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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **OAKLAND DIVISION**

12
13 In re RIPPLE LABS, INC. LITIGATION

Case No. 4:18-cv-06753-PJH

14 **XRP HOLDERS’ MOTION FOR**
15 **LEAVE TO FILE AN**
16 **AMICUS CURIAE BRIEF IN**
17 **SUPPORT OF DEFENDANTS’**
18 **OPPOSITION TO LEAD**
19 **PLAINTIFF’S MOTION**
20 **FOR CLASS CERTIFICATION**

21 This Document Relates to:

Date: April 26, 2023
Time: 1:30 p.m.
Ctrm: 3

22 All Actions

23 Consolidated FAC Filed: March 25, 2020
24 Trial Date: July 17, 2023

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT Jordan Deaton, James Lamonte, Tyler Lamonte, Mya
3 Lamonte, Mitchell Mckenna, Kristiana Warner, SpendTheBits, Inc., and all other similarly
4 situated XRP Holders (a known putative class of 75,890) (“XRP Holders”), respectfully move
5 the Court for leave to file a brief as *amici curiae* in support of Defendants’ Opposition to
6 Plaintiff’s Motion for Class Certification (Dkt. No. 201). A copy of XRP Holders’ proposed
7 *Amicus* Brief is attached as Exhibit A.

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9 The Plaintiff opposes XRP Holders’ request for leave. The Defendants consent.
10 Plaintiff’s opposition to the request to file an *Amicus* Brief - alone - demonstrates that the
11 interests of XRP Holders, and a known identifiable class of over seventy-five thousand, all
12 satisfying the very definition of Plaintiff’s Proposed Class, will not be pursued, or protected,
13 unless this Court grants leave to file the proposed *Amicus* Brief.

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15 **I. LEGAL STANDARD**

16 This Court has broad discretion to grant leave for interested nonparties to file briefs as
17 *amici curiae*. See *Inst. Of Med. Educ., Inc. v. W. Ass’n of Sch. & Colleges*, No. 11-CV-05755-
18 LHK, 2013 WL 6672443, at *3 n.1 (N.D. Cal. Dec. 18, 2013). The Court’s discretion is
19 generally exercised liberally as “[t]here are no strict prerequisites that must be established prior
20 to qualifying for amicus status.” *Woodfin Suite Hotels, LLC v. City of Emeryville*, No. C 06-1254
21 SBA, 2007 WL 81911, at *3 (N.D. Cal. Jan. 9, 2007). XRP Holders need merely to show that
22 their “participation is useful or otherwise desirable to the court.” *Id.* “District courts frequently
23 welcome amicus briefs from nonparties concerning legal issues that have potential ramifications
24 beyond the parties directly involved or if amicus has unique information or perspective that can
25 help the Court beyond the help that the lawyers for the parties are able to provide.” *NVG*

1 *Gaming, Ltd. v. Upstream Point Molate, LLC*, 335 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005)
2 (citation omitted).

3 Because no Federal Rule of Civil Procedure applies to motions for leave to appear as
4 *amicus curiae* filed in district courts, courts often look for guidance from Fed. R. App. P. 29,
5 which applies to *amicus* briefs in federal appellate cases. *See, e.g., Am. Humanist Ass’n v.*
6 *Maryland Nat’l Capital Park & Planning Comm’n*, 147 F. Supp. 3d 373, 389 (D. Md. 2015).
7 Rule 29 requires prospective *amici* to file a motion, attaching the proposed brief, stating “the
8 movant’s interest” and “the reason why an amicus brief is desirable and why the matters asserted
9 are relevant to the disposition of the case.” Fed. R. App. P. 29(a)(3). Courts freely permit the
10 filing of *Amicus* Briefs when they help the Court’s decision-making. *Id.*

11 **II. IDENTITY OF PROPOSED AMICUS CURIAE AND STATEMENT OF INTEREST**

12 Proposed *amici curiae* are six individual XRP holders, and SpendTheBits, Inc (“STB”), a
13 company that has integrated the XRP Ledger (“XRPL”) utilizing XRP in a payments’ application
14 business. Proposed *amici* represent the interests of a growing putative class of XRP holders from
15 the United States and 143 other countries, consisting of users, investors, holders, developers,
16 content providers and small businesses all who acquired and utilize XRP and the XRPL, most of
17 whom were unaware of Ripple or its executives when acquiring XRP. Today, the putative class
18 stands at 75,890. Because XRP Holders represent such a significant public interest, they were
19 granted *amici curiae* status in *SEC v. Ripple, Labs, Inc. et al.*, Case No. 1:20-cv-10832 (AT)
20 (S.D.N.Y. 2020) (“SEC Action”). *See* SEC Action ECF No. 372. Separately, STB was also
21 granted *amicus curiae* status. *See* SEC Action ECF No. 684.

22 On December 22, 2020, the Securities and Exchange Commission (“SEC”) filed an
23 enforcement action against Ripple Labs, Inc. (“Ripple”) and two of its executives, alleging
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1 substantially the same claims being asserted by the Plaintiff here. *See* SEC Action ECF No. 4.
2 Because the SEC’s allegations (like the one’s here) are not limited to direct sales by Ripple, but
3 rather include all sales of XRP, including secondary sales independent of Ripple, XRP Holders
4 filed a Motion to Intervene as Defendants in the SEC Action. *See* SEC Action ECF No. 123.
5 Remarkably, when proposed *amici* filed their Motion to Intervene, over 12,600 XRP holders
6 requested to join. SEC Action ECF No. 123 at n.1. Judge Torres, presiding over the *SEC* Action,
7 denied the Motion to Intervene but recognized that XRP Holders maintain a significant interest
8 in the outcome of the case and granted XRP Holders *amici curiae* status because XRP Holders
9 “represent third parties whose particular interests may be affected by the Court’s ruling and
10 whose particular interests are echoed in broader public interests.” *See* SEC Action ECF No. 372
11 at 9-10. Because both Ripple and the SEC opposed class certification and XRP Holders
12 conceded certification would delay the case, Judge Torres did not consider class certification and
13 granted *amici* status to the six XRP Holders in their individual capacities. *Id.* at n.1. The parties
14 and amici are awaiting Judge Torres’ decision on cross-motions for summary judgment. XRP
15 Holders filed an *Amicus* Brief in Opposition to the SEC’s Motion for Summary Judgment (SEC
16 Action ECF No. 708), while STB filed an *Amicus* Brief in Support of Ripple’s Motion for
17 Summary Judgment (SEC Action ECF No. 684).

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19
20 Plaintiff’s Motion for Class Certification (Dkt. No. 181) - as proposed - threatens to cause
21 substantial harm to XRP Holders. The Lead Plaintiff moves the Court for certification of a class
22 that includes: “All persons or entities who purchased XRP from May 3, 2017 through the present
23 and who have (a) retained the XRP, and/or (b) sold the XRP at a loss.” Dkt. No. 181 at 2. This
24 class definition, if approved and certified, would include proposed *amici* and the other 75,890
25 XRP holders proposed *amici*’s interests represent. The proposed class includes all XRP holders
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1 from May 3, 2017, who acquired XRP, regardless of the seller or the circumstances surrounding
 2 the sale and includes XRP holders who acquired XRP for non-investment reasons such as
 3 consumptive use. As the proposed brief demonstrates, Plaintiff does not adequately represent the
 4 proposed class or the putative class of 75,890 known XRP holders. In fact, unlike proposed *amici*
 5 and the other 75,890 known XRP holders, the Plaintiff is NOT an actual XRP holder. Lead
 6 Plaintiff Sostack is a day-trader who speculates on momentary price fluctuations of multiple
 7 digital assets, including XRP. Def. Opp., Dkt. No. 201. Unlike the Lead Plaintiff, who held XRP
 8 for less than two weeks, proposed *amici* and the tens of thousands of other XRP holders they
 9 represent, are long-time users and holders of the digital asset XRP.
 10

11 **III. AMICI CURIAE'S UNIQUE PERSPECTIVE WILL HELP THE COURT**

12 XRP Holders' perspective is unique and very different from the parties. As for Lead
 13 Plaintiff, he purchased XRP between January 1st and 16th, 2018 and sold that XRP between
 14 January 9th and 17th, 2018. Dkt. No. 63 at ¶ 13. In sum, he owned XRP for only two weeks
 15 MORE THAN FIVE YEARS AGO. Proposed *amici* and the other 75,890 XRP holders,
 16 presently own XRP. Furthermore, the technological advancements related to the XRPL, and the
 17 use cases for XRP, all developed independent of the Defendants, have exploded since Lead
 18 Plaintiff briefly owned XRP in 2018. In other words, 2018's XRP is not the same as 2023's
 19 XRP. Many different XRP holders acquired XRP for many different reasons – reasons
 20 apparently unknown (or ignored) by Plaintiff.
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23 Today, XRP Holders and millions of others, use XRP as a substitute for fiat and as a form
 24 of currency to buy everyday items at Walmart, Amazon, Target and countless other locations.
 25 *See e.g., Introducing the XRP MasterCard Debit Card*, available at [https://medium.com/global-](https://medium.com/global-id/introducing-the-xrp-mastercard-debit-card-827c0b37445b)
 26 [id/introducing-the-xrp-mastercard-debit-card-827c0b37445b](https://medium.com/global-id/introducing-the-xrp-mastercard-debit-card-827c0b37445b); *see also, Uphold's New Debit*
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1 *Card Lets You Pay With XRP*, available at, [https://cointelegraph.com/news/upholds-new-debit-](https://cointelegraph.com/news/upholds-new-debit-card-lets-you-pay-with-bitcoin-xrp-and-gold)
2 [card-lets-you-pay-with-bitcoin-xrp-and-gold](https://cointelegraph.com/news/upholds-new-debit-card-lets-you-pay-with-bitcoin-xrp-and-gold). Thousands of vendors, like Time Magazine, accept
3 XRP as a form of payment or medium of exchange. *See Time Magazine Will Accept*
4 *Cryptocurrencies*, available at [https://www.theblock.co/linked/102166/time-magazine-bitcoin-](https://www.theblock.co/linked/102166/time-magazine-bitcoin-digital-subscription-payments)
5 [digital-subscription-payments](https://www.theblock.co/linked/102166/time-magazine-bitcoin-digital-subscription-payments); *see also Pay With XRP*, available at [https://cryptwerk.com/pay-](https://cryptwerk.com/pay-with/xrp/)
6 [with/xrp/](https://cryptwerk.com/pay-with/xrp/) (listing 1,500 plus companies accepting XRP as a payment and helping users “[f]ind
7 where to spend [their] XRP.”).

9 Plaintiff fundamentally misunderstands (or is choosing to ignore) the very nature of an
10 open, permission-less distributed ledger blockchain technology. This Court will benefit from
11 XRP Holders’ participation because Plaintiff misunderstands what constitutes a truly
12 decentralized network such as the XRPL. *See* Complaint, Dkt. No. 63, ¶ 3. In fact, SpendTheBits
13 is a foreign for-profit company based out of Alberta, Canada that designed an application to
14 transfer Bitcoin on the decentralized, open-source blockchain technology of the XRPL without
15 Ripple’s knowledge, consent or assistance. For STB, XRP Holders and the 75,890 they
16 represent, the only difference between Bitcoin (not considered a security) and XRP, is that XRP
17 is a better version of Bitcoin and thus should be legally treated the same.
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19 . Plaintiff’s Proposed Class Certification includes **ALL** holders of XRP, including users of
20 the XRPL. XRP is used by XRP Holders to move money from the U.S. to Africa, Mexico,
21 Thailand, Brazil, the Philippines, all of Asia, and other cross-border destinations where XRP
22 holders send peer-to-peer payments utilizing XRP. XRP is also used as payroll currency by
23 multiple companies. BitPay, for example, launched a massive crypto payments service for
24 businesses in 225 countries and allows people to be paid in cryptocurrencies including Bitcoin,
25 Ether, **XRP**, Litecoin, Bitcoin Cash and others. *See Connecting with Bitpay*,
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1 <https://support.bigcommerce.com/articles/Public/Connecting-with-BitPay>. Plaintiff is either
2 unaware of these technological advances involving XRP or is choosing to ignore XRP’s vast use
3 cases that clearly do not trigger or involve U.S. securities laws. XRP Holders, on the other hand,
4 can serve as a true *friend of the Court*, ensuring that the Court is aware of such information that
5 will undoubtedly impact the Court’s decision on the Proposed Class Certification.
6

7 The Defendants are also ill-equipped to provide the Court with XRP Holders’ unique
8 perspective. In fact, in a sworn interrogatory in the SEC Action, Ripple admitted that it “does not
9 have knowledge of all current and potential ‘uses’ and ‘functions’ of XRP, and such information
10 is outside of Ripple’s possession, custody or control.” *See* SEC Action ECF No. 165-4. In fact,
11 when the SEC asked Ripple to list all known use cases for XRP, Ripple responded by referring to
12 a letter motion put forward by counsel for proposed *amici*. *Id.* (Citing a Letter from Attorney
13 John Deaton on behalf of XRP Holders to Judge Analisa Torres re: Intention to Intervene (Mar.
14 19, 2021) (SEC Action ECF No. 75 at 4) (Noting “literally hundreds of developers using XRP
15 and the XRPL[, where] the vast majority of these developers have never had any contact with
16 Ripple or its executives” among a list of eight uses for XRP, a “few examples of how XRP
17 Holders utilize XRP without Ripple’s knowledge or input”). STB is a perfect example of the
18 open, permission-less, and decentralized nature of the XRPL, because if STB were to scale, it
19 could, in theory, “become a competitor to Ripple’s ODL system that also runs on the XRPL.”
20 *See* SEC Action ECF No. 684 at 11.
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23 Considering the above, Judge Torres determined that “[proposed amici] may view XRP
24 differently from Defendants and thus may stress different arguments...and...will provide the
25 Court **with a meaningful perspective and** will help ensure ‘complete and plenary presentation
26 of difficult issues **so that the [C]ourt may reach a proper decision.**” *See* SEC Action ECF No.
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1 372 at 9-10 (emphasis added). Clearly, XRP Holders will provide this Court with a “perspective
2 that can help the Court beyond the help that the lawyers for the parties are able to provide.” *NVG*
3 *Gaming, Ltd.*, 335 F. Supp. 2d at 1067.

4 Additionally, XRP Holders can offer this Court the perspective of a decentralized XRP
5 user and investor, whose purchase of XRP, without knowledge of and unconnected to Ripple,
6 meets the Proposed Class definition offered by Plaintiff and whose property interests will be
7 significantly harmed if such a sweeping class were certified.

8 In the SEC Action, XRP Holders submitted approximately thirty-five hundred XRP
9 Purchaser Affidavits for the Court’s consideration. *See* SEC Action ECF No. 665-1-26; *also*
10 *attached to* Def. Opp., Dkt. No. 201, Ex. 26-51. Unlike Lead Plaintiff, XRP Holders offer the
11 perspective of the user and/or investor who does not rely on Ripple to achieve a financial profit –
12 yet those XRP holders would be captured by the proposed class definition.

13 XRP Holders’ perspective on why a proposed “Opt Out” would not protect XRP Holders
14 will also assist the Court, as well. The proposed brief demonstrates how XRP holders utilize
15 XRP as collateral to obtain financing for a fiat loan and how they “stake” (i.e. loan) their XRP
16 and earn interest. *See e.g., Binance Earn*, available at <https://www.binance.com/en/earn/xrp>
17 (offering XRP holders yield on their XRP); *also, Get a Loan Backed By Your XRP*, available at
18 <https://coinloan.io/cryptobacked-loans/xrp-loan/> (allowing XRP holders to borrow cash at 4.9%
19 annually). Many XRP Holders do not view XRP as an investment and acquired XRP for
20 consumptive use. *See* Def. Opp., Dkt. No. 201, Ex. 26-51.

21 XRP Holders also offer the perspective of the XRPL user and its decentralized exchange
22 (“DEX”). *Id.* When utilizing the XRPL, XRP is a tool for payment transfers or serves as a bridge
23 currency. *Id.* Anyone can access the XRPL and transfer value in the form of fiat currencies,
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1 NFTs, or other cryptocurrencies to anyone without the need to utilize an intermediary such as a
2 bank or money transmitter (e.g., Western Union or MoneyGram). *See “Direct XRP Payments”*
3 *XRPL.org*, <https://xrpl.org/direct-xrppayments.html>. Ironically, the Chairman of the SEC, prior
4 to becoming Chairman, publicly described XRP as a “bridge currency.” *See Gary Gensler*
5 *Comments*, at Peterson Institute for International Economics, September 26, 2018, at
6 <https://youtu.be/v0zAadukczY> at 1:29.

8 XRP Holders can also offer this Court the perspective of a decentralized XRPL
9 Developer. There are literally hundreds, if not thousands, of XRPL developers, with no
10 connection to Ripple, running applications on the XRPL, like STB. Many of these developers are
11 represented in the 75,890 known XRP holders. Some of these developers submitted XRP
12 Purchaser Affidavits in the SEC action. *See* SEC Action ECF No. 665-1-26; *also attached to*
13 *Def. Opp.*, Dkt. No. 201, Ex. 26-51. Understanding, the decentralized structure of the XRPL is
14 critical because anybody from anywhere can submit transactions on the XRPL. Yet, Plaintiff’s
15 Proposed Class captures all of these worldwide users and holders of XRP.

17 Because Plaintiff only owned XRP for two weeks five years ago, he wrongly asserts that
18 “XRP is not decentralized like Bitcoin.” *Complaint*, Dkt. No. 63, ¶ 3. XRP Holders can
19 demonstrate that a major reason independent developers from around the world use the XRPL
20 (like STB) is because unlike the Bitcoin Network, the XRPL contains the world’s first
21 established DEX. *See “Behind the Scenes of the XRPL Dex.”* DEV Community,
22 <https://dev.to/rippledev/behind-the-scenes-of-the-xrpl-dex-4jb>. The DEX enables the user on
23 the ledger to buy, sell or trade any asset—including Bitcoin, Ether, stable-coins, XRP,
24 DogeCoin, and other digital assets and even physical units of value such as gold. *Id.* This allows
25 users of the DEX and the XRPL to trade well-established commodities (e.g., Gold and Bitcoin)
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1 and other commodity-like assets (XRP, Ether, etc.) without using an intermediary such as a bank
2 or other financial institution and certainly, without needing the Defendants *Id.*

3 Over a year ago, Judge Torres granted XRP Holders *amici* status. XRP Holders’
4 involvement allows them to serve as a friend to this Court and “assist the Court in reaching the
5 right decision in a case affected with the interest of the general public.” *Russell v. Bd. of*
6 *Plumbing Examiners*, 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999). XRP Holders offer this
7 Honorable Court, similar assistance.
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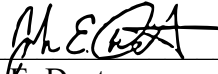
9 **IV. CONCLUSION**

10 Plaintiff’s Motion for Class Certification, if granted, will significantly harm the
11 interests of proposed *amici* and the 75,890 XRP Holders they represent. Considering that the
12 Plaintiffs in this case are alleging the same arguments as the SEC, Judge Torres’s conclusion that
13 XRP Holders represent third parties whose particular interests may be affected by the Court’s
14 ruling, equally applies to this case. The fact that proposed *amici* represent the interests of over
15 75,000 XRP holders, compared thus far, to only a few identified by the Plaintiffs, XRP Holders’
16 participation “will provide the Court with a meaningful perspective and will help ensure
17 complete and plenary presentation of difficult issues so that the court may reach a proper
18 decision.” SEC Action ECF No. 372 at 9-10. The mere fact that Plaintiff opposes this motion
19 demonstrates that the interests of XRP Holders will not be protected by Plaintiff.
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22 For these reasons, proposed *amici* respectfully request that the Court grant their Motion
23 for Leave to File a Brief as *Amici Curiae* in Support of the Defendants’ Opposition to Lead
24 Plaintiff’s Motion for Class Certification (Dkt. No. 201). The proposed Amicus Brief presents
25 the valuable perspective of the XRP holders who could be substantially harmed by the Court’s
26 decision.
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1 Dated: February 10, 2023

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2 

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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **OAKLAND DIVISION**

13 In re RIPPLE LABS, INC. LITIGATION

Case No. 4:18-cv-06753-PJH

14 **BRIEF OF *AMICUS CURIAE*, XRP**
15 **HOLDERS, IN SUPPORT OF**
16 **DEFENDANTS' OPPOSITION TO**
17 **LEAD PLAINTIFF'S MOTION FOR**
18 **CLASS CERTIFICATION**

19 This Document Relates to:

Date: April 26, 2023

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21 All Actions

22 Consolidated FAC Filed: March 25, 2020

23 Trial Date: July 17, 2023
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1 *S.E.C. v. Aqua–Sonic Prods. Corp.*,
2 524 F. Supp. 866, 876 (S.D.N.Y. 1981)..... 13

3 *United Hous. Found, Inc. v. Forman*,
4 421 U.S. 837, 852 (1975).....14

5 *Ellis v. Costco Wholesale Corp.*,
6 657 F.3d 970, 984 (9th Cir. 2011)..... 15

7 *Jimenez v. Allstate Ins. Co.*,
8 765 F.3d 1161, 1167 (9th Cir. 2014).....17

9 **Federal Rules**

10 Fed. R. Civ. P. 23(b)(3).....18

11 **Other Authorities**

12 SEC Rel. No. 33-5347 (Jan. 4, 1973)..... 12

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1 secondary market - not from Ripple. Plaintiff's claims are not limited to direct sales offered by
2 Ripple but includes all sales - regardless of the seller or circumstances surrounding the sale -
3 including secondary market transactions made by people completely unaware of the company
4 Ripple. If the Court were to certify the class - *as currently defined by Plaintiff* - and appoint
5 Sostack Representative of the class - it would suggest that *XRP*, which is nothing more than
6 software code, is itself a security and thus, always a security no matter the seller or the
7 circumstances surrounding the sale.
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9 Plaintiff cannot cite a single case in 76 years since *SEC v. W.J. Howey Co.*, 328 U.S. 293,
10 (1946) was decided, supporting such a sweeping and all-encompassing claim. The proposed
11 federal class, if certified, would include: "All persons or entities who purchased XRP from May
12 3, 2017 through the present and who have (a) retained the XRP." Dkt. No. 181 at 2. Hence, the
13 proposed class includes all XRP holders from May 3, 2017 who acquired XRP, including XRP
14 acquired by users for non-investment reasons. It would be absurd to try and argue *each and every*
15 secondary market transaction of XRP satisfies *Howey* in every instance. More importantly, there
16 is not a single case that can be cited where an investment contract has been found where there
17 exists no privity whatsoever between the buyer and the promoter.
18

19 Plaintiffs' Proposed Federal Class is so overbroad that it includes every sale of XRP made
20 anywhere in the world, including in foreign jurisdictions where XRP has been declared a non-
21 security.² Under these circumstances, Plaintiff cannot adequately represent *amici* and 75,890
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24
25 ² Japan, Switzerland, Singapore, UAE, and the United Kingdom have all declared XRP a
26 currency - not a security. *See SEC v. Ripple, Labs, Inc. et al.*, Case No. 1:20-cv-10832 (S.D.N.Y.
27 2020) ("SEC Action") ECF No. 673 at n.50. The Canadian Tax Foundation treats XRP as a
28 utility token and list it, along with Bitcoin as intangible property. *See*
https://farris.com/content/uploads/2019/04/20180924-Taxation_of_the_Token_Economy.pdf, at
34, 49.

1 XRP holders who oppose any determination that XRP is a security. XRP being deemed a
2 security would cause great harm to XRP holders because they would be unable to access, sell, or
3 use their XRP. Furthermore, *amici* will demonstrate that if Plaintiff’s request for certification is
4 granted, there is no “Opt Out” provision available that could offer XRP holders protection.
5 Additionally, *amici* and 75,890 XRP holders are currently on standby, regarding the summary
6 judgment outcome in the SEC Action.
7

8 Certification of the federal class - *as proposed* - should be denied. Alternatively, *amici*
9 asks the Court to consider holding off its decision on class certification until after a ruling in the
10 SEC Action. All briefs, including fourteen *amicus* briefs in support of Ripple’s Motion for
11 Summary Judgment, and XRP Holders’ *amicus* brief in opposition to the SEC’s Motion for
12 Summary Judgment, have been submitted and a decision could be issued at any moment.
13 Considering the SEC asserts substantially the same claims as Plaintiff, that Court’s ruling could
14 have a significant impact on this Court’s decision regarding certification.
15

16 Finally, Plaintiff has already proven he and his counsel are **inadequate** representatives of
17 the proposed class, and certification thus, must be denied. Plaintiff and his counsel opposed
18 *amici*’s motion for leave to file an *amicus* brief. The mere fact that they opposed known and
19 identifiable class members, requesting leave to file an *amicus* brief, proves that they will not act
20 in the best interests of the class moving forward.
21

22 INTERESTS OF AMICUS CURIAE

23 *Amici* are six individual XRP holders, along with a company that has integrated the XRP
24 Ledger (“XRPL”) utilizing XRP in a payments’ application business, called SpendTheBits, Inc.
25 (“STB”). Without Defendants’ knowledge, consent or assistance STB, a foreign for-profit
26 company based out of Alberta, Canada, designed an application to transfer Bitcoin on the
27

1 decentralized, opensource blockchain technology of the XRPL. Additionally, *amici* represent the
 2 interests of a growing putative class of XRP holders from the United States and 143 other
 3 countries around the world, consisting of users, investors, holders, developers, content providers
 4 and small businesses who acquired and utilize XRP and the XRPL - most of whom were
 5 completely unaware of Ripple when acquiring XRP. Today, the putative class stands at 75,890
 6 XRP holders. Because these XRP holders represent such a significant public interest, they were
 7 granted *amici curiae* status in the SEC Action. *See* SEC Action ECF 372.³ *Amici*, and the 75,890
 8 XRP holders they represent, meet the definition of the Federal Class being proposed by Plaintiff.
 9

10 I. RELEVANT FACTUAL BACKGROUND

11 A. XRP is Digital Code – Not a Security

12 XRP is one of the world’s largest cryptocurrencies by market capitalization. “XRP is
 13 estimated to be held today by millions of holders worldwide, with approximately \$700 billion to
 14 \$1 trillion in total trading volume since 2013.” SEC Action ECF 86 at 2. According to the SEC,
 15 “[s]tripped down, XRP is just computer code.” SEC Action ECF 640 at 10. The most widely
 16 known and held cryptocurrency in the world is Bitcoin.⁴ Three years after Bitcoin was created,
 17 three Bitcoin developers set out to build a better version of Bitcoin and thus, created XRP and
 18 the XRPL. *See* SEC Action ECF 643 at 4. Federal courts have recognized a blockchain’s job is
 19 to validate the authenticity of a transfer of a unit of cryptocurrency. *See e.g., SEC v. Telegram*
 20 *Grp., Inc.*, 448 F. Supp. 3d 352, at n.2 (S.D.N.Y. 2020). A blockchain network, like Bitcoin and
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25 ³ In the SEC Action, six XRP holders, Jordan Deaton, James Lamonte, Tyler Lamonte, Mya
 26 Lamonte, Mitchell Mckenna, and Kristiana Warner were granted *amici curiae* status and filed an
 27 amicus brief. SEC Action ECF No. 708. STB was separately granted *amicus* status and filed a
 28 separate *amicus* brief. SEC Action ECF No. 684.

⁴ *See* <https://www.forbes.com/advisor/investing/cryptocurrency/top-10-cryptocurrencies/>.

1 the XRPL, is an open source, widely distributed, secure ledger of transactions. *Id.* Each
2 blockchain produces a native cryptocurrency. *Id.*

3 **B. The U.S. Government Defines XRP**

4 Two years after XRP was created, the Government Accountability Office (“GAO”) issued
5 a report defining and highlighting XRP - not as a security – but as “*virtual currency*” utilized in
6 “a decentralized payment system.” *See GAO Report*, Deaton Decl. Ex. A. One year after the
7 *GAO Report*, XRP became the *first* cryptocurrency regulated in the U.S. and the government,
8 again, described XRP – not as a security – but as “*virtual currency.*” *See FinCEN Ripple Facts*,
9 Deaton Decl. Ex. B at 1. The same year FinCEN classified XRP as virtual currency, the
10 Commodity Futures Trading Commission (CFTC), declared: “Virtual Currencies Such as Bitcoin
11 are Commodities.” *See Coinflip, Inc. et al*, CFTC Docket No. 15-29, Deaton Decl. Ex. C
12 (“Bitcoin and other virtual currencies are... properly defined as commodities.”). As XRP was
13 getting more recognition from these different government agencies, it became even more
14 popular, second only to Bitcoin. *See Ripple (XRP) Overtakes Ethereum...*, Deaton Decl. Ex. D.
15 By 2019, XRP had become so popular, it was highlighted in the Financial Stability Oversight
16 Council’s (FSOC) 2019 Annual Report to the U.S. Treasury. *See 2019 FSOC Annual Report*.
17 Deaton Decl. Ex. E at 96 (“The market capitalization of digital assets, such as Bitcoin, Ethereum,
18 XRP, and Litecoin, has increased in recent years”). Also in 2019, the SEC published guidance
19 strongly suggesting XRP is not a security. *See SEC Framework*, Deaton Decl. Ex. F (stating
20 *Howey* is unlikely met when “a virtual currency...can immediately be used to make
21 payments...or acts as a substitute for real (or fiat) currency.”).
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1 **C. XRP Holders and Market Participants View XRP as Currency**

2 XRP holders view and utilize XRP exactly the way described in the 2014 *GAO Report*: as
 3 a form of payment. *Amici* and others have received XRP as a gratuity or tip for providing content
 4 on platforms like Twitter and YouTube. In fact, for years there existed an XRP TipBot allowing
 5 the transfer of XRP from person to person. *See XRP TipBot*, Deaton Decl. Ex. G. Thousands of
 6 vendors, like Time Magazine, accept XRP as a form of payment or medium of exchange. *See*
 7 *Time Magazine Will Accept Cryptocurrencies*, Deaton Decl. Ex. H, *see also Pay With XRP*,
 8 Deaton Decl. Ex. I (listing 1,500 plus companies accepting XRP as payment; helping users
 9 “[f]ind where to spend [their] XRP.”).

10 XRP holders were not alone viewing XRP as currency. After multiple government
 11 agencies declared XRP virtual currency, sophisticated market participants generally accepted
 12 three cryptocurrencies as not securities: Bitcoin, Ether, and XRP. *See e.g. Bailard, Inc.*⁵ *Code of*
 13 *Ethics*, January 4, 2021 at 2-3, Deaton Decl. Ex. J, (“Bailard has decided to allow investments in
 14 three cryptocurrencies – Bitcoin, Ethereum, and XRP – that are generally accepted to be
 15 currencies and not currently subject to regulation by the SEC.”). Speaking of sophisticated
 16 market participants, before becoming Chairman of the SEC, Gary Gensler described XRP as a
 17 “*bridge currency*.” *See Gary Gensler comments at Peterson Institute for International*
 18 *Economics*. Deaton Decl. Ex. K. Likewise, a former chairman of the CFTC stated XRP is more
 19 like currency than a security and should have the same legal status as Bitcoin or Ether.⁶
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 25 ⁵ Bailard Inc., because it is an SEC registered investment adviser and serves as a sub-adviser to
 26 certain registered investment companies, is required by the SEC to adopt a code of ethics. *See*
 27 Rule 204A-1, Investment Advisers Act of 1940; and Rule 17j-1, Investment Company Act of
 28 1940.

⁶ Writing an op-ed for the *International Financial Law Review*, along with Conrad Bahlke of the
 international law firm Willkie Farr & Gallagher, Giancarlo and Bahlke wrote that XRP doesn’t

1 **D. Understanding The XRP Ledger**

2 From Bitcoin on down, every network's token performs whatever function that
3 blockchain was invented to serve. The XRPL, like the Bitcoin Network, is a public distributed
4 ledger anyone, from around the world, can access, at any time. *See* SEC Action ECF 684. Any
5 person, developer or business, with basic technical knowledge can access the XRPL, including
6 its decentralized exchange (DEX), by simply establishing a trust-line. *See XRPL*, Deaton Decl.
7 Ex. L. Acquiring XRP to establish the trust-line is not an investment because the trust-line is
8 what allows **users** to move value in only 3-5 seconds, at a cost of only a fraction of a penny.
9 Hence, when a **user** opens an account, acquiring the minimum XRP to move or transfer value, it
10 is not an investment because the **user** is acquiring the XRP for consumptive use. *Id.* Anyone can
11 submit transactions on the XRPL. *See* SEC Action ECF 684. Any person can access the XRPL
12 and transfer value in the form of fiat currencies, NFTs, or other cryptocurrencies to friends,
13 family or loved ones, without the need to rely on Ripple or utilize an intermediary such as a bank
14 or money transmitter (e.g., Western Union or MoneyGram). *Id.*

17 Clearly, when accessing the XRPL to transfer value over the internet, XRP is not being
18 viewed or utilized as an investment. Rather, it is being utilized as a utility tool for payments.
19 Independent developers and users of the XRPL, can propose changes to the XRPL's source code
20 and those changes can be implemented over Ripple's objection, assuming 80% consensus is met.
21 *See Why XRP is the most misunderstood cryptocurrency*, Deaton Decl. Ex. M. Unlike the Bitcoin
22 Network, the XRPL contains the world's first established DEX. *See Behind the Scenes of the*
23 *XRPL Dex*, Deaton Decl. Ex. N. The DEX enables the user to buy, sell or trade multiple digital
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27 hit any prongs of the Howey Test and should not be regulated as a security but instead
28 considered a currency or medium of exchange.

1 assets or even physical units of value such as gold. *Id.*

2 **II. LEGAL STANDARD**

3 “Certification is proper only if ‘the trial court is satisfied, **after a rigorous analysis**, that
4 the prerequisites of Rule 23(a) have been satisfied.’” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S.
5 338, 350-51 (2011). The Plaintiff cannot rely on self-serving and conclusory statements because
6 “Rule 23 does not set forth a mere pleading standard.” *Id.* The Plaintiff “must actually prove –
7 not simply plead – that their class satisfies each requirement of Rule 23.” *Olean Wholesale*
8 *Grocery Coop., Inc. v. Bumble Bee Foods, LLC*, 31 F. 4th 651, 664-65 (9th Cir. 2022) (en banc).
9

10 **III. ARGUMENT**

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12 Certification should be denied because the Plaintiff and his counsel cannot satisfy Rule
13 23(a)’s requirements of numerosity, commonality, typicality, and adequacy of representation.
14 Plaintiff’s Federal Securities Class should be denied under Rule 23(b)(3) because individualized
15 inquiries predominate common questions thus making a class an inferior method of adjudication.
16

17 **A. Plaintiff And His Counsel Have Already Violated Rule 23(a)(4)**

18 “Adequate representation depends upon an absence of antagonism [and] a sharing of
19 interests between representatives and absentees.” *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d
20 1157, 1165 (9th Cir. 2013). The adequacy inquiry looks at whether “the named plaintiffs and
21 their counsel have any conflicts of interest with other class members” and whether “the named
22 plaintiffs and their counsel prosecute the action vigorously on behalf of the class.” *In re Hyundai*
23 *& Kia Fuel Econ. Litig.*, 926 F.3d 539, 566 (9th Cir. 2019). The purpose behind a rigorous
24 analysis regarding adequacy is to “uncover conflicts of interest between named parties and the
25 classes they seek to represent.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).
26 Plaintiff has already proven to be antagonistic toward the class he purports to represent.
27

1 According to Plaintiff's motion, "Lead Plaintiff understands his role as a fiduciary" and
2 that he and his counsel will prosecute the action vigorously on behalf of the class. Dkt. No. 181
3 at 13. Pleading that you understand the role of a fiduciary is the easy part. Proving it, on the other
4 hand, is where *the rubber meets the road*. This is why Rule 23 requires much more than a
5 pleading standard. Prior to class certification, Plaintiff must "prove that [he is] in fact" an
6 adequate representative. *Wal-Mart*, 564 U.S. at 350. *Amici's* Motion for Leave to File an *Amicus*
7 Brief, afforded Plaintiff and his counsel, the perfect opportunity to demonstrate that they
8 understand and accept their fiduciary role and prove Plaintiff *is in fact* an adequate
9 representative. However, when counsel for *amici* inquired as to whether Plaintiff would consent
10 to *Amici's* Motion for Leave, Plaintiff's counsel advised that the motion would be opposed. *See*
11 *Email exchange with Plaintiff's Counsel*, Deaton Decl. Ex. O. *Amici*, and 75,890 XRP holders
12 are, by definition, members of the proposed class. Plaintiff and his counsel are free to dispute or
13 disagree with *amici's* claims or perspective, but the mere fact that they oppose class members
14 having an opportunity to be heard - **proves** that they will not act in the best interests of the class.

17 Plaintiff's Opposition to *Amici's* Motion is a manifestation of the inherent, irreconcilable
18 conflicts existing between the Plaintiff and the class members Plaintiff seeks to represent.
19 Opposing *amici's* request for leave violates Rule 23(a)(4)'s plain language requiring
20 "representative parties will fairly and adequately protect the interests of the class." Attempting to
21 prevent *amici's* participation on behalf of the tens of thousands of known class members is not
22 adequately protecting the interests of the class.

24 **B. *Amici* And 75,890 Class Members Totally Disagree With Plaintiff's Claims**

25 Routinely, Rule 23(a)'s adequacy requirement is there to protect the due-process
26 interests of the unnamed class members who will be bound by a judgment litigated on their
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1 behalf by their representative. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5
2 (1996). Here, a putative class of 75,890 known class members exists who completely disagree on
3 the underlying issue at the very heart of the Plaintiff's claims. Similar to the SEC Action, the
4 Plaintiff is trying to prove that XRP itself is a security. *Amici* utterly disagree. In fact, *amici* and
5 more than twelve thousand other XRP holders believed so strongly against the claim that XRP
6 itself is a security, they took the extraordinary action of filing Motion to Intervene - *as*
7 ***Defendants*** - in the SEC Action. *See* SEC Action ECF 123.⁷ Plaintiff's claims mirror the claims
8 made by the SEC. The SEC's complaint, similar to Plaintiff's complaint, includes conclusory
9 allegations suggesting XRP is always a security, and therefore that every offer, sale, or
10 transaction involving XRP is subject to registration under Section 5 of the Securities Act. *See*
11 SEC Action ECF 46. In other words, the SEC, like Plaintiff, did not limit the claims to specific
12 distributions of XRP sold directly by Defendants. Instead, the SEC, like Plaintiff, asserted that all
13 XRP are securities. Plaintiff's Proposed Federal Class, likewise, is not limited to direct sales
14 offered by Ripple but include all sales made by anyone, including in the secondary market. In
15 other words, Plaintiff is alleging that XRP itself is a security regardless of the seller or the
16 circumstances surrounding the sale. In sum, the premise of the Plaintiff's case is that XRP itself
17 is a security. *Amici*, and the 75,890 XRP holders they represent, strongly believe Plaintiff's entire
18 premise is invalid as a matter of law. Regardless, the Ninth Circuit has made clear that conflicts
19 that are "fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from
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⁷ Because both Ripple and the SEC opposed class certification and XRP Holders conceded certification would delay the case, Judge Torres did not consider class certification and granted *amici* status to the six XRP Holders in their individual capacities. SEC Action ECF 123 at n.1. The Court acknowledged that never before had there been a case where thousands of individual asset holders petitioned a Court, requesting the extraordinary relief of having the SEC sue and name them as defendants in a pending action. *Id.* at 5.

1 meeting the Rule 23(a)(4) adequacy requirement.” *Sidibe v. Sutter Health*, 333 F.R.D. 463, 488
2 (N.D. Cal. 2019).

3 C. The Token Itself Is Never The Security

4 There is no case law from the Supreme Court or any appellate court that analyzes
5 whether an underlying asset of an investment contract is itself a security. The reason there is no
6 precedent is because the underlying asset utilized in an investment contract transaction is **never**
7 the security. *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946) (“If that test be satisfied, it is
8 immaterial... whether there is a sale of property with or without intrinsic value.”); *SEC v.*
9 *Telegram Grp., Inc.*, 448 F. Supp. 3d 352, 379 (S.D.N.Y. 2020) (“the security...is not simply the
10 Gram, which is little more than alphanumeric cryptographic sequence.”). For example, claiming
11 XRP itself is a security would be akin to calling the oranges in *Howey* securities. In *Telegram*,
12 the Court clarified its original decision, making clear that the underlying asset (whether oranges
13 or digital tokens) are not themselves investment contracts. *See Telegram*, 2020 WL 1547383 at
14 *1 (clarifying that the central point of the Court’s holding was that “the ‘security’ was neither the
15 Gram Purchase Agreement **nor the Gram.**”) (emphasis added).

16 Similarly, a former SEC Director unequivocally stated: “the token – or coin or whatever
17 the digital information packet is called – **all by itself is not a security**, just as the orange groves
18 in *Howey* were not.” *William Hinman Speech*, Deaton Decl. Ex. P (emphasis added). Director
19 Hinman noted that “the digital asset itself is simply code.” *Id.* Director Hinman emphasized,
20 “that the analysis of whether something is a security is not static and does not strictly inhere to
21 the instrument.” *Id.* Just like any other commodity, “investment contracts can be made out of
22 virtually any asset (including virtual assets).” *Id.* Former SEC Chairman Clayton also agreed. *See*
23 *Mar. 7, 2019 Ltr. from Chairman J. Clayton*, Deaton Decl. Ex. Q (“I agree that the analysis of
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1 whether a digital asset is offered or sold as a security is not static and **does not strictly inhere to**
2 **the instrument.**”) (emphasis added). These SEC statements make sense considering any asset or
3 commodity can be offered as a security, whether that asset be orange groves, whiskey,
4 chinchillas, condos, beavers, or Bitcoin. *See Howey*, 328 U.S. 293 (1946); *Glen-Arden*
5 *Commodities, Inc. v. Costantino*, 493 F.2d 1027, 1034 (2d Cir. 1974); *Miller v. Cent. Chinchilla*
6 *Grp., Inc.*, 494 F.2d 414 (8th Cir. 1974); SEC Rel. No. 33-5347 (Jan. 4, 1973); *Kemmerer et al.*
7 *v. Weaver et al.*, 445 F.2d 76 (7th Cir. 1971); and *SEC v. Shavers*, 4:13-cv-00416, 2013 WL
8 4028182, (Aug. 6, 2013), respectively. When an asset is offered and sold as an investment
9 contract, it does not transform the underlying asset into a security. Oranges remain oranges and
10 XRP remains software code. Therefore, even if Ripple offered XRP as a security - *related to*
11 *specific transactions by Ripple* – XRP would still remain exactly what multiple government
12 agencies classified it as in 2014, 2015, and 2019 - a decentralized virtual currency.
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15 A recent, extensive and comprehensive study was published reviewing every single
16 relevant federal appellate case that applied *Howey*. *See The Ineluctable Modality of Securities*
17 *Law*, Deaton Decl. Ex. R. The study confirmed that no federal appellate court has ever held the
18 underlying asset subject to an investment contract transaction, is itself an investment contract and
19 there is not a single federal case finding a subsequent transfer of that asset to be a securities
20 transaction. Plaintiff’s implausible theory that each and every sale of XRP, regardless of the
21 seller or the circumstances, is an investment contract with Ripple would mean XRP itself is a
22 security. In the SEC Action, the SEC was ultimately forced to admit that “[s]tripped down, XRP
23 is just computer code.” SEC Action ECF No. 640 at 10.
24

25 **D. The *Howey* Analysis Applies At The Time Of The Transaction**

26 Plaintiff asks this Court to certify a class that concludes each and every sale of XRP,
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1 from anywhere in the world, offered by anyone, including *amici*, was the offer and sale, of a
 2 security. Plaintiff is not allowed to shortcut the *Howey* analysis by creating a class that covers
 3 each and every sale of XRP from May 3, 2017 until the present day. That’s not how the *Howey*
 4 test operates and it’s not how Rule 23 certification works. The *Howey* test must be applied to
 5 each transaction and “examined as of the time that the transaction took place.” *See S.E.C. v.*
 6 *Aqua-Sonic Prods. Corp.*, 524 F. Supp. 866, 876 (S.D.N.Y. 1981); *see also, Telegram*, 448 F.
 7 Supp. 3d 352, 368 (“*Howey* requires the Court to examine the series of understandings,
 8 transactions, and undertakings **at the time they were made.**”) (emphasis added). Each *Howey*
 9 factor must be satisfied for each transaction and each transaction must be examined at the time it
 10 was made. Certification must exclude secondary sales by persons unaffiliated with Defendants.
 11

12 **E. Plaintiff is Atypical, Doesn’t Own/Use XRP, and Misunderstands the XRPL**

13 Plaintiff claims that he purchased XRP with an expectation that it would increase in price
 14 based on Ripple’s efforts. Def. Opp., Dkt. 201 at 2. But Plaintiff is a day-trader who speculates
 15 on momentary price fluctuations of multiple digital assets, including XRP. *Id.* at 2. Plaintiff
 16 purchased XRP between January 1st and 16th, 2018 and sold that XRP between January 9th and
 17 17th, 2018. Pl. Mot., Dkt. No. 63 at ¶ 13. In sum, he owned XRP for only two weeks – over five
 18 years ago! *Amici*, and the 75,890 XRP holders, on the other hand, represent long-time users and
 19 holders of the digital asset XRP. Unlike Plaintiff, XRP holders own XRP. Furthermore, the
 20 technological advancements related to the XRPL, and the use cases for XRP, independent of
 21 Defendants’ efforts, have exploded since Plaintiff briefly owned XRP in 2018. Truthfully,
 22 2018’s XRP is not the same as 2023’s XRP. During that time, XRP holders acquired XRP for
 23 many different reasons – reasons apparently unknown (or ignored) by Plaintiff.
 24

25 Today, XRP Holders and millions of others, use XRP as a substitute for fiat and as a form
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1 of currency to buy everyday items at Walmart, Amazon, Target and countless other locations.
2 *See e.g., Introducing the XRP MasterCard Debit Card*, Deaton Decl. Ex. S, *see also, UpHold’s*
3 *New Debit Card Lets You Pay With XRP*, Deaton Decl. Ex. T. Thousands of vendors, like Time
4 Magazine, accept XRP as a form of payment or medium of exchange. *See Time Magazine Will*
5 *Accept Cryptocurrencies*, Deaton Decl. Ex. H, *see also Pay With XRP*, Deaton Decl. Ex. I
6 (listing 1,500 plus companies accepting XRP as a payment and helping users “[f]ind where to
7 spend [their] XRP.”).

9 Plaintiff’s Proposed Class includes **ALL** holders of XRP, including users of the XRPL.
10 There are 4,573,339 XRP accounts, along with 7,281,869 Trust-Lines connected to the XRPL.
11 *XRPL Stats*, Deaton Decl. Ex. U. In other words, there are millions of XRP holders who could be
12 negatively impacted by such a sweeping federal securities class. XRP is used by these XRP
13 holders to move money from the U.S. to Africa, Mexico, Thailand, Brazil, the Philippines, all of
14 Asia, and other cross-border destinations where XRP holders send peer-to-peer payments
15 utilizing XRP. XRP is also used as payroll currency by multiple companies. BitPay, for example,
16 launched a massive crypto payments service for businesses in 225 countries and allows people to
17 be paid in cryptocurrencies including Bitcoin, Ether, **XRP**, Litecoin, Bitcoin Cash and others.
18 *See Connecting with Bitpay*, Deaton Decl. Ex. V. Plaintiff is either unaware of these
19 technological advances involving XRP or is choosing to ignore the use cases for XRP that
20 clearly do not trigger or involve U.S. securities laws. *See United Hous. Found, Inc. v. Forman*,
21 421 U.S. 837, 852 (1975) (“When a purchaser is motivated by a desire to use or consume the
22 item purchased...the securities laws do not apply.”).

25 Plaintiff fundamentally misunderstands the nature of an open, permission-less distributed
26 ledger blockchain technology like the XRPL. Maybe because Plaintiff only owned XRP for two
27

1 weeks five years ago, he wrongly asserted that “XRP is not decentralized like Bitcoin.”
2 Complaint, Dkt. No. 87 at 3. There are literally hundreds, if not thousands, of XRPL developers,
3 with no connection to Ripple, running applications on the XRPL. STB is a perfect example of the
4 open, permission-less, and decentralized nature of the XRPL. It is a perfect example, because if
5 STB were to scale significantly, it would “become a competitor to Ripple’s ODL system that
6 also runs on the XRPL.” *See* SEC Action ECF No. 684 at 11. Plaintiff’s Proposed Class captures
7 all of these worldwide users of XRP who believe the only difference between Bitcoin (not
8 considered a security) and XRP, is that XRP is a better version of Bitcoin.
9

10 The Ninth Circuit routinely finds typicality lacking where a named plaintiff’s “unique
11 background and factual situation require him to prepare to meet defenses that are not typical of
12 the defenses which may be raised against other members of the proposed class,” *Ellis v. Costco*
13 *Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011). Plaintiff owned XRP for less than two
14 weeks five years ago. Plaintiff is not an XRP holder, and he knows very little about the XRP
15 ecosystem or XRP’s unique utility, distinguishing it from other cryptocurrencies. *See* SEC
16 Action *Hrg Tr.* at 11:4-7 (Mar. 19, 2021) (“My understanding of XRP is that not only does it
17 have a sort of currency value, but it also has a utility, and that utility distinguishes it, I think,
18 from Bitcoin and Ether.”) (Netburn, J.). Plaintiff has a credibility problem and class certification
19 “should not be granted if there is a danger that absent class members will suffer if their
20 representative is preoccupied with defenses unique to it.” *Ellis*, 657 F.3d at 984.
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23 **F. The Harm Caused to XRP Holders Leaves No “Opt Out” Available**

24 Under Rule 23(b)(3), if individualized inquiries predominate common questions,
25 certification is not available. Establishing whether an XRP holder suffered a loss requires very
26 specific and individualized information about the circumstances surrounding the purchase and
27

1 use of XRP. Actual harm to XRP holders will be caused only if Plaintiff is successful. A
2 determination that XRP is a “security” would cause substantial harm because it would negatively
3 impact XRP holders’ ability to access, sell, and use their XRP.

4 In the SEC Action, XRP Holders submitted to the parties approximately thirty-five
5 hundred XRP Purchaser Affidavits. *See* SEC Action ECF No. 665-1-26; *also attached to* Def.
6 Opp., Dkt. No. 201, Ex. 26-51. These affidavits are from *actual* XRP holders and include
7 investors, users, and developers. *Id.* These affidavits demonstrate the irreconcilable and inherent
8 conflict between Plaintiff and the class members he seeks to represent. *Id.* Included in the XRP
9 Holder Affidavits are proposed class members residing in foreign jurisdictions that have
10 affirmatively declared XRP not a security. *See Supra*, fn.2. Currently, *amici*’s putative class
11 includes 6,814 XRP holders from the U.K.; 255 holders from Japan; 243 from Singapore; 316
12 from Switzerland; 218 from the UAE; and 3,720 from Canada. Included in the thirty-five
13 hundred or so XRP Holder Affidavits, submitted in the SEC Action, and in this case, are
14 affidavits from XRP investors, users and developers from these foreign jurisdictions. *See* Def.
15 Opp., Dkt. No. 201, Ex. 26-51. For the Court’s convenience, attached as Deaton Decl. Ex. W, is
16 a sample of affidavits from holders in jurisdictions that have declared XRP a non-security.
17 Plaintiff’s overbroad federal proposed class captures all of these investors, users, developers and
18 businesses who do not agree with Plaintiff’s claims.⁸

19 For thousands of XRP holders, their retirement accounts, held in XRP, have been frozen.
20 *Id.* XRP being determined a security threatens their funds. XRP holders do not want to sell their
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25 ⁸ *Amici* has focused their perspective on Plaintiff’s federal class, not the California state class.
26 Because the California class is limited to direct sales made by Ripple, *amici* takes no position.
27 *Amici* notes, however, that Plaintiff is a Florida resident. Included in *amici*’s putative class, are
28 4,903 Californians.

1 XRP. Any loss surrounding their inability to use XRP is going to be very individualized. XRPL
2 users need to utilize their XRP to transfer funds. Their damages will be unique compared to other
3 class members. If Plaintiff is successful, developers like STB could be shut down entirely.
4 Businesses that accept XRP as a form of payment would experience unique losses. Businesses
5 that utilize XRP as a payroll currency would have unique losses not commonly shared. Because
6 so many XRP holders purchase and use XRP for so many different reasons, damages are not
7 commonly calculable. Finally, if XRP is determined to be a security it exposes XRP holders to
8 legal liability if they attempt to sell or transfer their XRP. If XRP is determined to be a security,
9 then the burden will fall on XRP holders to determine if any statutory exemption applies to them.
10 XRP holders would incur legal fees associated with trying to not run afoul of U.S securities laws.
11

12 No “Opt Out” provision could be created that would offer XRP holders any relief or
13 protection. The harm to XRP holders is a determination that XRP is a security. If it is deemed a
14 security, it becomes useless to the user. XRP holders would lose the ability to utilize XRP as
15 collateral to obtain financing for a fiat loan or “stake” (i.e., loan) their XRP and earn interest. *See*
16 *e.g., Binance Earn*, Deaton Decl. Ex. X (offering XRP holders yield on their XRP); *also, Get a*
17 *Loan Backed By Your XRP*, Deaton Decl. Ex Y (allowing XRP holders to borrow cash at 4.9%
18 annually). Many XRP holders would not experience a financial loss if forced to sell their XRP
19 today. Thus, under the calculations offered by Plaintiff’s expert, many would not experience a
20 financial loss related to purchase and sell prices. The loss is the inability to utilize their XRP.
21

22 To satisfy Rule 23(b)(3)’s predominance requirement, the Ninth Circuit requires a
23 methodology for calculation of damages that **must** produce a class-wide result. *Jimenez v.*
24 *Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014). Because it is impossible for Plaintiff to
25 put forward a common methodology for calculating damages across the proposed class of XRP
26
27

1 Purchasers, certification must be denied.

2 **G. Plaintiff Cannot Satisfy Superiority**

3 XRP Holders have property rights and want to individually control their own rights and
 4 interests. *See* Fed. R. Civ. P. 23(b)(3)(A). *Amici* and XRP holders have a vested interest in the
 5 ongoing litigation of the SEC Action, which will fairly and efficiently adjudicate the controversy
 6 at issue here. Although this Court should deny certification outright, the proposed class is already
 7 involved and waiting for the outcome of the SEC Action. That outcome could have a significant
 8 impact on this Court's decision. *See* Fed. R. Civ. P. 23(b)(3)(C).

10 **IV. CONCLUSION**

11 Lead Plaintiff Sostack must prove by a preponderance of the evidence each requirement
 12 under Rule 23. *See Olean*, 31 F.4th at 664-65. Faced with the evidence offered by the Defendants
 13 in their Opposition (Dkt. No. 201), coupled with the perspective and arguments of *amici* and the
 14 interests of tens of thousands of known XRP holders, once this Court employs a *rigorous*
 15 *analysis*, it is impossible for Plaintiff to meet his evidentiary burden. *Amici* respectfully request
 16 the Court deny certification or, in the alternative, postpone certification until after a judgment is
 17 issued from Judge Torres in the SEC Action.
 18

19
 20
 21 Dated: February 10, 2023

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22 

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