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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

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,

Appellants

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,

Respondents.

APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER AND CITATION.

Appellants Access the USA, LLC, 520 Bridge Replacement Fund II, LP and Premier 520 Bridge Replacement Fund II, LP, respectfully petition the Supreme Court to grant discretionary review of *Access the USA, LLC v. State*, No. 75747-4-I, 2018 Wash. App. LEXIS 760 (Ct. App. Apr. 9, 2018).

II. ISSUES PRESENTED FOR REVIEW.

A. Does the privilege relied upon by the Court of Appeals conflicts with Supreme Court precedent?

B. Did an enforceable contract exist for Citigroup to attempt to onboard the Appellants, and if successful, to present their orders?

C. Does a promise have to be "clear and definite" before its actionable?

D. Was the Appellants' intended transaction with Citigroup so unique as to preclude any recovery under the Consumer Protection Act, RCW 19.86?

III. STATEMENT OF THE CASE.

A. Introduction.

This case arises from a concerted effort by the Office of the State Treasurer ("OST") to prevent Chinese investment in replacing the SR 520 Bridge. Acting on unfounded and jingoistic concerns, Deputy Treasurer Ellen Evans repeatedly directed Citigroup's brokers and underwriters to perform intensive due diligence into the Appellants, suggesting they were criminals or wrongdoers. In doing so, Ms. Evans exceeded her lawful authority and tortiously interfered in a valid commercial transaction. As result of Ms. Evans's conduct and Citigroup's acquiescence, the Appellants were unable to present orders for approximately $142 million

in 2012F GARVEE bonds.[1] OST and Citigroup's tortious conduct was ultimately successful, and Appellants' orders were never presented, leaving $38 million in Washington State bonds unsold.

This case also arises from the Court of Appeals's misinterpretation of authority. At the trial and appellate levels, Appellants have demonstrated that material questions of fact exist regarding OST and Citigroup's conduct, and that dismissal and summary judgement were inappropriate. By disregarding OST and Citigroup's wrongful conduct, the Court of Appeals opens the door to future discrimination against visa-applicants and EB-5 investors in Washington investments. In addition, the Court of Appeals has incorrectly defined the authority of state officials to act on unfounded concerns to obstruct valid commercial transactions.

Because this case presents both matters of the public interest and the Court of Appeals's decision is in conflict with published authority, review by the Supreme Court is warranted.

B. Factual History.

The EB-5 Immigrant Investor Program ("EB-5") provides qualified foreign investors and their families a method to obtain residency in the United States. CP 1584. The EB-5 Program is administered by the United States Citizenship and Immigration Service ("USCIS"). CP 1584. EB-5 investments are prepared and marketed by USCIS-approved

[1] Appellants do not argue that the April 9, 2012 agreement required Citigroup's underwriters to fulfill their orders, but merely required Citigroup's traders to attempt onboarding, and if completed, to present the 2012F LPs' bond orders to the underwriters.

"regional centers." CP 1584-85. Appellant Access the USA, LLC ("Access") is a USCIS-approved regional center. CP 1585. Access is managed by Michael Mattox, a resident of Olympia, WA. CP 1585. In 2009, Mr. Mattox developed an investment model which qualified municipal bonds for the EB-5 Program. CP 1585.

In 2011 and 2012, the State of Washington issued bonds to fund replacement of the State Route 520 bridge ("520 Bridge."). CP 1585. These issuances were managed by OST, specifically Deputy Treasurer for Debt Management Ellen Evans. CP 1716. Ms. Evans was the bond underwriters' primary contact at OST. CP 1716.

Two offerings are relevant to this action: 2012C (October 2011) and 2012F (May 2012). For these offerings, OST selected J.P. Morgan ("JPM"), Bank of America-Merrill Lynch, and Citigroup Global Markets ("Citigroup"), to serve as underwriters. CP 1585. For 2012C, JPM was selected to serve as "Senior Underwriter" and was responsible for managing orders and allocating bonds. CP 1779. Mr. Mattox worked with JPM to "onboard" two limited partnerships created by Access to participate in the 2012C offering (the "2012C LPs").[2] JPM completed onboarding in twenty-one days. CP 1586. On October 13, 2011, the 2012C LPs ordered $47.7 million in 2012C bonds. CP 1849.

Shortly before the 2012C issuance, Ms. Evans requested JPM to put Mr. Mattox and his companies "through their paces" by performing

[2] "Onboarding" is an industry term used to describe the process of performing due diligence and opening accounts for new financial clients. CP 1588.

more intensive and rigorous due diligence. CP 1769-73, 1721. Ms. Evans had never made this request before. CP 1770, 1736. Despite Ms. Evans' direction, JPM allocated the 2012C LPs' their full bond orders. CP 1849.

In late 2011, Access began preparing the next 520 Bridge offering, designated "2012F", scheduled for May 2012. CP 1588, 1744. Access formed two new limited partnerships: 520 Bridge Replacement Fund II and Premier 520 Bridge Replacement Fund II (the "2012F LPs.") CP 1587. After learning Access would participate in 2012F, Ms. Evans commented "I hope [JPM's] compliance folks and screeners do their work thoroughly." CP 1659-60. In April 2012, OST selected Citigroup as Senior Underwriter for 2012F, and JPM recommended the 2012F LPs onboard at Citigroup. CP 1777-78.

To accomplish this, Mr. Mattox was connected with John Leahy, Citigroup's Director of Institutional Sales. CP 1782. On April 9, 2012, Mr. Mattox and Mr. Leahy spoke by telephone. CP 1588. Mr. Mattox explained the 2012F LPs' investment structure and estimated the 2012F LPs would order $120-150 million in 2012F bonds. CP 1588. During the call, Mr. Leahy agreed to onboard the Appellants and present their orders if the orders were placed with him. CP 1233. Mr. Leahy re-confirmed seven days later that Citigroup would onboard the Appellants. CP 1859.

To facilitate onboarding, Access executed a Management Group/Grandparent Form ("MGGP") which it submitted on April 30, 2012 with Appellants' governance documents. CP 1867, 1870-77. This

onboarding application identified Access's ownership structure, involvement in the EB-5 Program, and that bonds would be purchased with "mostly Chinese funds for citizenship." CP 1872. This application was approved by John Leahy and his supervisor, Thomas Rasmussen, by May 11, 2012.[3]

On April 20, 2012, JPM confirmed to Ms. Evans that Access intended to participate in the 2012F Offering. CP 1664-65. In response, Ms. Evans contacted Citigroup's banker in Seattle, Jerry Bobo. CP 1745-46. Ms. Evans and Mr. Bobo regularly worked together on OST transactions with Citigroup over a twenty-year period. CP 1741-42. Ms. Evans expressed concerns about Mr. Mattox to Jerry Bobo. CP 1731-32. Through Mr. Bobo, Ms. Evans instructed Citigroup to perform additional rigorous due diligence into Mr. Mattox and his companies. Ms. Evans later claimed multiple bases for these warnings, including ignorance of EB-5's requirements (CP 1722-23), her personal suspicions of Mr. Mattox (CP 1733, 1748), and her favoritism of conventional investors (CP 1729-30).[4]

On May 3, 2012, Mr. Leahy sent an email regarding the 2012F LPs to Citigroup's brokers, underwriters, and bankers, including Jerry Bobo. CP 1666-69. Mr. Bobo quickly responded and offered to provide background on Mr. Mattox via telephone, characterizing the orders as a

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[3] Citigroup's anti-money laundering personnel approved Access' MGGP on May 18, 2012, effectively completing the due diligence process. CP 1877. However, Citigroup never submitted due diligence requests for the 2012F LPs, the entities placing the orders.

[4] When contacted by the Federal Bureau of Investigation ("FBI") regarding financing of the 520 Bridge Replacement, Ms. Evans, unprovoked, provided them Mr. Mattox's name and noted that Access "…was different, and we didn't know what it was about." CP 2000-1. The FBI never contacted her again. CP 1030.

"nightmare." *Id.* After speaking with the other Citigroup executives, Mr. Bobo communicated to Ms. Evans that Citigroup would carefully examine Mr. Mattox. CP 1748. Mr. Bobo later testified he had "no clue" whether Ms. Evans' concerns about the Appellants were legitimate. CP 1749.

On May 4, 2012, Mr. Leahy confirmed to Mr. Mattox that Citigroup was onboarding the 2012F LPs. Mr. Leahy had delegated the onboarding to John Sullivan, another Citigroup broker. CP 1671-73, 1675. Mr. Sullivan did not submit the onboarding request until May 11, 2012, and never submitted onboarding requests for the 2012F LPs. In his personal notes during this time, Mr. Leahy noted "[Thomas Rasmussen, Citigroup Broker] not comfortable w/ account yet." CP 1688.

On May 18, 2012, Mr. Leahy notified Mr. Mattox that Citigroup had not completed the onboarding. CP 1690, 1692. Shortly thereafter, Mr. Leahy promised the accounts would be open that day. CP 1696. After this exchange, John Sullivan re-submitted the onboarding request, noting: "we are trying to book a trade today. If not, we lose the account and they will trade with competitor…what takes so long?" CP 1685-86. As before, the onboarding request was only for Access, not the 2012F LPs.

As result of Mr. Leahy's May 18, 2012 emails and statements, Mr. Mattox began executing a contingency for LPL Financial, another financial firm, to present the 2012F LPs' bond orders. CP 1590, 1683, 1690, 1692, 1696. Mr. Leahy told Mr. Mattox that Citigroup would accept the 2012F LPs' orders if presented by LPL Financial. CP 1590-1.

On Monday, May 21, 2012, Mr. Leahy called Mr. Mattox to confirm the next day's bond sale. CP 1591, 1761-62. After this call, Mr. Leahy emailed Citigroup executives for permission to continue opening Access's account. CP 1698. Mr. Leahy then forwarded the email to Citigroup trader J.P. Connellan. *Id*.

Later that same day, Scott Karmazin of LPL Financial called J.P Connellan to place the 2012F LPs' orders. CP 1791-93, 1700. Mr. Karmazin provided Mr. Connellan with details of the bond orders. CP 1791-93. Ten minutes later, Mr. Connellan called Mr. Karmazin back and told him that Citigroup would not accept the 2012F LPs' orders. *Id*. When Karmazin asked why, Connellan said, "This is not my call or my decision, but Citi will not accept the offer." *Id*.

Citigroup and OST's decision to exclude the 2012F LPs from the 2012F Offering is evidenced by the notes of Ms. Evan's assistant, Kate Manley. CP 2089-94. Ms. Manley's notes, taken during a conference call between OST and the Underwriters on May 21, 2012 (75 minutes after Mr. Karmazin's attempt to place the 2012F LPs' orders), lists nearly all of the eventual 2012F participants, including US Trust, which purchased 0.2% of the 2012F Offering. *Id*. The Appellants are not listed. *Id*.

Citigroup's underwriters fulfilled orders by allocating bonds between 10:00 a.m. and 12:00 p.m. EDT on May 22, 2012. CP 1702. During that period, Mr. Bobo and Ms. Evans observed from an adjoining conference room and received regular updates. CP 1752, 1727, 1804-07.

In that room, Mr. Bobo, Ms. Evans and Citigroup's lead underwriter discussed Mr. Mattox. CP 1751.

After learning on May 22, 2012 that Citigroup had rejected the orders, Mr. Mattox contacted Mr. Leahy. Mr. Leahy responded, "Mike, you are just going to have to get another bond. There will be other bonds." CP 1592. Mr. Leahy then told Mr. Mattox "[t]here is nothing I can do. Things are going on in the back room that I can't tell you about, you are not getting your bonds. You've got to move on, get another bond." *Id*. Because of EB-5's requirements, the 2012F LPs could only purchase 2012F Bonds, a fact Mr. Mattox had repeatedly explained to Mr. Leahy. *Id*. At Mr. Leahy's suggestion, Mr. Mattox contacted OST, who directed Mr. Mattox back to Citigroup. CP 1855-56. In effect, both Citigroup and OST blamed the other.

In the end, Citigroup was unable to sell $38 million bonds and was forced to purchase them itself. CP 1806-07. Two days later, Citigroup sold these 2012F bonds on the less-preferred secondary market.

C. Procedural History.

This action was filed on May 16, 2014. In February 2015, the trial court dismissed Appellant's Consumer Protection Act ("CPA") claim. On August 8, 2016, the trial court granted Citigroup and OST's Motions for Summary Judgment and dismissed Appellants' claims with prejudice. On September 8, 2016, Appellants' Motion for Reconsideration was denied.

On September 1, 2016, Appellants filed a Notice of Appeal to the

Court of Appeals – Division I. After the Parties' submitted briefs and presented oral arguments, Division I issued its decision on April 9, 2018, affirming the trial court's rulings. The Appellants submitted a Motion for Reconsideration, which was denied on May 17, 2018.

IV. ARGUMENT.

Under RAP 13.4(b), the Supreme Court will grant discretionary review if a decision conflicts with Supreme Court or published Court of Appeals authority, or if it presents an issue of substantial public interest.

A. The Court of Appeals's Decision Promulgates the Utilization of a Privilege that Has No Foundation in the Law and Has Been Implicitly Overruled by this Court.

The genesis of the illusory "privilege" that OST claims was extended to claims for tortious interference by *Stidham v. State, Dept. of Licensing*,[5] and which the Court of Appeals applied to the instant case, [6] relied upon the immunity case *Moloney v. Tribune Pub. Co.*[7] for the creation of the "privilege." Namely, *Stidham* relied on *Moloney v. Tribune Publishing Co.*[8] for the proposition that a defense of privilege applicable to defamation is also applicable to a claim for the tort of outrage. *Stidham*, 30 Wn. App. at 616. Setting aside the fact that *Moloney* has been overruled by this Court,[9] *Moloney* never stood for this

[5] 30 Wn. App. 611.
[6] The Court of Appeals attempts to gloss over the privilege *Stidham* created by citing a number of cases that all refer back to *Stidham* as their only foundation for the privilege. The Court of Appeals has allowed this privilege to metastasize to its current form by relying on similar cursory statements bereft of supporting reasoning, beginning with *Stidham* itself. *Stidham* is the elephant in the room that the Court of Appeals has used to trample valid claims for thirty years.
[7] 26 Wn. App. 357.
[8] 26 Wn. App. 357, 613 P.2d 1179 (1980).
[9] *Chambers-Castanes v. King County*, 100 Wn.2d 275, 283, 669 P.2d 451 (1983).

proposition.

In *Moloney*, the plaintiff sued Pierce County under the tort of outrage and the Tacoma News Tribune ("Tribune") for invasion of privacy. 26 Wn. App. at 358. The *Moloney* Court, in the portion of the decision that was expressly overruled by this Court in *Chambers-Castanes v. King Cnty.*,[10] held that Pierce County was **immune, not privileged,** from the tort of outrage. *Moloney*. 26 Wn. App. at 360. It is essential to note that the court engaged in **no defamation or privilege analysis** as it pertained to the County in *Moloney*. The court did analyze the reporting of the Tacoma News Tribune under the defamation standard, but this was an analysis of privilege for the press. *Id*. 26 Wn. App. at 361 (citing Restatement (Second) of Torts § 611, comment c)("The privilege stated in this section is a qualified privilege commonly exercised by newspapers, broadcasting stations, and others who are in the business of reporting news to the public.") Crucially, no privilege was applied to the government in *Moloney*, only immunity.

With respect to immunity and why *Moloney* was overruled, Washington law has "recognized a narrowly circumscribed exception to [the abolishment of sovereign immunity] in instances involving high level discretionary acts exercised at a truly executive level." *Chambers*, 100 Wn.2d at 281 (citing *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965)). "A governmental entity's

[10] This Court overruled the *Moloney* Court holding that it had gone too far with its application of immunity/privilege. 100 Wn.2d at 283.

exercise of discretionary acts at a basic policy level is immune from suit, whereas the exercise of discretionary acts at an operational level is not." *Chambers*, 100 Wn.2d at 282 (citing *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975)).

This Court overruled *Moloney* to the extent that the county was immune because its actions were discretionary acts at an operational level and not at an executive policy level. *Chambers*, 100 Wn.2d at 283. Thus, any analysis of the defenses of immunity or privilege as they apply to the government in *Moloney* have been expressly overruled. Ms. Evans's interference with Appellants' business relationship with Citigroup was a discretionary act at an operational level based on jingoistic motivations and enjoys no privilege or immunity.

The only case that *Stidham*[11] cites for the proposition that a privilege defense for defamation is equally applicable to claims of tortious interference is *Moloney* and that portion of *Moloney* has been expressly overruled. *Chambers*, 100 Wn.2d at 283. *Stidham* is a zombie, wandering through our Courts of Appeals for thirty years. It is time for the Supreme Court to put *Stidham* to rest and hold that there is no government privilege to tortiously interfere with the business relations of individuals or companies.

In sum, the Court of Appeals affirmed a privilege that does not exist. The privilege conflicts with *Chambers Castanes v. King Cnty.*,

[11] 30 Wn. App. at 616.

which overruled *Moloney v. Tribune Pub. Co.* and is the only case that *Stidham v. State, Dept. of Licensing* cites in extending the non-existent government privilege to tortious interference. *Stidham* has been cited for this overruled proposition by Washington Courts of Appeals at least thirteen times and has been relied on at the Superior Court level countless times.[12]

B. There is No Clear Consensus Regarding When an Enforceable Contract Is Formed, When Custom Is to Leave Details Open Until the Transaction Date.

Appellants argue that an enforceable contract was formed during the April 9, 2012 telephone call between Mr. Mattox and Mr. Leahy. In that call, Mr. Mattox described Access' investment model and the need for Citigroup to present the 2012F LPs' bond orders. Mr. Mattox later summarized the agreement as "…we would use Citigroup as the underwriter, broker-dealer to obtain bonds for us." CP 705. In response, Mr. Leahy agreed to onboard the Appellants and present their orders, in exchange for placing the orders with him. CP 706, 1233. No other details remained unnegotiated.

In the Decision, the Court of Appeals dismissed this argument, finding that discussions between Mr. Mattox and Mr. Leahy were "preliminary negotiations and information discussions." Slip Op. 15. To support this ruling, the Court noted that Mr. Leahy lacked authority to promise to onboard the 2012F LPs, and that presentation of the orders was

[12] None of the cases citing *Stidham* have dealt with a standalone claim for tortious interference that is not accompanied by a dominant tort claim such as defamation.

contingent on completion of due diligence.[13] *Id*. In reaching this conclusion, the Court of Appeals focused on Mr. Leahy's prospective statements, rather than his objective agreement to act.

Under Washington's objective theory of contracts, if a party's words or acts, judged by a reasonable standard, manifest an intention to agree, a binding agreement may result even if the subjective intent was otherwise. *Barnes v. Treece*, 15 Wash. App. 437, 549 P.2d 1152 (1976) (public offer made by vice president of punchboard corporation to pay $100,000 to anyone who could find a crooked punchboard was binding offer even though intended as a joke). To differentiate between an actual offer and a mere opinion, the court must look to what a reasonable person would conclude. Calamari & Perillo, Contracts § 2.6, at 30 (6th ed. 2009). Here, Mr. Mattox reasonably believed that he was entering an enforceable agreement with Citigroup, because he had previously reached an agreement with JPM for 2012C.

The Court of Appeals's cited authority to support of its conclusion is distinguishable. Most occur in settings where details are orally negotiated in expectation of executing a written agreement. *Pac. Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 554, 608 P.2d 266, 268 (1980) (parties negotiating thirty-year commercial lease agreement); *BP W. Coast*

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[13] In the Decision, the Court of Appeals noted that Mr. Leahy lacked authority to "guarantee the LP Funds would satisfy Citigroup's onboarding requirements…" Slip Op. 15. Although Mr. Leahy may have lacked internal authority to make these promises, this was never communicated to Mr. Mattox. From Mr. Mattox's viewpoint, Mr. Leahy was a high-level Citigroup executive promising to onboard his companies and present their orders, in exchange for his business and the associated commissions.

Prods. LLC v. SKR Inc., 989 F. Supp. 2d 1109, 1121 (W.D. Wash. 2013) (dispute arising from franchise agreement); *Sandeman v. Sayres*, 50 Wn.2d 539, 540, 314 P.2d 428, 429 (1957) (dispute arising from employment agreement providing for payment of a bonus, in an amount to be determined three months in the future). Unlike those cases, neither Appellants nor Citigroup had any expectation of executing a written document embodying their broker-client relationship. [14]

Rather, both Mr. Mattox and Mr. Leahy immediately took concrete steps reflecting their agreed obligations. Mr. Leahy requested, and Mr. Mattox provided the entities' governance documents. CP 947, 709. Mr. Mattox also completed the MGGP form, which provided Citigroup's due diligence team with information to facilitate onboarding. CP 1870-77. Mr. Leahy never proposed Mr. Mattox sign any document embodying their agreement, and objectively acted as if the Appellants were his clients. For example, Mr. Leahy called Mr. Mattox on May 21, 2012, as was his custom for clients. CP 2022-23, 1854. As their contemporaneous actions demonstrate, the Parties had agreed that Citigroup would onboard the Appellants and present their orders, as JPM had done with 2012C.[15]

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[14] The customary informality surrounding large bond trades is demonstrated by Mr. Connellan's telephone call with Mr. Karmazin on May 21, 2012, during which Mr. Karmazin orally describes the details for a $147 million bond order, with the remaining terms to be defined by custom. CP 1791-93.

[15] Citigroup's belief that an agreement existed is demonstrated by John Sullivan's statements to Citigroup's onboarding personnel on May 17, 2012 "…we are looking to trade with client by week's end…" and then again on May 18 "we were looking to book a trade today. If not we lose the account and they will trade with competitor. What takes so long?" CP 1938.

The facts of this case are like those in *Hellbaum v. Burwell*, in which an insurer orally promised to procure sufficient fire insurance for insured's home but failed to do so. *Hellbaum*, 1 Wn. App. 694, 698, 463 P.2d 225, 228 (1969). At trial, the insurer contended that no contract existed because the parties had not agreed on the specific amount of insurance to be carried. 1 Wn. App. at 699. The court found that a broad formula was agreed upon and that substantial evidence supported the obligation to protect the insured's interest. *Id*.

Here, Mr. Leahy promised Mr. Mattox that he would onboard and present the 2012F LPs' bond orders in exchange for the bond orders being placed with him. Although the agreement was oral, no other material terms remained unnegotiated. If Citigroup had attempted to onboard the 2012F LPs, but they failed due diligence, this would have been a failure of a condition precedent and Citigroup would have been relieved of its duties to present their orders. In the end, Citigroup never submitted onboarding requests for the 2012F LPs. CP 1685.

As such, the Supreme Court should grant discretionary review and reverse the Court of Appeals's characterization of the agreement as "preliminary negotiations."

C. The Court of Appeals Mis-Applied A "Clear and Definite" Statement to Appellants' Claim for Promissory Estoppel.

In its Opinion, the Court of Appeals states that "Promissory estoppel requires a promise that is clear and definite." Slip Op. 16. The Court then adds "Contrary to Access's arguments that this standard is

limited to the employment setting, Washington cases have applied the clear and definite standard in other settings." Slip Op. 16; FN 58. Respectfully, Access is not arguing that the "clear and definite" standard is never applied in Washington cases, rather it argues that the "clear and definite" standard is only applied to promissory estoppel claims in an employment setting. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 173, 876 P.2d 435 (1994).

Washington courts commonly apply a broader definition of "promise." A promise is "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." *King v. Riveland*, 125 Wn.2d 500, 506, 886 P.2d 160, 164 (1994); citing Restatement (Second) Of Contracts § 2(1) (1981).[16]

Authority cited by the Court of Appeals does not support the argument that the "clear and definite" promise standard is used in **all** promissory estoppel cases. *Havens* applied a "clear and definite" standard in the context of terminable at will employment. *Havens*, 124 Wn.2d at 173 ("The requirement of a clear and definite promise is consistent with this state's terminable at will doctrine; where exceptions to the terminable at will rule have been recognized, they have been carefully drawn."); *see*

[16] It's important to note that the King opinion was published six months after the *Havens* opinion but makes no mention of the "clear and definite" standard. Like this case, *King* does not involve employment issues. *King,* 125 Wn.2d 500, 504, 886 P.2d 160, 163 (1994).

also Wash. Educ. Ass'n v. Dep't of Ret. Sys., 181 Wn.2d 212, 225, 332 P.3d 428, 435 (2014) (citing *Havens* to apply “clear and definite” standard to workers’ promissory estoppel claim.)[17]

Based on existing authority, the “clear and definite” promise standard is only utilized in cases arising in employment settings. The Court of Appeals’s reliance on this standard for non-employment promissory estoppel claims is clear error and contrary to this Court’s precedent.

D. The Subject Transaction Was Not Unique Enough to Preclude Recovery Under the Washington Consumer Protection Act.

In its Decision, the Court of Appeals ruled that even if Citigroup’s conduct was deceptive, that the Parties’ relationship was no unique as to preclude recovery under the CPA. Slip Op. 11. To reach this conclusion, the Court of Appeals focused on the Appellants’ investment model, rather than Citigroup’s manipulation of widely-used onboarding and trading processes. *Id*. at 12. Had the Court focused on Citigroup’s conduct, it would have seen that in the intended onboarding/presentation transaction, the Appellants were no different than any other entity seeking to open accounts and purchase bonds. In this regard, the Appellants’ investment structure is largely irrelevant and their relationship with Citigroup generic.

[17] The remaining cited authority to support application of a “clear and definite” standard are not promissory estoppel cases. Respectively, these cases involve divorce proceedings, ambiguous contracts, and homestead rights. *See State v. Miller*, 32 Wn.2d 149, 201 P.2d 136 (1948); *Peters v. Watson Co*., 40 Wn.2d 121, 241 P.2d 441 (1952); *Viewcrest Condo. Ass’n v. Robertson*, 197 Wn. App 334, 337, 387 P.3d 1147 (2016)

As to the question of whether Citigroup's conduct was injurious to the public interest, one must look to RCW 19.86.093. Under the statute, a claim may establish that its injurious to the public interest because it: (a) injured other persons, (b) had the capacity to injure other persons, or (c) has the capacity to injure other persons. Here, Citigroup's conduct meets all three requirements.

First, Citigroup's conduct injured the 2012F LP's limited partners, who intended to make investments in the Washington State economy and to apply for permanent citizenship. Also, Citigroup's conduct injured the citizens of Washington State by leaving approximately $38 million in 2012F bonds unsold.[18] CP 1806-07. Had Citigroup presented the Appellants' orders for $142 million, it may have been able to demand a higher price. Blocking the 2012F LPs' orders was an anti-competitive act injurious to the public interest.

Second, Citigroup's manipulation of the due diligence and trader process had and continues to have the capacity to injure other persons. Citigroup's actions demonstrate that federal due diligence protocols can provide false justification for excluding non-institutional market actors from public bond sales. By failing to submit onboarding requests for the 2012F LPs, Citigroup ensured that no due diligence could occur and that

[18] The Court of Appeals noted that Ms. Evans was concerned about OST bonds being placed on the secondary market for non-economic reasons. Slip Op. 5 & 13. As result of OST's interference and Citigroup's wrongful conduct that is exactly what occurred. CP 1806-07. Citigroup was forced to purchase unallocated bonds which it quickly liquidated on the secondary market.

their orders would not be presented.

When a claim arises from a private dispute, four factors support the existence of an injury to the public interest:

> (1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions?

Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 790-1, 719 P.2d 531, 538 (1986). None of the factors are necessary or dispositive. *Id*. at 791. Here, (1) the alleged acts occurred in the course of Citigroup's business, and (2) that Citigroup had a superior position as both trader and underwriter of the 2012F bonds. Due to Citigroup's designation as Senior Underwriter, the Appellants' most realistic chance of being allocated their full bond orders was to work with Citigroup's traders. In fact, the potential advantage of this in-house arrangement is demonstrated by pre-offering communications between John Leahy and Citigroup's underwriters regarding Appellants' bond order.

In this transaction, the Appellants' intended to invest in the revitalization of Washington State's infrastructure and to obtain residency for themselves and their families. By refusing their orders, Citigroup not only damaged the Appellants, but also Washington State's citizens by leaving 2012F bonds unsold on the open market. Citigroup's conduct was injurious to the public interest and requires Supreme Court review.

V. CONCLUSION.

As the Appellants have demonstrated, the Court of Appeals's decision conflicts with existing authority and raises substantial issues affecting the public interest. It also reflects the Court of Appeals's failure to understand the actions and motivations of Citigroup and OST personnel, and their desire to prevent Chinese investment in the SR 520 Bridge replacement. For these reasons and more, the Appellants respectfully request the Court grant discretionary review.

VI. APPENDIX.

The following documents are attached:

- Appendix A: Unpublished Opinion Affirming Trial Court Ruling;
- Appendix B: Order Denying Appellants' Motion for Reconsideration; and
- Appendix C: Revised Code of Washington 19.86.093.

Respectfully submitted this 18th day of June, 2018.

BADGLEY MULLINS LAW GROUP PLLC

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<u>**CERTIFICATE OF SERVICE**</u>

I, Jennifer Bates, paralegal for BADGLEY MULLINS TURNER PLLC, attorneys for Appellants in the above entitled action, hereby certify under penalty of perjury that I am over the age of eighteen (18), and am competent to testify to the facts contained herein. On the 18th day of June, 2018, I served by sending a true and correct copy in the manner indicated below of the following document(s):

1. **APPELLANTS' PETITION FOR DISCRETIONARY REVIEW**

upon the attorneys of record herein, as follows, to wit:

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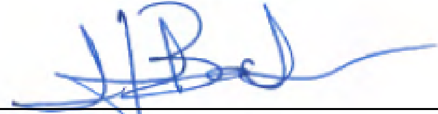

Jennifer L. Bates, Paralegal

APPENDIX A

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2018 APR -9 AM 9:23

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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,

Appellants,

v.

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

Respondents.

No. 75747-4-I

UNPUBLISHED OPINION

FILED: April 9, 2018

VERELLEN, C.J. — Access the USA, LLC formed limited partnerships with foreign investors under the EB-5 Immigrant Investor Program, intending to invest in State-issued bonds to fund construction of the new SR-520 Bridge. Access submitted applications to open accounts with Citigroup Global Markets, the lead underwriter. But on the bond pricing day, Citigroup had not opened accounts for the limited partnerships, who were therefore unable to purchase bonds. Access

sued Citigroup on theories of violation of the Consumer Protection Act (CPA),[1] breach of contract, promissory estoppel, and negligent misrepresentation. Access also sued the State, alleging tortious interference with business expectancy and negligent misrepresentation.

Because Access's alleged claims of deception are limited to its unique private interaction with Citigroup and no hypothetical facts support an impact on the public interest, the trial court properly dismissed its CPA claim under CR 12(b)(6).

Because Access fails to establish an enforceable contract, the trial court properly dismissed Access's breach of contract claim on summary judgment.

Access offers no facts or reasonable inferences of an actionable promise or reliance. The trial court properly dismissed Access's promissory estoppel claim against Citigroup.

Because Access cannot point to a false statement by Citigroup or the State of a presently existing fact, the trial court properly dismissed its claims for negligent misrepresentation.

Access establishes neither an intentional interference nor an improper purpose or means. The trial court properly dismissed Access's claim that the State intentionally interfered with its business expectancy.

Therefore, we affirm.

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[1] Ch. 19.86 RCW.

FACTS

The EB-5[2] Immigrant Investor Program (EB-5 Program) allows foreign investors and their families to obtain residency in the United States. The EB-5 Program is administered by the United States Citizenship and Immigration Service (USCIS). Qualifying investments must meet threshold requirements for job creation, term of investment, and risk. The investments are prepared by USCIS-approved regional centers.

Access is an approved regional center. Michael Mattox manages Access. He developed a municipal bond investment strategy. In this model, foreign investors participate in limited partnerships, which purchase municipal infrastructure bonds. Access served as general partner in these limited partnerships. Together with other requirements, each EB-5 applicant must invest at least $1,000,000.[3] Access forms and manages the limited partnerships that serve as the "funding accounts" for foreign investments. As part of Access's effort to establish funding accounts for a May 2012 bond offering, Access and its investors established two Washington limited partnerships.

Washington bond sales are conducted pursuant to recognized procedures established by the legislature and the Office of the State Treasurer. The Office of the State Treasurer competitively selects underwriters and establishes a lead underwriter. Each selected underwriter has a long history of working with State

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[2] Employment-Based Immigration, Fifth Preference.

[3] The minimum qualifying investment to participate either within a high unemployment or rural area in the United States is $500,000.

bond offerings and extensive experience in municipal bond offerings. Through its bond offerings, the State sells its bonds to underwriters. The underwriters, pursuant to a contract with the State, select the investors to purchase the bonds.

To purchase bonds, an investor must open an account with an underwriter. The process of opening an account with the underwriter is called "onboarding." Citigroup was the lead underwriter for the bond offering at issue in this appeal. Each underwriter determines its own onboarding process. Citigroup conducts a process that complies with federal money laundering and other regulations.

Before any SR-520 bond offering, Mattox contacted Ellen Evans, the deputy treasurer for debt management at the Office of the State Treasurer, asking for a private sale of those State bonds. Evans declined, explaining that the State "has a long-standing history of raising money exclusively through public sales of State securities and . . . we value the transparency of the public marketplace."[4] Evans learned that Mattox had reached out to other State officials "to promote his investment program,"[5] which made her wary. Evans advised members of the finance team and other State officials to respond that the State finances its capital projects with public sales of securities. Evans was concerned about the potential impact an EB-5 Program investment could have on the purchase of the bonds. Evans did not understand how State bonds qualify for the EB-5 program because of the low risk due to the State's excellent credit rating and because an investor's purchase would not itself create jobs.

[4] Clerk's Papers (CP) at 1029.

[5] Id.

Evans was also cautious of the potential impact an EB-5 investment could have on the volatility of the Washington bond market—if the federal government did not approve Mattox's proposed EB-5 investment plan, all the bonds purchased on behalf of those investors would likely be placed on the secondary market for noneconomic reasons.

I. First Bond Offering

In October 2011, Access purchased $48,000,000 in bonds in a State bond offering for the SR-520 project (2012C). J.P. Morgan Securities LLC served as the lead underwriter. USCIS had not previously approved a purchase of publicly-issued bonds as a qualifying EB-5 investment.

State employees were aware of Access's interest in the bonds and communicated with J.P. Morgan representatives about its vetting process. Evans was involved in this communication, telling J.P. Morgan she did not understand how the State's bonds would fit within the EB-5 program because there was little risk involved, and the investor's bond purchase was not itself creating jobs. Evans encouraged J.P. Morgan to perform due diligence on Access and its investors. J.P. Morgan completed its account creation process and sold some of the 2012C bonds to Access.

II. Second Bond Offering

The State scheduled a second bond offering for May 22, 2012, called GARVEE[6] 2012F (2012F) with Citigroup Global Markets as the lead underwriter.

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[6] GARVEE stands for Grant Application Revenue Vehicle, and refers to a debt instrument backed by a pledge from the federal government for future Title 23 funding. GARVEE bonds enable the State to accelerate construction

In November 2011, Access, together with its investors, established two Washington limited partnerships[7] (the LP Funds) and placed the limited partnership assets in escrow. Mattox intended that the LP Funds would purchase $143,000,000 in bonds. Mattox received millions from investors, all before any communication with Citigroup about the offering.

Mattox initially contacted representatives from J.P. Morgan to onboard the 2012F LP Funds, but was advised "to place its order through Citigroup."[8]

Mattox called Citigroup's director of institutional sales, John Leahy, on April 9, 2012. Mattox told Leahy he wanted to open new client accounts with Citigroup and place an order in the anticipated 2012F offering. According to Mattox, Leahy said "he would begin the account opening process at Citigroup so that Access the USA and the 2012F Limited Partnerships could participate in the 2012F Offering."[9]

Leahy e-mailed Mattox on April 16, 2012, asking if "there's someone we can call to get the paperwork started."[10] On April 30, Mattox sent electronic copies of Access's information to Leahy to "facilitate the account setup."[11] Over the following weeks, Mattox and Leahy communicated regarding onboarding

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timelines for a project and spread the cost of transportation infrastructure over its useful life.

[7] The 520 Bridge Replacement Fund II, LP and Premier 520 Bridge Replacement Fund II, LP.

[8] CP at 1587.

[9] CP at 946-47.

[10] CP at 1479.

[11] CP at 1458.

issues. Leahy e-mailed Mattox on May 9 asking for his percentage of ownership interest. And up to two business days before the offering, Mattox sent Citigroup documents for the onboarding process. The stated investment purpose raised concerns with Citigroup and the Office of the State Treasurer.

Representatives from the State, including Evans, worked with representatives from Citigroup leading up to the 2012F bond offering to facilitate the sale. Similar to her position before the first bond offering, Evans remained concerned whether State bonds were appropriate for the EB-5 program because of their low risk and whether EB-5 investors owning State bonds would increase volatility in the State bond market. Evans expressed her concerns in meetings which Citigroup representatives attended.

According to Jay Wheatley,[12] Citigroup's underwriter responsible for allocating the bonds, he had never talked to anyone with the State about Mattox or Access and acknowledged that there "were some concerns, but nothing to the degree of we don't want their interest."[13] Citigroup employees Leahy and Jerry Bobo acknowledged they were aware of Evans' concern but they had their own concerns about the relationship between the bonds and the EB-5 program.

Citigroup was unable to complete the onboarding for the LP Funds before the offering date, and accounts were never opened. Therefore, the LP Funds were unable to purchase any bonds in the 2012F bond offering.

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[12] Also referred to as George Wheatley throughout the record.

[13] CP at 1164-65; see also CP at 1173 (Wheatley's colleague Joseph Connellan corroborates Wheatley's deposition testimony).

On the evening of the failed purchase, Mattox e-mailed the State Treasurer saying he learned the State directed the underwriters not to sell bonds to his "company because of the concern of negative publicity of our investors."[14] In the e-mail, Mattox does not include any suggestion that Access had a contract with Citigroup to buy bonds or that Citigroup had promised to sell them bonds. Mattox e-mailed the agents for his investors and Citigroup, repeating his belief that they had been discriminated against. According to Mattox, Leahy told him in a phone call that there was nothing he could do, and "things are going on in the back room that I can't tell you about, you are not getting your bonds."[15]

III. Procedural History

Access sued the State and Citigroup.[16] Access alleged discrimination, violation of the Washington securities act,[17] and violation of the CPA. The United States District Court for the Western District of Washington dismissed Access's federal discrimination claim and, upon remand, the King County Superior Court dismissed the remaining state law claims, including the CPA claim, under CR 12(b)(6).

Access filed an amended complaint alleging Citigroup breached its oral agreement with Access, the State tortuously interfered with Access's business expectancy or contract with Citigroup, Access relied on Citigroup's promises to its detriment, and that Citigroup and the State made negligent

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[14] CP at 1519.

[15] CP at 1592.

[16] Access named other defendants, but they were dismissed.

[17] Ch. 21.20 RCW.

misrepresentations. The trial court granted summary judgment in favor of Citigroup and the State and denied Access's motion for reconsideration.

Access appeals.

ANALYSIS

We review summary judgment decisions de novo.[18] The moving party must show there are no genuine issues of material fact.[19] Once a moving defendant makes this showing, the burden shifts, "and if the plaintiff fails to make a showing sufficient to establish the existence of an element essential to its case, on which it will bear the burden of proof at trial," summary judgment in favor of the moving defendant is appropriate.[20]

We review a CR 12(b)(6) dismissal de novo.[21] Dismissal is appropriate "only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove 'any set of facts which would justify recovery.'"[22] "'We regard "the plaintiff's allegations in the complaint as true and consider hypothetical facts outside the record."'"[23] "'[A]ny hypothetical situation conceivably raised by the complaint defeats a [CR] 12(b)(6) motion if it is legally sufficient to support plaintiff's

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[18] Mohr v. Grantham, 172 Wn.2d 844, 859, 262 P.3d 490 (2011).

[19] Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

[20] Simmons v. City of Othello, 199 Wn. App. 384, 390, 399 P.3d 546 (2017).

[21] Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206 (2007).

[22] Id. (quoting Tenore v. AT & T Wireless Servs., 136 Wn.2d 322, 330, 962 P.2d 104 (1998)).

[23] Deegan v. Windermere Real Estate/Center-Isle, Inc., 197 Wn. App. 875, 884, 391 P.3d 582 (2017) (quoting FutureSelect Portfolio Mgmt. v. Tremont Grp. Holdings, Inc., 175 Wn. App. 840, 865, 309 P.3d 555 (2013)).

claim.'"[24] Trial courts grant motions to dismiss "'sparingly and with care,'" and "'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'"[25]

I. Claims Against Citigroup

A. CPA

Access argues it alleged sufficient facts supporting its CPA claim and that it should have survived a CR 12(b)(6) motion.

The CPA aims to "protect the public and foster fair and honest competition."[26] To prevail in a CPA action, a plaintiff must establish (i) an unfair or deceptive act or practice, (ii) occurring in trade or commerce, (iii) a public interest impact, (iv) injury to plaintiff's business or property, and (v) that the injuries were caused by the unfair or deceptive act or practice.[27] Whether a particular action gives rise to a CPA violation presents a question of law.[28]

Access contends Leahy's statements about creating accounts for the LP Funds were unfair or deceptive.

"The 'unfair or deceptive' element can be established in one of three ways: (i) per se unfair or deceptive conduct, (ii) an act that has the capacity to deceive

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[24] Id. (alterations in original) (quoting Halvorson v. Dahl, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)).

[25] Kinney, 159 Wn.2d at 842 (internal quotation marks omitted) (quoting Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

[26] RCW 19.86.920.

[27] Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

[28] Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

a substantial portion of the public, or (iii) an unfair or deceptive act or practice not regulated by statute but in violation of the public interest."[29] Deception exists where there is a representation, omission or practice that is likely to mislead a reasonable consumer.[30] Neither intent nor actual deception is required to prove a deceptive act or practice, the focus is whether the conduct "has the *capacity* to deceive a substantial portion of the public."[31] But in applying the capacity to deceive requirement, our concern "has been to rule out those deceptive acts and practices that are *unique to the relationship between plaintiff and defendant.* The definition of 'unfair' and 'deceptive' must be objective to prevent every consumer complaint from becoming a triable violation of the act."[32] Accurate information may be deceptive "if there is a representation, omission or practice that is likely to mislead."[33] "'Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA.'"[34]

The acts and practices of Citigroup were unique to the relationship between the parties. Access cannot show "a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or

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[29] State v. Mandatory Poster Agency, Inc., 199 Wn. App. 506, 518, 398 P.3d 1271 (2017).

[30] Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 50, 204 P.3d 885 (2009) (quoting Sw. Sunsites, Inc. v. Fed. Trade Comm'n, 785 F.2d 1431, 1435 (9th Cir. 1986)).

[31] Hangman Ridge, 105 Wn.2d at 785.

[32] Behnke v. Ahrens, 172 Wn. App. 281, 292-93, 294 P.3d 729 (2012) (emphasis added).

[33] Panag, 166 Wn.2d at 50.

[34] Bain v. Metropolitan Mortg. Grp., Inc., 175 Wn.2d 83, 116, 285 P.3d 34 (2012) (quoting State v. Kaiser, 161 Wn. App. 705, 719, 254 P.3d 850 (2011)).

deceptive act's being repeated."[35] Here, Access alleged (i) it made a single attempt to purchase bonds for the May 2012 offering, (ii) it provided "a unique and mutually beneficial service" to foreign investors, and (iii) these investors were only able to invest in limited debt offerings meeting specific criteria.

As a separate element, a claimant must establish an unfair or deceptive act which is "injurious to the public interest."[36] Access's contention that this private dispute affects the public interest is not persuasive. Generally, "a breach of private contract affecting [only] the parties to the contract is not an act or practice affecting the public interest."[37] "[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest."[38] Our Supreme Court has looked to four factors to determine public interest:

> (1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions? As with the factors applied to essentially consumer transactions, not one of these factors is dispositive, nor is it necessary that all be present. The factors in both the "consumer" and "private dispute" contexts represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact.[39]

Here, Access neither alleges nor argues any hypothetical fact that Citigroup solicited its business. Access suggests Citigroup's failure to onboard

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[35] Behnke, 172 Wn. App. at 295.

[36] RCW 19.86.093.

[37] Behnke, 172 Wn. App. at 293.

[38] Hangman Ridge, 105 Wn.2d at 790.

[39] Id. at 790-91.

the LP Funds forced Citigroup to purchase the remainder of the bonds for resale on the secondary market, decreasing the bonds' marketability "to the detriment of Washington citizens."[40] But Access does not offer authority that sales on the secondary market for bonds frustrated the goals of the CPA. Moreover, there is no allegation or hypothetical fact 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."[41] This was a private dispute about opening private accounts.[42]

We conclude the trial court properly dismissed Access's CPA claim under CR 12(b)(6) because Access did not allege anything more than a private dispute with no public impact.

B. Breach of Contract

Access argues Citigroup breached its agreement to onboard the LP Funds and present the bond orders.

A plaintiff must establish the existence of a valid contract, breach, and damages proximately caused by the breach.[43] To form a contract, the parties must objectively manifest their mutual assent.[44] Typically, this manifestation

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[40] Appellant's Br. at 20.

[41] Behnke, 172 Wn. App. at 293.

[42] In passing, Access also contends Citigroup and the State abused open market principles by removing "marginalized or minority interests from public bond sales," Appellant's Br. at 20, but offers no compelling authority supporting this theory of public impact.

[43] Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus., 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

[44] Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 177, 94 P.3d 945 (2004).

includes an offer and acceptance.[45] "An offer consists of a promise to render a stated performance in exchange for a return promise being given."[46] "Acceptance is the offeree's communication by word, sign, or writing to be bound" by the terms of the offer.[47] The terms of the agreement must be sufficiently definite.[48] "If an offer is so indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties, its acceptance cannot result in an enforcible agreement."[49] As acknowledged by our Supreme Court, the primary concern regarding valid contract formation is to "avoid trapping parties in surprise contractual obligations."[50]

Access contends Citigroup agreed to onboard the LP Funds and present the bond orders in exchange for receiving Access's business. Access argues the following exchange constituted a valid offer and acceptance:

> First, Mr. Leahy offered to onboard the [LP Funds] in exchange for the right to present their orders to Citigroup's underwriters. In accepting this offer, Mr. Mattox lost the opportunity to work with [J.P. Morgan].[51]

But in Mattox's declaration, he said:

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[45] Id. at 178.

[46] Pac. Cascade Corp. v. Nimmer, 25 Wn. App. 552, 556, 608 P.2d 266 (1980).

[47] Taufen v. Estate of Kirpes, 155 Wn. App. 598, 603, 230 P.3d 199 (2010).

[48] Keystone Land & Dev. Co., 152 Wn.2d at 178.

[49] Sandeman v. Sayres, 50 Wn.2d 539, 541, 314 P.2d 428 (1957).

[50] Keystone Land & Dev. Co., 152 Wn.2d at 178 (quoting Teachers Ins. & Annuity Ass'n v. Tribune Co., 670 F. Supp. 491, 497 (S.D.N.Y.1987)).

[51] Appellant's Br. at 23.

> During this initial conversation, he was confident that Citigroup *would* be able to onboard the 2012F LPs and set up the accounts necessary to present their orders. John Leahy also told me that because he was a Citigroup trader and Citigroup was underwriting the deal, and that Citigroup was the lead in determining the allocation of bonds which *would* put us in a good position to get the bonds we needed . . .
>
> . . . On this basis, and being satisfied with what Mr. Leahy said to me, I agreed that Citigroup should go forward with the plan.[52]

Washington courts routinely reject contract claims based on preliminary negotiations and informal discussions.[53] Here, the record is devoid of an objective manifestation. At most, Leahy expressed optimism about opening accounts and placing orders. He used terms that were prospective in nature, such as "would be able to" and that it "would put us in a good position."[54] There was neither a promise that the bonds would be issued nor a guaranteed outcome of the onboarding process. The onboarding depended on the due diligence and know-your-customer standards.[55] Leahy could not guarantee the LP Funds would satisfy Citigroup's onboarding requirements, Mattox and Leahy were aware it was a complicated process, and Leahy's efforts are evidenced by the continuing requests for more information and his communication with other

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[52] CP at 1588 (emphasis added).

[53] See Keystone Land & Dev. Co., 152 Wn.2d at 178-79 (no contract where defendant stated it was "prepared to negotiate" and the parties could later draft an agreement); Pac. Cascade Corp., 25 Wn. App. at 558 ("the parties' informal exchange of correspondence did not result in a contractual relationship"); see also 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).

[54] CP at 1588.

[55] 31 U.S.C. § 5318(h) & (i); 31 C.F.R. § 1020.210 & .220.

Citigroup representatives. These preliminary discussions between Mattox and Leahy do not establish an enforceable contract.

We conclude the trial court properly granted summary judgment dismissing Access's breach of contract claim.

C. Promissory Estoppel

Alternatively, Access argues it justifiably relied on Citigroup's promise.

Under promissory estoppel, the plaintiff must show:

> "(1) [a] promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise."[56]

The doctrine "was developed to cover certain situations in which consideration is lacking."[57] Promissory estoppel requires a promise that is clear and definite.[58] Our Supreme Court "has adopted the *Restatement*'s definition of 'promise': 'A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has

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[56] Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 171-72, 876 P.2d 435 (1994) (alteration in original) (quoting Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 259 n.2, 616 P.2d 644 (1980)).

[57] Hatfield v. Columbia Fed. Sav. Bank, 57 Wn. App. 876, 885, 790 P.2d 1258 (1990).

[58] Havens, 124 Wn.2d at 173. Contrary to Access's arguments that this standard is limited to the employment setting, Washington cases have applied the clear and definite standard in other settings. See Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc., 169 Wn. App. 111, 128, 279 P.3d 487 (2012); State v. Miller, 32 Wn.2d 149, 158, 201 P.2d 136 (1948); Viewcrest Condo. Ass'n v. Robertson, 197 Wn. App. 334, 337, 387 P.3d 1147 (2016); Peters v. Watson Co., 40 Wn.2d 121, 122-23, 241 P.2d 441 (1952).

been made.'"[59] The promise "must be explicit rather than implicit," and promissory estoppel "'may not be used as a way of supplying a promise.'"[60]

Similar to its breach of contract theory, Access suggests Leahy "promised to onboard the 2012F LPs and present their orders."[61] Access also contends Leahy promised that Citigroup "would accept the 2012F LPs' orders if placed through [another broker,] LPL Financial."[62]

But a promise that is "'vague, general or of indeterminate application' is not enforceable."[63] In his declaration, Mattox said he asked Leahy "whether Citigroup could onboard" the LP Funds before the pricing day, and Leahy responded that it "*would* not be a problem" and "Citigroup was the lead in determining the allocation of bonds *which would put us* in a good position."[64] Statements of mere future intent are insufficient to constitute a promise under the doctrine.[65] "An intention to do a thing is not a promise to do it."[66] An enforceable promise requires "an express undertaking or agreement" that "'something shall

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[59] Wash. Educ. Ass'n v. Dep't of Ret. Sys., 181 Wn.2d 212, 225, 332 P.3d 428 (2014) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1981)).

[60] Tacoma Auto Mall, Inc., 169 Wn. App. at 128 (quoting Havens, 124 Wn.2d at 173).

[61] Appellant's Br. at 26.

[62] Appellant's Br. at 27.

[63] Aguilar v. Int'l Longshoremen's Union Local No. 10, 966 F.2d 443, 446 (9th Cir. 1992) (quoting Hass v. Darigold Dairy Prods. Co., 751 F.2d 1096, 1100 (9th Cir. 1985)).

[64] CP at 1588 (emphasis added).

[65] Elliot Bay Seafoods, Inc. v. Port of Seattle, 124 Wn. App. 5, 13, 98 P.3d 491 (2004).

[66] Id.

happen . . . in the future.'"[67] Here, the alleged promise relies on statements of intent, not promises to perform. Leahy could not guarantee or promise new accounts because federal law required Citigroup to thoroughly vet new applicants, including anti-money laundering and know-your-customer investigations into each entity before opening any account.[68]

Access contends its reliance on Leahy's promise was justified. A plaintiff must show it *changed its position based on the promise*, and did so justifiably.[69] Though "justifiable reliance is normally a question of fact, summary judgment is appropriate if reasonable minds could reach but one conclusion."[70] As this court has recognized, "[w]hile reliance requires examination of relevant factors, we reject the contention that such examination cannot be done in a summary judgment motion."[71]

Here, Mattox raised money from investors before receiving *any* purported promise from Citigroup. Mattox formed the LP Funds in November 2011 and raised the funds for the proposed bond purchase before contacting Citigroup. Access does not establish an action or forbearance of definite and substantial character performed in reliance upon Leahy's statements.

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[67] Meissner v. Simpson Timber Co., 69 Wn.2d 949, 957, 421 P.2d 674 (1966) (quoting RESTATEMENT OF CONTRACTS § 2(1) (1932)).

[68] 31 U.S.C. 5318(h) & (i); 31 C.F.R. §§ 1010.210-.220.

[69] Wash. Educ. Ass'n, 181 Wn.2d at 224-25 (quoting Havens, 124 Wn.2d at 171-72).

[70] Cornerstone Equip. Leasing, Inc. v. MacLeod, 159 Wn. App. 899, 905, 247 P.3d 790 (2011) (citing Havens, 124 Wn.2d at 181).

[71] Stewart v. Estate of Steiner, 122 Wn. App. 258, 275, 93 P.3d 919 (2004).

Mattox's declaration, together with the e-mails, do not support his alleged change of position and reliance based on Leahy's statements about setting up accounts.

To determine if reliance is justified, courts also look to

> (1) the sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of long standing business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated the stock transaction or sought to expedite the transaction; and (8) the generality or specificity of the misrepresentations.[72]

Mattox is an entrepreneur with over 20 years of experience running businesses, including purchasing bonds. Access did not have a longstanding business or personal relationship with Citigroup, and Access initiated the contact and expressed interest in making a purchase.

Access argues only Citigroup had access to the relevant information, Mattox had no independent capability to detect the fraud, and Leahy's misrepresentations were "specific and pointed, and reasonably calculated to lead Mr. Mattox into believing Citigroup would onboard [the LP Funds] and present their orders."[73] But Mattox had access to the same offering information as Leahy and knew about the upcoming 2012F bond offering before contacting Leahy. The record does not reflect Leahy made a misrepresentation to Mattox or misled him. The alleged "specific and pointed" misrepresentations concerned general, aspirational, and indefinite statements.

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[72] Id. at 274.

[73] Appellant's Br. at 29.

We conclude Access did not change its position and justifiably rely on Citigroup's optimistic intent to onboard the LP Funds.

D. Negligent Misrepresentation

Access argues Citigroup negligently misrepresented the facts upon which Access relied.

A plaintiff must prove by clear, cogent, and convincing evidence:

> (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages.[74]

Washington courts apply the *Restatement of Torts* approach.[75] Unless there is clear, cogent, and convincing evidence that the information supplied by the defendant is false, a claim for negligent misrepresentation fails.[76] "[A] false representation as to a *presently existing fact* is a prerequisite to a misrepresentation claim," a discussion about future action is "not a representation of a presently existing fact."[77] Failing to perform "promises of

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[74] Ross v. Kirner, 162 Wn.2d 493, 499, 172 P.3d 701 (2007).

[75] RockRock Group, LLC v. Value Logic, LLC, 194 Wn. App. 904, 914, 380 P.3d 545 (2016).

[76] Elliot Bay Seafoods, Inc., 124 Wn. App. at 14.

[77] Donald B. Murphy Contractors, Inc. v. King County, 112 Wn. App. 192, 197-98, 49 P.3d 912 (2002) (emphasis added). To the extent Access suggests a present state of mind to engage in a future act equates to a "present fact," see Appellant's Br. at 30; Appellant's Reply at 13, Access presents no authority supporting such an expansive view of what constitutes a present fact.

future conduct . . . cannot alone establish the requisite negligence for negligent misrepresentation."[78]

In Havens v. C & D Plastics, Inc., the defendants' alleged oral statements during negotiations promising authority and duration of employment were "promises of future conduct."[79] Our Supreme Court held the plaintiff could not base a misrepresentation on these oral statements because they lacked "any false representation as to a *presently existing fact*, a prerequisite to a misrepresentation claim."[80] Similarly, in Donald B. Murphy Contractors v. King County, the plaintiff argued the county made promises to purchase and maintain insurance for a construction project.[81] This court held the county's "promise to procure insurance was not a representation of a presently existing fact."[82]

Here, Access focuses its negligent misrepresentation claim on Leahy's comments before and after the pricing day. Access contends Leahy's statements misrepresented that (i) "Citigroup was in the process of onboarding," (ii) Citigroup was prepared to accept the orders from the LP Funds through LPL Financial, and (iii) the State was capable of independently allocating bonds.[83]

Leahy communicated obstacles in the onboarding process to Mattox. In Mattox's declaration, he acknowledged Leahy told him about "certain challenges Citigroup was experiencing in the onboarding, but then repeatedly told me it

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[78] Havens, 124 Wn.2d at 182.

[79] 124 Wn.2d 158, 179-82, 876 P.2d 435 (1994).

[80] Id. at 182 (emphasis added).

[81] 112 Wn. App. 192, 197, 49 P.3d 912 (2002).

[82] Id. at 198.

[83] Appellant's Reply Br. at 13.

would be 'no problem' to complete the process."[84] This aspirational language does not amount to a presently existing fact. And it was Sharla Cameron of LPL Financial, not Leahy, who suggested the LP Funds could place the orders through LPL Financial and that there was confusion about the name for the accounts.

We conclude Access does not establish Citigroup misrepresented a presently existing fact or reliance. Therefore, the negligent misrepresentation claim was properly dismissed.

II. Claims Against the State

A. Tortious Interference

Access argues the State tortiously interfered with its agreement with Citigroup.

The plaintiff must establish

> (1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage.[85]

To survive summary judgment, a plaintiff must present factual evidence to support each element of its claim and cannot rely on assertions or allegations.[86]

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[84] CP at 1590 (emphasis added).

[85] Leingang, 131 Wn.2d at 157; Pleas v. City of Seattle, 112 Wn.2d 794, 800, 803-04, 774 P.2d 1158 (1989).

[86] Roger Crane & Assocs., Inc. v. Felice, 74 Wn. App. 769, 779, 875 P.2d 705 (1994).

The State argues Access cannot establish intentional interference by the State that induced or caused a breach or termination of Access's relationship or expectancy with Citigroup or that the State interfered for an improper purpose or used improper means.

"[I]ntentional interference denotes purposefully improper interference."[87] An intentional interference "requires an improper objective of harming the person or the use of wrongful means that in fact cause injury to the person's contractual or business relationships."[88]

Here, Evans merely expressed her concerns and did not intentionally interfere. Evans was unsure about the suitability of the EB-5 investors for State bond offerings, and explained that the State wanted to avoid any potential volatility in the market. Evans expressed concerns about the potential EB-5 investments in the 2012F bond offering when the subject came up in meetings with investment bankers and financial advisors, which included Citigroup representatives.

Access does not suggest that the State's interests in ensuring a successful underwriting and market stability were inappropriate. And the lead underwriter for Citigroup testified nobody told him about a governmental investigation of Access before the pricing day.

But even if the State did intentionally interfere, Access must also show that the State "interfered for an improper purpose or used improper means."[89]

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[87] Schmerer v. Darcy, 80 Wn. App. 499, 505, 910 P.2d 498 (1996).

[88] Id. (citing Pleas, 112 Wn.2d at 804).

[89] Leingang, 131 Wn.2d at 157; Pleas, 112 Wn.2d at 804.

In Pleas v. City of Seattle, our Supreme Court adopted the Oregon Supreme Court's approach that a claim for tortious interference can be established only "'when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means.'"[90]

The improper motive or purpose inquiry focuses on the reasons for the defendant's interference, such as greed or retaliation.[91] "Conclusory statements and speculation will not preclude a grant of summary judgment."[92] Arbitrary and capricious actions may constitute improper means of interference,[93] but exercising one's legal interests in good faith is not improper interference.[94]

Here, Access questions Evans' motives but does not offer compelling authority that its speculative accusations are sufficient to preclude summary judgment. Access contends Evans' actions backfired and caused some bonds to go unpurchased, resulting in a sale on the secondary market, but the focus of the

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[90] 112 Wn.2d 794, 804, 774 P.2d 1158 (1989) (quoting Top Serv. Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 204,582 P.2d 1365 (1978)).

[91] See Schmerer, 80 Wn. App. at 505; Cherberg v. Peoples Nat. Bank of Wash., 88 Wn.2d 595, 606, 564 P.2d 1137 (1977)).

[92] Elcon Constr., Inc. v. E Wash. Univ., 174 Wn.2d 157, 169, 273 P.3d 965 (2012).

[93] Pleas, 112 Wn.2d at 805.

[94] Tacoma Auto Mall, Inc., 169 Wn. App. at 132; Elcon Constr., Inc., 174 Wn.2d at 168-70 (trial court properly dismissed claim for tortious interference based upon legitimate motive by defendant in protecting its legal interest); Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship, 158 Wn. App. 203, 225-26, 242 P.3d 1 (2011) (trial court properly dismissed claim when plaintiff failed to provide sufficient facts to prove defendant had improper motive).

analysis is the motive and purpose, not the end result.[95] Evans expressed the State's legitimate interests in a successful underwriting and maintaining market stability.[96]

Access argues Evans used improper means because Citigroup already had policies in place to assure the bond offering would not fall through, thus, in voicing her concerns to Citigroup, Evans acted "outside the scope of her authority as a deputy treasury secretary."[97] But her duties as deputy treasury secretary include oversight of State bond sales. There is no evidence that Evans instructed underwriters not to cooperate with Access, told the underwriters about any FBI investigation, or urged the underwriters to disregard their own policies.

As to the question of any privilege, Access challenges the validity of Stidham v. State Department of Licensing.[98] But Washington courts have acknowledged the application of overlapping privilege in both defamation and tortious interference settings.[99] In any event, we need not reach the State's alternative argument regarding privilege in this setting.

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[95] Leahy's alleged statement about things "going on in the back room that I can't tell you about," CP at 1592, does not support a reasonable inference that Evans had an improper motive.

[96] Access suggests Evans' failure to take steps to confirm or deny the basis for her concerns reveals her improper motive but does not offer authority that a formal investigation or inquiry was required.

[97] Appellant's Br. at 35.

[98] 30 Wn. App. 611, 637 P.2d 970 (1981).

[99] Aitken v. Reed, 89 Wn. App. 474, 490-91, 949 P.2d 441 (1998); Liberty Bank of Seattle, Inc. v. Henderson, 75 Wn. App. 546, 564-65, 878 P.2d 1259 (1994); Lawson v. Boeing, 58 Wn. App. 261, 269, 792 P.2d 545 (1990).

We conclude Access does not establish any genuine issue of fact regarding the third and fourth elements of its tortious interference claim. Therefore, it was properly dismissed.

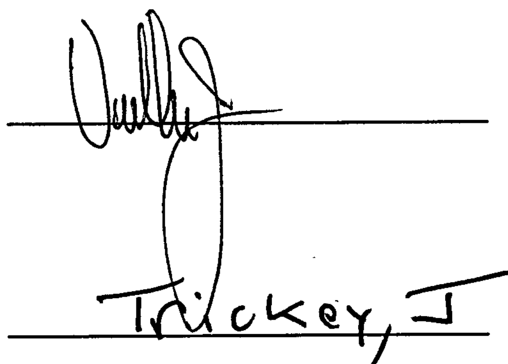
B. Negligent Misrepresentation

Access argues summary judgment was improper because there are issues of material fact regarding its negligent misrepresentation claim against the State. As discussed above, a claim for negligent misrepresentation requires a misrepresentation as to a presently existing fact.

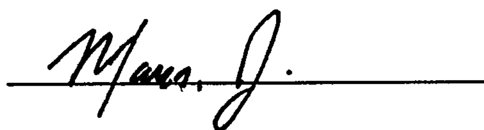
Access does not offer compelling authority or citations to the record showing it relied on a presently existing fact communicated by the State. And Access does not establish a causal link between the alleged misrepresentations and its failure to purchase the 2012F bonds. Access relies on its claim that the State misrepresented its role in the bond sale process but repeatedly cites to statements made by Leahy, not Evans.

We conclude Access's negligent misrepresentation claim against the State was properly dismissed.

Therefore, we affirm.



WE CONCUR:



APPENDIX B

FILED
5/17/2018
Court of Appeals
Division I
State of Washington

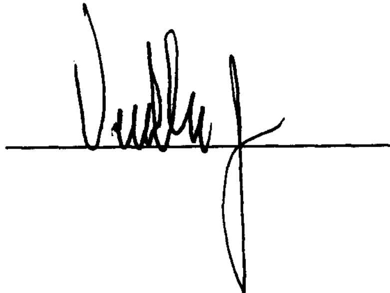
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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, Appellants, v. THE STATE OF WASHINGTON, a government entity; THE OFFICE OF THE TREASURER, a government entity and agency of the State of Washington; CITIGROUP GLOBAL MARKETS, a New York corporation, Respondents.	No. 75747-4-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellants filed a motion for reconsideration of the court's April 9, 2018 opinion. Following consideration of the motion, the panel has determined it should be denied. Now, therefore, it is hereby

ORDERED that the appellants' motion for reconsideration is denied.

FOR THE PANEL:



APPENDIX C

19.86.093. Civil action — Unfair or deceptive act or practice — Claim elements.

In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it:

(1) Violates a statute that incorporates this chapter;

(2) Violates a statute that contains a specific legislative declaration of public interest impact; or

(3)

(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

BADGLEY MULLINS TURNER PLLC

June 18, 2018 - 3:47 PM

Transmittal Information

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