

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

CASE NO. 11-12510-DD

Appeal from the United States District Court
For the Middle District of Florida
District Court Docket No. 8:09-cv-00455-SDM-TBM

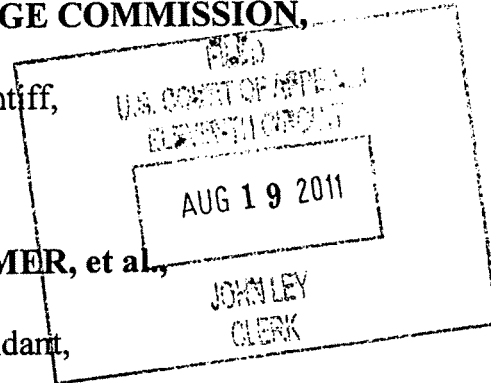
SECURITIES AND EXCHANGE COMMISSION,

Appellant/Plaintiff,

vs.

KENNETH R. KRAMER, et al.,

Appellee/Defendant,



**APPELLEE KRAMER'S POSITION REGARDING THE
JURISDICTIONAL QUESTION RAISED BY THE COURT, *SUA SPONTE***

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APPELLEE KRAMER'S POSITION REGARDING THE JURISDICTIONAL QUESTION RAISED BY THE COURT, *SUA SPONTE*

Appellee Kenneth R. Kramer ("Mr. Kramer"), by and through his undersigned counsel, pursuant to this Court's written instructions, dated August 5, 2011, as well as 28 U.S.C. §§ 1291 and 1292, Fed. R. App. P. 3 and 4, Fed. R. Civ. P. 54(b), and other controlling Eleventh Circuit precedent, hereby advises this Honorable Court, as directed, of his position, that **this Honorable Court lacks jurisdiction over this appeal**, for the following reasons:

Jurisdictional Question

1. On August 5, 2011, Record Counsel for Appellant and Mr. Kramer were each requested by this Honorable Court, through the Clerk of the Court, to simultaneously advise, in writing, on or before August 19, 2011, of their respective positions regarding the jurisdictional question(s) raised by the Court, *sua sponte* -- specifically, **"Whether and to what extent the district court's April 1, 2011, order and April 4, 2011, judgment are final and immediately appealable."** (Emphasis added) As explained herein, Mr. Kramer's position is simply, **"no, not at all."**

Factual and Procedural Background

2. The underlying statutory, civil "enforcement proceeding" was filed in the District Court, in 2009, by the U.S. Securities and Exchange Commission (the "Commission") against Sky Way Global LLC ("Sky Way Global" or the

“Company”), and five (5) separate individual Defendants. Four (4) of those individual Defendants were officers, directors, employees, or contractual agents of Sky Way Global.

3. Mr. Kramer was *not* affiliated with Sky Way Global, at all, except as a public shareholder. He was also the only Defendant represented by counsel during the litigation, and the only Defendant who actively (and successfully) defended the Commission’s civil enforcement action, through trial.

4. Prior to the bench trial respecting Mr. Kramer, only, a Default was entered against the defunct Company (Doc. 23), a Default Judgment was entered against Defendant Baker (Doc. 85), and Defendants B. Kovar, G. Kovar, and Kent entered into separate Consent Judgments with the Commission (Docs. 158, 159, and 164).

5. The District Court granted the Commission’s separate Motions, requesting approval of the various “Consent Judgments,” representing “partial settlements” with Defendants B. Kovar, G. Kovar, and Kent; *however*, each Order specifically stated that the District Court retained jurisdiction to impose money judgments in a sum certain, covering disgorgement of any ill-gotten gains, with pre-judgment interest, and civil fines/monetary penalties (Docs. 158, 159, and 164), just as the Commission had requested it to do (Docs. 150, 155, and 163).

6. To date, the Commission has never pursued these open issues, which remain pending before the District Court, concerning the amount of any money judgments, damages, disgorgement, pre-judgment interest, and/or civil fines/monetary penalties to be imposed against Defendants Sky Way Global, Baker, B. Kover, G. Kovar, and/or Kent, notwithstanding its prior requests to the District Court, to retain jurisdiction to do so. Id.

**Pursuant to Controlling Authorities, the Judgment
in Favor of Mr. Kramer Is Not Yet Final or Appealable**

7. On April 1, 2011 and April 4, 2011, following a two-week bench trial, the District Court entered an Order and “Judgment in a Civil Case” against the Commission, and in favor of Mr. Kramer, respectively (Docs. 208 and 209).

8. Notably, the Judgment in a Civil Case, dated April 4, 2011 (Doc. 209), is not an appealable, “final judgment,” because it failed to include the requisite “no just reason for delay” certification language, expressly required by Fed. R. Civ. P. 54(b), for matters involving multiple claims and multiple defendants, which is necessary in order to properly invoke appellate jurisdiction over a final, appealable order as to only one defendant (and/or addressing only part of the claims alleged), while other issues remain to be decided in the action. Additionally, paragraph 1.(b) of page 2 of the Judgment (Doc. 209) sets forth a very helpful and informative “Civil Appeals Jurisdictional Checklist,” concerning

appealable orders, time for filing, and related information, and states, in relevant part, that:

In cases involving multiple parties or multiple claims, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). (Emphasis in original)

As explained above, the Judgment at issue lacked such a certification, was not “final,” and is not appealable.

9. Thereafter, the Commission’s Senior Trial Counsel argued, twice, to the District Court, after trial, that the Court had *not yet* entered a Final Judgment. *See* Doc. 214 at p. 1, filed April 22, 2011, which stated:

The Commission notes that Mr. Kramer's EAJA claim is premature **because the Court's April 1, 2011 Judgment is not final** for EAJA purposes until after the Commission has had sixty days in which to decide whether to appeal. (Emphasis added)

See also Doc. 217 at p. 5, filed May 12, 2011, which stated:

As the Commission previously stated in our April 22, 2011 Notice [DE 214], **there is not a final judgment in this case** and therefore an EAJA application is premature. (Emphasis added)

10. Notwithstanding all of the foregoing, on June 1, 2011, the Commission’s Senior Trial Counsel filed a Notice of Appeal with the District Court, purportedly in compliance with Fed. R. App. P. 3 and 4 (Doc. 225).

11. Nevertheless, based upon the facts that:

- (a) the District Court has retained jurisdiction to enter other, further orders against the other defendants in the District Court action, on issues that remain pending, concerning the money judgments to be determined with respect to the other defendants;
- (b) the actual language contained in the District Court's Order and Judgment in a Civil Case, respecting Mr. Kramer (Docs. 208 and 209), lacks the certification language required by Fed. R. Civ. P. 54(b), and is not otherwise denominated a Final Judgment; as well as
- (c) controlling law,^{1/}

combine to demonstrate that the District Court's rulings, which nonetheless resolved the substantive issues respecting Mr. Kramer, are not yet appealable.

Mr. Kramer's Reservation of Rights

12. The Record below, including the District Court's 38-page Order (Doc. 208), following a two-week bench trial, involving only Mr. Kramer, demonstrates that the Commission lacked the evidence necessary to support its sole claim against Mr. Kramer. Mr. Kramer respectfully believes that the Commission was not substantially justified in bringing or maintaining its claim in the underlying

^{1/} See 28 U.S.C. §§ 1291, 1292; Fed. R. Civ. P. 54(b); SEC v. Carillo, 325 F.3d 1268, 1272 (11th Cir. 2003); Haney v. City of Cumming, 69 F.3d 1098, 1101 (11th Cir. 1995); Williams, 732 F.2d at 885-86; Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983); Atlantic Fed. Savs. & Loan Ass'n of Fort Lauderdale v. Blythe Eastman Paine Webber, Inc., 890 F.2d 371, 375-76 (11th Cir. 1989).

District Court action against Mr. Kramer, or in pursuing this premature appeal, now.

13. Therefore, Mr. Kramer continues to reserve all of his rights under applicable laws or Rules, including, but not limited to, the Equal Access to Justice Act, 28 U.S.C. § 2412, among others, in order to seek (at the appropriate time) the recovery of all applicable attorneys' fees, costs, and expenses incurred in the defense of the underlying action, as well as this premature appeal, which is equally without justification.

Conclusion

Mr. Kramer's respectfully believes, and asserts, that this Honorable Court lacks jurisdiction over the Commission's premature appeal.

Respectfully submitted this 19th day of August, 2011,



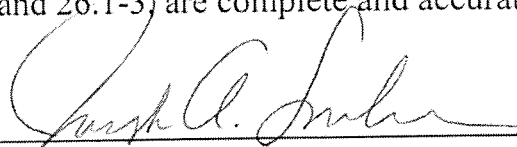
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Counsel for Appellee/Defendant Kramer

**CERTIFICATE OF INTERESTED PERSONS
AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to 11th Cir. R. 26.1-1, Mr. Kramer's counsel believes that the Certificate of Interested Persons and Corporate Disclosure Statement, previously filed by the Appellant in this appeal on June 13, 2011, pursuant to Fed. R. App. P. 26.1 and the 11th Cir. R. 26.1-1, 26.1-2, and 26.1-3) are complete and accurate.

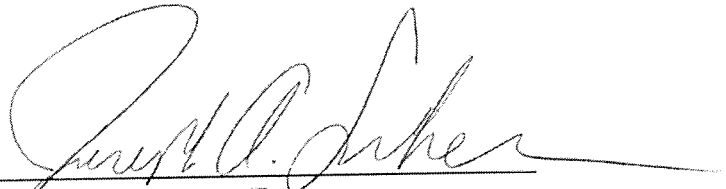


Joseph A. Sacher, Esq.
One of Counsel for Appellee
Kenneth R. Kramer

CERTIFICATE OF SERVICE

The following parties were served by regular mail and email on this 19th day of August, 2011:

David Lisitza, Esq.
U.S. Securities and Exchange Commission
100 F Street NE
Mail Stop 9040
Washington, D.C. 20549-2000



Joseph A. Sacher, Esq.
One of Counsel for Appellee
Kenneth R. Kramer

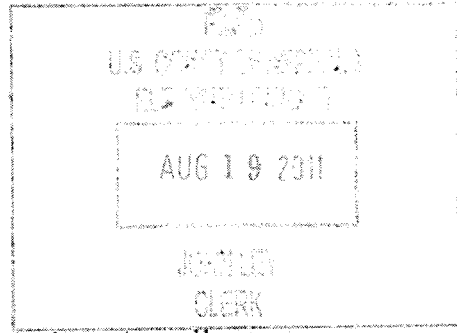
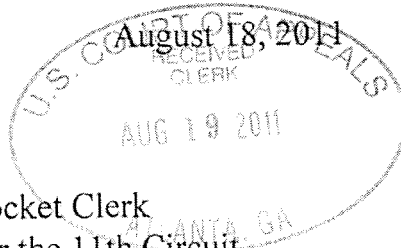


UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

DAVID LISITZA
SENIOR COUNSEL - APPELLATE GROUP
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Via next day air mail



Tonya L. Richardson, Docket Clerk
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St. N.W.
Atlanta, Georgia 30303

Re: *SEC v. Kramer*, 11-12510-DD
Jurisdictional Question,
Response by the Securities and Exchange Commission, Appellant

Dear Ms. Richardson,

On August 5, 2011, this Court issued a jurisdictional question inquiring whether the district court's April 4, 2011 judgment in favor of defendant Kenneth R. Kramer (Dkt. 209) is final and immediately appealable. *See* Appellate Dkt. 08/05/2011. As indicated by the jurisdictional question, Federal Rule of Civil Procedure 54(b) is implicated by the Commission's appeal of the judgment with regard to Kramer because the judgments the district court entered with regard to the other defendants—judgments that are not subject to appeal—are not "final" under 28 U.S.C. 1291 because in each instance they reserve to the district court jurisdiction over issues of monetary relief. *See* Fed. R. Civ. P. 54(b); *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 744, 96 S.Ct. 1202, 1206 (1976); *SEC v. Carrillo*, 325 F.3d 1268, 1272-73 (11th Cir. 2003) (*per curiam*).

However, this Court's appellate jurisdiction is proper because the judgment with regard to Kramer satisfies Rule 54(b) given that it is (1) a "judgment," (2) "final," and (3) the district court has indicated that there is "no just reason for delay" of the appeal of that final judgment. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7-8, 100 S.Ct. 1460, 1464-65 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436, 76 S.Ct. 895, 900 (1956)); *see also* *Lloyd*

Noland Foundation, Inc. v. Tenet Health Care Corp., 483 F.3d 773, 777-78 (11th Cir. 2007) (discussing *Curtiss-Wright* and *Sears*). There is a “judgment” in favor of Kramer because the district court ruled “upon a cognizable claim for relief,” namely the Commission’s claim that Kramer was liable for failing to register as a broker in violation of Section 15(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(a). *Curtiss-Wright*, 446 U.S. at 7, 100 S.Ct. at 1464. The judgment in favor of Kramer is “final” because it is an “ultimate disposition” concluding that Kramer is not liable and no relief is warranted. *Id.* And the district court indicated that there is “no just reason for delay” of the appeal of Kramer’s liability in two ways, described immediately below. *Curtiss-Wright*, 446 U.S. at 7, 100 S.Ct. at 1464 (quoting Fed. R. Civ. P. 54(b)).

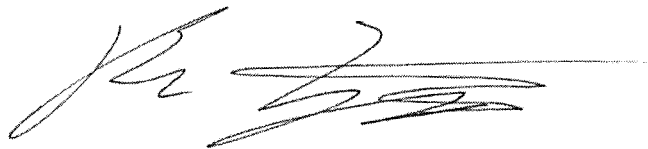
First, the district court has indicated that the liability of all the defendants must be resolved before turning to relief, which is an objective that demonstrates “sound judicial administration.” *Curtiss-Wright*, 446 U.S. at 8-11, 100 S.Ct. at 1465-66; *see also In re Yarn Processing Patent Validity Litig.*, 680 F.2d 1338, 1339-40 (11th Cir. 1982) (*per curiam*). In resolving issues of liability with regard to the other defendants one-by-one, the district court expressly reserved determining monetary relief with regard to any of these defendants. *See* Dkt. 53 (default judgment against Skyway Global LLC); Dkt. 85 (default judgment against Kenneth Bruce Baker); Dkt. 158 (consent judgment against Brent C. Kovar); Dkt. 159 (consent judgment against Glenn A. Kovar); Dkt. 164 (consent judgment against James S. Kent). Adhering to this course, the district court continues to reserve relief determinations until Kramer’s liability is resolved by this Court. After the appeal—whether this Court affirms or reverses and remands to determine appropriate relief with regard to Kramer—the district court will then be able to resolve all relief issues with regard to all of the defendants.

Second, after this Court issued its jurisdictional question, the district court expressly stated that the proceedings with regard to the remaining defendants should be administratively closed “pending appeal” of the judgment in favor of Kramer, and directed the parties to re-open the case only “upon the issuance of a mandate from the Eleventh Circuit Court of Appeals.” Dkt. 249, emphasis added. While the mere existence of an administrative closure order is not determinative (*see Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 295-96 (4th Cir. 2008)), the content of this administrative closure order demonstrates that the district court has already acted as a “dispatcher” to determine the proper sequence of events in this case. *Curtiss-Wright*, 446 U.S. at 8-11, 100 S.Ct. at 1465-66; *see also Lloyd Noland*, 483 F.3d at 777-78. This order demonstrates that there is nothing more

for the district court to do until the appeal in this Court is resolved, and therefore that the district court accepts that the appeal should proceed without delay.

But in an abundance of caution, on this day the Commission also requested that the district court enter a new judgment expressly stating that there is “no just reason for delay” of the appeal of that judgment, and expressly explaining the reasons why this is so. *See* Fed. R. Civ. P. 54(b); *Curtiss-Wright*, 446 U.S. at 3, 100 S.Ct. at 1462; *Yarn*, 680 F.2d at 1339-40. Attached to this response is the Commission’s motion in the district court containing a draft judgment. (This response was likewise attached to the motion filed in district court). Should the district court enter such a new judgment, the Commission would, according to well-established practice, supplement its appeal with the new judgment and new notice of appeal. *See Yarn*, 680 F.2d at 1340.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized name, possibly "John J. ...".

Attachments:

Rule 54(b) motion filed in district court

Certificate of Interested Persons and Corporate Disclosure Statement

cc: counsel of record

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)

Lisitz, 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 18, 2011



David Lisitza

Securities and Exchange Commission

CERTIFICATE OF SERVICE

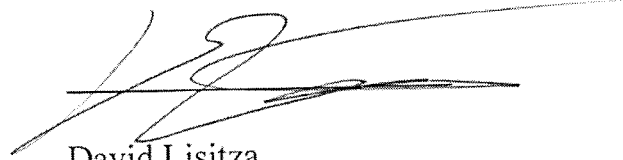
I hereby certify that, on this day, I caused the original plus three copies of the foregoing Jurisdictional Question Response By The Securities and Exchange Commission, Appellant, to be sent by overnight delivery to:

Tonya L. Richardson, Docket Clerk
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 foregoing 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 18, 2011



David Lisitza
Securities and Exchange Commission
100 F St., N.E.
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. : 09-455-CIV-MERRYDAY/MCCOUN

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

SKY WAY GLOBAL LLC, BRENT C. KOVAR,
GLENN A. KOVAR, JAMES S. KENT,
KENNETH BRUCE BAKER, KENNETH R.
KRAMER,

Defendants.

**PLAINTIFF'S MOTION TO CERTIFY UNDER
FEDERAL RULE OF CIVIL PROCEDURE 54(b) THE
JUDGMENT IN FAVOR OF DEFENDANT KENNETH R. KRAMER**

I. Introduction

Plaintiff Securities and Exchange Commission respectfully requests this Court to certify under Federal Rule of Civil Procedure 54(b) its April 4, 2011 Order granting judgment in favor of defendant Kenneth R. Kramer. The Court entered this judgment based on the conclusion that Kramer was not liable for violating the federal securities laws. As indicated by a jurisdictional question issued by the Eleventh Circuit, the Commission's appeal of this final judgment implicates Rule 54(b) because the judgments entered against the other defendants are not final. While these judgments resolve issues of liability, they reserve to this Court jurisdiction over issues of monetary relief.

There is no just reason for delay of the appeal. The legal and factual issues relating to Kramer's liability are separate from the pending issues involving the relief available against the other defendants. This Court has expressed its objective, consistent with Rule 54(b)'s

requirement that there be “no just reason for delay,” of resolving all such issues of relief only after the liability of every defendant—including Kramer—has been conclusively determined. The Court has done so by reserving determinations of relief and issuing an order to administratively close the case pending the determination of Kramer’s liability on appeal.

While this Court’s orders indicate that Rule 54(b) is satisfied, given the Eleventh Circuit’s inquiry, we ask the Court to enter an amended judgment expressly stating that there is “no just reason for delay” and expressly stating the reasons why this is so.

II. Procedural Background

A. District Court Proceedings

Prior to the January 2011 bench trial regarding Kramer’s liability, this Court entered judgments resolving issues of liability against all of the other defendants. (D.E. 53, 85, 158, 159 & 164). These judgments grant injunctions, but retain to this Court jurisdiction to impose monetary relief, namely the amount of disgorgement of ill-gotten gains with pre-judgment interest and civil penalties. *Id.*

Following the bench trial, this Court granted judgment in favor of Kramer on April 4, 2011. (DE 209). This Court concluded Kramer was not liable for failing to register as a broker in violation of Section 15(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(a). (DE 208). On June 1, 2011, the Commission filed a notice of appeal, appealing only this Court’s judgment in favor of Kramer. (DE 225; Fed. R. App. P. 4(a)(1)(B)).

On August 9, 2011, this Court entered an order directing the Clerk to administratively close the entire case “pending appeal,” and stating the case should be re-opened “upon the issuance of a mandate from the Eleventh Circuit Court of Appeals.” (DE 249).

B. Court of Appeals Proceedings

The Eleventh Circuit Court of Appeals docketed the Commission's appeal of this Court's judgment in favor of Kramer on June 6, 2011. *See SEC v. Sky Way Global LLC, et al.*, No. 11-12510-DD, Appellate Dkt. 06/06/2011. The Commission's opening brief and excerpts of record are due on or before August 22, 2011. Appellate Dkt. 08/11/2011.

On August 5, 2011, the Eleventh Circuit Court of Appeals issued a jurisdictional question to the Commission, seeking a response to the suggestion that the court of appeals lacks jurisdiction over this Court's judgment in favor of Kramer in light of the various orders expressly retaining jurisdiction to enter additional orders for money judgments against the other defendants. Appellate Dkt. 08/05/2011.

The Commission's answer to the Eleventh Circuit's jurisdictional question is attached to this motion. This motion is likewise included in the Commission's answer to the Eleventh Circuit

III. Argument

A. Rule 54(b) Is Implicated Because The Judgments Against Defendants Other Than Kramer Are Not Final.

Rule 54(b) is implicated where there is a final judgment as to one defendant, but not as to others. Rule 54(b) provides:

[W]hen multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all * * * parties only if the court expressly determines that there is no just reason for delay.

Fed. R. Civ. P. 54(b).

This Court has entered a final judgment as to Kramer, but not as to the other defendants. Fed. R. Civ. P. 54(b). The judgment in favor of Kramer is final because it is based on this Court's determination that Kramer was not liable for violating the federal securities laws, and

therefore no relief against him is available. The Commission's appeal only seeks review of the judgment entered in favor of Kramer. DE 225.

However, as the Eleventh Circuit has suggested (Appellate Dkt. 08/05/2011), the judgments this Court entered with regard to defendants other than Kramer are not "final" under 28 U.S.C. 1291, because in each instance this Court retained jurisdiction over issues of monetary relief. See *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 744, 96 S.Ct. 1202, 1206 (1976); *SEC v. Carrillo*, 325 F.3d 1268, 1272-73 (11th Cir. 2003) (*per curiam*);

Because there is a final judgment as to Kramer, but not as to the other defendants, the judgment with regard to Kramer must satisfy Rule 54(b).

B. Rule 54(b) Is Satisfied Because There Is "No Just Reason For Delay" Of The Appeal Of Kramer's Liability.

For the judgment with regard to Kramer to satisfy Rule 54(b), this Court must determine that there is "no just reason for delay" of the appeal of the final judgment. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7-8, 100 S.Ct. 1460, 1464-65 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436, 76 S.Ct. 895, 900 (1956)); see also *Lloyd Noland Foundation, Inc. v. Tenet Health Care Corp.*, 483 F.3d 773, 777-78 (11th Cir. 2007) (discussing *Curtiss-Wright* and *Sears*). There is no doubt that the judgment in favor of Kramer is "final" because it is an "ultimate disposition" concluding Kramer is not liable and no relief is warranted. *Id.* In addition, this Court has indicated there is "no just reason for delay" of the appeal. However, in an abundance of caution the Commission requests that the Court enter a new judgment expressly stating that there is "no just reason for delay" of the appeal of that judgment, and expressly explaining the reasons why this is so. See Fed. R. Civ. P. 54(b); *In re Yarn Processing Patent Validity Litig.*, 680 F.2d 1338, 1339 (11th Cir. 1982) (*per curiam*).

1. This Court Has Indicated That There Is “No Just Reason For Delay” Of The Appeal.

In two ways the Court has expressed its objective of resolving Kramer’s liability without delay. *See Curtiss-Wright*, 446 U.S. at 8-11, 100 S.Ct. at 1465-66 (assessing the district court’s reasoning for why there is no cause for delay); *In re Southeast Banking Corp.*, 69 F.3d 1539, 1546 (11th Cir. 1995) (same).

First, this Court has indicated that the liability of all the defendants must be resolved before turning to relief, which is an objective that demonstrates “sound judicial administration.” *Curtiss-Wright*, 446 U.S. at 8-11, 100 S.Ct. at 1465-66; *see also infra* at 6-7. In resolving issues of liability against the other defendants, this Court has expressly reserved determining monetary relief with regard to any of these defendants. (DE 53, 85, 158, 159 &164). Adhering to this practice, there is no reason to delay the appeal with regard to Kramer’s liability so that this Court can resolve the issues of relief with regard to the other defendants. Rather, this Court can continue to reserve relief determinations until Kramer’s liability is resolved in the court of appeals.

Second, after the Commission filed its notice of appeal, this Court again expressly reserved consideration of all issues in this case until after the appeal regarding Kramer is resolved. Ten days ago (and four days after the Eleventh Circuit issued its jurisdictional question), this Court expressly stated that the proceedings with regard to the remaining defendants should be administratively closed “pending appeal” of the judgment in favor of Kramer, and directed the parties to re-open the case only “upon the issuance of a mandate from the Eleventh Circuit Court of Appeals.” (DE 249) (emphasis added). While the mere existence of an administrative closure order is not determinative (*see Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 295-96 (4th Cir. 2008)), the content of this administrative closure order demonstrates

that the district court has already acted as a “dispatcher” to determine the proper sequence of events in this case. *Curtiss-Wright*, 446 U.S. at 8-11, 100 S.Ct. at 1465-66; *see also Lloyd Noland*, 483 F.3d at 777-78. This order demonstrates there is nothing more for this Court to do until the appeal is resolved, and therefore the appeal should proceed without delay.

2. Kramer’s Liability Is Separate From The Relief Against The Other Defendants.

The touchstone of whether there is “no just reason for delay” under Rule 54(b) is whether an immediate appeal demonstrates “sound judicial administration.” *Curtiss-Wright*, 446 U.S. at 8-11, 100 S.Ct. at 1465-66; *see also Yarn*, 680 F.2d at 1339-40. As explained immediately above, this Court has already exercised sound judicial administration by holding off its determination of monetary relief with regard to any defendant until the liability of all the defendants has been conclusively resolved. There is no just reason for upsetting this status quo.

Furthermore, there is no just reason for delaying the appeal because issues regarding Kramer’s liability involve separate issues of law and fact compared to the pending issues of relief with regard to the other defendants. *See Curtiss-Wright*, 446 U.S. at 8-9, 100 S.Ct. at 1465 (under Rule 54(b) it is “proper” for the district court to consider “whether the claims under review were separable from the others remaining to be adjudicated”); *Sears*, 351 U.S. at 436-37, 76 S.Ct. at 900 (same); *Southeast Banking*, 69 F.3d at 1547 (same). For example, in *Deboles v. Trans World Airlines, Inc.*, the Third Circuit affirmed the district court’s determination that there was no just reason for delaying an appeal to “decide the issue of TWA’s liability” until after the conclusion of proceedings to determine “the amount of damages” against other defendants. 552 F.2d 1005, 1007-08 (3d Cir. 1977). *Cf.*, *Mathis v. Zant*, 903 F.2d 1368, 1372 (11th Cir. 1990) (*per curiam*) (criminal liability and sentencing are separable for purposes of Rule 54(b) certification). Accordingly, there is no just reason for delaying the appeal for the months it may

take to resolve the pending issues of relief against other defendants. *See Curtiss-Wright*, 446 U.S. at 6, 11-12, 100 S.Ct. at 1464, 1466-67 (delay of appeal by “many months, if not years” supported Rule 54(b) certification, a demonstration of “economic duress” is not necessary); *see also* Fed R. Civ. P. 54, Advisory Committee Notes to 1961 Amendment (noting that the “danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases”).

3. This Court Should Enter A New Judgment Expressly Stating That There Is “No Just Reason For Delay” Of The Appeal Of The Judgment In Favor Of Kramer, And Explaining Why There Is No Just Reason For Delay.

As explained above (*supra* at 5-6), this Court has indicated that there is no just reason for delay of the appeal. However, because the Eleventh Circuit has issued a jurisdictional question, out of an abundance of caution the Commission requests that this Court enter a new judgment that expressly states: (1) that there is “no just reason for delay,” and (2) the reasons why delay is unjustified. The entry of such an order would leave no doubt regarding appellate jurisdiction. *See Curtiss-Wright*, 446 U.S. at 3, 100 S.Ct. at 1462; *Southeast Banking*, 69 F.3d at 1546. Attached is a draft judgment. Should this Court enter such a new judgment, the Commission would, according to well-established practice, supplement its appeal with the new judgment and new notice of appeal. *See Yarn*, 680 F.2d at 1340.

IV. Conclusion

For the foregoing reasons, the Commission respectfully requests this Court to certify under Fed. R. Civ. P. 54(b) its April 4, 2011 order granting judgment in favor of Kramer.

Dated: August 18, 2011

Respectfully submitted,

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. : 09-455-CIV-MERRYDAY/MSCCOUN

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

SKY WAY GLOBAL LLC, BRENT C. KOVAR,
GLENN A. KOVAR, JAMES S. KENT,
KENNETH BRUCE BAKER, KENNETH R.
KRAMER,

Defendants.

_____/

[PROPOSED] JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Kenneth R. Kramer and against the Securities and Exchange Commission. In accordance with Fed. R. Civ. P. 54(b), there is no just reason for delay of the appeal of this judgment. As this Court has previously indicated, there is no just reason for delay because it is sound judicial administration to determine relief with regard to all the defendants only after Kramer's liability has been resolved on appeal. Furthermore, there is no just reason for delay because the legal and factual issues relating to this judgment, *i.e.*, Kramer's liability, are separate from the pending issues involving relief against the other defendants.

Date:

By: _____

Copies furnished to:
Counsel of Record
Unrepresented Parties

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 18, 2011, I electronically filed the foregoing Plaintiff's Motion To Certify Under Federal Rule Of Civil Procedure 54(b) The Judgment Against Defendant Kenneth R. Kramer, and supporting exhibit with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties via the methods of service described below.

s/ Amie Riggle Berlin

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