

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

-against-

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

Defendants.

ANALISA TORRES, District Judge:

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20 Civ. 10832 (AT) (SN)

**ORDER**

Plaintiff, the United States Securities and Exchange Commission (the “SEC”), brings this action against Defendants Ripple Labs, Inc. (“Ripple”), and two of its senior leaders, Bradley Garlinghouse and Christian A. Larsen, alleging that Defendants engaged in the unlawful offer and sale of securities in violation of Section 5 of the Securities Act of 1933 (“Section 5”), 15 U.S.C. §§ 77e(a) and (c). Amend. Compl. ¶ 9, ECF No. 46. Ripple asserts, as an affirmative defense, that it lacked “fair notice that its conduct was in violation of law, in contravention of Ripple’s due process rights.” Answer, Affirmative Defenses at 97–99, ECF No. 51. The SEC moves to strike Ripple’s fair notice defense under Federal Rule of Civil Procedure 12(f). SEC Mot., ECF No. 128. For the reasons stated below, the SEC’s motion is DENIED.

**BACKGROUND**

The following facts are taken from Ripple’s answer and are presumed to be true solely for the purpose of considering the motion to strike. *See Tradeshift, Inc. v. Smucker Servs. Co.*, No. 20 Civ. 3661, 2021 WL 4463109, at \*4 (S.D.N.Y. Sept. 29, 2021).

Ripple was founded in 2012 as a “privately-held payments technology company that uses blockchain innovation . . . to allow money to be sent around the world instantly, reliably, and more cheaply than traditional avenues of money transmission.” Answer, Preliminary Statement

¶ 6 (footnote omitted). Ripple holds a large percentage of XRP, *id.* ¶ 11, “a fast, efficient and scalable digital asset” that “is transacted on the cryptographic XRP Ledger,” *id.* ¶ 7. XRP has a “fully functional ecosystem and [has] utility as a bridge currency” and other types of currency uses. *Id.* ¶ 13. XRP’s price is not and has not been determined by Ripple’s activities. *Id.* Rather, the market prices XRP in correlation with other virtual currencies, including bitcoin and ether. *Id.* Ripple has not filed a registration statement for XRP with the SEC. Answer, Response ¶ 1.

In February and October 2012, at Ripple’s request, a law firm provided two legal memoranda assessing the potential legal risks involved with Ripple’s then-proposed business plans, including risks related to banking and money transmission laws, securities laws, commodities laws, gambling laws, consumer protection laws, copyright laws, criminal laws, and tax laws. *See id.* ¶ 51.

Ripple has sold XRP in exchange for fiat or other currencies. *Id.* ¶ 1. To effectuate those sales, Ripple worked with third-party companies known as “market makers” that buy and sell XRP “on-ledger and on exchanges through blind bid/ask transactions.” *Id.* ¶ 93. At times, Ripple has included on its website a list of third-party digital asset exchanges that listed XRP. *Id.* ¶ 97. Ripple concedes that Ripple employees at times observed the trading price and volume of XRP. *Id.* ¶ 193. Ripple also admits that proceeds from Ripple’s sales of XRP were used to support Ripple’s operations, *id.* ¶ 294, but maintains that its sales of XRP consistently constituted a small portion of XRP trading volume, *id.* ¶ 99. In addition to selling XRP, Ripple has also made certain payments in XRP as a virtual currency substituting for fiat currency. *Id.* ¶¶ 83, 127.

Ripple claims that it has not sold XRP as an investment. Answer, Preliminary Statement ¶ 9. XRP holders do not acquire any claim to the assets of Ripple, hold any ownership interest in Ripple, or have any entitlement to share in Ripple’s future profits. *Id.* Ripple did not hold an “initial coin offering” (“ICO”)<sup>1</sup>; “offer[] or contract[] to sell future tokens as a way to raise money to build an ecosystem;” or promise profits to any XRP holder. *Id.* Ripple also has no relationship with the majority of XRP holders, nearly all of whom purchased XRP from third parties on the open market. *Id.* Moreover, Ripple has no obligation to any counterparty to expend efforts on their behalf, and does not pool proceeds of XRP sales in a “common enterprise.” *Id.* ¶ 10. Indeed, “Ripple has its own equity shareholders who purchased shares in traditional venture capital funding rounds and who . . . did contribute capital to fund Ripple’s operations, do have a claim on its future profits, and obtained their shares through a lawful (and unchallenged) exempt private offering.” *Id.* ¶ 13. Ripple claims that if it ceased to function tomorrow, XRP “would continue to survive and trade in its fully developed ecosystem.” *Id.* ¶ 10.

Ripple states that it has “worked to develop products that utilize XRP to allow financial institutions to effect currency transfers.” Answer, Response ¶ 67. One of those products is “On-Demand Liquidity” (“ODL”), which is intended to effect cross-border payments. *Id.* ¶ 131. Ripple asserts that it has made certain payments in XRP as a virtual currency in connection with ODL, “in accordance with standard market practices in connection with new products and markets.” *Id.*

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<sup>1</sup> Ripple states that an ICO “commonly describes a fundraising mechanism where an entity sells directly to investors a digital asset that has no functionality or utility yet, as a means of raising funds for the operations of the entity.” Answer, Preliminary Statement ¶ 9 n.4. An ICO “typically involves the release of a white paper by the token issuer to prospective investors describing, among other issues, how the token and the system would function in the future; how the funds raised will be allocated; and what future efforts will be undertaken by the issuer to develop the system and drive returns on the token’s price.” *Id.*

XRP II, LLC (“XRP II”) is a wholly-owned subsidiary of Ripple. *Id.* ¶ 19. XRP II is registered as a money service business with the Financial Crimes Enforcement Network (“FinCEN”) and is licensed by the New York Department of Financial Services to conduct certain virtual currency business activities. *Id.* In May 2015, Ripple and XRP II entered into a settlement agreement with the Department of Justice and FinCEN, which refers to XRP as a “convertible virtual currency.” *Id.* ¶ 379.

On May 16, 2017, Ripple announced that “it would place 55 billion XRP into an escrow on the XRP Ledger, and thereafter implemented the escrow of that XRP.” *Id.* ¶ 191.

In June 2018, the SEC’s then-Director of Corporate Finance stated that the SEC did not consider the virtual currencies bitcoin or ether to be securities, and that it would “put[] aside the fundraising that accompanied the creation of [e]ther” and look instead at the “present state of [e]ther.” Answer, Affirmative Defenses at 98 (alterations in original). And, in 2019, SEC staff met with a digital asset platform that was considering listing XRP. *Id.* That platform sought guidance on whether the SEC considered XRP a security. *Id.* During the meeting, the SEC did not say that it considered XRP to be a security. *Id.* The platform then proceeded to list XRP. *Id.* SEC officials have also stated publicly that digital assets may be considered securities under certain circumstances.<sup>2</sup>

Before the SEC filed the complaint in this action, “XRP was listed on over 200 exchanges, billions of dollars in XRP was bought and sold each month, numerous market makers engaged in daily XRP transactions, Ripple’s ODL product was used by many customers, and

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<sup>2</sup> See, e.g., SEC, No. 81207, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO (2017), <https://www.sec.gov/litigation/investreport/34-81207.pdf>; SEC Chairman Jay Clayton, Statement on Cryptocurrencies and Initial Coin Offerings (Dec. 11, 2017), <https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11>; Jay Clayton & J. Christopher Giancarlo, *Regulators are Looking at Cryptocurrency*, WALL ST. J. (Jan. 24, 2018), <https://www.wsj.com/articles/regulators-are-looking-at-cryptocurrency-1516836363>. The Court shall consider these statements only to the extent they establish that SEC leadership and employees made certain statements. See *United States v. Strock*, 982 F.3d 51, 63 (2d Cir. 2020).

XRP was used in third-party products, many of which were developed independently of Ripple.”  
*Id.* at 96.<sup>3</sup>

## ANALYSIS

### I. Legal Standard

Under Federal Rule of Civil Procedure 12(f), a court may strike from a pleading any “insufficient defense.” Fed. R. Civ. P. 12(f). Motions to strike an affirmative defense are disfavored and should generally not be granted. *SEC v. Thrasher*, No. 92 Civ. 6987, 1995 WL 456402, at \*5 (S.D.N.Y. Aug. 2, 1995); *see also SEC v. Honig*, No. 18 Civ. 8175, 2021 WL 5630804, at \*4 (S.D.N.Y. Nov. 30, 2021). In ruling on such a motion, courts “deem the non-moving party’s well-pleaded facts to be admitted, draw all reasonable inferences in the pleader’s favor, and resolve all doubts in favor of denying the motion to strike.” *Tradeshift*, 2021 WL 4463109, at \*4 (citation omitted).

To succeed on a motion to strike an affirmative defense, the SEC must “show that: (1) there is no question of fact which might allow the defense to succeed; (2) there is no question of

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<sup>3</sup> The SEC asks the Court to take judicial notice of 72 SEC enforcement actions enumerated in an appendix to a report created by a private entity (the “Report”). *See* SEC Reply Mem. at 4–5 & n.2, ECF No. 205; *see also* Report at 12–18, ECF 205-1. The SEC argues that the Court may take judicial notice of the complaints and charging documents listed in the appendix because they are public records. *See* SEC Reply Mem. at 5 n.2. The Court agrees that it may take judicial notice of these filings to the extent that they “establish the fact of such litigation and related filings.” *Glob. Network Commc’ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) (citation omitted). But here, the SEC appears to argue that the Court should accept that these enforcement actions “related to digital assets,” and that a subset of these actions “alleged an unregistered securities offering in violation of Section 5.” SEC Reply Mem. at 4–5. The SEC also asks the Court to accept that “each of these actions was premised on the allegation that the investment product at issue was a ‘security’ subject to the provisions of the federal securities laws.” *Id.* at 5. To the extent that the SEC urges the Court to adopt this characterization of these enforcement actions, the Court rejects such a suggestion because the Report’s analysis and conclusions with respect to these actions are not proper subjects for judicial notice. *See Abraham v. Town of Huntington*, No. 17 Civ. 3616, 2018 WL 2304779, at \*9 (E.D.N.Y. May 21, 2018). Moreover, to the extent that the SEC requests that the Court parse each of these filings to determine the underlying facts and legal basis for the enforcement actions and draw conclusions that they are similar to the enforcement action taken against Ripple, the Court declines to do so. Ripple disputes the SEC’s interpretation of these filings, *see* Ripple Sur-Reply at 5–6, at ECF No. 423; *cf. White Plains Hous. Auth. v. Getty Properties Corp.*, No. 13 Civ. 6282, 2014 WL 7183991, at \*3 (S.D.N.Y. Dec. 16, 2014), and the Court finds that such an assessment would be improper in resolving a motion to strike, *cf. Glob. Network Commc’ns*, 458 F.3d at 157.

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