SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES ACT OF 1933
Rel. No. 9076 / October 23, 2009

Admin. Proc. File No. 3-12943

In the Matter of

RODNEY R. SCHOEMANN
c/o Peter J. Anderson and Gregory S. Kaufman
Sutherland Asbill & Brennan LLP
1275 Pennsylvania Avenue, NW
Washington, DC 20004-2415

OPINION OF THE COMMISSION

CEASE-AND-DESIST PROCEEDING

Grounds for Remedial Action

Unregistered Offer and Sale of Securities

Respondent unlawfully made unregistered offers and sales of securities when no exemption from registration was available. *Held*, it is in the public interest to order respondent to disgorge ill-gotten profits and to cease and desist from committing or causing any violations of Sections 5(a) and 5(c) of the Securities Act of 1933.

APPEARANCES:

Peter J. Anderson and *Gregory S. Kaufman* of Sutherland Asbill & Brennan, Atlanta, GA and Washington, DC, for Rodney R. Schoemann.

William P. Hicks and *Edward G. Sullivan*, for the Division of Enforcement.

Appeal filed: January 21, 2009
Last brief received: April 16, 2009
Oral argument: September 16, 2009[1]

I.

Respondent Rodney R. Schoemann appeals from the decision of an administrative law judge.[2] Schoemann is in the business of investing his own money in the stock market. The law judge found that Schoemann violated Sections 5(a) and 5(c) of the Securities Act of 1933[3] in November 2004 by offering and selling the securities of Stinger Systems, Inc. ("Stinger"), a Nevada corporation, when no registration statement was filed or in effect with respect to those securities and no exemption from registration was available. The law judge ordered Schoemann to cease and desist from committing or causing any violations or future violations of Sections 5(a) and 5(c) of the Securities Act and to disgorge $967,901 in profits, plus prejudgment interest, from his sales of Stinger securities.

We base our findings on an independent review of the record except with respect to those findings not challenged on appeal.

II.

Schoemann purchased the Stinger shares at issue in this proceeding from Douglas Murrell, a Texas resident in the business of providing consulting services to companies seeking to purchase shell corporations in order to sell their shares publicly**.** Douglas Murrell was a shareholder in United Consulting Corporation ("UCC"), a Nevada shell corporation that was not publicly traded. UCC merged with Electronic Data Technology, LLC ("EDT"), an Ohio limited liability company and a manufacturer of stun devices, to form Stinger. These entities are described in greater detail below.

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[1] Rule of Practice 451(d), 17 C.F.R. § 201.451(d), provides that a member of the Commission who does not attend an oral argument may participate in the decision of the proceeding if that member reviews the oral argument transcript. Commissioner Casey, who did not attend the oral argument in this matter, has performed the requisite review.

[2] *Thomas J. Dudchik and Rodney R. Schoemann*, Initial Decision Rel. No. 363 (Dec. 5, 2008), 94 SEC Docket 12390. Thomas J. Dudchik did not appeal the Initial Decision, and the Initial Decision is final as to Dudchik. Notice That Init. Dec. Is Final, Securities Act Rel. No. 9001 (Jan. 29, 2009).

[3] 15 U.S.C. §§ 77e(a), 77e(c).

A. Douglas Murrell Acquires an Interest in UCC, and Matthew Murrell Becomes Majority Shareholder and Sole Officer and Director of UCC

UCC's principal business was to search for a merger candidate. In 1999, Douglas Murrell agreed to acquire UCC from UCC's founder. Prior to purchasing any UCC shares, Douglas Murrell consulted with Gary Henrie, a Utah-based securities attorney, regarding the corporate governance and structure of UCC. Douglas Murrell testified that he wanted to avoid a conflict of interest between his anticipated role as a consultant to UCC and any position he might hold at the company, and he wanted to ensure that he was not an affiliate of UCC. At the same time, Douglas Murrell wanted UCC's officer and director to be someone whom he trusted. Ultimately, Douglas Murrell decided that his then-twenty-four year old son, Matthew Murrell, was the best choice because, according to Douglas Murrell, his son could make independent decisions with good business sense and judgment, had a master's degree in Landscape Architecture, and was the most independent of Douglas Murrell's children.[4] Based on Douglas Murrell's recommendation, on March 14, 2000, UCC issued Matthew Murrell 10,000,000 restricted shares of UCC common stock. The Minutes of UCC's board meeting approving the issuance of the shares indicates that Matthew Murrell's shares were issued in exchange for $10,000. However, neither Matthew Murrell nor anyone else paid for the shares. When asked why Matthew Murrell received these shares, Douglas Murrell testified that "[UCC] had to have an officer/director that looked at the potential merger candidates."

On April 4, 2000, UCC's Board of Directors approved the issuance of 750,000 shares, described as "freely tradeable," to Douglas Murrell, for which he paid $8,250. At that time, UCC also issued another 250,000 "freely tradeable" shares to other persons. Thus, as of April 4, 2000, Douglas Murrell owned seventy-five percent of the authorized freely tradeable shares of UCC, and Matthew Murrell was the majority shareholder. UCC thereafter retained Douglas Murrell to serve as a consultant to UCC in its efforts to find a merger candidate. On May 1, 2000, the founder of UCC resigned as the sole officer and director, and Matthew Murrell was named the President, Secretary, Treasurer, and sole director of UCC.

B. Matthew Murrell's Background and Duties at UCC

During the time that Matthew Murrell was the sole officer and director of UCC, he was enrolled in graduate school at the University of Wisconsin and worked part-time as a natural resource scientist for the State of Wisconsin Department of Natural Resources and as a manager at a bar in Madison, Wisconsin. Matthew Murrell received no compensation from either UCC or his father while he served as UCC's sole officer and director. Matthew Murrell did not prepare any UCC corporate records or minutes, nor was he involved in any board meetings. Matthew Murrell was not aware of how many shareholders UCC had, nor did he communicate with any of the shareholders other than his father. When corporate documents required Matthew Murrell's

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[4] It does not appear that Douglas Murrell considered anyone other than his children for the position.

signature, Henrie prepared the documents and mailed them, through Douglas Murrell, to Matthew Murrell, who signed them and returned them to Henrie for filing and recordkeeping.

During the period from May 2000 to September 2004, Matthew Murrell reviewed merger candidates for UCC, but only after his father presented the candidates to him. Douglas Murrell compiled his list of potential merger candidates for UCC through discussions with various personal contacts. Douglas Murrell reviewed the resumes and management backgrounds of potential merger candidates, and conducted research on their respective industries before presenting the information to Matthew Murrell for his consideration. If Matthew Murrell thought that a particular candidate was promising, he conducted additional research about the company on his own, using the Internet and printed media. Matthew Murrell did not communicate with the management of any merger candidate he considered, and he did not preserve any of the research he conducted. Nonetheless, both Douglas and Matthew Murrell testified that any decision not to merge with a given candidate was made solely by Matthew Murrell, citing as an example the determination not to merge with a seafood company.

C. UCC Merges with EDT

In early 2004, Robert Gruder and his partner Thomas Yates Exley purchased EDT. Soon thereafter, EDT began to search for a merger partner, seeking a shell corporation with no operating history, no litigation, and no previous public trading of its securities.

On September 6, 2004, Gruder and Douglas Murrell signed an agreement (the "Consulting Agreement") under which Douglas Murrell would act as an exclusive consultant to find a merger candidate for EDT and to provide additional services related to such a merger.[5] Douglas Murrell would assist EDT in replacing the management of the merger candidate and in obtaining shares in the merger candidate. For his services, Douglas Murrell would receive a fee of $75,000, as well as 220,000 shares of the common stock of the company created by the merger. Douglas Murrell ultimately recommended that EDT merge with UCC.

During the course of several weeks in August and September 2004, EDT entered into negotiations with UCC as a potential merger partner. On September 23, 2004, EDT and UCC executed a document entitled Agreement and Plan of Reorganization (the "Merger Agreement"), under which UCC, as the Purchaser, acquired EDT, in exchange for the issuance of 10,000,000

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[5] The parties to the agreement were Stinger, with Gruder listed as Stinger's CEO, and Douglas Murrell's consulting firm. However, as discussed in detail below, Stinger did not exist as of the date of the agreement. We will use the name EDT to describe the Gruder-led entity prior to the merger.

shares of UCC to EDT-related parties, to form Stinger.[6] The Merger Agreement was signed by Matthew Murrell on behalf of UCC and by Gruder on behalf of EDT. The Merger Agreement includes a provision that states, "Upon and as a condition of closing this Agreement, [UCC] will deliver the resignations of its current officers and directors and in connection therewith appoint and elect directors as nominated by [EDT]." Although Douglas Murrell discussed the UCC/ EDT merger with Matthew Murrell, Matthew Murrell did not participate in the merger negotiations or the preparation of the necessary agreements, nor did he discuss the merger with anyone other than his father. Matthew Murrell signed all of the corporate documents necessary for the merger, which were prepared by Henrie. Douglas and Matthew Murrell testified that Matthew Murrell alone made the determination to proceed with the EDT/ UCC merger.

Although the Merger Agreement was apparently under negotiation throughout September 2004, Matthew Murrell continued to execute a number of merger-related documents, signing the documents in a number of different capacities on behalf of UCC, during the same time period.

(1) On September 20, 2004, in a Written Consent of the Sole Director of UCC, Matthew Murrell approved: (1) UCC's entry into the Merger Agreement; (2) an increase of UCC's authorized common stock to 50,000,000 shares; and (3) the change of UCC's name to Stinger Systems, Inc. upon execution of the Merger Agreement;

(2) In an Incumbency Certificate dated September 23, 2004, Matthew Murrell signed, as Chief Executive Officer of UCC, a statement indicating that he remained as one of four directors of UCC, along with Gruder (listed as both President and Director), Exley (listed as Secretary and Director), and Andrew Peter Helene, a Director;

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[6] The record includes two virtually identical versions of the Merger Agreement. The first version was initially dated August 26, 2004, but that date was crossed out in handwriting and replaced with the date September 20, 2004. The second version, dated September 23, 2004, is the version that the law judge found to be the applicable version of the Merger Agreement, and Schoemann does not contest this finding on appeal. The record does not contain evidence explaining why two virtually identical versions of the Merger Agreement exist.

Although the Merger Agreement appears to have been effective on September 23, 2004, as discussed in greater detail below, Matthew Murrell remained the sole officer and director of the merged company until September 25, 2004. During the two days after the Merger Agreement became effective, Matthew Murrell continued to sign UCC corporate documents such as written consents, even though UCC no longer existed once the Merger Agreement was effective. For ease of use and consistency, we use the name "Stinger" or the "merged entity" to describe the entity following the execution of the Merger Agreement.

(3) In a Written Consent of the Sole Director of UCC dated September 23, 2004, Matthew Murrell authorized: (1) the issuance of 9,750,000 shares of UCC stock to EDT-related parties pursuant to the terms of the Merger Agreement; (2) the issuance of 220,000 shares to Douglas Murrell's consulting firm pursuant to the terms of the Consulting Agreement; and (3) that 250,000 shares be reserved for future issuance pursuant to the instructions of EDT's President;

(4) In a Written Consent of the Majority Shareholder of UCC, dated September 23, 2004, Matthew Murrell resolved "to expand the number of members constituting the entire board of directors to six members and to thereafter reduce the number of members constituting the entire board of directors to five following the resignation of Matthew Murrell." This document further resolved "that the expansion of the board of directors and the election of the five new persons to the board of directors shall take effect on September 25, 2004, and that following the resignation of Matthew Murrell from the board of directors, the number of members constituting the entire board of directors shall be five." This document also resolved to increase the authorized capital of UCC to 50,000,000 common shares;

(5) In a Written Consent of the Sole Director of UCC dated September 24, 2004, Matthew Murrell resolved that his 10,000,000 common shares of UCC stock, which he had tendered to UCC, be cancelled; and

(6) On September 25, 2004, Matthew Murrell submitted his resignation as an officer and director of UCC.

Matthew Murrell received no compensation from Stinger or UCC for his UCC shares or for his service to UCC over the preceding four years. The only compensation that Matthew Murrell received was a $500 payment from his father's consulting firm.

D. Schoemann Purchases Stock from Douglas Murrell

In approximately June 2004, Gruder approached Schoemann about making an investment in the company that would ultimately become Stinger. On September 8 and 9, 2004, Schoemann received a Subscription Agreement for an investment in Stinger and a business plan, even though Stinger did not then exist as a corporate entity. Thereafter, Schoemann investigated the industry and market for Stinger's products. On September 21, 2004, Schoemann invested $200,000 in Stinger in exchange for 561,000 restricted shares. Schoemann received two share certificates for his 561,000 shares that were dated October 19 and 27, 2004. Schoemann understood that these initial 561,000 shares were not freely tradeable, and the certificates were marked "RESTRICTED" on their face.

Shortly after this initial purchase of restricted Stinger shares, Schoemann asked Gruder where Schoemann could purchase freely tradeable Stinger shares. Gruder referred Schoemann to Douglas Murrell. Schoemann and Douglas Murrell spoke for the first time on the telephone on September 23, 2004. Over the course of two telephone calls, Schoemann and Douglas Murrell reached an agreement that Schoemann would pay Douglas Murrell $0.75 per share for 100,000 shares, for a total purchase price of $75,000. The second telephone call occurred at approximately 2:00 p.m. Eastern time on September 23, 2004.

Later that day, Schoemann, a non-lawyer, drafted a document entitled Stock Purchase Agreement with Option (the "Stock Purchase Agreement"). The Stock Purchase Agreement states, "This Agreement is being executed this 23rd day of September 2004." In addition, next to Schoemann's signature on the document, Schoemann wrote "9/23/2004." The Stock Purchase Agreement states that Schoemann purchased 100,000 "freely tradeable shares of United Consulting, Inc., that next week will be changed to Stinger Systems, Inc." Schoemann testified that he believed he was purchasing Stinger shares, rather than UCC shares, but that Douglas Murrell told Schoemann "that the name change had not officially taken place."

The Stock Purchase Agreement further specified that Schoemann would pay for the shares by check sent to Douglas Murrell on September 28, 2004, for delivery on September 29, 2004. Schoemann testified that he included this provision in the Stock Purchase Agreement because he was uncertain if he wanted to go through with the transaction and needed extra time to think it over. Schoemann's check to Douglas Murrell was dated September 29, 2004; the memo line on the check reads: "9/23/04 Stock Purchase Agreement With Option 100,000 Freely Tradeable Stinger Systems, Inc., & 100,000 options."[7]

In a letter dated September 23, 2004, Douglas Murrell directed UCC's transfer agent to issue Schoemann a certificate for 100,000 shares of UCC. At some point before October 4, 2004, Schoemann received a certificate for these shares, which, unlike the certificates for the 561,000 shares he purchased on September 21, 2004, was not marked "RESTRICTED." On October 4, 2004, Schoemann sent this certificate to his broker, E*Trade, for deposit into his account.

Schoemann testified that he understood from Stinger's business plan that there would be a merger with a shell company, but he did not know that UCC was the shell company, even though the Stock Purchase Agreement stated that Schoemann purchased UCC shares, which were to be changed to Stinger the following week. Douglas Murrell and Schoemann did not discuss any element of UCC's corporate governance or structure prior to Schoemann's purchase of the

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[7] The Stock Purchase Agreement also contained a six-month option, under the terms of which Schoemann could purchase an additional 100,000 shares, for a price of $3.00 per share plus fifty percent of any profit made on that stock sold above $3.00 per share. Schoemann and Douglas Murrell subsequently cancelled this option, after Schoemann purchased additional Stinger shares from another source at a more favorable price.

100,000 shares. They never discussed Matthew Murrell's role with UCC or the part he or Douglas Murrell played in effecting the UCC/ EDT merger that produced Stinger. Schoemann testified that the only question he asked Douglas Murrell relating to UCC was how long Douglas Murrell had held the shares he sold to Schoemann. When Douglas Murrell replied that he had held the shares for over four years, both Schoemann and Douglas Murrell agreed that the shares were freely tradeable without, at the time, any consultation with a securities attorney. Schoemann acknowledged that he "did not know, until the commencement of the Administrative Hearing, from where Doug Murrell acquired the shares or why Doug Murrell decided to sell these shares to me."

E. Schoemann's Sales of Stinger Stock

After the completion of the EDT/ UCC merger and the subsequent cancellation of Matthew Murrell's shares, 10,000,000 shares of Stinger stock were authorized and issued to members of the management team, in addition to the already existing UCC shares held by Douglas Murrell and others. As noted above, the total authorized capital stock of Stinger was 50,000,000 shares. Gruder testified that he intended to file a registration statement for the securities soon after the merger, but Stinger did not file a registration statement with the Commission until February 7, 2005.

On October 1, 2004, Douglas Murrell requested a legal opinion from Henrie as to the tradeability of the shares he sold to Schoemann. Henrie provided an opinion letter to UCC's transfer agent stating that, although the UCC securities that Douglas Murrell sold to Schoemann were not registered, they were nevertheless not subject to the resale limitations contained in Securities Act Rule 144(k)[8] because Douglas Murrell was not an affiliate of UCC and had held the securities in question for over four years. Henrie testified that he based his opinion on his review of UCC corporate documents indicating that Matthew Murrell was UCC's sole officer and director and its majority shareholder. Henrie talked only to Douglas Murrell to obtain the information he used to reach his opinion, and never spoke with Matthew Murrell regarding his degree of control over UCC and his independence from Douglas Murrell. Henrie testified that, in his opinion, Douglas Murrell would have been a control person of UCC, but for Matthew Murrell's ownership of 10,000,000 UCC shares. Henrie did not ask whether Matthew Murrell had paid for his 10,000,000 shares. Henrie was also unaware that Matthew Murrell was not involved in the EDT/ UCC merger negotiations, but Henrie testified that this would not have been important to know in reaching his opinion as long as Matthew Murrell made the final decision about the merger on behalf of UCC.

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[8] 17 C.F.R. § 230.144(k). At the time, Rule 144(k) specified that unregistered shares could be sold without restriction if the shares were sold for the account of a person who is not an affiliate of the company at the time of the sale, provided that such person has not been an affiliate during the preceding three months and provided a period of at least two years has elapsed since the later of the date the securities were acquired from the company or from an affiliate of the company.

In early November 2004, a registered broker-dealer in Texas, First Southwest Company ("First Southwest"), agreed to make a market in Stinger stock. At First Southwest's request, Henrie provided information to the Pink Sheets, a national quotation system, as required pursuant to Rule 15c2-11 of the Securities Exchange Act of 1934.[9] Along with the Rule 15c2-11 form, Henrie submitted a letter to the Pink Sheets, dated November 8, 2004, in which he stated that the 1,000,000 Stinger shares that were originally issued as UCC shares to Douglas Murrell and others in April 2000 "are not subject to the resale limitations of Rule 144 pursuant to the operation of Rule 144(k)." On November 11, 2004, based on the Rule 15c2-11 information, Henrie's letter to the Pink Sheets, and Henrie's oral representation to First Southwest that the shares were freely tradeable, First Southwest entered the first quote for Stinger stock on the Pink Sheets and executed the first public trade of Stinger stock.

Beginning on November 12, 2004, and continuing through November 22, 2004, Schoemann sold the 100,000 shares he had purchased from Douglas Murrell through his E*Trade account, generating $967,901 in profits above his initial $75,000 purchase price. Schoemann testified that he was comfortable that his shares were freely tradeable based on E*Trade's acceptance of his share certificate for deposit into his account and based on his reading of Henrie's November 8 opinion letter submitted to the Pink Sheets.

III.

A. Violations of the Registration Requirements

1. Registration Requirements of Securities Act Section 5

Securities Act Section 5(a) prohibits any person, directly or indirectly, from selling a security in interstate commerce unless a registration statement is in effect as to the offer and sale of that security or there is an applicable exemption from the registration requirements. Securities Act Section 5(c) prohibits the offer or sale of a security unless a registration statement as to such security has been filed with the Commission, or an exemption is available.[10] The purpose of the

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[9] 17 C.F.R. § 240.15c2-11. Exchange Act Rule 15c2-11 requires brokers or dealers making a market in a security to provide documents and information prior to publishing any quotation for a security. Stinger's 15c2-11 form, dated November 9, 2004, included information about the company's stock issuances, the nature of its business, background information about the officers and directors, and attached Stinger's financial statements, among other items.

[10] 15 U.S.C. §§ 77e(a) and (c); *see also Jacob Wonsover*, 54 S.E.C. 1, 8 (1999), *petition denied*, 205 F.3d 408 (D.C. Cir. 2000); *Michael A. Niebuhr*, 52 S.E.C. 546, 549 (1995).

registration requirements is to "protect investors by promoting full disclosure of information thought necessary to informed investment decisions."[11]

The elements of a *prima facie* violation of Section 5 are that: (1) no registration statement was filed or in effect as to the security; (2) the respondent, directly or indirectly, sold or offered to sell the security; and (3) interstate transportation or communication or the mails were used in connection with the offer or sale.[12] A showing of scienter is not required to establish a violation of Section 5.[13]

Schoemann does not dispute that the Division has established a *prima facie* violation of the registration provisions here. Schoemann sold Stinger stock using interstate means between November 12 and 22, 2004, when no registration statement was filed or in effect as to the securities.

2. The Section 4(1) Exemption

Exemptions from registration are affirmative defenses that must be established by the person claiming the exemption.[14] Further, "exemptions from the general policy of the Securities

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[11] *SEC v. Murphy*, 626 F.2d 633, 642 (9th Cir. 1980) (citing *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124 (1953)).

[12] *SEC v. Cont'l Tobacco Co.*, 463 F.2d 137, 155 (5th Cir. 1972).

[13] *Swenson v. Engelstad*, 626 F.2d 421, 424 (5th Cir. 1980)("The Securities Act of 1933 imposes strict liability on offerors and sellers of unregistered securities . . . regardless of . . . any degree of fault, negligent or intentional, on the seller's part.")(internal citation omitted); *SEC v. Universal Major Indus. Corp.*, 546 F.2d 1044, 1046-47 (2d Cir. 1976).

[14] *Zacharias v. SEC*, 569 F.3d 458, 464, *petition denied*, 2009 WL 3190416 (D.C. Cir. 2009) (citing *Ralston Purina*, 346 U.S. at 126 ("Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable") and *Geiger v. SEC*, 363 F.3d 481, 484 (D.C. Cir. 2004)(same)); *Engelstad*, 626 F.2d at 425; *Lively v. Hirschfeld*, 440 F.2d 631, 632 (10th Cir. 1971).

Act requiring registration are strictly construed against the claimant."[15] Evidence in support of an exemption must be explicit, exact, and not built on mere conclusory statements.[16]

Schoemann argues that his sales of Stinger stock between November 12 and 22, 2004, were exempt from registration under Section 4(1) of the Securities Act.[17] Securities Act Section 4(1) exempts from the registration requirement "transactions by any person other than an issuer, underwriter, or dealer." Section 4(1) is intended to exempt routine trading transactions between individual investors with respect to securities already issued and not to exempt distributions by issuers or acts of other individuals who engage in steps necessary to such distributions.[18] The term "underwriter" is defined to mean "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security . . . ."[19] The

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[15] *Gearhart & Otis, Inc.*, 42 S.E.C. 1, 4-5 n.3 (1964) (citing *Ralston Purina*, 346 U.S. 119 (1953)), *aff'd*, 348 F.2d 798 (D.C. Cir. 1965); *see also Murphy*, 626 F.2d at 641; *Quinn & Co. v, SEC*, 452 F.2d 943, 945-46 (10th Cir. 1971).

[16] *Robert G. Weeks*, 56 S.E.C. 1297, 1322 n.35 (2003) (citing *V.F. Minton Sec., Inc.*, 51 S.E.C. 346, 352 (1993) (and authority cited therein), *aff'd*, 18 F.3d 937 (5th Cir. 1994) (Table)).

[17] 15 U.S.C. § 77d(1).

[18] *See Owen v. Kane*, 48 S.E.C. 617, 619 (1986), *aff'd*, 842 F.2d 194 (8th Cir. 1988); Preliminary Note to Rule 144, 17 C.F.R. § 230.144.

[19] Securities Act Section 2(a)(11), 15 U.S.C. § 77b(a)(11). The Commission promulgated Rule 144, which creates a "safe harbor" by identifying certain conditions under which a person will be deemed not to be a statutory "underwriter." As noted in note 8, *supra*, under Rule 144(k), as in effect at the time of the sales, an individual selling restricted shares would not be deemed to be a statutory underwriter provided that a period of at least two years had elapsed since the shares were acquired and the seller had not been an affiliate for a period of three months preceding the sale. An affiliate of an issuer is defined as "a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer." 17 C.F.R. § 230.144(a)(1).

Schoemann concedes that Douglas Murrell was an affiliate of UCC until at least midnight on September 23, 2004, when the merger with EDT became effective, stating, "Mr. Murrell's ability to control the issuer ceased at the time of the merger when he lost any ability he had to control the pre-merger company through his son. Mr. Murrell's status as an affiliate of the issuer thus also ceased at that time." As discussed below, we find that Douglas Murrell, in fact, remained an affiliate beyond the date of the merger. Therefore, because Schoemann purchased securities from an affiliate of the issuer, Schoemann received restricted securities. Schoemann

(continued...)

term "issuer" is defined to include "any person directly or indirectly controlling or controlled by the issuer. . . ."[20] Under Securities Act Rule 405, "control" is defined as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."[21]

Individual investors who are not securities professionals may be deemed "underwriters" within the statutory meaning of that term if they act as links in a chain of securities transactions from issuers or control persons to the public.[22] A sale by the intermediary in such a distribution is a transaction by an underwriter and thus not exempt from registration under Section 4(1).

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[19] (...continued)
did not hold these restricted securities for the two-year period required under Rule 144(k). As such, he does not meet the conditions of Rule 144. Schoemann has not argued that the Rule 144 safe harbor is available to him.

Rule 144 is not an exclusive safe harbor. *See* Preliminary Note to Rule 144, 17 C.F.R. § 230.144. Schoemann argues that, although the Rule 144 safe harbor is not available to him, his sales of the securities are still exempt from the registration requirements under Section 4(1) of the Securities Act. However, the adopting release to Rule 144 expressed clearly that individuals who do not comply with the Rule 144 safe harbor face a substantial burden in establishing the availability of an exemption from registration. "[P]ersons who offer or sell restricted securities without complying with Rule 144 are hereby put on notice by the Commission that in view of the broad remedial purposes of the Act and of public policy which strongly supports registration, they will have a substantial burden of proof in establishing that an exemption from registration is available for such offers or sales and that such persons and the brokers and other persons who participate in the transactions do so at their risk." Securities Act Rel. No. 5223 (Jan. 11, 1972). *See SEC v. Cavanagh*, 445 F.3d 105, 113 (2d Cir. 2006) (the adopting release "establishes a presumption that those not covered by [Rule 144] are likewise outside Section 4(1)"). As discussed below, we find that Schoemann has not satisfied this burden.

[20] *Id.*

[21] 17 C.F.R. § 230.405.

[22] *See Quinn & Co., Inc.*, 44 S.E.C. 461, 464 (1971), *aff'd*, 452 F.2d 943 (10th Cir. 1971); Preliminary Note to Rule 144, 17 C.F.R. § 230.144; *see also SEC v. Holschuh*, 694 F.2d 130, 138 (7th Cir. 1982)(stating that "even assuming that a particular defendant is not an issuer, underwriter, or dealer, he is not protected by Section 4(1) if the offer or sale of unregistered securities in question was part of a transaction by someone who was an issuer, underwriter, or dealer").

Otherwise, public distributions could be effected easily without registration and other protections afforded by the securities laws.[23]

a. Douglas Murrell Was a Control Person of UCC

The determination of whether a person is a control person "is a question of fact which depends upon the totality of the circumstances including an appraisal of the influence upon management and policies of a corporation by the person involved."[24] A person may be in control even though he does not own a majority of the voting stock.[25] In addition, control may rest with more than one person at the same time or from time to time.[26]

We find that Douglas Murrell controlled UCC through his son, Matthew Murrell. On appeal, Schoemann appears to concede that Douglas Murrell, through Matthew Murrell, exercised control over UCC prior to its merger with EDT. Matthew Murrell was issued 10,000,000 UCC shares in March 2000 for which he never paid, making him UCC's majority shareholder, a few weeks before his father paid $8,250 for 750,000 shares. Douglas Murrell testified that the shares were issued to Matthew Murrell primarily as a basis for making him UCC's sole officer and director. Matthew Murrell acknowledged that he had no prior experience with mergers and acquisitions, the only business of UCC and the business in which his father's consulting firm specialized. He only reviewed merger candidates that were presented to him by his father. Matthew Murrell performed virtually no work in his role with UCC, primarily signing paperwork sent to him through his father by UCC's attorney. He never met or had discussions with any shareholders or proposed merger partners.

Matthew Murrell did not participate in any of the merger negotiations with Gruder and only discussed the EDT merger with his father. His father received a $75,000 fee, as well as 220,000 shares of Stinger stock as payment for consulting services related to the merger approved by Matthew Murrell. In the Consulting Agreement, Douglas Murrell agreed to assist Stinger in securing the resignation of Matthew Murrell from his officer and director positions. Shortly after completion of the merger, Matthew Murrell cancelled all 10,000,000 of his shares and resigned from his officer and director positions, receiving no compensation other than $500 from his father's consulting firm. Although Matthew Murrell signed all of the necessary paperwork on behalf of UCC, he played no real, independent role in reaching any of the decisions he approved. As Henrie acknowledged, if Matthew Murrell did not hold the

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[23] *Quinn*, 44 S.E.C. at 465.

[24] *United States v. Corr*, 543 F.2d 1042, 1050 (2d Cir. 1976).

[25] *SEC v. R.A. Holman & Co.*, 377 F.2d 665, 667 (2d Cir.), *cert. denied*, 389 U.S. 991 (1967).

[26] *North American Co. v. SEC*, 327 U.S. 686 (1946).

10,000,000 shares, Douglas Murrell would have been the majority shareholder of the company. Given this evidence, we find that Douglas Murrell effectively controlled Matthew Murrell's conduct in his role as officer and director of UCC.

b. Douglas Murrell Continued to be a Control Person after the Merger

Schoemann contends that the law judge failed to consider the order in which the relevant events occurred on September 23, 2004, in reaching the conclusion that Douglas Murrell was a control person of UCC at the time that Schoemann purchased his UCC shares. On appeal, Schoemann states, "[a]t the first moment of the day on September 23, 2004, Gruder acquired UCC, merged EDT into UCC, and changed its name to Stinger."[27] Schoemann contends that Douglas Murrell lost any ability he had to control the merged entity upon consummation of the merger and, therefore, was no longer a control person of the merged entity. Given that Schoemann and Douglas Murrell had never spoken before the morning of September 23, 2004, and that they reached their agreement regarding Schoemann's share purchase no earlier than approximately 2:00 p.m. on that day, Schoemann argues that he purchased Douglas Murrell's shares after the merger had occurred and after Douglas Murrell had ceased to be a control person of the merged entity. As a result, Schoemann claims that the Section 4(1) exemption applies to the transaction.

Control status is a facts and circumstances test. The record does not support the assertion that Douglas Murrell's status as a control person automatically terminated on September 23. Assuming, *arguendo*, that the Merger Agreement became effective at the start of the day on September 23, there were a number of corporate actions related to the merger that needed to be completed as a condition of the merger's closing. These actions included the appointment of new officers and directors, the issuance of stock to the EDT-related entities, the increase in the company's authorized capital stock, and the resignation of Matthew Murrell from his officer and director positions.

Schoemann argues that neither Matthew nor Douglas Murrell undertook any actions on behalf of the merged entity during the period immediately after the execution of the Merger Agreement. However, Matthew Murrell continued to sign corporate documents related to these actions on behalf of the merged entity from September 23 until his resignation on September 25.

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[27] In support of this argument, Schoemann cites precedent holding that "where a contract, policy, or statute does not specify a time of day that it is effective and where there is no evidence as to when during the day in question the contract was executed, the law treats the contract as being effective from the first moment of the day in question." Schoemann cites *La Quay v. Union Fid. Life Ins. Co.*, 403 So.2d 1359, 1360 (Fla. 1981) and *Mississippi Ben. Ass'n v. Brooks*, 185 So. 569, 570 (Miss. 1939) (finding that where a burial policy became effective on a particular day, with no hour specified, it would be considered to have become effective at the earliest moment of that particular day).

For example, on September 23, Matthew Murrell signed two Written Consents necessary to authorize the issuance of 10,000,000 shares to the EDT-related parties.[28] These issuances could only occur after the execution of the Merger Agreement because only then were the EDT-related parties entitled to the shares, and Matthew Murrell's authorization of the issuances establishes that he continued to exercise authority after the Merger Agreement became effective.[29] Moreover, according to one of the Written Consents on September 23, the new directors were not to be appointed until September 25. Because the appointments of new officers and directors were not effective until September 25, Matthew Murrell was the merged entity's sole officer and director. As a result of his position as the sole officer and director, Matthew Murrell was a control person.[30] Further, Matthew Murrell did not tender his 10,000,000 shares for cancellation

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[28] Schoemann argues that "UCC's Articles of Incorporation authorized only 20 million shares of capital stock. Given this, the Murrells' 10.75 million shares (10 million held by Matt Murrell and 750,000 held by Doug Murrell), if added to the 10 million shares issued to EDT, would have caused the Company to violate the share restrictions. Clearly, the newly issued shares were issued to replace Matt Murrell's shares formally cancelled two days later." However, in Written Consents dated September 20 and 23, 2004, Matthew Murrell, acting as the sole director and majority shareholder of UCC, had authorized the expansion of the company's capital stock to 50,000,000 shares, not the 20,000,000 previously authorized. Therefore, UCC was not in violation of its Articles of Incorporation during the two days before Matthew Murrell's shares were cancelled.

[29] Schoemann states, "the Murrells had a vested interest in seeing these companies merge, and being paid." We note that this quote combines the financial interests of Douglas and Matthew Murrell, indicating that Schoemann accepts the premise that Matthew Murrell did not act independently from his father in approving the transaction.

[30] *See, e.g., SEC v. Cavanagh*, 155 F.3d 129, 134 (2d Cir. 1998) ("A control person, such as an officer, director, or controlling shareholder . . . is treated as an issuer when there is a distribution of securities"), *aff'd on other grounds*, 445 F.3d 105 (2d Cir. 2006). As noted above, we find that Douglas Murrell possessed the ability to control Matthew Murrell's actions with respect to his control over UCC and, therefore, that Matthew Murrell's status as a control person establishes that his father was also a control person.

In support of his claim that Matthew Murrell relinquished control of UCC by the time of the merger, Schoemann points to an Annual List of Officers, Directors, and Resident Agent of UCC filed with the State of Nevada on September 23, 2004, and a September 20 agreement between UCC and a stock transfer company that identify Gruder as President, Treasurer, and a Director of UCC and lists other officers and directors. However, there is no evidence in the record to suggest that Gruder or any EDT-related parties exercised control over the merged company before September 25, 2004. In any event, Securities Act Rule 405 does not require that a party have sole control of an entity to be a control person of that entity.

until September 24, and therefore remained a significant shareholder of the merged entity beyond September 23, 2004.

Based on this evidence, we find that Matthew Murrell was a control person of the merged entity after September 23 and, because we have found that Douglas Murrell exercised control over Matthew Murrell with respect to his role with UCC, we find that Douglas Murrell continued to be a control person of the company after September 23, 2004.

c. Schoemann Purchased the Shares at Issue on September 23, 2004

Schoemann argues that, even if Douglas Murrell remained a control person of the merged entity after September 23, 2004, the Section 4(1) exemption still applies to his purchase because he did not reach an agreement with Douglas Murrell to purchase his 100,000 shares until September 29, 2004, the date that Douglas Murrell received Schoemann's check in payment for the shares. According to Schoemann, Douglas Murrell was no longer a control person of Stinger by that date, and the purchase therefore falls within the Section 4(1) exemption from registration. Schoemann contends that the law judge erred by looking only to the Stock Purchase Agreement (and ignoring the hearing testimony of Schoemann and Douglas Murrell) in reaching the conclusion that Schoemann and Douglas Murrell reached their agreement on September 23, 2004.

The term "purchase" is not defined under the Securities Act. However, under the Securities Exchange Act of 1934, the term "purchase" includes "any contract for the purchase of

a security."[31] One court has held that the term "purchase" under the Securities Act is "functionally equivalent" to the definition under the Exchange Act.[32]

A securities purchase occurs even if the parties have not performed all of their obligations under the relevant agreement.[33] In addition, under the Exchange Act, acquisitions of contractual rights to receive stock in the future are to be included in the definition of "purchases."[34] Therefore, neither the receipt of payment by the seller nor the receipt of a share certificate by the purchaser is required to establish that a purchase has occurred.

In reaching our determination as to whether a binding agreement exists, "[I]ntent [of the parties] must be determined solely from the language used when no ambiguity in its terms exists."[35] The Stock Purchase Agreement specifies that it is "being executed this 23rd day of September 2004," and Schoemann included a notation of "9/23/04" next to his signature on the Stock Purchase Agreement. The Stock Purchase Agreement states that Schoemann "will purchase 100,000 freely tradeable shares of United Consulting, Inc., that next week will be

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[31] Exchange Act Section 3(a)(13), 15 U.S.C. § 78c(a)(13).

In addition, the term "sell," which is defined Section 2(a)(3) of the Securities Act, includes "every contract of sale." The Supreme Court has held that the term "purchase" under the Securities Act is a "correlative to both 'sell' and 'offer.'" *Pinter v. Dahl*, 486 U.S. 622, 645 (1988). Therefore, even though the term "purchase" is not defined in the Securities Act, the term should be interpreted to include "every contract of purchase."

See also "Securities Offering Reform," Sec. Act Rel. No. 8591 (July 19, 2005), 85 SEC Docket 3738, 3781 n.391 ("Courts have held consistently that the date of a sale is the date of a contractual commitment, not the date that a confirmation is sent or received or payment is made.") (citing *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 891 (2d Cir. 1972) (holding that a purchase occurs at "the time when the parties to the transaction are committed to one another"); *In re Alliance Pharm. Corp. Secs. Lit.*, 279 F. Supp. 2d 171, 186-87 (S.D.N.Y. 2003) (following the holding in *Radiation Dynamics* with respect to the timing of a contract of sale) and other cases)).

[32] *Nat'l Bank of Commerce v. All Am. Assurance Co.*, 583 F.2d 1295, 1298 (5th Cir. 1978).

[33] *Abrams v. Oppenheimer Gov't Sec., Inc.*, 737 F.2d 582, 587 (7th Cir. 1984) ("Neither delivery of nor the passing of title to the contracted-for security is required for the transaction to be considered a 'sale' for purposes of the . . . securities laws.").

[34] *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999).

[35] *Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 (7th Cir. 1989).

changed to Stinger Systems, Inc., from [Douglas Murrell], for $75,000." This provision contains no conditions and obligates Schoemann to purchase the shares.

In support of his argument that there was no binding agreement to purchase the shares until September 29, Schoemann relies primarily on his hearing testimony and that of Douglas Murrell. Schoemann argues that the Stock Purchase Agreement does not evidence a mutual manifestation of assent to the transaction between him and Douglas Murrell because under the agreement, Schoemann would not send payment to Douglas Murrell until September 29, 2004. Schoemann testified that this provision was included because both parties were uncertain about whether to proceed with the transaction on September 23, 2004. Schoemann describes the testimony of Douglas Murrell and Schoemann to the effect that they did not intend to form a binding agreement for the purchase of the shares on September 23 as "uncontroverted."

However, other evidence showing the parties' understanding of the transaction is inconsistent with the testimony Schoemann cites. The language of the Stock Purchase Agreement was unambiguous and unconditional, and thus was the most objective manifestation of the parties' agreement. The provision of the Stock Purchase Agreement states that Schoemann "will send out a check in the amount of $75,000 . . . for delivery on Wednesday, September 29, 2004." Nothing in this language indicates that the payment is contingent on further consideration of the transaction by the parties.

In addition, Douglas Murrell wrote UCC's transfer agent a letter, dated September 23, 2004, stating that Douglas Murrell had sold 100,000 UCC shares to Schoemann and requesting that the transfer agent issue a certificate for those shares to Schoemann. Schoemann argues that this fact is not persuasive because, although the letter was dated September 23, the letter was sent to the transfer agent as part of the package including Henrie's October 1, 2004, opinion letter. Schoemann also points to Douglas Murrell's testimony that he did not believe that he had reached an agreement with Schoemann on September 23 and had only dated the letter to the transfer agent as of September 23 because he hoped that Schoemann would agree to the transaction.[36] It is unclear from the record when Douglas Murrell provided this letter to Henrie, who then sent it to the transfer agent on October 1. Nonetheless, the fact that Douglas Murrell dated the letter September 23 is additional evidence that supports our finding that Schoemann and Douglas Murrell reached their agreement on that date. A November 11, 2004, letter from Schoemann to Douglas Murrell related to the option portion of the Stock Purchase Agreement, Schoemann

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[36] We note that the testimony cited by Schoemann occurred years after September 23, 2004. Further, Douglas Murrell's testimony that he was eager for the transaction to be completed is inconsistent with his other testimony that he "didn't feel that good about [going through with] the deal" and was concerned about selling the shares at $0.75 per share given that he expected Stinger to have great success and thought "[Stinger] could be a $10 stock."

refers to their "September 23, 2004 agreement," providing further evidence that Schoemann believed the date of the agreement to be September 23, notwithstanding his hearing testimony.

Schoemann also argues that the Initial Decision's findings are "inconsistent with the parties' intent, which was to transfer freely tradeable shares (to which there is no dispute)." Schoemann contends that a finding that the Stock Purchase Agreement was binding as of September 23 runs counter to the parties' intent, as expressed in that agreement, to purchase and sell freely tradeable shares because, based on our finding that Douglas Murrell was a control person of the merged entity on September 23, it would have been impossible for him to sell freely tradeable, unregistered shares purchased on that date. Schoemann correctly notes that the Stock Purchase Agreement specifies that the shares Schoemann would purchase were to be freely tradeable. However, Douglas Murrell incorrectly believed that his shares had been freely tradeable since his initial purchase of them in April 2000, and Schoemann testified that he never inquired as to Douglas Murrell's control person status before purchasing the shares. Therefore, there is no inconsistency between the parties' desire that Schoemann would purchase freely tradeable shares and our finding that the Stock Purchase Agreement evidences a mutual intent that an agreement was reached on September 23, 2004. To the extent that the parties considered the question at all, they believed, albeit incorrectly, that they were, in fact, reaching an agreement for the purchase of freely tradeable shares on September 23.

We find that the record establishes that Schoemann and Douglas Murrell reached a final agreement with respect to the purchase of the 100,000 shares on September 23, 2004.[37]

d. Schoemann Acquired Shares of UCC with a View to Distribution

We conclude Schoemann was an underwriter. As discussed above, an underwriter includes any person who has purchased a security from the issuer with a view to distribute the security. A distribution commences when the issuer begins making offers and does not end until the securities come to rest with the public. The fact that Schoemann purchased the shares from Douglas Murrell, who, in turn, had held the shares for four years, does not mean the shares "came to rest" with Douglas Murrell. Douglas Murrell was a control person and under the statutory definition of "issuer" was himself the issuer.

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[37] Because we find that the Stock Purchase Agreement was final on September 23, 2004, and because we have found that Douglas Murrell remained a control person after that date based on Matthew Murrell's continuing status as the sole director and a significant shareholder and his execution of several corporate consents after the merger, we do not address whether Douglas Murrell was an affiliate beyond September 25, the date of Matthew Murrell's resignation from the board of directors. We note, however, that the question of affiliate status is a facts and circumstances test, and an individual's status as an affiliate may not cease instantly after one ceases to have a control relationship with the issuer. *See Cavanagh*, 445 F.3d at 115.

In order to determine whether Schoemann purchased the UCC shares with a view to distribute them, we consider objective evidence indicating whether he initially acquired the shares "with an investment purpose and not for the purpose of reselling them."[38] In analyzing a purchaser's investment intent, "courts look to whether the security holder has held the securities long enough to negate any inference that his intent at the time of acquisition was to distribute them to the public."[39] The shares did not come to rest in the hands of Schoemann. He made clear in the Stock Purchase Agreement and in his discussions with Gruder after Schoemann's initial purchase of restricted shares and prior to his introduction to Douglas Murrell, that he sought freely tradeable shares, indications of his intent to quickly resell the shares into the market. Schoemann also began to sell his shares the day after the first quotation for Stinger appeared on the Pink Sheets and sold all 100,000 shares during the first two weeks that Stinger shares traded publicly, evidencing a lack of investment intent in his initial purchase. Thus, Schoemann served as a link in a chain of transactions through which securities moved from the issuer to the public, and in doing so, served as an underwriter. Because Schoemann was an underwriter, the Section 4(1) exemption is unavailable.

We find that Schoemann has failed to establish that Douglas Murrell was no longer a control person of the merged entity at the time that Schoemann purchased Douglas Murrell's shares and therefore has failed to meet his burden to establish that his sales of those shares were exempt from the registration requirements of the federal securities laws. Accordingly, we find that Schoemann's sales of Stinger stock between November 12 and 22, 2004, violated Securities Act Sections 5(a) and 5(c).

3. Advice of Counsel

Schoemann contends that he reviewed and relied upon Henrie's November 8 opinion letter, provided to the Pink Sheets on behalf of Henrie's client, Stinger, which stated that shares such as those he purchased from Douglas Murrell were freely tradeable. As a result of his supposed reliance on Henrie's letter, Schoemann claims that he sold the shares in good faith.

Schoemann's advice-of-counsel defense only goes to the question of scienter.[40] As noted above, scienter is not an element of Schoemann's Section 5 violations. Therefore, any reliance Schoemann may have placed on Henrie's letter is of no consequence to our determination regarding his violations. Section 5 of the Securities Act is a strict liability provision, and good faith is not a valid defense.

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[38] *Ackerberg v. Johnson*, 892 F.2d 1328, 1336 (8th Cir. 1989).

[39] *Id.*

[40] *SEC v. Howard*, 376 F.3d 1136, 1147 (D.C. Cir. 2004).

Further, to establish a valid advice-of-counsel claim, Schoemann is required to show: (1) that he made complete disclosure to counsel; (2) that he sought advice on the legality of the intended conduct; (3) that he received advice that the intended conduct was legal; and (4) that he relied in good faith on counsel's advice.[41] Schoemann never spoke to Henrie during Henrie's preparation of the opinion letter. Thus, Schoemann would not satisfy the first two elements of a valid advice-of-counsel claim, even if such a claim were relevant to a non-scienter based violation such as this. In addition, Henrie issued the opinion while representing Stinger, not Schoemann. One cannot rely on the advice of another's counsel because that counsel cannot be relied upon to give disinterested advice.[42]

IV.

A. Cease-and-Desist Order

Securities Act Section 8A(a) authorizes the Commission to impose a cease-and-desist order upon any person who "is violating, has violated, or is about to violate" any provision of the Securities Act or the regulations thereunder.[43] In determining whether a cease-and-desist order is an appropriate sanction, we look to whether there is some risk of future violations.[44] The risk of future violations required to support a cease-and-desist order is significantly less than that required for an injunction, and, absent evidence to the contrary, a single past violation ordinarily suffices to raise a sufficient risk of future violations.[45] We also consider whether other factors demonstrate a risk of future violations, but not all factors need to be considered, and no factor is

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[41] *Zacharias*, 569 F.3d at 467; *Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994); *C.E. Carlson v. SEC*, 859 F.2d 1429, 1436 (10th Cir. 1988); *SEC v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 467 (9th Cir. 1985); *SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981). *See also Joseph J. Vastano, Jr.*, 57 S.E.C. 803, 813 n.22 (2004); *Anthony H. Barkate*, 57 S.E.C. 488, 497 n.19 (2004); *Toni Valentino*, 57 S.E.C. 330, 338-39 & n.11 (2004).

[42] *John A. Carley*, Securities Act Rel. No. 8888 (Jan. 31, 2008), 92 SEC Docket 1693, 1734 n.137 (citing *C.E. Carlson*, 859 F.2d at 1436 ("We agree with the SEC that counsel also must be independent.")), *aff'd in part, remanded in part*, *Zacharias v. SEC*, 569 F.3d 458; *Sorrell v. SEC*, 679 F.2d 1323, 1327 (9th Cir. 1982) ("A broker may not rely on counsel's advice when the attorney is an interested party."); *David M. Haber*, 52 S.E.C. 201, 206 (1995) ("However, Haber could not rely on counsel for Brown, who could not be counted on to give disinterested advice.")).

[43] 15 U.S.C. § 77A(a).

[44] *KPMG Peat Marwick, LLP*, 54 S.E.C. 1135, 1185 (2001), *reh'g denied*, 55 S.E.C. 1 (2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002).

[45] *Id.* at 1185, 1191.

dispositive. Beyond the seriousness of the violation, these factors include the isolated or recurrent nature of the violation, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, the respondent's state of mind, the sincerity of assurances against future violations, recognition of the wrongful nature of the conduct, opportunity to commit future violations, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions sought in the proceeding.[46] On appeal, Schoemann has not specifically addressed the factors to be considered in our consideration of whether a cease-and-desist order is appropriate in the public interest.

We find that the public interest warrants imposing a cease-and-desist order against Schoemann. The registration requirements of the federal securities laws are "the heart of the securities regulatory system" and disregarding those requirements justifies strong remedial measures.[47] Schoemann's unregistered sales harmed the marketplace by enabling unregistered shares to be sold to the public without the benefit of the information that would have been provided had the registration requirements been followed. Schoemann testified that he makes his living solely by investing in the stock market and that he has owned significant stakes in many companies. Earning his living in this manner, Schoemann will have opportunities to commit future violations, and he has provided no assurances against future violations, nor has he recognized the wrongful nature of his conduct. A cease-and-desist order will serve the remedial purpose of encouraging Schoemann to take his responsibility to follow the registration requirements more seriously in the future.

B. Disgorgement

Section 8A(e) of the Securities Act authorizes the Commission to order the disgorgement of ill-gotten gains from violations of the Securities Act.[48] Disgorgement is an equitable remedy designed to deprive wrongdoers of unjust enrichment and to deter others from violating the securities laws.[49] "The effective enforcement of the federal securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits."[50] Whether or not the violations harmed others "is irrelevant to the question whether disgorgement is appropriate. The primary purpose of disgorgement is not to refund others for

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[46] *Id.* at 1192.

[47] *Charles F. Kirby*, Securities Act Rel. No. 8174 (Jan. 9, 2003), 79 SEC Docket 1081, 1105, *petition denied sub nom. Geiger v. SEC*, 363 F.3d 481 (D.C. Cir. 2004).

[48] 15 U.S.C. § 77A(e).

[49] *See, e.g. SEC v. Johnston*, 143 F.3d 260, 263 (6th Cir. 1998).

[50] *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972).

losses suffered but rather to 'deprive the wrong-doer of ill-gotten gains.'"[51] Disgorgement need only be a reasonable approximation of profits causally connected to the violation.[52] Once the Division establishes that its disgorgement figure reasonably approximates the amount of unjust enrichment, the burden of going forward shifts to the respondent who is "then obliged clearly to demonstrate that the disgorgement figure was not a reasonable approximation."[53] Where disgorgement cannot be exact, "any risk of uncertainty . . . should fall on the wrongdoer whose illegal conduct created that uncertainty."[54]

The Division has established that Schoemann made profits of $967,901 ($1,042,901 in gross proceeds, minus Schoemann's initial $75,000 purchase price) from his violative sales of Stinger stock between November 12 and 22, 2004. On appeal, Schoemann has not challenged the accuracy of the Division's profit calculation, although he has challenged whether the sales violated the applicable provisions. Ordering disgorgement will prevent Schoemann from reaping substantial financial gain from his violations.[55] Disgorgement will also impress upon Schoemann

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[51] *SEC v. Bilzerian*, 29 F.3d 689, 697 (D.C. Cir. 1994) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978)).

[52] *See, e.g., Bilzerian*, 29 F.3d at 697.

[53] *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989).

[54] *SEC v. Patel*, 61 F.3d 137, 140 (2d Cir. 1995).

[55] Schoemann complains that other entities that were involved in the transactions at issue, including the transfer agent, the market maker, and Schoemann's broker, E*Trade, were not "penalized for their role in these sales." The appropriate sanction depends on the facts and circumstances of each case, and cannot be readily compared to sanctions, or the lack thereof, imposed in other cases. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973). Moreover, the purpose of disgorgement is not, as Schoemann suggests, to "penalize" the respondent, but rather to force the respondent to give up gains that were achieved through violations of the securities laws. "An order to disgorge is not a punitive measure; it is intended primarily to prevent unjust enrichment." *Zacharias*, 569 F.3d at 471 (citing *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000); *Bilzerian*, 29 F.3d at 697; *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989); *Blatt*, 583 F.2d at 1335). The Division has not asked the Commission to assess a civil money penalty in this case.

Schoemann also complains that Douglas Murrell "settled with the SEC for a minuscule amount (approximately $50,000) for his own public sales of shares, and has retained millions of dollars from those stock sales." However, settlements can be reached for any number of reasons, and settlements are not precedent. *Richard J. Puccio*, 52 S.E.C. 1041, 1045 (1996) (citing *David A. Gingras*, 50 S.E.C. 1286, 1294 (1992), and cases there cited).

and other market participants the need to comply with the registration requirements of the federal securities laws and deter them from evading such requirements in the future in the hopes of reaping a substantial financial windfall. Accordingly, we order Schoemann to disgorge $967,901, plus prejudgment interest.[56]

An appropriate order will issue.[57]

By the Commission (Chairman SCHAPIRO and Commissioners CASEY, WALTER, AGUILAR, and PAREDES).

Elizabeth M. Murphy
Secretary

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[56] Securities Act Section 8A(e) authorizes the Commission to assess "reasonable interest" in connection with an order for disgorgement in any cease-and-desist proceeding. Commission Rule of Practice 600(b) provides that interest shall be computed at the underpayment rate established by Section 6621(a)(2) of the Internal Revenue Code and shall be compounded quarterly. We have held previously that the IRS underpayment rate applies to disgorgement amounts for the entire period from the date of assessment until paid. *Laurie Jones Canady*, 54 S.E.C. 65, 85 (1999). The Division contends that the starting date for the assessment of prejudgment interest should be January 1, 2005.

[57] We have considered all of the arguments advanced by the parties. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 9076 / October 23, 2009

Admin. Proc. File No. 3-12943

In the Matter of

RODNEY R. SCHOEMANN
c/o Peter J. Anderson and Gregory S. Kaufman
Sutherland Asbill & Brennan LLP
1275 Pennsylvania Avenue, NW
Washington, DC 20004-2415

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Rodney R. Schoemann cease and desist from committing or causing any violations, or any future violations, of Sections 5(a) and 5(c) of the Securities Act of 1933; and it is further

ORDERED that Rodney R. Schoemann shall disgorge $967,901, and prejudgment interest in the amount of $335,370.98 from January 1, 2005, computed as set forth in Rule 600 of the Commission's Rules of Practice, 17 C.F.R. § 201.600(b).

Payment of the amount to be disgorged, prejudgment interest, and the civil money penalty shall be: (1) made by United States postal money order, certified check, bank cashier's check, or bank money order; (2) made payable to the Securities and Exchange Commission; (3) mailed or delivered by hand to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Alexandria, VA 22312; and (4) submitted under cover letter that identifies the respondent and the file number of this proceeding. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement , directed to the attention of the counsel of record.

By the Commission.

Elizabeth M. Murphy
Secretary