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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 89303-9

FUTURESELECT PORTFOLIO MANAGEMENT, INC.,
FUTURESELECT PRIME ADVISOR II LLC, THE MERRIWELL
FUND, L.P., AND TELESIS IIW, LLC,

Respondents,

v.

TREMONT GROUP HOLDING, INC., TREMONT PARTNERS, INC.,
OPPENHEIMER ACQUISITION CORPORATION,
MASSACHUSETTS MUTUAL LIFE INSURANCE CO., and ERNST &
YOUNG LLP,

Petitioners.

ERNST & YOUNG LLP'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Ernst & Young LLP (“EY”) asks this Court to reverse the Court of Appeals and restore the trial court’s dismissal of FutureSelect’s claims against it. This Supplemental Brief incorporates by reference EY’s prior Statement of the Case, and addresses only the two issues raised in EY’s Petition for Review, i.e., choice of law and seller liability under the Washington State Securities Act (“WSSA”), RCW 21.20.430(1).

Choice of Law. Even though EY audited the Rye Funds in New York and FutureSelect does not allege EY did *anything* in Washington, the Court of Appeals applied Washington law—simply because FutureSelect has its place of business in Washington. But this Court has emphasized Washington law does *not* govern where the “only significant contact with Washington ... is Plaintiff’s residency.” *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 213, 875 P.2d 1213 (1994). Instead, like other courts across the country, this Court has applied the law of the state where an auditor performs its audit services to govern misrepresentation claims arising out of those services. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 744 P.2d 1032 (1987). Because EY performed its audit and issued its opinion in New York, this widely accepted rule mandates application of New York law. The Court should reinstate the trial court’s dismissal of all claims against EY as barred under New York law.

WSSA. If the Court were to affirm the Court of Appeals’ choice of Washington law (which it should not), it should hold the Court of Appeals misapplied the seller liability provision of the WSSA by defining “seller”

to include individuals and firms that meet no sensible definition of the term. FutureSelect never alleges EY had *any* involvement in selling the securities it purchased; instead, FutureSelect claims EY is a seller of securities because it performed an audit and issued an audit report—ordinary professional services this Court has found inadequate to support a claim of seller liability under the WSSA. *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 149, 787 P.2d 8 (1990). Given the allegations of the complaint, which address only the audit and the report flowing from it, the trial court properly resolved the issue on a CR 12(b)(6) motion. Unless this Court reverses, the limits on WSSA seller liability established in *Hines* will be toothless, and courts will be forced to expend resources on unmeritorious claims that deserve to be terminated at the pleadings stage.

II. ARGUMENT

A. The Trial Court Properly Dismissed the Claims against EY under New York Law.

1. New York Has the “Most Significant Relationship” to the Claims against EY.

“To determine which state’s law applies to a particular issue, Washington has adopted the ‘most significant relationship’ test as set out in the Restatement (Second) of Conflict of Laws § 145.” *Rice*, 124 Wn.2d at 213. “The approach is not to count contacts, but rather to consider which contacts are most significant and to determine where those contacts are found.” *Baffin Land Corp. v. Monticello Motor Inn*, 70 Wn.2d 893, 900, 425 P.2d 623 (1967); *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 581, 555 P.2d 997 (1976) (same); *Southwell v. Widing Transp.*, 101

Wn.2d 200, 204, 676 P.2d 477 (1984) (same). As the Court of Appeals noted, “different issues in a single case arising out of a common nucleus of facts may be decided according to the substantive law of different states.” *FutureSelect Portfolio Mgmt. v. Tremont Grp. Holding*, 175 Wn. App. 840, 857 n.15, 309 P.3d 555 (2013) (citations omitted). Thus, the Court must separately assess choice of law as to the claims against EY.

In *Haberman*, the Court applied the Restatement choice of law principles to WSSA and misrepresentation claims (the claims FutureSelect asserts here) asserted against EY’s predecessor, Ernst & Whinney. The Court focused on the most “significant” factors: “(a) the place of injury; (b) the place where the conduct causing the injury occurred; (c) the residence of the parties; and (d) the place where the relationship is centered.” 109 Wn.2d at 159–60 (citing Restatement § 145). As to the WSSA claim, Washington had the “most substantial contacts” because the primary defendant resided in Washington, all defendants had “substantial business dealings in Washington,” and the alleged misrepresentations “emanated” from Washington. *Id.* at 134–35. As to the misrepresentation claim, Washington law governed because a “significant number of the parties” were Washington residents, the “rendering of allegedly fraudulent services” occurred in Washington, the parties’ relationship “centered” in Washington, and the “statements and reports containing the injurious misrepresentations originated in Washington.” *Id.* at 160.

The same choice of law factors and analysis compel the application

of New York law here. FutureSelect does not allege EY did *anything* in Washington. The conduct underlying FutureSelect’s claims occurred in, and emanated from, New York—where the Rye Funds in which FutureSelect invested were operated and managed; where the Rye Funds’ books and records were audited; and where Madoff operated his Ponzi scheme. *See* CP 2-5, 21-23 ¶¶ 2-4, 11-13, 87-88. Further, FutureSelect alleges its principal “visited Tremont regularly” in New York to discuss its investments in the Rye Funds. CP 11-12 ¶ 39. By contrast, FutureSelect does not allege EY visited Washington at all. And although FutureSelect alleges Tremont (*not* EY) made one trip to Washington, it alleges no misrepresentations during that one in-state contact. CP 9-10 ¶ 34. Finally, five defendants, including EY, are either headquartered or reside in New York. In short, all “substantial contacts with the subject matter of the case” revolve around New York. *See Haberman*, 109 Wn.2d at 134.

The only connection FutureSelect’s claims have with Washington is that FutureSelect has its principal place of business here and therefore received the alleged misrepresentations here—allegedly prompting it to invest more in New York in the Rye Funds.¹ But the mere fact “that one of the parties is domiciled ... in a given state will usually carry little weight of itself.” *Rice*, 124 Wn.2d at 215 (quoting Restatement § 145 cmt. e). Because “there may be little reason in logic or persuasiveness to say that one state rather than another is the place of injury,” Restatement

¹ Although FutureSelect is based in Washington, it is a Delaware entity. CP 5-6 ¶¶ 15-18. Further, FutureSelect filed letters in the trial court showing many of its investors live outside Washington, including at least some in New York. CP 3142, 2939, 2963, 2991.

§ 145 cmt. e, “the place of injury is *less* significant in the case of fraudulent misrepresentations.” *Id.* cmt. f (emphasis added); *see also id.* § 148 cmt. c (“the place of loss does not play so important a role in the determination of the law governing actions for . . . misrepresentations”). In fact, this Court has rejected the application of forum law where, as here, the “only significant contact with Washington . . . is Plaintiff’s residency in Washington.” *Rice*, 124 Wn.2d at 215; *see also Werner v. Werner*, 84 Wn.2d 360, 370, 526 P.2d 370 (1974) (applying California law; plaintiffs resided and bought property in Washington, but the defendant notaries resided in California and the alleged tortious conduct occurred there).

Thus, the fact that FutureSelect has its principal place of business and claims injury in Washington does *not* alone justify Washington law. Such a rule “would mean that Washington law would be applied in all tort cases involving any Washington resident, regardless of where all the activity relating to the tort occurred.” *Rice*, 124 Wn.2d at 216. Further, in *Haberman*, this Court found the location of the audit services—*not* the residences of those who acted on the alleged misstatements—to be the most significant contact for WSSA and misrepresentation claims against EY’s predecessor. *See Haberman*, 109 Wn.2d at 160. Accepting the decision below would thus endorse a result-oriented “heads I win, tails you lose” choice of law approach, which runs counter to the Restatement.

Neither the Court of Appeals nor FutureSelect has offered any reason why the Court should revisit, much less revise, the principles

adopted in *Rice* and *Haberman*. In fact, allowing plaintiff's state of residence and the alleged locus of injury to dictate choice of law would undermine the purpose of the Restatement test, i.e., to promote "certainty, predictability and uniformity of result" and "ease in the determination and application of the law to be applied." Restatement § 6, Choice-of-Law Principles; see *Rice*, 124 Wn.2d at 216 ("[a]pplying Oregon law achieves a uniform result for injuries caused by products used in the state of Oregon and predictability for manufacturers whose products are used or consumed in Oregon"). Consistent with these principles, this Court in *Haberman* did not focus on the many places where investors in WPPSS bonds may have received the alleged misrepresentations; instead, it considered the place where the professional services were performed, where the parties' relationship "centered," and where the audit reports "originated." 109 Wn.2d at 160. See *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 552 (W.D. Wash. 2008) (Washington gives "greater weight to ... the location of the source of the injury" in misrepresentation cases). An even-handed application of those principles compels the application of New York law.

Applying New York law in this situation would put Washington in the mainstream of American jurisprudence—an appropriate result, given the Court's adoption of the Restatement principles for resolving choice of law. In dealing with claims of allegedly misleading audit reports, courts following the Restatement apply the law of the state where auditing services were performed, even when plaintiff claims it relied on and was

injured by the audit report in another state. “The trend of the authority in that direction is ... consistent with the notion that professionals practicing in a certain state should be able to practice in reliance upon the law of that state.” *In re Am. Int’l Grp., Inc.*, 965 A.2d 763, 820-21 (Del. Ch. 2009) (New York law applied where auditor “performed most of its audit services in New York, and performed no acts in Delaware that are relevant to the claims against it”). Thus, in *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1536-37 (10th Cir. 1996), the Tenth Circuit applied Colorado law, even though plaintiff “received and relied on the representations in Michigan,” because both accounting firms “performed their work ... in Colorado.” Other courts reach the same result. *See, e.g., DiLeo v. Ernst & Young*, 901 F.2d 624, 628 (7th Cir. 1990) (auditor “performed its audit in Illinois, so [Illinois] law is the right one to consult”); *KPMG Peat Marwick v. Asher*, 689 N.E.2d 1283, 1286-87 (Ind. Ct. App. 1997) (Missouri law applied where “accountant-client relationship existed in Missouri, and Peat Marwick’s auditing work ... was conducted in Missouri”); *HSA Residential Mortg. v. Casuccio*, 350 F. Supp. 2d 352, 364-66 (E.D.N.Y. 2003) (New York law applied because “the negligent misrepresentation claim arises from the audit work and preparation of audit papers ... performed in New York”); *In re Cendant Corp. Sec. Litig.*, 139 F. Supp. 2d 585, 602–04 (D.N.J. 2001) (Connecticut law applied where “audits were performed by Connecticut accountants based out of a Connecticut E&Y office,” despite harm in New Jersey).

FutureSelect cites a single case involving claims against an auditor. *See* Reply Br. at 8 (citing *Prospect High Income Fund v. Grant Thornton, LLP*, 203 S.W.3d 602, 610 (Tex. Ct. App. 2006)). But *Prospect* contains only a conclusory statement that “the trial court would not have erred in applying Texas law” when it dismissed claims for lack of standing under Texas law, even though the claims involved a Pennsylvania audit. And *Prospect* relied on *Grant Thornton LLP v. Suntrust Bank*, 133 S.W.3d 342, 361 (Tex. Ct. App. 2004), which discussed the issue in depth and reached the *opposite* result, consistent with courts across the country. In *Suntrust*, the court applied Texas law to claims asserted by non-Texas residents because “Grant Thornton performed the audit at issue” in Texas, and “the alleged misrepresentations and omissions at issue w[ere] prepared” in Texas, even though they were received and relied upon in other states.

This Court should follow *Haberman* and, consistent with courts across the country, hold FutureSelect’s claims are governed by the law of New York—where the services were performed, the audit reports originated, and FutureSelect made its investments.

2. New York Law Bars the Claims against EY.

Because New York law governs, the WSSA does not apply, and FutureSelect fails to state a New York statutory claim against EY. *See Haberman*, 109 Wn.2d at 134 (the “most significant relationship” test determines whether WSSA applies). On this issue, EY defers to the Supplemental Brief of Tremont Group Holdings, et al.

FutureSelect’s negligent misrepresentation claim against EY also

fails under New York law. Because FutureSelect waited more than six years after EY issued the last audit opinion at issue, New York's three year limitations period bars its claim. *See* EY Resp. Br. 15 (citing *Rosenbach v. Diversified Grp., Inc.*, 12 Misc.3d 1152(A), 2006 WL 1310656, at *4 (N.Y. Sup. Ct. May 10, 2006) (negligent misrepresentation claim against auditor governed by 3-year limitations for malpractice actions); *Ackerman v. Price Waterhouse*, 84 N.Y.2d 535, 541, 644 N.E.2d 1009 (1994) (in "a malpractice action against an accountant, the claim accrues upon the client's receipt of the accountant's work product," with no discovery rule)). Further, aside from the time-bar (which FutureSelect never seriously contested), FutureSelect fails to allege facts sufficient to satisfy New York's near-privity requirement for misrepresentation claims against an auditor. *See* EY Resp. Br. 16-20 (citing *Credit Alliance Corp. v. Arthur Anderson & Co.*, 65 N.Y.2d 536, 546, 483 N.E.2d 110 (1985) (requiring relationship "so close as to approach that of privity"))).

B. Even if Washington Law Applies, FutureSelect Failed to State a "Seller" Claim under the WSSA.

1. Washington Follows the Pre-1987 Federal Substantial Factor Test for Seller Liability.

The WSSA provides a rescission cause of action for buyers who purchase securities based on a seller's material misrepresentations:

Any person, who offers or sells a security in violation of any provisions of RCW 21.20.010² ... is liable to the person buying the security from him or her, who may sue ... to recover the consideration paid for the security

² RCW 21.20.010 forbids "any device, scheme or artifice to defraud" or "untrue statement of a material fact" in connection with the purchase or sale of any security.

RCW 21.20.430(1). The statute allows an aggrieved buyer to tender the security back to the seller and obtain a refund of the price, plus interest. *Id.* The WSSA also imposes joint and several secondary liability on those who materially aid in the transaction and have any one of several specified relationships with a seller, such as an officer, director, or partner. RCW 21.20.430(3). Thus, the universe of persons potentially liable for rescission under the WSSA turns on the reach of the term “seller.”

But the WSSA does not define seller. When this Court defined the term in 1987, it looked to federal law, as RCW 21.20.430 was modeled on Section 12(2) of the federal Securities Act of 1933. At the time, two federal circuits “require[d] privity between a plaintiff-purchaser and defendant-seller” to establish primary liability under Section 12(2); the privity approach imposed liability “only on the literal seller of a security who passes title directly to the plaintiff.” *Haberman*, 109 Wn.2d at 125-26 (citations omitted). Most circuits, however, “construed the term seller to include those whose participation in the sale was a substantial factor in causing the transaction to take place.” *Id.* at 127 (citations omitted).

Weighing the competing views, this Court expressed concern that defining seller to require actual privity would lead to anomalous results. For example, in *Haberman*, WPPSS sold its bonds to underwriters, and the underwriters then sold the bonds “to plaintiffs and intervenors.” *Id.* at 132. If privity were the test, the *Haberman* plaintiffs could recover *only* against the underwriters, “cutting off all potential claims against the issuer

of the bonds and others acting together with the issuer who were the actual beneficiaries of the sale proceeds,” and thereby immunizing the issuer from liability “regardless of its culpability.” *Id.* Rather than accept that unsatisfactory outcome, the Court decided that the substantial contributive factor test “prevailing in the federal circuits provides the best guidance for our analysis of seller liability under RCW 21.20.430(1).” *Id.* at 130.

Although the federal test adopted in *Haberman* did not require direct privity, this Court emphasized it intended to extend seller liability only slightly, to “those parties who have the attributes of a seller”:

Our substantial contributive factor analysis simply expands the strict privity approach to sellers so as to include those parties who have the attributes of a seller ... but who would escape primary liability for want of privity.

Id. at 132-33. Thus, although *Haberman* declined to adopt a privity standard, it hewed to the words of the statute: the term seller refers only to those who have the *attributes* of a seller—but happen not to be in privity, such as the bond issuer in *Haberman*. The “substantial contributive factor” test does not expand liability to those who may in some way contribute to a securities transaction but *lack* “the attributes of a seller.”

A year later, the federal standard tightened. In *Pinter v. Dahl*, 486 U.S. 622 (1988), the United States Supreme Court adopted a stricter test for seller liability under Section 12(1) of the Securities Act of 1933, focusing on whether the defendant solicited the sale for financial gain. But this Court declined to follow *Pinter*. In *Hoffer v. State*, 113 Wn.2d 148, 150-52, 776 P.2d 963 (1989), the Court “note[d]” *Pinter* involved

Section 12(1) of the 1933 Act, while WSSA's primary liability provision was modeled on Section 12(2).³ The Court also criticized *Pinter*'s "strict privity analysis," focusing on the potential insulation from liability for "issuers in a firm commitment underwriting," which might "leave a gap in the coverage of the state statute that does not exist in the federal." *Id.*

2. An Auditor Providing Routine Services to a Client Is Not a "Seller" under the WSSA.

This Court thus adopted, and continues to follow, a pre-existing federal test for seller liability, which seven federal circuits followed in 1987. *Haberman*, 109 Wn.2d at 127 (citing cases). Those courts emphasized, as did this Court in *Haberman*, that a party would not be treated as a seller under the WSSA unless it had an active role in the actual sales transaction through which the plaintiff obtained the securities at issue, i.e., had "the attributes of a seller." Thus, *Lawler v. Gilliam*, 569 F.2d 1283, 1288 (4th Cir. 1978), the first illustrative case *Haberman* cited, found a substantial factor to be someone "who actively solicits an order, participates in the negotiations, or arranges the sale." Similarly, *Pharo v. Smith*, 621 F.2d 656, 665-67 (5th Cir. 1980), also cited in *Haberman*, spoke in terms of active "participation in the buy-sell transaction."

Under this test, the federal courts consistently declined to find a professional, such as an auditor, liable as a seller for rendering ordinary professional services. In *Ahern v. Gaussoin*, 611 F. Supp. 1465, 1485 (D. Or. 1985), the court held an accounting firm was *not* a substantial factor in

³ Courts now agree *Pinter* also applies to claims under Section 12(2). See, e.g., *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 535 (9th Cir. 1989).

the sales transaction, even though it (a) issued clean audit opinions, *id.* at 1472; (b) assisted in preparing a securities registration statement, *id.* at 1485; and (c) gave a speech to investors reporting it had given the client “a clean bill of health.” *Id.* at 1486. In *Hudson v. Capital Management International*, 1982 WL 1385, at *5-6 (N.D. Cal. 1982), plaintiffs alleged an accounting firm participated in a defendant’s operations, “opined in the [offering] circulars,” and was “used to locate suitable investors.” *Id.* But the court granted a motion to dismiss a seller liability claim, given the absence of any allegation of “actual participation in the selling process.” *Id.* at *5. And in *In re Activision Securities Litigation*, 621 F. Supp. 415, 420-21 (N.D. Cal. 1985), the court granted a Rule 12(b)(6) motion to dismiss seller liability claims against the issuer’s auditor and others, even though the defendants planned the offering, drafted offering documents, and negotiated the offering price. *Id.* at 420. To satisfy the substantial factor test, the court held, a plaintiff must allege facts showing the defendant “actively solicit[ed] an order, participate[d] in the negotiations, or arrange[d] the sale.” *Id.* at 421 (citation and quotations omitted).

FutureSelect belittles this body of federal law as “much older cases from outside Washington.” Consol. Answer to Pets. at 23 n.9. But this is the body of law the Court endorsed in *Haberman*. Further, this Court followed their reasoning in declining to label outside professionals as sellers when they do not engage in direct marketing activity. In *Hines v. Data Line Systems, Inc.*, 114 Wn.2d 127, 149, 787 P.2d 8 (1990), a law

firm (Perkins Coie) advised an issuer with respect to an offering, helped draft the offering documents, and issued an opinion letter to the underwriter. Despite this extensive and direct involvement in the securities offering process, this Court concluded the law firm was *not* a seller. Under the substantial contributive factor test, professionals whose role includes “active participation *in the sales transaction*” qualify as sellers; but those whose role “is confined to rendering routine professional services in connection with an offer” of securities do not satisfy the “substantial contributive factor” test. *Id.* at 149 (emphasis added).

Plaintiffs in *Hines* alleged the law firm there had far more direct involvement in the securities offering process than FutureSelect alleges EY had here. FutureSelect alleges only that EY issued a clean audit opinion, an act with significance independent of the process of offering and selling securities. By contrast, the law firm in *Hines* advised the company on whether to disclose its CEO’s health problems to investors and helped draft Data Line’s disclosure documents. *Id.* at 132-34. The law firm also issued a letter to the underwriter saying it was not aware of any misstatements or omissions in the offering materials. *See Hines v. Data Line Sys., Inc.*, 53 Wn. App. 283, 286, 766 P.2d 1109 (1989). Applying the substantial contributive factor test, this Court concluded the law firm was not a seller under the WSSA: there was “no evidence to indicate [the firm] had any personal contact with any of the investors or was in any way involved in the solicitation process.” *Hines*, 114 Wn.2d at

149. The law firm’s alleged participation in defrauding investors through its professional services did not transform it into a seller. *Id.* at 149-50.

Significantly, *Hines* relied on both *Ahern*, 611 F. Supp. at 1485, and *Activision*, 621 F. Supp. at 420-21, in applying the “substantial contributive factor” test to professionals. *See* 114 Wn.2d at 149. Despite this, neither the Court of Appeals nor FutureSelect comes to grips with the federal cases rejecting seller liability for auditors. Instead, the Court of Appeals relies on the Supreme Court’s decision in *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984), and an Eastern District of Washington decision quoting it, *In re Metropolitan Securities Litigation*, 532 F. Supp. 2d 1260, 1301 (W.D. Wash. 2007).

The Court of Appeals’ reliance on these two cases manifests a profound misunderstanding of the *Haberman* substantial factor test. *Arthur Young* has nothing to do with private securities litigation at all, much less with the issues in this case. *Arthur Young* considered whether the work product doctrine protected an accountant’s work papers from disclosure to the IRS. 465 U.S. at 817-18. In *Metropolitan*, a federal district judge quoted *Arthur Young* to the effect that auditors “assume a public responsibility transcending any employment relationship with the client.” 532 F. Supp. 2d at 1301. The court therefore concluded the “natural roles of ... auditors ... go beyond ‘routine services’ rendered to a client.” *Id.* (citing *Haberman*, 109 Wn.2d at 25-26). But the “routine services” language in *Hines* was not intended to address the public

importance of the professional’s “natural role[]”; rather, it was intended to distinguish a professional’s customary work for its client from non-routine “active participation in the sales transaction” or “the solicitation process.” *Hines*, 114 Wn.2d at 149. Nothing in *Metropolitan* suggests the “natural roles” of auditors involve participating in securities sales or solicitations—a proposition that, if applied literally, would mean any auditor of a company issuing securities would presumptively be a substantial contributive factor to its client’s securities sales.⁴ The federal precedent adopted in *Haberman* and relied upon in *Hines* holds *exactly* the opposite.

The Court should repudiate the Court of Appeals’ reading of *Metropolitan* as an inaccurate statement of Washington law and reiterate that *Haberman* and *Hines* mean what they say: seller liability reaches only professionals with the attributes of a seller, not those who render ordinary professional services and do not engage in sales or marketing.

3. Dismissal under CR12(b)(6) Is Proper When a Plaintiff Alleges and Argues Nothing beyond Routine Professional Services.

The Court of Appeals reversed the CR 12(b)(6) dismissal of FutureSelect’s WSSA seller claim based on the “factual nature of the ‘substantial factor’ test.” 175 Wn. App. at 871. FutureSelect likewise argues that whether an auditor acted as a WSSA seller is a question of fact precluding “resolution in the CR 12(b)(6) context.” Consol. Answer to

⁴ The “primary function” of a CPA is “financial auditing.” *Bily v. Arthur Young & Co.*, 3 Cal.4th 370, 379-80, 834 P.2d 745 (1992). See *Blake v. Dierdorff*, 856 F.2d 1365, 1371 (9th Cir. 1988) (describing audit process). An auditor has responsibility only to express an opinion on financial statements prepared by its client; the financial statements themselves “are management’s responsibility.” Auditing Standards, AU § 110.03.

Pets. at 20. In fact, the trial court properly applied CR 12(b)(6) in rejecting FutureSelect's attempt to extend seller liability under the WSSA to EY's routine professional audit services, for three reasons.

First, the purpose of CR 12(b)(6) is to “weed[] out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy.” *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 102, 233 P.3d 861 (2010). Courts (and defendants) should not be required to devote their limited resources to the litigation of claims that fail as a threshold matter even if one accepts the truth of the complaint's factual allegations.

FutureSelect's complaint refers *only* to EY's audits and audit reports for the Rye Funds. CP 4-5, 8, 13, 20-23, 36-38, 45-46. On appeal, FutureSelect still relies only on EY's audits in asserting EY substantially contributed to FutureSelect's securities purchases. *See* FutureSelect Opening Br. 10-11, 29-30. But FutureSelect does *not* contend EY solicited a purchase, nor does it claim EY made sales presentations, visited investors, or engaged in *any* selling activity. *Id.* FutureSelect's naked assertion—repeated by the court below, 175 Wn. App. at 870-71—that EY's auditing service was a “substantial factor contributing to FutureSelect's investment,” CP 36-37 ¶ 145, is a legal conclusion that cannot prevent CR 12(b)(6) dismissal. *Haberman*, 109 Wn.2d at 120.

An accountant who merely provides professional audit services is not a seller under the WSSA. Because Washington law “does not provide a remedy” even if the Court accepts FutureSelect's factual allegations

criticizing the audit, the trial court properly dismissed the WSSA claim against EY. *McCurry*, 169 Wn.2d at 102. *See also Kinney v. Cook*, 159 Wn.2d 837, 845-46, 154 P.3d 206 (2007) (reinstating trial court order granting CR 12(b)(6) motion to dismiss WSSA claim).⁵

Second, this matter differs from the CR 12(b)(6) cases relied upon by the Court of Appeals and FutureSelect. *See* 175 Wn. App. at 871 (citing *Haberman*, 109 Wn.2d at 119; *Hoffer v. State*, 110 Wn.2d 415, 430, 755 P.2d 781 (1988)); Consol. Answer to Pets. at 20 (same). In both *Haberman* and *Hoffer*, claimants contended the professionals' roles involved much more than an allegedly misleading audit report. In *Haberman*, the claimants contended the "professionals made personal visits and telephone calls on several occasions to discuss the bonds." 109 Wn.2d at 163-64. Their briefs asserted the professionals "made *direct sales presentations* to some of the complaining parties during tours of WPPSS facilities in the Pacific Northwest and meetings in New York." Barbara L. Schmidt, Note, *Expanding Seller Liability Under the Securities Act of Washington*, 63 WASH. L. REV. 769, 783 n.140 (1988) (emphasis added). In *Hoffer*, the State Auditor was also involved in the WPPSS transactions. 110 Wn.2d at 422-23. Although aspects of the Auditor's

⁵ Washington courts often affirm CR 12(b)(6) dismissals where a plaintiff fails to allege facts supporting elements of a claim. *See, e.g., Havsy v. Flynn*, 88 Wn. App. 514, 945 P.2d 221 (1997) (party must "allege and prove, without violating CR 11... facts constituting" each element; affirming dismissal); *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 764, 881 P.2d 216 (1994) (although courts "may consider hypothetical facts," tort claims were dismissed as preempted under ERISA because complaint limited allegations to covered pension plan); *Woodrome v. Benton Cnty.*, 56 Wn. App. 400, 403-04, 783 P.2d 1102 (1989) ("court[s] may consider hypothetical facts," but plaintiff's "complaint asserts a particular negligent act as the only grounds for relief").

work resembled a private audit, *id.* at 430 n.4, the Auditor acted “pursuant to noncommercial and uniquely governmental duties,” rather than performing a routine audit of a public company. *Id.* at 422.

But most important, *Haberman* and *Hoffer* considered complaints drafted *before* this Court gave guidance on the limits of seller liability—and that swayed the Court: “When an area of the law involved is in the process of development, courts are reluctant to dismiss an action on the pleadings alone by way of a CR 12(b)(6) motion.” *Haberman*, 109 Wn.2d at 120. *See Hoffer*, 110 Wn.2d at 430 (“bondholders’ allegations do not address the[] factors” adopted in *Haberman*). By the time FutureSelect sued, however, this Court had clarified a professional is not a seller if it renders only ordinary services without involvement in the sales or solicitation process. *Hines*, 114 Wn.2d at 149. FutureSelect knew what it had to allege to state a WSSA seller claim—but it could not do so.

Third, the Court should not rewrite FutureSelect’s complaint to hypothesize a non-auditor role for EY that FutureSelect—mindful of its CR 11 obligations—chose not to assert. The Court may “consider hypothetical facts proffered by the plaintiff” to determine whether they are “legally sufficient to support plaintiff’s claim.”⁶ *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214-15, 118 P.3d 311 (2005) (citation and quotations omitted). But courts consider only hypothetical facts consistent with the allegations of the complaint and *actually proffered* by the plaintiff. *Id.* at

⁶ Washington’s pleading requirements differ from the federal courts’ “plausibility” standard. *See McCurry*, 169 Wn.2d at 102-03 (distinguishing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

215; *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (“a court may consider hypothetical situation *asserted by* the complaining party”) (emphasis added). Otherwise the courts would usurp the parties’ role and provide an improper “advisory ruling.” *West v. Thurston Cnty.*, 169 Wn. App. 862, 867 n.3, 282 P.3d 1150 (2012). FutureSelect has never presented even hypothetical facts to save its WSSA claim. Under *Hines*, FutureSelect has no WSSA claim against EY unless it can allege, without violating CR 11, facts from which one could infer EY performed a role going *beyond* routine professional services and giving it “the attributes of a seller.” But FutureSelect rests only on insufficient allegations that EY performed audits and issued “unqualified audit opinions on the Rye Funds.” CP 8 ¶ 27. *See also* CP 4, 22, 36-37; *compare* EY Pet. at 18-19 (identifying examples of colorable WSSA “seller” allegations).

Because FutureSelect “can prove no set of facts, consistent with [its] complaint, which would entitle [it] to relief,” *Haberman*, 109 Wn.2d at 120, the trial court properly dismissed its WSSA seller claim.

III. CONCLUSION

For these reasons, EY respectfully asks the Court to reverse the Court of Appeals and affirm the trial court’s dismissal of all claims against it pursuant to New York law. In the alternative, EY asks the Court to reverse the Court of Appeals and affirm the trial court’s dismissal of FutureSelect’s WSSA claim asserting EY’s primary liability as a seller.

RESPECTFULLY SUBMITTED February 7, 2014.

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CERTIFICATE OF SERVICE

I, Crystal Moore, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct. I am over the age of 18 years and not a party to the within cause. I am employed by the law firm of Davis Wright Tremaine LLP and my business and mailing addresses are both 1201 Third Avenue, Suite 2200, Seattle, Washington 98101-3045.

On February 7, 2014, I caused to be served the attached document entitled **ERNST & YOUNG LLP'S SUPPLEMENTAL BRIEF** to the following individuals:

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I certify under penalty of perjury under the laws of the State of
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Executed this 7th day of February, 2014, at Seattle, Washington.


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Supreme Court Case No. 89303-9*

Dear Clerk:

Attached please find Ernst & Young LLP's Supplemental Brief.

Thank you.

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