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February 22, 2022

VIA ECF

Hon. Analisa Torres
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

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

Dear Judge Torres:

We write on behalf of Defendant Ripple Labs Inc. (“Ripple”) to respond to the SEC’s letter (ECF No. 431) seeking leave to submit a “sur-sur-reply” in support of its motion to strike Ripple’s fair notice defense based on yet another out-of-circuit decision, *SEC v. LBRY, Inc.*, Case No. 21-cv-260-PB, 2022 U.S. Dist. LEXIS 21619 (D.N.H. Feb. 7, 2022). The SEC’s application should be denied.

The SEC’s supposed “sur-sur-reply” is anything but. It only nominally addresses Ripple’s sur-reply, which pointed out the flaws in the SEC’s attempt to introduce in its reply brief a list of enforcement actions as evidence supposedly bearing on Ripple’s fair notice defense. Instead, the SEC attempts to introduce a new – and irrelevant – argument based on a recently decided case. A “sur-sur-reply” is not the place for new material.

In any event, the SEC’s latest case does not help it. The *LBRY* decision says nothing about fair notice. In *LBRY*, the court granted judgment on the pleadings on LBRY’s selective enforcement defense. Contrary to the SEC’s claim (at 1), this defense is not “similar” to Ripple’s fair notice defense; it is much harder to prove and much easier to strike. *See, e.g., Freeman v. Town of Hudson*, 714 F.3d 29, 38 (1st Cir. 2013) (setting out elements). Indeed, LBRY separately pled a fair notice defense that the SEC did not even ask the court to strike, and which remains pending in that case. The SEC’s omission of this fact from its “sur-sur-reply” application is remarkable.

As we have previously noted, *e.g.*, ECF No. 421, in this Circuit, the SEC cannot prevail on its motion to strike without identifying controlling authority that would extinguish Ripple’s fair notice defense as a matter of law. It has not done so, because none exists. The SEC cannot fill that gap with out-of-circuit cases, and it certainly cannot do it with *LBRY*, which addressed a different defense.

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Respectfully submitted,

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