

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 89303-9

(Court of Appeals No. 68130-3-I)

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.

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PETITION FOR REVIEW OF ERNST & YOUNG LLP

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I. INTRODUCTION AND IDENTITY OF PETITIONER

Petitioner Ernst & Young LLP seeks review of the decision designated in Part II of this Petition.

This lawsuit arises from the 2008 collapse of Bernie Madoff's investment scheme. Plaintiffs (collectively, "FutureSelect") are a family of investment funds organized under Delaware law. FutureSelect alleges it began investing in 1998 in three of the Rye Funds, New York-based "feeder funds" that used Madoff as their investment manager.

FutureSelect admits it traveled to New York to invest in the funds for the avowed purpose of gaining access to Madoff as an investment manager.

From 2000 to 2003, Ernst & Young provided auditing services to two of the three Rye Funds in which FutureSelect invested. Ernst & Young did not audit Madoff or his firm. Moreover, Ernst & Young was hired as auditor for the Rye Funds only *after* FutureSelect invested in those funds. FutureSelect does not allege Ernst & Young performed anything other than routine audit services for the Rye Funds in New York. Despite Ernst & Young's limited role, FutureSelect seeks to hold the firm responsible for Madoff's fraud by alleging Ernst & Young's liability (a) as a "seller" of the funds under the Washington State Securities Act ("WSSA") and (b) for negligent misrepresentation under Washington law, both based solely on Ernst & Young's issuance of audit opinions on the Rye Funds' financial statements from 2000 to 2003.

This Court, however, has held the definition of a "seller" of securities under WSSA *excludes* professionals accused only of providing

routine professional services. *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 149–50, 787 P.2d 8 (1990). See also *Viewpoint-North Stafford LLC v. CB Richard Ellis, Inc.*, 175 Wn. App. 189, 303 P.3d 1096 (Div. 2 2013) (applying *Hines* to broker services); *Brin v. Stutzman*, 89 Wn. App. 809, 829, 951 P.2d 291 (Div. 1 1998) (affirming dismissal of securities claim against non-seller). Rather than follow this Court’s controlling decision in *Hines*, Division One relied on a misguided federal district court decision and reinstated FutureSelect’s WSSA claim against Ernst & Young—even though the Complaint contained no hint (much less an allegation) that Ernst & Young performed anything other than routine professional services, which cannot give rise to a WSSA claim for seller liability.

Further, the Court of Appeals erroneously refused to apply New York law to FutureSelect’s claims—which should have resulted in dismissing both tort claims against Ernst & Young under New York law. Under the choice of law principles adopted in *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 744 P.2d 1032 (1987), the Court of Appeals should have applied the law of New York, where five defendants reside or are headquartered; FutureSelect made its investments; Tremont managed and held the investments; Ernst & Young’s alleged misrepresentations originated; and Ernst & Young’s purportedly wrongful conduct occurred.

This Court should accept review for three reasons:

First, the Court of Appeals’ ruling on seller liability under the

WSSA conflicts with *Hines* and its progeny, meriting review under RAP 13.4(b)(1) and (2), and presents issues of substantial and recurring public interest meriting review under RAP 13.4(b)(4). This Court should confirm that, as *Hines* made clear, a defendant—including an auditor—who provides only routine professional services to a company selling securities cannot be liable as a “seller” under the WSSA. Division I’s contrary ruling transforms any accountant performing ordinary professional services into a presumed securities “seller” under Washington law—eviscerating the limits of seller liability set forth in *Hines*, and exposing the professional to strict liability for draconian rescissionary damages.

Second, the Court should accept review under RAP 13.4(b)(1) and (4) to confirm that ordinary CR 12 principles require dismissal of a WSSA seller claim when neither the plaintiff’s Complaint nor briefs elaborating on the Complaint even suggest a professional went beyond its routine role and, instead, took on the attributes of a seller.

Third, the Court of Appeals’ choice of law ruling conflicts with *Haberman* and its progeny, and therefore merits review under RAP 13.4(b)(1), (2), and (4). A comparison of the facts here to the facts in *Haberman* makes clear that this Court must either overrule *Haberman* or reverse the Court of Appeals: the controlling choice of law factors set forth in *Haberman*—including the place of the alleged conduct, residence of the defendants, and the center of the parties’ relationship—all favor application of New York law, not Washington law. Because these choice

of law issues recur in every case involving securities transactions that touch more than one State, this Court should accept review and restore consistency to Washington law.

II. COURT OF APPEALS DECISION

Ernst & Young seeks review of the published decision filed on August 12, 2013, by Division I of the Court of Appeals, reversing the Superior Court's judgment dismissing this case. *See* Appendix.

III. ISSUES PRESENTED FOR REVIEW

1. Does the definition of a "seller" of securities under the WSSA reach an auditor who (a) is accused only of providing routine professional services to its client and (b) is not alleged to have any of the attributes of a seller, such as passing title, marketing securities, or advocating securities purchases?

2. Did the superior court properly dismiss FutureSelect's WSSA claim against Ernst & Young under CR 12(b)(6) where FutureSelect never alleged or argued the auditor's role involved more than routine professional services?

3. Did the Court of Appeals erroneously determine that Washington rather than New York law governed FutureSelect's tort claims against Ernst & Young?

IV. STATEMENT OF THE CASE

A. Parties

Plaintiffs FutureSelect Prime Advisor II, LLC, the Merriwell Fund,

L.P., and Telesis IIW, LLC, are investment funds organized under Delaware law. CP 5-6 ¶¶ 15-18. Plaintiff FutureSelect Portfolio Management, Inc., also a Delaware company, manages these funds. CP 5 ¶ 15. These Delaware entities (collectively “FutureSelect”) allege they have their principal place of business in Washington. CP 5-6 ¶¶ 16-18.¹

Defendants Tremont Group Holdings, Inc. (a Delaware corporation), and Tremont Partners, Inc. (a Connecticut corporation) (collectively “Tremont”), are located in New York. Tremont was the general partner in the three Rye Funds—named after Tremont’s Rye, New York headquarters—in which FutureSelect invested. *See* CP 3, 6, 9-10 ¶¶ 6, 20, 34–35. In addition, FutureSelect sued defendants Oppenheimer Acquisition Corp. (a Delaware corporation) and Massachusetts Mutual Life Insurance Company (a Massachusetts corporation) as Tremont’s parent and alleged principal. CP 7 ¶¶ 24-25.

Defendant Ernst & Young is a Delaware limited liability partnership headquartered in New York, New York. CP 87-88 ¶ 2.

FutureSelect’s Complaint also includes claims against the accounting firms that audited the Rye Funds in the years before and after Ernst & Young provided its services to Tremont, i.e., Goldstein Golub Kessler LLP (“GGK”) and KPMG LLP (“KPMG”). Neither GGK nor

¹ Apparently based on this allegation, the Court of Appeals calls FutureSelect “a group of local investors.” Op. ¶ 1. But nothing in the record supports this characterization—and it is untrue. FutureSelect filed “investor letters” with the trial court, which came from investors from all over the country. *See, e.g.*, CP 3142, 2939, 2963, 2991-92. *See also* <http://www.insideindianabusiness.com/newsitem.asp?ID=33076> (referring to large FutureSelect investment by Indianapolis fund on behalf of its clients).

KPMG participated in this appeal: Future Select settled its claims against GGK, and the trial court compelled arbitration of FutureSelect's claims against KPMG. Op. ¶ 20 n.4.

B. Factual Background

Bernard Madoff promoted his Ponzi scheme by dealing only with select firms and individuals, refusing to deal directly with all investors who wanted to share in his spectacular investment returns. *See* CP 9 ¶ 32. FutureSelect alleges that in 1998 it invested in various funds to gain access to Madoff as an investment adviser. CP 9-12 ¶¶ 34–39. FutureSelect made those investments through Tremont and other funds, all of which invested with Madoff. CP 3, 9-12 ¶¶ 6, 34–39.

Ernst & Young had nothing to do with FutureSelect's decision to invest with Madoff—or the Rye Funds. When FutureSelect began investing in the Rye Funds in 1998, GGK was the auditor for the Rye Funds. CP 4, 8, 10 ¶¶ 11, 27, 36–37. Ernst & Young did not become the auditor of any Rye Fund until 2000. CP 8 ¶ 27. And even then, Tremont engaged Ernst & Young to audit only two Rye Funds: the Rye Select Broad Market Fund, L.P., and the Rye Select Broad Market Prime Fund, L.P. CP 23 ¶ 88. As auditor, Ernst & Young had the responsibility only to express an opinion on the annual financial statements of the Rye Funds prepared by their management, i.e., Tremont. *See* Auditing Standards, AU § 110.03 (“The financial statements are management's responsibility.”). Ernst & Young's role as auditor of these two Rye Funds lasted only three

years, ending in 2003. CP 8 ¶ 27.

According to the Complaint, Ernst & Young never had a contractual or other relationship with FutureSelect. Tremont, not FutureSelect, engaged Ernst & Young to audit the Rye Broad Market and the Rye Broad Market Prime Funds. CP 20 ¶ 77. FutureSelect does allege Ernst & Young—as part of its standard audit procedure—requested that all Rye Fund “Partners,” including FutureSelect, confirm the amount of their investments in the funds. CP 23 ¶ 89. It also alleges Ernst & Young addressed its audit reports generically to the Rye Funds’ “Partners,” including FutureSelect. *Id.* But FutureSelect does not allege Ernst & Young sent its investment confirmation forms or audit reports *directly* to FutureSelect in Washington. *See Op.* ¶ 40. Nor does it allege Ernst & Young ever visited Washington in connection with FutureSelect or the audit, or that any Washington-based personnel participated in Ernst & Young’s audits of the Rye Funds.

Beginning in 2003, KPMG audited the funds for several years before Madoff’s scheme collapsed in 2008. CP 8 ¶¶ 27-28.

C. Procedural History

On August 26, 2010, FutureSelect sued seven defendants in King County Superior Court: Tremont Group Holdings, Inc.; Tremont Partners, Inc.; Oppenheimer Acquisition Corp.; Massachusetts Mutual Life Insurance Company; GGK; KPMG; and Ernst & Young. CP 1-2.

FutureSelect's Complaint alleged Ernst & Young made false and misleading statements in issuing audit reports on the two Rye Funds from 2000 to 2003. CP 22-23 ¶¶ 87-88. FutureSelect asserted Tremont used Ernst & Young's audit reports to solicit investors in the Rye Funds, purportedly with Ernst & Young's "consent and knowledge," CP 20 ¶ 77, but did *not* allege Ernst & Young itself solicited or encouraged investment in the Rye Funds. FutureSelect contended the audit reports mistakenly stated that Ernst & Young conducted its audits in accordance with generally accepted auditing standards, and omitted facts about Madoff. CP 21, 37. Based on these allegations regarding the audits, FutureSelect asserted claims against Ernst & Young for violating the WSSA and negligent misrepresentation. CP 36-38, 45-46 ¶¶ 144-51, 201-08.

Six of the seven defendants—including Ernst & Young—moved to dismiss for failure to state a claim, CP 56-86, 530-556, 834-859, 860-888, 893-917, while defendant KPMG moved to compel arbitration, CP 562-594. On June 3, 2012, after extensive briefing and three oral argument sessions, the trial court granted defendants' motions in all respects, compelling FutureSelect to arbitrate its claims against KPMG and dismissing FutureSelect's claims against the other defendants, including Ernst & Young. CP 3343-3359.

On appeal, FutureSelect relied solely on Ernst & Young's audits as the basis for asserting Ernst & Young substantially contributed to FutureSelect's securities purchases. *See* FutureSelect Br. at 10-11, 29-30.

FutureSelect did *not* contend Ernst & Young solicited a securities purchase, nor did it claim Ernst & Young made sales presentations, visited investors, or engaged in *any* selling activity. *Id.*

On August 12, 2013, Division One of the Court of Appeals reversed the trial court, holding in a published decision that an accountant’s auditing of financial statements *automatically* goes “beyond ‘routine services’ rendered to a client.” Op. ¶ 62 (citing *In re Metro. Sec. Litig.*, 532 F. Supp. 2d 1260, 1301 (E.D. Wash. 2007)). Relying on the Ernst & Young audits, the Court of Appeals remanded for trial the question of whether Ernst & Young was a “seller” of the securities, based solely on its role as auditor. Op. ¶ 65. And applying Washington rather than New York law—which the court acknowledged would bar both FutureSelect’s securities claim and its misrepresentation claim against Ernst & Young, Op. ¶¶ 37 n.38, 43 n.52—the Court of Appeals also reversed dismissal of the negligent misrepresentation claim. Op. ¶ 100.

V. ARGUMENT

A. This Court Should Grant Review under RAP 13.4(b)(1), (2), and (4) to Correct the Court of Appeals’ Misinterpretation of the WSSA’s “Seller” Definition.

1. This Court Has Held a Professional Providing Routine Services to a Client Is Not a “Seller” of Securities under the WSSA.

The WSSA imposes primary liability on a person who “sells a security in violation of” enumerated provisions of the Act, including RCW 21.20.010. RCW 21.20.430(1). (The WSSA imposes secondary liability

on certain persons bearing a specified relationship with a statutory seller. RCW 21.20.430(3).) In 1987, this Court followed then-prevailing federal precedent in rejecting a strict “privity” requirement for securities “seller” status. Instead, the Court construed “the term seller to include those whose *participation in the sale* was a *substantial factor* in causing the transaction to take place.” *Haberman*, 109 Wn.2d at 127 (emphasis added). The Court said its “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* and thus who policy dictates should be subject to liability under RCW 21.20.430(1), but who would escape primary liability for want of privity.” 109 Wn.2d at 132 (emphasis added).²

Since *Haberman*, Washington courts continue to emphasize the “substantial contributive factor test applies only to persons who have the attributes of a seller.” *Viewpoint-North Stafford LLC*, 175 Wn. App. at 198 (holding broker was not acting a seller) (citing *Brin*, 89 Wn. App. at 829 (affirming dismissal of securities claim against non-seller)). In particular, fourteen years after *Haberman*, this Court held the term “seller” does not include a defendant “whose role is confined to rendering routine professional services in connection with an offer” of securities, without

² The requirement that a statutory “seller” have “the attributes of a seller” makes sense, given the WSSA’s draconian remedies against sellers. Under RCW 21.20.430(1), a seller who makes a material misstatement faces a strict rescissionary measure of damages, i.e., the price of the security plus interest at 8%, *without regard to fault*. By contrast, a party alleged to be secondarily liable may defend on the ground that “he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.” RCW 21.20.430(3).

“active participation in the sales transactions.” *Hines*, 114 Wn.2d at 149 (citing *Ahern v. Gaussoin*, 611 F. Supp. 1465, 1485 (D. Or. 1985) and *In re Activision Sec. Litig.*, 621 F. Supp. 415, 420-21 (N.D. Cal. 1985)). The Ninth Circuit, whose “substantial factor” test this Court adopted in *Haberman*, 109 Wn.2d at 131, likewise recognized “merely performing professional services, without actively soliciting a purchase of the underlying securities, does not give rise to liability” as a seller. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 535 n.5 (9th Cir. 1989) (affirming dismissal of seller claim against accountants) (collecting cases).

In this case, the Court of Appeals held Ernst & Young might be a “seller” of securities, even though *no one* contends it did anything other than provide routine professional services. Op. ¶¶ 60-65. Because that holding conflicts with established Washington law set forth in *Hines*, *Brin*, and *Viewpoint-North Stafford*, this Court should accept review to restore consistency to Washington law on this important topic.

2. FutureSelect Asserted Claims against Ernst & Young Based Solely on Routine Audit Services.

The Court of Appeals ruling rests on a fundamental (and unjustified) misperception of the nature of an accountant’s professional services. Citing a single federal trial court decision from the Eastern District of Washington, the Court of Appeals held an accountant engaged to audit a client’s financial statements *ipso facto* performs something “beyond ‘routine services’ rendered to a client.” Op. ¶ 62 (citing *In re Metro. Sec. Litig.*, 532 F. Supp. 2d 1260, 1301 (2007)). The Court of

Appeals' holding misstates Washington law and misapprehends the nature of services auditors provide to their clients.

For the proposition that an auditor *always* performs more than routine services, the federal district court in *Metropolitan Securities* relied on dictum plucked out of context from the Supreme Court's decision in *United States v. Arthur Young & Co*, 465 U.S. 805 (1984). See *In re Metro. Sec. Litig.*, 532 F. Supp. 2d at 1301. But *Arthur Young* dealt with an unrelated issue: whether the work product doctrine protects an accountant's work papers from disclosure to the IRS, recognizing that an auditor's work with public corporations by its nature involves communications that will be disseminated beyond the clients themselves. 465 U.S. at 817-18.³ Although the Court of Appeals quotes verbatim from *Arthur Young*, see Op. ¶ 62 ("natural roles of ... auditors ... go beyond 'routine services' rendered to a client") (ellipsis in original) (citing *In re Metro. Sec. Litig.*, 532 F. Supp. 2d at 1301), it never *cites Arthur Young*—or acknowledges the case involved only the scope of the work product doctrine. Instead, the Court of Appeals leaves the misleading (and, for the accounting profession, dangerous) impression the quoted dicta comes from this Court's pre-*Hines* rulings regarding the scope of seller liability under the WSSA. Op. ¶ 62 nn. 83-84 (citing *Haberman*, 109 Wn.2d at

³ Like the federal courts, Washington law does not recognize an accountant or auditor privilege. See, e.g., *State v. Dorman*, 30 Wn. App. 351, 359, 633 P.2d 1340, review denied, 96 Wn.2d 1019 (1981) (citing E. CLEARY, MCCORMICK ON EVIDENCE § 88 (2d ed.1972) (citations omitted)); RCW 5.60.060 (enumerating privileges recognized by Washington law).

119, and *Hoffer v. State*, 110 Wn.2d 415, 430, 755 P.2d 781 (1988)).

In fact, Washington case law does not support the extreme position adopted by the federal court in *Metropolitan Securities*—and now by the Court of Appeals here. To the contrary, in holding professionals *must* do “something more” than render “routine professional services” to face WSSA seller liability, this Court in *Hines*, 114 Wn.2d at 149–50, specifically relied on (and approved) *Ahern v. Gaussoin*, 611 F. Supp. 1465 (D. Or. 1985). In *Ahern*, the court held an auditor was *not* a substantial contributive factor in a securities sales transaction, even though it (a) issued clean audit opinions, 611 F. Supp. at 1472; (b) assisted in preparing a securities registration statement, *id.* at 1485; and (c) gave a speech to investors reporting the accounting firm had given the selling client “a clean bill of health,” *id.* at 1486.

Other courts have also recognized audits fall within the core professional services accountants routinely provide. For example, in a comprehensive discussion of the audit function in public accounting, the California Supreme Court observed that 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 also Blake v. Dierdorff*, 856 F.2d 1365, 1371 (9th Cir. 1988) (an “audit encompasses all acts necessary for preparation of the audit report, including review of confidential documents and information, acquisition of knowledge to conduct the audit, and issuance of the audit certification”).

Audits and financial statements *are* an accountant’s “routine professional services” for a client that engages in the sale of securities. *Hines*, 114 Wn.2d at 149. *See, e.g., Bily*, 3 Cal.4th at 379-80. But under the rule set forth by the federal district court in *Metropolitan Securities*—and now adopted by the Court of Appeals as the law of Washington—*every* auditor becomes a presumptive “seller” of its client’s securities (exposed to primary liability under the WSSA) simply by issuing an audit opinion, the primary professional service for which clients retain auditors. Indeed, *Metropolitan Securities* rests on the premise that auditors by definition *cannot* render routine professional services, 532 F. Supp. 2d at 1301, an extreme proposition with no support in Washington law.

This Court should accept review to avert the consequences of this troubling error, which otherwise promises to distort Washington law concerning auditors’ liability under the WSSA.

3. Superior Courts Must Dismiss WSSA Seller Claims When a Plaintiff Alleges and Argues Nothing beyond Routine Professional Services.

The Court of Appeals purported to distinguish *Hines* on the ground “*Hines* was decided on summary judgment.” Op. ¶ 61. Based on the procedural posture, the Court of Appeals apparently believed it had no obligation to examine the sufficiency of FutureSelect’s factual allegations. The Court of Appeals’ approach to this issue reflected a fundamental misunderstanding of a court’s obligation under CR 12(b)(6). Because that misunderstanding will recur, and therefore presents an issue of substantial

public importance, this Court should accept review for three additional reasons related to the Court of Appeals' misapplication of CR 12(b)(6).

First, the Court of Appeals apparently relied on FutureSelect's naked assertions that "Ernst & Young violated the WSSA as a 'seller of a security'" and that "Ernst & Young's actions were a substantial factor" in the sale of the securities. Op. ¶¶ 60, 63. But these amount to pure legal conclusions, not factual allegations, and a court is not required to accept the complaint's legal conclusions as true. *Haberman*, 109 Wn.2d at 120.⁴

Second, the Court of Appeals relied on the federal court's observation in *Metropolitan Securities* that this Court's first two decisions construing seller status under the WSSA involved the denial of auditors' motions to dismiss. Op. ¶ 62 n. 83 (citing 532 F. Supp. at 1300-01). But those decisions were a product of their time. As this Court observed in *Haberman*, "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." 109 Wn.2d at 120. In the decades since this Court first discussed "seller" status in the unprecedented WPPSS litigation, Washington courts have developed this

⁴ In fact, trial courts have applied *Hines* and granted motions to dismiss claims against accounting firms alleged to have done nothing more than perform audits. *See, e.g., Reale v. Ernst & Young, LLP*, No. 98-2-05378-0 (Super. Ct. King Co. Dec. 1, 1998) (Jordan, J.), *aff'd*, 101 Wn. App. 1037, 2000 WL 949388 (July 10, 2000) (unpublished opinion), *rev. denied*, 142 Wn.2d 1027, 21 P.3d 1149 (Feb. 6, 2001). *Ernst & Young* cites the trial court's decision in *Reale* to illustrate the need for a uniform understanding of *Hines*' application to dismissal motions; the reference to the case's subsequent history, including the Court of Appeals' unpublished opinion affirming the trial court, is included as required by GR 14(d) and App. GR 14 (Exception 10), and is not cited as "authority" under GR 14.1.

area of the law. Most notably, *Hines* established that a WSSA seller claim requires a plaintiff to show the defendant had the attributes of a seller—which, in the case of a professional such as an auditor, requires “something more” than the defendant’s mere performance of “routine professional services.” 114 Wn.2d at 149.⁵

Further, this Court subsequently held that courts *can* resolve on a motion to dismiss whether a defendant was a “substantial contributive factor” under the WSSA. In *Kinney v. Cook*, 159 Wn.2d 837, 845, 154 P.3d 206 (2007), the Court reinstated a trial court order granting the defendant’s CR 12(b)(6) motion to dismiss, holding “Cook was not a seller” under WSSA because plaintiffs *failed to allege* facts showing Cook “encouraging” the sales transaction. *Id.* at 845-46. Similarly, FutureSelect’s deficient allegations challenging the Ernst & Young audits raise purely legal questions regarding the scope of “seller” liability under the WSSA that may be resolved under CR 12(b)(6).

Third, the Court of Appeals erroneously analogizes FutureSelect’s WSSA claim against Ernst & Young to this Court’s refusal to dismiss WSSA seller claims against an auditor where the plaintiffs *actually argued* the auditor’s role went beyond providing routine professional services. Op. ¶ 62 (citing *Haberman*, 109 Wn.2d at 119). In *Haberman*,

⁵ FutureSelect may argue *Hines* does not apply because it involved lawyers. But in applying the substantial contributive factor test in *Hines*, this Court relied heavily on case law making clear that *auditors* do not face “seller” liability for performing mere audit services. See *Hines*, 114 Wn.2d at 149 (citing *Ahern*, 611 F. Supp. at 1485, and *In re Activision*, 621 F. Supp. at 420-21). The decisions in *Ahern* and *Activision* cannot be squared with *Metropolitan Securities*—or the Court of Appeals’ holding here.

the claimant contended on appeal that the defendant “professionals made personal visits and telephone calls on several occasions to discuss the bonds.” 109 Wn.2d at 163-63. *See also* Barbara L. Schmidt, Note, *Expanding Seller Liability Under the Securities Act of Washington*, 63 WASH. L. REV. 769, 783 n.140 (1988) (*Haberman* appeal briefs contended 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”). In contrast, FutureSelect’s Complaint and its arguments on appeal relied on Ernst & Young’s audit services, making *no* contention or argument the auditor had any other role in the transaction. *See* CP 36-38, 45-46 (Complaint); Appellants’ Br. at 10-11, 29-30.

Even the generous CR 12(b)(6) standard requires a plaintiff to actually *mention* facts necessary to support its claim. CR 12(b)(6) “weeds 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) (reaffirming Washington’s traditional standard for failure to state a claim). Although a court may consider a “hypothetical situation” in conjunction with a motion to dismiss under CR 12(b)(6), the plaintiff must actually *raise* the situation. *See, e.g., Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (courts may consider hypothetical situation alleged for first time on appeal); *see also* *McCurry*, 169 Wn.2d at 116 (Johnson, J., dissenting) (plaintiffs cannot defeat CR 12(b)(6) motion “by suggesting hypothetical facts that bear no

logical relation to the claims raised in their complaint”); *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005) (“*proffered* hypothetical” must be “legally sufficient to support plaintiff’s claim”) (citations omitted) (emphasis added).

Here, FutureSelect never argued Ernst & Young’s role went beyond providing standard audit services to its client, Tremont. *Hines*, 114 Wn.2d at 149. FutureSelect does *not* allege Ernst & Young engaged in “promotional conduct” or solicited sales transactions. *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 851, 786 P.2d 285 (1990) (no seller liability under WSSA in “absence of any real promotional conduct” by defendant). It does *not* allege Ernst & Young had “attributes of a seller” or acted as a “catalyst” in the sales transaction. *Brin*, 89 Wn. App. at 830 (dismissing WSSA claim where, although plaintiff “made her investment decision based on the [defendant’s] advice,” defendant “had no attributes of a seller”). It does *not* allege Ernst & Young “marketed” the Rye Funds or “solicited” FutureSelect’s investment in them. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 165–66, 795 P.2d 1143 (1990) (dismissing WSSA claim where escrow agent was not “involved in marketing [the property] or in soliciting plaintiffs to make the investment”). And it does *not* allege Ernst & Young had “active participation in the sales transaction” or “personal contact with any of the investors or was in any way involved in the solicitation process.” *Hines*, 114 Wn.2d at 149–50. FutureSelect alleges only that Ernst & Young did the routine work of an

auditor, i.e., it performed audits and issued “unqualified audit opinions on the Rye Funds” (apparently addressed to the partners in the funds) and that FutureSelect (which invested in the Rye Funds years before Ernst & Young audited two funds) “relied” on those audits in adding to its holdings. CP 8, 22-23 ¶¶ 27, 87–89.

Because the Court of Appeals’ decision conflicts with established Washington law on a matter of recurring importance under the WSSA, this Court should accept review under RAP 13.4(b).

B. The Court of Appeals’ Choice of Law Decision Also Conflicts with Prior Case Law and Presents an Issue of Substantial Public Interest.

The Court of Appeals erred in holding Washington, not New York, law governs FutureSelect’s securities and negligent misrepresentation claims against Ernst & Young. To avoid repetition, Ernst & Young will not duplicate the arguments set forth in the Tremont defendants’ Petition for Review regarding Washington’s “most significant relationship” tort choice of law standard. But Ernst & Young writes briefly here to point out that its own experience underscores the inconsistency (and injustice) of the Court of Appeals’ choice of law ruling—which amounts to a “heads I win, tails you lose” outcome for Ernst & Young.

In *Haberman*, this Court considered investors’ WSSA seller claims against Ernst & Young’s predecessor, Ernst & Whinney, as well as negligent misrepresentation claims under Washington law. The Court applied Washington law to both tort claims because the professional

services, the underlying investments, most of the parties, and the challenged audit reports all originated in Washington. *Haberman*, 109 Wn.2d at 160; *see also Ito Int'l Corp. v. Prescott, Inc.*, 83 Wn. App. 282, 921 P.2d 566 (1996) (applying *Haberman* factors to securities sale). By contrast, even though these *same* factors counsel application of New York law to FutureSelect's securities and misrepresentation claims here, the Court of Appeals instead chose to rely on different factors and determined Washington law governed FutureSelect's tort claims against Ernst & Young. Op. ¶ 36.

This Court should accept review under RAP 13.4(b)(1), (2), and (4) to maintain the consistency of Washington choice of law principles (particularly in securities cases that touch many states), provide guidance to lower courts, and prevent outcome-oriented choice of law rulings that have the potential to deter interstate commerce and reduce confidence in the rule of law.

VI. CONCLUSION

Ernst & Young requests that the Court grant review of the Court of Appeals' decision.

RESPECTFULLY SUBMITTED September 11, 2013.

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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 September 11, 2013, I caused to be served the attached document entitled **PETITION FOR REVIEW OF ERNST & YOUNG LLP** to the following individuals:

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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Executed this 11 day of September, 2013, at Seattle, Washington.


Crystal Moore

APPENDIX

--- P.3d ---, 2013 WL 4056275 (Wash.App. Div. 1)
 (Cite as: 2013 WL 4056275 (Wash.App. Div. 1))

H

Only the Westlaw citation is currently available.

Court of Appeals of Washington,
 Division 1.

FUTURESELECT PORTFOLIO MANAGEMENT,
 INC., FutureSelect Prime Advisor II LLC, The Mer-
 riwell Fund, LP, and Telesis IIW, LLC, Appellants,
 v.
 TREMONT GROUP HOLDINGS, INC., Tremont
 Partners, Inc., Oppenheimer Acquisition Corporation,
 Massachusetts Mutual Life Insurance Co., Goldstein
 Golub Kessler LLP, Ernst & Young LLP and KPMG
 LLP, Respondents.

No. 68130-3-I.
 Aug. 12, 2013.

Background: Investor brought action against investment firm, its corporate parent and grandparent, and auditor for securities fraud, negligence, and negligent misrepresentation. The Superior Court, King County, Patrick H. Oishi, J., dismissed. Investor appealed.

Holdings: The Court of Appeals, Verellen, J., held that:

- (1) Washington law applied to investor's Washington State Securities Act (WSSA) claims;
- (2) complaint adequately alleged that auditor's actions were a substantial factor in the securities sales occurring after investor received auditor's first audit as required for auditor to be considered a seller under WSSA;
- (3) complaint adequately stated a claim against investment firm's parent and grandparent based upon agency;
- (4) complaint alleged a viable claim that parent engaged in Washington in significant transactions as

required for purposeful availment element of personal jurisdiction over parent under long-arm statute; and (5) investor's assertion of specific personal jurisdiction over parent corporation satisfied the through-an-agent provision of the long-arm statute.

Affirmed in part and reversed in part.

West Headnotes

[1] Action 13  1713 Action13II Nature and Form

13k17 k. What Law Governs. Most Cited Cases

Where Washington law conflicts with the law of another relevant state, Court of Appeals determines which state has the most significant relationship to the action. Restatement (Second) of Conflict of Laws § 145.

[2] Action 13  1713 Action13II Nature and Form

13k17 k. What Law Governs. Most Cited Cases

In determining which state's law applies, if more than one state has a significant relationship and the contacts are evenly balanced between states, the court evaluates the interests and public policies of the concerned states to determine which state has the greater interest in determination of the particular issue. Restatement (Second) of Conflict of Laws § 145.

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[3] Action 13 17

13 Action

13II Nature and Form

13k17 k. What Law Governs. Most Cited Cases

Although no mechanical standard governs the selection of which state's law applies, one guideline is that when any two of those contacts are located wholly in a single state, this will usually be the state of the applicable law with respect to most issues. Restatement (Second) of Conflict of Laws §§ 145, 148.

[4] Action 13 17

13 Action

13II Nature and Form

13k17 k. What Law Governs. Most Cited Cases

If the plaintiff is a corporation and the loss is pecuniary, the plaintiff's principal place of business is a contact of substantial significance in determining which state's law applies. Restatement (Second) of Conflict of Laws §§ 145, 148.

[5] Action 13 17

13 Action

13II Nature and Form

13k17 k. What Law Governs. Most Cited Cases

In determining which state's law applies, the place of reliance is a more important contact than both the place of reception and the place where the defendant made the representations. Restatement (Second) of Conflict of Laws §§ 145, 148.

[6] Securities Regulation 349B 242

349B Securities Regulation

349BII State Regulation

349BII(A) In General

349Bk242 k. What Law Governs. Most Cited Cases

Washington had the most significant relationship to investor's Securities Act claims against investment firm that it made untrue statements of material fact and knew, or should of known, of omitted material facts, and made misrepresentations, and against auditor that it made untrue statements of material facts and engaged in acts of fraud and deceit, and, thus, Washington law applied to the claims, where the documents and communications underlying the claims were provided or made available to investor in its offices in Washington, including the partnership offering materials, subscription agreements, and audit reports, and investor alleged that the relationship began when firm representative met with investor in Redmond, auditor disseminated unqualified audit opinions and other materials to firm for delivery to investor in Washington, and knew investor was receiving and relying on its audits of the funds, which were allegedly feeder funds for a Ponzi scheme, and investor acted in reliance upon the misrepresentations in Washington where it was domiciled. West's RCWA 21.20.010; Restatement (Second) of Conflict of Laws §§ 145, 148.

[7] Accountants 11A 9

11A Accountants

11Ak9 k. Duties and Liabilities to Third Persons. Most Cited Cases

Washington had the most significant relationship to investor's negligent misrepresentation claim against auditor, and, thus, Washington law applied to the claims, although New York also had significant contacts, where investor's complaint expressly alleged

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that auditor was aware that investor was in Washington, knew its reports would be sent to Washington, and intended for investor to act in reliance upon the reports in Washington. Restatement (Second) of Conflict of Laws §§ 145, 148.

[8] Partnership 289 ↪2

289 Partnership

289I The Relation

289I(A) Creation and Requisites

289k2 k. What Law Governs. Most Cited Cases

Delaware law applied to investor's negligence claims against investment firm, where the funds in which investments were made were Delaware partnerships, and the funds' internal affairs were governed by the laws of Delaware.

[9] Appeal and Error 30 ↪893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate Court

30k893(1) k. In General. Most Cited Cases

Court of Appeals applies the de novo standard of review to a trial court's decision to dismiss for failure to state a claim for which relief can be granted. CR 12(b)(6).

[10] Appeal and Error 30 ↪919

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k915 Pleading

30k919 k. Striking Out or Dismissal.

Most Cited Cases

On review of motion to dismiss for failure to state a claim for which relief could be granted, Court of Appeals regards the plaintiff's allegations in the complaint as true, and considers hypothetical facts outside the record. CR 12(b)(6).

[11] Pleading 302 ↪48

302 Pleading

302II Declaration, Complaint, Petition, or Statement

302k48 k. Statement of Cause of Action in General. Most Cited Cases

Pleading 302 ↪72

302 Pleading

302II Declaration, Complaint, Petition, or Statement

302k72 k. Prayer for Relief. Most Cited Cases

Under notice pleading standards, a complaint need contain only (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled. CR 8(a).

[12] Pleading 302 ↪16

302 Pleading

302I Form and Allegations in General

302k16 k. Sufficiency of Allegations in General. Most Cited Cases

A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests. CR 8(a).

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[13] Appeal and Error 30 ↪837(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k837 Matters or Evidence Considered in Determining Question

30k837(1) k. In General. Most Cited Cases

Court of Appeals would not consider small sampling of material in conjunction with investment firm's motion to dismiss for failure to state a claim for which relief could be granted in action by investor against investment firm for violation of the Washington State Securities Act (WSSA), where they were a limited sampling from a period late in the parties' 10-year relationship, and the Court would not assume that they were representative. West's RCWA 21.20.010; CR 12(b)(6).

[14] Securities Regulation 349B ↪246

349B Securities Regulation

349BII State Regulation

349BII(A) In General

349Bk243 Statutory Provisions

349Bk246 k. Construction and Operation in General. Most Cited Cases

Because the primary purpose of the Washington State Securities Act (WSSA) is to protect investors, courts construe the statute liberally. West's RCWA 21.20.005, et seq.

[15] Securities Regulation 349B ↪306

349B Securities Regulation

349BII State Regulation

349BII(B) Civil Effects of Violations

349Bk303 Actions

349Bk306 k. Pleading. Most Cited Cases

Under Washington's liberal notice-pleading standard, investor's complaint adequately stated a seller claim against investment firm for violation of the Washington State Securities Act (WSSA), where the complaint alleged justifiable reliance on the basis of firm's misstatements. West's RCWA 21.20.005, et seq.; CR 12(b)(6).

[16] Securities Regulation 349B ↪302

349B Securities Regulation

349BII State Regulation

349BII(B) Civil Effects of Violations

349Bk291 Rights, Liabilities, and Remedies

349Bk302 k. Persons Liable. Most Cited Cases

A seller of a security under the Washington State Securities Act (WSSA) is any person who is a substantial contributive factor in the sales transaction. West's RCWA 21.20.010.

[17] Securities Regulation 349B ↪302

349B Securities Regulation

349BII State Regulation

349BII(B) Civil Effects of Violations

349Bk291 Rights, Liabilities, and Remedies

349Bk302 k. Persons Liable. Most Cited Cases

In order to be liable under the Washington State Securities Act (WSSA) as a seller, the defendant must exhibit attributes of a seller, or be a catalyst to the sale. West's RCWA 21.20.010.

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[18] Pretrial Procedure 307A ↩️680

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak680 k. Fact Questions. Most

Cited Cases

Due to the factual nature of the substantial factor test to determine whether a defendant was a seller under the Washington State Securities Act (WSSA), its determination is typically inappropriate for resolution on a motion to dismiss. West's RCWA 21.20.010.

[19] Securities Regulation 349B ↩️302

349B Securities Regulation

349BII State Regulation

349BII(B) Civil Effects of Violations

349Bk291 Rights, Liabilities, and Remedies

349Bk302 k. Persons Liable. Most Cited

Cases

Investor adequately alleged in complaint that auditor's actions were a substantial factor in the securities sales occurring after investor received auditor's first audit as required for auditor to be considered a seller under the Washington State Securities Act (WSSA), where investor alleged that auditor made untrue statements of material facts and engaged in acts of fraud and deceit that were a substantial factor contributing to investor's investment in funds which were allegedly feeder funds for a Ponzi scheme, misrepresented that it had conducted audits in conformity with generally accepted accounting standards, and omitted material facts, and adequately alleged that investor reasonably and justifiably relied on auditor's misrepresentations and would not have invested if the funds were not subject to the audits. West's RCWA 21.20.005, et seq.; CR 12(b)(6).

[20] Securities Regulation 349B ↩️302

349B Securities Regulation

349BII State Regulation

349BII(B) Civil Effects of Violations

349Bk291 Rights, Liabilities, and Remedies

349Bk302 k. Persons Liable. Most Cited

Cases

Investor's complaint adequately alleged that investment firm's parent and grandparent were control persons such that they could be liable under Washington State Securities Act (WSSA) provision that stated that control persons were liable jointly and severally with and to the same extent as the seller or buyer and that they actively participated in firm's operations in general and possessed the power to control the specific transaction or activity upon which the primary violation was predicated, where pleading alleged that parent and grandparent actually participated in firm's operations in general and possessed the power to control the specific transaction or activity upon which the primary violation was predicated. West's RCWA 21.20.430(3).

[21] Partnership 289 ↩️370

289 Partnership

289VIII Limited Partnership

289k370 k. Actions Between Partners. Most

Cited Cases

Investor, which was a limited partner in limited partnership, lacked standing under Delaware law to bring negligence claim against investment firm, which was the general partner, on the basis that firm owed it a fiduciary duty of care as managing partner of funds and failed to exercise reasonable care by not overseeing the management of the investments in the funds, which were allegedly feeder funds for a Ponzi scheme, where the injury investor suffered was the pro rata loss of the decline in the funds' value and was

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secondary to the direct injury to the funds, and investor's allegations did not demonstrate that the injury was independent to the injury to all of the funds' partners which was caused by the same alleged breach, and, thus, the claim was derivative and could be pursued only by the partnership, and not by individual investors.

[22] Principal and Agent 308

308 Principal and Agent

308I The Relation

308I(A) Creation and Existence

308k1 k. Nature of the Relation in General.

Most Cited Cases

The proper inquiry when a claim is based on agency is whether there is a retention of the right to direct the manner in which the work is performed, not simply whether there is an actual exercise of control over the manner in which the work is performed.

[23] Principal and Agent 308

308 Principal and Agent

308I The Relation

308I(A) Creation and Existence

308k24 k. Questions for Jury. Most Cited

Cases

Whether or not a principal-agent relationship exists is generally a question of fact.

[24] Principal and Agent 308

308 Principal and Agent

308I The Relation

308I(A) Creation and Existence

308k1 k. Nature of the Relation in General.

Most Cited Cases

The principal's right to control the alleged agent is determined by factors such as the conduct of the parties, the contract between them, and the right of the principal to interfere in the alleged agent's work.

[25] Brokers 65

65 Brokers

65II Employment

65k6 k. Relation to Principal in General. Most

Cited Cases

Corporations and Business Organizations 101

101 Corporations and Business Organizations

101II Disregarding Corporate Entity; Piercing Corporate Veil

101k1057 Particular Occasions for Determining Corporate Entity

101k1074 k. Fraud. Most Cited Cases

Investor's complaint adequately stated a claim against investment firm's parent and grandparent based upon agency, where investor alleged that firm came under their control, which included the manner by which firm offered investments, including the funds that were alleged to be feeder funds for Ponzi scheme, alleged that parent and grandparent learned of firm's enormous exposure with perpetrator of Ponzi scheme and firm's representations to the feeder funds' investors regarding its oversight and monitoring of perpetrator of scheme were false or, at a minimum, highly suspect, and investor's complaint and hypothetical facts supported the claim that parent and grandparent controlled investment firm and retained the right to direct the manner in which firm's work was performed.

[26] Principal and Agent 308

308 Principal and Agent

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308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k98 Implied and Apparent Authority
308k99 k. In General. Most Cited Cases

Principal and Agent 308 ↪159(1)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(C) Unauthorized and Wrongful Acts
308k159 Negligence or Wrongful Acts of Agent
308k159(1) k. Rights and Liabilities of Principal. Most Cited Cases

Apparent agency occurs, and vicarious liability for the principal follows, where a principal makes objective manifestations leading a third person to believe the wrongdoer is an agent of the principal.

[27] Principal and Agent 308 ↪124(1)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(A) Powers of Agent
308k124 Questions for Jury
308k124(1) k. In General. Most Cited Cases

Whether apparent authority exists is ordinarily a question of fact.

[28] Brokers 65 ↪6

65 Brokers
65II Employment
65k6 k. Relation to Principal in General. Most Cited Cases

Corporations and Business Organizations 101 ↪1074

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1057 Particular Occasions for Determining Corporate Entity
101k1074 k. Fraud. Most Cited Cases

Investor's contentions in complaint that investment firm's parent and grandparent marketed firm as a member of grandparent's family of companies and listed firm in its annual reports as one of its general agencies and other offices, which led investor to believe that firm had the authority to offer and sell funds, which were allegedly feeder funds for Ponzi scheme, were sufficient to state a claim on the basis of apparent agency.

[29] Brokers 65 ↪6

65 Brokers
65II Employment
65k6 k. Relation to Principal in General. Most Cited Cases

Corporations and Business Organizations 101 ↪1085(4)

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil
101k1079 Actions to Pierce Corporate Veil
101k1085 Pleading
101k1085(4) k. Alter Ego, Instrumentality, or Agency in General. Most Cited Cases

Investor's complaint failed to demonstrate the existence of an apparent agency relationship between investment firm and its parent, although complaint alleged that firm represented itself on its stationary and marketing material as a company of the parent, where firm's representations purportedly manifesting

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its apparent agency were not attributable to parent as principal, even when considering hypothetical facts.

[30] Accountants 11A

11A Accountants

11Ak9 k. Duties and Liabilities to Third Persons.

Most Cited Cases

Investor's complaint stated a claim for negligent misrepresentation against auditor, where it alleged that auditor made untrue statements of material facts and engaged in acts of fraud and deceit upon investor that were a substantial factor contributing to investor's investment in funds, which were allegedly feeder funds for Ponzi scheme, investor acted in reliance upon the misrepresentations and its investments in reliance of the auditors totaled approximately \$50 million, and auditor knew investor was receiving and relying on its audits of the funds because each audit was addressed to the partners of the funds, which auditor knew included investor. Restatement (Second) of Torts § 552 cmt.h.

[31] Courts 106

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k34 Presumptions and Burden of Proof as to Jurisdiction

106k35 k. In General. Most Cited Cases

Pretrial Procedure 307A

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)2 Grounds in General

307Ak554 k. Want of Jurisdiction. Most Cited Cases

The plaintiff has the burden of demonstrating jurisdiction, but when a motion to dismiss for lack of personal jurisdiction is resolved without an evidentiary hearing, only a prima facie showing of jurisdiction is required.

[32] Pretrial Procedure 307A

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)2 Grounds in General

307Ak554 k. Want of Jurisdiction. Most Cited Cases

Pretrial Procedure 307A

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak682 Evidence

307Ak683 k. Presumptions and Burden of Proof. Most Cited Cases

When a motion to dismiss for lack of personal jurisdiction is resolved without an evidentiary hearing, courts treat the allegations of the complaint as true.

[33] Courts 106

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

106k13.3 Factors Considered in General

106k13.3(5) Connection with Litiga-

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tion

106k13.3(7) k. Unrelated Contacts and Activities; General Jurisdiction. Most Cited Cases

If a nonresident is doing business in Washington state on a substantial and continuous basis, then the courts may exercise general jurisdiction over the defendant pursuant to the Long Arm Statute as to any cause of action. West's RCWA 4.28.185.

[34] Courts 106 ↪ 13.3(8)

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

106k13.3 Factors Considered in General

106k13.3(5) Connection with Litigation

106k13.3(8) k. Related Contacts and Activities; Specific Jurisdiction. Most Cited Cases

The courts may gain specific personal jurisdiction over a nonresident pursuant to the Long Arm Statute based on contacts with Washington that are much more limited than substantial and continuous; but, specific jurisdiction extends only to causes of action that arise out of those limited contacts. West's RCWA 4.28.185.

[35] Constitutional Law 92 ↪ 3964

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3964 k. Non-Residents in General.

Most Cited Cases

Courts 106 ↪ 13.3(8)

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

106k13.3 Factors Considered in General

106k13.3(5) Connection with Litigation

106k13.3(8) k. Related Contacts and Activities; Specific Jurisdiction. Most Cited Cases

Courts 106 ↪ 13.4(3)

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

106k13.4 Particular Nonresident Entities

106k13.4(3) k. Corporations and Business Organizations. Most Cited Cases

Court of Appeals applies three factors to inquiry of whether exercise of long-arm jurisdiction exceeds the limit of federal due process: (1) the nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state, (2) the cause of action must arise from, or be connected with, such act or transaction, and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and

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protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation. U.S.C.A. Const.Amend. 14; West's RCWA 4.28.185(1).

[36] Courts 106 ↪ 13.5(4)

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

106k13.5 Particular Contexts and Causes of Action

106k13.5(4) k. Torts in General. Most

Cited Cases

The purposeful availment analysis of long-arm jurisdiction in the tort context permits the exercise of jurisdiction when the claimant makes a prima facie showing that an out-of-state party's intentional actions were expressly aimed at the forum state and caused harm in the forum state. West's RCWA 4.28.185(1)(a).

[37] Courts 106 ↪ 13.6(9)

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

106k13.6 Agents, Representatives, and Other Third Parties, Contacts and Activities of as Basis for Jurisdiction

106k13.6(9) k. Related or Affiliated Entities; Parent and Subsidiary. Most Cited Cases

Investor's complaint alleged a viable claim that investment firm's parent was, not merely a parent corporation, but engaged in Washington in significant transactions and actively controlled and managed key marketing and solicitation activities of firm as its agent as required to satisfy purposeful availment element of Washington's personal jurisdiction over parent under long-arm statute. West's RCWA 4.28.185(1)(a).

[38] Constitutional Law 92 ↪ 3964

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3964 k. Non-Residents in General.

Most Cited Cases

While liability theories should not be conflated with jurisdiction standards, the application of the due process purposeful availment standard for long-arm jurisdiction may include practical policy considerations. U.S.C.A. Const.Amend. 14; West's RCWA 4.28.185(1)(a).

[39] Courts 106 ↪ 13.4(3)

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

106k13.4 Particular Nonresident Entities

106k13.4(3) k. Corporations and Business Organizations. Most Cited Cases

As a general rule, a business entity suffers harm at its principal place of business for purposes of

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long-arm jurisdiction analysis.

[40] Constitutional Law 92 ↪ 3965(7)

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3965 Particular Parties or Circumstances

92k3965(7) k. Banks, Banking, Finance, and Securities. Most Cited Cases

Courts 106 ↪ 13.6(9)

106 Courts

1061 Nature, Extent, and Exercise of Jurisdiction in General

1061(A) In General

106k13.1 Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

106k13.6 Agents, Representatives, and Other Third Parties, Contacts and Activities of as Basis for Jurisdiction

106k13.6(9) k. Related or Affiliated Entities; Parent and Subsidiary. Most Cited Cases

Investor's assertion of specific personal jurisdiction over investment firm's parent corporation satisfied the through-an-agent provision of the long-arm statute and comported with due process, where investor alleged that parent was actively controlling and managing key activities of the investment firm, firm was acting as its agent in Washington, those activities were financially significant to parent, investor's claims arose out of those activities, and the activities significantly impacted investor in Washington. U.S.C.A. Const.Amend. 14; West's RCWA 4.28.185(1).

Appeal from King County Superior Court; Honorable Patrick H. Oishi, J. Jeffrey M. Thomas, Jeffrey Iver

Tilden, Gordon Tilden Thomas & Cordell LLP, Seattle, WA, Steven W. Thomas, Emily Alexander, Mark Forrester, Thomas, Alexander & Forrester LLP, Venice, CA, for Appellants.

Timothy J. Filer, Charles Philip Rullman III, Foster Pepper PLLC, David F. Taylor, Cori Gordon Moore, Perkins Coie, Christopher Holm Howard, Virginia Nicholson, Claire Louise Been, Schwabe Williamson & Wyatt PC, Stephen Michael Rummage, John Goldmark, Davis Wright Tremaine LLP, Seattle, WA, David A. Kotler, Dechert LLP, Princeton, NJ, Carol E. Head, Joseph L. Kociubes, Bingham McCutchen, LLP, Boston, MA, Robert B. Hubbell, Morrison Foerster, LLP, Los Angeles, CA, for Respondents.

PUBLISHED OPINION

VERELLEN, J.

*1 ¶ 1 Bernard Madoff's incredible "success" as an investor spurred some investment firms to contract with Madoff to manage their "feeder funds." ^{EN1} An investment firm sold such funds to a group of local investors, who lost \$195 million when Madoff's notorious Ponzi scheme collapsed.

¶ 2 The investors (FutureSelect) sued the investment firm (Tremont), its corporate parent (Oppenheimer) and grandparent (Mass Mutual), as well as an auditor (Ernst & Young) for Washington securities fraud and tort claims. The King County Superior Court dismissed all of the claims pursuant to CR 12(b)(6) and the claims against Oppenheimer also for lack of personal jurisdiction.

¶ 3 Ten points drive the outcome of this appeal. First, the "most significant relationship" choice-of-law standards for misrepresentation and fraud claims favor the application of Washington law to all but one of the claims asserted.

¶ 4 Second, under CR 12(b)(6) we consider the allegations of the complaint and consistent hypothet-

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ical facts, but not limited samples of disputed transactional documents.

¶ 5 Third, under the generous CR 12(b)(6) standard, the investors adequately allege they relied upon representations and omissions by the investment firm in deciding to invest and maintain their investments.

¶ 6 Fourth, an auditor may be liable as a “seller” under The Securities Act of Washington (WSSA), chapter 21.20 RCW, if the auditor provides false and misleading information that was a “substantial contributive factor” in investors’ decisions to invest and maintain their investments.

¶ 7 Fifth, the corporate parent and grandparent of an investment firm may face liability as a “control person” under the WSSA if they actively managed and controlled key aspects of the investment firm’s operations, including the specific investments and representations that give rise to the investor’s claims.

¶ 8 Sixth, the allegation that the investment firm failed to conduct the due diligence and monitoring of Madoff that it promised its investors states a negligent misrepresentation claim.

¶ 9 Seventh, in their role as limited partners, the investors lack standing to pursue the derivative claim that the investment firm, as the general partner, negligently managed the limited partnerships (applying Delaware law).

¶ 10 Eighth, the corporate parent and grandparent may be liable for the acts of the investment firm under an agency theory if they actually controlled and actively managed key operations of the investment firm, but apparent agency requires that the parent or grandparent held the subsidiary out to others as their agent.

¶ 11 Ninth, an auditor may be liable for negligent misrepresentation if the auditor included untrue statements and omissions in materials provided to the limited partners knowing that the limited partners relied upon those materials.

¶ 12 Finally, the Washington contacts of the investment firm may be imputed to its parent corporation for purposes of long-arm jurisdiction if the parent actively managed and controlled key aspects of the investment firm’s activities in Washington, which activities gave rise to the claims of the investors.

*2 ¶ 13 We conclude that FutureSelect’s complaint adequately alleges WSSA claims against all respondents. Moreover, the complaint adequately alleges negligent misrepresentation claims against Tremont and Ernst & Young, agency claims against Mass Mutual and Oppenheimer, and an apparent agency claim against Mass Mutual. Based upon the allegations of the complaint, the exercise of long-arm jurisdiction over Oppenheimer does not offend due process.

¶ 14 We affirm the dismissal of FutureSelect’s apparent agency claim against Oppenheimer and its negligence claim against Tremont. We reverse the dismissal of all other claims.

FACTS

¶ 15 Because this is an appeal from a trial court order dismissing claims pursuant to CR 12(b)(6), we focus on the facts as alleged in the complaint.

The Parties

¶ 16 Delaware corporation FutureSelect Portfolio Management Inc. is the operations manager of Delaware limited liability companies FutureSelect Prime Advisor II and Telesis IIW and Delaware limited partnership The Merriwell Fund (collectively FutureSelect). These entities have their principal place of business in Redmond, Washington.

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¶ 17 Delaware corporation Tremont Group Holdings Inc. is the parent holding company of Connecticut corporation Tremont Partners Inc. and has its principal office in New York.^{FN2} Tremont was the general partner in Delaware limited partnerships the Rye Select Broad Market Fund ^{FN3} (Broad Market), Rye Select Broad Market Prime Fund (Prime), and Rye Select Broad Market XL Fund (XL) (collectively Rye Funds).

¶ 18 Delaware corporation Oppenheimer Acquisition Corporation (Oppenheimer) owns subsidiary entity OppenheimerFunds Inc. Oppenheimer acquired Tremont in 2001 and made it a wholly owned subsidiary. Employees of Oppenheimer and OppenheimerFunds Inc. served as Tremont board members and officers.

¶ 19 Massachusetts corporation Massachusetts Mutual Life Insurance Company (Mass Mutual) wholly owns Oppenheimer. Mass Mutual conducts business in Washington.

¶ 20 Delaware limited partnership Ernst & Young is an accounting firm conducting business worldwide, including Washington. Ernst & Young audited the Broad Market and Prime funds from 2000 to 2003 and issued annual financial statements.^{FN4} Ernst & Young disseminated unqualified audit opinions^{FN5} to the Rye Funds partners, including FutureSelect. Ernst & Young is headquartered in New York.

FutureSelect Invests with Tremont

¶ 21 Tremont was one of a limited number of investment firms that afforded investors access to feeder funds managed by Bernard L. Madoff Investment Securities LLC (Madoff). Investors accessed the funds by becoming limited partners in Rye Funds partnerships managed by Tremont Partners Inc. as general partner. The Rye Funds partnerships created accounts managed by Madoff. The Rye Funds'

agreements with Madoff did not require him to disclose key details of how he allegedly invested the accounts. In order to invest in funds managed by Madoff, FutureSelect became a limited partner in the Rye Funds and invested approximately \$195 million between 1998 and 2007. The Rye Funds assets managed by Madoff were lost as a result of his Ponzi scheme.

*3 ¶ 22 A Tremont representative visited FutureSelect principal Ron Ward in Redmond in 1997 to solicit investment in the Rye Funds. Ward soon visited Tremont's New York office and discussed the funds and Madoff. In both meetings, "Tremont told Ward that the Rye Funds invested all of their assets with Madoff and Madoff was given complete investment discretion over those assets, subject to Tremont's oversight and ongoing due diligence."^{FN6} Tremont provided Ward written materials, including "the 1996 audited financial statements of Broad Market and Broad Market Prime prepared by [accounting firm Goldstein Golub Kessler LLP], which certified that the funds had tens of millions in assets."^{FN7}

¶ 23 Relying on "Tremont's representations that it had a comprehensive understanding of Madoff's operations and conducted continuous monitoring and oversight" and on Goldstein Golub Kessler's unqualified audit report, FutureSelect invested in the Rye Funds.^{FN8} Ward and Tremont communicated monthly thereafter about Madoff and the Rye Funds.

¶ 24 Ward regularly visited Tremont in New York. During the visits, Tremont "represented to Ward that its ongoing oversight and testing of Madoff were satisfactory in every respect."^{FN9} Ward learned from Tremont in June 2000 that the United States Securities and Exchange Commission reviewed Madoff and identified "no issues" of concern.^{FN10} After Mass Mutual acquired Tremont in 2001, Tremont told Ward that "Mass Mutual and its investment banker ... had sent due diligence teams who evaluated Madoff's operations and had been com-

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pletely satisfied.”^{FN11} In both 2005 and 2007, Ward had “lengthy phone calls” with Tremont employee Bob Schulman “reviewing Tremont’s ongoing due diligence of Madoff.”^{FN12}

¶ 25 Both during and after the initial 1997 meeting, Tremont explained the specific monitoring it purported to conduct on Rye Funds accounts managed by Madoff. The steps Tremont claimed to take were detailed in a July 10, 2001 letter sent to Ward. The letter claimed that each month,

[w]e record the purchases and sales by security and analyze whether the purchase and sale orders on the individual securities were within the published traded range that particular day. We also analyze the trading volume by stock to calculate the percentage of the overall activity. Once we have reviewed each account, we then compare the accounts to each other to insure that all accounts are treated equally.^{FN13}

Tremont also claimed to monitor Madoff’s option activity and the timing of his investments. FutureSelect received annual audited financial statements for the Rye Funds prepared by accounting firms Goldstein Golub Kessler, KPMG LLP, and Ernst & Young. Ernst & Young specifically audited the Broad Market and Prime funds from 2000 through 2003.

¶ 26 Madoff later admitted that he never invested clients’ funds in any securities but instead deposited the funds into a bank account for personal use. He used his clients’ funds to pay other clients who requested redemptions.

*4 ¶ 27 FutureSelect filed its complaint in King County Superior Court, alleging that (1) the respondents violated the WSSA, (2) Tremont committed the torts of negligence and negligent misrepresentation, (3) Oppenheimer and Mass Mutual were liable for Tremont’s torts under theories of agency or apparent agency, and (4) Ernst & Young was liable for

the tort of negligent misrepresentation.

¶ 28 Respondents moved to dismiss on the basis that the complaint failed to state a claim for which relief could be granted. Tremont, Oppenheimer and Ernst & Young argued for dismissal on the grounds of forum non conveniens. Oppenheimer argued that the court did not have personal jurisdiction. The trial court dismissed all of FutureSelect’s claims.^{FN14}

¶ 29 FutureSelect appeals.

ANALYSIS

Choice of Law

[1][2] ¶ 30 Because the transactions at issue did not all occur in Washington, we must first determine the law applicable to each claim.^{FN15} Where Washington law conflicts with the law of another relevant state, this court determines which state has the most significant relationship to the action.^{FN16} If more than one state has a significant relationship and the contacts are “evenly balanced” between states, the court evaluates “the interests and public policies of the concerned states, to determine which state has the greater interest in determination of the particular issue.”^{FN17}

¶ 31 Washington courts have adopted section 145 of the *Restatement (Second) of Conflicts of Laws*, which sets forth the general principles of the “most significant relationship” test.^{FN18} It provides that the rights and liabilities of the parties with respect to an issue “are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.”^{FN19} This general rule is supplemented by related sections of the *Restatement* applying the most significant relationship standard to particular categories of claims because it is possible “to state rules of greater precision” as to those categories.^{FN20} The most significant relationship test includes more precise standards for claims of misrepresentation and fraud as set forth in section 148.^{FN21}

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¶ 32 Respondents argue that section 148 does not apply to FutureSelect's claims but present no compelling rationale for restricting our analysis to the more general criteria of section 145, where the more precise section 148 criteria fit the alleged claims. No controlling cases limit the most significant relationship test to the section 145 criteria.

¶ 33 Ernst & Young contends our Supreme Court “declined” to adopt section 148 in tort cases, citing *Southwell v. Widing Transportation, Inc.*^{FN22} However, the *Southwell* court did not reject section 148. Rather, it found that the parties failed to present “a record that is sufficiently developed to enable us to undertake the factual analysis necessary for proper resolution of the conflicts issues involved.”^{FN23} The court noted that “the general principles” enunciated in section 6 and section 145 apply to choice-of-law issues for claims sounding in tort^{FN24} but did not reject consideration of any of the more precise standards cross-referenced in the comments to section 145, including the standards of section 148. *Southwell* also makes clear that evaluation of a state's contacts is not limited to a mechanical application of the section 145 factors:

*5 These contacts are to be evaluated according to their relative importance with respect to the particular issue. The approach is not merely to count contacts, but rather to consider which contacts are most significant and to determine where these contacts are found.^{FN25}

¶ 34 Tremont contends that *Haberman v. Washington Public Power Supply System* requires application of only the section 145 factors in a most significant relationship test.^{FN26} This is not a precise reading of *Haberman*. In that case, “[n]o party contend[ed] that another state's securities act applie [d]”^{FN27} and the court rejected the argument that “WSSA should not be applied extraterritorially to out-of-state de-

pendants or transactions.”^{FN28} The *Haberman* court cited *Southwell* in discussing the most significant relationship standard but did not directly refer to the *Restatement*.^{FN29}

¶ 35 Even though no Washington court has formally adopted section 148, we may still refer to that provision for guidance.^{FN30} We conclude that section 148 is instructive in this case. Section 148 is best viewed as a refinement of the section 145 criteria, emphasizing more precise factors relevant to claims of misrepresentation or fraud.^{FN31} This is the express intent of the drafters of the *Restatement* and is consistent with decisions applying Washington law.^{FN32} Section 148(2) sets forth six factors to assess which state has the most significant relationship to the dispute and to the parties:^{FN33}

- (a) the place, or places, where the [injured party] acted in reliance upon the defendant[s'] representations,
- (b) the place where the [injured party] received the representations,
- (c) the place where the defendant[s] made the representations,
- (d) the domicile, ... place of incorporation and place of business of the parties,
- (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
- (f) the place where the [injured party] is to render performance under a contract which [it] has been induced to enter by the false representations of the defendant[s].^{FN34}

[3][4][5] ¶ 36 Although no mechanical standard governs the selection of the applicable law, one

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guideline is that when any two of those contacts are located wholly in a single state, this will usually be the state of the applicable law with respect to most issues.^{FN35} In addition, 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 in this case.^{FN36} Furthermore, the place of reliance (here, Washington) is a more important contact than both the place of reception (Washington) and the place where the defendant made the representations (New York).^{FN37}

A. FutureSelect's WSSA Claims

¶ 37 We first apply the most significant relationship choice-of-law factors to FutureSelect's WSSA claims.^{FN38} Those claims focus upon allegations of misrepresentations or fraud.

*6 ¶ 38 FutureSelect asserts Tremont "made untrue statements of material fact," "misrepresented," and made "misstatements."^{FN39} It asserts Oppenheimer controlled Tremont and "knew or should have known" that Tremont "omitted material facts and [made] untrue statements of material fact."^{FN40} It alleges Mass Mutual controlled Tremont and "knew or should have known that Tremont's representations ... omitted material facts and [made] untrue statements of material fact."^{FN41} It also alleges Ernst & Young "made untrue statements of material facts and engaged in acts of fraud and deceit."^{FN42}

[6] ¶ 39 We conclude that Washington has the most significant relationship to these claims. FutureSelect asserts that the documents and communications underlying its claims were provided or made available to it in its offices in Washington, including the partnership offering materials, subscription agreements, and Rye Funds audit reports. The complaint specifically states that "Tremont's relationship with FutureSelect began when a Tremont representative visited [FutureSelect principal] Ward in Redmond in 1997 to solicit FutureSelect's investment in the Rye Funds."^{FN43} More generally, FutureSelect alleges that Tremont

"disseminat[ed] offering materials, financial disclosures, audit reports and/or other written materials ... through communications with representatives of FutureSelect"^{FN44} and "made numerous misrepresentations and omissions to FutureSelect in the [s]tate of Washington and thereby injured FutureSelect in this [s]tate."^{FN45} The complaint specifically refers to a July 10, 2001 letter from Tremont to Ward in which "Tremont claimed to perform numerous procedures to confirm that the information Madoff was presenting to Tremont [about Rye Funds' investments] was accurate."^{FN46}

¶ 40 FutureSelect contends Ernst & Young "disseminated unqualified audit opinions" and other materials to Tremont for delivery to FutureSelect in Washington, and "knew [FutureSelect was] receiving and relying on its audits of the funds."^{FN47}

¶ 41 FutureSelect asserts that it acted in reliance upon the misrepresentations in Washington, where it is domiciled and has its principal place of business. As a result of these communications, FutureSelect alleges it entered into the Rye Fund partnerships, made ongoing decisions to maintain or increase its investments in those funds, and rendered performance under those partnership agreements from its place of business in Washington. Under the section 148 criteria, Washington has substantially more significant contacts than any other state.

B. Negligent Misrepresentation/Agency Claims

¶ 42 The negligent misrepresentation claim against Tremont and the related agency claims against Oppenheimer and Mass Mutual are premised on misrepresentation or fraud. FutureSelect alleges Tremont supplied and disseminated "false information."^{FN48} It alleges that Oppenheimer "had the right to control Tremont[,] including how Tremont offered investment products and advice, including the Rye Funds."^{FN49} And it alleges Mass Mutual had the "right to control ... how Tremont offered investment products and advice, including the Rye Funds."^{FN50} The complaint recites

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that most of the misrepresentations were directed to FutureSelect in Washington, that FutureSelect acted in reliance upon the misrepresentations in Washington, and that FutureSelect was damaged in Washington. Accordingly, Washington has the most significant contacts with the subject matter of these claims.

*7 [7] ¶ 43 FutureSelect's negligent misrepresentation claim against Ernst & Young alleges that Ernst & Young "supplied information ... that was false," "omitted material facts," "communicat[ed] such false information," and "disseminat[ed] false information" that FutureSelect received in Washington.^{FN51} Under the section 148 criteria, Washington and New York both have significant contacts, but Washington's are more significant.^{FN52} FutureSelect's complaint expressly alleges Ernst & Young was aware that FutureSelect was in Washington, knew that its reports would be sent to Washington, and intended for FutureSelect to act in reliance upon the reports in Washington. Specifically, the complaint alleges that (1) with Ernst & Young's "consent and knowledge, Tremont used the audited financials prepared by the [a]uditors to solicit investors to the Rye Funds";^{FN53} (2) Ernst & Young "knew and intended that FutureSelect would rely on their misrepresentations when it invested in the Rye Funds";^{FN54} and (3) Ernst & Young knew and intended to supply such information for the benefit and guidance of FutureSelect" in its Rye Funds investment decisions. FutureSelect alleges that its injury occurred in Washington.^{FN55} We conclude that Washington law applies to FutureSelect's tort claim against Ernst & Young.

C. Negligence Claim

[8] ¶ 44 Delaware law applies to FutureSelect's negligence claim against Tremont. The Rye Funds are Delaware partnerships. The Rye Funds' internal affairs, such as the managing partner's duty to exercise reasonable care in managing the funds, are governed by the laws of that state.^{FN56}

¶ 45 We conclude that Washington law applies to

FutureSelect's WSSA claims against all respondents, its negligent misrepresentation claims against Tremont and Ernst & Young, and its agency claims against Mass Mutual and Oppenheimer. Delaware law applies to the negligence claim against Tremont.

CR 12(b)(6)

[9][10][11][12] ¶ 46 This court applies the de novo standard of review to a trial court's decision to dismiss pursuant to CR 12(b)(6).^{FN57} Dismissal under CR 12(b)(6) is proper where " 'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.' " ^{FN58} We regard the plaintiffs allegations in the complaint as true, and consider hypothetical facts outside the record.^{FN59} Under notice pleading standards, a complaint need contain only "(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled." ^{FN60} " 'A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests.' " ^{FN61}

A. Additional Documents Provided by Tremont

¶ 47 As a threshold issue, we must decide which documents are pertinent to our determination of whether FutureSelect adequately states its claims under the CR 12(b)(6) and notice pleading standards. Most importantly in this case, Tremont relies heavily on examples of the partnership memoranda, limited partnership agreements, and subscription agreements to argue that FutureSelect fails to state a claim. The trial court expressly relied on these documents in dismissing FutureSelect's claims.^{FN62}

*8 ¶ 48 "Documents whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss," especially if "the parties do not dispute the authenticity of the documents the court considered and they do not constitute testimony." ^{FN63}

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[13] ¶ 49 But here, Tremont submitted only a small sampling of materials in conjunction with its motion to dismiss—one example of a partnership agreement, a subscription agreement, and a partnership memorandum for each Rye Fund. And the samples Tremont provided were from a period late in the parties' 10-year relationship. Further, at oral argument here, FutureSelect disputed the sample agreements' authenticity.

¶ 50 We decline to assume that the partnership memoranda, partnership agreements, and subscription agreements Tremont submitted are representative of the relevant documents throughout the parties' 10-year relationship. While documents of this type may become relevant to determine the merits of portions of FutureSelect's claims, or in narrowing or disposing of the claims in a summary judgment proceeding, the limited sampling of the documents submitted by Tremont should not be the basis for CR 12(b)(6) dismissal of the entirety of FutureSelect's claims against Tremont.

¶ 51 In evaluating FutureSelect's claims under CR 12(b)(6), we do not consider the sample documents offered by Tremont.

B. WSSA

¶ 52 The WSSA provides, in part:

It is unlawful for any person, in connection with the offer, sale [^{FN64}] or purchase of any security, directly or indirectly:

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

(2) To make any untrue statement of a material fact [^{FN65}] 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 are made, not

misleading; or

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. [^{FN66}]

¶ 53 To establish a claim under the WSSA, an investor must prove that (1) the seller made material misrepresentations or omissions about the security and (2) the investor relied on those misrepresentations or omissions. ^{FN67} Such reliance must be reasonable under the surrounding circumstances. ^{FN68}

[14] ¶ 54 Our Supreme Court expanded seller liability beyond the "strict privity" standard to include persons who "substantially contribute" to a sale of securities. ^{FN69} Because the primary purpose of the WSSA is to protect investors, courts construe the statute liberally. ^{FN70}

C. Tremont

¶ 55 FutureSelect alleges Tremont claimed to have conducted due diligence into Madoff's operations and to have continually conducted regular oversight and review measures over the Rye Funds' Madoff investments:

Tremont emphasized in its offering materials, financial disclosures and direct correspondence and conversations with FutureSelect that it had conducted thorough due diligence of Madoff to verify, among other things, the existence of the assets Madoff claimed to hold and manage for Tremont's investors, and the occurrence of trades that Madoff claimed to execute on the investors' behalf. ^{FN71}

*9 FutureSelect asserts that Tremont either failed to perform the monitoring it claimed or "uncovered evidence of Madoff's Ponzi scheme, and knowingly or recklessly misrepresented" the Rye Funds' assets. ^{FN72}

¶ 56 On these allegations, FutureSelect asserts

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Tremont violated the WSSA by making untrue statements of material fact in connection with the sale of a security:

Specifically, in connection with offering the Rye Funds as an investment, Tremont misrepresented that Tremont had conducted due diligence on Madoff, was familiar with Madoff's operations, and was monitoring Madoff's transactions, internal controls, and operational risk; that the assets purportedly managed by Madoff on behalf of the Rye Funds existed and were appreciating; and that the trades Madoff purported to be making on behalf of Rye Funds occurred.^[FN73]

¶ 57 Tremont argues that FutureSelect's WSSA claim is subject to CR 12(b)(6) dismissal because it fails to "adequately allege reasonable reliance."^{FN74} But Tremont primarily relies upon "exculpatory" language in its sample Rye Funds partnership memoranda, limited partnership agreements, and subscription agreements, and we have determined that those sample documents are not properly considered for purposes of CR 12(b)(6).

[15] ¶ 58 Tremont also relies on federal CR 12(b)(6) case law to support its argument that FutureSelect's complaint did not contain an adequate factual basis to establish reasonable reliance.^{FN75} But Washington State CR 12(b)(6) case law is not so strict.^{FN76} Under Washington's liberal notice-pleading standard,^{FN77} FutureSelect's complaint adequately states a WSSA seller claim against Tremont. RCW 21.20.010(2) prohibits making "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 are made, not misleading." The complaint also adequately alleges justifiable reliance:

FutureSelect reasonably and justifiably relied on Tremont's misstatements when it purchased securi-

ties in Tremont by investing in the Rye Funds. FutureSelect would not have purchased the Rye Funds securities if it had been aware that Tremont had not conducted due diligence of Madoff and was not monitoring Madoff's transactions, internal controls and operational risk, or that the assets purportedly managed by Madoff on behalf of the Rye Funds did not exist, or that the trades Madoff purported to be making on behalf of the Rye Funds had not occurred.^[FN78]

¶ 59 Because we determine that FutureSelect's WSSA claim against Tremont is sufficient to survive a CR 12(b)(6) motion to dismiss, we reverse the dismissal of that claim.

D. Ernst & Young

[16][17] ¶ 60 FutureSelect alleges Ernst & Young violated the WSSA as a "seller of a security" in violation of RCW 21.20.010. A "seller" is any person who is a "substantial contributive factor in the sales transaction."^{FN79} In order to be liable, the defendant must exhibit attributes of a seller, or be a catalyst to the sale.^{FN80}

*10 ¶ 61 Ernst & Young contends FutureSelect fails to show it was a substantial contributive factor to FutureSelect's investments, and thus is not liable as a "seller" of securities under the WSSA. Quoting *Hines*, Ernst & Young asserts that professionals "whose role is confined to rendering routine professional services in connection with an offer" cannot incur seller liability under the WSSA.^{FN81} But *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.

[18] ¶ 62 Due to the factual nature of the "substantial factor" test, its determination is typically inappropriate for resolution on a motion to dismiss.^{FN82} Washington courts have typically denied motions to

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dismiss that challenge “seller” status when the defendant is an auditor who prepared statements that were provided to investors.^{FN83} This is because “[t]he natural roles of ... auditors ... go beyond ‘routine services’ rendered to a client. They serve the additional role of communicating to investors about corporations and their securities.”^{FN84}

[19] ¶ 63 Given Washington’s notice pleading standard, FutureSelect adequately alleges that Ernst & Young’s actions were a substantial factor in the securities sales occurring after FutureSelect received Ernst & Young’s first audit. FutureSelect’s complaint alleges that Ernst & Young “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.”^{FN85} FutureSelect alleges that Ernst & Young “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.”^{FN86}

¶ 64 FutureSelect adequately alleges that it “reasonably and justifiably relied on [Ernst & Young’s] misrepresentations” and “would not have invested in the Rye Funds if the funds were not audited by [Ernst & Young].”^{FN87} FutureSelect claimed Ernst & Young “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.”^{FN88} Ernst & Young also “knew [FutureSelect was] receiving and relying on its audits of the [Rye Funds]” because “[e]ach audit was addressed to the ‘Partners’ of the fund[s], which [Ernst & Young] knew included [FutureSelect].”^{FN89} FutureSelect’s investment “in reliance on Ernst & Young’s audits totaled approximately \$50 million.”^{FN90}

¶ 65 We reverse the dismissal of the WSSA claim against Ernst & Young. The determination of whether

Ernst & Young was a substantial contributive factor to the sale requires an inquiry best conducted on specific facts.

E. *Mass Mutual and Oppenheimer*

*11 ¶ 66 FutureSelect alleges Oppenheimer and Mass Mutual were “control persons” within the meaning of RCW 21.20.430(3), had control over Tremont, and knew Tremont made false statements to FutureSelect. FutureSelect contends Mass Mutual and Oppenheimer are liable to it for Tremont’s false statements.

¶ 67 Under RCW 21.20.430(3),

[e]very person who directly or indirectly controls a seller ... liable under subsection (1) or (2) above ... who materially aids in the transaction is also liable jointly and severally with and to the same extent as the seller ... unless such person sustains the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

Our Supreme Court approved a two-step test to determine whether the required control exists:

[Plaintiffs must] “establish, first, that the defendant ... actually participated in (i.e., exercised control over) the operations of the corporation in general; then he must prove that the defendant possessed the power to control the specific transaction or activity upon which the primary violation is predicated, but he need not prove that this later power was exercised.”^{FN91}

¶ 68 FutureSelect’s complaint alleges Mass Mutual and Oppenheimer controlled Tremont, including “the manner by which Tremont offered investments, including the Rye Funds.”^{FN92} Specifically, FutureSelect alleges Oppenheimer was 100 percent owned by Mass Mutual and Tremont was 100 percent owned

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by Oppenheimer. The complaint alleges Oppenheimer and Mass Mutual actively managed marketing and solicitation of investment activity, including the Rye Funds. FutureSelect alleges that, although the Tremont board of directors changed over time, “the board always was made up of high level employees of MassMutual and Oppenheimer entities.” ^{FN93} FutureSelect contends Tremont’s two coprincipals also were Oppenheimer employees. Moreover, the complaint alleges Mass Mutual “was the principal of Oppenheimer and Tremont, who were MassMutual’s agents, and had the *power to exercise complete control* over those entities, including control over their policies and procedures and the Rye Funds’ manner by which those funds invested their assets, including with Madoff.” ^{FN94}

¶ 69 FutureSelect also alleges Oppenheimer “actively managed” marketing and solicitation of investment activity at Tremont through selection of investment vehicles and due diligence programs. ^{FN95}

¶ 70 Mass Mutual and Oppenheimer contend FutureSelect does not adequately allege that they “actually participated” in Tremont’s operation or possessed the power to control Tremont’s solicitation and sale of Rye Fund securities to FutureSelect by failing to state “ ‘the specific transaction or activity upon which the primary [WSSA] violation is predicated.’ ” ^{FN96}

*12 [20] ¶ 71 But Mass Mutual and Oppenheimer overstate the degree of specificity required. Under CR 12(b)(6) pleading standards, FutureSelect’s complaint adequately alleges “control person” claims that Mass Mutual and Oppenheimer “actually participated” in Tremont’s operations in general and possessed the power to control the specific transaction or activity upon which the primary violation is predicated.

¶ 72 We reverse the dismissal of FutureSelect’s WSSA claims against Mass Mutual and Oppenheimer.

Tort Claims

A. Negligent Misrepresentation—Tremont

¶ 73 A plaintiff claiming negligence must prove by clear, cogent, and convincing evidence that the defendant, in the course of its “ ‘business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplie[d] false information for the guidance of others in their business transactions’ ”; the defendant “ ‘fail[ed] to exercise reasonable care or competence in obtaining or communicating the information’ ”; and the loss to the plaintiff was caused “ ‘by their justifiable reliance upon the information’ ” “communicated by the defendant.” ^{FN97}

¶ 74 Liability for negligent misrepresentation is limited to cases where

(1) the defendant has knowledge of the specific injured party’s reliance; or (2) the plaintiff is a member of a group that the defendant seeks to influence; or (3) the defendant has special reason to know that some member of a limited group will rely on the information. ^{FN98}

¶ 75 FutureSelect alleges Tremont supplied it with false information, including statements that “Tremont had conducted due diligence on Madoff, was familiar with Madoff’s operations, and was monitoring Madoff’s transactions, internal controls, and operational risk; that the assets purportedly managed by Madoff on behalf of the Rye Funds existed and were appreciating; and that the trades Madoff purported to be making on behalf of Rye Funds occurred.” ^{FN99}

¶ 76 In addition to claiming “Tremont had explained how it exercised oversight over Madoff” ^{FN100} repeatedly from the initial 1997 communication, the complaint quotes from Tremont’s July 10, 2001 letter

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to FutureSelect specifying procedures for monitoring Madoff:

“Each month Tremont analyzes every account [held with Madoff]. We record the purchases and sales by security and analyze whether the purchase and sale orders on the individual securities were within the published trading range that particular day. We also analyze the trading volume by stock to calculate the percentage of the overall activity. Once we have reviewed each account, we then compare the accounts to each other to insure that all accounts are treated equally.” ^[FN101]

¶ 77 The complaint further states,

Tremont also stated that it had hired a company called Adviserware to do all the accounting [of Madoff accounts] independent of Tremont's review. They prepare the balance sheet, partnership reconciliation and statement.

*13 They also price the portfolio using a third party pricing system to verify the value of the total portfolio. ^[FN102]

The complaint also alleges that Tremont “knew and intended to supply such information for the benefit and guidance of FutureSelect in making its investment decisions regarding the Rye Funds,” that FutureSelect “justifiably relied on Tremont's false information,” and that FutureSelect was damaged as a result. ^[FN103] According to the complaint,

[i]f Tremont had actually conducted the due diligence and monitoring of Madoff that it claimed, it would have discovered the fraud. Tremont should have known that the only evidence of the assets Madoff purportedly held and the trades Madoff purportedly executed for the benefit of the Rye Funds was from Madoff himself and that those assets and trades could not be confirmed by independent third parties. ^[FN104]

¶ 78 Tremont contends the claim is barred by the exculpatory clauses in the sample documents it submitted (the limited partnership agreements, the partnership memoranda, and the subscription agreements). But those limited documents are not pertinent to our CR 12(b)(6) review, for the reasons stated above.

¶ 79 FutureSelect's complaint adequately alleges Tremont's negligent misrepresentation. We reverse the dismissal of FutureSelect's claim for negligent misrepresentation as against Tremont.

B. Negligence—Tremont

^[21] ¶ 80 FutureSelect's claim for negligence alleges Tremont owed it a fiduciary duty of care as managing partner of the Rye Funds and failed to exercise reasonable care by not overseeing Madoff's management of FutureSelect's investments in the Rye Funds.

¶ 81 Standing to assert the negligence claim depends on whether the claim is direct or derivative. Plaintiffs alleging an injury arising solely from an ownership interest in the company do not assert direct claims because their harm is secondary to the direct harm to the company. ^[FN105] Under Delaware law, to determine whether a claim is direct or derivative,

a court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation. ^[FN106]

¶ 82 The injury FutureSelect suffered as a result of the alleged negligent management was solely the pro rata loss of the decline in the Rye Funds' value and was secondary to the direct injury to the Rye Funds.

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FutureSelect's allegations do not demonstrate that the injury it suffered was independent of the injury to all Rye Funds partners caused by the same alleged breach. Under Delaware law, FutureSelect's claim is derivative.

¶ 83 FutureSelect lacks standing to assert the claim on behalf of the Rye Funds.^{FN107} We affirm the trial court's dismissal of FutureSelect's negligence claim against Tremont.

C. Agency—Mass Mutual and Oppenheimer

*14 [22] ¶ 84 FutureSelect alleges Mass Mutual and Oppenheimer are liable for Tremont's negligent misrepresentations under the theory of agency.^{FN108} The extent of control exercised by the principal over an agent is essential in determining liability:

When we distill the principles evident in our case law, the proper inquiry becomes whether there is a retention of the right to direct the manner in which the work is performed, not simply whether there is an actual exercise of control over the manner in which the work is performed.^{FN109}

[23][24] ¶ 85 Whether or not a principal-agent relationship exists is generally a question of fact.^{FN110} The right to control is determined by factors such as the conduct of the parties, the contract between them, and the right of the principal to interfere in the independent contractor's work.^{FN111}

[25] ¶ 86 FutureSelect's complaint adequately states a claim against Mass Mutual and Oppenheimer based on agency. FutureSelect alleges that in 2001, Tremont came under their control, which included the manner by which Tremont offered investments, including the Rye Funds.^{FN112}

¶ 87 FutureSelect alleges Mass Mutual and Oppenheimer “learned of Tremont's enormous exposure with Madoff [and] that Tremont's representations to

the Rye Funds' investors regarding its oversight and monitoring of Madoff were false or, at a minimum, highly suspect.”^{FN113} The complaint states, “MassMutual and Oppenheimer knew firsthand that Tremont had little to no ability to oversee and monitor Madoff's operations.”^{FN114}

¶ 88 FutureSelect's complaint alleges details of Mass Mutual's and Oppenheimer's control of Tremont:

At the time of the Tremont acquisition, MassMutual controlled Oppenheimer [and] OppenheimerFunds, another subsidiary of Oppenheimer, and that control included the manner in which Tremont solicited its investment business. Specifically, MassMutual and Oppenheimer had the right to control Tremont such that they could have prevented Tremont from offering investments with Madoff.

... Once Oppenheimer's acquisition of Tremont ended in October 2001, Tremont's operations—including the marketing and investment activities of the Rye Funds—were brought directly under the MassMutual umbrella. MassMutual and Oppenheimer directed and influenced the management of the company and provided extensive support services to Tremont, including compliance, audit, finance and human resources.

... Tremont's management structure was overhauled to reflect MassMutual's and Oppenheimer's deep involvement in and control over its operations.

... Specifically, as part of the acquisition, all five of Tremont's board members became MassMutual, Oppenheimer and/or OppenheimerFunds employees. John V. Murphy, a MassMutual executive vice president and Oppenheimer director (as well as chairman, CEO and president of OppenheimerFunds) was named a director of Tremont. Kurt Wolfgruber, management director and assistant

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treasurer of Oppenheimer (as well as president, chief investment officer and director of OppenheimerFunds) and Howard E. Gunton, executive vice president and chief financial officer of MassMutual, both became Tremont directors.

*15 ... Further, as part of the acquisition, Sandra Manzke and Robert Schulman, Tremont's co-chief executive officers and board members, became employees of OppenheimerFunds.

... Though there were changes in the directors on the Tremont board over time, post-acquisition, the board always was made up of high level employees of MassMutual and Oppenheimer entities. As board members, they had ultimate control over the manner of Tremont's investment strategy.

....

... Lynn Oberist Keaton, who served as a senior vice president of OppenheimerFunds, served as Tremont's chief financial officer and a senior vice president from 2005 through 2007. Margaret Weaver, an OppenheimerFunds employee, served as a senior vice president of Tremont and was described as a member of the "Tremont management team" on Tremont's website.^[EN115]

FutureSelect expressly alleges that Oppenheimer did in fact control Tremont:

At all relevant times, Oppenheimer had the power, both direct and indirect, to control Tremont and in fact did exercise such control:

....

... Oppenheimer actively managed the marketing and solicitation of investment activity at Tremont, including through selection of investment vehicles and due diligence programs.^[EN116]

¶ 89 FutureSelect's complaint and hypothetical facts support the claim that Oppenheimer and Mass Mutual controlled Tremont and retained the right to direct the manner in which Tremont's work was performed. While mere overlapping of directors and officers would not establish liability, the alleged dual roles of Tremont directors and officers who were simultaneously employees, directors, or officers of Mass Mutual or Oppenheimer, if true, could be consistent with FutureSelect's theory that Mass Mutual and Oppenheimer had control of Tremont's affairs, including the offering and management of the Rye Funds securities.^[EN117] These allegations go beyond a pure parent/subsidiary relationship and, for purposes of CR 12(b)(6), support a claim that Mass Mutual and Oppenheimer controlled Tremont's Rye Funds transactions with FutureSelect.

¶ 90 Because FutureSelect's negligent misrepresentation claim against Tremont is sufficient for purposes of a CR 12(b)(6) ruling, we reverse the dismissal of the claims against Oppenheimer and Mass Mutual based on actual agency for Tremont's alleged misrepresentations.

D. Apparent Agency—Mass Mutual and Oppenheimer

[26][27] ¶ 91 FutureSelect contends Mass Mutual's and Oppenheimer's statements and conduct conveyed that Tremont had the authority to offer and sell the Rye Funds on their behalf. "Apparent agency occurs, and vicarious liability for the principal follows, where a principal makes objective manifestations leading a third person to believe the wrongdoer is an agent of the principal."^[EN118] Whether apparent authority exists is ordinarily a question of fact.^[EN119]

[28] ¶ 92 In support of its apparent agency claims, FutureSelect contends Mass Mutual marketed Tremont as a "member of the MassMutual family of companies" and listed Tremont in its annual reports as one of its "General Agencies and Other Offices."^[EN120] FutureSelect alleges these statements "conveyed to FutureSelect that Tremont had the authority to offer

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and sell the Rye Funds' investments on MassMutual's behalf," "led FutureSelect to believe that Tremont had the authority to so act," and "would have led a reasonably careful person under the circumstances" to believe that Tremont had such authority.^{FN121}

*16 ¶ 93 These allegations could potentially establish that Mass Mutual held out Tremont as its agent and that FutureSelect reasonably believed the statements. The claim of apparent agency against Mass Mutual is sufficient for purposes of CR 12(b)(6). Accordingly, we conclude that the claim should not have been dismissed under CR 12(b)(6).

[29] ¶ 94 FutureSelect fails to identify any actions by Oppenheimer manifesting such an apparent agency. FutureSelect contends that while under Mass Mutual's and Oppenheimer's control, Tremont represented itself as "[a]n Oppenheimer Funds [c]ompany" on its stationery and marketing materials and listed Mass Mutual, Oppenheimer, and OppenheimerFunds as "control persons" of Tremont in documents filed with the Securities and Exchange Commission.^{FN122} But Tremont's representations purportedly manifesting its apparent agency are not attributable to Oppenheimer as principal.^{FN123} We conclude that the complaint does not set forth a claim against Oppenheimer for which relief can be granted on the basis of apparent agency.

¶ 95 These manifestations by Tremont are insufficient to demonstrate the existence of an apparent agency relationship between Oppenheimer and Tremont, even when considering hypothetical facts. FutureSelect's apparent agency claim against Oppenheimer was properly dismissed.

¶ 96 We reverse the dismissal of FutureSelect's apparent agency claim against Mass Mutual as to Tremont's negligent misrepresentation but affirm dismissal of its apparent agency claim against Oppenheimer.

E. Negligent Misrepresentation—Ernst & Young

¶ 97 Accountants may face liability for negligent misrepresentation in audit reports,^{FN124} provided that the maker of the representation knows that its recipient intended to transmit the information to a similar person, persons, or group.^{FN125}

[30] ¶ 98 FutureSelect's complaint alleges Ernst & Young "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."^{FN126} Specifically, Ernst & Young "misrepresented that they had conducted audits in conformity with" generally accepted auditing standards and "omitted material facts."^{FN127} FutureSelect asserts that it acted in reliance upon the misrepresentations and that its investments made "in reliance on Ernst & Young's audits totaled approximately \$50 million."^{FN128} FutureSelect contends that Ernst & Young "knew that its audits would be used by Tremont to solicit investors" and "knew and intended that current investors would rely on the audits when deciding to maintain and increase" their investments in the Rye Funds.^{FN129} Ernst & Young knew 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 [Ernst & Young] knew included [FutureSelect]."^{FN130}

*17 ¶ 99 These allegations and consistent hypothetical facts state a claim that (1) Ernst & Young supplied false information for the guidance of FutureSelect in their investments, (2) Ernst & Young knew or should have known that the information it supplied to Tremont was intended by Tremont to guide FutureSelect in its investments, (3) Ernst & Young was negligent in obtaining or communicating false information, (4) FutureSelect relied on the false information, (5) FutureSelect's reliance was reasonable, and (6) the false information proximately caused FutureSelect's damages. We conclude that FutureSelect's complaint is adequate for purposes of CR

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12(b)(6) to state a claim for negligent misrepresentation against Ernst & Young.

¶ 100 We reverse the trial court's dismissal of FutureSelect's negligent misrepresentation claim against Ernst & Young.

FutureSelect's Motion to Amend Complaint

¶ 101 FutureSelect contends this court should allow it to amend its complaint to correct any CR 12(b)(6) deficiencies but does not provide compelling authority for such relief on appeal, especially where it makes no showing in this court, or in the trial court, that it has grounds for a good faith amendment that would address the deficiencies we have identified.^{FN131} The motion is denied.

Long-Arm Jurisdiction over Oppenheimer

¶ 102 Oppenheimer argues that it is not subject to personal jurisdiction in Washington because it had no contacts with Washington and that FutureSelect's claims are nothing more than an attempt to hold a parent company liable for the acts of its subsidiary. Oppenheimer contends that an assertion of personal jurisdiction based upon acts of its subsidiary does not comport with constitutional due process requirements. These arguments are not persuasive.

[31][32] ¶ 103 The plaintiff has the burden of demonstrating jurisdiction, but when a motion to dismiss for lack of personal jurisdiction is resolved without an evidentiary hearing “ ‘only a prima facie showing of jurisdiction is required.’ “ ^{FN132} In this setting, “[w]e treat the allegations of the complaint as true.” ^{FN133}

[33][34] ¶ 104 Personal jurisdiction over a non-resident defendant may be general or specific.^{FN134} If a nonresident is doing business in this state on a substantial and continuous basis, then the courts may exercise general jurisdiction over the defendant as to any cause of action.^{FN135} The courts may gain specific

personal jurisdiction over a nonresident based on much more limited contacts with Washington, but specific jurisdiction extends only to causes of action that arise out of those limited contacts.^{FN136} FutureSelect claims specific jurisdiction over Oppenheimer based on the Washington contacts of Tremont acting as its agent.

[35] ¶ 105 Similar to many states, Washington's long-arm statute expressly provides that agency is a proper means for asserting personal jurisdiction over a principal for a cause of action that arises out of the agent transacting business or committing a tort in Washington:

*18 Any person, whether or not a citizen or resident of this state, who in person *or through an agent* does any of the acts in this section enumerated, thereby submits said person ... to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any said acts:

- (a) The transaction of any business within this state;
- (b) The commission of a tortious act within this state.^{FN137}

The Washington long-arm statute “extends jurisdiction to the limit of federal due process.” ^{FN138} We apply three factors to the due process inquiry:

“(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situa-

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tion.”^[FN139]

¶ 106 The long-arm jurisdiction question presented is whether a subsidiary acting as the agent for its parent subjects the parent to long-arm jurisdiction for claims arising out of the agent's transactions and torts in Washington. Oppenheimer argues that mere agency is inadequate and that due process requires that the subsidiary be the alter ego of the parent, allowing the corporate veil to be pierced. Only then could contacts by the subsidiary be imputed to the parent for purposes of long-arm jurisdiction.

¶ 107 Historically, the acts of a subsidiary do not subject the parent corporation to general jurisdiction, sometimes referred to as the *Cannon* doctrine.^[FN140] Several exceptions to the *Cannon* doctrine have developed over time.^[FN141] In *International Shoe Co. v. Washington*, the United States Supreme Court departed from the fiction of “presence” and concluded that for specific jurisdiction purposes, due process is properly measured in terms of minimum contacts:

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its “presence” without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far “present” there as to satisfy due process requirements, for purposes of ... the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms “present” or “presence” are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.^[FN142]

*19 ¶ 108 Few Washington cases discuss the impact of the parent-subsidary relationship upon personal jurisdiction, and those discussions focus upon general, rather than specific, jurisdiction.^[FN143] But Washington's long-arm statute expressly provides for jurisdiction based on agency, and Washington courts have acknowledged that principle.^[FN144]

¶ 109 Both Oppenheimer and FutureSelect point to federal case law, where numerous cases hold a subsidiary's contacts should or should not be imputed to the parent for personal jurisdiction.^[FN145] Many of those cases involve concepts of doing business for purposes of general jurisdiction, but some also apply the same standards to long-arm issues. Many federal courts recognize an alter ego standard, often related to piercing the corporate veil concepts. Some include an agency standard. Widely discussed, but not so widely adopted, is a merger (alter ego) and attribution (agency) framework.^[FN146] Some decry the conflation of the liability concept of alter ego/piercing the corporate veil with the jurisdiction “minimum contacts” question.^[FN147] The Ninth Circuit Court of Appeals in particular has refined its analysis to acknowledge both an alter ego test and an agency test.^[FN148] The Ninth Circuit's agency test requires a showing of “significant importance,” i.e., that the business activity of the subsidiary is so important to the principal that in the absence of a subsidiary, the principal would engage in the same business activity itself.^[FN149] The Ninth Circuit further refined the significant importance test to clarify it is not necessary that the parent would undertake the agent's activities itself:

For the agency test, we ask: Are the services provided by [the subsidiary] sufficiently important to the [parent] that if [the subsidiary] went out of business, [the parent] would continue [the business activity] itself, or alternatively by selling them through a new representative?^[FN150]

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But the court acknowledged a “lack of clarity and consistency” on this question.^{FN151} Against this backdrop, we turn to the application of the minimum contacts standard to analyze the due process limits for specific jurisdiction.^{FN152}

A. Purposeful Availment

¶ 110 To establish specific personal jurisdiction under RCW 4.28.185(1)(a) by transacting business in Washington, FutureSelect must show that Oppenheimer “ ‘purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws.’ ”^{FN153} Deliberately engaging in significant business activities within a state is adequate.^{FN154}

[36] ¶ 111 The purposeful availment analysis in the tort context permits the exercise of jurisdiction when the claimant makes a prima facie showing that an out-of-state party's intentional actions were expressly aimed at the forum state and caused harm in the forum state.^{FN155} Where defendants “ ‘purposefully derive benefit’ from their interstate activities, it would be unfair to allow them to escape the consequences that proximately arise from these activities in other jurisdictions.”^{FN156}

*20 [37] ¶ 112 Based upon the complaint, Tremont clearly had significant contacts with Washington. Oppenheimer argues its parent-subsidary relationship with Tremont is insufficient to attribute the minimum contacts of the subsidiary to the parent. But FutureSelect's complaint alleges Oppenheimer's involvement with Tremont was much more than a standard parent-subsidary relationship.

¶ 113 Consistent with *International Shoe*, we must focus upon the alleged activities of Oppenheimer. FutureSelect alleges that Oppenheimer controlled the manner in which Tremont solicited its Rye Fund investments and that Oppenheimer “actively managed the marketing and solicitation of investment

activity at Tremont, including ... selection of investment vehicles and due diligence programs.”^{FN157} FutureSelect further alleges that Oppenheimer and Mass Mutual benefited from the Tremont operations they controlled, with up to \$29 million in fees generated by the Rye Funds in 2007 alone.

¶ 114 Soliciting Rye Funds investors, marketing the funds' access to Madoff, and making representations about the due diligence programs used to monitor those funds are key to Tremont's business and central to the claims asserted by FutureSelect. Oppenheimer's alleged active management and control of those activities is significant in terms of Tremont's success, the financial rewards to Oppenheimer, and the impact on FutureSelect. Whether or not Oppenheimer itself would have engaged in the activities of Tremont or would have found another to solicit and market Madoff feeder funds, the alleged activities of Oppenheimer directed to and impacting Washington are significant and purposeful.

[38] ¶ 115 Oppenheimer argues that a plaintiff may not use a liability theory as a substitute for personal jurisdiction. While liability theories should not be conflated with jurisdiction standards, the application of the due process purposeful availment standard may include practical policy considerations. In *Harbison v. Garden Valley Outfitters, Inc.*, the court considered the successor liability of one corporation for the acts of another when deciding whether to impute the predecessor's contacts to the successor for purposes of long-arm jurisdiction:

The rationale of substantive successor liability is equally applicable to the question of personal jurisdiction. When a successor has assumed its predecessor's liabilities, the forum-related contacts of the predecessor should be attributed to the successor for jurisdictional purposes. This is because the assets purchased by the successor were, in part, derived from the forum, and the successor presumably had knowledge thereof. We perceive no policy basis

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in such a case for insulating the successor entity from liability in the same jurisdiction where its predecessor would have been exposed.^[FN158]

Similarly, FutureSelect's complaint alleges a viable claim that Oppenheimer was not merely a parent corporation but actively controlled and managed key marketing and solicitation activities of Tremont as its agent. The alleged activity is purposeful. Oppenheimer benefited from the acts of its agent in Washington. There is no policy basis for insulating Oppenheimer from liability in the same jurisdiction where its alleged agent transacted business and committed torts.

*21 ¶ 116 The complaint alleges that Oppenheimer deliberately engaged in significant transactions in Washington through its agent, Tremont, by controlling and actively managing Tremont's marketing and solicitation of investments aimed at FutureSelect. And the misrepresentations arising out of Tremont's business transactions had a significant impact on FutureSelect in Washington. We conclude that the complaint makes a prima facie showing of purposeful availment by Oppenheimer.

B. Claim Arises Out of Oppenheimer's Forum-Related Activities

[39] ¶ 117 FutureSelect alleges it was harmed by Tremont's acts in Washington, committed as Oppenheimer's agent. As a general rule, a business entity suffers harm at its principal place of business.^[FN159] Our Supreme Court "has held many times that when an injury occurs in Washington, it is an inseparable part of the 'tortious act' and that act is deemed to have occurred in this state for purposes of the long-arm statute."^[FN160] There is a prima facie showing that the causes of action arise out of the contacts in Washington.

C. Notions of Fair Play and Substantial Justice

¶ 118 Finally, we look to the nature, quality, and extent of Oppenheimer's activity in this state; the

convenience of the parties; the benefits and protections of Washington law; "and the basic equities of the situation." "FN161 Oppenheimer makes no showing that litigation in Washington would be "so gravely difficult and inconvenient" that it is unfairly at a "severe disadvantage" in comparison to its opponent.^[FN162] On the other hand, Washington has a legitimate interest in holding a defendant answerable on a claim related to its Washington contacts.^[FN163]

[40] ¶ 119 Due process would not be satisfied by mere allegations that Tremont is a subsidiary of Oppenheimer. Neither would a generic allegation of an agency relationship suffice. An allegation that the parent has the power to control the subsidiary but was oblivious to or failed to monitor the conduct of the subsidiary would not be compelling. Here, FutureSelect alleges Oppenheimer is actively controlling and managing key activities of its subsidiary, the subsidiary is acting as its agent in Washington, those activities are financially significant to Oppenheimer, FutureSelect's claims arise out of those activities, and the activities significantly impacted FutureSelect in Washington.

¶ 120 The assertion of specific personal jurisdiction over Oppenheimer satisfies the "through an agent" provision of the long-arm statute and comports with due process.

CONCLUSION

¶ 121 The court has personal jurisdiction over Oppenheimer. We conclude that FutureSelect's WSSA claims against all respondents, FutureSelect's negligent misrepresentation claims against Tremont and Ernst & Young, its actual agency claims against Mass Mutual and Oppenheimer, and its apparent agency claim against Mass Mutual are sufficient to survive the respondents' CR 12(b)(6) challenges. We reverse the dismissal of those claims.

*22 ¶ 122 We affirm the dismissal of FutureSe-

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lects apparent agency claim against Oppenheimer and its negligence claim against Tremont.

¶ 123 Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

WE CONCUR: LEACH, C.J. and COX, J.

FN1. A “feeder fund” is a structure “commonly associated with hedge funds and is used to pool together assets from [a variety of] investors in order to keep costs down, achieve better economies of scale and better tax efficiencies. Investors place their money in one of several funds, known as ‘feeders’. The feeders, in turn, invest their assets in one ‘master fund,’ which makes all the investment decisions for the portfolio.” *Lexicon*, Fin. Times, http://lexicon.ft.com/Term?term=master_feeder-fund (last visited July 30, 2013).

FN2. Because the distinction between Tremont Group Holdings Inc. and Tremont Partners Inc. has no impact on the issues raised in this appeal, we refer to them collectively as Tremont.

FN3. Formerly American Masters Broad Market Fund.

FN4. FutureSelect also filed claims against the other firms that audited the Rye Funds, Goldstein Golub Kessler LLP and KPMG LLP. However, those claims are not at issue in this appeal because FutureSelect settled its claims against Goldstein Golub Kessler and the trial court compelled separate arbitration of FutureSelect's claims against KPMG.

FN5. An “unqualified audit opinion” repre-

sents the auditor's opinion that the entity's financial statements are free of material misstatements and are represented fairly in accordance with the generally accepted accounting standards. See, e.g., *Grant Thornton, LLP v. Office of Comptroller of the Currency*, 379 U.S.App. D.C. 419, 514 F.3d 1328, 1340–41 (2008).

FN6. Clerk's Papers at 9–10.

FN7. Clerk's Papers at 10.

FN8. Clerk's Papers at 10. FutureSelect and Tremont entered into numerous agreements in conjunction with FutureSelect's investments. These include the limited partnership agreements that FutureSelect entered in order to invest in each of the Rye Funds. The limited partnership agreements included exculpatory provisions relating to Tremont's role as general partner.

FN9. Clerk's Papers at 11.

FN10. Clerk's Papers at 11.

FN11. Clerk's Papers at 11.

FN12. Clerk's Papers at 12.

FN13. Clerk's Papers at 12.

FN14. The trial court orders dismissing claims against Ernst & Young and Mass Mutual specified that dismissal was pursuant to CR 12(b)(6). The orders dismissing claims against Tremont and Oppenheimer did not cite a specific rule. In its briefing to this court, Tremont acknowledges that the trial court dismissed under CR 12(b)(6). Oppen-

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heimer argues that FutureSelect's claims were dismissed based on both CR 12(b)(6) and CR 12(b)(2) (lack of personal jurisdiction).

FN15. Under the principle of depechage, 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. See Experience Hendrix, LLC v. HendrixLicensina.com, LTD, 766 F.Supp.2d 1122, 1136 (W.D.Wash.2011) (citing Brewer v. Dodson Aviation, 447 F.Supp.2d 1166, 1175 (W.D.Wash.2006) (recognizing that Washington courts might “apply the law of one forum to one issue while applying the law of a different forum to another issue in the same case” (quoting KELLY KUNSCH, 1 WASHINGTON PRACTICE § 2.21 (4th ed. 1997 & Supp.2008))); see also Singh v. Edwards Lifesciences Corp., 151 Wash.App. 137, 143, 210 P.3d 337 (2009) (indicating that, having abandoned the lex loci delicti rule, Washington courts now “decide which law applies by determining which jurisdiction has the most significant relationship to a given issue” (emphasis added)).

FN16. Johnson v. Spider Staging Corp., 87 Wash.2d 577, 580, 555 P.2d 997 (1976); Martin v. Goodyear Tire & Rubber Co., 114 Wash.App. 823, 828, 61 P.3d 1196 (2003).

FN17. Zenaida-Garcia v. Recovery Sys. Tech., Inc., 128 Wash.App. 256, 260–61, 115 P.3d 1017(2005).

FN18. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

FN19. RESTATEMENT § 145(1). The *Restatement* provides the following broad

choice-of-law policy considerations: “(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states ..., (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability, and uniformity of result, and (g) ease in the determination and application of the law to be applied.” RESTATEMENT § 6(2).

FN20. RESTATEMENT § 145 cmt. a.

FN21. RESTATEMENT § 148.

FN22. 101 Wash.2d 200, 676 P.2d 477 (1984).

FN23. Id. at 205, 676 P.2d 477.

FN24. Id. at 204, 676 P.2d 477.

FN25. Id.

FN26. 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987).

FN27. Id. at 135, 744 P.2d 1032.

FN28. Id. at 134, 744 P.2d 1032.

FN29. Id.

FN30. See, e.g., Bank of America, NA v. Prestance Corp., 160 Wash.2d 560, 576 n. 11, 160 P.3d 17 (2007) (recognizing cases where courts have considered the *Restatement* approach as persuasive “but declined to clearly articulate a rule adopting the *Restatement* approach” regarding *Restatement*

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(Third) of Property: Mortgages § 7.6 (1997): Niemann v. Vaughn Cmty. Church, 154 Wash.2d 365, 381–82, 113 P.3d 463 (2005) (Supreme Court looked to Restatement (Third) of Trusts § 66 (2003) for guidance but did not expressly adopt it); Nivens v. 7–11 Hoagy's Corner, 133 Wash.2d 192, 202–03, 943 P.2d 286 (1997) (applying Restatement (Second) of Torts § 314A (1965), a section that was not formally adopted by a Washington court, as well as §§ 315 and 344, which were previously adopted); Bennett v. Hardy, 113 Wash.2d 912, 920, 784 P.2d 1258 (1990) (citing but not formally adopting Restatement (Second) of Torts § 874A (1979) as persuasive authority in adopting an analogous rule).

FN31. See In re Countrywide Fin. Corp. Mortgage-Backed Secs. Litig., 860 F.Supp.2d 1062, 1074 (C.D.Cal.2012) (“Because the factors listed in § 148 are specific to the fraud context and are a more detailed expression of the factors in § 145, the Court will focus its discussion on § 148.”); Value House, Inc. v. MCI Telecomms. Corp., 917 F.Supp. 5, 6 (D.D.C.1996) (“Section 145 contains the general principles with respect to tort cases, while Section 148 contains the factors specifically applicable in fraud and misrepresentation cases, such as ... negligent misrepresentation.”).

FN32. This approach is also consistent with the analyses undertaken by the United States District Court for the Western District of Washington in Carideo v. Dell, Inc., 706 F.Supp.2d 1122, 1128–29 (W.D.Wash.2010) (in Washington's statutory Consumer Protection Act claims, § 148 “provides guidance” where reliance upon false or fraudulent representations is a substantial factor in inducing a plaintiff to purchase a defendant's

goods or services) and Kelley v. Microsoft Corp., 251 F.R.D. 544, 552 (W.D.Wash.2008) (applying § 148 to claims raising a conflict between Washington Consumer Protection Act and Illinois Consumer Fraud Act). The Carideo court relied in part on the Court of Appeals' analysis under § 148 in Schnall v. AT & T Wireless Servs., Inc., 139 Wash.App. 280, 293–94, 161 P.3d 395 (2007), reversed in part on other grounds by Schnall v. AT & T Wireless Servs., Inc., 171 Wash.2d 260, 259 P.3d 129 (2011).

FN33. Section 148(2) applies because “the plaintiff's action in reliance took place in whole or in part in a state [i.e., Washington] other than that where the false representations were made [i.e., New York].” RESTATEMENT § 148(2). Section 148(1) does not apply here because it is limited to situations where a “plaintiff's action in reliance took place in the state where the false representations were made and received.” RESTATEMENT § 148(1).

FN34. RESTATEMENT § 148(2).

FN35. RESTATEMENT § 148 cmt. j.

FN36. RESTATEMENT § 148 cmt. i.

FN37. See RESTATEMENT § 148 cmt. g; see also Insituform Techs., Inc. v. Per Aarsleff A/S, 534 F.Supp.2d 808, 815 (W.D.Tenn.2008).

FN38. There is an actual conflict between WSSA and New York's securities law, the Martin Act, N.Y. Gen. Bus. Law art. 23–A. Specifically, the WSSA affords FutureSelect a private cause of action; the Martin Act does not. See CPC Int'l Inc. v. McKesson Corp.,

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70 N.Y.2d 268, 275, 514 N.E.2d 116, 519 N.Y.S.2d 804 (1987). The Martin Act, nevertheless, does not preclude a private right of action for common law claims for fraud or otherwise, provided the claim is not entirely dependent on the Martin Act violation for its viability. Assured Guar. (U.K.) Ltd. v. J.P. Morgan Inv. Mgmt. Inc., 18 N.Y.3d 341, 353, 962 N.E.2d 765, 939 N.Y.S.2d 274 (2011).

FN39. Clerk's Papers at 31–32.

FN40. Clerk's Papers at 33.

FN41. Clerk's Papers at 34–35.

FN42. Clerk's Papers at 36.

FN43. Clerk's Papers at 9.

FN44. Clerk's Papers at 8.

FN45. Clerk's Papers at 6.

FN46. Clerk's Papers at 12.

FN47. Clerk's Papers at 23.

FN48. Clerk's Papers at 43.

FN49. Clerk's Papers at 39.

FN50. Clerk's Papers at 41.

FN51. Clerk's Papers at 45–46. FutureSelect alleges in its tort claim that Ernst & Young “owed FutureSelect the duty to use reasonable care, or the competence or skill of a professional independent auditor, in conducting audits ... and rendering audit opinions ... in accordance with [generally accepted auditing

standards],” and “failed to exercise reasonable care by negligently failing to conduct audits of the Rye Funds in accordance with [generally accepted auditing standards] and by failing to inquire into many crucial facts.” Clerk's Papers at 45–46.

FN52. There is an actual conflict of laws applicable to FutureSelect's negligent misrepresentation claim against Ernst & Young. New York law, unlike Washington law, requires near privity between an auditor and a plaintiff as a condition precedent to a negligent misrepresentation claim. Credit Alliance Corp. v. Arthur Andersen & Co., 65 N.Y.2d 536, 551, 483 N.E.2d 110, 493 N.Y.S.2d 435 (1985). To demonstrate near privity, a plaintiff must show (1) the auditor was aware when preparing its audit opinions that the opinions would be used for the plaintiff's particular purposes; (2) the auditor knew the plaintiff intended to rely on its audit opinions; and (3) the auditor engaged in direct conduct linking them to the plaintiff, evidencing the auditor's understanding that the plaintiff would rely on its opinion. *Id.*

FN53. Clerk's Papers at 20.

FN54. Clerk's Papers at 37.

FN55. Ernst & Young argues that when a misrepresentation is nationwide in scope, the location of the plaintiff and thus the location of the injury is fortuitous. See Kelley, 251 F.R.D. at 552; Bryant v. Wyeth, 879 F.Supp.2d 1214, 1222–23 (W.D.Wash.2012). But here, where the loss is pecuniary, the place of business of FutureSelect (also the location of the injury) is of substantial significance. RESTATEMENT § 148 cmt. i.

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FN56. See Rodriguez v. Loudeye Corp., 144 Wash.App. 709, 718, 189 P.3d 168 (2008) (“Shareholder claims involving a corporation's internal affairs are governed by the law of the state in which the corporation was incorporated.”).

FN57. Gaspar v. Peshastin Hi-Up Growers, 131 Wash.App. 630, 634, 128 P.3d 627 (2006).

FN58. Lawson v. State, 107 Wash.2d 444, 448, 730 P.2d 1308 (1986) (internal quotation marks omitted) (quoting Bowman v. John Doe Two, 104 Wash.2d 181, 183, 704 P.2d 140 (1985)). A court may consider hypothetical facts not part of the formal record. Halvorson v. Dahl, 89 Wash.2d 673, 675, 574 P.2d 1190 (1978).

FN59. Burton v. Lehman, 153 Wash.2d 416, 422, 103 P.3d 1230 (2005) (quoting Tenore v. AT & T Wireless Servs., 136 Wash.2d 322, 330, 962 P.2d 104 (1998)).

FN60. CR 8(a). “Under notice pleading, plaintiffs use the discovery process to uncover the evidence necessary to pursue their claims.” Putman v. Wenatchee Valley Med. Ctr. PS, 166 Wash.2d 974, 983, 216 P.3d 374 (2009). “All pleadings shall be so construed as to do substantial justice.” CR 8(f).

FN61. Kirby v. City of Tacoma, 124 Wash.App. 454, 470, 98 P.3d 827 (2004) (internal quotation marks omitted) (quoting Dewey v. Tacoma Sch. Dist. No. 10, 95 Wash.App. 18, 23, 974 P.2d 847 (1999)).

FN62. See Clerk's Papers at 3344 (order dismissing claims against Tremont) and

Clerk's Papers at 3352–53 (dismissing claims against Mass Mutual) in which the trial court states it relied upon the declaration of Jason C. Vigna. That declaration, submitted in support of Tremont's motion to dismiss, includes as appendices sample copies of some limited partnership agreements, partnership memoranda, and subscription agreements for the Prime fund, the XL fund, and the Broad Market fund.

FN63. Rodriguez, 144 Wash.App. at 726 & n. 45, 189 P.3d 168. The court also explained that the trial court properly considered Loudeye's certificate of incorporation because it was a proper “subject of judicial notice” as a matter of public record and its validity was capable of “ ‘accurate and ready determination.’ ” Id. at 726, 189 P.3d 168 (quoting ER 201(b)); see also P.E. Systems, LLC v. CPI Corp., 176 Wash.2d 198, 204–05, 289 P.3d 638 (2012).

FN64. The terms “sale” and “sell” include “every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.” RCW 21.20.005(14).

FN65. Under the WSSA a “material fact” is a fact that may affect the desire of investors to buy, sell, or hold the company's securities. Guarino v. Interactive Objects, Inc., 122 Wash.App. 95, 114, 86 P.3d 1175 (2004).

FN66. RCW 21.20.010.

FN67. Hines v. Data Line Systems, Inc., 114 Wash.2d 127, 134–35, 787 P.2d 8 (1990); Stewart v. Estate of Steiner, 122 Wash.App. 258, 264, 93 P.3d 919 (2004); GrahamBingham Irrevocable Trust v. John Hancock

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Life Ins. Co. USA, 827 F.Supp.2d 1275, 1284 (W.D.Wash.2011).

FN68. Stewart, 122 Wash.App. at 265 n. 9, 93 P.3d 919 (citing Clausing v. DeHart, 83 Wash.2d 70, 73, 515 P.2d 982 (1973) (adopting objective view of a “material fact” as “ ‘a fact to which a reasonable [person] would attach importance in determining [his/her] choice of action in the transaction in question’ “ (emphasis omitted) (alterations in original))).

FN69. Haberman, 109 Wn.2d at 131 (a “seller” under RCW 21.20.430(1) includes those whose participation was a substantial factor in the sales transaction).

FN70. Kinney v. Cook, 159 Wash.2d 837, 844, 154 P.3d 206 (2007); Stewart, 122 Wash.App. at 264, 93 P.3d 919.

FN71. Clerk's Papers at 9.

FN72. Clerk's Papers at 15.

FN73. Clerk's Papers at 31.

FN74. Br. of Resp't Tremont at 16.

FN75. Fed.R.Civ.P. 12(b)(6) permits dismissal “unless the claim is *plausibly* based upon the factual allegations in the complaint—a more difficult standard to satisfy.” McCurry v. Chew Chase Bank, FSB, 169 Wash.2d 96, 101, 233 P.3d 861 (2010).

FN76. In McCurry, our Supreme Court declined to adopt the federal standard for dismissal. *Id.*

FN77. Putman, 166 Wash.2d at 983, 216 P.3d 374.

FN78. Clerk's Papers at 32.

FN79. Haberman, 109 Wn.2d at 131.

FN80. *Id.*; Hines, 114 Wash.2d at 150, 787 P.2d 8.

FN81. Br. of Resp't Ernst & Young at 21 (quoting Hines, 114 Wash.2d at 149, 787 P.2d 8).

FN82. See Haberman, 109 Wn.2d at 132; Hoffer v. State, 110 Wash.2d 415, 430, 755 P.2d 781 (1988).

FN83. See In re Metro. Sec. Litig., 532 F.Supp.2d 1260, 1300–01 (E.D.Wash.2007) (citing Haberman, 109 Wash.2d at 119, 744 P.2d 1032; Hoffer, 110 Wash.2d at 417–18, 755 P.2d 781).

FN84. *Id.* at 1301, 755 P.2d 781 (citations omitted) (citing Haberman, 109 Wn.2d at 125–26).

FN85. Clerk's Papers at 36.

FN86. Clerk's Papers at 21, 37. Ernst & Young certified that the Broad Market fund ended 2000 with \$288 million in assets, 2001 with \$364 million, 2002 with over \$400 million, and 2003 with nearly \$450 million. Ernst & Young certified that the Prime fund ended 2000 with \$497 million in assets, 2001 with \$667 million, 2002 with \$750 million, and 2003 with \$831 million.

FN87. Clerk's Papers at 37.

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FN88. Clerk's Papers at 37.

FN89. Clerk's Papers at 23.

FN90. Clerk's Papers at 22–23.

FN91. *Hines*, 114 Wash.2d at 136, 787 P.2d 8 (emphasis omitted) (internal quotation marks omitted) (quoting *Metge v. Baehler*, 762 F.2d 621, 631 (8th Cir.1985)); see also *Herrington v. David P. Hawthorne, CPA, PS*, 111 Wash.App. 824, 835–36, 47 P.3d 567 (2002) (*Hines* adopted the two-step test and rejected the Ninth Circuit “culpable participation” test requiring a finding that the control person culpably participated in the transaction.)

FN92. Clerk's Papers at 15.

FN93. Clerk's Papers at 18–19.

FN94. Clerk's Papers at 20 (emphasis added).

FN95. Clerk's Papers at 33.

FN96. Br. of Resp't Mass Mutual at 31 (quoting *Hines*, 114 Wash.2d at 136, 787 P.2d 8).

FN97. *Haberman*, 109 Wn.2d at 161–62 (quoting RESTATEMENT (SECOND) OF TORTS S § 552(1) (1977)).

FN98. *Id.* at 162–63.

FN99. Clerk's Papers at 42–43.

FN100. Clerk's Papers at 12.

FN101. Clerk's Papers at 12.

FN102. Clerk's Papers at 13 (internal quotation marks omitted).

FN103. Clerk's Papers at 43.

FN104. Clerk's Papers at 14–15.

FN105. *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del.2008).

FN106. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del.2004).

FN107. Under Delaware law, where “all of a corporation's shareholders are harmed and would recover *pro rata* in proportion with their ownership [interest],” the claim is derivative. *Feldman*, 951 A.2d at 733. Such derivative claims may be pursued only by the partnership and not by individual investors. See, e.g., *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 351–53 (Del.1988).

FN108. Mass Mutual argues that the complaint as drafted conflates the entities Mass Mutual Holdings and Mass Mutual Life Insurance. But Mass Mutual makes no compelling argument that more precise references to those two entities in the complaint would have any significant impact upon the outcome under the applicable CR 12(b)(6) standards.

FN109. *Kamla v. Space Needle Corp.*, 147 Wash.2d 114, 121, 52 P.3d 472 (2002).

FN110. *O'Brien v. Hafer*, 122 Wash.App. 279, 284, 93 P.3d 930 (2004).

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FN111. See *Arnold v. Saberhagen Holdings, Inc.*, 157 Wash.App. 649, 664, 240 P.3d 162 (2010).

FN112. According to the complaint, “Oppenheimer was the MassMutual subsidiary designated to pursue a deal [to purchase] Tremont.” Clerk’s Papers at 16.

FN113. Clerk’s Papers at 17.

FN114. Clerk’s Papers at 17.

FN115. Clerk’s Papers at 17–19.

FN116. Clerk’s Papers at 33.

FN117. FutureSelect contends that Oppenheimer was “100% owned by MassMutual,” and Tremont was “100% owned by Oppenheimer.” Clerk’s Papers at 34. FutureSelect also alleges that all five of Tremont’s directors and both of its co-principals were Oppenheimer and MassMutual employees.

FN118. *D.L.S. v. Maybin*, 130 Wash.App. 94, 98, 121 P.3d 1210 (2005) (trial court properly dismissed claim against franchisor based on claim of apparent agency relationship with franchisee); RESTATEMENT (SECOND) OF AGENCY Y § 267 (1958).

FN119. See, e.g., *Mohr v. Grantham*, 172 Wash.2d 844, 860–61, 262 P.3d 490 (2011); *Ranger Ins. Co. v. Pierce County*, 164 Wash.2d 545, 555, 192 P.3d 886 (2008).

FN120. Clerk’s Papers at 20.

FN121. Clerk’s Papers at 41.

FN122. Clerk’s Papers at 19.

FN123. See, e.g., *Estep v. Hamilton*, 148 Wash.App. 246, 258, 201 P.3d 331 (2008); *Mauch v. Kissling*, 56 Wash.App. 312, 316, 783 P.2d 601 (1989) (“Apparent authority can only be inferred from the acts of the principal and not from the acts of the agent.”).

FN124. See *ESCA Corp. v. KPMG Peat Marwick*, 135 Wash.2d 820, 828, 959 P.2d 651 (1998) (accounting firm found liable to bank for negligent misrepresentation contained in audit of customer to whom bank loaned money).

FN125. *Haberman*, 109 Wn.2d at 163 (quoting RESTATEMENT (SECOND) OF TORTS § 552 cmt.h (1977)).

FN126. Clerk’s Papers at 36.

FN127. Clerk’s Papers at 21, 37. Ernst & Young certified that the Broad Market fund ended 2000 with \$288 million in assets, 2001 with \$364 million, 2002 with over \$400 million, and 2003 with nearly \$450 million. Ernst & Young certified that the Prime fund ended 2000 with \$497 million in assets, 2001 with \$667 million, 2002 with \$750 million, and 2003 with \$831 million.

FN128. Clerk’s Papers at 22–23.

FN129. Clerk’s Papers at 37.

FN130. Clerk’s Papers at 23.

FN131. CR 15(a) states, in pertinent part, “If

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a party moves to amend a pleading, a copy of the proposed amended pleading, denominated 'proposed' and unsigned, shall be attached to the motion .”

FN132. Precision Lab. Plastics, Inc. v. Micro Test, Inc., 96 Wash.App. 721, 725, 981 P.2d 454 (1999) (quoting MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc., 60 Wash.App. 414, 418, 804 P.2d 627 (1991)).

FN133. SeaHAVN, Ltd. v. Glitnir Bank, 154 Wash.App. 550, 563, 226 P.3d 141 (2010).

FN134. CTVC of Hawaii Co. v. Shinawatra, 82 Wash.App. 699, 708, 919 P.2d 1243 (1996).

FN135. Id.

FN136. Id. at 709, 919 P.2d 1243.

FN137. RCW 4.28.185(1) (emphasis added).

FN138. Shute v. Carnival Cruise Lines, 113 Wash.2d 763, 771, 783 P.2d 78 (1989).

FN139. Precision Lab. Plastics, 96 Wash.App. at 726, 981 P.2d 454 (emphasis omitted) (quoting Tyee Constr. Co. v. Dullen Steel Prods., Inc., 62 Wash.2d 106, 381 P.2d 245, 115–16, 62 Wash.2d 106, 381 P.2d 245 (1963)).

FN140. Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634 (1925).

FN141. See 14 KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 4:27, at 117 (2d ed.2009).

FN142. 326 U.S. 310, 316–17, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (citations omitted).

FN143. See Williams v. Canadian Fishing Co., 8 Wash.App. 765, 768, 509 P.2d 64 (1973) (“We agree with respondent that ownership of a subsidiary by a parent, with nothing more, is not sufficient to constitute ‘doing business’ for jurisdictional purposes. Although in the case at bar the parent and subsidiary corporations share a common director, there is no showing in the record that the officers of the subsidiary do not act independently of the parent corporation or that the subsidiary is a ‘mere instrumentality’ of the parent.” (citations omitted)); State v. Nw. Magnesite Co., 28 Wash.2d 1, 41, 182 P.2d 643 (1947) (“it is the general rule that a foreign corporation which holds a controlling interest in a subsidiary corporation doing business within a particular state is not thereby subject to service of process through service upon an agent of the subsidiary within that state”); Osborne v. Spokane, 48 Wash.App. 296, 299, 738 P.2d 1072 (1987) (“A foreign corporation is not ‘doing business’ in this state for purposes of jurisdiction merely because it is a wholly owned subsidiary of a domestic corporation.”); see 14 TEGLAND, *supra*, §§ 4:27, 4:30, at 117–18, 120–22.

FN144. See, e.g., CTVC, 82 Wash.App. at 717, 919 P.2d 1243 (plaintiffs sued an individual and two corporations controlled by the individual and relied upon two contacts by the individual to support long-arm jurisdiction; court concluded agent can subject principal to long-arm jurisdiction).

FN145. See, e.g., 4A CHARLES ALAN

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WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069.4 nn. 2 & 10 (3d ed. 2002 & Supp.2013) (illustrative cases where federal courts have exercised or declined to exercise personal jurisdiction based on subsidiary contacts).

FN146. In re Teletronics Pacing Sys., Inc., 953 F.Supp. 909, 918 (S.D. Ohio 1997) (“We find persuasive the view that *International Shoe* has supplanted *Cannon* in the context of personal jurisdiction.... [T]he formalistic alter ego principles of *Cannon* are no longer applicable in the analysis of whether the exercise of personal jurisdiction over a foreign corporation is constitutional.”).

FN147. Id. at 916 (“Many courts, however continue to conflate the requirements of due process and the alter ego doctrine.”)

FN148. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 419–20 (9th Cir.1977) (specific jurisdiction); Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1404–06 (9th Cir.1994) (specific jurisdiction); Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 920–22 (9th Cir.2011) (general jurisdiction); Metro-Goldwyn-Mayer Studios, Inc., v. Grokster, Ltd., 243 F.Supp.2d 1073, 1098–1100 (C.D. Cal.2003) (specific jurisdiction); John Doe I v. Unocal Corp., 248 F.3d 915, 923–30 (9th Cir.2001) (both).

FN149. Chan, 39 F.3d at 1404–06; Unocal, 248 F.3d at 923–30; Wells Fargo, 556 F.2d at 419–20.

FN150. Bauman, 644 F.3d at 920.

FN151. Id. at 922 n. 13.

FN152. Refreshingly, one district court in the Western District of Washington has reconciled the Ninth Circuit alter ego analysis with the minimum contacts standard. See Langlois v. Déjà Vu, Inc., 984 F.Supp. 1327, 1338 (W.D. Wash.1997) (court “convinced that the analysis actually applied by the Ninth Circuit is a minimum contacts analysis”).

FN153. SeaHAVN, 154 Wash.App. at 564, 226 P.3d 141 (alteration in original) (quoting Walker v. Bonney-Watson Co., 64 Wash.App. 27, 34, 823 P.2d 518 (1992)).

FN154. Id. at 564–65, 226 P.3d 141 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475–76, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)).

FN155. See Precision Lab. Plastics, 96 Wash.App. at 727–28, 981 P.2d 454; Kysar v. Lambert, 76 Wash.App. 470, 487, 887 P.2d 431 (1995).

FN156. Grange Ins. Ass'n v. State, 110 Wash.2d 752, 760, 757 P.2d 933 (1988) (internal quotation marks omitted) (quoting Burger King, 471 U.S. at 473–74).

FN157. Clerk's Papers at 33.

FN158. 69 Wash.App. 590, 599, 849 P.2d 669 (1993) (citation omitted).

FN159. SeaHAVN, 154 Wash.App. at 570 n. 3, 226 P.3d 141.

FN160. Grange Ins. Ass'n, 110 Wash.2d at 757, 757 P.2d 933.

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FN161. Precision Lab Plastics, 96 Wash.App. at 726, 981 P.2d 454 (quoting Tye Constr., 62 Wash.2d at 116, 381 P.2d 245).

FN162. Burger King, 471 U.S. at 478; Bauman, 644 F.3d at 925 (burden on defendant, a large corporation, to litigate the case in another state “is not so weighty as to preclude jurisdiction—particularly since ‘modern advances in communications and transportation have significantly reduced the burden of litigating’ “ in a foreign state (quoting *Sinatra v. Nat’l Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir.1988)).

FN163. Precision Lab Plastics, 96 Wash.App. at 729–30, 981 P.2d 454; see also McGee v. Int’l Life Ins. Co., 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957) (a state frequently will have a “manifest interest in providing effective means of redress for its residents”).

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