COURT OF APPEALS STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Appeal initiated by Mieka Corporation, Daro Blankenship and Stephen Romo from a Final Cease and Desist Order of the Colorado Securities Commissioner, entered in *In the Matter of Mieka Corporation, Daro Blankenship and Stephen Romo*, Case No. XY-11-CD-11	
MIEKA CORPORATION, DARO BLANKENSHIP, and STEPHEN ROMO, Respondents-Appellants, v. FRED J. JOSEPH, COLORADO SECURITIES COMMISSIONER, and COLORADO DIVISION OF SECURITIES, Petitioners-Appellees.	▲ **COURT USE ONLY** ▲ Case No. 2011CA1080
Attorney for *Amicus Curiae*: Name: Andrew I. Friedman Address: 1355 S. Colorado Blvd., Suite 600 Denver, CO 80222 Phone Number: (303) 209-0012 FAX Number: (303) 209-0013 E-mail: andy@andrewfriedmanlaw.com Atty. Reg.#: 20812	

BRIEF OF *AMICUS CURIAE* NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g) because it contains 4,987 words.

/s/ Andrew I. Friedman

Andrew I. Friedman, Atty. #20812

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

I. STATEMENT OF *AMICUS CURIAE* ISSUES

1. Does Colorado Securities Law look to the "economic realities" of a joint venture or general partnership interest to determine whether it is a security?

2. Was the Colorado Securities Commissioner's decision that the joint venture interests at issue were securities based upon substantial evidence?

II. STATEMENT OF THE CASE

For purposes of this amicus brief, the relevant background facts and procedural history are sufficiently set forth in the Petitioners-Appellees' Answer Brief.

III. IDENTITY OF *AMICUS CURIAE*

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. It has 67 members, including the Colorado Division of Securities and securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. 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 members of NASAA include the state agencies that are responsible for regulating securities transactions under state securities statutes, commonly referred to as "Blue Sky" laws. Their fundamental mission is protecting investors, and their

principal activities include registering certain securities; licensing the firms and agents who offer and sell securities and offer investment advice; investigating violations of state law; and, where appropriate, pursuing enforcement actions for violations of state law. State securities regulators also educate the public about investment fraud and advocate for the adoption of strong, fair, and uniform securities laws and regulations at both the state and federal level.

NASAA supports the work of its members by coordinating multi-state enforcement actions, conducting training programs, publishing investor education materials, and presenting the views of its members in testimony before Congress on matters of securities regulation. Another core function of the association is to represent the membership's position, as *amicus curiae*, in significant cases involving the interpretation of securities laws and the rights of investors.

IV. INTEREST OF *AMICUS CURIAE*

NASAA is particularly interested in the instant case because investor protections in Colorado and nationwide will be severely weakened if the partnership interests offered and sold by Respondents-Appellants are found to not be securities. Fraudulent schemes are increasingly being organized as general partnerships and joint ventures to avoid regulation and detection by state and federal securities regulators. *See generally*, Kenneth L. MacRitchie, *General Partnership and Similar Interests as "Securities" Under Federal and State Law*,

32 LINCOLN L. REV. 29 (2004-05). Although fraud was not alleged in the instant case, a decision by this Court adopting a restrictive and inflexible approach to the definition of a security will provide a blueprint on how to evade regulatory scrutiny.

Consistent with its mission of promoting investor protection, NASAA is also particularly concerned about the potential impact the instant case will have on the rising trend of oil and gas fraud. High-pressure marketing tactics touting the mystique associated with untapped oil and gas reserves and bountiful production runs have justifiably earned oil and gas investments a perennial spot on NASAA's list of the top 10 investor traps.[1] Further, the Securities and Exchange Commission has warned that "while some oil and gas investment opportunities are legitimate, many oil and gas ventures are frauds."[2] However, despite the best efforts of regulators to warn the investing public, oil and gas frauds continue to be a favored tool of those looking to defraud investors of their hard-earned money.

[1]NASAA Top Investor Traps, *available at* http://www.nasaa.org/3752/top-investor-traps/(last visited Nov. 2, 2011).
[2] U.S. Securities and Exchange Commission, *Oil and Gas Scams: Common Red Flags and Steps You Can Take to Protect Yourself, available at* http://www.sec.gov/investor/pubs/oilgasscams.htm. (last visited Nov. 2, 2011).

Oil and gas scams have become increasingly common in Colorado. A review of the Colorado Division of Securities website[3] revealed that approximately 34.5 percent of the 55 Cease and Desist Orders issued by the Colorado Securities Commissioner during the period beginning January 1, 2007 through October 14, 2011 were issued against oil and gas companies or companies offering investment interests in the proceeds from oil and gas operations. Unfortunately, Securities Commissioner Fred Joseph expects this trend to continue.[4]

Moreover, Coloradans are at risk of falling victim to these scams due to their inherent complexities. Unscrupulous promoters indiscriminately victimize the gamut of the investing public, from the recreational investor to lawyers, doctors, company presidents, and even stockbrokers.[5] Therefore, a strong regulatory framework is essential to protect prospective investors in such complex transactions. When investments are subjected to the registration process, the experts at the Colorado Division of Securities are well suited to recognize fraudulent offerings before they harm the investing public. Thus, it is imperative to

---

[3]Colorado Division of Securities Enforcement Actions, *available at* http://www.dora.state.co.us/securities/enforcement.htm

[4]Fred Joseph, *Don't Fall For This Slick Deal*, THE PRIME TIME FOR SENIORS, May 2011, *available at*, http://www.dora.state.co.us/securities/pdf_forms/May-2011.pdf

[5] Ellora Israni, *Stanford Launches Center To Study Senior Fraud*, THE STANFORD DAILY, Oct. 3, 2011, *available at* http://www.stanforddaily.com/2011/10/03/stanford-launches-center-to-study-senior-fraud/.

the financial health of the citizens of Colorado and the legitimate business community that the Colorado Division of Securities maintains this ability unrestricted by unwarranted judicially created obstacles.

In sum, NASAA's participation as *amicus curiae* can assist the Court in understanding the nationwide impact of its decision upon the investing public, and to help the Court avoid unintended consequences from its decision. NASAA's expertise in the regulation of securities and the significant experience offered by the regulators across the country will contribute to the Court's understanding of these issues and the potential nationwide impact of the Court's decision in this matter.

V. SUMMARY OF THE ARGUMENT

1. Colorado securities law jurisprudence rejects the *Williamson* presumption in favor of a fact-based, "economic realities" approach to the third prong of the *Howey* test. Contrary to Respondents-Appellants' assertions, *Williamson* did not establish a rigid presumption that a joint venture or general partnership interest is not a security, and to the extent that other courts have interpreted their own jurisdictions' laws in such a way, that non-binding precedent is at odds with Colorado precedent and statute. Moreover, a *Williamson* presumption is unnecessary, outdated, and facilitates fraud.

2. The Commissioner's decision that joint venture interests were securities was based upon substantial evidence. Accordingly, it should be given proper deference and, therefore, be upheld.

VI. ARGUMENT

A. Colorado Jurisprudence Rejects the *Williamson* Presumption in Favor of a Fact-Based Approach to the Third Prong of the *Howey* Test.

1. Colorado Follows the *Howey* Test to Determine Whether an Interest in a General Partnership is a Security.

The instant case involves a controversy over whether the joint venture interests at issue are "securities" under the Colorado Securities Act. In Colorado, a general partnership or joint venture interest is a "security" under C.R.S. §11-51-201(17) if it falls within the definition of an "investment contract." *Joseph v. Viatica Mgmt., LLC*, 55 P.3d 264, 266 (Colo. App. 2002). To determine whether an interest in an enterprise is an "investment contract," Colorado follows the test first set out in *SEC v. WJ Howey Co.*, 328 U.S. 293 (1946). *Lowery v. Ford Hill Inv. Co.*, 192, Colo. 125, 130, 556 P.2d 1201, 1205 (Colo. 1976). 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; and 3) with the expectation of profits from the efforts of a third party. *Lowery*, 192 Colo. at 130, 556 P.2d at 1205.

The Appellants concede that the first two elements are met. Resp't-Appellants' Opening Br. 11. Therefore, at issue in the instant case is whether the sale of interests in the joint venture/general partnership satisfies the third element.

Colorado courts look to the commercial or economic realities of a transaction to determine whether it satisfies the third prong of the *Howey* test. *Toothman v. Freeborn & Peters*, 80 P.3d 804, 811(Colo. App. 2002). By its nature, the economic realities analysis is highly fact-specific and turns on different circumstances in each case. *Id.* In *Sauer v. Hays*, 36 Colo. App. 190, 539 P.2d 1343 (Colo. App. 1975), a division of this Court adopted the construction developed in *SEC v. Glenn W. Turner Enterprises, Inc.*, 348 F.Supp. 766 (D. Or. 1972), *aff'd*, 474 F.2d 476 (9th Cir.1973), which determined that the managerial efforts of others must be "the undeniably significant ones, those essential managerial efforts which affect the success or failure of the enterprise." *Toothman*, 80 P.3d at 812 (citing *Sauer*, 36 Colo. at 1347, 539 P.2d at 1347). In addition, the Colorado Supreme Court has stated that the emphasis is "on whether or not the investor has substantial power to affect the success of the enterprise." *Toothman*, 80 P.3d at 813 (citing *People v. Blair*, 195 Colo. 462, 473, 579 P.2d 1133, 1141–42 (1978) (quoting *SEC v. Heritage Trust Co.*, 402 F.Supp. 744 (D. Ariz. 1975))).

2. *Williamson* did not Establish a Rigid Presumption.

In *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981), the Fifth Circuit Court of Appeals analyzed whether an interest in a joint venture could satisfy the third prong of the *Howey* test. The lower court dismissed the case for lack of subject matter jurisdiction, concluding that the interests were not securities. *Id.* at 409-10. However, the Fifth Circuit reversed the dismissal, *Id*. at 417, and went to considerable lengths to describe the ways in which a general partnership or joint venture could be deemed to involve the sale of a security.

The Fifth Circuit began its analysis by reviewing the typical powers that are exercised by general partners. *Id*. at 422-23. The court observed that a traditional general partnership interest is not usually a security because the partners are active in the management of the business and do not rely upon the efforts of others for their profits. According to the court, when a general partner retains "substantial control" over the investment and is in a position to protect his or her own interests, the partner "has a difficult burden to overcome" to establish that the general partnership interest is an investment contract. *Id.* at 424.

The Fifth Circuit's mention of a "difficult burden" has given rise to the misleading appellation of the "*Williamson* presumption." Other courts have used that phrase, but nowhere in the original decision did the *Williamson* court use the term "presumption" or discuss a requisite evidentiary burden. In the absence of

specificity as to the extent of this "difficult burden," courts have construed it differently resulting in a "presumption" with varying levels of strength. *See generally*, Kenneth L. MacRitchie, *General Partnership and Similar Interests as "Securities" Under Federal and State Law*, 32 LINCOLN L. REV. 29 (2004-05).

The *Williamson* court listed the following three examples of the types of facts that would establish that a general partnership interest is a security.

> (1) an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers. *Williamson*, 645 F.2d at 424.

While noting that these were the only relevant factors in the *Williamson* case, the court pointed out that other factors could also "give rise to such a dependence on the promoter or manager that the exercise of partnership powers would be effectively precluded." *Id*. at 424, n. 15.

3. The *Williamson* Presumption Conflicts with Colorado Jurisprudence.

Colorado courts have used the *Williamson* analysis simply as a guide for identifying facts that could be relevant in considering whether an investor in a joint

venture or other general partnership is relying upon the efforts of others for the ultimate success of the enterprise. *Feigin v. Digital Interactive Assoc., Inc.*, 987 P.2d 876, 881-82 (Colo.App. 1999); *Toothman*, 80 P.3d at 811-12 (Colo. App. 2002); *People v. Robb*, 215 P.3d 1253, 1261 (Colo. App. 2009). In these cases, this Court has recited *Williamson's* analytical framework, including its so-called "presumption" that a general partnership interest is not a security because the partner has the right to participate in the management of the business. *Toothman*, 80 P.3d at 811. However, this Court has never construed *Williamson* to shift the burden of proof or raise the threshold of proof that is required to demonstrate that a general partnership interest is an investment contract.

Only two Colorado cases directly address the validity of the *Williamson* presumption under Colorado law. The first case is *Toothman*, which involved interests in a limited liability partnership as opposed to a general partnership. *Id*. at 812. While acknowledging the *Williamson* court's use of a presumption related to general partnerships, a division of this Court refused to adopt the presumption for analyzing whether interests in limited liability partnerships are securities under Colorado law. *Id.* at 812. The Court did not squarely address the issue of whether the *Williamson* presumption should apply to general partnerships under Colorado law, so the Respondents-Appellants' reliance on *Toothman* is misplaced.

Although the *Toothman* court acknowledged the use by other state and federal courts of the *Williamson* presumption, but this Court declined to require its use in *People v. Pahl*, 169 P.3d 169, 184 (Colo. App. 2006). In *Pahl*, the defendant was convicted of securities fraud after a jury found that investments in a drilling venture, as reflected in a joint operating agreement, were securities. *Id.* at 179. The jury was instructed on the definition of a security and was given the *Howey* test for determining whether the interests were investment contracts. *Id*. at 183. The defendant tendered three proposed instructions, which included the three-part *Williamson* test and the following statement: "Units in general partnerships are not generally considered to be investment contracts and thus, are not normally considered 'securities' within the meaning of the law." *Id*. at 184. The proposed instructions were denied and the defendant appealed his conviction, arguing that the instruction on the definition of a security was erroneous because it gave the jury insufficient guidance. *Id*. at 183.

In affirming the lower court's ruling, this Court held that the instructions provided to the jury contained an adequate explanation of the law because "[t]he jury was given a definition of an investment contract, and was instructed to consider the totality of the circumstances in determining whether the venture was a security." *Id*. The Court observed that the *Williamson* presumption, as described in

Toothman, does not apply to investors who are "not directly involved in managing the affairs of the partnership." *Id*. at 184.

This Court has clearly indicated that juries in Colorado are capable of applying the *Howey* test to unique factual scenarios to determine whether the investments are securities. Accordingly, this Court has not required the use of the *Williamson* analysis at all, much less a presumption that tilts the analysis toward a particular result.

4. The *Williamson* Presumption is Unnecessary and Outdated.

Williamson provides an analytical framework that can be a useful tool to help a fact-finder determine whether a general partner expected profits that were to be derived from the significant efforts of someone else, but an evidentiary presumption is simply not needed. If the jury in a Colorado criminal case is capable of applying the *Howey* test without being required to utilize the *Williamson* presumption, surely the Colorado Securities Commissioner can do the same in an administrative proceeding. The Commissioner is a securities regulator charged with applying the *Howey* test to a variety of facts, and he should be allowed to conduct this analysis free from the shackle of any special evidentiary burden.

J. William Callison, who the hearing panel below described as a "well-respected Colorado expert on partnership law," asserts that the *Williamson*

presumption should be abandoned. (Findings of Fact, Conclusions of Law, and Initial Decision ("Initial Decision"), R. vol. 1, 0024, ¶ 64(d).) (citing J. William Callison, *Changed Circumstances: Eliminating the Williamson Presumption that General Partnership Interests are not Securities*, 58 Bus. Law 1373 (2003)). He states that the *Williamson* presumption was appropriate when the case was originally decided, but it has "outlived its usefulness" because of subsequent developments in partnership law. *Id.* at 1384.

> Rebuttable presumptions, such as a presumption that general partnership interests are not securities, are intended to promote results that conform the probable connection of a basic fact (i.e., the issuance of a general partnership interest) with a presumed fact (i.e., the interest is not a security). On this analysis, the *Williamson* presumption should be reevaluated when it is no longer highly probable, due to changes in partnership law or otherwise, that general partnership interests are not securities. *Id*. at 1381 (citations omitted).

In the article, Callison walks through the changes to partnership law since the *Williamson* decision was rendered. For example, general partnerships can now elect to be treated as limited liability partnerships, and the resulting limitation of liability decreases the incentive for partners to be actively engaged in the management of the business. *Id*. at 1382. In addition, partnership law now permits the modification or elimination of important agency and management attributes. *Id.*

Therefore, Callison concludes that the *Williamson* presumption "should be abandoned in favor of a more pragmatic, fact-based approach." *Id.* at 1381.

5. The *Williamson* Presumption Conflicts with the Principle That the Colorado Securities Act "is to be Construed Broadly to Effectuate its Purposes."

This Court has consistently recognized that "[w]hether a particular transaction involves a security depends not on the name or the form of the instrument, but on the substantive economic realities underlying the transaction." *Joseph v. Viatica Mgmt., LLC*, 55 P.3d 264, 266 (Colo. App. 2002) (citing *Griffin v. Jackson*, 759 P.2d 839 (Colo. App. 1998); see also *People v. Robb*, 215 P.3d 1253. 1261 (Colo. App. 2009). The *Williamson* presumption values form over substance by placing the emphasis on the label used to describe the investment while discounting the true structure of the scheme. The more appropriate analysis should be driven by the reality of the investment and not its moniker. Valuing substance over form is essential to keep up with rapid developments in both legitimate and fraudulent product innovations. Therefore, NASAA strongly urges this Court to reject the *Williamson* presumption as being inconsistent with its prior holdings that value substance over form.[6]

[6] Should the Court decline to address the issue of whether the "*Williamson* presumption" applies in Colorado, NASAA would submit that the facts, as determined by the hearing panel and confirmed by the Commissioner are more than sufficient to support the conclusion that the interests are securities.

In addition, the Colorado Securities Act expressly states that it "is to be construed broadly to effectuate its purposes." C.R.S. § 11-51-101(2). 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*. It is imperative that the stated purposes of the Act are not relegated to the status of empty slogans because of restrictive interpretations of its definitions.

Protecting Investors

The first purpose of the Colorado Securities Act is to "protect investors." As the agency in charge of enforcing the Colorado Securities Act, the Colorado Division of Securities can only protect investors from fraudulent offerings in financial products which fall under the purview of the Act. By incorporating an unjustifiably rigid definition of an investment contract security, the *Williamson* presumption allows promoters to remove an offering from the purview of the Act by superficially labeling it a general partnership or joint venture, thereby preventing the Colorado Division of Securities from doing its job of protecting investors.

Maintaining Public Confidence in the Markets

The second purpose of the Colorado Securities Act 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. As discussed above, the *Williamson* presumption allows those seeking to perpetrate a fraud on the public to avoid regulation at the onset by organizing as a general partnership or joint venture. Thus, fraudsters have the opportunity to take the money and run before the Colorado Division of Securities can take action. When investors are defrauded, the public loses confidence in the securities markets.

Avoiding Unreasonable Burdens on Market Participants

The third purpose of the Colorado Securities Act is to avoid "unreasonable burdens on participants in capital markets." Requiring general partnerships to meet the standards of a bona fide general partnership is hardly an unreasonable burden, especially when balanced with the increased level of investor protection gained by rejecting the *Williamson* presumption. The fact-based approach inherent in prevailing case law is sufficient to meet the needs of business, while being vastly superior at "protecting investors" and "maintaining public confidence in the securities markets."

Therefore, consistent with the three goals set forth in C.R.S. § 11–51–101(2), NASAA urges this Court to reject the narrow *Williamson* presumption in favor of a broad interpretation of the definition of an "investment contract" under C.R.S. § 11-51-201(17).

6. The *Williamson* Presumption Facilitates Fraud.

If sunlight is the best disinfectant, the *Williamson* presumption that a general partnership is not a security is becoming the shade of choice for unscrupulous promoters of fraudulent offerings. For securities regulators the critical "sunlight" comes in the form of disclosure to potential investors and to regulators alike. In jurisdictions that recognize the presumption, it allows those seeking to defraud investors to evade the securities regulators by depriving regulators of the opportunity to review offerings *before* investors commit their capital. *See* Kenneth L. MacRitchie, *General Partnerships and Similar Interests as "Securities" Under Federal and State Law*, 32 Lincoln L. Rev. 29, 76 (2004-2005). This evasion of regulatory review can be disastrous for investors because investor funds are often long gone by the time the fraud is discovered. Therefore, NASAA strongly urges the Court to expressly reject the Defendants' call to adopt *Williamson* presumption.

By the early 1990s, Colorado fraudsters discovered the utility of establishing fraudulent tech industry investments as general partnerships, joint ventures, LLCs, or LLPs. In a series of notable cases, Coloradans were robbed of the essential protection of initial review by the Colorado Division of Securities because the offerings claimed to not be securities by virtue of being general partnerships, LLCs or LLPs. *See State of Colorado v. Riggle*, No. 95CA1476 (Colo. App. 1998) (offering of partnership units in a wireless cable system); *Feigin v. Digital*

Interactive Assoc.s, Inc., 987 P.2d 876 (Colo. App. 1999) (involving the sale of general partnership interests in IVDS Interactive Acquisition Partners, a company formed to participate in an auction to be conducted by the Federal Communications Commission at which licenses to operate interactive video and data services were to be sold); *Toothman*, 80 P.3d at 807 (involving 53 LLPs established to sell prepaid cellular telephone services). Although none of these cases expressly adopted the *Williamson* presumption, the lack of clarity encouraged future fraudsters to adopt similar strategies. MacRitchie, at 56-57, 78.

Now that the tech boom of the 1990s is over, the familiar tactic of disguising a fraudulent investment as a general partnership or joint venture is being applied to oil and gas partnerships. Gas prices remain high and new forms of energy exploration have made investors susceptible to get-rich-quick schemes, especially those with little experience in energy exploration. In response to the activities in Colorado, the Colorado Division of Securities has brought actions alleging oil and gas fraud or registration violations involving the use of general partnership and joint venture interests in several cases, including: *Joseph v. HEI Resources, Inc. et al*., No. 09CV7181, slip op., (2nd Jud. Dist. Jan. 6, 2011) ("Defendants formed roughly 100 joint ventures, each of which then purchased an oil and gas lease"); *In the Matter of Pathfinder Resources, LLC and Anthony L. Martin*, No. XY 08-CD-03 (Verified Petition to Show Cause and Consent Cease and Desist Order, alleging

violations of Colorado securities registration and anti-fraud statutes for offering joint venture interests in an oil venture); and *In the Matter of Legacy Capital Energy Group, LLC*, No. XY 09-CD-01 (finding violations of registration and anti-fraud statutes in connection with a "cold call" offering of joint venture interests in an oil and gas lease).

Although no Colorado appellate court has expressly adopted the *Williamson* presumption, other courts' tolerance of the *Williamson* presumption has created a moral hazard wherein "defendants reckon[] that they might get away with fraud if they establish[] their offerings as general partnerships, LLCs, or LLPs." MacRitchie, at 78. Accordingly, commenters have argued that the *Williamson* presumption should be discarded in favor of a more fact-based approach. *See* MacRitchie, at 84; Callison, at 1376.

Those seeking to defraud investors are constantly adapting their methods to circumvent regulations designed to protect investors. Although the hot investment item may change as the economy takes a new direction, fraudsters continue to confuse even the most highly-educated investors with increasingly complex offerings and continue to seek out and find potential loopholes to avoid detection by regulators. For the Colorado Division of Securities to stay one step ahead of these frauds, Colorado securities law needs to be as flexible as the fraudulent schemes. Thus, NASAA urges this court to expressly reject the Defendants' call to

adopt the *Williamson* presumption as it promises to create the perfect roadmap for those looking for a clear path to a successful scam.

B. The Commissioner's Decision that Joint Venture Interests were Securities was Based Upon Substantial Evidence and Should be Given Proper Deference.

1. Standard of Review

Amicus curiae agrees with the Petitioners-Appellee's statements concerning the standard of review for the court's review of final agency actions.

2. The Final Agency Action was Proper

Even though the *Williamson* presumption has never been adopted in Colorado, the hearing panel properly considered the types of facts that the *Williamson* decision indicated were relevant in deciding whether a general partnership interest is a security. For example, the panel found that the joint venture had 38 to 40 investors, with the potential for 25 more investors if the remaining units were similarly fractionalized (Initial Decision, R. vol. 1, 0017, ¶ 38.), and the panel believed the rights reserved for general partners were more typical of the powers reserved for limited partners or shareholders of corporations (Initial Decision, R. vol. 1, 0022, ¶ 63(c)). The hearing panel also found that the joint venture agreement "does not bear the hallmarks of a traditional bona fide general partnership" because the investors could not contractually bind the joint

venture or control the admission or exclusion of new investors (Initial Decision, R. vol. 1, 0022, ¶ 63(a)). In addition, Mieka marketed the investments as "passive" and the day-to-day operations were not managed by the investors, raising an inference that the investors were viewed as a mere source of capital as opposed to active participants in the enterprise (Initial Decision, R. vol. 1, 0023, ¶ 63(f)).

According to *Williamson*, an agreement that puts the controlling power in the hands of managing partners may be an investment contract because "the agreement allocates partnership power as in a limited partnership, which has long been held to be an investment contract." *Williamson*, 645 F.2d at 423. Similarly, the court observed that "one would not expect partnership interests sold to large numbers of the general public to provide any real partnership control; at some point there would be so many partners that a partnership vote would be more like a corporate vote." *Id.*

Based upon the facts as determined by the hearing panel, the panel stated that the joint venture interests were securities and that their conclusion would not change even if the *Williamson* presumption was used (Initial Decision, R. vol. 1, 0022 & 0024, ¶¶ 62 & 64). However, the panel did not reach an ultimate conclusion on whether the presumption outlined in *Williamson* must be applied under Colorado law. The panel merely noted that the Colorado appellate courts have never expressly adopted the presumption (Initial Decision, R. vol. 1, 0024, ¶

64(a).) and that *Williamson* could be used to analyze the economic realities of joint venture interests without using any presumption (Initial Decision, R. vol. 1, 0024, ¶ 64(c)).

In reviewing the Initial Decision of the hearing panel, the Colorado Securities Commissioner adopted the hearing panel's findings of fact (Final Cease and Desist Order ("Final Order"), R. vol. 1, 0004, part II; see supra). He also agreed with their conclusion that the joint venture interests were securities (Final Order, R. vol. 1, 0008, ¶ 2). But, the Commissioner refused to adopt a heightened evidentiary burden or a strict test for determining whether the interests were securities (Final Order, R. vol. 1, 0006). As administrator of the Colorado Securities Act, he concluded that the *Williamson* presumption is not the law in Colorado because it undermines the purpose and intent of the Colorado Securities Act and conflicts with Colorado jurisprudence that emphasizes substance over form (Final Order, R. vol. 1, 0005).

The Commissioner's findings of fact were thorough and appropriately focused on relevant issues. Those facts lead to the rational and reasonable legal conclusion that the joint venture interests sold by Mieka are investment contracts. That conclusion does not require the use of a legal presumption, particularly a presumption which has never been mandated under Colorado law and which has become inappropriate in light of the evolution in partnership law. Far from being

arbitrary and capricious, the Commissioner's findings and conclusions are well-reasoned and based upon an appropriate reading of Colorado law. His decision should therefore be upheld.

VII. CONCLUSION

For the reasons stated above, NASAA respectfully requests that this Court uphold the Final Agency Decision as issued by the Securities Commissioner, and dismiss the appeal filed by the Respondents-Appellants.

Respectfully submitted this 7th day of November, 2011.

By:

/s/ Andrew I. Friedman

Andrew I. Friedman, Atty. #20812

Attorney for Amicus Curiae
North American Securities Administrators Association

CERTIFICATE OF SERVICE

I, the undersigned individual, do hereby certify that true and correct copies of this Amicus Brief were served by Lexis/Nexis File and Serve on this 7th day of November, 2011 to the following:

Russell Klein, Esq.
First Assistant Attorney General
State of Colorado
Division of Securities
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

David A. Zisser, Esq.
Davis Graham & Stubbs LLP
1550 Seventeenth St., Suite 500
Denver, CO 80202

/s/ Andrew I. Friedman

Andrew I. Friedman

This document was filed and served via LexisNexis File & Serve. The original signed copy is on file at the law office of Andrew I. Friedman.