

NO. 74611-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
DIVISION ONE  
MAY 11 2016

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

---

DECLARATION OF GEORGE E. GREER IN SUPPORT OF  
RESPONDENT'S BRIEF

---

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I, George E. Greer, hereby declare as follows:

1. I am an attorney licensed to practice law in the State of Washington, and I am an attorney in the law firm of Orrick, Herrington & Sutcliffe LLP, counsel of record for defendant-respondent KPMG LLP in this case. I have personal knowledge of the matters stated herein, and, if called upon to testify, could and would testify competently thereto. I make this declaration in support of KPMG LLP's motion to dismiss the appeal.

2. Attached as Exhibit A to this Declaration is a true and correct copy of KPMG's August 16, 2011, motion to dismiss the appeal of the King County Superior Court's June 3, 2011, Order Granting KPMG's Motion to Compel Arbitration and Stay the Action Against It, noticed by Plaintiffs FutureSelect Portfolio Management, Inc., FutureSelect Prime Advisor II LLC, The Merriwell Fund, L.P., and Telesis IIW, LLC (collectively "FutureSelect") on June 16, 2011.

3. Attached as Exhibit B to this Declaration is a true and correct copy of this Court's order dismissing the appeal, dated November 21, 2011.

4. Attached as Exhibit C to this Declaration is a true and correct copy of the [Proposed] Order Granting KPMG's Motion to Compel Arbitration and Stay the Action Against It, or, in the Alternative, to Dismiss submitted to the Superior Court by KPMG on December 8, 2010.

5. Attached as Exhibit D to this Declaration is a true and correct copy of the [Proposed] Order Denying KPMG's Motion to Compel Arbitration and Stay the Action Against It, or, in the Alternative, to Dismiss submitted to the Superior Court by FutureSelect on February 22, 2011.

6. Attached as Exhibit E to this Declaration is a true and correct copy of this Court's certificate finality, certifying that its order dismissing the appeal became final on December 30, 2011.

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

Executed this 11th day of May, 2016, at Seattle, Washington



George E. Greer

# EXHIBIT A

NO. 67302-5-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

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

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KPMG LLP'S MOTION TO DISMISS APPEAL

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## **I. INTRODUCTION**

Respondent KPMG LLP (“KPMG”) moves pursuant to RAP 17.1 to dismiss on the grounds that Appellants seek to appeal from a Superior Court order that is not subject to appeal. Any attempt by Appellants to change tack and seek discretionary review would fail because they cannot satisfy the criteria for discretionary review.

## **II. STATEMENT OF CASE**

On June 3, 2011, the King County Superior Court granted Defendant KPMG’s Motion to Compel Arbitration and Stay the Action Against It (“Order Compelling Arbitration” or “Order”). Declaration of George E. Greer (“Greer Decl.”), Ex. A (Order). On June 16, 2011, Plaintiffs FutureSelect Portfolio Management, Inc., FutureSelect Prime Advisor II LLC, The Merriwell Fund, L.P., and Telesis IIW, LLC (“Appellants”) filed in King County Superior Court a Notice of Appeal of the Order in which they sought an appeal as of right. Greer Decl., Ex. B (Notice of Appeal). KPMG brings this Motion to Dismiss Appeal on the grounds that the Order is not subject to a right of appeal and the criteria for discretionary review cannot be met.

### III. ARGUMENT

#### A. APPELLANTS DO NOT HAVE THE RIGHT TO APPEAL AN ORDER COMPELLING ARBITRATION AND STAYING THE ACTION

Appellants seek an appeal as of right from the King County Superior Court's Order Compelling Arbitration. *Id.*; *see also* RAP 5.1(a) (a notice of appeal is a request for an appeal as of right). Under Washington law, however, there is no appeal of right from an order compelling arbitration.

The Revised Uniform Arbitration Act ("RAA" or "Act"), RCW 7.04A, does not allow for an appeal from an order compelling arbitration.

The Act provides that:

[a]n appeal may be taken from:

- (a) An order denying a motion to compel arbitration;
- (b) An order granting a motion to stay arbitration;
- (c) An order confirming or denying confirmation of an award;
- (d) An order modifying or correcting an award;
- (e) An order vacating an award without directing a rehearing; or
- (f) A final judgment entered under this chapter.

RCW 7.04A.280(1).

The RAA's exclusive list of appealable arbitration orders does not include orders granting motions to compel arbitration or staying actions pending arbitration. Thus, under the RAA, an order compelling arbitration is not subject to immediate appeal. The RAA reflects longstanding

Washington case law holding that orders compelling arbitration are not immediately appealable because they are not final orders. *See Teufel Const. Co. v. Am. Arbitration Ass'n*, 3 Wn. App. 24, 25, 472 P.2d 572 (1970) (“It has been definitively settled by the Supreme Court of this state that an order compelling arbitration is not final and therefore not appealable.”) (citing *All-Rite Contracting Co. v. Omev*, 27 Wn.2d 898, 181 P.2d 636 (1947)); *see also Am. States Ins. Co. v. Chun*, 127 Wn.2d 249, 254, 897 P.2d 362 (1995) (“An order to proceed with arbitration is not appealable.”); *Wooh v. Home Ins. Co.*, 84 Wn. App. 781, 783, 930 P.3d 337 (1997) (“[A]n order compelling arbitration is not a final order, appealable of right[.]”)

Neither does the Federal Arbitration Act (“FAA”), 9 U.S.C. § 16, provide a right to appeal. The United States Supreme Court has held that the FAA grants immediate appeal of orders compelling arbitration only where the order dismisses the court action, rather than staying it. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86-87 & n.2, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000). The Superior Court’s Order Compelling Arbitration stayed the Superior Court action pending resolution of arbitration (Greer Decl. Ex. A at 2 (Order)), so the Order is not appealable under *Green Tree*. *See Ventress v. Japan Airlines*, 486 F.3d 1111, 1119 (9th Cir. 2007) (“Th[e] order is not appealable because the district court

has stayed the case pending arbitration.”); *Dees v. Billy*, 394 F.3d 1290, 1294 (9th Cir. 2005) (“[A] district court order staying judicial proceedings and compelling arbitration is not appealable[.]”); *Bushley v. Credit Suisse First Boston*, 360 F.3d 1149, 1153 (9th Cir. 2004) (order compelling arbitration not appealable where action was “effectively stayed pending the conclusion of . . . arbitration”).

Therefore, the Superior Court’s Order Compelling Arbitration is not subject to appeal as of right, and Appellants’ appeal should be dismissed.

**B. THE COURT OF APPEALS SHOULD NOT GRANT DISCRETIONARY REVIEW OF THE ORDER**

Appellants have not requested discretionary review of the Order. In the event, however, that Appellants claim that the Order should be reviewed on a discretionary basis, the Court of Appeals should deny such request. Where, as here, the superior court has not certified an order for interlocutory review or the parties do not stipulate to review, the party moving for discretionary appeal “bears a heavy burden.” *In re Grove*, 127 Wn.2d 221, 235, 897 P.2d 1252 (1995) (noting that fewer than ten percent of motions for discretionary review filed in the court of appeals were granted in the preceding five years). Unless the superior court has certified the order or the parties have stipulated to review, the Court of

Appeals may grant discretionary review only under the following circumstances:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court . . . .

RAP 2.3(b). “[D]iscretionary review is not favored because it lends itself to piecemeal, multiple appeals.” *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002) (internal quotation marks omitted). Consequently, discretionary review is an extraordinary procedure that should only be granted in exceptional cases. *See id.* The Superior Court’s Order meets none of the statutory criteria for granting discretionary review, and therefore the appeal should be dismissed.

1. **The Order Does Not Meet the Requirements for Discretionary Review Under RAP 2.3(b)(1).**

RAP 2.3(b)(1) provides that discretionary review may be granted if the superior court committed obvious error which would render further proceedings useless. Appellants fail to meet either part of this exacting two-part standard for granting discretionary review.

The Order Compelling Arbitration contained no obvious error. In fact, the Superior Court's decision to compel arbitration was well-founded in fact and law.

The facts pertinent to the Order were undisputed. Appellants' claims against KPMG arise out of its audit of the financial statements of certain hedge funds known as the "Rye Funds," each of which is a Delaware entity that operated out of New York. Greer Decl. ¶ 2. Prior to conducting the audit, KPMG entered into an arbitration agreement with the Rye Funds providing that "[a]ny dispute or claim arising out of or relating to the engagement letter between the parties, the services provided thereunder, or any other services provided by or on behalf of KPMG" must be resolved through arbitration and mediation. *Id.* ¶ 3.

The central legal question was whether Appellants were bound by the arbitration agreement even though they had not signed it. KPMG successfully argued that Appellants' claims were derivative of the Rye Funds' interests under Delaware law, and therefore Appellants were bound by the arbitration clause in the same way that the Rye Funds would be. This argument, accepted by the Superior Court, was not novel, but was supported by a substantial body of case law.

Appellants claimed to suffer harm from a diminution of value in their partnership interests in the Rye Funds. Under Delaware case law,

which governed, such claims were derivative. See *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004) (whether claims are direct or derivative turns on “[w]ho suffered the alleged harm” and “who would receive the benefit of the recovery”); *TIFD III-X LLC v. Fruehauf Prod. Co.*, 883 A.2d 854, 859-60 (Del. Ch. 2004) (partner’s claims were derivative because the alleged harms only affected the partner “as a consequence of its ownership interest in the [p]artnership”); *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int’l Fund, L.P.*, 829 A.2d 143, 151 (Del. Ch. 2003) (claim based, like Appellants’, on diminution in value of partnership interests is “classically derivative in nature”); *Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12, 15 (Del. Ch. 1992) (plaintiffs’ claim, like the one here, was based on diminution in value of limited partnership interests and therefore was derivative); *Ernst & Young Ltd. v. Quinn*, 2009 U.S. Dist. LEXIS 99385, at \*24-25 (D. Conn. Oct. 26, 2009) (unpublished) (investors’ claims were derivative because they, like Appellants’ claims, stemmed from the fund suffering a direct injury); *Finley v. Takisaki*, 2006 U.S. Dist. LEXIS 27020, at \*9 (W.D. Wash. Apr. 28, 2006) (unpublished) (plaintiffs’ claims were derivative because their personal economic loss derived from their membership in the LLC in the same way that Appellants’ claims derive from their limited partnership interests in the Rye Funds).

Under well-settled case law, derivative plaintiffs are subject to the same defenses as the corporation or partnership would be, *see La Hue v. Keystone Inv. Co.*, 6 Wn. App. 765, 779, 496 P.2d 343 (1972), and therefore in similar cases courts have held that such plaintiffs are bound by arbitration agreements entered into between the partnership and the defendant. *See In re VeriSign, Inc., Deriv. Litig.*, 531 F. Supp. 2d 1173, 1224 (N.D. Cal. 2007) (derivative plaintiffs were bound by the arbitration clause in the audit engagement agreement between KPMG and the corporation); *Ernst & Young Ltd.*, 2009 U.S. Dist. LEXIS 99385, at \*34-35 (non-signatories were bound by arbitration agreement with audit firm because their claims were derivative).

Furthermore, Appellants asserted that they were third-party beneficiaries of the Engagement Agreement containing the arbitration clause. Third-party beneficiaries are subject to the same defenses that could be asserted against the promisee. *See, e.g., Oman v. Yates*, 70 Wn.2d 181, 187, 422 P.2d 489 (1967). Therefore, Washington courts have found third-party beneficiaries to be bound by arbitration provisions. *See Roberts v. Safeco Ins. Co.*, 87 Wn. App. 604, 607-08, 941 P.2d 668 (1997).

Not only is there no obvious error, but the Order does not render further proceedings useless. The Superior Court required Appellants to

pursue their claims, in the first instance, through arbitration. They will have every opportunity to seek full redress for the alleged wrongs in that forum. If Appellants prevail in arbitration, proceeding in the fashion required by the Superior Court certainly would not be useless. If they do not prevail, they will have a right of appeal following confirmation of the arbitration decision. *See ACF Prop. Mgmt., Inc. v. Chaussee*, 69 Wn. App. 913, 922, 850 P.2d 1387 (1993) (party “was entitled to challenge the validity of the arbitrators’ award when [it] moved to have it confirmed”).

In sum, the Superior Court did not commit obvious error rendering further proceedings useless.

2. **The Order Does Not Meet the Requirements for Discretionary Review Under RAP 2.3(b)(2).**

RAP 2.3(b)(2) allows for discretionary review if “the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.” The Order does not meet this standard.

As discussed above, the Order Compelling Arbitration is well-founded in fact and law and does not contain probable error. In this case, the decision to compel arbitration is based on established case law holding that Appellants bringing derivative claims are subject to the same defenses that would apply to the corporation or partnership on whose behalf the

Appellants bring the claim. *See La Hue*, 6 Wn. App. at 779 (derivative plaintiffs are subject to the same defenses as the related corporation would be). Several courts have compelled arbitration in circumstances similar to this one that involved claims derivative of a Delaware entity. *See, e.g., VeriSign*, 531 F. Supp. 2d at 1224; *Ernst & Young Ltd.*, 2009 U.S. Dist. LEXIS 99385, at \*34-35. Appellants can cite no binding legal precedent contrary to the Superior Court's holding.

The Order does not meet the other requirements of RAP 2.3(b)(2), either. The Order simply shifts the resolution of the parties' dispute to an arbitration forum and does not alter the status quo of the parties, who still must argue the merits of their claims before a neutral tribunal. And the Order Compelling Arbitration does not limit the parties' freedom to act, as it has no effect on the parties' actions outside of the litigation.

**3. The Order Does Not Meet the Requirements for Discretionary Review Under RAP 2.3(b)(3).**

The Order does not fall within the third prong for granting discretionary review, as the Superior Court did not "so far depart[] from the accepted and usual course of judicial proceedings . . . as to call for review by the appellate court." RAP 2.3(b)(3). The Superior Court's Order Compelling Arbitration was granted in accordance with standard judicial procedure after full briefing by the parties. All parties, including

Appellants, extensively briefed the issues and presented oral argument. The holding itself cannot be said to be outside the norms of judicial practice because it comported with the reasoning applied by other courts that have decided the issue.

4. **Discretionary Review Is Not Warranted by Other Considerations.**

Other considerations apart from the statutory requirements do not weigh in favor of discretionary review. The discrete issue decided by the Superior Court is fact-specific, is not widely applicable to a broad range of litigation, and is not a matter of general public interest. The parties are sophisticated business entities. Further, unlike recent orders compelling arbitration that have been reviewed by the Court of Appeals, there is no issue here of consumer or employment contract unconscionability. Neither does the Order concern a question of constitutional rights.

IV. **CONCLUSION**

Because the Superior Court's Order Granting Arbitration does not meet the statutory requirements for appeal as of right or for discretionary

review, KPMG requests dismissal of Appellant's appeal from the Order.

DATED this 16<sup>th</sup> day of August, 2011.

Respectfully submitted,

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# EXHIBIT B

*The Court of Appeals  
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No. 67302-5-1

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CASE #: 67302-5-1

Futureselect Portfolio Management, et al., Apps. vs. Tremont Group Holdings, et al., Resps.

Counsel:

Enclosed please find a copy of the order entered by this court in the above case today.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

hek

cc: Hon. Julie A. Spector

enclosure

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

FUTURESELECT PORTFOLIO  
MANAGEMENT, INC., FUTURESELECT  
PRIME ADVISOR II LLC, THE  
MERRIWELL FUND, L.P., 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. 67302-5-I

ORDER DENYING  
DISCRETIONARY REVIEW  
AND GRANTING MOTIONS  
TO DISMISS REVIEW

Respondents KPMG LLP; Tremont Group Holdings, Inc.; Tremont Partners, Inc.;  
Oppenheimer Acquisition Corp.; Massachusetts Mutual Life Insurance Co.; and Ernst &  
Young LLP have filed motions to dismiss the notice of appeal filed by FutureSelect  
Portfolio Management, Inc.; FutureSelect Prime Advisor II LLC; The Merriwell Fund,  
LLP; and Telesis IIW, LLC (collectively FutureSelect). FutureSelect has filed a  
response and respondents have filed replies.

We have considered the motions and have determined that they should be  
granted. FutureSelect's request for discretionary review is denied.

Now, therefore, it is hereby

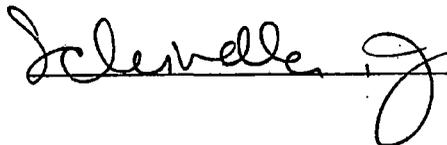
No. 67302-5-1/2

ORDERED that FutureSelect's request for discretionary review is denied; and it is further

ORDERED that the motions to dismiss are granted and review is dismissed.

Done this 21<sup>ST</sup> day of November, 2011.

  
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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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# EXHIBIT C

The Honorable Julie Spector  
Noted for Consideration: February 25, 2011, 9:00 a.m. – 12:00 p.m.  
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

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

Plaintiffs,

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

Defendants.

Case No. 10-2-30732-0 SEA

**[PROPOSED] ORDER GRANTING  
KPMG LLP'S MOTION TO  
COMPEL ARBITRATION AND  
STAY THE ACTION AGAINST IT,  
OR, IN THE ALTERNATIVE, TO  
DISMISS**

This matter having come before the Court on KPMG LLP's Motion to Compel Arbitration and Stay the Action Against It, or, in the Alternative, to Dismiss, and the Court having reviewed the papers filed by the parties, the record in this action, and any other pleadings and argument of the parties relevant to the issues raised therein, and the Court having found that arbitration should be compelled and this action should be stayed in favor of arbitration, or, in the alternative, that this action should be dismissed against KPMG on

1 grounds of collateral estoppel, lack of standing, failure to state a claim, and *forum non*  
2 *conveniens*,

3 IT IS HEREBY ORDERED THAT KPMG LLP's Motion is GRANTED, and:

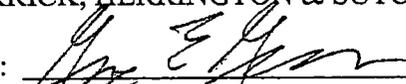
4 <input type="checkbox"/>	Plaintiffs' claims against KPMG are subject to mandatory arbitration and this 5 action shall be stayed pending resolution of that arbitration.
6 <input type="checkbox"/>	Plaintiffs' claims against KPMG are dismissed.

7  
8 Dated this \_\_\_ day of \_\_\_\_\_ 2011.

9  
10 THE HONORABLE JULIE SPECTOR  
11 KING COUNTY SUPERIOR COURT JUDGE

12 *Presented by:*

13 ORRICK, HERRINGTON & SUTCLIFFE LLP

14 By: 

15 George E. Greer, WSBA #11050

ggreer@orrick.com

16 Paul F. Rugani, WSBA #38664

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17 701 Fifth Avenue, Suite 5600

18 Seattle, WA 98104-7097

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19 Facsimile: +1-206-839-4301

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23 New York, NY 10022

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25 *Attorneys for Defendant KPMG LLP*

26 OHS West:261052344.1  
18699-2005 GEG/MYT

# EXHIBIT D

RECEIVED O.H.S. LLP

FEB 23 2011

The Honorable Julie Spector

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

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

Plaintiffs,

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,

Defendants.

NO. 10-2-30732-0-SEA

ORDER DENYING DEFENDANT  
KPMG LLP'S MOTION TO COMPEL  
ARBITRATION AND STAY THE  
ACTION AGAINST IT, OR, IN THE  
ALTERNATIVE, TO DISMISS

[PROPOSED]

THIS MATTER having come before the undersigned judge of the above-titled Court upon the motion to compel arbitration and stay the action against it, or, in the alternative, to dismiss of Defendant KPMG LLP, and the Court having reviewed the pleadings submitted by the parties, having conducted oral argument on April 8, 2011, and otherwise being fully advised in the premises:

ORDER DENYING KPMG LLP'S MOTION TO  
COMPEL ARBITRATION OR DISMISS  
[PROPOSED]- I

GORDON TILDEN THOMAS & CORDELL LLP  
1001 Fourth Avenue, Suite 4000  
Seattle, WA 98154  
Phone (206) 467-6477  
Fax (206) 467-6292

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IT IS HEREBY ORDERED that the motion is DENIED.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
King County Superior Court Judge

Presented by:

**GORDON TILDEN THOMAS & CORDELL LLP**

By: s/ Jeffrey M. Thomas

Jeffrey I. Tilden, WSBA #12219  
Jeffrey M. Thomas, WSBA #21175

**THOMAS, ALEXANDER & FORRESTER LLP**

By: s/ Jeffrey M. Thomas for

Steven W. Thomas  
Emily Alexander  
Mark Forrester  
Jessica Rassler  
Attorneys for Plaintiffs

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 22, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system and served counsel below by the method indicated:

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Via ECF

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Via U.S. Mail

Via ECF (insofar as the Party has opted in)

s/ Carol L. Russell  
Carol L. Russell, Legal Secretary for  
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Gordon Tilden Thomas & Cordell LLP  
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# EXHIBIT E

JAN 03 2012

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

FUTURESELECT PORTFOLIO  
MANAGEMENT, INC.,  
FUTURESELECT PRIME ADVISOR,  
II LLC, THE MERRIWELL FUND,  
L.P., 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. 67302-5-1

CERTIFICATE OF FINALITY

King County

Superior Court No. 10-2-30732-0.SEA

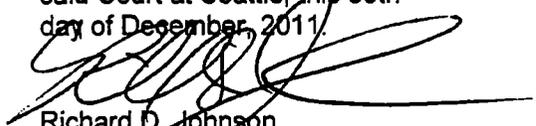
THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for  
King County.

This is to certify that the order of the Court of Appeals of the State of Washington, Division  
I, filed on November 21, 2011, became final on December 30, 2011.

- c: Timothy Filer
- David Taylor
- Christopher Howard
- Paul Rugani
- Stephen Rummage
- Jeffrey Tilden
- Paul Lawrence

IN TESTIMONY WHEREOF, I

have hereunto set my hand  
and affixed the seal of  
said Court at Seattle, this 30th  
day of December, 2011.



Richard D. Johnson  
Court Administrator/Clerk of the  
Court of Appeals, State of  
Washington Division I



NO. 74611-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

RECEIVED  
COURT OF APPEALS  
DIVISION ONE  
MAY 11 2016

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

---

NON-WASHINGTON AUTHORITY CITED IN  
RESPONDENT'S BRIEF OF KPMG LLP

---

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Paul F. Rugani (WSBA No. 38664).  
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Of Counsel  
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District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3726	EFILED Document CO Boulder County District Court 20th JD Filing Date: Apr 27 2012 3:27PM MDT Filing ID: 43937979 Review Clerk: N/A  <b>▲ COURT USE ONLY ▲</b>
<b>Plaintiffs:</b> AGILE SAFETY VARIABLE FUND, L.P., et al  v.  <b>Defendants:</b> TREMONT GROUP HOLDINGS INC. ET AL.	
<i>Attorney(s) for Plaintiffs:</i> <i>Steven M. Feder</i> <i>Jeff Ross</i> <i>Kelly K. Pierce</i> <i>Harry N. Niska</i>  <i>Attorney(s) for Defendants:</i> <i>Kevin M. Shea</i> <i>Gary F. Bendinger</i> <i>Gregory G. Ballard</i> <i>Gazeena K. Soni</i>	Case Number: 10 CV 2904 Division 3 Courtroom Q
<b>ORDER RE: DEFENDANT'S MOTION TO STAY AND COMPEL ARBITRATION</b>	

THIS MATTER comes before the Court on Defendant's Motion to Stay and Compel Arbitration (the "Mot. to Compel Arb"). Having considered the file, pleadings, and applicable case law, the Court finds and rules as follows:

### I. BACKGROUND

The Plaintiffs, Agile Safety Variable Fund, L.P., et al. ("Agile") allege in Agile's Complaint and Jury Demand ("Complaint") that they are hedge funds that owned limited partnership interests in Defendant Rye Select Broad Market Fund, L.P. and Defendant Rye Select Broad Market Prime Fund, L.P. ("Rye Funds") through Defendant Tremont Partners, Inc. and Tremont Partner's parent company, Defendant Tremont Group Holdings, Inc. ("Tremont"). Defendants KPMG, L.L.P. ("KPMG") have been auditors for the Rye funds since 2004.

In Defendant KPMG's Mot. to Compel Arb., KPMG alleges that it audited the Rye funds pursuant to an engagement agreement ("Audit Engagement Agreement") containing an arbitration clause. (Mot. to Compel Arb., Ex. A at 5, App. II). KPMG also assisted the Rye Funds in their preparation of K-1's, tax documents submitted by partnerships pursuant to engagement agreements ("Tax Engagement Agreement"), that also contain arbitration clauses.

Agile invested millions of dollars through Tremont and the Rye Funds with Bernard L. Madoff ("Madoff") and his affiliated companies with the understanding that Madoff would be using a "split-strike conversion strategy." A "split-strike conversion strategy" is a conservative way of investing that limits risk but also limits rewards. (Complaint at 2). Instead, Madoff was engaged in the now infamous Ponzi scheme and Agile lost tens of millions of dollars.

In its Complaint, Agile contends that Madoff's consistently high returns from such a conservative strategy should have tipped off KPMG that Madoff was involved in illegal activity.

Agile's Complaint asserts the following claims for relief: 1) violation of C.R.S. §§ 11-51-101, 2) fraud in the inducement, 3) negligent misrepresentation, 4) nondisclosure or concealment, 5) aiding and abetting breach of fiduciary duty, and 6) aiding and abetting fraud. KPMG filed a response replying to the claims and asking this Court to stay the litigation and compel arbitration.

## II. LEGAL STANDARDS

Arbitration is a favored method of resolving disputes. *Shams v. Howard*, 165 P.3d 876, 879 (Colo. App. 2007). C.R.S. § 13-22-207 permits a court to order parties to arbitrate their claims if the parties have an enforceable agreement to arbitrate that covers those claims. "The question of arbitrability is one for the court to decide." *Parker v. Ctr. for Creative Leadership*, 15 P.3d 297, 298 (Colo. App. 2000); *see also* C.R.S. § 13-22-206(2) ("The court shall decide

whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.”). An arbitration agreement is a contract and the court should first look to the plain language of the agreement. *Allen v. Pacheco*, 71 P.3d 375, 378 (Colo. 2003). The court must evaluate the agreement as a whole. *Id.* Any doubts or ambiguities as to the scope of the arbitration clause should be resolved in favor of arbitration. *Id.* “A court may refuse to compel arbitration only upon a showing that there is no agreement to arbitrate or that the issue sought to be arbitrated is clearly beyond the scope of the arbitration provision.” *Gergel v. High View Homes, LLC*, 996 P.2d 233, 235 (Colo. App. 1999). “The scope of an arbitration clause must faithfully reflect the reasonable expectations of the parties.” *Id.*

### III. ANALYSIS

In this case, If Agile’s claims are derivative, then Agile is bound by the Tax Engagement Agreement and Audit Engagement Agreement (“Engagement Agreements”). Additionally, if the claims in Agile’s Complaint are within the scope of the arbitration clauses contained in the Engagement Agreements, then the parties are bound to arbitrate. Because the Court finds that the claims are derivative and that the claims in the Complaint are within the scope of the arbitration clauses, the Court will stay the action against KPMG and compel arbitration.

#### 1. Agile’s claims are derivative and not direct.

KPMG asserts that because the Rye Funds are Delaware partnerships, Delaware law governs whether the claims are derivative. (“Mot. to Compel Arb at 4”). Agile does not deny that Delaware law governs whether the claims are derivative or direct, in its Plaintiff’s Combined Memorandum of Law in Opposition to Defendant’s Motion to Dismiss, 23 – 5 (“Agile’s Memo”). Similarly, case law states that Delaware law dictates whether the claims are direct or

derivative when brought against Delaware Limited Partnerships. *Zutty v. Rye Select Broad market Prime Fund, L.P.*, 2011 WL 5962804, 5 (N.Y. Supp.)

In *Tooley v. Donaldson*, 845 A.2d 1031, 1033 (Del. 2004), the Supreme Court of Delaware adopted a new test for whether claims are derivative or direct:

... [W]hether a stockholder's claim is derivative or direct .... must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)? *Id.*

Agile asserts that the limited partners were harmed individually by investing in the Rye Funds. (Agile's Memo at 4). Tremont, however, contends that Agile Safety only alleges injuries that were suffered directly by the Rye funds and only indirectly by Agile as investors. (The Tremont Defendant's Motion to Dismiss at 9 ("Tremont Motion to Dismiss")).

Agile relies on *Anglo American* to support its argument that the claims are direct. *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143 (Del. Ch. 2003). In *Anglo American*, a Delaware court found that the plaintiffs' claims were direct instead of derivative. However, the facts in *Anglo American* were unusual in that some of the limited partners who suffered economic losses caused by the general partner's contractual breach had left the fund before the claims were filed. *Id.* at 152. As a result, the court determined that an award for derivative claims would have resulted in a "windfall" to the new partners. *Id.* at 153. The *Anglo American* court also explained that ordinarily, claims brought by limited partners who suffer a loss because of a diminution of a fund are derivative, *Id.* at 151, and that it was only because "...[t]he operation and function of the Fund as specified in the Agreement diverge so radically

from the traditional corporate model that the claims made in the complaint must be brought as direct claims.” *Id.* at 152.

Moreover, in two recent cases with facts substantially similar to those in the present case, various courts held that the plaintiffs’ claims were derivative. In *Zutty*, an action was brought on behalf of “investors who suffered losses due to the Ponzi scheme perpetrated by Bernard L. Madoff ...” *Zutty*, 2011 WL 5962804 at 1. The *Zutty* court reasoned that even though investors were barred from recovering directly from Madoff because of SIPA<sup>1</sup>, that hardship alone did not mean their claims were direct, and they therefore had standing for claims against the intermediary hedge funds that handled their investments. *Id.* The *Zutty* court found that the ruling in *Anglo American* was inapposite because the plaintiffs in that case continued to remain limited partners in the funds, and they failed “to allege that they would be unable to share in any recovery obtained in a derivative action, or that any new investors have been admitted to the funds who would receive a ‘windfall’ in that action.” *Id.* at 7.

Similarly, in *Cocchi v. Tremont Group Holdings, Inc.*, 2010 WL 2008086, 3 (Fla. Cir. Ct. 2010), investors alleged that fraudulent practices and breaches of fiduciary duty by fund

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<sup>1</sup> Agile Safety is barred from recovering directly from Madoff, or his investment company, BMIS, because pursuant to the Securities Investor Protection Act of 1970 (“SIPA”), hedge funds that invested in Madoff through feeder funds, like Tremont, are not eligible to recover on an individual basis. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 454 B.R. 285, 302 – 7 (Bankr. S.D.N.Y. 2011). As a broker-dealer registered with the Securities and Exchange Commission (“SEC”), BMIS is a member of the Securities Investor Protection Corporation (“SIPC”), a corporation to which most registered brokers and dealers are required to belong. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 401 B.R. 629, 632 (Bankr. S.D.N.Y. 2009).

Congress created the SIPC in conjunction with SIPA to provide a way for claimants who qualify as “Customers” to recover financial losses in the event of their broker’s insolvency. *Investor Prot. Corp.*, 401 B.R. 629 at 633-4. However, the definition of “Customers” has been narrowly construed by the courts and applies to investors in privity with the insolvent brokers, rather than hedge funds who have invested with a specific broker through feeder funds. *Id.*, *Sec. Investor Prot. Corp.* 454 B.R. 285 at 302-7. As Agile Safety did not have a contract directly with BMIS, but rather invested its funds through Tremont, Agile Safety is not a “Customer” under SIPA and therefore cannot recover directly from BMIS.

managers who invested with Madoff led to investors' economic losses. The court stated that in order to assert a direct claim, the investors must be harmed in a way that is distinct from the harm that befell the fund generally. *Id.* at 2-3. The *Cocchi* court concluded that the plaintiffs did not plead sufficient facts to demonstrate that their claims were direct. *Id.*

Here, Agile fails to allege sufficient facts to distinguish itself from the plaintiffs in *Zutty* and *Cocchi* and prove that their situation is substantially similar to the one described in *Anglo American*. See Complaint and Agile's Memo. Instead, Agile describes a situation remarkably similar to the ones described in *Zutty* and *Cocchi*, where limited partners were harmed when they invested in a fund that then suffered an economic loss because of the actions of a general partner. Additionally, Agile does not allege that different people were members of the partnership at the time of the breach and at the time they filed the claim. Nor do they claim that the economic losses they suffered stemmed from events other than those that caused the financial harm that was inflicted on the funds as a whole. (Agile's Memo at 6).

Rather, Agile is alleging that the limited partners suffered harm because the entire fund was diminished, a situation the *Anglo American* court described as "classically derivative in nature." 829 A.2d at 151. Pursuant to Delaware law, a stockholder's claim may be direct if: 1) an individual sustains a different harm than an economic loss suffered by the fund as a whole and 2) if the same individual who was injured would not receive the benefit of any recovery or other remedy. *Tooley*, 845 A.2d 1031 at 1033. Because Agile does not sufficiently allege in its Complaint that: 1) the individual limited partners suffered an economic loss distinct from that sustained by the Rye Funds as a whole, and 2) nor does it show that newly added limited partners stand to unfairly benefit from any recovery or remedy, Agile's claims are derivative. KPMG was engaged by Tremont to audit the Rye Funds and perform tax services related to the Rye Funds.

(Agile's Complaint at 54). Because Agile Safety's claims against KPMG arise from the Plaintiff's claims against Tremont, Agile Safety's claims against KPMG are also derivative.

**2. Parties who bring derivative claims arising from contractual obligations are bound by the contract's arbitration provisions even if they are non-signatories.**

Parties who claim the benefits of an agreement bind themselves to all of the contract's clauses, including provisions requiring arbitration. *Pikes Peak Nephrology Assocs. v. Total Renal Care, Inc.*, 2010 WL 1348326, 1 (D.Colo.). In this case, Agile avers that it is not bound by the arbitration provisions in the Engagement Agreements because its claims are direct and it is a non-signatory to the agreements. (Agile's Memo at 24). However, as discussed *supra*, Agile's claims are derivative rather than direct.

Moreover, Colorado courts have found that third-party beneficiaries of an agreement are bound by arbitration clauses within those agreements. The Colorado Court of Appeals reasoned in *Smith v. Multi-Financial Sec. Corp.* that common law contract principles indicate that it is unjust to allow non-signatories or third-party beneficiaries to reap the benefits of contractual bargains without being bound to arbitration provisions within that contract. *Smith v. Multi-Financial Sec. Corp.*, 171 P.3d 1267, 1272 (Colo. Ct. App. 2007). In *Multi-Financial*, trust beneficiaries sued the investment company handling their account after a trustee allegedly breached his fiduciary duties to the trust. *Id.* at 1269. The investment company moved to stay the proceedings with the trust beneficiaries and to compel arbitration because of the arbitration clauses contained in agreements between the trustee and the investment company. *Id.* The *Multi-Financial* court further reasoned that when third-party beneficiaries have claims arising from contracts, the entire contract applies to all of the parties.

The key is whether the account agreement, containing the arbitration clause, is the underlying basis for all of the beneficiaries' claims; if so, the non-signatory beneficiary will be bound by the arbitration agreement. In other words, if the beneficiaries would have no claim against the investment firm in the absence of the agreement containing the arbitration clause, then the beneficiaries are bound by the arbitration clause in the agreement giving rise to their claims, despite the fact they did not sign the agreement themselves.

*Multi-Financial Sec. Corp.*, 171 P.3d 1267 at 1273 (quoting *Clark v. Clark*, 57 P.3d 95, 98 (Okla. Civ. App. 2002)). The Colorado Court of Appeals held that pursuant to common law contract principles, the trust beneficiaries were therefore "estopped from avoiding the arbitration provisions in the account agreements because they are seeking to invoke the duties the investment company allegedly owed them as a result of the signature of its representative on the account documents." *Id.* at 1272.

Similarly, in this case, Agile's causes of action are rooted in the Engagement Agreements between KPMG and Tremont which contain arbitration clauses. Agile alleges that KPMG's fiduciary relationship with Tremont carried over to Agile because Agile invested through Tremont. Therefore, Agile alleges that KPMG is vicariously liable for Agile's economic loss. However, KPMG would have no relationship with Agile but for the Engagement Agreements between KPMG and Tremont. Whenever a party's claims arise directly out of transactions made pursuant to an agreement, that party is bound by the provisions of that agreement even if that party is a non-signatory. *Multi-Financial Sec. Corp.*, 171 P.3d 1267 at 1272. Because Agile Safety's claims arise from the Engagement Agreements, Agile Safety is bound by all of the provisions in the agreements, including the arbitration clauses.

**3. Agile's claims are within the scope of the arbitration clauses.**

In Colorado there is a presumption in favor of arbitration. *City & County of Denver v. Dist. Court*, 939 P.2d 1353, 1363 (Colo. 1997). In order to protect the parties the freedom to contract, the Colorado Supreme Court stated that arbitration clauses should be interpreted in a way that enforces the contract according to its terms. *City & County of Denver*, 939 P.2d at 1361. Additionally, Colorado has adopted the Uniform Arbitration Act ("UAA") which requires district courts to apply a presumption in favor of arbitration to contract interpretation. *Id.* at 1363. When the parties intend the arbitration clause to cover a broad range of issues, it should be broadly enforced so that parties may rely on courts to uphold their agreements. *Id.* Therefore district courts should apply arbitration clauses "unless the court can say with 'positive assurance' that the arbitration provision is not susceptible of any interpretation that encompasses the subject matter of the dispute." *Id.* at 1363-4 (quoting *Jefferson County Sch. Dist. V. Shorey*, 826 P.2d 830, 840 (Colo.1992)).

Similarly, a claim is not necessarily outside the scope of an arbitration provision simply because a claim sounds in tort rather than in contract. *City & County of Denver v. Dist. Court*, 939 P.2d at 1364. "Creative legal theories asserted in complaints should not be permitted to undermine the presumption favoring alternative means to resolve disputes." *Id.* Accordingly, if the Engagement Agreements in this case contain broad arbitration clauses, they should be enforced.

- a. **The language in the clauses is broad and therefore should apply to Agile's claims.**

The arbitration clauses in the Engagement Agreements were drafted using very broad language designed to encompass a wide range of claims and to include third parties. The clause

in KPMG's Standard Terms and Conditions Tax Services indicates that KPMG intends all third-party beneficiaries to be required to arbitrate. The clause states in relevant part:

Any dispute or claim arising out of or relating to the Engagement Letter between the parties, the services provided thereunder, or any other services provided by or on behalf of KPMG or any of its subcontractors or agents in Client or at its request (*including any dispute or claim involving any person or entity for whose benefit the services in question are or were provided*) shall be resolved in accordance with the dispute resolution procedures set forth in Exhibit A, which constitute the sole methodologies for the resolution of all such disputes. By operation of this provision, the parties agree to forego litigation over such disputes in any court of competent jurisdiction. (Tuffuor Aff., Ex. 1 at 4, *emphasis added*).

Similarly, in KPMG's Standard Terms and Conditions for Advisory and Tax Services, there is a broad provision defining the scope of the arbitration clause as "[a]ny dispute or claim arising out of or relating to the Engagement Letter between the parties or the services provided thereunder ..." (Tuffuor Aff., Ex. 5 at 3).

The Supreme Court of Colorado has analyzed similar language in other arbitration provisions and held that the "arising out of or relating to" language is broad and is designed to cover practically any dispute between the parties. *City & County of Denver*, 939 P.2d at 1366. Moreover, the court reasoned that "[f]ailure to follow the mandates of a valid ADR clause contravenes Colorado's public policy of supporting ADR as well as frustrates the intent of the parties who originally agreed to an alternative remedy to resolve their disputes." *Id.* at 1357.

In the Engagement Agreements in this case, the parties agreed to broad language in the alternative dispute resolution clauses. Additionally, at least one of the clauses indicates that KPMG intended to be bound by the agreement only if all third-party beneficiaries were also bound to arbitrate. Therefore, in accordance with the Supreme Court of Colorado's decision in *City & County of Denver*, this Court finds that this dispute falls within the scope of the arbitration provisions in the Engagement Letters.

**b. The dispute resolution clause states that questions of arbitrability are also for the arbitrator.**

KPMG asserts in its Motion to Compel Arbitration that pursuant to the Engagement Agreements, questions of arbitrability go to the arbitrator. (Mot. to Compel Arb. at 6.) Agile does not dispute this in its response. (Agile's Memo at 23.) In the Engagement Agreement between KPMG and Tremont, under Dispute Resolution Procedures, there is specific language that addresses who is entitled to decide an issue of arbitrability. (Buchanan Aff., Ex. A, App. II). The section provides in relevant part: "Any issue concerning the extent to which any dispute is subject to arbitration, or any dispute concerning the applicability, interpretation, or enforceability of these procedures, including any contention that all or part of these procedures are invalid or unenforceable, shall be governed by the Federal Arbitration Act and resolved by the arbitrators." *Id.*

Additionally, all of KPMG's Engagement Agreements explicitly incorporate the Rules for Non-Administered Arbitration of the Center For Public Resources Institute for Dispute Resolution ("CPR Rules"). The relevant rule states:

**Rule 8: Challenges To The Jurisdiction Of The Tribunal**

8.1 The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

8.2 The Tribunal shall have the power to determine the existence, validity or scope of the contract of which an arbitration clause forms a part. For the purposes of challenges to the jurisdiction of the Tribunal, the arbitration clause shall be considered as separable from any contract of which it forms a part.

Center For Public Resources Institute for Dispute Resolution, *2007 Rules for Non-Administered Arbitration*, cpradr.org, Rul. 8,

<http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/600/2007-CPR-Rules-for-Non-Administered-Arbitration.aspx>.

In considering a motion to stay the proceedings and compel arbitration, courts must resolve gray areas in favor of arbitration. *Allen*, 71 P.3d 375 at 378. In this instance, the plain language of the Engagement Agreements and incorporated CPR Rules indicate that questions of arbitrability go to the arbitrator. Significantly, Agile does not dispute that this is the case. For these reasons, this Court finds that questions of arbitrability are properly decided by the arbitrator.

#### IV. CONCLUSION

The Court finds that Agile's claims are derivative. Because parties who bring derivative claims arising from contractual obligations are bound by the contract's provisions even if they are non-signatories, Agile is bound by the Engagement Agreements, including the arbitration