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.

Filed COA Div I 5-16-12

BRIEF OF RESPONDENT MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY

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I. INTRODUCTION

Plaintiffs-Appellants, FutureSelect,[1] seek to impose liability on Defendant-Appellees MassMutual[2] for the alleged wrongdoings of its affiliates, the Tremont Defendants.[3] It is black letter law that "[a] parent company generally will not be held liable for the torts of its wholly owned subsidiaries absent evidence that would justify piercing the corporate veil." *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 387–88, 47 P.3d 556 (2002). FutureSelect has not (and cannot) allege any facts that justify disregarding the legal separateness between the Tremont Defendants and the ultimate, indirect shareholder of TGHI, MassMutual. Instead, FutureSelect uses undisputed and unremarkable facts relevant to MassMutual's status as ultimate shareholder in an attempt to make MassMutual secondarily liable for the Tremont Defendants' alleged wrongs under theories of agency, apparent agency and control person liability under the Washington State Securities Act ("WSSA"). While the

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[1] As used herein, the term "FutureSelect" means Plaintiffs-Appellants FutureSelect Prime Advisor II, LLC, the Merriwell Fund, L.P., and Telesis IIW, LLC, three investment funds, and their operations manager, FutureSelect Portfolio Management, Inc. Clerk's Papers ("CP") 5–6, ¶¶ 15–18.

[2] As used herein, "MassMutual" means Defendant-Appellee Massachusetts Mutual Life Insurance Company. CP 7, ¶ 25.

[3] As used herein, the term the "Tremont Defendants" refers to Defendants-Appellees Tremont Group Holding, Inc. ("TGHI") and its subsidiary, Tremont Partners, Inc. ("TPI"), the general partner of the limited partnerships (funds) in which FutureSelect invested. CP 3, ¶ 6, CP 6, ¶¶ 19, 20. TGHI is owned by Defendants-Appellee Oppenheimer Acquisition Corp. ("OAC"), which, in turn is owned by MassMutual Holding LLC, a subsidiary of MassMutual. CP 7, ¶ 24. FutureSelect in the Complaint conflates TGHI and its various affiliates, including TPI, calling them "Tremont." *See* CP 3, ¶ 6.

kinds of "facts" pled might be relevant in a veil piercing case (though legally insufficient), they are largely irrelevant to FutureSelect's claims. This confusion lies at the heart of FutureSelect's claims against MassMutual and proves fatal to FutureSelect's Complaint against MassMutual.

After extensive briefing and hearings, the Superior Court of Washington for King County ("Superior Court") correctly granted MassMutual's motion to dismiss the Complaint because FutureSelect's claims against MassMutual fail as a matter of law. This Court should affirm.

II. NO ASSIGNMENT OF ERRORS

On June 3, 2011, the Superior Court properly dismissed all claims against MassMutual, OAC, TGHI, TPI, and Ernst & Young LLP ("Ernst & Young") based on the parties' respective motions to dismiss.

III. STATEMENT OF CASE

A. Procedural Background

On August 26, 2010, FutureSelect sued TPI; TPI's parent company, TGHI; TGHI's parent company, OAC; and MassMutual, owner of OAC. CP 1–48. FutureSelect also sued the accounting firms Ernst & Young, KPMG LLP ("KPMG") and Goldstein Golub Kessler LLP ("GGK"). *Id.*

Against MassMutual, FutureSelect asserted three claims: (1) violation of WSSA, RCW 21.20.430 (Third Claim for Relief) (CP 34–

35); (2) agency (Ninth Claim for Relief) (CP 40–41); and (3) apparent agency (Tenth Claim for Relief) (CP 41).

On December 15, 2010, MassMutual moved to dismiss the claims against it pursuant to CR 12(b)(6). CP 834–59. The other Defendants also moved to dismiss the Complaint in December 2010. CP 56–86 (Ernst & Young); CP 530–56 (GGK); CP 562–94 (KPMG) CP 860–88 (Tremont Defendants); CP 893–917 (OAC). In its motion to dismiss, OAC asserted the defense of lack of personal jurisdiction. CP 893–917. KPMG, as an alternative to dismissal, moved to compel arbitration and stay the action. CP 562–94. FutureSelect opposed each of these motions. CP 1633–59; CP 1660–85; CP 1686–12; CP 1720–44; CP 1745– 70; CP 1771–97. The Superior Court held oral argument on the motions to dismiss, with the exception of KPMG's motion, on April 8, 2011. CP 2145. The Superior Court held two additional hearings on May 5, 2011 and May 17, 2011. Super. Ct. Dkt. No. 149 and CP 3291.

On June 3, 2011, the Superior Court granted MassMutual's Motion to Dismiss. CP 3351–57. The Superior Court also granted the Tremont Defendants' Motion to Dismiss (CP 3343–46), OAC's Motion to Dismiss (CP 3347–48), and Ernst & Young's Motion to Dismiss. CP 3349–50. Finally, the Superior Court granted KPMG's Motion to Compel Arbitration and Stay the Action against It. CP 3358–59. After GGK and FutureSelect notified the Court that they had reached an agreement resolving the claims against GGK, the Court entered an order dismissing GGK from the action on June 30, 2011. Super. Ct. Dkt. No. 188.

FutureSelect moved for entry of a final judgment pursuant to CR 54(b) against the Tremont Defendants, OAC, MassMutual and Ernst & Young on December 5, 2011.[4] CP 3388–97. The Superior Court entered final judgment on December 13, 2011. CP 3404–07. FutureSelect filed a Notice of Appeal on December 23, 2011. CP 3408–37.

B. Factual Background

1. Plaintiffs-Appellants

Plaintiffs-Appellants are three Delaware limited liability hedge funds, Future Select Prime Advisor II, LLC, the Meriwell Fund, L.P., and Telesis IIW, LLC (the "FutureSelect Funds"), and FutureSelect Portfolio Management, Inc, a Delaware corporation that describes itself as the "operations manager" for the FutureSelect Funds. CP 5–6, ¶¶ 15–18. The Complaint alleges that the FutureSelect Funds, by investing in the Rye Funds,[5] invested and lost money with Bernard Madoff and Bernard L. Madoff Investment Securities, LLC (collectively, "Madoff"). CP 2, ¶ 4; CP 3, ¶ 7.

The FutureSelect Funds first invested in the Rye Funds in 1998. CP 10, ¶ 38. Then and now, the FutureSelect Funds apparently were managed by a professional money manager that knowingly placed the

[4] FutureSelect initially filed a notice of appeal on June 16, 2011. CP 3360-87. The Court of Appeals declined discretionary review and dismissed the appeal, No. 67302-5-1, on November 21, 2011.

[5] "Rye Funds" refers to the Rye Select Broad Market Fund, L.P. ("Broad Market Fund"), the Rye Select Broad Market Prime Fund, L.P. ("Prime Fund") and the Rye Select Broad Market XL Fund, L.P. ("XL Fund"). CP 3, ¶ 6.

assets of their investors with Madoff. CP 5, ¶ 15; CP 9–10, ¶¶ 33–40. In 1997 (before MassMutual's indirect subsidiary, OAC, acquired TGHI in 2001 (CP 7, ¶ 24)), FutureSelect's principal, Ron Ward ("Ward"), met with a representative of "Tremont" to discuss investing in the Rye Funds. CP 5, ¶ 15; CP 9–10, ¶ 34. In February 1998 (still years before OAC acquired TGHI), Ward traveled to Rye, New York, visited the Tremont Defendants' offices and "discussed the Rye Funds *and their investments in Madoff*." CP 9–10, ¶ 34 (emphasis added). "In both meetings, Tremont told Ward that *the Rye Funds invested all of their assets with Madoff* and Madoff was given complete investment discretion over those assets, subject to Tremont's oversight and ongoing due diligence." *Id.* (emphasis added).

FutureSelect's investments were governed by various "offering materials" including subscription agreements, limited partnership agreements and private placement memoranda. CP 9, ¶ 33; CP 970–92, 994–1016, 1018–48, 1050–133, 1135–208, 1211–68, 1270–307, 1309–40, 1342–92. These documents are part of the record on appeal.[6] MassMutual was not a party to any of these agreements.

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[6] These documents were submitted to the Superior Court by the Tremont Defendants in support of their motion to dismiss. On a motion to dismiss, a court may consider documents such as the subscription agreements, limited partnership agreements and private placement memoranda where, as here, the documents are referenced in the complaint or their contents cannot reasonably be questioned. *See Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725–28, 180 P.2d 168 (2008); *Birnbaum v. Pierce County*, -- Wn. App. --, -- P.3d --, 2012 WL 1299355, *1 (Wn. App. Apr. 16, 2012). FutureSelect also submitted documents not attached to the complaint to the Superior Court. *E.g.*, CP 1713–19, 2928–3105.

Because FutureSelect began investing in the Rye Funds in 1998, three years before OAC acquired TGHI in 2001, FutureSelect does not (and cannot) allege that the MassMutual affiliation caused FutureSelect to invest with "Tremont" or Madoff. CP 7, ¶ 24; CP 9–10, ¶ 34. Between 1998 and 2008, Ward and "Tremont" communicated monthly about Madoff and the performance of the Rye Funds. CP 10–11, ¶ 38. During this time, Ward continued to visit "Tremont" in New York. CP 11, ¶ 39. The Complaint is silent on what, if any, due diligence FutureSelect conducted on Madoff before investing its clients' money.

2. Defendant-Appellee MassMutual

MassMutual is a mutual insurance company organized under the laws of Massachusetts. CP 7, ¶ 25. MassMutual, through a wholly owned subsidiary, MassMutual Holding LLC, owns OAC. *See id.* OAC acquired TGHI in October 2001.[7] CP 7, ¶ 24; CP 18, ¶ 64. Prior to OAC's acquisition, TGHI was a publicly traded company. *See* CP 16, ¶ 58

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[7] Although not alleged in the Complaint, TGHI is the successor to the entity which OAC actually acquired. FutureSelect conflates TPI and TGHI, referring to them throughout the Complaint as "Tremont." *See* CP 3, ¶ 6. FutureSelect's conflation is relevant: TGHI and TPI are different entities with different boards. TPI, a TGHI subsidiary, served as the general partner of the various Rye Funds. CP 6, ¶¶ 19, 20; CP 18, ¶ 66. Although MassMutual did elect a representative to the TGHI board, it never elected any director to the board of TPI, the general partner of the funds.

As described in the Private Placement Memorandum for the XL Fund, TPI provided "consulting and specialized investment services to financial institutions, mutual funds, other investment companies, investment managers and individuals. [It] also develops, manages and provides consulting services to other of its own proprietary multi-advisor funds," which are sometimes referred to as "fund of funds." CP 1228.

(referencing TGHI's "Form 10-K SB filed with the SEC"). TGHI is a Delaware corporation. CP 6, ¶ 19. TPI is the "chief operating subsidiary" of TGHI, and is organized under the laws of Connecticut. CP 6, ¶ 20. TPI is the general partner of the Rye Funds, which, like the FutureSelect Funds, are Delaware limited partnerships. CP 6, ¶ 20; CP 6–7, ¶¶ 21–23; CP 5–6, ¶¶ 16–18.

FutureSelect alleges that prior to the 2001 acquisition, *four years after* Ward first met with "Tremont" and *three years after* FutureSelect first invested with Madoff, MassMutual and OAC conducted due diligence on TGHI and learned that "a significant contribution to Tremont's revenues" came from funds managed by Madoff.[8] CP 16–17, ¶ 60. FutureSelect further alleges that, before the acquisition, MassMutual and OAC visited Madoff's offices, and that MassMutual and OAC did not conduct due diligence on Madoff. CP 17, ¶ 61. The entity that OAC was considering acquiring at the time, of course, was TGHI, not Madoff.

After OAC acquired Tremont in 2001, MassMutual allegedly elected some directors of the board of directors of "Tremont." CP 18, ¶ 66. Although FutureSelect does not specify the entity on which MassMutual had board representation, it was TGHI, not TPI the general partner of the Rye Funds. *See id.* FutureSelect alleges that Tremont switched auditors, from Ernst & Young to KPMG, and alleges generally

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[8] For purposes of its motion to dismiss and this appeal only, MassMutual does not contest these allegations.

that MassMutual and/or OAC provided "support services" to "Tremont" such as compliance, audit, finance and human resources. CP 18, ¶ 64; CP 20, ¶ 75.

FutureSelect alleges that MassMutual's annual reports disclosed that "Tremont" was an affiliate, listing it as "one of MassMutual's worldwide 'General Agencies and Other Offices.'" CP 19–20, ¶ 73. And "Tremont" disclosed that MassMutual was its ultimate owner by listing MassMutual and OAC on Tremont's Uniform Application for Investment Advisors Registration ("Form ADV") filed with the SEC.[9] CP 19, ¶ 69. FutureSelect alleges that MassMutual listed Tremont and the Rye Funds as "approved investments in selling insurance policies to high net worth individuals." CP 20, ¶ 74.

FutureSelect does not (and cannot) allege that it invested in the Rye Funds based on anything MassMutual said or did.

IV. STANDARD OF REVIEW

The Superior Court's decision granting MassMutual's motion to dismiss is reviewed *de novo*. "A CR 12(b)(6) motion is properly granted when it appears from the face of the complaint that the plaintiff would not be entitled to relief even if he proves all the alleged facts supporting the claim." *Citizens for Rational Shoreline Planning v. Whatcom County*, 172

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[9] Form ADV requires that TPI disclose, among other things, any entity that directly or indirectly has the power to sell or direct the sale of 25 percent or more of a corporation's securities. *See* Form ADV Glossary of Terms at 3 (available at http://www.sec.gov/about/forms/formadv.pdf).

Wn.2d 384, 389, 258 P.3d 36 (2011). To survive a motion to dismiss, a complaint must contain "either direct allegations on every material point necessary to sustain a recovery on any legal theory," or "contain allegations from which an inference *fairly* may be drawn that evidence on these material points will be introduced at trial." *Havsy v. Flynn*, 88 Wn. App. 514, 518, 945 P.2d 221 (1997) (emphasis added). A plaintiff may not rely on general conclusory allegations to survive a CR 12(b)(6) motion, *Shutt v. Moore*, 26 Wn. App. 450, 453, 613 P.2d 1188 (1980), and the court need not accept legal conclusions as correct. *Orwick v. Seattle*, 103 Wn.2d 249, 255, 692 P.2d 793 (1984).

V. ARGUMENT

Having alleged no communications with MassMutual, FutureSelect has no claims against MassMutual based on any *direct* dealings. Instead, each of FutureSelect's claims is an attempt to hold MassMutual secondarily liable for the alleged wrongs of the Tremont Defendants. When the factual allegations asserted by FutureSelect are examined, each claim fails, as the Superior Court properly held. FutureSelect alleges only customary and usual indicia of ownership, appended with non-sequitor-type conclusions.

A. A Parent Corporation Is Not Liable for the Acts of a Subsidiary Absent Evidence that Supports Piercing the Corporate Veil.

It is "a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of

control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61, 118 S. Ct. 1876, 141 L.Ed. 2d 43 (1998) (internal quotation and citation omitted). This principle is only avoided in "exceptional cases." *Culinary Workers & Bartenders Union v. Gateway Cafe, Inc.*, 91 Wn.2d 353, 366, 588 P.2d 1334 (1979). MassMutual cannot be held liable for the Tremont Defendants' alleged wrongs merely because MassMutual is the ultimate stock owner and corporate great grandparent of these corporate entities. "The purpose of a corporation is to limit liability. Unless we are willing to say fulfilling that purpose is misconduct, [Plaintiff] is hard put to argue a theory of corporate disregard." *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 411, 645 P.2d 689 (1982).

To sue a parent corporation in its capacity as owner, a plaintiff must allege ownership *and*, critically, facts that would support disregarding the corporate separateness of the parent and subsidiary. "[M]ere common ownership of stock, the same officers, employees, etc., does not justify disregarding the separate corporate identities ...." *Minton*, 146 Wn.2d at 399 (quoting *Rena-Ware Distribs., Inc. v. State*, 77 Wn.2d 514, 518, 463 P.2d 622 (1970)). Under Washington law, "[t]o pierce the corporate veil and find a parent corporation liable, the party seeking relief must show that there is an overt intention by the corporation to disregard the corporate entity in order to avoid a duty owed to the party seeking to invoke the doctrine." *Id.* at 398; *see also Meisel*, 97 Wn.2d at 409 ("[t]he corporate entity is disregarded and liability assessed against shareholders

in the corporation when the corporation has been intentionally used to violate or evade a duty owed to another.") (quoting *Morgan v. Burks*, 93 Wn.2d 580, 585, 611 P.2d 751 (1980)); *W. Wash. Laborers-Employers Health & Sec. Trust Fund v. Harold Jordan Co., Inc.*, 52 Wn. App. 387, 393, 760 P.2d 382 (1988).

To establish abuse of the corporate form, it is necessary, but not sufficient, for a plaintiff to show "that the one [*i.e.*, parent corporation] so dominates the other [*i.e.*, subsidiary] as to make the other a mere tool and that their funds and property interests are commingled." *W. Wash. Laborers-Employers Health & Sec. Trust Fund*, 52 Wn. App. at 392–93 ("The abuse of corporate form typically involves 'fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit and creditor's detriment.'"). To determine if a parent corporation so dominates a subsidiary that the corporate separateness may be disregarded, Washington courts look to the following factors, including:

- whether the parent and subsidiary commingled funds;
- whether the parent paid the subsidiary's expenses and losses;
- whether the parent uses the subsidiary's property as its own;
- whether the subsidiary acted in the parent's interest rather than its own;
- whether the subsidiary has any business other than with the parent;
- whether the parent and subsidiary disregarded corporate formalities such as holding separate board meetings; and
- whether the parent and subsidiary kept separate books.

See Peterick v. State, 22 Wn. App. 163, 185, 589 P.2d 250 (1977), *reversed on other grounds by Stenberg v. Pac. Power & Light Co., Inc.*, 104 Wn.2d 710, 709 P.2d 793 (1985).

FutureSelect alleges MassMutual's ultimate ownership of the Tremont Defendants, and some incidents inherent to ownership, such as board representation. Although these allegations might be a starting point in a veil piercing case (and FutureSelect does not seek to pierce the corporate veil), they are insufficient to state a claim against MassMutual for the Tremont Defendants' alleged wrongs.[10] "[A] corporation's separate legal identity is not lost merely because all of its stock is held by [one company]." *Grayson v. Nordic Const. Co.*, 92 Wn.2d 548, 553, 599 P.2d 1271 (1979). Without a veil piercing claim—a claim which can not be made here, as FutureSelect implicitly recognizes—the facts which FutureSelect pleads (as opposed to its conclusory allegations) are irrelevant to its claims.

[10] FutureSelect does not (and cannot), for example, allege that MassMutual and the Tremont Defendants commingled funds or disregarded corporate formalities, that MassMutual used the Tremont Defendant's property and paid its expenses and losses, or any other factors that Washington courts consider in a veil-piercing analysis. *See, e.g., Peterick*, 22 Wn. App. at 185.

B. Because FutureSelect Alleges only that MassMutual Was the Ultimate Stock Owner of the Tremont Defendants, FutureSelect's Agency Claims against MassMutual Should Be Dismissed.

1. Allegations of a Parent-Subsidiary Relationship Are Insufficient to State a Principal-Agent Relationship.

"Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act"; "The one for whom action is to be taken is the principal" and "[t]he one who is to act is the agent." Restatement (Second) of Agency § 1 (1958); *see also Moss v. Vadman*, 77 Wn.2d 396, 402–03, 463 P.2d 159 (1970) (Washington courts "frequently cite[] the Restatement of Agency") (citing Restatement (Second) of Agency § 1). To state a claim that a principal is liable for the alleged acts of an agent requires a plaintiff to allege facts indicating (i) mutual consent by the agent and the principal to the agency relationship and (ii) control by the principal of the agent. *Uni-Com Northwest, Ltd. v. Argus Publ'g Co.*, 47 Wn. App. 787, 796, 737 P.2d 304 (1987) ("*Uni-Com*"). Like "many common legal relationships," a parent-subsidiary relationship does not in itself create an agency relationship. Restatement (Third) of Agency § 1.02, cmt. a (2006) ("[m]any common legal relationships do not by themselves create relationships of agency as defined in [the Restatement]. These include relationships between suppliers and resellers of goods or property, franchisors and franchisees, lenders and borrowers, *and parent*

corporations and their subsidiaries.") (emphasis added). "A corporation does not become an agent of another corporation merely because a majority of its voting shares is held by the other." Restatement (Second) of Agency, § 14M (1958).

The Washington Court of Appeals applied this logic in *Uni-Com.* In that case, the court refused to impose liability, under an agency theory, on a company's sole shareholder for the debts of a company that he owned.[11] 47 Wn. App. at 797. The court reasoned that, although the owner "certainly exerted control" over the company, to hold the company as an agent of the owner and make the owner liable for the company's debt "would be a disguised way of finding corporate disregard."[12] *Id.*; *see also* Restatement (Third) of Agency § 1.01 (2006), Reporter's Notes f(2) (collecting cases supporting "the proposition that a parent-subsidiary relationship does not in itself create a relationship of agency");[13]

[11] For the purposes of this Appeal, MassMutual applies Washington law, although, as set forth in the Ernst & Young's Brief, under a choice of law analysis, New York law may apply.

[12] This reasoning was found to be persuasive in the United States District Court for the Western District of Washington in *Campagnolo S.R.L. v. Full Speed Ahead, Inc.*, No. C08-1372, 2010 WL 2079694, *7 (W.D. Wash. May 20, 2010). Relying on *Uni-Com*, the Western District required that a plaintiff either adhere to the well-established, and more stringent, requirements for piercing the corporate veil or plead facts that establish "more than the agency affiliation present in all parent-subsidiary relationships." *Id.* ("The purpose of incorporation is to override the common law principal-agent relationship to limit liability.").

[13] Courts outside of Washington State concur. *See, e.g., Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 849 (D.C. Cir. 2000) ("A [parent] does not create an agency relationship merely by owning a majority of a corporation's stock or by appointing its Board of Directors. ... If majority stock ownership and appointment of the directors were sufficient, then the presumption

Restatement (Second) of Agency, § 14M, Reporter's Notes ("[T]o declare [that every subsidiary is the agent of its parent] would be to destroy the privilege of limited liability obtained by satisfying the incorporation law which permits the subsidiary to be organized.").

MassMutual does not deny being the ultimate stock owner of the Tremont Defendants. FutureSelect's allegations of ownership are not sufficient to allege an agency relationship. The Superior Court was correct in granting MassMutual's motion to dismiss the Complaint.

2. By Alleging Only that MassMutual Owns the Tremont Defendants, FutureSelect Fails to Allege the Elements of Principal-Agent Relationship: Consent and Control.

FutureSelect's allegations regarding MassMutual's ultimate

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of [corporate] separateness ... would be an illusion.") (citation omitted) (applying federal common law); *In re Kaiser Group Int'l, Inc.*, 730 F. Supp. 2d 247, 252 (D.D.C. 2010) ("Although the [parent] and [subsidiary] have substantial leadership in common, they are still separate legal entities that do business separately. A parent-subsidiary relationship, therefore, does not in itself create a principal-agent relationship, and there are not enough other indicia of control to establish an agency relationship."); *Manchester Equip. Co., Inc. v. Am. Way & Moving Co.*, 60 F. Supp. 2d 3, 7 (E.D.N.Y. 1999) ("the court recognizes that in the case of a parent-subsidiary relationship, it has been held that the standards to be applied for determining whether a corporation is acting as an agent for a related corporation are the same as the standards [for piercing the corporate veil]. To impose a less stringent standard would defeat the purpose of separate corporate organization to limit liability."); *Laird v. Capital Cities/ABC, Inc.*, 68 Cal. App. 4th 727, 741 (1998) ("to establish a parent corporation's liability for acts or omissions of its subsidiary on an agency theory, a plaintiff must show more than mere representation of the parent by the subsidiary in dealings with third persons. The showing required is that a parent corporation so *controls the subsidiary* as to cause the subsidiary to become *merely* the agent or instrumentality of the parent.") (internal quotation and citation omitted; emphasis in original).

ownership of the Tremont Defendants add nothing to the analysis of whether the Tremont Defendants acted as agents of MassMutual. FutureSelect has not alleged facts indicating (1) that the Tremont Defendants and MassMutual mutually consented to an agency relationship and (2) that MassMutual controlled the Tremont Defendants—"control establishes agency only if the principal controls the manner of performance." *Uni-Com*, 47 Wn. App. at 796–97.[14]

a. FutureSelect Has Not Alleged Facts Sufficient to Infer that MassMutual and the Tremont Defendants Consented to the Tremont Defendants Acting on MassMutual's Behalf.

FutureSelect has not alleged mutual consent. *Hewson Const., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984) (plaintiff must allege that "[b]oth the principal and agent ... consent[ed] to the relationship"). Obviously, a parent and subsidiary have in a general sense "consented" to their relationship. But because the common legal relationship of parent and subsidiary is not enough for agency, *see, e.g.*, Restatement (Third) of Agency § 1.02 (2006), courts have required more:

> [a]t a minimum, however, we can confidently state that the relationship of principal and agent does not obtain unless *the parent has manifested its desire for the subsidiary to act*

[14] FutureSelect's agency claims are predicated on alleged wrongdoing by the Tremont Defendants. To the extent this Court affirms the Superior Court's ruling dismissing the claims against the Tremont Defendants, it must also affirm the dismissal of all claims against MassMutual. *See Estep v. Hamilton*, 148 Wn. App. 246, 258, 201 P.3d 331 (2008) ("Essential to a principal's vicarious liability is some negligence by the alleged agent.").

> *upon the parent's behalf, the subsidiary has consented so to act,* the parent has the right to exercise control over the subsidiary with respect to matters entrusted to the subsidiary, and the parent exercises its control in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary's Board of Directors.

Transamerica Leasing, Inc., 200 F.3d at 849 (emphasis added); *see also Las Vegas Sands Corp. v. Ace Gaming, LLC*, 713 F. Supp. 2d 427, 447 (D.N.J. 2010) (no agency relationship between parent and subsidiary where "[t]here is absolutely no evidence in the record that could support a finding that [parent company] agreed—either explicitly or implicitly—to have [subsidiary] act on its behalf when [parent company] entered into the License Agreement").

FutureSelect's Complaint is devoid of any factual assertions that MassMutual and Tremont expressed mutual consent to the Tremont Defendants acting as agents for MassMutual, their corporate great grandparent, in any sense other than ownership. FutureSelect, for example, does not (and cannot) allege that the limited partnership agreements with TPI or the Rye Funds' private placement memoranda stated explicitly or implicitly that the Tremont Defendants were acting on behalf of MassMutual. *See* CP 970–92, 994–1016, 1018–48, 1050–133, 1135–208, 1211–68, 1270–307, 1309–40, 1342–92.

This pleading defect is not an accident by FutureSelect given the fact that FutureSelect first invested in the Rye Funds in 1998. At that time, MassMutual was years from having any relationship with the

Tremont Defendants. The Tremont Defendants could not have been acting as MassMutual's agent when FutureSelect invested.

The Superior Court correctly dismissed FutureSelect's agency claim against MassMutual because FutureSelect failed to allege that the Tremont Defendants and their corporate great-grandparent, MassMutual, had mutually consented to the Tremont Defendants acting as MassMutual's agent.

b. FutureSelect Has Not Alleged Facts Sufficient to Infer that MassMutual Controlled the Manner of the Tremont Defendants' Performance.

"Control is not established if the asserted principal retains the right to supervise the asserted agent merely to determine if the agent performs in conformity with the contract. Instead, control establishes agency *only if the principal controls the manner of performance*." *Uni-Com*, 47 Wn. App. at 797–98 (emphasis added) (quoting *Bloedel Timberlands Dev., Inc., v. Timber Indus., Inc.*, 28 Wn. App. 669, 674, 626 P.2d 30 (1981)). *See also Neil v. NWCC Invs. V, LLC*, 155 Wn. App. 119, 132, 229 P.3d 837, *rev. denied*, 169 Wn.2d 1018 (2010) (same). FutureSelect's agency claim fails because it has not alleged any facts from which a reasonable inference can be drawn that MassMutual controlled the manner of performance of any part of the Tremont Defendants' business, let alone "the manner of performance" of the Tremont Defendants offering investments to FutureSelect or selecting the managers the TPI utilized. FutureSelect admits that Madoff was an investment manager for the Rye

Funds in 1997, well before OAC acquired the Tremont Defendants. CP 9–10, ¶ 34.

To prevent "agency" claims from becoming "a disguised way of finding corporate disregard," the court in *Uni-Com* held that the following normal incidents of ownership did not support a conclusion that a parent "controlled" a subsidiary to such an extent that the parent could be liable under agency theory. The *Uni-Com* court explained:

> the following combination of factors *did not establish an agency as matter of law*: parent held voting shares in the subsidiary, parent and subsidiary had some common officers and directors, parent extended credit to the subsidiary, parent benefited from the subsidiary's operations, and parent and subsidiary had joint management programs and joint operations. The ... corporations at all times kept separate records and bank accounts, had some separate employees, and the subsidiary had rights and obligations in its own right.

47 Wn. App. at 797–98 (emphasis added) (adopting criteria set forth in *Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831 (D. Del. 1978)).[15]

When the *Uni-Com* factors are compared to the specific allegations in Complaint, FutureSelect's pleading deficiencies become apparent.

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[15] In *Japan Petroleum*, the plaintiff sought to hold a parent company, headquartered in the United States, liable for the acts of its Nigeria-based subsidiary, with which it conducted joint operations. The plaintiff argued that the subsidiary was acting as an agent of the parent. Considering the above factors, the court held that the parent did not control the subsidiary and the subsidiary was not an agent of the parent company. *Japan Petroleum Co. (Nigeria) Ltd.*, 456 F. Supp. at 842–46.

FutureSelect alleges that:

- MassMutual's subsidiary, OAC, acquired TGHI, a pre-existing, publicly traded company (*see* CP 16, ¶ 58), and its subsidiary TPI in 2001. CP 5, ¶ 24.
- MassMutual became the ultimate owner of the Tremont Defendants: the Tremont Defendants were brought under MassMutual's corporate "umbrella" and became one of many in MassMutual's "network of subsidiaries and affiliates" and a "member of MassMutual's family of companies." CP 18, ¶ 64; CP 19, ¶¶ 70, 71.
- TPI disclosed its ownership structure in public documents, including TPI's investment advisor registration with the SEC (Form ADV). CP 19, ¶ 69.
- In MassMutual's annul reports, MassMutual disclosed that TGHI was among its many subsidiaries and affiliates. CP 19, ¶ 73.
- TGHI had its own board that was composed of individuals from various MassMutual affiliates, as well as TGHI's prior (and retained) management.[16] CP 18–19, ¶¶ 66, 67, 68.

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[16] That a subsidiary and parent share the same officers or directors or publicly disclose ownership does not create liability on the part of a parent corporation. *See, e.g.*, *Bestfoods*, 524 U.S. at 69 ("it is entirely appropriate for directors of a corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its subsidiary's acts") (quotation and citation omitted); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1461–62 (2d Cir. 1995) ("The presence of a parent's logo on documents created and distributed by a subsidiary, standing alone, does not confer authority upon the subsidiary to act as an agent."); *Japan Petroleum Co. (Nigeria) Ltd.*, 456 F. Supp. at 841 ("Nor does the fact that a parent and a subsidiary have common officers and directors necessarily indicate and agency relationship."); *Minton*, 146 Wn.2d at 399 ("[M]ere common ownership of stock, the same officers, employees, etc., does not justify disregarding the separate corporate identities ...."); *id.* at 398–99 ("that [subsidiary corporation] labeled itself a 'subsidiary' of [parent corporation] on its letterhead and had its headquarters at the same location as [parent corporation]" "does not justify disregarding the separate corporate identities"); *see also Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001) ("Appropriate parental involvement includes: monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures .... ") (internal quotation and citation omitted).

- MassMutual and/or OAC may have assisted the Tremont Defendants with some back office "support services," such as audit, compliance, finance, and human resources, and all used the same auditing firm, KPMG.[17] CP 18, ¶¶ 64, 71.

These are vanilla allegations of mere incidents of ownership. Under *Uni-Com* and the Restatement, as a matter of law, they are insufficient to state an agency relationship. 47 Wn. App. at 797–98; Restatement (Third) of Agency § 1.02, cmt. a. FutureSelect alleged fewer indicia of control than was held insufficient in *Japan Petroleum* and *Uni-Com*. *See* 47 Wn. App. at 797–98; 456 F. Supp. at 842–46. For example, there is no allegation that MassMutual extended any credit to the Tremont Defendants or conducted joint operations with the Tremont Defendants, none of which created an agency relationship. *Uni-Com*, 47 Wn. App. at 797–98; *Japan Petroleum Co. (Nigeria) Ltd.*, 456 F. Supp. at 842–46.

Although citing *Uni-Com* for the elements of an agency claim, FutureSelect simply ignores the actual import of that decision. In addition to misunderstanding *Uni-Com*, FutureSelect relies on a case involving an individual driving a car owned by another (*O'Brien v. Hafer*, 122 Wn.

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[17] Allegations that a parent and subsidiary share some back office functions are not sufficient to impose liability on the parent. *See, e.g.*, *Japan Petroleum Co. (Nigeria) Ltd.*, 456 F. Supp. at 846 ("Arrangements by a parent and subsidiary for economy of expense and convenience of administration may be made without establishing the relationship of principal and agent."); *Lindsay Credit Corp. v. Skarperud*, 33 Wn. App. 766, 771, 657 P.2d 804 (1983) (that "all employees of the subsidiary were paid by the parent corporation" and "both companies had the same address, credit managers, lawyers, nonresident agents and auditors," among other things, "were insufficient in themselves to enable a court to disregard the corporate entity and declare the two corporations to be identical ...") (citing *J.I. Case Credit Corp. v. Stark*, 64 Wn.2d 470, 475, 392 P.2d 215 (1964)).

App. 279, 93 P.3d 930 (2004)) and a case concerning a manufacturer and wholesale distributor (*Jackson v. Standard Oil Co. of Cal.*, 8 Wn. App. 83, 505 P.2d 139 (1972)). Appellants' Brief at 45–46. The cases do not support using agency principles to hold a parent corporation liable for the acts of its subsidiary, or to circumvent well-established principles that govern attempts to impose liability on ultimate shareholders.

Instead, FutureSelect argues that the following allegation sufficiently alleges "control" for agency purposes: "[u]pon 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." Appellants' Brief at 46, quoting CP 15, ¶ 55 (emphasis added). Note that FutureSelect conflates two different meanings of "control." MassMutual was the ultimate shareholder of TGHI. Shareholders possess certain rights, including rights to "control" in the sense of voting their shares to elect directors who have the right to elect senior officers of a corporation.[18] FutureSelect uses "control' in that sense the first time it uses the word in the quoted passage.

> [18] [I]t is hornbook law that the exercise of the 'control' which stock ownership gives to the stockholders ... will not create liability beyond the assets of the subsidiary. That 'control' includes the election of directors, the making of by-laws ... and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal.

Bestfoods, 524 U.S. at 61-62 (internal quotation and citation omitted).

FutureSelect then slides into a use of "control" in the sense of actually controlling the actions of the Tremont Defendants. There is no factual predicate for this second use of "control." MassMutual did own and had rights as owner; MassMutual never controlled "the manner by which Tremont offered investments." *See id.* FutureSelect has pled not one single fact that supports this latter conclusory statement. FutureSelect then retreats to arguing that MassMutual had the "right to control" the Tremont Defendants "such that [MassMutual] could have prevented Tremont from offering investments with Madoff." Appellants' Brief at 46. But a "right to control" in the sense of electing directors does not equate to "control of the manner of performance." The only non-conclusory allegations supporting MassMutual's so-called "right to control" is that MassMutual owned OAC, which, in turn, owned TGHI and MassMutual had board representation on TGHI.

As explained by the United States Court of Appeals for the District of Columbia, in a parent-subsidiary context, "control" for agency purposes requires that "the parent has the right to exercise control over the subsidiary with respect to matters entrusted to the subsidiary, and the parent exercises its control in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary's Board of Directors." *Transamerica Leasing, Inc.*, 200 F.3d at 849.

FutureSelect cannot allege that MassMutual participated in, supervised or directed any investment decisions of Rye Funds, TPI or

TGHI. The documents governing FutureSelect's investments, referenced in the Complaint, demonstrate that this authority was vested in TPI, the general partner of the Rye Funds, and that MassMutual, TPI's corporate great-grandparent, had no role. For example, the Private Placement Memorandum for the Prime Fund states:

> The General Partner is responsible for the day-to-day administration and operation of the Partnership. In that regard, the General Partner has primary responsibility for monitoring the ongoing activities of the Underlying Manager or Underlying Managers. The General Partner reviews the confirmations of the Partnership's trading activity for purposes of tracking the current status of the Partnership's accounts. The General Partner has sole responsibility for contacting the Underlying Manager or Underlying Managers regarding trading activity, as well as the sole right to hire or' terminate the Underlying Manager or Underlying Managers.

CP 1064; *see also* CP 1080, 1143, 1158, 1219. All of the "principal decision-makers of the general partner" are Tremont employees. CP 1077–78, 1156–57, 1228–29.

Finally, FutureSelect cannot claim that MassMutual "controlled" the Tremont Defendants when they first "offered investments" in the Rye Funds to FutureSelect in 1997 and 1998. CP 9-10, ¶ 34. FutureSelect does not allege (nor could it) that MassMutual had any relationship with the Tremont Defendants at that time. It is undisputed that OAC (and thus MassMutual) acquired TGHI in 2001.

The Superior Court correctly dismissed the Complaint against MassMutual because FutureSelect alleged no facts from which one could

reasonably infer that MassMutual controlled the manner of the Tremont Defendants' performance.

3. Because FutureSelect Fails to Allege that MassMutual Held the Tremont Defendants Out as Agents, FutureSelect's Apparent Agency Claim Should Be Dismissed.

First, apparent agency could not have arisen during all of the years in which FutureSelect invested in the Tremont Defendants' Rye Funds but MassMutual and OAC did not own TGHI. FutureSelect could not have had any reasonable basis to have thought that any Tremont Defendant was an agent of MassMutual during 1997 or 1998 or 1999 or 2000 or most of 2001.

Second, "[a]pparent agency occurs, and vicarious liability for a principal follows, where a *principal makes objective manifestations* leading a third person to believe the wrongdoer is an agent of the principal." *D.L.S. v. Maybin*, 130 Wn. App. 94, 98, 121 P.3d 1210 (2005) (citing Restatement, (Second) of Agency § 267 (1957) (emphasis added)); *see also Estep*, 148 Wn. App. at 258. Apparent agency is "intended to protect third parties who *justifiably rely* upon the belief that another is the agent of the principal." *Maybin*, 130 Wn. App. at 98 (emphasis added). FutureSelect concedes that to successfully plead apparent agency, it must plead that (1) it actually, subjectively believed that the Tremont Defendants had the authority to act for MassMutual; and (2) that its actual belief was objectively reasonable. Appellant's Brief at 47; *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994); *see also Estep*, 148

Wn. App. at 258.

a. FutureSelect Fails to Allege any Manifestation by MassMutual to FutureSelect that the Tremont Defendants Were MassMutual's Agents.

Apparent agency depends on the manifestations *of the principal to a third party* leading a third person to believe the wrongdoer is an agent of the principal. *Estep*, 148 Wn. App at 258; *see also Mauch v. Kissling*, 56 Wn. App. 312, 316, 783 P.2d 601 (1989) ("Apparent authority can only be inferred from the acts of the principal and not from the acts of the agent.").

When FutureSelect first met with the Tremont Defendants in 1997 and first invested with Tremont in 1998, OAC, MassMutual's subsidiary, was years away from owning TGHI. CP 7, ¶ 24; CP 9–10, ¶ 34. FutureSelect cannot argue that MassMutual manifested any indicia that the Tremont Defendants were cloaked with authority to act on behalf of MassMutual at that time. Further, FutureSelect does not allege that it had any interaction with MassMutual after the 2001 acquisition. Without any alleged manifestation by MassMutual to FutureSelect, FutureSelect's apparent agency claim fails. *See Mauch*, 56 Wn. App. at 316.

FutureSelect argues that one public statement by MassMutual—that MassMutual disclosed TGHI was a subsidiary in a list of MassMutual's "worldwide 'General Agencies and Other Offices'" in its annual reports—is a manifestation that "led FutureSelect to actually believe that Tremont was acting as Oppenheimer's and MassMutual's agent." Appellants' Brief at 48. FutureSelect never alleges in its

Complaint that it *was actually aware of any statements by MassMutual* or ever reviewed MassMutual's annual reports. Nor does FutureSelect allege *when* MassMutual made this disclosure, but it surely was not in 1998, when FutureSelect first invested in the Rye Funds and years before OAC acquired TGHI. *See* CP 19–20.

TPI's Form ADV, in which TPI disclosed the Tremont Defendants' ownership structure, cannot form the basis for an apparent agency claim, because that manifestation was not by the alleged principal. *See* Appellants' Brief at 48 (referencing Form ADV) and CP 19, ¶ 69.

A statement of ownership is not an admission, or insinuation, that the Tremont Defendants had the authority to market and sell securities on behalf of MassMutual. Not surprisingly, FutureSelect has cited no case where apparent agency was found on facts similar to those alleged here.[19]

b. FutureSelect Fails to Allege that It Is Objectively Reasonable to Infer that the Tremont Defendants Are MassMutual's Agents.

FutureSelect must allege facts sufficient to show that "a person exercising ordinary prudence, acting in good faith and *conversant with business practices and customs*, would be mislead" into believing the apparent principal authorized the apparent agent to act on its behalf. *J&J Food Ctrs., Inc. v. Selig*, 76 Wn.2d 304, 309, 456 P.2d 691 (1969)

[19] FutureSelect cites only one case in support of its apparent agency claim—the *King* case, which is cited for the elements of apparent agency and does not involve a parent and subsidiary. *See* Appellants' Brief at 47.

(emphasis added); *see also Taylor v. Smith*, 13 Wn. App. 171, 177, 534 P.2d 39 (1975).

The Complaint alleges no facts that would lead an individual conversant with business practices and customs to believe that MassMutual had given the Tremont Defendants the authority to offer and sell the Rye Funds on MassMutual's behalf. When FutureSelect first invested in the Rye Funds 1998, TGHI was a publicly traded company, not affiliated with MassMutual's "worldwide" "family of companies." *See* Appellants' Brief at 48. The disclosure in MassMutual's annual reports that TGHI became one company in MassMutual's "worldwide" "family of companies" reveals only that TGHI was acquired. It is not objectively reasonable to infer from this statement that MassMutual had given the Tremont Defendants authority to act as MassMutual's agents. *See, e.g., D.L.S. v. Maybin,* 130 Wn. App. at 98 (nationwide marketing campaign was *not sufficient* to create liability against McDonald's for the acts of its franchisee under the apparent authority doctrine); *Estep*, 148 Wn. App. at 258 (finding it was not reasonable to believe that attorney, retained after law firm dissolved, "was acting with the apparent authority of his former partners"); *see also Japan Petroleum Co. (Nigeria) Ltd.*, 456 F. Supp. at 846 ("boastful advertising and consideration of subsidiaries as 'family' do not prove that corporate identities were ignored").

Additionally, FutureSelect can point to no evidence that MassMutual "had knowledge" of any alleged wrongdoing. For apparent agency, "there must be evidence the principal had knowledge of the act

which was being committed by its agent." *Mauch*, 56 Wn. App. at 316. Based upon the allegation that MassMutual *did not* conduct diligence on Madoff, FutureSelect makes the conclusory allegation that MassMutual and OAC knew that "Tremont had little to no ability to oversee and monitor Madoff's operations" and "knew or should have known that Madoff was operating a fraud." CP 17, ¶ 62. FutureSelect's conclusory allegation of MassMutual's knowledge is irrational. FutureSelect fails to suggest a reason why MassMutual and OAC would spend millions of dollars to buy TGHI if they even suspected that a manager used by TPI was engaged in fraudulent activity. The only reasonable inference to be drawn from the acquisition is that neither OAC nor MassMutual suspected, much less knew, that Madoff was running a Ponzi scheme. FutureSelect fails to explain why MassMutual and OAC either knew or should have known that Madoff operated a Ponzi scheme while FutureSelect, which knowingly had been placing its investors' monies with Madoff for several years, did not.

FutureSelect notes that the cases cited by MassMutual were not resolved in a motion to dismiss. Appellants' Brief at 48. It is true that most were resolved on summary judgment. However, the proper standard on a motion to dismiss is to analyze whether the plaintiff could state a claim if it could prove all of the factual allegations in the complaint. *Citizens for Rational Shoreline Planning*, 172 Wn.2d at 389.

Shorn of its conclusory allegations, FutureSelect's Complaint fails to state a claim for apparent agency. The Superior Court correctly

dismissed FutureSelect's claim against MassMutual.

C. Because FutureSelect Alleges only that MassMutual Was the Owner of the Tremont Defendants, FutureSelect's Control Person Liability against MassMutual Should Be Dismissed.

A prima facie case of control person liability under WSSA requires FutureSelect to plead (i) a primary violation and (ii) that MassMutual "directly or indirectly" controlled the violator. *Hines v. Dataline Sys., Inc.*, 114 Wn.2d 127, 137, 787 P.2d 8 (1990); RCW 21.20.430(3). In interpreting WSSA, Washington courts look to the "analogous" federal law, section 20(a) of the Securities Exchange Act of 1934. *Hines*, 114 Wn.2d at 135 (citing 15 U.S.C. § 77o). Assuming, *arguendo*, that FutureSelect states a primary violation claim against the Tremont Defendants, the control person liability claim against MassMutual still should be dismissed.[20]

1. Because New York, not Washington Law, Applies, FutureSelect Cannot Bring a WSSA Claim against MassMutual.

The Washington State Supreme Court has determined that Washington's "most significant relationship" test determines which law to apply when out-of-state parties are involved in WSSA litigation.

[20] To the extent WSSA applies to this matter, FutureSelect has failed to plead facts sufficient to support any primary violation of WSSA by the Tremont Defendants; therefore, the control person claim against MassMutual must be dismissed. *See Herrington v. Hawthorne*, 111 Wn. App. 824, 835–36, 47 P.3d 567 (2002); RCW 21.20.430(3) (control person liability under WSSA requires a primary violation and control of the primary violator).

Haberman v. Wa. Public Power Supply Sys., 109 Wn.2d 107, 134, 744 P.2d 1032 (1987). As set forth in the Tremont Defendants' Brief and Ernst & Young's Brief, New York law should apply to this matter, and the third claim for relief should be dismissed. New York has the most significant relationship: the Tremont Defendants reside in New York, the offering materials were disseminated from New York, and Ward visited Tremont regularly in New York. *See* CP 11–12, ¶ 39. Although MassMutual, as a life insurer, does business in the State of Washington, and does not contest personal jurisdiction in Washington, it had no dealings or interactions in Washington (or elsewhere) with FutureSelect.

2. FutureSelect Fails to Allege that MassMutual Actually Participated in Tremont's Operations, a Requirement for Control Person Liability.

For control person liability, FutureSelect must establish that (i) "the defendant ... *actually participated* in (*i.e.*, exercised control over) the operations of the corporation in general" and (ii) "the defendant possessed the power to control the specific transaction or activity upon which the primary violation is predicated, but he need not prove that this later power was exercised." *Hines*, 114 Wn.2d at 136 (quoting and adopting standard in *Metge v. Baehler*, 762 F.2d 621, 631 (8th Cir. 1985) (emphasis added)). *Hines* adopted the reasoning of *Metge*, which required "actual participation" to "distinguish between actual exercise of control in the violator's principal affairs and potential control over the violation."[21]

[21] The distinction between actual exercise of control and potential to control allows the concept of control person liability to coexist with the stringent

Metge, 762 F.2d 621 at 631–32 (that lender and stock owner controlled 51% of voting stock and had power over capital stock and debt structure suggested only "power to control, rather than actual control").

"Control" exists when there is "control of the seller in [its] capacity as seller .... It does not mean control of a person in some abstract or general sense." *Herrington,* 111 Wn. App. at 837. Allegations regarding power of attorney, attendance at meetings and even financial contributions made to a company have been found insufficient to "demonstrate that [Defendant] actually controlled the ... companies" or "had any actual authority over the sales of securities by those companies" so as to render that person a "control person." *Id.*

Relying on paragraphs 63 and 64 of the Complaint, FutureSelect argues that it has alleged that MassMutual's "control was so pervasive that MassMutual and Oppenheimer '*could have* prevented Tremont from offering investments with Madoff.'" Appellants' Brief at 33 (emphasis

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requirements necessary to pierce the corporate veil. FutureSelect argues that to state a claim for control person liability a plaintiff need only allege passive ownership, board representation and disclosure of that ownership interest (*i.e.*, power to control). FutureSelect offers no explanation, however, of how that result can be squared with the well-established law that a parent company is not liable for the acts of its subsidiary. Appellants' Brief at 32–34. To avoid unraveling well-established principles of corporate law, Washington courts have set a higher standard for control person liability. Either a plaintiff must pierce the corporate veil (and that FutureSelect has not alleged) or a plaintiff must allege something different than ownership—that parent company actually participated in the subsidiary's operations and had the power to control the transaction at issue. *Compare, e.g., Hines*, 114 Wn.2d at 136 and *Minton*, 146 Wn.2d at 387–88 ("a parent company generally will not be held liable for the torts of its wholly owned subsidiaries absent evidence that would justify piercing the corporate veil").

added).

(i) True, the Tremont Defendants' owners could have elected a board which would have entirely changed the business of the Tremont Defendants. Theoretically, the board of TGHI could have moved TGHI out of the money-management business altogether. FutureSelect does not explain how that kind of legal right is relevant to this case.

(ii) FutureSelect pleads no facts from which this Court could reasonably infer any "pervasive" control, much less relevant pervasive control. If FutureSelect had any such factual allegations to plead, it would be asserting a veil-piercing claim.

(iii) What is actually pled in paragraph 63 of the Complaint does not suggest "pervasive" control at all: that paragraph alleges that MassMutual was the parent of OAC, which, in turn was the parent of TGHI and thus MassMutual "had *the right to control* Tremont such that [it] could have prevented Tremont from offering investments with Madoff." CP 17–18, ¶ 63 (emphasis added); *see also* CP 4, ¶ 10 (MassMutual and OAC had the "right of control over Tremont and its investment decisions for the Rye Funds"); CP 20, ¶ 76 (MassMutual "had the power to exercise complete control"); CP 18–19 ¶ 68 ("As board members," MassMutual and OAC "had ultimate control over the manner of Tremont's investment strategy"). Similarly, paragraph 64 alleges that after the acquisition, the "Tremont's operations—including the marketing and investment activities of the Rye Funds—were brought directly under the MassMutual umbrella." CP 18, ¶ 64. These are allegations of

ownership—not factual allegations that would support a reasonable inference that MassMutual "*actually participated in*" the Tremont Defendants' operations. Conclusory allegations that MassMutual had "the right to control" or "power to control" the Tremont Defendants do not satisfy WSSA's pleading requirement for control person liability. *See Hines*, 114 Wn.2d at 136 (requiring actual participation). The allegation about MassMutual's "umbrella" is a metaphor for ownership—not a factual allegation at all.

A recent decision from Massachusetts, *Askenazy v. Tremont Group Holdings, Inc.*, cited by FutureSelect (Appellants' Brief at 33), is instructive. Civ. A. No. 2010-04801-BLS2, 2012 WL 440675 (Mass. Super. Jan. 26, 2012). *Askenazy* involved similar investor claims against the Tremont Defendants, OAC, MassMutual and others arising out of the Rye Funds' Madoff losses. Like FutureSelect, the allegations made by the plaintiffs in *Askenazy* boiled down to allegations of ownership, board representation and the like. *Id.* at *15 ("Shorn of conclusory statements about control, involvement, and oversight, the factual allegations [about MassMutual] show only common stock ownership and a modest overlap of senior executives and company directors."). Like FutureSelect, the plaintiffs in *Askenazy* argued that they had pled claims for control person liability under on various state securities laws (Massachusetts, Colorado,

Connecticut, New Mexico, Virginia and Illinois). *Id.*[22] And like the Washington Superior Court, the court in *Askenazy* properly dismissed the plaintiffs' claims against MassMutual for failure to state a claim. The *Askenazy* court held that "the Complaint fails to allege enough facts to satisfy this standard"—that the alleged controlling person "must *actually exercise control* over the company." *Id.* at *16–17 (emphasis in *Askenazy* decision) (quoting *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 85 (1st Cir. 2002)).

FutureSelect attempts to differentiate *Askenazy* by arguing it has pled more facts than the plaintiffs in *Askenazy.* But the allegations in *Askenazy* are nearly identical to the allegations in this case:

- *Compare* Appellants' Brief at 33 and CP 16, ¶ 58 ("Tremont's access to Madoff was one of its greatest selling points") *with Askenazy,* 2012 WL 440675 at *5 ("As one of the early pioneers in the 'fund of funds' sector, Tremont was an attractive target, and, according to the Complaint, Tremont's access to Madoff was one of its most critical selling points.").
- *Compare* Appellants' Brief at 33 and CP 18, ¶ 66 (MassMutual and OAC appointed directors) *with Askenazy,* 2012 WL 440675 at *6 ("At and after the time of the

[22] Each of the control liability provisions of the state securities laws at issue in *Askenazy*, like the WSSA, is based on section 20(a) of the Securities Exchange Act of 1934. *Askenazy,* 2012 WL 440675 at *16.

acquisition, the companies and/or their affiliates shared a number of senior executives and directors.").

- *Compare* CP 15–18, ¶¶ 55, 62, 63, 64, 68, 76 (conclusory allegations that MassMutual and OAC oversaw, had the "right to control" and the "power to exercise complete control" over the operations of the Tremont Defendants and the Rye Funds) *with Askenazy,* 2012 WL 440675 at *5 ("The plaintiffs allege in conclusory fashion that, through Tremont, Oppenheimer Acquisition and MassMutual were involved in and had oversight of the solicitation, sale, operation and management of the Rye Funds.").

Like the plaintiffs in *Askenazy*, FutureSelect's conclusory allegations show nothing more than a parent-subsidiary relationship between MassMutual and Tremont and are insufficient to state a claim based on control person liability under WSSA.[23] FutureSelect does not

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[23] The Court in *Askenazy* explained:

> Although the question of control is not ordinarily resolved summarily at the pleading stage ..., the plaintiffs' allegations fall well short of showing that [MassMutual] exerted actual control over Tremont or the Rye Funds. Here again, the plaintiffs rely on MassMutual's status as a parent corporation, the listing of MassMutual as a "control person" on Tremont Partners' SEC form, and some overlap of directors between MassMutual, Oppenheimer Acquisition, OppenheimerFunds, and Tremont. At most, these facts show some potential to control Tremont and the Funds, but the potential ability to control is not sufficient: what is required are facts from which it might reasonably be inferred that MassMutual 'actively participated in the decision-making processes' of Tremont and the Rye Funds. ... These facts are

allege that MassMutual "actually participated in" Tremont's operations. *See Hines*, 114 Wn.2d at 136. The Superior Court properly granted MassMutual's motion to dismiss the control person claims against it.

3. FutureSelect Fails to Allege that MassMutual Had the Power to Control the Specific Transaction at Issue.

The second element of a control person claim is that "the defendant possessed the power to control the specific transaction or activity upon which the primary violation is predicated ...." *Hines*, 114 Wn.2d at 136.

With regard to FutureSelect's initial investments in the Rye Funds in 1998, MassMutual could not have had the power to control the specific transaction because FutureSelect invested in the Rye Funds—and placed money with Madoff—before OAC acquired TGHI. CP 10, ¶ 38. Leaving aside conclusory allegations based on ownership and board representation, FutureSelect does not allege that, after OAC acquired TGHI, MassMutual had the power to control the Tremont Defendants' investment operations or the Rye Funds, let alone Tremont's transactions with FutureSelect. *See, e.g.*, CP 34–35, ¶¶ 133–37. Rather, FutureSelect makes allegations about what "Tremont" did.[24] *See, e.g.*, CP 9, ¶ 33 (referring to "offering

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> notably absent from the Complaint, even construing the allegations in favor of the plaintiffs.

Askenazy, 2012 WL 440675 at *17 (citations omitted).

[24] The relevant partnership agreements and private placement memoranda make clear that MassMutual had no role in the management of the Rye Funds. Section 3.03 of the Amended and Restated Limited Partnership Agreement dated July 1,

materials" of "Tremont"); CP 10, ¶ 37 (referring "monitoring and oversight" by "Tremont"); CP 12-13, ¶ 40-46 (allegations about what "Tremont" did).

Recognizing that Future Select has not alleged any facts from which to infer that MassMutual "possessed the power to control the specific transaction or activity upon which the primary violation is predicated," the Superior Court properly dismissed the WSSA claim against MassMutual for control person liability.

D. FutureSelect Lacks Standing to Assert Derivative Claims.

MassMutual incorporates by reference the Tremont Defendants' argument that FutureSelect's negligence claim is derivative and FutureSelect lacks standing to pursue derivative claims.

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2006 for the Rye Select Broad Market Fund, L.P. provides: "the management, operation and control of the business of the Partnership shall be vested completely and exclusively in the General Partner …." CP 1026; *see also* CP 973–74, Sections 2.1 and 2.2 of the Amended and Restated Limited Partnership Agreement dated March 1, 2008 for the Rye Select Broad Market Prime Fund, L.P. ("The General Partner exercises ultimate authority over the Partnership" and setting forth the authority of the General Partner); CP 998–99, Sections 2.1 and 2.2 of the Amended and Restated Limited Partnership Agreement dated November 1, 2007 for the Rye Select Broad Market XL Fund, L.P. (same). Similarly, each private placement memorandum states that "the General Partner [TPI] is responsible for the day-to-day administration and operation of the [Rye Funds]." CP 1064, 1080, 1143, 1158, 1219; *see also* CP 1228. The private placement memoranda list the "principal decision makers of the general partner," who are all Tremont employees. CP 1077–78, 1156–57, 1228–29.

VI. CONCLUSION

FutureSelect asks this Court to ignore well-established principles of corporate separateness and impose liability based on the existence of a parent-subsidiary relationship. Even if all inferences are drawn in favor of FutureSelect, FutureSelect has alleged no facts which indicate anything other than an ordinary parent-subsidiary relationship. Allegations of agency, apparent agency, and control are mere conclusions unsupported by the necessary factual underpinnings. The Superior Court properly dismissed FutureSelect's claims against MassMutual pursuant to CR 12(b)(6). Defendant-Appellee Massachusetts Mutual Life Insurance Company prays that this Court affirm the Superior Court's decision.

Dated this 16th day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2012, I caused to be served the foregoing BRIEF OF RESPONDENT MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY on the following parties via United States mail, with a courtesy copy by e-mail to at least one representative of each firm, as follows:

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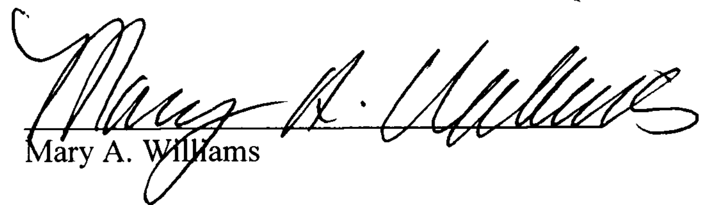

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