IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 89303-9

(Court of Appeals No. 68130-3-I)

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

Plaintiffs/Respondents,

v.

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

Defendants/Petitioners.

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I. INTRODUCTION

Petitioners/Defendants seek discretionary review of their motions to dismiss, asking this Court to revisit not only the considered and unanimous rejection of those motions by the Court of Appeals, but also to ignore or rewrite the Complaint and fill in a factual record that has not even begun to develop. That discretionary review is unwarranted. Passing that the appellate decision is correct and raises no conflict with any decision of this Court or any other appellate court, the case to date involves routine choice of law and legal issues that do not warrant further delaying a case that has now taken *three years* just to get out of initial motion practice.

The Plaintiffs/Respondents (collectively, "FutureSelect") are companies headquartered in Washington who were solicited by Defendants/Petitioners in Washington, using misrepresentations made in Washington, which caused injury in Washington. Respondents lost nearly $200 million as a result of their investment in funds managed by Tremont Partners, Inc.,[1] overseen by parent Oppenheimer Acquisition Corporation

[1] Tremont Partners, Inc., Tremont Group Holdings, Inc. and parent company Massachusetts Mutual Life Insurance Company filed their Petition jointly. The distinctions between these entities have no impact here, and they are collectively referred to as "Tremont."

("Oppenheimer" or "OAC") and audited by Ernst & Young LLP ("E&Y") (collectively, "Petitioners").[2]

Based on the these facts, the Court of Appeals concluded that Washington law applied and that FutureSelect had properly alleged all but two of the claims previously dismissed by the Superior Court. The Court of Appeals outlined its reasoning in a detailed, forty-nine page published decision. *See FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, No. 68130-3-I, -- P.3d --, 2013 WL 4056275 (Aug. 12, 2013) ("Opinion" or "Op."). In contrast, and contrary to Petitioners' statements, in initially granting motions to dismiss Respondents' 216-page, fourteen count complaint without leave to amend, the Superior Court made *no findings* concerning what law to apply and gave no explanation at all for its decision.

The Court of Appeals was right, and Petitioner's continuing efforts to delay the consideration of the merits of FutureSelect's claims do not come close to providing any basis under RAP 13.4(b) for discretionary review by this Court. Specifically:

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[2] Due to the overlapping nature of the issues raised by Petitioners, Plaintiffs/Respondents are filing a consolidated answer to the separate petitions of Tremont, E&Y and Oppenheimer, and are herewith filing a motion seeking leave to file an overlength consolidated answer.

Tremont

Tremont's claim that review is warranted under RAP 13.4(b)(1) because the Court of Appeals' decision to apply Washington law conflicts with *Haberman v. Washington Public Power Supply Systems*, 109 Wn.2d 107, 744 P.2d 1032 (1987) has no basis. The Court of Appeals explicitly applied the "most significant relationship" standard discussed in *Haberman* for resolving conflicts in law, and properly concluded that Washington had the most significant relationship to the subject matter of this case. Indeed, the Court of Appeals in its Opinion squarely addressed and appropriately rejected Tremont's argument that *Haberman* somehow limits the factors a court can consider in applying the most significant relationship test.

Ernst & Young

E&Y's claim that review is warranted under RAP 13.4(b)(1) or (2) is similarly without merit. E&Y asks this Court to reweigh the Complaint's allegations and reach a different conclusion than the Court of Appeal, but, as this Court has repeatedly made clear, that is not the purpose of interlocutory, discretionary review of this Court. The Court of Appeal directly considered whether the Complaint alleged beyond "routine services" by an auditor, and specifically held that it did. Moreover, although E&Y claims a conflict with *Hines v. Data Line*

Systems, Inc., 114 Wn.2d 127, 787 P.2d 8 (1990), E&Y ignores that (1) *Hines* did not even involve an auditor like E&Y and (2) *Hines* was a summary judgment case and specifically held that the question was an issue of fact that would *not* be determined on a motion to dismiss—the procedural posture of this case. This is true of the three appellate court decisions cited by Petitioners as purportedly in conflict with the Court of Appeals' decision here—*Viewpoint-North Stafford LLC v. CB Richard Ellis, Inc.*, 175 Wn.App. 189, 197, 303 P.3d 1096 (2013) or *Brin v. Stutzman*, 89 Wn.App. 809, 829-30, 951 P.2d 291 (1998). These three cases all were decided at the summary judgment stage. The Court of Appeals therefore was wholly consistent with those cases in concluding that whether a defendant is a "substantial contributive factor" in a sale sufficient to incur seller liability under the Washington State Securities Act (WSSA) is a question of fact.

Oppenheimer

Oppenheimer seeks review under RAP 13.4(b)(3), claiming the Court of Appeals' decision violates constitutional due process and so purportedly raises a significant question of law under RAP 13.4(b)(3). Oppenheimer's claim lacks any merit. Tellingly, Oppenheimer does not challenge the Court of Appeals' finding that Oppenheimer's subsidiary Tremont acted as its agent in Washington. Nor does Oppenheimer argue

that there is any question of law as to whether the Washington conduct of an agent on behalf of a principal may be imputed to the principal for purposes of long-arm jurisdiction.

The Court of Appeals applied well-established constitutional principles of jurisdiction, and properly found Oppenheimer subject to jurisdiction based on the in-state conduct of its agent, Tremont. Accordingly, there is no question of law to be resolved, much less one that rises to the level of significance warranting review under RAP 13.4(b)(3). At this procedural stage, Oppenheimer lacks any basis to seek a review by this Court.

Finally, all of the Petitioners hollowly invoke the "substantial public interest" under RAP 13.4(b)(4). What Petitioners seek to do here is deny Washington citizens the 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. It was precisely this public interest that the Court of Appeals vindicated in reversing the Superior Court. Granting Petitioners review in this case would have the perverse effect of undermining that very important public interest.

II. STATEMENT OF THE CASE

The Court of Appeals correctly set forth the factual and procedural background of this case in its opinion. *See* Op. at 4-8. Accordingly, FutureSelect provides only a brief summary of the pertinent facts.

A. Factual Background

FutureSelect's claim is straightforward: it relied on Petitioners' misrepresentations and omissions when deciding to invest and maintain its investment in the Rye Funds, which were a series of funds managed by Tremont and invested with Bernard Madoff.

1. Tremont Solicits FutureSelect in Washington and Makes False Representations

Tremont solicited FutureSelect in Washington to invest in the Rye Funds. Op. at 6; Clerk's Papers ("CP") 9-10. At the first meeting in Washington, and in subsequent meetings and visits, Tremont represented to FutureSelect that the Rye Funds presented a rare opportunity to invest with Madoff. *See* Op. at 5-6; CP 9-10.

Tremont represented to FutureSelect that it had a comprehensive understanding of Madoff's business and conducted continuous monitoring and oversight. Op. at 6; CP 10-11. Among other things, Tremont represented that it performed numerous confirmation and analysis procedures, engaged in regular conversations with Madoff himself, and

hired a third party to perform an independent accounting of Madoff in addition to Tremont's own review. *See* Op. at 7, 29; CP 12-13.

Tremont's representations were false and misleading. Op. at 29-30; CP 14-15, 31-32, 42-43. In fact, Tremont did not perform the due diligence and monitoring that it represented it would do. CP 4, 14-15. FutureSelect justifiably relied on Tremont's false representations, and as a result lost approximately $195 million it invested in the Rye Funds when the investment turned out to be worthless. CP 2-3, 32, 43.

2. Tremont Acts as an Agent of Oppenheimer in Washington

In 2001, before FutureSelect made the bulk of its investments in the Rye Funds, Oppenheimer acquired Tremont. CP 15. Oppenheimer knew that the Rye Funds were invested exclusively with Madoff, and saw this as a strong selling point. CP 16. When conducting due diligence in connection with its acquisition of Tremont, Oppenheimer learned that Tremont's representations to the Rye Funds' investors regarding its oversight and monitoring of Madoff were false or, at a minimum, highly suspect. CP 16-17.

Nevertheless, Oppenheimer went ahead with acquiring Tremont and took several steps to move Tremont under its control, including restructuring Tremont. CP 15, 18. Oppenheimer ensured that it had

ultimate control over the manner of Tremont's marketing, as well as its investment strategy and activity, including the selection of investment vehicles and due diligence programs. CP 18-20. In short, Oppenheimer had the power to control the Rye Funds' investments with Madoff. *Id.*

3. FutureSelect Relies on E&Y's Misrepresentations

FutureSelect received E&Y's unqualified audit opinions of the Rye Funds in Washington, and relied on them when making and increasing their investments in the Rye Funds. CP 8, 20-21. E&Y's opinions misrepresented that it had conducted its audits in conformity with Generally Accepted Auditing Standards, and falsely stated that the Rye Funds' financial statements were "free of material misstatement" and in accordance with generally accepted accounting principles. CP 21, 23-24. These untrue statements were negligently made, and were a substantial factor in contributing to FutureSelect's investment in the Rye Funds. CP 24, 36-37. In reliance on the E&Y audits, FutureSelect invested approximately $50 million in various Rye Funds. CP 23. In reality, this investment was worthless. CP 31.

B. Procedural Background

FutureSelect brought its complaint against Petitioners,[3] seeking relief under the WSSA, and bringing claims for negligent misrepresentation against Tremont and E&Y. FutureSelect also brought a claim for negligence against Tremont, and agency claims against Oppenheimer and Massachusetts Mutual Life Insurance Co.

Petitioners moved to dismiss FutureSelect's complaint. Tremont, Massachusetts Mutual Life Insurance Co. and E&Y sought dismissal pursuant to CR 12(b)(6), claiming, among other things, that New York law applied and precluded FutureSelect's WSSA claims. E&Y also claimed it could not be liable as a seller under the WSSA. Petitioners also sought dismissal on grounds of forum non conveniens, and Oppenheimer argued that the court did not have personal jurisdiction over it.

On June 3, 2011, the Superior Court signed the dismissal orders submitted by Petitioners, thereby dismissing FutureSelect's claims with prejudice. The Superior Court also signed the order submitted by KPMG, which compelled FutureSelect to arbitration. The Superior Court issued no written opinions or findings, leaving the parties to speculate as to its grounds for dismissal.

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[3] FutureSelect settled its claims with the Rye Funds' previous auditor Goldstein Golub Kessler LLP, and FutureSelect's claims against subsequent auditor KPMG LLP have been sent to arbitration. *See* Op. at 5 n. 4.

FutureSelect filed a notice of appeal. The Court of Appeals heard argument on FutureSelect's appeal on January 16, 2013.

On August 12, 2013, the Court of Appeals, Division I, reinstated all but two of the fourteen counts in FutureSelect's complaint. As relevant here, the Court of Appeals found that Washington law applied and that FutureSelect had sufficiently stated its WSSA and negligent misrepresentation claims. The Court of Appeals also found that Oppenheimer was subject to personal jurisdiction.[4]

Petitioners seek this Court's discretionary review of the Opinion under RAP 13.4(b).

III. ARGUMENT

Under RAP 13.4(b), Petitioners' request for review can be granted only if the Court of Appeals' decision (1) conflicts with a decision of the Supreme Court; (2) conflicts with another decision of the Court of Appeals; (3) presents a significant question of law under the Constitution of the State of the Washington or the United States; or (4) involves an issue of substantial public interest that should be determined by the Supreme Court. The Petitioners fail to meet any of these grounds.

[4] The Court of Appeals affirmed the Superior Court's dismissal of FutureSelect's apparent agency claim against Oppenheimer and its negligence claim against Tremont. FutureSelect does not seek this Court's review of the Court of Appeals' decision on those claims.

A. There Is No Basis Under RAP 13.4(b)(1) for Review by this Court Because the Court of Appeals Decision Regarding the Application of Washington Law Does Not Conflict with *Haberman* or any other Supreme Court Case

Tremont asserts that review should be granted under RAP 13.4(b)(1) because the Court of Appeals' decision to apply Washington law conflicts with *Haberman*.[5] Tremont Pet. at 10-12. This is simply a rehashing of Tremont's failed argument before the Court of Appeals. As it did below, Tremont wrongly asserts that the Supreme Court's consideration of certain facts in *Haberman* should be read as a mandatory legal standard that precludes Washington courts from considering any other factors. The one paragraph in *Haberman* at issue says no such thing. Tremont's argument is contrary to Washington law, and was properly rejected by the Court of Appeals as "not a precise reading of *Haberman*." *See* Op. at 11.

1. The Court of Appeals Properly Applied the Legal Standard Set Forth in *Haberman* and Other Supreme Court Cases

In *Haberman*, this Court stated that where Washington law conflicts with the law of another state relevant to the litigation, Washington courts should employ "a 'most significant relationship' standard to determine what law governs in a contracts or torts case." 107

[5] E&Y joined Tremont's petition regarding the Court of Appeals' application of Washington law. E&Y Pet. at 19-20.

Wn.2d at 134 (citations omitted). This Court then applied the standard to the specific facts of the case, and concluded that Washington was "clearly the state with the most substantial contacts with the subject matter of this case." *Id.*

Far from conflicting with *Haberman*, the Court of Appeals closely adhered to it. First, the Court of Appeals properly recognized the "most significant relationship" standard discussed in *Haberman* and followed in other Supreme Court cases. *See* Op. at 8-9 ("Where Washington law conflicts with the law of another relevant state, this court determines which state has the most significant relationship to the action.") (citing *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976)); *see also Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 213, 875 P.2d 1213 (1994); *Southwell v. Widing Transp., Inc.*, 101 Wn.2d 200, 204, 676 P.2d 477 (1984).

Second, as in *Haberman*, the Court of Appeals properly applied the "most significant relationship" standard to the specific facts of the case, and concluded that Washington had the most significant relationship to FutureSelect's claims. *See* Op. at 13-17. The Court of Appeals heeded the Supreme Court's directive that the "most significant relationship" standard is an "analytical framework" and the "ultimate outcome, in any given case, depends upon the underlying facts of that case." *Southwell*,

101 Wn.2d at 204. *See id.* at 204-05 (holding that "courts must look in *each case to the underlying factors themselves*" when applying "most significant relationship" standard in a particular case) (quoting Restatement (Second) of Conflict of Laws §6 cmt. c (1971)) (emphasis supplied by Supreme Court).

Contrary to Tremont's argument, the Court of Appeals considered the relevant factors set forth in *Haberman*, including from where the misrepresentations "emanated," *i.e.*, where they were made. *See, e.g.*, Op. at 12 n. 33, 13 (repeatedly considering fact that certain misrepresentations were made in New York); *see also id.* at 4-7 (noting Tremont's and E&Y's states of incorporation and headquarters).[6] Tremont's argument that the Court of Appeals could not consider other relevant factors, including the place of FutureSelect's reliance, is contrary to Supreme Court precedent, which requires a fact-specific analysis in each case. *See Southwell*, 101 Wn.2d at 204 ("The approach is not merely to count contacts, but rather to consider which contacts are most significant and to determine where these contacts are found.") (citing *Spider Staging*, 87 Wn.2d at 581).

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[6] Tremont argues that the partnership interests were offered in New York and the business transaction between FutureSelect and Tremont occurred in New York, but there are no allegations in the complaint or other record evidence to support these assertions. *See* RAP 10.3(a)(6) (argument of petitioner must include references to relevant part of the record). Tremont's argument therefore is improper.

Indeed, the Court of Appeals expressly considered Tremont's argument that *Haberman* precludes consideration of other factors, and rightly rejected it as "not a precise reading of *Haberman*." Op. at 11. As the Court of Appeals noted, the Supreme Court in *Haberman* did not directly refer to the Restatement (Second) of Conflict of Laws Section 145, let alone dictate that Section 145 set forth the exclusive factors that could be considered when determining which state had the "most significant relationship." The Court of Appeals' decision thus closely follows this Court's precedent.

2. The Court of Appeals Appropriately Weighed Competing New York Contacts In Concluding that Washington Law Applied

Tremont's claim that the Court of Appeals failed to weigh the New York contacts against the Washington contacts is simply wrong and misleading. The Court of Appeals' finding that Washington "has substantially more significant contacts than any other state," Op. at 15, makes clear that the Court of Appeals did, in fact, evaluate the contacts of competing states, including New York. *Id.* at 16 ("Washington has *the most* significant contacts with the subject matter of these claims.") (emphasis added); *id.* (noting that with respect to E&Y's negligent misrepresentation claim, "Washington and New York both have significant contacts, but Washington's are more significant").

Moreover, despite Tremont's claims to the contrary, the Court of Appeals expressly identified the factors supporting New York law in its opinion. For example, the Court of Appeals repeatedly considered the fact that certain misrepresentations were made in New York. *See, e.g.,* Op. at 13 ("[T]he place of reliance (here, Washington) is a more important contact than both the place of reception (Washington) and the place where the defendant made the representations (New York)."); *id.* at 12 n. 33 (stating that misrepresentations were made in New York). Further, the Court of Appeals considered that Tremont and E&Y have their principal places of business or headquarters in New York, *id.* at 4-5, and that FutureSelect's chairman regularly visited Tremont in New York. *Id.* at 6-7. The Court of Appeals nevertheless concluded that these New York factors were outweighed by the more significant factors favoring Washington law. *See* Op. at 14-15.

Tremont argues that the Court of Appeals should have considered other "competing New York contacts," extraneous to the complaint, including its assertion that "New York is where Tremont and FutureSelect's contractual relationship was formed" and where "tangible things" relating to the transaction were located. However, the Court of Appeals properly "focus[ed] on the facts as alleged in the complaint," Op. at 4, and there is nothing in the complaint—or elsewhere in the record—to

support Tremont's assertions. These other purported New York contacts therefore could not be properly considered. *See* RAP 10.3(a)(6) (argument of petitioner must include references to relevant part of the record); *see also Grobe v. Valley Garbage Serv., Inc.*, 87 Wn.2d 217, 228-229, 551 P.2d 748 (1976) (noting "the oft-repeated rule that cases on appeal are decided only from the record, and if the evidence is not in the record it will not be considered") (quotation and citation omitted).

Now, for the first time, Tremont attempts to dispute that the place of FutureSelect's reliance was Washington. Tremont cites part of one comment from Restatement (Second) of Conflicts of Law Section 148 regarding the places where a plaintiff acts in reliance, then baldly asserts that FutureSelect "relinquish[ed] assets in New York." However, there is nothing in the record showing where FutureSelect "relinquished assets"—let alone that this occurred in New York rather than Washington. *See, e.g.*, RAP 10.3(a)(6); *Grobe*, 87 Wn.2d at 228-229. Furthermore, Tremont selectively omits the rest of the comment to Section 148 that states that "[t]he plaintiff may rely in many other ways," including by entering into a contract, or taking or refraining from action in reliance on the misrepresentation. Restatement §148 cmt. f. The complaint makes clear that FutureSelect relied on misrepresentations when it decided to purchase

partnership interests in Tremont's funds, *see, e.g.,* CP 32, and that decision took place in Washington. *See* CP 5-6.

3. Section 148 Applies to Misrepresentation Claims

Finally, Tremont's argument that the Court of Appeals' consideration of Section 148 is contrary to Washington law is absurd. All parties agree that Washington courts have adopted Restatement (Second) of Conflicts of Law Section 145. As the Court of Appeals recognized, Section 145 refers to its related sections, including Section 148, as refinements that "state rules of greater precision" for particular kinds of claims. *See* Op. at 9-10 n. 20 (citing Restatement §145 cmt. a). Indeed, the Supreme Court has directed the Court of Appeals to refer to these supplemental sections when applying Section 145 in other contexts. *See, e.g., Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 736 n.6, 254 P.3d 818 (2011) (directing the Court of Appeals to consider the more precise Section 146, pertaining to personal injury claims, when applying Section 145's "most significant relationship" standard). The Court of Appeals thus was correct in considering Section 148. *See* Op. at 10-11.

4. The Court of Appeals Need Not Have Considered the Competing States' Interests and, In Any Event, Washington's Interests Far Exceed New York's

Tremont has completely reversed its position as to whether the Court of Appeals should have expressly considered the interest of each

potentially interested state. In its brief to the Court of Appeals, Tremont argued that the Court should not consider public policy arguments because the contacts were not evenly balanced. *See* Tremont Responsive Brief at 15, attached as Exhibit A. In a remarkable (and impermissible) about-face, Tremont now argues that the Court of Appeals was required to consider New York's state interest—and its failure to do so now warrants review. *See* Tremont Pet. at 17-18. Even more remarkably, Tremont now says that the case it cited approvingly to the Court of Appeals—*Zenaida-Garcia v. Recovery Systems Technology, Inc.*, 128 Wn.App. 256, 260-61, 115 P.3d 1017 (2005)—is a misreading of Supreme Court precedent. *See id.*

The doctrine of judicial estoppel precludes exactly this kind of unfair and improper change in position. *See Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-952, 205 P.3d 111 (2009) ("Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage.") (citation omitted). Tremont therefore should be estopped from reversing its position. *See id.*

Putting aside Tremont's impermissible flip-flopping, however, this Court has held that courts should balance the competing states' public interests only "[i]f the contacts are evenly balanced." *Myers v. Boeing*

Co., 115 Wn.2d 123, 133, 794 P.2d 1272 (1990) (explaining *Spider Staging* choice of law analysis). Here, the Court of Appeals properly found that "Washington has substantially more significant contacts than any other state," Op. at 15, and so it need not consider competing states' interests.

Nonetheless, even if the Court of Appeals had reached the issue of competing state interests, Washington's interest clearly outweighs that of New York. Applying Washington law in this action furthers the state's strong interest in protecting its investors, a public interest repeatedly recognized by this Court. *See, e.g., Cellular Eng'g, Ltd. v. O'Neill*, 118 Wn.2d 16, 23-24, 820 P.2d 941 (1991); *Hoffer v. State*, 113 Wn.2d 148, 152, 776 P.2d 963 (1989) (*"Hoffer II"*).

Far from protecting Washington investors, the application of New York law here would prevent FutureSelect from seeking any remedy against Tremont. Indeed, Tremont argues that applying New York law would result in "most (if not all)" of FutureSelect's claims being dismissed, and cite this as the rationale for applying New York law. Tremont Pet. at 19. Of course, Tremont cannot cite a single case where a Washington court applied choice of law principles to preclude a Washington investor from bringing a claim under the WSSA— let alone precluded the investor from bringing any claims at all. And for good

reason—allowing those who mislead or defraud Washington investors to avoid liability under the WSSA would be absolutely contrary to Washington's public interest and policy.

B. There Is No Basis for Granting Review of the Court of Appeals' Reinstatement of FutureSelect's WSSA Claim Against E&Y Under RAP 13.4(b)(1) or (b)(2)

1. The Court of Appeals Consistently Applied Washington Law in Ruling That Whether E&Y Meets the WSSA's Definition of "Seller" Is a Question of Fact

E&Y's claim for review under RAP 13.4(b)(1) and (2) lacks any merit.[7] In reversing the dismissal of FutureSelect's WSSA claim against E&Y, the Court of Appeals properly followed *Haberman* and *Hoffer*—two Washington Supreme Court cases directly on point. As here, those cases both involved WSSA claims against accountants at the motion to dismiss stage. The *Haberman* and *Hoffer* courts both concluded that whether an auditor was a "substantial contributive factor" is "necessarily a question of fact," *Haberman*, 109 Wn.2d at 132, "thereby precluding resolution in a CR 12(b)(6) proceeding." *Hoffer v. State*, 110 Wn.2d 415, 430 n.4, 755 P.2d 781 (1988) (*"Hoffer II"*) (emphasis added). E&Y improperly asks this Court for a resolution in the CR 12(b)(6) context.

[7] Like the other Petitioners, E&Y tacks on a claim for review under RAP 13.4(b)(4), arguing that the purported conflict between the Court of Appeals' opinion and prior decisions of this Court also constitutes an issue of substantial public interest. *See* E&Y Pet. at 9. As explained *infra*, there is a substantial public interest in this case—the protection of Washington investors—and that public interest militates completely in favor of permitting FutureSelect's claims to proceed.

Haberman established the doctrine that a defendant is liable as a seller under RCW 21.20.430(1) if his acts were a "substantial contributive factor" in the securities sales transaction. *Haberman*, 109 Wn.2d at 131. Under *Haberman*, whether the defendant's conduct rises to the level of a substantial contributive factor depends upon: (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.* at 131-32. In *Hoffer*, the Court noted that this test "necessarily involves many factual issues that cannot be resolved" on a CR 12(b)(6) motion to dismiss and instead "requires the development of more facts." *Id.* at 430-31 (holding that untrue statements of material fact might have been made by the auditor; and so for purposes of CR 12(b)(6), the court could not conclude the plaintiffs were foreclosed from recovery). As the Court of Appeals correctly determined, the absence of an evidentiary record requires the same result here.

2. The Court of Appeals' Opinion Does Not Conflict with *Hines* or Any of the Other Cases Cited by E&Y

E&Y argues that the Court of Appeals' ruling conflicts with *Hines*, which held that a plaintiff must show something more than "routine" professional services for a defendant's activities to rise to the level of a "seller" under the WSSA. E&Y Pet. at 9-10; *Hines*, 114 Wn.2d at 149. *Hines*, however, actually demonstrates why the Court of Appeals was correct in reversing the Superior Court. *Hines* was decided on a full evidentiary record and not at the motion to dismiss stage under Washington's lenient pleading standards. Op. at 24; *see Hines*, 114 Wn.2d at 148 (affirming the dismissal of counsel on stock offering "[a]fter reviewing the evidence").

The other "conflicting" cases cited by E&Y were also decided on summary judgment after the facts had been fully developed and also support the Court of Appeals' decision. *See Viewpoint-North*, 175 Wn.App. at 197 (noting that a "defendant's status as a seller is necessarily a question of fact" and holding on summary judgment that a defendant's mere referral which led to plaintiff's purchase of shares was not a substantial contributive factor in the investment); *Brin*, 89 Wn.App. at 829-30 (affirming dismissal of WSSA claim at trial).[8]

[8] E&Y misrepresents (another non-auditor case) *Kinney v. Cook*, 159 Wn.2d 837, 154 P.3d 206 (2007) in support of its argument that courts can resolve whether a defendant

Furthermore, *Hines*, *Viewpoint-North*, and *Brin* are distinguishable because they did not involve an auditor. The Court of Appeals' view that an auditor's role in communicating to the public about corporations and their securities go beyond "routine professional services" does not create a conflict with *Hines*. Op. at 24-25. Contrary to E&Y's hyperbolic assertion that *every auditor* will be liable as a seller under the WSSA, E&Y Pet. at 14, the Court of Appeals and the *In re Metropolitan Securities, Inc.* opinion relied upon by the Court of Appeals simply address when allegations against an auditor should survive a CR 12(b)(6) motion. *See In re Metro. Sec. Litig.*, 532 F. Supp.2d 1260, 1301-02 (E.D. Wash. 2007) (citing *Haberman* and *Hoffer*).[9]

In any event, the Court of Appeals found that FutureSelect's complaint alleged that E&Y's actions were anything but "routine:"

> FutureSelect's complaint alleges that Ernst & Young "made untrue statements of material facts and engaged in

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was a substantial contributive factor under the WSSA on a motion to dismiss. E&Y Pet. at 16. The *Kinney* court, however, did not analyze whether the defendant was a substantial contributive factor; rather, the court dismissed the claim because the transaction at issue was the repayment of a loan, not the sale of a security. *Id.* at 842-43. Another case cited by E&Y, *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531 (9th Cir. 1989) applied a different, more stringent test to a federal securities claim. *Id.* at 535-36 (applying *Pinter* standard extending liability to only those motivated at least in part to serve his own financial interests or those of the security owner).

[9] The Court of Appeals justifiably acknowledged *Metropolitan Securities*, a recent Washington federal court case involving a WSSA claim, instead of the much older cases from outside Washington involving federal securities law on which E&Y relies. *See* E&Y Pet. at 11, 13 & 16 (citing *Ahern v. Gaussoin*, 611 F. Supp. 1465 (D. Or. 1985); *In re Activision Sec. Litig.*, 621 F. Supp. 415 (N.D. Cal. 1985)).

> acts of fraud and deceit upon FutureSelect . . . that were a substantial factor contributing to FutureSelect's investment in the Rye Funds. FutureSelect alleges that Ernst & Young "misrepresented that they had conducted audits in conformity with" generally accepted auditing standards and "omitted material facts," including that it had not audited "Madoff's own books and records to verify the Rye Funds' assets.

Op. at 25;CP 10.[10] E&Y ignores these findings by the Court of Appeals. E&Y Pet. at 15 (arguing that the Court of Appeals relied only on FutureSelect's "naked assertions" that E&Y violated the WSSA as a seller of a security and its "actions were a substantial factor" in the sale); *id.* at 18 (stating that "FutureSelect never argued E&Y's role went beyond standard audit services to its client, Tremont"). Making untrue statements or engaging in fraud or deceit, of course, does not constitute "standard" auditing practice.

In short, the Court of Appeals considered and correctly applied every Washington Supreme Court or Court of Appeals decision cited by E&Y. Those cases, in fact, only support the Court of Appeals' decision

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[10] E&Y cites to an unpublished opinion, *Reale v. Ernst & Young, LLP*, No. 98-2-05378-0 (Super. Ct. King. Co. Dec. 1, 1998) (Jordan, J.), *aff'd* 101 Wn.App 1037, 2000 WL 949388 (July 10, 2000) (unpublished opinion) *rev. denied*, 142 Wn.2d 1027, 21 P.3d 1149 (2001) "not as authority" (because it is uncitable under GR 14.1(a)) but "to illustrate the need for a uniform understanding of *Hines*' application to dismissal motions." E&Y Pet. at 15 n. 4. The *Reale* case does not "illustrate any inconsistency" in the case law. The accountant in *Reale* issued an audit letter in connection with an initial public offering, and any potential investors were unknown to the defendant. *Reale*, 2000 WL 949388, at *5-6. Here, E&Y was the Rye Funds' external auditor for years, Op. at 25 n. 86, knew its audits were being used by current investors in their investment decisions and addressed its audits to FutureSelect. Op. at 25-26.

that FutureSelect had met its pleading burden and so dismissal was inappropriate. Accordingly, there is no basis for review by this Court under RAP 13.4(b)(1) or (2).

C. Oppenheimer's Petition Must Be Denied Because It Raises No Significant Question of Law

Oppenheimer claims that the Court of Appeals' decision raises a significant question of law under RAP 13.4(b)(3). There is no basis for this claim. Significantly, Oppenheimer does not challenge the Court of Appeals' finding that Oppenheimer's subsidiary Tremont acted as Oppenheimer's agent in Washington. Nor does Oppenheimer argue that there is any question of law as to whether the Washington conduct of an agent on behalf of a principal may be imputed to the principal for purposes of long-arm jurisdiction. It may.

Instead, Oppenheimer argues that this Court should establish a new and special test for imputing the contacts of a subsidiary to a parent under Washington's long-arm statute by adopting the standard currently applied by the Ninth Circuit under *Bauman v. Daimler Chrysler Corp.*, 644 F.3d 909 (9th Cir. 2011)[11]; Oppenheimer Pet. at 17-18.

[11] The United States Supreme Court granted *certiorari* in the *Bauman* case and will hear oral arguments on October 15, 2013. It is bizarre that Oppenheimer would invite this Court to newly adopt a standard currently under review by the United States Supreme Court.

There is absolutely no basis for Oppenheimer's argument because there is no question of law to be resolved, much less one that rises to the level of significance meriting review by this Court under RAP 13.4(b)(3). The Court of Appeals applied clear and well-established law on the issue of whether and under what circumstances a non-resident principal is subject to personal jurisdiction in Washington based on the in-state contacts of its agent. Op. at 39-48. The Court of Appeals properly determined that FutureSelect had made a prima facie showing of personal jurisdiction over Oppenheimer under the "through the agent" provision of Washington's long-arm statute. *Id.* at 47-48. At this procedural stage, Oppenheimer lacks any basis to seek a review of that determination, and FutureSelect is entitled to proceed to discovery without further delay.

1. The Standard by Which an Agent's Contacts May Be Imputed to a Principal Is Clear and Was Correctly Applied by the Court of Appeals

Oppenheimer acknowledges that the Court of Appeals found that Tremont acted as Oppenheimer's agent. Oppenheimer Pet. at 8. Oppenheimer also recognizes the three-part test applied by Washington courts to determine whether a defendant, acting directly or through an agent, has sufficient contacts to warrant jurisdiction consistent with the constitutional principle of due process. Oppenheimer Pet. at 9. This test applied by Washington courts in determining whether a nonresident

corporation is subject to long arm jurisdiction is set forth in *Tyee Construction Co. v. Dulien Steel Products, Inc.*, 62 Wn.2d 106, 115-16, 381 P.2d 245 (1963), and the numerous cases that have followed and refined the *Tyee* court's analysis. *See, e.g., Precision Lab. Plastics, Inc. v. Micro Test, Inc.*, 96 Wn.App. 721, 725-26, 981 P.2d 454 (1999). The three factors generally can be summarized as: (1) purposeful availment of the privilege of conducting activities in Washington; (2) whether the cause of action arises from or in connection with these activities and (3) whether it is fair and just to hold the defendant answerable in Washington. *See, e.g., Precision Lab.*, 96 Wn.App. at 729-30.

It is exactly this analysis that the Court of Appeals conducted in concluding that FutureSelect made a prima facie showing that Oppenheimer had brought itself within the ambit of Washington's long-arm statute. Op. at 48. The Court of Appeals spent nine pages addressing each and every due process argument raised by Oppenheimer. Op. at 39-48.

With respect to the purposeful availment factor, the Court properly concluded that the "complaint makes a prima facie showing of purposeful availment by Oppenheimer." Op. at 47. This determination was based on the conduct of Oppenheimer's agent Tremont on behalf of Oppenheimer in Washington and the harm caused in Washington. Op. at 48.

Oppenheimer builds its argument on the false pretense that the Court of Appeals found no Oppenheimer conduct in Washington: "the Court of Appeals did not— and could not—find that OAC's purported 'direction' or 'management' of Tremont's activities included any conduct in Washington." Oppenheimer Pet. at 14. Oppenheimer's bare assertion is flatly contradicted by the Court of Appeals: "Oppenheimer deliberately engaged in significant transactions in Washington through its agent, Tremont, by controlling and actively managing Tremont's marketing and solicitation of investments aimed at FutureSelect." Op. at 47 (emphasis added). There is simply no question that the Court of Appeals found that Tremont was acting as Oppenheimer's agent in Washington with respect to the transactions giving rise to FutureSelect's damages. Op. at 47-48. The Court of Appeals thus was entirely correct in its conclusion that this purposeful conduct by Oppenheimer through its agent in Washington was sufficient under Washington's long-arm statute. *See, e.g., CTVC of Hawaii, Co. v. Shinwatra*, 82 Wn.App. 699, 717, 919 P.2d 1243 (1996).

2. The Court of Appeals Decision Is Entirely Consistent with Constitutional Due Process

Oppenheimer accuses the Court of Appeals of not performing "the necessary constitutional analysis required to find personal jurisdiction." Oppenheimer Pet. at 10. Oppenheimer's accusation is false. The Court of

Appeals' decision explicitly states that constitutional requirements would not be met by "a generic allegation of an agency relationship" or by an allegation that the parent simply had the power to control its subsidiary. Op. at 48. Instead, the Court of Appeals rested its decision on the allegations that Oppenheimer actively controlled and managed key activities of its subsidiary/agent acting in Washington and that these activities caused harm in Washington. *Id.* Under these circumstances, the Court of Appeals properly concluded that there is nothing unconstitutional about holding Oppenheimer answerable on a claim related to these Washington contacts. Op. at 48; *see also Precision Lab.*, 96 Wn.App. at 729-30; *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed. 2d 223 (1957).

Oppenheimer's only response to the Court of Appeals' cogent constitutional analysis is to point to the Massachusetts decision *Askenazy v. Tremont Group Holdings, Inc.*, 2012 WL 440675 (Mass. Super. Jan. 26, 2012). *See* Oppenheimer Pet. at 10-12. Oppenheimer calls *Askenazy* "a nearly identical case," Oppenheimer Pet. at 10, and implies that the *Askenazy* court considered the same issue of agency as the Court of Appeals. Oppenheimer Pet. at 11 n.7 ("Massachusetts law also provides for jurisdiction over a principal for the in-forum acts of an agent.").

This is inaccurate and misleading. *Askenazy*, unlike here, did not involve an agency claim, but rather, as the *Askenazy* court noted, the plaintiffs in *Askenazy* alleged that "Tremont's jurisdictional contacts should be imputed to Oppenheimer Acquisition because of its 'controlling person status over Tremont ...." *Askenazy,* 2012 WL 440675, at *9. Unlike here, in *Askenazy* there was no allegation that Oppenheimer deliberately engaged in significant transactions through its agent in Massachusetts by controlling and actively managing Tremont's marketing and solicitation of investments aimed at the plaintiff. The *Askenazy* court concluded that generic allegations of control were not sufficient for finding personal jurisdiction. *Id.* at *8. In stark contrast, the Court of Appeals here concluded that jurisdiction was appropriate because "Oppenheimer is actively controlling and managing key activities of its subsidiary ...." Op. at 48. *Askenazy* thus only provides further support for the Court of Appeals' decision.

In short, Oppenheimer has failed to raise any question of law meriting review by this Court under RAP 13.4(b)(3).

D. The Only Substantial Public Interest at Issue Is the Protection of Washington Investors

Finally, all Petitioners weakly claim that their petitions involve an issue of substantial public interest that should be determined by the

Supreme Court under RAP 13(b)(4). However, none of the Petitioners can articulate any substantial public interest that would be served by this Court's review. To the contrary, as Petitioners make clear in their petitions, they seek to deny these Washington investors redress for the misrepresentations made to them, and so undermine the very public interest they claim would be served by this Court's review.

Unlike cases involving important questions of public policy with potentially far-reaching consequences, the Court of Appeals' application of well-established law to allegations at the pleading stage does not present a question of "substantial public interest" meriting Supreme Court review. *Cf. Cary v. Allstate Ins. Co.*, 130 Wn.2d 335, 347-48, 922 P.2d 1335, 1341-42 (1996) (determining whether certain exclusionary clause in insurance policies are void against public policy is matter of "substantial public importance"); *In re Marriage of Ortiz,* 108 Wn.2d 643, 644, 740 P.2d 843 (1987) (whether earlier Supreme Court opinion applied retroactively was a question of substantial public importance under RAP 13.4(b)(4)). Petitioners cannot point to any public interest—much less a substantial one— that would be served by having this Court review a Court of Appeals' decision that reversed dismissal of a complaint and allowed Washington investors to proceed to discovery on a securities claim.

Petitioners' appeals to judicial economy, *see, e.g.*, Tremont Pet. at 19 (review should be granted because application of New York law "would result in most (if not all) of the claims in this case being dismissed"), show how fundamentally they misapprehend the substantial public importance requirement of RAP 13.4(b)(4). Applying New York law to deny Washington investors redress would be inconsistent with the very purpose of the WSSA, particularly in light of the substantial contacts of the Petitioners with Washington in this case. *See Haberman*, 109 Wn.2d at 181 (purpose of WSSA is to protect investors and it should be interpreted in accordance with this "broad remedial purpose"). The Court of Appeals properly recognized that public interest, *see* Op. at 21, and protected Washington investors when it reinstated FutureSelect's claims. Petitioners should not be permitted to undermine this public interest by further delaying the consideration of the merits of FutureSelect's claims.

IV. CONCLUSION

For the reasons stated above, the petitions for discretionary review filed by Tremont, E&Y and Oppenheimer should be denied.

Dated: October 11, 2013

Respectfully submitted,

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on October 11, 2013, I caused a true and correct copy of the foregoing Consolidated Answer to Petitions to be delivered via U.S. first class mail, with a courtesy copy via email, to:

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EXHIBIT A

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

Defendants/Respondents.

BRIEF OF RESPONDENTS TREMONT GROUP HOLDINGS, INC. and TREMONT PARTNERS, INC.

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Plaintiffs/appellants ("FutureSelect" or "plaintiffs") appeal from the order of the Superior Court of Washington in and for King County (Spector, J.) entered on June 3, 2011 (the "Order"). The Order dismisses the complaint in this action (the "Complaint") for failure to state a claim for relief. For the reasons stated below, defendants/respondents Tremont Partners, Inc. ("TPI") and Tremont Group Holdings, Inc. ("TGH") (collectively, "Tremont") submit that the superior court properly dismissed the Complaint as against Tremont under Civil Rule 12(b)(6), and the Order therefore should be affirmed.

I. INTRODUCTION

Plaintiffs are three hedge funds (the "FutureSelect Funds") and the investment adviser to those funds. These professional – and highly sophisticated – investors wished to invest with Bernard Madoff but could not do so directly because Madoff's firm, Bernard L. Madoff Investment Securities LLC ("BLMIS"), limited the number of accounts it handled. FutureSelect therefore turned to three hedge funds managed by TPI, each of which had access or exposure to BLMIS and thus Madoff.

The three funds managed by TPI, Rye Select Broad Market Fund, L.P. (the "Broad Market Fund"), Rye Select Broad Market Prime Fund, L.P. (the "Prime Fund") and Rye Select Broad Market XL Fund, L.P. (the "XL Fund") (collectively, the "Rye Funds" or the "Funds"), are organized

as limited partnerships under Delaware law. The FutureSelect Funds invested in the Rye Funds by becoming limited partners of those Funds, thereby obtaining their own indirect exposure to Madoff.

As the world now knows, rather than investing the Rye Funds' assets as promised, Madoff misappropriated them and successfully concealed his malfeasance for decades. With Madoff in jail and unable to compensate his victims, FutureSelect sued Tremont in an effort to recoup the losses caused by Madoff's scheme. All of FutureSelect's claims, however, are facially defective and were properly dismissed by the superior court as against Tremont.

One of FutureSelect's claims alleges violations of the Washington State Securities Act ("WSSA," RCW 21.20.010) based on the assertion that Tremont disseminated false and misleading statements concerning TPI's management of the Rye Funds. The WSSA has no application here under governing choice of law rules, however, because the misconduct alleged in the Complaint occurred principally, if not exclusively, in the State of New York. But even if the WSSA were applicable – which it is not – the WSSA claim still would be facially defective in all events because FutureSelect failed adequately to allege an essential element of the claim, *i.e.*, facts sufficient to show that FutureSelect reasonably relied on any misstatement purportedly made by Tremont.

As for the Complaint's claims of negligence and negligent misrepresentation, the superior court properly dismissed them because they are barred by exculpation clauses contained in the limited partnership agreements of the Rye Funds, which govern the investments of all of the Funds' limited partners, including the FutureSelect Funds. Under the terms of the exculpation clauses, Tremont is exculpated against liability for all claims sounding in negligence, and all such claims therefore are properly dismissed on motion where, as here, they are asserted in a complaint. FutureSelect's negligence claim also was properly dismissed because the claim is derivative in nature and FutureSelect lacks standing to assert it. The Order therefore should be affirmed.

II. STATEMENT OF THE ISSUES

1. Did the superior court properly dismiss FutureSelect's WSSA claim given that under the Washington Supreme Court's decision in Haberman v. Washington Public Power Supply System, 109 Wn.2d 107, 744 P.2d 1032 (1987), opinion amended, 109 Wn.2d 107, 750 P.2d 254 (1988), the WSSA does not apply to the New York-based securities transactions at issue in this case?

2. Did the superior court properly dismiss FutureSelect's WSSA claim on the additional ground that the Complaint contains no allegations sufficient to establish for pleading purposes an essential

element of that claim – namely, reasonable reliance on a material misstatement made by Tremont?

3. Did the superior court properly dismiss FutureSelect's claims of negligence and negligent misrepresentation given that they are barred by the exculpation clauses contained in the Rye Funds' limited partnership agreements?

4. Did the superior court also properly dismiss FutureSelect's negligence claim given that the claim is derivative and FutureSelect lacks standing to assert it?

III. STATEMENT OF THE CASE

FutureSelect, the Rye Funds and Tremont

Plaintiff FutureSelect Portfolio Management, Inc. ("FSM") is the investment adviser to the FutureSelect Funds – plaintiffs FutureSelect Prime Advisor II, LLC, The Merriwell Fund, L.P. and Telesis IIW, LLC. (CP 5, 6.) The FutureSelect Funds are "funds of funds," *i.e.*, hedge funds that invest in other hedge funds. (CP 3, 21, 23, 24; FS Br. at 3, 11-12.)

The Rye Funds are New York-based hedge funds organized as limited partnerships under the laws of Delaware. (CP 6, 7, 1051, 1069, 1141, 1151, 1212, 1217.) The Rye Funds sold limited partnership interests to a number of highly sophisticated investors, including the FutureSelect Funds. (CP 3, 6-7.) FSM selected the Rye Funds as an

investment vehicle to enable the FutureSelect Funds to gain exposure to the investment strategy of Bernard Madoff. (CP 9.) The FutureSelect Funds could not invest with Madoff directly because Madoff's firm, BLMIS, limited the number of investors it would accept as clients, and the Rye Funds were among the select few granted access to Madoff. (Id.) Two of the Rye Funds, the Broad Market Fund and the Prime Fund, had accounts with BLMIS and entrusted their assets to that firm for investment. (CP 1057, 1058, 1141, 1142.) One of the Rye Funds, the XL Fund, had indirect exposure to Madoff in that it sought to replicate the returns of the Broad Market Fund on a leveraged basis by entering into swap agreements with third party financial institutions.[1] (CP 1218.)

Defendant TPI is the general partner and manager of the Rye Funds with headquarters in Rye, New York. (CP 6.) It is a wholly-owned subsidiary of defendant TGH, which also is based in New York. (CP 6, 1069, 1217.) Under the terms of the Rye Funds' limited partnership agreements, TPI was authorized to delegate responsibility for investing the

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[1] Swap agreements are contracts pursuant to which one party agrees to pay – often on a leveraged basis – an amount equal to the increase in the value of a security (here, the net asset value of limited partnership interests in the Broad Market Fund) in exchange for other payments (here, interest payments at a specified rate). (See Rye Select Broad Market XL Fund, L.P. Confidential Private Placement Memorandum (CP 1210-68) at CP 1225.) See also CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP, 654 F.3d 276, 279-80 (2d Cir. 2011) (discussing nature of swap agreements).

Funds' assets to an asset manager or managers selected in TPI's sole discretion.[2] Pursuant to that authority, TPI invested the assets of the Rye Funds through BLMIS and Madoff. (CP 2, 3.)

The Private Placement Memoranda

Prior to purchasing its limited partnership interests in the Rye Funds, FutureSelect received private placement memoranda disclosing the material terms and risks of its contemplated investments in the Funds (the "PPMs"). (CP 9.) TPI provided the same PPMs to all investors who expressed interest in purchasing the Funds' limited partnership interests, including prospective investors located throughout the United States.[3]

The PPM for the Prime Fund (the "Prime PPM") disclosed that "the partnership allocates its investment portfolio to one Manager" – Madoff – and that "[t]he overall success of the Partnership depends upon the ability of the Designated Manager to be successful in his own strategy."[4] The Prime PPM further disclosed that TPI would rely on information provided by Madoff, stating:

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[2] (Rye Select Broad Market Prime Fund, L.P. Am. and Restated Ltd. P'ship Agreement ("Prime LPA," CP 969-92) § 2.2; Rye Select Broad Market XL Fund, L.P. Am. and Restated Ltd. P'ship Agreement ("XL LPA," CP 993-1016) § 2.2; Rye Select Broad Market Fund, L.P. Am. and Restated Ltd. P'ship Agreement ("Broad Market LPA," CP 1017-48) § 3.03.)

[3] (See, e.g., CP 1054, 1139, 1213.)

[4] (Prime PPM (CP 1049-1133) at CP 1058, 1061, 1070-71, 1097.)

> [T]he Partnership will receive periodic reports from Underlying Managers . . . . The General Partner [TPI] will request detailed information on a continuing basis from each Underlying Manager regarding the Underlying Manager's . . . performance and investment strategies. However, the General Partner may not always be provided with detailed information regarding all the investments made by the Underlying Managers because certain of this information may be considered proprietary information by the Underlying Managers. This lack of access to information may make it more difficult for the General Partner to . . . evaluate the Underlying Managers.[5]

The PPM did not state that TPI would – or could – conduct "due diligence" on Madoff or his investment activity. Nor did it make any representations concerning the Fund's actual or anticipated returns.

The Prime PPM also admonished that investors should not rely on any representations outside the four corners of that document. Indeed, in that regard, the PPM included the following warning in bold text:

> NO PERSON HAS BEEN AUTHORIZED TO MAKE ANY REPRESENTATIONS OR PROVIDE ANY INFORMATION WITH RESPECT TO THE INTERESTS EXCEPT SUCH INFORMATION AS IS CONTAINED IN THIS MEMORANDUM. PROSPECTIVE INVESTORS SHOULD NOT RELY ON ANY INFORMATION NOT CONTAINED IN THIS MEMORANDUM.[6]

The PPMs for the Broad Market Fund (the "Broad Market PPM") and the

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[5] (Prime PPM (CP 1049-1133) at CP 1097.)
[6] (Prime PPM (CP 1049-1133) at CP 1052.)

XL Fund (the "XL PPM") contain similar disclosures.[7]

The Exculpation Provisions

The FutureSelect Funds and all other limited partners of the Rye Funds are parties to and bound by the Funds' limited partnership agreements ("LPAs"), which were attached as exhibits to the Funds' PPMs.[8] The LPAs for the Prime Fund and the XL Fund include provisions expressly exculpating TPI and its members, officers and affiliates from liability to the Funds and their limited partners for all "errors of judgment or for action or inaction, whether or not disclosed, which said party reasonably believed to be in the best interests of the partnership . . . to the fullest extent permitted by law[.]"[9]

The LPA for the Broad Market Fund also contains an exculpation clause. It provides that "[t]he General Partner [TPI] shall not be liable, responsible or accountable in damages or otherwise to any Limited Partners or the Partnership for any act or omission of such General Partner, except for acts or omissions constituting willful misfeasance, bad

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[7] (See generally Broad Market PPM (CP 1134-1209); XL PPM (CP 1210-68).)

[8] (Prime PPM (CP 1049-1133) at CP 1057, 1062, 1070; Broad Market PPM (CP 1134-1209) at CP 1152; XL PPM (CP 1210-68) at CP 1216, 1225.)

[9] (Prime LPA (CP 969-92) § 2.7; XL LPA (CP 993-1016) § 2.6.)

faith, gross negligence or reckless disregard of duty."[10]

FutureSelect's Investments in the Funds

Plaintiffs alleged in their Complaint that the FutureSelect Funds purchased limited partnership interests in the Rye Funds between 1998 and 2008. (CP 10-11.) Prior to making those investments, FSM's principal, Ronald Ward, signed subscription agreements with the Rye Funds representing and warranting that the FutureSelect Funds: (i) possessed sufficient "knowledge and experience in financial and business matters [such] that [they were] capable of evaluating the merits and risks" of investing in the Funds; (ii) had obtained "sufficient information from the [Funds or] authorized representatives to evaluate the merits and risks" of such investments; and (iii) could "afford a partial or complete loss" of their investments.[11] All hedge fund investors are required to make these representations and warranties under the federal securities laws.[12]

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[10] (Broad Market LPA (CP 1017-48) § 3.09(a).)

[11] (XL Fund Subscription Agreement signed by Ronald C. Ward (CP 1308-40) at CP 1323; see also Prime Fund Subscription Agreement signed by Ronald C. Ward (CP 1269-1307) at CP 1291; Broad Market Fund Subscription Agreement signed by Ronald C. Ward (CP 1341-92) at CP 1367.)

[12] For example, hedge fund investors must be: (i) "accredited investors" within the meaning of Regulation D promulgated under the Securities Act of 1933; (ii) "qualified clients" within the meaning of the Investment Advisors Act of 1940; and (iii) "qualified purchasers" as defined in the Investment Company Act of 1940. (Prime PPM (CP 1049-1133) at CP

FutureSelect's Claims

The Complaint alleges that TPI's failure to detect Madoff's fraud before he publicly revealed it demonstrates that TPI must not have monitored the Funds' investments. (CP 14-15.) Based on the conclusory (and erroneous) assertion that any minimal diligence would have revealed Madoff's fraud (CP 2, 14-15), the Complaint alleges claims against Tremont for: (i) violations of the WSSA (Count 1); (ii) negligence (Count 11); and (iii) negligent misrepresentation (Count 12).

IV. ARGUMENT

A. THE SUPERIOR COURT PROPERLY DISMISSED FUTURESELECT'S WSSA CLAIM

1. The WSSA Has No Application Here

The superior court properly dismissed FutureSelect's claim alleging violations of the WSSA because New York has the most significant relationship to the investments at issue in this case. Consequently, the WSSA has no application to the FutureSelect Funds' purchases of limited partnership interests issued by the Rye Funds.

In Haberman v. Washington Public Power Supply System, 109 Wn.2d 107, 744 P.2d 1032 – controlling authority FutureSelect largely

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1090-96; XL PPM (CP 1210-68) at CP 1234-38; Broad Market PPM (CP 1134-1209) at CP 1167-72.)

ignores in its brief[13] – the Washington Supreme Court addressed "the question . . . [of] whether the WSSA applies in an action brought in a Washington forum where out-of-state parties are under this State's jurisdiction." Id. at 134, 744 P.2d 1032. The court held that this question is governed by the "most significant relationship" choice of law test, which determines which state has the closest relationship to the transaction(s) at issue. See id. It does so by weighing, among other factors: (i) the place of alleged injury; (ii) the place where the conduct causing the injury occurred; (iii) the residence of the parties; (iv) the place where their relationship is centered; and (v) the interests of the competing states in regulating the conduct of the parties involved. See id. at 135, 159, 744 P.2d 1032; see also Rice v. Dow Chem. Co., 124 Wn.2d 205, 213, 875 P.2d 1213 (1994).

In Haberman, the Supreme Court weighed these factors and concluded that where the securities laws of two or more states potentially were applicable to plaintiff's securities law claim, the court should apply the law of the state in which: (i) the securities in dispute were issued; (ii)

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[13] Rather than address the choice of law analysis discussed at length by the Haberman court, FutureSelect cites the case for the proposition that the "primary goal of the WSSA is to protect Washington investors" (FS Br. at 20), as if to suggest that this is the principal, if not exclusive factor, driving the applicable choice of law analysis, which it most certainly is not.

the primary defendant resided; (iii) the parties had substantial business dealings; and (iv) the alleged misrepresentations originated. See 109 Wn.2d at 134-35, 744 P.2d 1032.

Analyzing those factors here, it becomes abundantly clear that New York law governs the claims alleged by FutureSelect in its Complaint challenging plaintiffs' securities transactions with the Rye Funds. In that connection, FutureSelect does not and cannot dispute that the limited partnership interests in question were issued by the Funds from their headquarters in New York, or that TPI, TGH and all the other defendants/respondents (except Massachusetts Mutual Life Insurance Company) are based in New York. (CP 9, 11, 1069; see also FS Br. at 19.) Furthermore, the Complaint alleges that FSM's principal, Ronald Ward, regularly traveled to New York to meet with TPI representatives (CP 11-13), and asserts that TPI's purported misconduct occurred in New York. (Id.) According to the Complaint, virtually *every* misrepresentation TPI purportedly made to FutureSelect emanated from TPI's office in New York. (Id.) The lone exception purportedly occurred during a single visit to Washington made by a New York-based representative of TPI in

1997.[14] (CP 9.) It also is significant that Madoff, based in New York, stole the assets of the Funds in New York, making New York the site of FutureSelect's alleged losses.

Ignoring Haberman, FutureSelect urges this Court to apply a different test, one that is unprecedented in this State.[15] According to FutureSelect, it should be able to assert claims against Tremont under the WSSA because TPI's representations reached FutureSelect at its place of business in Washington. (FS Br. at 18.) This argument should be rejected because it is contrary to controlling law, would require (in contravention of Haberman) courts to apply the WSSA to every securities claim asserted by a Washington resident, and is particularly inappropriate in this case given that TPI made many of the same statements to investors in different states. See Kelley v. Microsoft Corp., 251 F.R.D. 544, 552 (W.D. Wash. 2008) (holding that where defendant's conduct allegedly caused harm in two or more states, the "'place where the defendant's conduct occurred will

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[14] While FutureSelect implies that misrepresentations were made during this visit, it does not identify any misrepresentations allegedly made at that time.

[15] This is the "two contact" test mentioned in comment j to Section 148 of the Restatement (Second) of Conflict of Laws (1971). (FS Br. at 18.) The applicable "most significant relationship" test adopted by the Supreme Court is found in Section 145 of the Restatement (Second) of Conflict of Laws (1971). See Rice, 124 Wn.2d at 213, 875 P.2d 1213 ("Washington has adopted the 'most significant relationship' test as set out in the Restatement (Second) of Conflict of Laws *§ 145*." (emphasis added)); see also Haberman, 109 Wn.2d at 134, 744 P.2d 1032.

usually be given particular weight'" (quoting Restatement (Second) of Conflict of Laws § 145 cmt. e (1971))); Greenberg Traurig of N.Y., P.C. v. Moody, 161 S.W.3d 56, 71-72 (Tex. App. 2004) (rejecting "two contacts" test proposed by plaintiffs and applying New York law); see also Rice, 124 Wn.2d at 216, 875 P.2d 1213 (rejecting argument that "Washington law [sh]ould be applied in all tort cases involving any Washington resident").

Ito International Corp. v. Prescott, Inc., 83 Wn. App. 282, 921 P.2d 566 (1996), is not to the contrary, and FutureSelect's reliance on it is misplaced. (FS Br. at 19.) In Ito, the court applied Washington law where, in contrast to this case, the defendant was domiciled in Washington and the transaction at issue was an investment in a building located in Seattle. See 83 Wn. App. at 290, 921 P.2d 566. Here, Tremont is located in New York and the FutureSelect Funds purchased limited partnership interests issued by New York-based limited partnerships that invested assets with Madoff, a New York-based asset manager.[16]

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[16] FutureSelect also mistakenly relies on Peterson v. Graoch Associates # 111 L.P., No. C11-5069BHS, 2012 WL 254264 (W.D. Wash. Jan. 26, 2012), where the court cited Ito in holding that Washington law is applicable whenever Washington and a competing jurisdiction both have "significant contacts" to the transactions at issue. 2012 WL 254264, at *3. Peterson is contrary both to Ito and Haberman.

As for FutureSelect's "public policy" arguments (FS Br. at 20-21), they also have no merit. Where, as here, New York's connections to the transactions alleged in the Complaint are predominant, those connections are dispositive under Haberman. See Zenaida-Garcia v. Recovery Sys. Tech., Inc., 128 Wn. App. 256, 260-61, 115 P.3d 1017 (2005) (public policy arguments need only be considered where contacts are evenly balanced), review denied, 156 Wn.2d 1026, 132 P.3d 1094 (2006). Further, there also is no merit to FutureSelect's suggestion (FS Br. at 21) that New York lacks a strong interest in protecting investors from securities fraud merely because there is no private right of action under New York's securities statute, the Martin Act – the New York analog to the WSSA.[17] New York's interests predominate "because the financial industry is critical to its overall economic health and viability, as well as that of the nation." ExpressJet Airlines, Inc. v. RBC Capital Mkts. Corp.,

[17] See Carideo v. Dell, Inc., 706 F. Supp. 2d 1122, 1132 (W.D. Wash. 2010) (FS Br. at 18) (rejecting argument that allegedly lower level investor protection under another state's statute weighs against applying the laws of that state to claims asserted by plaintiffs); see also Rice, 124 Wn.2d at 216, 875 P.2d 1213 (holding that Washington's interest in applying its laws does not predominate simply because a foreign state's law would bar plaintiff's claim).

C.A. No. H-09-992, 2009 WL 2244468, at *13 (S.D. Tex. July 27, 2009).[18]

In sum, the Haberman factors compel the conclusion that New York, not Washington, law applies here, and the superior court therefore properly dismissed FutureSelect's WSSA claim as against Tremont.

2. FutureSelect Did Not Adequately Allege Reasonable Reliance

Even if the WSSA were applicable to the securities transactions at issue here – which it is not – the Complaint states no claim for relief under that statute. To establish liability under the WSSA, the purchaser of a security must show that the seller made material misrepresentations of fact concerning the security, and that the purchaser reasonably relied on those misrepresentations. See, e.g., Stewart v. Estate of Steiner, 122 Wn. App. 258, 264, 93 P.3d 919 (2004). In its Complaint, FutureSelect attempted to establish these elements by alleging that Tremont induced plaintiffs' investments in the Funds by misrepresenting that: (i) Tremont "conducted continuous monitoring and oversight" of Madoff (FS Br. at 4 (citing CP 10-12, 31)); and (ii) Tremont "conducted due diligence of Madoff to

[18] Thus, because the WSSA does not apply here, if FutureSelect still desired to attempt to pursue a securities claim under a state "blue sky" statute, it would need to look to New York's Martin Act, under which it is not entitled to relief. See, e.g., CPC Int'l Inc. v. McKesson Corp., 70 N.Y.2d 268, 275, 514 N.E.2d 116 (N.Y. 1987).

verify the existence of assets Madoff claimed to hold." (Id. (citing CP 9, 11-13).)[19] These allegations are insufficient to state a claim under the WSSA because the alleged misstatements do not appear in the Funds' PPMs, and plaintiffs expressly disclaimed reliance on any statements made outside the four corners of those offering documents.

The PPMs plainly disclose that "NO PERSON HAS BEEN AUTHORIZED TO MAKE ANY REPRESENTATIONS OR PROVIDE ANY INFORMATION WITH RESPECT TO THE INTERESTS EXCEPT SUCH INFORMATION AS IS CONTAINED IN THIS MEMORANDUM."[20] Moreover, in the subscription agreements signed by FutureSelect, plaintiffs represented that when deciding to invest in the Rye Funds, they "relied solely upon the [PPM], the [LPA] and [their] own independent investigations."[21] Plaintiffs therefore cannot base any claim under the WSSA on their alleged reliance upon any statement not found in the PPMs. Indeed, any such alleged reliance is unreasonable as a matter

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[19] The Complaint does not identify the source of these alleged misrepresentations with any particularity. Tremont is alleged to have made essentially the same misstatements in: (i) "offering materials" (CP 9); (ii) "materials Tremont provided to Ward" (CP 10); (iii) "when Ward visited Tremont's offices [in Rye, New York] and discussed the Rye Funds" (CP 9); (iv) in "telephone communications" (CP 11); and (v) in a letter dated July 10, 2001 (CP 12).

[20] (Prime PPM (CP 1049-1133) at CP 1052; Broad Market PPM (CP 1134-1209) at CP 1136; XL PPM (CP 1210-68) at CP 1213.)

[21] (E.g., XL Fund Subscription Agreement (CP 1308-40) at CP 1323.)

of law. See San Diego Cnty. Employees Ret. Ass'n v. Maounis, 749 F. Supp. 2d 104, 120-21 (S.D.N.Y. 2010); In re VMS Ltd. P'ship Sec. Litig., 803 F. Supp. 179, 193-94 (N.D. Ill. 1992).

In light of the representations made in the subscription agreements, FutureSelect cannot state a claim of securities fraud by alleging "'in effect, 'I lied when I told you I wasn't relying on . . . statements [outside the offering materials].'" Stewart, 122 Wn. App. at 268, 93 P.3d 919 (quoting Rissman v. Rissman, 213 F.3d 381, 382 (7th Cir. 2000) (Easterbrook, J.)). Yet FutureSelect attempts to do just that by claiming it relied on allegedly false statements nowhere found in the PPMs. Consequently, the Order dismissing the WSSA claim against Tremont can and should be affirmed on the ground that the Complaint fails to adequately allege the element of reasonable reliance, as required to state a claim under the statute. See Stewart, 122 Wn. App. at 274-75, 93 P.3d 919 (finding that sophisticated investor who had no prior relationship with defendant could not premise WSSA claim on alleged misrepresentations that were not contained in – or were contradicted by – disclosures in private placement memorandum).[22]

[22] The court in Stewart held that non-reliance clauses are presumptively enforceable and may be "overcome" only by a significant factual showing. 122 Wn. App. at 275, 93 P.3d 919. FutureSelect made no such showing in the Complaint here.

Entirely ignoring Stewart, FutureSelect points to the following allegation in the Complaint and contends it is sufficient to plead reasonable reliance: "'FutureSelect reasonably and justifiably relied on Tremont's misstatements when it purchased securities in Tremont by investing in the Rye Funds.'" (FS Br. at 28 (quoting CP 32).) That allegation, however, is nothing more than a bald conclusion of law, which is insufficient to state a claim for relief. See Haberman, 109 Wn.2d at 120, 744 P.2d 1032 (the "court need not accept legal conclusions as correct"); State ex rel. Pirak v. Schoettler, 45 Wn.2d 367, 370, 274 P.2d 852 (1954) ("A [motion to dismiss] does not admit recitals of conclusions either of fact or law. Only facts stated in the [complaint] which are well-pleaded are to be considered, and conclusions of the pleader are to be disregarded.").[23]

FutureSelect further argues that the superior court should have disregarded the non-reliance provisions of the PPMs. (FS Br. at 28.) But

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[23] In re Metropolitan Securities Litigation, 532 F. Supp. 2d 1260 (E.D. Wash. 2007) (FS Br. at 28), is not to the contrary. The Metropolitan court did not hold that conclusory allegations of reliance are sufficient to state a claim. Rather, it found that under the circumstances of that case, reliance could be presumed and therefore did not have to be alleged in the complaint. See 532 F. Supp. 2d at 1304. In this case, the Complaint alleges nothing to show that FutureSelect is entitled to any presumption of reliance. Indeed, there is and can be no presumption of reliance where, as here, the parties' contracts contain non-reliance clauses. See, e.g., Stewart, 122 Wn. App. at 272, 93 P.3d 919.

this contention is undermined by the Complaint, which repeatedly asserts (albeit in entirely conclusory terms) that the PPMs and other "Offering Materials" contain misrepresentations of material fact. (See, e.g., CP 8, 9.) Given FutureSelect's attack on the accuracy of the contents of the PPMs, it was entirely proper for the superior court to analyze the sufficiency of the attack in light of what the PPMs actually said without blindly accepting FutureSelect's characterization of those documents. See Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 717-28, 189 P.3d 168 (2008); see also Parrino v. FHP, Inc., 146 F.3d 699, 705-06 (9th Cir. 1998); Roe v. Unocal Corp., 70 F. Supp. 2d 1073, 1075 (C.D. Cal. 1999).[24]

FutureSelect fares no better with the fallback that any question of reasonable reliance necessarily raises issues of fact that may not be resolved on a motion to dismiss. (FS Br. at 29.) While such issues may arise from time to time in other cases, they are not presented by the Complaint in this action, where conclusory allegations of reasonable reliance have been made by sophisticated investors bound by non-reliance

[24] Berge v. Gorton, 88 Wn.2d 757, 567 P.2d 187 (1977) (FS Br. at 28), is readily distinguishable. Although Berge holds generally that "[f]actual allegations of the complaint must be accepted as true for purposes of the motion," id. at 759, 567 P.2d 187, it does not hold that courts must accept as true conclusory allegations flatly contradicted by documents, such as subscription agreements and offering documents, that are integral to the claims alleged in the complaint.

clauses. In San Diego County Employees Retirement Association v. Maounis, 749 F. Supp. 2d 104, for example, a pension plan signed a subscription agreement with a hedge fund containing a non-reliance clause substantially identical to the clause found in the subscription agreements signed by the FutureSelect Funds here. In granting defendants' motion to dismiss the pension plan's fraud claims, the court held that in light of "the sophistication of [the pension plan] and its investment advisor, and the clear, unambiguous language of the non-reliance provisions at issue, the . . . purported reliance on statements made before the execution of the Subscription Agreement [was] unreasonable as a matter of law." Id. at 121. The same conclusion is warranted here. See also In re VMS, 803 F. Supp. at 193-94 (dismissing analogous claim pursuant to non-reliance clause).

B. FUTURESELECT'S NEGLIGENT MISREPRESENTATION CLAIM IS BARRED BY THE EXCULPATION CLAUSES

In its brief, FutureSelect contends that this Court must ignore the exculpation provisions in the Funds' LPAs because they supposedly "go beyond the face" of the Complaint. (FS Br. at 35.) This contention is completely undermined by this Court's decision in Rodriguez, which holds that courts may construe and enforce exculpation clauses when deciding motions to dismiss – even if the contract containing the clause is not

attached to the complaint – provided that the contract is referenced in the complaint and plaintiffs do not dispute the authenticity or contents of the contract. See 144 Wn. App. at 725-26, 189 P.3d 168. Both conditions are satisfied here.

The LPAs of the Funds were attached as exhibits to the PPMs referenced by FutureSelect in its Complaint. (CP 8, 9, 1070, 1152, 1225.) While FutureSelect contends that the LPAs were not signed by plaintiffs (FS Br. at 35 & n.7), FutureSelect does not dispute that the FutureSelect Funds, as limited partners of the Rye Funds, were parties to the LPAs submitted by Tremont to the superior court in connection with its motion to dismiss. FutureSelect also does not dispute that the FutureSelect Funds signed subscription agreements with the Rye Funds in which they expressly represented and warranted that they had read the LPAs and agreed to be bound by the provisions of those contracts. (CP 1291, 1323, 1367.)[25] The LPAs therefore are properly considered by this Court for

[25] Thus, contrary to FutureSelect's contention, the FutureSelect Funds effectively signed the LPAs. But even if they did not sign those agreements, they still would be bound by the LPAs as matter of Delaware law. See Del. Code tit. 6, § 17-101(12) ("A limited partnership is bound by its partnership agreement whether or not the limited partnership executes the partnership agreement. . . . A written partnership agreement . . . [also s]hall not be unenforceable by reason of its not having been signed by a person being admitted as a limited partner[.]").

purposes of construing and enforcing exculpation clauses indisputably applicable to FutureSelect's claims against Tremont.

Further, public policy strongly favors consideration of exculpation provisions at the outset of a case. As the Delaware Court of Chancery has explained, it is appropriate to consider exculpation provisions when "resolving motions to dismiss . . . because it promotes the efficient allocation of the Court's and the parties' resources." In re Ply Gem Indus., Inc. S'holders Litig., C.A. No. 15779, 2001 WL 755133, at *10 (Del. Ch. June 26, 2001). Indeed, if plaintiffs could avoid application of such governing provisions simply by failing to quote them explicitly or by adding conclusory allegations to their complaints, "contracting parties would be stripped of the substantial benefit of their bargain, that is, avoiding the expense of lengthy litigation." Indus. Risk Insurers v. Port Auth. of N.Y. & N.J., 387 F. Supp. 2d 299, 307 (S.D.N.Y. 2005), aff'd in relevant part, 493 F.3d 283 (2d Cir. 2007); see also Parrino, 146 F.3d at 705-06 (plaintiffs may not "survive a Rule 12(b)(6) motion by deliberately omitting references to documents upon which their claims are based"); Zutty v. Rye Select Broad Mkt. Prime Fund, L.P., 33 Misc. 3d 1226, 939 N.Y.S.2d 745 (table), 2011 WL 5962804, at *7-8 (N.Y. Sup. Ct. Apr. 15, 2011) (dismissing claims against Tremont pursuant to exculpation clause); accord Wn. Super. Ct. Civil Rules, CR 11(b)(3) (pleadings should not be

drafted in a way that would cause "needless increase in the cost of litigation").[26]

With the exculpation clauses properly before the Court, those clauses plainly bar FutureSelect's negligent misrepresentation claim, and FutureSelect cites no authority to the contrary. Under governing Delaware law, see Rodriguez, 144 Wn. App. at 718, 189 P.3d 168 (Delaware law

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[26] While plaintiffs cite Askenazy v. Tremont Group Holdings, Inc., C.A. No. 2010-04801-BLS2, 2012 WL 440675 (Mass. Super. Ct. Jan. 26, 2012), as a case that declined to consider the contents of an exculpation clause in connection with a motion to dismiss, the Askenazy court did so based on the mistaken belief that governing Delaware law precluded the court from considering materials outside the pleadings. See id. at *12. To support this finding, the Askenazy court cited In re Nantucket Island Associates Limited Partnership Unitholders Litigation, C.A. No. 17379, 2002 WL 31926614 (Del. Ch. Dec. 16, 2002), a case that actually held defendants should raise exculpation defenses "early and loudly [because o]ne of the purposes of these defenses is to permit the early termination of cases that fall within their protective ambit." Id. at *4. Nantucket Island declined to consider the defendants' exculpation defense in the particular context of that case only because the defendant "wait[ed] until the eve of trial" to assert the defense. See id. The Delaware Supreme Court has clearly ruled that exculpation "'may be raised on a Rule 12(b)(6) motion to dismiss (with or without the filing of an answer).'" Emerald Partners v. Berlin, 787 A.2d 85, 91-93 & n.35 (Del. 2001) (citation omitted).

To the extent the vacated decision in Cocchi v. Tremont Group Holdings, Inc., No. 502009 CA 016230XXXXMB, 2010 WL 2008086 (Fla. Cir. Ct. Feb. 5, 2010), aff'd sub nom. KPMG LLP v. Cocchi, 51 So.3d 1165 (Fla. Dist. Ct. App. 2010), vacated, 132 S. Ct. 23 (2011), has any precedential value within or without Florida (which it does not, see, e.g., Salitros v. Chrysler Corp., 306 F.3d 562, 575 n.2 (8th Cir. 2002)), it was wrongly decided. Review of the provisions of a limited partnership agreement is appropriate when considering a motion to dismiss claims arising out of that agreement. See Rodriguez, 144 Wn. App. at 726, 189 P.3d 168; see also Parrino, 146 F.3d at 705-06.

governs interpretation of exculpation clauses in the constituent documents of Delaware companies), exculpation clauses of the kind found in the LPAs of the Prime Fund and the XL Fund operate to bar all claims, including those sounding in negligence, unless plaintiffs "plead . . . facts that demonstrate that the [defendants] acted with scienter, i.e., that they had 'actual or constructive knowledge' that their conduct was legally improper." Wood v. Baum, 953 A.2d 136, 141 (Del. 2008) (citation omitted); see also Del. Code tit. 6, § 17-1101(f). And to overcome the bar of the exculpation clause found in the LPA of the Broad Market Fund, which exculpates Tremont from liability for all alleged misconduct falling short of gross negligence, FutureSelect must adequately plead and prove "'reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason.'" In re Lear Corp. S'holder Litig., 967 A.2d 640, 652 & n.45 (Del. Ch. 2008) (citation omitted).

FutureSelect's claim of negligent misrepresentation – which sounds in simple negligence – is bereft of facts sufficient to establish bad faith or "actions which are without the bounds of reason," as illustrated by the decision of this Court in Rodriguez. In that case, plaintiff alleged that the defendant directors breached their fiduciary duties in connection with the sale of a company by failing to conduct an auction of the business, failing

adequately to disclose material information and failing to obtain the best price for the investors of the company – all in an alleged effort to obtain accelerated or enhanced compensation from the purchaser. See Rodriguez, 144 Wn. App. at 716-17; 189 P.3d 168. This Court held that plaintiff's allegations were insufficient to overcome the protections of a Delaware exculpation provision, noting that the complaint contained no "allegations of any conduct . . . "beyond the bounds of reasonable judgment."" Id. at 724, 189 P.3d 168 (citations omitted).

Like the plaintiff in Rodriguez, FutureSelect has failed to allege any *facts*, as opposed to conclusory assertions, sufficient to show that Tremont acted beyond the bounds of reasonable judgment. Accordingly, FutureSelect's negligent misrepresentation claim is barred by the exculpation provisions of the Funds' LPAs, and the superior court therefore properly dismissed the claim as against Tremont.

C. THE SUPERIOR COURT PROPERLY DISMISSED FUTURESELECT'S NEGLIGENCE CLAIM

Because FutureSelect's negligence claim against Tremont is, like its negligent misrepresentation claim, premised on allegations of simple negligence, see, e.g., Musalli Factory for Gold & Jewellry v. JPMorgan Chase Bank, N.A., 261 F.R.D. 13, 27-28 (S.D.N.Y. 2009) (setting out elements of negligence), aff'd, 382 F. App'x 107 (2d Cir. 2010), it also is

barred by the exculpation clauses of the LPAs and thus was properly dismissed on that basis by the superior court. But even in the absence of the exculpation clauses, the negligence claim still would be defective because FutureSelect lacks standing to assert it.

FutureSelect's negligence claim is derivative in nature and thus may be maintained, if at all, solely by or on behalf of the Funds. FutureSelect therefore may not assert the claim – as it purports to do in this case – solely in an individual capacity on its own behalf. See, e.g., Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 351-53 (Del. 1988) (except in circumstances not present here, derivative claims may only be pursued by the company in which plaintiffs have invested – and not by investors directly).

In determining whether a claim brought by an investor is direct or derivative, the applicable test under governing Delaware law is as follows:[27]

> Where all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature. The mere fact that the alleged harm is ultimately suffered by, or the recovery would ultimately inure to the benefit of, the stockholders does not make a claim direct. . . . In order to

[27] FutureSelect concedes, as it must, that Delaware law governs the question of "whether a claim is direct or derivative." (FS Br. at 39.) See also Rodriguez, 144 Wn. App. at 718, 189 P.3d 168.

> state a direct claim, the plaintiff must have suffered some individualized harm not suffered by all of the stockholders at large.

Feldman v. Cutaia, 951 A.2d 727, 733 (Del. 2008) (footnotes omitted).

FutureSelect's claim of negligence is derivative because it is premised on conduct that caused alleged injuries – *i.e.*, the loss of Fund assets and the Funds' payment of allegedly unjustified fees to TPI (CP 9-10, 15, 16) – suffered directly by the Rye Funds and only indirectly by plaintiffs pro rata to their interests in the Funds. See Feldman, 951 A.2d at 733; see also Litman v. Prudential-Bache Props., Inc., 611 A.2d 12, 15-16 (Del. Ch. 1992) (finding allegations that "the general partners . . . inadequately investigat[ed] and monitor[ed] investments" to be derivative); Newman v. Family Mgmt. Corp., 748 F. Supp. 2d 299, 315 (S.D.N.Y. 2010) ("'A claim for deficient management or administration of a fund is 'a paradigmatic derivative claim.'" (citations omitted)); West Palm Beach Police Pension Fund v. Collins Capital Low Volatility Performance Fund II, Ltd., No. 09-80846-CIV., 2010 WL 2949856, at *3 (S.D. Fla. July 26, 2010) ("By alleging that Collins Investments failed to conduct the necessary due diligence to discover the Madoff Ponzi scheme, Plaintiff has pled 'a paradigmatic derivative claim.'" (citation omitted)).

FutureSelect contends that its negligence claim is direct, not derivative, arguing that the claim is not based on Fund mismanagement,

but rather, on misrepresentations made directly to FSM's principal Ronald Ward. (See FS Br. at 39-42.) This assertion is foreclosed by the actual allegations of the Complaint, which assert that Tremont failed to "use reasonable care, or the competence or skill of a professional investment advisor, in managing and overseeing FutureSelect's assets that were invested in the . . . Funds." (CP 42.) But even if FutureSelect's negligence claim were premised on misrepresentations, it still would have been properly dismissed below on the ground that any such claim would have been impermissibly duplicative of FutureSelect's claim of negligent misrepresentation. See Francom v. Costco Wholesale Corp., 98 Wn. App. 845, 866, 991 P.2d 1182 (2000) (affirming dismissal of duplicative claim), review denied, 141 Wn.2d 1027, 10 P.3d 1071 (2000); accord Vanguard Mun. Bond Fund, Inc. v. Cantor, Fitzgerald L.P., 40 F. Supp. 2d 183, 188 (S.D.N.Y. 1999) ("the Court does not find any substantial difference between [plaintiff's] negligence and negligent misrepresentation claims and will address them together as a claim for negligent misrepresentation").

V. CONCLUSION

For the foregoing reasons, the Order should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 16th day of May, 2012.

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Attached for filing in *FutureSelect v. Tremont*, No. 89303-9, are the following documents:

Consolidated Answer to Petitions
Exhibit A to Consolidated Answer to Petitions
Respondents' Motion to File an Overlength Consolidated Answer to Petitions for Review
Motion for Limited Admission Pursuant to APR 8(b) (Pro Hac Vice) for Emily Alexander
Motion for Limited Admission Pursuant to APR 8(b) (Pro Hac Vice) for Steven W. Thomas

Thank you.

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