

WACHTELL, LIPTON, ROSEN & KATZ

51 WEST 52ND STREET
NEW YORK, N.Y. 10019

July 3, 2024

Via ECF

The Honorable Katherine Polk Failla, U.S.D.J.
United States District Court, Southern District of New York

Re: SEC v. Coinbase, Inc. and Coinbase Global, Inc., 23 Civ. 4738

Defendants Coinbase, Inc. and Coinbase Global, Inc. (together, “Coinbase”) respectfully submit this response to Plaintiff SEC’s June 28, 2024 letter seeking to quash Coinbase’s subpoena for the production of documents to Gary Gensler in his personal capacity. Ex. A (subpoena).

Background. Over the past 15 years, Mr. Gensler has been not only the most prominent regulator, but also the most vocal academic commentator, concerning the regulatory status of digital assets and exchanges. Because of his professional activities inside and outside of government since the launch of the digital asset industry, he has played a unique role in shaping how and whether the public understands the regulatory regime around digital assets.

From 2009 to 2014, Mr. Gensler served as Chair of the CFTC. He then became a professor at MIT and lectured extensively on blockchain technology, digital assets, and financial regulation. Ex. B.¹ In that role, he was at the center of discussions with market participants concerning the regulatory status of digital assets and testified before Congress multiple times on those issues.

In 2021, Mr. Gensler became Chair of the SEC, where he has continued his public commentary on the regulatory status of digital assets, sometimes in his official capacity as Chair and other times stating: “my views are my own, and I’m not speaking on behalf of the Commission or the SEC staff.” Ex. D at 1.

Against this backdrop, on June 14, 2024, Coinbase served Mr. Gensler with a subpoena for documents on core matters in this litigation. *See, e.g.*, Ex. A at Request Nos. 1 (named digital assets), 7 (communications with issuers of digital assets), 11 (registration of digital asset platforms), and 12 (DAO Report, Hinman Speech). The parties met and conferred three times concerning the subpoena; the SEC, while insisting it does not represent Mr. Gensler in his personal capacity, stated that he will produce no documents — citing relevance and burden for his noncompliance. The SEC will not, and cannot, even say whether Mr. Gensler has responsive communications in his personal capacity, as Mr. Gensler refuses to undertake any search to answer that threshold question.

The Discovery Sought from Mr. Gensler is Relevant. “Rule 45 subpoenas are governed by the relevancy and proportionality guidelines of Rule 26.” *Delta Air Lines, Inc. v. Lightstone Grp., LLC*, 2021 WL 2117247, at *2 (S.D.N.Y. May 24, 2021). Relevancy “is an extremely broad concept” with a “low threshold.” *Id.* (internal quotations and citations omitted). The communications Coinbase seeks to support its fair notice defense easily meet the relevancy bar.²

1. Mr. Gensler’s communications regarding the regulatory status of digital assets and exchanges during his tenure as Chair go to the heart of Coinbase’s fair notice defense. To determine

¹ *See, e.g.*, Ex. C (course syllabus covering “Blockchain and Use Case Economic[s]”; “Primary Markets [and] ICOs,” and “Secondary Markets and Crypto-Exchanges”).

² The SEC asserts that “the Court has held the SEC had provided fair notice.” Letter at 2. But Coinbase well pleaded the defense in its Answer, *see* ECF No. 22 at ¶¶ 6, 18, 76, 84, and p. 174, and the SEC chose not to move to strike it. Coinbase is entitled to discovery so the Court may consider that defense on a full record.

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whether this action comports with fair notice, the Court must consider whether a “person of ordinary intelligence” in Coinbase’s position had “a reasonable opportunity to know” what the securities laws and those charged with their enforcement prohibit with respect to secondary sales of digital assets — or, instead, whether “substantial uncertainty” deprived Coinbase of fair notice. *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996); *see also Copeland v. Vance*, 893 F.3d 101, 110 (2d Cir. 2018).

What Mr. Gensler was saying in his private communications about the regulatory status of digital assets, and what market participants were saying to him about these matters, is probative of the objective understanding of the public and market participants regarding what conduct the securities laws prohibit. As the *Ripple* court confirmed, a document or communication need not be public to provide insight into the public’s objective understanding as to what regulators require of them: agency personnel’s communications with market participants and interagency correspondence are all “relevant to the fair notice defense.” *SEC v. Ripple Labs, Inc.*, No. 20 Civ. 10832, ECF No. 112 at 51-52 (S.D.N.Y. Apr. 6, 2021), *clarified and aff’d*, ECF No. 163 at 6. The same is true of internal agency reports or position papers. *Ripple*, ECF No. 163 at 6. As the D.C. Circuit put it, “it is unlikely that regulations provided adequate notice when different divisions of the enforcing agency disagree about their meaning.” *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1332 (D.C. Cir. 1995).

Accordingly, the subpoena properly requests communications concerning the regulatory status of digital assets and exchanges from Mr. Gensler. And his personal email is an appropriate source of discovery. Mr. Gensler has purported to share his views and communicate with market participants at times expressly in his personal capacity: “my views are my own, and I’m not speaking on behalf of the Commission or the SEC staff.” Ex. D at 1. The SEC — abandoning the position it took in *Ripple* — now contends all such communications are in Mr. Gensler’s capacity as Chair. *See* SEC Letter at 1-2; *cf.* SEC Mot. to Quash Ltr., *SEC v. Ripple Labs, Inc.*, No. 20 Civ. 10832 (S.D.N.Y. June 24, 2021), ECF No. 255 at 3 (arguing similar statements showed that speech expressed “own views”). All the more reason, then, that Mr. Gensler’s personal email should properly be subject to discovery.

The SEC does not, and cannot, argue that during his tenure as Chair Mr. Gensler never communicated about these matters with market participants by personal email. They offer no evidence or even a representation from Mr. Gensler to that effect.³ Instead, they simply refuse to ask.

2. Mr. Gensler’s communications prior to joining the SEC are equally relevant, both as context for his statements as Chair and as a reflection of the public’s understanding of the regulatory status of digital assets during the period of time that the SEC chose to put at issue in this litigation.

First, the SEC has put in dispute the meaning of Mr. Gensler’s May 2021 testimony to Congress, in his third week as Chair, that “there is not a market regulator around [] crypto exchanges.” Ex. E at 11-12. “[O]nly Congress,” he testified, could “bring greater investor protection to the crypto exchanges.” *Id.* at 12. The SEC now contends that Mr. Gensler was referring only to trading in Bitcoin. *See* ECF Nos. 30 at 29, 69 at 4. But that statement was not made in a vacuum. It followed years of Mr. Gensler’s earlier speeches, lectures, other testimony to Congress, and communications with market participants. Those public and private statements all provide critical context for and inform

³ Citing 17 C.F.R. § 200.30-14(g), the SEC asserts that all documents and communications from Mr. Gensler’s tenure as Chair “belong to the SEC.” Letter at 2. But that provision applies only to “present or former *staff members*,” *id.* (emphasis added), not the Chair or Commissioners, *see id.* § 200.10 (distinguishing between the five Commissioners and “staff”). In any event, the SEC’s position that Mr. Gensler’s documents should be the subject of discovery from the agency warrants no credit: in response to Coinbase’s requests of the SEC, the SEC has refused to search *any* of Mr. Gensler’s files.

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market participants' understanding of Mr. Gensler's public proclamations as Chair — including the 2021 testimony to Congress at the center of Coinbase's fair notice defense. For example, before becoming Chair, then-Professor Gensler had stated that crypto exchanges were “not yet appropriately brought within public policy frameworks[,]” Ex. F, and he described the SEC's position on digital assets to be “a moving target . . . [and] a very unsettled area of public policy.” Ex. G at 15. These statements, and others like it in his private correspondence, provide necessary context for his statements as Chair (and the credibility of the SEC's interpretation of them). Here again, the SEC does not, and cannot, argue Mr. Gensler never conducted such responsive communications by personal email; it refuses even to ask.

Second, even before becoming SEC Chair, Mr. Gensler — as a former CFTC Chair, prominent academic, and uniquely influential voice on the regulation of digital assets — both shaped and reflected the public's understanding, or lack thereof, of the regulatory landscape in light of, among other things, the SEC's pronouncements on the regulation of digital assets and the attributes of specific tokens at issue in this litigation. *See, e.g.*, Ex. G (MIT class transcripts) at 112-13, 150, 197-98, 532, 538-39, 561-62, 569-70. Mr. Gensler's pre-Chair communications, including what he said to market participants and what they communicated to him, are thus probative of the public's understanding (or lack thereof) of the regulatory status of digital assets and exchanges. And again, the SEC does not argue that Mr. Gensler never communicated about these relevant matters through his personal email.

None of the SEC's authority supports Mr. Gensler's blanket refusal even to search for, much less produce, documents in his personal possession. Its leading precedent, a district court case from another Circuit, involved an inapposite facial challenge to a statute as vague in all applications. *Frese v. MacDonald*, 512 F. Supp. 3d 273, 278 (D.N.H. 2021). Two other cases the SEC cites — *Kik* and *LBRY* — concerned motions to quash subpoenas for *depositions*, *see* Exs. H (*Kik* Position Ltrs.) at 1-4, I (*LBRY* Decision) at 2, and thus involved a different legal standard from that at issue here. Finally, the SEC's citation to a one-sentence minute order in *Terraform* offers no help: Judge Rakoff denied a motion to compel on the ground of *privilege*, not relevance.

The SEC's Claim of Burden is Unfounded. The SEC's burden arguments likewise fail as, among other things, they have offered nothing to substantiate them. *Delta Air Lines*, 2021 WL 2117247, at *3 (granting motion to compel where recipient failed to specify “the nature or size” of the purported “undue burden”). The SEC refuses even to assess the purported burden of the subpoena, to engage with Mr. Gensler on its substance, or to work with Coinbase to address any purported burden.

Nor does the SEC offer a basis to speculate that enforcement of the subpoena will deter qualified candidates from joining the SEC. Mr. Gensler has had unique involvement in his personal capacity in matters relevant to this litigation — beginning long before he joined the SEC. It should hardly be surprising that he might be subject to discovery in an action brought by the SEC — especially where, as here, Mr. Gensler has been a key public voice on the regulatory status of the digital asset industry.

Mr. Gensler is not beyond the law and should be required to produce relevant documents. “Like any ordinary litigant, the Government must abide by the Federal Rules of Civil Procedure. It is not entitled to special consideration concerning the scope of discovery, especially when it voluntarily initiates an action.” *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009).

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Respectfully,

/s/ William Savitt

William Savitt

cc: All counsel of record

EXHIBIT A

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June 14, 2024

By Personal Service

Gary Gensler



Re: *Securities and Exchange Commission v. Coinbase, Inc. et al.*
Case No. 23 Civ. 4738 (KPF) (S.D.N.Y.)

To Mr. Gary Gensler:

Please find enclosed a subpoena calling for the production of certain documents and electronically stored information in connection with the above-referenced proceeding.

If you have any questions or wish to discuss this matter, please contact me or my colleagues Kevin Schwartz (KSchwartz@wlrk.com) and David Webb (DPTWebb@wlrk.com).

Sincerely,

William Savitt

WACHTELL, LIPTON, ROSEN & KATZ

Mr. Gary Gensler
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Enclosures:

U.S. District Court Subpoena to Produce Documents
Schedule A

UNITED STATES DISTRICT COURT

for the

Southern District of New York

Securities and Exchange Commission

Plaintiff

v.

Coinbase, Inc. and Coinbase Global, Inc.

Defendant

Civil Action No. 23 Civ. 4738 (KPF)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Mr. Gary Gensler (individual capacity), [Redacted]

(Name of person to whom this subpoena is directed)

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Schedule A, attached.

Table with 2 columns: Place (At a location mutually agreed upon by the parties or at Torri's Legal Services, 18403 Woodfield Rd., Suite A, Gaithersburg, MD 20879) and Date and Time (July 18, 2024 5:00 p.m. EST)

Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Table with 2 columns: Place and Date and Time

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: June 14, 2024

CLERK OF COURT

OR

[Handwritten Signature]

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Coinbase, Inc. and Coinbase Global, Inc., who issues or requests this subpoena, are:

William Savitt, Wachtell Lipton Rosen & Katz, 51 W. 52nd St., New York, NY 10019, WDSavitt@wlrk.com (212) 403-1000

Notice to the person who issues or requests this subpoena

A notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 23 Civ. 4738 (KPF)

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

SCHEDULE A

This subpoena requires the production of Documents described herein. The Requests are to be responded to in accordance with the following Definitions and Instructions.

DEFINITIONS

1. “Action” means the above-captioned civil action.
2. “Coinbase” means Coinbase, Inc., Coinbase Global, Inc., and any of their affiliates, subsidiaries, divisions, predecessors and successors, and any of their respective officers, directors, employees, agents, or attorneys.
3. “Coinbase Platform” means Coinbase’s digital asset spot exchange.
4. “Coinbase Prime” means the service described in the Coinbase Prime Product Guide. *See Coinbase Prime Product Guide*, Coinbase (2022), <https://tinyurl.com/mu89cran>.
5. “Coinbase Staking Services” means the services offered to individual Coinbase users through the “Coinbase Earn” program.
6. “Communication” or “communications” means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise), whether orally or in writing, or by any other means or medium, between or among two or more Persons or entities including but not limited to spoken words, inquiries, discussions, conversations, conferences, interviews, negotiations, agreements, reports, meetings, correspondence, letters, electronically transmitted messages (*e.g.*, email, text messages, instant messaging), postings on Internet bulletin boards, or other forms of written, verbal or electronic intercourse, however transmitted, ESI (as defined below), and documents, as defined herein.
7. “Complaint” means the Complaint filed in the Action on June 6, 2023.
8. “Defendants” means Coinbase, Inc. and Coinbase Global, Inc.

9. “Digital Asset” means any digital asset, including any cryptocurrency, virtual currency, or other blockchain-based coin or token.

10. “Digital Asset Platform” means any exchange or other platform on which Digital Assets are offered and sold.

11. “Document” or “documents” shall have the broadest meaning permitted under the Federal Rules of Civil Procedure and shall include, without limitation, the original and all non-identical copies of any handwritten, printed, typed, recorded, or other graphic material, or ESI (as defined below), of any kind and nature, including all drafts and transcriptions thereof, however produced or reproduced, and including but not limited to accounting materials, accounts, agreements, analyses, appointment books, books of account, calendars, catalogs, checks, communications (as defined herein), computer data, computer disks, contracts, correspondence, date books, diaries, diskettes, drawings, email messages, faxes, guidelines, instructions, inter-office communications, invoices, letters, logs, manuals, memoranda, minutes, notes, opinions, payments, plans, purchase confirmations, receipts, records, regulations, reports, sound recordings, spreadsheets, statements, studies, surveys, tickets, timesheets, trade records, vouchers, word processing materials (however stored or maintained), and all other means by which information is stored for retrieval in fixed form.

12. “ESI” means information that is stored in an electronic format, regardless of the media or whether it is in the original format in which it was created, and that is retrievable in perceivable form and includes but is not limited to metadata, system data, deleted data, and fragmented data.

13. “Government Entity” means any federal, state, or foreign agency or authority, or any current or former officer, employee, or agent thereof. For the avoidance of doubt, Government Entity includes, but is not limited to, the U.S. Securities and Exchange Commission (“SEC”), U.S.

Commodity Futures Trading Commission (“CFTC”), the U.S. Department of Justice, the U.S. Department of the Treasury, the Financial Crimes Enforcement Network (“FinCEN”), the U.S. Internal Revenue Service, and the New York Department of Financial Services (“DFS”).

14. “IEX Group, Inc.” or “Investors’ Exchange LLC” means IEX Group, Inc. or Investors’ Exchange LLC, as well as any parents, subsidiaries, affiliates, predecessors, successors, assigns, members, principals, partners, directors, boards, committees, subcommittees, officers, employees, agents, representatives, consultants, attorneys, or anyone else purporting to act on their behalf.

15. “Investigation” means the investigation(s) of individuals and entities that resulted in or contributed to the filing of the Complaint, including, but not limited to, the SEC investigation captioned *In the Matter of Coinbase, Inc.* (HO-14315).

16. “Named Digital Assets” means SOL, ADA, MATIC, FIL, SAND, AXS, CHZ, FLOW, ICP, NEAR, VGX, and DASH.

17. “Named Coinbase Services” means Coinbase Prime and Coinbase’s Staking Services.

18. “Person” means any natural person or individual, or any firm, partnership (general or limited), limited liability company, proprietorship, corporation, unincorporated association, trust, joint venture, or any other legal or Governmental Entity, organization, or body of any type whatsoever, as well as all agents, officers, directors, boards, committees, subcommittees, employees, consultants, representatives, or instrumentalities thereof.

19. “Prometheum, Inc.” means Prometheum, Inc., Prometheum Ember ATS Inc., Prometheum Capital LLC, as well as any parents, subsidiaries, affiliates, predecessors, successors, assigns, members, principals, partners, directors, boards, committees, subcommittees, officers,

employees, agents, representatives, consultants, attorneys, or anyone else purporting to act on their behalf.

20. “Securitize, Inc.,” “Securitize LLC,” or “Securitize Markets, LLC” means Securitize, Inc., Securitize LLC, or Securitize Markets, LLC, as well as any parents, subsidiaries, affiliates, predecessors, successors, assigns, members, principals, partners, directors, boards, committees, subcommittees, officers, employees, agents, representatives, consultants, attorneys, or anyone else purporting to act on their behalf.

21. “SEC” means the U.S. Securities and Exchange Commission, including any Divisions, Commissioners, Commission Staff, employees, subsidiaries, or individuals or entities acting on their behalf.

22. “Staking” means the proof of stake consensus mechanism used by certain blockchain protocols to validate, verify, and secure transactions on a blockchain.

23. “Staking as a Service” means services offered to individuals to facilitate the staking of their digital assets to a blockchain with a proof-of-stake consensus mechanism.

24. The terms “concerning,” “regarding,” “with regard to,” “relating to,” and “referring to” shall be read and applied as interchangeable and shall be construed in the broadest sense permitted to mean discussing, supporting, describing, concerning, regarding, with regard to, relating to, referring to, pertaining to, containing, analyzing, evaluating, studying, recording, memorializing, reporting on, commenting on, reviewed in connection or in conjunction with, evidencing, setting forth, contradicting, refuting, considering, recommending, or constituting, in whole or in part.

25. The language of the Requests shall be read liberally, so as to be inclusive rather than exclusive, and in particular: (i) the use of the singular shall be deemed to include the plural

and vice versa, and the use of one gender shall include the other; (ii) the terms “and” as well as “or” shall be construed disjunctively or conjunctively as necessary to bring within the scope of a Request all documents that might otherwise be construed as outside its scope; (iii) the present tense includes the past and future tenses, and vice versa; (iv) the terms “any” or “all” shall mean “any and all,” “each and every,” and “anyone and everyone”; and (v) “include,” “includes,” and “including” shall mean “including but not limited to.”

INSTRUCTIONS

Defendants request that you produce, wherever located, all documents described below that are in your possession, custody, or control, wherever located, regardless of whether they are possessed directly by you or any of your agents, representatives, employees, accountants, attorneys, or other persons acting or purporting to act on Your behalf.

1. Unless otherwise specified, the time period for these Requests is January 1, 2017 through the present.

2. Responsive Documents shall be produced in image format, with searchable text load files that are compatible with standard litigation support software, including Relativity, Concordance, and IPRO. The images shall be black and white, single-page, 300 DPI, Group IV .tiff images. Images for documents created with office or personal productivity software (e.g., wordprocessing documents, spreadsheets, presentations, databases, charts, and graphs) shall include tracked changes, comments, hidden rows, columns or worksheets, speakers notes, and any other similar content that can be made visible within the application. The load file shall include for each Document, the metadata fields listed below. For any Documents that have been globally de-duplicated, the custodian field shall reflect all custodians who had a copy of the Document during processing and before de-duplication. For each individual Document based on an electronic

file, the load file shall, unless such Document contains redactions, contain the path to the corresponding text that is extracted from the electronic file. Documents produced in redacted form shall contain text generated by optical character recognition (“OCR”) of the redacted image(s). In addition to the foregoing, for all email, the load file shall also include, to the extent practicable, header information including: (1) the individual(s) to whom the communication was directed (“To”); (2) the author of the e-mail communication (“From”); (3) all individuals who were copied (“cc”) and/or blind copied (“bcc”) on the communication; (4) the subject line of the communication (“Re” or “Subject”); and (5) the date and time sent. For each Document, the load file shall also contain: (1) the beginning Bates number (referring to the first page of the Document); (2) the ending Bates number (referring to the last page of the Document); and in the case of Documents with attachments; (3) the beginning attachment range number(s); and (4) the ending attachment range number(s), where the “attachment range” records the relationship of Documents to their attachments. The attachment range should be recorded from the first page of the first Document in the attachment range, to the last page of the last Document in the attachment range. In addition, all spreadsheet, presentation, audio, and audiovisual Documents that do not require redaction shall be produced in native format with a single-page placeholder (Group IV .tiff image) indicating that the file is being produced in native format. The right to demand production of any other responsive Documents in their native format (including all metadata) is expressly reserved.

3. A Request for a document shall be deemed to include a request for all transmittal sheets, cover letters, exhibits, enclosures, attachments, or other matters affixed to the document, in addition to the document itself.

4. Each Request seeks production of each document in its entirety without abbreviations, redaction, or expurgation.

5. Responsive documents and communications are to be designated clearly so as to reflect their owner and/or custodian. Any document not produced in electronic format is to be produced in its original file folder, with all labels or similar markings intact and included, and with the name of the Person from whose file it was produced.

6. Electronically stored information, or “ESI,” shall be produced in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable. Specifically, where the documents responsive to a Request are stored electronically, any responsive e-mails, Word documents, and other unstructured data are to be produced in TIFF plus metadata plus extracted text format. Any responsive Excel charts, PowerPoints, databases, and other structured data are to be produced in native format. The right to demand production of any other responsive documents in their native format (including all available metadata) is expressly reserved.

7. Each Request herein requires that You produce files from all reasonably accessible sources of information in or on which You store or maintain potentially responsive documents.

8. Draft or non-identical copies are to be considered separate documents for purposes of these Requests. Any and all drafts and copies of each document that are responsive to any Request for documents shall be produced, as shall all copies of such documents that are not identical in any respect, including, but not limited to, copies containing handwritten notes, markings, stamps, or interlineations, whether or not the original of such document is within Your possession, custody, or control. The author(s) of all handwritten notes should be identified.

9. You shall construe each Request independently and not with reference to any other Request for purposes of limitation.

10. The use of the term “the” shall not be construed as limiting the scope of any Request.

11. If it is not possible to produce any document called for by a Request, or if any part of a Request is objected to, the reasons for the failure to produce the documents or the objection should be stated specifically as to all grounds. If there are no documents or communications responsive to any particular Request or subpart thereof, You shall state so in writing.

12. If You claim any form of privilege or protection or other reason as a ground for withholding from production requested documents, You shall furnish a privilege log in compliance with Federal Rule of Civil Procedure 45(e)(2) and any other parameters agreed between You and Defendants.

13. If You contend that any Request is overly broad and/or unduly burdensome, identify all aspects of the Request that are overly broad or unduly burdensome and produce the documents and communications that are not subject to this contention.

14. These Requests are continuing in nature, and any document obtained or located after the production pursuant hereto, which would have been produced had it been available or its existence known at the time, is to be supplied promptly by way of a supplemental production.

15. Defendants serve these Requests without prejudice to their right to serve additional Requests for the production of documents.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1.

All Documents and Communications concerning Coinbase, the Coinbase Platform, the Named Digital Assets, the Named Coinbase Services, or the subject matter of the Investigation or the Action, including all Communications with any Person or entity not party to this Action concerning the foregoing.

REQUEST NO. 2.

Documents and/or Communications sufficient to establish when you first learned of the Coinbase Platform, the Named Digital Assets, and the Named Coinbase Services, and when you first learned that each of the Named Digital Assets had been listed or was planned to be listed on the Coinbase Platform, without limitation as to the applicable time period.

REQUEST NO. 3.

All Communications with, and Documents concerning Communications with, third parties (including any Government Entity) concerning the application of federal laws, regulations, or rules (including, but not limited to, the Securities Act of 1933 and the Securities Exchange Act of 1934) to Digital Assets, Digital Asset Platforms, or Staking as a Service.

REQUEST NO. 4.

All Communications and Documents concerning any investigation by a Government Entity concerning Digital Assets, Digital Asset Platforms, or Staking as a Service.

REQUEST NO. 5.

All Communications with, and Documents concerning Communications with, the Financial Industry Regulatory Authority (FINRA) or any Government Entity, including the SEC, or the CFTC, relating to the allegations in the Complaint, the Investigation, Digital Assets, Digital Asset Platforms, or Staking as a Service.

REQUEST NO. 6.

All Communications with, and Documents concerning Communications with, journalists or other employees or affiliates of news or media organizations concerning Coinbase, this Action, the Investigation, Digital Assets, Digital Asset Platforms, or Staking as a Service.

REQUEST NO. 7.

All Communications with, and Documents concerning Communications with, any alleged developers of, alleged issuers of, or Persons otherwise affiliated with any Digital Assets or their associated blockchain networks, including any Documents or information provided to you by any alleged developers of, alleged issuers of, or Persons otherwise affiliated with any Digital Assets, their affiliated blockchain networks, or their counsel.

REQUEST NO. 8.

All Documents and Communications concerning any discussions, instructions, advice, inquiries or other Communications between you and any Person concerning that Person's actual, planned, or potential business or other relationship with Coinbase or with a developer of or Person otherwise affiliated with Digital Assets, Digital Asset Platforms, or Staking as a Service.

REQUEST NO. 9.

All Communications with, and Documents concerning Communications with, Prometheus, Inc., Martin Kaplan, Aaron Kaplan, or Benjamin Kaplan; Securitize, Inc.; Securitize LLC; or Securitize Markets, LLC.

REQUEST NO. 10.

All Communications with, and Documents concerning Communications with, IEX Group, Inc. or Investors' Exchange LLC concerning Coinbase, Digital Assets, or Digital Asset Platforms.

REQUEST NO. 11.

All Communications with, and Documents concerning Communications with, any Person

concerning (i) any actual, planned, or potential registration by that Person as an exchange, broker, dealer, clearing agency, alternative trading system, or custodian that would or could facilitate the offer, sale, or custody of Digital Assets or any product or service relating to Digital Assets, including but not limited to the means or viability of such registration; or (ii) the registration with the SEC of any exchange-traded product that holds or references Digital Assets.

REQUEST NO. 12.

All Documents and Communications concerning (i) *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO*, Exchange Act Release No. 81207 (July 25, 2017), (ii) the June 14, 2018 speech by former SEC Director of the Division of Corporation Finance William Hinman titled “Digital Asset Transactions: When Howey Met Gary (Plastic)” (“Hinman Speech”), or (iii) FinHub’s April 2019 “Framework for ‘Investment Contract’ Analysis of Digital Assets.”

REQUEST NO. 13.

All Documents and Communications concerning any public statements by FINRA or any Government Agency, including but not limited to the SEC and CFTC, concerning Digital Assets, Digital Asset Platforms, Staking, or Staking as a Service.

REQUEST NO. 14.

All Documents and Communications concerning whether Digital Assets or transactions in Digital Assets are “investment contract[s]” within the meaning of the Securities Act of 1933 or the Securities Exchange Act of 1934, including Documents and Communications concerning the application of *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), to Digital Assets or transactions in Digital Assets.

REQUEST NO. 15.

All Documents and Communications concerning (i) the role of a Digital Asset’s

ecosystem in the application of the federal securities laws, including but not limited to determining whether transactions in an asset constitute transactions in investment contracts or other securities or (ii) the ecosystems of the Named Digital Assets, including, but not limited to, the components of such ecosystems, the identities of the alleged developers, issuers, and promoters affiliated with such ecosystems.

REQUEST NO. 16.

All Documents and Communications relating to the SEC’s assertion during Oral Argument that when someone “purchases tokens like [the Named Digital Assets], like these 13 examples . . . they are investing into the network behind it”—that is, “the ecosystem.” *See* Jan. 17, 2024 Hr’g Tr. at 21:20-22:5; *see also id.* at 57:17-21.

REQUEST NO. 17.

All Documents and Communications relating to Bitcoin’s ecosystem or lack thereof.

REQUEST NO. 18.

All Documents and Communications concerning the size, value, growth, or importance of the Digital Asset industry or Digital Asset Platforms.

REQUEST NO. 19.

All Documents and Communications concerning potential or proposed legislation relating to the regulatory and/or enforcement authorities of the SEC and/or another Government Entity with respect to Digital Assets or Digital Asset Platforms.

REQUEST NO. 20.

All Documents and Communications concerning any meeting or call involving one or more Commissioner concerning Coinbase, the Coinbase Platform or any of the Named Digital Assets or Named Coinbase Services, including a list of the attendees of any such meeting or call.

REQUEST NO. 21.

All Documents and Communications concerning the following litigation matters:

- a. *SEC v. Kik Interactive Inc.*, Case No. 19-cv-5244 (S.D.N.Y.);
- b. *SEC v. Telegram Grp. Inc. and TON Issuer Inc.*, Case No. 19-cv-9439 (S.D.N.Y.);
- c. *SEC v. Ripple Labs, Inc. et al.*, Case No. 20-cv-10832 (S.D.N.Y.);
- d. *SEC v. LBRY, Inc.*, Case No. 21-cv-260 (D.N.H.);
- e. *SEC v. Wahi et al.*, Case No. 2:22-cv-1009 (W.D. Wash.);
- f. *SEC v. Binance Holdings Ltd. et al.*, Case No. 23-cv-1599 (D.D.C.);
- g. *SEC v. Bittrex, Inc. et al.*, Case No. 23-cv-580 (W.D. Wash.);
- h. *SEC v. Genesis Global Capital, LLC and Gemini Tr. Co., LLC*, Case No. 23-cv-287 (S.D.N.Y.);
- i. *SEC v. Terraform Labs PTE Ltd. and Kwon*, Case No. 23-cv-1346 (S.D.N.Y.);
- j. *SEC v. Payward, Inc. and Payward Ventures, Inc.*, Case No. 23-cv-6003 (N.D. Cal.); and
- k. *SEC v. Payward Ventures, Inc. (D/B/A Kraken) and Payward Trading, Ltd. (D/B/A Kraken)*, Case No. 23-cv-588 (N.D. Cal.).

REQUEST NO. 22.

All Documents and Communications concerning Coinbase's direct public offering or registration statement on Form S-1 (including any drafts of such registration statement), including but not limited to Documents and Communications concerning the application or potential application of the federal securities laws to Coinbase's business or operations.

REQUEST NO. 23.

All Documents and Communications concerning your public remarks about Digital Assets, Digital Asset Platforms, and Staking as a Service, without limitation as to the applicable time period, including but not limited to:

- a. Your May 6, 2021 testimony before the United States House Committee on Financial Services;
- b. Your May 7, 2021 appearance on CNBC;
- c. Your May 26, 2021 testimony before the United States House Subcommittee on Financial Services and General Government;
- d. Your August 3, 2021 remarks before the Aspen Security Forum;
- e. Your September 21, 2021 interview with the *Washington Post*;
- f. Your October 5, 2021 testimony before the United States House Committee on Financial Services;
- g. Your August 19, 2022 opinion piece published by the *Wall Street Journal*, titled “The SEC Treats Crypto Like the Rest of the Capital Markets”;
- h. Your December 7, 2022 interview with Yahoo! Finance;
- i. Your interview with Ankush Khardori, as reported in Intelligencer’s February 23, 2023 article, “Can Gary Gensler Survive Crypto Winter? D.C.’s Top Financial Cop on Bankman-Fried Blowback”;
- j. Your interview with CNBC’s *Squawk Box*, as reported in CNBC’s February 10, 2023 article, “SEC’s Gary Gensler on Kraken Staking Settlement: Other Crypto Platforms Should take Note of This”;
- k. Your March 29, 2023 testimony before the United States House Appropriations Subcommittee on Financial Services and General Government;
- l. Your statements regarding Digital Assets during “Office Hours with Gary Gensler” including but not limited to the episodes from August 16, 2021, July 28, 2022, August 4, 2022, October 3, 2022, February 9, 2023, and April 27, 2023;
- m. Your April 18, 2023 testimony before the United States House Committee on Financial Services;
- n. Your interview with CNBC’s *Squawk Box*, as reported in CNBC’s June 6, 2023 article, “SEC Chair Gensler doubts the need for more digital currency”;
- o. Your interview with the *Wall Street Journal*, as reported in the June 8, 2023 article, “SEC’s Gary Gensler Had Crypto in His Sights for Years. Now He’s Suing Binance and Coinbase.”;
- p. Your June 8, 2023 remarks before the Piper Sandler Global Exchange & Fintech Conference;

- q. Your interview with the *Wall Street Journal*, as broadcast in the June 14, 2023 podcast episode, “SEC Chair Gary Gensler on His Crypto Crackdown”;
- r. Your September 12, 2023 testimony before the United States Senate Committee on Banking, Housing, and Urban Affairs;
- s. Your September 27, 2023 testimony before the United States House Committee on Financial Services; and
- t. Your statements concerning Digital Assets or Digital Asset Platforms made prior to your tenure as SEC Chair.

REQUEST NO. 24.

All Documents and Communications concerning the Petition for Rulemaking submitted by Coinbase on July 21, 2022, any comment letters submitted by Coinbase concerning its Petition for Rulemaking, or the Commission’s Order denying Coinbase’s Petition for Rulemaking issued on December 15, 2023, including any Communications with any third parties (including any Government Entity) concerning Coinbase’s Petition for Rulemaking or the Commission’s Order.

REQUEST NO. 25.

All Documents and Communications concerning the comment letter sent to Coinbase Global, Inc. by the Commission dated September 22, 2023 regarding Coinbase Global, Inc.’s Form 10-K for the year ended December 31, 2022, Form 10-Q for the period ended June 30, 2023, Form 8-K filed January 10, 2023, and Form 8-K filed May 4, 2023 (File No. 001-40289) and any subsequent correspondence relating thereto.

REQUEST NO. 26.

All Documents and Communications concerning your purchase, use, ownership, or trading of Digital Assets or use of Digital Asset Platforms.

REQUEST NO. 27.

All Documents and Communications concerning your courses “FinTech: Shaping the Financial World” and “Blockchain and Money,” including but not limited to syllabi, speaking

notes, presentations, distributed materials, assignments, and any classroom recordings.

REQUEST NO. 28.

All Documents and Communications concerning your work with the Massachusetts Institute of Technology's Digital Currency Initiative, including any speeches, publications, or reports concerning Digital Assets, Digital Asset Platforms, Staking, or Staking as a Service.

Dated: June 14, 2024
New York, New York

WACHTELL, LIPTON, ROSEN & KATZ

/s/ William Savitt

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*Attorneys for Coinbase, Inc. and Coinbase Global,
Inc.*

EXHIBIT B

by **MIT Sloan Office of Communications** | Jan 16, 2018

Cambridge, Mass., January 16, 2018—MIT Sloan School of Management and the MIT Media Lab today announce the joint appointment of Gary Gensler as Senior Advisor to the Director of the Media Lab and Senior Lecturer, MIT Sloan School of Management.

Gensler, former Chair of the Commodity Futures Trading Commission (CFTC), will teach graduate classes at MIT Sloan on public policy and the private sector, as well as on the functioning of global markets. He will also work with Media Lab Director Joi Ito, including as senior advisor to the Lab's Digital Currency Initiative and the Ethics and Governance of AI (Artificial Intelligence) project.

At MIT Sloan, Gensler will join the faculty of the Global Economics and Management Group as a Senior Lecturer, teaching a new course, "Public Policy and the Private Sector", along with Professor Simon Johnson.

At the Media Lab, Gensler will work on an array of projects, including blockchain technology, the future of accounting, the application of cryptography and machine learning to markets and accounting, and viral communications.

Gensler comes to MIT after a distinguished career in both the public and private sectors. As Chairman of the CFTC, he led the Obama Administration's post-crisis reform of the \$400 trillion over-the-counter derivatives, or swaps, market. Previously, he was Senior Advisor to U.S. Senator Paul Sarbanes, helping to draft the Sarbanes-Oxley Act; served as Assistant Secretary and then Undersecretary of the Treasury for Domestic Finance during the Clinton Administration; and co-authored *The Great Mutual Fund Trap*, a book on personal finance. Gensler also has worked on various political campaigns, most recently as chief financial officer for Hillary Clinton's 2016 presidential campaign. He currently is Chairman of the Maryland Financial Consumer Protection Commission.

Prior to his public service, Gensler worked at Goldman Sachs for 18 years, where he became a partner in the Mergers and Acquisition department, headed up fixed income and currency trading in Asia, and lastly was co-head of Finance worldwide. Gensler earned his undergraduate degree in economics summa cum laude

from the Wharton School at the University of Pennsylvania, where he also received an M.B.A. He is a recipient of the 2014 Tamar Frankel Fiduciary Prize.

“I am honored to be joining MIT, whose faculty, staff and students have long been at the cutting edge of research and technology,” said Gary Gensler upon his appointment. “I’m very excited to collaborate with MIT’s distinguished team of scholars trying to create a better future through blockchain technology and the ethics & governance of artificial intelligence.”

Joi Ito, Director and Professor of the Practice in Media Arts and Sciences at MIT’s Media Lab, said Gensler is a thought leader with regard to financial regulation and the organization of markets. “Gary will be a tremendous asset to our research teams, particularly as we explore the emerging standards that will help support the development of more decentralized solutions to the exchange of value, like cryptocurrencies,” Mr. Ito said.

Ezra Zuckerman Sivan, Deputy Dean and Alvin J. Siteman (1948) Professor of Entrepreneurship and Strategy at MIT’s Sloan School of Management adds: “MIT Sloan has a long tradition of outstanding courses related to global economic policy issues. Gary will strengthen our classroom offerings and the mentoring we provide to students along multiple dimensions. We are delighted to have him join our faculty.”

About the MIT Sloan School of Management

The MIT Sloan School of Management is where smart, independent leaders come together to solve problems, create new organizations, and improve the world.

About the MIT Media Lab

The MIT Media Lab transcends known boundaries and disciplines by actively promoting a unique, interdisciplinary culture that encourages the unconventional mixing and matching of seemingly disparate research areas.

FIND US

MIT Sloan School of Management

100 Main Street

Cambridge, MA 02142

617-253-1000

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EXHIBIT C



15.S12 | Fall 2018 | Graduate

Blockchain And Money

[Menu](#)[More Info](#)

Calendar

SESSION #	TOPIC	KEY DATES
1	Introduction	
Act 1: Blockchain and Money Fundamentals		
2	Money, Ledgers, and Bitcoin	
3	Blockchain Basics and Cryptography	
4	Blockchain Basics and Consensus	
5	Blockchain Basics and Transactions, UTXO, and Script Code	
	Smart Contracts and DApps	
6	Guest Lecturer: Prof. Lawrence Lessig , Harvard Law School	
7	Technical Challenges	
8	Public Policy	
9	Permissioned Systems	
10	Financial System Challenges and Opportunities	First business write-up due by this class
Act 2: Blockchain and Use Case Economic		
	Blockchain Economics	
11	Guest Lecturer: Rob Gensler, Investor and Financial Analyst	
12	Assessing Use Cases	
Act 3: Financial Sector Use Cases		
	Payments, Part 1	
13	Guest Lecturer: Alin Dragos , MIT Digital Currency Initiative	
14	Payments, Part 2	
	Central Banks and Commercial Banking, Part 1	
15	Guest Lecturer: Robleh Ali , MIT Digital Currency Initiative	
16	Central Banks and Commercial Banking, Part 2	
17	Secondary Markets and Crypto-Exchanges	
18	A New Approach to Crypto-Exchanges and Payments	
19	Primary Markets, ICOs, and Venture Capital, Part 1	
20	Primary Markets, ICOs, and Venture Capital, Part 2	
21	Post Trade Clearing, Settlement, and Processing	
22	Trade Finance and Supply Chain	
23	Digital ID	Second business write-up due by this class
24	Conclusion	Group Research Paper due by end of the semester



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EXHIBIT D



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SPEECH

Remarks Before the Aspen Security Forum

Chair Gary Gensler (</about/sec-commissioners/gary-gensler>)

Washington D.C. | Aug. 3, 2021

Thank you for that kind introduction. It's good to join the Aspen Security Forum.

As is customary, I'd like to note that my views are my own, and I'm not speaking on behalf of the Commission or the SEC staff.

Some might wonder: What does the SEC have to do with crypto?

Further, why did an organization like the Aspen Security Forum ask me to speak about crypto's intersection with national security?

Let me start at the beginning.

It was Halloween night 2008, in the middle of the financial crisis, when Satoshi Nakamoto published an eight-page paper^[1] on a cypherpunk mailing list that'd been run by cryptographers since 1992.^[2]

Nakamoto — we still don't know who she, he, or they were — wrote, "I've been working on a new electronic cash system that's fully peer-to-peer, with no trusted third party."^[3]

Nakamoto had solved two riddles that had dogged these cryptographers and other technology experts for a couple of decades: first, how to move something of value on the internet without a central intermediary; and relatedly, how to prevent the “double-spending” of that valuable digital token.

Subsequently, his innovation spurred the development of crypto assets and the underlying blockchain technology.

Based upon Nakamoto’s innovation, about a dozen years later, the crypto asset class has ballooned. As of Monday, this asset class purportedly is worth about \$1.6 trillion, with 77 tokens worth at least \$1 billion each and 1,600 with at least a \$1 million market capitalization.[4]

Before starting at the SEC, I had the honor of researching, writing, and teaching about the intersection of finance and technology at the Massachusetts Institute of Technology. This included courses on crypto finance, blockchain technology, and money.

In that work, I came to believe that, though there was a lot of hype masquerading as reality in the crypto field, Nakamoto’s innovation is real. Further, it has been and could continue to be a catalyst for change in the fields of finance and money. [5]

At its core, Nakamoto was trying to create a private form of money with no central intermediary, such as a central bank or commercial banks.

We already live in an age of digital public monies — the dollar, euro, sterling, yen, yuan. If that wasn’t obvious before the pandemic, it has become eminently clear over the last year that we increasingly transact online.

Such public fiat monies fulfill the three functions of money: a store of value, unit of account, and medium of exchange.

No single crypto asset, though, broadly fulfills all the functions of money.

Primarily, crypto assets provide digital, scarce vehicles for speculative investment. Thus, in that sense, one can say they are highly speculative stores of value.

These assets haven’t been used much as a unit of account.

We also haven't seen crypto used much as a medium of exchange. To the extent that it is used as such, it's often to skirt our laws with respect to anti-money laundering, sanctions, and tax collection. It also can enable extortion via ransomware, as we recently saw with Colonial Pipeline.

With the advent of the internet age and the movement from physical money to digital money several decades ago, nations around the globe layered various public policy goals over our digital public money system.

As a policy matter, I'm technology-neutral.

As a personal matter, I wouldn't have gone to MIT if I weren't interested in how technology can expand access to finance and contribute to economic growth.

But I am anything but public policy-neutral. As new technologies come along, we need to be sure we're achieving our core public policy goals.

In finance, that's about protecting investors and consumers, guarding against illicit activity, and ensuring financial stability.

So how does the SEC fit into all this?

The SEC has a three-part mission — to protect investors, facilitate capital formation, and maintain fair, orderly, and efficient markets in between them. We focus on financial stability as well. But at our core, we're about investor protection.

If you want to invest in a digital, scarce, speculative store of value, that's fine. Good-faith actors have been speculating on the value of gold and silver for thousands of years.

Right now, we just don't have enough investor protection in crypto. Frankly, at this time, it's more like the Wild West.

This asset class is rife with fraud, scams, and abuse in certain applications. There's a great deal of hype and spin about how crypto assets work. In many cases, investors aren't able to get rigorous, balanced, and complete information.

If we don't address these issues, I worry a lot of people will be hurt.

First, many of these tokens are offered and sold as securities.

There's actually a lot of clarity on that front. In the 1930s, Congress established the definition of a security, which included about 20 items, like stock, bonds, and notes. One of the items is an investment contract.

The following decade, the Supreme Court took up the definition of an investment contract. This case said an investment contract exists when "a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party."^[6] The Supreme Court has repeatedly reaffirmed this Howey Test.

Further, this is but one of many ways we determine whether tokens must comply with the federal securities laws.

I think former SEC Chairman Jay Clayton said it well when he testified in 2018: "To the extent that digital assets like [initial coin offerings, or ICOs] are securities — and I believe every ICO I have seen is a security — we have jurisdiction, and our federal securities laws apply."^[7]

I find myself agreeing with Chairman Clayton. You see, generally, folks buying these tokens are anticipating profits, and there's a small group of entrepreneurs and technologists standing up and nurturing the projects. I believe we have a crypto market now where many tokens may be unregistered securities, without required disclosures or market oversight.

This leaves prices open to manipulation. This leaves investors vulnerable.

Over the years, the SEC has brought dozens of actions in this area,^[8] prioritizing token-related cases involving fraud or other significant harm to investors. We haven't yet lost a case.

Moreover, there are initiatives by a number of platforms to offer crypto tokens or other products that are priced off of the value of securities and operate like derivatives.

Make no mistake: It doesn't matter whether it's a stock token, a stable value token backed by securities, or any other virtual product that provides synthetic exposure to underlying securities. These products are subject to the securities laws and must work within our securities regime.

I've urged staff to continue to protect investors in the case of unregistered sales of securities.

Next, I'd like to discuss crypto trading platforms, lending platforms, and other "decentralized finance" (DeFi) platforms.

The world of crypto finance now has platforms where people can trade tokens and other venues where people can lend tokens. I believe these platforms not only can implicate the securities laws; some platforms also can implicate the commodities laws and the banking laws.

A typical trading platform has more than 50 tokens on it. In fact, many have well in excess of 100 tokens. While each token's legal status depends on its own facts and circumstances, the probability is quite remote that, with 50 or 100 tokens, any given platform has zero securities.

Moreover, unlike other trading markets, where investors go through an intermediary like the New York Stock Exchange, people can trade on crypto trading platforms without a broker – 24 hours a day, 7 days a week, from around the globe.

Further, while many overseas platforms state they don't allow U.S. investors, there are allegations that some unregulated foreign exchanges facilitate trading by U.S. traders who are using virtual private networks, or VPNs.^[9]

The American public is buying, selling, and lending crypto on these trading, lending, and DeFi platforms, and there are significant gaps in investor protection.

Make no mistake: To the extent that there are securities on these trading platforms, under our laws they have to register with the Commission unless they meet an exemption.

Make no mistake: If a lending platform is offering securities, it also falls into SEC jurisdiction.

Next, I'd like to turn to stable value coins, which are crypto tokens pegged or linked to the value of fiat currencies.

Many of you have heard about Facebook's efforts to stand up a stablecoin called Diem (formerly known as Libra).

Due to the global reach of Facebook's platform, this has gotten a lot of attention from central bankers and regulators. This is not only due to general policies and concerns with crypto, but also due to Diem's potential impact on monetary policy, banking policy, and financial stability.

Maybe less well known to this audience, though, is that we already have an existing stablecoin market worth \$113 billion,^[10] including four large stablecoins — some of which have been around for seven years.

These stablecoins are embedded in crypto trading and lending platforms.

How do you trade crypto-to-crypto? Usually, somebody uses stablecoins.

In July, nearly three-quarters of trading on all crypto trading platforms occurred between a stablecoin and some other token.^[11]

Thus, the use of stablecoins on these platforms may facilitate those seeking to sidestep a host of public policy goals connected to our traditional banking and financial system: anti-money laundering, tax compliance, sanctions, and the like. This affects our national security, too.

Further, these stablecoins also may be securities and investment companies. To the extent they are, we will apply the full investor protections of the Investment Company Act and the other federal securities laws to these products.

I look forward to working with my colleagues on the President's Working Group on Financial Markets on these matters.^[12]

Next, I want to turn to investment vehicles providing exposure to crypto assets. Such investment vehicles already exist, with the largest among them having been around for eight years and worth more than \$20 billion.^[13] Also, there are a number of mutual funds that invest in Bitcoin futures on the Chicago Mercantile Exchange (CME).

I anticipate that there will be filings with regard to exchange-traded funds (ETFs) under the Investment Company Act ('40 Act). When combined with the other federal securities laws, the '40 Act provides significant investor protections.

Given these important protections, I look forward to the staff's review of such filings, particularly if those are limited to these CME-traded Bitcoin futures.

The final policy area has to do with custody of crypto assets. The SEC is seeking comment on crypto custody arrangements by broker-dealers and relating to investment advisers.^[14] Custody protections are key to preventing theft of investor assets, and we will be looking to maximize regulatory protections in this area.

Before I conclude, I'd like to note we have taken and will continue to take our authorities as far as they go.

Certain rules related to crypto assets are well-settled. The test to determine whether a crypto asset is a security is clear.

There are some gaps in this space, though: We need additional Congressional authorities to prevent transactions, products, and platforms from falling between regulatory cracks. We also need more resources to protect investors in this growing and volatile sector.

We stand ready to work closely with Congress, the Administration, our fellow regulators, and our partners around the world to close some of these gaps.

In my view, the legislative priority should center on crypto trading, lending, and DeFi platforms. Regulators would benefit from additional plenary authority to write rules for and attach guardrails to crypto trading and lending.

Right now, large parts of the field of crypto are sitting astride of — not operating within — regulatory frameworks that protect investors and consumers, guard against illicit activity, ensure for financial stability, and yes, protect national security.

Standing astride isn't a sustainable place to be. For those who want to encourage innovations in crypto, I'd like to note that financial innovations throughout history don't long thrive outside of our public policy frameworks.

At the heart of finance is trust. And at the heart of trust in markets is investor protection. If this field is going to continue, or reach any of its potential to be a catalyst for change, we better bring it into public policy frameworks.

Thank you. I look forward to your questions.

[1] See Satoshi Nakamoto, "Bitcoin: A Peer-to-Peer Electronic Cash System," available at <https://bitcoin.org/bitcoin.pdf> (https://bitcoin.org/bitcoin.pdf).

[2] See Haseeb Qureshi “The Cypherpunks” (Dec. 29, 2019), *available at* <https://nakamoto.com/the-cypherpunks/> ~~(https://nakamoto.com/the-cypherpunks/)~~.

[3] See “Bitcoin P2P e-cash paper” (Oct. 31, 2008), *available at* <https://satoshi.nakamotoinstitute.org/emails/cryptography/1/> ~~(https://satoshi.nakamotoinstitute.org/emails/cryptography/1/)~~.

[4] Numbers as of Aug. 2, 2021. See CoinMarketCap, *available at* www.coinmarketcap.com ~~(http://www.coinmarketcap.com)~~. Crypto asset figures are not audited or reported to regulatory authorities.

[5] See Michael Casey, Jonah Crane, Gary Gensler, Simon Johnson, and Neha Narula, “The Impact of Blockchain Technology on Finance: A Catalyst for Change” (2018), *available at* <https://www.sipotra.it/wp-content/uploads/2018/07/The-Impact-of-Blockchain-Technology-on-Finance-A-Catalyst-for-Change.pdf>.

[6] See SEC v. Howey Co., 328 U.S. 293 (1946), “Framework for ‘Investment Contract’ Analysis of Digital Assets,” *available at* <https://supreme.justia.com/cases/federal/us/328/293/> ~~(https://supreme.justia.com/cases/federal/us/328/293/)~~.

[7] See Jay Clayton, Testimony United States Senate Committee on Banking, Housing, And Urban Affairs, “Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission” (Feb. 6, 2018), *available at* <https://www.banking.senate.gov/hearings/virtual-currencies-the-oversight-role-of-the-us-securities-and-exchange-commission-and-the-us-commodity-futures-trading-commission> ~~(https://www.banking.senate.gov/hearings/virtual-currencies-the-oversight-role-of-the-us-securities-and-exchange-commission-and-the-us-commodity-futures-trading-commission)~~ (see approx. 32:00 mark).

[8] See Cornerstone Research, “Cornerstone Research Report Shows SEC Establishes Itself as a Key U.S. Cryptocurrency Regulator” (May 11, 2021), *available at* <https://www.cornerstone.com/Publications/Press-Releases/Cornerstone-Research-Report-Shows-SEC-Establishes-Itself-as-a-Key-U-S-Cryptocurrency-Regulator>.

[9] See Alexander Osipovich, “U.S. Crypto Traders Evade Offshore Exchange Bans” (July 30, 2021), *available at* <https://www.wsj.com/articles/u-s-crypto->

[traders-evade-offshore-exchange-bans-11627637401](https://www.wsj.com/article/s/u-s-crypto-traders-evade-offshore-exchange-bans-11627637401) [_ \(https://www.wsj.com/article/s/u-s-crypto-traders-evade-offshore-exchange-bans-11627637401\)](https://www.wsj.com/article/s/u-s-crypto-traders-evade-offshore-exchange-bans-11627637401).

[10] Numbers as of Aug. 1. See The Block, “Total Stablecoin Supply,” *available at* <https://www.theblockcrypto.com/data/decentralized-finance/stablecoins> [_ \(https://www.theblockcrypto.com/data/decentralized-finance/stablecoins\)](https://www.theblockcrypto.com/data/decentralized-finance/stablecoins).

[11] See The Block, “Share of Trade Volume by Pair Denomination,” *available at* <https://www.theblockcrypto.com/data/crypto-markets/spot> [_ \(https://www.theblockcrypto.com/data/crypto-markets/spot\)](https://www.theblockcrypto.com/data/crypto-markets/spot).

[12] See “Readout of the Meeting of the President’s Working Group on Financial Markets to Discuss Stablecoins” (July 19, 2021), *available at* <https://home.treasury.gov/news/press-releases/jy0281> [_ \(https://home.treasury.gov/news/press-releases/jy0281\)](https://home.treasury.gov/news/press-releases/jy0281).

[13] See Grayscale® Bitcoin Trust, *available at* <https://grayscale.com/products/grayscale-bitcoin-trust/> [_ \(https://grayscale.com/products/grayscale-bitcoin-trust/\)](https://grayscale.com/products/grayscale-bitcoin-trust/).

[14] See Securities and Exchange Commission, “Staff Statement on WY Division of Banking’s ‘NAL on Custody of Digital Assets and Qualified Custodian Status’” (Nov. 9, 2020), *available at* <https://www.sec.gov/news/public-statement/statement-im-finhub-wyoming-nal-custody-digital-assets> [_ \(https://www.sec.gov/news/public-statement/statement-im-finhub-wyoming-nal-custody-digital-assets\)](https://www.sec.gov/news/public-statement/statement-im-finhub-wyoming-nal-custody-digital-assets). See Securities and Exchange Commission, “SEC Issues Statement and Requests Comment Regarding the Custody of Digital Asset Securities by Special Purpose Broker-Dealers” (Dec. 23, 2020), *available at* <https://www.sec.gov/news/press-release/2020-340> [_ \(https://www.sec.gov/news/press-release/2020-340\)](https://www.sec.gov/news/press-release/2020-340).

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EXHIBIT E

**GAME STOPPED? WHO WINS AND
LOSES WHEN SHORT SELLERS,
SOCIAL MEDIA, AND RETAIL
INVESTORS COLLIDE, PART III**

VIRTUAL HEARING
BEFORE THE
COMMITTEE ON FINANCIAL SERVICES
U.S. HOUSE OF REPRESENTATIVES
ONE HUNDRED SEVENTEENTH CONGRESS
FIRST SESSION

MAY 6, 2021

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**GAME STOPPED? WHO WINS AND
LOSES WHEN SHORT SELLERS,
SOCIAL MEDIA, AND RETAIL
INVESTORS COLLIDE, PART III**

Thursday, May 6, 2021

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The committee met, pursuant to notice, at 12 p.m., via Webex, Hon. Maxine Waters [chairwoman of the committee] presiding.

Members present: Representatives Waters, Maloney, Sherman, Meeks, Scott, Green, Cleaver, Perlmutter, Himes, Foster, Vargas, Gottheimer, Lawson, Axne, Casten, Torres, Adams, Tlaib, Dean, Garcia of Illinois, Williams of Georgia, Auchincloss; McHenry, Lucas, Posey, Luetkemeyer, Huizenga, Wagner, Barr, Williams of Texas, Hill, Zeldin, Loudermilk, Mooney, Davidson, Budd, Kustoff, Hollingsworth, Gonzalez of Ohio, Rose, Steil, Timmons, and Taylor.

Chairwoman WATERS. The Financial Services Committee will come to order.

Without objection, the Chair is authorized to declare a recess of the committee at any time.

As a reminder, I ask all Members to keep themselves muted when they are not being recognized by the Chair. The staff has been instructed not to mute Members except when a Member is not being recognized by the Chair and there is inadvertent background noise.

Members are also reminded that they may only participate in one remote proceeding at a time. If you are participating today, please keep your camera on, and if you choose to attend a different remote proceeding, please turn your camera off.

Today's hearing is entitled, "Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part III."

I now recognize myself for 4 minutes to give an opening statement.

Today, this committee convenes for part three of our series of hearings focused on market volatility related to GameStop and other stocks. In our first hearing on those events, we received testimony from the CEOs of trading app, Robinhood; Wall Street firms, Citadel and Melvin Capital; and social media company, Reddit; as well as Keith Gill, a trader involved in WallStreetsBets on subreddit. We heard directly from those involved in the short squeeze and volatility and we got the facts.

In our second hearing, we received testimony from a number of capital markets experts and investor advocates to hear their views and begin to assess possible legislative and regulatory steps that may be necessary. We examined conflicts of interest in the market. We scrutinized payment for order flow, potential systemic risks to our financial system, the gamification of trading, the clearance and settlement process for trades, and the evolution of trading with the rising use of social media and new technologies.

Today, we will focus on the regulatory response to the market volatility. Specifically, we will hear testimony from the U.S. Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA), and the Deposit Trust and Clearing Corporation (DTCC) about their responses to events we are examining. It is critical for our cops on the block at the SEC to protect investors and ensure that our markets are transparent and fair. Unfortunately, the previous Administration's appointees to financial regulatory agencies were often more interested in helping out Wall Street than protecting Main Street.

I am very pleased that, thanks to President Biden's strong leadership, we now have Gary Gensler at the helm of the SEC. Chair Gensler, I look forward to hearing your testimony and discussing your views on the short squeeze and surrounding events, as well as practices like payment for order flow.

I am also interested in hearing from Mr. Cook and Mr. Bodson, the CEOs of private-sector corporation, FINRA, which oversees broker-dealers; and DTCC, which provides clearing and settlement services to our securities markets, respectively.

Under my leadership, this committee is focused on ensuring accountability for Wall Street. I decided to convene this series of three hearings on this topic to ensure that Congress is well-informed on developments in and functioning of our capital markets, and to put Wall Street on notice that we are watching closely.

I yield back the balance of my time, and I now recognize the ranking member of the committee, the gentleman from North Carolina, Mr. McHenry, for 4 minutes.

Mr. MCHENRY. Thank you, Madam Chairwoman. I would like to talk about what was learned at our last hearing on GameStop. We learned that everyday Americans have a newfound interest in the markets, and that is positive. We learned that financial technology is here to stay, and it is providing more opportunities for retail investors to participate in our markets. That is positive. We learned that Reddit is powerful. And we learned that Roaring Kitty is indeed not a cat, and we know just as much as we did at the first hearing.

And I continue to hear the same policy solutions from my Democrat colleagues, the repackaged, old, outdated, policy failures wrapped in whatever is in the news this week to sell the American people on the idea that this time is different. Well, it is not. Like so many other bad progressive ideas sold under the guise of investor protection, which I think is important, Democrats' proposals will ultimately reduce access to investment opportunities and charge D.C. bureaucrats and give them control of investing decisions of everyday Americans. If this committee is interested in re-

sponding to late January's events, we need to expand the credit investor regime, not restrict it.

It is ridiculous that our securities laws force most everyday Americans to the sidelines of early-growth investment opportunities. We need to find innovative solutions that allow more people to invest in businesses they support, while retaining the flexibility our changing workforce needs and requires.

This week I reintroduced my bill, the Gig Worker Equity Compensation Act, to expand the category of workers that can benefit from equity compensation to include nontraditional workers. If you want to see the juxtaposition of Democrat and Republican priorities right now, just yesterday, the Biden Administration moved to dismantle past efforts to provide gig workers with the flexibility they demand, that they need, that they require. If a State as liberal as California can recognize that a one-size-fits-all mandate on gig workers would be destructive, it should be obvious that the Biden Administration should not take those same actions that went down at the ballot box in California, actions that hurt nontraditional workers, not help them.

I initially called for this hearing on GameStop to begin the process of fact finding to inform our policy discussions, and the bottom line is that we are still gathering a number of facts. That is why we have representatives from FINRA and DTCC testifying before us today. I think that is a good thing.

Additionally, the SEC's review of the events is ongoing, as is the committee's work behind-the-scenes in terms of document review and interviews. Despite the ongoing investigations and the testimony we will receive today, many Democrats have their so-called solutions. A lot of these things have been kicked around for a long time.

At our first GameStop hearing, I asked Democrats to side with everyday American investors. I will ask that same thing today. We should not punish everyday American investors with a Democrat agenda, a progressive agenda that results in fewer investment options or forces folks to start paying to make trades again. So, let's go off of what we have learned. Let's stand up for everyday investors and make it easier for them to invest, and let's tear down barriers keeping folks out of the market instead of throwing up new ones to impair their ability to be in the market. Let's stand up for equity—true equity—and that is ownership of the American economy, and ownership in our capital markets so we can remain the center of the free world's economic policies.

And with that, Madam Chairwoman, I yield back.

Chairwoman WATERS. Thank you very much, Mr. McHenry. I am pleased that you see something good about our hearing today.

I now recognize the gentleman from California, Mr. Sherman, who is also the Chair of our Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, for 1 minute.

Mr. SHERMAN. I thank Chairman Gensler for being here, and I hope he joins us often. The ranking member is concerned about whether gig workers in my State have the protection that we accord employees. It is a little far from the mandate of our committee. But within our committee's jurisdiction is to make sure that when investors trade stocks, they get the best possible deal and are

not told that there is zero transaction cost when the big transaction cost is the spread, and you are paying for the transaction unless you are getting the best possible price improvement. Price improvement may not be fully available if your broker is getting paid for order flow or if your broker is acting as a market-maker.

We also need to look at short-sale disclosures. Right now, there are disclosures filed with the SEC quarterly. That is so 1977. We would expect reports to be filed far more often, and we have to discuss what reports should be made public, and I look forward also to looking at margin selling.

Chairwoman WATERS. Thank you. I now recognize the ranking member of the subcommittee, the gentleman from Michigan, Mr. Huizenga, for 1 minute.

Mr. HUIZENGA. Thanks, Madam Chairwoman. Advancements in technology have improved access to our capital markets and created new opportunities for countless Americans to participate in our markets who were previously excluded. App-based interfaces, combined with zero commission trades, fractional share trading, and lowered account minimums, have ushered in a new generation of investors. However, instead of celebrating this new era of investment, how have my colleagues across the aisle responded for the most part? By falsely claiming that this increase in market participation has caused gamification in the experience, that markets are rigged, and some have even gone so far as to equating it to gambling in a casino.

As Rahm Emanuel famously said, "You never want a serious crisis to go to waste. It is an opportunity to do things that you think you could not do before." Well, that is exactly what my friends on the other side of the aisle are doing. They are exploiting a high-profile situation to push a radical progressive agenda of these proposed, small "D," democratic solutions that will only further prevent everyday American investors from accessing our capital markets, and deny them the opportunity to further save and invest for a more prosperous future.

I yield back.

Chairwoman WATERS. Thank you. I want to now welcome today's distinguished witnesses to the committee.

First, we have the Honorable Gary Gensler, who is the recently-confirmed Chair of the U.S. Securities and Exchange Commission. This is Chair Gensler's first time appearing before the committee in his current capacity. He has previously served as Chair of the Commodity Futures Trading Commission, and in several senior roles at the Department of the Treasury.

Second, we have Mr. Michael Bodson, who is the President and Chief Executive Officer of the Depository Trust & Clearing Corporation (DTCC).

And finally, we have Mr. Robert Cook, who is the President and Chief Executive Officer of the Financial Industry Regulatory Authority (FINRA).

Each of you will have 5 minutes to summarize your testimony. You should be able to see a timer on your screen that will indicate how much time you have left, and a chime will go off at the end of your time. I would ask you to be mindful of the timer, and quick-

ly wrap up your testimony if you hear the chime. And without objection, your written statements will be made a part of the record.

Chair Gensler, you are now recognized for 5 minutes to present your oral testimony.

**STATEMENT OF THE HONORABLE GARY GENSLER, CHAIRMAN,
U.S. SECURITIES AND EXCHANGE COMMISSION (SEC)**

Mr. GENSLER. Good afternoon, Chairwoman Waters, Ranking Member McHenry, and members of the committee. I am honored to appear before you today for the first time as Chair of the Securities and Exchange Commission. I have been in front of this committee multiple times in multiple Administrations, and I will say this: I look forward to the day when we can meet in person in your beautiful hearing room again.

Thank you for inviting me to testify about January's market volatility, and I am pleased to be here with Mike Bodson and Robert Cook, whom I have known for a number of years as well.

I would like to note that my views are my own, and I am not speaking on behalf of my fellow Commissioners or of the SEC staff.

These events are part of a larger story about the intersection of finance and technology, which have lived in a symbiotic relationship since antiquity. And one thing that I have come to believe is that technology can allow greater access to our capital markets. Our central question is this, though: When new technologies come along and change the face of finance, as they have done for decades, how do we continue to achieve our core public policy goals?

In my role, I will always be animated by thinking about working families in the SEC's three-part mission: protecting investors; promoting fair, orderly, and efficient markets; and facilitating capital formation. I am pleased to submit written testimony that goes into detail on several factors at play during January's events. I will just highlight a few of those key issues in this opening statement.

The first is gamification and user experience. I agree with the Members who have already said that these new user experiences have facilitated a lot of opportunity for investors. They have expanded access to capital, making it easier for investors to sign up, start trading, and learn about investing. These apps also use a host of features that have come to be familiar in our increasingly-online world such as gamification, behavioral props, and predictive data analytics. Many of these features, in essence, encourage investors to trade more frequently. This could have a substantial effect on a saver's financial position. Some academic studies suggest that the more actively you trade, the lower your returns, so while they are encouraging investing, they may also be encouraging active trading.

I have asked the staff to prepare a request for public comment on these issues. The SEC must remain attuned to rapidly-changing technologies with an eye to freshening up our rule set, where appropriate, to continue to achieve our mission. If we don't address this now, the investing public, those saving for future retirement and education, may shoulder the burden later.

The second topic I would like to discuss is this area around payment for order flow. This practice brings to mind a number of questions, including whether it creates inherent conflicts of interest be-

tween the broker-dealers on the one side, and their customers on the other, who want to achieve, under our rules, best execution. Now, it is important to consider this, I think, in the overall context of market structure. Currently, a significant amount of retail orders are routed to a small number of wholesalers. I detail this more in my written testimony, but I think it raises questions about whether the market structure best promotes fair, orderly, and efficient markets. Evolving market technologies, along with this payment for order flow, has also led to increasing market concentration, which we have found, and history and economics show, can lead to fragility in markets, deter healthy competition, and limit innovation.

The next issue is short selling and market transparency, and, again, as outlined in my written testimony, under the Dodd-Frank Act reforms, the SEC received mandates and authorities to increase transparency in the markets. So, I have asked SEC staff to prepare recommendations on transparency and short selling, stock loan markets, and something called total return swaps, which was at the center of this Archegos event in March, for Commission consideration. And the five of us Commissioners can take a look to see what to do next.

Next, today's social media tools have far greater reach, scale, and anonymity than previous technology. This raises the possibility that wrongdoers will attempt to use their powerful forums to hype certain stocks or manipulate markets. I am not concerned about regular investors exercising their free speech rights online; I am more concerned whether bad actors potentially take advantage of influential platforms.

Further, the decisions by some broker-dealers to redirect customer trading raised several issues around clearance and settlement. In essence, they stopped investors from investing, and this raises questions of the market, what I will call, "plumbing." Sorry to Mike Bodson if I call infrastructure, "plumbing," but investors were shut out. I do believe we can lower costs and risk in our market by shortening the settlement cycle. For instance, I have asked SEC staff to put together a draft proposal for the Commission on the possibility of shortening the settlement cycles.

Thank you. I look forward to your questions. It is good to be back with you, and, again, I look forward to doing this in person.

[The prepared statement of Chairman Gensler can be found on page 89 of the appendix.]

Chairwoman WATERS. Thank you, Chair Gensler. Next, we will go to Mr. Bodson. You are now recognized for 5 minutes to present your oral testimony.

STATEMENT OF MICHAEL C. BODSON, PRESIDENT AND CHIEF EXECUTIVE OFFICER, THE DEPOSITORY TRUST & CLEARING CORPORATION (DTCC)

Mr. BODSON. Chairwoman Waters, Ranking Member McHenry, and members of the committee, my name is Michael Bodson, and I am the CEO of The Depository Trust & Clearing Corporation (DTCC), a holding company that operates three SEC-regulated clearing agencies, including the National Securities Clearing Cor-

poration, or NSCC, of which I will speak to you today. I appreciate this opportunity to speak to the committee.

In my line of work, the best days are those when nothing too exciting happens. That is because DTCC is, at its heart, a risk management organization enhancing efficiencies and reliability in the markets. On a normal day, we process about 200 million buys and sells for a value of nearly \$2 trillion. Through netting, that is reduced to about \$1 million in securities movement and \$35 billion in cash movement, creating significant efficiencies in the market.

When you buy or sell a stock, it takes 2 days for the trade to be completed. This is called T+2 settlement: trade date plus 2 days. A lot could happen during those 2 days that could create a risk that the buyer or seller fails to deliver money or shares. Because of clearing, investors don't have to worry about that. Clearing protects both firms and their customers against default risk. Default risk can destabilize markets, particularly in volatile times. People are reluctant to trade if they aren't sure they will get what they agreed to. And imagine how inefficient it would be for every market participant to have to assess the creditworthiness of everyone else in the market.

That is where DTCC comes in. We are infrastructure. You can call us, "plumbing." We are not insulted. We operate behind the scenes to guarantee completion of virtually all equity trades. We do not trade or take positions or bet on the direction in the market. We do not give investment advice. We do not know who the customers are behind the trades or their reasons for trading. We simply process and risk-manage trades.

DTCC protects against default risk by collecting margin, which is money that clearing members post as collateral. If a clearing member defaults between trade date and settlement date, DTCC uses that collateral to complete the defaulting member's trades no matter how much prices may have changed.

Margin requirements are calculated using statistical models and model-based calculations that are set forth in our rules, which must be approved by the SEC. Margin requirements increase the risk, and the member's portfolio increases. In other words, the greater the potential loss the default could produce, the greater the need for collateral.

Volatility has a very large impact on margin requirements. We saw this play out during the week of January 25th. Both volume and volatility that week were extraordinary, exceeding the pandemic-related record volume from March 2020 by more than 100 million trades. The concentration of trading in a small number of meme stocks that week was also extraordinary. Applying those statistical models of formulas, margin requirements increased substantially for firms with large volumes in these stocks.

I appreciate that this committee is exploring ways to continue to improve our markets. I would like to describe one effort that DTCC has undertaken to date, which is shortening the settlement cycle for equities from 2 days to 1 day. That may sound like a small thing if it is just 1 day, but cutting the settlement period in half can make a difference. We believe that shortening the settlement cycle to T+1 would enhance market resilience, reduce margin requirements, and lower costs for investors. Following a multi-year,

industry-wide effort, settlements were shortened in 2017 from T+3 to T+2, achieving margin savings estimated at 25 percent. DTCC estimates that the volatility component of margin requirement could potentially be reduced by 40 percent when it moves to T+1. This could save our clearing members upwards of \$6 billion per day during periods of extreme volatility.

While DTCC's technology can support T+1 today, changing the industry convention is a major undertaking that will require coordinated efforts across the whole industry. Over the past year, DTCC has engaged with a cross-section of the industry to assess readiness to further shorten the settlement cycle. In February, DTCC published a White Paper outlining the benefits associated with multiple changes to the settlement cycle, including a move to T+1. We are working with the Securities Industry and Financial Markets Association (SIFMA) and the Investment Company Institute (ICI) to accelerate this effort.

Thank you again for the opportunity to testify today. I look forward to your questions.

[The prepared statement of Mr. Bodson can be found on page 70 of the appendix.]

Chairwoman WATERS. Thank you very much, Mr. Bodson. Mr. Cook, you are now recognized for 5 minutes to present your oral testimony.

STATEMENT OF ROBERT W. COOK, PRESIDENT AND CHIEF EXECUTIVE OFFICER, FINANCIAL INDUSTRY REGULATORY AUTHORITY (FINRA)

Mr. COOK. Thank you, Chairwoman Waters, Ranking Member McHenry, and members of the committee for this opportunity to testify today, together with Chair Gensler and Mr. Bodson, regarding the January market events related to trading in GameStop and in other stocks. We commend the committee's review of these events and related investor protection concerns.

FINRA's mission is to protect investors and promote market integrity. We are a not-for-profit self-regulatory organization (SRO), and we support the SEC in overseeing one critical part of the securities industry: certain broker-dealers and the individuals they employ. To that end, we administer comprehensive regulatory programs, including surveillance, risk monitoring, examination, and enforcement. And we, in turn, are subject to comprehensive examination and oversight by the SEC.

This committee has heard already about the events of January, including the significant price swings and trading volume in GameStop and a limited number of other stocks. In this context, some broker-dealers restricted trading in these securities on a short-term basis. This led to confusion and frustration among some investors and concerns about the fairness of the markets. The event also focused attention on the growth of popular new retail trading platforms and services, changes in investor behavior, and the influence of social media on the markets.

Our markets are dynamic and are continually evolving. Market participants constantly innovate new technologies, methods of communication, and investment products and services. These innovations often benefit investors, such as by providing easier access to

the markets, lower costs, and a wider range of investment products and services to choose from, but they can also present new and sometimes unanticipated risks, so regulators must constantly review whether the rules governing the road need to be updated in light of new developments to better protect investors, while still facilitating vibrant and innovative markets and the opportunities these create. At FINRA, we are committed to doing just that. One important resource we rely on in this process is the research of the FINRA Investor Education Foundation, including recent research on new, inexperienced investors, and how they approach investing.

Since the events of January, FINRA has established an internal working group that is devoting significant resources to investigating whether its broker-dealer members comply with SEC and FINRA rules. We have also issued regulatory notices reminding firms of relevant duties and responsibilities in this area.

Although I cannot comment on specific firms or ongoing investigations or enforcement matters, generally speaking, we are reviewing order routing practices, the circumstances under which trading restrictions were imposed, any potential manipulative conduct, and compliance with short-sale requirements, among other matters. I can assure the committee that we will take all appropriate disciplinary or other remedial action as warranted if the facts indicate a violation of SEC or FINRA rules.

The upcoming SEC report on these market events will be critical in analyzing whether existing rules and standards should be updated. Many of the policy questions raised in your hearings to date involve areas in which the SEC has primary policymaking responsibilities such as market structure, payment for order flow, short sale regulation and disclosure, the settlement cycle, enhanced broker-dealer financial responsibility requirements, and whether certain communications with retail investors constitute recommendations that should be covered by the SEC's Regulation Best Interest. We will support the SEC in its review of these areas and then align FINRA's rules and oversight activities where necessary or appropriate.

My written testimony offers some further perspectives on key topics under the SEC's jurisdiction and also describes some areas where we are considering whether updates to guidance regarding our own rules would be appropriate. For example, we intend to review short sale position reporting by broker-dealers, as well as continue our review of the effects of gamification on retail investors. FINRA looks forward to working with this committee, the SEC, and our fellow regulators to review and learn from these recent market events so that we can strengthen investor protections and enhance confidence in our nation's capital markets.

Thank you, and I would be happy to answer your questions.

[The prepared statement of Mr. Cook can be found on page 76 of the appendix.]

Chairwoman WATERS. Thank you very much, Mr. Cook.

I now recognize myself for 5 minutes for questions, and my first question is for Chair Gensler. This committee has examined numerous issues that have arisen out of the GameStop short squeeze that took place earlier this year, including systemic risk arising from firms such as Citadel, who are executing close to 50 percent

of all U.S.-listed retail volume. During the first hearing, I questioned whether Citadel poses a systemic risk to our financial markets. I am also concerned about what Citadel's outsized market impact means for pricing and best execution, another market structure issue that this committee has examined as part of these hearings.

As the newly-confirmed Chair of the SEC, what will your approach be with respect to mitigating the risk associated with outsized market impact and understanding threats to our financial stability?

Mr. GENSLER. Thank you for that question. I think that at the heart of well-functioning markets and the mission of the SEC—fair, orderly, and efficient markets—is promoting competition in markets. It can be done through transparency, but it is also looking at our rule set to make sure that our rule set inspires more competition rather than concentration. And we have seen, as you noted in your hearing, an increasing concentration in market making, and also, separately, in brokerage, and particularly around retail order flow.

And so I have asked the staff from the Divisions of Economic Risk and Analysis, and Trading and Markets, to sort of give us a view, give internally the Commission a view of what we should be thinking about in our market structure to address this.

We have seen such concentration come in other markets. We know it is in search. When we all go online and search, there is really one dominant search engine. We know it is true in retail buying, retail products online. There is some dominance to that. And so, our modern 2020's economy does tend towards certain, what is called economics network effects. So, I have asked the staff just to think through that and to provide us with guidance as Commissioners on how do we promote competition in the face of these network economic effects that are leading to concentration.

Chairwoman WATERS. I want to thank you for that response, and I think what I am hearing from you is that there is real concern about concentration. And while you have instructed staff to do some additional research to determine the extent of it, it is something that we should be concerned about, is that correct?

Mr. GENSLER. Yes. I think that capital formation for issuers and for investors on the other side benefit from some broad competition amongst market actors. And as we get more concentration in the middle market, whether it is market making or brokerage, we could lose that concentration. It could lead to more fragile markets, meaning less orderly, and also more costly or less efficient markets. And that is what history and economics tell us when we get concentration.

Chairwoman WATERS. Thank you very much. I appreciate the concern that you are identifying as we talked about this concentration, and what could happen if, in fact, we are not aware of it and don't make an effort to deal with it.

I now recognize the ranking member, Mr. McHenry, for his questions.

Mr. MCHENRY. Thank you, Madam Chairwoman. Chairman Gensler, thank you for being here, and welcome back before the committee, and congratulations on your new role. I know that Act-

ing Chair Lee, at the time of this GameStop trade, emphasized that the core market infrastructure is quite resilient. Does the Commission intend to release any additional findings?

Mr. GENSLER. Thank you. And thank you for our meeting earlier this week. I look forward to doing those on a regular basis with the Chair, and you, and the subcommittee, and other members. We are looking at putting together a report. I am only in my 3rd week on the job, but our economists, our Trading and Markets folks have come together, and I think we will be releasing a report sometime this summer that will detail the range of activities out of the January events.

Mr. MCHENRY. Thank you for that. Small businesses right now are emerging from the pandemic just like everyone is, and these small businesses need access to capital. And, as you know, I have been focused on some of the burdensome requirements of the original Regulation Crowdfunding (Reg CF), which I helped legislate, and President Obama signed into law. There have been some helpful changes made to Reg CF to make it more efficient and to boost trading in Reg A and Reg CF securities, such as preemption under certain State regulations. Do you support these streamlining efforts for small businesses, and are you looking at additional steps?

Mr. GENSLER. I look forward to working with you and your staff to learn more about your initiatives and suggestions. But at the core, and maybe it is just a bit because my dad had a small business, never more than 30 employees, and didn't have access to the capital markets, but I think that small business, entrepreneur efforts are really kind of, if I might say, a bit of the backbone of American entrepreneurship and our economy. And so, access to the capital markets is a critical piece, whether it is accessing loans that might be securitized in the markets or accessing through equities. But I look forward to hearing more from you and your staff on ideas.

Mr. MCHENRY. Okay. But no comment on Reg CF?

Mr. GENSLER. Again, I'm just 3 weeks on the job, so I haven't looked closely at Reg CF yet or, frankly, done a detailed enough briefing to see how we can, as you say, and I really do believe this, facilitate capital formation up and down the issue or spectrum.

Mr. MCHENRY. Let's pivot to something that you spent some time out of government understanding. I think what we all have tried to seek is greater collaboration across agencies on the regulatory framework for digital assets, cryptocurrencies, notably. This includes more engagement from industry and appropriate regulators. In 2019, SEC staff produced the framework for investment contract analysis of digital assets. Since then, the staff has sought feedback on a number of issues, most recently on the evolving standards and the best practices for custody. This is progress, but I believe more concrete steps are necessary to further the crypto market. As you look at this issue, what steps can you outline to bring regulatory clarity so that we can have a vibrant digital asset marketplace with legitimate money and the rule of law?

Mr. GENSLER. Thank you for asking that. And I think that this market, which is close to \$2 trillion, the crypto asset market, is one that could benefit from greater investor protection within the SEC's current authorities, our authorities around securities, and around

asset managers and products that might invest in these cryptocurrencies. As you mentioned, we put out a comment, I think it was in October or November, asking for feedback on custody. I would hope that we would move forward and provide greater clarity around custody.

I do think that working with Congress, and I think it is only Congress that could really address it, it would be good to consider, if you would ask my thoughts, to consider whether to bring greater investor protection to the crypto exchanges. And I think if that were the case, because right now the exchanges trading in these crypto assets do not have a regulatory framework either at the SEC, or our sister agency, the Commodity Futures Trading Commission, that could instill greater confidence. Right now, there is not a market regulator around these crypto exchanges, and, thus, there is really not a protection against fraud or manipulation or a—

Mr. MCHENRY. I have time for one final question, Chairman Gensler. I am encouraged by your comments on crypto. Last year, the Commission proposed to allow certain gig workers to have access to equity compensation under the SEC's rules. Will you commit to finishing this important rulemaking?

Mr. GENSLER. Again, I'm in my 3rd week, so I need to get a briefing on it. I commit to work with the staff to understand what the comments were, because I don't know what comments came in, and to trying to understand the economics around that rule set.

Mr. MCHENRY. Thank you, and I wish you great luck in your tenure, and thank you for your testimony. Thank you for your outreach.

Mr. GENSLER. Thank you.

Chairwoman WATERS. I now recognize the gentlewoman from New York, Mrs. Maloney, for 5 minutes.

[No response.]

Chairwoman WATERS. We will go on to the gentlewoman from New York, Ms. Velazquez.

[No response.]

Chairwoman WATERS. The gentleman from California, Mr. Sherman, who is also the Chair of our Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, is now recognized for 5 minutes.

Mr. SHERMAN. Responding to the ranking member, who wants to instill confidence in those buying and selling cryptocurrencies, the only confidence I have is the U.S. dollar is an outstanding good currency, but cryptocurrencies, if they succeed, will have unique appeal to only two groups: narco-terrorists; and tax evaders. And for us to channel the animal spirits that should be investing in the American economy into creating tools for those who want to evade U.S. taxes is a step toward a much weaker America.

Mr. Gensler, you talked about Archegos and the total return swap. The image I have of 1929 is investors jumping out of buildings on Wall Street because they bought stock at 7, 8, 9 times margin. And in the 1930s, we decided to protect the markets and say that if you want to buy stock, the most margin you could get was 1-time margins, sometimes a little more. But we then see that using a total return swap, the big guys, like Archegos, can get 7

times margin, can invest only one-seventh of the cash to control \$100 million worth of this block of shares or that block of shares.

This raises the question, is 7-to-1 margin fine for everybody, and is that good for the markets? Should 1-time margin either rule for everybody and we should plug the loopholes, or should we continue to have a system where, if you are a family office, you can have 7 times margin by calling it a total return slot, and if you are the regular Robinhood investor, you can only get 1 time? What should the market rule be?

Mr. GENSLER. I think you raise some very important questions that came out of the market events late in March, not the January ones but the March events around a family office, Archegos. Family offices are outside of much of the SEC's remit, but not all of it.

Mr. SHERMAN. If I can clarify, this is not a question about family offices.

Mr. GENSLER. Oh, okay.

Mr. SHERMAN. Just that one investment company that has \$1 billion and decides they want a 7-to-1 margin. The fact this was a family office, put that aside. Whether you disclose it or you don't, whether you are a family office or a hedge fund or a billionaire, should you be able to get 7-to-1 margin, and if so, why can't Robinhood?

Mr. GENSLER. I have asked staff to better understand—and, again, it is just the 3rd week—the rules that were adopted by the SEC that are yet to go into final implementation around the margin and for these securities-based swaps, and how they would have affected the circumstances.

Mr. SHERMAN. I look forward—

Mr. GENSLER. But you are right, sir, that they are different than the retail investor, and this is true across our markets. And I have asked staff to better inform me as to what are we seeing there.

Mr. SHERMAN. For Mr. Cook, when it comes to disclosing short selling, there are arguments on both sides as to whether to disclose what an individual investor is doing. Some say it is harmful, some say it is helpful, but there seems to be agreement that the aggregate information is helpful, but we ought to know in aggregate how many shares of GameStop are short. You generate that information, but you don't put it on your website. I am told that you provide it to the exchanges and they publish it if they want to, and, often behind a pay wall. Why doesn't FINRA disclose all this information to everybody for free as quickly as you can?

Mr. COOK. Thank you, Mr. Sherman. That is a great question. As we look at disclosure around short selling, I think there are some good arguments that we can do more here. I have asked our staff to prepare a regulatory notice to solicit comment on changes to FINRA's disclosure here to make it more frequent and more granular. And certainly as part of that, we can look at the way in which that disclosure is disseminated.

Mr. SHERMAN. Is there any justification for what is a regulatory agency generating this information and giving it to private companies for them to sell rather than disclosing it to the public?

Mr. COOK. I appreciate the gist of your question, sir, and I am inclined to be biased towards making it publicly available. I don't understand all the history behind how this developed. I think that

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Even if a Thousand Projects Don't Make It, Blockchain Is Still a Change Catalyst

While we wait for crypto/blockchain success stories, it's already apparent that Satoshi's innovation is a change agent.

By Gary Gensler ⌚ Dec 15, 2019 at 9:23 a.m. EST Updated Sep 13, 2021 at 7:49 a.m. EDT




Gary Gensler

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Gartner, an IT research and consulting firm, came up with a framework to look at the stages of adoption and market enthusiasm of emerging technologies. Though criticized by some for being unscientific, the Gartner ‘Hype Cycle’ has caught on in popular culture. Where might cryptocurrencies and blockchain technology be now in that cycle compared with emerging technologies of the past?

Measured by market valuations, cryptocurrencies have experienced several booms and busts. The Mt. Gox-led boom and bust of 2012 to 2014. The ICO boom and bust of 2017 to 2018. And more recently the tokenization and Facebook Libra led boom and, dare I say, bust of 2019.

This post is part of CoinDesk's 2019 Year in Review, a collection of 100 op-eds, interviews and takes on the state of blockchain and the world. Gary Gensler is a professor at the MIT Sloan School of Management, Co-Director of MIT's Fintech@CSAIL and Senior Advisor to the MIT Media Lab Digital Currency Initiative. He was formerly Chairman of the U.S. Commodity Futures Trading Commission, Under Secretary of the Treasury, and a partner at Goldman Sachs.

Market values are but one measure and don't necessarily equate with underlying viability of an emerging technology. While expectations have waned, might cryptocurrencies and blockchain technology still be at inflated expectations? Many minimalists would contend so. NYU economist Nouriel Roubini isn't alone with his oft-noted doubts about cryptocurrencies.

Might the field be bouncing along the trough of disillusionment, awaiting signs of viable use cases?

Joe Lubin, founder of Ethereum and ConsenSys, thinks so, finalizing **the terms of his bet** with Jimmy Song on the future viability of DApps. Song remains optimistic about the utility of bitcoin as a digitally scarce store-of-value, but remains decidedly a minimalist with regard to the viability of blockchain technology for other uses.

Through the mist of 2019's hype of bold announcements, the crypto market's ups and downs, and departures of hundreds of projects from the field, though, some ground-truths are evident.

Satoshi Nakamoto – whomever she, he or they are – solved the payments riddle, how to securely move value peer-2-peer on the internet while avoiding double-spending.

Money is but a social and economic construct.

Regardless of cryptocurrency viability, we already live in an age of digital money.

Append-only ledgers and multi-party consensus (a.k.a. blockchain technology) provide an alternative which can address verification and networking costs.

Adoption rests on addressing comparative viability and value proposition of use-cases.

Bitcoin and other cryptocurrencies have evolved into a speculative asset class.

A new form of crowdfunding, built upon smart contracts and ICOs, raised nearly \$30 billion.

Crypto exchanges – not yet appropriately brought within public policy frameworks – have provided retail investors a direct way to trade crypto assets.

Crypto markets have been rife with scams, fraud, hacks and manipulation.

The potential this technology to be a catalyst for change is real.

This last point – crypto and blockchain technology acting as a catalyst for change - may not fulfill the heightened expectations of maximalists, but may be Nakamoto's most enduring early contribution. This new form of private money and its underlying shared ledger technology already have been catalysts for central banks, big finance and big tech. Along with fintech innovations, crypto initiatives have spurred incumbents to update payment solutions and explore new approaches to finance and multiparty database management.

The People' Bank of China's **Digital Currency/Electronic Payments project** and the US Federal Reserve's **FedNowSM Service** real time payments projects both emerged in the wake of Facebook's Libra announcement. Facebook's ambitious initiative to create **"a new global currency, which could meet the daily financial needs of billions of people"** is spurring change even in the face of the **many policy challenges** it raises.

To many observers, the question remains what uses will cryptocurrencies and blockchain have beyond acting as a catalyst for change? Beyond bitcoin providing a scarce digital speculative store of value, and niche applications in digital exchanges, gaming, and gambling, what applications will be sustainable for cryptocurrencies as a new form of private money? What will actually benefit from the shared multiparty ledger systems facilitated by blockchain technology?

Actual adoption of crypto or blockchain technology projects rests on addressing comparative viability and value creation propositions. Foremost:

How will the technology's decentralization actually benefit the use case's economics?

How will governance and collective action amongst multiple parties be resolved?

What specific gaps or pain points would a native token fill compared with fiat payment system?

What are the benefits of any P2P transfers not facilitated by traditional systems?

What are competitors (both traditional and blockchain) doing to address purported pain points?

What are the tradeoffs of performance, privacy, security, governance & regulation?

How can broad adoption and user interface be realized?

Though literally thousands of projects have yet to land on broadly adopted use cases, I remain intrigued by Satoshi's innovation's potential to spur change – either directly or indirectly as a catalyst. The potential to lower verification and networking costs is worth pursuing, particularly to lower economic rents and data privacy costs, and promote economic inclusion. Further, shared blockchain applications might help jumpstart multiparty network solutions in fields that historically have been fragmented or resilient to change. Even in this slightly less ambitious form – acting as an innovative irritant to incumbents and traditional technologies – cryptocurrencies and blockchain technology have already prompted real change and can continue to do so.

As an informed reader of CoinDesk, what do you think? Where might you place yourself on the scale from minimalist to maximalist? Where might the Gartner team put cryptocurrencies and blockchain technology as we close out the 2020s?

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I'm a former regulator. I ran the Commodity Futures Trading Commission. But this course is not about regulation, though we have to always come back to regulation. We always have to infuse what we're doing with the regulation.

But let me just give you a little framework. And then you'll have to be bored in a handful of weeks and read I gave some congressional testimony on it. Yes, it will be required reading, sorry. But it's guarding against illicit activity.

A lot of Bitcoin and cryptocurrencies started out in the cyber punk sort of movement and libertarian movement, so forth. And it is true. You can use this for illicit activity, absolutely. But would say, crime is not new, just the mechanisms and means are new. And so the criminals, yes, will use this and have used it for illicit activity.

Financial stability central bankers around the globe, sort of will this shake finance? Well, it's only \$200 billion. The financial markets are \$300 trillion plus not yet, is generally what they're saying. But for some countries, it's a way to get around capital controls. And so for those countries worried about capital controls, it's a very real and live set of issues.

And then protecting the investing public and when we do this in a few weeks, I'll go through each of these, the investor protection issues, and yes, the SEC, how we test, and the like. For those who wish to do their own initial coin offering, I'll give some broad sense of what the SEC is trying to accomplish. But it's a moving target.

So this is a very interesting thing. As opposed to many of your Sloan classes, or your C cell classes, or Media Lab classes, this is a very unsettled area of public policy. So it makes it interesting. And if you all go off and form companies, you will actually be helping sort of set the edge of that public policy debate.

I would always say, just remember poet Riley, the duck test. This is a poet, Indiana poet so those that aren't from the US might not know the duck test. But basically, if it quacks like a duck and it walks like a duck, it's a duck. So whenever you're thinking about public policy, folks like myself who once was a regulator, we think in the duck test.

And then we secondarily think about the actual words in the congressional act. Where is the common sense? And if it quacks and walks like a duck, it's probably a security. Or it's probably this or that.

Coindesk article. How many of you actually skimmed it, looked at it? Did it mean anything to you, or just meant that there's some alternative? What's that, Prya?

AUDIENCE: Just that there's some alternative.

GARY GENSLER: There's some alternative. That's what it meant to me the first time I looked into this about six months ago. But I want to just mention what the alternatives come down to.

They generally randomized or delegate the selection. So rather than saying any one of 10,000 nodes can prove that this works, they use various mathematical means randomized or delegated. And sometimes they do a little bit of delegation and randomization to pick who's going to validate the next block.

It all comes down to who is picking the next block. Is it by Adam Back's sort of, as Satoshi Nakamoto put out there, we'll call it Nakamoto consensus, proof of work? And you'll have a paper for Thursday that talks about Nakamoto Consensus, the Clark paper. But or is there some other randomized, delegated way to do it?

In some of them, they have a second check. If there's a delegated person to validate something, they put a second check in there that there's another group that officiates and says whether it's correct. And so there's proof of stake, which is based on the stake you have in the underlying currency. There's proof of activity, which is kind of a hybrid of proof of work and proof of stake.

Proof of burn are you willing to give up coins? Proof of capacity do you have storage capacity? And you might have a tiered system.

The major permissionless blockchains all use proof of work. And the reason is nobody's really solved all of these other alternatives, no one's really solved for a couple of problems in them. But they usually find a way to be more efficient through delegation and randomization, and might have a backup set of checks on it.

DASH and NEO will say that they use proof of stake. But they're actually kind of using some form of masternodes or set up professional nodes. But DASH and NEO are kind of, I think, the 13th and 15th largest market value cryptos, which means everything else kind of

And Ripple doesn't Ripple's really almost like a permission system rather than permissionless. I mean, they would say they're permissionless. But it's a confirmed set of

nodes in the node system.

So that's it for today. We're going to do transactions on Thursday. I moved that study question
And then I'm going to ask you to read through the Clark paper, which is really the academic
pedigree. Where is this built on? What's the background? But I think it's a good way to bring it
all together.

And remember on Thursday, you all come in to answer this question your own view as to
who Satoshi Nakamoto is. There is no right answer. But if MIT's Blockchain and Money class
can answer that, I'm sure that we'll get a write up somewhere about it.

The transactions are stored in Merkle keys. But guess what? If you were really interested and wanted to learn everything about Ethereum, there's at least four key Merkle trees that get summarized up into the block headers.

There's the transactions, which, in essence, aren't transactions. They call them state transitions. There's the state itself, something called storage, which is really related to each one of the individual Ethereum accounts, and then, believe it or not, actually, receipts. There's written records of receipts from every state transition.

So there's a lot more complexity inside the Ethereum blockchain. They run about 14 seconds a block instead of 10 minutes. And that change is a bunch of the economics.

Proof of work, for some reason, which others can study. Vatalik decided to use a different hash function. It's still based on elliptic curves, I think, but a different hash function.

What about the economics? Well, it's called ETH or E T H. It's programmed in such a way that you can't use ASICs, purposely makes it that mining is more decentralized, and you don't have the big factories.

The entire hash community, the entire mining community, is much smaller. In fact, I think it's about what would that be? 200,000 times smaller. There's 260 terahashes per second as of yesterday. And the bitcoin mining community has 54 exahashes. That means lots more computers, a lot more electricity, a lot more gnashing of teeth about resources.

Bitcoin started in January of 2009. And nobody owned any bitcoin, whereas Ethereum started with a presale and an ICO, which we'll be talking about, about 72 million Ethereum.

Vatalik wanted to raise money he was maybe 19 years old. He looped in with a venture capitalist from Canada, Joe Lubin, who now runs ConsenSys. Lubin took about 10% or 9 and 1/2% of the offering. They put 9 and 1/2% in a foundation called the Ethereum Foundation. And the other 80% was sold to the public for \$18 million.

We'll talk later in the semester as to whether that was really a securities offering. I've publicly said I think so, but that was in 2014. And in 2018, the Securities and Exchange Commission has said regardless of why it might have been in '14, it's now sufficiently decentralized that we'll consider it not a security.

But in essence, they raised \$18 million and were off to the races. Oh, and the 10% that Joe

And what Nakamoto consensus is, is he said, well, no. We're not going to have Haber and a central authority. It's going to be decentralized.

So these other consensus protocols generally have some randomized approach to delegate the selection of the next block. It's not always that way. But they may also have a mechanism to do a second thing a second touch.

Silvio Micali's algorand he's a professor over in the Computer Science and AI Lab and a Turing Award winner. He's got a company that has an interesting thing. It's like a jury selection. It's like picking somebody for the jury that's picking this short group of 12 nodes that might do something. And every block has that selection process. But then there's another broader group that then can check the work of the jury.

So often, there's kind of a second automated way, because trust isn't there, ensuring that there's a quick second check. Did they decide guilty or innocent correctly, so to speak. Again, I apologize if I'm a little oversimplifying Silvio's brilliant work.

So it could be proof of stake, proof of activity, proof of burn, as we talked about, proof of capacity. And as I mentioned last week, there's not large scale uses, but DASH and NEO both have some form of this going on right now.

And Ethereum has a big project. I'm confusing their two projects. There's Plasma and there's Casper. Casper is their project to get to prove of stake, but they're not there.

Privacy and security. So I'm trying to remember who raised the contradictory tensions. The contradictory tensions is law enforcement and regulators want more transparency. Even though the FBI did, you know, sort of figure out some Russians were using Bitcoin to mess in our elections, they want some more transparency in financial institutions. Users and even some regulators want less transparency. So it's not it kind of goes both ways.

But these, I think, are also truly solvable. Well, for consumers, there's DASH and Monero and Zcash. And there's even mechanisms called mixing and tumbling, which I truthfully can't tell you the difference. But I can tell you regulators talk about mixers and tumblers and privacy coins.

When I go to some regulatory conferences because they sometimes invite me as a former that middle slide the privacy coins and the mixers and tumblers the finance ministries and the law enforcement stuff, that's where they kind of get worried.

Madars, you want to come up here and tell us anything about Zcash? Or you want to do it from there, as to what inspired you to do a privacy coin that a bunch of law enforcement folks don't like?

[LAUGHTER]

Oh, I don't mean I mean, but, you know.

AUDIENCE: Obviously.

GARY GENSLER: And it's legal. I mean, it's a coin. It's real.

AUDIENCE: So just like cash can be used for illicit purposes, also systems that provide strong privacy like Torque can be used for illicit purposes. So it's said privacy is a human right, and we shouldn't be giving up our financial independence just because I want to buy a coffee. I don't want to reveal all my other transactions. Well, I think that there are mechanisms how law enforcement can against our regulatory objectives, but privacy I think is fundamental right, so we should fight for it.

GARY GENSLER: And so when did you start working on the project?

AUDIENCE: I think it was 2014 when we started writing the paper.

GARY GENSLER: So you started with a paper.

AUDIENCE: [INAUDIBLE] like prototype, codebase, we put it open source. And then there were the companies that got formed to launch the project.

GARY GENSLER: And I think Zcash now is somewhere around a billion dollar market cap.

AUDIENCE: It fluctuates wildly.

GARY GENSLER: Fluctuates. So that's why you're here. It went down? No, no. You don't need to answer that. Sorry. Privacy. But in essence, what Madars is saying that he came to this what were you doing in 2014?

AUDIENCE: I was a grad student here at MIT. I was mostly working in zero knowledge groups.

GARY GENSLER: On zero knowledge groups.

GARY GENSLER: You think it's just retained earnings?

AUDIENCE: They're selling nothing.

GARY GENSLER: All right. So the question is, is it earnings? Is it a revenue item when you sell it? Or some people book it as deferred revenue. So there's two ways you can book it. You could also book it as a liability, but it's either deferred revenue or current revenue. All right, what could motivate you to book it as a deferred revenue instead of current revenue? What's that?

AUDIENCE: Taxes, probably.

GARY GENSLER: Taxes. So some book it as deferred revenues, because they don't want to book taxes. And God knows whether that's really the right way to book it. And others book it right as a revenue item right now. But I don't know of anybody, whether they're booking it as deferred revenues or current revenues, that wants to book it to trigger that it's a security. So most law firms that I understand, they're not they're not accountants, but they don't want their clients to book it in a way that will make it look more like equity. So it's either deferred revenue or current revenue. Some, I've heard, have called it a liability, but I think that's the minority.

AUDIENCE: I don't know if it takes too much time to go through a use case to make these examples tangible. If I'm promising to deliver a good, then the company is getting back the tokens, right? How do you put it back out again in the market?

GARY GENSLER: So the question is what is the use case. So some use cases, the token is issued and it's really for the community. And some tokens come back to the company. So a file storage, Filecoin, for instance, they raised \$250 some million, the equivalent of. And in that case, I think the token would be used within the community rather than back to the company. So even like Ethereum, when you use Ethereum as a form of buying computing power, it doesn't go back to the Ethereum Foundation.

So the most dominant and that's why it really should be booked as current revenue, because it's not even that the software provider is providing a service later. The most dominant use case is, like in Ethereum, that you're using the Eth for other people in the network. It's a monetary unit that's not coming back. There are some where it comes back, and then it's basically returned to the corporate treasury. So it's two different models. Have I lost you or are you with me?

than more ICOs, because it just keeps cutting down the investor enthusiasm. I don't think it's FOMO anymore. What's the opposite of FOMO?

AUDIENCE: Here.

GARY GENSLER: What's that? So all right, so study questions for next Tuesday is just we're going to go back to ICOs, talk a little bit about the scams and frauds. We're going to talk about the Securities and Exchange Commission. We've already talked a lot about their design feature. So it's going to be like going back to some of the regulatory things. I'll try to look up on the Filecoin questions as well.

We will drop one more reading in, which is just this quick two pager from the SEC from last Friday that may be worthwhile looking at. And this is the best thing I could do to say Happy Thanksgiving. I know it's a Bitcoin turkey, blockchain turkey, and the like. But I do think it's an interesting thing. ICOs are a new means of crowdfunding. And there's been so many different ways to raise money over centuries. This is not equity, it's not debt, it's something else. I don't know how much of it will last three and five years from now, but the idea that you could pre fund an idea, a deferred revenue or some sort, but it's not your revenue, is an interesting evolution in the markets of finance.

But I think if you can't assess the viability of the use case and figure out what really is the benefit of the token economics that comes back to, is there really a benefit to having a native token on a network for a good or a service, for file storage, for ride sharing, and so forth? And then I think this will just be looked back decades from now, people look back and say, well, that was a small, little, odd thing that happened back there in the 2010s. But it might be. I'm not all the way to zero. I think there might be a reason why folks want to have a native currency, a native token to jumpstart a network and to motivate a network over time, whether it's like swords and skins and shields in a gaming site.

The majority of ICOs have failed already. And because they keep failing so fast I don't know by the end of this year or certainly by the middle of next year, over 90% or 95% of them will have failed, like if you take the whole total. So it's pretty clear it's going to come down. There's going to be less and less probably in this ICO thing. It doesn't mean that blockchain technology is over. It just means that this wave, I think, will diminish. So Happy Thanksgiving. Is there a question before we all go to Thanksgiving and airports and trains?

AUDIENCE: Just a quick question. Does any ICO take ownership of the company besides [INAUDIBLE]

GARY GENSLER: So we'll talk about this Tuesday. The question is, can you ever have an ownership right in a token? The answer is yes, you could structure it to have voting rights, governance rights, dividend rights. There are a handful that have done that. But after the DAO or DAO issuance, which did give some governance rights and cash flow rights, the SEC spoke to that in a paper one year ago or 15 months ago. There's very few of them. Most of them are what you would call either utility tokens or service tokens, where you have a right to get a service or a good usually from the rest of that network, rather than back. I'll check on Filecoin, but the answer is yes you can do it, but it's a rare case that does it. So thank you. Happy Thanksgiving. Thank you for all being in this class.

[APPLAUSE]

And then you get to some issuers who have to deal with multiple jurisdictions. And almost every large corporation that has investors in multiple jurisdictions has to deal with the investor laws in multiple jurisdictions. So initial coin offerings, if they want to tap into US 328 million people to buy some of these, it's more than a de minimis.

It's not a majority. US law doesn't need a majority. It just has to be more than a handful. US Securities and Exchange Commission might exert its jurisdiction. It doesn't always. So please.

AUDIENCE: So some of these ICOs, Filecoin, I think, included, only sold to accredited investors. In my mind, that doesn't really change the definition of security or highly taxed or jurisdiction. So what is the benefit of only selling to accredited investors?

GARY GENSLER: Can I hold that, because I'm going to slide on that? But it's a very good question. So the Ernst & Young study and I promise we'll get to it. So one year later, they looked at the top 141 ICOs of 2017.

I haven't looked at the whole list. But I think they pretty much got the top end. 86% are trading below listed price as of September 30. This does not take into consideration the last week. But the number would go up 86% nine months later.

30% have lost substantially all their value, and not necessarily scams and frauds. But it's interesting to compare that to Christian Catalini's 25% scam or fraud number. But these are the top 141 in size. These aren't the small riff raff size.

Collectively, the portfolio is down 66%. I didn't go back to compare what that would be versus Bitcoin because some of these were issued in October, some December. But collectively, if you invested in the port it's not January 1 to September 30. It's from investment day. And only 13% have working products and 16% have prototypes.

Another interesting thing is the 13% that have working products, which is about 25 of these. Is that right? Roughly, yeah, about 25 or so, 20 to 25. Seven of them have decided subsequent to launch to accept fiat currency to get the good or service. So literally, if you dig into the Ernst & Young report, they've chosen to take something else.

And Hugo, back to your question about XRP, as I understand it and as I studied it, I might be mistaken, but xRapid, you can actually use something other than XRP as the bridge currency. It has to be another crypto.

But 7 of 25 live projects that Ernst & Young followed have decided subsequently maybe to take a fiat currency for the good or service, as well. So that kind of gives you the sense this was a note about the Catalini report and that status report, as well.

What's going on on Ethereum? This is the most recent report. I summarized something from a site. These are exchanges. There's 179 DApps. This is just looking at Ethereum.

But there's only 25,000 uses a day for 179 sites. 17,000 in gambling. But it's exchanges, gambling, games, finance fourth. And then you can go down. The other category, which only has 275 daily uses, covers governance, identity, security, energy, insurance, and health.

Of six of those use cases 218 DApps, which means they're all being used zero or once a day. I believe I pulled this for the month of October. I think all these stats are yeah, this was for the month of October. So it might be September, but it's all current information.

So what has the SEC done in this space? Well, they brought the DAO report in July of 2017. If you remember, this was the big \$150, \$160 million big ICO in 2016. A third of it was hacked. It led to the break in the Ethereum network between Ethereum Classic, the hard fork, and Ethereum.

DAO actually shut down. It didn't take off. And a year later, the SEC did not bring an enforcement action. They chose not to penalize anybody. But they laid out in pretty good detail as to why these things were securities.

I don't think they had planned for what was going to happen next. But the ICO, boom, took off, I don't think because of the DAO report. But it's an interesting coincidence whether this kind of gave a bunch of lawyers and entrepreneurs a sense, all right, if I avoid doing what they did specifically and the DAO, they actually paid part of the revenues to the token holders, and they gave a sense of voting rights.

So it was so security looking because there were a form of participation in governance and a form of participation in profits that everything took off. Then then the SEC did two other things. One was the REcoin complaint was a real fraudulent player, and the Munchee order in December last year. I read that in January or February. And I thought, well, that's pretty clear.

And Jay Clayton, who runs the SEC, has said in congressional testimony in February that he hadn't met an ICO that he didn't think was a security. His words were a little different. But I

But I think that even the Securities and Exchange Commission will speak more definitively than Bill Hinman's speech he gave in, was it June? Yeah, June. That was one of the readings, right Director Hinman's. I like that he used my name in his speech, the title. He was talking about Gary, Indiana, though.

But I do think, just like what happened with Airfox and Paragon, more ICOs will be brought into compliance either by registering in the US under Reg D, or maybe Regulation A. Or they'll just come into compliance even if they didn't earlier come into compliance.

I think that the early tokens will be tested as some platforms become functional. Most will fail. Most we'll never hear from. But what happens when Filecoin actually they raised a quarter of a billion dollars.

Let's at least for now presume they will become functional sometime in 2019, or Telegraph. That will be interesting to see what the test of these large cap ICOs are. We'll learn from that.

I also think markets will better differentiate viability. They'll go through, when do you need an append only log, consensus among multiple parties, and a native token on a distributed ledger? That wasn't happening, probably, enough in late 2017 and early 2018.

I don't think they had to take this class, even though we'll put it out live, and people will be able to see it. But I think markets will start to differentiate viability by CO use cases a little better than they have the last 12 months. So any questions? Eric?

AUDIENCE: Yeah. There's a bunch of startups we've been checking out. They're going through a new approach. There is actually a lot of venture capital firms that are doing a financing stage pre ICO to help these startups build the actual network.

And in that case, when they go to post ICO, you could argue that that helps, building the network before the ICOs can actually make them fail the Howey Test, because there's no in a sense, you have a network, a decentralized arrangement, that you don't have the single enterprise

GARY GENSLER: So I think, Eric, you're raising two questions. Are there ways to stage your financing to help build a network, just as a pure money and finance? And secondly, what is the regulatory implication, because I think it's two part.

I think, like in any form of venture, you might stage your financing and, in this case, sort of address the network possibility before you do the regulatory. And it may be enough.

I mean, the US Securities and Exchange Commission and Hinman's speech sort of said you could be sufficiently decentralized as Ethereum. They, in essence, had some regulatory forbearance.

And there's a key sentence in that speech as to, I think the words were, regardless of what Ethereum might have been in 2014 like, Hinman kind of pushed that to the side and said, I'm not going to address that question implicitly. But it's sufficiently decentralized.

That's the debate that's going on now between a bunch of venture firms and the SEC. When are you sufficiently decentralized? And so that form that you just mentioned might get us there might. I don't know. Did you have one last question? And then we're going to

AUDIENCE: Maybe, just on the second point about likelihood of [INAUDIBLE], [? which I ?] obviously agree is there any research on

GARY GENSLER: This is just a prediction.

AUDIENCE: Yeah. I'll bet on it. How much of the ICO funding was crypto to fiat to crypto, people selling appreciated bitcoins

GARY GENSLER: Terrific question. Almost all ICOs are priced crypto to crypto. So if you look at whether the initial ones, all the way back when the Ethereum was priced vis á vis Bitcoin or, the most recent, iOS that raised \$4.2 billion, their actual pricing mechanism I'm not familiar with any that priced versus fiat.

Their pricing mechanism in their auction or offering, it's almost always crypto to crypto. But somebody might be funding it fiat to crypto. But I think, to answer your question, you should assume 99% the actual exchange is crypto to crypto.

AUDIENCE: So I mean, just the decline in the price of Ethereum to Bitcoin, Bitcoin to cash almost has to

GARY GENSLER: It has to put pressure on it. But I also think it is likely that the decline in the ICO market has put price pressure downward on Ethereum, for sure. And so Ethereum was the second most valued crypto. And now it's third.

And it's had more price decline than Bitcoin or XRP. And I think part of that's narrative. Part of

EXHIBIT H



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October 28, 2019

By ECF and UPS

Honorable Alvin K. Hellerstein
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: ***SEC v. Kik Interactive Inc.***, SDNY Case No. 19-cv-5244 (AKH)

Dear Judge Hellerstein:

Pursuant to Local Rule 37.2 and Rule 2(E) of Your Honor's Individual Rules of Practice, the parties write to request the Court's intervention regarding a discovery dispute concerning Defendant Kik Interactive Inc.'s request for a Rule 30(b)(6) deposition notice of the U.S. Securities and Exchange Commission ("SEC") and its service of subpoenas *ad testificandum* upon William Hinman (Director of the SEC's Division of Corporation Finance), Valarie Szczepanik (Associate Director of the SEC's Division of Corporation Finance), and Jonathan Ingram (Deputy Chief Counsel of the SEC's Division of Corporation Finance). Copies of the discovery requests at issue are attached hereto as Exhibits A-D.

The parties certify that they met and conferred regarding this dispute before bringing the issue before the Court. Specifically, the SEC outlined for Kik the legal bases for its objections to the discovery in a letter dated October 10, 2019. During a telephone call on October 11, 2019, the parties also discussed Kik's bases for the depositions and the SEC's objections.

The parties set forth their respective positions regarding these depositions below.

STATEMENT OF THE SEC

The SEC submits that, for the reasons that follow, each of the depositions sought by Kik should not go forward and the discovery requests should be quashed.

1. The Discovery Is Irrelevant.

As a preliminary matter, the discovery sought by Kik is irrelevant to the central issue in this litigation: whether Kik offered and sold unregistered securities in violation of Section 5(a) and (c) of

the Securities Act of 1933. Neither the SEC nor any of the senior SEC officials sought to be deposed by Kik are percipient witnesses to Kik's conduct in this regard. Indeed, Kik's demand for these depositions cannot be reconciled with the defendant's August 9, 2019 Rule 26(a)(1) initial disclosures, as neither these individuals nor the SEC are identified as "individuals likely to have discoverable information that Kik may use to support its defenses." *See* Exhibit E.

Despite their omission from Kik's Rule 26(a)(1) initial disclosures, Kik has offered as justification for the deposition Kik's affirmative defense of unconstitutional "vagueness" (*see* Answer, ECF No. 22 at 118, *et seq.*). Kik's "affirmative defense" that the Securities Act is "void for vagueness" with respect to digital tokens, however, lacks legal merit. *See United States v. Zaslavskiy*, 17 CR 647, 2018 WL 4346339 (E.D.N.Y. Sept. 11, 2018) (rejecting a similar "void for vagueness" defense). Indeed, Judge Dearie, citing numerous other unsuccessful efforts to find the definition of "investment contract" unconstitutionally vague, easily found that the argument had no merit given the decades of jurisprudence interpreting the *Howey* case:

Furthermore, the test expounded in *Howey* has—for over 70 years—provided clear guidance to courts and litigants as to the definition of "investment contract" under the securities laws. *See [SEC v.] SG Ltd.*, 265 F.3d [42,] 47 [(1st Cir. 2001)] ("[o]ver time, courts have classified as investment contracts a kaleidoscopic assortment of pecuniary arrangements that defy categorization in conventional financial terms"). Moreover, the abundance of caselaw interpreting and applying *Howey* at all levels of the judiciary, as well as related guidance issued by the SEC as to the scope of its regulatory authority and enforcement power, provide all the notice that is constitutionally required.

Id. at *9; *see also SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1052 n. 6 (2d Cir. 1973), *cert denied*, 415 U.S. 914 (1974) (argument that "investment contract" under the Securities Act was void for vagueness was "untenable" "in light of the many Supreme Court decisions defining and applying the term"). Kik is free to conduct discovery to establish that that the Kin it offered and sold in 2017 was not an "investment contract," but its "void for vagueness" argument has been rejected time and time again, and the Court should not sanction Kik's "fishing expedition" on such an untenable claim.

Accordingly, because the stated basis for the supposed relevance of the discovery is without legal merit,¹ there is simply no reason for these depositions to go forward.

¹ Consistent with this objection, the SEC has filed a motion for judgment on the pleadings as to Kik's first defense asserting unconstitutional vagueness. (Docket Nos. 25 and 26). As the SEC pointed out in support of this motion, an order granting the SEC's motion will streamline the litigation and obviate all of the discovery at issue in this joint letter. Although Kik here contends that by filing the motion the "SEC concedes that Kik's depositions are unquestionably relevant" (*see infra* Footnote 2), this is incorrect. Even if Kik is allowed to pursue its affirmative defense, its requested discovery is still objectionable on multiple grounds including relevance. For example, the subjective views of SEC employees, which cannot bind the Commission on whether *Howey*'s elements apply to facts and circumstances in other cases, hypothetical or real, are irrelevant to Kik's purported defense; such views could not be evidence that the securities laws failed sufficiently to cabin the agency's discretion when it brought an enforcement action against Kik on the facts at issue in this case.

2. Kik Intends to Focus Its Depositions On Privileged Subject Matter.

During the parties' telephonic meet-and-confer, Kik informed the SEC staff that it intends to question senior members of the Division of Corporation Finance staff and the SEC's Rule 30(b)(6) designee regarding the agency's regulation of digital assets – specifically, *why* the SEC has regulated digital assets as it has and the factual and legal bases for its regulatory decisions – which Kik contends is relevant to its “void for vagueness” defense, although, it is not entirely clear why this is so. Regardless, discovery on such topics necessarily implicates the attorney-client privilege, as each of the would-be deponents is an attorney, and he or she has a role in making recommendations to the five-member Commission, the only authoritative, decision-making body of the agency. What, why, and when these individuals communicated to the Commission (and vice-versa) regarding the regulation of digital tokens is necessarily protected by the attorney-client privilege and cannot be the subject of discovery. *See, e.g., United States v. Klein*, 16-cr-442, 2017 WL 782326 (E.D.N.Y. Feb. 28, 2017) (finding that a SEC action memo, a document intended to “convey legal advice to the Commission,” was protected by the attorney-client privilege).

Similarly, discovery as to the “decision making processes of [a] government agenc[y]” – the expressed reason for the depositions in question – are also protected from discovery by the deliberative process privilege. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-53 (1975) (disclosure of intra-agency deliberations and advice is injurious to federal government's decision-making functions because it tends to inhibit frank and candid discussion necessary to effective government); *see also Klein*, 2017 WL 782326 (SEC action memo also protected by deliberative process privilege).

To the extent Kik desires discovery regarding the *public* decisions and *public* statements that the Commission has made with respect to digital tokens (the only topics conceivably relevant to Kik's legally flawed “vagueness” defense), these statements are all available on the SEC's public-facing website, and the SEC is willing to stipulate to their content, publication date, and authenticity. Accordingly, the depositions Kik seeks should be quashed.

3. Senior Government Officers Should Not Be Deposed Absent Exceptional Circumstances, Which Are Not Present Here.

Each of the individuals subpoenaed by Kik is a high-ranking official in the SEC's Division of Corporation Finance – William Hinman is the Director of the Division, Ms. Szczepanik is an Associate Director, and Mr. Ingram is the Deputy Chief Counsel. And, the law is well-settled that “a high-ranking government official should not—absent exceptional circumstances—be deposed or called to testify regarding the reasons for taking official action.” *Lederman v. New York City Dept. of Parks and Recreation*, 731 F.3d 199, 203 (2d Cir. 2013). In order to depose a senior government official, the party seeking the discovery bears the burden of establishing “extraordinary circumstances.” *See In re United States*, 197 F.3d 310, 312 (8th Cir. 1999) (party seeking deposition bears burden to prove extraordinary circumstances). Consequently, to take the deposition of a senior official, Kik must show *for each would-be deponent*, “for example, that the official has unique first-hand knowledge related to the litigated claims or that the necessary information cannot be obtained through other, less burdensome or intrusive means.” *Lederman*, 731 F.3d 203. Kik, however, cannot carry its burden because no such “exceptional circumstances” exist here. Again, neither the agency nor these officials have any first-hand information regarding Kik's offer and sale of Kin.

Kik may contend that it needs to take these depositions because the testimony may constitute some sort of “admission” Kik can use against the SEC in litigation. But, even this argument is wrong. The law is equally well-settled that none of these employees’ statements can bind the Commission. *See Sidell v. Commissioner of Internal Revenue*, 225 F.3d 103, 111 (1st Cir. 2000) (“statements by individual IRS employees cannot bind the Secretary [of Treasury]”).

Given this well-settled law, which the SEC provided to Kik before Kik issued the subpoenas in question, and Kik’s rejection of the SEC staff’s offer to cooperate with Kik to obtain through less obtrusive means the discovery it claims to need (e.g., stipulation), the deposition notices appear designed solely to harass the identified Division of Corporation Finance officials.² The SEC submits that they should, therefore, be quashed.

4. The Subject Matter Of Kik’s Rule 30(b)(6) Deposition is Overbroad and Unduly Burdensome

Each and every topic Kik has identified for the Rule 30(b)(6) deposition of the SEC is overly burdensome and wholly out of proportion with the needs of the litigation – again, so much so that burden appears to have been their only design. As just one example, Kik has demanded that the SEC designate a witness to testify regarding the following:

Communications between the SEC and distributed ledger industry stakeholders or other groups representing the interests of entities working with Virtual Currencies and/or Digital Assets, from January 1, 2013 to June 1, 2019, concerning the application of federal securities laws (including, but not limited to, the Securities Act of 1933) to Virtual Currencies and/or Digital Assets and the offer and sale of such Virtual Currencies and/or Digital Assets.

See Exhibit D at Request 11.

The agency, however, employs thousands of lawyers in the Division of Enforcement alone, yet Kik has demanded a designee to testify regarding each and every “communication[]” between the SEC and “distributed ledger stakeholders or other groups representing the interests of entities working with the Virtual Currencies and/or Digital Assets” during a six-and-a-half-year period. Clearly, such a demand is overbroad and excessively burdensome – so much so that it is impossible to comply with Kik’s discovery request for information.

Kik also makes similar demands for testimony regarding all “communication” by anyone employed by the agency with “exchanges or trading platforms” (*id.* at Request 12), “elected state or federal officials” (*id.* at Request 13) and “foreign securities regulators” (*id.* at Request 9), which are equally overbroad and improper. And, Kik’s demands for testimony regarding each and every

² Kik contends that the officials it has subpoenaed are not “senior enough” to warrant protection from its subpoenas, and that the *Morgan* doctrine should only apply to Presidential appointees. Such an argument is impossible to square with *Lederman*, wherein the Second Circuit affirmed a protective order barring the deposition of a mayor and deputy mayor. Moreover, the United States District Court for the District of Massachusetts recently quashed the deposition of Stephanie Avakian, Co-Director of the SEC’s Division of Enforcement. *See SEC v. Navellier & Associates, Inc.*, Case 1:17-cv-11633-DJC (D. Mass), ECF No. 209.

“enforcement action and investigation” of a digital asset offering (*id.* at Request 16) or “crowdfunding platform” (*id.* at Request 21) are also obviously out-of-bounds. The SEC requests that the Court quash the defendant’s oppressive demands for discovery.

5. Kik Has Refused The SEC’s Offer To Stipulate In Lieu of the Depositions

Finally, the SEC has requested that the parties enter into a stipulation, which would obviate the depositions and to preserve the SEC’s arguments as to the relevancy of the discovery. Kik has informed the SEC that it will not, under any circumstances, accept a stipulation in lieu of the deposition, which bolsters the SEC’s conclusion that Kik’s discovery is designed to harass rather than to conduct legitimate discovery. For this additional reason, the SEC asks the Court to quash Kik’s proposed depositions.

STATEMENT OF KIK

This case is the first litigated action instituted by the SEC against a cryptocurrency developer premised solely on a technical, strict liability Section 5 violation with no allegation of fraud. Kik has asserted as an affirmative defense in this case that the ambiguity in the SEC's guidance concerning virtual currencies resulted in arbitrary enforcement and deprived Kik of its constitutional right to fair notice of what the law required. *See* Answer, ECF No. 22 at 123-26. Kik is not alone in its criticism of the SEC's inconsistent and ambiguous regulatory approach. Indeed, members of U.S. Congress, academia, and *even an SEC Commissioner* have publicly and repeatedly criticized the SEC's failure to provide any guidance or demonstrate any consistency in its application of federal securities laws to cryptocurrency projects.³ There is ample evidence to show that the SEC has contributed to the confusion in this area by engaging in a pattern of arbitrary enforcement. For example, despite the fact that it was aware of cryptocurrencies since as early as 2011—including hundreds of token sales occurring in 2016 and early 2017 alone—the SEC declined to pursue an enforcement action against token issuers until after Kik's token distribution event in September 2017.

Kik seeks to depose a 30(b)(6) representative of the SEC's choosing to shed light on the SEC's inconsistent (and apparently arbitrary) application of securities laws in this area and its affirmative decision not to provide clear guidance. It also seeks to depose three of the individuals who were most involved in, and thus aware of, the development and execution of this approach. Indeed, two of these proposed deponents have made public statements (cited by Kik in connection with its affirmative defense) that have contributed to the ambiguity in this area. *See* Answer at 123-26. Their testimony is unquestionably relevant.

The SEC seeks to prevent Kik from taking the depositions and other discovery relevant to its affirmative defense. In doing so, it first chooses to ignore Kik's affirmative defense by setting up a straw man and asserting that the discovery is irrelevant to *the SEC's* claim. However, as the SEC knows, while the witnesses may not have been percipient witnesses to Kik's alleged conduct, they clearly have personal knowledge relevant to *Kik's* affirmative defense. Forced to acknowledge Kik's affirmative defense, the SEC prejudices the issue prior to discovery and unilaterally decides that it is without merit. It then raises a laundry list of challenges that either do not apply or need to be determined on a question-by-question basis. Among the more disingenuous challenges is that the depositions would be overbroad, excessively burdensome, and oppressive. During the meet-and-confer, Kik expressly stated that based on the SEC's response to Kik's pending requests for admissions and/or reasonable proposals from the SEC (which alone knows the nature and location of the requested information), it would be willing to limit the time and scope of the depositions. The SEC made clear that it would not make a witness available under *any* circumstances. In short

³ *E.g.*, Katie Rooney, CNBC.com, "Congress Members Ask SEC Chairman for Clarity on Cryptocurrency Regulation," (Sept. 28, 2018), <https://www.cnbc.com/2018/09/28/congress-ask-sec-chairman-for-clarity-on-cryptocurrency-regulation.html>; Hester Peirce, "How We Howey," Securities Enforcement Forum, East Palo Alto, California (May 9, 2019), <https://www.sec.gov/news/speech/peirce-how-we-howey-050919> ("It is therefore our duty as a regulator to provide the public with clear guidance as to how people can comply with our law. We have not yet fulfilled this duty."); Interview by Nicole Kim with Commissioner Hester Peirce (Aug. 8, 2019), <https://dragonchain.com/blog/-hester-peirce-us-securities-exchange-commission/> ("we [the SEC] really need to be proactive . . . in providing clear rules and guidance so that people know what it is they have to comply with. Then we can hold them accountable for not complying with it.").

and as set forth below, none of the arguments raised by the SEC provides a basis for it to block Kik from the discovery it is entitled to and needs for its affirmative defense.

1. Kik's Discovery Is Relevant to Its Affirmative Defense.

The SEC is seeking to prevent Kik from taking *any* discovery on its void for vagueness defense.⁴ As its primary argument, the SEC contends the depositions are not relevant to the SEC's claim in this matter. Again, Kik is seeking the depositions not with regard to the SEC's claim but to gain evidence to support its affirmative defense.⁵ The SEC then argues that Kik's affirmative defense has no merit.⁶ The SEC's self-serving position on this issue provides no basis for the SEC to block discovery plainly relevant to Kik's defenses. *EEOC v. LifeCare Mgmt. Servs LLC*, 2009 WL 772834, at *3 (W.D. Pa. Mar. 17, 2009) (permitting 30(b)(6) deposition, noting that "Defendants are entitled to discovery on [their affirmative defense] before any dispositive ruling"). "A motion for a protective order is not the proper vehicle for the court to adjudicate the merits of a party's claims or defenses and determine which affirmative defenses are available to Defendants for discovery purposes." *Branch Banking & Tr. Co. v. Iny*, 2014 WL 12785312, at *2 (D. Nev. July 18, 2014); *see also Tutor Time Learning Ctrs., LLC v. KOG Indus., Inc.*, 2013 WL 12363550, at *2 (E.D.N.Y. Apr. 5, 2013) (compelling discovery, noting "Plaintiff essentially challenges the merit of Defendants' affirmative defense, which is an issue better left for dispositive motion practice or trial").

Pursuant to Rule 26(b)(1), Kik "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense[.]" Fed. R. Civ. P. 26(b)(1); *see also Cohen v. Cohen*, 2015 WL 4469704, at *3 (S.D.N.Y. June 29, 2015) ("[I]t is well-settled within this Circuit that 'any possibility' that the sought-after information may be relevant to the subject-matter of the action will satisfy Rule 26(b) (1)'s requirements."). Kik pled a void for vagueness affirmative defense, and now seeks discovery related to that defense. This, alone, satisfies Rule 26(b). *SEC v. Navellier & Assocs.*, 2019 WL 688164, at *2 (D. Mass. Feb. 19, 2019) (defendants may depose SEC "to learn the facts underlying their selective enforcement defense"). The SEC cannot argue that there are no facts to support Kik's affirmative defense while at the same time blocking all efforts at discovery aimed at confirming or refuting that position.

⁴ In addition to objecting to the depositions, the SEC has taken a similar position on Kik's requests for documents, declining to provide *any* documents relating to Kik's affirmative defense, beyond public documents already available to Kik. As with the depositions, it has declined Kik's invitation to suggest a more limited set of custodians or categories of information it is willing to provide.

⁵ Each of the prospective deponents are listed on Kik's amended Rule 26(a)(1) initial disclosures.

⁶ Notably, the SEC waited until October 24, 2019—nearly *three months* after Kik filed its Answer and raised its affirmative defense—and on the eve of submitting this joint letter to the Court to file its Motion for Judgment on the Pleadings as to Kik's Void for Vagueness Affirmative Defense ("Motion"). ECF No. 26. In filing its Motion, the SEC concedes that Kik's depositions are unquestionably relevant and that the SEC lacked any legal basis in refusing to provide Kik with the discovery to which it is entitled and needs to defend itself and pursue its affirmative defense. Kik fully intends to oppose the Motion. With five weeks left in discovery, however, Kik respectfully requests the Court order the SEC to comply with its discovery obligations by a date certain.

2. None of the Prospective Deponents Are “Top Executive Officials” Meriting Protection from Depositions Under *Morgan*.

The SEC next relies on *United States v. Morgan* and its progeny to argue that certain staff members from the SEC’s Division of Corporate Finance constitute “high-ranking government officials.” *Lederman v. New York City Dept. of Parks and Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) (New York City mayor and former Deputy Mayor are high-ranking government officials (citing *United States v. Morgan*, 313 U.S. 409 (1941))). The SEC’s reliance on *Morgan* is misplaced. *Morgan* is a “form of executive privilege,” *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997), and it has been extended to persons at the very top levels of executive government agencies, such as cabinet officials, agency heads, commission chairs, and governors, with limited expansion beyond those examples. *SEC v. Comm. on Ways & Means*, 161 F. Supp. 3d 199, 250 (S.D.N.Y. 2015) (*Morgan* rule “has generally only been applied to government officials who are at the apex of their organization”); *Byrd v. District of Columbia*, 259 F.R.D. 1, 8 (D.D.C. 2009) (collecting cases, and concluding that deputy mayor and general counsel for a city department were not “high-ranking officials”).

For example, in *Cobell v. Norton*, the court held that the Associate Deputy Secretary of the Interior was not a “top executive department official,” but rather a “mid-level executive.” 226 F.R.D. 67, 94 (D.D.C. 2005). The court explained that “[t]op executive officials are confirmed by the Senate and are in the Executive Schedule ... [the Associate Deputy Secretary of Interior] is not the type of executive official in need of protection from the discovery process.” *Id.* Based on these criteria, the only SEC officials shielded from depositions under the *Morgan* rule are the Chairman of the SEC and its Commissioners, all of whom were confirmed by the Senate and hold positions identified in the Executive Schedule. *See* 5 U.S.C. §§ 5311–5318 (identifying the top officials in the executive branch).

Here, the SEC does not and cannot establish that Mr. Hinman, Mr. Ingram, and Ms. Szczpanik are “top executive officials.” This Court need only examine their employment positions to make this determination. Further, Kik is not aware of any authority (and the SEC cites none) in which federal employees holding analogous positions within a federal agency were held to be “high-ranking officials” under *Morgan* and its progeny. Indeed, Courts have rejected *Morgan* protection for officials at the same or even higher levels than that which Mr. Hinman, Mr. Ingram, and Ms. Szczpanik occupy. *See, e.g., Comm. on Ways & Means*, 161 F. Supp. 3d at 250 (Staff Director of the Health Subcommittee was not a “high-ranking government officer”); *Citizens for Responsibility and Ethics in Washington v. Cheney*, 580 F. Supp. 2d 168, 179 (D.D.C. 2008) (neither the Chief of Staff to Vice President Richard Cheney nor the Director of the Presidential Materials Staff in the Office of the Presidential Libraries is the kind of “cabinet-level officer” that receives “protection from discovery”).

3. The SEC Is Not Exempt from Rule 30(b)(6).

With respect to the Rule 30(b)(6) deposition, the basic premise of the SEC’s argument appears to be that because it is a government agency that makes policy and employs many lawyers, it should be exempt from the Rule 30(b)(6) procedure. This position is facially improper. By its very terms, Rule 30(b)(6) applies to a governmental agency. *See* Fed. R. Civ. P. 30(b)(6) (“[A] party may name as the deponent ... a governmental agency[.]”). “[L]ike any ordinary litigant, the Government must abide by the Federal Rules of Civil Procedure.” *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009); *see also Francis v. City of New York*, 262 F.R.D. 280, 282 (S.D.N.Y. 2009)

(same). The SEC “is not entitled to special consideration concerning the scope of discovery, especially when it voluntarily initiates an action.” *Collins & Aikman Corp.*, 256 F.R.D. at 414; *see also SEC v. Kramer*, 778 F. Supp. 2d 1320, 1327 (M.D. Fla. 2011) (permitting deposition, noting that the Federal Rules provide the SEC “neither an exemption from Rule 30(b)(6) nor special consideration concerning the scope of discovery” (internal quotation marks omitted)).

Courts routinely permit Rule 30(b)(6) depositions of government agencies, particularly where, as here, the noticed deposition topics relate to a party’s defenses. *See, e.g., SEC v. Navellier & Assocs., Inc.*, 2019 WL 688164, at *2 (D. Mass. Feb. 19, 2019) (defendants may conduct Rule 30(b)(6) depositions “to learn the facts underlying their selective enforcement defense” (internal quotation marks omitted)); *SEC v. Goldstone*, 301 F.R.D. 593, 676 (D.N.M. 2014) (permitting defendant to depose the SEC pursuant to Rule 30(b)(6)); *SEC v. Merkin*, 283 F.R.D. 689, 693-94 (S.D. Fla. 2012) (same); *SEC v. McCabe*, 2015 WL 2452937, at *5 (D. Utah May 22, 2015) (same, rejecting argument that discovery is limited to the SEC’s investigative file).

Without law on its side, the SEC laments the fact that Kik would not agree to stipulations in lieu of deposition testimony. As a preliminary matter, Kik made clear during the telephonic conference that it was open to narrowing the duration and scope of the depositions based on the SEC’s responses to Kik’s requests for admissions. The SEC refused to entertain (much less propose) any solution that would allow for deposition testimony, even if under more limited circumstances. However, the SEC may not restrict Kik’s right to take its deposition merely because the SEC prefers written discovery over live testimony. To reach the essential truth of such matters, there is no substitute for examining a live witness under oath. *See U.S., ex rel. Fry v. Health Alliance*, 2009 WL 5227661, at *3 (S.D. Ohio Nov. 20, 2009) (“Parties are entitled to test [assertions] in questioning witnesses during depositions, and it is fundamental that parties may simultaneously utilize any or all of the discovery mechanisms authorized by the rules.”) (internal quotations marks omitted); *Alexander v. FBI*, 186 F.R.D. 113, 121 (D.D.C. 1998) (movant’s request to answer questions by declaration or affidavit was “not an adequate substitute for live testimony” because “such an approach eschews the opportunity for opposing counsel to probe the veracity and contours of the statements” and denies counsel “the opportunity to ask probative follow-up questions”). Further, Kik’s experience in discovery to date provides no basis for Kik to conclude that written responses in lieu of depositions would be any more efficient. The SEC has made clear that it will not respond to discovery requests concerning Kik’s affirmative defense absent Court instruction.

4. The SEC Attempts to Preemptively Challenge Deposition Questions That Have Not Yet Been Framed.

The SEC next argues that the topics in the deposition notice seek information wholly protected by either the attorney-client privilege or the deliberative process privilege. This argument is also invalid on its face. The SEC cannot assert blanket privilege objections to deposition questions that have not yet been asked. *Dealer Computer Servs., Inc. v. Curry*, No. 2013 WL 499520, at *6 (S.D.N.Y. Feb. 7, 2013) (“Litigants usually cannot prohibit a 30(b)(6) deposition by arguing in advance that each and every question would trigger the disclosure of attorney-client and work product information.” (citing *Merkin*, 283 F.R.D. at 698)). Indeed, courts have routinely rejected government agencies’ attempts to declare all information that might be elicited in a deposition as privileged before the deposition even occurs. *See, e.g., EEOC v. LifeCare Mgmt. Svcs., LLC*, 2009 WL 772834, at *2 (W.D. Pa. Mar. 17, 2009) (holding that the agency “cannot seek protection from

Defendants' 30(b)(6) Notice of Deposition by unilaterally declaring all information known" to the agency would invade the deliberative process privilege); *Kramer*, 778 F. Supp. 2d at 1328 (permitting Rule 30(b)(6) deposition of the SEC, noting that the "need for protection usually cannot be determined before the examination begins"); *Elkins v. District of Columbia*, 250 F.R.D. 20, 27 (D.D.C. 2008) (rejecting agency's attempt to "claim privilege pre-emptively, before any deposition question has been propounded"). Here, the SEC's blanket privilege objections are similarly premature. Instead, "[c]ounsel may protect against the disclosure of work product or privileged information in 30(b)(6) depositions by interposing appropriate objections and by giving instructions on a question-by-question basis." *Merkin*, 283 F.R.D. at 698 (permitting Rule 30(b)(6) deposition of the SEC).

The SEC asks the Court to presume that every question will necessary lead to privileged information, but the requested information may not deserve protection from the deliberative process privilege. The deliberative process privilege is limited to "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Collins & Aikman*, 256 F.R.D. at 415. As reflected in the Rule 30(b)(6) topics, Kik seeks to examine the SEC on *final* policies, statements, and decisions regarding virtual currencies (Exhibit D, Topics 1-5, 14-21); communications with third parties (Topics 6-13); and public statements and enforcement actions concerning virtual currencies. None of these topics, on their face, will intrude on the deliberative process doctrine. *SEC v. Kovzan*, 2013 WL 653611, at *3 (D. Kan. Feb. 21, 2013) (permitting deposition of the SEC on topics such as its "interpretation and meaning of certain regulatory terms and guidance and any confusion regarding the same" in connection with a void for vagueness defense). Moreover, where, as here, the government's own decision-making process is at issue, "the historical and overwhelming consensus and body of law within the Second Circuit is that the deliberative process privilege cannot be a bar to discovery." *Children First Found., Inc. v. Martinez*, 2008 U.S. Dist. LEXIS 120828, at *9 (N.D.N.Y. June 20, 2008) (internal quotation marks omitted) (collecting cases). The SEC offers no credible reason why these depositions should not go forward.

Very truly yours,

/s/ *Stephan J. Schlegelmilch*

Stephan J. Schlegelmilch
Counsel for Plaintiff U.S. Securities and
Exchange Commission

cc: All Counsel of Record (by ECF)

EXHIBIT I

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* * * * *
SECURITIES AND EXCHANGE COMMISSION,
Plaintiff.
v.
LBRY, INC.,
Defendant.

No. 1:21-cv-00260-PB
February 23, 2022
2:00 p.m.

TRANSCRIPT OF MOTION HEARING AND STATUS CONFERENCE
HELD VIA VIDEOCONFERENCE
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

For the Plaintiff: Peter Moores, Esq.
Securities and Exchange Commission

For the Defendant: Keith Miller, Esq.
Perkins Coie LLP
Timothy John McLaughlin, Esq.
Shaheen & Gordon

Court Reporter: Brenda K. Hancock, RMR, CRR
Official Court Reporter
United States District Court
55 Pleasant Street
Concord, NH 03301
(603) 225-1454

1 deposition to establish that extraordinary circumstances are
2 present to warrant the circumstance of taking his deposition.
3 The test under the Morgan Doctrine for whether or not there are
4 exceptional circumstances has been phrased in a couple of
5 different ways, but essentially that the information sought is
6 not obtainable elsewhere and it is personally and uniquely
7 possessed by Director Hinman in this case; and, two, the second
8 prong, is that the information sought is essential, not merely
9 relevant to in this case the LBRY's case.

10 Many courts actually have a third prong, and, in fact,
11 the Ninth Circuit In Re: U.S. Department of Education, which
12 was cited on February 4th, 2022, has a third prong that there
13 has to be a showing of agency bad faith, and I don't believe
14 that that has been sort of argued here per se, but LBRY in its
15 papers has never suggested or offered that there is agency bad
16 faith and would fail under that third prong of the test. But
17 at least on the papers both parties, I believe, have argued
18 sort of the first and second prong that I identified, and we'll
19 go through that today, your Honor.

20 As I said, it is LBRY's burden to show these
21 extraordinary circumstances. LBRY has not shown that in its
22 papers. And, first, what LBRY has conceded is that Director
23 Hinman does not possess any knowledge of the case here. He
24 doesn't possess any knowledge about LBRY, doesn't possess any
25 knowledge about LBRY's offer and sales, nor LBC, which is LBRY

1 credits, token in question.

2 THE COURT: Let's back up, though, because I do think
3 they challenge your contention that he's a high-ranking
4 government official with a position -- formerly held a position
5 that would qualify for the privilege that you're invoking.
6 I've collected the cases that I can find, and certainly there
7 are cases where a court says this person is a high-ranking
8 official, this person is not a high-ranking official, but what
9 is the principal basis on which I should make the distinction
10 between someone who is sufficiently high ranking to be covered
11 by the privilege?

12 MR. MOORES: Your Honor, a lot of those cases that I
13 think we've all collected don't articulate a specific test. I
14 think that the case that -- one of the cases that LBRY has
15 cited says it has to be the sort of apex of the agency, but the
16 proof of the cases throughout have shown that it doesn't have
17 to be sort of the highest member of an executive agency, and so
18 I think it ultimately falls back as to the sort of first
19 principles of why the executive privilege or why that
20 protection is afforded, which is essentially that a member of
21 the sort of Executive Branch is not to be hauled into court to
22 testify or to be deposed based upon their decision-making
23 processes. Here we have Director Hinman who is, reports sort
24 of the second highest in terms of he's the head of the
25 division, is in charge of a lot of sort of internal decision

1 making at the Commission here and advising not only he's also
2 an attorney -- so advising as to policy as well as
3 attorney-client privilege up to the members of the Commission
4 itself. So, I believe that he qualifies in other cases,
5 including the Navellier case that we cited, where it upheld
6 that a division director was a high-ranking governmental
7 official.

8 THE COURT: Was that issue challenged by the plaintiff
9 in Navellier? I know that the judge applied the privilege and
10 concluded that the official was a high-ranking official, but I
11 didn't see in their evidence that that was a litigated point, a
12 disputed point. Can you help me out on that?

13 MR. MOORES: So, with respect to whether or not the
14 Morgan Doctrine applied, it was challenged, the Morgan Doctrine
15 specifically applied.

16 THE COURT: Did they make an argument to the judge
17 that the deponent was not a high-ranking government official
18 under Morgan?

19 MR. MOORES: My recollection, your Honor, is it at
20 least wasn't sort of foremost in the judge's ruling.

21 THE COURT: She didn't really explain. I agree she
22 applied it to someone at the same rank as we have here. I just
23 didn't see in her decision that she was evaluating competing
24 claims by the parties and coming down in a particular way on
25 it. So, I think it clearly applies to people like

1 cabinet-level secretaries, it clearly applies to people like
2 mayors of a city, and it has been widely applied to people who
3 are not at the very top of the agency that they're heading, and
4 I've got examples, and I can draw analogies, but I don't find
5 in any of the case law a detailed discussion of the way in
6 which a judge would go about determining whether someone is or
7 is not a high-ranking official.

8 The weakness of these kind of categorical approaches
9 to problems are that you don't get to weigh competing
10 considerations and a totality of relevant circumstances
11 sometimes that you would like to be able to do. For example,
12 here it appears that what LBRY wants to do is question the
13 former Director not about any facts about this particular case
14 that that person has knowledge of, because you've proffered
15 that he has no knowledge about this case, was not involved in
16 it, and has nothing to contribute based on personal knowledge
17 about it. Instead, it appears that LBRY is trying to depose
18 this person to gain access to his thought process about how the
19 general issue of how the Howey test applies to digital
20 currencies works, and that seems to be matters of which you
21 would ordinarily not get a deposition for reasons completely
22 unrelated to the Morgan Doctrine. It's the kind of thing that
23 either is simply not calculated to lead to any kind of relevant
24 information at all, or it's protected by the deliberative
25 process privilege. So, I think that's part of the struggle

1 here.

2 It is just not apparent to me what this person has to
3 say that could be at all helpful to me in resolving the case,
4 but I did want your thoughts on how I would go about
5 distinguishing between whether someone is a high-ranking
6 official or not. If you've got any other thoughts about it,
7 let me know.

8 MR. MOORES: Yeah, your Honor. I think that -- first
9 of all, I agree with a lot of what you just said about in terms
10 of the import of what Director Hinman's thoughts are and what
11 LBRY is seeking here, and I do think that there is a
12 relationship between the Morgan Doctrine and sort of
13 deliberative process privilege, which I think you were touching
14 a little bit upon, in terms of seeking the mental
15 decision-making processes of the deponent, and I think that
16 when you have someone who is cloaked with that decision-making
17 authority, which is, I believe, the sort of true import of why
18 LBRY is seeking Director Hinman, himself, they haven't noticed
19 somebody who is sort of lower on the staff or even a sort of,
20 you know, a low member of the staff. They wanted the Director
21 himself, who is cloaked with that authority of decision making
22 on behalf of the Division of Corporation Finance, and so I
23 think sort of the reasons that LBRY is seeking Director
24 Hinman's point of fact that he would be protected under the
25 Morgan Doctrine itself.

1 THE COURT: Although, the Morgan Doctrine appears to
2 be, rather than the deliberative process privilege, appears to
3 be focused primarily on the need to ensure that high-ranking
4 government officials aren't deluged with deposition requests,
5 because they supervise so many cases and deal with so many
6 issues that they should not be subjected to deposition as a
7 routine matter primarily because of the burden that it inflicts
8 on the person holding the position either as a current officer
9 or former official. So, that seems to be the primary
10 motivation for the doctrine. So, in one sense, if you were to
11 try to construct a test you would say, well, let's interpret
12 what a high-ranking official is in light of why we have the
13 rule, and we seem to have the rule because someone who is
14 sufficiently high up in a governmental structure can find their
15 lives completely consumed with testifying in depositions of
16 routine cases. I think your argument would be this person
17 oversees hundreds of matters that are potentially the subject
18 of litigation at any one time, and if you do not apply the
19 Morgan Doctrine to someone like this you will overburden the
20 holders of that office both while they currently hold the
21 office and after they complete their government service and
22 move on to other jobs. So, that would seem to be one way of
23 trying to distinguish when someone who is sufficiently high
24 ranking to qualify.

25 MR. MOORES: Your Honor, I agree. In terms of the

1 Division of Corporation Finance, it oversees the registration
2 of security offerings that, you know, equate to trillions of
3 dollars and hundreds, if not thousands, of various issuers.
4 So, to the extent that there was ever a decision on the
5 registration that would involve Director Hinman, just with
6 respect to digital assets this is the third case in which
7 Director Hinman has been at least noticed, if not more, and I'm
8 just basing this upon when there have been motions to quash in
9 the Kik case, which we cited in our briefs, and the Ripple
10 matter, which I'm sure you're going to hear at least about from
11 LBRY. So, this is the third time in which he's been hauled in
12 to testify as to his internal decision-making process with
13 respect to digital assets and --

14 THE COURT: One of the concerns, potential concerns,
15 about extending the doctrine too far down into an organization
16 is that you're unnecessarily insulating people from having to
17 provide information about things that might be very important
18 to a particular litigant. Say, for example, a person holding
19 the Director's position is a witness to allegations of sexual
20 harassment in the workplace. That would be a case in which the
21 availability of that person for deposition would be highly
22 important notwithstanding his or her high position in
23 government, but the way the privilege works, the Morgan
24 Doctrine works under those circumstances it would be relatively
25 easy for someone in LBRY's position to demonstrate that the

1 Director, although holding a high-ranking position, should not
2 be immune from having to cooperate because they have direct
3 personal knowledge and they are uniquely positioned to
4 contribute in an important way to the case, not simply because
5 they're high up in a chain, where the actual work is being done
6 by people many levels below. That's something that suggests to
7 me that we don't need to be, in determining what is high enough
8 for the Morgan Doctrine to apply, we don't need to be overly
9 concerned that will insulate people from being accountable for
10 their actions to the extent there's some reason to believe that
11 the person has engaged in conduct that might implicate them in
12 some kind of civil liability, or that they're a witness to
13 conduct. Then, even if the Morgan Doctrine applied, it would
14 fit within the exception.

15 MR. MOORES: Yes, your Honor. I believe the
16 hypothetical you provided does not really touch upon a lot of
17 the main primary concerns of the Morgan Doctrine. You know, if
18 it's an issue of sexual assault, that seems potentially a more
19 of a one-off situation that wouldn't overburden the
20 governmental official as well as something that's, you know,
21 within their knowledge as a potentially percipient witness and
22 does not go to their sort of decision-making in their official
23 duties.

24 THE COURT: And if there is an allegation, say, that
25 someone at the director level harbored a particular bias and

1 participated in decisions in a way that potentially provided
2 the target of the decision with a defense, say there was a
3 selective enforcement claim that survived, I've said the
4 selective enforcement defense doesn't survive here, one could
5 say that there's a general Morgan Doctrine applicability; but
6 where the subjective mental state of the Director bears
7 directly on a viable defense, that would be a case where you
8 would find an exception to the Morgan Doctrine.

9 MR. MOORES: Right, which I think is why you find, if
10 you read the Ninth Circuit's recent opinion and some of the
11 other court opinions that impose the bad-faith prong to the
12 sort of exceptional -- to whether or not the Morgan Doctrine
13 would apply or not, if there is a colorable argument of bad
14 faith, as you're suggesting, with the selective enforcement
15 claim, then that would fall outside of the Morgan Doctrine
16 potentially or at least it would be an exceptional --
17 extraordinary circumstance which would fall out of the
18 protection of the Morgan Doctrine.

19 THE COURT: All right. What else did you want to say
20 in support of your argument?

21 MR. MOORES: Thank you, your Honor. So, with respect
22 to the prong of whether or not the information is otherwise
23 available, this is not something that LBRY, who, again, has the
24 burden to establish is under the Morgan Doctrine, has really
25 put forth in their papers. If we look at some of the topics

1 that they believe that Dr. Hinman, sorry, Director Hinman would
2 be testifying about, the perception in the marketplace, so if
3 this is what the marketplace was thinking, then that clearly
4 would be available from another source other than Director
5 Hinman. And then the other sort of topics that they've
6 identified, which is the Commission's application of the Howey
7 test, or the Commission's approach in response to market
8 participants, or the status of the Commission's adoption, these
9 are not necessarily topics that are limited to Director Hinman,
10 and, again, if subject to discovery, then they could be
11 achieved in other ways than taking Director Hinman's testimony.
12 So, that would just, that prong alone LBRY fails in its effort
13 to take Director Hinman's testimony.

14 But more importantly I think, perhaps, is just whether
15 or not it is indeed relevant to this case, and as the standard
16 is, it's not just mere relevance. It actually has to be
17 essential to the defense's argument here, LBRY's argument, and
18 primarily they're offering or they're proffering it that
19 Director Hinman's testimony would be somehow relevant to their
20 fair notice defense for --

21 THE COURT: I think I've got your argument on that,
22 and my initial reaction is that argument is persuasive, that
23 fair notice defenses really turn on objective evaluations of
24 the available information and not the subjective understandings
25 of the people who are enforcing or promulgating the doctrine

1 that's being challenged. So, I understand you make that
2 argument. At least my preliminary assessment is that argument
3 is persuasive with me, so I don't need to hear you say more,
4 unless you feel you need to.

5 MR. MOORES: No, your Honor. The one thing I would
6 note sort of interestingly is LBRY is putting a lot of focus on
7 Director Hinman's speech and believes that it somehow supports
8 their position that the Howey test is too vague as applied to
9 at least LBRY's offer and sales. But Director Hinman
10 throughout his speech in 2018 upholds the Howey test. He's
11 simply applying the Howey test, and the references that he
12 makes to the Howey test are essentially just quoting the prongs
13 of it, where he might say if a promoter does not satisfy prong
14 two, then it's not an investment contract, or if it doesn't
15 satisfy prong three, then it's not an investment contract. So,
16 in any sort of way it doesn't sort of make logical sense that
17 the speech in and of itself would be evidence that the Howey
18 test is too vague, because Director Hinman himself is saying
19 that the Howey test is what controls and, you know, the
20 application of it is the facts and circumstances of the
21 situation.

22 So, the last point I would make, your Honor, is really
23 just the notion that, even if it was relevant, what they're
24 ultimately seeking, what LBRY is ultimately seeking is stuff
25 that is protected by the deliberative process privilege or the

1 attorney-client privilege. As I mentioned beforehand, Director
2 Hinman is an attorney, and in his role he would be providing
3 advice to the Commission or the Commissioners, and in terms of
4 developing policy, internal discussions about how that Howey
5 test would apply, the deliberative process privilege would also
6 apply. So, in terms of how --

7 THE COURT: I think you may be right on that, but if
8 that were all we were dealing with my inclination would be to
9 say you should have the deposition and you object and instruct
10 not to answer, and then the Court can evaluate on a
11 question-by-question basis claims of a deliberative process.

12 The basic problem for me is I haven't seen anything in
13 LBRY's requests that gives me any encouragement that he has
14 anything to say that would be relevant. I understand your
15 point is that the test here, to the extent the doctrine
16 applies, is much more than mere relevance, but I'm just not
17 seeing what he has to say that's useful at all in this
18 litigation, and so that would be a basis on which to
19 potentially quash a deposition subpoena. If it was just, well,
20 he's got things to say that are protected by the
21 attorney-client or deliberative process privilege, my view is,
22 well, let's see what he says in a deposition and you instruct
23 him not to answer on those questions where there's a potential
24 privilege, and then I evaluate those on a motion to compel.
25 Something like that's the way I would ordinarily do it.

1 MR. MOORES: I would agree, your Honor. I was just
2 suggesting that under this Morgan Doctrine specifically, and I
3 think you were talking a little bit perhaps outside the Morgan
4 Doctrine just on relevance, but within the construct of the
5 Morgan Doctrine, where LBRY has to establish extraordinary
6 circumstances, ultimately what they're seeking is not available
7 from Director Hinman due to the privileges, and that sort of
8 guts their argument that it is actually relevant or satisfies
9 the extraordinary circumstance.

10 THE COURT: Your point is to the extent they want to
11 get from him, Tell us what you guys were talking about inside
12 the agency when you were formulating your policies about what
13 would qualify as an investment contract under Howey, your view
14 is that's deliberative process and/or attorney-client, and he
15 would never get it anyway, so he can't satisfy the
16 extraordinary circumstances exception based on that. Okay. I
17 understand your argument.

18 MR. MOORES: Right. And then, lastly, I know that
19 LBRY has suggested that Director Hinman's testimony would be
20 relevant to its sort of defense in chief, which is just that
21 the offer and sales do not satisfy the Howey test itself, but
22 it doesn't seem that Director Hinman --

23 THE COURT: No offense to him, but that's my job here,
24 not his. What he says when he speaks as a private citizen,
25 what he says when he gives speeches, my reaction is I could

1 care less. I mean, that's not something that's entitled to
2 deference under any doctrine that I'm aware of, and in the end
3 of the day I'll make the decision whether the SEC has a viable
4 claim here or not. So, I don't think what he has to say about
5 how he thinks the doctrine works matters at all. Does it? I
6 mean, how does it -- I don't defer to government employees
7 giving speeches on their own dime talking about the way they
8 think the law works. I'm not giving any deference to that. Am
9 I right about that? Do you understand my concern?

10 MR. MOORES: I do, and I think you are right, your
11 Honor, that the deference is to the precedent and the
12 controlling case law, not to director --

13 THE COURT: And any regulations or actions that are
14 taken under doctrines like Chevron or similar doctrines in
15 which, when the agency speaks in ways that entitle it to
16 deference, then, of course, the Court would grant deference,
17 but the Court doesn't give deference to agency employees, even
18 high-ranking ones, when they try to say to people what they
19 think the law is. That doesn't get any deference, and so it
20 wouldn't affect my decision making one way or the other.

21 MR. MOORES: So, your Honor, subject to your questions
22 or rebuttal to what LBRY has to argue, I'll cede the floor.

23 THE COURT: Okay. Let me see what LBRY has to say.
24 Go ahead, Counsel.

25 MR. MILLER: Good afternoon, your Honor. My name is

1 Keith Miller. I represent LBRY, Inc. I'm a partner at Perkins
2 Coie.

3 Your Honor, I thought you made a good observation
4 regarding the rationale for the doctrine, and I'd like to
5 elaborate a little bit further on it. First, as I understand,
6 the rationale for the rule is twofold. One is to prevent a
7 chilling effect, if you will, on senior official government
8 officials so that they do not -- their discussions amongst
9 members of the agency are not chilled because of a threat of
10 being deposed. The second rationale, as you stated, is the
11 need to ensure that an official, because of his title, he's not
12 engaged in litigation depositions because of his title.

13 So, with that rationale I would argue, your Honor, we
14 need to look at what we're trying to get from Mr. Hinman.
15 First of all, we're trying to obtain as a private citizen -- as
16 he said, These are my personal statements -- what he believed
17 was relevant in making determination under Howey whether a
18 digital asset is a security. It's his speech that we're asking
19 to depose him about, not what did the other staff members talk
20 to you about about digital assets. That's not what we're here
21 to ask Mr. Hinman about. We're here -- he made a speech where
22 he drew conclusions as a personal individual. We believe it is
23 very dispositive on the issue of fair notice.

24 If the Director of -- I'm sorry. If the Director of
25 Corporate Finance has a theory about what the industry does

1 know and what the industry doesn't know, that's important
2 because it provides a standard. If the entire industry, and we
3 will be presenting evidence at trial on this, if the entire
4 industry doesn't know if a digital asset under these types of
5 circumstances is an investment contract under Howey, okay, that
6 is relevant to evidence at trial to prove that they didn't have
7 fair notice.

8 THE COURT: So, if he thought -- if a person in his
9 position gave a deposition in this case and took the position
10 that he subjectively thought that LBRY's offerings were
11 registrable securities offerings, that's a fact that I could
12 take into account in deciding whether your client is liable or
13 not? That seems really weird to me. We want to make decisions
14 about whether your client is liable based on the law, not based
15 on what random private citizens think about it.

16 MR. MILLER: It goes to fair notice, your Honor, what
17 in our papers we've shown. We have Mr. Hinman talking about
18 two digital assets, Bitcoin and Ether, and he concludes that
19 they are not securities, and he also concludes that at some
20 point in time, and his speech is clear on this, and it's also
21 cited by Chairman Clayton in his letter to Congress, that
22 securities that are initially securities can morph if the
23 efforts of others are no longer there. So, we think, and
24 there's never been any communication by the SEC about what are
25 those factors, like when is something a security in the

1 beginning and then morphs into a non-security? And so, we've
2 raised that as a defense here. In our answer we said, even if
3 it was at some point in time and it is no longer a security
4 because the efforts of others are ministerial, and so, if
5 Hinman were to testify, I went through this process in writing
6 my article and in connection with that I met with industry
7 leaders, I met with lots of different attorneys, and that was
8 the impetus of writing this speech, I think that goes to show
9 or support our argument of fair notice, that there really
10 wasn't fair notice here.

11 THE COURT: Let's assume that you're right, at least
12 insofar as it bears on your fair notice defense, what Hinman
13 actually publicly says, but that's not what you're seeking to
14 obtain in this deposition, because you already have what he
15 publicly says.

16 MR. MILLER: Right.

17 THE COURT: You're trying to get at things he hasn't
18 publicly said but that you think are useful in understanding
19 his thought process. I don't see how that has any bearing on
20 your fair notice defense.

21 MR. MILLER: Well, we would ask him, What was the
22 rationale for your speech? Why did you put it out? What were
23 your communications with third parties in connection with your
24 speech? What was your application at the time -- how did you
25 apply Howey to Bitcoin and Ether? You know, I think those are

1 the things that we would explore to try to figure out whether
2 our fair notice defense has further evidence that can be
3 demonstrated at the trial.

4 THE COURT: Okay. Well, look, I think that's helpful
5 to me, because it does -- you're being frank with me about the
6 kinds of things you want, which I appreciate. It helps me
7 evaluate your request. But I do understand you to be saying
8 that we really want to know what led into his speech, what his
9 thinking was, who he was talking to, what input he was getting
10 for it, because we think that bears on our fair notice defense.
11 That's primarily what you want to talk to him about. Is that
12 fair to say?

13 MR. MILLER: That's fair to say, and that's, frankly,
14 consistent in how the Court in the Ripple case has approached
15 this, and that is allow Hinman's deposition to occur and to
16 allow limited discovery regarding --

17 THE COURT: In that Ripple case I'm remembering, if
18 I've got it wrong, you'll tell me, wasn't there an aiding and
19 abetting allegation in that case, and didn't the Court
20 specifically have to be concerned with the subjective mental
21 state of the deponent to evaluate a claim? Much in the nature
22 of before I precluded it you asserted a selective enforcement
23 defense and a kind of bad-faith argument on the part of
24 decision makers, if I allowed that defense this case would look
25 more like Ripple, but it isn't really a Ripple case as it

1 currently is postured. So, isn't that a way to distinguish
2 Ripple? I think the government makes that point.

3 MR. MILLER: They do, and in our response, your Honor,
4 we demonstrate why the Court's opinion wasn't solely focused on
5 the aiding and abetting. Ripple and the individuals brought
6 the motion. And so, yes, the Court did mention that the
7 individuals have to substantiate a knowledge prong for aiding
8 and abetting, but it was also for the benefit of Ripple. It
9 wasn't just, Okay, individuals, you can take the deposition,
10 and I think we mention that in our brief at pages 12 and 13.

11 THE COURT: So, you argue that, but what about Judge
12 Bowler's decision in Navellier? She reached the conclusion
13 that the Morgan Doctrine did apply and protect someone at the
14 very same level. You just say she got it wrong on this one and
15 I should --

16 MR. MILLER: I think that case, if I remember it
17 correctly, your Honor, I believe that the depositions did take
18 place, but, again, the deliberative process privilege was
19 invoked at the deposition. It wasn't a blanket, absolute
20 prohibition, unless I'm mixing that case --

21 THE COURT: I may have misunderstood that. Let me ask
22 the government. Just tell me. You're the one that cited
23 Navellier. Is that right, the depositions already took place
24 and it's just a selective -- because that wouldn't make sense
25 to me. That would be a deliberative process privilege, not a

1 Morgan Doctrine problem.

2 MR. MOORES: Your Honor, I'll double check on this,
3 but it's my understanding that those depositions did not go
4 forward. It was a former Commissioner and it was the Director
5 of Enforcement. My understanding is that neither of those went
6 forward.

7 THE COURT: Yeah, the Morgan Doctrine is designed to
8 prevent the deposition entirely, not to prevent selective -- to
9 protect certain answers once the deposition is underway.
10 That's really more deliberative-process privilege kind of
11 issues. If you allow the deposition, the ordinary rules govern
12 how the deposition takes place. That's the way I thought the
13 Morgan Doctrine worked. Okay. So, you'll both check on that
14 and let me know if you come up with anything, and I'll go back
15 over it, but I didn't recollect that the depositions, in fact,
16 occurred. There were other depositions, but those depositions
17 I don't think did occur.

18 Okay. So, Counsel, can you help me out on this? What
19 do you think is the way to distinguish a high-ranking official
20 from a non-high-ranking official for purposes of the doctrine?

21 MR. MILLER: I think you need to go back to the
22 rationale again, which is the need to ensure that an official
23 in his official capacity isn't being burdened. Mr. Hinman is
24 no longer an official. So, that argument I think is much more
25 supportive of our argument.

1 THE COURT: I do think it's a relevant factor in
2 determining if they are a high-ranking official potentially
3 able to invoke the Morgan Doctrine whether there should be an
4 exception. I think it's a factor but not determinative.
5 That's how I process it. Do you agree or disagree?

6 MR. MILLER: Yeah, I agree. I do agree. And we also
7 say in terms of looking at, as you said, there are cases on
8 both sides where a mayor is clearly, you know, a top-ranking
9 official and when there's other deputies, things like that,
10 depending on the agency. So, we need to look at the SEC. The
11 SEC is run by the Chairman and four Commissioners. We're not
12 asking for their depositions. Underneath are five Division
13 Directors and 25 other offices that report to the office of the
14 Chairman. You've got Chief Accountant's office, you have Head
15 of Public Affairs, you have legislation and inter-government
16 affairs, you have the various divisions, Enforcement, things
17 like that. Our position would be in this context Mr. Hinman is
18 not a high-ranking official because he's not at the apex of the
19 decision making. And so, a lot of these cases talk about the
20 apex, and I've been trying to figure out what is apex, what
21 isn't, and I think it comes down to can they make the ultimate
22 decision.

23 THE COURT: Well, if you believe in the unitary
24 executive theory, there's only one person at the apex of the
25 Federal Government, and that's the President of the United

1 States. So, it clearly doesn't mean that, because it applies
2 to a secretary, it applies to cabinet secretaries, and it would
3 clearly apply to the SEC Commissioners and the Chair of the
4 Commission. The question is does it ever apply below that
5 level in an organization like the SEC, and I don't think
6 there's been a well-reasoned decision that I've seen that helps
7 inform how a court should go about undertaking that analysis,
8 so what we're left with are a bunch of analogies where the
9 court applied it this way and the other court applied it that
10 way.

11 What I'm inclined to do is to say that we should
12 evaluate high ranking not in any kind of absolutist or
13 categorical way; we should really look at what the functions of
14 the office are, and if those functions are such that that
15 person is likely to be involved in highly voluminous, complex,
16 discretionary decision making, where the person exercises a
17 policy formulation role and isn't simply executing policies
18 established at lower levels, that you probably ought to think
19 of that person as high ranking because, given the exposure that
20 that person has to potential litigation, the burdens on the
21 office could be extraordinary, as opposed to, say, a line SEC
22 attorney, like the one that's currently arguing in front of me,
23 who's not a high-ranking official, but when you go sufficiently
24 up the policy chain that that person is effectively a manager
25 of a big portfolio where hundreds and thousands of decisions

1 are being made by subordinates and reviewed that that person is
2 sufficiently high ranking to potentially qualify.

3 And then, in my mind, we should police the
4 extraordinary circumstances exception reasonably to allow
5 exceptions like the one I proposed, where someone has direct
6 personal knowledge of a matter that isn't part of his
7 management portfolio where he's indirectly supervising a bunch
8 of stuff but he, in fact, or she, in fact, witnessed something
9 if it happened in the office that gives rise to potential
10 liability. Then you would easily find the exception satisfied,
11 because that person has unique and very important information
12 as opposed to information that is largely derivative about
13 policymaking or execution of policy.

14 So, that's how I'm inclined to look at it, and
15 anything else you want to say on that subject go ahead, and
16 then make any other points you want to make on the particular
17 issue.

18 MR. MILLER: Just a final point is, again, I think the
19 Court should view this as an individual, yes, he was at an
20 agency, but expressed an opinion, their personal opinion, and
21 for that reason I think the exceptions to Morgan, the Morgan
22 Doctrine, apply, and the rationale for the Morgan Doctrine
23 would not apply in this situation.

24 THE COURT: All right. Thank you. I appreciate the
25 argument on it.

1 So, in preparation for the hearing today I carefully
2 reviewed the Supreme Court's decision in Morgan. I read the
3 First Circuit's decision in Bogan against the City of Boston
4 reported at 489 F.3d 417, a 2017 First Circuit decision, which
5 is, of course, controlling precedent in my case.

6 I tried to look at how other courts dealt with the
7 issue of whether someone is a high-ranking official or not,
8 and, as I have suggested to you, I don't think there are an
9 abundance of well-reasoned decisions, certainly nothing that's
10 controlling on me. Let me just identify a couple of examples
11 that I think are somewhat helpful, although the reasoning
12 provided is very limited.

13 I did look at the case of RI, Inc. against Gardner,
14 which is reported at 2011 Westlaw 4974834, an Eastern District
15 of New York decision from 2011 that held that the Solicitor
16 General of the United States Department of Labor was a
17 sufficiently high-ranking official to qualify under the Morgan
18 Doctrine.

19 I looked at a decision from the District of New
20 Jersey, U.S. against Sensient, S-e-n-s-i-e-n-t Colors, Inc.,
21 reported at 649 F.Supp. 2d 309, a 2009 District of New Jersey
22 decision, where the Court held that an EPA regional
23 administrator was a high-ranking government official.

24 And I looked at a decision from the District Court of
25 the District of Columbia, Low against Whitman, reported at 207

1 F.R.D. 9, where the Court concluded that the EPA's Deputy Chief
2 of Staff did qualify as a sufficiently high-ranking person.

3 Finally, I looked at, again, a District of -- Columbia
4 District Court decision, *Sourgoutsis, S-o-u-r-g-o-u-t-s-i-s*,
5 against United States Capitol Police, 323 F.R.D. 100, a 2017
6 District of Columbia District Court decision where the Court
7 held that the Inspector General of the United States Capitol
8 Police was a high-ranking official for the purpose of the
9 Morgan Doctrine.

10 As I said, my inclination, in the absence of more
11 specific guidance from the First Circuit or the Supreme Court,
12 is to suggest that in determining whether someone's a
13 high-ranking official you shouldn't look at a simple
14 categorical approach of are they the highest ranking official
15 in their agency. Rather, I think you should look at it
16 functionally, and do they perform functions that involve
17 supervision of a large number of subordinate employees that are
18 responsible for carrying out the day-to-day operations of that
19 particular governmental agency, whether they are involved in
20 overseeing substantial amounts of government activity that
21 could potentially expose them to hundreds of thousands of
22 lawsuits if they were routinely subject to deposition, and
23 judged by that standard -- and I do believe, as I said, that
24 the Navellier case that I've previously cited supports this.

25 I do believe that potentially that the former Director

1 does qualify as a high official. The fact that he's a former
2 official is a factor to consider but isn't dispositive,
3 because, again, we don't want people who take these positions
4 when they do leave office to spend the rest of their life
5 taking depositions, responding to efforts to establish whatever
6 it is that the litigant wants to establish. So, I do think
7 that this former Director does have a position that potentially
8 qualifies him under the Morgan Doctrine for protection against
9 deposition.

10 What's really important to me here, though, is I just
11 do not understand how the former Director has anything to
12 contribute here. And I respect Mr. Miller's argument, and I
13 appreciate his frankness. I don't think that questions about
14 what drove him to make the speech, who he communicated with
15 when he made the speech, what his internal thought process was,
16 or who he may have been deliberating with while formulating his
17 views on this matter come anywhere close to satisfying an
18 extraordinary circumstance test. To the extent he wants to use
19 the testimony to convince me that it was widely understood in
20 the marketplace that there was a particular view about how the
21 Howey test applies, that could be established from people other
22 than the former Director. One could imagine an expert witness
23 that might testify about that, one could imagine people engaged
24 in the industry that might be able to testify about that, and I
25 don't believe that that information would be uniquely available

1 from the former Director.

2 More fundamentally, I just don't see how that
3 information has any potential relevance to the proceeding. The
4 way I'm seeing it, the primary defenses here are this just
5 doesn't qualify under Howey, it's not an investment contract,
6 the SEC can't prove its case, and, in any event, we have a
7 viable fair notice defense. Both of those issues turn on
8 objective facts, the Director has no personal knowledge of the
9 particulars of this case, and in my view the fair notice
10 defense really turns on objective criteria, not subjective
11 thought process of the individual involved, and I do agree that
12 it's likely that, to the extent one wants to get into that,
13 it's hard for me to see how it isn't protected by the
14 deliberative process privilege, and so it wouldn't be
15 available, in any event. So, I don't believe that the
16 exceptional circumstances test comes anywhere close to being
17 satisfied here.

18 So, for those reasons and the additional reasons set
19 forth in the SEC's supporting memorandum I'm going to grant the
20 Motion for Protective Order and bar the deposition of the
21 former Director.

22 Does anybody need me to make any additional findings
23 or rulings with respect to that particular issue?

24 Is there anything else from the SEC that you feel I
25 need to take up that I haven't taken up?

1 MR. MOORES: Not as to that motion, your Honor.

2 THE COURT: All right. Mr. Miller, anything else?
3 Your objections are all preserved, of course, for purposes of
4 appeal. Is there anything else you need me to take up that I
5 haven't taken up on that particular --

6 MR. MILLER: No, your Honor.

7 THE COURT: All right. So, let's turn to the next
8 matter, which is a proposal by the SEC to delay the scheduling
9 of this case.

10 Counsel, one thing that has really resonated with me
11 in this case is that LBRY feels extremely burdened by this
12 litigation. Now, you make arguments that everything you've
13 done is appropriate and the discovery requests to date have not
14 been overly burdensome, but this is a company that is clearly
15 not in great financial circumstances. This has a big bearing
16 on their efforts to survive. This has been going on for years.
17 To the extent they oppose delays, I want to try to keep this
18 matter moving. On the other hand, your point is you think that
19 they have -- if I'm understanding your position correctly, your
20 position is that LBRY, without making it clear to you
21 initially, has arbitrarily drawn a self-imposed line on what
22 discovery they're going to produce and that they're not -- they
23 haven't produced anything post filing of the complaint. Am I
24 overstating your position, or is that your position?

25 MR. MOORES: Your Honor, there's a lot that's true.

1 There's, I'm sure, things that just need to be clarified on the
2 edges. But, you know, our position is we're not seeking sort
3 of additional number of depositions, we're not seeking
4 additional interrogatory numbers. What we're really seeking
5 here is a little bit more time for LBRY to produce the
6 documents that are responsive to the requests and that have
7 been sort of outstanding since October and that LBRY just has
8 not yet produced, either sort of inadvertent oversight or
9 potentially they just hadn't gotten to it at that point, and
10 one of the things --

11 THE COURT: I'll let you finish in a minute, but as
12 specifically as you can and as narrowly as you can do it and
13 consistent with your responsibilities, what is it that you're
14 seeking from LBRY that you believe you've requested but have
15 not yet received?

16 MR. MOORES: Just as sort of a chronology, your Honor,
17 is that essentially LBRY was doing a rolling production. It
18 had made a substantial production towards the end of January.
19 We looked -- and they reported they were mostly done with their
20 production. We started looking at it, you know, soon after it
21 got in and it was processed, and we noticed that there were a
22 lot of gaps in their production. Some of them were gaps about
23 what custodians that they had collected documents from. Some
24 were as to the types of documents. So, for example, business
25 records like memoranda, Excel spreadsheets, presentations to

1 investors. So, all of that type of documentation was not
2 produced.

3 Their filing system is like a Google Drive, and that
4 is where the company stores its documents, and those documents
5 hadn't been produced.

6 THE COURT: Well, let me stop you. This is not
7 Facebook; this is a company that has got a very small
8 operation. It's hard for me to understand why you can't meet
9 and confer and specifically lay out for them. This is what I
10 think you have that you haven't produced. We don't need these
11 kind of mass over-productions where people just, like, dump the
12 hard drive on someone else. At this point you've had years to
13 get your act together. You should be able to be very specific
14 about -- you know who's involved in this company that makes
15 representations regarding the LBRY currency. You know what
16 they've been doing and saying. Why can't you just be a little
17 more specific with them, rather than making kind of blanket
18 requests that they then have to just kind of blindly poke
19 around in their files for?

20 MR. MOORES: Well, your Honor, we did actually go
21 through that meet-and-confer process just like you're
22 suggesting. We provided a long list of items that we thought
23 that they hadn't produced that were responsive and were
24 relevant and important to their claims or defenses -- our
25 claims or their defenses -- but they have endeavored after that

1 meet and confer to actually produce a large volume of those
2 documents that we noticed that were missing, and they're still
3 endeavoring to produce it, like, as I mentioned, sort of the
4 Google Drive documents, which, you know, it's a company that
5 does a lot of their work, my understanding is, virtually
6 because, you know, the employees might be scattered at
7 different places, and they save their documents to a Google
8 Drive, at which point they will link their communications, even
9 with investors, that will say, Go to our Google Drive and look
10 at documents in connection with an offer. And those are the
11 types of documents that we were seeking and that hadn't been
12 produced and the company is still producing.

13 THE COURT: What depositions do you have left that you
14 need to do?

15 MR. MOORES: So, we had previously noticed the
16 depositions of Mr. Kauffman and Mr. Grin. We also have a
17 30(b)(6) deposition that has been noticed, and there's
18 potentially a couple of other depositions that we would take,
19 depending on the Court's --

20 THE COURT: And you want to delay these depositions
21 until you've had what you think is a more complete production
22 from LBRY? You're not planning to take more; you want to do
23 those depositions after you've had a reasonable time to process
24 a full document disclosure?

25 MR. MOORES: Right. So, there are potentially a

1 couple of depositions -- to be candid, your Honor, our schedule
2 ends at the end of -- a week from Friday, and if the Court did
3 not extend the schedule, then next week would be full of as
4 many depositions as possible. So, there are other depositions
5 that we hadn't noticed that we were contemplating taking, but,
6 you know, there just isn't enough time under the current
7 schedule. But to your point, your Honor, that is fundamentally
8 the important piece, is that we wanted to be able to receive
9 the documents, review them, process them in order to use them
10 at these depositions, and there just isn't enough time. There
11 was a production made last night; there was a production that
12 was made earlier this morning. We anticipate that LBRY will
13 continue to make productions over the next couple of weeks in
14 order to fulfill those items. There is a discovery dispute.

15 And specifically as to that cutoff that you had
16 mentioned, your Honor, where LBRY has sort of arbitrarily cut
17 the date of the complaint off as what is discoverable, we
18 disagree with that. Now, the company has produced some
19 documents that postdate the date of the complaint, but they're
20 withholding a number of others, and we have sent that to the
21 Magistrate for her attention and mediation.

22 THE COURT: So, have they presented a log of documents
23 that are responsive but they believe should not be produced?

24 MR. MOORES: Negative, your Honor. They just have
25 sort of said the date of the complaint is a date that we would

1 not be receiving any electronic communications or business
2 records.

3 THE COURT: I'm the last one to want to encourage
4 discovery motion practice. I abhor discovery motion practice.
5 I usually ask the Magistrate Judge to oversee it for me, and,
6 frankly, it's not in either of your side's interest to involve
7 me in those matters, because it becomes unpleasant quickly.
8 So, I want to try to avoid having to become engaged with those
9 kind of specific back and forth. I will offer some general
10 thoughts.

11 You have an argument where you are going to be
12 requesting injunctive relief, and you have allegations of what
13 you say are continuing violations. The date of the complaint
14 is not an arbitrary cutoff date. On the other hand, I am
15 sympathetic to LBRY's expressed concern. I keep in mind when
16 they say the million documents -- you make a good point that,
17 as is usually the case when you make electronic production
18 nowadays, what in the paper world 30 years ago would have been
19 three file boxes is now a million documents. So, I don't make
20 too much of the number of documents. But you've had a long
21 time to do pre-filing investigation here; you've had a
22 substantial amount of time to engage with this litigation.
23 Ordinarily, when we get to the end of a discovery period you
24 should be, and you're trying to be, courteous and cooperative,
25 and let's meet and confer, all of which I encourage, but as the

1 discovery deadline approaches that's when you have to sort of
2 get tough and you have to say, Look, I need A, B and C, and I
3 need them by this date, or we're going to have to extend the
4 discovery deadline by X amount of time.

5 So, I'm sympathetic to the extent that LBRY has not
6 produced post-filing documents that are responsive to your
7 request. In my view, a company that isn't producing what's
8 requested either should seek a protective order from the Court
9 on the grounds that it's overly burdensome, or they should
10 withhold the documents and produce a privilege log explaining
11 the legal reasons why, although responsive, they don't have to
12 be produced. Absent that, I expect the moving party to file a
13 motion to compel so that we then can order a person to compel
14 and then moderately extend the deadline. We haven't done any
15 of that here. My inclination is to say, all right, let's --
16 what are you requesting, a 60-day extension?

17 MR. MOORES: Yes, your Honor, which actually doesn't
18 impact the trial date as proposed.

19 THE COURT: My proposal is that we try to cut this
20 thing down, we extend everything by 30 days, we keep the trial
21 date as we schedule it. That will put pressure on me. It will
22 take time away from me to resolve the summary judgments
23 motions, but I'm willing to try to assign this matter as an
24 expedited matter in my chambers so that, when the motions
25 become ripe, we hold argument and I try to resolve those on an

1 expedited basis.

2 So, that gives you a little more time, but I think
3 what you would need to do is you need to be very specific with
4 LBRY and say, These are the things out there that I really need
5 before I can do these remaining depositions, and then, if they
6 don't get them, I think what you probably need to do is take
7 the depositions with the documents you've got, file a motion to
8 compel, and at the risk of, if LBRY doesn't produce and I later
9 determine that they have failed to produce, I'll reopen
10 discovery, allow you to do a limited re-deposition about the
11 new documents at LBRY's expense.

12 I want to keep the case moving. I recognize we're
13 close to the deadline, and so a month seems to be reasonable.
14 You'll have to work hard to get everything in. But at this
15 point I think the two things you need to do is take a look back
16 at your demands, see what reasonable focus you can bring to
17 them, renew your demands, schedule the remaining depositions.
18 If you don't get the documents you want, file a motion to
19 compel and remind me that I told you that you should go ahead
20 and take the depositions with what you've got, and if I allow
21 additional relevant discovery I'll consider a request to reopen
22 limited depositions at LBRY's expense if they're improperly
23 withholding information. Okay? So, that's how I would say to
24 practically resolve it.

25 Let me hear from LBRY. As I said, I'm sympathetic to

1 your desire to move ahead, but I also -- I don't believe, to
2 the extent you're using some kind of arbitrary filing date
3 cutoff, that that's justifiable, and I do think you should be
4 able at this point -- that the SEC should be able to be quite
5 specific with you as to what they need, and then you need to
6 assign it as a priority. But we need to get those depositions
7 taken, complete the record here, get our motion practice
8 underway and get this matter resolved. That's sort of where I
9 am in my thinking.

10 But, Mr. Miller, what did you want to say?

11 MR. MILLER: I just want to make sure the record is
12 clear on certain things and it's really on what's occurring in
13 discovery. In our objections to their initial request for
14 document productions we claim we are going to produce between
15 this time and this time. You need to have, as I explained to
16 counsel, there's got to be a point in time when you have to
17 stop collecting. I can't go to the company and say, Last week
18 did you -- did you -- were you responding on a slot chain (ph)?
19 That's not fair and reasonable. We did say to them after this
20 was raised -- and when was this raised? And I think it's
21 interesting, you Honor, to find out when it was raised. It was
22 raised in the beginning, right after we submitted our expert
23 report, which was February 4th. The SEC did not submit an
24 expert report, and since then we've been deluged with, Oh, we
25 don't have this, we don't have that, we don't have this, and

1 we've been trying to work with them.

2 The Google Drive. We've produced almost everything
3 except for 226 loose documents from Google Drive that are being
4 reviewed right this second, and that's how we've been making
5 production since last week. If you say this is what we need
6 past this point, we're willing to consider it. But you can't
7 tell us, You take the subpoena and you interpret it and you
8 produce everything that's responsive as of last week. That's
9 not fair and reasonable.

10 THE COURT: I'm sympathetic to that concern. We're
11 getting towards the end of discovery, so at this point we've
12 got to have the SEC reasonably say, Give us what you've got to
13 this point, and then let's move on, and then, of course, if
14 there is some unusual development in the last few weeks, if
15 someone needs to move to reopen discovery, you can try and do
16 that, but I agree we've got to try to bring this matter to
17 closure. I would have to imagine that the SEC will have
18 virtually everything it needs to bring its case when it takes
19 those few remaining depositions, and we've just got to get on
20 with the matter. So, I hear you on that, and I am sympathetic
21 and just would, you know, tell you I will do what I can to
22 expedite my part of it once the motions are ripe and I can
23 consider it.

24 I did take a long time, in my book, to resolve the
25 selective enforcement claim, and I will tell you that, because

1 of the arguments that the parties were taking and my own view
2 -- so the ground on which I decided that matter was a narrow
3 ground, but I have a broader view about how selective
4 enforcement works. I would have come out the same way without
5 dealing with the narrower ground. I don't believe the SEC is
6 completely right on its position of a kind of categorical, We
7 can never be charged with selective enforcement approach, that
8 it was arguing. I also don't believe that LBRY's position --
9 regarding how you deal with selective enforcement defenses, I
10 have my own view, which I spent a lot of time thinking about
11 and ultimately decided, you know, that wasn't an argument that
12 the parties presented, and so out of fairness to the parties I
13 went back and looked at the narrower argument on which I
14 believed from the beginning that the SEC was correct and
15 followed that. So, that took me a while, because that, as I
16 think you both will acknowledge, is a pretty challenging area
17 of law where the Supreme Court has not been as clear as we
18 would all like it to be about how you deal with the issues of
19 selective enforcement post Engquist.

20 So, I apologize for that. That took me longer than I
21 expected, but I will assign a priority to this matter when it
22 comes up on the remaining issues, and I should be able to put
23 out an order within, like, 60 days of the time the matter is
24 argued to me, if not sooner. So, I'll work on my end. I want
25 you to work on your end.

1 I will grant a 30-day extension of the deadlines you
2 propose, not 60.

3 I will instruct the parties to meet and confer again.
4 I'll tell the SEC that I agree with LBRY's position that we
5 can't expect it to make open-ended, every day they're doing
6 something different they need to go back and they're, Have you
7 got any more now that we need to produce? It's reasonable to
8 impose a cutoff date, and so you'll explain what that is, agree
9 to it, be specific in your requests, they'll comply, you'll go
10 ahead and schedule all the remaining depositions you propose to
11 take within the next 30-or-so days that we have left in the
12 discovery period, and then we'll move on. Okay?

13 So, the parties' positions on that are preserved, to
14 the extent they disagree with that. It's a practical approach
15 to try to address I think legitimate concerns on both sides.

16 Did you want to say something else, Mr. Miller?

17 MR. MILLER: Yeah, I just wanted, for point of
18 clarification, the extension of 30 days is simply for the
19 completion of discovery; it doesn't include expert disclosures
20 and reports. Is that correct?

21 THE COURT: All right. I'm glad you raised that. You
22 alluded to this, and we need to explore it. I think maybe I'm
23 reading too much into your remarks, but you've left me with the
24 impression that what you think is going on here is that the SEC
25 was caught flatfooted by your expert disclosure, and what it's

1 really trying to do here is bargain for more time to find a
2 last-minute expert and make a report? Am I reading too much
3 into your remarks?

4 MR. MILLER: I think that's correct, your Honor.

5 THE COURT: All right. So, are you trying to get an
6 extension of the expert disclosure deadline, and, if so, why?
7 I'm talking to the SEC now.

8 MR. MOORES: Your Honor, that's not a part of our
9 proposal.

10 THE COURT: Okay.

11 MR. MOORES: But I would reserve, you know, if we were
12 to come back and propose to the Court a rebuttal expert report
13 deadline, but at this time we are not seeking an extension of
14 the expert report deadline.

15 THE COURT: Okay. So, that's covered, and you reserve
16 your right to try to get an extension, if you need one, on the
17 rebuttal disclosure deadline.

18 So, that should give you some comfort, Mr. Miller.

19 Okay. So, that takes care of that issue. The other
20 issue really isn't ripe yet. I can't really, out of fairness
21 to LBRY, the government filed a motion for protective order
22 with respect to the 30(b)(6) deposition. I do need to hear
23 LBRY's response to it. On the other hand, I do think there is
24 information that the parties can glean from this hearing that
25 should give them some ability to predict how I'm likely to rule

1 on some of these matters. So, do what you need to do, but we
2 should probably not hold the 30(b)(6) deposition until LBRY
3 responds and I have a chance to rule on LBRY's response. And
4 I'm completely open-minded on this with respect to specific
5 issues, but, as I said, I am inclined to think of the fair
6 notice defense, and this isn't an investment contract defense,
7 as largely issues that are resolved based on what's in the
8 public record and not on what's in the internal deliberative
9 processes of the SEC. So, I think to the extent LBRY is
10 seeking all of the things it's listed in that enumerated list
11 with the government's filing there are going to be some
12 problems with that based on what I've said to you up to now.
13 But I'm open to hearing your views, and perhaps the parties
14 between now and then can reach some kind of reasonable
15 compromise on a narrower subset of proposals. But if you
16 can't, file your objection. I'll rule on it when I get the
17 objection, and I'll rule on it on the papers and try to do it
18 expeditiously so we can keep this thing moving.

19 All right. Is there anything more from the SEC?

20 MR. MOORES: No, thank you, your Honor.

21 THE COURT: Anything else from LBRY, Mr. Miller?

22 MR. MILLER: Nothing further. Thank you, your Honor.

23 THE COURT: All right. Thank you. That concludes the
24 hearing. I appreciate the good quality of the argument. The
25 parties in their dealings with me have been nothing but

1 cooperative and responsive, and I hope you'll continue to work
2 that way with me and with each other so that we can focus on
3 the legitimate legal issues that are being raised here. So, I
4 appreciate your efforts in that regard.

5 All right. Thank you. That concludes the hearing.

6 MR. MOORES: Thank you, your Honor.

7 (WHEREUPON, the proceedings adjourned at 3:10 p.m.)

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C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of the within proceedings.

Date: 2/25/22

/s/ Brenda K. Hancock
Brenda K. Hancock, RMR, CRR
Official Court Reporter