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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.

APPELLANTS' REPLY BRIEF IN RESPONSE TO BRIEFS OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

Appellants FutureSelect Portfolio Management, Inc., FutureSelect Prime Advisor II, LLC, The Merriwell Fund, L.P., and Telesis IIW, LLC (collectively "FutureSelect") file this reply brief in support of their appeal of the trial court's granting of motions to dismiss filed by Respondents Massachusetts Mutual Life Insurance Co. ("MassMutual") and Oppenheimer Acquisition Corp. ("Oppenheimer") (collectively, "MassMutual Respondents"), Respondents Tremont Group Holdings, Inc. and Tremont Partners, Inc. (collectively, "Tremont"), and Respondent Ernst & Young LLP ("EY").[1]

In order to justify the Superior Court's unexplained dismissal of FutureSelect's claims—with prejudice and without leave to amend—Respondents abandon their primary argument below concerning venue and instead put forth a series of erroneous arguments that ignore the basic rule of pleading: Plaintiffs' allegations must be taken as true. Moreover, Respondents ask the Court to reject Restatement (Second) of Conflicts of Law Section 148. Yet, this Court and other Washington courts have found Section 148 applicable when deciding choice of law for claims involving misrepresentations. *See Schnall v. AT&T Wireless Servs.*, 139 Wn. App. 280, 161 P.3d 395, 402 (2007), *rev'd in part on other grounds*, 171 Wn.2d

[1] Tremont and EY apparently concede that FutureSelect's Complaint could not have been properly dismissed on forum grounds. Tremont also abandons its argument that Madoff's criminal acts were a supervening cause of its negligence, and that Tremont Group Holdings is not liable for the acts of Tremont Partners, Inc. MassMutual has abandoned its challenge to FutureSelect's standing.

260, 259 P.3d 129 (2011). Consideration of all the relevant factors—not those selectively offered by Respondents—demonstrates that Washington has the most significant relationship here, and Washington law should apply.

Moreover, although each Respondent asserts a different ground for dismissal of FutureSelect's WSSA claims, they all incorrectly rely on cases discussing what must be ***proven*** to prevail on such a claim, not what must be alleged to survive a motion to dismiss. When the proper standards are applied, it is clear that FutureSelect alleges WSSA claims against each of the Respondents.

With respect to FutureSelect's negligent misrepresentation claims, both Tremont and EY ignore express allegations in the Complaint to justify dismissal. Tremont argues that unsigned limited partnership agreements ("LPAs") ***Tremont*** submitted defeat FutureSelect's negligent misrepresentation and negligence claims. However, as other courts have recognized in claims involving the same defendants, LPAs (even signed ones) do not defeat the Complaint's allegations and cannot serve as a basis for dismissal. *See, e.g., Cocchi v. Tremont Group Holdings, Inc.*, 2010 WL 2008086 (Fla. Cir. Ct. Feb. 5, 2010)[2] ("The LPAs at issue are neither attached to the Complaint nor referenced by it, and therefore cannot be considered."); *Askenazy v. Tremont Group Holdings, Inc.*, No. 2010-

[2] *Aff'd KPMG LLP v. Cocchi*, 51 So. 3d 1165 (Fla. Dist. Ct. App. 2010); *vacated on other grounds* 132 S. Ct. 23 (2011); *aff'd in part; rev'd in part on other grounds*, 88 So. 3d 327 (Fla. Dist. Ct. App. 2012) (hereinafter "*Cocchi*").

04801-BLS2, 2012 WL 440675 (Mass. Super. Jan. 26, 2012), at *11, 12 (holding that it is improper to consider the exculpatory language in Tremont's LPA on a motion to dismiss).

Tremont also asserts that FutureSelect's negligence claim is derivative, not direct. But FutureSelect's negligence allegations relate to specific representations directly made to its individual manager—not mismanagement of the fund—so they are direct claims, again as numerous other courts already have held.

In justifying the court's dismissal of FutureSelect's agency claims, MassMutual and Oppenheimer do not cite a single Washington case where agency allegations were deemed inadequate under CR 12(b)(6). Courts in Washington consistently have recognized that "[t]he existence of a principal-agent relationship is a question of fact unless the facts are undisputed." *Uni-Com Northwest, Ltd. v. Argus Pub. Co.*, 47 Wn. App. 787, 796, 737 P.2d 304 (1987). Regarding the WSSA claims against MassMutual and Oppenheimer, the specific allegations of control ***over the very transaction at issue*** that allege that ***MassMutual and Oppenheimer could have prevented the loss***, demonstrate agency under any standard and differentiate this case from any other. This Court should reinstate FutureSelect's agency claims. Further, FutureSelect made an adequate showing that Oppenheimer is subject to jurisdiction in Washington through the acts of its agent.

Finally, if this Court credits any of Respondents' arguments, the trial court nevertheless erroneously dismissed the Complaint in this complex action without first granting FutureSelect any opportunity to correct deficiencies. *See In re Metro. Sec. Litig.*, 532 F. Supp. 2d 1260, 1276 (E.D. Wash. 2007). FutureSelect requests that it be permitted to file an amended complaint if the Complaint is deemed deficient in any way.

II. ARGUMENT

A. Washington Law Applies to FutureSelect's Claims

1. Restatement Section 148 Is Relevant

Neither Tremont nor EY dispute that the specific factors set forth in the Restatement (Second) of Conflicts of Law Section 148 demonstrate that Washington law applies to FutureSelect's claims. Instead, EY and Tremont seek to avoid Section 148 by arguing that—even though it specifically addresses fraud and misrepresentation claims such as those here—it should be disregarded in favor of Restatement Section 145's "most significant relationship" test.

However, Section 145 sets forth choice of law principles for tort claims generally, and itself instructs the Court to apply Section 148 specifically to misrepresentation claims such as those at issue here:

> The rule of this Section states a principle applicable to all torts and to all issues in tort and, as a result, is cast in terms of great generality.... ***Title B (§§ 146-155) deals with particular torts as to which it is possible to state rules of greater precision.***

RESTATEMENT (SECOND) CONFLICTS OF LAW § 145, cmt. a (1971).

As a result, ***this Court*** applies Section 148 when determining what law applies to the claims at issue here—misrepresentations claims. *Schnall v. AT&T Wireless Servs.*, 139 Wn. App. at 291-94 (analyzing choice of law under both Sections 145 and 148 for claims under Washington's consumer fraud statute). This Court is correct, as demonstrated by the fact that other Washington courts (and courts around the country) do the same and consider both Section 148 ***and*** Section 145 of the Restatement when determining choice of law for misrepresentation claims such as those at issue here. *Carideo v. Dell, Inc.*, 706 F. Supp. 2d 1122, 1128-29 (W.D. Wash. 2010) (considering both Sections 145 and 148 for claims under consumer fraud statute and common law); *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 551 (W.D. Wash. 2008) (same). *See also Atlantic City Elec. Co. v. Estate of Riccardo*, 682 F. Supp. 2d 498, 504 (E.D. Pa. 2010) (Section 145's "most significant relationship test" directs court to consider Section 148 for misrepresentation claims); *Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349, 355 (Tex. App. 2003) (same); *Value House, Inc. v. MCI Telecomms. Corp.*, 917 F. Supp. 5, 6 (D.D.C. 1996) ("Section 145 contains the general principles with respect to tort cases, while Section 148 contains the factors specifically applicable in fraud and misrepresentation cases"); *Ormond v. Anthem, Inc.*, No. 1:05-cv-1908, 2008 WL 906157, at *29 (S.D. Ind. Mar. 31, 2008) (Restatement discusses "how to determine which state's substantive law to apply

involving misrepresentation (§ 148) and torts in general (§ 145)"); Br. of Appellants at 17-18.

Tremont and EY argue that the Supreme Court's opinion in *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 744 P.2d 1032 (1987), should be read as a rejection of Restatement Section 148. *Haberman* made no such holding. As EY acknowledges, Br. of EY at 8-9, the Supreme Court in *Haberman* did not discuss the issue at all and ***did not cite either Section 145 or Section 148*** when analyzing the choice of law issue for a WSSA claim, but relied on its previous opinion in *Southwell v. Widing Transp., Inc.*, 101 Wn.2d 200, 204, 676 P.2d 477 (1984). That *Southwell* referred only to Restatement Section 145 is not surprising, as *Southwell* involved a wrongful death claim, ***not misrepresentations***, and Section 148 could not be applicable. EY and Tremont cannot extrapolate the Supreme Court's reliance on its earlier opinion in *Southwell* as a rejection of Section 148.[3]

Clearly, this Court did not read *Haberman* as a rejection of Restatement Section 148 because—subsequent to *Haberman*—this Court expressly considered Section 148 when considering choice of law for tort claims based on misrepresentations. *See Schnall*, 139 Wn. App. at 293. In *Schnall*, the Court of Appeals considered the factors in ***both*** Restatement Section 145 ***and*** Restatement Section 148 to conclude that Washington

[3] Tremont and EY also cite *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 875 P.2d 1213 (1994), to demonstrate the Washington Supreme Court's rejection of Section 148, but *Rice* involved a personal injury claim, not misrepresentations, so the Court in *Rice* had no cause to consider Section 148.

had the most significant relationship to claims under the Washington consumer fraud statute. *Id.* The Washington Supreme Court did not disturb this finding on appeal. *See Schnall*, 171 Wn.2d at 137-38 (remanding to the trial court for further consideration of whether plaintiffs satisfied elements of Washington's consumer fraud statute).

2. Washington Law Applies Because Washington Has the "Most Significant Relationship" under the Law, including Section 148

As explained in FutureSelect's Opening Brief considering ***all*** relevant factors as set forth in both Section 145 and Section 148, Washington has the "most significant relationship" here, and its law should govern. *See* Br. of Appellant at 18-20. Restatement Section 148 provides that when applying the "most significant relationship" test to misrepresentations, the place where the plaintiff acted in reliance upon the defendant's representations is crucial. RESTATEMENT (SECOND) CONFLICTS OF LAW § 148(2) cmt. g (1971) (where plaintiff acted in reliance on defendant's representations is more important than where representations were made or received). Thus, when the plaintiff acted in reliance upon the representations in a single state—here, Washington—this state's law will usually govern if the defendant received the representation, or if the plaintiff was domiciled or had its principal place of business in this state. *Id.* cmt. j.

Respondents do not dispute that FutureSelect is domiciled in Washington, has its principal place of business in Washington, received

many of the misrepresentations in Washington, and—most critically—acted in reliance on the misrepresentations in Washington. *See* CP 5-6 ¶¶ 15-18; CP 8 ¶ 27; CP 9-10 ¶ 34; CP 11-13 ¶¶ 39-48; CP 20-21 ¶ 78. Washington law therefore applies. *See Schnall*, 139 Wn. App. at 293; RESTATEMENT (SECOND) CONFLICTS OF LAW § 148(2) cmt. g (1971).

Tremont and EY argue that New York law should apply because most defendants are in New York, the misrepresentations "emanated" from New York, and non-party Bernard Madoff was based in New York. *See* Br. of Tremont at 12-13; Br. of EY at 13-14. However, for misrepresentation claims, "[t]he domicile, residence and place of business of the plaintiff are more important than are similar contacts on the part of the defendant." RESTATEMENT (SECOND) CONFLICTS OF LAW § 148(2) cmt. i (1971). Moreover, critical here is that FutureSelect received the misrepresentations and acted in reliance on them ***in Washington***. *See id.* cmt. j. *See also Prospect High Income Fund v. Grant Thornton, LLP*, 203 S.W.3d 602, 610 (Tex. App. 2006), *rev'd in part on other grounds*, 314 S.W.3d 913 (Tex. 2010) (applying Texas law even though audit occurred in Pennsylvania because plaintiff received and relied upon the audit's representations in Texas). *See also Agile Safety Variable Fund, L.P., et al v. Tremont Group Holdings, Inc., et al.*, Case No. 10-2904 (Colo. St. Ct., Boulder Cty.), MassMutual Respondents' Joint RAP 10.8 Statement of Additional Authorities, Ex. A at 6-7 (finding Colorado law applicable, and considering claim against MassMutual and Oppenheimer under Colorado

State Securities Act because "Tremont offered the sales of the units to Agile in Colorado").

3. Public Policy Requires Application of Washington Law

Even assuming the relevant contacts are balanced between Washington and New York—which they are not—public policy dictates application of Washington law. *See Peterson v. Graoch Ass'ns*, No. C11–5069BHS, 2012 WL 254264, at *3 (W.D. Wash. Jan. 26, 2012) ("[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. v. Prescott, Inc.*, 83 Wn. App. 282, 290, 921 P.2d 566 (1996)). Applying Washington law in this action furthers the state's strong interest in protecting its investors. *See, e.g., Cellular Eng'g, Ltd. v. O'Neill*, 118 Wn.2d 16, 23, 820 P.2d 941 (1991). Neither EY nor Tremont cites a single case where a court applied choice of law principles to preclude a Washington investor from bringing a claim under the WSSA—let alone one who received and relied on the misrepresentations in Washington.

4. Even under New York Law the Complaint States a Claim

Finally, even if the Court were to hold that New York law applied, the trial court's order still must be reversed. Since the trial court dismissed FutureSelect's claims, the New York Court of Appeals held that the Martin Act does ***not*** preclude a private right of action for common law

claims based on securities violations. *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 18 N.Y.3d 341, 353, 962 N.E.2d 765, 939 N.Y.S.2d 274 (N.Y. 2011). Therefore, if the trial court concluded that New York law applied and dismissed FutureSelect's claims against Tremont as preempted by the Martin Act, it was error. *See Stephenson v. PricewaterhouseCoopers, LLP*, No. 11-1204-cv, 2012 WL 1764191, at *2 (2d Cir. June 13, 2012).

The Complaint also adequately alleges a negligent misrepresentation claim against EY under New York law. The claim was timely brought within two years of discovering Madoff's fraud. *See* N.Y. CPLR § 203(g) (action must commenced within two years of "the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered"); *Von Hoffmann v. Prudential Ins. Co. of Am.*, 202 F. Supp. 2d 252, 263-64 (S.D.N.Y. 2002) (under section 203(g), "a two-year limitations period runs from discovery of the negligent misrepresentation, or from the time when facts could have been discovered with reasonable diligence").

Moreover, the Complaint's allegations satisfy the requirements set forth in *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 551, 483 N.E.2d 110, 118, 493 N.Y.S.2d 435, 443 (N.Y. 1985). First, the Complaint alleges that EY knew and consented to their audit opinions being used for the particular purpose of soliciting FutureSelect, as partners of the Rye Funds, to retain and increase their investments. CP 20 ¶ 77.

Second, the Complaint alleges that EY knew that Plaintiffs, as partners in the Rye Funds, would rely on E&Y's audit opinions, and that EY had specifically confirmed that FutureSelect was an investor in the Rye Funds. CP 23 ¶ 89; CP 45 ¶202; CP 45-46 ¶¶ 204-205. Finally, the Complaint alleges that EY addressed their audit reports to the "Partners" of the Rye Funds and ***contacted FutureSelect*** to confirm that they were investors in the Rye Funds. CP 23 ¶ 89. The Complaint's allegation of EY's direct contact with FutureSelect, and EY's specific confirmation of FutureSelect as an investor, distinguishes FutureSelect's Complaint from those complaints that have insufficiently alleged negligent misrepresentation claims against auditors. *See, e.g., Meridian Horizon Fund, LP v. KPMG (Cayman)*, Nos. 11-3311-cv, 11-3725-cv, 2012 WL 2754933, at *4 (2d Cir. Jul 10, 2012) (affirming dismissal where no allegation that auditors knew investor's identity or had direct contact with investor).

B. The Complaint Adequately States Claims under the WSSA

1. The Complaint Alleges that FutureSelect Relied on Tremont's Misrepresentations

a. Tremont Overlooks Numerous, Non-"Conclusory" Allegations Supporting Reliance

Tremont's assertion that FutureSelect has not alleged reasonable reliance is contradicted by the Complaint, which specifically alleges that "FutureSelect reasonably and justifiably relied on Tremont's

misstatements when it purchased securities in Tremont by investing in the Rye Funds." CP 32 ¶ 126. Tremont simply ignores this and the Complaint's other allegations that expressly: (i) allege reliance and; (ii) provide specific factual allegations why that reliance was reasonable. *See, e.g.,* CP 3-4 ¶ 8 ("FutureSelect invested in the Rye Funds because Tremont made statements directly to FutureSelect"); CP 10 ¶ 37 ("In investing in the Rye Funds, [FutureSelect's principal] Ward (and FutureSelect) relied on Tremont's representations that it had a comprehensive understanding of Madoff's operations and conducted continuous monitoring and oversight"); CP 13-14 ¶ 48 ("From the inception of FutureSelect's investments in 1998 through 2008, FutureSelect relied on Tremont's assertions in maintaining its investments (and making new investments) in the Rye Funds…Unlike Tremont and its auditors, FutureSelect did not have the ability to confirm the legitimacy and size of Madoff's investments. FutureSelect was expressly told that it could rely on Tremont and its Auditors to perform that critically important function. FutureSelect did rely, to its great detriment."). Moreover, specifically establishing reasonableness are the allegations concerning the "Tremont Letter," written directly to FutureSelect, where Tremont made specific representations concerning its monitoring of Madoff and its direct communication with Madoff. *See* CP 12-13 ¶¶ 41-47.

These allegations more than meet the requirements for purposes of a motion to dismiss.[4] *King Cty. v. Merrill Lynch & Co.*, No. C10-1156 RSM, 2011 WL 643166 (W.D. Wash. Feb. 18, 2011) (denying motion to dismiss where plaintiff pled defendants possessed specialized knowledge pertaining to the investment and that plaintiff was unaware of the risks associated with the securities).

b. Under Washington Law, Reasonable Reliance Is a Question of Fact and Cannot Be Determined on a Motion to Dismiss

Although FutureSelect's allegations of reliance more than satisfy the requirements on a motion to dismiss, Tremont argues for a more burdensome standard and that the Court weigh a series of factors to determine that FutureSelect's reliance was reasonable. *See* Br. of Tremont at 16. First, as the detailed factual allegations cited above demonstrate, FutureSelect meets this standard because its allegations of reasonable reliance must be taken as true. Second, as the key cases relied on by Tremont demonstrate, the standard suggested by Tremont is the standard for summary judgment, not the preliminary stage of litigation. In fact, it was Tremont's oft-cited case, *Stewart v. Estate of Steiner*, which established a series of factual criteria for purposes of ***summary judgment*** in making a determination of reasonable reliance. 122 Wn. App. 258, 274, 93 P.3d 919 (2004) (identifying factors, such as the existence of long

[4] Tremont attempts to insert a "particularity" requirement for claims under the WSSA (Brief of Tremont at 17, n. 19), but no such requirement exists.

standing relationships, access to the relevant information and the existence of a fiduciary relationship).

Thus, in misrepresentation claims like these, "whether a party justifiably relied is a question of fact" and inappropriate for determining on a motion to dismiss. *Hoel v. Rose,* 125 Wn. App. 14, 18, 105 P.3d 395 (2004). *See also Swartz v. KPMG LLP,* 476 F.3d 756, 761-63 (9th Cir. 2007) ("A party's reliance is justified when it is 'reasonable under the surrounding circumstances.' An analysis of the 'surrounding circumstances' is necessarily fact-intensive and involves multiple considerations.") (quoting *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 959 P.2d 651 (1998); *King Cty.*, 2011 WL 643166, at *5 (denying motion to dismiss because "reasonable reliance is a highly factual inquiry," and "an in-depth factual analysis...would be inappropriate at the dismissal stage"). *See also Moore v. Thornwater Co.*, No. CO1-1944C, 2006 WL 1423535, at *8 (W.D. Wash. May 23, 2006) (affirming jury verdict for plaintiff on WSSA claim; applying *Stewart* factors to conclude that evidence supported finding that plaintiff's reliance on oral misrepresentations "was reasonable notwithstanding his signature on a document expressing nonreliance on oral misrepresentations."). *See also In re Metro. Sec.*, 532 F. Supp. 2d at 1301-02 (where reliance is not expressly alleged in WSSA claim, it may nevertheless be presumed in several circumstances, including "based upon common sense").

c. The Trial Court Could Not Properly Consider Exculpatory Language in Unsigned, Disputed Documents Extrinsic to the Complaint

Tremont's argument that the exculpatory language in extrinsic LPAs defeats Plaintiffs' Complaint's allegations of reasonable reliance also fails. The LPAs at issue here are unsigned, do not mention FutureSelect, and are not referenced in the Complaint. CP 877-89; 1779-81. It is black letter law that a court ruling on a motion to dismiss may not go beyond the face of the pleading. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725, 189 P.3d 168 (2008).

Although a trial court can take judicial notice of facts "not subject to reasonable dispute," *see id.(citing* ER 201(b)), there is no authority for the trial court to have considered these ***LPAs—unsigned, unexecuted and submitted by Tremont in an incomplete form***. CP 1779-81; *Rodriguez*, 144 Wn. App. at 725. Tremont relies 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 documents such as the company's registration statements and certificate of incorporation. *Rodriguez*, 144 Wn. App. at 726-28. Those are nothing like the unsigned documents submitted here. *Rodriguez* does not hold that privately drafted, unexecuted documents such as the LPAs here are properly considered. *Id.* at 728.

Tremont also relies on *Stewart*, but, as noted above, *Stewart* did not involve a motion to dismiss, but rather detailed factors of "reasonableness" to be examined and resolved on ***summary judgment***. 122 Wn. App. at 274. The only reason the exculpation clause was considered and summary judgment granted in *Stewart* was because, unlike here—and after discovery—it was undisputed that the plaintiff had not relied on defendants' misrepresentations, had submitted a subscription agreement with non-reliance provisions to defendants, and had read a memorandum with additional non-reliance language, different from the language Tremont tries to submit here. *Id.* at 927-28.

The other cases cited by Tremont, *San Diego Cty. Emp. Ret. Ass'n v. Maounis*, 749 F. Supp. 2d 104 (S.D.N.Y. 2010) and *In re VMS Ltd. P'ship Sec. Litig.*, 803 F. Supp. 179 (N.D. Ill. 1992), also are distinguishable. In both cases, the documents were actually incorporated by reference throughout the complaints and "heavily" relied upon by plaintiffs to state their claims. *In re VMS*, 803 F. Supp. at 182 n.2; *San Diego Cty.*, 749 F. Supp. 2d at 119. That is not the case here.

2. EY Ignores the Relevant Legal Standard for WSSA Claims Against Auditors

a. Whether an Auditor Is a "Substantial Contributive Factor" under WSSA Cannot Be Resolved on a Motion to Dismiss

Like Tremont, EY improperly asks this Court to make a fact-specific judgment in order to affirm dismissal of FutureSelect's WSSA

claim under CR 12(b)(6). Thus, EY necessarily ignores the Washington Supreme Court's holding in *Hoffer v. State*, 110 Wn.2d 415, 755 P.2d 781 (1988) ("*Hoffer I*"), which held that the issue of whether an auditor was a "substantial contributive factor" to a sales transaction sufficient for liability as a "seller" under the WSSA "necessarily involves many factual issues," and should not be decided on a CR 12(b)(6) motion. 110 Wn.2d at 430. Recognizing that its opinion in *Haberman,* 109 Wn.2d at 131, set forth a fact-specific test to determine whether a defendant is a "substantial contributive factor," the Supreme Court in *Hoffer I* held that dismissal of a WSSA claim against an auditor was not merited—even though the complaint did not set forth allegations that satisfied the *Haberman* test—because the"[d]etermination of the auditor's status as a seller under RCW 21.20.430(1) requires the development of more facts," and these unalleged—and as yet to be discovered facts—could suffice to show liability. *Hoffer I*, 109 Wn.2d at 430. Indeed, the Supreme Court in *Hoffer I* held that deciding an auditor's seller status on a motion to dismiss would be "inconsistent" with the Court's previous decision in *Haberman*:

> In *Haberman,* we did not decide if the professional defendants, including accountants, qualified as sellers. Instead, we concluded that this issue was factual in nature...thereby precluding resolution in a CR 12(b)(6) proceeding. The Auditor's role in the present case is similar to that of the professional accountants in *Haberman,* both having auditing duties. Accordingly, we decline to decide if the Auditor was a seller in the present case.

Hoffer I, 110 Wn.2d at 430 n. 4.

In accord with *Haberman* and *Hoffer I*, the only cases that have considered motions to dismiss WSSA claims against auditors or accountants on grounds of their "seller" status have denied them. *See, e.g., Haberman*, 109 Wn.2d at 119; *Hoffer*, 110 Wn.2d at 430; *In re Metro. Sec. Litig.*, 532 F. Supp. 2d at 1300-01 ("Washington courts have typically denied motions to dismiss that challenge 'seller' when the defendant is an auditor who prepared statements that were provided to investors").

This rule makes sense for auditors, who owe a public duty beyond any duty to their audit client. An auditor's "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust." *United States v. Arthur Young & Co.*, 465 U.S. 805, 818 (1984). E&Y owed "ultimate allegiance" to investors like FutureSelect, not its audit client. *See In re Metro. Sec. Litig.*, 532 F. Supp. 2d at 1300-01. In *Metropolitan Securities*, the court explained that an auditor's "natural role" goes beyond "'routine services' rendered to a client." *Id.* at 1301. As the court recognized, auditors "serve the additional role of communicating to investors about corporations and their securities," and thus assume "'***a public responsibility transcending any employment relationship with the***

client.'" *Id.* (citing *Arthur Young & Co.*, 465 U.S. at 805) (emphasis in original).

b. EY Relies on Cases Decided on an Evidentiary Record, Not Allegations

Despite this clear precedent directly on point, EY ignores *Hoffer I* and relies on cases not involving auditors where a trial court considered evidence and made findings concerning a third party's liability under the WSSA.[5] *See, e.g., Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 149, 787 P.2d 8, 20 (1990) (summary judgment); *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 851, 786 P.2d 285 (1990) (court evidentiary hearing); *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 165, 795 P.2d 1143, 1151 (1990) (directed verdict); *Brin v. Stutzman*, 89 Wn. App. 809, 830, 951 P.2d 291 (1998) (findings based on evidence). Although these cases address what facts must be ***proven*** to establish liability against non-auditor third parties, they do not address the issue here, *i.e.*, what facts must be ***alleged*** to state a claim against an auditor under the WSSA.

EY asks the Court to reject *Metropolitan Securities* in favor of an Oregon case interpreting federal law, *Ahern v. Gaussoin*, 611 F. Supp. 1465 (D. Or. 1985). However, *Ahern* involved a motion for summary judgment and a different standard for liability as a "seller," whereas

[5] EY cites only one case where the Washington Supreme Court upheld dismissal of a WSSA claim on the pleadings. In *Kinney v. Cook*, 159 Wn.2d 837, 154 P.3d 206 (2007), the Court briefly noted that a defendant could not be a "seller" under the WSSA when he had opposed the only transaction that could be deemed a "sale." 159 Wn.2d at 845. The *Kinney* Court did not approve deciding the "substantial contributive factor" test against anyone—let alone an auditor—on a motion to dismiss.

Metropolitan Securities involved pleading a WSSA claim against an auditor—*i.e.*, precisely the issue here. Contrary to EY's assertion, *Metropolitan Securities* did not hold that all auditors should be held liable as "sellers" under the WSSA. Rather, the court in *Metropolitan Securities* properly applied a different standard for ***pleading*** a claim against an auditor under WSSA and ***proving*** such a claim, and found that the complaint "sufficiently plead[ed]...EY's seller status for the purposes of WSSA." 532 F. Supp. 2d at 1301. In accord with *Haberman* and *Hoffer I*, the court in *Metropolitan Securities* then held that "the fact-intensive question of whether [the auditors] meet the substantial contributing factor test may not be resolved on a motion to dismiss." *Id.*

c. The Complaint's Allegations Are Sufficient to State a Claim under WSSA against EY

As in *Haberman, Hoffer I,* and *Metropolitan Securities*, FutureSelect's WSSA claim against EY should proceed past the motion to dismiss stage. In addition to alleging that EY consented to Tremont using its audited financial statements to solicit investors, FutureSelect's Complaint alleges that EY knew and understood that FutureSelect specifically was receiving and relying on these statements. *See, e.g.,* CP 20 ¶ 77; CP 23 ¶ 89. Moreover, EY directly communicated with FutureSelect for each audit it conducted, requesting that FutureSelect confirm its investment in Tremont. CP 23 ¶ 89. Under any standard, the

Complaint's allegations are sufficient to allege a claim against EY for seller liability under the WSSA.

EY's assertion that *Hines*, 114 Wn.2d at 132-34, "squarely rejected" FutureSelect's theory is incorrect; *Hines* involved summary judgment in favor of a law firm, and did not address pleading requirements for a WSSA claim against an auditor. Moreover, although *Hines* held that "something more" than a law firm providing advice to its own client was required to establish seller liability, it did not address auditor conduct such as that alleged here. *Id. See also In re Metro. Sec. Litig.*, 532 F. Supp. 2d at 1301 ("*Hines* is distinguishable because the statements at issue consisted of legal advice presented only to the corporate client").

In any event, the Supreme Court in *Hines* certainly did not decide that an auditor's status as a seller could be decided on a motion to dismiss because to do so would have been "inconsistent" with its prior opinions in *Haberman* and *Hoffer I*. *See Hoffer I*, 110 Wn.2d at 430 n. 4.

3. FutureSelect's Complaint Adequately Alleges Control Person Claims under WSSA against MassMutual and Oppenheimer

a. The Complaint Alleges Actual Participation and Control over the Transactions at Issue

Like their co-Respondents, the MassMutual Respondents ignore critical allegations in FutureSelect's Complaint in order to justify the lower court's dismissal of FutureSelect's WSSA claims against them.

Although not acknowledged by the MassMutual Respondents, FutureSelect's Complaint sets forth specific allegations of WSSA control person liability, including control over the investments at issue in this case and control that could have prevented the loss. *See, e.g.,* CP 15 ¶ 55 (Respondents' "***control included the manner by which Tremont offered investments, including the Rye Funds***") (emphasis added); CP 17-18 ¶ 63 (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.***") (emphasis added); CP 4 ¶ 10 (each of the MassMutual Respondents "had the right of control over Tremont and its investment decisions for the Rye Funds"); CP 33 ¶ 130 (Oppenheimer "actively managed the marking and solicitation of investment activity at Tremont, including through selection of investment vehicles and due diligence programs.").

These allegations specifically distinguish this case from the cases cited by the MassMutual Respondents, including the case attached in their Joint Statement of Additional Authorities, *Agile Safety Variable Fund, supra* at 8. There, the Colorado court noted that the complaint did not have "any specific allegations that could support an inference that MassMutual had the power to control or actually exercised control over Tremont's decision to invest with Madoff." *See* Joint RAP 10.8 Statement of Additional Authorities, Ex. A at 6-7. The exact opposite is true of this

Complaint, as it alleges that the MassMutual Respondents had the right to control Tremont's investments, and ***could have prevented Tremont's investment in Madoff***. *See, e.g.*, CP 4 ¶ 10; CP 15 ¶ 55; 17-18 ¶ 63; CP 20 ¶ 76 (MassMutual "had the power to exercise complete control over [Oppenheimer and Tremont], including control over their policies and procedures and the Rye Funds' manner by which those funds invested their assets, ***including with Madoff***") (emphasis added).

b. Specific Allegations of "Actual Participation" in Day-to-Day Operations Are Not Required, but Are Made Anyway over the Investments at Issue

The MassMutual Respondents also ignore the relevant case law holding specific allegations that the defendant actually participated in the day-to-day operations of the primary violator are not required to state a control person claim under the WSSA. In fact, courts in Washington and elsewhere have held that a plaintiff need not allege specific facts showing "actual participation" in the corporation's day-to-day affairs in order to state a claim for control person liability. *See, e.g., In re Metro. Sec. Litig.*, 532 F. Supp. 2d at 1296-97 ("[i]t is sufficient, ***at the pleading stage***, to identify the defendants' positions and allege that they 'had the power to control and influence [the defendant], which they exercised'") (quoting *In re Cylink Sec. Litig.*, 178 F. Supp. 2d 1077, 1089 (N.D. Cal. 2001)) (emphasis added); *In re Metawave Commc'ns Corp. Sec. Litig.*, 298 F. Supp. 2d 1056, 1087 (W.D. Wash. 2003) (whether control person liability

exists is an "intensely factual question, involving scrutiny of the defendant's participation in the day-to-day affairs of the corporation and the defendant's power to control corporate actions," but ***"[a]t the motion to dismiss stage,*** general allegations concerning an individual defendant's title and responsibilities are sufficient to establish control") (emphasis added); *Reese v. Malone*, No. C08-1008 MJP, 2009 WL 506820, at *9-10 (W.D. Wash. Feb. 27, 2009) (complaint adequately alleges control person claims by general allegations that defendants occupied positions of power and exercised control; lack of participation is defense to be raised at a later date); *Tsirekidze v. Syntax-Brillian Corp.*, No. CV-07-02204, 2009 WL 275405, at *7 (D. Ariz. Feb. 4, 2009) (allegations of power and influence to control sufficient to state a claim for control person liability) (citing *In re Metawave Commc'ns,* 298 F. Supp. 2d at 1087).

Most recently, the California Court of Appeals expressly rejected that a plaintiff pleading a control person claim must allege specific facts showing actual participation. In *Hellum v. Breyer*, 194 Cal. App. 4th 1300, 1316, 123 Cal. Rptr. 3d 803 (Cal. Ct. App. 2011), the court considered the control person provision in the California securities statute, which is virtually identical to the provision in the WSSA, and concluded that a plaintiff must "allege facts supporting a conclusion that the controlling person had the power to control the controlled person or to influence corporate policy, ***but that actual exercise of that control need not be alleged.***" 194 Cal. App. 4th at 1316 (emphasis added).

Accordingly, the MassMutual Respondents' reliance on the Massachusetts case *Askenazy*, and the Colorado case, *Agile Safety Variable Fund,* is misplaced. Both cases held that a control person claim requires specific facts of actual participation—a standard not applied by courts in Washington, and expressly rejected by the California Court of Appeals in *Hellum*. *Compare Askenazy,* 2012 WL 440675, at *17 (control person claim requires plaintiff to allege facts showing that the control person "actively participated in the decision-making processes" of corporation) (quoting *Aldridge v. A.T. Cross Corp.* 284 F.3d 72, 85 (1st Cir. 2002)) *and Agile Safety Variable Fund* (allegation of control person liabiiity requires "'a specific allegation demonstrating control or influence over the wrongdoing or over the day-to-day business of the company'") (quoting *Grubka v. WebAccess Int'l, Inc.* 445 F. Supp. 2d 1259, 1268-69 (D. Colo. 2006)) *with In re Metawave Commc'ns,* 298 F. Supp. 2d at 1087 ("At the motion to dismiss stage, general allegations concerning an individual defendant's title and responsibilities are sufficient to establish control.").

c. The Complaint Alleges that MassMutual Respondents Had the Power to Control

As with their argument concerning actual participation, the MassMutual Respondents' assertion that FutureSelect does not allege that Respondents had the power to control Tremont is belied by the Complaint. As explained above, this power was alleged over the investments at issue

in this case. *See, e.g.,* CP 17-18 ¶ 63. Moreover, the Complaint alleges that Tremont was 100 per cent owned by Oppenheimer, which was 100 per cent owned by MassMutual. *See, e.g.,* CP 7 ¶¶ 24-25; CP 15 ¶ 55; CP 34 ¶ 135. As alleged in the Complaint, both MassMutual and Oppenheimer were identified as "Control Persons" on Tremont's Uniform Application for Investment Advisors Registration ("Form ADV") filed with the SEC. *See* CP 19 ¶ 69.[6] The Complaint also alleges that, after their acquisition of Tremont, high-level employees of the MassMutual Respondents occupied ***every seat*** on Tremont's board. CP 18 ¶ 66. Tremont's two highest officers became Oppenheimer employees, and officers of Oppenheimer took over managerial positions at Tremont. CP 18-19 ¶¶ 67, 70.

These allegations are more than sufficient to allege that MassMutual and Oppenheimer had the power to control Tremont, and they distinguish FutureSelect's control person claims from those in the cases cited by Oppenheimer. For example, the court in *Fouad v. Isilon Sys., Inc.*, No. C07-1764, 2008 WL 5412397, at *13 (W.D. Wash. Dec. 29,

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[6] Oppenheimer dismisses this disclosure in Tremont's Form ADV as a "red herring" (Br. of Oppenheimer at 35), but cannot dispute that other courts have considered such forms relevant—including courts sustaining control person claims involving MassMutual and Oppenheimer. *See, e.g., In re Oppenheimer Rochester Funds Group Sec. Litig.*, 838 F. Supp. 2d 1148, 1181 (D. Colo. 2012) (considering allegation that OppenheimerFunds Inc. identified MassMutual in its Form ADV as control person when concluding control person claim stated against MassMutual); *Belmont v. MB Inv. Partners, Inc.*, No. 09-4951, 2010 WL 2348703, at *10 (E.D. Pa. June 10, 2010); *In re Wash. Mut., Inc.*, 462 B.R. 137, 142 (Bankr. D. Del. 2011). Oppenheimer cites *Sedona Corp. v. Ladenburg Thalmann & Co.*, No. 03 Civ. 3120, 2005 WL 1902780, at *16 (S.D.N.Y. Aug. 9, 2005), but there the disclosure form only reflected a parent-subsidiary relationship, not a control person relationship like the Form ADV at issue here.

2008), found that allegations that defendants were minority shareholders who could each only appoint one director to the corporation's board were not sufficient to allege control person liability. Here, however, the Complaint includes numerous allegations of control, including that the MassMutual Respondents wholly owned Tremont and occupied ***all of the seats*** on Tremont's board. CP 18-19 ¶¶ 66, 68; CP 33 ¶ 130; CP 34 ¶ 135. The control person claims in *City of Westland Police & Fire Ret. Sys. v. Sonic Solutions,* No. C 07-05111, 2009 WL 942182, at *10 (N.D. Cal. Apr. 6, 2009) and *Swartz v. Deutsche Bank*, No. C03-1252MJP, 2008 WL 1968948, at *19-20 (W.D. Wash. 2008), contained only one or two conclusory allegations that defendants acted as control persons. In contrast, FutureSelect's Complaint includes a multi-paragraph section titled "MassMutual and Oppenheimer's Control Over Tremont" (CP 17-19 ¶¶ 63-70), which, among other things, alleges that Respondents occupied ***every seat*** on Tremont's board, took responsibility for Tremont's finance, audit and other critical services, and installed their employees into high-level positions at Tremont. Indeed, even the court in *Askenazy,* upon which the MassMutual Respondents so heavily rely, held that lesser allegations in that complaint showed MassMutual's power or "potential to control."[7] 2012 WL 440675, at *17.

[7] Respondents' argument that they could not be liable as control persons because FutureSelect made its initial investment before Oppenheimer acquired Tremont is wrong because, as made clear in the Complaint, FutureSelect almost ***quadrupled*** its investment in Tremont ***after*** its acquisition by the MassMutual Respondents, based on ongoing misrepresentations made by Tremont regarding its oversight and testing of Madoff. *See,*

If this Court should credit any of Respondents' arguments, and find FutureSelect's WSSA claims insufficient, it still was error to dismiss the Complaint in an action of this level of complexity without first granting FutureSelect an opportunity to correct any deficiencies. *See In re Metro. Sec. Litig.*, 532 F. Supp. 2d at 1276. Plaintiffs should be permitted to file an amended complaint if there are deficiencies in allegation.

C. FutureSelect's Negligent Misrepresentation Claims Were Improperly Dismissed

1. Tremont's Reliance on the Exculpatory Clauses Is Improper

a. The Disputed Exculpatory Clauses Should Not Have Been Considered on Motion to Dismiss

Tremont does not dispute that FutureSelect's negligent misrepresentation claim was sufficiently pled. *See* CP 877-89. Instead, like its arguments against FutureSelect's WSSA claim, Tremont relies on exculpatory language in the LPAs that are extrinsic to the Complaint, yet offers no support for its position that they should be considered. As explained in Section B.1.c., *supra*, the LPAs are disputed, unsigned and incomplete documents not referenced in the Complaint and cannot be considered on a motion to dismiss. *Rodriguez,* 144 Wn. App. at 725-26.

Other courts have properly rejected these exact arguments in Tremont-related cases. *See Cocchi*, 2010 WL 2008086 (denying motion

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e.g., CP 10-13 ¶¶ 38-47; CP 23 ¶ 88; CP 24 ¶ 94. *See, also,* CP 16-17 ¶¶ 60-62 (at time of the Tremont acquisition, MassMutual and Oppenheimer knew that Tremont could not be conducting the monitoring and oversight it purported to conduct).

to dismiss negligent misrepresentation claim and 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."). *See also Askenazy,* 2012 WL 440675, at *11-12 (holding it improper on a motion to dismiss to consider an exculpatory clause, an affirmative defense).

Tremont erroneously argues that *Cocchi* lacks any precedential value because it was vacated on other, unrelated grounds, *see KPMG LLP v. Cocchi,* 88 So.3d 327, 330 (Fla. Dist. Ct. App. 2012) (Supreme Court vacated its prior opinion with respect to arbitration only). A search of Washington case law shows that cases previously vacated on other grounds are routinely cited as precedent.

Similarly, Tremont's effort to neutralize *Askenazy* as a "mistaken" decision is unfounded. Rather than the court's purportedly "mistaken" holding that Delaware law precluded from considering Tremont's exculpation clauses, FutureSelect cites *Askenazy* for its determination that the exculpatory language in Tremont's LPAs are "not a basis to dismiss certain counts at this early stage...On a motion to dismiss brought under Rule 12(b)(6), however, the court must be convinced that the complaint contains no facts that cast any doubt on the defendant's entitlement to this affirmative defense. This Court cannot say at this point that there is no doubt but that the exculpation clauses apply." *Id.* at *12.

The cases cited by Tremont again are inapposite. *Zutty v. Rye Select Broad Market Prime Fund, L.P.*, No. 113209/09, 2011 WL 5962804 (N.Y. Sup. Apr. 15, 2011), involved breach of fiduciary duty, unjust enrichment and fraud claims, and the court provides no analysis as to why or how the LPA exculpatory language impacted its decision. It is not even clear whether the plaintiff objected to the court's consideration of the LPA. In *Industrial Risk Insurers v. Port Authority*, 387 F. Supp. 2d 299, 303 (S.D.N.Y. 2005), in dismissing a gross negligence claim, the court considered extrinsic documents containing a mutual release "without objection by the parties." *Id.* at 303. And in *In re Ply Gem Industries, Inc. Shareholders Litigation*, No. CIV. A. 15779-NC, 2001 WL 755133 (Del. Ch. June 26, 2001), the court considered a Delaware statute that shielded corporate directors from breach of duty of loyalty claims.

b. Exculpatory Clauses Never Excuse Gross Negligence

Tremont makes no effort to dispute FutureSelect's position that, even if the exculpation clauses were relevant here, they do not apply if Tremont acted with gross negligence. *See Indus. Risk Insurers*, 387 F. Supp. 2d at 306 (cited by Tremont) ("a party may not exonerate itself from liability from its own grossly negligent conduct"). FutureSelect has alleged facts showing that Tremont acted with reckless indifference and a deliberate disregard to its duties to Plaintiffs. *See, e.g.*, CP 14-15 ¶¶ 49-52 ("Tremont's Representations Were Knowingly or Recklessly False and

Misleading" because Tremont had no basis to provide FutureSelect with the assurances it provided); CP 4 ¶ 9; CP 15 ¶ 53 ("Tremont either failed to perform the due diligence or monitoring it claimed to do have performed, or it uncovered evidence of Madoff's Ponzi scheme, and knowingly or recklessly misrepresented to FutureSelect...that the Rye Funds' assets existed and were appreciating—all in order to continue collecting substantial management fees from FutureSelect"); CP 15 ¶ 54 ("despite utterly failing to do what it had represented to investors...Tremont collected millions in 'Management Fees' and 'Administrative Fees'"); CP 11-12 ¶ 39 (describing specific misrepresentations made directly to FutureSelect); CP 12-13 ¶¶ 40-46 (detailing specific representations of monitoring in Tremont Letter).

2. EY Cannot Manufacture Pleading Requirements to Defeat FutureSelect's Negligent Misrepresentation Claim

Although EY purports to agree that Washington follows the Restatement (Second) of Torts Section 553 for negligent misrepresentation claims, it asserts that FutureSelect must satisfy additional requirements nowhere contemplated in the Restatement. For example, EY argues for an extra element to a negligent misrepresentation claim, citing *Haberman* for the proposition that FutureSelect must allege it was "singled out for special treatment" by EY. *See* Br. of EY at 25-26. However, the Supreme Court in *Haberman* characterized these "special treatment" allegations as "hypothetical facts forming a viable conceptual background for the alleged

negligent misrepresentations," not elements of a negligent misrepresentation claim. 109 Wn.2d at 164. Moreover, following *Haberman*, the Supreme Court in *Hoffer v. State*, 113 Wn.2d 148, 152-53, 776 P.2d 963 (1989) (*Hoffer II*) explained that a recipient would be adequately "singled out" if he was part of a smaller group targeted to receive the misrepresentations. As repeatedly alleged here, FutureSelect was "singled out" in this manner, as EY addressed its misrepresentations to FutureSelect as a partner in the Rye Funds. CP 8 ¶ 27; CP 23 ¶ 89.

Indeed, the "special treatment" requirement suggested by EY contradicts Restatement Section 552, which provides that "it is not necessary that the maker should have any particular person in mind as the intended, or even the probable, recipient of the information," and "it is not required that the person who is to become the plaintiff be identified or known to the defendant as an individual when the information is supplied." *See* RESTATEMENT (SECOND) TORTS § 552(2) cmt. h (1977). Because the maker of the misrepresentation need not know the identity of the particular recipient, he need not give that unidentified recipient "special treatment." This Court should not change the elements of a negligent misrepresentation claim.

Next, EY asserts that FutureSelect's claim fails to satisfy Restatement Section 552(2) because the Complaint does not allege that EY intended to influence existing investors to make additional securities purchases. *See* Br. of EY at 27. This assertion is patently false, as the

Complaint expressly alleges that EY "knew and intended to supply such information for the benefit and guidance of FutureSelect in making its investment decisions regarding the Rye Funds." CP 45 ¶ 204. *See also* CP 37 ¶ 149 (EY "knew and intended that current investors would rely on the audits when deciding to maintain and increase their investments in the Rye Funds," and "knew and intended that FutureSelect would rely on their misrepresentations when it invested in the Rye Funds"); CP 20-21 ¶¶ 77-78 (EY knew and consented to Tremont using its audit report "to solicit investors to the Rye Funds," and "FutureSelect was one of those investors.").

EY omits mention of these allegations in order to align this case with cases that have dismissed negligent misrepresentation claims. However, in all of the cases cited by EY (none of which are from Washington) the auditor was not alleged to have known or intended that the plaintiff receive or rely on the representations. *See, e.g., Machata v. Seidman & Seidman*, 644 So. 2d 114 (Fla. Dist. Ct. App. 1994) (accountants not alleged to have been aware of transaction for which their work was to be used); *Bacon v. Stiefel Labs.*, 677 F. Supp. 2d 1331, 1352 (S.D. Fla. 2010) (no allegations showing how accountants knew that plaintiffs were part of a limited group who were going to rely on accountants' valuations); *Spear v. Ernst & Young*, No. CIV. A. 3:94-1150-17, 1994 WL 585815, at *10 (D.S.C. Aug. 15, 1994) (no allegation that defendant knew that its client intended plaintiffs to rely on audit report);

Scottish Heritable Trust, PLC v. Peat Marwick Main & Co., 81 F.3d 606, 614 (5th Cir. 1996) (potential investors unknown to accountant are not within limited group of persons to whom accountant owes a duty).

These cases have no bearing here, where the Complaint alleges EY knew that FutureSelect was an investor, addressed its audit reports directly to FutureSelect, and intended for FutureSelect to rely on the reports in connection with its investment decisions. *See, e.g.*, CP 8 ¶ 27; CP 23 ¶ 89. *See also* CP 20-21 ¶¶ 77-78; CP 23 ¶ 89; CP 37 ¶ 149; CP 45 ¶ 204. Under Washington law, nothing more is required. *See, e.g., Hoffer I*, 110 Wn.2d at 129 (Restatement Section 552(b) satisfied when bondholders alleged that auditor "wrote the letter knowing that the [seller] intended for it to reach investors who were deciding whether to purchase bonds").

Even if the Court accepts EY's arguments that additional negligent misrepresentation elements must be alleged, it should grant FutureSelect an opportunity to file an amended complaint.

D. FutureSelect's Negligence Claim against Tremont Was Improperly Dismissed

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

FutureSelect's negligence claim against Tremont is premised on misrepresentations and non-disclosures and thus is direct under settled law. Numerous courts—including those considering these same claims

against Tremont for the same conduct—already have rejected Tremont's argument.[8]

Here, FutureSelect's negligence claim against Tremont is premised on Tremont's misrepresentations. *See, e.g.,* CP 2 ¶ 1 ("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 3-4 ¶¶ 8-9; CP 9-15 ¶¶ 34-47; CP 31-32 ¶¶ 123-126. These misrepresentations were made to FutureSelect's principal, Ron Ward, and FutureSelect unquestionably suffered the harm, and will be the one who benefits from this litigation. *See, e.g.*, CP 42 ¶¶ 181-84.

Therefore, FutureSelect's claims are direct. *Albert v. Alex Brown Mgmt. Servs., Inc.*, No. Civ. A. 762, 2005 WL 2130607 at *12-13 (Del. Ch. Aug. 26, 2005) (where the "gravamen" of the investors' claims was 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," the claims are direct.).

The *Askenazy* court recently and specifically held that claims just like those in this case—negligence, negligent misrepresentation, and fraud claims against Tremont related to the Rye Funds—are direct, not derivative under Delaware law, the same law that applies here. *See* 2012

[8] Tremont also argues for the first time that FutureSelect's negligence claim is impermissibly duplicative of the negligent misrepresentation claim. *See* Br. of Tremont at 29. Arguments Tremont did not present to the trial court should not be considered on appeal. *See Sourakli v. Kyriankos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008).

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)) *aff'd* 2012 WL 1764191 (2d Cir. June 13, 2012). Tremont does not even attempt to distinguish this line of cases.

Moreover, numerous courts addressing identical claims against Tremont have determined the claims to be direct, not derivative. *See, e.g., Cocchi*, 88 So.3d at 329-30 (claims based on misrepresentations are direct claims that could be brought by limited partners suffering individual harm); *Saltz v. First Frontier, LP*, 782 F. 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*, 700 F. Supp. 2d at 610-11 (holding 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]"); "recovery on a claim based solely on inducement would only flow to those individuals, such as [plaintiffs], who were so induced.").

2. The Exculpation Clauses Are Irrelevant to FutureSelect's Negligence Claim

For the reasons discussed in connection with FutureSelect's WSSA and negligent misrepresentation claims, *see supra* Sections II. B. 1. c. and II. D., the exculpation clauses in Tremont's LPAs are irrelevant and should not have been considered by the trial court in connection with Plaintiffs' negligence claim.

E. FutureSelect's Agency Claims against MassMutual and Oppenheimer Were Improperly Dismissed

1. The MassMutual Respondents Cite No Washington Case where an Agency Claim Was Dismissed Under CR 12(b)(6)

Although MassMutual asserts that FutureSelect "ignores the actual import" of *Uni-Com*, in fact the MassMutual Respondents ignore that *Uni-Com* and all other Washington cases cited by Respondents make a finding concerning actual or apparent agency ***based on a consideration of evidence***. None of these cases support their argument that FutureSelect's agency claims should have been dismissed under CR 12(b)(6). *See Uni-Com*, *supra* (affirming grant of summary judgment based on evidence); *Hewson Const., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 685 P.2d 1062 (1984) (same); *Campagnolo S.R.L. v. Full Speed Ahead Inc.*, No. C08-1372 RSM, 2010 WL 2079694, at *7 (W.D. Wash. May 20, 2010) (same); *Neil v. NWCC Invs. V, LLC*, 155 Wn. App. 119, 229 P.3d 837 (same); *Progressive N. Ins. Co. v. Fleetwood Enters., Inc.*, No. C04-1308-MAT, 2006 WL 1009334 (W.D. Wash. Apr. 14, 2006) (finding based on

evidence after discovery allowed); *King v. Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847 (D.C. Cir. 2000) (agency finding based on "extensive evidence").[9]

MassMutual simply ignores the procedural posture of the cases it cites, and misleadingly asserts that cases like *Hewson* pertain to what allegations are required to survive a motion to dismiss. *See* Br. of MassMutual at 16; Br. of Oppenheimer at 21. However, *Hewson* and the other cases MassMutual cites do not discuss what must be alleged to state an agency claim for purposes of a motion to dismiss. Indeed, that these cases all proceeded past the motion to dismiss stage, and were decided based on evidence—not allegations—confirms that the pleading standards offered by Respondents are not accepted by Washington courts.

Applying the proper standard, FutureSelect states a claim. *See, e.g.,* Br. of Appellant at 46-47. *See also, e.g.*, CP 4 ¶ 10; CP 15 ¶ 55; CP 17-18 ¶ 63; CP 33 ¶ 130; CP 34 ¶ 135. Courts in Washington have refused to dismiss agency claims pled with far less specificity than FutureSelect's claims here—even under the heightened pleading standards of Fed. R. Civ. P. 12(b)(6). *See, e.g., In re Park West Galleries, Inc.,*

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[9] Oppenheimer cites one unpublished case where a Delaware Bankruptcy Court purported to apply Washington law to dismiss an agency claim on a motion to dismiss. *See In re Wash. Mut.,* No. DBDCV0660001665, 2010 WL 3238903, at *15 (Bank. D. Del. Aug. 13, 2010) (cited at Br. of Oppenheimer at 25). However, in that case the court already had allowed the plaintiff an opportunity to amend the complaint. 2010 WL 3238903, at *1. Moreover, the court there expressly applied the "heightened pleading requirements" of Fed. R. Civ. P. 12(b)(6), *id* at *2, which do not apply under CR 12(b)(6). *See McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101-02, 233 P.3d 861 (2010).

Mktg. and Sales Practices Litig., No. 09-2076RSL, 2010 WL 2640243, at *8 (W.D. Wash. June 25, 2010) (agency claim against cruise line allowed to proceed based on one allegation that cruise line allowed tortfeasors to identify themselves as cruise crew members); *Amini v. Bank of Am. Corp.*, No. C11-097RSL, 2012 WL 398636, at *7 (W.D. Wash. Feb. 7, 2012) (denying motion to dismiss and rejecting argument that allegations of principal-agency relationship between subsidiary and parent were insufficient).

Moreover, as the court in *Uni-Com* recognized, "[t]he existence of a principal-agent relationship is a question of fact unless the facts are undisputed." *Uni-Com*, 47 Wn. App. at 796 (citing *Bloedel Timberlands Dev., Inc., v. Timber Indus., Inc.*, 28 Wn. App. 669, 626 P.2d 30 (1981)). Here, the facts must be taken as true, the MassMutual Respondents' version of the facts are disputed, and discovery would uncover more facts relevant to their agency relationship with Tremont. *See, e.g., Commercial Fin. Servs., Inc. v. Great Am. Ins. Co. of New York*, 381 F. Supp. 2d 291, 301-02 (S.D.N.Y. 2005) (denying motion to dismiss agency claim on grounds where plaintiff alleged some indicia of agency relationship and discovery may establish implicit or authorization of agent by principal); *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir. 2006) (error to dismiss agency claim when complaint alleged agency relationship and "it is not at all clear that it 'appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle

him to relief'") (citation omitted); *Guar. Residential Lending, Inc. v. Int'l Mortg. Ctr., Inc.*, 305 F. Supp. 2d 846, 860-61 (N.D. Ill. 2004) (because agency allegation is not required to be pled with particularity, "it would be sufficient to allege conclusorily...that [co-defendant] was acting as [co-defendant's] agent").

Contrary to the argument that FutureSelect bears some heavier pleading burden in light of their parent-subsidiary relationship with Tremont, the court in *Amini* recently denied a motion to dismiss an agency claim against a parent company based on a subsidiary's negligence. 2012 WL 398636, at *7. The court specifically rejected the parent company's assertion that the allegations of agency were insufficient, noting that the concept "contains[s] both factual and legal elements, that plaintiff's allegation and its relevance to his claims are clear, and that defendants are well aware of their own corporate relationships." *Id.* at *7 n. 11. The court's opinion in *Amini* also refutes the MassMutual Respondents' assertion that courts do not allow agency claims to proceed against a parent company for the acts of its subsidiary, *see* Br. of Oppenheimer at 23, and that FutureSelect must plead a claim for piercing the corporate veil to allege an agency claim. *See* Br. of MassMutual at 9-12.

2. FutureSelect's Complaint Adequately Alleges Actual Agency

a. The Complaint Alleges Right of Control

Unable to counter the specific allegations of control over the relevant transactions alleged in FutureSelect's Complaint, and discussed in FutureSelect's opening brief, the MassMutual Respondents instead ignore them. *See* Br. of Appellant at 46-47. *See also* CP 4 ¶ 10; CP 15 ¶ 55; CP 17-18 ¶ 63; CP 33 ¶ 130; CP 34 ¶ 135. This strategy is fatal to their argument.

The Complaint's allegations regarding the MassMutual Respondents' control over the investments at issue, and their ability to have stopped the loss in this case, allege a right of control. *See, e.g.,* CP 15 ¶ 55 ("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***") (emphasis added); CP 17-18 ¶ 63 ("Specifically, MassMutual and Oppenheimer had the right to control Tremont such that they could have prevented Tremont from offering investments with Madoff"); CP 17-19 ¶¶ 63-70 (detailing how Respondents exercised control).

MassMutual concedes that FutureSelect expressly alleges control, but asks the Court to reject the allegation, and incorrectly interpret it as simply an assertion of the parent-subsidiary relationship. *See* Br. of

MassMutual at 22. This effort to go beyond the face of the Complaint must fail. *See Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998).

Oppenheimer's argument that FutureSelect cannot allege agency because it made its initial investment before Oppenheimer acquired Tremont similarly is wrong. Moreover, the Complaint alleges that FutureSelect almost quadrupled the amount of its investment in Tremont after it became Oppenheimer's agent. *See* CP 23 ¶ 88; CP 24 ¶ 94.

b. The Complaint Alleges Manifestations of Mutual Consent

Even assuming it must allege that MassMutual and Tremont mutually consented to an agency relationship, the Complaint is sufficient. MassMutual does not dispute that the "mutual consent" required for actual agency may be manifested through actions, and need not be shown by express words. *See Rho Co., Inc. v. Dep't of Revenue*, 113 Wn.2d 561, 570-71, 782 P.2d 986 (1989) ("agency is a legal concept that depends on the manifest conduct of the parties"); *O'Brien v. Hafer,* 122 Wn. App. 279, 283, 93 P.3d 930 (2004) ("agency relationship results from manifestation of consent by one party...with a correlative manifestation of consent by the other party") (quoting *Moss v. Vadman,* 77 Wn.2d 396, 402-03, 463 P.2d 159 (1969)); *see also* RESTATEMENT (THIRD) OF AGENCY § 2.01 cmt. c (2006) (principal's assent may be manifested by "expressive conduct toward an agent," and agent's actions establish its consent).

Here, FutureSelect's Complaint contains multiple allegations regarding manifestations of assent between Tremont and the MassMutual Respondents to a principal-agent relationship. *See, e.g.*, CP 19 ¶ 69 (Tremont listing Oppenheimer and MassMutual as "Control Persons" on S.E.C. Registration forms); CP 19 ¶ 70 (Oppenheimer installing its senior officers in control positions at Tremont and Tremont publicly identifying said persons as part of Tremont's management team); CP 19 ¶¶ 71-72 (Tremont advertising itself as an Oppenheimer Funds company with knowledge and approval of MassMutual and Oppenheimer); CP 19-20 ¶ 73 (MassMutual listing Tremont as one of its "General Agencies and Other Offices" in annual report).

3. FutureSelect's Complaint Adequately Alleges Apparent Agency

Again, rather than addressing the allegations in the Complaint that regarding objective manifestations of the principal-agent relationship between Tremont specifically discussed in FutureSelect's opening brief (*see* Br. of Appellant at 45-49), Oppenheimer simply ignores them. *See* Br. of Oppenheimer at 26. MassMutual acknowledges only one of those manifestations—that MassMutual publicly identified Tremont as one of its "Worldwide General Agencies and Other Offices" in its annual reports—but asserts that FutureSelect's Complaint has to allege that FutureSelect actually reviewed MassMutual's annual reports to allege a claim of apparent agency. *See* Br. of MassMutual at 26-27. MassMutual cites no

case to support this requirement—let alone a case considering the pleading requirements to survive a motion to dismiss.

Even cases discussing what must be proven—not alleged—to show apparent authority state that a plaintiff must establish an objective manifestation of agency, and a subjective belief in the agency relationship by the plaintiff. *See, e.g., D.L.S. v. Maybin*, 130 Wn. App. 94, 98, 121 P.3d 1210 (2005). FutureSelect's Complaint alleges numerous objective manifestations, *see, e.g.,* CP 18-20 ¶¶ 65-75; CP 40 ¶¶ 167-168; CP 41 ¶¶ 176-177, and its own subjective belief in the agency relationship. *See, e.g.,* CP 40 ¶¶ 168-170; CP 41 ¶¶ 178-179. FutureSelect has more than satisfied the pleading requirements for apparent agency. *See, e.g., In re Park West Galleries*, 2010 WL 2640243, at *8 (denying motion to dismiss apparent and actual agency claim based on one allegation that cruise line allowed sales agents to identify themselves as crew members).

As with FutureSelect's other claims, in the event this Court determines FutureSelect's agency claims are inadequate, FutureSelect requests an opportunity to file an amended complaint. *See In re Metro. Sec. Litig.*, 532 F. Supp. 2d at 1276.

F. FutureSelect Made a Prima Facie Showing of Personal Jurisdiction over Oppenheimer

Just as FutureSelect does not dispute that the exercise of personal jurisdiction must comport with constitutional due process, Oppenheimer cannot dispute that due process permits the exercise of jurisdiction over a

principal based on the in-forum contacts of its agent. *See* RCW 4.28.185(1) ("[a]ny 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) (emphasis added). *See also Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1192 (9th Cir. 2002) (due process satisfied when non-resident corporation's agent purposefully availed itself in forum state).

The amount of control required to support a finding of personal jurisdiction based on an agency relationship is not as much as the control required to satisfy an "alter ego" test. *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 921 (9th Cir. 2011). Moreover, where—as here—the trial court does not hold an evidentiary hearing on the motion to dismiss for lack of personal jurisdiction, the plaintiff "need ***only*** demonstrate facts that ***if true*** would support jurisdiction over the defendant." *Bauman*, 644 F.3d at 913 (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001)) (emphasis added by court in *Bauman*).

Oppenheimer's implication that it is immune from jurisdiction simply because it describes itself as a holding company is plainly wrong. Courts in Washington and elsewhere have found the exercise of personal jurisdiction proper over holding companies based on the contacts of their agent-subsidiaries. *See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 344 F. Supp. 2d 686, 694-95 (W.D. Wash. 2003) (holding "facts and documents as cumulatively supporting a prima facie case for

the exercise of personal jurisdiction" over parent holding company based on subsidiary's contacts); *ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1166-67 (N.D. Cal. 2002) (holding company subject to personal jurisdiction through contacts of its subsidiary agent because of "overlapping boards, collaborative marketing efforts, and unitary self-image"); *Modesto City Schools v. Riso Kagako Corp.*, 157 F. Supp. 2d 1128, 1136 (E.D. Cal. 2001) (holding company subject to personal jurisdiction based on subsidiary's in-forum contacts). These courts have found that the "totality of circumstances" cumulatively supported a finding of agency sufficient to confer personal jurisdiction. *In re PPA Prods. Liab. Litig.*, 344 F. Supp. 2d at 694-95.

Here, the totality of circumstances supports a finding of personal jurisdiction, especially where the principal was alleged to control the very transaction that caused the loss to Washington citizens. *See, e.g.*, CP 18 ¶ 66 (Oppenheimer and its parent MassMutual took over every seat on Tremont's board, and two Oppenheimer directors who were also high-ranking officers in OppenheimerFunds became Tremont directors); CP 18 ¶ 67 (Tremont's executives became employees of OppenhemerFunds); CP 19 ¶ 69 (Tremont identified Oppenheimer as one of its "control persons" on its Uniform Application for Investment Advisers Registration filed with the SEC); CP 19 ¶ 72 (Tremont's stationary and marketing materials stated it was "An OppenheimerFunds Company").

Rather than addressing these allegations, Oppenheimer ignores them. *See* Br. of Oppenheimer at 17 (only acknowledging certain allegations that it describes as "tangential facts regarding OAC's ownership of Tremont"). Oppenheimer's selective excerpting conveniently omits the allegations showing Oppenheimer penetrating Tremont's management system. For example, the Complaint does not allege merely that Oppenheimer and Tremont "shared board members," but states that Oppenheimer took over four of Tremont's five board seats, with Oppenheimer's parent MassMutual occupying the fifth seat. *See* CP 18-19 ¶¶ 66-68. Oppenheimer installed its highest-ranking officers on the Tremont board—including OppenheimerFunds' President and Chief Executive Officer, and its Chief Investment Officer—and made Tremont's Co-Chief Executive Officers employees of Oppenheimer Funds. *See* CP 18 ¶¶ 66-67. Tremont identified Oppenheimer as a "control person" on its Form ADV. *See* CP 19 ¶ 69. Tremont held itself out as an Oppenheimer agent, identified on stationary and marketing materials as "An OppenheimerFunds Company." *See* CP 19 ¶ 72.

Oppenheimer makes much of FutureSelect's purported "failure" to argue that Oppenheimer would have sold securities itself if not for Tremont, but the Ninth Circuit recently made clear that there is no such requirement. *See Bauman*, 644 F.3d at 921 n. 13. Rather, FutureSelect's Complaint need only allege facts showing that the services Tremont performed were "sufficiently important" to Oppenheimer so "that they

would almost certainly be performed by other means" if Tremont did not exist—either by Oppenheimer performing those services itself ***or*** through another representative. *Bauman*, 644 F.3d at 922. As alleged in the Complaint, Oppenheimer acquired Tremont when it and its parent MassMutual decided to enter the hedge fund market. CP 16 ¶ 57. This hedge fund investment activity was sufficiently important to Oppenheimer such that had Tremont not existed, Oppenheimer would have found another hedge fund to perform these investment services.

Oppenheimer relies on *Askenazy*, but the court in *Askenazy* held Massachusetts law did not permit the exercise of personal jurisdiction over a parent corporation for acts of its subsidiary based on a theory of agency. *See* 2012 WL 44065 at *8 (refusing to impute Tremont's in-state activities to Oppenheimer because "[u]nder Massachusetts law...that is permissible only upon a showing tantamount to what is necessary to pierce the corporate veil"). Massachusetts law is not applicable here. Under Washington law, the long-arm statute specifically recognizes agency as a proper ground for jurisdiction. *See* RCW 4.28.185(1). Still further, *Askenazy* directly contradicts the Ninth Circuit's recognition of the agency theory and the alter ego/piercing the corporate veil theory as "two ***separate*** tests...to support the exercise of personal jurisdiction over a parent company by virtue of its relationship to a subsidiary." *Bauman*, 644 F.3d at 920-21 (emphasis in original).

III. CONCLUSION

For the reasons above, FutureSelect respectfully requests that this Court reverse the trial court's grant of motions to dismiss filed by the Respondents because the Complaint states a claim, and remand to the trial court for further proceedings. Alternatively, FutureSelect respectfully requests that the Court reverse the trial court and grant FutureSelect leave to amend the Complaint to cure any defect.

Dated: August 10, 2012

Respectfully submitted,

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DECLARATION OF SERVICE

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