No. 95991-9

SUPREME COURT
OF THE STATE OF WASHINGTON

FEDERAL HOME LOAN BANK OF SEATTLE,
a bank created by federal law,

Petitioner,

v.

RBS SECURITIES INC., f/k/a GREENWICH CAPITAL MARKETS, INC., a Delaware corporation; GREENWICH CAPITAL ACCEPTANCE, INC., a Delaware corporation; and RBS HOLDINGS USA, INC., f/k/a GREENWICH CAPITAL HOLDINGS, INC., a Delaware corporation,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. Introduction.

A plaintiff asserting claims for material misstatements in connection with the sale of a security under the Washington State Securities Act ("WSSA") must plead and ultimately prove reliance on the alleged misstatements. This Court so held nearly 30 years ago in *Hines v. Data Line Systems, Inc.*, 114 Wn.2d 127, 134, 787 P.2d 8 (1990), and the courts of appeals have been applying this rule without exception for nearly 50 years since *Shermer v. Baker*, 2 Wn. App. 845, 858, 472 P.2d 589, *rev. denied*, 78 Wn.2d 994 (1970). The courts below correctly followed these precedents in dismissing the claims of petitioner and plaintiff below, Federal Home Loan Bank of Seattle ("Seattle Bank"), because the undisputed facts conclusively established that Seattle Bank did not rely on any alleged misstatement. In its petition, Seattle Bank does not challenge its lack of reliance, but instead asks this Court to reverse nearly 50 years of Washington law and hold that reliance is not an element of a WSSA misstatement claim. There is no reason for this Court to overturn settled law.

In *Hines*, this Court unequivocally held that reliance is an element of a WSSA claim. Its holding was both necessary to resolve that dispute and has been consistently followed as binding precedent. This Court should adhere to that decision, which the Court of Appeals below faithfully applied, under the doctrine of *stare decisis*.

Moreover, even if *Hines* were not controlling, there is no indication that our legislature ever intended to create a strict liability statute. As the Court of Appeals correctly recognized, the text and structure of the WSSA's liability-creating provision—RCW 21.20.010—mirror that of Securities and Exchange Commission ("SEC") Rule 10b-5, which creates a private cause of action that courts have long held (even before the WSSA was enacted) requires the plaintiff to prove reliance. And as originally enacted, the WSSA prohibited "fraud or misrepresentation" in connection with security sales, claims that at common law required a showing of reliance. The Court of Appeals also correctly rejected Seattle Bank's fallback contentions that this Court should read reliance out of the WSSA to "protect investors" and make the WSSA more like other states' securities laws. The WSSA amply protects investors, and the fact that other states have interpreted their own, different, securities laws in different ways, is of little relevance as to what our legislature intended when enacting the WSSA.

The Court's decision in two other pending cases brought by Seattle Bank[1] will likely control this case. Respondents ask the Court to hold that

[1] *See Fed. Home Loan Bank of Seattle v. Barclays Capital Inc.*, 1 Wn. App. 2d 551, 406 P.3d 686 (2017), *review granted*, 190 Wn.2d 1018 (2018) (consolidated with 75779-2-I); *Fed. Home Loan Bank of Seattle v. Credit Suisse Sec. (USA) LLC.*, 1 Wn. App. 2d 1039, 2017 WL 6336000 (2017) (unpublished), *review granted*, 190 Wn.2d 1018 (2018) (consolidated with No. 75913-2-I). These cases were coordinated for pre-trial purposes in Superior Court with the instant action.

reliance is an element of a WSSA claim in *Credit Suisse* and *Barclays*, to consider RBS's arguments here in deciding this issue, and to ultimately deny Seattle Bank's petition in the instant case.

II. Restatement of the Case.

Seattle Bank seeks rescission under the WSSA for its June 29, 2006 purchase of a $200 million certificate in the Harborview Mortgage Loan Trust Series ("HVMLT") 2006-5 securitization,[2] which RBS entities sponsored and underwrote. In its amended complaint, Seattle Bank alleged that RBS violated RCW 21.20.430, by making material misstatements in the HVMLT 2006-5 prospectus supplement concerning the characteristics of the residential mortgage loans backing the HVMLT 2006-5 certificate Seattle Bank purchased.[3] Seattle Bank filed ten similar lawsuits against other entities that sold it other certificates, and those cases were coordinated with this action for pre-trial purposes before King County Superior Court Judge Laura Inveen (the "trial court").

On June 23, 2011, in ruling on defendants' motions to dismiss, the trial court held that reasonable reliance is a required element of a WSSA claim, but concluded that it was premature to decide whether Seattle Bank

[2] CP 8.

[3] CP 11792-839; CP 1-48.

had actually relied on any alleged misstatement.[4] Following four years of fact and expert discovery, the trial court initially denied RBS's summary judgment motion on the issue of reliance, finding that Seattle Bank's receipt and reliance upon the HVMLT 2006-5 prospectus supplement before it purchased its certificate presented a disputed issue of fact.[5]

The trial court then granted RBS's motion for reconsideration, finding that SEC records conclusively established that Seattle Bank could not possibly have relied on any statement in the prospectus supplement, because it was filed with the SEC one day *after* Seattle Bank completed its purchase of the certificate. The trial court also rejected, as belated efforts to amend its complaint, Seattle Bank's new arguments that it relied instead on preliminary marketing materials and that it reasonably expected the prospectus supplement would contain false or misleading statements.[6]

The Court of Appeals affirmed both rulings of the trial court, holding that the WSSA requires a showing of reasonable reliance and that Seattle Bank's complaint was based solely on misstatements in the prospectus supplement. *Fed. Home Loan Bank of Seattle v. RBS Sec., Inc.*, 3 Wn. App. 2d 642, 418 P.3d 168 (2018). That decision came on the heels of the Court of

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[4] CP 365, 367.

[5] CP 7702.

[6] CP 8184-87; *see* CP 7722, 7724.

Appeals' affirmance of summary judgment dismissing Seattle Bank's claims in *Credit Suisse* and *Barclays*, and adopted the reasoning in those decisions "that the words of the statute, its substantial similarity to its federal counterpart, and an unbroken line of controlling cases" led to the conclusion "that reliance is an essential element of this statute." 3 Wn. App. 2d at 646, ¶ 10. Seattle Bank now petitions this Court for review of that aspect of the Court of Appeals' decision holding that reliance is an element of its WSSA claim.[7]

III. Argument Why Review Should Ultimately Be Denied

A. This Court long ago held that a WSSA plaintiff must prove reliance. The Court of Appeals correctly held that this result was not "dictum."

Twenty-eight years ago, this Court held that to prove a WSSA misstatement claim, a plaintiff must demonstrate that it "relied on the misrepresentations in connection with the sale of the securities." *Hines*, 114 Wn.2d at 134. That holding, which Washington courts have consistently followed,[8] and which the Court of Appeals followed in *Credit Suisse* and

[7] Seattle Bank has abandoned its prior contention that it relied on an expectation that the prospectus supplement would mirror preliminary marketing materials. Failure to raise these issues has resulted in their waiver. RAP 13.7(b). *See Garth Parberry Equip. Repairs, Inc. v. James*, 101 Wn.2d 220, 225 n.2, 676 P.2d 470 (1984) (failure to raise issue in petition for review results in its waiver).

[8] *See, e.g., Stewart v. Estate of Steiner*, 122 Wn. App. 258, 260, 264, 93 P.3d 919 (2004), *rev. denied*, 153 Wn.2d 1022 (2005); *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 109, 86 P.3d 1175 (2004), *rev. denied*, 153 Wn.2d 1024 (2005); *FutureSelect Portfolio Mgmt. Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 867-68, ¶ 53, 309 P.3d 555 (2013), *aff'd* 180 Wn.2d 954, 331 P.3d 29 (2014).

Barclays (as well as in this action), is unambiguous and controlling. Seattle Bank does not argue that *Hines* was wrongly decided, and offers no reason why this Court should depart from the principles of *stare decisis* and overrule *Hines*. *Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 277, ¶ 51, 413 P.3d 549 (2018) (petitioner must show "that an established rule is incorrect and harmful before it is abandoned").

Instead, Seattle Bank argues that the Court of Appeals erred in treating *Hines* as binding precedent because "the issue of reliance was not before this Court." Pet. 9-10. That is wrong. In *Hines*, this Court resolved two separate appeals—one by plaintiffs, appealing the affirmance of summary judgment dismissing WSSA claims against certain defendants, and one by other defendants, appealing a judgment finding them liable for WSSA violations. 114 Wn.2d at 130-31. As stated in their appellate briefs and petitions, the *Hines* parties asked this Court not only to determine "the level of causation" needed to sustain a WSSA misstatement claim, but also to provide "guidance" on the interpretation of the statute generally because "substantial portions . . . remain in doubt."[9] And contrary to Seattle Bank's

[9] Reply Brief for Appellants at 18, *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 787 P.2d 8 (1990) (No. 20506-4-I); Brief for Appellants at 58-65, *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 787 P.2d 8 (1990) 20506-4-I); Brief for Respondents at 31-34, *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 787 P.2d 8 (1990) (No. 20506-4-I).

suggestion that the scope of the Court's review was narrow, the *Hines* parties asked this Court to "clearly delineate" the elements of a WSSA misstatement claim "so that citizens (and the lower courts) can act with confidence and predict the consequences of their actions."[10]

This Court did just that in resolving *Hines*, finding that the WSSA was intended to protect investors who have been "wrongfully induced" to buy securities; holding that reliance was therefore a required element of a WSSA misstatement claim; and affirming, on the facts, the judgment entered against the defendants based in part on the record "that each investor relied on statements in the selling materials." 114 Wn.2d at 134. Those statements were far from *dictum*, contrary to Seattle Bank's contention, but were "necessary to [the court's] ultimate holding" that defendants were liable under the WSSA for their alleged misstatements. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 209, 691 P.2d 957 (1984). The Court of Appeals thus did not err in concluding that *Hines* was binding precedent.

Seattle Bank's related contention that it is "implausible" that the *Hines* Court could have intended to create binding precedent on the issue of reliance because this Court had in *other* cases previously interpreted the

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[10] Reply of Petitioners to Respondents' Answers To Petition For Review at 1-2, *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 787 P.2d 8 (1990) (Nos. 20506-4-I, 20519-6-I).

WSSA to "protect investors," Pet. 10 (citing cases), is baseless. Only one of those decisions—*Kittilson v. Ford*—even remotely relates to the issue of reliance *at all*,[11] and that decision undermines rather than supports Seattle Bank's position here. There, the Court, in addressing whether a WSSA plaintiff must plead and prove that the security seller acted with intent to defraud, held that "the interpretation" of the WSSA's liability-creating provision, RCW 21.20.010, "first announced in *Shermer* is the better rule." *Kittilson v. Ford*, 93 Wn.2d 223, 227, 608 P.2d 264 (1980). The "better rule" in *Shermer* that *Kittilson* adopted was that "[i]n an action brought under RCW 21.20.010, a plaintiff need neither plead nor prove that the defendant intended to deceive him by the misrepresentation or omission. *It is sufficient that the plaintiff relied upon the misrepresentation or omission of a material fact.*" *Shermer*, 2 Wn. App. at 857-58 (emphasis added). In short, this Court's other WSSA decisions do not call into question *Hines* or suggest, as Seattle Bank contends, that this Court did not actually mean

[11] The five other decisions Seattle Bank cites relate to wholly inapposite issues, including the definition of "sale" under the WSSA, *see Cellular Eng'g, Ltd. v. O'Neill*, 118 Wn.2d 16, 820 P.2d 941 (1991); the definition of "seller" under the WSSA, *see Hoffer v. State*, 113 Wn.2d 148, 776 P.2d 963 (1989); *Hoffer v. State*, 110 Wn.2d 415, 755 P.2d 781 (1988), *on reconsideration in part* 113 Wn.2d 148 (1989); and *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 744 P.2d 1032 (1987), *amended* 109 Wn.2d 107 (1988); and whether the WSSA applies to off-market transactions, *see Clausing v. DeHart*, 83 Wn.2d 70, 515 P.2d 982 (1973).

what it said that to succeed on a WSSA claim a plaintiff must demonstrate that it relied on the alleged misstatement.

B. The Court of Appeals correctly concluded, separate from *Hines*, that the WSSA is not a strict liability statute.

Seattle Bank is also wrong that the Court of Appeals' decision conflicts with "settled doctrine" from this Court that the WSSA is a "strict-liability statute." Pet. 11. As discussed above, it is "settled doctrine" in this state that a WSSA plaintiff must prove reliance, as nearly 50 years of unbroken authority from this Court and the courts of appeals attests. But even if *Hines* were not controlling (it is), the Court of Appeals correctly held in *Barclays* (and adopted in this action) that the WSSA's text, structure and history independently demonstrated that the legislature "intended reasonable reliance to be an essential element" of a WSSA misstatement claim. 1 Wn. App. 2d at 565 ¶ 49. Seattle Bank's attempts to find error with the Court of Appeals' analysis are misguided and based on a flawed understanding of the statute as well as this Court's WSSA jurisprudence.

1. The text and structure of the WSSA's liability-creating section mirror SEC Rule 10b-5, which courts have long held requires proof of reliance. The WSSA's history similarly reflects the legislature's intent to avoid strict liability.

The WSSA's civil liability section, RCW 21.20.430, confers on securities purchasers a private right of action against sellers who violate the WSSA's liability-creating section, RCW 21.20.010. RCW 21.20.430(1)

("Any person who offers or sells a security in violation of any provision of RCW 21.20.010 . . . is liable to the person buying the security from him or her[.]"). The legislature adopted RCW 21.20.010 from Section 101 of the Uniform State Securities Act of 1956 ("USSA"), *see, e.g.*, *In re Metro. Sec. Litig.*, 2009 WL 36776, at *3 (E.D. Wash. Jan. 6, 2009), which itself was adopted from SEC Rule 10b-5. *See* Uniform Securities Act of 1956, Section 101, Official Code Comment ("This section is substantially the [SEC's] Rule X-10B-5[.]"). As the Court of Appeals correctly recognized in *Barclays* (and adopted in its decision below), 1 Wn. App. 2d at 558-59 ¶¶ 22-23, RCW 21.20.010 mirrors SEC Rule 10b-5 in all material respects, including in proscribing the same three types of conduct that Rule 10b-5 does—including, as relevant here, the making of a material misstatement under subpart 2—and in using nearly identical language to do so. This Court too has recognized that RCW 21.20.010 "is patterned after and restates in substantial part" SEC Rule 10b-5. *Clausing*, 83 Wn.2d at 72.

There is also no dispute that to establish a claim under SEC Rule 10b-5(2) for alleged material misstatements in connection with the sale of a security, an investor-plaintiff must prove that it relied on those misstatements. Lower federal courts had uniformly reached that conclusion prior to our legislature adopting the WSSA, *see, e.g.*, *Reed v. Riddle Airlines*, 266 F.2d 314, 319 (5th Cir. 1959); *Speed v. Transamerica Corp.*,

5 F.R.D. 56, 60 (D. Del. 1945), and the U.S. Supreme Court confirmed that understanding in 1976, *see Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), a year before our legislature first enacted the version of RCW 21.20.430 that, like the current version, made violations of RCW 21.20.010 the predicate offense giving rise to civil liability.[12] Given (i) this text, structure and history, (ii) this Court's statement about the similarity between RCW 21.20.010 and SEC Rule 10b-5, (iii) the language of RCW 21.20.900 that courts should "coordinate the interpretation" of the WSSA with its SEC counterpart; (iv) the fact that our legislature presumptively "enacts legislation in light of existing law," *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 396, ¶ 11, 325 P.3d 904 (2014), and amended the WSSA many times after courts first began interpreting it as requiring a showing of reliance without modifying the language of the statute;[13] and (v) this Court's admonishment that "Washington courts will not construe a statute to impose strict liability absent a clear indication that the Legislature intended to do so," *Wright v. Engum*, 124 Wn.2d 343, 349, 878 P.2d 1198 (1994), the Court

[12] *See* Laws of 1977, Ex. Sess., ch. 172, § 4.

[13] Laws of 1998, ch. 15, § 20; Laws of 1986, ch. 304, § 1; Laws of 1985, ch. 171, § 1; Laws of 1981, ch. 272, § 9; Laws of 1979, Ex. Sess., ch. 68, § 30; Laws of 1977, Ex. Sess., ch. 172, § 4; Laws of 1975, 1st Ex. Sess., ch. 84, § 24; Laws of 1974, Ex. Sess., ch. 77, § 11.

of Appeals in *Barclays* (and here), correctly held that the WSSA is not a strict liability statute. *Barclays*, 1 Wn. App. 2d at 559-61, ¶¶ 23-32.

Seattle Bank labels as absurd two straw man conclusions it purports to derive from the Court of Appeals decision: (i) that the legislature in 1959 knew that the Supreme Court would eventually interpret SEC Rule 10b-5 as containing a reliance requirement, or (ii) that the legislature "intended that RCW 21.20.010 would . . . mean whatever the federal courts thought that Rule 10b-5 meant." Pet. 14. But Seattle Bank's own logic is seriously flawed. The *lower* federal courts had consistently construed SEC Rule 10b-5 as requiring a showing of reliance prior to the WSSA's enactment—persuasive authority that our legislature was presumptively aware of and intended to follow by enacting a statute that was modeled directly upon SEC Rule 10b-5, as the *Barclays* court concluded. 1 Wn. App. 2d at 560, ¶ 27. The Supreme Court in *Ernst* only later *confirmed* that widespread understanding. Further, there is nothing "absurd" about the legislature desiring that RCW 21.20.010 be construed consistently with its federal counterpart—to the contrary, the legislature wrote that requirement directly into the statute. *See* RCW 21.20.900.

Seattle Bank's separate argument, Pet. 11-13, that RCW 21.20.010(2) should be interpreted consistently with Section 12 of the federal Securities Act of 1933, 15 U.S.C. § 77l—which also prohibits the

making of a material misstatement in connection with security sales, but which does not require a showing of scienter, loss causation or reliance—is similarly misguided.[14] Had the legislature intended to create a strict liability regime, it easily could have drafted the civil liability section of RCW 21.20.430 so that it did not cross-reference RCW 21.20.010 but instead mirrored Section 12, much like USSA Section 430[15] and the securities laws of other states do.[16] But it did not, and the fact that RCW 21.20.010(2), RCW 21.20.430 and Section 12 bear similarities because they generally proscribe the same conduct, or offer the same remedy of rescission, does not sufficiently evince any intent on the part of the legislature to create a strict liability regime given the statute's text and structure, as the Court of Appeals rightly recognized. *Barclays*, 1 Wn. App. 2d at 563-64, ¶¶ 42-44.

Moreover, Seattle Bank's argument cannot be reconciled with the legislative history of RCW 21.20.430. When that section was first adopted by the legislature in 1959, it prohibited sellers from engaging in "fraud or

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[14] Seattle Bank essentially contends that in adopting SEC Rule 10b-5 into the WSSA through RCW 21.20.010 and making it a predicate violation giving rise to civil liability, the legislature intended to import jurisprudence *from an entirely different federal statute*—or, at least, intended to have that jurisprudence apply to subpart 2 of RCW 21.20.010. WSSA's text, structure and history refute that argument.

[15] *See* Uniform Securities Act of 1956, Section 430.

[16] *See, e.g.*, Va. Code § 13.1-522(A); Mass. Gen. Laws ch. 110A, § 410.

misrepresentation." Laws of 1959, ch. 282 § 43. At that time, it was well-settled that such claims required a showing of reliance.[17] The statute as initially enacted also did not cross-reference RCW 21.20.010 or make its violation a predicate offense giving rise to civil liability, and it was an open question among the Washington lower courts whether a private cause of action could be brought directly under that provision.[18] The legislature resolved that issue by amending RCW 21.20.430 in 1977 to make violations of RCW 21.20.010—the Washington counterpart to SEC Rule 10b-5 which, by that time, the Supreme Court in *Ernst* had construed to contain a reliance requirement—a predicate offense in lieu of "fraud or misrepresentation." Laws of 1977, Ex. Sess., ch. 172 § 4; *see also Wade*, 915 F.2d at 1329-32. As this history reflects, the legislature never intended RCW 21.20.430 to create a strict liability regime, and Seattle Bank's efforts to graft Section 12 jurisprudence onto that section would completely undermine that intent.

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[17] *See, e.g.*, *Andrews v. Standard Lumber Co.*, 2 Wn.2d 294, 300, 97 P.2d 1062 (1940) (fraud elements); *Bryant v. Vern Cole Realty Co.*, 39 Wn.2d 571, 574-75, 237 P.2d 487 (1951) (negligent misrepresentation elements).

[18] *Compare Shermer*, 2 Wn. App. at 849-50 (private cause of action for aggrieved sellers) *with Ludwig v. Mut. Real Estate Investors*, 18 Wn. App. 33, 44, 567 P.2d 658 (1977) (no private cause of action for buyers harmed by material omissions), *abrogated by statute as recognized in Kittilson*, 93 Wn.2d at 225. *See also Wade v. Skipper's Inc.*, 915 F.2d 1324, 1329-32 (9th Cir. 1990) (discussing split in authority).

2. This Court's WSSA jurisprudence does not support Seattle Bank's contention that the WSSA is a strict liability statute.

Seattle Bank also argues that the Court of Appeals' reasoning "cannot be reconciled" with this Court's decisions in *Kittilson*, *Hines* and *Go2net, Inc. v. Freeyellow.Com, Inc.*, 158 Wn.2d 247, 143 P.3d 590 (2006), insofar as in those decisions the Court refused to apply *other* elements or defenses associated with an SEC Rule 10b-5 claim—specifically, scienter (*Kittilson*), loss causation (*Hines*), and waiver and estoppel (*Go2Net*)—to misstatement claims under the WSSA. Pet. 15-17. The Court of Appeals correctly recognized, however, that those authorities do not stand for the general proposition that the WSSA dispenses with a requirement of reliance. *Barclays*, 1 Wn. App. 2d at 562-63, ¶¶ 36-41.

Seattle Bank's focus on *Kittilson*, Pet. 15-16, where this Court held that scienter is not an element of a WSSA misstatement claim, 93 Wn.2d at 226, demonstrates the error in its reasoning. The *Kittilson* Court refused to apply to the WSSA the U.S. Supreme Court's holding in *Ernst* that scienter was an element of a Rule 10b-5 claim, because that result was based on the language of Rule 10b-5's enabling statute, which prohibited "manipulative" and "deceptive" conduct and which had no Washington counterpart. 93 Wn.2d at 226. Of course, that the WSSA proscribes more than just a seller's "manipulative" or "deceptive" conduct in no way negates the reliance

requirement, which unlike manipulative or deceptive conduct, has nothing to do with the seller's state of mind. And, tellingly, in refusing to import scienter into the WSSA, the *Kittilson* Court expressly adopted the "better rule" set forth in *Shermer*, 93 Wn.2d at 227, that expressly endorsed the reliance requirement. In short, *Kittilson* does not support Seattle Bank's argument.

Seattle Bank fares no better in invoking *Hines,* which expressly held that a WSSA plaintiff must prove reliance. Arg. § A, *supra*. It is beside the point that the *Hines* Court separately refused to import a loss causation requirement into the statute because nothing in the WSSA's text or history indicated that the legislature had intended to do so, 114 Wn.2d at 134-35. The legislature clearly intended to make reliance an element as the *Hines* Court held and as the text, structure and history of the WSSA demonstrate.

Seattle Bank's reliance on *Go2Net* is equally misplaced. There, the Court re-affirmed the reliance requirement by stating—in the second sentence of the opinion—that the defendant-appellant "does not challenge the jury's findings that [plaintiff], in entering the agreement, relied on [defendant's] material misrepresentation or omission regarding the ownership of his company—findings that established [defendant's] violation" of the WSSA. *Go2net*, 158 Wn.2d at 250. The Court's separate holding that the WSSA's "purpose and structure" counseled against

allowing defendants to raise waiver and estoppel defenses, which were not among the statute's expressly enumerated affirmative defenses, and which would upset the statutory scheme by "shifting the focus to the post-sale conduct of the uninformed investor," *id.* at 254, is irrelevant. Reliance is an element of the claim (not an affirmative defense), and does not shift the focus of the claim to any post-sale conduct.

C. The WSSA amply protects investors, even though they must prove reliance on the alleged misstatement.

Seattle Bank's argument that the decisions below and in *Barclays* and *Credit Suisse* are irreconcilable with the WSSA's purpose to "protect investors," Pet. 18, is also misguided. "No legislation pursues its purposes at all costs," *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (quotation omitted), and, as the Court of Appeals rightly concluded, the WSSA's "purpose" cannot overcome the statute's text, structure and history which reveal a clear intent to make reliance an element of a WSSA misstatement claim. *Barclays*, 1 Wn. App. 2d at 561, ¶ 35. More generally, the reliance requirement is not "anti-investor," Pet. 18, nor will it chill private actions seeking to hold securities sellers accountable for their material misstatements that actually mattered to and were relied upon by investors, as decisions like *Hines* and others affirming judgments against such sellers attest. This Court and the Court of Appeals have repeatedly

upheld the reliance requirement while at the same time reaffirming that the WSSA's purpose is to protect investors, making clear that those two principles are not at odds, and are in fact compatible.[19]

D. The WSSA is unique compared to other state securities laws and there is no reason to ignore those differences.

Seattle Bank's final contention, that this Court should follow the decisions of non-Washington courts holding that reliance is not an element of other states' securities laws, Pet. 19-20, has no merit. This Court is the final arbiter of Washington law, *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 555, 14 P.3d 133 (2000), and has already held that reliance is an element of a WSSA claim for the reasons stated above. Other courts' holdings under different states' securities laws are irrelevant.

More generally, Seattle Bank is wrong that the WSSA must be interpreted in harmony with disparate securities laws that other states have enacted. Seattle Bank relies on RCW 21.20.900, but that provision provides simply that courts should construe "*this chapter*" in uniformity with the laws of others states "*that enact it*"—a clear mandate reflecting the

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[19] *Hines*, 114 Wn.2d at 134, 145 (discussing both reliance and WSSA's purpose to "protect investors"); *Guarino*, 122 Wn. App. at 109 ("Because the primary purpose of the WSSA is to protect investors, it is construed liberally. The WSSA also requires reliance upon the alleged misrepresentations or omissions."); *Stewart*, 122 Wn. App. at 264; *FutureSelect*, 175 Wn. App. at 868, ¶ 53 (same).

legislature's intent to "imitate" the construction of only those state laws that mirror WSSA's unique text and structure. *Go2Net*, 158 Wn.2d at 258. Tellingly, Seattle Bank does not even attempt to argue that the securities laws of the other states it identifies mirror the WSSA, and a side-by-side comparison belies any claim of uniformity. Indeed, many of the identified state securities laws mirror Section 12 of the Securities Act[20] and, not surprisingly, have been interpreted consistently with that statute. And even those state laws that are arguably facially similar to RCW 21.20.430 insofar as they make their equivalent of RCW 21.20.010 a predicate violation to civil liability, have their own unique features, such as providing seller-defendants with a due diligence defense,[21] or requiring proof of loss causation[22] or scienter,[23] that preclude uniform interpretation. Adopting

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[20] *Compare* 15 U.S.C. § 77l *with, e.g.*, Cal. Corp. Code § 25401; Conn. Gen. Stat. § 36b-29(a)(2); N.J. Stat. Ann. § 49:3-71(b)(1); Mass. Gen. Laws ch. 110A, § 410; Neb. Rev. Stat. § 8-1118(1); Va. Code § 13.1-522(A).

[21] *Compare* Colo. Rev. Stat. Ann. § 11-51-604(4) (West 1990); Ind. Bus. Stat. Ann. tit. 23 § 23-2-1-19 (West 1984); Ky. Rev. Stat. Ann. § 292.480(1) (West 1970); Pa. St. tit. 70 § 1-501(a) (West 1973); Tenn. Code Ann. § 48-2-122(a)(1)(B) (West 2003); Utah Code Ann. § 61-1-22(3) (West 1997); Wisc. Stat. Ann. § 551.59(1)(b) (West 1984) (all providing a "reasonable care" defense) *with* RCW 21.20.430(a)(2) and CP 21660-61 (holding that RCW 21.20.430 does not permit the assertion of a due diligence defense).

[22] *See, e.g., Ashland, Inc. v. Oppenheimer & Co., Inc.*, 648 F.3d 461, 471 (6th Cir. 2011) (interpreting Kentucky's securities law to require loss causation).

[23] *See, e.g.*, N.J. Stat. Ann. § 49:3-71(b)(1) (West 1997).

those states' interpretations of their own different laws would do violence to the Washington legislature's intent in enacting a quite different statute.

IV. Conclusion.

For the foregoing reasons, RBS respectfully requests that the Court affirm the *Barclays* and *Credit Suisse* decisions which are currently before the Court and deny Seattle Bank's petition in the instant action.

Dated: August 20, 2018

SMITH GOODFRIEND, PS

By: _____
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Attorneys for Respondents RBS Securities Inc., f/k/a Greenwich Capital Markets, Inc., RBS Acceptance Inc. sued as Greenwich Capital Acceptance, Inc., and RBS Holdings USA, Inc., f/k/a Greenwich Capital Holdings, Inc.

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 20, 2018, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
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DATED at Seattle, Washington this 20th day of August, 2018.

Andrienne E. Pilapil

SMITH GOODFRIEND, PS

August 20, 2018 - 3:50 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	95991-9
Appellate Court Case Title:	Federal Home Loan Bank of Seattle v. RBS Securities, Inc., et al.
Superior Court Case Number:	09-2-46347-6

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Comments:

- Answer to Petition for Review - Motion and Certification for Pro Hac Vice Admission of Alan C. Turner

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