IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HE OFFICIAL CAPACITY AS RECEIVEI FOR SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE, MARK R. DENTON, DISTRICT JUDGE, DEPT. 13

Respondents,

And Concerning,

THOMAS MULLIGAN, an individual; CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC, a Missouri Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES LLC, a California Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC, a Hawaii Limited Liability Company; CRITERION CLAIMS SOLUTIONS OF OMAHA, INC., a Nebraska Corporation; PAVEL KAPELNIKOV, an individual; CHELSEA FINANCIAL GROUP, INC., a California Corporation; CHELSEA FINANCIAL GROUP, INC., a Missouri Corporation;

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Supreme Court Case No.:

Dist. Ct. Case No.: **A-20-809963-B**

PETITION FOR WRIT OF MANDAMUS

CHELSEA FINANCIAL GROUP, INC., a New Jersey Corporation d/b/a CHELSEA PREMIUM FINANCE CORPORATION; FOURGOREAN CAPITAL, LLC, a New Jersey Limited Liability Company; KAPA MANAGEMENT CONSULTING, INC. a New Jersey Corporation; KAPA VENTURES, INC., a New Jersey Corporation; GLOBAL FORWARDING ENTERPRISES LIMITED LIABILITY COMPANY, a New Jersey Limited Liability Company; NEW TECH CAPITAL, LLC, a Delaware Limited Liability Company; LEXICON INSURANCE MANAGEMENT LLC, a North Carolina Limited Liability Company; ICAP MANAGEMENT SOLUTIONS, LLC, a Vermont Limited Liability Company; SIX ELEVEN LLC, a Missouri Limited Liability Company; 10-4 PREFERRED RISK MANAGERS INC., a Missouri Corporation; IRONJAB LLC, a New Jersey Limited Liability Company; YANINA G. KAPELNIKOV, an individual; IGOR KAPELNIKOV, an individual; QUOTE MY RIG LLC, a New Jersey Limited Liability Company; MATTHEW SIMON, an individual; DANIEL GEORGE, an individual; JOHN MALONEY, an individual; JAMES MARX, an individual; CARLOS TORRES, an individual; VIRGINIA TORRES, an individual; SCOTT McCRAE, an individual; BRENDA GUFFEY, an individual; and 195 GLUTEN FREE LLC, a New Jersey Limited Liability Company,

Real Parties in Interest,

Mark E. Ferrario, Esq., NBN 1625
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Attorneys for Petitioner

CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Petitioner, Barbara D. Richardson, through her undersigned counsel, states that she is an official of the government of the State of Nevada, acting herein such capacity as the Receiver for an insolvent insurer, and accordingly, no corporate disclosure statement is necessary.

Petitioner has been represented by the following law firm in the proceedings below:

GREENBERG TRAURIG, LLP.

DATED this 1st day of April, 2021.

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden
Mark E. Ferrario, Esq., NBN 1625
Kara B. Hendricks, Esq., NBN 7743
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Las Vegas, Nevada 89135

Attorneys for Petitioner Barbara D. Richardson

VERIFICATION

The undersigned declares under the penalty of perjury that she is counsel for Petitioner, Commissioner Of Insurance, Barbara D. Richardson, In Her Official Capacity As Receiver ("Commissioner," Or "Receiver") For Spirit Commercial Auto Risk Retention Group, Inc. and has read the attached Petition for Writ of Mandamus and that the factual assertions therein are true of her own knowledge, or supported by exhibits contained in the Appendix filed herewith, and that as to such matters so supported, she believes them to be true. This verification is made pursuant to NRS 15.010.

DATED this 1st day of April, 2021.

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden
Mark E. Ferrario, Esq., NBN 1625
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Petitioner, BARBARA D. RICHARDSON, as RECEIVER ("Commissioner," or "Receiver") for SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC. ("SPIRIT" or "SCARRG"), presents her Petition for Writ of Mandamus ("Petition").

STATEMENT OF RELIEF SOUGHT

Spirit was an insurance company created by Defendants below (here, the real Parties in Interest), solely for the purpose of plundering it, leaving policy holders with millions of dollars in unpaid liability claims. Due to the District Court's orders, the Receiver is powerless to recover the millions belonging to Spirit taken by the Real Parties in Interest, who include both the persons responsible for the fraud on the public, and the entities used to facilitate that misconduct. The Receiver may not proceed against *any* defendant until she has completed arbitration of claims against two of the thirty plus defendants—CTC[1] and Criterion[2]—but the Receiver has no authority to initiate arbitration proceedings. As a result of these orders, the Receiver is unable to recover money needed to pay Spirit's obligations to its policyholders and other creditors.

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[1] Collectively, CTC Transportation Services of California, CTC Transportation Services of Missouri, and CTC Transportation Services of Hawaii.

[2] Criterion Claims Solutions of Omaha, Inc.

Mandamus is needed to direct the District Court to exercise subject matter jurisdiction over the claims raised by Petitioner against CTC and Criterion and to lift the stay imposed on claims against the remaining Real Parties in Interest.

ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding, as this case: originated in Business Court; involves issues related to Nevada's statutory and common law previously unaddressed in a published decision; and implicates questions of statewide public importance, as it involves the interpretation of Nevada's Insurance Code ("NIC"), NRS Title 57, and reverse preemption of the Federal Arbitration Act by the McCarran-Ferguson Act. NRAP 17(a) (9), (11) & (12).

STATEMENT OF ISSUES PRESENTED

I. **THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING CLAIMS ON THE BASIS OF ARBITRATION CLAUSES UNENFORCEABLE AS TO THE RECEIVER.**

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY DISMISSING CLAIMS THAT WERE NOT ENCOMPASSED BY THE ARBITRATION CLAUSES.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY STAYING ALL PROCEEDINGS AGAINST THE REMAINING DEFENDANTS.

STATEMENT OF RELEVANT FACTS

Background information

Petitioner is the court-appointed Receiver for Spirit, a Risk Retention Group (RRG) that offered commercial trucking liability insurance to customers in Nevada and across the United States. **APP0003, ¶5; APP0011, ¶52.** In its short life, Spirit rapidly grew into one of the ten largest operational RRGs in the country. *See* C. Daniel, "Management and Regulators Contribute to Spirit Commercial RRG's Mounting Troubles," *Risk Retention Reporter,* February 2019, p. 2. But despite this rapid growth, Spirit failed. In February 2019, Spirit was involuntarily placed into receivership. **APP0018, ¶¶90-91; APP0541-556.** As relevant here, the Receivership Order:

- established that the Receivership Court had jurisdiction over Spirit's property, "to the exclusion of any other court or tribunal," such exclusive jurisdiction being "***essential to the safety of the public and of the claimants against [Spirit]";*** and
- granted the Receiver the power to
  - "institute and maintain actions at law or equity" to collect monies due to Spirit;

- to [i]nstitute and prosecute any and all <u>*suits*</u> regardless of whether they were pending at the time of the order, and *abandon or <u>further</u> prosecute any "suits, legal proceedings and claims*";
- to affirm, reject, or disavow all or part of any executory contract.

APP0541-556. ¶¶6(f), 15(a), (h), and (p)(emphasis added). Thus, the Receiver is authorized to *institute lawsuits* to recover Spirit's assets. With respect to arbitration proceedings, however, the Receiver is authorized <u>*only*</u> to *continue or abandon* any such proceedings as existed as of the time of the Order; <u>***there is no authorization for the Receiver to initiate an arbitration proceeding***</u>. ***Id.* at 6(f), 15(a) and (h).** With respect to any arbitration clause that had not yet been invoked as of the time of the Order, such clause would be executory, and therefore subject to disavowal by the Receiver. ***Id.* at ¶15 (p).**

Following investigation, the Receiver filed this action against more than thirty individuals and entities to recover tens of millions of Spirit's dollars. **Complaint, APP0001-0079.**

Nature of the claims against the Defendants

Thomas Mulligan ("**Mulligan**") is the architect of the scheme. Through CTC, he founded Spirit and then hogtied Spirit's operations to CTC, resulting in the Nevada DOI concluding that Spirit had no existence separate from CTC. **APP0004-5, ¶¶10-13; APP0605.** Spirit's Board of Directors shared members with that of

CTC, and with other companies known or believed to also be owned or controlled by Mulligan. Mulligan used his control of CTC and Criterion to cause millions of dollars to be diverted from Spirit to himself, to his many companies and co-conspirators, and to their companies. Of the more than twenty entities named as Defendants, Mulligan has control over as many as 17. **APP0004, ¶10.** CTC was designated as the "ultimate controlling person" of Spirit in NDOI filings by Spirit; as 100% owner of CTC, Mulligan was thus the ultimate controlling person of Spirit. **APP0708-709.** CTC was authorized to handle virtually all aspects of Spirit's insurance business. **APP0012, ¶55**, **APP0017-18, ¶¶86-87.** CTC failed to perform its contractual obligations, but also engaged in misconduct that allowed CTC, Mulligan, and/or other Defendants to profit at Spirit's expense. In addition to contract-based claims, the claims alleged against CTC include fraud, breach of fiduciary duty, and unjust enrichment; these claims relate to and depend upon CTC's obligations as the controlling party of Spirit, and not just CTC's contractual obligations. **APP0048-69, ¶¶263-268, 286-292, 300-319, 327-384**.

Mulligan did not rely solely on his control of CTC to plunder Spirit. He found willing accomplices, and used many additional entities to skim funds from Spirit. For example, to perform Claims Administration, Mulligan caused Spirit to contract with Criterion, a company now wholly owned by Mulligan, and likely previously controlled by him. **APP0004, 0012, 0025, ¶¶10, 57, 145.** Through Criterion's manipulation of claims valuation, Spirit was prevented from maintaining proper reserves, freeing more funds to be scooped up by Mulligan and his cohorts. As with CTC, the multiple tort claims against Criterion are based on the unity of ownership and control by Mulligan, and thus, its special relationship with Spirit. **APP0025-0028, ¶¶141-159; APP0048-69, ¶¶263-268, 286-292, 300-319, 327-384**. Additionally, Criterion was also the recipient of fraudulent transfers from Spirit and/or CTC, through direct transfers or the write-off of "debt." **APP0069-76, ¶¶ 385-434.** This liability too is independent of any contractual obligations.

Mulligan is alleged to be a controlling person in another group of companies, collectively referred to herein as "Chelsea,"[3] that exploited Spirit. Chelsea purported to "finance" premiums for Spirit customers. However, while Chelsea collected payments and interest from such customers, Chelsea did not pay the premium price in full to Spirit; instead, when it paid at all, it made payments over time. **APP0005-6, 12, ¶¶18-21, 58-59.** Additionally, Chelsea also received many millions of dollars in transfers from CTC. **APP0069-76, ¶¶385-434.** Claims against Chelsea include fraud, RICO, unjust enrichment, civil conspiracy, and avoidance of fraudulent transfers. **APP0056-69, ¶¶327- 384**.

[3] The Defendants collectively referred to as "Chelsea" include three entities named Chelsea Financial Group, Inc." incorporated in California, Missouri and New Jersey, and Chelsea Holdings NV which was defaulted. Chelsea Holding Company, LLC a Nevada limited liability company and Chelsea Financial Group, Inc., a Delaware Corporation were dismissed. **APP0005, ¶¶15-16.**

Yet another company owned by Mulligan, along with Spirit Director and Officer Daniel George, retained tens of millions of Spirit's funds by failing to perform the services for which it received high administrative fees. In addition to claims related to Lexicon's failure to perform, Spirit's claims include breach of fiduciary duty, fraud, RICO, unjust enrichment, and civil conspiracy. **APP0049-69**, **¶¶270-273, 286-25, 327-384.**

The remaining entity defendants include numerous companies owned by Mulligan, as well as those owned by other individual defendants, all of whom received unexplained payments from Spirit's funds. **APP006-10**, **¶¶22-32, 34-35, 44-47.** All of these entities are alleged to have participated in the torts committed by the other entities and/or received transfers of funds properly belonging to Spirit. ***Id.* at ¶¶327-434.**

Claims Against the Individual Defendants

Mulligan, who owned or controlled more than a dozen companies that improperly received millions in Spirit funds, also received payments of approximately $2 million to himself or made on his behalf. **APP0045-47, ¶256.** Claims against Mulligan include fraud, RICO, unjust enrichment, alter ego, civil conspiracy, fraudulent conveyances, preferential transfer, and unlawful distribution. ***Id.* at ¶¶ 327-434.**

Mulligan was assisted in his schemes by the other Individual Defendants. Pavel Kapelnikov had ownership interests and held officer positions in multiple companies that received unexplained transfers of funds from Spirit and/or CTC including Chelsea, Global, Kapa, and New Tech[4]. **APP009, ¶40; APP0045-48; ¶¶255-262; APP0566.** Kapelnikov's relatives Igor and Yanina also received unexplained transfers of funds. **APP0060-61; ¶346.**

Additionally, Mulligan was assisted by numerous Directors and Officers of Spirit (Matthew Simon, Daniel George, John Maloney, James Marx, Carlos Torres, Virginia Torres, and Brenda Guffey), several of whom were also officers or directors of CTC, Criterion, and/or other Entity Defendants. In addition to the same tort claims alleged against Mulligan, the Kapelnikovs, and Scott McCrae, claims against these directors also include breach of fiduciary duty as directors/officers, and recovery of the unlawful transfers and distributions. **APP0051-52, 76-77, ¶¶286-289, 435-441.** Mr. McCrae was also an officer in both CTC and Criterion, and he directly participated in conduct related to undervaluing Spirit's losses, which would make it appear to regulators that Spirit had lower capital reserve needs. The claims against

[4] "Global" refers collectively to Defendants Global Forwarding Enterprises Limited Liability Company; default was entered against Global Capital Group, LLC, and Global Consulting was not served with the complaint. "Kapa" refers collectively to Defendants Kapa Management Consulting, Inc. and Kapa Ventures, Inc. "New Tech" refers to Defendant New Tech Capital, LLC.

him included fraudulent transfer, RICO, unjust enrichment, and civil conspiracy. **APP0001-79**, **¶¶ 42, 327-384.**

The Activities That Gutted Spirit

Spirit was conceived by Mulligan and his cohorts as a mechanism through which the Defendants could bilk the insurance-buying public of tens of millions of dollars.[5] Investigation uncovered many actions taken during Spirit's short life that doomed Spirit to insolvency, all directed or authorized by Mulligan and other individual Defendants, including:

- commingling funds, operating with limited financial controls, and allowing transfers of funds for unauthorized purposes, resulting in more than $32 million of unexplained transfers of Spirit funds to the Defendants;
- underreporting necessary loss reserves and deliberately undervaluing existing claims, so that Spirit would have lower reserve requirements;
- failing to address lapsed premiums, causing Spirit to be liable for millions of dollars in claims for which there should have been no coverage; and

[5] Spirit was conceived in 2011, at approximately the same time the Delaware Department of Insurance obtained a receivership order for Federal Motor Carriers RRG, an insurance carrier that, like Spirit, was controlled by a program management company controlled by Thomas Mulligan, and driven into insolvency. *See* C. Daniel, "Management and Regulators Contribute to Spirit Commercial RRG's Mounting Troubles," R*isk Retention Reporter* February 2019, p. 3.

- Chelsea *purporting* to finance premiums for Spirit customers, which financing would have required Chelsea to pay the insured's premium to Spirit in full in advance, and obtain repayment through monthly payments plus interest from the insured; however, Chelsea did not pay Spirit the premium in advance, and when Chelsea paid at all, it merely remitted a portion of the amount due.

There are many more examples of the ways in which the Individual Defendants used the Entity Defendants to rob Spirit, and through Spirit, the policyholders. **APP0014-48, ¶¶ 64-262.**

The District Court's Orders

After Spirit filed suit against the Defendants, CTC and Criterion separately filed motions to compel arbitration. **APP452-536.**

CTC's Motion was premised on the following clause contained in the 2011 Agreement with CTC CA and in the 2015 agreement with CTC MO:

> ***Any controversy or claim arising out of or related to this Agreement or any breach, condition or obligation***, which is not settled by non-binding mediation, shall be settled by final and binding arbitration before arbitrators chosen under and governed by the Commercial Arbitration Rules of the American Arbitration to be held in the District of Columbia, and judgment upon any award rendered by the arbitrators may be entered by any court have jurisdiction.

APP0507 (Emphasis added). The clause dictates that any arbitration must be held in the District of Columbia. The Agreement does not purport to include claims against owners, officers, or directors of CTC, and the Motion to Compel did not include any of those defendants.

Criterion's Motion was premised on the following clause contained in its 2011 Agreement with Spirit:

> 13. **Arbitration.** Binding arbitration shall be the exclusive method for resolving disputes between the parties. **Any dispute concerning the terms of this agreement or performance by the parties under this agreement which cannot be resolved by agreement of the parties shall be submitted to binding arbitration before an arbitrator agreed upon by the parties.** In the event the parties cannot agree, then each party shall select an arbitrator and these two arbitrators shall select a third arbitrator. The decision of the arbitrator or arbitrators shall be final. The arbitrator or arbitrators selected pursuant to this paragraph shall have significant property and casualty insurance company background and experience. Each party shall pay its own attorneys' fees and any other expenses in connection with the resolution of any dispute relating to this agreement. Notwithstanding the provisions of paragraph 24[6] [sic] "Choice of Law", this agreement to arbitrate is governed by the Federal Arbitration Act, 9 lJ.S.C. l through J 5 (1988).

APP0468 (emphasis added). As can be seen, the details of an arbitration conducted under this provision are limited to disputes concerning the terms of the Agreement and performance thereunder. The Agreement does not purport to include claims against owners, officers, or directors of Criterion, and the Motion to Compel did not include any of those defendants.

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[6] Paragraph 24 of the agreement does not contain a choice of law provisions, but instead, relates to severability. Paragraph 21 provides that Nebraska law will govern the Agreement.

In their briefing in support of their Motions, both CTC and Criterion relied on an unpublished panel decision of this Court, wherein a writ petition was denied after the panel concluded that there had been no showing that an appeal could not provide an adequate remedy. *See* **APP0777, 0852,** citing *Commissioner of Ins. v. Eighth Judicial Dist. Ct,* Case No. 77682 (Nev. Dec. 19, 2019) (unpub) (hereafter, "*Milliman*"). Both CTC and Criterion inaccurately contended that this unpublished order, which has no binding precedential effect, ruled on the *substance* of the issues raised by the Petitioner therein. ***Id.*** CTC and Criterion further inaccurately contended that the Receivership Order in *Milliman* was identical to that granted in the Spirit Receivership with respect to jurisdictional issues. However, unlike the Spirit Receivership Order, the Receivership Order in *Milliman* expressly granted the Receiver the right to institute "actions at law, equity, or any other type of action or proceeding of any nature. . ." and to "*institute and to prosecute . . . any and all suits or other legal proceedings...").*[7] **See APP840-841***,* ¶¶ (14)(h).

The District Court granted the Motions without hearing and executed the draft orders proffered by CTC and Criterion. **APP1003-1025.** Despite the lack of any

[7] The District Court's references to this Court's decision on the writ in the Milliman matter displays a fundamental misunderstanding of the effect of this Court's Order, which was *not* a decision on the merits of the arbitration ruling. The District Court frequently refers to the decision as having *upheld* the District Court decision in *Milliman*, and displays no understanding that an eventual appeal of that issue in *Milliman* will be possible.

submission of evidence or an evidentiary hearing, the CTC Order contains "factual findings" on such issues as whether the arbitration provisions were the product of a criminal enterprise, despite the absence of any opportunity to present evidence on such issues. The CTC Order also incorporates the District Court Order from the Milliman case, even though that document had been submitted only in CTC's Reply. ***Id.*** While both Orders are titled as Orders granting motions to compel, *neither Order actually orders that arbitration occur.* Instead, the Criterion Order merely dismisses Criterion without prejudice, while the CTC Order dismisses CTC from this action, *with prejudice*. *Id.* The Receiver moved for reconsideration, which was denied. **APP1041-1077, 1303-1316, 1407-1409**.

Following the entry of the Orders dismissing CTC and Criterion, nine of the remaining Entity Defendants moved to stay all proceedings, contending that all allegations against them were entwined with and dependent upon the claims against CTC and Criterion—even though those claims have been dismissed from this action, and in CTC's case, with prejudice. **APP1181.** The remaining Defendants joined in the motion. **APP1216-1256**. Apparently oblivious to the fact that the Orders granting the Motions to Compel had merely dismissed the claims, without ordering that arbitration occur, the District Court granted the stay.

While the Receiver's action against the robbers of Spirit now lies dormant, a case against most of these Defendants, brought by a plaintiff with a liability judgment against a trucking company formerly insured by Spirit, is proceeding in the U.S. District Court, Western District of Kentucky. *See* Gillett v. Spirit Commercial Auto Risk Retention Grp., Civil Action No. 3:19-cv-00260-RGJ (W.D. Ky. Jan. 4, 2021). While the claim against Spirit is stayed pending the resolution of liquidation proceedings, the claims against the same Defendants proceed, greatly enhancing the possibility that assets that could otherwise be recovered on behalf of Spirit will be dissipated while the Receiver is powerless to proceed. Given that the Receiver is wholly blocked from proceeding, it is likely that additional suits from liability claimants will arise.

REASONS THE WRIT SHOULD ISSUE

Mandamus relief is required here, as the dismissal of the claims against CTC and Criterion, and the stay of proceedings against all remaining Defendants, leave the Receiver powerless to fulfill her statutory obligations to Spirit's policyholders and other creditors.

As shown in Parts I and II, the claims against CTC and Criterion should not have been dismissed, as arbitration of those claims is neither possible nor mandated. The arbitration provisions, as applied, support an illegal enterprise, and therefore, equity demands they be voided. Additionally, the Receiver has no authority to initiate arbitrations. The arbitration orders impede Nevada's regulation of the business of insurance, and therefore, the FAA is reverse preempted under the

McCarran-Ferguson Act. And, finally, even if arbitration were possible and appropriate, such arbitration could not extend to the entirety of the claims against CTC and Criterion, as many of the claims are not related to the agreements.

The District Court's abuse of discretion was exacerbated by the stay of all claims against the remaining Defendants. None of those claims would have required proof of breach of contract by CTC or Criterion, and therefore, the claims were not inextricably entwined with claims even arguably arbitrable. The Receiver has the authority to determine which claims are to be pursued. It would be more efficient and cost-effective for the Receiver to pursue the tort claims against the remaining defendants prior to any potential arbitration, particularly given that most of the remaining Defendants are the individuals actually responsible for CTC's and Criterion's actions. The imposition of a stay was arbitrary and capricious.

This Court may grant mandamus where the aggrieved party demonstrates that: (1) an eventual appeal does not afford "a plain, speedy and adequate remedy" and (a) mandamus is needed to control the district court's manifest abuse, or arbitrary and capricious exercise, of discretion, or (b) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition. *See* NRS 34.160; NRS 34.170*; Archon Corp. v. Eighth Judicial Dist. Ct.*, 407 P.3d 702, 706 (Nev. 2017); *Tallman v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 71, 359 P.3d 113, 118 (2015); *State v.*

Eighth Judicial Dist. Court, 118 Nev. 140, 147, 42 P.3d 233, 237-38 (2002). These requirements are met here.

As explained in Part I below, the Receiver has been deprived of any remedy. In *Tallman,* this Court acknowledged that an eventual appeal may not suffice as a plain, speedy remedy. Determining the adequacy of an eventual appeal "depends on a careful balance of the case-specific benefits and detriments" of writ review. *In re Gulf Exploration*, LLC, 289 S.W.3d 836, 842 (Tex. 2009), *cited with approval in Tallman*, 359 P.3d at 118. Additionally, this Court has provided writ relief "under circumstances of urgency or strong necessity." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (internal quotation marks omitted). Here, immediate review is needed, because the Receiver has no authority to arbitrate claims against CTC or Criterion, but cannot proceed against the remaining defendants until the arbitration against CTC and Criterion are completed. Thus, there is both urgency and a strong necessity to resolve the issues herein.

Additionally, writ review may be granted "when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *Nalder v. Eighth Judicial Dist. Court*, 462 P.3d 677, 681-82 (Nev. 2020). Judicial economy dictates review be granted where parties are at risk of relitigating the same issues. *Id.*, 462 P.3d at 682 (noting that mandamus review would "save petitioners the unnecessary costs of relitigation."). Here, the issue of the McCarran-Ferguson Act reverse-preempting the FAA in insurance insolvency matters, left undecided in *Milliman*, has proven to be recurrent. Even assuming arbitration judgments could somehow be obtained despite the Receiver's lack of arbitration authority, reversal of said judgments due to a determination that arbitration had been improperly imposed would obviously result in relitigation of the substantive issues. Such duplicative costs here would be particularly onerous, in light of the Receiver's remedial goals of recovering funds to see to the payment of policyholder claims. Writ review would thus serve Nevada's public policy, as embodied in the Nevada Insurance Code ("NIC"), particularly NRS Chapter 696B.

The District Court's arbitrary and capricious Orders prevent the Receiver from proceeding on any claims against any Defendant and undermines the regulatory process. Absent mandamus review, the Receiver has no plain, speedy or ordinary remedy. Accordingly, the writ should issue.

I. THE GRANT OF THE MOTIONS TO COMPEL ARBITRATION WAS AN ABUSE OF DISCRETION AS THE ARBITRATION CLAUSES MAY NOT BE ENFORCED AGAINST THIS RECEIVER.

For a host of reasons, the District Court's dismissal of the claims against CTC and Criterion was an abuse of discretion warranting mandamus relief. First, granting arbitration where the arbitration provisions perpetuate fraud is an abuse of discretion. Additionally, because the Receiver has no authority to initiate arbitration proceedings, the District Court's Orders leave the Receiver without a remedy against these Defendants. Next, the Order deprives the Receiver of her statutory right to disaffirm the remaining executory portions of the agreements with CTC and Criterion, on the basis of an equitable theory, even though equity cannot overturn statutory law. The District Court purported to rely on the Federal Arbitration Acts (FAA), but the FAA is reverse-preempted by Nevada's Insurance Code. For these reasons, the writ of mandamus should issue.

A. Granting Arbitration where the Arbitration Provisions Perpetuate Fraud is an Abuse of Discretion.

The claims alleged here address the egregious wrongs inflicted on the insurance-buying public through the multitude of money-grubbing schemes perpetrated by Mulligan, using Spirit and his many entities, including CTC and Criterion. Spirit's very *raison d'être* was to serve as a cash conduit for Mulligan and his gang. The strategic use of the arbitration provisions, during the creation of which Defendants here were on both sides of the transactions, has brought the Receiver's efforts to vindicate the policyholders to a full stop.

"Arbitration agreements may be rejected when they are instruments of a criminal enterprise …." *Janvey v. Alguire*, 847 F.3d 231, 246 (5th Cir. 2017) (Higginbotham, J. concurring).[8] While acknowledging the policy favoring

[8] The *Janvey* court's majority affirmed the district court's denial of a motion to compel a statutory receiver – the SEC – on separate grounds not urged by Plaintiff here. *Janvey*, 847 F.3d at 236–46. Judge Higginbotham issued the concurring opinion discussed here because the broader criminal enterprise encompassing the

arbitration, Judge Higginbotham cautioned that "efforts to enforce contracts in service of criminal enterprise ought *receive a cold reception in the courts*." *Id.* at 246, 251 (emphasis added). In *Janvey,* the SEC receiver appointed to distribute the proceeds of a Ponzi scheme to victims successfully resisted efforts to force arbitration of claims against the ringleader of the scheme, his varied entities, and the employees of the entities. Judge Higginbotham rejected the arguments that the employees were entitled to the benefits of the arbitration agreements, stating:

> I am persuaded that the Receiver—standing in the shoes of the Stanford entities—is not bound by the arbitration agreements because those agreements were instruments of Stanford's fraud. Stanford and his co-conspirators exercised complete control over the receivership entities before the scheme collapsed, and that control included the agreements to arbitrate, which were part of the contracts that had to be signed by the entities.

Id. at 250 (5th Cir. 2017). Here, the Receiver alleged that Mulligan controlled both CTC and Spirit. **APP023**, **¶ 129**. CTC itself admitted to it and Mulligan being the controlling parties of Spirit, in filings with the NDOI. **APP0708-709.** The Receiver also alleged that Mulligan similarly exercised control over Criterion and that CTC used Spirit's relationship with Criterion to deceive insureds and conceal Spirit's true financial condition from the Division. **APP0025-28, ¶ 141-157.** The arbitration agreements were not products of bargaining between independent entities, but were tools of fraud, made amongst companies with joint control and or ownership. In

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arbitration provisions at issue was a more "fundamental reason" for rejection of arbitration. *Id.* at 246.

these circumstances applying an equitable doctrine to impose arbitration upon the Receiver, a nonsignatory to the agreement, was an abuse of discretion.

B. The District Court Abused its Discretion in Granting the Motion to Compel Arbitration, where the Receiver has no Authority to Initiate Arbitration.

An arbitrary or capricious exercise of discretion is one "founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law. *State v. Eighth Judicial Dist. Court of Nevada*, 267 P.3d 777, 780 (Nev. 2011) (internal quotations and citations omitted). Here, the order granting the Motions to compel is both contrary to the evidence, and contrary to established rules of law, as the ruling expects the Receiver to take unauthorized action and usurps the authority of the Receivership Court.

The District Court relied on this Court's Order in the *Milliman* decision, which involved the same receiver here (*i.e.*, the Nevada Commissioner of Insurance as statutory receiver), acting on behalf of an insolvent health insurer. **APP995-996**. But in *Milliman*, the order appointing the Receiver arguably granted her the authority to engage in new arbitration proceedings, an authority that is not present here. **APP841, ¶14(h).** Here, in contrast, the Receiver is authorized only to "initiate and maintain actions at law or equity" and to "institute . . . suits." **APP549-550, 15(a) and (h)**.

A receiver is an officer of the court, and has no powers beyond those granted by the court. *Anes v. Crown Partnership, Inc.,* 113 Nev. 195, 201, 932 P.2d 1067, 1070 (1997). "A receiver must not exceed the limits of the authority granted." *Fullerton v. District Court*, 111 Nev. 391, 400 (Nev. 1995). A receiver who acts outside the scope of granted authority may be held personally liable. *Anes,* 113 Nev. at 201, 932 P.2d at 1070. With its orders, the District Court made clear that it expected the receiver to take an unauthorized action.

The District Court's Orders do not require the Receiver to arbitrate the claims against CTC and Criterion[9]; instead, they dismiss those claims. However, because the Receiver has no authority to initiate any arbitration, these dismissals leave the Receiver without recourse against these entities.

Where the receiver of an insolvent insurance company, appointed pursuant to insurance regulation statutes, is unable to institute arbitration proceedings, arbitration cannot be compelled. *See Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d 225, 234 (N.Y. 1990) (superintendent of insurance Commissioner, acting as liquidator of insolvent insurer, "is excepted from arbitration because the arbitration clause and the dispute alleged to be subject to it are not capable of performance and settlement

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[9] Even if the Orders had directed the receiver to arbitrate, such direction could not constitute an increase in the Receiver's authority. One district court judge cannot overturn or alter the ruling of another district court judge. *Rohlfing v. District Court*, 106 Nev. 902, 906 (1990) (holding that district courts have equal and coextensive jurisdiction and may not review each other's acts).

under the law of New York." *Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998)" (statute giving exclusive jurisdiction of insurance insolvency to district court precluded arbitration); *Davister Corp. v. United Rep. Life*, 152 F.3d 1277, 1280 (10th Cir. 1998) (where insurance insolvency proceedings were to be consolidated in single forum, arbitration could not be compelled); *Ernst Young v. Clark*, 323 S.W.3d 682, 691 (Ky. 2010) ("arbitration or tort and contract claims against accountants could not be compelled where state statute gave district court exclusive jurisdiction over insurance insolvency matters); *see also, Donelon v. Shilling*, No. 2019-C-00514 (La. Apr. 27, 2020)(cert. den'd, sub nom. *Milliman, Inc. v. Donelon*, 2021 U.S. LEXIS 1267) (finding that statutes that stated that insurance rehabilitator may bring an action in district court, precluded forced arbitration).

Because the Receiver has no authority to initiate arbitration under the Spirit Receivership Order, *see Fullerton*, 892 P.2d at 94, the District Court's Orders force her to choose between deliberately exceeding the limits of the authority granted to her by the Receivership Court—twice!—and thus risking personal liability, or refraining from seeking *any* remedy against CTC and Criterion on behalf of Spirit and its policyholders. The District Court's placement of the Receiver in this untenable position was an abuse of discretion.

C. The District Court Abused its Discretion in Enforcing an Executory Agreement that the Receiver had Clearly Disaffirmed.

The Receiver has the authority to disaffirm all or part of any executory contract. **APP 0552, ¶15(p).** An "executory contract" is a "contract . . . for which there remains something still to be done on both sides." Here, to the extent the agreements with CTC MO and Criterion were in effect as of the date of the Receivership Order, there were continuing, unperformed obligations on both sides. Additionally, as to these contracts, and also the agreement with CTC CA, the arbitration clauses, which placed *future* obligations on both parties to each agreement, remained executory as of that date. Accordingly, the Receiver had a statutory right to reject such agreements.

Despite this statutory right, the District Court held that the Receiver was bound by the arbitration provisions, based on two theories. First, the District Court found that the Receiver stood in the shoes of Spirit, and was therefore bound to the agreement as Spirit would have been. Second, the District Court applied the equitable estoppel theory of "direct benefit." *See Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 636, 189 P.3d 656, 661 (2008) (party claiming benefit of a contract is estopped from denying arbitration provisions contained in the agreement.). The District Court abused its discretion in applying both of these theories.

Unlike Spirit, the Receiver had authority to disavow portions of contracts. Accordingly, the Receiver did *not* simply step into Spirit's shoes. Moreover, courts have long recognized that a receiver appointed to marshal the assets of an insolvent insurer does not act "merely to prosecute claims of an entity under receivership." *Arthur Andersen v. Superior Court*, 67 Cal. App. 4th 1481, 1495 (Cal. Ct. App. 1998). Accordingly, the notion that such a receiver merely steps into the shoes of the insolvent insurer, and is thus as bound to whatever limitations on forum selection or arbitration contained in the agreement as would be the insolvent entity, has long been rejected. Instead, because the Receiver of an insolvent insurer is representing the claims of the policyholders, with the primary goal being to fulfill their insurance coverage needs, that receiver is engaged in public protection. *See Donelon v. Shilling*, No. 2019-C-00514, at *5 (La. Apr. 27, 2020)(cert. den'd) ("The Commissioner of Insurance as rehabilitator or liquidator owes an overriding duty to the people of the State of Louisiana."); *Taylor v. Ernst & Young*, 130 Ohio St. 3d 411, 419 (Ohio 2011) ("The fact that any judgments in favor of the liquidator accrue to the benefit of insureds, policyholders, and creditors means that the liquidator's unique role is one of public protection…."); *Corcoran v. Ardra* 77 N.Y.2d at 232 (Superintendent of Insurance "holds office as liquidator *solely to protect the interests of policyholders, stockholders and the public* and lacks the commercial interests motivating the original parties.") (emphasis added); *see also*, *LeBlanc v. Bernard*, 554 So. 2d 1378, 1381 (La. Ct. App. 1990) (finding that Commissioner of Insurance as Liquidator exercises the police power of the state in marshalling the assets of insolvent insurer. Because the Receiver acts specifically to further the ends of the statutory regulatory scheme, the provisions of that scheme govern the rights and duties of the Receiver. Here, the NIC does not grant the Receiver the express authority to initiate arbitration.

Here, in filing her claims in the Eighth Judicial District Court, the Receiver not only complied with the exclusivity mandates in both the statutes and the Receivership Order, she also thereby rejected the executory arbitration requirements in the CTC and Criterion Agreements, as permitted by the Receivership Order. The District Court abused its discretion in disregarding the Receiver's right and obligation to disaffirm those provisions.

The District Court also relied on the direct benefit estoppel theory (*i.e.,* the notion that a party seeking to enforce a contract cannot disavow a portion of that agreement). However, this equitable theory has no application here. The "doctrine of direct benefits estoppel is a jurisprudentially created type of estoppel [and] an equitable remedy" *Donelon v. Shilling*, No. 2019-C-00514, at *8 (La. Apr. 27, 2020). However, "equitable principles will not justify a court's disregard of statutory requirements." *Pellegrini v. State*, 117 Nev. 860, 878 (Nev. 2002), "*abrogated on other grounds by Rippo v. State*, 134 Nev. ___, ___ n.12, 423 P.3d 1084, 1097 n.12

(2018). *See also*, *Mello v. Woodhouse*, 110 Nev. 366, 373 (Nev. 1994) ("[I]t is well established that courts of equity can no more disregard statutory and constitutional requirements than can courts of law.").

In *Donelon*, the rehabilitator of an insolvent insurer opposed arbitration of his claims against certain insiders of the company. The Louisiana Supreme Court rejected application of the direct benefit theory because the Louisiana insurance regulatory statutes give the rehabilitator the choice of forum. The Court stated:

> Equitable remedies are only available in the absence of legislation and custom. Because an express grant of authority exists in favor of the Commissioner, resort to equity is unwarranted.

Donelon v. Shilling, No. 2019-C-00514, at *8 (La. Apr. 27, 2020). The Commissioner, acting as Receiver, is authorized by NRS 696B to institute *lawsuits*, with no mention made of arbitration proceedings. Consistent with the statute, the Receivership Court also authorized initiation of lawsuits only.

The doctrine of equitable estoppel should not be used to supplant the legislature's will. Accordingly, the District Court abused its discretion in granting the Motions to Compel.

D. Neither the FAA nor the NAA Can Require Arbitration Here.

CTC and Criterion relied on the Federal Arbitration Act ("FAA") 9 U.S.C. 1, et seq., as requiring arbitration here. But contrary to the District Court's conclusion, the FAA cannot require arbitration here, because the Nevada Insurance Code reverse-preempts the FAA pursuant to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ("McCarran-Ferguson"). The Nevada Arbitration Act ("NAA"), as a general statutory scheme, must give way to the more specific jurisdictional dictates of the Insurers Conservation, Rehabilitation and Liquidation Law ("ICRLL")[10], as the NAA applies only when another statutory scheme does not supplant it. Accordingly, neither arbitration act requires arbitration here.

1. The FAA is Preempted Pursuant to McCarran-Ferguson and the NIC.

The FAA cannot require arbitration here, because it is reverse preempted by the McCarran-Ferguson Act, 15 U.S. §1012, and the Nevada Insurance Code. The McCarran-Ferguson Act states that:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b). Courts have long acknowledged that statutes authorizing state regulators to step in as receivers for the benefit of the policyholders and the public, including through liquidation, satisfy the reverse-preemption requirements. *See e.g.*, *United States v. Fabe,* 508 U.S. 491 (1993) (statute setting priority for repayment of claims against insolvent insurer reverse-preempted federal priority statute).

[10] NRS 696B.010.

Reverse-preemption of federal law through McCarran-Ferguson occurs when: 1) the state statute was enacted for the purpose of regulating the business of insurance; 2) the federal statute involved "does not specifically relat[e] to the business of insurance"; and 3) the application of the federal statute would "invalidate, impair, or supersede" the state statute regulating insurance. *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999). Here, there is no reasonable argument that the FAA specifically relates to insurance. Here, NRS Chapter 696B, the Insurers Conservation, Rehabilitation, and Liquidation Law ("ICRLL") was enacted specially to provide for the marshaling of assets of the insolvent insurers, and to assure, to the extent possible given the insolvency, that the policyholders receive the benefit of their insurance contracts and are treated equitably.

a. *The ICRLL was enacted for the purpose of regulating the business of insurance.*

The category of laws enacted "for the purpose of regulating the business of insurance" is broad and consists of those laws "that possess the end, intention, or aim of adjusting, managing, or controlling the business of insurance." *Fabe*, 508 U.S.at 505. (1993) (citation omitted). Statutes protecting the relationship between the insurer and insured fall within this scope. *Id*. at 501.

Federal courts acknowledge that jurisdictional limitations in insurer insolvency statutes are enacted for the purpose of regulating the business of insurance. Thus, where such limitations apply, federal removal statues are reverse preempted when insurance liquidators bring contract or tort claims on behalf of the insolvent insurer in state courts. See *Fla. Dep't of Fin. Servs. v. Gen. Reinsurance Corp.*, No. 4:08cv443-WS, 2009 U.S. Dist. LEXIS 137802, at *12 (N.D. Fla. Feb. 2, 2009) (removal to federal court of receiver's claims for preferential transfers "would interfere with the state's comprehensive administrative scheme for liquidating and marshalling the assets of an insolvent insurance company"); *Covington v. Sun Life of Can. (U.S.) Holdings, Inc.*, No. C-00-069, 2000 WL 33964592 (S.D. Ohio May 17, 2000) (removal statute reverse preempted where liquidator challenged preferential transfer); *Amwest Sur. Ins. Co. v. J.A. Jones Constr. Co.*, 245 F. Supp. 2d 1038 (D. Neb. 2002) ("The combined effect of Nebraska's legislation designating the forum which "shall have summary jurisdiction, . . . over preferential transfer claims, and federal law which prohibits enforcement of any federal statute which would impair, invalidate, or supersede that jurisdictional designation, is that the exclusive jurisdiction over this action lies in the district court of Lancaster County."); *Amwest Sur. Ins. Co. v. Swiss Reinsurance Am. Corp.*, No. 8:03CV273, 2004 WL 628217 (D. Neb. Mar. 30, 2004) (statute granting exclusive jurisdiction reverse preempted removal statute); *Corcoran v. Universal Reinsurance Corp.*, 713 F.Supp. 77 (S.D. N.Y. 1989) (same but involving claim for set-off). Even jurisdiction under the Bankruptcy Code to determine whether the debtor or insolvent insurer owned a particular asset is reverse-preempted by the

McCarran-Ferguson Act. *Advanced Cellular Systems, Inc. v. Mayol,* 235 B.R. 713 (Bankr. D.P.R. 1999) and *Wagner v. Amwest Ins. Group (In re Amwest Ins. Group),* 285 B.R. 447 (Bankr. CD. Cal. 2002).

Given that such statutory jurisdictional limitations preclude removal to federal court through reverse preemption, it follows that courts have also held that the FAA is reverse-preempted by such restrictions on jurisdiction. *See, e.g., Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 586 (5th Cir. 1998), 142 L. Ed. 2d 448, 119 S. Ct. 539 (1998) (receiver of insolvent insurer could not be compelled to arbitrate insurer's claims to reinsurance settlement proceeds, as FAA reverse preempted by statutory jurisdictional limitations); *Davister Corp. v. United Republic Life Ins. Co.***,** 152 F.3d 1277, 1281 (10th cir. 1998) (Utah's insurance liquidation statute granting exclusive jurisdiction to state court over insurer's liquidation impaired by enforcement of Federal Arbitration Act).

The jurisdictional limitations for claims of delinquent insurers are intended to ensure ultimately that policyholders and their claims are protected, that the bargained for risk transfer occurs, and that insurance contracts are honored despite the insurance company insolvency. *Fabe,* 508 U.S. at 503-04. Thus, Nevada's mandate of jurisdiction in the District Court, and grant of authority for the District Court to issue orders to preclude actions elsewhere, as was ordered here, was designed to regulate the business of insurance. Enforcement of these arbitration provisions undermines the regulatory process and provides wrongdoers with a way to avoid court oversight as mandated by the NIC.

b. Requiring the Receiver to arbitrate "invalidates, impairs, and supersedes" the NIC's jurisdictional limitations.

The application of the FAA to require arbitration here unquestionably "invalidate[s], impair[s], or supersede[s]" the NIC. The Receiver has been rendered powerless to proceed against any Defendant, thereby leaving no foreseeable ability to pay in full the millions of dollars in outstanding policy claims. Thus, just as the removal to federal courts would have impaired the grants of exclusive jurisdiction in *Covington*, *Amwest*, and *Corcoran*, and just as arbitration would impair such grants in *Donelon, Munich,* and *Davistar*, the imposition of arbitral jurisdiction impairs the NIC's jurisdictional restrictions.

As the requirements of the test set forth in *Fabe* are met, the FAA is reverse preempted, and therefore cannot justify arbitration here.

c. This Court's decision in Milliman is neither binding nor persuasive.

The District Court indicated that it was following the *Milliman* decision for the proposition that arbitration provisions are enforceable against the Commissioner in her role as receiver. However, that unpublished decision was not binding. NRAP 36(c)(3) (emphasis added). Moreover, the decision did not announce any holdings of law as to the substantive issues raised in the writ. Instead, the decision was based on the purported adequacy of an eventual appeal. *See Milliman, at* *1–2. Furthermore, unlike the situation here, the *Milliman* Receiver had at least arguable authority to arbitrate. And, in the *Milliman* matter, the arbitration clauses had not been entered into by entities all controlled by the same person, nor was the insurer there created for the purpose of defrauding its customers. As set forth above, more persuasive and on-point authority dictates the opposite result in this matter.

2. The NAA Cannot Be Applied to Override the ICRLL

CTC and Criterion also relied on the NAA as requiring arbitration here. However, the NAA does not apply. It is well-settled that where a general statute conflicts with a specific one, the specific one governs. *See, e.g.*, *State Dep't of Taxation v. Masco Builder*, 129 Nev. Adv. Op. 83, 312 P.3d 475, 478 (2013) ("A specific statute controls over a general statute"). "Under the general/specific canon, the more specific statute will take precedence, and is construed as an exception to the more general statute, so that, when read together, the two provisions are not in conflict and can exist in harmony." *Williams v. State Dep't of Corr.*, 402 P.3d 1260, 1265 (Nev. 2017) (internal citations and quotations omitted).

Here, although the NAA provides a general policy in favor of arbitration, the ICRLL creates a specific and detailed statutory scheme for winding down insolvent insurance companies for the benefit of policyholders, other creditors, and the public at large. NRS Chapter 696B. As discussed above, the Nevada Legislature showed its intent that the receivership court have exclusive jurisdiction over claims, by granting that court both exclusive jurisdiction over claims against the liquidating insurer, and over persons—including past or present officers, managers, trustees, directors, organizers and promoters— in an action brought by the Receiver. NRS 696B.190 and 696B.200. Additionally, the receivership court has the power to issue injunctions to prevent any interference with the Receiver's efforts to complete the liquidation. NRS 696B.270.

As neither the FAA nor the NAA authorizes compelling the Receiver to arbitrate claims, the District Court's grant of the Motions to Compel were an abuse of discretion.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING ALL CLAIMS AGAINST CTC AND CRITERION AS SPIRIT'S NON-CONTRACTUAL CLAIMS AGAINST THESE ENTITIES FALL OUTSIDE THE ARBITRATION PROVISIONS, AS THE CLAIMS DERIVE FROM DUTIES EXISTING OUTSIDE THE CONTRACTUAL RELATIONSHIP.

Even if arbitration could be compelled against the Receiver based on the CTC and Criterion Agreements, not all of the claims against CTC and Criterion fell within the scope of the respective Agreements. Arbitration clauses "must not be so broadly construed as to encompass claims and parties that were not intended." *Truck Ins. Exch. v. Palmer J. Swanson, Inc.,* 124 Nev. 629, 634, 189 P.3d 656, 660 (2008). An arbitration clause "can extend only so far as the series of obligations set forward in the underlying agreement." *Parfi Holding v. Mirror Image*, 817 A.2d 149, 156 (Del.

2002). Compelling arbitration where no agreement applies is fruitless because any decision on an issue outside the scope of the agreement is without effect. *City of Reno v. Int'l Ass'n of Firefighters, Local 731*, 340 P.3d 589 (Nev. 2014) (arbitration properly denied on issue not within scope of the agreement).

"Whether a dispute is arbitrable is essentially a question of construction of a contract." *Internat'l Ass'n of Firefighters,* 112 Nev. at 1323, 929 P.2d at 956. Contracts must be enforced according to the plain meaning of the written language. *Masto v. Second Judicial Dist. Court*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009). Applying the plain meaning of the language of the arbitration provisions, it is clear that the non-contract claims against CTC and Criterion are not encompassed within those provisions.

A. The Non-Contract Claims Against CTC are Not within the Scope of the CTC Agreement's Arbitration Clause.

The CTC Agreement clearly contemplates that disputes to be arbitrated will be based on the *contractual* obligations of the parties. **APP0507** ("*Any controversy or claim arising out of or related to this Agreement or any breach, condition or obligation . . .").* While the language "arising out of or relating to" has been deemed to be a broadly inclusive provision, the mere fact that the dispute would not have arisen had the parties not contracted is insufficient by itself to transform a dispute into one "arising out of or relating to" the agreement. *See, e.g, Parfi Holding v. Mirror Image*, 817 A.2d 149, 156 (Del. 2002) (breach of fiduciary duty claims not arbitrable where fiduciary duty arose under Delaware law independently from contract); *Seifert v. U.S. Home Corporation,* 750 So. 2d 633 (Fla. 1999); (overturning arbitration order, as claim did not arise from charter agreement, but instead, arose from litigation over charter agreement); *Necchi S. p. A. v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693, 698 (2d Cir. 1965) (finding claims that did not allege a breach of contract or otherwise rely on contract did not meet required "arising out of or connected to" contract). One court explained this reasoning very well:

> For example, if two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract.

Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511, 1516 (10th Cir. 1995).

Here, CTC's actions are analogous to an assault, as Spirit's resources were plundered and Spirit was intentionally harmed to satisfy Mulligan's greed. The non-contract claims asserted by Spirit extend beyond inadequate performance of contracted marketing, underwriting and policy issuances services. Spirit's claims for breach of fiduciary duties, violation of Nevada's RICO statute, unjust enrichment, fraud, civil conspiracy and fraudulent/unlawful transfers/distributions of Spirit's funds arise separate and apart from any contractual duties, and can be resolved without reference to CTC's obligations under the CTC Agreements. This is so because CTC's fiduciary obligations to Spirit arise by virtue of its status as a controlling entity, as well as by the joint control of CTC and Spirit by Mulligan.

As none of the non-contract claims depend upon purported breaches of the CTC's program administration agreement, and because CTC was a controlling entity of Spirit, the non-contract claims do not fall within the scope of the arbitration provisions. Accordingly, the District Court erred in dismissing the non-contract, and thus, non-arbitral, claims.

B. Non-Contract Claims Against Criterion are Not within the Scope of the Criterion Agreement's Arbitration Clause.

The Criterion Agreement provides that arbitration is to be the exclusive method for resolving disputes, but then describes the arbitration process only with respect to disputes "concerning the terms of this agreement or performance by the parties under this agreement." **APP0468.** This narrowed application of the arbitration process indicates that the parties contemplated arbitration for disputes dependent upon interpretation of the contract. The Receiver alleged/pleaded that Criterion had fiduciary obligations to Spirit independent of the terms of the Criterion Agreement, stemming in part from the control wielded by Mulligan. Accordingly, the non-contract claims against Criterion were improperly dismissed.

Spirit alleges that Criterion participated in an extra-contractual criminal conspiracy to defraud Spirit, its insureds, and the Nevada Division of Insurance. Specifically, Spirit's tenth, eleventh, twelfth, and thirteenth claims for relief – for

Nevada RICO, unjust enrichment, fraud, and civil conspiracy – are based on allegations of a sprawling criminal conspiracy, in which Criterion, along with Defendants Mulligan, Simon, McCrae, and others, misled insureds and regulators alike, and obscured Spirit's descent into deepening insolvency. **APP0001-79 ¶¶ 147–156**. Similarly, a fair reading of Plaintiff's fifteenth through eighteenth claims against Criterion to avoid certain transfers or distributions hinge on Criterion's knowing involvement in this greater fraudulent scheme, not a failure to perform under the Agreement. *See id.,* ¶¶ 388, 401, 412, 424. Put simply, none of the conduct alleged in support of these claims creates a dispute over the terms of the Criterion Agreement. No reference to the obligations of the parties under the Criterion Agreement will be needed to prove these claims.

A court faced with similar allegations regarding schemes to hide an insurer's insolvency determined that such claims do not fall within the scope of arbitration provisions that relate to the contractual agreements. *See Washburn v. Societe Commerciale De Reassurance*, 831 F.2d 149, 151 (7th Cir. 1987) (finding no agreement to arbitrate noncontract claims because "even if every word of the [underlying] agreement were interpreted, this case would be no closer to a resolution.").

Spirit's fraud, RICO, conspiracy, and fraudulent conveyance claims against Criterion fall outside of the narrow bounds of Paragraph 13 of the Criterion Agreement. Accordingly, the District Court erred in dismissing those claims.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN STAYING PROCEEDINGS AGAINST ALL OTHER DEFENDANTS, AS THE STATUTORY SECTIONS RELIED ON BY THE COURT DO NOT AUTHORIZE A STAY OF PROCEEDINGS AGAINST THE REMAINING DEFENDANTS.

The District Court's Order cites 9 U.S.C. 3 and NRS 38.291(7), as authority for staying the proceedings against the remaining Defendants. This constituted clear error.

In granting a stay, the District Court relied in part on Section 3 of the FAA. **APP1417-1418, COL ¶ 18.** However, 9 U.S.C. 3 creates a federal procedural rule, and has no application in state courts. *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477 n.6 (1989) ("While we have held that the FAA's "substantive" provisions—§§ 1 and 2—are applicable in state as well as federal court, we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court.")(citations omitted); *Cronus Invs., Inc. v. Concierge Servs.*, 35 Cal.4th 376, 390 (Cal. 2005) (holding that § 3 of the FAA does not apply in state courts.). Accordingly, the stay here cannot be justified based on 9 U.S.C. § 3.

The Court also relied upon NRS 38.291(7), even quoting its language: "***If the court orders arbitration***, the Court on just terms shall stay any judicial proceedings that involve a claim that is subject to arbitration." **APP1418, COL, ¶ 19**. But here, the Court did *not* order arbitration of the claims against CTC or Criterion. Instead, the Court *dismissed* all of the claims it deemed subject to arbitration.[11] Therefore, the litigation as it *now* stands does ***not*** involve claims subject to arbitration. Thus, NRS 38.291(7) provides no basis for granting a stay.

Furthermore, the Stay Order depends on an underlying, unwarranted *assumption* that the Receiver both could and would proceed with the two arbitration proceedings against CTC and Criterion. But as explained above, the Receiver cannot initiate arbitration proceedings. The Receiver's inability to arbitrate the claims against CTC and Criterion thus undercuts the entirety of the basis for the District Court's grant of a stay. There will not be concurrent proceedings in three forums, and therefore, there will not be any duplicative discovery. Nor will there be any danger of inconsistent outcomes.

Moreover, even if the Receiver *did* have the authority to arbitrate, choosing to first arbitrate the tort claims against the *entities* used by the *individual Defendants*, before litigating the conduct of those individuals, would be a comparative waste of

[11] The NAA does not authorize the dismissal of arbitral claims; it only authorizes staying such claims.

the Receivership's few resources. The Receiver should be permitted to proceed with Spirit's claims against the remaining Defendants, ***particularly the individual Defendants who were the actual bad actors responsible for the corporate misconduct of CTC and Criterion***. The District Court's purported consideration of judicial economy failed to consider that it would be far more cost effective for the Receiver—whose funds are limited and must be expended judiciously for the benefit of the policy holders and other creditors— to pursue the claims against the remaining Defendants in the district court, where the Receiver need not pay hourly fees for two facilities and two arbitration panels. Once the litigation has been completed, and the conduct of the individuals has been established in that litigation, comparatively few remaining issues—corporate liability for contractual obligations and on the basis of *respondeat superior* —would need to be resolved in the forums where the Receiver will be forced to pay hundreds of dollars per hour to *each* of six arbitrators for their time, plus rental of trial facilities—assuming the Receiver could even proceed with such arbitration at all.

The District Court's decision that the Receiver must pursue a remedy to which she is unauthorized, and must, moreover, do so before seeking relief against any other defendant, was arbitrary and capricious. Accordingly, writ relief is warranted.

CONCLUSION

Because the District Court's Orders have left the receiver without a remedy, and thus, unable to fulfill her statutory duty of marshaling the assets of Spirit for the benefit of Spirit's policyholders and other creditors of the failed insurer, the writ of mandamus should issue.

DATED this 1st day of April, 2021.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this Petition complies with the formatting requirements of NRAP 32(c)(2), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2010 in Times New Roman 14, with double spacing. The brief contains approximately 9259 words.

Finally, I hereby certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that, except as stated in the accompanying Motion for Permission to Exceed Word Length, which seeks relief from the requirements of NRAP 21(d), this brief complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day of April, 2021.

GREENBERG TRAURIG, LLP

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25,1 certify that I am an employee of GREENBERG TRAURIG, LLP, that in accordance therewith, that on April 1, 2021, I caused a copy of the foregoing ***Petition for Writ of Mandamus*** to be served via U.S. Mail, first class postage prepaid, and via the 8th Judicial District Court's e-service system, upon the below identified Real Parties:

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With a courtesy copy via email (pursuant to March 20, 2020 order of the Chief Judge of the EDJC that courtesy copies be submitted via email) :

Judge Mark R. Denton
Eighth Judicial District Court
Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

via email on April 1, 2021 to Dept13lc@clarkcountycourts.us

/s/ Andrea Lee Rosehill
An Employee of Greenberg Traurig LLP