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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x  
4 SECURITIES and EXCHANGE COMMISSION,

5 Plaintiff,

6 v.

20 Civ. 10832 (AT)(SN)

7 RIPPLE LABS, INC., et al.,

8 Defendants.  
9 -----x

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

11 Before:

12 HON. SARAH NETBURN,

U.S. Magistrate Judge

13 APPEARANCES

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1 (The Court and all parties appearing telephonically)

2 THE COURT: Good morning, everybody. This Judge  
3 Netburn.

4 I think we are all set. This case is SEC v. Ripple  
5 Labs, Incorporated. The docket number is 20 CV 10832.

6 We have a number of lawyers on the line. I'm going to  
7 ask that only those lawyers who anticipate speaking state their  
8 names for the record at this time.

9 On behalf of the SEC?

10 MR. TENREIRO: Good morning, Judge Netburn.

11 This is George Tenreiro on behalf of the SEC.

12 THE COURT: On behalf of Defendant Garlinghouse?

13 MR. SOLOMON: Good morning, your Honor.

14 My name is Matthew Solomon on behalf of  
15 Mr. Garlinghouse.

16 THE COURT: Thank you.

17 On behalf of Defendant Larsen?

18 MR. FLUMENBAUM: Good morning, your Honor.

19 This is Marty Flumenbaum from Paul, Weiss, Rifkind,  
20 Wharton & Garrison LLP on behalf of Mr. Larsen.

21 THE COURT: On behalf of Ripple Labs?

22 MR. CERESNEY: Good morning, your Honor.

23 This is Andrew Ceresney on behalf of Ripple from  
24 Debevoise & Plimpton.

25 THE COURT: Thank you.

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1 I hope everybody on the call is healthy and safe.  
2 In light of the pandemic, we are conducting this proceeding  
3 remotely by telephone. We have a court reporter on the line,  
4 so if I can ask that the attorneys state their name each and  
5 every time so that we can have a clean record.

6 I've asked only those lawyers who anticipate speaking  
7 to state their appearance. Certainly, if any other lawyer  
8 wishes to speak, I'll just ask that you state your full  
9 appearance at that time.

10 We are here right now on discovery letters that were  
11 filed on March 11, and the SEC responded on March 17. These  
12 concern requests from the SEC to obtain information from the  
13 defendants seeking their personal financial records, as well as  
14 subpoenas that were served upon the defendants' financial  
15 institutions.

16 Why don't I begin. I don't know who intends to take  
17 the lead here, whether or not that will be you, Mr. Solomon, or  
18 somebody else on behalf of the defendants.

19 MR. SOLOMON: It is going to be me, your Honor. I'm  
20 happy to begin.

21 THE COURT: Great.

22 MR. SOLOMON: Great. Good morning, again.

23 Again, it is Matthew Solomon from Cleary Gottlieb  
24 Steen & Hamilton. I'm going to be arguing on behalf of  
25 Mr. Garlinghouse and also Mr. Larsen.

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1 I may take a little bit more time, your Honor, than I  
2 normally would. I anticipate Mr. Larsen's counsel will want to  
3 speak when I'm done, but he will not repeat the same arguments  
4 that I'm making. I think his comments will be brief.

5 With me from Cleary are Nowell Bamberger, Alexander  
6 Janghorbhani, Sam Levander and Lucas Hakkenberg.

7 Your Honor, we filed our letter motion on March 11, on  
8 behalf of Mr. Garlinghouse and Mr. Larsen, because the SEC has  
9 made multiple discovery requests in the form of requests for  
10 production of records and third-party subpoenas for  
11 Mr. Garlinghouse and Mr. Larsen's detailed personal financial  
12 information and those of their families. These requests seek  
13 irrelevant information that is disproportionate to the nature  
14 of the case and inappropriately burdens their privacy  
15 interests.

16 Your Honor, I want to be perfectly clear off the bat.  
17 This is not a case where defendants are unwilling to produce  
18 financial records. We have produced, many months ago,  
19 including details of all of their XRP transactions while at  
20 Ripple. This is not unspecified, self-selected trading  
21 records, as the SEC says in their letter. They have the XRP  
22 transactions already. That is why they have alleged all of  
23 these sales of those transactions.

24 But the SEC now has made a sweeping request for all of  
25 their other personal financial records. And, your Honor, they

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1 are entitled to nothing more than they already have or will  
2 shortly receive. Despite shifting theories, and I know your  
3 Honor comes prepared and has read the letters, and the theories  
4 have shifted, but they still have not and cannot provide  
5 support for their theory of relevance. They do not have a high  
6 burden granted, but they have to make a prima facie showing of  
7 relevance, and they can't.

8 They don't get the records to pressure test whether  
9 there may be something out there they don't know about. They  
10 don't get the records to try to establish motive. The sales of  
11 XRP, they already have and detailed in their complaint and in  
12 their letter to you, give them all three to need or to make  
13 whatever argument they want about motive. They don't get the  
14 records to fish for ways the individuals may have somehow  
15 privately promoted Ripple. They have no allegations about  
16 that.

17 And they certainly don't get the records merely  
18 because they are seeking a penalty. This is a really strange  
19 proposition, and if it were accepted, it would open up every  
20 litigant to discovery of all of their personal financial  
21 records merely upon filing of a lawsuit seeking a penalty.  
22 That is not the law.

23 So, your Honor, the bottom line, Mr. Garlinghouse and  
24 Mr. Larsen have already produced and will continue to produce  
25 all potentially relevant financial information, namely, their

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1 trading records in relation to XRP. We have tried to work with  
2 the SEC on this. They responded by issuing more third-party  
3 subpoenas to banks seeking the same information they seek from  
4 us.

5 When we demanded they withdraw those subpoenas, you  
6 can imagine, your Honor, when we called the banks, they are  
7 anxious to get this resolved. They don't want to get crossways  
8 with the SEC. So we asked the SEC to withdraw the subpoenas  
9 they sought, they refused and said they were going to court.  
10 That is why we filed.

11 Because the law doesn't support them, as your Honor  
12 probably already knows from your review of the cases. What  
13 they are reduced to is making up new arguments and denigrating  
14 the obvious privacy individuals have in their personal,  
15 financial records, especially where, as here -- and this is  
16 critical -- the charge conduct does not sound in fraud, it does  
17 not sound in misrepresentation, it doesn't sound in market  
18 manipulation, or anything of the sort. By their own admission,  
19 it is a strict liability case. That is how they categorize it.

20 So we are asking you to squash the third-party  
21 subpoenas and to grant our protective order as to the  
22 individual defendants' personal financial records.

23 Let me take a step back, your Honor, because this is  
24 the first time we are appearing in front of you, and I'm not  
25 going to belabor this, but I think it would be useful to

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1 provide a little bit of context generally for the request and  
2 why it is so inappropriate.

3 XRP is a digital asset. It is just like Bitcoin or  
4 Ether. It has traded for years, years without incident.  
5 Millions of XRP holders, dozens of exchanges and market makers  
6 all operated under the well-founded belief that XRP was not an  
7 investment contract and, therefore, not a security. This is  
8 not some rinky-dink ICO, initial coin offering. This was,  
9 until the SEC sued, the third largest digital asset after  
10 Bitcoin and Ether, with major customers, major bank customers,  
11 several global financial institutions.

12 In 2018, right after Mr. Garlinghouse became CEO, the  
13 SEC officials stated publicly, neither Bitcoin nor Ether were  
14 securities. In fact, other government agencies regulating XRP  
15 regulate it as a currency, not as a security. In fact, they  
16 brought an enforcement action in 2013, right after  
17 Mr. Garlinghouse started, on the basis that XRP was a currency.

18 So following a lengthy investigation, your Honor, the  
19 SEC brought this case alleging for the first time publicly in  
20 December 2020 that XRP, in their view, is an investment  
21 contract and, therefore, a security.

22 This is the first time -- this was the first time the  
23 SEC brought a litigated case against individuals in this space  
24 that did not sound in fraud. So when you hear discussions of  
25 Telegram and Kik, please keep that in mind. These are Section



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1 5 cases against companies. They have now sued the company and  
2 individuals based on conduct they say stretches back to 2013.

3 What did Mr. Garlinghouse and Mr. Larsen allegedly do?  
4 Well, the SEC says they participated in one long, unregistered  
5 securities offering over many years. An offering that took  
6 place in plain sight, that the SEC now dramatically says in its  
7 letter was illegal. And this started, your Honor, this scheme  
8 allegedly started well before my client had ever heard of  
9 Ripple or XRP and four years before he sold a single XRP unit.  
10 This long offering, according to the SEC in their 79-page  
11 amended complaint, allegedly violated Section 5 of the  
12 Securities Act. And the SEC has also brought additional claims  
13 against Mr. Larsen and Mr. Garlinghouse relating to their  
14 personal XRP sales and for allegedly aiding and abetting Ripple  
15 sales.

16 And just to be clear, the aiding and abetting claim  
17 means that the SEC believes Mr. Garlinghouse and Mr. Larsen  
18 intentionally or recklessly helped Ripple break the law. That  
19 is what they have to prove. They will never be able to prove  
20 that. We are moving to dismiss this charge. That is what they  
21 have to prove.

22 That brings us to the instant motion, and that is just  
23 some background, your Honor. We met and conferred --

24 THE COURT: Can I interrupt for one moment?

25 I know that this is the very issue that is being

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1 briefed right now in the motion to compel the SEC that has been  
2 filed by Ripple, I believe.

3 But can you talk to me from your perspective on this  
4 distinction -- again, I'm trying to wrap my brain around the  
5 various terms and assets here -- how you view XRP as  
6 distinguishable from Bitcoin and Ether?

7 MR. SOLOMON: Yes. Your Honor, it is a great  
8 question.

9 We don't view it as distinguishable. Bitcoin and  
10 Ether are also digital assets. They also originated with an  
11 initial offering. They also have developed use cases for  
12 Bitcoin and Ether, just like XRP has. They also are  
13 decentralized, just like Ripple is. Just like Ripple, Bitcoin  
14 and Ether, you know, again, have been trading for many, many  
15 years. And the SEC apparently decided that they were not  
16 securities, not investment contracts, and these are the sister  
17 assets of XRP.

18 And the SEC made this proclamation in 2018. So  
19 naturally, the SEC, having made that decision, SEC officials  
20 having declared that Bitcoin and Ether are not securities, they  
21 are not investment contracts and, of course, those companies  
22 have not been sued, their executives have not been sued. Your  
23 Honor can check the price of Bitcoin. It's been quite a run.  
24 XRP has been treated differently, and for no good reason.

25 THE COURT: Again, this may not be relevant to the

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1 issues that are before us today, but it is just helpful for me  
2 to understand.

3 MR. SOLOMON: Yes.

4 THE COURT: My understanding of XRP is that not only  
5 does it have a sort of currency value, but it also has a  
6 utility, and that utility distinguishes it, I think, from  
7 Bitcoin and Ether.

8 Is that correct?

9 MR. SOLOMON: So Bitcoin and Ether, I think, also have  
10 utilities. They also have use. You can't use Bitcoin, for  
11 example, necessarily everywhere to buy a cup of coffee or to  
12 buy groceries, but Bitcoin does have use cases that it has  
13 developed. So does Ether. They have smart contracts, for  
14 example, that can be done over the Ethereum block chain.

15 XRP also has developed a number of use cases, and  
16 these started very early in the process, which is why it is so  
17 baffling that the SEC has charged this long-running scheme from  
18 2013 to the present. Because XRP, for example, has a product  
19 called ODL, on demand liquidity, which is used to assist  
20 financial institutions in having seamless and less costly  
21 transactions in key corridors. For example, the U.S. to  
22 Mexico. And XRP as a digital asset is helpful because it means  
23 the banks don't have to have their own accounts on either end  
24 and can deploy that money more effectively elsewhere and XRP  
25 can be used as a bridge currency.

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1           Mr. Garlinghouse was brought to Ripple to help develop  
2 these additional use cases, and they have developed them. They  
3 have major customers. So it really is strange, your Honor,  
4 that we have a situation where the SEC has charged this  
5 long-running scheme. To present day, they are alleging even  
6 today XRP is a security. It is absurd, and they are not going  
7 to be able to prove it.

8           What is frustrating is, because they've lumped in  
9 individuals, they basically have tried to charge this as just  
10 one long, overarching scheme. Again, it is hard to follow the  
11 complaint, but think that is their theory. There was an  
12 issuance of XRP very early, and then the company,  
13 Mr. Garlinghouse and Mr. Larsen, even though they came at  
14 different times and had different roles, in selling their XRP,  
15 both for Ripple, and also selling their XRP themselves, were  
16 scheming to violate the SEC's registration requirements.  
17 Again, all of this happened openly, notoriously, right under  
18 their nose for years.

19           Market makers thought it was not a security.  
20 Exchanges thought it was not a security. Millions of retail  
21 holders thought it was not a security. And the SEC did nothing  
22 until December 2020. So that is -- sorry to be frustrated  
23 about it, but it really is one of these situations where you  
24 hate to be trite. It is pure regulatory overreach, especially  
25 dragging individuals into this.

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1           My client wasn't even there at the founding of this  
2 company. He didn't even sell a single unit of XRP until mid  
3 2017, when they clearly had multiple use cases. Your Honor,  
4 XRP is very similar to Ether. It is also similar to Bitcoin.  
5 And a key aspect of this case is going to be able to get behind  
6 the SEC's thinking of why in the world they are not investing  
7 contracts. They are not securities. But we are. So that is a  
8 key issue in this case.

9           And if your Honor would like, I'm happy to move on to  
10 the instant motion, just to put in context what the SEC is now  
11 trying to do to build a case that it really doesn't have. It  
12 launched this case. It doesn't have a case. We are going to  
13 prove that. But they have now got a blizzard of discovery out  
14 there to try to build a case they don't yet have. I just don't  
15 want Mr. Garlinghouse and Mr. Larsen to be unfairly victimized  
16 by that.

17           THE COURT: All right. Let's move forward then to the  
18 discovery.

19           MR. SOLOMON: Sure.

20           So we had meet and confer. I think this is ripe for  
21 your Honor. They already have, again, the documents they need  
22 to make any conceivable argument that these individuals were  
23 motivated somehow to look the other way and violate the law.  
24 They have detailed the money they made selling XRP, just like  
25 a lot of other people, by the way, who sold XRP associated with

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1 this company.

2 THE COURT: And just so I'm clear -- I'm sorry.

3 MR. SOLOMON: Sure.

4 THE COURT: Just so I'm clear, they say they have  
5 received this. Can you just describe to me in, maybe, lay  
6 terms what it is that you have produced?

7 They have seen that Larsen sold 100,000 -- what  
8 exactly have they seen?

9 MR. SOLOMON: It's a great question, because the SEC  
10 fudges this.

11 Here is what they have seen from Mr. Garlinghouse, and  
12 then Mr. Flumenbaum can clarify for Mr. Larsen. I just want to  
13 make sure I'm being very precise on the fact. We have already  
14 produced to them during the investigation all of the trading  
15 records showing the XRP that Mr. Garlinghouse got as employee  
16 compensation. By the way, he was paid XRP as employee  
17 compensation, which naturally, when that vested, he monetized.  
18 Because while XRP has a number of uses, your Honor, and did  
19 back in '15, '16 and '17, you can't buy a cup of coffee  
20 necessarily with XRP or Bitcoin or Ether.

21 So he got grants of XRP at various stages. They have  
22 all the documentation about those grants. When that XRP  
23 vested, they have all the documentation about Mr. Garlinghouse  
24 selling his XRP. He did himself and he did through a market  
25 maker. They have it all. They have all the totals. That is

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1 how they were able to put together their complaint.

2 And you're going to hear over and over again, these  
3 guys made this much money because that is the one fact they  
4 had; they made money. Of course, it doesn't get you anywhere  
5 in a litigation. They are going to trumpet that, which they've  
6 done in their letter. They have trading records, they have the  
7 grant agreement from Mr. Garlinghouse, and we're getting them  
8 trading records actually for 2020. They've asked for those. I  
9 think we are producing those imminently.

10 We have also given them W-2s for Mr. Garlinghouse. So  
11 they are going to have, for Mr. Garlinghouse, all the money,  
12 all the XRP that he got from Ripple during the entire time he  
13 was there. They are coming to you saying, Judge, we can't make  
14 a motive argument. We need to understand everything. They've  
15 got what they need.

16 In fact, I could have fought them on the W-2s, but I  
17 didn't. They've got a complete financial picture in terms of  
18 the money and the XRP Mr. Garlinghouse got at Ripple as COO in  
19 2015 and early 2016, and then as CEO in 2016 going forward.  
20 And I defy Mr. Tenreiro to stand up and say otherwise. They  
21 have those records.

22 So I don't even know what they are talking about in  
23 this new argument about we can't trace this or that on the  
24 block chain. It sounds like maybe they think it is too hard to  
25 do their jobs, but from Mr. Garlinghouse, they have got what

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1 they need.

2 I hope I answered your question.

3 THE COURT: It does.

4 One of the arguments I understand the SEC to make --  
5 and certainly, Mr. Tenreiro, you'll have an opportunity to be  
6 heard, I appreciate you holding patiently.

7 One of the arguments I understand that the SEC is  
8 making is we don't really know how much -- how many XRP each of  
9 these individuals ever obtained or how they -- when they sold  
10 them or how much they sold. And I guess what you're saying is  
11 that is not true, that they have received evidence of all of  
12 the grants of XRP that they were given as part of compensation,  
13 as well as W-2s, and they have also received all of the trades  
14 that each of the individuals has made, all of the sales of the  
15 XRP that they have received.

16 Is that correct?

17 MR. SOLOMON: That's exactly right, your Honor. That  
18 is exactly right.

19 And maybe it makes sense for me just to address that  
20 first argument they make because, frankly, it is the first time  
21 they've ever made the argument to me that they need bank  
22 records for Mr. Garlinghouse to somehow validate what we have  
23 provided to them.

24 That argument, again, which isn't in any of their  
25 other letters, because it is not something they thought of



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1 because I think it is not a good argument, they are an ordinary  
2 litigant now. The SEC has got to play by the same rules that  
3 we do. And what they are basically saying, Judge, is we are  
4 entitled to production of all the irrelevant information for  
5 Mr. Garlinghouse's financial records just so we can confirm  
6 that he and Mr. Larsen fulfilled their discovery obligations,  
7 and that is just not how civil discovery works.

8 It may be how the SEC can comport itself in  
9 administrative contexts, but they cannot do that in federal  
10 court. The rules simply do not provide for that. That would  
11 be like granting the plaintiff access to all of a defendant's  
12 e-mail to allow the plaintiff to confirm that the defendant has  
13 produced the e-mails that are responsive to the plaintiff's  
14 requests.

15 They can propound discovery requests if they want to  
16 know, for example, did Mr. Garlinghouse personally make efforts  
17 to somehow fund Ripple-related projects. They haven't done  
18 that. They are just asking for everything so they can fish.

19 So that first argument they make in their letter, it  
20 just fails. And frankly, the cases they cite, this Zietzke v.  
21 U.S., that is a tax evasion case. It involved a validity of an  
22 IRS administrative subpoena, different standard as an IRS tax  
23 evasion case, and the IRS said it didn't already have this  
24 data. And the Court said, well, the IRS is not required to  
25 just accept the individual's claim that he provided it with

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1 everything it needs to know. Criminal tax evasion. Different  
2 standard administrative subpoena.

3 In this KingSett case, which by the way is  
4 unpublished, these are the two lead cases they cite for their  
5 lead argument on entitlement to these records. That is an  
6 unpublished decision, an SEC administrative subpoena from a pro  
7 se party for bank records. And all the SEC has to show, as  
8 they know in an administrative subpoena context, it that its  
9 discovery request was relevant to a legitimate law enforcement  
10 inquiry.

11 And all the court said there was that the pro se  
12 party's claim he had already produced some of the records  
13 didn't make the SEC's inquiry illegitimate. That is their lead  
14 argument. Those are their cases, and the cases don't get them  
15 anywhere where they need to be. They don't get to validate.  
16 They don't get to say we don't trust these people, so give us  
17 everything. They have got to use the discovery tools just the  
18 way we do. And we'll be arguing in future conferences, I'm  
19 sure, Judge, about trying to, in a more surgical way, discover  
20 relevant evidence. They don't get everything. But that is  
21 their first argument.

22 If I could just briefly touch on the other arguments,  
23 just to make sure that we're clear on these.

24 Their second argument in their letter is that they  
25 need these detailed financial records to show that XRP are

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1 investment contracts under the Howey test. There is this test  
2 that the Supreme Court developed like 70 years ago that you  
3 apply --

4 THE COURT: Yes.

5 MR. SOLOMON: -- to various arrangements. I mean, it  
6 is an old test and hard to apply to things like digital assets.  
7 But the SEC is trying to do that here. It is just trying to do  
8 it in an unprincipled way and just stretching the test to  
9 beyond recognition. That is for another day.

10 They're saying --

11 THE COURT: I'm still focusing on factors three and  
12 four here, and I guess I would like to hear -- and obviously  
13 I'll give the SEC an opportunity to respond in a moment -- how  
14 these bank records would further that inquiry.

15 MR. SOLOMON: That's exactly the right question.

16 They say in their letter, they anticipate -- well,  
17 they say two things. First they say they anticipate these  
18 records will show whether individual defendants personally  
19 funded efforts. Then they say the extent to which the  
20 individual defendants personally funded efforts. If it is the  
21 extent to which, I don't think they alleged it. They certainly  
22 didn't as to Mr. Garlinghouse.

23 So it seems, your Honor, they want to see how the  
24 defendants might have used their personal resources in some  
25 way, shape, or form to further the efforts of Ripple. Now, it

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1 is a bizarre thing in the first instance because under Howey, I  
2 think the inquiry is, you know, they are saying Ripple is the  
3 issuer. They've got all of Ripple's records. They know what  
4 Ripple did and didn't do. So they've got -- they are able to  
5 make those arguments.

6 Now they want them from the individual defendants, who  
7 I think under their theory are underwriters, but it is not  
8 completely clear to us, your Honor. We are waiting for the SEC  
9 to maybe spell that out with a little more clarity. There is  
10 no logical connection to Mr. Garlinghouse and Mr. Larsen, given  
11 what the charges are and how they might speculatively be doing  
12 things in their personal lives in relation to Ripple. It just  
13 doesn't compute.

14 Because the SEC's theory is, Mr. Garlinghouse, for  
15 example, as he sold XRP, he entered an investment contract with  
16 somebody and he promised to, you know, promote XRP and use his  
17 own efforts. I mean, that is absurd. He didn't even know who  
18 he was selling his XRP to. He didn't even know he was a party,  
19 so it is hard to imagine he had a contract with a party he  
20 didn't even know.

21 I think their theory is Ripple entered into these  
22 contracts with individuals, and that Mr. Garlinghouse and  
23 Mr. Larsen, you know, were sort of part of an overarching  
24 scheme. I guess that's what they are saying. Whatever they  
25 are saying, they haven't spelled out the link between any

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1 personal efforts they might have made as individuals and the  
2 Howey test. It just doesn't make sense.

3 And, again, if the SEC wants to propound  
4 interrogatories, they want to ask Mr. Garlinghouse in his  
5 deposition, Hey, did you spend your personal funds in a way  
6 that benefited the enterprise? We may object as irrelevant,  
7 given what they have charged, but they can ask him that. What  
8 they can't do is get inside all of his and his children's  
9 personal financial affairs. They are just not entitled to  
10 that.

11 And you're going to hear Mr. Tenreiro stand up and  
12 talk about SEC v. Telegram. That is because he litigated that  
13 case. That case is from the Southern District, where no  
14 individuals were charged, and the SEC got bank records from  
15 Telegram that, according to the court, were relevant to the  
16 question of how the company spent funds from investors to  
17 ascertain whether purchasers of the supposed security  
18 reasonably expected to profit based on the company's efforts  
19 under Howey.

20 Again, here, these individuals, the SEC does not  
21 allege that the individual defendants received funds from  
22 investors in their personal bank accounts, and the burden of  
23 producing personal financial records plainly exceeds that of  
24 corporate bank records in any event. So they are sort of  
25 taking the Telegram argument and trying to put it on top of

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1 this case, and it doesn't work, principally because they are  
2 individuals. But also because Brad and Chris are not alleged  
3 to have -- they are not the company. They are individuals,  
4 executives.

5 So I don't think the claim works. I'm interested to  
6 see how Mr. Tenreiro explains it, because this is very  
7 different from Telegram, but that is their second argument.  
8 The Howey argument.

9 And, your Honor, I'll just be honest, I don't fully  
10 understand -- because they haven't thoroughly articulated it.  
11 However they articulate it, there are other means, much less  
12 burdensome means, to get at the question to how, if at all,  
13 Mr. Larsen or Mr. Garlinghouse did things in their personal  
14 capacity to help Ripple, if that is even relevant, which I  
15 doubt it is.

16 Now, there are two more arguments they make that I  
17 just want to touch on briefly, and I'm mindful of the time and  
18 thank you for your indulgence, your Honor.

19 The third argument is that they say detailed knowledge  
20 of Mr. Garlinghouse's personal financial condition is relevant  
21 to scienter. They want to understand what proportion of his  
22 income was comprised of proceeds from XRP sales. Apparently,  
23 based on their theory -- and this is their aiding and abetting  
24 theory -- that Mr. Garlinghouse was motivated to ignore  
25 Ripple's alleged wrongdoing to protect one of his major revenue

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1 streams. They are picking up that language from the Southern  
2 District case, but they are citing the case for the wrong  
3 proposition.

4 He is producing financial records concerning the  
5 revenue streams that could be relevant here. As I just told  
6 your Honor -- and, again, Mr. Flumenbaum can confirm on behalf  
7 of Mr. Larsen -- they've got that. They have alleged it. They  
8 put it in, I think, the first paragraph of the letter to you.  
9 That is their case, that they made money. So they have that  
10 information about revenue streams.

11 But what they are not entitled is to discover just how  
12 significant those sales were to his bottom line. And this is  
13 just another way of saying, you know, Mr. Garlinghouse  
14 incentivized to make money. That can be said about any  
15 defendant in any case. It can't be a basis for relevance in  
16 this case.

17 And by the way, your Honor, that is why they walked  
18 away from the Goldstone case. If you look at their early  
19 letters, they site SEC v. Goldstone for the proposition that  
20 they are entitled to the records. We pointed out, yeah,  
21 Goldstone stands for the opposite proposition. The court there  
22 allowed only evidence of income that the individual defendants  
23 got from the company to make the motive argument. That was a  
24 fraud case, by the way, that one of the attorneys on this call  
25 litigated. They just dropped it. They just walked away from

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1 that case altogether because they realized it doesn't support  
2 them.

3 I think that is just emblematic that they are grasping  
4 for some theory, any theory, to get bank records. Because, of  
5 course, they want them. Of course they want them. You know,  
6 what are you going to find in someone's bank records? Are you  
7 going to find that, you know, Matt Sullivan, two years ago, got  
8 a facial? OK. Nobody is entitled to know that. That is not  
9 their business. It is not germane. It is not tied to anything  
10 in this case.

11 Again, I would just cite your Honor to the Eastmark  
12 case. They cite that case. That is Judge Boasberg in DC.  
13 He's is a terrific judge. I was at the SEC for this. That's a  
14 case about intent to defraud. It is not a Section 5 case,  
15 where the defendant was accused of diverting funds raised from  
16 investors to her personal accounts. Diverting funds, that is  
17 what they are citing as authority. It is apples and oranges.

18 And then this America Growth Funding case, it is  
19 closer to the mark, it is a better case, but, again, you're  
20 talking about the percentage of revenues the corporation earned  
21 from security sales relevant to its overall revenue for trial.  
22 That evidence was relevant to the intent to defraud for  
23 scienter. These people were accused of stealing, tricking  
24 people.

25 This is a Section 5 case. They already have plenty of



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1 financial information to make whatever motive or scienter  
2 argument they want. That is their case. That really is their  
3 case against the individuals. They made money.

4 So they also cite, you know, Lipkin, your Honor, SEC  
5 v. Lipkin and U.S. v. Lindsey. I mean, again, Lipkin is a case  
6 where the defendants hid the proceeds of their fraud in  
7 offshore bank accounts. That is not this case. That is not  
8 this case. No one is saying Mr. Garlinghouse hid any proceeds.  
9 They are not bringing assets claims.

10 THE COURT: I understand this point.

11 MR. SOLOMON: Yes. Last point. Last point and then  
12 I'm going to wind down.

13 They finally throw out this argument in a footnote, it  
14 is in their opposition at page three, note three, they say  
15 that --

16 THE COURT: This is the discord argument?

17 MR. SOLOMON: Exactly.

18 And the penalty argument and punitive damages  
19 argument, it is ridiculous. If you read the Rajaratnam case,  
20 as I did last night, Second Circuit case, insider trading,  
21 parallel criminal action. all the court said there was the  
22 wealth of Mr. Rajaratnam could be used to determine the amount  
23 of penalty in that case. It doesn't say that you're entitled  
24 at the discovery stage of a civil case to have intrusive  
25 discovery into a defendant's entire financial portrait. That

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1 is the one case they cite.

2 They actually say, Judge that this is an independent  
3 basis, that on this fact alone, they get discovery. That would  
4 mean anytime the SEC brings a case and asks for a penalty,  
5 a *fortiori*, they get to troll through individuals' personal  
6 bank accounts. That is no way that is the law. They know it  
7 is not the law. I don't know why they are making the argument  
8 that it is.

9 Last couple of points, Judge. We have cases,  
10 obviously, to point you to where courts have turned away this  
11 kind of discovery. The Morelli case, the Reserved Solutions  
12 case, the Solow case. These cases show that, of course, there  
13 is a privacy interest. I mean, the government -- it is  
14 shocking the government says there is no privacy interest. Of  
15 course there is a privacy interest. We are not saying it can  
16 yield. Of course it can yield. Those cases stand for the  
17 proposition there is a privacy interest.

18 By the way, Judge, the last major point I want to  
19 make, we are also arguing, contrary to what the SEC says in  
20 this letter, that even if these documents could be relevant,  
21 which we don't believe they are, they haven't pointed to a  
22 single case establishing they are. What they are asking is  
23 wildly disproportionate and extremely burdensome. It is not a  
24 tailored request.

25 It doesn't help that the SEC comes in and says, OK,

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1 give us all the checks over 10,000 to your Honor. They should  
2 have said that three weeks ago. We could have had a dialogue  
3 about it. But they didn't. What they said was, You give it to  
4 us or we're going to get it from the banks. And no, we are  
5 going to withdraw our subpoena for the banks until you guys  
6 stipulate. that is not the way the government should act. It  
7 is not the way any civil litigant should act, and that is why  
8 we're here.

9 Your Honor, if the order doesn't help, the cases they  
10 cite for that are 26(c) cases. They don't get the documents.  
11 Not a protective order. They don't get these documents. They  
12 are not entitled to them. They have plenty of documents  
13 between us and Ripple.

14 Final point, and I would cite the Collins & Aikman  
15 case, your Honor, a Southern District case from 2009. The SEC  
16 is not a super-litigant. They are not investigating now. They  
17 are in a litigation, just like any other litigant. They've got  
18 to abide by the federal rules. We don't think they are doing  
19 that.

20 In fact, your Honor, they misstate the standard. They  
21 misstate the standard and say it is our burden. Your own case  
22 from a few days ago, the 9/11 case that you penned, it is the  
23 correct version. They have the burden to make a prima facie  
24 case. Then the burden sits to us. And they misstate the  
25 standard because they know they can't meet it.

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1           Your Honor, we would ask that you quash all of the  
2 subpoenas for financial records that they've made for the  
3 individuals, and enter a protective order for the request that  
4 they've made to Mr. Garlinghouse and Mr. Larsen.

5           This is harassing. It is not appropriate. It is  
6 completely untethered to the law. And I appreciate the extra  
7 time and indulgence that you've given me. I'm sorry if I've  
8 abused it. Obviously, we feel very strongly about this.

9           Thank you, your Honor.

10          THE COURT: Thank you, Mr. Solomon.

11          Mr. Flumenbaum, do you want to add anything on behalf  
12 of your individual client?

13          I assume the issues are largely the same.

14          MR. FLUMENBAUM: Yes, your Honor.

15          Mr. Larsen was one of the founders of Ripple in late  
16 2012. He served as Ripple's CEO until the end of 2016, when  
17 Mr. Garlinghouse took over. Mr. Larsen has served as Ripple's  
18 executive chairman since 2017.

19          What I wanted to just stress is to pull you back into  
20 the actual requests that are attached here and talk about how  
21 broad they are. For Mr. Larsen, they are talking about eight  
22 years of detailed financial information, checks, money orders,  
23 deposit slips, withdrawals, with no linkage whatsoever that was  
24 required. Their definition of assets, again, includes anything  
25 of value; cars, boats. There is no tethering of these

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1 requests.

2           When we tried to negotiate with the SEC, as  
3 Mr. Solomon said, what happens? They issue third-party  
4 subpoenas to banks for the same information and wouldn't  
5 withdraw it. That is why we were forced to come to you as  
6 quickly as we did.

7           So we have tried very hard to negotiate. There is no  
8 need for this information at this time. This case is just  
9 beginning. If, for some reason, we have motions to dismiss  
10 that are scheduled to be heard, which will be fully briefed by  
11 early June. There is no dispute as to the amount of XRP that  
12 were sold by either Ripple or Mr. Larsen or Mr. Garlinghouse.  
13 They have all the records from all of these entities. They  
14 know exactly --

15           I should point out to your Honor that these make up a  
16 fraction of a percent of the total volume of XRP that has been  
17 traded. There has literally been a trillion dollars in XRP  
18 trading since 2013. And as Mr. Solomon said, XRP has traded  
19 over 200 exchanges. They have subpoenaed our account records  
20 at the exchanges, which we utilized, and they will get that.  
21 That is more than enough information to verify the financial  
22 information that we have already provided.

23           Mr. Larsen has given them actually tax information  
24 that lists all of the sales he has made while he was with  
25 Ripple. So they have all that stuff. They can verify it

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1 through the subpoenas that they have issued to GSR, which we  
2 have not opposed.

3 And what you'll find, your Honor, is that virtually  
4 all of these sales that they are complaining about took place  
5 on foreign exchanges. The SEC doesn't even have jurisdiction  
6 over these sales, and they know that. So that is going to be  
7 one of the key issues that is in our motion to dismiss before  
8 Judge Torres.

9 So this is not the time, on a practical basis, for the  
10 SEC to be given the intrusive powers to look at all of our  
11 clients' individual financial records.

12 I think that's all I want to add. There is some  
13 reference in his letter that I feel I need to deal with. Point  
14 two about certain evidence that suggests that Mr. Larsen has  
15 been -- has sold XRP since the filing of the case. I have no  
16 idea what evidence they have, but it is my understanding that  
17 there are no sales by Mr. Larsen of his XRP since the filing of  
18 the complaint.

19 And I want to also stress that even if there were,  
20 that would not be inappropriate. The SEC did not seek any  
21 preliminary relief restricting Ripple or Mr. Garlinghouse or  
22 Mr. Larsen from selling XRP. And, indeed, every day, tens of  
23 thousands of other users of XRP sell these digital assets on  
24 foreign exchanges and on domestic exchanges throughout the  
25 world.

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1           But I just wanted to address that the implication by  
2 the SEC is really false, and in any case, it is irrelevant. I  
3 think the fact that they didn't bring a preliminary injunction  
4 is something that your Honor should consider, because if the  
5 SEC was confident in its case, they would have done that, and  
6 they didn't do that.

7           THE COURT: Thank you.

8           MR. FLUMENBAUM: Thank you.

9           THE COURT: I appreciate, again, that the SEC has  
10 waited patiently. I'm sure they've been biting their  
11 collective tongues.

12          I'll invite the SEC to respond.

13          MR. TENREIRO: Thank you, your Honor.

14          Good morning, again. This is Jorge Tenreiro on behalf  
15 of the SEC.

16          Your Honor, this is a case where an entity, and at  
17 least two individuals, devised a scheme to use the money of  
18 others on the expectation or on the promise of profits. I just  
19 quoted directly from the Supreme Court's language in Howey,  
20 328 u.S. at 299.

21          What they did here falls squarely within the reach of  
22 Howey, which was, again, quoting from the Supreme Court,  
23 "drafted as a flexible principle capable of adaptation to  
24 various and different schemes that people might devise to raise  
25 money from other people."

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1 Courts in this district and in the country have had no  
2 problem applying Howey to digital assets. Mr. Solomon's  
3 comparison of XRP to other assets by saying, well, they are  
4 digital assets, fails on its face, as the Supreme Court in  
5 Howey and other cases explained, that labels are not  
6 sufficient.

7 Because these individuals sold millions of XRP and  
8 raised at least \$600 million from investor funds and have been  
9 charged by the SEC with violating Section 5 of the Securities  
10 Act for these sales, but also for aiding and abetting Ripple's  
11 sales of XRP, the bank records and financial records that we  
12 seek go to core issues at dispute in this case.

13 Fundamentally, the SEC needs to be able to establish  
14 all of the sales that occurred, and is not required to take  
15 their words for it that they have produced all of the records.  
16 Mr. Solomon tries to distinguish the cases that we cite in our  
17 letters, and our letter pointed to the fact that some of those  
18 involves an IRS case or administrative subpoena.

19 However, in SEC v. Garber, a case also in the Southern  
20 District, the SEC sought tax records which require an even  
21 higher burden and even higher threshold. That case is  
22 990 F.Supp.2d 462.

23 In that case, Magistrate Judge Francis explained that  
24 the SEC was not entitled to rely on the first page of tax  
25 returns and had the opportunity to test the liability of the



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1 claims the defendants were making by looking at the complete  
2 tax returns. We are not seeking tax returns here. As the  
3 court is aware, the threshold for that is even higher. We are  
4 simply seeking --

5 THE COURT: Let me stop you for a second, and I will  
6 certainly look at the case that you just cited. I have a lot  
7 of respect for Judge Francis.

8 But distinguishing between the first page of your tax  
9 filings and the underlying supporting documents is one thing.  
10 What I understand is happening here is you're getting a full  
11 picture from Ripple, from the individual defendants, of all of  
12 the XRP that they were granted through various grants, all  
13 transactional information regarding any time that they sold  
14 those assets. So it is not as if you're being given half the  
15 information. You're being given all of the information.

16 Your argue, as I understand it is, well, we just don't  
17 know that they are telling the truth, that they are actually  
18 giving us everything. And in my experience, that is an  
19 argument that parties make often. Usually what I require is  
20 some proof that your suspicion that there is information that's  
21 being withheld, that there is some evidence to support that  
22 suspicion beyond we just don't need to take your word for it.  
23 Because we are in litigation. Lawyers are officers of the  
24 court, and there is some expectation, certainly that I have,  
25 that lawyers are complying with their obligations.

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1           So I guess my question to you is: Do you have a basis  
2 for believing that what you have received already is not  
3 complete, or that there is some withholding that you're not  
4 being informed of?

5           MR. TENREIRO: Thank you, your Honor. The answer is  
6 yes.

7           So Mr. Solomon pointed to how we drafted the complaint  
8 based on the record that they provided. That is not quite  
9 accurate. We had records, incomplete records from them when we  
10 filed the complaint and had to ourselves try to trace on  
11 pseudonymous block chain transactions, other sales that  
12 appeared to belong to Mr. Garlinghouse.

13           I appreciate the court's point that, you know, we are  
14 in civil litigation, and that we don't get the documents simply  
15 to confirm. But this is a little bit different in the sense  
16 that transactions on block chain are, by definition, difficult  
17 to trace and difficult to understand. We have also developed  
18 evidence that during the time of the conduct at issue, Ripple,  
19 Garlinghouse, Larsen, and another entity that they used to sell  
20 XRP, intermingled their XRP sales through one of the market  
21 makers and one of the exchanges that the market makers  
22 utilized, and sold all of the XRP together.

23           So it is not clear to us that we're going to be able  
24 to actually obtain full and clear individualized records of  
25 these sales. And we're not only talking about sales here, but

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1 we're also talking about transactions and movements of the XRP,  
2 because offers are also at issue.

3 So because of the --

4 THE COURT: How would the latter be revealed in what  
5 you're seeking?

6 MR. TENREIRO: Right. What we're seeking is bank  
7 records, but also a full picture of the trading records, which  
8 we don't think we received either, your Honor.

9 As I mentioned, we had to reconstruct some of the  
10 trading records. We also have not received, for example,  
11 account opening documents for some of the trading accounts,  
12 which are relevant, understanding their argument that these  
13 accounts are foreign arguments that Mr. Flumenbaum made at the  
14 end.

15 So I believe that we have developed evidence, and we  
16 have also developed evidence, that during the time of the  
17 conduct at issue here, the transaction, some of the XRP moved  
18 into what is called unhosted wallets, so wallets that are not  
19 created or managed by digital asset trading platforms. And so  
20 it might just be that they don't even necessarily know where  
21 all of the wallets are because, you know, an individual might  
22 easily go to, you know, say I have these four addresses, these  
23 four accounts with these four digital asset trading platforms,  
24 but the XRP can move outside of those platforms without even  
25 them knowing about it or being able to sort of give us a full

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1 picture of that.

2 The bank records --

3 THE COURT: Let me stop you for a second.

4 My understanding, that the scope of today's dispute is  
5 that you want the defendants' personal financial records either  
6 from them or from their banks.

7 So just to, like, be really simple-minded here, you  
8 want their UBS account, right?

9 MR. TENREIRO: That's right.

10 THE COURT: One of the things you just said you are  
11 seeking and you think you haven't received in full are the  
12 trading records.

13 You may be right that you haven't received all of the  
14 trading records. I don't understand that to be part of today's  
15 dispute. I understand what you're asking for their UBS  
16 account.

17 And so, one, I'm not sure that if what you want is  
18 their trading records, I don't think that is going to be in  
19 their hypothetical UBS account. And number two, you just  
20 started talking about how -- I'm not going to be able to say it  
21 exactly the way you did -- wallets are in different systems and  
22 they may not even know where their money is running, etc.

23 That is also not going to be in their UBS account.

24 MR. TENREIRO: Your Honor, that's right.

25 THE COURT: So what do you think you're going to see

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1 in this hypothetical bank account that you're not getting  
2 access to elsewhere?

3 MR. TENREIRO: So, your Honor --

4 THE COURT: Can you describe for me what you think  
5 you're going to see?

6 MR. TENREIRO: The bank accounts are the simple and  
7 most reliable evidence of the net proceeds from their sales.  
8 They have to convert -- you know, eventually they have to  
9 convert the XRP into foreign currency, because as they  
10 recognize, XRP is not universally accepted as a currency. So  
11 the net sales, the net proceeds that they received, personally  
12 received, will be reflected in their bank accounts.

13 And so, again, because -- I was mentioning the trading  
14 records simply to illustrate or respond to the court's question  
15 about why the trading records were not sufficient and to  
16 explain why we believe we don't have a full picture of the  
17 trading records.

18 The simplest way to shortcut all of this is to look at  
19 what monies reached their bank accounts. And in my experience,  
20 typically you will see a transfer of funds, and it will say  
21 this came from, you know, X exchange, or X digital asset  
22 trading platform. You have a date and you have an amount, and  
23 that will give the most reliable and comprehensive exposition  
24 of the full extent of their sales and the proceeds that they  
25 personally received from the sales of XRP.

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1 I can't imagine --

2 THE COURT: Because you believe that their  
3 hypothetical bank account will show a \$1 million wire transfer  
4 from, I don't know who, to Ripple? From the Coin Bank?

5 MR. TENREIRO: Right.

6 THE COURT: I'm sorry, what was that?

7 MR. TENREIRO: So let's just use an example Coinbase,  
8 which is a digital asset trading platform that sells --

9 THE COURT: All of a sudden you'll see a million  
10 dollars from Coinbase into Mr. Larsen's account?

11 MR. TENREIRO: I haven't seen his trading records,  
12 your Honor, but I would be shocked not to find that  
13 information. That is how this works in this space.

14 So the individual creates either, again, an unhosted  
15 wallet or a wallet with a digital access trading platform, such  
16 as Coinbase, but to monetize these digital assets after they  
17 are sold for U.S. dollars. So to monetize the digital assets  
18 as the platform sells the assets for U.S. dollars, for example,  
19 and then, you know, those funds have to be deposited at a  
20 U.S. -- in a bank account, in a bank account that handles that  
21 currency so they can use it.

22 For example, I don't mean to pick on Coinbase. You  
23 know, you could say Kraken or Bitstamp or whatever. They have  
24 used several different platforms here. If, as Mr. Flumenbaum  
25 emphasized towards the end of his presentation, many of these

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1 platforms are incorporated or have offices abroad. But  
2 eventually the money has to come back to their U.S. bank  
3 accounts for them to essentially receive it.

4 So when they sell the XRP, eventually the money comes  
5 back. I have worked on a large number of these cases, and just  
6 let's say, I've never seen a case where the bank accounts don't  
7 show exactly what I just mentioned, as the court illustrated  
8 it. Coinbase, X date, X amount, etc. I expect to see --

9 THE COURT: And that transaction will then also be  
10 available on a business record from the other side of the  
11 ledger, which is to say you would not see that either from  
12 Ripple or from another entity. Again, defendant one --

13 (Reporter interruption)

14 I'm sure what I was saying was eloquent, and I'm sure  
15 I can't get back to where I was. Let me see if I can recall  
16 where I was.

17 My question to Mr. Tenreiro is, wouldn't this  
18 information about the liquidation of the XRP also be available  
19 from the business records or the trading records that the  
20 defendants have already committed to providing?

21 MR. TENREIRO: Your Honor, so Ripple, I don't believe,  
22 would have these trading records. The individuals have market  
23 makers that conduct the trading on their behalf. So it  
24 wouldn't be in any of Ripple's records.

25 But to answer the court's question, some of the

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1 transactions would be in the trading records that they are  
2 providing. But as I mentioned earlier, we have identified  
3 other transactions or situations in which the assets are  
4 commingled, such that it is not clear to us which trades belong  
5 to who.

6 So, again, the most reliable and complete way to get  
7 all this information is to see what amounts were transferred to  
8 their accounts. And, again, because of the very specific  
9 factual situation which we're in, where we're dealing with  
10 transactions that are, by definition, pseudonymous on a block  
11 chain, the bank records are simply the most reliable and most  
12 complete picture of the full extent of the proceeds,  
13 particularly given not just when we're dealing with a block  
14 chain, which, again, by definition, the transactions are  
15 pseudonymous.

16 And, therefore, to the extent that there are movements  
17 of assets of XRP, as we have already been able to identify,  
18 that are not hosted by a company that has business records, we  
19 won't be able to get those records. So, in other words, let's  
20 say we have -- so if Mr. Larsen, for example, has his XRP, he  
21 gets his XRP from Ripple. Certainly we can understand how much  
22 XRP he gets from Ripple from some sort of business records from  
23 Ripple. So that is step one.

24 Then Mr. Larsen would have available to him a number  
25 of options which he has availed himself, as we have explained,



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1 which he did avail himself during the period in question. One  
2 is he can go to a digital asset trading platform, such as  
3 Coinbase -- again, I don't mean to pick on them -- or he could  
4 go to a digital asset platform that is headquartered in, let's  
5 say, Hong Kong, as he has in this case. And he can do this --  
6 excuse me -- to an intermediary and say, I'd like to open an  
7 account. Open an address on the block chain for me. I'm  
8 transferring the XRP that Ripple gave me, and now sell some of  
9 these for me.

10 Mr. Larsen could also himself simply transfer the XRP  
11 from the block chain addressing which he received to other  
12 block chain addresses that are not hosted by Coinbase, that are  
13 not hosted by the hypothetical Hong Kong trading platform or  
14 Kraken or whatever.

15 Once he starts moving the XRP into those new addresses  
16 that are pseudonymous and anonymous and not -- that are  
17 unhosted because they don't belong or were not created by  
18 Coinbase or Kraken or whatever exchange we're discussing in the  
19 hypothetical. There is no business record that can give us  
20 that transaction because there is no business we can go to and  
21 say, hey, who does this address belong to? Who are you trading  
22 on behalf of?

23 He could sell the XRP through that address, but  
24 essentially the proceeds, the way that it comes back out of a  
25 block chain for Mr. Larsen, is he eventually converts it into

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1 U.S. dollars, say -- I mean, I suppose he could have converted  
2 it into other currencies, but our understanding is he did it  
3 into U.S. dollars. Therefore, he has to send it back to an  
4 account, a bank account, probably in the United States.

5 So the bank account in the United States is the only  
6 way to get a complete, reliable picture of all of these sales,  
7 because eventually the money has to hit back his personal  
8 account. What happened in between is simply, by definition,  
9 anonymous and just lends itself to incomplete and unreliable  
10 transactions. That is simply the nature of the platforms on  
11 which these instruments trade.

12 So it is not -- I think it is very different than not  
13 saying we're entitled to verify every single, little thing that  
14 they give us or every e-mail, as Mr. Solomon said. This is a  
15 very specific -- this is a very sort of different type of  
16 asset, where the most reliable information comes from the bank  
17 records.

18 Now that goes to --

19 THE COURT: So, let me ask you the million-dollar  
20 question then, which is, why does all this matter? Right?

21 This is a Section 5 case. So why do you need to have  
22 the most precise answer of how much money one of the defendants  
23 made by selling the XRP?

24 You know that they received however many millions of  
25 XRPs. You know generally what sort of value that is. It is a

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1 lot of money, you know that. You're going to get a fair number  
2 of transactions. Maybe you think there is other transactions  
3 you're not getting, but you're certainly going to get a pretty  
4 good picture of the profitability for these individual  
5 defendants of their transactions, even if you think it is not  
6 complete.

7 Why do you need precision here if this is not a fraud  
8 case? This is a Section 5 case, so why is this so important?

9 MR. TENREIRO: Right, your Honor.

10 So in a Section 5 case, the reason we need all of the  
11 sales, because as the Second Circuit explained in the Cavanagh  
12 case, which we put in our letter, each sale is a violation if  
13 it is made not made pursuant to a registration statement or  
14 qualifies for an exemption.

15 So this is not just -- you know, I will get to the  
16 other reasons why we need these reasons in a moment, if I am  
17 permitted to do so, but this is at the core of the case. These  
18 are the violations.

19 What are the violations we are charging? We need to  
20 be able to establish exactly what times and which times and how  
21 many times the statute was violated by these sales. It simply  
22 goes to the core of the case, to the core claim of the  
23 Section 5 claim.

24 THE COURT: That the individual defendants violated  
25 Section 5 every time they sold it.

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

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

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

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

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

25          THE COURT: And you have specific claims -- I

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1 apologize for asking a question maybe I should know the answer  
2 to -- but you have claims against these two defendants that  
3 they have engaged in these violations.

4 I thought the claims were aiding and abetting of  
5 Ripple. But there is also claims that they individually  
6 engaged in violations?

7 MR. TENREIRO: Yes. We allege that they -- we allege  
8 that the individuals violated Section 5 with their own sales  
9 because they were affiliates of Ripple when they were making  
10 the sale. So their sales, every time they sold and failed to  
11 register the transaction, unless they point to an exemption,  
12 they violated Section 5 individually, irrespective of Ripple's  
13 violation.

14 So that is correct, we have Section 5 claims against  
15 them, and we have aiding and abetting claims also against them  
16 for Ripple's violation.

17 THE COURT: That clarification is helpful.

18 MR. TENREIRO: Thank you, your Honor.

19 Now, if I might move on to the other reasons why the  
20 financial information is relevant, and that does get to the  
21 Section 5 claim.

22 Mr. Solomon, at some point during his presentation,  
23 said that, you know, all sorts of individuals, including his  
24 clients, were operating under -- I think it was a good faith  
25 belief, or perhaps I'm paraphrasing, something along the lines

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1 of they had something in their mind that made them believe that  
2 their actions. As they also mentioned, they are moving to  
3 dismiss, and they very strongly dispute the allegations that  
4 they knew that their conduct, that their conduct was wrongful.

5 Now, I would like to make a couple of factual and  
6 legal points on this very important question, your Honor. The  
7 first is that, as we allege in our complaint, Mr. Larsen and  
8 Ripple received an opinion from a lawyer in 2012, before they  
9 began a single sale of XRP, where the lawyer said -- again,  
10 this is in our complaint -- the lawyer said, Look, there are  
11 certain circumstances under which if you sell these  
12 instruments, you could be selling securities. You probably  
13 should talk to the SEC before you do any of it.

14 And as, again, alleged in our complaint -- and I don't  
15 think they will dispute -- neither Ripple, nor Larsen, nor  
16 later Garlinghouse approached the SEC before they engaged in  
17 these types of sales. And so our point of contention here --  
18 now, what they have tried to do, and I would like a moment also  
19 to address the Howey point in a second.

20 What they have tried to do here is recap themselves as  
21 innocent victims of some power of the SEC, and when the facts  
22 that we pointed to actually suggest quite the opposite. This  
23 brings me back to the bank records, your Honor. Now, they are  
24 trying to sort of distinguish cases that involve fraud, but I'm  
25 sort of failing to understand why that is significant for this

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1 reason. For aiding and abetting, we have to prove scienter.  
2 Although they try to raise the standard for what scienter  
3 means, our position is and always has been, and it is  
4 consistent in our letter to them, that scienter simply means  
5 knowing or reckless conduct. And that is what scienter means.

6 I'm not aware of a definition of scienter that shifts  
7 simply because we're talking about aiding and abetting scienter  
8 or scienter for purposes of fraud. The way that I understand  
9 the statute, scienter is scienter. It might mean something  
10 different in the context of what you have to know that you're  
11 doing. That is a separate point. But it is always knowing and  
12 reckless conduct that we have to prove, and there is a whole  
13 host of cases, many of them are in our letter, where the courts  
14 say one of the ways that you prove scienter, the cases  
15 typically say you can't get into an individual's mind, so  
16 scienter is typically proved by circumstantial evidence. The  
17 cases that we cite stand for that principle.

18 Trying to distinguish the AGF case or the Telegram  
19 case because they involve corporations doesn't really work. By  
20 the way, both of those cases involved wholly owned  
21 corporations, that individuals wholly owned, and in the AGF  
22 case, the individuals were also on trial.

23 So the judge I think recognizes what I think is a  
24 pretty logical principle that comes from the Goldstone case  
25 that Mr. Solomon mentioned from which we are not walking away.

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1 If an individual's livelihood depends very, very heavily on  
2 this conduct, he has an incentive to turn the other way. We  
3 are not talking about a general incentive that all corporate  
4 insiders have to sort of raise the stock of the price of a  
5 corporation. We are talking about a very specific individual  
6 incentive.

7 Mr. Larsen netted at least \$450 million from the sales  
8 while he had in his hand an opinion from a reputable law firm  
9 that said, This could get you in trouble with the SEC. You  
10 should contact him before you do this.

11 The question is, why did he make these sales while he  
12 had that opinion? I think it is pretty fair argument to make  
13 to a jury that it was simply worth too much money to him to  
14 take on this risk and, therefore, he recklessly disregarded  
15 that his conduct could violate the securities -- that the  
16 conduct he was aiding and abetting could violate the statute.

17 So they are saying, well, you know, we are innocent.  
18 We really thought this was OK. I think we are entitled to  
19 argue to a jury, you know, if this is the only source of income  
20 for this individual for eight years, he has nothing else to do.  
21 He has no other income to make, and the same goes for  
22 Mr. Garlinghouse. If that is the case, we are entitled to make  
23 that argument.

24 Now, the Eastmark case, I think, is interesting and  
25 very on point on this point. Mr. Solomon talked up the



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1 Eastmark case. In the Eastmark case, the SEC had said, look,  
2 we can't trace all of these funds. We don't know where they  
3 are. They may be in the bank account. We didn't even say that  
4 those records, that they were actually in the bank account.  
5 The judge in that case said, Well, if they're in the bank  
6 account, then that might prove scienter because she converted  
7 funds. If they're not on the bank account, that might help her  
8 prove that she acted innocently.

9 So it is the same exact situation here where the bank  
10 records, I don't know what is in the bank records, right. It  
11 sounds like I'm trying to find something I don't know is there.  
12 The bank records are relevant because scienter is so important  
13 in this case.

14 Their attempt to sort of distinguish the scienter and  
15 fraud cases and the standard for scienter and aiding and  
16 abetting, I think, fails because scienter is scienter. The  
17 Telegram case, you know, in Telegram, Judge Castel compelled  
18 the production of bank records and it was only a Section 5  
19 case. And there, it was simply -- we didn't even need the  
20 scienter point there. It was simply we need to know what  
21 happened to these funds, where did all these sales go, and what  
22 happened to the funds.

23 Then in the Telegram case, we also made a point about  
24 Howey, which is the point I would like to address next your  
25 Honor.

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1           Now, Mr. Solomon, I believe, stated a confused test  
2 for the Howey test. I urge the court to look at Howey. If the  
3 court has not done so already, I cited the relevant passages.  
4 The first thing that I would like to mention is that the  
5 Supreme Court in Howey itself said that a contract -- it is via  
6 contract, a transaction, or a scheme. So this idea that a  
7 contract is needed is simply not correct.

8           The leading Second Circuit cases about Howey are the  
9 two cases called Aqua-Sonic and Glen-Arden Commodities, and I'm  
10 happy to give the court the cites, if the court would find them  
11 helpful, to put into context what this dispute is really about.

12           Just briefly, Glen-Arden is 493 F.2d 1027, and  
13 Aqua-Sonic is 687 F.2d 577. Your Honor, I am going to bring  
14 this back to the bank records in a moment. I think it is  
15 important to give context for what Howey and these cases say  
16 is the test for establishing whether something is an investment  
17 contract.

18           Mr. Solomon tried to say, you know, we are no  
19 different than Bitcoin and Ether because we are a digital  
20 asset. These cases are uniformly clear, you can't just say  
21 we're like something else. We're a digital asset and end it on  
22 the label. We have to look at the promises and the statements  
23 that a promoter made and the economic reality of the  
24 transaction.

25           As Ripple's own lawyers told them, you are not like

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1 Bitcoin because you are a centralized entity. You are one  
2 entity that has created these assets and is selling them. That  
3 is fundamentally different than the Bitcoin situation. This  
4 theme was repeated throughout Ripple's existence.

5 Mr. Garlinghouse, we have allegations in our complaint  
6 where the defendants and Ripple discussing, for example, XRP  
7 with a fund in 2015. They say, you know, The Ripple ecosystems  
8 rely on the efforts of Ripple Labs, the single largest holder  
9 of XRP, breeds greater risk that XRP might be deemed a security  
10 as compared to other virtual currency.

11 Again, the key distinction between Bitcoin and Ether  
12 is there is a group of people that -- the people that are  
13 selling the assets into the market and telling people, We are  
14 going to create value.

15 Now, the court referenced a utility for XRP. We  
16 dispute whether that utility actually exists, your Honor. But  
17 the point is, even if it did exist, Ripple and the defendants'  
18 efforts and their stated promised efforts to develop a use for  
19 XRP is what makes XRP a security. That is at the core of what  
20 makes something a security under the Howey test and the cases  
21 that I have cited.

22 Ripple, and today the defendants, made a point about  
23 how they indiscriminately sold XRP. That is quite true. I  
24 believe when the court goes to the Second Circuit cases that I  
25 mentioned, the court will find that in those cases, the Second

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1 Circuit said, Wait a second. If you're telling me that you're  
2 selling this instrument to people who might use it for utility  
3 but, in fact, you don't restrict your sales to those people,  
4 then I'm not going to buy your utility argument.

5 So in the Glen-Arden case, the promoter was selling  
6 whiskey caskets to people who have no interest in drinking  
7 whiskey. And in the Aqua-Sonic case, dental licenses to people  
8 who are not dentists or who could use these licenses.

9 Here, XRP, Ripple and the defendants claim that XRP  
10 had or was going to have some utility for affecting bank  
11 transfers. What they did was, they sold it into the market to  
12 individuals just like you and I, indiscriminately to everybody.

13 Now, why did they do that? Because the first and most  
14 important, the fundamental goal that Ripple and the defendants  
15 had was to get as much XRP trading into the market as possible.  
16 They believed that liquidity would get twice increases and  
17 might even make it more appealable as to have utility for some  
18 banks in the future.

19 Now, I would like to point out that although  
20 Mr. Solomon said that Ripple had utility since 2015, when his  
21 client joined the company, and at paragraph 336 of our  
22 complaint, we allege that in 2018, Mr. Garlinghouse explained  
23 in a public speech, nobody was using XRP to effect profit or  
24 payments as of that date, and instead said that he expected  
25 that maybe this year, we could finally have our utility use

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1 case.

2           Setting that point aside, your Honor, and going back  
3 to what I was saying a moment ago, Ripple's first and foremost  
4 was to get as much XRP trading into the market. And these  
5 efforts were multifaceted. They took on many different efforts  
6 and projects that Ripple undertook. One of the ways in which  
7 they did so, and we allege this in our complaint -- was the  
8 establishing -- the establishment of a foundation called Ripple  
9 Works that Mr. Larsen himself funded with his XRP.

10           So this is not a situation where we're just fishing or  
11 inventing some sort of theory. These individuals have very  
12 concrete personal reasons to try to develop this,  
13 quote-unquote, utility for Ripple. They understand, I believe  
14 they understand very well, that if an act is sold solely for  
15 the purpose of this utility, it might fall outside of the  
16 rubric of the Howey test. So they made a lot of efforts to  
17 develop that utility. And these efforts included their own  
18 personal efforts as CEOs of Ripple, but also utilizing, at  
19 least for Mr. Larsen, their own personal finances. That is  
20 alleged in our complaint.

21           So the statement that we have not alleged that they  
22 actually engaged in what I will call Howey efforts is  
23 incorrect. Mr. Larsen, indeed, engaged in Howey efforts, as  
24 Ripple Works then turned around and sold, I believe, hundreds  
25 of millions of units of XRP, which is tied directly into

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1 Ripple's goals and the type of efforts that Ripple, Mr. Larsen,  
2 and Mr. Garlinghouse were making.

3 So the fact that they used sort of an intermediary  
4 entity is irrelevant for the Howey analysis. They were using  
5 different methods of making Howey efforts so that the token  
6 might become more adopted. So that is one of the reasons why  
7 we need also the records, because the records will show the  
8 extent of the Howey efforts, and that is the argument that was  
9 accepted by Judge Castel, or presumably accepted by Judge  
10 Castel, in Telegram because they are strongly refuting that  
11 this asset is a security in the first place.

12 If they made sort of Howey efforts, it is very  
13 different than a situation from Bitcoin and Ethereum. There is  
14 no centralized actor that we can point to that sort of meets  
15 three different characteristics; owns the majority of the  
16 assets that they created, is selling this asset, and then  
17 telling people I'm going to make efforts to create utility for  
18 your assets, so that, you know, this might be beneficial to  
19 you, and then ultimately actually engage in these efforts.

20 Our allegations in the complaint are not just that  
21 Ripple made these statements, but that Larsen and Garlinghouse  
22 made these statements, that Larsen and Garlinghouse made these  
23 sales, and that Larsen and Garlinghouse made these efforts,  
24 including with their own personal finances.

25 So that is how we reason why we need the records, your

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1 Honor. And I have touched upon scienter. I don't want to  
2 belabor the scienter point again, but I would like to mention  
3 that to the extent that they are pounding the table on this  
4 idea that they acted, you know, innocently, the way that they  
5 handled their finances, when they are holding an opinion from a  
6 lawyer that is telling them this might get you in trouble, and  
7 then turn around and do it anyway, the way they handled their  
8 finances, your Honor, I believe is very relevant to scienter,  
9 because it might prove or disprove whether they actually  
10 believed they were acting innocently.

11 I would like to make one last Howey point. They are  
12 talking about the records about the XRP they received as  
13 vesting, it is called vesting grants. They are treating it as  
14 a stock. The company is treating it as stock. And then they  
15 turn around and tell the court and tell us they were acting  
16 innocently, and that this was somehow all the SEC's false.

17 I believe, your Honor, that we are entitled to test  
18 that theory and to respond to that theory by pointing to the  
19 reasons that they had to ignore what the clear warnings were  
20 that they had received.

21 Now, I focused on the opinion that they received from  
22 the lawyers. But in our letter, we refer the court to the  
23 other many warnings that they received, including starting at  
24 paragraphs 395 in the amended complaint, where Mr. Larsen and  
25 Mr. Garlinghouse individually were warned that their conduct

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1 could run afoul of the securities laws. Now they're saying we  
2 acted innocently, and we believe the records would go to that  
3 point as well.

4 If I might just respond to a couple more points, your  
5 Honor.

6 Mr. Flumenbaum referenced something in a letter about  
7 sales that he says were misstating the records. Just to be  
8 clear, our letter references movement of assets by Mr. Larsen.  
9 We haven't identified any sales. I don't know if there are or  
10 not. That sort of illustrates the problem here. Again, the  
11 most reliable source of this information is the bank records.

12 You know, the fact that he highlights that virtually  
13 all of this occurred on foreign exchanges, I think, sort of  
14 reflects why, you know, we're going to the bank records in the  
15 United States.

16 Now, Mr. Flumenbaum also mentioned, you know, your  
17 Honor, this case is just beginning. There is a motion to  
18 dismiss pending. I believe, your Honor, that Judge Torres'  
19 scheduling order is quite clear that the fact that there is a  
20 motion to dismiss pending is not a reason that should be used  
21 to delay discovery. The individual defendants are trying to  
22 back-door a stay of discovery while they've also told us in  
23 meet and confers we're only to get one shot at deposing their  
24 client. We have entered into a rather aggressive discovery  
25 schedule, and so far have received little to nothing -- or we



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1 received little documents from all three defendants. I think  
2 that delaying this question is not going to be helpful to the  
3 resolution of this case.

4 The other point I'll make is, for example, we have  
5 received -- the self-selecting point. We received just this  
6 morning some trading records from Mr. Larsen that, you know,  
7 reflect trading in a certain account at a digital trading  
8 platform. In that account, he shows us his trading, not just  
9 of XRP, but of the two other assets that they are going to come  
10 and say, see, we are just like those two assets.

11 So I'm not dismissing the privacy concern. My concern  
12 here is that the defendants want to show us what they want to  
13 show us, so that they can make their arguments, and withhold  
14 the full picture that allows us to make our argument.

15 So when I see a statement from a digital asset trading  
16 platform with trades by Mr. Larsen with XRP and Bitcoin and  
17 Ethereum, I can already hear the defense counsel saying, See,  
18 you know, we are just like Bitcoin and Ethereum. I have gone  
19 through the reasons why that is not the case, your Honor. But  
20 we should be able to have the full picture, which includes the  
21 bank records, the most reliable and entire picture of what  
22 actually they did, so we can respond to these theories.

23 I would be happy to answer any other questions the  
24 court may have.

25 THE COURT: I don't have any specific questions for

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1 you now. This was very helpful.

2 MR. FLUMENBAUM: Your Honor, may I just make a few  
3 points in rebuttal here?

4 MR. SOLOMON: Marty, I have a few also. Maybe let me  
5 make a few, just to keep this in order. Sorry. Only because  
6 I'm just conscious of the courts time and I know that we are  
7 really probably testing your Honor's patience.

8 I'm sorry.

9 THE COURT: I'm sorry. Mr. Solomon, two things.

10 One, I want to confirm this is Mr. Solomon speaking,  
11 so we have a clear record.

12 MR. SOLOMON: It is, your Honor. I apologize.

13 THE COURT: Secondly, if I can ask you to respond  
14 first to the argument that was made by Mr. Tenreiro that each  
15 sale by your client is a Section 5 violation, and so aside from  
16 these issues about the motive, that I think were at least in my  
17 opinion, sort of the thrust of the SEC's response in writing.  
18 I would like you to focus on this Section 5 argument, if you  
19 could.

20 MR. SOLOMON: Absolutely.

21 So, in theory, Judge, each domestic sale could be a  
22 violation and that would include, contrary to what Mr. Tenreiro  
23 said, not just Ripple, not just Ripple's affiliates, but any  
24 retail holder or any party, if there is any intent to  
25 distribute the security further.

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1           So it is not correct to say that there is no potential  
2 liability throughout the XRP ecosystem. They have chosen to  
3 focus on Ripple. They have chosen to focus on Mr. Larsen and  
4 Mr. Garlinghouse, very strategically. But there is others at  
5 the company who hold an enormous exam of XRP, who, for whatever  
6 reason, maybe it is a matter of prosecutorial discretion, have  
7 not elected to charge. But in theory, any unregistered sale  
8 not subject to an exemption -- and, by the way, talking about  
9 exemptions is a little bit specious for these trades.

10           But here is the irony of that point, Judge. They had  
11 to amend their initial complaint because they failed even to  
12 allege a single domestic transaction on the part of either  
13 defendant. They don't amend their complaint. So they are  
14 talking about they need to have all this information about  
15 detailed financial data, but before suing these individuals in  
16 federal court, they didn't establish that any transactions, any  
17 sales, any offers, were domestic. Now they have amended their  
18 complaint, and the complaint still fails to do that.

19           We have moved to dismiss. I would commend you, your  
20 Honor, just to look at the public letter that Mr. Garlinghouse  
21 filed. It explains this, I think, very clearly and I hope  
22 compellingly. So yes, it is true that each sale of an  
23 unregistered security, absent an exemption, as a matter of  
24 strict liability could, could be prosecuted by the SEC. Not  
25 just Ripple, not just individuals, but anybody. That is why it

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1 is so wild that when Mr. Tenreiro says this is just a simple  
2 application of Howey, nothing to see here folks, clearly there  
3 is a contract, there is promises.

4 Why in the world did it take him eight years to figure  
5 that out? The reason is because there is no viable claim under  
6 Howey that XRP is or ever was a security. That is why it took  
7 so long, and is why this case got brought when people were  
8 walking out the door in late 2020.

9 But let me get back to the facts. I think what is  
10 going on here, and why Mr. Tenreiro was struggling for the  
11 first few minutes to talk about why they need to backfill these  
12 trading records, which are complete -- they are complete. He  
13 has never raised with me they are incomplete. Never said that  
14 once. Never. So that is news to me. And if they are  
15 incomplete, which they are not, we are happy to fix that. They  
16 can have whatever they want about Mr. Garlinghouse's sales of  
17 XRP. Just ask. They never have. This is a brand new issue  
18 that they have raised.

19 But what happens at the SEC, your Honor, is  
20 different people investigate the case than litigate the case.  
21 Mr. Tenreiro was busy litigating Telegram during the  
22 investigation here. I guess they didn't get the documents they  
23 need. they certainly didn't get personal financial information  
24 that they are now claiming is critical -- that is word they  
25 used, critical to their case. They sued without it.

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1           They didn't get information about the domesticity of  
2 Mr. Garlinghouse's sales. 95 percent were overseas. They  
3 don't tell you that. They don't tell Judge Netburn that. That  
4 is a fact. And they didn't bother to even allege any domestic  
5 transaction, and they still haven't.

6           So it is a little ironic to hear Mr. Tenreiro come  
7 in here and say, We need the minutia of every aspect of your  
8 financial life, when they didn't even plead what they need to  
9 have a viable claim under Section 5 for Mr. Garlinghouse or  
10 Mr. Larsen. So I want to be very clear about that.

11           Frankly, Howey is, you know, we can go on and on about  
12 Howey, and I get Mr. Tenreiro's position. He is dealing with  
13 the cards he was dealt by a 30-month investigation. That is  
14 what the SEC does, they hand off cases from investigators to  
15 litigators, and litigators deal with it and make the best  
16 arguments they can. He is a worthy adversary. He has got  
17 arguments. Ours are better. But you sort of heard it. You  
18 have sort of heard the case distilled. But on the financial  
19 records, I think by his own admission, I think by  
20 Mr. Tenreiro's own admission, he doesn't have any information  
21 that would tie the need, any legal need in this case, to  
22 getting personal financial information.

23           I think it is just a simple way for them to get  
24 everything they want, and that is just not the way, again, your  
25 Honor, discovery works. That is why they have a blizzard of

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1 third-party subpoenas, and they hit us with a bunch of  
2 subpoenas. And we are not complaining it is hard to put  
3 together the information we have. we are doing what we can,  
4 and they just need to play by the same rules. This is not a  
5 matter of convenience for them. They are not regulators right  
6 now, they are just an ordinary litigant.

7 Also, in terms of account opening documents, there was  
8 an illusion they don't even have account opening documents for  
9 Mr. Garlinghouse. They are getting those, and they know it. I  
10 just wish the SEC wouldn't say things like we haven't produced  
11 a single document, when they know that they have gotten  
12 documents from the individuals, and they got a production  
13 today.

14 So we are going to just try to just say the facts to  
15 your Honor. I would really like to maintain credibility, and I  
16 really hope the SEC can do the same. We are fighting hard, but  
17 this isn't a game. And I don't want to sit here and have to  
18 correct things in front of your Honor every time I stand up.

19 But speaking of corrections, the Bitstamp records from  
20 Mr. Garlinghouse, they have a withdrawal column. I don't even  
21 follow what Mr. Tenreiro is saying. They have withdrawal  
22 columns. He knows the money that went out after the XRP was  
23 sold. He has those records. Maybe he hasn't looked at them  
24 because he didn't do the investigation, but now that he is  
25 litigating, he has got to familiarize himself with the evidence

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1 before running into court.

2 Also, your Honor, they are raising cases they have  
3 never --

4 THE COURT: Mr. Solomon, can I interrupt you for one  
5 second?

6 Mr. Solomon, can I interrupt one for one second?

7 MR. SOLOMON: Absolutely.

8 THE COURT: I appreciate your remarks, but let's focus  
9 on the facts and not on what Mr. Tenreiro has or has not done  
10 in his role as taking over this case. I don't think that is  
11 productive.

12 MR. SOLOMON: Fair enough, your Honor. Fair enough.

13 I guess the point is, after a very long investigation,  
14 there is some very basic information that they never asked for.  
15 And now coming into court and saying we haven't provided it, we  
16 are withholding documents, and making spurious accusations  
17 about not being able to trust me, as counsel, or  
18 Mr. Garlinghouse, with nothing to back that up, I just think  
19 that is inappropriate.

20 But moving forward, your Honor, I'm glad Mr. Tenreiro  
21 acknowledges that Apuzzo is the governing standard for  
22 scienter. There's been some confusion about that in his  
23 papers, although he still misstates and says that it is knowing  
24 or reckless conduct. It is knowing or reckless conduct to help  
25 an illegal enterprise, to help something unlawful that Ripple

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1 is doing.

2 My client didn't see legal advice. The legal advice  
3 he talked about, your Honor, you can see the complaint  
4 concluded it was unlikely that XRP would be determined to be a  
5 security. So this case, the aiding and abetting is all about  
6 whether it was knowing or reckless to sell XRP, or to assist  
7 Ripple in selling XRP, given everything out there in the  
8 marketplace. I think I sort of led with the argument by  
9 talking about all the factors that pointed in the direction  
10 that the SEC would not determine this as a security, at the  
11 least of which is Bitcoin, Ether, and some of the other facts.

12 So we're not using the language of crime, saying  
13 innocence. That is not helpful. What we have to show is that  
14 it wasn't reckless or knowing for Mr. Garlinghouse or  
15 Mr. Larsen to be a part of Ripple's sales, and demonstrably, it  
16 wasn't. Again, eight years, no action by the SEC, and various  
17 other facts. We just wanted to sort of clear the record on  
18 this.

19 In terms of the economic reality, I just want to be  
20 clear. I never said that it is about labels. In fact, I  
21 started to tick through some of the similarities between Ether,  
22 Bitcoin, and XRP. I'm glad that we have joined issue on this,  
23 because we are going to be seeking discovery from the SEC about  
24 the manner in which it is determined that Bitcoin and Ether --  
25 or the manner in which it found and articulated through its



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1 senior officials, that Bitcoin and Ether are not securities.  
2 That is obviously a critical part of this case.

3 And if the SEC is confident in its view that those are  
4 materially different digital assets, it should have no problem  
5 sharing them with the court, sharing them with the public.  
6 These are critical judgments. And Mr. Tenreiro is exactly  
7 right, it is not about the labels. It is a functional test.  
8 We need to be able to test that proposition, because the SEC is  
9 a team market actor.

10 We'll be back in front of you on that, your Honor,  
11 once it is ripe.

12 THE COURT: Right. That's the next motion.

13 MR. SOLOMON: Absolutely. Yes, exactly. That's the  
14 next motion.

15 So, look, the SEC is doing its job. They are fighting  
16 hard. But I would just say, again, they are not a super-  
17 litigant. They can't point to a single case that has ever  
18 allowed this kind of searching discovery, particularly as it  
19 relates to individuals. It is not a fraud case. And the  
20 distinction there is, not just fraud, but individuals.

21 In a fraud case, it is easier to understand when  
22 you're talking about cash -- about hiding assets or tax  
23 evasion, why there may be a compelling need to get the  
24 documents. It is just not the case here.

25 So I hope before your Honor would be inclined to allow

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1 any additional discovery, because we don't think anything is  
2 required here, we can see what the SEC says about XRP. I don't  
3 know what they are talking about. They have never raised that  
4 with me. I don't believe they have raised it with  
5 Mr. Flumenbaum.

6 And maybe this entire episode was a waste of your  
7 time, and I apologize for that, because we are willing and able  
8 to provide any XRP information for the time that Mr. Larsen and  
9 Mr. Garlinghouse were at Ripple so that they can make whatever  
10 arguments they want to a fact-finder about motivations. And we  
11 believe we've already done that.

12 Apparently Mr. Tenreiro thinks differently. We hope  
13 we can join issue on that. In terms of any non-XRP financial  
14 information, I think they have made no showing today at all  
15 that they are entitled to it, and it has been made very clear  
16 that this is really something they want to have, not something  
17 they are entitled to.

18 Thank you, your Honor.

19 THE COURT: Thank you.

20 MR. FLUMENBAUM: Your Honor, this is Mr. Flumenbaum.  
21 I'm going to be very brief, because Mr. Solomon, as always,  
22 said some of the things that I wanted to say.

23 There was nothing in Mr. Tenreiro's argument that  
24 justifies the specific XRPs before your Honor, and the specific  
25 third parties to banks like Citibank and Silicon Valley Bank,

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1 where the defendants have some of their personal accounts.  
2 They are not going to learn anything about XRP from those  
3 accounts, and they know that. They just want to be intrusive,  
4 and they are harassing these two individuals.

5 Mr. Tenreiro misspoke when he quoted to you from the  
6 2012 -- and I stress the date -- legal opinion. This was  
7 before Ripple was actually created and before it began its  
8 operations, that it was unlikely that it would be determined to  
9 be a security. That is what -- and that legal opinion will be  
10 in evidence, because it was utilized and it has been produced  
11 to the SEC. So the SEC has had this document for a long time.  
12 That's one.

13 Two, what Mr. Tenreiro ignores is that in 2015, after  
14 Ripple began its operations, they entered into an agreement  
15 with the Department of Justice and the Department of Treasury,  
16 in which Ripple was determined to be a money transfer  
17 organization subject to the currency rules and money laundering  
18 rules. And that is the way it has been regulated since 2015.

19 Also, the Department of Financial Services in New York  
20 regulates Ripple in that same manner. So there is a major  
21 distinction. And in terms of XRP, XRP is -- this may be  
22 important for your Honor to know -- XRP actually existed, the  
23 entire quantity of XRP existed before Ripple was created.

24 So this is not a situation where Ripple created a, you  
25 know, a token and then sold it out. XRP existed beforehand,

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1 and then it was utilized for appropriate uses as, starting back  
2 in 2015. As Mr. Solomon said, there were gateways, you know,  
3 for uses, and it's now one of the predominant methods for money  
4 transfers throughout the world.

5 There has been at least -- there are 140 million  
6 payment transactions since 2013. Approximately 1.3 trillion  
7 units of XRP have moved across its decentralized ledger. And  
8 we will be able to show, in connection with Bitcoin and Ether,  
9 that the prices of XRP, at least until the SEC brought it,  
10 moves with the other virtual currencies, not in accordance with  
11 Ripple's statements or conduct.

12 Ripple has its own shareholders who have funded the  
13 company and they have sold stock that's separate from the  
14 digital assets of XRP. You know, XRP, we will prove, is  
15 similar to Bitcoin and Ether.

16 That's all I want to respond to Mr. Tenreiro's  
17 remarks. Again, nothing that he said relates to the broad,  
18 intrusive discovery that they are seeking. If he has a problem  
19 identifying, you know, a transaction or he thinks there is an  
20 intermediary here, we can deal with that. He has never raised  
21 that with us before, and that is really the point.

22 His attempt to get these documents from the  
23 third-party banks was just totally inappropriate, when we were  
24 discussing this. And if there is an issue with respect to a  
25 transaction that he doesn't understand, we'll be glad to

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1 explain it. We have told him, we're prepared to give him  
2 everything relating to the XRP trades. He'll know exactly how  
3 many of them. Why he needs to know -- if he has 1,000 trades  
4 now, so maybe he'll find 1001? I'm not quite sure of the  
5 relevance of that.

6 But in any event, we'll be glad to try to deal with  
7 Mr. Tenreiro's knowledge of the market.

8 MR. TENREIRO: Your Honor, may I respond briefly?  
9 This is Jorge Tenreiro.

10 THE COURT: Mr. Tenreiro, sure.

11 MR. TENREIRO: Yes. May I respond, your Honor?

12 THE COURT: Go ahead.

13 MR. TENREIRO: Your Honor, the court asked a question  
14 to focus on whether each sale is a violation of the statute.  
15 The defendants did not respond or address this question and  
16 sort of went on the similar path that they typically do, and  
17 that I would urge the court to resist, which is to sort of put  
18 the SEC on trial, and now apparently put my own litigation  
19 schedule on trial.

20 We have made a prima facie case for why we need these  
21 documents, your Honor. The defendants are arguing that some of  
22 these sales are beyond the reach of the SEC because it matters  
23 where the sales were placed. Again, the only way that we can  
24 understand the full extent of the sales and of where the sales  
25 came from and the proceeds of the sales came from are the bank

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1 records.

2 THE COURT: I'm sorry. Mr. Tenreiro, Mr. Solomon said  
3 that 95 percent of Mr. Garlinghouse's sales happened overseas.  
4 So that may not -- those sales may not qualify as a Section 5  
5 violation.

6 I don't quite see what -- we all can have a fight  
7 whether that is true or not. But if we accept, meaning whether  
8 95 percent of its sales were overseas, if we accept the  
9 proposition that certain sales that are overseas would not be  
10 subject to your claims, it's still not obvious to me why seeing  
11 money that flows into a hypothetical bank account because of a  
12 transaction would necessarily be probative of your claims.

13 MR. TENREIRO: Right, your Honor.

14 Mr. Solomon urged the court to look at the letters on  
15 this point. I would urge the court to do the same and look at  
16 our letters.

17 The premise is incorrect. We can accept the fact that  
18 some of the sales occurred on platforms that occurred abroad,  
19 but as the defendants have pointed out, this is a Section 5  
20 case, and their claim under Morrison is incorrect. Morrison  
21 dealt with fraud, and so they are sort of now, now that the  
22 table is turned and they say, look at Morrison, which is a  
23 fraud case.

24 We point out in our letter, it's regulation S, which  
25 is issued under Section 5 and deals with what transactions are

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1 considered domestic. And under regulation S, which the SEC  
2 promulgated, you know, a sale can't be exempted from the Act  
3 simply by going essentially through a foreign conduit and then  
4 finding its way back into the United States. Otherwise, it  
5 would be the easiest way to avoid the registration requirement  
6 of the Securities Act, simply dumping all the securities to  
7 people --

8 THE COURT: We just lost Mr. Tenreiro. I think he was  
9 winding up. I don't think it is appropriate for him to end the  
10 conference without him joining back in. I guess I'm going to  
11 continue with my generosity. I'm going to hold off for a  
12 moment. We'll get Mr. Tenreiro hopefully back on the line, and  
13 then we'll wrap things up.

14 (Pause)

15 MR. TENREIRO: Your Honor, this is Jorge Tenreiro. I  
16 apologize. I believe my call dropped.

17 THE COURT: Yes. We heard it when it happened.

18 I'll give you an opportunity to finish your thought,  
19 and then we're going to conclude today's proceeding.

20 MR. TENREIRO: Thank you, your Honor.

21 So under Morrison -- so Morrison is inapplicable in  
22 the way the defendants claim. Regulation S controls whether a  
23 sale or offer is domestic. So under regulation S, as we  
24 explain in our letter, if there is no restrictions on the  
25 securities coming back to the United States, they are not

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1 exempted. As the court might imagine, it would be the easiest  
2 way to avoid the registration requirement of Section 5 to  
3 simply sell the shares, quote-unquote, abroad and have the  
4 shares resold back in the United States. So there is a very  
5 fundamental dispute here as to what constitutes a domestic  
6 sale, and it is another reason why the individual transactions  
7 are relevant.

8 I would also urge the court to resist the entreaties,  
9 it seems like the individual defendants, you know, have no  
10 answer to the point that every sale is a potential violation of  
11 the Act, now want to retreat and say, Well, let's go back and  
12 meet and confer.

13 I urge the court to look at the record and the  
14 letters. We sent them a letter on February 26. They didn't  
15 respond to it. we had to follow up with an e-mail on March 3.  
16 Then we had a meet and confer. Then they told us, you know, if  
17 you don't withdraw the subpoenas, we're not going to meet and  
18 confer with you again. We have tried to meet and confer with  
19 them.

20 Mr. Flumenbaum, who referenced the XRPs before your  
21 Honor, the XRPs have been narrowed. We have narrowed them, as  
22 we have stated in our letters to them and in our letters to the  
23 court. We believe we have met our prima facie case to  
24 demonstrate why these records are important and critical to  
25 both the SEC's claims and the defenses, and I have not heard --



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1 Mr. Solomon is correct. We have the burden to set forth that  
2 case. But having done so, they have to explain to the court  
3 why there is a burden to them, or the requests are otherwise  
4 improper. And we respectfully submit to the court that they  
5 have not done so.

6 Thank you.

7 THE COURT: All right. Thank you, everybody.

8 I'm going to take all of your recommendations to  
9 reread some of the cases and look over some of these letters  
10 again before making my rulings.

11 I'm going to reserve on a ruling at this time. I do  
12 need to adjourn the conference, in part, because I have another  
13 conference. I just wanted to check with you, Mr. Tenreiro,  
14 just in the upcoming motions. I don't know that we have a date  
15 by which you are going to be responding to the motion to  
16 compel?

17 MR. TENREIRO: Monday, your Honor.

18 THE COURT: You're going to file it on Monday?

19 MR. TENREIRO: That's correct.

20 THE COURT: OK. All right. So we will take a look at  
21 those motions once they are fully submitted by Monday and  
22 determine whether or not we think oral argument is appropriate  
23 on those motions, and if so, we'll issue an order.

24 Again, I want to thank --

25 MR. TENREIRO: If I may?

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1 THE COURT: Is this Mr. Tenreiro?

2 MR. TENREIRO: I want to add, since the court  
3 neglected to mention the SEC v. Kik case. To the extent that  
4 the court is looking at the Howey issue, the Telegram case has  
5 the bank records, but also a substantive decision on the merits  
6 in both SEC v. Kik and SEC v. Telegram, which are Southern  
7 District cases, apply the Howey test to digital assets, and I  
8 believe those would be the helpful to the court, if I may.

9 THE COURT: Thank you.

10 I think both of those cases are in your letter.

11 MR. TENREIRO: I believe only Telegram is, and  
12 Telegram only cites the bank records decision. But the docket  
13 number for the Kik case is 19 CV, I believe it is 5433. It is  
14 not actually my case, but it is a case before Judge  
15 Hellerstein. And his opinion is, I believe, on West Law as  
16 well.

17 THE COURT: Great.

18 MR. SOLOMON: We have no new authority, Judge. We'll  
19 rest on the authority that we have already set in our letters.

20 Thank you, again, for your time today.

21 MR. FLUMENBAUM: Thank you, your Honor.

22 THE COURT: Thank you, everybody. Stay safe.

23 We're adjourned.

24 (Adjourned)

25