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SUPREME COURT
STATE OF WASHINGTON

(COURT OF APPEALS, DIVISION III, No. 22704-2001 OCT -9 A 10:05

BY C. J. MERRITT

SUPREME COURT OF THE STATE OF WASHINGTON CLERK

KENNETH B. COOK,
a single man,

Petitioner,

v.

CLARK E. KINNEY, and BARBARA E. KINNEY,
individually and the marital community,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

I. SUPPLEMENTAL ARGUMENT 1

TABLE OF AUTHORITIES

<u>Case</u>	<u>Page(s)</u>
<u>Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,</u> 126 S.Ct. 1503, 1510 (2006)	4-6
 <u>Statute</u>	
RCW 21.20.010	5
 <u>Administrative Rule</u>	
17 C.F.R. § 240.10b-5	4-5
 <u>Court Rule</u>	
Rule of Appellate Procedure 13.7(d)	4

I. SUPPLEMENTAL ARGUMENT

In accordance with Rule of Appellate Procedure 13.7(d), the Petitioner Kenneth B. Cook ("Cook") submits this Supplemental Brief to notify the Court of additional authority that was published after the Petition for Review was filed.

As discussed in detail in Cook's Petition for Review, at pages 14-18, the decision of the Court of Appeals involves an issue of substantial public interest. On March 21, 2006, the United States Supreme Court again confirmed that the federal securities laws involve matters of important public concern. On a state level, the Washington State Securities Act ("WSSA") has the same significance for our state economy and securities transactions, despite its different emphasis on protection of investors rather than the market place. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S.Ct. 1503, 1510 (2006), the Supreme Court concluded that, in furtherance of federal public policy, the federal securities laws exist only to regulate purchasers and sellers of securities. Only purchasers and sellers of securities may bring suit claiming a violation of federal securities laws. *Id.*

Rule 10b-5, promulgated by the Securities and Exchange Commission pursuant to Section 10(b) of the Securities Exchange Act of 1934, states as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

Except for the federal jurisdiction statement, this Rule is identical to the provisions of RCW 21.20.010. Both the Respondents Clark E. and Barbara E. Kinney and the respondent/plaintiff in *Merrill Lynch, supra.*, are required to plead facts showing a misrepresentation or omission of material fact in connection with a sale of a security. It would violate state and federal public policy to allow suits by others under state or federal securities laws.

In *Merrill Lynch, supra.*, the Supreme Court reinforced its earlier determination by stating that:

Relying principally on "policy considerations" which the Court viewed as

appropriate in explicating a judicially crafted remedy, *ibid.*, and following judicial precedent rather than "the many commentators" who had criticized the *Birnbaum* rule as "**an arbitrary restriction which unreasonably prevents some deserving plaintiffs from recovering damages,**" 421 U.S., at 738, 95 S.Ct. 1917, the Court in *Blue Chip Stamps* chose to limit the private remedy. The main policy consideration tipping the scales in favor of precedent [that only purchasers and sellers could bring suits under securities laws] was the widespread recognition that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Id.*, at 739, 95 S.Ct. 1917. Even weak cases brought under the Rule may have substantial settlement value, the Court explained, because "[t]he very pendency of the lawsuit may frustrate or delay normal business activity." *Id.*, at 740, 95 S.Ct. 1917. Cabining the private cause of action by means of the purchaser-seller limitation would, in the Court's view, minimize these ill effects.

Id. at 1510, citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975) and *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2nd Cir. 1952) [bold in original, underline added].

Clark E. and Barbara E. Kinney's lawsuit against Cook, if allowed to proceed, is precisely the type of vexatious litigation that is referred to in this Supreme Court decision. As discussed in detail in Cook's Petition for Review, at pages 8-14, Cook was not a seller and the Kinneys were not

purchasers, because no sale of a security occurred on July 26, 2000. As such, the Kinneys are not entitled to the protection of the WSSA and have no standing to bring suit thereunder. Therefore, Cook respectfully requests the Court to reverse the Court of Appeals' decision and reinstate the trial court's dismissal of the Kinneys' Complaint for failure to state a claim.

DATED this 6th day of October, 2006.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of October, 2006, I caused to be served a true and correct copy of the foregoing SUPPLEMENTAL BRIEF OF PETITIONER as follows:

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