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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 CV 10832 (AT)(SN)  
Remote Conference

8 RIPPLE LABS INC., et al.,

9 Defendants.

-----x  
10 New York, N.Y.  
11 August 31, 2021  
12 12:16 p.m.

13 Before:

14 HON. SARAH NETBURN,

Magistrate Judge

15 APPEARANCES

16 SECURITIES AND EXCHANGE COMMISSION  
17 BY: JORGE G. TENRERIRO

18 CLEARY GOTTLIEB STEEN & HAMILTON LLP  
19 Attorneys for Defendant Garlinghouse  
20 BY: MATTHEW C. SOLOMON

21 PAUL WEISS RIFKIND WHARTON & GARRISON LLP  
22 Attorneys for Defendant Larsen  
23 BY: MARTIN FLUMENBAUM

24 DEBEVOISE & PLIMPTON LLP  
25 Attorneys for Defendant Ripple Labs, Inc.  
BY: MICHAEL K. KELLOGG

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1 (The Court and all parties appearing telephonically)  
2 (Case called)

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

6 MR. TENREIRO: Good afternoon, your Honor. This is  
7 Jorge Tenreiro, on behalf of the SEC.

8 THE COURT: Good afternoon, Mr. Tenreiro.

9 THE DEPUTY CLERK: And on behalf of --

10 THE COURT: Thank you.

11 THE DEPUTY CLERK: I apologize, your Honor.  
12 On behalf of Defendant Garlinghouse?

13 MR. SOLOMON: Good afternoon, your Honor. It's  
14 Matthew Solomon, on behalf of Mr. Garlinghouse.

15 THE DEPUTY CLERK: And on behalf of Defendant Larsen?

16 MR. FLUMENBAUM: Good afternoon, your Honor. This is  
17 Martin Flumenbaum, Paul Weiss Rifkind Wharton & Garrison.

18 THE DEPUTY CLERK: And on behalf of Defendant Ripple  
19 Labs.

20 MR. KELLOGG: Good afternoon, your Honor. This is  
21 Michael Kellogg, counsel for Ripple Labs, Inc.

22 THE COURT: Thank you.

23 Good afternoon, everybody. I hope everybody on the  
24 call remains healthy and safe. We're continuing to conduct  
25 these proceedings remotely, by telephone, because of the

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1 pandemic. I hope very much that we will have a conference one  
2 day in court all together, but, for now, we're continuing to  
3 appear by telephone.

4 We have made available to the public an open line for  
5 members of the public and the press to listen in. I will  
6 remind everyone that it is a violation of our court's rules, as  
7 well as my own rules and orders, that any recording or  
8 rebroadcasting of today's proceeding is strictly prohibited.  
9 We are following up after these conferences, and when we learn  
10 that postings are being made on various platforms, we are  
11 requesting that they be taken down because it is a violation of  
12 our orders and rules. And so I will request that everybody  
13 comply with those obligations.

14 Finally, I'll note that we have a court reporter on  
15 the line and remind everybody both to mute your phone when  
16 you're not speaking, and when you are speaking, if you'll  
17 please state your name each and every time that you speak. I  
18 know that only the lawyers who intend to speak have stated  
19 their appearance. If any other lawyer who's on the line wishes  
20 to be heard, I'll just ask that you state your appearance  
21 clearly the first time you speak and then remind the court  
22 reporter every time thereafter so we know to whom we should be  
23 attributing our remarks.

24 We are here today in connection with a motion that was  
25 brought by the defendant - it was filed on August 10th -

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1 regarding the SEC's assertion primarily of the deliberative  
2 process privilege, and I have reviewed the SEC's response  
3 letter filed on August 17th and the reply letter by the  
4 defendants filed on August 23rd.

5 I know that there is also a motion pending in  
6 connection with the Slack messaging. I don't intend to address  
7 that today. And I believe another motion was recently filed by  
8 the defendants, which I don't believe is fully briefed, and so  
9 we will certainly not be addressing that either.

10 Why don't I begin. Mr. Solomon, will you be taking  
11 the lead on behalf of your team?

12 MR. SOLOMON: Yes, I will, your Honor.

13 THE COURT: Let me ask you a pointed question, and  
14 I'll ask the same question to Mr. Tenreiro as well: In your  
15 opinion – I want to focus first on the aiding and abetting  
16 charge against the individual defendants – is the standard for  
17 that charge an objective standard or a subjective standard?  
18 Meaning is the question whether or not your client was  
19 objectively reckless or is the question whether your client was  
20 subjectively reckless? And if you could point to the law that  
21 you think supports your position, I would appreciate it.

22 MR. SOLOMON: Of course, your Honor.

23 The standard is, for recklessness, one of objective,  
24 not subjective. And in our motion to dismiss, we cited a lot  
25 of law on that. I think Apuzzo is the formative Second Circuit

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1 case on that, and there are numerous other cases in the  
2 Southern District of New York that also apply that same  
3 objective standard. The Dodd-Frank Act, again, amended aiding  
4 and abetting, which originally required knowledge, and now it  
5 requires knowledge and recklessness. Another case that I would  
6 cite for that proposition that aiding and abetting -- reckless  
7 aiding and abetting is an objective standard is *Novak v.*  
8 *Kasaks*, and that's 216 F.3d 300 -- that's a Second Circuit case  
9 from 2000 -- and that's the case, again, that stands for the  
10 proposition that if the underlying law was unclear at the time  
11 even to the SEC, then the alleged violation could not have been  
12 "so obvious, that the defendant must have been aware of it."  
13 It's that "so obvious" point, your Honor, that we've been  
14 coming to the Court with, and we came to Judge Torres on the  
15 motion to dismiss, that is really one of the key linchpins for  
16 why we've been arguing since April, and your Honor has  
17 accepted, that the SEC's internal documents and the way the SEC  
18 was looking at the issue of XRP, Bitcoin and Ether, and  
19 whether, to the SEC, there was certainty, there was clarity,  
20 about whether or not those digital assets were securities  
21 because of the objective recklessness standard. That means it  
22 is relevant, highly relevant, and ultimately highly probative,  
23 that we get discovery into the SEC's thinking on that, because,  
24 as a key market participant, the SEC's views go into the  
25 objective analysis. And, again, I would commend your Honor to

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1 our motion to dismiss and our reply that catalogs the law on  
2 these points. I would just add, finally, the SEC really can't  
3 argue otherwise, although it tries to argue it's a different  
4 standard in its opposition, because it's taken the position in  
5 its own jury instructions that recklessness is an objective,  
6 not a subjective standard. We think that is an accurate way to  
7 look at the law.

8 The last thing I'll say, your Honor, is we've also  
9 cited the *Safeco* case. This is a Supreme Court case, 551 U.S.  
10 47, it's from 2007, and, again, the Supreme Court is looking at  
11 the recklessness standard generally, and it makes the point -  
12 we've made this point in our papers - that uncertainty in the  
13 applicable law is fatal to the SEC's claims if the governing  
14 law "allows for more than one reasonable interpretation, a  
15 defendant who merely adopts one such interpretation does not  
16 possess knowledge or recklessness." So I think the *Safeco* case  
17 is a key case.

18 Finally, your Honor, the civil law generally calls a  
19 person reckless who acts, or if the person has a duty to act,  
20 fails to act in the face of an unjustifiably high risk of harm  
21 that is either known or, again, "so obvious, that it should be  
22 known." And that's Prosser and Keaton, that's a restatement of  
23 torts. And then, again, *Farmer v. Brennan* is another Supreme  
24 Court case, 511 U.S. 825. So the overarching point is, if it  
25 wasn't so obvious to the SEC during the 2013 to late 2020

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1 alleged unregistered offering that XRP was a security, how  
2 could it possibly have been so obvious to my client,  
3 Mr. Garlinghouse, or Mr. Larsen under the reckless standard of  
4 aiding and abetting.

5 THE COURT: So, in the section of the SEC's opposition  
6 letter, they mention the *Safeco* case -- that's S-a-f-e-c-o for  
7 the court reporter -- but they do so also in connection with a  
8 criminal case, it's *U.S. v. Zaslavskiy*, and in a footnote, they  
9 talk about why, in that criminal case, the defendant sought  
10 information about internal deliberations, according to this  
11 letter, and was denied that discovery, and the court rejected  
12 the argument that the SEC's views were relevant.

13 I know that this is a securities fraud case -- this  
14 being the *Zaslavskiy* case -- it's a securities fraud case, and  
15 so we're talking about different legal standards, it's not a  
16 Section 5 case, but I'm wondering if you could just discuss for  
17 me, to the extent you're aware, how that case, that criminal  
18 case, does or does not affect my analysis.

19 MR. SOLOMON: Absolutely, your Honor. Very fair  
20 question.

21 So I think what the SEC does is it is, candidly, to  
22 mischaracterize Ripple's fair notice defense as well as the  
23 individual's scienter argument in trying to sort of force this  
24 case into the fact pattern of *Zaslavskiy*. It doesn't fit, that  
25 case doesn't apply to any of the arguments raised by the

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1 defendants, and let me explain why.

2 First of all, Ripple's fair notice defense is not that  
3 *Howey* is unconstitutionally vague as applied to  
4 cryptocurrencies – that was the argument made in *Zaslavskiy*,  
5 it's not being made here – and the individual defendants are  
6 not raising that argument at all.

7 THE COURT: That's also the argument made before Judge  
8 Hellerstein in the *Kik* case, I believe; is that correct?

9 MR. SOLOMON: That's exactly right, your Honor.  
10 That's exactly right. That decision concerned a different  
11 issue. The defendants in *Kik* wanted discovery into why the SEC  
12 chose to bring that action. That's not what we're looking for  
13 here. What we're looking for is whether the SEC acknowledged  
14 that market participants did not understand that offers and  
15 sales of XRP would be treated as securities either because the  
16 SEC itself wasn't certain or because their communications with  
17 market participants made that clear. So, that's exactly right.  
18 That is one distinguishing feature.

19 Now, in terms of the individual defendant's scienter  
20 argument, the one that you just focused on, the SEC argues, or  
21 tries to argue, that only its external conduct is relevant.  
22 But as I just explained in the context of aiding and abetting,  
23 and particularly the recklessness prong of aiding and abetting,  
24 the internal memos we're seeking are relevant to showing  
25 whether it would have been obvious to anyone – anyone – that

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1 XRP was a security, particularly the SEC. As your Honor has  
2 already noted correctly, the documents we're seeking are highly  
3 probative, we believe, of the scienter element of this  
4 unprecedented aiding and abetting charge the SEC chose to bring  
5 here. By contrast, bringing it back to *Zaslavskiy*, he did not  
6 raise a *mens rea* argument at all in his motion to dismiss the  
7 indictment.

8           There's a few other distinguishing features, your  
9 Honor, because this is a case the SEC cites to frequently, it  
10 is a case that Mr. Tenreiro argued, and he argued it well, but,  
11 again, it's a very different case. That case also involved,  
12 your Honor, an ICO and a fraud, neither of which are present  
13 here. Specifically, the defendant in *Zaslavskiy* had an ICO for  
14 a virtual currency it hadn't even created yet that he claimed  
15 was backed by reinvestments, and these are investments he never  
16 secured. He promised particular returns – 10 to 15 percent, I  
17 believe it was. That promise is what's so glaringly absent in  
18 this case. That's why this is not an ICO case, unlike  
19 *Zaslavskiy*, and it's not a fraud case.

20           And then just thinking about the facts in light of the  
21 three *Howey* prongs, your Honor, because your Honor has found  
22 the internal memoranda and position papers we're seeking to be  
23 relevant on the basis of fair notice, on the basis of *Howey*,  
24 and also on the basis of scienter, I think it's fair to say  
25 when you look at the *Zaslavskiy* case, that criminal case, it's

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1 a clear application of *Howey*, and the court found as much and  
2 said that a reasonable jury could find that the coins at issue  
3 there were investment contracts. So, again, radically  
4 different facts. That's all the court said there.

5 And, finally, your Honor, the SEC's briefing in that  
6 case, which I went back and read last night – it's an  
7 interesting read – it noted that the DAO report – this is the  
8 report in 2017 that the SEC issued, it was a 21(a) report,  
9 which is basically an expression of the Commission's views – in  
10 other enforcement actions that the SEC had brought against  
11 ICOs, those were flagged, but none of these cases, obviously,  
12 gave Ripple any clarity on the regulatory status of XRP. In  
13 other words, your Honor, part of the argument we've been making  
14 to your Honor on relevance is, if anything, these actions  
15 suggest that XRP was less likely to be considered a security  
16 given the absence of an ICO. And especially, your Honor, when  
17 you look at the briefing, again, in the *Zaslavskiy* case, in the  
18 SEC's own brief, they say ICO's -- they say, "ICO's promised  
19 profits through the issuance of digital assets." There's no  
20 promise here, none whatsoever.

21 So bottom line is recklessness was not even a  
22 consideration in that case. That was a criminal case. It was  
23 an intentional fraud case. Recklessness is a construct that is  
24 a creature of the civil law, and it's something that, again, is  
25 part of the aiding and abetting charge that the SEC chose to

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

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

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

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

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

11           MR. SOLOMON: Sure.

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

25           I think there is case law for the proposition -- and I

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

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

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

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

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

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

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1 THE COURT: Thank you.

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

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

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

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

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1 think Mr. Solomon correctly pointed the Court to our briefing  
2 on this issue. From our perspective, and this is cited in our  
3 motion to dismiss brief, the *SEC v. Falstaff* case from the D.C.  
4 Circuit says, "Knowledge means awareness of the underlying  
5 facts, not the labels that the law places on those facts.  
6 Except in very rare circumstances, no area of the law, not even  
7 the criminal law, demands that a defendant have thought his  
8 actions were illegal. A knowledge of what one is doing and the  
9 consequences of those actions suffices."

10           And that's consistent, from our perspective, with  
11 criminal law cases in other circuits. Again, these are cited  
12 in our motion to dismiss brief, which is Document 183, pages 28  
13 and 29. And in a case involving specifically aiding and  
14 abetting of a regulatory violation, of a books and records  
15 violation, called *SEC v. Mattesich*, which we cite in that brief  
16 and, I believe, also in our letter, a judge in this district  
17 sort of adopts *Apuzzo* and says, "knowledge of the violation by  
18 the aider and abettor." There's no requirement that they  
19 understand the consequences, the legal consequences of the law.  
20 They're creating a standard that doesn't exist in criminal law,  
21 your Honor.

22           So I think, from our perspective, it's a little bit  
23 less about whether it's objective or subjective, but what do  
24 they have to know is the question, from our perspective. And  
25 they can't actually cite to a single case that says that they

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1 have to know the legal consequences of the conduct, certainly  
2 not an aiding and abetting case and, ironically, not even in  
3 the *Novak* case, which is a fraud case.

4 Now, they spent a lot of time saying don't look at the  
5 fraud cases when we don't want you to look at them. *Zaslavskiy*  
6 was fraud, it's different. And there's another irony there,  
7 your Honor. The argument is self-defeating because they are  
8 asking -- if the Court looks at the privilege logs at issue --  
9 and I'm going to exclude Exhibit C to their motion for a moment  
10 for a reason I'll explain -- I looked at the logs again last  
11 night, I think maybe there are three documents that relate to  
12 XRP in these logs. So what they're asking the Court is to say,  
13 you know, they're saying, on the one hand, XRP is different,  
14 you can't look at *Kik*, that was an ICO, you can't look at  
15 *Zaslavskiy*, he committed fraud, XRP is unique, unique, unique,  
16 that has been their sort of mantra throughout this litigation,  
17 but now they're asking for the SEC to turn over all  
18 conversations about all digital assets, parties that are not  
19 before this Court. It's hard to reconcile this sort of -- this  
20 broad request for every conversation the SEC has had about  
21 digital assets with their statement that XRP is so unique, that  
22 this case is unique and that their knowledge can be proven  
23 because their fact pattern was made.

24 I would like to clarify a point, your Honor, and I  
25 apologize if the way that I wrote the letter was misleading.

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1 In the *Zaslavskiy* case, the defendant did not seek internal SEC  
2 deliberations. In the *Zaslavskiy* case, the defendant said he  
3 could not be liable because he lacked notice that the laws  
4 applied to him. That's a higher standard. Criminal law  
5 standard is higher than civil standard, and the judge rejected  
6 the idea that the defendant could be excused by not knowing  
7 that the laws applied to him. So that just goes to that point  
8 that I was making earlier.

9 Contrary to what Mr. Solomon said, the case that did  
10 request internal SEC deliberations was the *Kik* case.  
11 Mr. Solomon said correctly that in *Kik*, they wanted to know the  
12 reasons for bringing that case – that is one of the things they  
13 requested – but they also wanted to more generally sort of  
14 discover what the SEC was thinking. And, by the way, the  
15 defense in *Kik* did rely on *Upton*. It wasn't just this  
16 unconstitutional vagueness argument, it relies specifically on  
17 *Upton*, and even though *Upton* was before Judge Hellerstein, he  
18 denied them discovery, both external and internal SEC  
19 discovery, in that case. He said if this is an objective  
20 standard, then we can look at what the law is and what the  
21 effects of the law are.

22 So, I hope I've answered the Court's questions about  
23 the objective versus subjective. I think where I'm getting  
24 stuck is that, from your perspective, the dispute here is what  
25 is it that they have to know. They claim that they have to

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1 know objectively that the law applies to their conduct, and  
2 they can't cite to a single case that says that. And I don't  
3 think there is any case that says that. They don't cite it in  
4 this motion, and they don't cite it in their motion to dismiss  
5 brief.

6 There's --

7 THE COURT: Can I interrupt you for a second?

8 MR. TENREIRO: Sure.

9 THE COURT: Is it the SEC's position that in order to  
10 determine whether or not Mr. Garlinghouse was objectively  
11 reckless, you would look to see what he knew --

12 MR. TENREIRO: Yes.

13 THE COURT: -- and the state of the public sphere,  
14 what was out in the public, to determine whether or not he was  
15 objectively reckless, and even if internally, within the SEC,  
16 there was a lack of clarity on the issue, that would not, in  
17 your view, speak to the recklessnesses of Mr. Garlinghouse? Is  
18 that the SEC's view?

19 MR. TENREIRO: So, on the first part, your Honor, I  
20 think the way that we would prove that Mr. Garlinghouse was  
21 reckless is we would ask, and we would put forth evidence, did  
22 you talk to anyone, did you ask a lawyer whether what you were  
23 doing was right, did you ask an advisor, did you -- this is  
24 your company's business selling this asset, how did you become  
25 convinced that this applied. So I'm not sure why anything that

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1 some staffer at the SEC in a field office thought is relevant  
2 to what he thought.

3 And this, by the way, feeds into a number of the  
4 factors that courts analyzed with respect to need, right?  
5 Courts say, well, if you can't get the evidence anywhere else,  
6 maybe there's a need, but Mr. Garlinghouse doesn't need the  
7 evidence. He knows what he thought, he knows what he believed.  
8 He can say -- he can stand in front of a jury and say, I  
9 honestly thought that this was not a security, and these were  
10 my reasons, and I was reasonable, I was not reckless. We would  
11 argue --

12 THE COURT: That's a subjective test. That's a  
13 subjective test, and I think the defendants have said it's an  
14 objective test. So it has to be -- the measure has to be  
15 against something objective, not what Mr. Garlinghouse said.  
16 He could say whatever he wants he subjectively thought, but the  
17 question is, was his belief objectively reasonable, and I think  
18 what the defendants are saying is that in order to determine if  
19 it was objectively reasonable, you have to look to see what the  
20 world thought of it, and the question is whether or not if  
21 internally at the SEC -- and I'm not suggesting that this is  
22 what one would see, but if, internally, all of the  
23 commissioners were sitting together having lunch saying, I have  
24 no idea what to do about this, it's so confusing, I really just  
25 don't know whether or not XRP should or should not be

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1 considered a security, so they think it's unclear, the question  
2 is whether or not the defendants should be entitled to know  
3 that there was a lack of certainty among the experts, even if  
4 he never heard that uncertainty, as a way of establishing that  
5 objectively, it was reasonable for him to behave in the way he  
6 did.

7 MR. TENREIRO: Right. So I think that there are two  
8 problems, I think, with that sort of way of characterizing it.

9 To the extent that it's an objective test, it's an  
10 objective test in his position -- it's an objective person in  
11 his position, not in the position of an expert, but I don't  
12 think that -- typically, when one proves knowledge or  
13 recklessness, one has to focus on what the person actually  
14 knew. That is the case in the *Novak* case. Even in the *Safeco*  
15 case. I think what the Supreme Court says in *Safeco* is if the  
16 law is subject to determination by judges, then maybe that's a  
17 problem, but I think there are two components, and there are  
18 two sort of ways here, and that's why I just don't agree with  
19 them that it's just an objective test. I think there's a  
20 number of ways in which the SEC can prove knowledge in a case  
21 that involves scienter.

22 Otherwise, again, lack of understanding of the law  
23 becomes a defense to every case, and there's no case that says  
24 that. That would apply in the criminal law. And someone could  
25 come in and say, as Mr. Zaslavskiy did, who was on trial for,

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1 you know, his life, for his freedom, it wasn't clear to me that  
2 these laws and *Howey* applied to digital assets, and it says  
3 that that's just not the test, it's the law is what the law is.  
4 So I'm not sure that I agree that it's objective in the way  
5 that they characterized it, and so it's just not relevant.

6 To give another example, the *Nacchio* case, your Honor,  
7 which we cited in connection with the Hinman issue, in the  
8 *Nacchio* case, the SEC brought a lawsuit against individuals for  
9 misapplying an accounting standard, and the accounting standard  
10 they said -- it's very confusing, nobody knew how the  
11 accounting standard applied, and they said we need the SEC's  
12 internal deliberations because if someone at the SEC was saying  
13 we have no idea, we're sitting around sort of to go with your  
14 Honor's hypothetical, we're sitting around having lunch, and we  
15 think we don't know how this standard applies, then that would  
16 go to show that we were sort of justified in how we applied  
17 these standards. And this was a deliberative process privilege  
18 case, and the court said, and I quote, that it failed to see  
19 how personal opinions by staff would be relevant, particularly  
20 if those opinions could not be attributed to the Commission  
21 itself or were never communicated outside the Commission.

22 So I just don't think that they pointed to a single  
23 case that says that deliberation inside the agency is relevant  
24 to the defense they're making.

25 I think it's important here, your Honor, to draw a

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1 distinction between Mr. Solomon is sort of -- the premise of  
2 his entire argument is that there was confusion, and I don't  
3 think there's any basis for that. I think what there was is  
4 deliberation, and the deliberative process privilege is meant  
5 to protect that. They don't cite a single case in which aiding  
6 and abetting or fraud or -- without fraud, a court has ever  
7 said, you know, you have to look at what the SEC was doing and  
8 was saying to sort of measure whether the defendant can be  
9 liable.

10 And I think it's particularly problematic for them, to  
11 the extent that they're saying XRP is totally different anyway,  
12 so what's the relevance of documents that have nothing to do  
13 with XRP? They've spent the entire litigation arguing that XRP  
14 is totally different, and then we can look at *Kik*, can look at  
15 *Zaslavskiy*, and can look at *Telegram*. Now they are saying, no,  
16 no, I have to know everything the SEC said about every digital  
17 asset, because now when I want the documents, it's relevant to  
18 my state of mind even though the digital assets has nothing to  
19 do with my digital assets, at least according to them.

20 And, your Honor, I think the consequence of that --  
21 sorry?

22 THE COURT: Go ahead.

23 MR. TENREIRO: Yeah, I think the sort of -- the  
24 consequences of that are, I think, breathtaking and broad. The  
25 priv logs show that the government is deliberating -- and this

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1 might be a good transition into the second question about  
2 perpetual deliberations - I think the priv logs show that the  
3 SEC is deliberating various different issues, not -- again,  
4 there's three documents maybe there that talk about the  
5 application of -- or that even talk about XRP as per the log.  
6 There's a number of issues in the digital asset space. I think  
7 the defendants are trying to collapse it all as digital assets  
8 and law, but there's a lot of security statutes, and different  
9 provisions can apply to different sorts of activities in the  
10 digital asset space and, also, other provisions of the  
11 U.S. Code that might apply in overlapping fashion or in other  
12 ways different activities.

13           So what they're saying is we're a very unique asset,  
14 we're very different than everyone else, but we've been sued,  
15 so this opens the door for us to look at everything that the  
16 government is talking about if it touched the SEC because it  
17 goes to our state of mind even if -- I mean, I'm looking at  
18 some of the priv logs, and the priv logs themselves show that  
19 some of these are conversations with the FBI about money  
20 laundering and crypto, some of them are with individuals at  
21 Treasury that work for the terrorism finance and financial  
22 crimes unit. Their argument is that because they are so  
23 different than every other digital asset, they get to swing the  
24 door open, and they swing the door open for all sorts of  
25 defendants, to examine sort of the government's deliberations

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1 across this very significant and expanding segment of our  
2 economy. I don't think there's any basis for that, your Honor,  
3 and the breathtaking scope of a ruling would really be, I  
4 think, significantly damaging to the quality of the  
5 deliberations that the government is having contrary to the  
6 NLRB case and other Supreme Court cases have recognized. I  
7 recognize those are FOIA cases, but those FOIA cases  
8 incorporate -- the language of the statute incorporates the  
9 civil discovery standard.

10 So, the fact that they're --

11 THE COURT: So what you, I think, just said is that a  
12 lot of the issues presented for which you are seeking  
13 protection from the deliberative process privilege apply to a  
14 whole host of deliberation.

15 MR. TENREIRO: Yes.

16 THE COURT: If you could answer the question that I  
17 posed to Mr. Solomon about whether or not the Court needs to  
18 know what the moment in time in which the deliberations have  
19 ceased, whether that's because a decision has been made or  
20 because the deliberations have ended and there will be no  
21 decision. Is it your view that the Court needs to be able to  
22 say, this is the date by which the deliberations ended and be  
23 able to identify either a decision or a decision not to decide,  
24 or should the Court just assume that there can be, as I said  
25 previously, perpetual deliberation on these complex issues?

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1 MR. TENREIRO: Your Honor, I don't think -- I suppose  
2 that an agency or several agencies could deliberate an issue  
3 for a long time. I think that the Court should know, and the  
4 priv logs -- and, I mean, if it's not clear, I'm happy to sort  
5 of amend them, but the Court should know what the end date is  
6 because the Court does need to be able to analyze, is it  
7 predecisional or postdecisional, right? So there does need to  
8 be an end date, but the problem, I think, is that defendants  
9 are collapsing all sorts of deliberation, and they're saying,  
10 oh, there's this one big deliberation about digital assets. I  
11 think in our back-and-forth, I think it's Exhibit, I want to  
12 say, H to their motion -- I'm just going to make sure -- it's  
13 Exhibit G to their motion, so that's Document 289-7, we gave  
14 them a list of different issues that are being deliberated. So  
15 the DAO report has been mentioned, right? The DAO report was  
16 deliberated, and then the final decision was issued. The  
17 decision whether to bring this case was deliberated, and then  
18 that became final.

19 There are a number of issues in this space, your  
20 Honor, so I think the answer to the Court's question, very  
21 specifically, is that there's no perpetual deliberation. The  
22 Court's other hypothetical is what I think is correct -- there  
23 either is a date on which a decision is made, or perhaps at  
24 some moment in time, some avenues of potential policymaking are  
25 abandoned. But we're not claiming this sort of blanket

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1 deliberative over everything. We have specifically stated the  
2 different issues that are being deliberated. I mean, just as  
3 an example, I think the first privilege logs that they have, so  
4 I think it's Exhibit A, and a couple of others mentioned what  
5 we call action memos, right? Those are the recommendations by  
6 the Division of Enforcement to the Commission on potential  
7 avenue of enforcement. That's essentially assuming the  
8 Commission makes a decision on those, that's the date on which  
9 that deliberation ends.

10 But to take another example, there's Exhibit E -  
11 again, I'm using the exhibit letters to their motion just for  
12 simplicity - that would have a lot of SEC communications with  
13 other agencies. And it's publicly available, sort of the  
14 different guidances or different statements that other  
15 regulatory bodies have made.

16 So, for example, there's communications with FSOC, the  
17 Financial Stability Oversight Council. The FSOC issued  
18 guidance in December 2020. The communications in the priv log  
19 predate that. There's deliberations with the FSB, Financial  
20 Stability Board. They issued guidance, I believe, in June of  
21 2019. The documents predate those. The documents in my log  
22 predate those.

23 There's the --

24 THE COURT: How am I supposed to know all of this?  
25 I'm looking at Exhibit E right now. How would I know, based on

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1 this, what the decision is and when it was rendered?

2 MR. TENREIRO: That's a fair question, your Honor. I  
3 think that the problem is defendants want everything, and  
4 rather than sort of identifying here's the categories, they're  
5 saying there's no privilege, or if there is, we get all of it  
6 because we're very unique. And if the answer here is to go  
7 back and either narrow the scope of the dispute or to provide  
8 information about the decisions, I think we do provide that  
9 information in the priv log and in the declarations, but if  
10 there's something that the Court -- for example, the Hinman  
11 speech logs -- that's Exhibit B and D -- I think that's pretty  
12 clear. Exhibit C, which I had exempted earlier, is what we  
13 call the investigative file over this case. So those are all  
14 the deliberations about whether and when or how to bring this  
15 matter. That deliberation ends when the case is brought.

16 But if there are particular documents, I'm happy to  
17 give more information. I think the defendants haven't actually  
18 said they want this or that, and part of the reason for that  
19 is, I'm not sure how they're going to come in and say I want  
20 communications with the Financial Stability Board about digital  
21 assets generally or about a conversation with the FBI about  
22 money laundering when we're this unique asset that's about  
23 *Howey*. It doesn't make sense. How could there be any  
24 relevance? Just that argument wouldn't fly, and I think that's  
25 why they haven't made it.

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1           But if they want to go back and say, okay, these are  
2 the ones we want, and we want more information, I guess that's  
3 something we could look at, but I just don't think it's proper  
4 in this case. They haven't made that request, and they haven't  
5 made sort of the showing.

6           So --

7           THE COURT: So the requests that they have made --  
8 yes, you have, thank you.

9           The requests that they have made is that the Court  
10 conduct an in camera review, which is something that I do often  
11 in privilege issues. And your response to that, I think, is  
12 limited to what's Section C of your letter on page 8, which  
13 asserts that -- just generally that the in camera review is  
14 unnecessary because the factual material is intertwined with  
15 the deliberative process discussions.

16           My inclination is to conduct an in camera review. My  
17 inclination is to do what I always do in these cases, which is  
18 to request that the party seeking the documents identify a  
19 small number of documents, which the defendants have now done,  
20 and then to ask for limited briefing, recognizing that the SEC  
21 has a privilege position because I'd like them to explain to  
22 me, potentially with some of that information redacted to the  
23 defendants, why they believe the privilege applies. Obviously  
24 to redact as little as possible, but I recognize that you can't  
25 make an argument about privilege and, in so doing, waive that

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1 privilege.

2 So that's my inclination. Is there a reason, from  
3 your view, why I shouldn't conduct an in camera review as  
4 proposed by the defendants?

5 MR. TENREIRO: Right, your Honor. So, look, I guess  
6 the answer is if the Court wants to do an in camera review, we  
7 welcome in camera review, but there is a body of case law that  
8 sort of talks about how if there's an issue with the priv logs,  
9 it's better to correct them, and if there's -- at least a  
10 couple of cases, at least in the D.C. Circuit, say that courts  
11 have to exercise caution and consider the potential prejudice  
12 to the privilege holder, and that, in fact, you might need to  
13 have a prima facie showing of sort of bad faith, and  
14 Mr. Solomon concedes to raising that here. Some citations  
15 include 9833 F.2d 248 out of the D.C. Circuit or 257 F.R.D. 302  
16 out of the District of Columbia. I think that the  
17 defendants -- I guess my concern a little bit is the defendants  
18 that we've accused of breaking the law and raising billions of  
19 dollars are getting a little bit of special treatment. Our  
20 logs -- we sought their documents on the basis of the legal  
21 basis that they waived their privilege, and the Court was able  
22 to make a decision that applied and that applied generally.

23 I'm also sort of troubled by the request, I believe  
24 the Court is referring to Appendix A, which sort of narrows the  
25 number of documents. The very first entry is notes, right,

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1 notes with -- conversations with other parties. I mean, these  
2 other parties (unintelligible).

3 THE COURT: Sorry, I think you cut out. The very  
4 first entry is notes with other parties.

5 MR. TENREIRO: Yeah, I apologize, your Honor. I think  
6 someone accidentally unmuted their line.

7 The very first entry is notes with other parties about  
8 conversations with other parties. Now, in a case we cite in  
9 our letter, which is *Bloomberg v. SEC*, the district court said  
10 it would be very prejudicial for the SEC's ability to sort of  
11 conduct its mission if notes that are taken by officials about  
12 meetings with companies subject to SEC regulations are, you  
13 know, disclosed, it would severely undermine, is the quote from  
14 the case, the SEC's ability to gather information. What's more  
15 interesting about this is that they can call these third  
16 parties, their names are here, Professor Grundfest is on the  
17 payroll. I don't understand what the need is. These notes  
18 tell you who to ask, and there's a senator there, and public  
19 records show if they have a relationship or donations to the  
20 senator. I don't understand why our logs should be treated any  
21 differently than theirs.

22 A lot of these others, again, sort of speak for  
23 themselves. Ms. Enwall works for --

24 THE COURT: To be clear, I'm not suggesting that the  
25 defendants review these documents. I assume you know that I'm

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1 suggesting that I review these documents and that we could have  
2 a more specific conversation. I mean, much of this letter  
3 writing is in the abstract, but it may be that you are exactly  
4 right, that when you actually look at the types of documents,  
5 they really are too far afield or not appropriate for discovery  
6 for any host of reasons. But the deliberative process  
7 privilege is a qualified privilege, it's not like the  
8 attorney-client privilege, and so I think the argument is that  
9 the defendants have, at least in my view, at least raised a  
10 question as to whether or not the broad application of the  
11 privilege is appropriate here, and have identified a series of  
12 documents that they believe would establish that the privilege  
13 was not invoked appropriately as to those documents.

14 When I have privilege issues, I typically conduct  
15 myself in this manner where I'll issue a ruling which will say,  
16 as to Document 1, it is privileged, and it doesn't need to be  
17 produced and any similar documents don't need to be produced;  
18 as to Document 2, it's the privilege doesn't apply and similar  
19 type of documents need to be produced, something of that  
20 nature.

21 So I guess I don't see why these defendants are  
22 getting any privileged – excuse the pun – treatment here. I  
23 actually think it may assist the SEC so that I can see exactly  
24 what these types of documents are and why you believe that they  
25 would unfairly interfere with the SEC's important mission. So

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1 my instinct is to move forward in that regard. I don't see  
2 that as any special treatment for these defendants. And you  
3 didn't really address this in your letter, which is why I  
4 wanted you to address it now.

5 MR. TENREIRO: Right. No, thank you, your Honor, I  
6 understand, and I do understand the proposal.

7 As I said, if that's the Court's inclination, then  
8 we'll obviously follow that directive. I think what I was  
9 taking a little bit of issue with is sort of the suggestion  
10 that there is a broad assertion of privilege or that there's an  
11 issue with our assertion of privilege, and that's taking me  
12 back to the cases I cited where the courts say in camera review  
13 in the context of deliberative process sort of requires the  
14 prima facie finding or this idea that the agency has done  
15 something wrong, and I take that the Court is not actually  
16 saying that in this case, but that was sort of the response  
17 that was given. I think in camera review typically is reserved  
18 for cases where there's been a problem that's been identified,  
19 and I think this Appendix A sort of speaks for itself. You  
20 know, there's drafts, and the case law and deliberative process  
21 could not be clearer that drafts -- you know, in the case we  
22 cite where Judge Parker from this district -- I think it's in  
23 our letter, if I can just have one moment, I think it's  
24 called -- it's not Citizens United, it's *Citizens Union*, she  
25 says drafts are just -- how could drafts ever be relevant. So

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1 if one looks at Appendix A, there's drafts, there's a  
2 hodgepodge, there's some documents that suggest they can get  
3 the evidence elsewhere, there's drafts, there's one that  
4 talks -- I think two that talk about XRP maybe. So that was  
5 sort of my response, is that I just don't think it's needed in  
6 this case, but if the Court wants us to do that, we will.

7 THE COURT: Okay, good. Thank you. I do.

8 So let's talk about how to move forward. What I would  
9 like is to have the SEC send to me in camera the documents  
10 logged on Appendix A, and then I'm going to give both parties  
11 an opportunity to submit to me targeted letter briefs on those  
12 documents, and with respect to the SEC, I'm going to allow it  
13 to file certain portions of that letter redacted. I will ask  
14 the SEC to be as limiting as possible so that the defendants  
15 have as much opportunity to respond, but I recognize, again,  
16 that the privilege has not been waived, and I'm not going to  
17 ask the SEC to do that in the context of defending its  
18 position. So what I'd like is the documents and a letter brief  
19 from the SEC filed on the public record with redactions, as  
20 limited as possible, and made available fully to me, and then  
21 I'll give the defendants an opportunity to respond -- I don't  
22 think I need a reply brief here -- and then I'll be able to  
23 issue a ruling with respect to these privileged documents and  
24 give the parties some guidance. And if I conclude that certain  
25 documents should be produced, it will give some guidance for

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1 the SEC to review other assertions and see if there are other  
2 documents that should be produced, and if I conclude that the  
3 SEC has properly asserted the privilege, that means that  
4 similar documents of that category also don't need to be  
5 produced.

6 So let's set a schedule for that. Today is the  
7 Tuesday before Labor Day weekend. Mr. Tenreiro, when would you  
8 like to file your letter brief? And I'd like it to be, let's  
9 say, about 10 pages, I think, seems like a reasonable --  
10 10 single-spaced or 20 double-spaced pages to address these  
11 specific documents.

12 MR. TENREIRO: Your Honor, may we have two weeks?

13 THE COURT: Sure.

14 So that will get you to September 14th.

15 MR. TENREIRO: Right.

16 THE COURT: Mr. Solomon, I will have you speak on  
17 behalf of your team. When do you want to file any opposition  
18 letter?

19 MR. SOLOMON: Your Honor, if we could take two weeks  
20 after that, and we'll try to get it to you as quickly as we  
21 can, so it may be less than two weeks, but two weeks would be  
22 good.

23 THE COURT: Okay. So that will get you to  
24 September 28.

25 So, on the 14th, I'd like Mr. Tenreiro not only to

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1 file his publicly available moderately or modestly or limited  
2 redacted letter on the docket, and then send to the Court  
3 ex parte the documents themselves and an unredacted version of  
4 that letter. If the documents are voluminous, as they may well  
5 be, if I can ask you to also send me a binder with those  
6 documents, I think that that would be helpful for me.

7 MR. TENREIRO: Yes, your Honor.

8 THE COURT: Thank you. If you can just send that to  
9 chambers.

10 MR. TENREIRO: So a physical copy, obviously?

11 THE COURT: A physical copy, yes, please.

12 MR. TENREIRO: I'm happy to arrange for a physical  
13 copy. In addition to that, would the Court like a digital  
14 transmission? I'm happy to discuss with the deputy offline as  
15 well.

16 THE COURT: Why don't you just send me both. Just  
17 give me both.

18 MR. TENREIRO: Absolutely.

19 THE COURT: Thank you.

20 And then I'll get an opposition letter from the  
21 defendants, recognizing that they will be a little bit with one  
22 hand tied behind their back because there may be some limited  
23 redactions in the SEC's letter, but that, unfortunately, is  
24 just a product of this process, and then I will do my best to  
25 turn around a decision as quickly as possible.

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1 All right. Anything further from you, Mr. Tenreiro?

2 MR. TENREIRO: Your Honor, I would just like to  
3 mention, the Court correctly mentioned the Slack motion and a  
4 motion filed by the defendants last week. We also filed a  
5 motion. I apologize that it was late last night. It's  
6 obviously not fully briefed, but I just wanted to bring it to  
7 the Court's attention.

8 THE COURT: Great.

9 And the parties, I think, have worked cooperatively on  
10 scheduling their responses, so if anyone needs to ask for a  
11 particular schedule outside of the norm, feel free to just  
12 submit something on consent with respect to the briefing  
13 schedule.

14 MR. TENREIRO: I believe they have, your Honor.

15 MR. SOLOMON: Yes, we have cooperated on the  
16 scheduling issues so far.

17 THE COURT: Terrific. We'll take what we can get.

18 All right. Mr. Solomon, anything further from you and  
19 your colleagues?

20 MR. SOLOMON: Your Honor, if I could just -- because  
21 Mr. Tenreiro made a number of points for the record, if you'd  
22 indulge me just for a very small amount of time, not to revisit  
23 anything, but just to make sure the record is complete on a few  
24 discreet points? May I do that now quickly?

25 THE COURT: Sure.

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1 MR. SOLOMON: First of all, the way your Honor is  
2 approaching this, we think, is very sensible. We'll do our  
3 part to make the Court's burden as low as possible. In camera  
4 review makes all the sense in the world to us.

5 Just a few quick points to make sure, again, the  
6 record is clear on this: We don't agree with the recitation of  
7 law on the part of Mr. Tenreiro. Recklessness is an objective  
8 standard. Attempts to collapse knowledge with recklessness are  
9 not helpful, and they're not going to be helpful to the Court's  
10 review, because as you look through these documents, a key  
11 inquiry for the probativeness relevant to these documents is  
12 going to be were people discussing these issues at the SEC in a  
13 way that would be potentially helpful or not helpful to the  
14 defendants in terms of what the objective standard is, not just  
15 for recklessness, but also for fair notice. So we do want to  
16 make sure to correct the record on that and make sure that our  
17 position is clear – recklessness is objective, fair notice is  
18 objective. The Court has already so ruled in its prior  
19 hearings, and the case law can all be found in our motion to  
20 dismiss and our opposition.

21 The second quick point is that the *Kik* case on that  
22 point is inapposite. There were no individuals charged, there  
23 was no reckless at play there.

24 The third point is simply, your Honor, as you're  
25 thinking about notes, the SEC notes, this is a key area for us,

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1 it's obviously a key area of sensitivity for the SEC, which is  
2 why Mr. Tenreiro flagged it specifically. Those, we don't  
3 believe, ought to be covered by the deliberative process  
4 privilege. To the extent any could be, that privilege should  
5 be overcome. And let me just explain why. The SEC has been  
6 using a sword-and-shield approach to notes. In the context of  
7 Mr. Hinman's deposition, they used an internal note that the  
8 SEC itself had generated from August 20th, 2018, offensively,  
9 and it's a note that purported to capture a conversation  
10 between my client and Mr. Clayton -- Bill Hinman and Jay  
11 Clayton. And this is the one note, internal note, that they've  
12 produced, and they've tried to use it offensively at the Hinman  
13 deposition. It's actually an exculpatory note, it's very  
14 helpful to my client, it's helpful to Ripple, but these kinds  
15 of sword-and-shield tactics can't be countenanced, and so we do  
16 feel very strongly, your Honor, and you will make the ultimate  
17 determination, that internal SEC notes need to be turned over,  
18 at a minimum parts, that we can get the facts from those notes.  
19 We just want to be very clear about that. We hope that this  
20 exercise is one not just of separating facts from alleged DPP  
21 protected materials, but really one that attempts to impose  
22 some fairness and order on this process, to avert the sword and  
23 shield phenomenon going forward.

24           Again, we believe these internal documents are going  
25 to be highly exculpatory and critical to the fair defense of

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1 this trial, and the public has a right to know what's in them,  
2 we certainly have a right to know what's in them.

3 And I guess the last point I'd make is there's no  
4 standard that your Honor needs to apply for in camera review.  
5 Judges do it all the time. Judges did it in most, if not all,  
6 the cases that the SEC points to where deliberative process was  
7 found to remain intact. So we appreciate what the Court is  
8 doing, it makes perfect sense, but I did want to be crystal  
9 clear, we think the SEC has fallen down on its initial showing  
10 that the DPP applies at all. We think it's overbroad, we think  
11 we basically just heard a concession of that from Mr. Tenreiro.  
12 We appreciate the Court wants to be careful and incremental and  
13 surgical, and that makes perfect sense, but our position is  
14 they have not alleged DPP adequately at this point in time.  
15 They haven't made a showing, and it's their burden. Our  
16 position is also, as your Honor noted, to the extent they are  
17 able to establish deliberative process over any of the  
18 documents in Appendix A or beyond, we suspect you may want to  
19 look at more documents once you look at Appendix A, we believe  
20 that that is easily overcome under the Franklin factors. I'm  
21 not going to belabor them, you haven't asked me to, but I just  
22 wanted to make sure that our position was clear on the record.  
23 We think you could make a ruling now that DPP was improperly  
24 invoked, and to the extent DPP could exist over any of these  
25 documents, they've had weeks, if not months, to review and log

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1 and haven't done so adequately, in our view, you could find  
2 that DPP is overcome. We still think your Honor's approach is  
3 the correct one – it's careful, it's incremental – but I just  
4 wanted to make clear what our position was since I didn't have  
5 a chance to make those points.

6 Thank you for your indulgence, your Honor, and we'll  
7 do our part, again, to make your review as seamless as  
8 possible.

9 THE COURT: All right. Well, thank you, everybody.  
10 So I will look forward to the SEC's filing on the 14th and the  
11 defendants' response on the 28th. Between now and then, I hope  
12 everybody has a happy Labor Day. For those of you celebrating  
13 the Jewish holidays, I hope you have a nice holiday. And I  
14 will look out for the rest of the motions that have been filed  
15 in this case.

16 Thank you very much, everybody. We're adjourned.

17 MR. SOLOMON: Thank you, your Honor.

18 MR. TENREIRO: Thank you, your Honor.

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