UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
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NEW YORK
REGIONAL OFFICE

December 8, 2021

VIA ECF
Hon. Sarah Netburn
United States Magistrate Judge
Southern District of New York

Re: *SEC v. Ripple Labs, Inc. et al.*, No. 20-cv-10832 (AT) (SN) (S.D.N.Y.)

Dear Judge Netburn:

Pursuant to the Court's December 3, 2021 Order (D.E. 403), the SEC respectfully submits this supplemental brief opposing Defendants' Motion to Compel (D.E. 289), in light of the Second Circuit's decision in *Natural Resources Defense Council v. EPA*, No. 20-cv-422, 2021 WL 5549405 (2d Cir. Nov. 29, 2021) ("*NRDC*"). This recent decision bolsters the SEC's assertion of the deliberative process privilege ("DPP"), particularly over the documents submitted for *in camera* review. *NRDC* reaffirms that an agency need not connect its records to a "single, discrete decision" to assert the DPP. Instead, the agency may identify a broader "decisionmaking process" to which the records relate. Because all of the withheld documents are connected to an identified decision or decisionmaking process, the DPP protects them all from disclosure. Further, *NRDC* shows that the SEC's internal communications about the content of speeches and other public-facing communications are "messaging records" protected by the DPP.

I. The DPP Provides Broad Protection for Policy-Oriented Deliberations that Reflect an Agency's Decisionmaking Process.

In *NRDC*, the Second Circuit adopted a clear test for determining whether a document is predecisional: "[W]e hold that a record is predecisional if it relates to a specific decision *or a specific decisionmaking process* and was generated before the conclusion of that decision or process." *NRDC* at *10 (emphasis in original). The court rejected the suggestion that an agency must "identify a specific decision in connection with which" a document was prepared to obtain DPP protection. *Id.* (internal quotations omitted). "To the contrary, [a]gencies are, and properly should be, engaged in a continuing process of examining their policies, and courts should be wary of interfering with this process." *Id.* (internal quotations omitted).

The court's express instruction that an agency's "continuing process of examining [its] policies" is a basis for assertion of the DPP fatally undermines Defendants' argument that the SEC's ongoing deliberations regarding the regulation of digital assets are somehow outside the scope of the DPP because they continued over a number of years. *See, e.g.*, Ex. A (Tr. of Aug. 31, 2021 Hrg. at 12 (defense counsel arguing that the SEC could not take the position that "going back to 2013 and continuing through today, the SEC has continuously deliberated on the issue of whether – not just Ethereum, but also Bitcoin, and . . . XRP are securities")); D.E. 289 at 5. The deliberations reflected in the withheld documents are part of the SEC's ongoing decisionmaking processes relating to the SEC's efforts to regulate and enforce the securities laws in the digital assets space.[1]

[1] Defendants argue that the SEC has never stated that it "commenced a policy process addressing whether to regulate digital assets as securities." D.E. 363 at 6. But *NRDC* shows that an agency's policy-oriented decisionmaking processes

In reaching its holding, the Second Circuit reiterated that the "key question" in determining whether the DPP applies to an agency's deliberations is "whether disclosure would tend to diminish candor within an agency": "This concern with 'diminish[ing] officials' candor or otherwise injur[ing] the quality of agency decisions' arises when an agency is compelled to disclose 'materials [that] can reasonably be said to embody an agency's policy-informed or -informing judgmental process' or its 'mode of formulating or exercising policy-implicating judgment.'" *NRDC* at *4 (quoting *Petrol. Info. Corp. v. US. Dep't of Interior*, 976 F.2d 1429, 1435–36 (D.C. Cir. 1992) (R.B. Ginsburg, J.) & *3 n.4; *see* D.E. 388 at 2–3.

Applying this "policy-oriented judgment proviso," the court clarified that documents that were "prepared to help the agency formulate its position," and which reflect "the give-and-take of the consultative process" are protected by the DPP. *Id.* at *4 (internal quotations omitted). By contrast, the DPP does not protect "peripheral" decisions—decisions that are "mundane, standard, or routine, and over which the agency has no significant discretion," such as "which conference room to use for a press briefing" or "what time of day an agency spokesperson will be available." *Id.* at * 5, 8. Defendants' argument that the SEC's deliberations about the regulatory status of digital assets reflect "routine agency business" as opposed to "policymaking" (D.E. 363 at 5–6), is unequivocally contradicted by the Second Circuit's articulation of the policy-oriented judgment standard. The deliberations reflected in the withheld documents—involving the applicability of regulatory frameworks to the complex and evolving digital assets space by the SEC and other regulatory and law enforcement agencies—are precisely the type of frank and open discussions that would be chilled by compelled disclosure.

As the Second Circuit noted, courts "accord[ ] a presumption of good faith to an agency's [a]ffidavits or declarations, and when an agency provides reasonably detailed explanations to support its decision to withhold a document, its justification is sufficient if it appears logical and plausible." *NRDC* at *3. Here, the SEC has provided logical and plausible explanations to support its assertion of the DPP over each document at issue (*see* D.E. 300-3, 351, 388)—far beyond "simply connect[ing] a record to a topic within its purview." *NRDC* at *9 n.14; *see also* Ex. A at 15 (defense counsel stating "no one is asserting any bad faith" in connection with the SEC's privilege determinations). Specifically, as outlined in the SEC's prior submissions (D.E. 351 & 388), the handwritten notes reflected in Entries 1(A) through 1(Q) discuss matters relevant to a number of sensitive decisions or decisionmaking processes, including [redacted]. Similarly, Entry 2 contains the preliminary views of SEC staff members about [redacted]. Entries 3 to 5 reflect deliberations with other federal agencies about how to apply the laws each agency is tasked with enforcing to the digital asset space. The redacted portions of Entries 6 and 8 contain SEC staff's preliminary legal analyses of the application of the securities laws to digital assets. Entry 10 consists of highly confidential assessments of [redacted]. Additional Document 3 contains deliberations about a market participant's request for possible no-action relief from the SEC, including deliberations on whether offers and sales of the asset at issue constituted securities transactions. These documents relate to important, sensitive

need not be as narrow as Defendants suggest. The SEC has repeatedly explained that during the time period at issue it was considering a broader question: the regulation of digital assets under the U.S. securities laws, *see. e.g.*, D.E. 388 at 1—a matter that is at the core of the agency's policy mandate.

policy-oriented decisions or decisionmaking processes over which the SEC and its counterparts across the government should be able to deliberate with the utmost candor, and as such they are protected by the DPP. [2]

II. The DPP Likewise Protects "Messaging Records"

NRDC also makes clear that the DPP applies to "messaging records," defined as "records relating to an agency's decision about how to communicate its policies to people outside the agency." *NRDC* at *3. The DPP applies to such records regardless of whether the communications relate to "a finalized policy or to one not yet conclusively determined." *Id.* An agency "exercises 'policy-oriented judgment' when communicating its policies to people outside the agency" and therefore those "records reflecting deliberations—as opposed to merely descriptive discussions—regarding those decisions are protected by the [DPP]." *Id.* at *8 (internal quotations omitted).

Specifically, the Second Circuit found that "draft talking points prepared for senior agency staff" and "internal discussions and draft responses relating to [outside] inquiries" implicate the agency's policies and, therefore, involve "the formulation or exercise of policy-oriented judgment." *NRDC* at *4–5. Similarly, "[r]egardless of whether the agency has definitively determined the relevant policy, its decision about how to communicate that policy does not constitute a mundane, standard or routine decision over which the agency has no significant discretion" such as "which conference room to use for a press briefing." *Id.* at *5 (internal quotations omitted). Rather, where communications "reflect[ ] discussions about what to say … or how to formulate the message… [and] reflect the views of agency staff, not the ultimate communications decision," they are "predecisional and deliberative." *Id.* at *8.

The documents found in Entries 9 and 11 to 14 are protected "messaging records" under *NRDC*. These documents consist of draft talking points and Q&A for future speeches by the then-SEC Chair and the then-Director of the SEC's Division of Corporation Finance, Bill Hinman, as well as a draft of Director Hinman's June 2018 speech regarding, among other things, offers and sales of Ether. Similarly, Additional Document 1 reflects internal debate about the structure of an SEC public forum, as well as SEC staff views on appropriate panelists. Additional Document 2 reflects staff views about whether meeting with certain outside parties would be useful to the staff's deliberations about the SEC's regulatory approach to digital assets. *NRDC* flatly rejects Defendants' arguments that the SEC's assertion of the DPP over communications about public messaging are "facially incredible" or that related "SEC staff's 'deliberations' are not privileged." D.E. 400 at 2. To the contrary, the DPP protects such messaging records in order to "ensure[ ] that agency staff can consider communications decisions candidly and thereby promote[ ] efficient government operation." *NRDC* at *5 (internal quotations omitted).

For the reasons set forth above and in the SEC's prior submissions, the Court should deny Defendants' Motion to Compel.

[2] Defendants have argued that DPP protection does not apply unless the records were intended to assist the final SEC decisionmaker (the five-member Commission) in arriving at a decision. D.E. 363 at 8. In *NRDC*, however, the Second Circuit included no such requirement in its analysis of the documents at issue, which included records "created to brief senior agency staff" and "provide[ ] [a] senior manager with information and supporting documentation in response to her questions and comments." NRDC at *10.

Respectfully submitted,

/s Ladan F. Stewart

Ladan F. Stewart

cc: Counsel for All Defendants (*via* ECF)

Exhibit A

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

Plaintiff,

v. 20 CV 10832 (AT)(SN)
Remote Conference

RIPPLE LABS INC., et al.,

Defendants.

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New York, N.Y.
August 31, 2021
12:16 p.m.

Before:

HON. SARAH NETBURN,

Magistrate Judge

APPEARANCES

SECURITIES AND EXCHANGE COMMISSION
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BY: MICHAEL K. KELLOGG

bring in this case. And by bringing that case here, in the civil case, that does open them up to exploration of what was objective in the marketplace and was it so obvious that XRP was a security. And it is that charge, we believe -- in addition, your Honor has found that *Howey* fair notice also rendered these documents relevant for that purpose, but, really, it's that aiding and abetting charge and the recklessness inquiry that makes these internal documents so potentially highly probative and so critical to the defendants' defense of this case, and, really, that is the critical distinction from this criminal case in *Zaslavskiy* along with all the other factual distinctions as well.

And, again, these documents, we believe, will be highly, highly exculpatory because it wasn't so obvious to the SEC that XRP was a security.

THE COURT: Let me switch gears now and ask you some questions about the deliberative process privilege. Again, I'm going to ask Mr. Tenreiro these same questions.

In reading the SEC's opposition, they seem to make the argument that the deliberative process privilege doesn't need — I think this is the argument they make — doesn't need a specific decision, that you can be predeliberative, but you don't necessarily need to identify specifically what the decision that was being deliberated is, and they cite to a FOIA case, the NLRB case, for that proposition.

And so I wanted to get your read on whether or not you believe that the deliberative process privilege requires that the Court find the decision in order to determine what is predeliberative -- or, excuse me, predecisional, or whether or not there is case law that supports the proposition that an entity can be sort of in perpetual deliberation. Obviously, I'll give Mr. Tenreiro an opportunity to be heard to the extent that I am overstating the SEC's position, but, for now, if I could ask you to just tell me what you believe the law is with respect to the deliberative process privilege.

MR. SOLOMON: Sure.

I think that an agency cannot be in a perpetual state of deliberation. I haven't seen a single case, your Honor, where any court has accepted the kind of breathtakingly expansive claim of deliberative process that's being made here. And, basically, I think Mr. Tenreiro will tell you this straight up, as he articulated to us several times, they're taking the position that going back to 2013 and continuing through today, the SEC has continuously deliberated on the issue of whether -- not just Ethereum, but also Bitcoin, and, I guess, concluding at least in December 2020 for some sales purposes, XRP are securities. That's their position. They were deliberating back in '13. That continued in the ensuing eight years, and it still continues today.

I think there is case law for the proposition — and I

think Mr. Tenreiro cited that in his opposition — that some courts don't require there to be a specific identifiable policy that was actually enacted, but what courts do require is that for each document that is allegedly part of a deliberative process, that that document needs to be tied to an actual process, that has to be articulated, and the document has to be prepared in order to assist the decision-maker in arriving at an actual or potential decision. And that's what's missing here. I think what the SEC is trying to say is, it's all one big long deliberation, but we're only going to give you platitudes, and this is the Tallarico declaration. I don't mean this in a pejorative way, but if you look at that declaration, your Honor, it is very boilerplate, it is extremely high level, it is basically we are looking at how and whether the -- whether digital assets generally should be regulated by the SEC. And I don't think the case law goes so far as to permit that kind of expansive definition of deliberative process.

I would point your Honor to the *Yorkville* case, where Judge Pitman makes this very point. He basically says, look, you can't just say everything is deliberative, you actually have to tie those deliberations if not to a specific policy, because policies may not actually end up being enacted or policies may -- one policy may stop, and then there may be another policy that picks up and begins. So it isn't that

there has to be a specific policy you can point to for DPP to apply, but each and every document, with specificity, has to be tied to a policy-making process that is predecisional, and it is deliberative. And, frankly, we don't think the SEC has made that showing based on their overbroad assertion, we believe, based on the Tallarico deposition -- or the Tallarico declaration, and then based on the case law, which basically says, look, there's a bias in favor of transparency, not secrecy. The government has the burden of drawing the lines, the government has the burden of delineating what is predecisional, what is deliberative. But, frankly, I think that just hasn't been done here, which is part of the reason why, your Honor, we don't think -- even though we're sitting here on the last day of fact discovery, we don't think it's premature that we're before your Honor on this question, because this has been their position for weeks, we've asked them are we going to get any documents, and they've made very clear, we're going to assert a deliberative process privilege over every single responsive document of the Court's two orders.

Now, they've come off that after we filed our motion, and 40 documents that were previously denominated as protected by the DPP no longer are; however, 29 of those documents are still being withheld from us on the basis of other privileges — attorney-client privilege, work product privilege — and, your

Honor, of the 40 documents that they came off the DPP on, 11 of those have been produced, but only in heavily redacted form. And I would say to your Honor that this is really -- when you look at the case law and you look at the standards that the SEC ought to be held to in declaring this privilege, it is relevant that they have now abdicated their initial position on 40 documents. On 11, they appear to be maintaining it. Even on those 11, there's very heavy redactions, but on the unredacted parts of the 11, your Honor, it's not a close call at all. There's nothing deliberative about the information in those 11 documents. And that's what gives us pause, and no one is asserting any bad faith. What's happening here is a difficult process. We've been through the ringer ourselves, Ripple and the individuals, in carefully putting forth privilege logs, we've been challenged on them, I've been challenged on them. This is part of litigation, but, here, I think it is ripe for your Honor because they are implacable in their broad-based assertion. It was only once we challenged, that they came off any documents, and even the ones that they've come off, it's very clear, we believe, that the deliberative process assertion is still grossly overbroad given what the law provides.

So that's sort of the first step in the process, your Honor. We think it is way overbroad, the way it's asserted, and on that basis alone, your Honor is empowered to order disclosure of all of these documents, and other courts have.

THE COURT: Thank you.

Mr. Tenreiro, as promised, I'm going to turn to you now. So why don't we take these issues in the order in which I addressed them with Mr. Solomon and begin with my question about the reckless standard and whether you agree that that's an objective standard, and, if so, how you reconcile that with the view that the potential uncertainty within the agency would not be probative as to whether the individual defendants were objectively reckless in their conduct.

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

I think that the most interesting thing about Mr. Solomon's answer in that regard is that he cites the *Novak* case. The *Novak* case is a fraud case, a 10b-5 case, and then he spent the rest of his argument on this question distinguishing fraud cases and *Zaslavskiy*, which was a securities fraud case. So I'm having a little bit of trouble understanding when fraud cases are relevant to our analysis and when they're not.

To answer the Court's question, even if the test is objective, no objective outsider would have insight to internal SEC deliberations, and I fundamentally disagree with Mr. Solomon's statement that their knowledge of the law is what's at issue here. That's the standard that they want to propose, and that's what's at issue before Judge Torres. I