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2 East 14th Avenue
Denver, CO 80203</td><td rowspan="3">

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<tr><td>Appeal from City and County of Denver District Court
Judge Michael Martinez
Case No. 2009CV7181</td></tr>
<tr><td>Plaintiff-Appellee/Cross-Appellant:
CHRIS MYKLEBUST, Securities Commissioner for the State of Colorado,
v.
Defendants-Appellants/Cross-Appellees:
HEI RESOURCES, INC. f/k/a HEARTLAND ENERGY, INC., CHARLES REED CAGLE, BRANDON DAVIS, HEARTLAND ENERGY DEVELOPMENT CORPORATION, JOHN SCHIFFNER, and JAMES POLLAK</td></tr>
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<tr><td colspan="2">BRIEF OF AMICUS CURIAE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., IN SUPPORT OF PLAINTIFF/APPELLEE CHRIS MYKLEBUST, SECURITIES COMMISSIONER FOR THE STATE OF COLORADO</td></tr>
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<u>CERTIFICATE OF COMPLIANCE PURSUANT TO C.A.R. 32(h)</u>

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 **<u>4663</u>** 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.

<u>*/s/ Theodore Hartl*</u>
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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. Colorado Securities Commissioner Chris Myklebust (the "Commissioner"), Plaintiff/Appellee here, is the NASAA member representative from this state.

NASAA's members are responsible for administering state securities laws, commonly known as "Blue Sky Laws." *See generally* 1 LOUIS LOSS ET AL., SECURITIES REGULATION 55–251 (5th ed. 2014)). NASAA supports 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 perspectives 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, though the mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse. NASAA has an interest in this case because this matter involves numerous important questions of state securities law that could impact the ability of the Commissioner or other NASAA members to protect their citizens from fraud and abuse.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT APPELLANTS COMMITTED FRAUD UNDER THE COLORADO SECURITIES ACT BUT INCORRECTLY REQUIRED THE COMMISSIONER TO PROVE SCIENTER AS AN ELEMENT OF THIS VIOLATION.

The district court held that Appellants committed fraud within the meaning of the Colorado Securities Act, § 11-51-501(1)(b)-(c). [Record at 14458.] The Colorado legislature modeled the Colorado Securities Act after the Revised Uniform Securities Act of 1985 (hereinafter, the "1985 RUSA"), a successor model state law to the Uniform Securities Act of 1956 (hereinafter, the "1956 USA"). *See Rome v. Mandel*, 405 P.3d 387, 393 (Colo. App. 2016). While there are stylistic differences between the 1985 RUSA and the 1956 USA, they were intended be interpreted similarly to one another and to conform with the federal securities laws. *See* 1985 RUSA § 803; 1956 USA § 415.[1]

NASAA agrees with the district court's conclusion that Appellants committed securities fraud but we disagree with the court's analysis. Specifically, the district court erred by requiring the Commissioner to prove scienter under

[1] The 1985 RUSA is available on subscription services such as Westlaw. The 1956 USA is publicly available at: www.nasaa.org/wp-content/uploads/2011/08/UniformSecuritesAct1956withcomments.pdf.

C.R.S. § 11-51-501(1)(b). As is widely accepted in other states, the Commissioner should not be required to show scienter when it brings antifraud enforcement actions. The district court's erroneous scienter requirement ultimately did not affect the outcome, as it found the Commissioner met this heightened standard, but this Court should correct the district court's mistake in construing the Colorado Securities Act for the benefit of future litigations.

A. The district court's scienter requirement was inconsistent with the text of the Colorado Securities Act and contrary to the Act's legislative intent.

The district court relied on *Black Diamond Fund, LLP v. Joseph*, 211 P.3d 727 (Colo. App. 2009), in its scienter analysis. [*See* Record at 14446.] But the district court misinterpreted *Black Diamond*. It is worth retracing the path taken by *Black Diamond* to demonstrate where the district court misstepped.

Black Diamond interpreted the scope of the Commissioner's authority to seek injunctions under C.R.S. § 11-51-602(1) for violations of the Colorado Securities Act's antifraud provision, C.R.S. § 11-51-501(b). *Black Diamond* looked at the plain text of Section 602(1) and concluded the Commissioner is not required to show scienter when he seeks injunctive relief. *See Black Diamond*, 211 P.3d at 736. *Black Diamond* then went on to discuss scienter standards when the Commissioner seeks other remedies, namely damages, restitution or disgorgement. *Black Diamond* explained that C.R.S § 11-51-602(2) authorizes the Commissioner to seek these equitable remedies for, among other things, violations of the act's civil liability provision, Section 604. And Section 604 contains varying scienter standards; subparagraph (3) requires scienter but subparagraph (4) does not. *Black Diamond* recognized this important point. *See Black Diamond*, 211 P.3d at 736. Unfortunately, the district court did not.

The district court overlooked the important distinction between subparagraphs (3) and (4) of Section 604 regarding scienter and required the Commissioner to show scienter generally as part of any claim. To be clear, whereas here, the Commissioner seeks damages by authority of Section 602(2) for an underlying violation of Section 604(4), the Colorado Securities Act does not require the Commissioner to prove scienter. *See Black Diamond*, 211 P.3d at 736 (citing the burden shifting language in 604(4) and stating "[t]his subsection does not expressly require intent to defraud, or recklessness, to establish the seller's liability").

In addition, to the extent the district court relied on *People v. Terranova*, 563 P.2d 363 (Colo. App. 1976) and *Boettcher & Co. v. Munson*, 854 P.2d 199 (Colo. 1993) in concluding scienter is required, it also erred. *Terranova* and *Boettcher* are simply inapt to the circumstances of this case. *Terranova* was a criminal case and criminal *mens rea* requirements are inapplicable to civil enforcement actions like this case. *See State v. Fries*, 337 N.W.2d 398, 405 (Neb. 1983) (stating civil liability "may be imposed for both intentional and negligent misrepresentations or omissions" whereas "a more strict requirement is present in criminal cases"). Likewise, *Boettcher* involved a private civil lawsuit filed under the federal Securities Exchange Act of 1934 (the "Exchange Act"). *Boettcher*, 854 P.2d at 204, 206-07. There are material differences in the elements required in private civil securities fraud claims versus those brought by the government, most notably that scienter is not required when the government is the plaintiff. *See, e.g., Harrington v. Sec'y of State*, 129 So. 3d 153, 170 (Miss. 2013) (finding scienter is not required in antifraud actions brought by the state and citing other relevant decisions); *Sec'y of State Secs. Div. v. Tretiak*, 22 P.3d 1134, 1140-42 (Nev. 2001) (*same*); *State v. Larsen*, 865 P.2d 1355, 1358-60 (Utah 1993) (*same*).

B. The district court incorrectly analogized the Colorado Securities Act's antifraud provision to Section 10(b) of the Exchange Act and SEC Rule 10b-5 thereunder.

In reaching its conclusion that the Commissioner must show scienter, the district court stated that the standards in Colorado's antifraud provision, C.R.S. § 11-51-501, are analogous to those under the federal Exchange Act. [Record at 14447.] Some other Colorado courts have voiced this opinion as well. *See Boettcher*, 854 P.2d at 208; *People v. Prendergast*, 87 P.3d 175, 178–79 (Colo. App. 2003); *Black Diamond*, 211 P.3d at 736. In contrast, the Colorado Supreme Court has analogized Colorado law to the federal Securities Act of 1933

("Securities Act") and to Sections 12 and 17(a) of the Securities Act in particular. *See Goss v. Clutch Exch., Inc.*, 701 P.2d 33, 35 (Colo. 1985); *People v. Riley*, 708 P.2d 1359, 1363 (Colo. 1985). This Court should follow the Colorado Supreme Court and adhere C.R.S. § 11-51-501 to the standards in the federal Securities Act. This is not mere semantics; there are material differences in how the Securities Act and the Exchange Act are interpreted.

Both the Securities Act and the Exchange Act contain broad antifraud provisions. In the Securities Act this is Section 17(a) (15 U.S.C. § 77q(a)); in the Exchange Act it is Section 10(b) (15 U.S.C. § 78j(b)) and SEC Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5). The Supreme Court has instructed that while Section 10(b) and Rule 10b-5 always require scienter but that Section 17(a) can be violated even in the absence of scienter. *See Aaron v. SEC*, 446 U.S. 680 (1980). The SEC thus can bring non-scienter based fraud charges under Section 17(a), but *only* the SEC may do so. Private litigants cannot bring claims under Section 17(a). *Crookham v. Crookham*, 914 F.2d 1027, 1028 n.2 (8th Cir. 1990) ("We have consistently held that there is no private right of action for violation of section 17(a) of the Securities Act."). Private litigants instead must always bring antifraud claims under Section 10(b) and Rule 10b-5 – with the concomitant obligation of proving scienter.

The ability of federal and state securities regulators to bring non-scienter based civil fraud charges is important. These claims help ensure securities regulators can police the securities markets and punish wrongdoers. If Colorado courts were to apply the standards required under the Exchange Act to the Commissioner's antifraud enforcement actions, the Commissioner would be denied an important investor protection tool. Courts in other states that have addressed this issue overwhelmingly agree that the Securities Act is the correct federal analogue for state securities laws. *See Trivectra v. Ushijima*, 144 P.3d 1, 14 (Haw. 2006) (analogizing the state's securities statute to the Securities Act of 1933); *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 50 (2004) (*same*); *Tanner v. State*, 574 S.E.2d 525, 530 (Va. 2003) (*same*); *Tretiak*, 22 P.3d at 1140-42 (*same*); *Larsen*, 865 P.2d at 1359 (*same*); *State v. Temby*, 322 N.W.2d 522, 528-29 (Wisc. 1982) (*same*); *State v. Kershner*, 801 P.2d 68, 69 (Kan. 1990) (*same*); *Sprangers v. Interactive Techs., Inc.*, 394 N.W.2d 498, 503 (Minn. 1986) (stating Minnesota's securities fraud provision is a "derivative" of Section 17(a)(2) of the Securities Act); *State v. Gunnison*, 618 P.2d 604, 606 (Ariz. 1980) (referring to the Securities Act as the "federal counterpart" to the Arizona Securities Act). *But see Hubbard v. Hibbard Brown & Co.*, 633 A.2d 345, 349 (Del. 1993) (interpreting the state's securities antifraud provision in accordance with Exchange Act Rule 10b-5); *Koegler v. Krasnoff*, 601 S.E.2d 788, 791 (Ga. App. Ct. 2004) (*same*). This Court should follow the lead of the Colorado Supreme Court – and the majority of other states – and clarify that, to the extent district courts in this state look to the federal securities laws for guidance, the Securities Act of 1933 is the proper lodestar.

II. THE DISTRICT COURT CORRECTLY DISTINGUISHED THE SUPREME COURT'S *JANUS* DECISION.

Appellants assert that they are not liable under C.R.S. § 11-51-501(1)(b) because Davis did not "make" any false or misleading statements. [Appellant Brief at 57-61.] Appellants rely on a Supreme Court decision that held "the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011). Appellants seek to make *Janus* the law in Colorado; this court should not do so.

The district court correctly distinguished *Janus*, holding that "[*Janus*] narrowly applies to private actions under federal securities law, which does not allow 'aider and abettor' claims . . . [and that] Colorado has not limited the scope of liability to that extent in an action brought by the Colorado Securities Commissioner." [Record at 15218.] No Colorado court has adopted *Janus* or its "maker" standards. *Id.*. What is more, no court in <u>any</u> state has done so. *Janus's* "maker" standard is purely a creature of federal law.

Appellants argue further that they cannot be liable for perpetrating a scheme to defraud because *Janus* precludes such liability where it is predicated upon a material misstatement or omission. In Appellants' view, material misstatements or omissions are only actionable as disclosure violations and cannot be pled as elements in a fraudulent scheme. Some federal courts felt compelled to make this distinction after *Janus* (*see*, *e.g.*, *SEC v. Kelly*, 817 F. Supp. 2d 340, 344 (S.D.N.Y. 2011)), but this issue has been rendered moot by the Supreme Court's recent decision in *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019). In *Lorenzo*, the Supreme Court noted the considerable overlap between the various subparagraphs of Rule 10b-5. *Id.* at 1102. The Supreme Court held that that each subparagraph of Rule 10b-5 does not limit the scope of the others: each prohibition "was meant to cover additional kinds of illegalities – not to narrow the reach of the prior sections." *Id*. Moreover, the Court noted that *Janus* dealt with misstatements made by a different entity and said nothing about the Rule's application to the dissemination of false or misleading information as part of a broader scheme. *Id.* at 1103. Accordingly, the Court held in *Lorenzo* that "[t]hose who disseminate false statements with intent to defraud are primarily liable under Rules 10b-5(a) and (c), §10(b), and §17(a)(1), even if they are secondarily liable under Rule 10b-5(b)." *Id.* at 1104. Accordingly, *Janus* is of no moment to the Commissioner's claims against Appellants.

III. <u>THE DISTRICT COURT CORRECTLY FOUND THAT APPELLANTS' "GOOD FAITH" DEFENSE IS BASELESS.</u>

The Colorado Securities Act excuses misconduct done in reasonable reliance on "any rule, form, or order of the securities commissioner." *See* C.R.S. § 11-51-704(4). This so-called "good faith" defense has not been tested prior to the instant litigation, and there are few other state or federal decisions applying this defense.

Appellants argue that, even if they engaged in misconduct, it should be excused under Section 704(4) of the Colorado Securities Act because Appellants reasonably relied on a 2002 order of the Commissioner that caused them to engage in their misconduct. Specifically, Appellants point to the Final Order, *In the Matter of Heartland Energy, Inc.*, No. XY 02-CD-03 (Colo. Sec. Comm'r Sept. 27, 2002), as the source of their troubles. The district court rightly dismissed this baseless argument, explaining:

> Here, Defendants insist that they relied on the Final Order when conducting their business. However, the Final Order does not give Defendants a rule to rely on. Instead, the Final Order merely finds that the Securities Commissioner did not meet its burden of proof that the joint ventures were securities. Notably, a finding that a party did not meet its burden of proof is not a clear rule that Defendants' joint ventures were not securities. Therefore, the Court finds that it is impossible for Defendants to rely in good faith on an order that did not provide them with a clear rule to abide by.

[Record at 14459.] The district court's analysis on this question is unassailable and needs no further explication.

IV. **<u>THE DISTRICT COURT CORRECTLY ORDERED RESTITUTION BUT ERRED BY REDUCING THE AMOUNT OF RESTITUTION ON ACCOUNT OF INVESTOR TAX BENEFITS AND APPELLANTS' ADVICE OF COUNSEL CLAIM.</u>**

The Colorado Securities Act grants the Commissioner authority to seek restitution on behalf of defrauded investors. *See* C.R.S. § 11-51-602(2). Violators are liable to disgorge the consideration they received for a security, with interest and attorneys' fees, less any money they previously paid out to investors. *See* C.R.S. § 11-51-604(4). The district court correctly ordered Appellants to pay restitution in favor of harmed investors but the court's methodology in calculating the amount of restitution was flawed. Specifically, the district court should not have reduced its restitution award because of the putative tax benefits that inured to investors in Appellants' scheme, or because Appellants supposedly committed their scheme in reliance on the advice of legal counsel. The court's restitution award accordingly was far too low as a matter of law.

The primary purpose of restitution is to restore aggrieved parties to the position that existed before the illegal act or wrongful transaction occurred. *United States v. Lane Labs-USA, Inc.*, 324 F. Supp. 2d 547, 576 (D.N.J. 2004). Unlike damages, which are designed to compensate a victim, restitution seeks to ensure wrongdoers do not profit from their misconduct. *Griffin v. Capital Secs. of Am., Inc.*, 298 P.3d 970, 979 (Colo. App. 2010). When calculating restitution, Colorado courts award the amount of a victim's actual pecuniary loss or the "amount of money that will fulfill the statutory purpose of simply making the victim whole." *People v. Stafford*, 93 P.3d 572, 575 (Colo. 2004). A wrongdoer's ability to actually pay restitution is immaterial. Colorado courts should not consider whether a restitution award is likely to ever actually be paid when assessing the proper amount of restitution to award. *See id.*; *SEC v. Credit Bancorp Ltd.*, No. 99-cv-11395, 2011 WL 666158, at *2 (S.D.N.Y. Feb. 14, 2011). To the extent doubts exist as to the proper amount of restitution, they should be resolved against the wrongdoer. *United States v. United Techs. Corp.*, 190 F. Supp. 3d 752, 759 (S.D. Ohio 2016).

A. The district court erred by reducing its restitution award on account of investors' putative tax benefits.

The district court held that the Commissioner's proposed measure of restitution was too high because the Commissioner did not consider tax benefits that inured to defrauded investors through their participation in Appellants' scheme. The district court thus reduced its restitution award by the amount of these putative investor tax benefits. [Record at 15077-80.] This was plain error; the Colorado Supreme Court explicitly rejected this idea in *Boettcher*. Although *Boettcher* involved a claim for civil damages, not restitution, the principles set forth in *Boettcher* should guide here.

In *Boettcher*, the Colorado Supreme Court was asked to set aside a private damages award that had not accounted for income tax benefits that had accrued to the plaintiff: "[defendant] contends that not permitting the fact finder to consider evidence of income taxes owed during the relevant time period gives [plaintiff] a tremendous windfall." *Boettcher*, 854 P.2d at 203. The Court came down unambiguously on the side of the plaintiff. Drawing on a decision from the federal Ninth Circuit Court of Appeals, *Boettcher* explained that to reduce the damages award on account of the tax benefits plaintiffs received would "leave[] the government bearing the cost of defendants' fraud." *Id.* (quoting *Burgess v. Premier Corp.*, 727 F.2d 826, 838 (9th Cir. 1984)). "A better result is to set damages equal to the [plaintiffs'] losses exclusive of tax benefit." *Id.* This would not result in a double tax benefit for the plaintiffs because the plaintiffs' original tax benefit was void *ab initio*: "we presume that the IRS will do its duty if the [plaintiffs] should actually recover on their judgments and thereafter fail to file amended returns as required by law." *Id.*

Civil damages and restitution are different legal remedies, but the Colorado Securities Act treats them similarly. The Colorado Securities Act does not distinguish between these remedies in terms of how they are imposed; the Commissioner may seek an order for "damages . . . restitution, disgorgement or other equitable relief" as appropriate in each case. Courts evaluate the potential imposition of these remedies similarly and defer to the Commissioner on which remedy the Commissioner seeks. *See Feigin v. Alexa Group, Ltd.*, 19 P.3d 23, 29-

30 (Colo. 2001). The total amount of money that may be awarded under a damages theory versus a restitution theory can differ under the facts of a given case, but they are functionally equivalent in a case like this. *See People v. Johnson*, 780 P.2d 504 (Colo. 1989). As such, the principles from *Boettcher* outlined above should control here as well. To the extent investors in Appellants' scheme reduced their income taxes by participating in the scheme, those tax benefits should not reduce the amount of restitution ordered against the Appellants. Rather, Appellants should be ordered to make full restitution and the burden should be on investors to amend any prior tax filings that may become inaccurate after they receive restitution.

B. The district court erred by reducing its restitution award for Appellants' reliance on the advice of counsel.

The district court also incorrectly reduced its restitution award because the court found Appellants reasonably relied on the advice of their own legal counsel. [Record at 155078-79]. Even assuming *arguendo* that Appellants' misconduct arose in material part from bona fide legal advice, the district court should not have taken this into account when calculating restitution. As with the tax issue above, reliance on the advice of counsel is simply of no moment to restitution awards. This issue does not appear to have been addressed previously in Colorado, but decisions in other states clearly establish this point.

As a threshold matter, it is an ancient principle that following the erroneous advice of legal counsel is no excuse for violating the law. *See, e.g., Hunter v. State,* 12 S.W.2d 361, 361 (Tenn. 1928); *People v. Monk*, 28 P. 1115, 1116 (Utah 1892). Exempting wrongdoers from punishment because they relied on their legal counsel would elevate the role of attorneys over that of the courts in the administration of justice. *Hopkins v. State*, 69 A.2d 456, 460 (Md. 1949). The only exception to this general principle is that following the advice of counsel can negate a defendant's scienter when this is a required element of a claim or charge. *See State v. Jacobson*, 681 N.W.2d 398, 404 (Minn. App. 2004); *State v. Thorstad*, 261 N.W.2d 899, 906 (N.D. 1978). The "advice of counsel defense" is thus not really a legal defense as such. Rather, it is a way for a defendant to argue it lacked scienter. *See Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004) (stating the advice of counsel defense is not a formal defense as such but "simply evidence of good faith, a relevant consideration in evaluating a defendant's scienter"); *see also Jacobson*, 681 N.W.2d at 404.

The district court focused its analysis of Appellants' advice of counsel claim at the end of its opinion – *i.e.*, after making its findings of liability and after concluding restitution was proper. This was error; the court should have considered and rejected Appellants' advice of counsel claim (if at all) as part of its liability analysis. To retrace, the district court – incorrectly – required the Commissioner to prove scienter and then found the Commissioner had met this burden as to some claims but not others. [*See* Record at 14457-58.] Absent from this analysis was any consideration to Appellants' advice of counsel claim. Instead, the district court assessed this claim at the end of its decision, effectively treating it like an affirmative defense to reduce the amount of Appellants' restitution liability. This was legal error. Reliance on the advice of counsel is not a proper reason to reduce a restitution award.

V. THE DISTRICT COURT CORRECTLY HELD THAT APPELLANTS OFFERED AND SOLD SECURITIES AND THAT THE COMMISSIONER CAN SEEK RESTITUTION ON BEHALF OF INVESTORS FROM OTHER STATES

The district court held that the investment interests offered by Appellants were securities [*see* Record at 14445] and that the Commissioner can seek restitution for injuries suffered by investors were not resident in Colorado [*see* Record at 15073-74]. Appellants object to both conclusions. [*See* Appellants Brief at 16-40, 49-53.] The district court was correct in its interpretation on both of these points.

A. Appellants' investments were securities.

Appellants' amended appellate brief to this Court argues for over twenty pages that their investment offerings were not securities under Colorado law. [*See* Appellants Brief at 16-40.] Space limitations in this brief prevent us from responding to each of their points. However, we offer the following foundational positions for this Court's consideration.

Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981), is a leading case on how to adjudicate whether a general partnership interest is a security. But this court was correct when it ruled previously in this litigation that Colorado courts should not apply the so-called "*Williamson* presumption" that some other courts have read into the decision. *See Rome v. HEI Resources*, 411 P.3d 851, 860-61 (Colo. App. 2014). *Williamson* should be used merely as a guide for determining whether the *Howey* test has been met. *See SEC v. Merchant Capital, LLC*, 483 F.3d 747, 755 (11th Cir. 2007) ("*Williamson* is ultimately simply a guide to determining whether the partners expected to depend solely on the efforts of others, thus satisfying the *Howey* test").

With respect to the specific question of whether Appellants' general partnership interests were securities, we believe the Tenth Circuit Court of Appeals' decision in *SEC v. Shields*, 744 F.3d 633 (10th Cir. 2014), is instructive. In *Shields*, the court held interests in an oil and gas general partnership were securities where they had been marketed nationwide through cold-calls, the investors lacked experience in the oil and gas industry and relied on the promoter, and the promoter controlled the flow of information over the life of the project. *See id.* at 646-48. Appellants' twenty pages of repetitious assertions do not establish that a contrary result is warranted here.

B. The Commissioner can seek restitution on behalf of out-of-state investors.

Appellants also oppose the Commissioner's efforts to seek restitution for harmed investors outside Colorado. [*See* Appellants Brief at 49-53.] The district court's holding on the extraterritoriality of the Colorado Securities Act was correct, and this is an important investor protection issue.

The Colorado Securities Act "is remedial in nature and is to be broadly construed to effectuate its purposes." C.R.S. § 11-51-101. That broad effectuation is embodied in the scope of the act, which states "an offer to sell or to purchase is made in this state, whether or not either party is then present in this state, when the offer originates from this state or is directed by the offeror to this state . . ." C.R.S. § 11-51-102(3). The fraud at issue in this case was perpetrated from Colorado and the Commissioner can seek to vindicate the interests of harmed investors outside of this state. The Court of Appeals of Kansas recently addressed a substantially similar question in *Kansas v. Lundberg*, 391 P.3d 49 (Kan. Ct. App. 2017). In

Lundberg, the Kansas Securities Commissioner[2] brought a securities enforcement action against the promoters of a Kansas real estate venture. Of note, virtually all the investors lived outside Kansas and the offers and sales occurred outside Kansas. The defendants argued that Kansas lacked jurisdiction over these transactions – and thus that the Kansas Securities Commissioner's enforcement action lacked a jurisdictional nexus to the state. *See id.* at 725-26. But the *Lundberg* court rejected the defendants' argument, finding that the Kansas Securities Act did reach the transactions with out-of-state investors and thus that the state's enforcement action could proceed. *Id.* at 732. The jurisdictional question addressed in *Lundberg* is not distinguishable from the jurisdictional question in this case, and a similar result should follow.

VI. **<u>THE DISTRICT COURT'S INJUNCTION DID NOT EXCEED ITS AUTHORITY.</u>**

Appellants also challenge the breadth of the district court's injunction against them. The district court's orders did not exceed its authority, though.

Section 602 of the Colorado Securities Act affords trial courts broad injunctive authority once a violation is found. The 1956 USA and 1985 RUSA similarly contemplate that courts will enjoy broad injunctive authority (*see* 1956

[2] The Kansas Securities Commissioner is a NASAA member and NASAA filed an *amicus curiae* brief in support of the Kansas Securities Commissioner in the *Lundberg* case.

USA § 408, 1985 RUSA § 603), as do the federal securities laws (*see* 15 U.S.C. § 77t, 15 U.S.C. § 78u(d)). Courts accordingly routinely issue broad injunctions against securities violations, 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); *SEC v. Ahmed*, 343 F. Supp. 3d 16, 25 (D. Conn. 2018). These injunctions are not improper, and the district court's orders were fully in keeping with these standards.

CONCLUSION

The district court correctly held, and this Court should affirm, that Appellants committed fraud in the offer and sale of securities, that *Janus* is irrelevant to this dispute, that Appellants' "good faith" defense is baseless, that a restitution award is appropriate and that the scope of restitution should include harms to non-Coloradans, and that the district court's injunction was within its powers. For the reasons discussed herein, though, the district court erred where it required the Commissioner to show scienter, reduced its restitution award on account of investors' putative tax benefits, and reduced its restitution award on account of Appellants' professed reliance on legal counsel. If the Record were to stand on these points, the ability of the Commissioner and other NASAA members to protect the public could be compromised.

Dated: May 31, 2019

Respectfully Submitted,

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** Pro hac vice admission pending*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 31, 2019, true and correct copies of the foregoing **Brief of Amicus Curiae North American Securities Administrators Association, Inc., in Support of Plaintiff/Appellee Chris Myklebust, Securities Commissioner for the State of Colorado** were served electronically via ICCES on all counsel of record.

/s/ Brandon Blessing