ORIGINAL

No. 89303-9

IN THE SUPREME COURT OF WASHINGTON

(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

Plaintiffs/Appellants,

v.

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

Defendants/Respondents.

PETITION FOR REVIEW OF OPPENHEIMER ACQUISITION CORP.

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I. INTRODUCTION

In finding that "[t]here is no policy basis for insulating [OAC] from liability in the same jurisdiction where its alleged agent transacted business and committed torts,"[1] the Court of Appeals committed several fundamental errors that warrant this Court's review pursuant to RAP 13.4(b)(3) and (4) by reversing the trial court and exercising personal jurisdiction over OAC, a non-resident parent holding company that has no direct contacts with Washington.

First, the Court of Appeals' decision tramples on the settled recognition by the Washington courts as to the concept of corporate separateness between a parent and a subsidiary, particularly with respect to a personal jurisdiction analysis. *See State v. Nw. Magnesite Co.*, 28 Wn.2d 1, 41, 182 P.2d 643 (1947) (corporate separateness "is a legal fact, and not a fiction to be disregarded when convenient" for purposes of service of process).

Second, to hold, as the Court of Appeals did, that conclusory allegations of a parent "controlling and actively managing" aspects of a

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1 *FutureSelect Portfolio Mgmt. v. Tremont Group Holdings, Inc.*, No. 68130-3-I, 2013 WL 4056275, at *20 (Wn. App. Div. 1 Aug. 12, 2013).

subsidiary's business suffice to subject a non-resident parent holding company to personal jurisdiction would unconstitutionally subject every parent company to jurisdiction in Washington each time a plaintiff tacks on similar allegations regardless of their factual support or ultimate proof.

Third, the Court of Appeals' decision, if left to stand, would create a very strong disincentive for any subsidiary of a parent company to conduct business activity in Washington. This case therefore demonstrates the need for this Court to provide guidance on the proper application of the agency jurisdiction test in the parent/subsidiary context, especially given that FutureSelect's attempt to connect OAC to Washington is unsubstantiated and contrary to the unrebutted record before both the trial and appellate courts.

Pursuant to RAP 13.4(b)(3) and (4), the Court of Appeals' decision should be reviewed because it violates constitutional due process and establishes a precedent that is contrary to the public interest.

II. IDENTITY OF THE PETITIONER

Defendant/Respondent Oppenheimer Acquisition Corp. ("OAC") is the Petitioner.

III. DECISION BELOW

On August 12, 2013, the Court of Appeals, Division I (hereafter "Court of Appeals") reversed the trial court's decision granting OAC's motion to dismiss for lack of personal jurisdiction, and reversed in part the trial court's decision granting OAC's motion to dismiss for failure to state a claim. *FutureSelect Portfolio Mgmt. v. Tremont Group Holdings, Inc.*, No. 68130-3-I, 2013 WL 4056275 (Wn. App. Div. 1 Aug. 12, 2013) (copy attached as Appx. A).

IV. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals err in finding constitutionally sufficient minimum contacts exist over a foreign parent holding company on an agency theory where (i) the foreign parent's only alleged contacts with Washington or with the plaintiff are those of its subsidiary, and (ii) the court's analysis conflated the standard for pleading an agency claim with constitutional due process?[2]

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[2] OAC also hereby joins in the petition for review filed by the Tremont and MassMutual Defendants.

V. STATEMENT OF THE CASE

A. RELEVANT FACTS

OAC is a non-resident holding company that wholly owns Defendant Tremont Group Holdings, Inc. ("Tremont Group"), which in turn is the parent holding company of Defendant Tremont Partners, Inc. ("Tremont Partners," together with Tremont Group, "Tremont"). Tremont Partners is the investment advisor that Appellants (collectively, "FutureSelect") utilized to invest in Tremont-sponsored hedge funds. Those hedge funds were, in turn, invested with the now-infamous Bernard L. Madoff Investment Securities, LLC ("Madoff").

OAC has no connection with FutureSelect, its investments with Tremont, or with Madoff, and FutureSelect does not allege otherwise. Instead, FutureSelect is seeking to hold OAC secondarily liable for Tremont's alleged wrongs on the basis of agency, apparent agency, and control person liability under the Washington State Securities Act.

However, OAC has no direct contacts with Washington. This is established in the Declaration of OAC's Vice President, Secretary and General Counsel, Robert Zack (the "Zack Declaration"), that OAC submitted to the trial court with its motion to dismiss (CP 889-92) and FutureSelect never even attempted to rebut. Instead, FutureSelect seeks to

rely on *Tremont's* contacts with Washington as a basis for finding jurisdiction over OAC.

OAC is a holding company and therefore is not involved in the day-to-day management of Tremont Partners. CP 891 ¶ 19. At all relevant times, those duties were performed by Tremont Partners. *Id.* OAC also was not responsible for reviewing, nor did it review, Tremont Partners' selection or oversight of fund managers or portfolio investment decisions, including the selections and decisions with respect to the Rye Funds. *Id.* ¶ 20. Nor was OAC involved in the preparation of offering, marketing or any other fund materials, including the materials described in the Complaint. *Id.* Furthermore, OAC does not market or solicit potential investors on behalf of itself or any other entity, including Tremont. CP 890 ¶ 10. Hence, OAC never participated in any marketing of Tremont products to Washington residents or otherwise. CP 892 ¶ 22.

OAC never interacted with FutureSelect. *Id.* ¶ 23. Indeed, FutureSelect does not allege that it relied upon, in any way was affected by, or even was aware of, OAC's acquisition of Tremont in 2001.

B. PROCEDURAL HISTORY

On August 26, 2010, FutureSelect filed its Complaint in the Superior Court (King County) against OAC and various other defendants.

OAC moved to dismiss the Complaint under CR 12(b)(2) and 12(b)(6). Following oral argument on all defendants' motions heard over the course of three hearing days, on June 3, 2011 the trial court issued an order dismissing all counts against OAC.

FutureSelect appealed to the Court of Appeals. On August 12, 2013, the Court of Appeals issued its decision in which, *inter alia*, it reversed the trial court's dismissal of the complaint for lack of personal jurisdiction pursuant to CR 12(b)(2).[3]

VI. ARGUMENT

A. THE COURT OF APPEALS' HOLDING THAT OAC IS SUBJECT TO PERSONAL JURISDICTION IN WASHINGTON VIOLATES CONSTITUTIONAL DUE PROCESS AND THEREFORE SHOULD BE REVIEWED

FutureSelect concedes, and the Court of Appeals properly held, that (i) OAC lacks the requisite contacts with Washington to satisfy personal jurisdiction, and therefore (ii) suit against OAC only may proceed in Washington if Tremont's in-forum contacts are imputed to OAC under an agency theory. *FutureSelect*, 2013 WL 4056275, at *18 (recognizing that "[t]he long-arm jurisdiction question presented is

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[3] OAC is not seeking review with respect to the Court of Appeals' reversal in part of the trial court's grant of OAC's CR 12(b)(6) motion.

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").[4] As the Court of Appeals further properly recognized, it is settled law that a Washington court cannot exercise personal jurisdiction over a non-resident defendant unless both the long long-arm statute and the strict test for constitutional due process are satisfied. *FutureSelect*, 2013 WL 4056275, at *18 ("Washington long-arm statute 'extends jurisdiction to the limit of federal due process.'"); *see* RCW 4.28.185; *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 771, 783 P.2d 78 (1989), *rev'd on other grounds,* 499 U.S. 585 (1991).

However, the Court of Appeals' holding that OAC is subject to jurisdiction in Washington is constitutionally flawed because: (i) constitutional due process standards are far more rigorous than Washington's pleading standards, and finding the former met based merely on satisfaction of the latter swallows years of long-established U.S. and Washington Supreme Court due process jurisprudence; and (ii)

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[4] The Court of Appeals did misstate OAC's argument, erroneously describing it as suggesting "that due process requires that the subsidiary be the alter ego of the parent, allowing the corporate veil to be pierced." *Id.* at *18. Even if this misstatement were corrected, however, review of the decision is still warranted for all of the reasons set forth herein.

conclusory allegations of a substantive agency claim, like conclusory allegations of a parent-subsidiary relationship, are insufficient to find minimum contacts with Washington absent any allegation that OAC managed, controlled, or directed Tremont's conduct in Washington -- which FutureSelect does not (and cannot) allege.

1. Constitutional Due Process Requires More Than A Mere Finding That A Plaintiff Has Adequately Pled An Agency Claim Over A Non-Resident That Has No Direct Contacts With Washington

The Court of Appeals found that Tremont's contacts with Washington could be imputed to OAC solely because FutureSelect had adequately pled that Tremont was OAC's agent. *FutureSelect*, 2012 WL 4056275, at *17. Although the Court of Appeals found "no policy reason" for distinguishing between the standards for pleading a claim and for satisfying constitutional due process, Washington courts have recognized what the United States Supreme Court established almost 70 years ago: that extending personal jurisdiction to a corporation based on an agent's contacts with a forum implicates not just corporate law but constitutional due process.[5]

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[5] *See International Shoe Co. v. Washington, Office of Unemployment Comp. & Placement*, 326 U.S. 310, 317 (1945) ("[T]he casual presence of the corporate agent . . . in a state in the corporation's

Under the Washington long-arm statute, a court "may assert jurisdiction over nonresident individuals and foreign corporations to the extent permitted by the due process clause of the United States Constitution." *Shute*, 113 Wn.2d at 767-68. To observe constitutional limitations, Washington has developed a three-part test[6] to determine whether a defendant has sufficient "minimum contacts" with Washington for a Washington court to exercise jurisdiction. *See, e.g.*, *Tyee Constr. Co. v. Dulien Steel Products, Inc.*, 62 Wn.2d 106, 115-16, 381 P.2d 245 (1963). In contrast, for purposes of pleading a substantive claim, this Court has explained that "a plaintiff states a claim upon which relief can

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behalf [is] not enough to subject it to suit on causes of action unconnected with the activities there. To require the corporation in such circumstances to defend the suit away from its home . . . has been thought to lay too great and unreasonable a burden on the corporation to comport with due process."); *Williams v. Canadian Fishing Co.*, 8 Wn. App. 765, 768, 509 P.2d 64 (1973) (declining to attribute parent corporation's Washington contacts to foreign subsidiary as doing so would be inconsistent with "traditional notions of fair play and substantial justice").

[6] A Washington court may exercise specific jurisdiction only where a plaintiff has demonstrated each of the following: "(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in [Washington]; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by [Washington] must not offend traditional notions of fair play and substantial justice." *FutureSelect*, 2013 WL 4056275, at *18.

be granted if it is *possible* that facts could be established to support the allegations in the complaint." *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101, 233 P.3d 861 (2010) (emphasis added).

In holding that FutureSelect had adequately stated an agency claim against OAC, and consequently had established jurisdiction over OAC, the Court of Appeals erroneously conflated pleading standards with the necessary constitutional analysis required to find personal jurisdiction. Indeed, the Court of Appeals reduced the constitutional due process standard to Washington's far more lenient pleading standard. This is reviewable error.

Courts across the country have squarely rejected the approach adopted by the Court of Appeals, finding instead that subsuming the rigorous jurisdictional inquiry into a pleading test runs afoul of constitutional due process. In a nearly identical case, involving another attempt by another Rye Fund investor to establish jurisdiction over OAC based on Tremont's in-forum conduct, a Massachusetts court squarely rejected the proposition that adequately pleading a substantive claim satisfies the constitutional jurisdictional inquiry. *Askenazy v. Tremont Group Holdings, Inc.*, No. Civ. 201004801BLS2, 2012 WL 440675 (Mass. Super. Jan, 26, 2012), *aff'd*, 988 N.E.2d 463 (Mass. App. Ct.

2013). The *Askenazy* plaintiffs, also investors in Tremont-managed funds, sought to assert jurisdiction over OAC in Massachusetts based on allegations that OAC was a "control person" of Tremont under state securities laws. *Id.* at *9. The court rejected that argument and dismissed all claims against OAC for lack of jurisdiction,[7] finding that "substantive liability . . . 'is not to be conflated with amenability to suit in a particular forum.'" *Id.*; *accord Pet Quarters, Inc. v. Badian*, No. 04-697, 2007 WL 1020538, at *3 (E.D. Ark. Mar. 20, 2007) ("[T]his Court rejects the contention that control person liability can confer jurisdiction over a defendant. Control person liability and personal jurisdiction are separate issues.").

As the *Askenazy* court cogently explained, this critical distinction exists because "personal jurisdiction has constitutional dimensions, protecting nonresident defendants from being haled into distant courts," such that substantive liability "is simply 'not germane to the issue of personal jurisdiction.'" *Askenazy*, 2012 WL 440675, at *9; *see AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 590-91 (9th Cir.) (stating that

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[7] Similar to Washington's long arm statute, Massachusetts law also provides for jurisdiction over a principal for the in-forum acts of an agent. Mass. Gen. Laws ch. 223A § 3 ("A court may exercise personal jurisdiction over a person, who acts directly or by an agent . . . .").

plaintiff "may not use liability as a substitute for personal jurisdiction" over parent company), *op. supp.*, 95 F.3d 1156 (9th Cir. 1996). This constitutional prohibition against premising jurisdiction on an adequately pled substantive claim is even more crucial here because this Court has rejected the heightened Rule 12(b)(6) pleading standard established by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), in favor of the more relaxed "possible" standard. *McCurry*, 169 Wn.2d at 101.

If the Court of Appeals' decision is left in place, the result will be that a Washington court may find jurisdiction over a non-resident parent company merely on the basis of "possible" misconduct by a subsidiary that is "possibly" an agent of the parent without ever conducting the requisite constitutional due process inquiry. This Court therefore should review the Court of Appeals' constitutional error.

2. The Court Of Appeals Erroneously Determined That OAC Had Sufficient Minimum Contacts With Washington

The Court of Appeals premised its ruling that OAC is subject to jurisdiction in Washington on its finding that OAC -- as a parent company -- "managed" and "controlled" certain aspects of its subsidiary's conduct. *FutureSelect*, 2013 WL 4056275, at *20. Yet, none of Tremont's conduct

that OAC purportedly managed or controlled occurred in Washington; FutureSelect does not allege otherwise, and the Court of Appeals did not find otherwise. Hence, by finding that allegations of OAC's general oversight of its subsidiary outside of Washington -- as is typical of a parent-subsidiary relationship -- give rise to jurisdiction over OAC in Washington, the Court of Appeals again committed an error of constitutional proportions.

The Court of Appeals acknowledged that it only could find that OAC had sufficient minimum contacts with Washington based on Tremont's Washington conduct if OAC "actively managed and controlled key aspects of [Tremont's] activities in Washington, which activities gave rise to the claims of the investors." *FutureSelect*, 2013 WL 4056275, at *1 (emphasis added). Indeed, Washington courts have made clear that the minimum contacts inquiry requires that a parent company have directed or managed: (i) its subsidiary's Washington conduct, and (ii) that the in-forum conduct directed and managed by the parent company give rise to the plaintiff's claims. For example, in a case cited by the Court of Appeals in support of its analysis (*FutureSelect*, 2013 WL 4056275, at *19 n.144), *CTVC of Hawaii Co. v. Shinawatra*, 82 Wn. App. 699, 919 P.2d 1243 (1996), the Court of Appeals considered whether to exercise

personal jurisdiction over two foreign corporations based on the corporations' agent's contacts. Crucially, the court there held that the agent's two potential contacts with Washington were properly attributed to the principal companies *only* "to the extent [the alleged agent] was acting as the agent" for the companies when performing "these two activities." *Id.* at 717; *accord Osborne v. City of Spokane*, 48 Wn. App. 296, 301-02, 738 P.2d 1072 (1987) (a wholly-owned subsidiary of a domestic corporation was not "doing business" in Washington for purposes of jurisdiction where its activities for its parent were performed outside Washington and began a year after the conduct giving rise to the claim).

Here, the Court of Appeals did not -- and could not -- find that OAC's purported "direction" or "management" of Tremont's activities included any conduct in Washington. The Court of Appeals relied only on allegations that OAC "actively managed the . . . selection of investment vehicles and due diligence programs." *FutureSelect*, 2013 WL 4056275, at *20. However, the selection of investment vehicles and due diligence programs is not alleged by FutureSelect to have occurred -- and as established in the uncontradicted Zack Declaration, did not occur -- in Washington. CP 18-19, 890-91.

Similarly, that OAC "actively managed the marketing and solicitation of investment activity at Tremont" and "controlled the manner in which Tremont solicited its Rye Fund investments," as alleged by FutureSelect and cited by the Court of Appeals (*FutureSelect*, 2013 WL 4056275, at *20), cannot support the exercise of jurisdiction over OAC in Washington because, according to the Complaint itself, any Washington-based solicitation and marketing to FutureSelect by Tremont transpired more than three years before OAC even acquired Tremont. *See* CP 9-10 ¶¶ 34-37. Thus, OAC is not alleged to have, and could not even theoretically have, controlled any of Tremont's Washington-based solicitation of FutureSelect.[8]

Consequently, Washington may not extend jurisdiction over OAC consistent with constitutional due process because OAC never directed or controlled any Washington-based conduct by Tremont, let alone any Washington-based conduct that gives rise to FutureSelect's claims. The

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[8] Nor do any of FutureSelect's allegations of OAC's purported control and oversight of Tremont involve activities actually giving rise to any of FutureSelect's claims. *See, e.g.*, CP 19 ¶ 72 (alleging that Tremont put "An OppenheimerFunds Company" on Tremont's stationary" and that Tremont began offering funds with non-party OFI's name); CP 20 ¶ 75 (alleging that "Oppenheimer changed Tremont's auditor").

Court therefore should review, and reverse, the Court of Appeals' erroneous ruling to the contrary.

B. THIS COURT SHOULD ESTABLISH THE STANDARD BY WHICH A SUBSIDIARY'S CONDUCT MAY BE IMPUTED TO A PARENT CORPORATION

It is clear, as discussed above, that Washington courts refuse to impute a subsidiary's in-forum contacts to its foreign parent merely based on corporate affiliation or stock ownership. *See Future Select*, 2013 WL 4056275, at *19. However, Washington courts remain without guidance on the applicable test to apply to determine whether a subsidiary's Washington contacts may be properly imputed to a non-resident parent corporation consistent with due process. This Court should therefore take this opportunity to address this critical question, and in so doing adopt the well-reasoned "sufficient importance" test developed and applied by the federal Court of Appeals for the Ninth Circuit.

1. The Ninth Circuit's "Sufficient Importance" Standard Ensures That Imputation Of A Subsidiary's Contacts To A Non-Resident Parent Comports With Constitutional Due Process

Pursuant to the "sufficient importance" standard adopted by the Ninth Circuit to determine whether agency is a constitutionally permissible basis to impute contacts from a subsidiary to its parent, a court

must evaluate whether the subsidiary's in-forum activities are "sufficiently important to the [parent] that if [the subsidiary] went out of business, [the parent] would continue [the business activity] itself." *FutureSelect*, 2013 WL 4056275 at *19 (citing, *inter alia, Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 920-22 (9th Cir. 2011) and *Doe v. Unocal Corp.*, 248 F.3d 915, 923-30 (9th Cir. 2001)).

This "sufficient importance" test was established to address the very flaw inherent in the Court of Appeals' decision -- i.e., it ensures that exercising personal jurisdiction over a non-resident parent based on an "agency" relationship with its subsidiary comports with constitutional due process. *See, e.g., Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 921 (9th Cir. 2011) (observing that "the purpose of examining sufficient importance is to determine whether the actions of the subsidiary can be understood as a manifestation of the parent's presence"), *cert. granted,* __ U.S. __, 133 S. Ct. 1995 (2013); *Doe v. Unocal Corp.*, 248 F.3d 915, 929 (9th Cir. 2001) (recognizing that agency jurisdiction centers on "whether, in the truest sense, the subsidiaries' presence substitutes for the presence of the parent"). The significance of addressing this constitutional question is magnified where, as here, the parent is a holding company and thus by definition has no business other than owning the stock of its subsidiaries

as its investments. *Doe*, 248 F.3d at 929 (agency jurisdiction over non-resident parent holding company examined with higher scrutiny because the subsidiary "conduct[s] business not as [the parent's] agent but as its investment. The business of the parent is the business of the investment, and that business is carried out entirely at the parent level").

2. Application Of The "Sufficient Importance" Standard Would Eliminate The Violation Of Due Process Inherent In The Court Of Appeals' Decision

While the Court of Appeals noted the Ninth Circuit's agency standard, it failed to apply the standard; instead, as noted above, the Court of Appeals erroneously subsumed the constitutional jurisdiction inquiry into a pleading probe.[9] Thus, rather than evaluating the "sufficient importance" of Tremont's in-forum conduct to OAC, the Court of Appeals found agency jurisdiction over OAC based on the bare allegations that OAC allegedly "actively controlled and managed" certain "key activities" -- which are not alleged to have taken place in Washington -- of its

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[9] The Court of Appeals also was somewhat confused in its review of the Ninth Circuit's agency test, as it intermittently invoked the related, but inapplicable, alter ego test. *FutureSelect*, 2013 WL 4056275, at *19 n.152 (citing *Langlois v. Déjà vu, Inc.*, 984 F. Supp. 1327, 1338 (W.D. Wash. 1997) as a case providing "refreshing" clarity on the issue of jurisdiction although that case applies the alter ego test for jurisdiction).

purported agent, Tremont. *FutureSelect*, 2013 WL 4056275, at *20. However, courts applying the Ninth Circuit test have consistently emphasized that "*the principal focus* of [the] agency test for purposes of personal jurisdiction is the importance of the services provided to the parent corporation." *Bauman*, 644 F.3d at 922 (emphasis added); *Trust v. Schiro*, No. 04-370, 2005 WL 1926025, at *6 (E.D. Wash. Aug. 10, 2005) (finding personal jurisdiction lacking where there was no evidence that the parent would step in and perform the subsidiary's functions if the subsidiary were not present); *Barantsevich v. VTB Bank*, No. 12-08993, 2013 WL 3188178, at *7 (C.D. Cal. May 29, 2013) (dismissing claim for lack of personal jurisdiction over a foreign parent corporation where (i) subsidiary's activities were not an "indispensable part" of parent's business; and (ii) plaintiff failed to show that parent exercised "the requisite degree of control" over its subsidiary).

Had the Court of Appeals properly applied the "sufficient importance" standard, it could not have found jurisdiction over OAC. As a holding company, OAC never has stepped, or will step, into the shoes of Tremont to perform Tremont's activities in Washington; FutureSelect does not and cannot allege or demonstrate otherwise. As such, agency jurisdiction over OAC cannot exist. *Schiro*, 2005 WL 1926025, at *6

(declining to exercise personal jurisdiction over a foreign holding company and reasoning that "where a holding company is nothing more than an investment mechanism, i.e., a device for diversifying risk through corporate acquisitions, the subsidiaries conduct business not as its agents but as its investments").

VII. CONCLUSION

For the foregoing reasons, OAC respectfully requests that pursuant to RAP 13.4(b), this Court review the Court of Appeals' decision as it concerns the unconstitutional exercise of personal jurisdiction over non-resident parent holding company OAC.

RESPECTFULLY SUBMITTED this 11th day of September, 2013.

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APPENDIX

Exhibit A

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

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Only the Westlaw citation is currently available.

Court of Appeals of Washington,
Division 1.
FUTURESELECT PORTFOLIO MANAGEMENT, INC., FutureSelect Prime Advisor II LLC, The Merriwell 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 ⇐17

13 Action
13II 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 ⇐17

13 Action
13II 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.

[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 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 gov-

erned 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).

[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 whey 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.

[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 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 derivate and could be pursued only by the partnership, and not by individual investors.

[22] Principal and Agent 308 ⚿1

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 ⚿24

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 ⚿1

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 ⚿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 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 ⚿99

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

[30] Accountants 11A ⚿9

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 ⚿35

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 ⚿554

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 ⚿554

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 ⚿683

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 ⚿13.3(7)

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(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 Nonresid-

ents, 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 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 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
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 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.

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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." [FN1] 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 hypothetical 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.

¶ 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 completely 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]

¶ 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 signific-

ant 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 defendants 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 domicil, ... 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 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 plaintiffs 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 rela-

tionship 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 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]

[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 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 securities 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 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 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 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. 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 over-

sight 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 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.[FN115]

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.[FN116]

¶ 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 al-

leged 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. FN117 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." FN118 Whether apparent authority exists is ordinarily a question of fact. FN119

[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." FN120 FutureSelect alleges these statements "conveyed to FutureSelect that Tremont had the authority to offer 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 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 nonresident 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 com-

mitting 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 situation." [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-subsidiary 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 do-

ing 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]

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-subsidiary 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-subsidiary 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 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 Wash-

ington, 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 FutureSelects 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" represents 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). Oppenheimer 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 depecage, 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 (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.,* 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.

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 Obiects, 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 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.

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).

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 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. Dulien 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 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 Telectronics 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. Bonnev–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.

FN161. *Precision Lab. Plastics,* 96 Wash.App. at 726, 981 P.2d 454 (quoting *Tyee 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").

Wash.App. Div. 1,2013.
FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.
--- P.3d ----, 2013 WL 4056275 (Wash.App. Div. 1)

END OF DOCUMENT

CERTIFICATE OF SERVICE

NANCY LYGREN certifies and states: On September 11, 2013, I caused to be served a true and correct copy of the following document on the following counsel of record at their address as stated by the method of service indicated.

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I declare under penalty of perjury under the laws of the United States of America and of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on September 11, 2013.

Nancy Lygren

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