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No. 68130-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FUTURESELECT PORTFOLIO MANAGEMENT, INC., FUTURESELECT PRIME ADVISOR II LLC, THE MERRIWELL FUND, L.P., and TELESIS IIW, LLC

Plaintiffs/Appellants,

v.

TREMONT GROUP HOLDING, INC., TREMONT PARTNERS, INC., OPPENHEIMER ACQUISITION CORPORATION, MASSACHUSETTS MUTUAL LIFE INSURANCE CO., and ERNST & YOUNG LLP

Defendants/Respondents.

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APPELLANTS' OPENING BRIEF

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FutureSelect Portfolio Management, Inc. ("Portfolio"), FutureSelect Prime Advisor II, LLC ("Prime Advisor"), The Merriwell Fund, L.P. ("Merriwell"), and Telesis IIW, LLC ("Telesis") (collectively, "FutureSelect") appeal the trial court's granting of motions to dismiss filed by Tremont Group Holdings, Inc. and Tremont Partners, Inc. (collectively, "Tremont"), Oppenheimer Acquisition Corporation ("Oppenheimer"), Massachusetts Mutual Life Insurance Co. ("MassMutual") and Ernst & Young LLP ("EY") (collectively, "Madoff Defendants").

I. INTRODUCTION

FutureSelect, all Washington based companies, lost nearly $200 million as a result of their investment in the Rye Funds. The Rye Funds are managed by Tremont, overseen by Oppenheimer and MassMutual (as Tremont's parents), and audited by EY (as the Rye Funds' auditor). Without granting leave to amend and with no explanation whatsoever, the Superior Court dismissed with prejudice a detailed, 216-paragraph complaint. This extraordinary, unexplained denial of Washington citizens' right to recover for a crippling loss for investments solicited in Washington, through misrepresentations made in Washington, and under laws designed to protect Washington investors demands reversal. FutureSelect can and did plead claims against each Madoff Defendant.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted the motions to dismiss filed by EY, Tremont, Oppenheimer and MassMutual of all fifteen counts of the Complaint, especially without granting any leave to amend.

a. Did FutureSelect's Complaint make a prima facie showing that jurisdiction was proper over Oppenheimer?

b. Is it possible that facts could be established to support the allegations in FutureSelect's Complaint: (1) under the Washington State Securities Act ("WSSA") against Tremont, Oppenheimer, MassMutual and EY, (2) of negligent misrepresentation against EY and Tremont, and (3) of agency and apparent agency against Oppenheimer and MassMutual?

c. Can FutureSelect's Complaint be dismissed with prejudice in favor of a federal case in the Southern District of New York that has since been settled, and where FutureSelect opted out of the settlement?

d. Can FutureSelect's Complaint be properly dismissed with prejudice on *forum non conveniens* grounds where FutureSelect, residents of Washington, who were harmed in Washington, received misrepresentations in Washington, assert Washington causes of action, and chose a Washington forum to pursue their claims?

III. STATEMENT OF THE CASE

A. Tremont

1. Tremont Solicits FutureSelect in Washington to Invest in Madoff through Rye Funds

FutureSelect, which includes FutureSelect Portfolio, Prime Advisor, Merriwell and Telesis, are registered Washington companies operating out of Washington and acting on behalf of investors holding mostly Washington assets. CP 5-6. Tremont visited and solicited FutureSelect in Washington to invest in Bernard Madoff through the Rye Funds.[1] CP 9. The Rye Funds are a series of funds that were sold and managed by Tremont and invested exclusively or nearly exclusively with Bernard Madoff and his companies. CP 9-10. Tremont represented that the Rye Funds were a rare opportunity to invest with Madoff, who according to Tremont, was soon going to stop accepting new investments. CP 9-10.

2. Tremont Vouches for Madoff

Tremont made misrepresentations to FutureSelect in Washington, through in-person meetings, numerous monthly telephone communications from 1998 through 2008, and through written correspondence sent to FutureSelect in Washington. CP 9-10, 12-13 ¶¶34,

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[1] These funds include Rye Select Broad Market Fund, L.P., Rye Select Broad Market Prime Fund, L.P., and Rye Select Broad Market XL Fund, L.P.

38, 40-47. During that time, Tremont misrepresented it had a comprehensive understanding of Madoff's business and conducted continuous monitoring and oversight. CP 10-12, 31. Tremont falsely emphasized in its offering materials, financial disclosures, direct correspondence, and conversations with FutureSelect that it had conducted thorough due diligence of Madoff to verify the existence of the assets Madoff claimed to hold and manage for Tremont's investors and the occurrence of trades that Madoff claimed to execute on the investors' behalf. CP 9. Among other things, Tremont misrepresented that it performed numerous confirmation and analytic procedures, engaged in regular conversations with Madoff himself, and hired an entity to perform an objective accounting of Madoff's accounts independent of Tremont's review. CP 11-13. Tremont told FutureSelect that "[e]ach month Tremont analyzes every account" held with Madoff. CP 12. Tremont represented to FutureSelect that its ongoing oversight and testing of Madoff was satisfactory in every respect. CP 11-12.

3. Tremont's Representations Were Knowingly False and Misleading.

Tremont's representations to FutureSelect in Washington were knowingly false and misleading. CP 14-15, 31-32, 42-43. In December 2008, it was revealed that Madoff's operation was a massive fraud. CP

14. Madoff's fraud was not complicated. Madoff has admitted he never made any of the investments he purported to, but simply deposited investors' funds into a checking account. CP 2, 14.

If Tremont actually had conducted the monitoring that it claimed, it would have discovered Madoff's fraud. CP 14-15. In fact, Tremont did not perform the due diligence and monitoring it represented it would do, did so negligently, or discovered evidence of Madoff's fraud and failed to report it. CP 4, 14-15. In other words, Tremont had no basis to provide FutureSelect with the assurances and reports that purported to show Tremont's active and effective oversight of FutureSelect's investments. CP 15.

B. Oppenheimer and MassMutual Had the Right to Control Their Agent Tremont.

In 2001, before the bulk of FutureSelect's investments in the Rye Funds were made, MassMutual acquired Tremont through Oppenheimer. CP 15. Oppenheimer and MassMutual knew that Tremont's Rye Funds were invested exclusively with Madoff, and saw this as a strong selling point. CP 16. In particular, the fees collected by Tremont on the Rye Funds were what made Tremont such an attractive acquisition to MassMutual. CP 15-16.

1. MassMutual and Oppenheimer Knew or Should Have Known Tremont Was Making False Statements to FutureSelect.

When conducting due diligence in connection with their acquisition of Tremont, both Oppenheimer and MassMutual learned that Tremont's representations to the Rye Funds' investors regarding its oversight and monitoring of Madoff were false or, at minimum, highly suspect. CP 16-17. Nevertheless, MassMutual and Oppenheimer acquired Tremont. CP 15. Because of the financial benefit they received from Tremont's operations, MassMutual and Oppenheimer permitted Tremont to continue to offer the Rye Fund investments and make false and misleading statements regarding those investments. CP 17.

2. MassMutual's and Oppenheimer Admitted Their Right of Control Over Tremont and These Investments.

MassMutual and Oppenheimer admitted in public filings that they were the control persons over Tremont, as specifically alleged in the Complaint: "MassMutual, Oppenheimer and Oppenheimer Funds were listed as 'control persons' of Tremont on Tremont's Uniform Application for Investment Advisors Registration filed with the SEC." CP 19. Moreover, the Complaint alleges the touchstone of agency, the right of control, as to the very investments at issue: "MassMutual and Oppenheimer had the right to control Tremont such that they could have prevented Tremont from offering investments in Madoff." CP 17-18.

The Complaint alleges numerous other facts demonstrating the right of control: upon acquiring Tremont, MassMutual and Oppenheimer took several steps to move Tremont under their control, including restructuring Tremont. CP 15, 18. For example, Oppenheimer and MassMutual directed and influenced Tremont's management and provided extensive support services, including compliance, audit, finance and human resources. CP 18, 20. All five of Tremont's board members became MassMutual or Oppenheimer employees, and Tremont's co-chief executive officers became employees of Oppenheimer. CP 18. In addition, senior Oppenheimer personnel became Tremont executives. CP 19. Through these structural changes, Oppenheimer and its parent MassMutual ensured they had ultimate control over the manner of Tremont's investment strategy. CP 18-19. Through these and other changes, MassMutual and Oppenheimer ensured they had the power to control Tremont's policies and procedures, including the manner in which the Rye Funds invested. CP 20. Accordingly, MassMutual and Oppenheimer had the power to control the Rye Funds' investments with Madoff. CP 20.

3. MassMutual and Oppenheimer Held Tremont Out as Their Agent.

MassMutual, Oppenheimer and Tremont manifested their principal-agency relationship in many ways. Tremont stated publicly that MassMutual and Oppenheimer were control persons over Tremont. CP 19. Tremont put "An Oppenheimer Funds Company" on its stationary and marketing materials. *Id.*

Moreover, MassMutual began to market Tremont as its agent, listing it in its annual reports as "one of MassMutual's worldwide 'General Agencies and Other Offices,'" and listing Tremont and the Rye Funds as approved investments for its high net worth individuals. CP 19-20. These manifestations led FutureSelect to believe that Tremont was acting as MassMutual's and Oppenheimer's agent. CP 41.

4. The Complaint Alleges Actual Control.

The Complaint alleges not only that Defendants publicly admitted that MassMutual and Oppenheimer were control persons over Tremont, it alleges that MassMutual and Oppenheimer actively participated in the very decisions giving rise to this Complaint. The Complaint alleges that MassMutual and Oppenheimer controlled the "manner in which Tremont solicited its investment business." CP 17-18 ¶63. Moreover, MassMutual and Oppenheimer "directed and influenced the management of" Tremont, so much so that they could have prevented the losses in this case. CP 18 ¶¶63-64.

C. The Auditor: EY

Tremont and MassMutual knew that the Rye Funds would be much more attractive investments if the funds' financial statements were audited by reputable, well-known auditors, so they hired EY as the funds' auditor from 2000 through 2003.[2] CP 20, 23-24.

1. EY Knew that FutureSelect Was Receiving the Audited Financial Statements.

EY knew its audits were being used to solicit FutureSelect's investment in Washington. CP 10, 20, 21, 23-25. Each audit was addressed to the "Partners" of the fund, which EY knew included FutureSelect in Washington. CP 23-25. In fact, for each audit, EY sent to FutureSelect in Washington requests for confirmation of FutureSelect's investments in the Rye Funds. CP 23 ¶89.

2. EY Made False and Misleading Statements.

EY's opinions misrepresented that it had conducted its audits in conformity with Generally Accepted Auditing Standards ("GAAS"), and falsely stated that the Rye Funds' financial statements were "free of material misstatement" and were in accordance with generally accepted accounting principles ("GAAP"). CP 21, 23-25. In fact, EY missed the

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[2] KPMG was the funds' auditor from 2004 through 2007.

largest misstatement in history. Each year EY certified that the Rye Funds' assets were real, however, no assets existed. CP 23, 25. These untrue statements were made negligently, and were substantial factors contributing to FutureSelect's investment in the Rye Funds. CP 24, 26-27, 36-38.

3. EY Was Negligent and Violated Its Professional Duties.

EY's job was to verify that the hundreds of millions of dollars the Rye Funds claimed to have under the management of Madoff were real and properly valued. CP 21, 27. EY could not perform the tests required under GAAS at Tremont, however, because Tremont's entire investment was in Madoff, and Madoff prepared and controlled all of the information regarding the investments. CP 27. Because Madoff had control over these assets, the auditors could either obtain assurance that they could rely on Madoff's information or audit Madoff's own operations—they did neither. CP 27.

EY did not perform the testing it was required to under GAAS. CP 27. Because the auditors failed to do so and because they had no basis to rely on the information supplied by Madoff, EY had insufficient audit evidence to conduct the audits and issue its unqualified opinions on the Rye Funds' financial statements. CP 28. In fact, if EY had performed the required procedures, it would have discovered the Madoff fraud. CP 29-30.

EY was grossly negligent when it certified that the Rye Funds had hundreds of millions of dollars—ultimately over a billion—in assets when, in fact, Madoff stole all the money invested in those funds. CP 24, 26-27. The funds never had any of the assets EY certified as real. CP 24.

D. FutureSelect Relied on the Madoff Defendants' Representations and Lost Millions.

From the inception of FutureSelect's investments in 1998, through 2008, FutureSelect relied in Washington on Tremont's assertions in maintaining investments and in making new investments in the Rye Funds. CP 13-14, 32, 42-43. From the time of FutureSelect's initial investment in Tremont until the discovery of the Madoff fraud, FutureSelect received—at its offices in Washington—and relied on the Rye Funds' audited financial statements when making its investments. CP 5-6, 8, 20, 37, 39, 46-47. FutureSelect relied on EY's statements and took great comfort in knowing that Tremont was audited by a prestigious "Big 4" auditing firm, EY, and that Tremont was performing due diligence on and monitoring Madoff. CP 13-14, 30-31. Unlike the Madoff Defendants, FutureSelect had no access to Madoff's information and could not perform any of the due diligence and oversight itself. CP 10, 13-14.

FutureSelect justifiably relied on the Madoff Defendants' false representations, and as a result had approximately $195 Million invested in the Rye Funds that was, in fact, worthless. CP 2, 23-24, 31-32, 43.

E. FutureSelect's Claims

FutureSelect filed its Complaint where it resides, where it was solicited, where it was lied to, where it relied on those lies, and where it was injured—in Washington. The Complaint alleges claims against Tremont for negligent misrepresentation and negligence. It seeks to hold Oppenheimer and MassMutual liable for those acts on theories of actual agency and apparent agency. In addition, the Complaint alleges a violation of the Washington State Securities Act ("WSSA") against Tremont, and seeks to hold Oppenheimer and MassMutual liable as "control persons" under the WSSA. The Complaint alleges claims against EY for violations of WSSA and for negligent misrepresentation.

F. Motions to Dismiss

The Madoff Defendants moved to dismiss FutureSelect's claims on the grounds that they should be brought in federal court in New York, where a class action involving investors in Tremont was then pending. CP 82-85, 574-78, 853, 873-76. In the alternative, the Madoff Defendants sought to stay the action on the same grounds, and also argued lack of personal jurisdiction, *forum non conveniens* and failure to state a claim. CP 70-85, 588-593, 839-852, 876-87, 900-17.

On June 3, 2011, in a departure from decisions involving investors' claims against the Madoff Defendants around the country,[3] the King County Superior Court granted Tremont's, Oppenheimer's, MassMutual's and EY's motions to dismiss, signing dismissal orders identical to those submitted by the Madoff Defendants. CP 3343-57. The dismissal orders do not state the basis on which the trial court's decisions were made. CP 3343-57. FutureSelect filed a notice of appeal on June 16, 2011. CP 3360-87. Respondents filed motions to dismiss the notice of appeal. The appeal was dismissed on November 21, 2011. FutureSelect subsequently filed a motion for entry of final judgment pursuant to Civil Rule 54(b).

[3] This is not the only suit by an investor against the Madoff Defendants; in fact, they have made the exact same arguments in numerous courts to avoid liability – unsuccessfully. *See White v. Manzke*, 2011 WL 1021362 (Cal. Ct. App. 2d Dist. Mar. 23, 2011) (reversing dismissal of investors' claims on *forum non conveniens* grounds in action against the Rye Funds, Tremont, Oppenheimer and MassMutual relating to defendants' failure to conduct proper due diligence on Madoff); *KPMG LLP v. Cocchi*, 51 So.3d 1165 (Fla. Dist. Ct. App. 2010) (affirming denial of KPMG's motion to dismiss Tremont investors' negligent misrepresentation and fraud claims as derivative and on *forum non conveniens* grounds in favor of the consolidated New York action), *vacated and remanded on other grounds* __ U.S. __, 132 S. Ct. 23, 181 L. Ed. 2d 323 (2011). *See also Askenazy v. Tremont Group Holdings, Inc.*, 2012 WL 440675 (Mass. Super. Ct. Jan. 26, 2012), at *12-14 (denying motions to dismiss investor state securities and negligent misrepresentation claims against Tremont Defendants and auditor). FutureSelect recognizes that *Manzke* is an unpublished California case that ordinarily should not be cited under GR 14.1. FutureSelect references it here because the Madoff Defendants cited the trial court decision in support of their motions to dismiss—which subsequently was reversed in an unpublished opinion.

CP 3388-3400. None of the Respondents opposed entry of those findings, and FutureSelect's motion was granted on December 14, 2011. FutureSelect timely filed this appeal on December 23, 2011. CP 3408-3437.

IV. STANDARD OF REVIEW

A motion to dismiss under Civil Rule 12(b)(6) may be granted "only if it appears beyond doubt that the plaintiff cannot prove any set of facts, consistent with the complaint, justifying recovery." *Hipple v. McFadden*, 161 Wn. App. 550, 556-57, 255 P.3d 730, 733 (2011). *See also McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101, 233 P.3d 861, 862-63 (2010) (refusing to change the standard for dismissing a Civil Rule 12(b)(6) motion despite the United States Supreme Court's recently altered and more stringent interpretation of the corresponding Federal Rule of Civil Procedure.). The Court of Appeals reviews rulings on motions to dismiss for failure to state a claim upon which relief can be granted de novo. *Hipple*, 161 Wn. App. at 556; *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230, 1233-34 (2005).

V. SUMMARY OF ARGUMENT

Washington law applies to these claims of Washington citizens, who were solicited by the Madoff Defendants in Washington using misrepresentations made in Washington in violation of Washington law that caused injury in Washington. The Washington State Securities Act ("WSSA") was designed to protect investors just like FutureSelect.

Because the Superior Court dismissed the Complaint with prejudice, by law that dismissal could not have been based on the priority of action rule or *forum non conveniens*, which require that the dismissal be without prejudice to permit filing in another forum. In any event, there was no identity of parties with a New York federal class action and no grounds to require these Washington citizens to travel across the country to file and pursue their claims.

FutureSelect has pleaded every element of every claim in its Complaint. As to the WSSA, FutureSelect specifically pleaded that it relied on Tremont's misstatements and Tremont's reliance on documents outside the Complaint cannot contradict the allegations of the Complaint, which must be taken as true. The Complaint also pleads that EY was a substantial contributive factor to FutureSelect's investments, and thus EY's argument that it is not a "seller" under the WSSA is irrelevant. Whether EY was a substantial contributive factor is a question of fact, and like EY's argument that it performed "routine services" despite the contradictory allegations of the Complaint, cannot be resolved on a motion to dismiss.

The Complaint specifically pleads that Oppenheimer and MassMutual are control persons under the WSSA, including that they admitted they were control persons in publicly filed documents and controlled the actual investments at issue in this case. Similarly, the Complaint pleads, in detail, that Oppenheimer and MassMutual had the right to control Tremont, the touchstone of agency, including with respect to the very investments at issue. Based on Washington's long-arm statute, jurisdiction is proper over Oppenheimer because jurisdiction concededly is proper over its agent, Tremont.

The Complaint likewise pleads all elements of FutureSelect's negligence claim against Tremont and its negligent misrepresentation claims against EY and Tremont. Tremont again sought to rely on documents outside the Complaint, in this case unsigned limited partnership agreements, to dispute the Complaint's allegations. This tactic fails on a motion to dismiss. The Complaint also specifically pleads that EY knew that FutureSelect was relying on EY's audits to invest—EY addressed its audits to FutureSelect and sent confirmations of FutureSelect's investments directly to FutureSelect in Washington—and pleaded that EY proximately caused FutureSelect's losses.

FutureSelect's claims are direct, not derivative, because they are based on misrepresentations and non-disclosures. Other Courts addressing these same issues have so held.

VI. ARGUMENT

A. Washington Law Applies.

Washington (and not New York) law governs FutureSelect's claims. To determine which law applies, Washington courts apply the "most significant relationship" test and consider which contacts are most significant and where those contacts took place. *Johnson v. Spider Staging Corp.,* 87 Wn.2d 577, 580-81, 555 P.2d 997, 1000 (1976). When significant contacts are evenly balanced, courts will next evaluate "the interests and public policies of the concerned states, to determine which state has the greater interest in determination of the particular issue." *Zenaida-Garcia v. Recovery Sys. Tech., Inc.*, 128 Wn. App. 256, 260-61, 115 P.3d 1017, 1020 (2005) (citing *Myers v. Boeing Co.*, 115 Wn.2d 123, 133, 794 P.2d 1272, 1278 (1990)). Although the Court need not reach the respective public policies of Washington and New York, any test favors application of Washington law.

1. Washington Has the "Most Significant Relationship" to FutureSelect's Claims.

Every meaningful relationship in this action is with Washington. The FutureSelect entities are domiciled and have their principal place of business in Washington. CP 5-6. They received the Madoff Defendants' representations in Washington and acted in reliance upon those representations in Washington. CP 8-14, 20-21, 30-31. Their injury was suffered—and continues to be suffered—in Washington. CP 2-3, 31-32, 38-39, 43, 46-47.

Washington courts follow the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971), *Johnson*, 87 Wn.2d at 580-81, and more specifically, Restatement §148 concerning misrepresentation claims such as those at issue here. *See Careideo v. Dell, Inc.*, 706 F. Supp. 2d 1122, 1129 (W.D. Wash. 2010) (considering both §145 and §148). Under the Restatement and therefore Washington law, when the plaintiff acted in reliance upon the defendant's representations in a single state, here Washington, this state will usually be the state of the applicable law if: (a) the defendant's representations were received by the plaintiff in this state, or (b) this state is the state of the plaintiff's domicile or principal place of business. RESTATEMENT (SECOND) CONFLICTS OF LAW § 148(2) cmt. j (1971). Although only one is enough, in this case *both* are true: FutureSelect received Defendants' misrepresentations in Washington *and* Washington is FutureSelect's principal place of business. Washington law therefore applies.

Moreover, FutureSelect was solicited by Tremont in Washington. CP 9-10. When investors are solicited in Washington and specific representations are made to them in Washington, Washington law applies. *See, e.g., Ito Int'l Corp. v. Prescott, Inc.*, 83 Wn. App. 282, 921 P.2d 566 (1996) (concluding Washington law applied to plaintiffs' securities-related claims, in part because investors were solicited in Seattle). *See also Peterson v. Graoch Assoc. #111 Ltd. P'ship*, 2012 WL 254264 (W.D. Wash. Jan. 26, 2012), at *3 (holding in a WSSA case, "[i]f both Washington and the other jurisdiction have 'significant contacts with the transaction, . . . public policy favors the application of Washington law.'") (quoting *Ito Int'l Corp)*.

Finally, under Section 148, when a plaintiff takes action in Washington in reliance on a defendant's misrepresentation made elsewhere, the court considers: (a) the place where the plaintiffs acted in reliance upon the defendant's representations; (b) the place where the plaintiff received the representations; (c) the place where the defendant made the representations; and (d) the domicile and place of business of the parties. RESTATEMENT (SECOND) CONFLICTS OF LAW § 148(2) (1971).

The only factor favoring New York is that some of the Madoff Defendants are domiciled there. But the Madoff Defendants' state of residence is not the decisive factor in the significant relationship test. In determining which state has the most significant contacts, "[t]he domicile, residence and place of business of the plaintiff are more important than are similar contacts on the part of the defendant." Section 148, cmt. i. Thus, even considering domicile, the majority of the "significant relationships" are with Washington. Accordingly, Washington law applies to FutureSelect's claims against all of the Madoff Defendants. CP 1645-47, 1665-67, 1758-62, 1783-86.

2. Washington's Interest and Public Policies Favor Application of Washington Law.

The very purpose of the Washington State Securities Act demonstrates Washington law must apply here. The primary goal of the WSSA is to protect Washington investors. *Haberman v. WPPSS*, 109 Wn.2d 107, 125-26, 744 P.2d 1032, 1047 (1987). FutureSelect consists of Washington investors who the Complaint alleges were solicited in Washington and were induced to invest in Washington by misrepresentations made in Washington. CP 5-14, 20-21, 30-31.

Underscoring the state's interest in applying the WSSA, a Washington appellate court refused to apply a contractual choice of law clause because of Washington's "strong interest in applying its securities act to a partnership involving several Washington defendants, Washington plaintiffs, and property located in Washington." *Ito Int'l Corp.*, 83 Wn.

App. at 288. Applying Washington law in this action furthers the state's interest in and policies supporting protecting investors. *See, e.g., Cellular Eng'g, Ltd. v. O'Neill*, 118 Wn.2d 16, 23, 820 P.2d 941, 945 (1991).

Moreover, New York law does not allow a private right of action for securities violations. Accordingly, application of that law would deprive Washington investors of any private remedy and would wholly undermine Washington's interest in providing a remedy for injured Washington investors.

Following Defendants' argument would mean that the WSSA will rarely protect Washington investors, which would directly undermine the Act itself. The Madoff Defendants argued that New York law applied because some of them were from New York and New York is where the investment markets are. But this logic would mean that the WSSA could never protect Washington investors because Washington is not where the New York Stock Exchange or other major exchanges are. But the WSSA protects Washington investors who are solicited in Washington and lied to in Washington, and the fact that New York hosts the securities markets does not change that.

Therefore, under both Restatement and public policy principles, Washington law applies to FutureSelect's claims.

B. The Superior Court's Dismissal With Prejudice Could Not Have Been Based on Forum Grounds.

1. The Superior Court's Dismissal With Prejudice Means It Was Not Based on Forum Grounds.

The Madoff Defendants argued first, and principally,[4] that the existence of a federal class action in New York precludes this Washington action under the "priority of action" rule or *forum non conveniens*. That is simply wrong under Washington law, but in any event could not have been the basis for the Superior Court's decision because the dismissal was with prejudice. CP 3343-57; JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE§ 14.8 (4th ed. 2005) (assuming that a dismissal is with prejudice unless the trial court specifies that the dismissal is without prejudice, following the rule in the federal courts). Actions dismissed on *forum non conveniens* or "priority of action" grounds must be without prejudice to allow the actions to be filed in the appropriate forum. *See, e.g., Sales v. Weyerhauser Co.*, 163 Wn.2d 14, 21, 177 P.3d 1122, 1125 (2008) (courts may dismiss an action in favor of a more convenient forum subject to a stipulation that the defendant submit to jurisdiction in that forum as a condition on the dismissal) (quoting *Myers*, 115 Wn.2d at 128). *See also Arrow Gear Co. v. Downers Grove*

[4] The argument that the "priority of action" rule precludes this action in favor of a federal New York action was raised first by Tremont in its Motion to Dismiss and incorporated by reference by MassMutual, then all Madoff Defendants relied on that argument during the hearing on the motion to dismiss.

Sanitary Dist., 629 F.3d 633 (7th Cir. 2010) (if the basis for dismissal is *forum non conveniens*, it is a dismissal without prejudice that does not extinguish the claim but does expel it from the court in which it was filed.); *Moyers v. Moyers*, 284 S.W.3d 182 (Mo. Ct. App. 2009) (same); *Stidam v. Butsch*, 783 N.E.2d 935, 151 Ohio App. 3d 202 (Ohio Ct. App. 2002) (same).

Because the Madoff Defendants did not appeal this decision, it cannot form the basis to affirm the dismissal orders. *See, e.g., Bushong v. Wilsbach*, 151 Wn. App. 373, 376, 213 P.3d 42, 44 (2009); *West v. Port of Olympia*, 146 Wn. App. 108, 120, 192 P.3d 926, 932 (2008). No dismissal could have occurred on forum grounds.

2. FutureSelect's Action is Not Precluded by the Priority of Action Rule.

In addition, the "priority of action" rule does not apply. That rule provides that if "two cases involve identical subject matter, parties and relief," the first-filed case has priority. *Civil Serv. Comm'n v. City of Kelso*, 137 Wn.2d 166, 177, 969 P.2d 474, 480 (1999). *See also American Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 317, 796 P.2d 1276 (1990). The priority of action rule does not apply here because there are no identical parties.

Here, the Madoff Defendants argued that *In re Tremont Securities Law, State Law, and Insurance Litigation*, a class action pending in Federal Court in New York, had priority. That was wrong because FutureSelect opted out of the class action, and therefore there is no identity of parties. *See, e.g., Aguirre v. AT&T Wireless Serv.*, 109 Wn. App. 80, 33 P.3d 1110 (2001) (by opting out of a class action, a claimant preserved her right to pursue a separate action against the defendant.); *see also Sarasota Oil Co. v. Greyhound Leasing & Fin. Corp.*, 483 F.2d 450, 452 (10^{th} Cir. 1973).

Similarly, the Madoff Defendants argued below that one of the four plaintiffs in this Washington action—Prime Advisor—had been named as a derivative plaintiff in the *In re Tremont* action. CP 69, 576-77. However, the Prime Advisor derivative claim was dismissed and Prime Advisor is not a party.

Finally, because the New York action has ended with a court-approved settlement, the priority of action rule, if it was ever relevant, is moot. *See Frank v. United Airlines, Inc.*, 216 F.3d 845, 852 (9th Cir. 2000) ("[C]lass members in a Rule 23(b)(3) class may be bound to the result of that action only if the notice and opt-out requirements applicable to Rule 23(b)(3) actions are satisfied.").

3. The Madoff Defendants' *Forum Non Conveniens* Argument Is Insufficient to Overcome FutureSelect's Choice of Forum.

Just as other courts looking at the same issues in Madoff cases have decided, *forum non conveniens* is not a ground for dismissal.[5] In analyzing *forum non conveniens* arguments, a Washington court "begins with the principle that a plaintiff's choice of forum should rarely be disturbed." *J.H. Baxter & Co. v. Central Nat. Ins. Co. of Omaha*, 105 Wn. App. 657, 661, 20 P.3d 967, 970 (2001). A plaintiff's choice of a Washington forum is entitled to great weight, particularly if the plaintiff is a Washington resident. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56, 102 S. Ct. 252 (1981). Washington courts then balance a number of private and public interest factors to determine whether that presumption can be overcome. Unless these factors "strongly favor" the alternative forum, the *forum non conveniens* motion should be denied. *Johnson*, 87 Wn.2d at 579.

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[5] *See White v. Manzke*, 2011 WL 1021362 (Cal. Ct. App. 2d Dist. Mar. 23, 2011) (finding trial court abused its discretion in staying the action pending resolution in a New York forum and "permitting this action involving California plaintiffs and California law to proceed in the state where defendants [Tremont, Oppenheimer and MassMutual, *inter alia*,] marketed their products"); *Cocchi*, 51 So.3d at 1169 (denying KPMG's motion to dismiss on *forum non conveniens* grounds where fact that the witnesses and documents relating to KPMG's Tremont audits were all in New York did not overcome the strong presumption in favor of a resident plaintiff's choice of forum).

Private interests favor retaining this matter in Washington. First, the relative means of the parties favor Washington and the locations of witnesses and documents favor Washington because the claims arise from acts and omissions that took place in Washington, pursuant to contracts with Washington residents. CP 5-6, 8-14, 20-21, 30-31. Second, public interest factors favor Washington because of Washington's strong interest in enforcing its own securities laws. New York has no interest in applying the laws of Washington to securities claims.

Other courts addressing similar *forum non conveniens* arguments have affirmed keeping the case in the plaintiff's chosen forum. In *Cocchi*, 51 So.3d at 1169, a Florida appeals court upheld the trial court's denial of KPMG's motion to dismiss on *forum non conveniens* grounds. KPMG's argument that defense witnesses and documents were all in New York did not overcome the strong presumption favoring a resident plaintiff's forum of choice. *Id.* Similarly, in *White v. Manzke*, 2011 WL 1021362 (Cal. Ct. App. 2d Dist. Mar. 23, 2011), a California appellate court reversed the trial court's decision staying Rye Fund investors' actions against Tremont, Oppenheimer and MassMutual on *forum non conveniens* grounds. EY relied on the *Manzke* trial court opinion in its motion to dismiss, arguing the case was "just like this one." CP 84-85 (citing *White Trust v. Schulman*, No. LC083957 (Cal. Super. Ct. Los Angeles Co., Nov. 30, 2009). Now that the California Appellate Court has held that *forum non conveniens* does **not** apply in a case, in Respondent EY's words "just like this one," by EY's own admission *forum non conveniens* does not apply to this case.

C. FutureSelect Stated Claims for Violation of the WSSA.

As noted above under the Standard of Review, the standard for assessing a Rule 12(b) motion was recently reaffirmed in *McCurry*, 169 Wn.2d at 101:

> Under CR 12(b)(6) a plaintiff states a claim upon which relief can be granted if it is possible that facts could be established to support the allegations in the complaint. *See Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978) ("On a [CR] 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff's allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim."); *Christensen v. Swedish Hosp.*, 59 Wn.2d 545, 548, 368 P.2d 897 (1962).

Applying this test, FutureSelect stated claims against each of the Madoff Defendants under the WSSA. CP 31-39.

The WSSA makes it unlawful, in connection with the offer, sale, or purchase of any security, directly or indirectly, to make any untrue statement of a material fact or omit to state a material fact). RCW 21.20.010(2). "To establish liability under the WSSA, the purchaser of a security must prove that the seller and/or others made material misrepresentations or omissions about the security, and the purchaser relied on those misrepresentations or omissions." *Stewart v. Estate of Steiner,* 122 Wn. App. 258, 264, 93 P.3d 919, 922 (2004).

1. FutureSelect Properly Alleged that It Relied on Tremont's Statements.

Tremont's sole argument for dismissal of the WSSA claim was that FutureSelect failed to allege reliance on statements made by Tremont. CP 882. However, FutureSelect expressly alleges reliance in its WSSA claim against Tremont: "FutureSelect reasonably and justifiably relied on Tremont's misstatements when it purchased securities in Tremont by investing in the Rye Funds." CP 32. That allegation (and numerous others) compel the denial of Tremont's motion to dismiss the WSSA claim. *See* CP 3, 10, 13-14; *In re Metropolitan Sec. Litig.*, 532 F. Supp. 2d 1260, 1304 (E.D. Wash. 2007).

Tremont argued to the trial court that language in private placement memoranda and subscription agreements for the Rye Funds contradicted FutureSelect's allegations of reasonable reliance. CP 882-84. In fact, that language does not contradict FutureSelect's allegations, but even if it did, the argument was improper on a motion to dismiss because the allegations must be taken as true and it is impermissible to go beyond the facts of the pleading. CP 1779-81; *Berge v. Gorton,* 88 Wn.2d 756, 759, 567 P.2d 187, 189 (1977).

Moreover, "[t]he question of whether a party justifiably relied is a question of fact" and improper to resolve on a motion to dismiss. *Hoel v. Rose,* 125 Wn. App. 14, 18, 105 P.3d 395, 397-98 (2004). *See also Swartz v. KPMG LLP*, 476 F.3d 756, 761-63 (9th Cir. 2007) (reversing dismissal under Washington law because reasonable reliance "is necessarily fact-intensive and involves multiple considerations.").

2. FutureSelect Properly Alleged that EY Is Liable Under WSSA Section 21.20.010.

As the Complaint specifically alleges, EY's audit reports misrepresented that the Rye Funds' financial statements were materially free from fraud or misstatement. The Complaint further alleges that EY's false audit reports were sent to FutureSelect and relied on by FutureSelect in making new investments and maintaining investments in the Rye Funds. CP 4, 20-23. Nonetheless, EY contends that it may not be held liable for its misrepresentations because it is not a "seller" of the security. CP 77-79.

The WSSA is not so limited. Liability under the WSSA is not limited to one who sells securities, but may attach to anyone who was "a substantial contributive factor in the sales transaction" at issue. *See Haberman*, 109 Wn.2d at 130-31 (expanding the scope of "seller" liability under the WSSA).

To determine whether a defendant was a "substantial contributive factor," a court must consider "(1) the number of other factors which contribute to the sale and the extent of the effect which they have in producing it; (2) whether the defendant's conduct has created a force or series of forces which are in continuous and active operation up to the time of the sale, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; and (3) lapse of time." *Id.*

First, as a matter of Washington law and logic, these are issues of fact that cannot be resolved on a motion to dismiss: "Whether a defendant's conduct was a substantial contributive factor is necessarily a question of fact." *Haberman*, 119 Wn.2d at 130-31. Accordingly, it is not appropriate to decide the issue on a motion to dismiss. *See id.; Hoffer v. State*, 110 Wn.2d 415, 430 & n.4, 755 P.2d 781 (1988) (whether defendant is a "substantial contributive factor" was "factual in nature...thereby precluding resolution in a CR 12(b)(6) proceeding"); *Herrington v. David D. Hawthorne, CPA, P.S.,* 111 Wn. App. 824, 833-34, 47 P.3d 567, 572 (2002) (reversing summary judgment because "whether a defendant's conduct was a substantial contributive factor ... is necessarily a question of fact").

Second, the Complaint pleads—repeatedly—facts supporting that

EY's negligence and misrepresentations were a "substantial contributing factor" to FutureSelect's injury. CP 1-4, 13-14, 22-24, 30-31, 37. If EY had done its job and identified the largest corporate fraud in history, that discovery would have impacted FutureSelect's investment in the Rye Funds. CP 30.

EY argued contrary facts to the Superior Court, but contradicting the Complaint cannot defeat a motion to dismiss. *Howell v. Alaska Airlines, Inc.*, 99 Wn. App. 646, 648; 994 P.2d 901, 902 (2000) (all allegations in Complaint accepted as true for purposes of motion to dismiss.). EY argued that its role in the sale of interests in the Rye Funds was limited to "routine professional services" made in connection with an offer, invalidating any claim under the WSSA. CP 78-79. But the Complaint extensively alleges otherwise, therefore defeating that argument on a motion to dismiss. The Complaint alleges that EY went beyond providing routine services by knowingly consenting to Tremont using the Rye Funds' audited financial statements to solicit investors. CP 20, 23, 37. Moreover, EY directly communicated with FutureSelect in Washington in performing its audits, requesting confirmation of its investments in the selected Rye Funds, which demonstrates its knowledge of FutureSelect's investments. CP 23. EY delivered its certification that Rye Funds financial statements were "free of material misstatement" directly to FutureSelect in Washington. CP 23, 37, 45-46.

EY's intentional communications with FutureSelect takes EY's conduct well outside the realm of "routine services" and EY therefore cannot escape liability under the WSSA. *See Metropolitan Sec.,* 532 F. Supp.2d at 1301 ("The natural roles of accountant/auditors and [underwriters] go beyond 'routine services' ... *They serve the additional role of communicating to investors about corporations and their securities.*") (emphasis added).[6]

3. FutureSelect Properly Alleged Control Person Liability Against Oppenheimer and MassMutual Under WSSA Section 21.20.430—Including that the Madoff Defendants Admitted It.

The Complaint alleges that Oppenheimer and MassMutual were the agents and control persons of Tremont and therefore stated a claim, **including alleging that Tremont admitted MassMutual and Oppenheimer were control persons of Tremont in a public document**. CP 15-20. Paragraph 69 of the Complaint alleges that "MassMutual, Oppenheimer and Oppenheimer Funds were listed as 'control persons' of

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[6] In *Metropolitan Securities*, like here, plaintiffs sufficiently pled the auditors' "seller" status and "the fact-intensive question of whether they meet the substantial contributing factor test may not be resolved on a motion to dismiss." *Id.* (citing *Haberman*, 109 Wn.2d at 133). As the court noted, an "independent auditor goes beyond routine services by 'assum[ing] a *public responsibility transcending any employment relationship with the client.*'" *Id.* (emphasis in original) (quoting *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18, 104 S. Ct. 1495 (1984)).

Tremont on Tremont's Uniform Application for Investment Advisors Registration filed with the SEC." CP 18. The Madoff Defendants' own admission that Oppenheimer and MassMutual, as pleaded in the Complaint, states a claim.

Just as fundamentally, the Complaint pleads actual control over by MassMutual and Oppenheimer over Tremont, including control over the very solicitation of FutureSelect to invest in Madoff. CP 17-18 ¶63. Moreover, the Complaint pleads that MassMutual and Oppenheimer actively participated in the decision-making processes and exercised actual, day to day control such that "MassMutual and Oppenheimer directed and influenced the management of [Tremont]." CP 18 ¶64. This control was so pervasive that MassMutual and Oppenheimer "could have prevented Tremont from offering investments with Madoff." CP 18 ¶64. *Cf. Askenazy*, 2012 WL 440675, at *17 (holding that just these kinds of allegations would have pleaded control person liability, but finding them absent from the Complaint in that case).

The Complaint alleges numerous additional facts demonstrating control person liability, including that Madoff was the reason MassMutual and Oppenheimer obtained control over Tremont, that they appointed directors and officers to ensure control, and that they directed Tremont's management and exercised control over the very investments in this case. *See supra* at 6-7 and CP 4, 15, 17-20.

D. FutureSelect States Negligent Misrepresentation Claims Against EY and Tremont.

The elements of negligent misrepresentation claim are: (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages. *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007).

The Complaint pleads every element against EY and Tremont. *See supra* at 9-10; CP 42-43, 45-46.

1. Tremont Is Liable for Its Negligent Misrepresentations.

Tremont did not dispute that FutureSelect's negligent misrepresentation claim was sufficiently pled. *See* CP 877-89. Instead, Tremont improperly sought to dismiss FutureSelect's claims based on exculpation clauses in unsigned limited partnership agreements ("LPAs") extrinsic to the Complaint and that never mentioned FutureSelect. CP 877-89; 1779-81.

Considering the LPAs is improper. "Generally, in ruling on a CR 12(b)(6) motion to dismiss, the trial court may only consider the allegations contained in the complaint and may not go beyond the face of the pleadings." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 189 P.3d 168 (2008). Although a trial court can take judicial notice of facts "not subject to reasonable dispute," *see id.*; ER 201(b), there is no authority for the trial court to have considered the disputed LPAs—unsigned and unexecuted by anybody. CP 1779-81; *Rodriguez*, 144 Wn. App. at 725.

Other courts properly rejected these exact same arguments in a Madoff case—even where executed exculpatory clauses were presented to the Court. *See Cocchi v. Tremont Group Holdings, Inc.*, 2010 WL 2008086 (Fla. Cir. Ct. Feb. 5, 2010) (rejecting precise exculpation argument presented here by Tremont because "[t]he LPAs at issue are neither attached to the [c]omplaint nor referenced by it, and therefore cannot be considered."); *aff'd KPMG LLP v. Cocchi*, 51 So.3d 1165 (Fla. Dist. Ct. App. 2010) (*vacated on other grounds* --- S.Ct. ---, 2011 WL 5299457 (U.S. Fla. Nov. 7, 2011); *see also Askenazy*, 2012 WL 440675, at *11-12 (holding that improper on a motion to dismiss to consider exculpatory clause, an affirmative defense).[7]

[7] Tremont relied exclusively on *Rodriguez* to support its argument that the Court may consider the LPAs, CP 877, but *Rodriguez* only allowed judicial notice to be taken of proxy statements **referenced in the plaintiff's complaint**, and of publicly filed

2. EY Is Liable for Its Negligent Misrepresentations.

a. EY is a Public Watchdog for Washington Citizens.

As to EY, the Complaint again pleads, in detail, numerous negligent misrepresentations. *See supra* at 9-10; CR 20-24, 87-93, 201-08. EY's failure to do its job violated more than its duty to FutureSelect—it violated its duty to the Washington public. As the United States Supreme Court has held, EY as auditor was supposed to act as a "public watchdog":

> By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to investing public. This *"public watchdog" function* demands that the accountant maintain total independence from the client at all times and *requires complete fidelity to the public trust.*

Arthur Young & Co., 465 U.S. at 817-18; *In re Metropolitan Sec. Litig.*, 532 F. Supp.2d at 1301. EY violated its "public watchdog" duty to Washington citizens by its grossly negligent audits, missing the largest fraud in history. CP 21-22, 27-30.

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documents such as the company's registration statements and certificate of incorporation. 144 Wn. App. at 726-28. The court in *Rodriguez* did not—and could not—hold that privately drafted, unexecuted documents such as those here could properly be considered. *Id.* at 728 (error for court deciding motion to dismiss to consider evidence outside the pleadings where facts could not be judicially noticed).

b. The Complaint Alleges EY Directed its Audits to FutureSelect.

EY's contentions under Washington law were that FutureSelect did not allege they are part of a limited group of investors that EY intended to influence and did not allege proximate cause. CP 79-80. This is false. FutureSelect expressly alleges that "EY knew Plaintiffs were receiving and relying on its audits of the funds." CP 23. Moreover, the Complaint alleges that EY addressed its audits to the "Partners" of Rye Funds (one of which was FutureSelect), and EY sent its unqualified audit opinions to FutureSelect in Washington. CP 8, 23. EY knew FutureSelect was within the class of Rye Fund "Partners," because every year it contacted FutureSelect directly in Washington to confirm FutureSelect's investment. CP 23.[8]

EY's argument that it did not know FutureSelect by name, contrary to the allegations in the Complaint that must be taken as true, is not relevant as a matter of law. In order for there to be liability, "it is not necessary that the maker [of the misrepresentation] should have any particular person in mind....It is sufficient...that the maker supplies the information for repetition to a certain group or class of persons and that

[8] Moreover, as the Complaint specifically alleges, EY consented to the use of the audited financials it prepared to solicit investors in the Rye Funds, and intended that Rye Fund investors, such as FutureSelect, would rely on its audits when deciding to maintain and increase their investments in the Rye Funds. CP 20, 37.

the plaintiff proves to be one of them, *even though the maker never had heard of him by name* when the information was given." *Haberman*, 109 Wn.2d at 1068 (quoting RESTATEMENT (SECOND) OF TORTS § 552, cmt. h (1971)) (emphasis added). Accordingly, if auditors know of their client's intent to supply the information to institutional investors to induce the sale of securities, as in this case, those investors "would be part of a limited group which the professionals knew would receive their information and rely on it in making a decision to purchase bonds." *Id. See also Hoffer*, 110 Wn.2d at 428-29 (bondholders sufficiently alleged negligent misrepresentation claim against auditor where auditor knew that the opinion letter containing false statements was intended to reach investors).

The Complaint also alleges—repeatedly and specifically—that EY proximately caused FutureSelect's harm. CP 30 (alleging that had EY undertaken these procedures "and not made material representations in regards thereto, FutureSelect would never have invested in Madoff and never lost tens of millions of dollars"). *See also* CP 27-31; 208.

Under *Haberman*, these allegations subject EY to liability under Washington law. There, the court reversed the lower court's dismissal of negligent misrepresentation claims, finding that the investors had adequately stated claims against certain professionals, including accountants, by alleging they had negligently supplied information regarding their client. *Id.* at 1068. S*ee also Hoffer*, 110 Wn.2d at 429 (reversing dismissal under CR 12(b)(6) of negligent representation claim against auditor where plaintiffs maintained that the auditor had failed to inform them of weaknesses in their investments and had sent letters containing misrepresentations).

E. FutureSelect Stated a Negligence Claim Against Tremont.

The essential elements of negligence are duty, breach, causation, and damages. *Little v. Countrywood Homes, Inc.*, 132 Wn. App. 777, 780, 133 P.3d 944, 946 (2006). As described below, FutureSelect's Complaint pled all elements.

1. FutureSelect's Claim Is Direct, Not Derivative.

Tremont argued to the trial court that FutureSelect's negligence claim was derivative, CP 879-80, but this claim is premised on misrepresentations and non-disclosures and thus is direct under settled law. Numerous courts already have rejected the derivative argument from these exact same Madoff Defendants because claims for misrepresentations are direct, not derivative.

Under Delaware law, which applies to whether a claim is direct or derivative because Tremont is a Delaware partnership, determining whether a claim is direct or derivative turns solely on: (i) whether the corporation or suing shareholders individually suffered the alleged harm, and (ii) whether the corporation suing shareholders would receive the benefit of any remedy. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004). "In every case the court must determine from the complaint whether the claims are direct or derivative and may not rely on either party's characterization." *Anglo American Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 150 (Del. Ch. 2003).

Here, FutureSelect's negligence claim against Tremont is premised on Tremont's misrepresentations. CP 2 ("This lawsuit arises out of Defendants' willingness to misrepresent and omit critical information regarding their due diligence and ongoing oversight of what would turn out to be the largest fraud in history"). *See also* CP 3, 9-15, 31, 42. These misrepresentations were made to FutureSelect, who unquestionably suffered the harm, and to whom the benefit of this litigation will unquestionably go. CP 42. Therefore, FutureSelect's claims are direct. *Albert v. Alex Brown Mgmt. Servs., Inc.*, 2005 WL 2130607 at *12-*13 (Del. Ch. Aug. 26, 2005).[9]

Numerous courts addressing identical claims against Tremont have determined the claims to be direct, not derivative, including after the trial court decision in this case. *See, e.g., Saltz v. First Frontier, LP*, 782 F.

[9] Copy attached as Appendix A. Cited pursuant to Del. Sup. Ct. Rules, Rule 14 (b)(vi)(B)(2) (2012).

Supp. 2d 61, 79-80 (S.D.N.Y. 2010) (investor fraud, negligent misrepresentation and malpractice claims against feeder fund and its auditor were direct to the extent they allege inducement); *Stephenson v. Citgo Group Ltd.*, 700 F. Supp. 2d 599, 610-11 (S.D.N.Y. 2010) (finding Greenwich Sentry feeder fund investors' gross negligence, negligence, and fraud claims direct to the extent "that they allege (1) violation of a duty owed to potential investors at large and (2) that such violations induced plaintiff to invest in [the fund]"). "[R]ecovery on a claim based solely on inducement would only flow to those individuals, such as [Plaintiffs], who were so induced."); *Cocchi*, 51 So.3d at 1166 (negligent misrepresentation and fraud claims involved torts directed at individual limited partners of the Rye Funds and were direct, not derivative).

The court in *Askenazy* recently and specifically held that claims just like those in this case—negligence, negligent misrepresentation, and fraud—are direct, not derivative under Delaware law, the same law that applies here. *See* 2012 WL 440675, at *9. Just like here, the claims in *Askenazy* were that as a result of "misstatements and professional incompetence, [plaintiffs] were induced to invest in the Rye Funds, to stay invested, and in some cases to make additional investments in the Funds." *Id.* The court held that "these claims describe individualized harm independent of harm to the partnership, and rest on a duty to each plaintiff that is not merely derivative." *Id.* (*citing Stephenson v. Citgo Group Ltd.*, 700 F. Supp. 2d 599 (S.D.N.Y. 2010)).

2. FutureSelect Pleaded the Elements of Negligence.

Tremont also argued to the trial court that FutureSelect failed to plead the required elements of negligence. CP 886. This is not accurate. The Complaint alleges that Tremont owed FutureSelect a duty, breached that duty by failing to exercise reasonable care and thereby caused FutureSelect damages. CP 41-42. These allegations state a claim for negligence.

Nonetheless, Tremont argued that FutureSelect had not alleged its actions fell below the standard of care in the industry. CP 886. But the Complaint specifically alleges that Tremont had a duty to use "the competence or skill of a professional investment advisor," and Tremont breached that duty "by negligently failing to manage and oversee the management by Madoff of FutureSelect's investments." CP 4, 14-15, 42. Indeed, courts in New York have upheld *gross* negligence claims against Madoff feeder funds based on similar claims. *See, e.g., Anwar v. Fairfield Greenwich, Ltd.*, 728 F. Supp.2d 372, 414-15 (S.D.N.Y. 2010) ("*Anwar II*").

3. Madoff's Criminal Acts Are Not a Supervening Cause.

Finally, Tremont asserted to the trial court that Madoff's fraud was a supervening cause that should sever its own liability for its actions. CP 886-87. Like Tremont's other arguments, this argument expressly has been rejected by other courts considering claims against Madoff feeder funds because it involves issues of fact that cannot be resolved on a motion to dismiss.

In *Anwar II*, also involving a Madoff feeder fund like Tremont, the court found the defendant feeder fund's "argument that Madoff's fraud was an intervening force that cuts off all liability to them ... without merit;"

> The evaporation of Plaintiffs' investment was directly related to [the fund's] unwillingness or inability to discover and disclose that Madoff was running a Ponzi scheme or at the very least that Madoff was not providing sufficient information to justify [the fund's] trust in him. Though Madoff's fraud forms an essential element of the chain of causation in this case, his theft of the [p]laintiffs' money could not have struck these defendants as a cataclysmic, last minute surprise. The [complaint] sufficiently alleges that the [feeder fund] intentionally or recklessly funneled [p]laintiffs' money to Madoff over time while allegedly ignoring clear signs that they were dealing with a master thief.

728 F. Supp.2d at 412. The court in *Anwar II* rejected this supervening cause argument, finding that liability would depend on whether Madoff's intervening criminal acts were reasonably foreseeable, and "[w]hether or

not Madoff's actions were reasonably foreseeable is a question of fact not proper for resolution at the motion to dismiss stage." *Id.* at 446.[10] As in *Anwar II*, any argument that Madoff's fraud excuses Tremont from liability is a question of fact and not a ground for dismissal at the outset of the action.

F. FutureSelect States Claims Against Tremont Holdings, Not Just Tremont Partners.

FutureSelect brought claims against Tremont, which includes Tremont Group Holdings, Inc. ("Tremont Holdings") and Tremont Partners, Inc. ("Tremont Partners"), and alleges that both these entities made negligent misrepresentations to FutureSelect and induced them to invest in Madoff through the Rye Funds. CP 3-4, 9-15, 31-32, 42-43. Tremont asserted to the trial court that FutureSelect sought to hold Tremont Holdings liable "solely by virtue of its ownership of all of the shares of [Tremont Partners]." CP 887-88. In fact, the Complaint alleges that Tremont Holdings itself committed misconduct. CP 3-4, 9-15, 31-32, 42-43. Although Tremont may seek to dismiss claims against Tremont

[10] Rather than acknowledging *Anwar II*, which is directly on point, Tremont cited in its motion to dismiss cases from other courts it asserted are "nearly identical." In fact, unlike *Anwar II*, none of the cases cited by Tremont in its motion to dismiss actually considered whether a claim for negligence could be dismissed on grounds that Madoff's fraud was a supervening act that severed causation. *See, e.g., Michael S. Rulle Family Dynasty Trust v. AGL Life Assur. Co.*, 2010 WL 3522135, at *5 (E.D. Pa. Sept. 8, 2010) (applying Alaska and Pennsylvania law to dismiss a negligent misrepresentation claim against an insurer—not a feeder fund).

Holdings and Tremont Partners on grounds that it did not commit the relevant misconduct, it cannot do so through a CR 12(b)(6) motion where a plaintiff's allegations must be accepted as true. *Berge*, 88 Wn.2d at 759 ("Factual allegations of the complaint must be accepted as true for purposes of the motion.").

G. FutureSelect States Agency Claims against Oppenheimer and MassMutual.

The Complaint specifically pleads agency. Although Oppenheimer and MassMutual dispute these *facts*, they cannot dispute the *allegations* on a motion to dismiss. *See Berge*, 88 Wn.2d at 759. As a result, the Complaint states a claim of agency.

1. Actual Agency Alleged Against Oppenheimer and MassMutual

a. Right of Control is the Touchstone of Agency.

Oppenheimer and MassMutual should be held liable for the Tremont's negligence and negligent misrepresentations under a theory of agency. CP 39-41. "The two elements of an agency are mutual consent, and control by the principal of the agent." *Uni-Com Northwest, Ltd. v. Argus Publ'g Co.*, 47 Wn. App. 787, 796, 737 P.2d 304, 309 (1987). "The crucial factor is the right to control the manner of performance....It is the existence of the **right to control**, not its exercise, that is decisive." *O'Brien v. Hafer*, 122 Wn. App. 279, 283, 93 P.3d 930, 932 (2004) (emphasis added); *Uni-Com Northwest*, 47 Wn. App. at 796. Whether these elements exist to create "a principal-agent relationship is a question of fact unless the facts are undisputed." *Uni-Com Northwest,* 47 Wn. App. at 796. *See also Jackson v. Standard Oil Co. of Cal.*, 8 Wn. App. 83, 91, 505 P.2d 139, 144 (1972) ("usually the question of control or right of control is also one of fact for the jury.").

b. The Complaint Specifically Alleges Right of Control and Every Other Element with Numerous Supporting Facts.

The Complaint specifically alleges the touchstone of agency, the right of control, and even control itself, *specifically over the investments at issue in this case*: "Upon MassMutual's acquisition of Tremont in 2001, Tremont *came under the control* of Oppenheimer, Tremont's direct parent, and MassMutual, Tremont's ultimate parent. *Their control included the manner by which Tremont offered investments, including the Rye Funds.*" CP 15 (emphasis added). Even more specifically, the Complaint alleges that Oppenheimer's and MassMutual's right of control caused harm to FutureSelect through these Madoff investments. Oppenheimer and MassMutual's "control included the manner in which Tremont solicited its investment business. Thus, MassMutual and Oppenheimer had the right to control Tremont such that they could have prevented Tremont from offering investments with Madoff." CP 17-18. *See also* CP 4, 20 (emphasis added). The Complaint contains numerous other specific factual allegations that explain how the right of control was acquired, how it was exercised, and each element of agency. *See supra* 6-7; CP 39-41.

These allegations are more than sufficient to demonstrate MassMutual's and Oppenheimer's agency relationship with Tremont.[11] *See O'Brien*, 122 Wn.App. at 283.

2. FutureSelect Also Alleged Apparent Agency against Oppenheimer and MassMutual.

FutureSelect also alleges an apparent agency claim against Oppenheimer and MassMutual. CP 40-41. A finding of apparent agency turns on the objective manifestations made by the principal to third parties. *King v. Riveland*, 125 Wn.2d 500, 506-07, 886 P.2d 160, 164-65 (1994). Such manifestations will support a finding of apparent authority if: (1) they cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for the principal; and (2) they must be such that the claimant's actual, subjective belief is objectively reasonable. *Id.*

FutureSelect satisfied these elements. Tremont was marketed as a member of the MassMutual family of companies, which included

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[11] MassMutual had argued in its motion to dismiss that FutureSelect was required to demonstrate "total control" over Tremont for agency liability to trigger. CP 1753-56. However, none of the cases cited by MassMutual required "total control," and, in fact, the *right to control* is all that is needed. *O'Brien*, 122 Wn. App. at 283; *Uni-Com Northwest,* 47 Wn. App. at 796.

Oppenheimer. CP 19-20. MassMutual and Oppenheimer were publicly listed as "control persons" of Tremont. CP 19. "An Oppenheimer Funds Company" was put on Tremont's stationary and marketing materials, and Moreover, MassMutual began to market Tremont as its agent, listing it in its annual reports as "one of MassMutual's worldwide 'General Agencies and Other Offices,'" and listing Tremont and the Rye Funds as approved investments for its high net worth individuals. CP 19-20. In short, Tremont was held out to the public, including FutureSelect, as an agent of MassMutual and Oppenheimer. CP 19. These manifestations led FutureSelect to actually believe that Tremont was acting as Oppenheimer's and MassMutual's agent. CP 40. Based on these manifestations, FutureSelect's belief was objectively reasonable. CP 40.

As with their arguments concerning actual agency, neither Oppenheimer nor MassMutual identified a single Washington court case where an apparent agency claim was resolved in a motion to dismiss. CP 845-46. *See, e.g., Douglass v. Stanger*, 101 Wn. App. 243, 251-52, 2 P.3d 998, 1003 (2000) (affirming summary dismissal of apparent agency claim); *Estep v. Hamilton*, 148 Wn. App. 246, 201 P.3d 331 (2008) (decided on summary judgment); *D.L.S. v. Maybin*, 130 Wn. App. 94, 121 P.3d 1210 (2005) (deciding apparent agency on summary judgment and noting that "[w]hether apparent authority exists is normally a question for the trier of fact"); *Taylor v. Smith*, 13 Wn. App. 171, 534 P.2d 39 (1975) (finding evidence was sufficient to establish apparent agency and affirming court's judgment after trial). FutureSelect stated a claim for apparent agency.

H. FutureSelect's Complaint Made a Prima Facie Showing of Jurisdiction over Oppenheimer.

Oppenheimer was the only party to contest jurisdiction. CP 900-04. Oppenheimer is subject to personal jurisdiction in Washington because the conduct of its agent, Tremont, is imputed to Oppenheimer under the express provisions of Washington's long-arm statute.

Washington's long-arm statute provides that a principal may be subject to specific personal jurisdiction based on the acts of its agents: "Any person, whether or not a citizen or resident of this state, who in person *or through an agent* commits a tortious act within the state will be subject to jurisdiction in Washington's courts." RCW 4.28.185(1) (emphasis added); *see also CTVC of Hawaii, Co., Ltd. v. Shinawatra*, 82 Wn. App. 699, 717 & n.66, 919 P.2d 1243, 1253 (1996) (agent can subject principal to long-arm jurisdiction); *Kreidler v. Pixler*, 2006 WL 3539005, at *7 (W.D. Wash. Dec. 7, 2006) (for purposes of personal jurisdiction, the actions of an agent are attributable to the principal.).

Oppenheimer never disputed that its subsidiary (and agent) Tremont is subject to personal jurisdiction in Washington. Thus, based on the principal-agent relationship, Oppenheimer is subject to jurisdiction in Washington courts. *See* RCW 4.28.185(1).[12]

VII. CONCLUSION

For the reasons above, FutureSelect respectfully requests that this Court reverse the decision of the trial court to grant the motions to dismiss filed by the Tremont Defendants, MassMutual, Oppenheimer and EY. FutureSelect asks that its claims against the Tremont Defendants, MassMutual, Oppenheimer and EY be remanded to the trial court for further proceedings.

Dated: March 15, 2012

Respectfully submitted,

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[12] *Compare Askenazy*, 2012 WL 440675, at *8 (finding jurisdiction over Tremont but not Oppenheimer where there was no agency claim unlike here).

APPENDIX A

2005 WL 2130607

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

Todd ALBERT, Joseph M. Bryan, Jr., Kevin Calderwood, Katherine D. Crothall, Scott W. Frazier, FU Family Revocable Trust, Robert B. Goergen, Sr., Robert G. Goergen, Jr., Todd A. Goergen, Hasan 1995 Living Trust, Wai Yan Ho, Willis James Hindman, Johnson Family Living Trust, Michael R. Kidder Revocable Trust, Mark and Ann Kington, Jeffrey A. Koser, Marlenko Inc., Elaine McKay Family, LP, David Mixer, MRW Trust, James Murray, Jim K. Omura 1996 Trust, Jennifer Owen and Michael J. Ross, Nicholas Peay, Douglas G. Smith, Frederick G. Smith, Jane Vei-Chun Sun, Mark Wabschall, Karen L. Walsh, Warmenhoven 1995 Children's Trust, Yan 1996 Revocable Trust, Barbara J. Zale, and Charles A. Ziering, Plaintiffs,

v.

ALEX. BROWN MANAGEMENT SERVICES, INC.; Deutsche Bank Securities, Inc.; Deutsche Bank, AG; Richard Hale; Gary Fearnow; Bruns Grayson; E. Robert Kent, Jr.; Truman T. Semans; DC Investment Partners, LLC; Doctor Robert Cants, III; and Michael W. Devlin, Defendants.

Elizabeth J. BAKER, Bender 1996 Revocable Trust, Dr. Steven J. Berlin, Estate of Robert B. Blow, Luther C. Boliek, Stephen E. Coit, Sara Crowder, Gerald K. and Teresa K. Fehr, FU Family Revocable Trust, Ralph Glasgal, Robert G. Goergen, Jr.1985 Trust, Todd A. Goergen 1985 Trust, Peter O. Hausmann, Willis James Hindman, William F. Kaiser, Mark and Ann Kington, Timothy K. Krauskopf, William T. McConnell, Philip R. McKee, David Mixer, MRW Trust, James Murray, Paul D. and Judith F. Newman, W.L. Norton, Gregory Packer, Howard E. Rose, Ruben Family Limited Partnership, 5 S Trust, Saladrigas Family Ltd. Partnership, Ricardo A. Salas, Jose M. Sanchez, Samuel Siegel, Silverman 1996 Irrevocable Trust, Douglas G. Smith, Frederick G. Smith, Ronald B. Stakland, Strauch Kulhanjain Family Trust, Bruce E. Toll, Alexander R. and Marjorie L. Vaccaro, Yanover Family Ltd. Partnership, Michael Yokell, and Justin A. Zivin, Plaintiffs,

v.

ALEX. BROWN MANAGEMENT SERVICES; Deutsche Bank Securities, Inc.; Deutsche Bank, AG; Richard Hale; E. Robert Kent, Jr.; Truman T. Semans; DC Investment Partners, LLC; Doctor Robert Crants, III, and Michael W. Devlin, Defendants.

No. Civ.A. 762-N, Civ.A. 763-N. | Submitted July 22, 2005. | Decided Aug. 26, 2005.

Attorneys and Law Firms

Jeffrey S. Goddess, Jessica Zeldin, Rosenthal, Monhait, Gross & Goddess, P.A., Wilmington, Delaware; Steven E. Fineman, Hector D. Geribon, Daniel P. Chiplock, Lieff, Cabraser, Heimann & Bernstein, LLP, New York, New York, for the Plaintiffs.

Michael D. Goldman, Peter J. Walsh, Jr., Melony R. Anderson, Potter Anderson & Corroon LLP, Wilmington, Delaware; Christopher P. Hall, Kevin Rover, John Vassos, Marilyn B. Ampolsk, Morgan Lewis & Bockius, LLP, New York, New York, for the Defendants Alex. Brown Management Services, Inc., Deutsche Bank Securities, Inc. and Deutsche Bank A.G.

Daniel Griffith, Marshall Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware, for Defendants DC Investment Partners, LLC, Dr. Robert Crants, III, and Michael W. Devlin.

Richard D. Allen, Thomas W. Briggs, Jr., Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for Defendants Richard Hale, Gary Fearnow, Bruns Grayson, E. Robert Kent, Jr. and Truman T. Semans.

Opinion

MEMORANDUM OPINION

LAMB, Vice Chancellor.

I.

*1 In a recent opinion in these two related cases on the defendants' motion to dismiss under Court of Chancery

Rule 12(b)(6), the court addressed the defendants' statute of limitations argument and concluded that any claims arising before November 11, 2000, the date upon which the parties entered into an agreement tolling the statute of limitations, were barred.[1] Because it was unclear which, if any, claims for relief set out in the complaints arise after that date, the court requested additional submissions from the parties.

In this opinion, the court now addresses the issues raised in the additional submissions as well as the remaining issues raised by the defendants' motion to dismiss. Included among the latter are: (i) whether any surviving claims are derivative, rather than direct claims as to which demand was neither made nor excused; and (ii) whether the court can exercise personal jurisdiction over several defendants (the "DCIP Defendants") who served as agents, or employees of agents, of the partnerships.

II.

In the earlier opinion, the court noted that some of the factual allegations in the complaints occurred after November 11, 2000 and that, therefore, viable claims based on these factual allegations are not time-barred.[2] The Plaintiffs' Response Brief[3] identified five other factual allegations in the complaints (all involving allegedly material misrepresentations or non-disclosures) which, they contend, support viable claims for relief. These are: (i) the Managers' failure in the December 2000 semi-annual reports (dated on or about February 28, 2001) to inform the defendants that hedging was desirable, but the Funds could not afford to do so; (ii) the allegedly misleading statement in the December 31, 2000 report to the unitholders that the Managers remained "comfortable with the broad diversification achieved by the Fund[s'] portfolio of public securities and private investments ....;" (iii) the defendants' failure to inform the unitholders of the Funds' "liquidity issues," "steps that the management could take to improve liquidity," and "alternatives to raise additional liquidity," although these themes were the focus of the Management Committee meetings of October 3, 2000, March 23, 2001, and September 6, 2001; (iv) the defendants' failure to inform the unitholders that, in June of 2001, AmSouth Bank withdrew from the credit syndicates for the Funds, thereby leaving Bank of America as the only lender for the Funds; and (v) the defendants' failure to inform the unitholders of the Funds violation of their credit arrangements with their lenders, including their eventual defaults, on June 5, 2002 (for the Fund I loan), and June 28 and September 30, 2002 (for the Fund II loan).

All five of these factual allegations are found in the complaints. Furthermore, they allegedly occurred after November 11, 2000. Therefore, claims based on these allegations are timely. However, a threshold question is whether the information that the plaintiffs allege should have been disclosed, or was disclosed but was allegedly false and misleading, is material. If this information is not material as a matter of law, the allegations will not support claims that the Managers violated their disclosure duties.

***2** The determination of materiality is a mixed question of fact and law that generally cannot be resolved on the pleadings.[4] Therefore, the court cannot (and does not) make any final findings on the materiality of these alleged disclosure allegations. However, on a Rule 12(b)(6) motion, the court must determine whether, under the facts alleged in the complaints, these disclosure (or non-disclosure) allegations support a reasonable inference of materiality. If they do not, these factual allegations cannot support a claim for relief.

An omitted fact is material if "under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[5]

The first alleged non-disclosure is that the Managers' failed in the December 2000 semi-annual reports to inform the unitholders that hedging was desirable, but the Funds could not afford to do so. This allegation of non-disclosure, viewed in the context of the allegations contained in the complaints, supports a reasonable inference that this information is material. According to the complaints, the defendants marketed the Funds as being actively managed by experienced, professional managers. Viewed in this context, a unitholder would likely find it important to know that the Managers could not manage the Funds in what they believed to be the Funds' best interests, because they were facing liquidity problems and could not afford to purchase collars.

The second alleged non-disclosure is that the defendants failed to inform the unitholders of the Funds' "liquidity issues," "steps that the management could take to improve liquidity," and "alternatives to raise additional liquidity." As alleged in the complaints, the real cause of the Funds' losses was the lack of liquidity. The lack of liquidity allegedly prevented the Managers from properly hedging the Funds as they (allegedly) thought was best for the Funds. Viewed in that context, a reasonable investor would likely find it important to know such information.

The third alleged non-disclosure is that the defendants failed to inform the unitholders that, in June of 2001, AmSouth Bank withdrew from the credit syndicates for the Funds, thereby leaving Bank of America as the only lender for the Funds. Under the facts alleged, the court cannot reasonably infer that this information is material. The complaints allege that the unitholders understood from the very beginning that the Funds would have to borrow money. This is because the contributed securities were illiquid and the Funds needed cash to purchase collars. Given that fact, it is unlikely that a reasonable investor would find it important to know that the Funds were borrowing from one lender as opposed to multiple lenders. In fact, such information would likely only confuse an investor by giving him more information than is necessary to understand the Funds. Therefore, the plaintiffs cannot bring any claims based on this factual allegation.

***3** The fourth alleged non-disclosure is that the defendants failed to inform the unitholders of the Funds' violations of the credit arrangements with their lenders, including the eventual defaults, on June 5, 2002 (for the Fund I loan), and June 28 and September 30, 2002 (for the Fund II loan). This allegation supports a reasonable inference of materiality. As opposed to the information about a bank withdrawing from the credit syndicate, the fact that the Funds were in default on their loans directly speaks to the financial condition of the Funds. A reasonable investor would want to know this information.

Finally, the plaintiffs allege that the claim in the December 31, 2000 report that the Managers remained "comfortable with the broad diversification achieved by the Fund[s'] portfolio of public securities and private investments" was materially false and misleading. This allegation does *not* support a reasonable inference that this information is material. It is simply a statement of the Managers' opinion. Furthermore, there is no allegation in the complaints that this statement of opinion was not honestly held, i.e. false. Therefore, the plaintiffs cannot bring any claims based on this factual allegation.

The Non-Disclosure Allegations[6] relate to failures to disclose allegedly material information. There is not, of course, any general duty to disclose information. To bring a non-disclosure claim, a party must allege either a fiduciary duty or a contractual duty to disclose. The plaintiffs have attempted to allege both. Therefore, the court will address the Non-Disclosure Allegations in the context of the plaintiffs' claims for breach of fiduciary duty and breach of contract.

III.

The allegations set out in the two complaints are nearly identical and the complaints are both set out in eleven counts: breach of fiduciary duty (Count 1); aiding and abetting a breach of fiduciary duty (Count 2); common law fraud (Count 3); aiding and abetting common law fraud (Count 4); breach of contract against AB Management (with respect to Fund I) and breach of contract against DCIP (with respect to Fund II) (Count 5); breach of the covenant of good faith and fair dealing against AB Management (with respect to Fund I) and breach of the covenant of good faith and fair dealing against DCIP (with respect to Fund II) (Count 6); gross negligence (Count 7); unjust enrichment against all defendants (Count 8); conspiracy liability (Count 9); an accounting (Count 10); and agency liability against Deutsche Bank and DBSI (Count 11). The court first addresses each of the substantive claims (Counts 1, 3, 5-8, & 10). The court then considers the vicarious liability claims (Counts 2, 4, 9, & 11).

A. *Breach Of Fiduciary Duty (Count 1)*

1. *Failure To Provide Financial Statements*

The complaints allege that the Managers failed to provide the unitholders with the 2001 audited financial statements until 2003, and failed to provide any investor reports or audited financial statements for 2002. The plaintiffs argue that this amounted to a breach of the Managers' fiduciary duties.

***4** There is not, of course, a general fiduciary duty to provide financial statements. Instead, under the Partnership Agreements, the Managers had a contractual duty to provide the unitholders with such reports.[7] The plaintiffs have not articulated why the violation of this contractual right amounted to a breach of fiduciary duty.[8] Thus, this factual allegation does not state a claim for breach of fiduciary duty.

2. *Withdrawal Allegations*

The plaintiffs argue that the Managers wrongfully allowed the Fund I December 2000 Withdrawals and the Fund II 2001 Withdrawals. The plaintiffs contend that the defendants violated their fiduciary duties "by failing to ensure that the Funds had 'sufficient financial resources' to accomplish their 'investment objectives,' and failed to ensure that the Managers were providing professional and active supervision, oversight and management of the Funds." [9]

From these factual allegations, the court cannot reasonably infer a breach of the fiduciary duty of loyalty. The complaints do not allege that the Managers benefited personally in any way by allowing the withdrawals. In fact, the amount of fees that the Managers received were based on the amount of money the Funds had under management. Therefore, if anything, the Managers had an incentive *not* to allow redemptions.

Likewise, the plaintiffs' allegations relating to the Fund I December 2000 Withdrawals and the Fund II 2001 Withdrawals do not rise to the level of a breach of the duty of care. Director liability for breaching the duty of care "is predicated upon concepts of gross negligence." [10] A court faced with an allegation of lack of due care should look for evidence of whether a board has acted in a deliberate and knowledgeable way in identifying and exploring alternatives. [11]

Gross negligence has a stringent meaning under Delaware corporate (and partnership) law, one "which involves a devil-may-care attitude or indifference to duty amounting to recklessness." [12] "In the duty of care context with respect to corporate fiduciaries, gross negligence has been defined as a reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." [13] In order to prevail on a claim of gross negligence, a plaintiff must plead and prove that the defendant was "recklessly uninformed" or acted "outside the bounds of reason." [14]

The plaintiffs argue that the Fund I December 2000 Withdrawals and the Fund II 2001 Withdrawals were actionably wrongful. Yet, the plaintiffs specifically allege in the complaints that the Partnership Agreements gave limited partners, in defined circumstances, the right to redeem. While the agreements also gave the Managers the power to delay or deny redemption requests "in [their] sole discretion," [15] it is difficult to read that discretionary power as imposing a positive duty to exercise that power to prevent or delay a withdrawal in order "to ensure that the Funds had 'sufficient financial resources' to accomplish their 'investment objectives." ' Thus, while the redemptions may have exacerbated the Funds' liquidity crunch, this is not enough to say that the Managers' failure to delay or deny those redemptions can give rise to a duty of care claim.

*5 Therefore, the factual allegation that the Managers wrongfully allowed the Fund I December 2000 Withdrawals and the Fund II 2001 Withdrawals does not give rise to a claim for breach of fiduciary duty.

3. *Active And Competent Management And Disclosure Allegations*

First, the complaints allege that the Managers lacked the experience and expertise to manage the Funds. Second, the complaints allege that the Managers devoted inadequate time and attention to managing the Funds. The complaints also allege that the Managers failed to disclose material information, and made misleading disclosures.

The claim that the Managers lacked the experience and expertise to manage the Funds is completely without merit. The defendants disclosed the qualifications of the Funds' Management Committee in the Private Placement Memoranda (the "PPMs") that the defendants gave to all of the unitholders. The "Management" sections of the PPMs disclosed the names, titles, affiliations, ages, educations, and experience of the Management Committee members, DCIP's principals, and DCIP's degree of experience with exchange funds. [16] The unitholders received this information before they ever made their investment in the Funds. They, therefore, implicitly agreed that the Managers were sufficiently qualified to manage the Funds.

However, the plaintiffs' other claim, that the Managers devoted inadequate time and attention to managing the Funds and committed disclosure violations, is more substantial. The complaints allege that the Managers made false and misleading statements to the unitholders, and failed to disclose material information. While many of the alleged misstatements took place before November 11, 2000, some (specifically, the Non-Disclosure Allegations) took place after this date.

The complaints allege that the Managers met only sporadically, less than once a year since the inception of the Funds. During this time, the Funds were facing difficult challenges. The Managers originally set up the Funds with collars, attempting to limit the upside and downside potential of the Funds. [17] The appreciation of certain contributed securities (especially Yahoo!) was causing the Funds to blow through the collars. The Managers then made the decision to remove the collars on the Funds, a decision that had beneficial effects in the short-term, but over the long-term, when the defendants failed to reinstate the collars, resulted in sharp losses.

Viewed in the light most favorable to the plaintiffs, these alleged facts do (just barely) raise a duty of care claim. Whether the Managers exercised the requisite amount of due care in managing the Funds is, of course, a fact sensitive inquiry. In certain circumstances, meeting once a year to manage an investment vehicle would be sufficient. This would be the case when the investment is relatively straight-forward, or where the complexity of the investment lies in its original design. In fact, a typical exchange fund could require less active management than other types of investments. These funds are often designed to avoid tax liability and to provide diversification, *not* to generate spectacular returns. Therefore, under normal circumstances, a properly hedged and diversified exchange fund might need less active management than, say, a typical mutual fund.

***6** The facts alleged in the complaints, however, paint a picture of the Funds being faced with exceptional challenges, first by the sharply rising value of the securities that made up the Funds, and second by the rapid fall in value of those same securities. The response of the Managers was, allegedly, almost nonexistent, meeting less than once a year.

Furthermore, the complaints allege that the Managers failed to disclose the challenges facing the Funds and the meager steps they were taking to meet those challenges. These alleged disclosure violations were potentially material because, had the plaintiffs known the truth, they could have asked for withdrawals, or brought suit before the value of the Funds plummeted.

It is quite possible that the Managers acted appropriately in both the amount of time they spent managing the Funds and the disclosures they made. However, the complaints paint a picture of the Managers taking almost *no* action over the course of several years to protect the unitholders' investments, while the value of the Funds first skyrocketed and later plummeted. Under the circumstances, the plaintiffs should at least be allowed discovery to find out if, as the complaints imply, the Managers received millions of dollars in fees for doing almost nothing.

Therefore, for all of the above reasons, the court holds that the plaintiffs have plead sufficient facts to give rise to a duty of care claim.

B. *Breach Of Contract And The Implied Covenant Of Good Faith And Fair Dealing (Counts 5 & 6)*

In order to survive a motion to dismiss for failure to state a breach of contract claim, a plaintiff must demonstrate: (i) the existence of the contract, (ii) a breach of an obligation imposed by that contract, and (iii) resultant damages to the plaintiff. [18]

1. *Failure To Provide Financial Statements Allegations*

The complaints allege that the Managers had a contractual duty under the Partnership Agreements to provide semi-annual unaudited financial statements reporting on the financial condition of the Funds, and an annual audited report. The complaint further alleges that the Managers did not provide the unitholders with these reports for 2002 and did not provide the 2001 audited financial statements until 2003. Further, the court reasonably infers from the facts alleged in the complaints that the plaintiffs were harmed by either not being able to ask for a redemption, or not being able to sue for rescission or a like remedy. Therefore, the plaintiffs have satisfied the pleading requirements for a breach of contract claim and this claim cannot be dismissed.

2. *Withdrawal Allegations*

The plaintiffs argue that the Fund I December 2000 Withdrawals and the Fund II 2001 Withdrawals constituted a breach of contract. They argue that the withdrawals caused, or made worse, the Funds' liquidity crunch. However, the Partnership Agreements gave the unitholders the right to withdraw their investments after two years. [19] As alleged in the complaints, the unitholders' right to withdraw was limited by the power of the Managers to delay or deny redemptions "in [their] sole discretion." [20]

***7** This contractual provision did not create a duty for the Managers to individually assess the financial position of the Funds and the effect that such a withdrawal would have each time a unitholder requested a withdrawal. Instead, it placed a restriction on the unitholders' right to receive withdrawals. It gave the Managers the power to limit withdrawals, in their sole discretion. Therefore, the plaintiffs have not identified a contractual obligation that the Managers have violated and this claim must be dismissed. [21]

3. *Active And Competent Management And Disclosure Allegations*

The plaintiffs allege that the defendants owed them a contractual duty to provide active management and to disclose all material information. The complaints allege that the Managers made false and misleading statements to the unitholders, failed to disclose material information, and that the Managers met only sporadically, less than once a year since the inception of the Funds.

As stated above, the Managers are alleged to have owed the unitholders a contractual duty to provide regular financial reports. Of course, concomitant to the duty to provide information is the duty that such information not be false or misleading. In other words, the defendants had a contractual duty to provide the information in good faith. The complaints allege that the Managers failed to provide reports when they were contractually obligated to do so, and that, when they did provide the reports, they were false and misleading. Specifically, the plaintiffs argue that the Managers failed to disclose certain material information-the Non-Disclosure Allegations and the withdrawals.

These allegations, if proven, are sufficient to support a claim for breach of contract. Therefore, this claim survives the motion to dismiss.

C. *Fraud (Count 3)*

The plaintiffs' third claim is for fraud. Common law fraud in Delaware requires that: (1) the defendant made a false representation, usually one of fact; (2) the defendant had knowledge or belief that the representation was false, or made the representation with requisite indifference to the truth; (3) the defendant had the intent to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted or did not act in justifiable reliance on the representation; and (5) the plaintiff suffered damages as a result of such reliance. [22] In addition to overt representations, where there is a fiduciary relationship, fraud may also occur through deliberate concealment of material facts, or by silence in the face of a duty to speak. [23] Fraud claims are subject to the heightened pleading standards of Rule 9(b). This means that the pleading must identify the "time, place and contents of the false representations, the facts misrepresented, as well as the identity of the person making the misrepresentation and what he obtained thereby." [24]

The plaintiffs argue that the defendants committed fraud by failing to disclose material information which they had a contractual and fiduciary duty to disclose, specifically the Non-Disclosure Allegations. Obviously, this claim (resting principally on alleged omissions) is merely a rehash of Count 1's claim of breach of fiduciary duty and Count 5's claim for breach of contract. It does not independently support a claim for relief. Moreover, the plaintiffs fail to plead with particularity what the defendants obtained through their alleged fraud. The plaintiffs plead generally that the Managers received management fees based on the amount of money that the Funds had under management, thereby giving them an incentive to keep money in the Funds. But the plaintiffs' arguments on this score are inherently contradictory. While they argue that the defendants had an incentive to keep money in the Funds to earn great management fees, they also argue that the Managers wrongfully allowed withdrawals, thereby reducing the amount of money they had under management. Are the withdrawals also part of the alleged fraud?

***8** For the above reasons, the plaintiffs have failed to adequately state a claim for fraud. Therefore, Count 3 will be dismissed without prejudice to the claims asserted in Count 1 or Count 5.

D. *Gross Negligence (Count 7)*

The plaintiffs' fourth claim is for gross negligence. Both of the Funds' Partnership Agreements contain an exculpatory provision, limiting the liability of the Managers for losses the unitholders incurred with respect to the Funds. Except for misrepresentation or breach of the Partnership Agreements, the General Partners of the Funds (AB Management for Fund I and DCIP for Fund II), and those who perform service on their behalf, are not liable to the unitholders, unless their conduct constituted "gross negligence or intentional misconduct." [25] As such, the unitholders are forced to argue that the Managers' alleged misconduct amounted to gross negligence.

First, as discussed above, the allegations of the Fund I December 2000 Withdrawals and the Fund II 2001 Withdrawals do not state a claim for gross negligence. Second, also as stated above, claims for breach of the duty of care are predicated on concepts of gross negligence. The court has already found that the plaintiffs' claim for breach of the duty of care survive the motion to dismiss. Therefore, this claim survives as well.

E. *Unjust Enrichment (Count 8)*

The plaintiffs, in the alternative, plead both a claim for breach of contract and a claim for unjust enrichment. In some circumstances, alternative pleading allows a party to seek recovery under theories of contract or quasi-contract. This is generally so, however, only when there is doubt surrounding the enforceability or the existence of the contract. Courts generally dismiss claims for *quantum meruit* on the pleadings when it is clear from the face of the complaint that there exists an express contract that controls .[26] It is undisputed that a written contract existed between the unitholders and the defendants. The Partnership Agreements for the Funds spelled out the relationship between the parties, and the plaintiffs specifically brought claims based on these contracts.

Notwithstanding the existence of these contractual relationships, the plaintiffs make the bald claim that the Managers were unjustly enriched at the unitholders expense. This is insufficient to state a claim for unjust enrichment, when the existence of a contractual relationship is not controverted. Thus, this claim must be dismissed.

F. *Agency Liability (Count 11)*

The plaintiffs also bring claims against Deustche Bank and DBSI (as controlling persons of AB Management) based on agency liability. A parent corporation can be held liable for the acts of its subsidiary under either of two theories of agency liability. The first is where "piercing the corporate veil" is appropriate. While many factors are considered in deciding whether to pierce the corporate veil, "the concept of complete domination by the parent is decisive."[27]

***9** Second, while one corporation whose shares are owned by a second corporation does not, by that fact alone, become the agent of the second company, a corporation-completely independent of a second corporation-may assume the role of the second corporation's agent in the course of one or more specific transactions. This restricted agency relationship may develop whether the two separate corporations are parent and subsidiary or are completely unrelated outside the limited agency setting. Under this second theory, total domination or general alter ego criteria need not be proven.[28]

With respect to DBSI, the plaintiffs argue that AB Management was dominated and controlled by DBSI. In essence, the plaintiffs ask the court to disregard AB Management's corporate form[29] and impose liability on DBSI. The complaints allege that: (i) DBSI and AB Management operate out of the same Maryland office; (ii) AB Management, although incorporated, has no functioning board of directors and no business other than the management of the Funds; (iii) AB Management is run by its Management Committee, which is comprised of employees and executives of DBSI; (iv) DBSI provided margin accounts for the Funds; and (v) DBSI served as the placement agent and custodian for the Funds' accounts.[30]

"Persuading a Delaware Court to disregard the corporate entity is a difficult task. The legal entity of a corporation will not be disturbed until sufficient reason appears."[31] Allegations (i), (iv) and (v) above, while consistent with an obviously close relationship between DBSI and its wholly owned subsidiary, do not alone or together support any inference that would lead this court to disregard the separate legal existence of AB Management; nor does the allegation that AB Management's business is run by DBSI employees. However, the well pleaded factual allegation that AB Management has "no functioning board of directors," when viewed most favorably to the plaintiffs in light of the other facts alleged, if proven, could provide a basis to conclude that the corporate form should be ignored. The corporate veil may be pierced where a subsidiary is in fact a mere instrumentality or alter ego of its parent.[32] The complaints allege that AB Management does not have board meetings or follow other corporate formalities. Instead, employees of DBSI allegedly perform the activities that, in a properly functioning corporation, the board of directors would perform. If these facts are true and the other relationships are shown to exist, an adequate basis for piercing the corporate veil could be established. Therefore, this claim against DBSI cannot be dismissed.

The complaints make additional allegations as to why AB Management is a mere agent of Deutsche Bank. These are: (i) Deutsche Bank purchased Alex. Brown, Inc. (the parent company of AB Management) thereby acquiring 100% ownership of AB Management; (ii) Deutsche Bank changed the name of the Funds the reflect the "Deutsche Bank" name; (iii) when the liquidity crisis became acute, the Management Committee decided that it needed to alert officials at Deutsche Bank; and (iv) in July of 2002, Deutsche Bank fired all the members of the Management Committee.[33]

***10** First, these factual allegations do not give rise a reasonable inference that Deutsche Bank dominated and controlled AB Management and the Management Committee. These factual allegations show little more than Deutsche Bank owned the parent company of AB Management and, indirectly, AB Management itself. Ownership alone is not sufficient proof of domination or control.[34] The complaints allege that Deutsche Bank bought AB Management in June of 1999 and changed its name a few months later. The complaints do not allege any action by Deutsche Bank to influence or control the management of the Funds until July of 2002, when it fired the majority of the Management Committee. From these bare factual allegations, the court simply cannot infer domination or control.

Second, these factual allegations do not give rise a reasonable inference that, in the managing and/or sale of the Funds, AB Management and the Management Committee were Deutsche Bank's agent. Under the rubric of agency liability, there are two main theories-actual authority and apparent authority. Because the plaintiffs do not describe which theory of liability they assert, the court addresses both.

Actual authority is that authority which a principal expressly or implicitly grants to an agent. [35] There is simply no allegation in the complaints that Deutsche Bank expressly gave either AB Management or the Management Committee the authority to bind it as its agent.

Apparent authority is that authority which, though not actually granted, the principal knowingly or negligently permits an agent to exercise, or which he holds him out as possessing. [36] In order to hold a defendant liable under apparent authority, a plaintiff must show reliance on indicia of authority originated by principal, and such reliance must have been reasonable. [37] The plaintiffs have not alleged any facts showing that Deutsche Bank held out either AB Management or the Management Committee as its agent; nor have the plaintiffs alleged facts from which the court can reasonably infer reliance.

For the above reasons, the plaintiffs have failed to plead sufficient facts to support a claim for agency liability against Deutsche Bank and Count 11 against Deutsche Bank must be dismissed. However, the plaintiffs plead sufficient facts to support a claim for liability against DBSI. Therefore, Count 11 against DBSI will not be dismissed.

G. *Conspiracy, Aiding And Abetting Fraud, And Breach Of Fiduciary Duty (Count 2, 4, & 9)*

The plaintiffs allege that the defendants conspired to commit fraud and to commit a breach of fiduciary duty. The elements for civil conspiracy under Delaware law are: (i) a confederation or combination of two or more persons; (ii) an unlawful act done in furtherance of the conspiracy; and (iii) damages resulting from the action of the conspiracy parties. [38] While the plaintiffs caption their claim as aiding and abetting breach of fiduciary duty, the court treats it as a claim for civil conspiracy. Claims for civil conspiracy are sometimes called aiding and abetting. [39] However, the basis of such a claim, regardless of how it is captioned, is the idea that a third party who *knowingly* participates in the breach of a fiduciary's duty becomes liable to the beneficiaries of the trust relationship. [40]

***11** However captioned, civil conspiracy is vicarious liability. [41] It holds a third party, not a fiduciary, responsible for a violation of fiduciary duty. [42] Therefore, it does not apply to the defendants which owe the unitholders a direct fiduciary duty. Instead, the plaintiffs attempt to hold Deustche Bank and DBSI responsible for the Managers' alleged breaches of fiduciary duty.

The defendants argue that the plaintiffs have not adequately alleged that Deustche Bank and DBSI had knowledge of the alleged wrongful acts, the breach of fiduciary duty and fraud. Where a complaint alleges fraud or conspiracy to commit fraud, the Rules of this court call for a higher pleading standard, requiring the circumstances constituting the fraud or conspiracy to "be pled with particularity." [43] While Rule 9(b) provides that "knowledge ... may be averred generally," where pleading a claim of fraud or breach of fiduciary duty that has at its core the charge that the defendant knew something, there must, at least, be sufficient well-pleaded facts from which it can reasonably be inferred that this "something" was knowable and that the defendant was in a position to know it. [44]

Furthermore, Delaware law states the knowledge of an agent acquired while acting within the scope of his or her authority is imputed to the principal. [45] With respect to DBSI, the complaints allege repeatedly that its employees, acting within the scope of their employment, had knowledge of the underlying factual allegations. Specifically, the complaints allege that the Funds were run by the Management Committee, all the members of which were employees of DBSI. [46] This knowledge is thereby imputed to DBSI.

With respect to Deutsche Bank, the plaintiffs allege that AB Management and the Management Committee are mere agents of Deutsche Bank. However, as discussed above, the factual allegations in the complaints are insufficient to infer that AB Management and the Management Committee are the agents of Deutsche Bank.

For the above reasons, the court holds that the plaintiffs have not adequately pleaded facts that, if proven, would support an inference that Deustche Bank had knowledge of the alleged wrongful acts, the breach of fiduciary duty and fraud. The plaintiffs have adequately pleaded that DBSI had knowledge of the alleged wrongful acts. Therefore, with respect to Deutsche Bank, Counts 2, 4, and 9 must be dismissed. With respect to DBSI, these counts will not be dismissed.

H. *Accounting (Count 10)*

The plaintiffs' tenth claim is for an accounting. An accounting is an equitable remedy that consists of the adjustment of accounts between parties and a rendering of a judgment for the amount ascertained to be due to either as a result.[47] As it is a remedy, should the plaintiffs ultimately be successful on one or more of their claims, the court will address their arguments for granting an accounting.

V.

The defendants argue that several of the claims in the complaints are derivative and that, since the plaintiffs did not make demand upon the Funds, and demand was not excused, these claims should be dismissed pursuant to Rule 23.1.[48]

***12** The demand requirement in the limited partnership context is codified in 6 *Del. C.* § 17-1001. That statute states:

> A limited partner or an assignee of a partnership interest may bring an action in the Court of Chancery in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.

Likewise, the determination of whether a claim is derivative or direct in nature is substantially the same for corporate cases as it is for limited partnership cases.[49] Accordingly, throughout this decision, the court relies on corporate as well as partnership case law for its determination of this lawsuit's nature.

The Delaware Supreme Court's recent decision in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.* revised the standard for determining whether a claim is direct or derivative. Now, the determination "turn[s] solely on the following questions: (i) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (ii) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"[50] "[U]nder *Tooley,* the duty of the court is to look at the nature of the wrong alleged, not merely at the form of words used in the complaint."[51] "Instead the court must look to all the facts of the complaint and determine for itself whether a direct claim exists."[52]

As they are factually distinct, the court deals with the claims separately. First, the court addresses the claims for breach of contract and the breach of fiduciary duty based on the Non-Disclosure Allegations. Second, the court addresses the claims for gross negligence and failing to provide active and competent management, and the fiduciary duty claims based thereon.

A. *Breach Of Contract And The Non-Disclosure Allegations*

The claims for breach of contract and the claims for breach of fiduciary duty based on the Non-Disclosure Allegations are direct. First, the unitholders, not the partnerships, suffered the alleged harm. In order to show a direct injury under *Tooley,* a unitholder "must demonstrate that the duty breached was owed to the [unitholder] and that he or she can prevail without showing an injury to the [partnership]."[53] The gravamen of these claims is that the Managers failed to disclose material information when they had a duty to disclose it and made other misleading or fraudulent statements, in violation of their contractual and fiduciary duties. Generally, non-disclosure claims are direct claims.[54] Moreover, the partnerships were not harmed by the alleged disclosure violations. Any harm was to the unitholders, who either lost their opportunity to request a withdrawal from the Funds from the Managers, or to bring suit to force the Managers to redeem their interests.

***13** Second, the unitholders would receive any recovery, not the Funds. Under the second prong of *Tooley,* in order to maintain a direct claim, stockholders must show that they will receive the benefit of any remedy.[55] While the best remedy for a disclosure violation is to force the partnership to disclose the information, due to the passage of time since the alleged wrongdoing, that remedy would likely be inadequate. In order to compensate the unitholders for their alleged harm, the court may find it appropriate to grant monetary damages. Such damages would be awarded to the unitholders, and not the partnerships.

For all of the above reasons, the court concludes that the claims based on the Non-Disclosure Allegations and the alleged breach of contract are direct claims and, thus, demand was not required.

B. ***Gross Negligence And Failure To Provide Competent And Active Management***

The claims for gross negligence and failure to provide competent and active management are clearly derivative. First, as stated above, in order to show a direct injury under *Tooley,* a unitholder "must demonstrate that the duty breached was owed to the [unitholder] and that he or she can prevail without showing an injury to the [partnership]." [56] The gravamen of these claims is that the Managers devoted inadequate time and effort to the management of the Funds, thereby causing their large losses. Essentially, this a claim for mismanagement, a paradigmatic derivative claim. [57] The Funds suffered any injury that resulted from the Managers' alleged inattention. Any injury that the unitholders suffered is derivative of the injury to the Funds.

Second, the Funds, not the unitholders, would receive any recovery. Again, under the second prong of *Tooley,* in order to maintain a direct claim, stockholders must show that they will benefit from the remedy. [58] If the court finds that the Managers violated their fiduciary duties by failing to devote adequate time and effort to managing the Funds, any recovery would go to the party harmed, namely the Funds. Thus, these claims are derivative claims.

If a party brings derivative claims without first making demand, and demand is not excused, those claims must be dismissed. [59] In this case, the plaintiffs have not alleged that they made demand on the Fund, nor have they alleged why demand should be excused. Accordingly, the derivative claim must be dismissed. However, in the interest of justice, the court dismisses these claims with leave to replead. [60]

VI.

The DCIP Defendants argue that, with respect to the Fund I Complaint, this court lacks personal jurisdictions over them. With respect to the Fund II Complaint, they argue that this court lacks personal jurisdiction over Crants and Devlin. [61]

In support of their Rule 12(b)(2) motion, the DCIP Defendants adduced affidavits of both Devlin and Crants. The plaintiffs have not adduced any affidavits rebutting the Devlin and Crants affidavits, nor have they asked to take discovery. Instead, they have decided to rely on the well-pleaded allegations in their complaint. Moreover, since they have not been rebutted, the court must take as true the facts contained in the Devlin and Crants affidavits. However, where the well-pleaded allegations in the complaints are not rebutted by affidavit, the court will, for the purposes of this Rule 12(b)(2) motion, assume the truthfulness of those allegations. [62]

***14** According to the Devlin and Crants affidavits, DCIP is a Tennessee limited liability company, with its principal place of business in Nashville, Tennessee. Both Crants and Devlin are residents of Tennessee and perform the vast majority of their duties from their office in Nashville. Neither Crants nor Devlin recall ever traveling to Delaware. None of the DCIP Defendants solicit any business in Delaware or engage in any regular conduct with Delaware.

When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing a basis for the court's exercise of jurisdiction over the nonresident defendant. [63] In determining whether it has personal jurisdiction over a nonresident defendant, the court will generally engage in a two-step analysis. First, was service of process on the nonresident authorized by statute? Second, does the exercise of jurisdiction, in the context presented, comport with due process? [64]

A. ***The Long-Arm Statute***

The plaintiffs argue that the court has personal jurisdiction over the DCIP Defendants under 10 *Del. C.* § 3104, the Delaware long-arm statute. Section 3104(c) provides, in relevant part: "As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident ... who ... (1) Transacts any business or performs any character of work or service in the State ... [or] (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State...." Section 3104 has been broadly construed to confer jurisdiction to the maximum extent possible under the due process clause. [65] Furthermore, when *in personam* jurisdiction is challenged on a motion to dismiss, the record is construed most strongly against the moving party. [66]

The complaints lay out detailed allegations of the connections between the DCIP Defendants and the Funds. The Funds were established as Delaware limited partnerships and are governed by Delaware law. DCIP is the Sub-Advisor of Fund I and the General Partner and Sub-Advisor of Fund II. Crants and Devlin are the managing members and owners of DCIP. DCIP acts principally through Crants and Devlin. The PPMs touted the DCIP Defendants' experience and qualifications in order to sell units in the Funds.

The PPMs also state that DCIP is responsible for the day-to-day management of the Funds. DCIP, in the persons of Crants and Devlin, attended every meeting of the Management Committee (none of which took place in Delaware). Also, DCIP, which acted through Crants and Devlin, was primarily responsible for choosing the securities included in the Funds.

In *RJ Associates,* Justice (then-Vice Chancellor) Jacobs held that this court could exercise personal jurisdiction over a limited partner in a Delaware limited partnership under Section 3104(c)(1). Justice Jacobs held that the following three contacts, taken together, were sufficient to constitute "transacting business" under the Delaware long-arm statute: (i) the limited partner participated in the formation of the limited partnership, (ii) the limited partnership indirectly participated in the limited partnership's management by 'controlling' the general partner, and (iii) the limited partner caused the Partnership Agreement to be amended to alter the method of distributions to the partners. [67]

***15** The operative facts of this case, as alleged in the complaints, are similar to those in *RJ Associates.* First, DCIP participated in the formation of the Funds. In fact, DCIP was primarily responsible for selecting the initial securities accepted by the Funds. [68] Second, DCIP not only participated in the management of the Funds, DCIP was primarily responsible for the management of the Funds. The PPMs state that "the Sub-Advisor will provide day-to-day management and administration of the Fund and investment advisory services, including, among other matters, the screening of contributed securities, advice regarding the selection of the illiquid Assets and hedging and borrowing strategies." [69] Finally, DCIP received millions of dollars in fees to manage the two Delaware entities.

With respect to Crants and Devlin, the complaints allege that they are the owners and managing partners of DCIP. The complaints further allege that DCIP only acts through Crants and Devlin. In essence, the complaints allege that it was Crants and Devlin who selected the securities for the Funds, and managed the Funds on a day-to-day basis.

The court finds that these contacts are sufficient to constitute "transacting business" under the long-arm statute.

B. *Due Process*

The focus of a minimum contacts inquiry is whether a nonresident defendant engaged in sufficient minimum contacts with the State of Delaware to require it to defend itself in the courts of the state consistent with the traditional notions of fair play and justice. [70] In order to establish jurisdiction over a nonresident defendant, the nonresident defendant's contacts with the forum must rise to such a level that it should reasonably anticipate being required to defend itself in Delaware's courts. [71] The minimum contacts which are necessary to establish jurisdiction must relate to some act by which the defendant has deliberately created obligations between itself and the forum. [72] Consequently, the defendant's activities are shielded by the benefits and protection of the forum's laws and it is not unreasonable to require it to submit to the forum's jurisdiction. [73]

In addition to the contacts outlined above that the complaints allege between DCIP Defendants and the Funds, the plaintiffs also allege that the DCIP Defendants enjoyed the benefits of Delaware law. They claim that the DCIP Defendants have received millions of dollars in fees for managing the Delaware partnerships and are entitled to claim limited liability under the terms of the Partnership Agreements, which established the Funds and limit the DCIP Defendants' liability to cases of gross negligence. [74]

In *RJ Associates,* Justice Jacobs found that the following contacts were sufficient to satisfy due process: (i) the limited partner took an active role in establishing the Delaware Partnership; (ii) the limited partner owned a 50% interest in the partnership's general partner, and appointed four of the general partner's seven board members; (iii) the limited partner received 49 .5% of the partnership's cash flow distributions; (iv) the limited partner allegedly controlled the partnership; (v) the limited partner allegedly caused the partnership agreement to be amended under Delaware law to change the agreed-upon cash flow distribution payments to the limited partners; and (vi) the limited partner agreed to a Delaware choice of law provision in the partnership agreement. [75]

***16** While not exactly the same, the contacts that DCIP has with Delaware are substantially similar to those in *RJ*

Associates. DCIP took part in the formation of the Funds, two Delaware entities. DCIP managed the Funds on a day-to-day basis and received millions of dollars in fees for doing so. In addition, the Partnership Agreements which established the Funds limited the DCIP Defendants' liability to cases of gross negligence.[76] They have, thereby, benefited by expressly limiting their liability under Delaware law. Given all of these contacts, DCIP should have reasonably expected to be haled before the courts in Delaware.

Crants and Devlin also should have reasonably expected to be haled before the courts of this state. As stated above, the complaints allege that DCIP could only act through Crants and Devlin. All the actions attributed to DCIP were really performed by them. Moreover, in the case of Fund II, Crants and Devlin are alleged to be the managing partners of the general partner of a Delaware limited partnership. In the case of Fund I, Crants and Devlin are alleged to have managed a Delaware limited partnership, despite the fact that DCIP is not that entity's general partner.

In *In re USACafes,* former Chancellor Allen found that the directors of a corporation that was the general partner of a Delaware limited partnership were subject to the jurisdiction of this state's courts, due to their positions with the general partner .[77] Chancellor Allen focused on the important state interest that Delaware has in regulating entities created under its laws, and how that interest could only be served by exercising jurisdiction over those who managed the Delaware entity.

> The relationship between the General Partner and the limited partners was created by the law of Delaware. The state empowered defendants to act, and this state is obliged to govern the exercise of that power insofar as the issues of corporate power and fiduciary obligation are concerned. These factors bear importantly on the fairness of exercising supervisory jurisdiction at this point in the relationship of the various parties. The wrongs here alleged are not tort or contract claims unconnected with the internal affairs or corporate governance issues that Delaware law is especially concerned with.[78]

Likewise, the wrongs alleged in this case go essentially to the management of a Delaware limited partnership. The DCIP Defendants voluntarily undertook to mange the Funds and received millions of dollars in compensation for doing so. Now, limited partners in the Delaware entity seek to hold them accountable for alleged wrongs they committed. It is both necessary and proper for the courts of this state to ensure that the managers of a Delaware entity are held responsible for their actions in managing the Delaware entity. When a person manages a Delaware entity, and receives substantial benefit from doing so, he should reasonably expect to be held responsible for his wrongful acts relating to the Delaware entity in Delaware.[79]

***17** For the above reasons, the court concludes that it has personal jurisdiction over the DCIP Defendants in both cases. Therefore, the DCIP Defendants' motion to dismiss pursuant to Rule 12(b)(2) must be denied.

VII.

For the above reasons, the defendants' motion to dismiss is GRANTED in part and DENIED in part. The defendants are directed to submit a form of order, on notice, within 10 days.

Parallel Citations

31 Del. J. Corp. L. 267

Footnotes

1 The facts alleged in the complaints are recited in detail in the earlier opinion. *Albert v. Alex. Brown Mgmt. Servs.,* 2005 Del. Ch. LEXIS 100, at *43-58, 2005 WL 1594085 (Del. Ch. June 29, 2005). Reference is made to that opinion for a complete recitation of the facts and for the definition of terms used herein. However, to avoid confusion, the court refers in this opinion to Alex. Brown Management Services, Inc. as "AB Management." Unless otherwise noted, the facts recited in this opinion are taken from the well-pleaded allegations of the complaints.

2 The factual allegations specifically discussed in the earlier opinion are as follows: First, the Managers failed to provide financial statements and reports as they are required to under the Partnership Agreements and Delaware law. Second, the Managers wrongfully allowed certain withdrawals from the Funds, thereby causing or exacerbating a liquidity crisis. Specifically, the Fund II Complaint alleges that three withdrawals from Fund II occurred after November 11, 2000. These allegedly occurred on January 17, 2001, October 25, 2001, and December 31, 2001 (the "Fund II 2001 Withdrawals"). Additionally, the Fund I Complaint alleges approximately $8.0 million in withdrawals occurred in December of 2000 from Fund I (the "Fund I December 2000 Withdrawals"). Third, the Managers

failed to provide active and competent management of the Funds. *Alex. Brown,* 2005 Del. Ch. LEXIS 100, at *78-*79, 2005 WL 1594085 (Del.Ch.).

3 The Plaintiffs' Response Brief is titled "Plaintiffs' Brief In Response To The Court's Memorandum Opinion And Order Of June 29, 2005" and was filed on July 15, 2005.

4 *O'Malley v. Boris,* 742 A.2d 845, 850 (Del.1999)

5 *Rosenblatt v. Getty Oil Co.,* 493 A.2d 929, 944 (Del.1983) (quoting *TSC Indus. v. Northway, Inc.,* 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976)).

6 Collectively, the court refers to the three remaining factual allegations of non-disclosure as the "Non-Disclosure Allegations."

7 Partnership Agreements § 11.2.

8 In the Plaintiffs' Response Brief, the plaintiffs argue that the Managers failed to make material disclosures, when they had a fiduciary obligation to do so. They further outline specific factual allegations, the Non-Disclosure Allegations, they contend are material and should have been disclosed. The Non-Disclosure Allegations are discussed below.

9 Pls.'s Resp. Br. at 7.

10 *Aronson v. Lewis,* 473 A.2d 805, 812 (Del.1984); *accord Citron v. Fairchild Camera & Instrument Corp.,* 569 A.2d 53, 66 (Del.1989).

11 *Citron,* 569 A.2d at 66

12 William T. Allen, Jack B. Jacobs and Leo E. Strine, Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law,* 56 BUS. LAW. 1287, 1300 (2001); *accord Tomczak v. Morton Thiokol, Inc.,* 1990 Del. Ch. LEXIS 47, at *35, 1990 WL 42607 (Del. Ch. Apr. 5, 1990) ("In the corporate context, gross negligence means reckless indifference to or a deliberate disregard of the whole body of stockholders' or actions which are 'without the bounds of reason." ') (citations omitted).

13 *In re Walt Disney Co. Derivative Litig.,* 2005 Del. Ch. LEXIS 113, at *162, 2005 WL 2056651, 907 A.2d. 693, (Del. Ch. Aug. 9, 2005) (internal citations and quotations omitted).

14 *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc.,* 1996 Del. Ch. LEXIS 116, at *42, 1996 WL 506906 (Del. Ch. Sept. 3, 1996) (citations omitted), *aff'd,* 692 A.2d 411 (Del.1997) (TABLE); *see also Solash v. Telex Corp.,* 1988 Del. Ch. LEXIS 7, at *24-*25, 1988 WL 3587 (Del. Ch. Jan. 19, 1988) (stating that the standard for gross negligence is a high one, requiring proof of "reckless indifference" or "gross abuse of discretion") (citations omitted).

15 Fund I Compl. ¶ 82; Fund II Compl. ¶ 94.

16 *See* Fund I PPM at 27-29; Fund II PPM at 29-31.

17 "Collaring" is financial jargon for purchasing offsetting calls and puts on a security to limit upside and downside exposure. At the inception of the Funds, the Managers attempted to limit upside and downside exposure to roughly 10%. *Alex. Brown,* 2005 Del. Ch. LEXIS 100, at *9, 2005 WL 1594085 (Del.Ch.).

18 *VLIW Tech., L.L.C. v. Hewlett-Packard Co.,* 840 A.2d 606, 612 (Del.2003).

19 *See* Partnership Agreements ¶¶ 6.3.

20 Fund I Compl. ¶ 82, Fund II Compl. ¶ 94.

21 In the Plaintiffs' Response Brief, the plaintiffs implicitly admit that the Managers had the authority to allow the withdrawals. Instead of arguing this point, the plaintiffs argue that the Managers had a contractual obligation to report the withdrawals.

22 *Stephenson v. Capano Dev., Inc.,* 462 A.2d 1069, 1074 (Del.1983).

23 *Id.*

24 *York Linings v. Roach,* 1999 Del. Ch. LEXIS 160, at *25, 1999 WL 608850 (Del. Ch. July 28, 1999). (internal quotations and citations omitted).

25 Partnership Agreements § 3.5.

26 *Rossdeutscher v. Viacom, Inc.,* 768 A.2d 8, 24 (Del.2001) (applying New York law); *ID Biomedical Corp. v. TM Tech., Inc.,* 1995 WL 130743, at *15 (Del.Ch. Mar.16, 1995) (applying Delaware law).

27 *Phoenix Canada Oil Co. v. Texaco, Inc.,* 842 F.2d 1466, 1477 (3d Cir.1988).

28 *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 14M, cmt. (a) (1958)).

29 AB Management is a corporation, organized under the laws of Maryland.

30 Fund I Compl. ¶¶ 44, 45, 247, 250, 332, 334; Fund II Compl. ¶¶ 54, 179, 253-259.

31 *Mason v. Network of Wilmington, Inc.,* 2005 Del. Ch. LEXIS 99, at *9, 2005 WL 1653954 (Del. Ch. July 1, 2005) (internal quotations omitted).

32 *Mabon, Nugent & Co. v. Texas Amer. Energy Corp.,* 1990 Del. Ch. LEXIS 46, at *14-*15, 1990 WL 44267 (Del. Ch. Apr. 12, 1990); *Phoenix Canada Oil,* 842 F.2d at 1477.

33 Fund I Compl. ¶¶ 153, 163, 239-240; Fund II Compl. ¶¶ 179, 253-259.

34 *Aronson,* 473 A.2d at 815; *see also In re W. Nat'l S'holders Litig.,* 2000 Del. Ch. LEXIS 82, 2000 WL 710192 (Del. Ch. May 22, 2000) (holding that a 46% shareholder does not control or dominate the board due to stock ownership alone).

35 *Billops v. Magness Constr. Co.,* 391 A.2d 196, 197 (Del.1978).

36 *Henderson v. Chantry,* 2002 Del. Ch. LEXIS 14, at *14, 2002 WL 244692 (Del. Ch. Feb. 5, 2002).

37 *Billops,* 391 A.2d at 198.

38 *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus.,* 871 A.2d 428, 437 n. 8 (Del.2005); *Nicolet, Inc. v. Nutt,* 525 A.2d 146, 149-50 (Del.1987).

39 *See Benihana of Tokyo, Inc. v. Benihana, Inc.,* 2005 Del. Ch. LEXIS 19, at *26, 2005 WL 583828 (Del. Ch. Feb. 28, 2005).

40 *Gilbert v. El Paso Co.,* 490 A.2d 1050, 1057 (Del.Ch.1984), *aff'd,* 575 A.2d 1131 (Del.1990).

41 *See, e.g., Parfi Holding AB v. Mirror Image Internet, Inc.,* 794 A.2d 1211, 1238 (Del.Ch.2001) ("Civil conspiracy thus provides a mechanism to impute liability to those not a direct party to the underlying tort."), *rev'd on other grounds,* 817 A.2d 149 (Del.2002).

42 *Gilbert,* 490 A.2d at 1057.

43 *Atlantis Plastics Corp. v. Sammons,* 558 A.2d 1062, 1066 (Del.Ch.1989) (citing Rule 9(b), which states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

44 *IOTEX Communs., Inc. v. Defries,* 1998 Del. Ch. LEXIS 236, at *12-*13, 1998 WL 914265 (Del. Ch. Dec. 21, 1998).

45 *J.I. Kislak Mtg. Corp. v. William Matthews Bldr., Inc.,* 287 A.2d 686, 689 (Del.Super.1972), *aff'd,* 303 A.2d 648 (Del.1972).

46 Fund I Compl. ¶¶ 45, 47-51, 247-251; Fund II Compl. ¶¶ 55, 57-61, 261-266.

47 *Jacobson v. Dryson Acceptance Corp.,* 2002 Del. Ch. LEXIS 4, at *12-*13, 2002 WL 75473 (Del. Ch.2002).

48 The claims that the defendants contend are derivative are as follows: breach of fiduciary duty (Count 1), aiding and abetting breach of fiduciary duty (Count 2), breach of contract (Count 5), breach of the covenant of good faith (Count 6), gross negligence (Count 7), unjust enrichment (Count 8), accounting (Count 10), and agency liability (Count 11). As the court has already dismissed the claim for unjust enrichment (Count 8) and agency liability as to Deutsche Bank (Count 11), and deferred granting the equitable remedy of an accounting (Count 10), it will not discuss those claims here.

49 *Litman v. Prudential-Bache Prop., Inc.,* 611 A.2d 12, 15 (Del.Ch.1992).

50 845 A.2d 1031, 1033 (Del.2004).

51 *In re Syncor Int'l Corp. S'holders Litig.,* 857 A.2d 994, 997 (Del.Ch.2004).

52 *Dieterich v. Harrer,* 857 A.2d 1017, 1027 (Del.Ch.2004).

53 *Tooley,* 845 A.2d at 1039.

54 *See, e.g., Dieterich,* 857 A.2d at 1029 (characterizing non-disclosure claims as direct claims); *Abajian v. Kennedy,* 1992 Del. Ch. LEXIS 6, at *10, 1992 WL 8794 (Del. Ch. Jan. 17, 1992) (same).

55 *Tooley,* 845 A.2d at 1033.

56 *Tooley,* 845 A.2d at 1039.

57 *See, e.g., Kramer v. W. Pac. Indus., Inc.,* 546 A.2d 348, 353 (Del.1988) ("A claim of mismanagement ... represents a direct wrong to the corporation that is indirectly experienced by all shareholders. Any devaluation of stock is shared collectively by all the shareholders, rather than independently by the plaintiff or any other individual shareholder. Thus, the wrong alleged is entirely derivative in nature.").

58 *Tooley,* 845 A.2d at 1033.

59 *Haber v. Bell,* 465 A.2d 353, 357 (Del.Ch.1983).

60 In a letter to the court, the plaintiffs stated that AB Management sent letters to all the unitholders of the Funds (the "Redemption Letters"), stating that the Managers would allow the unitholders to redeem their units and that the Managers are pursuing the dissolution of the Partnerships. The plaintiffs argue that the Redemption Letters bolster their contention that their claims are direct, not derivative. However, the complaints do not contain the information in the Redemption Letters and the Redemption Letters are not referenced in the complaints. Therefore, these documents are not properly before the court on a Rule 12(b)(6) motion.

61 DCIP is the General Partner of Fund II. As such, there is no dispute that the court has personal jurisdiction over DCIP viz. Fund II. *See RJ Assocs. v. Health Payors' Org. Ltd. P'ship.,* 1999 Del. Ch. LEXIS 161, at *12, 1999 WL 550350 (Del. Ch. July 16, 1999) (quoting 6 *Del. C.* § 17-109(a) and holding that, as a matter of law, by accepting the position of general partner, a corporation consents to be subjected to a Delaware court's jurisdiction if the limited partnership has chosen to incorporate under Delaware law).

62 *See Hart Holding Co. v. Drexel Burnham Lambert, Inc.,* 593 A.2d 535, 539 (Del.Ch.1991) (citing *Marine Midland Bank, N.A. v. Miller,* 664 F.2d 899, 904 (2nd Cir.1981)) (stating that a trial court is vested with broad discretion in shaping the procedure by which a motion under Rule 12(b)(2) is resolved).

63 *See Plummer & Co. Realtors v. Crisafi,* 533 A.2d 1242, 1244 (Del.Super.1987); *see also Finkbiner v. Mullins,* 532 A.2d 609, 617 (Del.Super.1987) (stating that, on a Rule 12(b)(2) motion, "the burden is on the plaintiff to make a specific showing that this Court has jurisdiction under a long-arm statute.") (citing *Greenly v. Davis,* 486 A.2d 669 (Del.1984)).

64 *LaNuova D & B, S.P.A. v. Bowe Co.,* 513 A.2d 764, 768 (Del.1986).

65 *Id.*

66 *RJ Assocs.,* 1999 Del. Ch. LEXIS 161, at *13, 1999 WL 550350 (Del.Ch.).

67 *RJ Assocs.,* 1999 Del. Ch. LEXIS 161, at *18, 1999 WL 550350 (Del.Ch.).

68 *See* Fund I Compl. ¶ 71; Fund II Compl. ¶¶ 82, 241.

69 Fund I PPM at 3-4, Fund II PPM at 3.

70 *AeroGlobal,* 871 A.2d at 440 (citing *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

71 *Id.*

72 *Sternberg v. O'Neil,* 550 A.2d 1105, 1120 (Del.1988).

73 *Id.; see also Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (U.S.1985) (requiring "purposeful availment" of the benefits of the state's laws to satisfy the minimum contacts test).

74 Partnership Agreements § 3.5.

75 *RJ Assocs.,* 1999 Del. Ch. LEXIS 161, at *19-*20, 1999 WL 550350 (Del.Ch.).

76 Partnership Agreements § 3.5.

77 600 A.2d 43, 52 (Del.Ch.1991).

78 *Id.*

79 *See Assist Stock Mgmt. L.L.C. v. Rosheim,* 753 A.2d 974, 975 (Del.Ch.2000) ("When nonresidents agree to serve as directors or managers of Delaware entities, it is only reasonable that they anticipate that ... they will be subject to personal jurisdiction in Delaware courts.").

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COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

FUTURESELECT PORTFOLIO MANAGEMENT, INC., FUTURESELECT PRIME ADVISOR II LLC, THE MERRIWELL FUND, L.P., and TELESIS IIW, LLC, Plaintiff/Appellant, v. TREMONT GROUP HOLDINGS, INC., TREMONT PARTNERS, INC., OPPENHEIMER ACQUISITION CORPORATION, MASSACHUSETTS MUTUAL LIFE INSURANCE CO., and, ERNST & YOUNG LLP, Defendant/Respondent.	NO. 68130-3-I CERTIFICATE OF SERVICE

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