11-12510-DD

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellant,
v.
KENNETH R. KRAMER,
Defendant-Appellee,
and
SKY WAY GLOBAL LLC (A.K.A. SKY WAY GLOBAL, INC.),
BRENT C. KOVAR, GLENN A. KOVAR, JAMES S. KENT,
KENNETH BRUCE BAKER (A.K.A. BRUCE BAKER),
Defendants.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division

OPENING BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLANT

MARK D. CAHN
General Counsel

ANNE K. SMALL
Deputy General Counsel

JACOB H. STILLMAN
Solicitor

RANDALL W. QUINN
Assistant General Counsel

DAVID LISITZA
Senior Counsel

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
(202) 551-5015 (Lisitza)

SEC v. Kramer, No. 11-12510-DD

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and the Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for Appellant Securities and Exchange Commission certify that the following persons and entities have or may have an interest in the outcome of this case:

Baker, Kenneth Bruce (also known as Bruce Baker, defendant)

Berlin, Amie Riggle (trial attorney for Plaintiff-Appellant)

Carlson, James Michael (trial attorney for Plaintiff-Appellant)

Cahn, Mark D. (attorney on appeal for Plaintiff-Appellant)

Grilli, Peter John (trial mediator)

Kent, James S. (defendant)

Kramer, Kenneth R. (Defendant-Appellee)

Kovar, Brent C. (defendant)

Kovar, Glenn A. (defendant)

Lisitza, David (attorney on appeal for Plaintiff-Appellant)

McCoun III, Thomas B. (Magistrate Judge)

Merryday, Steven D. (U.S. District Court Judge)

SEC v. Kramer, No. 11-12510-DD

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT (CONTINUED)

Panahi, Drew Douglas (trial attorney for Plaintiff-Appellant)

Quinn, Randall W. (attorney on appeal for Plaintiff-Appellant)

Sacher, Barton S. (trial attorney for Defendant-Appellee)

Sacher, Joseph A. (trial attorney for Defendant-Appellee)

Securities and Exchange Commission (Plaintiff-Appellant)

Sky Way Global LLC (also known as Sky Way Global, Inc., defendant)

Small, Anne (attorney on appeal for Plaintiff-Appellant)

Stillman, Jacob H. (attorney on appeal for Plaintiff-Appellant)

Dated: August 19, 2011

_____

David Lisitza

Securities and Exchange Commission

STATEMENT REGARDING ORAL ARGUMENT

The Securities and Exchange Commission, appellant, requests oral argument. *See* Fed. R. App. P. 34(a). Oral argument would assist the Court in addressing the important legal issue of the meaning of the term "broker" under the federal securities laws.

TABLE OF CONTENTS

PAGE

CERTIFICATE OF INTERESTED PERSONS AND

CORPORATE DISCLOSURE STATEMENT C-1

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF AUTHORITIES vi

STATEMENT OF JURISDICTION 1

ISSUE PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 2

I. NATURE OF THE CASE 2

II. STATUTORY FRAMEWORK.....3

III. FACTS.....5

A. Kramer was not registered as a broker. 5

B. Kramer told potential investors that Skyway was "a good investment" and "a good deal," and directed their attention to Skyway's web site and press releases. Some of these people then purchased Skyway shares, and some told additional persons about Skyway, who in turn purchased Skyway shares. 5

TABLE OF CONTENTS (CONTINUED)

PAGE

C. Kramer earned compensation based on the number of Skyway shares that each person he told about Skyway bought. Where persons that Kramer told about Skyway told additional persons about Skyway, Kramer also earned compensation based on the number of Skyway shares bought by those additional persons.....7

D. From 2003 to 2005, Kramer earned shares ultimately worth $700,000 as compensation for his activities with regard to Skyway stock transactions.....9

IV. PROCEEDINGS BELOW.....10

A. The Commission's complaint and pre-trial proceedings.....10

B. The district court's grant of judgment to Kramer.....12

SUMMARY OF ARGUMENT.....16

STANDARD OF REVIEW.....18

TABLE OF CONTENTS (CONTINUED)

PAGE

ARGUMENT 20

The district court erred in concluding that Kramer's conduct did not qualify Kramer as a "broker" under Section 3(a)(4)(A) whose failure to register violated Section 15 20

A. "Broker" is construed broadly based on the presence of factors that indicate broker conduct because requiring registration of the intermediaries between investors and the securities markets protects those investors. 20

B. In view of the district court's findings that Kramer solicited investors, and received transaction-based compensation, and thereby participated in a number of securities transactions over two years, the district court erroneously concluded that Kramer was not a broker. 22

1. Kramer's soliciting securities transactions strongly indicates that Kramer is a broker. 23

2. Kramer's receipt of transaction-based compensation strongly indicates that Kramer is a broker. 26

3. Kramer's regularity of participation in securities transactions strongly indicates that Kramer is a broker. 33

TABLE OF CONTENTS (CONTINUED)

PAGE

C. The district court found that Kramer was not a "broker" based on erroneous legal conclusions. 35

1. The district court erred in relying on the fact that the investors Kramer solicited were his "friends" and family. 35

2. The district court erroneously reasoned that the presence of other brokers at different points in the chain of distribution of securities meant that Kramer could not also be a "broker." 40

3. The district court erroneously treated any factor regarding broker conduct that was not present as a factor that suggested the absence of Kramer's broker conduct. 43

CONCLUSION 45

CERTIFICATE OF COMPLIANCE 46

CERTIFICATE OF SERVICE 47

STATUTORY ADDENDUM 48

Section 15 of the Exchange Act, 15 U.S.C. 78o [excerpt] 48

Section 3(a)(4)(A) of the Exchange Act, 15 U.S.C. 78c(a)(4)(A) 49

TABLE OF AUTHORITIES

PAGE

Bonner v. City of Pritchard, Ala., 661 F.2d 1206 (11th Cir. 1981).....3

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837, 104 S. Ct. 2778 (1984) 18, 28

Cornhusker Energy Lexington, LLC v. Prospect Street Ventures,
No. 04-586, 2006 WL 2620985 (D. Neb. Sept. 12, 2006) 26, 27, 30, 31

DeHuff v. Digital Ally, Inc., No. 01-00116,
2009 WL 4908581 (S.D. Miss. 2009) 44

E. Remy Martin & Co. v. Shaw-Ross Intn'l Imports, Inc.,
756 F.2d 1525 (11th Cir. 1985) 18

Eastside Church of Christ v. National Plan, Inc.,
391 F.2d 357 (5th Cir. 1968) 3, 20, 21

Jaramillo v. INS, 1 F.3d 1149 (11th Cir.1993).....19

Mass. Fin. Servs., Inc. v. SIPC, 545 F.2d 754 (1st Cir. 1976).....19

Morrison v. Magic Carpet Aviation, 383 F.3d 1253 (11th Cir. 2004) 18

Renteria-Marin v. Ag-Mart Produce, Inc., 537 F.3d 1321
(11th Cir. 2008) 18

Roth v. SEC, 22 F.3d 1108 (D.C. Cir. 1994) 21, 43

TABLE OF AUTHORITIES (CONTINUED)

PAGE

SEC v. Benger, 697 F. Supp. 2d 932 (N.D. Ill. 2010) 27, 30, 42, 43

SEC v. Bravata, No. 09-12950,

2009 WL 2245649 (E.D. Mich. July 27, 2009).....33, 44

SEC v. Corporate Relations Group, Inc., No. 99-1222, 2003 WL 25570113

(M.D. Fla. Mar. 28, 2003) 24, 25, 27, 28, 32, 34, 41, 42

SEC v. Dowdell, No. 01-00116, 2002 WL 424595 (W.D. Va.. 2002) 43

**SEC v. George*, 426 F.3d 786 (6th Cir. 2005) 24, 27, 33, 43, 44

SEC v. Hansen, No. 83-3692,

1984 WL 2413 (S.D.N.Y. April 6, 1984).....30

**SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1 (D.D.C. 1998).....4, 33, 34

SEC v. Martino, 255 F. Supp. 2d 268 (S.D.N.Y. 2003) 33

**SEC v. U.S. Pension Trust Corp.*, No. 07–22570, 2010 WL 3894082

(S.D. Fla. Sept. 30, 2010) 24, 25, 27, 28, 34, 44

SEC v. Rabinovich & Associates, LP, No. 07-10547,

2008 WL 4937360 (S.D.N.Y. Nov. 18, 2008) 30

---

* Indicates citations upon which the Commission primarily relies.

TABLE OF AUTHORITIES (CONTINUED)

PAGE

SEC v. Zandford, 535 U.S. 813, 122 S. Ct. 1899 (2002).....18, 19

Thomas Jefferson University v. Shalala, 512 U.S. 504,
114 S. Ct. 2381 (1994).....19

United States v. Elliott, 62 F.3d 1304 (11th Cir. 1995).....19. 28

United States v. Fleet, 498 F.3d 1225 (11th Cir. 2007).....36

United States v. Johnson, 529 U.S. 53, 120 S.Ct. 1114 (2000).....36

United States v. Mead Corp., 533 U.S. 218, 121 S. Ct. 2164 (2001).....18

University of Georgia Athletic Ass'n v. Laite, 756 F.2d 1535
(11th Cir. 1985) 18

Warfield v. Alaniz, 569 F.3d 1015 (9th Cir. 2009) 3, 36

TABLE OF AUTHORITIES (CONTINUED)

PAGE

STATUTES AND RULES

Securities Act of 1933, 15 U.S.C. 77a, *et seq*.

Section 5, 15 U.S.C. 78e.....11

Section 17(a), 15 U.S.C. 77q(a).....11

Section 20, 15 U.S.C. 77t 1

Section 22(a), 15 U.S.C. 77v(a).....1

Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq*.

*Section 3(a)(4)(A), 15 U.S.C. 78c(a)(4)(A) ..... 3, 4, 10, 12, 19, 20, 23, 24, ... 26, 30, 33, 35, 37, 38, 44, 49

Section 3(a)(4)(B), 15 U.S.C. 78c(a)(4)(B).....36

Section 3(a)(39), 15 U.S.C. 78c(a)(39) 22

Section 10(b), 15 U.S.C. 78j(b).....11

Section 13(a), 15 U.S.C. 78m(a) 11

*Section 15(a), 15 U.S.C. 78o(a)..... 3, 4, 10, 11, 12, 20, 24, 25, ... 34, 36, 37, 39, 40, 41, 42, 44, 48

Section 15(b)(4), 15 U.S.C. 78o(b)(4).....22

Section 15(b)(6), 15 U.S.C. 78o(b)(6).....22

TABLE OF AUTHORITIES (CONTINUED)

PAGE

Section 15(b)(8), 15 U.S.C. 78o(b)(8).....22

Section 15(c), 15 U.S.C. 78o(c).....22, 39

Section 21, 15 U.S.C. 78u 1

Section 27, 15 U.S.C. 78aa.....1

Section 3(a)(2) of the Securities Investor Protection Act of 1970,

15 U.S.C. 78ccc(a)(2) 22

Rules under the Securities Exchange Act of 1934, 17 C.F.R. 240.0-1, *et seq*.

Rule 10b-5, 17 C.F.R. 240.10b-5 11

Rule 10b-10, 17 C.F.R. 240.10b-10 32

Rule 12b-20, 17 C.F.R. 240.12b-20 11

Rule 13a-11, 17 C.F.R. 240.13a-11.....11

Rule 15c1-2, 17 C.F.R. 240.15c1-2.....22, 38, 39

Rule 17a-3, 17 C.F.R. 240.17a-3.....22

Rule 17a-4 , 17 C.F.R. 240.17a-4.....22

Rule 17a-5, 17 C.F.R. 240.17a-3.....22

TABLE OF AUTHORITIES (CONTINUED)

PAGE

28 U.S.C. 1291 1

Fed. R. App. P. 4 1

Fed. R. App. P. 32 46

COMMISSION RELEASES AND MATERIALS

Proposed Rulemaking, Release No. 34-13195,
1977 WL 174110 (January 21, 1977) 27, 30, 31

Persons Deemed Not To Be Brokers, Release No. 34-122172,
1985 WL 634795 (June 27, 1985) 4, 21, 27, 28, 29, 30, 40, 41, 42

Registration Requirements for Foreign Broker-Dealers,
Release No. 34-27017, 1989 WL 1097092
(July 11, 1989) 20, 22, 25, 39, 40

Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Release No. 34-44291,
2001 WL 1590253 (May 11, 2001) 4, 25, 41

TABLE OF AUTHORITIES (CONTINUED)

PAGE

In re Associated Investors Securities Inc., Release No. 34-6859,
1962 WL 68442 (July 24, 1962).....37

In re Kemprowski, Release No. 34-35058, 1994 WL 684628
(Dec. 8, 1994) 4, 25, 27, 28, 34, 41

In re Rooney, Release No. 34-44414, 2001 WL 664689
(June 13, 2001) 34

In re Blake, Release No. 34-52036, 2005 WL 1963439
(July 14, 2005).....37

In re Tier One, Inc., Release No. 34-55662,
2007 WL 1201732 (April 24, 2007).....34

In re Ruiz, Release No. 34-64501, 2011 WL 1847038
(May 16, 2011) 34, 36, 37, 39

SEC v. Ohana Intn'l, Inc., Litigation Release No. 18961,
2004 WL 2495057 (November 4, 2004) 39

SEC v. Sunbelt Development Corp., Litigation Release No. 19596
2006 WL 542612 (March 7, 2006).....39

TABLE OF AUTHORITIES (CONTINUED)

PAGE

SEC v. Byers, Litigation Release No. 20678,
2008 WL 3318764 (August 11, 2008).....39

Brumberg, Mackey & Wall, P.L.C., SEC No-Action Letter,
2010 WL 1976174 (May 17, 2010).....29

MISCELLANEOUS

Thomas Lee Hazen, *Law of Securities Regulation*
(6th ed. 2011).....20, 25, 26, 34, 39

David A. Lipton, *Broker-Dealer Regulation* (July 2011).....26, 28, 30, 34

Robert L.D. Colby & Lanny A. Schwartz, *What is a Broker-Dealer?*,
1821 PLI/Corp 37 (June 28, 2010).....20, 28, 37, 41

Black's Law Dictionary (9th ed. 2009).....37

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to Sections 20(b), 20(d), and 22(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. 77t(b), 77t(d), and 77v(a), and Sections 21(d), 21(e), and 27 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78u(d), 78u(e), and 78aa, over this civil law enforcement action brought by the Securities and Exchange Commission. The Commission appeals from the district court's judgment in favor of defendant Kenneth R. Kramer. This Court has jurisdiction pursuant to 28 U.S.C. 1291.[1] The district court entered a judgment in favor of Kramer on April 4, 2011. Dkt. 209. The Commission's notice of appeal was timely filed on June 1, 2011. Dkt. 225; Fed. R. App. P. 4(a)(1)(B).

[1] This Court, by letter dated August 5, 2011, requested that the Commission address whether the Court has jurisdiction. The Commission responded on August 18, 2011.

ISSUE PRESENTED FOR REVIEW

A variety of factors are examined to determine whether an individual acts as a "broker" and therefore is required to register with the Commission. Three factors that strongly indicate broker conduct are that the individual (1) solicited investors and promoted investment in a security, (2) earned transaction-based compensation from securities sales, (3) demonstrated a regularity of participation in securities sales.

The issue in this case is whether the district court erred in granting judgment in favor of defendant Kramer where the district court found that Kramer solicited investors and promoted investment in a security, earned a large amount of transaction-based compensation from securities sales, and participated in a number of securities sales over two years, but nevertheless reached a legal conclusion that Kramer was not a "broker."

STATEMENT OF THE CASE

I. NATURE OF THE CASE

The Securities and Exchange Commission appeals from the judgment entered after a bench trial in favor of defendant Kenneth R. Kramer by the District Court for the Middle District of Florida, Tampa Division (Merryday, J.). Dkt. 209. The district court concluded that Kramer was not a

"broker" under Section 3(a)(4)(A) of the Exchange Act (15 U.S.C. 78c(a)(4)(A)), and therefore that his failure to register as a broker did not violate the registration requirements of Exchange Act Section 15(a) (15 U.S.C. 78o(a)). Dkt. 208.

II. STATUTORY FRAMEWORK

Because brokers act as intermediaries between the investing public and the securities markets, the registration and regulation of brokers is a central element of the federal securities laws' protection of investors. *See Eastside Church of Christ v. National Plan, Inc.*, 391 F.2d 357, 362 (5th Cir. 1968).[2] *See also infra* at 20-22. Individuals who act as "brokers" must register as such with the Commission unless they are "specifically exempted from registration." *Warfield v. Alaniz*, 569 F.3d 1015, 1024-25 (9th Cir. 2009).

"Broker" is a defined term under the Exchange Act. Section 3(a)(4)(A) of the Exchange Act generally defines a broker as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. 78c(a)(4)(A). Section 15(a) of the Exchange Act provides that it is "unlawful for any broker" to "effect any transactions in, or to induce or attempt to induce the

[2] Fifth Circuit decisions decided on or before September 30, 1981 are binding precedent in the Eleventh Circuit. *See Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

purchase or sale of, any security" unless such broker is "registered in accordance with [Section 15(b) of the Exchange Act]." 15 U.S.C. 78o(a).[3] However, the terms "engaged in the business" and "effecting transactions" and are not statutorily defined.

Instead, to determine if an individual was "engaged in the business" of "effecting securities transactions," courts and the Commission examine a range of factors. These factors include, but are not limited to, whether an individual: solicited investors or promoted securities, received commissions or other transaction-based remuneration, or regularly participated in securities transactions. *See generally*, *In re Kemprowski*, Release No. 34-35058, 1994 WL 684628, at *2 (Dec. 8, 1994); *see also Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934*, Release No. 34-44291, 2001 WL 1590253, at *20 & n.124 (May 11, 2001) (solicitation); *Persons Deemed Not To Be Brokers*, Release No. 34-22172, 1985 WL 634795, at *4 (June 27, 1985) (receipt of transaction-based compensation); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12-13 (D.D.C. 1998) (regularity of participation).

[3] Relevant statutory provisions are reproduced in the Statutory Addendum to this brief. *Infra* at 48-49.

III. FACTS

In this appeal, the Commission is not challenging the factual findings made by the district court. Accordingly, the following statement of facts is taken directly from the district court's April 1, 2011 memorandum opinion, Dkt. 208 ("Op.").

A. Kramer was not registered as a broker.

This case involves Kramer's conduct from 2003 to 2005 with regard to the sales of stock in Skyway Communications Holding Corp. ("Skyway"), a publicly held company. Op. 17-19, 37 n.54. "[A]t no time" was Kramer "registered with the Commission" as a broker-dealer. Op. 23 & n.47.[4]

B. Kramer told potential investors that Skyway was "a good investment" and "a good deal," and directed their attention to Skyway's web site and press releases. Some of these people then purchased Skyway shares, and some told additional persons about Skyway, who in turn purchased Skyway shares.

Kramer became involved in Skyway through Kenneth Bruce Baker ("Baker"). Op. 16-19. Baker was an independent contractor who Skyway retained to raise money from "wealthy individuals" and "investment groups."

---

[4] Before becoming involved in Skyway, Kramer had experience as the vice-president and president of companies that sold municipal bonds, and was co-owner of a company that sold "London Commodity Options" until Congress prohibited the sale of such options. Op. 15-16. Subsequently, "in 1988, Kramer pleaded guilty to a charge of wire fraud and conspiracy and later served twenty-eight months in prison." Op. 16.

Op. 18. Specifically, Skyway had an agreement with Baker in which Skyway agreed to pay Baker a commission in the form of Skyway shares on capital raised on behalf of the company. Op. 17-18.

Kramer, who the district court found to be an employee of Baker, "assisted Baker in Baker's efforts for Skyway." Op. 19, 32. Baker introduced Kramer to Skyway's corporate officers in 2003. Op. 19. Baker asked Kramer to "tell people about Skyway." Op. 20. In turn, Kramer told certain people that "Skyway was a good company," "a good investment" and "a good deal." Op. 20-21, 34-35, 37. "[W]hen Skyway issued a press release, Kramer recommended that people read the press release." Op. 20. In addition, Kramer encouraged people "to visit Skyway's web site." Op. 20; *see also* Op. 31, 35 (Kramer "direct[ed] attention to Skyway's web site and press releases."). Kramer told people these things about Skyway in order "to generate 'market awareness.'" Op. 31.

In this manner, Kramer told ten people about Skyway. Op. 20-21. These included eight of Kramer's "friends": Barry Krohn, Seymour Cohen, Bob Herko, Lino Morris, Jeffrey Steinig, Allen Katz (Kramer's neighbor), Allen Denowitz (Kramer's attorney), and Allen Sklover (Kramer's doctor). Op. 20-21. Kramer also discussed Skyway with his two sons. Op. 21. Some of these people later

purchased Skyway shares. Op. 21-22. For instance, "[Barry] Krohn purchased Skyway shares after Kramer's mentioning Skyway to Krohn." Op. 21.

Furthermore, after hearing about Skyway from Kramer, some of these persons told additional persons about Skyway. For example, "[a]fter purchasing shares, Krohn (similar to Kramer) talked to people about Skyway," and "advised [these] certain others that Skyway was both a good company and worth considering as an investment." Op. 21.

C. Kramer earned compensation based on the number of Skyway shares that each person he told about Skyway bought. Where persons that Kramer told about Skyway told additional persons about Skyway, Kramer also earned compensation based on the number of Skyway shares bought by those additional persons.

Baker offered to pay Kramer in Skyway stock amounting to twenty percent of the number of shares in Skyway that investors purchased. Op. 22. Accordingly, after Kramer told people that Skyway was a good investment and some of these people then purchased Skyway shares, Kramer would send to Baker reports showing who had purchased Skyway shares, from which registered brokers the people had purchased the shares, and the number of shares purchased. Op. 22, 35. The cover page of the reports that Kramer sent stated that "the number below represents balance owed after stock delivery," then listed the "number of shares 'owed,'" followed by Kramer's name, address and social security number. Op. 22. After

receipt of the reports, Baker paid Kramer with shares of Skyway according to the number of shares that each person had bought. *See* Op. 31 (Kramer "admitted receiving shares of Skyway from Baker based on Kramer's reports to Baker of Skyway purchases"); Op. 22 & n. 39-42 (citing Kramer's testimony (Dkt. 231 at 33-35, Dkt. 229 at 60-74, 94-95), Exhibit 299 (Dkt. 92-22), and Exhibit 399 (Dkt. 92-23)); Op. 34-35 (Kramer "received compensation from Baker based on Kramer's reporting to Baker purchases of Skyway shares"); Op. 36 ("Baker paid Kramer" to "tell people about Skyway and to send reports of Skyway share purchases.").

For example, after Kramer told Allen Katz that Kramer thought Skyway "might be a good deal" and Katz later purchased Skyway shares, Kramer reported the number of shares Katz purchased to Baker, and "Kramer received from Baker (through Baker's company, Affiliated Holdings) additional shares in Skyway" amounting to twenty percent of the number of shares that Katz had purchased. Op. 21-22.

In addition, where the people that Kramer had told about Skyway then advised additional persons that Skyway was a good investment, and those additional persons then purchased Skyway shares, Kramer also received compensation in Skyway shares based on the number of shares bought by those additional persons. Op. 22 (Baker offered Kramer "twenty percent of the number of shares that *each*

person bought") (emphasis added). Kramer "collect[ed] and sen[t] to Baker reports of purchases of Skyway shares" from each of these persons, whereupon "Baker paid Kramer" with "shares of Skyway." Op. 36.

For example, Kramer told Barry Krohn about Skyway, and then Krohn purchased Skyway shares. Op. 21. Kramer received twenty percent of the number of shares Krohn purchased. Op. 22. Krohn then advised additional persons that Skyway was a good company and worth considering as an investment. Op. 21. Of the additional persons with whom Krohn discussed Skyway, "approximately four or five" purchased Skyway shares. Op. 21. "Krohn reported to Kramer (who reported to Baker)" the amount of these additional persons' purchases, and then Kramer received twenty percent of the number of shares that they had bought. Op. 22, 34-36.

D. From 2003 to 2005, Kramer earned shares ultimately worth $700,000 as compensation for his activities with regard to Skyway stock transactions.

From the time Baker introduced Kramer to Skyway in 2003 until Skyway petitioned for bankruptcy in 2005, "Kramer had earned approximately $700,000.00" from the Skyway shares Kramer received from Baker. Op. 23 & n.44 (citing

Kramer's stipulation, Dkt. 238 at 45-46); *see also* Op. 14-15 ("the parties stipulated to the amounts received by Kramer" in "his brokerage account").[5]

IV. PROCEEDINGS BELOW

A. The Commission's complaint and pre-trial proceedings

This appeal involves one of the defendants below, Kramer, whom the Commission alleged violated Section 15(a) by failing to register as a broker while engaging in activities that constitute broker conduct under Section 3(a)(4)(A). *See* Dkt. 1 at 3-4 ¶¶8, 12-13; at 5 ¶19; at 16-17 ¶¶67-69; at 21-22 ¶¶91-93; at 22-23.

The Commission's complaint was filed against six defendants. Kramer, and also Baker, were alleged only to have violated the broker registration requirements. The others were alleged to have violated the antifraud provisions and securities

[5] Separate from the $700,000 Kramer earned from the Skyway shares he received from Baker, Kramer also earned between $189,000 and $200,000 in checks he received from Skyway for introducing Nick Talib to Skyway. Op. 19-20. Talib was a registered broker who raised from investors $14 million for Skyway. Op. 19-20. The district court found that "the extent of Kramer's involvement in the Talib transaction consisted of arranging the meeting and providing transportation for Talib from the airport to Skyway's headquarters." Op. 33. *See also infra* at 12 n. 7.

registration requirements.[6] The fraud violations consisted of defrauding investors through a "pump-and-dump" scheme involving shares of Skyway. *See* Dkt. 1. The complaint alleged that numerous material misrepresentations and omissions about Skyway were made to investors through offering materials and press releases. *Id.* The Commission alleged that the fraud violators, after fraudulently inflating Skyway's stock price, sold over 75 million of their shares to the investing public and made more than $12 million in profits. *Id.*

Prior to trial, the Commission obtained default judgments or consent judgments against all the defendants except Kramer. *See* Dkt. 53 (default judgment against Skyway Global LLC); Dkt. 85 (default judgment against Baker); Dkt. 158 (consent judgment against Brent Kovar); Dkt. 159 (consent judgment against Glenn

[6] Kramer was charged with violating Section 15(a) of the Exchange Act for failing to register as a broker. Baker was also charged with violating Section 15(a) of the Exchange Act for failing to register as a broker. Sky Way Global LLC, Brent C. Kovar, Glenn A. Kovar, and James S. Kent were charged with violations of Sections 5(a), 5(c), and 17(a) of the Securities Act, 15 U.S.C. 77e(a), 77e(c), and 77q(a), and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, 15 U.S.C. 78j(b) and 17 C.F.R. 240.10b-5. Brent Kovar and Kent were also charged with aiding and abetting Skyway's violations of Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-11 thereunder, 15 U.S.C. 78m(a) and 17 C.F.R. 240.12b-20 and 240.13a-11, and Kent was also charged with aiding and abetting Skyway's violations of Section 10(b) and Rule 10b-5. The Commission sought permanent injunctions against future violations, disgorgement with prejudgment interest, and civil penalties against every defendant, as well as officer and director bars against Brent Kovar and Kent, and penny stock bars against Brent Kovar, Glenn Kovar, Kent, Baker, and Kramer. *See* Dkt. 1.

Kovar); Dkt. 164 (consent judgment against Kent). The district court denied both the Commission's and Kramer's motions for summary judgment. Dkt. 169.

B. The district court's grant of judgment to Kramer.

In January 2011, the Commission proceeded to trial against Kramer. After an eight-day bench trial, the district court concluded that Kramer did not violate Section 15(a)'s broker registration provisions because Kramer did not act as a "broker" within the meaning of Section 3(a)(4)(A). Dkt. 208. The district court's conclusions are discussed immediately below.[7]

Solicitation. The district court found that Kramer engaged in "solicitation" and provided "advice" to ten people when Kramer told them that Skyway stock was a "good investment" and a "good deal," told them Skyway was "a good company," and directed their attention to Skyway's press releases and website. Op. 20-21, 34-37.

However, the district court concluded that Kramer had not engaged in the business of effecting securities transactions because each of the ten people that

[7] The district court concluded that Kramer's conduct with regard to Talib did not qualify as "broker" conduct. Op. 33-34; *see also supra* at 10 n. 5. A challenge to this conclusion is not part of the Commission's appeal. Nor does the Commission challenge on appeal the district court's conclusion that Baker's testimony during the Commission's investigation was inadmissible at trial. Op. 2-9.

Kramer solicited was one of his friends or a member of his family. Op. 34-35 (the ten investors were "susceptible to description as either a friend or an intimate").

Transaction-based compensation. The district court found that Kramer received "transaction-based compensation." Op. 33-34. Kramer earned twenty percent of the number of shares purchased by the investors that Kramer told about Skyway. Op. 22. In addition, where the people Kramer told about Skyway then told additional persons about Skyway, Kramer earned twenty percent of the number of Skyway shares purchased by these additional persons. Op. 22, 35-36. The district court concluded that from 2003 to 2005, Kramer earned a total of approximately $700,000 from the Skyway shares he received from Baker. Op. 23.

However, the district court concluded that this was not "broker" conduct based on its conclusion that Baker paid Kramer a percentage of others' purchases of Skyway shares solely "[i]n exchange for the *reports*" to Baker of those purchases. Op. 35 & n. 53 (emphasis added); *see also* Op. 22 & n. 39. The district court found that Baker requested that Kramer report to him "who purchased Skyway shares," "from whom the person purchased the Skyway shares," and "the number of shares purchased" by other investors. Op. 22. The court concluded that Baker then paid Kramer in shares ultimately worth $700,000 merely for "collect[ing] and send[ing] to Baker reports of purchases of Skyway shares." Op. 35.

The court noted that "[a]s to why Baker sought the reported information" and why Baker "was willing to pay Kramer" for the reports," Kramer did not "provid[e] an explanation." Op. 22 n.39. The district court found that Kramer could not "articulate the reason for Baker's requesting the reports, which contain information likely available from a better source for a lesser or no charge." Op. 35 n.53. The district court concluded that this was "[o]dd, but true," and that it was "odd" activity, "but not 'broker' activity." Op. 35.

Regularity of participation. The district court, as noted, found that from 2003 to 2005 Kramer solicited potential investors and earned Skyway shares as transaction-based compensation which were ultimately worth $700,000. Op. 20-21, 23. The district court found that Kramer earned transaction-based compensation on purchases not only by the investors that he solicited, the district court also found that when those investors told additional persons about Skyway, Kramer earned transaction-based compensation on those additional persons' purchases. Op. 22, 35. However, the court characterized the number of investors that Kramer solicited and upon whose purchases he received transaction-based compensation as "small." Op. 34.

Other findings and conclusions. The district court gave additional reasons for its conclusion that Kramer was not a "broker." The district court suggested that because registered brokers executed the purchases of Skyway stock, Kramer was not required to register as a broker. Op. 22. Similarly, the district court suggested that because Baker acted as a broker, albeit unregistered, Kramer was not required to register since Kramer was employed by Baker. Op. 36. Finally, the district court found that the Commission did not purport to show, or did not convincingly show, that some of the other factors that qualify as broker conduct were present in this case.[8] The district court reasoned that any factor that was not present was a factor that would "suggest[] the absence of broker activity." Op. 35.

[8] Specifically, the district court found that Kramer did not: sell a single share of Skyway stock, participate in the purchase and sale of a security, provide additional advice about the investment, distribute promotional material for Skyway, sponsor a seminar or social event, sell the security of another issuer, hire employees to contact potential investors about Skyway, or encourage a broker to sell Skyway shares. Op. 36.

SUMMARY OF ARGUMENT

Based on the facts found by the district court, Kramer acted as a "broker" as a matter of law because he was engaged in the business of effecting securities transactions. Kramer solicited investors and promoted investment in securities. In addition, Kramer earned transaction-based compensation from two tiers of investors' securities purchases—he earned a commission on securities purchases by investors that he directly solicited, and where the investors that he solicited went on to solicit additional investors who purchased securities, Kramer also received a commission on those purchases. Kramer received commissions in the form of shares, from which Kramer earned $700,000. In this manner Kramer regularly participated in the distribution of securities for at least two years.

Each of these activities corresponds to a factor that courts have found to be strongly indicative that a person qualifies as a "broker": solicitation, receipt of transaction-based compensation, and regularity of participation. Taken separately, each factor shows that Kramer acted as an intermediary between the investing public and securities markets, and therefore he was required to be subject to the training, professional standards, and oversight that broker registration ensures. The presence of all three factors unquestionably demonstrates that Kramer qualified as a broker.

In concluding that Kramer was not a "broker," the district court erroneously relied on its observation that the investors Kramer solicited were members of his family or persons that may be characterized as his "friends." But Kramer did not merely *solicit* his friends and family, Kramer was paid a commission on their securities purchases, and he was also paid a commission on a second tier of purchases by investors who were not his friends or family. Moreover, there is no authority that provides a "friends and family" exception to broker registration. Creating such an exception is particularly ill-advised because it would put the friends and family of those who act as brokers at greater risk of becoming victims of affinity fraud.

The district court also erroneously concluded that Kramer was not a broker because other brokers were present in the chain of distribution of these securities. Every intermediary between investors and securities markets who, like Kramer, acts as a broker, and is not otherwise exempt, must register as a broker.

Lastly, the district court identified certain other activities that may constitute "broker" conduct that were not present here, and erroneously found these determinative despite the presence of Kramer's solicitation, transaction-based compensation, and regularity of participation that strongly indicated Kramer qualified as a broker.

STANDARD OF REVIEW

The district court made findings of fact regarding Kramer's conduct, and then reached the legal conclusion that Kramer's conduct did not make him a "broker" under the Exchange Act. The Commission's appeal does not challenge the district court's findings of fact. *See University of Georgia Athletic Ass'n v. Laite*, 756 F.2d 1535, 1543 (11th Cir. 1985). However, according to those findings Kramer was a "broker" as a matter of law. The district court's contrary legal conclusion was erroneous, and is reviewed by this Court *de novo*. *See Renteria-Marin v. Ag-Mart Produce, Inc.*, 537 F.3d 1321, 1324 (11th Cir. 2008); *Morrison v. Magic Carpet Aviation*, 383 F.3d 1253, 1254-55 (11th Cir. 2004). Under *de novo* review, if the district court reached erroneous legal conclusions "then this court must review and correct the error." *E. Remy Martin & Co. v. Shaw-Ross Intn'l Imports, Inc.*, 756 F.2d 1525, 1529 (11th Cir. 1985).

In determining the meaning of "broker" as used in the Exchange Act, the Commission's rule-making releases and formal adjudications interpreting that term are afforded deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 2781-82 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 229-231 & n.12, 121 S.Ct. 2164, 2172-73 & n.12 (2001); *SEC v. Zandford*, 535 U.S. 813, 819-20, 122 S.Ct. 1899, 1903 (2002)

(deferring to the Commission's interpretation of the Exchange Act). This Court has explained that while the Commission's interpretation is not dispositive, it is "entitled to great weight." *United States v. Elliott*, 62 F.3d 1304, 1310 (11th Cir. 1995) (giving deference to the Commission's interpretation of the Investment Advisers Act); *see also Jaramillo v. INS*, 1 F.3d 1149, 1152-55 (11th Cir.1993) (*en banc*) (noting the need to "heed to Supreme Court precedent which commands us to defer to the interpretation of a statute by the agency charged with administering it").

Deference to the Commission's analysis is particularly appropriate in this case because the terms "effecting transactions" and "engaged in the business" are not statutorily defined in this context (*see* 15 U.S.C. 78c(a)), and because broker registration involves a "complex and highly technical regulatory program." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 2386-87 (1994); *see also Mass. Fin. Servs., Inc. v. SIPC*, 545 F.2d 754, 757 n.3 (1st Cir. 1976) (the term "broker" has a "highly technical meaning in securities law").

ARGUMENT

The district court erred in concluding that Kramer's conduct did not qualify Kramer as a "broker" under Section 3(a)(4)(A) whose failure to register violated Section 15.

A. "Broker" is construed broadly based on the presence of factors that indicate broker conduct because requiring registration of the intermediaries between investors and the securities markets protects those investors.

The broker-dealer registration requirements "were drawn broadly by Congress to encompass a wide range of activities involving investors and securities markets." *Registration Requirements for Foreign Broker-Dealers*, Release No. 34-27017, 1989 WL 1097092, at *3 (July 11, 1989); *see also* Thomas Lee Hazen, 5 *Law of Securities Regulation* § 14.4[1][A] (6th ed. Jan. 2011) (the Exchange Act's "registration requirements, as well as the definitions of broker and dealer, are drafted broadly"). Accordingly, "[t]he courts and the SEC have taken an expansive view of the scope" of the terms "broker," "engaged in the business" and "effecting transactions." Robert L.D. Colby & Lanny A. Schwartz, *What is a Broker-Dealer?*, 1821 PLI/Corp 37, 46 (June 28, 2010).

A broad definition of "broker" is appropriate because, as courts of appeals have stated, the "requirement that brokers and dealers register is of the utmost importance in effecting the purposes of the [Exchange] Act. It is through the

registration requirement that some discipline may be exercised over those who may engage in the securities business and by which necessary standards may be established with respect to training, experience, and records." *Eastside Church*, 391 F.2d at 362; *see also Roth v. SEC*, 22 F.3d 1108, 1109 (D.C. Cir. 1994) (the registration requirement serves as the "keystone of the entire system of broker-dealer regulation").

Broker registration provides "important safeguards to investors." *Persons Deemed Not To Be Brokers*, Release No. 34-22172, 1985 WL 634795, at *2. Because a broker is registered, investors are assured that the persons who act as intermediaries between them and the securities markets "have the requisite professional training," must "conduct their business according to regulatory standards," and are "subject to a comprehensive regulatory scheme designed to ensure that customers are treated fairly" and "that they receive adequate disclosure." *Id*. The registration requirements for brokers "ensure that securities are [only] sold by a salesman who understands and appreciates both the nature of the securities he sells and his responsibilities to the investor to whom he sells." *Roth*, 22 F.3d at 1109 (brackets in decision).

For example, registered brokers must be members of a self-regulatory organization and the Securities Investor Protection Corporation, and are subject to

"extensive recordkeeping and reporting obligations, fiduciary duties, and special antifraud rules." *Registration Requirements*, Release No. 34-27017, 1989 WL 1097092, at *3-*4 (discussing Section 15(b)(8) of the Exchange Act, 15 U.S.C. 78o(b)(8) (requiring SRO membership); Section 3(a)(2) of the Securities Investor Protection Act of 1970, 15 U.S.C. 78ccc(a)(2) (requiring SIPC membership); Rules 17a-3 (recordkeeping), 17a-4 (record preservation), and 17a-5 (reporting), 17 C.F.R. 240.17a-3, 17a-4, and 17a-5; and Section 15(c) of the Exchange Act, 15 U.S.C. 78o(c), Rule 15c1-2, 17 C.F.R. 240.15c1-2 (examples of special antifraud rules)). In addition, registered brokers are subject to statutory disqualification standards and the Commission's disciplinary authority, "which are designed to prevent persons with an adverse disciplinary history" from becoming registered brokers. *Id.* (discussing Sections 3(a)(39), 15(b)(4), and 15(b)(6) of the Exchange Act, 15 U.S.C. 78c(a)(39), 78o(b)(4), and 78o(b)(6)).

B. In view of the district court's findings that Kramer solicited investors, and received transaction-based compensation, and thereby participated in a number of securities transactions over two years, the district court erroneously concluded that Kramer was not a broker.

Based on the facts found by the district court, Kramer acted as a "broker" as a matter of law. Specifically, three findings of fact demonstrate that Kramer qualified as a "broker." The district court found that (1) Kramer solicited several

investors and promoted Skyway stock, (2) when those investors as well as additional persons told about Skyway by those investors purchased Skyway stock, Kramer received transaction-based compensation on those sales, and (3) between 2003 and 2005 Kramer received $700,000 in proceeds from his activities. Each of these three findings corresponds to a factor that, even viewed separately, courts and the Commission have found to be strongly indicative of "broker" conduct. Taken together, they leave no doubt that Kramer was a broker who was "in the business" of "effecting transactions." Section 3(a)(4)(A).

1. Kramer's soliciting securities transactions strongly indicates that Kramer is a broker.

The district court found that Kramer, according to his own testimony, solicited at least ten individuals and promoted Skyway stock. *See supra* at 5-7, 12; Op. 18-21, 31, 34-35. The following factual findings demonstrate that Kramer solicited investors and promoted securities transactions:

- Kramer solicited potential investors and promoted Skyway stock by telling potential investors that "Skyway was a good company," "a good investment" and "a good deal." Op. 20-21, 34-35, 37.
- Kramer solicited at least ten investors. Op. 20-21.
- Skyway retained Baker to identify potential investors ("venture capital, wealthy individuals, [and] investment groups"), and "Kramer assisted Baker in Baker's efforts for Skyway." Op. 18-19.

- To "generate 'market awareness,'" Kramer promoted Skyway to potential investors. Op. 31.

- When Skyway issued press releases, Kramer directed potential investors' attention to them and recommended that potential investors read the press releases. Op. 20, 35.

- Kramer encouraged potential investors to visit Skyway's website. Op. 20, 35.

- "Baker paid Kramer" to "tell people about Skyway." Op. 36.

The district court correctly concluded that these activities constituted solicitation. Op. 35.

Kramer's solicitation of investors and promotion of investment in Skyway securities strongly indicates that Kramer was "effecting transactions" and "engaged in the business" of selling securities. In *SEC v. George*, the Sixth Circuit held that a defendant's "communications with and recruitment of investors for the purchase of securities" demonstrated broker conduct. *George*, 426 F.3d 786, 797 (6th Cir. 2005). In this circuit, district courts recognize that a defendant's solicitation of investors is relevant to whether he qualifies as a "broker." *See SEC v. U.S. Pension Trust Corp.*, No. 07–22570, 2010 WL 3894082, at *20-*21 (S.D. Fla. Sept. 10, 2010) (solicitation by unregistered brokers violated Section 15), *appeal docketed*, No. 10-15095 (11th Cir. November 5, 2010) (Section 15 finding not challenged on appeal); *SEC v. Corporate Relations Group, Inc.*, No. 99-1222, 2003 WL 25570113,

at *17-*18 (M.D. Fla. Mar. 28, 2003) (solicitation by unregistered brokers violated Section 15).

The Commission has likewise explained that "actively solicit[ing] investors" and "advis[ing] investors as to the merits of an investment" both constitute broker conduct. *Kemprowski*, Release No. 34-35058, 1994 WL 684628, at *2; *see also Definition of Terms*, Release No. 34-44291, 2001 WL 1590253, at *20 n.124 (solicitation is one of the "relevant factors in determining whether a person is effecting transactions."). In the context of broker-dealer regulation, soliciting securities transactions "includes any affirmative effort intended to induce transactional business for a broker-dealer and encompasses such activities as advertising and providing investment advice or recommendations intended to induce transactions that benefit or involve the solicitor." *Definition of Terms*, Release No. 34-44291, 2001 WL 1590253, at *20 n.124; *see also Registration Requirements*, Release No. 34-27017, 1989 WL 1097092, at *6. Courts have given deference to the Commission's interpretation of the role of solicitation in determining broker conduct. *See Pension Trust*, 2010 WL 3894082, at *21(quoting *Kemprowski*); *Corporate Relations Group*, 2003 WL 25570113, at *17-*18 (same).

Finally, leading commentators agree that solicitation is broker conduct. *See* Hazen, 5 *Law of Securities Regulation* § 14.4[1][A] ("In addition to indicating that a

person is 'effecting transactions,' soliciting securities transactions is also evidence of being 'engaged in the business.'"); David A. Lipton, 15 *Broker-Dealer Regulation* § 1:6 (July 2011) ("Solicitation of business is considered a badge of securities activity that would bring a person within the definition of broker.").

2. Kramer's receipt of transaction-based compensation strongly indicates that Kramer is a broker.

The district court found that, according to Kramer's own testimony, Kramer received "transaction-based compensation." *See supra* at 7-9, 12-14; Op. 21-23, 33-36. The court found that Kramer received from Baker twenty percent of the number of shares purchased by investors that Kramer had directly solicited, and that where the investors Kramer solicited went on to promote Skyway to additional investors who then purchased Skyway shares, Kramer also received from Baker twenty percent of the number of shares the additional investors purchased. Op. 22, 35. The district court concluded that Kramer earned a total of $700,000 from the Skyway shares he received from Baker. Op. 23.

Kramer's receipt of transaction-based compensation strongly indicates that Kramer was "effecting transactions" and "engaged in the business" of selling securities. Courts have explained that "[t]ransaction-based compensation, or commissions are one of the hallmarks of being a broker-dealer." *Cornhusker*

Energy Lexington, LLC v. Prospect Street Ventures, No. 04-586, 2006 WL 2620985, at *6 (D. Neb. Sept. 12, 2006); *see also George*, 426 F.3d at 797 ("payment by commission as opposed to salary" is a factor that qualifies an individual as a broker); *SEC v. Benger*, 697 F. Supp. 2d 932, 945 (N.D. Ill. 2010) (same). In this circuit, district courts have found that defendants engaged in unregistered broker conduct "*especially* considering the transaction-based compensation that the [defendants] were paid." *Corporate Relations Group*, 2003 WL 25570113, at *18 (emphasis added); *see also Pension Trust*, 2010 WL 3894082, at *21 (evidence that the defendants received transaction-based compensation supported conclusion that defendants were brokers).

The Commission too has explained that "the receipt of transaction-based compensation often indicates that such a person is engaged in the business of effecting transactions in securities." *Persons Deemed Not To Be Brokers*, Release No. 34-22172, 1985 WL 634795, at *4; *see also Kemprowski*, Release No. 34-35058, 1994 WL 684628, at *2. Transaction-based compensation, or "remuneration based on transactions in securities," includes remuneration or a commission that "varied directly with the volume or number of securities transactions." *Proposed Rulemaking*, Release No. 34-13195, 1977 WL 174110, at *2 (January 21, 1977). Transaction-based compensation accordingly gives a

person a salesman's stake in securities transactions, and therefore "can induce high pressure sales tactics and other problems of investor protection which require application of broker-dealer regulation." *Persons Deemed Not To Be Brokers*, Release No. 34-22172, 1985 WL 634795, at *4. Courts have given deference to the Commission's interpretation of the role of transaction-based compensation in determining broker conduct. *See Pension Trust*, 2010 WL 3894082, at *21 (quoting *Kemprowski*); *Corporate Relations Group*, 2003 WL 25570113, at *17-*18 (same). Indeed, the Commission's determinations regarding the nature and importance of transaction-based compensation is entitled to deference. *See Chevron*, 467 U.S. at 842-44; *Elliott*, 62 F.3d at 1310; *supra* at 18-19.

Leading commentators agree that "[c]ommission compensation is a hallmark of a broker-customer relationship" because "[c]ommission income demonstrates *success* in effecting transactions for the account of others." Lipton, 15 *Broker-Dealer Regulation* § 1:6 (emphasis added); *see also* Colby & Schwartz, *What is a Broker-Dealer?*, 1821 PLI/Corp 37, 50-53 ("receiving commissions or other transaction-related compensation is one of the determinative factors in deciding whether a person is a 'broker'").

The district court here criticized the Commission for what the court characterized as the Commission's proposal of a "single-factor 'transaction-based

compensation' test for broker activity," which the court found was an "inaccurate statement of the law." Op. 37 n.54 (citing *Brumberg, Mackey & Wall, P.L.C.*, SEC No-Action Letter, 2010 WL 1976174 (May 17, 2010)). The district court also accused the Commission of not embracing this position until 2010. Op. 37 n.54. But the Commission did not propose a single-factor test in this case, in releases, or even in the no-action letter cited and quoted by the district court. While this staff no-action letter is not binding (as the district court recognized, Op. 37 n.54), that letter fairly articulates the position that has long been expressed in Commission releases, and which has also been—prior to the district court's decision here—universally accepted by courts: "any person receiving transaction-based compensation in connection with another person's purchase or sale of securities *typically* must register as a broker-dealer." *Brumberg* No-Action Letter, 2010 WL 1976174, at *1 (emphasis added) (quoted at Op. 29), *compare with Persons Deemed Not To Be Brokers*, Release No. 34-22172, 1985 WL 634795, at *4 (the receipt of transaction-based compensation "*often indicates*" that broker registration is required) (emphasis added).

Despite finding that Kramer received "transaction-based compensation" (Op. 33-34), and acknowledging that transaction-based compensation is "one of the hallmarks of being a broker-dealer" (Op. 25), the district court concluded that

Kramer's receipt of transaction-based compensation was "not 'broker' activity." Op. 35. This conclusion is untenable.

Kramer's compensation varied directly with the number of securities purchased, and therefore was unmistakably transaction-based compensation. *See Proposed Rulemaking*, Release No. 34-13195, 1977 WL 174110, at *2; *Persons Deemed Not To Be Brokers*, Release No. 34-22172, 1985 WL 634795, at *4; *Cornhusker*, 2006 WL 2620985, at *3, *6. The percentage-based commission in the form of Skyway shares that Kramer received—shares ultimately worth $700,000—qualifies him as a broker because it demonstrates his success in his "business of effecting transactions in securities." Section 3(a)(4)(A); *see also* Lipton, 15 *Broker-Dealer Regulation* § 1:6.

Indeed, Kramer's commission (20%) and total transaction-based compensation ($700,000) was equal to, or higher than, compensation received by individuals that courts and the Commission have found to have engaged in broker conduct. *See, e.g.*, *Benger*, 697 F. Supp. 2d at 945 (commission calculated as the greater of 1% percent or $5,000); *SEC v. Hansen*, No. 83-3692, 1984 WL 2413, at *2, *11 (S.D.N.Y. April 6, 1984) (15% commission on securities sales totaling $400,000); *SEC v. Rabinovich & Associates, LP*, No. 07-10547, 2008 WL 4937360, at *5-*6 (S.D.N.Y. Nov. 18, 2008) ($92,000 in compensation).

The district court disregarded Kramer's transaction-based compensation on the ground that Kramer supposedly earned the compensation—stock ultimately worth $700,000—merely for *reporting* investors' purchases rather than for the purchases themselves, even though Kramer was paid the compensation at a rate calculated based on those *purchases*. The district court concluded that Kramer provided reports of investor purchases to Baker, and Baker was willing to pay Kramer solely "[i]n exchange for the reports." Op. 35 & n.53. The district court found that this was "odd" activity, but "not 'broker' activity." *Id.*; *see also* Op. 22 & n. 39. The district court was mistaken for two reasons.

First, the test is how the compensation is calculated. So long as it is calculated, as here, to vary with the volume or number of securities transactions, a characterization of what the compensation was in exchange for is irrelevant. *See Proposed Rulemaking*, Release No. 34-13195, 1977 WL 174110, at *2; *Cornhusker*, 2006 WL 2620985, at *3, *6. Second, there is no basis for concluding that Kramer was being compensated in exchange for reports, because Kramer was not paid a rate calculated per report, per page of these reports, or per word. Rather, as the court found, Kramer's compensation was based on the "number of shares" purchased by investors as reflected in those reports. Op. 22. Indeed, the cover page of the reports that Kramer sent to Baker listed a number of shares that Kramer was "owed,"

and stated that this "number below represents balance owed after *stock* delivery," not the balance owed after delivery of the *report*. Op. 22 (emphasis added).

Accordingly, the reports were simply the means by which Kramer reported stock purchases, but Kramer earned a percentage-based commission on stock purchases, not on the reports. Just like the unregistered brokers who received commissions in *Corporate Relations Group*, Baker paid Kramer commissions on securities transactions only "upon presentment of proof of securities transactions." *Corporate Relations Group*, 2003 WL 25570113, at *18. It would be absurd to conclude that brokers who report or confirm securities sales in order to obtain commissions are paid for the act of reporting or confirming rather than their role in effecting the sales. *Cf.*, 17 C.F.R. 240.10b-10 (requiring brokers to confirm transactions and disclose remuneration).

The district court also stated that Kramer could not explain the reason for Baker's requesting the reports, or why Baker was willing to pay Kramer shares worth $700,000 for such reports which contain information available "from a better source for a lesser or no charge." Op. 35 n.53 (Kramer could not "articulate the reason for Baker's requesting the reports"); *see also* Op. 22 n. 39 ("[a]s to why Baker sought the reported information" and why Baker "was willing to pay" for the reports," Kramer did not "provid[e] an explanation"). However, this behavior is

not mysterious. The only reasonable conclusion that can be drawn is that Kramer was being paid a commission for securities transactions.

3. Kramer's regularity of participation in securities transactions strongly indicates that Kramer is a broker.

The district court found that Kramer participated in the distribution of securities for at least two years (from 2003-2005), actively solicited investors, and obtained shares as transaction-based compensation from which he earned $700,000. *See supra* at 9-10, 14; Op. 20-21, 23. This regularity of participation strongly indicates that Kramer was a broker.

Courts have read Section 3(a)(4)(A)'s term "engaged in the business" as connoting a "regularity of participation" in securities transactions. *See George*, 426 F.3d at 797. Accordingly, courts describe "regularity of participation" as a key factor. *See SEC v. Bravata*, No. 01-00116, 2009 WL 2245649, at *2 (E.D. Mich. July 27, 2009); *see also Kenton*, 69 F. Supp. 2d at 12-13. Consideration of the "regularity of participation" includes the duration of participation, whether the participation is a single or repeated occurrence, the number of transactions, and the dollar amount of securities sold. *See Kenton*, 69 F. Supp. 2d at 12-13; *SEC v. Martino*, 255 F. Supp. 2d 268, 283-84 (S.D.N.Y. 2003). The Commission has identified such regularity of participation in securities transactions as a key indicator

of broker conduct. *See Kemprowski*, Release No. 34-35058, 1994 WL 684628, at *2; *In re Rooney*, Release No. 34-44414, 2001 WL 664689, at *6 (June 13, 2001). In this circuit, district courts have given deference to the Commission's view. *See Pension Trust*, 2010 WL 3894082, at *21 (quoting *Kemprowski*); *Corporate Relations Group*, No. 99-1222, 2003 WL 25570113, at *17-*18 (same). *See also* Hazen, 5 *Law of Securities Regulation* § 14.4[1][A] (describing regularity of participation as a key factor); Lipton, 15 *Broker-Dealer Regulation* § 1:5 (same).

While the district court characterized the number of investors Kramer solicited and upon whose purchases he received transaction-based compensation as "small" (Op. 34), violating Section 15 by soliciting and profiting for two years from at least ten investors is sufficient. *Cf.*, *Kenton*, 69 F. Supp. 2d at 17 n.15 (12 investors); *In re Tier One, Inc.*, Release No. 34-55662, 2007 WL 1201732 (April 24, 2007) (10 investors); *In re Ruiz*, Release No. 34-64501, 2011 WL 1847038, at *1 (May 16, 2011) (9 investors). Furthermore, Kramer earned commissions on purchases not only by the ten investors that he solicited, but when those ten investors promoted Skyway to additional investors, Kramer earned commissions on those additional investors' purchases. Op. 21-22, 34-36. Ultimately, Kramer earned $700,000 from the shares he received as commissions, commissions that were

directly based on his success in steering investors into a "'pump-and-dump' scheme" (Dkt. 1, Dkt. 53).

C. The district court found that Kramer was not a "broker" based on erroneous legal conclusions.

1. The district court erred in relying on the fact that the investors Kramer solicited were his "friends" and family.

In concluding that Kramer was not engaged in the business of effecting securities transactions, the district court relied on its finding that Kramer directly solicited only his friends and family. Op. 34-35. The district court was mistaken for three reasons discussed in turn below: (1) there is no exception for broker conduct with regard to one's "friends" and family members among the explicit exceptions to broker registration; (2) Kramer's receipt of commissions based on securities purchases made by his friends and family and additional investors his friends and family solicited demonstrates that Kramer was "engaged in the business"; and (3) requiring registration of individuals who act as brokers with regard to investments by their friends and family members protects those investors from abusive sales practices and affinity fraud.

First, there is no "friends and family" exception to broker registration. The district court cited no authority, and there is none, that provides that individuals who engage in broker conduct under Section 3(a)(4)(A) but only solicit their friends and

family are exempt from registration under Section 15. If Congress had wanted to provide a "friends and family" exemption to its broker registration regime, Congress would have done so explicitly. *See United States v. Fleet*, 498 F.3d 1225, 1230 (11th Cir. 2007).

Moreover, because Congress did provide explicit exemptions to broker registration, but these explicit exemptions do not include conduct with respect to friends and family, reading an additional exemption into the broker registration provisions is improper. *See Warfield*, 569 F.3d at 1024-25 (brokers must be registered unless they are "*specifically exempted* from registration") (emphasis added). For example, Congress exempted from broker registration certain bank activities, and brokers whose business is exclusively intrastate. *See*, *e.g.*, 15 U.S.C. 78c(a)(4)(B), 15 U.S.C. 78o(a). Because "Congress considered the issue of exceptions," and Congress limited the exemptions to "the ones set forth," courts do not have "authority to create others." *United States v. Johnson*, 529 U.S. 53, 58, 120 S.Ct. 1114, 1118 (2000).

The Commission has rejected the argument that individuals who solicit only their friends and family are exempt from registering as brokers under Section 15. For example, the Commission found a Section 15 violation in *Ruiz* where the unregistered broker raised capital "from nine investors—all of whom were either

[his] friends or family members." *Ruiz*, Release No. 34-64501, 2011 WL 1847038, at *1. Likewise, in *Blake* the Commission found a Section 15 violation where an unregistered broker recommended stocks only to her "friends and acquaintances." *In re Blake*, Release No. 34-52036, 2005 WL 1963439, at *2 (July 14, 2005); *see also In re Associated Investors Securities, Inc.*, Release No. 34-6859, 1962 WL 68442, at *3 (July 24, 1962) (concluding that the intrastate exemption was unavailable where the only interstate broker conduct was solicitation of "relatives, friends and associates").

Indeed, a standard for broker conduct that relies on determining whether a person has solicited or effected transactions for his "friends" is unworkable, as the terms "friend" and "friendship " are not amenable to a definite legal meaning. *Cf.*, *Black's Law Dictionary* (9th ed. 2009) (containing no entry for "friend" or "friendship").

Second, Kramer did not merely *solicit* his friends and family, he was also *paid* a commission based on their securities purchases to do so. Kramer's receipt of transaction-based compensation from his friends' and family members' securities purchases demonstrates that Kramer was "engaged in the business." Section 3(a)(4)(A). The factors that determine broker conduct cannot be viewed in isolation, and it is improper to consider Kramer's solicitation as wholly separate

from the transaction-based compensation that he earned. Indeed, a finding of solicitation more strongly indicates broker conduct when it is combined with transaction-based compensation. *See* Colby & Schwartz, *What is a Broker-Dealer?*, 1821 PLI/Corp 37, 47 ("Each of these factors are substantially heightened when combined with transaction-based compensation").

Furthermore, where the friends and family members that Kramer solicited went on to promote Skyway to additional investors (who were not Kramer's friends or family members), Kramer also received a commission on those additional investors' purchases. Accordingly, while Kramer's friends and family were a first tier of investors that he directly solicited, there were two tiers of investors from whom Kramer earned shares as transaction-based compensation. Kramer's receipt of such transaction-based compensation—shares ultimately worth $700,000—demonstrates that Kramer did not just engage in *personal* conduct, but was also "engaged in the *business*" of securities transactions. Section 3(a)(4)(A) (emphasis added).

Third, investors who are solicited to engage in securities transactions by one of their friends or a member of their family are no less deserving of the important safeguards that the broker registration requirement provides. *See supra* at 20-22. Indeed, while Kramer was not charged with fraud here, requiring registration can

help discourage a friend or family member who acts as a broker from taking advantage of his intimates' pre-existing confidence and trust, such as by engaging in abusive sales practices or by perpetrating an affinity fraud. *See Registration Requirements*, Release No. 34-27017, 1989 WL 1097092, at *4 & n.30 (registered brokers are subject to "special antifraud rules") (citing 15 U.S.C. 78o(c) and 17 C.F.R. 240.15c1-2); c*f.*, Hazen, 5 *Law of Securities Regulation* § 14.15[2] & n.35 (discussing "affinity fraud"). For example, in *Ruiz* the respondent who violated Section 15 when he solicited "only his friends and family" was found also to have engaged in an "affinity fraud" by selling his friends and family non-existent securities and using the proceeds to pay his personal expenses. *Ruiz*, Release No. 34-64501, 2011 WL 1847038. *See also SEC v. Sunbelt Development Corp.*, Litigation Release No. 19596, 2006 WL 542612 (March 7, 2006) (unregistered broker perpetrated affinity fraud against fellow church members, members of churches of the same denomination, and friends and relatives of the church members); *SEC v. Ohana Intn'l, Inc.*, Litigation Release No. 18961, 2004 WL 2495057 (November 4, 2004) (unregistered broker perpetrated affinity fraud against African-American community); *SEC v. Byers*, Litigation Release No. 20678, 2008 WL 3318764 (August 11, 2008) (unregistered broker perpetrated affinity fraud against Jewish community).

2. The district court erroneously reasoned that the presence of other brokers at different points in the chain of distribution of securities meant that Kramer could not also be a "broker."

To the extent the district court concluded that, because *registered* brokers executed the purchases of Skyway stock, Kramer was not required to register as a broker (Op. 22), or that because Baker was a broker Kramer could not *also* be a broker (Op. 36), the court's conclusions were erroneous. There is no limitation to one broker per securities transaction. Any intermediary between customers and the securities markets who acts as a broker, and is not otherwise exempt, must be registered under Section 15(a). *See Persons Deemed Not To Be Brokers*, Release No. 34-22172, 1985 WL 634795, at *1-*2. Therefore, a securities transaction may require "more than one registered broker-dealer to serve as intermediary" between investors and securities markets. *Registration Requirements*, Release No. 34-27017, 1989 WL 1097092, at *15 & n.133.

Accordingly, the district court's reasoning (Op. 22) that because registered brokers executed the ultimate purchases of Skyway stock, Kramer was not required to register as a broker is erroneous. Kramer, by soliciting the investors who made those purchases and regularly receiving transaction-based commissions on those purchases, was liable as an unregistered broker with regard to those transactions.

See Persons Deemed Not To Be Brokers, Release No. 34-22172, 1985 WL 634795, at *1-*2. The Exchange Act "mandates registration of the individual who directly takes a customer's order for a securities transaction, but also requires registration of any other person who acts as a broker with respect to that order." Colby & Schwartz, *What is a Broker-Dealer?*, 1821 PLI/Corp 37, 51. For example, in *Corporate Relations Group* the district court granted summary judgment against the defendant for acting as a broker even though registered brokers ultimately sold securities to investors. 2003 WL 25570113, at *17-*18; *see also Kemprowski*, Release No. 34-35058, 1994 WL 684628, at *2-*3 (finding that respondents violated Section 15 even though they contacted investors through registered brokers).

Likewise, the district court's suggestion (Op. 36) that because Baker was a broker, albeit unregistered, Kramer could not also be a broker is erroneous because if Baker received from Skyway a commission on securities sales, and Kramer received from Baker commissions on the same sales, then *both* Baker and Kramer had a "salesman's stake" in the securities transactions and *both* must be registered as brokers. *See Persons Deemed Not To Be Brokers*, Release No. 34-22172, 1985 WL 634795, at *4; *Definition of Terms*, Release No. 34-44291, 2001 WL 1590253, at *21.

To the extent the district court reasoned that Kramer did not have to register as a broker because Kramer was employed by Baker, an *unregistered* broker, the court erred. The district court read *Corporate Relations Group* as holding that the firm in that case was liable under Section 15 as an unregistered broker, and also holding that the employees of that firm who acted as brokers were not liable. Op. 36-37 (discussing 2003 WL 25570113). The court reasoned that likewise Baker had violated Section 15 but his employee Kramer had not. Op. 36-37. The district court's reliance on *Corporate Relations Group*, however, was misplaced. That opinion made no finding that the employees were exempt from registration. Indeed, not only did the court in *Corporate Relations Group* grant summary judgment against the *employer* for broker registration violations (*see* 2003 WL 25570113, at *17-*19), the opinion notes that prior to summary judgment the Commission had also obtained consent judgments against the *employees* for violating Section 15 (*see id.* at *1 n.1 and cited docket entries 61, 97 & 190). *See also Benger*, 697 F. Supp. 2d at 944 (rejecting defendant's argument that "the registration requirements for broker-dealers do not apply to him given that he was an *employee*" of a broker-dealer where his employer "was not registered as broker-dealer") (emphasis added). Indeed, because Baker was not registered as a broker, whatever supervision he exercised over Kramer's broker conduct in no way

advanced Congress's goal under the Exchange Act of ensuring that intermediaries between the investing public and securities markets are registered brokers. *See Roth*, 22 F.3d at 1109-1110.

3. The district court erroneously treated any factor regarding broker conduct that was not present as a factor that suggested the absence of Kramer's broker conduct.

Not only did the district court reach erroneous legal conclusions about each of the three factors that qualified Kramer as a broker that the district court found to be present, the district court also misapplied the legal standard for determining broker conduct when it treated any factor that was *not present* as a factor that would "suggest[] the *absence* of broker activity." Op. 35 (emphasis added); *see supra* at 15. Broker conduct is identified by the presence of certain factors even if the "remaining factors are inapplicable." *Benger*, 697 F. Supp. 2d at 945. For example, in *Benger* the court concluded that the Commission had sufficiently alleged that the defendant qualified as a broker based on his receipt of transaction-based compensation as well as other factors that were present, even though the defendant was not alleged to have solicited investors. *See Benger*, 697 F. Supp. 2d at 945; *see also SEC v. Dowdell*, 2002 WL 424595, *11 (W.D. Va. 2002) (factors that were present were sufficient even where the defendant did not solicit investors); *George*, 426 F.3d at 797 (defendant qualified as a "broker" even if he was

not employed by the issuer and did not receive compensation because he was "regularly involved in communications with and recruitment of investors for the purchase of securities"). Thus in making the determination whether a person is a "broker" courts examine the "several factors that may *qualify* an individual as a broker." *George*, 426 F.3d at 797 (emphasis added); *see also Bravata*, 2009 WL 2245649, at *2 (considering "several factors to determine whether a person or entity *qualifies* as a broker for the purposes of section 15(a)") (emphasis added); *DeHuff v. Digital Ally, Inc.*, No. 01-00116, 2009 WL 4908581, at *3 (S.D. Miss. Dec. 11, 2009) (same). Because factors are present that strongly indicate that Kramer qualifies as a broker, the absence of a particular factor or factors does not *disqualify* him from being a broker.

Furthermore, courts examine many non-exhaustive factors under Section 3(a)(4)(A) (*see*, *e.g.*, *Pension Trust*, 2010 WL 3894082, at *21), and treating these factors as a checklist of propositions that the Commission must collectively demonstrate such that any absent factors are weighed *against* a finding of broker conduct is incompatible with the broadly-drawn statutes governing broker registration. This approach also construes the registration requirement in a manner that is contrary to the important safeguards to investors that broker registration provides. *See supra* at 20-22.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

MARK D. CAHN
General Counsel

ANNE K. SMALL
Deputy General Counsel

JACOB H. STILLMAN
Solicitor

RANDALL W. QUINN
Assistant General Counsel

DAVID LISITZA
Senior Counsel

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
(202) 551-5015 (Lisitza)

August 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c)

I hereby certify that, this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,379 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and this brief complies brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman.

Dated: August 19, 2011

David Lisitza
Securities and Exchange Commission
100 F St., N.E.
Washington, D.C. 20549
(202) 551-5015

CERTIFICATE OF SERVICE

I hereby certify that, on this day, I caused the Opening Brief of the Securities and Exchange Commission, Appellant, to be uploaded to the Eleventh Circuit's website and caused the original plus six copies to be sent by overnight delivery to:

John Ley, Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St. N.W.
Atlanta, Georgia 30303

I also certify that, on the same day, I caused the Opening Brief to be served on counsel for Kenneth R. Kramer by email and caused two copies to be sent by overnight delivery to:

Barton S. Sacher
Joseph A. Sacher
Sacher, Zelman, Hartman, Paul, Beiley & Rolnick, PA
1401 Brickell Ave., Suite 700
Miami, FL 33131

Dated: August 19, 2011

David Lisitza
Securities and Exchange Commission
100 F St., N.E.
Washington, D.C. 20549
(202) 551-5015

STATUTORY ADDENDUM

Section 15 of the Securities Exchange Act of 1934
15 U.S.C. 78o [excerpt]

(a) Registration of all persons utilizing exchange facilities to effect transactions; exemptions

(1) It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

(2) The Commission, by rule or order, as it deems consistent with the public interest and the protection of investors, may conditionally or unconditionally exempt from paragraph (1) of this subsection any broker or dealer or class of brokers or dealers specified in such rule or order.

(b) Manner of registration of brokers and dealers

(1) A broker or dealer may be registered by filing with the Commission an application for registration in such form and containing such information and documents concerning such broker or dealer and any persons associated with such broker or dealer as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

STATUTORY ADDENDUM (CONTINUED)

Section 3(a)(4)(A) of the Securities Exchange Act of 1934
15 U.S.C. 78c(a)(4)(A)

(a) Definitions

(4) Broker

(A) In general

The term "broker" means any person engaged in the business of effecting transactions in securities for the account of others.