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

v.

TREMONT GROUP HOLDINGS, INC., TREMONT PARTNERS,
INC., OPPENHEIMER ACQUISITION CORPORATION,
MASSACHUSETTS MUTUAL LIFE INSURANCE CO.,
GOLDSTEIN GOLUB KESSLER LLP, ERNST & YOUNG LLP and
KPMG LLP, Defendants/Respondents.

**KPMG LLP'S ANSWER IN OPPOSITION TO
THE MOTION FOR DISCRETIONARY REVIEW**

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

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I. INTRODUCTION

In this second piecemeal appeal from a five-year-old interlocutory order staying proceedings pending arbitration, appellants (collectively “FutureSelect”) ask this Court to command the Court of Appeals to grant review. When the Court of Appeals dismissed the first attempted appeal five years ago, FutureSelect did not seek review in this Court. Instead, it informed the superior court that it “must proceed to arbitration,” but never did. Its claims remain stayed, just as they were in 2011.

Having elected not to arbitrate, FutureSelect is relegated to transparently misreading an opinion of this Court, *Hill v. Garda CL Northwest, Inc.*, in an argument it waited years to raise. FutureSelect claims the *Hill* opinion *sub silentio* altered Washington’s Revised Uniform Arbitration Act (“RUAA”) and reversed decades of jurisprudence uniformly holding that orders compelling arbitration are not final and thus not appealable. The Court of Appeals correctly rejected that argument, concluded FutureSelect’s appeal was untimely, and declined to reconsider its 2011 dismissal of the first appeal. By now, six Court of Appeals judges (and the commissioner) have rejected FutureSelect’s attempts to appeal.

Had FutureSelect proceeded to arbitration—as it once conceded it must—it long ago would have secured an outcome favorable to it or obtained an appealable order. To allow FutureSelect to sit idly by while five years pass, then re-file the same interlocutory appeal that had been rejected, would reward litigants who ignore well-settled rules of finality and appealability. The Court should deny FutureSelect’s motion for review.

II. STATEMENT OF THE ISSUES

No issues warrant review, but if any did, they would be these:

1. Did this Court's opinion in *Hill v. Garda CL Northwest, Inc.*, create a right to appeal from an interlocutory order staying litigation pending arbitration, even though *Hill* never considered that issue; the arbitration statutes establish no such right; and seven decades of this Court's precedent say exactly the opposite?

2. Is the Court of Appeals obligated to grant discretionary review of an interlocutory order staying litigation pending arbitration when the appellants did not properly identify RAP 2.3 as a basis for review?

3. If review had been required at one time, was the Court of Appeals still obligated to grant review five years later, despite RAP 18.8(b)?

4. Is the Court of Appeals required—despite RAP 12.7 and RAP 18.8(c)—to reconsider its own interlocutory decision five years after issuing the certificate of finality?

5. Did the Court of Appeals commit obvious error rendering further proceedings useless—despite the legislative policy favoring arbitration and the availability of post-arbitral review—such that this Court should command the Court of Appeals to review the five-year-old order?

III. STATEMENT OF THE CASE

In August 2010, FutureSelect Portfolio Management, Inc., FutureSelect Prime Advisor II LLC, The Merriwell Fund, L.P., and Telesis IIW, LLC (collectively "FutureSelect") filed this lawsuit in King County Superior Court against the investment manager and auditors of the Rye

Funds—hedge funds in which FutureSelect invested. FutureSelect alleged it suffered loss because Bernard Madoff and his co-conspirators stole from the Rye Funds. KPMG performed year-end financial statement audits not for Madoff or his company but for the Rye Funds. KPMG’s engagement agreements require arbitration, and KPMG promptly moved in the superior court to compel arbitration on multiple, independent grounds.

The parties fully briefed the issues. *See* CP 55–78, 327–38, 361–69. FutureSelect did not contest the validity or broad scope of the arbitration agreements; it instead claimed the agreements were not enforceable against it because it had not signed them. CP 337–38. KPMG contended that (1) FutureSelect’s claims are derivative and belong to the Rye Funds, meaning FutureSelect stands in the shoes of the Rye Funds and is subject to defenses—including arbitration—available against the Rye Funds, and (2) other basic principles of contract law required arbitration even against a non-signatory. CP 55–78, 361–69; RP 37:22–43:11, 76:15–77:3 (May 17, 2011). At oral argument, the court noted it had received “significant” briefing and argument, which was “incredibly helpful.” RP 67:10–22.¹

On June 3, 2011, “having reviewed the papers filed by the parties,” and the “argument of the parties relevant to the issues,”² the superior court

¹ FutureSelect’s motion suggests the superior court did not consider whether the arbitration agreements are enforceable. Mot. for Review at 11–12. That is false. As stated in the text, the parties briefed and argued the issue, and the judge said she had considered and appreciated those submissions.

² FutureSelect impugns the superior court’s order as a “check box order,” Mot. for Review at 2, even though “findings of fact and conclusions of law are not necessary” for orders resolving motions. CR 52(a)(5)(B). Following King County Local Rule 7(b)(5)(c), KPMG

granted KPMG's motion to compel arbitration. CP 400-01. The court correctly held that FutureSelect's claims against KPMG must be arbitrated and stayed those claims "pending resolution of that arbitration."³ *Id.* The same day, the court dismissed the claims against the other parties.

On June 16, 2011, more than five years ago, FutureSelect filed a notice of appeal. CP 730. KPMG moved to dismiss. Decl. of George E. Greer ("Greer Decl."), Ex. C. Consistent with a long line of precedent precluding appeal of orders compelling arbitration, Judges Applewick, Grosse, and Schindler dismissed FutureSelect's appeal and denied its request for discretionary review. Greer Decl., Ex. D. FutureSelect sought neither reconsideration nor review in this Court, and the Court of Appeals issued a certificate of finality on December 30, 2011. Greer Decl., Ex. E.

Back in the superior court, FutureSelect moved under CR 54(b) for an order entering final judgment of its then-dismissed claims against the non-KPMG parties. CP 758. FutureSelect represented to the superior court that proceeding against those other parties "will not delay the arbitration proceedings [between] Plaintiffs and KPMG," and FutureSelect informed the court that its claims against KPMG "*must proceed to arbitration.*" CP 764-65 (emphasis added). The trial court granted the motion, severing the

and FutureSelect each submitted two-page orders incorporating by reference the parties' pleadings and arguments. Decl. of George E. Greer, Exs. A, B. FutureSelect's "check box" refrain has little to do with the merits of its appeal; it is an attempt to disparage the rules and practices—not to mention the distinguished judges—of the superior court.

³ FutureSelect's petition for review states the superior court stayed the case "pending resolution of FutureSelect's claims against other parties." Mot. for Review at 7. That is incorrect. The court's order stayed the case pending *arbitration*. CP 400-01.

stayed claims against KPMG from the rest of the case.

In September 2016, after four years of litigation, one of the other parties, Ernst & Young LLP (“E&Y”), moved to compel arbitration. CP 656. FutureSelect argued that, unlike KPMG, which had moved to compel arbitration promptly, E&Y engaged in “gamesmanship” by waiting. CP 664. FutureSelect further informed the superior court that KPMG’s motion to compel arbitration was irrelevant to E&Y’s motion because KPMG’s motion “involved different engagement letters, different arbitration clauses and [was] not *res judicata*.” CP 784. On December 3, 2014, the superior court denied E&Y’s motion. CP 678. E&Y did not seek appellate review.

Most of FutureSelect’s claims against the other parties settled in 2015. *See* CP 695. FutureSelect subsequently went to trial against just one defendant, E&Y. *See id.* 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 out investments with Madoff and met with him personally—was 50 percent at fault for its own losses. CP 710. The superior court entered judgment on the claims against E&Y in December 2015. CP 701.

Despite having represented to the superior court that its claims against KPMG “must proceed to arbitration,” FutureSelect never arbitrated with KPMG—not in 2011 or in the years since. Inexplicably, with its claims against KPMG still stayed, FutureSelect initiated this second appeal on January 15, 2016, again challenging the June 2011 order compelling arbitration. CP 712. KPMG moved to dismiss the appeal arguing, *inter alia*,

that the stayed claims had not been adjudicated to finality, and interlocutory review of a five-year-old order was unavailable.⁴

On May 19, 2016, a Court of Appeals commissioner correctly granted KPMG's motion and dismissed the appeal for multiple reasons. The commissioner concluded that *Hill* does not allow appeals from orders compelling arbitration. Ruling at 2. Instead, decades of precedent preclude appeal from such orders. *Id.* The commissioner also found FutureSelect's appeal untimely, noting that "FutureSelect does not explain why th[e Court of Appeals] can and should revisit the same issue . . . after FutureSelect did not pursue a petition for review of [its] November 2011 order[.]" *Id.* at 2, 3.

FutureSelect sought modification of the ruling. After another full round of briefing, Judges Cox, Dwyer, and Spearman denied it. By then, a commissioner and six judges of the Court of Appeals had rejected FutureSelect's attempts to obtain review.

After FutureSelect filed a petition for review in this Court, the deputy clerk informed the parties that under RAP 13.3(d), the Court would treat the petition as if it were a motion for discretionary review given that the Court of Appeals decision denied review and was interlocutory.

⁴ KPMG also moved to disqualify Thomas Alexander & Forrester LLP ("TAF"), one of the law firms representing FutureSelect. As stated in that fully briefed motion, a partner at Williams & Connolly LLP, KPMG's outside counsel, accessed KPMG's confidential information pertinent to this lawsuit just days before leaving Williams & Connolly to become one of just four partners at TAF. TAF did not implement a screen, and the lawyer at issue has participated in this lawsuit personally. Because it dismissed the appeal and denied the motion to modify, the Court of Appeals denied KPMG's motion to disqualify without prejudice to re-filing. KPMG does not waive the conflict, and contemporaneously with this filing will renew its motion for disqualification in this Court.

III. ARGUMENT

“Interlocutory appeals are the antithesis of judicial efficiency and economy.” *State v. Brown*, 64 Wn. App. 606, 617, 825 P.2d 350 (1992). Following its earlier attempt to appeal the same interlocutory order in 2011, this is FutureSelect’s second attempt to skirt that “wise and salutary” rule. *Maybury v. City of Seattle*, 53 Wn.2d 716, 721, 336 P.2d 878 (1959).

A. RAP 13.5, not RAP 13.4, supplies the standard of review of interlocutory decisions of the Court of Appeals

FutureSelect’s petition for review under RAP 13.4 was improper. The Court of Appeals never granted review, and thus its dismissal order was interlocutory. *See Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 501–02, 798 P.2d 808 (1990). Rule 13.5 sets forth the standards for this Court’s review of interlocutory decisions. It allows for review “only” if the Court of Appeals has committed “obvious error which would render further proceedings useless” or “probable error and the decision . . . substantially alters the status quo or substantially limits the freedom of a party to act.” RAP 13.5(b).⁵ None of those requirements is met.

B. The Court of Appeals committed neither obvious nor probable error when it declined to review the five-year-old order

The Court of Appeals did not err by dismissing the appeal. A party seeking review in the Court of Appeals must follow one of “only” two methods: review as a matter of right or discretionary review. *See* RAP 2.1(a). Neither method obligated the Court of Appeals to review the superior court’s 2011 order. Even if review had been required at one time (it was

⁵ FutureSelect does not contend that RAP 13.5(b)(3) applies.

not), the timing limits of RAP 18.8(b) favoring finality foreclose review now, five years later. Unable to obtain review now, FutureSelect also suggests the Court of Appeals was required to reconsider its 2011 order, but that order long ago became final, precluding reconsideration.

1. There is no right to appeal an order compelling arbitration

FutureSelect primarily claims there should be a “right to appeal following an order compelling arbitration.” Mot. for Review at 3, 5. There is not. Decades of precedent and the arbitral statutes make that abundantly clear, and nothing about *Hill v. Garda CL Northwest, Inc.* changed the law.

a. Seventy years of precedent prohibits appeals from orders compelling arbitration

For nearly seven decades, this Court has held that there is no right to appeal from orders compelling arbitration. *Saleemi v. Doctor’s Assocs., Inc.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013); *Am. States Ins. Co. v. Chun*, 127 Wn.2d 249, 254, 897 P.2d 362 (1995); *All-Rite Contracting Co. v. Omey*, 27 Wn.2d 898, 901, 181 P.2d 636 (1947). The law is “definitely settled” that “an order compelling arbitration is not final and therefore is not appealable.” *Teufel Constr. Co. v. Am. Arbitration Ass’n*, 3 Wn. App. 24, 25, 472 P.2d 572 (1970) (citing *All-Rite*).

b. The RUAA does not permit appeals from orders compelling arbitration

The text of Washington’s Revised Uniform Arbitration Act (the “RUAA”) also reflects the legislative determination that orders compelling arbitration are not appealable. The RUAA identifies six types of appealable

arbitration-related orders; an order compelling arbitration is *not* one of them. *See* RCW 7.04A.280(1)(a)–(f).⁶ Although an appeal may be taken from a final judgment, an order compelling arbitration is not a final judgment under the RUAA. The statutory scheme provides for entry of a final judgment only upon “confirming, vacating without directing a rehearing, modifying, or correcting an [arbitral] award,” *not* upon compelling arbitration. RCW 7.04A.250(1).⁷ Moreover, the RUAA requires courts to retain jurisdiction during arbitration. RCW 7.04A.070(6). In contrast, a final judgment “ends the litigation, leaving nothing for the court to do but execute the judgment.” *In re Petersen*, 138 Wn.2d 70, 88, 980 P.2d 1204 (1999).

The judicial and legislative determinations that orders compelling arbitration are not appealable comports with the majority of state jurisdictions to consider the issue and accords with the Federal Arbitration Act (“FAA”), which also holds that stays in favor of arbitration are not appealable. *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).⁸

⁶ The “age old rule” *expressio unius est exclusio alterius* establishes an inference that the legislature intended the omission. *State v. LG Elecs. Inc.*, 186 Wn.2d 1, 9, 375 P.3d 636 (2016). That rule of interpretation is particularly apt here because the legislature is “presumed to know the existing state of the case law in those areas in which it is legislating.” *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994). When it enacted the RUAA in 2005, the legislature elected not to disturb the decades-old state of this Court’s jurisprudence prohibiting appeals from orders compelling arbitration.

⁷ *See supra* n.6.

⁸ *See Dennis v. Jack Dennis Sports, Inc.*, 253 P.3d 495, 496 (Wyo. 2011); *Bullard v. Tall House Bldg. Co.*, 196 N.C. App. 627, 633–635, 676 S.E.2d 96 (N.C. Ct. App., 2009); *In re Gulf Exploration, LLC*, 289 S.W.3d 836, 839 (Tex. 2009); *Robinson v. Advance Loans II, L.L.C.*, 290 S.W.3d 751, 755 (Mo. Ct. App. E.D. 2009); *Seguin v. Northrop Grumman Sys. Corp.*, 277 Va. 244, 248, 672 S.E.2d 877 (2009); *Carolina Care Plan, Inc. v. United*

c. ***Hill* did not alter the RUAA or overrule 70 years of precedent *sub silentio***

FutureSelect contends that *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 308 P.3d 635 (2013), altered the RUAA and overruled decades of established precedent, without saying so and without addressing the RUAA's statutory provisions. It claims *Hill* established an “appeal as a right following an order compelling arbitration,” even though neither party in *Hill* had sought to appeal as a matter of right. Mot. for Review at 19.

FutureSelect is flat wrong. This Court does not overrule binding precedent *sub silentio*. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280–81, 208 P.3d 1092 (2009). Instead, a clear determination that an “established rule is incorrect and harmful” is required to reject *stare decisis*. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). In *Hill*, this Court made no such determination about the appealability of orders compelling arbitration. To the contrary, *Hill* did not discuss—or even cite—any of that long line of cases establishing that a party opposing arbitration has “only a right to move for discretionary review

HealthCare Servs., Inc., 361 S.C. 544, 558, 606 S.E.2d 752 (S.C. 2004); *Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 547 n.2 (Ky. 2008); *Powell v. Cannon*, 179 P.3d 799, 802–807 (Utah 2008); *Penn. Supply, Inc. v. Mumma*, 921 A.2d 1184, 1194 (Pa Super. Ct. 2007); *Creamer v. Bishop*, 902 A.2d 838, 839 (Me. 2006); *Lane v. Urgitus*, 145 P.3d 672, 679 (Colo. 2006); *Muao v. Grosvenor Props. LTD.*, 99 Cal. App. 4th 1085, 1089, 122 Cal. Rptr. 2d 131 (2002); *Kindred v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 116 Nev. 405, 408–410, 996 P.2d 903 (2000); *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, 52–53, 977 P.2d 769 (1999); *Superpumper, Inc. v. Nerland Oil, Inc.*, 582 N.W.2d 647, 648–53 (N.D. 1998); *Nat'l Educ. Ass'n-Topeka v. Unified Sch. Dist. No. 501*, 260 Kan. 838, 840–44, 925 P.2d 835 (1996); *Chem-Ash, Inc. v. Ark. Power & Light Co.*, 296 Ark. 83, 85, 751 S.W.2d 353 (1988); *Peter Kiewit Sons' Co. v. Port of Portland*, 291 Or. 49, 61–63, 628 P.2d 720 (1981) (en banc); *Sch. Comm. of Agawam v. Agawam Educ. Ass'n*, 371 Mass. 845, 846–847, 359 N.E.2d 956 (1977).

under RAP 2.3, *not for review as of right under RAP 2.2.*” *Saleemi*, 176 Wn.2d at 376, 292 P.3d at 112 (emphasis added); *see also supra* p.8

The *Hill* opinion also did not address the text of the RUAA or its statutory preference for “uniformity of the law” with other states. RCW 7.04A.901. The clear majority of jurisdictions do not consider orders staying litigation and compelling arbitration to be final, appealable orders. *See supra* n.8. Had *Hill* altered Washington law—it did not—it would have violated the legislature’s statutory preference for uniformity, without acknowledging it was doing so, let alone stating reasons why.

The reason *Hill* never addressed those issues is straightforward: *the issue was not presented*. No party in *Hill* sought to appeal as a matter of right. Rather, both sides treated the superior court’s order as interlocutory and filed cross-motions in the Court of Appeals for *discretionary review* under RAP 2.3. *See Hill v. Garda CL Nw., Inc.*, 169 Wn. App. 685, 689, 690 n.7, 281 P.3d 334 (2012). The Court of Appeals granted those motions as to some issues but not others. *Id.* This Court reversed, but not because the Court of Appeals must review all orders compelling arbitration—nothing in *Hill* suggests such a rule. Instead, in that unique setting involving a class of minimum-wage workers with a collective bargaining agreement, *Hill* determined only that the Court of Appeals should not have accepted *discretionary review* over some arbitration-related issues without also considering the plaintiffs’ challenge to the validity of the arbitration clause. 179 Wn.2d at 55, 308 P.3d at 638.

In particular, this Court did not grant the petition for review in *Hill*

to revisit its jurisprudence about a right to appeal. It granted review to address a specific issue that was a matter of “substantial public concern”—whether limitations on back-pay and fee-shifting provisions that made arbitration prohibitive for minimum-wage employees were substantively unconscionable. *Id.* at 50, 54, 56–58, 308 P.3d at 636, 638–40.

Those objections are not available here for several reasons. *First*, this case does not involve fee-shifting or back-pay provisions like those in *Hill*. *Second*, FutureSelect is a sophisticated hedge fund that has funded protracted litigation against other defendants for years. It acknowledged that its claims against KPMG “must proceed to arbitration” but elected not to arbitrate for strategic reasons. CP 764–65. *Third*, FutureSelect never raised a validity challenge or claimed the arbitral forum is inaccessible due to cost, not in the superior court or on appeal. It is too late to do so now because courts will not consider claims of error “raised for the first time on appeal.” *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995).

2. FutureSelect did not request—and the Court of Appeals was not obligated to grant—discretionary review

A party with no right to appeal may seek discretionary review under RAP 2.3, but bears a “heavy burden.” *In re Grove*, 127 Wn.2d 221, 235, 897 P.2d 1252 (1995). FutureSelect did not even attempt to meet that burden. It neither filed a notice for discretionary review nor meaningfully argued that review under RAP 2.3(b) was required.⁹ The Court of Appeals was not

⁹ FutureSelect did not make any arguments regarding discretionary review before the Court of Appeals commissioner. *See* Opp’n to Mot. to Dismiss (Greer Decl., Ex. F). In seeking to modify the commissioner’s ruling, FutureSelect sought “discretionary review,” but as a

obligated to consider arguments not properly asserted. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Additionally, RAP 2.3(b) describes when the Court of Appeals “may” grant review. The word “may”—included in a 2002 amendment—gives the Court of Appeals discretion to grant or deny review. *See Scannel v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982). The drafters of the amendment explained that the amendment “changes the word ‘will’ to ‘may’ in the introductory clause, to make clear that review under any of the enumerated grounds is discretionary[.]” Karl B. Tegland, 2A Wash. Prac., Rules Practice RAP 2.3 (7th ed.). Because “[t]he appellate court is never required to grant discretionary review, even if the requirements of RAP 2.3 appear to be satisfied,” the Court of Appeals did not err by declining to review the five-year-old interlocutory order. *Id.* cmt. 1.

Given the Court of Appeals’ discretion, it is not necessary for this Court to assess whether RAP 2.3(b) would have allowed for review had the Court of Appeals been inclined to grant it. Even if this Court were to reach that issue, it would find no basis for review at all. Rule 2.3(b) requires “obvious error which renders further proceedings useless” under RAP 2.3(b)(1) or “probable error” that substantially alters the status quo or limits

request to waive the rules under RAP 1.2, not under RAP 2.3. *See* Mot. to Modify at 19 (Greer Decl., Ex. G); Mot. to Modify Reply at 7 (Greer Decl., Ex. H). The sole material from which the Court of Appeals might have divined a request under RAP 2.3 was in a parenthetical—in a string cite—quoting from a commissioner’s ruling. Mot. to Modify at 19–20; *see infra* n. 14. The Court of Appeals hardly can be faulted for FutureSelect’s failure to assert the argument properly in any of the three briefs it filed in the Court of Appeals.

the freedom of a party to act under RAP 2.3(b)(2).¹⁰ Neither applies.

The superior court did not commit any error. Numerous courts from around the country, before and after the superior court's 2011 order, reviewed KPMG's Rye Fund engagement letters. Under Delaware law, which both parties agree applies,¹¹ those courts found the arbitration agreements are enforceable against Rye Fund investors like FutureSelect.¹²

FutureSelect ignores that abundant caselaw, focusing instead on a different order dealing with another party's (E&Y's) arbitration clause. Mot. for Review at 12. FutureSelect does not disclose, however, that a different judge decided E&Y's motion, and FutureSelect informed him that KPMG's motion was "irrelevant" to E&Y's motion because it "involved *different* engagement letters, *different* arbitration clauses and [was] *not res judicata*." CP 784 (emphases added). Based on those statements, the judge did not review KPMG's motion. CP 679–80 (identifying materials reviewed).

¹⁰ FutureSelect did not—and does not—contend RAP 2.3(b)(3) or RAP 2.3(b)(4) apply.

¹¹ FutureSelect agrees that Delaware law governs. *See* Mot. for Review at 17 n.3.

¹² *Sandalwood Debt Fund A, L.P. v. KPMG LLP*, 2013 WL 3284126 (N.J. App. July 1, 2013); *Agile Safety Variable Fund, L.P. v. Tremont Grp. Holdings Inc.*, 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 other cases, plaintiffs recognized that their claims were subject to arbitration. *In re Tremont State Law Action*, 08 Civ. 11183, slip op. (S.D.N.Y. Mar. 29, 2010); *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.). Even in the small minority of cases in which courts erred in finding Rye Fund–related claims against KPMG non-arbitrable, the claims subsequently were dismissed voluntarily or because KPMG owed no obligations to Rye Fund investors. *See KPMG LLP v. Cocchi*, 88 So.3d 327 (2012) (KPMG voluntarily dropped from amended complaint); *Askenazy v. KPMG LLP*, 988 N.E.2d 463 (Mass. App. 2013) (claims dismissed in *Askenazy Tremont Grp. Holdings, Inc.*, No. SUCV 2010-4801, 2015 WL 1095684 (Mass. Super. Mar. 10, 2015)).

FutureSelect's turnabout is improper and judicially estopped,¹³ and its reliance on the E&Y order misplaced.

Furthermore, none of the other requirements for review were met. Rule 2.3(b)(1) requires, in addition to *obvious* error, that the superior court's order "render further proceedings useless." Orders staying litigation in favor of arbitration do no such thing. Established procedure allows for further proceedings—notably arbitration and a post-arbitral challenge. *See* RCW 7.04A.230. Holding the arbitration before the appeal, moreover, hardly is useless.¹⁴ It effectuates the pro-arbitral policies embodied in the arbitration acts and may yield a settlement or resolution that FutureSelect finds satisfactory. Even if the dispute ultimately were found nonarbitrable, the arbitration will help refine the issues, easing the burden on the trial court.¹⁵

Nor did the superior court's 2011 order compelling arbitration

¹³ Judicial estoppel avoids "inconsistency" and "duplication" and applies "if a litigant's prior inconsistent position benefited the litigant or was accepted by the court." *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 224–25, 230–31, 108 P.3d 147 (2005), *cited in* *Arkinson v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, 160 P.3d 13 (2007).

¹⁴ In a parenthetical, FutureSelect points to a quote from a commissioner's ruling in *Huntley v. Frito Lay, Inc.*, 96 Wn. App. 398, 401–02, 979 P.2d 488 (1999). That case, like *Hill*, addressed a Minimum Wage Act ("MWA") claim—specifically, whether federal law preempted the state statutory claim. The trial court obviously erred by finding the MWA claim preempted, overlooking two then-recent Court of Appeals decisions. The implication of the trial court's order was that "unions could waive employees' basic rights under the MWA without their consent and without effective redress. Th[at] would contradict the clear public policy in this state to provide and enforce basic minimum employment rights." This matter is different. The superior court did not overlook controlling caselaw, *see, e.g., supra* n.12, and did not dismiss FutureSelect's claims against KPMG. FutureSelect simply prefers to pursue those claims in one forum over the other.

¹⁵ Trial courts' orders compelling arbitration "usually will be correct, and the arbitration process is apt to produce considerable savings in the process of preparing for trial if the dispute is ultimately found nonarbitrable. If the dispute is found to be arbitrable, of course, great saving will be made." 134 Cong. Rec. S 16309 (daily ed. Oct. 14, 1988) (section-by-section analysis of the FAA's appeal provisions, which are analogous to the RUAA's).

“substantially alter[] the status quo or substantially limit[] the freedom of a party to act,” as required by RAP 2.3(b)(2). The order merely stayed the court case. It contained no injunction limiting FutureSelect’s ability to act; rather, it preserved the status quo pending arbitration.

Accordingly, none of the requirements for discretionary review were met. The Court of Appeals could not have granted review, and, given the discretion granted to it by RAP 2.3(b), certainly was not required to do so.

3. Review of the five-year-old order would have been untimely in any event

There is no basis for review. Even if there were—either as a matter of right or discretionary review—FutureSelect could not possibly justify its gross delay in filing this appeal. After this Court decided *Hill* in 2013, FutureSelect waited 855 days—two years, four months, and three days—to pursue this second appeal of the order compelling arbitration.

With no final, appealable judgment in this case,¹⁶ only the order compelling arbitration, entered on June 3, 2011, could have been reviewed. “A party is allowed 30 days in which to file a notice of appeal.” *Schaefco Inc. v. Columbia River Gorge Comm’n*, 121 Wn.2d 366, 367–68, 849 P.2d 1225 (1993) (citing RAP 5.2(a)¹⁷). When as here, an “appellant fails to timely perfect an appeal, the disposition of the case is governed by RAP

¹⁶ FutureSelect’s notice of appeal and motion for review mentions a “final judgment,” referring to the 2015 judgment against E&Y. That, however, was not a final, appealable judgment because it did not affect KPMG’s rights or resolve any claims against KPMG. See RAP 2.2(d) (precluding appeal from judgment disposing of fewer than all claims).

¹⁷ The limited, narrowly defined extensions available under RAP 5.2(a) do not apply here.

18.8(b).”¹⁸ *Id.* at 368, 849 P.2d at 1226. Rule 18.8(b) states that the “appellate court will *only in extraordinary circumstances and to prevent a gross miscarriage of justice* extend the time within which a party must file a notice of appeal [or] a notice for discretionary review[.]” RAP 18.8(b) (emphasis added). The rule sets a “policy preference for the finality of judicial decisions over the competing policy of reaching the merits in every case.” *Shumway v. Payne*, 136 Wn.2d 383, 395, 964 P.2d 349 (1998).

For FutureSelect to “demonstrate[] sound reasons to abandon the [judicial] preference for finality,” it must show extraordinary circumstances and the need to prevent a gross miscarriage of justice. *Schaefco*, 121 Wn.2d at 368, 849 P.2d at 1226. It can establish neither. *See Shumway*, 136 Wn.2d at 395, 964 P.2d at 355 (“[T]he rule is rarely satisfied.”).

There are no extraordinary circumstances. Extraordinary circumstances are those “where the filing, *despite reasonable diligence*, was defective due to excusable error or circumstances beyond the party’s control.” *Id.* at 395, 964 P.2d at 354–55 (emphasis added). Application of RAP 18.8(b) does not turn on prejudice or the gravity of the issue being appealed.¹⁹ *See id.* at 394, 11 P.3d at 317. Nothing about FutureSelect’s multi-year delay is reasonable, excusable or beyond its control. After this

¹⁸ FutureSelect notes that RAP 1.2 “permits” an appellate court to waive rules of procedure “in order to serve the ends of justice.” Mot. at 20 (citing *State v. Hathaway*, 161 Wn. App. 634, 651–52, 251 P.3d 253 (2011)). As FutureSelect notes, however, RAP 1.2 is permissive, not mandatory, identifying only what the Court of Appeals “may” do. Rule 1.2, moreover, always is “subject to the restrictions in rule 18.8(b) and (c).” RAP 1.2(a), (c).

¹⁹ Even when an appeal presents “many important issues” of constitutional significance, the rule applies just the same. *Schaefco, Inc.*, 121 Wn.2d at 368, 849 P.2d at 1226.

Court denied review in 2011, FutureSelect informed the trial court that it “must proceed to arbitration,” but then chose not to arbitrate. CP 765. Even after the 2013 *Hill* opinion, FutureSelect sat idle more than two years. FutureSelect does not even attempt to justify that delay.²⁰

No gross miscarriage of justice has or will occur. FutureSelect also cannot show that arbitrating first, before appealing, would result in a gross miscarriage of justice. The arbitration-first sequence is required by the RUAA, decades of this Court’s precedent, and the majority of U.S. jurisdictions. *See supra* n.8. It is the norm; it does not remotely approach a gross miscarriage of justice. Moreover, this is a private dispute in which FutureSelect, a hedge fund, can appeal at the proper time. It can oppose confirmation of the award after arbitration if it still contends then that “[t]here was no agreement to arbitrate.” RCW 7.04A.230(1)(e). If that fails, FutureSelect may appeal the confirmation order. RCW 7.04A.280(1)(c).²¹

4. The Court of Appeals was not required to reconsider its 2011 decision five years after it became final

Alternatively, FutureSelect suggests this appeal is a “request for reconsideration” of the Court of Appeal’s November 2011 order dismissing the first attempted appeal. Mot. for Review at 12–14. That 2011 decision,

²⁰ Additionally, to the extent FutureSelect contends the superior court’s decision denying E&Y’s motion to compel arbitration has any significance, the superior court issued that order in December 2014, more than a year before the January 2016 notice of appeal.

²¹ FutureSelect devotes considerable attention to its claimed right to a jury trial. There is, of course, no right to a jury in arbitration. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 526, 79 P.3d 1154 (2003). Otherwise, there could not be arbitration. Moreover, RCW 7.04A.230 allows for vacatur of the arbitral award if the dispute ultimately is found non-arbitrable. That post-arbitral process is more than adequate to preserve whatever jury right FutureSelect has. *See Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 652, 771 P.2d 711 (1989).

however, was not the type of decision that may be reconsidered, and in any event, reconsideration has been time barred for years.

Reconsideration is available “only” for decisions that “terminat[e] review” or decide “a personal restraint petition on the merits.” RAP 12.4(a). Neither of those categories applies. The Court of Appeal’s 2011 decision, declined review and thus was interlocutory, not a decision terminating review. *See Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 501, 798 P.2d 808 (1990); RAP 12.3(a), (b); *see also* RAP 16.3(b) (personal restraint). There thus was no order that could be reconsidered.

Additionally, once an appellate decision becomes final—including by issuance of a certificate of finality—it cannot be reconsidered at the whim of the losing party because the court “loses the power to change its decision.” *State v. Kilgore*, 167 Wn.2d 28, 37–38, 216 P.3d 393, 397–98 (2009); RAP 12.7. On December 30, 2011, the Court of Appeals issued the certificate of finality. Once that occurred, the Court of Appeals could not “enlarge the time . . . within which [it] may change or modify its decision.” RAP 18.8(c). And for good reason, especially in a case like this in which FutureSelect waited years to file its second notice of appeal: “To require courts to consider and reconsider cases at the will of litigants would deprive the courts of that stability which is necessary in the administration of justice.” *Reeploeg v. Jensen*, 81 Wn.2d 541, 546, 503 P.2d 99 (1972).

The limited exception to the rule of finality found in 2.5(c)(2) does not help FutureSelect, as it contends. FutureSelect selectively quotes RAP 2.5(c)(2) to suggest it is an always-available basis for appellate jurisdiction.

Id. It is not. Rule 2.5(c) applies only “if the same case is again before the appellate court following a remand.”²² The rule thus has no application in this matter, which was not properly before the Court of Appeals pursuant to either of the “only” two methods of review. *See* RAP 2.1(a).²³

C. The remaining requirements for review under RAP 13.5 also do not apply

As demonstrated above, the Court of Appeals committed no error— certainly not obvious or probable error as RAP 13.5(b)(1) and (b)(2), respectively, require. Even if there were error, however, review would be inappropriate because RAP 13.5’s other requirements, discussed in more detail in Part III.B.2, are not met. *First*, under RAP 13.5(b)(1), compelling arbitration does not render further proceedings useless. An arbitration will occur that may resolve to FutureSelect’s satisfaction, post-arbitral rights to appeal exist, and the arbitration will refine the issues for a subsequent trial even if the case ultimately is found nonarbitrable. *Supra* p. 15. *Second*, under RAP 13.5(b)(2), the order staying the case pending arbitration preserves the status quo and does not alter it. *Supra* pp. 15–16.

IV. CONCLUSION

For the foregoing reasons, KPMG respectfully requests that this Court deny FutureSelect’s motion for discretionary review.

²² *See also State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008); *In re Gentry*, 179 Wn.2d 614, 618 n.1, 316 P.3d 1020 (2014).

²³ FutureSelect cites *State v. Schwab*, 134 Wn. App. 635, 141 P.3d 658 (2006), and *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005). In those cases, however, there was an independent basis for appellate jurisdiction: a criminal judgment and sentence in *Schwab* and a judgment following a jury verdict in *Perez*. This Court, moreover, noted that the passage in the Court of Appeals opinion in *Schwab* regarding recalling the mandate— on which FutureSelect has relied—was dicta. *See* 163 Wn.2d at 677, 185 P.3d at 1157.

Dated this 12th day of December 2016 at Seattle, Washington.

Respectfully submitted,

ORRICK HERRINGTON & SUTCLIFFE LLP

By:


George E. Greer (WSBA No. 11050)
ggreer@orrick.com
Paul F. Rugani (WSBA No. 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 (*pro hac vice* pending)
jvilla@wc.com

David A. Forkner (*pro hac vice* pending)
dforkner@wc.com

Jonathan E. Pahl (*pro hac vice* pending)
jpahl@wc.com

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, D.C. 20005
Telephone: +1-202-434-5000
Facsimile: +1-202-434-5029

Attorneys for KPMG LLP

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FUTURESELECT PORTFOLIO
MANAGEMENT, INC., et al.,

Petitioners,

v.

TREMONT GROUP HOLDINGS,
INC., et al.,

Respondents.

No. 93824-5

CERTIFICATE OF SERVICE

(KPMG LLP'S ANSWER IN
OPPOSITION TO THE MOTION
FOR DISCRETIONARY
REVIEW)

I, Malissa A. Tracey, hereby certify that on December 12, 2016, I caused the following documents to be served on the parties below via the method specified:

1. KPMG LLP's Answer in Opposition to the Motion for Discretionary Review;
2. Declaration of George E. Greer in Support of KPMG LLP's Answer in Opposition to the Motion for Discretionary Review; and
this
3. Certificate of Service.

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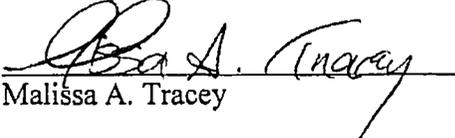
Jeffrey M. Thomas
Susannah Christiana Carr
Gordon Tilden Thomas & Cordell LLP
1001 Fourth Avenue, Suite 4000
Seattle, WA 98154-1007
jthomas@gordontilden.com
scarr@gordontilden.com

Via Email

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 12th day of December 2016 at Seattle, Washington.


Malissa A. Tracey

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Sent: Monday, December 12, 2016 4:09 PM
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Cc: 'jthomas@gordontilden.com' <jthomas@gordontilden.com>; scarr@gordontilden.com; steventhomas@tafsattorneys.com; 'emilyalexander@tafsattorneys.com' <emilyalexander@tafsattorneys.com>; 'markforrester@tafsattorneys.com' <markforrester@tafsattorneys.com>; melissalawton@tafsattorneys.com; JPahl@wc.com; 'Forkner, David' <DForkner@wc.com>; 'jvilla@wc.com' <jvilla@wc.com>; Greer, George <ggreer@orrick.com>; Rugani, Paul F. <prugani@orrick.com>
Subject: 93824-5: Futureselect Portfolio Management, Inc., et al. v. Tremont Group Holdings, Inc., et al.

FutureSelect Portfolio Management, Inc., et al. v. Tremont Group Holdings, Inc., et al.
Case No. 93824-5 (Court of Appeals Case No. 74611-1-1)

George E. Greer
WSBA #11050
Tel: 206-839-4403

ggreer@orrick.com

Documents attached are:

KPMG LLP's Answer in Opposition to the Motion for Discretionary Review

Declaration of George E. Greer in Support of KPMG LLP's Answer in Opposition to the Motion for Discretionary Review + Exhibits A-H

Certificate of Service

Malissa Tracey

Legal Secretary

Orrick

Seattle 

T 206-839-4309

mtracey@orrick.com



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