SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 Certiorari to the Colorado Court of Appeals Case No. 2016CA1145	
Petitioner: **SHAUN D. LAWRENCE** **v.** **Respondent:** **THE PEOPLE OF THE STATE OF COLORADO**	**∆ COURT USE ONLY ∆**
Theodore J. Hartl Ballard Spahr LLP 1225 17th Street, Suite 2300 Denver, CO 80202-5596 Tel.: (303) 454-0528; Fax: (303) 573-1956 (Reg. #32409) hartlt@ballardspahr.com	Case No. 2019SC556
BRIEF OF *AMICUS CURIAE* NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., IN SUPPORT OF RESPONDENT PEOPLE OF THE STATE OF COLORADO	

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

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

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

☒ It contains **4512** words (excluding the caption page, this certificate page, the table of contents, the table of authorities, and the signature block).

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

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

/s/ Theodore Hartl
Theodore Hartl (Reg. #32409)
Ballard Spahr LLP

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The North American Securities Administrators Association, Inc., by and through its counsel, respectfully submits this brief as *amicus curiae* in support of Respondent People of the State of Colorado.

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.

NASAA's members are responsible for administering state securities laws. *See generally* 1 LOUIS LOSS ET AL., SECURITIES REGULATION 55–251 (5th ed. 2014)). NASAA supports its members in carrying out their statutory duties by, for example, promulgating model rules and statutes, providing training and continuing education 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 it involves important questions of state securities law that could impact the ability of the Colorado Securities Commissioner, and potentially other NASAA members, to protect their citizens from fraud and abuse.

ARGUMENT

This matter presents an opportunity for the Court to clarify and affirm the broad scope of the Colorado Securities Act ("CSA"), C.R.S. § 11-51-101 *et seq.*, as a remedial statute designed to protect investors. As the Court has previously recognized, the Colorado legislature defined the term "security" expansively in order "to provide the flexibility needed to regulate the various schemes devised by those who seek the use of the money of others with the lure of profits." *Lowery v. Ford Hill Inv. Co.*, 556 P.2d 1201, 1205 (Colo. 1976) (citing *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), and *Sauer v. Hays*, 539 P.2d 1343 (Colo. Ct. App. 1975)). In addition to common instruments like stocks and bonds, the definition of a "security" includes the term "investment contract." C.R.S. § 11-51-201(17). In Colorado, like in many other states and in the federal courts, the elements of an investment contract are (1) an investment of money, (2) in a common enterprise, (3) that is premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. *E.g.*, *People v. Milne*, 690 P.2d 829, 833 (Colo. 1984)

(citing *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), and *Howey*, *supra*).

In determining whether a land sales contract for units of a citrus grove, together with a service contract for cultivating and marketing the crops, was an investment contract under the federal securities laws, the U.S. Supreme Court defined an investment contract as (1) an investment of money, (2) in a common enterprise, (3) with the expectation of profits to come "solely" from the efforts of others. *Howey*, 328 U.S. 293, 299, 301 (1946). Lawrence urges this Court to read "solely" in the above test strictly to mean that an investor can have no involvement whatsoever in the enterprise. Op. Br. at 13-14. But federal and state courts have long rejected such an interpretation for the simple reason that such an unduly restrictive approach would enable unscrupulous promoters to easily evade the securities laws. Instead, courts have focused on the structure of the investment and the economic reality of the transaction. *See*, *e.g.*, *Forman*, *supra*; *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *Howey*, 328 U.S. at 298; *Lowery*, 556 P.2d at 1205.

The Court should reject Lawrence's invitation to rewrite the law in Colorado for his benefit, and affirm the analysis of the Court of Appeals for two primary reasons. First, the Court of Appeals correctly applied the prevailing interpretation of the *Howey* test. This interpretation reflects the broad consensus of state and

federal courts, is consistent with the principles underlying *Howey*, and is consistent with the policy and objectives of the CSA. Second, under the appropriate test, the transaction at issue here is an investment contract because the victim ("D.B.") lacked any real or substantial control of Lawrence's company, and her profits depended on his entrepreneurial and managerial efforts.

I. The Court of Appeals correctly applied the prevailing interpretation of the *Howey* test.

The Court of Appeals correctly stated and applied the prevailing interpretation of the third prong of the *Howey* test; namely, "whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the success or failure of the enterprise." *People v. Lawrence*, 2019COA84, ¶ 14 (May 30, 2019) (citing *Rome v. HEI Res., Inc.*, 411 P.3d 851, 856 (Colo. Ct. App. 2014) (quoting *Toothman v. Freeborn & Peters*, 80 P.3d 804, 813 (Colo. Ct. App. 2002), and *Sauer*, 539 P.2d at 1347-48)). This interpretation follows the consensus that has developed among other courts that have considered the issue (including unanimous support among the federal circuit courts of appeals), and it is consistent with *Howey* and the purposes of the CSA. Lawrence provides no convincing rationale for the Court to reject this well settled area of the law and thereby inject uncertainty and inconsistency into the application of the securities laws between jurisdictions.

A. The Court of Appeals follows the overwhelming consensus among state and federal courts regarding the third *Howey* prong.

The standard applied by the Court of Appeals was first articulated by the Ninth Circuit Court of Appeals in *SEC v. Glenn W. Turner Enters.*, 474 F.2d 476 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973). In that case, the court applied the *Howey* test to a multi-level marketing scheme in which the investors needed to recruit new participants in order to realize the promised return on their investments. *Id.* at 481-82. Focusing on the remedial nature of the federal securities laws and the policy of affording broad protection to the public, the court held that the word "solely" is not a strict or literal limitation on the definition of an investment contract, and it instead articulated a "more realistic test.". *Id.* at 482. The court reasoned that a strict interpretation "would not serve the purposes of the [federal securities laws]" because it would be unnecessarily "mechanical, unduly restrictive [and] easy to evade by adding a requirement that the buyer contribute a modicum of effort." *Id.*

The U.S. Supreme Court's subsequent analysis of the *Howey* test in *Forman*, *supra*, offers support for a broader application of the third prong of the *Howey* test, including by omitting "solely" as a strict requirement. In *Forman*, the court clarified that the "touchstone" of the third *Howey* prong is a "reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." 421 U.S. at 852; *accord Milne*, 690 P.2d at 833; *see also Lowery* 556 P.2d at 1205 n.1 (stating the "generic definition" in *Howey* "was recently restated by the Supreme Court" in

Forman). The *Forman* court explicitly acknowledged *Turner* while restating the *Howey* test without the word "solely" and in terms sufficiently open-ended to accommodate the Ninth Circuit's interpretation. *See* 421 U.S. at 852 and n.16.

Following *Forman*, the federal circuit courts of appeals have unanimously embraced *Turner*'s analysis.[1] Courts in many of Colorado's sister states have also adopted the same interpretation of the third prong of the *Howey* test.[2] NASAA is

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[1] *See, e.g.*, *SEC v. Int'l Loan Network, Inc.*, 968 F.2d 1304, 1307-08 (D.C. Cir. 1992); *SEC v. SG Ltd.*, 265 F.3d 42, 55 (1st Cir. 2001); *SEC v. Aqua-Sonic Products Corp.*, 687 F.2d 577, 582 (2d Cir. 1982); *Lino v. City Investing Co.*, 487 F.2d 689, 691-93 (3d Cir. 1973); *Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 840 F.2d 236, 240 n.4 (4th Cir. 1988); *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 479-85 (5th Cir. 1974); *Davis v. Avco Fin. Servs., Inc.*, 739 F.2d 1057, 1063 (6th Cir. 1984); *Goodman v. Epstein*, 582 F.2d 388, 408 n.59 (7th Cir. 1978); *Miller v. Cent. Chinchilla Grp., Inc.*, 494 F.2d 414, 417 (8th Cir. 1974); *Crowley v. Montgomery Ward & Co.*, 570 F.2d 875, 877 (10th Cir. 1975). *See also SEC v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1201 (11th Cir. 1999) (stating "the crucial inquiry [for the third prong] is the *amount* of control that the investors retain") (emphasis added); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (adopting as binding precedent all decisions of the Fifth Circuit handed down before October 1, 1981).

[2] *See, e.g.*, *Burke v. Alabama*, 385 So. 2d 648, 651 (Ala. 1980); *Am. Gold & Diamond Corp. v. Kirkpatrick*, 678 P.2d 1343, 1345-46 (Alaska 1984) (citing *Hentzner v. State*, 613 P.2d 821, 823 (Alaska 1980)); *Rose v. Dobras*, 624 P.2d 887, 890 (Ariz. 1981); *People v. Black*, 214 Cal. Rptr. 3d 402, 411 (Cal. Ct. App. Feb. 16, 2017); *Jarozewski v. Gamble*, 2013 Ct. Sup. 2234, 56 Conn. L. Rptr. 779 (Conn. Super. Ct. Sep. 12, 2013); *Adams v. State*, 443 So. 2d 1003, 1005-06 (Fla. Dist. Ct. App. 1983); *State v. Gertsch*, 49 P.3d 392, 398 (Idaho 2002); *Integrated Research Servs., Inc. v. Sec. of State*, 765 N.E.2d 130, 136 (Ill. App. Ct. 2002); *Activator Supply Co. v. Wurth*, 722 P.2d 1081, 1089 (Kan. 1986); *Scholarship Counselors, Inc. v. Waddle*, 507 S.W.2d 138, 142 (Ky. 1974); *Ek v. Nationwide Candy Div., Ltd.*, 403 So. 2d 780, 786 (La. Ct. App. 1981); *Mathews v. Cassidy Turley Md., Inc.*, 80 A.3d 269, 282 (Md. 2013); *Redding v. Mont. First Jud. Dist. Ct.*, 281 P.3d 189, 199 (Mont. 2012); *People v. First Meridian Planning Corp.*, 658 N.E.2d 1017, 1024

not aware of any state in which an appellate-level court has considered and rejected this prevailing interpretation, and Lawrence cites none. Although the exact terms have varied, courts applying the consensus standard have generally found an investment contract to exist where the investor lacked real or substantial control over the success or failure of the enterprise, or where the investor's profits depended upon someone else's efforts. *See* cases cited in notes 2 and 3.

B. The Court of Appeals' interpretation of the third prong of the *Howey* test is consistent with the principles underlying *Howey*.

Lawrence assumes that *Howey* embodies a rigid definition to be mechanically applied by courts and argues that the controlling interpretation has "broadened the definition of an 'investment contract.'" Op. Br. at 12. This is incorrect. The *Howey* court did not intend to establish the strict, "bright-line" rule that Lawrence urges this Court to adopt, but instead described the analytical principles that courts should use to determine whether an investment is subject to the securities laws. The *Howey*

(N.Y. 1995); *Jost v. Locke*, 673 P.2d 545, 551 (Or. Ct. App. 1983); *Majors v. S.C. Sec. Comm'n*, 644 S.E.2d 710, 717-18 (S.C. 2007); *Tschetter v. Berven*, 621 N.W.2d 372, 376 (S.D. 2001); *Searsy v. Commercial Trading Corp*., 560 S.W.2d 637, 641 (Tex. 1977); *Payable Accounting Corp. v. McKinley*, 667 P.2d 15, 21 (Utah 1983); *McClellan v. Sundholm*, 574 P.2d 371, 374 (Wash. 1978).

Some states, such as Hawai'i and Tennessee, have rejected the *Howey* test entirely and adopted what is commonly known as the "risk capital" test. *See, e.g., State v. Hawaii Market Ctr., Inc.*, 485 P.2d 105, 108-109 (Haw. 1971); *King v. Pope*, 91 S.W.3d 314, 322 (Tenn. 2002). This Court has thus far found it unnecessary to "test the boundaries of the *Howey* formula" by considering that alternative test. *See Lowery*, 556 P.2d at 1205 n.1.

court carefully explained that the definition "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." 328 U.S. at 299; *accord Lowery*, 556 P.2d at 1205.

In defining an investment contract under the federal securities laws, the *Howey* court looked to interpretations of the term under preexisting state law. *See* 328 U.S. at 298. The term "investment contract" was "common in many state 'blue sky' laws in existence prior to adoption of the [Securities Act of 1933] and . . . had been broadly construed by state courts." *Id.* Under these state "blue sky" laws, an investment contract was any "contract or scheme for 'the placing of capital or laying out of money in a way intended to secure income or profit from its employment.'" *Id.* (quoting *State v. Gopher Tire & Rubber Co.*, 177 N.W. 937, 938 (Minn. 1920)). In two such cases cited in *Howey*, the state courts found investment contracts where the investors were expected to contribute significant efforts. *See Stevens v. Liberty Packing Corp.*, 161 A. 193 (N.J. Ch. 1932) (investors would raise rabbits and sell the offspring to back to the company); *Gopher Tire*, 177 N.W. at 938 (investors acted as "booster agents" for the sale of the company's goods). In *Gopher Tire*, the Supreme Court of Minnesota described the purposes of that state's securities statute in terms very similar to the *Turner* court:

> It is a proper and needful exercise of the police power of the state and should not be given a narrow construction, for it was the evident

> purpose of the legislature to bring within the statute the sale of all securities not specifically exempted . . . . To lay down a hard and fast rule by which to determine whether that which is offered to a prospective investor is such a security as may not be sold without a license would be to aid the unscrupulous in circumventing the law. It is better to determine in each instance whether a security is in fact of such a character as fairly to fall within the scope of the statute.

177 N.W. at 938.

The facts in *Howey* are also incongruous with the strict, literal reading urged by Lawrence because some of the investors in that case participated in the enterprise. The court noted that some of the investors visited their plots annually and made suggestions regarding its care and cultivation. 328 U.S. at 302 n.2. Further, investors had the opportunity to select and make arrangements with service providers other than the promoter's affiliate to service their land. *Id.* at 295. Even with some investor involvement, however, the *Howey* court found that third prong of its test was satisfied and that the transactions were indeed investment contracts.

The flexibility necessary to provide investors a full measure of protection and to avoid easy evasion of the securities laws is not simply the result of a "modern trend," as Lawrence contends. *See* Op. Br. at 8. Instead, that flexibility has been part of the definition of an investment contract from the beginning. The Court of Appeals' interpretation of the *Howey* test is therefore no departure from *Howey*, but is instead entirely consistent with the principles underlying that decision.

C. The Court of Appeals' interpretation of the third prong of the *Howey* test is consistent with the policy and objectives of the CSA.

As a remedial statute, the CSA must be construed broadly to effectuate its purposes, namely, to "protect investors and maintain public confidence in securities markets while avoiding unreasonable burdens on participants in capital markets." C.R.S. § 11-51-101(2). The interpretation of the Court of Appeals appropriately balances these considerations.

The interpretation applied by the Court of Appeals provides the "flexibility needed to regulate the various schemes devised by those who seek the use of the money of others with the lure of profits," as the legislature intended. *See Lowery*, 556 P.2d at 1205. At the same time, the lower court's adherence to the broad consensus minimizes burdens on investors and businesses in Colorado by promoting a consistent and predictable application of the securities laws between jurisdictions. In contrast, Lawrence's strained interpretation would undermine the fundamental remedial purposes of the CSA. A promoter could evade the securities laws by the very act of making fraudulent promises of control and participation. Such a result is incompatible with the admonitions of this Court and the U.S. Supreme Court to focus on the facts of each case and the economic reality of the transaction at issue. *See Lowery*, 556 P.2d at 1205; *Tcherepnin*, 389 U.S. at 336. It would also fatally undermine the remedial purpose of the CSA. *Cf. Koscot*, 497 F.2d at 480 ("[t]he securities laws are intended to protect investors not merely to test the ingenuity of sophisticated corporate counsel").

The Court of Appeals' interpretation of the *Howey* test is consistent with a large majority of holdings by state and federal courts, consistent with the principles underlying *Howey*, and consistent with the goals of the CSA. Against the backdrop of this consistency, under which the law has developed to serve statutory policy, Lawrence offers no sound reason for the Court to reject this approach and invalidate nearly fifty years of precedent in Colorado.

D. Lawrence fails to provide any convincing reasons for the Court to reject the broad consensus followed by the Court of Appeals.

Lawrence erroneously contends that a flexible definition of "security" and "investment contract" fails to provide notice of what conduct is proscribed under the securities laws and permits arbitrary enforcement, contrary to due process. *See* Op. Br. at 13-15. This argument has no merit. The intentional breadth of the terms "security" and "investment contract" does not render the securities laws unconstitutionally vague. Courts have routinely held that the definitions of "security" and "investment contract" are sufficient to give persons of ordinary intelligence fair notice of what is prohibited by statute and to prevent arbitrary enforcement.[3] Due process does not require a narrow reading if the legislature

[3] *See, e.g., U.S. v. Farris*, 614 F.2d 634, 642 (9th Cir. 1980); *SEC v. Brigadoon Scotch Dist. Co.*, 480 F.2d 1047, 1052 n.6 (2d Cir. 1973); *U.S. v. Zaslavskiy*, No. 17CR647(RJD), 2018 BL 331441, 2018 WL 4346339 (E.D.N.Y. Sept. 11, 2018) (parallel federal definitions not unconstitutionally vague as applied to cryptocurrencies); *Digman v. Quarterman*, No. A-06-CV-070-SS, 2006 BL 92764 (W.D. Tex. Aug. 29, 2006); *State v. Irons*, 574 N.W.2d 144, 151-52 (Neb. 1998);

intended otherwise. *Cf. SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 354-55 (1943) (quoting *U.S. v. Wiltberger*, 18 U.S. 76 (1820) (Marshall, J.); and *U.S. v. Hartwell*, 73 U.S. 385 (1868)); *cf. Gopher Tire*, 177 N.W. at 938.

Lawrence also urges the Court to fashion a new standard for the third prong of the *Howey* test because, he argues, the interpretation of the Court of Appeals inappropriately "focus[es] on the efforts of the promoter, rather than the investor." *See* Op. Br. at 15-18. The Court's decision in *People v. Blair*, 579 P.2d 1133 (Colo. 1978), does not support this distinction, and it is not necessary for the Court to invent a new standard in this case.

In *Blair*, the primary question before the Court was not the interpretation of the third prong of the *Howey* test, but the second; namely, whether the trusts represented a common enterprise. *Id.* at 1141. Even if *Blair* had addressed the same issue, it would not support Lawrence's argument for a new test. First, the Court determined that the trusts at issue were securities, but the Court focused on the conduct of the trustees rather than the settlors. *Id.* at 1140-42. Second, both of the federal cases on which the Court relied in *Blair* stand for the same standard applied by the Court of Appeals in this case. *See id.* at 1141-42 (quoting *SEC v. Heritage*

State v. Evans, 191 N.W. 425, 527-28 (Minn. 1922); *Szpunar v. State*, 783 N.E.2d 1213,1220 (Ind. Ct. App. 2003); *State v. Brewer*, 932 S.W.2d 1 (Tenn. Crim. App. 1996); *cf. West v. State*, 942 N.E.2d 862, 866 (Ind. Ct. App. 2011) (statute not void for vagueness because jury was given sufficient information to determine existence of investment contract).

Trust Co., 402 F. Supp. 744 (D. Ariz. 1975), and citing *Turner*, *supra*).[4] The Court does not need to search for a new standard when a sensible standard has been applied in Colorado for nearly fifty years.

II. D.B. did not have sufficient control over her investment to exclude her from the protections of the CSA.

Lawrence does not dispute that D.B. made an investment of money in a common venture, that D.B. expected to profit from her investment, or that his efforts would factor into D.B.'s expected profit. Nevertheless, Lawrence argues in the alternative that D.B.'s investment is not a security "under any test" because she had control of her investment. Op. Br. at 18-21. That is not correct. The facts of this case demonstrate clearly that D.B.'s expected profit on her investment could only have been derived from Lawrence's entrepreneurial and managerial efforts because D.B. lacked actual, meaningful control of her investment.

D.B. was not an experienced, sophisticated investor. She was a casino cashier with no significant experience in the surveillance industry. *See* 2019COA84, ¶¶ 15-

[4] Lawrence's purported confusion about the scope of disclosure is of no moment to the question before the Court. Leaving aside the fact that there is a well-established standard to determine what information must be disclosed, *see, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988), Lawrence has not challenged the materiality of his misstatements and omissions. Even if there were no such standard, Lawrence's concern would militate in favor of developing a standard, rather than contravening legislative intent by construing the definition of "security" narrowly so as to broadly exclude transactions from the requirements of the CSA. *See Lowery* 556 P.2d at 1205.

16. Lawrence solicited her investment by promising that she could more than double her investment and that there was a "large upside." *See* Op. Br. at 3. Demonstrating her lack of investment sophistication, D.B. deposited her investment directly into Lawrence's personal bank account (at his instruction), trusting that he would use the money as a down payment for ankle monitors. *See* 2019COA84, ¶¶ 6, 16.

Lawrence did all of the meaningful work, and that he assigned D.B. some ministerial tasks. Lawrence rented an office, registered the company with the Secretary of State, and began creating a website for the business. *Id.*, ¶ 7. D.B.'s participation in the business was limited to a single service of process. *Id.*, ¶ 18. Lawrence made all of the important decisions and did not consider D.B.'s opinion. *Id.*, ¶ 17. While Lawrence emphasizes that D.B. selected the location of the company's office, Op. Br. at 18, he does not explain how this simple act of choosing was an essential managerial effort that affected the success or failure of the enterprise. While location would be an important strategic decision for a retail business that depends on visibility and foot traffic, these considerations would seem to have "little direct effect" on the success or failure of an ankle monitoring and surveillance business. *See Lino*, 487 F.2d at 692.

D.B.'s minimal contributions reflected the realities of the ownership of the company. In exchange for her investment, D.B. received a 30% "equity interest" in the company, including supposedly 30% of the voting power and a 30% share of the

company's profits. *See* Op. Br. at 3. However, Lawrence controlled the remaining 70%. In reality, D.B. could take no action that Lawrence did not agree with; her vote was guaranteed to be the minority on every decision . As a result, D.B.'s role in decision-making was nominal and inconsequential to the success or failure of the business.

Nor did D.B.'s intention to eventually become an employee of the company reflect meaningful participation, influence or control. To the contrary, employees perform their duties subject to the direction and control of the people who actually control the business. *See, e.g., Norton v. Gilman*, 949 P.2d 565, 567 (Colo. 1997). Practically, this meant that D.B.'s employment would be subject to *Lawrence's* direction and control due to his insurmountable majority ownership. Further, D.B.'s potential employment was separate from her investment. D.B.'s investment of money did not entitle her to work for the company. Before Lawrence would hire her, she first had to make an additional investment of significant time and effort in the form of hundreds of hours of unpaid training. 2019COA84, ¶ 15. Even if D.B. eventually completed this training, there was no guarantee that Lawrence would hire her.

D.B. did not elect not to exercise powers that she had negotiated for herself, as Lawrence suggests. *See* Op. Br. at 18-19. In reality, the control she expected to have was illusory as a result of Lawrence's fraudulent and deceptive conduct. On

this point, the Tenth Circuit's decision in *Andrews v. Blue*, 489 F.2d 367, 371 (10th Cir. 1973), is instructive. In *Andrews*, the court determined that the plaintiff's 20% interest in a real estate investment was an investment contract, even though he intended to use his real estate experience as a consultant for the enterprise. *Id.* at 371. After the initial investment, the defendants engaged in a series of legal maneuvers to dilute the plaintiff's ownership and declined to respond to his repeated requests for information. *Id.* at 371-72. The court found that the plaintiff's role "was nil[,] it existed in name only[,] he had no managerial status[, and the company] regarded and treated him as an outsider devoid of management rights." *Id.* at 375.

The same is true here. Despite her purported authority as an owner, D.B. repeatedly had to ask Lawrence to begin her training so that she could eventually become an employee. 2019COA84, ¶ 7. However, Lawrence routinely cancelled scheduled trainings at the last minute until he eventually stopped responding to D.B. altogether. *Id.* Eventually, D.B. visited the office only to find it empty except for a single computer. *Id.* Thus, as a result of the management and ownership structure of the company, together with Lawrence's deception, D.B. never had real control or managerial powers; she was simply a source of money whom Lawrence strung along until it was no longer worth the effort.

In sum, D.B. depended on Lawrence's entrepreneurial and managerial efforts to realize any profit on her investment in his company. Neither her intended

employment nor her nominal role in decision-making demonstrates real control over her investment such that it is not an investment contract. The Court should affirm the findings of the jury, the analysis of the Court of Appeals, and, ultimately, Lawrence's convictions for securities fraud under the CSA.

CONCLUSION

Lawrence does not dispute that D.B. invested money in a common enterprise and expected to profit from her investment. Applying the appropriate standard for the third prong of the *Howey* test, the facts support the conclusion by both the jury and the Court of Appeals that D.B. expected and depended on those profits to come from Lawrence's "entrepreneurial or managerial efforts." On the question whether D.B.'s investment is legally and factually an investment contract, the Court should affirm Lawrence's convictions for securities fraud under the CSA.

Dated: August 18, 2020

Respectfully Submitted,

/s/ Theodore J. Hartl
Theodore J. Hartl, #32409
BALLARD SPAHR LLP
Counsel for NASAA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 18, 2020, true and correct copies of the foregoing **Brief of Amicus Curiae North American Securities Administrators Association, Inc., in Support of Respondent People of the State of Colorado** were served electronically via ICCES on all counsel of record.

/s/ Brandon Blessing