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<tr><td>SUPREME COURT
STATE OF COLORADO

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Denver, CO 80203</td><td rowspan="3">▲ COURT USE ONLY ▲</td></tr>
<tr><td>On Certiorari to the Colorado Court of Appeals, Division II
Opinion by Judge Ashby (JJ. Freyre and Nieto concurring)
Court of Appeals Case No. 13CA0239</td></tr>
<tr><td>C. RANDEL LEWIS, Receiver,

Petitioner,

v.

STEVE TAYLOR,

Respondent.</td></tr>
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BRIEF OF GERALD ROME, SECURITIES COMMISSIONER FOR THE STATE OF COLORADO, AND THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, AS AMICI CURIAE IN SUPPORT OF PETITIONER

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29, C.A.R. 32, and C.A.R. 53 including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amici brief complies with the applicable word limit set forth in C.A.R. 29(d).

☒It contains [2860] words (does not exceed 4,750 words).

The amici brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/Charles J. Kooyman

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Gerald Rome, Securities Commissioner for the State of Colorado, through his counsel, the Colorado Attorney General, files this Amici Curiae Brief on behalf of himself and the North American Securities Administrators Association, Inc. ("NASAA").

STATEMENT OF INTEREST OF AMICI CURIAE

Gerald Rome is the Securities Commissioner for the State of Colorado ("Commissioner"), and the head of the Colorado Division of Securities. *See* § 11-51-701, C.R.S. (2017). The Commissioner is charged with enforcement of the Colorado Securities Act, §§ 11-51-101 *et seq*., C.R.S. (2017) (the "Act"),[1] which includes as its primary purpose to "protect investors and maintain public confidence in securities markets while avoiding unreasonable burdens on participants in capital markets. [The Act] is remedial in nature and is to be broadly construed to effectuate its purpose." *See* § 11-51-101(2), C.R.S. (2017). Through

[1] The Commissioner is also charged with enforcement of the Colorado Commodity Code, §§ 11-53-101 *et seq*., C.R.S. (2017), the Colorado Municipal Bond Supervision Act, §§ 11-59-101 *et seq*., C.R.S. (2017) and the Local Government Investment Pool Trust Fund Administration and Enforcement Act, §§ 11-51-901 *et seq*. C.R.S. (2017).

his regulation of the securities marketplace, the Commissioner is responsible for the licensure of over 200,000 professionals, including broker dealers, securities sales representatives, investment advisers, and investment adviser representatives.

The Commissioner is empowered to seek injunctive and other equitable remedies against those who violate the Act, including restitution on behalf of injured investors. § 11-51-602, C.R.S. (2017). One case in which the Commissioner has sought injunctive, restitution and other equitable relief is *Gerald Rome v. Sean Michael Mueller*, 2010CV3280 (Den. Dist. Ct. 2010) (the "*Mueller* Case"). The *Mueller* Case was filed in 2010 following revelations that Mueller was operating a Ponzi scheme. After the entry of a temporary restraining order, the Commissioner sought the appointment of C. Randel Lewis as Court Appointed Receiver ("Receiver"). The request was granted on April 27, 2010. This matter stems from the Receiver's appointment in that case.[2]

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[2] This matter has already been before the Supreme Court on *certiorari* related to a different issue. *Lewis v. Taylor*, 2016 CO 48 (June 20, 2016). The Commissioner relies upon the Petitioner's restatement of the appellate and litigation history.

The Commissioner may seek the appointment of a receiver in a securities fraud case as one of the equitable remedies available under the Act. *See*, § 11-51-602, C.R.S. (2017). A receiver ousts the management upon appointment, marshals assets, and maximizes returns to investors in a way that is fair, efficient, and done under the guidance of the district court judge, who must ultimately approve the interim and final distributions of proceeds to investors. *See SEC v. Bowler*, 427 F.2d 190, 198 (4th Cir. 1970) ("a receiver is permissible and appropriate where necessary to protect the public interest and where it is obvious, as here, that those who have inflicted serious detriment in the past must be ousted").

A Ponzi scheme is "an investment scheme in which returns to investors are not financed through the success of the underlying business venture, but are taken from principal sums of newly attracted investments." *SEC v. Thompson*, 732 F.3d 1151, 1154 n. 3 (10th Cir. 2013); *Miller v. Wulf*, 84 F.Supp.3d 1266, 1273 (D. Utah 2015) ("payment of new investor money to old investors is the *sine qua non* of a Ponzi scheme"). Ponzi schemes are "by definition … insolvent from

day one." *In re Independent Clearing House*, 77 B.R. 843, 860 (D. Utah 1987); *e.g.*, *Scholes v. Lehmann*, 56 F.3d 750, 755 (7th Cir. 1995).

Many courts that have considered the treatment of investors in a Ponzi scheme have applied a "Ponzi presumption." The Ponzi presumption posits that "the general rule is that to the extent innocent investors have received payments in excess of the amounts of the principal that they originally invested, those payments are avoidable as fraudulent transfers." *Miller*, 84 F. Supp. 3d at 1274.

The *Mueller* Case was a classic Ponzi scheme, and the Commissioner sought the appointment of a receiver to ensure that the remaining assets could be efficiently marshalled and equitably distributed.

Because of the Commissioner's role in seeking the appointment of receivers and his interest in the efficient administration of securities enforcement actions, he has a unique interest in the outcome of this case. The published opinion by the Court of Appeals not only has an impact on this case, but will impact future actions brought by the Commissioner, other cases where a receiver is sought in the state of

Colorado, and claims brought under the Colorado Uniform Fraudulent Transfer Act, §§ 38-8-101, *et seq*., C.R.S. (CUFTA).

Formed in 1919, NASAA is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada and Mexico. NASAA has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. The Commissioner is the NASAA member representative from Colorado.

NASAA's U.S. members are responsible for administering state securities laws, commonly known as "Blue Sky Laws." NASAA supports the work of its members and the investing public by promulgating model rules, providing training opportunities, coordinating multi-state enforcement actions, and commenting on legislative and rulemaking proposals. NASAA also offers its legal analysis and policy perspective to state and federal courts as amicus curiae in cases involving the interpretation of state and federal securities laws. One of NASAA's goals is the fostering of greater uniformity in state and federal securities laws. The overriding mission

of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse.

NASAA and its U.S. members have an interest in this case because the Court of Appeals decision is inconsistent with the law in other jurisdictions and undermines investor protection interests that are at the root of state securities laws. Were the Court of Appeals decision to stand, it could potentially harm the ability of NASAA's U.S. members to achieve equitable distributions of assets arising from successful Ponzi prosecutions.

REASONS BRIEF OF AMICI CURIAE IS DESIRABLE

Narrowly speaking, this case is about the power of the Receiver to effectively marshal the assets of the receivership estate and make an equitable distribution of assets to the victims of Mueller's fraud. Broadly speaking, the novel published opinion disrupts the ability of receivers in current and future cases to efficiently administer the estates that they are charged by courts with overseeing.

Going forward, the published Court of Appeals decision discourages parties from settling satellite litigation and will frustrate the ability of court-appointed receivers to fairly, effectively and efficiently administer the aftermath of securities fraud. Because of his legislative charge to administer the Act and enforce the laws on behalf of all investors in Colorado, the Commissioner is interested in any legal decision that impacts the efficient and effective operation of investment-estate administration.

Consequently, this brief of the Commissioner and NASAA as amici curiae is desirable because they can speak to the broader public policy reasons that are important to this Court's review of the Court of Appeals published decision in this case. Given the Commissioner's role as a party litigant in the underlying *Mueller* Case and as the administrator of laws regulating Colorado's capital markets alongside NASAA's role as advocate for all state securities administrators, amici are uniquely positioned to address the central public policy considerations that flow from the Court of Appeals opinion below.

ARGUMENT

Under the Securities Act, the Commissioner may seek injunctive and equitable relief, including the appointment of a receiver, to remedy violations of the Act. § 11-51-602, C.R.S. (2017). The decision below is inconsistent with prior Colorado law, has the potential to upend well-settled law, and could disrupt the orderly and equitable resolution of Ponzi schemes.

I. The Court of Appeals ruling is inconsistent with the CUFTA, is inconsistent with prior rulings of the Court of Appeals, and is out of alignment with nearly all other courts to have considered the question.

The Court of Appeals Opinion in *Lewis v. Taylor*, 2017COA13 (Colo. App. 2017) (the "Opinion"), analyzed whether the Receiver would be able to recover profits from an investor who was an innocent investor in the Ponzi scheme perpetrated by Mueller. The analysis turned upon the Court's erroneous interpretation of the phrase "reasonably equivalent value" and an incorrect belief that investors in a Ponzi scheme should be entitled to recover the "time value of money." This misinterpretation by the Court of Appeals is inconsistent with the

approach taken by the vast majority of courts. It is also inconsistent with the approach taken by a different panel of the Court of Appeals when considering the rights of investors in a Ponzi scheme receivership.

A. The Opinion applied the wrong line of reasoning in its analysis.

In its analysis, the Opinion leaned heavily on a line of reasoning from *In re Carrozzella & Richardson*, 286 B.R. 480 (D. Conn. 2002). In doing so, the Opinion rejected the majority, and more applicable, line of reasoning in *Donell v. Kowell*, 533 F.3d 762 (9th Cir. 2008). This analysis was also inconsistent with prior authority in Colorado.

The fundamental difference between the two schools of thought rests in the treatment of investors under the Uniform Fraudulent Transfer Act (UFTA) and whether investors should be able to recover the "time value of money" beyond their principal investment once an investment is revealed to be a Ponzi scheme.

Prior to the Opinion issued below, another panel of the Court of Appeals rejected the concept that investors should be able to recover the "time value of money" in Ponzi schemes. In *Higley v. Peabody & Co.*,

920 P.2d 884 (Colo. App. 1996), the Court of Appeals considered an objection by an unnamed class member to a settlement formula that would have precluded him from receiving proceeds from the settlement. The court reasoned that "[i]n substance, Hard had already received some other investor's capital when he withdrew more money than he had invested, and if he were to receive any cash from the settlement proceeds, he would essentially be receiving even more of some other investor's capitol." *Id*. at 892.

The opinion further stated that "Hard's request that the trial court consider the 'time value of money' was based on his calculation of the fictitious profits reported by Donahue from the Ponzi scheme. … Allowing Hard's method of computation would simply continue the false pretense of 'profit' that characterized this scheme." *Id*.

This analysis is consistent with the majority of circuit courts that have considered the issue, and is consistent with the Tenth Circuit's analysis in *In re Hedged-Investments Assocs.*, 84 F.3d 1286 (10th Cir. 1996); *see also Scholes*, 56 F.3d at 757 (investor in Ponzi scheme had no

claim to "profit" generated by scheme).[3] A majority of courts applying other states' fraudulent transfer statutes agree that false profits derived by an investor from a Ponzi scheme should be clawed back for the benefit of other unrecompensed investors. *See Silverman v. Cullin*, No. 15-1341, 2016 WL 423800 (2d Cir. Feb. 4, 2016) (applying New York's fraudulent conveyance law); *Janvey v. Brown*, 767 F.3d 430 (5th Cir. 2014) (applying Texas's UFTA);[4] *Donell v. Mojtahedian*, 976 F. Supp. 2d 1183 (C.D. Cal. 2013) (applying California's UFTA); *Gordon v. Demey*, No. 11-cv-13506, 2013 WL 607839 (E.D. Mich. Feb. 19, 2013) (applying Michigan's UFTA); *Wiand v. Morgan*, 919 F. Supp. 2d 1342 (M.D. Fla. 2013) (applying Florida's UFTA); *In re Consol. Meridian Funds*, 487 B.R. 263 (Bankr. W.D. Wash. 2013) (applying Washington's

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[3] As further discussed in the Receiver's Opening Brief, pp. 24–26.

[4] Subsequent to the *Brown* decision, the Texas Supreme Court issued *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560 (Tex. 2016). *Brown* remains good law after *Golf Channel*, though. *Golf Channel* adjusted the way "value" should be interpreted under Texas's unique UFTA statute, *see Janvey v. Golf Channel, Inc.*, 834 F.3d 570, 572 (5th Cir. 2016), but did not obviate the ultimate conclusions reached in *Brown*.

UFTA); *In re Canyon Sys. Corp.*, 343 B.R. 615 (Bankr. S.D. Ohio 2006) (applying Ohio's UFTA).

The analysis by the Court of Appeals in the Opinion misses the critical point in these cases. *Higley, Donell*, *In re Hedged-Investments Assocs*, and the other cases identified above recognize a simple fact (whether explicitly or impliedly): Allowing Taylor to retain investment "profits" under a time value of money analysis simply harms the other investors victimized by Mueller's fraud who remain unrecompensed. In short, the novel Opinion is inconsistent with the remedial intent of the Colorado Securities Act (and other state securities laws), and the intent of UFTAs in that it allows a party to retain profits at the expense of victims of fraud – precisely the type of outcome that such acts are intended to prevent.

B. The Opinion disrupts the Commissioner's enforcement of the Securities Act to efficiently resolve Ponzi schemes.

The Opinion creates a number of significant problems that have the potential to interfere with the Commissioner's enforcement actions.

First, as described above with *Higley*, the Opinion creates a split in precedent under Colorado law. The Opinion's novel conclusion creates administrative uncertainty in handling future Ponzi schemes. The split of authority in Colorado will discourage parties from settling claims with receivers, will create uncertainty in the courts, and has the potential to vastly increase the cost of winding down Ponzi schemes.

Moreover, as described herein and in the Receiver's Opening Brief, the Opinion places Colorado well outside of the mainstream on an issue that has a detrimental impact on matters of public policy. This is particularly important when considering application of a uniform law that has been broadly adopted nation-wide. The Opinion represents an interpretation of UFTA that is an outlier nationally and inconsistent with the CUFTA and Colorado policy.

Finally, as a practical matter, this Opinion may have far-reaching consequences for the administration of Ponzi-estates under the Colorado Securities Act (and, potentially, other state securities laws). By suggesting that "winners" in a Ponzi scheme may keep the time value of money of their investment, the motive to resolve potential

claims involving profits paid on an investment with the receiver is greatly diminished.

The ability of investors to receive an equitable outcome is also greatly lessened because the Opinion represents a significant departure from two basic principles employed in fairly resolving Ponzi schemes. The first is that investor victims be treated equally when distributing assets of the estate. *See, e.g.*, *Cunningham v. Brown*, 265 U.S. 1, 13 (1924) (in addressing Ponzi schemes, "equality is equity"). Allowing early investors in a Ponzi scheme to keep false profits is both inequitable and unsupported by any legitimate benefit to the entities used by the Ponzi scheme. *See Scholes*, 56 F.3d at 757 (profits paid by schemer served to entice more victims to invest and were paid at the expense of other defrauded investors).

The second principle is that the timing of an investor's ensnarement in a Ponzi scheme should not dictate how much they recover through the receivership. *See, e.g.*, *SEC v. Credit Bancorp*, 290 F.3d 80, 89 (2d Cir. 2002) (quoting *U.S. v. Durham*, 86 F.3d 70 (5th Cir. 1996)) (rejecting tracing in Ponzi scheme receivership because the

merely fortuitous timing of investment should not determine amount of victim's recovery). The Opinion turns this principle on its head by allowing early investors in a Ponzi scheme to retain profits of an insolvent fraud on the dubious proposition that they are entitled to the "time value" of money for their equity investment. As discussed at length in the Petitioner's brief, there simply is no support in the CUFTA or cases interpreting it for this position. Opening Brief at 8–12 and 16–22.

Finally, the ability of the Commissioner to protect investors (§ 11-51-101(2), C.R.S.) and exercise remedies under § 11-51-602(2), C.R.S. is also greatly curtailed if the Opinion stands. The Opinion inadvertently incentivizes Ponzi schemes by providing investors in those frauds with a novel means to protect false profits paid to them. The same profits the Opinion protects entice new investors to the scheme, thus furthering the harm to Colorado's securities markets and investors. *See Scholes*, 56 F.3d at 757 (profits paid to investor and continuing investments in Ponzi scheme prolong the fraud and increase losses to the investors).

Further, by parting with the Court of Appeals' prior decision in *Higley*, 920 P.2d 884, and the national consensus on the issue, the Opinion greatly increases the uncertainty and costs in administrating receiverships in subsequent Ponzi schemes. These delays and increased costs directly impact the victims of fraud who were not fortunate enough to receive payouts by reducing the amount of proceeds available to compensate them for their losses.

CONCLUSION

The consequences of the Court of Appeals decision are broad and will impact the cost and necessity of litigation, to the detriment of victims of securities fraud statewide and across the United States.

Because the Court of Appeals' opinion is in conflict with another opinion of the Court of Appeals, is inconsistent with the vast majority of authorities on the subject, and impacts the ability of the Commissioner and court-appointed receivers to fairly administer the marshalling and distribution of fraudulently-obtained funds, amici curiae Securities

Commissioner Gerald Rome and NASAA urge this Court to overturn the Opinion.

Respectfully submitted this 13th Day of November, 2017.

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