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

District Court case nos.: CV18-01798 and CV18-02032

REPLY IN FURTHER SUPPORT OF MOTION TO STAY SHORT TRIAL PROCEEDINGS

Petitioners, JOHN S. WALKER and RALPH ORTEGA, hereby file their Reply in Further Support of Motion to Stay Short Trial Proceedings, and submits the following Points and Authorities, exhibits and argument in support thereof.

Dated this 4th day of March, 2020.

___William R. Kendall /s/____

William R. Kendall, Esq.
State Bar No. 3453
137 Mt. Rose Street
Reno, NV 89509

POINTS AND AUTHORITIES

1. Irreparable or serious injury to Petitioners

Petitioners have not asserted preservation of resources, time, effort or financial reasons to stay the short trial proceedings.

Respondents argue that Petitioners have "already wasted resources, time and effort by waiting to file the writ petition and the motions to stay. In response to this, Petitioners point out that there is no proscribed time frame for filing a writ of mandamus or motions to stay. Furthermore, although the writ process is an "extraordinary" proceeding, in this case it is not an "emergency." No one is going to die, no property will be irretrievable lost, and there is no danger of losing evidence or witnesses.

However, allowing the short trials to go forward while the writ is still pending could result in:

1. Short trial verdicts;
2. A writ from the Supreme Court reversing the District Court and ordering the Requests for Trial De Novo stricken;
3. A resulting incongruency where short trials should never have taken place in light of the potential writ order;
4. A resulting procedural issue on how to reconcile the short trial verdicts and a writ striking the trial de novos that lead to the verdicts.

All of the above can be avoided by simply postponing the short trials until the

Supreme Court has ruled upon the writ petition. No one would be prejudiced by the delay and justice will eventually be served.

Furthermore, regardless of what could happen at short trial, the alleged bad faith participation in the arbitration process by requesting trial de novo in every case that they loose without regard to the facts and circumstances of each individual case would persist. Such conduct is in great need of review by this Court as it severely undermines the Arbitration Program.

2. Prevailing on the merits

Petitioners demonstrated that of the 10 cases that McMillen/Farmers took to arbitration and lost (from the beginning of McMillen's employment with Farmers), they filed requests for trial de novo **in every single one of them.** That is a 100% de novo rate. In striking contrast, the Nevada Supreme Court statistics show a consistent de novo rate in Washoe County of about 15 % over 15 years. (See 2015 Annual Report of the Nevada Judiciary, ADR summary, at p. 35.)

Respondents make the fallacious argument that every case McMillen has ever handled in his career with Farmers ought to be considered when assessing his de novo rate. Of course, that is erroneous when we are only assessing the cases which McMillen/Farmers lost at arbitration and thereafter filed for trial de novo.

McMillen/Farmers claims about their successes at short trial are simply wrong. A close analysis of the cases that went to short trial, as was done by Petitioners at the evidentiary hearing, demonstrates that McMillen/Farmers obtained

a better financial outcome in only one case.

McMillen/Farmers' entire discussion of what Petitioner's Statistical Analysis expert "did not consider" is irrelevant and are simply multiple "red herrings." They continue to attempt to divert the focus from McMillen/Farmers' abominable de novo rate to a multitude of case that have nothing to do with requesting trial de novos.

To criticize the expert for not offering an opinion on whether McMillen/Farmers files for trial de novo without regard to the facts and circumstances of each case is disingenuous and fallacious. The expert's opinions were limited to statistical analysis of the high de novo rate of McMillen/Farmers. It was not his place to then draw any conclusions from that circumstantial evidence.

3. Proof that McMillen/Farmers filed requests for trial de novo in every case without regard to the facts and circumstances of each case.

It is fantasy to expect that there would ever be direct evidentiary proof that they filed for trial de novo in every case without regard to the facts and circumstances of each case. There would never be a witness break down and confess on the witness stand. Nor would there ever be a "smoking gun" memo from Farmers to McMillen instructing him to file for trial de novo without regard to the facts and circumstances of each case.

So how is it proven that they engaged in such bad faith conduct? In *Gittings v. Hartz,* 116 Nev. 386 (2000), the Supreme Court instructs on how such evidence

could be presented. The Court says: "...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." *Gittings* at 394. A 100 % rate demonstrates that filing a request for trial de novo is "routine." This is sufficient circumstantial evidence of bad faith.

Thus, statistical analysis of the McMillen/Farmers 100% de novo data can and has been presented to show that they file for trial de novo in every case without regard to the facts and circumstances of each case.

Petitioners submit that they have a likelihood of prevailing on the merits.

First the uncontroverted evidence shows that McMillen/Farmers filed for trial de novo in every case (100 %) they lost since McMillen began working for Farmers. This is circumstantial evidence of bad faith.

Second, uncontroverted and un-impeached expert statistical analysis testimony was presented establishing that McMillen/Farmers de novo cases at an alarmingly higher rate that the 15 % average experienced in Washoe County.

Third, the District Court chose to disregard the un-assailed expert testimony and substitute his own lay opinions in place thereof in order to reach his conclusions. This is an abuse of discretion.

Fouth, *Gittings* held that "This statistic [52 %] raises a question in this court's mind as to whether this percentage constitutes bad faith per se in violation

of Rule 2(A) of the Nevada Arbitration Rules." *Gittings* at 391-392. Disregarding the strikingly higher de novo rate of McMillen/Farmers as compared to the 52 % rate of Allstate in *Gittings,* the District Court abused its discretion in not finding that McMillen/Farmers percentage constituted bad faith per se in violation of Rule 2(A) of the Nevada Arbitration Rules.

4. Conclusions

Petitioners submit that an order staying the short trial proceedings in both cases is warranted. The fact is, it just makes good judicial sense to stay the short trial proceedings while the Supreme Court is evaluating the Petition for a Writ of Mandamus.

Respectfully submitted, this 4th day of March, 2020.

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CERTIFICATE OF SERVICE

The undersigned does hereby swear and declare under penalty of perjury that on the day and date set out below, a true and correct copy of the preceding document was served upon the relevant parties in interest via electronic service through the Court's E-flex system, addressed as follows:

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A true and correct copy of the preceding document was served by United States mail upon:

Honorable Barry Breslow

Second Judicial District Court, Department 8

75 Court Street

Reno, NV 89501

Respondent

Dated this 4th day of March, 2020.

William R. Kendall