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

Plaintiff,

v. 20CV10832(AT)(SN)
Remote Proceeding

RIPPLE LABS, INC., et al.,

Defendants.

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New York, N.Y.
April 30, 2021
10:00 a.m.

Before:

HON. SARAH NETBURN,

U.S. Magistrate Judge

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(The Court and all parties appearing telephonically)

THE COURT: Good morning, everybody. This is Judge Netburn. I think we are all set to go.

Ms. Slusher, will the call the case, please.

THE DEPUTY CLERK: Good morning, your Honor.

This is in the matter of *Securities and Exchange Commission v. Ripple Labs, Inc., et al.*, 20 CV 10832.

Starting with the plaintiff, will you please state statement your appearance for the record?

MR. TENEIRO: Good morning, your Honor. This Jorge Teneiro on behalf of the Securities and Exchange Commission. With me are my colleagues Dugan Bliss, Daphna Waxman, Jon Daniels, and Lavan Stewart; and as in previous conferences, other SEC staff members may also be listening in on the line.

THE COURT: Thank you. Good morning.

On behalf Ripple Labs.

MR. KELLOGG: Good morning, Judge Netburn.

This is Michael Kellogg on behalf of Ripple Labs. There are various colleagues also on the phone, but I will be speaking for Ripple Labs.

THE COURT: Thank you.

On behalf Mr. Garlinghouse.

MR. SOLOMON: Good morning, your Honor.

This is Mat Solomon from Cleary Gottlieb with various other Cleary attorneys. If necessary today, I will be speaking

on behalf of Mr. Garlinghouse.

THE COURT: Thank you. Good morning.

On behalf of Mr. Larsen.

MR. FLUMENBAUM: Good morning, your Honor.

This is Marty Flumenbaum from Paul, Weiss, Rifkind, Wharton & Garrison. With me on the phone is Michael Gertzman, Robin Linsenmayer, and Christina Bunting. Mr. Gertzman will make the principal argument on behalf of all the defendants.

THE COURT: So we are here on the motion filed by Ripple Labs and all the defendants collectively. That letter was filed on April 16th. I have the SEC's response from April 23rd followed by an April 28th and April 29th letter from the defendants and a late filed letter last night from the SEC. I have read all of those letters. I think that is everything that is before the Court right now.

The issue that is presented today is a question about the SEC's use of the Memoranda of Understanding that it has with foreign regulators and its efforts to obtain discovery through those channels. I have read the letters as I mentioned. I will begin by giving each side an opportunity to state their position any further. Again, I feel like this issue has been well briefed; but I am happy to hear from the parties.

Since this is the defendants' motion, Mr. Kellogg, I will let you begin.

MR. KELLOGG: Actually, your Honor, Mr. Gertzman was going to begin if that is okay, and then I will have a couple Ripple Labs specific points to make at the end of his presentation.

THE COURT: That is fine, but I didn't hear who was going to speak.

MR. GERTZMAN: Good morning, your Honor. This is Michael Gertzman from Paul Weiss. We represent Mr. Larsen. As Mr. Kellogg just said, I have been asked to speak on behalf of all the defendants to get started here.

I apologize, your Honor, my call just dropped so I missed the first sentences of what your Honor had to say. So I apologize for that and hope my line will be stable now.

Your Honor, the SEC in this case is improperly using its memoranda of understanding for foreign securities regulators to seek wide-ranging discovery from overseas parties to gain unfair advantage over the defendants in a matter that improperly evades the Federal Rules of Civil Procedure and the powers of the Court. We have no problems whatsoever with the SEC's use of the MoU process in the pre-litigation investigative stages of its work; but once the SEC completes its investigation and proceeds to file a case in federal court, as it has done in this case, the SEC is and it should be bound by the very same rules of discovery as every other federal court litigant.

The SEC is not a superlitigant. It doesn't have the right to take for itself questionable discovery powers that we, the defendants, don't have; but it was done so here and in doing so, it has undone the level playing field that the courts and rules of procedure require all litigants to abide by, and it has done so in a manner that has evaded the supervision of this Court. Since the very moment we first learned that the SEC was engaging in these extrajudicial tactics, we repeatedly asked them to stop, but they refused.

Now, 36 hours ago on the eve of this hearing -- and I submit, your Honor, it is no coincidence that it was on the eve of this hearing -- and only after weeks of meeting and conferring and corresponding with SEC in which we asked them to provide us with information about their overseas discovery requests, the SEC has finally provided information that revealed the enormity of the breadth and scope of their previously undisclosed foreign discovery program. It is really quite enormous. It is 50 separate requests to over 30 different individuals or entities in nine different countries all around the world. Far from alleviating the unfairness of its use of the MoUs after this litigation was filed, the disclosures that came in late Wednesday night only highlight how one-sided and unfair the SEC's extrajudicial discovery program is.

Most importantly the Wednesday night letter doesn't

change the fact at all that they have refused to stop using these Moves to improperly secure the discovery from overseas in this case. So we're asking the Court to direct the SEC to stop the use of MoUs in this litigation and for an order directing the SEC to produce all the documents they have received or reviewed in response to their use of the MoUs as well as the requests themselves and their related correspondence with the foreign regulators.

THE COURT: I assume that this issue doesn't come up all this often, which may explain the lack of case law here. The only case law that the parties have cited that is specifically on point is the *Badian* case, which upheld the SEC's use of an MoU request.

Are you aware of any cases where the courts have adopted the defendants' position here and directed the SEC to cease using these requests?

MR. GERTZMAN: No, your Honor. There is no case that specifically so holds; but the only case on this issue anywhere that we're aware of is the *Badian* case. I would submit to your Honor that the *Badian* case is a very, very different case from this one for a number of reasons. I would also submit that when you look at the record in that case, you can see that the case was decided based on a faulty factual premise that resulted from a statement by defense counsel in its papers that turned out to be incorrect.

I would like to address *Badian*, but I should also say, your Honor, that while there is no case that specifically goes in our direction that I am aware of, there is plenty authority in the very analogous contexts of the SEC's use of administrative subpoenas; and SEC itself is quite clear and has been clear in many contexts that it does not believe it should be using administrative subpoenas and the context of litigation once the investigation has concluded. This is really no different. The administrative subpoenas are the domestic equivalent of what the SEC is doing here with the MoUs. So I would submit, your Honor, that that authority is quite analogous and quite potent on this issue.

Let me, if I could, speak more directly to *Badian*. It is a very different case from this one. It involved only a single targeted overseas discovery request. It didn't involve a multitude of requests across nine different countries asserting entities as we have here. Even if it were controlling law, which of course it isn't and it has never been followed, it does not stand for the proposition that the SEC can make such broad, unrestrained use of the MoU processes as it seems it is doing here.

Now, as I said the holding of *Badian* rests on a faulty premise, and the record in that case shows that the decision rests on a statement by defense counsel in that case that was in fact incorrect; and when you unpack the record, you can see

that. *Badian* said that the SEC could use its powers to obtain foreign discovery in a civil case; but the mistaken belief on which it relied was that the SEC's use of the MoU to obtain that overseas discovery did not involve compulsory process.

The reason why the Court came to that view, your Honor, was that defense counsel told the Court that the U.K. financial regulator in that case that the request issued by the U.K. financial regulator to the overseas entity from which discovery was sought stated that the FSA, which was the regulator, sought voluntary production of documents from the overseas entity. You can see that statement, an incorrect statement, in one of the documents in Exhibit B to the SEC's April 23rd letter. Specifically, it is defense counsel's August 12, 2009, letter to the Court, which states that the FSA request was voluntary.

When you actually look at the FSA's request and you look at the law, the MoU itself, and you look at the FSA's own rules about how these things work -- and we can see the FSA's actual request in Exhibit B to the SEC's April 23rd letter. Specifically, it's the July 27th, 2009, letter that is part of the Exhibit B. When you look at that FSA request, it is crystal clear that it was not voluntary at all. The letter says that if the entity does not provide the document voluntarily, the FSA has the power to compel production of the document. The FSA request goes on to say that the entity

requires the FSA to compel the production, it should tell the FSA that. That does not sound like a voluntary request at all, your Honor, and that was the erroneous premise on which the opinion is based.

As Magistrate Judge Pittman went on to conclude -- he analogized the FSA request to a voluntary request that any party might make with third-party seeking discovery; but the FSA request was not voluntary. It basically said, *If you are not going to produce voluntary, tell us and we'll make you produce.* That is not a voluntary request. In fact, your Honor, the MoU process is compulsory. It's compulsory at the level of a foreign regulator's request. The MoU makes that clear. You can see that in Section 9(d) of the MoU. It is at page 6 of the multilateral Memoranda of Understanding.

As I mentioned, the enforcement guide for the U.K. conduct authority, which is the same authority that was -- well, similar authority that was of issue in the *Badian* case, it provides that the issuance -- for issuance of compulsory process that in the event of noncompliance may be punished as contempt.

THE COURT: Can I just clarify, Mr. Gertzman?

MR. GERTZMAN: Sure.

THE COURT: Just to clarify that we all have the same understanding, it is my understanding that the request from the SEC to its foreign counterpart, that request is one that could

be rejected, that it is arguably a voluntary engagement; but that once the foreign regulator agrees to move forward with the request as to those entities that it regulates, that that request may be more compulsory.

Is that your understanding as well?

MR. GERTZMAN: Well, your Honor, it's our position that it is compulsory at both levels -- both the level of the SEC request to the foreign regulator and at the level of the foreign regulator's request to the overseas party. The reason why it is compulsory at the level of the request from the SEC to the foreign regulator is that the SEC, contrary to what they suggest, there is no discretion. There is no unilateral pre-discretion on the part of the overseas regulator to decline a request. If you look at Section 6(e) of the MoU, it delineates very, very narrow limited circumstances under which the foreign regulator can decline.

And when the SEC makes a request under the MoU, it's backed by the full force and power of the U.S. government. It's a binding international agreement. It's a treaty in effect. It's part of international law. It isn't the SEC calling up and saying, *Hey, would you mind giving us some documents.* It's the SEC writing pursuant to this international treatise, this international obligation masking on behalf of the U.S. government under a treaty to which our respective countries are bound that you obtain and provide the documents.

That is not a mere request. It's a call for a legal obligation under an agreement backed by all the weight and power of the U.S. government.

The real point, your Honor, is how much differential and power there is here between the SEC's use of the MoUs and our ability to get discovery form overseas parties. Can you imagine, your Honor, if we were to call up an overseas regulator and say, *Hey, we're defendants in this case. Would you please get some discovery from us from one of the entities in your country?* Or if we were to call up the entity itself and say, *Would you please sends up some documents*? You can imagine, your Honor, that that is a very different type of requests from the SEC using its power under this MoU backed by the U.S. government to enforce the powers of the MoU to obtain this discovery.

That's the whole point, your Honor. There should be a level playing field. The SEC has the full power to use the MoU in the investigative process; but once the litigation began, just like administrative subpoenas, it should play by the same rules that we have to play by. There are rules, your Honor. There are clear procedures that all parties have equal access to the -- the Hague Convention, letters rogatory. There are rules of civil procedure and statutes that apply to these situations and we have to abide by them and so should the SEC.

THE COURT: Let me ask you a question. If we all

agree that you and the SEC can utilize the Hague Convention to obtain discovery from a foreign entity, what is the difference between use of a Hague Convention request and an MoU request other than it's a little bit easier for the SEC? Is that the only difference?

MR. GERTZMAN: No, your Honor. There are very important differences that go to the need and the entire scheme of the Federal Rules of Civil Procedure to have the courts supervise and keep track of what goes on in discovery. What the SEC is doing via the MoU process is entirely outside the powers and supervision of this Court. We only found out about this, your Honor, because one of the foreign parties the SEC was seeking discovery from told the company. And we raised it with the SEC and for weeks we didn't find out until Wednesday night how sweeping and broad this discovery is.

If the SEC, like us, had to follow the Hague Convention, they would have to make an application to the Court. The Court would have to approve that application. Everyone would see and you would see what discovery is being sought. We would have an opportunity to object. And if there was something narrow or constricted about that request, we could ask that it be expanded or changed in some way to make it more fair. What is going on here is the SEC is engaging in discovery in secret on its own outside the supervision of the Court. And if it were a Rule 45 subpoena for domestic

discovery, we would see that because Rule 45 requires the parties to tell the other parties about it. If it was a Hague Convention request, we would see it and your Honor would see it. But what is going to on here is outside the supervision of the Court.

Your Honor, this is no small bit of discovery here. When we got the letter on Wednesday night, it really became clear how sweeping and broad this is. There is an entire massive overseas discovery program going on here that until we press the SEC over weeks to get this information, we didn't know about and we couldn't even bring it to your Honor's attention. That is not the way the Rules of Civil Procedure are supposed to work.

Your Honor, let me make also a point about the SEC's complaint that if they have play by the usual rules of the Hague Convention that it will take too long. Your Honor, I submit that your Honor should not hear that complaint from the SEC. The investigation in this case went on for two and a half years. SEC had the full power of the MoU process to take and get whatever international discovery it wanted. There was nothing surprising or secret about the fact that there would be a need perhaps to get international documents in this case.

My client, through counsel, told the SEC that the transactions here occurred overseas. It was part of the Wells process. This was a significant argument in the pre-litigation

investigative phase of the case. We produced documents that show these transactions took place overseas. But for some reason the SEC decided to rush to bring the case at the end of the year as the administration was turning over and having done so, they have to play by the same rules. They can develop the record just the way we can develop the record, but they should do it using the same rules that we are bound by.

Lastly, your Honor, I just wanted to briefly address the argument that the SEC should not have to turn over the requests themselves or the correspondence with the foreign regulators. Your Honor, they are making a claim of privilege here. The privilege claim is vague. Like any other litigant if there are documents that are privileged, they should log them. If they are privileged in part, they should redact them and produce a redaction log. They don't just get to say, *Sorry. We're not giving you the stuff*, especially how sweeping and broad this discovery is from essentially countries all over the world.

Your Honor, we submit to you that you should tell the SEC to stop using the MoU process. Now that this litigation is underway they should play by the same rules of foreign discovery that we have to play by and they should produce the requests themselves as well as the correspondence of the foreign regulators.

Happy to answer any further questions you may have.

THE COURT: Thank you.

Mr. Kellogg, is there something you wanted to add to that.

MR. KELLOGG: Yes, your Honor. I will be quite brief.

I wanted to emphasize the practical consequences of what the SEC is doing here for our litigation. Once they file a complaint, they have stepped into an Article III forum and are subject to the rules of that forum. They have tried to evade that and those fundamental constraints by relying on an investigative tool, the MoUs, to conducts extensive international discovery. That is not a no-harm-no-foul situation as the SEC tries to suggest. It has two real world consequences that call into question the fairness of the proceeding.

First, even though they eventually have to share with us the documents they received through foreign regulators, they can skew the evidence by what they ask for. And they have done exactly that in the MoUs, or at least what they have told us about the MoUs. As Mr. Gertzman noted in the domestic discovery context if they want to serve a Rule 45 third-party subpoena, we get to see it first. If it is a one-sided request for information, we can add our own subpoena. In international discovery, the same holds true for letters rogatory under the Hague Convention. We get to see them first and we can request additional items to balance them out. But that is not the case

with MoUs. We don't get to see them before they go out. Indeed, the SEC says we never get to see them and we don't get to add to them. That is critical here.

The SEC has asked 14 international digit-asset trading platforms, and I am quoting from their April 23 letter at page 5 -- "Intraday XRP trading data for Ripple's XRP sales for certain time periods." It admits that such data "is critical to a central dispute between the parties whether XRP's price moves were influenced by Ripple's announcement." The Court knows how critical that is from the past argument we had. In other words, as we discussed at that argument, the information is critical to whether the price of XRP moves in conjunction with market forces rather than do solely or primarily to the efforts of Ripple.

The problem is that the SEC couched its request to get only the data that it thinks will support its argument. They are only looking for Ripple's sales at XRP even though those are only a tiny fraction of a percent of overall sales, and they reserve the right to cherrypick timeframes. To make our case, our experts need intraday trading data for all sales at XRP and for the entire period in 2013 to December 2020. That information is incredibly hard to get.

As the SEC knows the Hague Convention process is likely to be way too slow for the accelerated schedule in this case, a schedule I would stress we need to keep because of the

tremendous harm the filing of this suit has done to XRP holders throughout the world. We have been working very hard to get that data voluntarily from trade platforms and business partners throughout the world, which brings me to the second real-world consequence of the SEC's skirting the rules here.

When they filed this suit, it scared a lot of third-parties who were suddenly faced with the prospect of being sued for securities violation. Many exchanges as a result delisted XRP; some hedge funds dropped XRP from their portfolios; and businesses using XRP, for example, in the forum settlement process, stopped doing so. The remaining ones, particularly those in jurisdictions where regulators have concluded that XRP is not a security, these businesses are now being hit by massive document requests from their home regulators and they are understandably freaked out. We are very concerned about further delisting and the dissolution of existing business relationships.

Now, the SEC claims they are not deliberately intimidating companies continuing to use XRP. Whether deliberate or not, that is the result. Frankly, they are trying to destroy our business before we have our day in court and they are using what is an investigative tool in the completely different context of discovery without notice to us.

Indeed, they tried to keep this a secret. They kept it a secret from us. They kept it a secret from the foreign

regulators, who were enlisting to help, by using the file number from its original investigation not acknowledging that it was now in a court proceeding. Most egregiously, they kept it secret from the Court.

Now, as an Article I enforcement agency, they can be as arbitrary and one-sided as the law allows in their Article I world of investigations; but once they step into an Article III court, they have to abide by the rules of that court and that is all we're asking here.

THE COURT: With respect to your first point about your position that the SEC's MoU requests are only seeking part of the information, which is not sufficient for you to defend against the case, why isn't the response that you should be issuing letters rogatory, or that you should at the appropriate time move to exclude the evidence because it's prejudicial or incomplete?

MR. KELLOGG: Well, the SEC can hardly take that position that letters rogatory are sufficient for us when they have claimed in their letter that they would be extremely prejudiced by having to use that standard school of discovery because of the accelerated schedule and because how long it traditionally takes to get information through letters rogatory.

Now, as I noted we are trying our best to get this information from our foreign partners and from foreign trading

platforms to the extent that they haven't been scared off by the SEC from doing so and being seen to cooperate with us; but it is very hard and it it is getting harder when they can then issue MoUs. We may have to resort to the Hague Convention process, but it would be very slow. If we have to do that, the SEC should have to do it as well.

THE COURT: Okay. Thank you.

Mr. Teneiro, were you the one who will be responding?

MR. TENEIRO: Yes, your Honor. This is Jorge Teneiro. If I may, I would like to make a few points on our position and then respond to some of the arguments made by counsel.

Your Honor, at issue in this dispute is a multilateral forum of protrude information that is specifically authorized by the Securities Exchange Act. In that statute, Congress itself recognizes a critical distinction between subpoenas, which are enforceable in court, and requests for assistance, which the statute does not make enforceable in court. Mr. Gertzman said that administrative subpoenas have the domestic equivalent of the request that are at issue here, but the statute itself belies this distinction by actually making one enforceable in court and the other one not enforceable in court. In fact, Section 21 and 2 of the Exchange Act says that the SEC may provide assistance to foreign regulators. So the whole idea that the relationship between the SEC and the foreign regulator is compulsory in any way is simply incorrect.

It is also worth noting that although the defendants characterize these as treaties, they are not treaties. They are Memorandum of Understanding. A treaty, just to get technical about it, has to be ratified by two-thirds of the Senate and approved by the Senate and ratified by the President. This is not that. Section 6(a) of the MMoU specifically says that it creates no rights and obligations. As much as I wish that we always had answers from the regulators, that simply is not the case. In this very case, we have received negative responses from some of them.

So, with the statute drawing no distinction between -- the statute itself draws no distinction between the SEC's ability to use requests or in no way suggests that the abilities to cease its active litigation once it commences. The defendants don't provide any authority to the contrary -- at least not in the statute.

They also don't cite any provision in the rules that indicate either that the request is akin to compulsory process or that the ability to issue requests ceases when litigation commences. Accordingly in *Badian*, the only case that is on point and is squarely on point at issue here, the Judge Pittman correctly recognized that the requests are akin to voluntary discovery. Now, they say this was based on a misunderstanding by Judge Pittman of the record. I respectfully submit, your Honor, that Judge Pittman did not misunderstand the record.

If the Court goes to Docket 136-2 at page 8 in this docket, it is clear that although that Judge Pittman had a proper record before him that explained that the regulator was going to seek voluntary production of documents first and then might compel the production of documents later. By the way, that point illustrates the other important piece here, which is that the requests are also not compulsory at the other end. It simply depends on the regulator's discretion.

In any case, your Honor, in her opinion that adopted Judge Pittman's recommendation, Chief Judge Swain specifically held that the fact that foreign authorities may choose to use compulsory process--

OFFICIAL REPORTER: Counsel, please slow down.

MR. TENEIRO: I am sorry about that.

THE COURT: Thank you, madam court reporter. I was going to say the same thing. Yes, if you can speak more slowly so I can hear you and the court reporter can hear you. We're both important.

MR. TENEIRO: Thank you, your Honor.

So as I was saying in her opinion, adopting Judge Pittman's opinion, Chief Judge Swain specifically held that the fact that foreign authorities may choose to use compulsory process does not change the nature of requests from voluntary to compulsory. The Court can see that in the opinion, which is also at Docket 136-3 at page 4 in this docket.

On the other side of the balance, your Honor, defendants suffer neither harm nor prejudice from the SEC's use of these requests. First, we notified them from the beginning of the case that we were going to use the requests and they did not object at this point. We had a conversation about the need to obtain evidence abroad and why that might make it a need for the individual defendants to get additional discovery. We mentioned that we would be using these requests and they did not object.

Second, as defendants cannot dispute, they have gotten and will get all the documents that the SEC collects.

Third, as the Court recognized, they have all their objections to admissibility of the evidence before the fact finder if it is incomplete or unreliable or in some other way improper.

Lastly, as the Court also noted, they're able to obtain evidence located abroad by use of letters of requests or by leveraging what are frankly impressive and vast business relationships with foreign entities or simply by leveraging their status as clients of some of the digital-asset trading platforms. If they want to do that, there is nothing that we can do to stop there. For them to say -- it seems like their complaint boils down to, *Well, that takes too much time and we just want to resolve this case quickly. So let's resolve it without all of the evidence that we need to actually resolve*

the claims. That is not what the rules provide, your Honor. The rules provide for the just and speedy resolution of discovery, but we have to have all the evidence to our arguments and to their defenses.

On the other side of this balance, your Honor, where they have identified no harm, the SEC would be harmed programmatically and in this particular case in any ruling in favor of defendants. Essentially what they are asking is for the Court to exempt only the United States and the SEC from the multilateral process that regulators across the globe use for collecting information.

If I may just emphasize a little bit of what is in our papers, your Honor, just because this is very important to the SEC. 124 securities authorities are signatories to the MMoU and it facilitates mutual assistance among international regulators. This cooperation is fundamental to the SEC's mission and to other agencies around the globe to protect public investors and the global economy. As the Court knows, the flow of securities and money does not stop at a country's borders as this very case illustrates. This flow is good for the global economy, but it also presents jurisdictional challenges from a global law enforcement prospective.

For these reasons foreign regulators have signed onto the MMoU process specifically as a response to the trend towards greater globalization, and Congress authorizes the SEC

to use these methods. Sure, what we said in 2014, one of the most important tools in our enforcement arsenal is strong cooperation with our counterparts around the world, which is absolutely critical.

THE COURT: Mr. Teneiro, I reminder again to please read or speak slowly.

MR. TENEIRO: Thank you, your Honor.

So it is hard to imagine that merely seeking the production of documents would be seen by foreign business partners as reputational damaging of the defendants particularly in light of the fact that this dispute is already public. Again, this harm which is nonexistence must be weighed against the SEC's ability to continue with its international cooperation probe in this global marketplace.

I don't want to get into the relevance of the evidence, your Honor, unless the Court would like me to simply because they do not claim that the evidence is not relevant to this case. Respectfully their complaint about how we're acting outside the supervision of the Court are difficult to square with the fact that defendants have availed themselves of the Freedom of Information Act and issued at least three requests to the SEC that are not also subject to the supervision of the Court.

The SEC is definitely not a superlitigant, but for them to pretend that the Federal Rules of Civil Procedure can

in fact erase the fact that the SEC is a governmental agency that is subject to additional restrictions and also responsibilities is simply not persuasive. Again, they have resources, including contractual relationships, that they can avail themselves of and the Federal Rules of Civil Procedure cannot and should not eliminate that.

Lastly, your Honor, as I believe the Court recognized, there will be no meaningful difference if we went to the letters rogatory procedure. The supposed harm to the business relationships would still occur. The only difference would be that the completion of discovery in this case will take much, much longer. I am pretty certain based on counsel's comments that if we went back to them and said, *Well, why don't we agree all to use letters rogatory but let's have another year of discovery,* they would say no because they believe that this lawsuit has caused tremendous harm to XRP people around the world and they want to get it resolved quickly. We do too. This is why we're using the request process.

It is confounding to us that now they come in and say, *Well, no, we don't want you to use that because it is too fast and you are going to get all the evidence that you may might need for this case*. There is nothing in inequitable, your Honor, about trying to obtain discovery quickly and efficiently in order to meet the tight discovery schedule that defendants want to meet as well. There is nothing inequitable about

telling the defendants that the SEC will seek assistance promptly turning over the documents and particularly given that they retain all the rights to object to admissibility.

The only in equitable outcome would be a ruling granting any part of defendant's motion because it wold upend well established interconnected processes in which--

OFFICIAL REPORTER: Counsel, you are reading too fast.

MR. TENEIRO: The only inequitable outcome in this case, your Honor, would be a ruling granting any part of defendant's motion because that ruling would upend well established processes in which global market regulators rely every day and it would threaten the SEC's ability to protect U.S. capital markets and investors and it would threaten the ability of the fact-finder to have all the evidence before her that is relevant to the resolution of this case.

Thank you. I'd be happy to answer any questions.

THE COURT: I have a question with respect to the privilege issue. Why would your requests to these foreign regulators be privileged? And if they are privileged, why would you not be obligated to put that on a privilege log?

MR. TENEIRO: Thank you, your Honor.

So we are going to put those on a privilege log. The parties have not exchanged privilege logs with respect to documents that they have been producing in the litigation; but we are going to put those on a privilege log.

With respect to the Court's first question, as required by the MMoUs, the SEC has to sort of state its understanding of the case as a part of the request. So to the extent that the request -- that the letter that we transmit to the regulator states our impression and perhaps even our theories of the case, that's our work product and it's privileged. To the extent the letters simply say, We seek Documents A, B, C, and D, we provided them that information. So, again, I am not sure what the harm to them is, but they are not entitled to look into our work product as to why the document might be relevant to a case.

THE COURT: When you say you've provided that information, I know in one of the letters you indicated or they indicated that you have provided categories of information. Have you actually provided them with a redacted version of the request that at this time redacts your theory of the case section but provides to the defendants the specific requests that have been issued?

MR. TENEIRO: We have not done that, your Honor. We have simply extracted from the request. It's not just the categories. It is actually the actual substantive request itself. So when we say, Please, help us obtain all documents relating to intraday trades, all documents relating to XRP's legal status. I guess it is fair to describe them as categories only to the extent that subpoenas talk about

categories of documents and requests talk about the categories of documents. But we have provided them with that substantive information. It's what is in the request themselves.

Redacting them and producing redacted versions is only going -- I am not sure why if we're giving them that information, they need a redacted version of the letter. There is, as I mentioned, sensitivities around disclosing and communications with foreign regulators that we rather avoid. We are providing them the substance of the requests.

THE COURT: Thank you.

MR. GERTZMAN: Your Honor, very briefly in reply?

THE COURT: Yes, go ahead.

MR. GERTZMAN: On the *Badian* case, Mr. Teneiro I think is just incorrect when he says that these requests are really voluntary and as I explained at both levels, they are not voluntary. I don't think I said, your Honor, that Magistrate Judge Pittman misread the record. I think what I said, at least what I intended to say, is that he relied on a statement by defense counsel that mischaracterized the voluntary nature of the request to the overseas party.

The distinction between treaties and the MMoU, the point, your Honor, is I don't think I was saying that the MMoU had been ratified by the Senate. The point is it is an agreement bit the United States government and is backed by the United States government. When the SEC uses that agreement to

get discovery, that is a power for greater than any power that we have. It is supposed to play by the same rules as we have to play by and every other litigant has to play by under law like the *Collins & Aikmen* case and many, many other cases as well as the entire structure of the federal rules, which are designed to level the playing field when it comes to discovery.

THE COURT: Let me interrupt you for a couple of points.

MR. GERTZMAN: Sure.

THE COURT: I will ask you questions that you are raising right now.

First, explain to me why you think this voluntary versus not voluntary point is the linchpin here. Mr. Teneiro cites to your use of the FOIA statute and those requests can be deemed to be compulsory depending upon the scope of the request. So explain to me why you think whether the MoU requests are compulsory or not is the linchpin?

MR. GERTZMAN: Your Honor, it's important I think mainly because it was the linchpin of the *Badian* decision. As your Honor knows that is the only case that squarely discusses this issue at all. When you tease apart that end, you can see that these requests really are compulsory and therefore the reasoning is flawed. Not because Magistrate Judge Pittman made a mistake but because defense counsel said something that wasn't correct. That is really the key.

The key for us, your Honor, is a tremendous differential in power. A government contract with you, if you will, with overseas regulators that allows the SEC, and the SEC alone, to get foreign discovery that we can't get. That is the linchpin for us. The differential in power created by the government itself created by in this case the Executive Branch.

It is completely outside the purview of this Court. Once this case is brought, it belongs to your Honor and Judge Torres to supervise discovery. That is what the rules are all about and the SEC should not be able to go do whatever it wants, especially what it is doing here which is this massive program of overseas discovery that is beyond entirely the purview of this Court and the federal rules.

The FOIA point, your Honor, is really a red herring. The FOIA requests that we submitted are from the SEC's own documents. So there is really no unlevel playing field here when it comes to FOIA. The FOIA requests as well and FOIA's entire statutory framework and regime is also subject to court oversight in the way the MoU tactics of the SEC have been playing here is not.

Your Honor, I also wanted to respond to Mr. Teneiro's point that they told us at the beginning that they were going to be using the MoU process. Your Honor, that is simply not correct. The only citation Mr. Teneiro gave for that in his letter is Judge Torres' case management order, but that case

management order says nothing about the use of MoUs. Mr. Teneiro in the letter using the acronym RSA. That acronym, as far as I know, doesn't appear in any context that is relevant here with respect to MoUs. And RSAs in my experience usually are further requests for admission, not requests for assistance under MoUs.

I can assure your Honor that the minute we understood that the SEC was engaging in this kind of tactics, we brought it to the attention of the SEC with the subject of extensive correspondence and meet and confers over the last six weeks leading up to this hearing and we at no time assented to the use of this process. Yes, it was clear that there was international discovery that may be needed here, but that has been clear going back into the earliest days of the investigative phase of this case. Not the time for the SEC to use its MoU powers, not now after it has brought the case when we don't have the same rights.

I also, your Honor, wanted to address the SEC's point that the order that we seek here would somehow debilitate the SEC's ability to protect investors and regulator the securities markets. We are all for protecting investors and regulating the securities markets appropriately, your Honor; but it is just parade of horribles that is incorrect. Our motion and the order we seek has nothing to do with the SEC's use of the MoU process in the investigative phase. We have no issues with

that whatsoever and it can engage in that process to the greatest extent that it wants to in this case, in any conflicts on any issue. But once the case is brought, they should play by the same rules that we have to play by, your Honor.

I will stop there unless there are any additional questions.

THE COURT: No. Thank you.

I am going to take all this under advisement. I would like to go back and look at a few other things before I issue my ruling. So I am afraid I am not going to rule on this today, but we'll get a written opinion out shortly addressing the issues.

There are some other issues that are before the Court. I am not prepared to address those today either. I don't know that I am going to need further argument on those issues. If I will, I will schedule that conference. Otherwise, I will issue a ruling.

Before I let everybody go, is there anything further from the SEC?

MR. TENEIRO: No, your Honor. Thank you very much.

THE COURT: Anything further from the team of defense counsel?

MR. GERTZMAN: No, your Honor.

MR. KELLOGG: No, your Honor.

THE COURT: Let me remind everybody, as I have put in

all of my orders, we continue to have problems with the public recording the proceedings. I should have mentioned that at the beginning but I failed to do so. If we find out that anybody has recorded today's conference and is posting it on the internet, we do find these and we'll have it taken down through our relations. A reminder to everyone that is not only a violation of the rules but can render someone subject to criminal sanctions. I appreciate that there is high interest in these matters but recording federal proceedings and broadcasting them is impermissible. A reminder to everyone of that.

With that, I wish everybody a good weekend and to stay safe.

We're adjourned.

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