No. ________

In the Supreme Court of the United States

TERRAFORM LABS PTE, LTD. AND DO KWON,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR WRIT OF CERTIORARI

Stephen R. McAllister
Counsel of Record
Douglas W. Henkin
Michael E. Harriss
Parker B. Bednasek
Dentons US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
(816) 460-2400
stephen.mcallister@dentons.com

Counsel for Petitioners Terraform Labs Pte, Ltd. and Do Kwon

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Did the United States Securities and Exchange Commission ("SEC") properly exercise personal jurisdiction over a foreign company when its only purported service of process on the company was personal service on the company's CEO while he was transiently attending a conference in New York City—a tactic referred to as corporate "tag" jurisdiction that has been rejected by at least two circuits and questioned by members of this Court?

2. By personally serving an individual the SEC knew was represented by counsel—contrary to longstanding and clear SEC rules—and without authorization for such service of process by the legally required SEC officials, do the SEC's actions in this case conflict with decisions of this Court and other circuits?

CORPORATE DISCLOSURE STATEMENT

Terraform Labs Pte, Ltd. states that it has no parent corporation and no publicly traded corporation currently owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York:

- *United States Securities and Exchange Commission v. Terraform Labs Pte Ltd., Do Kwon*, No. 1:21-mc-00810-JPO (S.D.N.Y.), oral ruling entered Feb. 17, 2022; and
- *United States Securities and Exchange Commission v. Terraform Labs Pte Ltd., Do Kwon*, No. 22-368 (2d Cir.), judgment entered June 8, 2022.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of Rule 14.1(b)(iii).

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

STATEMENT OF RELATED PROCEEDINGS iii

TABLE OF AUTHORITIES vii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION... 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE.................................... 2

REASONS FOR GRANTING THE WRIT 6

I. Without Any Basis for Finding Proper Service of Process on TFL, the Second Circuit's Decision Squarely Presents the Question of the Constitutionality of "Corporate Tag Jurisdiction" to This Court 9

II. Circuits Are Split on the Constitutionality of Corporate Tag Jurisdiction 14

A. The Ninth and Fifth Circuits Have Rejected Corporate Tag Jurisdiction 14

B. The Second and First Circuits Have Accepted Corporate Tag Jurisdiction....... 16

C. Misapplying *Burnham*, Ignoring *Perkins*, and in Conflict with Decisions of the Fifth and Ninth Circuit, the Second Circuit Erroneously Accepted Corporate Tag Jurisdiction over TFL Here 18

D. This Case Is an Ideal Vehicle to Determine Whether Corporate Tag Jurisdiction Is Constitutional 22

III. The Second Circuit's Decision that Kwon Was Properly Served Is at Odds with the SEC's Own Rules and Contrary to Decisions of Both This Court and the Circuits 24

A. Kwon and TFL Were Represented by Counsel... 25

B. Under the Plain Language of the SEC's Rules of Practice, Attorneys Representing Parties Are Not Required to Accept Service of Subpoenas and Other Compulsory Process 27

CONCLUSION.. 32

APPENDIX

Appendix A

Opinion, United States Court of Appeals for the Second Circuit, *United States Securities and Exchange Commission v. Terraform Labs Pte Ltd., Do Kwon*, No. 22-368 (June 8, 2022).. 1a

Appendix B

Transcript and Oral Ruling, United States District Court for the Southern District of New York, *United States Securities and Exchange Commission v. Terraform Labs Pte Ltd., Do Kwon*, No. 1:21-mc-00810-JPO (Feb. 17, 2022) 12a

Appendix C

Declaration of Han Chang Joon in Opposition to the U.S. Securities and Exchange Commission's Application for an Order Requiring Compliance with Subpoenas 49a

Appendix D

Relevant Statutory Provision and Federal Regulations... 53a

15 U.S.C. § 78aa(a)-(b) 53a

17 C.F.R. § 201.102(a)................................. 55a

17 C.F.R. § 201.102(b)................................. 55a

17 C.F.R. § 201.102(d)(1) 55a

17 C.F.R. § 201.102(d)(2) 56a

17 C.F.R. § 201.150(b)................................. 58a

17 C.F.R. § 201.150(c) 58a

17 C.F.R. § 201.150(d)................................. 59a

TABLE OF AUTHORITIES

Page(s)

Cases

Argentina v. Weltover, Inc.,
504 U.S. 607 (1992) 12

Baltimore & Ohio R.R. v. Gallahue's Adm'r's,
55 Va. (14 Grattan) 563 (1858) 19

Burnham v. Superior Ct.,
495 U.S. 604 (1990) .... *passim*

Bria Health Services, LLC v. Eagleson,
950 F.3d 378 (7th Cir. 2020) 29

C.S.B. Commodities, Inc. v. Urban Trend Hong Kong (HK) Ltd.,
626 F. Supp. 2d 837 (N.D. Ill. 2009) 8

Christensen v. Harris Cnty.,
529 U.S. 576 (2000) 28

Consolidated Textile Corp. v. Gregory,
289 U.S. 85 (1933) 20

Corley v. United States,
556 U.S. 303 (2009) 29

Daimler AG v. Bauman,
571 U.S. 117 (2014) 9, 15

First Am. Corp. v. Price Waterhouse LLP,
154 F.3d 16 (2d Cir. 1998) 8, 14, 16, 17

Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.,
141 S. Ct. 1017 (2021) .... *passim*

F.T.C. v. Compagnie De Saint-Gobain-Pont-a-Mousson,
636 F.2d 1300 (D.C. Cir. 1980) 24

Goldey v. Morning News,
156 U.S. 518 (1895) 19, 20

Goodyear Dunlop Tires Operations, S.A. v. Brown,
564 U.S. 915 (2011) 7, 20, 21, 24

Grandbouche v. Lovell,
913 F.2d 835 (10th Cir. 1990) 24

Hawaii v. Office of Hawaiian Affairs,
556 U.S. 163 (2009) 29

Helicopteros Nacionales de Columbia, S.A. v. Hall,
466 U.S. 408 (1984) 21, 22

In re Grand Jury Subpoenas Issued to Thirteen Corps.,
775 F.2d 43 (2d Cir. 1985) .... *passim*

International Shoe Co. v. Washington,
326 U.S. 310 (1945) 6, 14

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 28, 29

K Mart Corp. v. Cartier, Inc.,
486 U.S. 281 (1988) 12

Lamie v. U.S. Tr.,
540 U.S. 526 (2004) 12

Martinez v. Aero Caribbean,
764 F.3d 1062 (9th Cir. 2014) .... *passim*

Northern Light Tech., Inc. v. Northern Lights Club,
236 F.3d 57 (1st Cir. 2001)........................... *passim*

Perkins v. Benguet Consolidated Mining Co.,
342 U.S. 437 (1952) .... *passim*

Pharaohs GC, Inc. v. U.S. Small Bus. Admin.,
990 F.3d 217 (2d Cir. 2021).................................. 28

Railroad Co. v. Harris,
79 U.S. 65 (1870) 19

Ransom v. Brennan,
437 F.2d 513 (5th Cir. 1971) 24

Riverside & Dan River Cotton Mills v. Menefee,
237 U.S. 189 (1915) 20

Rosenberg Brothers & Co. v. Curtis Brown Co.,
260 U.S. 516 (1923) 20

Schultz v. Schultz,
436 F.2d 635 (7th Cir. 1971) 24

Stone v. Bank of Commerce,
174 U.S. 412 (1899) 31

United States v. Powell,
379 U.S. 48 (1964) 11

United States v. Ziegler Bolt & Parts Co.,
111 F.3d 878 (Fed. Cir. 1997)............................. 24

Wenche Siemer v. Learjet Acquisition Corp.,
966 F.2d 179 (5th Cir. 1992) .... *passim*

Statutes

15 U.S.C. § 77s(c) 3

15 U.S.C. § 78aa.. 2

28 U.S.C. § 1254(1) 1

Rules

Fed. R. Civ. P. 4(h) 10, 13

Regulations

17 C.F.R. § 200.30-7(a)(9) 31

17 C.F.R. § 201.102(a)... 27

17 C.F.R. § 201.102(b).. 26, 27

17 C.F.R. § 201.102(d)(1) ....*passim*

17 C.F.R. § 201.102(d)(2) ....*passim*

17 C.F.R. § 201.142(a)(2) 12, 13

17 C.F.R. § 201.150(b).......................................*passim*

17 C.F.R. § 201.150(c) 4, 32

17 C.F.R. § 201.150(d)... 11

17 C.F.R. § 201.232(c) 11

17 C.F.R. § 203.8 11

Other Authorities

Patrick J. Borchers, *Ford Motor Co. v. Montana Eighth Judicial District Court and "Corporate Tag Jurisdiction" in the Pennoyer Era*, 72 Case Western L. Rev. 45 (2021) 8

Cody J. Jacobs, *If Corporations Are People, Why Can't They Play Tag?*, U. N.M. L. Rev. 1 (2016).. 8

New Foreign Direct Investment in the United States, 2021, Bureau of Econ. Analysis (July 6, 2022), https://www.bea.gov/news/2022/new-foreign-direct-investment-united-states-2021... 23

4A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1097 (2d ed. 1987)..................... 31, 32

PETITION FOR WRIT OF CERTIORARI

Terraform Labs Pte, Ltd., and Do Kwon, CEO of Terraform, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which permitted the United States Securities and Exchange Commission to serve subpoenas in violation of the law and obtain jurisdiction over them.

OPINIONS BELOW

The Second Circuit's order and opinion affirming the district court's order, *United States Securities and Exchange Commission v. Terraform Labs Pte Ltd., Do Kwon*, No. 22-368 (2d Cir. June 8, 2022), is not reported but is reprinted at App. 1a-11a. The district court did not issue a written order. It conducted oral arguments on the motion to compel compliance with the subpoenas and rendered an oral ruling on February 17, 2022, all of which is reprinted at App. 12a-48a.

JURISDICTION

The Second Circuit issued its decision on June 8, 2022. Petitioners filed a timely request for an extension of time to file a petition for writ of certiorari with Justice Sotomayor, which was granted. Justice Sotomayor extended the deadline for filing the petition to October 6, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of Section 27 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78aa are reproduced in the appendix at App. 53a-54a. Relevant regulations promulgated under the Exchange Act, including 17 C.F.R. § 201.102 and *id.* § 201.150, are reproduced in the appendix at App. 55a-60a.

STATEMENT OF THE CASE

1. *Facts.*

Terraform Labs PTE, Ltd. ("TFL") is a Singapore-based technology company. TFL's CEO is Do Kwon ("Kwon"), who at all relevant times was a citizen and resident of South Korea. TFL developed decentralized finance applications that can be used and are controlled by a community of users for a variety of purposes. These applications include the Mirror Protocol and the MIR governance tokens associated with it.

The Mirror Protocol depends on Terra, a decentralized and open-source, public blockchain network which TFL also developed. Mirror Protocol users create synthetic assets ("mAssets") that mirror the value of other tangible or intangible assets, a process called "minting." To mint an mAsset, a user submits to the protocol a digital collateral (such as a stablecoin or different mAsset) in an amount set by the smart contracts that underlie the protocol. Minting can be done by using a TFL-created interface or interfaces created by third parties.

The Mirror Protocol also supports native governance tokens known as MIR tokens. These allow holders to vote on governance proposals, including what kinds of mAssets users may create. MIR tokens are granted to users for participating in governance and providing liquidity to mAsset and MIR token markets. Both MIR tokens and mAssets are created by the Mirror Protocol; they cannot be purchased from TFL. Once created, however, they can be traded in peer-to-peer transactions on blockchains, including but not limited to the Terra blockchain.

In May 2021, the United States Securities and Exchange Commission ("SEC") initiated an investigation into whether MIR tokens and mAssets are securities and whether to recommend an enforcement action because they are not registered with the SEC. Because the SEC lacks the authority to serve administrative subpoenas outside the United States, 15 U.S.C. § 77s(c), it contacted TFL and Kwon and sought their voluntary cooperation.

TFL and Kwon retained Dentons US LLP ("Dentons") as counsel and voluntarily cooperated with the SEC from May through September 2021, including voluntarily producing numerous requested documents to the SEC and Kwon voluntarily appearing for a five-hour interview by the SEC.

In September 2021, an SEC attorney learned from Kwon's Twitter feed that Kwon would be speaking at a blockchain conference in New York City at the Marriott Marquis hotel. The SEC then prepared subpoenas for TFL and Kwon and had a process server hand-deliver them to Kwon in the hotel. The SEC

later that day emailed "courtesy" copies to Dentons, as petitioners' legal counsel.

2. *District Court Decision.*

Petitioners objected to the subpoenas, arguing personal service on Kwon was improper because he was represented by counsel and service was not otherwise properly authorized by SEC procedures. They also expressly argued that personal service on Kwon did not result in proper service on TFL.

In the district court, petitioners argued "we fully briefed this and there essentially was not a response to it . . . even if service of the subpoena was proper directed to Mr. Kwon . . . [it] was not effective service [for Terraform]." App. 27a. "And the SEC didn't really have a response to that." *Id.* Indeed, petitioners "cited multiple cases saying that just handing a subpoena to an officer of a company, when he or she happened to be transiting through the United States, is not sufficient to get jurisdiction over the entity as opposed to the individual." *Id.*

The district court ruled that personal service upon Kwon was proper because SEC Rule of Practice 150(c) and not Rule 150(a) applied. App. 44a. The district court further held that specific jurisdiction existed over both TFL and Kwon, pointing to several contacts between them and the United States. The district court made no distinction between TFL and Kwon for purposes of service of process.

3. *Second Circuit Decision*.

The court of appeals affirmed the district court. That court declared the only question with respect to service was whether the SEC complied with its own rules. App. 5a. Critically, the Second Circuit relied on an outdated and no longer controlling precedent for the proposition that "our precedent makes clear that the SEC could serve the corporate entity Terraform through Kwon, the company's chief executive officer and authorized agent." *Id.* at 5a. For this proposition, the court cited *In re Grand Jury Subpoenas Issued to Thirteen Corps.*, 775 F.2d 43, 46 (2d Cir. 1985), with the parenthetical that "[a] corporation may be served through an officer or agent explicitly or implicitly authorized to accept service of process." *Id.* As explained below, this precedent is no longer valid, and certainly not in the context of an SEC subpoena.

The Second Circuit then concluded that 17 C.F.R. § 201.150(b), requiring service on counsel, applies only when counsel has filed a notice of appearance pursuant to 17 C.F.R. § 201.102. App. 6a-8a. The court concluded that either Dentons had not filed such a notice of appearance, so that service on Kwon personally was permitted, or that even if Dentons had, the SEC's email to Dentons attaching the subpoenas after handing them to Kwon satisfied the rule. *Id.* at 7a-8a.

As for personal jurisdiction, the Second Circuit essentially tracked and slightly expanded upon the district court's analysis of specific jurisdiction. The Second Circuit pointed to seven asserted contacts with the United States and found them sufficient. App. 9a.

REASONS FOR GRANTING THE WRIT

This case presents an established circuit split on the constitutionality of corporate "tag" jurisdiction that has already attracted the attention of members of this Court and, to be resolved, requires the Court's clarification as to the limits of due process. This legal issue is squarely presented in this case because, absent effective service on TFL—which did not happen here even if one concedes effective service on Kwon, which petitioners do not—there can be no assertion of jurisdiction over TFL unless it is on the basis of the theory of "tag" jurisdiction. There was not effective service on TFL under any valid precedent in the Second Circuit, and the sole case upon which the Second Circuit relied is thirty-seven years old and based upon Federal Rules of Civil Procedure that do not apply to SEC investigative subpoenas. And the theory of "tag" jurisdiction has divided the circuits and caught the attention of members of this Court, meriting a grant of review in this case.

Nearly eighty years ago, *International Shoe Co. v. Washington* revolutionized the law of personal jurisdiction. 326 U.S. 310 (1945). Since then, the Court has focused on two types of personal jurisdiction under the Fourteenth Amendment's Due Process Clause: specific and general. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). Although the Court's specific jurisdiction jurisprudence has been ever-evolving, its general jurisdiction jurisprudence has been more stable. But an *International Shoe*-type revolution is developing in

general jurisdiction jurisprudence based on the hotly contested concept of "corporate tag jurisdiction."

General jurisdiction—although less frequently litigated than specific jurisdiction—reaches farther than specific jurisdiction's case-dependent nature. If a court has general jurisdiction, the court's power "extends to any and all claims" brought against a defendant. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). But a court may exercise general jurisdiction only if the defendant is "essentially at home" in the forum. *Id.* For individuals, it is their place of domicile; for corporations, the equivalents are its place of incorporation and principal place of business. *Ford*, 141 S. Ct. at 1024. Most often, entities will be subject to all-purpose general jurisdiction in only a limited number of fora: individuals will have one, while corporations will have (at most) two.

But general jurisdiction is not just limited to where the defendant is "at home." In *Burnham v. Superior Court*, the Court held that "[a]mong the most firmly established principles of personal jurisdiction in the American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State." 495 U.S. 604, 610 (1990) (Scalia, J., plurality). Therefore, under *Burnham*, a court can exercise general jurisdiction over an individual defendant found within its borders "no matter how fleeting his visit." *Id.* at 610–11. This territorial exercise of general jurisdiction has been called "tag" jurisdiction.

Critically, however, *Burnham*'s affirmation of "tag" jurisdiction only spoke to individuals; the Court made clear it was "express[ing] no views" over whether "tag" jurisdiction applied to corporations. *Id.* at 610 n.1; see also *C.S.B. Commodities, Inc. v. Urban Trend Hong Kong (HK) Ltd.*, 626 F. Supp. 2d 837, 849 (N.D. Ill. 2009) (acknowledging *Burnham* "left unresolved" the issue of corporate tag jurisdiction). So whether "corporate tag jurisdiction"—*i.e.*, gaining *in personam* jurisdiction over a corporation by serving its corporate officer or employee in the forum state—is constitutional is unclear.

What is clear, however, is that the question of corporate "tag" jurisdiction deserves an answer. The constitutionality of corporate tag jurisdiction has split the circuits. Compare *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1064 (9th Cir. 2014) (holding there is no corporate tag jurisdiction), with *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16 20-21 (2d Cir. 1998) (applying tag jurisdiction to a partnership), and *Northern Light Tech., Inc. v. Northern Lights Club*, 236 F.3d 57, 63 n.10 (1st Cir. 2001) (applying tag jurisdiction to a corporation). The split has sparked scholarly debate, too. See, e.g., Patrick J. Borchers, *Ford Motor Co. v. Montana Eighth Judicial District Court and "Corporate Tag Jurisdiction" in the Pennoyer Era*, 72 Case Western L. Rev. 45 (2021); Cody J. Jacobs, *If Corporations Are People, Why Can't They Play Tag?*, U. N.M. L. Rev. 1 (2016). Members of this Court have also recently expressed interest in the question. See *Ford*, 141 S. Ct. at 1037-38 (Gorsuch, J., concurring) (questioning why individuals remained

subject to tag jurisdiction while corporations did not); *Daimler AG v. Bauman*, 571 U.S. 117, 158 (2014) (Sotomayor, J., concurring) (noting that recognizing individual tag jurisdiction but not corporate tag jurisdiction was "incongruous").

The Court should grant this petition for several reasons. First, the Second Circuit had no basis for asserting jurisdiction over TFL except the theory of "tag" jurisdiction, *i.e.*, personal service of Kwon in New York accomplished jurisdiction over TFL. Second, there is a recognized circuit split on whether corporate tag jurisdiction is constitutional. Third, this case offers straightforward facts and squarely presents the legal issue. And, finally, the issue is significant, reoccurring, and increasingly important in a growing global economy.

I. Without Any Basis for Finding Proper Service of Process on TFL, the Second Circuit's Decision Squarely Presents the Question of the Constitutionality of "Corporate Tag Jurisdiction" to This Court.

To justify service on TFL the Second Circuit simply stated that "[o]ur precedent makes clear that the SEC could serve the corporate entity Terraform through Kwon, the company's chief executive and authorized agent." App. 5a. But the Second Circuit was wrong.

The Second Circuit relied solely on *In re Grand Jury Subpoenas Issued to Thirteen Corps.*, 775 F.2d 43, 46 (2d Cir. 1985), where, thirty-seven years ago, the Second Circuit held that "[a] corporation may be

served through an officer or agent explicitly or implicitly authorized to accept service of process." Although this seems controlling, it is not. *In re Grand Jury Subpoenas* was interpreting the Federal Rules of Civil Procedure, which are not at issue here.

Although the exact Rule is not the same as it was in 1985, its modern equivalent is Rule 4(h), which states:

> Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:
>
> (1) in a judicial district of the United States:
>
> (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or
>
> (B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant[.]

Fed. R. Civ. P. 4(h). The key phrase in Rule 4(h) is "*[u]nless federal law provides otherwise*"—because here *federal law does provide otherwise.*

The SEC's Rules of Practice are set forth in the Code of Federal Regulations and are as legally binding as a federal statute. The SEC's Rules of Practice apply to "investigations," such as this one. See 17 C.F.R. § 203.8; *id.* § 201.232(c) (stating that "[t]he provisions of paragraph (c) shall apply to the issuance of subpoenas for purposes of investigations" and requiring that "[s]ervice shall be made pursuant to the provisions of § 201.150(b) through (d)"). Additionally, to judicially enforce an SEC administrative subpoena, the court should determine if "the administrative steps required . . . have been followed." *United States v. Powell*, 379 U.S. 48, 57-58 (1964). Indeed, the Second Circuit's opinion addresses the SEC Rules of Practice, not the Federal Rules of Civil Procedure, in evaluating the propriety of service here. That was correct. But relying on a case involving only the Federal Rules of Civil Procedure was not.

The Second Circuit held the SEC followed the proper administrative steps when it served Kwon, relying on 17 C.F.R. § 201.150(d), which states:

> [I]f service is of an investigative subpoena pursuant to 17 CFR 203.8, service may be made by delivering a copy of the filing. Delivery means: (1) Personal service - handing a copy to the person required to be served.

But this Regulation was not the basis for the decision in *In re Grand Jury Subpoenas*. The Second Circuit simply assumed serving Kwon personally meant TFL also was properly served, but, in doing so, it errantly relied upon a thirty-seven-year-old decision that

interpreted Federal Rules of Civil Procedure containing materially different language than the SEC Rules of Practice that control this case.

In doing so, the Second Circuit violated the rules of statutory interpretation. One of the principal canons of statutory interpretation is that "[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). When a statute does not clearly cover a situation, "the question . . . is not what Congress 'would have wanted' but what Congress enacted." *Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). It is not a court's province to fix poor statutory or regulatory drafting to extend a statute's or regulation's plain meaning. See *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.").

Here, the Second Circuit bulldozed its way through a fundamental issue in the case, holding TFL had been served by relying on only an irrelevant case that interpreted very different and inapplicable rules. That leaves a huge gap in the analysis of the case.

It is fundamental that statutes and regulatory schemes should be interpreted as a whole. Looking to the SEC's Rules of Practice more broadly, 17 C.F.R. § 201.142(a)(2)—the provision just before *id.* § 201.150—we find that it contains the rules for "[s]ervice of an order instituting proceedings" (which an investigation is not). That provision gives detailed

instructions on how to serve "individuals" and "corporations." *Id.* § 201.142(a)(2). The language in this provision is similar to the instructions for service found in Federal Rule of Civil Procedure 4(h). Thus, *In re Grand Jury Subpoenas* might be persuasive authority for interpreting 17 C.F.R. § 201.142(a)(2), but it has no bearing on interpreting *id.* § 201.150.

Thus, the SEC's Rules of Practice contain a lacuna that the Federal Rules of Civil Procedure do not. 17 C.F.R. § 201.150 does not speak to whether a corporate officer is deemed authorized to accept service of investigative process for the corporation itself. Courts should not write in a provision covering a situation that the SEC could address by notice-and-comment rulemaking but has not.

Because service on TFL was ineffective, jurisdiction was never effected over TFL, even assuming for the sake of argument that there may have been minimum contacts with the United States sufficient for due process purposes. The SEC's only hope is that this Court ignores the Second Circuit's reliance on misplaced authority and deems Kwon authorized to accept service for TFL. But the Court should not ignore the clear issue this creates. Doing so would effectively authorize corporate "tag" jurisdiction—a hotly contested issue—as a reward for an agency's poor drafting of its own regulations. Instead, the Court should recognize that the Second Circuit lacked a basis for finding proper service on TFL, grant review on the question of corporate "tag" jurisdiction, resolve the circuit split, and restore uniformity to this area of law.

II. Circuits Are Split on the Constitutionality of Corporate Tag Jurisdiction.

The circuits are split on the constitutionality of corporate tag jurisdiction under the Fourteenth Amendment's Due Process Clause. As the Court acknowledged in *Ford*, "some courts have sought to revive the tag rule for artificial entities while others argue that doing so would be inconsistent with *International Shoe*." 141 S. Ct. at 1038 n.4 (Gorsuch, J., concurring) (citing *Martinez* 764 F.3d at 1067-69 and *First Am.*, 154 F.3d at 20-21).

A. The Ninth and Fifth Circuits Have Rejected Corporate Tag Jurisdiction.

Two circuits have rejected corporate tag jurisdiction: the Ninth in *Martinez v. Aero Caribbean*; and, the Fifth in *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992).

1. *The Ninth Circuit rejected tag jurisdiction in* Martinez v. Aero Caribbean.

In a product-liability suit, the plaintiffs in *Martinez* sued the defendants over a plane crash in Cuba. 764 F.3d at 1067-69. The defendant—a French aviation company—had few contacts in the United States and no contacts in the forum state. The plaintiffs, however, served the company's vice president of marketing while he attended a short conference in the forum state. *Id.* at 1064-65.

Relying on *Burnham*, the plaintiffs argued that "in-state service of process on a corporate officer who is acting on behalf of the corporation at the time of

service creates tag jurisdiction over the corporation." *Id.* at 1067. But the Ninth Circuit rejected *Burnham* as an endorsement of corporate tag jurisdiction: "An officer of a corporation is not the corporation, even when the officer acts on the corporation's behalf. While a corporation may in some abstract sense be 'present' wherever its officers do business, such presence is not physical in the way contemplated by *Burnham*." *Id.* at 1068 (citations omitted).

The Ninth Circuit also analyzed the case in light of *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). In *Perkins*, the CEO of a foreign corporation operating in the United States was personally served, *id.* at 438, but, as the Ninth Circuit pointed out, the Court's finding of jurisdiction in *Perkins* relied on "the company's contacts with Ohio, not on the in-state service of the company's president," *Martinez*, 764 F.3d at 1068-69 (citing, further, *Daimler*, 571 U.S. at 129-30 n.8 (describing *Perkins* as "the textbook case of general jurisdiction" and identifying "the point on which [*Perkins*] turned: All of [the company's] activities were directed by the company's president from within Ohio.")). Therefore, under the Ninth Circuit's decision, neither *Burnham* nor *Perkins* support the constitutionality of corporate tag jurisdiction.

2. *The Fifth Circuit rejected tag jurisdiction in* Wenche Siemer v. Learjet Acquisition Corp.

The plaintiffs in *Wenche* were residents of Greece and other European countries who filed suit in Texas against an out-of-state aviation company over a foreign airplane crash that had no connection to

Texas. 966 F.2d 179, 180 (1992). Further, the aviation company's state of incorporation was Delaware, not Texas, and its principal place of business was in Kansas, not Texas. *Id*. Notwithstanding, the plaintiffs argued that personal service of the company's corporate agent in Texas gave Texas general jurisdiction over the company based on *Burnham*. *Id*. at 182.

The Fifth Circuit found the plaintiffs' reliance on *Burnham* "puzzling" because "*Burnham* did not involve a corporation and it did not decide any jurisdictional issue pertaining to corporations." *Id*. The Fifth Circuit explained that, instead, general jurisdiction claims over corporations must satisfy the minimum contacts test under *Perkins* because, in *Perkins*, "the Court refused to find jurisdiction based solely upon service on the president." *Id*. at 183. Because a minimum contacts analysis under *Perkins* was required, the Fifth Circuit rejected a theory of corporate tag jurisdiction based on *Burnham*.

Therefore, personal service of a corporate officer is insufficient in both the Ninth and Fifth Circuits to gain general jurisdiction over a corporation. Other circuits, however, have come to a different conclusion, creating a split on this important jurisdictional issue.

B. The Second and First Circuits Have Accepted Corporate Tag Jurisdiction.

Two circuits have accepted corporate tag jurisdiction: the Second in *First American Corp. v. Price Waterhouse LLP* and here; and, the First in

Northern Lights Technology, Inc. v. Northern Lights Club.

1. *The Second Circuit accepted tag jurisdiction over a partnership in* First American Corp. v. Price Waterhouse LLP.

In *First American*, a partner of the defendant—a UK-based accounting partnership—was personally served in the forum state and, relying on *Burnham*, the plaintiffs argued that personal service on the partner gave them general jurisdiction over the partnership. 154 F.3d at 18-20. The Second Circuit agreed. *Id*. Although the Second Circuit permitted jurisdiction, it did not perform a robust analysis on the topic. Unquestionably, though, a partnership is not legally the same as a corporation, and petitioners acknowledge the arguments for "tag" jurisdiction may be stronger in the partnership context.

2. *The First Circuit accepted tag jurisdiction over a corporation in* Northern Lights Technology, Inc. v. Northern Lights Club.

The plaintiffs in *Northern Lights* personally served the president of a foreign corporation as a way of obtaining personal jurisdiction over both the president (named as an individual defendant) and the corporation (also a named defendant). 236 F.3d at 60, 63 n.10. Interestingly enough, the corporation's president was only in the forum state to attend a personal jurisdiction hearing in the case. *Id.* at 60. Sparse in its reasoning, the First Circuit held "service of process effected upon [the individual defendant] also conferred jurisdiction over the other [corporate]

defendants." *Id.* at 63 n.10. The court did not, however, conduct a full constitutional analysis under *Burnham*. Instead, it relied on Federal Rule of Civil Procedure 4(h)(1), which allows personal service on a corporation's officer, to support its holding. *Id.*

In sum, there is at least a 2-2 circuit split on the issue of corporate tag jurisdiction. The circuits are plainly divided on the proper application of this Court's precedents and the limits of due process in this context, meriting the Court's review.

C. Misapplying *Burnham*, Ignoring *Perkins*, and in Conflict with Decisions of the Fifth and Ninth Circuit, the Second Circuit Erroneously Accepted Corporate Tag Jurisdiction over TFL Here.

The Second Circuit's application of corporate tag jurisdiction over TFL conflicts with the decisions of the Fifth and Ninth Circuits, and is wrong for two reasons. First, it misapplies *Burnham* by imputing a corporate officer's temporary physical presence to the corporation itself. Second, it ignores *Perkins* by asserting jurisdiction without finding "continuous and systematic" contacts that render TFL "essentially at home."

1. *The Second Circuit misapplied* Burnham*'s history-and-tradition test.*

The Second Circuit misapplied *Burnham* when it claimed jurisdiction over TFL because of personal service on Kwon. *Burnham* was clear that the decision applied only to individual defendants; the opinion "express[ed] no views" on its application to

corporations. 495 U.S. at 610 n.1. The Court reasoned that due process was satisfied when jurisdiction was conferred based on an individual's physical presence because it was "[a]mong the most firmly established principles of personal jurisdiction in American tradition." *Id.* at 610. In fact, during the nineteenth and twentieth centuries, "the issue was so well settled that it went unlitigated." *Id.* at 613 (citations omitted). Based on the strong history and undisputed tradition in the United States, due process was clearly satisfied when a court's jurisdiction was based on personal service of an individual. For corporate tag jurisdiction to apply under *Burnham*, the same history and tradition must exist.

But the same undisputed history and tradition does not exist for corporations. For example, in *Railroad Co. v. Harris*, the Court upheld jurisdiction over a corporation where its president was personally served, but the Court's decision did not rely on that service; instead, it relied on the fact that the company "assented" to jurisdiction by constructing a railroad in the forum. 79 U.S. 65, 83 (1870) (citing *Baltimore & Ohio R.R. v. Gallahue's Adm'r's*, 55 Va. (14 Grattan) 563 (1858)). Thus, while a corporation could impliedly consent to jurisdiction under the Due Process Clause, personal service of a corporate officer alone was insufficient.

And the Court has continued to affirm that personal service on a corporate officer alone is not enough to confer jurisdiction on the corporation. The Court was presented with these identical arguments in two remarkably similar cases. In both *Goldey v.*

Morning News, 156 U.S. 518 (1895) and *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915), corporate officers were personally served in states where the corporation did not conduct business. Although a corporate officer "may temporarily be in the state or even permanently reside therein," personal service alone is not enough to confer jurisdiction on the corporation. *Dan River*, 237 U.S. at 195. In later cases, the Court continued to reject corporate tag jurisdiction based on personal service of a corporate officer. See *Rosenberg Brothers & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923); *Consolidated Textile Corp. v. Gregory*, 289 U.S. 85 (1933).

Therefore, under *Burnham*'s history-and-tradition test, corporate tag jurisdiction simply does not have the same foundation that individual tag jurisdiction does. As the Court noted, individual tag jurisdiction's foundation was so cemented in American legal tradition, that "it went unlitigated." *Burnham*, 495 U.S. at 613. But the same is not true for corporate tag jurisdiction, which is a heavily contested, oft-litigated, and controversial area of law. Without a strong history and tradition, corporate tag jurisdiction is not constitutional under *Burnham*. And, as applied to this case, jurisdiction over TFL cannot be based on the service on Kwon.

2. *The Second Circuit ignores* Perkins' *continuous and systematic contacts requirement.*

By claiming specific or general jurisdiction over a foreign corporation based on personal service on its CEO, the Second Circuit ignored *Perkins*. But *Perkins* remains the "textbook case of general jurisdiction

appropriately exercised over a foreign corporation that has not consented to suit in the forum." *Goodyear*, 564 U.S. at 927-28 (internal quotation marks and citation omitted). And, under *Perkins* and its progeny, a court cannot exercise general jurisdiction over a foreign corporation without finding it "essentially at home" in the forum. *Id.* at 920.

In *Perkins*, the defendant was a Philippines-based mining company that had been displaced by Japanese occupation during World War II. The mining company had ceased operations in the Philippines and instead began operating in Ohio. During the defendant's operations in Ohio, the defendant's president was personally served in a suit unrelated to its contacts with Ohio. Nevertheless, Ohio determined it had personal jurisdiction over the defendant without violating due process. 342 U.S. at 447-48.

The Court held that Ohio had general jurisdiction over the defendant corporation. But the Court's determination relied on "the continuous and systematic" contacts that rendered the corporate defendant "essentially at home"—not the personal service on the defendant's president. *Id.* at 448; *Goodyear*, 564 U.S. at 919. Subsequently, the Court has affirmed that *Perkins* is the appropriate precedent for analyzing claims of general jurisdiction over foreign corporations. *Goodyear*, 564 U.S. at 927-28 (describing *Perkins* as the "textbook case" on general jurisdiction over foreign corporations); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984) (holding the defendant's contacts did not "constitute the kind of continuous and systematic

general business contacts the Court found to exist in *Perkins*"). Other courts have also correctly understood *Perkins* as requiring a minimum contacts analysis and precluding corporate tag jurisdiction. See *Martinez*, 764 F.3d at 1068 ("If tag jurisdiction had been available, that alone would have resolved the case."); *Wenche*, 966 F.2d at 183 (5th Cir. 1992) ("In *Perkins*, the Supreme Court upheld general jurisdiction over a Philippine corporation . . . but only after a thorough 'minimum contacts' and fairness analysis.").

But the Second Circuit ignored *Perkins* and did not engage in a minimum contacts analysis before finding TFL "essentially at home" in New York or Washington D.C. Instead, the Second Circuit simply claimed jurisdiction over TFL based on personal service on Kwon in New York and minimum contacts with the United States as a whole. This reasoning is neither sufficient nor consistent with this Court's precedents.

D. This Case Is an Ideal Vehicle to Determine Whether Corporate Tag Jurisdiction Is Constitutional.

The Court should use this case to determine if corporate tag jurisdiction is constitutional because it is an ideal vehicle: first, the operative facts in this case are straightforward and the legal issue is squarely presented; second, the implications of corporate tag jurisdiction are vast and represent a revolutionary change in the law of personal jurisdiction. Therefore, the Court should grant this petition for writ of certiorari to resolve the circuit split.

1. *The facts are straightforward.*

Because the operative facts here are straightforward and undisputed, and the legal issue is squarely presented, this case allows the Court to resolve the circuit split based on the law. And the undisputed facts of this case are relevant to the concept of corporate tag jurisdiction generally and sufficient to address the legal issue, specifically that: "[T]he SEC prepared two investigative subpoenas—one for Kwon, one for Terraform. On September 20, 2021, a process server hand-served the subpoenas on Kwon on behalf of the SEC while he was in New York." App. 5a. By allowing Kwon's personal service to serve as a sufficient method of obtaining personal jurisdiction over Terraform Labs, the Second Circuit implicitly allowed corporate tag jurisdiction. Because the operative facts are simple, this case is an ideal vehicle to decide if corporate tag jurisdiction is constitutional.

2. *The issue is significant and only increasing in importance as the global economy expands.*

This case's implications are vast. We now live in an age of globalization, and corporate tag jurisdiction represents a revolutionary change in the law of personal jurisdiction. In today's globally connected world, foreign-based corporations are ever-present in the United States. In 2021 alone, foreign corporations employed nearly 237,000 U.S. employees. *New Foreign Direct Investment in the United States, 2021*, Bureau of Econ. Analysis (July 6, 2022), https://www.bea.gov/news/2022/new-foreign-direct-investment-united-states-2021. But, as the Court's

precedent has commanded for seventy years, these corporations are not subject to general jurisdiction unless they have continuous and systematic contacts that render them essentially at home. See *Perkins*, 342 U.S. at 448; *Goodyear*, 564 U.S. at 919. Corporate tag jurisdiction, as allowed by the Second Circuit, would upend the Court's precedent and allow foreign corporations to be subject to general jurisdiction wherever their officers could be found, even temporarily. This would be a revolutionary departure from long-standing precedent. The Court should grant this petition and reverse the Second Circuit.

III. The Second Circuit's Decision that Kwon Was Properly Served Is at Odds with the SEC's Own Rules and Contrary to Decisions of Both This Court and the Circuits.

The Second Circuit's decision conflicts with numerous circuit decisions that hold general grants of authority to an attorney or other agent do not imply authority to receive process, see, e.g., *United States v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 882 (Fed. Cir. 1997); *F.T.C. v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1304 (D.C. Cir. 1980); *Schultz v. Schultz*, 436 F.2d 635, 639-40 (7th Cir. 1971), and that hold an attorney-client relationship, without more, does not render an attorney an agent for service of process, see, e.g., *Grandbouche v. Lovell*, 913 F.2d 835, 837 (10th Cir. 1990); *Ransom v. Brennan*, 437 F.2d 513, 518-19 (5th Cir. 1971). The plain text of the SEC's Rules of Practice incorporate

this bedrock principle, although the SEC did not follow those rules.

This case also involves a question of exceptional importance because the lower courts' decisions authorize the SEC to serve initial compulsory process in a manner that violates its own rules and raises serious due process concerns. The SEC could have (i) asked Kwon's and TFL's counsel if they would accept service of the subpoenas at issue, or (ii) obtained an order from the SEC authorizing personal service on Kwon (which would not have required substantial work by the staff). But the SEC did neither, and the lower courts upheld its ultra vires actions. This decision merits the Court's review.

A. Kwon and TFL Were Represented by Counsel.

Although the district court recognized that TFL and Kwon were represented by Dentons in connection with the investigation and their voluntary cooperation with it, App. 44a, the court incorrectly held that SEC Rule of Practice 150(b) did not apply because Dentons did not file a "notice of appearance," *id.* The district court further erred by concluding that, even if Dentons had effectively filed such a notice, doing so necessarily would have included an agreement to accept service of process on behalf of its clients. The Second Circuit's affirmance of these rulings ignored critical facts and makes a mess of SEC Rule of Practice 150.[1]

---

[1] 17 C.F.R. § 201.150 is reproduced at App. 55a.

Dentons indisputably appeared before the SEC and represented Kwon and TFL, and the SEC attorneys interacting with Dentons clearly understood that because:

- Dentons provided the information required by Rule of Practice 102(d)(2)[2] to the SEC in writing. App. 14a.
- From that point on, all communications from the SEC to Kwon and TFL were directed to Dentons. App. 18a.
- When the SEC requested a voluntary interview, it made the request through Dentons. App. 17a.
- The SEC identified Dentons as "counsel" for Kwon in the letter that resulted in Kwon's voluntary interview, and Dentons represented Kwon during that interview (which lasted almost twice as long as the SEC requested). App. 17a.
- When the SEC desired Kwon and TFL to produce documents, the request was directed to them through Dentons. App. 17a.
- On behalf of Kwon and TFL, Dentons objected to the scope of the document requests and worked with the SEC attorneys to attempt to narrow and clarify the requests. App. 15a.

---

[2] For the requirements, see 17 C.F.R. § 201.102(d)(2) reproduced at App. 56a.

Thus, the record is clear that Dentons appeared on behalf of Kwon and TFL, as contemplated by Rule of Practice 102(d)(2), and subsequently represented Kwon and TFL extensively before the SEC.

B. Under the Plain Language of the SEC's Rules of Practice, Attorneys Representing Parties Are Not Required to Accept Service of Subpoenas and Other Compulsory Process.

An individual interacting with the SEC can do so pro se or through counsel. See 17 C.F.R. § 201.102(a) (pro se) & (b) (through counsel). Critically, individuals representing themselves are required by Rule of Practice 102(d)(1) to file or otherwise state on the record "a mailing address and email address at which any notice or other written communication required to be served upon him or her." *Id.* § 201.102(d)(1).

But that requirement does not apply to attorneys. When an attorney appears in a representative capacity before the SEC, the attorney is not required to provide an address where anything can be "served" like individuals representing themselves; the word "service" does not appear in Rule of Practice 102(d)(2). *Id.* § 201.102(d)(2). The plain language of the Rules of Practice makes a clear distinction between represented and unrepresented parties with respect to service of documents. Individuals appearing pro se must provide the SEC with contact information for service, *id.* § 201.102(d)(1), but that is not the case for represented parties, *id.* § 201.102(d)(2). The Rules of Practice therefore establish that attorneys can appear and represent individuals and entities before the SEC

without being a conduit for service of subpoenas and other compulsory process. And this makes sense. It is not uncommon for attorneys to appear before compulsory process is served, and the Second Circuit's interpretation would convert an appearance through counsel into a *de facto* acceptance of service in contravention of longstanding law and the text of the SEC's Rules of Practice.

The Second Circuit wiped this textual distinction off the books, in violation of at least three bedrock tenets of statutory and regulatory interpretation. First, "if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). "Deference in that circumstance would 'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation,'" which plainly is improper. *Id.* (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000)); see also *Pharaohs GC, Inc. v. U.S. Small Bus. Admin.*, 990 F.3d 217, 226 (2d Cir. 2021) (quoting and following *Kisor*). What this Court condemned in *Kisor*—misreading a perfectly clear rule to allow an agency to create *de facto* a new rule under the guise of applying that rule in litigation—is exactly what occurred here.

Second, by importing words used in 17 C.F.R. § 201.102(d)(1) into *id.* § 201.102(d)(2), the Second Circuit violated the rule that unambiguous text cannot be varied by related headings. Compare App. 6a ("Rule 102(d) is entitled . . . *service*" (italics in

original)) with *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009) (heading has no power to give what the text of the statute takes away). The decision improperly used a subheading of 17 C.F.R. § 201.102 to insert into the body of subsection (d)(2) a "service" requirement that is not actually in the text of the rule.

Third, the decision violates yet another of the "most basic interpretive canons"—that a statutory or regulatory scheme must be read as a whole "so that effect is given to all its provisions, [and] so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (cleaned up). Again, "[t]he same basic rules that apply to statutory interpretation apply to regulatory interpretation." *Bria Health Services, LLC v. Eagleson*, 950 F.3d 378, 382 (7th Cir. 2020) (citation omitted); see also *Kisor*, 139 S. Ct. at 2415 (holding that "a court must exhaust all the traditional tools" before concluding that a rule is genuinely ambiguous (internal quotation marks and citation omitted)).

The SEC's interpretation of its rules, adopted by the decision, creates a direct and unnecessary conflict between 17 C.F.R. § 201.102(d)(1) and *id.* § 201.102(d)(2) because the text of subsection (d)(2) makes no mention of an attorney who represents a party before the SEC being required to be that party's agent for service of compulsory process. Only *id.* § 201.102(d)(1) requires service information to be provided—and that is for parties *not represented by counsel*. The SEC's interpretation creates an unnecessary and avoidable conflict between *id.* § 201.102(d)(1) and *id.* § 201.102(d)(2) where none

exists in the plain language. Worse, by reading an acceptance-of-service requirement into subsections that do not even contain the word "service," the decision renders the term "service" redundant or superfluous.

The Second Circuit's decision thus violates standard tenets of construction and basic principles designed to constrain executive agencies. If the SEC wanted *id.* § 201.102(d)(1) and *id.* § 201.102(d)(2) to include acceptance-of-service requirements, it could have written them identically, but it did not. It could amend the rule to do that, but only prospectively through the notice-and-comment rulemaking it ordinarily uses. The SEC cannot effectively rewrite its regulations through litigation maneuvers and justify its purported "service" of the subpoenas by ignoring the plain language and limitations of *id.* § 201.102(d)(2) to include a requirement that simply is not there.

Under these same canons of statutory interpretation, it is equally clear that the SEC's Rules of Practice did not authorize the SEC to effectuate personal service upon Kwon by having a process server meet him at an escalator in a New York hotel and hand him investigative subpoenas. Rule of Practice 150(b) states in no uncertain terms that "[w]henever service is required to be made upon a person represented by counsel who has filed a notice of appearance pursuant to § 201.102, *service shall be made* pursuant to paragraph (c) of this section *upon counsel*, unless service upon the person represented is

ordered by the Commission or the hearing officer." 17 C.F.R. § 201.150(b) (emphasis added).

The SEC knew that Dentons was actively representing Kwon and TFL, but the SEC still chose to serve Kwon personally. This is clearly prohibited by Rule of Practice 150(b) without the requisite order. *Id.* Making the SEC's decision even more inexplicable, it would not have been difficult for SEC staff to seek the order required, as the SEC delegated the authority to issue such orders to the SEC's Secretary. See 17 C.F.R. § 200.30-7(a)(9). Thus, as opposed to a vote of all Commissioners, compliance here would have required only asking the Secretary; yet no one did so.

Nor did the SEC purport to serve Dentons. Rather, the SEC had a process server personally serve Kwon in a New York hotel and only later did the SEC send Dentons an after-the-fact email advising Dentons that, in the SEC's view, the subpoenas had already been served upon Dentons' clients. App. 18a-20a. Even if that email could be read as purporting to effect service (it cannot), the plain language of Rule of Practice 102(d)(2) did not require Dentons to accept service for Kwon and TFL. 17 C.F.R. § 201.102(d)(2).

The well-established rule is that an attorney is not authorized to accept process on a client's behalf unless the client has expressly agreed to allow such service. See, e.g., *Stone v. Bank of Commerce*, 174 U.S. 412, 421 (1899) ("[An attorney] cannot, while acting generally as an attorney for an estate or a corporation, accept service of process which commences the action, without any authority so to do from his principal."); 4A Charles Alan Wright & Arthur R. Miller, Federal

Practice and Procedure § 1097 (2d ed. 1987). The Second Circuit's decision violates this rule.

The Second Circuit also erred by holding that even if Rule of Practice 150(b) applied, the SEC properly served Dentons by emailing the subpoenas. Although electronic service is permitted under 17 C.F.R. § 201.150(c), it nevertheless begs the question whether Dentons had any authority to accept service on behalf of Kwon and TFL, which Dentons did not have and was not required to have. As such, any purported service by email was ineffective.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Stephen R. McAllister
Counsel of record
Douglas W. Henkin
Michael E. Harriss
Parker B. Bednasek
Dentons US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
(816) 460-2400
stephen.mcallister@dentons.com

Counsel for Petitioners Terraform Labs Pte, Ltd. and Do Kwon

October 6, 2022

APPENDIX

APPENDIX A

22-368-cv

United States Securities and Exchange Commission v. Terraform Labs Pte Ltd., Do Kwon

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of June, two thousand twenty-two.

PRESENT:

ROSEMARY S. POOLER,
RICHARD C. WESLEY,
MYRNA PÉREZ,
Circuit Judges.

22-368

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Petitioner-Appellee,

v.

TERRAFORM LABS PTE LTD., DO KWON,

Respondents-Appellants.

FOR PETITIONER-APPELLEE:

ERIC A. REICHER, Special Trial Counsel (Tracey L. Sasser, Samuel M. Forstein, *on the brief*), United States Securities and Exchange Commission, Washington, DC.

FOR RESPONDENTS-APPELLANTS:

DOUGLAS W. HENKIN, Dentons US LLP, New York, NY.

Appeal from an order of the United States District Court for the Southern District of New York (Oetken, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the February 17, 2022 order of the district court is AFFIRMED.

Appellants Terraform Labs Pte Ltd. ("Terraform") and Do Kwon ("Kwon") (collectively "Appellants") appeal from the district court's (Oetken, *J.*) order granting the United States Securities and Exchange Commission's ("SEC") application for an order requiring compliance with investigative subpoenas for documents from Appellants and testimony from Kwon. The subpoenas

were served as part of an SEC investigation into whether Appellants violated federal securities laws in their participation in the creation, promotion, and offer to sell various digital assets related to the "Mirror Protocol," a blockchain technology. On appeal, Appellants argue that the district court erred in two ways. First, the application should not have been granted because the SEC violated its Rules of Practice ("the Rules") when it served the subpoenas by handing a copy to Kwon, Terraform's chief executive officer, while he was present in New York. Second, the district court lacked personal jurisdiction because Appellants lacked sufficient contacts with the U.S. For the reasons stated below, we conclude that the district court properly granted the SEC's application. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision.

I. Service

The district court properly concluded that the SEC complied with the Rules. We review a district court's decision to enforce an administrative subpoena for abuse of discretion. *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1169 (2017). "To win judicial enforcement of an administrative subpoena, SEC must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the Commissioner's possession, and [4] that the administrative steps required have been followed." *RNR Enters. v. S.E.C.,* 122 F.3d 93, 96–97 (2d Cir. 1997) (internal quotation marks and alterations omitted). Here, only the last prong is in dispute. The Rules provide the relevant administrative steps for serving investigative subpoenas, *see generally* 17

C.F.R. Part 201, Subpart D, and require that such service comply with the provisions of Rule 150(b) through (d), *id.* § 201.232(c). Those provisions of Rule 150 in relevant part, read:

> (b) Upon a person represented by counsel. Whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance pursuant to § 201.102, service shall be made pursuant to paragraph (c) of this section upon counsel, unless service upon the person represented is ordered by the Commission or the hearing officer.
>
> (c) How made. Service shall be made electronically in the form and manner to be specified by the Office of the Secretary in the materials posted on the Commission's website. Persons serving each other shall have provided the Commission and the parties with notice of an email address.
>
> [. . .]
>
> (d) Additional methods of service. If a person reasonably cannot serve electronically, or if service is of an investigative subpoena pursuant to 17 C.F.R. 203.8, service may be made by delivering a copy of the filing. Delivery means:
>
>> (1) Personal service–handing a copy to the person required to be served . . .

Id. § 201.150(b)–(d).

Before the SEC served Kwon, Appellants' counsel contacted the SEC and provided some contact information. Appellants then entered a proffer agreement with the SEC. According to the SEC, despite the

agreement, Appellants failed to answer questions related to their digital assets and did not commit to complying with the SEC's document requests. After attempts at voluntary compliance, the SEC prepared two investigative subpoenas—one for Kwon, one for Terraform. On September 20, 2021, a process server hand-served the subpoenas on Kwon on behalf of the SEC while he was in New York and emailed copies to Appellants' counsel. Appellants' counsel informed the SEC that he "did not believe that service of the subpoenas was proper." App'x at 70–71.

At the outset, our precedent makes clear that the SEC could serve the corporate entity Terraform through Kwon, the company's chief executive officer and authorized agent. *See In re Grand Jury Subpoenas Issued to Thirteen Corps.*, 775 F.2d 43, 46 (2d Cir. 1985) ("A corporation may be served through an officer or agent explicitly or implicitly authorized to accept service of process."). Here, the sole issue as to the SEC's compliance with the Rules is the method of service. Appellants contend that the SEC's service on Kwon failed to comply with Rule 150(b) because Appellants' counsel provided certain contact information to the SEC, such that Kwon and Terraform were "represented by counsel" within the meaning of that provision. 17 C.F.R. § 201.150(b). As "persons represented by counsel," Appellants assert that the SEC was obligated to comply with Rule 150(b) and effect service upon Appellants' counsel or obtain an order from the Commission or a hearing officer before serving Kwon or Terraform directly, and its failure to take either step made the service ineffective. Appellants also argue, alternatively, that the copies emailed to their counsel did not satisfy Rule 150(b) because the email "did not purport to have effected service" via their counsel and was therefore not valid service.

Appellants' reading of the Rules is contrary to the text and would produce absurd results by allowing a party to insist on service through counsel, but allow the party to block said service by not authorizing their counsel to receive any filings.

Rule 150(b) only applies when a represented party's counsel "file[s] a notice of appearance pursuant to [Rule 102]." *Id.* § 201.150(b). Rule 102(d) is entitled: "[d]esignation of address *for service*; notice of appearance; power of attorney; withdrawal." *Id.* § 201.102(d) (emphasis added). Rule 102(d)(2) provides that persons "representing others" before the SEC "shall file with the Commission . . . a written notice stating . . . the representative's . . . business address [and] email address" among other things. *Id.* § 201.102(d)(2). The "business address" and "email address" to be included in the "written notice" is obviously the "address" that is to be designated for service under Rule 102(d).[1] Accordingly, a plain reading of the text prohibits a

[1] Although we need not resort to the regulation's history, we note that it, too, confirms our interpretation of Rule 102. In 1995, the SEC adopted comprehensive revisions to the Rules, including a revision to Rule 102 to require "persons filing a notice of appearance [to] keep the information contained in the notice, such as address and telephone number, up-to-date." *Rules of Practice*, 60 Fed. Reg. 32738, 32747 (June 23, 1995). The SEC clarified that "[c]urrent information is necessary to permit the expeditious *service* of orders as well as other efforts to contact a party." *Id*. (emphasis added). In 2020, the SEC amended the Rules "to require persons involved in Commission administrative proceedings to file and *serve* documents electronically." *Amendments to the Commission's Rules of Practice*, 85 Fed. Reg. 86464, 86464 (Dec. 30, 2020) (emphasis added). Rule 102(d) was amended to require "both a mailing address and an email address" in the "notice" for the purposes "of electronic filing and *service*." *Id*. at 86473 (emphasis added).

writing from being a notice of appearance unless a party agrees to receive service at the provided address.

To be clear, Appellants do not maintain that they filed a formal notice of appearance with the SEC, arguing instead there was no docket to file such notice and, their counsel's email to the SEC suffices as notice under the Rules. We need not decide whether the Rules require a formal filing on a docket because, even if counsel could "file" a notice of appearance by emailing contact information to the SEC, whatever writing Appellants' counsel provided was not a notice of appearance because it did not contain an address suitable for service. In fact, before the district court, Appellants refused to confirm whether their counsel was authorized to accept service. *See* App'x 187. At oral argument before this Court, Appellants conceded that counsel was not authorized to accept service at the time Kwon was served or at any time thereafter. Oral Arg. at 6:28–7:09. Therefore, because they never provided an address for service, Appellants cannot now claim that their counsel filed a notice of appearance that would make hand-service on Kwon improper under the Rules.

But even assuming Appellants' counsel should have been served, the subpoena copies sent via email to Appellants' counsel constituted proper service under Rule 150(c). Rule 150(b) permits the SEC to serve counsel pursuant to Rule 150(c), 17 C.F.R. § 201.150(b), and Rule 150(c) provides that "[s]ervice shall be made electronically in the form and manner to be specified by the Office of the Secretary in the materials posted on the Commission's website," *id*. § 201.150(c). According to the SEC's Office of the Secretary, "[i]nvestigative [s]ubpoenas must be served electronically" and outside of the agency's electronic filing system. OFF. OF THE

SEC'Y, U.S. SEC. AND EXCH. COMM'N, INSTRUCTIONS FOR ELECTRONIC FILING AND SERVICE OF DOCUMENTS IN SEC ADMINISTRATIVE PROCEEDINGS AND TECHNICAL SPECIFICATIONS 2, 5 (2020). Appellants argue that the SEC's email to their counsel was ineffective service because the cover email "did not purport to have effected service by being sent to [counsel]." Appellants' Br. at 11. Appellants provide no authority for the proposition that a subpoena or its cover email must convey certain specific and precise words to be effective.

Accordingly, the district court correctly concluded that the SEC's service of the subpoenas complied with the Rules.

II. Personal Jurisdiction

The district court properly concluded that it had personal jurisdiction over Terraform and Kwon. We review the factual findings in a district court's decision on personal jurisdiction for clear error and its legal conclusions de novo. *Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic*, 582 F.3d 393, 395 (2d Cir. 2009). Appellants are a foreign person and entity—Terraform is a Singapore-incorporated company and Kwon is a resident of the Republic of Korea. For a court to exercise specific jurisdiction over these non-residents, three conditions must be satisfied. "First, the [non-resident] must have purposefully availed itself of the privilege of conducting activities within the forum State or have purposefully directed its conduct into the forum State. Second, the plaintiff's claim must arise out of or relate to the [non-resident's] forum conduct. Finally, the exercise of jurisdiction must be reasonable under the circumstances." *U.S. Bank Nat'l Ass'n v. Bank of Am. N.A.*, 916 F.3d 143, 150 (2d Cir. 2019) (internal quotation marks and citations omitted).

The district court's specific personal jurisdiction determination rested on seven contacts with the U.S.[2] We agree. Appellants purposefully availed themselves of the U.S. by promoting the digital assets at issue in the SEC's investigation to U.S.-based consumers and investors. *See, e.g.*, *Securities & Exch. Commn. v. PlexCorps*, 2018 WL 4299983, at *10 (E.D.N.Y. Aug. 9, 2018) ("Defendants created contacts with the United States by . . . doing business while traveling in the United States, . . . and marketing their products to United States consumers via the Internet."). Appellants retained U.S.-based employees, including a Director of Special Projects that has promoted these digital assets in the U.S. *See, e.g., Goldfarb v. Channel One Russia*, 442 F. Supp. 3d 649, 664 (S.D.N.Y. 2020) (exercising personal jurisdiction where corporation's in-forum employee served subscribers in the forum). Appellants entered into agreements with U.S.-based entities to facilitate the trade of these same digital assets, including a $200,000 deal with one U.S.-based trading platform. *See, e.g.*, *U.S. Titan, Inc. v. Guangzhou Zhen Hua Ship. Co.*, 241 F.3d 135, 152 (2d Cir. 2001) (concluding corporation purposely availed itself of the U.S. forum by "negotiating and forming a contract" with U.S.-based corporation). While seeking to enter into an agreement with a U.S.-based company, Appellants indicated that 15% of users of its Mirror Protocol are within the U.S. *See, e.g.*, *EMI Christian Music Grp., Inc.*, 844 F.3d at 98 (exercising specific

[2] In evaluating Kwon and Terraform's contacts with the U.S., we have, consistent with our precedent, imputed Terraform's contacts onto Kwon. *See, e.g.*, *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 98 (2d Cir. 2016) (holding that it is "appropriate" to consider company's contacts in forum in evaluating whether court could exercise personal jurisdiction over CEO who "exercised extensive control" over said company).

personal jurisdiction because nonresident was aware that his company provided services to users in the forum). Moreover, the district court's exercise of jurisdiction was reasonable and would not "offend traditional notions of fair play or substantial justice" because the conduct was "purposefully directed toward residents of [the U.S.], and the suit arose from and related directly to those [forum] contacts." *U.S. Bank Nat'l Ass'n*, 916 F.3d at 152.

Appellants' arguments to the contrary are unpersuasive. First, they argue that the SEC's previous efforts to obtain voluntary cooperation suggests that the SEC knew Appellants' contacts with the U.S. were not sufficient to support personal jurisdiction. This argument is not relevant because personal jurisdiction is a question of federal law to be decided by federal courts—not the SEC. *See, e.g.*, *Chew v. Dietrich*, 143 F.3d 24, 30 (2d Cir. 1998). Second, Appellants argue that the district court's exercise of personal jurisdiction was so expansive that it could subject any corporation listed on a U.S. securities exchange as well as any "digital asset" company to the court's jurisdiction. However, this argument misinterprets the district court's justification for its exercise of *specific* personal jurisdiction which relied on Appellants' purposeful and extensive U.S. contacts, including marketing and promotion to U.S. consumers, retention of U.S.-based employees, contracts with U.S.-based entities, and business trips to the U.S., all of which related to the Mirror Protocol and digital assets at issue in the SEC's investigation. *See, e.g.*, *Balestra v. ATBCOIN LLC*, 380 F. Supp. 3d 340, 350–51 (S.D.N.Y. 2019) (exercising specific personal jurisdiction over founders of a "blockchain" company based on conduct "target[ing] the U.S. market in an effort to promote the sale of . . .

the very unregistered security at issue in [the] litigation”).[3]

We have considered all of Appellants’ remaining arguments and conclude they are without merit.[4] For the foregoing reasons, we conclude that the district court properly granted the SEC’s application for an order requiring compliance with the investigative subpoenas and we AFFIRM the order of the district court.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court

/s/ Catherine O’Hagan Wolfe

---

[3] Appellants also argue that the district court’s personal jurisdiction analysis took improper judicial notice of a sponsorship agreement between the Washington Nationals baseball team and an entity known as “Terra Community Trust.” We need not resolve, however, whether the judicial notice was an abuse of discretion as the district court found more than enough contacts in the U.S. to support specific personal jurisdiction despite the sponsorship agreement.

[4] Appellants contend that the SEC would likely have difficulty establishing that the digital assets at issue could be subject to federal securities laws, arguing they are not listed or traded on any U.S. exchange. We need not address the question of whether Terraform’s digital assets are securities to conclude the district court properly exercised personal jurisdiction.

APPENDIX B

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

21 MC 0810 (JPO)

U.S. SECURITIES AND EXCHANGE COMMISSION,

Petitioner,

v.

TERRAFORM LABS PTE, LTD. AND DO KWON,

Respondents.

Remote Conference
February 17, 2022 11:00 a.m.

Before:

HON. J. PAUL OETKEN,
District Judge

APPEARANCES

U.S. SECURITIES AND EXCHANGE COMMISSION
BY: JAMES P. CONNOR

DENTONS US LLP
Attorneys for Defendants
BY: DOUGLAS W. HENKIN

[2] (The Court and all parties appearing telephonically) (Case called)

THE DEPUTY CLERK: Starting with the petitioner, counsel, please state your name for the record.

MR. CONNOR: Good morning. This is James Connor for the SEC.

THE COURT: Good morning.

MR. HENKIN: Good morning, your Honor. This is Douglas Henkin for Mr. Kwon and Terraform Labs.

THE COURT: Good morning.

All right. Thanks for joining. I would appreciate it if you would all state your names before speaking so the transcript is clear as to who is speaking.

I scheduled this call in response to the briefing, as we discussed at the last conference, which was back on December 3rd, and this matter is an application by the SEC to enforce an administrative subpoena. The respondents are Terraform Labs and Mr. Do Kwon.

I have read the briefing and the subsequent letters, and I will start with the SEC. And I guess – well, maybe I won't start with the SEC actually. Maybe I will start with Mr. Henkin. You're the one that really wanted oral argument. So here it is.

MR. HENKIN: Thank you, your Honor.

Look, I will not go over everything that was said in [3] the papers, but the case here is that the SEC wants this Court to condone what is a very crystal-clear violation of one of their own rules that they wrote and they are now unhappy with because of the way it applies in this case. If they don't like the way the rule works, there is a way to try to change it, but this proceeding isn't that way.

The SEC has known that Mr. Kwon and TFL are represented by Dentons since just days after the SEC sent Mr. Kwon a request for voluntary cooperation, months before it tried to serve the subpoenas that are

at issue. The SEC's regulations prohibit the SEC staff from serving subpoenas on people who are represented by counsel.

THE COURT: Wrong.

What the rule says is, whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance.

Have you filed a notice of appearance – had you, at the time it was served before the SEC?

MR. HENKIN: Before that, your Honor, we had provided the SEC – and you can see this in the exhibits to Mr. Senderowitz's declaration – we had provided them with all the contact information that was required by a notice of appearance. And in the Deloitte case, the SEC took the position that that is sufficient to become a notice of appearance.

[4] And with respect to –

THE COURT: I don't care what the SEC said in that case. It's not binding on me. Plus, in that case, it was completely different, because in that case, the party had agreed to accept service and then was reneging.

I don't know how you can get around this language. It says, whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance. Then it goes on and says, other methods of service, i.e., in situations where no one has filed a notice of appearance, service may be made by delivering a copy, handing a copy to the person required to be served. That's what happened.

MR. HENKIN: That's the difference between this case and the ordinary circumstances in which that rule applies. The service on counsel idea applies only in circumstances in which the SEC has gotten

jurisdiction over someone. Remember that in this instance, this started with the SEC sending requests for voluntary cooperation to Mr. Kwon and TFL. Mr. Kwon and TFL then immediately retained counsel to represent them in connection with the underlying proceeding and responding to those requests.

THE COURT: If we are not in the world where the SEC has acquired jurisdiction and notices of appearances are being filed, then why doesn't (c) of 150 apply allowing personal service? Because it was just really annoying and bad?

[5] MR. HENKIN: No. It doesn't apply because when you read through the full rule, starting with 203.8, it directs you to (b). And that's how you get there. The way you get there is that 203.8 of the SEC's rules relating to investigations say, service of subpoenas issued in formal investigations, investigative proceedings, shall be effected in the manner prescribed by Rule 232(c).

Then you jump to 232(c) of the Rules of Practice, which say the provisions of this paragraph (c) shall apply to the issuance of subpoenas for purposes of investigations, and instructs that service shall be made pursuant to the provisions of Rule 150(b) through (d). So it expressly includes 150(b).

And then 150(b) says, upon a person represented by counsel, whenever service is required to be made upon a person represented by counsel, who has filed a notice of appearance pursuant to Rule 201.102, service shall be made pursuant to, and then it continues as your Honor was discussing.

There was no place to file a formal appearance form here because of the way that this had begun.

THE COURT: What is the first thing you cited, 203 point what?

MR. HENKIN: 203.8 of the SEC's rules relating to investigations, which are separate from the Rules of Practice, your Honor.

THE COURT: Right. Service of subpoenas issued in [6] formal investigative proceedings shall be effected in the manner prescribed by 232(c).

MR. HENKIN: Of the Rules of Practice, your Honor.

THE COURT: Right. So what does that then say?

MR. HENKIN: Then that says, the provisions of this paragraph (c), so 232(c), shall apply to the issuance of subpoenas for purposes of investigations. And it goes on to say that service shall be made pursuant to the provisions of 201.150(b) through (d), which is Rule 150(b) through (d) that we have been talking about.

THE COURT: So that includes (c).

MR. HENKIN: It includes (c), but it starts with (b). And so the question is –

THE COURT: That's because (b) comes before (c) in the alphabet.

MR. HENKIN: In the way the rule is structured.

What you have here, though, is you have a situation in which the genesis of this dispute started with the SEC seeking voluntary cooperation, and counsel appearing and being recognized in the proffer letter, by the way, which was drafted by the SEC.

THE COURT: So your view is that when someone cooperates and can have counsel for a limited purpose, that they then shield themselves from being subject to service by the SEC?

[7] MR. HENKIN: Well, I wouldn't say for a limited purpose. The retention was for – we knew that there was a formal order of investigation, and so Dentons was retained for that purpose. And if you look at the SEC's proffer letter, which is an exhibit to Mr. Senderowitz's declaration – by the way, which was written by the SEC, recognizing Dentons as counsel for both Mr. Kwon and TFL in connection with the investigation and the responses to the voluntary request.

What you have here is a circumstance in which the SEC would like to get to a place where it doesn't have to abide by Rule 150(b) when it starts out this way. And there is a reason, by the way, your Honor, that it started out with requests for voluntary cooperation. If it really believed that there is personal jurisdiction over Mr. Kwon and TFL, then why at the very beginning – and this is going back to May of 2021 – didn't it try to serve subpoenas on Mr. Kwon and TFL? Why did it continue with additional voluntary requests for information sent to Dentons as counsel for Mr. Kwon and TFL?

There was a very clear recognition by the SEC that we were acting as counsel for TFL and Mr. Kwon in connection with this entire inquiry. And then, in the midst of it, because the SEC got unhappy with the way things were going, and you know this from reading Mr. Landsman's declaration, he was monitoring Mr. Kwon's Twitter feed, took this upon himself and took a shortcut.

[8] And there is a reason, by the way, an ethical reason, which we point out in our brief, why Rule 150(b) should be interpreted this way. A lawyer in a case should never directly contact a party opponent he knows to be represented by counsel unless authorized by law. And that comes from Rule of Professional

Conduct 4.2(a), which directly applies to the SEC staff, as we noted in our brief. And that, by the way, explains precisely why, as soon as we identified ourselves to the SEC staff, all the communications after that were between the staff and counsel.

THE COURT: You have segued a bit into personal jurisdiction, which I think is the real issue here. And all your argument about how to interpret Rule 150 is, once you know somebody has counsel, you have to serve them through counsel, but then we can also reject service. And that's just not a reasonable reading of the rule. You're saying that the rule creates this gap between being able to serve someone.

Now, you might believe that 150(c) is not operative when there is no personal jurisdiction. Obviously, that's the argument. But I just don't think your reading of the rule is tenable at all. Because you're arguing that we should rely on this section (a) that says, when you file a notice of appearance, service is through them. But when you file a notice of appearance, you are agreeing to the jurisdiction. You can't reject service then. So you're saying there is this [9] gap in the rule that is not there.

MR. HENKIN: Well, no, actually, I am not saying that there is a gap. I am actually saying the opposite, your Honor.

The problem here is that there is an assumption in connection with the idea that we declined to accept service.

First of all, the question was never asked. One of the things that we pointed out in our submission is that the SEC never asked us to accept service of anything. In fact, they never notified us about the subpoenas until the e-mail that was sent, which you also have in

the record, by the way, that's Exhibit 4 to Mr. Senderowitz's declaration, that notified us that they believed that they had served Mr. Kwon.

So there was never a request. So the idea that we were asked to accept service and declined is false. That never happened. The SEC doesn't know what would have happened if they had asked us to accept it. And your Honor knows from private practice what happens when there are requests, but that didn't happen here. And you have a situation where there is counsel representing parties in the context of what has been identified as a formal order of investigation. Everything that your Honor has seen in the record talks about the fact that there is a formal order of investigation. And when there is counsel under those circumstances, it's our view that the only reading that makes sense is the reading that they are required to either ask counsel, which didn't happen, so we put that one [10] off to the side because they just never asked, or get an order from the Commission, which they didn't do. So neither of the things that 150(b) says, and it's either/or, neither of those things happened.

THE COURT: So 150(b) does say service shall be made electronically in the form and manner to be specified by the office of the secretary on the Commission's website. Why doesn't the courtesy copy, which was electronically made to you after the personal service, why doesn't that satisfy (b)? Because it didn't come with the magic words "we hereby serve you"?

MR. HENKIN: No. It's not a question of magic words, your Honor. It's a question of reading that e-mail. It says, "Please see the attached subpoenas for Do Kwon and Terraform Labs Pte Ltd. that were served this morning personally on Do Kwon. If you

would like to discuss further, please e-mail me some proposed times to speak."

That's the entirety of that e-mail. It didn't say, and this qualifies as service on you. It didn't ask the question. It didn't do anything other than assert that they had been properly served on Mr. Kwon that morning. And so if that service was in fact not proper, because it didn't comply with 150(b), that's the end of the inquiry. That's the argument that we are making with respect to 150(b).

The e-mail just doesn't say what the SEC would like it [11] to say. And there was never a follow-up saying, well, will you accept them nunc pro tunc, or can we try again, or any of the other various things that they could have done. That's the sum total of the e-mail.

THE COURT: Let me give Mr. Connor a chance to respond to any of those points briefly. I want to leave personal jurisdiction to the side for now.

Mr. Connor.

MR. CONNOR: Thank you, your Honor. This is James Connor for the SEC.

Your Honor, whether the question is under 150(b), 150(c), or 150(d), the SEC unquestionably effected proper service on Mr. Kwon.

Rule 150(d) – and this is the only portion of the rule that specifically references investigative investigations – says, service of an investigative subpoena may be made by delivering a copy of the filing. And then it defines delivery as personal service handing a copy of the person required to be served.

That's exactly what the SEC did here. The SEC hired a process server – did not communicate with Mr. Kwon, as respondents' counsel incorrectly stated, but

actually hired a process server to effect service of the subpoena. That alone under 150(d) should end the inquiry.

But if the Court looks at 150(b), every part of that [12] rule supports the SEC's position. As your Honor pointed out, it says, Whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance. There is no dispute now that respondents' counsel did not file a notice of appearance. But even if a formal filing of a notice of appearance is not required, Rule 150(b) references 17 C.F.R. 201.102 when it references a notice of appearance. And that section, the title of that section, subpart (d), says designation of address for service. The entire point of Rule 150(b) is to allow for service through counsel. Counsel's supposed partial representation does not allow them to not accept service if they claim that they entered an appearance in the case.

Again, whereas here, counsel does not agree to accept service, they have not entered an appearance in the investigation for purposes of Rule 150(b). So, therefore, it was fully proper for the SEC to serve Mr. Kwon personally.

They claim they provided the business address and e-mail address, but again, they wouldn't accept service through those addresses. So the SEC was not required to get an order from the Commission.

Counsel for respondents I think attempts to be a little coy in whether they would or would not accept service, but their filings are very clear on the issue. On page 15 of their opposition brief, they quote a case that says service of [13] process on an attorney not authorized to accept service for his client is ineffective. And then, in paragraph 8 and 21 of the complaint that

they filed, they state the SEC knew it could not serve subpoenas on Mr. Kwon or TFL.

So, essentially, what respondents' counsel has stated is that they were not authorized to accept service. And since they are not authorized to accept service, it was fully appropriate for the SEC to serve Mr. Kwon personally.

Now, even if respondents' counsel is correct about everything they said, regarding a notice of appearance, regarding Rule 150(b), the dispute here is academic because the SEC served counsel through electronic means, which is specifically allowed for in Rule 150(c).

Now, counsel makes the argument that the SEC didn't provide the, quote, magic words necessary to effect service. But the rules answer this question. Rule 150(e) specifically states that electronic service is complete upon transmission. So the SEC does not have to say, attached is a copy for service. All the SEC is required to do is actually send the subpoenas electronically to respondents' counsel, and that is exactly what the SEC did here.

So because the SEC has followed the administrative steps in serving the subpoenas, the Court should enforce the subpoenas.

The only other point I will raise about the Deloitte [14] case that counsel relies very heavily in their briefing was in a completely different circumstance in which the attorney in that case had actually agreed to accept service. So because counsel agreed to accept service, that's why the SEC served upon counsel, and then they tried to renege that years after the fact. So the Deloitte case and this case bear no resemblance. The SEC followed Rule 150, and so, therefore, the Court should enforce the subpoenas.

Thank you.

MR. HENKIN: Your Honor, can I jump back to just a few quick things about that?

THE COURT: Sure.

MR. HENKIN: I am actually glad that Mr. Connor focused on our citation of the Zherka case because what that really shines a light on is the fact that there was never a request for acceptance of service. Because, as your Honor knows from being in private practice, when counsel for an opposing party makes a request, will you accept service of A, B, C or D, on behalf of your client, you then go to your client, talk about it with your client, and decide how to respond. That request was never made here. And that request is particularly important here because the idea of electronic service being effected as soon as something is sent means one thing, when jurisdiction has been gotten over a party, and it means something entirely different when the document that you [15] are attempting to serve is the document – when it is in itself a compulsory process document.

That's what they attempted to serve here, and that's why we cited the Zherka case and specifically service of process on an attorney not authorized. Essentially, the argument that Mr. Connor made would turn any lawyer, who appears on behalf of an entity that is asked to provide voluntary cooperation with the SEC, into an authorized agent for service of process for anything that the SEC then wants to serve on them. And that's not the way any of this works. That would mean, if you took it to its logical conclusion, that the SEC could decide to commence an enforcement proceeding and just e-mail a copy of it to Dentons, and according to the SEC's reasoning, that would count as

service on Mr. Kwon or TFL, for example. That cannot be and isn't the way the law works.

The last two things I will say is Rule 150(b), if you read it, specifically relates to investigative subpoenas. That's something that I noted before. And the notice of appearance in an investigative proceeding is exactly what we provided because when all that is going on is voluntary cooperation, that's all there is, and then you get to where we are now.

THE COURT: OK. Thank you for those arguments. I would like to move on to the personal jurisdiction issue, if we could.

[16] I think again I will start with Mr. Henkin, if you don't mind, because you had addressed the issue of potentially filing a reply brief and really wanted to be heard after what you suggested were some new points made in the reply. What we are really talking about is any of the bases for purposeful availment of United States by Kwon and Terraform such that personal jurisdiction for purposes of the subpoena would be appropriate.

So, Mr. Henkin.

MR. HENKIN: Sure. Thank you, your Honor.

So let me address that in two steps.

The first step, and we alluded to this in the letter, but I just want to highlight it, there are a number of things that are stated in Mr. Landsman's reply declaration where he talks about, for example, in paragraphs 3, 4 and 5, evidence that is not before the Court that the SEC wants the Court to rely on with respect to the personal jurisdiction arguments that it makes in the reply brief. And they all start with actually the same phrase: the staff has obtained

evidence of an agreement or a document, and so on. But those documents are not in the record, and the only things that are in the record are Mr. Landsman's characterizations about those documents. We don't think that the Court should be relying on any of that for a number of reasons. One, it's hearsay, possibly multiple levels depending upon which document we are talking about; and [17] also, Mr. Landsman isn't competent to testify about those documents. None of them are SEC documents, for example.

So that's the overall point that I wanted to make with respect to that. And that applies to all of the assertions that are in Mr. Landsman's reply declaration.

With respect to jurisdiction itself, I was surprised, frankly, that the SEC argued in the reply brief that there is general jurisdiction over Mr. Kwon, because as your Honor knows, it's not at all clear that general jurisdiction can apply to individuals. In the Burnham v. Superior Court case from 1990, the Supreme Court said it may be that general jurisdiction only applies to corporations. And in the Hoechst Celanese case, from the Middle District of Florida, from 1995, the court said it's not clear that general jurisdiction can ever be held over a private nonresident defendant. And your Honor in the Reich v. Lopez case, from 2014, this was applying New York law and citing the Second Circuit's decision in the Roman Catholic Diocese case, you noted that for an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile. And for Mr. Kwon, that was Korea and is now Singapore. So the idea that there is general jurisdiction over Mr. Kwon just doesn't fly here.

I guess I should pause there and ask if your Honor has any questions.

THE COURT: I guess I am wondering about what that [18] means in terms of the Kidder, Peabody case that the SEC cites, which says that Exchange Act, Section 27 confers personal jurisdiction over a defendant who is served anywhere within the United States, that is, that service alone covers personal jurisdiction.

MR. HENKIN: I think that flips the issue on its head, your Honor, because essentially that's making general jurisdiction over an individual apply on – essentially tag jurisdiction or happening to travel through the United States. Whereas I think the ordinary course definition, going all the way back to Burnham, is that for general jurisdiction – and this is also true under pretty much every state law that I am aware of – is that in order for general jurisdiction to exist as opposed to specific jurisdiction, that is limited to the domicile. And to allow the SEC to just assert general jurisdiction over somebody by the happenstance of them happening to be in some sort of the U.S., continental U.S., at some point, when their domicile is outside the United States, I think that would raise some fairly significant due process issues.

THE COURT: OK.

MR. HENKIN: I think the best way to read that statute is it is a territorial limitation on what the SEC can do, not as something that creates general jurisdiction in circumstances where it otherwise wouldn't exist.

[19] THE COURT: OK.

So let's get into specific personal jurisdiction. I don't know that there is a lot of daylight between how that would apply with respect to Mr. Kwon and with respect to Terraform Labs, because he is the cofounder and CEO and what he is alleged to have done, in terms of United States-focused activities, was really

all coextensive with Terraform Labs, or doing it for Terraform Labs.

So how do you respond to the various ways in which the SEC contends Kwon and Terraform were availing themselves of U.S. markets and activity?

MR. HENKIN: So two points about that. One general and then I will get into the actual assertions of the contacts themselves.

The first part – and we fully briefed this and there essentially was not a response to it – there is a little bit of daylight between Mr. Kwon and TFL, in the sense that even if jurisdiction could be had, even if service was proper of the subpoena directed to Mr. Kwon, handing him a subpoena when he is transiting the United States for TFL is not effective service. And the SEC didn't really have a response to that. We cited multiple cases saying that just handing a subpoena to an officer of a company, when he or she happened to be transiting through the United States, is not sufficient to get jurisdiction over the entity as opposed to the individual.

[20] Now just getting into the specific issues, I think what you have to do is you have to look at the subpoenas and the underlying investigation. The subpoenas, like the investigation, are focused on whether mAssets or MIR tokens might be securities that TFL might have sold or marketed to U.S. investors. And nothing that the SEC has focused on shows either Mr. Kwon or TFL marketing or selling those things to U.S. persons. So they don't count for the purpose of establishing specific jurisdiction.

What they point to, for example, on page 6 of the reply, is that Mr. Kwon spoke at a New York event as the cofounder and CEO of Terraform. That's the way

they phrase it. That's not purposeful availment. He was speaking on a panel about emerging blockchain technology, not conducting business. It's not even related to the Mirror Protocol. The SEC, by the way, did not challenge this in its reply papers. The panel that he spoke on was called "The Multichain Future is Here," and it was about how leading blockchains interoperate with each other and various developments in cross-blockchain technology. That's not purposeful availment with respect to the Mirror Protocol or MIR tokens.

They argue also that Mr. Kwon promotes the Mirror Protocol through TFL's website, web app, social media, podcast interviews and U.S. media. But they don't identify anything he said on any of those platforms to promote the Mirror Protocol [21] to U.S. investors as opposed to just around the world, which, as your Honor is aware, is not sufficient. The SEC only identifies two items even in the U.S. media about Mr. Kwon, and neither of them involves marketing to U.S. investors.

Then they say that Mr. Kwon talked to Coinbase, which led to a contract to list MIR tokens on Coinbase. A couple of things about that.

First of all, Mr. Kwon wasn't a party to the agreement between Coinbase and Terra. He didn't sign it. Two, his communications with Coinbase didn't cause the SEC to issue the subpoenas. The subpoenas don't even ask about those communications.

Then they also point to a contract whereby a U.S. digital – and this is actually in paragraph 3 of Mr. Landsman's reply declaration – a U.S. digital asset trading platform paid a Terra subsidiary $200,000 for MIR tokens. But, first of all, as I pointed out, in

general, there is no competent evidence about this in the record. All of this is from statements by Mr. Landsman about a document he claims to have reviewed. So that's hearsay. And he is not competent to testify about it. It's also irrelevant because the most that this shows is that some U.S. entity purchased MIR tokens from a subsidiary of TFL, and that doesn't establish jurisdiction over TFL or Mr. Kwon.

And I would refer your Honor back to your own opinion [22] in *Alibaba v. Alibabacoin*, which held that contracting with a company in the forum doesn't support jurisdiction unless the case relates to that contract. And specifically what your Honor said in that case was that Alibaba had contracted with Digital Ocean LLC, which was headquartered in New York City, to host the website. But even if Alibaba's websites were hosted in New York, that alone is insufficient to establish personal jurisdiction. That covers everything that the SEC has argued here and means that it is not sufficient to support the exercise of specific jurisdiction.

There is also, by the way, a line of cases going back 130 years that hold that listing – let me take a step back here and say, I am going to talk about equity securities because that's what the cases that I am about to describe cite. I am not acknowledging or admitting or agreeing that anything that we are talking about in this proceeding is an equity security or is a security at all. But these cases are interesting because for 130 years people have been trying to argue that merely choosing to list an equity security on a U.S. equity exchange, such as NYSE or AMEX or NASDAQ, is sufficient to create jurisdiction in some U.S. forum.

Literally, going back to 1890, and this is discussed in the *Wiwa v. Royal Dutch Petroleum* case in the

Second Circuit, and in a whole series of other cases that I can give you, but even doing that, even listing your securities on a [23] U.S. market is not sufficient to establish specific jurisdiction. And that's been the rule quite literally since 1890. You can look at a case called *Law Debenture v. Maverick Tube*, which is 2008 WL 4615896, and several other cases which I could read to you, but if you would like, I can provide them in a supplemental letter. The point is that that sort of activity, and that's the most that you could say that the SEC has asserted here, is not sufficient for specific jurisdiction. So the idea of there is a listing agreement. It's not enough.

Also, and this further distinguishes this case from all of those cases that went before, in all of those cases there were payments to the listing exchange, listing fees, for example. Here, TFL paid the platform nothing and TFL earned nothing from the listing agreement. So it's even less of a support.

THE COURT: What is the entity that it's listed by?

MR. HENKIN: The one that they referred to is Coinbase.

THE COURT: OK.

MR. HENKIN: So that can't be sufficient. If listing on an equities exchange can't be sufficient for personal jurisdiction, then MIR tokens, when it's not even a paid listing, couldn't possibly be sufficient.

THE COURT: But why wouldn't it be sufficient, when you list on Coinbase, that entity pays $200,000 for MIR tokens, [24] and you have several employees in the United States, including the general counsel. Why else would it have a general counsel in the United States?

MR. HENKIN: It's interesting, your Honor, and that's one of the other reasons that I wanted to bring up these cases because they also go to exactly those questions. Among the things that are alleged in some of them, not all of them, are things like paying someone, having employees in the area, and things like that, as opposed to purposeful availment with respect to the specific issues that are in dispute. And in all of the cases in which those are addressed, and I will give you an example, some of the cases, for example, had situations where underwriters were hired in the same jurisdiction, or where investor relations companies were hired in the same jurisdiction, or where there were small numbers of employees in the same jurisdiction, and again, your Honor, if you want, I can give you a quite long string cite with these cases, but what they uniformly hold is that those things even put together aren't enough.

The reason for that is, if you think about it from a policy perspective, that would discourage companies from coming into the United States, or from even – essentially, it would make companies do everything they possibly could to avoid contact with the United States, to avoid those things giving rise to personal jurisdiction.

[25] THE COURT: There is also a 2019 custodial services agreement. Is that also with Coinbase or is that with somebody else?

MR. HENKIN: That I believe is with somebody else, although I don't remember off the top of my head because I haven't seen the specific document that's being referred to. But again, that is the equivalent of the cases in which plaintiffs have alleged having a bank account and appointing a transfer agent or a registrar is not sufficient. So, for example, in a case

called Gilson v. Pittsburgh Forgings, the allegations were, Oh, there is an NYSE listing and there is the appointment of a New York-based transfer agent and registrar, and the court said, no, that's not enough.

THE COURT: You're pointing to four different areas where it's not enough, but here we have all of those things.

MR. HENKIN: No. Actually, in that case, it was the combination was not sufficient.

THE COURT: The second declaration by the SEC, which I realize you have problems with, I think it says 15 percent or some percent of customers are in the United States. Do you have a response to that?

MR. HENKIN: I am trying to find where that is. Notice that it doesn't say customers. What it says – and this is one of the problems with it. What that paragraph says is, The staff obtained evidence of an e-mail from a Terraform [26] employee to the U.S.-based digital asset trading platform and U.S.-based outside representatives of the trading platform indicating that about 15 percent of users of the Mirror Protocol come from the U.S.

Now, that's a very, very vague statement because users of the Mirror Protocol doesn't necessarily mean that they were buying or selling mAssets. It also doesn't mean that they were using the Mirror Protocol through a TFL interface. One of the important parts about the Mirror Protocol is that it's just a protocol that operates on the internet. It's essentially been released into the wild, one way of thinking about it, by TFL. TFL doesn't control it. TFL doesn't control what mAssets are minted or how they trade. That is controlled by the Mirror Protocol community. So nothing in that statement says anything about what

those users are doing. Another way of thinking about it is those users are not customers of TFL. They are simply using the protocol in ways that TFL has no control over.

THE COURT: Right. That's kind of the brave new world of the blockchain that is what makes this unlike prior cases, right?

MR. HENKIN: It's one of the things, yes.

THE COURT: I want to give a chance to Mr. Connor to address personal jurisdiction as well. Did you cover everything you wanted to, Mr. Henkin?

MR. HENKIN: The only other thing that I would throw [27] in, your Honor, is that we think that the 2021 case *Blockchange Ventures v. Blockchange, Inc.* is another case that supports our argument that there is no jurisdiction. In that case, the defendant provided digital asset investment services and the plaintiff had pointed to a partnership between the defendant and a New York company for the New York company to share customer information with the defendant, but the court found that there was no jurisdiction because the plaintiff hadn't shown that its case arose out of that partnership. And I think that the cases that the SEC cites do not show the existence of personal jurisdiction here.

THE COURT: All right. Thank you.

Mr. Connor.

MR. CONNOR: Yes, your Honor. Thank you.

I would like to start with personal jurisdiction over Mr. Kwon.

We don't think this is a close question. The court has personal jurisdiction over Kwon because he was

served with the subpoena while he was found in the United States. And that "found" language comes from Exchange Act, Section 27, 15 U.S.C. 78aa. And we included the reference to the Kidder case, which squarely addresses this question and held that when a person is found in the United States, that it's proper for a court to exercise jurisdiction over that person.

We also cited the *Edelman* case, 295 F.3d 171, that [28] says, when a potential witness comes to the United States, it is neither unfair nor inappropriate under the statute to undertake his discovery here.

THE COURT: What was that cite of *Edelman*?

MR. CONNOR: 295 F.3d 171.

I think there might be a misunderstanding on the *Burnham* case. Because in *Burnham*, which was a plurality opinion, the court held jurisdiction, based on physical presence alone, constitutes due process. I am just reading from the case. And it reaffirmed a century of judicial practice that serving a person while they are found in the location comports with due process.

I think the confusion is that that doctrine doesn't always apply to corporations, and that's something that the Supreme Court found in *Daimler*. And to be clear, we are not saying that the Court has general jurisdiction over the corporation. We are just saying it has it over Kwon because he was found in the location.

So our position there is supported Supreme Court case law, Second Circuit case law, and the statute itself.

Just turning to specific personal jurisdiction over Mr. Kwon and Terraform, there's numerous minimum contacts that establish purposeful availment of the

forum. And I will just tick through a few of these because I think it's important.

First, Mr. Kwon travelled to the United States to [29] speak at a digital asset conference where he was identified as the founder and CEO of Terraform. He signed an agreement with what we termed as a U.S. digital asset trading platform, but which counsel has identified now as Coinbase, under which the digital asset platform paid a Terraform subsidiary at least $200,000 for MIR mirrors. Again, that was an agreement that was signed by Mr. Kwon personally.

THE COURT: I thought he said he didn't sign it. Maybe I'm wrong.

MR. CONNOR: Yes. Mr. Kwon signed the agreement. I think the caveat there was that the agreement was with a wholly-owned Terraform subsidiary.

MR. HENKIN: Just to be clear, your Honor, the agreement he didn't sign was the listing agreement.

THE COURT: Got it.

So the agreement that you're talking about, the listing of MIR tokens, when was that?

MR. CONNOR: The agreement that I am referring to is not for the listing. It's called a SAFT, which is a simple agreement for future token, and that was signed in 2021. And that was where the U.S. digital asset platform agreed to pay $200,000 for the MIR tokens.

THE COURT: For the tokens.

MR. CONNOR: Yes. Just to be clear, that's separate and apart from the custody agreement and the listing agreement. [30] This is a third agreement.

THE COURT: So they were buying the tokens from the Terraform subsidiary?

MR. CONNOR: Yes.

THE COURT: All right.

And Coinbase is a U.S.-based entity?

MR. CONNOR: It is.

THE COURT: But this wasn't a listing agreement. They weren't reselling the tokens.

MR. CONNOR: No. But there was also a listing agreement between Terraform and Coinbase as well.

THE COURT: And tell me about that.

MR. CONNOR: That is an agreement, Terraform contracted with Coinbase under which – and this just addressed the MIR tokens, not the mAssets. But the MIR tokens were, through this listing agreement, made available for trading in the U.S. To be clear, when they enter into the agreement, it's Coinbase that's actually – once that agreement is made, it's Coinbase that is making them available for sale.

THE COURT: So if I go on, I can purchase MIR tokens through a Coinbase platform now?

MR. CONNOR: Yes.

THE COURT: But what about the argument that there is no ongoing role of Terraform in that situation?

MR. CONNOR: Well, Terraform is – they call MIR token [31] the, quote, governance token of the Mirror Protocol, which, again, Terraform developed and continues to maintain. So there still is a relationship between Terraform and the governance token for the Mirror Protocol.

And that's putting aside the fact that, again, Terraform created the Mirror Protocol, which also allowed for the creation of these mAssets. And these mAssets, they mimic the price of U.S.-based equity securities. So, for example, they talk about something called mApple and mTesla. So these are things that Terraform created the infrastructure, and created the Mirror Protocol through which these mimicked assets are developed.

Also, with respect to the custody agreement, Terraform signed a contract, and I think we have identified it as Coinbase, for – actually, this agreement is with a trust associated with Coinbase. So the custody agreement is not with Coinbase, but with the trust. And that's for the trust to custody and store digital assets on Terraform's behalf. So, again, that's a contract between Terraform and the U.S.-based entity, in which the U.S.-based entity is storing and custodying digital assets on Terraform's behalf. That's continuing, ongoing conduct that's memorialized in an agreement, and that is sufficient for purposes of availment.

That's not even to mention, again, at least four individuals, it's growing, Terraform just hired an additional [32] general counsel, but there's at least four individuals residing in the United States that are employed by Terraform and press reports – I will just throw this out there. There's also press reports that Mr. Kwon and Terra-related entities have a new sponsorship agreement with the Washington Nationals. There is section behind home plate called The Terra Club.

So there is significant minimum contacts between Terraform, Mr. Kwon, and the United States that are more than sufficient for the Court to exercise jurisdiction.

I will also point out, Terraform in its briefing tries to minimize the fact that its website and web application allowed U.S. investors to purchase MIR tokens and mAssets. And the way they do this is sort of retroactively. If you look at the declaration of the Terraform employee, it states that the website has been open-sourced and is no longer even hosted by Terraform. But that only changed on November 14, 2021, two days after we filed the subpoena enforcement action. So up until that time, a U.S. investor could go to Terraform's website and purchase these MIR tokens and these mAssets on a website hosted by Terraform. Terraform's belated attempt to kind of eliminate this contact does not change the fact that it hosted the website. And this is just in addition to all the other contacts that I also discussed.

I will also point out, the last point is that Mr. Kwon also promotes the mAssets and MIR tokens in U.S. media. We [33] included a cite to a Yahoo! News article and Mr. Kwon is quoted as saying, So we have things like Mirror Protocol, which creates synthetic assets that track the price of real-world assets. So this would be, for example, MIR Tesla or MIR Apple, referring to the equity securities of U.S.-based companies Apple, Inc. and Tesla, Inc.

In the end, the question on jurisdiction over Mr. Kwon and Terraform boils down to this. Should the Court exercise personal jurisdiction over a digital asset company, when that company has multiple contracts with a U.S.-based trading platform, markets of digital assets, which mimic U.S. securities to U.S. investors, through U.S. media, employs at least four individuals residing in the U.S. in key positions, and has a CEO who travels to the U.S. on behalf of Terraform to speak at digital asset conferences? We believe the answer is

clear and the Court should exercise specific personal jurisdiction over both Kwon and Terraform.

THE COURT: Let me just ask you if you would like to respond to Mr. Henkin's objections to the hearsay and personal knowledge points, particularly with respect to the second SEC declaration.

MR. CONNOR: Sure. With respect to the agreement, as a practical matter, I think counsel has essentially confirmed what we said in the declaration that these agreements exist. He said that they do have agreements with Coinbase. And so [34] that's the point that we were laying out in the second declaration. We didn't attach the actual agreements to the declaration. We are happy to do that. We have them. We did provide the Bates numbers so that the Court can have some confidence that they do exist, and we will certainly provide them if need be.

As far as of sort of the timing of it, when we initially filed the petition for enforcement of the subpoenas, we did not believe that jurisdiction was going to be a large issue because of all of these contacts with the U.S. So that's why in our initial papers we focused on the Rule 150 issue, which is the issue that respondents filed the complaint on, and so that's what we focused on. We did include some of the contracts. But given that in their response brief respondents described their contacts with Coinbase as a one-shot contract, that's what they said, that was just inaccurate. So we needed to correct that inaccuracy, that there were more than one contract; there were multiple contracts. And again, counsel has confirmed what we have said here about these contracts with Coinbase. There is no dispute about the facts here. And so I think we have provided more than enough indicia of liability for these agreements, and

it's more than enough for the Court to exercise jurisdiction over Kwon and Terraform.

MR. HENKIN: Your Honor, can I respond?

THE COURT: Sure.

[35] MR. HENKIN: A few things.

First of all, we didn't confirm the content or what the SEC would like the Court to infer from these contracts. I would like to mention that Terraform is a fairly large company that does a lot of things besides having created the Mirror Protocol, part of which is the MIR token. It has a lot of very much more substantial products and projects that it works on that have nothing to do, for example, with the Mirror Protocol. So it's the SEC's burden to demonstrate that what it is investigating here, which is only mAssets and the MIR tokens, are related to the things that it has identified as contacts with the U.S. And it hasn't done that. That's one of the reasons why I focused on the listing cases and investor relations and other contacts-type cases because those sorts of things in a generic context are not the same.

So, for example – and, of course, this is not in the record, but because Mr. Connor brought it up I will also bring it up – he referred to discussions with the Washington Nationals. Two things about that. One, that started months after the service of the subpoenas was attempted. But, two, it's got nothing to do with the Mirror Protocol or MIR tokens. It has to do with a completely separate – and I apologize for the fire engines in the background. It has nothing to do with mAssets or MIR tokens. It has to do with a separate cryptocurrency digital asset that TFL had created.

[36] THE COURT: It's a DSL thing called cryptocurrency Terra USD. So it stands for Terra USD.

MR. HENKIN: It's a stable coin. It's not the MIR token and it's not mAssets.

THE COURT: It's based on the Mirror Protocol as well.

MR. HENKIN: No. It can interact with the Mirror Protocol, but Terra USD is separate from the Mirror Protocol. And I don't think that's subject to dispute here.

The second thing is, neither TFL nor Mr. Kwon creates mAssets. Those are created and they are traded by people who use the Mirror Protocol. So it's not up to Mr. Kwon whether mApple or M any other U.S. equity is created. Those are proposed by and voted on by the community. TFL doesn't have control over whether one mAsset gets created; if it does get created, who trades it; if it gets destroyed, or anything like that. In a sense, the Mirror Protocol, one thing that you might analogize it to is a 3D printer, and what somebody who buys a 3D printer makes with it is up to them, not to the company that sells it. At the end of the day, none of this has been linked to the investigation. They are just throwing out contacts. And that's why I think it's very important to focus on, have they demonstrated that any of these contacts are actually related to the things that they are investigating? Because that's what is relevant for specific jurisdiction.

Of course, all of this assumes that service was proper [37] in the first place. And I just want to say one brief thing about that. We provided all the information, and I don't think it's disputed, that is required by the SEC's Rule 102(b). There is no docket, in the context of a situation like this, in which to file a

notice of appearance or any other kind of a form. You provide it to the SEC staff the way we did provide it. They recognized that we were counsel for TFL and Mr. Kwon. And you can't knock out Rule 150(b) by disagreeing with that. It would essentially write the rule out of existence.

That's all I have to say, unless your Honor has further questions.

THE COURT: Thank you.

Let me ask Mr. Connor one more thing, and that is, this Nationals deal, do you agree that because it involves a different product, I guess, cryptocurrency Terra USD is not within what would be a basis for specific jurisdiction because it's not within what the SEC is investigating here?

MR. CONNOR: Your Honor, I think, from our perspective, we don't have those agreements. We can only read what is in the press.

What I will say is, with respect to specific jurisdiction and the contacts between Mr. Kwon in the United States, Mr. Kwon is quoted very heavily in these press releases announcing a deal between his company and a major sports franchise here in Washington, D.C. So I think that does [38] support our position. We think the Court has general jurisdiction over Mr. Kwon, but also specific jurisdiction over Mr. Kwon. And I think, as Mr. Henkin said, the Terra-related entities that he claims were sort of party to the sponsorship agreement, there is some interaction between those entities and the Mirror Protocol. We can't speak with any more specificity on that because we don't have those agreements yet. But I was just sort of pointing that out as an example of the fact of the contacts between at least Mr. Kwon and Terra-related entities with the

United States that continue to be ongoing, in addition to the litany of contacts that we described earlier.

THE COURT: What is the scope of the SEC's investigation?

MR. CONNOR: The SEC's investigation is named *In re Mirror Protocol* and is investigating whether there were potential violations of the securities laws regarding Mirror Protocol; and as we lay out in our papers, under the Mirror Protocol, MIR tokens are created, and mAssets, which mimic U.S.-based securities, are also created.

So I think that's in our papers, and I think that's all that – yes. To be clear, that is what our subpoena relates to that's at issue here.

So, again, the subpoena relates to the Mirror Protocol through which the MIR tokens and mAssets are created.

MR. HENKIN: Just to get back to the general [39] jurisdiction point, because Mr. Connor focused on it so much, I would again refer back to Burnham, Hoechst, and the Reich cases, which make clear, although Mr. Connor is correct that Burnham was a plurality case, was a plurality decision, the Supreme Court stated it may be that general jurisdiction applies only to corporations. And then the Hoechst case said that it wasn't clear that general jurisdiction could ever be held over a private nonresident defendant, i.e., an individual. So there is significant doubt, at least at the federal level and also at the state level, whether general jurisdiction can ever be asserted over a two-legged entity as opposed to a corporate entity.

THE COURT: All right. Thank you for your arguments. I am going to rule.

There are two issues before me. One is whether there was proper service. And on this, I rule that there was proper service. I think Rule 150(a) applies, specifically by its terms, when service is required to be made upon a person represented by counsel who has filed a notice of appearance, and (c) provides for and allows service by handing a copy of the person required to be served, and I think that does require proper service.

Mr. Henkin is a very smart lawyer and has made clever arguments about how, because the respondents were represented by counsel, service had to be made kind of as service through [40] counsel, but I just don't think Rule 150(a) applies by its terms. And there really is no authority for respondents' position, other than a reply brief by the SEC which is not authority. In any event, I think that that is distinguishable. It's not binding on me. In any event, I think the plain language of Rule 150 permits the service that was made here. And I think the reading proposed by respondents would read out Rule 150(c). This purported gap that respondents' position would create between being personally served and being served through counsel that has "appeared" is illusory and reflects a misreading of SEC rules.

With respect to personal jurisdiction, I don't need to decide the general jurisdiction question because I find that there is specific personal jurisdiction with respect to both Kwon and Terraform Labs because they purposely availed themselves of the privilege of doing business in the United States in several respects that are directly causally connected to the basis for the subpoena at issue here in the sense of but-for causation.

They promoted the Mirror Protocol and MIR tokens through Terraform's website, web application, social media accounts, interviews, and U.S. media.

Second, Kwon corresponded with U.S. digital asset trading platform Coinbase regarding a listing of MIR tokens, which is the governance token of the Mirror Protocol, leading [41] to a contract between Terraform and the U.S.-based trading platform on the listing of MIR tokens.

Third, Kwon and a Terraform subsidiary entered into an agreement with the U.S.-based digital trading platform under which the U.S. entity paid at least $200,000 for MIR tokens.

Fourth, there was a custody agreement entered with a U.S.-based entity for storing digital assets on behalf of Terraform.

Fifth, there are employees in United States, including the general counsel, which I think is telling.

Sixth, the mAssets mimic U.S. stocks and are plainly being offered to U.S. customers.

And, finally, there is this sponsorship. I note that there is an NBC Sports online article from February 9, which says, "The Nationals announced Wednesday a partnership with the cryptocurrency community Terra, a decentralized autonomous organization run by stake-holders rather than a traditional corporate structure. As part of the agreement, the cryptocurrency Terra USD could be accepted at Nationals Park as a form of payment as early as next season."

Finally, I note that some of the cases that Mr. Henkin has, understandably and quite persuasively, relied on are different because this is a different kind of entity, and that is exactly what is being explored by

the SEC. And the fact that this is something that was sort of kicked off and then [42] managed on an ongoing basis by the community makes it different from a lot of prior case law, and that is exactly what the SEC I think is exploring.

Taken all together, I think that there are clearly sufficient contacts and sufficient personal availment authorizing specific jurisdiction over both Kwon and Terraform, and I find that service is proper, and therefore the application to enforce the subpoena is granted.

MR. HENKIN: Your Honor, at this point, Mr. Kwon and TFL would like to seek a stay of your order pending appeal under FRAP 8. Would you like us to address that now while we are on the call or in some other manner?

THE COURT: How long would you like a stay? I can't remember if the rule provides a specific period.

MR. HENKIN: The rule does not provide a specific period. We will obviously be filing a notice of appeal, and we will ask for expedited treatment, expedited handling of the appeal. So we can get the notice of appeal filed as soon as there is an order from which we can appeal, and we will get that done expeditiously. If your Honor filed it today, I would promise you that we will get the notice of appeal filed no later than Monday, or Tuesday, actually, because Monday is a holiday, so to have the stay pending. We would also file a request for an expedited hearing by the Second Circuit. So we would ask for the stay to last for at least three months or [43] until the Second Circuit addresses it otherwise.

THE COURT: All right.

Do you want to respond, Mr. Connor?

MR. CONNOR: Your Honor, I have to confess I was not prepared to address the law and the standards for a stay pending appeal. What I can say is that this is a very important investigation to the SEC, and through respondents' failure to comply with the subpoenas, our investigation continues to be delayed. So we would reserve all our rights in opposing a motion for stay of your Honor's order. So I think our position is that the subpoena should be enforced in accordance with the proposed order that we filed along with our application. But we are happy to address, if plaintiffs want to file something, we are happy to research the issue and respond in kind.

THE COURT: OK. For now I will issue the order granting the application, and I will stay my decision for a period of 14 days pending the request by respondents to submit anything requesting more time. But for now I will automatically stay it for 14 days, and you can file either a letter motion or formal motion, letter motion is fine, requesting a longer stay and then the SEC can respond as soon as possible to that. What I would like is, whenever you file it, if the SEC could respond within four business days, then I can determine whether and how long to grant a longer stay.

[44] Does that work?

MR. HENKIN: That's perfect, your Honor. Thank you.

THE COURT: Anything else from Mr. Henkin today?

MR. HENKIN: No, your Honor.

THE COURT: From Mr. Connor?

MR. CONNOR: Nothing from us. Thank you, your Honor.

THE COURT: Thanks, everyone.

We are adjourned. Have a good day.

(Adjourned)

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 1:21-mc-00810____

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Applicant,

v.

TERRAFORM LABS PTE LTD. AND DO KWON

Respondents,

Hon. J. Paul Oetken
Hon. Barbara C. Moses

DECLARATION OF HAN CHANG JOON IN OPPOSITION TO THE U.S. SECURITIES AND EXCHANGE COMMISSION'S APPLICATION FOR AN ORDER REQUIRING COMPLIANCE WITH SUBPOENAS

I, Han Chang Joon, pursuant to 28 U.S.C. § 1746, do hereby declare as follows:

1. I am Chief Financial Officer of Terraform Labs PTE Ltd.

2. I submit this declaration in support of Respondents Terraform Labs PTE, Ltd. ("TFL") and Do Kwon's opposition to the Application by the United States Securities and Exchange Commission ("SEC" or "Commission")

for an Order Requiring Compliance with Subpoenas. The SEC's application seeks an order directing Mr. Kwon and TFL to comply with investigative subpoenas served personally upon Mr. Kwon for both himself and TFL in connection with the SEC's investigation entitled In the Matter of Mirror Protocol, File No. HO-14164 (the "Mirror Protocol Investigation"). This Declaration is based upon my personal involvement with and knowledge of TFL's business, including the technical underpinnings of the Mirror Protocol.

I. General Information about TFL

3. TFL is a private company located at 22 Cross Street #02-103 Singapore 048421, engaged in open source software and blockchain platform development and related activities.

4. Do Kwon, a citizen of South Korea, is now a resident of Singapore.

5. TFL is the developer of Terra, a decentralized and open-source public blockchain network, and the Mirror Protocol, a decentralized finance protocol built on Terra that is governed by its stakeholder community. Through the Mirror Protocol, users can choose to create (or "mint") Mirrored Assets ("mAssets") that "mirror" real-world assets of the users' and the community's choice. Through the operation of the autonomous smart contracts that create and enable them, these tokens mimic the price behavior of the assets upon which they are based.

6. To mint (or create) an mAsset, users deposit collateral to the Mirror Protocol. The protocol accepts TerraUSD and other decentralized algorithmic stablecoins pegged to fiat currencies and other mAssets as collateral. Which mAssets are minted is determined by governance proposals submitted to and

voted on by the Mirror Protocol community, participation in which is based on holding MIR tokens, the governance tokens for the Mirror Protocol.

7. In addition, the Mirror Protocol allows users to obtain MIR tokens granted from the community pool for services to the community (this entire process is also governed by autonomous smart contracts not controlled by TFL). Neither TFL nor Mr. Kwon control the Terra network or the Mirror Protocol. Various user interfaces (some web-based, some app-based) facilitate access to the Mirror Protocol; only one such interface was created by TFL, and TFL no longer hosts that interface. The trading of assets through the Mirror Protocol generates no revenue for TFL.

8. TFL maintained a web application that some users utilized to interact with the Mirror Protocol until November 14, 2021. That user interface has since been open sourced and is not hosted by TFL.

9. In April 2021, TFL entered into a "listing agreement" for MIR tokens (not mAssets) with a global digital asset trading platform incorporated in Delaware. TFL earns no money from that agreement, which facilitates trading of MIR tokens by third parties around the world.

10. TFL does not pay to advertise mAssets or MIR tokens in the U.S. or otherwise market them specifically to U.S. persons.

11. On September 20, 2021, Mr. Kwon attended "Mainnet 2021," a cryptocurrency summit. At the summit, Mr. Kwon participated in a panel titled "The Multi-Chain Future Is Here" about interoperability among the leading blockchains.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information and belief

December 17, 2021

/s/ Han Chang Joon
Han Chang Joon

APPENDIX D

15 U.S.C. § 78aa

§ 78aa. Jurisdiction of offenses and suits

(a) In general

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this chapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28. No costs shall be assessed for or against the

Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

(b) Extraterritorial jurisdiction

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving—

(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

* * *

17 C.F.R. § 201.102 (SEC Rule of Practice 102)

§ 201.102 Appearance and practice before the Commission.

A person shall not be represented before the Commission or a hearing officer except as stated in paragraphs (a) and (b) of this section or as otherwise permitted by the Commission or a hearing officer.

(a) *Representing oneself*. In any proceeding, an individual may appear on his or her own behalf.

(b) *Representing others*. In any proceeding, a person may be represented by an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any State (as defined in Section 3(a)(16) of the Exchange Act, 15 U.S.C. 78c(a)(16)); a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association; and an officer or employee of a state commission or of a department or political subdivision of a state may represent the state commission or the department or political subdivision of the state.

(c) *Former Commission employees*. Former employees of the Commission must comply with the restrictions on practice contained in the Commission's Conduct Regulation, Subpart M, 17 CFR 200.735.

(d) *Designation of address for service; notice of appearance; power of attorney; withdrawal* -

(1) *Representing oneself*. When an individual first makes any filing or otherwise appears on his or her own behalf before the Commission or a hearing officer in a proceeding as defined in § 201.101(a), he or she shall file with the Commission, or otherwise state on the record, and keep current, a mailing

address and email address at which any notice or other written communication required to be served upon him or her or furnished to him or her may be sent and a telephone number where he or she may be reached during business hours. Within ten days of April 12, 2021, any individual appearing on his or her own behalf before the Commission or hearing officer in a proceeding as defined in § 201.101(a) that is ongoing on that date shall electronically file a notice that complies with this paragraph. Notices required by this section shall be served in accordance with § 201.150(a). Individuals shall electronically file a § 201.102(d) compliant notice in their ongoing proceedings even if a prior § 201.102(d) paper filing included the participant's email address.

(2) *Representing others*. When a person first makes any filing or otherwise appears in a representative capacity before the Commission or a hearing officer in a proceeding as defined in § 201.101(a), that person shall file with the Commission, and keep current, a written notice stating the name of the proceeding; the representative's name, business address, email address, and telephone number; and the name, email address, and address of the person or persons represented. Within ten days of April 12, 2021, any person appearing in a representative capacity before the Commission or hearing officer in a proceeding as defined in § 201.101(a) that is ongoing on that date shall electronically file a notice that complies with paragraph (d)(2) of this section. Notices required by this section shall be served in accordance with § 201.150(a). Participants are directed to electronically file a § 201.102(d) compliant notice in their ongoing proceedings even if a prior § 201.102(d) paper filing included the participant's email address.

(3) *Power of attorney*. Any individual appearing or practicing before the Commission in a representative capacity may be required to file a power of attorney with the Commission showing his or her authority to act in such capacity.

(4) *Withdrawal*. Any person seeking to withdraw his or her appearance in a representative capacity shall file a notice of withdrawal with the Commission or the hearing officer. The notice shall state the name, mailing address, email address, and telephone number of the withdrawing representative; the name, email address, address, and telephone number of the person for whom the appearance was made; and the effective date of the withdrawal. If the person seeking to withdraw knows the name, mailing address, email address, and telephone number of the new representative, or knows that the person for whom the appearance was made intends to represent him- or herself, that information shall be included in the notice. The notice must be served on the parties in accordance with § 201.150. The notice shall be filed at least five days before the proposed effective date of the withdrawal.

* * *

17 C.F.R. § 201.150 (SEC Rule of Practice 150)

§ 201.150 Service of papers by parties.

(a) *When required*. In every proceeding as defined in § 201.101(a), each paper, including each notice of appearance, written motion, brief, or other written communication, shall be served upon each party in the proceeding in accordance with the provisions of this section; provided, however, that absent an order to the contrary, no service shall be required for motions which may be heard *ex parte*.

(b) *Upon a person represented by counsel*. Whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance pursuant to § 201.102, service shall be made pursuant to paragraph (c) of this section upon counsel, unless service upon the person represented is ordered by the Commission or the hearing officer.

(c) *How made*. Service shall be made electronically in the form and manner to be specified by the Office of the Secretary in the materials posted on the Commission's website. Persons serving each other shall have provided the Commission and the parties with notice of an email address.

(1) *Certification of inability to serve electronically*. If a person reasonably cannot serve electronically (due, for example, to a failure to have a functional email address or a lack of access to electronic transmission devices due to incarceration or otherwise), the person promptly shall file a certification under this paragraph that explains why the person reasonably cannot comply using any additional method of service listed in § 201.150(d). The filing also must indicate the expected duration of the person's reasonable inability to comply, such as whether the

certification is intended to apply to a solitary instance of service or all instances of service made during the proceeding. The certification is immediately effective. Upon filing the certification, it will be part of the record of the proceeding, and the person may serve paper documents by any additional method listed in § 201.150(d).

(2) [Reserved]

(d) *Additional methods of service*. If a person reasonably cannot serve electronically, or if service is of an investigative subpoena pursuant to 17 CFR 203.8, service may be made by delivering a copy of the filing. *Delivery* means:

(1) Personal service - handing a copy to the person required to be served; or leaving a copy at the person's office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein;

(2) Mailing the papers through the U.S. Postal Service by first class, registered, or certified mail or express mail delivery addressed to the person;

(3) Sending the papers through a commercial courier service or express delivery service; or

(4) Transmitting the papers by facsimile transmission to the person required to be served. The persons so serving each other shall have provided the Commission and the parties with notice of a facsimile machine telephone number.

(e) When service is complete. Electronic service is complete upon transmission, but is not effective if the sender learns that the transmission failed. Personal service, service by U.S. Postal Service express mail or service by a commercial courier or express delivery service is complete upon delivery. Service by mail is complete upon mailing. Service by facsimile is complete upon confirmation of transmission.