

NO. 74611-1-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.

---

RESPONDENT'S BRIEF OF KPMG LLP

---

George E. Greer (WSBA No. 11050)  
Paul F. Rugani (WSBA No. 38664)  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
701 Fifth Avenue, Suite 5600  
Seattle, WA 98104-7097  
(206) 839-4300

Of Counsel  
John K. Villa  
David A. Forkner  
Jonathan E. Pahl  
WILLIAMS & CONNOLLY LLP  
725 Twelfth Street, NW  
Washington, DC 20005  
(202) 434-5000

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2016 MAY 11 PM 4:34

**TABLE OF CONTENTS**

I. Introduction ..... 1

II. Statement of the issues ..... 3

III. Counterstatement of the case ..... 4

    A. Background ..... 4

        1. Madoff and his co-conspirators ran an undetected Ponzi scheme for decades ..... 4

        2. Tremont established the Rye Funds allegedly “as an opportunity to invest in Madoff” ..... 5

        3. FutureSelect sought investments managed by Madoff and invested in the Rye Funds ..... 6

        4. KPMG performed routine year-end audits of the Rye Funds’ financial statements starting in 2004 ..... 6

    B. Procedural history ..... 8

        1. FutureSelect awaited the outcome of another matter brought on its behalf before initiating this lawsuit ..... 8

        2. In this case, FutureSelect sued seven defendants including Tremont entities and the Rye Funds’ auditors ..... 9

        3. The Superior Court stayed the claims against KPMG pending arbitration ..... 10

        4. FutureSelect chose to prioritize its claims against other parties over its claims against KPMG ..... 11

        5. KPMG has prevailed in all its Rye Fund litigation ..... 12

IV. Summary of the argument ..... 14

V. Argument ..... 16

    A. The standard of review is mixed in the context of a stay compelling arbitration ..... 16

    B. Arbitration may be enforced on any grounds supported by state law ..... 17

    C. FutureSelect’s claims are derivative, belong to the Rye Funds, and must be arbitrated ..... 18

Table of contents—cont'd

1.	<i>Tooley</i> requires a remedy-focused analysis of the complaint, disregarding the plaintiffs' labels .....	18
2.	The actual allegations of loss in the complaint establish the derivative nature of the claims .....	19
3.	Courts around the country have found Rye Fund–investor claims against KPMG derivative.....	26
4.	FutureSelect's labeling of the claims as "misrepresentation" claims does not change their derivative nature .....	27
5.	The cases FutureSelect cites do not change the derivative nature of these claims.....	30
6.	FutureSelect's reliance on a Superior Court order <i>not</i> involving KPMG does not change the derivative nature of these claims.....	34
D.	FutureSelect is otherwise obligated to arbitrate its claims against KPMG .....	38
1.	KPMG's alternative arguments do not preclude arbitration .....	41
2.	FutureSelect must arbitrate .....	42
VI.	Conclusion .....	45

**TABLE OF AUTHORITIES**

**CASES**

*Agile Safety Variable Fund, L.P. v. Tremont Grp. Holdings Inc., et al.*, No. 10 CV 2904, slip op. (Colo. Dist. Ct. Apr. 25, 2012).....13, 26, 28, 37

*Aholelei v. Dept. of Pub. Safety*, 488 F.3d 1144 (9th Cir. 2007) .....40

*AHW Inv. P’ship, MFS v. Citigroup Inc.*, 980 F. Supp. 2d 510 (S.D.N.Y. 2011).....1, 30

*Albert v. Alex Brown Mgmt. Servs., Inc.*, No. Civ.A. 762-N, Civ.A. 763-N, 2005 WL 2130607 (Del. Ch. Aug. 26, 2005) .....1

*Anglo American Security Fund, L.P. v. S.R. Global International Fund, L.P.*, 829 A.2d 143 (Del. Ch. 2003) .....36, 37

*Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372 (S.D.N.Y. 2010).....32

*Anwar v. Fairfield Greenwich Ltd.*, 884 F. Supp. 2d 92 (S.D.N.Y. 2012).....32

*Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009) .....17, 42

*Askenazy v. KPMG LLP*, 988 N.E.2d 463 (Mass. App. 2013) .....26

*Askenazy v. Tremont Grp. Holdings, Inc.*, No. SUCV 2010-4801, 2015 WL 1095684 (Mass. Super. Mar. 10, 2015) .....8, 13, 27, 32

*Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC*, 922 A.2d 1169 (Del. Ch. 2006).....29

*Broyles v. Cantor Fitzgerald & Co.*, C.A. No. 10-864-JJB, 10-857-JJB, 2013 WL 1681150 (M.D. La. 2013).....29

*Cal. Pub. Emps. Ret. Sys. v. Shearman & Sterling*, 741 N.E.2d 101 (N.Y. 2000).....39

*Canal Station N. Condo. Ass’n v. Ballard Leary Phase II, LP*, 179 Wn. App. 289 (2013) .....42

*City of Spokane v. Marr*, 129 Wn. App. 890 (2005).....34

*Comer v. Micor, Inc.*, 436 F.3d 1098 (9th Cir. 2006).....44, 45

<i>Conom v. Snohomish County</i> , 155 Wn.2d 154 (2005).....	1
<i>Culverhouse v. Paulson &amp; Co.</i> , 133 A.3d 195 (Del. 2016) .....	21
<i>Cunningham v. Reliable Concrete Pumping, Inc.</i> , 126 Wn. App. 222 (2005) .....	35
<i>In re Det. of Ambers</i> , 160 Wn.2d 543 (2007) .....	37, 38
<i>Doe v. Princess Cruise Lines, Ltd.</i> , 657 F.3d 1204 (11th Cir.2011) .....	42
<i>Eastham Capital Appreciation Fund L.P. v. KPMG LLP</i> , 2013 WL 7018202 (Aug. 21, 2013).....	14
<i>Ernst &amp; Young LLP v. Quinn</i> , C.A. No. 09-cv-1164 (JCH), 2009 WL 3571573 (D. Conn. Oct. 26, 2009) .....	28, 29, 37
<i>Feldman v. Cutaia</i> , 951 A.2d 727 (Del. 2008) .....	18, 23, 25, 31
<i>Fleetwood Enters., Inc. v. Gaskamp</i> , 280 F.3d 1069 (5th Cir. 2002) .....	45
<i>FutureSelect Portfolio Mgmt. v. Tremont Grp. Holdings, Inc.</i> , 180 Wn.2d 954 (2014) .....	40
<i>Haberman v. Wash. Public Power Supply Sys.</i> , 109 Wn.2d 107 (1987) .....	40
<i>Hakopian v. Mukasey</i> , 551 F.3d 843 (9th Cir. 2008).....	40
<i>Hartsel v. Vanguard Grp., Inc.</i> , 2011 WL 2421003 (Del. Ch. June 15, 2011).....	19
<i>Hillier v. Siller &amp; Cohen</i> , No. 09CA723 (Fla. Cir. Ct.).....	13, 26
<i>Hribar v. Marsh &amp; McLennan Cos.</i> , 73 A.D.3d 859 (N.Y. App. Div. 2010) .....	29
<i>Isakov v. Ernst &amp; Young Ltd.</i> , No. 3:10cv1517 (MRK), 2012 WL 951897 (D. Conn. 2012) .....	30
<i>In re J.P. Morgan Chase &amp; Co. S'holder Litig.</i> , 906 A.2d 808 (Del. Ch. 2005).....	19, 35, 36
<i>In re J.P. Morgan Chase &amp; Co. S'holder Litig.</i> , C.A. No. 531-N, 2005 WL 5783536 (Del. Ch. Apr. 29, 2005).....	24
<i>Kim v. Moffett</i> , 156 Wn. App. 689 (2010) .....	39

<i>King v. Olympic Pipeline Co.</i> , 104 Wn. App. 338 (2000) .....	16
<i>KPMG LLP v. Cocchi</i> , 88 So.3d 327 (Fla. Dist. Ct. App. 2012) .....	26
<i>Lagrone Canst., LLC v. Landmark, LLC</i> , 40 F. Supp. 3d 769, 781 (N.D. Miss. 2014).....	45
<i>Landis v. N. Am. Co.</i> , 299 U.S. 248 (1936) .....	16
<i>Litman v. Prudential-Bache Props., Inc.</i> , 611 A.2d 12 (Del. Ch. 1992).....	18, 23
<i>Mayer v. Sto Industries, Inc.</i> , 156 Wn.2d 677 (2006).....	17
<i>McClure v. Tremaine</i> , 77 Wn. App. 312 (1995).....	17
<i>Metro. Life Ins. Co. v. Tremont Grp. Holdings, Inc.</i> , No. Civ.A. 7092–VCP, 2012 WL 6632681, at *8 (Del. Ch. Dec. 20, 2012).....	18, 31, 37
<i>Micro Enhancement Int’l, Inc. v. Coopers &amp; Lybrand, LLP</i> , 110 Wn. App. 412 (2002) .....	35
<i>Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983).....	16
<i>New Castle County v. Goodman</i> , 461 A.2d 1012 (Del. 1983) .....	19
<i>Newman v. Family Mgmt. Corp.</i> , 748 F. Supp. 2d 299 (S.D.N.Y. 2010).....	30
<i>Poptech, L.P. v. Stewardship Inv. Advisors, LLC</i> , 849 F. Supp. 2d 249 (D. Conn. 2012).....	30, 31
<i>Port of Seattle v. Lexington Ins. Co.</i> , 111 Wn. App. 901 (2002) .....	41
<i>Postlewait Constr., Inc. v. Great Am. Ins. Cos.</i> , 106 Wn.2d 96 (1986) .....	39
<i>R.J. Griffin &amp; Co. v. Beach Club II Homeowners Ass’n</i> , 384 F.3d 157 (4th Cir. 2004) .....	45
<i>Ex Parte Regions Fin. Corp.</i> , 67 So. 3d 45 (Ala. 2010) .....	29
<i>Romney v. Franciscan Med. Group</i> , 186 Wn. App. 728 (2015) .....	42

<i>Saltz v. First Frontier, LP</i> , 782 F. Supp. 2d 61 (S.D.N.Y. 2010).....	30, 34, 41, 42
<i>San Diego County Employees’ Ret. Assoc. v. Maounis</i> , 749 F. Supp. 2d 104 (S.D.N.Y. 2010).....	29
<i>Sandalwood Debt Fund A, L.P. v. KPMG LLP</i> , 2013 WL 3284126 (N.J. App. July 1, 2013).....	13, 26, 27
<i>Satomi Owners Ass’n v. Satomi, LLC</i> , 167 Wn.2d 781 (2009) (en banc) .....	17, 18
<i>In re SemCrude L.P.</i> , 796 F.3d 310 (3d Cir. 2015) .....	29
<i>Smith v. Waste Mgmt. Inc.</i> , 407 F.3d 381 (5th Cir. 2005) .....	29, 31
<i>Stephenson v. Citgo Group, Ltd.</i> , 700 F. Supp. 2d 599 (S.D.N.Y. 2010).....	30, 32
<i>Stephenson v. PricewaterhouseCoopers, LLP</i> , 482 F. App’x 618 (2d Cir. 2012) .....	32, 33
<i>Sweet Dreams Unlimited, Inc. v. Dial–A–Mattress Int’l, Ltd.</i> , 1 F.3d 639 (7th Cir. 1993) .....	42
<i>In re Syncor Int’l Corp. S’holders Litig.</i> , 857 A.2d 994 (Del. Ch. 2004).....	19
<i>T-Mobile USA, Inc. v. Montijo</i> , 2012 WL 6194204 (W.D. Wash. Dec. 11, 2012) .....	16
<i>Thompson v. Dep’t of Licensing</i> , 138 Wn.2d 783 (1999) .....	10
<i>TIFD III-X LLC v. Fuehauf Prod. Co.</i> , 883 A.2d 854 (Del. Ch. 2004).....	18, 21, 23
<i>Tooley v. Donaldson, Lufkin, &amp; Jenrette, Inc.</i> , 845 A.2d 1031 (Del. 2004) .....	<i>passim</i>
<i>Townsend v. Quadrant Corp.</i> , 153 Wn. App. 870 (2009) .....	41
<i>Townsend v. Quadrant Corp.</i> , 173 Wn.2d 451 (2012) .....	42, 44
<i>In re Tremont Sec. Law, State Law, &amp; Ins. Litig.</i> , 703 F. Supp. 2d 362 (S.D.N.Y. 2010).....	12
<i>Wexler v. Tremont Partners, Inc.</i> , No. 09-101615 (N.Y. Sup. Ct.).....	13, 26

*Woods v. Christensen Shipyards, Ltd.*, No. 04-61432-CIV,  
2005 WL 5654643 (S.D. Fla. Sept. 23, 2005) .....45

*Zutty v. Rye Select Broad Market Prime Fund, L.P.*,  
2011 WL 5962804 (N.Y. Sup. Ct. Apr. 15, 2011).....13, 26, 37

**OTHER AUTHORITIES**

9 U.S.C. § 3 .....16

6 Del. Code §§ 17-107(13), 17-701 .....22

G.R. 14.1(b) .....19

RAP 2.5(a) .....37, 38

RCW 7.04A.070(3).....41

RCW 7.04A.070(6).....16

Restatement (Second) of Torts § 552.....1, 13

A threshold issue in this appeal is whether appellate jurisdiction exists. *See Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005) (“A court lacking jurisdiction must enter an order of dismissal.”). KPMG’s motion to dismiss the appeal on jurisdictional grounds is fully briefed and pending before this Court. Also fully briefed and pending is KPMG’s motion to disqualify one of the law firms representing plaintiff-appellants, given its access to confidential KPMG materials and lack of an effective screen. Because those issues are addressed in separate motions, they are not addressed in this brief.

## I. INTRODUCTION

KPMG had no involvement in Bernard Madoff’s Ponzi scheme, nor was KPMG engaged to audit the financial statements of Madoff’s firm, Bernard L. Madoff Investment Securities LLC (“BMIS”). Nonetheless, hoping to access a deep pocket, Plaintiff-Appellants (collectively “FutureSelect”) brought claims against KPMG. FutureSelect seeks to recover the value of its partnership interests in three private investment funds (collectively the “Rye Funds”), that were devalued when Madoff revealed the Ponzi scheme. Unable to sue Madoff or BMIS because they are in bankruptcy, FutureSelect, like other limited partners in the Rye Funds, tried to blame others for their losses. Of the Madoff-related cases KPMG has faced, KPMG has won them all—all discontinued voluntarily, abandoned, dismissed, or arbitrated and adjudicated in KPMG’s favor on the grounds that its audits complied with professional standards and KPMG owed no obligations to Rye Fund investors.<sup>1</sup>

---

<sup>1</sup> *See infra* Section III.B.5; *see also infra* Section V.C.3 (cases compelling arbitration).

FutureSelect's claims against KPMG, which were ordered to be arbitrated five years ago and remain stayed, allege that FutureSelect lost the value of its partnership interests in the Rye Funds because the Rye Funds invested in brokerage accounts at BMIS and Madoff stole the Rye Funds' assets in his massive criminal scheme. FutureSelect sued not only KPMG, but the Rye Funds' general partner, Tremont, Tremont's corporate parents, and the other auditors of the Rye Funds.

For its part, KPMG was hired not to audit BMIS, but to audit the year-end financial statements of the Rye Funds. KPMG did so pursuant to written engagement agreements. The engagement agreements specified the professional services KPMG would perform for the Rye Funds, including auditing the Rye Funds' year-end financial statements and issuing audit opinions in accordance with generally accepted auditing standards ("GAAS"). The engagement agreements also contain binding arbitration provisions, which provide that mediation or arbitration are the "sole methodologies" for resolving disputes.

FutureSelect surmises that KPMG's audits should have uncovered the Ponzi scheme that eluded the U.S. Securities and Exchange Commission ("SEC"), the Financial Industry Regulatory Authority ("FINRA"), other government regulators, prominent financial institutions, hedge funds, accounting firms and thousands of sophisticated investors, including FutureSelect. In particular, FutureSelect alleges that KPMG "violated GAAS when [it] issued [its] unqualified audit opinions for the Rye Funds. CP 28 ¶ 109.

KPMG promptly moved to compel arbitration or, in the alternative, to dismiss the claims against it. After full briefing and hours of oral

argument, the King County Superior Court issued an order in June 2011. It found that FutureSelect’s “claims against KPMG are subject to mandatory arbitration and this action shall be stayed pending resolution of that arbitration.” CP 401.

FutureSelect filed a notice of appeal on June 16, 2011, nearly five years ago, seeking this Court’s review of the stay order. *See* CP \_\_ (Sub No. 180).<sup>2</sup> KPMG moved to dismiss the appeal because orders granting stays pending compulsory arbitration are not subject to a right of appeal and the criteria for discretionary review were not met. *See* No. 67302-5-I (Aug. 16, 2011) (Declaration of George E. Greer (“Greer Decl.”), Ex. A). This Court agreed, dismissed FutureSelect’s 2011 appeal, and denied its request for discretionary review. *See id.* (Nov. 21, 2011) (Greer Decl., Ex. B). Since that denial, FutureSelect has done nothing to pursue any claim against KPMG—not in 2011 or in the years since. Instead, FutureSelect let its claims against KPMG sit idle for nearly five years. During that time, FutureSelect chose not to pursue arbitration against KPMG but instead litigated against other parties. Inexplicably, with its claims against KPMG untouched and stayed, FutureSelect now asks this Court to entertain a second piecemeal appeal from a five-year old interlocutory order.

## II. STATEMENT OF THE ISSUES

The issue on appeal is whether the Superior Court properly stayed the proceedings against KPMG pending mandatory arbitration. It did.<sup>3</sup>

---

<sup>2</sup> Materials cited as “CP \_\_” refer to materials designated in KPMG’s Supplemental Designation of Clerk’s Papers filed concurrently with this brief.

<sup>3</sup> Other issues before the Court are not addressed in this brief but are the subject of separately filed motions, which address (a) whether this appeal is properly before the Court and (b) whether one of the law firms representing FutureSelect is disqualified.

### III. COUNTERSTATEMENT OF THE CASE

#### A. Background

##### 1. Madoff and his co-conspirators ran an undetected Ponzi scheme for decades

Until December 2008, Madoff was a prominent and respected member of the financial community. He had served on the NASDAQ stock market's board of governors and as a member of the board of directors of the National Association of Securities Dealers ("NASD"). He founded and was chairman of BMIS—a broker-dealer that had been in business since the 1960s and was registered with, and regulated by, among others, the Securities and Exchange Commission ("SEC"), NASD, and NASD's successor, the Financial Industry Regulatory Authority ("FINRA").

Madoff's scheme operated for at least twenty years, and he never was caught; the fraud came to light only when Madoff encountered a liquidity problem in the financial crisis that required him to confess in December 2008. CP 14 ¶¶ 49–50. Since then, approximately a dozen co-conspirators have pleaded guilty to or been convicted of federal crimes for helping perpetuate and conceal the scheme. *See, e.g., United States v. O'Hara, Perez, Bonventre, Bongiorno, Crupi, P. Madoff, D. Kugel, C. Kugel, E. Lipkin, I. Lipkin et al.*, 10 Cr. 228 (LTS) (S.D.N.Y.) (judgments in criminal case); *United States v. DiPascali*, 09 Cr. 764 (RJS) (S.D.N.Y.) (judgment in criminal case)

The efforts of Madoff and his accomplices were so effective that the Ponzi scheme escaped detection for decades despite repeated investigations by multiple regulators. After his confession, the SEC sued Madoff and BMIS, and the United States government charged Madoff

with criminal counts to which he pleaded guilty and for which he was sentenced to 150 years in prison. CP 14 ¶ 50; *United States v. Madoff*, No. 09 Cr. 0213 (DC), (S.D.N.Y. June 29, 2009) (judgment in a criminal case).

**2. Tremont established the Rye Funds allegedly “as an opportunity to invest in Madoff”**

Tremont Group Holdings, Inc. (“Tremont Holdings”), a Delaware corporation, was formed in the 1990s and headquartered in Rye, New York. *See* CP 6 ¶ 19. Tremont Holdings operated as an investment manager of fund-of-hedge-fund products and multi-manager portfolios. Its subsidiary, Tremont Partners, Inc. (“Tremont”), acted as the general partner of those funds. CP 6 ¶ 20.

The Rye Funds are the Rye Select Broad Market Fund, LP (“Broad Market Fund”), the Rye Select Broad Market Prime Fund, LP (“Prime Fund”), and the Rye Select Broad Market XL Fund, LP (“XL”). CP 6 ¶ 20. Tremont organized the Broad Market Fund in 1994 and the Prime Fund in 1997, and both invested a substantial portion of their assets in brokerage accounts at BMIS. The Prime Fund’s strategy was the same as the Broad Market Fund’s except the Prime Fund used leverage to enhance returns. Tremont created the XL Fund in 2006 and used leverage, including total return swaps, to provide a return comparable to three times the performance of the Broad Market Fund.

Tremont allegedly sold the Rye Funds “as an opportunity to invest in Madoff with the assurances that Tremont knew Madoff [and] had conducted due diligence into Madoff’s operations[.]” CP 9 ¶ 32. For its services, “Tremont collected [over \$160 million] in ‘Management Fees’ and ‘Administrative Fees.’” CP 15 ¶ 54.

**3. FutureSelect sought investments managed by Madoff and invested in the Rye Funds**

Plaintiffs are FutureSelect Portfolio Management, Inc. (“Portfolio Management”), FutureSelect Prime Advisor II, LLC (“Prime Advisor”), The Merriwell Fund, L.P. (“Merriwell”), and Telesis IIW, LLC (“Telesis”) (collectively, “FutureSelect”). CP 5–6 ¶¶ 15–18. Portfolio Management is the operations manager of Prime Advisor, Merriwell, and Telesis, which are investment funds. CP 5 ¶ 15. Plaintiffs are all Delaware entities with their principal place of business in Washington. CP 5–6 ¶¶ 15–18.

FutureSelect sought out investments managed by Madoff, and according to Ron Ward, FutureSelect’s principal, he met personally with Madoff in the now-infamous Lipstick Building in New York. Following that meeting, FutureSelect began to invest in funds that invested in Madoff, eventually investing in the Rye Funds starting in 1998. CP 10–11 ¶ 38.

**4. KPMG performed routine year-end audits of the Rye Funds’ financial statements starting in 2004**

KPMG is a limited liability partnership based in New York. KPMG was not the original auditor for the Rye Funds. Instead, the original auditor was Goldstein Golub Kessler LLP, which was replaced by Ernst & Young LLP (“E&Y”) in 2000. CP 4 ¶ 11.<sup>4</sup> Neither discovered the Ponzi scheme, and each issued unqualified opinions in each year they were auditors. CP 7–8 ¶¶ 26–27. Six years after FutureSelect began investing in the Rye Funds, KPMG replaced E&Y. KPMG performed routine audits of the year-end financial statements of the Broad Market and Prime Funds from

---

<sup>4</sup> For purposes of this appeal only and except as contradicted or supplemented by unopposed affidavit evidence, KPMG accepts FutureSelect’s pleading *solely* to show the nature of the allegations and scope of the dispute.

2004 through 2007. CP 4 ¶ 11, 24 ¶ 95. KPMG performed routine audits of the year-end financial statements of the XL Fund in 2006 and 2007. CP 24 ¶ 95.

KPMG's audit work was performed in New York and its audit opinions were issued by its New York office pursuant to engagement agreements signed in New York and dated November 23, 2004; January 12, 2006; October 6, 2006; and October 15, 2007. CP 287–326. KPMG was not engaged to perform an audit of, or perform due diligence on, BMIS. CP 287–326. Instead, KPMG agreed to audit the year-end financial statements of the Rye Funds in accordance with generally accepted auditing standards “with the objective of expressing an opinion as to whether the presentation of the financial statements, taken as a whole, conforms with [those standards].” *E.g.*, CP 291. The engagement agreements provided that KPMG would earn roughly \$40,000 per audit. CP 298, 304, 308, 319, 326.

Under the engagement agreements, mediation followed by arbitration are the “sole methodologies” for resolving “[a]ny dispute or claim arising out of or relating to the engagement letter, or the services provided thereunder” or “any other services provided by or on behalf of KPMG.” CP 295. Furthermore, the enforceability of the arbitration clause, including the threshold question of arbitrability, “shall be governed by the Federal Arbitration Act and resolved by the arbitrators.” CP 300

For each audit year in question, KPMG issued single-page reports containing unqualified audit opinions. CP 8 ¶ 28. Tremont then sent the audited financial statements from its offices in New York to the Funds' existing limited partners including FutureSelect. *See* CP 289 ¶¶ 13–14.

The engagement agreements, however, restricted Tremont’s use of those audit opinions. CP 292. To include or reference KPMG’s audit opinions in offering materials used to solicit investors, Tremont would have had to secure KPMG’s consent and engage KPMG to perform additional “subsequent event” procedures and determine “whether [certain] information, or the manner of its presentation, is materially inconsistent with information, or the manner of its presentation, appearing in the financial statements.” CP 292. FutureSelect does not—and cannot—allege that such subsequent event procedures were performed because they were not, and there is “no evidence” KPMG gave its permission for Tremont to use its audit opinions to solicit investments. *Askenazy v. Tremont Grp. Holdings, Inc.*, No. SUCV 2010-4801, 2015 WL 1095684, at \*2 (Mass. Super. Mar. 10, 2015).

**B. Procedural history**

**1. FutureSelect awaited the outcome of another matter brought on its behalf before initiating this lawsuit**

In 2009, cases brought by limited partners in the Rye Funds were consolidated in front of Judge Griesa in the United States District Court for the Southern District of New York. CP 91, 98. Judge Griesa divided the complaints into three groups, a Securities Law Action, an Insurance Action, and a State Law Action. *Id.* Among the “lead plaintiffs” in the State Law Action was John Dennis, who brought derivative claims on behalf of FutureSelect Prime Advisor. CP 110 ¶ 23, CP 232–39. The State Law Action claimed, like here, that (1) “the limited partners in the Rye Funds were the intended beneficiaries of KPMG’s work;” (2) KPMG “violated GAAS;” and (3) as a result, the Rye Funds “lost all of their

capital.” CP 169 ¶ 332, 178 ¶ 362, 216 ¶ 527 (consolidated amended complaint). On February 27, 2009, FutureSelect acknowledged in a letter to investors that it was aware of, and would benefit from, those actions. CP 285.

One year later, on March 30, 2010, Judge Griesa dismissed the claims brought against KPMG in the State Law Action “because the claims against it are subject to mandatory arbitration.” CP 464. Three months after that and more than a year after the deadline for moving to dismiss, FutureSelect challenged—for the first time—Dennis’s right to act on its behalf. *See* CP 232–39.<sup>5</sup> FutureSelect almost simultaneously filed this suit in the King County Superior Court.

**2. In this case, FutureSelect sued seven defendants including Tremont entities and the Rye Funds’ auditors**

FutureSelect brought this lawsuit in August 2010 asserting claims against Tremont and its corporate parents, as well as three different audit firms for failing to uncover and prevent Madoff’s fraud. More than half the causes of action were asserted against Tremont and its corporate parents. The complaint alleges that Tremont represented that it “had conducted thorough due diligence of Madoff.” CP 9 ¶ 33. “[D]espite utterly failing to do what it had represented to investors,” however, “Tremont collected [more than \$160 million] in [fees].” CP 15 ¶ 54.

With respect to KPMG, FutureSelect alleged that beginning in 2004, KPMG was hired to perform year-end financial statement audits of

---

<sup>5</sup> That motion was denied on March 3, 2011. *In re Tremont State Law Action*, 08 Civ. 11117 (TPG), Dkt. No. 416 (S.D.N.Y. Mar. 3, 2011). Dennis remained part of the State Law Action until his derivative claims were voluntarily dismissed with prejudice on May 26, 2011. *Id.*, Dkt. No. 541.

the Rye Funds. FutureSelect asserted claims for (i) violation of the Washington State Securities Act (the “WSSA”), RCW 21.20.010,<sup>6</sup> and (ii) negligent misrepresentation. CP ¶¶ 152–59, CP 46–47 ¶¶ 209–16.). The fundamental assertion underlying these claims is that KPMG “[v]iolated [its] [p]rofessional duties.” CP 27. Plaintiffs claim KPMG failed to comply with GAAS, because “GAAS required the Auditors to audit Madoff’s operations and records relating to the Rye Funds’ reported investments and investment income.” CP 29 ¶ 111. Had KPMG conducted a GAAS-compliant audit, FutureSelect asserts, it “would have discovered the Madoff fraud.” CP 29 ¶ 112; *see also* CP 30 ¶ 117, 38 ¶ 155, 47 ¶ 214.

### **3. The Superior Court stayed the claims against KPMG pending arbitration**

On December 8, 2010, KPMG timely moved to compel arbitration and stay the action or, in the alternative, to dismiss. CP 55. Plaintiffs did not contest the validity of the arbitration agreement or whether its scope encompasses these claims; they contested only whether it applies to them. CP 337–38. KPMG, however, demonstrated that the engagement agreements are binding on FutureSelect not only because its claims against KPMG are derivative under Delaware law, but also because FutureSelect alleges it is a third-party beneficiary of the agreement. CP 76–77. After full briefing, followed by hours of oral argument, the King County

---

<sup>6</sup> FutureSelect litigated to judgment and lost its WSSA claim against E&Y, which FutureSelect claims issued the same unqualified audit opinions. CP 4 ¶ 11, 8 ¶¶ 27–28, 21 ¶ 79, 23 ¶ 90, 25 ¶ 97, 30 ¶ 117, 36–37 ¶¶ 145–46, 38 ¶¶ 153–54. The jury rejected FutureSelect’s claim that E&Y’s unqualified audit opinions contained “any untrue statement of material fact or omit[ted] a statement of material fact necessary to make any statement made, in the light of the circumstances under which they were made misleading.” CP 706. FutureSelect did not appeal that finding. Now, having litigated and lost, FutureSelect will be precluded from litigating that same claim again against KPMG. *See, e.g., Thompson v. Dep’t of Licensing*, 138 Wn.2d 783, 791–93, 982 P.2d 601 (1999).

Superior Court granted Defendant KPMG's motion to compel arbitration and stay the action against it ("order compelling arbitration"). CP 400-01. The Superior Court correctly ruled that FutureSelect's "claims against KPMG are subject to mandatory arbitration and this action shall be stayed pending resolution of that arbitration." CP 401.<sup>7</sup>

On June 16, 2011, FutureSelect filed a notice of appeal of the order compelling arbitration. CP \_\_ (Sub No. 180). KPMG moved to dismiss that appeal because the order compelling arbitration is not subject to a right of appeal and the criteria for discretionary review were not met. *See* No. 67302-5-I (Aug. 16, 2011) (Greer Decl., Ex. A). Consistent with a long line of Washington precedent precluding review of orders compelling arbitration, this Court agreed with KPMG. On November 21, 2011, this Court dismissed FutureSelect's first appeal and denied its request for discretionary review. *See id.* (Nov. 21, 2011) (Greer Decl., Ex. B). FutureSelect did not seek reconsideration or further appellate review, and this Court issued a certificate of finality, certifying that its order dismissing the appeal became final on December 30, 2011. *See id.* (Dec. 30, 2011) (Greer Decl., Ex. E).

**4. FutureSelect chose to prioritize its claims against other parties over its claims against KPMG**

Back in the Superior Court, FutureSelect acknowledged that the dismissal of its appeal meant that it "must proceed to arbitration," and FutureSelect assured the court that its litigation against the other defendants in court "will not delay the arbitration proceedings [between]

---

<sup>7</sup> Pursuant to Local Civil Rule 7(b)(5)(c), KPMG and FutureSelect each included with their submissions a one-page proposed order. The proposed orders each incorporated the briefs and arguments of the parties by reference. Greer Decl., Exs. C, D.

Plaintiffs and KPMG.” CP \_\_ (Sub. No. 195 at 2, 6, 7). Rather than proceeding to arbitration, however, FutureSelect ignored the Superior Court’s arbitration order, making no effort to arbitrate against KPMG. To date, almost five years after the order compelling arbitration, FutureSelect still has made no effort to arbitrate with KPMG. Its claims against KPMG remain stayed, no closer to final judgment now than they were five years ago.

In the interim, FutureSelect proceeded against the other defendants. It settled its claims against the Tremont entities and took its claims against E&Y to trial. CP 695–98. There, the jury rejected FutureSelect’s Washington State Securities Act claim, finding E&Y had made no material misrepresentations of fact. CP 706. The jury also found that FutureSelect—which had sought investments with Madoff and met with him personally—was 50 percent at fault for its own losses. CP 710.

#### **5. KPMG has prevailed in all its Rye Fund litigation**

This is one of many lawsuits filed against KPMG around the country following Madoff’s 2008 confession. KPMG has prevailed in each of those cases. Nearly two dozen plaintiffs have simply abandoned their claims, dismissed them, or dropped KPMG from the complaints. *E.g.*, *Cocchi et al. v. Tremont Grp. Holdings, Inc.*, 12 Civ. 9057–64(TPG) (S.D.N.Y. Oct. 3, 2013) (consolidated amended complaint). Multiple cases have been dismissed on the merits at the pleadings stage. *E.g.*, *In re Tremont Sec. Law, State Law, & Ins. Litig.*, 703 F. Supp. 2d 362, 371 (S.D.N.Y. 2010) (“The notion that a firm hired to audit the financial statements of one client [the Rye Funds] . . . must conduct audit procedures on a third party that is not an audit client (BMIS) on whose

financial statements the audit firm expresses no opinion has no basis.”), *aff’d sub nom. Meridian Horizon Fund, LP v. KPMG (Cayman)*, 487 F. App’x 636 (2d Cir. 2012).

Of the remaining lawsuits, nearly all were ordered to arbitration or plaintiffs voluntarily recognized their claims were arbitrable. *See Sandalwood Debt Fund A, L.P. v. KPMG LLP*, 2013 WL 3284126 (N.J. App. July 1, 2013), *cert. denied* 76 A.3d 532 (N.J. 2013) (table); *Agile Safety Variable Fund, L.P., et al. v. Tremont Grp. Holdings Inc., et al.*, No. 10 CV 2904, slip op. (Colo. Dist. Ct. Apr. 25, 2012), *petition for review denied* No. 2012SA340 (Colo. Dec. 10, 2012); *Zutty v. Rye Select Broad Market Prime Fund, L.P.*, 2011 WL 5962804 (N.Y. Sup. Ct. Apr. 15, 2011); *In re Tremont State Law Action*, 08 Civ. 11183, Dkt. No. 172, slip op. (S.D.N.Y. Mar. 29, 2010) (at CP 464); *Wexler v. Tremont Partners, Inc.*, No. 09-101615 (N.Y. Sup. Ct.); 2005 *Tomchin Family Charitable Trust v. Tremont Partners, Inc.*, No. 600332-09, (N.Y. Sup. Ct. May 26, 2009); *Hillier v. Siller & Cohen*, No. 09CA723 (Fla. Cir. Ct.).

Of the various proceedings, only two have progressed beyond the pleadings stage. In one, the court granted summary judgment because after fulsome discovery, there was “no evidence” KPMG owed any obligations to prospective investors in the Rye Funds under the Restatement (Second) of Torts § 552, which is the same standard applicable under Washington law. *Askenazy v. Tremont Grp. Holdings, Inc.*, No. SUCV 2010-4801, 2015 WL 1095684, at \*3–4 (Mass. Super. Mar. 10, 2015). The other was an arbitration that took place in 2013 before a panel of three neutrals—all former judges—who heard evidence at a merits hearing. Those former judges evaluated KPMG’s audits and concluded that they were performed

in accordance with professional standards. *See Eastham Capital Appreciation Fund L.P. v. KPMG LLP*, 2013 WL 7018202 (Aug. 21, 2013), *conf'd by KPMG LLP v. Eastham Capital Appreciation Fund L.P.*, No. 654139/2013, No. 31 (N.Y. Sup. Ct. Feb. 11, 2014).

#### IV. SUMMARY OF THE ARGUMENT

The arbitration agreement is indisputably valid and its scope encompasses the claims asserted in this lawsuit. Even though FutureSelect did not sign the arbitration agreement, it is well established that arbitration may be enforced against non-signatories under “traditional principles” of state law. Two such principles allow for enforcement in this case.

1. FutureSelect’s claims are derivative and thus properly belong to the Rye Funds. Because the Rye Funds are signatories to the arbitration agreement, their claims must be arbitrated. The test for determining whether a claim is direct or derivative is straightforward under Delaware law, which the parties agree is controlling. That test requires an analysis of the body of the complaint, without considering the labels plaintiffs attach to their claims, to ask who suffered the alleged harm and who would receive the benefit of any recovery. Where the harm falls in the first instance on the entity, the claims are derivative.

Here, FutureSelect seeks to recover the entire value of its Rye Fund investments, claiming that those investments “are now worthless” because they lost all their value “when th[e Rye Funds] collapsed.” the Rye Funds plainly were harmed in the first instance because Rye Fund assets, not FutureSelect assets, were invested in Madoff accounts and stolen by Madoff. The Rye Funds suffered the injury and a Rye Fund

recovery would replenish their value, indirectly restoring the value FutureSelect now seeks.

Although the test under Delaware law is a damage- and remedy-focused inquiry calling for an analysis of the body of the complaint, FutureSelect's brief is devoid of any meaningful discussion of its actual damage allegations. Because the allegations of loss underscore the derivative nature of the claims, FutureSelect devotes page after page to doing what Delaware law says is irrelevant—labeling its claims. Ignoring Delaware law's prohibition against adhering to plaintiffs' labels and denominations, FutureSelect contends that "misrepresentation" claims are "fundamentally" direct. FutureSelect disregards its own allegations, the nature of its claims, and the many cases that have found "misrepresentation" and "inducement" claims derivative. FutureSelect also apparently fails to recognize that the cases it cites do not stand for the sweeping proposition it advances here, and FutureSelect has relied on a key case without disclosing the subsequent appellate history in the same case that supports KPMG's position.

2. FutureSelect is otherwise bound to arbitrate under "traditional principles" of state contract law. It is undisputed that KPMG's audit opinions were prepared pursuant to the engagement agreements containing the arbitration clauses. Those engagement agreements, among other things, set forth the scope of KPMG's engagement, define to whom the audit opinions would be addressed, and established the standards KPMG would follow in conducting its audits. Having asserted that they received and relied on those audits, FutureSelect has attempted to take the benefits of the engagement agreements but seeks to avoid the

corresponding obligations set forth in the arbitration clauses. A party may not take the benefits of a contract while disregarding other provisions.

## V. ARGUMENT

For the procedural reasons identified in KPMG’s motion to dismiss the appeal, and for the substantive reasons identified below, FutureSelect’s attempt—for a second time—to appeal the order staying the case in favor of mandatory arbitration should be denied.

### A. **The standard of review is mixed in the context of a stay compelling arbitration**

If any issue in litigation is arbitrable, the federal and state arbitration acts require a stay pending arbitration. *See* 9 U.S.C. § 3; RCW 7.04A.070(6). The arbitrability of FutureSelect’s claims against KPMG is reviewed *de novo*. To the extent any non-arbitrable issues co-exist in the same case, the trial court may as “a matter of its discretion to control its docket” allow those non-arbitrable issues to proceed in court or stay them. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20–21 n.23 (1983); *see also* RCW 7.04A.070(6) (“If a claim subject to the arbitration is severable, the court *may* sever it and limit the stay to that claim.” (emphasis added)). A court’s determination regarding the scope of its stay “is discretionary, and is reviewed only for abuse of discretion.” *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 350–51, 16 P.3d 45 (2000) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936) (allowing for the “exercise of judgment” under courts’ inherent powers)).<sup>8</sup> For any matters within its discretion, the Superior Court’s orders should

---

<sup>8</sup> Trial courts may even stay non-arbitrable claims between parties who did not agree to arbitrate. *E.g., T-Mobile USA, Inc. v. Montijo*, 2012 WL 6194204, at \*6 (W.D. Wash. Dec. 11, 2012).

not be disturbed unless the Superior Court issued a decision that is “manifestly unreasonable.” *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 1115 (2006) (internal citation omitted).

**B. Arbitration may be enforced on any grounds supported by state law**

There is no dispute in this case that KPMG’s engagement agreements contain valid agreements to arbitrate. Nor is there any dispute that those arbitration agreements embrace “[a]ny dispute or claim *arising out of or relating to* th[is engagement letter], the services provided thereunder, or any other services provided by or on behalf of KPMG[.]” CP 295 (emphasis added). That is “broad language.” *McClure v. Tremaine*, 77 Wn. App. 312, 315, 890 P.2d 466 (1995).

Given the expansive scope of the arbitration agreement, FutureSelect is relegated to arguing that it is not bound to arbitrate because it did not sign the engagement agreements. FS Br. at 5, 14. It is well settled, however, that arbitration agreements may be enforced against both signatories and non-signatories alike when “traditional principles of state law allow a contract to be enforced *by or against* nonparties[.]” *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (emphasis added); *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 811 n.22, 225 P.3d 213 (2009) (en banc) (“Nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles.” (internal marks and citations omitted)). Similarly when claims are brought “on behalf of a signator to the arbitration agreement,” the claims are arbitrable. *Satomi Owners Ass’n*, 167 Wn.2d at 810, 225 P.3d at 230. FutureSelect acknowledges these bases for enforcement of the arbitration agreement. FS Br. at 17 (describing “traditional principles of state law” as

“exceptions”). Although FutureSelect did not sign KPMG’s engagement agreements, it nonetheless is subject to arbitration under those traditional principles.

**C. FutureSelect’s claims are derivative, belong to the Rye Funds, and must be arbitrated**

The parties agree that the Rye Funds signed a valid arbitration agreement and that any derivative claims properly belonging to the Rye Funds must be arbitrated. *See, e.g., Satomi*, 167 Wn.2d at 810, 225 P.3d at 230. The parties further agree that Delaware law controls the determination of whether the claims are derivative. *See* FS Br. at 17 n.2. Because FutureSelect’s claims against KPMG are derivative, they must be arbitrated.

**1. Tooley requires a remedy-focused analysis of the complaint, disregarding the plaintiffs’ labels**

Whether claims are direct or derivative under Delaware law turns “solely on the following questions: [w]ho suffered the alleged harm” and “who would receive the benefit of the recovery.” *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033, 1035 (Del. 2004) (emphasis in original).<sup>9</sup> *Tooley* directs an inquiry into whether a plaintiff “can prevail without showing an injury to the corporation.” *Id.* at 1036; *see also Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008) (stockholder must have “suffered harm independent of any injury to the corporation[.]”); *Metro. Life Ins. Co. v. Tremont Grp. Holdings, Inc.*, No. Civ.A. 7092–VCP, 2012 WL 6632681, at \*8 (Del. Ch. Dec. 20, 2012) (“If the nature of the injury is

---

<sup>9</sup> This test applies to limited partnerships, such as the Rye Funds. *TIFD III-X LLC*, 883 A.2d at 859-60 (applying *Tooley* to claims involving a partnership); *see also Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12, 16 (Del. Ch. 1992) (stating the analysis “is substantially the same for corporate cases as it is for limited partnership cases”).

such that it falls directly on the business entity as a whole and only secondarily on individual investors . . . then the claim is derivative[.]” (citation omitted).<sup>10</sup>

Courts applying *Tooley* should look to “the body of the complaint,” disregarding plaintiffs’ labels and denomination of the claim. *Tooley*, 845 A.2d at 1036; see *Hartsel v. Vanguard Grp., Inc.*, 2011 WL 2421003, at \*16 (Del. Ch. June 15, 2011). “The manner in which a plaintiff labels its claim and the form of words used in the complaint are not dispositive.” *Hartsel*, 2011 WL 2421003, at \*16. Instead, “the court must look to the nature of the wrong alleged, taking into account all of the facts alleged in the complaint, and determine for itself whether a direct claim exists.” *Id.*; *In re Syncor Int’l Corp. S’holders Litig.*, 857 A.2d 994, 997 (Del. Ch. 2004) (“[A]fter *Tooley*, a claim is not ‘direct’ simply because it is pleaded that way.” (internal quotation omitted)).<sup>11</sup>

## **2. The actual allegations of loss in the complaint establish the derivative nature of the claims**

The *Tooley* analysis demands attention to the specific allegations of harm at issue in each complaint, but FutureSelect’s brief is devoid of any meaningful discussion of the damages it alleges or the remedy it seeks. Although it devotes pages of its brief to lengthy quotations from its complaint having nothing to do with the alleged harm, FutureSelect’s brief

---

<sup>10</sup> Unpublished orders have precedential effect in Delaware. See, e.g., *New Castle County v. Goodman*, 461 A.2d 1012, 1013 (Del. 1983). Likewise, the other unpublished cases cited in this brief may be cited in their respective jurisdictions. See G.R. 14.1(b).

<sup>11</sup> See also *In re J.P. Morgan Chase & Co. S’holder Litig.*, 906 A.2d 808, 817 (Del. Ch. 2005) (“the duty of the court is to look at the nature of the wrong alleged, not merely at the form of words used in the complaint” (quoting *In re Syncor*, 857 A.2d at 997)); *Tooley*, 845 A.2d at 1036.

mentions harm in only one instance, stating in passing that it “lost its entire investment.” *Compare* FS Br. at 3, *with id.* at 22–24.

An analysis of the substance of the complaint reveals that FutureSelect is seeking to recover derivatively for its proportional share of the Rye Funds’ losses. It alleges that beginning in 1998, FutureSelect invested in the Rye Funds by purchasing limited partnership interests. CP 10–11 ¶ 38. Over the next decade, FutureSelect “maintained” its investments in the Rye Funds as their value increased, and it “continued to invest.” CP 13–14 ¶ 48, 24 ¶ 94. Augmented by the returns Madoff reported, FutureSelect eventually “had approximately \$190 million invested in [the Rye Funds].” CP 24 ¶¶ 94, 95. FutureSelect asserts that KPMG was hired by Tremont to audit the Rye Funds’ financial statements but did not “discover[] the Madoff fraud” and that “[d]uring the first week of December 2008, it was revealed that Madoff’s investment advisory operation was a massive fraud.” FS Br. at 8; CP 14 ¶ 49; *see also, e.g.*, CP 2 ¶ 3. As a consequence, FutureSelect “los[t] all of its investments in the Rye Funds when those funds collapsed.” CP 31 ¶ 121; *see* CP 2 ¶ 4 (“FutureSelect invested and lost more than \$195 million in the Madoff fraud[.]”).

FutureSelect contends it “lost its entire investment” and claims the Rye Fund securities it holds “are now worthless.” FS Br. at 3; CP 24 ¶ 94, CP 32 ¶ 127, 39 ¶ 159, 42 ¶ 184, 47 ¶ 216. “All moneys invested in those [Rye F]unds were stolen by Madoff,” contends FutureSelect. CP 26 ¶ 102. As pleaded, the harm flowing from the Rye Funds’ losses from Madoff’s scheme would be suffered, in the first instance, by the Rye Funds, not

FutureSelect. *See Culverhouse v. Paulson & Co.*, 133 A.3d 195, 198–99 (Del. 2016).

**a. The alleged damages derive from—and depend on—Madoff’s theft of Rye Fund assets**

Regarding the first *Tooley* question—“who suffered the alleged harm”—claims are derivative if the alleged harm “fell, in the first instance, on the Partnership,” and the limited partners were affected only indirectly, “as a consequence of [their] ownership interest[s] in the Partnership.” *TIFD III-X LLC v. Fuehauf Prod. Co.*, 883 A.2d 854, 859 (Del. Ch. 2004). Conversely, to state a direct claim, the plaintiff must allege an injury “independent of any alleged injury to the [entity].” *Tooley*, 845 A.2d at 1039.

FutureSelect’s allegations necessarily involve injury to the Rye Funds, as is evident not only from the allegations quoted above—including that FutureSelect lost its investments “when th[e] funds collapsed”—but also from the substance of the rest of the complaint, which alleges a loss suffered in the first instance by the Rye Funds. CP 31 ¶ 121, CP 3 ¶ 7, CP 9–10 ¶¶ 34, 36, CP 12–13 ¶ 43, CP 15 ¶ 54.

As FutureSelect alleges, Madoff was “notorious for restricting who he accepted as an investor. CP 9 ¶ 32. FutureSelect was not among “the few avenues to investing with Madoff,” but the Rye Funds were. CP 9 ¶ 32. Accordingly, FutureSelect “channeled” its investments “to Madoff through the Rye Funds” by investing in the Rye Funds. CP 16 ¶ 59; CP 30–31 ¶ 120. The Rye Funds are limited partnerships formed under Delaware law. CP 6 ¶ 21; CP 7 ¶¶ 22–23. By investing in them, FutureSelect became entitled to a pro rata share of any Rye Fund

distributions and profits or losses, but retained “no interest in specific partnership property.” 6 Del. Code §§ 17-107(13), 17-701.

The assets invested in Madoff accounts accordingly were “the Rye Funds’ Madoff investments,” not FutureSelect’s. CP 9 ¶ 32. FutureSelect’s pleading makes that plain: “Madoff claimed to hold and invest for the Rye Funds.” CP 4–5 ¶ 12; CP 9–10 ¶ 34. Madoff “purportedly executed all trades *on behalf of the Rye Funds* and was the custodian for *their* securities.” CP 3 ¶ 7 (emphases added). FutureSelect understood that arrangement—that Madoff claimed to hold assets “for the Rye Funds” and made trades “for the [Rye F]unds.” CP 3 ¶ 8.

FutureSelect does not complain that KPMG treated some limited partners differently than others but instead that KPMG did not detect a fraud affecting the assets of its audit client, the Rye Funds. Specifically, FutureSelect alleges that KPMG failed “to discover a Ponzi scheme that ultimately defrauded investors of billions of dollars.” CP 2 ¶ 2; *see also* CP 2 ¶¶ 2–3, 4 ¶ 11, 5 ¶ 13, 8 ¶ 28, 10–11 ¶ 38, 38 ¶ 155–56. FutureSelect asserts KPMG failed “to independently verify . . . the existence of the assets Madoff claimed to hold and invest for the Rye Funds[.]” CP 4–5 ¶¶ 12–13. Those alleged failures “allowed the Madoff scheme to go undetected” while Madoff continued to steal the Rye Fund assets from Madoff-managed accounts. CP 2 ¶ 3.

Because the Rye Funds, not FutureSelect, were the investors with Madoff-managed accounts, the “client funds” Madoff stole were Rye Fund assets. CP 14 ¶ 50. Madoff’s theft thus reduced the value of some \$3 billion of assets belonging to the Rye Funds. CP 2–3 ¶ 4. Those losses, in turn, impaired the value of the Rye Funds, eventually leading to its

“collapse” and diminishing the value of the partnership interests held by all Rye Fund investors. CP 31 ¶ 121, CP 32 ¶ 127, CP 43 ¶ 192. FutureSelect’s alleged losses of nearly \$200 million were but a fraction of the \$3 billion lost by the Rye Funds. *See* CP 2–3 ¶ 4.

FutureSelect’s claimed loss is classically “derivative in nature”—a diminution in the value of partnership interests. *See Litman v. Prudential Bache Props. Inc.*, 611 A.2d 12, 16 (Del. Ch. 1992) (“[D]iminution in the value . . . clearly is not a direct injury.”). Had the Rye Funds not incurred losses, neither FutureSelect nor any other Rye Fund limited partners would have. This is not a securities case in which FutureSelect claims it purchased securities on a certain date at a certain price but the true value of the securities was different on that date—and the difference is the alleged damage. Instead, FutureSelect made an initial investment in 1998 that grew over time, largely during the half dozen years before KPMG issued its first audit opinion. The value FutureSelect claims it accrued by 2008—nearly \$200 million—reflected its proportionate share of the Rye Funds’ reported \$3 billion. *See* CP 24 ¶ 95, CP 4–5 ¶¶ 12–13. Both the Rye Funds and FutureSelect allegedly lost those respective values “when th[e Rye Funds] collapsed.” CP 31 ¶ 121. Because Madoff stole from the Rye Funds and FutureSelect allegedly lost its proportionate share of the Rye Funds losses, FutureSelect suffered losses only indirectly, as a consequence of the losses suffered by the Rye Funds. *See Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008); *TIFD III-X LLC*, 883 A.2d at 859. FutureSelect accordingly cannot “prevail without showing an injury to the

corporation.” *Tooley*, 845 A.2d at 1036.<sup>12</sup> After all, if the Funds had not been harmed, what harm would FutureSelect have suffered?

**b. The Rye Funds would be the proper beneficiaries of any recovery**

The answer to the second question of the *Tooley* analysis—who receives the benefit of any recovery—“logically follow[s]” the first. *Id.* FutureSelect is one of many limited partners in the Rye Funds. It claims that the Rye Fund auditors each harmed all of the Rye Fund’s limited partners in the same way: they failed to detect Madoff’s fraud. CP 4 ¶ 11, 8 ¶ 28, 20 ¶ 77, 24–25 ¶ 96–98.

For this alleged harm, FutureSelect seeks to recover from KPMG “its entire investment,” which is the full value of its Rye Fund limited partnership interests that it claims “are now worthless.” FS Br. at 3; CP 32 ¶ 127. FutureSelect is unable to demonstrate why it, and not the Rye Funds should receive the benefit of any remedy. If there was any harm from KPMG’s audits—contrary to KPMG’s position on the merits—the Rye Funds suffered it in the first instance. *See, e.g., In re J.P. Morgan Chase & Co. S’holder Litig.*, C.A. No. 531-N, 2005 WL 5783536, at \*7 (Del. Ch. Apr. 29, 2005). Because the Rye Fund assets were stolen and any recovery necessarily would replenish those assets, FutureSelect’s claims cannot be independent of the Rye Funds’ claims.

---

<sup>12</sup> FutureSelect apparently conflates the Rye Funds and Tremont, contending that Tremont suffered no harm and thus FutureSelect’s harm was “not dependent on *any* injury suffered by Tremont.” *See* FutureSelect Br. at 26 (emphasis in original). FutureSelect, however, never invested in Tremont—an entity wholly owned by Oppenheimer. CP 17–18 ¶ 63, 19 ¶ 69. The relevant question is whether FutureSelect’s injury is independent of any injury to the entities—the Rye Funds—in which FutureSelect invested.

Moreover, allowing a claim seeking that relief to go forward as a direct claim would create a precedent allowing investors to obtain double recoveries. There is no dispute that auditors' clients (like the Rye Funds here) generally have standing to sue auditors seeking recovery for allegedly negligent audits. Any recoveries from those claims would replenish the audit client's assets and, in the case of a limited partnership audit client (like the Rye Funds)<sup>13</sup> restore the value of the partnership interests. Each limited partner would be entitled to share in that recovery according to his or her proportional partnership interests. *See Feldman*, 951 A.2d at 733.

The approach advocated by FutureSelect would allow investment funds, like the Rye Funds, to sue their auditors for the entire amount of their losses, and *also* allow individual investors in those funds to sue the auditor for their "entire investment" as well. FS Br. at 3. That precedent would allow for duplicative suits and double recoveries: investor-plaintiffs could recover on their own individual, so-called direct claims, seeking recovery of "all of [their] investment" and the hedge funds in which they invested could recover as well, restoring their "entire investment" again. CP 31 ¶ 121; FS Br. at 3.<sup>14</sup>

---

<sup>13</sup> In this case, the Rye Funds assigned their limited partnership interests for good and valuable consideration as part of a settlement with a class of Rye Fund investors. FutureSelect opted out of that class but did not object to the Rye Funds' settlement.

<sup>14</sup> FutureSelect's argument that it would receive the benefit of any recovery is circular: if the court allows it to recover, it says, then it will recover. FS Br. at 27–28. That is hardly the kind of logic the *Tooley* court meant when it wrote that the answer to the question of who would receive the benefit of any recovery would "logically follows" the answer to the first question. *See Tooley*, 845 A.2d at 1036.

### 3. Courts around the country have found Rye Fund–investor claims against KPMG derivative

FutureSelect contends that “courts evaluating KPMG’s same arbitration agreement” at issue here “uniformly declined to compel arbitration.” FS Br. at 21. That is simply untrue.

Courts around the country have evaluated claims against KPMG involving the same underlying audits, concluded those claims are derivative under Delaware law, and compelled arbitration. *See Sandalwood Debt Fund A, L.P. v. KPMG LLP*, 2013 WL 3284126 (N.J. App. July 1, 2013); *Agile Safety Variable Fund, L.P., et al. v. Tremont Grp. Holdings Inc., et al.*, No. 10 CV 2904, slip op. at 6 (Colo. Dist. Ct. Apr. 25, 2012), *petition for review denied* No. 2012SA340 (Colo. Dec. 10, 2012); *Zutty v. Rye Select Broad Market Prime Fund, L.P.*, 2011 WL 5962804 (N.Y. Sup. Ct. Apr. 15, 2011).<sup>15</sup> In other cases, the plaintiffs recognized that their Rye Fund–related claims against KPMG were derivative and subject to mandatory arbitration. *In re Tremont State Law Action*, 08 Civ. 11183, Dkt. No. 172, slip op. (S.D.N.Y. Mar. 29, 2010) (CP 464); *Wexler v. Tremont Partners, Inc.*, No. 09-101615 (N.Y. Sup. Ct.); *2005 Tomchin Family Charitable Trust v. Tremont Partners, Inc.*, No. 600332-09, (N.Y. Sup. Ct.); *Hillier v. Siller & Cohen*, No. 09CA723 (Fla. Cir. Ct.).<sup>16</sup> Since those decisions and voluntary dismissals, there has been

---

<sup>15</sup> In *Zutty*, the plaintiffs ostensibly agreed to arbitrate but not in accordance with KPMG’s engagement agreement. The *Zutty* court compelled arbitration according to the terms of the engagement agreements.

<sup>16</sup> Even in the small minority of cases in which courts erred in finding certain Rye Fund–related claims direct, the claims subsequently were dismissed, either voluntarily or upon a finding that KPMG owed no obligation to prospective investors. *See KPMG LLP v. Cocchi*, 88 So.3d 327 (Fla. Dist. Ct. App. 2012) (KPMG voluntarily dropped from consolidated amended complaint after removal and transfer in the consolidated amended complaint in *Cocchi et al. v. Tremont Grp. Holdings, Inc.*, 12 Civ. 9057–64(TPG) (S.D.N.Y. filed Oct. 3, 2013)); *Askenazy v. KPMG LLP*, 988 N.E.2d 463 (Mass. App.

[Footnote continues on next page]

no intervening opinion of the Delaware Supreme Court dictating a different result in a case like this in which the plaintiff seeks the entirety of its investment.

**4. FutureSelect’s labeling of the claims as “misrepresentation” claims does not change their derivative nature**

In a one-size-fits-all approach, FutureSelect contends it is pursuing “misrepresentation” claims and such claims “are fundamentally direct.” FutureSelect Br. at 17–19. The applicable law, however, prohibits reliance on the plaintiffs’ characterization—and instead requires a review of the body of the complaint without regard to the plaintiffs’ labels. 845 A.2d at 1036. Contrary to FutureSelect’s assertion, numerous cases applying *Tooley* have found misrepresentation claims derivative—including in Rye Fund–investor cases against KPMG.

In *Sandalwood*, for example, the plaintiffs brought a claim for negligent misrepresentation. The New Jersey intermediate appellate court concluded that the “injury for which plaintiffs seek redress . . . was suffered by the Rye Funds . . . and only indirectly by plaintiffs as limited partners.” 2013 WL 3284126, at \*7, *cert. denied* 76 A.3d 532 (N.J. 2013) (table). Similarly, with respect to the claimed remedy, the court concluded that “the claimed damages would not benefit the plaintiffs alone but would inure to the benefit of the Rye Funds and all partners accordingly.” *Id.* at \*8. The court concluded all the claims were derivative. *Id.*

---

2013) (claims dismissed in *Askenazy Tremont Grp. Holdings, Inc.*, No. SUCV 2010-4801, 2015 WL 1095684 (Mass. Super. Mar. 10, 2015)). Those cases also involved different complaints and different allegations of loss—including, in *Askenazy*, claims about tax losses. Moreover, as described below, the reasoning in both *Askenazy* and *Cocchi* relied on a district court case later reviewed on appeal, and the summary appellate order undermines FutureSelect’s position here.

In *Agile*, the plaintiffs brought fraudulent inducement, negligent misrepresentation, non-disclosure, and Colorado Securities Act claims against KPMG. The court found all were derivative because “the economic losses [plaintiffs] suffered stemmed” from the events “that caused the financial harm that was inflicted on the funds as a whole.” *Agile Safety Variable Fund, L.P., et al. v. Tremont Grp. Holdings Inc., et al.*, No. 10 CV 2904, slip op. at 6 (Colo. Dist. Ct. Apr. 25, 2012), *petition for review denied* No. 2012SA340 (Colo. Dec. 10, 2012). There, as here, “the limited partners suffered harm because the entire fund was diminished,” which under Delaware law is “classically derivative in nature.” *Id.*

Other Ponzi scheme cases also have found misrepresentation claims derivative. In *Ernst & Young LLP v. Quinn*, for example, an audit firm was sued by plaintiffs who, like FutureSelect, had invested in a hedge fund. C.A. No. 09-cv-1164 (JCH), 2009 WL 3571573, at \*1 (D. Conn. Oct. 26, 2009). That hedge fund was “heavily invested” in the Petters Group. *Id.* When a federal task force identified the Petters Group as “a massive Ponzi scheme,” the investments reported in the hedge fund’s audited financial statements were gone. *Id.*

Applying the *Tooley* standard under Delaware law, the *Quinn* court specifically addressed the plaintiffs’ fraudulent inducement claims and determined they were derivative. Like FutureSelect, the plaintiffs contended that if the auditor “had . . . not made material misrepresentations,” they “would not have purchased, continued to purchase, or retained their limited partnership investment interests.” *Id.* at \*6 (internal quotation omitted). The court explained that the claims were

only actionable “because of the injuries sustained to the Fund; were it not for [the Fund’s] loss in value, [the plaintiffs] could not claim that they were fraudulently induced because their induced decision to invest in [the Fund] would not have yielded cognizable damages.” *Id.*<sup>17</sup> Although plaintiffs attempted to “classify their state court claims as direct,” the court wrote, “they are *clearly* derivative under Delaware law.” *Id.* at \*8 (emphasis added).

Numerous other federal and state courts applying *Tooley* also have found misrepresentation claims to be derivative. *E.g.*, *San Diego County Employees’ Ret. Assoc. v. Maounis*, 749 F. Supp. 2d 104, 127 (S.D.N.Y. 2010) (non-disclosure); *Broyles v. Cantor Fitzgerald & Co.*, C.A. No. 10-864-JJB, 10-857-JJB, 2013 WL 1681150, at \*11 (M.D. La. 2013) (fraud); *Smith v. Waste Mgmt. Inc.*, 407 F.3d 381, 384–85 (5th Cir. 2005) (misrepresentations); *Ex Parte Regions Fin. Corp.*, 67 So. 3d 45 (Ala. 2010) (misrepresentation) (citing *Tooley* under Maryland law, which looks to Delaware law); *In re SemCrude L.P.*, 796 F.3d 310, 318–19 & n.8 (3d Cir. 2015) (misrepresentation) (citing *Tooley* under Oklahoma law, which looks to Delaware law); *Hribar v. Marsh & McLennan Cos.*, 73 A.D.3d 859, 900 N.Y.S.2d 449 (N.Y. App. Div. 2010) (fraud and negligent misrepresentation).<sup>18</sup>

---

<sup>17</sup> The *Quinn* court evaluated the direct-derivative issue under Connecticut and Delaware law. This particular quote is in the passage addressing Connecticut law, but is incorporated by reference in the Delaware law discussion. 2009 WL 3571573, at \*7.

<sup>18</sup> One of the cases FutureSelect cites in support of its assertion that misrepresentation claims are “fundamentally” direct instead says the opposite. *Big Lots Stores, Inc. v. Bain Capital Fund VII, LLC*, 922 A.2d 1169, 1176–77 (Del. Ch. 2006), explains that “fraudulent inducement claims where the only alleged injury is inextricably linked to a corporate injury are derivative claims.” FS Br. at 18 n.3.

In each instance, those courts—as *Tooley* directs—looked to the facts alleged rather than the labels plaintiffs attached to their claims. In each instance, as here, plaintiffs’ claims were derivative because the entity in which they invested had suffered harm in the first instance.

**5. The cases FutureSelect cites do not change the derivative nature of these claims**

To support its position about misrepresentation claims, FutureSelect relies on a smattering of federal cases from New York and Connecticut.<sup>19</sup> Not only do those cases fail to support FutureSelect’s position and are distinguishable, subsequent appellate history undermines FutureSelect’s position.

*First*, the cases FutureSelect relies on do not support FutureSelect’s sweeping assertion that misrepresentation claims are “fundamentally direct.” Instead, addressing the particular allegations before them, those courts concluded that fraud and negligent misrepresentation claims can be direct “to the extent (*and only to the extent*)” the plaintiffs were “potential investors at large” who were induced to invest by the defendants’ unlawful conduct. FS Br. at 18, 19 (emphasis added); *Stephenson v. Citgo Grp. Ltd.*, 700 F. Supp. 2d 599, 611–12 (S.D.N.Y. 2010). Even FutureSelect’s preferred cases confirm that misrepresentation claims are not

---

<sup>19</sup> Nearly all the opinions on which FutureSelect relies actually dismissed the entire lawsuit. *Stephenson v. Citgo Group, Ltd.*, 700 F. Supp. 2d 599 (S.D.N.Y. 2010); *Newman v. Family Mgmt. Corp.*, 748 F. Supp. 2d 299 (S.D.N.Y. 2010); *Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61 (S.D.N.Y. 2010); *AHW Inv. P’ship, MFS v. Citigroup Inc.*, 980 F. Supp. 2d 510 (S.D.N.Y. 2011). *Cf. Isakov v. Ernst & Young Ltd.*, No. 3:10cv1517 (MRK), 2012 WL 951897 (D. Conn. 2012) (staying all but one claim). *But see Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249 (D. Conn. 2012).

FutureSelect’s citation to *In re Adelpia Communications Corp. Securities & Derivative Litigation* is inapposite. Those plaintiffs had a contract with the defendant which provided *advice* (not an audit) directly to the plaintiffs. No. 03 MDL 1529(JMF), 2013 WL 6838899, at \*1–2, 4 (S.D.N.Y. Dec. 27, 2013). KPMG never provided FutureSelect with any direct advice. CP 289 ¶ 14.

“fundamentally” direct but instead—at most—are direct to a very limited extent.

*Second*, the cases on which FutureSelect relies are inapposite. The claims FutureSelect asserts against KPMG are not about targeting potential investors at large to invest in the Rye Funds. FutureSelect alleged that KPMG addressed its audit opinions to *existing* Rye Fund “Partners,” FutureSelect received KPMG’s audits in that capacity, and KPMG never had contact with any investors (existing or prospective) at all. CP 24–25 ¶ 96; CP 289 ¶¶ 13–14; CP 30 ¶ 119.

Additionally, the allegations in this case are not that KPMG targeted or wronged FutureSelect in any unique way when issuing routine year-end audit opinions. To the contrary, FutureSelect asserts a harm to the Rye Funds “suffered by all of the stockholders at large.” *Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 264 (D. Conn. 2012) (quoting *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008)). FutureSelect alleges that (a) years after FutureSelect started investing in the Rye Funds, “KPMG issued [its] unqualified audit opinions” (b) KPMG failed to detect Madoff’s fraud; (c) the Rye Funds lost billions of dollars in Madoff’s scheme; and (d) FutureSelect lost its proportionate share of that amount CP 2 ¶ 2, 4–5 ¶¶ 12–13, 10 ¶ 36, 25 ¶ 98, 26–27 ¶ 102, 28 ¶ 109. FutureSelect could not possibly be unique in that respect, and its allegations make out derivative, not direct claims. *See supra* Section V.C.2; *see also Smith*, 407 F.3d at 384–85 (“[I]t is clear that [plaintiff’s] claims are derivative, not direct. The misrepresentations that allegedly caused [plaintiff’s] losses injured not just [plaintiff] but the corporation as a whole.”); *see also Metro. Life Ins. Co., Inc.*, No. 7092–VCP, 2012 WL

6632681, at \*8–9 (claims brought by limited partners in the Rye Funds were derivative where the injury was suffered by the limited partnership).

Additionally, KPMG’s engagement agreements imposed strict limitations on when the Rye Funds could use its audit opinions to solicit investments. To include or even reference KPMG’s audit opinions in the Rye Fund registration or offering materials, Tremont not only had to secure KPMG’s consent, but also had to engage KPMG to perform additional “subsequent event” procedures and determine “whether [certain] information, or the manner of its presentation, is materially inconsistent with information, or the manner of its presentation, appearing in the financial statements.” CP 292. FutureSelect does not—and cannot—allege satisfaction of those requirements. *See Askenazy*, 2015 WL 1095684, at \*2 (granting summary judgment for KPMG in a case brought by Rye Fund investors, finding that “[t]here is *no evidence* that KPMG ever gave such permission” (emphasis added)).

*Third*, all the “Madoff-related” cases (and several others) that FutureSelect cites relied on *Stephenson v. Citigo Group Ltd.* *See supra* n.19.<sup>20</sup> After those cases were decided, a panel of the U.S. Court of Appeals for the Second Circuit heard *Stephenson* on appeal. *Stephenson v. PricewaterhouseCoopers, LLP*, 482 F. App’x 618 (2d Cir. 2012). The Second Circuit panel dismissed the inducement claims, concluding that the

---

<sup>20</sup> *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372 (S.D.N.Y. 2010), is an exception that did not rely on *Stephenson* because *Anwar* applied New York (not Delaware) direct-derivative law. Upon reconsideration of its opinion after the *Stephenson* appellate opinion, the *Anwar* judge explained that the distinction between the two jurisdictions’ laws made all the difference. *Anwar v. Fairfield Greenwich Ltd.*, 884 F. Supp. 2d 92, 98–99 (S.D.N.Y. 2012). One need look no further than the *Anwar* judge’s opinion to appreciate that *Anwar* provides no basis for FutureSelect’s assertions.

complaint failed to demonstrate that the auditor owed plaintiff a duty as a potential investor in the fund. *Id.* at 621. It further explained that the district court correctly had concluded that misrepresentation claims against an outside auditor are *derivative* to the extent they assert a claim “based on [plaintiff’s] decision to remain invested.” *Id.* at 621. Such a “holding claim” necessarily requires “showing injury to the partnership as a whole.” *Id.*; *id.* at 620, 624.

FutureSelect’s allegations clearly assert such “holding claims.” FutureSelect alleges it began investing in the Rye Funds in 1998—six years before KPMG was engaged—and *held* Rye Fund investments throughout. CP 31 ¶ 121, 46 ¶ 210, 24 ¶ 94, 39 ¶ 157, 47 ¶ 216. More specifically, FutureSelect alleges it “*maintained* [its] investment” in the Rye Funds; it alleges the auditors’ conduct caused it to “purchase and *retain* partnership interests in the Rye Funds,” and “purchase and *hold* partnership interests in the Rye Funds[.]” *Id.* (emphases added). Thus, even under the authority cited by FutureSelect, its claims are derivative *at the very least to the extent* that they allege holder claims, and the order staying the claims and compelling arbitration was appropriate.<sup>21</sup>

---

<sup>21</sup> Two other cases on which FutureSelect relies also differ materially from this one. *AHW Inv. P’ship, MFS v. Citigroup, Inc.*, 980 F. Supp. 2d 510 (S.D.N.Y. 2013), and *Albert v. Alex Brown Mgmt. Servs., Inc.*, No. Civ.A. 762-N, Civ.A. 763-N, 2005 WL 2130607 (Del. Ch. Aug. 26, 2005). In each, company management misled or did not disclose information to an investor. The company possessed relevant information that was withheld from the investors, causing a different harm to the investors than the company. Here, on the other hand, the relevant information (KPMG’s audit opinions) went both to the Rye Funds’ management and (according to FutureSelect’s allegations), the investors.

**6. FutureSelect’s reliance on a Superior Court order *not* involving KPMG does not change the derivative nature of these claims**

FutureSelect wrongly emphasizes the Superior Court’s order denying E&Y’s motion to compel arbitration. E&Y filed that motion four year after it chose to litigate. CP 656. FutureSelect argued that unlike KPMG, E&Y was simply engaging in “gamesmanship.” CP 664. FutureSelect also argued that KPMG’s motion to compel arbitration was “irrelevant” because KPMG’s motion “involved different engagement letters, different arbitration clauses and [was] not *res judicata*.”CP \_\_ (Sub. No. 236 at 12). Now, FutureSelect takes the opposite position and argues that the arbitration clauses in KPMG and E&Y’s engagement agreements were “substantially the same.” FS Br. at 5; *id.* at 1, 9, 11. FutureSelect’s turnabout is improper and its reliance on the order denying E&Y’s motion to compel arbitration misplaced.

*First*, FutureSelect is estopped from “gaining advantage by asserting one position in a court proceeding and later seeking a second advantage by taking a clearly inconsistent position.” *City of Spokane v. Marr*, 129 Wn. App. 890, 893, 120 P.3d 652 (2005). FutureSelect opposed E&Y’s motion by asserting that “KPMG’s motion to compel arbitration involved *different* engagement letters [and] *different* arbitration clauses[.]” CP \_\_ (Sub. No. 236 at 12). It argued that “The Court’s Decision on KPMG’s Motion to Compel Arbitration Is Irrelevant.” *Id.* Following those arguments, the Superior Court did not even review the order granting KPMG’s motion to compel or KPMG’s briefing in support of its motion to compel. CP 679–80 (identifying documents reviewed). FutureSelect’s assertions in the Superior Court successfully deterred the Superior Court

from evaluating KPMG’s motion yet now FutureSelect attempts to take the opposite view here. See *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 226–27, 230–31, 108 P.3d 147 (2005) (Judicial estoppel applies “if a litigant’s prior inconsistent position benefited the litigant or was accepted by the court.”).

*Second*, FutureSelect’s reliance on the Superior Court’s order denying E&Y’s motion to compel arbitration is misplaced. The Superior Court recognized that the Delaware test set forth in *Tooley* requires that the court base its analysis “solely on the following questions: *Who suffered the alleged harm . . . and who would receive the benefit of the recovery or other remedy?*” CP 683. The Superior Court found that FutureSelect had pleaded direct claims because E&Y owed FutureSelect an “independent duty . . . that is not merely derivative of EY’s fiduciary duties as the Rye Funds.” CP 686. There are numerous problems with that statement aside from the flawed conclusion that auditors owe their clients fiduciary duties. See *Micro Enhancement Int’l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 434, 40 P.3d 1206 (2002) (“an auditor is not a fiduciary of its client.”).

“[U]nder *Tooley*, the duty of the court [was] to look at the nature of the wrong alleged, not merely at the form of words used in the complaint.” *In re J.P. Morgan Chase & Co. S’holder Litig.*, 906 A.2d 808, 820 (Del. Ch. 2005) (citation omitted). Here, the nature of the alleged wrong arises solely from KPMG’s engagement with the Rye Funds—not some independent relationship between KPMG and FutureSelect, as there was none. FutureSelect’s core allegations are that (1) Tremont engaged KPMG to audit the Rye Funds’ financial statements under GAAS; (2) KPMG did

not satisfy that obligation; (3) KPMG’s audit opinions were addressed to existing partners of the Rye Funds; and (4) had KPMG complied with GAAS, it “would have discovered the Madoff fraud.” CP 4 ¶ 11, CP 29 ¶ 112, CP 30 ¶ 117, CP 38 ¶ 155, CP 47 ¶ 214.

*Tooley* further required FutureSelect to demonstrate to the Superior Court not only that the duty breached was owed separately to it, but also that it could “prevail without showing an injury to the corporation.” *Tooley*, 845 A.2d at 1036. The Superior Court—relying on *Anglo American Security Fund, L.P. v. S.R. Global International Fund, L.P.* (“*Anglo American*”), 829 A.2d 143 (Del. Ch. 2003), and without analyzing FutureSelect’s allegations of harm or relief requested—concluded in a single sentence that “Plaintiffs’ injuries are independent of any alleged injury to the Rye Funds; . . . and the Plaintiffs can prevail without showing an injury to the Rye Funds.” CP 686. But, *Tooley* requires much more.

*Tooley* requires the court “to examine all the facts of the complaint and determine for itself whether a direct claim exists.” *In re J.P. Morgan Chase & Co. S’holder Litig.*, 906 A.2d at 820. The facts alleged by FutureSelect unquestionably show the nature of the alleged injury is such that it falls directly on the Rye Funds as a whole and only secondarily on its limited partners “as a function of and in proportion to [their] pro rata investment in the [Funds].” *Tooley*, 845 A.2d at 1039; *In re J.P. Morgan Chase*, 906 A.2d at 817. FutureSelect alleges that it invested in the Rye Funds and was harmed because KPMG’s audits failed to detect Madoff’s theft of “all monies” in the Rye Funds. *See* CP 22 ¶ 86, 26–27 ¶ 102; *see also* CP 2 ¶ 4 (“FutureSelect invested and lost more than \$195 million in

the Madoff fraud.”). Without an injury to the Rye Funds, FutureSelect has no case.

The Superior Court’s reliance on *Anglo American* was also misplaced. *Anglo American* pre-dated *Tooley* and arose out of materially different facts. See *Metro. Life Ins. Co., Inc.*, No. 7092–VCP, 2012 WL 6632681, at \*11. “The partnership in *Anglo American* was structured such that “whenever the value of the Fund is reduced, the injury accrues irrevocably and almost immediately to the current partners but will not harm those who later become partners.” *Id.* The decision in “*Anglo American* arose out of a concern that the ‘recovery would flow to partners that had joined the fund after the harm occurred, and would provide no relief to the former partners who were actually harmed by the alleged conduct.’” *Id.* (citation omitted). Unlike in *Anglo American*, “the [Rye] Funds in this case have had no new investors since December 11, 2008, by which date litigation had been commenced against Madoff, any recovery on behalf of [the Funds] would benefit all investors[.]” *Id.*; see also *Zutty v. Rye Select Broad Market Prime Fund, L.P.*, No. 113209/09, 2011 WL 5962804 (N.Y.Sup.Ct. Apr. 15, 2011) (distinguishing *Anglo American* in the context of the Rye Funds).<sup>22</sup>

---

<sup>22</sup> FutureSelect’s appellate brief makes a new argument. FutureSelect attempts to distinguish the WSSA claim and asserts that the WSSA claim should be treated differently than the negligent misrepresentation claim. FS Br. at 19–20. Not making the argument in the Superior Court generally precludes raising it for the first time on appeal. *In re Det. of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007); RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.”). The WSSA claim, like the negligent misrepresentation claim is also based on losses incurred in the first instance by the Rye Funds. See *Agile Safety Variable Fund, L.P., et al. v. Tremont Grp. Holdings Inc., et al.*, No. 10 CV 2904, slip op. at 2 (Colo. Dist. Ct. Apr. 25, 2012), *petition for review denied* No. 2012SA340 (Colo. Dec. 10, 2012) (compelling arbitration of Colorado Securities Act claim); *Ernst & Young LLP v. Quinn*, C.A. No. 09-cv-1164 (JCH), 2009 WL 3571573 (D. Conn. Oct. 26, 2009). FutureSelect’s position regarding the WSSA claim is likely moot in any event because

[Footnote continues on next page]

\* \* \*

The gist of the complaint against KPMG is an alleged audit malpractice that supposedly should have “discover[ed]” Madoff’s Ponzi scheme. Had KPMG discovered Madoff’s fraud—as FutureSelect claims it should have—the engagement agreements called for KPMG to report that to the management of the Rye Funds, KPMG’s audit client, whose assets were invested in (and lost in) Madoff’s sophisticated scheme. CP 293. FutureSelect’s own complaint makes clear that the Rye Funds were the entities whose assets were invested in Madoff-managed accounts and who suffered the harm from Madoff’s scheme in the first instance. That alleged harm and the remedy FutureSelect seeks in this case—recovery for its share of the Rye Funds’ losses—make the allegations in this case derivative under *Tooley* and subject to arbitration.

**D. FutureSelect is otherwise obligated to arbitrate its claims against KPMG**

The order compelling arbitration should be affirmed for a second, independent reason: FutureSelect’s allegations establish it as a third-party beneficiary of the engagement agreements that is required to arbitrate.<sup>23</sup> A

---

the jury found that audit opinions are opinions not facts, FutureSelect will be precluded from arguing otherwise, and WSSA liability requires a finding of a material misstatement of *fact*. CP 721.

<sup>23</sup> FutureSelect argues for the first time on its appeal that its own allegations are insufficient to establish it is a third-party beneficiary. It alleges that KPMG had the intent to benefit investors like FutureSelect at the time it issued its audit opinions in February or March of each year, CP 47 ¶¶ 212–13, but now suggests that KPMG had such an intent *only* at the moment it issued its audit opinions—lacking that intent just a few months before when it signed the engagement agreements for that year and lacking that intent again just a few months later when it signed the engagement agreements for the following year’s engagement. FS Br. at 29. However incredible FutureSelect’s positions, it failed to raise this argument in the Superior Court. Such failure generally precludes the appealing party from raising it for the first time on appeal. See *In re Det. of Ambers*, 160 Wn.2d at 557 n.6, 158 P.3d at 1151; RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.”); cf RAP 2.5(a) (“A party may

[Footnote continues on next page]

third-party beneficiary exists when “performance under the contract would necessarily and directly benefit the third party.” *Postlewait Constr., Inc. v. Great Am. Ins. Cos.*, 106 Wn.2d 96, 99, 720 P.2d 805 (1986) (internal quotation omitted).<sup>24</sup>

Here, Tremont and KPMG executed the engagement agreements, which obligated KPMG to audit the year-end financial statements of the Rye Funds. CP 290–326; CP 4 ¶ 11 (Tremont hired KPMG “to audit the Rye Funds.”). The engagement agreements established not only the objectives and scope of the audits but also KPMG’s responsibilities. They obligated KPMG to (1) audit the year-end financial statements of the Rye Funds; (2) “conduct [its] audits . . . in accordance with [GAAS];” (2) “issue a written report upon [its] audits of the [Rye Funds’] financial statements;” and (3) address its audit opinions “to the general and limited partners of the [Rye Funds]” for distribution by Tremont. *E.g.*, CP 290–96; *see also* CP 24–25 ¶ 96 (“Each audit was addressed to the ‘Partners’ of the fund[.]”); CP 46 ¶ 210 (The opinions “were addressed and distributed to FutureSelect.”).

FutureSelect further alleges that when KPMG issued its audit reports, it did so intentionally “*for the benefit and guidance*” of and “*to influence*” investors in making their investment decisions. CP 46–47

---

present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.”).

<sup>24</sup> KPMG and the Rye Funds were based in New York, and the audit work performed almost exclusively in New York. Accordingly, While New York law applies to the engagement agreements, Washington and New York law are substantially similar. *Compare Cal. Pub. Emps. Ret. Sys. v. Shearman & Sterling*, 741 N.E.2d 101, 104 (N.Y. 2000); *with Kim v. Moffett*, 156 Wn. App. 689, 699, 234 P.3d 279 (2010) (“In determining whether or not a third party beneficiary status is created by a contract, the critical question is whether the benefits flow directly from the contract or whether they are merely incidental, indirect, or consequential.”).

¶¶ 210–13 (emphases added); *see also* CP 24–25 *id.* ¶ 96 (“KPMG knew Plaintiffs were receiving and relying on its audits of the funds.”); CP 39 ¶ 157 (“KPMG also knew and intended that current investors would rely on the audits when deciding to maintain and increase their investments in the Rye Funds”).

Such allegations amply establish that performance under the engagement agreements necessarily and directly benefited FutureSelect, as a limited partner in the Rye Funds. *See, e.g., Hakopian v. Mukasey*, 551 F.3d 843 (9th Cir. 2008) (factual allegations in a complaint, which are not pleaded in the alternative, are considered judicial admissions); *Aholelei v. Dept. of Pub. Safety*, 488 F.3d 1144, 1149 (9th Cir. 2007) (“[A] pleading should not be construed as an admission against another alternative or inconsistent pleading in the same case.”).<sup>25</sup> Nonetheless, FutureSelect argues that “KPMG’s own ‘admissions’ preclude its arguments.” and that “even if FutureSelect was a ‘third-party’ to and a ‘beneficiary’ of the engagement agreements, it could not be bound to the arbitration clause.” FS Br. at 15, 29. Both of those arguments lack merit.<sup>26</sup>

---

<sup>25</sup> These allegations are also necessary to FutureSelect’s claims against KPMG. Its claim that KPMG is liable under the Washington State Securities Act depends largely on allegations that KPMG “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.” *FutureSelect Portfolio Mgmt. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 972, 331 P.3d 29 (2014). FutureSelect’s negligent misrepresentation claim depends on those allegations, too, because FutureSelect must show, *inter alia*, that KPMG intended to supply its audit opinions for the “benefit and guidance” of the plaintiff *and* be “manifestly aware of the use to which the information was to be put and *intended* to supply it for that purpose.” *Haberman v. Wash. Public Power Supply Sys.*, 109 Wn.2d 107, 162, 744 P.2d 1032 (1987) (quoting Restatement (Second) of Torts §552(2) & cmt. a) (emphasis added).

<sup>26</sup> After four years of asserting (not in the alternative) that FutureSelect was not a third-party beneficiary, E&Y cited a single paragraph of FutureSelect’s complaint to argue that FutureSelect was a third-party beneficiary of E&Y’s engagement letter with Tremont. *See* CP 418. Based on that very different and limited record, the Superior Court concluded

[Footnote continues on next page]

**1. KPMG’s alternative arguments do not preclude arbitration**

When KPMG filed its motion to compel arbitration in 2011, it moved in the alternative to dismiss FutureSelect’s claims. CP 64 (KPMG “hereby moves to compel arbitration, or in the alternative, to dismiss the Complaint”). Ignoring the alternative nature of KPMG’s pleading, FutureSelect wrongly claims KPMG now is foreclosed from seeking arbitration because KPMG also disagrees with its claim on the merits. *See* FS Br. at 15.

*First*, KPMG’s challenge to the validity of FutureSelect’s claims does not alter the arbitrability of those claims. It is well settled that courts are not permitted to “reach the underlying merits of the controversy when determining arbitrability.” *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 887, 224 P.3d 818 (2009), *aff’d*, 173 Wn.2d 451 (2012); *see also* RCW 7.04A.070(3) (A “court may not refuse to order arbitration because the claim subject to arbitration lacks merit[.]”). Here, FutureSelect pleaded—and will attempt to prove—facts that also establish it as a third-party beneficiary. Thus, the dispute FutureSelect chose to frame is arbitrable.

*Second*, KPMG is not foreclosed from arguing alternatively that FutureSelect is bound by its own allegations, while simultaneously disputing the merits of those allegations. *See* CP 76 n. 9. Such alternative pleading is basic to motions practice and cannot “be construed as an admission against another alternative or inconsistent pleading in the same case.” *Port of Seattle v. Lexington Ins. Co.*, 111 Wn. App. 901, 909, 48

---

that the record did not support a finding that FutureSelect was a third-party beneficiary. CP 687.

P.3d 334 (2002) (internal quotation omitted); *see also Canal Station N. Condo. Ass'n v. Ballard Leary Phase II, LP*, 179 Wn. App. 289, 301-02, 322 P.3d 1229 (2013) (filing a motion to dismiss does not preclude a motion to compel arbitration).

## 2. FutureSelect must arbitrate

As a third-party beneficiary—and even if not—FutureSelect is obligated to arbitrate its claims against KPMG. *First*, FutureSelect must arbitrate its claims against KPMG as they are inextricably intertwined with the obligations imposed by engagement agreements. *See Romney v. Franciscan Med. Group*, 186 Wn. App. 728, 747, 349 P.3d 32 (2015) (“Where claims are based on the same set of facts and inherently inseparable, the court may order arbitration of claims against the party even if that party is not a party to the arbitration agreement.”).<sup>27</sup> *Second*, FutureSelect may not, as they are attempting to do, rely on the benefits of the engagement agreements “while simultaneously attempting to avoid the burdens th[ose] contract[s] impose[.]” *See Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 461, 268 P.3d 917 (2012) (internal quotation marks omitted) (citation omitted); *see also id.* at 464 (Stephens, J., concurring and dissenting).<sup>28</sup>

Here, all of FutureSelect’s claims arise from and necessarily are intertwined with the engagement agreements. Without those agreements,

---

<sup>27</sup> It is clear that state law, and not federal law, determines the arbitrability of FutureSelect’s claims. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

<sup>28</sup> That FutureSelect’s claims are recast in tort rather than contract does not avoid the arbitration clause. *See, e.g., Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1221 n. 13 (11th Cir.2011) (A party cannot avoid arbitration by “slapping a tort claim label” on a claim.); *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int’l, Ltd.*, 1 F.3d 639, 643 (7th Cir. 1993) (“[A] party may not avoid a contractual arbitration clause merely by casting its complaint in tort.”) (internal quotation omitted).

there would be no audits, no audit opinion, and no obligation on the part of KPMG to audit the Rye Funds' financial statements in accordance with GAAS. The engagement agreements are the reason KPMG performed the audits in question and provide the underlying bases of FutureSelect's claims.

The engagement agreements established the scope of the audits. KPMG agreed to "[a]udit the Partnerships' financial statements as set forth in [the appendices to the engagement agreements.]" *E.g.* CP 291, 312. Those audits are the genesis of FutureSelect claims against KPMG. *See* CP 4 ¶ 11 (Plaintiffs challenge the audits Tremont hired KPMG to perform from 2004 to 2007); *see id.* CP 24 ¶ 95 (KPMG became the auditor for the Rye Funds for the years 2004 through 2007).

The Engagement Agreement defined the objective of the audits. KPMG agreed to perform its audits "with the objective of expressing an opinion as to whether the presentation of the financial statements, taken as a whole, conforms with [GAAS]." *E.g.*, CP 291. It also defined KPMG's responsibilities. In particular, KPMG undertook the "responsibility to conduct and will conduct the audits of the Partnerships' financial statements in accordance with [GAAS]." *E.g.*, CP 291, 312. These are same the obligations and responsibilities that form the crux of FutureSelect's claims against KPMG. *See* CP 4–5 ¶ 12, 27 ¶¶ 104–05, CP 29 ¶¶ 111–12, 115, CP 30 ¶ 117, 47 ¶ 214; *see* CP 28 ¶ 109 (KPMG "violated GAAS when [it] issued [its] unqualified audit opinions for the Rye Funds."); CP 5 ¶ 13 (Had KPMG audited "as GAAS requires [it] would have discovered the fraud[.]"); CP 30 ¶ 117 (If KPMG "had performed these required procedures they would have discovered the

Madoff fraud[.]”); CP 38 ¶ 155 (“KPMG should have known that Madoff was engaging in a massive Ponzi scheme[.]”); CP 38 ¶ 156 (“If KPMG had conducted its audits in accordance with GAAS and with ordinary care, it would have discovered that the assets did not exist and the trades had not occurred.”). FutureSelect cannot prevail on any claim against KPMG without establishing a breach of these contractual obligations and responsibilities.<sup>29</sup>

The engagement agreements provide that KPMG “will issue a written report upon our audits of the Partnerships’ financial statements.” *E.g.*, CP 291. In certain years, the Engagement Agreement also provided that KPMG’s reports will be addressed to the general and limited partners of the Partnerships.” *Id.* These audit opinions, and their distribution to the limited partners, are fundamental to FutureSelect’s claims. *See* CP 38 ¶¶ 154–55, CP 39 ¶¶ 157–58, CP 46–47 ¶¶ 211–16, *see* CP 46 ¶ 210 (“KPMG knew that FutureSelect would rely upon its audit reports[.]”); *id.* (KPMG “render[ed] audit opinions that were addressed and distributed to FutureSelect[.]”); CP 20–21 ¶ 78 (“FutureSelect would not have invested in the Rye Funds without . . . unqualified opinions of the Auditors.”). Without the creation and delivery of KPMG’s audit reports, FutureSelect has no claim against KPMG.

---

<sup>29</sup> That is unlike decisions where the crux of the claims and alleged injuries each fall outside the contract. *See Comer v. Micor, Inc.*, 436 F.3d 1098, 1102 (9th Cir. 2006) (Comer did not seek to take advantage of the management agreements and instead brought a lawsuit based entirely on ERISA); *see also Townsend*, 173 Wn.2d at 465, 264 P.3d at 923–24 (Stephens, J., concurring and dissenting) (crux of the children's claims sounded in tort, arose outside the contract, and sought relief for personal injuries relating to mold, pests, and poisonous gases).

At bottom, FutureSelect embraces all the benefits of the engagement agreements, including receipt of KPMG’s audit opinions and KPMG’s agreement to perform GAAS audits, yet turns it back on the corresponding obligations to arbitrate claims related to those very same audits. To allow FutureSelect to claim the benefit of the Engagement Agreement and simultaneously avoid its burdens would disregard basic principles of equity.<sup>30</sup>

## VI. CONCLUSION

KPMG respectfully requests that the Court dismiss this appeal for the reasons set forth in its separate motion to dismiss. Should the Court deny that motion, KPMG requests that the Court affirm the Superior Court’s order staying the action pending mandatory arbitration.

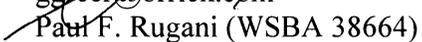
---

<sup>30</sup> The cases cited by FutureSelect are not to the contrary. *See, e.g., R.J Griffin & Co. v. Beach Club II Homeowners Ass’n*, 384 F.3d 157, 164 (4th Cir. 2004) (A “nonsignatory is estopped from refusing to comply with an arbitration clause when it is seeking or receives a direct benefit from a contract containing an arbitration clause.”); *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1075 (5th Cir. 2002) (under Texas law, a party can be bound by the terms of an arbitration provision when asserting claims that require reliance on the contract containing the arbitration provision.”); *Comer*, 436 F.3d at 1102 (“[n]onsignatories have been held to arbitration clauses where the nonsignatory ‘knowingly exploits the agreement containing the arbitration clause’”); *Woods v. Christensen Shipyards, Ltd.*, No. 04-61432-CIV, 2005 WL 5654643, at \*5 (S.D. Fla. Sept. 23, 2005) (a party “cannot accept the benefits and avoid the burdens or limitations of the contract.”); *Lagrone Canst., LLC v. Landmark. LLC*, 40 F. Supp. 3d 769, 781 (N.D. Miss. 2014) (under Tennessee law, third-party beneficiaries can be bound to an arbitration clause if they seek to enforce their rights under a contract).

DATED this 11<sup>th</sup> day of May 2016.

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By:   
George B. Greer (WSBA No. 11050)  
ggreer@orrick.com  
  
Paul F. Rugani (WSBA 38664)  
prugani@orrick.com

701 Fifth Avenue, Suite 5600  
Seattle, WA 98104-7097  
Telephone: +1-206-839-4300  
Facsimile: +1-206-839-4301

Of Counsel  
John K. Villa  
jvilla@wc.com  
David A. Forkner  
dforkner@wc.com  
Jonathan E. Pahl  
jpahl@wc.com  
WILLIAMS & CONNOLLY LLP  
725 Twelfth Street, NW  
Washington, DC 20005  
Telephone: +1-202-434-5000  
Facsimile: +1-202-434-5029

*Attorneys for KPMG LLP*

NO. 74611-1-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

**FILED**  
COURT OF APPEALS  
DIVISION ONE  
MAY 11 2016

---

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

---

George E. Greer (WSBA No. 11050)  
Paul F. Rugani (WSBA No. 38664)  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
701 Fifth Avenue, Suite 5600  
Seattle, WA 98104-7097  
(206) 839-4300

Of Counsel  
John K. Villa (*pro hac vice* pending)  
David A. Forkner (*pro hac vice* pending)  
Jonathan E. Pahl (*pro hac vice* pending)  
WILLIAMS & CONNOLLY LLP  
725 Twelfth Street, NW  
Washington, DC 20005  
(202) 434-5000

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.

---

KPMG LLP'S MOTION TO DISMISS APPEAL

---

George E. Greer (WSBA No. 11050)  
Paul F. Rugani (WSBA No. 38664)  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
701 Fifth Avenue, Suite 5600  
Seattle, WA 98104-7097  
(206) 839-4300

Of Counsel

John K. Villa (*admitted pro hac vice*)  
jvilla@wc.com  
David A. Forkner (*admitted pro hac vice*)  
dforkner@wc.com  
WILLIAMS & CONNOLLY LLP  
725 Twelfth Street, NW  
Washington, DC 20005  
(202) 434-5000

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2016 MAY 11 PM 4:35

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. STATEMENT OF CASE .....	1
III. ARGUMENT.....	2
A. APPELLANTS DO NOT HAVE THE RIGHT TO APPEAL AN ORDER COMPELLING ARBITRATION AND STAYING THE ACTION .....	2
B. THE COURT OF APPEALS SHOULD NOT GRANT DISCRETIONARY REVIEW OF THE ORDER.....	4
1. The Order Does Not Meet the Requirements for Discretionary Review Under RAP 2.3(b)(1). .....	5
2. The Order Does Not Meet the Requirements for Discretionary Review Under RAP 2.3(b)(2). .....	9
3. The Order Does Not Meet the Requirements for Discretionary Review Under RAP 2.3(b)(3). .....	10
4. Discretionary Review Is Not Warranted by Other Considerations. ....	11
IV. CONCLUSION.....	11

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>FEDERAL CASES</b>	
<i>Bushley v. Credit Suisse First Boston</i> , 360 F.3d 1149 (9th Cir. 2004) .....	4
<i>Dees v. Billy</i> , 394 F.3d 1290 (9th Cir. 2005) .....	4
<i>Ernst &amp; Young Ltd. v. Quinn</i> , 2009 U.S. Dist. LEXIS 99385 (D. Conn. Oct. 26, 2009) .....	7, 8, 10
<i>Finley v. Takisaki</i> , 2006 U.S. Dist. LEXIS 27020 (W.D. Wash. Apr. 28, 2006).....	7
<i>Green Tree Fin. Corp.-Ala. v. Randolph</i> , 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000).....	3
<i>In re VeriSign, Inc., Deriv. Litig.</i> , 531 F. Supp. 2d 1173 (N.D. Cal. 2007) .....	8, 10
<i>Ventress v. Japan Airlines</i> , 486 F.3d 1111 (9th Cir. 2007) .....	3
<b>STATE CASES</b>	
<i>ACF Prop. Mgmt., Inc. v. Chaussee</i> , 69 Wn. App. 913, 850 P.2d 1387 (1993) .....	9
<i>All-Rite Contracting Co. v. Omey</i> , 27 Wn.2d 898, 181 P.2d 636 (1947) .....	3
<i>Am. States Ins. Co. v. Chun</i> , 127 Wn.2d 249, 897 P.2d 362 (1995).....	3
<i>Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.</i> , 829 A.2d 143 (Del. Ch. 2003).....	7
<i>In re Grove</i> , 127 Wn.2d 221, 897 P.2d 1252 (1995).....	4

<i>La Hue v. Keystone Inv. Co.</i> , 6 Wn. App. 765, 496 P.2d 343 (1972).....	8, 9
<i>Litman v. Prudential-Bache Props., Inc.</i> , 611 A.2d 12 (Del. Ch. 1992).....	7
<i>Oman v. Yates</i> , 70 Wn.2d 181, 422 P.2d 489 (1967).....	8
<i>Right-Price Recreation, LLC v. Connells Prairie Cmty. Council</i> , 146 Wn.2d 370, 46 P.3d 789 (2002).....	5
<i>Roberts v. Safeco Ins. Co.</i> , 87 Wn. App. 604, 941 P.2d 668 (1997).....	8
<i>Teufel Const. Co. v. Am. Arbitration Ass'n</i> , 3 Wn. App. 24, 472 P.2d 572 (1970).....	3
<i>TIFD III-X LLC v. Fruehauf Prod. Co.</i> , 883 A.2d 854 (Del. Ch. 2004).....	7
<i>Tooley v. Donaldson, Lufkin &amp; Jenrette, Inc.</i> , 845 A.2d 1031 (Del. 2004).....	6, 7
<i>Wooh v. Home Ins. Co.</i> , 84 Wn. App. 781, 930 P.3d 337 (1997).....	3
<b>FEDERAL STATUTES</b>	
9 U.S.C. § 16.....	3
<b>STATE STATUTES</b>	
RCW 7.04A.....	2
RCW 7.04A.280(1).....	2
<b>OTHER AUTHORITIES</b>	
RAP 2.3(b).....	5
RAP 2.3(b)(1).....	5

RAP 2.3(b)(2) .....	9, 10
RAP 2.3(b)(3) .....	10
RAP 5.1(a) .....	2
RAP 17.1.....	1

## **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,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: 

George E. Greer (WSBA No. 11050)

ggreer@orrick.com

Paul F. Rugani (WSBA 38664)

prugani@orrick.com

701 Fifth Avenue, Suite 5600

Seattle, WA 98104-7097

Telephone: +1-206-839-4300

Facsimile: +1-206-839-4301

Of Counsel:

John K. Villa (*admitted pro hac vice*)

jvilla@wc.com

David A. Forkner (*admitted pro hac vice*)

dforkner@wc.com

WILLIAMS & CONNOLLY LLP

725 Twelfth Street, NW

Washington, DC 20005

Telephone: +1-202-434-5000

Facsimile: +1-202-434-5029

Attorneys for KPMG LLP

# EXHIBIT B

*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

November 21, 2011

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

David Martin Simmonds  
Gordon Tilden Thomas & Cordell  
1001 4th Ave Ste 4000  
Seattle, WA, 98154-1007  
dsimmonds@gordontilden.com

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

Paul J. Lawrence  
Pacifica Law Group LLP  
1191 2nd Ave Ste 2100  
Seattle, WA, 98101-2945  
paul.lawrence@pacificalawgroup.com

David F Taylor  
Perkins Coie  
1201 3rd Ave Ste 4800  
Seattle, WA, 98101-3099  
dftaylor@perkinscoie.com

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

Bradley S. Keller  
Byrnes Keller Cromwell LLP  
1000 2nd Ave Fl 38  
Seattle, WA, 98104-1094  
bkeller@byrneskeller.com

Cori Gordon Moore  
Perkins Coie LLP  
1201 3rd Ave Fl 40  
Seattle, WA, 98101-3029  
cgmoore@perkinscoie.com

Charles Philip Rullman, III  
Foster Pepper PLLC  
1111 3rd Ave Ste 3400  
Seattle, WA, 98101-3264  
rullc@foster.com

Timothy J. Filer  
Foster Pepper PLLC  
1111 3rd Ave Ste 3400  
Seattle, WA, 98101-3299  
filet@foster.com

John Goldmark  
Davis Wright Tremaine LLP  
1201 3rd Ave Ste 2200  
Seattle, WA, 98101-3045  
johngoldmark@dwt.com

Stephen Michael Rummage  
Davis Wright Tremaine LLP  
1201 3rd Ave Ste 2200  
Seattle, WA, 98101-3045  
steverummage@dwt.com

Virginia Nicholson  
Schwabe Williamson & Wyatt PC  
1420 5th Ave Ste 3400  
Seattle, WA, 98101-4010  
vnicolson@schwabe.com

Christopher Holm Howard  
Schwabe Williamson & Wyatt PC  
1420 5th Ave Ste 3400  
Seattle, WA, 98101-4010  
choward@schwabe.com

No. 67302-5-1

Page 2

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

Claire Louise Been  
Schwabe Williamson & Wyatt  
1420 5th Ave Ste 3400  
Seattle, WA, 98101-4010  
cbeen@schwabe.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

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

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.

  
\_\_\_\_\_

  
\_\_\_\_\_

  
\_\_\_\_\_

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 NOV 21 AM 9:32

# EXHIBIT C

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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 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.

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:

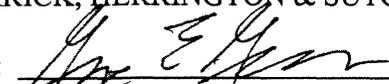
4 <input type="checkbox"/>	Plaintiffs' claims against KPMG are subject to mandatory arbitration and this 5 action shall be stayed pending resolution of that arbitration.
6 <input type="checkbox"/>	Plaintiffs' claims against KPMG are dismissed.

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

prugani@orrick.com

17 701 Fifth Avenue, Suite 5600

Seattle, WA 98104-7097

18 Telephone: +1-206-839-4300

19 Facsimile: +1-206-839-4301

20 Of Counsel:

Corey Worcester

worcesterc@howrey.com

21 HOWREY LLP

22 601 Lexington Avenue, Floor 54

23 New York, NY 10022

Telephone: +1-212-896-6500

24 Facsimile: +1-212-896-6501

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]- 1

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

1 IT IS HEREBY ORDERED that the motion is DENIED.

2  
3 DATED this \_\_\_\_ day of \_\_\_\_\_, 2011.  
4  
5

6  
7  
8 \_\_\_\_\_  
9 King County Superior Court Judge

10 Presented by:

11  
12  
13 **GORDON TILDEN THOMAS & CORDELL LLP**  
14

15  
16 By: s/ Jeffrey M. Thomas

17 Jeffrey I. Tilden, WSBA #12219

18 Jeffrey M. Thomas, WSBA #21175  
19

20 **THOMAS, ALEXANDER & FORRESTER LLP**  
21

22  
23 By: s/ Jeffrey M. Thomas for

24 Steven W. Thomas

25 Emily Alexander

26 Mark Forrester

27 Jessica Rassler

28 Attorneys for Plaintiffs  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45

**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:

**Attorneys for Defendants Tremont Group Holdings, Inc., and Tremont Partners, Inc.**

Tim J. Filer, WSBA #16285 Via U.S. Mail  
Charles P. Rullman, WSBA #42733  
Foster Pepper PLLC Via ECF (insofar as the Party has opted in)  
1111 Third Avenue, Suite 3400  
Seattle, WA 98101-3299  
E-mail: [FileT@foster.com](mailto:FileT@foster.com)  
E-mail: [RullC@foster.com](mailto:RullC@foster.com)

**Attorneys for Defendant Oppenheimer Acquisition Corporation**

David F. Taylor, WSBA #25689  
Cori G. Moore, WSBA #28649  
Perkins Coie LLP Via ECF  
1201 Third Avenue, Suite 4800  
Seattle, Washington 98101-3099  
E-mail: [DFTaylor@perkinscoie.com](mailto:DFTaylor@perkinscoie.com)  
E-mail: [CGMoore@perkinscoie.com](mailto:CGMoore@perkinscoie.com)

**Attorneys for Massachusetts Mutual Life Insurance Co.**

Christopher H. Howard, WSBA #11074  
Virginia R. Nicholson WSBA#39601  
Schwabe, Williamson & Wyatt, P.C. Via ECF  
1420 Fifth Avenue, Suite 3400  
Seattle, Washington 98101-4010  
E-mail: [choward@schwabe.com](mailto:choward@schwabe.com)  
E-mail: [vnicholson@schwabe.com](mailto:vnicholson@schwabe.com)

**Attorneys for Defendant Goldstein Golub Kessler LLP**

Bradley S. Keller, WSBA #10665  
Byrnes Keller Cromwell LLP Via ECF  
1000 Second Avenue, 38<sup>th</sup> Floor  
Seattle, Washington 98104  
E-mail: [bkeller@byrneskeller.com](mailto:bkeller@byrneskeller.com)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45

**Attorneys for Ernst & Young LLP**  
Stephen M. Rummage, WSBA #11168  
John A. Goldmark, WSBA #40980  
Davis Wright Tremaine LLP  
1201 Third Avenue, Suite 2200  
Seattle, Washington 98101-3045  
E-mail: [steverummage@dwt.com](mailto:steverummage@dwt.com)  
E-mail: [johngoldmark@dwt.com](mailto:johngoldmark@dwt.com)

Via ECF

**Attorneys for KPMG LLP**  
George E. Greer, WSBA #11050  
Paul F. Rugani, WSBA #38664  
Orrick, Herrington & Sutcliffe  
701 Fifth Avenue, Suite 5600  
Seattle, Washington 98104-70975  
E-mail: [ggreer@orrick.com](mailto:ggreer@orrick.com)  
E-mail: [prugani@orrick.com](mailto:prugani@orrick.com)

Via U.S. Mail

Via ECF (insofar as the Party has opted in)

s/ Carol L. Russell  
\_\_\_\_\_  
Carol L. Russell, Legal Secretary for  
Jeffrey M. Thomas  
Gordon Tilden Thomas & Cordell LLP  
1001 Fourth Avenue, Suite 4000  
Seattle, WA 98154  
Telephone: (206) 467-6477  
Facsimile: (206) 467-6292

# EXHIBIT E

JAN 03 2012

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

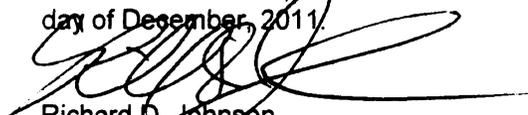
FUTURESELECT PORTFOLIO	)	
MANAGEMENT, INC.,	)	
FUTURESELECT PRIME ADVISOR,	)	No. 67302-5-I
II LLC, THE MERRIWELL FUND,	)	
L.P., and TELESIS IIW, LLC,	)	CERTIFICATE OF FINALITY
	)	
Appellants,	)	King County
v.	)	
	)	Superior Court No. 10-2-30732-0.SEA
TREMONT GROUP HOLDINGS,	)	
INC., TREMONT PARTNERS, INC.,	)	
OPPENHEIMER ACQUISITION	)	
CORPORATION, MASSACHUSETTS	)	
MUTUAL LIFE INSURANCE CO.,	)	
GOLDSTEIN GOLUB KESSLER LLP,	)	
ERNST & YOUNG LLP and KPMG	)	
LLP,	)	
Respondents.	)	

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

---

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

---

George E. Greer (WSBA No. 11050)  
Paul F. Rugani (WSBA No. 38664)  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
701 Fifth Avenue, Suite 5600  
Seattle, WA 98104-7097  
(206) 839-4300

Of Counsel  
John K. Villa  
David A. Forkner  
Jonathan E. Pahl  
WILLIAMS & CONNOLLY LLP  
725 Twelfth Street, NW  
Washington, DC 20005  
(202) 434-5000

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 MDL 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: <b>10 CV 2904</b> 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

---

<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 *JeffersonCounty 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

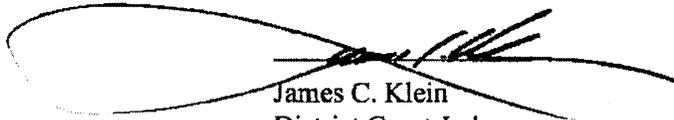
provisions. Moreover, the language in the arbitration provisions is broad and explicitly states that questions of arbitrability are for the arbitrator. Therefore, Agile's claims, including its tort claims, are included in the scope of the arbitration clause. Accordingly, the Court will stay the litigation against KPMG and compel arbitration.

#### V. RULING

KPMG's Motion to Stay and Compel Arbitration is GRANTED.

Done this 25<sup>th</sup> day of April, 2012.

By the Court:



James C. Klein  
District Court Judge



NO. 74611-1-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.

---

CERTIFICATE OF SERVICE

---

George E. Greer (WSBA No. 11050)  
Paul F. Rugani (WSBA No. 38664)  
ORRICK, HERRINGTON & SUTCLIFFE LLP  
701 Fifth Avenue, Suite 5600  
Seattle, WA 98104-7097  
(206) 839-4300

Of Counsel  
John K. Villa  
David A. Forkner  
Jonathan E. Pahl  
WILLIAMS & CONNOLLY LLP  
725 Twelfth Street, NW  
Washington, DC 20005  
(202) 434-5000

2016 MAY 11 PM 4:35

FILED  
COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON

**CERTIFICATE OF SERVICE**

I, Malissa A. Tracey, hereby certify that on May 11, 2016, I caused the following documents to be served on the parties below via the method specified:

1. Respondent's Brief of KPMG LLP;
2. Declaration of George E. Greer in Support of Respondent's Brief;
3. KPMG LLP's Supplemental Designation of Clerk's Papers and Exhibits;
4. Non-Washington Authority Cited in Respondent's Brief of KPMG LLP; and this
5. Certificate of Service

**Via Legal Messenger**

Clerk  
Court of Appeals, Division I  
600 University Street  
Seattle, WA 98101

**Via Legal Messenger & Electronic Delivery**

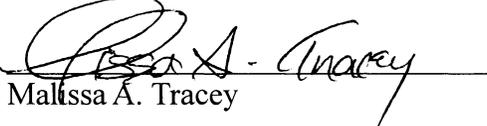
Jeffrey Thomas  
Gordon Tilden Thomas & Cordell LLP  
1001 Fourth Avenue, Suite 4000  
Seattle, WA 98154  
jthomas@gordontilden.com

**Via Federal Express & Electronic Delivery**

Steven Thomas  
Emily Alexander  
Mark Forrester  
Thomas, Alexander & Forrester LLP  
14 – 27th Avenue  
Venice, CA 90291  
steventhomas@tafsattorneys.com  
emilyalexander@tafsattorneys.com  
markforrester@tafsattorneys.com  
melissalawton@tafsattorneys.com

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

Dated this 11th day of May 2016, at Seattle, Washington.

  
Melissa A. Tracey