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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 SECURITIES and EXCHANGE
5 COMMISSION,

6 Plaintiff,

7 v.

20 Civ. 10832 (AT) (SN)
Remote Proceeding

8 RIPPLE LABS, INC., et al.,

9 Defendants.

10 -----x

New York, N.Y.
April 6, 2021
2:00 p.m.

11 Before:

12 HON. SARAH NETBURN,

13 U.S. Magistrate Judge

14 APPEARANCES

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MEREDITH DEARBORN

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1 (The Court and all parties appearing telephonically)

2 THE COURT: Good afternoon, everybody. This is Judge
3 Netburn. Let's begin by calling the case and then I want to
4 address a few housekeeping matters before we address the motion
5 that's before me today.

6 This case is SEC v. Ripple Labs Incorporated, the
7 docket no. is 20 Civil 13832. Let me first confirm that our
8 court reporter is on the line.

9 OFFICIAL REPORTER: Good afternoon, your Honor.
10 Pamela Utter with Southern District Reporters.

11 THE COURT: Wonderful. Thank you.

12 On behalf of the SEC?

13 MR. BLISS: Good afternoon, your Honor. This is Dugan
14 Bliss. Joining me are my colleagues, Jorge Tenreiro, Daphna
15 Waxman, Jon Daniels, and Ladan Stewart.

16 THE COURT: Thank you. And will you be speaking
17 primarily on behalf of the SEC?

18 MR. BLISS: I will, your Honor.

19 THE COURT: Thank you.

20 And on behalf of defendant Ripple Labs?

21 MR. KELLOGG: Good afternoon, your Honor. This is
22 Michael Kellogg. With me on the phone are several colleagues,
23 but I will be the one speaking on behalf of Ripple Labs.

24 THE COURT: Thank you.

25 On behalf of defendant Bradley Garlinghouse?

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1 MR. SOLOMON: Good afternoon, your Honor. Matt
2 Solomon from Cleary Gottlieb and, like Mr. Kellogg, there is
3 other Cleary lawyers on the phone but I will be speaking on
4 behalf of Mr. Garlinghouse today. Thank you.

5 THE COURT: Thank you.

6 On behalf of defendant Christian Larsen?

7 MR. FLUMENBAUM: Good afternoon, your Honor. This is
8 Martin Flumenbaum from Paul Weiss. With me are my colleagues,
9 Mike Gertzman and Meredith Dearborn, and Mr. Gertzman will be
10 the principal spokesperson for this hearing for Mr. Larsen.

11 MR. GERTZMAN: Good afternoon, your Honor. This is
12 Michael Gertzman.

13 THE COURT: Thank you. All right. Good afternoon.

14 I hope everybody on the call is healthy and safe, as
15 well as our audience listening in. Let me first address the
16 audience. I understand that we have 500 people listening in.
17 I understand that we have maxed out our capacity to have people
18 listening to the conference. We apologize for that. We will
19 see if we can make arrangements to increase the limit from 500
20 but that is the full capacity for today's conference. Related
21 to that, earlier this morning I was conducting other business
22 and approximately 175 individuals called in this morning --
23 into my conference line that I ordinarily use for court
24 conferences -- thinking that our 2:00 p.m. conference was
25 scheduled for this morning. And that lasted for several hours

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1 constantly interrupting my other cases. I then issued an
2 emergency order which I think stemmed that flow of people
3 calling in during my other court conferences. We will make
4 every effort to keep these conferences open to the public. We
5 have every intention of accommodating as many people as we can
6 and doing everything that we can to facilitate an open hearing
7 as though we were in the court house but I do need everybody
8 who wants to participate to pay attention to when conferences
9 are held. This is not my only case and having 175 people
10 calling in, interrupting my court conferences, was incredibly
11 disruptive this morning, and so I will request and urge that
12 anyone who wants to listen in is welcome to listen in but
13 please make sure that you are calling in at the right time. I
14 know a number of you were calling in from abroad and so maybe
15 there was some confusion as to how to calculate the time.
16 Please, use the Internet or some way to make sure you are
17 calling at the right time that the conference is scheduled for
18 so that that problem that happened this morning, which as I
19 said, was incredibly disruptive to my morning conferences, does
20 not repeat itself.

21 The second housekeeping matter I want to raise is with
22 respect to recording or rebroadcasting of today's proceeding.
23 That is strictly prohibited. Let me say that again. It is
24 prohibited for anyone to record or rebroadcast today's
25 proceeding. That has been the law in the Southern District of

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1 New York for as long as the court has been around and it is the
2 oldest court house in the country. We have a court reporter
3 here, she is excellent, and she is transcribing every single
4 utterance and that record will be made available to the public
5 through the court's filing system but it is impermissible to
6 record the conference and post it on YouTube or any other
7 platform for the public to see. That is a violation of our
8 court rules and it is a violation of my order directing
9 everybody not to record or rebroadcast today's proceeding.

10 So, I want to make those points as clear as possible
11 so that we don't find out, as we did after our last conference
12 that the conference was recorded and then it was broadcast onto
13 YouTube.

14 Okay. With those housekeeping matters completed let's
15 turn to the reason that we are all here today which is the
16 application filed by the defendants and a letter filed on March
17 15 regarding discovery requests that were served on the SEC. I
18 have received the defendant's letter, again filed March 15th,
19 the SEC's response filed on March 22nd, and the defendant's
20 reply which was filed on March 24th and I have reviewed all of
21 those in preparation for today's proceeding.

22 Why don't I turn first to the SEC, even though this is
23 defendant's motion, but since the defendants filed a reply
24 brief I would like to turn first to the SEC so I guess I will
25 address my questions to Mr. Bliss.

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1 Mr. Bliss, let me ask you a few questions. I
2 understand that a number of the arguments that you raise in
3 opposing the discovery that is sought is by citing other cases
4 that address two different factors, one is the question of
5 whether or not other cryptocurrencies, namely BitCoin and Ether
6 whether discovery related to those assets could be discoverable
7 in cases here and you cite to a couple of cases including the
8 *Kik* case where Courts have held that discovery related to other
9 assets was not appropriate. So, I would like to ask you
10 whether or not in any of those cases you had individual
11 defendants that were sued where questions about recklessness or
12 knowledge was at issue, or whether all of those cases that you
13 cite were cases brought exclusively against the alleged issuer.

14 MR. BLISS: Yes, your Honor. So, those were cases
15 brought against issuers, not against individuals, although I do
16 believe that we explained in our letters why we think the
17 reasoning applies.

18 THE COURT: Let's talk about that a little bit. Go
19 ahead.

20 MR. BLISS: So, I am happy to expand. So, defendants
21 asked for these documents because essentially they're asking
22 that the Court look at how XRP was viewed and somehow it would
23 be relevant to look at how Bitcoin and Ether are viewed as
24 well. Defendants summarily claim that Bitcoin and Ether are
25 like XRP but that is simply wrong and defendants know better

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1 than anyone how XRP is different from those digital assets, and
2 I think, your Honor, if you look at that and just on the facts
3 as we have alleged them, it is clear why the arguments are
4 making -- don't make sense. So, among other things, we alleged
5 in our complaint at paragraph 53 that back in 2012, Ripple and
6 Mr. Larsen received legal memos stating that XRP could be
7 considered a security including because Ripple was responsible
8 for promoting and marketing XRP and --

9 THE COURT: Can I stop you for one moment?

10 MR. BLISS: Yes.

11 THE COURT: Sorry, Mr. Bliss.

12 I just want to remind you that we are on an open and
13 public line and to the extent there was any information that
14 was filed under seal, I don't know if what you are talking
15 about covers that, but I just want to remind everybody that
16 there were documents that were filed under seal here and that
17 should be honored.

18 MR. BLISS: Absolutely, your Honor. And to be clear,
19 I am only going to reference facts that we alleged in the
20 complaint, although there were additional facts filed under
21 seal that I will not be mentioning during this argument.

22 THE COURT: Thank you. All right. Proceed.

23 MR. BLISS: Certainly.

24 So, additionally, all 100 million XRP in existence
25 were created in 2012 and were controlled by Ripple and its

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1 founders as we allege at Complaint paragraph 46. Now, in
2 contrast, Bitcoin and Ether are mined on an ongoing basis,
3 meaning that totally unrelated people from around the world
4 performed calculations with computers that unlock new coins
5 which those people can then hold or sell themselves. And
6 unlike Bitcoin and Ether, Ripple and Mr. Larsen, and later
7 Mr. Garlinghouse, themselves offered and sold XRP all from that
8 100 million XRP that was originally created that was part of an
9 ongoing offering that continued from at least 2013 to the
10 filing of the complaint and raised about \$1.4 billion for
11 Ripple and enriched Mr. Larsen and Mr. Garlinghouse by about
12 \$600 million as we allege in paragraph complaints paragraphs 1
13 through 8.

14 So, the point is there was never a central promoter
15 profiting from an ongoing offering of Bitcoin or Ether. So,
16 XRP is nothing like those other digital assets. And so,
17 however defendants try to explain the basis of the relevance of
18 the Bitcoin and Ether documents, we just believe there is no
19 supporting basis. We did, obviously, highlight several cases
20 that did not analyze or, rather, did not analyze Bitcoin and
21 Ether, Zaslavskiy, Telegram, Kik as you noted. I do agree that
22 those did not involve individual defendants but there is
23 nothing about the inclusion of individual defendants in our
24 case that somehow makes these coins that are not at issue in
25 our case relevant to the proceedings here.

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1 THE COURT: Can I ask you a question, Mr. Bliss? If
2 you are saying to me, Judge, they shouldn't get documents
3 related to Bitcoin and Ether because those are just totally
4 different assets, they have nothing to do with XRP; if I am to
5 make a discovery ruling on that conclusion, wouldn't I just be
6 deciding the case? Because as I understand it the defendants
7 are saying, well, actually, there are many ways in which they
8 are similar and we are at discovery and we are entitled to
9 pursue our own defenses and one of the defenses that we are
10 going to make -- maybe we will be successful and maybe we
11 won't -- but one of the defenses is, hey, we are just like
12 those guys and so we want to build-up that defense.

13 So, it seems to me, if I understand your argument,
14 that if I were to agree with you and say you are right, these
15 are different assets and they shouldn't get discovery I would
16 basically be deciding the case.

17 MR. BLISS: Your Honor, I understand where you are
18 coming from but in response, no. For instance, defendants own
19 cited case law I think really establishes that. Because the
20 case law that is out there, such as the *Marine Bank* Supreme
21 Court case, says that in doing the analysis that the Court will
22 ultimately have to do in this case that the Court has to look
23 at the character the instrument is given in commerce by the
24 terms of the offer, the plan of distribution, and the economic
25 inducements held out to the prospects. That's the Supreme

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1 Court's *Marine Bank* decision. In other words, the focus is on
2 the promoter. In Section 5 cases, be they, you know, crypto,
3 digital asset cases, or otherwise, the question is how did the
4 promoter offer this instrument? Was it offered as an
5 investment? Was it something else? There is absolutely no
6 case law supporting the idea that pulling in some unrelated
7 asset that somehow adds to the analysis matters and so, no,
8 there wouldn't be pre-judgment of the case because the case,
9 from the outset, needs to be focused on XRP, not on these other
10 assets that have nothing to do with whether XRP is a security.

11 THE COURT: That brings me to another question that I
12 was going to ask you which is is it your view that the *Howey*
13 factors, when the Court is evaluating those, that the Court
14 should be looking exclusively at -- from the point of view of
15 the alleged issuer, meaning all that really matters, all that
16 should be concerned is how XRP or Ripple Labs introduced itself
17 to the world, how it made its offers -- I'm not using that word
18 in the legal term -- but how it promoted and presented itself
19 and that the Courts would not be looking at the marketplace,
20 the community, and how what was being offered for sale was
21 being interpreted by the rest of the community.

22 MR. BLISS: Well, I think, your Honor, that several
23 cases have dealt with this including the *Warfield* case out of
24 the Ninth Circuit which found that it's possible that some
25 factors, in terms of market understanding of third-parties are

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1 relevant, but the *Warfield* case found, did "we must focus our
2 inquiry on what the purchases were offered, were promised."
3 And so, there are certainly are factors about market
4 understanding that are relevant but case after case -- *Marine*
5 *bank*, *Warfield*, and others that we discuss -- keep going back
6 to the offer and the promise made by the promoter. So, the
7 case is focused from a legal perspective and should be focused
8 from a discovery perspective on that. To broaden it and to
9 bring in these unrelated coins, it simply goes far beyond what
10 the law provides and how to decide these Section 5 cases.

11 THE COURT: Thank you.

12 So, we were talking a moment ago about individual
13 liability and you were, I believe, expressing the view that the
14 claims against Garlinghouse and Larsen don't change the
15 analysis from any of these other cases that have been relying
16 on.

17 Can you discuss with me more a little bit why that is
18 your thinking?

19 MR. BLISS: Sure.

20 So, I think that's one of the reasons why the
21 defendants assert that it somehow does change, it relates to
22 the claimed lack of due process or fair notice that they claim
23 to have not been given but, as we cited, and in particular the
24 *Kik* case focuses on that issue. It makes clear that the law
25 does not require the government to reach out and warn all

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1 potential violators on individual or industry level and I
2 think, more importantly for today's purposes, the Court in *Kik*
3 ruled that the vagueness inquiry does not call for a factual
4 investigation, and to whether the statute has led to arbitrary
5 enforcement it asks objectively whether the statute authorizes
6 or even encourages arbitrary and discriminatory enforcement.
7 So, whether it is based on the individual's scienter,
8 affirmative defenses, or standard liability under Section 5, we
9 are talking about objective facts that matter. The *Howey* test
10 raises objective questions based on the facts known to
11 defendants. The due process and fair notice defenses raise
12 objective questions about the statute and so none of these
13 various issues that have been raised by the defendants or, in
14 particular, the individual defendants, provide any basis to
15 expand discovery into assets that are not at issue in the case
16 and, as we point out in our letter, we certainly don't believe
17 that they have identified a single case that has done that or
18 that would support doing that.

19 THE COURT: Thank you.

20 Let's change focus now. Can you talk about, more
21 generally, setting aside the Bitcoin and Ether documents but
22 even with respect to the XRP documents, the SEC's position with
23 respect to searching communications with third-parties, other
24 government agencies, and searching more broadly even within the
25 SEC. I understand that that has been only to look at its

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1 investigative files and only half of the custodians that were
2 sought. So, can you talk to me about the SEC's position with
3 respect to what I will call the XRP documents?

4 MR. BLISS: Yes, I am happy to do that, your Honor.

5 First of all, we did agree, as part of this meet and
6 confer process leading up to the March 15 letter, that we would
7 review the e-mails of nine custodians who are high-ranking SEC
8 individuals for the terms "XRP" and "Ripple" that occurred in
9 external e-mails, meaning any communication that went outside
10 of the SEC itself so it could be to a complete third-party, to
11 another government agency, something like that, that we would
12 review those and produce responsive non-protected
13 non-privileged documents to defendants. So, we are in the
14 process of doing that. In terms of going beyond that -- so
15 obviously I have explained in some detail, both in the letter
16 and today, why we don't think that Bitcoin and Ether are
17 relevant and so why we didn't agree to search beyond that.
18 There are two additional parts to your question, one is the
19 searching for the internal XRP and Ripple documents and,
20 finally, I will get to the custodians themselves.

21 As for the internal XRP and Ripple documents, our
22 view, in coming up with this offer during the meet and confer
23 process, was that even though we don't believe that any of
24 these communications, you know, with third-parties between SEC
25 individuals and the outside world about XRP, are of any

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1 relevance. Nonetheless, to try to accommodate defendants'
2 theory that somehow that would reflect the market view of XRP,
3 we did agree to produce those documents that are non-protected
4 because there would be third-party communications that would
5 presumptively not be protected. But when it comes to --

6 THE COURT: Can I interrupt you for definitional
7 clarification?

8 MR. BLISS: Yes.

9 THE COURT: You are talking about internal
10 communications, and when I think of internal communications I
11 think of SEC staffer to SEC staffer as an internal
12 communication but it sounds like you are referring to a
13 communication from an SEC staffer to somebody outside the SEC.
14 So, I just want to be clear what I am talking about.

15 MR. BLISS: I apologize, your Honor. I clearly was
16 confusing the way I said it. I am referring to the internal
17 communication being e-mail communications between SEC staffers
18 or potentially commissioners, but essentially e-mail from one
19 SEC.gov address to another. If there is an outside e-mail
20 address involved I would characterize that as an external
21 communication.

22 THE COURT: So now we are just talking about internal
23 SEC to SEC.

24 MR. BLISS: Yes.

25 And so, the internal communications really fall into

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1 two buckets; one is that the defendants have asked for internal
2 communications that reference external communications. We
3 think that it would be unnecessarily burdensome and duplicative
4 to conduct that review because we are already going to be
5 producing the external communications themselves and so it
6 would be a lot of review to simply produce information related
7 to what we are already producing. Now, the other set of
8 documents would be the internal discussions that if two folks
9 from one the SEC were, for whatever reason, discussing XRP or
10 Ripple. Now, we believe that those are completely irrelevant
11 because there was no communication of those views to the
12 outside world to influence the market view as defendants are
13 looking for, and so there is simply nothing of relevance. In
14 addition, as we pointed out in our letters, when you are
15 talking about internal agency communications you are getting to
16 the heart of deliberative process and other privileges and
17 while we have not reviewed all of those documents and while I
18 can't say for certain that any particular document would be
19 covered by the deliberative process privilege, law enforcement,
20 attorney-client, or work product, we also believe that a
21 substantial chunk of any review like that would be of protected
22 e-mails and so it would be asking us to search for irrelevant
23 and protected e-mails which we just feel that it is a
24 disproportionate burden in the case.

25 Finally, your Honor, if you would like, I am happy to

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1 go into a little bit more detail about how we selected the nine
2 custodians out of the 19 suggested by defendants. If your
3 Honor wants to do that I would suggest that I will do that by
4 referring to initials rather than names given the nature of
5 these proceedings, if that's acceptable.

6 THE COURT: That is certainly acceptable to me. I am
7 happy to hear from you on your views generally.

8 MR. BLISS: Yes, your Honor.

9 So, as to the custodians, we first of all identified a
10 number of custodians on our own before the custodians were
11 suggested by defendants. They then provided a list and there
12 was a substantial overlap between the ones that we already
13 picked and the ones that they wanted. And so, what we did is
14 that we had internal discussions to identify which individuals
15 in which division or other part of the Securities and Exchange
16 Commission would have potentially had communications with
17 third-parties -- with the outside world -- about Ripple or XRP.
18 And so, we identified two or three of the most relevant and
19 highest ranking people within the divisions of trading and
20 markets, divisions of investment management within the division
21 of corporate finance, as well as FinHub which is a subpart of
22 CorpFin dealing specifically with digital technology. And so,
23 based on that we believed that we had identified the most
24 relevant custodians. We cross-referenced that with the initial
25 disclosures put forward by defendants to make sure that if they

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1 had identified any individuals from the SEC they were included
2 on that list and we did that. And so, that is how we arrived
3 at the nine individuals that we are currently searching for
4 e-mails in their boxes and those would be initials EB, DB, WH,
5 JI, JM, BR, VS, AS, and MV.

6 Now, there are 10 additional custodians that were
7 suggested by defendants who we don't believe -- we have not
8 agreed to search the e-mails and we do not believe we should be
9 ordered to search the e-mails and so there are a few reasons
10 particular to different individuals. So, as to the individuals
11 with the initials FA, KL, and JB, these are people who are in
12 or were in high-ranking positions within the division of
13 enforcement who either were involved in the investigation
14 leading to, or who in the case of JB we have no reason to think
15 that there were third-party communications about XRP or Ripple.
16 So, for the other two, we think that's -- and the review would
17 show documents related to the investigation, not the type of
18 third-party communications that we understand defendants to be
19 seeking.

20 There are a few custodians who we believe are simply
21 duplicative of others and so those would be with the initials
22 SGB, RC, MR, and NS, who are largely are or were in the
23 division of corporate finance or the cyber unit. And, from our
24 understanding of how communications are made within those
25 divisions involving those people, we believe that searching

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1 those e-mails would largely produce duplicative results. In
2 other words, if those people were involved with communications
3 with the outside world, based on our own internal diligence, we
4 believe those communications would nevertheless show up in the
5 mail boxes of those custodians we are already searching.

6 And then, finally, there are three additional
7 custodians suggested by defendants with the initials JC, HP,
8 and ER, and those individuals are either current or former SEC
9 commissioners or chairs and our understanding is that those
10 individuals would have been unlikely or less likely to have
11 communicated with the outside world about XRP or Ripple by
12 e-mail but that has not been the standard practice. And so, we
13 did not agree to search those mail boxes on that basis. And I
14 apologize, that's a bit of a lengthy explanation, but that was
15 our analysis of each of the proposed custodians.

16 THE COURT: No, that was helpful. Thank you very
17 much.

18 Let me turn to Mr. Kellogg who I assume is going to
19 take the lead here.

20 MR. KELLOGG: Thank you, your Honor.

21 I think Mr. Bliss' discussion really highlights why we
22 need and why we are entitled to the information about Bitcoin
23 and Ether. At issue in this case is almost how to apply a
24 90-year-old statute and 75-year-old Supreme Court precedent to
25 something that only came into existence quite recently which is

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1 cryptocurrencies. The SEC has not provided a lot of guidance
2 on that issue and they have been widely criticized for not
3 doing so but we do have some data points to look at. On the
4 one hand there is the well publicized conclusion that two
5 digital currencies -- Bitcoin and Ether -- do not run afoul of
6 the how we test and are not securities. On the other side of
7 the spectrum they have their initial coin offering cases, you
8 will see reference to DOW tokens, and you mentioned Kik and
9 Telegram, and they have said that those are securities because
10 an initial coin offering is just like a fundraising tool
11 created to start creating and deploy future crypto. So, in
12 that context, digital coins or tokens are really shares in the
13 enterprise that will be created when funds are raised. The
14 question here, at the great risk of oversimplifying an
15 important issue, is whether XRP is in relevant respects like
16 Bitcoin and Ether, or whether it is like the tokens in the
17 other digital asset cases the SEC relies on. So,
18 understandably we are seeking documents exchanged between the
19 SEC and third-parties about Bitcoin and Ether and why they are
20 not securities so that we can apply that to our own XRP.

21 Now, the SEC claims we are not entitled to those
22 documents because Bitcoin and Ether are "unrelated digital
23 assets" and therefore irrelevant to the *Howey* test. Instead,
24 they claim that XRP is indistinguishable from the DOW tokens
25 and the initial coin offerings but that is a classic legal

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1 argument based on precedent. Is the unique instrument we are
2 dealing with today, is it more like precedent A or is more like
3 precedent B? And perhaps the most telling fact on that motion
4 is that the SEC, itself, is seeking comparative information
5 about XRP and other digital assets. It made clear just last
6 week, as part of the meet and confer process -- and I want to
7 quote this because it is quite remarkable given the argument he
8 is making here -- they said to Ripple, "We request that you
9 also search for and produce documents relating to comparisons
10 to assets that have been the subject of SEC enforcement action
11 for being securities under *Howey*." In other words, they want
12 to see comparative information of how XRP relates to other
13 digital assets but only if they think it helps their case. If
14 it helps our case then they argue that the assets are unrelated
15 and information about them should be excluded. Now, that's not
16 the way Rule 26 works. The question is whether requested
17 discovery is relevant to any party's claim or defense. And as
18 the Court explained in *Palm Bay International* and as you
19 yourself noted earlier, and I quote here from the case: It
20 would be inappropriate for the Court, at this discovery stage
21 in this litigation, to make any substantive determination
22 regarding a disputed defense. That determination is properly
23 made upon a motion for summary judgment or a trial before the
24 district judge.

25 So the SEC, in essence, wants summary judgment on this

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1 aspect of our defense but they don't get it in a Rule 26
2 dispute; all we need to show is the relevance of it to any
3 defense that we might offer. Now, I am happy to walk through
4 the merits on why we think that Bitcoin and Ether are in fact
5 like XRP, they are the three major digital currencies in use
6 today and I can go down a check list of factors that they share
7 in common. Indeed, I can also add factors that show that XRP
8 has certain advantages over Bitcoin and Ether that makes it
9 even less like a security in the SEC's telling and under the
10 *Howey* test. Again, though, that isn't relevant, the merits
11 right now. What is relevant is that we have got a legitimate
12 defense that we think we should be able to press. The SEC has
13 published a 38-factor test for when a particular coin or
14 cryptocurrency is a security or at least factors that they say
15 you should take into account but they have made no effort to
16 weight those factors in any way or provide actual guidance for
17 the marketplace so we are left in the position of saying, okay,
18 these two -- Ether and Bitcoin -- you have said that they're
19 not securities. These over here -- DOW, Telegram, Kik -- they
20 are securities. We can gather evidence to support our view of
21 why XRP is like Bitcoin and XRP, part of which will show under
22 the *Howey* test that the Price of XRP moves in conjunction with
23 the digital currencies Bitcoin and Ether, not with anything
24 that Ripple is doing to promote those which is extremely
25 relevant under the *Howey* test. The SEC is incorrect that *Howey*

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1 somehow silos XRP and treats it in isolation as if Bitcoin and
2 Ether did not exist. That's not the way the *Howey* test works.
3 As the case law indicates and, actually, as the SEC itself
4 concedes, whether XRP is a security is a fact-specific inquiry
5 that necessarily turns on the totality of the circumstances.
6 So, we need to investigate the circumstances under which
7 Bitcoin and Ether are not securities, as well as the
8 circumstances under which that the SEC wants to indicate what
9 in *DOW* and *Kik* are. The case Law says *Howey* turns on the
10 character of the instrument in commerce and what objective
11 participants were led to expect, and XRP's character in
12 commerce, what people were led to expect, is shaped by the
13 SEC's own messaging to the public about Bitcoin and Ether,
14 similarities between those currencies and XRP and its eight
15 years of non-action against XRP. All of that led market
16 participants and Ripple itself to conclude that XRP was not a
17 security. But, definitely relevant to the *Howey* test, as you
18 pointed out, it has great relevance both to our fair notice
19 defense because if we -- and the Second Circuit put it in
20 *Upton* -- if the SEC failed to give, "a person of ordinary
21 intelligence" a reasonable opportunity to know what is
22 prohibited and they are not put on fair notice that the SEC
23 would suddenly, after eight years decides that it would treat
24 XRP as a security and the same as Mr. Solomon and Mr. Gertzman
25 will elaborate, the same applies whether the individual

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1 defendants were reckless or had knowledge that XRP would be
2 found to be a security.

3 Now, we have already found documents from
4 third-parties going to various market participants like
5 cryptocurrency exchanges and hedge funds, met with the SEC
6 specifically seeking guidance on whether they could list and
7 transact in XRP along with Bitcoin and Ether or whether XRP had
8 to be treated as a security. They presented their own analysis
9 to the SEC about why XRP was not a security. And after the
10 meeting they proceeded to list XRP on their exchanges or invest
11 in XRP in their funds. So, obviously they reached the
12 conclusion that XRP was not a security and was not told
13 otherwise by the SEC. So, materials on those meetings between
14 the SEC and third-parties were shaping market expectations
15 about XRP and are highly relevant to our argument that we are
16 like Bitcoin and Ether and not like the initial coin offerings
17 at issue in Telegram. And the SEC obviously cannot dispute
18 that its communications with these third-parties about how XRP
19 compares with Bitcoin and Ether and are not securities are
20 plainly relevant to our defenses and Rule 26 requires no more.

21 If I may move on I will turn to the SEC internal
22 documents and we are talking about documents concerning XRP
23 itself, as well as documents about how XRP compares to Bitcoin
24 and Ether and why the latter aren't securities.

25 THE COURT: Mr. Kellogg, I just want to raise the same

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1 definitional points that I raised with Mr. Bliss which is if
2 you can be clear about whether you are speaking about documents
3 within the SEC, meaning SEC staffer to SEC staffer at whatever
4 hierarchy, versus documents between someone at the SEC and
5 someone outside of the SEC, whether that's another government
6 agency or a market participant or whomever.

7 MR. KELLOGG: Yes, your Honor. I am now talking about
8 the former, purely internal SEC documents, but one of the
9 reasons why such documents are relevant is that to the extent
10 that they're reflecting their communications in meetings with
11 third-party, they'll reveal market views on XRP and additional
12 contacts that external communications alone would not show.
13 The internal communications don't have themselves to be
14 admissible to be discoverable under 26(b)(1). Now, as I noted,
15 the SEC is the focal point for requests for regulatory guidance
16 as to whether XRP was a security. There are more than 200
17 currency exchanges (inaudible) creating an XRP before the suit
18 was brought and at least as many companies after using XRP in
19 their business plans. We can't track down every one of those
20 companies to find out their interactions with the SEC but the
21 SEC's own internal correspondence, summaries of meetings,
22 communications, reports of communications the SEC may have had
23 with market participants, e-mails about meetings just
24 concluded, arguments made by participants in those meetings,
25 those will all provide us with a shortcut to clearly admissible

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1 evidence about third-party views.

2 The second point here is it is part of the SEC's
3 mission statement to study and understand market conditions.
4 There almost certainly are documents in their files that
5 reflect not SEC deliberations but market conditions and
6 investor expectations regarding digital currencies studied by
7 the SEC and that evidence goes squarely to the *Howey* inquiry.
8 As the Second Circuit held in the *Glen-Arden* case, to properly
9 apply *Howey* the Court must consider what investors
10 contemplated, their understanding of what defendants would do
11 to turn a profit, and market condition. Those are market facts
12 and no one is in a better position to have studied those market
13 facts than the SEC. And to stress we are not talking about
14 deliberations, we are not talking about what led to their final
15 enforcement decision, we are talking about their gathering
16 reports and otherwise on-market facts.

17 And the third reason why the internal communications
18 are important is they're likely to show that the SEC was
19 flailing when it came to the application of the Securities Act
20 of 1933 in digital currencies. It is understandable that they
21 want to keep such documents hidden but they chose to bring this
22 case and such documents would support the individual
23 defendants' lack of knowledge or recklessness and Ripple's lack
24 of fair notice. It will also reflect the SEC's own knowledge
25 about market uncertainty and how the SEC chose to respond or

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1 not to respond to that uncertainty. Let me just give one
2 example: We have a copy of a communication that the SEC has
3 made about XRP to the public saying that after a request was
4 received on whether XRP is like Bitcoin and Ether or not in
5 which the SEC -- this was just two months before they filed the
6 suit -- we haven't made any decision about XRP, we are not in a
7 position to say anything about XRP. But their internal
8 communications on that issue are likely to reveal deficiently
9 substantial uncertainty that no market participant could have
10 been on fair notice as to how the SEC would come out in that
11 case.

12 Finally, if I may, I will address burden and
13 privilege. Mr. Bliss did not press burden particularly much
14 and for good reason. The burden of complying with our request
15 is far less than complying with the SEC's own request. We have
16 the statistics laid out at page 5 in our reply. What we are
17 requesting is also proportional to the needs of the case
18 considering the importance of the issues at stake, the amount
19 in controversy, and the parties' relative access to
20 information, all of which are factors are relevant under
21 26(b)(1). And that's also true of custodians. We sought
22 documents from 19 custodians compared to the 30 custodians the
23 SEC sought from us. All 19 were centrally involved in meetings
24 with market participants and understanding the character of
25 digital currencies and commerce. And, if they were following

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1 government protocols, all of their communications would be over
2 the SEC.gov handle and, hence, readily searchable. The SEC
3 unilaterally cut down our list to nine custodians and as we are
4 holding information from the other 10 if we just ask, if not
5 more likely, to have responsive documents. They picked our 30
6 custodians, we didn't get to pick and choose. They don't get
7 to pick and choose anymore who the custodians we want them to
8 search are, as long as it is proportional to the importance of
9 the case and the needs of the parties. And I am happy to go
10 through all of the examples. I think one of them is
11 particularly important, I am only talking about publicly
12 available information so there is no invasion of privacy here
13 but the Commission's former chairman is the one who authorized
14 the suit against XRP on his last day in office, thereby causing
15 a huge and immediate drop in XRP's market value, yet
16 Mr. Clayton has actively embraced Bitcoin and Ether. Indeed,
17 he was the face of the agency meeting constantly with market
18 participants and receiving studies on the features and roles of
19 each of those digital currencies in commerce. He was even
20 writing to Congress about them. Based on these meetings and
21 studies, he obviously concluded that XRP is a security but
22 Bitcoin and Ether are not. That has enormous market
23 consequences and we should have the right to seek documents and
24 meeting memos as set forth to the critical features and market
25 perceptions of each of the three digital currencies.

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1 Now, as to privilege, communications with
2 third-parties about Bitcoin and Ether are obviously not
3 privileged, just to go back to the first step in the
4 discussion. None of those things are privileged. Nor should
5 internal documents be to the extent that they're about market
6 conditions. Case law draws a clear distinction between factual
7 material and deliberative process. Moreover, the fact that
8 some documents may be privileged is not a basis to refuse to
9 conduct search. Even some documents that are privileged,
10 whether it's deliberative process, litigation privilege,
11 they're subject only to a qualified privilege which means that
12 we may be entitled to argue as to specific documents if we have
13 a compelling need for them and no other source to fill that
14 need. But, we can develop those arguments only if the SEC does
15 what Rule 26 requires which is review the documents and prepare
16 a privilege log.

17 Those are the points I wanted to make, your Honor, and
18 I am happy to answer any questions.

19 THE COURT: Let me ask you a question with respect to
20 the documents related solely to Ether or Bitcoin.

21 My understanding is that in 2018 the SEC announced its
22 decision that those two assets were not securities. Is there
23 any reason why you would need or be entitled to communications
24 in any form that relate solely to Bitcoin and Ether that
25 post-date that decision?

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1 MR. KELLOGG: First of all, ones that post-date a
2 decision are not subject to the deliberative process
3 whatsoever, they're considered the development of the law by
4 the SEC and so there is no privilege for such document to the
5 extent that they reflect the SEC's understanding of just why --
6 an elaboration of just why Bitcoin and Ether are not
7 securities. Now they announced this to the public -- or rather
8 the director of their corporate finance division announced this
9 to public in a speech in 2018 but it will read that speech in
10 vein for any details about just what it is that makes Bitcoin
11 and Ether not a security where it is something like a digital
12 currency like XRP is a security. They talk about, for
13 example -- I mean we can go over the assets. They say it has
14 a --

15 THE COURT: I will stop you. Sorry. I will stop you.

16 MR. KELLOGG: Okay.

17 THE COURT: I don't need to go over the assets but my
18 question is if one of the reasons why you want to look at
19 Bitcoin and Ether communications or documents, I believe
20 exclusively to those assets, is because you want to see what
21 the SEC was thinking, what it was saying to other market
22 participants about how it was viewing these assets. But, we
23 know that come 2018, when the speech is given, we know what
24 they think because now they're going public with it whether in
25 a sort of speech or otherwise, and presume that that decision

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1 was well thought out before the speech was given. And so my
2 question to you is, after that public announcement in whatever
3 fashion and in whatever opaque way it was made, after that
4 announcement why would it matter what they were saying about
5 those assets since the market now had that information and
6 would act accordingly?

7 MR. KELLOGG: Because the reasons for the decision are
8 certainly less than clear. As I said, they later came up with
9 the framework for investment contract analysis, the list of 38
10 factors with no explication. So, the reason why subsequent
11 communications, you could say everybody was coming to us and
12 saying, Okay, you now told us that Bitcoin and Ether are not
13 securities, you told us that DOW tokens are securities, what
14 about the vast middle in here? What about XRP? In what ways
15 is that like Bitcoin and Ether? In what ways to you think that
16 is like DOW tokens? And that information, what it is telling
17 the marketplace, is an admission about what the key factors are
18 that the SEC would apply to say something is or is not a
19 digital security as opposed to a cryptocurrency. And we think
20 that to the extent they have articulated some factors
21 elaborating on the *Howey* test, we think we fall within what
22 they were telling people about when a particular currency is or
23 is not a digital asset. That's been an ongoing dialogue since
24 the speech in June of 2018 that was given by Mr. Hinman.

25 THE COURT: Thank you.

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1 I want to give an opportunity to the individual
2 defendants to speak but I want to reiterate my admonition to
3 the public again that the recording of today's conference is
4 prohibited and rebroadcasting it is prohibited and that anyone
5 who is found to have engaged in this conduct is subject to
6 criminal sanctions. I know that this is being broadcast now on
7 the Internet and so we already have people looking into who is
8 engaging in that conduct. Again, we will make this proceeding
9 as open as possible, to make it available for more people to
10 listen in than the 500 that are already listening if we are
11 able to do that. Obviously, if we were in the court house we
12 would be limited by the physical limitations of the court
13 house. The fact that we are engaging in this proceeding
14 remotely is not a basis to engage in criminal violations and so
15 we have our law enforcement officers looking into this issue
16 now. And so, whoever is engaging in this conduct is on notice
17 that they are engaging in a violation of my specific order to
18 stop doing it, as well as the rules of our court and that
19 whoever is engaged in this conduct may be subject to criminal
20 sanctions.

21 So, why don't I turn -- I think we have spoken a lot
22 about some of the issues that relate to the individual
23 defendants but if Mr. Solomon or Mr. Gertzman wish to be heard,
24 I will certainly give them an opportunity to speak.

25 MR. SOLOMON: Thank you, your Honor. Matt Solomon for

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1 Mr. Garlinghouse and I am cutting as we are talking so I am
2 really going to trying not to repeat Mr. Kellogg's points which
3 were ably made with respect to *Howey* and, independently, with
4 respect to the individuals but let me amplify on the
5 individuals to make crystal clear our position.

6 As your Honor knows, in order to establish aiding and
7 abetting, and that's the second charge here brought against the
8 individuals, the SEC has to prove that Mr. Garlinghouse and
9 Mr. Larsen acted with scienter and that means that, to take my
10 client, Mr. Garlinghouse knew or recklessly disregarded that he
11 was associating himself with something improper, and that
12 something improper in the SEC's telling is Ripple's offers and
13 sales of XRP without a registration statement. And that, your
14 Honor makes this a very different case from the typical SEC
15 case. As you asked Mr. Bliss about up front, because aiding
16 and abetting charges are involving lying, insider trading,
17 accounting fraud, here the SEC case is really one of regulatory
18 interpretation and I think that's really what separates it from
19 so many others. And the SEC isn't just saying that
20 Mr. Garlinghouse and Mr. Larsen got it wrong, they're saying
21 they got it beyond grossly negligent wrong, they were reckless
22 in not knowing that XRP was a security or they intentionally
23 avoided knowing that XRP was a security. So, why is that
24 relevant for today's purposes? We have already talked about
25 the kind of documents we are seeking, your Honor, documents

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1 perhaps showing that the SEC itself was struggling with the
2 question of whether XRP was a security and documents showing
3 the SEC's communications with other market participants who
4 were trying to get insight from the regulator as to whether XRP
5 was a security. And where the SEC is advancing as its primary
6 theory that Mr. Garlinghouse and Mr. Larsen acted recklessly or
7 consciously avoided knowledge that they were acting improperly
8 because the SEC sales formed investment contracts and
9 substantially assisted that violation, again, what they have to
10 prove is in the face of an unjustifiably high risk of harm that
11 is either known or so obvious it should be known that they are
12 liable as aiders and abettors. So, we are not talking about
13 negligence, we are not talking about gross negligence, this is
14 an order of magnitude above that, that's the scienter
15 component. And the key to the scienter component in terms of
16 the discovery that's being sought in this case, your Honor, is
17 that recklessness has an objective component and that's the
18 Supreme Court that says that and the *Safebuilt* case that we
19 cited, and the Second Circuit affirms that in the *Sleighton*
20 case, 604 F.3d at 776, note 9, and it is that objective
21 component that is most relevant here. The SEC's understanding
22 of and discussions around the nature of XRP throughout the
23 entire time, as well as Bitcoin and Ether which apparently are
24 not securities according to the SEC is relevant to the question
25 of whether the allegedly improper aspects of Ripple sales were

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1 so obvious that they should have been known by Mr. Garlinghouse
2 and Mr. Larsen. And just to be very concrete about it, your
3 Honor, let's say we learn through this discovery that it wasn't
4 so obvious to Jay Clayton, or it wasn't so obvious to Bill
5 Hinman who ran CorpFin that XRP was or is a security, if we get
6 that and we are entitled to look for it before a fact finder,
7 that's game over for the SEC under the aiding and abetting
8 claim. And, frankly, their entire case. That's just one
9 illustration of why this discovery is so critical.

10 Conscious avoidance is another theory that the SEC has
11 put out in addition to recklessness. That requires that the
12 SEC prove the executives deliberately shielded themselves from
13 sheer evidence of critical facts that are strongly suggested by
14 the circumstances. This is the *Global Tech Appliance* case.
15 And again, we are going to show in our motion to dismiss which
16 will be filed next week, that the SEC has not adequately
17 alleged knowledge and recklessness and we believe that Judge
18 Torres will ultimately dismiss the aiding and abetting claims
19 but until she does, the individual defendants are entitled to
20 seek discovery to defend themselves and the SEC has to look.
21 They have to search for and produce the requested documents so
22 that we can at least have a full and fair opportunity to build
23 a defense for the SEC's recklessness and conscious avoidance
24 arguments.

25 We also have reason to believe, your Honor -- and I am

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1 not going to belabor it, Mr. Kellogg gave you some examples of
2 discovery that we have gotten, this is not some fishing
3 expedition, we have concrete examples of interactions between
4 sophisticated market players as late as May '19 where the SEC
5 has engaged in dialogue with those market players and the
6 actions they took after that dialogue establishes that they
7 believed, walking away from the meetings with the SEC, that XRP
8 was not a security. That's exculpatory. And we know the SEC
9 has provided private guidance to other market participants
10 leading them to understand that XRP was not a security and that
11 guidance is directly relevant to how the market viewed XRP.
12 That's the argument under *Howey* but it is also relevant to
13 whether it was reckless or intentional to our client to make a
14 determination themselves where the SEC itself may not have made
15 a determination or in fact may have believed, up until very
16 recently, that XRP was not a security, perhaps was more like
17 Ether, more like Bitcoin. We are entitled to explore that and
18 we cited, your Honor, the *Kovzan* case. It is a short case,
19 your has probably already read it. It is really on all fours
20 with what is happening here and if you read the underlying
21 papers for the *Kovzan* case, the SEC filings, the same arguments
22 are being made by the SEC there. This was the case, your
23 Honor, where the CFO of a public company was charged with
24 several scienter-based claims based on his involvement in a
25 perks scheme. He was alleged to have omitted information on

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1 proxy statements of perks -- payments -- going to the CEO. So
2 it was an omissions case and the Court there stated that the
3 recklessness component of scienter had an objective component
4 and that the individual defendant was therefore "entitled to
5 seek evidence from the SEC related to the industry standard in
6 relation to what the SEC itself considered to be unlawful
7 conduct in this area of executive compensation." And the Court
8 was very clear that the SEC must produce relevant documents
9 including those reflecting communications between the SEC and
10 third-parties because they could reflect -- and again I'm
11 quoting from a case -- confusion regarding the regulations.
12 And again, the SEC made the same arguments in *Kovzan* that it
13 attempts to make here. It said there, look, our internal
14 communications are irrelevant to scienter because the defendant
15 didn't know about them, but the Court said wait a minute, there
16 is an objective standard of recklessness so *Kovzan* is entitled
17 to this evidence whether or not -- and this is a quote -- "such
18 evidence was previously known to him or the public."

19 Now, Mr. Bliss may say, look, *Kovzan* involved an SEC
20 regulation. Here we are talking about the *Howey* test. But,
21 the Court didn't make that qualification and frankly, your
22 Honor, it is irrelevant in the context of a scienter-based
23 aiding and abetting claim against the individuals. In both
24 cases industry practice and SEC guidance are relevant to the
25 objective components of the individual defendants'

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1 reckless. In fact, here I think we have a stronger claim
2 than Mr. Kovzan did because what the SEC is effectively saying
3 is that Mr. Mr. Garlinghouse and Mr. Larsen didn't correctly
4 predict that the law would be, in the future, such that XRP
5 would be deemed, in 2020, to be a security by the SEC.

6 And we would say the *Sentinel* case also, your Honor,
7 as another case where the Court allowed exactly the kind of
8 discovery that we are seeking here. So our entitlement, the
9 individual defendants' entitlement through this discovery isn't
10 just *Howey*, what Mr. Kellogg argued, that's an independent
11 basis when you ought to get discovery, but there is another
12 basis which is the decision to charge this with reckless
13 conduct and that's their theory of the case. They chose to
14 charge individuals, they chose to do it with scienter-based
15 conduct despite an obvious lack of clarity. They're telling
16 Judge Torres it is a simple case involving a rogue application
17 of *Howey* but, your Honor, I don't think anybody perhaps beyond
18 the SEC litigation team believes this is a separate case. And,
19 again, we have seen evidence already of this in the discovery
20 that's been produced so far.

21 Again, the SEC has asked us to produce various
22 documents and they've attached to their letter two examples of
23 communications from Ripple or its investors that it cites as
24 evidence that XRP's status as a security should have been
25 obvious to the defendants. Well, what we are seeking, your

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1 Honor, is the inverse of that and we are entitled to it because
2 we believe that the SEC's statements about XRP, Bitcoin, and
3 Ether, especially those made to market participants, is
4 evidence that shows it was much more questionable whether XRP
5 would ever be classified as a security than the SEC tells this
6 Court today.

7 Now, just a couple of final points and I think
8 Mr. Gertzman will want to make a couple of remarks on behalf of
9 Mr. Larsen. I want to address the pandora's box argument,
10 Mr. Bliss alludes to it but I just want to take it on now
11 because really it goes to how unusual these circumstances are.
12 This is not the garden variety Section 5 case. We are not
13 dealing with stocks or bonds or orange groves or whiskey drams
14 or the kind of cases that Courts and markets have considered
15 and evaluated for 75 years. And XRP -- Ripple -- is not
16 like -- again, I'm not talking merits here I am just giving
17 context what the SEC has brought -- it is not like micro cap
18 initial coin offerings or ICOs that look just like IPOs.
19 That's Kik and Telegram. And they brought enforcement actions
20 against those entities. Fine. But, Mr. Garlinghouse was out
21 there encouraging the SEC to pursue fraud actions in this space
22 because that kind of conduct threatens to taint the entire
23 industry and if this case proceeds there will be evidence of
24 that. And Mr. Garlinghouse was talking to regulators, talking
25 to the public, and talking, indeed, to the SEC itself. He

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1 never believed he was doing anything wrong and he wasn't.

2 So, we are not making a claim of selective enforcement
3 here. You may hear that as well. *The SEC chose not to sue*
4 *someone else for committing fraud so they can't sue us.* All we
5 are saying is that the SEC is likely to have communications
6 that reflect on whether believing that XRP was not a
7 security -- as my client did, as Mr. Larsen did -- was
8 reasonable or at least not reckless. And the SEC knows these
9 communications are relevant, it is seeking the same kind of
10 communications from us, it is offering up additional discovery,
11 your Honor, because I believe it realizes that we are entitled
12 to these documents but I have a lot of respect for Mr. Bliss
13 and I trust him but, frankly, I don't want him picking or
14 anybody in the SEC, picking our custodians. I think that the
15 custodians we offered up is a reasonable number, the right
16 people, particularly the commissioners themselves, so we would
17 just ask again that that discovery be permitted and that the
18 SEC not be permitted to pick and choose what it provides to us.
19 We are not permitted to pick and choose what we provide to
20 them.

21 On Kik and Telegram finally, your Honor, I just want
22 to be very clear about this. Again, put the merits aside, this
23 isn't about the merits but they've offered up discovery on Kik
24 and Telegram but not on Bitcoin and Ether. I want to be
25 perfectly clear about this: This case is nothing like those

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1 cases as you pointed out very early on, your Honor. This is a
2 huge step beyond what the SEC took on there. Kik and Telegram
3 involved initial coin offerings, ICOs. This doesn't. The SEC
4 sought preliminary injunctive relief in those cases to stop
5 what it believed was an ongoing unregistered offering scheme.
6 It didn't do it here. Grams were new, according to Judge
7 Castel. XRP isn't new at all. There was no Telegram
8 blockchain at the time of the offering. Not true here. And
9 the companies in Kik and Telegram -- and this is critical --
10 were in privity of contract with the initial purchasers.
11 Ripple was not. Digital assets in Kik and Telegram had no
12 utility. XRP's technology has been used already to make faster
13 cheaper and more efficient payments. But here is the kicker,
14 and Judge, this is back to where you started with your
15 questions: The SEC didn't charge individuals in those cases,
16 nor in the case that they cited, this *Marine Bank* case. No
17 individuals. The issue in Kik was whether defendants could
18 seek discovery into internal SEC documents in support of its
19 defense that *Howey* was unconstitutionally vague and Judge
20 Castel said -- and the Court there said that is an issue of
21 law, not of fact. Here, as Mr. Kellogg said with respect to
22 *Howey*, these documents speak directly to the fact-intensive
23 inquiry, specifically the character that XRP was given in
24 commerce. You heard Mr. Bliss concede that there is an
25 objective inquiry to be made here under *Howey* and there is

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1 plainly an objective inquiry to be made if you are charging
2 individuals with recklessness. And here, your Honor also, the
3 defendants have raised a fair notice defense, not vague to
4 avoid this defense.

5 So, I just want to be very clear that the ruling in
6 *Kik* on this issue has no bearing on the relevance of the
7 requested discovery to defend against the SEC's allegations
8 about the individual defendants' scienter. And, again, these
9 are just some of the differences with *Kik* and *Telegram*. There
10 are many others.

11 So just to conclude, your Honor, if the expert agency
12 couldn't resolve the question apparently for years on what XRP
13 was, was it a security? Is it more like Bitcoin and Ether? Or
14 is it more like one of these ICOs that they waited for years to
15 sort of figure that out, how could it possibly be reckless or
16 intentional for Mr. Garlinghouse or Mr. Larsen to determine XRP
17 was not a security? It can't be. And that's why this
18 discovery, independently of everything Mr. Kellogg said about
19 the *Howey* test -- those arguments apply to individuals too --
20 but on this independent basis we need this discovery to defend
21 ourselves. If the SEC is prepared to say they're not pursuing
22 reckless they're not pursuing conscious avoidance maybe we
23 would be in a different place on this argument but I don't
24 think they're prepared to say that.

25 So, for all of those reasons, your Honor, we believe

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1 we are entitled to this discovery and we hope the Court orders
2 the discovery forthwith so we can make effective use of it to
3 defend ourselves in this litigation.

4 Thank you.

5 THE COURT: Thank you.

6 Mr. Gertzman, there has been a lot of oxygen spent on
7 these arguments but if you feel like you have something
8 particular that is unique as to Mr. Larsen, there is something
9 that hasn't been raised that is important I will give you the
10 opportunity to be heard.

11 MR. GERTZMAN: Thank you, your Honor, and I appreciate
12 that and I will be very brief and not repeat or try not to
13 repeat anything that Mr. Kellogg or Mr. Solomon said, although
14 I agree and support their points completely.

15 Just a couple of brief things. First, Mr. Bliss said
16 in response to one of your questions early on that there is
17 nothing about the inclusion of the individual defendants in
18 this case that makes documents about Bitcoin and Ether
19 irrelevant in this case. I don't agree with that, I think it
20 is incorrect, I think it is incorrect for the reason that your
21 Honor already pointed out which is it essentially asks this
22 Court, on an unsupported, naked assertion by the SEC on a
23 motion to compel, to throw out an entire issue of whether
24 Bitcoin and Ether are similar and how similar they are to XRP.
25 But the point I want to make is the point about recklessness in

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1 this context because the issue of how different or similar XRP
2 is to Bitcoin and Ether also goes to the issue of recklessness
3 in the minds of the individual defendants. And no one is
4 saying, your Honor, that these three assets are exactly the
5 same. How similar they are and how different they is a
6 critical factor when it comes to the way the defendants are
7 thinking about this and that's why this discovery is relevant
8 on the issue of recklessness.

9 I also want to just drill down a little bit on the
10 definition of recklessness because I think it helps explain and
11 show why the discovery we seek here is so critical and
12 relevant. This is a term -- recklessness is a term that has
13 been defined, well-defined by the Courts at this point and the
14 cases that we cite in our papers including the definition but
15 the point is that there is an element of recklessness that is
16 objective. There is an element that requires the SEC to prove
17 here that it was so obvious, it would have been so obvious to
18 Mr. Larsen and Mr. Garlinghouse that XRP was a security that
19 they were reckless; that they departed so far from ordinary
20 standards of care on that question that they were reckless.
21 And the way to think about how to prove or disprove an issue of
22 recklessness is to look at what's being said and thought about
23 and done in the marketplace on that issue. And to use a term
24 Mr. Kellogg used, he described the SEC as a focal point. I
25 think that's a fair characterization, that the SEC has a focal

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1 point on the issue of whether XRP was a security because it sat
2 at the center of lots of communications and discussions and
3 internal review and assessment of that issue. And so, it is
4 the logical place to turn to for that evidence because if, in
5 the end, the evidence from the SEC shows that they were unsure
6 about whether XRP was a security or that they concluded at
7 times that it wasn't, then how in the world can Mr. Larsen and
8 Mr. Garlinghouse be accused of being reckless on that issue?

9 I also want to make a quick point, your Honor, about
10 specific allegations in the amended complaint, specifically
11 paragraphs 55 and 59 of the amended complaint in which the SEC
12 alleges that Mr. Larsen received legal advice in 2012 that he
13 should go to the SEC to seek clarity as to whether XRP was a
14 security. I am mindful of your Honor's reminder that one of
15 the documents at issue here is under seal so I won't go into
16 the substance of the document but there will be a lot to be
17 said about that document as we go forward because I think the
18 SEC's allegations in the complaint about that advice really
19 distort and omit critical compliance and conclusions of that
20 advice.

21 The point I want to make on this motion to compel,
22 your Honor, is that it is really not appropriate and fair for
23 the SEC in the complaint to take Mr. Larsen to task for not
24 going to the SEC to ask about whether XRP was a security and
25 then to tell us, as they are in this motion, sorry, we are not

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1 going to tell you what we would have told Mr. Larsen about
2 whether XRP was a security. We are not going to tell you what
3 we were thinking and doing and talking about with others on
4 that issue. We are just going to criticize you for not going
5 to us in the first place. That's not appropriate, your Honor.
6 They have put in issue the very question of what they were
7 saying and doing and thinking and talking about when it came to
8 whether XRP was a security.

9 The last point I want to make, your Honor, is that it
10 is really more of a general point that I think it's pretty
11 obvious that the issues in this case are really important;
12 they're obviously important to the parties, they are important
13 to my client and Mr. Garlinghouse who have been accused of
14 reckless and knowing conduct which is obviously a very serious
15 allegation. I think it is fair to say that important segments
16 of the fintech and cryptocurrency community are watching this
17 case closely and, ultimately, it is going to be up to the
18 Court. And by Court I mean this Court, your Honor, and Judge
19 Torres, and potentially the Court of Appeals and maybe even the
20 United States Supreme Court if it comes to that, it is going to
21 be up to the Court to decide whether XRP is or was a security
22 or not. And I just think, given the importance of those issues
23 and how new an issue this is, how critical it is in the context
24 of trying to apply this 1933 definition of security and the
25 1946 Supreme Court *Howey* definition to the current situation it

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1 is important that this evidence within the SEC about its
2 communications with others and its discussions about those
3 communications, that that not be kept from the Court, it not be
4 kept out from the record. The Court can always decide whether
5 that evidence should be admissible at trial and what weight it
6 should be given. But, for that evidence to be ruled out of
7 discovery in the first place I think is really a distortion in
8 the face of Rule 26 so we would ask the Court to grant the
9 motion to compel.

10 I am happy to answer any questions you may have.

11 THE COURT: Great. Thank you.

12 Mr. Bliss, if you want to take five minutes to respond
13 to anything in particular I am happy to give that to you.

14 MR. BLISS: Yes. Thank you, your Honor. I appreciate
15 that, because in listening to various different counsel's
16 statements it is really remarkable to hear that what really
17 underlies a lot of their request is this claim that action or
18 inaction by the SEC has somehow led the markets to believe
19 something about XRP as far as its status as a security.

20 Since 1946 there has never been a case saying that
21 some action or inaction by the SEC influences how the market
22 views an instrument. They don't cite one. It doesn't exist.
23 The actions of the promoter are what needs to be the focus
24 here. And so, to try to put the SEC on trial is totally
25 inappropriate based on decades of law. And it is clear, in

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1 listening to the various defense counsel assert that they think
2 that the discovery would somehow show that the SEC was flailing
3 or was confused is, again, remarkable. The SEC acts pursuant
4 to its statutory authority. It investigates. It issues
5 enforcement actions. It issues no action letters. That's how
6 it operates. And so, the idea that because it took X number of
7 years from the time XRP existed to get an enforcement action
8 somehow opens the kimono to total and complete discovery inside
9 the SEC is really a remarkable position for the Defense to be
10 advocating and it is not supported. And specifically, on the
11 point that was suggested by Mr. Solomon that the SEC
12 individuals are somehow giving comfort to market participants
13 in SEC meetings that XRP is not a security, again, that is not
14 how the SEC operates. In this case the SEC took time,
15 completed an investigation, filed an enforcement action. And
16 so, allowing discovery into the SEC's internal and deliberative
17 communications would have a chilling effect on every federal
18 agency. If agency employees' communications were subject to
19 discovery, every time an agency filed an enforcement action in
20 which the defendant challenged the clarity of the law or the
21 defendant's understanding of it or the timing of the action, it
22 would derail federal agency litigation from being focused on
23 the conduct of the defendants to being about the conduct of the
24 government and its officials. It would also open the door to
25 discovery far beyond the issues in the filed regulatory

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1 actions. Here it would involve the complicating factor of
2 opening the door to discovery from Ripple's own counsel who
3 were the chair of the SEC and the head of the Division of
4 Enforcement for several years of the relevant period in this
5 case when defense counsel now apparently claims that the SEC
6 gave the market some impression of XRP during the time that it
7 took to file the action. And the improper breadth of the
8 discovery, it was further demonstrated today in terms of the
9 discussion of Mr. Clayton and a subpoena that was sent last
10 week to the former SEC's Chair's new place of employment for
11 documents and communications from while he was the Chair about
12 XRP and other digital assets.

13 So, there is just no basis to allow defendants to put
14 the SEC and its commissioners and its staff on trial for
15 operating in the way that it does.

16 And, specifically on the point of the *Kovzan* case,
17 Mr. Solomon correctly identified that that case and any of the
18 few cases they cited that grant some type of SEC internal
19 discovery are about situations in which the SEC has promulgated
20 rules and interpretation of those rules. Every one of the
21 cases that they cite that's the case. And this is not the case
22 here. The *Howey* test is for federal court interpretation and
23 has been out there since 1946, it is not about an SEC rule that
24 has been implemented.

25 And, I also think it is important to go back to the

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1 speech by Mr. Hinman that has been referenced several times
2 now. This was not an official position of the SEC commissioner
3 itself but it is important that in 2018 Mr. Hinman gave a
4 speech not about XRP but about digital assets generally. He
5 said -- to quote that speech which is publicly available on the
6 SEC's website -- "The digital asset itself is simply code but
7 the way it is sold as part of an investment to non-users by
8 promoters to develop the enterprise can be, and in that
9 context, most often is a security because it evidences an
10 investment contract." He contrasted that to Bitcoin: "When I
11 look at Bitcoin today, I do not see a central third-party whose
12 efforts are a key to determining the factor in the enterprise."
13 But here Ripple is doing exactly what Mr. Hinman said makes a
14 digital asset a security: Acting as a central party promoting
15 XRP as an investment. And notably, as of June 2018 when
16 Mr. Hinman made that speech, there was no use for XRP other
17 than investment. As we alleged in the complaint, paragraphs
18 362 to 364, it wasn't until October 2018 that Ripple
19 commercially launched any use for XRP. And, even since then,
20 that use has been minimal accounting for no more than 1.6
21 percent of XRP's trading volume during any given quarter. So,
22 at the time of Mr. Hinman's speech, Ripple had been conducting
23 an ongoing offering for five years during which time XRP was
24 offered and sold as an investment with no current use at all.
25 And, to the extent the defendants now wish to feign confusion

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1 about the time at which Mr. Hinman made those remarks in 2018,
2 Ripple was under investigation by the SEC at the time of that
3 speech. That speech could not have provided any comfort or
4 confusion to the defendants about the status of XRP at that
5 time.

6 With that, I am happy to answer any questions.

7 THE COURT: Just a quick clarifying question. You
8 distinguish the speech, Mr. Hinman's speech suggesting it was
9 not a pronouncement but rather just a speech that referenced
10 Bitcoin and so is it -- does the SEC take a position that as of
11 a certain date its position was official as to Bitcoin and
12 Ether?

13 MR. BLISS: So I want to make clear that this is my
14 understanding of the current situation and I don't want to be
15 overly technical but the SEC, itself, my understanding, it has
16 not taken an official position. There is no action that it
17 took to say Bitcoin is not a security, Ether is not a security.
18 Now, there was a speech by a high-ranking person who said that
19 to him that's what it looked like but there has been no action
20 letter, no enforcement action, none of the official ways in
21 which the SEC takes a position on that matter that has
22 occurred. What I understand defendants to be referencing is
23 the speech by Mr. Hinman which is not an official statement of
24 the Securities and Exchange Commission itself.

25 THE COURT: Okay. Thank you. I appreciate that

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1 clarity.

2 Okay. Thank you everybody for your arguments. I
3 appreciate them. As I have come to expect from this group of
4 lawyers, they were excellent and the papers that you submitted
5 as well were excellent. And I recognize that this is
6 high-stakes litigation and that people are quite invested in
7 the outcome of the issues including the individual defendants
8 who face serious individual liability.

9 I have reviewed the letters and have listened
10 carefully to the argument. I am going to grant, in large part,
11 the defendant's motion. I think that the discovery related to
12 Bitcoin and Ether is relevant. I think it is relevant to the
13 Court's eventual analysis with respect to the *Howey* factors,
14 but I also think it is relevant as to the objective review of
15 defendants' understanding in thinking about the aiding and
16 abetting charge or aiding and abetting count. I also think it
17 is relevant to the fair notice defense that Ripple is raising.
18 So, for all of those reasons, I think discovery into Bitcoin
19 and Ether is appropriate and I am going to authorize it. I am
20 going to authorize discovery both as to exclusively Bitcoin or
21 Ether communications as well as XRP communications between the
22 SEC and third-parties, and by that I am including all market
23 participants and the other government agencies. I am not
24 including SEC-to-SEC internal communications in that ruling.
25 And so, the SEC is obligated to review the discovery request.

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1 I am just looking at the actual requests themselves. I know we
2 have been talking about requests 4, 7, 8, 11, and 14. Search
3 all of the relevant repositories for documents and discovery
4 related to communications to third-parties. In addition, I am
5 ordering that discovery be conducted of all 19 custodians. I
6 don't think that the SEC's arguments, as set forth within their
7 letters and again today, are a legitimate basis given the
8 relevancy standard to preclude discovery here. 19 custodians
9 for an incredibly high-stakes, high-value litigation is not
10 unreasonable, and given the three different categories of
11 grounds not to produce documents, I don't think that that is a
12 legitimate basis so I am going to direct that the SEC search
13 all 19 custodians for relevant and responsive documents.

14 I am going to deny in part the request for discovery
15 that is internal, and specifically internal, for instance
16 e-mail communications between what I will call the SEC staff to
17 SEC staff. I think that that communication both is less
18 relevant as it goes to how the outside world -- how the market
19 is considering XRP and how the individual defendants, how it
20 affects their reasonable belief, and I also think that there
21 are likely to be extensive privilege issues there and I think
22 it has the potential to seriously chill government
23 deliberations and so I am not going to require communications
24 to be produced that are internal e-mail communications within
25 the agency. If you want the parties to meet and confer -- and

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1 this will betray some of my ignorance as to how the SEC may
2 operate -- to the extent there are relevant minutes or more
3 official internal memos on these areas of discovery that I am
4 authorizing, both the Bitcoin and Ether discovery as well as
5 the XRP discovery, I want the parties to meet and confer on
6 whether those should be produced. So, my limitation now is
7 just as to e-mail communications, the sort of everyday, more
8 informal communications that I think would not be appropriate
9 for discovery here. But, to the extent internally there are
10 memos being sent up to higher-ranking officials expressing the
11 agency's interpretation or views on these matters, those types
12 of documents may be discoverable but I will direct that the
13 parties meet and confer with respect to that. Obviously to the
14 extent in producing these documents there are documents that
15 are privileged, the SEC certainly has the right and obligation
16 to identify privileged documents and produce the privilege log
17 and the parties are ordered to meet and confer on that
18 privilege assertion and if you can't reach a resolution you can
19 obviously bring that dispute to me.

20 All right. That is my ruling on the motion. Anything
21 further from the SEC?

22 MR. BLISS: No, your Honor. Thank you.

23 THE COURT: Anything further from the defendants?

24 MR. KELLOGG: Nothing from Ripple left, your Honor.

25 Thank you.

