

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

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

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

v.

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

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**SUPPLEMENTAL BRIEF OF RESPONDENT KPMG LLP**

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## I. INTRODUCTION

FutureSelect, a group of hedge funds, should not be rewarded for ignoring an order compelling arbitration and waiting half a decade while pursuing claims against other parties. Had FutureSelect simply pursued arbitration, as it represented to the trial court it would, it long ago would have either obtained satisfaction or been able to seek appellate review.

The Court of Appeals properly rejected FutureSelect's arguments, and was not required to take untimely review. *Hill v. Garda CL Northwest, Inc.* did not change decades of jurisprudence, as FutureSelect claims. The long-standing prohibition on interlocutory review as a matter of right remains intact and is the correct and better rule. Even if *Hill* had changed the law (it did not), the Court of Appeals was not obligated to hear the interlocutory appeal six years after dismissing it. Instead, the Court of Appeals properly exercised discretion in dismissing the appeal as untimely.

This brief supplements KPMG's answer in opposition to the motion to modify the commissioner's ruling (the "Answer"). The Answer provides the initial response to the issues FutureSelect has submitted for review.

## II. STATEMENT OF THE ISSUES

This is a review of the unanimous Court of Appeals' order dated October 5, 2016, denying FutureSelect's motion to modify the Court of Appeals commissioner's ruling, dated May 19, 2016, dismissing FutureSelect's January 15, 2016, appeal as "untimely and not proper[.]"<sup>1</sup>

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<sup>1</sup> *E.g.*, Mot. to Modify Ruling at 16 (seeking "review the [*sic*] Court of Appeals' October 5, 2016 Order Denying Motion to Modify the Commissioner's May 19, 2016 Order.").

Pursuant to Rule 13.7(b), the scope of review is defined by the statement of issues in FutureSelect’s motion for discretionary review.<sup>2</sup>

FutureSelect identified two issues:

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

Mot. for Discretionary Rev. at 4. The Court of Appeals dismissed the appeal on procedural grounds, and thus did not address the merits of the superior court’s June 2011 order compelling arbitration. FutureSelect has not identified the merits of that order as an issue for review. “The Supreme Court will review only the questions raised in the motion for discretionary review . . . unless the Supreme Court orders otherwise upon the granting of the motion.” *In re Talley*, 172 Wn.2d 642, 649, 260 P.3d 868 (2011). On September 6, 2017, this Court granted discretionary review without expanding upon the issues FutureSelect identified, and accordingly the merits of the June 2011 order compelling arbitration are not addressed here.<sup>3</sup>

### III. STATEMENT OF THE CASE

The statement of the case is set forth in KPMG’s Answer.

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<sup>2</sup> FutureSelect erroneously designated its motion as a “petition for review.” By letter, the clerk ordered that the filing be treated as a motion for discretionary review.

<sup>3</sup> KPMG has filed a motion to disqualify one of the law firms representing FutureSelect—Thomas Alexander & Forrester (“TAF”)—because a current TAF partner accessed KPMG’s confidential information when he was at a prior law firm and then participated in this case, including by briefing matters and deposing witnesses about KPMG. *See* Answer at 6 n.5. KPMG does not waive the conflict but believes its motion to disqualify should be addressed and decided by whichever forum next takes up this case.

#### IV. ARGUMENT

More than six years ago, on June 3, 2011, the superior court stayed FutureSelect’s claims against KPMG pending mandatory arbitration. CP 728–29. The judge entered the stay after briefing and oral argument at which she asked questions of FutureSelect’s counsel about the issues of Delaware law that the parties agreed decided the arbitrability issue. RP 66–69. FutureSelect did not seek certification for interlocutory review<sup>4</sup> but filed a notice of appeal. After the Court of Appeals dismissed the appeal on November 21, 2011, FutureSelect did not seek review in this Court; instead, it informed the superior court that it “must proceed to arbitration.” CP 759.

Despite that representation, FutureSelect did not arbitrate but made the choice to pursue its claims against other parties first. Most of those claims settled in 2015, and FutureSelect went to trial against Ernst & Young LLP (“E&Y”). In its one-at-a-time trial strategy, FutureSelect blamed E&Y for all its alleged losses. FutureSelect recovered from E&Y just a small fraction of what it sought, and on January 15, 2016, filed a second interlocutory appeal of the then five-year-old order compelling arbitration.

This time, FutureSelect attempted to manufacture finality by writing the term “final judgment” into the December 2015 judgment against E&Y. CP 716–18. That language, however, did not make final the separate order

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<sup>4</sup> The certification process allows lower courts (or the parties on stipulation) to make sensitive case-specific evaluations, considering the likelihood the trial court may have erred as well as all the other factors bearing on the advancement of the litigation. This process has been used repeatedly to review orders compelling arbitration. *See Hill v. Garda CL Nw., Inc.*, 169 Wn. App. 685, 281 P.3d 334 (2012); *Wright v. Jerry Fulks & Co.*, 130 Wn. App. 1011, 2005 WL 2840335, at \*1 (2005) (cited solely for the procedural fact of the grant of discretionary review, not precedential value in light of GR 14.1).

compelling arbitration. “A final judgment is an order that adjudicates *all the claims*, counts, rights, and liabilities *of all the parties*.” *Rose v. Fritz*, 104 Wn. App. 116, 120, 15 P.3d 1062 (2001) (emphases added). The December 2015 judgment only resolved claims against one party, E&Y, not KPMG, and accordingly was not a final, appealable judgment. *See id.*

Having failed to perfect its appeal, FutureSelect relegates itself to misreading a 2013 opinion of this Court, *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 308 P.3d 635 (2013), in an argument it waited years to raise. FutureSelect claims *Hill* altered Washington’s Revised Uniform Arbitration Act (“RUAA”) *sub silentio*, reversing decades of jurisprudence uniformly holding that orders compelling arbitration are not immediately appealable.

The Court of Appeals correctly rejected that argument and also held FutureSelect’s appeal was untimely. The Court of Appeals was not obligated to reconsider its dismissal of the 2011 interlocutory appeal five years later, let alone change the result. By now, six Court of Appeals judges and two commissioners have rejected FutureSelect’s attempts to appeal.

**A. *Hill v. Garda CL Northwest* did not create a right to an interlocutory appeal from an order compelling arbitration**

*Hill* did not address—let alone reverse—decades of jurisprudence uniformly holding that orders staying litigation pending arbitration are not final and thus not appealable as a matter of right until after the arbitration. Precluding interlocutory appeals from those orders, moreover, is the majority and better rule.

**1. Hill did not overrule seventy years of precedent**

Seventy years ago in *All-Rite Contracting Co. v. Omev*, this Court considered whether an order compelling arbitration was appealable. 27 Wn.2d 898, 181 P.2d 636 (1947). Applying the general rule prohibiting “piecemeal” review “unless clearly authorized . . . by [statute],” the Court held that an order compelling arbitration was not a “final judgment,” the arbitration statutes did not authorize review, and thus “an appeal cannot be taken from an order to proceed with arbitration.” *Id.* at 901, 181 P.2d at 637.<sup>5</sup>

Ever since *All-Rite*, the law has been “definitely settled.” *Teufel Constr. Co. v. Am. Arbitration Ass’n*, 3 Wn. App. 24, 25, 472 P.2d 572 (1970). In *American States Insurance Co. v. Chun*, the Court reiterated that an “order to proceed with arbitration is not appealable.” 127 Wn.2d 249, 254, 897 P.2d 362 (1995). Additionally, just months before *Hill*, this Court explained that there is “only a right to move for discretionary review under RAP 2.3, not for review as of right under RAP 2.2.” *Saleemi v. Doctor’s Assocs., Inc.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013).

When *Hill* arrived in this Court, Washington’s law on the appealability of orders compelling arbitration was well developed and widely recognized as prohibiting interlocutory appeals as a matter of right. Numerous courts around the country recognized Washington’s position. *See, e.g., County of Hawaii v. UniDev, LLC*, 301 P.3d 588, 601 n.28 (Haw. 2013); *GMAC v. Pittella*, 17 A.3d 177, 185 n.10 (N.J. 2011); *Peter Kiewit*

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<sup>5</sup> The current version of the RUAA, likewise does not permit appeals from orders compelling arbitration. *See Answer at 9–10; infra Section III.A.3.a.*

*Sons' Co. v. Port of Portland*, 628 P.2d 720, 726–27 (Or. 1981); *Sch. Comm. of Agawam v. Agawam Educ. Ass'n*, 359 N.E.2d 956, 958 n.6 (Mass. 1977).

Washington remains well known as a jurisdiction where an “[o]rder compelling arbitration is not final and not appealable.” 2A Karl B. Tegland, *Washington Practice Series*, RAP 2.2 cmt.32 (8th ed. 2017); see 1 Martin Domke et al., *Domke on Commercial Arbitration* § 22:15 n.10 (3d ed. 2016); David B. Harrison, *Appealability of State Court’s Order or Decree Compelling or Refusing to Compel Arbitration*, 6 A.L.R.4th 652, § 3[b] (2017). Those sources in no way suggest *Hill* altered Washington’s law about appeals as a matter of right.

**2. *Hill* did not involve questions about the availability of review as a matter of right**

This Court in *Hill* did not address whether the Court of Appeals should have taken review as a matter of right. Rather, the Court of Appeals granted discretionary review under Rule 2.3(b)(4). See *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d at 54, 308 P.3d at 638.<sup>6</sup>

**a. The parties in *Hill* did not address, let alone make a “clear showing” on the topic**

In *Hill*, there was no briefing addressing whether the Court of Appeals would have been required to grant review as a matter of right had

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<sup>6</sup> Garda at first claimed a right to appeal from the partial *denial* of its motion to compel arbitration. See Decl. of Paul F. Rugani, Ex. A at 2. The parties, however, later supplanted their notices of appeal with cross-motions for—and a Rule 2.3(b)(4) stipulation seeking—discretionary review. *Id.* at 4. The record does not suggest the plaintiff-employees ever argued for review as a matter of right or that review as a matter of right could be available from an order compelling arbitration. By the time of the Court of Appeals’ decision, the initial notices were moot, and did not even warrant mention in either appellate opinion. Thus, the statement in KPMG’s Answer that “[n]o party in *Hill* sought to appeal” accurately described the state of play for the relevant appellate proceedings. Answer at 13.

it declined discretionary review. *See generally* Decl. of Paul F. Rugani (“Rugani Decl.”), Exs. B–K. No party mentioned the established law that “an appeal cannot be taken from an order to proceed with arbitration.” *E.g.*, *All-Rite*, 27 Wn.2d at 901, 181 P.2d at 637. No party addressed the appeals provisions of the RUAA. No party referred to the rule governing review as a matter of right. No party explained that Washington’s law prohibiting review as a matter of right comports with the law of the clear majority of jurisdictions.<sup>7</sup> These matters also went unaddressed at oral argument.<sup>8</sup>

FutureSelect cannot credibly argue that *Hill* overruled decades of clear precedent on a topic not presented, and did so *sub silentio*. Answer at 12 (citing cases). A party seeking to overturn precedent “must make” a “clear showing that an established rule is incorrect and harmful.” *State v. Johnson*, 188 Wn.2d 742, 756–57, 399 P.3d 507 (2017); *see also Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) (“Where we have expressed a clear rule of law . . . we will not—and should not—overrule it *sub silentio*.”). In *Hill*, there was no showing at all.

**b. *Hill* did not speak to review as a matter of right**

*Hill* moreover did not announce a new rule regarding interlocutory

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<sup>7</sup> As explained in KPMG’s Answer, a clear majority of jurisdictions prohibit interlocutory appeals as a matter of right from orders entering a stay pending arbitration. *See* Answer at 10–12 & nn.10–16. FutureSelect notes that in some of the cases KPMG cites, the courts did not compel arbitration, did not stay litigation, and in some, discretionary review was taken. *See* Reply ISO Mot. to Modify Ruling at 7–8 & nn.6–8. What FutureSelect cannot—and does not—contest is that each of those cases accurately described the law in the respective jurisdiction: appeals are not allowed as a matter of right from orders staying litigation in favor of arbitration.

<sup>8</sup> *Hill v. Garda CLNw., Inc.*, No. 87877-3 (May 21, 2013), *recording by* TVW, Washington State’s Public Affairs Network, *available at* <http://www.tvw.org>.

appeal as a matter of right. The Court’s dicta about review as a matter of right focused on situations where courts *decline* to compel arbitration:

When the trial court declines to compel arbitration, that decision is immediately appealable, in part because “if a trial court does not compel arbitration and there is no immediate right to appeal, the party seeking arbitration must proceed through costly and lengthy litigation before having the opportunity to appeal, by which time such an appeal is too late to be effective.” *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 44, 17 P3d 1266 (2001). While we have never addressed whether the opposite is always true, similar considerations are at play.

179 Wn.2d at 54, 308 P.3d at 638. The statement that “similar considerations are at play” hardly amounts to a rule of law, let alone one that would overrule 70 years of precedent. *See Kelly v. Carroll*, 36 Wn.2d 482, 501, 219 P.2d 79 (1950) (“Being dicta we do not need to either follow it or overrule it, since it never was the law.”).<sup>9</sup>

Instead, for “practical reasons,” the *Hill* Court addressed the unconscionability issue. In doing so, it stated that “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.” 179 Wn.2d at 55, 308 P.3d at 638.<sup>10</sup> That passage concerns the

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<sup>9</sup> FutureSelect suggests the reference to the “opposite” scenario, which the Court has “never addressed,” refers to whether a decision *compelling* arbitration is immediately appealable. Mot. to Modify Ruling at 7–8. That makes no sense. This Court *has* considered that issue. *See supra* Section III.A.1; Answer at 9. The “opposite” scenario refers instead to what *Hill* later identified as a “practical consideration[.]”—whether a “party seeking [litigation] must proceed through costly and lengthy [arbitration] before having the opportunity to appeal.” 179 Wn.2d at 54, 308 P.3d at 638. That is addressed *infra* Section III.A.3.b–c.

<sup>10</sup> The Court of Appeals appears to have believed that *each issue* in *Hill* had to meet the Rule 2.3(b)(4) requirements. *See* 169 Wn. App. 685, 690, 281 P.3d 334 (2012) (“We

“Court of Appeals’ decision”—the decision it actually made—in which the court granted discretionary review, “determined that . . . the parties unequivocally agreed to arbitrate the current disputes,” and “remand[ed] for individual arbitration.” 169 Wn. App. at 697, 699, 281 P.3d at 340, 341. This Court’s statement does not address the implications of a decision the Court of Appeals did not make: whether there would be a right to review if the Court of Appeals had declined discretionary review. Reading *Hill* to have addressed that issue would extend it well beyond the scope of the opinion, regarding matters not briefed or argued by the parties.

The answer to the issue FutureSelect presents is clear: *Hill* did not create a right to appeal from an order compelling arbitration.

### **3. Requiring arbitration before appeal is the correct rule**

*Hill* did not overrule this Court’s long-standing precedent. In addition, neither the RUAA nor the Rules permit interlocutory review as a matter of right. That approach is the better rule.

#### **a. Neither the RUAA nor the RAPs guarantee interlocutory review**

Appeal as a matter of right is permitted only when authorized by Rule 2.2(a) or a specific statute. *See* RAP 2.2(a); *In re Chubb*, 112 Wn.2d 719, 721, 773 P.2d 851 (1989). For orders compelling arbitration, neither

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conclude the third ground does not merit discretionary review under RAP 2.3(b)(4) and do not consider it.”). That, however, is incorrect. Rule 2.3(b)(4) allows “review of the order” if, among other things, “the order involves a [singular] controlling question of law.” Rule 2.3(b)(4) therefore did not provide the Court of Appeals a basis for restricting the issues. Although Rule 2.3(e) can allow for the specification of certain issues, it is tempered by Rule 2.4, which states regarding the scope of review that the appellate court “will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to [the] respondent.” RAP 2.4(a).

the RUAA nor Rule 2.2(a) provides that authority.

The legislature adopted the RUAA in 2005. Unlike the prior statute, the RUAA explicitly authorizes appeals from certain specific types of arbitration-related orders *but not from orders compelling arbitration*. See RCW 7.04A.280. The legislature is presumed to know the state of the case law. See Answer at 9–10. By 2005, decades of case law had prohibited appeal as a matter of right from orders compelling arbitration. See *supra* Section III.A.1.<sup>11</sup> In enacting the RUAA, the legislature declined to provide a statutory basis for review as a matter of right.

Absent a statutory basis, this Court’s precedent continues to proscribe review as a matter of right. Under *All-Rite* and its progeny, orders compelling arbitration are not final judgments and thus not appealable as a matter of right under RAP 2.2. See *id.*<sup>12</sup>

**b. Appeals as a matter of right would frustrate the purposes of arbitration**

Arbitration acts are designed “to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). Like its federal counterpart, the RUAA contains no right to

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<sup>11</sup> Additionally, the RUAA provides for entry of final judgment after certain arbitration-related orders *but not orders compelling arbitration*. RCW 7.04A.250(1). That, too, matters because review as a matter of right is unavailable absent a final judgment. See Answer at 10 n.9.

<sup>12</sup> The Court of Appeals has allowed interlocutory review of orders *denying* arbitration under Rule 2.2(a)(3). See, e.g., *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 43–45, 17 P.3d 1266 (2001) (refusing to compel arbitration discontinues the arbitration, irretrievably losing its benefits). For orders *compelling* arbitration, however, Rule 2.2(a)(3) is not available because a stay of litigation in favor of arbitration does not “prevent[] a final judgment[] or discontinue the action”—either with respect to the litigation or arbitration.

interlocutory appeal of orders compelling arbitration. *See* RCW 7.04A.280; 9 U.S.C. § 16. That legislative choice promotes the pro-arbitration policies of the statutes, “endeavor[ing] to promote appeals from orders barring arbitration and limit appeals from orders directing arbitration.” *Bushley v. Credit Suisse First Bos.*, 360 F.3d 1149, 1153 (9th Cir. 2004).

Adopting FutureSelect’s position—even though the legislature did not—would guarantee parties an appeal anytime they fault an order compelling arbitration.<sup>13</sup> Nearly every order compelling arbitration would be appealable under the rule advocated by FutureSelect, including challenges to the scope, existence, fairness, and burden of an agreement to arbitrate. Such appeals are not good for courts or litigants.

This case illustrates the needless costs and time associated with interlocutory appeals. In addition to FutureSelect’s years of strategic delay, the parties have filed more than three hundred pages of appellate briefing since FutureSelect filed its notice of appeal in January 2016. The process has lasted nearly two years—and that is not atypical. A quarter of civil appeals to the Court of Appeals take about eighteen months *or longer*, from filing the notice until the court issues an opinion.<sup>14</sup>

The parties surely could have completed an arbitration in that time (not to mention in the five years before). Indeed, in 2013, KPMG prevailed

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<sup>13</sup> *See, e.g., Saleemi*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013) (party that sought to compel arbitration later opposed the order compelling arbitration).

<sup>14</sup> *See* Caseloads of the Courts of Washington, Days Between Events for Civil Appeals Pending or Disposed of by Opinion—75th Percentile—2012 to 2016, *available at* [http://www.courts.wa.gov/caseload/content/pdf/coa/Annual/t18\\_ctip10r.pdf](http://www.courts.wa.gov/caseload/content/pdf/coa/Annual/t18_ctip10r.pdf).

in an arbitration regarding the same Rye Fund audits at issue here, in which a panel of three former federal judges unanimously found that KPMG’s audits complied with professional standards. Rugani Decl., Ex. L. The merits hearing involved testimony from KPMG auditors and experts, and took four hearing days. *Id.* at 2. Even if the arbitration of FutureSelect’s claims took twice that long (say two weeks), it would have been completed long ago. Many matters are even more straightforward, with arbitrations taking only a few days. “In most cases . . . the most economical approach is not to allow an intermission for appellate review, but rather for the parties to proceed expeditiously to arbitration.”<sup>15</sup>

**c. Compelling arbitration does not raise the same concerns as *declining* to compel arbitration**

In *Hill*, this Court described one of the reasons interlocutory appeal from orders *declining* to compel arbitration is guaranteed: a “party seeking arbitration,” the Court wrote, “must proceed through costly and lengthy litigation before having the opportunity to appeal, by which time such an appeal is too late to be effective.” 179 Wn.2d at 54, 308 P.3d at 638 (quoting *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 44, 17 P.3d 1266 (2001)). *Hill* stated that “similar considerations are at play” when compelling arbitration. *Id.* Although similarities may exist,<sup>16</sup> there are significant differences.

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<sup>15</sup> *Napleton v. Gen. Motors Corp.*, 138 F.3d 1209, 1214 (7th Cir. 1998), *overruled in part on other grounds by Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000). *Green Tree* permitted from orders *dismissing* litigation but precluded them from orders, like the one here, staying litigation pending arbitration. Answer at 10–11 & n.10.

<sup>16</sup> The considerations are “similar” in that some cost and delay are imposed on parties when a court erroneously compels arbitration or declines to compel arbitration. That is not unique to arbitration, however. Cost and delay are imposed anytime a trial court enters an interlocutory order leading to a reversal—whether or not the issues involve arbitration.

When a court erroneously *declines* to compel arbitration, the parties lose the right to the faster, more efficient dispute-resolution process. *See Stein*, 105 Wn. App. at 44, 17 P.3d at 1268. That bell cannot be un-rung. *See id.* The aspects of arbitration that are faster, more efficient, and more economical would be lost; none of the added cost of litigating in court can be unspent. The confidentiality often protected in arbitration would be useless after the dispute is made public through a court proceeding. In sum, the “benefits of arbitration [are] irretrievably lost without an interlocutory right to appeal.” *Stein*, 105 Wn. App. at 44, 17 P.3d at 1268.

By contrast, when a court erroneously *compels* arbitration, the parties participate in an abbreviated process, one *less* costly and lengthy than court proceedings. *Id.* What the parties do in arbitration, they need not re-do in court. *See, e.g.*, Answer at 19 n.25. The arbitration can help “narrow the issues in dispute,” streamlining the matter and leading to a more efficient court process should the arbitration ultimately be vacated and the matter found not arbitrable. *Maye v. Smith Barney Inc.*, 903 F. Supp. 570, 574 (S.D.N.Y. 1995); *see also, e.g.*, Answer at 19 n.25.<sup>17</sup>

**d. Compelling arbitration does not deny fundamental rights**

FutureSelect claims that arbitration “denies” it the “fundamental”

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<sup>17</sup> *See also* Sarah Baxter, *Appeals from Arbitration Orders Under the Federal Arbitration Act*, 2000 J. of Disp. Resol. 165, 170; Carla Kemp, *Appeals of Orders Compelling Arbitration in Embedded Proceedings Must Wait*, 1997 J. of Disp. Resol. 143, 148 (“Even if the party is not satisfied with the result of [the] arbitration and the arbitration is overturned on appeal, the work that both parties invested in the arbitration process will be helpful at trial.”).

right to a jury trial. FS Mot. to Modify Ruling at 15–16. That is incorrect. To the extent a party has a right to a jury—which it might if it did not agree to arbitrate<sup>18</sup>—the RUAA affords ample protections. First, a preliminary assessment is made by the trial court. In appropriate, limited instances, discretionary review may be available. Even when it is not, aggrieved parties may move to vacate an award after arbitration (or oppose a motion to confirm the award) claiming the matter was not arbitrable. *See* RCW 7.04A.230(1)(e), (4). If the award is confirmed, a party can then appeal from the judgment. *See* RCW 7.04A.280(1)(c). Those options adequately preserve whatever right to a jury trial a party may have. *See Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 652, 771 P.2d 711 (1989).<sup>19</sup>

**B. FutureSelect’s delay allowed the Court of Appeals to dismiss even if *Hill* changed the law**

*Hill* did not change the law. Even if it did, the Court of Appeals properly dismissed the appeal. FutureSelect contends the Court of Appeals was somehow obligated to allow review now, even though it did not need to do so five years ago, based on the exception to the law-of-the-case doctrine found in Rule 2.5(c)(2). That, however, is not an independent method of review. *See* RAP 2.1. It instead is contingent on “the same case [being] again before the appellate court following a remand.” RAP 2.5(c); Answer at 18. If Rule 2.5(c)(2) were a basis for appellate jurisdiction, *any*

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<sup>18</sup> Parties that have agreed to arbitrate do not have a right to a jury. *See* Answer at 20.

<sup>19</sup> FutureSelect admits as much, stating that it would be “obviously incorrect” to suggest that a party “could never appeal a trial court’s decision to compel arbitration, even after arbitration was complete.” Mot. to Modify Ruling at 9; *see also id.* at 11 (referring to arbitration as merely “delaying its right to a jury trial”). If FutureSelect has a right to a jury trial, it can enforce that right after the arbitration, as permitted by the RUAA.

appellate decision in any case could be revised long after becoming final.

Without a final judgment in the case, and after so many years had passed, the Court of Appeals did not have authority to grant review. Even if it had authority, it certainly had discretion to leave its prior decision undisturbed. Given FutureSelect’s years of strategic delay and the policies disfavoring interlocutory review—especially in the context of arbitration—the Court of Appeals’ dismissal of this second appeal was fully justified.<sup>20</sup>

**1. The Court of Appeals was not required to change its November 2011 decision**

After FutureSelect lost its appeal in 2011, it chose not to seek review in this Court. Consequently, the Court of Appeals issued its certificate of finality on December 30, 2011. Answer at 4. “[U]pon issuance of [the] certificate of finality,” the Court of Appeals “los[t] the power to change or modify its decision.” RAP 12.7(a). In two limited circumstances, the Court of Appeals “may” recall the certificate of finality: “to correct an inadvertent mistake” or to change a decision obtained by fraud,<sup>21</sup> and then only if the request comes “within a reasonable time.” RAP 12.9(b), (c). This second attempt at review satisfies none of those requirements.

**a. Waiting 2.5 years after *Hill* was not reasonable**

A party must move “within a reasonable time” to recall a certificate

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<sup>20</sup> See *Hartley v. State*, 103 Wn.2d 768, 773, 698 P.2d 77 (1985) (“Judicial policy generally disfavors interlocutory appeals.”); *Saleemi*, 176 Wn.2d at 387, 292 P.3d at 117 (Madsen, C.J., concurring) (interlocutory review disfavored for orders compelling arbitration “because it can cause unnecessary delay of the arbitral process”).

<sup>21</sup> FutureSelect has not claimed any fraud, nor could it. It also did not file a “motion” as would be required by Rule 12.9(c). *In re Greening*, 141 Wn.2d 687, 9 P.3d 205 (2000), is inapt here, where RCW 10.73.100’s provision for untimely review clearly does not apply.

of finality. RAP 12.9(c). FutureSelect did not. *Hill* was decided in September 2013. FutureSelect filed its notice of appeal (not a motion) *years later*, in January 2016. Nothing about that delay is reasonable.<sup>22</sup>

FutureSelect contends its lawyers should not have to “research every issue” to file within a reasonable time. Reply ISO Mot. to Modify Ruling (“Reply”) at 10. That, however, is exactly what the rule requires. Allowing appellate court decisions to be challenged years after the fact merely because parties’ lawyers are unaware of the state of the law would undermine judicial finality and stability.

**b. The Court of Appeals was not obligated to recall the certificate of finality**

A change in the law also does not make a prior decision an “inadvertent mistake.” *See* RAP 12.9(b). Applying the law in existence at the time is neither mistaken nor inadvertent.<sup>23</sup> Additionally, even if *Hill* changed the law (it did not) *and* a change in the law rendered a prior decision an inadvertent mistake (it does not), the Court of Appeals still was not required to recall the certificate of finality. The term “may” in Rule 12.9(b) connotes “discretionary, rather than mandatory, terms.” *Roberson v. Perez*, 156 Wn.2d 33, 39–40, 123 P.3d 844 (2005). Especially after *five*

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<sup>22</sup> By contrast, in *State v. Schwab*, the State sought to recall the mandate “immediately.” 134 Wn. App. 635, 647, 141 P.3d 650 (2006), *aff’d*, 163 Wn.2d 664, 185 P.3d 1151 (2008).

<sup>23</sup> FutureSelect relies on the Court of Appeals’ *dicta* in *Schwab* suggesting a change in law can be an “inadvertent mistake,” even though the court made clear it did not need to decide that issue. 134 Wn. App. at 646–47, 141 P.3d at 664. On review, this Court expressly declined to address that issue. 163 Wn.2d at 677, 185 P.3d at 1157. The dissenting justices, however, wrote that changes in the law “cannot be considered an inadvertent mistake without such consideration swallowing the general rule of finality every time this court announces an opinion that possibly influences prior decisions.” *Id.* at 682, 185 P.3d at 1159 (Sanders, J., dissenting); *id.* at 683, 185 P.3d at 1160 (J.M. Johnson, J. dissenting).

years had passed, more than two years since *Hill*—and in light of the policies favoring arbitration and disfavoring interlocutory review—the Court of Appeals was not obligated to recall the certificate of finality.

**2. A second appeal would be improper after years of delay**

FutureSelect did not file a “motion” to recall the certificate of finality, as Rule 12.9 requires. It instead filed a notice of appeal. That notice should be treated as if it were a Rule 12.9(b) motion (albeit an improper one) lest repeat notices of interlocutory appeal operate as end-runs around the limits on reconsideration set forth in Rules 18.8(c) and 12.9.

Additionally, even if FutureSelect’s 2016 notice of appeal is treated as a stand-alone filing, it was untimely. *See* RAP 5.2. To file an untimely appeal,<sup>24</sup> FutureSelect would have had to obtain permission under a “severe test,” that cannot be “waive[d] or alter[ed].” RAP 1.2; RAP 18.8(a). An extension of time is available “only in extraordinary circumstances and to prevent a gross miscarriage of justice.” *Schaefco, Inc. v. Columbia River Gorge Comm’n*, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993). FutureSelect never even sought an extension,<sup>25</sup> let alone showed extraordinary circumstances and a gross miscarriage of justice.

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<sup>24</sup> Rule 18.8(b) also governs extensions of time to file a motion for discretionary review in this Court. It precluded FutureSelect from seeking review of the Court of Appeals’ 2011 order more than thirty days after it was issued—at least without filing a motion purporting to meet the “severe test” in Rule 18.8(b). *See* RAP 1.2(b). FutureSelect never filed any such motion when it first sought review here, in 2016. As stated in the text, it could not have made that showing.

<sup>25</sup> Rule 18.8(a) allows a court to grant most extensions of time “on its own initiative,” but that is “subject to the restrictions in sections [18.8](b) and (c).” Rule 18.8(b) imposes the “severe test” and contemplates that the party seeking an extension will file a motion. RAP 18.8(b) (“The motion to extend time is determined by the appellate court to which the untimely notice, motion or petition is directed.”) FutureSelect filed no such motion.

**a. Wait-and-see is no extraordinary circumstance**

Rule 18.8(b) requires “reasonable diligence” and “excusable error or circumstances beyond the party’s control.” Answer at 16. FutureSelect made a choice to put its claims against KPMG on hold. Having informed the superior court that it must arbitrate and would do so, not arbitrating was no accident. FutureSelect waited until after its trial against E&Y ended, only then filing its 2016 notice of appeal. Waiting five years to see what happens in litigation against other parties was neither reasonable diligence nor excusable error nor a circumstance outside FutureSelect’s control. *See* RAP 18.8(b). It was a strategic choice.

**b. There would be no gross miscarriage of justice**

Granting an extension would not prevent a gross miscarriage of justice. It is no miscarriage of justice to require FutureSelect to arbitrate first, as required by the law of the majority of jurisdictions in the United States. *See* Answer at 10–11. FutureSelect’s particular grievances furthermore do not amount to any kind of gross miscarriage of justice.

**The superior court considered arbitrability.** FutureSelect repeatedly has claimed the superior court never considered the arbitrability issue. *E.g.*, Reply at 5. That is false.<sup>26</sup> The parties briefed and argued arbitrability, and the court held argument on the issue. *See* RP 66–69; Answer at 2–4. At argument, the superior court asked numerous questions

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<sup>26</sup> The superior court did not write an opinion, but it was not required to do so to consider the issue. *See Matter of K.J.B.*, 187 Wn.2d 592, 387 P.3d 1072 (2017) (consideration does not require explicit findings); *see also id.* at 607, 387 P.3d at 1080 (Madsen, J., dissenting) (explicit findings not necessary for consideration). The rules also do not mandate findings. CR 52(a)(5)(B). Following the rules is no gross miscarriage of justice.

of FutureSelect’s lawyer, Mr. Thomas, specifically about whether the arbitration agreement is enforceable against FutureSelect under Delaware law—which both parties agree governs that issue. *Id.* This is not a situation, as in *Hill*, where the trial judge did not consider the issue; here, she did.

**The merits of the order compelling arbitration.** FutureSelect incorrectly claims the superior court’s order compelling arbitration was “obviously wrong.” Reply at 2. To even reach the merits, FutureSelect must first overcome its procedural failures. As this Court has stated regarding matters of constitutional rights: it “would be improper to consider these questions given the procedural failures of this case.” *Schaefco*, 121 Wn.2d at 368, 849 P.2d 1226.<sup>27</sup> In any event, FutureSelect admits that arbitration is required if its claims against KPMG are derivative under Delaware law. Courts across the country have found that claims of Rye Fund investors, like FutureSelect, are derivative under Delaware law and ordered arbitration even though the plaintiffs did not personally sign the Rye Funds’ arbitration agreement. *See* Answer at 4 n.3 (citing cases). FutureSelect’s disagreement with those decisions does not make them “obviously wrong.”

**Arbitration is not cost-prohibitive for these hedge funds.**

FutureSelect, a group of hedge funds, complains about the cost of arbitrating, but has done no more than speculate. *See, e.g.*, Reply at 2. It has

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<sup>27</sup> The fact that FutureSelect did not separately sign the arbitration agreements does not establish any gross miscarriage of justice. Under state-law principles—most importantly Delaware law in this matter—non-signatories may compel arbitration and be compelled to arbitrate. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009). Moreover, the “category of order appealed from”—an order compelling arbitration, here—prohibits interlocutory appeals regardless of whether the parties are signatories or not. *See id.* at 628.

not submitted any evidence that arbitration would be cost prohibitive.<sup>28</sup> Nor could it. FutureSelect’s complaint seeks nearly \$200 million; to proceed in arbitration, it need only find a lawyer willing to take its case on contingency. FutureSelect already litigated against multiple parties for years, ultimately participating in a month-long trial at which it presented multiple experts.<sup>29</sup> If arbitration were cost-prohibitive amounting to a gross miscarriage of justice in these circumstances, it is hard to imagine a case in which a party would be required to arbitrate.

**3. The Court of Appeals had discretion to dismiss again in any event**

Even if the Court of Appeals *could have* applied Rule 2.5(c)(2) to reach a different decision this time, it was not required to do so. The exception is discretionary rather than mandatory. *State v. Schwab*, 163 Wn.2d 664, 673, 185 P.3d 1151 (2008); *Roberson*, 156 Wn.2d at 42, 123 P.3d at 849. The strong preference against discretionary review and in favor of arbitration, coupled with FutureSelect’s five years of strategic delay, adequately justified the Court of Appeals’ second dismissal.

**V. CONCLUSION**

For the foregoing reasons, KPMG respectfully requests that this Court affirm the Court of Appeals’ decisions dismissing review.

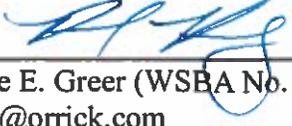
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<sup>28</sup> Parties can mount a “prohibitive-cost defense” upon showing, for example, that an unemployed individual seeking \$3,500 in damages would have to pay more than \$5,000 to arbitrate. *See, e.g., Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 604, 293 P.3d 1197 (2013). This case is not like that circumstance.

<sup>29</sup> Investors in hedge funds like FutureSelect normally must be accredited investors—meaning wealthy people or entities who can bear the economic risk of losing the entire investment. Similarly, hedge fund management companies, like plaintiff FutureSelect Portfolio Management, Inc. typically receive substantial fees.

Respectfully submitted,

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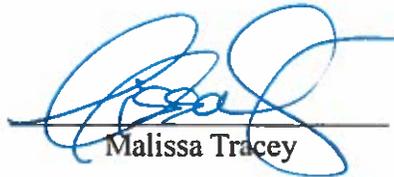
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## CERTIFICATE OF SERVICE

I, Malissa Tracey, do hereby certify and declare under penalty of perjury under the laws of the State of Washington as follows:

That I am an employee of Orrick, Herrington & Sutcliffe LLP, 701 Fifth Avenue, Suite 5600, Seattle, WA 98104, and on October 6, 2017, I caused the foregoing document to be electronically filed with the Clerk of the Court and served on the parties below via the court's ECF system.

Executed at Seattle, Washington this 6th day of October 2017.



Malissa Tracey

**ORRICK, HERRINGTON & SUTCLIFFE LLP**

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