

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

No. 1:23-cv-01599 (ABJ)

**DEFENDANTS BAM TRADING SERVICES INC., BAM MANAGEMENT US
HOLDINGS INC., BINANCE HOLDINGS LIMITED, AND CHANGPENG ZHAO'S
MOTION FOR AN ORDER DIRECTING COUNSEL FOR PLAINTIFF SEC TO
COMPLY WITH APPLICABLE RULES OF CONDUCT**

Defendants BAM Trading Services Inc., BAM Management US Holdings Inc., Binance Holdings Limited, and Changpeng Zhao (together, "Defendants") respectfully request that the Court enter the proposed order attached hereto. The grounds for this motion are further set forth in the supporting memorandum, dated June 21, 2023. Counsel for Defendants have conferred with counsel for Plaintiff Securities and Exchange Commission, which opposes this motion.

Dated: June 21, 2023

/s/ William R. McLucas

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FOR THE DISTRICT OF COLUMBIA**

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BINANCE HOLDINGS LIMITED,
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Defendants.

No. 1:23-cv-01599 (ABJ)

**MEMORANDUM IN SUPPORT OF DEFENDANTS BAM TRADING SERVICES INC.,
BAM MANAGEMENT US HOLDINGS INC., BINANCE HOLDINGS LIMITED, AND
CHANGPENG ZHAO'S MOTION FOR AN ORDER DIRECTING COUNSEL FOR
PLAINTIFF SEC TO COMPLY WITH APPLICABLE RULES OF CONDUCT**

On the morning of June 17, 2023, the Court entered a Consent Order governing, among other things, the control of BAM Trading Services Inc. (together with BAM Management US Holdings Inc., “BAM”) customer assets, which was negotiated by the parties with the assistance of Magistrate Judge Faruqi. Dkt. 71. Minutes later, the Securities and Exchange Commission (“SEC”) issued a misleading press release stating that the Consent Order was “essential to protecting investor assets” because “Changpeng Zhao and Binance have control of the [BAM] platforms’ customers’ assets and have been able to commingle customer assets or divert customer assets as they please.” Declaration of Adam J. Fee dated June 19, 2023 (“Fee Decl.”) Ex. 1. Yet, as the SEC acknowledged to the Court just days earlier, the SEC has *no evidence that BAM customer assets have been dissipated, commingled, or misused in any way.*

The SEC’s press release is disappointing given the SEC’s prior concessions before this Court about its lack of evidence on this issue and the fact that Defendants worked in good faith before and after the Complaint was filed to address the SEC’s unsubstantiated concerns about BAM customer assets. The SEC’s press release also appears to be designed to introduce unwarranted confusion into the marketplace, which could have the effect of harming BAM customers rather than protecting them. It also risks tainting the jury pool with misleading descriptions of the evidence concerning the Defendants.

For these reasons, as outlined below, Defendants BAM, Binance Holdings Limited, and Changpeng Zhao (collectively, “Defendants”) respectfully request that the Court issue an order directing counsel for the SEC to comply with all applicable rules of conduct concerning extrajudicial statements, including Rule 3.6 of the D.C. Rules of Professional Conduct, which provides that counsel cannot make misleading extrajudicial statements that may materially impact court proceedings.

BACKGROUND

As set forth in the declarations accompanying BAM’s opposition to the SEC’s Emergency Motion for a Temporary Restraining Order (Dkt. 40, “BAM Opposition” or “BAM Opp.”), BAM customer fiat and crypto assets are secure; the SEC’s motion did not identify a single instance in which BAM customer assets were mishandled or misused; and there was no “emergency” because, among other reasons, BAM had been cooperating in good faith with the SEC for years, knew that the SEC planned to file claims for several weeks, and had been negotiating a stipulation addressing the SEC’s concerns before the SEC’s motion was even filed. *See* BAM Opp. at 2-3; 11-15.

During the June 13 hearing on the SEC’s motion, the Court repeatedly asked SEC counsel whether it had any evidence that Defendants had misused, dissipated, or commingled BAM customer assets. Indeed, the Court asked that question and made related inquiries to two SEC attorneys on no less than a dozen occasions.¹ SEC attorneys initially failed to provide answers responsive to the Court’s question, but they eventually confirmed what Defendants argued in their opposition briefs—there is no evidence that BAM customer assets have been misused or dissipated:

COURT: Well, if you’re saying we need to shut down and impose this regime on the U.S. companies because we’re concerned about the dissipation of assets from the U.S. companies, I want to know,

¹ For example, the Court’s inquiries to one SEC attorney included: (i) “Can you clarify or walk me through the transfers you allege were made specifically from the U.S. entities, as opposed to the international Binance platform, to offshore accounts held by Zhao and how you know that those were customer assets,” Fee Decl. Ex. 2 (transcript of June 13, 2023 hearing) at 30:6-10; (ii) “[W]hat I want to know is where specifically are the allegations about transfers from BAM Trading – BAM Trading – out, offshore, as opposed to the examples you’re giving me are still Binance.com, not Binance.US.com,” *id.* at 32:1-4; (iii) “Q. I want to know, where have you made a showing that it is the money from the U.S. companies that is moving out? A. It hasn’t happened yet, Your Honor,” *id.* at 33:4-6; (iv) “But, I want to know, besides the interlocking relationships then, what have you seen of money going out that supports those concerns,” *id.* at 34:1-3; *see also id.* at 34:17-21, 35:5-8, 36:7-11, 36:20-24, 43:3-4, 44:6-9, 44:22-23, 44:25-45:2.

where have you made a showing that it is money from the U.S. companies that is moving out?

[SEC]: It hasn't happened yet, Your Honor.

. . . .

COURT: I want to know, are [BAM] assets going offshore? . . . [A]re you saying it's happening or it's not? And it's kind of stunning to me that I've now asked this question to each of [the SEC attorneys] five times.

[SEC]: So currently the assets are not going offshore. . . . [W]e're not seeing any flows of money outside of the United States.

Fee Decl. Ex. 2 at 33:1-6; 44:22-45:9.

The Court ultimately referred the parties to mediation before Judge Faruqui. The Court explained that it was "looking for . . . some variation of what we almost already have, which is something that permits BAM Trading to operate, permits the government to be comfortable that the 2.2 billion is secure, [that] U.S. customer assets don't leave the country and don't leave the U.S. company's control, and that [the SEC] get[s] the additional information and documents that [it is] seeking." *Id.* at 54:12-18.

With the assistance of Judge Faruqui, the parties ultimately agreed on the stipulated Consent Order. In that order, the SEC withdrew its request for a total asset freeze and agreed that BAM could continue operating in the ordinary course of business. BAM, in turn, agreed to provide the SEC with a monthly summary of ordinary business expenses. Immediately following entry of the Consent Order, the SEC issued a press release titled, "SEC Secures Emergency Relief to Protect Binance.US Customers' Assets." Fee Decl. Ex. 1. Among other things, the press release stated: "Given that Changpeng Zhao and Binance **have control** of the platforms' customers' assets and **have been able** to commingle customer assets or divert customer assets as they please, as we have alleged, these prohibitions are essential to protecting investor assets." *Id.* (emphasis added).

APPLICABLE RULES

Attorneys engaged in a case before the U.S. District Court for the District of Columbia must comply with the Rules of Professional Conduct as adopted by the District of Columbia Court of Appeals. D.D.C. LCvR 83.15(a). Rule of Professional Conduct 3.6 prohibits “[a] lawyer engaged in a case being tried to a judge or jury” from “mak[ing] an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of mass public communication and will create a serious and imminent threat of material prejudice to the proceeding.”

SEC employees also are required to comply with the SEC’s Canons of Ethics (17 C.F.R. § 200.51-72, the “Canons of Ethics”) and Regulation Concerning Conduct of Members and Employees and Former Members and Employees of the Commission (17 C.F.R. § 200.735-1-18, the “Regulation Concerning Conduct”). 5 C.F.R. § 4401.101. The Canons of Ethics require an SEC employee’s conduct “in the performance of the duties of his office” to be “beyond reproach.” 17 C.F.R. § 200.56. The Regulation Concerning Conduct mandates that “[i]n view of the effect which Commission action frequently has on the general public, it is important that members, employees, and special Government employees maintain unusually high standards of honesty, integrity, impartiality and conduct.” 17 C.F.R. § 200.735-2.

ARGUMENT

THE COURT SHOULD ISSUE AN ORDER DIRECTING THE SEC TO FOLLOW APPLICABLE RULES CONCERNING EXTRAJUDICIAL STATEMENTS

The SEC’s press release is misleading, contains statements that the SEC knows to be unsupported by evidence, and is inconsistent with the rules of professional conduct. At a minimum, the SEC’s statement contravenes the principle that the SEC so frequently cites—it omits material facts necessary to ensure the statements being made are not false and misleading. The

SEC's statement that Defendants "have been able to commingle customer assets or divert customer assets as they please" is directly contradicted by the SEC's statements to the Court that the SEC has no evidence of that ever occurring. *See* Fee Decl. Ex. 2 at 33:1-6; 44:22-45:9. Furthermore, the SEC's statements that it had "secured emergency relief" and that this relief was "essential to protecting investor assets" are misleading given that the Consent Order was the result of weeks of negotiations between the parties, was entered with Defendants' consent, and there is no evidence whatsoever that BAM customer assets are in danger.

The SEC's press release creates a risk of material prejudice to this proceeding. D.C. LCvR 83.15(a); D.C. Rule of Professional Responsibility 3.6. As explained in the BAM Opposition, the mere filing of the SEC's motion risked harming BAM's customers, effectively ending BAM's business, and preventing BAM from defending itself in this litigation. During the TRO hearing, the Court pressed the SEC on these issues, confirmed that the SEC had no evidence to support its allegations that BAM had misused or dissipated customer assets, and reinforced that BAM should be able to continue operating its business. Nevertheless, as soon as the Consent Order was entered, the SEC immediately issued a press release reasserting unsupported allegations about the misuse of customer assets that served only to reinforce confusion and uncertainty among BAM's customers and banking partners.

The SEC's press release also risks tainting the jury pool. It has been "long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial." *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378 (1979); *see also Warger v. Shauers*, 574 U.S. 40, 50 (2014) ("The Constitution guarantees both criminal and civil litigants a right to an impartial jury."). This is particularly so where, as here, the case has generated significant media attention. *See Fourte v. Country Wide Home Loans, Inc.*, 2009 WL 10744339, at *3 (D.N.J. July 31, 2009) (in cases with

“overeager” media following, “court-imposed limitations on extrajudicial statements may be necessary to adequately prevent tainting the jury pool and protect the defendants’ right to a fair and impartial trial”). By making misleading assertions that clearly imply that Defendants have dissipated BAM customer assets, potential jurors are left with the impression that Defendants have improperly diverted customer assets and must have been engaged in wrongdoing.

The SEC’s use of the phrase “as we have alleged” in the press release does not permit it to make assertions for which it knows it has no supporting evidence. The placement of “as we have alleged” after the assertion that Defendants “have been able to commingle customer assets or divert customer assets as they please” suggests that the SEC’s “allegation” already has been proven. *See, e.g., United States v. Silver*, 103 F. Supp. 3d 370, 378 (S.D.N.Y. 2015) (“[T]he Court does not . . . accept the Government’s suggestion that any prejudicial effect of otherwise improper comments is magically dispelled by sprinkling the words ‘allege(d)’ or ‘allegation(s)’ liberally throughout the press conference or speech, or by inserting a disclaimer that the accused is ‘innocent unless and until proven guilty’ at the end of an otherwise improper press release.”).

Based on the foregoing, Defendants respectfully request that the Court issue the attached Proposed Order directing counsel for the SEC to comply with all applicable rules of conduct concerning extrajudicial statements, including D.C. Professional Rule of Conduct 3.6. Doing so will help ensure that the SEC’s public statements do not further prejudice Defendants and materially impact this proceeding.

CONCLUSION

For the foregoing reasons, the Court should enter the Proposed Order.

Dated: June 21, 2023

/s/ William R. McLucas

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MANAGEMENT US HOLDINGS INC., AND
CHANGPENG ZHAO,

Defendants.

Civil Action No. 1-23-cv-01599-ABJ

DECLARATION OF ADAM J. FEE

Adam J. Fee, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a member of the law firm Milbank LLP, counsel to Defendants BAM Trading Services Inc. (“BAM Trading”) and BAM Management US Holdings Inc. (collectively with BAM Trading, “BAM”). I submit this declaration in support of Defendants BAM, Binance Holdings Limited, and Changpeng Zhao’s Motion for an Order Directing Counsel for Plaintiff Securities and Exchange Commission to Comply with Applicable Rules of Conduct.

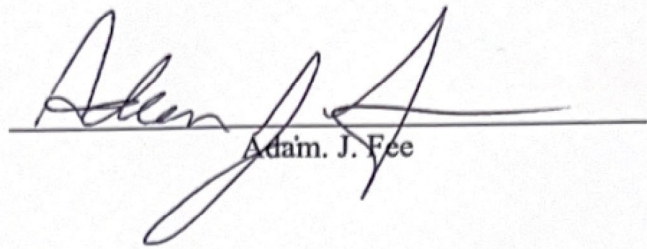
2. I have personal knowledge of the matters set forth in this declaration, and, if called as a witness, I could and would competently testify under oath to the facts stated herein.

3. Attached as **Exhibit 1** is a true and correct copy of a press release titled, “SEC Secures Emergency Relief to Protect Binance.US Customers’ Assets,” issued by the SEC on June 17, 2023.

4. Attached as **Exhibit 2** is a true and correct copy of the transcript of the hearing held before Judge Amy Berman Jackson on June 13, 2023 in the above-referenced matter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 19, 2023
Los Angeles, California



Adam. J. Fee

Exhibit 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Securities Exchange)	
Commission,)	Civil Action
)	No. 23-cv-1599
Plaintiff,)	
)	Hearing for Temporary
vs.)	Restraining Order
)	
Binance Holdings Limited,)	Washington, DC
et al.,)	June 13, 2023
)	Time: 2:00 p.m.
Defendants.)	

TRANSCRIPT OF HEARING FOR TEMPORARY RESTRAINING ORDER
HELD BEFORE
THE HONORABLE JUDGE AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE

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1 * * * * * P R O C E E D I N G S * * * * *

2 THE COURTROOM DEPUTY: Good afternoon, Your Honor.

3 This afternoon we have civil action No. 23-1599, the *SEC versus*
4 *Binance Holdings Limited, BAM Trading Services, Inc., BAM*
5 *Management U.S. Holdings, Inc., and Changpeng Zhao.*

6 Will one of the attorneys representing the SEC please
7 approach the lectern, identify himself and his colleagues for
8 the record.

9 MR. SCARLATO: Good afternoon. This is Matt Scarlato
10 on behalf of the SEC. I have with me, on the right, Jen Farer,
11 Jorge Tenreiro, Emmett Murphy, and David Nasse on the left.

12 THE COURT: All right. Good afternoon.

13 THE COURTROOM DEPUTY: Counsel for Binance.

14 MR. NELSON: Good afternoon, Your Honor. Dan Nelson
15 from Gibson, Dunn on behalf of Binance Holding, Limited. With
16 me are my colleagues Michael Celio, Mary Beth Maloney, Jason
17 Mendro, Stephanie Brooker, Kendall Day, and Richard Grime.

18 THE COURT: All right. Good afternoon, everybody.

19 MR. NELSON: Thank you, Your Honor.

20 THE COURTROOM DEPUTY: Counsel for the BAM parties.

21 MR. MERTENS: Good afternoon, Your Honor. Matthew
22 Mertens for the BAM entities. I'm joined by my colleague Matt
23 Beville. And from the Milbank law firm, Adam Fee.

24 THE COURT: All right. Good afternoon.

25 THE COURTROOM DEPUTY: Mr. Qureshi, representing the

1 individually named defendant Mr. Zhao.

2 MR. QURESHI: Good afternoon, Your Honor. Abid R.
3 Qureshi, of Latham & Watkins on behalf of the individual
4 defendant. With me are Mr. Yatter, also of Latham & Watkins,
5 and Ms. Melanie Blunschi, also of Latham.

6 THE COURT: All right. Good afternoon, everyone. Is
7 that everyone? I take it there's lots more lawyers sitting in
8 the back representing all of these people. And I hope you'll
9 all consider, before you leave the courthouse, filling out the
10 form agreeing to accept CJA assignments. We need lawyers.
11 Apparently there are a lot of them who have a lot of time on
12 their hands here in the District of Columbia. And please note
13 if any of you speak Spanish, because we need some people like
14 that to take on even just mediations on behalf of indigent
15 defendants, which apparently these defendants are not.

16 All right. We're here on the government's motion for
17 a TRO. The memorandum, I have to say, at some points was
18 written as if it was for opposing counsel, as opposed to a
19 neutral who has not been living with these entities and assets
20 on a day-to-day basis for the past few years. There's a lot of
21 technical terminology that takes a lot of time to unpack, as
22 they say in the business space, along with parades of acronyms
23 which I've devoted considerable time to reviewing and
24 absorbing.

25 But I do have some basic questions that I want to

1 ask, just to make sure I know exactly what is and what is not
2 being alleged and exactly what the government's position is
3 with respect to these assets and these companies.

4 However, before I get into that -- I was planning to
5 do this later, but this seems like the appropriate time -- I do
6 want to note that you've given me, the government, 1,000 pages
7 of exhibits, and the defendants have filed more than 3,000,
8 some of them late. Putting aside who is right about the merits
9 of the legal and factual allegations, I think everyone in the
10 room can agree that it's important to get this issue of first
11 impression right. And even holding a hearing in 14 days isn't
12 going to give me enough time to get to the bottom of everything
13 that you've given me with the level of understanding that you
14 all deserve.

15 And it appeared to me last night, when I got the
16 defense submission, was largely about the fact that you thought
17 there was some sort of consent decree that could be entered,
18 that the parties weren't really that far apart in terms of how
19 to preserve the assets of the U.S. investors and the U.S.
20 entities pending the outcome of these proceedings, and if an
21 order could be entered with the parties' agreement, that would
22 actually give us time to give this complicated factual and
23 legal matter the attention it deserves.

24 So I ordered the government to give me a red line,
25 what exactly is missing from what they've proposed? I wanted

1 to kind of strip away the grand statements by each side about
2 what was and wasn't a good proposal and I want to get into the
3 nitty-gritty. And while there was sort of a spray of red
4 across the red line that initially was a little intimidating,
5 the more I looked at it, the more I thought that, really,
6 there's not that much difference between the parties anymore.
7 The SEC seems to understand that BAM Trading needs to operate
8 in the ordinary course of business pending the outcome of this
9 proceeding, not only for itself, but shutting it down
10 completely would create significant consequences not only for
11 the company, but for the digital asset market in general.

12 What's left to negotiate is the kind of nitty-gritty
13 and the kind of details, the wallets, and the shards that are
14 of importance to and understood much better by those who are
15 knowledgeable and immersed in these matters. And so it seems
16 to me, notwithstanding the fact that I think I'm a pretty smart
17 person, I do a pretty good job up here, that there's a lot of
18 reasons why it would be far better for people like you, as
19 opposed to a generalist like me, to get this consent decree
20 over the finish line and you have the opportunity to be
21 operating under an agreement that you all crafted, as opposed
22 to the one that I come up with, and which would ultimately then
23 be appealable by whichever side is disappointed, taking even
24 more time and attention away from getting to the merits.

25 So, in some cases, when you have this many lawyers

1 working on something, there's kind of a Department of State and
2 a Department of Defense and you've got the people that are
3 doing the diplomacy and the people that are getting ready for
4 battle. And if that is the case here, and there would be some
5 benefit to excusing some of you, the Department of State, to
6 now discuss the red line that you have, that all of the
7 disputes have now been limited to, a couple pages, or whether
8 you still want the afternoon and the evening to think about it,
9 at which time I could, if you thought it was -- would be of
10 benefit, send you to Magistrate Judge Faruqui to try to finish
11 the process.

12 But does it make sense to just go ahead with all my
13 questions and answers with all of you present right now, or
14 would some of you like the opportunity to confer?

15 (Pause.)

16 MR. SCARLATO: Your Honor?

17 THE COURT: Yes.

18 MR. SCARLATO: Matt Scarlato. Good afternoon. Your
19 points are well taken. And so if you can give us a minute's
20 indulgence to speak with the other side, we'll have an answer
21 for you shortly.

22 THE COURT: All right.

23 MR. SCARLATO: Thank you, Your Honor.

24 THE COURT: I'll be happy to give you all the time
25 you need to cross the middle of the courtroom and put your

1 heads together. Would it be easier for you all if I left the
2 room? No? It looks like you're fine.

3 (Pause.)

4 MR. SCARLATO: That was fast, Your Honor. No, we
5 cannot come to an agreement right now.

6 THE COURT: Shocker. Okay. All right. What I'm
7 going to do then is go ahead with the questions that I have.
8 But, one of the questions I will be asking all of you is
9 whether you would agree to participate with Judge Faruqui as
10 early as he can see you to try to discuss the consent decree.
11 In the meantime, I'm going to have the TRO and everything you
12 tell me today under advisement.

13 But, there's a lot of reasons, in addition to the
14 ones I've listed, why the best agreement would be one that you
15 all draft. So I'm not going to ask you that question now, but
16 you can be prepared for it.

17 All right. Then are you the one answering the
18 questions with respect to the motion?

19 MR. SCARLATO: Depends on the question, Your Honor,
20 but probably.

21 THE COURT: Okay. Well, that will be fun. All
22 right. The memorandum says, at multiple points, including on
23 pages 16 and 19, that the defendant, particularly the U.S.
24 entity BAM Trading offers the ability to buy and sell, quote,
25 crypto assets, including crypto asset securities. That's your

1 formulation. At various points in the memorandum you refer to
2 "crypto assets," but in others you use the term "crypto asset
3 securities."

4 I am aware of your legal argument about what made a
5 particular offer, the Binance coin -- which you also refer to
6 BNB -- a security for purposes of the act. My first question
7 is, is that the same as the BUSD, or is it different?

8 MR. SCARLATO: Different coin, Your Honor.

9 THE COURT: Okay. All right. And we'll get to that
10 in a minute, but it would help me if, first, you would walk me
11 through what differentiates crypto assets from crypto asset
12 securities, and then I'm going to ask you to tell me which
13 assets in particular referred to in the memo and in the
14 complaint, other than the Binance coin, are the securities that
15 are the predicate for your complaint.

16 MR. SCARLATO: For our complaint, Your Honor?

17 THE COURT: Yes. The only one mentioned, are we in
18 agreement, in the TRO is the Binance coin, is that correct.

19 MR. SCARLATO: It's correct. We also rely on other
20 cases where judges have found other coins in other cases to be
21 securities.

22 THE COURT: All right. And so the notion as to
23 whether these are securities or not, are you saying this has
24 been -- this is not a case of first impression here, that this
25 has been dealt with before?

1 MR. SCARLATO: Other courts have dealt with the
2 question in other -- not as to, at least, the coins at issue in
3 the TRO, which is Binance's coins, but in other cases, yes,
4 there have been judicial opinions on whether they meet what's
5 called the *Howey* test, Your Honor.

6 THE COURT: Okay. I understand that. But before we
7 get into -- so my point is, the only one you're arguing in
8 the -- in your TRO motion of the defendants' is the Binance
9 coin? You're saying that is a security.

10 MR. SCARLATO: That's correct.

11 THE COURT: All right. But when you talk generally
12 about the companies and their businesses, you say they deal
13 both in crypto assets and crypto asset securities. Does the
14 complaint allege any other specific coins are securities,
15 besides the BNB or the Binance coin?

16 MR. SCARLATO: Yes, it does, Your Honor.

17 THE COURT: Which ones are they?

18 MR. SCARLATO: That would be in our complaint, Your
19 Honor, starting on paragraphs -- in the 300s, page 85, section
20 8, we give an explanation of the different coins that were
21 trading on the defendants' platforms. And, you know, while
22 it's our position we only need to prove one of these coins is a
23 security to prove our case, you know, we thought it proper to
24 allege that there were other coins that we see trading on these
25 platforms that should also be deemed securities.

1 THE COURT: All right. And --

2 MR. SCARLATO: Go ahead.

3 THE COURT: When you use the formulation crypto asset
4 versus crypto asset securities, can you tell me, what are the
5 differentiating factors?

6 MR. SCARLATO: Whether they meet the *Howey* test.

7 THE COURT: That's it? The *Howey* test for each
8 one --

9 MR. SCARLATO: Yes.

10 THE COURT: -- in --

11 MR. SCARLATO: I'm sorry, Your Honor. Yes, that's
12 how a security is defined, and we give 14 specific
13 representatives. We're not saying that's exclusive, Your
14 Honor. Our complaint, we feel like, was long enough, so we
15 gave a bunch that we thought satisfied that test and reserve
16 our right in discovery to, you know, conform our complaint to
17 the pleadings or whatever is necessary before trial.

18 THE COURT: All right. Are the other crypto assets
19 that you're not labeling as securities, commodities?

20 MR. SCARLATO: The other -- that aren't alleged in
21 our complaint, Your Honor?

22 THE COURT: The others that you say they're trading
23 in that you're not saying are securities, because you're not
24 saying all of the ones they're trading in are securities,
25 correct?

1 MR. SCARLATO: We -- at this time, Your Honor, we're
2 reserving our rights, just given we're at the pleading stage we
3 have to get into discovery where we can make a full assessment.
4 But our position, Your Honor, is that if one of these coins are
5 a security, we've won.

6 THE COURT: I heard that.

7 MR. SCARLATO: Okay.

8 THE COURT: But you have said all over the complaint
9 crypto assets -- and you differentiate that specifically from
10 crypto asset securities, and you make it clear that one
11 category is larger than the other category and that both
12 categories are on the Binance.com platform and the Binance.US
13 platform, correct?

14 MR. SCARLATO: Yes.

15 THE COURT: So I'm asking you, the ones that you are
16 not putting in the securities category, what are they? Are
17 they commodities?

18 MR. SCARLATO: We are not -- thank you, Your Honor.
19 We are not taking a position at this time. We're at the
20 pleading stage. We are trying to get past, you know, any
21 potential motion to dismiss and satisfying our burden under the
22 rules. So we have, we think, way more than is required under
23 Rule 8. We gave the Court and the parties notice as to -- I
24 think the number is 14 total coins, including BNB, which is at
25 issue in the TRO.

1 THE COURT: All right. If the Binance coin is the
2 only security that you're relying on right now for purposes of
3 the TRO and the facts that you rely upon when you describe to
4 me why it meets the test are from the time of the initial
5 offering, how does that -- how does that make it a security
6 now, such that BAM Trading, which was created later, didn't
7 even exist at the time of the ICO, how does it make it a dealer
8 in these securities?

9 MR. SCARLATO: And, Your Honor, I want to see if my
10 colleague wants to -- do you mind if I defer to my colleague,
11 Mr. Murphy, on this?

12 THE COURT: No. Go ahead. I don't want two of you
13 answering the same question, but two of you can answer
14 different questions.

15 MR. MURPHY: So, sorry, Your Honor, let me just
16 restate -- oh, Emmett Murphy, from the SEC.

17 So let me just restate, so I understand. The
18 question is, why is -- why are facts back from 2017 relevant to
19 whether BNB is a security when BAM Trading as a platform hadn't
20 opened by 2017?

21 THE COURT: Yes. There's an argument made in their
22 opposition that when you describe it as a security, the facts
23 you're relying upon are the fact that it was offered at the
24 time when they were saying we're going to use these funds to
25 set up this platform, et cetera, et cetera, and you talk about

1 the enterprises being created and you -- all your facts relate
2 to the 2017 offering. And they have pointed out that they
3 didn't exist at the time of the offering and now these coins
4 have been around since then. So, how does it make it a
5 security? Why is it still a security now?

6 MR. MURPHY: Yeah, Your Honor, so I was reading that
7 last night and I was confused because I thought at one point
8 they were making an argument about statute of limitations for a
9 Section 5 offering under the Securities Act, which they can
10 raise as a defense. I don't think that undermines our prima
11 facie case. But if the question is: Why is it a security?
12 *Howey* looks at the economic substance of the instrument at
13 issue.

14 And here, those statements back in 2017 are
15 unfiltered statements about what the economic reality is of
16 these crypto assets. They were absolutely candid that these
17 were investments where they were seeking money for investors to
18 grow the enterprise. If their argument is that it somehow is
19 no longer an investment contract because -- and they have a
20 bunch of different things in their papers -- because it's
21 become adequately decentralized or somehow has changed its
22 nature --

23 THE COURT: I guess the point is, when you did the
24 offering, people could buy them. And since then they've been
25 on the platforms and people could trade them, sell them,

1 repurchase them. At that point the people aren't responding to
2 the initial offering, they're responding to that asset. I want
3 one of those, I don't want one of those. So at that point, why
4 is it a security, as opposed to, like, another coin?

5 MR. MURPHY: I guess I would just say that there are
6 secondary trading markets for all kinds of securities. And if
7 the idea that once it goes into the secondary trading market it
8 doesn't become a security, that would destroy all kinds of
9 understandings of how the securities markets work. The
10 statements that they made, again, go to the raw economic
11 reality of these people buy them so that their value will be
12 appreciated.

13 The Binance enterprise -- and you know in our papers
14 that we don't think there's such a clear distinction between
15 .com and BAM and the platforms. Right? Binance is running
16 both. But they're clear in statement after statement that we
17 set out in our papers that this is an ongoing enterprise, there
18 are ties to the BNB, their prestige is tied to the BNB, they
19 will support the price; you will make money if you buy BNB.
20 And that is continuous from that ICO to the present day.

21 THE COURT: Isn't that the flip side of what you say
22 a security is? You're saying that they're saying it's tied to
23 them, as opposed to they're tied -- the success of the coin is
24 based on the success of the platform, and you just turned that
25 the other way, I think.

1 MR. MURPHY: I don't know, Your Honor. I think
2 they've tied their fate to BNB in many ways, which goes to the
3 commonality element of *Howey*, where folks are looking at the
4 efforts of others. And the question might be, there's
5 statements in their papers to the effect of Binance has nothing
6 to do with BNB anymore, BNB is a baby that's been born and we
7 have nothing to do with it and it will be fine without Binance.
8 And I think the facts that we put into our papers are very
9 clear that that's not the case, that they've -- on their web
10 page and their blog, they are constantly monitoring the price,
11 talking about how it's a valuable asset, giving you additional
12 uses for the asset, and making clear to the investing public
13 that they are invested in it, they are going to continue to
14 create ways to make money on BNB.

15 THE COURT: All right. What is your response to the
16 argument that the coin can't be a security contract for
17 purposes of the *Howey* case if there's no contract?

18 MR. MURPHY: I would respond by pointing to the
19 language in *Howey* itself which says, essentially, that
20 investment contract was meant to be a catchall term for all the
21 different ways that people solicit capital to get other
22 people's money on the promise of profits. And the language in
23 *Howey* -- if I could just look, so I don't -- *Howey* says that an
24 investment contract can cover schemes or contracts. And I
25 think that language is clear. And if you look at -- this is

1 on, sorry, 298 and -99 in *Howey*.

2 *Howey* defined the investment contract as a contract
3 transaction or scheme. If you look at the *Telegram* case that
4 we cited in our papers, there you had initial purchasers who
5 had contracts and the later public where it was distributed
6 very quickly. And the Court looked through the economic
7 substance of that, where there had clearly been an attempt made
8 to insulate themselves from the securities laws by saying we
9 had these initial sophisticated purchasers, they're exempt from
10 the securities laws, they're very sophisticated, and whatever
11 happens after that we have no control of.

12 The Court in *Telegram* looked through that and said,
13 no, it's all part of the same offering. You are selling to a
14 broader public, that's the only reason it has its value. There
15 was no contract with that broader public and yet the Court
16 still found a Section 5 offering there.

17 THE COURT: Okay. I want to talk about the
18 misrepresentations, which is section 6 of your statement of
19 facts. I don't know if that's your issue.

20 MR. MURPHY: We're going to tag team, if you'd allow.

21 THE COURT: All right.

22 MR. MURPHY: Sorry, I don't want to walk off with
23 Mr. Scarlato's papers here.

24 THE COURT: All right. That section alleges
25 misrepresentations by the U.S. BAM entities regarding trade

1 surveillance and trade volume, and it expresses skepticism
2 about whether these organizations are really truly monitoring
3 for market manipulation or whether they have procedures to
4 control it, and you point to the wash trades. What exactly is
5 the actionable misrepresentation? Is it the statement in the
6 pitch deck that they hired vendors and got the reporting
7 software to provide trade surveillance and market manipulation
8 monitoring?

9 MR. SCARLATO: Close. It's basically -- it's not the
10 wash trading itself, Your Honor. We don't charge that conduct,
11 we use it as evidence that -- of the misreps that you
12 identified. And just to put them in boxes, you first have
13 misrepresentation in the pitch deck, which are to the equity
14 investors that we allege. And you have two sets of
15 misrepresentations. You have one, first, that they said they
16 had surveillance on the platform, which is, Your Honor, typical
17 of any registered platform. This one was not registered, so it
18 didn't have any surveillance and wasn't required to.

19 THE COURT: The sentence, I think you put it in your
20 statement of facts, you said the platform is engaged in
21 monitoring for manipulation. Is that one of the false
22 statements? Or you just said --

23 MR. SCARLATO: Correct --

24 THE COURT: -- that they represented that, but you
25 didn't say where they said it, so I wasn't --

1 MR. SCARLATO: If that's the case, Your Honor, we
2 apologize. But it's a citation to the pitch deck, which was
3 given to equity investors, Exhibit A-53.

4 THE COURT: Right. Is there anything else? The
5 statement in the pitch deck was we hired vendors and got
6 third-party software to provide trade surveillance and
7 monitoring.

8 MR. SCARLATO: That's right.

9 THE COURT: Okay. That's the false statement. Is
10 there any other false statement?

11 MR. SCARLATO: In the category of surveillance
12 there's another false statement where the former CEO, Catherine
13 Coley, made a public statement -- I don't have it in front of
14 me, but it's something about how we don't allow toxic behavior
15 on the exchange, which, again, this was in, I think, 2019, and
16 that statement was also false because at that time, in effect,
17 it wasn't until 2022 that BAM Trading put any trade
18 surveillance on the platform.

19 So that's one box. And it has two subparts, equity
20 investors and then just the retail public who is listening to
21 the CEO talk about the platform.

22 The second box, if Your Honor is ready, has to do
23 with the volume reporting itself. And here we -- you know,
24 this is a trading platform, the way that it solicits customers
25 is it says we have a lot of volume, come trade with us, right?

1 So throughout the relevant period BAM Trading made a bunch of
2 representations on Twitter, through data aggregators and
3 elsewhere that said our trading volume is X. And what the
4 fraud was, is they did not explain that X meant we weren't even
5 checking for any wash trade. And that's where the Sigma Chain
6 point comes in, where they were actually conducting wash
7 trading, which was inflating the volumes.

8 The final piece in that category, Your Honor, is
9 again back to the pitch deck, because the pitch deck itself
10 that was shared with investors who invested in BAM also made
11 representations about trading volumes. And then there was some
12 other accompanying documents we did not include in the TRO
13 papers for simplicity sake, but there were other
14 representations made to these investors about the volume on the
15 platform. And again, the fraud is these volumes were inflated
16 by wash trading and the lack of surveillance.

17 THE COURT: All right. What's your response to the
18 defense argument that the volume was minimal compared to the
19 overall volume and it couldn't have really been material or
20 affected anybody?

21 MR. SCARLATO: Then I would refer defense counsel to
22 Mr. Zhao's own statement on Twitter that we cite, I think both
23 in our brief and the complaint, where he acknowledges that
24 investors want to know if they're trading on a platform that is
25 corrupted by wash trading or lacked surveillance.

1 And then in addition, Your Honor, as to the equity
2 investors --

3 THE COURT: I think the statements you quoted were
4 much broader than that. It was like credibility is important.
5 I don't remember -- he made a specific statement about wash
6 trades that you --

7 MR. SCARLATO: I believe it does mention wash
8 trading. I have to pull it up. But while I'm doing that, Your
9 Honor, I'll just say that we also, in the Steele declaration,
10 give -- Mr. Steele attests to an interview we had with one of
11 the equity investors who told us that when he was investing in
12 BAM Trading -- or, BAM Management, excuse me, he wanted to know
13 if this volume was inflated and if they had trade surveillance.
14 And that was -- so that was the materiality point from a
15 different perspective.

16 THE COURT: And so is he saying he relied on that
17 when he made his decision to buy?

18 MR. SCARLATO: He said it would have been important
19 for him to know. He didn't know it at the time, right? He was
20 defrauded. But when we interviewed post hoc and told him the
21 situation, he -- you know, I can refer you to the paragraph in
22 the Steele declaration, if you'd like.

23 But if I can first refer to Mr. Zhao's comment?

24 THE COURT: Sure.

25 MR. SCARLATO: He said, "Credibility is the most

1 important asset for any exchange. If an exchange fakes their
2 volumes" -- and that's how you fake your volumes, through wash
3 trades.

4 THE COURT: All right. So let's go back to the
5 statement in the pitch deck that they hired vendors and got
6 third-party software to provide trade surveillance and market
7 monitoring. Are you alleging that they did not do that, or
8 just that they -- those things weren't actually doing what they
9 were supposed to do? Was the statement literally false or did
10 it just give rise to an impression of more oversight than there
11 was? You don't actually say that.

12 MR. SCARLATO: So the full facts are that they had
13 hired a trade surveillance monitor, but they had done nothing
14 with it at the time that these statements were made. The facts
15 are that it wasn't until after the -- what was called the seed
16 funding ground was completed, they finally started ramping up
17 the actual surveillance of the platform. But that was well
18 after these statements were made. And so, again, it matters at
19 the time the statements were made and at that time they had
20 nothing, frankly. They had a contract, but it wasn't
21 implemented in any way.

22 THE COURT: Are there -- putting aside the ones
23 described in section 6, are there other alleged
24 misrepresentations that you maintain were in violation of the
25 Act?

1 MR. SCARLATO: Those two categories with retail and
2 equity investors are it.

3 THE COURT: All with respect to trade volume and
4 trade surveillance on the U.S. BAM platform.

5 MR. SCARLATO: That's exactly right.

6 THE COURT: Are there any other misrepresentations
7 that you're alleging?

8 MR. SCARLATO: Oh, Your Honor, I forgot to mention
9 that the terms of use for BAM Trading and the terms of use,
10 which is what anyone who joined the platform has to sign up
11 for, they have a section on manipulative trading, and we allege
12 that, and I believe prove in our TRO papers, that when people
13 were signing up for the platform, they were defrauded by
14 believing that BAM prohibited manipulative trading, when in
15 fact its own control person, Mr. Zhao, was doing exactly that.

16 THE COURT: All right. But the answer -- but that's
17 sort of part of the same thing, right, the --

18 MR. SCARLATO: Correct, yeah. I just forgot a layer
19 to it.

20 THE COURT: All right. So I read that section. Are
21 there any other misrepresentations that you're talking about
22 besides that set?

23 MR. SCARLATO: Not at this time.

24 THE COURT: So every other claim in the case then
25 relates to failure to register. Am I correct about that?

1 MR. SCARLATO: Failure to register, the exchange, the
2 clearing agency, the broker-dealer, and then the section 5
3 claims, which are the office --

4 THE COURT: Control person.

5 MR. SCARLATO: Excuse me?

6 THE COURT: The control person.

7 MR. SCARLATO: No. I'm sorry. The section 5
8 Securities Act, which is registering the office in sales. So
9 that we allege they were selling BNB, BUSD, and then they're
10 providing a service or offering sales that needed to be
11 registered and were not.

12 THE COURT: All right.

13 MR. SCARLATO: Did I confuse you?

14 THE COURT: When you go through -- I'm going to go
15 through all the failure to register claims with you to make
16 sure I understand them.

17 MR. SCARLATO: Sure.

18 THE COURT: You're kind of swallowing your words and
19 I still don't know what you said at the end of the last
20 sentence, the sentence that you keep saying failure to
21 register. Besides failure to register as a broker-dealer,
22 failure to register as an exchange, and failure to register --
23 what's the term? As the trading --

24 MR. SCARLATO: Clearing agency.

25 THE COURT: Clearing agency.

1 MR. SCARLATO: There you go. Okay.

2 THE COURT: Those were the three. And different
3 entities are alleged to be one or the other, and fail to
4 register as one or the other. I'm going to go through which
5 ones you're alleging are or aren't those things, and fail to
6 register. But is there some other failure to register you're
7 talking about?

8 MR. SCARLATO: Yes. And I apologize if I wasn't
9 clear. So there are the offers and sales of the securities
10 themselves. For example, you talked earlier with my colleague
11 about the IPO -- ICO, excuse me, of BNB. So that should have
12 been registered; it was not. Subsequent sales of BNB, which
13 includes to the employees, and then we also allege BUSD -- it's
14 not in the TRO papers, Your Honor, but in the complaint we also
15 allege that the offer and sale of BUSD should have been
16 registered under Securities Act section 5.

17 THE COURT: Okay. I think that is more in the
18 complaint than in the --

19 MR. SCARLATO: Correct.

20 THE COURT: -- in the TRO memo, which is what I'm
21 really focused on at this point.

22 Is it an element of the claims, the failure to
23 register claims, that the individual or organization knew of
24 the registration obligation, failed to register, or is knowing
25 and willful not an element of that violation?

1 MR. SCARLATO: Not an element at all.

2 THE COURT: And a big theme of the submission, an
3 important aspect of your concerns is the potential conflicts
4 arising from the overlapping ownership and relationships
5 between the various defendants and the multiple functions that
6 they perform; in particular, the international company and then
7 the U.S. companies. But the memo in support of the TRO doesn't
8 specifically allege that those conflicts or functions violate
9 the Act. And if the companies were registered, would there be
10 regulations that would be violated by these relationships?

11 MR. SCARLATO: Your Honor is exactly on point. We
12 point out those conflicts of interest to show you why they
13 should have been registered, because the failure to register
14 creates the conflicts of interests that things like wash
15 trading and commingling result in without supervision or
16 regulation. But those themselves are not the laws that are
17 violated.

18 THE COURT: You say the failure to register created
19 the conflicts of interest. So --

20 MR. SCARLATO: Permitted.

21 THE COURT: Permitted.

22 MR. SCARLATO: Permitted.

23 THE COURT: So if they were registered, then these
24 would not be violations of the Act, but they would be
25 regulatory violations of a registered entity?

1 MR. SCARLATO: Like, if the exchange were registered,
2 there would be safeguards in place to make sure there was trade
3 surveillance so that Mr. Zhao could not wash trade on the
4 platform.

5 THE COURT: And disclosure obligations, I take it,
6 also?

7 MR. SCARLATO: Many. And including the custody of
8 assets, which is why we're here today, right, Your Honor.

9 THE COURT: Now, the SEC has obviously been aware of
10 the nature of Binance's business and the business of the U.S.
11 affiliates for some time. They got involved back in 2019 when
12 they told Binance they couldn't operate in the U.S., which is
13 what led to the creation of the U.S. entities. So what
14 prompted the need to seek emergency relief?

15 MR. SCARLATO: Right. So, Your Honor, it is true we
16 have been investigating the entities for several years. And
17 obviously they were -- we were aware that they were operating,
18 but as I'm sure Your Honor can understand, that, you know,
19 government investigations take time. And, you know, we have
20 been engaged with the parties to ensure that, you know, just
21 that the investigation went as planned. And so there is a
22 process, we followed it, and there came a time that we, as well
23 as the defendants, that was this year, there were settlement
24 discussions and when those settlement discussions broke down we
25 realized that we were going to have to file a case, and then at

1 that point we assessed the facts that we were learning, and we
2 were learning them real-time, Your Honor. There were things we
3 learned leading up to filing, like some of the audit reports
4 that we cite in our briefs. And when we put that all together
5 and then there was a failure to come to an agreement on a deal,
6 the SEC realized it needed to not only file the case, but
7 accompany it with a TRO.

8 THE COURT: All right. Now, the defendants say,
9 well, this is a big broad area that is generally unregulated at
10 this point, you should be proceeding by rule making. No one
11 seems to be saying let's see what congress gets around to
12 doing. Why is it prudent, from the Commission's point of view,
13 to assign the determination that would have such far-reaching
14 affects in a billion dollar industry to a lone federal district
15 judge, especially when there's another lone federal district
16 judge in a parallel action who could rule the other way? It
17 seems like an inefficient and cumbersome way to establish a
18 national, consistent, understandable policy for the regulation
19 of trading in crypto assets.

20 Now, I'm not sure on what basis the defense says,
21 well, you should tell them that they should have exercised
22 their discretion to do a rule making, because I don't know that
23 I have the power to do that and I imagine you would tell me
24 that I don't. But, still, the question is, why -- why does it
25 make sense to go this way?

1 MR. SCARLATO: Because this is the law, Your Honor.
2 The *Howey* test has been around since the 1940s. And, you know,
3 we tried to interact with these entities to, you know, figure
4 out a plan. The technology was new. The rules are
5 longstanding and anything but new, Your Honor, and defendants
6 knew the rules. You know, Your Honor says this wasn't -- many
7 of our claims are not scienter based. But, you know, as we
8 allege, there are many things that the defendants have said
9 that acknowledge they knew these were the rules and they just
10 chose not to follow them.

11 So at a given time the SEC can try to interact with
12 these entities to come to a resolution or try to do rule
13 making. Yes, there's lots of things the SEC could do, but the
14 enforcement arm is here, too, and when we see the law is being
15 violated, we have to act on it.

16 THE COURT: All right. Now, most important for
17 purposes of the TRO and the asset freeze is section 7 of your
18 statement of facts where you're talking about the money that's
19 going out and where it's going. And there are a lot of details
20 about amounts transferred and where they went, but it wasn't
21 always clear to me in the memorandum, even when I sat down and
22 looked at the accountant's declaration, where they come from
23 and your language kind of blurred the distinction.

24 For example, on page 26 you say: Between 2019 and
25 2021, Merit Peak's account received over \$22 billion. And then

1 you say: And Merit Peak, just to circle back, is a wholly
2 owned company of defendant Zhao, and you -- offshore. And you
3 say these funds consisted in significant part of Binance
4 Platforms, plural, customer assets, including those of
5 Binance.US platform customers and other sources.

6 Can you clarify or walk me through the transfers you
7 allege were made specifically from the U.S. entities, as
8 opposed to the international Binance platform, to offshore
9 accounts held by Zhao and how you know that those were customer
10 assets?

11 MR. SCARLATO: Sure, Your Honor. It is a lot of
12 details. So the Merit Peak account, Your Honor, was receiving
13 money primarily from three sources, one of which was an entity
14 called Key Vision. And if you look at Mr. Verma's declaration
15 at 8-A, you believe -- let me grab it. Yep, 8-A. It gives
16 some detail, Mr. Verma gives some detail on the application
17 that Key Vision submitted, and it shows you that -- it talks
18 about how Key Vision was involved in accepting deposits for
19 converting to the stable coin BUSD that we talked about
20 earlier. And it shows you that the email address is at
21 Binance.com.

22 So that shows that this is Binance customers --
23 Binance.com, the international entity, customers and investors
24 who were putting money into the platform and it's going through
25 Key Vision, and so you have that. And then separately, Merit

1 Peak had billions of dollars coming in through other finance-
2 related entities, primarily BAM trade. And it was over
3 a billion dollars, I believe. I was just trying to get to it.
4 I believe that's paragraph 12. Yep, 1.154 billion.

5 So you have what totals, in paragraph 12, \$11 billion
6 coming in from Key Vision, which is customer funds, and then
7 you have \$6 billion coming from Binance Holdings Limited, which
8 is the entity that operates the foreign exchange, .com. And we
9 don't allege that's customer funds; we don't know at this time,
10 you know, discovery hasn't begun. But coming -- that amount of
11 money coming from Binance Holdings. There's probably an
12 inference of that, but we're not saying that at this time. And
13 similar as to BAM Trading. So you're taking --

14 THE COURT: I'm still trying to get to the money
15 coming from the U.S. platform customers. I think the thrust of
16 the TRO is the U.S. entities, making sure that their customers'
17 assets and their assets are not dissipated, are not sent
18 offshore, and are here in the event you determine that they
19 should be registered, or that there's a disgorgement or money
20 owed, due to the customers. And they're the subject of the --
21 really, the focus of your proposed TRO, that they can't
22 transfer any money. And you're asking for repatriation. I
23 assume when you're talking about bringing money back to this
24 country, you're talking money back to the U.S. entities, not to
25 Binance.com.

1 So what I want to know is where specifically are the
2 allegations about transfers from BAM Trading -- BAM Trading --
3 out, offshore, as opposed to the examples you're giving me are
4 still Binance.com, not Binance.US.com.

5 MR. SCARLATO: Fair enough, Your Honor. Sorry if
6 that was not clear. But the point is that BAM Trading is
7 operating in the U.S., that's correct. The only thing that's
8 abroad are some of those so-called key shards, and that's part
9 of the repatriation order. We want those back.

10 THE COURT: Some of the what? Key shards.

11 MR. SCARLATO: Key shards. Did you get that
12 terminology down? I can explain it, if you'd like.

13 THE COURT: Go right ahead.

14 MR. SCARLATO: Okay. So under the crypto currency
15 security protocols that Binance -- excuse me, this is BAM
16 Trading employs, you need keys, kind of like, you know, the
17 nuclear football needs several people to put a key and turn it.
18 This is the crypto version of that. And so you need -- there
19 are seven keys, as far as we understand.

20 THE COURT: And there's -- three of them are
21 offshore.

22 MR. SCARLATO: That's right, and we want them back.

23 THE COURT: Okay.

24 MR. SCARLATO: But your question was as to the money,
25 so do you want me to continue there?

1 THE COURT: Well, if you're saying we need to shut
2 down and impose this regime on the U.S. companies because we're
3 concerned about the dissipation of assets from the U.S.
4 companies, I want to know, where have you made a showing that
5 it is the money from the U.S. companies that is moving out?

6 MR. SCARLATO: It hasn't happened yet, Your Honor.
7 But that's not the point. The point is that we are concerned
8 about Mr. Zhao and Binance exerting their influence, based on
9 the motives that they've shown since the relevant period began,
10 for many years now, to exert that influence and to take those
11 funds offshore.

12 THE COURT: Okay. So you can say we don't want your
13 funds to go offshore, but why does what you just told me
14 justify saying you don't get to spend your money at all, it's
15 just frozen? I mean, you've argued, on page 31 of your memo,
16 you describe the back and forth with counsel for the
17 defendants -- and we're talking about the U.S. -- and you said
18 the SEC has not obtained sufficient reassurance that Binance.US
19 customer assets, which total over 2.2 billion, are squarely in
20 the control of BAM Trading, rather than under the control or
21 influence of Binance or Zhao.

22 You're not alleging that they aren't, you're saying
23 you're not sufficiently reassured that they are. And then you
24 say the SEC is concerned about the safety and security of those
25 assets. Okay. I understand that.

1 But, I want to know, besides the interlocking
2 relationships then, what have you seen of money going out that
3 supports those concerns? And are the concerns you talked about
4 enough to support the kind of significant -- you're saying I
5 want to preserve the status quo. The status quo is anything
6 you've got, that 2.2 billion, that stays right here in the
7 U.S., thank you very much. But you're saying more than that,
8 you're saying you can't spend any of it, and we want an
9 accounting. But you're not alleging that it's gone anywhere.
10 You said it hasn't happened yet. Isn't that a little bit
11 earlier in the TRO for asset freeze process than usual?

12 MR. SCARLATO: Your Honor, I would say this is the
13 perfect time to freeze those assets. But my colleague,
14 Ms. Farer, would like to comment on your question as well.

15 THE COURT: All right. Okay.

16 MS. FARER: Good afternoon.

17 THE COURT: And just to finish up, when you're
18 talking about repatriation, you're not talking about
19 repatriation of funds taken from the U.S. entities, because
20 you're not saying funds from the U.S. entities are gone; is
21 that correct?

22 MS. FARER: We're saying funds from -- that relate to
23 the U.S. entities and the customers of the U.S. entities are
24 not based in the United States.

25 THE COURT: Funds that relate to the U.S. customers

1 and the U.S. entities are not based in the United States.

2 MS. FARER: Correct.

3 THE COURT: That is a different statement than the
4 question I asked you. So what does that mean and how does that
5 fit into what you're saying? And what's the answer to the
6 question of whether customer assets that came into the U.S.,
7 whether they left? Have they left? He said no. Do you
8 disagree with that?

9 MS. FARER: Your Honor, there are a number of
10 transfers out of the United States bank accounts that have left
11 the country. But I think in large part we're focussed on the
12 \$2.2 billion in crypto assets. And the way that crypto asset
13 securities and crypto assets generally are controlled, and
14 their movement is controlled, is through these functions called
15 private keys, and portions thereof are what defendants refer to
16 as key shards.

17 And so the private keys, which control the
18 \$2.2 billion in customer assets just for the Binance.US
19 platform, all but one of those are based outside of the
20 United States. And so our concern is with respect to those
21 private keys. In addition --

22 THE COURT: I thought the keys were -- four were in
23 the U.S. and three were out? There were seven altogether, and
24 it was three and four. So you always needed one U.S., was
25 their position.

1 MS. FARER: So we can take a step back, Your Honor.
2 And I think that would be helpful to help us --

3 THE COURT: But what bothers me is the keys and the
4 shards are not mentioned in the memorandum. The memorandum
5 says they're transferring money out, out, out, they're
6 dissipating assets, assets are going, they're leaving, and see
7 the Verma declaration. So I'm saying, okay, tell me about
8 money that left the United States that belonged to U.S.
9 investors, because you're saying we're really concerned that
10 it's going to disappear. And now you're not saying that it has
11 disappeared.

12 MS. FARER: So I think we're saying a couple of
13 things, Your Honor. I think in our memo we did identify
14 significant transfers out of bank accounts in the
15 United States.

16 THE COURT: Okay. And I think you said that they
17 consisted of Binance platforms customer assets, including those
18 of Binance.US. And so I said, okay, where was the money coming
19 from Binance.US? And your colleague just said it hasn't
20 happened yet. So has it happened? What is the -- the money
21 coming out of the U.S., is it money in accounts that the
22 international company happened to have in the U.S. that it's
23 now moved out? Or is it money that the U.S. company had in the
24 U.S. that has been moved out?

25 MS. FARER: It's both, Your Honor. So I think, to

1 take a step back, contrary to defendant's framing and
2 characterization of our papers, we are concerned about all U.S.
3 investors, both those on the domestic platform, Binance.US, and
4 the international platform, Binance.com. And a large reason
5 for the violation set forth in our complaint does relate to, as
6 Your Honor identified, the interlocking of the entities and
7 trading platforms, the trading and money flow between the
8 platforms, between the entities.

9 And we have really tried to be reasonable, as set
10 forth in our papers and as represented by my colleague here, in
11 trying to have a narrowly tailored order to preserve assets
12 that are currently identifiable in the United States, and to
13 preserve assets, the crypto assets, the \$2.2 billion in crypto
14 assets that we understand are under the control of individuals,
15 including those relating to Binance Holdings that are located
16 outside of the United States.

17 Really, what we're just trying to accomplish here,
18 Your Honor, is to preserve the status quo for all of the U.S.
19 investors on both platforms, and having a narrowly tailored
20 order to freeze this and understand the lay of the land.

21 And what I think is important for Your Honor to
22 understand is in addition to --

23 THE COURT: Except it's not their characterization of
24 your memo. I'm talking about your characterization of your
25 memo. And what you said in your memo was we need this TRO

1 because we don't have sufficient reassurance that Binance.US
2 customer assets, which total over 2.2 billion, are in the
3 control of BAM Trading. And you said you're concerned about
4 the safety and security of those assets. And now you just told
5 me, well, no, actually, the TRO is about all the investors on
6 both platforms. What is it? Which is it? What you just told
7 me or what you wrote in your pleading? Put aside what the
8 defendants have to say.

9 MS. FARER: So it's both, Your Honor. The freeze --

10 THE COURT: Where is that --

11 MS. FARER: -- so the asset --

12 THE COURT: -- in your memorandum, where you asked me
13 to do this?

14 MS. FARER: So the asset freeze pertains to the
15 \$2.2 billion. Some of the discovery provisions that we've
16 asked for that relate to the Binance holdings and Binance.com
17 relate to the broader universe investors. And it is for this
18 very reason that I explained, Your Honor, is that we've
19 identified this \$2.2 billion that we want to preserve and we
20 need additional information about the assets that may still be
21 held by Binance Holding on the .com platform that relate to
22 U.S. investors. As we said, we are trying to have this as
23 narrowly tailored as possible.

24 THE COURT: Okay. Well, why is it saying that the
25 trading company, U.S. trading company can't make any

1 withdrawals whatsoever, narrowly tailored, to accomplish this,
2 now that you've said that really a big part of the problem is
3 the investors on the international platform and not on their
4 platform?

5 MS. FARER: We're saying the crux of the focus for
6 the freeze, Your Honor, relates to the 2.2 billion in U.S.
7 assets. And if you'll allow me, Your Honor, I'll explain. The
8 risks that we've identified here relates to the ever changing
9 story and the movement of key shards and crypto assets that
10 have occurred within the past six months.

11 If you'll indulge me, Your Honor, I can explain.
12 There's been a lot of talk in the papers about this wallet
13 custody agreement. When the BAM Trading platform was
14 established, the domestic entities engaged in a number --
15 entered into a number of service agreements with Binance
16 holdings and Mr. Zhao, one of which was the wallet custody
17 agreement which specifically designated that Binance holdings
18 was the custodian of the wallets, meaning they had the -- they
19 set up the servers, they set up the software, they set up the
20 wallets, had control of all of the keys. All evidence furthers
21 that view that that agreement was in effect. All the employees
22 referred to the Binance Holdings and Binance.com as the
23 custodian.

24 It has been only recently, since the fall, that
25 defense counsel has now told us that the wallet custody

1 agreement was, quote, not operationalized. This is in the face
2 of audited financial reports reflecting that the wallet
3 agreement was in effect and that auditors have in fact
4 identified that Binance Holdings is implementing those
5 custodial functions. This is also in the face of BAM Trading
6 and BAM Management counsel representations to the SEC
7 specifically identifying that this wallet agreement that --
8 that wallet custody agreement was in effect and that Binance
9 served as the custodian. To the point, so much so, that they
10 said we are trying to explain to you how our assets are
11 custodied and controlled, but we have limited information,
12 given that Binance.com is our wallet custodian and performs the
13 functions at issue here.

14 So this -- we started asking a number of questions
15 for the past few months and all of the information has changed.
16 The wallet agreement is not operationalized, the wallet
17 agreement that was not operationalized has now been terminated
18 with no explanation as to why an agreement that was not
19 operationalized needed to be terminated.

20 THE COURT: Well, does it matter, for purposes of the
21 TRO, to get to the bottom of whether it was operationalized or
22 whether it wasn't, whether it was operationalized and then
23 terminated? Isn't just the question, where are the assets and
24 who is controlling them? We don't care what you call it.

25 MS. FARER: This gives rise to some of the questions,

1 because then, subsequent to this engagement about the back and
2 forth of this agreement, because we would submit that it gets a
3 little bit too into the weeds, and we've said, we just want to
4 know who is in control and how they're in control and to make
5 sure that they -- the investor assets are safe and secure. So
6 then we start hearing about all these movements of tech stocks
7 and servers and key shards.

8 The protocols that govern and secure the assets at
9 issue have changed multiple times since January. It used to be
10 that there were -- it was a nine key shard protocol. And, Your
11 Honor, if you would like to take it to a higher level to
12 explain. But really, it's a password that's broken up into
13 pieces and there are a certain number of pieces -- from what
14 our understanding is, we've asked a number of questions about
15 how this protocol works -- but what they've represented to us,
16 the particular pieces need to have, like -- need to execute
17 transfers and withdrawal.

18 January it was nine key shards, Binance Holdings had
19 three of them. It was -- three shards were only required to
20 transfer. So as of that time, Binance.com could transfer
21 without BAM Trading key shards.

22 Again, at that time no key shards, except for maybe
23 one, was located in the United States. Then at some point the
24 key shards changed to seven key shards. You know, four
25 required, three of which are by Binance.com. But notably, this

1 key shard protocol does not even govern all of the assets at
2 issue. There were assets in Singapore and Tokyo that were not
3 governed by this protocol. And we were told by counsel that
4 they were in the control of BAM Trading, but when pressed upon
5 that, it was a Binance employee who had recently been holding
6 the wallet at issue and now it was a BAM employee.

7 So there's been a lot of moving parts, including,
8 most recently, we've been engaged with counsel for weeks now
9 about a hardware leger wallet located in Singapore. And in
10 their papers, as of last night, they've said that there are no
11 Binance.US wallet -- assets on that wallet. And we've seen
12 significant transfers.

13 So our concern here about the risk, Your Honor, is
14 there are all these moving parts, there's no evidence as to who
15 is in control at what point and there's -- all the evidence
16 shows that there is not a sufficient control within the
17 United States, within the Court's jurisdiction to make sure the
18 significant amount of customer assets are protected. And
19 contrary to defense counsel's explanation about the, quote,
20 unquote, fiat, the U.S. dollars in bank accounts, we have no
21 confidence that the company assets and the investor assets are
22 segregated because they are held in these -- what are called
23 omnibus wallets, they all go into these wallets.

24 So in addition to the significant movement of money,
25 dollars through these fiat accounts, numbers of accounts have

1 closed, even before we began this TRO process, the fiat has
2 changed --

3 THE COURT: Well, that's what I keep asking about, is
4 the significant movement of money. You've explained to me that
5 we've got the 2.2 billion, whether they're in wallets or
6 they're not, they have eight people governing them, they have
7 nine; they're here, they are there. Some of it is from the BAM
8 trading Binance.US platform, some of it are assets that people
9 got on the international platform, but they belong to U.S.
10 customers, and it's 2.2 billion and it's somewhere, and you
11 want it frozen. I understand that. And is that a freeze or is
12 that also a repatriation because you don't think it's here?

13 MS. FARER: Your Honor, the way that we -- because we
14 are not -- we were trying to have a very narrowly tailored
15 order. And as Your Honor identified, we don't want the
16 investor assets frozen. So we are allowing customer
17 redemptions out of those customer funds. Our concern is we
18 just want whoever is controlling those assets to be within the
19 United States under the Court's jurisdiction.

20 THE COURT: All right. Now, that's the 2.2 billion
21 that you said you wanted to preserve.

22 MS. FARER: Right.

23 THE COURT: But the memo talks a lot about transfers,
24 not -- this went to Merit Peak, this went here, this went
25 there, it's going offshore. And I thought the upshot was that

1 it was going offshore from -- I'm not taking about the 2.2
2 anymore -- from BAM Trading's customers' assets or BAM
3 trading's own assets. U.S. assets are going offshore or are --
4 and what your colleague said is our concern is that they're at
5 risk of going offshore. It hasn't happened yet. And you just
6 said we're seeing significant movement of money. So I want to
7 know, talking about Binance.US, U.S. customer assets, money
8 that should be in the control of BAM Trading here in the
9 United States, has it moved yet? Is it moving?

10 MS. FARER: The current account information that we
11 have, Your Honor, is that it is moving within banks within the
12 United States. In the time that we have been engaging with
13 counsel, certain banking partners have not allowed them to --
14 are shutting down their accounts. And this is even before we
15 raised any -- we raised the idea of a TRO.

16 So contrary to defense counsel's representation,
17 these banking issues have been public that BAM is having. And
18 so they are having trouble securing the U.S. dollars in the
19 United States.

20 But to Your Honor's question about all of the
21 allegations --

22 THE COURT: I want to know, are they going offshore?
23 That was a big theme of the memo.

24 MS. FARER: Yes, Your Honor.

25 THE COURT: And I just want to know, are you saying

1 it's happening or it's not? And it's kind of stunning to me
2 that I've now asked this question to each of you five times.

3 MS. FARER: So currently the assets are not going
4 offshore. The references to the Merit Peak and Sigma Chain
5 relates to a lot of movement of funds from Merit Peak into the
6 United States, into accounts that include U.S. customer funds
7 and back out. But the current funding is that we are -- the
8 current accounts, we're not seeing any flows of money outside
9 of the United States.

10 THE COURT: So other than the 2.2 billion, are you
11 seeking an order to freeze or repatriate money transferred from
12 the international Binance platform at this time?

13 MS. FARER: There is no freeze focused on the
14 Binance.com platform, Your Honor.

15 THE COURT: Now, is the accounting a necessary
16 predicate for the repatriation order?

17 MS. FARER: Before this morning, Your Honor, I would
18 have said no, but now we understand from defense counsel's
19 brief that the staking assets that were located on a ledger
20 wallet in Singapore have since moved.

21 So as we said, the risk is great, Your Honor. Funds
22 and crypto -- either crypto and fiat, everything is moving,
23 that's why we need everything frozen and we need an accounting
24 to preserve the status quo and ensure that our investors are
25 protected.

1 THE COURT: All right. Now the argument that they
2 keep making -- and again, I'm not sure I hear anybody
3 address -- is that you said freeze this, freeze that. But with
4 respect to BAM Trading in particular, you basically said freeze
5 it, period. Not, you can use it in the ordinary course.
6 That's what you asked me to impose. Now it seems like you've
7 backed off of that considerably in the red line that I asked
8 for and received in the middle of the day today.

9 So what are you saying now with respect to what needs
10 to be ordered with respect to the U.S. company BAM Trading and
11 their ability to do business while this case plays out?

12 MS. FARER: So our proposal, Your Honor, is to
13 freeze -- have a freeze on the assets; it allows for customer
14 withdrawals. That was our proposed order. In engagement with
15 counsel, they have asked for exceptions relating to the
16 ordinary course of business.

17 And some additional context that we think is
18 important, Your Honor, since we've been engaging with them, as
19 we identified, we are very focused on protecting investors, but
20 reasonably understand the continued -- the issues associated
21 with the continued operations of the business. However, Your
22 Honor, we have been told multiple times by defense counsel that
23 the business is shutting down. And multiple defense counsel
24 have represented to my colleague that there is a fear of
25 dissipation of assets.

1 So, Your Honor, we have no choice. We have a duty to
2 our investors, a duty under our authority to be before the
3 Court when defense counsel themselves are identifying a risk of
4 dissipation of assets, that there's a back and forth about
5 whether they're shutting down or not shutting down. This is
6 why we're here, Your Honor. But we are trying to get to a
7 point -- to an agreement on this issue.

8 And we have told defense counsel, we are not
9 categorically opposed to a very narrow exception for ordinary-
10 course expenses, given the context I just identified, that they
11 are telling us they're shutting down, we've had defense counsel
12 tell us that there is a serious risk of dissipation of
13 assets --

14 THE COURT: Well, they're going to object to that --

15 MS. FARER: Yes.

16 THE COURT: -- and I really don't think I can base
17 this TRO on what everybody's representing about what you each
18 said to each other in the context of these settlement
19 discussions. What I want to know is: If they operate, there's
20 some need for ordinary-course expenses. They have to pay
21 salaries. I don't know if these entities even pay rent. But
22 they at least probably pay salaries, and they may pay for
23 their -- some utilities or internet or WiFi or something.

24 MS. FARER: We propose --

25 THE COURT: So they have expenses to do what they're

1 doing; they have accountants, they have lawyers, they have a
2 number of expenses that they need to pay. And I think the TRO
3 went further than it needs to go to preserve customer assets by
4 saying nothing, no exception. And if they are shutting down,
5 then still there's a way to say whatever is in there, the
6 customers can get their own stuff out, but nothing else, the
7 bank accounts need to be preserved.

8 MS. FARER: So what we've proposed on this issue,
9 Your Honor, is while we maintain the low threshold to preserve
10 the status quo of a freeze is appropriate here, we have
11 proposed -- we hear you on the ordinary expenses, but we want a
12 better sense of what is involved, particularly given the
13 interrelationship between these entities.

14 You know, Mr. Zhao spins up a new company --
15 there's almost 100 companies that we're aware of for which he's
16 the ultimate beneficial owner. And we appreciate that they
17 expressly put a carve-out in, but we just want an understanding
18 to make sure that the expenses that they are paying will not
19 unduly dissipate the assets that should be preserved for
20 investors.

21 And so what we've proposed is a limited, ten-day
22 period in which -- provides some expedited discovery so we can
23 evaluate the experiences that they have incurred now and they
24 anticipate going forward, so we can see, evaluate what might be
25 appropriate ordinary-course expenses to allow for the

1 exception.

2 THE COURT: All right. So a lot of what you're
3 talking about now has arisen since you even filed your memo?

4 MS. FARER: Correct, Your Honor.

5 THE COURT: So --

6 MS. FARER: Literally, the ordinary expense
7 discussion occurred over the weekend. We expressed to counsel
8 our concerns on the issue, they came back with a proposal. We
9 don't think it's sufficient because of the -- you know, sort of
10 moving targets that we've received on information, what
11 payments are being made, et cetera, so we just said provide
12 some accounting information, provide some additional discovery
13 and hopefully we can work this out, but understanding that we
14 believe a narrowly tailored exception is the appropriate
15 carve-out in this instance, given the nature of the activity at
16 issue.

17 THE COURT: All right. I think the answer to the
18 questions that I was asking about the transfers -- and I still,
19 I guess, want to go back through -- I got off the track with my
20 allegations. So I don't know if you're back up, but --

21 MS. FARER: Depends on what the question is.

22 THE COURT: Okay. Well, I want to talk about which
23 of the three defendant entities you're alleging is performing
24 which role without registration, and just make sure I've got
25 this straight based on the memorandum.

1 MS. FARER: Yes, I'm happy to turn it over to
2 Mr. Murphy.

3 THE COURT: All right. All right. In the
4 memorandum, in section II.5, you assert that Binance is an
5 unregistered exchange. I think that much is clear. And in
6 II.6 you assert that Binance and BAM Trading as a group are an
7 unregistered exchange. So you're not alleging that BAM Trading
8 alone is an unregistered exchange?

9 MR. MURPHY: It is, as part of a group of persons
10 with Binance. Because that really goes to the point that in
11 the early days Binance was really providing all the
12 functionality for the exchange.

13 THE COURT: Well, that's my question. You said it
14 is, as part of a group. But there's some things, like when you
15 get to II.7, you say that Binance and BAM Trading each are
16 unregistered clearing agencies, but XI.6 you say Binance and
17 BAM Trading as a group are an unregistered exchange. So
18 there's no allegation by BAM Trading by itself, while it is an
19 unregistered clearing agency, is an unregistered exchange. Am
20 I correct about that?

21 MR. MURPHY: No, it is. It is on its own an
22 exchange.

23 THE COURT: Okay. That's not -- it may be in the
24 complaint, but it's not clear at all in the memo. All right.
25 So, that's helpful.

1 You've also alleged that Binance and BAM Trading are
2 each unregistered broker-dealers. Do the acts that make them
3 broker-dealers overlap with the acts that make them exchanges
4 or clearing agencies? Or are all these separate types of
5 conduct?

6 MR. MURPHY: There is overlap, Your Honor, and part
7 of that is because -- and the securities laws account for that.
8 There are exceptions, for example, that if you are acting as a
9 broker-dealer, there's an acknowledgment that you are matching
10 buyers and sellers, which is something that exchanges do, but
11 you don't have to register as a national exchange if you are
12 registered as a broker-dealer. As it turns out here --

13 THE COURT: So you can be a broker-dealer without
14 being an exchange, but you can't really be an exchange without
15 being a broker-dealer, or no?

16 MR. MURPHY: Yeah. I mean, exchanges don't typically
17 take custody of funds, for example, Your Honor, whereas brokers
18 do. Brokers do carry some of the functions that exchanges do
19 in matching buyers and sellers.

20 THE COURT: All right. Well, and finally, in section
21 II.9 you allege that Zhao is a -- has control person liability
22 for all of it; the unregistered exchanges, clearing agencies
23 and broker-dealers, and the misrepresentations, the alleged
24 misrepresentations by BAM Trading and BAM Management. So
25 that's your allegation as to him individually.

1 MR. MURPHY: Yes, Your Honor. And I think part of
2 this is that the services are so intertwined for the three
3 intermediary charges that it's kind of -- it goes to the core
4 of the business that he founded.

5 THE COURT: Now, that's everything that's in the
6 memorandum in section II about the failures to register. So
7 what was the outstanding failure to register that was being
8 described to me earlier?

9 MR. MURPHY: I think that's a section 5 offering of
10 individual securities, which, frankly, I don't think you need
11 to reach for the purposes of the TRO, Your Honor.

12 THE COURT: All right. So that, I think, might have
13 been referenced when you get to the personal jurisdiction
14 section. On page 56 you say: Binance and Zhao have
15 purposefully availed themselves of a forum by their coordinated
16 operation of three essential securities market functions:
17 Exchange, broker-dealer, and clearing agency on the Binance
18 platforms in the U.S. without registering with the SEC.

19 And then you said: In addition, Binance and BAM
20 Trading have engaged in the offers and sales of crypto asset
21 securities, including BNB, in the U.S. So that's the other
22 function that you're talking about. But that sentence didn't
23 have, "and failed to register." So that's the other failure to
24 register that you're talking about?

25 MR. MURPHY: Yes, Your Honor.

1 THE COURT: Okay.

2 MR. MURPHY: Unregistered offers and sales.

3 THE COURT: Okay. On page 57 you mention contracts
4 between Binance and BAM Trading governed by the law of New York
5 as a sign of availing themselves of the forum. That does mean
6 New York or any U.S. forum?

7 MR. MURPHY: Well, under the securities laws, I think
8 here we're talking about any forum because of the contacts with
9 the United States for personal jurisdiction.

10 THE COURT: All right. So now my question, before I
11 turn to the defendants and give the court reporter a break,
12 is -- maybe I can ask you this after the break -- is whether
13 you're going to continue to discuss this among yourselves or
14 whether you're going to accept my very strong suggestion to get
15 together with Magistrate Faruqui with respect to this consent
16 decree which, notwithstanding everything that's been said this
17 morning, the differences between the parties and their rhetoric
18 is much greater than the differences between the parties and
19 the proposal and the red line.

20 So if you can answer that question, that would be
21 helpful. But if you want to answer it after the break, we can
22 do that as well.

23 MR. MURPHY: I think it would be helpful to answer
24 after the break.

25 THE COURT: All right. So we're going to break for

1 ten minutes and then we'll be back.

2 (Recess.)

3 THE COURT: All right. Before I ask the question, I
4 just want to underscore that I am not urging the parties at
5 this point to get together, unless you choose to do so, to
6 hammer out a permanent consent decree. What I'm looking to do
7 is to have an order that works for both parties in place so
8 that we can then proceed to deal with the merits at an
9 appropriate pace. And it seems that there might be some
10 benefit, given some of the distrust going back and forth, to
11 have a neutral in the room.

12 But all I'm looking for is for some variation of what
13 we almost already have, which is something that permits BAM
14 Trading to operate, permits the government to be comfortable
15 that the 2.2 billion is secure, and that U.S. assets, U.S.
16 customer assets, don't leave the country and don't leave the
17 U.S. company's control, and that then we get the additional
18 information and documents that we're seeking.

19 So, you know, again, I think the nitty-gritty of it,
20 because it's very detailed, is better handled by all of you
21 than by me. And if you don't work it out among yourselves,
22 then the government risks having an order that doesn't go as
23 far as it wants it to go, and the defense risks having an order
24 that it really finds it hard to live under. So there's some
25 benefit to this.

1 So what's your point of view about whether it makes
2 sense to meet with Judge Faruqui with respect to the
3 refinement, potentially, of a consent decree, instead of a TRO?

4 MS. FARER: Your Honor, the government is certainly
5 open to that. We did want to clarify that the freeze that
6 we're seeking is a freeze of all of the assets. Because,
7 importantly, the operating -- the company operating funds
8 should be preserved under the applicable precedent for --
9 ultimately if we get a judgment, for disgorgement to investors.
10 In addition to --

11 THE COURT: Freeze of all of the assets of?

12 MS. FARER: Of the BAM entities. Our position is --

13 THE COURT: With the exception that they're allowed
14 to give customers back their money when they ask for it and to
15 pay salaries and operate their business, if they're still
16 operating their business, or not?

17 MS. FARER: Yes, Your Honor. What we're proposing
18 here is that all assets are frozen, both the customer assets,
19 but subject to the exception that is already included for
20 withdrawals, and then the remainder of the company assets.
21 It's important to note that we're preserving the status quo for
22 the investors who have paid transaction fees and whatnot that
23 would be included in a disgorgement order, should we prevail at
24 the end.

25 And so what we're asking for is the freeze, and then

1 we are certainly open to mediation on the scope of the
2 ordinary-course expenses. As discussed, Your Honor, we are
3 open to the business continuing to operate, we just want to get
4 additional information as to what the scope of the payments
5 will be.

6 THE COURT: But the extent of your position is fully
7 set out in what you sent me at 1 o'clock today, or a little
8 before?

9 MS. FARER: Yes, Your Honor.

10 THE COURT: All right. Okay. Thank you.

11 All right let me hear from the BAM defendants.

12 I want to start with you by saying that obviously
13 your memorandum raises a lot of legitimate questions and
14 concerns about the merits and about whether litigation is the
15 best method to get at this highly disputed issue that affects
16 billions of dollars already invested on multiple platforms in
17 the U.S. and elsewhere. But some of your claims claim to be
18 shocked that the SEC thinks you're dealing in securities and
19 took this step. And some of the surprise expressed in the
20 pleadings rang a little hollow in light of defendant Zhao's
21 statements over the years, the fact that the SEC banned Binance
22 from doing business in the United States in 2019. And this
23 appears to be an extension of that, given the overlapping
24 ownerships and relationships.

25 And so the BAM Trading was in direct response for the

1 fact that Binance couldn't trade here anymore. Plus, the
2 defendants received a Wells Notice, which you don't get unless
3 the SEC is planning to bring a civil enforcement action. So
4 I'm not necessarily interested in getting further into whether
5 it's surprising or shocking or not, as much as how to deal with
6 it and get to the merits of it in a logical and organized
7 fashion.

8 Similarly, you all repeat in the memo that there's no
9 evidence, absolutely no evidence of any dissipation of assets
10 whatsoever. And the government at this point has said they
11 haven't seen the evidence of offshore transfers from BAM
12 Trading itself. But we do have considerable evidence of
13 offshore transfers and we do have the problem of the individual
14 defendants' ownership of the entities that own BAM Management,
15 which is the parent of BAM Trading. So there's a lot of layers
16 going on here and a lot of onion that needs to be peeled to
17 figure out who is doing what.

18 So while you can quibble with the strength of the
19 evidence, whether there's anything wrong with any of the
20 transfers, I probably don't need a lot of hyperbole about how
21 shocking this is, and I probably don't need to hear the word
22 "draconian" anymore.

23 So you gave me the terms of exactly what you would be
24 willing to agree to in a consent decree. But your proposed
25 order to me within your opposition to the memo just said TRO

1 denied. So if you all can't come to an agreement, if I enter
2 the terms that you proposed, would that be with your consent?

3 MR. MERTENS: Yes.

4 THE COURT: And then, would it then be appropriate to
5 consolidate the PI with the merits and order that it remain in
6 place pending a ruling on a dispositive motion?

7 MR. MERTENS: I believe it would, Your Honor. We've
8 said all along that we are not -- we are not interested in
9 making transfers among the defendants. The sticking point, and
10 the really only sticking point, and it is still a sticking
11 point, even with the SEC's most recent submission, is on page 6
12 of the filing, which is numbered 5 at the bottom of the red
13 line, which is a paragraph 3-A which prohibits any disposal
14 whatsoever of any funds in BAM's possession. That is a
15 prohibition on ordinary course expenditures. And that is the
16 sticking point.

17 We are not willing to accept the death penalty eight
18 days into the case, and that is, in effect, what that would be
19 for our business. We are simply asking for ordinary course.
20 And because while we don't --

21 THE COURT: When you say ordinary course and that is
22 the sticking point, and I know that's the sticking point --

23 MR. MERTENS: Yes, yes.

24 THE COURT: -- what is it exactly that you need to be
25 able to do?

1 MR. MERTENS: So for example, last night on the call
2 we said things like rent, salaries, vendor costs, professional
3 fees; you know, normal operating business expenses. Those are
4 the -- and we could make -- we offered last night to make a
5 list of those things. We think we could sit down and make a
6 list of those things. But the government's position, the SEC's
7 position has been until this point --

8 THE COURT: All right. I'm not asking you whether
9 they're being unreasonable or not --

10 MR. MERTENS: Sure. Understood.

11 THE COURT: -- I want to know what you need. I may
12 have to craft this myself.

13 MR. MERTENS: Right. We need ordinary-course
14 business expenses, which is how the language we believe normally
15 appears in an order. If we need a laundry list of those, we're
16 happy to provide them. But the things, the type of things we
17 are thinking about are like salaries, rent, vendors. We
18 obviously have, to the extent that there are servers or
19 licensing of software, professional fees, you know, those are
20 the sorts of things -- office supplies, you know, to the extent
21 that those are relevant, those are the types of things that we
22 are asking for; normal, ordinary course. That is, I believe,
23 the primary sticking point.

24 THE COURT: All right. So you're willing to agree on
25 a ban of transfers to any account in which the individual

1 defendant not only has an ownership interest -- or, whether he
2 has an ownership interest or signatory authority, nothing
3 that's got his name on it?

4 MR. MERTENS: We are -- it is acceptable to us not to
5 transfer money to -- you know, directly or indirectly in
6 control of the co-defendants. You know, affiliated with them,
7 whatever the appropriate language is.

8 THE COURT: And you obviously don't need to transfer
9 money to any offshore account in the ordinary course, much less
10 one that he owns.

11 MR. MERTENS: I assume that we could -- there are
12 enough U.S. accounts that we could deal with that.

13 THE COURT: And they also seem to be interested, with
14 respect to the 2.2 billion, about the clearing team and who
15 holds the key shards and all that. Is there any reason why
16 they all have to be -- why they can't all be independent from
17 Binance?

18 MR. MERTENS: We are prepared to bring all the key
19 shards to the U.S., if the Court orders that. We have no
20 problem with that.

21 THE COURT: The Court will definitely order it if you
22 agree to it.

23 MR. MERTENS: Well, the only reason I'm hesitating on
24 that is because to the extent that the key shards are in the
25 possession of Binance, I can't speak for Binance. I can speak

1 to what we, BAM will do.

2 THE COURT: I understand that.

3 MR. MERTENS: And the order would have to direct or
4 not direct what another entity would do. But we don't have an
5 objection to them all being in BAM's possession.

6 THE COURT: All right. And there was a point where
7 you told me earlier today that there is no daylight between any
8 of the defendants at this point. But I don't know that that
9 particular language was in the existing order, so I will
10 actually ask that to Binance's counsel.

11 And if there is no consent order and I have to issue
12 my own order -- and I meant to ask the government this, and
13 I'll ask you this when you get back up, because I know you're
14 going to want to get back up at the end. What's your position
15 about how long a TRO could remain in place? It's not a TRO
16 without notice, which is what Rule 65 says only lasts 14 days.
17 The government seems to take the position that it could only
18 last 14 days or it might expire, unless it gets turned into a
19 PI.

20 I don't see how, given what I've been provided, that
21 I can do the kind of order that would rule on all of the legal
22 and factual issues underlying a preliminary injunction in two
23 weeks. So if I have to put something in place, how long can it
24 stay in place?

25 MR. MARTENS: Well, I don't have an answer to that

1 because our position is that a TRO is not warranted, so I'm not
2 in a position to say so we would agree to one for X number of
3 days. Obviously, if the Court ordered one, we would have to
4 have a discussion, as you do in any case, about how long is
5 necessary for discovery to conduct a PI hearing. But as of
6 today, we don't believe that the sale -- and I think this is an
7 important point, and the Court identified this, they're
8 alleging on crypto asset among more than 100, and arguing --
9 while they say that allows them to win the case, that doesn't
10 provide a justification for taking over an entire business.
11 And that, I think, is -- I think we're going a long way to
12 saying, listen, we don't think this is justified at all based
13 on their showing, but we are willing to do -- to take steps to
14 allay concerns because we don't think that there's any valid
15 concerns here.

16 And so we're fine with agreeing to the handling of
17 these funds appropriately because my client believes they are
18 handling the funds appropriately. But what we're not willing
19 to do is accept something that goes so far as to shut down our
20 business.

21 THE COURT: I understand that.

22 MR. MERTENS: I can't really answer the Court's
23 question about how long we would be willing to tolerate a TRO.
24 A, because we don't believe it's appropriate, but, B, because
25 depending on what it does, it could end our business.

1 THE COURT: I don't think that a TRO can completely
2 shut down your business; it has to preserve the assets. They
3 talked about status quo, status quo, status quo; status quo,
4 this business exists. So I think if they're talking about a
5 TRO, it can't really go much further than literally preserving
6 the assets that we're talking about.

7 MR. MERTENS: But that's not the status quo, Your
8 Honor. The status quo is that we're continuing to operate as a
9 business and pay ordinary business expenses, that's the status
10 quo.

11 THE COURT: I understand that. I understand your
12 position about that. I think you've made that very clear and
13 that is why I was asking you what you need in the ordinary
14 course. And if you want to put it in a piece of paper for me,
15 if it wasn't received over the phone last night, you can docket
16 that. It would be helpful for you to be specific.

17 MR. MERTENS: Sure.

18 THE COURT: But I think that I don't need to be in
19 the room where it happens and that there is a better way to get
20 to what the nature of this is and should be.

21 MR. MERTENS: We're happy to provide that list, Your
22 Honor.

23 THE COURT: All right. Now, you raised important
24 questions to be considered in terms of whether the Binance coin
25 is or is not a security and, therefore, whether the

1 registration obligations attach. And that's, obviously, the
2 legal question at the heart of the case that I'm going to have
3 to resolve. But I want to make sure I understand, though, that
4 while you disagree that the assets bought and sold were
5 securities, do you dispute whether BAM Trading was operating as
6 an exchange with Binance with respect to those assets, whatever
7 they are?

8 MR. MERTENS: So the reason I hesitate is because I
9 don't know whether you're using an exchange in a technical
10 sense under the securities laws or whether you mean in a
11 colloquial sense. Certainly it was a platform under which
12 people could buy and sell crypto assets. I hesitate to use the
13 word "exchange" because that has technical legal meaning in the
14 securities laws that we're not prepared to concede.

15 THE COURT: All right. Well, I was going to ask the
16 same questions about acting as a broker-dealer and acting as a
17 clearing agency. And I guess my question is: Your memorandum
18 took issue with the "it's a security," as opposed to "I'm
19 making them available for sale, I'm providing credit or
20 dealing, clearing the transactions, I'm offering them on a
21 platform where people can pick and choose among, and buy and
22 sell."

23 The underlying facts that make something an exchange,
24 a broker-dealer or clearing agency, you took issue with
25 whatever -- our offering of these assets is not something

1 that's subject to the jurisdiction of the agency because the
2 assets aren't securities, that's what you were saying, as
3 opposed to, no, we're not engaged in those operations.

4 MR. MERTENS: We didn't have to get to the issue of
5 the operations because the operations -- the statutes governing
6 the operations only govern the operations if it's a security.
7 And so if they -- and we do believe they do -- fail on the
8 question of whether it's a security, everything else falls,
9 too.

10 THE COURT: I understand that. I was just wondering
11 if there's some even-if argument, that even if it turned out to
12 be a security, you can't call me a broker-dealer because I
13 didn't do X, Y, or Z, or I'm not a clearing agency because I
14 didn't do X, Y, and Z. It wasn't in the memo and I assume
15 you're not giving that up as an option, should it come down to
16 that?

17 MR. MERTENS: Right. It's just for the TRO purposes
18 we took a simpler approach.

19 THE COURT: All right. You argue in your memo that
20 the Binance coin, at least by the time it was available to be
21 purchased through BAM Trading on the Binance.US platform was
22 not a security. So what was it? Was it a commodity?

23 MR. MERTENS: It was a crypto asset.

24 THE COURT: What is a crypto asset that is different
25 from a crypto security? No one wants to tell me.

1 MR. MERTENS: Well, the crypto asset security, as I
2 understand it, is they're adding the word "security" to bring
3 it within the scope of the federal securities laws. And
4 whether it's section -- I believe it's section 2 of the
5 Securities Act or section 3 of the Exchange Act, defines a
6 security as, among other things, an investment contract, as the
7 Court has heard, and that is what the government is relying on.

8 An investment contract requires a contract. The
9 language about a scheme, as I understand, it was dicta. There
10 was not a scheme at issue in *Howey*, it was a contract. And as
11 I understand the case law, all of the cases under *Howey* and all
12 of the cases under the Blue Sky laws prior to *Howey* under which
13 was the origin of the securities laws, involved a contract. We
14 are not aware of any case that's found a security without a
15 contract. And that is --

16 THE COURT: Even since *Howey*? I mean, what about the
17 government's citing cases where actually crypto assets were
18 found to be securities?

19 MR. MERTENS: So my understanding is that those other
20 cases did have a contract in place, and there is not a contract
21 here. And that's our dispute. You can't have an investment
22 contract without a contract. You also can't have an investment
23 contract without some expectation of profit. And here
24 there's -- no one has talked, explained at all what the
25 obligation -- what the contractual obligations or the

1 contractual benefits are from supposedly buying one of these
2 assets.

3 And, you know, there's lots of other language used by
4 the SEC when they were speaking about it that, you know, people
5 hoped to earn a return. That's not -- that doesn't equal an
6 investment contract. It's a long way from investing in an
7 orange grove in *Howey* and expecting to earn returns when the
8 oranges were picked from the trees and sold. There's no
9 contract here --

10 THE COURT: When you buy stock in a company that's a
11 security, yes, you'd hoped to earn a profit, but is there any
12 promise you're going to earn a profit?

13 MR. MERTENS: So the difference there is the stock is
14 specifically identified in the definition of a security as
15 being a security. So it begins stock and then it has a list of
16 other things. Halfway down the definition is the word
17 "investment contract."

18 So investment contract is its own unique thing, and
19 in order to claim this is an investment contract, they need to
20 start with a contract.

21 THE COURT: And I know you've said that. So that
22 even at the ICO stage, you're saying it wasn't even a security
23 then because there was no contract. But it seemed like you
24 were also arguing even if it was, it lost that character by the
25 time it was being sold on the U.S. platform with something else

1 at that point. Is that something you're also arguing? And
2 when and how does it transform itself?

3 MR. MERTENS: I think what -- so we were focused on
4 the time when it was trading on our platform because that is
5 the time relevant to establishing, thus, whether we were an
6 exchange or a broker-dealer. And I think our particular focus,
7 for purposes of the TRO, was at the time it was trading on our
8 platform there was not a contract and, thus, not an investment
9 contract.

10 THE COURT: Okay.

11 MR. MERTENS: Yet, I think it remains to be seen, if
12 this proceeds into litigation, whether there was ever a
13 contract, even at the time of the ICO. I suspect the evidence
14 is that there is not a contract even at that point. But our
15 particular focus was at the time it was trading on our
16 platform.

17 THE COURT: Well, you've been very clear about the
18 need for the ordinary course exception to any freeze with
19 respect to BAM Trading's assets. The government's spent a lot
20 of time today talking about the 2.2 billion of U.S. investor
21 assets that it wants to make sure that they're under your
22 control and nobody else's control. Do you have any problems
23 with any of that?

24 MR. MERTENS: We do not.

25 THE COURT: Okay. And then given the fact that it

1 seems like really the difference between the two parties is
2 rent and ordinary expenses, what's your position about whether
3 it makes sense for you to be in a room with Magistrate Judge
4 Faruqui and your colleagues on the other side of the courtroom
5 sooner rather than later?

6 MERTENS: We are happy to have a discussion with or
7 without the magistrate judge. We don't think that's required
8 to sort out what ordinary-course expenses are. But we're happy
9 to reach an agreement on ordinary-course expenses. Again, we
10 don't -- I think that that language is typical. I don't think
11 it's really a novel term to be included. I don't know that
12 there's always a list, but we're not against having a
13 discussion about a list.

14 THE COURT: All right. Well, they have added a lot
15 of language about the 2.2 billion and who is actually going to
16 be in charge of it, and it seems to be different, what they
17 wrote than what you had. But that's not the area that's giving
18 you consternation at this point.

19 MR. MERTENS: That is not the area that's giving us
20 consternation. The area that's giving us consternation is an
21 asset freeze that will be misconstrued by our banks. What we
22 have agreed -- what we want to be able to do is make clear we
23 are entitled to continue spending our money in the ordinary
24 course and so that the banks understand that and so that we can
25 continue to operate.

1 THE COURT: All right. Do you want to say anything
2 in response to the statement that you said something about
3 shutting down or not shutting down?

4 MR. MERTENS: Your Honor, I think -- I know you don't
5 want rhetoric, so I'll be measured. But I think it is
6 inappropriate for the government to come in and make
7 announcements about whether a business will continue or not
8 continue. We have made no such decision as BAM Trading. And I
9 don't believe it's appropriate to come into court and make
10 announcements about what we are or not going to do as a
11 business.

12 THE COURT: Well, given the public nature of these
13 proceedings, I wanted to give you the opportunity to say
14 something with respect to that, so that was why I asked the
15 question.

16 I have fewer questions for you, not because I think
17 your position is any less important, but because I think I
18 understand your position and I think that the questions for
19 what I'm supposed to do in the short-term for interim relief
20 are different questions than, at the end of the day, the legal
21 rulings that lie at the heart of this case, which I don't think
22 I should be making at this pace.

23 What I'm trying to do is to make sure that we can
24 reach that decision in a thoughtful pace and not have the
25 chickens fly the coop in the meantime.

1 So I think you and I have discussed what I need to
2 ask you about that, unless there is anything you would like to
3 put on the record right now that I haven't asked you about.

4 MR. MERTENS: I don't think there is, Your Honor.
5 Again, I agree with you that I don't think we need to sort out
6 the merits now. Our position is we believe there's a way
7 forward here that allows us to keep operating and allows this
8 litigation to proceed in the normal case and to decide these
9 issues on the facts, with appropriate time to review them.

10 THE COURT: All right. Let me hear from counsel for
11 Binance then.

12 MR. NELSON: Good afternoon, Your Honor.

13 THE COURT: Good afternoon. What was I supposed to
14 do with 3,000 pages of exhibits filed four and a half hours
15 after memorandum was due without a motion for leave to file it
16 at that time?

17 MR. NELSON: Hopefully accept an apology. And we
18 worked hard to coordinate with counsel for Mr. Zhao. And,
19 candidly, underestimated the process of getting everything into
20 ECF. But the process of trying to work to coordinate on a
21 brief and a single set of exhibits, we ended up with some
22 logistical issues yesterday afternoon that were wrong, so I
23 apologize.

24 THE COURT: All right. Well, you understand,
25 obviously, that by 9:30 last night I was really focused on the

1 dueling proposals and the larger issues, rather than the
2 exhibits. I've not yet had the opportunity, the pleasure to
3 dig into them fully. But, understanding that I need to, and
4 I'm not going to be able to decide this case without looking at
5 all of theirs and looking at all of yours. And what we're
6 trying to do is figure out how to manage this case so that that
7 is done.

8 What's your position about sitting down with a
9 magistrate judge to try to finish the process of hammering out
10 something that will govern the conduct of the parties between
11 now and then?

12 MR. NELSON: Your Honor, Binance Holding, Limited,
13 would be agreeable with that approach, and we think it has
14 wisdom. If the parties can come to an agreement, that would be
15 better. Mr. Mertens has addressed the main issue. There are
16 other details about, you know, difference of wording that may
17 make a difference. But I think the parties in the first
18 instance would be best positioned to address that.

19 THE COURT: Well, putting aside wording, and I
20 understand the ordinary course issue is BAM Trading's issue,
21 but the 2.2 million and whether anyone other than BAM Trading
22 is going to hold the wallets or make the decisions on
23 withdrawals, do you have problems with what the government has
24 proposed with respect to the 2.2 billion, which they are
25 alleging are U.S. investor dollars that are at stake in this

1 litigation?

2 MR. NELSON: We do not, Your Honor. And while we
3 disagree that it's necessary to transfer the key shards in
4 order to preserve the security of the assets, as you've seen
5 from our proposed order, we're willing to voluntarily undertake
6 the steps necessary to do that. It's in II.4, where we have
7 specifically agreed to do that to address what we understand is
8 the government's concern.

9 THE COURT: All right. Now one of the points you
10 made -- I'm just going back to the original point. Even
11 without the apology, I've accepted the filing of the exhibits
12 and I'm not going to strike them or do anything horrible to you
13 because of the four hours; it was just frustrating to have them
14 arrive.

15 I don't understand your addressability point. You're
16 not saying that the lawsuit itself can't provide relief or
17 redress if the defendants are indeed performing the functions
18 for which they need to be registered. They could be enjoined,
19 they could have to pay penalties. There might be money that
20 has to go back to customers. Are you saying that a motion for
21 TRO, for interim relief, based on the facts in the complaint,
22 has to separately meet all of the *Lujan* requirements if there
23 is standing to bring the action?

24 MR. NELSON: Your Honor, I'll hand off to my
25 colleague Mr. Celio.

1 THE COURT: All right.

2 MR. CELIO: Good afternoon, Your Honor. Michael
3 Celio for BHL.

4 It's not the *Lujan* holding, it's that for an exercise
5 of this Court's jurisdiction on the TRO, what the law requires
6 is that the relief that is sought be tightly coupled to what it
7 is we've actually done. And --

8 THE COURT: But my jurisdiction is over the case.
9 The TRO is a pleading in the case. You're saying I don't have
10 jurisdiction to hear this case?

11 MR. CELIO: It's that the relief sought can't be
12 granted by this Court on this record. This is a registration
13 case against us. We're not aware of any of the cases that the
14 other side cited where a registration case has resulted in a
15 TRO like this. Now we're willing to do it, I want to be clear.
16 I'm not disagreeing with anything my colleague said. We've
17 offered what we've offered and we stand by that. But we think
18 on the law -- we just want to be clear -- we're going far
19 beyond what we're required to do here. Because this kind of
20 case, where it's just a question of whether we should have
21 registered, an issue that's been out there for what? Six
22 years? That doesn't actually allow the Court, no, to enter
23 that kind of relief. You absolutely have jurisdiction over the
24 case, we get that.

25 THE COURT: The question is whether ultimately I'm

1 going to have -- there would be relief associated, if it was
2 found to be a security. And if it was found that you had
3 failed to register and you were supposed to register and that
4 resulted in X billions of trades or profits, you're saying
5 you're not going to owe anything at the end of the day? It
6 would just be I'm sorry, will you accept my apology, as we said
7 earlier?

8 MR. CELIO: No, ma'am. That's not what I'm saying.

9 THE COURT: So there could be a penalty owed. And
10 they're saying all we're saying is we want to make sure the
11 money is there when we're all left standing at the end of the
12 day. How does standing fit into this?

13 MR. CELIO: Because redressability is a separate --
14 and we've said it in our papers, the redressability is a
15 separate element at the TRO stage and they have not met their
16 burden to establish that.

17 THE COURT: Tell me what happened in the NLRB, the
18 one case you cited for that.

19 MR. CELIO: So I can't give you chapter and verse on
20 that case, but I think -- it's really just a common sense
21 principle, Your Honor.

22 THE COURT: It isn't to me, actually. I've never
23 heard of it before and that's why I want to know what the case
24 held and why you're relying on it.

25 MR. CELIO: So I'm not prepared to answer that

1 question, and I apologize Your Honor. But what we're saying,
2 though, is really what this goes to is the emergency nature of
3 what's sought against us here. We understand why we're in the
4 case, we understand that this is an important issue. Look
5 around us, we get it; it's an issue of first impression and
6 it's important. So we're not --

7 THE COURT: Some of those are press, some of those
8 are your associates, I'm pretty sure.

9 MR. CELIO: I only know which ones are associates of
10 Gibson, Dunn, Your Honor. But there are a lot of people here,
11 it's obviously an important case. The question is, at this
12 stage, just at this narrow first stage, the Court doesn't have
13 unlimited ability to fashion any relief. It's got to fashion
14 relief that's related to what's actually in the complaint and
15 what's actually before you, that's the argument.

16 As to my client, who is simply a corporate cousin of
17 BAM, admittedly with some relationship, contractual
18 relationships and other things, but we don't really understand
19 why we're here at the TRO stage. We understand why we're in
20 the case, to be clear. We understand, at the end -- and our
21 position is that at the end, if jurisdiction is established in
22 all the ways, that it will be fought. We're not making any of
23 the claims you suggested.

24 But it is the case that the Court's ability to issue
25 interim relief has to be tied to what's actually in the

1 complaint and it's just not here.

2 THE COURT: What are the specific aspects that
3 they're asking for in their order that apply to you in
4 particular? I mean, there's things like the not destroying any
5 documents in discovery and that sort of thing, but what are the
6 particular aspects of what they're asking for that you say are
7 deficient for this reason?

8 MR. CELIO: Here's the good news, Your Honor: We
9 don't have to get into it because we've offered to do it
10 voluntarily. So, I mean, we've said -- I think that it's, you
11 know, I think that our proposal that we filed today, earlier,
12 really makes this an easy question for me. We want to preserve
13 our record that we think, you know, we're doing more than we're
14 required to do. But we really want to assure the Court how
15 reasonable --

16 THE COURT: The record will so reflect, that it is
17 your position that you are doing more than you're required to
18 do.

19 MR. CELIO: I appreciate that.

20 THE COURT: You argue, and your argument has some
21 force, that these kinds of complex legal and financial issues
22 are better resolved through regulation or rule making than
23 through test case litigation, but I don't run the executive
24 branch. So what would be the authority under which I could
25 say, as you suggested, no, I'm sorry, you've exceeded your

1 discretion, you must proceed by rule making here. How is that
2 in my lane as a member of the judiciary?

3 MR. CELIO: If we made that statement, that's not
4 what I'm arguing today. I think that it is something -- it may
5 well be in the brief, but I think that that's -- we're not
6 asking you to deny it on that basis. I think the issue is --
7 I've got to go to Chicago in a little bit and defend the same
8 case on the issue of whether it's a commodity, and we are put
9 in a difficult position. And I hope that the Court appreciates
10 that the executive has its authority to do what it wishes, they
11 have the right to bring this case, I suppose. It is a
12 difficult thing for my client to be told it's a security, it's
13 a commodity --

14 THE COURT: Well, "it," is the "it" the same?

15 MR. CELIO: I think it is, but I'm sure we're going
16 to argue about that. But the BNB is what I'm talking about
17 here. But I think that there's disagreement as on those facts.
18 But I think that the issue that we're trying to raise --

19 THE COURT: In the CFTC case they say the BUSD was
20 the commodity, and the SEC just told me that that's not the
21 same as the BNB. Are you saying it is?

22 MR. CELIO: BUSD is not the same as BNB, but BUSD is
23 very much in the papers that they filed, it's right there.

24 THE COURT: Yes.

25 MR. CELIO: So those things -- I mean, the point more

1 broadly is, and I think it's relevant to the TRO, right, is
2 because the TRO is a terrible way to do this, right? It is
3 putting unfair pressure on the Court, it's putting unfair
4 pressure on my client. We accept that we have to have this
5 fight. We understand that this is coming. I think it's been
6 pretty clear that it was coming against someone -- maybe not
7 against us, but someone -- for years. So let's have the fight.
8 The Court should be given the opportunity to hear from
9 different parties, from -- you know, from amicus briefs, from
10 sort of all the relevant parties that this Court usually has
11 access to.

12 You know, we should do this over -- in a normal,
13 orderly discovery process so that the facts aren't coming in
14 the night before the Court -- you know, I had my apologies that
15 it came in late -- that the Court should have a full record.

16 THE COURT: I agree, completely. And so the question
17 is: What do I need to do to make sure that happens and to make
18 sure that the government's, I think, legitimate concerns, given
19 the offshore nature of some of the defendants and the ease of
20 moving money from place to place, given the overlapping
21 ownership, that something needs to be done. But, it may not be
22 everything they originally asked for. They're not asking for
23 everything they originally asked for anymore. It may look a
24 lot like what you all have proposed. There's nothing I would
25 like better than an orderly process to get at complicated

1 issues, that's the way we do things.

2 All right. I don't think I have anything else to ask
3 you.

4 MR. CELIO: Okay.

5 THE COURT: And, finally, counsel for the individual
6 defendant, your brief and your proposals were linked, but if
7 there's anything you want to add to the discussion I just had
8 on behalf of the two defendants?

9 MR. QURESHI: Thank you, Your Honor. No, I have
10 nothing to add. I would agree with my colleague representing
11 Binance that there are some stray issues that we look forward
12 to discussing with the Commission and hopefully resolving in
13 the ways that you've outlined.

14 THE COURT: But right now there's no reason that you
15 see -- is there any reason that BAM Trading needs to be sending
16 money offshore to your client's accounts to operate its
17 business?

18 MR. QURESHI: No, Your Honor. And I think in the
19 proposed stipulation that we offered at 1 o'clock today, I
20 think that's at docket 58-1, there is a restriction on anything
21 like that happening.

22 THE COURT: All right. And so if all of that is in
23 place with respect to the 2.2 billion of U.S. customer assets,
24 that's something preserving your objections, the jurisdictional
25 objections and your personal jurisdiction, that's something

1 you're willing to live with while we figure out all these other
2 objections?

3 MR. QURESHI: That is correct, Your Honor.

4 THE COURT: All right. All right. Thank you.

5 All right. Is there anything the government wants to
6 add at this point?

7 MS. FARER: Just briefly, Your Honor. On the issue
8 of the case brought by the CFTC, we would just highlight that
9 courts across the country have identified that different crypto
10 assets can be a commodity in certain contexts, can be a
11 security in different contexts. As Your Honor may very well be
12 aware, there's a very fulsome court opinion, the *CFTC versus*
13 *McDonnell*, an EDNY case that sets forth the framework. And a
14 number of the regulatory agencies have issued joint statements
15 about how different assets can be treated differently in
16 different context. So the BUSD product that is identified in
17 the CFTC's complaint is different than the one that we are
18 alleging here.

19 With respect to the open questions, as Your Honor
20 identified with respect to just wanting a list, that's really
21 all we're asking for. We just want information about the
22 expenses at issue. You know, a general category of, quote,
23 unquote, professional fees. When I was in the private sector,
24 that could cover a lot of things. And so we just want an
25 understanding of what may be anticipated.

1 THE COURT: Notwithstanding the eye rolling on my
2 right, I'm going to just order that BAM Trading docket a list
3 of what it maintains are the ordinary-course expenses, even if
4 it's obvious and even if it's commonly ordered, just go ahead
5 and do it, put it in writing. And then I'll see it, if I end
6 up having to issue a TRO, and the government can see it, and
7 maybe that will streamline the conversation that you're going
8 to have with Magistrate Faruqui.

9 Yes?

10 MS. FARER: We would just ask, Your Honor, in
11 connection with that request, that there be some time
12 parameters imposed. We want to -- it would be helpful to have
13 an understanding of, sort of, the time periods at which these
14 expenses are anticipated.

15 THE COURT: All right.

16 MS. FARER: We would just add a couple other things
17 for the record.

18 THE COURT: Yes.

19 MS. FARER: We understand that defendants may be
20 frustrated by our reference to communications that we've had
21 with them, and we certainly, as a regulator in this space,
22 appreciate the sensitivities. We would just highlight that the
23 defendants made this public themselves by including
24 communications between us that reference the shutdown
25 communications, at docket 41-6. And we thought it was

1 important for Your Honor to understand our position on certain
2 issues that was within that context, that we needed to take
3 certain positions on certain issues.

4 And the final point, Your Honor, is I think an open
5 question that was a sticking point with respect to the consent
6 is -- are the terms of discovery. It's not clear to us exactly
7 why Mr. Zhao is -- and Binance are extending the time period by
8 which they would be subject to certain discovery obligations.
9 We think that it's very important, for all the reasons that
10 we've discussed, that we have expedited discovery of all the
11 parties for -- as set forth in the proposed order. So I think
12 that's one of the open questions for us, as well.

13 THE COURT: All right. Well, if you get to the point
14 that you can agree to everything except things like that --

15 MS. FARER: We agree, Your Honor.

16 THE COURT: -- you can submit to me a consent decree
17 that has, you know, two brackets; what one party thinks and
18 what the other party thinks, and I can figure that out. I do
19 that all the time with discovery disputes among parties. So, I
20 think if that's -- if that's where this resides, then there's
21 absolutely no need for a TRO, we can figure that out.

22 And, you know, I don't think I've ever issued a
23 discovery order that sooner or later somebody didn't say, Your
24 Honor, can we have additional time? So what difference does it
25 make at the end of the day if I say ten days? Ten days from

1 now somebody is going to tell me they need more time. Maybe.

2 MS. FARER: Given the expedited issue, we completely
3 appreciate.

4 I think the last piece on the list of expenses, Your
5 Honor, we understand that certain processors that may be
6 involved with BAM's ongoing operation are not located in the
7 United States. And so it would be helpful -- this is one of
8 the issues that we want to make sure that all payments or all
9 vendors that may control the investor assets at issue are
10 within the United States, so it would be helpful if there are
11 going to be payments going offshore.

12 THE COURT: All right. But, I mean, everything
13 you've said is really so much to the side of what you stood up
14 and said, oh, you know, we're really worried about the
15 2.2 billion and we're really worried about BAM trading and
16 their investor assets, and this is -- these are all, like, the
17 little details around the fringes. And I'm not saying they're
18 not important and that you all shouldn't be caring deeply about
19 them as advocates for your side, but if they're telling you we
20 don't need to send money offshore, we'll send the keys and the
21 wallets and all that back, they're telling you they're willing
22 to do that by consent, that gets you a lot further and the
23 relief lasts a long longer than even if I issued a TRO that
24 said everything you asked me to say.

25 So that's really worth thinking about. And that

1 leads me to the question I didn't ask initially, which is, if I
2 have to issue a TRO, your pleading assumed it would evaporate
3 in two weeks. Is that true if it was issued with notice and
4 after a hearing?

5 MS. FARER: Our position, Your Honor, is that it
6 should convert to a preliminary injunction and last for the
7 duration of litigation.

8 THE COURT: If and when it converts, at that point I
9 need an opinion with more findings in it than a TRO would have,
10 isn't that true?

11 MS. FARER: It's our position that if it's entered by
12 consent, which we are hopeful --

13 THE COURT: Well, yes, if it's entered by consent, I
14 don't have to do anything. But if that process doesn't work --
15 and it really should, given how close you are -- and I have to
16 do something, I think we have to think seriously about how long
17 it could last and when we would be having a hearing on a
18 preliminary injunction, which would be very similar to this
19 hearing except you would actually be talking about the
20 exhibits, and I don't see how I have a chance to read them in
21 two weeks.

22 Given the volume of what you've all given me, I don't
23 think it would be fair to the Court or fair to you to say this
24 thing needs to be decided in two weeks, particularly since
25 everything else I have on my schedule and had on my schedule

1 before the TRO came along, in the next two weeks.

2 So what I'm going to do then is refer just the
3 question of the language of the consent decree to mediation
4 with Magistrate Judge Faruqui starting as soon as he can see
5 you, and ask the parties for a status report with respect to
6 the -- if you haven't docketed anything within the day after
7 the order, then I guess I would ask for a status report on --
8 what is today? Tuesday. Maybe by close of business Thursday
9 as to whether the discussions are ongoing or whether they've
10 reached an impasse.

11 And if it's just an impasse with respect to things
12 that you can say we've agreed to all this, but we have this and
13 this and this, you can just let me know what's going on by
14 close of business Thursday. And if it turns out that he can't
15 see you between now and then, you need more time, let me know.

16 If there is a consent decree, that will render the
17 request for a TRO, and I think preliminary injunction, moot.
18 And at that point, what we will need to do is set a schedule
19 for the disposition, dispositive motions, whether they're
20 motions to dismiss or they're motions for summary judgment, and
21 you'll be able to propose how long you think you need to do
22 that and do that right.

23 The way I would envision this happening is the
24 defense would file -- defendants would file their motions
25 first, the government would then have the opportunity to oppose

1 and file at that time any cross motion of its own, supported by
2 a single memorandum of law, and then the reply or cross
3 opposition, and then the cross reply. I think, I've done this
4 in big finance cases, like the *A&E Trust* case, that shortly
5 after the pleading is due -- you'll get detailed instructions
6 about how to do this -- but you're going to file a hyperlinked
7 version so that I can read -- with all the technology in this
8 courtroom, I know you can do it -- so that I can read the
9 pleading and just click on the link and get to the exhibit that
10 you're citing.

11 I have a lot of difficulty toggling back and forth.
12 The government's memo, when it got to the legal section, it
13 cited the statement of facts, so then I had to go back to the
14 statement of facts and see what you cited in the statement of
15 facts. With respect to that, the statement of facts, there
16 will be instructions, it's not going to look like this, where
17 it's full paragraphs and they're fairly argumentative. It's
18 going to be one fact per numbered paragraph, with the citation
19 that supports it in that paragraph, so it's very, very clear to
20 me where every fact that either side is relying on is coming
21 from.

22 But I don't think we need to set the schedule for
23 that until -- if we know that we have a consent decree, then
24 you can propose a schedule for how to do this and we'll set a
25 hearing date and all that. But, let's -- and if this is not

1 going to work out and I have to issue on order, then I'll issue
2 on order.

3 All right. Is there anything else I need to take up
4 right now on behalf of the government?

5 MS. FARER: Nothing for the government, Your Honor.

6 THE COURT: Okay. Anything further on behalf of any
7 of the defenses?

8 MR. CELIO: No, Your Honor.

9 MR. NELSON: (Shakes head.)

10 THE COURT: Okay. Appreciate the time that everyone
11 has put into this this afternoon. Thank you. Including the
12 dog.

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, JANICE DICKMAN, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 14th day of June, 2023

Janice E. Dickman, CRR, CMR, CCR
Official Court Reporter
Room 6523
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Exhibit 2

Press Release

SEC Secures Emergency Relief to Protect Binance.US Customers' Assets

Order ensures platform customers can continue to withdraw their assets

FOR IMMEDIATE RELEASE

2023-110

Washington D.C., June 17, 2023 — The Securities and Exchange Commission today secured emergency relief in which the all the defendants in [its litigation](#) against Binance Holdings Limited, BAM Management US Holdings Inc., BAM Trading Services Inc., and Changpeng Zhao agreed to repatriate to the United States assets held for the benefit of customers of the Binance.US crypto trading platform. The order from the United States District Court for the District of Columbia also prohibits defendants BAM Trading Services Inc. and BAM Management US Holdings, Inc. (together, “BAM”) from spending corporate assets other than in the ordinary course of business. The order helps ensure that Binance.US customers are permitted to withdraw their assets from the platform and that those assets that remain on the platform are protected and remain in the United States through the resolution of the SEC’s pending litigation against Binance Holdings Ltd., BAM, and their founder, Zhao.

“Given that Changpeng Zhao and Binance have control of the platforms’ customers’ assets and have been able to commingle customer assets or divert customer assets as they please, as we have alleged, these prohibitions are essential to protecting investor assets,” said Gurbir S. Grewal, Director of the SEC’s Division of Enforcement. “Further, we ensured that U.S. customers will be able to withdraw their assets from the platform while we work to resolve the alleged underlying misconduct and hold Zhao and the Binance entities accountable for their alleged securities law violations.”

Specifically, the order (1) requires all of the defendants to repatriate to the United States assets held for the benefit of BAM’s U.S. customers; (2) requires BAM to maintain U.S. customer assets in the United States for the duration of the litigation and to facilitate customer withdrawals; (3) expressly prohibits BAM from transferring any assets or funds, or from providing control over such assets or funds, to co-defendants Binance Holdings Limited, Changpeng Zhao, or their affiliates; (4) restricts BAM from spending assets or funds except for ordinary course business expenses and requires BAM to provide the SEC with oversight over such expenses; (5) prohibits all of the defendants from destroying records; (6) requires all of the defendants to submit expedited sworn accountings of certain assets to the SEC; and (7) requires all of the defendants to submit to expedited discovery by the SEC on the custody and security of customer assets.

###

[Related Materials](#)

- Consent Order

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

No. 1:23-cv-01599 (ABJ)

[PROPOSED] ORDER

Plaintiff Securities and Exchange Commission is directed to comply with all applicable rules of conduct concerning extrajudicial statements, including Rule 3.6 of the District of Columbia Rules of Professional Conduct.

SO ORDERED.

Dated this ____ day of _____, 2023

HON. AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE

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