ORAL ARGUMENT HELD MAY 12, 2009

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-7095

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 THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, ON ISSUES ADDRESSED

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Defendants-Appellees' Petition for Rehearing or Rehearing En Banc and the Response of Plaintiffs-Appellants to Defendants-Appellees' Petition for Rehearing or Rehearing En Banc.

Rulings Under Review

References to the rulings at issue appear in the Brief of Appellees.

Related Cases

This case is before the Court on Defendants-Appellees' Petition for Rehearing and Rehearing En Banc of an August 21, 2009 decision of a panel of the Court. *Liberty Prop. Trust v. Republic Props. Corp.*, 577 F.3d 335 (D.C. Cir. 2009). A related case, *Grigg v. Liberty Prop. Trust*, No. 2006 CA 9051 B (Josey-Herring, J.), is pending before the Superior Court of the District of Columbia.

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GLOSSARY OF ABBREVIATIONS

Contribution Agreement	Agreement between RPC and RPLP whereby RPC contracted to contribute the Professional Services Agreement to RPLP in exchange for 100,234 limited partnership units in RPLP
IPO	Initial Public Offering of REIT stock
Partnership Agreement	First Amended and Restated Agreement of Limited Partnership of Republic Property Limited Partnership
Professional Services Agreement	Agreement between RPC and a municipality under which RPC would be paid to provide real estate development services to the municipality
REIT	Real Estate Investment Trust
RPC	Defendant-Appellee Republic Properties Corporation
RPT	Republic Property Trust, predecessor in interest to Plaintiff-Appellant Liberty Property Trust
RPLP	Republic Property Limited Partnership, predecessor in interest to Plaintiff-Appellant Liberty Property Limited Partnership
UPREIT	Umbrella Partnership Real Estate Investment Trust

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission is the agency principally responsible for the administration and enforcement of the federal securities laws. This *amicus curiae* brief is filed pursuant to the Court's invitation to respond to the defendants' petition for rehearing or rehearing en banc. The brief addresses questions relating to the definition of a "security."

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in this brief's Addendum.

BACKGROUND

A. REITS and UPREITS

This case involves a real estate investment trust, or "REIT," and associated umbrella limited partnership. A REIT is a "corporation or business trust combining the capital of many investors to own and, in most cases, operate income-producing real estate." Peter M. Fass, et al., *Real Estate Investment Trusts Handbook* § 1:1, at 3 (2006 ed.) ("*Handbook*"). In a conventional REIT, private investors transfer their real estate and other property directly to the REIT in exchange for shares. 1 Michael T. Madison, et al., *Law of Real Estate Financing*, REFINLAW § 4:29 (Westlaw). Such a transfer, however, may trigger tax liabilities for the transferors. Stuart M. Saft, *Commercial Real Estate Transactions*, CRETRANS § 4:36 (Westlaw). "The problem of immediate

taxation of property owners from a transfer of property to a REIT is solved by using an 'UPREIT.'" *Handbook* § 7:1, at 989.

In a typical UPREIT, the REIT holds all of its assets and conducts all of its business through an umbrella, or operating, limited partnership. David M. Einhorn, et al., *REIT M&A Transactions: Peculiarities and Complications*, 55 Bus. Law. 693, 695 (2000). Private investors contribute property to the operating partnership in exchange for limited partnership units, and, contemporaneously, the REIT sells stock to the public and contributes the proceeds of the offering to the partnership in exchange for a general partnership interest. 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). The transfers of property in exchange for units occur simultaneously with the initial public offering of REIT stock. Alvin L. Arnold, *Real Estate Investor's Deskbook*, REINVESTOR § 6.56 (Westlaw). Typically, each limited partnership unit is convertible after one year into a share of REIT stock or, at the REIT's option, into the cash value of a share of REIT stock. *Handbook* § 2:272, at 476-77, and § 7.1, at 990-91.

B. Relevant Facts

In this action under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, a REIT, together with its umbrella limited partnership that privately sold limited

partnership units, sued a corporation that purchased units, and that corporation's two owners, for alleged fraud. Defendants Richard L. Kramer and Steven A. Grigg and a third individual formed Republic Property Trust ("RPT"), predecessor in interest to plaintiff Liberty Property Trust, in anticipation of creating an UPREIT. *See* JA 9 ¶1, JA 11-12 ¶¶11-14. Before its initial public offering ("IPO") in December 2005, RPT established Republic Property Limited Partnership ("RPLP"), predecessor in interest to plaintiff Liberty Property Limited Partnership, as the operating partnership through which RPT (the REIT) would conduct the business (JA 9 ¶2). As is typical in the creation of an UPREIT, prior to the IPO for RPT's stock in December 2005, RPT, through RPLP, entered into a number of transactions whereby RPT contracted to acquire property and contracts in exchange for shares of RPT and units in RPLP (JA 12 ¶¶12-13).

In one of those transactions, in September 2005, defendant Republic Properties Corporation ("RPC"), which was wholly owned by Kramer and Grigg, entered into a "Development Services Rights Contribution Agreement" with RPLP (JA 13 ¶18). This "Contribution Agreement" provided that, "in connection with the IPO Transactions," RPC would contribute to RPLP, in exchange for 100,234 limited partnership units in RPLP (valued at $1.2 million), a preexisting "Professional Services Agreement" between RPC and a municipality under which RPC was paid to provide real estate development services to the municipality (JA

12-13 ¶15, JA 43-44). The Contribution Agreement conditioned the exchange on the closing of the IPO and provided that the units were to be issued simultaneously with the closing (JA 50, JA 51-52). When RPT completed its IPO on December 20, 2005, RPC contributed the Professional Services Agreement to RPLP and RPLP issued the limited partnership units to RPC (JA 14 ¶21).

RPLP's Partnership Agreement contained the provision—standard in UPREITs (see *supra* page 2)—entitling the limited partners, including RPC, to have each limited partnership unit converted after one year into either one share of REIT stock or the cash equivalent (at the REIT's option). *See Liberty Prop. Trust v. Republic Props. Corp.*, 570 F. Supp. 2d 95, 99 (D.D.C. 2008); First Amended and Restated Agreement of Limited Partnership of Republic Property Limited Partnership ("Partnership Agreement") art. I and § 8.6, *available at* http://www.sec.gov/Archives/edgar/data/1335686/000110465905058095/a05-16242_1ex10d1.htm. Also, the Partnership Agreement was a traditional limited partnership agreement that gave limited partners no managerial authority, while the sole general partner, RPT, would manage the partnership (and the business). *Liberty Prop. Trust v. Republic Props. Corp.*, 577 F.3d 335, 339 (D.C. Cir. 2009); Partnership Agreement §§ 7.1 and 8.2.

After facts surfaced that caused the municipality to terminate the Professional Services Agreement in October 2006, RPT and RPLP filed this action

alleging that RPC, Kramer, and Grigg committed securities fraud by failing to disclose those facts, which affected the Professional Services Agreement's value, at the time of the Contribution Agreement (JA 29 ¶¶103-105). The district court dismissed the complaint on the ground that the limited partnership units were not securities; a panel of this Court, with one judge dissenting, reversed.

SUMMARY OF ARGUMENT

The limited partnership units are securities because they are options or rights to purchase stock or the cash value of stock—items identified in the Exchange Act definition of a security. The units satisfy this part of the definition because they are convertible into REIT stock or the cash value of REIT stock.

Under the majority's view of the facts, the limited partnership units are also investment contracts under the test of *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946), which is whether an investment involves "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.*

ARGUMENT

I. The Limited Partnership Units are Securities Because They are Options or Rights to Purchase or Otherwise Acquire Securities or the Cash Value of Securities.

Section 3(a)(10) of the Exchange Act defines "security" to include any "stock," "any . . . option, or privilege on any security . . . (including any interest

therein or based on the value thereof)," and any "warrant or right to subscribe to or purchase, any of the foregoing." 15 U.S.C. § 78c(a)(10). In *One-O-One Enters., Inc. v. Caruso*, 848 F.2d 1283 (D.C. Cir. 1988) (R.B. Ginsburg, J.), this Court held that an "option to purchase stock" "is such a traditional securities instrument that its existence may be shown 'by proving the document itself' without any need 'to look beyond the characteristics of the instruments' and, specifically, without any need to apply the *Howey* test." *Id.* at 1288. The Court reached this conclusion by "attend[ing] to the presence in the [Exchange Act] definition of 'security' not only of the term 'option' but also of the phrase 'any . . . right to . . . purchase, any of the foregoing,' where 'the foregoing' includes 'stock.'" *Id.*

In *Caruso*, the Court held that a "contractual option to buy all of [a company's] stock established defendants' 'right to purchase' that stock," and that therefore the "option to purchase [the] stock was a security." *Id.* Similarly, the Partnership Agreement in this case, as is typical for an UPREIT, gave holders of limited partnership units the right to acquire REIT stock by redeeming their units for shares. The limited partnership unit is a security, therefore, because it contains a contractual option to acquire a security. *See also Lawrence v. Cohn*, 932 F. Supp. 564, 578 (S.D.N.Y. 1996).

Caruso cannot be distinguished on the ground that the option in that case gave the holder the right to *purchase* stock and the limited partnership units here

give limited partners the right to *redeem* the units for stock. Section 3(a)(13) of the Exchange Act provides that the "terms 'buy' and 'purchase' each include any contract to buy, purchase, or *otherwise acquire*." 15 U.S.C. § 78c(a)(13) (emphasis added). The right to acquire stock, therefore, satisfies the definition of a security in Section 3(a)(10) of the Exchange Act.

The fact that here, as is typical in UPREITs, the REIT had the choice to give holders of the units the cash value of the REIT stock, rather than the stock itself, does not undermine the conclusion that the limited partnership units are securities. An option on the *value* of a security is also itself a security. In *Caiola v. Citibank, N.A.*, 295 F.3d 312 (2d Cir. 2002), the Second Circuit, agreeing with the view expressed by the Commission in an *amicus* brief filed in that case, held that "cash-settled over-the-counter options on the value of a security are covered by Section 10(b)." *Id*. at 325. Section 3(a)(10) of the Exchange Act provides that the term "security" includes an "option . . . on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof)." 15 U.S.C. § 78c(a)(10). Therefore, "the right to take possession does not define an 'option' under Section 3(a)(10), which covers options that can be physically delivered as well as those that cannot," 295 F.3d at 326, and there is "no textual basis for reading section 3(a)(10) to define 'option' as including only transactions that give the holder the right to receive the underlying securities," *id*.

at 327. Accordingly, "options based on the value of a security are . . . securities." *Id*. at 327 n.7.

In sum, the limited partnership units in this case are securities because they give unit holders the right to acquire either REIT stock, which renders each unit an option to acquire a security, or the cash value of REIT stock, which renders each unit an option based on the value of a security.

This conclusion comports with the Commission's historical treatment of limited partnership units in the operating partnership of an UPREIT as securities. For example, in adopting rules regarding limited partnership roll-up transactions, "the SEC, by way of footnote, made it clear that the typical UPREIT transaction could not avail itself of the exclusion from the definition of a rollup" for transactions that "involve[] only issuers . . . that are not required to register or report under Section 12 of the 1934 Act both before and after the transaction." *Handbook* § 2:260, at 464 (citing *Limited Partnership Roll-Up Transactions*, Exchange Act Rel. No. 35036 (Dec. 1, 1994), 1994 WL 669982, at *3 n.33). In the footnote, the Commission stated that "if a transaction involves the issuance of a security that, after the transaction, would be convertible into a security of an issuer that is required to register or report under Section 12, this exclusion would not be available since the transaction would not involve only non-Section 12 issuers." 1994 WL 669982, at *3 n.33. The footnote's reasoning demonstrates

that the Commission considers the issuance of limited partnership units in the operating partnership of an UPREIT, which may be converted into REIT stock, to "involve[] the issuance of a security." 1/

II. Under the Majority's View of the Facts, the Limited Partnership Units are Securities Because They are Investment Contracts.

The panel majority, noting that Section 3(a)(10) of the Exchange Act defines "security" to include an "investment contract," analyzed "whether the limited partnership units in this case are investment contract[s]" under "the test of *SEC v. W.J. Howey Co.*, 328 U.S. at 298-99." 577 F.3d at 339. As the majority opinion stated, the Supreme Court, in *Howey*, held an investment contract to be "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.* (quoting *Howey*, 328 U.S. at 298-99). "The courts of appeals have been unanimous in declining to give literal meaning to the word 'solely' in this context," *SEC v. SG Ltd.*, 265 F.3d 42, 55 (1st Cir. 2001), and, as the majority stated, 577 F.3d at 339, this Court has repeatedly treated this test as met when profits are generated predominantly from the efforts of others, *e.g., SEC v. Int'l*

1/ Leading commentators also recognize that UPREIT limited partnership units are securities. *See Handbook* § 2:260, at 462; Jack H. McCall, *A Primer on Real Estate Trusts: The Legal Basics of REITS*, 2 Transactions: Tenn. J. Bus. L. 1, 11 (2001); M. Guy Maisnik, *Basic Issues in Exchanging Property Interests for UPREIT OP Units*, 468 PLI/Real 401, 406 (2001).

Loan Network, Inc., 968 F.2d 1304, 1308 (D.C. Cir. 1992). In this case, the only aspect of the *Howey* analysis the dissent argues is lacking is the expectation that profits will come predominantly from the efforts of others, because, the dissent contends, Kramer and Grigg, who owned purchaser RPC, also controlled RPT, the general partner that would manage the business.

As the majority recognized here, a traditional limited partnership interest (in a limited partnership not associated with a REIT and without a redemption-for-shares feature) "generally is a security" in the form of an investment contract "because such an interest involves an investment in a common enterprise with profits to come primarily from the efforts of others." 577 F.3d at 339 (internal quotation marks and citations omitted). 2/ The majority held that profits from the limited partnership units in this case were expected to come predominantly from the efforts of others because after its IPO in December 2005, RPT, which controlled RPLP, had additional trustees and executive officers, and Kramer's and Grigg's votes were a minority of the board. *Id.* at 341. The majority opinion

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2/ *Accord Williamson v. Tucker*, 645 F.2d 404, 423 (5th Cir. 1981) (observing that "a limited partnership [interest] . . . has long been held to be an investment contract"); 3 Harold S. Bloomenthal, *Securities & Federal Corporate Law* § 2:38, at 2-92 (2001) ("Since, in order to achieve limited liability for the limited partners, it is essential that they not participate in management, the investment contract approach ordinarily results in classification [of a limited partnership interest] as a security. These interests have generally been regarded by the Commission and courts as securities.")

concluded, based on this economic reality analysis, that after the IPO "Kramer and Grigg did not exercise sufficient control of the limited partnership to disqualify their units as securities." *Id.* at 340-41.

The dissent focused on control of RPT at the time the "Contribution Agreement [was] executed on September 23, 2005, when Kramer and Grigg were two of only three trustees." *Id.* at 343 n.*. The majority held in the alternative, however, that "the analysis does not change if we consider the trust at the time the Contribution Agreement was signed in September 2005" because even at that earlier time Kramer and Grigg expected that the business would operate with the additional trustees to be added at the time of the IPO in December 2005. *Id.* at 341.

The Commission agrees with the majority that, whether one looks at September or December, determining whether the purchaser of the units, RPC, expected its financial return to come primarily from the efforts of others must focus on managerial control of the business as it was expected to operate. *SEC v. Edwards*, 540 U.S. 389, 395 (2004) (stating that the "'touchstone'" of an investment contract is "'an investment in a common venture premised on a reasonable *expectation* of profits to be derived from the entrepreneurial or managerial efforts of others'") (emphasis added) (quoting *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 (1975)). In the case of an

UPREIT, this means the expectations as to how the business will operate after the completion of the IPO because, in an UPREIT, limited partnership units are not issued, and the business does not begin operating, until after the IPO's closing. The closing of the IPO is a condition of the issuance of the units and the time at which the proceeds of the offering are contributed to the partnership to enable the business to operate. In this case, the Contribution Agreement expressly provided (as is typical in such agreements in anticipation of creating an UPREIT) that the parties' obligations under the agreement were subject to the closing of the IPO, and that if the IPO did not close the agreement would be terminated and would be "of no further force and effect" (JA 50, JA 52). Any profits to be generated from the limited partnership units were expected to come only from operation of the business after the IPO.

As noted above, the majority held that the presence of the independent trustees and executive officers demonstrated that Kramer and Grigg did not exercise sufficient control after the IPO to exclude their limited partnership units from the scope of an investment contract. The Commission assumes the correctness of the majority's conclusion that Kramer and Grigg did not exercise sufficient control at this time and takes no position on whether or not that was a correct reading of the allegations of the complaint.

Earlier in its opinion, the majority appears to have held that the limited partnership units were investment contracts based on the Partnership Agreement's legal rights alone, without regard to the economic reality regarding control of the business. 577 F.3d at 339-40. The Commission disagrees with the majority's statement that, in deciding whether an interest is an investment contract, "'the *legal* rights and powers enjoyed by the investor' should be the touchstone of [the] analysis." 577 F.3d at 339 (quoting *Steinhardt Group, Inc. v. Citicorp.*, 126 F.3d 144, 153 (3d Cir. 1997)). That approach is inconsistent with *Howey*. In *Howey*, a contract to purchase a fee simple interest in land and a service contract to grow crops on the land—documents that alone gave investors control of their property and its use—nonetheless were held to be an investment contract when viewed together and in the context of surrounding circumstances, including the promoter's representations. In cases where, as in *Howey* but unlike here, formal documents purport to give investors legal control of the enterprise—while in fact investors' powers are illusory and the promoters retain practical control—the Commission and the courts have long recognized that the formal documents are not the focus of the analysis. *See, e.g., SEC v. Merchant Capital LLC*, 483 F.3d 747, 756-57 (11th Cir. 2007) (agreeing with the Commission that the *Howey* analysis is not limited to partnership documents); *SEC v. Aqua-Sonic Prods. Corp.*, 687 F.2d 577, 584 (2d Cir. 1982) (stating that "it would be incongruous to attach decisive significance to

mere legal formality when the Court [in *Howey*] explicitly refused to be bound by 'the legal terminology in which such contracts are clothed'") (quoting *Howey*, 328 U.S. at 300); *see also Edwards*, 540 U.S. at 393 (stating that the definition of investment contract "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits"); *Forman*, 421 U.S. at 848 (stating that "'form should be disregarded for substance and the emphasis should be on economic reality'") (citation omitted).

The majority's reference to legal rights under the documents being the "touchstone" of the investment contract analysis can be read, however, as limited to cases like this one where the limited partnership agreement itself gives unit holders no managerial authority. 577 F.3d at 340-41 n.2. According to the majority opinion, "[n]either party argues that the limited partnership units purchased by the corporation granted legal rights to control the limited partnership." 577 F.3d at 339. Partnership agreements for operating partnerships of UPREITs ordinarily, as here, are traditional limited partnership agreements that give limited partners no managerial authority—such authority is given to the REIT itself, the general partner of the limited partnership. Arguably, in such cases, where the documents give limited partners no managerial authority, an analysis that looks only to the legal rights of the parties could be appropriate. It is

unnecessary, however, to decide whether the majority's analysis based on the Partnership Agreement alone is correct under *Howey* and other Supreme Court decisions, and the Commission takes no position on that issue, because the majority also held, as noted above, that the limited partnership units were investment contracts based on the economic reality of the transaction.

CONCLUSION

For the foregoing reasons, the Court should rule in accordance with the positions urged in this brief.

Respectfully submitted,

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December 2009

CERTIFICATE OF COMPLIANCE

In compliance with the Court's October 5, 2009 order, I certify that the Brief of the Securities and Exchange Commission, Amicus Curiae, on Issues Addressed, does not exceed fifteen pages.

/s/ Benjamin L. Schiffrin
BENJAMIN L. SCHIFFRIN

STATUTORY ADDENDUM

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Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10)

(a) 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 security 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.

Section 3(a)(13) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(13)

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

(13) The terms "buy" and "purchase" each include any contract to buy, purchase, or otherwise acquire. For securities futures products, such term includes any contract, agreement, or transaction for future delivery.

Section 10(b) of the Securities Exchange Act of 1934,
15 U.S.C. § 78j(b)

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—

(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) 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) to the same extent as they apply to securities. Judicial precedents decided under section 17(a) of the Securities Act of 1933 and sections 9, 15, 16, 20, and 21A 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.

Rule 10b-5 under the Securities Exchange Act of 1934,
17 C.F.R. § 240.10b-5

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) To employ any device, scheme, or artifice to defraud

(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 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.

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2009, I caused a copy of the Brief of the Securities and Exchange Commission, Amicus Curiae, on Issues Addressed to be served via e-mail on George A. Borden, counsel for Appellees Republic Properties Corporation and Richard L. Kramer; Leslie R. Cohen, counsel for Appellee Steven A. Grigg; and Mark Earl Nagle, counsel for Appellants Liberty Property Trust and Liberty Property Limited Partnership, by filing the brief with the Clerk of Court using the CM/ECF system.

/s/ Benjamin L. Schiffrin
BENJAMIN L. SCHIFFRIN