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DISTRICT OF COLUMBIA CIRCUIT
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No. 08-7095

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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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 APPELLEES

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March 19, 2009

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Defendants-Appellees Republic Properties Corporation, Steven A. Grigg and Richard L. Kramer make the following certification:

(A) Parties, Intervenors, and Amici. Plaintiffs appeal the entry of judgment following the District Court's grant of a motion to dismiss. The parties to this appeal are as stated in Plaintiffs-Appellants' brief.

Republic Properties Corporation ("RPC") is a real estate development and management company with real estate holdings in a number of different states. RPC has no parent company, and no publicly-held company maintains a ten percent or greater ownership interest in RPC.

There are no intervenors or amici.

(B) Rulings under Review. The rulings at issue in this appeal are:

(1) Memorandum Opinion and Order, dated March 31, 2008, by the Honorable Royce C. Lamberth, granting Defendants-Appellees' Motion to Dismiss. The Opinion and Order is published at 540 F. Supp. 2d 144 and available at page 148 of the Joint Appendix.

(2) Memorandum Opinion and Order, dated and August 13, 2008, by the Honorable Royce C. Lamberth, denying Plaintiffs-Appellants' Motion for

Reconsideration. The Opinion and Order is published at 570 F. Supp. 2d 95 and available at page 176 of the Joint Appendix.

(C) Related Cases. This case has not previously been before this Court or any other court for appellate review.

A related case, *Grigg v. Liberty Property Trust*, No. 2006 CA 9051 B (Josey-Herring, J.), is currently pending before the Superior Court of the District of Columbia.

Dated: March 19, 2009

Respectfully submitted,

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DEFENDANT-APPELLEE REPUBLIC PROPERTIES CORPORATION'S RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rules 26.1 and 28, Republic Properties Corporation ("RPC") states that it is a real estate development and management company with real estate holdings in a number of different states. RPC has no parent company, and no publicly-held company maintains a ten percent or greater ownership interest in RPC.

Dated: March 19, 2009

Respectfully submitted,

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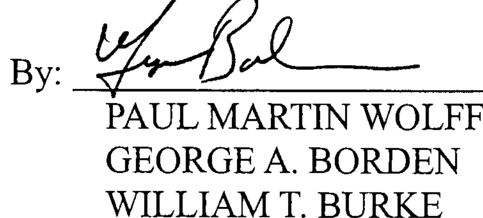

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GLOSSARY OF ABBREVIATIONS

Complaint	Amended Complaint. JA-8-35
Contribution Agreement	The Development Services Rights Contribution Agreement (City Center) of September 23, 2005 between RPC and RPLP. JA-43-62.
CRA	The West Palm Beach Community Redevelopment Agency
JA	Amended Joint Appendix
Partnership Agreement	The First Amended and Restated Agreement of Limited Partnership of RPLP of December 20, 2005
Pls.' Br.	Brief of Appellants
Professional Services Agreement	Professional Services Agreement of October 26, 2004 between the CRA and a subsidiary of RPC. JA-68.
PSLRA	Private Securities Litigation Reform Act of 1995
REIT	Real Estate Investment Trust
RPC	Defendant-Appellee Republic Properties Corporation
RPLP	Plaintiff-Appellant Republic Property Limited Partnership, predecessor in interest to Liberty Property Limited Partnership
RPT	Plaintiff-Appellant Republic Property Trust, predecessor in interest to Liberty Property Trust
UPREIT	Umbrella Partnership Real Estate Investment Trust

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 15 U.S.C. § 78aa and 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291. The District Court denied Plaintiffs-Appellants' Motion for Reconsideration on August 13, 2008. Plaintiffs filed their Notice of Appeal on September 12, 2008.

STATEMENT OF THE ISSUES

1. Did the District Court correctly hold that the limited-partnership units issued to RPC were not investment contracts because Richard Kramer and Steven Grigg were actively involved in the management of the limited partnership, so that profits were to be derived from their own efforts and not predominantly from the efforts of others?

2. Should the District Court's dismissal of the Amended Complaint be affirmed because Plaintiffs did not adequately allege economic loss and loss causation based on RPLP's acquisition of an asset for allegedly inflated value, where RPLP transferred the asset to a non-plaintiff before the alleged losses were suffered, and where the alleged losses are speculative and remote from the Defendants' alleged conduct?

3. Should the District Court's dismissal of the Amended Complaint be affirmed because Plaintiffs did not adequately allege scienter where the strongest inference from the facts alleged was that the Defendants believed that the allegedly concealed consulting arrangement was proper and that Plaintiffs would not be misled by any alleged omission?

4. Did the District Court correctly hold that Republic Property Trust lacked standing to sue when it neither purchased nor sold securities?

STATEMENT OF THE CASE

This case is one of five currently pending between these parties and various affiliates, all resulting from a bitter corporate falling-out.[1] Richard Kramer and Steven Grigg, the principals of Republic Properties Corporation ("RPC"), were the two principal founders of Republic Property Trust ("RPT"). After the creation of RPT, however, a faction led by RPT's CEO, former RPC employee Mark Keller, maneuvered to undermine Kramer and Grigg's position and wrest control of RPT. This battle was widely reported.[2] As they stated at the time, Kramer and Grigg believe that this case was brought as part of the Keller faction's corporate strategy.[3]

Many of the claims in the Complaint in this case were originally asserted as counterclaims in *Grigg v. Republic Property Trust*, a case in which Grigg alleges that RPT violated his employment agreement by refusing to pay his severance

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[1] The other cases are: *Grigg v. Republic Prop. Trust*, No. 2006 CA 009051 B (D.C. Super. Ct.); *Liberty Prop. Ltd. P'ship v. 25 Mass. Ave. Prop. LLC*, No. 188, 2008 (Del. Sup. Ct.); *25 Mass. Ave. Prop. LLC v. Liberty Prop. Trust*, No. 2008 CA 0008712 (D.C. Super. Ct.); and *Richard L. Kramer v. Liberty Prop. Trust*, No. 02260, Sept. Term, 2007 (Md. Ct. of Appeals).

[2] *See, e.g.*, Dana Hedgpeth, *Fla. Project Causes REIT Furor; 2 Jobs on the Line After Hiring of Official Who Voted on Contract*, Wash. Post, Nov. 17, 2006, at D4.

[3] *See id.* (quoting Kramer, who characterized RPT's investigation that led to this case as "a mechanism for the board and the current management to force us out of the company for whatever agendas they have").

benefits after forcing him out. Some of those counterclaims have been withdrawn, while other, substantially similar ones remain pending. In particular, Liberty Property Trust (RPT's successor) claims that Grigg breached his employment agreement with, and his fiduciary duty to, RPT based on the same facts at issue in this case, and it seeks substantially the same damages there as here.[4]

At the heart of this case is Plaintiffs' attempt to take advantage of a bizarre and unforeseen turn of events to spin a lawful consulting arrangement between RPC and Raymond Liberti into the basis of a claim for securities fraud. Despite a lengthy internal investigation and access to all relevant records, Plaintiffs cannot and do not allege that Defendants bribed Liberti, or that the consulting arrangement violated any law whatsoever — and no such violation has ever been charged. The Liberti relationship assumed importance only after Liberti was charged with completely unrelated criminal conduct — months after the transaction at issue — and he became a political hot potato in West Palm Beach.

Also notable is that this case is far afield from the normal case arising under the federal securities laws. Whereas the typical securities plaintiff is a buyer of stock who has been allegedly misled about the value of his investment, here the Plaintiffs are alleged sellers of limited partnership units, and the alleged fraud

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[4] Discovery is virtually complete in the Superior Court case and Grigg's summary

concerns the value of the consideration exchanged for the units, not the units themselves.

The District Court dismissed RPT's claims under the Securities Exchange Act of 1934 on the basis that RPT was not a purchaser or seller of securities and thus had no standing. JA-157-60. The District Court also dismissed RPLP's claims under the Exchange Act on the basis that, under the specific circumstances pleaded, the limited partnership units that changed hands in the transaction were not securities within the meaning of the Exchange Act. In particular, the District Court held that the units did not meet the definition of an "investment contract" established in *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), because Kramer and Grigg — as owners and directors of RPC as well as owners and trustees of RPT — exercised significant control and influence over the business of RPLP. JA-168-72. The District Court also found Plaintiffs' pleading of economic loss and loss causation "problematic," but ultimately did not base its ruling on that failing. JA-172-73. The District Court dismissed Plaintiffs' claims of control-person liability under the Exchange Act because no primary violation of the securities laws had been pleaded, JA-173-74, and it declined to exercise jurisdiction over Plaintiffs'

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judgment motion will be filed shortly.

state-law claims, JA 174-75. Plaintiffs moved for reconsideration of the dismissal of their federal claims, but the District Court denied that motion. JA-177-86.

COUNTERSTATEMENT OF FACTS[5]

A. The Formation of RPT and RPLP by Kramer, Grigg, and Keller

Defendants Kramer and Grigg along with Mark Keller formed RPT and Republic Property Limited Partnership in July 2005. JA-11-12, ¶ 11. RPT was the general partner in RPLP, the operating partnership of RPT.[6] JA-9. Shortly after their formation, RPLP engaged in a series of transactions to acquire property, property development opportunities and service contracts from entities affiliated with Kramer. JA-12. RPT became a publicly traded real estate investment trust ("REIT") on December 20, 2005.

From the time of RPT's founding through the time this suit was filed, Kramer was the chairman of the board of trustees of RPT. JA-10. Kramer also

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[5] In reviewing the District Court's grant of a motion to dismiss this Court "treat[s] the complaint's factual allegations as true . . . grant[ing] [Plaintiff-Appellants] the benefit of all inferences that can be derived from the facts alleged." *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003) (ellipsis in original, quotations omitted). Accordingly, the facts described below are those alleged in the Amended Complaint and included in documents incorporated in the Amended Complaint.

[6] Plaintiff-Appellant Liberty Property Trust ("LPT") is the successor to RPT. Plaintiff-Appellant Liberty Property Limited Partnership is the successor to RPLP and is the operating subsidiary of LPT. Pls.' Br. at 4.

held an ownership interest in RPLP. *Id.* Grigg, too, was a member of RPT's board of trustees and was President and Chief Development Officer of RPT from the time of its founding until November 2006. JA-9. Grigg also held an ownership interest in RPLP. *Id.*

B. RPLP Acquires Rights Under the Professional Services Agreement from a Related Entity, RPC, and Transfers It to a Subsidiary

RPLP acquired a property development opportunity from RPC, a business owned by Kramer and Grigg and engaged in private real estate development. JA-9. Kramer owned 85% of RPC, and Grigg owned 15%. JA-10. RPC was engaged in a number of real estate development opportunities in addition to the one acquired by RPLP.

More than nine months before RPT and RPLP were formed, RPC had entered into an agreement (the "Professional Services Agreement") with the West Palm Beach, Florida city government, through its Community Redevelopment Agency (the "CRA"), to design, develop and construct a project called City Center in West Palm Beach. JA-12-13.

The Professional Services Agreement had a number of contingencies. The original version of the Agreement covered only Phase I of the project, which called for programming and conceptual design. JA-75. It specifically prohibited RPC from performing any other services related to the project until a written agreement

for such services was executed. JA-79. Accordingly, with respect to future design, development and construction of the project, the Professional Services Agreement was no more than an agreement to try to reach agreement in the future.

On March 28, 2005, after completion of Phase I, the CRA approved Amendment No. 1 to the Professional Services Agreement, which covered "Phase II – Schematic Design." JA-18, 119a. That Amendment reflected that the CRA and RPC were in the process of negotiating a contract for further work on the project. JA-119a. Amendment No. 1 further stated that "[a]fter the scope and design of the Project is defined by the City Commission and CRA, [RPC] will establish and submit in writing to the City for its approval a Guaranteed Maximum Price" for the construction phase of the project. JA-119b. Nothing in the Agreement obligated the CRA to go forward with the construction phase, and the CRA could terminate the Professional Services Agreement "at any time for convenience, without cause and without penalty, when in its sole discretion it deems such termination is in the best interest of the CRA." JA-118.

On September 23, 2005, RPC and RPLP entered into the Development Services Rights Contribution Agreement ("Contribution Agreement"), pursuant to which RPC assigned all of its right, title and interest under the Professional Services Agreement to RPLP in exchange for 100,234 limited partnership units in

RPLP. JA-14, 43-44. Grigg signed the Contribution Agreement on behalf of RPC, and Keller signed on behalf of RPLP. JA-54, 55.

On December 19, 2005, the CRA consented to the assignment of the Professional Services Agreement to RPLP and the further assignment by RPLP to a wholly-owned subsidiary. JA-127, 140. RPLP thereafter assigned all of its right, title and interest in the Professional Services Agreement to Republic WPB LLC, which was a wholly owned subsidiary of Republic Property TRS, LLC, which itself was a wholly owned subsidiary of RPLP. JA-20, 127, 140. In March 2006, the CRA approved an amendment to the Professional Services Agreement for demolition and site clearance on the City Center project, for a fee of $36,366.96 to Republic WPB LLC. JA-20, 127.[7]

In April 2006, the CRA approved another amendment to the Professional Services Agreement, which provided for construction of the City Center project. JA-20, 140. This Amendment was never executed. JA-20, 141. Plaintiffs, however, allege that Republic WPB LLC performed unspecified services under the inoperative and unexecuted Amendment, entitling "RPT/Republic WPB [LLC]" to

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[7] Although the Amended Complaint alleges that Republic WPB LLC was never paid this fee, RPT and RPLP do not allege that Republic WPB LLC performed the work called for by this amendment or satisfied the conditions precedent to payment. JA-20. In the related Superior Court employment case, RPT originally

over $1 million in damages, JA-20, even though the Professional Services Agreement provided that the developer (Republic WPB LLC) was not to commence any services other than schematic design "until a written agreement for such services is executed by the parties." JA-119g.

C. RPC's Involvement in Other Development Opportunities in Florida and Its Unrelated Consulting Agreement with Liberti

In addition to the City Center development, RPC pursued various potential real estate development opportunities in other areas of southeastern Florida, outside of the City of West Palm Beach. In particular, RPC pursued a potential development opportunity for an undergraduate building and hospital at Florida Atlantic University. JA-63. In connection with this project, RPC engaged Dr. Raymond Liberti to perform consulting services relating to "the approval, planning, lobbying, funding, and awarding of [the potential] construction contract." *Id.* Kramer and Grigg had been introduced to Liberti, a member of the West Palm Beach City Commission and CRA, in 2004 by an attorney with a major Florida law firm who represented RPC and who was a former West Palm Beach City Administrator. JA-15. Beginning in November 2004, more than nine months before RPT and RPLP were formed, RPC retained Liberti as a consultant, initially

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claimed the $36,366.96 fee as an element of its damages against Grigg, but it later dropped that claim.

for a three-month term and continuing through May 2006 under extensions in January and April 2005 and January 2006. JA-15-16, 63-67. The parties explicitly agreed that Liberti would provide services related to projects "outside the City limits of West Palm Beach." JA-63. Plaintiffs have made no allegation that the consulting relationship between RPC and Liberti was unlawful.[8]

D. Liberti's Unrelated Criminal Charges and the Resulting Fallout

In an unrelated series of events months after RPC and RPLP entered into the Contribution Agreement, Liberti was criminally charged with fraud and corruption. JA-22. These charges did not involve the parties or facts in this case. JA-22. Liberti eventually pled guilty to these charges. JA-23.

All of Liberti's dealings with private entities became the subject of investigation, and RPC's relationship with Liberti became politically sensitive. JA-23. The City notified Republic WPB LLC of its intent to terminate the Professional Services Agreement, and the Mayor alerted federal and state prosecutors to RPC's payments to Liberti. A state grand jury investigated Liberti's dealings with RPC as part of a comprehensive review of all private parties doing

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[8] Although the Complaint uses the word "Illegal" once in a heading, JA-14, and elsewhere vaguely refers to "improper" conduct, it identifies no law that was violated by the consulting agreement. Indeed, the Complaint alleges only that RPC made payments to Liberti "while" he cast favorable votes as a member of the City Commission and CRA, not that the payments were a *quid pro quo* for his votes or were intended to influence his votes. JA-15.

business with the City of West Palm Beach. JA-23. No criminal charges were ever brought against RPC, Grigg or Kramer, and none were ever brought against Liberti with respect to his consulting relationship with RPC. JA-23.[9]

E. The Assignment of the Professional Services Agreement to the CRA

There has never been any finding, or any formal accusation, that RPC breached or was in default under the Professional Services Agreement. The Professional Services Agreement was never formally terminated.[10]

Rather, as of October 2006, Republic WPB LLC assigned all its rights and obligations under the Professional Services Agreement to the CRA in an Assignment and Assumption Agreement. JA-24, 144. In that Agreement, Republic WPB LLC "unconditionally release[d]" the CRA and the City of West Palm Beach from all claims, "including but not limited to those arising out of or related to the City Center Project and/or the Professional Services Agreement." JA-145. This

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[9] It has been publicly reported that CRA wanted to terminate the Professional Services Agreement irrespective of the events involving Liberti. *See* Thomas R. Collins, *W. Palm Commits Cash for Complex*, Palm Beach Post, June 27, 2006, at 1B (reporting that "[t]he city wanted to get out of the deal anyway, because City Center's private element has been eliminated and Republic was considered no longer necessary").

[10] The Agreement provided that the CRA could terminate the Agreement "for cause" if "the Developer materially violates any provisions of this Agreement or performs same in bad faith." JA-118.

unconditional release barred Plaintiffs from seeking reimbursement from the CRA for any fees earned and expenses incurred under the Professional Services Agreement (which Plaintiffs now seek in damages), despite the fact that the Agreement stated that the Developer was to be paid for services performed satisfactorily prior to any termination. JA-118.

SUMMARY OF ARGUMENT

The District Court correctly ruled that the RPLP units that RPC received in exchange for assigning to RPLP all its rights under the Professional Services Agreement are not securities within the meaning of the Exchange Act. Limited partnership units are not defined as securities by the Act, and therefore they are securities only if under the circumstances presented they are "investment contracts." The term "investment contract," as defined by the Supreme Court and this Court, applies only if the investor expects to profit predominantly from the efforts of others. *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946); *SEC v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996). Here, by contrast, RPC expected to profit from its ownership of RPLP units not based predominantly on the efforts of others but rather based on the efforts of its two co-owners, Kramer and Grigg, who were the Chairman (Kramer) and Vice-Chairman, President and Chief Development Officer (Grigg) of RPT, RPLP's parent. The District Court properly

followed the Supreme Court's instructions to look through corporate formalities and base its decision on the economic realities of the situation.

The judgment below also may be affirmed on the ground that Plaintiffs failed to plead any economic loss or loss causation. Plaintiffs' allegation that the rights under the Professional Services Agreement they acquired were "worth nothing" does not itself establish an economic loss. Under *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), an inflated purchase price is not alone sufficient to make out a cognizable loss, because the loss is not incurred until the alleged truth emerges and the purchased asset loses value in the purchaser's hands. Here, because RPLP transferred its rights under the Agreement to another entity (Republic WPB LLC) before it allegedly learned about RPC's relationship with Liberti in May 2006,[11] and because it does not allege facts showing it suffered a loss in that transaction, the Complaint does not satisfy the *Dura* standard.

Plaintiffs may contend that they suffered other forms of loss, including lost profits and lost payment for work allegedly performed under the Professional Services Agreement, but these forms of loss are not within the out-of-pocket

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[11] Defendants believe that RPT was aware of the Liberti consulting agreement before the Contribution Agreement was entered into, but that issue of fact is not before the Court at this juncture.

measure of damages and are not recoverable under Section 10(b). Moreover, even if such alleged losses were recoverable under Section 10(b), they are too speculative and attenuated from the Defendants' alleged conduct to establish loss causation (which is akin to proximate cause). The unforeseeable criminal charges brought against Liberti – and the reaction of the political establishment of West Palm Beach that allegedly led to the assignment to the CRA of the Professional Services Agreement — intervened in the causal chain.

The judgment below also may be affirmed on the ground that Plaintiffs failed adequately to plead scienter. Under *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 127 S.Ct. 2499 (2007), plaintiffs must plead facts that give rise to an inference of scienter that is cogent and at least as plausible as a competing inference of nonfraudulent intent. Here, the most reasonable inference is that Defendants had no intent to mislead Plaintiffs and were not extremely reckless that the alleged omission of information about Liberti could be misleading. Defendants were introduced to Liberti by a prominent Florida law firm; the consulting agreements were in writing and stated that they were for services outside West Palm Beach; and payments were made by check. Plaintiffs do not plead that RPC's payments to Liberti under the consulting agreement were a bribe given in exchange for his votes or even that they were intended to influence his votes, and

there have been no criminal charges and no formal accusations, much less findings, of wrongdoing in connection with the payments. The District Court's conclusion that the allegations of the Complaint gave rise to an appearance of impropriety that supports a strong inference of scienter was in error.

Finally, the District Court correctly held that RPT has no standing to sue because it was not a purchaser or seller of any securities. It was RPLP, not RPT, that issued the limited partnership units to RPC.

ARGUMENT

I. LEGAL BACKGROUND: SECTION 10(b) AND RULE 10b-5.

Section 10(b) of the Securities Exchange Act of 1934 provides that it is unlawful for any person "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] may prescribe." 15 U.S.C. § 78j(b).[12] Pursuant to Section 10(b), the SEC promulgated Rule 10b-5, which states that:

> [i]t 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) To employ any device, scheme, or artifice to defraud,

[12] The full text of Section 10(b) is reproduced in the Statutory Addendum.

> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

Although neither Section 10(b) nor Rule 10b-5 expressly provides for a private right of action, the courts have recognized such a private right for more than 50 years. The Supreme Court has observed, however, that from the "legislative acorn" of Section 10(b) and Rule 10b-5, private securities litigation has grown into "a judicial oak." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975). The Court has further recognized on repeated occasions that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Id.* at 739. *See also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80 (2006); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994). Accordingly, over the last 35 years, the Supreme Court has imposed important limitations on the private right of action under Rule 10b-5. Confining the scope of the private right of action to "narrow dimensions,"

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 774 (2008), is consistent with the recognition that "Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud," *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982).

Important limitations that are relevant to this case include the Supreme Court's holdings that Rule 10b-5 does not reach all breaches of fiduciary duty in connection with a securities transaction, *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 472 (1977); that scienter is required, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 (1976); that only purchasers and sellers of securities have standing to sue, *Blue Chip Stamps*, 421 U.S. at 731; and that loss causation must be established and requires more than an inflated purchase price, *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342 (2005).

In addition to limitations imposed by the Supreme Court, Congress also has enacted a series of strictures on private securities litigation. Many of these were included in the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). In particular, the PSLRA requires that "the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on

which that belief is formed." 15 U.S.C. § 78u-4(b)(1). The PSLRA also requires that where a particular state of mind is an element of a private claim, as here, "the complaint shall, with respect to each act or omission alleged to violate this [Act], state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* § 78u-4(b)(2).

In this case, Plaintiffs have no viable claim under Section 10(b) and Rule 10b-5 because (1) the RPLP units in question were not a "security" within the meaning of the Exchange Act; (2) Plaintiffs failed to plead economic loss or loss causation; and (3) Plaintiffs failed to plead a strong inference of scienter.

II. THE RPLP UNITS AT ISSUE WERE NOT SECURITIES.

In light of the Supreme Court's instructions and the economic realities of the transaction at issue, the District Court correctly concluded that the RPLP limited partnership units purchased by RPC were not securities. RPC's investment in RPLP was not the type of transaction regulated by the securities laws because the profit expected from the investment would be generated not predominantly from the efforts of others but rather largely from the efforts of RPC's own co-owners: Kramer and Grigg.

A. Limited Partnership Units Are Deemed "Securities" When Profits Are Predominantly Derived from the Efforts of Others.

The Exchange Act defines a security as

> 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, . . . 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. . .

15 U.S.C. § 78c(a)(10). Here, Plaintiffs acknowledge that "investment contract" is the only element of this definition that could apply to the partnership units at issue. *See* Pls.' Br. at 18.

In the seminal case of *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946), the Supreme Court held that an instrument constitutes an "investment contract" when it (1) involves an investment of money; (2) in a common enterprise; and (3) with the expectation that the profits come solely from the efforts of others. As opposed to common stock, which is the "paradigm of a security" and is thus "more susceptible of a plain meaning approach," *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 693 (1985), determining whether an instrument not specifically enumerated in the statutory definition constitutes an "investment contract" under the Exchange Act requires a close examination of the substance of the transaction. As the Supreme Court explained in *United Housing Foundation, Inc. v. Forman*, "[b]ecause securities transactions are economic in character Congress intended the

application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto." 421 U.S. 837, 849 (1975). Thus, when applying the *Howey* test, the Supreme Court teaches that "form should be disregarded for substance and the emphasis should be on economic reality." *Id.* at 848 (internal quotation mark omitted); *accord Howey*, 328 U.S. at 298.

Only the third prong of *Howey* is at issue here. Under the law of this Circuit, to qualify as an investment contract, "profits [must] be generated . . . 'predominantly' from the efforts of others . . . ." *SEC v. Life Partners, Inc.*, 87 F.3d 536, 545 (D.C. Cir. 1996); *accord SEC v. Banner Fund Int'l*, 211 F.3d 602, 615 (D.C. Cir. 2000). In this Court and others, many types of instruments have failed to meet this requirement, including limited partnership interests in circumstances similar to those presented here.[13]

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[13] *See, e.g., SEC v. Life Partners, Inc.*, 87 F.3d at 538 (viatical settlements); *Pamaco P'ship Mgmt. Corp. v. Enning*, 27 F.3d 563 (4th Cir. 1994) (table), *available at*, 1994 WL 273874 (interests in car washes); *Holden v. Hagopian*, 978 F.2d 1115, 1120 (9th Cir. 1992) (partnership interests); *Maritan v. Birmingham Properties*, 875 F.2d 1451, 1459 (10th Cir. 1989) (limited partnership interests); *Deutsch Energy Co. v. Mazur*, 813 F.2d 1567, 1570 (9th Cir. 1987) (interests in oil well leases and management contract); *Schultz v. Dain Corp*, 568 F.2d 612, 615 (8th Cir. 1978) (apartment building and management contract); *Lino v. City Investing Co.*, 487 F.2d 689, 695-96 (3d Cir. 1973) (franchise sale center licensing agreements); *David v. L.A. Presidential Mgmt II, L.P.*, No. Civ. A. 98-6556 2000 WL 1207157, *4 (E.D. Pa. Aug. 22, 2000) (limited partnership interests); *Endico v. Fonte*, 485 F. Supp. 2d 411, 414-15 (S.D.N.Y.) (limited liability company

In the context of limited partnership interests, courts have given effect to *Howey*'s third prong by examining the involvement of the investor in the management of the limited partnership – and thus by extension, his ability to influence the profitability of the limited partnership interests. *See Steinhardt Group Inc. v. Citicorp*, 126 F.3d 144, 152 (3d Cir. 1997) ("In analyzing this element, the courts have also looked at whether the investor has meaningfully participated in the management of the partnership such that it has more than minimal control over the investment's performance."). Where a limited partner is not involved in the management of the limited partnership, courts have held the partnership interest is a security.[14] On the other hand, where a limited partner is involved in the management of the limited partnership or its activities, courts have held the partnership interest is not a security.[15]

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interests); *Bamco 18 v. Reeves*, 675 F. Supp. 826, 831 (S.D.N.Y. 1987) (limited partnership interests).

[14] *See, e.g., Mayer v. Oil Field Sys. Corp.*, 721 F.2d 59, 65 (2d Cir. 1983) (limited partnership interest was a security where limited partners exercised no managerial control in partnership's affairs and there were considerable number of limited partners); *Rodeo v. Gillman*, 787 F.2d 1175, 1178 (7th Cir. 1986) (limited partnership interest was a security where limited partners did not exercise managerial control over limited partnership).

[15] *See, e.g., Steinhardt*, 126 F.3d at 154 (limited partnership interest not a security where limited partner had "pervasive control"); *Maritan*, 875 F.2d at 1459 (limited partnership interest in property development company not a security where investor, among other factors, demonstrated "active involvement"); *Frazier v.*

B. RPC Expected To Derive Profit from Its Investment in RPLP through the Entrepreneurial Efforts of Its Co-Owners, Kramer and Grigg.

The RPLP units RPC received in exchange for the Professional Services Agreement were not securities because the profits RPC expected from that investment would depend greatly on the activities of its co-owners – Kramer and Grigg – and were not expected to be generated predominantly by the efforts of others.

RPC is a close corporation in which Kramer has an 85% interest and Grigg has the remaining 15% interest. JA-10. There are no other shareholders. *Id.* As Plaintiffs acknowledged in the Complaint, both Kramer and Grigg have "the ability to and generally do[] control . . . the affairs of RPC." *Id.*

At the time RPC and RPLP entered into the Contribution Agreement and thereafter, Kramer and Grigg also had significant involvement in the management of RPLP through their positions in RPLP's general partner, RPT. As general partner, RPT was exclusively vested with "all management powers over the

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Manson, 651 F.2d 1078, 1081 (5th Cir. 1981) (limited partnership interest not a security where investor had power to exercise control over limited partnership); *David*, 2000 WL 1207157 at *4 (limited partnership interest not a security where investors, through a representative, "participated in all major decisions" regarding the venture and "intended to profit from [the representative's efforts]"); *Bamco*, 675 F. Supp. at 830 (limited partnership interest not a security where investor "had some control over the subject of its investment").

business and affairs of [RPLP] . . . ." Pls.' Br. at 21. Kramer and Grigg served as Chairman and Vice Chairman, respectively, of the Board of Trustees of RPT, and Grigg served as RPT's President and Chief Development Officer. JA-9-10. Moreover, at the time of RPT's initial public offering, Kramer and Grigg were collectively the company's largest shareholders, owning over 9% of the company. *See* Republic Property Trust, Registration Statement (Form S-11/A) (Dec. 14, 2005) at 14. RPT acknowledged in its registration statement that Kramer and Grigg each had "the ability to exercise significant control" over RPT and could "significantly influence the outcome of matters submitted for shareholder action," including "approval of significant corporate transactions" and "the determination of . . . day-to-day business decisions and management policies." *Id.* at 33. Finally, in addition to his role as RPT's Vice-Chairman of the Board, President and Chief Development Officer, Grigg was directly responsible for managing the City Center project both before and *after* the contribution of the project to RPLP. *Compare* JA-73 (designating Grigg as RPC's Project Manager under the Professional Services Agreement) *with* JA-136 (terms and provisions of Professional Services Agreement remain unmodified and in full force and effect following the transfer); *See also* JA-141 (denoting Grigg as President of Republic WPB LLC, the

subsidiary of RPLP to which RPLP assigned the Professional Services Agreement).[16]

These facts demonstrate that Kramer and Grigg were direct participants in the management and activities of RPLP through their positions and ownership interests in RPT. Indeed, in the case of Grigg, he was in charge of managing the City Center project. As a result, when RPC purchased the RPLP partnership units, it did not expect its profits to come predominantly from the "entrepreneurial or managerial efforts of others," *Forman*, 421 U.S. at 852 (emphasis supplied), but rather, as the District Court correctly recognized, "from the efforts of the REIT and by, extension, those of its trustees – including RPC's two co-owners." JA-169.

In their effort to overturn the District Court's ruling, Plaintiffs ignore the economic substance of the transaction and focus exclusively on the fact that *RPC* was the purchaser of the limited partnership units and *RPC* had no formal role in either RPT or RPLP. Plaintiffs' argument is misplaced.

First, the inquiry here is not whether the limited partnership units RPC purchased conferred the right to participate in the management of RPLP. *See* Pls.' Br. at 18-19 (collecting cases). In this case, control over the limited partnership –

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[16] The similarity in the names of these entities was not coincidental and demonstrates the interrelationship between the companies and degree of involvement expected and control intended to be exercised by Kramer and Grigg.

and thus influence over the success of RPC's investment in it – flows not from the limited partnership units, but from the position of RPC's co-owners in the general partner of RPLP. The "economic reality" of this transaction, *Howey*, 328 U.S. at 298, is that RPC could not (and did not) expect that its investment in RPLP would generate profit "predominantly" from the efforts of "others," *Life Partners*, 87 F.3d at 311, when RPC's own co-owners participated actively in the management of RPLP through their respective roles as Chairman and Vice-Chairman, President and Chief Development Office of RPLP's general partner.[17]

Second, Plaintiffs assert that the Court is not permitted to consider the roles of Kramer and Grigg in RPC, on the one hand, and in RPT and RPLP, on the other hand, in determining whether this transaction satisfies *Howey*. *See* Pls.' Br. at 22-25. Plaintiffs contend the District Court erred by "effectively pierc[ing] two corporate veils by looking beyond RPC to its owners—Kramer and Grigg—and beyond RPT to its management." Pls.' Br. at 22.

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[17] Plaintiffs' observation that Kramer and Grigg could have been removed from their positions within RPT, Pls.' Br. at 25, does not alter the analysis. What controls is the expectation of the parties at the time of the transaction concerning their roles, not whether those expectations are borne out. *See, e.g.*, *Endico*, 485 F. Supp. 2d at 415 n.16 ("Whether Endico was passive in fact is quite a different matter from the question whether he was expected at the time of the transaction to remain passive, which is the controlling standard.").

As an initial matter, Plaintiffs' argument confuses the notion of the liability of owners of an entity with the question of whether a transaction is an investment contract. The District Court did not pierce the corporate veil, in terms of imposing liability on Kramer and Grigg for the actions of RPC, but rather examined the economic realities of RPC's contribution. The state-law analysis for limited liability and piercing the corporate veil "does not necessarily equate to the threshold for finding a passive investor under federal securities laws." *Steinhardt*, 126 F.3d at 155.

In any event, this Court should decline Plaintiffs' invitation to ground its analysis on the corporate forms of the entities which purchased and sold the partnership interests. Indeed, *Howey* itself involved the examination of the impact of several different contracts as a whole. *See* 328 U.S. at 297-98 (holding that units in citrus grove development coupled with a contract for cultivating and marketing the fruit and remitting the proceeds to investors was an investment contract). The Supreme Court specifically rejected the argument that its analysis should be confined to the formalities of contract law and looked instead to the economic impact of the various contracts at issue. *Id.*

In accordance with the Supreme Court's teaching, courts applying the *Howey* test have traced a party's interest through a series of entities or contracts to

determine the true economic structure of the transaction. *See Steinhardt*, 126 F.3d at 153 (instructing that courts should "look at the transaction as a whole, considering the arrangements that the parties made" with each other). For example, in *Frazier v. Manson*, 651 F.2d 1078 (5th Cir. 1981), Frazier and Manson had formed a general partnership that became the general partner in a limited partnership that developed real estate. *See id.* at 1079-80. Frazier also held limited partnership units in the same entity. *See id*. Even though the partnership entity—*not* Frazier individually—was the general partner of the limited partnership, the court concluded that Frazier's "managerial rights" and "expected involvement in the management and profitability of the general partnership" were "sufficient to distinguish his status from that of a 'passive' investor" in the limited partnership. *Id.* at 1081. Thus, the court held that under *Howey* the limited partnership units at issue were not securities.

Similarly, in *Kravco Inc. v. Rodamco N. Am. N.V.*, No. 00-0272, 2000 WL 1839735, *18 (E.D. Pa. Dec. 13, 2000), the court examined the plaintiffs' interests in four different entities "to determine who is participating in the operation of the ultimate 'investment' vehicle." Mindful that the test required review of "the transaction as a whole, considering the arrangements that the parties [have] made with each other," *id.* at *4 (quotation marks omitted), the court analyzed a

complicated structure to determine whether the investors exercised control over the limited partnership at issue. Specifically, the court looked to the representation on the board of directors of the general partnership of the entity at issue. *Id.* at *5-6. Because the investors held three of the six seats on the board of directors of the general partner, their limited partnership units were not securities. *Id.*

Both *Frazier* and *Kravco* demonstrate that the analysis under *Howey* is not limited to the entity that made the formal purchase or sale of the instrument at issue.[18] In this case, the District Court correctly followed the same approach, examining not just that RPC purchased limited partnership units in RPLP, but that Kramer and Grigg, RPC's co-owners, had the ability to influence the success of that investment through their roles in RPLP's general partner.

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[18] *Darrah v. Garrett*, No. C 83-424 1984 WL 2422 (N.D. Ohio Mar. 14, 1984), also is instructive. There, the court held the investors' limited partnership interest was not an investment contract because the partnership's profits (and thus the value of the limited partnership interests) depended directly upon the profits of a corporation which was actively managed by the investors. While noting the corporation and the partnership were "distinct legal entities," the court examined the "economic realities of the financial relationship in issue" and found that the investors' "profits from the partnership depended upon the profits of the corporation, which, in turn, depended upon their efforts in performing their managerial functions" as officers of the corporation. *Id.* at *2-3. Thus, the transaction failed to satisfy the third prong of *Howey* because the investors had "extensive control over the profit and loss potential" of the corporation, and "in turn the profitability of their own investment" in the partnership. *Id.* at *3.

For all these reasons, the District Court correctly applied *Howey* and held the RPLP partnership units were not an "investment contract" under the Exchange Act.

C. The District Court's Conclusion is Consistent with the SEC's Treatment of UPREITs.

Plaintiffs attempt to invoke the SEC's treatment of operating partnership units in an UPREIT as securities to support their theories here, as they did before the District Court. *Compare* Pls.' Br. at 26-27, *with* Mot. for Recons. at 5-6. Notably, Plaintiffs do not assert that the SEC has spoken on this issue directly. *See* Pls.' Br. at 26 (stating merely that "the SEC also has treated operating partnership units as securities); *id.* at 27 ("The SEC's treatment of an instrument as a security is significant . . . .").

As the District Court noted, neither of the two sources cited by Plaintiffs directly addresses the issues presented here. *See* JA-185. The first, Order Approving NASD Proposed Rule Change Relating to Limited Partnership Rollup Transactions, Release No. 34-34533, 59 Fed. Reg. 43147 (Aug. 15, 1994), addressed UPREIT consolidation transactions, not the issuance of limited partnership units at issue here. *See* JA-185. The second source is a no-action letter and "pertains to a very different sort of transaction from that here," namely, the

solicitation of limited partners' approval of the merger of an UPREIT with another REIT. *Id.*[19]

There is no evidence that the SEC has considered the type of transaction at issue here in which the limited partnership unit holder was actively involved in the management of the partnership.[20]

D. Plaintiffs' Remaining Arguments Are Without Merit.

Plaintiffs advance four other arguments, all of which this Court can and should easily reject because none of them addresses the central inquiry of the *Howey* test.

First, Plaintiffs fault the District Court for "disregarding the terms of the partnership agreement." *See* Pls.' Br. at 20. Plaintiffs did not submit the partnership agreement to the District Court, and it is not in the record on appeal. It is, therefore, not a proper basis for argument, and any error by the District Court in

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[19] Of course, SEC no-action letters are entitled to only limited deference. These letters "constitute neither agency rule-making nor adjudication and thus are entitled to no deference beyond whatever persuasive value they might have." *MONY Group, Inc. v. Highfields Capital Management, L.P.*, 368 F.3d 138, 146 (2d Cir. 2004). Here, the letter has no persuasive value because it addresses a different factual situation.

[20] Plaintiffs also cite various commentators for general propositions concerning UPREITs, Pls.' Br. at 26, but none of these addressed the specific situation presented here.

not considering it would be invited error. *See, e.g., Wagner v. Taylor*, 836 F.2d 596, 599 (D.C. Cir. 1987).[21] In any event, Plaintiffs did quote from the Partnership Agreement in opposing the motions to dismiss, and there is no reason to believe that the District Court failed to consider their argument. The Partnership Agreement does not alter the result; while the name given to a transaction, the terms of an agreement, and the legal rights contained therein may be relevant under the *Howey* analysis, *see Landreth*, 471 U.S. at 686-87; *Steinhardt*, 126 F.3d at 153, the dispositive factor is the economic realities. *Forman*, 421 U.S. at 850 (while "a security might be shown by proving the document itself, which on its face would be a note, a bond, or a share of stock," the economic realities underlying a transaction govern (internal quotations omitted)). In the instant case, as in *Howey* itself, *see* 328 U.S. at 297-98, the economic realities require the Court to look beyond a single contract or document.

Second, the notion that limited partnership units in an UPREIT are the "economic equivalent" of the REIT's publicly traded shares, Pls.' Br. 16-18, 27-28, is irrelevant to the *Howey* test, as the District Court correctly recognized, JA-182, and would make a poor basis for determining what is an investment contract. The

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[21] As explained below, although the Court need not reach the point, the Partnership Agreement in its entirety contradicts Plaintiffs' position in significant ways. If the

one-for-one redemption ratio and parity in the cash distributions cannot transform the limited partnership unit into securities. If these characteristics were dispositive of when a limited partnership unit is a security, then the partnership could take itself outside the ambit of the securities laws simply by making limited partnership units redeemable on a 2-to-1 basis for REIT shares or by similarly altering the cash distributions.

Economic equivalence requires more than a similarity in the number of shares and units. Here, the economic attributes — in basic terms, the risks and rewards — of shares in RPT and units in RPLP are not equivalent. The rewards of units in an operating partnership of an UPREIT are tax deferral, *see* Pls.' Br. at 16; pooling of real estate assets and diversification, *see* Chadwick M. Cornell, Comment, *REITS and UPREITS: Pushing the Corporate Law Envelope*, 145 U. Pa. L. Rev. 1565, 1566-67 (1987); and, as discussed above, an active role in management of the operating partnership, for certain contributors, *see* pp. 24-36 *supra*. The rewards of shares in a REIT are similar to the rewards associated with stock ownership. *See* Peter M. Fass et al., *Real Estate Investment Trust Handbook* at 19 (2008-2009 ed.).

Court wishes to consider the agreement, Defendants will submit it to supplement the record on appeal.

Moreover, although the Court need not reach the point, Plaintiffs' general assertions about the convertibility of limited partnership units of an UPREIT into REIT shares, *see* Pls.' Br. at 16-18, 28, are not applicable to the RPLP-RPT structure here. The Partnership Agreement provides that a holder of an RPLP unit has the right to redeem the unit for a cash amount one year after it is issued; the redemption of units for shares in RPT is in the "sole and absolute discretion" of RPT itself. Accordingly, a limited partner may not freely convert its units into RPT shares, and the units are not the economic equivalents of shares.

<u>Third</u>, Plaintiffs assert that the parties themselves treated the RPLP units as securities. Pls.' Br. at 28-29. Even if this assertion were accurate, the subjective beliefs of the parties — or what is more properly characterized as precautions taken in the event that the units were considered securities — is no more dispositive than any of the formalities or labels offered by plaintiffs. *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990) ("In discharging our duty, we are not bound by legal formalisms, but instead take account of the economics of the transaction under investigation"). As the Supreme Court has said, no matter how the parties label a transaction, the economic realities govern. *See Forman*, 421 U.S. at 851 (rejecting the premise that instrument was a security "simply because the transaction is evidenced by something called a share of stock").

Fourth, in a last-ditch effort, Plaintiffs suggest that this issue is not appropriate for resolution on a motion to dismiss. *See* Pls.' Br. at 29-30. Such an inquiry is undoubtedly fact-intensive, *see SEC v. SG Ltd.*, 265 F.3d 42 (1st Cir. 2001), but the relevant facts here are all evident on the face of the Complaint and the documents incorporated by it. *See Jeanne Piaubert A.A. v. Sefroni,* 208 F.3d 221 (9th Cir. 2000)(table), *available at,* 2000 WL 194149, *3-4 (affirming in part the grant of a motion to dismiss on the issue of whether a limited partnership interest was a security). Plaintiffs have pointed to no further factual development that is needed to resolve this dispute because there is none.

In sum, the District Court properly concluded that the limited partnership units are not securities.

III. ALTERNATIVE GROUNDS SUPPORT THE JUDGMENT BELOW.

The District Court's judgment may be upheld on any alternative ground sufficient to support it. *See United States v. Amer. Ry. Express Co.*, 265 U.S. 425, 435 (1924); *Cody v. Cox*, 509 F.3d 606, 610 n.3 (D.C. Cir. 2007). Here, there are multiple alternative grounds, any one of which is sufficient to support the judgment below.

A. Plaintiffs Did Not Adequately Plead Economic Loss or Loss Causation.

Economic loss, transaction causation (often called reliance), and loss causation (akin to proximate causation) are all essential elements of a claim under Section 10(b). *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).[22] Here, Plaintiffs failed to plead that they suffered any economic loss or that any such loss was proximately caused by Defendants' conduct.

1. Plaintiffs Did Not Plead that they Suffered Any Loss in Light of RPLP's Transfer of the Services Agreement to Other Entities.

Plaintiffs fail to plead that they suffered any economic loss at all as a result of the alleged conduct, because RPLP (the only Plaintiff with standing to sue) disposed of its interest in the Professional Services Agreement before it allegedly learned of the Liberti relationship.

The normal measure of loss under Section 10(b) is out-of-pocket loss, which (in the case of an allegedly defrauded seller of securities) means the difference between the fair value of the security and the fair value of the consideration

[22] The loss-causation requirement is codified in the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(4) (plaintiff carries burden of proving that the defendant's conduct "caused the loss for which the plaintiff seeks to recover damages").

received for it.[23] Plaintiffs' only attempt to plead out-of-pocket loss is their allegation that the Professional Services Agreement was "worth nothing at the time it was assigned" because of "the relationship between RPC, Grigg, and Liberti." JA-27.

In *Dura*, however, the Supreme Court held that "an inflated purchase price will not itself constitute or proximately cause the relevant economic loss." 544 U.S. at 342.[24] That is because at the moment of the transaction, before the truth has been disclosed, the purchaser holds an asset that has equivalent value to what he paid for it and has not yet suffered any loss. *Id.* If the party sells the asset before the truth emerges, it, too, benefits from the alleged inflation and thus suffers no loss. *Id.*

Here, RPLP transferred its rights under the Professional Services Agreement, through a subsidiary, to yet another related entity, Republic WPB LLC, before RPLP allegedly learned of the Liberti consulting relationship. Under *Dura*, it thus presumptively benefited from the alleged inflation and suffered no loss. RPLP,

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[23] *See* 5E Arnold S. Jacobs, *Disclosure and Remedies Under the Securities Laws* § 20:7 (2009).

[24] Although this case involves allegations of fraud in a private transaction rather than the more typical allegation of fraud by a buyer of securities in an open market, the loss-causation rule, as interpreted in *Dura*, still applies. *See, e.g., McCabe v. Ernst & Young, LLP*, 494 F.3d 418, 425 & n.2 (3d Cir. 2007) (loss-causation requirement applies in "non-typical" as well as typical 10b-5 cases).

moreover, pleads no facts concerning the terms of this transfer, including no facts showing that it did not receive consideration commensurate with the value of the units it exchanged for the Professional Services Agreement. Accordingly, RPLP has not pleaded that it suffered any out-of-pocket loss based on acquisition of the Professional Services Agreement, let alone loss caused by the alleged nondisclosure.[25]

Faced with the paucity of the allegations of out-of-pocket economic loss in the Complaint, Plaintiffs opposed the motion to dismiss by arguing that they are entitled to recover other forms of damages, including purported lost future profits associated with the Professional Services Agreement and approximately $1 million purportedly due on work in progress.[26] While none of these is a recoverable element of loss under Section 10(b) (*see* Section III.A.2 *infra*), any lost profits or amounts owed for development work were incurred (if at all) by Republic WPB LLC, not Plaintiffs.

Plaintiffs cannot maintain suit to recover alleged losses suffered by Republic WPB LLC. As the District Court observed, JA-172, n.6, the general rule is that a parent corporation lacks standing to sue for injury to a subsidiary. *See EMI Ltd. v.*

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[25] As discussed in Section IV *infra*, RPT did not sell the RPLP units and thus has no standing.

[26] Pls.' Mem. in Opp. to Grigg's Mot. to Dismiss at 17.

Bennett. 738 F.2d 994, 997 (9th Cir. 1984); *USA Interactive v. Dow Lohnes & Albertson, P.L.L.C.*, 328 F. Supp. 2d 1294, 1310 (M.D. Fla. 2004); *Am. Towers, Inc. v. Town of Falmouth*, 217 F. Supp. 2d 154, 157 (D. Me. 2002); *Bross Utils. Serv. Corp. v. Aboubshait*, 618 F. Supp. 1442, 1444-45 (S.D.N.Y. 1985). "[A] corporation may not pierce its own veil . . . for its own benefit." *Payphone LLC v. Brooks Fiber Commc'ns*, 126 F. Supp. 2d 175, 179 (D.R.I. 2001). Plaintiffs offered no basis to depart from the general rule here.

2. The Damages Plaintiffs Seek Are Not Recoverable under Section 10(b).

In opposing the motions to dismiss in the District Court, Plaintiffs listed four elements of supposed loss: (1) the alleged termination of the Professional Services Agreement and the purported lost future profits associated therewith; (2) West Palm Beach's alleged refusal to pay Republic WPB LLC approximately $1 million purportedly owed for work in progress; (3) the costs associated with RPT's so-called "internal investigation"; and (4) RPT's costs and attorneys' fees incurred in this case.[27] None of these forms of damages is cognizable under Section 10(b).

[27] Pls.' Mem. in Opp. to Grigg's Mot. to Dismiss at 17. Even then, Plaintiffs said that "RPT and RPLP are not seeking recovery for all of these categories of damages on their Section 10-b claim . . . .," without identifying which damages they <u>are</u> seeking to recover under Section 10(b).

Damages under Section 10(b) are statutorily limited to "actual damages" under Section 28(a) of the Exchange Act. 15 U.S.C. § 78bb(a). That limitation has been interpreted to restrict plaintiffs to out-of-pocket loss in almost all cases. *See, e.g.,* 5E Arnold S. Jacobs, *Disclosure and Remedies Under the Securities Laws* § 20:7 (2009) ("The traditional measure of damages in 10b-5 actions is the out-of-pocket measure."); 4 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 12.12[2], at 187 (6th ed. 2009) ("In Rule 10b-5 cases, most courts have rejected a benefit-of-the-bargain measure of damages in lieu of an out-of-pocket measure. . . ." (footnote omitted)).[28] "'Out of pocket' loss does not include lost profits." *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.*, 910 F.2d 1540, 1552 (7th Cir. 1990). *Accord Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1437 n.2 (9th Cir. 1987), *overruled on other grounds by Hollinger v. Titan Capital Corp.,* 914 F.2d 1564, 1575 (9th Cir.1990) (en banc) ("The guiding

[28] While a benefit-of-the-bargain measure has been permitted in a small minority of cases, such a remedy would not be appropriate here. A benefit-of-the-bargain measure is available only where it does not result in speculation. *See Pelletier v. Stuart-James Co.*, 863 F.2d 1550, 1558 (11th Cir. 1989); *Harris v. Am. Inv. Co.*, 523 F.2d 220, 225 (8th Cir. 1975). Here, a lost-profits theory would be highly speculative, as it would presume profits from successful completion of a future contract (Amendment No. 3 to the Services Agreement) that had not been awarded at the time of the Contribution Agreement, that was never signed, and was in any event terminable at will by the City of West Palm Beach. In addition, a condition precedent to the granting of the contract was that it contain a guaranteed maximum

philosophy of the out-of-pocket theory of damages . . . is to award not what the plaintiff might have gained, but what he has lost by being deceived into the purchase" (internal quotation marks omitted)); *Three Crown L.P. v. Salomon Bros., Inc.*, 906 F. Supp. 876, 890 (S.D.N.Y. 1995) ("[A] plaintiff's lost future profits are not recoverable in Rule 10b-5 actions.").

In *Astor*, a similar case in which a plaintiff sought lost profits under Section 10(b), the Seventh Circuit made clear that where a plaintiff "cast [the transaction] as a securities transaction, . . . it gets the securities measure of damages." 910 F.2d at 1552. Having used federal securities law as "an entrée to federal court," the plaintiff "must take the bitter with the sweet." *Id.* Precisely the same conclusion applies as to Plaintiffs here — they have characterized their case as one under the securities laws, and they cannot escape the consequences of that decision for their damages theories.[29]

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price for the development, which, if exceeded, would have reduced or eliminated any potential profit.

[29] The other theories of loss Plaintiffs advanced in the District Court are all similarly flawed. Money owed for work performed should have been sought from the CRA, as the Professional Services Agreement provided for payment for services rendered prior to termination, or on a quantum meruit theory if nothing else. *See, e.g., Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 186 n.4 (Fla. 1995) (holding that lawyer who could not recover from client based on improper fee agreement could recover reasonable value of her services based on quantum meruit). The cost of an internal investigation does not meet any recognized theory of damages under Section 10(b). Attorneys' fees are not generally recoverable

3. The Allegation that Plaintiffs Would Not Have Entered the Transaction but for the Alleged Fraud Does Not Plead Loss Causation.

Plaintiffs allege that "[h]ad RPT and RPLP known of the nature of Grigg's and RPC's relationship with Liberti, RPT would not have caused RPLP to enter into the Development Contribution Agreement . . . ." JA-30. That allegation may suffice to plead transaction causation, but it does not plead loss causation, as the District Court correctly noted, JA-172 n.6.

"Transaction causation only requires allegations that but for the claimed misrepresentations or omissions, the plaintiff would not have entered into the detrimental securities transaction." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 106 (2d Cir. 2007) (quotation marks omitted). "Loss causation, by contrast, is the proximate causal link between the alleged misconduct and the plaintiff's economic harm." *Id.* Merely alleging that but for the Defendants' conduct, Plaintiffs would not have entered into the Contribution Agreement is insufficient to plead loss causation. *See, e.g., Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1495-96 (2d Cir. 1992) (affirming dismissal where plaintiffs alleged

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under Section 10(b). *See Cyrak v. Lemon*, 919 F.2d 320, 327 n.13 (5th Cir. 1990); 5E Arnold S. Jacobs, *Disclosure and Remedies Under the Securities Laws* § 21:69 (2009).

only "but-for" cause); *Bastian v. Petren Resources Corp.*, 892 F.2d 680, 686 (7th Cir. 1990) (same).

4. Plaintiffs' Alleged Damages Are Too Attenuated and Remote To Satisfy the Loss-Causation Requirement.

Even if Plaintiffs had adequately pleaded an economic loss and the law permitted them to recover lost profits and other collateral forms of alleged harm under the Professional Services Agreement, Plaintiffs' losses are far too attenuated to meet the loss-causation requirement. *See Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 174 (2d Cir. 2005) (relationship between plaintiff's loss and information misstated or concealed must be direct, not attenuated).

Consider the steps in the logical chain necessary to support Plaintiffs' position: (1) RPLP acquired rights under the Professional Services Agreement; (2) RPLP then apparently transferred those rights to a subsidiary, which then apparently transferred the rights to a further subsidiary, Republic WPB LLC; (3) Republic WPB LLC then allegedly undertook work under an unsigned contractual amendment, in apparent contravention of the Professional Services Agreement, JA-119g, which was, in any event, terminable at will by the CRA; (4) Republic WPB LLC was allegedly not paid for the work and failed to pursue any claim against the CRA for payment; (5) Liberti was charged with unrelated criminal conduct in May 2006; (6) it became the subject of newspaper comment that RPC had entered into

an unrelated consulting arrangement with Liberti in November 2004, prior to the formation of RPT, RPLP, and Republic WPB LLC; (7) the CRA, confronted with the news of Liberti's criminal charges, indicated its intention to terminate the Professional Services Agreement (an intention that was never realized); and (8) WPB assigned its rights under the Professional Services Agreement back to the CRA in October 2006 and unconditionally released the CRA from any claims. This chain is too tortuous — and embedded with too many uncertainties — to satisfy the loss-causation requirement.

A claim fails if factors other than the defendant's alleged fraud intervene to cause the loss. *See, e.g.*, *First Nationwide Bank Corp. v. Gelt Funding*, 27 F.3d 763, 769-70 (2d Cir. 1994). "[I]t is of course insufficient for a plaintiff to allege that the defendant incorrectly predicted the future, or that some unforeseen event occurred which rendered the investment worthless." *Pasternak v. Colonial Equities Corp. (In re Colonial L.P. Litig.)*, 854 F. Supp. 64, 94 (D. Conn. 1994). A plaintiff must allege facts showing that the loss resulted from the supposed fraud rather than from an unforeseen future event or other remote factors. *See, e.g.*, *Ventura v. Merrill Lynch & Co. (In re Merrill Lynch & Co. Research Reports Sec. Litig.)*, 568 F. Supp. 2d 349, 363 (S.D.N.Y. 2008) (dismissing claim where plaintiff

failed to allege facts showing that loss suffered due to drop in internet stock price was caused by fraud rather than the "bursting of the Internet bubble").

Here, the unrelated criminal charge against Liberti was an unforeseen and unforeseeable event that utterly changed the circumstances in which the parties found themselves. "Hindsight is always 20/20," but if the defendant "could not possibly have anticipated" the relevant turn of events, the claim must be dismissed. *AUSA Life Ins. Co. v. Ernst & Young*, 119 F. Supp. 2d 394, 402 (S.D.N.Y. 2000), *aff'd,* 30 F. App'x 677 (2d Cir. 2002). "[L]ack of clairvoyance simply does not constitute securities fraud." *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 53 (2d Cir. 1995).

Moreover, the risk that the Professional Services Agreement could be terminated at any time for any reason was evident on the face of the document. In a situation where some risks are disclosed and others allegedly concealed, "a plaintiff must allege . . . facts sufficient to support an inference that it was defendant's fraud — rather than other salient factors — that proximately caused plaintiff's loss . . . ." *Lentell*, 396 F.3d at 177. Plaintiffs, however, have pleaded no

facts showing that the alleged loss was caused by fraud rather than the coming to fruition of a disclosed risk.[30]

Thus, although the District Court ultimately did not need to decide this issue, Plaintiffs' failure adequately to plead economic loss and loss causation are fatal flaws, each of which independently supports the judgment below.

B. Plaintiffs Did Not Adequately Plead Scienter.

Plaintiffs' attempt to satisfy the stringent pleading requirements for scienter under the PSLRA fail. Plaintiffs' allegations fail to raise a strong inference of either intentional wrongdoing or extreme recklessness, but rather most readily give rise to an innocent inference. The District Court's holding that a potential appearance of impropriety is sufficient to plead scienter was incorrect.

Scienter is an essential element of Plaintiffs' claims under Section 10(b). Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Either intentional wrongdoing or "extreme recklessness" is required to meet this standard. *SEC v. Steadman*, 967 F.2d 636, 641 (D.C. Cir. 1992). "Extreme recklessness" is "not

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[30] In addition, to the extent Plaintiffs seek payment for fees or expenses incurred prior to what Plaintiffs contend was the termination of the Professional Services Agreement, their own independent decisions to perform work in the absence of the required signed contract and to release all claims against the City despite the Agreement's provision that pre-termination services would be paid for are intervening causes of the alleged loss.

merely a heightened form of ordinary negligence; it is an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Id.* at 641-42 (ellipsis in the original, internal quotation marks omitted).

In cases involving allegedly omitted information, "[t]he question is not merely whether the [defendant] had knowledge of the undisclosed facts; rather, it is the *danger of misleading buyers* [or sellers] that must be actually known or so obvious that any reasonable man would be legally bound as so knowing." *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 946 (7th Cir. 1989) (internal quotation marks omitted); *see also City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1260-61 (10th Cir. 2001).

Under the heightened standard imposed by the Private Securities Litigation Reform Act, a plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). The Supreme Court interpreted this standard in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007), to mean that "an inference of scienter must be more than merely plausible or reasonable — it must be cogent and

at least as compelling as any opposing inference of nonfraudulent intent." *Id.* at 2504-05.

Here, on the facts pleaded by Plaintiffs, the strongest available inference is that Defendants did not have the requisite scienter. Plaintiffs have not pleaded that any *quid pro quo* existed between RPC and Liberti; have not identified any law violated by the RPC-Liberti relationship; and have not pleaded (because they cannot) that there has been any official accusation, much less a finding, that the arrangement was unlawful. As reflected in the Complaint, the Defendants were introduced to Liberti by a major Florida law firm; the consulting contracts were in writing and stated they were for services outside of West Palm Beach; and payments were made by check. There is no allegation that Grigg or Kramer had any knowledge of Liberti's unrelated criminal conduct. And Grigg and Kramer had a significant ownership interest in the very entity (RPLP) that they allegedly defrauded, which refutes any notion of motive.

In sum, no facts pleaded in the Complaint suggest that Grigg or Kramer had reason to believe that RPLP would be materially misled by the alleged omission of the information concerning the RPC-Liberti arrangement. Rather, the facts pleaded most naturally lead to the inference that Grigg and Kramer believed the consulting arrangement was lawful, bore no relationship to the City Center project, was for an

immaterial amount of money that was not to be borne by RPLP, and thus would not be considered significant by RPLP.

The District Court concluded that the innocent inference discussed above was not compelling because the RPC-Liberti agreement, as alleged by Plaintiffs, suffered from an "appearance of impropriety" that gives rise to scienter even though "Grigg and Kramer may well have orchestrated the consulting agreement with Liberti in good faith, and all transactions may, in fact, have been above-board." JA-167. This holding was error.

The District Court presented no persuasive reason that the supposed appearance of impropriety — which the Defendants had no obligation to adopt — would have caused Grigg or Kramer to believe that RPLP would be materially misled at the time of the Contribution Agreement (before Liberti's unrelated criminal charges). The court below did not find that the Complaint's allegations showed that RPC in fact was in default under the Services Agreement, but rather only that "it would not be unreasonable under these circumstances to infer that RPC *might* be 'in default.'" JA-161. It is impossible to justify a finding of scienter — which requires intentional wrongdoing or extreme recklessness – based on a "not . . . unreasonable" inference that omitted information might have been viewed as significant.

The law relating to scienter does not require "[c]orporate officials [to] be clairvoyant." *See Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000). Indeed, many cases have held that scienter is lacking where defendants are faulted for failing to speculate as to potential consequences of their conduct. *See, e.g., In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 572 (6th Cir. 2004); *Acito*, 47 F.3d at 53-54; *In re Citigroup, Inc. Sec. Litig.*, 330 F. Supp. 2d 367, 380-82 (S.D.N.Y. 2004). In *Citigroup*, for example, the court found insufficient the plaintiffs' allegations that the CEO, CFO and investment-banking head of Citigroup knew of transactions with Enron that were not disclosed and led to litigation against the company (which was ultimately settled for $1.7 billion). Because the complaint was "devoid of facts establishing that [the officers] knew such transactions to be fraudulent or that [they] consciously disregarded a known risk," it failed to state a claim. 330 F. Supp. 2d at 381-82. The same conclusion is called for here.[31]

Finally, because Plaintiffs failed to plead scienter against either Kramer or Grigg, they also failed to plead scienter as to RPC. *See Southland Sec. Corp. v.*

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[31] The Complaint alleges that Kramer sent an email two days after Liberti cast a favorable vote in which he declared his fondness for Liberti and proposed entering into an exclusive employment relationship with him (JA-18), but that email undercuts any inference of scienter. If Defendants had intended a clandestine bribery scheme, why propose to hire Liberti as an employee of RPC, which would further publicize the affiliation? And if Liberti's only value was as a member of

INSpire Ins. Solutions, Inc., 365 F.3d 353, 366 (5th Cir. 2004) ("For purposes of. . . Rule 10[b-5] scienter we believe it appropriate to look to the state of mind of the individual corporate official or officials who make or issue the statement").

IV. RPT HAS NO STANDING TO SUE.

The District Court held that RPT has no standing to sue under Section 10(b) because it did not purchase or sell any securities in the transaction at issue. Although Liberty raises a half-hearted challenge to this holding on appeal, the District Court's holding was clearly correct.

In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the Supreme Court upheld the long-standing rule — known as the "*Birnbaum* rule" due to its adoption in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952) – that only parties who purchase or sell securities may maintain private suits under Section 10(b). 421 U.S. at 749.

The only alleged securities involved here were the RPLP units that changed hands pursuant to the Contribution Agreement. RPT, however, neither bought nor sold these units. Rather, RPLP issued the units to RPC. Accordingly, RPT has no standing to sue under Section 10(b).

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the CRA, why hire him as a full-time employee? The only reasonable inference is that Kramer believed the consulting relationship was lawful.

Plaintiffs muster only "*Cf.*" cites to two cases, neither of which assists their cause. The court in *Allard v. Arthur Andersen & Co. (USA)*, 924 F. Supp. 488, 495-96 (S.D.N.Y. 1996), stated in dicta, and without serious analysis, that "there is no reason to believe" that the holding in *Capri v. Murphy*, 856 F.2d 473 (2d Cir. 1988) — that general partners can be deemed sellers of limited partnership interests under Section 12(2) of the Exchange Act[32] — should not also apply under Section 10(b). This was dicta because the *Allard* court went on to hold that the plaintiff was not defrauded in connection with any purchase or sale of securities; rather, the plaintiff claimed that it properly received the proceeds of the securities transaction but those proceeds were subsequently embezzled. 924 F. Supp. at 496. In any event, the District Court in this case correctly concluded that *Capri* does not control here. *Capri* held that under certain circumstances, general partners could be *liable* as sellers of limited partnership interests, not that they could maintain a cause of action as *plaintiffs*. JA-158; *see also* 856 F.2d at 478.

Plaintiffs' other case, *Lawrence v. Cohn*, 932 F. Supp. 564 (S.D.N.Y. 1996), arose in the idiosyncratic context of will beneficiaries. As the District Court correctly analyzed, the *Lawrence* court recognized a form of derivative standing, which may apply in cases where those who actually bought or sold a security are

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[32] Former Section 12(2) is now Section 12(a)(2), 15 U.S.C. § 77*l*(a)(2).

among the wrongdoers. JA-159. Thus, in *Lawrence*, beneficiaries of a will were permitted to sue "on the estate's behalf" against the executor, who allegedly had fraudulently induced the beneficiaries to agree to a settlement in which the estate sold certain securities. 932 F. Supp. at 572-73. Here, RPLP is not disabled from suing for securities fraud and, indeed, it has done so. There is, therefore, no basis to bend the *Birnbaum* rule in order to permit RPT to do so as well.

CONCLUSION

For the reasons stated above, the judgment of the District Court should be affirmed.

Dated: March 19, 2009

Respectfully submitted,

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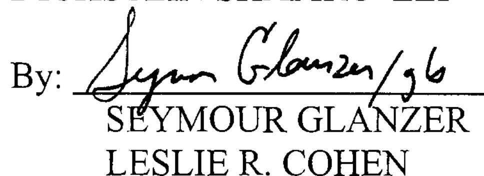
By: 
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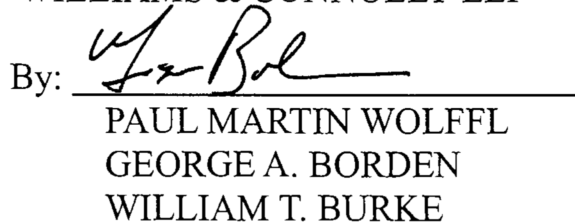
By: 
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CERTIFICATE OF COMPLIANCE

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 12,295 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

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George A. Borden

STATUTORY ADDENDUM

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15 U.S.C. § 78c(a)(10)

§ (a)(10) Definitions.

When used in this chapter, unless the context otherwise requires—

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

§ 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), 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) of this section 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) of this section 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) to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78o, 78p, 78t, and 78u-1 of this title, 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) to the same extent as they apply to securities.

CERTIFICATE OF SERVICE

I certify that on March 19, 2009, I caused to be served by hand two copies of Brief of Appellees on:

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