

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TETRAGON FINANCIAL GROUP LIMITED,	:
	:
Plaintiff,	:
	:
v	: C. A. No.
	: 2021-0007-MTZ
RIPPLE LABS INC.,	:
	:
Defendant.	:

- - -

Chancery Court Chambers  
Leonard L. Williams Justice Center  
500 North King Street  
Wilmington, Delaware  
Friday, March 5, 2021  
9:15 a.m.

- - -

BEFORE: HON. MORGAN T. ZURN, Vice Chancellor

- - -

TELEPHONIC RULINGS OF THE COURT ON PLAINTIFF'S MOTION  
FOR PRELIMINARY INJUNCTION

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CHANCERY COURT REPORTERS  
Leonard L. Williams Justice Center  
500 North King Street - Suite 11400  
Wilmington, Delaware 19801  
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## 1 APPEARANCES:

2 GARRETT B. MORITZ, ESQ.  
3 ELIZABETH M. TAYLOR, ESQ.  
4 Ross Aronstam & Moritz, LLP  
5 -and-  
6 MICHAEL S. SHUSTER, ESQ.  
7 VINCENT LEVY, ESQ.  
8 NEIL R. LIEBERMAN, ESQ.  
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10 ALISON B. MILLER, ESQ.  
11 of the New York Bar  
12 Holwell Shuster & Goldberg LLP  
13 for Plaintiff

14 MICHAEL A. BARLOW, ESQ.  
15 ADAM K. SCHULMAN, ESQ.  
16 Abrams & Bayliss LLP  
17 -and-  
18 DAVID M. GRABLE, ESQ.  
19 of the California Bar  
20 Quinn Emanuel Urquhart & Sullivan LLP  
21 -and-  
22 MARLO A. PECORA, ESQ.  
23 MATTHEW B. FOX, ESQ.  
24 of the New York Bar  
Quinn Emanuel Urquhart & Sullivan LLP  
-and-  
ALEC A. LEVY, ESQ.  
of the District of Columbia Bar  
Quinn Emanuel Urquhart & Sullivan LLP  
for Defendant

## 18 ALSO PRESENT:

19 SEAN CÔTÉ, ESQ.  
20 Tetraxon general counsel  
21  
22 STU ALDEROTY, ESQ.  
23 Ripple Labs general counsel  
24  
25 DEBORAH McCRIMMON, ESQ.  
26 Ripple Labs in-house counsel

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1 THE COURT: Good morning, Counsel.  
2 This is Morgan Zurn. May I have appearances, please,  
3 beginning with counsel for Tetragon.

4 MR. MORITZ: Good morning, Your Honor.  
5 This is Garrett Moritz of Ross Aronstam & Moritz on  
6 behalf of the plaintiff, Tetragon Financial Group  
7 Limited. I'm joined by my colleague Elizabeth Taylor.  
8 I'm also joined by my co-counsel from Holwell  
9 Shuster & Goldberg, Michael Shuster, Vincent Levy,  
10 Neil Lieberman, and Scott Danner. And we also have  
11 Tetragon's general counsel, Sean Côté, on the line, as  
12 well as some others who are the telephonic equivalent  
13 of being in the gallery. I won't introduce them.

14 With the Court's permission, to the  
15 extent there's discussion after the ruling this  
16 morning, I expect that Mr. Shuster will be taking the  
17 lead for Tetragon today.

18 THE COURT: Thank you very much.  
19 And counsel for Ripple.

20 MR. BARLOW: Your Honor, it's Mike  
21 Barlow from Abrams & Bayliss on behalf of defendant,  
22 Ripple Labs. I'm joined today by Adam Schulman of my  
23 firm. I'm also joined by my colleagues, from the  
24 Quinn Emanuel firm, Dave Grable, Marlo Pecora, whom

1 you remember from the preliminary injunction hearing,  
2 as well as Matthew Fox and Alec Levy. I'm also joined  
3 by in-house counsel from Ripple Labs, Stu Alderoty and  
4 Deborah McCrimmon.

5 THE COURT: Thank you. I have a  
6 21-page ruling to share with you. So if you all could  
7 mute your lines, and you can enjoy your coffee.

8 Thank you for getting on the line so  
9 that I can deliver my ruling on Tetragon's motion for  
10 a preliminary injunction. For the reasons that I will  
11 explain, the motion is denied. I understand that  
12 after my ruling we will be discussing several  
13 scheduling issues.

14 I draw the following background from  
15 the record at the preliminary injunction stage and  
16 include in this background only those facts necessary  
17 to resolve the pending motion.

18 Defendant, Ripple Labs Inc., a  
19 Delaware corporation, is an enterprise blockchain  
20 company. It uses a cryptocurrency called XRP and  
21 provides a payment platform, RippleNet, that utilizes  
22 XRP in global transactions. Plaintiff, Tetragon  
23 Financial Group Limited, is an investment company.  
24 Plaintiff, through its affiliates, which I will refer

1 to collectively as "Tetragon," is a majority  
2 shareholder of Ripple's Series C preferred stock.  
3 Ripple and Tetragon signed a stockholders' agreement  
4 dated December 20th, 2019, memorializing Tetragon's  
5 investment and status as lead purchaser.

6           In the stockholders' agreement,  
7 Tetragon bargained for several provisions protecting  
8 its investment, including a securities default  
9 provision at issue in this case. Section 5.4 defines  
10 a securities default as follows: "A 'Securities  
11 Default' means if XRP is determined on an official  
12 basis (including without limitation by settlement) by  
13 the U.S. Securities and Exchange Commission (or (1)  
14 another governmental authority or (2) a governmental  
15 agency of similar stature and standing) to constitute  
16 a security on a current and going forward basis (and  
17 not, for the avoidance of doubt, a determination that  
18 XRP was a security in the past)."

19           If a securities default has occurred,  
20 the stockholders' agreement gives Tetragon the right  
21 to demand redemption of its Series C stock. In order  
22 to trigger the redemption procedure, Tetragon must  
23 send Ripple a redemption request. The redemption  
24 procedure is laid out in Section 5.1 of the

1 stockholders' agreement and provides, in part, that:  
2 "Upon receipt of a Redemption Request, the Company  
3 shall redeem the number of shares of Series C  
4 Preferred Stock specified in the Redemption Request at  
5 the Default Redemption Price, and the Company shall  
6 apply all of its available cash and other liquid  
7 assets (including any available XRP the Company may  
8 lawfully use) to fund the payment of the redemption  
9 price in cash (and for no other purpose), except to  
10 the extent such redemption would violate Delaware  
11 law." Section 5.1 also provides that redemption must  
12 occur within 60 days after the receipt by the company  
13 of the redemption request.

14           This dispute largely turns on whether  
15 a securities default has occurred that triggers  
16 Ripple's redemption obligations under Section 5.1.  
17 Tetrakon claims that, via two recent events, the SEC  
18 made a determination that XRP is a security on an  
19 official basis. Ripple counters that neither event  
20 qualifies as a securities default.

21           At the time the parties entered into  
22 the stockholders' agreement, the SEC was in the midst  
23 of investigating Ripple and XRP. In mid-October 2020,  
24 Tetrakon learned that SEC staff had sent Ripple a

1 Wells notice. The Wells notice suggested SEC staff  
2 believed XRP was a security and had preliminarily  
3 decided to recommend the SEC bring an enforcement  
4 action against Ripple.

5           Tetragon took the position that the  
6 Wells notice was an official determination and sent  
7 notice to Ripple of a securities default in an  
8 October 19, 2020, letter. Tetragon claims that this  
9 letter was a redemption request under Section 5.1,  
10 triggering the 60-day deadline for Ripple to redeem  
11 Tetragon's shares and an obligation to use its funds  
12 only to redeem those shares. Tetragon argues Ripple  
13 breached the shareholders agreement by not redeeming  
14 Tetragon's shares after 60 days and by using its funds  
15 for other reasons in the meantime.

16           Ripple counters that the Wells notice  
17 does not qualify as a determination on an official  
18 basis by the SEC that XRP is a security. Ripple also  
19 asserts that even if the redemption procedure had been  
20 triggered, Ripple was not obligated to set aside its  
21 money until 60 days had passed.

22           After the SEC sent the Wells notice,  
23 on December 22nd, 2020, the SEC filed an enforcement  
24 action against Ripple in the U.S. District Court for

1 the Southern District of New York, alleging that XRP  
2 is a security and asking the Court, one, to  
3 permanently enjoin Ripple from violating Sections  
4 55(a) and (c) of the Securities Act; two, order Ripple  
5 to disgorge ill-gotten gains and pay prejudgment  
6 interest for unregistered sales of XRP; three,  
7 prohibit Ripple from participating in the offering of  
8 digital asset securities; and, four, impose civil  
9 money penalties upon Ripple, as Section 20(d) of the  
10 Securities Act allows. I will refer to this suit as  
11 the "enforcement action."

12           Tetragon contends that the  
13 commencement of the enforcement action also  
14 constitutes a securities default, giving Tetragon the  
15 right to demand redemption of its shares. Ripple  
16 contends that the SEC's enforcement allegations are  
17 not a determination on an official basis.

18           On January 4th, 2021, Tetragon filed  
19 its complaint in this action, seeking a declaration  
20 that the Wells notice and/or enforcement action  
21 constituted a securities default under the  
22 stockholders' agreement, as well as specific  
23 performance of its redemption right. Tetragon also  
24 sought expedition and a TRO enjoining Ripple from

1 using legally available cash or other liquid assets  
2 for any purpose other than to redeem Tetragon's shares  
3 until redemption is complete.

4           Last month, I endeavored to protect  
5 Tetragon's priority in a less burdensome way and  
6 entered a TRO enjoining Ripple from making  
7 extraordinary or net-negative XRP purchases outside  
8 the ordinary course of business. I also ordered  
9 expedition of the entire case, with a PI hearing in  
10 mid-February.

11           Tetragon seeks a preliminary  
12 injunction enjoining Ripple from utilizing its cash  
13 and other liquid assets for any purpose other than  
14 redeeming Tetragon's Series C preferred stock in full.  
15 The parties briefed Tetragon's request and presented  
16 oral argument on February 17th, 2021.

17           Today, I deny that request primarily  
18 on the grounds that Tetragon is not reasonably likely  
19 to prevail on the merits, as the plain language of the  
20 definition of "Securities Default" does not encompass  
21 the SEC enforcement action or the Wells notice.

22           A preliminary injunction is an  
23 extraordinary and powerful form of relief, not to be  
24 granted lightly. This Court possesses broad

1 discretion in granting or denying a preliminary  
2 injunction. The standard for a preliminary injunction  
3 is well-worn. One, a reasonable probability of  
4 ultimate success on the merits at trial; two, that the  
5 failure to issue a preliminary injunction will result  
6 in immediate and irreparable injury before the final  
7 hearing; and, three, that the balance of hardships  
8 weighs in the movant's favor. "The elements are not  
9 necessarily weighed equally. A strong showing on one  
10 [] may overcome a weak showing on another []. [But] a  
11 failure of proof on one of the elements will defeat  
12 the application." That's from *Cantor Fitzgerald, L.P.*  
13 *v. Cantor*.

14           The critical question at this stage is  
15 whether Tetragon has established a reasonable  
16 likelihood of success on the merits of its claim. In  
17 other words, whether Tetragon can show that a  
18 securities default has occurred. This question turns  
19 on my interpretation of Section 5.4 of the  
20 stockholders' agreement.

21           To determine what contractual parties  
22 intended, Delaware courts start with the text. In  
23 doing so, the Court aims to give priority to the  
24 parties' intentions as reflected in the four corners

1 of the agreement, construing the agreement as a whole  
2 and giving effect to all its provisions.

3           Delaware adheres to the objective  
4 theory of contracts, meaning that a contract's  
5 construction should be that which would be understood  
6 by an objective, reasonable third party. The Court  
7 will give effect to the plain meaning of the  
8 contract's terms and provisions, will read a contract  
9 as a whole, and will give each provision and term  
10 effect, so as to not render any part of the contract  
11 mere surplusage. Contract terms themselves will be  
12 controlling when they establish the parties' common  
13 meaning so that a reasonable person in the position of  
14 either party would have no expectations inconsistent  
15 with the contract language.

16           Unless there is ambiguity, Delaware  
17 courts interpret contract terms according to their  
18 plain, ordinary meaning, without resorting to  
19 extrinsic evidence. Whether a contract is ambiguous  
20 is a question of law. Ambiguity exists when the  
21 provisions in controversy are reasonably or fairly  
22 susceptible of different interpretations.

23           Neither party here contends that the  
24 definition of securities default is ambiguous, so I do

1 not reach the parties' arguments about their  
2 negotiation history or other extrinsic evidence of  
3 their intent. Instead, I turn directly to the  
4 language in question and apply it to the Wells notice  
5 and the SEC enforcement action.

6 Under well-settled case law, Delaware  
7 courts look to dictionaries for assistance in  
8 determining the plain meaning of terms which are not  
9 defined in a contract. This is because dictionaries  
10 are the customary reference source that a reasonable  
11 person in the position of a party to a contract would  
12 use to ascertain the ordinary meaning of words not  
13 defined in the contract. So I look to contemporaneous  
14 dictionaries to help understand the undefined terms in  
15 Section 5.4.

16 By its plain meaning, a determination  
17 has finality. According to Merriam-Webster's  
18 Dictionary, to "determine" something means "to fix  
19 conclusively or authoritatively," as in to "determine  
20 national policy," or "to settle or decide by choice of  
21 alternatives or possibilities," as in to "determine  
22 the best time to go." The Oxford Dictionary similarly  
23 states that a "determination" is "the process of  
24 deciding something officially." The "official" nature

1 of a determination is echoed in definitions in the  
2 legal arena. In those definitions, a determination  
3 comes from an authoritative source, such as a court.  
4 Black's Law Dictionary tells us that a "determination"  
5 is "the act of deciding something officially;  
6 esp[ecially], a final decision by a court or  
7 administrative agency." Merriam-Webster's definition  
8 suggests that a legal determination has finality, as  
9 in "a judicial decision settling and ending a  
10 controversy."

11           Section 5.4's determination is  
12 modified by two phrases: it must be "on an official  
13 basis" and "on a current and going forward basis."  
14 The phrase "on an official basis" echoes the official  
15 nature of a determination, which as noted is baked in  
16 by its plain meaning. Something that is official  
17 typically relates to an office, as in "official  
18 duties," or is authoritative or authorized, as in an  
19 "official statement." That is supported by the  
20 definitions in Merriam-Webster and Black's.

21           Finally, the SEC's official  
22 determination must be made "on a current and going  
23 forward basis." This language suggests that the  
24 determination must have meaning, both at the time it

1 is made and into the future. This again supports a  
2 construction of "determination" that involves finality  
3 or the end of a controversy, as in Merriam-Webster's  
4 definition.

5           Section 5.4 enumerates a single  
6 example of a securities default: a settlement.  
7 Canonically, Delaware courts interpret words in the  
8 context of words surrounding them and use specific  
9 examples to construe general language. Settlements,  
10 by their very nature, end a controversy and constitute  
11 the final say on a subject. In this way, they  
12 exemplify the sort of final, binding decision  
13 described in the dictionary definitions of a  
14 determination that I have related.

15           By its plain meaning, I find that a  
16 securities default involves a final, authoritative  
17 decision that XRP is currently a security and will be  
18 a security in the future. That decision can be made  
19 by the SEC or by, one, another governmental authority;  
20 or, two, a governmental agency of similar stature and  
21 standing. In other words, a determination in Section  
22 5.4 settles the question of whether XRP is a security.

23           To aid in applying this plain meaning  
24 to the steps the SEC has taken against Ripple, both

1 parties have produced expert testimony characterizing  
2 and contextualizing how the SEC acts. The experts  
3 disagree as to whether the steps the SEC has taken  
4 against Ripple, an enforcement action before a  
5 District Court, preceded by a Wells notice, constitute  
6 a determination under Section 5.4. With the aid of  
7 their opinions, and with the plain meaning of the  
8 definition in mind, I conclude neither the Wells  
9 notice nor the enforcement action filing is a  
10 securities default.

11           The parties' experts agreed that the  
12 SEC can make "determinations on an official basis" in  
13 three particular ways. In an administrative  
14 proceeding, the SEC initiates an enforcement action  
15 before an administrative law judge. After the ALJ  
16 makes her decision, the commission makes its own final  
17 determination by reviewing that decision. Similarly,  
18 Section 21(a) of the SEC Act of 1934 authorizes the  
19 commission to undertake investigations "necessary to  
20 determine whether any person has violated, is  
21 violating or is about to violate any provision of this  
22 chapter," or other SEC regulation. That quote is  
23 directly from the language of the Act.

24           The commission may thereafter publish

1 a report called a 21(a) report describing the  
2 investigation. The SEC seeks the consent of the  
3 subjects of the investigation before issuing a report.  
4 The commission recently released a 21(a) report in the  
5 cryptocurrency space known as the DAO report. In that  
6 report, consistent with the SEC's statutory authority,  
7 the commission stated that it had determined that DAO  
8 tokens are securities. That determination is final  
9 and comes from the commission itself.

10 Finally, in the rulemaking setting,  
11 the SEC votes to issue rules and regulations pursuant  
12 to the Administrative Procedure Act at 5 U.S.C.  
13 Section 551. Through this mechanism, the SEC may give  
14 its determinations the full force of the law.

15 The parties agree that all three of  
16 these actions would constitute a determination for the  
17 purposes of Section 5.4. Indeed, these determinations  
18 all have the hallmarks of the official, final, and  
19 controversy-ending decisions described in Black's and  
20 Merriam-Webster's. They are final, binding, and have  
21 the force of the commission behind them. Each ends at  
22 an SEC determination that is final and has present  
23 effect, even though there are mechanisms for  
24 additional review, like appeal or judicial review.

1 These alternative paths for a determination show that  
2 the SEC has ample power to resolve the question of  
3 whether XRP is a security with finality, and give  
4 meaning to Section 5.4's provision for a determination  
5 on an official basis by the SEC.

6           The dispute here is whether a Wells  
7 notice and enforcement action are also determinations  
8 on an official basis by the SEC. Before evaluating  
9 these measures under Section 5.4, I want to set forth  
10 what I understand them to be based on reconciling the  
11 parties' expert submissions.

12           Tetragon has offered the expert report  
13 and deposition of Professor Robert J. Jackson, Jr.,  
14 former SEC commissioner, in support of its position  
15 that the SEC's actions constitute an official  
16 determination that XRP is a security within the  
17 meaning of the agreement. Ripple supported its  
18 position that neither the Wells report nor the  
19 subsequent enforcement action is an official  
20 determination with the expert testimony of Harvey L.  
21 Pitt, long-time SEC veteran and former chairman of the  
22 SEC from 2001 to 2003, and Dr. Michael S. Piwowar,  
23 former commissioner of the SEC from 2013 to 2018, and  
24 acting chairman of the SEC for several months in 2017.

1           According to *Board of Public Education*  
2 *in Wilmington v. Rimlinger*, "The weight to be given  
3 [expert] testimony is a matter for the trier of fact."  
4 Where there is a battle of the experts, this Court  
5 regularly makes determinations based upon conflicting  
6 expert testimony, often finding for the party with the  
7 more credible and persuasive expert witness. On a  
8 motion for a PI, if a fact is disputed, as it is here,  
9 among the parties' experts, this Court will only find  
10 in favor of the plaintiff if there is a reasonable  
11 likelihood that the facts will ultimately be found in  
12 favor of the plaintiff by a preponderance of the  
13 evidence. That is set forth in *Wolfe & Pittenger* at  
14 14.03[b][3].

15           Turning to what the experts have  
16 taught the Court, SEC investigations and their progeny  
17 are usually initiated when a potential violation of  
18 securities law is identified. If the matter  
19 escalates, the SEC will issue a formal order of  
20 investigation, which identifies the nature of the  
21 investigation, grants power to SEC staff to  
22 investigate, and allows the SEC and its officers to  
23 issue subpoenas and compel sworn witness testimony.  
24 If SEC staff determines further action is warranted,

1 the staff may recommend that the SEC file an action or  
2 institute a proceeding. Prior to doing so, SEC staff  
3 may send a Wells notice, which allows potential  
4 defendants the chance to provide a written submission  
5 in defense of their actions. At this stage, staff  
6 must obtain an associate or regional director's  
7 approval. Once a defendant submits a writing in  
8 response to a Wells notice, that submission must be  
9 sent to the commission with a staff memorandum.

10           Following a Wells notice, staff may  
11 recommend that the SEC settle or litigate the matter  
12 in a formal action memorandum. This recommendation is  
13 based on a substantial evidentiary record, as  
14 potential defendants have had the opportunity to make  
15 their cases via their written submissions. The action  
16 memorandum sets forth the factual and legal bases for  
17 the staff's recommendation and the risks that  
18 recommendation carries. Usually, several SEC  
19 directors and the general counsel's office review the  
20 memorandum before the members of the commission do.  
21 Once the action memorandum reaches the members of the  
22 commission with the potential defendant's written  
23 submission, the commission votes to approve or reject  
24 the recommendation.

1           An enforcement action begins when the  
2 SEC files a claim in federal court. After the  
3 commissioners vote to bring an enforcement action,  
4 they are minimally involved in the litigation. Rarely  
5 do commissioners even see complaints, nor do they ever  
6 specifically sign off on them when an enforcement  
7 action commences. That commissioners vote to initiate  
8 actions does not mean they engage in fact-finding or  
9 accept specific facts to make some official  
10 determination. Rather, the commission kicks questions  
11 of fact to staff, and staff determinations are not  
12 independently assessed prior to the filing of an  
13 enforcement action. And significantly here, the  
14 ultimate question of whether the instrument in  
15 question is a security is presented to the Court  
16 rather than the commission.

17           With this background, I turn to  
18 whether an enforcement action triggers a securities  
19 default. An enforcement action lacks the essential  
20 and characteristic finality of a determination  
21 described in Section 5.4. The enforcement action  
22 initiates a process by which the Court will ultimately  
23 determine whether XRP is a security on a current and  
24 going forward basis. While the SEC has taken the

1 litigation position that XRP is a security, it left  
2 the final resolution of whether it is a security to  
3 the Court. The act of filing the enforcement action  
4 is not itself the act of deciding something  
5 officially, especially a final decision by a court or  
6 administrative agency, as contemplated by Black's, nor  
7 is it akin to a judicial decision settling and ending  
8 a controversy, as described in Merriam-Webster.

9           In this way, an enforcement action  
10 before a district court is distinguishable from the  
11 other avenues available to the SEC, which would result  
12 in an SEC determination. These avenues all end at the  
13 same point, a final conclusion that the instrument at  
14 issue is a security now and is a security going  
15 forward. By filing the enforcement action, the SEC  
16 started down an enforcement avenue, but has not yet  
17 arrived at its end, a determination.

18           Tetragon takes the position that by  
19 filing the enforcement action, the SEC has, within its  
20 own theater, determined that XRP is a security. This  
21 argument seems appealing at first brush, as there can  
22 be no question that the SEC has taken a position that  
23 XRP is a security. But the distinction Tetragon seeks  
24 to draw between the SEC's theater on the one hand and

1 the rest of the world on the other is not supported by  
2 the agreement's plain language. A determination on an  
3 official basis, as I have explained, is final and  
4 authoritative. Under the plain terms of Section 5.4,  
5 such a decision must reach outside the walls of the  
6 SEC and determine that an XRP is a security on a  
7 current and going forward basis.

8           And Tetragon's distinction makes a  
9 determination under an enforcement action  
10 fundamentally different from the determinations  
11 resultant from the SEC's other avenues. As explained,  
12 Section 21(a) reports, formal rulemaking,  
13 administrative proceedings, and even settlements all  
14 end in a final determination vis-a-vis the world, not  
15 only within the SEC's theater. The enforcement action  
16 may ultimately end in a similar place; but it will  
17 arrive there by the Court's actions, not the SEC's.

18           It is also illuminating to contrast  
19 settlements, which Section 5.4 specifically identifies  
20 as a determination that would constitute a securities  
21 default, with preliminary allegations in complaints.  
22 The latter is not an official determination insofar as  
23 it does not resolve a dispute, as the former would.  
24 Settlements also differ from complaints and

1 enforcement actions, as they require findings of fact  
2 or acceptance of facts by the commission.

3 Additionally, an SEC settlement necessarily requires  
4 the authorization of an enforcement proceeding.

5 Accordingly, the filing of an enforcement action is  
6 often moot, and finding that such an authorization  
7 triggers a securities default would render the  
8 explicit inclusion of settlements to be meaningless.

9           To be sure, the SEC's decision to sue  
10 Ripple has consequences. As Tetragon points out,  
11 after receiving the Wells notice, Ripple pleaded with  
12 the SEC not to determine, within its own theater, that  
13 XRP is a security. But XRP is no more a security  
14 after the SEC filed the enforcement action than it was  
15 before it. A determination under Section 5.4 resolves  
16 the question of whether XRP is a security. The  
17 enforcement action, by contrast, asks that question.  
18 The question is not yet resolved, so a determination  
19 has not yet been made. And when it is made, it will  
20 be made by the District Court. That the SEC is not  
21 the authority making the determination on this track  
22 is permissible under the agreement. In fact, this  
23 paradigm is consistent with Section 5.4, which  
24 contemplates the possibility that the ultimate

1 determination of whether XRP is a security may be made  
2 by another governmental authority.

3           Based on the plain language of Section  
4 5.4, I find it is unlikely that Tetragon will prevail  
5 at trial in proving that the enforcement action is a  
6 securities default.

7           Tetragon's arguments regarding the  
8 Wells notice present an even weaker case for a  
9 securities default. A Wells notice precedes an  
10 enforcement action, giving potential defendants notice  
11 of the SEC investigation and providing them the  
12 opportunity to explain to the SEC why an enforcement  
13 action is unnecessary.

14           Ripple's expert witnesses, Mr. Pitt  
15 and Dr. Piwovar, concluded affirmatively that Wells  
16 notices do not constitute determinations on an  
17 official basis by the SEC. Their opinions pointed to  
18 the fact that the SEC staff, rather than the  
19 commission itself, is responsible for sending the  
20 Wells notices. As Ripple's experts explained, a Wells  
21 notice indicates that the staff might recommend an  
22 enforcement action to the commissioners, but the  
23 commission is free to reject this recommendation. And  
24 SEC commissioners, who lead the SEC, are simply not

1 involved in the Wells process. A Wells notice from  
2 staff is a far cry from the type of official, final  
3 decision contemplated by Section 5.4.

4 Further, a Wells notice invites the  
5 potential defendant to convince the staff that such a  
6 recommendation would be improper. The Wells notice  
7 serves to inform potential defendants about an SEC  
8 investigation and provide those individuals or  
9 entities the opportunity to explain to the SEC why an  
10 enforcement action is unnecessary. To this point,  
11 Mr. Pitt stated, and Professor Jackson confirmed, that  
12 Wells notices often do not result in any further  
13 action by the SEC.

14 Tetragon's own expert, Professor  
15 Jackson, was unwilling to state that Wells notices are  
16 determinations by the SEC. He repeatedly concluded  
17 that his opinion on the matter was unnecessary.  
18 Professor Jackson stated that he would need to see  
19 Ripple's particular Wells notice to opine upon whether  
20 it was an official determination, but Tetragon did not  
21 provide it to him to review. So to paraphrase  
22 *Manichaeen Capital, LLC v. SourceHOV*, "in its zeal to  
23 reach a desired litigation outcome, [Tetragon] finds  
24 itself in the awkward position of advancing a position

1 at odds with its own expert ...."

2           Where opposing experts do not  
3 disagree, as here, undisputed expert testimony will  
4 carry the day. Mr. Pitt and Dr. Piwowar offer  
5 substantiated and unrebutted expert opinions that  
6 Wells notices do not constitute a determination on an  
7 official basis by the SEC. In the face of this  
8 unrebutted expert testimony, and the plain language of  
9 Section 5.4, I conclude that Tetragon is not  
10 reasonably likely to prevail at trial on this point.

11           Because Tetragon cannot show that  
12 either the Wells notice or the enforcement action is a  
13 securities default, it has not shown the requisite  
14 likelihood of success on the merits of its claim.

15           The other elements of a preliminary  
16 injunction rise and fall with Tetragon's ability to  
17 succeed on the merits of its claim. Without a current  
18 redemption right, there is no imminent irreparable  
19 harm to Tetragon that must be remedied. Similarly,  
20 the equities do not tip in favor of issuing an  
21 injunction to enforce or preserve a right that  
22 Tetragon does not have. And fundamentally, as  
23 described in *Cantor Fitzgerald*, "a failure of proof on  
24 one of the elements will defeat the application."

1                   So, for the foregoing reasons,  
2 Tetragon's request for a preliminary injunction is  
3 denied, and the TRO is hereby vacated.

4                   With that, I will ask counsel if they  
5 have any questions about this ruling before we turn to  
6 scheduling, beginning with Mr. Shuster.

7                   MR. SHUSTER: Thank you, Your Honor.  
8 And thank you for the Court's ruling. I do not have  
9 any questions at this time.

10                  THE COURT: Thank you.

11                  Mr. Grable, any questions on the  
12 ruling?

13                  MR. GRABLE: No questions on the  
14 ruling, Your Honor. Thank you.

15                  THE COURT: Thank you.

16                  How can I help you with scheduling  
17 today?

18                  MR. SHUSTER: Your Honor, this is Mike  
19 Shuster. I think what we would like to do, in light  
20 of the Court's ruling, is to confer with our client  
21 and to potentially meet and confer with the other  
22 side, with Ripple's counsel, and then to come back to  
23 the Court on the issue of scheduling and any  
24 outstanding discovery rulings. But I would like an

1 opportunity to digest the Court's ruling and discuss  
2 it with our client and come to a view, at least from  
3 our perspective, on how we'd like to proceed.

4 THE COURT: Understood.

5 Mr. Grable or Mr. Barlow, do you have  
6 any comments on the scheduling at this time?

7 MR. GRABLE: Your Honor, this is  
8 Mr. Grable. We're comfortable meeting and conferring  
9 with Tetragon's counsel after they've had a chance to  
10 confer.

11 THE COURT: Thank you. Is there  
12 anything else that I can help you with today?

13 MR. GRABLE: Nothing from Ripple's  
14 perspective, Your Honor. Thank you very much.

15 MR. SHUSTER: Same for Tetragon, Your  
16 Honor. Thank you.

17 THE COURT: All right. Well, thank  
18 you all. Happy Friday. Have a good weekend, and take  
19 care.

20 (Proceedings concluded at 9:44 a.m.)

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CERTIFICATE

I, DEBRA A. DONNELLY, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 28 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except as revised by the Vice Chancellor. IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 5th day of March, 2021.

/s/ Debra A. Donnelly  
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Debra A. Donnelly  
Official Court Reporter  
Registered Merit Reporter  
Certified Realtime Reporter  
Delaware Notary Public