NEW YORK CITY BAR

SEVENTY-FOURTH ANNUAL NATIONAL MOOT COURT COMPETITION

AMENDED RECORD ON APPEAL

SUPREME COURT OF THE UNITED STATES
October Term 2023

Docket No. 2023-24

SECURITIES AND EXCHANGE COMMISSION, Petitioner-Cross/~~Appellant~~ Respondent

and

DR. HENRY DRAKKEN, Petitioner-Cross Respondent

v.

KIMBERLY ANN POSSIBLE, Respondent-Cross/~~Appellee~~ Petitioner.

AMERICAN COLLEGE OF TRIAL LAWYERS

ACKNOWLEDGEMENTS

Special thanks to the Committee members who contributed to this year's competition problem:

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The Committee is grateful to **Stephanie Glazer** and **Martha Harris** for their unwavering support and commitment to the sound administration of our National Competition.

The Committee is also grateful to the **American College of Trial Lawyers** for its continued support and commitment to our Competition.

We also thank all of our **Regional Sponsors**, staff, and volunteers, whose dedication and efforts are integral to the success of the National Moot Court Competition.

FACTS IN THE RECORD

The state of Middleton, nestled on the border of the country of Newland, is a small but influential community boasting affluence and prestige. With a population of fewer than 17,800, the city is home to some of the nation's preeminent leaders and celebrities. Dr. James T. Possible is a renowned rocket scientist that serves as head of the Middleton Space Center. James Possible and his wife, Dr. Ann Possible, a respected plastic surgeon, reside in the Alpha District of Middleton. Newland and the United States enjoy a uniquely strong partnership, forged by shared geography, similar values, common interest, and strong cultural and military connections. The two countries' borders share lakes and rivers and have strong trade relations as a result of their close proximity. Additionally, many nationals of Newland often frequent the United States—and particularly, the bordering U.S. ~~territories~~states of Wakanda and Knowhere.

The Possibles live in Middleton, Newland and have four children: 12-year-old twins Jim and Tim; 15-year-old Katherine; and 17-year-old Kimberly Ann ("Kim Ann"). Professor James Possible was recently featured on the cover of PLACE magazine, a Newland-based news magazine, for developing a new rocket prototype, called the Plenty Hefty rocket, which represents a fully reusable transportation system designed to carry both crew and cargo to Earth orbit, the Moon, Mars, and beyond. Dr. Ann Possible is just as impressive: she is a world-renowned board-certified plastic surgeon trained in plastic, reconstructive, and general surgery. Dr. Ann Possible's patients fly into her clinic, based in Middleton State, from all over the world. She is colloquially referred to as the "Plastic Surgeon to the stars," and has reportedly done work on several Hollywood celebrities, who rave about her excellent (and minimally invasive!) surgical procedures. The work of both

Prof. James Possible and Dr. Ann Possible frequently require them to visit the United States to speak on panels, visit new clinics and space development programs, and interact with clients.

In addition to their accomplished parents, the Possible children honed their own impressive abilities over the course of their childhoods. Jim and Tim began playing chess at the age of 7 and quickly rose to champion status, recently winning first place in the prestigious (and televised) Middleton Scholastic Chess Tournament. Katherine, an avid collector of comic books, stood out as a creative artist who loves painting portraits and creating sophisticated drawings with the help of her photographic memory. Even among these siblings, Kim Ann emerged as the superstar of the family at an early age. On the one hand, she demonstrated a talent for acting; performing skits from her favorite television show segments; and entertaining friends, family, and Hollywood insiders whenever they visited the Possible Estate. On the other hand, Kim Ann proved an adept student in martial arts, particularly Brazilian jiu-jitsu, a self-defense combat sport focused on leveraging holds and submissions to defeat larger and stronger opponents. At age 16, Kim Ann earned renown in Middleton State after she entered, under her mom's guidance, into the Alpha District Jiu-Jitsu regional tournament, netting first place for her age, weight, and gender class. Her win at the Alpha District Jiu-Jitsu regional tournament quickly garnered some international recognition, including in the United States.

On the tail of Kim Ann's regional championship victory, Ann and James connected Kim with their Hollywood contacts in hopes of securing an opportunity for Kim to break into the acting industry. Soon after, Kim Ann, at age 17, was signed as a client to Fictitious Management, a premiere talent agency, with Ann assuming the role of Kim's manager.

Kim quickly gained stardom on broadcast television and popular social media platforms. Her first big break was a lead role as a superhero fighting crime incognito while managing the complex life of a popular high school student. In connection with her newfound fame, Kim received offers from major companies for brand advertisements and promotions. Sensing the potential difficulties arising from Kim's meteoric rise, Ann and James opted to have Kim homeschooled at their Possible Estate, which in turn afforded Kim the flexibility to grow her social media presence to over 360 million followers on Instagram and 25 million followers on Facebook, all in the comfort of her own home. Kim also boasts 15 million followers on "Y", a highly publicized U.S. text-based social media service known for its recent controversial merger with Parody Inc. and the subsequent name change.[1] Specifically, Kim has "Y" followers in Middleton and other states in Newland, as well as in every state ~~and territory~~ in the United States, including Wakanda, Knowhere, and Ragnarok.

Despite achieving cross-country fame, Kim Ann was dedicated to growing her hometown community in Middleton, frequently publicizing local Middleton businesses and home-grown products and attending public influencer events in Middleton. Because of the close proximity to the United States and the frequency with which her client base sends her products, Kim Ann has a P.O. ~~b~~Box in Wakanda. Although her parents visit the United States quite often, up to ten times per year, Kim only travels to the United States once or twice a year (at most) for certain conventions and brand promotions ~~to last for a minimum of three years~~.

[1] "Social Media Name Change Has Critics Asking 'Why?'", *Middleton Times* (~~[~~January Jan. 9, 2023~~]~~).

Shortly before Kim's 18th birthday, ~~her management team was contacted by~~ OCTOCoin, a technology startup based in Ragnarok (located within the United States) dedicated to developing its own blockchain cryptocurrency, contacted Kim's management team, her mom, her publicist, and agent. Like other cryptocurrencies, OCTOCoin advertises that it functions as a fungible asset traceable through a decentralized blockchain ledger. In OCTOCoin's case, the ledger was known as the Independent Operating Utility or "IOU," touting a wide variety of benefits to potential investors looking to expand past traditional equity and bond offerings. Emphasizing the perceived personal autonomy granted by investing in blockchain-based cryptocurrency, OCTOCoin often advertises with the slogan: "Invest in Yourself." Ann negotiated an enforceable written agreement (the "OCTOCoin Agreement") on Kim's behalf, the material terms of which specified upcoming promotional events and campaigns as part of the OCTOCoin partnership.

In celebration of her 18th birthday, Kim agreed to participate in a Brazilian Jiu-Jitsu cage-match against OCTOCoin's CEO and co-founder, Larissa Anderson. To signify the trans-border and decentralized nature of OCTOCoin, the match would be held at the *Four Corners* Monument, which uniquely marks the quadripoint between four states and two countries: Middleton (Newland), Ragnarok (United States), Wakanda (United States), and Knowhere (United States), all in one location. Adding to the public appeal, the company highlighted the well-recognized sports rivalry between Middleton and Ragnarok. Anderson, a U.S. citizen and Ragnarok native, wanted to capitalize on this rivalry (and the attendant media attention) by challenging Kim, a hometown hero of Middleton. The anticipated in-person event, licensed by the respecting gaming commissions of each of these four states, was set to occur in a caged-ring platform shaped as an octagon (the

"Octagon"), with the center of the *Four Corners* Monument aligning with and notated in the Octagon. Each state is indicated on the Octagon platform.[2]

Because of her impressive following on social media, particularly Y, Kim agreed to ~~post to~~publicize the event via her Y account a week before the match, a promotional post drafted by OCTOCoin management.

In consideration for the OCTOCoin Agreement, OCTOCoin agreed to pay Kim 1,337 OCTOCoins,[3]~~, which amounted to~~ valued at approximately $1,000,000 or approximately $747.94 per OCTOCoin during February 2023. Per the negotiated contract, the OCTOCoins become payable immediately upon completion of the match, regardless of whether Kim wins. As part of the terms, Kim would not be entitled to payment unless and until the match reache~~s~~d completion, either through submission, disqualification, or points tally.

Prior to the scheduled promotional post, the United States Securities and Exchange Commission (the "~~Commission~~SEC"), by way of its Division of Enforcement and Compliance,[4] issued a statement informing market participants that coins offered and sold shall be categorized as securities. Further, individuals who offer and/or sell securities in the United States must comply with federal securities law, including by properly registering

[2] For clarity, an approximate depiction of the *Four Corners* Monument is provided in Appendix A.
[3] By way of assessment, such price may be considered highly volatile.
[4] The United States Congress granted the SEC plenary authority and broad discretion to enforce the nation's securities laws. The SEC maintains untethered power to enforce every provision in the U.S. securities laws, and exercises its authority as required.

any securities offered for sale to the public.[45] OCTOCoin did not register its cryptocurrency prior to sale.

On February 1, 2023, in accordance with the OCTOCoin agreement, Kim posted the following to all of her followers on her Y account:

Kim published the post on her Y account from her family's car while she was leaving Knowhere (where she attended a two-day event promoting her brand generally, including her acting and influencer career) ~~and going~~, heading back home to Middleton.[56] The post contained a link to the company's website, where anyone clicking the link would be provided with video instructions to purchase OCTOCoin tokens.

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[45] Under the U.S. securities law, any public influencers or celebrities who promote virtual coins that are deemed securities must disclose the nature, scope, and amount of compensation received for the promotion.

[56] It is unclear from which country the post was actually published. The forensic evidence shows that Kim ~~drafted~~published the post while she was in Knowhere (in the United States), but the metadata of the publication contains a Newland IP address.

In the few days following Kim's post, the price of OCTOCoin increased dramatically. While Kim had no reason to doubt the value of OCTOCoins, she was personally unwilling to monitor and endure the inherent price volatility incumbent with trading in cryptocurrencies. Before the match with Anderson, she instructed her mother and other financial advisors to reduce risk by liquidating whatever OCTOCoin winnings she receive~~s~~d immediately on the open market.

On February 8, 2023,[7] the match—consisting of three rounds—proceeded without any delay or technical issues. In the first round, Anderson prevailed by 5 points. Kim gained momentum in the second round and prevailed by 10 points. After a climactic third round, the match ended with Kim dominating Anderson with her signature Atemi Jujitsu style. Kim pinned Anderson in the northeast corner of the Octagon, representing Middleton. Unwilling to end the match there, Kim uttered under her breath (but within microphone range), "I want to beat you in your own state." In dramatic fashion, Kim dragged Anderson to the Southwest corner of the ring, representing Ragnarok, where she pinned Anderson to submission, and at that point, the referee announced her victory.

Seconds after the judges confirmed Kim's victory, the sum of 1,337 OCTOCoins was transferred to Kim's IOU wallet, the unique identifying account associated with Kim's OCTOCoin trading. Pursuant to Kim's instructions, her financial managers immediately liquidated the OCTOCoins for approximately $~~1~~2,000,000.

By all accounts, the match had been a success and, simultaneously, the price of OCTOCoins rapidly inflated. Two weeks following the *Four Corners* match, news outlets reported on the "IOU" scandal, the systematic fraud occurring at OCTOCoin. The media

[7] The cage-match took place on Kimberly Ann Possible's 18th birthday.

uncovered that OCTOCoin's allegedly decentralized "IOU" system was nothing of the sort. Rather, the staff at OCTOCoin had been inputting trades directly and falsifying business records to the financial benefit of Anderson.

After news of the widespread fraud reached the public, the price of OCTOCoins plummeted to near zero. Because of the outcry over the scandal, the ~~Commission~~SEC discovered Kim's social media post on "Y" in concert with OCTOCoin and conducted an internal investigation into the matter. Upon identifying the transactions in Kim's "IOU" wallet, the ~~Commission~~SEC instituted ~~charges~~civil enforcement proceedings against Kim ~~Possible~~. A separate securities fraud action has been brought against OCTOCoins. *In re OCTOCoins Sec. Litig.*, Dkt. 23-cv-1034 (S.D.N.Y.). Anderson has apparently fled the country and her current whereabouts are unknown.

Dr. Henry Drakken, a U.S. citizen and Ragnarok native, is a business associations law professor who, in his spare time, researches top trends in cryptocurrencies. He decided to invest and purchase two OCTOCoin tokens just a few days after the scheduled cage-match. On the afternoon of February 10, 2023, he read an article in the *Crypto Reporter* about the SEC's civil enforcement action against Kim Possible for the alleged securities violation involving OCTOCoin. Enraged about the rapid loss in value of his OCTOCoins, Dr. Drakken commenced a lawsuit against Kim Possible in the District Court of Ragnarok.

PROCEDURAL HISTORY OF THE PRESENT ACTION

On March 6, 2023, the ~~Commission~~SEC brought ~~claims~~a civil enforcement action against Kimberly Ann Possible in the District of Ragnarok. The ~~Commission~~SEC alleged that Kim ~~was subject to liability under~~ violated Section 17(b), the "anti-touting" provision,

of the federal securities laws. Upon conclusion of the SEC's proceedings, the SEC's Order[8] dated April 17, 2023, determined that Kim Possible violated Section 17(b) because, although she made public that she would be receiving 1337 OCTOCoins, she did not disclose the monetary value of those securities. The SEC imposed sanctions against Ms. Possible in the amount of $2,000,000 and prohibited her from committing any further violations under the federal securities laws.

Upon learning that the SEC initiated the civil enforcement action against Ms. Possible, Dr. Henry Drakken, an OCTOCoin purchaser, filed suit against Kim Possible in the District Court of Ragnarok, alleging a violation of Section 12(a)(2) of the Securities Act of 1933. He contended that Ms. Possible was subject to liability under this section because she acted as a "seller" pursuant to the statute by her participation in the solicitation of OCTOCoin through her social media platform ~~and failing to disclose details concerning her partnership with OCTOCoin. The Commission also alleged that Kim violated Section 17(b) of the Securities Act because she did not fully disclose the nature of her promotional relationship with OCTOCoin.~~ . On March 20, 2023, Kim Possible ~~moved~~filed a motion to dismiss ~~the action~~Dr. Drakken's complaint, for lack of personal jurisdiction and failure to state a claim~~, arguing that she did not qualify as a seller under Section 12 of the Securities Act and that she disclosed the necessary details regarding her relationship with OCTOCoin. The district court granted the motion, holding that the~~ pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). On April 17, 2023, the Ragnarok District Court issued

[8] Pursuant to Section 8A of the Securities Act of 1933, the SEC may publish its investigative findings and enter an enforcement order against an individual that violated any provision of the federal securities laws, subject to notice and an opportunity for a hearing.

an order granting Ms. Possible's motion to dismiss. It held that Ms. Possible lacked sufficient contacts with the United States forum, and therefore, the court could not properly exercise ~~of~~ personal jurisdiction ~~was~~over Ms. Possible. Because it found that it could not ~~im~~properly~~. Having decided to dismiss the action~~ exercise personal jurisdiction over Ms. Possible, the ~~d~~District ~~c~~Court ~~did not reach the~~declined to address whether Dr. Drakken had adequately pled his securities ~~questions~~claim.

On April 24, 2023, ~~the Commission~~Dr. Drakken timely appealed the District Court's decision to the Fourteenth Circuit Court of Appeals of Marvel. That same day, Ms. Possible appealed the SEC's Order, including the monetary sanctions, to the Fourteenth Circuit. The Fourteenth Circuit determined that given that both cases arose out of the same nucleus of common facts, it made sense in the interest of judicial economy to hear both appeals together. The Fourteenth Circuit's opinion reversed in part but affirmed in part the judgment of the ~~d~~District ~~c~~Court, holding that:

1. The Ragnarok District Court had personal jurisdiction over Kim Possible based on her minimum contacts and purposeful availment within the state; and
2. That Kim~~'s~~ Possible's promotion did not qualify her as a "seller" pursuant to Section 12(a)(2) of the Securities Act ~~nor~~; and
3. That Kim Possible did ~~she~~not violate the anti-touting provision under Section 17(b) of the Securities Act.

The Fourteenth Circuit set aside the SEC's determination in its entirety, including the $2,000,000 monetary sanctions against Ms. Possible.

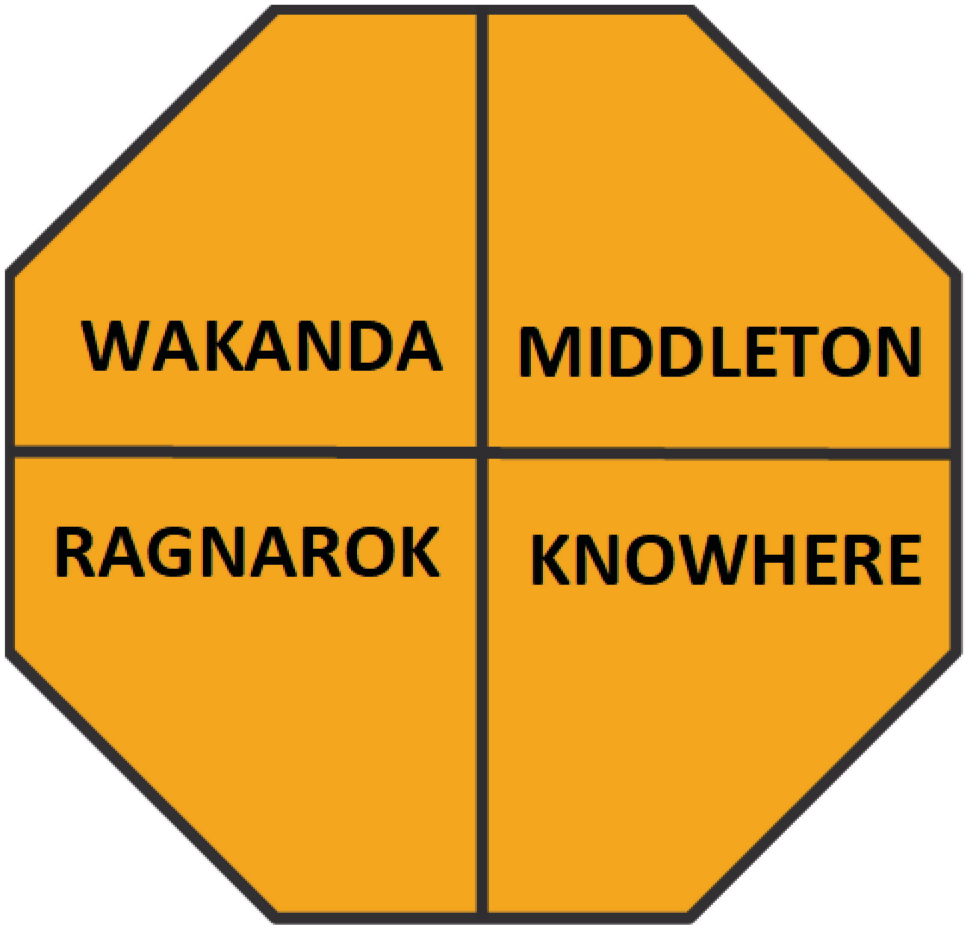
On May 22, 2023, ~~Kim Possible~~Dr. Drakken and the SEC timely petitioned the United States Supreme Court for writ of certiorari, asking the Supreme Court to decide ~~two issues~~three issues, which would assist the district court on remand in its determination of whether Dr. Drakken's claims are sufficiently pled to survive Ms. Possible's motion to dismiss:

~~1. Whether it was proper for the District Court of Ragnarok to render judgment over Kim Ann Possible based on her minimum contacts and purposeful availment within the state of Ragnarok;~~

1. ~~2. Whether~~Are Kim Ann Possible's ~~social media post publicizing a crypto asset security gives rise to liability under the Securities Act of 1933.~~connections to the forum sufficient to establish a constitutionally proper exercise of personal jurisdiction under *International Shoe*?
2. Can an individual be held liable under Section 12(a)(2) of the Securities Act of 1933 when she publicly recommends a crypto security by publishing a promotional post on her social media account to a vast online presence?
3. Under Section 17(b) of the Securities Act of 1933, does an individual subject herself to liability when she discloses the number of crypto coins she received for participation in an event sponsored by the crypto issuer via social media?

The Supreme Court granted certiorari on September 5, 2023.

APPENDIX A



UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 99995 / April 17, 2023

ADMINISTRATIVE PROCEEDING
20 SEC Docket 8042

In the Matter of

KIMBERLY ANN POSSIBLE

Respondent.

ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 8A OF THE SECURITIES ACT OF 1933, MAKING FINDINGS, AND IMPOSING CEASE-AND-DESIST ORDER

The Securities and Exchange Commission ("SEC") deems it appropriate that cease-and-desist proceedings be instituted pursuant to Section 8A of the Securities Act of 1933 against Kimberly Ann Possible.

On the basis of this Order, the SEC has determined that Kim Ann Possible violated Section 17(b) of the Securities Act by touting a security on her social media account via the OCTOCoin promotional post published on February 1, 2023, without disclosing that she received compensation for doing so and the amount of such consideration. This finding is a result of an investigation completed by the Division of Enforcement and Compliance.

Accordingly, it is hereby ORDERED that:

Pursuant to Section 8A of the Securities Act, Kim Ann Possible cease and desist from committing any future violations under Section 17(b) and any section of the federal securities laws; and

Kim Ann Possible pay a monetary penalty in the amount of $2,000,000 to the Securities and Exchange Commission.

By the Commission.

Camille Leon
Secretary

UNITED STATES DISTRICT COURT,
DISTRICT OF RAGNAROK

~~SECURITIES AND EXCHANGE COMMISSION~~DR. HENRY DRAKKEN , Plaintiff, v. KIMBERLY ANN POSSIBLE, Defendant.	Case No: 3:23-cv-2024 **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS** [Dkt. Nos. 12, 14, 16.]

On March 20, 2023, Defendant Kimberly Ann Possible filed a motion to dismiss Plaintiff ~~Securities and Exchange Commission's ("SEC" or the "Commission")~~Dr. Henry Drakken's complaint for lack of personal jurisdiction and failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(2) and 12(b)(6). (Dkt. No. 12.) On April 3, 2023, ~~the SEC~~Dr. Drakken filed ~~their~~his response in opposition to ~~Defendant Kim's~~Ms. Possible's motion to dismiss (Dkt. No. 14), and on April 10, 2023, ~~Defendant~~Ms. Possible filed a reply (Dkt. No. 16). Pursuant to Federal Rule of ~~Federal~~Civil Procedure 78 and Local Rule 8.3(d)(3), the Court determined this matter was appropriate for resolution without oral argument and submitted this motion on the parties' papers. For the reasons that follow, the Court **GRANTS** Defendant's~~'~~ motion to dismiss.

BACKGROUND

The facts of this case are set forth in the Record and are derived from Plaintiff's complaint, the materials included with the parties' briefing, ~~the hearing held before the court,~~ and public records; none are disputed.

~~The~~After learning of the United States Securities and Exchange Commission's (the "SEC") ongoing civil enforcement action against Ms. Possible, Dr. Drakken brings this complaint against Defendant Possible ~~under~~alleging a violation of Section 12(a)(2) ~~and Section 17(b)~~ of the Securities Act ~~alleging violations of federal securities laws~~, which purportedly occurred when Defendant Possible allegedly encouraged her followers to purchase OCTOCoin cryptocurrency—an unregistered security—via her February 1, 2023 post to her Y social media account. OCTOCoin is currently subject to a separate securities fraud action based on the results of an investigation revealing that OCTOCoin has been falsifying trades and business records to the financial benefit of its CEO, Larissa Anderson. Defendant Possible's involvement is based on a promotional social media post that Possible made on "Y" (previously Parody, Inc.) where she announced a jiu-jitsu cage match against Anderson, and in that same post, publicized OCTOCoin and "Invest In Yourself." The Y post linked to the company's website, and Possible disclosed that she would be receiving "1337 OCTOCoins" after the match "in the ring." The post also clearly indicated that Possible was not offering financial advice ("#NotFinancial~~Advice~~ [. . .] Advice"). According to the record, Defendant Possible wrote the post on her Y account from her family's car while she was leaving Knowhere, where she attended a two-day promotional event, and was on her way back to Middleton, Newland. Defendant does not indicate whether she "published" the post when she was physically located in the United States or in Newland.

PROCEDURAL HISTORY

On March 6, 2023, ~~the Commission~~Dr. Drakken brought this litigation against Defendant Possible, alleging ~~Defendant~~that Ms. Possible violated Section 12(a)(2) ~~and~~

~~Section 17(b)~~ of the Securities Act through her Y post regarding OCTOCoins prior to the jiu-jitsu ~~cage~~ cage-match~~. Defendant~~. Ms. Possible accepted service of the Complaint, reserving her rights to challenge the assertion of jurisdiction over her. On March 20, 2023, ~~Defendant~~Ms. Possible moved to dismiss the ~~claims~~complaint, arguing that she is not subject to personal jurisdiction in the District of Ragnarok and that ~~the Commission~~Dr. Drakken failed to state a claim because she did not qualify as a seller under Section 12(a) ~~and that she fully disclosed her financial relationship pursuant to Section 17~~(~~b~~2).[9] In support of her motion to dismiss, Defendant Possible states that she is a citizen of Newland and currently resides in Middleton, Newland. On April 3, 2023, ~~the SEC~~Dr. Drakken filed ~~their~~a response in opposition to ~~Defendant~~Ms. Possible's motion to dismiss, but did not challenge any of the factual assertions in ~~Defendant~~Ms. Possible's motion or supporting evidence. On April 10, 2023, ~~Defendant~~Ms. Possible filed a reply. This dispute is ripe for resolution.

[9] Defendant Possible does not dispute that OCTOCoin is a security as defined within the meaning of the federal securities laws.

DISCUSSION

I. LEGAL STANDARD

Motion to Dismiss for Lack of Personal Jurisdiction

Defendant Possible brings ~~a~~this motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). When contested, the plaintiff has the burden of proving jurisdiction exists. *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 608 (9th Cir. 2010); *John Crane, Inc. v. Shein Law Center, Ltd.*, 891 F.3d 692, 695 (7th Cir. 2018). Where there has been no evidentiary hearing and the court considers the motion to dismiss on the basis of affidavits and other written materials, the plaintiff has the light burden of needing only to make a prima facie showing. *John Crane, Inc.*, 891 F.3d at 695. In determining whether such a showing exists, the court is to accept the allegations in the complaint as true and resolve all factual disputes in the plaintiff's favor. *DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001). Nevertheless, only the ~~well pled~~well-pled facts of the plaintiff's complaint, as distinguished from mere conclusory allegations, must be accepted as true, and conclusory allegations are to be disregarded. *Wenz v. Memery Crystal*, 55 F.3d 1503, 1506 (10th Cir. 1995).

II. CAN THIS COURT EXERCISE PERSONAL JURISDICTION OVER DEFENDANT POSSIBLE?

~~Defendant~~Ms. Possible argues that ~~the SEC's claims~~Dr. Drakken's complaint should be dismissed because, among other reasons, this Court lacks specific personal jurisdiction over her and therefore cannot bind her in a judgment on Dr. Drakken's securities claims. The Court agrees.

The Securities ~~Exchange~~ Act of 1933 provides that a defendant sued under the statute may be served with process "wherever the defendant may be found." 15 U.S.C.A. § 78aa. In conjunction with Rule 4(k)(2) of the Federal Rules of Civil Procedure, we understand that such service is sufficient to confer personal jurisdiction in a claim that arises under federal law if "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction" and "exercising jurisdiction is consistent with the United States Constitution and laws." As such, the fact that ~~Defendant~~Ms. Possible was properly served does not end the inquiry on personal jurisdiction grounds: the Court's assertion of personal jurisdiction must comport with the requirements of the Constitution. *GTE New Media Services Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1347 (D.C. Cir. 2000) (even when statutory requirements are met, "a plaintiff must still show that the exercise of personal jurisdiction is within the permissible bounds of the Due Process Clause"). In this respect, the Court must consider whether ~~Defendant Kim~~Ms. Possible has the requisite "minimum contacts" with the judicial forum such that assuming jurisdiction over ~~them~~her satisfies the core demand of due process: that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

It is well established that "[t]he due process clause ... constrains a federal court's power to acquire personal jurisdiction" over a nonresident defendant. *In re Chase & Sanborn Corp.*, 835 F.2d 1341, 1344 (11th Cir. 1988), *rev'd on other grounds sub nom. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). The exercise of personal jurisdiction comports with due process when "(1) the nonresident defendant has purposefully established minimum contacts with the forum . . . and (2) the exercise of

jurisdiction will not offend traditional notions of fair play and substantial justice." *Francosteel Corp. v. M/V Charm*, 19 F.3d 624, 627 (11th Cir. 1994). If the plaintiff makes a threshold showing of minimum contacts, the defendant must show that the exercise of jurisdiction is nonetheless unreasonable to prevail on a motion to dismiss. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477~~, 105 S.Ct. 2174, 85 L.Ed.2d 528,~~ (1985)~~)~~.

A. Minimum Contacts

A few fundamental principles guide the Court's decision today. First, to satisfy the minimum contacts requirement for purposes of specific jurisdiction, "the relationship must arise out of contacts that *the defendant* [ ] create[d] with the forum[.]"~~6~~[10] *Walden v. Fiore*, 571 U.S. 277, 283 (2014) (emphasis added). Per guidance from the Supreme Court, we "reject[] attempts to satisfy the defendant-focused minimum contacts inquiry by

~~6~~[10] A preliminary question before the Court today is what "forum" applies. Defendant argues that it is contacts with the state—the State of Ragnarok—that should frame the Court's analysis. ~~The SEC~~Plaintiff argues that because service of process has been effected pursuant to a federal statute authorizing nationwide (or worldwide) service, that the applicable forum is the United States. We agree with the ~~Commission~~Plaintiff. While courts in this Circuit have not explicitly stated a rule to that effect, most Circuits have found that "[w]hen the personal jurisdiction of a federal court is invoked based upon a federal statute providing for nationwide or worldwide service, the relevant inquiry is whether the respondent has had sufficient minimum contacts with the United States." *In re Application to Enforce Admin. of Subpoenas of S.E.C. v. Knowles*, 87 F.3d 413, 417 (10th Cir. 1996) (Securities Exchange Act); *see also, e.g.*, *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993) (Securities Exchange Act); *United Elec. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1085–86 (1st Cir. 1992) (ERISA); *Go–Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1414–16 (9th Cir. 1989) (RICO). This rule is predicated on the well settled principle that "service of process constitutes the vehicle by which the court obtains jurisdiction." *United Elec. Workers*, 960 F.2d at 1085. Courts have reasoned that "a federal statute which permits the service of process beyond the boundaries of the forum state [via a nationwide or worldwide service provision] broadens the authorized scope of personal jurisdiction. Under such a statute, the question becomes whether the party has sufficient contacts with the United States, not any particular state." *Go–Video, Inc.*, 885 F.2d at 1414.

demonstrating contacts between [third parties] and the forum state." *Id.* (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984)). Second, "minimum contacts" looks to the defendant's contacts with the forum itself, not the defendant's conducts with persons who reside there. *See International Shoe,* 326 U.S. at 319 (Due process "does not contemplate that a state may make binding a judgment *in personam* against an individual ... with which the state has no contacts, ties, or relations"). And third, it is the defendant's ***conduct*** that must form the necessary connection with the forum state that is the basis for its jurisdiction over him. *Burger King*, 471 U.S. at 478 ("If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot."); *Kulko v. Superior Court of Cal., City and Cty. Of San Francisco*, 436 U.S. 84, 93 (1978) (declining to "find personal jurisdiction in a State . . . merely because [the plaintiff in a child support action] was residing there").

To show constitutionally minimum contacts, the defendant's contacts with the applicable forum must satisfy three criteria: "[f]irst, the contacts must be related to the plaintiff's cause of action or have given rise to it. *Burger King*, 471 U.S. at 472. Second, the contacts must involve "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum . . . thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. ~~at~~235, 253 (1958) (*citing Int'l Shoe Co. v. State of Wash.*, 326 U.S. 310, 319 (1945)). Third, the defendant's contacts with the forum must be "such that [the defendant] should reasonably anticipate being haled into court there." *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Each of these factors counsel against the Court exercising jurisdiction over the foreign Defendant Kim Possible.

1. **Relatedness Prong**

Under the first prong of the minimum contacts inquiry, we find that the alleged contacts between Defendant Possible and the United States are neither related to nor give rise to the cause of action asserted by ~~the SEC~~Dr. Drakken because the contact with the United States through Defendant Possible's publication of the Y post was merely coincidental.

To satisfy the relatedness prong, the ~~SEC~~Plaintiff must show a nexus between its claim and the defendants' forum-based activities. That means that "[t]he plaintiff's claims . . . 'must arise out of or relate to the defendant's contacts' with the forum." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, —— U.S. ——, 141 S. Ct. 1017, 1025 (2021) (quo*ting Bristol-Myers Squibb Co. v. Superior Ct.*, —— U.S. ——, 137 S. Ct. 1773, 1780 (2017)). The ~~SEC~~Plaintiff asserts, and we agree, that there are three "contacts" that ~~Defendant Kim~~Ms. Possible has with the United States in this case: first, and most obvious, is that ~~Defendant Kim~~Ms. Possible was in the United States when she created the Y post in question. Second, ~~Defendant Kim~~Ms. Possible visits the United States (albeit twice a year) for other promotional events related, in part, to her status as a brand influencer. ~~And t~~Third, ~~Defendant Kim~~Ms. Possible regularly uses the Y service for promotional services, and the Y servers are located in the United States. Where we disagree with the ~~SEC~~Plaintiff is the significance of those contacts.

~~The Defendant's~~Ms. Possible's "suit related conduct"—using the Y platform while passing through the United States—did not "create a substantial connection with [the

United States]," and the ~~SEC's~~Plaintiff's claims otherwise are unavailing. *See Walden v. Fiore*, 571 U.S. 277, 284 (2014); *see also Werner v. Dowlatsingh*, 818 Fed. App'x 671, 672 (holding that "[defendant's] "suit related conduct"—allegedly displaying copyright protected photos via videos uploaded to YouTube from Toronto—did not "create a substantial connection with [California]," and [plaintiff's] claims otherwise are unavailing" (quoting *Walden*, 571 U.S. at 284)). And the Defendant's trips to the United States for promotional content—including the match in question—is not a "meaningful" connection to the United States (*Walden*, 571 U.S. at 289-90); it is merely coincidental. *See Werner*, 818 Fed. App'x at 672-73 (defendant's trips to the forum "to attend VidCon" and a "sponsorship agreement with a California watch-making company" were "not related to the suit" and therefore "do not support an exercise of specific personal jurisdiction"). We find no other relevant connections between the Defendant and the United States.

2. **Purposeful Availment**

Purposeful availment reflects a "rough quid pro quo," *Bluetarp Fin., Inc. v. Matrix Constr. Co.*, 709 F.3d 72, 82 (1st Cir. 2013) (quoting *Carreras v. PMG Collins, LLC*, 660 F.3d 549, 555 (1st Cir. 2011)) – "[w]hen (but only when) a company exercises the privilege of conducting activities within a state – thus enjoying the benefits and protection of its laws —~~–~~ the State may hold the company to account for related misconduct," *Ford Motor*, 141 S. Ct. at 1025 (quoting *Int'l Shoe*, 326 U.S. at 319)). The purposeful-availment inquiry is intended to assure that personal jurisdiction is not premised solely upon a defendant's "random, isolated, or fortuitous' contacts with the forum state." *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984).

~~The SEC~~Dr. Drakken argues that ~~the Defendant~~Ms. Possible's and her family's ~~constant~~ contacts with the United States demonstrate that ~~the Defendant~~Ms. Possible purposely availed herself to the jurisdiction. That is wrong. To start, the Defendant's ***family's*** contacts are irrelevant for this analysis. The Court looks only to the "*defendant's* suit-related conduct" and its connection to the forum; "a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Walden*, 571 U.S. at 283, 286; *Philos Techs., Inc. v. Philos & D, Inc*., 802 F.3d 905, 915–16 (7th Cir. 2015).

Next, ~~the SEC~~Dr. Drakken argues that the "transactional aspects of securities fraud establish purposeful availment." *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 480 F. Supp. 3d 1050, 1065 (N.D. Cal. 2020). That very well may be true (though it is not "well-settled law," contrary to ~~the SEC's~~Plaintiff's assertion), but it cannot be said that ~~Defendant~~Ms. Possible's *de minimis* contact with the United States (through a single ~~tweet~~social media post) demonstrates that "transactional aspect" (*id.*) of securities fraud.[7] ~~The SEC~~ [11] Dr. Drakkem also argues that because Defendant Possible relies heavily on Y for her brand promotion (thereby garnering a significant U.S.-based fan base)—and Y's servers are all located in the U.S.—that Defendant Possible actively sought out and conducted business in the United States. We recognize that there is a dearth of case~~law~~ law on this issue. But it seems unlikely that ~~Defendant~~Ms. Possible targeted her activities to the U.S. forum (particularly given her demonstrated commitment to her hometown of Middleton) simply by posting a message on a website. And just because

[7] ~~We contrast that with the conduct of OCTOCoins.~~

[11] We contrast that with the conduct of OCTOCoins.

using U.S.-based social media accounts ***could*** garner the attention of a certain forum (here, a U.S.-customer base) does not prove that a defendant purposefully ***directed*** activities to that forum. *See, e.g.*, *Smith v. Facebook, Inc.*, 262 F. Supp. 3d 943, 951-52 (N.D. Cal. 2017) *aff'd* 745 F. App'x 8 (9th Cir. 2018) ("But even if the Healthcare Defendants knew that Facebook tracks users via "Share" and "Like" buttons, Plaintiffs' allegations do not support the conclusion that the Healthcare Defendants targeted their activities at Plaintiffs in California. Without 'something more,' embedding third-party code cannot confer personal jurisdiction over a website operator in the forum where the third party resides. . . . Under Plaintiffs' theory, every website operator that embeds one of these tools could be haled into court where the third-party company resides. Personal jurisdiction cannot reasonably stretch so far. This Court is aware of no other case that raises the same question, but courts have reached the same conclusion in related scenarios."). This Court agrees with the Northern District of California's reasoning in the *Smith* case.

3. **Reasonable Expectation of Being Haled Into Court**

For this prong, the Court focuses "on the defendant's intentions," for which "the cornerstones are voluntariness and foreseeability." *Bluetarp Fin.*, 709 F.3d at 82. The first analaysis, voluntariness, asks whether the defendant's contacts with the forum state are of its own making and "not based on the unilateral actions of another party or a third person." *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 716 (1st Cir. 1996). The second, foreseeability, asks whether the defendant's voluntary conduct and connection with the forum state are "such that [the defendant] should reasonably anticipate being haled into court there." *Id.* In all, the contacts "must show that the defendant deliberately reached out beyond its home —— by, for example, exploiting a market in the forum State or entering a contractual

relationship centered there." *Ford Motor*, 141 S. Ct. at 1025 (quoting *Walden v. Fiore*, 571 U.S. 277, 285 (2014)).

While it is true that ~~Defendant~~Ms. Possible "enter[ed] [into] a contractual relationship," (*id.*), with a U.S. company, we do not think that is the type of conduct that the Supreme Court envisioned would confer a reasonable expectation that ~~Defendant~~Ms. Possible would be haled into our Court. The contract between ~~Defendant~~Ms. Possible and OCTOCoin was focused on a single event (~~a~~ between Possible and Larissa Anderson (the OCTOCoin CEO)) and did not, in any event, envision a long-lasting contractual relationship that more typically confers personal jurisdiction on a defendant. *See e.g.*, *Provident Bank v. Hering*, 2018 WL 445431, at *2 (D.N.J. Jan. 16, 2018) (finding a "sufficient[] demonstrate[ion] that the Court has specific jurisdiction over Defendants" based on a seven-year loan agreement that created rights and obligations stemming from their contractual relationship with Plaintiff and, therefore, purposefully availed themselves of the benefits and protections of the State of New Jersey" and that "the course of dealings, prior negotiations, and the terms of the contract were such that Defendants should have reasonably anticipated being haled into a New Jersey court"). This is insufficient to sustain the conclusion that Defendant Possible would have anticipated being haled into this Court.

B. Fair Play And Substantial Justice

Because we find that minimum contacts are not satisfied, we see no need to engage in the question of whether this is "one of those rare cases in which minimum requirements inherent in the concept of fair play and substantial justice … defeat the reasonableness of jurisdiction.~~...~~" *Asahi*, 480 U.S. at 116, 107 S.Ct. at 1034 (Brennan, J., concurring) (internal quotation marks omitted).

Because minimum contacts are not sufficient to warrant personal jurisdiction and thus ~~Defendant~~Ms. Possible's motion to dismiss must be granted, this Court need not address ~~Defendant~~Ms. Possible's alternative grounds for dismissal under Rule 12(b)(6), and indeed should not do so.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** ~~Defendant~~Ms. Possible's motion to dismiss to the ~~Commission's complaint~~extent that it requests dismissal of Dr. Drakken's claims against Ms. Possible for lack of personal jurisdiction ~~pursuant to FRCP 12(b)(2).~~ The motion is granted with prejudice. The Court directs the Clerk of Court to close the case.

IT IS SO ORDERED.

DATED:~~-~~ April 17, 2023

/s/Hon. Wade Load
HON. WADE LOAD, District Judge
UNITED STATE DISTRICT COURT

UNITED STATES COURT OF APPEALS,
FOURTEENTH CIRCUIT OF MARVEL

Docket No. 22-1954, Securities Act Release No. 99995, 20 SEC Docket 8042

(Apr. 17, 2023)

SECURITIES AND EXCHANGE COMMISSION,
Appellant

and

DR. HENRY DRAKKEN,
Appellant

v.

KIMBERLY ANN POSSIBLE,
Appellee

OPINION

~~DRAKKEN~~WILCOX, J., and SHEGO, C.J., Circuit Judges:

~~We received this~~Dr. Henry Drakken appeals ~~from~~ the decision of the District Court determining that Ms. Possible was not properly subject to personal jurisdiction. This Court exercises jurisdiction under 28 U.S.C. § 1291.

Ms. Possible appeals the decision of the Securities and Exchange Commission (the "SEC") determining that Ms. Possible violated Section 17(b) of the Securities Act.

The Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, empowers the SEC to initiate administrative proceedings to determine whether a person has violated the statute and whether to impose civil penalties. *See, e.g.*, 15 U.S.C. 78u-1, 78u-2, 78u-3. If the SEC issues a decision that is adverse to the respondent, that person

"may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit." 15 U.S.C. 78y(a)(1). Once the respondent files a petition for review in an appropriate court of appeals, that court "has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part." 15 U.S.C. 78y(a)(3). Dr. Drakken's claim and the SEC's civil action against Ms. Possible arise out of the same nucleus of common facts, therefore, it makes sense – as a matter of law, logic, and judicial economy – to decide both appeals together for the purposes of resolving the issues of whether Ms. Possible violated Section 12(a)(2) and Section 17(b) of the Securities Act.

For the reasons that follow, we ~~will affirm~~REVERSE the District Court's ~~decision dismissing the~~determination that it did not have personal jurisdiction over Ms. Possible and AFFIRM the District Court's dismissal of Dr. Drakken's complaint (the "Complaint") ~~filed by the Security and Exchange Commission (the "SEC").~~ on the alternate grounds that Dr. Drakken has not met his pleading burden under Rule 12(b)6). We set aside, in its entirety, the SEC's determination that Ms. Possible violated the Securities Act of 1933 and its monetary sanctions against Ms. Possible for her involvement in the promotion of crypto securities, including OCTOCoin.

BACKGROUND

We direct the parties to the District Court's recitation of the facts, which are drawn from the well-pleaded allegations of the Complaint. The District Court's factual findings are incorporated herein and thus we do not restate the facts here other than when relevant to the Court's reasoning.

PROCEDURAL HISTORY

The SEC brought an enforcement action against Kimberly Ann Possible in the District of Ragnarok on March 6, 2023, alleging a violation of Section 17(b), the "anti-touting" provision, of the federal securities laws. At the conclusion of the SEC's proceedings, the SEC's order dated April 17, 2023 determined that Kim Possible violated Section 17(b) because, although she made public that she would be receiving 1337 OCTOCoins, she did not disclose the monetary value of those securities. The SEC imposed sanctions against Ms. Possible in the amount of $2,000,000 and prohibited her from committing any further violations.

Upon learning that ~~T~~the SEC ~~brought charges~~initiated the civil enforcement action against ~~Kimberly Ann~~Ms. Possible, Dr. Henry Drakken, an OCTOCoin purchaser, filed suit against Kim Possible in the District Court of Ragnarok ~~on March 6~~, ~~2023~~ alleging a violation of Section 12(a)(2) of the federal securities laws. He contended that Ms. Possible was subject to liability under this section because she acted as a seller pursuant to the statute by her participation in the solicitation of OCTOCoin through her social media platform. On March 20, 2023, ~~Ms.~~Kim Possible filed a motion to dismiss ~~the~~Dr. Drakken's ~~C~~complaint for lack of personal jurisdiction and failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). On April 17, 2023, the District Court of the District of Ragnarok issued an order granting Ms. Possible's motion to dismiss. It held that Ms. Possible lacked sufficient contacts with the United States forum~~.~~, and therefore, the court could not properly exercise personal jurisdiction over Ms. Possible. Because of its decision that there was no personal jurisdiction, the District Court declined to reach ~~the~~Dr. Drakken's securities ~~issues raised by Ms. Possible.~~ claim.

–On April 24, 2023, ~~the SEC~~Dr. Drakken timely appealed the District Court's decision to the Fourteenth Circuit~~ of Marvel~~ Court of Appeals. That same day, Ms. Possible appealed the SEC's Order and the monetary sanctions to the Fourteenth Circuit Court of Appeals.

The parties briefed ~~two~~three questions to the Court:

1. Whether the court ~~maintains~~may properly exercise personal jurisdiction over Kim Possible based on her minimum contacts and purposeful availment within the state of Ragnarok; ~~and~~
2. Whether Kim Possible is subject to liability under ~~the Securities Act of 1933 for the~~Sections 12(a)(2) for her widely disseminated promotional ~~Y~~ post on her social media ~~platform.~~account; and
3. Whether Kim Possible is liable under Section 17(b) of the Securities Act of 1933 for publicly announcing that she will be earning 1337 OCTOCoins for her participation in the cage match.

DISCUSSION

This Court reviews *de novo* the District Court's dismissal of ~~the SEC's~~Dr. Drakken's complaint ~~under Federal Rule of Civil Procedure Rule 12(b)(2)~~. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011); *Indah v S.E.C.*, 661 F.3d 914, 920 (6th Cir. 2011). When reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(2), we are obliged to accept all of the plaintiff's allegations as true. *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368 (3d Cir. 2002). In considering a motion to dismiss pursuant to Rule 12(b)(6), a court must accept as true the well-pleaded factual allegations set forth in the complaint and draw all reasonable inferences in favor of the plaintiff.

Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009). In doing so, the Court need not give "credence to plaintiff's conclusory allegations" or lead conclusions masquerading as fact. *Cantor Fitzgerald v. Lutnick*, 313 F.3d 704, 709 (2d Cir. 2002) (internal quotations omitted).

We review the SEC's findings of fact and legal conclusions under the familiar principles of administrative law. The findings of fact are subject to a review for substantial evidence, *see Wonsover v. SEC,* 205 F.3d 408, 412 (D. C. Cir. 2000), and the "other conclusions may be set aside only if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Graham v. SEC*, 222 F.3d 994, 999-1000 (D. C. Cir. 2000).

I. The Court Does Have Personal Jurisdiction Over Kim Possible

The District Court held that the courts in this jurisdiction lack specific personal jurisdiction over Kim Possible and therefore ~~SEC's~~Dr. Drakken's claims against her should be dismissed. For the reasons below, this Court disagrees.

~~The parties~~Dr. Drakken and Ms. Possible do not dispute that ~~Kim~~Ms. Possible was properly served pursuant to Rule 4(f)(2)(C)(ii) of the Federal Rules of Civil Procedure and the Hague Convention for Service of Process, to which both the United States and Newland is a party. Most Circuits have found that "[w]hen the personal jurisdiction of a federal court is invoked based upon a federal statute providing for nationwide or worldwide service," as here, "the relevant inquiry is whether the respondent has had sufficient minimum contacts with the United States." *See In re Application to Enforce Admin. of Subpoenas of S.E.C. v. Knowles*, 87 F.3d 413, 417 (10th Cir. 1996); *accord United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993) (Securities Exchange Act);

United Elec. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1085–86 (1st Cir. 1992). The District Court correctly identified that the relevant forum for analysis is Ms. Possible's contacts with the United States, rather than just Ragnarok. It is to this analysis we now turn.

A. Ms. Possible Has Sufficient Contacts With the United States

To constitute minimum contacts for purposes of specific jurisdiction, we must undertake a three-step analysis: First, the contacts must be related to the plaintiff's cause of action, if not having given rise to it; Second, the contacts must include acts by which the defendant "purposefully avails" itself of the privilege of conducting activities within the forum, such that the defendant can be said to have invoked the benefit of the forum; and third, the defendant's contacts with the forum must be such that the defendant should "reasonably anticipate being haled into court there." *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1546-47 (11th Cir. 1993).

We turn to the first prong, the relatedness of Ms. Possible's contacts to the SEC's cause of action. Under this prong, we find that the contacts between ~~Kim~~Ms. Possible and the United States are related to the cause of action asserted by ~~the SEC~~Dr. Drakken because, *inter alia*, ~~Kim~~Ms. Possible contracted with a United States Corporation and committed SEC violations using servers located in the United States.

The District Court properly recognized that ~~Kim~~Ms. Possible had several contacts with the United States. But ~~that~~the court's review was too myopic~~—~~ – it did not acknowledge that each of ~~Defendant's~~Ms. Possible's acts within the forum worked together to bring about the harm at issue in this case. She was in the United States when she posted on Y; she has continuing contacts with the United States because she visits for

promotional events, boosting her profile and making any promotional efforts more likely to be successful; and the relevant message on Y was targeted at Ragnarok, given that the match with Ms. Anderson was set to take place there. These acts combine to lead to the wrongful act, giving jurisdiction. *See SkyHop Techs., Inc. v. Narra*, 58 F.4th 1211, 1229 (11th Cir. 2023) (where Defendant 'knowingly and intentionally directed [messages]" into the forum, where a resident received them, "essential foundation of specific jurisdiction" was present).

Additionally, by these acts, Ms. Possible "purposefully availed" herself of the United States' securities market. *See Pinker*, 292 F.3d at 371 (holding that "active marketing . . . to American investors" provides "adequate notice that [a foreign entity] may be haled into an American court"); *see also Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1357-58 (11th Cir. 2013) (recognizing that internet marketing, combined with other acts, can demonstrate purposeful availment). As in *Pinker*, Ms. Possible "took affirmative steps purposefully directed at the American investing public," 292 F.3d at 371~~.~~, by sending a message promoting OCTOCoins and her battle royale with Anderson. *See also S.E.C. v. Carrillo*, 115 F.3d 1540, 1545 (11th Cir. 1997) ("It is well settled that advertising that is reasonably calculated to reach the forum may constitute purposeful availment of the privileges of doing business in the forum.").

B. Fair Play and Substantial Justice

We now consider whether exercising jurisdiction over ~~Defendant~~Ms. Possible "is consistent with traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316. Given our above analysis, Ms. Possible must "make a 'compelling case' that the exercise of jurisdiction would violate traditional notions of fair play and substantial

justice." *Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc.*, 593 F.3d 1249, 1267 (11th Cir. 2010) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)). She cannot do so here. As other courts have recognized, "the national interest" of the United States in furthering the purposes of its securities laws supports an exercise of jurisdiction here. *See, e.g.*, *Pinker*, 292 F.3d at 372-73. Additionally, Ms. Possible frequently travels to Ragnarok to promote her acting and brand, which undermines any argument that exercising jurisdiction would offend justice. *See Curry v. Revolutions Labs., LLC*, 949 F.3d 385, 402 (7th Cir. 2020) (holding that "conducting business" in jurisdiction undercut any potential unfairness). It is not inconsistent with the interests of justice to subject Ms. Possible to Ragnarok's jurisdictional pull.

For the reasons outlined above, the ~~decision of the~~ District Court's determination that ~~there is~~it could not properly exercise personal jurisdiction over Ms. Possible was incorrect.[8][12]

II. ~~The SEC failed to state a claim under~~Ms. Possible Has Not Violated Section 12(a) of the Securities Act ~~of 1933.~~

Though we disagree with the District Court's reasoning, we may affirm the judgment of the District Court dismissing the Complaint based on any ground supported by the record. *See Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 18 (1st Cir. 2006); *Thole*

[8][12] The "effects" test, as derived from *Calder v. Jones*, 465 U.S. 783 (1984), also suggests that exercising jurisdiction over Defendant Possible is proper. The *Calder* test asks "whether the defendant: (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Will Co. v. Lee*, 47 F.4th 917, 922 (9th Cir. 2022). Defendant Possible intentionally posted a message on Y, knowing that Y users could read the message and were likely to purchase OCTOCoins in the United States as a result of her promotional activity. That is enough.

v. U.S. Bank, Nat'l Ass'n, 873 F.3d 617, 628-29 (8th Cir. 2017). Thus, we turn to Ms. Possible's argument under Fed. R. Civ. P. 12(b)(6). As shall be seen, that argument is much stronger and, indeed, prevails.

~~A. The SEC Failed to Allege that Ms. Possible Violated Section 12 of the Securities Act~~

~~The SEC~~Dr. Henry Drakken alleges in ~~its~~his complaint that Ms. Possible violated Section 12(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77~~l~~l by encouraging her followers to purchase OCTOCoin cryptocurrency via her February 1, 2023 post to her Y social media account. In response, Ms. Possible argues ~~the SEC~~that Dr. Drakken has failed to allege that she is a "seller" for purposes of Section 12(a), and therefore ~~the SEC's~~Dr. Drakken's complaint should also be dismissed for failure to state a claim pursuant to Rule 12(b)(6).

Section 12(a)(2) of the Securities Act prohibits "any person who . . . offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omit[ted] to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading . . . to the person purchasing such security from him." 15 U.S.C. § 71~~l~~l(a)(2). The Supreme Court, in *Pinter v. Dahl*, has defined a "seller" for purposes of Section 12(a)(2) as anyone who (1) "passe[s] title, or other interest in the security, to the buyer for value" or who, (2) while not the actual owner of the security, "successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Pinter v. Dahl*, 486 U.S. 622, 643–47 (1988).[~~9~~13]

Here, ~~the Commission~~Dr. Drakken alleges that Ms. Possible engaged in the solicitation of OCTOCoin securities through her post on her Y account and is therefore a "seller" under the second *Pinter* prong. Specifically, ~~the Commission~~Dr. Drakken alleges

[~~9~~13] This is sometimes referred to as a "statutory seller." *See, e.g.*, *Pino v. Cardone Capital, LLC*, 55 F.4th 1253, 1258 (9th Cir. 2022).

that Ms. Possible encouraged her followers to purchase OCTOCoin securities through her Y post in advance of her cage match against OCTOCoin's CEO and founder Anderson. ~~The Commission~~He further alleges that Ms. Possible knew before making that post that she would be receiving 1,337 OCTOCoins after the match and that Ms. Possible's Y post was motivated, at least in part, by her desire to drive up the value of the OCTOCoins she was to receive and which she intended to sell at the conclusion of the match.

In response, Ms. Possible argues that ~~the Commission~~Dr. Drakken failed to allege that she "solicited" sales of OCTOCoin because she did not target any specific individuals to purchase OCTOCoin securities and only posted on her Y account because she agreed to do so to keep her relationship with OCTOCoin amicable. Ms. Possible further argues that she had no say in the content of post and that OCTOCoin's management drafted it. As such, Ms. Possible contends that ~~the SEC~~Dr. Drakken has not sufficiently ~~shown~~alleged that Ms. Possible posted on her Y account with the desire to serve her own financial interests.

The Court is not convinced that ~~the Commission~~Dr. Drakken has met ~~its heavy~~his burden to allege that Ms. Possible is a "seller" under Section 12(a)(2). While the Fourteenth Circuit has not yet addressed this issue, courts of appeals in other circuits have recognized that for a defendant to be considered to have "solici~~edt~~ted" sales of a security, the defendant must do more than merely publicly recommend a security; rather, to qualify as a "seller" under Section 12(a)(2), the defendant must ***actively*** and ***directly*** solicit sales of a security and target a purchaser. *See, e.g.*, *Capri v. Murphy*, 856 F.2d ~~XX~~473, 473–79 (2d Cir. 1988); *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 636 (3d Cir. 1989). ~~The Commission~~Dr. Drakken has not demonstrated that Ms. Possible has done so here. The

Ninth Circuit Court of Appeals in *Moore v. Kayport Package Express, Inc.*, addressed the issue of whether mere performance of services without active solicitation of a security purchase gave rise to securities liability. *Moore*, 885 F.2d 531, 536-37 (9th Cir. 1989). The investors-plaintiffs in *Moore* argued that accountant and lawyer defendants were subject to liability under Section 12 because their actions played a substantial factor in the securities transactions. *Id*. at 534. The court held that the plaintiffs failed to state a claim pursuant to Section 12 because plaintiffs merely alleged that defendants performed services in their respective capacities as lawyers and accountants, rather than demonstrate their involvement in ***soliciting*** security purchases. *Id*. at 537. Further, the allegations did not support a finding that the defendants promoted purchases based on a motivation for financial gain. *Id*.

Similarly, here, Ms. Possible's Y post was merely a general recommendation to her followers regarding OCTOCoin currency and is devoid of any evidence of direct participation in a securities transaction. Like the plaintiffs in *Moore*, ~~the Commission~~Dr. Drakken cannot demonstrate that Ms. Possible made the post based on her motivation to serve her financial interests with respect to securing crypto asset transactions. Indeed, it seems more likely that Ms. Possible was merely hyping up the grudge match between Middleton and ~~Ragnorak~~Ragnarok; she wanted to "see [more people] there" for her victory.

Further supporting our holding is the Tenth Circuit Court of Appeals' decision in *Maher v. Durango Metals, Inc*. In that case, the Court of Appeals declined to find liability under Section 12(a)(2) where the plaintiff failed to allege facts demonstrating that defendant company and owner directly and actively engaged in the solicitation of the Durango stock to a specific purchaser. *See Maher v. Durango Metals, Inc.*, 144 F.3d 1302,

1307 (10th Cir. 1998). Similarly, here, ~~the Commission~~Dr. Drakken has not alleged that Ms. Possible reached out to any ***specific*** followers encouraging them to purchase OCTOCoin; Ms. Possible merely sent out a post via her Y account. Put differently, Section 12(a)(2) liability needs a targeted shot rather than a blunderbuss blast.

Accordingly, the Court holds that ~~the Commission~~Dr. Drakken has not met his burden to survive a motion to dismiss because he has failed to adequately allege that Ms. Possible is a "seller" for purposes of Section 12(a)(2).[10] Thus, ~~although~~ the Court disagrees with the district court regarding the personal jurisdiction question~~, we AFFIRM~~ and REVERSES the judgement of that court ~~dismissing the complaint against Ms. Possible and remand for proceedings not inconsistent with this opinion.~~ on the question of personal jurisdiction, but AFFIRMS the dismissal on the grounds that Dr. Drakken has failed to state a claim.

III. Ms. Possible has not violated Section 17(b) of the Securities Act

[10] ~~We recognize that the Commission also alleged a violation of Section 17(b) of the Securities Act. We need not be detained long by this shotgun pleading. Because Ms. Possible disclosed the relevant facts of her relationship with OCTOCoin by using the hashtag "Promotion" and including a link to OCTOCoin's website, there can be no liability under Section 17(b).~~

As to the SEC's enforcement action against Ms. Possible, we need not be detained long by Ms. Possible's shotgun appeal of the SEC's Order and its imposition of $2,000,000 in monetary sanctions against her. Because Ms. Possible disclosed the relevant facts of her relationship with the OCTOCoin by using the hashtag "Promotion" and by including a link to OCTOCoin's website, we find the SEC's determination that Ms. Possible violated Section 17(b) to be arbitrary or otherwise not in accordance with the law. We therefore set aside the Order and monetary sanctions in whole and we lift the SEC's ban against Ms. Possible's promotional activities. However, we caution Ms. Possible that the federal securities laws are clear that any celebrity must disclose the nature, source, and the amount of compensation they received in exchange for the promotion. Investors are entitled to know whether the publicity of a security is unbiased, and Ms. Possible must ensure, going forward, that there is no question as to whether she has properly disclosed her affiliations as required under the law.

OPINION DISSENTING IN THE JUDGMENT BY ROCKWALLER, J.

While I concur with my colleagues that personal jurisdiction is proper over Ms. Kim Ann Possible, ~~the Commission's~~it is clear from the facts as ~~well~~ pleaded in the complaint ~~does in fact state a claim against~~that Ms. Possible ~~for~~ violat~~ions~~ed Section 12(a)(2) of the Securities Act of 1933 ~~(the "Securities Act" or the "Act") and should be allowed to proceed.~~ when she participated in the solicitation of OCTOCoin through her Y account. Further, the SEC properly determined that Kim Possible violated Section 17(b) of the Securities Act of 1933 by touting OCTOCoin via the promotional post on her social media account without properly disclosing the source and amount of compensation for publishing the post.

A. Violation under Section 12(a)(2)

The majority incorrectly holds that ~~the Commission~~Dr. Henry Drakken failed to meet ~~its~~his burden of sufficiently alleging that Ms. Possible is a "seller" under Section 12(a)(2) because: (1) ~~Appellee's~~Ms. Possible's Y post at issue was a general recommendation to her followers regarding OCTOCoin currency; and (2) ~~the Commission~~Dr. Drakken has not alleged that Ms. Possible reached out to any specific followers encouraging them to purchase OCTOCoin. But the facts as pleaded in the complaint paired with common sense demonstrate that the majority is misguided.

Section 12 of the Securities Act of 1933 imposes liability on an individual who offers or sells securities "by means of a prospectus or oral communication" which includes material misstatements or omissions to "~~"~~the person purchasing such security from him.~~"~~" 15 U.S.C. § 77l(a)(2). The Supreme Court has previously held that a person may qualify as a seller under the statute when that individual (1) "passe[s] title, or other interest in the

security, to the buyer for value" or someone who, (2) while not the actual owner of the security, "successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Pinter v. Dahl*, 486 U.S. 622, 643–47 (1988). The Supreme Court has not, however, defined the scope of solicitation, including whether it must be directed at a particular purchaser. *See Pino v. Cardone Cap., LLC*, 55 F.4th 1253, 1258 (9th Cir. 2022). The majority agrees with the Second, Third, and Ninth Circuit courts that to qualify as a "seller" under Section 12(a)(2), the individual must actively and directly solicit a security and target a purchaser. *See, e.g.*, *Capri v. Murphy*, 856 F.2d 473–79 (2d Cir. 1988); *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 636 (3d Cir. 1989); *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 536-37 (9th Cir. 1989). However, other circuit courts have rightfully considered this requirement with a more realistic lens than the majority does here. I discuss ~~those~~recent case~~s~~ law below.

In *Wildes v. BitConnect International PLC*, the Eleventh Circuit addressed the issue of whether a person may solicit a purchase, pursuant to the Securities Act, by promoting a security asset in a mass communication. 25 F.4th 1341, 1345 (11th Cir.), *cert. denied sub nom. Arcaro v. Parks*, 143 S. Ct. 427 (2022). The plaintiffs in that case alleged that the promoters, who persuaded the public to purchase a new cryptocurrency, BitConnect coin, were liable under Section 12 of the Securities Act for the sale of unregistered securities through their BitConnect videos. *Id*. at 1345. The court reasoned that "broadly disseminated communications" like YouTube and similar websites convey a solicitation which triggers a security violation. *Id*. at 1346. The court held in favor of liability reasoning that when the promoters encouraged individuals to purchase BitConnect coins via online videos, they effectively solicited the purchases that followed. *Id*. Applying the

court's reasoning in *Wildes*, ~~the Commission~~Dr. Drakken does not need to show that Ms. Possible reached out to specific followers to promote the purchase of OCTOCoin; Section 12 is not so limited as to require solicitation to be direct or personal to a particular purchaser.

In sum, it is unreasonable to limit the "seller" qualification to a narrow definition of "direct" and "targeted." As the Eleventh Circuit accurately reasoned: "A seller cannot dodge liability through his choice of communications—especially when the Act covers 'any means' of "communication." *Wildes*, 25 F.4th at 1346. Indeed, according to the majority's strained interpretation, Ms. Possible ***avoids*** liability by casting a broader net and causing more harm. That cannot be, and I therefore dissent from the majority's decision to dismiss ~~the Commission's~~Dr. Drakken's claim under Section 12(a)(2) of the Securities Act.

B. Violation under Section 17(b)

Additionally, ~~despite the majority's treatment of the issue in a cursory footnote,~~I concur with the SEC's determination in its civil action against Kim Possible. ~~t~~The allegations in the ~~Complaint~~SEC's civil enforcement action support a finding that Ms. Possible's Y post did violate Section 17(b) of the Securities Act. Section 17(b) provides the following:

> It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to. or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the

> receipt, whether past or prospective, of such consideration and the amount thereof.

15 U.S.C. § 77q (b).

Pursuant to the foregoing, Section 17(b) makes it unlawful for a person to publicize a security for payment unless the nature, amount, and source of the compensation is disclosed. To establish a Section 17(b) violation, "a person must (1) publish or otherwise circulate (using a means of interstate commerce), (2) a notice or type of communication (which describes a security), (3) for consideration received (past, currently, or prospectively, directly or indirectly), (4) without full disclosure of the consideration received and the amount." *SEC v. Gorsek*, 222 F. Supp. 2d 1099, 1105 (C.D. Ill. 2001). Further, "Section 17(b) is particularly designed to meet the evils of" and protect the market from materials that "purport to give an unbiased opinion but which opinions in reality are bought and paid for." *SEC v. Wall St. Pub. Inst., Inc.*, 591 F. Supp. 1070, 1089 (1984) (quoting *United States v. Amick*, 439 F.2d 351, 365 (7th Cir. 1971)).

Here, the first two prongs are easily met as Ms. Possible disseminated her promotional material across the country (and perhaps the world) through Y, and her promotional post unambiguously described a security— OCTOCoin. Prong three is also easily satisfied as Ms. Possible does not dispute that she received 1337 OCTOCoins as consideration for— at least in part— publishing her contractually mandated promotional Y post. The majority more or less concedes these points, dedicating not a single character of text to discussing them.

The majority instead rests its entire analysis on the argument that Ms. Possible disclosed in her post that she would be receiving 1337 OCTOCoins and included in the post the term "#Promotion." This is a thin reed indeed. To hold that such limited and

ambiguous "disclosure" constitutes "full disclosure" as contemplated by the Act is laughable. First, Ms. Possible's Y post stated that she would "be earning [her] own coveted OCTOCoin prize (1337 OCTOCoins) in the ring next week[.]" Ms. Possible did ***not*** disclose that her Y post had anything to do with her earning the OCTOCoins. Instead, the language in the post suggests that the so-called prize was not at all tied to the Y post, but stemmed solely from Ms. Possible's participation (and potentially her victory) in the promotional event. Further, although Ms. Possible disclosed the amount in OCTOCoins, she did not disclose the monetary ***value*** of the securities.

In light of the foregoing omissions, I would hold that Ms. Possible did not fully disclose the consideration she received and the amount thereof and that the allegations in the complaint squarely support a finding that Ms. Possible violated Section 17(b) of the Securities Act. ~~I therefore must respectfully dissent from the affirmance of the grant of the motion to dismiss the Complaint.~~

SUPREME COURT OF THE UNITED STATES

October Term 2023

Docket No. 2023-24

SECURITIES AND EXCHANGE COMMISSION, Petitioner-Cross~~/Appellant~~ Respondent

and

DR. HENRY DRAKKEN, Petitioner-Cross Respondent[14]

v.

KIMBERLY ANN POSSIBLE, Respondent-Cross~~/Appellee.~~ Petitioner

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Petition for certiorari is GRANTED. The Court certifies the following questions:

~~1. May a United States court exercise jurisdiction over Ms. Possible, a foreign individual who utilized a U.S.-based social media platform?~~

1. Are Kim Ann Possible's connections to the forum sufficient to establish a constitutionally proper exercise of personal jurisdiction under *International Shoe*?

2. Can ~~Ms. Possible be subject to liability under~~an individual be held liable under Section 12(a)(2) of the Securities Act of 1933 ~~for promoting~~when she publicly recommends a crypto ~~asset~~ security ~~on a~~by publishing a promotional post on her social media ~~platform~~account to a vast online presence?

3. Under Section 17(b) of the Securities Act of 1933, does an individual subject herself to liability when she discloses the number of crypto coins she received for participation in an event sponsored by the crypto issuer via social media?

[14] For the purpose of the appeal to the United States Supreme Court, only one attorney will give the oral argument on behalf of both the Securities and Exchange Commission and Dr. Henry Drakken.

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Embedded Graphics (Visio, ChemDraw, Images etc.)	0
Embedded Excel	0
Format changes	0
Total Changes:	658