No. 11-55479

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAMER SALAMEH, *et al.*,

Plaintiffs-Appellants,

v.

TARSADIA HOTEL, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*

MARK D. CAHN
General Counsel

JACOB H. STILLMAN
Solicitor

RANDALL W. QUINN
Assistant General Counsel

WILLIAM K. SHIREY
Senior Litigation Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(202) 551-5043 (Shirey)

TABLE OF CONTENTS

STATEMENT OF THE ISSUE 1

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND SUMMARY OF ITS POSITION 2

STATEMENT OF THE CASE 5

A. FACTS 5

B. DISTRICT COURT PROCEEDINGS 8

ARGUMENT 10

I. THE UNIT SALES AND RENTAL MANAGEMENT PROGRAM COMPRISE A SINGLE TRANSACTION FOR PURPOSES OF THE FEDERAL SECURITIES LAW. 11

II. CONTRARY TO THE DISTRICT COURT'S CONCLUSION, TARSADIA OFFERED AND SOLD INVESTMENT CONTRACTS. 13

CONCLUSION 18

TABLE OF AUTHORITIES

Cases Page

In re Abbondante, 1934 Act Rel. No. 53055, 2006 WL 42393 (Jan. 6, 2003).....15

Bailey v. J.W.K. Properties, Inc., 904 F.2d 918 (4th Cir. 1990) 17-18

In re Barkate, 57 S.E.C. 488 (April 8, 2004).....15

Buie v. United States, 420 F.2d 1207 (5th Cir. 1969).....17

Davis v. Metro Productions, Inc., 885 F.2d 515 (9th Cir. 1989).....17

Demarco v. LaPay, 2009 WL 3855704, No. 2:09-CV-190 (D. Utah Nov. 17, 2009) 16

Garcia v. Santa Maria Resort, Inc., 528 F. Supp.2d 1283 S.D. Fla. 2007) 16

Hocking v. Dubois, 885 F.2d 1449 (9th Cir. 1989).....*passim*

SEC v. Eurobond Exchange, Ltd., 13 F. 3d 1334 (9th Cir. 1993) 15

SEC v. Glenn W. Turner Enters., 474 F.2d 476 (9th Cir. 1973).....15

SEC v. Rubera, 350 F.3d 1084 (9th Cir. 2003).....*passim*

SEC v. W.J. Howey Co., 328 U.S. 293 (1946).....*passim*

Tcherepnin v. Knight, 389 U.S. 332 (1967).....11

Timmreck v. Munn, 433 F. Supp. 396, 401 (N.D. Ill. 1977) 17

Warfield v. Alaniz, 569 F.3d 1015 (9th Cir. 2009) 14-15

TABLE OF AUTHORITIES (CONTINUED)

Commission Release — Page

Guidelines as to the Applicability of the Federal Securities Law to Offers and Sales of Condominiums or Units in a Real Estate Development, Securities Act Release No. 33-5347, 1973 WL 158443 (Jan. 4, 1973)..... 2, 13-14

Statutes and Rules

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

Section 2(1), 15 U.S.C. 77b(1) 10

Section 12(a)(2), 15 U.S.C. 77l(a)(2) 8

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

Section 3(a)(10), 15 U.S.C. 78c(a)(10) 10

Section 10(b), 15 U.S.C. 78j(b) 8

Rules Under the Securities Exchange Act of 1934, 17 C.F.R. 240.01, *et seq*.

Rule 10b-5, 17 C.F.R. 240.10b-5 8

Federal Rules of Civil Procedure

Rule 12(b)(6) 8

Miscellaneous

S.E.C. No-Action Letter to MarcoPolo Hotel, Inc., 1987 WL 108553 (Sept. 30, 1987) 12

S.E.C. No-Action Letter to Intrawest Corp., 2002 WL 31626919 (Nov. 8, 2002) 12

No. 11-55479

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAMER SALAMEH, *et al.*,

Plaintiffs-Appellants,

v.

TARSADIA HOTEL, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*

STATEMENT OF THE ISSUE

Whether a series of related contracts offered by the defendants involving the sale and rental management of hotel rooms in a hotel that the defendants were constructing constituted investment contracts under the federal securities laws where, from the time the sales commenced, the purchasers had so little use or control of the rooms that they had no practical alternative but to rely on the

defendants to rent the rooms and obtain profits, which were shared between the purchasers and the defendants.

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND SUMMARY OF ITS POSITION

The Securities and Exchange Commission – the agency principally responsible for the administration of the federal securities laws – submits this brief as *amicus curiae* to address a question concerning the applicability of the securities laws to real-estate developments, an issue that has been of importance to the Commission for many decades. See generally Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development, Securities Act Release No. 33-5347, 1973 WL 158443 (Jan. 4, 1973). The Commission believes that the district court, in determining that the hotel-room sales did not involve sales of investment contracts, failed to give effect to the economic and practical realities of the transactions as required by Supreme Court and Ninth Circuit precedent.

The Commission is concerned that the district court's holding on the investment contract issue, unless reversed, would seriously erode the investor protections of the securities laws. It would impermissibly allow a promoter to avoid the coverage of these laws by (1) artificially dividing a single investment transaction into ostensibly separate parts, and (2) including written disclaimers that falsely state that there is no investment expectation.

This case involves the offer and sale of hotel rooms, and related rental-management agreements, in a large-scale luxury hotel venture that the defendants undertook to develop, construct, and operate in San Diego, California. Early during the hotel's construction phase, the defendants sold the hotel rooms to the public, including the plaintiffs, by requiring that the purchasers execute two agreements that, collectively, denied the purchasers the effective use and control of the units and substantially reserved that control for the defendants. Approximately a year later but still prior to the hotel's opening, the defendants offered a rental management arrangement whereby the defendants became the exclusive agent to manage, promote, and rent each room as part of the hotel. Plaintiffs brought suit against the hotel developer asserting that the hotel rooms and the rental management program, together, comprise an investment contract covered by the federal securities laws. The district court determined that the plaintiffs' "allegations do not sufficiently set forth facts indicating they were offered [the rooms and the rental management program] as part of a single package" (ER14),[1] and that in the absence of this, the sale of the rooms did not standing alone constitute an investment contract.

[1] "ER__" refers to the page number in the plaintiffs' Excerpts of Record.

The Commission believes that the sale and rental program should be analyzed as a single package for purposes of the investment contract determination because:

- the original sales agreements left the plaintiffs with so little use or control that it was obvious from the beginning that the defendants would exercise exclusive control to rent and operate the rooms;
- the practical reality of the defendants' plan to operate a functioning hotel made it obvious from the outset that these rooms would be necessary to serve as the hotel's guest rooms; and
- the hotel was under construction during this entire period, thereby making the time gap between the room sales and rental program inconsequential.

Further, the district court erroneously relied on language in the sales agreements disclaiming any investment expectation, a consideration under the investment contract test. (ER14-15) The disclaimers should not be given any weight here because the economic and practical reality demonstrates that the transactions were investments.

STATEMENT OF THE CASE

The factual allegations discussed below are based upon the plaintiffs' second amended complaint and the written sales, operation, and rental agreements between the parties.

A. FACTS

Through several entities that they owned or controlled – including defendants Tarsadia Hotels and 5th Rock, LLC – defendants Tushar Patel, B.U. Patel, and Greg Casserly (collectively "Tarsadia") developed, promoted and operated the Hard Rock Hotel San Diego ("Hotel"). (ER33-34, 43-44, 51, 56, 71) Tarsadia designed the Hotel to be a "world class" luxury hotel comprising 420 hotel rooms and suites, as well as extensive space for shops, restaurants, and meeting events. (ER40, 43-44, 47-50)

In May 2006, with construction of the Hotel underway, Tarsadia began to sell the hotel rooms and suites as "non-residential condominium units." (ER89, 254) The fact that the rooms were never intended for residential use is apparent given the absence of kitchens and a San Diego zoning restriction requiring that the rooms be sold for "non-residential" use and "at all times … be managed as part of the Hotel." (ER39-40, 46)

Tarsadia sold the vast majority of the rooms to purchasers for approximately $176 million, retaining ownership of only a small number of rooms. (ER36) The

Purchase Contract that purchasers were required to execute contained provisions stating that Tarsadia made no representations regarding the rental potential of the rooms and that the purchasers were not acquiring the rooms as investment opportunities. (ER100) For example, the Purchase Contract stated that the "buyer expressly acknowledges" that "buyer is purchasing the unit for its real estate value and not as an investment." (ER370)

Notwithstanding these provisions, other restrictions in documents that were coupled with the Purchase Contract were structured so that, as a practical matter, the purchasers were left with no use for the rooms except to allow Tarsadia to rent and operate them as the Hotel's guest rooms. (ER50-51) At the time of each sale, Tarsadia required purchasers to agree to the terms of a "Master Association Declaration of Covenants, Conditions, Easements and Restrictions" that the Purchase Contract expressly incorporated. (ER383-384) This Declaration provided that purchasers could rent their rooms only under a program operated by Tarsadia or a "third party approved by" Tarsadia, and further provided that Tarsadia possesses "the exclusive right to show the Room Units to prospective Guests[] and to permit access thereto." (ER44; Plaintiffs' Motion for the Ninth Circuit Court of Appeals to Take Judicial Notice of Master Association Declaration of Covenants, Conditions, Easements and Restrictions, Ex. A, at 49 ¶10.2.3(i)(c))

Tarsadia additionally required room owners to execute at the time of each sale a Unit Maintenance and Operation Agreement that further restricted purchasers' use and control of the rooms. (ER24, 374, 433; see also ER375, 384) The Unit Operations Agreement required that the rooms be maintained as "non-residential"; that purchasers not occupy the rooms more than 28 days a year; that all room keys "be maintained by the Hotel," and that purchasers "not copy, retain or distribute the keys or any copies thereof"; that the room "be managed as part of the Hotel," including use of the Hotel's housekeeping services, mini-bar rentals, telephone switchboard, and television cable system; and that purchasers pay a service fee of not less than $90 for each day that they or their guests occupy the room. (See, e.g., ER44, 47-48, 434-437)

Approximately a year later in August 2007, with the Hotel's opening still several months away, Tarsadia offered purchasers a Rental Management Agreement that authorized Tarsadia to serve as the "sole and exclusive authority to manage, operate, market and rent" a participating room. (ER 43, 254, 456) Among other things, the Rental Agreement authorized Tarsadia to set and adjust rental rates, and to apportion reservations among various units in the Hotel. (ER456-458) In return for these services, the Rental Agreement afforded Tarsadia a majority of each participating room's gross revenue, with the room owner receiving any residual net revenue from their unit after other costs were deducted.

(ER 41-42, 462-463) The Rental Agreement did not provide for a pooling of revenue among the participating rooms. (ER465)

B. DISTRICT COURT PROCEEDINGS

The plaintiffs are a group of individuals and entities that acquired rooms in the Hard Rock Hotel from Tarsadia prior to the Hotel's December 2007 opening. (ER10) They filed this proposed class action in the U.S. District Court for the Southern District of California on December 8, 2009, seeking to represent a class of all similarly situated purchasers. (ER29, 791) Their complaint alleges that Tarsadia's sale of the rooms, coupled with the rental program, constitutes an investment contract under the federal securities laws and that, in offering and selling the investment contract, Tarsadia was liable under Section 12(a)(2) of the Securities Act, 15 U.S.C. 77l(a)(2), and violated 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, by making material misrepresentations and omissions. (ER28, 51, 72-73) The complaint alleged, among other things, that Tarsadia made material misrepresentations and omissions regarding the strength of the San Diego hotel market and the viability of the project. (ER48-50)

Tarsadia moved to dismiss the complaint on the pleadings pursuant to Federal Rule of Civil Procedure 12(b)(6). On March 22, 2011, the district court ordered the case dismissed, holding (among other things) that the plaintiffs failed

to allege a plausible claim that the sales and rental program transactions constituted an investment contract. (ER13-16) The court concluded that the plaintiffs "have not sufficiently alleged facts" demonstrating "that the real estate sale and the rental agreement at issue here formed a single transaction, nor have they sufficiently alleged an expectation of profits from the efforts of others at the time they agreed to purchase" the rooms. (ER16)

The district court relied on the "significant gap between the execution of the Purchase Contracts … and the execution of the Rental Management Agreements," as well as the absence of "sufficient facts regarding the timing of when representations were [first] made relating to the Rental Management Agreement," to conclude that the "allegations do not sufficiently set forth facts indicating [that] they were offered … as part of a single package." (ER13-14) As the district court viewed it, the plaintiffs were offered two separate, temporally distinct opportunities – a property sale and subsequently a participation in a rental management program. (ER16)

Concluding that these were two separate transactions, the court turned to the "plain language" of the Purchase Contract to find that the plaintiffs lacked a necessary condition for an investment contract – an expectation of profits from the efforts of others – when they acquired the rooms in 2006. (ER14-16) As the court explained, when the plaintiffs executed the Purchase Contract, the plaintiffs

"specifically represented [that] they were not purchasing the units for investment purposes and were not relying on any external representations regarding the rental value of the units." (ER15) In the court's view, "any expectation of profits from the efforts of others [that] they developed was a result of the Rental Management Agreement, which they entered months later[.]" (ER15) As a result, the district court concluded that when the plaintiffs entered the Purchase Contract, they did nothing more than enter a real estate transaction for property – not an investment contract covered by the securities laws.

ARGUMENT

Both the Securities Act and the Exchange Act define "security" as including an "investment contract." See Section 2(1) of the Securities Act, 15 U.S.C. 77b(1); Section 3(a)(10) of the Securities Exchange Act, 15 U.S.C. 78c(a)(10). The Supreme Court in the seminal *Howey* case has in turn defined an investment contract as a contract, transaction, or scheme involving an investment of money in a common enterprise with an expectation of profits produced by the efforts of others. See *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). This is a "flexible" concept that is "capable of adaptation to the meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Howey*, 328 U.S. at 299. Furthermore, the existence of an investment contract turns on the economic and practical realities of the transaction

or scheme, and not the legal formulations or contract terminology the parties may use. See, e.g., *id.* at 300; *SEC v. Rubera*, 350 F.3d 1084, 1089-90 (9th Cir. 2003) (citing *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)).

I. THE UNIT SALES AND RENTAL MANAGEMENT PROGRAM COMPRISE A SINGLE TRANSACTION FOR PURPOSES OF THE FEDERAL SECURITIES LAWS.

The district court misapplied the *Howey* test by treating the room sales and the rental program as separate transactions. The critical considerations for the district court were the "significant gap between execution of the Purchase Contracts … and execution of the Rental Management Agreements," and the absence of "sufficient facts regarding the timing of when representations relating to the Rental Management Agreement were made[.]" The district court failed to appreciate the broader realities underlying the arrangements between the parties.

Parties cannot escape the federal securities laws by artificially dividing a securities investment into a series of ostensibly discrete transactions. See, e.g., *SEC v. W.J. Howey Co.*, 328 U.S. 293, 295-96 (1946); *SEC v. Rubera*, 350 F.3d 1084, 1091 (9th Cir. 2003). Courts must ascertain the "general 'scheme' of profit seeking activities" that was explicitly or implicitly offered to induce the purchase. See *Hocking v. Dubois*, 885 F.2d 1449, 1457-58 (9th Cir. 1989) (*en banc*). If the economic and practical realities indicate that multiple agreements in fact comprise a single transaction or package, they must be analyzed together to determine if they

constitute an investment contract. See, e.g., *Howey*, 328 U.S. at 300; *Rubera*, 350 F.3d at 1091; *Hocking*, 885 F.2d at 1457-58.

The room sales and rental management program plainly constituted a single transaction – an investment in a hotel enterprise. The Declaration of Covenants and the Unit Operations Agreement, both of which Tarsadia required plaintiffs to agree to at the time of sale, imposed conditions that effectively denied the plaintiffs meaningful use or control of the rooms, and *reserved significant control for Tarsadia* (as the Hotel operator). Among other things, these documents limited a purchaser's personal use of the room to 28 days each year[2] and precluded the purchaser from retaining a room key; tied each room to the Hotel's cleaning, linen, television, telephone, and mini-bar services; imposed a $90 daily minimum payment for each day the purchaser or his guest occupies the room; and restricted room rental to a rental program operated or approved by Tarsadia.

More importantly, the economic reality of the Hotel venture itself further supports this analysis. Tarsadia's stated purpose in undertaking the project –

---

[2] The district court's opinion stated that "the S.E.C. has previously issued a no-action letter stating [restrictions based on zoning requirements] will not transform a condominium into a security." (ER11 (citing S.E.C. No-Action Letter to MarcoPolo Hotel, Inc., 1987 WL 108553 (Sept. 30, 1987), and S.E.C. No-Action Letter to Intrawest Corp., 2002 WL 31626919 (Nov. 8, 2002))). However, neither of the staff letters cited by the district court addresses the zoning issue; rather, both letters rest on the fact that, under the totality of the circumstances, the condominium units in question were arguably being offered and sold for personal use.

including entering into a license agreement with the Hard Rock Hotel chain (EA438-439) – was to operate a functioning, economically viable hotel. This would clearly prove impossible unless the vast majority of the rooms that Tarsadia was selling remained under Tarsadia's rental and operational control. Cf. *Hocking*, 885 F.2d at 1461 ("The commercial viability of a one-room hotel does not strongly argue for separate management.").

In light of these economic and practical realities that extend back to the time of the room sales, the fact that Tarsadia did not make the Rental Management Agreement available until a year after the room sales is of little or no consequence. This is particularly so given that the Hotel was still under construction throughout the entire period in question, and did not finally open until several months *after* Tarsadia formally offered the rental management program. Tarsadia's ability to delay having the plaintiffs actually execute the Rental Management Agreement should not disguise the economic and practical reality here: Tarsadia's operation of a rental management program was at all times here a necessary and essential component of the room sales, making the two a single transaction or package.

II. CONTRARY TO THE DISTRICT COURT'S CONCLUSION, TARSADIA OFFERED AND SOLD INVESTMENT CONTRACTS.

The securities laws' potential applicability to sales of units in real estate developments for investment has long been recognized. In 1973, recognizing the importance of this issue, the Commission issued an interpretive release (which

remains operative) explaining that an investment contract exists when a developer such as Tarsadia offers units in a real estate venture in conjunction with "a rental or similar arrangement whereby the purchaser must hold his unit available for rental for any part of the year, must use an exclusive rental agent *or is otherwise materially restricted in his occupancy or rental of his unit*." Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development, Securities Act Release No. 33-5347, 1973 WL 158443, at *3 (Jan. 4, 1973) (emphasis added).[3] This Court, applying the *Howey* test, has similarly recognized that condominium sales offered in conjunction with rent pooling or rental management agreements can constitute an investment contract. *Hocking v. DuBois*, 885 F.2d 1449, 1460 (9th Cir. 1989) (*en banc*).

Under the *Howey* test, Tarsadia was offering and selling an investment contract. There is no dispute that each purchase required an investment of money that exposed the purchaser to a risk of financial loss. See *Warfield v. Alaniz*, 569 F.3d 1015, 1021 (9th Cir. 2009) (stating an "investment of money" under the

[3] The Purchase Contract (with Declaration of Covenants) and the Unit Operations Agreement offered in 2006, and the Rental Management Agreement offered in 2007, together comprise an investment contract under the Commission's interpretive release. As discussed above, from the time the purchasers signed the Purchase Contract and Unit Operations Agreement, Tarsadia had materially restricted the plaintiffs' occupancy and rental of the rooms, and effectively left them with no option but to rely on Tarsadia as the exclusive rental agent.

Howey test "requires that the investor commit his assets to the enterprise in such a manner as to subject himself to financial loss") (internal quotation marks omitted). Under this Court's precedent, it is also clear that a "common enterprise" exists because the Rental Management Agreement establishes a revenue-sharing arrangement for each participating room between Tarsadia and the unit owner. [4] See *SEC v. Eurobond Exchange, Ltd.*, 13 F.3d 1334, 1339 (9th Cir. 1993).

It is also apparent that the plaintiffs were led to expect profits from the defendants' efforts. This showing refers to profits from the "undeniably significant [efforts of others], those essential managerial efforts which affect the failure or success of the enterprise." *Rubera*, 350 F.3d at 1091-92 (quoting *SEC v. Glenn W. Turner Enters.*, 474 F.2d 476, 482 (9th Cir. 1973)). Moreover, this Court has held that the showing is established where the purchaser demonstrates a practical "inability to exercise meaningful powers of control or to find others to manage his investment," notwithstanding any appearance of legal control that the parties' written agreements may suggest. *Hocking*, 885 F.2d at 1460. As discussed above,

[4] Although the issue is not squarely presented by this case, the Commission had held that "common enterprise" is *not* a distinct requirement for an investment contract under *Howey*. *In re Barkate*, 57 S.E.C. 488, 495 n.13 (April 8, 2004). See also *In re Abbondante*, 1934 Act Rel. No. 53066, 2006 WL 42393, at *6 (Jan. 6, 2006) ("an investment contract under *Howey* is a contract or scheme for the 'placing of capital or laying out of money in a way intended to secure income or profit from its employment") (internal quotation marks omitted).

from the time of the room sales, the plaintiffs were precluded for all practical purposes from exercising any meaningful control over their rooms; Tarsadia had largely reserved such authority for itself. Moreover, the Rental Management Agreement expressly provided Tarsadia with "sole and exclusive authority to manage, operate, market and rent" the owner's room.

The district court, in concluding that the purchasers lacked an expectation of profits at the time they entered into the Purchase Contract, erroneously relied on disclaimers in the Purchase Contract that stated the purchasers were not acquiring the rooms "as an investment" and that Tarsadia had not "represented or offered the property as an investment opportunity."[5] The district court placed dispositive weight on these representations and, in doing so, failed to fully consider the broader realities of the overall transaction. This was error because, as the Supreme Court has admonished, the economic reality of a transaction or scheme

[5] The court cited two other district court decisions that the Commission believes placed undue emphasis on written disclaimers and representations in contravention of the economic analysis required by the Supreme Court. See, e.g., *Demarco v. LaPay*, 2009 WL 3855704, No. 2:09-CV-190 (D. Utah Nov. 17, 2009); *Garcia v. Santa Maria Resort, Inc.*, 528 F. Supp. 2d 1283 (S.D. Fla. 2007). In *Demarco*, the court erroneously implies that boilerplate language in a written agreement can extinguish oral representations regarding the nature of the transaction that the purchasers were offered. *Id.* at *8. In *Garcia*, the court erroneously focused on the terms of the sales contract – which provided that the plaintiffs were purchasing the units for "personal use" and "with no expectation of investment potential" – without considering other aspects of the transaction that strongly suggested the existence of an investment contract. *Id.* at 1289; see also *id.* 1292-93.

controls the investment contract analysis, irrespective of legal terminology or formalisms that may attempt to disguise it. See, e.g., *Howey*, 328 U.S. at 298-301. See also, e.g., *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 524-25 (9th Cir. 1989) ("It is well established that courts look beyond contractual language to economic realities in determining whether a transaction is an investment contract."). This is particularly so where, as here, the representations and disclaimers are false. See, e.g., *Buie v. United States*, 420 F.2d 1207, 1210 (5th Cir. 1969) (stating that in determining whether an investment contract exists, a "court is not bound in a securities law case by boilerplate representations (such as obviously erroneous recitations that the purchaser was not relying on the sellers' efforts)"); *Timmreck v. Munn*, 433 F. Supp. 396, 401 (N.D. Ill. 1977) (stating that "boilerplate disclaiming inducements to purchase land as an investment should not deter the court from considering all the evidence bearing upon the true nature of the purchase" and emphasized that "[t]his is particularly true where the boilerplate is likely to prove palpably false").

The danger with the district court's approach lies in the fact that, were it allowed to stand, it could provide an easy mechanism for those seeking to avoid the protections that the securities laws afford investors. See *Bailey v. J.W.K. Properties, Inc.*, 904 F.2d 918, 922 n.6 (4th Cir. 1990) (to "limit[] the examination to the contract itself would provide an easy loophole through which sellers could

circumvent federal securities laws"). It is essential, therefore, that written representations or warranties not trump the economic and practical realities of a transaction that otherwise qualifies as an investment contract.

CONCLUSION

For the foregoing reasons, the sales and rental management agreements that Tarsadia offered constituted investment contracts.

Respectfully submitted,

MARK D. CAHN
General Counsel

JACOB H. STILLMAN
Solicitor

RANDALL W. QUINN
Assistant General Counsel

/s/ William K. Shirey
WILLIAM K. SHIREY
Senior Litigation Counsel

Securities and Exchange Commission
100 F St., N.E.
Washington, D.C. 20549
(202) 551-5043 (Shirey)

August 2011

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 3,907 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-Point Times New Roman.

/s/ William K. Shirey
WILLIAM K. SHIREY

August 5, 2011

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 5, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ William K. Shirey
WILLIAM K. SHIREY

August 5, 2011