Supreme Court No. 95420-8
Court of Appeals No. 75779-2-I

SUPREME COURT
OF THE STATE OF WASHINGTON

FEDERAL HOME LOAN BANK OF SEATTLE,

Petitioner,

v.

CREDIT SUISSE SECURITIES (USA) LLC, f/k/a CREDIT SUISSE FIRST BOSTON LLC, CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., and CREDIT SUISSE MANAGEMENT LLC, f/k/a CREDIT SUISSE FIRST BOSTON MANAGEMENT LLC,

Respondents.

ANSWER TO AMICUS CURIAE

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Respondents Credit Suisse Securities (USA) LLC, Credit Suisse First Boston Mortgage Securities Corp. and Credit Suisse Management LLC (collectively, "Credit Suisse"), respectfully submit this brief in response to the Washington State Department of Financial Institutions ("DFI") Amicus Curiae Brief, dated March 9, 2018, in Support of the Federal Home Loan Bank of Seattle's ("FHLBS") Petition for Review.

I. INTRODUCTION

This Court should deny review. DFI's Amicus Brief is largely duplicative of FHLBS' Petition for Review, and it similarly fails to point to any conflict between the Court of Appeals' decision and any decision of this Court, or to any conflict with any other Washington state court decision, or to any substantial issue of public interest involved in FHLBS' Petition. The fact remains that Washington law requiring proof of reliance for a private action under the Washington State Securities Act ("WSSA") has been settled for half a century. DFI's enforcement powers are not at issue in FHLBS' Petition, and DFI's dislike of the settled law for private actions is not a reason to grant review of this case.

II. STATEMENT OF THE CASE

A complete statement of the relevant facts and procedural history in this case is included in Credit Suisse's Answer to FHLBS' Petition for Review, dated February 9, 2018.

III. ARGUMENT

This Court should deny review. FHLBS' Petition for Review does not meet the criteria required for a discretionary grant of review by this Court. *See* RAP 13.4(b). DFI's arguments do not change that.

DFI argues that review should be granted under RAP 13.4(b)(1) and (4) because the Court of Appeals' decision allegedly conflicts with decisions of this Court and because FHLBS' Petition purportedly involves an issue of substantial public interest. (Amicus Br. 2, 3.) Neither of these criteria is met here. This is not the first time DFI has submitted an amicus brief in support of a petition for review and argued that settled Washington law on reliance for private actions should be changed. This Court denied review in the prior case and should do so again here. *See Stewart v. Estate of Steiner*, 153 Wn.2d 1022, 108 P.3d 1229 (2005) (Table).

DFI's mischaracterizations of various cases do not change the fact that it cannot point to any conflict between the Court of Appeals' decision and any decision of this Court. (*See* Section A.) The Uniform Securities Act commentary DFI cites does not show any error by the Court of Appeals. (*See* Section B.) Lastly, DFI fails to identify any issue of substantial public interest involved in FHLBS' Petition—the scope of DFI's enforcement powers are not involved in FHLBS' Petition, and in any event, DFI has not pointed to anything suggesting that application of

the long-settled and correct law of reliance for a private action under the WSSA might somehow alter DFI's enforcement powers in the future. (*See* Section C.) This Court has denied review of this issue before and should do so again here. *See Kunkle v. W. Wireless Corp.*, 161 Wn.2d 1010, 166 P.3d 1217 (2007) (Table); *Stewart*, 153 Wn.2d 1022.

A. Review Should Not Be Granted Under RAP 13.4(b)(1) Because the Court of Appeals' Decision Does Not Conflict with Any of This Court's Decisions.

DFI has failed to point to any conflict between the Court of Appeals' decision and any decision of this Court. DFI repeats several arguments duplicative of those raised by FHLBS in its Petition for Review and refuted by Credit Suisse in its Answer to FHLBS' Petition. In addition, DFI makes the erroneous argument that the WSSA's reliance requirement somehow conflicts with *Hines v. Data Line Sys., Inc.*, and "other decisions of this Court in which the Court set forth the elements of a violation under [the WSSA]" and allegedly did not include reliance. (Amicus Br. 5-6.) This is wrong, and is based on a serious misreading of this Court's decisions.

None of the three cases DFI cites calls the reliance element into question in any way. *Hines* clearly states that "investors need only show that the misrepresentations were material *and that they relied on the misrepresentations*" and that the "Findings of Fact . . . substantiate that

each investor relied on [the] statements". 114 Wn.2d 127, 134, 787 P.2d 8 (1990) (emphasis added); *see also id.* at 135 ("The violation is in the misrepresentation itself; it is not how the misrepresentation affected the price of the stock. . . . Thus an investor who is *wrongfully induced to purchase* a security may recover his investment without any requirement of showing a decline in the value of the stock.") (emphasis added); *cf.* Amicus Br. 10 (referencing misstatements that "induce" investors "to purchase the fraudulent investment"—a classic description of reliance).

DFI's argument with respect to *Go2Net, Inc. v. Freeyellow.com, Inc.*, fares no better. This Court specifically called out the proof of the reliance element. *See* 158 Wn.2d 247, 251, 143 P.3d 590 (2006) ("As the trial court's judgment acknowledged, the jury's findings" that "the misrepresentation or omission was material *and that Go2Net had relied on the misrepresentation* or omission . . . established [defendant's] violation of the Act") (emphasis added). The passage in *Go2Net* upon which DFI relies does not seek to set forth a definitive list of all the elements an investor must prove; rather, it identifies elements that an investor does *not* need to prove—and reliance is not on that list. *See id.* at 253 ("The [WSSA] thus requires only proof of the seller's material, *preclosing* misrepresentation or omission; it does not require proof of the seller's intent to defraud, nor does it require a showing that the misrepresentation

or omission actually caused a purchaser to incur losses in a securities transaction.") (citation omitted, emphasis added). *Kinney v. Cook*, the last case DFI cites on this point, does not purport to identify all the elements of RCW 21.20.010(2). 159 Wn.2d 837, 842, 846, 154 P.3d 206 (2007) (dismissing because complaint "did not implicate a sale, offer to sell, or disposition of a security as contemplated by RCW 21.20.010").

Thus, while DFI urges review "in light of the confusion created by Division One's interpretation of *Hines*" (Amicus Br. 10), it does not—and cannot—cite a single decision of this Court or any lower court that is inconsistent with the Court of Appeals' decision. DFI itself acknowledges 48 years' worth of entirely consistent decisions requiring reliance for liability in private actions. (Amicus Br. 4.) There is no confusion sown by the Court of Appeals' decision following *Hines*.

B. DFI Fails To Identify Any Error in the Court of Appeals' Reasoning.

Unable to create a conflict between the Court of Appeals' decision and any decision of this Court, DFI next tries to find an error in the Court of Appeals' reasoning. (Amicus Br. 7-9.) DFI focuses on commentary to Section 410 of the Uniform Securities Act of 1956, on which RCW 21.20.430 was modeled. That commentary states that Section 410 was modeled on Section 12(a)(2) of the Securities Act of 1933 and was not intended to have a reliance requirement. (Amicus Br. 7-8.) However,

RCW 21.20.430 is the *remedy* portion of the WSSA. *See Hines*, 114 Wn.2d at 135 ("RCW 21.20.430(1) provides rescission as the basic *remedy*.") (emphasis added); *Go2Net*, 158 Wn.2d at 251 ("*[R]emedies* [are] set forth in RCW 21.20.430.") (emphasis added). The Washington Legislature did not model the *liability* provision, RCW 21.20.010, on Section 410, and DFI does not even argue that it did. Only RCW 21.20.010—liability—is at issue in this case, so DFI's cited commentary is irrelevant.

Moreover, despite its title, the Uniform Securities Act was not enacted in a uniform manner across all states. Even the commentator DFI cites shows that there is no uniformity. *See* 12A Joseph C. Long et al., *Blue Sky Law* § 12:5 (2016) (state-by-state chart of variations in state securities laws elements). Some states, like Washington, require reliance; some do not. This variation does not make the Court of Appeals' decision wrong. It simply reflects that the Washington legislature made different choices from some other states, as is their right to do.

C. Review Should Not Be Granted Pursuant to RAP 13.4(b)(4) Because FHLBS' Petition Does Not Involve an Issue of Substantial Public Interest.

DFI has failed to point to an issue of substantial public interest involved in FHLBS' Petition. (*See* Amicus Br. 9-10.) The scope of DFI's enforcement power is not at issue in the Petition. DFI cannot create an

issue of substantial public interest by pointing to something that is not before this Court and that this Court would not be called to rule on if it did grant the Petition. In any event, DFI's suggestion that long-settled law requiring reliance in private actions under the WSSA might suddenly change DFI's ability in the future to protect investors from "fraudulent offers that had been made, [when] no investor had yet been duped" is meritless. (Amicus Br. 9.) Certain of the statutory provisions DFI cites specifically contemplate DFI intervening before any investors rely on misrepresentations. *See* RCW 21.20.280(5) (permitting DFI to issue a stop order if "[t]he offering has worked or tended to work a fraud upon purchasers *or would so operate*") (emphasis added); RCW 21.20.390 (permitting DFI to seek injunctive and ancillary relief "[w]henever it appears to the director that any person has engaged *or is about to engage* in any act or practice constituting a violation of any provision of this chapter or any rule hereunder") (emphasis added). The statutory regime that applies to DFI's enforcement power is materially different from—and irrelevant to—the statutory provision for the private civil liability at issue in the present case.

IV. CONCLUSION

For the foregoing reasons, this Court should deny review.

RESPECTFULLY SUBMITTED this 28th day of March, 2018.

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I hereby certify, under penalty of perjury under the laws of the State of Washington and the United States, that the foregoing is true and correct.

DATED this 28th day of March 2018, at Seattle, Washington.

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HILLIS CLARK MARTIN & PETERSON P.S.

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