SUPREME COURT NO. 959749
COURT OF APPEALS NO. 757474

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ACCESS THE USA., LLC, a Washington Limited Liability Company, 520 BRIDGE REPLACEMENT FUND II, LP, a Washington Limited Partnership and PREMIER 520 BRIDGE REPLACEMENT FUND II, LP, a Washington Limited Partnership,

Plaintiffs/Petitioners,

v.

THE STATE OF WASHINGTON, a government entity; THE OFFICE OF THE TREASURER, a government entity and agency of the State of Washington; and CITIGROUP GLOBAL MARKETS, a New York corporation,

Defendants/Respondents.

CITIGROUP'S ANSWER TO PLAINTIFFS' PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

Plaintiffs pooled money from 295 investors to buy residency in the U.S. through a special program for wealthy foreigners who could invest at least $500,000. To satisfy the program's requirements, Plaintiffs needed a suitable investment vehicle for their foreign investors. Plaintiffs tried, unsuccessfully, to buy over one hundred million dollars in bonds offered by the State of Washington, and underwritten by Citigroup Global Markets ("Citigroup"), to finance the SR-520 Bridge construction. Plaintiffs sued, claiming they had a legal entitlement to buy all of the bonds they desired, and that Citigroup was liable for failing to facilitate that purchase. From the outset, and through this Petition, Plaintiffs have struggled to identify any legal basis upon which to hold Citigroup liable. They first alleged violations of federal and state discrimination statutes, the State Securities Act, and the Consumer Protection Act. Those claims were all dismissed on the pleadings—first by the federal court, and then the remaining state law claims after remand.

Plaintiffs then conjured new theories, claiming for the first time in an amended complaint that Citigroup had entered into an oral contract to sell them the bonds and misled them into believing the bonds would be sold to them. After discovery, and extensive briefing and argument, King County Superior Court Judge Timothy Bradshaw granted summary

judgment dismissing Plaintiffs' breach of contract, promissory estoppel, and negligent misrepresentation claims. The Court of Appeals entirely affirmed the trial court's opinion. *See Access the USA, LLC v. State*, 3 Wn. App. 2d 1012 (2018). Plaintiffs now seek discretionary review, but they provide no basis for such review under RAP 13.4(b).[1] The Court should deny Plaintiffs' Petition for the following reasons:

First, Plaintiffs attempt to relitigate their breach of contract claim while failing to present any reviewable issue under RAP 13.4(b). Plaintiffs do not argue that the Court of Appeals parted from binding precedent; nor can they do so because its opinion applied well-established Washington case law on contract formation.

Second, the Court of Appeals affirmed the dismissal of Plaintiffs' promissory estoppel claim on two independently-dispositive grounds that Plaintiffs do not even challenge. As for the additional ground for dismissal addressed in the Petition, Plaintiffs fail to show that the Court of Appeals misapplied *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 173 (1994). As the Court of Appeals explained, the "clear and definite" standard in *Havens* is not restricted to claims based on promises made in the context of at will employment.

[1] Citigroup does not address Plaintiffs' discussion of privilege in Part IV.A of the Petition because that issue concerns only the State of Washington and the Office of the Treasurer.

Third, the Court of Appeals applied well-established Washington precedent to dispose of Plaintiffs' ill-suited CPA claim. Plaintiffs cite no basis for discretionary review under RAP 13.4(b).

II. STATEMENT OF THE CASE

A. Factual Background

1. The Parties

Plaintiff Access the USA, LLC ("Access") solicits investments from wealthy foreigners who have the means to buy U.S. residency through the EB-5 immigrant investor program ("the EB-5 Program"). CP 638-39. EB-5 applicants must invest at least $1 million (or $500,000 in certain areas) in projects that meet specific requirements. CP 639-40. Access forms and manages limited partnerships that serve as the "funding accounts" for foreign investments. CP 500 ¶ 3.16. Plaintiffs 520 Bridge Replacement Fund II, LP and Premier 520 Bridge Replacement Fund II, LP (the "LP Funds") were the investment vehicles at issue here.

Defendants State of Washington and Office of the Treasurer offered a series of state-issued bonds to fund construction of the new SR-520 Bridge. Defendant Citigroup was the lead underwriter for the second such bond offering, along with co-underwriters J.P Morgan Securities, LLC and Merrill Lynch, Pierce, Fenner & Smith, Inc. The co-underwriters were dismissed from this suit.

2. The First Bond Offering

Access's principal, Michael Mattox, believed buying publicly-issued bonds could qualify under the EB-5 Program and he thought the idea was so novel that he applied for a patent to protect it. CP 1198, 1310-14. In October 2011, the State issued bonds (the "2012C" bonds) for the SR 520 Bridge construction through lead underwriter JP Morgan. Access, through two limited partnerships, bought $47.7 million of bonds from JP Morgan in this first offering. *Id.* Access's purchase was the first time anyone had tried to qualify under the EB-5 Program by buying public bonds, and the U.S. Citizenship and Immigration Service had not previously approved a purchase of publicly-issued bonds as a qualifying EB-5 investment. CP 1231-32, 1261-62.

3. The Second Bond Offering

The State's second bond offering for the SR-520 bridge, called GARVEE 2012F (the "2012F" bonds), was scheduled for May 22, 2012, with Citigroup as the lead underwriter. CP 641. The State did not announce that offering to the public or disclose any detail about the bonds until May 9, 2012. CP 1426-27. In November 2011, Access formed the LP Funds to invest in this second bond offering. CP 1374.

In soliciting investments, Access told its investors that it had been unable to obtain a commitment from the State or Citigroup to sell Access any bonds. As Plaintiffs stated in their offering memorandum to investors:

> ***Unavailability of Bonds.*** The company has been unable to obtain a commitment from the State of Washington or its underwriters to set aside a specific issue of Project Bonds for the Company to purchase or to guarantee a certain amount of Project Bonds to be sold to the Company.

CP 792, 1386. Mr. Mattox testified that he never obtained a commitment to set aside any bonds. CP 716-17. Access also told its investors they should not invest based solely on oral information: "DO NOT CONSIDER ANY INFORMATION WHICH HAS BEEN DESCRIBED TO YOU ORALLY." CP 1368.

By December 2011, Mr. Mattox had already raised $75 million from investors in China in anticipation of the second bond offering, CP 1280, even though the State had not even publicly announced the offering or disclosed any details about the bonds, and would not do so for another five months. CP 1426-27. By early April 2012, Mattox had raised between $115-150 million from investors—all before he had a single communication with Citigroup about the offering. CP 1281-84.

In mid-April 2012, Mattox called a Citigroup sales agent, John Leahy, to introduce himself and discuss his interest in buying bonds in the upcoming offering. CP 1448-51. This was the first contact between

Plaintiffs and Citigroup. During the call, Mattox told Leahy that he wanted to open new client accounts with Citigroup and place an order in the anticipated offering, for up to $150 million in bonds. CP 1235-37. According to Mattox, Leahy stated that "he would begin the account opening process at Citigroup." CP 946-47.

On April 16, 2012, Leahy emailed Mattox, asking him to submit the paperwork necessary to start the process of client onboarding and account opening. CP 1479. Two weeks later, Mattox responded and "[t]o facilitate the account setup," CP 1458, emailed Leahy background material about Access so Citigroup could begin due diligence. CP 1363-97, 1481-82, 1484-85. During the next two weeks, Mattox and Leahy communicated in an effort to address various new client onboarding issues. For example, Leahy emailed Mattox on May 9 asking for the ownership interest of each Access owner for legal compliance reviews, CP 1487 (App. A), and as late as May 18 (two business days before the May 22 offering), Mattox was sending Citigroup documents needed to onboard Access as a new customer, including Access's signed W-9, passports for Access's owners, and other information for vetting high-risk entities. CP 1286-87, 1325-26, 1492-94.[2] Mattox testified that the onboarding

[2] Federal law requires financial institutions to conduct strict due diligence before opening new customer accounts. *See, e.g.*, 31 U.S.C. § 5318(h) & (i); 31 C.F.R. Chapter X; 31

process posed many "difficulties," but nevertheless and throughout the process Leahy "was working very hard to get it done." CP 1277, 1318.

Plaintiffs were newly-formed entities, had no relationship with Citigroup, and sought to purchase over one hundred million dollars' worth of bonds for an unusual and untested investment purpose. CP 2, 709, 713, 843, 1587. Plaintiffs' own financial advisor raised concerns about these issues to Mattox, telling him: "My concern is that maybe [Citigroup] [is] having a hard time in setting up your account (***I know I did***)." CP 1678 (emphasis added). Plaintiffs' stated investment purpose—using the bond purchase as investments under the EB-5 Program, CP 1374, 1609, raised additional red flags. CP 1746-48, 1750, 1688, 1984-86. As the U.S. Government Accountability Office found, "[u]nique fraud risks identified in the [EB-5] program included uncertainties in verifying that the funds invested were obtained lawfully and various investment-related schemes to defraud investors."[3]

Citigroup was unable to complete the new client onboarding for Access and the LP Funds in the short time before the offering date, and accounts were never opened in their names. CP 1295-96, 1324, 1327-28,

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C.F.R. § 1020.210 & .220 (requiring anti-money laundering and customer identification due diligence review before opening new accounts).

[3] U.S. Gov't Accountability Office, *Immigrant Investor Program: Additional Actions Needed to Better Assess Fraud Risks & Report Economic Benefits* (Aug. 12, 2015), http://www.gao.gov/products/GAO-15-696.

1497-98. As a result, Plaintiffs did not have accounts with Citigroup and no orders were placed with Citigroup for bonds during the order window, which was open for a few hours on May 22, 2012. CP 1263-64, 1510, 1512-14.

4. Plaintiffs' Response to Their Failed Purchase

On the evening of the offering date, Mattox emailed the State Treasurer, stating he believed the state had barred Plaintiffs' proposed purchase in an act of "blatant discrimination." CP 1518-20. Notably, he did not claim Plaintiffs had a contract with Citigroup to buy bonds or that Citigroup had promised to sell them bonds. CP 1290-94. The next day, Mattox emailed the agents for his investors, telling them the State "decided they were uncomfortable with selling bonds to Chinese investors because of the potential negative press that could come from it. They locked us out and did not allow us to purchase any bonds … We believe this is illegal and discriminatory and we have been seeking a reversal of their decisions." CP 1522. Once again, Mattox did not assert Citigroup had agreed or promised to sell Plaintiffs bonds, or open their accounts. *See id.* Shortly thereafter, Plaintiffs wrote the State and Citigroup, reiterating their belief they had been discriminated against. CP 1528-30.

B. Procedural History and Evolution of Plaintiffs' Claims

Since filing suit on May 16, 2014, Plaintiffs have been grasping for some legal basis upon which to blame Citigroup for their failed attempt to buy the bonds. Their claims have shifted from one unsupported theory to another. Their first complaint asserted claims against Citigroup for alleged discrimination (because Plaintiffs' investors were Chinese). They claimed—without alleging any facts—that Citigroup violated federal and state discrimination statutes, the Washington State Securities Act, and the Washington Consumer Protection Act (CPA) by failing to sell Plaintiffs the bonds they sought. CP 11-13. U.S. District Court Judge John C. Coughenour dismissed Plaintiffs' federal discrimination claim and, after remand, the King County Superior Court dismissed Plaintiffs' remaining state law claims, including the CPA claim. CP 51, 479-82.

Plaintiffs then filed an amended complaint with entirely new theories. They alleged, for the first time, that Citigroup entered into a contract with them and made enforceable promises to sell bonds. CP 636-51. The amended complaint alleged three claims against Citigroup: breach of contract, promissory estoppel, and negligent misrepresentation. Each of these claims was rooted in Plaintiffs' theory that Citigroup promised to sell them bonds, and then failed to follow through.

After extensive discovery, Citigroup moved for summary judgment on all three claims. Plaintiffs saw they could not sustain their theory that Citigroup contracted or promised to sell them bonds. So, in response to Citigroup's summary judgment motion, Plaintiffs changed their theory ***yet again***. They argued that the purported contract/promise with Citigroup was not to buy bonds (as Mattox testified and as alleged in their complaint), but instead to open accounts at Citigroup's "broker/dealer arm" and then present orders to its "underwriting arm." CP 1555. Plaintiffs also claimed this contract was later modified to allow their orders to be placed through LPL Financial. CP 1572.

Citigroup argued that Plaintiffs' new contract theory failed as a matter of law because: (1) Plaintiffs alleged merely an unenforceable agreement to agree, (2) Plaintiffs had no evidence that Citigroup made an enforceable promise to open the accounts, (3) the claimed consideration for this new contract theory was illusory, and (4) the parties could not "modify" a nonexistent agreement. CP 2113-15.

The trial court granted summary judgment on all the claims against Citigroup, CP 2142-43, and denied reconsideration. CP 2206-07. Plaintiffs appealed, seeking to reverse the superior court's dismissal under CR 12(b)(6) of Plaintiffs' CPA claim and its dismissal on summary judgment of Plaintiffs' breach of contract, promissory estoppel, and

negligent misrepresentation claims. The Court of Appeals affirmed the trial court's rulings. *See Access the USA, LLC v. State*, 3 Wn. App. 2d 23 1012, at *6-10 (2018). Plaintiffs now seek discretionary review by this Court.

III. ARGUMENT

A. Legal Standard

RAP 13.4(b) states that the Washington Supreme Court will accept a petition for review only if one of the following conditions is met:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

B. Plaintiffs Attempt to Relitigate Their Breach of Contract Claim While Failing to Present Any Reviewable Issue Under RAP 13.4(b)

Plaintiffs cannot show that the Court of Appeals' application of Washington contract law creates a reviewable issue under RAP 13.4(b). In their Petition, Plaintiffs repeat their view that the parties' conduct created a contract and that the cases cited by Citigroup (and subsequently by the Court of Appeals) are distinguishable. *See* Pet. at 12-15. The King

County Superior Court and the Court of Appeals have considered and rejected those arguments. While Plaintiffs may disagree with the Court of Appeals' ruling, mere disagreement does not provide a basis for discretionary review under the plain language of RAP 13.4(b). Instead, Plaintiffs must show that the Court of Appeals' opinion directly conflicts with Supreme Court or Court of Appeals precedent or involves an issue of substantial public interest. *See* RAP 13.4(b)(1), (2) & (4).

Plaintiffs do not claim to satisfy these tests. Nor could they, because the Court of Appeals' opinion does not conflict with any binding precedent. Rather, it involves a straightforward application of well-established Washington case law on contract formation. As the opinion explains, Mattox stated in his declaration[4] that Leahy of Citigroup told him it "would not be a problem to set up the accounts," and that Leahy was "confident that Citigroup would be able to onboard" Plaintiffs. *Access the USA, LLC*, 3 Wn. App. 2d 1012, at *8; CP 1588 (¶ 21). Citigroup argued—and the Court of Appeals agreed—that this discussion did not create a binding contract and amounted to nothing more than an unenforceable "agreement to agree." As explained in the opinion, "Washington courts routinely reject contract claims based on preliminary negotiations and informal discussions." *Access the USA, LLC*, 3 Wn. App.

[4] For purposes of its summary judgment motion, Citigroup treated Mattox's declaration as true despite its disagreement with his recollection of the facts.

2d 1012, at *7 n.53 (citing *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 178-79 (2004) (finding no contract where defendant stated it was "prepared to negotiate" and the parties could later draft an agreement); *Pac. Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 558 (1980) ("'the parties' informal exchange of correspondence did not result in a contractual relationship'"); *BP W. Coast Prods. LLC v. SKR Inc.*, 989 F. Supp. 2d 1109, 1121 (W.D. Wash. 2013) ("rejecting contract claim on summary judgment because agreement to use 'best efforts' to fill buyers' orders did not establish a duty to perform")). The Court of Appeals went on to hold that "[t]hese preliminary discussions between Mattox and Leahy do not establish an enforceable contract" and that "the trial court properly granted summary judgment dismissing Access's breach of contract claim." *Access the USA, LLC*, 3 Wn. App. 2d 1012, at *7.

The Court of Appeals properly affirmed the trial court's dismissal of Plaintiffs' breach of contract claim under well-established Washington contract law. Plaintiffs do not argue that the Court of Appeals parted from binding precedent and thus they fail to present a basis for discretionary review under RAP 13.4(b).

C. The Court of Appeals Properly Applied *Havens* in Affirming the Trial Court's Dismissal of Plaintiffs' Promissory Estoppel Claim.

Plaintiffs contest the dismissal of their promissory estoppel claim, but in doing so they ignore two distinct grounds upon which the Court of Appeals affirmed the dismissal. First, the Court of Appeals held that the "alleged promise relies on statements of intent, not promises to perform." *Access the USA, LLC*, 3 Wn. App. 2d 1012, at *8. In so doing, the Court of Appeals applied settled Washington law, explaining that "'[a]n intention to do a thing is not a promise to do it'" and that a promise that is "'vague, general or of indeterminate application' is not enforceable." *Id.* (quoting *Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443, 446 (9th Cir. 1992); *Elliot Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn. App. 5, 13 (2004)).

Second, the Court of Appeals affirmed the dismissal of Plaintiffs' promissory estoppel claim because Plaintiffs could not demonstrate justifiable reliance. *Id.* The Court of Appeals explained that "Mattox raised money from investors before receiving *any* purported promise from Citigroup" and therefore could not show that he "changed [his] position based on the promise, and did so justifiably." *Id.* (citing *Wash. Educ. Ass'n v. Dep't of Ret. Sys.*, 181 Wn.2d 212, 224-25 (2014)).

Each of these two grounds sufficiently and independently supports the Court of Appeals' decision to affirm dismissal of the promissory estoppel claim. Plaintiffs' Petition should be denied for that reason alone.

Moreover, Plaintiffs are mistaken as to the sole ground for review they assert—i.e., that the Court of Appeals misapplied *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 173 (1994) to their promissory estoppel claim. *See* Pet. at 15-17. The Court of Appeals observed that a promissory estoppel claim requires a "clear and definite" promise. *Id.* (citing *Havens*, 124 Wn.2d at 173). Plaintiffs contend the "clear and definite" standard applies only to promissory estoppel claims asserted in the context of terminable at will employment (*See* Pet. at 16), but there is no such limitation. Plaintiffs ignore the Court of Appeals' citation to multiple Washington cases applying *Havens* and/or the "clear and definite" standard outside the employment context. *Access the USA, LLC*, 3 Wn. App. 2d 1012, at *7 n.58 (citing *Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.*, 169 Wn. App. 111, 128 (2012) (citing *Havens* in dismissing promissory estoppel claim in case concerning franchise agreements); *State v. Miller*, 32 Wn.2d 149, 158 (1948) (applying "clear and definite" standard in marital property dispute); *Peters v. Watson Co.*, 40 Wn.2d 121, 122-23 (1952) (applying "clear and certain" standard to dispute over agreement to purchase realty)); *see also Wash. Educ. Ass'n v. Dept. of Ret.*

Sys., 181 Wn.2d 212, 225 (2014) (applying "clear and definite" standard to promissory estoppel claim challenging the state legislature's authority to alter a pension program); *Seattle-First Nat'l Bank v. Westwood Lumber*, 65 Wn. App. 811, 824-25 (1992) (applying "clear and definite" test in rejecting defense that bank was estopped from enforcing guaranty agreement based on a promise allegedly made to the borrower).

Because Plaintiffs ignore two distinct grounds upon which the Court of Appeals affirmed dismissal of their promissory estoppel claim, and incorrectly contend the "clear and definite" standard under *Havens* does not apply, this Court should deny their Petition.

D. Plaintiffs Attempt to Relitigate Their CPA Claim While Failing to Present Any Reviewable Issue Under RAP 13.4(b)

Once again, Plaintiffs make no argument as to how the Court of Appeals' analysis of their CPA claim creates a reviewable issue under RAP 13.4(b). Instead, Plaintiffs simply attempt a third bite at the apple by restating the same arguments that the King County Superior Court and Court of Appeals rejected. Their Petition should be rejected because they fail to establish that the Court of Appeal's opinion directly conflicts with Supreme Court or Court of Appeals precedent or involves an issue of substantial public interest. *See* RAP 13.4(b)(1), (2) & (4).

Assuming for discussion that Plaintiffs could meet the applicable standards for review (they cannot), the Court of Appeals properly applied Washington law in affirming the dismissal of Plaintiffs' CPA claim. The Court of Appeals found that Plaintiffs could not meet at least two CPA elements. First, the Court of Appeals held that Plaintiffs failed to show an actionable "unfair or deceptive act." *Access the USA, LLC*, 3 Wn. App. 2d 1012, at *5. The Court of Appeals explained that "Access cannot show 'a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act's being repeated.'" *Id.* (citing *Behnke v. Ahrens*, 172 Wn. App. 281, 295 (2012)). Plaintiffs' own allegations made clear that that Access provided "a unique" service to selected foreign investors, that their limited partners could invest only in particular debt offerings meeting specific criteria, and that they were specially formed to make a single attempt to purchase specific bonds (the May 2012 offering). *Id.* The Court of Appeals therefore concluded that "[t]he acts and practices of Citigroup were unique to the relationship between the parties." *Id.*

Second, the Court of Appeals found that Plaintiffs could not establish an unfair or deceptive act which is "injurious to the public interest." *Id.* (quoting RCW 19.86.093). "Access did not allege anything more than a private dispute with no public impact." *Id.* at *6. This is

especially true given that "there is no allegation … that the unique interaction with the LP funds for the purpose of participating in the 2012F bond offering has or will injure others in 'exactly the same fashion.'" *Id.* at *6 (citing *Behnke v. Ahrens*, 172 Wn. App. at 293). The Court of Appeals correctly held that these unique interactions between private parties could not possibly harm the public interest.

The Court of Appeals applied well-established Washington law in affirming the dismissal of Plaintiffs' CPA claim. Nothing in the opinion contradicts binding Washington precedent or involves an issue of substantial public interest. Plaintiffs therefore fail to meet the test for discretionary review under RAP 13.4(b).

IV. CONCLUSION

Plaintiffs fail to provide any basis for discretionary review under RAP 13.4(b). The Court should disregard Plaintiffs' attempt to relitigate the merits of claims that were properly dismissed. Citigroup requests that the Court deny Plaintiffs' Petition.

Respectfully submitted this 18th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2018, I caused the foregoing CITIGROUP'S ANSWER TO PLAINTIFFS' PETITION FOR DISCRETIONARY REVIEW to be electronically filed using the Washington State Appellate Courts' Portal Electronic Delivery System which will serve counsel of record:

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