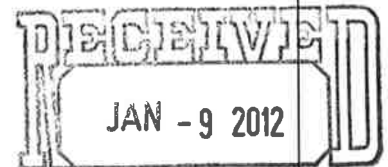
SUPREME COURT, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	
Court of Appeals No. 2010CA93 District Court, Arapahoe County No. 08 CV 2070 Honorable Valeria N. Spencer	**Δ COURT USE ONLY Δ**
Petitioners-Defendants: Charles Reed Cagle, Joseph D. Kinlaw, Heartland Energy Of 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., and R&J Associates, Inc. v. **Respondents-Plaintiffs:** Mathers Family Trust, William H. Mathers, Myra M. Mathers, Thomas E. Carpenter Trust, Margaret M. Carpenter Trust, Robert Hall and Gianpaolo Callioni	Case No.: 11 SC 496 
Attorneys for North American Securities Administrators Association, Inc: Donald E. Lake, III, Atty. Reg. # 32289 Thomas D. Leland, Atty. Reg. # 35631 LATHROP & GAGE LLP 950 17th Street, Suite 2400 Denver, CO 80202 Phone: (720) 931-3200 Fax: (720) 931-3201 E-mail: tlake@lathropgage.com tleland@lathropgage.com	JUDGMENT REVERSED Opinion by: JUSTICE ROVIRA Taubman and Roy, .JJ., concur May 12,2011, as modified June 16, 2011

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:

1. The brief complies with C.A.R. 28(g). It contains 7,139 words.
2. The brief complies with C.A.R. 28 (k). It contains, under a separate heading, statements concerning the standard of review and preservation for appeal of the issue the brief represents.

LATHROP & GAGE LLP

Donald E. Lake, III
Signature of attorney or party

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

STATEMENT OF *AMICUS CURIAE* ISSUE

Whether Colorado public policy or the anti-waiver provision of the Colorado Securities Act, § 11-51-604(11) , C.R.S. (2011) ("section 604 (11)"), voids forum selection clauses in securities contracts?

STATEMENT OF CASE/STANDARD OF REVIEW

NASAA relies upon the Statement of Case and Standard of Review provided in the Opening Brief filed by the Respondents-Plaintiffs.

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

I. IDENTITY OF *AMICUS CURIAE*

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 1919, NASAA is the

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

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).[1] Their principal responsibilities fall into two distinct categories: regulation and enforcement. Regulation encompasses 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. Each year, state securities regulators file thousands of administrative,

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[1] The Colorado Division of Securities is a member of NASAA through the Colorado Department of Regulatory Affairs, Division of Securities.

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 2010 Enforcement Report.[2] As the 2010 Enforcement Report shows, NASAA members initiated 3,475 enforcement actions—many of them criminal prosecutions—resulting in $171 million in fines, $14.1 billion in restitution ordered, and 1,134 years of incarceration.

II. INTERESTS OF *AMICUS CURIAE*

NASAA and its members have a substantial interest in the outcome of this appeal for several reasons. This appeal involves abuses under state securities law with wide ranging implications for investors in Colorado and other states. As alleged in the Second Amended Complaint and Jury Demand (*"Compl."*), Petitioners-Defendants committed repeated violations of the Colorado Securities Act, §11-51-101, C.R.S. *et seq.* (the "CSA"), over an extended period of time, by targeting senior citizens and bilking them out of millions of dollars. *See Compl.*, *ID22927524* at 263-379. Petitioners-Defendants were the subject of numerous prior state regulatory enforcement proceedings, yet they continued this pattern of

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[2] NASAA 2010 Enforcement Report, a*vailable at* http://www.nasaa.org/wp-content/uploads/2011/10/2010-Enforcement-Report.pdf.

illegal behavior. Order RE: Motion to Dismiss at 2-3, *Mathers v. HEI Res,, Inc.*, No. 08CV2070 (Colo. Oct. 7, 2009). These are precisely the type of recalcitrant defendants who deserve the full measure of liability that the law can bring to bear.

The court of appeals' decision is in accord with the anti-waiver provision of the model state securities acts, the rubric upon which the CSA is based. Further, the court of appeals' decision recognizes the significant public policy supporting the provision. A decision reversing the court of appeals' ruling would sanction the use of mechanisms designed to evade the anti-waiver provision and the investor protection measures embodied therein. A reversal would seriously weaken the deterrent effect of the CSA, thereby subjecting Colorado investors to a greater likelihood of illicit conduct in the offer and sale of securities. A decision reversing the holding of the lower court would also set 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 nationwide.

III. THE ASSISTANCE THAT NASAA CAN OFFER TO THE COURT

In support of its members, 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.[3]

By virtue of NASAA's knowledge and experience in the field of securities regulation and enforcement, the Association can assist this Court to correctly decide the legal issues presented in this appeal, to understand the significance of this Court's decision in the larger context of state securities regulation, and to weigh 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*.

SUMMARY OF THE ARGUMENT

The court of appeals correctly held that a forum selection provision in a contract between the parties was invalid for the following reasons:

1. The forum selection clause constitutes a waiver that is prohibited by section 604(11) because the language of section 604(11) is to be broadly construed for the protection of investors. Furthermore, the forum selection clause

[3] NASAA *Amicus Curiae* Briefs, *available at* http://www.nasaa.org/2004/legal-briefs/.

operates as a waiver of compliance with the CSA and is void under section 604(11) because the forum selection clause is interwoven with an impermissible choice of law provision.

2. The forum selection clause is contrary to Colorado public policy and is contrary to the public interest as expressed in the CSA.

3. The decision of the court of appeals to void the forum selection clause is consistent with decisions in other states.

4. Federal precedent is less persuasive than state decisions construing state securities laws.

For all of these reasons, this Court should affirm the decision of the court of appeals below and hold that the forum selection provision is void as a matter of law under the CSA.

ARGUMENT

I. THE FORUM SELECTION CLAUSE CONSTITUTES A WAIVER THAT IS PROHIBITED BY SECTION 604(11).

As the court of appeals correctly held, the forum selection clause in the application and joint venture agreements is void because it is prohibited by section 604(11). Read in its entirety, the plain language of section 604(11) confirms that the Colorado legislature intended to impose a broad anti-waiver requirement. The

forum selection clause operates as a waiver that is prohibited under section 604(11).

A. THE EXPANSIVE LANGUAGE OF SECTION 604(11) IS TO BE BROADLY CONSTRUED FOR THE PROTECTION OF INVESTORS.

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, "Our fundamental responsibility in interpreting a statute is to give effect to the General Assembly's purpose or intent in enacting the statute. *Reg'l Transp. Dist. v. Lopez,* 916 P.2d 1187, 1192 (Colo. 1996); *Lakeview Assocs. v. Maes,* 907 P.2d 580, 584 (Colo. 1995). Our interpretive efforts begin with the language of the statute itself. *Lopez,* 916 P.2d at 1192; *Maes,* 907 P.2d at 584." *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)).

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.

§ 11-51-604(11), C.R.S. (2011).

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 Securities Act "is void." *Id.* (*emphasis added*).[4] In addition to the broad anti-waiver language in section 604(11), section 101(2) of the CSA expressly states that the entire Act, including section 604(11), "is to be construed broadly to effectuate its purposes." § 11-51-101(2), C.R.S. (2011). Those purposes are stated explicitly: to (1) "protect investors"; (2) "maintain public confidence in the securities markets"; and (3) avoid "unreasonable burdens on participants in capital markets." *Id.* Therefore, a dispute about whether a contractual provision is an impermissible waiver under Section 604(11) should be resolved in favor of investor protection.

[4] Deference must also be given to the Colorado Securities Commissioner's interpretation of the breadth of waiver provisions. Colorado courts have 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. App. 2001) (citing *Commercial Fed. Sav. & Loan Ass'n v. Douglas County Bd. of Equalization,* 867 P.2d 17 (Colo. App. 1993)). The Colorado Securities Commissioner, appointed by the Executive Director of the Department of Regulatory Agencies for the State of Colorado, is the head of the Colorado Division of Securities. In an *amicus curiae* brief filed in *Barnhill v. HEI Resources, Inc.* (Case No. #2008CV4190) on February 12, 2009, the Commissioner correctly noted that Section 604(11) of the CSA ensures that "an investor cannot contract out of the protection of the CSA, if the Act applies." Brief at 4, *Barnhill v. HEI Res., Inc.*, No. 2008CV4190 (Colo. Feb. 12, 2009). Consistent with Colorado courts' prior decisions, the Commissioner's interpretation of the Colorado Securities Act should be given due deference and all waiver provisions, including those containing forum selection provisions, should be considered void under the CSA.

B. THE FORUM SELECTION CLAUSE OPERATES AS A WAIVER OF COMPLIANCE WITH THE COLORADO SECURITIES ACT AND IS VOID UNDER C.R.S. SECTION 11-51-604(11) BECAUSE THE FORUM SELECTION CLAUSE IS INTERWOVEN WITH AN IMPERMISSIBLE CHOICE OF LAW.

The Petitioners-Defendants attempt to draw a clear distinction between the choice of law and the choice of forum provisions in the securities contracts. However, the contract written by the Petitioners-Defendants deliberately conjoined the choice of law and forum to their advantage, and the two are not easily separated.

The Venture Agreement (Paragraph 11.4) states as follows:

> Applicable Law. This Agreement and the application or interpretation hereof shall exclusively be governed by and construed in accordance with the laws of the State of Texas. This Agreement shall be deemed to be performable in and venue shall be mandatory in Dallas County, Texas. The Managing Venturer and each Venturer hereby expressly consents and submits to the jurisdiction of said courts and to venue being in Dallas County, Texas. *ID* 27674350 at 1678; Ex. 1 at 94.

Similarly, Paragraph 10 of the Application Agreement provides as follows:

> Applicable Law. This Agreement will be construed according to the laws of the State of Texas, and is deemed performable in the City of Dallas, Dallas County, Texas. The Courts located in the State of Texas, state or federal, shall have exclusive jurisdiction to hear and determine all claims, disputes, controversies and actions arising from or relating to this Application Agreement and any of its terms or

> provisions, or to any relationship between the parties hereto, and venue shall be solely in the courts located in Dallas County, Texas. The undersigned expressly consents and submits to the jurisdiction of said courts and to venue being in Dallas County, Texas. *ID 22927524* at 377; Ex. 8 at 11.

Despite the Petitioners-Defendants' protestations to the contrary, the Venture and Application Agreements show a clear design to not only have disputes heard by a Texas court, but also for the court to apply Texas law, including Texas *securities* law. One of the central issues of this case – "a hotly disputed issue," according to the Opening Brief of Petitioners ("*Opening Brief*") – is whether the Petitioners-Defendants sold a security to the Respondents-Plaintiffs when they entered into the Venture and Application Agreements. *Opening Brief,* at 19. That issue requires an analysis of the terms of the agreement, so it undoubtedly involves the "application or interpretation" of the Venture and Application Agreements and is therefore governed by Texas law.

The Petitioners-Defendants now concede that the contract cannot waive the CSA in favor of Texas law for the purpose of deciding whether a security was sold via the Venture and Application Agreements. In effect, they ask this Court to ignore the choice of law within their contract, but to uphold their choice of forum provision. They assert that a Texas court can apply the CSA without requiring the

Respondents-Plaintiffs to waive compliance with the CSA. But, on the issue that is at the heart of this case, the question of whether the joint ventures are securities, the choice of law and forum selection clauses are not so easily disentangled.

This case illustrates the danger to investors if the Colorado courts do not carefully guard their prerogative to decide important policy questions involving the CSA. The question of whether an interest in a joint venture is a security is currently before this Court in a separate case. *See Mieka Corp. v. Joseph*, Case No. 11CA1080, (Oct. 7, 2011).[5] However, the issue has been squarely addressed in Texas.

Although it is true that courts from other states are generally able to apply the law of foreign jurisdictions, that is not always possible. For instance, when Colorado courts have not resolved an issue, such as the question of when joint ventures are securities, other courts are left to guess at what the Colorado courts would decide. Naturally, in the absence of clear Colorado jurisprudence, a Texas court may give undue weight to Texas case law. In a case like this one, where Texas case law is outside the mainstream on the most vital issue in the case, a

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[5] *Amicus Curiae* filed a brief in support of Colorado Securities Commissioner Fred Joseph in his application of the CSA to the sale of joint venture interests. Brief of *Amicus Curiae* North American Securities Administrators Association, Inc., filed in *Mieka Corp. v. Joseph*, Case No. 2011 CA 1080 (Nov. 7, 2011), *available at* http://www.nasaa.org/wp-content/uploads/2011/08/NASAA-Amicus-Brief-2011-11-07.pdf. Petitioner-Defendant HEI Resources, Inc. filed an *amicus* brief in which it opposed the Commissioner's interpretation. Brief of Amicus Curiae HEI Resources, Inc, filed in *Mieka Corp. v. Joseph*, Case No. 2011 CA 1080 (Oct. 7, 2011).

Texas forum selection clause is a way to stack the deck against investors from other states.

Most states, including Colorado, use a multi-part test to determine whether an interest in an enterprise falls within the definition of a security because it is an "investment contract." 12A JOSEPH C. LONG, BLUE SKY LAW § 2:40 (2011)(stating that for investment contracts "[t]he *Howey* test … is recognized by a clear majority of the state courts as either the sole test or the major test of several alternative ones."). Under this test, commonly known as the *Howey* test, an investment contract is any agreement or transaction in which a person (1) invests money (2) in a common enterprise (3) with the expectation of profits from the efforts of a third party. *Lowery v. Ford Hill Inv. Co.*, 556 P.2d 1201, 1205 (Colo. 1976) (citing *SEC v. WJ Howey Co.*, 328 U.S. 293 (1946)). The third element evaluates whether the person was dependent upon someone else to generate the profits, and the courts look at whether the efforts of the third party are "the undeniably significant ones, those essential managerial efforts which affect the success or failure of the enterprise." *SEC v. Glenn W. Turner Enter., Inc.*, 348 F.Supp. 766 (D.Or.1972), *aff'd*, 474 F.2d 476 (9th Cir.1973); *Sauer v. Hays*, 36 Colo. App. 190, 539 P.2d. 1343 (Colo. App. 1975). Furthermore, this Court has stated that the emphasis is

"on whether or not the investor has substantial power to affect the success of the enterprise." *Toothman v. Freeborn & Peter*, 80 P.3d 804, 812 (Colo. App. 2002). (citing *People v. Blair*, 195 Colo. 462, 473, 579 P.2d 1133, 1141–42 (Colo. 1978) (quoting *SEC v. Heritage Trust Co.*, 402 F.Supp. 744 (D.Ariz. 1975)).

In Texas, the courts generally apply the *Howey* test. *See Searsy v. Commercial Trading Corp.*, 560 S.W.2d 637, 640 (Tex. 1977). "Texas courts have also accepted and used [the *Howey* test]." *Id.* (internal citations omitted).

For joint ventures, however, the Texas courts apply a different test. To determine whether a general partnership can be classified as a joint venture, Texas courts examine whether there are (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a "mutual right of control or management of the enterprise." *Russell v. French & Assoc.*, 709 S.W.2d 312, 315 (Tex.App. 1986). For the fourth element, Texas courts evaluate whether the agreement designates the partners as joint venturers and whether it gives any joint participation, control or operation of the enterprise to the partners. *Id.*

If Texas courts determine that a joint venture exists, the venturers are deemed ineligible to pursue a claim under the Texas Securities Act. *Id.*; *see also*

Dunbar v. RKG Eng'g, Inc., 746 S.W.2d 314 (Tex.App. 1988). Presumably, Texas courts consider a joint venture and an investment contract to be mutually exclusive because a joint venturer is too active in management to satisfy the third prong of the *Howey* test. See *Russell,* at 314.[6] But, the "control" element of the joint venture test is a much lower threshold than the "efforts of others" standard for an investment contract. *See Id.,* at 315 (citing *Ayco Dev. Corp. v. G.E.T. Serv. Co*, 616 S.W.2d 184 (Tex. 1981), in which the Texas Supreme Court declined to find a joint venture because the party lacked "any" control over the enterprise); *see also Sparks v. Baxter*, 854 F.2d 110 (5th Cir. 1988) (distinguishing between the Texas test for a joint venture and the "federal test" for an investment contract as espoused in *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981)). As a result, Texas courts exclude from the definition of a security an investor who has any semblance of control over the enterprise, while the traditional *Howey* test would only exclude an investor who has "substantial power to affect the success of the enterprise." *Toothman,* 80 P.3d at 812.

If the forum selection clause is upheld, Colorado investors will be at risk of having a Texas court, in the absence of controlling Colorado authority, interpret

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[6] Curiously, the Texas courts exclude joint venture interests from the *entire* definition of a security, not just the investment contract portion of the definition. *Dunbar v. RKG Eng'ng, Inc.*, 746 S.W.2d 314, 316 (Tex.App. 1988).

Colorado law to be consistent with established Texas law. The court below voiced this fear, and it is a valid one. The court below also refused to separate the forum selection issue from the choice of law, for very good reason. In a case like this one, the choice of forum is tantamount to a choice of law.

Clearly the Petitioners-Defendants appreciated the state of the law in Texas when they drafted the agreements. The agreements were structured such that on their face they provide, at least on paper, some element of control to the venturers in an attempt to evade state securities laws. The choice of law and choice of forum provisions serve as further insurance to the promoters that the agreements would be interpreted under Texas law. In short, the choice of law and choice of forum provisions are tantamount to prohibited waivers. Because the selection of a Texas forum would usurp the protections that an investor would reasonably expect from the CSA, this Court should rule that the forum selection clause is void under Section 604(11) and affirm the decision of the court of appeals.

II. THE FORUM SELECTION CLAUSE IS CONTRARY TO COLORADO PUBLIC POLICY.

The United States Supreme Court has held that a "contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by

statute or by judicial decision." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 1916 (1972). The forum selection clause in the instant case is contrary to the public policy as expressed in the CSA, and it would defeat Colorado's strong public interest in adjudicating this dispute. It would also leave investors at risk of having no remedies available to them.

A. THE FORUM SELECTION CLAUSE IS CONTRARY TO THE PUBLIC INTEREST AS EXPRESSED IN THE COLORADO SECURITIES ACT

The express purpose of the CSA, 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* § 11-51-101(2). C.R.S. (2011). This purpose is achieved by the remedial nature of the CSA, which "is to be broadly construed to effectuate its purposes." *Id.* It is imperative that the stated goals of the CSA are not relegated to the status of empty slogans because of an overly restrictive interpretation of its anti-waiver provision.

The first, and most important, purpose of the CSA is to "protect investors." Colorado must not become an attractive haven for those who are willing to run the risk of securities law violations as long as civil liability within Colorado is an unlikely prospect. Instead of placing a heavy burden on Respondents-Plaintiffs to litigate this case in Texas, Respondents-Plaintiffs should be allowed to seek redress

for violations of the CSA in a Colorado court, with all the protections afforded them under Colorado law.

The second purpose of the CSA is "maintaining public confidence in the securities markets." Confidence in the securities markets requires a robust system of regulation in order to deter, punish, and prevent fraud. Successful civil enforcement of Colorado securities law violations within Colorado courts maintains this confidence.

Finally, the third purpose of the CSA is to avoid "unreasonable burdens on participants in capital markets." There can be no more "unreasonable burden" to an investor than an increase in vulnerability to fraud and abuse in the offer and sale of securities.

The CSA 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 and is against public policy. Therefore, consistent with the three goals set forth in § 11–51–101(2), C.R.S (2011), NASAA urges this Court to conclude that the waiver provisions in the instant case are void.

B. COLORADO HAS A STRONG INTEREST IN ADJUDICATING THIS DISPUTE.

Respondents-Plaintiffs must have a Colorado forum in which to pursue their CSA claims. The court of appeals recognized this when it concluded that "in order for the anti-waiver provisions of the CSA to adequately protect investors' rights under the act, when those rights may not be enforceable in a different jurisdiction, investors must be permitted to bring their claims in Colorado." *Op.* at 11.

The interest that Colorado has in construing and applying securities legislation in its own state is apparent. Both the sale of securities and the protection of investors carry heightened public policy considerations that outweigh the enforcement of forum selection provisions. As discussed above, the question in this case of whether an interest in a joint venture is a security should be left to the courts and regulators in Colorado. The Court should not pass the responsibility of resolving this important Colorado securities law issue to a court in another state.

For the CSA's anti-waiver provisions to adequately protect investors' rights, investors must be allowed to bring their CSA claims in Colorado. The circumstances of this case should be considered in totality, and the better course is to refuse to apply the forum selection provision contained in the securities agreement. This Court must therefore hold that enforcement of the forum selection

language under these circumstances would be unreasonable and allow the issues in this case to be decided by the courts in Colorado.

Congress,[7] courts,[8] and commentators[9] 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. As such, "[c]ivil 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. Separate actions against Petitioners-Defendants have been brought by the Securities and Exchange Commission, the Virginia Corporation Commission, the Alabama Securities Commission, and the Colorado Division of Securities. Order RE: Motion to Dismiss at 2-3, *Mathers v. HEI Res,,*

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[7] "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. NO.104-98, at 7 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 679, 687.

[8] "[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).

[9] Under the Uniform Securities 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).

Inc., No. 08CV2070 (Colo. Oct. 7, 2009). The Respondents-Plaintiffs, the civil counterparts to these government actors, must be allowed to avail themselves of this critical component of the securities laws and should be given the opportunity to litigate under Colorado laws, in a Colorado court.

C. RESPONDENTS-PLAINTIFFS MIGHT NOT HAVE REMEDIES AVAILABLE TO THEM UNDER TEXAS LAW.

In its *Opening Brief*, Petitioners-Defendants "acknowledged that if this case were heard in Texas the CSA would apply." *See Opening Br. of Petr.* at 9. Given this acknowledgement that Colorado law applies, one is left to wonder why Petitioners-Defendants are insisting that this case be heard by a Texas court. As is typical in securities disputes, this case involves a one-sided balance of power with the stronger party, the investment promoter, dictating the terms of the securities agreements to the individual investors. By including a choice of forum clause that requires an aggrieved investor to file their case far from the state where the solicitation occurred, the company is effectively destroying the ability of the investors to pursue their claims. This is unfair, unreasonable, and contrary to the securities laws that are enacted to protect innocent investors from unscrupulous promoters.

Aside from the reasons enumerated above, this case should be adjudicated in Colorado given the connection between the State of Colorado and the violations. Contributing to this nexus is the sheer number of Petitioners-Defendants who either reside in Colorado or are Colorado business entities: Petitioner-Defendant Charles Reed Cagle resides in Colorado; Petitioner-Defendant Heartland Energy of Colorado, LLC is a Colorado limited liability company; Petitioner-Defendant Steve Ziemke resides in Colorado; Petitioner-Defendant Brandon Davis resides in Colorado; Petitioner-Defendant Beau Beard resides in Colorado; Petitioner-Defendant John Schiffner resides in Colorado; Petitioner-Defendant Martin Harper resides in Colorado; Petitioner-Defendant Reed Petroleum, LLC is a Colorado limited liability company. *See Compl., ID 22927524* at 265-266.

Even though Petitioners-Defendants have acknowledged that the CSA should be applied by the Texas court, the Texas court is not *required* to do so. The Texas court may refuse to apply Colorado law, thereby rendering Petitioners-Defendants' acknowledgment meaningless. This proposition is aptly demonstrated in a Texas antitrust case involving a Texas choice of law provision. *See Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671 (Tex. 2006). In *Coca-Cola Co. v. Harmar Bottling Co.,* the Texas Supreme Court refused to entertain claims brought under the antitrust laws of neighboring states. *Id.* at 671. The Texas

Supreme Court opined that "[W]hen the forum court must determine policies that broadly impact the public of another state in order to adjudicate rights claimed under that state's statutes, interstate comity is protected by abstention, not enforcement." *Id.* at 686. Ultimately, the Texas Supreme Court held that, "Texas courts, as a matter of interstate comity, will not decide how another state's antitrust laws and policies apply to injuries confined to that state."[10] *Id.* at 674-675. As the Texas Supreme Court demonstrated in *Coca-Cola Co. v. Harmar Bottling Co.*, the risk of a Texas court protecting comity by abstaining from applying Colorado law is real, especially in a securities law case where Colorado has strong investor protection policies underlying the Colorado Securities Act.

If a Texas court declines to apply the CSA, the Texas court may refuse to accept the case at all because the Texas Securities Act applies only to securities sold in, or to the residents, of the State of Texas. The relevant section of 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

[10] Just as the Texas Securities Act applies only to securities sold in, or to the residents, of the State of Texas so too does the Texas Free Enterprise and Antitrust Act of 1983 ("TFEAA"). The Texas Supreme Court recognized this limitation when it stated "The TFEAA does not, in clear language, afford a cause of action for injury outside of the state, and we will not imply one." *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 683 (Tex. 2006).

> 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*).

In addition to the plain language of the Texas Securities Act, 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, TEX. REV. CIV. STAT. ANN. art. 581-1, *et seq*., 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.").

If the court of appeals' decision is reversed, investors would be denied access to Colorado courts, and there is a very real likelihood that they could also be denied access to the Texas courts. This outcome is unconscionable, especially when considering the strong connection that Petitioners-Defendants have with the State of Colorado.

By upholding the forum selection clause, the Court would create the incentive for bad-actors in the future to evade remedies available under Colorado law by including a similar Texas forum selection provision in their securities agreements. Because the selection of a Texas forum could deny Respondents-

Plaintiffs of remedies available under Colorado law, this Court should affirm the court of appeals and find that forum selection language is void under the CSA's anti-waiver provision.

III. THE DECISION OF THE COURT OF APPEALS TO VOID THE FORUM SELECTION CLAUSE IS CONSISTENT WITH DECISIONS IN OTHER STATES.

In the securities agreements at issue, the forum selection provision is so interwoven with the choice of law provision that their effects are essentially one and the same. Due to this interconnectedness, state securities cases voiding choice of law provisions are relevant in the analysis of the impact of Colorado's anti-waiver provision on forum selection language in securities agreements. Furthermore, in the non-securities law context, states have recognized that forum selection provisions are void in various other types of contracts.

A. IN SECURITIES TRANSACTIONS, FORUM SELECTION CLAUSES THAT ARE COUPLED WITH CHOICE OF LAW PROVISIONS HAVE BEEN FOUND VOID BY OTHER STATE COURTS.

"Where a forum selection clause is coupled with a void choice of laws clause, it is unreasonable to enforce the forum selection clause." 4 JOSEPH C. LONG, BLUE SKY LAW § 4:64 (2011). In the security agreements at issue, the forum selection provision is so interwoven with the choice of law provision, that their

effects are essentially one and the same. Choosing the forum is in essence choosing the law.

A decision from the California Court of Appeals supports voiding forum selection provisions when those provisions are interwoven with choice of law 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 provision: "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*, and deny enforcing the forum selection provision.

Petitioners-Defendants wrongly assert that cases voiding choice of law provisions are irrelevant for purposes of analyzing the validity of forum selection clauses. As noted above, the forum selection provision is so interwoven with the choice of law provision that their effects are essentially one and the same. As such, cases voiding choice of law provisions are relevant in the analysis of the impact of Colorado's anti-waiver provision on forum selection language in securities agreements.[11]

Various courts in other states with similar anti-waiver provisions to Colorado's section 604(11) have held that the choice of law provisions are void. 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

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

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 "The application of Washington law would [] 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 they recognized that "where a strong public policy exists for the prevention of wrongful acts against citizens of the State of Kansas,[12] this court will apply the *lex fori*, or the law of the forum." *Id.* at 376-377. 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 state, is *Getter*

[12] 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* , 44 P.3d at 367.

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 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.C.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.").

The cases cited previously herein support the assertion that choice of law provisions, and by extension choice of law provisions including forum selection language, should not be upheld when they work to deprive investors of important

protections and are thus contrary to public policy. *See Hall v. Superior Court*, 150 Cal. App.3d 411 (4th Dist. 1983); *Brenner v. Oppenheimer & Co. Inc.*, 44 P.3d 364 (Kan. 2002); *Ito Int'l Corp. v. Prescott, Inc.*, 921 P.2d 566 (Wash. Ct. App. 1996); *see also Getter v. R.G. Dickinson & Co.*, 336 F.Supp 559 (S.D. Iowa 1973); *Boehnen v. Walston & Co., Inc.*, 358 F.Supp. 537 (D.C.S.D. 1973). These cases demonstrate the well-founded principle upon which all state securities statutes are based—protection of investors is paramount and must prevail.

B. FORUM SELECTION CLAUSES IN OTHER, SIMILAR CONTEXTS HAVE BEEN FOUND VOID.

Various state courts have recognized that forum selection provisions are void in various types of contracts. "Some states, like Montana and South Carolina, have a general statute prohibiting all forum-selection clauses." 4 JOSEPH C. LONG, BLUE SKY LAW § 4:62 (2011); *see also* MONT. CODE ANN. § 28-2-708, and S.C. CODE ANN. § 15-7-120(1976).

In other states without a broad statutory prohibition against forum selection provisions, the courts have stepped in and refused to enforce forum selection language. For example, a California court declined to enforce a Virginia forum-selection clause in a California suit against a Virginia franchisor. *Wimsatt v. Beverly Hills Weight Loss Clinics Int'l, Inc.*, 32 Cal.App.4th 1511, 38 Cal.Rptr.2d

612 (1995). The court relied on the strong public policy underlying California's Franchise Investment Law, which voids any provision in franchise agreement that waives protections afforded by that statute. *Id.* In *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, 146 N.J. 176,193, 680 A.2d 618, 626 (N.J. 1996), a New Jersey court opined "[w]e are persuaded that enforcement of forum-selection clauses in contracts subject to the Franchise Act would substantially undermine the protections that the Legislature intended to afford to all New Jersey franchisees." The court held "that such [forum-selection] clauses are presumptively invalid because they fundamentally conflict with the basic legislative objectives of protecting franchisees from the superior bargaining power of franchisors and providing swift and effective judicial relief against franchisors that violate the Act." *Id.* In *Dove Air, Inc. v. Bennett*, 226 F.Supp.2d 771, 776 (W.D.N.C. 2002), the North Carolina court held that the foreign forum selection clause was unreasonable and unenforceable as a matter of law in light of public policy of North Carolina not to enforce mandatory foreign forum selection clauses.

The above cases demonstrate that forum selection provisions have been found to be void in various types of agreements in various states. This holds true even in states without a broad statutory prohibition against forum selection

provisions. For the same reasons that the courts above stepped in and refused to enforce forum selection provisions based upon their own states' public policy, so too should this court refuse to enforce the forum selection provisions in the instant case.

IV. FEDERAL PRECEDENT IS LESS PERSUASIVE THAN STATE DECISIONS CONSTRUING STATE SECURITIES LAWS.

In the instant case, federal precedent is wholly distinguishable in light of the public policy considerations embodied in the CSA. Instead of relying on the body of case law from state courts involving issues arising under similar state securities statutes, the Petitioners-Defendants 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. App. 2002), federal authority is not controlling with regard to the CSA if it is distinguishable. *Id.* at 267. In *Viatica*, the court of appeals declined to follow the D.C. Circuit's opinion in *SEC v. Life Partners, Inc.*, 87 F.3d 536 (D.C. Cir. 1996). The court of appeals instead concluded that a viatical investment was a security under the CSA and "that *Life Partners* [was] clearly distinguishable, and [the court was] not persuaded by either the rationale or conclusions reached in that case." *Viatica* at 267. The 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 the court of apples did in *Viatica*, this Court should now conclude that the federal authority upon which the Petitioners-Defendants rely upon is not controlling and is unpersuasive.

Furthermore, besides not controlling, the cases cited by Petitioners-Defendants are distinguishable. For example, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907 (1972), is 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.[13] 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.

Another case cited by the Petitioners-Defendants is *Huffington v. T.C. Group, LLC.* 685 F.Supp.2d 239 (D. Mass. 2010). The *Huffington* case, however, is also distinguishable. As the court of appeals forcefully stated in its opinion, "this federal precedent [is] unpersuasive in the context of the strong public policy embodied in the CSA." *Op.* at 14. The appellate court expressed concern that, unlike the *Huffington* case which found "no reason that an out-of-state court cannot enforce Massachusetts' strong public policy of protecting investors from misrepresentation in the sale of securities," in this case "[b]ecause the agreements here were not made in Texas, the remedy, if any, available under the securities

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[13] "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* 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.

laws of Texas would be inadequate." *Op.* at 15, *c.f. Huffington*, 685 F.Supp.2d at 243.

The Petitioners-Defendants' reliance on *Bremen* and *Huffington* 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. *Huffington* is also distinguishable because of the strong public policy in the CSA to protect investors. Relying on these federal cases to determine a case involving elderly investors with diminished capacity bringing an action under state securities statute, such as the CSA, is a stretch at best. This Court should instead look to the well-reasoned analyses of state courts in making its determination, and affirm the decision of the court of appeals.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the appellate court in its entirety.

Respectfully submitted this 9th day of January, 2012.

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CERTIFICATE OF SERVICE

I, the undersigned individual, do hereby certify that true and correct copies of this Amicus Brief were served via U.S. Mail, first class postage prepaid on this 9th day of January, 2012 to the following:

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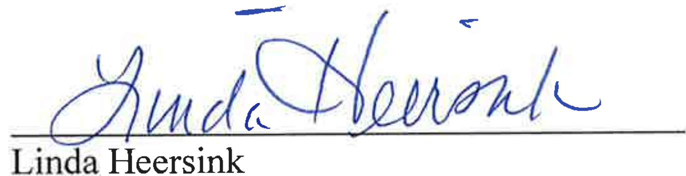

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