DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO City and County Building 1437 Bannock, Denver, CO 80202	DATE FILED: October 17, 2013 10:46 AM ▲ COURT USE ONLY ▲
Plaintiff: FRED J. JOSEPH, Securities Commissioner for the State of Colorado v. **Defendant:** HEI RESOURCES, et al.	Case Number: 09 CV 7181 Courtroom: 259
ORDER	

THIS MATTER came on for trial to the Court on July 22, 2013 through July 30, 2013. The Court has considered the evidence presented and properly admitted at trial as well as the testimony and credibility of the witnesses that testified. Having heard the arguments and statements of counsel and being otherwise fully advised, the Court now makes the following findings of fact and conclusions of law:

I.
FINDINGS OF FACT[1]

1. Defendants HEI Resources, Inc. ("HEI") and Heartland Energy Development Corporation ("HEDC") operate and have their principal places of business in Colorado.

2. During the formation, capitalization and operation of the Los Ojuelos ("LO") Numbers 1-7 Joint Ventures, Defendant Charles Reed Cagle was the President of HEI.

3. During the formation, capitalization and at times during the operation (generally, from 2006 to 2008) of the LO Number 9 Joint Venture, Defendant Brandon Davis was the President of HEDC. The LO Numbers 1-7 and 9 Joint Ventures are collectively referred to as the "Joint Ventures."

4. HEI and HEDC employed sales representatives who were not licensed pursuant to § 11-51-401, C.R.S. of the Colorado Securities Act.

[1] All of the Court's findings herein are determined by a preponderance of the evidence as applied to the evidence presented at trial.

5. Prior to approaching any of the investors regarding a Joint Venture, HEI and HEDC made substantial efforts to begin the operations of the respective Joint Ventures. These efforts included securing the lease for the land; hiring a geologist to evaluate the land and reviewing his substantial analysis; selecting the well site; contracting for the drilling and operation of the prospective wells; and retaining professional services for the individual Joint Ventures, including attorneys and accountants.

6. HEI and HEDC capitalized the Joint Ventures, in large part, by cold-calling individual investors.

7. Potential investors were solicited without regard to their experience or interest in oil and gas exploration.

8. HEI and HEDC obtained contact information for certain individuals from outside sources, including non-affiliated business entities.

9. HEI and HEDC sent information packages concerning the Joint Ventures to individuals they contacted by telephone. The information package included a cover letter, maps, figures, a conversion table, geological information, a 'Confidential Information Memorandum' ("CIM") and Joint Venture Agreements ("JVA").

10. Further, the JVA give HEI or HEDC authority to review additional geological and geophysical data and select an alternative drilling site to the one originally proposed in the CIM, subject to a contrary vote.

11. The CIM included a turnkey price for drilling and testing component and a separate turnkey contract for the well completion component, assuming that a Joint Venture voted to complete the venture's well. The turnkey price was based in part upon the cost of the well and estimated costs to complete the well. The actual drilling and completion cost cannot be determined until after these operations are complete due to the uncertainties involved in the practice of oil exploration and drilling, the risk factors of which are described in greater detail below.

12. In addition to a disclosure of the business plan for the joint venture at issue page 1 of the CIM lists the following risks inherent in the joint venture including the:

    a. Speculative nature of oil and gas exploration;
    b. Speculative revenues from production, if any;
    c. General liability of all participants as general partners
    d. Inability to sell or transfer units;
    e. Assessments and abandonment of interest for non-payment;
    f. Uninsured risks;

g. Possible loss of entire investment;
h. Pollution hazard; and
i. All additional risks identified in section "Risk Factors" on page 4

13. The CIM also provides the following advisement, set apart and conspicuously placed at the bottom of the CIM's cover page:

    a. *Participants in this Joint Venture are provided extensive and significant management powers. Participants are expected to exercise such powers and are prohibited from relying on the Managing Venturer for the success or profitability of the Venture*.

    (emphasis in original).

14. The terms of the joint venture agreements provide for the formation of a joint venture (which is a general partnership) pursuant to the laws of the State of Texas, and which shall be governed by the Texas Revised Partnership Act ("Partnership Act").

15. If a venturer is denied a right to which he is entitled under the Partnership Act, he can sue to enforce those rights.

16. A vote of a simple majority of the units is sufficient to pass and approve any matters submitted to a vote of the venturers, and an abstention counts as a "no" vote.

17. Joint venturers failing to pay a completion assessment once the majority voted to complete a well would lose their interest in the joint venture. If a frac was approved by a majority vote, a joint venturer would not lose his or her interest for failure to pay the frac assessment but would fall under the penalty clause of the joint venture agreement. If the frac was successful, any nonpaying joint venturers would receive revenue only after the joint venturers who paid their assessments were reimbursed in full along with a penalty percentage interest return.

18. Each individual joint venture partner has:

    a. The right to participate in the joint venture.
    b. The right to call joint venture meetings.
    c. The right to propose agenda items for a vote of the joint venture partners.
    d. The right to call for a majority of partners in interest to cause the partnership to maintain an action against the managing venturer for breach of the partnership agreement.
    e. The right to access the books and records of the joint venture.
    f. The right to information concerning their fellow joint venture partners.

g. Joint and several liability for the venture's obligations and liabilities.

19. Collectively, by a simple majority vote (51%), the joint venture partners can:

    a. Remove the managing venturer and replace it with another managing venturer, without having to establish "cause" or "misconduct."
    b. Change the business purpose of the joint venture or engage in any other business venture.
    c. Perform any act the joint venture partners determine to be necessary, desirable or convenient.
    d. Determine to explore and develop substitute acreage.
    e. Change the name of the joint venture.
    f. Terminate the term of (e.g., dissolve) the joint venture.
    g. Approve the reasonableness of indemnification expenses reimbursable to any venturer.
    h. Cause the joint venture to borrow the necessary funds to satisfy the unfulfilled completion assessments, additional assessments, or farm-out the prospect well.
    i. Conduct subsequent operations (i.e., operations after the initial drilling and completion attempts for a prospect well).
    j. Permit joint venture funds to be utilized for a purpose other than the stated purpose for which such funds were raised.
    k. Reduce, change, or eliminate the powers of the managing venturer.
    l. Modify any provision of the agreement that does not affect the rights and interests of another venturer.
    m. Approve the sale, transfer or assignment by the managing venturer of its interest in the joint venture.
    n. Approve substituted venturers in place of an existing venturer.
    o. Require audited annual financial statements for the joint venture.
    p. Upon liquidation of the joint venture's assets, substitute another liquidator in place of the managing venturer.

20. The CIM also contains a questionnaire in which information is sought, pertaining to the applicant's specific education, business experience, and income level.

21. Before joining a joint venture, joint venture partners are put on notice, as set forth in the questionnaire, that they will be expected to exercise their management rights, and that the venture is not intended to be a passive investment or security.

22. In the questionnaire, the applicant must represent that he or she possesses "extensive experience and knowledge in business affairs such that he or she is capable of intelligently exercising his or her management powers," and that the venturers are not relying upon any unique entrepreneurial or management ability of the managing venturer.

23. Once investors decided to invest, they filled out Application Documents, which HEI and HEDC reviewed before admitting the investors as joint venturers into the Joint Ventures. HEI and HEDC reviewed these documents to ensure investors met their suitability requirements.

24. The potential venturer must sign the application under penalty of perjury, and applicants are told that HEI and HEDC rely upon the information provided and representations made.

25. Each of the partners in the Joint Ventures at issue here made these warranties and representations.

26. Each of the Joint Ventures had a large number of investors.

    a. LO 1 had 58;
    b. LO 2 had 87;
    c. LO 3 had 69;
    d. LO 4 had 51;
    e. LO 5 had 46;
    f. LO 6 had 63;
    g. LO 7 had 60;
    h. LO 9 had 90 (this includes 54 investors in LO 9 and an additional 36 investors who joined 29 of the LO 9 investors in a subsequent operation known as Sub-Op 9A).

27. Investors in each venture were geographically dispersed, with investors coming from almost each of the fifty states.

    a. LO 1 had investors from 24 states: Alabama, Arkansas, Arizona, California, Florida, Georgia, Iowa, Illinois, Massachusetts, Maryland, Michigan, Minnesota, Missouri, North Carolina, New Hampshire, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Texas, Vermont, Washington, and West Virginia.
    b. LO 2 had investors from 30 states: Alabama, Arizona, California, Connecticut, Florida, Georgia, Iowa, Illinois, Kentucky, Maryland, Michigan, Minnesota, Missouri, Montana, North Carolina, Nebraska, New Hampshire, New Jersey, New Mexico, Nevada, New York, Ohio, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, and Wyoming.
    c. LO 3 had investors from 26 states: Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Iowa, Illinois, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, South Carolina, Texas, Utah, Vermont, Washington, and Wyoming.

d. LO 4 had investors from 23 states: Alabama, Arizona, California, Colorado, Florida, Georgia, Illinois, Kentucky, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, South Carolina, Texas, Utah, and Washington.
e. LO 5 had investors from 19 states: Alabama, Arizona, California, Florida, Illinois, Kentucky, Massachusetts, Maryland, Minnesota, Mississippi, Montana, New York, Ohio, Oregon, Pennsylvania, Texas, Utah, Washington, and Wyoming.
f. LO 6 had investors from 23 states: Alabama, Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Kentucky, Maryland, Michigan, Minnesota, Montana, New Jersey, New Mexico, New York, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, and Washington.
g. LO 7 had investors from 20 states: Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Kentucky, Massachusetts, Minnesota, Missouri, North Carolina, New Jersey, New York, Oklahoma, South Carolina, South Dakota, Texas, and Utah.
h. LO 9 had investors from 23 states: Arizona, California, Connecticut, Georgia, Iowa, Illinois, Kentucky, Massachusetts, Maryland, Michigan, Missouri, North Carolina, North Dakota, New Jersey, New Mexico, Nevada, New York, Ohio, Oklahoma, Oregon, Tennessee, Texas, and Washington.

28. The partners that testified at trial varied in age from 48 to 78 years old at the time they made an investment in an HEI or HEDC sponsored joint venture. There is no indication that HEI or HEDC targeted any specific age or demographic group other than to establish that HEI or HEDC actively sought out individuals that were wealthy, educated and sophisticated investors with sufficient business experience to exercise the significant partnership powers granted to them under the joint venture agreements. The HEI and HEDC partners were educated (many with advanced degrees), wealthy (most were accredited investors), and experienced in business affairs (many holding executive management positions or owning their own businesses).

29. HEI and HEDC sent each investor over the age of 70 in the case of HEI and over 60 in the case of HEDC a "senior letter" reminding those investors of the perils of oil and gas exploration and requiring them to sign a statement that they acknowledged and understood those risks.

30. HEI and HEDC did not provide investors with the names or contact information of their fellow venturers unless they requested it in writing. The reason for this was to protect the privacy of the individual joint venturers.

31. As a group, the joint venture partners possessed significant knowledge and experience in business affairs.

32. The persuasive and credible evidence in the record compels the court's conclusion that the partners in the Joint Ventures were capable of intelligently exercising the partnership powers granted to them in the joint venture agreements.[2]

a. **Evelyn Ensminger**

i. Ms. Ensminger testified that she was 75 years old at the time she invested in an HEI sponsored joint venture and that she had received a Bachelor's Degree from Wayne State University, a Masters in Behavior Science from the University of Michigan and took one year of classes toward a PhD at the University of Michigan in education.

ii. Ms. Ensminger's work experience varied from teaching students to assisting her husband in running his surveying business. Further, Ms. Ensminger represented an annual income between $60,000 to $70,000 and an estimated liquid net worth of $1 million

iii. Ms. Ensminger understood the tax benefits available to joint venture partners if they realized a loss, in particular the ability to utilize conversions to a Roth IRA to enhance those losses for tax purposes.

iv. HEI provided Ms. Ensminger with informational materials including maps, seismic data, fault lines, and sand charts.

v. Ms. Ensminger read and signed the questionnaire contained in the application documents for LO 3 and executed similar application documents for LO 4. Ms. Ensminger understood each of the representations in the questionnaire when she initialed them.[3] Ms. Ensminger also represented to HEI that

[2] The following joint venturers were called as witness by the parties as a representative sample of the partners in the Joint Ventures.

[3] By initialing and returning the questionnaire, each joint venturer understood and represented to HEI and HEDC under penalty of perjury that: (1) they possessed extensive experience and knowledge in business affairs such that they were capable of intelligently exercising the management powers of a Joint Venturer; (2) they were not relying upon HEI for the success of the captioned Venture; (3) their experience and knowledge in business affairs enabled them to replace HEI as the Managing Venturer; (4) they made the independent investment decision that participation in the Joint Ventures were suitable investments for them; and (5) they were capable of participating in the Joint Ventures without undue financial difficulties due to their other liquid assets. They also represented to HEI that they received and read the CIM for each

she received and read the CIM for each of her Joint Ventures, she understood the risks associated with participation in the Joint Ventures, and that she was financially able to bear the risk of losing her entire capital contribution to the Joint Ventures.

vi. Ms. Ensminger was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action.

vii. Ms. Ensminger consulted her broker who advised against investing in HEI, and consulted a hydrologist who informed her of the risks and potential rewards involved in oil and gas exploration before she purchased her partnership interests from HEI. She made her decision to invest based upon the information provided and her discussions with the hydrologist.

viii. Ms. Ensminger originally rescinded her application for the LO 4 and her documents and funds were returned to her. A week later, she resubmitted her application documents for the LO 4 and was accepted as a joint venture partner.

ix. Ms. Ensminger participated in the management of her Joint Ventures. For example, she took part in a decision in LO 3 to add an additional zone to the well and to frac stimulate that zone through an immediately paid additional assessment. Further, Ms. Ensminger participated in the October 5, 2006 conference call regarding LO 3, wherein the partners discussed the economic merits of adding an additional zone at that time due to low gas prices and the prospect of a drop in gas prices. Also during that call, a partner suggested paying for the proposed work using banked revenues from the sale of current gas products rather than an immediate assessment. Pursuant to the partners' decision, that proposal to bank funds was added to the vote for that conference call and Ms. Ensminger voted in favor of adding a zone to the well and frac stimulating the well. She also voted to pay for the work immediately. A memo was sent by HEI informing the partners in the LO 3 that the adding of a zone to the well and the frac stimulation had been approved and requested a written vote on how the assessment should be funded. Ms. Ensminger confirmed her vote to pay

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of their Joint Ventures, understood the risks associated with participation in the Joint Ventures, and that they were financially able to bear the risk of losing their entire capital contribution to the Joint Ventures.

the immediate assessment and included her check with that written ballot.

x. In total, Ms. Ensminger invested approximately $100,000 in LO 3 and LO 4, while receiving less than $3,000 in returns.

b. **Lois Fretter**

i. Ms. Fretter testified that she was 77 years old at the time she invested in an HEI sponsored joint venture and that she holds a "Masters plus 30" in counseling and education and is certified in school administration. Ms. Fretter considers herself a "smart and tough" business woman.

ii. Ms. Fretter is a retired school teacher, who "dabbles" in real estate, managing a portfolio consisting of her home and eleven rental properties. Her real estate portfolio management duties include locating tenants, lease generation, lease execution, tenant management, setting rental rates, evicting problem tenants, and coordinating property upkeep.

iii. On her initial questionnaire, signed and returned to HEI, Ms. Fretter represented an annual income of $25,000 and an estimated liquid net worth of $1 million. However, at trial, Ms. Fretter testified that her real estate ventures also generate a monthly income of approximately $13,000

iv. Ms. Fretter had experience in the oil and gas industry, as she had previously invested in an Ohio-based oil and gas investment firm before becoming an HEI joint venture partner. She also had an annuity and a brokerage account.

v. Mr. Fretter testified that she continued to invest in HEI in an attempt to regain her losses, after she had "wasted" $300,000 in her joint ventures.

vi. Ms. Fretter was aware that oil and gas exploration was "prevalent" through her ownership of mineral rights and real property in Colorado located next to several oil and gas exploration sites.

vii. Ms. Fretter was informed of partnership opportunities with HEI by her sister, Ms. Ensminger, and she traveled to Colorado Springs with Ms. Ensminger to meet with HEI representatives in person.

viii. Ms. Fretter executed the application documents for LO 3, LO 4 and LO 5. In so doing, she initialed and understood each of the representations in the questionnaire.

ix. Ms. Fretter was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action.

x. Ms. Fretter participated in the October 5, 2006 conference call for LO 3 and she voted and paid in line with Ms. Ensminger, as described above.

c. **Walter Hojsak**

i. Mr. Hojsak testified that he was 51 years old at the time he invested in an HEI sponsored joint venture. He holds a Bachelor of Electrical Engineering degree and pursued graduate work in computer science. Mr. Hojsak's business experience includes working for TestQuest as a Project Manager, as well as a Project Manager for Booz Allen Hamilton. In that capacity he is currently in charge of managing interactions between prime contractors and General Dynamics as a part of a communications project for the U.S. Army. Further, Mr. Hojsak is an experienced investor through managing his 401K, IRA and personal stocks.

ii. Prior to investing in LO 1, Mr. Hojsak spoke with HEI representative, Dale Phillips, on several occasions about a prior HEI project, had a conference call with Reed Cagle and Dale Phillips to address HEI's concerns regarding his financial ability to participate in the joint venture because he needed to liquidate funds in order to invest, and contacted references including Lavon Evans, concerning HEI.

iii. Mr. Hojsak reviewed, understood and signed the application documents and questionnaire, affirming his financial wherewithal, capacity to make business decisions, and understanding that his participation was required in the Joint Venture.

iv. Mr. Hojsak was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners

could have lobbied their fellow partners to take almost any other action.

v. Mr. Hojsak was aware that technical information concerning the joint venture, including well data, was available on HEI's website. Further, Mr. Hojsak was an active participant in the Joint Venture conference calls, voting and communicating with his joint venturers.

d. **David Topp**

i. Mr. Topp testified that he was 61 years old when he invested in an HEI sponsored joint venture, initially investing $62, 500. He had lifelong business experience as a career farmer.

ii. Mr. Topp reviewed, understood and signed the application documents and questionnaire. In his questionnaire and application materials, Mr. Topp represented that he had an annual income of $60,000 and an estimated liquid net worth of $1.5 million dollars.

iii. Mt. Topp was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action.

iv. Prior to joining the Joint Venture, Mr. Topp retained an attorney to review the joint venture documents, who did not raise any issue with the joint venture documents noting that they appeared to be typical partnership documents. Further, Mr. Topp discussed the tax advantages available to joint venture partners with HEI representative Brian Sullivan. Brian Sullivan then explained the joint ventures to Mr. Topp's banker to address the banker's concerns that Mr. Topp's money was going into an appropriate investment. Mr. Topp also consulted a financial-savvy friend about his joint venture investment. His friend chose not to participate in the joint venture.

v. HEI did nothing to discourage Mr. Topp from consulting his lawyer, financial advisors, accountants, or friends.

vi. Mr. Topp was never denied any information that he requested from HEI, and participated regularly in conference calls, voting on management and other issues, as he understood that he was required to be an active partner.

vii. In total, Mr. Topp invested approximately $100,000 into his HEI joint ventures.

e. **Sherwood Minckler**

i. Mr. Minckler testified that he was 75 years old at the time he invested with HEI, that he had a Bachelor of Science degree in chemistry from Southern Illinois University and a PhD from Northwestern University in organic chemistry, and that he had a successful career with Exxon for 30 years.

ii. Mr. Minckler represented his annual income as $75,000 and his estimated liquid net worth as $1.5 to 2 million. Mr. Minckler's investment experience includes stocks, IRA accounts and "a bit of speculation on the side."

iii. Prior to investing, HEI sent Mr. Minckler a preview package and Mr. Minckler testified to understanding the math underlying the joint venture conversion table as described in these materials. The geologic maps were not unfamiliar to him since "some of it is pretty obvious" and he had seen similar maps in magazine or newspaper articles pertaining to "drilling and that sort of thing."

iv. HEI representative, John Schiffner explained the risks involved in an investment in an HEI sponsored joint venture and Mr. Minckler noted that the risks were noted in the literature. Before investing in LO 1, LO 2, and LO 3, Mr. Minckler received a favorable opinion of the HEI joint venture program from his stockbroker, contacted the Texas Railroad Commission to verify that the well permits had been issued, contacted the Texas Water Board, and contacted the Department of Energy.

v. Mr. Minckler filled out the HEI questionnaires without assistance. Further, Mr. Minckler actively participated in the management of the Joint Ventures, concerning, among other things, frac stimulation, negotiation of gas and liquids sales contracts, well completion, and replacement of the well operator, as evinced through his numerous voting ballots.

vi. Mr. Minckler was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action.

f. **Alvin Zipperlen**

i. Mr. Zipperlen testified that he was 48 years old when he invested in an HEI sponsored joint venture, received an Associate's Degree of Electronics from Westwood College of Denver and worked as an electronic technician for Union Pacific Railroad.

ii. Mr. Zipperlen represented his annual income as $60,000 and his estimated liquid net worth as $909,000.

iii. Mr. Zipperlen sought counsel from his investment advisor and wife before investing in HEI, each of whom advised against the investment. Mr. Zipperlen decided to move forward despite their advice because he thought the LO 3 was very promising.

iv. Mr. Zipperlen was made aware of the risks of investing in oil and gas such as "hit[ting] a dry hole" and made the educated decision to become a joint venture partner. He reviewed and executed the LO 3 and LO 4 application documents and questionnaire.

v. Mr. Zipperlen was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action.

vi. Mr. Zipperlen actively participated in joint venture management by asking questions on conference calls, each of which was answered by HEI, and submitting written ballots documenting his decisions.

g. **Thomas Price**

i. Mr. Price testified that he was 57 years old at time of his investment in an HEI sponsored joint venture and was 58 years old at the time of his investment in the LO 9, a HEDC sponsored joint venture.

ii. Mr. Price holds a BS in Management and an MBA in finance and investments.

iii. Mr. Price represented his annual income as $500,000 with an estimated liquid net worth of $7 million. As the Executive Vice President and Treasurer of the Bank of New York, Mr.

Price was charged with setting interest rates on loans and deposits worldwide, managing a team handling a $30 billion bond investment portfolio, setting internal rates of return on inter-department deposits, and underwritings for the bank in connection with its issuance of capital securities or debt securities.

iv. Mr. Price filled out questionnaires regarding his suitability for each of his joint ventures.

v. Mr. Price participated in conference calls, voting regularly on management decisions, and utilized the joint venture websites to keep track of well data. He even convinced his friends, who were also sophisticated investors, to join him as joint venture partners, including, Bruce Van Saun – the Vice Chairman and CFO of the Bank of New York (currently CEO of Citizens Bank), George Welde – a Managing Director and Partner of Goldman Sachs (currently on the board of directors for Fortress Investments), and Abraham Schneider – a cardiologist and partner in a cardiologist association.

vi. Mr. Price was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action.

vii. Mr. Price did not ask for a list of fellow venturers because he "didn't much care who they were." Further, Mr. Price testified that filling out the application documents and sending in checks for his joint ventures were "not memorable events" and that his over loss on the ventures was not "a life changing event" to him.

viii. Mr. Price was aware of and took advantage of the tax advantages available to HEI joint venture partners.

ix. In total, Mr. Price invested $1.9 million into his joint ventures, while receiving a return of approximately $250,000.

h. **Kenneth Pompliano**

i. Mr. Pompliano testified that he was 49 years old at the time of his investment in an HEI sponsored joint venture. Mr. Pompliano has some college education supplemented with 30 years of experience in the engineering field specializing in

equipment design and automation. He also has Marine Corps training in electronics. In addition to engineering, Mr. Pompliano operates an online bookstore.

ii. Mr. Pompliano represented to HEI that he had a net worth of over $1 million dollars excluding his home.

iii. Mr. Pompliano's investment history consists of purchasing technology stocks, real estate and starting small businesses.

iv. Prior to investing, Mr. Pompliano requested references form HEI and spoke to those references about the credibility of the company and received favorable reviews.

v. Mr. Pompliano received, read and discussed the CIM with HEI representatives. He understood each of the risk disclosures contained in the CIM and knew participation in the joint ventures could be risky.

vi. In filing out his joint venture agreement, Mr. Pompliano testified that he initialed certain aspects of the document with the aid of Steve Ziemke. Mr. Pompliano likened this exercise to filling out a contract on a house, testifying that "you initial tons of times on the document, you don't really read them. And then the person that's assisting you will kind of guide you on what those areas are all about."

vii. Mr. Pompliano was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action.

viii. Mr. Pompliano converted his investment from an individual investment to corporate investment by forming Texas Ventures, Inc. with two friends and business associates based upon the advice of his attorneys. Each Texas Ventures, Inc. shareholder was provided with the CIM as well as the other joint venture information. Texas Ventures, Inc. shareholders had access to HEI and received information they requested. Mr. Pompliano called to get additional information from HEI when necessary.

ix. Mr. Pompliano was aware of the tax advantages available to joint venturers and took advantage of those benefits by reporting himself as an active partner to the IRS.

x. Mr. Pompliano participated in joint venture conference calls and voted on managerial aspects of the Joint Ventures.

xi. Mr. Pompliano testified that he invested approximately $100,000 in LO 3 and $80,000 in LO 5, receiving only "small" returns.

i. **James Creighton, M.D.**

i. Dr. Creighton testified that he was 69 years old at the time he invested in the HEI sponsored joint ventures and that he earned his undergraduate degree at UCLA and Medical Degree from Hahnemann Medical College.

ii. Dr. Creighton practiced in a medical partnership as an OB/GYN for 38 years with two other doctors and has invested in stocks and bonds his entire life and participated in several oil ventures.

iii. Prior to investing, Dr. Creighton received the CIM, reviewed the HEI preview package, traveled to Colorado to meet with HEI representatives, and reviewed maps of drilling sites and oil fields.

iv. Dr. Creighton signed and returned the questionnaire, representing himself to be knowledgeable in business affairs.

v. Dr. Creighton was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action

vi. Dr. Creighton participated in joint venture conference calls and voted on managerial aspects of the Joint Ventures.

j. **Michael Cox**

i. Mr. Cox testified that he was 54 years old when he invested in the HEI sponsored joint ventures and that he received an undergraduate degree in architecture from the University of Minnesota.

ii. Mr. Cox reported annual income of $500,000 with an estimated liquid net worth of $3 million on his questionnaire.

iii. Mr. Cox's business experience included making regular business decisions in his architectural partnership that employs 120 people in three offices. He had a high level of involvement overseeing each project, as he was "responsible for everything" due to his high ownership interest. Mr. Cox's prior investment experience includes mutual funds, stocks, 401k, IRA and real estate.

iv. Mr. Cox received the CIM prior to investing and was aware that the venturers would be making decisions. He read the questionnaire and went through the document again with Jim Pollak as he completed each field.

v. Mr. Cox contacted Jay Gelbart, a fellow partner and professional investor, who was provided as a reference. He also requested a list of his fellow joint venture partners, which he received from HEI.

vi. Mr. Cox was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action. Mr. Cox did not hire third-party experts because he was provided information from HEI that he believed to be accurate. Mr. Cox received information he asked for from HEI and was presented with opportunities to run ideas by his fellow partners.

vii. Mr. Cox regularly participated in conference calls and voted on the managerial aspects of the Joint Ventures.

viii. Mr. Cox testified that he invested over $1 million with HEI, receiving a return of approximately $200,000.

k. **Thomas Carpenter**

i. Mr. Carpenter testified that he was 65 years old when he invested in an HEI sponsored joint venture, initially investing $98,000. He received a BS from Notre Dame and an MBA from Indiana University. Both degrees focused on finance.

ii. Mr. Carpenter reported an annual income between $60,000 and $100,000 and listed an estimated liquid net worth of $1.5 million on his HEI questionnaire.

iii. Mr. Carpenter was a particularly sophisticated investor. His work experience includes active duty in the Marine Corp, a position at the National Bank of Detroit, positions with three separate investment banks, and a 20-year membership in the Chicago Mercantile Exchange trading fixed income Eurodollars and currencies. Further, Mr. Carpenter had made previous $10,000 investments in multiple unsuccessful oil wells before HEI.

iv. Mr. Carpenter spoke with references provided by HEI including John Harper, a successful HEI investor, and Joel Held of Baker McKenzie before becoming a partner. Mr. Carpenter did not consult with any third parties, although he was given to the opportunity to do so.

v. Mr. Carpenter received and reviewed the CIM before investing. He discussed the CIM with John Schiffner and circled numbers to note how most of the wells in prior HEI projects did not produce a return.

vi. Mr. Carpenter initially invested in LO 1, and continued to invest in other joint ventures because LO 1 was "looking so good." In total, Mr. Carpenter invested in LO1, LO 2, LO 3, LO 4, and LO 5, admitting that he had become "overaggressive in committing funds."

vii. Mr. Carpenter was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action.

viii. Mr. Carpenter regularly followed the HEI website and was able to understand the daily well reports presented therein.

ix. Mr. Carpenter availed himself of all the tax advantages available to joint venture partners, as those have previously been described in detail.

x. Mr. Carpenter regularly participated in conference calls and voted, or abstained, on the managerial aspects of the Joint Ventures.

xi. For example, during the October 5, 2006 conference call on LO 3, he voted in favor of adding an additional zone and frac stimulating the well and against paying for the work through

banked well revenues. Mr. Carpenter confirmed his vote with a written ballot in favor of performing the work and a handwritten "Pay Now." Mr. Carpenter's position was the majority and he paid the immediate assessment.

xii. HEI sent Mr. Carpenter a list of his fellow joint venture partners, per his request. Mr. Carpenter made use of the list to communicate regularly with the joint venturers and has been in contact with over 100 partners via telephone calls, emails and written correspondence. Since then, he has learned about his other partners' investments and investment history.

xiii. Following a downturn in production on the Joint Ventures, Mr. Carpenter has encouraged his fellow joint venturers to abstain from voting on their Joint Ventures, to which many have obliged. This action by Carpenter has resulted in a stalemate between the joint venturers and the managing venturer for LO 1, causing the well to cease production and to be shuttered.

l. **Robert Durkin**

i. Mr. Durkin testified that he was 78 years old when he first invested in an HEI sponsored joint venture and Durkin was 79 years old when he invested in LO 9, a HEDC sponsored joint venture.

ii. Mr. Durkin earned a Bachelor of Arts degree in industrial arts from San Jose State University.

iii. Mr. Durkin is a retired high school teacher currently running a real estate business from his home that purchases and restores homes for sale or rent.

iv. Mr. Durkin reported an annual income between $600,000 from investments and listed an estimated liquid net worth of $1.5 million on his HEI questionnaire.

v. Mr. Durkin has experience in oil and gas through an introduction to geology course taken in college and prior investing in oil and gas through a 23-unit investment with Ridgewood Energy that has provided returns. Further, he was aware of the inherent risk in the oil drilling investments.

vi. In total, Mr. Durkin invested approximately $1.4 million in HEI and HEDC, receiving minimal returns.

vii. Mr. Durkin was familiar with the term "accredited investor" believing himself to be an accredited investor. He confirmed his accredited investor status to HEI on the application documents for LO 1, LO 6, LO 7 and LO 9.

viii. Mr. Durkin was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action.

ix. Mr. Durkin participated in the management of his joint ventures through conference call votes and written ballots.

m. **Lanette Campbell**

i. Ms. Campbell testified, via telephone, that she was 55 years old at the time she invested in an HEI sponsored joint venture. Ms. Campbell was retired from her self-employment as the owner/operator of a custom marine canvas fabrication business. She ran the day-to-day operations and her business duties included ordering raw materials, handling customer relations, maintaining the books and records of the business and selling her products at market.

ii. Ms. Campbell represented an annual income of $40,000 and an estimated liquid net worth of $1 million.

iii. Ms. Campbell was referred to HEI by Jack Clyne, an employee of Chevron Texaco that was already a partner in an HEI sponsored joint venture. Ms. Campbell had known Mr. Clyne for 15 years at this time of his referral, through her husband.

iv. Ms. Campbell testified that her husband decided to invest in the LO 3 and that she wanted nothing to do with it. However, her husband instructed her to fill out application documents regardless of her feelings on the matter.

v. The first questionnaire filled out by Ms. Campbell was returned to her because she failed to initial the business experience section. Ms. Campbell initialed the business experience section of the questionnaire, at the insistence of her husband, and returned the fully executed application documents for LO 3. Ms. Campbell's husband sent the check to HEI to purchase interests in the LO 3 joint venture.

vi. Ms. Campbell was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action.

vii. Ms. Campbell participated in and voted in numerous management meetings with respect to frac stimulation, an acid job, adding well zones, and payment logistics. Her managerial control is demonstrated by her executed ballots.

n. **Michael Holoka**

i. Mr. Holoka testified that he was 54 years old when he invested in the HEI sponsored joint venture, and that he holds a degree from the University of Illinois and a law degree from Northern Illinois University. Currently, Mr. Holoka is a practicing lawyer in Illinois and is a real estate agent in Florida.

ii. Mr. Holoka had a good deal of oil and gas investment experience before purchasing his partnership interest in LO 1 through his participation in 12 to 15 prior HEI sponsored joint ventures.

iii. Mr. Holoka received the application package and CIM for LO 1 prior to investing and discussed the application documents with HEI representative, Tony Black. Mr. Holoka testified that he would have called Reed Cagle if he had any substantial questions. Further, Mr. Holoka used the oil and gas primer provided by HEI to familiarize himself with the industry.

iv. Mr. Holoka was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action.

v. Mr. Holoka participated in the conference calls, testifying that Reed Cagle would present information to the joint venture partners on conference calls. The partners would then have an opportunity to ask questions before an alphabetical roll call was taken. Often times, a partner would ask a question once their name was called in the roll call. It was common for partners to introduce themselves before speaking and "after a while you got to know people that way because you could just

tell who was going to ask what type of question so it was pretty interesting."

vi. HEI provided a list of LO 1 joint venture partners to Mr. Holoka at his request. Mr. Holoka used this partner list to contact several partners. He also contacted HEI to schedule a LO 1 conference call, without Reed Cagle, to discuss his concerns. However, Mr. Holoka's concerns were addressed before his conference call took place and the meeting was never held.

vii. Mr. Holoka understood the risks involved with oil and gas exploration, and participated in the management of the LO 1 through executing ballots and casting his votes.

o. **Paul Lefevre**

i. Mr. Lefevre testified that he was 62 years old when he invested in the HEI sponsored joint ventures, LO 1, LO 4 and LO 7, and that he holds a BA degree in math from Colgate University, spent five years in the Navy teaching math in a nuclear power school, and has passed ten exams to become an actuarial.

ii. Mr. Lefevre has held every senior management position with Keystone Provident Life. He prepares his own taxes, has been on committees in Washington D.C. regarding tax policies in connection with the insurance industry, and he even caught a mistake on one of his other HEI sponsored joint venture tax returns that he had HEI correct for that partnership.

iii. Currently, Mr. Lefevre is active in business through investing, running a charity in the Bahamas, and sitting on the board of a reinsurance company in Bermuda.

iv. Mr. Lefevre reported an annual income of $330,000 and a liquid net worth of $2.8 million.

v. Mr. Lefevre participated in other HEI sponsored joint ventures prior to, and subsequent to, his involvement in LO 1, LO4 and LO 7. His participation in the prior joint ventures provided him with familiarity with the oil and gas industry before he became an LO 1 partner. Additionally, Mr. Lefevre's father was an accountant for Mobil Oil providing him with some knowledge of the industry. He acknowledged having sufficient experience in oil and gas and in other general business matters to participate actively as a general partner.

vi. Mr. Lefevre received and reviewed the information package, the CIM, and joint venture application documents before investing. The information package contained maps, a geological explanation of the Wilcox Play, a conversion table, as well as a sheet describing interest and the tax advantages for oil and gas investments. Mr. Lefevre reviewed these documents before he decided to participate in a joint venture, and he executed the application documents for each joint venture. Further, Mr. Lefevre understood the inherent risk associated with oil exploration.

vii. Mr. Lefevre was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action.

viii. Mr. Lefevre participated in the management of the joint venture's operations, as evinced by multiple executed ballots.

p. **David Matheny**

i. Mr. Matheny testified that he was 61 years old when he invested in the HEI sponsored LO 2 joint venture and that he holds a BS degree in international relations and has completed significant post-graduate work (30 hours) toward an MBA.

ii. Mr. Matheny is a retired commercial airline pilot. In addition to flying, Mr. Matheny owned a Mr. Lube franchise (which he begin and franchised out to others), a roller rink, a vending business, fast food restaurants, a service station, and five or six other businesses.

iii. Mr. Matheny had partners in his other businesses that would run the day-to-day operations while he was away on his job as a commercial airline pilot. He felt that his role in the HEI partnerships was very similar in that they handled day-to-day tasks, but that the ultimate business decisions rested with the partners.

iv. Further, Mr. Matheny operated a successful custom drill bit business that re-tipped or reused worn oil well drill bits despite having no experience in drilling bits manufacturing and without consulting brokers or professionals to advise him. Mr. Matheny testified that he was "generally experienced" in the

area of oil and gas drilling from operating the custom drill bit business.

v. Mr. Matheny reported an annual income of $150,000 and a $2 million liquid net worth.

vi. Prior to his investment in LO 2, Mr. Matheny was a partner in previous HEI sponsored joint ventures, and was contacted by an HEI representative regarding the opportunity to participate in LO 2.

vii. Mr. Matheny received the CIM before joining LO 2 and had the opportunity to ask questions, but chose not to do so.

viii. Mr. Matheny understood the risks involved in oil and gas exploration. Mr. Matheny's knowledge of these risks came from the LO 2 documents and his experiences in his hometown of Bakersfield, California, which he referred to as an "oil and gas area."

ix. Mr. Matheny was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action.

x. Mr. Matheny participated in the joint venture conference calls and believed other partners to be knowledgeable and experienced in the oil and gas industry. Further, Mr. Matheny characterized his role in LO 2 as an active role, in which he expected Reed Cagle to manage the day to day operations, but that he and the other investors always had a vote on how he managed. Mr. Matheny's managerial participation is evidenced by his written voting ballots.

q. **John R. Forsberg, II**

i. Mr. Forsberg testified that he was 55 years old at the time he invested in a HEDC sponsored joint venture, and had received a Bachelor's Degree from Northern Illinois University.

ii. Mr. Forsberg's work experience was primarily with Motorola where he worked in engineering, quality improvement, and as director of quality capacity. While at Motorola, Mr. Forsberg also ran the inbound 1-800 number call center for approximately ten years with a team of 150 people reporting to

him. He is currently employed by AIM Specialty Health doing process engineering.

iii. Mr. Forsberg represented a net worth in excess of $1 million, and has invested in 401K, nontax-deferred accounts, IRA funds, mutual funds, bonds and individual stocks.

iv. Mr. Forsberg testified that he was looking for a new investment to create additional cash flow when he received a call from a HEDC sales representative. Mr. Forsberg thought the venture sounded promising and agreed to receive additional information. HEDC sent an information packet describing the LO 9 joint venture to Mr. Forsberg per his request.

v. Mr. Forsberg reviewed the LO 9 information packet, went over the details with a HEDC representative and conducted his own online research.

vi. Mr. Forsberg recognized the risks associated with oil and gas exploration and that these risks are shared by the company and the partners. He was never denied access to information when he requested it.

vii. Mr. Forsberg was aware that a 51% partner vote controlled the joint venture. As such, the partnership could have changed operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action.

viii. Mr. Forsberg actively participated in the joint venture management meetings via conference calls and participated in numerous other managerial decisions for his Joint Ventures, each of which is documented by written ballots.

ix. Mr. Forsberg continues to participate as a joint venture partner with HEDC's successor company.

33. The Joint Ventures included partners with varying levels of business experience and investor sophistication. Of particular importance, the evidence and testimony presented unequivocally established that each of the joint venturers were aware that a 51% partner vote controlled the joint venture, and thus, the partnership could have changed the managing venturer or operators, hired engineers or geophysicists, or the partners could have lobbied their fellow partners to take almost any other action. Further, the joint venturers were not precluded from retaining independent industry experts to review data

and perform analysis of the oil and gas projects in order to increase their familiarity with the industry.

34. The joint venturers testifying at trial continued to invest in HEI and HEDC after receiving little to no returns on their investments in an effort to regain their losses. In fact, many of the joint venturers participated in multiple Joint Ventures.

35. The method by which the partners in the Joint Ventures were initially contacted and solicited did not impact their ability to exercise their partnership powers granted to them in the joint venture agreements.

36. The geographic dispersion of the partners in the Joint Ventures did not impact their ability to exercise their partnership powers granted to them in the joint venture agreements.

37. The number of partners in the Joint Ventures did not impact their ability to exercise their partnership powers granted to them in the joint venture agreements.

38. The age of the partners in the Joint Ventures did not impact their ability to exercise their partnership powers granted to them in the joint venture agreements.

39. The fact that some of the partners in the Joint Ventures were strangers to one another and/or the promoter did not impact their ability to exercise their partnership powers granted to them in the joint venture agreements.

40. As finder of fact, the Court may draw reasonable inferences from the evidence presented. Here, based on the credible evidence presented at trial, the Court concludes that the venturers' complaints against HEI and HEDC are more reasonably explained or driven by their own dissatisfaction with the end result of their participation in the joint ventures and the disappointing return on their investments. As has been discussed above and explained to and acknowledged by each of the joint venturers, a loss or lack of return on an investment in oil and gas development is an inherent risk on such highly speculative ventures. The record is unequivocally clear that each of the venturers that testified were appropriately advised of the nature of this risk, in writing, prior to investing. Each of them was capable of making an informed decision whether to invest or not. Those witnesses who testified that they passively relied on the managing venturer's expertise, expecting a return on their investment without participating as partners in the Joint Ventures, acted unreasonably and entirely inconsistent with the CIM advisement described in paragraph 13 above.

II.
CONCLUSIONS OF LAW

The issue presented here is whether the interests sold in the Joint Ventures at issue are securities pursuant to the Colorado Securities Act (the "CSA"), C.R.S. § 11-51-201(17). The CSA defines "Sale" or "sell" to include "every contract of sale of, contract to sell, or disposition of a security or interest in a security for value." "Offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a securities or interest in a security for value. § 11-51-201(13)(a). "Offer" means an offer to sell or an offer to purchase. § 11-51-201(13)(c). The CSA defines the term "security" broadly, providing a list of investment instruments, such as any "note," "stock," or "any interest or instrument commonly known as a security." The definition also includes the catch-all term "investment contract." In its inaction of the CSA, Colorado's General Assembly intended that Colorado's securities laws be coordinated with federal securities laws. *Cagle v. Mathers*, 295 P.3d 460, 467 (Colo. 2013) (citing C.R.S. § 11-51-101(3)).

According to the law of this case, the question of whether the subject interests are securities is governed by the three-factor test set forth in *Williamson v. Tucker*, 645 F.2d 404, 424 (5th Cir. 1981), the preeminent case on federal securities law.[4]

On January 6, 2011, this Court's predecessor, the Honorable Morris B. Hoffman, issued an Order denying the State's Motion for Partial Summary Judgment on this same

[4] Under *Williamson*, a general partnership or joint venture interest can be designated a security if the investor can establish, for example, that: (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. 645 F.2d at 424.

issue – whether the joint venture interests in question are securities. In his Order, Judge Hoffman analyzed the State's contentions under the holding set forth in *Williamson* and concluded that the subject joint venture interests "are strongly presumed not to be securities and [the State] has not met [its] summary judgment burden of proving . . . the second *Williamson* exception or any other catch-all economic realities." In that same Order, Judge Hoffman granted Defendants' "Cross Motion . . . for Ruling on Question of Law," concluding that Defendants had satisfied their burden of showing an absence of genuine issues of material fact "by which Plaintiff could prove *Williamson* exceptions 1 or 3."[5] Accordingly, the remaining issues for trial are whether the joint venture interests are securities under *Williamson* factor 2 or any other catch-all economic realities. The Court will confine its analysis in this manner and will address each, in turn, below.

I. The Second *Williamson* Factor

Under the second *Williamson* factor, a court looks to whether the joint venturers are so inexperienced and unknowledgeable in business affairs that they are incapable of intelligently exercising their partnership powers. 645 F.2d at 424. In making this determination, courts are not tasked with undertaking an investor-by-investor analysis, but rather, courts look at the joint venture offering as a whole. *See Williamson*, 645 F.2d 404; *Feigin v. Digital Interactive Associates, Inc.*, 987 P.2d 876 (Colo. App. 1999) (considering the joint venture offering as a whole, rather than undertaking an investor-by-investor analysis).

[5] Judge Hoffman's January 6, 2011 Order was reaffirmed by this Court in its Order dated July 8, 2013, denying Plaintiff's Motion for Ruling on a Question of Law that the Joint Venture Interests Offered by the Defendants are Securities.

While Plaintiff urges this Court to undertake its analysis under *Williamson* factor 2, considering whether the investors' had experience in the specific business of the joint venture, citing *Long v. Schultz Cattle Co.*, 881 F.2d 129 (5th Cir. 1989), the Court finds most persuasive the overwhelming federal authority addressing the knowledge and experience requirement under the second *Williamson* factor. That authority holds that a partner in a general partnership must have experience and knowledge in business affairs *generally*, and a partner is not required to have industry specific knowledge in order to preclude a finding that a joint venture interest is a security.[6] *See, e.g.*, *Deutsch Energy Co. v. Mazur*, 813 F.2d 1567, 1568 (9th Cir. 1987) ("While one may surmise … that neither of the Deutsches possesses the expertise to drill and complete the oil wells personally, it does not follow that they are 'inexperienced and unknowledgeable members of the general public.'" (quoting *Williamson*, 645 F.2d at 423)); *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992) ("The proper inquiry is whether the partners are inexperienced or unknowledgeable 'in business affairs' generally, not whether they are experienced and sophisticated in the particular industry or area in which the partnership engages and they have invested."); *Koch v. Hankins*, 928 F.2d 1471, 1479 (9th Cir. 1991) ("While it is undisputed that none of the investors had prior experience in jojoba farming, that draws the question too narrowly. Under *Williamson*, the relevant inquiry is whether 'the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of exercising his partnership or venture powers."); *Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 840 F.2d 236, 242 n.10 (4th Cir. 1988) ("To the

[6] This premise was reiterated by the testimony of Adam Prichard, Defendants expert witness, an objective, well qualified law professor, whom this Court found particularly persuasive and credible, particularly in light of the perceived bias of Plaintiff's offered expert on the issue, Phillip Feigin, who had previously served as Colorado's Securities Commissioner and expressed an avowed commitment to the prosecution of securities actions "in the public interest and for the protection of the investors."

extent a partner needs advice or assistance in the exercise of his powers, he is of course free to consult with more knowledgeable partners or third persons, or to employ accountants and lawyers."); *Robinson v. Glynn*, 349 F.3d 166, 171-72 (4th Cir. 2003) ("Business ventures often find their genesis in the different contributions of diverse individuals — for instance, as here, where one contributes his technical expertise and another his capital and business acumen. Yet the securities laws do not extend to every person who lacks the specialized knowledge of his partners or colleagues, without a showing that this lack of knowledge prevents him from meaningfully controlling his investment.").

On that basis, this Court concludes that the appropriate standard in applying the experience and knowledge requirement set forth in *Williamson* factor 2 is whether the partners are so inexperienced or unknowledgeable in business affairs *generally*, not whether they are experienced and sophisticated in the particular industry or area in which the partnership engages and they have invested.

Applying that standard to the evidence presented at trial, this Court finds that, as a whole, the joint venturers in the LO 1-7 and 9 joint ventures were not so inexperienced and unknowledgeable in business affairs that they were incapable of intelligently exercising their partnership powers. Rather, the testimony of the witnesses and exhibits presented at trial, as described above, confirms that the joint venturers were unquestionably knowledgeable and experienced in business affairs, sufficient to carry out their roles as partners in the LO 1-7 and 9 joint ventures. Accordingly, based on the evidence presented at trial, Plaintiff failed to establish that the joint venture interests were securities under *Williamson* factor 2.

II. Catch-all Economic Realities

The next issue for the Court's consideration is whether the joint venture interests at issue may be considered securities based on any catch-all economic realities. In Colorado, *Feigin v. Digital Interactive Assoc., Inc.*, 987 P.2d 876, 881-83 (Colo. App. 1999) and *Joseph v. Mieka Corp.*, 282 P.3d 509 (Colo. App. 2012) are controlling precedent on this issue.[7]

In *Digital Interactive*, the Colorado Court of Appeals considered the following relevant factors in discussing whether probable cause existed to support a finding that the interests at issue in that case were securities under the CSA:

> (1) a significant number of the investors were senior citizens;
>
> (2) the investors were strangers to the promoters;
>
> (3) the investors were strangers to each other;
>
> (4) the investors were widely scattered geographically;
>
> (5) the investors were solicited without regard to whether they had expertise or prior interest in the business of the partnership;
>
> (6) the large number of investors; and
>
> (7) that the management of the partnership would be vested in a management committee with expertise.

987 P.2d at 881. Similarly, in *Meika*, the Colorado Court of Appeals considered the following additional factors in upholding a determination that joint venture interests in an oil and gas well were securities:

> (1) investors lacked the right or ability to vote on the admission or exclusion of new investors;

[7] Significantly, the circumstances surrounding the procedural postures of those cases are substantially different from the circumstances surrounding the case at bar. Specifically, *Digital Interactive* dealt with a question of whether there was sufficient probable cause to believe that defendants were offering "investment contracts" under state law, while the Court in *Mieka* was precluded from considering any contradictory evidence in determining that the joint venture interests in that case were securities.

(2) investors could not bind the joint venture;

(3) no votes or other actions had been taken by investors concerning management decisions even though the joint venture was active;

(4) the types of management powers afforded to investors were also typically available in limited partnership agreement and similar to those granted corporate shareholders;

(5) the percentage of votes required to replace the operator exceeded the investor's ability to execute a change in operator;

(6) the promoter did not inquire into or assess the investors' specific knowledge or sophistication concerning oil and gas development to determine whether investors would be able to exercise their management rights in any intelligent or meaningful way;

(7) the investments were marketed to at least some investors as passive;

(8) day-to-day operations and management was delegated to non-investors (the promoter, Mieka); and

(9) the promoters solicited a large number of investors with whom they had no prior relationship.

282 P.3d at 513.

However, notwithstanding the procedural discrepancies between *Digital Interactive* and *Meika* and the circumstances presented in the present action, based on a review of the evidence and testimony presented at trial and applying that evidence to the factors set forth in *Digital Interactive* and *Meika*, the Court concludes that the joint venture interests at issue here are not securities.

Specifically, following the holding in *Cagle*, 295 P.3d at 467, that provisions of the CSA be coordinated with federal securities law, which overwhelmingly hold that a partner is not required to have industry specific knowledge in order to preclude a finding that a joint venture interest is a security, and balancing the additional aforementioned factors and weighing them against the strong presumption that joint venture interests are not securities, *Williamson*, 645 F.2d at 424, Plaintiff has simply failed to carry its heavy

burden of establishing that the joint venture interests in LO 1-7 and 9 are securities under any catch-all economic realities.

ORDER

WHEREFORE, for the reasons set forth above, the Court finds and hereby Orders that the Units of Interest in the Joint Ventures are not "securities" as contemplated by C.R.S. § 11-51-201(17). Accordingly, because the Court's findings contained herein are dispositive of all claims raised by Plaintiff against HEI and HEDC, the bifurcated trial, currently set for March 10, 2014 is hereby VACATED. This Order shall constitute a final judgment pursuant to CRCP 58(a).

DONE this 17th day of October, 2013.

BY THE COURT:

MICHAEL A. MARTINEZ
District Court Judge