

NO. 93824-5  
NO. 74611-1-I

RECEIVED  
DEC 14 2016  
WASHINGTON STATE  
SUPREME COURT

byh

SUPREME COURT  
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.

---

DECLARATION OF GEORGE E. GREER IN SUPPORT OF  
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

 ORIGINAL

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 answer in opposition to the motion for discretionary review.

2. Attached as Exhibit A 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.

3. Attached as Exhibit B 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.

4. Attached as Exhibit C to this Declaration is a true and correct copy of KPMG's August 16, 2011, motion to dismiss appeal number 67302-5-I, an appeal from 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"), initiated on June 16, 2011.

5. Attached as Exhibit D to this Declaration is a true and correct copy of the Court of Appeals order dismissing that appeal, dated November 21, 2011.

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

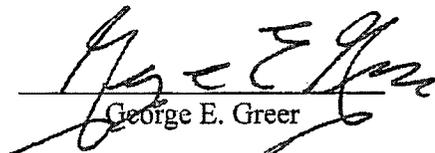
7. Attached as Exhibit F to this Declaration is a true and correct copy of Appellants' Opposition to Appellee's Motion to Dismiss Appeal, filed by FutureSelect in the Court of Appeals on April 18, 2016.

8. Attached as Exhibit G to this Declaration is a true and correct copy of the Petition for Review of FutureSelect Portfolio Management, Inc., FutureSelect Prime Advisor II LLC, The Merriwell Fund, L.P., and Telesis IIW, LLC, filed in this Court on June 20, 2016. By notation ruling dated July 13, 2016, Commissioner Neel of the Court of Appeals granted FutureSelect's motion to treat this Petition for Review as a motion to modify Commissioner Kanazawa's May 19, 2016 notation ruling granting KPMG's motion to dismiss the appeal.

9. Attached as Exhibit H to this Declaration is a true and correct copy of Appellants' Reply on Motion to Modify, filed by FutureSelect in the Court of Appeals on August 4, 2016.

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

Executed this 12th day of December, 2016, at Seattle, Washington

  
George E. Greer

# EXHIBIT A

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:

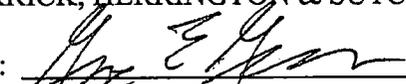
4 <input type="checkbox"/>	Plaintiffs' claims against KPMG are subject to mandatory arbitration and this 5 action shall be stayed pending resolution of that arbitration.
6 <input type="checkbox"/>	Plaintiffs' claims against KPMG are dismissed.

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  
16 ggreer@orrick.com  
17 Paul F. Rugani, WSBA #38664  
18 prugani@orrick.com  
19 701 Fifth Avenue, Suite 5600  
20 Seattle, WA 98104-7097  
21 Telephone: +1-206-839-4300  
22 Facsimile: +1-206-839-4301

23 Of Counsel:  
24 Corey Worcester  
25 worcesterc@howrey.com  
26 HOWREY LLP  
27 601 Lexington Avenue, Floor 54  
28 New York, NY 10022  
Telephone: +1-212-896-6500  
Facsimile: +1-212-896-6501

Attorneys for Defendant KPMG LLP

OHS West:261052344.1  
18699-2005 GEG/MYT

# EXHIBIT B

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 King County Superior Court Judge

9  
10 Presented by:

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

13  
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 Ressler

28 Attorneys for Plaintiffs

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 C

AUG 16 2011

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

**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. Crédit 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>Woo 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 D

*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@pacificallawgroup.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  
filer@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  
vnicholson@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

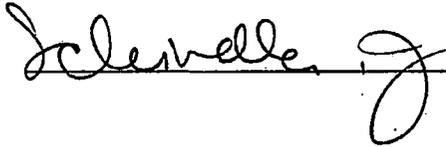
No. 67302-5-1/2

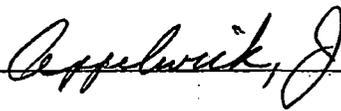
ORDERED that FutureSelect's request for discretionary review is denied; and it is further

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 E

JAN 03 2012

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

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

Appellants,

v.

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

Respondents.

No. 67302-5-1

CERTIFICATE OF FINALITY

King County

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

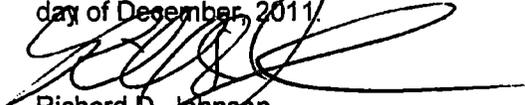
THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for  
King County.

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

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

IN TESTIMONY WHEREOF, I

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



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



# EXHIBIT F

No. 74611-1-I

---

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

---

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

*Plaintiffs/Appellants,*

v.

**KPMG LLP,**

*Defendant/Respondent.*

---

**APPELLANTS' OPPOSITION TO  
APPELLEE'S MOTION TO DISMISS APPEAL**

---

**GORDON TILDEN THOMAS &  
CORDELL LLP**

Jeffrey M. Thomas, WSBA #21175  
1001 Fourth Avenue, Suite 4000  
Seattle, WA 98154

**ATTORNEYS FOR Appellants**

**THOMAS, ALEXANDER &  
FORRESTER LLP**

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

**ATTORNEYS FOR Appellants**

Appellants FutureSelect Portfolio Management, Inc., FutureSelect Prime Advisor II, LLC (Prime Advisor), The Merriwell Fund, L.P., and Telesis IIW, LLC (collectively “FutureSelect” or “Plaintiffs”) here oppose the Motion to Dismiss Appeal (“Motion”) filed April 4, 2016 by Respondent KPMG LLP (“KPMG” or “Defendants”).

## I. INTRODUCTION

FutureSelect lost nearly \$200 million in its investments in the Rye Funds. The Rye Funds were audited by KPMG, who for four years issued clean audit opinions despite the fact that no assets actually existed. KPMG certified the Rye Funds’ assets as real when Madoff had in fact stolen all the money invested. FutureSelect relied on KPMG’s clean audit opinions in making its decisions to invest in the Rye Funds.

FutureSelect filed this case in August 2010 in the King County Superior Court in Washington—the state in which it received and relied on KPMG’s audits and lost its entire investment. In June 2011, the trial court granted KPMG’s motion to compel arbitration based on an arbitration clause between KPMG and the Rye Funds—not FutureSelect. The trial court provided no written opinion reflecting the legal basis for denying FutureSelect its day in court when it had never agreed to arbitrate claims against KPMG. This Court subsequently refused to review the trial

court's order compelling arbitration of FutureSelect's claims against KPMG.

The Superior Court's ruling was in error. This error is evidenced by the Superior Court's later ruling denying the Rye Funds' prior auditor Ernst & Young's ("EY") motion to compel arbitration *based on a nearly identical arbitration clause* between EY and Tremont because FutureSelect was "not bound by the arbitration clause . . . because the Plaintiffs did not sign . . . and their claims are direct claims . . ." CP 692. This time, the Superior Court wrote a lengthy order explaining why arbitration could *not* be ordered between FutureSelect and EY, despite EY making the same arguments KPMG had previously made. Plaintiffs' claims against all defendants have now been resolved, including a jury verdict and final judgment against EY.

At this time, the Superior Court's unexplained order compelling arbitration against KPMG should be reviewed by this Court. Since this Court declined to review the order compelling arbitration, the Washington Supreme Court has held that it is improper for a Court of Appeals to decline review of the arbitrability of claims. *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 54, 308 P.3d 635 (2013). If this Court does not review the arbitration order, then the exact prejudicial consequences the Supreme Court warned against will occur: the parties will squander

immeasurable time, effort, and money arbitrating claims that FutureSelect never agreed to arbitrate *before* getting the opportunity to have the validity of an arbitration order reviewed. This unjust result would lead to arbitration, then appeal, then trial—the antithesis of judicial efficiency and economy.

In light of this new development in the law, and in the best interest of justice and judicial economy, FutureSelect respectfully asks that KPMG’s motion to dismiss FutureSelect’s appeal (*i.e.* “Motion”) be denied and its appeal heard.

## II. STATEMENT OF THE CASE

### A. FutureSelect

FutureSelect, which consists of Washington investment companies, invested nearly \$200 million in Bernard Madoff through the Rye Funds.<sup>1</sup> CP 2, 9. The Rye Funds were sold and managed by Tremont Group Holdings, Inc. and Tremont Partners, Inc. (collectively, “Tremont”). CP 9-10.

### B. The Auditor: KPMG

In order to attract investors, Tremont hired Big 4 auditing firm KPMG—its new parent company’s long time auditors—to audit the Rye

---

<sup>1</sup> The “Rye Funds” include Rye Select Broad Market Fund, L.P., Rye Select Broad Market Prime Fund, L.P., and Rye Select Broad Market XL Fund, L.P.

Funds from 2004-2007. CP 20, 24-25. Each audit was conducted subject to an engagement agreement between KPMG and Tremont. CP 337. The engagement agreements were executed by Tremont and KPMG alone. CP 291. Each engagement letter contained an agreement to arbitrate claims among the parties. CP 295.

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

In fact, KPMG did not perform its audits in compliance with GAAS. CP 27. If KPMG had performed the required procedures, it would have discovered Madoff's fraud—the biggest in United States history. CP 29-30.

#### **C. FutureSelect's Claims**

FutureSelect filed its complaint where it resides, where it was solicited, where it received and relied on KPMG's misrepresentations, and where it was injured—in Washington. CP 8. FutureSelect's complaint

alleges a violation of the Washington State Securities Act (“WSSA”) against KPMG, and claims for negligent misrepresentation against KPMG. CP 38, 46.

**D. The Superior Court’s Order Compelling Arbitration**

On December 8, 2010, KPMG moved to compel arbitration of FutureSelect’s claims based on the arbitration provision contained in the engagement agreement between KPMG and Tremont (the “Arbitration Motion”). CP 55. KPMG claimed that FutureSelect’s claim was derivative of Tremont or that FutureSelect was a third-party beneficiary to the agreement between KPMG and Tremont, and that FutureSelect is collaterally estopped from avoiding the arbitration agreement by a decision in the Southern District of New York compelling arbitration between John Dennis (“Dennis”), an investor in FutureSelect Prime Advisor, and KPMG. CP 74, 76-77.

On June 3, 2011, the King County Superior Court granted the Arbitration Motion. CP 401. The order does not articulate a basis on which the trial court’s decision was made. *Id.* On June 16, 2011, FutureSelect timely filed a notice of appeal, seeking review of the Superior Court’s order compelling arbitration. Greer Decl., Ex. B. KPMG filed a motion to dismiss the appeal, citing several cases for the proposition that orders compelling arbitration are not immediately

appealable. Greer Decl., Ex. C at 3. On November 21, 2011, the Court of Appeals issued an order denying FutureSelect's request for review and dismissing the appeal ("Denial of Review"). Greer Decl., Ex. D.

On September 3, 2014, EY moved for arbitration on substantially the same grounds as KPMG. CP 402. On December 3, 2014, the Superior Court denied the Motion in a written opinion. CP 678. The Superior Court held that the Plaintiffs are not bound by the arbitration clause in EY's audit engagement agreements because the Plaintiffs did not sign EY's agreements and their claims are direct claims against EY, not derivative claims. CP 692.

On December 17, 2015, a final judgment was entered against EY after a jury verdict in Plaintiffs' favor. CP 716. All claims against all defendants were resolved.

On January 15, 2016, FutureSelect filed this appeal, requesting review of the June 3, 2011 order of the Superior Court granting KPMG's motion to compel arbitration. CP 712. KPMG moved to dismiss this appeal.

### **III. ARGUMENT**

#### **A. FutureSelect Has a Right to Appeal the Arbitration Order Before Arbitrating**

Under current Washington law, FutureSelect has an immediate right to appeal an order compelling arbitration. This sensible state of the

law reflects Washington's evolved view that a party should not be forced to undergo expensive and time consuming arbitration *before* getting the opportunity to have the validity of an arbitration order reviewed.

In *Hill v. Garda CL Northwest, Inc.*, which was decided *after* FutureSelect was initially denied the right to appeal the KPMG arbitration order, the Washington Supreme Court addressed a materially identical issue and reversed the Court of Appeals' refusal to review the enforceability of the arbitration agreement under RAP 2.3(b)(4). *Hill*, 179 Wn.2d at 54. The Court did this based on the obvious—that the interests of justice and economy are best served when appeal of an order compelling arbitration is heard *before* the parties go to the tremendous expense and effort of actually arbitrating:

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

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

*Id.* at 54 (emphasis added).

The Supreme Court's holding ran contrary to previous decisions of lower courts which had suggested that a party seeking to avoid arbitration did not have a right to appeal prior to final judgment, and in fact is contrary to this Court's denial of discretionary review of the Arbitration Order. Consistent with KPMG's original motion to dismiss the appeal, which cited several cases arguing that parties opposing orders compelling arbitration were not entitled to appellate review of those orders as a matter of right,<sup>2</sup> the Appellate Court denied FutureSelect's motion in its Denial of Review.

Since the Denial of Review, the Washington Supreme Court has clarified Washington law in *Hill* that a party opposing arbitration *has* a right to appellate review of the validity of an arbitration agreement, and articulated the logic behind that rule: that arbitrability is a threshold issue and there is no sense in making parties arbitrate if, as here, they ultimately cannot be compelled as a matter of law to do so. In fact, *this* Court has since recognized its responsibility to review the arbitrability of claims before arbitration. *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 735, 349 P.3d 32 (2015) (Washington's strong policy favoring arbitration "does not, however, lessen this court's responsibility to determine whether

---

<sup>2</sup>See Mot. to Dismiss at 4.

the arbitration contract is valid.”) (citing *Hill*). There have been no Washington appellate cases since the *Hill* decision that have declined review of an order compelling arbitration.

Given the current state of the law in Washington, FutureSelect may now appeal the order of the trial court compelling arbitration.

**B. This Court Can and Should Review Its Previous Order Denying Discretionary Review**

To whatever extent appellate review was not available as a matter of right, the Appellate Court always has the right to—and should here—review its own previous decision and modify that decision in the interest of justice based on its current understanding of the law. RAP 2.5 (c)(2) (“The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.”); *State v. Schwab*, 163 Wn.2d 664, 672-73; 185 P.3d 1151 (2008) (RAP 2.5(c)(2) “allows a prior appellate holding in the same case to be reconsidered where there has been an intervening change in the law.”); *Roberson v. Perez*, 156 Wn.2d 33, 43, 123 P.3d 844 (2005) (“An appellate court’s discretion to disregard the law of the case doctrine is at its apex when there has been a subsequent change in controlling precedent on appeal.”).

Justice would best be served by the Court reviewing its previous Denial of Review. Denying FutureSelect's right to appeal the order compelling arbitration, in contravention of the Washington Supreme Court, and forcing FutureSelect and KPMG into expensive and time consuming arbitration before having the opportunity to appeal would pose substantial undue burden on both parties. Forcing FutureSelect and its investors who lost millions to pay unnecessary arbitration fees and pay for arbitrators before having its case heard by this Court is exactly what the Supreme Court recognized makes no sense and is prejudicial. Moreover, requiring arbitration would put further distance between the events causing this litigation—KPMG's gross negligence—and the actual, legitimate trial that those events merit, prejudicing FutureSelect.

In light of *Hill*, which came after this Court's Denial of Review, and in the interest of justice, the Court should review its prior Denial of Review.

**C. FutureSelect's Appeal Is Not Time-Barred**

FutureSelect's appeal is not, as KPMG suggests, untimely. The Superior Court gave its order compelling arbitration on June 3, 2011 and FutureSelect filed its first notice of appeal on June 16, 2011, thirteen days after the order. Mot. to Dismiss at 2. Given that FutureSelect's initial request for review was timely, KPMG argues FutureSelect was required to

request reconsideration within twenty days of this Court's November 2011 dismissal. KPMG's argument fails.

FutureSelect litigated to final judgment against all remaining defendants and then refiled its appeal. Even if the appeal is treated as a motion for reconsideration as KPMG urges, a request for reconsideration of an order of the Court of Appeals based upon an intervening change in the law is not required to be made within twenty days of the original decision. *State v. Schwab*, 134 Wn. App. 635, 647, 141 P.3d 635 (2006) (reversing a prior decision under RAP 2.5(c)(2), "Nor is the [appellant's] motion untimely because the Supreme Court's [intervening decision] was not foreseeable by any court or party involved in this case."). *Hill*, the Supreme Court decision which gave FutureSelect a right to immediate appeal, was decided in September 2013, nearly two years after this Court's Denial of Review. In this case, just as in *Schwab*, the intervening decision was not foreseeable by any court or party involved in this case. Because the *Hill* decision was not foreseeable at the time of this Court's Denial of Review, FutureSelect's current request for reconsideration is not untimely.

Furthermore, this Court has the discretion to hear this appeal to promote justice. *See, e.g.*, RAP 1.2(a) (Appellate rules "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits."); *State v. Hathaway*, 161 Wn. App. 634, 651-52, 251 P.3d 253

(2011) (Where a “challenge is not properly before [the Appellate Court] as a matter of right . . . RAP 1.2(c) permits us to waive or alter the rules of appellate procedure ‘in order to serve the ends of justice.’”). Forcing FutureSelect and KPMG to arbitrate the claims before FutureSelect has the opportunity to try the case in Washington Superior Court would be costly, inefficient, and would only serve to delay the inevitable trial that FutureSelect deserves. To promote justice, this Court should review the improper order of the trial court compelling arbitration.

#### IV. CONCLUSION

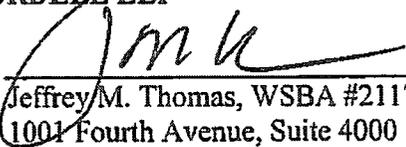
For the foregoing reasons, FutureSelect respectfully requests that the Court review its prior Denial of Review and accepts FutureSelect’s notice of appeal.

DATED this 18th day of April, 2016.

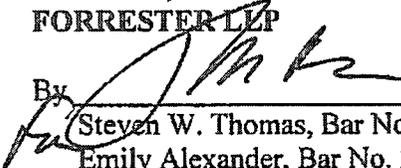
Respectfully submitted,

**GORDON TILDEN THOMAS &  
CORDELL LLP**

By

  
Jeffrey M. Thomas, WSBA #21175  
1001 Fourth Avenue, Suite 4000  
Seattle, WA 98154  
Tel. (206) 467-6477  
Fax (206) 467-6292  
Email: [jthomas@gordontilden.com](mailto:jthomas@gordontilden.com)

**THOMAS, ALEXANDER &  
FORRESTER LLP**

By 

Steven W. Thomas, Bar No. 168967

Emily Alexander, Bar No. 220595

14 27th Avenue

Venice, California 90291

Tel. (310) 961-2536

Fax (310) 526-6852

Email: [steventhomas@tafattorneys.com](mailto:steventhomas@tafattorneys.com)

Email: [emilyalexander@tafattorneys.com](mailto:emilyalexander@tafattorneys.com)

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be delivered via email and U.S. first class mail to:

**Attorneys for Respondent KPMG:**

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

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

DATED this 18th day of April, 2016, at Seattle, Washington.



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

# EXHIBIT G

No.

---

IN THE SUPREME COURT OF  
WASHINGTON

---

Court of Appeals No. 74611-1-1)

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

*Plaintiffs/Appellants,*

v.

KPMG, LLP

*Defendant/Respondent.*

---

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

---

**GORDON TILDEN THOMAS &  
CORDELL LLP**

Jeffrey M. Thomas, WSBA #21175  
1001 Fourth Avenue, Suite 4000  
Seattle, WA 98154  
ATTORNEYS FOR  
Plaintiffs/Appellants

**THOMAS, ALEXANDER &  
FORRESTER LLP**

Steven W. Thomas, *admitted pro hac vice*  
Emily Alexander, *admitted pro hac vice*  
14 - 27th Avenue  
Venice, CA 90291  
ATTORNEYS FOR Plaintiffs/Appellants

COPY

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

#### I. INTRODUCTION

This Court should grant discretionary review because the Commissioner’s ruling conflicts with this Court’s decision in *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 54, 308 P.3d 635 (2013) and the coherent public policy set forth therein. Otherwise, FutureSelect and its victimized investors, many of whom lost material portions of their retirement savings, will be forced to pay for an expensive arbitration with auditor KPMG only to return to court to enforce their right to a jury trial.

FutureSelect lost nearly \$200 million in its investments in the Rye Funds. The Rye Funds had been audited by KPMG from 2004-2007 and by Ernst & Young LLP (“EY”) from 2000-2003. Each year, KPMG and EY stated that the Rye Fund’s financial statements contained no material misstatement due to error or fraud and “presented fairly, in all material respects” the financial position of the Rye Funds. Each year, KPMG’s and

EY's representations were false. All of the Rye Funds assets were fake—they did not exist. Bernard Madoff had stolen all the money invested. In other words, KPMG and EY certified completely false financial statements.

In 2011, the King County Superior Court (Hill, J.) dismissed FutureSelect's claims against EY and four other defendants.<sup>1</sup> On the same day, the Superior Court literally "checked the box" to send FutureSelect's claims against KPMG to arbitration. KPMG had submitted to the Superior Court a form order with two boxes—one for arbitration and one to dismiss. CP 400-01. The Court of Appeals ruled that FutureSelect could not appeal the KPMG arbitration ruling.

Every other order entered that day by the Superior Court was unanimously reversed by the Court of Appeals. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 894-95, 309 P.3d 555 (2013) (*FutureSelect I*). This Court unanimously affirmed. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 972-74, 331 P.3d 29 (2014) (*FutureSelect II*).

Revealingly, after remand from this Court, EY brought the same motion as KPMG for arbitration under virtually the same arbitration clause. This time, the Superior Court (Ruhl, J.), reached the exact

---

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

*opposite conclusion* and correctly denied arbitration. In a lengthy decision explaining its reasoning (CP 678-94), the Superior Court held that FutureSelect was “not bound by the arbitration clause in EY’s audit engagement agreements because the Plaintiffs did not sign EY’s agreements and their [negligent misrepresentation and WSSA] claims are direct claims against EY . . . .” CP 692.

The merits of Plaintiffs’ claims cannot be questioned. A jury found in Plaintiffs’ favor against auditor EY and a final judgment has been entered. CP 715-26. Plaintiffs’ claims against the four other defendants have been resolved as well.

The Court should now review the Superior Court’s unexplained order compelling arbitration against KPMG. Since the time the Court of Appeals declined to review the order compelling arbitration, this Court has held that it is improper for a Court of Appeals to decline review of the arbitrability of claims. *Hill*, 179 Wn.2d at 54.

The Commissioner’s decision, if left to stand, violates the constitutional right to a jury trial. Pursuant to RAP 13.4(b)(1), RAP 13.4(b)(3) and RAP 13.4(b)(4), the Commissioner’s decision should be reviewed because it is in conflict with this Court’s opinion in *Hill* and establishes a precedent that is contrary to the public interest and constitutional right to a jury trial. Without any opportunity to review the

order compelling FutureSelect to arbitrate with KPMG—an order that has been rejected by the Superior Court considering an identical arbitration clause between FutureSelect and EY—then the exact prejudicial consequences this Court warned against in *Hill* will occur: the parties will squander immeasurable time, effort, and money arbitrating claims that FutureSelect never agreed to arbitrate *before* getting the opportunity to have the validity of an arbitration order reviewed. This would be the antithesis of judicial efficiency and economy. Requiring a litigant who is not a party to an arbitration agreement to undergo costly arbitration without appellate oversight when a trial court checks a box and mandates arbitration presents an issue of substantial public interest and a constitutional question that should be determined by this Court. RAP 13.4(b)(3) and (4).

## II. IDENTITY OF THE PETITIONERS

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

## III. COURT OF APPEALS DECISION

On May 19, 2016, Commissioner Masako Kanazawa of the Court of Appeals, Division I (hereafter the “Commissioner”) granted KPMG’s Motion

to Dismiss FutureSelect's appeal of the Superior Court's order compelling arbitration and dismissed this case. *FutureSelect Portfolio Mgmt. v. KPMG LLP*, Notation Ruling, No. 74611-1-I (Wn. App. Div. 1 May 19, 2016) (attached as Appendix A). FutureSelect requests that this Court review the Commissioner's May 19 Order and the prior decisions to which it relates: the Superior Court's June 3, 2011 Order compelling arbitration (CP 400-01) and the November 11, 2011 Court of Appeals Order granting KPMG's motion to dismiss (attached as Appendix B).

#### IV. ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court have an obligation to review the validity of the arbitration clause in the audit engagement agreements that FutureSelect challenged as unenforceable before compelling arbitration?
2. Did the Commissioner err in granting KPMG's Motion to Dismiss FutureSelect's appeal based on its alleged untimeliness?
3. Did the Superior Court ignore well-settled rules of contract law by ordering Plaintiffs to arbitrate under the arbitration provision in a contract of which Plaintiffs were neither signatories nor third-party beneficiaries?
4. Does this Court's opinion in *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d at 54, create a right to appeal following an order compelling arbitration in Washington?

## V. STATEMENT OF THE CASE

### A. Relevant Facts

#### 1. FutureSelect

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

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

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

Each KPMG audit was conducted subject to an engagement agreement between KPMG and Tremont. CP 337. The engagement agreements were executed by Tremont and KPMG alone. CP 291. Each engagement letter contained an agreement to arbitrate claims among the parties. CP 295. EY's engagement letters for the years prior to Tremont hiring KPMG contained an identical arbitration clause to KPMG's. FutureSelect was not a party to and therefore did not execute or otherwise agree to either the KPMG or EY engagement agreements.

---

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

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

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

**B. Procedural History**

In August 2010, FutureSelect filed state securities laws violations and negligent misrepresentation claims against the investment manager, parent companies and auditors of the Bernard Madoff feeder Rye Funds, in which FutureSelect invested. KPMG audited the Rye Funds and failed to detect that none of the Rye Funds alleged assets existed. On June 3, 2011, the trial court granted KPMG's motion to compel arbitration and stayed the case against KPMG pending arbitration. FutureSelect filed a notice of appeal. (No. 67302-5-I). KPMG filed a motion to dismiss on appeal, arguing that the order compelling arbitration was not appealable and that discretionary review was

not warranted under RAP 2.3(b). On November 11, 2011, a three-judge panel of the Court of Appeals granted KPMG's motion to dismiss and denied discretionary review, thus terminating review. FutureSelect did not seek review of the order at that time in light of the prevailing law, and a certificate of finality was issued on December 30, 2011.

On September 3, 2014, EY moved to compel arbitration on substantially the same grounds as KPMG. CP 402. On December 3, 2014, the Superior Court denied the Motion in a written opinion. CP 678. In explaining its denial of EY's motion, the Superior Court held that Plaintiffs are not bound by the arbitration clause in EY's audit engagement agreements because Plaintiffs did not sign EY's agreements and their claims are direct claims against EY, not derivative claims. CP 692.

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

In light of the Superior Court's decision, and the resulting verdict against EY and resolution of claims against all defendants, FutureSelect filed an appeal on January 15, 2016, requesting review of the June 3, 2011 order of the Superior Court granting KPMG's motion to compel arbitration. CP 712. KPMG moved to dismiss this appeal. On May 19, 2016, the Commissioner granted KPMG's motion to dismiss. The Commissioner did not consider the

issue of enforceability of the arbitration provision in the audit engagement letter, and merely dismissed the appeal as untimely.

## VI. ARGUMENT

Pursuant to RAP 13.4(b)(1), (3) and (4), this Court should review the Commissioner's May 19, 2016 Order and the related Superior Court and Court of Appeals orders. The orders conflict with a decision of this Court, *Hill*, 179 Wn.2d at 54. RAP 13.4 (b)(1). The orders also implicate an issue of substantial public interest and a constitutional question—whether a plaintiff should be denied its constitutional right to a jury trial and be bound by an arbitration clause in an audit engagement agreement even though the plaintiff did not sign the agreement, and the plaintiff's claims are direct claims against the auditor, not derivative claims—without first having the order compelling arbitration reviewed by a higher court. RAP 13.4(b)(3) and (4).

### A. Review of the Commissioner's Ruling Is Warranted Because It Conflicts with the Supreme Court Ruling in *Hill*

Whether an arbitration clause is valid and enforceable is a “gateway” issue that a court must determine before compelling a party to arbitrate. *Saleemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-4, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (“reference of the gateway

dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate”). Indeed, “it is the court’s duty to determine whether the parties have agreed to arbitrate a particular dispute.” *Yakima Cty. Law Enforcement Officers Guild v. Yakima Cty.*, 133 Wn. App. 281, 285, 135 P.3d 558 (2006) (citation omitted). If a party opposing a motion to compel arbitration raises a defense that there is no agreement to arbitrate, “the court shall proceed summarily to decide the issue.” RCW 7.04A.070(2). Washington’s strong policy favoring arbitration “does not, however, lessen this court’s responsibility to determine whether the arbitration contract is valid.” *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 735, 349 P.3d 32 (2015).

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

costly arbitration before having the opportunity to appeal.” *Hill*, 179 Wn.2d at 54.

In *Hill*, this Court addressed an issue similar to that presented here and determined that the lower courts erred in failing to review the enforceability of the arbitration agreement prior to compelling arbitration. *Hill*, 179 Wn.2d at 54. This Court stressed that the interests of justice and economy are best served when the court examines the enforceability of an arbitration agreement before compelling the parties go to the tremendous expense and effort of actually arbitrating. *Id.* “We find no support in the rules of procedure or case law for the Court of Appeals’ decision to compel arbitration without considering whether the arbitration clause is even valid.” *Id.* at 55.

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

Yet, the Superior Court subsequently held in the intervening litigation against EY that the arbitration clause in the audit engagement agreements—a clause almost identical in form and substance to the clause contained in KPMG’s audit engagement agreements—was not enforceable against FutureSelect. CP 678-94. The EY trial court’s written opinion explains that FutureSelect was not bound by the arbitration clause in EY’s audit engagement agreements because Plaintiffs did not sign EY’s agreements and their claims are direct claims against EY, not derivative claims. *Id.*

No court in the KPMG litigation has undertaken any enforceability analysis of the nearly identical clause in KPMG’s audit engagement agreements. It would be a miscarriage of justice to deny FutureSelect review of this “gateway” issue before the parties are both forced to expend considerable time and resources in an arbitration involving tens of millions of dollars in damages, only then to be able to address the issue of enforceability currently before this Court.

**B. The Commissioner Erred in Granting KPMG’s Motion to Dismiss as Untimely**

The Commissioner improperly dismissed FutureSelect’s appeal as untimely without addressing the pertinent legal questions regarding whether a non-signatory to an arbitration agreement should be compelled

to go through the burdensome time and expense to arbitrate before any review of the gateway dispute.

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

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

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

To whatever extent appellate review was not available as a matter of right, the Appellate Court always has the right to review its own previous decision and modify that decision in the interest of justice based on its current understanding of the law. RAP 2.5(c)(2) ("The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review."); *State v. Schwab*, 163 Wn.2d 664, 672-73, 185 P.3d 1151 (2008) (RAP 2.5(c)(2) "allows a prior appellate holding in the same case to be reconsidered where there has been an intervening change in the law."); *Roberson v. Perez*, 156 Wn.2d 33, 43, 123 P.3d 844 (2005) ("An appellate court's discretion to disregard the law of the case doctrine is at its apex when there has been a subsequent change in controlling precedent on appeal.").

In light of this subsequent ruling on the appealability of orders compelling arbitration, and the resulting verdict against EY in late 2015

that concluded proceedings involving all other defendants, FutureSelect filed an appeal on January 15, 2016, requesting review of the June 3, 2011 order of the Superior Court granting KPMG's motion to compel arbitration. CP 712. The Commissioner did not consider the issue of enforceability of the arbitration provision in the audit engagement agreement, and merely dismissed the appeal. In the interest of justice—and judicial economy—this Court should review this petition on its merits.

**C. The Public Interest Warrants Review**

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

It is well settled that contract defenses can be used to challenge the enforceability of an arbitration agreement. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 383-84, 191 P.3d 845 (2008). “[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. at 83 (citation omitted). Washington law generally favors arbitration when “the parties agree by contract to submit their disputes to an arbitrator.” *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998) (emphasis added). With very few exceptions, a non-signatory to an arbitration agreement cannot be compelled to arbitrate. *Satomi Owners Ass'n v. Satomi. LLC*, 167 Wn.2d 781, 810-11, 225 P.3d 213 (2009).

KPMG moved to compel arbitration based on an agreement between KPMG and the Rye Funds—not FutureSelect. FutureSelect is not a signatory to nor a beneficiary of the agreement between KPMG and the Rye Funds.

“As a general rule, nonsignatories are not bound by arbitration clauses.”

*Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 460, 268 P.3d 917.

“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Woodall v.*

*Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, 923, 231 P.3d

1252 (quoting *Satomi*, 167 Wn.2d at 810) (internal quotation marks omitted);

*Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn. App. 890, 898, 988 P.2d 12

(1999).

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

FutureSelect asserts negligent misrepresentation claims and Washington State Securities Acts claims against KPMG. CP 38-39; 46-47. FutureSelect did not assert any contract claims based on KPMG’s engagement agreements with the Rye Funds. In fact, courts addressing the precise issue

here—whether under Delaware<sup>3</sup> law Madoff-related claims against auditors for inducement and misrepresentation are direct or derivative—have repeatedly held that such claims are direct. *Askenazy v. KPMG LLP*, 988 N.E.2d 463, 466-69, 83 Mass. App. Ct. 649 (2013); *KPMG LLP v. Cocchi*, 88 So. 3d 327, 329, 37 Fla. L. Weekly D1081 (Fla. Dist. Ct. App. 2012); *Saltz v. First Frontier, LP*, 782 F. Supp. 2d 61, 79-80 (S.D.N.Y. 2010); *Stephenson v. Citgo Grp., Ltd.*, 700 F. Supp. 2d 599, 611-12 (S.D.N.Y. 2010); *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 401 n.9 (S.D.N.Y. 2010); *see also* CP 684 (Superior Court explaining why these cases controlled).

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

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

FutureSelect's claims against KPMG raise issues of substantial public interest. The United States Supreme Court has held that auditors like KPMG are the "public watchdog" with "ultimate allegiance to the investing public." *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18, 104 S. Ct. 1495, 79 L. Ed. 2d 826 (1984); *see also In re Metro. Sec. Litig.*, 532 F. Supp. 2d

---

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

1260, 1301 (E.D. Wash. 2007); *FutureSelect I*, 175 Wn. App. at 871 & n.83-84. Here, FutureSelect is a Washington member of that investing public and did not agree to arbitrate. FutureSelect has a constitutional right to a jury trial. What is at stake here is determining who should decide the responsibility of the “public watchdog” in the largest financial fraud in United States history. Given concerns over numerous recent abuses committed in the financial industry, as well as the fact that the *only* public civil jury trial to date regarding the Madoff fraud was FutureSelect’s against EY here in Washington—questions about KPMG’s responsibility for the Madoff fraud are questions much better decided publicly than behind closed doors in a private arbitration.

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

In *Hill v. Garda*, this Court recognized the importance of preliminary review by the trial courts of the threshold matter of enforceability of arbitration agreements. *Hill*, 179 Wn.2d at 57. This Court’s opinion suggests that a party should be permitted an appeal as a right following an order compelling arbitration.

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

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

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

But, even if the *Hill* opinion does not create a right to appeal an order compelling arbitration, the Commissioner should not have denied FutureSelect discretionary review on the issue of enforceability. See *Huntley v. Frito-Lay, Inc.*, 979 P.2d 488, 489-90, 96 Wn. App. 398 (1999) (recognizing that even if an appeal is procedurally improper when compelled to arbitrate, the issue of enforceability of an arbitration agreement still merits discretionary review because "[i]t would be a useless act to engage in an arbitration of state-law claims if they are not subject to arbitration.") (footnote omitted); see also, RAP 1.2(a) (Appellate rules "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits."); *State v. Hathaway*, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (where a "challenge is not properly before [the Appellate Court] as a matter of right . . . RAP 1.2(c) permits us to waive or alter the rules of appellate procedure 'in order to serve the ends of justice.'").

Forcing FutureSelect and KPMG to arbitrate the claims before FutureSelect has even the opportunity to have the applicability of the

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

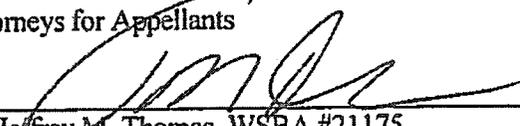
#### VII. CONCLUSION

For the foregoing reasons, FutureSelect respectfully requests that pursuant to RAP 13.4(b), this Court review the Commissioner’s May 19, 2016 Order and the Superior Court’s and Court of Appeals’ related orders.

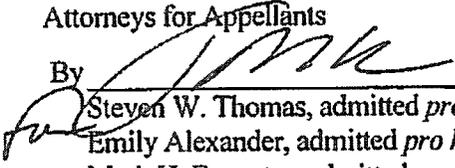
RESPECTFULLY SUBMITTED this 20th day of June, 2016.

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

By

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

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

By 

Steven W. Thomas, admitted *pro hac vice*

Emily Alexander, admitted *pro hac vice*

Mark H. Forrester, admitted *pro hac vice*

14 27th Avenue

Venice, CA 90291

Telephone: (310) 961-2536

Facsimile: (310) 526-6852

Email: [steventhomas@tfsattorneys.com](mailto:steventhomas@tfsattorneys.com)

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be delivered via email and U.S. first class mail to:

**Attorneys for Respondent KPMG:**

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

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

DATED this 20th day of June, 2016, at Seattle, Washington.



Carol Hudson, Legal Secretary  
Gordon Tilden Thomas & Cordell LLP

# **APPENDIX A**

RICHARD D. JOHNSON,  
Court Administrator/Clerk

*The Court of Appeals  
of the  
State of Washington*

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

May 20, 2016

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

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

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

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

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

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

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

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

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

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

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

Counsel:

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

**NOTATION RULING**

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

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

**FACTS**

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

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

**DECISION**

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

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

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

Case law appears to continue to hold that an order compelling arbitration is not appealable as a matter of right under RAP 2.2(a) but is subject to discretionary review under RAP 2.3(b). See Saleemi v. Doctor's Assocs., Inc., 176 Wn.2d 368, 376, 292 P.3d 108 (2013) ("At the time of the order compelling arbitration, DAI had only a right to move for discretionary review under RAP 2.3, not for review as of right under RAP 2.2."); Saleemi, 176 Wn.2d at 387 (Madsen J., concurring) ("Permitting interlocutory review is disfavored because it can cause unnecessary delay of the arbitral process."); Am. States Ins. Co. v. Chun, 127 Wn.2d 249, 254, 897 P.2d 362 (1995) ("An order to proceed with arbitration is not appealable.").

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

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

Page 4 of 4

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

Therefore, it is

**ORDERED** that this case is dismissed.

Masako Kanazawa  
Commissioner

Sincerely,

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

Richard D. Johnson  
Court Administrator/Clerk

khn

c: The Hon. Beth M. Andrus

# **APPENDIX B**

RICHARD D. JOHNSON,  
Court Administrator/Clerk

*The Court of Appeals  
of the  
State of Washington*

DIVISION I  
One Union Square  
600 University Street  
Seattle, WA  
98101-4170  
(206) 464-7750  
TDD: (206) 537-5505

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@pacificallawgroup.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 Phillip 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  
filer@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

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

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

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

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

CASE #: 67302-5-1

Futuresselect 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. 67302-5-1

ORDER DENYING  
DISCRETIONARY REVIEW  
AND GRANTING MOTIONS  
TO DISMISS REVIEW

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

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

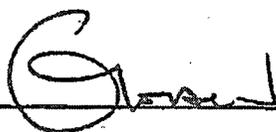
Now, therefore, it is hereby

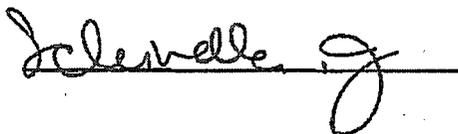
No. 67302-5-1/2

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

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

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

  
\_\_\_\_\_

  
\_\_\_\_\_

  
\_\_\_\_\_

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 NOV 21 AM 9:32

# EXHIBIT H

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.

**KPMG, LLP**

*Defendant/Respondent.*

---

**APPELLANTS' REPLY ON MOTION TO MODIFY**

---

**GORDON TILDEN THOMAS &  
CORDELL LLP**

Jeffrey M. Thomas, WSBA #21175  
1001 Fourth Avenue, Suite 4000  
Seattle, WA 98154  
ATTORNEYS FOR  
Plaintiffs/Appellants

**THOMAS, ALEXANDER &  
FORRESTER LLP**

Steven W. Thomas, *admitted pro hac vice*  
Emily Alexander, *admitted pro hac vice*  
14 - 27th Avenue  
Venice, CA 90291  
ATTORNEYS FOR Plaintiffs/Appellants

## I. INTRODUCTION

The central issue in this appeal is whether Plaintiffs/Appellants FutureSelect's constitutional right to a jury trial can be trumped by an arbitration clause in an agreement to which it was not a party. Since this Court last reviewed this issue, the law has changed, both in the Washington Supreme Court and in this very case. Despite KMPG's protestations, there is nothing "piecemeal" about resolving a constitutional question before the parties are required to conduct an arbitration that will likely be for naught and a waste of the parties' time and resources. Properly construed, the Rules of Appellate Procedure permit this Court in these unusual circumstances to resolve this issue now, not after a wasteful arbitration.

This is not a garden-variety situation. At its threshold, it involves a significant constitutional issue. It also involves two significant judicial decisions since this Court determined that FutureSelect could not appeal the trial court's determination that FutureSelect was bound by an arbitration clause in a document to which it was not a party. First, in *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 54, 308 P.3d 635 (2013), the Washington Supreme Court articulated for the first time that the same policy that permitted the immediate appeal of an order denying arbitration applies to an order compelling arbitration. Second, the trial court in this very case got it right when another auditor defendant tried to bind FutureSelect to an arbitration

clause to which it did not agree—one with the same language as the operative clause here.

KPMG tries to fault FutureSelect for the timing here, without merit. FutureSelect brought this appeal in the most practical way possible. After resolving all claims against multiple other defendants, FutureSelect sought review of the remaining claims against KPMG before pursuing arbitration to which it did not agree. Only after FutureSelect's claims against the other defendants were fully resolved by settlements and trial did it become fully necessary to pursue the remaining claims against KPMG.<sup>1</sup>

Given these circumstances, this Court should modify the Commissioner's ruling dismissing FutureSelect's appeal and determine this threshold constitutional question on the merits.

## II. ARGUMENT

### A. The Washington Supreme Court's Intervening Decision in *Hill*.

In *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 54, 308 P.3d 635 (2013), the Washington Supreme Court expressly stated that it had never before addressed the policy behind compelling a party to submit to arbitration, *before* fully adjudicating the applicability of a disputed arbitration clause. In

---

<sup>1</sup> At trial, FutureSelect sought to hold Ernst & Young liable for damages during KPMG's subsequent auditing periods. The jury rejected that claim, but had it succeeded FutureSelect would have had no reason to continue to pursue KPMG.

so doing, the Court concluded that there was no cognizable difference in policy whether the order compelled or denied arbitration:

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

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

*Hill*, 179 Wn.2d at 54 (emphasis added). In its opposition, KPMG does not even attempt to argue that this principle is incorrect.

In arguing that *Hill* does not control the result here, KPMG cites a handful of cases that were decided before *Hill* and therefore have no bearing on the Washington Supreme Court's newly-decided opinion. *American States Ins. Co. v. Chun*, 127 Wn.2d 249 (1995) was decided eight years before *Hill*. Moreover, the issues presented were: (1) whether an unconfirmed arbitration award had collateral estoppel effect on a subsequent proceeding; and (2) whether the court erred in awarding attorneys' fees. *American States*, 127 Wn.2d at 251. The case also involved a motion to stay arbitration under RCW 7.04.020 (now repealed), where the appellant conceded it could not meet the requirements of the statute. Nowhere did the Court discuss the policies

involved here. Another case cited by KPMG, *All Rite Contracting Co. v. Omev*, 27 Wn.2d 898 (1947) was decided almost 70 years prior to *Hill*. The decision is all of three paragraphs long and is silent as to the policy discussed in *Hill*. Moreover, *All Rite* involved a Washington statute that has since been repealed that specifically indicated an appeal could be taken from a final order or judgment entered upon an award. *Id.* at 1900-01.<sup>2</sup>

**B. This Court Has the Discretion to Review Its Prior Decision in this Case Under RAP 2.5(c)(2).**

This Court has the right to review its own previous decision and modify that decision in the interest of justice based on its current understanding of the law. RAP 2.5 (c)(2) (“The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.”); *State v. Schwab*, 163 Wn.2d 664, 672-73, 185 P.3d 1151 (2008) (RAP 2.5(c)(2) “allows a prior appellate holding in the same case to be reconsidered where there has been an intervening change in the law.”); *Roberson v. Perez*, 156 Wn.2d 33, 43, 123 P.3d 844 (2005) (“An appellate court’s discretion to disregard the law of the case

---

<sup>2</sup> KPMG also incorrectly relies upon *Saleemi v. Doctor’s Assocs.*, 176 Wn.2d 368 (2013), which also was decided before *Hill*. Moreover, *Saleemi* involved an appeal after the entry of an arbitration award and whether a party could after arbitration raise a challenge on grounds of venue, damages limitations, or choice of law—not whether a party could be compelled to arbitrate pursuant to an agreement to which it was not a party.

doctrine is at its apex when there has been a subsequent change in controlling precedent on appeal.”). Importantly, application of RAP 2.5(c)(2) is discretionary by this Court. *Schwab*, 163 Wn.2d at 674. In its opposition, KPMG spends less than a page discussing this important rule (and getting it wrong, to boot).

RAP 2.5(c)(2) restricts the normal operation of the law of the case doctrine, *i.e.*, that once there is an appellate court ruling, its holding must be followed in all of the subsequent states of the same litigation.

*Roberson*, 156 Wn.2d at 41. As discussed in *Schwab*:

The *Roberson* court acknowledged that RAP 2.5(c)(2) codified at least two historically recognized exceptions to the law of the case doctrine. First, the appellate court may reconsider a prior decision in the same case where that decision is “clearly erroneous, ... the erroneous decision would work a manifest injustice to one party,” and no corresponding injustice would result to the other party if the erroneous holding were set aside. Second, the language allowing consideration of the law at the time of the later review allows a prior appellate holding in the same case to be reconsidered where there has been an intervening change in the law.

*Schwab*, 163 Wn.2d at 672 (citations omitted).

The discretionary application of RAP 2.5(c)(2) due to change in law is available: (1) at the instance of a party; (2) in the same case; and (3) where justice would be best served. All three elements are met here. FutureSelect is a party and requests review in the same case.<sup>3</sup> Justice

---

<sup>3</sup> In *Schwab*, the Washington Supreme Court rejected an argument for narrow interpretation of the “same case,” holding that applies to “the same litigation.”

would best be served by the Court reviewing its previous denial of review. The former decision is in contravention of the Washington Supreme Court's subsequent policy regarding appealability of orders compelling arbitration. Forcing FutureSelect and KPMG into expensive and time-consuming arbitration before having the threshold question of arbitrability determined would be a substantial undue burden on both parties. Forcing FutureSelect and its investors who lost millions to pay unnecessary arbitration fees, pay hundreds of thousands of dollars in discovery, and pay for arbitrators before having its case heard by this Court is exactly what the Supreme Court recognized as nonsensical and prejudicial.

In its cursory discussion of this rule, KPMG gets it wrong. KPMG conflates RAP 2.5(c)(1) language that "if a trial court decision is otherwise properly before the appellate court" as applying to RAP (c)(2), which it does not. The prefatory language to subsections (1) and (2) merely says "[t]he following provisions apply if the same case is again before the appellate court following a remand." That is true here. This is the same case. It is before the appellate court following a remand. This Court's discretion to revisit its prior decision terminating review because of a change in law is not limited by the language in RAP 2.5(c)(1).

In light of *Hill*, which came after this Court's denial of review, and in the interest of justice, the Court should review its prior denial of review.

**C. This Court Has the Discretion to Hear this Appeal under RAP 1.2(a).**

This Court also has the discretion to hear this appeal to promote justice. *See, e.g.*, RAP 1.2(a) (appellate rules “will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.”); *State v. Hathaway*, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (Where a “challenge is not properly before [the Appellate Court] as a matter of right . . . RAP 1.2(c) permits us to waive or alter the rules of appellate procedure ‘in order to serve the ends of justice.’”). Forcing FutureSelect and KPMG to arbitrate the claims before FutureSelect has the opportunity to try the case in Superior Court would be costly, inefficient, and would only serve to delay the inevitable trial that FutureSelect deserves. To promote justice, this Court should review the improper order of the trial court compelling arbitration.

**III. CONCLUSION**

This is a case where Washington investors lost over \$100 million due to Bernard Madoff's fraud—where auditor KPMG failed to notice that billions of dollars of purported assets were in fact fake. FutureSelect has resolved claims against the other defendants. FutureSelect should not be required to arbitrate claims against KPMG pursuant to an arbitration clause in an agreement to which it was not a party, and only then be able to have this Court address the threshold question of FutureSelect's constitutional right to a jury

trial. In the interests of justice, this Court should exercise its discretion and reverse the Commissioner's ruling dismissing FutureSelect's appeal.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of August, 2016.

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

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

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

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

**DECLARATION OF SERVICE**

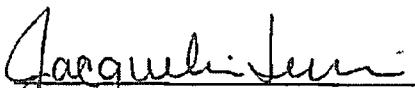
The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be delivered via email and U.S. first class mail to:

**Attorneys for Respondent KPMG:**

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

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

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



Jacqueline Lucien, Legal Secretary  
Gordon Tilden Thomas & Cordell LLP

## Tracey, Malissa

---

**From:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Sent:** Monday, December 12, 2016 4:36 PM  
**To:** Tracey, Malissa  
**Cc:** 'jthomas@gordontilden.com'; scarr@gordontilden.com;  
steventhomas@tafsattorneys.com; 'emilyalexander@tafsattorneys.com';  
'markforrester@tafsattorneys.com'; melissalawton@tafsattorneys.com; JPahl@wc.com;  
'Forkner, David'; 'jvilla@wc.com'; Greer, George; Rugani, Paul F.  
**Subject:** RE: 93824-5: Futureselect Portfolio Management, Inc., et al. v. Tremont Group Holdings, Inc., et al.

Received 12-12-16. Please send by U. S. Mail a hardcopy of the 97 page "DECLARATION OF GEORGE E. GREER IN SUPPORT OF KPMG LLP'S ANSWER IN OPPOSITION TO THE MOTION FOR DISCRETIONARY REVIEW". Our address is:

P. O Box 40929  
Olympia, WA 98504-0929

Thank you,

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:  
[http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/clerks/](http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/)

Looking for the Rules of Appellate Procedure? Here's a link to them:  
[http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.list&group=app&set=RAP](http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP)

Searching for information about a case? Case search options can be found here:  
<http://dw.courts.wa.gov/>

---

**From:** Tracey, Malissa [mailto:mtracey@orrick.com]  
**Sent:** Monday, December 12, 2016 4:09 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**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-I)

George E. Greer

WSBA #11050

Tel: 206-839-4403

[ggreer@orrick.com](mailto: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](mailto:mtracey@orrick.com)



---

**NOTICE TO RECIPIENT** | This e-mail is meant for only the intended recipient of the transmission, and may be a communication privileged by law. If you received this e-mail in error, any review, use, dissemination, distribution, or copying of this e-mail is strictly prohibited. Please notify us immediately of the error by return e-mail and please delete this message from your system. Thank you in advance for your cooperation.

For more information about Orrick, please visit <http://www.orrick.com>.