COLORADO COURT OF APPEALS Court Address: 101 W. Colfax, Ste. 800 Denver, CO 80202 Appeal from Judgment of the District Court, Arapahoe County, State of Colorado Civil Action No.: 08CV2070 Div. 401, Ctrm. 401 Honorable Valeria N. Spencer	**Δ COURT USE ONLY Δ**
Plaintiffs-Appellants: Mathers Family Trust, William H. Mathers, Myra M. Mathers, Thomas E. Carpenter Trust, Margaret M. Carpenter Trust, Robert Hall and Gianpaolo Callioni v. **Defendants-Appellees**: Charles Reed Cagle, Joseph D. Kinlaw, Heartland Energy of Colorado, LLC, Steve Ziemke, Brandon Davis, Beau Beard, John Schiffner, Joel Held, Martin Harper, HEI Resources, Inc., f/k/a Heartland Energy, Inc., Heartland Energy Development Corp., Reed Petroleum, LLC, D. Deerman, Ltd., R&J Associates, Inc., and DOES 1-20	Case No.: 2010CA0093
Attorneys for North American Securities Administrators Association, Inc: E. Lee Reichert, Atty Reg. No. 22667 Michelle E. Cormier, Atty Reg. No. 39917 Kamlet Reichert, LLP 950 Seventeenth Street, Suite 2400 Phone: (303) 825-4200 Fax: (303) 779-0740 E-mail: lreichert@kamletlaw.com mcormier@kamletlaw.com	
BRIEF OF AMICUS CURIAE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all the applicable requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g) because contains 5862 words and does not exceed 30 pages.

/s/ E. Lee Reichert
Signature of attorney or party

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

The North American Securities Administrators Association, Inc. ("NASAA"), by and through its undersigned counsel, files this Brief of Amicus Curiae in support of the Plaintiffs-Appellants' Opening Brief.

STATEMENT OF AMICUS CURIAE ISSUE

1. Did the district court err, as a matter of law, by failing to void the Texas choice of law provisions, which include forum selection language, in light of the statutory anti-waiver provisions contained in Section 11-51-604(11) of the Colorado Securities Act and the public policy considerations raised thereby?[1]

STATEMENT OF CASE

NASAA relies upon the Statement of Case provided in the Opening Brief filed by the Plaintiffs-Appellants.

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

I. INTRODUCTION

NASAA is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. It has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, who are responsible for administering their respective state or territorial securities laws. Formed in

[1] Statutory interpretation is a question of law, subject to de novo review. *See Leverage Leasing Co. v. Smith,* 143 P.23 1164, 1166 (Colo. Ct. App. 2006).

1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in connection with the offer and sale of securities.

NASAA and its members have a substantial interest in the outcome of this appeal for several reasons. This appeal involves serious abuses under state securities law with wide ranging implications for investors in Colorado and other states. Defendants-Appellees committed repeated violations of the Colorado Securities Act, Colo. Rev. Stat. §§11-51-101 *et seq*. (the "Colorado Act"), over an extended period of time, by systematically targeting senior citizens and bilking them out of millions of dollars. Defendants-Appellees were the subject of numerous prior enforcement proceedings, yet they continued this pattern of illegal and predatory behavior. These are precisely the type of recalcitrant defendants who deserve the full measure of civil (and criminal) liability that the law can bring to bear.

The district court's decision also has a more far-reaching impact by undermining investor protection in Colorado and potentially elsewhere. It places a heavy burden on victims seeking redress for violations of the Colorado Act. This decision, if upheld, will make successful civil enforcement of securities law violations much more difficult, and seriously weaken the deterrent effect of the Colorado Act. As a result, in a very real sense, Colorado

citizens and investors in Colorado businesses will be more vulnerable to fraud and abuse in the offer and sale of securities. The decision also sets a bad precedent that may influence courts in other states that have not yet been called upon to decide the issues presented here. Such an impact would further erode investor protection.

Finally, and perhaps most importantly, unless reversed, the district court's decision will undermine the uniformity of state securities law. The vast weight of authority holds that choice of law provisions are void under state securities acts with substantially similar language to the Colorado Act. The district court's decision runs counter to this view and relegates Colorado to a stand-alone exception that would honor choice of law provisions. The adverse consequences are twofold. First, the decision creates variability in state law that fosters confusion without conferring investor protection benefits. Second, relative to other states, Colorado is more likely to become an attractive haven for white collar criminals who are willing to run the risk of securities law violations as long as civil liability is an unlikely prospect.

The implications of the district court's decision are particularly ominous in the current economic climate. Most observers agree that inadequate oversight and weak enforcement have allowed abuses on Wall Street to flourish, in the form of institutional risk-taking as well as massive Ponzi

schemes exemplified by the Madoff case and by similar cases in Colorado such as this spring's Sean Mueller case. Stronger enforcement—both civil and criminal—is essential for preventing a recurrence of these behaviors and the market upheavals and investor injury they cause. These remedies are also essential for preventing wide scale abuses *while* our markets rebuild. Difficult economic times call for greater vigilance against white-collar crime. Perpetrators feel strong economic pressure to flout the law, investors search desperately for new investments to recover prior losses, and regulators and prosecutors struggle to police the markets. As a necessary counterbalance, Colorado victims must have the ability to bring successful civil actions in Colorado against those who exploit the public. The district court's opinion needlessly impedes these important undertakings.

II. THE WORK OF STATE SECURITIES REGULATORS AND NASAA'S ROLE IN SUPPORTING ITS MEMBERS

The U.S. members of NASAA are the state agencies responsible for administering state securities laws, a body of law that first emerged nearly 150 years ago. *See generally* LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 31-34 (3d ed. 1989).[2] Their principal responsibilities fall into two distinct categories: regulation and enforcement. Regulation encompasses

[2] Colorado is a member of NASAA through the Colorado Department of Regulatory Affairs, Division of Securities. The Colorado Attorney General has jurisdiction to bring criminal actions for violations of the Colorado Act.

preventive measures such as registering broker-dealers and their agents to help ensure that they have the integrity and competence to deal fairly with the public; registering securities offerings to ensure adequate disclosure is made to investors; and establishing standards of conduct and remedial sanctions to ensure that industry participants refrain from exploiting the public.

Equally important is the states' enforcement role: protecting the nation's investors by bringing enforcement actions against the firms and individuals who have ignored their registration obligations, failed to register their securities offerings, or committed fraud or other sales abuses in the offer and sale of securities. For nearly a century, state securities regulators have tirelessly pursued those who violate state securities laws, from the con artist operating a local Ponzi scheme to the Wall Street brokerage firm engaged in dishonest practices on a national scale. Each year, state securities regulators file thousands of administrative, civil, and criminal enforcement actions under their securities codes seeking a wide range of punitive and remedial sanctions, including injunctions, fines, restitution orders, registration revocations, and criminal convictions accompanied by fines and jail terms. *See, e.g.,* NASAA Member Enforcement Statistics.[3] As the enforcement statistics cited show, from 2004 to 2007, NASAA members initiated over 8,300 enforcement

[3] NASAA Member Enforcement Statistics, a*vailable at* http://www.nasaa.org/issues___answers/enforcement___legal_activity/1002.cfm.

actions—many of them criminal prosecutions—resulting in $178 million in fines, $1.8 billion in restitution orders, and 2,764 years of incarceration.

Since 1919, NASAA has supported both the regulatory and the enforcement work of its members. For example, NASAA and the Financial Industry Regulatory Authority jointly operate the Central Registration Depository ("CRD"). The CRD system enables state and federal regulators to register broker-dealer firms and their agents electronically. It also enables members of the public to check the background information, disciplinary history, and licensing status of their brokers, via the web or through direct contact with state securities regulators.

In the securities registration area, in order to promote efficient capital formation, NASAA has helped develop standardized registration procedures for small, regional securities offerings. These procedures, such as the "Small Company Offering Registration" program, assist issuers by designating a lead state to review the proposed offering, establishing uniform review criteria, and setting firm deadlines for responses by state regulators. This approach reflects the states' modern approach to securities registration, which alleviates the regulatory burden on industry while preserving a significant measure of protection for investors.[4]

[4] *See generally* NASAA Corporation Finance, *available at*

In support of the states' enforcement mission, NASAA offers training for investigators and attorneys and coordinates multi-state enforcement actions. In addition, through associations of prosecutors such as the National District Attorneys Association and the National Association of Attorneys General, NASAA promotes an understanding of securities law and facilitates the prosecution of securities law violations.

Finally, NASAA regularly offers legal analysis and policy considerations to various appellate courts, including the U.S. Supreme Court, as *amicus curiae* in significant enforcement actions and other cases involving the interpretation of the securities laws and the rights of investors. In its amici briefs, NASAA addresses legal issues ranging from the remedies available to state securities regulators to the elements that investors must prove to recover damages for securities fraud. *See* Online Compendium of NASAA Amicus Briefs.[5]

III. THE ASSISTANCE THAT NASAA CAN OFFER TO THE COURT

By virtue of NASAA's knowledge and experience in the field of securities regulation and enforcement, the association can assist this Court in correctly deciding the legal issues presented in this appeal, in understanding the significance of the district court's decision in the larger context of state

---

http://www.nasaa.org/Industry___Regulatory_Resources/Corporation_Finance/ (NASAA webpage describing coordinated registration programs).

[5] NASAA *Amicus Curiae* Brief, a*vailable at* http://www.nasaa.org/issues___answers/enforcement___legal_activity/968.cfm.

securities regulation, and in weighing the impact of the case on investor protection in Colorado and throughout the country.

Accordingly, NASAA hereby respectfully submits the following argument as Amicus Curiae.

ARGUMENT

The district court erred in holding that a choice of law provision that contained forum selection language in a securities agreement was valid. The court ignored dispositive language in the Colorado Act itself that demonstrates that the Colorado legislature clearly intended choice of law provisions in securities agreements to be void. In addition, the district court failed to follow persuasive decisions issued by state appellate courts throughout the country determining similar choice of law provisions to be void. Finally, the district court gave no weight to the underlying remedial purposes of the Colorado Act—indeed it failed to even consider investor protection policies at all. Compounding these omissions was the district court's reliance on a small number of cases decided under federal law, on clearly distinguishable grounds. For all of these reasons, this Court should reverse the decision of the district court below and hold that choice of law provisions are void as a matter of law under the Colorado Act.

I. THE HOLDING OF THE DISTRICT COURT RUNS COUNTER TO THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE COLORADO ACT.

Read in its entirety, the plain language of Section 11-51-604(11) of the Colorado Act ("Section 604(11)") confirms that the Colorado legislature intended to impose a broad anti-waiver requirement. The legislative history of Section 604(11) supports this conclusion. Even more compelling is the legislative history of the Uniform Securities Act of 1956 (the "Uniform Act"), created by the National Conference of Commissioners on Uniform State Laws, which Colorado used as a model for Section 604(11), as well as its predecessor Colo. Rev. Stat. §11-51-125(10) (1981).

A. The statutory language of the anti-waiver provision in the Colorado Act voids any choice of law provision.

The first and most important guide to the meaning of any Colorado statute is the wording of the statute itself. As the Colorado Supreme Court has stated, a court's "fundamental responsibility in interpreting a statute is to give effect to the General Assembly's purpose or intent in enacting the statute." *Martin v. People*, 27 P.3d 846, 851 (Colo. 2001) (citing *Reg'l Transp. Dist. v. Lopez,* 916 P.2d 1187, 1192 (Colo. 1996); *Lakeview Assocs. v. Maes,* 907 P.2d 580, 584 (Colo. 1995)). Such interpretive efforts "begin with the language of the statute itself." *Id.* (citing *Lopez,* 916 P.2d at 1192; *Maes,* 907 P.2d at 584). If

the statutory language unambiguously sets forth the legislative purpose, there is no need to "apply additional rules of statutory construction to determine the statute's meaning." *Id.*

The statutory provision at issue in this appeal states, in its entirety,

> Any condition, stipulation, or provision binding any person acquiring or disposing of any security to waive compliance with any provision of this article or any rule or order under this article is void.

Colo. Rev. Stat. § 11-51-604(11) (2009).

The wording of this provision confirms that the Colorado legislature was unequivocal in its language. "*Any* condition, stipulation, or provision binding *any* person" "to waive compliance with *any* provision" or rule under the Colorado Act "is void." *Id.* (*emphasis added*). Colorado courts "employ standard rules of statutory construction in examining the [Colorado Act], and first look to the statute's plain language." *Joseph v. Equity Edge*, *LLC*, 192 P.3d 573, 576 (Colo. Ct. App. 2008) (citing *Rosenthal v. Dean Witter Reynolds, Inc.,* 908 P.2d 1095, 1100 (Colo. 1995); *People v. Prendergast,* 87 P.3d 175, 179 (Colo. Ct. App. 2003)). Further, in construing the [Colorado Act], Colorado courts "give full effect to the intent of the General Assembly." *Id.* Based on the plain language of Section 604(11), there is no question that the legislature intended to void *any* waiver provision, and by extension any choice of law provision, including one with forum selection language.

A decision from the California Court of Appeals supports voiding waiver provisions in securities agreements. *See Hall v. Superior Court*, 150 Cal. App.3d 411 (4th Dist. 1983). In *Hall*, two California residents and partners in California oil and gas limited partnerships executed an exchange agreement at McCarran Airport in Las Vegas, Nevada. *Id.* at 414. The agreement contained the following choice of law clause: "This Agreement shall be deemed to have been made in and shall be governed by and enforced in accordance with the laws of the State of Nevada." *Id.* The California Court of Appeals reasoned that "a determination as to the validity of the choice of law provision is prerequisite to a determination of whether the forum selection clause should be enforced." *Id. at 416.* Recognizing that "California's policy is to protect the public from fraud and deception in securities transactions[,]" the *Hall* court held that the choice of law provision violated both the anti-waiver provision of the California Securities Law (which statutory provision is substantially similar to Section 604(11)) and public policy, and for that reason denied enforcement of the forum selection clause as "unreasonable." *Id.* at 417 and 418. This Court should follow the well-reasoned analysis of *Hall*.

B. The adoption of the language of the Uniform Act, as well as Section 604(11), confirms that choice of law provisions in securities agreements are void.

As noted above, Colorado adopted language from Section 410(g) of the Uniform Act[6] as it relates to waiver. Section 410(g) of the Uniform Act states, "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this act or any rule or order hereunder is void."

Where Colorado has based a statutory provision on a uniform act, it is appropriate for Colorado courts to consult the history of the uniform act for interpretive guidance. *See Giguere v. SJS Family Enter., Ltd.,* 155 P.3d 462, 467 (Colo. Ct. App. 2006) ("We accept the intent of the drafters of a uniform act as the General Assembly's intent when it adopts that uniform act.") (citing *Copper Mountain, Inc. v. Poma of Am., Inc.,* 890 P.2d 100 (Colo.1995)); *see also Leverage Leasing Co. v. Smith,* 143 P.23 1164, 1166 (Colo. Ct. App. 2006) (same); *Yacht Club II Homeowners Ass'n, Inc. v. A.C. Excavating,* 94 P.3d 1177 (Colo. Ct. App. 2003) (same), *aff'd,* 114 P.3d 862 (Colo. 2005). The specific provision at issue in this appeal, Section 604(11), parallels almost word-for-word[7] Section 410(g) of the Uniform Act.

---

[6] The purpose of the Uniform Act is to "be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this act with the related federal regulation." Unf. Sec. Act § 415 (1956).

[7] The only difference is that Section 604(11) of the Colorado Act extends to "any person acquiring *or disposing* of any security" while the Section 410 of the Uniform Act applies to "any person acquiring any security."

In addition, the legislative history of the Colorado Act, while not extensive, supports the conclusion that waiver provisions are void. Section 604(11) has survived unchanged through multiple revisions of the Colorado Act. The exact language of Section 604(11) is found in the 1981 Colorado Revised Statutes, repealed and reenacted at Section 11-51-125(10).[8] The Colorado Act had major revisions in 1990, where the current version of the anti-waiver provision was moved to Section 604(11). The statutory history reveals that the Colorado legislature had ample opportunities to delete or amend the anti-waiver provision, and yet, time and time again, through multiple revisions of the Colorado Act, the provision has remained unchanged.

II. OTHER STATE COURTS UNIFORMLY RECOGNIZE THAT CHOICE OF LAW PROVISIONS IN SECURITIES AGREEMENTS ARE VOID.

Various courts in other states have held that the choice of law provisions in securities agreements are void. The district court ignored this substantial body of case law from other states with similar statutory provisions to Colorado's Section 604(11) and instead incorrectly relied upon clearly distinguishable federal decisions not involving statutory anti-waiver provisions.

[8] The 1981 annotations of the Act do not indicate that subparagraph (10) was added; it appears the language existed prior to 1981.

A. Commentators and other state appellate courts have uniformly recognized that choice of law provisions in securities agreements are void.

With respect to the specific provisions at issue in this appeal—the waiver of choice of law provisions including ones with forum selection language—one of the leading experts on state securities law, Professor Joseph Long, has summarized the case law in these terms:

> There are three arguments which suggest that these choice of laws clauses in securities agreements are void. [] First, the case law suggests that these clauses are void as against the public policy of the state where the investor was located at the time of either the offer or the sale. [] Second, this conclusion is re-enforced under the Uniform Securities Act as Section 410(g) contains an anti-waiver provision. Courts have held that this section voids choice of laws clauses. [] Finally, [when arbitrations are involved] an argument can be made that such clauses violate the NASD Rules of Fair Practice.

See 4 JOSEPH C. LONG, BLUE SKY LAW § 4:54 (2010) (footnotes omitted).

In the related context of policy considerations for choice of law provisions, the Second Restatement of Conflict of Laws as promulgated by the American Law Institute states,

> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, **unless** []
>
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the

> rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187(2) (1988) (emphasis added).

The Comments to the Restatement further elaborate on the policy arguments forbidding the choice of law provisions based on a state's interests and regulatory authority.

> *g. When application of chosen law would be contrary to fundamental policy of state of otherwise applicable law.* Fulfillment of the parties' expectations is not the only value in contract law; regard must also be had for **state interests and for state regulation**. The chosen law should not be applied without regard for the interests of the state which would be the state of the applicable law with respect to the particular issue involved in the absence of an effective choice by the parties.[A] fundamental policy may be **embodied in a statute** which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power.

Restatement (Second) of Conflict of Laws § 187 (1988) Comment g (emphasis added).

An illustrative case involving the public policy considerations for the waiver of choice of law provisions is *Ito International Corp. v. Prescott, Inc.*, 921 P.2d 566 (Wash. Ct. App. 1996). In *Ito*, a group of Washington state investors invested in Inter Co-op USA No. 1, a Japanese general partnership. The investors alleged securities violations under the Washington State Securities Act.

In *Ito*, "[e]ach partner received a Certificate of Partnership Interest, stating that the partnership was 'formed pursuant to Japanese law.' The contract also provided that the partnership regulations must be interpreted in accordance with Japanese law []." *Id.* at 570. The investors argued that the choice of law provision was invalid under the Washington State Securities Act because the Act stated that "any provision binding a person acquiring a security to waive compliance with the statute is void." *Id*.

Recognizing that the Washington State Securities Act "expressly invalidates provisions waiving compliance with the statute," the *Ito* court did "not rely on the choice of law provisions and instead conduct[ed] a choice of law analysis." *Id.* After conducting its analysis, the court held that public policy favored the application of Washington state law because "Washington residents were involved in the sale and should not escape liability. [] The application of Washington law would also encourage Washington residents involved in business transactions to behave responsibly." *Id.* at 571.

Many other cases to the same effect can be found from other states. For example, in *Brenner v. Oppenheimer & Co, Inc.*, 44 P.3d 364 (Kan. 2002) investors brought an action against Oppenheimer, who was acting as a clearing broker for a brokerage firm that sold unregistered securities to the investors. *Id.* at 366-369. When investors opened the accounts in Kansas, they signed a client

agreement with Oppenheimer which contained a New York choice of law provision. *Id.* at 367.

The investors asserted "that due to the strong public policy of the State of Kansas for the protection of investors, [the] court should refuse to enforce the choice of law provision []." *Id.* at 374. The Kansas Supreme Court acknowledged that "the issue of applying the public policy exception to the sale of securities is one of first impression in Kansas," yet the court recognized that "where a strong public policy exists for the prevention of wrongful acts against citizens of the State of Kansas,[9] this court will apply the *lex fori*, or the law of the forum." *Id.* at 376-77. The Kansas Supreme Court reviewed various state court decisions and held that "a strong public policy in favor of rigid government regulation of the sale of securities and the protection of investors exists and has been thoroughly established in both statutory and case law. [] Other states' courts interpreting either identical or similar securities laws to those of Kansas have concluded that state public policy and non-waiver provisions of state securities law required the disregard of contract provisions specifying the application of another state's law." *Id.* at 377.

Another case holding that choice of law provisions in a securities contract were not enforceable, even where no direct case law existed in the

[9] One of the investors was a citizen of the State of Kansas, and the other investor was a citizen of the State of Missouri. *Brenner* at 367.

state, is *Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559 (S.D. Iowa 1973). In *Getter*, investors purchased stock issued by Audio Communications, Inc.; however, the stock was not registered as required by Iowa securities law. *Id.* at 570-571. The defendants argued that the Iowa securities laws were inapplicable to the transaction because, "the parties stated in the purchase agreement that New York law would apply." *Id.* at 572.

The *Getter* court recognized that "[o]rdinarily, choice of law provisions in contracts are valid *except* where they are contrary to State public policy." *Id.* at 575. The court also acknowledged that there was "no Iowa case authority directly on point," and so turned to case law from other states. Ultimately, the court held that the choice of law provisions were not enforceable and that the Iowa Securities Act applied to the transaction. *Id.* at 576; *see also Boehnen v. Walston & Co.*, 358 F.Supp. 537, 540-41 (D.S.D. 1973) (holding that permitting a choice of law provision which selected New York law as governing when the alleged violations were of South Dakota securities laws, "would be to provide an effective means of circumventing legislation designed to protect the citizens of South Dakota. This would be against public policy.").

B. The cases cited by the district court are distinguishable.

Instead of relying on this body of case law from state courts involving issues arising under similar state securities statutes, the district court chose to

look to federal cases with little bearing on state securities regulation. As demonstrated in *Joseph v. Viatica Management*, 55 P.3d 264 (Colo. Ct. App. 2002), this Court has recognized that federal authority is not controlling with regard to the Colorado Act if it is distinguishable. *Id.* at 267. In *Viatica*, this Court declined to follow the D.C. Circuit's opinion in *SEC v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996). This Court instead concluded that a viatical investment was a security under the Colorado Act and "that *Life Partners* [was] clearly distinguishable, and [was] not persuaded by either the rationale or conclusions reached in that case." *Viatica* at 267. This Court reached its decision citing "the prophylactic and remedial purposes of the [Colorado] Act, and [the court's] duty to interpret it broadly." Just as this Court did in *Viatica*, it should now conclude that the federal authority upon which the district court relied upon is distinguishable and unpersuasive.

The district court relied on *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), a case based on admiralty law. In *Bremen*, "respondent Zapata, a Houston-based American corporation, contracted with petitioner Unterweser, a German corporation, to tow Zapata's ocean-going, self-elevating drilling rig Chaparral from Louisiana to a point off Ravenna, Italy, in the Adriatic Sea, where Zapata had agreed to drill certain wells." *Id.* at 2. The contract that the parties entered into contained a provision stating, "Any dispute arising must be

treated before the London Court of Justice." *Id.* When Zapata brought suit in the United States District Court in Florida, Unterweser responded by invoking the forum selection provision of the towing contract. *Id.* at 3-4.

Throughout its opinion, the Supreme Court recognized the limited application of the *Bremen* case. For example, it opined that forum selection clauses "are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances. We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty." *Id.* at 10. The Supreme Court also focused on the international nature of the agreement and the sophistication of both parties to the agreement.[10] Ultimately, the Supreme Court qualified its holding by stating, "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." *Id.* at 15.

The district court's reliance on *Bremen* is misplaced. *Bremen* involved a specialized area of the law, admiralty, two sophisticated parties, and a dispute over towing a vessel through international waters. These facts alone dictate that its applicability is highly limited. Relying on it to determine a case involving

[10] "Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans." *Bremen*, 407 U.S. at 9-10. "The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." *Id.* at 12. "This case, however, involves a freely negotiated international commercial transaction between a German and an American corporation for towage of a vessel from the Gulf of Mexico to the Adriatic Sea." *Id.* at 17.

elderly investors with diminished capacity bringing an action under a state securities statute, such as the Colorado Act, is a stretch at best.

The district court's reliance on *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) is similarly misplaced. In *Rodriguez de Quijas*, the petitioners sued their broker alleging violations of the Securities Act of 1933 and the Securities Exchange Act of 1934. *Id.* at 478-479. The customer agreement the petitioners signed "included a clause stating that the parties agreed to settle any controversies 'relating to the accounts' through binding arbitration that complies with specified procedures." *Id.* at 478. The Supreme Court affirmed the Fifth Circuit Court of Appeals' decision that the predispute agreement to arbitrate was enforceable; the Court also overruled *Wilko v. Swan*, 346 U.S. 427 (1953). *Id.* at 486. *Rodriguez de Quijas* does not apply in the instant case because, in essence, it is a case about arbitration agreements and the interplay with federal securities laws. The *Rodriguez de Quijas* case does not involve questions related to choice of law provisions in a state securities law case.

The district court also looked to the Colorado Supreme Court case *Sager v. District Court*, 698 P.2d 250 (Colo. 1985) in reaching its decision in this case. Although *Sager* involved a securities dispute, *Sager* did not address any choice of law issues. Instead, as the district court here conceded, the *Sager* case

"dealt with the enforceability of arbitration agreements, as opposed to forum selection clauses." *See* Order RE: Motion to Dismiss at 10, *Mathers v. HEI Res, Inc*., No. 08CV2070 (Colo. Oct. 7, 2009).

The *Sager* Court only held that "[a] nonwaiver provision in a state securities law is at odds with [the Federal] Arbitration Act and thus is void under the Supremacy Clause." *Sager* at 255. The *Sager* court's holding, however, applies in the very limited context of the enforceability of an arbitration provision. The Federal Arbitration Act does not preempt ALL state statutes, it only preempts provisions of state statutes attempting to limit arbitration in a manner contrary to the Federal Arbitration Act. In the instant case, there is no provision regarding arbitration, instead there is a choice of law provision that purports to require litigation in Texas. Therefore, *Sager* is clearly distinguishable and simply does not apply.

III. WAIVER PROVISIONS ARE VOID PER THE COLORADO SECURITIES COMMISSIONER.

The Colorado Securities Commissioner (the "Commissioner") is the head of the Colorado Securities Commission. Appointed by the Executive Director of the Department of Regulatory Agencies for the State of Colorado, the Commissioner is responsible for enforcing the Colorado Act, the licensing of broker-dealer firms and investment advisers, registration of certain securities

offerings, pursuing investment fraud cases, and providing investor education to citizens of the State of Colorado.

This Court has consistently stated that "[a]s a general rule, we defer to an administrative agency's interpretation of a statute it administers involving a subject matter that calls for the technical expertise the agency possesses." *Westmark Asset Mgmt. Corp. v. Joseph*, 37 P.3d 516, 521 (Colo. Ct. App. 2001) (citing *Commercial Fed. Sav. & Loan Ass'n v. Douglas County Bd. of Equalization,* 867 P.2d 17 (Colo. Ct. App. 1993)).

The Commissioner filed an *amicus curiae* brief in *Barnhill v. HEI Resources, Inc.* (Case No. #2008CV4190) on February 12, 2009.[11] In his brief, the Commissioner correctly noted that Section 604(11) of the Colorado Act ensures that "an investor cannot contract out of the protection of the Colorado Securities Act, if the Act applies." Brief at 4, *Barnhill v. HEI Res., Inc.*, No. 2008CV4190 (Colo. Feb. 12, 2009). Consistent with this Court's prior decisions, the Commissioner's interpretation of the Colorado Act should be given due deference and all choice of law provisions should be considered void under the Colorado Act.

[11] The Colorado Securities Commissioner's Amicus Curiae Brief in Support of Plaintiff's Reponses to Defendants' Motions to Dismiss was filed in *Barnhill v. HEI Res. Inc.*, No. 2008CV4190 (Colo. Feb. 12, 2009).

IV. THE DISTRICT COURT'S DECISION CONFLICTS WITH THE POLICIES UNDERLYING THE COLORADO ACT AND STATE SECURITIES LAW GENERALLY.

The district court erred by failing to consider the public policy underlying a broad reading of Section 604(11) that voids waiver provisions due to their far reaching consequences.

A. The investor protection policies underlying the Colorado Act call for voiding all choice of law provisions.

The underlying purpose of the Colorado Act, like state securities laws in general, is to "protect investors and maintain public confidence in securities markets while avoiding unreasonable burdens on participants in capital markets." *See* Colo. Rev. Stat. § 11-51-101(2) (2009). This purpose is achieved by the remedial nature of the Colorado Act, which "is to be broadly construed to effectuate its purposes." *Id.*

In addition, the Colorado Act is intended to promote uniformity in the regulation of securities. One benefit of such uniformity is establishing clear and consistent rules throughout the country and eliminating uncertainty for both buyers and sellers of securities. When a Colorado statutory provision is based on a section of a uniform act (as is the case here), it should be construed by Colorado courts to promote uniformity among the states that have adopted the same statutory provision. *See In re Marriage of Rose*, 134 P.3d 559, 562 (Colo.

Ct. App. 2006); *In Interest of R.L.H.*, 942 P.2d 1386, 1388 (Colo. Ct. App. 1997).

Enforcing a choice of law provision, such as the one at issue here, would place Colorado outside of the established state securities law jurisprudence, which consistently void these provisions. The cases cited previously herein support the assertion that choice of law provisions should not be upheld when they work to deprive investors of important protections and are thus contrary to public policy. *See Hall*, 150 Cal. App.3d at 411; *Brenner*, 44 P.3d at 364; *Ito Int'l*, 921 P.2d at 566; *see also Getter*, 336 F.Supp at 559; *Boehnen*, 358 F.Supp. at 537. These cases demonstrate the well-founded principle upon which all state securities statutes are based—protection of investors is paramount and must prevail.

The Colorado Act affords a strong public policy favoring application of its provisions to cases involving the offer and sale of securities in the State of Colorado. A securities agreement that waives these provisions does not protect investors, is against public policy, and does not promote uniformity in the regulation of securities among the states, particularly states that have adopted the same statutory language. Therefore, this Court should conclude that the waiver provisions in the instant case are void.

B. Civil liability is a critical component of state securities laws and should not be diminished.

Congress,[12] courts,[13] and commentators[14] all have recognized the importance of civil liability for securities law violations. Private actions play an important role as a way for defrauded investors to be made whole, and as a counterpart to securities regulators enforcement efforts. "Civil liability is an essential adjunct to a blue sky law." LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 4137 (3d ed. 1989).

Nowhere is the interplay between private and government actions more evident than in the current case. As the district court noted, separate actions against Defendants-Appellees have been brought by the Securities and Exchange Commission, the Virginia Corporation Commission, the Alabama Securities Commission, and the Colorado Securities Commission. Order RE: Motion to Dismiss at 2-3, *Mathers v. HEI Res,, Inc*., No. 08CV2070 (Colo. Oct.

---

[12] "The SEC enforcement program and the availability of private rights of action together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws. As noted by SEC Chairman Levitt, 'private rights of action are not only fundamental to the success of our securities markets, they are an essential complement to the SEC's own enforcement program.' The Supreme Court has also described private securities actions as a 'necessary supplement' to the SEC's enforcement regime." S. REP. 104-98, 1995 WL 372783, 7.

[13] "[A] private cause of action exists for a violation of § 10(b) and Rule 10b-5, and constitutes an essential tool for enforcement of the 1934 Act's requirements." *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988).

[14] Under the Uniform Act, there are four basic mechanisms for dealing with an actual or threatened violation of the Act: a violator can be subject to civil liability, a violator can be subject to criminal prosecution, a violator can be the subject of a civil injunctive action brought by an administrator, and under certain circumstances, an administrator can take direct administrative action against a person who has or is about to violate the Act. 9 JOSEPH C. LONG, BLUE SKY LAW § 9:1 (2010).

7, 2009). The civil counterparts to these government actors should be given the opportunity to litigate under Colorado laws in a Colorado court.

C. Appellants might not have remedies available to them under Texas law.

One of the unforeseen consequences of changing the venue to Texas and applying Texas law (as required by the choice of law provision in the security agreements at issue) would be that Appellants would have no remedies under the Texas Securities Act because that act applies only to securities sold in, or to the residents, of the State of Texas. The Texas Securities Act provides,

> [N]o person, firm, corporation or dealer shall, directly or through agents, offer for sale, sell or make a sale of any securities *in this state* without first being registered as in this Act provided. No agent shall, in behalf of any dealer, sell, offer for sale, or make sale of any securities *within the state* unless registered as an agent for that particular registered dealer under the provisions of this Act.

TEX. REV. CIV. STAT. ANN. art. 581-12 (Vernon 1964)(emphasis added).

Case law in Texas reinforces the statutory language. *See Enntex Oil & Gas Co. (of Nevada) v. State,* 560 S.W.2d 494, 497 (Tex.Civ.App. 1977)("The Texas Securities Act . . . only applies to disposition of securities within the state"); *Rio Grande Oil Co. v. State*, 539 S.W.2d 917, 921-922 (Tex.Civ.App. 1976) ("the Texas Securities Act applies if any act in the selling process of securities covered by the Act occurs in Texas.").

By moving the forum to Texas and applying Texas law, the Appellants would be forced to give up their rights under the Colorado Act, yet would have no remedies under the Texas Securities Act. This outcome is unconscionable considering the strong connection that Defendants-Appellees have with the State of Colorado.[15] In addition, such a decision would create the incentive for securities bad-actors in the future to try and absolve themselves of civil liability to Colorado investors by including a similar Texas choice of law provision in their securities agreements.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the district court in its entirety.

[15] Defendant Charles Reed Cagle resides in Colorado; Defendant Heartland Energy of Colorado, LLC is a Colorado limited liability company; Defendant Steve Ziemke resides in Colorado; Defendant Brandon Davis resides in Colorado; Defendant Beau Beard resides in Colorado; Defendant John Schiffner resides in Colorado; Defendant Martin Harper resides in Colorado; Defendant Reed Petroleum, LLC is a Colorado limited liability company. *See* Second Amended Complaint and Jury Demand, p. 3-4.

Respectfully submitted this 21st day of June, 2010.

By:

s/ E. Lee Reichert

E. Lee Reichert, Atty Reg. No. 22667
Michelle E. Cormier, Atty Reg. No. 39917
Kamlet Reichert, LLP
950 Seventeenth Street, Suite 2400
Phone: (303) 825-4200
Fax: (303) 825-1185
Attorneys for Amicus Curiae North American Securities Administrators Association, Inc.

In accordance with C.R.C.P. 121 § 1-26(9) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request.

CERTIFICATE OF SERVICE

I, the undersigned individual, do hereby certify that true and correct copies of this Amicus Brief were served by Lexis/Nexis File and Serve on this 21st day of June, 2010 to the following:

Andrew R. Shoemaker
Shoemaker Ghiselli & Schwartz LLC
1007 Pearl Street, Suite 200
Boulder, Colorado 80302
Attorneys for Charles Reed Cagle, HEI, HEC, Reed Petroleum, and R&J Associates

Mikel J. Bowers
Donnie W. Wisenbaker, Jr.
Bell Nunnally & Martin, LLP
3232 McKinney Ave., #1400
Dallas, TX 75204-2429
Attorneys for Charles Reed Cagle, HEI, HEC, Reed Petroleum, and R&J Associates

Otto K. Hilbert, II
Robinson Waters & O'Dorisio, P.C.
1099 18th Street, 26th Floor
Denver, CO 80202
Attorneys for Joe Kinlaw, John Schiffner, HED, and D. Deerman Ltd.

Thomas P. Johnson
Lydia Floyd
Davis Graham & Stubbs, LLP
1550 Seventeenth Street, #500
Denver, CO 80202
Attorneys for Joel Held

Jeffrey S. George
Anne H. Turner
Hogan & Hartson, LLP
Two North Cascade Avenue, Suite 1300
Colorado Springs, CO 80903
Attorneys for Steve Ziemke

A. Thomas Tenenbaum, Esq.
The Tenenbaum Law Firm
Park Ridge Corporate Center, Suite 600
10475 East Park Meadows Drive
Lone Tree, Colorado 80124
Attorneys for Brandon Davis

Mark E. Haynes
Ireland Stapleton Pryor & Pascoe, P.C.
1675 Broadway, #2600
Denver, CO 80202
Attorney for Martin Harper

Irving G. Johnson
John R. Paddock, Jr.
Elizabeth C. Moran
Marta M. Jucha
Pryor Johnson Carney Karr Nixon, P.C.
5619 DTC Parkway, Suite 1200
Greenwood Village, Colorado 80111
Attorneys for Plaintiffs

s/Diana L. Brechtel
Diana L. Brechtel

In accordance with C.R.C.P. 121 § 1-26(9) a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request.