

No. *93824-5*  
(Court of Appeals No. 74611-1-I)

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WASHINGTON STATE  
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**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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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,

*Defendants,*

KPMG LLP, *11050*  
*38664*

*Respondent,*

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**PETITION FOR REVIEW OF FUTURESELECT PORTFOLIO  
MANAGEMENT, INC., FUTURESELCT PRIME ADVISOR II  
LLC, THE MERRIWELL FUND, L.P. AND TELESIS IIW, LLC**

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**GORDON TILDEN  
THOMAS & CORDELL LLP**  
Jeffrey M. Thomas, WSBA #21175  
1001 Fourth Avenue, Suite 4000  
Seattle, WA 98154

ATTORNEYS FOR  
Plaintiffs/Appellants

**THOMAS, ALEXANDER &  
FORRESTER LLP**  
Steven W. Thomas, admitted *pro hac vice*  
Emily Alexander, admitted *pro hac vice*  
14 - 27th Avenue  
Venice, CA 90291

ATTORNEYS FOR Plaintiffs/Appellants

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Pursuant to RAP 13.4(b)(1), (3) and (4), Petitioners FutureSelect Portfolio Management, Inc., FutureSelect Prime Advisor II, LLC, The Merriwell Fund, L.P., and Telesis IIW, LLC (collectively “FutureSelect” or “Plaintiff”) request this Court to grant discretionary review of the Court of Appeals Division One’s October 5, 2016 Order Denying Motion to Modify the Commissioner’s May 19, 2016 grant of KPMG LLP’s (“KPMG” or “Defendant”) Motion to Dismiss FutureSelect’s Appeal of the trial court’s June 3, 2011 grant of KPMG’s Motion to Compel Arbitration.

## I. INTRODUCTION

This Court should grant discretionary review because the Court of Appeals’ ruling conflicts with this Court’s intervening decision in *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 54, 308 P.3d 635 (2013). Absent reversal, FutureSelect and its investors will be forced to pay for an expensive arbitration with auditor KPMG before returning to court to enforce their right to a jury trial. Requiring FutureSelect to do so violates *Hill*, constitutional rights, and the well-reasoned public policy for which it stands.

FutureSelect lost nearly \$200 million in its investments in the Rye Funds. The Rye Funds had been audited by two auditors—KPMG from 2004-2007 and by Ernst & Young LLP (“EY”) from 2000-2003—

pursuant to engagement letters to which FutureSelect was not a party and did not sign. Each year, KPMG and EY negligently stated that the Rye Fund's financial statements contained no material misstatement when, in fact, the financial statements contained nearly no real assets.

In 2011, on defendants' motions, the King County Superior Court dismissed FutureSelect's claims against EY and four other defendants<sup>1</sup> and granted KPMG's motion to compel FutureSelect to arbitration. KPMG had submitted to the Superior Court a form order with two blank "check boxes"—one for arbitration and one to dismiss—and the trial court checked "arbitration." CP 400-01.

While every *other* order entered that day by the Superior Court was reversed, see *FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 175 Wn. App. 840, 894-95, 309 P.3d 555 (2013) ("*FutureSelect P*") and *FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 180 Wn.2d 954, 972-74, 331 P.3d 29 (2014) ("*FutureSelect IP*"), the Court of Appeals did not even consider the merits of FutureSelect's appeal of the check box order compelling

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<sup>1</sup> The other defendants were Tremont Group Holdings, Inc., Tremont Partners, Inc., Oppenheimer Acquisition Corporation and Massachusetts Mutual Life Insurance Co.

arbitration, instead ruling that FutureSelect could not appeal until final judgment had been entered.

Since then, this Court has held that it is improper for an appellate court to decline review of the arbitrability of claims. *Hill*, 179 Wn.2d at 54. This ruling is sensible. Absent an opportunity for appellate review, the exact prejudicial consequences this Court warned against in *Hill* will occur: the parties will waste years of time and millions of dollars arbitrating claims that FutureSelect never agreed to arbitrate *before* getting the opportunity to have the validity of an arbitration order reviewed. This would be the antithesis of judicial efficiency and economy and presents an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(3) & (4).

By this petition, FutureSelect requests that the Court now review the Superior Court's unexplained order compelling arbitration against KPMG. The Court of Appeals' decision, if left to stand, violates the right to a jury trial and the holding of *Hill*. Pursuant to RAP 13.4(b)(1), RAP 13.4(b)(3) and RAP 13.4(b)(4), the Court of Appeals' decision should be reviewed because it is in conflict with this Court's opinion in *Hill* and establishes a precedent that is contrary to the public interest in a right to a jury trial.

## **II. IDENTITY OF THE PETITIONERS**

Plaintiffs/Appellants FutureSelect Portfolio Management, Inc., FutureSelect Prime Advisor II LLC, The Merriwell Fund, L.P., and Telesis IIW, LLC ask this Court to accept review of the Court of Appeals decision denying modification designated in Part III of this petition.

## **III. COURT OF APPEALS DECISION**

On October 5, 2016, the Court of Appeals, Division I denied Plaintiffs' motion to modify the May 19, 2016, ruling by Commissioner Masako Kanazawa of the Court of Appeals, Division I (hereafter the "Commissioner") which granted KPMG's Motion to Dismiss FutureSelect's appeal of the Superior Court's order compelling arbitration. *FutureSelect Portfolio Mgmt. v. KPMG LLP*, Notation Ruling, No. 74611-1-I (Wash. Ct. App. Div. 1 May 19, 2016) (attached as Appendix A). FutureSelect requests that this Court review the Court of Appeals' October 5, 2016 Order (attached as Appendix B) and the prior decisions to which it relates: the Commissioner's May 19, 2016 Order, the Superior Court's June 3, 2011 Order compelling arbitration (CP 400-01) and the November 11, 2011 Court of Appeals Order granting KPMG's motion to dismiss (attached as Appendix C).

#### IV. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in denying Plaintiffs' Motion to Modify the Commissioner's ruling granting KPMG's Motion to Dismiss?
2. Does this Court's opinion in *Hill v. Garda CL Northwest, Inc.* create a right to appeal following an order compelling arbitration in Washington?

#### V. STATEMENT OF THE CASE

##### A. Relevant Facts

##### 1. FutureSelect

FutureSelect, which consists of Washington investment companies, invested nearly \$200 million in Bernard Madoff through the Rye Funds.<sup>2</sup> CP 2, 9. The Rye Funds were sold and managed by Tremont Group Holdings, Inc. and Tremont Partners, Inc. (collectively, "Tremont"). CP 9-10.

##### 2. The Auditors: KPMG and EY

In order to attract investors, Tremont hired Big 4 auditing firm KPMG—its new parent company's long time auditors—to audit the Rye Funds from 2004-2007. CP 20, 24-25. KPMG replaced EY as Tremont's auditor from 2000-2003.

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<sup>2</sup> The "Rye Funds" include Rye Select Broad Market Fund, L.P., Rye Select Broad Market Prime Fund, L.P., and Rye Select Broad Market XL Fund, L.P.

Each KPMG audit was conducted subject to an engagement agreement between KPMG and Tremont. CP 337. The engagement agreements were executed by Tremont and KPMG alone. CP 291. Like EY's before it, each KPMG engagement letter contained an agreement to arbitrate claims among the parties to the agreement. CP 295. FutureSelect was not a party to and therefore did not execute or otherwise agree to either the KPMG or EY engagement agreements.

As auditor of the Rye Funds, KPMG's and EY's job was to verify that the billions of dollars the Rye Funds claimed to have under the management of Madoff were real and properly valued. CP 4. Year after year, KPMG and EY claimed to have done their job, representing they had conducted their audits in conformity with Generally Accepted Auditing Standards ("GAAS"), and stating that the Rye Funds' financial statements were "free of material misstatement" and were in accordance with Generally Accepted Accounting Principles ("GAAP"). CP 21, 24-26, 330.

KPMG and EY did not perform their audits in compliance with GAAS. CP 27. A jury already has concluded that EY was negligent and a final judgment has been entered against EY. CP 701-11.

**B. Procedural History**

In August 2010, FutureSelect filed state securities laws violations and negligent misrepresentation claims against the investment manager,

parent companies and auditors of the Bernard Madoff feeder Rye Funds, in which FutureSelect invested. KPMG audited the Rye Funds and failed to detect that none of the Rye Funds alleged assets existed.

On June 3, 2011, the trial court granted KPMG's motion to compel arbitration and stayed the case against KPMG pending arbitration. FutureSelect filed a notice of appeal. (No. 67302-5-I). KPMG filed a motion to dismiss the appeal, arguing that the order compelling arbitration was not appealable and that discretionary review was not warranted under RAP 2.3(b). On November 11, 2011, a three-judge panel of the Court of Appeals granted KPMG's motion to dismiss and denied discretionary review. A certificate of finality was issued on December 30, 2011, and all litigation against KPMG was stayed pending resolution of FutureSelect's claims against other parties.

EY had moved to dismiss the claims against it, which motion was granted by the trial court and then reversed by the Court of Appeals. On September 3, 2014, after remand, EY moved to compel arbitration on substantially the same grounds as KPMG. CP 402. On December 3, 2014, the Superior Court denied EY's motion to compel in a written opinion. CP 678. In explaining its denial of EY's motion, the Superior Court held that Plaintiffs were not bound by the arbitration clause in EY's audit engagement agreements because Plaintiffs did not sign EY's

agreements and their claims were direct claims against EY, not derivative claims. CP 692.

FutureSelect's claims against EY proceeded to trial in September 2015. On December 17, 2015, a final judgment was entered against EY after a jury verdict in Plaintiffs' favor. CP 716. All claims against all defendants were resolved, except for the claims against KPMG.

Because of the resolution of all claims except those against KPMG, FutureSelect filed an appeal on January 15, 2016, requesting review of the June 3, 2011 order of the Superior Court granting KPMG's motion to compel arbitration. CP 712. KPMG moved to dismiss this appeal. On May 19, 2016, the Commissioner granted KPMG's motion to dismiss. The Commissioner did not consider the issue of enforceability of the arbitration provision in the audit engagement letter, instead dismissing the appeal on the procedural ground that it was untimely.

On June 20, 2016, FutureSelect filed a Motion to Modify the Commissioner's May 19, 2016 order granting KPMG's motion to dismiss. On October 5, 2016, the Court of Appeals, Division I entered the Order Denying FutureSelect's Motion to Modify.

## **VI. ARGUMENT**

Pursuant to RAP 13.4(b)(1), (3) and (4), this Court should review the Court of Appeals' October 5, 2016 Order and the related

Commissioner, Superior Court, and Court of Appeals orders. The orders conflict with an intervening decision of this Court, *Hill*, 179 Wn.2d at 54. RAP 13.4(b)(1). The orders also implicate an issue of substantial public interest—whether a plaintiff should be denied access to courts and required to arbitrate its claim *before* having the order compelling arbitration is reviewed by a higher court. RAP 13.4(b)(3) & (4).

**A. Review of the Commissioner’s Ruling Is Warranted Because It Conflicts With This Court’s Ruling in *Hill***

Whether an arbitration clause is valid and enforceable is a “gateway” issue that a court must determine before compelling a party to arbitrate. *Saleemi v. Doctor’s Assocs., Inc.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-4, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (“reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate”). Indeed, “it is the court’s duty to determine whether the parties have agreed to arbitrate a particular dispute.” *Yakima Cty. Law Enf’t Officers Guild v. Yakima Cty.*, 133 Wn. App. 281, 285, 135 P.3d 558 (2006) (citation omitted).

If a party opposing a motion to compel arbitration raises a defense that there is no agreement to arbitrate, “the court shall proceed summarily to decide the issue.” RCW 7.04A.070(2). Washington’s strong policy

favoring arbitration “does not, however, lessen this court’s responsibility to determine whether the arbitration contract is valid.” *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 735, 349 P.3d 32 (2015).

This Court has articulated its reasoning behind the trial court’s responsibility. First, the Washington State Constitution “unequivocally guarantees that ‘[t]he right of trial by jury shall remain inviolate’” and “any waiver of a right guaranteed by a state’s constitution should be narrowly construed in favor of preserving the right.” *Wilson v. Horsley*, 137 Wn.2d 500, 509, 974 P.2d 316 (1999) (citations omitted). Therefore, any waiver must be “voluntary, knowing, and intelligent.” *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). Second, “[i]f a court compels arbitration without deciding the validity of the arbitration clause, a party may be forced to proceed through a potentially costly arbitration before having the opportunity to appeal.” *Hill*, 179 Wn.2d at 54.

In *Hill*, this Court addressed a materially identical issue to that presented here and determined that the lower courts erred in failing to review the enforceability of the arbitration agreement prior to compelling arbitration. *Hill*, 179 Wn.2d at 54. This Court stressed that the interests of justice and economy are best served when the court examines the enforceability of an arbitration agreement **before** compelling the parties

go to the tremendous expense and effort of actually arbitrating. *Id.* “We find no support in the rules of procedure or case law for the Court of Appeals’ decision to compel arbitration without considering whether the arbitration clause is even valid.” *Id.* at 55.

Here, in ordering FutureSelect to arbitrate its claims with KPMG, the Superior Court failed to examine the threshold matter of whether there was an enforceable agreement to arbitrate between the parties. The Superior Court issued no written opinion and provided no analysis of the existence of a valid and enforceable agreement to arbitrate between the parties. The Superior Court did nothing more than check the first box on a form drafted by KPMG. The Superior Court had a duty to make an initial determination that an agreement to arbitrate existed between the parties.

When it *did* consider the enforceability of an agreement to arbitrate by an auditor against FutureSelect—in the intervening litigation against EY whose engagement agreement contained a clause almost identical in form and substance to the clause contained in KPMG’s audit engagement agreements—the Court determined that the arbitration provision was not enforceable against FutureSelect. CP 678-94. The EY trial court’s written opinion explains that FutureSelect was not bound by the arbitration clause in EY’s audit engagement agreements because Plaintiffs did not sign EY’s

agreements and their claims are direct claims against EY, not derivative claims. *Id.*

No court in the KPMG litigation has undertaken any enforceability analysis of the nearly identical clause in KPMG's audit engagement agreements. It would be a miscarriage of justice to deny FutureSelect review of this "gateway" issue **before** the parties are both forced to expend considerable time and resources in an arbitration involving tens of millions of dollars in damages, only then to be able to address the issue of enforceability currently before this Court. FutureSelect filed its claim against KPMG over six years ago—delaying its right to a jury trial by ordering a useless, lengthy, and expensive arbitration is antithetical to the pursuit of justice.

**B. The Commissioner Erred in Granting KPMG's Motion to Dismiss for Timeliness**

The Commissioner improperly dismissed FutureSelect's appeal as untimely without addressing the pertinent legal questions regarding whether a non-signatory to an arbitration agreement should be compelled to go through the burdensome time and expense to arbitrate before any review of the gateway dispute. That refusal was error not only because it violated *Hill* and the constitutional right to a jury trial, but because it was simply wrong: the appeal was not untimely.

A request for reconsideration of an order of the Court of Appeals based upon an intervening change in the law is not untimely where the intervening change in law occurred outside the prescribed time to appeal the order. *State v. Schwab*, 134 Wn. App. 635, 647, 141 P.3d 658 (2006) (reversing a prior decision under RAP 2.5(c)(2), “Nor is the [appellant’s] motion untimely because the Supreme Court’s [intervening decision] was not foreseeable by any court or party involved in this case.”). In *Hill*, the Supreme Court decision that gave FutureSelect a right to immediate appeal, was decided in September 2013, nearly two years after the Court of Appeals’ Denial of Review. In this case, just as in *Schwab*, the intervening decision was not foreseeable by any court or party involved in this case. Because the *Hill* decision was not foreseeable at the time of the Court of Appeals’ Denial of Review, FutureSelect’s current request for reconsideration is not untimely.

When the Superior Court summarily ordered FutureSelect and KPMG to arbitrate in 2011, FutureSelect timely appealed. That appeal was denied in the Court of Appeals’ discretion. Appendix B. Subsequently, this court in *Hill* held that “[w]hen the trial court declines to compel arbitration, that decision is immediately appealable . . . . **If a court compels arbitration without deciding the validity of the arbitration clause, a party may be forced to proceed through a**

**potentially costly arbitration before having the opportunity to appeal.**

... **We find no support** in the rules of procedure or case law for the Court of Appeals' decision to compel arbitration without considering whether the arbitration clause is even valid." *Hill*, 179 Wn.2d at 54-55 (emphasis added).

Moreover, FutureSelect's current attempt at appellate review comes as the result of a verdict—and final judgment—against EY in late 2015 that concluded proceedings involving all other defendants. That judgment is significant for two reasons. *First*, FutureSelect, filed its renewed appeal on January 15, 2016, requesting review of the June 3, 2011 order of the Superior Court granting KPMG's motion to compel arbitration, and that appeal was within the time limits prescribed following entry of judgment. CP 712. *Second*, the EY jury verdict necessitated further pursuit of KPMG. Because the jury held EY responsible only for damages occurring while it was the auditor—and not in the subsequent years when KPMG became the auditor—FutureSelect now has to assert its claim for those years against KPMG.

Finally, to whatever extent appellate review was not available as a matter of right, the Appellate Court always has the right to review its own previous decision and modify that decision in the interest of justice based on its current understanding of the law. RAP 2.5(c)(2) ("The appellate

court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review."); *State v. Schwab*, 163 Wn.2d 664, 672-73, 185 P.3d 1151 (2008) (RAP 2.5(c)(2) "allows a prior appellate holding in the same case to be reconsidered where there has been an intervening change in the law."); *Roberson v. Perez*, 156 Wn.2d 33, 43, 123 P.3d 844 (2005) ("An appellate court's discretion to disregard the law of the case doctrine is at its apex when there has been a subsequent change in controlling precedent on appeal.").

### **C. The Public Interest Warrants Review**

#### **1. Non-Signatory FutureSelect Should Not Be Compelled to Forego Its Constitutional Right to a Jury**

It is well settled that contract defenses can be used to challenge the enforceability of an arbitration agreement. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 383-84, 191 P.3d 845 (2008). "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. at 83 (citation omitted). Washington law generally favors arbitration when "the parties agree by contract to submit their disputes to an arbitrator." *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998) (emphasis added). With very few exceptions, a non-signatory to an

arbitration agreement cannot be compelled to arbitrate. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 810-11, 225 P.3d 213 (2009).

KPMG moved to compel arbitration based on an agreement between KPMG and the Rye Funds—not FutureSelect. FutureSelect is not a signatory to nor a beneficiary of the agreement between KPMG and the Rye Funds. “As a general rule, nonsignatories are not bound by arbitration clauses.” *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 460, 268 P.3d 917 (2012). “[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, 923, 231 P.3d 1252 (quoting *Satomi*, 167 Wn.2d at 810) (internal quotation marks omitted); *Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn. App. 890, 898, 988 P.2d 12 (1999).

Courts have only recognized “limited exceptions” to the rule that nonsignatories cannot be compelled to arbitrate. *Woodall*, 155 Wn. App. at 923; *Satomi*, 167 Wn.2d at 810. A limited exception to the rule that nonsignatories cannot be bound by arbitration clauses is if the nonsignatory’s claim is derivative. As the Superior Court subsequently held, FutureSelect’s claims are not derivative. CP 678-94.

FutureSelect asserts negligent misrepresentation claims and Washington State Securities Acts claims against KPMG. CP 38-39; 46-

47. FutureSelect did not assert any contract claims based on KPMG's engagement agreements with the Rye Funds. In fact, courts addressing the precise issue here—whether under Delaware<sup>3</sup> law Madoff-related claims against auditors for inducement and misrepresentation are direct or derivative—have repeatedly held that such claims are direct. *Askenazy v. KPMG LLP*, 988 N.E.2d 463, 466-69, 83 Mass. App. Ct. 649 (2013); *KPMG LLP v. Cocchi*, 88 So. 3d 327, 329, 37 Fla. L. Weekly D1081 (Fla. Dist. Ct. App. 2012); *Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61, 79-80 (S.D.N.Y. 2010); *Stephenson v. Citgo Grp., Ltd.*, 700 F. Supp. 2d 599, 611-12 (S.D.N.Y. 2010); *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 401 n.9 (S.D.N.Y. 2010); *see also* CP 684 (Superior Court explaining why these cases controlled).

To compel arbitration would fly in the face of this Court's decision in *Hill*, the Superior Court's well-reasoned opinion in the EY litigation, as well as all other case law in Washington holding a non-signatory cannot be compelled to forego its right to a jury trial and arbitrate.

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<sup>3</sup> Tremont is a Delaware partnership, therefore whether claims by a limited partner such as FutureSelect are direct or derivative is governed by Delaware law. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 108-09, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991).

## 2. The Public Has an Interest in a Jury Trial

FutureSelect's claims against KPMG raise issues of substantial public interest. The United States Supreme Court has held that auditors like KPMG are the "public watchdog" with "ultimate allegiance to the . . . investing public." *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18, 104 S. Ct. 1495, 79 L. Ed. 2d 826 (1984); *see also In re Metro. Sec. Litig.*, 532 F. Supp. 2d 1260, 1301 (E.D. Wash. 2007); *FutureSelect I*, 175 Wn. App. at 871 & n.83-84. Here, FutureSelect is a Washington member of that investing public and did not agree to arbitrate.

FutureSelect has a constitutional right to a jury trial. What is at stake here is determining who should decide the responsibility of the "public watchdog" in the largest financial fraud in United States history. Given concerns over numerous recent abuses committed in the financial industry, as well as the fact that the *only* public civil jury trial to date regarding the Madoff fraud was FutureSelect's against EY here in Washington—questions about KPMG's responsibility for the Madoff fraud are questions much better decided publicly than behind closed doors in a private arbitration.

### D. The Commissioner's Interpretation of the *Hill* Opinion Did Not Require Dismissal

In *Hill v. Garda*, this Court recognized the importance of preliminary review by the trial courts of the threshold matter of

enforceability of arbitration agreements. *Hill*, 179 Wn.2d at 57. This Court's opinion suggests that a party should be permitted an appeal as a right following an order compelling arbitration.

When the trial court declines to compel arbitration, that decision is immediately appealable . . . . While we have never addressed whether the opposite is always true, similar considerations are at play. **If a court compels arbitration without deciding the validity of the arbitration clause, a party may be forced to proceed through a potentially costly arbitration before having the opportunity to appeal.**

. . . **We find no support** in the rules of procedure or case law for the Court of Appeals' decision to compel arbitration without considering whether the arbitration clause is even valid.

*Id.* at 54-55 (emphasis added). However, the Commissioner ignored this language and dismissed FutureSelect's appeal. Order at 3 (Appendix A).

But, even if the *Hill* opinion does not create a right to appeal an order compelling arbitration, the Commissioner should not have denied FutureSelect discretionary review on the issue of enforceability. *See Huntley v. Frito-Lay, Inc.*, 96 Wn. App. 398, 400, 979 P.2d 488 (1999) (recognizing that even if an appeal is procedurally improper when compelled to arbitrate, the issue of enforceability of an arbitration agreement still merits discretionary review because "it would be a useless act to engage in an arbitration of state-law claims if they are not subject to arbitration.") (footnote omitted); *see also*, RAP 1.2(a) (Appellate rules

“will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.”); *State v. Hathaway*, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (Where a “challenge is not properly before [the Appellate Court] as a matter of right . . . RAP 1.2(c) permits us to waive or alter the rules of appellate procedure ‘in order to serve the ends of justice.’”).

Forcing FutureSelect and KPMG to arbitrate the claims before FutureSelect has even the opportunity to have the applicability of the arbitration clause reviewed—particularly in light of the subsequent full opinion of the Superior Court holding that FutureSelect was *not* bound by a nearly identical arbitration clause between the Rye Funds and KPMG’s co-defendant, EY—would be costly, inefficient, and would only serve to delay the inevitable jury trial to which FutureSelect is entitled. To promote justice and pursuant to RAP 13.4(b)(1), (3) and (4), this Court should review the improper order of the trial court compelling arbitration.

## **VII. CONCLUSION**

For the foregoing reasons, FutureSelect respectfully requests that pursuant to RAP 13.4(b), this Court review the Court of Appeals’ October 5, 2016 Order, and the Commissioner’s and the Superior Court’s and Court of Appeals’ related orders.

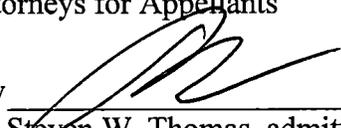
Respectfully submitted this 4th day of November, 2016.

**GORDON TILDEN THOMAS & CORDELL LLP**  
Attorneys for Appellants

By 

\_\_\_\_\_  
Jeffrey M. Thomas, WSBA #21175  
1001 Fourth Avenue, Suite 4000  
Seattle, Washington 98154  
Telephone: (206) 467-6477  
Facsimile: (206) 467-6292  
Email: [jthomas@gordontilden.com](mailto:jthomas@gordontilden.com)

**THOMAS, ALEXANDER & FORRESTER LLP**  
Attorneys for Appellants

By   


\_\_\_\_\_  
Steven W. Thomas, admitted *pro hac vice*  
Emily Alexander, admitted *pro hac vice*  
Mark H. Forrester, admitted *pro hac vice*  
14 27th Avenue  
Venice, CA 90291  
Telephone: (310) 961-2536  
Facsimile: (310) 526-6852  
Email: [steventhomas@tafattorneys.com](mailto:steventhomas@tafattorneys.com)  
[emilyalexander@tafattorneys.com](mailto:emilyalexander@tafattorneys.com)  
[markforrester@tafattorneys.com](mailto:markforrester@tafattorneys.com)

**DECLARATION OF SERVICE**

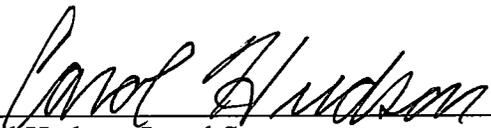
The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be delivered to:

**Attorneys for Respondent KPMG:**

George E. Greer, WSBA #11050  
Paul F. Rugani, WSBA #38664  
Orrick, Herrington & Sutcliffe LLP  
701 Fifth Avenue, Suite 5600  
Seattle, WA 98104-7097  
[ggreer@orrick.com](mailto:ggreer@orrick.com)  
[prugani@orrick.com](mailto:prugani@orrick.com)  
Via Email and Hand Delivery

Jonathan Pahl  
David A. Forkner  
Williams & Connolly LLP  
725 Twelfth Street, N.W.  
Washington, D.C. 20005  
[dforkner@wc.com](mailto:dforkner@wc.com)  
[jpahl@wc.com](mailto:jpahl@wc.com)  
Via Email and U.S. Mail

DATED this 4th day of November, 2016, at Seattle, Washington.

  
\_\_\_\_\_  
Carol Hudson, Legal Secretary  
Gordon Tilden Thomas & Cordell LLP

# **APPENDIX A**

*The Court of Appeals*  
of the  
*State of Washington*

RICHARD D. JOHNSON,  
*Court Administrator/Clerk*

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 587-5505

May 20, 2016

Susannah Christiana Carr  
Gordon Tilden Thomas & Cordell LLP  
1001 4th Ave Ste 4000  
Seattle, WA 98154-1007  
scarr@gordontilden.com

Jeffrey M. Thomas  
Gordon Tilden Thomas & Cordell LLP  
1001 4th Ave Ste 4000  
Seattle, WA 98154-1007  
jthomas@gordontilden.com

Emily Alexander  
Thomas Alexander & Forrester LLP  
14 - 27th Avenue  
Venice, CA 90291  
emilyalexander@tafattorneys.com

Steven W. Thomas  
Thomas, Alexander & Forrester LLP  
14 - 27th Avenue  
Venice, CA 90291  
steventhomas@tafattorneys.com

George E. Greer  
Orrick Herrington & Sutcliffe LLP  
701 5th Ave Ste 5600  
Seattle, WA 98104-7045  
ggreer@orrick.com

Mark Forrester  
Thomas Alexander & Forrester LLP  
14 - 27th Avenue  
Venice, CA 90291  
markforrester@tafattorneys.com

John K. Villa  
Williams & Connolly LLP  
725 Twelfth Street N.W.  
Washington, DC 20005  
jvilla@wc.com

Paul Francis Rugani  
Orrick Herrington & Sutcliffe LLP  
701 5th Ave Ste 5600  
Seattle, WA 98104-7045  
prugani@orrick.com

Jonathan Pahl  
William & Connolly LLP  
725 Twelfth Street NW  
Washington, DC 20005  
jpahl@wc.com

David A. Forkner  
Williams & Connolly LLP  
725 Twelfth Street N.W.  
Washington, DC 20005  
dforkner@wc.com

CASE #: 74611-1-I  
FutureSelect Portfolio Management, Inc., et al., Apps. v. KPMG LLP, Res.  
King County No. 10-2-30732-0 SEA

Counsel:

Page 2 of 4

74611-1-I, FutureSelect Portfolio Management, Inc., et al. v. KPMG LLP  
May 20, 2016

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on May 19, 2016, regarding respondent KPMG's motion to dismiss appeal and motion to disqualify Thomas Alexander & Forrester:

**NOTATION RULING**

**FutureSelect Portfolio Management, Inc. v. KPMG LLP, No. 74611-1-I  
May 19, 2016**

On January 15, 2016, plaintiffs (collectively FutureSelect) filed a notice of appeal of a June 3, 2011 order compelling arbitration and staying action pending arbitration. On April 4, 2016, defendant KPMG LLP filed a motion to dismiss, arguing that the June 3 order is not properly before this Court. As explained below, KPMG's motion to dismiss is granted, and this case is dismissed.

**FACTS**

In August 2010, FutureSelect filed a lawsuit against the investment manager and auditors of Rye Funds, in which FutureSelect invested. KPMG was one of the defendants. On June 3, 2011, the trial court granted KPMG's motion to compel arbitration and stayed the case against KPMG pending arbitration. FutureSelect filed a notice of appeal to this Court (No. 67302-5-I). KPMG filed a motion to dismiss, arguing that the order compelling arbitration was not appealable and that discretionary review was not warranted under RAP 2.3(b). On November 11, 2011, a three-judge panel of this Court granted KPMG's motion to dismiss and denied discretionary review, thus terminating review. FutureSelect did not seek review of the order, and a certificate of finality was issued in December 30, 2011. FutureSelect has not initiated arbitration against KPMG.

More than five years later, in January 2016, FutureSelect filed a notice of appeal of the same June 3, 2011 order compelling arbitration and staying action pending arbitration.

**DECISION**

FutureSelect argues that it has a right to appeal the June 3, 2011 order compelling arbitration as a matter of right, citing Hill v. Garda CL Northwest, Inc., 179 Wn.2d 47, 308 P.3d 635 (2013). But there are several problems with this argument. First, this Court has already decided in No. 67302-5-I that the June 3 order was not appealable and did not merit discretionary review under RAP 2.3(b). This Court granted KPMG's motion to dismiss and denied discretionary review. FutureSelect does not explain why this Court can and should revisit the same issue at this time after FutureSelect did not pursue a petition for review of this Court's November 2011 order terminating review.

FutureSelect argues that this Court may revisit its November 2011 order terminating review under RAP 2.5(c), which applies “if the same case is again before the appellate court following a remand.” “The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.” RAP 2.5(c)(2). But RAP 2.5 addresses an appellate court’s scope of review and assumes that an appeal is otherwise properly before the court.

Further, Hill does not appear to be a change in the law on the appealability of an order compelling arbitration. Hill did not hold that such an order is appealable. That case involved a grant of discretionary review. There, this Court granted discretionary review under RAP 2.3(b)(4) and affirmed an order compelling arbitration while reversing the trial court on a class arbitration issue. See Hill, 179 Wn.2d at 52. In affirming the order compelling arbitration, this Court did not address whether the arbitration clause was unconscionable. The Supreme Court granted a petition for review and held that the unconscionability issue should be addressed. See id. at 54. In so holding, the Court noted that if “a court compels arbitration without deciding the validity of the arbitration clause, a party may be forced to proceed through a potentially costly arbitration before having the opportunity to appeal.” Id. Hill does not involve an issue of appealability and is not a basis for this Court to revisit its November 2011 order terminating review, even assuming that FutureSelect’s appeal is timely.

Case law appears to continue to hold that an order compelling arbitration is not appealable as a matter of right under RAP 2.2(a) but is subject to discretionary review under RAP 2.3(b). See Saleemi v. Doctor’s Assocs., Inc., 176 Wn.2d 368, 376, 292 P.3d 108 (2013) (“At the time of the order compelling arbitration, DAI had only a right to move for discretionary review under RAP 2.3, not for review as of right under RAP 2.2.”); Saleemi, 176 Wn.2d at 387 (Madsen J., concurring) (“Permitting interlocutory review is disfavored because it can cause unnecessary delay of the arbitral process.”); 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.”).

I conclude that FutureSelect’s appeal is untimely and is not properly before this Court.

KPMG filed a motion to disqualify Thomas Alexander & Forrester, counsel for FutureSelect, in connection with its claims against KPMG in this action. The motion is denied without prejudice for KPMG to raise the issue in the arbitration or in the trial court.

Page 4 of 4

74611-1-I, FutureSelect Portfolio Management, Inc., et al. v. KPMG LLP  
May 20, 2016

Therefore, it is

**ORDERED** that this case is dismissed.

Masako Kanazawa  
Commissioner

Sincerely,

A handwritten signature in black ink, appearing to read "R.D. Johnson", with a long horizontal flourish extending to the right.

Richard D. Johnson  
Court Administrator/Clerk

khn

c: The Hon. Beth M. Andrus

# **APPENDIX B**



# **APPENDIX C**

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. 67302-5-1

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.

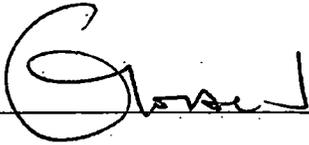
Now, therefore, it is hereby

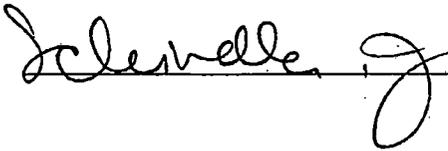
No. 67302-5-1/2

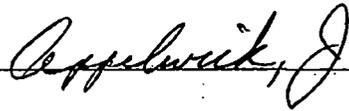
ORDERED that FutureSelect's request for discretionary review is denied; and it is further

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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