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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VLADI ZAKINOV, et al.,
Plaintiffs,
v.
RIPPLE LABS, INC., et al.,
Defendants.

Case No. 18-cv-06753-PJH

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS**

Re: Dkt. No. 70

United States District Court
Northern District of California

Defendant Ripple Labs, Inc.’s (“defendant Ripple”), defendant XRP II, LLC’s (“defendant XRP II”), and defendant Ripple’s Chief Executive Officer, Bradley Garlinghouse (“defendant Garlinghouse”) (collectively, “defendants”) motion to dismiss plaintiff Vladi Zakinov’s (“plaintiff”) consolidated class action complaint came on for hearing before this court on January 15, 2020. Plaintiff appeared through his counsel, James Taylor-Copeland and Oleg Elkhunovhich. Defendants appeared through their counsel, Damien Marshall, Kathleen Hartnett, and Menno Goedman. Having read the papers filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby **GRANTS IN PART** and **DENIES IN PART** defendants’ motion for the following reasons.

BACKGROUND

This consolidated putative class action (“In re Ripple”) arises out of the creation, dispersal, circulation, and sale of “XRP,” a sort of digital units often referred to as a “cryptocurrency.” In re Ripple comprises various actions alleging both violations of federal and California state securities laws. Such actions include Coffey v. Ripple et al.,

18-0000-Creech v. Dineen et al., 18-1700-Zakimov v. Dineen et al., 18-CV-0045 (Cal

1 Super. Ct. San Mateo Cty.), and Oconer v. Ripple Labs, Inc., 18-CIV-3332 (Cal. Super.
 2 Ct. San Mateo Cty.). The procedural posture of this action is complex and its
 3 restatement here is largely unnecessary. The court need note only that this action is the
 4 only ongoing matter of those referenced above. For more information, the court directs
 5 readers to its February 28, 2019 order denying remand. Dkt. 33.

6 On August 5, 2019, plaintiff filed the operative consolidated complaint against
 7 defendants. In it, plaintiff alleges the following claims:

- 8 1. Violation of Section 12(a)(1) of the Securities Act (Title 15 U.S.C. §
 9 77l(a)(1)) against defendants for the unregistered offer and sale of
 10 securities. Compl. ¶¶ 169-175;
- 11 2. Violation of Section 15 of the Securities Act (Title 15 U.S.C. § 77o) against
 12 defendant Ripple and defendant Garlinghouse for control person liability for
 13 the primary violation of Title 15 U.S.C. § 77l(a)(1). Id. ¶¶ 176-183 (together
 14 with U.S.C. § 77l(a)(1), the “federal securities claims”);
- 15 3. Violation of California Corporations Code § 25503 against defendants for a
 16 primary violation of § 25110’s restriction on the offer or sale of unregistered
 17 securities. Id. ¶¶ 184-190.
- 18 4. Violation of California Corporations Code § 25504 against defendant Ripple
 19 and defendant Garlinghouse for control person liability in connection with
 20 defendants’ primary violation of § 25110. Id. ¶¶ 201-207;
- 21 5. Violation of California Corporations Code § 25501 against defendant Ripple
 22 and defendant XRP II, as well as a parallel material assistance claim under
 23 § 25504.1 against defendant Ripple and defendant Garlinghouse, for
 24 misleading statements in connection with the offer or sale of securities in
 25 violation of § 25401. Id. ¶¶ 191-200;
- 26 6. Violation of California Business & Professions Code § 17500 against
 27 defendants for misleading advertisements concerning XRP. Id. ¶¶ 208-212;
- 28 7. Violation of California Business & Professions Code § 17200 against

1 defendants for their unregistered offer or sale of securities in violation of
 2 federal and state law, false advertising practices, misleading statements,
 3 and offense to established public policy. *Id.* ¶¶ 212-222.

4 Defendants filed the instant motion to dismiss for failure to state a claim under
 5 Rule 12(b)(6). Dkt. 70. At the core of plaintiff's claims is that XRP qualifies as a security
 6 under California state and federal law. While plaintiff alleges this legal theory at length in
 7 his complaint, Compl. ¶¶ 121-159, defendants save their dispute with that theory for
 8 another day and assume—solely for the instant motion—plaintiff's legal position that XRP
 9 qualifies as a security. Dkt. 70 at 11; Dkt. 74 at 9; Dkt. 75 at 7 n.1. Instead, defendants
 10 challenge the complaint on grounds of Title 15 U.S.C. § 77m's three-year statute of
 11 repose and traditional Rule 12(b)(6) failure to state a claim grounds. Below, the court
 12 provides a summary of the relevant allegations and judicially noticeable facts.

13 **A. The Court Partially Grants Defendants' Unopposed Requests for Judicial**
 14 **Notice**

15 As an initial matter, defendants request that the court take judicial notice of the
 16 following documents:

- 17 • The Statement of Facts from the federal government's May 2015 settlement
 18 with defendants Ripple Labs and defendant Ripple XRP II (predecessor to
 19 defendant XRP II, LLC). Dkt. 70-3. This document is cited or referenced in
 20 the complaint at paragraphs 2 n.2, 25, and 112.
- 21 • The "Ripple Credits" page from defendant Ripple's Wiki website. Dkt. 70-4.
 22 This document is cited or referenced in the complaint at paragraphs 24 n.7,
 23 130 n.91, and 145 n.99.
- 24 • A Quarter One 2018 XRP Markets Report. Dkt. 70-5. This document is
 25 cited at complaint paragraph 36 n.16.
- 26 • An article titled "Ripple is sitting on close to \$80 billion and could cash out
 27 hundreds of millions per month—but it isn't." Dkt. 70-6. This document is
 28 cited at complaint paragraph 52 n.24.

1 Here, the court need not consider the fourth request for judicial notice (Dkt. 70-6)
2 to resolve defendants' motion. As a result, the court denies that request. Otherwise,
3 because plaintiff does not oppose the remaining requests and their underlying documents
4 are sufficiently cited at the complaint sections noted immediately above, the court grants
5 defendants' request for judicial notice of those three documents and will incorporate their
6 contents by reference in its analysis below.

7 **B. The Parties**

8 **1. Defendant Ripple**

9 Defendant Ripple is a Delaware corporation with its principal place of business in
10 San Francisco. Compl. ¶ 14. While defendant Ripple sells certain enterprise software
11 products, the primary source of its income is the sale of XRP. Id. ¶ 28.

12 **2. Defendant XRP II**

13 Defendant XRP II is a New York limited liability company with its principal place of
14 business in San Francisco. Id. ¶ 15. Defendant XRP II's predecessor is XRP Fund II,
15 LLC, which was incorporated in South Carolina on July 1, 2013. Dkt. 70-3 ¶ 22.
16 Defendant XRP II was created to "engage in the sale and transfer of" XRP to "various
17 third parties on a wholesale basis." Id.

18 **3. Defendant Garlinghouse**

19 Defendant Garlinghouse is the Chief Executive Officer of defendant Ripple.
20 Defendant Garlinghouse has held that position since January 2017. Compl. ¶ 16.
21 Previously, Garlinghouse served as Ripple's Chief Operating Officer from April 2015
22 through December 2016. Id.

23 **4. Plaintiff**

24 On June 21, 2019, the court appointed Bradley Sostack as lead plaintiff. Dkt. 60.
25 Plaintiff is a Florida resident. Id. ¶ 13. Between January 1, 2018 and January 16, 2018,
26 plaintiff purchased roughly 129,000 units of XRP for approximately \$307,700 in other
27 cryptocurrencies. Id. Plaintiff alleges that he purchased such XRP "from defendants," id.

28 ¶¶ 172, 187, although he does not specify whether he made such purchases directly from

1 defendants or incidentally on a cryptocurrency exchange. Plaintiff sold his XRP between
 2 January 9, 2018 and January 17, 2018 for \$189,600 in other cryptocurrency, representing
 3 a \$118,100 loss in XRP value. Id. ¶ 163. Plaintiff seeks to certify a Rule 23(b)(3) class
 4 that generally includes all persons or entities who purchased XRP. Id. ¶ 160.

5 **C. Relevant Allegations**

6 In 2013, defendant Ripple generated 100 billion units of XRP. Compl. ¶ 2.
 7 Following their creation, defendant Ripple gave 20 billion XRP to its founders and
 8 retained the remaining 80 billion XRP. Id. ¶¶ 2, 22, 23.

9 **1. XRP Escrow Program**

10 Since the XRP's creation, defendant Ripple has placed a substantial percentage of
 11 XRP that it owns in escrow and developed a plan for when and in what quantities XRP
 12 should be sold. Id. ¶ 5. As of May 2017, defendant Ripple maintained 62 billion XRP.
 13 Id. ¶ 84. At that time, defendant Ripple stated that it would place 55 billion XRP in a
 14 secured escrow account and would only offer and sell limited amounts of XRP at defined
 15 intervals. Id. In an article, defendant Garlinghouse publicly stated that “[o]ur goal in
 16 distributing XRP is to incentivize actions that build trust, utility, and liquidity.” Id. ¶ 86. In
 17 that same publication, Garlinghouse subsequently characterized the XRP distribution as
 18 “ongoing.” Id. Defendants adopted the escrow plan to allow investors “to mathematically
 19 verify the maximum supply of XRP that can enter the market.” Id. ¶ 87.

20 **2. Alleged Offers or Sales of XRP by Defendants**

21 **a. Sales Acknowledged in Defendants' May 2015 Settlement** 22 **Agreement**

23 In May 2015, defendant Ripple and defendant XRP II entered a settlement
 24 agreement with the United States Attorney's Office for the Northern District of California
 25 (“USAO”) for violation of the Bank Secrecy Act, Title 31 U.S.C § 5330. Id. ¶ 25; Dkt. 70-

26 3. Significantly, plaintiff alleges that, as part of that agreement, defendants
 27 “acknowledged that they sold XRP to the **general public.**” Compl. ¶ 25 (emphasis

28 added). The parties' characterization of the agreement aside, its statement of facts and

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