

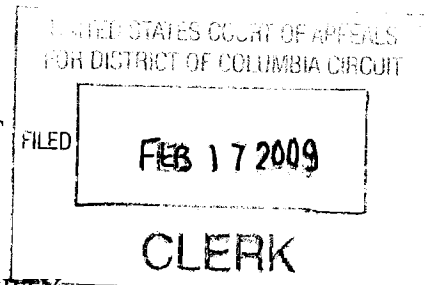
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT



LIBERTY PROPERTY TRUST AND LIBERTY PROPERTY
LIMITED PARTNERSHIP,

Plaintiffs-Appellants

v.

REPUBLIC PROPERTIES CORPORATION, STEVEN A. GRIGG AND
RICHARD L. KRAMER,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Liberty Property Trust (“LPT”) and Liberty Property Limited Partnership (“LPLP”) file the following certificate as to parties, rulings, and related cases:

A. Parties

The parties appearing below and in this Court are:

1. Plaintiff Republic Property Trust, predecessor in interest to Liberty Property Trust
2. Plaintiff Republic Property Limited Partnership, predecessor in interest to Liberty Property Limited Partnership
3. Plaintiff/Appellant Liberty Property Trust
4. Plaintiff/Appellant Liberty Property Limited Partnership
5. Defendant/Appellee Republic Properties Corporation (“RPC”)
6. Defendant/Appellee Steven A. Grigg (“Grigg”)
7. Defendant/Appellee Richard L. Kramer (“Kramer”)

B. Rulings Under Review

LPT and LPLP appeal from the Order and Memorandum Opinion of the District Court dated March 31, 2008, granting motions to dismiss filed by RPC, Grigg and Kramer, and the District Court’s Order and Memorandum Opinion dated August 13, 2008, denying LPT and LPLP’s motion for reconsideration.

C. Related Cases

This case has not previously been before this Court or any other court; however, some of the parties, facts, and issues presented in this case are the same as those in *Steven A. Grigg v. Liberty Property Trust*, Civil Action No. 06-CA-009051, which currently is pending in the Superior Court for the District of Columbia, Civil Division.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, I, the undersigned counsel of record for Appellants Liberty Property Trust and Liberty Property Limited Partnership, certify that to the best of my knowledge and belief:

1. Liberty Property Trust does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.
2. Liberty Property Trust owns approximately 95% of Liberty Property Limited Partnership and is its sole general partner.
3. Together Liberty Property Trust and Liberty Property Limited Partnership provide leasing, property management, development and other tenant-related services for its real estate properties.

Dated: February 17, 2009


Mark E. Nagle
Counsel for Appellants

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GLOSSARY

City Center Project – \$100 million urban mixed-use development in West Palm Beach, which was the subject of the Professional Services Agreement

City Commission – West Palm Beach City Commission

CRA or Community Redevelopment Agency – The West Palm Beach Community Redevelopment Agency

Development Contribution Agreement – Development Services Rights Contribution Agreement (City Center), dated September 23, 2005, between RPC and RPLP, pursuant to which RPLP acquired RPC's interest in the Professional Services Agreement in exchange for 100,234 Units

Exchange Act – Securities Exchange Act of 1934

Grigg – Defendant/Appellee Steven A. Grigg

IPO – RPT's Initial Public Offering, which took place on December 20, 2005, at which time common shares of RPT began trading on the New York Stock Exchange

IPO Transactions – Transactions entered into in connection with the IPO, pursuant to which RPT and RPLP obtained properties and contracts in exchange for shares of RPT and/or Units

Kramer – Defendant/Appellee Richard L. Kramer

Liberti – Raymond Liberti, a sitting City Commissioner and member of the Community Redevelopment Agency during relevant times hereto, including from 2004 until May 2006

LPLP – Plaintiff/Appellant Liberty Property Limited Partnership, successor in interest to RPLP

LPT – Plaintiff/Appellant Liberty Property Trust, successor in interest to RPT

Partnership Agreement – The First Amended and Restated Agreement of Limited Partnership of RPLP, dated December 20, 2005

Professional Services Agreement – Professional Services Agreement entered into between the CRA and a subsidiary of RPC on or around October 26, 2004, and all amendments thereto

REIT – Real Estate Investment Trust

RPC – Defendant/Appellee Republic Properties Corporation

RPLP – Plaintiff Republic Property Limited Partnership, predecessor in interest to LPLP

RPT – Plaintiff Republic Property Trust, predecessor in interest to LPT

Units – Limited partnership units in RPLP, issued pursuant to and governed by the terms of the Partnership Agreement

UPREIT – Umbrella Partnership Real Estate Investment Trust. An UPREIT is a REIT in which real estate and other assets are contributed by investors to a limited partnership, which operates as an “umbrella partnership,” in exchange for limited partnership units in the umbrella partnership. An UPREIT is more fully described in Section II of the Argument

APPELLANTS' JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, and 28 U.S.C. §§ 1331 and 1337, as a result of false and misleading statements and omissions made by RPC, Grigg, and Kramer in relation to the issuance by RPLP of limited partnership units pursuant to a Development Rights Services Contribution Agreement between RPLP and RPC. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as it is an appeal from a final judgment of the District Court.

STATEMENT OF ISSUES

1. Whether the District Court erred in concluding that Units of Republic Property Limited Partnership were not securities.

2. Whether the District Court erred in concluding that Appellant Liberty Property Trust was not a “seller” of securities and therefore did not have standing to bring a cause of action for securities fraud pursuant to the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78j(b), t(a) and aa.

STATUTORY AND REGULATORY PROVISIONS

The relevant statutory provisions are contained in the Addendum to this Brief.

STATEMENT OF THE CASE

Appellants LPT and LPLP seek review of the District Court's March 31, 2008 Memorandum Opinion granting the motions to dismiss of Appellees RPC, Kramer, and Grigg, and the August 13, 2008 Memorandum Opinion and Order denying LPT and LPLP's motion for reconsideration.

RPT and RPLP – LPT and LPLP's predecessors in interest respectively– brought this action against RPC, Kramer, and Grigg, asserting claims for, among other things,¹ violations of Sections 10(b) and 20(a) of the Exchange Act, and Rule 10b-5 promulgated thereunder. LPT and LPLP alleged that RPC, Kramer, and Grigg engaged in securities fraud in connection with the parties' execution of the Development Contribution Agreement. In a nutshell, RPLP issued 100,234 Units to RPC in exchange for RPC's assignment to RPLP of its right and interest in the Professional Services Agreement for the West Palm Beach City Center Project. In entering into the Development Contribution Agreement and purchasing the RPLP Units, RPC, Kramer, and Grigg failed to disclose their approval and disbursements of improper payments to Raymond Liberti, a then sitting member of

¹ The Amended Complaint also asserted claims for violations of District of Columbia securities laws, breach of contract, indemnification, common law fraud, unjust enrichment, and declaratory relief. (JA-32-39.) Because there was no independent jurisdictional basis for these claims, the District Court declined to exercise supplemental jurisdiction over these claims upon the dismissal of the Exchange Act claims. (JA-175.) Accordingly, these claims are not at issue on

the West Palm Beach City Commission and Community Redevelopment Authority Agency.

RPC, Kramer, and Grigg moved to dismiss the Section 10(b) claim on a variety of grounds, arguing that: (1) LPT and LPLP failed to plead scienter adequately; (2) the claim was barred by the Development Contribution Agreement's integration clause; (3) RPC, Kramer, and Grigg had no duty to disclose the payments they made to Liberti; (4) the claim of misrepresentation failed as a matter of law; (5) LPT and LPLP failed to plead loss causation adequately; (6) the Units were not securities; and (7) RPT was not a "seller" of the Units and therefore did not have standing to pursue the Section 10(b) claim. (Grigg Br. at 6-20; Kramer Brief at 4-13.)

In its Memorandum Opinion dated March 31, 2008, the District Court granted RPC, Kramer, and Grigg's motions to dismiss. Though the District Court rejected almost all of Defendants' arguments, it ruled that the RPLP Units were not "securities" and that RPT was not the "seller" of the Units. LPT and LPLP moved for reconsideration of the Court's decision on these two points. The District Court denied the motion in a Memorandum and Order dated August 14, 2008. This appeal followed.

appeal, but properly would be before the District Court again if this Court reverses the dismissal of the Exchange Act claims.

STATEMENT OF THE FACTS

A. RPC, Kramer, and Grigg and the Liberti Relationship

Defendant RPC is a private real estate development, redevelopment, and management company founded by, among others, Kramer and Grigg. (JA-9.) Kramer owns an 85% interest in RPC and, at all times relevant to this action, served as the Chairman of RPC's Board of Directors. (JA-10.) Grigg owns a 15% interest in RPC and, at all times relevant to this action, served as a member of RPC's Board. (JA-10.) During times relevant hereto, Grigg also served as RPC's President and Chief Executive Officer. (JA-10.)

Sometime in late 2002 or early 2003, RPC became aware of the possibility of the City Center Project in West Palm Beach Florida. (JA-13-14.) Ultimately, in 2004, RPC entered into a Professional Services Agreement with the City of West Palm Beach to serve as the developer of the City Center Project. (JA-68.) At around the same time that it began work on the City Center Project, RPC entered into a series of "Consulting Agreements" for unspecified real estate development services with Raymond Liberti, a member of the West Palm Beach City Commission and a voting member of the City's Community Redevelopment Agency. (JA-63-67.) Between November 2004 and May 2006, RPC, at the direction of Grigg and with Kramer's knowledge, paid Liberti over \$100,000. (*Id.*)

Throughout the time that he was receiving payments from RPC, Liberti, as a member of the Community Redevelopment Agency cast votes in favor of and otherwise acted for the benefit of RPC (and later RPT), and other business interests of Grigg and Kramer. Among other things, Liberti: (1) voted to approve Amendment No. 1 to the Professional Services Agreement, which entitled RPC and its subcontractors to \$1,118,268, (JA-18); and (2) voted to approve the assignment, described below, of the Professional Services Agreement to an affiliate of RPT/RPLP, (JA-19.); and (3) voted on and took actions with respect to a project in West Palm Beach known as Datura & Olive. (JA-21.)

B. The REIT's Formation and the Relationship Between RPT and RPLP

In July 2005, RPT was organized primarily through the efforts of three individuals: Kramer; Grigg; and Mark Keller, who was RPT's Chief Executive Officer and a member of its Board of Trustees until its acquisition by LPT. (JA-9-12.) As is typical for a REIT, RPT did not conduct business and did not have any real assets prior to going public.²

Substantially all of RPT's assets were held by and managed through RPLP, the umbrella limited partnership through which RPT conducted its business. (JA-9.) RPT owned approximately 88% of RPLP, was RPLP's sole general partner,

² A description of how an UPREIT, such as RPT, is formed and operated is included in Section II(A) of RPT's Argument, *infra*.

and generally had the exclusive right and full authority and responsibility to manage and operate RPLP's business. (JA-9.) Limited Partners of RPLP had no control over the affairs of the REIT. (Partnership Agreement §§ 7.1 and 8.2.)³ This operating structure came together as a part of the formation of the REIT and in anticipation of its initial public offering ("IPO"). During this formative process, RPT, through RPLP and other subsidiaries, entered into a number of transactions (the IPO Transactions) whereby RPLP acquired property and contracts in exchange for shares of RPT and partnership units of RPLP. (JA-12.)

C. The Development Contribution Agreement

One of the IPO Transactions was the Development Contribution Agreement between RPLP and RPC, pursuant to which RPC contributed the City Center Project Professional Services Agreement to RPLP, so that the agreement became an asset and an obligation of the REIT. (JA-12-14.) As consideration for the contribution of the Professional Services Agreement to the REIT, RPT admitted

³ The Partnership Agreement is incorporated by reference into the Development Contribution Agreement at Section 6.3, and is therefore part of the Development Contribution Agreement. *Air Line Pilots Assoc, Int'l v. Delta Air Lines, Inc.*, 863 F.2d 87, 94 (D.C. Cir. 1988) ("It is generally held that '[W]hen a document incorporates outside material by reference, the subject matter to which it refers becomes a part of the incorporating document just as if it were set out in full.") (citations omitted). RPT's rights under the Partnership Agreement also are set forth in the Amended Complaint. Accordingly, the Partnership Agreement properly was part of the record on the motions to dismiss and can be considered by this Court on appeal. *See Felder v. Johanns*, No. 06-910, 2007 U.S. Dist. LEXIS 38001 (D.D.C. May 25, 2007).

RPC as a limited partner of RPLP by causing RPLP to issue 100,234 Units to RPC. (JA-14.)

Although Kramer and Grigg were fiduciaries of RPT and stood on both sides of the transaction in that they also were fiduciaries of RPC with knowledge of facts exclusively in RPC's possession, and although RPC made various representations in the Development Contribution Agreement regarding the validity of the Professional Services Agreement, neither Kramer nor Grigg nor RPC disclosed the Liberti relationship to RPT or RPLP in connection with the Development Contribution Agreement. (JA-25-27.)

D. Federal Charges Against Liberti, Termination of the Professional Services Agreement, and RPT's Independent Investigation

RPC's relationship with Liberti continued until May 2006, when the United States Attorney's Office for the Southern District of Florida filed an information charging Liberti with fraud and corruption in relation to accepting payments (not related to RPC or RPT) in abuse of his elected position as City of West Palm Beach Commissioner. (JA-22-25.) On May 5, 2006, the same day that Liberti was charged, RPT and RPLP learned for the first time that Grigg, with Kramer's approval, had authorized RPC to make payments to Liberti while he was an acting commissioner of the City of West Palm Beach and a voting member of the

Community Redevelopment Agency. (JA-14-27.)⁴ Subsequently, as a result of the improper and undisclosed payments made by RPC to Liberti, the City of West Palm Beach informed RPT that it intended to terminate the Professional Services Agreement. (JA-23.)

In October 2006, Liberti pled guilty to the charges filed against him and was sentenced to 18 months incarceration followed by three years probation. (JA-23.) The following day, in an effort to mitigate any damages it suffered as a result of the wrongful acts of RPC, Grigg, and Kramer, the REIT entered into an “Assignment Agreement” with the Community Redevelopment Agency, which had the effect of terminating the Professional Services Agreement. (JA-24.)

⁴ In light of the above revelations, RPT’s independent Audit Committee engaged the law firm of Shulman Rogers Gandal Pordy & Ecker as independent counsel to assist the Audit Committee in a full investigation the Liberti relationship, the results of which revealed to RPT and RPLP the full extent of RPC, Grigg, and Kramer’s relationship with Liberti. (JA-24.) On October 31, 2006, after a full and thorough investigation, Shulman Rogers provided the findings of its investigation to RPT’s Audit Committee. (*Id.* at JA-24-25.)

SUMMARY OF ARGUMENT

The District Court's holdings that the RPLP Units were not securities and that RPT was not the seller of those Units erred in several material respects.

In holding that the RPLP Units were not securities, the District Court misapplied and improperly extended existing case law analyzing whether limited partnership units are securities. First, the District Court failed to take into account the terms of the Partnership Agreement, which explicitly precluded RPC – the recipient of the Units at issue in this case – and all other limited partners from exercising any control over the business and affairs of RPLP. Second, the District Court misconstrued Grigg and Kramer's standing on both sides of the transaction in certain respects – *i.e.*, that they owed fiduciary duties to RPT and that they were owners of RPC – to mean that Grigg and Kramer were the actual parties in interest to the Development Contribution Agreement. In so doing, the District Court, without any evidentiary record, effectively and improperly pierced the corporate veils of both RPC and RPT to reach the conclusion that the RPLP Units were not securities.

The District Court also failed to take into account the relationship between RPT and RPLP and the purpose of the Development Contribution Agreement. Consistent with the formation and business operations of other UPREITs, RPT and RPLP were, for all intents and purposes, one functioning business with two

economically equivalent types of securities: (1) publicly traded shares of RPT, provided to cash investors in the REIT; and, (2) privately held RPLP Units, which were convertible to RPT shares on a Unit for share basis, consistently provided to investors who invested by contributing real property and other assets to the REIT.

The purpose of the Development Contribution Agreement was to give RPC an ownership interest in the REIT in exchange for the Professional Services Agreement. Had RPC received RPT publicly traded shares in exchange for its contribution of the Professional Services Agreement, there would be no question that those shares were securities. *See* 15 U.S.C. § 78c(a)(10). The Units received by RPC were the economic equivalent of those RPT publicly traded shares, and RPC enjoyed no more control over RPLP than any RPT shareholder. The choice of the transaction – *i.e.*, Units for properties instead of cash for shares – does not change the substance of the transaction. Accordingly, the Units purchased by RPC also were securities. That the Units were securities is evidenced further by the SEC's and the industry's treatment of UPREIT operating partnership units as securities and the parties' treatment of the Units as securities.

Finally, the District Court erred in holding that RPT was not a seller of the RPLP Units. RPT owned an 88% interest in RPLP, was RPLP's sole general partner, and had the authority to and did, in fact, conduct all of RPLP's business. RPT caused RPLP to issue the Units to RPC in connection with the Development

Contribution Agreement. Accordingly, both RPT and RPLP were sellers of the Units.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews “*de novo* the District Court’s dismissal of plaintiffs’ complaint for failure to state a claim, accepting the factual allegations made in the complaint as true and giving plaintiffs the benefit of all inferences that can be reasonably drawn from their allegations.” *E.g., Wagener v. SBC Pension Benefit Plan*, 407 F. 3d 395, 401 (D.C. Cir. 2005). This Court reviews the District Court’s denial of a motion for reconsideration for abuse of discretion. *E.g., Smith v. Mallick*, 514 F.3d 48, 50 (D.C. Cir. 2008)(Rule 60(b)); *Ciralsky v. CIA*, 355 F.3d 661, 668 (D.C. Cir. 2004)(Rule 59(e)). Errors of law by the District Court, discussed in detail *infra*, are *per se* an abuse of discretion and subject to reversal. *Koon v. United States*, 518 U.S. 81, 100 (1996); *Southeastern Federal Power Customers v. Green*, 514 F.3d 1316, 1321 (D.C. Cir. 2008).

II. OVERVIEW OF A REIT

The relationship between RPT and RPLP is central to both of the issues raised in this appeal, which are whether the Court below erred in ruling that: (1) RPLP Units were not securities; and (2) RPT was not a seller of the Units. An informed resolution of these issues requires a clear understanding of not only the RPT-RPLP relationship, but also of the structure and function of real estate investment trusts generally.

A. The UPREIT Structure

RPT was an umbrella limited partnership real estate investment trust, or UPREIT, which is a fairly standard structure used by real estate investment trusts. The primary purpose of this structure is to permit the REIT to acquire property on a tax efficient basis by issuing partnership units, instead of REIT shares, to property owners who purchase an interest in the REIT through the contribution of property.

In an UPREIT structure, real estate and other assets are contributed to a limited partnership, which operates as an “umbrella” or “operating” partnership. In exchange for these assets, the umbrella partnership (here, RPLP) issues limited partnership units to the people or entities contributing assets. Contemporaneously, a REIT (here, RPT) is formed and sells shares to the public. The REIT contributes the proceeds from the public offering to the umbrella partnership in exchange for a general partnership interest.

In general, business operations are conducted through the umbrella partnership (and not by the publicly held REIT). Similarly, virtually all of the real properties and other assets of the enterprise are held by the umbrella partnership. In general, the umbrella partnership is required to reimburse the publicly held REIT for all of the REIT’s expenses as well as purchase prices paid by the REIT to acquire assets or stock. Accordingly, the economic and legal interests of the

umbrella partnership and the REIT are intertwined in virtually all respects and, in many ways, are indistinguishable.

The multi-tiered UPREIT structure was developed to allow individuals and entities to transfer property to the REIT on a tax-deferred basis – *i.e.*, by transferring assets in exchange for operating partnership units, investors in the REIT are able to defer tax recognition that would be required if the same appreciated property were transferred directly to the publicly traded REIT in exchange for shares. *See, e.g.*, Russell J. Singer, *Note: Understanding REITS, UPREITS, and Down-REITS, and the Tax and Business Decisions Surrounding Them*, 16 Va. Tax Rev. 329, 334 (1996).

B. A REIT’s Umbrella Partnership’s Limited Partnership Units are the Equivalent of the REIT’s Publicly Traded Shares

Though issued by different entities in order to achieve tax deferral for asset contributing investors, the units in the umbrella partnership and the REIT’s public common shares are economic equivalents. *See* Peter M. Fass, *et al.*, *Real Estate Investment Trusts Handbook, 2008 Ed.* 1070 (2007) (“a unit in the operating partnership is economically equivalent to a REIT share”); Jack H. McCall, Jr., *A Primer on Real Estate Trusts: The Legal Basics of REITS*, 2 Transactions 1, 12 (2001) (“Because of their ability to be generally redeemed on a one-for-one basis for shares of REIT stock, *Units in UPREITs [] are structured to be the economic and functional equivalent of REIT shares of capital stock.*”) (emphasis added);

Singer, at 334-35 (“Because the UPREIT owns substantially all of its property through its general partnership interest in the umbrella partnership, *the limited partnership interests held by the original contributors are the economic equivalent of an interest in the UPREIT itself.*”) (emphasis added). For example, the total number of outstanding common shares of the REIT equals the total number of partnership units owned by the REIT. In addition, the cash distributions made on each partnership unit mirror the cash distributions made on each publicly held common share of the REIT. *See, e.g., Fass, et al.* at 1070. Finally, the limited partners of the umbrella partnership generally have a right, after one year, to have their partnership units redeemed by the umbrella partnership. *See, e.g., id.* This redemption right essentially amounts to a one-for-one conversion right for partnership unit holders because the REIT has the option to issue one publicly traded share, instead of cash, for each redeemed unit. *See, e.g., id.* at 52, 1070.

An umbrella partnership’s limited partnership units also are similar to the REIT’s publicly traded shares in that a limited partnership interest provides no control over the day to day operations of the REIT. Significantly, however, limited partners in the operating partnership, in their capacity as such, have even less of a voice in the control of the REIT than shareholders of the publicly traded entity. For example, holders of limited partnership interests do not normally benefit from the same voting rights enjoyed by shareholders. *See, e.g., Fass,* at 503, 1070.

In sum, in an UPREIT, the publicly traded REIT and the umbrella partnership both are pieces of a single operating business, with the publicly traded REIT conducting the business and holding most of its assets indirectly through its general partnership interest in the umbrella partnership. Accordingly, from an economic and investor power perspective, an investment in the limited partnership via asset contribution is substantially the same as a cash investment in shares of the publicly traded REIT.

As more fully explained below, in this case, RPLP was the umbrella partnership, and RPT was the REIT. (See Section III, *infra*.) RPT was the general partner of RPLP, and it owned approximately 88% of the total outstanding RPLP partnership units. RPT had the exclusive authority to manage RPLP's business. (JA-9.)

III. THE RPLP UNITS WERE SECURITIES

A. The RPLP Units Were Securities Under the Exchange Act

The Exchange Act provides a flexible definition of the term “securities” that, *inter alia*, includes “investment contracts” and “in general, any instrument commonly known as a security.” 15 U.S.C. § 78c(a)(10). This broad statutory definition has been interpreted to include limited partnership interests in limited partnerships where the limited partners do not have a significant managerial role over the partnership's affairs. *Id.*; see, e.g., *Mayer v. Oil Field Systems Corp.*, 721

F.2d 59, 65 (2d Cir. 1983); *see also*, *Randall v. Loftsgaarden*, 478 U.S. 647, 665 (1986) (stating that the petitioners' interests in a limited partnership constituted securities); *SEC v. Parkersburg Wireless Ltd. Liab. Co.*, 991 F. Supp. 6, 7 (D.D.C. 1997) ("it is clear that the interests sold in [the limited partnership] are securities"); *Rodeo v. Gillman*, 787 F.2d 1175 (7th Cir. 1986); *Frazier v. Manson*, 651 F.2d 1078 (5th Cir. 1981); *Goodman v. Epstein*, 582 F.2d 388 (7th Cir. 1978); *Van Arsdale v. Claxton*, 391 F. Supp. 538 (S.D. Cal. 1975).

The Supreme Court in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), first articulated the test for determining whether a particular investment contract is a "security" within the meaning of the Exchange Act. Such a contract will be considered a security if it is "a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *Id.* at 298-99.

Although application of this test to the context of specific limited partnership interests can be a complex task, as *Howey* would suggest, the analysis begins with an inquiry regarding the "**legal** rights and powers enjoyed by the investor." *Steinhardt Group, Inc. v. Citicorp*, 126 F.3d 144, 153 (2d Cir. 1997) (emphasis added); *cf. e.g., Hirsch v. DuPont*, 396 F. Supp. 1214, 1227 (S.D.N.Y. 1975), *aff'd* 553 F.2d 750 (2d Cir. 1977) ("Because limited partners must, by statute, rely solely

on the efforts of others for their profit, limited partnership interests have been held to be securities in this district.”).

In dismissing LPT and LPLP’s Exchange Act claims and denying their motion for reconsideration, the District Court misapplied *Howey* and other relevant authority in holding that the RPLP Units did not satisfy the third prong of the *Howey* standard – the expectation of profits solely from the efforts of others. Specifically, the District Court: (1) ignored the terms of the Partnership Agreement and (2) disregarded the fact that RPC and RPT were distinct corporate entities, separate from their owners and management.

1. The District Court Erred by Disregarding the Terms of the Partnership Agreement, Under Which Limited Partners Had No Authority to Manage or Otherwise Participate in RPLP’s Business

At the outset, it is fundamental to this analysis to understand that RPC – not its individual owners – was the limited partner and purchaser of the Units. In concluding that the Units purchased by RPC were not securities, the District Court ignored the terms of the Partnership Agreement, under which no limited partner had any authority to participate in the management of RPLP. Indeed, the Partnership Agreement in this case stands in stark contrast to cases in which Courts have held limited partnership units not to be securities. For example, in *Steinhardt Group*, the court held that that the limited partnership interests at issue were not securities because:

The [Limited Partnership Agreement] gives [the Limited Partner, who owned a 98.7% interest in the partnership] pervasive control over the management of the Partnership. Indeed, these quite significant powers are far afield of the typical limited partnership agreement whereby a limited partner leaves the control of the business to the general partners.

126 F.3d at 154. Here, the RPLP Partnership Agreement provided the *limited partners* with no control over the affairs of RPT. Rather, the Partnership Agreement charged the *general partner* – RPT – with, among others, the following management rights and duties:

A. **Powers of the General Partner.** Except as otherwise expressly provided in this Agreement, all management powers over the business and affairs of the Partnership are and shall be exclusively vested in the General Partner, and *no Limited Partner shall have any right to participate in or exercise control or management power over the business and affairs of the Partnership.* The General Partner may not be removed by the Limited Partners with or without cause . . . [T]he General Partner . . . shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership . . .

B. **No Approval by Limited Partners.** . . . [E]ach of the Limited Partners Agrees that the General Partner is authorized to execute, deliver and perform the above-mentioned agreements and transactions on behalf of the Partnership without any further act, approval or vote of the Partners . . .

Partnership Agreement at § 7.1 (emphasis added). The Partnership agreement goes on to provide that:

No Limited Partner or Assignee (other than the General Partner, any of its Affiliates, or any officer, director, employee, partner, agent or trustee of the General Partner, the Partnership or any of their Affiliates, *in their capacity as such*) shall take part in the operation, management or control . . . of the Partnership's business, transact

any business in the Partnership's name or have any power to sign documents for or otherwise bind the Partnership.”

Partnership Agreement at § 8.2 (emphasis added). The District Court's orders do not address the specific terms of the Partnership Agreement, let alone reconcile the terms of the Partnership Agreement with other cases in which courts have analyzed the terms of limited partnership agreements. RPC had no “legal rights and powers,” as limited partner or otherwise, to participate in the management of RPLP's business. Therefore, the Units purchased by RPC were securities.

2. The District Court Erred by Looking Beyond RPC and RPT to Their Owners and Managers

To get around RPC's lack of any legal right or power to participate in the management of RPLP, the District Court misapplied a “general principle” it extracted from prior case law to hold that the RPLP Units were not securities because the same parties were on both sides of the transaction. (JA-171, JA-183.) Specifically, the District Court, improperly and without any evidentiary record, effectively pierced two corporate veils by looking beyond RPC to its owners – Kramer and Grigg – and beyond RPT to its management – which included, but was not limited to, Kramer and Grigg.⁵ See *U.S. ex rel Siewick v. Jamieson Sci. &*

⁵ Significantly, though the District Court ignored the fact that RPC and RPT were distinct legal entities in concluding that the RPLP Units were not securities, it went on to deem irrelevant the operation of the REIT as one functional business with two types of ownership interests – shares and Units – because, it noted, RPT and RPLP were separate legal entities.

Eng'g, Inc., 322 F.3d 738, 740 (D.C. Cir. 2003) (declining to pierce corporate veil and recognizing that a corporation is a distinct entity from its shareholders and corporate officers, even when an individual has a significant ownership interest in the corporation and substantially controls its actions). RPC, however, was not on both sides of the transaction and had no relationship to RPT or RPLP other than as limited partner. Moreover, the District Court's decision to equate RPC and RPT with their owners and management runs afoul of well established corporate law and finds no support in prior case law regarding limited partnership interests. *See id.*; *Labadie Coal Co. v. Black*, 672 F.2d 92 (D.C. Circuit 1981) (setting forth detailed factual analysis required prior to piercing corporate veil and holding that corporate form cannot be ignored unless the corporation's principals disregarded the separate corporate form and/or it would be unfair for the court to recognize the separate corporate form).

This is not a case “where the limited partnership purchaser holds a majority stake in the company of which the general partner is a wholly owned subsidiary,” or “where parties control a partnership which purchases limited partnership units and also control one of the general partners of the seller's general partner.”⁶ (JA-

⁶ The cases relied upon by the District Court are factually and legally distinct from, and not applicable to, this case. In *Piaubert v. Sefriouri*, No. 97-56131, 2000 U.S. App. LEXIS 2462, at *12-13 (9th Cir. Feb. 17, 2000), the court noted in dicta that a majority owner of the parent company of the general partner in a limited partnership **may**, in certain circumstances, have a sufficient interest in the limited

171.) LPT and LPLP are unaware of and have been unable to find any case in which a Court has pierced two corporate veils to reach a conclusion that a limited partnership interest was not a security. Instead, similar to other instances in which limited partnership units have been held to be securities, RPC had no ability – *in any capacity* – to assert influence or control over RPLP.

Any management authority exercised by Grigg and Kramer over RPLP’s business does not call for a different result. This authority derived solely from their role as members of RPT’s management, not from RPC’s or their status as limited partners. *Cf. Hirsch*, 396 F. Supp. at 1228 (noting the distinction between rights derived from status as general partner versus rights derived from status as limited partner and holding that “[m]oreover, for purposes of the Howey test, all rights and powers to participate in the management of the firm derive from the general partnership, not the limited partnership, interests) (emphasis added)); *see also Rodeo*, 787 F.2d at 1178 (“a limited partnership interest has been found to

partnership to prevent its interest therein from being securities. The Court, however, reversed the District Court’s dismissal and held that a limited partner pled facts sufficient to proceed on a claim based on the position that its interest in the limited partnership was a security, where it alleged that it was distinct from the legal entity that controlled the partnership. *Id.* In *Kravco, Inc. v. Rodamco North America, N.V.*, No. 00-0272, 2000 U.S. Dist. Lexis 17953, at *20-23 (E.D. Pa. Dec. 13, 2000), the court analyzed the contract rights of the parties and held that the plaintiffs’ limited partnership interests were not securities because the plaintiffs had the contractual power to appoint half of the members of the general partner’s board. *Id.*

constitute a security even where there was an accompanying general partnership interest”) (citing *Hirsch* 396 F. Supp. at 1227-28).

To demonstrate that Kramer’s and Grigg’s management authority over RPT was wholly independent of and distinct from RPC’s limited partner status, the Court need look no further than what would have happened had Grigg and Kramer been removed from RPT’s management: they no longer would have had any ability to manage RPT or RPLP, despite RPC’s continued status as limited partner.

Because RPC had no authority, in any capacity, to control the operation or affairs of RPLP, the Units issued to RPC in connection with the Development Contribution Agreement were securities.

B. UPREIT Limited Partnership Units Generally are Treated as Securities

Though existing case law regarding other types of limited partnership interests can provide guidance in this case, “in determining the existence of a ‘security’ the court should apply a flexible rather than a static principle . . .” *Ballard & Cordell Corp. v. Zoller & Danneberg Exploration, Ltd.*, 544 F.2d 1059, 1063 (10th Cir. 1976). In this regard, the routine treatment of UPREIT limited partnership units as securities and the equivalence between partnership units and REIT shares are instructive.

Due to the close relationship between the public REIT shares and limited partnership units, the umbrella partnership limited partnership units generally are

considered securities. *See, e.g.*, McCall, at 10-12 (“[S]ince Units are securities (much like shares of common stock), they are subject to applicable federal and state securities laws . . . [and] [b]ecause UPREIT Units are generally sold without registration under the 1933 Act and state “Blue Sky” laws, they are considered to be ‘restricted’ securities.”); *c.f., e.g.*, Fass, at 503-20 (discussing various securities law issues associated with issuance of operating partnership units, with a focus on avoiding the private placement of operating partnership units losing its exemption by being integrated with the REIT’s initial public offering); Judith F. Fryer, *REITS: 1999 Strategies for Financing & Growth in a Challenging Market*, 1137 *PLI/Corp* 439, 439-453 (1999) (analyzing securities issues affecting REITs, and noting, “thought should be given when structuring acquisitions using such securities [operating partnership units] in order to avoid having ‘private placements’ of these securities integrated with each other or with follow on offerings of REIT securities;” and noting that, “[b]oth the issuance of OP Units which are exchangeable for REIT shares and the actual exchange of REIT shares for OP Units create opportunities for inadvertently violating the securities laws due to gun-jumping and integrations issues”).

Consistent with this general consensus, the SEC also has treated operating partnership units as securities. *See* Limited Partnership Rollup Trans. Order, Exchange Act Release No. 34-34533, 59 Fed. Reg. 43147, 43153-54 (Aug. 22,

1994) (noting that there are at least three mechanisms by which operating partnership units are offered: (1) issuance of the units and REIT shares pursuant to “*bona fide* private placement exemptions under the Section 4(2) of the Securities Act;” (2) issuance of the units via “a registered transaction, with a simultaneous public offering of REIT units;” and (3) similar to the structure here, issuance of the units “pursuant to a *bona fide* private placement exemption, along with a public offering of units by the REIT general partner”); Summit Properties Partnership, L.P., SEC No-Action Letter, 2005 SEC No-Act. LEXIS 338 (March 7, 2005) (stating no action would be taken with respect to merger involving an UPREIT operating partnership); Fass, at 582 (noting that the SEC has, in some instances, required similar accounting treatment for redeemable operation partnership units as for redeemable preferred stock).

The SEC’s treatment of an instrument as a security is significant because “the task has fallen to the Securities and Exchange Commission (SEC), the body charged with administering the Securities Acts, and ultimately to the federal courts, to decide which of the myriad financial transactions in our society come within the coverage of these statutes.” *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990).

RPC received RPLP Units as part of the REIT’s IPO transactions. Indeed, the REIT formation here – *i.e.*, the issuance of RPLP Units in exchange for property and assets, and RPT’s IPO, issuance of shares, and purchase of a general

partnership interest in RPLP – mirrored a typical UPREIT formation in every possible way. Although RPT and RPLP were distinct legal entities, they were, for all practical purposes, one operating business. As such, the publicly traded RPT shares and the RPLP units (which were redeemable, after one year, on a one-for-one basis for RPT shares) were economic equivalents. Therefore, and because limited partnership units issued in connection with the formation of an UPREIT consistently are considered securities – by practitioners, investors, and by the SEC – due to the economic realities of the transaction, the RPLP Units issued to RPC were securities.

Moreover, because UPREIT limited partnership units generally are treated as securities, a holding that the Units were not securities could have wide ranging effects on the entire REIT industry. First, it potentially could defeat the expectations of individuals and entities in all UPREITs who pledged property to a REIT in exchange for operating partnership units with the understanding that their investment would be subject to and protected by the federal securities laws. Second, it could have a chilling effect on the large-scale commercial real estate investment and development fields and other areas in which REITs operate.

C. The Parties Treated the RPLP Units as Securities

RPT, RPLP, and RPLP's limited partners, *including Grigg and RPC*, treated RPLP Units as securities under federal law. For example, each agreement

pursuant to which RPLP Units were issued, including the Development Contribution Agreement, contained standard representations made by the recipient of the Units regarding securities and securities law. (JA-46.) Moreover, each issuance of RPLP Units, including the Units issued to RPC in connection with the Development Contribution Agreement and Units issued to Grigg in connection with other agreements, was accompanied by the filing by Grigg with the SEC of a Form D, notifying the SEC of the issuance of covered securities exempt from registration by Rule 506 under Regulation D of the Securities Act of 1933.

Only when confronted with the ramifications of their conduct did RPC, Kramer, and Grigg change their historical position and ask the District Court to decide that the limited partnership interests issued to RPC in connection with the Development Contribution Agreement were not securities.

D. Fact Issues Remain as to Whether the RPLP Limited Partnership Units Were Securities

LPT and LPLP alleged unequivocally that the RPLP Units were securities, (JA-29), and alleged facts underlying this allegation – that RPT was the sole general partner of RPLP and had exclusive control over RPLP’s business dealings. (*e.g.* JA-9.)

Even if this Court does not determine that, as a matter of law, the Units were securities, there remain complex issues of fact that require resolution prior to a decision that the Units were not securities. *See, e.g., SEC v. SG Ltd.*, 265 F.3d 42

(1st Cir. 2001) (reversing trial court's dismissal of claims on 12(b)(6) motion, and holding that determining whether a particular investment was a security required fact intensive analysis and was not appropriately decided on a motion to dismiss). Should the Court have any question regarding the status of the RPLP Units at issue here, it should reverse and remand for further development of the factual record. RPLP's Units should not, *ipso facto*, be deemed to fall outside the Exchange Act's definition of "securities."

IV. RPT WAS A "SELLER" OF THE RPLP UNITS

There is no dispute that RPLP issued RPLP Units to RPC pursuant to the terms of the Development Contribution Agreement, and is therefore the seller of those Units. (JA-14, JA-44.) Thus, if this Court holds that the Units were securities or that more factual development is required on that issue, LPLP unquestionably has standing to assert a claim against RPC, Kramer, and Grigg for securities fraud. The issue is whether LPT, as successor in interest to RPT, also was a seller and also has standing.

Here, RPT owned approximately 88% of RPLP, was RPLP's sole general partner, and generally had the exclusive right and full authority and responsibility to manage and operate RPLP's business. RPT and RPLP were two necessary parts of the one functioning UPREIT, and RPT caused RPLP to enter into the Development Contribution Agreement at issue and to issue Units to RPC. Indeed,

RPT, not RPLP, executed the limited partner acceptance associated with the issuance of RPLP Units to RPC. (JA-60-62.)

Looking at the REIT as a whole, and taking into consideration the relationship between RPT and RPLP, and between RPT shares and RPLP Units, both RPT and RPLP should be considered sellers of the Units. *Cf. Allard v. Arthur Andersen & Co.*, 924 F. Supp. 488, 496 (S.D.N.Y. 1996) (noting that general partners have been deemed “sellers” for purposes of Section 12(a)(2) claims under the Securities Act of 1933, 15 U.S.C. § 771(2), and that there was no reason to apply a different definition to claims under the Securities Exchange Act of 1934);⁷ *Lawrence v. Cohn*, 932 F. Supp. 564, 573 (S.D.N.Y. 1996) (holding that, in addition to having derivative standing to bring claims, standing “comports with the underlying purpose of section 10(b) and rule 10b-5. . . . Although plaintiffs were not technically buyers or sellers, they were the ones who essentially negotiated the [transaction] . . .”).

⁷ The District Court drew a distinction between a general partner being liable as a seller under Section 12 of the Securities Act, on the one hand, and maintaining a cause of action as a seller under Section 10(b) of the Exchange Act, on the other. LPT and LPLP submit that there is no basis here to draw such a distinction with respect to RPT. Both it and RPLP were the sellers of the Units.

CONCLUSION

For all of the foregoing reasons, Appellants Liberty Property Trust and Liberty Property Limited Partnership respectfully request that the Court reverse the District Court's orders granting the motion to dismiss and denying the motion for reconsideration.

No. 08-7095

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LIMITED PARTNERSHIP,

Plaintiffs-Appellants

v.

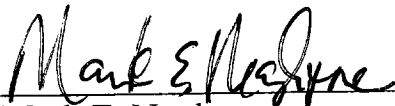
REPUBLIC PROPERTIES CORPORATION, STEVEN A. GRIGG AND
RICHARD L. KRAMER,

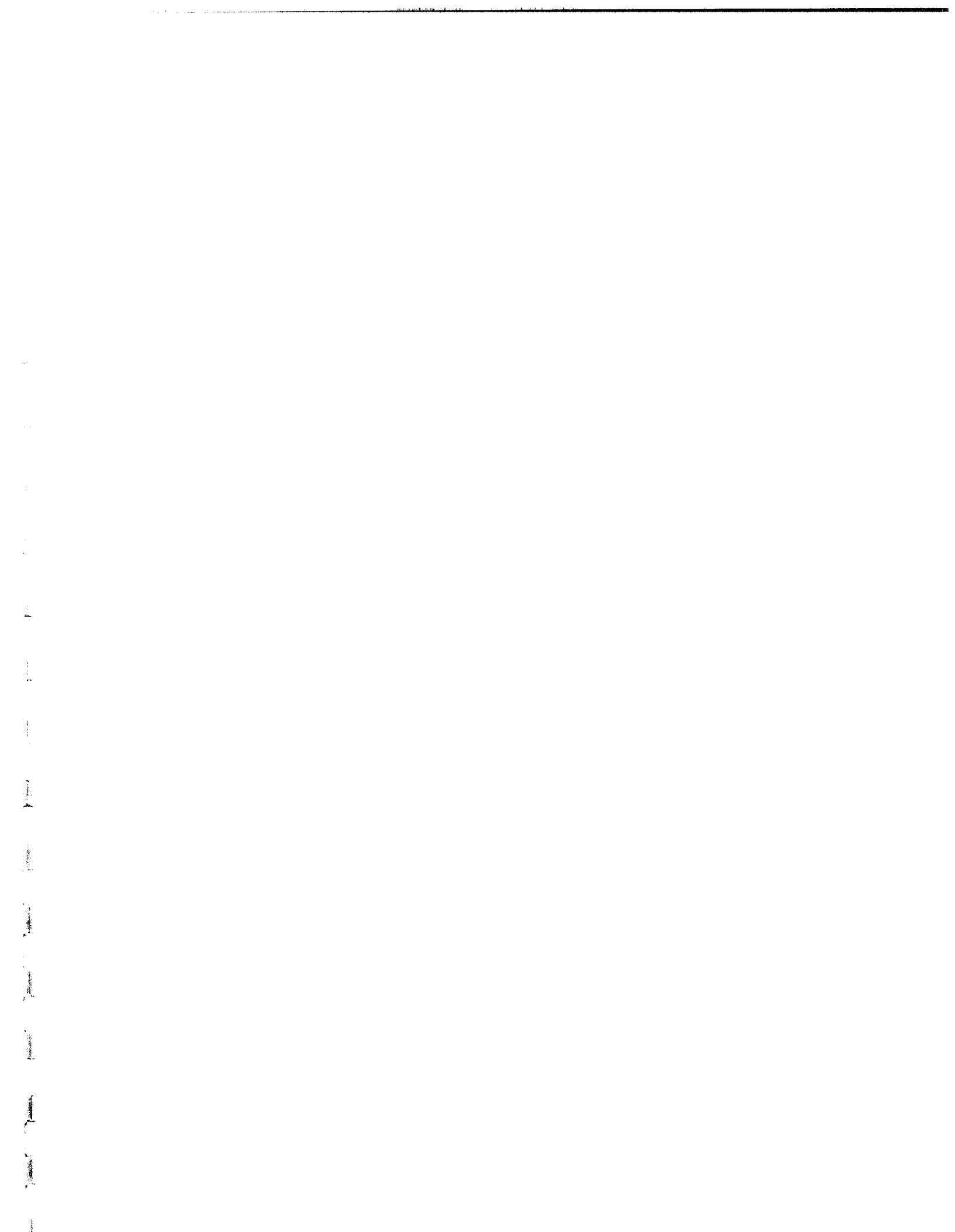
Defendants-Appellees.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32(a) because this brief contains 6130 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word XP in Times New Roman 14.

Dated: February 17, 2009


Mark E. Nagle
Counsel for Appellants



ADDENDUM

<u>Statute</u>	<u>Addendum Page</u>
15 U.S.C. § 78c(a)(10)	i
15 U.S.C. § 78j	ii

15 U.S.C. § 78c. Definitions and application

(a) Definitions. When used in this title, unless the context otherwise requires—

(10) The term "security" means any note, stock, treasury stock, security future, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance, which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

15 U.S.C. § 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(a)

(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) to the same extent as they apply to securities. Judicial precedents decided under section 17(a) of the Securities Act of 1933 [15 USCS § 77q(a)] and sections 9, 15, 16, 20, and 21A of this title [15 USCS §§ 78i, 78o, 78p, 78t, and 78u-1], and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) to the same extent as they apply to securities.

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CERTIFICATE OF SERVICE

This is to certify that on February 17, 2009, I caused to be served by hand two copies of Brief of Appellants and one copy of Joint Appendix on:

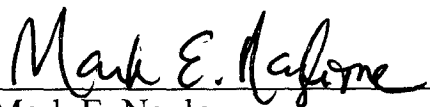
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