UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SECURITIES and EXCHANGE COMMISSION,

Plaintiff,

v. 20 Civ. 10832 (AT)(SN)

RIPPLE LABS, INC., *et al.*,

Defendants.

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New York, N.Y.
May 21, 2021
2:00 p.m.

Before:

HON. SARAH NETBURN,

U.S. Magistrate Judge

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(The Court and all parties appearing telephonically)

(Case called)

THE DEPUTY CLERK: Starting with the Securities and Exchange Commission, could you please state your appearances for the record.

MR. TENREIRO: Good afternoon, your Honor, this is Jorge Tenreiro on behavior of the Securities and Exchange Commission. My colleagues are on the line. I'm happy to go through them, but I think the court reporter has their appearances.

THE COURT: Thank you. Good afternoon, Mr. Tenreiro.

On behalf of Ripple Labs.

MR. RAPAWY: Good afternoon, your Honor. This is Gregory Rapawy for Ripple Labs, and Mr. Kellogg is also on the line with me.

THE COURT: Good afternoon.

And on behalf of defendant Larsen?

MR. FLUMENBAUM: On behalf of defendant Larsen, this is Martin Flumenbaum, from Paul Weiss Rifkind Wharton & Garrison. With me are Robin Linsenmayer and Christina Bunting.

THE COURT: Thank you.

On behalf of Mr. Garlinghouse?

MR. SOLOMON: Hi, Judge Netburn. It is Matt Solomon on behalf of Mr. Garlinghouse. Nowell Bamberger, Sam Levander, and Nicole Tatz are on the phone with me, from Cleary Gottlieb.

Thank you.

THE COURT: Great. Good afternoon to everyone.

A few housekeeping matters. First, I will remind everybody that this is an open, public line, that members of the public and the press are listening in.

We have a court reporter on the line. The court reporter is the only person who is permitted to make any recording or rebroadcasting of today's proceeding. It is a violation of my court orders and the law for anybody to record or rebroadcast this proceeding.

To the lawyers, I will ask that you always state your name before you speak each and every time, so that the court reporter can properly attribute your statements to you. And I will remind everybody to please speak slowly so that the court reporter can get every word that you say.

We are here on an application filed by the Securities and Exchange Commission. The letter was filed on May 7. I have the defendant Ripple's May 14 letter in opposition and a reply brief filed on May 19 by the Securities and Exchange Commission.

The question presented in today's conference is whether or not, by asserting the affirmative defense of fair notice, whether the Ripple defendants have waived their attorney-client privilege such that fairness requires that they turn over communications with their counsel.

Mr. Tenreiro, why don't I begin with you since it is your application.

MR. TENREIRO: Yes.

THE COURT: I want to start by just jumping into some statements that you make in your letters.

You describe the defendants' defense as one that subjectively lacked fair notice, and I want to ask if you have any authority for the proposition that the fair notice defense is a subjective defense and that the good faith of the defendant in asserting that defense is relevant.

And relatedly, in discussing the fair notice defense, you state -- I am looking at your opening letter. You state that "the SEC should be" required -- or "be permitted to test and rebut this defense." That's a quote. And then in your reply letter you cite to the Court's decision in *Scott v. Chipotle* about the requirement to test the truth of a defense that's raised.

And so my second question to you, after the subjective question, is what sort of testing would one be doing? These are obviously related questions. But what sort of testing are you suggesting that fairness requires the SEC to engage in?

MR. TENREIRO: Thank you, your Honor. This is Jorge Tenreiro on behalf of the SEC.

So to answer the Court's first question, I think, your Honor, that the case that Ripple relies on the most for its

affirmative defense, which is the *Upton* case, shows that the Court may look to whether there was actual notice.

Now, in that case, the Second Circuit said, look, just because an examiner had warned you that you might be violating the law, we are not going to say that's sufficient notice, but the Second Circuit's analysis of that fact suggests that the actual notice could be a bar to the defense.

And I want to get to the Court's second question, and I will, but I think what's important from --

THE COURT: Can I interrupt you?

MR. TENREIRO: Yes, please.

THE COURT: Sorry. I just want to interrupt you for a second. In the *Upton* case, which I agree is the case that the defendants rely on most firmly, in the *Upton* case, the question was with respect to a particular rule, and as I read the case, there was a question as to whether or not the rule was being enforced, but there was no question that the rule said what it said, though in that case I think it is slightly different because there wasn't a question about the state of play. The state of play was clear. The SEC had issued a particular rule that, on its face, was clear. And so I think there was a legitimate question about actual notice of a very clear rule.

We don't have that here. Here, as I read the affirmative defense -- this is the fourth affirmative defense that Ripple asserts -- it couches its defense in a lack of

clarity on the SEC's part, that the SEC was unclear, that market participants did not know what the SEC was intending to do, and that there were various events that supported that lack of clarity.

So I think the actual notice question is a little bit different when you are talking about a very clear rule that was clear on its face versus an assessment of various factors over time.

MR. TENREIRO: Well, that's right, your Honor. So there are two points that are important there.

Our position has been, from the beginning of the case, that *Howey* provides the clear guidance and standards that are ascertainable, which is all that due process and fair notice require.

So from our perspective, one can look -- you know, in *Upton*, as the Court correctly said, there was a rule that was clear. Our position is Howey provides the clear standards here and what the -- you know, the lack of action by the SEC, because they don't actually point to any rule or statement that we made. They simply said the lack of action somehow made that clear rule unclear. And so they sort of made the *Upton* case turn on subjective factors.

But what I think is more important, your Honor, is, I think the Court in the *Chipotle* case recognized that it doesn't necessarily matter if it is subjective or objective because,

even in *Chipotle*, the defense under Section 259 was objective and the defense under 260 was subjective. I think the principle that controls here is that if the defendant voluntarily injects their state of mind into the case, then the -- the then fairness results in waiver.

And our position is, well, how do we know that their defense injects their state of mind into the case, whether it's from an objective or subjective point of view? Well, we submit that they have all but admitted that their state of mind is what this defense is about, and I can point the Court -- we point to the Court -- we point the Court to some of these statements in our reply letter, and I would like to point the Court to a couple of more.

In the premotion conference letter that they submitted to Judge Torres about their affirmative defense, they said, at page 2, this is docket entry 70, they essentially say there that if they can prove that there was confusion in the minds of market participants, then they win on the affirmative defense.

When they sought to compel documents from the SEC, they filed a letter to this Court. That's docket 81 at 5, and they repeated the same concept. They said: If there is confusion in the minds of market participants, the SEC cannot as a matter of law prevail. And so they have essentially -- they have directly inserted their state of mind as a part of their defense.

Now, to be sure, they are very careful not to say good faith, because I believe they know what the consequences of that would be, but I think this Court and other Courts in this circuit, including the Second Circuit in *Bilzerian* very clearly said you can't -- you know, you can't split it in half. Right? Chipotle, in the *Chipotle* case, said: My defense is based only on what I perceived from the guidance that was out there. And this Court said, wait a second, okay, but we need to test that with what you actually knew or believed about that guidance that was out there. So you can't cabin it or artificially cut it up in half. That's just simply not fair.

The answer -- you know, Ripple's answer, when they assert the affirmative defense, talks about how they transacted for years in XRP, quoting, "believing XRP was not an investment contract." You know, they say that when Platform A listed XRP, the SEC supposed inaction confused them into thinking their actions were legal.

So whether one couches a defense as objective or subjective doesn't ultimately matter because they have injected their state of mind into the case, and that's the principle that controls.

In other words, your Honor, Ripple is asserting an advice of the SEC defense. We have stated that defense does not exist. But insofar as they are asserting that advice, it is essentially the mirror image of a defense of counsel

defense. They just want to cabin it to be supposed advice of the SEC. So it doesn't matter that they don't also rely on the advice of counsel. As I said, they can't artificially cabin that. And we point the Court not just to the *Chipotle* case, but also to the *United States v. Exxon* case in the D.C. -- in the District of D.C., where the defendant tried sort of the same trick that Ripple is trying here, you know: We were confused by what the Department of Energy was doing and saying. And the Court there said, okay, that's fine, you can make that defense, but you have received the advice of lawyers.

And here Ripple cannot and will not deny they received -- you know, they were a sophisticated player in this market, they hired up to 12 law firms, and at least four of them specifically gave them advice as to the legal status of XRP under the securities laws.

That brings me to answering the court's second question, which is, well, how would we test -- what would we be testing? It might be helpful to walk through the events that they point to that the Court alluded to a moment ago.

They say, for example, that they entered into a settlement with FinCEN, where FinCEN said, you know, XRP is a virtual currency. Well, we would test that defense if there is advice where a lawyer might tell them, oh, you know, you can be a currency, but you could also be a security. And in fact, we know they got that advice. They got that advice in 2012 from

what we call Law Firm A in our letter, and they got similar advice from another law firm in a -- you know, it is either Exhibit E or F in our submission, where a lawyer says to them, you know, you can be a currency but also repackage it as a security.

So that's how we would test, for example, that particular point. They (inaudible) of their affirmative defense at the very top.

THE COURT: We just lost you for one second, Mr. Tenreiro. You just cut out for a second.

MR. TENREIRO: I apologize.

At the beginning of their answer, on page 97, they say that fair notice required that a party -- a reasonably intelligent party can ascertain the standards by which it measures the legality of its conduct. Well, one answer would be did a lawyer actually ascertain them for you? And our contention is, you know, the Law Firm A memos correctly identified the standards. So as a factual matter, you cannot come to court and say I just didn't know what standards governed the legality of my conduct if a lawyer actually identified those standards for you. So Ripple's confusion, or supposed confusion, has to be tested against what it was actually being told.

Now, on the Platform A listing, right, how would we test that? They say well, Platform A listed XRP and nothing

happened. They must have believed this was legal. Well, Ripple will not deny, as we have shown also in our opening letter, that Ripple said to Platform A: We have the advice of a lawyer that says this is fine. That's identical to what happened in the *Exxon* case that I have referred to. *Exxon* was saying, well, you know, there were price issues here. This wasn't our fault. The district court said: Wait a second. There is evidence that you were talking to these people that were setting prices. So for that point, we also need to know what was in your mind, based on what your lawyers told you, to see whether you influenced what these people were doing.

So what we submit, your Honor, is that under the fairness principle -- well, to take a step back --

THE COURT: Sorry. Maybe I misheard what you said. You are saying -- the last thing you just said, that you might need to see what the lawyers said because it would be influenced by Ripple?

MR. TENREIRO: Well, no. Ripple is influencing what the platforms are doing. So Ripple is saying, right, that the SEC's supposed inaction is influencing what the market participants are thinking, and our submission is, it just cannot be the law, under the fairness principle, that they get to advance that fair notice defense based on, for example, internal SEC communications about digital assets generally that they were not even privy to, and we do not get to test that or

rebut that, you know, or at least that we are not allowed to weigh that against the advice they actually received about the product they actually had.

So, you know, critical to that point is that we know they got advice. As I have said, I think the advice that we have already submitted shows the Court how it would be tested. Ripple also says, your Honor, that they are not relying on the advice of counsel. So, again, that's not relevant as I have mentioned, as this Court recognized in *Chipotle*. You don't have to actually rely on the advice of lawyer as long as you put your state of mind into the case. It is also not true. In their motion to strike, in their -- sorry, in their opposition to our motion to strike, they say, at pages 18 and 19, this is docket 172, they say that the legal memos from Law Firm A support their fair notice defense. I mean, they actually say that. So they are relying on that advice. Again, it's not needed, but they are doing that. So they are putting the question of what was in their mind at issue by asserting a defense that depends on all of these facts.

We have said, your Honor, from the beginning of the case, they certainly are allowed to argue unconstitutional vagueness. And Judge Hellerstein, in *Kik*, said that's objective. You don't get discovery as to what the SEC was doing. We wouldn't get discovery as to what their lawyers were telling them, but that's not sort of the battlefield that they

have been wanting to litigate this case in. They want to litigate it as these are the things that occurred and our belief when these things occurred was that what we were doing was okay, such that there is some sort of constitutional barrier to liability because we were just too confused as to what was happening.

I think that's at the core of the --

THE COURT: So I get the differences -- I get the difference between those two concepts, and I understand that if a defendant says "I just didn't believe it to be true" or "I was acting in good faith" that this would be an appropriate area for discovery.

You know, this is really akin, as I understand it, this defense, to a void for vagueness argument, where somebody challenges a statute and says, you know, this law that restricts speech is unconstitutional because it is so vague. And comparing this defense to a claim like that, it would be of no moment that the particular entity that was challenging the statute had a lawyer who said, oh, actually, the law is really clear, or the law is not clear at all. The Court, in deciding that question, would simply look at the statute, how it was enforced, what was going on in the relevant market, etc., to decide whether or not a particular statute was void for vagueness. And it seems to me that the fair notice defense that's raised here is much more akin to that kind of a

challenge.

MR. TENREIRO: Well, your Honor, so we agree that if it were -- sorry, we agree that if it were a void for vagueness challenge, we would completely agree, whatever the lawyers told them, not relevant.

But I respectfully disagree that the defense as they have couched it is more akin to a void for vagueness challenge. In their motion to strike, they disavow a void for vagueness challenge. They say: That is not the defense we are making. You know, I could find the citation in a minute, but they are saying, in their opposition to our motion to strike, this is not a void for vagueness challenge. This is not what this is about. And they said that to Judge Torres in their premotion conference letter, which is docket 70. They conclude that letter by saying, "The bottom line is that the Court must rest with the factual context in deciding what constitutes fair notice in this particular case. It is not based just on does *Howey* provide the relevant standards by which the conduct can be measured."

Again if that was a defense, we would not be here. But they have said repeatedly to this Court, and to Judge Torres, you know -- again, I'm quoting from docket 70 -- "this defense is not purely a legal question." That's -- you know, the Court, your Honor just described a purely legal question. Right? Is it void for vagueness? Is it too

confusing? They said it's a factual inquiry. We need a fully developed factual record. That's, again, from docket 70.

And not only have they said that to sort of defend their affirmative defense from our motion to strike, they have also -- they have also couched -- or characterized that defense in those terms when seeking discovery against us. They said -- and I am repeating myself a little bit, but they said that ---they basically said that if they can prove that there was confusion in the minds of market participants, based on these specific moments that they point to, then they win. So they are not saying, if we can prove there was confusion in the minds of market participants because people read *Howey* and have no idea what it means, they can't say that, your Honor, because the Second Circuit has repeatedly turned back void for vagueness challenges to *Howey*. So they don't want to make that defense, because they know they would lose. And Judge Hellerstein in *Kik* rejected that defense when it was purely void for vagueness, Judge Dearie in *Zaslavskiy* rejected it, and of course the Second Circuit has rejected it. So they can't make that argument because they know all of the cases are against them.

They have affirmatively decided to move away from a purely legal question, and they specifically say that. They say this is not a pure legal question. The Court must wrestle with the factual context in citing this particular case, and as

the Court alluded to, they -- you know, they have these moments in which they claim they were confused.

Now, if I might add, your Honor, another reason why we know this defense injects Ripple's state of mind into the case, again, Ripple has said that. Ripple has told us that. In their motion -- in their opposition to our motion to strike they conclude by saying that the individual defendants' defenses will justify the same discovery as Ripple's fair notice defense. That's a quote from page 26 or 27 of their opposition to our motion to strike. I don't think counsel will be able to argue that the individual defendants are not making a good-faith defense. They are. They are saying, We did not know. We acted in good faith.

So to the extent that Ripple says that the same -- the defenses will justify the same discovery, it's because it is the same defense. Ripple is making exactly the same defense as the individual defendants are making. And so, you know, the old adage, what's good for the goose has to be good for the gander. There can be no dispute that the -- that this advice would be relevant to the individual defendants, setting aside, of course, they cannot waive Ripple's privilege, that -- we are not arguing that. But if the individual defendants' defense means that they get the same discovery from the SEC as Ripple would under the affirmative defense, then that means we get the same discovery from Ripple as we would against the individual

defendant. The principle has to apply both ways. Otherwise, they are getting to say, on the one hand, you know, it's a purely legal issue; on the other, it's very factual.

Just for the citation on the motion to strike their opposition, it's at page 17, where they say, "The SEC erroneously contends that Ripple's defense lacks merit because it is impermissible as applied to void for vagueness."

So I appreciate the Court's point and, again, I agree, if it's void for vagueness, we are done. But they reject that. They say that's not the defense. And so given that, we are here because they are asserting, they are putting in their state of mind into play.

I am happy to answer other questions, your Honor. I would like to simply conclude at least my affirmative presentation by responding a little bit to some of the policy arguments in the same way that this Court did in *Chipotle*, which is, you know, they may assert the defenses that they want. They retain control over that. If they decide to assert a defense that they couch in, you know, their state of mind, then we get to see what was actually in their state of mind. A ruling in our favor will give all the parties access to the documents, the documents needed to litigate the defense on a fully developed record and, as the Court said in *Chipotle*, "will encourage sophisticated parties," like Ripple, that clearly had access to resources and to 12 law firms, "to

receive competent advice and to follow the advice." If they received advice and they did not follow it, we submit that, as they have couched their affirmative defense, they would lose. They would not be able to argue that they actually were confused if they got advice and refused to follow it.

Again, I'm happy to answer any additional questions.

THE COURT: My understanding -- and obviously Ripple will be given an opportunity to speak on its behalf, but the fact that it says that there is a factual record that needs to be developed for its defense doesn't necessarily follow that that development includes the state of mind of Ripple. I have read closely their affirmative defense and, as I interpret it, they are arguing that the conduct of the SEC and of the market created a lack of clarity on the question of how XRP should be regulated.

It is not entirely clear to me still, despite your excellent presentation, why Ripple's state of mind on that question is relevant. The way I have been thinking about it, in part, is that a lawyer, either five years ago or as an expert in this lawsuit, might look at various facts, might look at various actions, and say, based on this landscape, I opine that it's clear that XRP should have been regulated as a security or it's not clear. And in some way that's sort of expert opinion about what the state of play was at the relevant time, and Ripple's lawyers providing that assessment was just

one expert's opinion on what the assessment was.

But the defense, as I am interpreting it, at least at this moment, seems to focus much more on the external factors and not what an expert would do when she evaluates those external factors. And I haven't seen a case -- and I would request if you know of one to provide it to me -- that looks at a fair notice defense and asks about how somebody asserting that defense subjectively believed -- what their subjective belief was.

Certainly with respect to a good-faith defense, which I believe a lot of the cases that we have talked about discuss, certainly the *Bilzerian* case talked about a good-faith belief, the *Chipotle* case talked about a good-faith belief, in those instances I think the subjective belief does need to be probed. But my reading of the cases with respect to a fair notice defense is that an entity's subjective belief is not relevant. It could have bad intent. The question is what were the external factors for the market? So I am looking for a case that says, well, no, what somebody actually believed is relevant in a fair notice defense.

MR. TENREIRO: Thank you, your Honor. This is Jorge Tenreiro again.

So on the first part of the question, I agree, I think that's fair that if -- you know, simply because they might say there are facts here doesn't necessarily push them over the

line into actually sort of waiving involuntarily. But what I would urge the Court to sort of focus on, and it comes from *Chipotle* and from *Bilzerian*, is it doesn't have to be that they say good faith, because otherwise it's too easy for them to just avoid the words "good faith" in their pleadings. I think the Court in *Chipotle* relied on Judge Kimba Wood's opinion in *Arista Records*, where Judge Wood said, if the parties' state of mind is at issue -- now let me get to that point, right, because the Court then said, why is there state of mind at issue here and where is the case? I would point the Court to the *United States v. Exxon* case from the -- you know it is 94 F.R.D. 246, from the District of Columbia, where that's exactly what happened. The party tried to say: My defense is just based on what the Department of Energy told me. It is not based on anything else. It is just based on these external factors. And the judge said: Wait a second. That's not fair. You can't do that. You can't cut it up like that.

And in fact, that's actually what this Court said in *Chipotle*, where Chipotle said: I'm asserting that I cannot be, you know, subjected to this additional damages, or whatever, under the Fair Labor Standards Act, based on guidance that was out there. I'm just looking at the guidance, is what *Chipotle* said. That's all I am looking at. And this Court quite correctly said: Wait a second. You can't do that. You can't split it up like that. If you are going to go there, we have

to go there.

So the case that the Court is asking me for, I think, is the *Exxon* case from D.C. And I think that the other thing that's important, your Honor, that, again, I keep citing *Chipotle*, because I think it is very much -- not exactly on all fours, but very similar to this case --

THE COURT: It was also written by a very smart judge.

MR. TENREIRO: That's right. Exactly.

So in *Chipotle*, the Court did something -- did two things, your Honor, that in fact we have seen in subsequent cases, and many Southern District judges have sort of adopted this approach, because it is such a smart approach, two things that are important. The Court said, first, it is a case-by-case question. We have to see how the privilege is being asserted and what's going on here. So we have gone through that. I don't want to belabor a lot of it. But these external factors that Ripple is pointing to are sort of intertwined with the internal views that they have, to the extent that they have legal advice that then they use to influence external views, because they are telling the platforms: We have lawyers. They disclose in 2012 and '13: Here is what our lawyers told us. In 2015, they disclose a memo and they said: Here is what our lawyers told us.

So even if it's true that one could artificially cabin Ripple's defense, and we really can't, but even if that were

true and they want to just focus on external factors, in this case they influence those factors with the opinions of the lawyers. And --

THE COURT: But you have received those opinions.

MR. TENREIRO: Well, that's right, your Honor. But we have to understand sort of what were the factual bases for the opinions.

So if the Court looks, for example, at the October 2012 memo by the Law Firm A, you know, it indicates we received, you know, a document from you that sort of updates your business plan. So we need to be able to -- and subsequent disclosures by Mr. Larsen suggest that there were clarifications or conversations with those lawyers. So we need sort of the full record, not just the ones that Ripple has chosen to disclose to the market for its benefit or for its purposes.

And as I said a moment ago, you know, Ripple shouldn't be able to put on a defense that sort of looks at the state of mind of the SEC and every market participant, because that is what the external focus is, but does not look at their state of mind. That is sort of fundamentally unfair. And they are putting in their state of mind because they are a market participant. So they can't sort of externalize themselves in that way. They are a market participant. The confusion in their minds that they point to in multiple filings, the

confusion in the minds of every market participant, as they have described it, well, okay, that's them. They are a market participant. In fact, they are the most important one. They are the ones with the assets.

The other thing that the Court did in *Chipotle*, your Honor, that I sort of point to is, you know, *Chipotle* was trying to say this isn't a good-faith defense and the Court said, well, let me look at the case law that applies to this defense, and how can I tell from this case law that good faith matters? And perhaps that's why the Court is asking me for a case where, sort of, the analysis happened along these lines.

This is why we pointed the Court to cases that say if you have actual notice, it's an absolute bar. In the Eighth Circuit case that we cite, you know, it wasn't even notice by the government. It was, like, the Court said: Based on your own actions -- the defendant there his name was Washam, I believe. The Eighth Circuit said, based on your own actions -- the pin cite is -- it's 312 F.3d at 930. The Eighth Circuit said: Based on your actions, we can tell that you knew what the law required from you. So you can't come here now and say there is a constitutional bar to liability. And the Eighth Circuit there relied on a Tenth Circuit opinion along the same line. It's not just that the government can give you the actual notice, but you could actually have notice based on what you knew. And so that -- those cases sort of stand for that

principle, that the state of mind becomes relevant when they make it -- when they make that affirmative defense.

Your Honor, respectfully perhaps one of the reasons --

THE COURT: I --

MR. TENREIRO: Um-hmm?

THE COURT: Sorry. Continue. I didn't mean to interrupt you.

MR. TENREIRO: Your Honor, I simply wanted to say that one of the reasons why perhaps there is not a case that directly addresses this issue is because, as we have said, this fair notice defense, *Upton* is the only case that sort of recognizes the fair notice defense as they sort of couch it. But we understand the Court has seen it differently in the context of seeking discovery against us. We want to cabin this defense as an objective defense, unconstitutional vagueness, that's the end of the story. We can argue based on what *Howey* and the cases interpreted in it say. But they resist that. They don't want to do that. They want discovery from us. They want to be able to say that what we believed and what the market participants believed was relevant. That simply means that what they believed was relevant.

But the interesting thing about it, though, is that *Upton* itself recognizes that if a person actually had notice, they might be precluded even from raising the *Upton* type defense because the Second Circuit at the end of the opinion

analyzes that question, rejects it, says this isn't enough, but says, well, you know, here is something that the SEC pointed to. So I'm not sure why there should be a distinction between notice that might have been provided for -- provided to Ripple by an examiner at the New York Stock Exchange or by the SEC itself or by their own lawyers, and I don't think the cases would recognize that distinction to the extent that, you know, the fair notice defense is based on this sort of, oh, I was confused because of all of these sort of things that were happening. I don't see why we would cabin out what they were told, what they knew.

I mean, let's just say that Mr. Garlinghouse was reading the Bill Hinman speech that they point to and sent an e-mail to his colleague and said, oh, wow, this speech makes it really clear that we are a security. I think we would all agree that that goes against his defense and it goes against Ripple's defense really. So why would it be different if a lawyer said that? The whole point of the fairness principle is that you can't make a defense that calls into question what you you believed and then shield the advice of the lawyer.

So I think that -- and, again, to sort of remind the Court, to the extent that Ripple says that their defense is the same as the individual defendants' defense, it becomes abundantly clear what is going on here. They are trying to make an argument based on what they believed. If Ripple pleads

a different defense, it's a different argument.

THE COURT: May I ask you a question? You say, persuasively, that Ripple itself is a market participant, and so if the fair notice defense is just what did the market think, then what Ripple thinks is also part of that assessment. And I don't think anyone is arguing that, you know. Certainly we can look and see what Ripple did. We know what its conduct was obviously.

And, you know, to your point about if Mr. Garlinghouse wrote an e-mail after the speech reflecting Ripple's or its officers' thinking, that would be discoverable. But obviously attorney-client communications are of a different sort and, generally speaking, the law protects those communications for good policy reasons.

So if you already have some of these memos that were provided from Ripple to third parties, you know what Ripple's conduct was. You know what actions it took. You know what it was saying to third parties, like the exchanges. Why do you need that additional interference with their attorney-client communications? Why is that deeper assessment critical to your ability to defend against this defense?

MR. TENREIRO: Well, your Honor, because of the fairness principle. They chose what, you know -- they chose what advice to disclose to market participants, presumably because they thought it helped them. We have to be able to

test what the lawyers actually told them.

Let's just imagine a scenario where, you know, they enter into a settlement with FinCEN, and FinCEN says you are virtual -- a convertible virtual currency, and then -- we know they have the advice of a lawyer helping them out with that, and that's fine. The lawyer says to them, by the way, you still have the SEC. You know, you better talk to them because this doesn't clear you. You know, there are still other federal laws out there. They are not going to disclose that to a market participant, but that would rebut -- that would be the end. You know, as they said, that would be game over for their affirmative defense, that they were confused when they entered into the FinCEN settlement. They just chose not to follow that advice. So I don't know what is out there, but what I do know is that they chose which ones to disclose.

And just a minor point on the exchanges, we don't know what they have given, the exchanges, because we haven't seen that, but, you know -- and, your Honor, it's sort of -- that argument, if accepted, would be sort of the reverse argument that we made that was rejected by Ripple, where we said: Look. You have our external communications. You have what we have said publicly. You have what the SEC has said. You have the Dow report. You have the guidance. You have statements. You have speeches. But that's not enough. They say, no, no, what you were thinking was relevant because there is confusion, and

if you were confused, how could we not be confused? Well, okay, but the other side of that is, if you were not confused, then why does it matter if we were confused? It just simply goes to that.

And having only the memos that Ripple chose to disclose to its business partners to sort of convince them to do business with them, I think, would really be an affront to the fairness principle. I certainly -- you know, I'm very attuned to the Court's concern that, you know, attorney-client is different, we protect it, but I think, again, *Chipotle*, even there, the Court said, you know, we have to construe it narrowly at times to protect sort of the public's right to every man's evidence, I think is the quote. And the Court concluded by noting that the policy point that *Chipotle* advanced and said, all I'm doing here is encouraging you to follow your lawyer's advice. If Ripple follows the lawyer's advice, if the lawyer's advice comes in and the lawyer said, hey, this is really confusing, I'm sorry I can't -- you know, there might be this, or might be that, okay, you know, it's not going to help us. It would help them. And if it doesn't say that, if it says something else, they might lose --

THE COURT: Mr. Tenreiro, we lost you for the last four seconds. You dropped again.

MR. TENREIRO: Sorry.

THE COURT: You were saying --

MR. TENREIRO: I thought by doing this from my office line it wouldn't happen. I apologize, your Honor.

THE COURT: It's out of use.

MR. TENREIRO: Exactly. Exactly.

So as I was saying, if Ripple received advice -- I was sort of talking about the policy points that the Court raised which, you know, is a very good point and obviously, you know, Courts should be careful in this area. We are not disputing that. But if Ripple got advice from lawyers that sort of said, hey, this is really confusing, and I'm not sure what's going to happen here, that's going to help them, and we won't be able to rebut their affirmative defense. But if that's not the advice they got, if they got advice that sort of identifies the standards that they need to follow, that identifies for them that the speech doesn't really say anything about fair conduct at all, it doesn't apply to them, if they got advice that the FinCEN settlement doesn't clear them with the SEC, then, you know, the fairness principle requires them to lose that defense, but it will encourage sophisticated parties with access to deep resources, like Ripple, to follow the lawyers' advice, as the Court said in *Chipotle*.

So I would argue that sort of the policy concerns weigh strongly in favor of disclosure here, your Honor, and will permit all of the parties to litigate this issue that has sort of become, in ways, again, that we don't agree with, in

many ways the heart of the case or a part of the case on a full record and will permit the fact-finder to make a determination based on all of the advice and not just the advice that Ripple chose to disclose.

You know, I would add that in the motion we filed this week, Ripple is now clawing back some of that advice that it apparently doesn't think is helpful to them, so that's why the fairness principle is there and says, once you put your state of mind into play, we just need to look at all of it and assess everything, and then Ripple will have -- Ripple will have what they want. The factual record will be developed and the fact-finder will have to determine, you know, what was in your mind. Were you really confused or not?

THE COURT: Thank you.

Before I switch to Ripple I just have two I think quick questions for you, which are, do you think this question before the Court today should wait for a decision on the motion to strike the answer?

MR. TENREIRO: Okay.

THE COURT: And a related question, what about the motion that's in the pipeline that I have not looked at but I know has to do also with the attorney-client privilege issues? Do you think that that motion should be resolved with this motion.

MR. TENREIRO: So, your Honor, thank you. Jorge

Tenreiro again, for the benefit of the court reporter.

On the first question, the answer is no. I don't think it is premature, because I don't believe they are going to withdraw the defense, and we are sort of barreling toward the end of fact discovery. And Ripple has said that they intend to move for summary judgment. We are looking at that issue. We might move on -- you know, as to summary judgment as well.

So if they move on summary judgment and we say, you know, these sales and offers meet the *Howey* test, they are going to turn around and say, okay, but as a matter of law, because of my defense, even if reliable, the Constitution sort of stands in your way, SEC. So we won't be able to rebut that defense at summary judgment. Discovery is about to close. So short of sort of -- sorry, short of them withdrawing the defense or everybody waiting until Judge Torres decides the motion to strike, we need the discovery now. And Judge Torres did say in her scheduling order that there shouldn't be any sort of stay of discovery issues, you know, based on the pending of dispositive motions under Rule 12. Certainly if the --

THE COURT: Right.

MR. TENREIRO: -- Court is inclined to wait, then we would have to reevaluate whether we can complete discovery in this case, and the parties will have to make decisions about

what that means. You know, I certainly understand the Court's question about, well, maybe the defense goes away, right, the defense goes away, but if the Court orders its discovery and the defense goes away, well, you know, the documents are no longer relevant to Ripple. There is a protective order, they can claw them back, and that's the end of it.

If Ripple gets on the line following my presentation and they are willing to say, no, that's okay, you know what? We will wait to move for summary judgment until the motion to strike is decided, maybe that's a different question, and maybe, you know, we both agree, okay, let's all just wait. But I don't think that's going to be their position.

I think their position is we need to move for summary judgment, you know, in August. Discovery is going to end. This case needs to be completed. And so insofar as that continues to be their position, then we need the discovery now. Again, if they are going to change that sort of way in which they wanted to manage the litigation schedule, then perhaps we can revisit.

As to the Court's second question, there is some overlap, your Honor, with the new motion. At least insofar as the facts of that motion demonstrate that there has been -- to sort of answer the Court's last question to me, which is, why do you need more than what they have chosen to disclose? I think the facts of that motion -- and I know the Court is going

to look at them very carefully in deciding that motion, but the facts that we lay out there show Ripple trying to essentially game the attorney-client privilege that they have and disclose the information that's helpful to them, claw back the information that's not helpful to them. And this is why we refer to sort of fairness principle more broadly in our submissions in connection with this motion, and answers the Court's previous question to me, why do we need more? It's because Ripple has chosen so far and they have remained in control over what they disclose, and even when they disclose it, and then when they have seen that it is something doesn't help them, they claw it back. They should be subject, your Honor, to an order that says that all of this information is discoverable and that it's been put in issue by their defense.

Thank you.

THE COURT: All right. Thank you.

(Court and staff confer)

THE COURT: I will turn to Ripple. Mr. Rapawy, are you going to take the lead here?

MR. RAPAWY: I am, your Honor. For the court reporter's benefit, Gregory Rapawy, for Ripple Labs.

THE COURT: Thank you.

MR. RAPAWY: Your Honor, Ripple -- I'm sorry?

THE COURT: I just said thank you.

MR. RAPAWY: Oh. Excuse me.

THE COURT: You can continue.

MR. RAPAWY: Your Honor, Ripple has not -- very good.

Your Honor, Ripple has not waived its attorney-client privilege. That privilege, as the Court knows, is vital to protect clients' candid disclosures to attorneys and attorneys' candid advice to clients.

The rules that govern the waiver of that privilege, because it is so important, should be clear, so that clients can make knowing and intelligent decisions on whether to waive or preserve the privilege.

Now, here, the SEC is tasking the Court to declare an extraordinarily broad waiver. Here it is a privileged communication that is extending into the SEC's own investigation.

They originally, I believe, made two arguments in support of that. One of them was the selective disclosure doctrine from *von Bulow* and the other is at-issue waiver from *Bilzerian*. In their reply, they said that they were not arguing selective disclosure at all. In the argument today it sort of sounded like that point had come back a little bit. But I will take them at their word that they are not arguing selective disclosure. If they were, for the reasons stated in our letter, it would be foreclosed by the Second Circuit's *von Bulow* decision. We are not dealing with any selective disclosures in litigation here. We are dealing with

pre-litigation disclosures, and *von Bulow* forecloses that argument entirely.

The at-issue waiver argument deals only with the situation where the client has put the legal advise it received from its attorneys at issue in litigation, and Ripple has not done that. And to be clear, the focus is whether the party claiming privilege has put the communications at issue. It's not enough that the adversary would like to use them or put them at issue, and it is not enough that they are merely relevant to a claim or defense. And we take that from the Supreme Court -- the general rule from the Supreme Court's decision in *Salerno* that you don't forfeit the privilege merely because it might contradict your position. And I believe the Second Circuit's decision in *County of Erie* essentially took the same analysis and applied it to the attorney-client privilege waiver context. And that has to be the rule because privileged communications are very frequently potentially relevant. Clients talk to attorneys all the time about facts that then become the subjects of litigation. That's part of what we want to protect. That doesn't in and of itself create a waiver.

The two classic ways to put privileged communications at issue are, of course, the advice-of-counsel defense, which literally makes privileged advice defense and a good-faith defense which, under *Bilzerian*, is considered to be an

affirmative contention about state of the defendant's mind and therefore puts at issue what the client heard from their attorney that might have informed their state of mind.

But there is no advice-of-counsel defense or good-faith defense to a primary section 5 violation. Section 5 is strict liability.

THE COURT: Sorry, Mr. Rapawy. Sorry. Sorry. Can I just ask everybody who is not Mr. Rapawy to mute your phones so we can get rid of some of the background noise. Thank you.

All right. Continue.

MR. RAPAWY: Thank you, your Honor.

So section 5, strict liability, it doesn't matter that we wholeheartedly believed and believe now that XRP is not an investment contract. If the finder of fact disagrees with us on that, we will still be liable. And it also doesn't matter if our attorneys told us that it was an investment contract or if they told us that it wasn't or if they told us that they weren't sure. None of those things will help us make out the defense we are trying to make out. Instead, our defense is fair notice under *Upton*, and that focuses on whether a reasonable person of ordinary intelligence could have learned whether the conduct was prohibited not on the particular state of mind that Ripple had.

There are some similarities, I think, to the void for vagueness argument. I think *Upton* certainly cites some void

for vagueness cases, but we do think it is sort of evolution or distinct branch of the doctrine, not a void for vagueness argument as such and that, of course, is the subject of the motion to strike that is currently pending before Judge Torres.

The controlling authority here is *Upton*. I think that, properly read, *Upton* makes clear that a fair notice defense does not turn on subjective beliefs or awareness, and I think if you look at the part at the end that was discussed in the SEC's argument, the informal warning that the firm received from a Stock Exchange examiner that the disputed practice "violated the spirit of the rule" and was "being looked at closely by the regulatory bodies," and then the Second Circuit goes on to say, well, that's not enough, that doesn't give you -- that did not -- that doesn't give you fair notice, that is a pretty clear statement that advice that's received is not the subject of this defense. Whatever -- in that case it happened to be advice from the examiner, but I don't know why advice from a lawyer would be any different. It's not the kind of fair notice we are concerned about in the *Upton* line of cases.

And I think our position is also supported by the *County of Erie* case, which we raised in our letter, and the SEC did not address in reply, and that case involved qualified immunity, so it is not squarely on point, but it did hold that an argument that the law was not clear does not put legal

advice or the defendant's state of mind at issue, and we think the same principle should apply here.

And your Honor asked whether we had anything that was really squarely on point. I do have one case for you. I apologize that it is not in our letter. I learned of it after the letter was filed. It is from the Eastern District of Ohio, *United States v. Ohio Edison Company,* 2002 WL 1585597. And because we didn't have that in our letters, I don't want to argue it, but I will just put that cite there for the Court's attention. I think it is responsive to your question, and I think it coheres with the points that we are making today.

Now, the SEC has cited a couple of decisions that I would like to address for the first time in their reply letter, and that they have cited for the proposition that a fair notice defense does require good faith, and in particular they relied on the *General Electric* case from the D.C. Circuit and the *Exxon Mobil* case from the Northern District of Texas. And to be clear, there are two *Exxon Mobil* cases. One of them is from DC in the '80s and the other is more recent from Texas.

But the ones that they cite that use the phrase "good faith" are talking, in my view, pretty clearly about the good faith of a hypothetical regulated party. So if you look at page 1329 of line 53 F.3d, it's the *General Electric* case, you will see that the -- that the full statement of the inquiry from Judge Tatel is "whether, by reviewing the regulations and

other public statements issued by the agency, a regulated party acting in good faith would have been able to identify the prohibited conduct." And the "would have," I think, is key, because that makes clear that you are talking about a hypothetical objective party, you are not talking about the knowledge of an actual existing party.

(Continued on next page)

MR. RAPAWY: In any event, regardless of your reading of General Electric or -- and the Exxon Mobile case from the Northern District of Texas just followed General Electric. It is the same analysis.

But Upton is controlling here. Upton was 25 years ago. Nobody has found one case that says that an Upton defense puts state of mind at issue, and we would respectfully suggest that this is not a good case to be the first, your Honor.

A couple of points that I would like to address that the SEC raised during their argument. One argument is that the way that we have argued our defense puts our state of mind at issue, regardless of whether Upton is objective or subjective. I don't agree with that characterization of our arguments.

I will not go through point by point, but I think if you look at their citations, you will find that were are consistently referring to the notice that would be available to a reasonable market participant or member of the public. That is the objective standard; it is not a subjective standard.

Now, to be clear, Ripple is a market participant. And so in that sense, you know, Ripple's communications, even their internal communications, could be relevant because they would be evidence of what a reasonable market participant would have seen. But that does not put at issue Ripple's particular state of mind, and so it is not enough to create a waiver under Bilzerian. The ultimate question is objective, and an ultimate

goal would be the same for Ripple or anyone else who is participating in the market.

On the question of internal communications, there is a theme that comes through in the letters and we heard it again this morning, that we are being inconsistent for seeking discovery of their internal communications but withholding ours. I don't think there is any inconsistency at all.

To be clear, we have not, at any time, resisted discovery of our non-privileged internal documents as being somehow irrelevant. We have produced those where they are responsive. And, in fact, the discovery they have received from us has been much broader than the discovery that we have received from them, because discovery of them, as the court knows, having been your Honor's ruling, excludes informal internal e-mails, and to lessen the burden on the agency, we, of course, do not have any similar protection and we haven't asked for one.

So I would say both parties' internal communications are potentially relevant to the fair notice defense. Neither parties' internal communications are at issue and, therefore, there is no waiver.

On the subject of whether actual notice is a bar to a fair notice defense. I do not think the cases they rely on support a rule that raising fair notice waives the privilege. They have two. These were, again, raised for the first time in

their reply. One of them was the Backlund case from the Ninth Circuit. And I think, as was almost sort of conceded before, the agency specifically told one of the individuals there he was violating the law. And the other one had a communication with the agency where he asked for and didn't get the required permit.

So under those circumstances, I think that is a very different kind of actual notice argument than the argument, well, your lawyer might have told you that you were breaking the law, which is an argument that could be made about any defendant in any case.

The Washam case from the Eighth Circuit actually did not technically decide the actual notice issue. It said the rule was clear and commented in dicta that the fact that the defendant told customers how much to ingest of the chemical, where the label said not to ingest it, indicates that he knew perfectly well what he was doing. I think that was a fair observation. I don't think that had anything to do with this case.

In any event, we are again under Upton here in the Second Circuit, and I do think Upton, properly read, rejected an argument that advice was or could be relevant.

I don't want to spend a lot of time on your Honor's opinion in Chipotle, because you know it better than I do. But very briefly, our reading of that case is that those were

explicit statutory good faith defenses. That is clearly under Bilzerian. Our defense is not a good faith defense, and it is certainly not the defense where there is a statute that explicitly says you have to -- explicitly, excuse me, says that you have to show good faith, which is what you were dealing with in this case.

THE COURT: At this point, can you address -- I think it is related to what you're talking about now -- the argument that the SEC raised that your individual defendants -- who I know are not your clients -- are raising a good faith defense, and that in your applications and letter briefing to Judge Torres, you have suggested that the evidence will be the same for both of those defenses?

MR. RAPAWY: So I think that the argument there, your Honor, is that some of the same evidence is relevant, not that the -- and I will clarify a little bit further. I can't say whether the defendants, if and when they answer, will raise an affirmative good faith defense. That's not my decision to make, and it may never come to pass.

I can say that to the extent that the defendants are saying that the SEC hasn't met its burden to show that they acted recklessly or with knowledge that they were violating the law or aided and abetted with that knowledge. To the extent they are making that argument, that is not a good faith defense. That is, instead, a claim that -- it is a mere denial

of a culpable state of mind. And if you go to the Bilzerian case in particular, at page 1293, it says that the district court's ruling did not prevent the defense from urging lack of intent.

So, again, we don't know what they are going to plead. We won't find that out until later. But to the extent that what they are going to argue is the SEC can't prove lack of intent because in 2013, 2015, 2017, maybe right up until this case was filed, nobody knew what the law required. No one knew what the law required. That would overlap with our defense, perhaps, it would negate recklessness, but it would not be a good faith defense.

I hope that is responsive to your Honor's question.

THE COURT: Yes. Thank you.

MR. RAPAWY: I wanted to touch briefly on the Exxon case, the DC one that came up a couple of times.

I think, properly read, that is just another good faith case. To the extent that there is some reasoning in it that maybe goes a little bit further, I would point out that it relies extensively on the Hearn case from the Eastern District of Washington, 1975. And I think that the Second Circuit made clear in the County of Erie case that while Bilzerian is certainly still good law, Hearn is not a reliable guide for waiver of privilege in this circuit.

So to the extent that your Honor were to read that

1980 DC case against Exxon as supporting their position in terms of its logic, I think you should look to County of Erie and determine that that is not analyzing the law in the way that it should be analyzed in this circuit today.

Very briefly, a few additional points. The point of the disclosure before the litigation came up several times. I do think that is foreclosed by von Bulow because it is pre-litigation disclosure. There has not been any showing that we disclosed anything during investigation, that had not previously been disclosed before the investigation began or during the litigation.

I understand that there is another letter pending about, you know, with an argument about an act that was made. I would respectfully ask your Honor to put that one to the side. We have not had an opportunity to respond to that letter yet. We don't agree with their statement of the facts. We don't agree with their characterization of our position. I don't think it would be prudent of me to try to respond to that entire letter orally in this hearing. And so I would ask your Honor just to deal with that one when it is fully briefed.

THE COURT: Can I ask you to just go back a little bit to the top here.

You know, one of the questions that I asked Mr. Tenreiro was to explain to me why he believed he needed to test your position that there was not fair notice, and that the

only way to test that is to see whether or not your own lawyers were telling you what the state of play was.

I would like you to respond to Mr. Tenreiro's arguments in response to my question.

MR. RAPAWY: Yes.

So I think that the arguments as to why -- I mean, there are a couple of -- well, let me try to unpack.

What I think I heard him saying -- and I don't want to mischaracterize. what I think I heard him saying was that if, you know, we influenced the market through putting communications out there, then that necessarily would allow them to go back to see what advice we were getting from our lawyers contemporaneously to determine -- I mean, it is not entirely clear to me what that would necessarily show. Because at the end of the day, the statements that were made to the market are the statements that were made to the market.

Now, as we said with regard to the internal communications, they can get our internal communications to find out more evidence about the statements made to the market that might have affected those market perception, as long as they are non-privileged.

But what was --

THE COURT: I think what they were saying, in part, was that if you were saying to the exchanges, it's fine, we are not a regulated security, you can trade us, etc., and therefore

you were affecting the marketplace by putting that proposition into the marketplace, but at the same time you're receiving counsel saying, no, no, no, you're a security, you should not be trading in this manner. And so you might have been manipulating that market.

(Indiscernible speaking)

I don't know who that is. If you can mute your phone, please.

Ms. Slusher, I don't know if you can tell who that is from your end and mute, if that is possible.

Mr. Rapawy, I think the argument that the SEC was making was that you may have been affecting the marketplace in a biased way by revealing only some information and withholding other information that might have moved the market differently.

MR. RAPAWY: OK. Two responses to that.

I mean, first, of course, obviously we're not revealing the privileged communications here, so it is difficult a little bit for me to address the speculation about what advice we might have or might not have received.

But, in general, I think von Bulow is very clear that alleged selective disclosure or alleged selective disclosure before litigation, even if it is arguably unfair, does not create a subject matter waiver.

My second response to that would be that I think it goes to the point that the Supreme Court made in Salerno, which

is the possibility that privileged communications might contradict a party's position. I think the hypothetical, which we don't acknowledge to be true, that Mr. Tenreiro had sketched is an argument that the privileged communications, if revealed, might contradict our position. That is not enough to forfeit the privilege, because the privileged communications themselves aren't directly at issue and because any party could say that about the other side in any case.

And not necessarily, you know, in any case, where you're trying to prove the other side say that mine is part of your affirmative case, you could say, well, their lawyers might have told them something that is helpful to me. I want to see it. We don't know whether their lawyers told them something helpful unless I can see it.

And that is just not enough. It would be fair too broad, and it would allow parties to effectively pierce the other side's privilege without the -- decide that holds the privilege ever affirmatively putting that material in issue.

THE COURT: Thank you.

Anything further?

MR. RAPAWY: Not unless your Honor has any further questions.

THE COURT: Thank you.

Mr. Tenreiro, anything you would like to say in response?

MR. TENREIRO: Yes, your Honor, briefly. This is Jorge Tenreiro. I appreciate the court's indulgence. I do have some points to respond to.

Counsel started by saying that they have not put the legal advice that Ripple received at issue in this litigation, and I would just like to highlight, while that is both not true and also not relevant.

And one more time I would like to quote from Chipotle where the court said, "Courts have recognized that a party need not explicitly rely on advice of counsel. Instead, advice of counsel may be placed at issue where a party's state of mind, such as his good faith belief in the lawfulness of his conduct, is relied upon in support of the claim or defense."

That is from Chipotle, and as a matter of fact, now I'm going to read from their opposition for our motion to strike. They say, "The October 2012 memo supports Ripple's fair notice defense through its" -- and then they redact what portion of it, and then we are obviously debating whether these parts should be redacted or not. I don't need to read it. The Court can read it. It's at page 19 of their opposition. They explicitly say the memo supports Ripple's fair notice defense. So the very first State of that they make is not true and it is not relevant.

They also say, your Honor, that in this case, it doesn't matter -- you know, I'm not purporting to quote now,

and I don't want to mischaracterize what he said, but in sum and substance he said, it doesn't matter if we believed that it was an investment contract or that it was not an investment contract. If that is true, your Honor, then I would ask him to withdraw the affirmative defense. Because in the very second paragraph they say, "Countless market participants for years transacted in XRP believing it was not an investment contract."

So they can't come to the court now and say it doesn't matter what we believed and tell the court this is the heart of our affirmative defense. That is how they are making the defense, your Honor. And they can't now, you know, sort of contradict that.

I'm very familiar with the Ohio Edison case from, I think, the District of Ohio. Your Honor, the court is going to look at that case, and if the court has questions about that case, since it was not raised, you know, we would ask for an opportunity to submit something in writing, but I can address it now.

There, the court said that the defenses raised in that case were routine defenses to a governmental enforcement action. I'm quoting from the decision. The court said these are, sort of, traditional unconstitutional vagueness, estoppel defense.

When the court asked defense counsel if they were asserting that defense, he said very artfully, he said, this is

not a individual for vagueness as such defense. So Ohio Edison is fine, but if they were making the void for vagueness defense, we would have no argument. But they won't say that that is the defense they are making because it is not in. Again, your Honor, I submit that the reason they are not making the defense as a void for vagueness defense is because they would lose.

Briefly, on County of Erie and Hearn. I think this court in Chipotle recognized that County of Erie didn't deal with Bilzerian, but simply dealt with the specific type of defense which was qualified immunity.

County of Erie and Hearn. This court, Judge Netburn, this court in Chipotle recognized that County of Erie didn't sort of upset the Bilzerian fairness rule, and the sort of fairness principle still applied. County of Erie dealt with a very specific qualified immunity type defense that is not at issue here.

So they want to say, well, you know, County of Erie, sort of calls into question Hearn, and to the extent that the Exxon case in the DC -- in the District of Colombia relied on that. That is called into question. But the fact is the Second Circuit relied on that DC case in Bilzerian and cited it approvingly in sort of its holding that when the party raises their state of mind, there's been a waiver.

Now, defense counsel also concedes, your Honor, that

Ripple's internal communication about whether they believed XRP was a security or not would be relevant. They cannot answer. If that is true, why wouldn't the communications from lawyers be discoverable. All they say is, well, that is because they are privileged. But that is circular, right. We are here because it is not proper for them to assert privilege, you know, over those communications once they put their state of mind at issue. We're not arguing that we get to see them because they are relevant. We are arguing we get to see them because they are relevant to their defense, as they have couched that defense as, again, not a void for vagueness as such defense.

Finally, your Honor, they say, well, Chipotle is based on a statutory defense. That is fine. That is true. This is a constitutional defense. They point to Upton, and there is no reason why the court, as in Chipotle, can't look to case law that interprets this constitutional defense. And the General Electric case and the Exxon -- the other Exxon case, the Nugent case, both talk about how you have to be acting in good faith. Otherwise, you can't just come in and say, I was confused, but not have good faith. So there is no statute for the court to look at here, as in Chipotle for sort of what the elements of the defense are, but there is judicial doctrine that sort of establishes what the defense is.

Defense counsel said -- and I think this is one of my

last points, your Honor -- they said nobody knew what the law required. That is not true. Their lawyers knew. 2012, they told them. In 2012, they said, you could be a security. Here is Howey. Here is Reeves. Here is -- you know, their lawyers knew from the very beginning.

And so for them to now come and say to the court, Nobody knew, and leave us unable to rebut that by showing all of the advice that they got, not just what they selectively disclosed to third parties, is fundamentally unfair and fundamentally against the fairness principle, as recognized in this circuit.

Finally, your Honor, they cannot address the last point which the court raised about, you know, if we look at objective views in the market, that is fine. But the question is, did they unfairly influence the market? They don't have a response to that.

And if they are making the argument that the objective views of market participants are relevant -- and, by the way, not just to their defense. They are saying it is relevant to Howey itself. Right? If a market participant said or thought, Oh, no, this isn't a security under Howey, they also say that we should lose.

OK, well, if they thought that it was a security under Howey because they were told that, that goes to that defense. And, again, under the fairness principle, we should be

permitted to see that advice and those communications.

Thank you.

THE COURT: Thank you very much.

All right. As always, excellent arguments from the lawyers. Thank you very much for that.

I'm going to take this all under advisement. I understand that the rulings affect discovery, which is quickly approaching, so I will do my very best to get something out in writing as soon as possible.

All right. I think with that, we are adjourned.

MR. TENREIRO: Your Honor, this is Jorge Tenreiro, if I might interrupt the court.

I wanted to raise an administrative issue. Ripple had filed a motion to seal certain documents at docket 176, and we would like to make an oral application for our response to be due next Friday.

We have received their consent over e-mail, and rather than burden the court with more letters, I thought I would just take a shot and ask the court at the end of the conference.

THE COURT: Application granted.

MR. TENREIRO: Thank you.

THE COURT: Anything further from either side?

(Pause)

Great. All right. With that, enjoy your weekend, everybody. Thank you. We're adjourned.