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SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs/Respondents,

v.

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

Defendants/Petitioners.

**SUPPLEMENTAL BRIEF OF RESPONDENTS
FUTURESELECT PORTFOLIO MANAGEMENT, INC.,
FUTURESELECT PRIME ADVISOR II LLC,
THE MERRIWELL FUND, L.P. and TELESIS IIW, LLC**

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I. INTRODUCTION

This appeal asks first, and principally, whether Washington law applies to misrepresentations made in Washington, relied upon in Washington, that induced investments from Washington by Washington-based investment funds managed by a Washington-resident whose investors are, in large part, Washington retirees robbed by Bernard Madoff. It does.

Petitioners Tremont Group Holdings, Inc. and Tremont Partners, Inc. (collectively, “Tremont”), solicited Plaintiffs’¹ investment by making in-person misrepresentations to Plaintiffs in Washington that Tremont did extensive due diligence on Bernard Madoff. Tremont’s false statements—Tremont in fact conducted virtually *no* due diligence on Madoff—caused Plaintiffs to elect, in Washington, to invest in the biggest fraud in American history. Plaintiffs’ reliance, and the harm to Plaintiffs and their investors, took place entirely in Washington.

Tremont’s argument that New York law applies—and requires dismissal—ignores precedent, policy and sense. No case has limited, as Tremont argues, the factors a court considers in the “significant relationship test” to only those that concern New York-based defendants

¹ The Plaintiffs are FutureSelect Portfolio Management, Inc., FutureSelect Prime Advisor II, LLC, The Merriwell Fund, L.P., and Telesis IIW, LLC (collectively, “FutureSelect”).

and their internal activities. Consideration and balancing of the full range of factors described in this Court's precedents and the Restatement (Second) of Conflicts sections 145 and 148 not only honors the Washington State Securities Act's ("WSSA") broad remedial purpose of protecting Washington investors, but compels the Court of Appeals' conclusion: that Washington's contacts to the action are more numerous and more significant than New York's.

The appeal also concerns the sufficiency of the Complaint against Petitioner Oppenheimer Acquisition Corporation ("Oppenheimer"), one of the principals who controlled Tremont's activities in Washington, and against Petitioner Ernst & Young LLP ("E&Y"), who audited Tremont. Jurisdiction is proper over Oppenheimer under the specific provision of Washington's long-arm statute for principals. Oppenheimer openly promoted its control of Tremont and connection with Madoff. Oppenheimer, in fact, bought Tremont specifically because of its access to Madoff and promoted its control of Tremont in federal filings. *See* CP 15-16 (MassMutual and Oppenheimer bought Tremont to enter the then-extraordinarily lucrative hedge fund market. Tremont's access to Madoff was one of its greatest selling points as it was a vehicle for investments with "hard to access" managers.); CP 19 (MassMutual and Oppenheimer were listed as "control persons" on Tremont's registration with the SEC.).

Washington's long arm statute should and does provide for jurisdiction in these circumstances.

E&Y's role was precisely to protect investors like Plaintiffs. E&Y acted as the "public watchdog" responsible to determine whether there was a material misstatement due to error or *fraud*, and whose "ultimate allegiance" was owed to the public, including "creditors and investors" like Plaintiffs in this case. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984). E&Y's liability under the WSSA is clearly and sufficiently pleaded.

This case provides the Court an opportunity to confirm that Washington law applies and that Washington courts have jurisdiction over claims of securities fraud involving harm to Washington investors. The Court of Appeals should be affirmed.

II. STATEMENT OF THE CASE

FutureSelect is a group of Washington-based investment entities that invested in feeder funds known as the Rye Funds. The Rye Funds are operated and managed by Tremont, which has its principal place of business in New York. Tremont is a fully owned subsidiary of Oppenheimer, which is owned by MassMutual.

FutureSelect first invested in the Rye Funds after a Tremont representative who traveled to Washington solicited its Washington-based

principal. In person in Washington, and in subsequent communications, Tremont made numerous misrepresentations to FutureSelect about the due diligence it performed on Madoff. Contrary to its representations, Tremont had done no such due diligence.

Tremont's auditor E&Y also made misrepresentations to FutureSelect. Specifically, E&Y sent FutureSelect audit reports that certified the Rye Funds' assets and stated that the Rye Funds' financial statements were "free of material misstatement." In fact, the Rye Funds did not have the assets E&Y certified and their financial statements were materially misstated. In reliance on these misrepresentations, FutureSelect decided to invest, maintain and increase its investment in the Rye Funds. When Madoff's fraud was revealed, FutureSelect lost its entire investment, totaling approximately \$190 million.

The Court of Appeals, Division I, held that the trial court had improperly dismissed twelve of the fourteen counts in FutureSelect's Complaint. The Court identified ten bases for its opinion. *FutureSelect*, 175 Wn. App. at 851. The Petitioners, however, have sought review of only three of these issues in their petitions: (1) whether Washington law should apply; (2) whether FutureSelect's WSSA claim against E&Y was

adequately pled; and (3) whether Oppenheimer was subject to *specific* personal jurisdiction.²

III. ARGUMENT

A. Washington Law Applies

In seeking application of New York law, Petitioners ask this Court to hold that Washington retirees have no remedy under Washington law (and no remedy anywhere) when misrepresentations are made in Washington, received and relied upon in Washington, and inflict injury on Washington citizens in Washington. *See* Tremont Pet. at 19 (reversal of Court of Appeals’ decision regarding choice of law “would result in most (if not all) of the claims in this case being dismissed”). Washington law does not so abandon its citizens who make investments based on misrepresentations. Instead, consistent with Washington’s interest in protecting its investors, *see, e.g., Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 125-26 (1987) (“the WSSA is intended to protect investors”), the Court of Appeals properly concluded that

² Petitioners have not challenged the sufficiency of FutureSelect’s WSSA claims against Tremont, MassMutual and Oppenheimer, agency claims against MassMutual and Oppenheimer, apparent agency claim against MassMutual or FutureSelect’s common law negligent misrepresentation claims against Tremont and E&Y. However, as discussed below, should New York law apply, FutureSelect and its investors would have no statutory remedy and likely no remedy under common law.

Washington has the “most significant relationship” to FutureSelect’s claims.

1. The “Most Significant Relationship” Test Includes Factors from Restatement (Second) of Conflicts Sections 145 and 148

Tremont argues that New York law applies because the “most significant relationship” test comprises four factors *exclusively*: (1) where the defendant issued securities; (2) where the defendants reside; (3) where the parties had substantial business dealings; and (4) from where the misrepresentations “emanated.” Tremont Pet. at 11. The *Haberman* court found that these factors were sufficient to require the application of Washington law. *Id.* at 134-35. This Court, however, has not held that the analysis of contacts is limited to these four factors. And with good reason—it would undermine Washington law and public policy to limit a court’s assessment to a *defendant’s* significant contacts while excluding other relevant contacts of the plaintiff.

Instead, sections 145 and 148 of the Restatement (Second) Conflicts of Laws provide the foundation of any conflict analysis in a misrepresentation action. Section 145 provides the “general principles of the ‘most significant relationship’ test” and is “supplemented by related sections of the Restatement” (including section 148), which sections apply to “particular categories of claims because it is possible ‘to state rules of

greater precision' as to those categories." *FutureSelect*, 175 Wn. App. at 857 (quoting Restatement § 145 cmt. a).

Accordingly, and consistent with virtually every court that has confronted the issue,³ the Court of Appeals concluded that when applying the "most significant relationship" test to FutureSelect's misrepresentation claims, it should consider the broad range of "significant contacts" factors listed in section 148.⁴ The Court of Appeals noted: "Section 148 is best viewed as a refinement of the section 145 criteria, emphasizing more precise factors relevant to claims of misrepresentation or fraud. This is the express intent of the drafters of the *Restatement* and is consistent with decisions applying Washington law." *FutureSelect*, 175 Wn. App. at 859.

The application of the section 148 factors is wholly consistent with this Court's precedent that urges reference to section 145, *see Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580 (1976), and specifically

³ *See, e.g., Carideo v. Dell, Inc.*, 706 F. Supp. 2d 1122, 1128-29 (W.D. Wash. 2010); *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 551 (W.D. Wash. 2008) (same); *Trumpet Vine Inv., N.V. v. Union Capital Partners I, Inc.*, 92 F.3d 1110, 1118 (11th Cir. 1996); *Atlantic City Elec. Co., Inc. v. Estate of Riccardo*, 682 F. Supp. 2d 498, 504 (E.D. Pa. 2010); *Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349, 355 (Tex. App. 2003); *Value House, Inc. v. MCI Telecomms. Corp.*, 917 F. Supp. 5, 6 (D.D.C. 1996). *See also In re Tremont Secs. Law, State Law & Ins. Litig.*, 2013 WL 2257053 (S.D.N.Y. May 23, 2013), at *8 (considering sections 145 and 148 when deciding negligent misrepresentation claim against Tremont for misrepresentations concerning due diligence of Madoff).

⁴ Even had the Court of Appeals limited itself to the factors in section 145, those factors point strongly to the application of Washington law. *See* Restatement § 145 (factors to be considered include place of injury and place where the conduct causing the injury occurred).

instructs courts to consider the Restatement provisions that, like section 148, apply the most significant relationship test for specific actions. *See Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 735-36 n.6 (2011) (remanding and directing Court of Appeals “to review the trial court’s choice of law ruling, giving application to the *Restatement (Second) of Conflict of Laws* § 146 (1971)”). *See also Zenaida-Garcia v. Recovery Sys. Tech., Inc.*, 128 Wn. App. 256, 263-64 (2005) (quoting Restatement sections 145 and 146 for choice of law in personal injury case), *review denied* 156 Wn. 2d 1026 (2006); *Bush v. O’Connor*, 58 Wn. App. 138, 144 (same), *review denied*, 115 Wn.2d 1020 (1990).

Accordingly, Washington federal courts applying Washington law to misrepresentation claims routinely look to section 148 for guidance. For example, in *Kelley*, 21 F.R.D. at 551, the Court held:

“Both parties agree that the Restatement applies, but Plaintiffs contend section 145 applies, while Defendant relies on section 148. Section 145 sets out the general tort principles, while section 148 elaborates on section 145 with regard to fraud and misrepresentation claims.

Consideration of both sections is appropriate.”

(emphasis added).

More recently, in *Carideo*, 706 F. Supp. 2d at 1128-29, the court held:

“[w]here reliance upon false or fraudulent representations or advertising is a substantial factor in inducing a plaintiff and proposed class members to purchase a defendant’s goods or services,” section 148 applies. *Schnall*

v. AT&T Wireless Servs., Inc., 139 Wn. App. 280 (2007); see *Restatement (Second) Conflict of Laws* § 148.

Tremont's suggestion that this Court limited conflicts of law consideration to four factors is simply wrong. The *Haberman* opinion does not claim to set forth an exclusive or exhaustive list of contacts—in fact, *Haberman* set forth no list at all—and no court has read it as such. See, e.g., *Ito Int'l Corp. v. Prescott, Inc.*, 83 Wn. App. 282, 289 (1996) (citing *Haberman* for “most significant relationship” test then considering a variety of relevant contacts, including many not contemplated in *Haberman*, before concluding that Washington law applied); *Carideo*, 706 F. Supp. 2d at 1129; *Kelley*, 251 F.R.D. at 552-53.

Moreover, *Haberman* did not even refer to any section of the Restatement when applying the “most significant relationship” test to WSSA claims. Instead, *Haberman* focused on those factors tending to demonstrate that *Washington* had the “most significant relationship” to plaintiff's claims in that case. 109 Wn.2d at 134-35.

Interpreting *Haberman* to exclude other relevant contacts, would be unsound law and contrary to the type of “factual analysis” deemed “necessary for proper resolution” of a choice of law issue. *Southwell v. Widing Transp. Inc.*, 101 Wn.2d 200, 205 (1984). To strictly limit Washington courts to the four factors that proved dispositive in *Haberman*

would preclude consideration of other highly relevant contacts, including the residence of investors and the location of their reliance and injury.

As the Court of Appeals held in this case, and as this Court has held by directing courts to consider specific sections of the Restatement beyond section 145 applicable to the tort at issue, consideration of sections 145 and 148 is the law. The Restatement, as set forth in section 145, directs specific considerations for particular torts. Restatement § 145 cmt. a. There is every reason to consider the Restatement's specific, considered view of the appropriate factors for particular torts. By considering the specific factors for each cause of action, Washington courts have the best chance of getting the choice of law correct in each particular case. All torts are not the same and *exclusively* applying the same blanket factors to all torts would unnecessarily restrict the analysis. As this Court repeatedly has recognized, the detailed, serious consideration reflected by the Restatements of Law aids the Court in making the correct determination in each case. *See, e.g., Southwell*, 101 Wn.2d at 204-05.

Limiting a court's analysis exclusively to the four factors determinative in *Haberman* would undermine the purposes of the WSSA and Washington's policy of protecting Washington investors. That is not

the intent of the legislature, nor the effect of any decision made previously by any court in Washington.

2. The Court of Appeals Properly Determined that the Action’s “Most Significant Contacts” Were With Washington

Consistent with precedent, the Court of Appeals considered and weighed relevant contacts beyond those considered in *Haberman*. It did not “count contacts,” but used the guidance from sections 145 and 148 to assess “[t]he relative weight that will be given the various contacts.” Restatement § 148. Such consideration of the “relative weight” of contacts is precisely what this Court has required in prior cases. *See, e.g., Southwell*, 101 Wn.2d at 204 (“contacts are to be evaluated according to their relative importance with respect to the particular issue”).

The Court of Appeals carefully considered all the relevant New York contacts and correctly found that Washington State’s contacts were more significant:⁵

⁵ For the first time in its Petition to this Court, Tremont argues that FutureSelect’s reliance should be counted as a New York contact because it purportedly “relinquished assets” in New York. Tremont Pet. at 14. That argument makes no sense and is unsupported by any case. The place of reliance is where FutureSelect made the decision to invest in the Rye Funds—Washington. *See, e.g., CP* at 1.

Washington Contact	New York Contact
FutureSelect has principal place of business and is domiciled in Washington. 175 Wn. App. at 852, 860, 862.	Two defendants (Tremont Group Holdings and E&Y) have principal places of business in New York. <i>Id.</i> at 852.
Tremont representative visited FutureSelect in Washington to solicit initial investment. <i>Id.</i> at 853-54, 862.	After initial solicitation, FutureSelect's principal visited Tremont in New York and discussed Rye funds. <i>Id.</i> at 854.
False representations were made in Washington. <i>Id.</i> at 853-84.	False representations were made in New York. ⁶ <i>Id.</i> at 859-60 n.33, 860-61.
FutureSelect received misrepresentations in Washington. <i>Id.</i> at 860-62.	
FutureSelect's actions in reliance on the misrepresentations took place in whole or in part in Washington. <i>Id.</i> at 859-60 n.33, 862-63.	
FutureSelect suffered pecuniary loss in Washington. <i>Id.</i> at 862.	

The Washington contacts far outweigh the New York contacts in relative importance. As the Court of Appeals noted, “if the plaintiff is a corporation, the plaintiff’s principal place of business (here, Washington) is a contact ‘of substantial significance when the loss is pecuniary,’ as it is

⁶ Other purported “New York contacts” identified by Tremont (see Tremont Pet. at 13 (discussing location of “contractual relationship” and “tangible things”)) are not found in the record and cannot be considered. See RAP. 10.3(a)(6), 13.7(a). See also *Grobe v. Valley Garbage Serv., Inc.*, 87 Wn.2d 217, 228-29 (1976).

in this case.” 175 Wn. App. at 860 (quoting Restatement § 148 cmt. i). Further, the place of reliance is a more important contact than both where the misrepresentations were made and where they were received. *Id.* at 860-61 (quoting Restatement § 148 cmt. g).

3. Washington’s Interest in this Matter Overwhelmingly Favors Application of Washington Law

Washington’s interest in this case also overwhelmingly favors application of Washington law. Washington has a strong interest in protecting its investors. Absent the protections mandated by the legislature and common law, Washington’s citizens will have no recourse for hundreds of millions of dollars in losses.

As the Court of Appeals recognized, if the contacts between two states are evenly balanced, the court looks to each state’s interest in applying its law. *FutureSelect*, 175 Wn. App. at 857. *See Myers v. Boeing Co.*, 115 Wn.2d 123, 133 (1990) (holding that court “must first look to the contacts each forum has with the case” and “[i]f the contacts are evenly balanced, look to which forum has the greater interest”). “When one of two states related to a case has a legitimate interest in the application of its law and the other state has no such interest, clearly the interested state’s law should apply.” *Johnson*, 87 Wn.2d at 582-83.

Petitioners and FutureSelect agree that there are actual conflicts between New York and Washington law. Unlike Washington, New York does not provide a private right of action under its securities statute, the Martin Act, N.Y. Gen. Bus. Law § 352 *et seq.* See *CPC Int'l Inc. v. McKesson Corp.*, 70 N.Y.2d 268 (1987).⁷ The primary purpose of the Martin Act is to grant the New York Attorney General “broad regulatory and remedial powers” to root out securities fraud. *CPC Int'l*, 70 N.Y. at 277. That interest is not implicated here. New York’s statute, in short, is not focused on protecting investors. Should New York law apply, FutureSelect and its investors would have no statutory remedy. Nor would they likely have any remedy under common law because New York courts generally dismiss negligent misrepresentation claims brought by sophisticated investors on the basis that there could not have been reasonable reliance. See, e.g., *Emergent Capital Inv. Mgmt., LLC v. Stonepath Grp., Inc.*, 343 F.3d 189, 195 (2d Cir. 2003). In contrast, Washington courts impose no such bar on negligent misrepresentation claims, and instead hold that “[w]hether a party justifiably relied upon a

⁷ In December 2011, the New York Court of Appeals ruled in *Assured Guaranty (UK) v. J.P. Morgan Inv. Mgmt. Inc.*, 18 N.Y.3d 341 (2011) that the Martin Act does not preclude a private litigant from bringing a nonfraud common-law cause of action provided the claim is not entirely dependent on the Martin Act violation for its viability. *Id.* at 351; *FutureSelect*, 175 Wn. App. at 861 n.38.

misrepresentation is an issue of fact.” *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 828 (1998).

New York law also conflicts with Washington law in that it requires a plaintiff bringing a negligent misrepresentation claim against an auditor to allege near privity. *See Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y. 2d 536, 551 (1985). Washington law imposes no such requirement. *See e.g., Hoffer v. State*, 110 Wn.2d 415, 429-30 (1988) (“*Hoffer I*”).

In contrast to New York, Washington law displays a strong interest in protecting its investors. That is the “primary purpose” of the WSSA. *Go2net, Inc. v. Freeyellow.com, Inc.*, 158 Wn.2d 247, 253-54 (2006) (WSSA “is remedial in nature and has as its purpose broad protection of the public.”) (quotations and citations omitted). *See, e.g., Haberman*, 109 Wn.2d at 125-26 (“[W]hile the purpose of federal securities laws is to maintain the integrity of the secondary securities markets and to enforce disclosure, the WSSA is intended to protect investors.”); *Cellular Eng’g, Ltd. v. O’Neill*, 118 Wn.2d 16, 23-24 (1991); *Hoffer v. State*, 113 Wn.2d 148, 152 (1989) (“*Hoffer II*”). Applying New York law to preclude Washington investors’ right of action under the WSSA would be unprecedented and would undermine Washington’s interests. Neither Petitioners (nor FutureSelect) has found a single case where choice of law

principles precluded a Washington investor from bringing claims under the WSSA.

As to FutureSelect’s common law claims, even New York courts—considering similar Madoff-related claims against Tremont—have declined to apply New York law and instead chose to apply other state law to claims for negligent misrepresentations. *See In re Tremont Secs. Law, State Law & Ins. Litig.*, 2013 WL 2257053, at *8 (considering Restatement sections 145 and 148 and concluding that Texas law applied to plaintiff’s negligent misrepresentation claim against Tremont).

The Washington contacts in this case, coupled with Washington’s strong interest in protection of its investors and enforcement of the WSSA, militate overwhelmingly in favor of Washington law.

B. E&Y Is Properly Alleged to Be a Substantial “Contributive Factor” in FutureSelect’s Investment Decision under the WSSA

Petitioner E&Y challenges the Court of Appeals’ finding that Plaintiffs sufficiently alleged that E&Y was a “substantial contributive factor” in causing their investments in Tremont and therefore is subject to liability under the WSSA. Plaintiffs have clearly met this standard. Under Washington’s notice pleading requirements, FutureSelect’s Complaint adequately alleged that E&Y’s conduct was a substantial factor in the securities sales occurring while E&Y was the Rye Funds’ auditor.

FutureSelect, 175 Wn. App. at 871. That conclusion was correct under Washington law and gives effect to the purposes of the WSSA.

1. Determination of Whether E&Y’s “Substantial Contributive Factor” Test under the WSSA Is *Fact Specific* and Therefore Improper to Resolve on a Motion to Dismiss

The WSSA imposes liability on one who “sells” a security in violation of certain provisions of the Act. RCW 21.20.430(1). This Court in *Haberman*, 109 Wn.2d at 131, held that one whose acts were a “substantial contributive factor” in the securities sales transaction is also liable as a “seller.” Whether a defendant’s conduct rises to the level of a substantial contributive factor depends on the following: (1) the number of other factors which contribute to the sale and the extent of the effect which they have in producing it; (2) whether the defendant’s conduct has created a force or series of forces which are in continuous and active operation up to the time of the sale, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; and (3) lapse of time. *Id.* at 131-32. These are fact-specific inquiries. *Id.* at 132.

Recognizing the factual nature of the “substantial factor” test, the Court of Appeals concluded “its determination is typically inappropriate for resolution on a motion to dismiss.” *FutureSelect*, 175 Wn. App. at 871

(citing *Haberman*, 109 Wn.2d at 132 and *Hoffer I*, 110 Wn.2d at 430).

Both *Haberman* and *Hoffer I* involved motions to dismiss WSSA claims against auditors. Just as E&Y has argued throughout the various stages of this appeal, the defendants in *Haberman* and *Hoffer I* argued that WSSA claims should be dismissed because the plaintiffs had not shown they as auditors were “sellers” under the WSSA.

Both *Haberman* and *Hoffer I* rejected the auditors’ arguments as the Court of Appeals did here. In *Haberman*, this Court held that whether an auditor was a “substantial contributive factor” is “necessarily a question of fact,” *Haberman*, 109 Wn.2d at 132. The *Hoffer I* Court agreed, noting that the substantial factor test “necessarily involves many factual issues that cannot be resolved” on a CR 12(b)(6) motion to dismiss and instead “requires the development of more facts.” *Id.* at 430-31. The Court of Appeals thus was correct that “[t]he determination of whether E&Y was a substantial contributive factor to the sale requires an inquiry best conducted on specific facts.” *FutureSelect*, 175 Wn. App. at 872.

2. FutureSelect’s Complaint More Than Sufficiently Alleged E&Y’s Seller Status to Survive a CR 12(b)(6) Motion

The Court of Appeals properly held that FutureSelect adequately alleged that E&Y’s conduct was a substantial factor in the securities transactions that occurred while E&Y was the auditor for two of the Rye

Funds in which FutureSelect invested. *FutureSelect*, 175 Wn. App at 871-72. FutureSelect’s detailed allegations regarding E&Y’s misrepresentations directed to FutureSelect must be accepted as true for purposes of E&Y’s CR 12(b)(6) motion:

- E&Y “made untrue statements of material facts and engaged in acts of fraud and deceit upon FutureSelect . . . that were a substantial factor contributing to FutureSelect’s investment in the Rye Funds. *Id.* at 871 (citing CP 36).
- E&Y “misrepresented that they had conducted audits in conformity with” generally accepted auditing standards and “omitted material facts,” including that it had not audited “Madoff’s own books and records to verify the Rye Funds’ assets.” *Id.* (citing CP 21, 37).
- FutureSelect “would not have invested in the Rye Funds if the funds were not audited by [E&Y].” *Id.* (citing CP 37).
- E&Y “knew that its audits would be used by Tremont to solicit investors [and] also knew and intended that current investors would rely on the audits when deciding to maintain and increase their investments in the Rye Funds.” *Id.* (citing CP 37).
- E&Y also “knew that [FutureSelect] was receiving and relying on its audits of the [Rye Funds]” because “[each audit was addressed to the ‘Partners’ of the fund[s], which [E&Y] knew included [FutureSelect].” *Id.* (citing CP 23).

As the Court of Appeals concluded, these allegations sufficed as showing E&Y’s misrepresentations and that such misrepresentations were a “substantial factor” contributing to FutureSelect’s investments in the Rye Funds.

3. Auditors Owe a Duty to the Investing Public and So Should Be Subject to Liability Under the WSSA When They Materially Misrepresent the Financial Condition of Investments

E&Y argues that it is unfair for auditors to be subject to liability under the WSSA merely for misrepresenting the financial condition of investment securities in the course of a “routine” audit. *See* E&Y Pet. at 12. E&Y is wrong that audits are routine services between a professional and client that do not matter to the investing public. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984) (discussing auditor’s “public responsibility” and “public watchdog function”); *In re Metro. Sec. Litig.*, 532 F. Supp. 2d 1260, 1300-01 (E.D. Wash. 2007) (citing *Haberman*, 109 Wn.2d at 119; *Hoffer I*, 110 Wn.2d at 417-18); Amer. Inst. of Certified Public Accountants Code of Professional Conduct, ET § 53. Moreover, E&Y simply ignores the Complaint’s allegations that it made untrue statements and engaged in fraud and deceit—no one’s definition of what constitutes “routine services” by an auditing firm. CP 4-5 (E&Y misrepresented that it had performed GAAS-compliant audits of Rye Funds and failed to confirm the existence of \$3 billion in assets invested with Madoff).

E&Y also repeatedly cites *Hines v. Data Lines Systems, Inc.*, 114 Wn.2d 127 (1987) and other case law that all concluded *at the summary*

judgment or trial stage—not on a CR 12(b)(6) motion—that, considering all the evidence, the defendant’s services had been “routine,” which precluded seller status liability. *Id.* at 148; *see Viewpoint-North Stafford LLC v. CB Richard Ellis, Inc.*, 175 Wn. App. 189, 197 (2013); *Brin v. Stutzman*, 89 Wn. App. 809, 829-30 (1998). As the Court of Appeals underscored, “*Hines* was decided on summary judgment based on specific facts. Here, by contrast, we are reviewing FutureSelect’s allegations only in the context of the more forgiving CR 12(b)(6) standards.”

FutureSelect, 175 Wn. App. at 871.⁸ The cases relied on by E&Y show *what facts must be proven at the close of discovery*, not *what must be alleged to state a claim*. The issue here, however, is not whether E&Y *is liable* but whether FutureSelect’s allegations about E&Y *survive a CR 12(b)(6) motion*.

The Court of Appeals was correct in reversing the trial court’s dismissal of FutureSelect’s WSSA claim against E&Y. Exempting auditors from liability under the WSSA for misrepresenting to investors the financial conditions of investments in the course of their audits would undermine the public gatekeeper function served by auditors. *See NCP Litig. Trust v. KPMG LLP*, 187 N.J. 353, 379-80 (2006). Madoff’s fraud

⁸ *Hines* is further distinguishable because it did not involve an auditor. *Id.* at 147-48 (dismissing claims against attorneys).

and FutureSelect's loss only highlights the critical need to hold gatekeepers like E&Y *more* (not less) accountable for their public duties.

C. Oppenheimer Is Subject to Specific Personal Jurisdiction under Washington's Long-Arm Statute

Oppenheimer asks this Court to overturn the Court of Appeals' ruling that Oppenheimer is subject to specific personal jurisdiction under Washington's long-arm statute. Those specific activities led to FutureSelect's investment in Madoff's Ponzi scheme and the harm to FutureSelect. Whatever its plans to contest them as a matter of fact, Oppenheimer cannot here dispute the allegations that it controlled and managed Tremont's key activities in Washington. As the Court of Appeals determined, those allegations are sufficient to withstand a motion to dismiss.

Lacking a fact basis to seek dismissal, Oppenheimer instead invites this Court to change the law by adopting the standard for *general* jurisdiction for *specific* jurisdiction. Oppenheimer asks the Court to find specific jurisdiction over a parent only where the business is so important to the parent that it would conduct the business itself if the subsidiary went out of business. Oppenheimer Pet. at 17 (citing *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011)). In effect, this

would eliminate *specific* jurisdiction for foreign corporations that operate through subsidiaries in Washington.

Oppenheimer's invitation should be declined for three important reasons. First, Oppenheimer's attempt to merge *specific* personal jurisdiction with *general* personal jurisdiction is at odds with the United States Supreme Court's recent confirmation in *Bauman* that those two concepts require distinct analyses. *DaimlerAG v Bauman*, ___ U.S. ___, 134 S. Ct. 746, 749 (2014). Second, *eliminating* specific jurisdiction for foreign corporations would be contrary to well-settled Washington law requiring the long arm statute to be extended "to the limit of due process." *Shute v. Carnival Cruise Lines*, 13 Wn.2d 763, 771 (1989). Finally, Washington has an important interest in holding defendants (like Oppenheimer) who purposefully avail themselves of the privilege of doing business in Washington answerable for claims arising out of their Washington contacts. Immunizing a foreign parent corporation that controls the activities of a subsidiary from liabilities for harms caused by those activities in Washington would provide a perverse incentive for foreign corporations to limit their liability by conducting their activities in Washington through subsidiaries. Washington law does not and should not permit a corporation to avoid liability by engaging in activities *indirectly* that would subject the corporation to liability if done *directly*.

There is no dispute that Washington courts can exercise jurisdiction over a principal based on the in-forum contacts of its agent. *See* RCW 4.28.185(1) (“Any person, whether or not a citizen or resident of this state, who in person *or through an agent*” commits a tortious act within the state will be subject to jurisdiction in Washington’s courts.) (emphasis added). *See also* *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1192 (9th Cir. 2002) (due process satisfied when non-resident corporation’s agent purposefully availed itself in forum state). The only question then is whether the assertion of specific personal jurisdiction over Oppenheimer *on these facts* comports with due process.

The Court of Appeals correctly applied the three-factor due process analysis adopted by the Court in *Tyee Construction Co. v. Dulien Steel Products, Inc. of Wash.*, 62 Wn.2d 106, 115-16 (1963), and applied by Washington courts for more than fifty years. The Court of Appeals found that Oppenheimer had purposely availed itself of the privilege of doing business in Washington. *FutureSelect*, 175 Wn. App. at 874. This conclusion is supported by detailed factual allegations showing Oppenheimer controlled and managed Tremont’s key activities, including the choice to continue investing FutureSelect’s money with Madoff and the marketing of such funds to FutureSelect in Washington. CP 17-19, 33-34 (Oppenheimer selected investment vehicles, managed due diligence

and marketed/solicited investments in Tremont). This type of purposeful activity of a principal acting through an agent is exactly what was intended to be covered by the “through the agent” provision of Washington’s long-arm statute. RCW 4.28.185(1); *see CTVC*, 82 Wn. App. at 717 (noting that the Washington contacts of an agent can subject principal to jurisdiction where principal controls the agent).

To allow Oppenheimer to avoid jurisdiction because it conducted these activities *indirectly* would render the “through the agent” provision of Washington’s long-arm statute meaningless. Moreover, Oppenheimer benefitted from its agent’s marketing and sale of the Madoff funds to FutureSelect in Washington. Equity and justice therefore require it to be answerable in Washington.

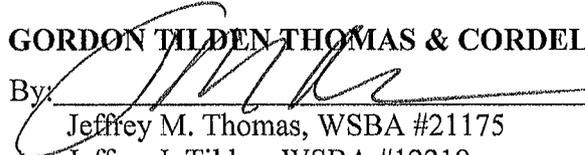
IV. CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed in its entirety.

Dated: February 7, 2014

Respectfully submitted,

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on February 7, 2014, I caused a true and correct copy of the foregoing Supplemental Brief of Respondents to be delivered via U.S. first class mail, with a courtesy copy via email, to:

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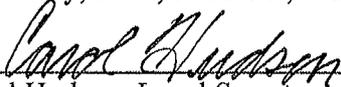
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Subject: No. 89303-9, FutureSelect v. Tremont
Attachments: Pltfs' Mtn for Overlength Suppl. Brief.pdf; Suppl. Brief of Respondents.pdf

Re: FutureSelect Portfolio Management, Inc., et al. v. Tremont Group Holding, Inc., et al.
Supreme Court No. 89303-9

Dear Clerk:

Attached for filing are:

Plaintiffs' Motion to File an Overlength Consolidated Supplemental Brief; and
Supplemental Brief of Respondents FutureSelect Portfolio Management, Inc., et al.

Thank you.

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