DATE FILED: July 19, 2016 3:01 PM
FILING ID: D8C1353D24CA3
CASE NUMBER: 2015CA2033

COURT OF APPEALS, COLORADO Colorado State Judicial Building 2 East 14th Avenue Denver, Colorado 80203	
Appeal from the Trial Court for the City and County of Denver, Colorado Honorable Shelley I. Gilman Case No. 2014CV34131	
Defendants/Appellants, **MARC MANDEL and WALL STREET RADIO, INC. d/b/a WINNING ON WALL STREET,** v. **Plaintiff/Appellee,** **GERALD ROME, Securities Commissioner for the State of Colorado.**	Δ **COURT USE ONLY** Δ
Zachary Knepper Deputy General Counsel NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. 750 First Street, NE, Suite 1140 Washington, DC 20002 Tel.: (202) 737-0900; Fax: (202) 783-3571 (DC Bar #488508)* zk@nasaa.org * *Pro hac vice admission pending* Associated Colorado Counsel: Paul Vorndran VORNDRAN SHILLIDAY, P.C. 1888 Sherman Street, Suite 760 Denver, CO 80203 Tel.: (720) 439-2500; Fax: (720) 439-2501 (Reg. #22098) paul@vs-lawyers.com	Court of Appeals Case Number: **2015CA2033**

BRIEF OF *AMICUS CURIAE* NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., IN SUPPORT OF PLAINTIFF/APPELLEE GERALD ROME

CERTIFICATE OF COMPLIANCE PURSUANT TO C.A.R. 32(h)

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

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

☒ It contains **4,748** words (excluding the caption page, this certificate page, the table of contents, the table of authorities, and the signature block).

The amicus 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/Paul Vorndran
Paul Vorndran (Reg. #22098)
VORNDRAN SHILLIDAY, P.C.

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE PURSUANT TO C.A.R. 32(h) ii

TABLE OF CONTENTS.. iii

TABLE OF AUTHORITIES v

IDENTITY AND INTEREST OF *AMICUS CURIAE* PURSUANT TO C.A.R. 29(c)(2)...1

ARGUMENT 3

I. STATEMENT OF THE CASE. 3

II. DEFENDANTS' CONDUCT AS AN AUTO-TRADING LEAD TRADER WAS NOT EXEMPT FROM LICENSURE AS AN INVESTMENT ADVISER UNDER EITHER C.R.S. § 11-51-201(9.5)(b)(II) OR C.R.S. § 11-51-201(9.5)(b)(III)..5

A. Defendants' conduct as an auto-trading lead trader squarely fits within the definition of "investment adviser" under the Colorado Securities Act and the federal Investment Advisers Act of 1940, and requiring lead traders to register is consistent with the underlying purposes of investment adviser regulation. 6

B. Legislative intent, the Supreme Court's *Lowe v. SEC* decision, other relevant precedents and the interests of comity among federal and state securities laws demonstrate that Defendants' conduct as a lead trader was not exempt from licensure under the C.S.A. or the Advisers Act.............7

1. Colorado's two publisher's exemptions mirror the exemptions in the 1956 Uniform Securities Act and the 1985 Revised Uniform Securities Act which were intended to be co-extensive; if this court were to interpret them otherwise, this court would disrupt the comity of federal and state securities laws. 8

2. Justice Stevens's majority opinion in *Lowe v. SEC* and a subsequent federal trial court case, *SEC v. Park*, demonstrate that auto-trading lead traders are investment advisers. 14

3. Other precedents support the conclusion that auto-trading is not conduct exempt from licensure..17

C. A finding that Defendants are exempt from licensure would defeat the purposes of investment adviser registration and open a potential loophole in the regulatory framework for financial advisers. 18

III. AUTO-TRADING IS NOT PROTECTED SPEECH UNDER THE FIRST AMENDMENT OR THE COLORADO CONSTITUTION...........................19

IV. IN ADDITION TO DEFENDANTS' LEAD TRADER RECOMMENDATIONS, DEFENDANTS' SELECTIVE COMMUNICATIONS WITH SUBSCRIBERS ALSO CONSTITUTED INVESTMENT ADVICE FOR WHICH LICENSURE WAS REQUIRED. .20

V. THE TRIAL COURT'S INJUNCTION DID NOT EXCEED ITS AUTHORITY...21

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Brown v. Grand Junction, 136 F. Supp. 3d 1276 (D. Colo. 2015) 20

Denver Pub. Co. v. Aurora, 896 P.2d 306 (Colo. 1995) 20

Ginsburg v. Agora, Inc., 915 F. Supp. 733 (D. Md. 1995) 11, 14

Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2006) 15

Johnston v. CIGNA Corp., 916 P.2d 643 (Colo. Ct. App. 1996) 6

Joseph v. Equity Edge, LLC, 192 P.3d 573 (Colo. Ct. App. 2008) 7

Locke v. Shore, 634 F.3d 1185 (11th Cir. 2011) 16

Lowe v. S.E.C, 472 U.S. 181 (1985) .... *passim*

Murphy v. Reynolds, No. 02-10-229-cv, 2011 WL 4502523
(Ct. App. Tex. 2011) 14

NAAMJP v. Castille, 799 F.3d 216 (3d Cir. 2015) 15

People v. Innovative Fin. Svcs., Inc., No. D045555, 2006 WL 392030 (Cal. Ct.
App. 2006) 22

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) 20

Sauer v. Hays, 539 P.2d 1343 (Colo. Ct. App. 1975) 13

SEC v. Boyd, No. 95-cv-3174, 2012 WL 1060034 (D. Colo. 2012) 22

SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963) 7, 18

SEC v. Park, 99 F. Supp. 2d 889 (N.D. Ill. 2000) 15-17

SEC v. Pirate Investor LLC, 580 F.3d 233 (4th Cir. 2009) 15, 16

SEC v. Terry's Tips, Inc., 409 F. Supp. 2d 526 (D. Vt. 2006)........................... 5, 15

SEC v. Wyly, 56 F. Supp. 3d 394 (S.D.N.Y. 2014) 22

Serafine v. Branaman, 810 F.3d 354 (5th Cir. 2016) 15

Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014) 15, 16

United States v. Carpenter, 791 F.2d 1024 (2d Cir. 1986).....................................20

United States v. Wenger, 427 F.3d 840 (10th Cir. 2005)..20

STATE STATUTORY PUBLISHER'S EXEMPTIONS

Alabama: ALA. CODE § 8-6-2(18)(e) (2015)..12

Alaska: ALASKA STAT. § 45.55.990(34)(B)(v) (2015) 12

Arizona: ARIZ. REV. STAT. ANN. § 44-3101(5)(d) (2015).....................................12

Arkansas: ARK. CODE ANN. § 23-42-102(9)(D) (2015) 12

California: CAL. CORP. CODE § 25009(a)(5) (2015)..11

Colorado: COLO. REV. STAT. ANN. § 11-51-201(9)(b)(II) (2015) .... *passim*

Colorado: COLO. REV. STAT. ANN. § 11-51-201(9)(b)(III) (2015)................ *passim*

Connecticut: CONN. GEN. STAT. ANN. § 36b-3(11)(E) (2015) 11

Delaware: DEL. CODE ANN. tit. 6, § 73-103(8)(E) (2015) 12

Florida: [None].. *n/a*

Georgia: GA. CODE ANN. § 10-5-2(17)(D) (2015)..11

Hawaii: HAW. REV. STAT. ANN. § 485A-102 (2015)..11

Idaho: IDAHO CODE ANN. § 30-14-102(15)(d) (2015) 11

Illinois: 815 ILL. COMP. STAT. ANN. § 5/2.11 (2015) 11

Indiana: IND. CODE ANN. § 23-19-1-2(15)(D) (2015) 11

Iowa: IOWA CODE ANN. § 502.102(15)(d) (2015) 11

Kansas: KAN. STAT. ANN. § 17-12a102(15)(D) (2015) 11

Kentucky: KY. REV. STAT. ANN. § 292.310(11)(d) (2015) 11

Louisiana: LA. REV. STAT. ANN. § 51:702(7)(d) (2015) 11

Maine: ME. REV. STAT. ANN. tit. 32, § 16102(15)(D) (2015) 11

Maryland: MD. CODE ANN. CORPS. & ASSN'S. § 11-101(h)(2)(v) (2015) 12

Massachusetts: MASS. GEN. LAWS ANN. ch. 110A, § 401(m)(1)(D) (2015) 12

Michigan: MICH. COMP. LAWS ANN. § 451.2102a(e)(iv) (2015) 11

Minnesota: MINN. STAT. ANN. § 80A.41(16)(D) (2015) 11

Mississippi: MISS. CODE ANN. § 75-71-102(15)(D) (2015) 11

Missouri: MO. REV. STAT. ANN. § 409.1-102(15)(D) (2015) 11

Montana: MONT. CODE ANN. § 30-10-103(11)(b)(v) (2015) 12

Nebraska: NEB. REV. STAT. ANN. § 8-1101(7)(f) (2015) 12

Nevada: NEV. REV. STAT. ANN. § 90.250(5) (2015) 12

New Hampshire: N.H. REV. STAT. ANN. § 421-B:1-102(26)(D) (2015) 11

New Jersey: N.J. STAT. ANN. § 49:3-49(g)(2)(iv) (2015) 11

New Mexico: N.M. STAT. ANN. § 58-13C-102(P)(4) (2015) 12

New York: N.Y. GEN. BUS. LAW § 359-eee(1)(a)(4) (2015) 11

North Carolina: N.C. GEN. STAT. ANN. § 78C-2(1)(e) (2015) 12

North Dakota: N.D. CENT. CODE § 10-04-02(10)(e) (2015) 12

Ohio: OHIO REV. CODE ANN. § 1707.01(X)(2)(b) (2015) 11

Oklahoma: OKLA. STAT. ANN. tit. 71, § 1-102(17)(d) (2015) 11

Oregon: OR. REV. STAT. ANN. § 59.015(20)(B)(e) (2015) 11

Pennsylvania: 70 PA. CONS. STAT. ANN. § 1-102(j)(iv) (2015) 12

Rhode Island: R.I. GEN. LAWS § 7-11-101(11)(v) (2015) 12

South Carolina: S.C. CODE ANN. § 35-1-102(15)(D) (2015) 11

South Dakota: S.D. CODIFIED LAWS § 47-31B-102(15)(D) (2015) 11

Tennessee: TENN. CODE ANN. § 48-1-102(10)(D) (2015) 11

Texas: TEX. REV. CIV. STAT. ANN. § 581-4(N)(4) (2015) 11

Utah: UTAH CODE ANN. § 61-1-13(q)(iii)(E) (2015) 12

Vermont: VT. STAT. ANN. tit. 9, § 5102(15)(D) (2015) 11

Virginia: VA. CODE ANN. § 13.1-501 (2015) 12

Washington: WASH. REV. CODE ANN. § 21.20.005(8) (2015) 12

West Virginia: W. VA. CODE ANN. § 32-4-401(g)(4) (2015) 12

Wisconsin: WIS. STAT. ANN. § 551.102(15)(d) (2015) 11

Wyoming: WYO. STAT. ANN. § 17-4-102(xv)(D) (2015) 11

OTHER FEDERAL AND STATE STATUTES AND RULES

15 U.S.C. § 78u(d) (2015) 22

15 U.S.C. § 80b-2(a)(11) (2015).................... 6, 8, 9

15 U.S.C. § 80b-9(d) (2015) 22

COLO. REV. STAT. ANN. § 11-51-101 *et seq.* (2015)....................2

COLO. REV. STAT. ANN. § 11-51-101(3) (2015) 13

COLO. REV. STAT. ANN. § 11-51-201(9.5)(a)(I) (2015)....................6

COLO. REV. STAT. ANN. § 11-51-602 (2015) 21

FLA. STAT. ANN. § 517.021(14)(b) (2015)....................11

OTHER AUTHORITIES

1998 Colo. Sess. Laws page 546 8

2016 Wyo. Sess. Laws page 76 11

July 21, 2015, Letter to Phyllis Borzi (DOL) 19

June 4, 2013, Letter to Hon. Mary Jo White....................19

Appellant's Opening Brief (filed May 20, 2016) 5, 7, 14

Cathryn B. Mayers, *Colorado's Regulation of Investment Advisers*, 28:4 COLO. LAW. 39 (Apr. 1999) 8

Colo. Bill History, H.B. 98-1244 (1998) 12

Conflict of Interest Rule, 81 Fed. Reg. 20946 (Apr. 8, 2016) 19

In re Financial Destination, Inc., Kentucky Dept. of Fin. Institutions, Blue Sky Policies Reporter ¶ 27,600 (Sept. 2, 2005) 18

In re The Wall Street Digest et al., Fla. Admin. Proc. No. 85-12-DOS, Blue Sky Reporter Decisions ¶ 72,278 (Aug. 9, 1985) 11

In re Weiss Research, SEC Release No. IA-2525 (June 22, 2006) 17

LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION (3d ed. 1989) 1

Order, *Rome v. Mandel*, No. 2014cv34131 (Dist. Ct. Den. Colo. Aug. 20, 2015) .... *passim*

Order, *Rome v. Mandel*, No. 2014cv34131 (Dist. Ct. Den. Colo. Oct. 26, 2015) 4, 21

Revised Uniform Securities Act (1985) § 101 .... 9, 10

Revised Uniform Securities Act (1985) § 101, Comment 10

Revised Uniform Securities Act (1985) § 603....................22

Revised Uniform Securities Act (1985) § 704....................14

Study on Investment Advisers and Broker-Dealers, SEC Staff Study (January 2011) 18

Testimony Before the U.S. House of Representatives, SEC Chair Mary Jo White (Nov. 18, 2015)....................19

Uniform Securities Act (1956) § 401 9

Uniform Securities Act (1956) § 408 22

Uniform Securities Act (1956) § 415 14

Uniform Securities Act (2002) § 102 10

Uniform Securities Act (2002) § 608 14

IDENTITY AND INTEREST OF *AMICUS CURIAE* PURSUANT TO C.A.R. 29(c)(2)

Formed in 1919, the North American Securities Administrators Association, Inc. ("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. Plaintiff/Appellee Securities Commissioner Gerald Rome 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." *See generally* LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 31-34 (3d ed. 1989). 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 processes. 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 to foster greater uniformity among state and federal securities laws. Ultimately, the mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse.

NASAA and its U.S. members have two interests in this case. First, this court is presented with the question whether acting as an auto-trading lead trader constitutes the provision of investment advice for which licensure as an investment adviser is required. No federal or state court has squarely ruled on this question. Second, and more broadly, Defendants/Appellants Marc Mandel and Wall Street Radio ("Defendants") have asked this court to interpret provisions of the Colorado Securities Act ("C.S.A."), codified as C.R.S. § 11-51-101 *et seq.* (2015), in a manner that could disrupt the comity of federal and state securities law. In particular, this court is presented with an issue of first impression and is uniquely positioned – among *all* federal and state courts – to potentially harmonize or rupture the uniformity of federal and state law regarding the extent to which newspaper or newsletter publishers are exempt from investment adviser registration. NASAA is submitting this *amicus curiae* brief to show that auto-trading lead traders such as the Defendants are required to obtain licensure as investment advisers and to forestall thereby any potential cleaving of state and federal law that could arise from this litigation.

ARGUMENT

I. STATEMENT OF THE CASE.

A district court for the city and county of Denver (the "trial court") found the following facts by summary judgment order. *See* R. CF, p. 933. Marc Mandel is the Chairman and CEO of Winning on Wall Street ("WOWS"). R. CF, p. 933. Neither WOWS nor Mandel has ever been licensed in Colorado as an investment adviser or investment adviser representative. R. CF, p. 934. Defendants maintained a website that provided investment-related services, including newsletters, seminars, workshops, trading alerts, portfolios and stock ideas. R. CF, p. 935. Defendants offered a Master Membership Plan and a Lead Trader Membership Plan. *Id.* The Master Membership Plan cost subscribers $500 per year for which subscribers received Defendants' investment newsletter and daily trading ideas, had online access to Defendants' trading system and portfolio, and had the opportunity to communicate with Mandel by email or telephone. R. CF, p. 937. The summary judgment order quoted several emails from Mandel in which he provided advice to subscribers about specific securities. R. CF, p. 937-38.

Subscribers to the Lead Trader Membership Plan paid Defendants between $1,000 and $2,000 per year. R. CF, p. 936. For this, subscribers were included in the Master Membership Plan and also had the opportunity to "follow" Defendants'

trading decisions via an online auto-trading platform, Ditto Trade. R. CF, p. 935. Defendants were a Ditto Trade "lead trader." Defendants' followers could then base their own portfolios on the Defendants' trading decisions. A follower who set his or her portfolio to "ditto all" would execute trades in lockstep with the Defendants, giving Defendants de facto discretionary trading authority over the follower's portfolio. R. CF, p. 935. Defendants had between 75 and 100 subscribers to their Lead Trader Membership Plan. R. CF, p. 936.

The trial court found that Defendants were providing investment advice in Colorado for which licensure as an investment adviser was required. R. CF, p. 939. In particular, the trial court concluded that Defendants' were not exempt from licensure through Colorado publisher's exemption in C.R.S. § 11-51-201(9.5)(b)(III) (2015). R. CF, p. 940. The trial court's summary judgment order did not discuss a second publisher's exemption under Colorado law, C.R.S. § 11-51-201(9.5)(b)(II) (2015). R. CF, p. 940. Subsequent to this order, the trial court issued a second order, imposing a broad injunction on Defendants and directing them to pay $80,000 in restitution ($1,000 for each of 80 clients). *See* R. CF, p. 929-32.

II. <u>DEFENDANTS' CONDUCT AS AN AUTO-TRADING LEAD TRADER WAS NOT EXEMPT FROM LICENSURE AS AN INVESTMENT ADVISER UNDER EITHER C.R.S. § 11-51-201(9.5)(b)(II) OR C.R.S. § 11-51-201(9.5)(b)(III).</u>

The trial court's two orders do not define where the Defendants crossed the line from conduct that would not have required licensure as an investment adviser into conduct that did require it. The trial court noted that while "Mandel and WOWS may have engaged in some exempt publishing activities," their conduct as a whole was not exempt. *See* R. CF, p. 939-41. The court cited a 2006 Vermont federal trial court case with substantially similar facts in support of its conclusions. *See id.* at 8 (citing *SEC v. Terry's Tips, Inc.*, 409 F. Supp. 2d 526 (D. Vt. 2006)).

Importantly, the trial court did not rule on whether acting as an auto-trading lead trader *in and of itself* would require licensure as an investment adviser.[1] No federal or state court has reached this question. But the correct answer is, "Yes." This court can therefore affirm the trial court's summary judgment order based solely on Defendants' conceded conduct as an auto-trading lead trader. What is more, this court is presented with a question of interpreting Colorado's two

---

[1] Defendants/Appellants' opening brief for simplicity ignores distinctions between licensure as an investment adviser versus as an investment adviser representative. *See* Appellants' Opening Brief at 2, n.1. We agree that this is a useful simplification in this case. *Amicus curiae* accordingly will not analyze the extent to which WOWS and/or Mandel should have been licensed as an investment adviser or as an investment adviser representative and instead will treat the Defendants' conduct holistically, as if they were a single person.

publisher's exemptions. As explained below, this court is uniquely positioned to potentially disrupt the comity of federal and state securities law regarding the scope of publisher's exemptions throughout the United States.

A. Defendants' conduct as an auto-trading lead trader squarely fits within the definition of "investment adviser" under the Colorado Securities Act and the federal Investment Advisers Act of 1940, and requiring lead traders to register is consistent with the underlying purposes of investment adviser regulation.

Acting as an auto-trading lead trader is plainly within Colorado's definition of an "investment adviser," which includes:

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.

C.R.S. § 11-51-201(9.5)(a)(I) (2015). This definition is identical to the term "investment adviser" in the federal Investment Advisers Act of 1940 ("Advisers Act"). *See* 15 U.S.C. § 80b-2(a)(11) (2015).

Congress enacted the Advisers Act "to protect the public 'from the frauds and misrepresentations of unscrupulous tipsters and touts' and to safeguard bona fide investment counsel from the 'stigma of the activities of these individuals.'" *Johnston v. CIGNA Corp.*, 916 P.2d 643, 646 (Colo. Ct. App. 1996) (quoting legislative history). A fundamental purpose of the Advisers Act was to replace a

philosophy of *caveat emptor* with a philosophy of full disclosure of all actual or potential conflicts of interest. *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963). This court has interpreted the requirements of the C.S.A. similarly. *See Joseph v. Equity Edge, LLC*, 192 P.3d 573, 578 (Colo. Ct. App. 2008). Enforcing investment adviser licensure is a critical backstop to investor protection and maintaining the rule of law in this field.

B. Legislative intent, the Supreme Court's *Lowe v. SEC* decision, other relevant precedents and the interests of comity among federal and state securities laws demonstrate that Defendants' conduct as a lead trader was not exempt from licensure under the C.S.A. or the Advisers Act.

Defendants argued to the trial court that they are exempt from licensure because of Colorado's publisher's exemptions contained in C.R.S. § 11-51-201(9.5)(b)(II) (the "(b)(II) exemption") and C.R.S. § 11-51-201(9.5)(b)(III) (the "(b)(III) exemption"). Defendants' appellate brief points particularly to the (b)(III) exemption. *See* Appellants' Opening Brief at 15-17. These two exemptions read as follows.

> (b) "Investment adviser" does not include:
>
> . . .
>
> (II) A publisher of a bona fide newspaper, magazine, or business or financial publication with a regular paid circulation;
>
> (III) A publisher of a securities advisory newsletter with a regular and paid circulation who does not provide advice to subscribers on their specific investment situations;

. . . .

C.R.S. § 11-51-201(9.5) (2015).

The (b)(II) exemption is nearly word for word the same as the publisher's exemption in the Advisers Act. *See* 15 U.S.C. § 80b-2(a)(11)(D) (2015) (exempting from registration "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation"). But the Advisers Act has no textual analogue to Colorado's (b)(III) exemption. *See id.*

1. **Colorado's two publisher's exemptions mirror the exemptions in the 1956 Uniform Securities Act and the 1985 Revised Uniform Securities Act which were intended to be co-extensive; if this court were to interpret them otherwise, this court would disrupt the comity of federal and state securities laws.**

Colorado's publisher's exemptions were added to the C.S.A. in 1998 as part of legislation regulating investment advisers in Colorado for the first time. *See* 1998 Colo. Sess. Laws page 546.[2] Most states were already regulating investment advisers by this point. *See* Cathryn B. Mayers, *Colorado's Regulation of Investment Advisers*, 28:4 COLO. LAW. 39, 39 & n.17 (Apr. 1999) (noting that by 1996, only Colorado, Iowa, Ohio and Wyoming had not yet enacted legislation to regulate investment advisers).

[2] Available at: http://tornado.state.co.us/gov_dir/leg_dir/olls/sl1998/sl_177.htm.

When the Colorado legislature adopted the 1998 C.S.A. amendments, there were two basic textual models for publisher's exemptions enacted by the other states. Most states followed Section 401 of the 1956 Uniform Securities Act (the "1956 USA"), which exempted "a publisher of any bona fide newspaper, news magazine, or business or financial publication of general, regular, and paid circulation." 1956 USA § 401(f)(4). This phraseology was nearly verbatim to the publisher's exemption in the Advisers Act. Colorado's (b)(II) exemption follows this model as well. *Compare* C.R.S. § 11-51-201(9.5)(b)(II) *with* 1956 USA § 401(f)(4) *and* 15 U.S.C. § 80b-2(a)(11)(D).

Other states followed Section 101 of the 1985 Revised Uniform Securities Act ("1985 RUSA"), which had the following entirely reformulated publisher's exemption:

> (7) "Investment adviser" does not include –
>
> . . .
>
> (v) a publisher, employee, or columnist of a newspaper, news magazine, or business or financial publication, or an owner, operator, producer, or employee of a cable, radio, or television network, station, or production facility if, in either case, the financial or business news published or disseminated is made available to the general public and the content does not consist of rendering advice **on the basis of the specific investment situation of each client** . . . .

1985 RUSA § 101(7)(v) (emphasis added). The drafters of the 1985 RUSA revised their model publisher's exemption, including by adding the phraseology

"on the basis of the specific investment situation of each client," explicitly in response to the U.S. Supreme Court's 1985 *Lowe v. SEC* decision. The drafters' comments reflect this:

> Subparagraph (v) has been revised to make it clear that newsletters, radio, or TV broadcasts and other financial publications do not constitute giving investment advice if the information is made available to the general public and the content is not based upon the specific investment situations of the publisher's clients. **This provision is consistent with the United States Supreme Court's construction in *Lowe v. S.E.C.*, 105 S. Ct. 2557 (1985), of the counterpart provision in the Investment Advisers Act of 1940.**

1985 RUSA § 101, Comment (emphasis added). The drafters of the 1985 RUSA thus recognized *Lowe's* significance to the Advisers Act publisher's exemption and sought to incorporate *Lowe's* jurisprudential impact directly into their model statute.[3] But they never intended their reformulation would broaden or narrow the actual scope of the exemption vis-à-vis the Advisers Act or the 1956 USA after *Lowe*. Numerous states have embraced the 1985 RUSA model statute, including the "specific investment situation" phraseology of its publisher's exemption. *See*, *e.g.*, *Ginsburg v. Agora, Inc.*, 915 F. Supp. 733, 738 (D. Md. 1995) (discussing

---

[3] The drafters of the 2002 Uniform Standards Act ("2002 USA") subsequently discarded the 1985 RUSA's reformulated publisher's exemption, including its "specific investment situations" language, and returned to a model expressly like the Advisers Act and 1956 USA. *See* 2002 USA § 102(15)(D) (exempting "a publisher of a bona fide newspaper, news magazine, or business or financial publication of general and regular circulation").

Maryland's incorporation of the phrase "specific investment situation" within its publisher's exemption in response to the Supreme Court's *Lowe* decision). Colorado's (b)(III) exemption follows the 1985 RUSA model as well. *Compare* C.R.S. § 11-51-201(9.5)(b)(III) *with* 1985 RUSA § 101(7)(v).

Today, every state has passed legislation regulating investment advisers.[4] Forty-nine states have statutory publisher's exemptions.[5] Twenty-nine of these forty-nine states have publisher's exemptions that are verbatim (or essentially identical) to the 1956 USA / Advisers Act model.[6] In particular, these state exemptions lack any reference to a subscriber's "specific investment situation." In contrast, nineteen states have publisher's exemptions that are verbatim (or essentially identical) to the 1985 RUSA and its "specific investment situation"

[4] Wyoming was the fiftieth state to regulate investment advisers, having recently enacted legislation that does so. Wyoming's new legislation takes effect in 2017. *See* 2016 Wyo. Sess. Laws page 76 *et seq*.

[5] Florida is the only state without a statutory publisher's exemption. *See* FLA. STAT. ANN. § 517.021(14)(b) (2015). But the Florida Division of Securities follows *Lowe v. SEC* as a matter of policy and exempts bona fide publishers from registration. *See In re The Wall Street Digest et al.*, Fla. Admin. Proc. No. 85-12-DOS, Blue Sky Reporter Decisions ¶ 72,278 (Aug. 9, 1985).

[6] These twenty-nine states are: California, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Vermont, Wisconsin and Wyoming. (For the specific statutory citations, see the State Statutory Publisher's Exemptions list in the Table of Authorities of this brief.)

terminology.[7] Uniquely, only one state – Colorado – has adopted multiple publisher's exemptions. Colorado follows both the 1956 USA / Advisers Act model (through Colorado's (b)(II) exemption) and the 1985 RUSA model (through Colorado's (b)(III) exemption).

No legislative history explains why Colorado adopted two publisher's exemptions. Both exemptions were included in the initial draft legislation introduced to the Colorado House, and were carried forward without revision or apparent discussion into the final, adopted legislation. *See* Colo. Bill History, H.B. 98-1244 (1998). The most reasonable explanation of why the Colorado legislature did so would seem to be that the legislature recognized that there were two different exemptions in use by other states and sought to comport Colorado's statute to both standards. This would keep Colorado law consistent with all other federal and state laws, to the extent any divergence ever arose.

A challenging side effect of this entirely reasonable objective, though, is that a Colorado court could be asked to determine to what extent the (b)(II) exemption

---

[7] These nineteen states are: Alabama, Alaska, Arizona, Arkansas, Delaware, Maryland, Massachusetts, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, Utah, Virginia, Washington and West Virginia. (*See* State Statutory Publisher's Exemptions list.)

means something different than the (b)(III) exemption. This court is now in that position.

This court should interpret the (b)(II) and (b)(III) exemptions as co-extensive. Concluding otherwise would necessarily imply that the twenty-nine states that follow the 1956 USA /Advisers Act model have materially different publisher's exemptions from the nineteen states that follow the 1985 RUSA model. This would upend the comity of federal and state securities laws regarding the scope of publisher's exemptions from investment adviser registration, and could not have been the Colorado legislature's intent when it adopted both standards. And, while this court is not bound by the potential implications of its decisions on other jurisdictions, the Colorado legislature and Colorado courts have long sought to maintain consistency between the C.S.A. and other securities statutes. *See*, *e.g.*, C.R.S. § 11-51-101(3) (2015) (instructing that the C.S.A. should be interpreted consistently with federal law); *Sauer v. Hays*, 539 P.2d 1343, 1346 (Colo. Ct. App. 1975) (stating that the C.S.A., like other state securities laws, parallels federal law).[8] Furthermore, to the extent courts have evaluated the scope of other states' publisher's exemptions, courts have treated them as co-extensive with the federal

[8] The Uniform Securities Acts also seek to foster uniformity. *See* 1956 USA § 415; 1985 RUSA § 704; 2002 USA § 608.

exemption. *See Ginsburg v. Agora*, *Inc.*, 915 F. Supp. 733, 738 (D. Md. 1995) (interpreting Maryland's 1985 RUSA-like publisher's exemption as similar to the Advisers Act exemption); *Murphy v. Reynolds*, No. 02-10-229-cv, 2011 WL 4502523, at *7 (Ct. App. Tex. 2011) (interpreting Texas's 1956 USA-like publisher's exemption as similar to the Advisers Act exemption).

2. Justice Stevens's majority opinion in *Lowe v. SEC* and a subsequent federal trial court case, *SEC v. Park*, demonstrate that auto-trading lead traders are investment advisers.

The most significant precedent for this court's analysis of the Colorado publisher's exemptions is *Lowe v. S.E.C*, 472 U.S. 181 (1985), which reviewed the scope of the Advisers Act publisher's exemption. There were two opinions in *Lowe*, Justice Stevens's majority opinion and a concurrence authored by Justice White. Subsequent courts have variously applied one or the other opinion in different contexts, but contrary to Defendants' argument, there is no "analytical battle" between them, and Justice White's opinion has not "won the war." *See* Appellants' Opening Brief at 17. Rather, as outlined below, this court should rely to Justice Stevens's majority opinion when interpreting the scope of Colorado's (b)(II) and (b)(III) exemptions. In so doing, this court can look further to the excellent analysis of *Lowe* by an Illinois federal trial court in *SEC v. Park*, 99 F. Supp. 2d 889 (N.D. Ill. 2000).

This court is presented with essentially the same issue as was before the Supreme Court in *Lowe*: the scope of a publisher's exemption from investment adviser registration (though whereas the Supreme Court examined the scope of the Advisers Act's exemption, this court is presented with Colorado's two state exemptions). Justice Stevens's opinion is accordingly the proper one to guide this court, as his opinion spoke for the majority of justices in *Lowe*. In this vein, other courts have applied Justice Stevens's opinion when reviewing *Lowe's* holding or, more narrowly, what the Advisers Act publisher's exemption means. *See*, *e.g.*, *SEC v. Pirate Investor LLC*, 580 F.3d 233, 252 (4th Cir. 2009); *Goldstein v. SEC*, 451 F.3d 873, 880 (D.C. Cir. 2006); *SEC v. Terry's Tips, Inc.*, 409 F. Supp. 2d 526, 531-32 (D. Vt. 2006). In contrast, some courts have applied Justice White's concurrence to evaluate governmental regulation of so-called "professional speech" in other, unrelated contexts, such as over psychologists (*Serafine v. Branaman*, 810 F.3d 354 (5th Cir. 2016)), attorneys (*NAAMJP v. Castille*, 799 F.3d 216 (3d Cir. 2015)), physicians (*Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014)), and interior designers (*Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011)). The two *Lowe* opinions thus are not in conflict. They are merely different tools in a court's toolbox, variously suited for one task or another. (Indeed, the Fourth

Circuit Court of Appeals has applied *both* opinions. *Compare Pirate Investor*, 580 F.3d 233, *with Stuart*, 774 F.3d 238.)

The federal trial court case *SEC v. Park* provides helpful guidance in interpreting and applying Justice Stevens's opinion. For a publisher of an investment advisory publication to be exempt from licensure under *Lowe*, the publication must be "bona fide" and "of regular and general circulation." *Park*, 99 F. Supp. 2d at 894. Defendants' auto-trading meets neither criterion.

First, for a publication to be "bona fide" under *Lowe*, it must be (a) disinterested and (b) impersonal to subscribers. *Id.* at 894-95. The Defendants were not disinterested because, by definition, their subscribers were trading alongside them. This in effect gave Defendants discretionary trading authority over their subscribers' portfolios. It also created significant potential for abuse, such as the potential to front-run subscribers, take undisclosed opposing trading positions, or dupe subscribers into pump-and-dump schemes. In addition, Defendants' trading recommendations were not impersonal to the subscribers. As the court noted in *Park*, "Defendants make much of the fact that they disseminated their advice without tailoring it to the particular needs of each subscriber." *Id.* at 896. But this ignores the fact that the Defendants stock "picks may have become or are the subscriber's picks." *Id.* Furthermore, as noted in *Park*, the Defendants'

subscribers self-selected into the Lead Trader Membership Plan and therefore necessarily have similar risk tolerances. *See id.*

Second, for a publication to be "of general and regular circulation" under *Lowe*, it should be issued on a periodic, regular basis and not timed to any particular market event. *Id.* A publication certainly should not act as a "bulletin[] from time to time on the advisability of buying and selling [particular] stocks." *Id.* But Defendants' lead trader recommendations constituted precisely such a buy/sell trading bulletin.

3. Other precedents support the conclusion that auto-trading is not conduct exempt from licensure.

The SEC has not spoken in an official rulemaking capacity about auto-trading, but it has brought several enforcement actions against auto-trading lead traders. The trial court cited one such case, *SEC v. Terry's Tips*. Other actions include *In re Weiss Research*, SEC Release No. IA-2525 (June 22, 2006), a settled enforcement action against an auto-trading lead trader for failing to register as an investment adviser and for other Advisers Act violations. A 2005 no-action letter from the Kentucky Department of Financial Institutions also demonstrated that, in Kentucky's view, acting as an auto-trading lead trader would not qualify for the state's publisher's exemption. Kentucky's securities regulator concluded that because lead traders have effective control over subscribers' assets, they cannot be

deemed exempt from registration after *Lowe*. *See In re Financial Destination, Inc.*, Kentucky Dept. of Fin. Institutions, Blue Sky Policies Reporter ¶ 27,600 (Sept. 2, 2005).

C. A finding that Defendants are exempt from licensure would defeat the purposes of investment adviser registration and open a potential loophole in the regulatory framework for financial advisers.

A core purpose of investment adviser registration is a requirement for heightened duties of care by those with the ability to direct other people's money. *See SEC v. Capital Gains Research Bureau*, 375 U.S. 180 (1963). Auto-trading, with its significant potential for abuse and undisclosed conflicts of interest, is precisely the sort of activity that legislators wanted to bring under the light of regulation. Furthermore, recent regulatory trends have gravitated towards heightened duties of care for financial advisers. Broker-dealers and investment advisers traditionally have been subject to differing standards, with investment advisers treated as fiduciaries and broker-dealers subject to lower "suitability" standards. *See* Study on Investment Advisers and Broker-Dealers, SEC Staff Study (January 2011).[9] Federal regulators are closing this gap. The U.S. Department of Labor recently adopted a rule imposing fiduciary duties on all financial advisers to retirement accounts. *See* Conflict of Interest Rule, 81 Fed.

---

[9] Available at: https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

Reg. 20946 (Apr. 8, 2016). The SEC is similarly considering whether to create a generalized, uniform fiduciary duty for all broker-dealers and investment advisers. *See* Testimony Before the U.S. House of Representatives, SEC Chair Mary Jo White (Nov. 18, 2015).[10] NASAA supports these initiatives. *See*, *e.g.*, July 21, 2015, Letter to Phyllis Borzi (DOL);[11] June 4, 2013, Letter to Hon. Mary Jo White.[12] If lead traders were exempt from registration, auto-trading could provide an escape hatch from regulation. Financial advisers would potentially be able to opt-out of regulation completely by becoming ostensible newsletter publishers and rebranding their clients as subscribers.

III. AUTO-TRADING IS NOT PROTECTED SPEECH UNDER THE FIRST AMENDMENT OR THE COLORADO CONSTITUTION.

NASAA's interest in this matter principally relates to maintaining comity of federal and state securities laws. To the extent Defendants assert that being required to obtain licensure as an investment adviser would infringe their free speech rights, we patently disagree. It is well-settled that securities law is an area in which government has a compelling regulatory interest that overcomes potential

---

[10] Available at: https://www.sec.gov/news/testimony/chair-white-testimony-sec-agenda-operations-2017-budget.html.

[11] Available at: http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/07/2015-07-21-NASAA-Comment-to-DOL.pdf.

[12] Available at: http://www.nasaa.org/wp-content/uploads/2013/10/June-4-2013-Coalition-Letter-to-the-SEC.pdf.

First Amendment implications. *See*, *e.g.*, *Lowe*, 472 U.S. at 204; *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235 (2015) (Breyer, J., concurring); *United States v. Wenger*, 427 F.3d 840, 847-50 (10th Cir. 2005); *United States v. Carpenter*, 791 F.2d 1024, 1033 (2d Cir. 1986). Courts apply even higher scrutiny to free speech challenges under the Colorado Constitution than under the First Amendment. *Brown v. Grand Junction*, 136 F. Supp. 3d 1276, 1294 n.9 (D. Colo. 2015). And Colorado statutes are presumed constitutional; a party attacking a Colorado statute has the burden of proving it unconstitutional beyond a reasonable doubt. *Denver Pub. Co. v. Aurora*, 896 P.2d 306, 318 (Colo. 1995). Given these standards, there is no basis to conclude Defendants' constitutional rights would be violated by requiring them to obtain licensure as an investment adviser.

IV. IN ADDITION TO DEFENDANTS' LEAD TRADER RECOMMENDATIONS, DEFENDANTS' SELECTIVE COMMUNICATIONS WITH SUBSCRIBERS ALSO CONSTITUTED INVESTMENT ADVICE FOR WHICH LICENSURE WAS REQUIRED.

As demonstrated in Sections II and III above, this court can affirm the trial court's summary judgment order based solely on Defendants' conduct as an auto-trading lead trader. Yet the trial court found still further facts supporting its summary judgment order. The trial court cited several emails Mandel had sent to individual subscribers with recommendations about specific securities. *See* R. CF, p. 937-38. This is absolutely the sort of investment advice that legislatures sought

to regulate through the Advisers Act and related state securities laws. Given these additional facts, it is certain that Defendants were acting as an investment adviser and that no exemption obviated their obligation to obtain licensure as such.

V. THE TRIAL COURT'S INJUNCTION DID NOT EXCEED ITS AUTHORITY.

Defendants also challenge the breadth of the trial court's injunction and the imposition of $80,000 in restitution through the court's October 26, 2015, injunction and restitution order. But nothing in the injunction and restitution order exceeded the trial court's authority.

Section 602 of the C.S.A. afforded the trial court broad injunctive authority once it found violations of the act. *See* C.R.S. § 11-51-602 (2015). The 1956 USA and 1985 RUSA contemplate that courts will have broad injunctive authority (*see* 1956 USA § 408; 1985 RUSA § 603), as do the Securities Exchange Act of 1934 and the Advisers Act (*see* 15 U.S.C. § 78u(d) (2015); 15 U.S.C. § 80b-9(d) (2015)). Courts routinely issue broad injunctions for violations of federal or state securities laws, including injunctions that in effect order a defendant to "obey the law." *See*, *e.g.*, *SEC v. Wyly*, 56 F. Supp. 3d 394, 434 (S.D.N.Y. 2014); *SEC v. Boyd*, No. 95-cv-3174, 2012 WL 1060034, at *10-11 (D. Colo. 2012); *People v. Innovative Fin. Svcs., Inc.*, No. D045555, 2006 WL 392030, at *9-10 (Cal. Ct. App. 2006).

CONCLUSION

For all these reasons, this court should affirm the trial court's orders and find that Defendants were not exempt from licensure as an investment adviser under either the (b)(II) exemption or the (b)(III) exemption. This result is consistent with the most reasonable interpretation of the Colorado legislature's intent in adopting the two exemptions, accords with the Supreme Court's *Lowe v. SEC* decision and related case law, keeps Colorado law consistent with other federal and state publisher's exemptions and avoids a potential cleaving of the law in this regard, and fulfills the ultimate intent of federal and state licensure of investment advisers by bringing the murky field of auto-trading under the light of regulation.

Respectfully Submitted this 19th of July, 2016.

s/ Zachary Knepper
Zachary Knepper*
Deputy General Counsel
Joseph Brady, Executive Director
A. Valerie Mirko, General Counsel
NORTH AMERICAN SECURITIES
ADMINISTRATORS ASSOCIATION, INC.
** Pro hac vice admission pending*

s/ Paul Vorndran
Paul Vorndran
VORNDRAN SHILLIDAY, P.C.
Associated Colorado Counsel for NASAA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of July, 2016 a true and correct copy of the within *Amicus Curiae* Brief In Support Of Gerald Rome was served via ICCES upon the following:

David A. Zisser
Jones & Keller, P.C.
1999 Broadway, Suite 3150
Denver, CO 80202

Russell Klein
Deputy Attorney General
Office of the Attorney General
1300 Broadway, 8th Floor
Denver, CO 80203

s/Paul Vorndran
Paul Vorndran