IN THE SUPREME COURT OF THE STATE OF NEVADA

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JOHN S. WALKER, and RALPH ORTEGA,

Petitioners,

vs.

THE SECOND JUDICIAL DISTRICT COURT and BARRY L. BRESLOW, as District Judge,

Respondents.

SHEILA MICHAELS and KATHERYN FRITTER, real parties in interest.

Case No.: 80358

OPPOSITION TO MOTION TO STAY SHORT TRIAL PROCEEDINGS

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ATTORNEYS FOR REAL PARTIES IN INTEREST

COMES NOW Defendants/Real Parties in Interest, SHEILA MICHAELS and KATHERYN FRITTER, by and through their attorneys of record, and hereby file their Opposition to Plaintiffs'/Petitioners' Motion to Stay Short Trial Proceedings.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

For the following reasons, Plaintiffs' motion to stay is procedurally deficient, untimely and not likely to succeed on the merits.

On April 2, 2019, Plaintiff Walker filed his motion to strike request for trial de novo. On July 15, 2019, Plaintiff Ortega filed his motion to strike request for trial de novo. On November 12, 2019, the district court held a hearing on the motions to strike and the district court denied the motions.

On November 15, 2019, the district court provided the parties with the Short Trial Program—Selection Lists for the Ortega and Walker matters. On November 20, 2019, the district court entered the Order Addressing Motions to Strike and For Rule 11 Sanctions. On December 4, 2019, the district court appointed James Beasley as the short trial judge for the Ortega matter and appointed Lance Van Lydegraf as the short trial judge for the Walker matter. On December 13, 2019, the district court entered the Short Trial Program—Scheduling Order for the Ortega matter, indicating the parties met with the short trial judge and scheduled a short trial date of June 1, 2020 with the district court. On December 17, 2019, the

district court entered the Short Trial Program—Scheduling Order for the Walker matter, again, indicating the parties met with the short trial judge and scheduled a short trial date of May 18, 2020 with the district court.

It was not until January 9, 2020, that Plaintiffs filed their petition for writ of mandamus, challenging the district court's decision to deny the motions to strike. This was more than eight weeks after the hearing at which the district court orally denied Plaintiffs' motions to strike, and more than seven weeks after the district court entered its written order denying the motions. Plaintiffs have never provided an excuse for their delay. Even further, it was not until January 29, 2020, that Plaintiffs first filed identical Motions to Stay Short Trial Proceedings in the district court for both the Ortega and Walker matters. This was ten weeks after the district court had entered the written order denying the motions to strike. And once again, Plaintiffs offered no excuse for their delay. On February 12, 2020, the short trial judge denied Plaintiff's motion to stay the Ortega matter. The short trial judge in the Walker case has yet to rule on the motion to stay that matter.

On February 25, 2020, Plaintiffs filed their instant motion to stay under NRAP 8. However, Plaintiffs admit the district court has not ruled on the motion to stay the Walker case. Since Plaintiffs have not moved for an emergency stay under NRAP 27(e), there is no reason Plaintiffs could not have waited for the district court to rule on the motion to stay in the Walker case before filing the instant motion in this Court,

and therefore the current motion to stay before this Court is procedurally deficient, as it fails to comply with NRAP 8(a)(1)'s requirement to seek a stay in the district court before seeking a stay in this Court.

Not only is Plaintiffs' motion procedurally deficient, given the passage of time, it is also untimely. It is well known that petitions for extraordinary writs are particularly time-sensitive, calling for the prompt resolution of issues which could not otherwise be suitably addressed through an appeal. If Plaintiffs felt a stay was appropriate, they should have filed a motion to stay at or near the time the district court denied their motions on November 12, 2019, or at the very least, when they filed their writ petition in January 9, 2020.

Instead, Plaintiffs waited 106 calendar days after the district court denied their Motions to Strike Trial De Novo Requests before filing the instant motion to stay.

A. PLAINTIFFS WILL NOT SUFFER IRREPARABLE OR SERIOUS INJURY IF THE STAY IS DENIED

With regards to preservation of resources, time and effort, this is not an element the Nevada Supreme Court generally considers in deciding whether to issue a stay. In fact, even the prospect of lengthy and time-consuming discovery, trial preparation and trial, "while potentially substantial, are neither irreparable nor serious." *Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 658, 6 P.3d 982, 986–87 (2000) (citing *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029–30 (1987) (noting that, with respect to injunctive relief,

irreparable harm is harm for which compensatory damages would be inadequate, such as the sale of a home at trustee's sale, because real property is unique); *Berryman v. Int'l Bhd. Elec. Workers*, 82 Nev. 277, 280, 416 P.2d 387, 389 (1966) (stating that with respect to harm, there should be a "reasonable probability that real injury will occur if the injunction does not issue"); *see Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C.Cir.1985) (noting that " '[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough'" to show irreparable harm) (quoting *Virginia Petroleum Job. Ass'n v. Federal Power Com'n*, 104 U.S.App.D.C. 106, 259 F.2d 921, 925 (D.C.Cir.1958)).

In addition, Plaintiffs already wasted resources, time and effort by waiting to file the writ petition and the motions to stay well after the time the district court provided the parties with short trial program selection lists and appointed short trial judges and the parties attended short trial hearings with the short trial judges and the parties scheduled dates for the short trials and the district court scheduled the short trials.

With regards to the possibility of inconsistent results being prevented should the short trials proceed, Plaintiffs have not shown what possible inconsistent results could potentially arise or how this is an element the Court would consider in deciding whether to issue a stay. Moreover, Nevada has a policy of law

favoring the disposition of cases on the merits and a trial in these matters would not produce inconsistent results since either the Plaintiffs will be awarded what they were awarded in the arbitrations or Plaintiffs will be awarded what a jury provides in the short trial program for each individual matter.

B. PLAINTIFFS HAVE NOT SHOWN THEY ARE LIKELY TO PREVAIL ON THE MERITS OF THE WRIT PETITION

A "party opposing the stay motion can defeat the motion by making a strong showing that appellate relief is unattainable." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 40 (2004). This court will only grant a petition for extraordinary relief where the petition "involves only a purely legal issue." *Ragamas v. Eighth Judicial Dist. Court*, 129 Nev 424, 431, 305 P.3d 887, 892 (2013). This court typically declines to exercise its discretion to consider writ petitions involving disputed issues of fact. *See Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997). And this court will only grant a petition for extraordinary relief where the district court's ruling was a manifest abuse or arbitrary or capricious exercise of discretion. *See Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

Here, the district court conducted an evidentiary hearing, after which the district court made findings of fact that Plaintiffs now challenge in their writ petition. Those findings were supported by evidence and cannot be challenged in this writ proceeding. Moreover, Plaintiffs' motion to stay does not contain any

meritorious support for their contention that they are likely to prevail on the legal merits in the writ petition. Instead, they simply point to their writ petition and argue that the district court abused its discretion by "disregarding the unchallenged and uncontroverted expert testimony" of Plaintiffs' expert and failing to "find per se bad faith participation in the Arbitration Program" pursuant to *Gittings v. Hartz*, 116 Nev. 386, 996 P.2d 898 (2000). *See* Motion, p. 5, lines 10-16.

However, the *Gittings* Court noted that, even where an insurance company files for trial de novo in over 50% of its cases, the statistics will not support a finding of bad faith unless it can be shown the insurance company requests a trial de novo without regard to the facts and circumstances of each case. *Id.*, 116 Nev. at 394, 996 P.2d at 903 ("competent statistical information that demonstrates that an insurance company has routinely filed trial de novo requests without regard to the facts and circumstances of each individual case may be used to support a claim of bad faith."). Plaintiffs have never demonstrated that Adam McMillen or Farmers Insurance have routinely filed trial de novo requests without regard to the facts and circumstances of each individual case.

Instead, Plaintiffs merely looked at 11 cases handled by attorney Adam McMillen in a frivolous attempt to demonstrate McMillen and Farmers file requests for trial de novo without regard to the facts and circumstances of each individual case and with an intent to increase the time and expense of litigation for

claimants and to obstruct payment. 1 A.App. OR021, OR213. Not only did Plaintiffs fail to make any assessment of the facts and circumstances of those 11 cases, Plaintiffs ignored the actual statistics of the cases handled by McMillen on behalf of Farmers.

At the time Defendants filed their opposition to Plaintiffs' motion to strike Defendants' requests for trial de novo, and from the time McMillen began working for Farmers, McMillen had been assigned 180 matters by Farmers and of those matters he participated in settling and/or resolving 54 of those matters outside of the mandatory arbitration program in various courts throughout Nevada. 1 A.App. OR192-196. Of those 180 matters, McMillen participated in settling and/or resolving 29 matters in the mandatory arbitration program prior to the arbitration hearing. 1 A.App. OR196-199.

Of those 180 matters, McMillen participated in settling and/or resolving 11 matters in the mandatory arbitration program after an arbitration award but prior to a short trial; 2 of these defendant accepted the arbitration award; 8 of these were settled below the amount of the arbitration award; 1 of these the award was paid after the trial de novo was stricken for paying the arbitrator late). 1 A.App. OR199-201.

Of those 180 matters, McMillen defensed 2 matters in the mandatory arbitration program where no trial de novo was filed. 1 A.App. OR201. Of those

180 matters, McMillen tried 5 matters to verdict in the short trial program and thereby reduced the arbitration award. 1 A.App. OR201-202. Of those 180 matters, McMillen tried 1 matter to verdict in the short trial program after plaintiff, not McMillen, filed a request for trial de novo. 1 A.App. OR202. Of those 180 matters, McMillen tried 1 matter to verdict in the short trail program after prior defense counsel filed a request for trial de novo and did not reduce the arbitration award. 1 A.App. OR202. Accordingly, of the 6 matters that McMillen tried to verdict in the short trial program, where the defense filed the request for trial de novo, the arbitration award was reduced in 5 of those cases.

These statistics overwhelmingly demonstrate McMillen and Farmers settled more cases than they tried in the short trial program. These statistics also demonstrate that McMillen and Farmers only file a request for trial de novo after carefully considering the facts and circumstances of each case. There is no evidence in the record to demonstrate otherwise.

With regards to Plaintiffs' statistical expert, he was engaged to read the *Gittings* case and provide the statistical analysis that was described therein. 4 A.App. Transcript p. 59. However, Plaintiffs' expert admitted at the November 12, 2019 hearing that his statistical analysis does not indicate whether McMillen/Farmers look at the facts and circumstances of each individual case before filing a request for trial de novo. 4 A.App. Transcript p. 62.

Further, Plaintiffs' expert admitted his analysis failed to account for McMillen's total caseload. 4 A.App. Transcript p. 62. Plaintiffs' expert admitted he did not do any analysis based on McMillen's total cases litigated, total cases settled, settlement rate, total trial de novo requested, and trial de novo rate. 4 A.App. Transcript p. 64. Plaintiffs' expert admitted he did not do an analysis based on McMillen's total cases that could potentially have a trial de novo request. 4 A.App. Transcript p. 64. Plaintiffs' expert admitted he did not look at the facts and circumstances of any case McMillen has been involved with to determine if McMillen participated in good faith. 4 A.App. Transcript p. 64-65.

Plaintiffs' expert did not know and did not consider what the actual statistics are for 2018 or 2019, the time period in question, for any other litigant in Washoe County and therefore made no actual comparison to McMillen's statistics. 4 A.App. Transcript p. 65. Plaintiffs' expert did not even consider McMillen's cases where they were entered into the arbitration program and settled prior to an arbitration award. 4 A.App. Transcript p. 70. In fact, he eliminated them from his statistical analysis. *Id.*

Finally, Plaintiffs' expert admitted that his analysis did not tell the district court whether or not McMillen or Farmers filed requests for trial de novo without regard to the facts and circumstances of each individual case. 4 A.App. Transcript p. 81.

The actual statistics demonstrate McMillen and Farmers carefully considered the facts and circumstances of each individual case when deciding to file a request for trial de novo. There is nothing in the record to support Plaintiffs' arguments otherwise. In addition, there has never been a finding of bad faith conduct in any of the cases cited Plaintiffs. The district court was well within its discretion in making the factual determinations supporting the denial of Plaintiffs' motions to strike the requests for trials de novo in the Ortega and Walker matters.

As a result, Plaintiffs have not shown and cannot demonstrate they are likely to prevail on the merits.

II. CONCLUSION

Therefore, Defendants respectfully request the stay be denied.

DATED: March 2, 2020 LEMONS, GRUNDY & EISENBERG

BY: /s/ Robert Eisenberg
ROBERT L. EISENBERG, ESQ.
Attorney for Defendants/Real Parties in Interest

DATED: March 2, 2020 THE LAW OFFICES OF S. DENISE MCCURRY – RENO

BY:
/s/ Adam McMillen
ADAM P. MCMILLEN, ESQ.
Attorney for Defendants/Real Parties in Interest

CERTIFICATE OF SERVICE

Pursuant to Rule 5(a) of the Nevada Rules of Civil Procedure, Rule 9 of the NEFCR, I certify that I am an employee of THE LAW OFFICES OF S. DENISE MCCURRY - RENO and that on the 2nd day of March, 2020, I served a true and correct copy of the above and foregoing **OPPOSITION TO MOTION TO STAY SHORT TRIAL PROCEEDINGS** on the parties addressed as shown below:

_X_ *Via Electronic Filing* [N.E.F.R. 9(b)]

_X_ *Via Electronic Service* [N.E.F.R. 9]

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