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Supreme Court No. 95420-8 (consolidated with No. 95436-4)
(Court of Appeals No. 75779-2-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FEDERAL HOME LOAN BANK OF SEATTLE,

Petitioner,

v.

CREDIT SUISSE SECURITIES (USA) LLC, f/k/a CREDIT SUISSE
FIRST BOSTON LLC, CREDIT SUISSE FIRST BOSTON
MORTGAGE SECURITIES CORP., and CREDIT SUISSE
MANAGEMENT LLC, f/k/a CREDIT SUISSE FIRST BOSTON
MANAGEMENT LLC,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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INTRODUCTION¹

Sixty years ago, the Washington Legislature chose to enact a securities law, RCW 21.20.010, modeled after Section 10(b) of the federal Securities Exchange Act and its implementing regulation, Rule 10b-5 (codified at 17 C.F.R. § 240.10b-5). Washington's law was designed to protect investors who are "induced to" make an investment by the seller's material misrepresentation. *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 135, 787 P.2d 8 (1990) (emphasis added). Consistent with that principle and the federal law the WSSA was modeled after, every court since the WSSA's adoption has understood reliance to be an element of a WSSA claim. In the wake of decades of precedent, the Legislature has amended the WSSA eight times and never changed the law to eliminate reliance as an element. As a result, there is no instance where a court has allowed a plaintiff to prevail on a WSSA claim without needing to prove reliance.

FHLBS brought its WSSA claim against Credit Suisse in accordance with that longstanding precedent. FHLBS premised its claim on allegations that it relied on supposedly false statements in prospectus supplements prepared by Credit Suisse. But discovery revealed that to be a false premise. FHLBS could not possibly have relied on anything in the

¹ The abbreviations and capitalized terms used in this brief are defined in the briefs Credit Suisse filed in the Court of Appeals.

prospectus supplements because FHLBS did not obtain them until after it bought the certificates. The trial court granted summary judgment to Credit Suisse because FHLBS could not prove reliance on statements it had never seen before buying the certificates.

On appeal, FHLBS has dropped its false pretense and now concedes it did not rely on anything in the prospectus supplements. It instead asked the Court of Appeals, and now this Court, to jettison the reliance element that has always been a central part of WSSA claims and allow FHLBS to sue over alleged misstatements it did not, and could not have, relied on when it bought the certificates. The Court of Appeals correctly rejected FHLBS's entreaty. (Op. 5-8; *see also FHLBS v. Barclays Capital, Inc.*, 1 Wn. App. 2d 551, 565, 406 P.3d 686 (2017).) This Court should affirm.

This Court settled the issue nearly thirty years ago: WSSA claims cannot proceed unless the plaintiff "relied on" the statements it challenges as misleading. *Hines*, 114 Wn.2d at 134. *Hines* confirmed what had been recognized for decades at the intermediate appellate level. *See Shermer v. Baker*, 2 Wn. App. 845, 858, 472 P.2d 589 (1970) (requiring proof that "the plaintiff relied upon the misrepresentation or omission of a material fact"). FHLBS's only response to this longstanding body of law is that the courts did not really mean what they said. This Court should not so

casually cast aside decades of precedent. Stare decisis “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 346, 217 P.3d 1172 (2009). FHLBS has not made, and cannot make, that showing.

Requiring reliance as an element of a WSSA claim gives effect to the Legislature’s intent in enacting the statute. The Legislature could have modeled a WSSA violation after Section 12 of the Securities Act, which does not require proof of reliance but which instead provides other defenses to liability not adopted into the WSSA. The Legislature chose instead to codify Rule 10b-5 almost verbatim. Washington courts have long recognized that this choice meant the Legislature intended to include reliance—an essential element of a 10b-5 claim—as an element of a WSSA claim. *See Shermer*, 2 Wn. App. at 858; *Hines*, 114 Wn.2d at 135. This Court’s observation in 1980 that “[t]he legislature has not seen fit to disturb” *Shermer*’s application of RCW 21.20.010 remains true today. *Kittilson v. Ford*, 93 Wn.2d 223, 227, 608 P.2d 264 (1980). Despite ample opportunity, the Legislature has never taken a contrary position.

Unable to point to a single case questioning the place of reliance as an element of a WSSA claim, FHLBS falls back on the refrain that the Act must be “interpreted liberally to protect investors.” (Pet. 2.) But even remedial statutes have their limits. No jurisdiction imposes the absolute

liability FHLBS seeks here: the existence of any misstatement forcing a seller to undo a securities transaction (and pay high statutory interest), even if the purchaser never saw that statement until after buying the security (or worse, knew about the misstatement and invested anyway), even if the seller could show that it exercised diligence in trying to avoid misstatements, and even if factors other than the misstatement caused the security to lose value.

There are good reasons that courts interpreting the WSSA and Rule 10b-5 have universally required proof of reliance. That element is necessary to ensure a causal connection between the alleged false statement and the plaintiff's injury. To do what FHLBS asks would allow sophisticated buyers to unwind deals they later regret by pointing to statements that had nothing to do with their purchasing decision. That would convert the WSSA into "a scheme of investor's insurance" that exists nowhere in the United States. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345, 125 S. Ct. 1627, 161 L.Ed.2d 577 (2005). Requiring reliance is not "anti-investor" (Pet. 18); it ensures that the strong medicine of rescission under the WSSA is reserved for investors actually in need of protection.

ISSUE PRESENTED

Can an investor plaintiff prevail on a civil claim under the WSSA,

RCW 21.20.010, without proving that it relied on the statements alleged to be untrue or misleading, when every court to have considered the question has concluded that RCW 21.20.010 requires proof of reliance?

STATEMENT OF THE CASE

In its complaint, FHLBS alleged that prospectus supplements Credit Suisse filed with the SEC for certain RMBS offerings contained false or misleading statements. (CP 8-109.) In pleading its WSSA claim, FHLBS explicitly alleged that its securities traders relied on those alleged misstatements when purchasing those RMBS. (CP 9, 55, 88, 108-09.)

Discovery revealed that these allegations were untrue. FHLBS did not and could not have relied on alleged misstatements in the prospectus supplements because those prospectus supplements had not been filed with the SEC, much less made their way to FHLBS, when FHLBS bought the certificates. (CP 3268-69, 3276, 3281, 3286, SCP 9852, 10364.) Although nothing stopped FHLBS from waiting to see the prospectus supplements before finalizing its purchases, it chose to buy without reviewing the documents it later claimed to have relied on.

The trial court granted Credit Suisse's motion for summary judgment, finding FHLBS could not prove reliance because it could not have relied on statements that had not yet been made. (CP 3311-12.) On appeal to the Court of Appeals, FHLBS abandoned any pretense that it

relied on the challenged statements. Instead, its only assignment of error was that the trial court “erred by holding that, in an action under RCW 21.20.010(2), a plaintiff must prove that it relied on the [challenged] statement.” (FHLBS C.A. Br. 5.) FHLBS has waived all other issues.²

The Court of Appeals affirmed, adhering to the longstanding rule that “[r]easonable reliance is an essential element of a claim under RCW 21.20.010(2) of the [WSSA].” (Op. 1.) The Court of Appeals recounted this Court’s determination that RCW 21.20.010 “‘is patterned after and restates in substantial part the language of the federal Securities Exchange Act of 1934,’” and that the Exchange Act has long been understood to require proof of reliance. (Op. 5 (quoting *Clausing v. DeHart*, 83 Wn.2d 70, 72, 515 P.2d 982 (1973)).) The Court of Appeals noted that courts in this State (including this Court) have uniformly recognized reliance as an element of a RCW 21.20.010 claim, and “[t]he legislature has never acted to amend the statute in light of this construction.” (Op. 7.) For these and other reasons (including those set forth in the Court of Appeals’ decision in *Barclays*, 1 Wn. App. 2d 551), the Court of Appeals determined that

² See RAP 10.3(g). FHLBS contended in its Petition for Review (at 8) that Credit Suisse “was required to file the prospectus supplements with the SEC before it sold the RMBS.” FHLBS made a similar argument below in resisting summary judgment. (RP 613.) In response, Credit Suisse explained that the SEC Rules permit delivery of the prospectus after sale of the security. (RP 616-17.) FHLBS neither appealed this issue to the Court of Appeals nor raised it in this Court as a ground for review.

“the legislature intended reasonable reliance to be an essential element of a claim under RCW 21.20.010.” (Op. 8.) On that basis, the Court of Appeals affirmed the trial court’s summary dismissal. (Op. 9.)

Before this Court, FHLBS once again concedes it did not rely on any of the alleged misstatements. Instead, it again argues it should be excused from an element of its claim it cannot possibly prove. FHLBS petitioned for review on the question of whether RCW 21.20.010(2) requires proof of reliance. (Pet. 3.) This Court granted review.³

ARGUMENT

A. This Court And The Court Of Appeals Have Held For Decades That Reliance Is An Element Of The WSSA.

This Court in *Hines v. Data Line Systems, Inc.* held that plaintiffs suing under the WSSA must show they “relied on the misrepresentations in connection with the sale of the securities.” 114 Wn.2d at 134. After declaring that “decline in the market value of the stock is not an element” of a WSSA claim because of the nature of the relief prescribed by the statute, *Hines* made clear what is an element: the investor must be “wrongfully induced to purchase a security” by a misrepresentation. *Id.* at 135 (emphasis added).

³ This Court also granted review in *Barclays* and consolidated that case with this one. See No. 95436-4 (May 3, 2018). Credit Suisse incorporates the arguments set forth in Barclays’ supplemental brief.

In recognizing reliance as a necessary element of a WSSA claim, *Hines* is by no means an outlier. Sixteen years after *Hines*, this Court restated that requirement, noting that a WSSA violation was established by, *inter alia*, a plaintiff's showing that it "relied on [defendant's] material misrepresentation." *Go2Net, Inc. v. FreeYellow.com, Inc.*, 158 Wn.2d 247, 250, 143 P.3d 590 (2006). And as the Court of Appeals explained below (Op. 7) and in *Barclays*, 1 Wn. App. 2d at 559, that court has recognized reliance as an element since *Shermer* in 1970, 2 Wn. App. at 858. FHLBS has not identified a single decision from any court that has interpreted the WSSA to lack a reliance element.

That consistent and longstanding interpretation not only confirms *Hines* was correct, it also illustrates the Legislature's satisfaction with Washington law as it has stood for 50 years. The Legislature has amended the WSSA eight times since *Shermer* but has never altered or removed the reliance element. The Legislature's decision to leave this Court's construction of the WSSA undisturbed, despite the Legislature's "demonstrated ... willingness and ability to correct its own omissions" in the Act, *Wade v. Skipper's, Inc.*, 915 F.2d 1324, 1332 (9th Cir. 1990), is "telling," *Barclays*, 1 Wn. App. 2d at 560.

FHLBS argues that because many states' blue sky laws do not require reliance, this Court should reverse course on fifty years of

established law. (Pet. 19-20.) Those holdings are neither binding nor persuasive, as they do not speak to the Washington Legislature’s intent. Many of those statutes contain different language, modeled after different provisions of federal law, which naturally results in different elements. At most, FHLBS has shown that some states require reliance, and some do not. (*Id.*) It is thus impossible to construe the WSSA “so ... as to effectuate its general purpose to make uniform the law of those states which enact it.” (Pet. 20 (quoting RCW 21.20.900).)

Stare decisis principles also counsel against unmooring reliance from its settled place in Washington law. Where, as here, a party seeks to disturb an “established rule,” it must make “a clear showing” that the rule “is incorrect and harmful.” *Fed. Way*, 167 Wn.2d at 346. The doctrine “protects the interests of litigants by providing clear standards for determining their rights and the merits of their claims.” *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009). As explained below, FHLBS’s attempt to upend settled precedent falters at each step: the Legislature plainly intended to include reliance in enacting the WSSA, and its inclusion serves as a limitation on windfall recoveries for misstatements that had no bearing on the plaintiff’s investment.

B. By Incorporating The Rule 10b-5 Standard For Liability, The Legislature Made Reliance An Element Of A WSSA Claim.

Even beyond this Court’s own statements on the question, the Court of Appeals had ample basis to conclude that “the legislature intended reasonable reliance to be an essential element of a claim under RCW 21.20.010.” (Op. 8 (citing *Barclays*, 1 Wn. App. 2d at 564-65).) As Washington courts have long recognized, RCW 21.20.010 derives from—and must be interpreted in light of—a federal counterpart, SEC Rule 10b-5, which requires reliance.

When a Washington statute is “taken ‘substantially verbatim’ from [a] federal statute, it carries the same construction as the federal law and the same interpretation as federal case law.” *State v. Bobic*, 140 Wn.2d 250, 264, 996 P.2d 610 (2000)). This Court has already held that RCW 21.20.010 “is patterned after and restates in substantial part the language of the federal Securities Exchange Act.” *Clausing*, 83 Wn.2d at 72. In particular, “Rule 10b-5 of the Securities and Exchange Commission is identical to RCW 21.20.010 except for references to interstate commerce, the mails and the facility of any national securities exchange.” *Kittilson*, 93 Wn.2d at 226; *see also Morris v. Int’l Yogurt Co.*, 107 Wn.2d 314, 329-30, 729 P.2d 33 (1986) (holding that where language in a Washington statute “is virtually identical to the corresponding language in Rule 10b-

5,” “it is appropriate to look to the federal courts’ construction of the securities rule for guidance in interpreting [that] provision”); RCW 21.20.900 (WSSA is to be “construed ... to coordinate the interpretation and administration of this chapter with the related federal regulation”).

The Court of Appeals correctly rejected FHLBS’s contention “that the legislature intended WSSA actions to be strict liability actions because it borrowed language from Section 12(2)” of the 1933 Securities Act. (Op. 8.) As explained in *Barclays*, the borrowed language was irrelevant to the WSSA’s liability provisions: “the legislature only borrowed Section 12(2)’s remedy to draft the WSSA’s remedy provisions in RCW 21.20.430.” 1 Wn. App. 2d at 563 (emphasis added). “In contrast, it borrowed the state act’s liability provisions from Rule 10b-5.” *Id.*

If the Legislature had wanted to incorporate the reliance-free approach taken in Section 12(2) of the 1933 Act, it could have easily done so by including that provision’s liability standard, which requires proof that the purchaser lacked knowledge of the alleged misstatement or omission and also provides a defense for sellers that exercise “reasonable care.” 15 U.S.C. § 77l(a)(2). Instead, the Legislature chose to use Rule 10b-5 as the template for the WSSA’s liability provision. Accordingly, “RCW 21.20.430 and Section 12(2) are irrelevant to whether RCW 21.20.010 requires a plaintiff to show reliance to establish liability.”

Barclays, 1 Wn. App. 2d at 564.

Under settled principles of statutory interpretation, RCW 21.20.010 must “carr[y] the same construction as the federal law and the same interpretation as federal case law” considering the relevant enactment, *Bobic*, 140 Wn.2d at 264—here, SEC Rule 10b-5. The federal interpretation is plain: “[T]he United States Supreme Court has long required reliance in Rule 10b-5 actions.” *Barclays*, 1 Wn. App. 2d at 559. In so holding, the federal courts have drawn on a “well known and well understood common law definition[]” of reliance for torts involving misrepresentation. *List v. Fashion Park, Inc.*, 340 F.2d 457, 462 (2d Cir. 1965). “The question the reliance analysis ultimately seeks to resolve is simply whether the alleged misrepresentations were a cause in fact of the plaintiff’s injury.” *Atari Corp. v. Ernst & Whinney*, 981 F.2d 1025, 1030 (9th Cir. 1992). That connection is demonstrably lacking on the facts of this case, and that deficiency is fatal to FHLBS’s claim.

C. The Reliance Element Provides Necessary Limits On Securities Law Liability Without Interfering With The WSSA’s Goal Of Investor Protection.

Unable to point to a single case that supports its interpretation of the WSSA, FHLBS retreats to policy arguments based on the WSSA’s aim of protecting investors. (Pet. 16-18.) Those arguments are deeply misguided, were properly rejected by the Court of Appeals, *see Barclays*,

1 Wn. App. 2d at 561, and do not provide a basis to upend settled law. In uniformly recognizing reliance as an essential element of a WSSA claim for nearly 50 years, Washington courts have understood themselves to be acting in accordance with the Act's status as "remedial in nature, its primary purpose being to protect investors from speculative or fraudulent schemes of promoters." *Cellular Eng'g, Ltd. v. O'Neill*, 118 Wn.2d 16, 23, 820 P.2d 941 (1991). Reliance is not "anti-investor" (Pet. 18); it instead ensures that the WSSA's protections are not overextended into a form of investor insurance. The reliance element serves important purposes, does not impede investor protection, and coheres with this Court's other constructions of the WSSA.

1. Courts have long recognized that reliance serves as a necessary limitation on liability for misstatements.

As the U.S. Supreme Court has explained, "private securities fraud actions" under Rule 10b-5 "resemble in many (but not all) respects common-law deceit and misrepresentation actions." *Dura*, 544 U.S. at 343. Reliance is an element that Rule 10b-5 is understood to have "carried over" from the common law. *List*, 340 F.2d at 463; *see also Basic Inc. v. Levinson*, 485 U.S. 224, 243, 108 S. Ct. 978, 99 L.Ed.2d 194 (1988); 3 Hazen, Law of Securities Regulation § 12.79 (2018). In preserving that requirement, courts have recognized Rule 10b-5's broad anti-fraud

purpose, but still concluded that it does not justify “reading out of the rule so basic an element of tort law as the principle of causation in fact.” *List*, 340 F.2d at 463.

The reliance element has a venerable history precisely because it cabins the “potentially limitless thrust” of liability for misrepresentations. *Wilson v. Comtech Telecomms. Corp.*, 648 F.2d 88, 92 (2d Cir. 1981). Reliance does that by ensuring “the requisite causal connection between a defendant’s misrepresentation and a plaintiff’s injury.” *Basic*, 485 U.S. at 243. To “allow[] recovery in the face of affirmative evidence of nonreliance, would effectively convert Rule 10b-5 into a scheme of investor’s insurance.” *Id.* at 252 (White, J., concurring in part and dissenting in part) (citation and internal quotation marks omitted); *accord*, e.g., *Grigsby v. CMI Corp.*, 765 F.2d 1369, 1376 (9th Cir. 1985). “The securities laws,” of course, “are not intended as investor insurance every time an investment strategy turns out to have been mistaken.” *Podany v. Robertson Stephens, Inc.*, 318 F. Supp. 2d 146, 156 (S.D.N.Y. 2004).

2. The reliance element prevents undeserving plaintiffs from avoiding the consequences of their investment decisions, without diminishing protections for those actually harmed by misstatements.

For the reasons just described, this Court and the Court of Appeals were not writing on a blank slate when they interpreted the WSSA to

require proof of reliance. Instead, those decisions recognize that unless a plaintiff can demonstrate a causal connection between the alleged misrepresentation and their injury, rescission will afford an unjustified recovery. The facts of this case provide an apt illustration. There is no dispute that the complained-of statements appeared in documents that FHLBS did not read before it made its decision to invest. To impose liability in these circumstances would eliminate any incentive for an investor to review and evaluate statements in offering materials, knowing that they can always put their investment back to the seller based on any material misstatements they can find after the fact.

If FHLBS's position were accepted, Washington law would impose a form of absolute liability that has no precedent in federal or state securities law. It is true that Section 12 of the 1933 Act has been interpreted not to require proof of reliance, but that Act provides other defenses and limitations on liability that the WSSA lacks.⁴ And no other state has a blue sky law that lacks both a reliance element and a due diligence defense. 12A Long et al., Blue Sky Law § 12:5 (2017). No securities law in the country does what FHLBS claims the WSSA should

⁴ See 15 U.S.C. § 77l(a)-(b) (plaintiffs must lack knowledge of the alleged untruth, defendants are not liable if they could not have known of the misstatement "in the exercise of reasonable care," and defendants may offset plaintiff's recovery by showing the security's decline in value was due to causes other than the misstatement).

be interpreted to do: allow an investor to undo a securities transaction because a statement it did not see or rely on turned out to contain a significant inaccuracy, no matter what else the investor knew at the time of the transaction, even if the seller acted with perfect diligence to try to avoid misstatements, and even if the securities declined in value for reasons that had nothing to do with the statement in question. There is no evidence that the Legislature intended Washington to be the first to experiment with such a regime.

Although FHLBS decries the reliance element as “anti-investor” (Pet. 18), there is no reason to think reliance will pose an obstacle to anyone other than those who “might recover undeservingly.” *Morris*, 107 Wn.2d at 329. As an initial matter, “questions of reliance are highly factual and thus courts are properly reluctant to dismiss on the pleadings.” *Hazen, supra*, § 12:81. In the Rule 10b-5 context, moreover, “[t]he United States Supreme Court has developed various presumptions in order to aid plaintiffs in their efforts to prove reliance under rule 10b-5.” *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1102 (Colo. 1995). For example, under federal law reliance is presumed for a claim based on an alleged material omission (rather than an affirmative misrepresentation), *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54, 92 S. Ct.

1456, 31 L.Ed.2d 741 (1972),⁵ and where a security “trade[s] in an efficient market,” *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2405, 189 L.Ed.2d 339 (2014). This Court thus has ample doctrinal means to apply the reliance requirement in a way that “makes sense,” accounting for “difficulties of ... proof.” *Morris*, 107 Wn.2d at 329.

This case, of course, does not require consideration of presumptions or complicated facts. It was impossible for FHLBS to have relied on the statements it now claims are misleading. This is one of the rare, but not unprecedented, cases in which a plaintiff is seeking relief for misstatements that were not available at the time it bought its securities. It is hornbook law that such claims cannot proceed under Rule 10b-5. 5 Bromberg & Lowenfels on Securities Fraud § 7:466 (2d ed. 2017) (“A plaintiff cannot buy in reliance on a statement made after the purchase.”); Hazen, *supra*, § 12.79 (“If the transaction takes place prior to the disclosures in question, reliance cannot be established.”). No sensible interpretation of the WSSA would allow FHLBS, having come to regret an investment decision that had nothing to do with those statements, to use them as a basis for windfall relief.

⁵ In *Morris*, this Court interpreted another Washington statute patterned after Rule 10b-5 as incorporating the “federal approach adopting a rebuttable presumption of reliance ... in cases of nondisclosure of a material fact.” 107 Wn.2d at 329. The Court of Appeals has since applied that presumption to WSSA claims. See *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 119, 86 P.3d 1175 (2004).

D. This Court's Other Interpretations Of The WSSA Do Not Support Abandoning Reliance.

Contrary to FHLBS's argument (Pet. 16-18), this Court's treatment of scienter, loss causation, and waiver and estoppel defenses are perfectly consistent with reliance remaining a necessary element of a WSSA claim.

Scienter and Loss Causation. In holding that neither scienter nor loss causation is required under the WSSA, this Court did not conclude that the Act must be interpreted independently from Rule 10b-5 for all purposes. Instead, the Court focused on differences in the statutory schemes specific to the elements in question. In rejecting scienter, the Court looked to specific language ("manipulative or deceptive") that appears in Section 10(b) of the federal Exchange Act but was "not included" in the WSSA. *Kittilson*, 93 Wn.2d at 226. That conclusion has no bearing on the element of reliance, which does not depend on language peculiar to Section 10(b). *See Barclays*, 1 Wn. App. 2d at 563.

Similarly, in concluding that loss causation need not be proven under the WSSA, the Court treated as critical the Act's remedy of rescission, which differs from the damages available under Rule 10b-5. *Hines*, 114 Wn.2d at 135. And *Hines*, as noted, understood the WSSA's protections as applying to "an investor who is wrongfully induced to purchase a security." *Id.* (emphasis added). If such claims can proceed

without proof of causation *or* reliance, as FHLBS contends, the statute would permit recovery of investment losses that were not actually “induced” by the alleged misstatements.

Indeed, to dispose of any showing of reliance or causation would stray from this Court’s understanding of WSSA’s rescission remedy. In *Clausing*, this Court disregarded a contractual recital of reliance and emphasized the need for purchasers to show that they actually relied on the challenged statements. 83 Wn.2d at 75-76. Noting the “extremely broad-reaching” consequences of the WSSA remedy, the Court reasoned: “Where the equitable powers of the court are sought, as in rescission, this court will be more concerned with the actual impact of any statements or omissions on the parties than with formal recitals of their effect.” *Id.* (emphasis added). That holding should foreclose FHLBS’s argument that rescission is available even when the challenged statements have no “actual impact” on the purchaser.

Waiver and Estoppel. In holding that waiver and estoppel are not defenses under the WSSA, *Go2Net*, 158 Wn.2d at 254, this Court did not question the status of reliance as an element of liability. To the contrary, the Court emphasized that the plaintiff there “established [the defendant’s] violation” in part through proof that the plaintiff “had relied on the misrepresentation or omission.” *Id.* at 251. In declining to recognize

equitable defenses, *Go2Net* was addressing the scope of the WSSA's remedial provision, RCW 21.20.430, not the liability provision. In any event, equitable defenses serve purposes entirely distinct from the reliance element. Such defenses "shift[] the focus" to the investor's "postsale conduct." *Id.* at 254. Reliance, by contrast, looks only to what the purchaser knew at the time of the sale, and is needed to ensure that plaintiffs do not receive windfall recoveries for misstatements that had nothing to do with their purchasing decisions.

CONCLUSION

Reliance has always been an essential element of a WSSA claim. The Legislature made its intent clear by patterning WSSA's liability provision after SEC Rule 10b-5 and then acquiescing in an unbroken line of decisions recognizing reliance as an element. FHLBS does not provide any reason for this Court to upset decades of settled law and impose an unprecedented form of absolute liability. This Court should affirm.

Dated: June 4, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be electronically filed with the Clerk of the Court and served on counsel of record via the Court's ECF system.

Executed at Seattle, Washington this 4th day of June 2018.



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