EXHIBIT 21

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

RIPPLE LABS, INC., BRADLEY GARLINGHOUSE, and CHRISTIAN A. LARSEN

Defendants.

----------X

Case No.: 20-cv-10832 (AT) (SN)

AMICUS CURIAE MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTEREST OF AMICUS CURIAE

This memorandum of law is submitted in further support of Defendants', Bradley Garlinghouse, Christian A. Larsen, and Ripple Labs Inc., Opposition to Plaintiff, Security and Exchange Commission's (SEC) Summary Judgment Motion. Plaintiff Security and Exchange Commission (SEC) in this litigation seeks to enforce its opinions in lieu of engaging in the democratic process of enacting regulation and/or legislation. Granting SEC's motion for summary judgment will have a chilling effect on innovation.

Cryptillian Payment Systems, LLC ("Cryptillian") is a Delaware, for-profit company with offices in Rhode Island and New Hampshire. Cryptillian designed and developed a secure digital asset ("Crypto") payment and transaction platform that allows users ("Cardholders") to store Crypto in secure online wallets and when desired, use a traditional magnetic stripe or EMV chip payment card to transfer Crypto to a retailer ("Merchant"), in a way identical to a traditional credit or debit card purchase. *See* Declaration of Vincent Bono dated November 10, 2022 ("Bono Dec.") In this way Cryptillian allows its Cardholders and Merchants to utilize Crypto in a way indistinguishable from *fiat* currency. Even inclusive of the cost of transferring Crypto in and out of the Cryptillian system, this use is much less expensive for both Cardholders and Merchants than traditional payment card processing services which can be as much as $0.50 USD per transaction and upwards of 3.5% of each transaction total or higher. Unlike those traditional payment services, Cryptillian's Crypto transactions never touch the legacy payment network used by Visa, MasterCard, American Express and Discover which are burdened by obsolete technology holdovers and fees for services that have not had meaning since the 1980s but are still passed on to purchasers or retailers. Id. Cryptillian's platform is an innovated system which will greatly benefit customers and merchants.

The transfer of Crypto between Cardholders and Merchants is achieved with Cryptillian proprietary technology, to facilitate the transfer of tokens into or out of Cryptillian wallets the individual blockchain systems of each token must be utilized. Id. Since, XRP, the token developed by Defendants, is one supported by Cryptillian, the XRP Ledger ("XRPL") is utilized to move XRP into and out of Cryptillian Cardholder and Merchant Wallets. The development, testing and use of the XRPL was done without any knowledge, support or guidance from Defendants. Defendants do not benefit in any way, and in fact are completely unaware of transactions that occur in the manner.

BACKGROUND

On September 1, 2021 Cryptillian began testing of its Crypto based payment card system and with selected volunteer merchants and cardholders, and supports six tokens for use. When the SEC filed its suit against Defendants in December of 2020 many digital asset exchanges and trading platforms delisted the XRP token out of concern. Id. This in and of itself shows the chilling effect even an undecided matter has when an organ of the Government becomes involved in any market. That filing and the subsequent delistings arguably made XRP the LEAST likely token to be traded or speculated on as any type of investment tool. Yet when Cryptillian launched nearly a year after the suit filing, XRP quickly became, and still is, the second most popular token used by its Cardholders.

Interestingly Ether, the token that former SEC Director Hinman in his speech on June 14, 2018 specifically identified as NOT a security, is the LEAST popular token for use by Cryptillian cardholders.[1]

[1] A copy of Director Hinman's speech is located at https://www.sec.gov/news/speech/speech-hinman-061418.

Pending litigation is not settled law despite SEC's public insinuations. However, the consequences of public perception to the contrary is very real. In fact, the specter of potential wrongdoing looms over each and every person or company that uses XRP in its business or as a means of exchange. In its filing, the SEC alleges the XRP token themselves represent individual investment contracts and specifically asserted that to be the case for XRP in the secondary market - which means that at the very least anyone transferring XRP and at worst anyone even owning XRP is at risk. *See* ECF 46 ("The nature of XRP itself made it the common thread among Ripple, its management, and all other XRP holders."); ECF 153 at 24 ("The XRP traded, even in the secondary market, is the embodiment of those facts, circumstances, promises, and expectations, and today represents that investment contract."); and, ECF Doc. 87 at 44:7-16 (Mar. 19, 2021) ("Presumably under this theory then, every individual in the world who is selling XRP would be committing a Section 5 violation based on what you just said.") (Netburn, J.)

This theory is flawed at best and would be somewhat analogous to finding anyone consuming the oranges grown by W.J. Howey Co being in violation of Section 5 of the Act. Needless to say, should the SEC prevail this would be a tremendous blow to the willingness of everyday Americans to embrace or even try new technologies.

One of the terms frequently associated with digital assets is "utility". If an asset has "utility" it typically means that it has a use beyond its speculative value. The SEC also alleges that XRP has no utility. ECF Doc. 87 at 51:15-16 ("Now, the court referenced a utility for XRP. We dispute whether that utility actually exists, your Honor."); ECF Doc. 46 at 63 ("No Significant Non-Investment "Use" for XRP Exists") (original emphasis).

Cryptillian Cardholders and Merchants utilize XRP as a means of exchange every day tracking Cardholder purchases and Merchant sales with no regard to the investment opportunity

presented (or not presented thanks to the SEC's suit) demonstrating the fundamental and basic utility of ANY asset.

ARGUMENT

Defendants' Opposition should be granted because XRP is not an investment contract. Cryptillian's Cardholders and Merchants daily demonstrate dozens of unique instances of non-investment use of XRP. In each transaction, neither Cryptillian, the Cardholder purchasing goods or services nor the Merchant selling those goods or services form a common enterprise with Defendants or rely on the efforts of Defendants in any way.

I. SECURITIES LAWS DO NOT APPLY

The SEC is granted authority over the securities industry by The Securities Exchange Act of 1934 however: "[w]hen a purchaser is motivated by a desire to use or consume the item purchased… the securities laws do not apply." United Hous. Found, Inc. v. Forman, 421 U.S. 837 (1975). Thus if an asset is purchased to use, consume or otherwise hold with "a desire to use or consume the item purchased." Id. at 852–53 it is not a security. Since XRP's use by Cryptillian and its users is independent of participation, oversight or contribution by Defendants, and driven by a desire to use XRP as a secure method of exchange for goods and services, XRP serves as a commodity, and as such not subject to the securities laws.

According to the U.S. Supreme Court, securities laws are applicable when an "investment contract" is "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." S.E.C. v. W.J. Howey Co., 328 U.S. 293, 298–99 (1946) as this standard is now known as the this Howey test is used to determine whether an investment contract exists and consists of three prongs: (1) has there been an investment of money (2) in a common enterprise (3) with the expectation of profit from the sole efforts of another. Id.

II. THE HOWEY TEST

Cryptillian collects a minimal percentage of the Crypto used for each transaction on its platform as part of its fee structure. This acquisition is, as a fee for service, a consumptive use on the part of the customer which is not considered an investment, thus pursuant to Forman, *supra*, securities law should not apply. Notwithstanding that this transaction is not an investment, even under the standard from Howey, prongs 2 and 3 clearly fail in this matter. There simply is no common enterprise despite SEC assertions that any use of XRP derives from Defendants' efforts or is somehow under their control. ECF 153 at 24. The SEC simply cannot implicate XRP purchasers or users who had no knowledge of Defendants, never communicated with Defendants, purchased XRP from parties other than Defendants for purposes unrelated to any plan or project of Defendants.

A. Not A Common Enterprise

Cryptillian is a proprietary platform that allows Cardholders to easily transfer Crypto to Merchants in exchange for goods or services specifically excluding any financial institution at the time of transfer. Further Cryptillian makes the transfer seamless for the users despite multiple token types being allowed (although not converted between each other). Further the actuation method is use of a payment card which is ubiquitous for purchases today across all age groups and levels of technological sophistication.

This is not "common enterprise" with Defendants design and vision for the use of XRP Defendants' original and current plan for XRP is as an add-on, upgrade or replacement for classic banking transfer methods specifically international or "cross border" transfers. *See* ECF 46 at ¶¶ 67, 243, 266, 358, 362. Even drilling further into each Cryptillian transaction it is absurd to imagine that Defendants formed a common enterprise with the Cardholder transferring XRP

tokens via Cryptillian to a merchant in exchange for a pair of designer sneakers. Accordingly the second prong of the Howey test, existed, must fail.

B. There Is No Expectation of Profits From Ripple's Efforts

Cryptillian derives its profits from retaining a minimal portion of each Crypto transaction made with its platform, in this case XRP. Cryptillian's Merchants derive their profits from the sale of their goods or services to Cryptillian's Cardholders, who in turn have no expectation of profit at all. In all these instances there is no expectation of profit from the efforts of any third party, and certainly not the efforts of Defendants. Cryptillian's cardholders have merely elected to use Cryptillian's platform to pay Cryptillian's merchants for a product, good or service. So, the third Howey prong fails as well.

CONCLUSION

For the above reasons Cryptillian respectfully requests this Court grant Defendants' Motion for Summary Judgement.

Dated: New York, New York
November 10, 2022

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EXHIBIT 22

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. RIPPLE LABS, INC., BRADLEY GARLINGHOUSE, and CHRISTIAN A. LARSEN, Defendants.	Case No. 1:20-cv-10832-AT-SN

BRIEF OF *AMICUS CURIAE* VALHIL CAPITAL, LLC
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INTEREST OF AMICUS CURIAE

Valhil Capital, LLC is a private equity firm based in Houston, Texas, which owns a portfolio of early-stage companies, brands, and alternate asset classes. Valhil's business model is centered around promoting innovation and unlocking unrealized potential in emerging economies, primarily using blockchain technology and digital assets. *See* James Vallee Affidavit ("Vallee Aff.") ¶ 3. XRP plays a critical role in the operation and management of Valhil's portfolio.

As a participant in the digital assets market and an entity that uses XRP in its daily operations and investments, Valhil has a significant interest in the outcome of this action and can offer the Court a practical perspective on the numerous use-cases of XRP. As an initial matter, Valhil compensates its executives in XRP and its portfolio investments maintain their excess cash in digital assets, including XRP. *See id.* ¶ 5, 6. Further, given XRP's determinative role in the emerging digital economy, Valhil has focused its resources and portfolio on companies and investments that utilize XRP's unique consumptive attributes. Thus, Valhil has major investment projects, both domestic and international, that are premised and dependent on XRP and the XRP Ledger ("XRPL"). *See id.* ¶ 7.

Valhil is also well-suited to describe the perspective of market participants regarding the drastic shift in the regulatory landscape applicable to XRP. Valhil and other market participants specifically relied on guidance from federal agencies and officials (including officials at the Securities and Exchange Commission ("SEC")) in forming and acting upon a good-faith belief that XRP, consistent with its apparent function, enjoys legal status as a currency. Until the SEC filed this lawsuit, the information provided by the government to the market heavily favored the considered view that XRP is a virtual currency and not a security within the SEC's regulatory purview. In reversing course, the SEC has created uncertainty in the market regarding XRP's

designation as a digital currency where none existed and threatened the increasing utilization of a digital currency that promises to exponentially improve the speed, efficiency, and certainty of financial transactions the world over. This unwarranted action by the SEC has clouded the title of XRP users and holders in the United States and throughout the world. Should the SEC be allowed to convert these digital currencies into securities, such regulation would go too far and be tantamount to a taking without due process or just compensation.

ARGUMENT

I. XRP Is a Virtual Currency with Unique Utility and Is Not a Security

From Valhil's position as a market participant, XRP's functionality and consumptive use cases make it an indispensable digital asset that bears none of the hallmarks of a security subject to regulation by the SEC under the Securities Act. *See SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–300 (1946); *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852–53 (1975) ("[W]hen a purchaser is motivated by a desire to use or consume the item purchased … the securities laws do not apply"). As detailed below, XRP plays a fundamental role for the central banking system in improving cross-border payments (primarily because of its interoperability), as well as increasing efficiency of peer-to-peer payments at the micro level (because it is energy-efficient, faster and more cost-efficient than other virtual currencies). And because of XRP's unique functions as a digital currency, Valhil relies on its ability to use XRP as a critical component of its operations and management of its assets.[1]

[1] The parties and other amici have extensively briefed whether the terms "security" and "investment contract," as defined under the U.S. securities laws, can be extended to include XRP and other digital currencies under *Howey* and its progeny. Instead of duplicating those arguments, Valhil focuses its arguments on the practical considerations of market participants and users of XRP, a perspective that has not been fully represented and may help inform the Court's consideration of the pending motions for summary judgment.

A. XRP Serves a Unique Function in the Digital Economy Because of Its Interoperability and Efficiency

XRP occupies a unique role in the digital economy ecosystem as it primarily serves as a wholesale payment method among central banks and large financial institutions. XRP is used as a settlement mechanism among central banks, eliminating the need for nostro/vostro accounts that require the maintenance of enormous amounts of fiat currency in reserve to settle trillions of dollars' worth of transactions every day. Under that legacy system, cross-border payments are particularly challenging for payment service providers and small and medium-sized enterprises, as they are required to maintain large prefunding accounts that serve only to trap capital.[2] Ripple's On-Demand Liquidity transforms this burdensome process and delivers instant and cost-effective retail remittances and business-to-business payments leveraging XRP for crypto-enabled cross-border payments.[3] For market participants like Valhil, central banks, and others, XRP's use as a settlement mechanism eliminates the need for central clearinghouses, freeing up capital, and reducing the complexity, time constraints, and significant transaction costs imposed

[2] The "trapped capital" problem has become particularly acute for even the largest international corporations making cross-border payments. For example, airlines like Emirates are in the process of—or considering—canceling routes to Lagos, Nigeria because Nigeria was holding onto huge amounts of revenue belonging to foreign air carriers. *See* Nimi Princewill, *Emirates airline suspends all flights to Nigeria as it struggles to repatriate funds*, CNN (Aug. 19, 2022), https://cnn.it/3gWIcXJ. As of June 2022, nearly $450 million in revenue belonging to foreign carriers was trapped in Nigeria. *See id*. As of July 2022, Emirates alone had "$85 million stuck in the country," as a result of funds being blocked by the Nigerian government. *See* Libby George, *Emirates plans to reduce Nigeria service due to trapped revenue*, REUTERS (Aug. 1, 2022), https://reut.rs/3DmImiJ.

[3] Ripple recently announced a partnership with FINCI, the Lithuanian online international money transfer provider, to provide such services and enable FINCI's customers to make seamless payments between Europe and Mexico while eliminating the need for FINCI to pre-fund accounts abroad, giving them the opportunity to return capital into their businesses. *Ripple and FINCI Introduce the Benefits of On-Demand Liquidity to Lithuania*, Fintech Finance News (May 19, 2022), https://bit.ly/3WaUls8. Ripple has also announced similar partnerships with companies in France and Sweden. Press Release, *Ripple Continues European Expansion, Bringing the Benefits of On-Demand Liquidity to France and Sweden* (Oct. 11, 2022), https://bit.ly/3N9R20p.

by the legacy banking system.

Further, by reducing these barriers, smaller customers and emerging economies can also turn to XRP to fund financial ecosystems that have been traditionally excluded from the banking system, such as trading in goods and services by individuals in emerging economies. For example, in certain regions of Africa, individual farmers trade their products in exchange for phone points (a system not unlike airline miles). Using XRP, such individuals can find new customers and play an increased role in the global economy even without access to a bank account. XRP provides for a more efficient payment structure than traditional currency, thereby opening access to previously disempowered groups, by enabling users to make small, fractional, and even micro payments without the need for intermediaries, fees, or bureaucracy.

The key feature of XRP that makes this feasible is the interoperability of the XRPL—XRP's associated decentralized and public blockchain ledger—with other digital currencies and assets. Each of the many digital currencies currently in circulation exists within its own specific network and operates pursuant to its own specific protocol, such as proof-of-work, proof-of-stake, or consensus protocols. Because of these network-specific attributes, many digital currencies cannot communicate value from one protocol to another when they involve digital assets different from the "native value-transmitting asset." Just like when a native English-speaker tries to converse with a native Japanese-speaker (neither of whom knows the other's language), the language protocols are simply not compatible—or "interoperable," as that term is used in the digital-asset sector.

Unlike other networks, however, the XRPL is interoperable with other network protocols supporting other digital currencies and assets—the value of items tokenized in XRP can be converted into value on another network protocol that utilizes a different digital asset currency.

XRPL's interoperability significantly enhances overall liquidity in the broader currency and asset markets because a user may utilize a wide range of assets to transact business on the XRPL blockchain (so long as the value of any such asset can be denominated digitally). In this way, XRP and the XRPL help form a bridge between financial networks and individuals who do not have the capacity to participate in the traditional financial system by providing access to the digital economy through a mobile phone, making peer-to-peer transactions of different assets possible within seconds.

B. Valhil Relies on XRP for Its Operations and Management of Its Portfolio

Valhil's use of XRP instead of other digital currencies is driven by pragmatic concerns. According to Ripple's CTO, XRP is approximately 57,000 times more energy-efficient than Bitcoin.[4] XRP transaction costs are significantly less than those associated with other virtual currencies, resulting in significant material savings for the company. And, perhaps most importantly, XRP is fast: transactions are settled within five seconds, as opposed to more than an hour for Bitcoin and more than two minutes for Ether. Because of these characteristics, Valhil has integrated XRP in its day-to-day operations and portfolio management. *See* Vallee Aff. ¶ 4.

From a treasury function, Valhil implemented a policy in April 2020 that the firm and each of its portfolio companies would be required to maintain all "excess cash" (i.e., cash not needed for "fiat dollar-denominated" payables within the forward 30 days) in XRP. *See* Vallee Aff. ¶ 5. On average, this amounted to approximately 80% of cash and cash equivalents on a

[4] Sarah Tran, *Bitcoin is 57,000 Times Less Environmentally Friendly Than the "Green Cryptocurrency" XRP, Says Ripple*, Blockchain.News (July 9, 2020), https://bit.ly/3WicFjf; *see also* David Schwartz, *The Environmental Impact: Cryptocurrency Mining vs. Consensus*, Ripple.com (July 8, 2020), https://bit.ly/3SSyHGp ("[N]ot all blockchains are made equally. For example, for every 1 million transactions, XRP could power 79,000 lightbulb hours. In contrast, for every 1 [million] transactions, Bitcoin could power 4.51 billion lightbulb hours. This means that the energy consumption of XRP [i]s 57,000x more efficient.").

consolidated basis being maintained in XRP. *Id.* Additionally, at the request of the individuals, Valhil compensates its executives and one of its portfolio company CEOs in XRP, many of whom use XRP for everyday activities, such as purchasing groceries or gas. *See* Vallee Aff. ¶ 6.

Valhil has also invested significant capital in projects premised on XRP's functionality as a digital currency. For example, one of Valhil's most significant investments is in its portfolio company Deltawave Energy. *See id.* ¶ 8. Deltawave is among the first transparent carbon-accounting protocols to harness digital-asset blockchain technology for use in the oil and gas industry. *See id.* ¶ 9. Deltawave is currently valued at approximately $50 million and seeks to create an operating system that substantially streamlines the oil and gas supply chain by matching the distribution and allocation of value to the various stakeholders across the industry (e.g., operators, working interest holders, royalty interest owners, service providers, taxing authorities, and others) to the actual physical flow of hydrocarbons through natural-gas distribution systems. *See id.* ¶ 10. Deltawave will provide an automated carbon-emissions analysis service accelerating the energy sector's transition to an "on-chain" carbon economy, ultimately making it easier to build a more sustainable, carbon-neutral energy industry. *See id.* ¶ 11. Deltawave will also include an ESG ("environmental, social, and governance") carbon-tracking component. *See id.* And one of the core advantages of Deltawave is that it will accelerate payments sent and received among the various stakeholders to near real-time. *See id.* ¶ 12. These transactions and carbon accounting rely on XRP to provide instant and cost-efficient settlements and will be recorded on the XRPL blockchain, rendering the records of those transactions auditable, immutable, and secure. *See id.* ¶ 13. Relying on XRP, Deltawave is projected to reduce operating costs for back-office accounting and administrative expenses by up to 40%. *See id.* ¶ 14.

Valhil's integration of XRP in its day-to-day operations, as well as its XRP-related projects and investments, are premised on XRP and XRPL's functionality as a virtual currently that can effectuate payments in a speedy and cost-efficient way and are in no way dependent on Ripple's efforts. *See United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852-53 (1975) ("when a purchaser is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply"); *see also* SEC, *Framework for "Investment Contract" Analysis of Digital Assets*, (April 3, 2019), https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets (stating that the *Howey* test is "less likely met" when, inter alia, "[the] virtual currency,. . .can immediately be used to make payments in a wide variety of contexts, or acts as a substitute for real (or fiat) currency.). Importantly, XRP's uses and their implantation are not only independent of Ripple's efforts at a practical level, but Valhil has never operated under the assumption that Ripple's operations are in any way integral to XRP's functionality. This was the case for XRP at the time of its launch and it is certainly the case today, given the level of decentralization of XRPL at this stage of its lifecycle.[5]

Indeed, Valhil has no legal relationship with Ripple, no expectation of profit based on Ripple's performance as an entity, and none of its projects or investments involve any direct interests in Ripple. This alone is fatal to the SEC's position. *See*, *e.g.*, *Hart v. Pulte Homes of Michigan Corp.*, 735 F.2d 1001, 1004-05 (6th Cir. 1984) (concluding that given the absence of a contractual relationship between the real estate developer and purchasers of model homes, there was no common enterprise with expectation of profits from the efforts of others under *Howey*

[5] This belief is in line with the fact that as disclosed in Ripple's Q3 2022 XRP Markets Report, across Ripple's various wallets, the amount of XRP held is now below 50Bn or 50% of the total outstanding supply. *See* https://ripple.com/insights/q3-2022-xrp-markets-report/; *see also* https://www.coinbase.com/price/xrp#:~:text=The%20current%20circulating%20supply%20is%2050%2C232%2C406%2C634%20XRP (stating that as of November 17, 2022, the current circulating supply of XRP is 50,232,406,634).

where "even assuming that individual purchasers were assured of development, nothing in the pleadings suggests that the fortunes of individual purchasers were 'inextricably intertwined' by contractual or financial arrangements"); *Gugick v. Melville Capital LLC*, No. 11-CV-6294 (CS), 2014 WL 349526, at *4 (S.D.N.Y. Jan. 31, 2014 ("Strict vertical commonality requires that 'the fortunes of plaintiff and defendants are linked so that they rise and fall together.")).

C. The SEC Lacks Clear Authority to Regulate Digital Currencies and the SEC Efforts to Regulate XRP Have Harmed Holders and Users of Digital Currencies, Like Valhil

Congress has not clearly authorized the SEC's encroachment into the digital currency market, which (unlike the securities market) is based on the concept of decentralization and does not give rise to concerns regarding informational asymmetries between investors and the entity issuing the relevant asset. As the Supreme Court recently confirmed, there are "extraordinary cases in which the history and the breadth of the authority that the agency has asserted and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia v. EPA*, 142 S. Ct. 2587, 2595, 2609 (2022). The Supreme Court emphasized that "[a]gencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line." *Id.* ("We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies.); *see also Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.") (cleaned up); *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) ("The sheer scope of [the agency's] claimed authority. . . would counsel against the Government's interpretation.").

In the Commodity Futures Trading Commission Act, Congress specifically entrusted the Commodity Futures Trading Commission ("CFTC") with "*exclusive jurisdiction* [over] transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated . . . or any other board of trade, exchange, or market, and transactions." 7 U.S.C. § 2 (emphasis added). As the Supreme Court has explained, the purpose of this exclusive jurisdiction of the CFTC was to "separate the functions of the [CFTC] from those of the Securities and Exchange Commission and other regulatory agencies." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 386 (1982); *see also Gonzalez v. Paine, Webber, Jackson & Curtis, Inc.*, 493 F. Supp. 499, 503 (S.D.N.Y. 1980) (noting that the provision was "intended to oust other federal agencies, such as the Securities Exchange Commission, of jurisdiction over commodities transaction").[6] XRP bears none of the characteristics of a security, and, like every other currency, it has real-world consumptive uses that preclude its categorization as a security. Accordingly, this Court should "hesitate" before allowing the SEC to expand its authority and begin regulating commodities markets that never have and simply do not fall within its purview. *West Virginia*, 142 S. Ct. at 2612–13.

And here, a ruling embracing the SEC's position that XRP—and by extension, other virtual currencies bearing similar characteristics—constitute "securities" or "investment contracts" would have tremendous implications for the digital economy and the entities and individuals that rely on XRP and other virtual currencies for their operations and transactions.

[6] Further, a Congressional report regarding the exclusive-jurisdiction provision stated that the CFTC was "created in order to assure that a single expert agency would have the responsibility for developing a coherent regulatory program encompassing futures trading and related activities" and the jurisdictional delineation was meant to "build upon the foundation provided by the Commodity Exchange Act in erecting a sound and strong Federal regulatory policy governing futures trading." S. Rep. No. 95-850 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2087, 2101.

Indeed, a determination by the Court that XRP is a security notwithstanding its consumptive uses would severely prejudice Valhil, materially and adversely impacting the value of Valhil and its portfolio companies that seek to make use of XRP.

As Prof. Joseph A. Grundfest of Stanford Law School (also a former SEC Commissioner) explained to the SEC before it initiated this action against Ripple:

> [S]imply initiating the action will impose substantial harm on innocent holders of XRP, regardless of the ultimate resolution. Upon learning of the proceeding, intermediaries will cease transacting in XRP because of associated legal risk. The resulting reduction in liquidity will cause XRP's value to decline . . . . Given the significance of liquidity to the XRP market, the withdrawal of intermediaries will most likely cause billions of dollars of losses to innocent third-party holders.[7]

Prof. Grundfest added that this litigation "presents a material risk that, by resolving the narrow case and controversy before it," this Court may "inadvertently rule in a manner that generates collateral consequences adverse to the nation's long-term interests."[8]

Should this Court allow the SEC to regulate XRP as a security (an authority that it would not otherwise have), the magnitude of the economic impact and the degree of interference with the assets of third parties who reasonably expected that XRP was not a security would be tantamount to a regulatory taking of private property. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("if regulation goes too far it will be recognized as a taking"); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005) (noting that the "primary" factors in assessing a "regulatory taking" are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations") (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). Indeed, as Prof.

[7] Letter from Prof. Joseph A. Grundfest, Stanford Law School, to Hon. Jay Clayton, Chairman, SEC at 2 (Dec. 17, 2020), https://bit.ly/3sHJxUX.

[8] *Id.* at 4.

Grundfest recognized, the entities that would bear most of the burden of an adverse ruling in this action are innocent third-party holders and users of XRP, like Valhil.[9]

II. Market Participants Have Operated on a Good-Faith Belief that XRP Is a Currency

Valhil, like other market participants, conducted extensive due diligence before integrating XRP into its day-to-day operations and portfolio. *See* Vallee Aff. ¶ 15. A 2015 designation by the U.S. Treasury Department of XRP as a "virtual currency," as well as public comments by agencies and high-ranking CFTC and SEC officials, including former SEC Commissioner Jay Clayton, informed Valhil's good-faith belief that XRP is not a security. Until the SEC filed this action in December 2020, market participants such as Valhil had no reason to believe that XRP—a virtual currency operating in a manner substantially identical to Bitcoin and Ether—would be deemed a security by the SEC, which had already explicitly stated that neither of those digital assets constitute securities. Such reliance on the government's considered view that XRP is a currency (not a security) as expressed by these officials should also give this Court "reason to hesitate" before embracing the SEC's changed view. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

A. The Department of Treasury Determined that XRP is a Virtual Currency

In a 2015 civil enforcement action, the U.S. Treasury's Financial Crimes Enforcement Network ("FinCEN") agreed that XRP is "a virtual currency" rather than a security.[10]

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[9] *Id*. at 2. As there is no basis for forcing XRP users to bear the significant costs of this regulatory change, just compensation would be required to account for the harm to their property. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (explaining that in regulatory takings cases, "the analysis must be driven by the purpose of the Takings Clause, which is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

[10] FinCEN/Ripple Settlement Agreement, Statement of Facts at ¶ 17, https://www.fincen.gov/sites/default/files/shared/Ripple_Facts.pdf ("From at least March 6, 2013, through April 29, 2013, Ripple Labs sold convertible virtual currency known as 'XRP'").

Specifically, FinCEN had accused Ripple Labs of violating the Bank Secrecy Act by acting as a money services business and selling XRP without properly registering with the agency.[11] The action resulted in a settlement in which FinCEN permitted the trading of XRP, stating that XRP is "a virtual currency."[12] Valhil and other market participants reasonably relied on FinCEN's 2015 classification of XRP as a currency and acted with the understanding that it would not be effectively annulled by an SEC determination made years later.

B. SEC and Other Government Officials Confirm that XRP Cannot Constitute a Security

In addition to FinCEN's characterization of XRP as a virtual currency, numerous high-ranking CFTC and SEC officials have also advised the markets that digital assets structured and operating in a similar way as XRP are not securities and allowed market participants to operate in reliance on that understanding. Specifically, several SEC officials have opined that Bitcoin and Ether and other virtual currencies bearing the same characteristics, such as XRP, are presumed to not be securities subject to the SEC's regulation.

For example, on June 6, 2018, then-SEC Chairman Jay Clayton described cryptocurrencies like XRP as replacements for traditional currencies in an interview with CNBC:

> Cryptocurrencies: These are replacements for sovereign currencies, replace the dollar, the euro, the yen with bitcoin . . . . ***That type of currency is not a security.*** A token, a digital asset, where I give you my money and you go off and make a venture, and in return for giving you my money I say "you can get a return" that is a security and we regulate that[.][13]

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[11] *Id.* at ¶¶ 16-21.

[12] *Id.* at ¶ 17 ("From at least March 6, 2013, through April 29, 2013, Ripple Labs sold convertible virtual currency known as 'XRP.'").

[13] Kate Rooney, *SEC Chief Says Agency Won't Change Securities Laws To Cater To Cryptocurrencies*, CNBC (June 6, 2018) (emphasis added), https://www.cnbc.com/2018/06/06/sec-chairman-clayton-says-agency-wont-change-definition-of-a-security.html.

William Hinman, former Director of the SEC's Division of Corporate Finance, also publicly announced during his tenure with the agency that virtual currencies like XRP do not fall within the purview of the securities laws. For example, on June 14, 2018, then-Director Hinman gave a speech discussing why a digital currency on its own "is not a security." He explained: "Central to determining whether a security is being sold is how it is being sold and the reasonable expectations of purchasers."[14] In connection with an Initial Coin Offering, while "[t]he digital asset itself is simply code," "the way it is sold" determines whether it is a security.[15] Director Hinman added that this perspective:

> [A]lso points the way to when a digital asset transaction may no longer represent a security offering. If the network on which the token or coin is to function is sufficiently decentralized—where purchasers would no longer reasonably expect a person or group to carry out essential managerial or entrepreneurial efforts—the assets may not represent an investment contract. Moreover, when the efforts of the third party are no longer a key factor for determining the enterprise's success, material information asymmetries recede. As a network becomes truly decentralized, the ability to identify an issuer or promoter to make the requisite disclosures becomes difficult, and less meaningful.[16]

Director Hinman pointed to Bitcoin and Ether as virtual currencies that do not bear the characteristics of securities and argued that confining them within the contours of the securities laws "would seem to add little value."[17]

Moreover, in March 2019, then-Chairman Clayton publicly endorsed Director Hinman's comments in a letter to Representative Ted Budd, including the assertion that Ether is not a security:

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[14] Director William Hinman, Digital Asset Transactions: When Howey Met Gary (Plastic) (June 14, 2018), https://www.sec.gov/news/speech/speech-hinman-061418.

[15] *Id*.

[16] *Id*.

[17] *Id*.

> I agree with Director Hinman's explanation of how a digital asset transaction may no longer represent an investment contract if, for example, purchasers would no longer reasonably expect a person or group to carry out the essential managerial or entrepreneurial efforts. Under those circumstances, the digital asset may not represent an investment contract under the *Howey* framework."[18]

The SEC has also issued guidance that led the market participants to believe that XRP was not, and could be, viewed as a security by the Commission. For example, in April 2019, the SEC's Strategic Hub for Innovation and Financial Technology released a "Framework for 'Investment Contract' Analysis of Digital Assets," (the "SEC Framework").[19] The objective of the Framework was to provide guidance "for analyzing whether a digital asset is an investment contract and whether offers and sales of a digital asset are securities transactions." *Id*. The SEC Framework explained that in assessing whether there is a reasonable expectation of profit derived from the efforts of others, federal courts should look to "the economic reality of the transaction," and consider "whether the instrument is offered and sold for use or consumption by purchasers." *Id*. The SEC Framework goes on to list several factors that would make the *Howey* test "less likely" to be met, including:

- The distributed ledger network and digital asset are fully developed and operational.
- Holders of the digital asset are immediately able to use it for its intended functionality on the network, particularly where there are built-in incentives to encourage such use.

  ***
- With respect to a digital asset referred to as a virtual currency, it can immediately be used to make payments in a wide variety of contexts, or acts as a substitute for real (or fiat) currency.
    - This means that it is possible to pay for goods or services with the digital asset without first having to convert it to another digital asset or real currency.

[18] Letter from Jay Clayton to Ted Budd (Mar. 7, 2019), https://coincenter.org/files/2019-03/clayton-tokenresponse.pdf.

[19] https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets.

Id. Valhil, and numerous other market participants, have been using XRP as a virtual currency, making micro-payments, compensating their executives, and investing in projects that were designed and developed for (and because of) XRP's and XRPL's functionality as a substitute for fiat currency in paying for goods and services. *See supra* at 5–9.

Additionally, Chris Giancarlo (former Chair of the CFTC), has argued that Ripple Labs has not violated any U.S. securities laws or regulations because XRP is not a security.[20] Writing in the *International Financial Law Review*, Chair Giancarlo and his co-author explained that XRP, the third-largest virtual currency by market capitalization, is essentially indistinguishable from the two largest virtual currencies, Bitcoin and Ether, which the SEC has recognized are not securities:

> Much like bitcoin and ether, XRP is a digital currency supported by a distributed ledger that uses cryptography to store and transfer assets. However, XRP and the underlying XRP Ledger were designed in 2011 and 2012 specifically as a payment mechanism by software developers who later founded Ripple Labs (Ripple). Ripple today utilises XRP to address liquidity challenges faced by financial institutions, including high transaction fees, long processing times and the need for third-party monitoring interposed by traditional clearinghouses and settlement mechanisms.[21]

Chair Giancarlo also detailed why XRP does not satisfy any of the prongs under the *Howey* test. First, XRP involves no investment of money because "[t]he mere fact that an individual holds XRP does not create any relationship, rights or privileges with respect to Ripple."[22] Second, there is no common enterprise in the absence of horizontal commonality because "[al]though broad price fluctuations uniformly affect those who hold XRP, the currency is not pooled in any sense, much less by Ripple or another central party," and "XRP holders who

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[20] https://www.iflr.com/article/2a644yk131snh9bzqpou8/cryptocurrencies-and-us-securities-laws-beyond-bitcoin-and-ether.

[21] *Id*.

[22] *Id*.

utilize the coins for different purposes have divergent interests with respect to XRP."[23] Further, no vertical commonality exists, "because XRP and Ripple exist independently of one another, such that the XRP Ledger would continue to function even without Ripple's involvement."[24] Finally, "given Ripple's marketing forbearance and the autonomy of the XRP architecture," the third prong of the *Howey* test (requiring a reasonable expectation of profits derived from the efforts of others) is also absent because:

> Ripple has not marketed XRP as an investment product, nor has it promised XRP holders any sort of profit or return on investment. To the contrary, Ripple has repeatedly emphasized the functionality of XRP as a liquidity tool and a settlement mechanism. The fact that certain parties may acquire XRP with the hope that it may appreciate in value cannot be dispositive as the same is equally true of the large number of bitcoin and ether speculators.[25]

Thus, Chair Giancarlo concluded, "under a fair application of the *Howey* test and the SEC's presently expanding analysis, XRP should not be regulated as a security, but instead considered a currency or a medium of exchange, consistent with interpretations offered by other federal regulators."[26]

* * *

FinCEN's designation of XRP as a virtual currency, along with the SEC Framework and repeated statements by governmental agencies and high-ranking officials at the SEC and CFTC that based on its characteristics, XRP could not constitute a security, provided clear guidance to the market. Valhil and other market participants correctly and reasonably understood that XRP was not a security subject to regulation by the SEC and built their businesses accordingly. The

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[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* The op-ed goes on to quote former SEC Chairman Jay Clayton's speech noting that cryptocurrencies functioning "as replacements for sovereign currencies" do not constitute securities. *See supra* at 11.

expectations of and reliance on XRP's classification as a digital currency by its users is an important factor for this Court's analysis and weighs heavily against the SEC's newfound belief regarding the appropriate legal classification for XRP. Should the SEC nonetheless prevail, market entities like Valhil would be severely and irreparably harmed and would likely have to seek judicial redress of their own. This Court should hold that XRP is not a security.

CONCLUSION

For these reasons, this Court should grant Defendants' motions for summary judgment.

Dated: November 18, 2022

Respectfully submitted,

By: */s/Brandon Duke*_____

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EXHIBIT 23

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

RIPPLE LABS, INC., BRADLEY GARLINGHOUSE, and CHRISTIAN A. LARSEN

Defendants,

JORDAN DEATON, JAMES LAMONTE, TYLER LAMONTE, MYA LAMONTE, MITCHELL MCKENNA, KRISTIANA WARNER and ALL SIMILARLY SITUATED XRP HOLDERS,

Proposed Intervenors.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 24

20-cv-10832 (AT)

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Proposed Intervenor-Defendants, Jordan Deaton, James Lamonte, Tyler Lamonte, Mya Lamonte, Mitchell Mckenna, Kristiana Warner and all other similarly situated XRP Holders, ("XRP Holders") respectfully submit this memorandum of law in support of their Motion to Intervene pursuant to Federal Rule of Civil Procedure 24.

PRELIMINARY STATEMENT

XRP Holders are a putative class of users, investors, holders, developers, content providers and small businesses that utilize the digital asset XRP and the XRP Ledger ("XRPL"). Many XRP Holders have never heard of Ripple.[1] XRP Holders have a significant interest in the property at issue in this enforcement action. When the Securities and Exchange Commission ("SEC") brought this lawsuit against Ripple and its two executives, it not only alleged that the named Defendants conducted an unprecedented eight-year continuous and ongoing offering, it also specifically alleged XRP itself to be a security. This novel and dangerous assertion suggests *all* XRP constitute unregistered securities, including the XRP owned and utilized by XRP Holders.

The SEC allegations are riddled with material misrepresentations about XRP Holders; their reliance on Ripple, their use of XRP and their independent development of the XRP ecosystem. By failing to distinguish specific prior sales and distributions by Ripple from present-day XRP, the SEC has put the property of XRP Holders at the heart of this case and positions its interest at the complete opposite end of the spectrum from that of XRP Holders. The Defendants have also made it clear that they do not represent the interests of XRP Holders. Simply put, XRP Holders cannot rely on the Defendants' efforts in this case. Without intervention, the SEC can

[1] Proposed Intervenors and their counsel have been contacted by over 12,600 XRP holders, users, investors, developers, and small businesses utilizing XRP requesting to join in the motion to intervene.

continue to manipulate the role of XRP Holders to fit its narrative against Ripple and its two executives and potentially destroy the property interests of XRP Holders. XRP Holders, therefore, seek to intervene in this enforcement action pursuant to Fed. R. Civ. P. 24.

STATEMENT OF RELEVANT FACTS

I. Government Agencies Recognize XRP as a Currency

Prior to the SEC's enforcement action against Ripple and XRP Holders, XRP was the third-largest Cryptocurrency in the world. *See* Hr'g Tr. 8:8-10 (Mar. 19, 2021). Beginning in 2013, XRP was openly traded on over two hundred exchanges. Def.'s Answer to First Am. Compl. at 42, ECF No. 51.

XRP traded on exchanges with the two larger similar cryptocurrencies, Bitcoin and Ether. Senior officials from the SEC publicly deemed Bitcoin and Ether as non-securities. Def.'s Answer to First Am. Compl. at 3, ECF No. 51. Bitcoin, Ether and XRP have repeatedly been referred to as a new nascent asset class.[2]

In 2015 and 2020, the Department of Justice ("DOJ") and the Financial Crimes Enforcement Network ("FinCEN") entered into an agreement with Ripple stating XRP would be considered virtual currency and its use would be registered exclusively with FinCEN, not the SEC. Def.'s Answer to First Am. Compl. at 2, ECF No. 51.

[2] The Head of Asset Management of Signum, a Swiss bank in Singapore, called out to the public to *increase exposure to "the tokens of the future"* and listed those tokens to be "*Bitcoin, Ether, and XRP*." Signum classified Bitcoin as the future asset for store of value and wealth. It classified Ether as an infrastructure play of the future. It classified XRP as not a security, but as technology of the future regarding *payments*. *Realizing the Future of the Blockchain Economy With Signum Capital*, Asia Blockchain Review, July 21, 2019.

In 2018, the newly appointed chairman of the SEC, Gary Gensler, described XRP as a "***bridge currency"*** between two Central Bank Digital Currencies ("CBDC"). *See* Deaton Decl. Ex. B, Gensler Financial Roundtable, (September 26, 2018).

In June 2020, former chairman of the U.S. Commodity Futures Trading Commission ("CFTC") Chris Giancarlo ("Giancarlo") stated XRP is more like an alternative currency than a security and should have the same legal status as Bitcoin or Ether.[4]

The United States isn't the only government to classify XRP as a non-security or alternative currency. Japan, Singapore, and the U.K. have all declared XRP to be a non-security. Def.'s Answer to First Am. Compl. at 42, ECF No. 51.

II. The Securities and Exchange Commission's Action, Inaction, and Acquiescence Communicate That XRP, Similar to Bitcoin and Ether, is Not a Security

In 2018, the SEC permitted and authorized Ripple to purchase a nine-percent minority stake in MoneyGram International ("MGI") knowing that Ripple would distribute XRP to MGI which in turn, would sell the XRP in the secondary market to purchasers including XRP Holders. Pl's First Am. Compl. at 64, ECF No 46.

In June 2018, then-director of corporation and finance, William Hinman gave a speech in which he publicly deemed Bitcoin and Ether as non-securities and provided general commentary that at some point, a digital asset becomes sufficiently decentralized and can no longer be

[4] 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 hit any of the prongs of the *Howey Test* and should not be regulated as a security but instead considered a currency or a medium of exchange. According to Giancarlo and Bahlke, XRP was never marketed as a security, nor were investors promised any returns; the token has a very specific use case for liquidity and settlements; Ripple has never offered holders any rights of ownership or share of profits; and, therefore, there is no investment contract or formal relationship that exits between Ripple Labs and XRP Holders. *See* Deaton Decl. Ex. D Giancarlo cryptocurrencies and us securities laws beyond bitcoin and ether (June 17, 2020).

considered an investment contract. *See* Deaton Decl. Ex. C, William Hinman Speech (June 14, 2018).

In 2019, Platform A, prior to listing XRP, met with the SEC to determine the legal status of XRP and sought guidance as to whether the SEC considered XRP to be a security. Following that meeting, Platform A listed XRP. Other market participants also sought guidance from the SEC prior to the commencement of this action. At no time prior to the filing of this case did the SEC dissuade market players from listing or trading XRP. Def.'s Answer to First Am. Compl. at 98-99, ECF No. 51.

In March 2019, then-chairman of the SEC, Jay Clayton ("Clayton"), stated:

> [T]he analysis of whether a digital asset is offered or sold as a security is not static and does not strictly inhere to the instrument. A digital asset may be offered and sold initially as a security because it meets the definition of an investment contract, but that designation may change over time if the digital asset later is offered and sold in such a way that it will no longer meet that definition. I agree with Director Hinman's explanation of how a digital asset transaction may no longer represent an investment contract if, for example, purchasers would no longer reasonably expect a person or group to carry out the essential managerial or entrepreneurial efforts. Under those circumstances, the digital asset may not represent an investment contract under the *Howey* framework.

See Deaton Decl. Ex. E, Jay Clayton Letter (March 7, 2019).

In January 2020, Bailard, a wealth and investment management firm, submitted its Code of Ethics for the SEC's approval. The section that deals with the cryptocurrency asset class reads as follow:

> In light of the extremely complex nature of the legal analysis regarding cryptocurrencies to determine which ones are securities and which ones are not, Bailard has decided to allow investments in three cryptocurrencies – Bitcoin, Ethereum, and XRP – that are generally accepted to be currencies and not currently subject to regulation by the SEC.

See Deaton Decl. Ex. F, Bailard Code of Ethics Excerpt at 2-3 (January 1, 2020).

As late as October 2020, approximately 60 days before Clayton directed and authorized the suit against Defendants and XRP, the SEC continued to inform XRP Holders – who were inquiring as to the status of XRP in relation to Bitcoin and Ether – that the SEC had made no determination as to whether XRP is a security and did not know when or if it would ever make such a determination. Def's Resp. Fn. 3 at 5, Mar. 24, 2021, ECF No. 81.

In December 2020, Clayton and the SEC was warned by a former chief of the SEC, Joseph Grundfest ("Grundfest") that the mere filing of an enforcement action alleging XRP to be securities would result in unprecedented multi-billions in losses to individual holders and users of XRP with absolutely no connection to Ripple or its two executives. Grundfest argued that the SEC had not established a material distinction between Ether and XRP that justified filing an enforcement action against XRP and doing so would call into question the Commission's exercise of discretion. *See* Deaton Decl. Ex. G, Grundfest Letter Discussion (December 17, 2020).

In March 2021, SEC Commissioner Hester Peirce appeared for an interview on the Thinking Crypto YouTube channel. During this interview, Commissioner Peirce admitted that the SEC tends to think of the token as the security, rather than the totality of the offering. She commented that it would be a better approach to look at the offering as a whole, rather than treat the token as securities. *See* Deaton Decl. Ex. H, Hester Peirce Thinking Crypto Interview (Mar. 9, 2021).

III. XRP Holders Contribute to the XRP Ecosystem

From 2013 to present, XRP Holders have been utilizing XRP and the XRPL for multiple purposes, creating value and utility for XRP. Undoubtedly, some XRP Holders purchased XRP for the purposes of speculative investment just as they have purchased Bitcoin and Ether. Some

XRP Holders are simply users of XRP and the XRPL, utilizing XRP exclusively in their capacity as consumers. *See* Deaton Decl. Ex. I, emails from XRP Holders. As consumers, XRP Holders utilize XRP as a substitute for fiat currency for everyday purchases at Walmart, Amazon, Target and millions of other businesses. *Id at 1.* XRP is utilized for direct payments in XRP for over 500 shopping markets, 300 internet service providers, 500 crypto-services, 30 tourism businesses and the list grows weekly. *See* Deaton Decl. Ex. K, Cryptwerk's XRP Directory. Some XRP Holders utilize their XRP as collateral in order to secure loans in fiat currency. *See* Deaton Decl. Ex. L, Nexo's Instant Crypto Credit Lines. Some XRP Holders use their XRP on XRP TipBot to donate to charities and other organizations. *See* Deaton Decl. Ex. M, Several known companies and applications using XRP.

Some XRP Holders are developers who use XRP operationally within their business model. *Id*. Some XRP developers utilize the XRPL's decentralized exchange ("DEX") for the digitalization of different assets, such as stocks, bonds and commodities. *Id.* Some XRP developers have created consumer products such as the Xumm Wallet which utilizes the XRPL to store multiple cryptocurrencies, including Bitcoin, Ether and XRP. *See* Deaton Decl. Ex. J, twitter responses from XRP Holders. Some XRP Holders acquired XRP, not as an investment but as a payment for goods and/or services rendered. *Id.* Some XRP Holders receive XRP as micropayments for providing content on YouTube, Coil and other media outlets. *Id.*

Some XRP Holders utilize XRP and XRPL to tokenize nonfungible tokens. *Id.* Some XRP Holders utilize XRP as a bridge currency to transfer one asset from one exchange to another. *See* Deaton Decl. Ex. N, excerpt of XRPL's overview of XRP. Some XRP Holders utilize XRP's superior speed and lower cost to purchase and move other assets such as Bitcoin and Ether. *See* Deaton Decl. Ex. O. The same is true for foreign fiat concurrencies (i.e. Pesos, Euros, Yen). *See*

Deaton Decl. Ex. M. Some XRP Holders utilize XRP to send money to friends and family around the world. *Id.*, Deaton Decl. Ex. I. Some XRP Holders utilize XRP for cross-border payments between the United States and Mexico, Europe, the Philippines, Thailand, and other foreign countries. *Id.*, Deaton Decl. Ex. I. Some XRP Holders have utilized businesses such as Linqto, Inc. to purchase stock before companies go public in an initial public offering.[5]

IV. The SEC Complaint Charges Ripple but Attacks XRP and XRP Holders

On December 22, 2020, the SEC filed an enforcement action against named defendants Ripple Labs ("Ripple"), along with two of its executives, co-founder and chairman Christian Larsen ("Larsen") and CEO Bradley Garlinghouse ("Garlinghouse"). Pl.'s Compl., ECF No. 4. In both the original and Amended Complaint ("AC"), in the very first paragraph, the SEC labels XRP itself as a "digital asset security" *Id.* at 1; AC at 1, ECF No. 46. By alleging "[f]rom 2013 through the present, Defendants sold over 14.6 billion units of a digital asset security called XRP," the SEC's theory is that the named Defendants have conducted a public eight year continuous and ongoing offering of unregistered securities. *Id.* Thus, the offering includes all present-day sales and distributions of XRP. The Complaint is not limited to only direct sales by the Defendant but includes all sales of XRP no matter the seller, including XRP Holders. *Id.* at 2. In fact, an entire section of the Complaint is dedicated to Ripple's alleged promises to create a market, not only for Ripple's sales, but for XRP Holders' sales, as well. The SEC incorrectly alleges that: "*Defendants Promised to Undertake Significant Efforts to Develop and Maintain a Public Market for XRP Investors to Resell XRP*." *Id* at 46. The SEC's Complaint is riddled with allegations directly attacking XRP Holders. The SEC dedicates another section of its AC alleging

[5] Some XRP holders used their XRP to purchase shares of the company Ripple Labs through the Linqto service. This is a clear example of the difference between an alternative form of currency (XRP) and a true security (Ripple stock). Deaton Decl. Ex I.

XRP Holders have entered into a common enterprise with Ripple. AC at 51-55, ECF No. 46. The SEC claims (wrongly) that: "*Economic Reality Dictates that XRP Purchasers have No Choice But to Rely on Ripple's Efforts for the Success or Failure of Their Investment*." *Id.* at 50. The SEC incorrectly asserts that XRP Holders have no independent options related to the utility of XRP, without Ripple. Not true. The SEC also claims (wrongly) that XRP Holders lack the ability to develop or grow the XRP ecosystem independent of Ripple's efforts. *See* AC ¶¶ 285-289. In other words, throughout the Complaint, the SEC alleges that all XRP, including the XRP purchased, acquired, and/or utilized by XRP Holders are unregistered securities. The Complaint has an entire section dedicated to the assertion that all "**Purchasers of XRP Invested into a Common Enterprise**." *Id.* at 50.

The SEC is alleging that any sale or transfer of XRP by any entity, business or individual is a violation of Section 5 of the Securities Act.[6] In attempting to meet *Howey's* common enterprise prong, the SEC absurdly claims that because "XRP investors stand to profit equally if XRP's popularity and price increase,"[7] all XRP Holders entered into a common enterprise with Ripple. This claim is ridiculous because the same statement equally applies to Bitcoin, Ether, XRP, or even gold or silver investors. The language utilized by the SEC in the Complaint is both reckless and dangerous as it could be applied not only to every cryptocurrency but every commodity. The SEC's claim that XRP itself is a security *per se* is not an implied or suggested claim. The SEC

[6] AC ¶ 290 ("Investors who purchased XRP in the offering invested into a common enterprise with **other XRP purchasers**, as well as with Ripple") (emphasis added). Apparently, according to the SEC, XRP Holders entered into a common enterprise with not only a company that many never heard of but also with every other unknown XRP Purchaser in the world. See also AC ¶ 291 ("Because XRP is fungible, the fortunes of XRP purchasers were and are tied to one another, and each depend on the success of Ripple's XRP strategy.").

[7] AC ¶ 292; see also AC ¶ 282 ("… which would serve Ripple's economic interest and that of **all** XRP owners equally…the price of XRP rises and falls for XRP investors together and equally for all investors.") (emphasis added).

actually asserts that the very "nature of XRP itself" makes it a security. AC ¶¶ 293, 353.[8] Judge Netburn quickly recognized this outlandish claim and questioned the SEC regarding this novel (and dangerous) theory when she proclaimed: "Presumably under this theory then, every individual in the world who is selling XRP would be committing a Section 5 violation based on what you just said." Hr'g Tr. 44:7-9 (Mar. 19, 2021).

If the SEC is successful in its claims against XRP, the SEC would have the authority to regulate a vast number of non-parties, including digital asset exchanges, developers, vendors, ordinary users, and retail holders of XRP. This would dramatically affect the entire secondary retail market for XRP and possibly, all of cryptocurrency.

V. XRP Holders Take Action

Concerned with the impact the SEC's claims would have, including the suspension or delisting of XRP on major U.S. exchanges, XRP Holders took immediate action to protect their interests and filed a petition for a Writ of Mandamus against the Acting Chairman of the SEC asking the Court to order the SEC to amend the Complaint to exclude the XRP owned and utilized by XRP Holders. *Deaton v. SEC*, No. 1:21-cv-00001-WES (D. R.I. Jan. 1, 2021), ECF No. 1.

In its Motion to Dismiss the Writ, the SEC made clear that this Honorable Court provides the **exclusive forum** to hear **all matters** related to its enforcement action against Ripple and XRP. The SEC argued:

> Here, an avenue for judicial review of the Commission's complaint against Ripple clearly exists. The Southern District of New York **will decide** whether the complaint warrants any relief. Thus, the Commission's enforcement proceeding in the Southern

[8] AC ¶ 293 ("The **nature of XRP itself** made it the common thread among Ripple, its management and **all XRP holders**.") (emphasis added); AC ¶ 353 ("The very **nature of XRP** in the market – as constructed and promoted by Ripple – compels reasonable XRP purchasers to view XRP as an investment.") (emphasis added); AC ¶ 291 ("Because XRP is fungible…").

> District of New York, brought under the Securities Act, supplies the **exclusive** method for testing the validity of the Commission's complaint against Ripple.

Resp'ts Mot. to Dismiss at 12, Deaton v. SEC, No. 1:21-cv-00001-WES (D. R.I. Mar. 5, 2021), ECF No. 11.

After reviewing the SEC's motion to dismiss and considering the arguments and statements contained therein, XRP Holders withdrew their petition and now move to intervene in the current proceeding.

LEGAL STANDARD

"Rule 24 of the Federal Rules of Civil Procedure provides the criteria a putative intervenor must meet to intervene either as of right or permissively." *Yang v. Kellner*, No. 20 CIV. 3325, 2020 WL 2115412 at *1 (S.D.N.Y. May 3, 2020) (Torres, A.). Intervention as a matter of right is governed by Rule 24(a) and permissive intervention is governed by Rule 24(b). When considering permissive intervention, the Court "considers the same factors that it considers for intervention as of right." *In re Reyes,* No. 19 CIV. 7219, 2019 WL 6170901 at *1 (S.D.N.Y. Nov. 20, 2019) (Torres, A.) (quoting *MASTR Adjustable Rate Mortgs. Trust 2006-OA3 v. UBS Real Estate Secs.,* 2013 WL 139636, at *2 (S.D.N.Y. 2013).

Intervention as a right will be granted only if: (1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties. *In re Reyes, at* *1 (citing *MasterCard Int'l Inc. v. Visa Int'l Serv. Assoc., Inc.,* 471 F.3d 377, 389 (2d Cir. 2006); *see also In re Holocaust Victim Assets Litig.,* ("*HVAL*") 225 F.3d 191, 197 (2d Cir. 2000). "Failure to satisfy any one of these requirements is a sufficient ground to deny the application." *R Best Produce,*

Inc. v. Shulman-Rabin Mktg. Corp., 467 F.3d 238, 240 (2d Cir. 2006). However, denial of intervention is not mandatory if one element is not met. *See Cole Mech. Corp. v. Nat'l Grange Mut. Ins. Co*., No. 06 CIV. 2875 LAK HBP, 2007 WL 2593000, at *2 (S.D.N.Y., Sept. 7, 2007) (noting that the test is flexible, and courts generally look at all four factors rather than focusing narrowly on anyone). "The Court has broad discretion to, on timely motion, **permit anyone to intervene** who has a claim or defense that shares with the main action a common question of law or fact, so long as the intervention does not unduly delay or prejudice the adjudication of the original parties' rights." Whether a party may intervene is left to the Court's sound discretion. *Brennan v. New York City Bd. Of Educ.,* 260 F.3d 123, 128 (2d Cir. 2001) (emphasis added).

ARGUMENT

I. Intervention in SEC Enforcement Actions is Permitted

The SEC claims that intervention is precluded in a case involving the SEC unless it consents. Pl.'s Resp. to Mot. To Intervene, at 3 (Mar. 26, 2021), ECF No. 85 (citing Securities Exchange Act of 1934, 15 U.S.C. § 78u(g) (2018)). To support its claim, the SEC mistakenly relies on *SEC v. Caledonian Bank*, Ltd., 317 F.R.D. 358 (S.D.N.Y. 2016). Actually, *Caledonian* supports XRP Holders' intervention. The case stated explicitly that, "[w]hile Section 21(g) bars counterclaims against the SEC in enforcement actions, it **does not preclude all forms of intervention**." *Caledonian* at *368. (emphasis added). XRP Holders are not asserting any claims or counterclaims against the SEC. XRP Holders seek intervention as a third-party defendant, not as a third-party plaintiff asserting claims against the SEC. XRP Holders are de facto unnamed defendants in this action (although XRP Holders are referenced throughout the Complaint). Pursuant to Fed. R. Civ. P. 24(c), XRP Holders have provided the Court with Intervenor-Defendant's Proposed Answer to the First Amended Complaint. Deaton Decl. Ex. A.

The SEC makes passing reference to *S.E.C. v. Credit Bancorp, Ltd.,* 194 F.R.D. 457 (S.D.N.Y. 2000) acknowledging that "[s]ome courts have held that Section 21(g) does not bar intervention in SEC enforcement actions in a particular situation not presented here." Pl.'s Resp. at n. 4, ECF no. 85. After reading *Credit Bancorp,* XRP Holders understand why the SEC only made slight reference to the case. *Credit Bancorp* discusses the disagreement among the courts regarding whether § 21(g) precludes all applications to intervene. The conclusion of *Credit Bancorp*, however, asserts that because § 21(g) makes no direct mention of intervention, it cannot be reasonably interpreted to prohibit it *per se. Credit Bancorp, Ltd.,* at 466. In sum, this Honorable Court is not precluded from granting intervention to XRP Holders.

As stated, the SEC made clear that this Honorable Court "supplies the exclusive method for testing the validity of the Commission's complaint" against XRP. Resp'ts Mot. to Dismiss at 12, *Deaton v. SEC*, No. 1:21-cv-00001-WES (D. R.I. Mar. 5, 2021), ECF No. 11. The SEC has abrogated its responsibility and deferred to this Court's authority. The SEC has attempted to minimize its own conflicting views of XRP during the litigation of this case. In its response to Defendants' motion to compel discovery related to Bitcoin, Ether and XRP, the SEC basically stated that its own views on whether an asset is a security are irrelevant. Pl's Resp. at 7, Mar. 22, 2021, ECF No. 79. The SEC took the remarkable position that statements made by senior officials of the SEC, including its chairman, add little value when deciding if an asset or instrument constitutes a security. The SEC declared:

> Statements of agency staff cannot bind the SEC or otherwise alter its decision. Nor are the SEC's views as to the treatment under *Howey* of other digital assets relevant to whether XRP is a security. It is for the federal courts, which have for over 70 years… [produced an] abundance of caselaw interpreting and analyzing *Howey*," to decide whether XRP is an investment contract.

Id. (citations omitted). Its grossly irresponsible for the SEC to suggest its own representations are irrelevant so soon after it suddenly decided that a digital asset owned by millions of individuals now constitutes a security *per se.* Moreover, the SEC deferred to the authority of this Court yet objects to the holders and users of that asset seeking intervention. Not only is intervention allowable but its required considering XRP Holders satisfy the requirements of Fed. R. Civ. P. 24(a).

II. XRP Holders Should be Granted Intervention as of Right

Pursuant to Federal Rule of Civil Procedure 24(a), XRP Holders are entitled to intervene as a right.

A. The Motion is Timely

Timeliness has no precise definition. In determining timeliness, "the Court may consider . . . factors [including]: (1) how long the applicant had notice of its interest in the action; (2) prejudice to the existing parties resulting from this delay; (3) prejudice to the applicant resulting from a denial of the motion; and (4) any unusual circumstance militating in favor of or against intervention. *HVAL* at 198; *MasterCard Int'l Inc*. at 389.

i. XRP Holders Took Immediate Action to Protect Their Interests

XRP Holders' motion to intervene has been timely made. XRP Holders took immediate action to protect their interests when they filed a petition for Writ of Mandamus in the Federal District Court of Rhode Island on January 1, 2021, only nine days after the SEC filed its case against Defendants. The petition sought an order compelling the acting chairman of the SEC to amend its Complaint to make clear that the SEC was not alleging that the XRP held by XRP Holders constituted securities. In short, intervenors were asking for a declaration or clarification that the XRP token, itself, was not a security *per se*. On March 5, 2021, the SEC filed a motion

to dismiss intervenors petition invoking this Honorable Court's exclusive jurisdiction. Nine days later, on March 14, 2021, intervenors filed a motion to intervene.[10] According to the scheduling order entered in this case, the deadline to add additional parties (which does not apply to intervenors) expired on March 17, 2021. The mere fact that XRP Holders' initial filing was within the relevant deadline applicable to the existing parties in this case makes the motion timely on its face. *See e.g., Int'l Design Concepts, LLC v. Saks, Inc.,* 486 F.Supp.2d 229, 234 (S.D.N.Y. 2007) (motion to intervene filed more than one year after the second amended complaint was timely where delay caused no prejudice to parties). The first pretrial hearing on this case was February 22, 2021, less than 30 days from the timing of XRP Holders initial intervention motion.

ii. There is No Prejudice to Existing Parties Resulting From Delay

An essential factor for the Court to consider is prejudice to the existing parties caused by any delay attributed to intervenors. *HVAL* at 198. XRP Holders have acted without delay and there is no prejudice to the parties that can be attributed to XRP Holders' motion. Moreover, XRP Holders do not seek additional discovery or any change to the current scheduling order entered by the Court. Therefore, granting XRP Holders' motion causes no delay prejudicing the existing parties.

[10] On March 15, 2021, XRP Holders' motion to intervene was "[d]enied without prejudice to renewal in a motion that complies with Rule III(A) of the Court's Individual Practices in Civil Cases." Doc. 68 at *3. XRP Holders' erroneously relied on an exception contained within Rule III(A) believing that "a delay in filing might result in the loss of a right." Rule III(A), Individual Practices in Civil Cases, Analisa Torres, U.S. Dist. J. S.D.N.Y. (rev. Jan. 21, 2020). The mere fact that this Honorable Court disagreed with intervenors' belief that a delay could result in a loss of right, is proof, alone, that this motion is timely.

iii. XRP Holders Would Be Prejudiced By a Denial of the Motion

Denial of the motion, however, would prejudice XRP Holders. As users, investors, holders, developers, content providers and small businesses that utilize the digital asset XRP and the XRPL, they possess the very property the SEC claims are unregistered securities. If left unrepresented, XRP Holders will be entirely unable to defend their interests.

iv. Circumstances Favoring Intervention

The SEC has taken the extraordinary position that XRP is an unregistered security that has no utility without the efforts of the Defendants. AC ¶¶ 282-289; ¶¶ 358-376. By focusing on the underlying asset, XRP, as a security *per se,* the SEC is abandoning the principle holding of *Howey,* which defines an investment contract as "a contract, transaction or scheme." *SEC v W.J. Howey*, 328 U.S. 293, 298-99 (1946). As is discussed below, focusing on the underlying asset is not only a departure from 75 years of precedent since *Howey,* it directly contradicts recent case law involving digital assets within the Southern District of New York. *See generally SEC v. Telegram Group Inc., et al.* 448 F. Supp.3d 352 (2020). This gross departure from precedent coupled with an approach that the token itself is a security, demands intervention.[12]

B. XRP Holders Have a Protectable Interest in the Property Subject to This Action

To intervene, a party must show a cognizable interest in the action. "For an interest to be cognizable under Rule 24(a)(2), it must be direct, substantial, and legally protectable." *Brennan,*

[12]Apparently, the SEC, as an institution, has struggled in applying *Howey* to digital assets. SEC Commissioner Hester Peirce said "one of the things I've been rethinking is we tend at the SEC to talk about the token itself as a security and that's really a shorthand. It's not that the thing itself- it's not that the orange groves, or orange trees or oranges were the security. We're saying the way you sold those pieces of land - it was a security offering. Instead, **what we've done now** is said that orange groves are kind of like the security. I think it's better if we really look at the offering as a whole and we don't try to treat the token as securities." *See* Deaton Decl. Ex. H, Hester Peirce Interview, Thinking Crypto, Mar. 9, 2021, (emphasis added).

260 F.3d at 129. XRP Holders are entitled to intervene in this action as a matter of right because they have a legally protectable interest in the subject matter of the action. XRP Holders have a direct protectable interest in this action because they own and utilize the very property and asset in question.

Throughout the AC, the SEC alleges that XRP Holders, many of whom had never heard of the Defendants prior to purchasing, acquiring or utilizing XRP, entered into a common enterprise with Ripple and other XRP holders. AC ¶¶ 290-314. Nothing could be further from the truth. XRP Holders include hundreds of developers, small businesses, artists, and content providers who are paid in XRP. XRP is utilized by many XRP Holders as not just a store of value but as a substitute for fiat currency, making daily purchases for ordinary items such as groceries, clothing and fuel. As stated above, XRP Holders have created value and utility to the XRP ecosystem irrespective of the efforts of Ripple.

The SEC is alleging that XRP itself is a security because it lacks the very utility XRP Holders have created. AC ¶¶ 282-289; ¶¶ 358-376. During a recent hearing before Judge Netburn, the Court recognized "not only does [XRP] have a sort of currency value, but it also has a utility, and that utility distinguishes it, I think, from Bitcoin and Ether." Hr'g Tr. 11:4-7 (Mar. 19, 2021). As stated, the SEC denies XRP's utility. "We dispute whether that utility actually exists, your Honor. But the point is, even if it did exist, Ripple and the Defendants' efforts and their stated promised efforts to develop a use for XRP is what makes XRP a security." Hr'g Tr. 51:15-21 (Mar. 19, 2021). The SEC's position is just plain wrong. Every passing month the XRP ecosystem continues to grow with more use cases being developed, irrespective of the efforts, strategies and/or statements of the Defendants. *See* Deaton Decl. Ex. R, XRP Use Cases To Explode With Defi Crypto Integration (April 13, 2021).

During this case, the SEC has often relied on *SEC v. Telegram Grp. Inc.,* 448 F. Supp. 3d 352 (S.D.N.Y. 2020). However, *Telegram* actually supports XRP Holders' intervention. Judge Castel made clear that "the security in this case is ***not simply the Gram***, which is little more than alphanumeric cryptographic sequence." 448 F. Supp. at 379 (emphasis added). The same exact statement can be made about XRP, Bitcoin, or Ether. Claiming that the token itself is the security would be akin to calling the "oranges" produced by the orange groves in *Howey* the securities.[13]

Judge Castel made clear that the central issue in *Howey* was not the underlying product, agreement, or the underlying asset. "*Howey* refers to an 'investment contract,' i.e. a security, as 'a contract, transaction or scheme,' using the term 'scheme' in a descriptive, not pejorative, sense." *Id.* (Citing *Howey*, 328 U.S. at 298-99). Judge Castel confirmed that the underlying asset (whether oranges or digital assets) are not *per se* investment contracts, but it is the "scheme" involving the full set of contracts, expectations, and understandings centered on the sales and distribution of the underlying asset that must be evaluated under *Howey. Id*. "*Howey* requires an examination of the entirety of the parties' understandings and expectations." *Id.* Any doubt or confusion on whether Judge Castel considered the token itself a security was laid to rest when he delivered his second Opinion and Order in *Telegram*. Judge Castel clarified that a central point of the Court's Opinion and Order was:

> [T]he 'security' was neither the Gram Purchase Agreement ***nor the Gram*** but the entire scheme that comprised the Gram Purchase Agreements and the accompanying understandings and undertakings made by Telegram, including the expectation and intention that the Initial Purchasers would distribute Grams into a secondary public market.

[13] Prior to filing this case, it seemed that Clayton and the SEC understood this point. *See* Deaton Decl. Ex. E, Jay Clayton Letter (March 7, 2019) ("a digital asset is offered or sold as a security is not static and does not strictly inhere to the instrument"); *but compare with* Hester Peirce interview, *supra*, Fn. 12.

Telegram Slip Copy 2020 WL 1547383 at *1(emphasis added). In *Telegram,* the Court recognized the inherent utility of a cryptocurrency such as Bitcoin, Ether or XRP.

> Cryptocurrencies (sometimes called tokens or digital assets) are a lawful means of storing or transferring value and may fluctuate in value as any **commodity** would. In the abstract, an investment of money in a cryptocurrency utilized by members of a decentralized community connected via blockchain technology, which itself is administered by this community of **users** rather than by common enterprise, is not likely to be deemed a security under the familiar test laid out in S.E.C. v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946).

Telegram, 448 F. Supp. 3d 352, 358 (emphasis added). The critical factor that distinguishes XRP Holders from the investors in *Telegram* is the motive for consumptive use. The SEC attempts to classify all XRP Holders as "speculative investors." Undeniably, some XRP Holders include investors who speculate in this relatively new asset class.[14] Many XRP Holders also own Bitcoin and Ether. But XRP Holders include developers, small businesses, artists, and content providers who are paid in XRP. XRP is utilized by many XRP Holders as not just a store of value but as a substitute for fiat currency. In sum, the consumptive use of XRP is an interest that the SEC lacks standing to regulate.

The *Telegram* decision is of great significance to the issue of intervention as well as the most important issue presented in this case: whether present day XRP constitutes investment contracts. The SEC was successful in proving that *Telegram*'s plan to distribute Grams was an offering of securities under the *Howey* test to which no exemption applied. The difference here is that

[14] The SEC seems to conflate the *Howey* test with speculative investing. The SEC writes that "[m]ovants may buy and sell XRP as a **speculative investment** . . . proof that Defendants offered and sold XRP as a **speculative investment.**" Doc. 85 at *1 (emphasis added). Whether some people acquired XRP as a speculative investment has no bearing on whether it's a security or not. The same can be said for Bitcoin, Ether, Gold, Silver or any other commodity. More importantly, according to *Howey*, speculation is irrelevant. *See Howey*, 328 U.S. at 301 ("If that test be satisfied it is immaterial whether the enterprise is speculative or nonspeculative, or whether there is a sale of property with or without intrinsic value.").

today's XRP has "functional consumptive uses." It can be used for transferring value and for many other uses. Because of the functionality of the asset, XRP is a product – a commodity or alternative currency– and therefore, not subject to the securities laws.

One major example of consumptive use is that XRP is routinely used as money or currency. XRP is used as a currency to purchase goods and services. In opposing the intervention, the SEC focused much of its attention on the statutory definition of "currency"[15] and claimed that the Defendants will make the appropriate argument that XRP is a currency.[16] However, XRP Holders use the term currency and money interchangeably and any statutory distinction between the two words make no difference in determining whether XRP itself is an investment contract. XRP doesn't have to be deemed a currency to prevent it from being classified as a security. Many XRP Holders' interest in XRP is unrelated to investment. Instead, the interest is in XRP's operational utility and its utility as currency or money.

Regardless of the legal or sovereign definition of currency, there is no dispute that XRP acts as "money." And "[m]oney, in common parlance, is a medium of exchange – that is, a token that can be traded for goods or services." *U.S. v. Harmon,* No. 1:19-cr-00395-BAH, Doc. 59 *at* *14-15 (District of Columbia Jul. 24, 2020) (internal citations omitted).

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[15] In fn. 3 of Doc. 85 the SEC states that the Treasury Regulations define "currency" in the context of FinCEN Regulations as "[t]he coin and paper money of the United States or any other country that is designated as legal tender." Citing 31 C.F.R. sec. 1010.100(m).

[16] The SEC attempts to defeat intervention by claiming the Defendants will make the currency argument, but the SEC has made clear its intention to offer into evidence the fact that Garlinghouse has repeatedly said that he did not view XRP as a currency. SEC Resp. Mar. 10, 2021, Doc. 55 Fn. 3 (citing AC ¶ 386-87). The fact that the CEO of Ripple did not consider XRP as currency militates in favor of intervention because it demonstrates (1) XRP Holders use XRP in a way not intended by Ripple, thus, there could be no common enterprise and (2) the Defendants are not adequate protectors of XRP Holders' interests.

It is well settled that cryptocurrencies are considered money. "Bitcoin is just that – a medium of exchange, method of payment, and store of value. *Id.* at *15.[17] "Bitcoin can be used to pay for goods or services." *Id.* The same applies to XRP. XRP was the world's second cryptocurrency and is used daily in payments.[18] "Bitcoin can also be exchanged for conventional currency." *Id*. at *16 (citing IRS *Virtual Currency Guidance* ("Bitcoin can be digitally traded between users and can be purchased for, or exchanged into, U.S. dollars, Euros, and other real or virtual currencies")). The same exact statements equally apply to XRP – with a caveat – XRP is one-thousand times faster, one-thousand times cheaper, and can handle 100 times more transactions per second and is better for the environment. *See* Deaton Decl. Ex. P, Major Reasons Why XRP is Better than Bitcoin (September 17, 2020). Federal Courts have concluded that Bitcoin qualifies as money under these ordinary definitions. *See U.S. v. Faiella*, 39 F. Supp. 3d 544, 545 (holding that Bitcoin is "money" because it can be easily purchased in exchange for ordinary currency, acts as a denominator of value, and is used to conduct financial transactions."). In fact, the SEC itself has relied on the fact that Bitcoin is a form of currency in prosecuting enforcement actions. In *SEC v. Shavers*, 4:13-cv-00416, 2013 WL 4028182, at *2 (E.D. Tex., Aug. 6, 2013) the Court stated:

> It is clear that Bitcoin can be used as money. It can be used to purchase goods or services, and as *Shavers* stated, used to pay for individual living expenses. The only limitation on Bitcoin is that it is limited to those places that accept it as currency. [I]t can also be exchanged for conventional currencies, such as the U.S. Dollar, Euro, Yen, and Yuan. Therefore, Bitcoin is a currency or form of money.

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[17] Citing Robert C. Hockett & Saule T. Omarova, *The Finance Franchise,* 102 Cornell L. Rev. 1143, 1208 (2017) (defining "Bitcoins, electronic tokens or bits of data, as a means of payment and exchange similar to regular currencies"); Internal Revenue Service, *IRS Virtual Currency Guidance Notice* 2014-21, 2014-16 I.R.B. 938 (2014) ("Virtual Currency is a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value.").

[18] *See* Deaton Decl. Ex. S, Brainard speech, (May 15, 2018),("[A] typical cryptocurrency may be used in payments.").

Every word of these statements can be equally stated about XRP. In fact, many XRP Holders use XRP to purchase and transfer Bitcoin and fiat currency on the XRPL utilizing XRP because of its speed and cost effectiveness. *See* Deaton Decl. Ex. Q, XRP is the Fastest Way to Send Bitcoin (August 4, 2019) and Deaton Decl.Ex. O.

The Southern District of New York has likewise found that Bitcoin and **similar cryptocurrencies** meet the definition of money. In *United States v. Ulbricht*, 31 F. Supp. 3d 540, 570 (S.D.N.Y. 2014) the Court defined "money" as an "object used to buy things" and concluded that "the only value for Bitcoin lies in its ability to pay for things" because "[b]itcoins can be either used directly to pay for certain things or can act as a medium of exchange and be converted into a currency which can pay for things."[19] XRP has the same value and can be used in the same way.

The SEC claims that "Defendants repeatedly recognized that XRP was not like Bitcoin and was not a currency." Pl's Resp. at 6, Mar. 22, 2021, No. 79. Ripple's intended use case is immaterial to XRP Holders. XRP Holders utilize XRP as a form of currency or money regardless of its original design or purpose. Assets and technology change and evolve over time. Bitcoin was designed to be a peer-to-peer electronic cash payment system,[20] yet today, Bitcoin is generally known as being too slow of a network for payments but is touted as a great store of value and accepted as digital gold. *See* Deaton Decl. Ex. T, BTC as Digital Gold (July 29,2019).

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[19] *See also United States v. Murgio,* 209 F. Supp. 3d 698, 707 (S.D.N.Y. 2016) (stating "Bitcoins clearly qualify as money or funds …because they can be easily purchased in exchange for ordinary currency, act as a denominator of value, and [are] used to conduct financial transactions"); *and United States v. Ologeam,* No. 5:18-cr-81, 2020 WL 1676802, at *11 (E.D. Ky. Apr. 4, 2020 ([T]he federal district courts have unanimously and univocally concluded that Bitcoin constitutes money.").

[20] *See generally* Bitcoin: A Peer-to-Peer Electronic Cash System, Satoshi Nakamoto (2008).

Ripple may have specific use cases in mind for XRP but that doesn't prevent XRP Holders from utilizing the asset as they see fit. Thus, XRP's multiple utility has been driven by XRP Holders and not only from Ripple's efforts. As a result, the XRP of 2021 is much different than that of 2013. For these reasons, it is clear that XRP Holders have a significant interest in their XRP and a right to intervene in order to adequately protect it.

C. Without Intervention, XRP Holders' Interests May Be Impeded by the Disposition of This Case

This new security *per se* theory directly threatens the interests of XRP Holders, whose ability to utilize, trade or transact in XRP could be impaired even though there is nothing about their conduct that could plausibly make XRP an investment contract.[21] For more than eight years, the SEC has allowed XRP, the XRPL, and their associated technologies evolve from a promising digital asset with superior functionality into the third-largest digital currency in the world (after Bitcoin and Ether).

"XRP is estimated to be held today by millions of holders worldwide, with approximately $700 billion to $1 trillion in total trading volume since 2013." Def. Resp. Mar. 26, 2021 Doc. 86, at *2. Those XRP Holders, investors, developers, and businesses have sought intervention because the entire theory being pursued by the SEC threatens their interests. If XRP Holders are

[21] The SEC makes the extraordinary claim that because some holders of XRP may be utilizing XRP as a speculative investment that's traded in secondary markets "on digital asset trading platforms" is actual "proof that Defendants offered and sold XRP as a speculative investment [contract]." SEC Resp. Mar. 22, 2021, ECF No. 85 at *1. This meritless claim by the SEC would make every digital asset and/or cryptocurrency, including Bitcoin and Ether, unregistered securities because all of these digital assets are held, by some, as pure speculative investments that are traded in secondary markets on the same "digital asset trading platforms" that XRP is traded on.

not allowed to intervene, their interests could be more than impaired – those interests could be destroyed.

Considering that the SEC disputes the independent utility of XRP, intervention is necessary for XRP Holders to help develop the Court's understanding related to the **current** utility and development and technology behind XRP and the XRPL completely independent of Ripple and its executives. In fact, many of the current uses of XRP by XRP Holders are performed without Ripple or its executives' knowledge or awareness. This information is critical to the Court's application of the *Howey* test and ultimate determination as to whether XRP itself is a security.

Judge Castel made note that "[t]he SEC, for example, does not contend that Bitcoins transferred on the Bitcoin blockchain are securities." *Telegram*, 448 F. Supp. 3d 352, 358. In this case, however, the SEC is asking the Court to conclude that *all* XRP, including those owned by XRP Holders are securities. AC ¶¶ 239-244; ¶¶282-289; ¶¶ 290-293; ¶¶ 353-356;¶371-377; ¶¶ 381-389;¶ 391. Judge Netburn posited the SEC's theory when she stated "[p]resumably under this theory then, every individual in the world who is selling XRP would be committing a Section 5 violation based on what you just said." Hr'g Tr. 44:7-9 (Mar. 19, 2021). The SEC's response to Judge Netburn's factually correct statement was ambiguous and nonsensical, to be polite. The SEC did not reject the premise of Judge Netburn's statement but attempted to minimize the interests of XRP Holders by stating:

> That's not quite correct, your Honor. So the statute, the Securities Act of 1933 has sort of a registration provision under Section 5, and then an exemption provision under Section 4. And broadly speaking, the Section 4 exemptions, I'm speaking very generally here, if these are transactions by people in the market, they are exempt by statute.

Hr'g Tr. 44:10-16 (Mar. 19, 2021). However, Section 4 exemptions only apply to a security subject to registration under Section 5. Securities Exchange Act, 15 U.S.C. § 4

(2018). Hence, the SEC confirmed its belief and/or claim that the XRP held by XRP Holders are in fact securities. Furthermore, the burden of proof to claim these exemptions would fall to XRP Holders. *Telegram*, 448 F. Supp. 3d 352, 366 (citing *SEC v. Cavanaugh*, 155 F.3d 129, 133 (2d Cir. 1998).

D. XRP Holders' Interests Are Not Adequately Represented

"[T]he burden to demonstrate inadequacy of representation is generally speaking minimal." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001) (internal quotations omitted). XRP Holders easily satisfy this minimal standard.

i. **The SEC Does Not Adequately Represent The Interest of XRP Holders**

The law is well settled that if there is no investment intent a transaction does not fall within the scope of the securities laws. "[W]hen a reasonable purchaser is motivated to purchase by a consumptive intent" and not for purposes of making a profit, the SEC has no interest to protect under securities laws. *Telegram,* 448 F. Supp. 3d 352, 371. Clearly, the SEC is either unaware of XRP Holders' use of XRP or they are choosing to ignore such use for litigation reasons. The SEC repeatedly categorizes XRP Holders as speculative investors incapable of developing independent utility and contributing to the overall growth and development of the XRP ecosystem. AC ¶ 282-289. The SEC claims that XRP Holders' "ultimate goal in seeking to intervene is for XRP to become available again for trading on digital asset platforms so that Movants may buy and sell XRP as a speculative investment**."** Pl.'s Resp. to Mot. To Intervene, at 1 (Mar. 26, 2021), ECF No. 85**.**

This statement alone proves that the SEC fails to truly understand or appreciate the threat to XRP Holders' interests that the overly broad and vague allegations contained in its complaint against Ripple and XRP Holders have caused. There are literally hundreds of businesses and

developers – independent of Ripple and its executives – utilizing the underlying technologies of XRP and the XRPL. *See* Deaton Decl. Ex. I-T. Many of those developers and individuals and small businesses have been slowed or halted due to the allegation that today's XRP itself is an investment contract and thus a security. But even if the SEC were correct (they are not) and XRP Holders' "primary motivation" is to "reinstate speculative trading of XRP on digital asset platforms" so that XRP Holders can sell XRP to "other investors at a profit",[23] this would demonstrate that XRP Holders are not relying on the Defendants at all. Putting aside the fact that XRP Holders did not purchase their XRP from Ripple, it confirms that XRP Holders wish to manage their own XRP holdings on their own terms. Ripple has no say in XRP Holders' decision to trade XRP (or hold, hedge, borrow, lend, etc.). Whether XRP Holders decide to sell their XRP, and whether they do so at a profit, is certainly not dependent on the efforts of Ripple, but is solely dependent on the personal trading decision of each holder and user and the fluctuations of the broader cryptocurrency market. It is well established that XRP's price is not correlated with the efforts of Ripple, but instead, the price of bitcoin.

In order to be successful in the application of the *Howey* test, the SEC must persuade this Court to believe allegations that are in direct contradiction to the interests of XRP Holders. The SEC claims that XRP Holders entered into a common enterprise with Ripple; XRP Holders claim they did not. The SEC claims that XRP Holders have solely relied on Ripple's efforts; XRP Holders claim they have not. The SEC claims XRP lacks utility; XRP Holders claim intend to

[23] In the SEC's pre-motion letter opposing XRP Holders' intervention, SEC Attorney Teneiro, at best, misinterpreted Deaton's quote, and, at worst, intentionally misled this Court, by claiming that Deaton stated the purpose of re-listing XRP was so that XRP's "price could double." Doc 85 at 1. No fair reading of Deaton's quote could be interpreted as such as Deaton was commenting "that if the SEC chooses to inform exchanges that they can resume trading XRP, its price could double, which means Ripple could have twice the money to defend the case."). Deaton Decl. Ex. U, Deaton FXStreet Interview (Mar. 22, 2021)

prove that XRP has the greatest utility of all cryptocurrencies. The SEC claims it represents the interests of XRP Holders; XRP Holders claim it does not.

Clearly, the SEC's interests and the interests of XRP Holders are at odds with each other.

ii. Defendants Do Not Adequately Represent The Interests of XRP Holders

Legal counsel for Ripple, Larsen and Garlinghouse have no ethical responsibility to XRP Holders. Consider the fact that although the shared interests of Ripple and these two executives are clearly intertwined, they have separate legal counsel to represent their independent interests. The lack of ethical responsibility to XRP holders stems from a conflict-of-interest that is present if Ripple's counsel even attempted to represent the interests of both holders of XRP and Ripple. It would be antithetical for Ripple's counsel or counsel for Garlinghouse or Larsen to attempt to represent the interests of XRP Holders. It is an integral part of the defense to demonstrate that these defendants owe no duty and have no obligation to XRP Holders.

Ripple makes clear that it "never held an ICO, never offered future tokens to raise money, and has no contracts with the vast majority of XRP holders." Def.'s Answer at 5, (Jan. 29, 2021), ECF No. 43. There are no contracts or sales between Defendants and XRP Holders. This is an important distinction because Ripple must defend its own distribution of XRP and states that "it never offered or sold investment contracts in its distributions of XRP." *Id.* at 10, ¶ 10. Ripple's lawyers cannot be expected to focus their attention on distributions of XRP made by entities not associated with their clients. Ripple's lawyers will be focused on Ripple sales of XRP, not sales of XRP offered by Coinbase, Uphold, Kraken, or any other third-party exchange.

Furthermore, the defense has made it very clear that "Defendants do not represent the interests of Intervenors as holders of XRP." Def. Resp. at 1, Mar. 2, 2021, ECF No. 86.

III. Alternatively, XRP Holders Should be Granted Permissive Intervention

In the alternative, if XRP Holders' motion for intervention as of right is denied, XRP Holders should be allowed permissive intervention in this action. "The Court has broad discretion to, on timely motion, **permit anyone to intervene** who has a claim or defense that shares with the main action a common question of law or fact, so long as the intervention does not unduly delay or prejudice the adjudication of the original parties' rights." *In re Reyes,* at *1 (emphasis added) (citing Fed. R. Civ. P. 24(b); and *Peterson v. Islamic Republic of Iran,* 290 F.R.D. 54, 57 (S.D.N.Y. 2013)) (emphasis added).

A. Common Questions of Law and Fact Favor Intervention

The defenses that XRP Holders desire to assert in this action, if permitted to intervene, share both common questions of law and fact. Although XRP Holders are not named defendant in this action, they are identified throughout the complaint. As stated above, entire sections of the SEC's AC are dedicated to claims and allegations against XRP Holders. The SEC alleges that "*Economic Reality Dictates that XRP Purchasers Have no Choice But to Rely on Ripple's Efforts for the Success or Failure of Their Investment*", (AC at 50), even though XRP Holders have developed entire businesses utilizing the XRPL without Ripple's knowledge. *See* Deaton Decl. Ex. M. For example, XRP is utilized to purchase and transport Bitcoin due to the XRPL's superior technology over the Bitcoin network. S*ee* Deaton Decl. Ex. O. The SEC claims "[m]ost, if not all, XRP investors simply lack the technical expertise and resources," to grow the XRP ecosystem. AC ¶ 285. Yet, XRP Holders have been essential to the development of the ecosystem over the last eight years. Contrary to the AC ¶ 286, XRP Holders have demonstrated great entrepreneurial effort without Ripple's support. The SEC has alleged that all "[p]urchasers of XRP invested into a common enterprise." AC ¶ 290. In essence, the SEC has claimed that

every XRP purchaser in the world has entered into a common enterprise, not only with Ripple, but with "all other XRP holders." AC ¶ 293.

The SEC claims "that XRP has no significant use beyond investment." AC ¶ 371. This is simply not true and XRP Holders should be present to defend against such blatantly false allegations.

B. Intervention Does Not Prejudice Existing Parties

XRP Holders do not seek additional discovery or any change to the current scheduling order entered by the Court. Therefore, granting XRP Holders' motion will cause no delay that could prejudice the existing parties.

In an attempt to dissuade the Court from granting intervention, the SEC claims that if the Court permitted XRP Holders to intervene, all other XRP holders, including a **large** class of XRP investors that have sued Ripple, would also likely intervene creating an "avalanche" of claims and "near-certainty of undue delay, complexity and confusion," Pl. Resp. at 1 (March 26, 2021) (citing to *In Zakinov v. Ripple Labs, Inc.,* No. 4:18-6753 (D.E. 87) at para 1 (N.D. Cal. Mar. 25, 2020)). This claim is fear mongering and a complete red herring offered by the SEC. One, the same argument could be argued in every single case where intervention is sought. Essentially, the SEC claims that if the Court grants intervention it will encourage "all other XRP holders" to seek intervention. Counsel for XRP Holders, however, has been contacted by over 12,600 XRP holders asking to join. The proposed intervenors – XRP Holders - represent and share the interests of the nearly all XRP holders and investors. Second, the SEC misleads the Court by claiming that a "large class of XRP investors" have sued Ripple and might seek intervention. Moreover, the interests of this "large class" (a total of six plaintiffs) are already represented by the SEC. The SEC admits that those "purchasers argue, **as the SEC does**, that

Ripple unlawfully sold XRP in an unregistered securities offering." (emphasis added). *Id.* The SEC's cited case law clearly demonstrates that this alleged "avalanche" of potential intervenors would not be permitted by the Court. The SEC admits that these other XRP investors are making the same exact argument against the Defendants that the SEC is making. Yet, the SEC cites to *MASTR Adjustable Rate Mortgages Trust v. UBS Real Estate Serv., Inc.*, No. 12 Civ. 7322, 2013 WL 139636, at *2 (S.D.N.Y. Jan. 11, 2013) which clearly states "[w]hen a potential intervenor shares 'the same ultimate objective" as an existing party in the case . . . adequate representation is presumed." The XRP investors suing Ripple make identical allegations being pursued by the SEC. Those XRP investors' interests are being protected by the SEC, thus there is no need for intervention. Any other XRP holders' interests are being pursued by the Proposed Intervenors and the 12,600 XRP Holders asking to join.

If granted leave to intervene, counsel for XRP Holders will significantly contribute to the full development of the underlying factual issues in the case to the just and equitable adjudication of the legal questions presented.

IV. Due Process and Fundamental Fairness Favor Intervention

For the last eight years, the SEC was well aware that XRP was widely sold, distributed and traded in the secondary markets. The government was very familiar with Ripple and XRP from the 2015 FinCEN settlement. The SEC permitted and authorized Ripple to purchase a nine-percent minority stake in MGI knowing that Ripple would distribute XRP to MGI; which in turn, would sell the XRP in the secondary market to purchasers, including XRP Holders. AC at 64, ECF No 46.

Market participants including Ripple, XRP Holders, market-makers and intermediaries sought regulatory guidance for eight years prior to this action. Def.'s Answer to First Am.

Compl. at 98-99, ECF No. 51. The SEC's action, inaction, and acquiescence communicated that XRP, similar to Bitcoin and Ether, was not a security.

In sum, the SEC's enforcement action against XRP converts "commonplace acts in the industry into violations." *Upton v. SEC*, 75 F. 3d 92, 97-98 (2nd Circuit 1996). In *Upton*, the Second Circuit overturned an SEC enforcement action. The SEC had been aware for years that market participants were engaging in the practice at issue. The SEC knew from its third-party communications that market participants lacked clarity of the SEC's position. The SEC nevertheless took "no steps to advise the public" of the SEC's new and opposite interpretation. The Court held that the SEC violated the Defendant's due process rights. *Id.* at 98.

Despite eight years of acceptance and acquiescence, Clayton directed the SEC to file this action on his last day at the SEC, then left forever. Although the SEC claims the motive or reasons behind why the SEC brought this action are irrelevant, Grundfest clearly stated that the filing of this action raised concerns over the "exercise of the Commission's discretion." *See* Deaton Decl. Ex. G, Grundfest Letter Discussion (December 17, 2020). XRP Holders respectfully submit to this Honorable Court's discretion.

CONCLUSION

For the foregoing reasons, XRP Holders respectfully ask that they be allowed to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a), or, in the alternative, should be permitted to intervene pursuant to Federal Rule of Civil Procedure 24(b).

Dated: April 19,, 2021

Respectfully Submitted,

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EXHIBIT 24

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VIA ECF AND EMAIL

March 19, 2021

The Honorable Analisa Torres
United States District Judge
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, NY 10007

Re: SEC v. Ripple Labs Inc. et al., No. 20-cv-10832-AT

Dear Judge Torres:

On behalf of XRP Holders, as Proposed Intervenors, we write pursuant to Section III of Your Honor's Individual Practices, setting forth the arguments that Proposed Intervenors anticipate raising on a motion to intervene pursuant to Fed. R. Civ. P. 24.

As of the date of this letter, Proposed Intervenors and their counsel have been contacted by over ten thousand XRP Holders expressing their desire to intervene in this action in order to ensure that adjudication of this case considers the full array of vested property interests at stake, and to make sure those interests and related rights are fully and vigorously defended. Proposed Intervenors, and all others similarly situated ("XRP Holders"), are holders of the Digital Asset XRP, the underlying asset the SEC is alleging constitutes an investment contract.

On December 22, 2020, the SEC filed this action against the named Defendants, but there is an unnamed defendant that the SEC essentially sued de facto - all XRP Holders. XRP Holders are thousands of individuals who have acquired XRP, not from Ripple or its executives, but from the multiple exchanges that have publicly traded XRP during the last eight years. Strikingly, the SEC didn't limit the claims (as they have in other digital token cases) to specific distributions of XRP directly sold from the Defendants during a specific time period. Instead, the SEC implied that all XRP are securities. The SEC alleges that "from 2013 to the present" Ripple sold unregistered securities in the form of XRP. By alleging that XRP sold and/or distributed by Ripple - in the present day - are unregistered securities, the SEC is implying that all XRP constitute unregistered securities, including the XRP in the accounts of the XRP Holders.

XRP Holders have suffered great prejudice based on these "present day" allegations. Because the SEC is alleging that today's XRP constitute investment contracts in violation of U.S. Securities laws, the vast majority of U.S. Exchanges have either delisted XRP or halted trading of XRP, including the XRP owned by XRP Holders who have no connection whatsoever to Ripple or its two executives. Until the filing of this enforcement action, many XRP Holders had never heard of Ripple Labs, Inc. The economic damages suffered by XRP Holders has been estimated at $15 billion. These catastrophic losses were not unforeseeable. The SEC was warned that if it alleged that the sale of today's XRP constituted the transfer of unregistered securities, XRP Holders would suffer unprecedented losses. The SEC was warned by former SEC Chief Joseph Grundfest ("Grundfest") that the mere filing of this action would result in multi-billions in losses to XRP Holders with no connection to Ripple or its two executives. Grundfest warned

that the exchanges and market intermediaries would feel compelled to delist and/or halt the trading of XRP out of fear of running afoul with U.S. Securities laws. Within 48 hours of the SEC's Complaint against Ripple and XRP, everything Grundfest predicted came true.

XRP Holders took immediate action to protect their interests and filed a petition for Writ of Mandamus against the Acting Chairman of the SEC.[1] After reviewing the SEC's motion to dismiss the Writ, XRP Holders withdrew their petition, and instead, move this Honorable Court for intervention. In its motion to dismiss the writ, the SEC made clear that this Court provides the exclusive forum to hear all matters related to its action against Ripple and XRP. The SEC stated "[h]ere, an avenue for judicial review of the Commission's complaint against Ripple clearly exists. The [SDNY] will decide whether the complaint warrants any relief. Thus, the Commission's enforcement proceeding in the [SDNY], brought under the Securities Act, supplies the exclusive method for testing the validity of the Commission's complaint against Ripple." *See Deaton v. SEC,* Doc. 11 at *12. Although it was warned that the mere filing of the Complaint would cause the market intermediaries and exchanges to delist and/or suspend the trading of XRP, thereby causing the price to collapse, resulting in multi-billions in losses, the SEC blamed the exchanges for causing the harm suffered by XRP Holders. *Id.* at *14.

I. Legal Standard

"Rule 24 of the Federal Rules of Civil Procedure provides the criteria a putative intervenor must meet to intervene either as of right or permissively." *Yang v. Kellner*, No. 20 CIV. 3325, 2020 WL 2115412 at *1 (S.D.N.Y. May 3, 2020) (Torres, A.). The Court analyzes the same factors whether intervention is sought pursuant to Fed. R. Civ. P. 24(a) or 24(b). *In re Reyes,* No. 19 CIV. 7219, 2019 WL 6170901 at *1 (S.D.N.Y. May 3, 2020) (Torres, A.) (quoting *MASTR Adjustable Rate Mortgs. Trust 2006-OA3 v. UBS Real Estate Secs.,* 2013 WL 139636, at *2 (S.D.N.Y. 2013)). These factors are whether: (1) the motion is timely; (2) the applicant asserts an interest relating to the property that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may impair or impede the applicants' ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties. *In re Reyes,* at *1 *(citing MasterCard Int'l Inc. v. Visa Int'l Serv. Assoc., Inc.,* 471 F.3d 377, 389 (2d Cir. 2006). Denial of intervention is not mandatory if one factor is not met. *See Cole Mech. Corp. v. Nat'l Grange Mut. Ins. Co.,* No. 06 CIV. 2875 LAK HBP, 2007 WL 2593000, at *2 (S.D.N.Y. Sept. 7, 2007) (noting that the test is flexible and courts generally look at all four factors rather than focusing narrowly on anyone). "The Court has broad discretion to, 'on timely motion,' **permit anyone to intervene** who 'has a claim or defense that shares with

[1] On January 1, 2021, nine days after the SEC filed its Complaint against the interests of XRP Holders, XRP Holders filed a Petition for Writ of Mandamus in Rhode Island Federal District Court, asking the Court to order the Acting Chairman of the SEC to amend the Complaint to exclude the XRP owned by XRP Holders, and only allege claims the SEC can, in good faith, attempt to prove. On March 5, 2021, the SEC filed a motion to dismiss the XRP Holders' Writ of Mandamus for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. *See* Respondents' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim Upon Which Relief Can Be Granted, *Deaton v. U.S. Securities and Exchange Commission et al.,* Case 1:21-cv-00001-WESPAS, Document 11, District of Rhode Island.

the main action a common question of law or fact', so long as the intervention does not 'unduly delay or prejudice the adjudication of the original parties' rights."' *In re Reyes*, at *1 (emphasis added) (citing Fed. R. Civ. P. 24(b); *U.S. Postal Serv. V. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978)); and *Peterson v. Islamic Republic of Iran*, 290 F.R.D. 54, 57 (S.D.N.Y. 2013).

II. XRP Holders Satisfy All Four Factors of Intervention

A. Matter of Right. XRP Holders satisfy the four criteria for intervention as of right. This Honorable Court should allow the motion to intervene because the motion for intervention is timely. The motion is being made as soon as possible after discovering the existence of the Complaint filed by the SEC and after receiving the SEC's motion to dismiss the Writ of Mandamus on March 5, 2021. The intervention is so timely that it almost meets the deadline, set by the Court for the existing parties to amend in new parties; and thus, is on its face, timely. *See e.g., Int'l Design Concepts, LLC v. Saks, Inc.,* 486 F.Supp.2d 229,234 (S.D.N.Y. 2007) (motion to intervene filed more than one year after the second amended complaint was timely where delay caused no prejudice to parties). The first pretrial hearing on this case was February 22, 2021, less than thirty days from the date of this pre-motion letter. There is no delay and no prejudice to the parties. XRP Holders do not seek to alter the existing scheduling order set by this Honorable Court.

The second factor is that XRP Holders must assert an interest related to the property that is the subject of the action. XRP Holders easily meet this factor. The SEC is claiming that present day XRP sold, transferred and/or distributed constitute investment contracts. XRP Holders own the very property or asset that is the subject of the underlying action. "For an interest to be cognizable under Rule 24(a)(2), it must be direct, substantial, and legally protectable." *Brennan v. New York City Bd. Of Educ.,* 260 F.3d 123, 128 (2d Cir. 2001). XRP Holders have been deprived use of their property as the exchanges have halted trading because of the SEC's allegations. Their property rights are a direct substantial and legally protectable interest.

XRP Holders' interests in this action will substantially be impaired or impeded if they are not allowed to intervene. Ripple's Answer actually states that "holders of XRP cannot objectively rely on Ripple's efforts." *Ripple Labs, Inc.'s Answer To First Amended Complaint* ¶ 10. Ripple's lack of duty to XRP Holders is replete throughout Ripple's Answer but it's also inextricably intertwined in its defense. An integral part of Ripple's defense is that because XRP is not a security, Ripple owes no duty to XRP Holders. Grundfest warned the SEC that the exchanges would delist and suspend XRP if it alleged that XRP was a security, yet it did so anyways. Between the SEC's reckless disregard for XRP Holders and the nature of Ripple's defense, adjudication of this action may harm or impeded the interests of XRP Holders. In short, XRP Holders' interests could be impaired without intervention.

Finally, intervention as of right is appropriate because XRP Holders are not adequately represented by the existing parties in this action. "[T]he burden to demonstrate inadequacy of representation is generally speaking minimal." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001). XRP Holders easily satisfy this minimal standard. Counsel for Ripple owe no ethical responsibility to XRP holders. It would be antithetical for counsel for

Ripple or its two executives to attempt to represent the interests of XRP Holders. In fact, it istheir responsibility to show that there is no duty or obligation to XRP Holders. Clearly, the SEC's interests and the interests of XRP Holders are at odds with each other considering they have engaged in litigation as adverse parties. XRP Holders need independent representation.

B. Permissive Intervention. In the alternative, if XRP Holders' motion for intervention as of right is denied, they should be allowed permissive intervention in this action. "[A] court 'considers the same factors that it considers for intervention as of right." *In re Reyes,* at *1 (quoting *MASTR Adjustable Rate Mortgs. Trust 2006-OA3 v. UBS Real Estate Secs.,* 2013 WL 139636, at *2 (S.D.N.Y. 2013). The claims asserted by XRP Holders share both common questions of law and fact. The most critical issue presented in this case is whether today's XRP is an unregistered security. Currently, the interests of XRP Holders are not represented in this action. Adding XRP Holders and their claims to the current suit would not substantially delay the trial or prejudice any party. In fact, granting the XRP Holders' Motion to Intervene will cause no delay as they do not seek any modification to the current scheduling order. The factual issues related to present day XRP are substantially similar. If granted leave to intervene, counsel for XRP Holders will significantly contribute to the full development of the underlying factual issues in the case and assist in the just and equitable adjudication of the legal questions presented. As briefly discussed in the section below, XRP Holders will demonstrate that today's XRP cannot, in good faith, be classified as an investment contract or security.

III. Today's XRP is a Government Recognized Form of Currency and is Utilized by XRP Holders Completely Independent of Ripple or its Executives

If allowed to intervene, XRP Holders will demonstrate to the Court that XRP is used around the world and in the United States as currency. Six years ago, the Financial Crimes Enforcement Network ("FinCEN") entered into an agreement with Ripple that XRP would be considered virtual currency and its use would be registered exclusively with FinCEN, not the SEC. Afterwards, foreign nations started agreeing with the U.S. Government's 2015 currency classification of XRP, and Japan, Switzerland, the U.K. and the UAE all declared XRP as non-securities. Since that 2015 designation as virtual currency, the use cases of XRP have exploded. The following are only a few examples of how XRP Holders utilize XRP without Ripple's knowledge or input: XRP Holders use an Uphold XRP debit card to buy everyday items at Walmart, Amazon, and Target; XRP is accepted as a currency to pay for goods and services at over a thousand businesses; XRP is used to move money from the U.S. to Africa, Mexico, Thailand, Brazil, the Philippines and all of Asia; XRP is used as payroll currency by multiple companies; XRP Holders use their XRP as collateral for loans or to earn interest; the XRP ledger (XRPL) hosts more than 5,000 different ledgers and all can transfer value between them utilizing XRP; XRP is used to purchase gold and silver online; XRP is used to purchase cars at dealerships; and there are literally hundreds of developers utilizing XRP and the XRPL and the vast majority of these developers have never had any contact with Ripple or its executives.

XRP Holders' interests in this action are not adequately represented by the existing parties and absent intervention the disposition of this case may impede their ability to protect their interests. XRP Holders' intervention is timely, will cause no delay and intervention will not prejudice the exiting parties.

Respectfully submitted,

John E. Deaton

cc: All counsel (via email)

EXHIBIT 25

L3JsSECc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

SECURITIES and EXCHANGE COMMISSION,

Plaintiff,

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

RIPPLE LABS, INC., et al.,

Defendants.

----------x

New York, N.Y.
March 19, 2021
10:30 a.m.

Before:

HON. SARAH NETBURN,

U.S. Magistrate Judge

APPEARANCES

SECURITIES and EXCHANGE COMMISSION
Attorneys for Plaintiff SEC
BY: JORGE G. TENREIRO
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Attorneys for Defendant Ripple Labs, Inc.
BY: ANDREW J. CERESNEY
MARY JO WHITE
LISA ZORNBERG
JOY GUO

So forget everybody else who is selling XRP, these individual defendants violated Section 5 each and every time that they sold it?

MR. TENREIRO: Well, your Honor, so -- I'm sorry. What was the question about other individuals that were selling?

THE COURT: Presumably under this theory then, every individual in the world who is selling XRP would be committing a Section 5 violation based on what you just said.

MR. TENREIRO: That's not quite correct, your Honor. So the statute, the Securities Act of 1933 has sort of a registration provision under Section 5, and then an exemption provision under Section 4. And broadly speaking, the Section 4 exemptions, I'm speaking very generally here, if these are transactions by people in the market, they are exempted by statute.

Section 5, though, focuses on and is relevant to this case, the issuer and the affiliates of the issuer. So it is only Mr. Larsen and Mr. Garlinghouse, the CEOs, or someone on the board. The affiliates of the issue are captured by the statute. Section 4 specifically exempts these transactions that the court put in the hypothetical of all these other people buying and selling XRP in the market. I don't think that would be the case, your Honor.

THE COURT: And you have specific claims -- I