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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.

20 Civ. 10832 (AT)

ORDER

ANALISA TORRES, District Judge:

Plaintiff, the 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 (the "Securities Act"), 15 U.S.C. §§ 77e(a), (c). Am. Compl. ¶¶ 9, 430–35, ECF No. 46. The SEC also alleges that Larsen and Garlinghouse aided and abetted Ripple's Section 5 violations. *Id.* ¶¶ 9, 436–40. On July 13, 2023, the Court granted in part and denied in part the parties' cross-motions for summary judgment (the "Order"). Order, ECF No. 874; *see SEC v. Ripple Labs, Inc.*, No. 20 Civ. 10832, 2023 WL 4507900 (S.D.N.Y. July 13, 2023).

The SEC now moves to certify for interlocutory appeal two holdings in the Order. ECF No. 892; SEC Mem. at 1, ECF No. 893. For the reasons stated below, the SEC's motion for certification of the interlocutory appeal is DENIED.

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BACKGROUND[1]

This case involves Defendants' offer and sale of XRP. XRP is the native digital token of the XRP Ledger, a cryptographically secured ledger, or "blockchain." Order at 2. The SEC alleges that Ripple engaged in three categories of unregistered XRP offers and sales:

> (1) Institutional Sales[2] under written contracts for which it received $728 million;
> (2) Programmatic Sales on digital asset exchanges for which it received $757 million; and
> (3) Other Distributions under written contracts for which it recorded $609 million in "consideration other than cash."

Id. at 15–16; *see id.* at 4–5. The SEC also alleges that Larsen and Garlinghouse engaged in unregistered individual XRP sales from which they received at least $450 million and $150 million, respectively. *Id.* at 5, 16.

Under Section 5 of the Securities Act, it is "unlawful for any person, directly or indirectly, . . . to offer to sell, offer to buy or purchase[,] or sell" a "security" unless a registration statement is in effect or has been filed with the SEC as to the offer and sale of such security to the public. 15 U.S.C. §§ 77e(a), (c), (e). To prove a violation of Section 5, the SEC must show: (1) that no registration statement was filed or in effect as to the transaction, and (2) that the defendant directly or indirectly offered to sell or sold the securities (3) through interstate commerce. *See SEC v. Cavanagh*, 445 F.3d 105, 111 n.13 (2d Cir. 2006).

At summary judgment, Defendants did not dispute that they offered and sold XRP through interstate commerce and that they did not register those offers or sales. Order at 10. Rather, the relevant question before the Court was whether Defendants offered to sell or sold XRP as a security. *Id.* The SEC alleged that Defendants sold XRP as an "investment contract,"

[1] The Court presumes familiarity with the facts and procedural history of this matter as detailed in prior orders, *see* Order at 2–9, and, therefore, only summarizes those facts necessary for its decision here.
[2] Capitalized terms not otherwise defined herein have the meanings set forth in the Order.

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which is a type of security as defined by the Securities Act, 15 U.S.C. § 77b(a)(1). *Id.*; Am. Compl. ¶¶ 3, 9, 60. Defendants argued that they did not sell XRP as an investment contract, and, therefore, no registration statement was required. Order at 11.

In *SEC v. W.J. Howey Co.*, the Supreme Court held that under the Securities Act, an investment contract is "a contract, transaction[,] or scheme whereby a person [(1)] invests his money [(2)] in a common enterprise and [(3)] is led to expect profits solely from the efforts of the promoter or a third party." 328 U.S. at 298–99; *see also SEC v. Edwards*, 540 U.S. 389, 393 (2004). In analyzing whether a contract, transaction, or scheme is an investment contract, "form should be disregarded for substance and the emphasis should be on economic reality" and the "totality of circumstances." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *Glen-Arden Commodities, Inc. v. Constantino*, 493 F.2d 1027, 1034 (2d Cir. 1974).

In the Order, the Court declined to adopt Defendants' novel "essential ingredients" test. Order at 11–13. Instead, the Court applied *Howey* to each category of Defendants' unregistered XRP offers and sales. *Id.* at 16–27. After the Court "examine[d] the totality of circumstances surrounding Defendants' different transactions and schemes involving the sale and distribution of XRP," *id.* at 15, the Court concluded that Ripple's Institutional Sales constituted offers or sales of investment contracts, but Ripple's Programmatic Sales and Other Distributions did not, *id.* at 30. The Court also held that Larsen's and Garlinghouse's individual sales were not offers or sales of investment contracts for "substantially the same reasons" stated in the Court's analysis of Ripple's Programmatic Sales. *Id.* at 27–28. The Court, therefore, granted in part and denied in part the parties' cross-motions for summary judgment.[3]

[3] The Court also rejected Defendants' due process defenses and denied the SEC's motion for summary judgment on the aiding and abetting claim against Larsen and Garlinghouse. Order at 29–30, 33–34. Those holdings are not at issue in this order.

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On August 9, 2023, the Court set a pretrial scheduling order and directed the parties to submit blackout dates for trial. ECF No. 884. On August 18, 2023, the SEC moved to certify for interlocutory appeal two holdings in the Order:

> (1) the ruling that, as a matter of law, Defendants' "Programmatic" offers and sales of XRP over crypto asset trading platforms could not lead investors to reasonably expect profits from the efforts of others; and
>
> (2) the ruling that Ripple's "Other Distributions" of XRP as a "form of payment for services" . . . was legally insufficient to constitute an "investment of money" under [*Howey*].

SEC Mem. at 1; ECF No. 892. The SEC also requested that the Court "stay any remedies litigation and any pretrial proceedings while [its] interlocutory certification request and any appeal are pending." SEC Mem. at 19.

DISCUSSION

I. Legal Standard

Pursuant to 28 U.S.C. § 1292(b), a district court may certify an order for interlocutory appeal where: (1) "[the] order involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See also Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, No. 13 Civ. 5784, 2015 WL 585641, at *1 (S.D.N.Y. Feb. 10, 2015). The moving party bears the burden of establishing the three factors. *Bellino v. JPMorgan Chase Bank, N.A.*, No. 14 Civ. 3139, 2017 WL 129021, at *1 (S.D.N.Y. Jan. 13, 2017).

Section 1292(b) is "a rare exception to the final judgment rule that generally prohibits piecemeal appeals." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996). Because interlocutory appeals are strongly disfavored, "only exceptional circumstances will justify a departure from the basic policy of postponing appellate review until after the entry of a

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final judgment." *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 25 (2d Cir. 1990) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)) (cleaned up).

II. Application

A. Controlling Question of Law

Under § 1292(b), "[a] question of law must refer to a pure question of law that the reviewing court could decide quickly and cleanly without having to study the record." *Youngers v. Virtus Inv. Partners Inc.*, 228 F. Supp. 3d 295, 298 (S.D.N.Y. 2017) (cleaned up); *see Stone v. Patchett*, No. 08 Civ. 5171, 2009 WL 1544650, at *2 (S.D.N.Y. June 3, 2009). A question of law is controlling where: "(1) reversal of the district court's opinion could result in dismissal of the action, (2) reversal of the district court's opinion, even though not resulting in dismissal, could significantly affect the conduct of the action, or (3) the certified issue has precedential value for a large number of cases." *Flo & Eddie, Inc.*, 2015 WL 585641, at *1 (citation omitted); *see Klinghoffer*, 921 F.2d at 24.

Here, the SEC has not presented a "pure question of law" that could be "decided quickly and cleanly without having to study the record." *Youngers*, 228 F. Supp. 3d at 298 (cleaned up). To the contrary, the Court "examine[d] the totality of circumstances surrounding Defendants' different transactions and schemes involving the sale and distribution of XRP," Order at 15, and ultimately found that the Institutional Sales were sales of securities, but the Programmatic Sales and Other Distributions were not, *id.* at 16–27. In doing so, the Court studied an extensive, heavily disputed factual record and detailed expert reports. *See, e.g.*, ECF Nos. 814, 835, 842. For example, the SEC's Rule 56.1 statement contains over 1,600 purported facts—many of which are disputed by Defendants—and cites over 900 exhibits. ECF Nos. 629, 835.

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