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, 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; CHELSEA FINANCIAL GROUP, INC., a New Jersey Corporation d/b/a

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Supreme Court Case No.:

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

PETITIONER'S APPENDIX

Volume IV (APP0670-846)

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
Kara B. Hendricks, Esq., NBN 7743
Tami D. Cowden, Esq., NBN 8994
GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Ste. 600
Las Vegas, Nevada 89135
Telephone (702) 792-3773
Facsimile (702) 792-9002
Attorneys for Petitioner

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I	APP0140-206	4/2/20	Defendant Daniel George's Answer to Complaint
II	APP0207-268	4/2/20	Defendant ICAP Management Solutions, LLC_s Answer to Complaint
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II	APP0426-451	5/14/20	Answer to Complaint filed by Defendants Six Eleven, et al.,
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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 ***Petitioner's Appendix*** 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:

William R. Urga, Esq. David J. Malley, Esq. Michael R. Ernst, Esq. **Jolley Urga Woodbury & Holthus** 330 S. Rampart Blvd., Suite 380 Las Vegas, Nevada 89145 *wru@juwlaw.com; djm@juwlaw.com; mre@juwlaw.com* *Attorneys for Real Parties in Interest Thomas Mulligan*	Matthew T. Dushoff, Esq. Jordan D. Wolff, Esq. **Satlzman Mugan Dushoff** 1835 Village Center Circle Las Vegas, Nevada 89134 *Mdushoff@nvbusinesslaw.com* *jwolff@nvbusinesslaw.com* *Attorneys for Real Parties in Interest CTC Transportation Insurance Services of Missouri, LLC, CTC Transportation Insurance Services, LLC and CTC Transportation Services of Hawaii, LLC*
John R. Bailey, Esq. Joshua M. Dickey, Esq. Rebecca L. Crooker, Esq. **Bailey Kennedy** 8984 Spanish Ridge Avenue Las Vegas, Nevada 89148 *JBailey@BaileyKennedy.com* *JDickey@BaileyKennedy.com* *RCrooker@BaileyKennedy.com* *Attorneys for Real Parties in Interest Criterion Claim Solutions of Omaha, Inc.*	

Thomas E. McGrath, Esq. Russell D. Christian, Esq. **Tyson & Mendes LLP** 3960 Howard Hughes Parkway, #600 Las Vegas, Nevada 89169 *tmcgrath@tysonmendes.com* *rchristian@tysonmendes.com* *Attorneys for Real Parties in Interest Attorneys for Defendants Pavel Kapelnikov; Chelsea Financial Group, Inc. a California corporation; Chelsea Financial Group, Inc. a New Jersey corporation; Global Forwarding Enterprises, LLC; Kapa Management Consulting, Inc.; Kapa Ventures, Inc.; and Igor and Yanina Kapelnikov*	L. Christopher Rose, Esq. Kirill V. Mikhaylov, Esq. William A. Gonzales, Esq. **HOWARD & HOWARD ATTORNEYS PLLC** 3800 Howard Hughes Parkway, #1000 *lcr@h2law.com; kvm@h2law.com* *wag@h2law.com* *Attorneys for Defendants Six Eleven LLC; Quote My Rig, LLC; New Tech Capital LLC; 195 Gluten Free LLC; 10-4 Preferred Risk Managers, Inc.; Ironjab, LLC; Fourgorean Capital LLC; Chelsea Financial Group, Inc. a Missouri corporation*
Robert S. Larsen, Esq. Wing Yan Wong, Esq. **Gordon Rees Scully Mansukhani, LLP** 300 South Fourth Street, Suite 1550 Las Vegas, Nevada 89101 *rlarsen@grsm.com* *wwong@grsm.com* *Attorneys for Real Parties in Interest Lexicon Insurance Management LLC, Daniel George and ICAP Management Solutions, LLC*	Tamara Beatty Peterson, Esq. Nikki L. Baker, Esq. David E. Astur, Esq. **Peterson Baker, PLLC** 701 S. 7th Street Las Vegas, Nevada 89101 *tpeterson@petersonbaker.com* *nbaker@petersonbaker.com* *dastur@petersonbaker.com* *Attorneys for Real Parties in Interest Matthew Simon Jr. and Scott McCrae*

Sheri M. Thome, Esq. Rachel L. Wise, Esq. **Wilson, Elser, Moskowitz, Edelman & Dicker LLP** 6689 Las Vegas Blvd., Suite 200 Las Vegas, Nevada 89119 *Sheri.Thome@wilsonelser.com* *Rachel.Wise@wilsonelser.com* *Attorneys for Real Parties in Interest Attorneys for Defendant James Marx, John Maloney, Virginia Torres, and Carlos Torres*	Kurt R. Bonds, Esq. Trevor R. Waite, Esq. **Alverson Taylor & Sanders** 6605 Grand Montecito Pkwy, Ste 200 Las Vegas, Nevada 89149 *efile@alversontaylor.com* *Attorneys for Real Parties in Interest Brenda Guffey*

With a courtesy copy to

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

OPP
MARK E. FERRARIO, Bar No. 1625
KARA B. HENDRICKS, Bar No. 7743
KYLE A. EWING, Bar No. 14051
GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
Telephone: (702) 792-3773
Facsimile: (702) 792-9002
Email: ferrariom@gtlaw.com
hendricksk@gtlaw.com
ewingk@gtlaw.com

Counsel for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC., Plaintiff, v. THOMAS MULLIGAN, et al. Defendants.	Case No.: A-20-809963-B Dept. No.: XIII **PLAINTIFF'S OPPOSITION TO CRITERION CLAIM SOLUTIONS OF OMAHA INC.'S MOTION TO COMPEL ARBITRATION** **Hearing: June 18, 2020, 9:00 a.m.**

COMES NOW, Plaintiff Barbara D. Richardson, in her capacity as the Statutory Receiver for Spirit Commercial Auto Risk Retention Group, Inc. ("Receiver"), by and through her attorneys of record, the law firm of Greenberg Traurig, LLP, and hereby opposes Defendant Criterion Claim Solutions of Omaha, Inc.'s Motion to Compel Arbitration ("Opposition").

This Opposition is based upon the pleadings and papers on file herein, the following Memorandum of Points & Authorities, and any and all oral arguments allowed by this Court at the time of hearing.

Dated this 4th day of June, 2020.

By: */s/Kara B. Hendricks*
MARK E. FERRARIO, Bar No. 1625
KARA B. HENDRICKS, Bar No. 7743
KYLE A. EWING, Bar No. 14051
GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135

Attorneys for the Plaintiff

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

The allegations in the Complaint arise from a vast fraudulent enterprise by which the Defendants operated a multitude of interrelated companies in the insurance service industry for their own benefit and to the detriment of Spirit Commercial Auto Risk Retention Group, Inc. (hereafter "Spirit" or SCARRG") and its insureds. Defendant Criterion Claim Solutions of Omaha, Inc.'s ("Criterion") played a critical role in the scheme. Notably, Criterion was a part of an Insurance Holding Company governed by Nevada laws and was also the third-party administrator that provided claims administration services to Spirit. Part of Criterion's obligations were to establish loss reserves, settle claims, and issue loss payments, on behalf of Spirit insureds. However, as detailed in the Complaint, Criterion knowingly and intentionally manipulated the reserves which left Spirit grossly underfunded to pay claims and led to its insolvency. For example, Criterion would set the claim reserve at an artificially low amount, sometimes as low as $100, even when the severity of the loss was far beyond the reserve amount.[1] Thus, when financial

[1] "Reserving is an important business function, and its goal is to set aside money for paying out claims. In the reserving process, claim adjusters determine the ultimate value of a claim. To do so, they deploy learning from the past cases, and the settlement they had for similar cases, and use this information in their estimation of reserves. The ability to correctly predict the final claim amount is key for insurers and has significant impact on financial statements, as the reserve amount is reported in Quarterly Earnings statements."

reports were made to the Nevada Division of Insurance ("Division"), it appeared that Spirit had sufficient funds to pay claims, when it did not.

Not only did Criterion manipulate reserves and breach its obligations as Spirit's third-party claims administrator, Criterion's business operations were unlawfully funded by a so called $2.8 million "loan" from the CTC Defendants,[2] with money that was wrongfully looted away from Spirit and was never repaid to Spirit. Indeed, Criterion along with the CTC Defendants were a part of a web of interrelated companies that wrote insurance policies, provided so-called financing for insureds wishing to purchase insurance, processed insurance premiums, and/or adjusted and paid insurance claims, and collected Spirit's assets under an enterprise owned and controlled by Thomas Mulligan[3] (the "Mulligan Enterprise"). Thomas Mulligan and his confederates, including Criterion siphoned millions of dollars from Spirit. Comp. ¶ 2. Moreover, as detailed below, the liquidation of Spirit and appointment of the Commissioner as its receiver provides this Court with jurisdiction to hear the claims asserted. The Receiver's investigation of Spirit's finances revealed the sprawling fraud and conspiracy detailed in the Complaint. As a key player in the fraud, and a direct recipient and absconder of Spirit's assets, Criterion cannot now claim the benefit of an arbitration agreement facilitated by the criminal enterprise spearheaded by Defendant Mulligan. Indeed, at relevant times, both Spirit and Criterion were under Mulligan's control and actively concealing fraud from the Nevada Division of Insurance ("Division").

Relatedly, Plaintiff is not bound by an arbitration provision entered into by Spirit before a Receiver was appointed receiver. Although the liquidating receiver may be said to "step into the shoes" of Spirit in some regards, the Receiver is also in the unique position of acting on behalf of both Spirit and its creditors, including its insured claimants. Enforcement of Criterion's arbitration provision would frustrate the purpose of the receivership. Accordingly, any provision favoring arbitration generally is

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https://www.propertycasualty360.com/2019/02/11/modeling-approaches-to-claims-reserving-in-general-insurance/?slreturn=20200429120153

[2] CTC Transportation Insurance Service of Missouri, LLC ("CTC Missouri"); Defendant CTC Transportation Insurance, LLC ("CTC California"); and Defendant CTC Transportation Insurance Service of Hawaii, LLC ("CTC Hawaii"); (Collectively "CTC" or "CTC Defendants")

[3] Thomas Mulligan purchased the name "Criterion" in 2016, and filed articles of incorporation for Criterion Claim Solutions of Omaha, Inc. in Nebraska on March 16, 2016.

preempted by the more specific statutory mandate of a liquidating receiver under NRS 692B. Furthermore, despite Criterion's misplaced reliance on a prior unpublished, distinguishable, and inconclusive Nevada Supreme Court order against the Commissioner, there is no binding Nevada authority on the subject.

As a liquidating receiver, Plaintiff functions more like a bankruptcy trustee than a typical receiver charged with maximizing equity value – marshalling all available assets in a single forum under the jurisdiction of one court for the purpose of maximizing distributions to creditors. Courts have long held that trustees for bankruptcy debtors may reject executory contracts like arbitration provisions. Persuasive and thoughtful authority from other jurisdictions cautions that receivers charged with protecting a company's creditors should be treated like a trustee and afforded the same leeway to litigate claims in a single forum when the receiver determines this would conserve the assets of the estate for creditors. Arbitration provisions that might otherwise frustrate the receiver's purpose should be disfavored in this context. Allowing Criterion to enforce the arbitration here would serve only to multiply proceedings, inhibit the truth-seeking goals of litigation, and frustrate the discovery process.

II. RELEVANT FACTS

Plaintiff is the Commissioner of the Nevada Division of Insurance and brought the subject action in her capacity as Spirit's court-appointed Permanent Receiver ("Receiver") on behalf of Spirit, Spirit's members, insured enrollees, and creditors.

Spirit was a Nevada corporation with its principal place of business in Las Vegas, Nevada, and was an association captive insurance company organized under the laws of Nevada and the Liability Risk Retention Act of 1986. Spirit received its Certificate of Authority on February 24, 2012 and operated under the authority of NRS Chapter 694C. Spirit transacted commercial auto liability insurance business and specialized in serving commercial truck owners. After finally being able to uncover Spirit's true financial condition and hopeless insolvency where it was unable to cure its financial deficiencies, Spirit was placed into receivership.

/ / /

A. Receivership Order

The receivership order was entered in the Eighth Judicial District Court of Clark County, Nevada, Case No. A-19-787325 on February 27, 2019 (the "Receivership Order") and subsequently, Spirit was placed into liquidation on November 6, 2019.. The Receivership Order directs the Receiver to seek recovery from those that harmed Spirit in this court and provides in relevant part:

> (2) SCARRG is in a hazardous financial condition in that, based on its present or reasonably anticipated financial condition, it is unlikely to be able to meet obligations to policyholders with respect to known claims and reasonably anticipated claims, or to pay other obligations in the normal course of business and, moreover, is insolvent for purposes of Sections 696B.110(1), 696B.220(2), and 696B.210(1).
>
> …
>
> (5) **The Receiver is hereby directed to conserve and preserve the affairs of SCARRG and is vested, in addition to the powers set forth herein, with all the powers and authority expressed or implied under the provisions of chapter 696B of the Nevada Revised Statute ("NRS"), and any other applicable law.** The Receiver is hereby authorized to rehabilitate or liquidate SCARRG's business and affairs as and when deemed appropriate under the circumstances and for that purpose may do all acts necessary or appropriate for the conservation, rehabilitation, or liquidation of SCARRG. Whenever this Order refers to the Receiver, it will equally apply to the SDR.
>
> (6) Pursuant to NRS 696B.290, the Receiver is hereby vested with exclusive title both legal and equitable to all of SCARRG's property wherever located, to administer under the general supervisions of the Court, and whether in the possession of SCARRG or its officers, directors, employees, consultants, attorneys, agents, subsidiaries, affiliated corporations, or those acting in concert with any of these persons, and any other persons (referred to hereafter as the "Property")…, including …
>
> e. Pursuant to NRS 696B.290 and 696B.270, the Receiver is hereby directed to take immediate and exclusive possession and control of the Property except as she may deem in the best interest of the receivership estate. **In addition to vesting title to all of the Property in the Receiver or her successors, the said Property is hereby placed in the *custodia legis* of this Court and the Receiver, and the Court hereby assumes and exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting the Property to the exclusion of any other court or tribunal, such exercise of sole and exclusive jurisdiction being hereby found to be essential to the safety of the public and of the claimants against SCARRG.**
>
> …

(13) <u>The officers, directors, trustees, partners, affiliates, brokers, agents, creditors, insureds, employees, members, and enrollees of SCARRG, and all other persons or entities</u> of any nature including, but not limited to, claimants, plaintiffs, petitioners, and any governmental agencies who have claims of any nature against SCARRG, including cross-claims, counterclaims and third party claims, **are hereby permanently enjoined and restrained from doing or attempting to do any of the following, except in accordance with the express instructions of the Receiver or by Order of this Court:**

. . .

e. **Interfering in any way with these proceedings or with the Receiver**, any successor in office, or any person appointed pursuant to Paragraph (2) hereinabove in their acquisition of possession of, the exercise of dominion or control over, or their title to the Property, or in the discharge of their duties as Receiver thereof; or

f. **<u>Commencing, maintaining or further prosecuting any direct or indirect actions, arbitrations, or other proceedings against any insurer of SCARRG for proceeds of any policy issued to SCARRG</u>**.

…

(24) The Court shall retain jurisdiction for all purposes necessary to effectuate and enforce this Order.

(Receivership Order, attached hereto as **Exhibit 1,** emphasis added.)

Subsequently, the Receiver instituted the instant action on behalf of Spirit and the thousands of people and entities who were injured by Spirit's liquidation. Pursuant to the Receivership Order, the Receiver initiated this action in the Eighth Judicial District Court, the situs of the receivership proceedings and the only courts with jurisdiction over the property of Spirit.

B. Claims Asserted Against Criterion

The claims asserted against Criterion by the Receiver are to recover the property of Spirit and to seek redress for Criterion's wrongdoing and participation in the fraudulent enterprise that led to Spirit's demise. Spirit's relationship with Criterion began at Spirit's inception when in the fall of 2011 when a Claims Administration Agreement was entered (the "Criterion Agreement") for a three-year term. Although Criterion was initially owned and controlled by a third party, Mulligan immediately began asserting himself into the business and reserve setting process and ultimately in or around 2016 Mulligan and/or an entity he is affiliated with purchased the Criterion name and took overs its operations to ensure complete control of the reserve setting and claim settlement process. Mulligan's take-over of Criterion

doomed Spirit as Mulligan highjacked the claims reserve process and overruled the comments or recommendations provided by claims professionals taking control of key claim decisions.[4] Additionally, Criterion along with other Mulligan controlled entities comprised an "Insurance Holding Group" which group is regulated and required to report to the Division pursuant to NRS 692C.[5]

The regular under-reserving of claims served to underreport Spirit's claim liabilities, mislead the Division and other insurance regulators with regard to Spirit's financial condition and performance, and lead to further losses to Spirit that would have been avoided if the Company had suspended operations earlier. Comp. ¶ 152. As detailed in the Complaint, beyond setting reserves at shockingly low levels, Criterion, by and through the influence of Mulligan and the Mulligan Enterprise, engaged in patterns of the following improper conduct, all of which served to prolong Spirit staying in business, which ultimately allowed Mulligan and the other individual Defendants to continue to operate the Mulligan Enterprise for their benefit and to the detriment of Spirit, its policyholders, and its other creditors which included: repeated material misstatements, financial and otherwise, to state regulators, including the Division, concerning claims by Spirit policyholders; the failure to properly report and maintain other claims reserves, including incurred by not reported claim reserves of which Criterion was aware; repeated failures to maintain and enforce a governance structure that would ensure that Criterion acts in the unconflicted interest of Spirit and the operation of its business; and delays in claim payments and proper claims settlement which resulted in deeper Spirit losses. Comp. ¶ 153.

Based on the foregoing, the Complaint asserts ten causes of action against Criterion which include: Breach of Contract (Claim 3); Breach of implied covenant of good faith and fair dealing -

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[4] Complaint ¶145. Further, upon information and belief Mulligan, George and McCrae would participate in "claims committee" meetings which were held at Criterion, during which Defendants Mulligan, George, and/or McCrae would knowingly and intentionally adjust claim reserves downward on total loss and severe injury cases and/or fail to adjust upwards claims on which information had been provided to support significant losses and/or payments. In so doing, Spirit would put the claim reserve at an artificially low amount, sometimes as low as $100, even when the severity of the loss exceeded the reserve amount demanded by Mulligan and other individuals, with the intent of overstating Spirit's financial performance. Guffey was aware of claim reserve manipulations that were unjustified and inappropriate, and yet, she did nothing about reporting or disclosing these wrongful matters to the Division. Comp. ¶ 147.

[5] *See e.g.* June 29, 2018 Insurance Holding Company System Annual Registration Statement, (page 16), attached hereto as **Exhibit 2**.

contract (Claim 9); Nevada Rico Claims (Claim 10); Unjust Enrichment (Claim 11) Fraud (claim 12); Civil Conspiracy (Claim 13); Avoidance transfer pursuant to NRS 112 (Claim 15); Voidable Transfers pursuant to NRS 696B (Claim 16); Recovery of Distributions and payments under NRS 696B (Claim 17); and Recovery of Distributions and payments under NRS 692C.402 (Claim 18).

Contrary to Criterion's assertions otherwise, these claims go beyond what could be potentially compelled to arbitration. As detailed below, due to Criterion's own actions, Nevada's Liquidation Act, and this Court's inherent authority to oversee claims asserted by Spirit for the benefit of Spirit's members, enrolled insureds, and creditors, exclusive jurisdiction is proper in the Eighth Judicial District Court.

III. LEGAL ARGUMENT

There is no legal basis to compel arbitration on all ten claims asserted against Criterion. Review of the contract and application of federal and state law governing arbitration provisions does not get the result Criterion is asking for. As detailed below, an arbitration provision does not end the Court's inquiry. Instead, the Court must determine 1) if the arbitration provision is binding on the parties; and 2) if deemed binding, which of the claims asserted are subject to the arbitration provision and which are not.

A. The Court should not Enforce an Arbitration Provision that is the Product of a Criminal Enterprise

Plaintiff, as statutory receiver for Spirit, is not bound by the arbitration agreement between Spirit and Criterion when Criterion and its contractual relationship with Spirit were merely instruments in a criminal enterprise. "Simply put, arbitration agreements may be rejected when they are instruments of a criminal enterprise …." *Janvey v. Alguire*, 847 F.3d 231, 246 (5th Cir. 2017) (concurring opinion).[6] The court acknowledged a broad policy favoring arbitration but cautioned that "there are limits" and "efforts to enforce contracts in service of criminal enterprise ought *receive a cold reception in the courts*." *Id.* at 246, 251 (emphasis added). *Janvey* involved the claims of an SEC receiver appointed over the perpetrator

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

of a Ponzi scheme, Allen Stanford, and his corporations. *Id.* at 248. The federal receiver – charged with conserving Stanford assets for victims of the fraud, just like the Receiver here – brought claims against former Stanford employees. The employee-defendants sought to enforce arbitration provisions in contracts with various receivership entities. *Id.* The court rejected their arguments:

> 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. The arbitration agreements were central to the Stanford Ponzi scheme with its inherent need for privacy.

Id. at 250 (5th Cir. 2017).

As in *Janvey*, Plaintiff alleges that the Criterion Agreement was an instrument of Defendant Mulligan's fraud. Compl. ¶ 149-53. As in *Janvey*, Plaintiff alleges here that Mulligan "exercised complete control over" Spirit. Compl. ¶¶ 153-157. Here, the Receiver also alleges that Mulligan similarly exercised control over Criterion and used Spirit's relationship with Criterion to deceive insureds and conceal Spirit's true financial condition from the Division. *Id.* Maintenance of Mulligan's Enterprise, like that of Stanford, had an inherent need for privacy—it could not continue if the Division became aware of the true financial condition of Spirit. *See id.*[7] It is not surprising then that Mulligan, who at relevant times controlled both Spirit and Criterion, caused Spirit to agree to arbitration provisions in the Agreement, just like Stanford. If Mulligan lost control of Spirit, as he eventually did, the cloak of confidentiality provided by arbitration protected the extent of his Enterprise from the daylight of litigation by "shielding the fraudulent activity from potentially revealing discovery while giving the scheme an air of legitimacy." *Janvey*, 847 F.3d at 250–51. Still today, Criterion attempts to hide the true extent of Mulligan and the other Individual Defendants' involvement in the fraud perpetuated by Spirit and Criterion by compelling arbitration here.

[7] Plaintiff is unaware whether Mulligan continues to use CTC as an instrument for defrauding other insurance companies like Spirit, from which Mulligan will continue to benefit from the secrecy of arbitration of the Commissioner's disputes.

Janvey's reasoning is persuasive. The court notes that "the receivership entities [like Spirit, here,] are not responsible for actions directed by … Stanford to perpetuate the fraudulent Ponzi scheme …."[8] *Id.* at 250 n. 40 (citing *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995) ("The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more [the scheme's perpetrator's] evil zombies.") Here, Plaintiff is charged with recovering Spirit's assets from, among others, the participants in Mulligan's fraudulent scheme. The arbitration provisions Mulligan and the other Individual Defendants facilitated to ensure their fraudulent scheme remained concealed if they lost control of the Enterprise should not be enforceable against the Receiver's efforts to recover assets for the benefit of Spirit's insureds, the victims of the scheme.

B. The Federal Arbitration Act Does Not Require that all Criterion Claims be Arbitrated

Criterion attempt to rely on the Federal Arbitration Act ("FAA") to compel all of the claims asserted against it to arbitration. However, the general policy in favor of arbitration does not apply here, for several reasons. First, the FAA and Nevada law cited in support of arbitration are inapplicable to this matter because the Nevada's Liquidation Act reverse-preempts the FAA. Second, because there are specific Nevada statutes at issue, the general premise that arbitration is favored is not applicable. Additionally, because Criterion is part of a Nevada Insurance Holding Company jurisdiction is proper. Furthermore, the Claims asserted against Criterion are not solely for contract damages and are brought on behalf Spirit's members, insured enrollees, and creditors and therefore cannot be compelled into arbitration.

Criterion argues that the general policy in favor of arbitration under the FAA should apply to compel all claims asserted against it to arbitration. However, the FAA is reverse-preempted by the McCarran-Ferguson Act, because it conflicts with the more specific Nevada statute governing insurance receivership proceedings. As such, arbitration is not required. Here, the Court should refuse to compel arbitration under the FAA as the controlling Liquidation Act found in NRS 696B[9] reverse-preempts the

[8] These actions included Stanford causing the entities to sign arbitration provisions, just as Mulligan caused Spirit to execute the arbitration provision with the CTC Defendants which he also controlled.

[9] Nevada's Liquidation Act may be cited as the Uniform Insurers Liquidation Act. NRS 696B.280. The Act is set forth at NRS 696B.030 to 696B.180 and 696B 290 to 696B.340. *Id.*

FAA under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ("McCarran-Ferguson").

In the McCarran-Ferguson Act, Congress declared that the continued regulation by the states of the business of insurance is in the public interest. *See* 15 U.S.C. § 1011. Congress concluded that "[t]he business of insurance, and ***every person engaged therein***, shall be subject to the laws of the . . . States which relate to the regulation . . . of such business." *Id*. at §1012(a) (emphasis added). No federal law "shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the Business of insurance. . . unless such Act specifically relates to the business of insurance." *Id*. at §1012(b). Thus, McCarran-Ferguson exempts state laws regulating the business of insurance from preemption by federal statutes that do not specifically relate to the business of insurance, such as the FAA. 15 U.S.C. § 1012(b). The Supreme Court has created a three-part test to determine whether reverse-preemption of federal law through McCarran-Ferguson occurs. Specifically, a court is to examine whether: 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, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999). Here, each of these criteria is met as to Criterion.

First, there can be no real dispute that the provisions of NRS 696B that make up the Nevada Liquidation Act were enacted for the purpose of regulating the business of insurance. The Liquidation Act provides that "upon taking possession of the assets of an insurer, the domiciliary receiver shall immediately proceed *to conduct the business of the insurer* or to take such steps as are authorized by this chapter for the purpose of rehabilitating, liquidating, or conserving the affairs or assets of the insurer. NRS 696B.290(3); *see Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010) (holding that this prong was "clearly satisfied" and noting that "[w]e can hardly overstate the degree to which the regulation of insurance permeates this controversy. The very claims which [the defendant] would take to arbitration arise directly out of Kentucky's intense interest in the regulation of worker's compensation insurance... The [liquidation act at issue] is itself the ultimate measure of the state's regulation of the insurance

business: the take-over of a failing insurance company."). Here, the claims Criterion seeks to arbitrate relate to the administration of Spirit's insurance business and specifically the setting of reserves and handling claims and are claims Nevada has an interest in as they relate specifically to regulating insurance. Additionally, Criterion was a part of a Nevada Insurance Holding Company and the Mulligan Enterprise that was established to perpetrate fraud and hide or abscond with funds that were meant to pay insurance claims. Such claims clearly fall under Nevada statutes that were enacted for the purpose of regulating the business of insurance. The Receivership Order is further evidence of this.

Second, courts have determined that the FAA is not a federal statute that specifically relates to the business of insurance. *See, e.g. Munich Am Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998) (there is no question that the FAA does not relate specifically to the business of insurance."); *Stephens v. Am. Int'l Ins. Co*., 66 F.3d 41, 44 (2d Cir. 1995) ("No one disputes the fact that the FAA does not specifically relate to insurance.") Accordingly, the second prong to whether reverse-preemption of federal law through McCarran-Ferguson occurs is satisfied here.

Third, the application of the FAA would "invalidate, impair, or supersede" Nevada's Liquidation Act. Nevada's Liquidation Act incorporates the Uniform Insurers Liquidation Act ("UILA"). *See* NRS 696B.280. The general purpose of the UILA is to "centraliz[e] insurance rehabilitation and liquidation proceedings in one state's court so as to protect all creditors equally." *Frontier Ins. Serv. V. State*, 109 Nev. 231,236, 849 P.2d 328, 331 (1992), *quoting Dardar v. Ins. Guaranty Ass'n*, 556 So. 2d 272, 274 (La. Ct. App. 1990). Similarly, the UILA's overall purpose is to protect the interests of policyholders, creditors and the public. *See, e.g*. NRS 696B.210, 696B.530, 696B540; *see also* Joint Meeting of the Assembly and Senate Standing Committees on Commerce, March 25, 1977 (summarizing statements by Richard Rottman, Insurance Commissioner, and Dr. Tom White, Director of Commerce Department) (Nevada's insurance law was "designed to help the Insurance Division regulate the industry on behalf and primarily in the interests of the public of the State of Nevada"). Applying the law of the domiciliary state, as well as centralized proceedings in one state's court, advances these purposes. *See Frontier Ins. Serv*., 109 Nev. at 236, 849 P.2d at 3341; *In re Freestone Ins. Co.*, 143 A.3d 1234, 1260-61 (Del. Ch.

2016); *see also Benjamin v. Pipoly*, 2003-Ohio-5666, ¶45, 155 Ohio App. 3d 171, 184, 800 N.E.2d 50, 60 ([C]ompelling arbitration against the will of the liquidator will always interfere with the liquidator's powers and will always adversely affect the insurer's assets.").

Here, Nevada's Liquidation Act recognizes the need for consolidation in one court via various statutory provisions. *See, e.g.*, NRS 696B.190(1) (District court has original jurisdiction over delinquency proceedings under NRS 696B.010 to 696B.565, inclusive, and any court with jurisdiction may make all necessary or proper orders to carry out the purposes of those sections); NRS 696B.190(4) ("No court has jurisdiction to entertain, hear or determine any petition or complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer…or other relief …relating to such proceedings, other than in accordance with NRS 696B.010 to 696B.565, inclusive."); NRS 696B.270 ("The court may at any time during a proceeding...issue such other injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions…"). Likewise, the Court, acting within its statutory authority, ordered that it would exercise "sole and exclusive jurisdiction" over all Property (including lawsuits), "to the exclusion of any other court or tribunal." This is consistent with the Receivership Order which not only vested title of all Spirit's property with the receiver, but exclusive jurisdiction of all claims and rights were assumed by the Eighth Judicial Court ***to the exclusion of any other Court or tribunal***. Specifically, Section 6(f) of the Receivership Oder Provides:

> Pursuant to NRS 696B.290 and 696B.270, the Receiver is hereby directed to take immediate and exclusive possession and control of the Property except as she may deem in the best interest of the receivership estate. **In addition to vesting title to all of the Property in the Receiver or her successors, the said Property is hereby placed in the *custodia legis* of this Court and the Receiver, and the Court hereby assumes and exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting the Property to the exclusion of any other court or tribunal, such exercise of sole and exclusive jurisdiction being hereby found to be essential to the safety of the public and of the claimants against SCARRG.**

Ex. 1, Receivership Order (emphasis added).

In conducting a similar analysis, the Kentucky Supreme Court held that "the third part of the *Forsyth* test is satisfied because the Federal Arbitration Act's preference for arbitration conflicts with, and impairs, the [liquidation act's] grant of broad and exclusive jurisdiction to the Franklin Circuit Court… the federal policy favoring arbitration is subordinated to the state's superior interest in having matters relating to the rehabilitation of an insurance company adjudicated in the Franklin Circuit Court." *See Clark*, 323 S.W.3d 682, 692. Likewise, Nevada's Liquidation Act relates directly to the business of insurance and thus reverse-preempts the FAA. As the Court in *Taylor v. Ernst & Young* held when interpreting that states statutes which were also based on the Uniform Insurers Liquidation Act, "when allowed, forum selection ***belongs to the liquidator*** and the liquidator ***alone***." 958 N.E.2d at 1209 (emphasis added).

Finally, Criterion's reliance on *State ex rel. Comm'r of Ins. v. Eighth Judicial Dist. Court of Nev.*, Nev. Unpub. LEXIS 1366, 454 P.3d 1260 (2019), for the proposition that arbitration provisions are enforceable against the Commissioner in her role as receiver is misplaced. First, the unpublished decision is not binding on the Court and may be cited only "for its persuasive value, *if any* …." NRAP 36(c)(3) (emphasis added). And the decision has no persuasive value because it did not announce any holdings of law. *See Comm'r of Ins. v. Eighth Judicial*, Nev. Unpub. LEXIS 1366 *1–2. The Supreme Court was considering a petition for extraordinary writ relief, which *it declined* to entertain. The court merely observed that the district court did not commit "clear error" by relying on persuasive authority from other jurisdictions. *Id.* at *3–4. Importantly, it did not analyze the issue or adopt the reasoning of those courts. Further, the underlying court did not analyze an arbitration agreement like the one at issue here where the contractual relationship with Spirit was merely an instrument in a criminal enterprise. As set forth above and below, more persuasive authority dictates the opposite result.

C. Nevada's specific statutes regarding insurance liquidation take precedence over general arbitration preferences.

In footnote 14 of its Motion, Criterion summarily argues that Nevada's Uniform Arbitration Act mirrors the FFA and strongly favor's arbitration. However, 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). Furthermore, although Nevada has a general policy in favor of arbitration, the Liquidation Act creates a specific and detailed statutory scheme for winding down insolvent insurance companies for the benefit of Spirit's members, and those that were insured and/or injured by an insured of Spirit, and the public at large. *See* NRS 696B.

Under this framework, this court (not an arbitrator) has original jurisdiction over delinquency proceedings (including liquidation) and may make all necessary or proper orders to carry out the purposes of the Liquidation Act. *See* NRS 696B.190. Likewise, the statute provides that "[n]o court has jurisdiction to entertain, hear or determine any petition or complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer…or other relief preliminary, incidental or relating to such proceedings, other than in accordance with NRS 696B.010 to 696B.565, inclusive. *Id*. The Court may issue injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof. *See* NRS 696B.270.

Similarly, because Criterion served as the program administrator or manager of Spirit's claims, jurisdiction is proper pursuant to NRS 696B.200(c) which provides courts in the state in which an order of rehabilitation or liquidation is entered jurisdiction over persons and entities served as managers, trustees, directors, organizers and promoters of the insurer or others with similar positions and responsibilities. *See* NRS 696B.200(c). Accordingly, this Court is the proper forum to resolve the dispute.

D. Spirit's Non-Contractual Claims Against Criterion Fall Outside the Parties' Arbitration Agreement

Even if Criterion can compel arbitration of Plaintiff's third and ninth claims for breach of contract and the implied duty of good faith and fair dealing, the narrow arbitration agreement between Spirit and Criterion does not reach Plaintiff's claims for fraud, RICO, and conspiracy. While arbitration agreements are generally favored by Courts, arbitration clauses "must not be so broadly construed as to encompass claims and parties that were not intended by the original contract." *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 634, 189 P.3d 656, 660 (2008) (citations omitted). "Whether a dispute is arbitrable is essentially a question of construction of a contract." *Internat'l Ass'n of Firefighters, Local No. 1285 v. City of Las Vegas*, 112 Nev. 1319, 1323, 929 P.2d 954, 956 (1996). Here, Criterion argues "all disputes" fall within the arbitration provision in the Spirit-Criterion Agreement. *See* Mot. p. 9. In so arguing, Criterion inserts the word "all" where it does not exist and, more importantly, avoids the second sentence of the Parties' arbitration provision. *See* Mot., Ex. A, Spirit-Criterion ¶ 13 p. 3. That language limits arbitration to disputes "concerning the terms of this agreement or performance by the parties under this agreement." *Id.*

A careful reading of Plaintiff's complaint, which Criterion seeks to avoid, demonstrates that many of Plaintiff's claims have nothing to do with the terms or performance of the Agreement and thus fall outside of the arbitration limitation in the Agreement. *See, e.g.*, Comp. ¶¶ 147–56. Indeed, separately from its contract claims, 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 Defendants Mulligan, Simon, McCrae, and others caused Criterion to affect a pattern of underserving claims against Spirit to mislead insureds and regulators alike and obscure Spirit's descent into deepening insolvency. *See* Comp. ¶¶ 147–56. Similarly, a fair reading of Plaintiff's fifteenth through eighteenths 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* Comp. ¶¶ 388, 401, 412,

424. Put simply, none of the conduct alleged in support of these claims creates a dispute over the terms of the Spirit-Criterion Agreement and can certainly not be described as "performance" of the Agreement. Spirit did not and could not contract with Criterion to be part of a fraudulent scheme orchestrated by Mulligan with the help of the other Individual Defendants. Accordingly, these claims/disputes fall outside of the arbitration provision Criterion relies on.

While no Nevada court had addressed an analogous issue, courts in other jurisdictions have evaluated this very scenario and declined to compel arbitration, focusing on the limiting language in arbitration provisions similar to that between Spirit and Criterion. Indeed, in a case brought by the statutory receiver of a different insolvent insurer based on analogous fraud and conspiracy allegations, the Seventh Circuit held that a narrow arbitration provision like that of Criterion does not reach claims based on a fraudulent conspiracy to hide the insolvency of an insurance company:

> As the Director [of insurance] correctly points out, the primary problem with SCOR's arguments is its mischaracterization of the underlying lawsuit. The litigation does not involve a controversy arising under the agreement itself, but rather a conspiracy in which the conspirators … dr[o]ve Reserve further into insolvency and defraud[ed] entities and individuals who had interests in the continued viability of Reserve …. In short, the central allegation of this litigation does not involve an issue "with respect to the interpretation of [the terms of] this Agreement or the performance of the respective obligations of the parties under this Agreement" as the arbitration agreement requires.

Washburn v. Societe Commerciale De Reassurance, 831 F.2d 149, 151 (7th Cir. 1987) In *Washburn*, as here, the parties' agreement required arbitration of disputes "with respect to the interpretation of this Agreement or the performance of the respective obligations of the parties under this Agreement." *Id.* at 150. The Court distinguished the arbitration provision at issue from broader arbitration provisions that might encompass "all" disputes as Criterion urges when it selectively quotes the Parties' Agreement. *Id.*

The *Washburn* court's reasoning is persuasive. The court noted that "even if every word of the [underlying] agreement were interpreted, this case would be no closer to a resolution." *Id.* The same is true of Spirit's RICO, fraud, and conspiracy-based claims. Nothing in the language of the Agreement, or Criterion's performance of its obligations under it, would bring Plaintiff's fraud, RICO, and conspiracy claims any closer to resolution. Nor is Plaintiff's basis for claiming injury or grounds for redress for

these claims dependent on rights derived from the Agreement. *Cf. Phillips v. Parker*, 106 Nev. 415, 418, 794 P.2d 716, 718 (1990). Put simply, "the dispute here centers around whether the agreement played a role in a much wider fraudulent scheme," not on Criterion's obligations or performance under the Agreement. *Id.* Accordingly, Plaintiff's fraud, RICO, conspiracy, and fraudulent conveyance claims against Criterion fall outside of the narrow bounds of Paragraph 13 of the Spirit-Criterion Agreement. Therefore, at most, it is only Plaintiff's claims against Criterion for breach of contract and the implied duty of good faith and fair dealing that should be dismissed in favor of arbitration.

E. A stay and or dismissal of the claims asserted against Criterion is not warranted.

As set forth above, the Nevada Liquidation Act preempts arguments that arbitration is required and provides the Court jurisdiction to resolve the claims asserted. Furthermore, under no scenario can all of the claims asserted against Criterion can be compelled to arbitration under the terms of the Spirit-Criterion Agreement. Accordingly, dismissal is not justified because there remain issues that require the Court's attention.

Furthermore, given that a number of the claims asserted against Criterion are also asserted against other defendants, Criterion will have continued involvement in this matter and dismissal prejudicial to Plaintiff. Indeed, Criterion's role in the fraudulent scheme the Receiver seeks to unwind cannot be untangled from the scheme at large. As noted above, Criterion is a part of an "insurance holding company" under NRS Chapter 696C and is entangled with a host of other interrelated companies that comprise the Mulligan Enterprise. Criterion is a critical witness and whether Criterion remains a party to this case or becomes a third-party, significant discovery of relevant information in Criterion's possession, custody, or control will be at issue in this matter. Accordingly, there is no merit to staying or dismissing the claims against Criterion. Doing so would be a tremendous waste of resources and the Receiver, who is pursuing claims for the victims of a fraudulent scheme that Criterion was instrumental in, will directly bear the expense of both proceedings.

///

IV. CONCLUSION

Allowing Criterion to enforce its arbitration provision, the provision it procured through its role in a criminally fraudulent enterprise, would serve only to multiply proceedings, inhibit the truth-seeking goals of litigation, and frustrate the discovery process. Furthermore, this Court has jurisdiction to hear the claims pursuant to Nevada's Liquidation Act, the Receivership Order, and the underlying limited nature of the contract at issue. Accordingly, Criterion's Motion to Compel Arbitration should be denied.

Dated this 4th day of June, 2020.

By: */s/Kara B. Hendricks*

MARK E. FERRARIO, Bar No. 1625
KARA B. HENDRICKS, Bar No. 7743
KYLE A. EWING, Bar No. 14051
GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135

Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2020, a true and correct copy of the foregoing ***Plaintiff's Opposition to Criterion Claim Solutions of Omaha Inc.'s Motion to Compel Arbitration*** was served electronically using the Odyssey eFileNV Electronic Filing system upon all parties with an email address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R. The date and time of the electronic proof of service is in place of the date and place of deposit in the U.S. Mail.

/s/ Andrea Lee Rosehill
An employee of Greenberg Traurig, LLP

EXHIBIT 1

ORD

AARON D. FORD
Attorney General
RICHARD PAILI YIEN, Bar No. 13035
Deputy Attorney General
State of Nevada
Business and Taxation Division
100 N. Carson Street
Carson City, NV 89701
Telephone: (775) 684-1129
Facsimile: (775) 684-1156
Email: ryien@ag.nv.gov

MARK E. FERRARIO, Bar No. 1625
KARA B. HENDRICKS, Bar No. 7743
TAMI D. COWDEN, Bar No. 8994
GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
Telephone: (702) 792-3773
Facsimile: (702) 792-9002
Email: ferrariom@gtlaw.com
hendricksk@gtlaw.com
cowdent@gtlaw.com

Attorneys for the Plaintiff

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, IN HER OFFICIAL CAPACITY AS STATUTORY RECEIVER FOR DELINQUENT DOMESTIC INSURER, Plaintiff, vs. SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC., a Nevada Domiciled Association Captive Insurance Company, Defendant.	Case No. A-19-787325-B Dept. No. 27 **PERMANENT INJUNCTION AND ORDER APPOINTING COMMISSIONER AS PERMANENT RECEIVER OF SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC.**

PERMANENT INJUNCTION AND ORDER APPOINTING COMMISSIONER AS PERMANENT RECEIVER OF SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC.

On January 11, 2019, Barbara D. Richardson, Commissioner of Insurance ("Commissioner"), filed her Petition for Appointment Of Commissioner as Receiver and Other Permanent Relief; Request for Temporary Injunction Pursuant to NRS 696B.270(1), against Defendant SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC. ("SCARRG"); on January 15, 2019, the Commissioner filed an Errata to the Petition For Appointment Of Commissioner as Receiver and Other Permanent Relief; Request for Temporary Injunction Pursuant to NRS 696B.270(1); on January 18, 2019, this Court entered its Order Appointing Insurance Commissioner, Barbara D. Richardson, as Temporary Receiver Pending Further Orders of the Court and Granting Temporary Injunctive Relief Pursuant to NRS 696B.270(1), and authorizing the Temporary Receiver to appoint a special deputy receiver.

On January 23, 2019, SCARRG filed its Motion for Relief From January 18, 2019 Order or, Alternatively, Motion for Reconsideration, as well as an Ex Parte Application for Order Shortening Time for Hearing on Motion for Relief from January 18, 2019 Order or, Alternatively, Motion for Reconsideration; on January 29, 2019, the Temporary Receiver filed her Opposition to Motion for Relief / Motion for Reconsideration; and Request to Set Hearing for Order to Show Cause; on January 30, 2019, the Temporary Receiver filed an Errata to Opposition to Motion for Relief / Motion for Reconsideration; and Request to Set Hearing for Order to Show Cause, and on that same date SCARRIG filed its Reply in Support of Motion for Relief from January 18, 2019 Order or, Alternatively, Motion for Reconsideration.

On January 30, 2019, this Court held a hearing on the Motion for Relief from January 18, 2019 Order or, Alternatively, Motion for Reconsideration, at which the Court: (a) granted in part SCARRG's alternate motion for reconsideration, consolidating it with the hearing to Show Cause to be held on February 28 and March 1, 2019 ("Consolidated Hearing'); and (b) stayed the appointment of a receiver; and (c) limited the injunctive relief in the January 18, 2019 Order, pending the Consolidated Hearing, by requiring SCARRG to notify the State and the Court immediately if Accredited Surety and Casualty Company, Inc. ("Accredited"), the counterparty to a certain Loss Portfolio Transfer ("LPT") with

SCARRG, were to act on its assertion of SCARRG's default under the LPT, enjoining all payments by SCARRG to any affiliate or related party, authorizing the State to have a person on the premises of SCARRG's operations to observe the transaction of business, and prohibiting SCARRG from paying any claims. On February 11, 2019, Accredited gave notice it was terminating the LPT pursuant to the Special Termination provision of the LPT for failure to pay premium owed under the LPT which includes a 15 day notice provision making the termination effective on February 27, 2019.

On February 12, 2019, the Temporary Receiver filed a Notice of Accredited' s Decision to Act on Default and Request for Immediate Hearing and Application for Order Shortening Time for Hearing Regarding Notice of Accredited's Decision to Act on Default and Request for Immediate Hearing. On February 19, 2019, Spirit filed its Opposition to Notice of Accredited's Decision to Act on Default and Request for Immediate Hearing.

On February 20, 2019, the Court held a hearing on the Notice of Accredited's Decision to Act on Default, at which the Court: (a) decided to take no further action on Spirit's status and to maintain the status quo of its Order rendered from the January 30, 2019, hearing on the Motion for Relief filed by Spirit; and (b) set a hearing on February 27, 2019, at 10:30 a.m. to further consider and address the issues raised in the Notice of Accredited's Decision to Act on Default and related filings.

SCARRG having been unable to cure the default identified by Accredited and set forth in the Notice of Accredited' s Decision to Act on Default, the parties hereby stipulate and agree that the Consolidated Hearing should and is vacated and further agree to a Permanent Receivership of SCARRG without the need for and waiving all rights to a Show Cause Hearing.

The Court having reviewed the points and authorities submitted by counsel and exhibits in support thereof, and the parties having proffered this Order to the Court by agreement, for good cause, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) The Consolidated Hearing scheduled for February 28 and March 1, 2019 is hereby vacated, the parties having stipulated and agreed to the appointment of a Permanent

Receiver of SCARRG without the need for and waiving all rights to a Show Cause Hearing.

(2) SCARRG is in a hazardous financial condition in that, based on its present or reasonably anticipated financial condition, it is unlikely to be able to meet obligations to policyholders with respect to known claims and reasonably anticipated claims, or to pay other obligations in the normal course of business and, moreover, is insolvent for purposes of Sections 696B.110(1), 696B.220(2), and 696B.210(1).

(3) Pursuant to NRS 696B.220, the Commissioner is hereby appointed Permanent Receiver for conservation, rehabilitation or liquidation ("Receiver"), and is authorized to employ and to fix the compensation of a Special Deputy Receiver ("SDR") and such other deputies, counsel, employees, accountants, actuaries, investment counselors, asset managers, consultants, assistants, and other personnel as she considers necessary, and to enter the business and immediately oversee the operation and conservation, rehabilitation, or liquidation of the business. All compensation and expenses of such persons and of taking possession of SCARRG and conducting this proceeding shall be paid out of the funds and assets of SCARRG in accordance with NRS 696B.290.

(4) The SDR shall have all the responsibilities, rights, powers, and authority of the Receiver subject to supervision and removal by the Receiver and the further Orders of this Court. Whenever this Order refers to the Receiver, it will equally apply to the SDR.

(5) The Receiver is hereby directed to conserve and preserve the affairs of SCARRG and is vested, in addition to the powers set forth herein, with all the powers and authority expressed or implied under the provisions of chapter 696B of the Nevada Revised Statute ("NRS"), and any other applicable law. The Receiver is hereby authorized to rehabilitate or liquidate SCARRG's business and affairs as and when deemed appropriate under the circumstances and for that purpose may do all acts necessary or appropriate for the

conservation, rehabilitation, or liquidation of SCARRG. Whenever this Order refers to the Receiver, it will equally apply to the SDR.

(6) Pursuant to NRS 696B.290, the Receiver is hereby vested with exclusive title both legal and equitable to all of SCARRG's property wherever located, to administer under the general supervisions of the Court, and whether in the possession of SCARRG or its officers, directors, employees, consultants, attorneys, agents, subsidiaries, affiliated corporations, or those acting in concert with any of these persons, and any other persons (referred to hereafter as the "Property"), including but not limited to:

a. Assets, books, records, property, real and personal, including all property or ownership rights, choate or inchoate, whether legal or equitable of any kind or nature;

b. Offices maintained or utilized by SCARRG, furniture, fixtures, office supplies, safe deposit boxes, legal/litigation files, accounts, books, paper and electronic documents and records of every kind, computers, internal and external computer memory devices, and software;

c. Causes of action, defenses, and rights to participate in legal proceedings other than the right to participate in arbitration proceedings, and the Receiver's rights will include the right to initiate or maintain suit in the name of SCARRG or in the Receiver's name, in any state or federal court in any state in which the Receiver deems such action necessary or appropriate to protect the interests of the receivership estate, and any such filings outside of this Court by the Receiver will be without prejudice to the exclusive jurisdiction of this Court over SCARRG's affairs;

d. Letters of credit, contingent rights, stocks, debt, bonds, debentures, cash, cash equivalents, contract rights, reinsurance contracts and reinsurance recoverables, in force insurance contracts, loss portfolio transfers, and

business, deeds, mortgages, leases, book entry deposits, bank deposits, certificates of deposit, evidences of indebtedness, bank accounts, securities of any kind or nature, both tangible and intangible, including but without being limited to any special, statutory or other deposits or accounts made by or for SCARRG with any officer or agency of any state government or the federal government or with any banks, savings and loan associations, or other depositories;

e. All such rights and property of SCARRG described herein now known or which may be discovered hereafter, wherever the same may be located and in whatever name or capacity they may be held; and

f. Pursuant to NRS 696B.290 and 696B.270, the Receiver is hereby directed to take immediate and exclusive possession and control of the Property except as she may deem in the best interest of the receivership estate. In addition to vesting title to all of the Property in the Receiver or her successors, the said Property is hereby placed in the *custodia legis* of this Court and the Receiver, and the Court hereby assumes and exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting the Property to the exclusion of any other court or tribunal, such exercise of sole and exclusive jurisdiction being hereby found to be essential to the safety of the public and of the claimants against SCARRG.

(7) Pursuant to NRS 696B.270, SCARRG, its officers, directors, stockholders, members, subscribers, agents, employees, and all other persons, corporations, partnerships, associations and all other entities wherever located, are hereby permanently enjoined and restrained from interfering in any manner with the Receiver's possession of the Property or her title to or right therein and from interfering in any manner with the conduct of the receivership of SCARRG. Said officers, directors, stockholders, members, subscribers,

agents, employees, and all other persons, corporations, partnerships, associations and all other entities are hereby permanently enjoined and restrained from wasting, transferring, selling, disbursing, disposing of, withdrawing, removing or assigning the Property or any portion thereof, and from attempting to do so except as provided herein.

(8) All landlords, vendors and parties to executory contracts with SCARRG are hereby enjoined and restrained from discontinuing services to, or disturbing the possession of premises and leaseholds, including of equipment and other personal property, by SCARRG or the Receiver on account of amounts owed prior to January 18, 2019, or as a result of the institution of this proceeding and the causes therefor, provided that SCARRG or the Receiver pays within a reasonable time for premises, goods, or services delivered or provided by such persons on and after January 18, 2019, at the request of the Receiver and provided further that all such persons shall have claims against the estate of SCARRG for all amounts owed by SCARRG prior to January 18, 2019.

(9) Pursuant to NRS 696B.340, during the pendency of delinquency proceedings in this or any reciprocal state, no action or proceeding in the nature of an attachment, garnishment or execution shall be commenced or maintained in the courts of this state against SCARRG or the Property, and any lien obtained by any such action or proceeding within 4 months prior to the commencement of any such delinquency proceedings or at any time thereafter is void as against any rights arising in such delinquency proceedings.

(10) Pursuant to this Court's exclusive jurisdiction over the Property as the first court to assert *in rem* jurisdiction over the Property, all claims against the Property must be submitted to the Receiver as specified herein to the exclusion of any other method of submitting or adjudicating such claims in any forum, court, arbitration proceeding, or tribunal subject to the further Order of this Court. The Receiver is hereby authorized to establish a receivership claims and appeal procedure, for all receivership claims. The receivership

claims and appeal procedures shall be used to facilitate the orderly disposition or resolution of claims or controversies involving the receivership or the receivership estate.

(11) The Receiver may change to her own name the name of any of SCARRG's accounts, funds or other property or assets, held with any bank, savings and loan association, other financial institution, or any other person, wherever located, and may withdraw such funds, accounts and other assets from such institutions or take any lesser action necessary for the proper conduct of the receivership.

(12) All secured creditors or parties, pledge holders, lien holders, collateral holders or other persons claiming secured, priority or preferred interest in any property or assets of SCARRG, including any governmental entity, are hereby enjoined from taking any steps whatsoever to transfer, sell, encumber, attach, dispose of or exercise purported rights in or against the Property.

(13) The officers, directors, trustees, partners, affiliates, brokers, agents, creditors, insureds, employees, members, and enrollees of SCARRG, and all other persons or entities of any nature including, but not limited to, claimants, plaintiffs, petitioners, and any governmental agencies who have claims of any nature against SCARRG, including cross-claims, counterclaims and third party claims, are hereby permanently enjoined and restrained from doing or attempting to do any of the following, except in accordance with the express instructions of the Receiver or by Order of this Court:

a. Conducting any portion or phase of the business of SCARRG;

b. Commencing, bringing, maintaining or further prosecuting any action at law, suit in equity, arbitration, or special or other proceeding against SCARRG or its estate, or the Receiver and her successors in office, or any person appointed pursuant to Paragraph (2) hereinabove;

c. Making or executing any levy upon, selling, hypothecating, mortgaging, wasting, conveying, dissipating, or asserting control or dominion over the Property or the estate of SCARRG;

d. Seeking or obtaining any preferences, judgments, foreclosures, attachments, levies, or liens of any kind against the Property;

e. Interfering in any way with these proceedings or with the Receiver, any successor in office, or any person appointed pursuant to Paragraph (2) hereinabove in their acquisition of possession of, the exercise of dominion or control over, or their title to the Property, or in the discharge of their duties as Receiver thereof; or

f. Commencing, maintaining or further prosecuting any direct or indirect actions, arbitrations, or other proceedings against any insurer of SCARRG for proceeds of any policy issued to SCARRG.

(14) No bank, savings and loan association or other financial institution shall, without first obtaining permission of the Receiver, exercise any form of set-off, alleged set-off, lien, or other form of self-help whatsoever or refuse to transfer the Property to the Receiver's control.

(15) The Receiver shall have the power and is hereby authorized to:

a. Collect all debts and monies due and claims belonging to SCARRG, wherever located, and for this purpose: (i) to institute and maintain actions in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts; (ii) to do such other acts as are necessary or expedient to marshal, collect, conserve or protect its assets or property, including the power to sell, compound, compromise or assign debts for purposes of collection upon such terms and conditions as she deems appropriate, and the power to initiate and maintain actions at law or equity, in this and other jurisdictions; (iii) to pursue any creditor's remedies available to enforce her claims;

b. Conduct public and private sales of the assets and property of SCARRG, including any real property;

c. Acquire, invest, deposit, hypothecate, encumber, lease, improve, sell, transfer, abandon, or otherwise dispose of or deal with any asset or property of SCARRG, and to sell, reinvest, trade or otherwise dispose of any securities or bonds presently held by, or belonging to, SCARRG upon such terms and conditions as she deems to be fair and reasonable, irrespective of the value at which such property was last carried on the books of SCARRG. She shall also have the power to execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary or proper to effectuate any sale of property or other transaction in connection with the receivership;

d. Borrow money on the security of SCARRG's assets, with or without security, and to execute and deliver all documents necessary to that transaction for the purpose of facilitating the receivership;

e. Enter into such contracts as are necessary to carry out this Order, and to affirm or disavow as more fully provided in subparagraph p., below, any contracts to which SCARRG is a party;

f. Designate, from time to time, individuals to act as her representatives with respect to affairs of SCARRG for all purposes, including, but not limited to, signing checks and other documents required to effectuate the performance of the powers of the Receiver;

g. Establish employment policies for SCARRG employees, including retention, severance and termination policies as she deems necessary to effectuate the provisions of this Order;

h. Institute and prosecute, in the name of SCARRG or in her own name, any and all suits, to defend suits in which SCARRG or the Receiver is a party in this state or elsewhere, whether or not such suits are pending as of the date of this Order, to

abandon the prosecution or defense of such suits, legal proceedings and claims which she deems inappropriate, to pursue further and to compromise suits, legal proceedings or claims on such terms and conditions as she deems appropriate;

i. Prosecute any action for common (*i.e.*, not personal) claims that may exist on behalf of the members, enrollees, insureds or creditors, of SCARRG as a group against any officer or director of SCARRG, or any other person, for such common claims as are derivative of injury or damages to SCARRG;

j. Remove any or all records and other property of SCARRG to the offices of the Receiver or to such other place as may be convenient for the purposes of the efficient and orderly execution of the receivership, and to dispose of or destroy, in the usual and ordinary course, such of those records and property as the Receiver may deem or determine to be unnecessary for the receivership;

k. File any necessary documents for recording in the office of any recorder of deeds or record office in this County or wherever the Property of SCARRG is located;

l. Intervene in any proceeding wherever instituted that might lead to the appointment of a conservator, receiver or trustee of SCARRG or its subsidiaries, and to act as the receiver or trustee whenever the appointment is offered;

m. Enter into agreements with any ancillary receiver of any other state as she may deem to be necessary or appropriate, if such ancillary receivership is proper;

n. Perform such further and additional acts as she may deem necessary or appropriate for the accomplishment of or in aid of the purpose of the receivership, it being the intention of this Order that the aforestated enumeration of powers shall not be construed as a limitation upon the Receiver;

o. Terminate and disavow the authority previously granted SCARRG's agents, brokers, or marketing representatives to represent SCARRG in any respect, including the underlying agreements, and any continuing payment obligations created therein, as

of the receivership date, with reasonable notice to be provided and agent compensation accrued prior to any such termination or disavowal to be deemed a general creditor expense of the receivership; and

p. Affirm, reject, or disavow part or all of any leases or executory contracts to which SCARRG is a party. The Receiver is authorized to reject, or disavow any leases or executory contracts at such times as she deems appropriate under the circumstances, provided that payment due for any goods or services received after appointment of the Receiver, with her consent, will be deemed to be an administrative expense of the receivership, and provided further that other unsecured amounts properly due under the disavowed contract, and unpaid solely because of such disavowal, will give rise to a general unsecured creditor claim in the Receivership proceeding.

(16) SCARRG, its officers, directors, partners, agents, brokers and employees, any person acting in concert with them, and all other persons, having any property or records belonging to SCARRG, including data processing information and records of any kind such as, by way of example only, source documents and electronically stored information, are hereby ordered and directed to surrender custody and to assign, transfer and deliver to the Receiver all of such property in whatever name the same may be held, and any persons, firms or corporations having any books, papers or records relating to the business of SCARRG shall preserve the same and submit these to the Receiver for transfer and/or examination at all reasonable times. Any property, books, or records asserted to be simultaneously the property of SCARRG and other parties, or alleged to be necessary to the conduct of the business of other parties though belonging in part or entirely to SCARRG, shall nonetheless be delivered immediately to the Receiver who shall make reasonable arrangements for copies or access for such other parties without compromising the interests of the Receiver or SCARRG.

(17) In addition to that provided by statute or by SCARRG's policies or contracts of insurance, and to the extent not in conflict with the other provisions of this Paragraph (17), the Receiver may, at such time she deems appropriate, without prior notice, subject to the following provisions, impose such full or partial moratoria or suspension upon disbursements owed by SCARRG, provided that

a. Any such suspension or moratorium shall apply in the same manner or to the same extent to all persons similarly situated. However, the Receiver may, in her sole discretion, impose the same upon only certain types, but not all, of the payments due under any particular type of contract;

b. Under no circumstances shall the Receiver be liable to any person or entity for her good faith decision to impose, or to refrain from imposing, such moratorium or suspension; and

c. Notice of such moratorium or suspension, which may be by publication, shall be provided to the holders of all policies or contracts affected thereby.

(18) It is hereby ordered that all evidences of coverage, insurance policies and contracts of insurance of SCARRG are hereby terminated effective on April 15, 2019, unless the Receiver determines that any such contracts should be cancelled as of an earlier date.

(19) No judgment, order, attachment, garnishment sale, assignment, transfer, hypothecation, lien, security interest or other legal process of any kind with respect to or affecting SCARRG or the Property shall be effective or enforceable or form the basis for a claim against SCARRG or the Property unless entered by the Court, or unless the Court has issued its specific order, upon good cause shown and after due notice and hearing, permitting same.

(20) All reasonable costs, expenses, fees or any other charges of the Receivership, including but not limited to reasonable fees and expenses of accountants, peace officers, actuaries, investment counselors, asset managers, attorneys, special deputies, and other assistants

employed by the Receiver, the giving of the Notice required herein, and other expenses incurred in connection herewith shall be paid from the assets of SCARRG. Provided, further, that the Receiver may, in her sole discretion, require third parties, if any, who propose rehabilitation plans with respect to SCARRG to reimburse the estate of SCARRG for the expenses, consulting or attorney's fees and other costs of evaluating and/or implementing any such plan.

(21) The Commissioner is part of the government of the State of Nevada, acting in her official capacity, and as such, should be exempt from any bond requirements that might otherwise be required when seeking the relief sought in this proceeding. Accordingly, it is Ordered that no bond shall be required from the Commissioner as Receiver.

(22) If any provision of this Order or the application thereof is for any reason held to be invalid, the remainder of this Order and the application thereof to other persons or circumstances shall not be affected thereby.

(23) The Receiver may at any time make further application for such further and different relief as she sees fit.

(24) The Court shall retain jurisdiction for all purposes necessary to effectuate and enforce this Order.

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(25) The Receiver is authorized to deliver to any person or entity a copy or certified copy of this Order, or of any subsequent order of the Court, such copy, when so delivered, being deemed sufficient notice to such person or entity of the terms of such Order. But nothing herein shall relieve from liability, nor exempt from punishment by contempt, any person or entity that, having actual notice of the terms of any such Order, shall be found to have violated the same.

IT IS SO ORDERED

DATED this 27 day of February, 2019. 10:53 am

Nancy L Allf
DISTRICT COURT JUDGE

Case No. A-19-787325-B
Dept. No. 27

Submitted by:

GREENBERG TRAURIG, LLP

Kara B. Hendricks

MARK E. FERRARIO, Bar No. 1625
ferrariom@gtlaw.com
KARA B. HENDRICKS, Bar No. 7743
hendricksk@gtlaw.com
TAMI D. COWDEN, Bar No. 8994
cowdent@gtlaw.com

AARON D. FORD
Attorney General
RICHARD PAILI YIEN, Bar No. 13035
Deputy Attorney General
State of Nevada
Business and Taxation Division
ryien@ag.nv.gov

Approved as to form and content by:

BROWNSTEIN HYATT FARBER SCHRECK, LLP

KIRK B. LENHARD, ESQ., Nevada Bar No. 1437
abult@bhfs.com
TRAVIS F. CHANCE, ESQ., Nevada Bar No. 13800
tchance@bhfs.com

Attorneys for Defendant Spirit Commercial Auto Risk Retention Group, Inc.

EXHIBIT 2

FORM B

INSURANCE HOLDING COMPANY SYSTEM ANNUAL REGISTRATION STATEMENT

Filed with the Insurance Commissioner of the State of Nevada

By and on behalf of:

Spirit Commercial Auto Risk Retention Group, Inc.

(Registrant)

For the Year Ended December 31, 2017

Date: June 29, 2018

Individual to Whom Notices and Correspondence

Concerning This Statement Should Be Addressed To:

Elliott M. Kroll, Esq.
Arent Fox LLP
1675 Broadway
New York, NY 10019
Phone: (212) 484-3987
E-mail: elliott.kroll@arentfox.com

ITEM 1: IDENTITY AND CONTROL OF REGISTRANT

In accordance with the federal Liability Risk Retention Act and Section 695E.110, Nevada Revised Statutes, Registrant is solely owned by the members of its commercial auto association (the "Association"), all members of the Association are insureds of Registrant and all insureds of Registrant are members of the Association.

Registrant, with principal offices located at 9550 S. Eastern Avenue, Suite 253, Las Vegas, Nevada, 89123, is a Nevada domiciled captive insurance company organized pursuant to Chapter 694C, Nevada Revised Statutes, and operating as a risk retention group pursuant to the federal Liability Risk Retention Act and Chapter 695E, Nevada Revised Statutes. It was granted a Certificate of Authority by the Nevada Division of Insurance on February 24, 2012. Registrant is authorized to issue 750,000 of common stock, par value of $1.00 per share. All authorized shares of Registrant have been issued to and are wholly owned by Spirit Commercial Auto Association (the "Association"), a Nevada domestic non-profit, non-stock corporation organized February 12, 2012 pursuant to Chapter 82, Nevada Revised Statutes.

As indicated by Exhibit "A," Thomas Mulligan ("Mr. Mulligan") is Registrant's ultimate controlling person.

Mr. Mulligan is the owner of 100% of the membership interests in CTC Transportation Ins. Services of MO, LLC ("CTC-MO"), which directly manages Registrant's commercial auto insurance program. CTC-MO has contracted with Registrant to serve as Registrant's program administrator, providing marketing, underwriting and policy issuance services to Registrant's insurance program. CTC Transportation Insurance Services, Inc. ("CTC") previously served as program administrator for Registrant and was integrally involved in Registrant's initial formation and organization. At the request of the Division, CTC assigned its rights and obligations under its program management agreement to CTC-MO.

Matthew Simon, Chief Operating Officer of CTC-MO, serves as a director and President of the Association and also serves as a director and President of Registrant. Daniel George, an independent consultant of CTC, is Treasurer of Registrant. Mr. Simon's NAIC Biographical Affidavit is attached as Exhibit B.

ITEM 2: ORGANIZATIONAL CHART

Please see Exhibit A — Organizational Chart

ITEM 3: THE ULTIMATE CONTROLLING PERSON(S)

(a) Name:

Thomas Mulligan

(b) Home office/principal office address:

CTC Transportation Insurance Services LLC
325 Adelphia Road

Farmingdale, NJ 07727

(c) Principal executive office address:

Same as (b)

(d) Organizational structure:

Individual

(e) Principal business:

General agent/producer specializing in transportation insurance.

(f) Name and address of any person(s) who holds or owns ten percent or more of any class of voting security, the class of the security, the number of shares held of record or known to be beneficially owned, and the percentage of the class held or owned:

Thomas Mulligan
325 Adelphia Road
Farmingdale, NJ 07727
100% ownership of CTC Transportation Services of Missouri LLC

(g) Pending court proceedings involving a reorganization or liquidation:

None.

ITEM 4: BIOGRAPHICAL INFORMATION

Name/Address/Occupation	Offices/Positions Held	Prior Convictions*
Thomas Mulligan CTC Transportation Insurance Services LLC 325 Adelphia Road Farmingdale, NJ 07727 Occupation: Insurance Executive	Chief Executive Officer	None

*Last 10 years (other than minor traffic violations)

ITEM 5: TRANSACTIONS AND AGREEMENTS

Following is a description of agreements and transactions currently outstanding or which have occurred during the last calendar year between Registrant and its affiliates:

(a) Loans, other investments, or purchases, sales, or exchanges of securities of the affiliates by the Registrant or of the Registrant by its affiliates:

None.

(b) Purchases, sales, or exchanges of assets:

None.

(c) Transactions not in the ordinary course of business:

None.

(d) Guarantees or undertakings for the benefit of an affiliate which result in an actual or contingent exposure of the Registrant's assets to liability, other than insurance contracts entered into in the ordinary course of Registrant's business:

None.

(e) All management agreements, service contracts, and cost-sharing arrangements:

None.

(f) Reinsurance agreements:

Reinsurance agreements in effect at the beginning of the last calendar year remain in effect. Registrant's reinsurance agreement with Wesco Insurance Company was modified on two occasions, retroactive to January 1, 2017. Both modifications were disclosed to and approved by the Division.

(g) Dividends and other distributions to shareholders:

None.

(h) Consolidated tax allocation agreements:

None.

(i) Any pledge of the Registrant's stock or of the stock of any subsidiary or controlling affiliate for a loan made to any member of the insurance holding company system:

None.

ITEM 6: LITIGATION OR ADMINISTRATIVE PROCEEDINGS

Following is a brief description of any litigation or administrative proceedings of the following types, either pending or concluded within the preceding fiscal year, to which the ultimate controlling person or any of its directors or executive officers was a party or of which the property of any such person is or was the subject, giving the names of the parties and the court or agency in which such litigation or proceeding is or was pending:

(1) Criminal prosecutions or administrative proceedings by any government agency or authority which may be relevant to the trustworthiness of any party to the litigation or proceeding:

None.

(2) Proceedings which may have a material effect upon the solvency or capital structure of the ultimate controlling person, including but not limited to bankruptcy, receivership, other or other corporate reorganizations:

None.

ITEM 7: STATEMENTS REGARDING PLAN OR SERIES OF TRANSACTIONS AND OVERSIGHT OFCORPORATE GOVERNANCE AND INTERNAL CONTROLS

Transactions entered into since the inception of Registrant in the holding company system are not part of a plan or series of like transactions, the purpose of which is to avoid statutory threshold amounts and the review that might otherwise occur.

The Registrant's board of directors oversees corporate governance and internal controls. Registrant's officers and/or senior management have approved, implemented, and continue to maintain and monitor the corporate governance and internal controls of Registrant.

ITEM 8: FINANCIAL STATEMENTS AND EXHIBITS

The following exhibits are attached to this Registration Statement:

Exhibit A: Organizational Chart

Exhibit B: NAIC Biographical Affidavit of Matthew Simon

Exhibit C: Registrant's 2017 Annual Financial Statement

ITEM 9: FORM C REQUIRED

Form C, Summary of Registration Statement, has been prepared and is filed with this Form B.

ITEM 10: SIGNATURE AND CERTIFICATION

Pursuant to the requirements of Chapter 692C, of the Nevada Revised Statutes, Section 270, and the Nevada Administrative Code, Section 030, the Registrant has caused this annual Registration Statement to be duly signed or its behalf in the City of Butler, and the State of Missouri, on this 29th day of June, 2017

Spirit Commercial Auto Risk Retention Group, Inc.

By: /s/ Matthew Simon
President

Attest:

By: /s/ Daniel George
Treasurer

CERTIFICATION

The undersigned deposes and says that he has duly executed the attached annual Registration Statement for the year ending December 31, 2017, for and on behalf of Spirit Commercial Auto Risk Retention Group, Inc.; that he is the President of such Company and that he is authorized to execute and file such instrument. Deponent further says that he is familiar with such instrument and the contents thereof, and that the facts therein set forth are true to the best of his knowledge information and belief.

By: /s/ Matthew Simon

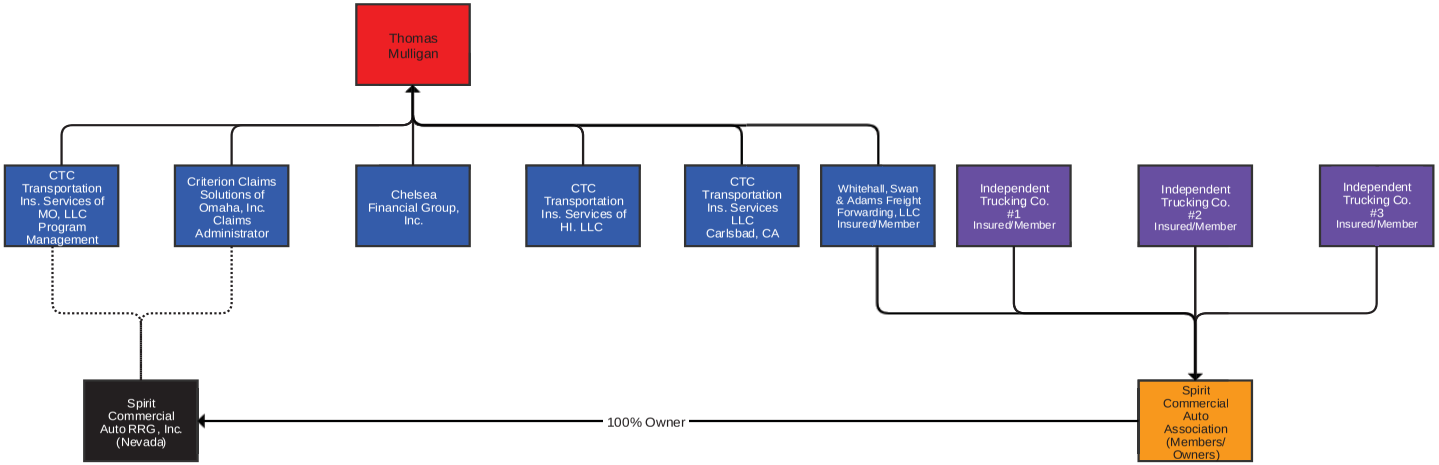
Matthew Simon
President

EXHIBIT A
ORGANIZATIONAL CHARTS

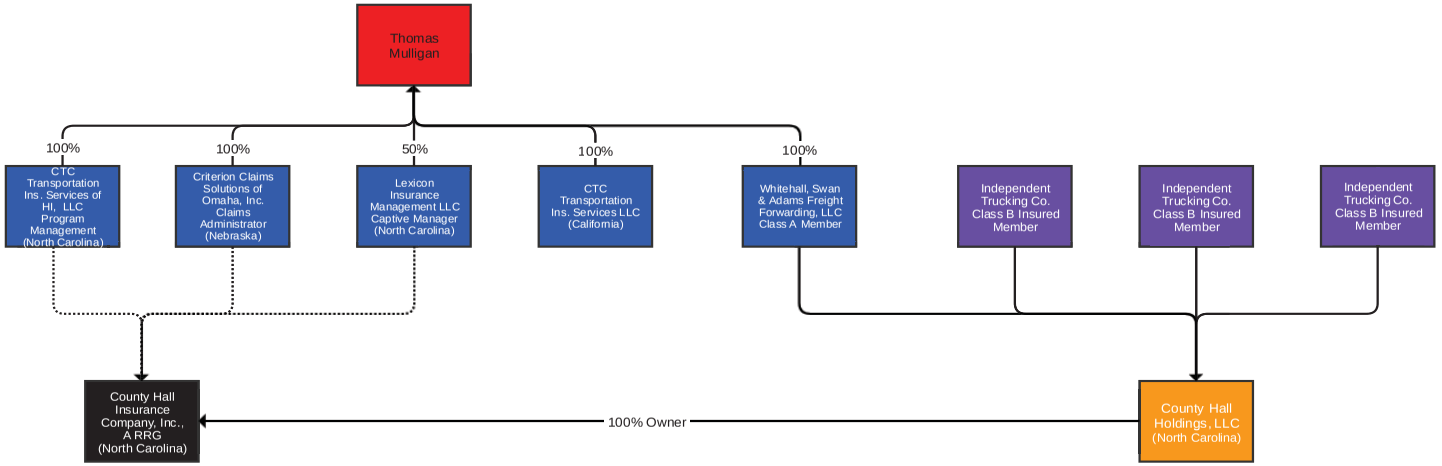
EXHIBIT B
NAIC BIOGRAPHICAL AFFIDAVIT OF MATTHEW SIMON

EXHIBIT C
SPIRIT COMMERCIAL AUTO ASSOCIATION RISK RETENTION GROUP, INC. 2017
FINANCIAL STATEMENT

Spirit Commercial Auto Risk Retention Group, Inc.
Holding Company Group



County Hall Insurance Company, Inc.,
A Risk Retention Group
Holding Company Group



APP0718

OPP

MARK E. FERRARIO, Bar No. 1625
KARA B. HENDRICKS, Bar No. 7743
KYLE A. EWING, Bar No. 14051
GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135
Telephone: (702) 792-3773
Facsimile: (702) 792-9002
Email: ferrariom@gtlaw.com
hendricksk@gtlaw.com
ewingk@gtlaw.com

Counsel for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC., Plaintiff, v. THOMAS MULLIGAN, et al. Defendants.	Case No.: A-20-809963-B Dept. No.: XIII **PLAINTIFF'S OPPOSITION TO CTC DEFENDANTS' MOTION TO COMPEL ARBITRATION** **Hearing: June 18, 2020, 9:00 a.m.**

COMES NOW, Plaintiff Barbara D. Richardson, in her capacity as the Statutory Receiver for Spirit Commercial Auto Risk Retention Group, Inc., (hereafter "Receiver") by and through her attorneys of record, the law firm of Greenberg Traurig, LLP, and hereby opposes Defendant CTC Transportation Insurance Service of Missouri, LLC ("CTC Missouri"); Defendant CTC Transportation Insurance, LLC ("CTC California"); and Defendant CTC Transportation Insurance Service of Hawaii, LLC ("CTC Hawaii"); (Collectively "CTC" or "CTC Defendants") Motion to Compel Arbitration ("Opposition").

This Opposition is based upon the pleadings and papers on file herein, the following Memorandum of Points & Authorities, and any and all oral arguments allowed by this Court at the time of hearing.

Dated this 4th day of June, 2020.

By: */s/ Kara B. Hendricks*

MARK E. FERRARIO, Bar No. 1625
KARA B. HENDRICKS, Bar No. 7743
KYLE A. EWING, Bar No. 14051
GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

The allegations in the Complaint arise from a vast fraudulent enterprise and CTC, like a hub of a wheel, was at the center of the scheme that caused the insolvency of Spirit Commercial Auto Risk Retention Group, Inc. ("Spirit" or SCARRG"). This is not "a simple breach of contract claim" as CTC contends in its motion. Indeed, there are twelve separate and distinct claims asserted against the CTC Defendants many of which arise from the "link" between CTC and Spirit that began when CTC integrated itself in Spirit's initial formation and organization. CTC was so involved, the Nevada Commissioner of Insurance took notice and required compliance with the provisions of NRS 692C after determining that CTC, with Spirit and other entities comprised an Insurance Holding Company System and thus had statutory obligations under Nevada law separate and apart for any contractual administration agreement.

Although the CTC Defendants would have the Court believe all claims in the complaint arise solely from a program administration agreements whereby CTC was to provide marketing, underwriting and policy insurance services to Spirit, the claims asserted go far beyond any such agreements. Indeed, even after the expiration of the program administrator agreement between CTC California and Spirit, CTC California was the entity that recorded Spirit's business.

Moreover, as detailed below, the liquidation of Spirit and appointment of a Receiver provides this Court with jurisdiction to hear the claims asserted. The Receiver's investigation of Spirit's finances revealed the sprawling fraud conspiracy detailed in the Complaint. As a key player in the fraud, CTC cannot now claim the benefit of an arbitration agreement procured from Spirit through the criminal enterprise spearheaded by Defendant Thomas Mulligan. Both Spirit and all three CTC Defendants were under his control and concealed the fraud from the Nevada Division of Insurance ("Division").

Relatedly, the Receiver is not bound by an arbitration provision entered into by Spirit before the Receiver was appointed. Although the Receiver may be said to "step into the shoes" of Spirit in some regards, the Receiver is also in the unique position of acting on behalf of both Spirit and its creditors, including its insured claimants. Enforcement of CTC's arbitration provision would frustrate the purpose

of the receivership. Accordingly, any provision favoring arbitration generally is preempted by the more specific statutory mandate of a liquidating receiver under NRS Chapter 692B. Despite CTC's misplaced reliance on a prior unpublished, distinguishable, and inconclusive Nevada Supreme Court order in *Comm'r of Ins. v. Eighth Jud.*, there is no binding Nevada authority on the subject.

As a liquidating receiver, Plaintiff functions more like a bankruptcy trustee than a typical receiver charged with maximizing equity value – marshalling all available assets in a single forum under the jurisdiction of one court for the purpose of maximizing distributions to creditors. Courts have long held that trustees for bankruptcy debtors may reject executory contracts like arbitration provisions. Persuasive and thoughtful authority from other jurisdictions cautions that receivers charged with protecting a company's creditors should be treated like a trustee and afforded the same leeway to litigate claims in a single forum when the receiver determines this would conserve the assets of the estate for creditors. Arbitration provisions that might otherwise frustrate the receiver's purpose should be disfavored in this context. Allowing CTC to enforce the arbitration provision it procured through its role in a criminally fraudulent enterprise would serve only to multiply proceedings, inhibit the truth-seeking goals of litigation, and frustrate the discovery process.

II. RELEVANT FACTS

Plaintiff is the Commissioner of the Nevada Division of Insurance and brought the subject action in her capacity as Spirit's court-appointed Permanent Receiver ("Receiver") on behalf of Spirit, Spirit's members, insured enrollees, and creditors.

Spirit was a Nevada corporation with its principal place of business in Las Vegas, Nevada and was an association captive insurance company organized under the laws of Nevada and the Liability Risk Retention Act of 1986. Spirit received its Certificate of Authority on February 24, 2012 and operated under the authority of NRS Chapter 694C. Spirit transacted commercial auto liability insurance business and specialized in serving commercial trucking companies . After finally being able to uncover Spirit's true financial condition and hopeless insolvency where it was unable to cure its financial deficiencies, Spirit was placed into receivership.

A. Receivership Order

The receivership order was entered in the Eighth Judicial District Court of Clark County, Nevada, Case No. A-19-787325 on February 27, 2019 (the "Receivership Order") and subsequently, on November 6, 2019, Spirit was placed into liquidation. The Receivership Order directs the Receiver to seek recovery from those that harmed Spirit in this court and provides in relevant part:

> (2) SCARRG is in a hazardous financial condition in that, based on its present or reasonably anticipated financial condition, it is unlikely to be able to meet obligations to policyholders with respect to known claims and reasonably anticipated claims, or to pay other obligations in the normal course of business and, moreover, is insolvent for purposes of Sections 696B.110(1), 696B.220(2), and 696B.210(1).
>
> …
>
> (5) **The Receiver is hereby directed to conserve and preserve the affairs of SCARRG and is vested, in addition to the powers set forth herein, with all the powers and authority expressed or implied under the provisions of chapter 696B of the Nevada Revised Statute ("NRS"), and any other applicable law.** The Receiver is hereby authorized to rehabilitate or liquidate SCARRG's business and affairs as and when deemed appropriate under the circumstances and for that purpose may do all acts necessary or appropriate for the conservation, rehabilitation, or liquidation of SCARRG. Whenever this Order refers to the Receiver, it will equally apply to the SDR.
>
> (6) Pursuant to NRS 696B.290, the Receiver is hereby vested with exclusive title both legal and equitable to all of SCARRG's property wherever located, to administer under the general supervisions of the Court, and whether in the possession of SCARRG or its officers, directors, employees, consultants, attorneys, agents, subsidiaries, affiliated corporations, or those acting in concert with any of these persons, and any other persons (referred to hereafter as the "Property")…, including
>
> …
>
> e. Pursuant to NRS 696B.290 and 696B.270, the Receiver is hereby directed to take immediate and exclusive possession and control of the Property except as she may deem in the best interest of the receivership estate. **In addition to vesting title to all of the Property in the Receiver or her successors, the said Property is hereby placed in the *custodia legis* of this Court and the Receiver, and the Court hereby assumes and exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting the Property to the exclusion of any other court or tribunal, such exercise of sole and exclusive jurisdiction being hereby found to be essential to the safety of the public and of the claimants against SCARRG**.
>
> …
>
> **(13) The officers, directors, trustees, partners, affiliates, brokers, agents, creditors, insureds, employees, members, and enrollees of SCARRG, and all other persons or**

entities of any nature including, but not limited to, claimants, plaintiffs, petitioners, and any governmental agencies who have claims of any nature against SCARRG, including cross-claims, counterclaims and third party claims, **are hereby permanently enjoined and restrained from doing or attempting to do any of the following, except in accordance with the express instructions of the Receiver or by Order of this Court:**

. . .

e. **Interfering in any way with these proceedings or with the Receiver**, any successor in office, or any person appointed pursuant to Paragraph (2) hereinabove in their acquisition of possession of, the exercise of dominion or control over, or their title to the Property, or in the discharge of their duties as Receiver thereof; or

f. **Commencing, maintaining or further prosecuting any direct or indirect actions, arbitrations, or other proceedings against any insurer of SCARRG for proceeds of any policy issued to SCARRG**.

…

(24) The Court shall retain jurisdiction for all purposes necessary to effectuate and enforce this Order.

(Receivership Order, attached hereto as **Exhibit 1,** emphasis added.)

Subsequently, the Receiver instituted the instant action on behalf of Spirit and the thousands of people and entities who were injured by Spirit's liquidation. Pursuant to the Receivership Order, the Receiver initiated this action in the Eighth Judicial District Court, the situs of the receivership proceedings and the only courts with jurisdiction over the property of Spirit.

B. Claims Asserted Against CTC Defendants Go Beyond Program Administrator Agreement

The subject Motion is brought by three different CTC entities:

1) CTC Transportation Insurance Services, LLC ("CTC California"), which served as Program Administrator for Spirit from 2011 to 2016, underwriting and issuing Spirit's insurance policies;

2) CTC Transportation Insurance Services of Missouri, LLC ("CTC Missouri"), which took over from CTC California as Program Administrator for Spirit, beginning on or about July 2016; and

3) CTC Transportation Insurance Services, LLC of Hawaii ("CTC Hawaii") which did not enter into a contract with Spirit but is affiliated with both CTC California and CTC Missouri.

CTC California is also the parent company of CTC Missouri and CTC Hawaii, as well as Defendant Criterion, Chelsea Financial Group, Inc. and non-party County Hall Insurance Company ("County Hall"). Even after the program administrator agreement with CTC California ended, Spirit's business was recorded on CTC California's QuickBooks General Ledger.[1] Additionally, CTC California was the entity used by CTC management to record details of transactions between all of the CTC Defendants.[2] Moreover, beginning in at least 2015 the CTC Defendants were subject to oversight by the Nevada Division of Insurance ("Division") pursuant to NRS 692C as they were all part of an insurance holding company required to report to the Division.

As an insurance holding company and the program administrator for Spirit, the CTC Defendants were responsible for virtually all of the Spirit's operations as Spirit itself had virtually no employees. Acting as Spirit's agent and fiduciary, the CTC Defendants were obligated to hold in trust all funds received as a fiduciary of Spirit and failed to do so. Instead, the CTC Defendants disregarded their obligations to Spirit and acted on their own accord to pillage and blunder away Spirit's assets and transfer Spirit's money to affiliates and other entities at the direction of Mulligan and thereby created unlawful payment preferences only this Court (not an arbitrator) has the authority to unwind. The claims asserted against the CTC Defendants are for: Breach of Contract (Claim 1); Breach of Fiduciary Duty (Claim 5); Breach of implied covenant of good faith and fair dealing - tortious (Claim 7); Breach of implied covenant of good faith and fair dealing - contract (Claim 8); Nevada Rico Claims,[3] Unjust Enrichment (Claim 11); Fraud (Claim 12); Civil Conspiracy (Claim 13); Avoidance transfer pursuant to NRS 112 (Claim 15); Voidable Transfers pursuant to NRS 696B (Claim 16); Recovery of Distributions and payments under NRS 696B (Claim 17); and Recovery of Distributions and payments under NRS 692C.402 (Claim 18).

As set forth in the Complaint, CTC California served as program administrator for Spirit from 2011 to 2016. Thereafter, CTC Missouri took over from CTC California as Spirit's program administrator beginning on or about July 2016. A change in the program administrator was requested by

[1] *See*, FTI Consulting Report dated December 20, 2019, page 4, attached hereto as **Exhibit 2**.
[2] Id.
[3] Additional parties to the RICO claim include Defendants: Mulligan, George, Simon, Guffey, McCare, Kapelinkovs, Lexicon and Criterion.

the Division when it was discovered that Spirit's Board had 66.7% of its directors connected unambiguously to CTC and Spirit seemed to have no separate existence apart from CTC. Indeed, the Division expressed concern that if CTC were to cease operations, there was no contingency plan for Spirit to continue operations.[4] Due to such issues, the Division disallowed the disclaimer of affiliation CTC attempted to file and required the entities to register as an insurance holding company in accordance with NRS 692C. As part of the clean-up process, the Division approved the transition of the program administrator functions to CTC Missouri.[5] In June of 2016, annual registration documents for the insurance holding company for year-end 2015, were filed with the Division identifying CTC Missouri as the "ultimate controlling person".[6] The document also explained that CTC Missouri and CTC California were "integrally involved" with Spirit since its inception including Spirit's initial formation and organization.[7] This was affirmed in June 2017, when annual statements for year-end 2016 were filed with the Division.[8] The amended annual registration statement filed with the Division on August 31, 2017 included a detailed organizational chart with Mulligan as the 100% owner of all three CTC Defendants as well as Chelsea and identifies CTC Missouri as the controlling entity of Spirit.[9] The following year, the Insurance Holding Company System Summary Statement (for year end 2017) provided an organizational chart indicating that the Spirit Insurance Holding Company Group included Thomas Mulligan, CTC Missouri, Criterion Claims Solutions of Omaha Inc., Chelsea Financial Group, Inc., CTC Hawaii, CTC California, Whitehall Swan & Adams Freight Forwarding and three independent trucking companies as the holding company[10] ("Insurance Holding Group").

[4] *See*, July 11, 2015 Disallowance of CTC Disclaimer attached hereto as **Exhibit 3.**
[5] *See*, June 29, 2016 approval letter from Division, attached as Exhibit B to the Motion.
[6] *See*, June 29, 2016 Insurance Holding Company System Annual Registration Statement for year ending 2015, Form B, attached hereto as **Exhibit 4.**
[7] Id.
[8] *See* June 29, 2017 Insurance Holding Company System Annual Registration Statement for year ending 2016, Form B, attached hereto as **Exhibit 5**.
[9] *See* August 31, 2017 Change No. 1 to Insurance Holding Company System Annual Registration Statement for year ending 2017, (pages 9-10), attached hereto as **Exhibit 6**.
[10] *See* June 29, 2018 Insurance Holding Company System Annual Registration Statement for year ending 2017, (page 16), attached hereto as **Exhibit 7**.

In addition to each of the CTC Defendants being a part of the Insurance Holding Group and CTC Missouri acting as the program manager and ultimate controlling entity of Spirit, Plaintiff acknowledges that Spirit entered into program administrator agreements at different times with both CTC California and CTC Missouri. Both agreements contain an arbitration provision that purports to require arbitration of "any controversy or claim of either of the parties arising out of or relating to this Agreement, or the breach of any term, condition, or obligation..." *See*, CTC California Agreement, Section 18 attached as Exhibit A to the Motion and CTC Missouri Agreement, Section 17 attached as Exhibit C to the Motion.

The claims asserted in the Complaint go far beyond the arbitration provisions and the role of the CTC Defendants and their fraudulent and criminal dealings are also detailed in the independent audit report prepared by FTI.[11] At best, only a sliver of the claims asserted against the CTC Defendants could potentially be compelled to arbitration. Notably, Spirit did not contract with CTC Hawaii to be its program administrator at <u>any</u> time, and thus there is no arbitration provision even potentially applicable to the claims asserted against CTC Hawaii. Further, Spirit's program administration agreement with CTC California ended in July 2016. However, CTC California continued to meddle with Spirit's operations and affairs and was even the entity that recorded Spirit's business after the program administration agreement terminated. Similarly, claims arising from CTC Missouri's involvement in the initial formation and organization of Spirit cannot be compelled to arbitration as the Missouri entity did not have a program administration agreement with Spirit until July 2016.

A cursory review of the Complaint makes it clear that this is not a standalone commercial arbitration matter in which all claims asserted against the CTC Defendants can be compelled into arbitration. As detailed below, due to CTC's own actions, Nevada's Liquidation Act, and this Court's inherent authority to oversee claims asserted by Spirit for the benefit of Spirit's members, enrolled insureds, and creditors, exclusive jurisdiction is proper in the Eighth Judicial District Court.

[11] *See*, Ex. 2.

III. LEGAL ARGUMENT

There is no legal basis to compel arbitration on all twelve claims asserted against the CTC Defendants. CTC is overreaching in an effort to hide the scope of its actions from the Court. Review of the contract and application of federal and state law governing arbitration provisions does not get the result CTC is asking for. The mere existence of an arbitration provision does not end the Court's inquiry. Instead, the Court must determine 1) if the arbitration provision is binding on the parties; and 2) if deemed binding, which of the claims asserted are subject to the arbitration provision and which are not.

A. The Court should not Enforce an Arbitration Provision that is the Product of a Criminal Enterprise

Plaintiff, as statutory receiver for Spirit, is not bound by the arbitration agreement between Spirit and CTC when CTC and its contractual relationship with Spirit were merely instruments in a criminal enterprise. "Simply put, arbitration agreements may be rejected when they are instruments of a criminal enterprise …." *Janvey v. Alguire*, 847 F.3d 231, 246 (5th Cir. 2017) (concurring opinion).[12] The court acknowledged a broad policy favoring arbitration but cautioned that "there are limits" and "efforts to enforce contracts in service of criminal enterprise ought *receive a cold reception in the courts*." *Id.* at 246, 251 (emphasis added). *Janvey* involved the claims of an SEC receiver appointed over the perpetrator of a Ponzi scheme, Allen Stanford, and his corporations. *Id.* at 248. The federal receiver – charged with conserving Stanford assets for victims of the fraud, just like the Plaintiff here – brought claims against former Stanford employees. The employee-defendants sought to enforce arbitration provisions in contracts with various receivership entities. *Id.* The court rejected their arguments:

> 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. The arbitration agreements were central to the Stanford Ponzi scheme with its inherent need for privacy.

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

Id. at 250 (5th Cir. 2017).

As in *Janvey*, Plaintiff alleges that the CTC Agreement (which binds only some of the CTC Defendants and certain times) was an instrument of Defendant Mulligan's fraud. Compl. ¶ 131. As in *Janvey*, Plaintiff alleges here that Mulligan "exercised complete control over" Spirit. Compl. ¶¶ 55–63, 131. Here, the Receiver also alleges that Mulligan exercised control over CTC and used Spirit's relationship with CTC to deceive creditors and customers and conceal Spirit's true financial condition from the Nevada Division of Insurance. *Id.* Maintenance of Mulligan's Enterprise, like that of Stanford, had an inherent need for privacy—it could not continue if the Division became aware of true financial condition of Spirit. *See id.*[13] It is not surprising then that Mulligan, who controlled both Spirit and CTC at the time of the program administrator agreements caused Spirit to agree to arbitration provisions in the Agreement, just like Stanford. If Mulligan lost control of Spirit, as he eventually did, the cloak of confidentiality provided by arbitration protected the extent of his enterprise from the daylight of litigation by "shielding the fraudulent activity from potentially revealing discovery while giving the scheme an air of legitimacy." *Janvey*, 847 F.3d at 250–51. Still today, CTC attempts to hide the true extent of Mulligan and the other Individual Defendants' involvement in the fraud perpetuated by Spirit and CTC by compelling arbitration here.

Janvey's reasoning is persuasive. The court notes that "the receivership entities [like Spirit, here,] are not responsible for actions directed by … Stanford to perpetuate the fraudulent Ponzi scheme …."[14] *Id.* at 250 n. 40 (citing *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995) ("The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more [the scheme's perpetrator's] evil zombies.") Here, the Receiver is charged with recovering Spirit's assets from, among others, the participants in Mulligan's fraudulent scheme. Arbitration provisions Mulligan and the other Individual Defendants caused to ensure his fraudulent scheme remained concealed if he lost control of

[13] Plaintiff is unaware whether Mulligan continues to use CTC as an instrument for defrauding other insurance companies like Spirit, from which Mulligan will continue to benefit from the secrecy of arbitration of the Commissioner's disputes.

[14] These actions included Stanford causing the entities to sign arbitration provisions, just as Mulligan caused Spirit to execute the arbitration provision with other entities he controlled.

the Enterprise should not be enforceable against the Receiver's efforts to recover assets for the benefit of the scheme's victims—namely, Spirit's insureds.

B. The FAA and Nevada Law Do Not Require that all CTC Claims be Arbitrated

The CTC Defendants' attempt to rely on NRS 38.221 and the Federal Arbitration Act ("FAA") to compel all of the claims asserted against them to arbitration falls flat because the general policy in favor of arbitration does not apply here. First, the FAA and Nevada's statutes favoring arbitration are inapplicable to this matter because the Nevada's Liquidation Act reverse-preempts the FAA. Second, because there are specific Nevada statutes at issue, the general premise that arbitration is favored is not applicable. Additionally, because the CTC Defendants are registered as part of a Nevada Insurance Holding Company jurisdiction is proper. Further, the Claims asserted against CTC are not solely for contract damages and are brought on behalf Spirit's members, insured enrollees, and creditors and therefore cannot be compelled into arbitration. Alternatively, even if certain claims against CTC Missouri and CTC California could be compelled to arbitration, they would be limited by the time period each contract was in place and claims against CTC Hawaii (for which there was no arbitration agreement) cannot be compelled to arbitration.

1. The General Policy in Favor of Arbitration Does Not Apply Where Nevada's Insurers Liquidation Law Reverse-Preempts the FAA.

CTC contends that the general policy in favor of arbitration under the FAA and Nevada statutes should apply to compel all claims against the CTC Defendants to arbitration. However, the FAA and NRS 38.221 is reverse-preempted by the McCarran-Ferguson Act, because they conflict with the more specific Nevada statute governing insurance receivership proceedings. As such, arbitration is not required. Specifically, the Court should refuse to compel arbitration under the FAA as the controlling Liquidation Act found in NRS 696B[15] reverse-preempts the FAA under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ("McCarran-Ferguson").

[15] Nevada's Liquidation Act may be cited as the Uniform Insurers Liquidation Act. NRS 696B.280. The Act is set forth at NRS 696B.030 to 696B.180 and 696B 290 to 696B.340. *Id.*

In the McCarran-Ferguson Act, Congress declared that the continued regulation by the states of the business of insurance is in the public interest. *See* 15 U.S.C. § 1011. Congress concluded that "[t]he business of insurance, and ***every person engaged therein***, shall be subject to the laws of the . . . States which relate to the regulation . . . of such business." *Id*. at §1012(a) (emphasis added). No federal law "shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the Business of insurance. . . unless such Act specifically relates to the business of insurance." *Id*. at §1012(b). Thus, McCarran-Ferguson exempts state laws regulating the business of insurance from preemption by federal statutes that do not specifically relate to the business of insurance, such as the FAA. 15 U.S.C. § 1012(b). The Supreme Court has created a three-part test to determine whether reverse-preemption of federal law through McCarran-Ferguson occurs. Specifically, a court is to examine whether: 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, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999). Here, each of these criteria is met, especially because of CTC's role in forming, organizing and managing Spirit. Additionally, CTC was also an integral part of the regulated Insurance Holding Group.

First, there can be no real dispute that the provisions of NRS 696B that make up the Nevada Liquidation Act were enacted for the purpose of regulating the business of insurance. The Liquidation Act provides that "upon taking possession of the assets of an insurer, the domiciliary receiver shall immediately proceed *to conduct the business of the insurer* or to take such steps as are authorized by this chapter for the purpose of rehabilitating, liquidating, or conserving the affairs or assets of the insurer. NRS 696B.290(3); *see Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010) (holding that this prong was "clearly satisfied" and noting that "[w]e can hardly overstate the degree to which the regulation of insurance permeates this controversy. The very claims which [the defendant] would take to arbitration arise directly out of Kentucky's intense interest in the regulation of worker's compensation insurance... The [liquidation act at issue] is itself the ultimate measure of the state's regulation of the insurance

business: the take-over of a failing insurance company."); *see also* 696B.420 (providing payment priority for receivership assets to "all claims under [insurance] policies"). Here, the claims CTC seeks to arbitrate relate to the administration of Spirit's insurance business including the underwriting and issuance of insurance which is regulated by the Division. Additionally, because CTC was integrally involved in the formation, organization, administration, and control of Spirit, the claims in the Complaint that demonstrate the structure was established to perpetrate fraud and hide or abscond with funds that were meant to pay insurance claims bring the claims against CTC within the gambit of NRS 696B. Moreover, CTC was required to register as an *insurance* holding company due to its relationship with Spirit. The Receiver's claims clearly relate to duties under Nevada statutes enacted for the purpose of regulating the business of insurance. The Receivership Order is evidence of this.

Second, courts have determined that the FAA is not a federal statute that specifically relates to the business of insurance. *See, e.g. Munich Am Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998) (there is no question that the FAA does not relate specifically to the business of insurance."); *Stephens v. Am. Int'l Ins. Co*., 66 F.3d 41, 44 (2d Cir. 1995) ("No one disputes the fact that the FAA does not specifically relate to insurance.") Accordingly, the second prong to whether reverse-preemption of federal law through McCarran-Ferguson occurs is satisfied here.

Third, the application of the FAA would "invalidate, impair, or supersede" Nevada's Liquidation Act. Nevada's Liquidation Act incorporates the Uniform Insurers Liquidation Act ("UILA"). *See* NRS 696B.280. The general purpose of the UILA is to "centraliz[e] insurance rehabilitation and liquidation proceedings in one state's court so as to protect all creditors equally." *Frontier Ins. Serv. V. State*, 109 Nev. 231,236, 849 P.2d 328, 331 (1992), *quoting Dardar v. Ins. Guaranty Ass'n*, 556 So. 2d 272, 274 (La. Ct. App. 1990). Similarly, the UILA's overall purpose is to protect the interests of policyholders, creditors and the public. *See, e.g*. NRS 696B.210, 696B.530, 696B540; *see also* Joint Meeting of the Assembly and Senate Standing Committees on Commerce, March 25, 1977 (summarizing statements by Richard Rottman, Insurance Commissioner, and Dr. Tom White, Director of Commerce Department) (Nevada's insurance law was "designed to help the Insurance Division regulate the industry on behalf

and primarily in the interests of the public of the State of Nevada"). Applying the law of the domiciliary state, as well as centralized proceedings in one state's court, advances these purposes. *See Frontier Ins. Serv*., 109 Nev. at 236, 849 P.2d at 3341; *In re Freestone Ins. Co.*, 143 A.3d 1234, 1260-61 (Del. Ch. 2016); *see also Benjamin v. Pipoly*, 2003-Ohio-5666, ¶45, 155 Ohio App. 3d 171, 184, 800 N.E.2d 50, 60 ([C]ompelling arbitration against the will of the liquidator will always interfere with the liquidator's powers and will always adversely affect the insurer's assets.").

Here, Nevada's Liquidation Act recognizes the need for consolidation in one court via various statutory provisions. *See, e.g*., NRS 696B.190(1) (District court has original jurisdiction over delinquency proceedings under NRS 696B.010 to 696B.565, inclusive, and any court with jurisdiction may make all necessary or proper orders to carry out the purposes of those sections); NRS 696B.190(4) ("No court has jurisdiction to entertain, hear or determine any petition or complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer…or other relief …relating to such proceedings, other than in accordance with NRS 696B.010 to 696B.565, inclusive."); NRS 696B.270 ("The court may at any time during a proceeding...issue such other injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions…"). Likewise, the Court, acting within its statutory authority, ordered that it would exercise "sole and exclusive jurisdiction" over all Property (including lawsuits), "to the exclusion of any other court or tribunal." This is consistent with the Receivership Order which not only vested title of all Spirit's property with the receiver, but exclusive jurisdiction of all claims and rights were assumed by the Eighth Judicial Court ***to the exclusion of any other Court or tribunal***. Specifically, Section 6(f) of the Receivership Oder Provides:

> Pursuant to NRS 696B.290 and 696B.270, the Receiver is hereby directed to take immediate and exclusive possession and control of the Property except as she may deem in the best interest of the receivership estate. **In addition to vesting title to all of the Property in the Receiver or her successors, the said Property is hereby placed in the *custodia legis* of this Court and the Receiver, and the Court hereby assumes and exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting the**

> **Property to the exclusion of any other court or tribunal, such exercise of sole and exclusive jurisdiction being hereby found to be essential to the safety of the public and of the claimants against SCARRG**.

Ex. 1, Receivership Order (emphasis added).

In conducting a similar analysis, the Kentucky Supreme Court held that "the third part of the *Forsyth* test is satisfied because the Federal Arbitration Act's preference for arbitration conflicts with, and impairs, the [liquidation act's] grant of broad and exclusive jurisdiction to the Franklin Circuit Court… the federal policy favoring arbitration is subordinated to the state's superior interest in having matters relating to the rehabilitation of an insurance company adjudicated in the Franklin Circuit Court." *See Clark*, 323 S.W.3d 682, 692. Likewise, Nevada's Liquidation Act relates directly to the business of insurance and thus reverse-preempts the FAA. As the Court in *Taylor v. Ernst & Young* held when interpreting that states statutes which were also based on the Uniform Insurers Liquidation Act, "when allowed, forum selection ***belongs to the liquidator*** and the liquidator ***alone***." 958 N.E.2d at 1209 (emphasis added).

Finally, CTC's reliance on *State ex rel. Comm'r of Ins. v. Eighth Judicial Dist. Court of Nev.*, Nev. Unpub. LEXIS 1366, 454 P.3d 1260 (2019), for the proposition that arbitration provisions must be enforced against Plaintiff is misplaced. First, the unpublished decision is not binding on the Court and may be cited only "for its persuasive value, *if any* …." NRAP 36(c)(3) (emphasis added). And the decision has no persuasive value because it did not announce any holdings of law. *See Comm'r of Ins. v. Eighth Judicial*, Nev. Unpub. LEXIS 1366 *1–2. The Supreme Court was considering a petition for extraordinary writ relief, which *it declined* to entertain. The court merely observed that the district court did not commit "clear error" by relying on persuasive authority from other jurisdictions. *Id.* at *3–4. Importantly, it did not analyze the issue or adopt the reasoning of those courts. Further, the underlying court did not analyze an arbitration agreement like the one at issue here where the contractual relationship with Spirit was merely an instrument in a criminal enterprise. As set forth above and below, more persuasive authority dictates the opposite result.

2. General State Law Favoring Arbitration Does Not Account for Nevada Insurance Liquidation law.

In addition to seeking to compel arbitration under the FAA, the CTC Defendants argue that arbitration is proper pursuant to the District of Columbia's arbitration act and Nevada law. However, the enforcement of the arbitration is procedural and is thus governed by Nevada law. *Tipton v. Heeren*, 109 Nev. 920, 922 n.3 (1993) (holding Nevada law governs the procedural inquiry.)[16]

The Nevada law cited by CTC stands for the general proposition that disputes are presumptively arbitrable. However, 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).

Although Nevada has a general policy in favor of arbitration, the Liquidation Act creates a specific and detailed statutory scheme for winding down insolvent insurance companies for the benefit of Spirit's members, and those that were insured and/or injured by an insured of Spirit, and the public at large. *See* NRS 696B. Under this framework, the district court has original jurisdiction over delinquency proceedings (including liquidation) and may make all necessary or proper orders to carry out the purposes of the Liquidation Act. *See* NRS 696B.190. Likewise, the statute provides that "[n]o court has

[16] Furthermore, it is unclear why either party to the program administrator agreements would have agreed to the application of law from the District of Columbia given that Spirit was issued a Certificate of Insurance in Nevada, CTC is a part of a Nevada Insurance Holding Company, and neither party had its primary place of business in the District of Columbia. To the extent the Court is interested in how the District of Columbia would look at the issue, the standard for an evaluation of an arbitration provision under the laws of District of Columbia is that of summary judgment. *See Mobile Now, Inc., v. Sprint Corp.*, 393 F. Supp. 3d 56 (2019). Here there are issues of fact regarding if Spirit fully understood the provisions of the contract including the choice of law provision and arbitration provision, given CTC's integral role in the set-up of Spirit and the unity of control between the two entities observed by the Division especially in light of the alleged fraud. Accordingly, at the very least, discovery would be necessitated to flesh these issues out. Notwithstanding, nothing in the cases cited by CTC suggest that the arbitration provisions in the contracts at issue take precedent over the liquidation statutes specifically governing insurance and, in this case, the liquidation of Spirit and recovery efforts set forth in the Complaint. Moreover, the case cited by CTC makes it clear that the Court cannot expand the scope of an arbitration beyond what is specified in the agreement. *See Giron v. Dodds*, 35 A.3d 433, 437 (D.C. 2019).

jurisdiction to entertain, hear or determine any petition or complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer…or other relief preliminary, incidental or relating to such proceedings, other than in accordance with NRS 696B.010 to 696B.565, inclusive. *Id*. The Court may issue injunctions or orders as may be deemed necessary to prevent interference with the Receiver or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof. *See* NRS 696B.270.

3. This Court Has Jurisdiction of the Claims asserted against Spirit's Manager, CTC.

In addition to the foregoing, in documents submitted to the Division, CTC California and CTC Missouri made it clear that in addition to serving at times as Spirit's program administrator, each entity was "integrally involved" in the Spirit's initial formation and organization."[17] Further, CTC Missouri was reported as "ultimate controlling entity" and "program manager" of Spirit.[18]

Due to CTC's responsibility to Spirit, claims are appropriately brought in this court pursuant to NRS 696B.200 which provides in pertinent part:

> ***NRS 696B.200 Jurisdiction over related persons and transactions; service of process.***
>
> *1. A court of this state in which an order of rehabilitation or liquidation has been entered in delinquency proceedings against a domestic insurer or alien insurer domiciled in this state, has jurisdiction also over persons, served as provided in subsection 2, in an action brought by the insurer's receiver on or arising out of such obligation or relationship, as follows:*
>
> *(a) Persons obligated to the insurer as a result of agency or brokerage or transactions between such persons and the insurer;*
>
> *(b) Reinsurers of the insurer and their representatives; and*
>
> *(c)* ***Past or present officers, managers, trustees, directors, organizers and promoters of the insurer, and other persons in positions of similar responsibility with the insurer.***

(Emphasis added.)

[17] June 29, 2017 Insurance Holding Company System Annual Registration Statement for year ending 2016. *See* Exhibit 5.
[18] Id.

CTC's role as program administrator – and effectively the "back office" of Spirit – was clearly one of a manager, organizer and promoter of Spirit and thus the claims asserted in the Complaint are properly before the Court pursuant to 696B.200(1)(c) and arbitration is not warranted.

4. The Claims asserted against CTC are not solely for contract damages and are brought on behalf Spirit's members, insured enrollees, and creditors.

The claims asserted in the complaint do not arise solely out of a contract nor are they brought simply on behalf of Spirit. Indeed, the Complaint asserts claims on behalf of Spirit's members, insured enrollees, and creditors. As set forth in the Complaint, Spirit is seeking the return of company assets and clawing back preferential distributions that were made to a number of individuals and parties associated with Mulligan for the benefit of other creditors of the estate. These claims are clearly articulated in causes of action 15-18 of the complaint in which Plaintiff is seeking to void the transfers. Such actions are expressly authorized under the Nevada liquidation statutes and directly affects creditor's rights.

A liquidator or receiver of a defunct insurance company does not simply "stand in the shoes" of an insolvent insurer, because he or she also represents the insureds, policyholders, and creditors of that entity. *See Taylor v. Ernst & Young*, 130 Ohio St. 3d 411, 419 (Ohio 2011) ("[t]he 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…"); *see generally Cordial v. Ernst & Young*, 199 W. Va. 119, 128 (W.Va. 1996) (insurance commissioner as receiver for an insurer "acts as the representative of interested parties, such as the defunct insurer, its policyholders, creditors, shareholders, and other affected members of the public," not simply as the defunct insurer). In *Arthur Andersen v. Superior Court*, a California court rejected the defendant's argument that an insurance liquidator acts as a typical receiver, holding:

> No authority is offered for the proposition that the Insurance Commissioner acts merely as an ordinary receiver. Ordinary receivers do not become involved until control of a business is taken away from its officers or owners due to insolvency, deadlock or other causes. Ordinary receivers do not monitor the solvency of an entity on behalf of persons, such as policyholders, who do business with the entity. The Insurance Code, by contrast, assigns such pre-conservatorship duties to the Insurance Commissioner. (See, e.g., Ins. Code, § 730, subd. (b).) In carrying out these duties, the Insurance Commissioner acts not in the interests of the equity owners of the insurance company, but rather in the interests of policyholders. Thus the Insurance Commissioner in this case is not seeking merely to

> prosecute claims of an entity under receivership. To the contrary, the essence of the Insurance Commissioner's claim is that AA damaged the policyholders. Thus even though a receivership may bear some points of analogy to a statutory insurance company liquidation (primarily in that each can involve the marshalling of the assets of an estate), an ordinary receivership is a different procedure for a different situation.
>
> 67 Cal. App. 4th at 1495.

This fact is important to courts when determining whether or not to enforce an arbitration clause. For example, the *Taylor* court called the defendant's attempt at compelling arbitration "a garden-variety attempt to enforce an arbitration clause against a nonsignatory" and applied a presumption ***against*** arbitration. 130 Ohio St. 3d 411, 420; *see generally Covington v. Am. Chambers Life Ins. Co*, 779 N.E.2d 833, 838 (Ohio Ct. App. 2002) (holding liquidator not bound by arbitration agreement because the dispute involved setoff and proof of claims, which impacted the rights of creditors); *Jaime Torres Int'l Sports Mgmt., Inc. v. Kapila*, 2016 WL 8585339, at *7 (S.D. Fla. May 11, 2016) (in bankruptcy context, because the trustee stood in the shoes of both the debtor and the creditors, and the creditors were not parties to the agreement containing the arbitration clause, the claims were not subject to the arbitration clause).

Such is the case here. The statutory framework in NRS Chapter 696B was not designed to primarily protect the insolvent insurance company in receivership or its equity investors but rather their insureds and their creditors. *See* NRS 696B.420(b) and (l) (providing *first* payment priority to "all claims under policies" after the administrative costs of the receivership estate and *last* priority to "shareholders or other owners" after *all other creditors*). Indeed, Nevada vested the Receiver with broad authority to take possession and title of "all of the property, contracts and rights of action, and all of the books and records of the insurer, wherever located …," in or out of the State of Nevada, and it vested the Court with broad *in rem* and *in personam* jurisdiction over proceedings, property, and persons related to the delinquency proceedings. *See* NRS 696B.190, 696B.200, and 606B.290(2).

Arbitration, inherently an unconsolidated process, conflicts with such a framework, which is designed to consolidate all claims – whether by or against the receivership estate – in a single forum to conserve receivership assets for the benefit of the insurer's claimants and creditors. CTC, which helped defraud those claimants, now seeks to undermine that policy for *its own* benefit. The district court in

Janvey v. Alguire analyzed this issue at great length, studying the historic role of liquidating receivers as conservators for creditors primarily and equity owners only secondarily. *See* Civil Action No. 3:09-CV-0724-N, 2014 U.S. Dist. LEXIS 193394, at *128-31 (N.D. Tex. July 30, 2014).[19] The court held that a receivership for the purpose of liquidating an insolvent entity organized around a fraudulent enterprise "is the essential equivalent of a Chapter 7 bankruptcy." *Id.* at *134. The court noted, however, that the receiver proceeded, as the Receiver does here, under "statutes that give special jurisdictional authorization to federal equity receivers pursuing receivership assets." *Id.* at * 139. It was this statutory authority that allowed "a receiver and district court to exercise jurisdiction over purported receivership estate property … as a stepping stone on a court's way to exercising *in personam* jurisdiction' over those persons having custody or control over the property at issue." *Id.* at *138–39 (citations omitted). Importantly, the court's analysis demonstrated that "the central goals and underlying purposes of federal [liquidating] receiverships produce the same potential conflicts with the FAA" as a bankruptcy trustee. *Id.* at *140. Indeed, the Court found the same concerns arose with conflicts between the FAA and receiverships as bankruptcy: "the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders." *Id.*

And indeed, the same conflicts hold under Nevada's liquidating receiver statutes. NRS 696B's primary purpose is to provide the Receiver with "centralized resolution of purely [insurance] issues"—i.e., the resolution of insurance claims. The centralized forum approach adopted by the Legislature also "protect[s] creditors and [liquidating insurers] from piecemeal litigation and preserves "the undisputed power of a [receivership] court to enforce its own orders." The authority CTC relies on as cited in *Comm'r of Ins. v. Eighth Jud.* fails to appreciate these policy goals, drawing an artificial distinction between the benefits of consolidating claims *by* creditors and claims brought by the Receiver *for the benefit of* creditors. *See Comm'r of Ins. v. Eighth Jud.* At *3–4 (collecting cases). This analysis misses

[19] The Commissioner cites to the Fifth Circuit opinion affirming the district court and bearing the same caption above. For ease of reference, the Commissioner will refer to the Fifth Circuit opinion as "*Janvey*" and this district court order as "*Janvey II*."

the mark. Chapter 696B does not draw these distinctions—it provides an exclusive forum for all proceedings, by, for, or against insolvent insurers like Spirit. The tension between NRS Chapter 696B and the FAA or NRS Chapter 38 thus presents "conflicts of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach toward dispute resolution." *Janvey II* at * 141. The *Janvey II* court summed it up best:

> Arbitration decentralizes, deconsolidates, strips the court and the receiver of exclusive jurisdiction over the receivership assets, interferes with the broad powers of both the court and the receiver to adjudicate all issues affecting receivership assets, and opens the door to the possibility of a distribution process that becomes, in part, "first-come, first-served."

Janvey II at *141–42. Accordingly, whether the Receiver is bringing or administering a claim, consolidation in a single forum – here, the Eighth Judicial District Court – conserves the assets the receivership estate *for the benefits of the insurer's creditors*. An order condoning CTC's effort to arbitrate for its own benefit would directly undermine these explicit goals of the statutory framework in NRS Chapter 696B.

Based on the foregoing, there is no basis for this court to conclude that the arbitration provision is binding despite its inherent conflict with the statutory liquidation scheme envisioned by the Legislature in NRS Chapter 696B. CTC's motion should thus be denied.

C. Limited Applicability of CTC Arbitration Provisions to Claims Asserted.

As detailed above, Plaintiff believes the arbitration provisions in the program administrator agreements are not dispositive and should not be applied to the claims asserted against CTC in the Complaint. However, it the Court should find otherwise, it must limit the claims that are compelled to arbitration based on the language in the applicable contracts. Indeed, while arbitration agreements are generally favored by Courts, arbitration clauses "must not be so broadly construed as to encompass claims and parties that were not intended by the original contract." *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 634, 189 P.3d 656, 660 (2008) (citations omitted). Furthermore, any public policy that favors arbitration in Nevada extends only to "the benefits of arbitration [parties] have bargained for." *Phillips v. Parker*, 794 P.2d 716, 718 (1990). Additionally, "[w]hether a dispute is arbitrable is essentially

a question of construction of a contract." *Internat'l Ass'n of Firefighters, Local No. 1285 v. City of Las Vegas*, 112 Nev. 1319, 1323, 929 P.2d 954, 956 (1996).

In this case, the Court has been presented with a program administrator agreement by which CTC California and CTC Missouri (at different times) provided marketing, underwriting and policy issuances services to Spirit. However, there is no such agreement relating to CTC Hawaii. Accordingly, the claims asserted against CTC Hawaii cannot be compelled to arbitration.

Furthermore, even if the Court finds that the provisions in the program administrator agreement are enforceable during the applicable contract periods relevant to CTC California and CTC Missouri, the claims asserted by Spirit in the Complaint extend beyond a simple breach in provided marketing, underwriting and policy issuances services. As such, the fact that there was a contractual relationship between the parties does not end in the inquiry. Instead the Court must determine if the non-contractual claims are within the scope of arbitration provision. *See Shakespeare Foundation v. Jackson*, 61 So. 3d 1194, 1198. (Fla. App. 2011) (The "contractual nexus" question is not answered in the affirmative simply because the dispute would not have arisen but for the contractual relationship." Instead, the inquiry must focus on whether the duty alleged to have been breached arose as a result of the relationship between the parties, or was a general duty owed pursuant to statutory or common law. *Id., (finding that fraud claim was unrelated to the contract containing a broad arbitration provision); see also, Seifert v. U.S. Home Corp.,* 750 So. 2d 633, 636 (Fla. 1999) (wrongful death claim unrelated to real estate purchase contract containing broad arbitration provision).

Here, claims that arise outside the timeframe CTC California and CTC Missouri were contracted to perform program administrator services do not fall within any arbitration threshold and can only be classified as non-contractual. As such, claims against CTC Missouri prior to July of 2016 (when it was involved in Spirit's initial formation and organization) cannot be arbitrated. Similarly, claims against CTC California relating to its actions after July 2016 cannot be compelled to arbitration because there was no agreement to arbitrate. The timeframe distinction is especially important when looking at the actions of CTC California. An independent auditor that was asked to quantify the amounted owed to

Spirit and was retained jointly by CTC Missouri and the Receiver prior to this litigation, determined that "Spirit's business was recorded on CTC CA's QuickBooks General Ledger" and CTC California recorded most of the transactions relating to CTC Missouri who had limited records available. [20] Because tens of thousands of dollars that belonged to Spirit have disappeared and CTC California recorded Spirit's business records prior to the Court ordered receivership in early 2019, Spirit has direct claims against CTC California separate and apart for the program administrator agreement it had with CTC California that ended mid-2016. Accordingly, these claims are not subject to arbitration.

CTC's violation of its fiduciary duties, violation of Nevada's Rico statute, unjust enrichment, fraud, civil conspiracy and unlawful transfers of funds also did not arise simply from the program administrator agreement and relate to CTC's integral involvement in the formation and organization of Spirit, CTC's role in the Insurance Holding Group and CTC's actions as the program manager and ultimate controlling entity of Spirit. As detailed below, review of the Complaint demonstrates that the majority of the claims asserted against the CTC Defendants are outside the scope of the program administrator agreement and therefore cannot be compelled to arbitration. Put simply, Spirit and CTC never contracted for CTC to involve Spirit in a massive fraudulent scheme and conceal that scheme from the Division of Insurance. CTC is not entitled to arbitrate this extracontractual and criminal conduct.

1. The Breach of Fiduciary Duty Cause of Action should not be arbitrated.

Contrary to CTC's assertion, the breach of fiduciary duty claim asserted in the Complaint does not arise solely from the program administrator agreement.[21] Indeed, paragraph 287 of the Complaint explains that there was a duty pursuant to the agreement between the parties and pursuant to CTC's trusted position as set forth in the complaint.[22] The fiduciary duty claim also specifies breaches that include CTC "failing to act in Spirit's best interests, and instead acting in its own self-serving interest by failing to disclose financial records to Spirit, failing to safeguard or account for Spirit's funds, using Spirit's assets for its own benefit rather than for the benefit of Spirit, dissipating Spirit's assets, aiding

[20] Ex. 2, FTI report page 4 and 8.
[21] *See,* Complaint, Fifth Cause of Action.
[22] Complaint ¶ 287.

and abetting Mulligan and Pavel Kapelnikov and their affiliated parties and entities to loot Spirit of its money."[23] Additionally, CTC was responsible for filing false or improper financial statements with the Division.[24] These are simply not obligations arising from a program administrator agreement. A fiduciary relationship exists independently of a contractual relationship when a plaintiff has the right to expect trust and confidence in the integrity and fidelity of another. *Powers v. United Servs. Auto. Ass'n* 114 Nev. 690, 979 P.2d 1286 (1999). Here, the CTC Defendants had additional fiduciary obligations as the program manager and ultimate controlling entity of Spirit. Pillaging Spirit's assets for its own benefit and dissipating Spirit assets to third parties are not called for by the program administrator agreements and the Receiver's dispute regarding them cannot be compelled to arbitration.

2. The Nevada RICO claim asserted against CTC extends beyond contractual issues and are not subject to arbitration.

The Tenth Cause of Action set forth in the Complaint seeks recovery based on CTC's involvement in the repeated embezzlement of Spirit funds including CTC's acquiescing to, willfully ignoring, and participation in transferring Spirit assets to further the racketeering activities and concealing the location of Spirit assets to avoid detection by Nevada Regulators and others.[25] Although CTC's motion chooses to cherry pick language in the complaint regarding CTC's failure to collect and remit premiums and failing to pay commissions in an attempt to tie the claim to the program administrator agreement, CTC's actions extend much further. Indeed, the independent audit report completed by FTI Consulting identifies widespread fraud and unauthorized distribution of Spirit's assets than can only be categorized as fraudulent and/or criminal behavior.[26]

CTC's involvement in the scheme, which is further detailed in paragraphs 327- 341 of the complaint, does not exclusively arise from the program administrator agreement, but once again relates to CTC's role as the program manager and ultimate controlling entity of Spirit that CTC described as being

[23] Complaint ¶ 288.
[24] Complaint ¶¶ 74-80, 116 -117.
[25] Complaint ¶ 327.
[26] *See*, Ex. 2.

integrally involved in Spirit's initial formation and organization.[27] For example, paragraph 330 of the complaint describes as part of the racketeering activities the design of the Mulligan Enterprise[28] to systematically comingle the assets and liabilities of the various entities to obscure the location, source, ownership, and/or control of Spirit assets. As the program manager and ultimate controlling entity of Spirit, CTC facilitated this structure. The scheme is further described in paragraph 332 which explains that the structure established by CTC which allowed the embezzlement of Spirit funds and false reporting and financial statements to the Division. This extended to reporting relating to the Insurance Holding Company that CTC facilitated. A laundry list of CTC bad acts are detailed in paragraph 335 and its subparts and include: making payments on related-party loans without documentation of the underlying debt and without proper disclosure to the Division -Paragraph 335(g); disguising fraudulent payments to insiders and/or related parties as legitimate transactions-Paragraph 335(h); and continuing Spirit's business operations far past the point of insolvency by manipulating Spirit's books and records and its representations to the Division and exposing Spirit's policyholders to unpayable claims, including by making misleading, false, incomplete, and/or untimely representations and omissions to the Division regarding Spirit and/or CTC's ability to fund the LPT Spirit proposed with a reinsurer and/or Spirit's ability to obtain financing, delaying the ultimate suspension of Spirit's business and receivership by months, and allowing Spirit to continue to incur losses under ballooning insolvency while the Mulligan Enterprise and the individual Defendants responsible for it continued to benefit -Paragraph 335(j). Further paragraph 337 explains that "CTC and the individual defendants who exercise control over CTC and the rest of the Mulligan Enterprise made the unlawful transfers or funds…"

Clearly, the allegations in the tenth cause of action are not solely related to the program administrator agreement and cannot be compelled to arbitration. The mere fact that CTC had a commercial relationship with Spirit governed by an agreement does not mean that any misconduct CTC

[27] Insurance Holding Company System Annual Registration Statement dated June 28, 2017 for year ending December 31, 2016. *See* Ex. 5

[28] The Mulligan Enterprise includes a number of the named Defendants (including CTC) and is defined in the complaint as a web of interrelated companies that wrote insurance policies, provided so-called financing for insureds, processed insurance premiums. Complaint ¶ 3.

engages in with respect to Spirit somehow "arises out" of such agreement. It is evident that Spirit did not contract with CTC to use Spirit as an embezzlement piggy bank, and the Receiver's claims for such conduct do not arise from Spirit's agreement with CTC to provide legitimate services. Only the Receiver's claims for CTC's failure to provide those legitimate services or *legitimate* CTC activity related to the services could so arise.

3. Arbitration is not the proper forum for Plaintiff's unjust enrichment claim.

Unjust enrichment occurs whenever an entity has and retains benefits which in good conscience and in equity belong to another. *Lespeartners Corp. v. Robert L. Brooks* Trust, 111 Nev. 799, 898 P.2d 699 (1995). Here, CTC was unjustly enriched by its role as manager and the control it took of Spirit's assets that far exceeded any duty or obligation set forth in the program administrator agreement. Not only did CTC improperly transfer Spirit funds as set forth in paragraph 346 of the Complaint, but paragraphs 347 and 348 detail improper and fraudulent write-offs of debt that CTC owed to Spirit from parties including Chelsea Financial, Criterion and County Hall as well as reclassification of debt and dividends that were not collected on Spirit's behalf. Contrary to the assertions in the Motion, such actions are not exclusively related to the program administrator agreement which was primarily intended as a mechanism by which CTC was to provide marketing, underwriting and policy issuance services. *See*, Motion, Exhibits A and C. Indeed, nothing in the program administrator agreement gives CTC the unilateral ability to write off debt owed to Spirit by CTC or others, or to reclassify and hide the true nature of Spirit's financial obligations to the Division. Because the scope of the allegations in Spirit's eleventh cause of action extend beyond any contractual obligations that CTC may have had, arbitration is not proper.

4. The Fraud claims alleged against CTC should not be Arbitrated.

In attempting to compel the fraud claims asserted against CTC to arbitration, the Motion argues that 1) the claims solely arise from alleged breaches of the program administrator agreement; and 2) that the allegations are verbatim with respect to Spirit's RICO claims. Plaintiff acknowledges that the underlying basis of the fraud and RICO claims are similar unlawful conduct by CTC. However, as detailed above, it is an egregious misstatement to conclude that the fraud claim solely arises from the alleged breach of the program administrator agreement The FTI report identifies an egregious

> fraudulent scheme to fleece Spirit.[29] As is relevant here, the fraud claims are not limited to overpayments of commissions and amounts due Spirit, but also include the creation of a complex enterprise by which CTC and others were utilized as vehicles to siphon money from Spirit.[30] Given CTC's admission that it was integral to the formation and organization of Spirit it cannot be said that it was not a part of the fraudulent scheme. Moreover, CTC misrepresented both its own financial condition and Spirit's condition to obscure its mismanagement of Spirit and transfers made to third parties which further perpetuated the fraud, and CTC even went as far as to advise the Division it would make good on the balances owed to Spirit when it lacked the financial ability to do so.[31] Such allegations are in addition to CTC manipulating Spirit's books and records, continuing Spirit's business operations beyond the point of solvency, and exposing policyholders to unfunded claims.[32] As explained in paragraph 366: Absent Defendants' fraudulent action and false representation, Spirit may have operated as a successful insurer or, absent Defendants' fraudulent representations to the Division, Spirit's operations would have been halted by the state regulators earlier, protecting its insureds and other creditors. At the very least, more Spirit money would be available to pay policy claims but for the actions of Defendants.

Complaint ¶ 366.

This is simply not a claim based exclusively on any agreements between CTC and Spirit and is not appropriate for arbitration.

5. Arbitration is not the proper forum for Plaintiff's civil conspiracy claim

The thirteenth cause of action in the complaint is for civil conspiracy. Once again, CTC is wrong in suggesting this claim arises directly from the program administrator agreements and therefore must be compelled to arbitration. The seventy-seven (77) page complaint details the actions of CTC and other defendants that led to Spirit's demise. CTC's conclusion that Plaintiff's conspiracy claim arises solely from a breach of contract because similar facts may be referenced in both claims has no merit. The Court must look at claims and contract separately to determine if the claim is one that was intended by the original contract and was one the parties bargained for. *See, Truck Ins. Exc. V. Palmer J. Swanson, Inc.*, 124 Nev. 629, 634, 189 P.3d 656, 660 (2008); *Internat'l Ass'n of Firefighters, Local No. 1285 v. City of Las Vegas*, 112 Nev. 1319, 1232, 929 P.2d 954, 956 (1996).

As detailed above and in Exhibits 2-7 attached hereto, CTC's role was not nearly as limited to as they would have the Court believe. CTC was integrally involved in Spirit's formation, organization, and

[29] *See*, Ex. 2.
[30] Complaint ¶ 354.
[31] Complaint ¶ 359 and ¶ 365.
[32] Complaint ¶ 365.

had complete administration and control of the now defunct company. Moreover, the Complaint (and specifically the thirteenth cause of action) sets forth the concerted effort by CTC and others to falsify and conceal financial problems which included CTC misrepresenting is own financial condition and books and records, and the concealing of transfers of Spirit funds to insiders.[33] Paragraph 374 of the Complaint provides further details regarding the concerted effort to fleece Spirit which extended beyond collecting premiums and paying commissions and also included knowingly and intentionally: making payments on related party loans without documentation - Paragraph 374(i); disguising fraudulent payments to insiders and/or related parties as legitimate transactions – Paragraph 374(j); making false representations to the Division regarding CTC's own viability – Paragraph 374(k); and continuing Spirit's business operations past the point of insolvency and manipulating the books and records – Paragraph 374(l).

This is simply not a claim based exclusively on any agreements between CTC and Spirit as CTC was integrally involved in Spirit's formation and organization which effectuated the conspiracy. This claim should not be compelled to arbitration.

6. Transfer avoidance claims are properly before this Court.

The complaint asserts claims to avoid transfers made by CTC of Spirit funds to a number of named defendants (and others) pursuant to Nevada law.

The parties and transfers at issue include:

- Chelsea Financial (~$6.5 million dollars);
- Global Capital Group (more than $3 million dollars);
- Payments to Chase Bank to pay Mulligan's creditor cards (~$2.67 million dollars);
- Kapa Management Consulting (~$2.3 million dollars);
- Mulligan (three transfers totaling more than $1.8 million
- ICAP Management Solutions (more than $1.5 million dollars);
- Fourgorean (two transfers of ~$1.2 million and ~$214,000);
- Six Eleven LLC (three transfers of ~$872,000 and ~$337,913 and, on information and belief, $72,000);
- Global Forwarding (~$719,000);
- Bank of America to pay, on information and belief, personal credit card bills of Mulligan (~$363,000);
- Igor and/or Yanina Kapelnikov (~$354,000);

[33] Complaint ¶ 373.

- Six Eleven LLC (~$340,000);
- Quote my Rig, LLC (more than $300,000);
- Carrus Mobile (two transfers of ~$100,000 and ~$200,000);
- Borson Law LLC for "settlement" with Guffey (~$256,000);
- Chelsea Premium Finance (~$195,000);
- Siro Smith Dickson for "settlement "with Guffey (~$194,000);
- Yanina Kapelnikov (~$173,000);
- 10-4 Preferred Risk Managers (~$150,000);
- Criterion (more than $90,000);
- 195 Gluten Free LLC (~$44,000);
- Kapa Ventures (more than $35,000);
- Ironjab, LLC (more than $15,000); and
- Global Consulting (nearly $14,000).

Such transfers can be voided by this Court pursuant to NRS 112 as set forth in the fifteenth cause of action; or under the framework of NRS 696B as detailed in the sixteenth and seventeen causes of action; or NRS 692C.402 as set forth in the eighteenth cause of action. Although CTC is quick to contend that these claims all arise out of the program administrator agreement with Spirit, the Motion fails to identify, how the parties that received the funds can be compelled to arbitration or what authority the arbitrator has to void the transfers and ensure the funds are provided to Spirit. Further, because CTC California recorded Spirit's business at the time the transfers were made and a contract with Spirit does not exist in regard to the same, arbitration is nonsensical. Moreover, given that NRS 696B is specific to delinquent insurers and NRS 692C.402 is specific to insurance holding companies, there can be no doubt that Nevada's Liquidation Act provides this Court with exclusive jurisdiction as detailed herein. Further, the Receivership Order also clearly indicates such claims must be heard by the Eighth Judicial District Court. Ex. 1. Thus, even if CTC's argument that fraudulent transfers were based on its program administrator agreement, the relief Plaintiff seeks can only be obtained in this forum.

D. CTC is a necessary participant to this proceeding and judicial economy will be served by all claims against CTC remaining in this forum.

CTC's role in the fraudulent scheme the Receiver seeks to unwind cannot be untangled from the scheme at large. As noted above, CTC organized Spirit as part of an "insurance holding company" under NRS Chapter 696C – although it tried to avoid that classification – and entangled Spirit with a host of

other interrelated companies that comprise the Mulligan Enterprise. Defendant Mulligan, with the active participation of the other Individual Defendants, controlled CTC and the scheme. Nearly every fraudulent and unlawful act the Receiver has identified was transacted by or with the knowledge of CTC. Put simply, CTC is a star witness. And whether CTC remains a party to this case or becomes a third party, trying the issues in this matter, even as they relate to the Receiver's claims against the other Defendants, will require significant discovery of relevant information in CTC's possession, custody, or control. To require the Receiver to arbitrate with CTC on the one hand and require the other Parties and CTC to take discovery from CTC in this matter *again*, on the other, would squander tremendous resources. When CTC will be involved in these proceedings regardless of whether it arbitrates some or all of the Receiver's claims against it, forcing arbitration makes little sense except to gain a tactical advantage by making prosecution of the Receiver's claims more costly.

The Receiver, who pursues her claims for the victims of a fraudulent scheme organized and orchestrated *by CTC*, will directly bear the expense of both proceedings. CTC will also bear the expense of both proceedings, but CTC has admitted it owes Spirit nearly $30 Million it cannot pay. In other words, by multiplying the proceedings and driving its own costs up, CTC is indirectly reducing the potential receivership estate further by depleting its own available assets before Spirit can obtain a judgment or arbitration award. This is a net-net loss. CTC will waste its own assets – to which Spirit has a claim – just to waste the Receiver's assets. This apparent gamesmanship by CTC of forcing the Receiver into expensive and distracting arbitration, to gain what it perceives to be some unclear advantage, should be viewed skeptically and rejected. Given the Receiver's unique role as conservator of Spirit's assets under NRS Chapter 696B, as discussed above, the multiplication of costs for both CTC and the Receiver is yet another reason to foil CTC's effort to use arbitration to undermine the policy prerogative behind the Receiver's appointment as receiver. The Court should reject the effort and its transparent disregard for judicial economy.

IV. CONCLUSION

CTC's Motion should be denied. First, the Court should not enforce an arbitration provision secured as part of a fraudulent scheme to deprive Spirit and its insureds of their assets. This is particularly true here, where the Receiver brings claims on behalf of those very insureds and Spirit's other creditors to maximize the value of her receivership estate for the benefit of Spirit's claimants and creditors. Secondly, persuasive authority holds that arbitration provisions like that urged by CTC are not enforceable in the liquidating receiver context because they interfere with and impede the policy behind the legislative scheme that grants this Court exclusive jurisdiction over receivership assets, as well as the Receiver's authority to prosecute receivership claims in the forum she determines maximizes the benefit to the receivership estate. For this reason, any right to arbitration under the FAA or state law is federally preempted. Finally, even if the Court chooses to enforce the arbitration provision with regard to the Receiver's contract claims, the remainder of the Receiver's claims against CTC do not arise from or relate to the Parties' program administration Agreement—and claims against CTC California (after July 2016), claims against CTC Missouri (before July 2016), and CTC Hawaii are not based on any arbitration agreements. Put simply, Spirit did not contract with CTC to be defrauded, and CTC cannot now force Spirit to litigate its massive fraud through arbitration because the Parties happen to have a contract. For these reasons, the Receiver asks that the Court deny CTC's Motion to Compel Arbitration.

Dated this 4th day of June, 2020.

By: */s/ Kara B. Hendricks*
MARK E. FERRARIO, Bar No. 1625
KARA B. HENDRICKS, Bar No. 7743
KYLE A. EWING, Bar No. 14051
GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive, Suite 600
Las Vegas, NV 89135

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2020, a true and correct copy of the foregoing ***Plaintiff's Opposition to CTC Defendants' Motion to Compel Arbitration*** was served electronically using the Odyssey eFileNV Electronic Filing system upon all parties with an email address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R. The date and time of the electronic proof of service is in place of the date and place of deposit in the U.S. Mail.

/s/ Andrea Lee Rosehill
An employee of Greenberg Traurig, LLP

HOWARD & HOWARD ATTORNEYS PLLC
L. CHRISTOPHER ROSE, ESQ.
Nevada Bar No. 7500
KIRILL V. MIKHAYLOV, ESQ.
Nevada Bar No. 13538
WILLIAM A. GONZALEZ, ESQ.
Nevada Bar No. 15230
3800 Howard Hughes Parkway, Suite 1000
Las Vegas, Nevada 89169
Telephone: 702.257.1483
Fax: 702.567.1568
lcr@h2law.com
kvm@h2law.com
wag@h2law.com

Attorneys for Defendants Six Eleven LLC; Quote My Rig, LLC; New Tech Capital LLC; 195 Gluten Free LLC; 10-4 Preferred Risk Managers, Inc.; Ironjab, LLC; Fourgorean Capital LLC; Chelsea Holding Company, LLC; and Chelsea Financial Group, Inc. (Missouri)

Howard & Howard
3800 Howard Hughes Pkwy., Suite 1000
Las Vegas, NV 89169
(702) 257-1483

DISTRICT COURT

CLARK COUNTY, NEVADA

BARBARA D. RICHARDSON IN HER CAPACITY AS THE STATUTORY RECEIVER FOR SPIRIT COMMERCIAL AUTO RETENTION GROUP, INC., Plaintiff, vs. 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 INSURANCES 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,	CASE NO.: A-20-809963-B DEPT NO.: 13 **DEFENDANT CHELSEA FINANCIAL GROUP, INC., A MISSOURI CORPORATION'S ANSWER TO COMPLAINT**

INC., a Missouri Corporation; CHELSEA FINANCIAL GROUP, INC., a New Jersey Corporation d/b/a CHELSEA PREMIUM FINANCE CORPORATION; CHELSEA FINANCIAL GROUP, INC., a Delaware Corporation; CHELSEA HOLDING COMPANY, LLC, a Nevada Limited Liability Company; CHELSEA HOLDINGS, LLC, a Nevada Limited Liability Company, 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; GLOBAL CAPITAL GROUP, LLC, a New Jersey Limited Liability Company; GLOBAL CONSULTING; 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; 195 GLUTEN FREE LLC, a New Jersey Limited Liability Company, DOE INDIVIDUALS I- X; and ROE CORPORATE ENTITIES I-X,

Defendants.

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Las Vegas, NV 89169
(702) 257-1483

Defendant Chelsea Financial Group, Inc., a Missouri Corporation ("Defendant"), by and its attorneys, Howard & Howard Attorneys, PLLC, hereby answers and responds to Plaintiff's Complaint as follows:

INTRODUCTION

1. Answering paragraphs 1 through 4, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

PARTIES AND JURISDICTION

The Plaintiff

2. Answering paragraph 5, Defendant admits that Plaintiff Barbara D. Richardson is the court-appointed Permanent Receiver of Spirit. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations set forth in paragraph 5, and therefore denies the same.

3. Answering paragraphs 6 through 9, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

The Defendants

4. Answering paragraph 10, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

5. Answering paragraphs 11 through 14, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

6. Answering paragraph 15, Defendant admits that it is a corporation registered to do business in Missouri. Defendant denies that it has a unity of ownership, activities, purposes and finances with Defendant Chelsea Financial Group, Inc., a California Corporation, Defendant Chelsea Financial Group, Inc., a New Jersey Corporation, and Defendant Chelsea Financial Group, Inc., a Delaware Corporation and denies that it is impossible to distinguish between the

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same. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations set forth in paragraph 15, and therefore denies the same.

7. Answering paragraph 16, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

8. Answering paragraph 17, Defendant denies the allegations set forth therein.

9. Answering paragraph 18, Defendant denies that it failed to pay any premiums and financial funds to CTC and Spirit, that it participated in any scheme, and that it misled insurance regulators and insured about Spirit's financial condition and operation. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations set forth in paragraph 18, and therefore denies the same.

10. Answering paragraphs 19 and 20, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set for therein, and therefore denies the same.

11. Answering paragraph 21, Defendant denies the allegations set forth therein.

12. Answering paragraphs 22 through 46, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

13. Answering paragraphs 47 and 48, Defendant contends that said paragraphs contain conclusions of law to which no response is required. To the extent a response is required, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth in paragraphs 47 and 48, and therefore denies the same.

Jurisdiction

14. Answering paragraphs 49 through 51, Defendant contends that said paragraphs contain conclusions of law to which no response is required. To the extent a response is required, Defendant is without sufficient knowledge of information to form a belief as to the truth of the allegations set forth in paragraphs 49 through 51, and therefore denies the same.

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FACTUAL ALLEGATIONS

Background Information Regarding Spirit

15. Answering paragraphs 52 through 57, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

16. Answering paragraph 58, Defendant denies that it made any false or misleading "statements" to Spirit insureds regarding funding and financing insurance premiums and that it misled Spirit policyholders regarding their collected premium payments. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations set forth in paragraph 58, and therefore denies the same.

17. Answering paragraph 59, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

18. Answering paragraphs 60 through 62, Defendant denies that it failed to remit any collected premium funds to CTC or Spirit and that it worked in concert with anyone to "cover up" or "conceal" anything. Defendant is without sufficient knowledge or information to form a belief as to the remaining allegations set forth in paragraphs 60 through 62, and therefore denies the same.

19. Answering paragraph 63, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

Events Leading Up to the Discovery of Defendants' Misconduct

20. Answering paragraphs 64 through 76, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

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Spirit Discloses a 27.6 Million-Dollar Receivable from CTC

21. Answering paragraphs 77 through 85, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

CTC's Duties Owed to Spirit under the CTC Agreement

22. Answering paragraphs 86 through 90, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

Spirit's Certificate of Authority is Suspended, and Spirit is Placed in Receivership

23. Answering paragraphs 91 through 94, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

24. Answering paragraph 95, Defendant admits the allegations set forth therein.

25. Answering paragraphs 96 through 99, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

CTC Fails to Collect and Pay to Spirit Premiums for Policies Issued

26. Answering paragraphs 100 through 110, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

27. Paragraph 111 is blank and does not require a response. To the extent a response is required, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

CTC Retroactively Reclassifies Uncollected Premiums

28. Answering paragraphs 112 through 128, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

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Mulligan Dominated and Controlled the Affairs of CTC and Spirit and other Related Entities

29. Answering paragraphs 129 through 140, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

Criterion and 10-4 Preferred Managers Harm to Spirit

30. Answering paragraphs 141 through 158, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

31. Answering paragraph 159, Defendant contends that said paragraph contains conclusions of law to which no response is required. To the extent a response is required, Defendant is without sufficient knowledge of information to form a belief as to the truth of the allegations set forth in paragraph 159, and therefore denies the same.

Chelsea Financial Harm to Spirit

32. Answering paragraph 160, Defendant denies that it made any false or misleading representations to Spirit policyholders, that it misled Spirit policyholders regarding collected premium payments to Spirit, and that it failed to pay Spirit and/or CTC collected premium payments from Spirit policyholders. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraph 160, and therefore denies the same.

33. Answering paragraph 161, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

34. Answering paragraph 162, Defendant denies that it inappropriately kept and used Spirit's money and that it did not provide what it collected to Spirit. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraph 162, and therefore denies the same.

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35. Answering paragraph 163, Defendant denies that Spirit has not received premium funds from the Defendant. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraph 163, and therefore denies the same.

36. Answering paragraph 164, Defendant denies that charged Spirit's policyholders for financing that did not exist. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraph 164, and therefore denies the same.

37. Answering paragraph 165, Defendant denies that it failed to collect premiums. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraph 165, and therefore denies the same.

38. Answering paragraph 166, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

39. Answering paragraph 167, Defendant denies that it executed any transaction to "hide" anything. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraph 167, and therefore denies the same.

40. Answering paragraphs 168 and 169, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

41. Answering paragraph 170, Defendant denies that it hid anything from the Division. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraph 170, and therefore denies the same.

42. Answering paragraphs 171, Defendant denies that it failed to keep and maintain complete and accurate records relating to the premiums collected on Spirit's behalf. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraph 171, and therefore denies the same.

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43. Answering paragraph 172, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

44. Answering paragraph 173, Defendant denies that it participated in the alleged "scheme". Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraph 173, and therefore denies the same.

45. Answering paragraph 174, Defendant contends that said paragraph contains conclusions of law to which no response is required. To the extent a response is required, Defendant is without sufficient knowledge of information to form a belief as to the truth of the allegations set forth in paragraph 174, and therefore denies the same.

Lexicon Insurance Management LLC Harm to Spirit

46. Answering paragraphs 175 through 185, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

47. Answering paragraph 186, Defendant contends that said paragraph contains conclusions of law to which no response is required. To the extent a response is required, Defendant is without sufficient knowledge of information to form a belief as to the truth of the allegations set forth in paragraph 186, and therefore denies the same.

Spirit's "Investment" in New Tech Capital LLC for Mulligan's Personal Benefit

48. Answering paragraphs 187 through 191, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

Other Significant Findings of Spirit's Former Auditor

49. Answering paragraph 192 through 196, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

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The Officers and Directors of Spirit Failed to Govern the Company Appropriately

50. Answering paragraphs 197 through 223, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

The Other Individual Defendants' Roles in the Scheme to Divert Funds to the Mulligan Enterprise

51. Answering paragraph 224, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

52. Answering paragraphs 225 and 226, Defendant denies that it participated in any "misconduct" and that it unlawfully and improperly diverted, received, and withheld funds from Spirit. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraphs 225 and 226, and therefore denies the same.

53. Answering paragraph 227, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set for the therein, and therefore denies the same.

54. Answering paragraph 228, Defendant denies that it participated in any improper transfers or withholding of Spirit funds. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraph 228, and therefore denies the same.

55. Answering paragraphs 229 through 236, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set for the therein, and therefore denies the same.

56. Answering paragraph 237, Defendant denies that it participated in any improper transfers or withholding of Spirit funds. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraph 237, and therefore denies the same.

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57. Answering paragraphs 238 through 240, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set for the therein, and therefore denies the same.

Deficiencies in CTC's Books and Records

58. Answering paragraphs 241 through 254, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

Improper Fund Transfers and Improper Transactions

59. Answering paragraphs 255 through 262, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

FIRST CAUSE OF ACTION

(Breach of Contract, as Against CTC)

60. Answering paragraph 263, Defendant repeats and realleges its answers to each and every other paragraph as though fully set forth herein.

61. Answering paragraphs 264 and 265, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

62. Answering paragraph 266, Defendant denies that it absconded and dissipated assets belonging to Spirit. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraph 266, and therefore denies the same.

63. Answering paragraphs 267 and 268, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

SECOND CAUSE OF ACTION

(Breach of Contract as Against Lexicon)

64. Answering paragraph 269, Defendant repeats and realleges its answers to each and every other paragraph as though fully set forth herein.

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65. Answering paragraph 270, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

66. Answering paragraph 271, Defendant Chelsea Holding Company, LLC denies that it absconded and dissipated assets belonging to Spirit. Defendant is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations of paragraph 271, and therefore denies the same.

67. Answering paragraphs 272 and 273, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

THIRD CAUSE OF ACTION

(Breach of Contract as Against Criterion)

68. Answering paragraph 274, Defendant repeats and realleges its answers to each and every other paragraph as though fully set forth herein.

69. Answering paragraphs 275 through 279, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

FOURTH CAUSE OF ACTION

(Breach of Contract as Against Spirit Director Defendants)

70. Answering paragraph 280, Defendant repeats and realleges its answers to each and every other paragraph as though fully set forth herein.

71. Answering paragraphs 281 through 285, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

FIFTH CAUSE OF ACTION

(Breach of Fiduciary Duty as Against CTC and Lexicon)

72. Answering paragraph 286, Defendant repeats and realleges its answers to each and every other paragraph as though fully set forth herein.

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73. Answering paragraphs 287 through 292, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

SIXTH CAUSE OF ACTION

(Breach of Fiduciary Duty as Against the Spirit Director Defendants)

74. Answering paragraph 293, Defendant repeats and realleges its answers to each and every other paragraph as though fully set forth herein.

75. Answering paragraphs 294 through 299, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

SEVENTH CAUSE OF ACTION

(Breach of the Implied Covenant of Good Faith and Fair Dealing – Tortious as Against CTC and Lexicon)

76. Answering paragraph 300, Defendant repeats and realleges its answers to each and every other paragraph as though fully set forth herein.

77. Answering paragraphs 301 through 310, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

EIGHTH CAUSE OF ACTION

(Breach of the Implied Covenant of Good Faith and Fair Dealing – Contract as Against CTC and Lexicon)

78. Answering paragraph 311, Defendant repeats and realleges its answers to each and every other paragraph as though fully set forth herein.

79. Answering paragraphs 312 through 319, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

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NINTH CAUSE OF ACTION

(Breach of Implied Covenant of Good Faith and Fair Dealing – Contract as Against Criterion)

80. Answering paragraph 320, Defendant repeats and realleges its answers to each and every other paragraph as though fully set forth herein.

81. Answering paragraphs 321 through 326, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

TENTH CAUSE OF ACTION

(Nevada RICO Claims as Against Mulligan, George, Simon, Guffey, McCrae, Kapelnikovs, CTC, Lexicon, and Criterion)

82. Answering paragraph 327, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

83. Answering paragraphs 328 through 342, Defendant denies the allegations asserted against it. To the extent the allegations do not relate to this answering Defendant, it is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

ELEVENTH CAUSE OF ACTION

(Unjust Enrichment as Against All Defendants)

84. Answering paragraph 343, Defendant repeats and realleges its answers to each and every other paragraph as though fully set forth herein.

85. Answering paragraphs 344 through 351, Defendant denies the allegations asserted against it. To the extent the allegations do not relate to this answering Defendant, it is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

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TWELFTH CAUSE OF ACTION

(Fraud as Against All Defendants)

86. Answering paragraph 352, Defendant repeats and realleges its answers to each and every paragraph as though fully set forth herein.

87. Answering paragraph 353, Defendant contends that said paragraph contains conclusions of law to which no response is required. To the extent a response is required, Defendant is without sufficient knowledge of information to form a belief as to the truth of the allegations set forth in paragraph 353, and therefore denies the same.

88. Answering paragraphs 354 through 370, Defendant denies the allegations asserted against it. To the extent the allegations do not relate to this answering Defendant, it is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

THIRTEENTH CAUSE OF ACTION

(Civil Conspiracy as Against All Defendants)

89. Answering paragraph 371, Defendant repeats and realleges its answers to each and every paragraph as though fully set forth herein.

90. Answering paragraphs 372 through 379, Defendant denies the allegations asserted against it. To the extent the allegations do not relate to this answering Defendant, it is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

FOURTEENTH CAUSE OF ACTION

(Alter Ego as Against Mulligan, George, Guffey, Simon, and Pavel Kapelnikov)

91. Answering paragraph 380, Defendant repeats and realleges its answers to each and every paragraph as though fully set forth herein.

92. Answering paragraphs 381 through 384, Defendant denies the allegations asserted against it. To the extent the allegations do not relate to this answering Defendant, it is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

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FIFTEENTH CAUSE OF ACTION

(NRS 112- Avoidance of Transfers as Against CTC and its Transferees)

93. Answering paragraph 385, Defendant repeats and realleges its answers to each and every paragraph as though fully set forth herein.

94. Answering paragraphs 386 through 390, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

95. Answering paragraphs 391 through 396, Defendant denies the allegations asserted against it. To the extent the allegations do not relate to this answering Defendant, it is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

SIXTEENTH CAUSE OF ACTION

(NRS 696B – Voidable Transfers as Against CTC and its Transferees)

96. Answering paragraph 397, Defendant repeats and realleges its answers to each and every paragraph as though fully set forth herein.

97. Answering paragraphs 398 through 403, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

98. Answering paragraphs 404 through 409, Defendant denies the allegations asserted against it. To the extent the allegations do not relate to this answering Defendant, it is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

SEVENTEENTH CAUSE OF ACTION

(NRS 696B – Recovery of Distributions and Payments as Against CTC and its Transferees)

99. Answering paragraph 410, Defendant repeats and realleges its answers to each and every paragraph as though fully set forth herein.

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100. Answering paragraphs 411 through 415, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

101. Answering paragraphs 416 through 421, Defendant denies the allegations asserted against it. To the extent the allegations do not relate to this answering Defendant, it is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

EIGHTEENTH CAUSE OF ACTION

(NRS 692C.402 – Recovery of Distributions and Payments as Against CTC and its Transferees)

102. Answering paragraph 422, Defendant repeats and realleges its answers to each and every paragraph as though fully set forth herein.

103. Answering paragraphs 423 through 427, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

104. Answering paragraphs 428 through 434, Defendant denies the allegations asserted against it. To the extent the allegations do not relate to this answering Defendant, it is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

NINETEENTH CAUSE OF ACTION

(NRS 78.300 – Recovery of Unlawful Distribution as Against the Spirt Director Defendants)

105. Answering paragraph 435, Defendant repeats and realleges its answers to each and every paragraph as though fully set forth herein.

106. Answering paragraphs 436 through 440, Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

. . .

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107. Answering paragraph 441, Defendant denies the allegations asserted against it. To the extent the allegations do not relate to this answering Defendant, it is without sufficient knowledge or information to form a belief as to the truth of the allegations set forth therein, and therefore denies the same.

108. Defendant denies that Plaintiff is entitled to any of the relief sought in its prayer for relief.

109. Any allegations not responded to above are hereby denied.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief may be granted.

2. At all relevant times, Defendant used reasonable care and diligence and acted according to its best judgment and obligations, if any, dealing fairly and in good faith, having no intent to inflict harm or damage.

3. Plaintiff's claims are barred based on the doctrine of estoppel.

4. Plaintiff's claims are barred by the doctrine of laches.

5. Plaintiff's claims are barred based on the doctrine of waiver.

6. Plaintiff's claims are barred based on the doctrine of release.

7. Plaintiff's claims are barred based on the doctrine of ratification.

8. Plaintiff's claims are barred by the statute of frauds.

9. Plaintiff has failed to do equity towards Defendant.

10. Plaintiff's claims are barred by the applicable statute of limitations.

11. Any conduct on the part of Defendant was not the cause of Plaintiff's alleged damages, the existence of which are denied.

12. Plaintiff's damages, the existence of which are denied, were caused, in whole or in part, or contributed to be reason of the acts, omissions, negligence, and/or intentional misconduct of third parties over which Defendant have no control.

13. Plaintiff failed to mitigate its damages, the existence of which are denied.

14. Any alleged damages, the existence of which are denied, were not the result of any conduct by Defendant.

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15. Plaintiff's claims are barred due to the failure to satisfy conditions precedent and/or conditions subsequent.

16. Plaintiff lacks standing to assert claims and receive the relief sought in the Complaint.

17. The Court lacks subject matter jurisdiction over the claims alleged in the Complaint.

18. Plaintiff's claims are barred because they have failed to exhaust administrative remedies, if any.

19. The claims, and each of them, are barred by the failure of Plaintiff to plead those claims with sufficient particularity.

20. Plaintiff failed to allege sufficient facts and cannot carry the burden of proof imposed on them by law to recover attorney's fees incurred to bring and prosecute this action.

21. Plaintiff has failed to join necessary and indispensable parties to this litigation under NRCP 19 as the Court cannot grant any of its claims without affecting the right and privileges of other parties.

22. Defendant is not jointly or severally liable for any of the damages alleged in the Complaint, the existence of which are denied.

23. Defendant did not enter into a conspiracy to harm Plaintiff.

24. Defendant did not intend to accomplish an unlawful objective for the purpose of harming Plaintiff.

25. Defendant had no intent to hinder, delay or defraud Plaintiff.

26. Defendant was a subsequent transferee who received the asset in good faith and for reasonably equivalent value.

27. Plaintiff's alleged transfers to Defendant, if any, were made in the ordinary course of business or financial affairs.

28. Defendant received any transfers in good faith and for reasonably equivalent value.

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(702) 257-1483

29. Defendant did not accept any transfers with reasonable cause to believe that such transfers were made with intent to give Defendant preference over other creditors.

30. Defendant was a bona fide holder for value prior to entry of an order to show cause under NRS Chapter 696B.

31. The distributions and transfers to Defendant, if any, were lawful and reasonable.

32. The transfers made to Defendant resulted from decisions that were made in good faith, on an informed basis and with a view to the interest of Plaintiff.

33. There was no co-mingling of funds, no under capitalization, no authorized diversion of funds, no treatment of corporate assets as other's own assets, and no failure to observe corporate formalities by Defendant.

34. Justice does not require the corporate fiction to be disregarded.

35. There is not such unity of interest and ownership between this Defendant and anyone else such that one is inseparable from the other.

36. Defendant has not retained any benefit which in equity or good conscience belongs to Plaintiff.

37. Plaintiff has failed to plead the alleged fraud allegation with requisite particularity.

38. Defendant made no false representations of material fact that it knew to be false.

39. Defendant's acts were not misleading in any material way.

40. Defendant committed no deceptive acts.

41. Defendant's conduct was not oppressive, fraudulent, nor committed with malice.

42. Plaintiff was not a creditor of Defendant.

43. The result of alleged transfers to Defendant did not leave Plaintiff with an unreasonably small amount of capital.

44. Defendant acted in good faith, pursuant to its obligations, if any, and was justified, privileged, or excused in its actions.

45. Plaintiff's damages, the existence of which are denied, were caused, in whole or in part, or contributed to by reason of the acts of Plaintiff.

. . .

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Las Vegas, NV 89169
(702) 257-1483

46. Pursuant to NRCP 11, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry. Defendant reserves the right to amend this Answer to allege additional affirmative defenses as necessary or appropriate or as further discovery warrants.

Defendant has been required to retain the services of attorneys to defend against this Complaint, and, as a direct, natural, and foreseeable consequence, therefore, has been damaged thereby, and is entitled to reasonable attorneys' fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays for judgment as follows:

1. Plaintiff take nothing by way of its Complaint;

2. The Complaint, and all causes of actions alleged against the Defendant therein be dismissed with prejudice;

3. For reasonable attorney's fees and costs, awarded to Defendant; and

4. For any such other and further relief the Court deems just and proper under the circumstances.

DATED this 10th day of June, 2020.

HOWARD & HOWARD ATTORNEYS PLLC

/s/ L. Christopher Rose
L. CHRISTOPHER ROSE, ESQ.
KIRILL V. MIKHAYLOV, ESQ.
WILLIAM A. GONZALEZ, ESQ.
3800 Howard Hughes Parkway, Suite 1000
Las Vegas, Nevada 89169

Attorneys for Defendants Six Eleven LLC; Quote My Rig, LLC; New Tech Capital LLC; 195 Gluten Free LLC; 10-4 Preferred Risk Managers, Inc.; Ironjab, LLC; Fourgorean Capital LLC; Chelsea Holding Company, LLC; and Chelsea Financial Group, Inc. (Missouri)

Howard & Howard
3800 Howard Hughes Pkwy., Suite 1000
Las Vegas, NV 89169
(702) 257-1483

Howard & Howard
3800 Howard Hughes Pkwy., Suite 1000
Las Vegas, NV 89169
(702) 257-1483

CERTIFICATE OF SERVICE

I hereby certify that I am employed in the County of Clark, State of Nevada, am over the age of 18 years and not a party to this action. My business address is Howard & Howard Attorneys PLLC, 3800 Howard Hughes Parkway, Suite 1000, Las Vegas, Nevada 89169.

On this day, I served the **DEFENDANT CHELSEA FINANCIAL GROUP, INC., A MISSOURI CORPORATION'S ANSWER TO COMPLAINT** in this action or proceeding electronically with the Clerk of the Court via the Odyssey E-File and Serve system, which will cause this document to be served upon the following counsel of record:

Mark E. Ferrario, Bar No. 1625 Kara B. Hendricks, Bar No. 7743 Kyle A. Ewing, Bar No. 14051 **GREENBERG TRAURIG, LLP** 10845 Griffith Peak Drive, Suite 600 Las Vegas, NV 89135 Telephone: (702) 792-3773 Facsimile: (702) 792-9002 ferrariom@gtlaw.com hendricksk@gtlaw.com ewingk@gtlaw.com *Attorneys for the Plaintiff*	Matthew T. Dushoff, Bar No. 4975 Jordan D. Wolff, Bar No. 114968 **SALTZMAN MUGAN DUSHOFF** 1835 Village Center Circle Las Vegas, NV 89134 *Attorneys for Defendants CTC Transportation Insurance Services of Missouri, LLC; CTC Transportation Insurance Services LLC; and CTC Transportation Insurance Services of Hawaii, LLC*

I certify under penalty of perjury that the foregoing is true and correct, and that I executed this Certificate of Service on June 10, 2020 at Las Vegas, Nevada.

/s/ Julia M. Diaz
An employee of HOWARD & HOWARD ATTORNEYS PLLC

4841-6199-7759, v. 1

RIS
MATTHEW T. DUSHOFF, ESQ.
Nevada Bar No. 004975
JORDAN D. WOLFF, ESQ.
Nevada Bar No. 014968
SALTZMAN MUGAN DUSHOFF
1835 Village Center Circle
Las Vegas, Nevada 89134
Telephone: (702) 405-8500
Facsimile: (702) 405-8501
E-Mail: mdushoff@nvbusinesslaw.com
jwolff@nvbusinesslaw.com

Attorneys for Defendants
CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; and CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

BARBARA D. RICHARDSON IN HER CAPACITY AS THE STATUTORY RECEIVER FOR SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC., Plaintiff, vs. 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; CHELSEA FINANCIAL GROUP, INC., a New Jersey Corporation d/b/a CHELSEA PREMIUM FINANCE CORPORATION; CHELSEA FINANCIAL GROUP, INC., a Delaware	CASE NO. A-20-809963-B DEPT NO. XIII **DEFENDANTS CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; AND CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC'S REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION**

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

Corporation; CHELSEA HOLDING COMPANY, LLC, a Nevada Limited Liability Company; CHELSEA HOLDINGS, LLC, a, Nevada Limited Liability Company; 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; GLOBAL CAPITAL GROUP, LLC, a New Jersey Limited Liability Company; GLOBAL CONSULTING; 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; 195 GLUTEN FREE LLC, a New Jersey Limited Liability Company, DOE INDVIDUALS I-X; and ROE CORPORATE ENTITIES I-X,

Defendants.

DEFENDANTS CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; AND CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC'S REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION

Defendants CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC ("CTC-MO"); CTC TRANSPORTATION INSURANCE SERVICES LLC ("CTC-CA"); and CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC ("CTC-HI" and hereafter collectively referred to with CTC-MO and CTC-CA as "CTC"), by and through their

counsel, Saltzman Mugan Dushoff, hereby files their reply in support of their Motion to Compel Arbitration (the "Motion").

This Reply is made and based upon NRS 38.221, the following Memorandum of Points and Authorities, the exhibits annexed thereto, the pleadings and papers on file herein, and any argument presented at the time of hearing on this matter.

DATED this 11th day of June, 2020.

SALTZMAN MUGAN DUSHOFF

By _____

MATTHEW T. DUSHOFF, ESQ.
Nevada Bar No. 004975
JORDAN D. WOLFF, ESQ.
Nevada Bar No. 0114968
1835 Village Center Circle
Las Vegas, Nevada 89134

Attorneys for Defendants
CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; and CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In Plaintiff's[1] opposition to CTC's Motion (the "Opposition"), Plaintiff takes great strides to attempt to distance herself from the District Court's recent decision in *Nevada Commissioner of Insurance, v. Milliman Inc, et al.*, Case No. A-17-760558-C, in which the District Court enforced the arbitration provision in a contract between a Nevada regulated insurer and a third-party service provider during a contemporaneous liquidation proceeding – a decision that was upheld following the Receiver's writ to the Nevada Supreme Court in *State ex rel. Comm'r of Ins. v. Eighth Judicial Dist. Court of Nev.*, 454 P.3d 1260 (Nev. 2019).

Despite the fact that the prior case is essentially identical to the present action, with the same Plaintiff, represented by the same attorneys, in the same jurisdiction, concerning another insurance company regulated under Nevada law, in the context of a receivership action wherein an order of liquidation has been entered, concerning a third-party performing similar services subject to an agreement with an arbitration provision, and in which Plaintiff is pursuing almost identical causes of action, Plaintiff still seeks to entirely sidestep this binding precedent.

The main precedent from both cases is that the Federal Arbitration Act (the "FAA") governs the enforceability of an arbitration provision in a civil action such as this one for breach of contract brought on behalf of an insolvent entity by the Receiver. Under these circumstances, there is no "reverse preemption" that would cause state laws, including the Nevada Insurers Liquidation Act (the "NILA'), to control whether or not the arbitration provision should be enforced. Given the FAA's strong preference for enforcing arbitration provisions, the result is that the Receiver may only pursue such claims in arbitration.

Plaintiff's strategy is thwarted by her own Opposition. A quick comparison between the Opposition and Plaintiff's prior papers in *Nevada Commissioner of In's, v. Milliman Inc* shows that she is effectively just regurgitating her earlier arguments, and in many instances, she does so

[1] Plaintiff Barbara D. Richardson ("Receiver"), in her capacity as the statutory receiver for Spirit Commercial Auto Risk Retention Group, Inc. ("Spirit") is referred to herein as "Plaintiff."

verbatim. To be clear, at least seven pages of her prior opposition are copied directly into her opposition to this Motion with, at most, some minimal reformatting. Obviously, it is impossible for Plaintiff to effectively distinguish the present case when so many of her opposing arguments are repeated word for word.

Out of respect for this Court's time, CTC does not believe it is appropriate to go through the exercise of cutting and pasting Milliman's prior successful arguments from that earlier case into this reply. Instead, when appropriate, we will direct the Court to the relevant language in the District Court's and Nevada Supreme Court's respective orders explaining why Plaintiff's contentions are incorrect.

Setting aside Plaintiff's prior futile arguments, there is not much new ground to cover. Plaintiff pays substantial attention to a concurring opinion in an irrelevant Fifth Circuit decision, *Janvey v. Alguire*, 847 F.3d 231 (5th Cir. 2017), along with its progeny, *Janvey II*, in an effort to argue that the arbitration agreements in this case are unenforceable as "instruments in a criminal enterprise." *Janvey* is easy to distinguish on the facts, as it concerns actual criminal activity (i.e. a Ponzi scheme) for which the principles had already been convicted and were actively serving time in prison during the subsequent civil case. No such criminal action exists here, and in any event, the proposition Plaintiff relies on is merely dicta in a concurring opinion that has no bearing on *Janvey's* majority opinion.

Plaintiff goes on to argue that certain claims in the Complaint are not subject to arbitration because they do not arise out of the agreements at issue, but once again, Plaintiff ignores that fact that an almost identical series of claims were all sent to arbitration in *Nevada Commissioner of In's, v. Milliman Inc.*, and in any event, the law is again clear that such claims are subject to arbitration as long as they "touch" the underlying agreement, which all Plaintiff's claims do.

Finally, Plaintiff concludes with her most disingenuous argument, stating that CTC should be forced to remain in this litigation as a necessary party for the purpose of judicial economy. It is Plaintiff, not CTC, who is squandering Spirit's assets by pursuing these baseless civil claims in a forum that she and her attorneys know for a fact is improper. Instead of bringing her claims against CTC in arbitration (as she has already been clearly instructed by the District Court and

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

Nevada Supreme Court), Plaintiff and her attorneys prefer to waste Spirit's money in order to repackage their prior losing arguments and ignore controlling caselaw. To extent money is wasted in this proceeding, only Plaintiff is to blame.

For all these reasons, the Court should grant CTC's Motion in its entirety and dismiss CTC from this case.

II. FACTUAL BACKGROUND

CTC relies on the factual background provided in its Motion.

III. LEGAL ARGUMENT

A. The Arbitration Provisions are Enforceable, and are Not the Product of a "Criminal Enterprise."

Plaintiff argues that she should not be bound by the arbitration provision in the Program Administration Agreement between Spirit and CTC-MO (the "CTC Agreement") because it was "merely an instrument in a criminal enterprise" allegedly perpetrated by CTC and the other Defendants. In doing so, Plaintiff cites to a single case, *Janvey v. Alguire*, 847 F.3d 231 (5th Cir. 2017), a fifth circuit decision which has no bearing on this action for a plethora of reasons.

Janvey concerns a receiver appointed by a federal district court, at the request of the Securities and Exchange Commission, to preserve and recover corporate assets that were stolen from investors through the commission of a Ponzi scheme organized by two individuals, R. Allen Stanford and James Davis, both of who pled guilty to a number of federal offenses and were incarcerated by the time the *Janvey* court issued its decision. At issue were a series of employment agreements containing arbitration clauses that were entered into between the various companies used by Stanford and Davis to carry out their crimes and employees whose job was to assist with the commission of those same crimes.

Unlike *Janvey*, this case is not premised on a criminal matter wherein numerous principals of a sham enterprise have been convicted by the federal government for running an illicit scheme. Instead, it is undisputed that Spirit was a fully functioning insurance company which wrote policies and paid out claims on behalf of its insureds.

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SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

It is also undisputed that CTC did in fact act as Spirit's program administrator in accordance with the CTC Agreement. Pursuant to the FTI Report, dated December 20, 2019 (the "FTI Report"), FTI stated that CTC paid Spirit a total of $288,500,472 in its capacity as program administrator. *See* Exhibit 2 to the Opposition, p. 11, Table 2. The sole outstanding issue between CTC and Spirit is whether or not CTC paid Spirit the entire amount owed to it pursuant to the CTC Agreement, or whether FTI is correct that CTC still owes Spirit an additional payment of $30,839,150, a claim that CTC disputes. *Id.* Again, the crux of this case is a simple breach of contract claim to determine whether or not CTC underpaid Spirit by approximately 10%. In this context, Plaintiff's bombastic cries of "criminality" are ridiculous. Contrary to Plaintiff's argument, even the concurring opinion in *Javney* upon which she relies is ultimately in favor of resolving similar claims in arbitration. *Id.*, at 249 ("The Supreme Court has long enforced agreements to arbitrate statutory claims, including claims under .... the Racketeer Influenced and Corrupt Organizations Act (RICO)").

Moreover, Plaintiff cites only the court's concurring opinion, and the majority opinion in *Janvey* was decided on entirely different grounds. Only one of the employment agreements at issue was between the employee and the entity represented by the receiver, and so the court held that all the other agreements were not enforceable against the receiver since he was not a party to those agreements. *See Janvey*, 847 F.3d, at 242 ("Because the Receiver brings his claims on behalf of the Bank and the Bank has not consented to arbitration, the motions to compel arbitration fail."). The final employment agreement, which was between an employee and the actual entity represented by the receiver, was not upheld because the employee actively participated in the civil case brought against him constituting waiver, and prejudiced the plaintiff by not seeking to invoke his right to arbitration until almost three years of litigation had been completed. *Id.*, at 243-244.

Neither of these arguments have any relevance to the present action. Here, Spirit is a party to the agreement containing the arbitration provision at issue, and CTC immediately moved to compel arbitration of the claims brought against it.

In addition, the concurring opinion on which Plaintiff exclusively relies, arguing that arbitration agreements should not be enforced if they are instruments of fraud, is also inapplicable

here. In *Janvey*, the "illegal" agreements were employment contracts wherein the job of the employee was to break the law and steal from his or her customers, and the concurring judge opined that he believed the arbitration provisions were in defendants' agreements in order to keep their criminal acts hidden. *See Janvey*, 847 F.3d, at 250 ("The arbitration clauses, including their ostensible compliance with FINRA rules, perpetuated the Ponzi scheme by shielding the fraudulent activity from potentially revealing discovery while giving the scheme an air of legitimacy).

Plaintiff's claim that the arbitration clause in the CTC Agreement could be used to "conceal" evidence of a fraudulent scheme is equally ludicrous. Spirit and CTC have been subject to the regulation of the Nevada Department of Insurance (the "Department"), and specifically the Receiver herself for almost a decade, and their underlying financials have been previously made available to the Receiver. In fact, in order to create the FTI Report, FTI has already been permitted to review all of CTC's primary financial records. *See* Exhibit 2 to the Opposition, at pp. 4-5. While CTC vehemently disputes the conclusions set forth in the FTI Report and looks forward to upending them through arbitration, there is simply no argument that CTC is concealing anything – they are literally an open book.

Plaintiff's role of regulator also afforded her the opportunity to review and approve agreements between the parties, including the CTC Agreement, which Plaintiff herself approved on June 29, 2016. *See* Exhibit B to the Motion. Again, any argument that the CTC Agreement was used to conceal anything from the Plaintiff is patently absurd.

Finally, Plaintiff ignores the fact that the Complaint alleges that "[t]he CTC Agreement was a valid and enforceable contract," and she has alleged a breach of contract claim against CTC premised upon its enforcement. Complaint, at ¶¶ 264, 266. The law is clear that Plaintiff must now pursue her claims in accordance with this valid, enforceable agreement. Hence, the Court should grant this Motion in its entirety and compel Plaintiff to pursue its claim against CTC in arbitration.

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SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

B. The Arbitration Provision in the CTC Agreement is Enforceable Pursuant to the Federal Arbitration Act.

Plaintiff argues that the arbitration provision of the CTC Agreement should not be enforced pursuant to either the Federal Arbitration Act (the "FAA") or Nevada law for the following four reasons: (i) the NILA reverse-preempts the FAA pursuant to the McCarran-Ferguson Act; (ii) the arbitration provision is not enforceable under the NILA; (iii) the District Court has jurisdiction pursuant to NRS 696B.200; and (iv) the Receiver is not bound by the arbitration provision since she acts on behalf of Spirit's members, insureds, and creditors, as opposed to Spirit itself. As set forth below, not only do these arguments completely lack merit, but they are copied almost verbatim from Plaintiff's unsuccessful opposition in *Nevada Commissioner of Insurance, v. Milliman Inc, et al.*, a copy of which is annexed hereto as **Exhibit A**. As this case is essentially identical, this Court should follow the prior precedent set forth in *Milliman* that the FAA governs enforcement of the contract between the parties and all claims must be resolved in arbitration. A copy of the *Milliman* court's order is annexed hereto as **Exhibit B**. The Nevada Supreme Court also stated its agreement with the *Millian* court's conclusion that the FAA controls in an ensuing order in which it denied Plaintiff's subsequent writ on that same issue, a copy of which is annexed hereto as **Exhibit C**.

1. The FAA is not reverse preempted by the NILA, and requires enforcement of the arbitration provision in the CTC Agreement.

Plaintiff's argument that the NILA preempts the FAA is copied almost verbatim from its prior argument in *Milliman*. *Compare* Opposition, at p.11-14, with Exhibit A, at p. 8-11.

When confronted with these identical arguments in an identical proceeding, the *Millian* Court held that there is no reverse preemption of the FAA, stating the following:

> **[T]he Nevada Liquidation Act does not reverse-preempt the FAA under the McCarren-Ferguson Act**, 15 U.S.C. §§ 1011-1015. The standard for reverse preemption is not satisfied here because forcing a statutory liquidator to arbitrate ordinary, pre-insolvency breach of contract and tort claims, such as Plaintiff's damages claims against Milliman, neither implicates the business of insurance nor interferes with the liquidator's statutory function. NHC is no longer a functioning entity engaged in the business of insurance. Enforcing the Agreement's arbitration clause will not disrupt the orderly liquidation of NHC, and Plaintiff's action against

> Milliman has no bearing on the administration, allocation or ownership of NHC's property or assets, which is the province of the Receivership Action.
>
> Moreover, nothing in the Nevada Liquidation Act precludes a liquidator from arbitrating its claims. On the contrary, the Receivership Order entered pursuant to the Act expressly authorizes Plaintiff to "initiate and maintain actions at law or equity or any other type of action or proceeding of any nature, in this and other jurisdictions," and to "[i]nstitute and prosecute ... any and all suits ***and other legal proceedings***" on behalf of NHC. Absent such a conflict, there is no reverse preemption…

Exhibit B, at pp. 8-9.[2] (emphasis added) (internal cites omitted)

When Plaintiff's counsel filed a writ seeking to overturn this decision, Plaintiff's same legal argument was further refuted by the Nevada Supreme Court, which stated the following:

> **Richardson claims the district court committed legal error by ordering arbitration despite her argument that the McCarran Ferguson Act, 15 U.S.C. § 1012, reverse-preempts the FAA.** In her view, enforcement of an arbitration agreement against an insurance liquidator pursuing contract and tort damages against third parties would thwart the insurance liquidator's broad statutory powers and the general policy under Nevada's Uniform Insurance Liquidation Act (VILA), *see* NRS 696B.280, to concentrate creditor claims in a single, exclusive forum. However, at issue here is not a creditor's claim against the Co-Op; at issue is Richardson's breach-of-contract and tort claims against several third parties on behalf of the Co-Op, which happens to be in receivership. **Courts elsewhere that have considered Richardson's argument have rejected it.**

State ex rel. Comm'r of Ins. v. Eighth Judicial Dist. Court of Nev., 454 P.3d 1260 (Nev. 2019) (emphasis added) (internal cites omitted).

In one of the short portions of Plaintiff's Opposition that is not identical to her prior papers, Plaintiff seeks to distinguish this case by noting that the order permanently appointing Richardson as the receiver states that this Court has "exclusive jurisdiction over all the Property and any claims or rights respecting the Property to the exclusion of any other Court or tribunal, such exercise of sole and exclusive jurisdiction being hereby found to be essential to the safety of the public and of the claimants against [Spirit]." (Opposition, pp. 13-14). However, Plaintiff ignores the fact that

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[2] Notably, almost identical language in the order appointing Richardson as permanent receiver for Spirit gives her the same power to commence an arbitration, stating that she may "[i]nstitute and prosecute, in the name of [Spirit] or in her own name, any and all suits, to defend suits in which [Spirit] or the Receiver is a party in this state or elsewhere, whether or not such suits are pending as of the date of this Order, to abandon the prosecution or defense of such suits, legal proceedings and claims which she deems inappropriate, ***to pursue further and to compromise suits, legal proceedings or claims on such terms and conditions as she deems appropriate***." Exhibit 2 to the Opposition, Section 15(h), pp. 10-11 (emphasis added).

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

this same language also appeared word for word in the prior order appointing Richardson as the permanent receiver in *Milliman* (where once again the court ordered the parties to arbitration pursuant to the FAA), a copy of which is annexed hereto as **Exhibit D**. *See* Exhibit D, p.3, Section 3, lines 15-20.

Plaintiff also tries to distinguish this case on the basis that CTC was registered as an insurance holding company with the Department. However, she provides no cognizable rational as to why this should cause the Court to deviate from the clear precedent in *Milliman*, and does not cite a single case in support of her argument. Plaintiff concludes her argument by once again claiming that the Court should disregard *Milliman*, claiming that this case is different because "Spirit was merely an instrument in a criminal enterprise," however, as already discussed herein, this criminal instrument standard has no relation to the present facts, and in any event, comes solely from a concurring opinion in an easily distinguished fifth circuit case.

For all these reasons, the FAA is not reverse preempted by the NILA, and so Plaintiff's argument fails.

2. Again, the FAA preempts Nevada law and the NILA.

Plaintiff goes on to makes a convoluted argument that appears to argue that Nevada law should preempt District of Columbia law (the controlling law pursuant to the terms of CTC Agreement) because "arbitration is procedural, " and then proceeds to reiterate its prior claim that the NILA preempts the Nevada Arbitration Act's general proposition that arbitration clauses are enforceable.[3]

This Court does not need to look further than the aforementioned precedent in *Milliman* stating that the FAA preempts state law in its entirety. As such, it is of no import which state law, Nevada or District of Columbia, would theoretically apply in its absence.

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[3] Notably, the only sentence in this section which is not directly copied from Plaintiff's prior opposition in *Milliman* concerns a cite to a footnote in *Tipton v. Heeren*, 109 Nev. 920 (1993), which states that a Nevada court should enforce a Wyoming choice of law provision in a promissory note with respect to substantive issues while Nevada law would still apply to procedural issues. This is irrelevant, as *Tipton* does not stand for the proposition that arbitration is procedural (in fact, it does not mention arbitration at all), nor does it provide any basis to argue that the FAA is preempted by Nevada law, or any state law for that matter. The remainder of the argument is reproduced wholesale. *Compare* Opposition, at pp. 15-16, with Exhibit A, pp. 11-12.

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

Curiously, Plaintiff also includes a footnote challenging the rational of the choice of law clause providing that District of Columbia law should apply to the CTC Agreement. *See* Opposition, p. 15, fn. 16. CTC reminds this Court that the Receiver previously approved the CTC Agreement, including the choice of law provision that she now seeks to question. Furthermore, to the extent Plaintiff opines as to whether Spirit "fully understood the provisions of the contract," Plaintiff also alleges in her Complaint that the CTC agreement is "valid and enforceable," so any novel argument against contract formation that she may be attempting to invoke in the Opposition is directly contrary to her own allegations.

3. NRS 696B.200 has no bearing on the enforceability of the arbitration provisions pursuant to the FAA.

Plaintiff argues that its claims are "appropriately" brought in this Court against CTC pursuant NRS 696B.200(1)(c). NRS 696B.200 provides that a Nevada court "has jurisdiction" in an action brought by an insurance receiver against certain persons, including managers, organizers, and promoters of an insurer. Plaintiff claims that this Court has jurisdiction because she believes that CTC must fall into one of the three aforementioned categories.

However, the issue here is not whether this Court would have jurisdiction but for the arbitration provision in the CTC Agreement. Instead, as the Nevada Supreme Court and the *Milliman* court have already stated, the FAA preempts Nevada state law concerning arbitration in this context, and so Plaintiff's claims against CTC must be brought in arbitration regardless of what other courts could potentially hear the matter in the absence of such a provision.

4. The receiver stands in the shoes of Spirit.

Plaintiff concludes this portion of her Opposition by resurrecting another failed argument in favor of the NILA's reverse preemption of the FAA – that as Receiver she does not merely "stand in the shoes" of Spirit, and instead functionally represents its insureds, policyholders, and creditors. As already discussed at length, Nevada law is clear that the FAA applies and that the arbitration provision of the CTC Agreement should be enforced.

Again, a large portion of Plaintiff's argument is copied verbatim from the *Milliman* opposition. *Compare*, Opposition, at pp. 17-18, with Exhibit A, at pp. 14-15. When confronted

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

with this argument, the *Milliman* court noted that "[w]hile it is true that virtually everything the Liquidator does is for the benefit of the insolvent insured's creditors and policyholders, this does not mean that the Liquidator may ignore and avoid the contractual, statutory, and judicial limitations applicable to the particular claims she brings against Milliman." Exhibit B, at p. 6, ln. 19-22.

Plaintiff also relies exclusively on Nevada state statutory law, again ignoring clear direction from the Nevada Supreme Court that the FAA preempts state law with respect to the enforcement of the arbitration provision in this context. *State ex rel. Comm'r of Ins.*, 454 P.3d at 1260 ("Richardson claims the district court committed legal error by ordering arbitration despite her argument that the McCarran Ferguson Act, 15 U.S.C. § 1012, reverse-preempts the FAA....Courts elsewhere that have considered Richardson's argument have rejected it.").

Plaintiff goes on to argue that enforcement of the arbitration clause is inequitable because it would benefit CTC and Plaintiff asserts that CTC is a bad actor, again relying on its previously debunked "criminal enterprise" theory. In support, Plaintiff again cites only to a second decision concerning the *Janvey* matter, styled as *Janvey II*, which is just as irrelevant as the first citation as it concerns wholly different facts and controlling law.

Despite the fact that neither *Janvey* nor *Janvey II* have any bearing on this proceeding, Plaintiff relies on them in arguing that this Court should abandon the binding Nevada precedent set forth in *Milliman* and *Comm'r of Ins. V. Eighth Jud.* because our own Nevada Supreme Court "fails to appreciate" the policy goals advocated by Plaintiff, and insists on "drawing an artificial distinction between the benefits of consolidating claims *by* creditors and claims brought by the Receiver *for the benefit of* creditors." Opposition, at p. 19. (emphasis in original)

In actuality, it is Plaintiff who fails to appreciate that her disagreement is not with policy, but with Nevada law. Sadly, she does so only at the cost of the insureds, policyholders, and creditors, whose best interests she claims to ultimately represent. Not only has Plaintiff wasted money on needless litigation and motion practice, but she also seeks to deprive the parties of a proceeding that would be cost effective and also resolve this dispute in an expedient manner. *See Sylver v. Regents Bank, Nat'l Ass'n*, 129 Nev. 282, 286, 300 P.3d 718, 721 (2013) ("we

consider that '[s]trong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation.'") (internal citation omitted).

For all these reasons, the Court should grant the Motion in its entirety and compel Plaintiff to arbitration all of its claims against CTC.

C. All of the Receiver's Claims Against CTC Arise out of the Agreement and are Subject to Arbitration.

As already discussed, the FAA controls whether Plaintiff's claims are subject to arbitration. The FAA reflects a "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 1745 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983)). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Bank of N.Y. Mellon v. Christopher Cmtys. at S. Highlands Golf Club Homeowners Ass'n*, No. 2:17-CV-1033 JCM (GWF), 2019 U.S. Dist. LEXIS 152830, at *8 (D. Nev. Sep. 9, 2019) (citations omitted).

"In construing arbitration clauses, courts should first determine the breadth of the arbitration clause." *Rupracht v. Union Sec. Ins. Co.*, No. 3:07-cv-00231-BES (RAM), 2007 U.S. Dist. LEXIS 112456, at *12 (D. Nev. Dec. 20, 2007) (internal cites omitted). "An arbitration clause is broad if it covers "all disputes arising out of a contract" and is a narrow clause if it covers only specific types of disputes. *Id.*

As the arbitration provision in the CTC Agreement covers "any controversy or claim of either of the parties arising out of or relating to" the agreement, it is a "broad" arbitration provision. When interpreting the scope of a broad arbitration clause "factual allegations need only 'touch matters covered by the contract containing the arbitration clause, and all doubts are to be resolved in favor of arbitrability.'" *Rupracht*, 2007 U.S. Dist. LEXIS 112456, at *13 (quoting *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) (internal citations omitted) (emphasis added)). *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 624 n.13, 105 S. Ct. 3346, 3352 (1985) ("[I]nsofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

arbitrability."); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987) ("If the allegations underlying the claims 'touch matters' covered by the parties' sales agreements, then those claims must be arbitrated, whatever the legal labels attached to them.").

Regardless, Plaintiff argues that certain claims it alleges against CTC do not arise out of the CTC Agreement because they are based upon time periods where such agreements were not in affect against particular CTC entities. However, in doing so, Plaintiff only highlights the vague, problematic nature of the allegations in her own Complaint.

While Plaintiff names CTC-HI as a party, the Complaint does not contain any specific allegations against CTC-HI whatsoever. Instead, CTC-HI is only referenced as a part of the defined term "CTC," which collectively refers to all three CTC entities who are defendants in this case. For this reason alone, CTC-HI should be dismissed from whatever legal proceeding Plaintiff brings to pursue these claims in the future, as there is clearly no good faith basis to name CTC-HI as a party.

CTC-CA and CTC-MO both entered into Agreements with Plaintiff containing identical arbitration provisions. CTC-CA's Agreement was effective from November 2011 until July 1, 2016, at which time CTC-MO and Spirit executed the CTC Agreement which was effective on that same date. Plaintiff continues to grasp at straws arguing that it has alleged claims against those two entities that would fall outside their respective contractual periods with Plaintiff. However, Plaintiff again fails to cite to a single allegation in her Complaint in support of that argument, because no such allegations exist.

Instead, Plaintiff's Complaint only refers to the CTC entities collectively, claiming that all three entities are parties to, and breached the CTC Agreement. (*See* Complaint, at ¶¶ 55, 264, 266). Noticeably absent from the Complaint are any allegations that any of the CTC entities, including CTC-CA, breached the earlier agreement between CTC-CA and Spirit. Any attempt to refocus this Court on that earlier agreement falls flat, as it is completely overlooked in Plaintiff's

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SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

Complaint. There is simply no cognizable argument that distinct allegations were made against either entity either before or after they contracted with CTC.[4]

Realizing that nothing in the Complaint can support her argument, Plaintiff turns back to the FTI Report. Notably, the FTI Report is not an Exhibit to the Complaint, nor does it have any other connection to the Complaint. Even if the FTI Report supported Plaintiff's argument (and it does not) Plaintiff cannot make up for its vague, conclusory allegations by simply pointing to an outside document consisting entirely of hearsay. In any event, the two pages of the FTI Report cited by Plaintiff in support of her argument are immaterial, as they merely state that FTI believes CTC-CA has custody of CTC's records, while tacitly admitting that the other entities also had their own "limited records" which were also provided to FTI.[5]

Next, Plaintiff singles out certain claims seeking to argue that they are not sufficiently connected to the CTC Agreement to require arbitration. In doing so, Plaintiff has no choice but to admit that each claim involves CTC's alleged breach of its duties pursuant to the CTC Agreement, as CTC has already cited such allegations in the Complaint in extensive detail. *See* Motion, at pp. 10-15. Nonetheless, Plaintiff seeks to argue that since certain claims are not exclusively based upon the CTC Agreement, those claims are not subject to arbitration. However, Plaintiff's argument completely ignores the correct legal standard.

As already set forth on pages 10 through 15 of CTC's Motion, it is undeniable that all of Plaintiff's claims "touch" the CTC Agreement, easily satisfying the requisite legal standard for

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[4] These shortcomings concerning Plaintiff's Complaint were initially noted by CTC itself in the Motion, recognizing that while Plaintiff's allegations were excessively vague, CTC has no choice but to stay within the four corners of the Complaint with respect to the Motion. *See* Motion, at p.10, fn. 2.

[5] Even if Plaintiff's Complaint did contain allegations against an entity that was not a party to CTC Agreement, that entity would still be bound by the arbitration provision as a non-signatory since it would allegedly be an agent of the other entities, and would also be subject to estoppel as it benefitted from the existence of the agreement. *See Truck Ins. Exch. v. Swanson*, 124 Nev. 629, 634-35, 189 P.3d 656, 660 (2008) ("[T]he obligation to arbitrate, which was executed by another party, may attach to a nonsignatory. In particular, a nonsignatory may be bound to an arbitration agreement if so dictated by the 'ordinary principles of contract and agency. Accordingly, various courts have adopted theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.") (internal quotations omitted).

arbitrability. *See Rupracht, supra.* Therefore, Plaintiff has no choice but to pursue these claims against CTC in arbitration.

D. CTC is Not a Necessary Party to this Proceeding and Judicial Economy Does Not Compel CTC to Remain a Party to this Action.

Plaintiff finally argues that CTC is so closely intertwined with the other allegations in her Complaint, that the Court should disregard the arbitration provision because judicial economy and Plaintiff's own convenience somehow trumps Nevada law. Again, Plaintiff can cite no cases to back up this assertion, and relevant caselaw is squarely opposed to this argument. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 1745 (2011) (stating that the FAA reflects a liberal federal policy in favor of arbitration and the fundamental principal that arbitration is a matter of contract); *Seasons Homeowners Ass'n v. Richmond Am. Homes of Nev., Inc.*, No. 2:11-cv-01875-RCJ-PAL, 2012 U.S. Dist. LEXIS 100859, at *26 (D. Nev. July 19, 2012) (recognizing that Nevada law favors the lower costs and faster resolution afforded by arbitration when compared to traditional litigation).

Even so, Plaintiff claims that as the "star witness," CTC must remain a party to this action. Obviously, Plaintiff ignores the fact that she can obviously seek CTC's testimony through NRCP Rule 30 should she so choose. Plaintiff also claims that a separate arbitration would squander Spirit's resources, however, it is actually Plaintiff who is squandering resources by refusing to recognize the clear precedent that she must bring claims against CTC in arbitration. As Plaintiff and her same attorneys were directly involved in a prior case resulting in such precedent, this is not simply an oversight, but conscious disregard on the part of both Plaintiff and her attorneys to ignore applicable law.

Plaintiff goes on to argue that CTC orchestrated the alleged fraudulent scheme against Spirit. Plaintiff forgets in her Complaint, she actually alleges that Thomas Mulligan "orchestrated" the alleged fraud, not CTC. *See, e.g.,* Complaint, at ¶ 1 ("This complaint arises out of a vast fraudulent conspiracy orchestrated by Thomas Mulligan and others…"). A close look at the Complaint and the responsive motions pleadings before the Court shows that Plaintiff essentially considers every defendant to be a criminal mastermind, as well as a mere "vessel" or

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

"instrumentality," depending on which label best suits Plaintiff's argument at any given time. *See, e.g.*, Complaint, at ¶ 354 (stating that CTC and the other company defendants "are merely vehicles by which funds are knowingly and intentionally siphoned from Spirit for the benefit or the individual defendants and/or the entities controlled by the same.").

Plaintiff continues to argue that "CTC has admitted it owes Spirit $30 million dollars it cannot pay." Opposition, at p. 29. CTC does not admit it owes Spirit any amount of money under the CTC Agreement, and will zealously defend itself against any such claim or other liability related thereto.

Plaintiff concludes by reiterating the same underwhelming policy argument that appears several times throughout her Opposition, and it is still unpersuasive. It is Plaintiff, not CTC, who exhibits "gamesmanship" by disregarding an arbitration provision that she knows is effective in an effort to bring a vague, overbroad litigation against as many parties as possible so she can artificially expand her simple contract claims into a purported conspiracy. Plaintiff's dispute with CTC boils down to a simple accounting disagreement pursuant to the parties' performance of the CTC Agreement, and whether one party underpaid the other. This discreet issue should be quickly and efficiently disposed of through arbitration in accordance with the admittedly "valid and enforceable" CTC Agreement.

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SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

IV. CONCLUSION

As provided herein, the CTC Agreement is a valid, enforceable agreement pursuant to which Spirit and CTC agreed to arbitrate any disputes arising from the CTC Agreement. The arguments perpetrated by the Receiver in opposition to this Motion are wholly without merit, and so CTC reiterates its request that the Court grant this Motion and compel arbitration with respect to all claims against CTC in this action.

DATED this 11th day of June, 2020.

SALTZMAN MUGAN DUSHOFF

By _____

MATTHEW T. DUSHOFF, ESQ.
Nevada Bar No. 004975
JORDAN D. WOLFF, ESQ.
Nevada Bar No. 014968
1835 Village Center Circle
Las Vegas, Nevada 89134

Attorneys for Defendants
CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; and CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SALTZMAN MUGAN DUSHOFF, and that on the 11th day of June, 2020, I caused to be served a true and correct copy of the foregoing **DEFENDANTS CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; AND CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC'S REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed below:

Barbara D Richardson:
Mark Ferrario (ferrariom@gtlaw.com)
Megan Sheffield (sheffieldm@gtlaw.com)
Kara Hendricks (hendricksk@gtlaw.com)
LVGT docketing (lvlitdock@gtlaw.com)
Andrea Flintz (flintza@gtlaw.com)
Kyle Ewing (ewingk@gtlaw.com)
Andrea Rosehill (rosehilla@gtlaw.com)

Thomas Mulligan:
William Urga (wru@juwlaw.com)
David Malley (djm@juwlaw.com)
Michael Ernst (mre@juwlaw.com)
Linda Schone (ls@juwlaw.com)

CTC Transportation Insurance Services of Missouri, LLC:
Matthew Dushoff (mdushoff@nvbusinesslaw.com)
Jordan Wolff (jwolff@nvbusinesslaw.com)

Criterion Claims Solutions of Omaha, Inc.:
Joshua Dickey (jdickey@baileykennedy.com)
John Bailey (jbailey@baileykennedy.com)
Bailey Kennedy, LLP (bkfederaldownloads@baileykennedy.com)
Rebecca Crooker (rcrooker@baileykennedy.com)

Chelsea Holding Company, LLC:
L. Christopher Rose (lcr@h2law.com)
Julia Diaz (jd@h2law.com)
Susan Owens (sao@h2law.com)
Kirill Mikhaylov (kvm@h2law.com)
William Gonzales (wag@h2law.com)

Lexicon Insurance Management LLC, a North Carolina LLC:
Sean Owens (sowens@grsm.com)
Gayle Angulo (gangulo@grsm.com)

Robert Larsen (rlarsen@grsm.com)
Wing Wong (wwong@grsm.com)
E-serve GRSM (WL_LVSupport@grsm.com)

James Marx:
Efile LasVegas (efilelasvegas@wilsonelser.com)
Sheri Thome (sheri.thome@wilsonelser.com)
Lani Maile (lani.maile@wilsonelser.com)

Scott McCrae:
Tamara Peterson (tpeterson@petersonbaker.com)
Nikki Baker (nbaker@petersonbaker.com)
Erin Parcells (eparcells@petersonbaker.com)
David Astur (dastur@petersonbaker.com)

Brenda Guffey:
Copy Room (efile@alversontaylor.com)
Kurt Bonds (kbonds@alversontaylor.com)

Other Service Contacts not associated with a party on the case:
Olivia Swibies (oswibies@nevadafirm.com)
Alejandro Pestonit (apestonit@nevadafirm.com)
Richard Holley, Esq. (rholley@nevadafirm.com)
Mary Langsner (mlangsner@nevadafirm.com)
Thomas McGrath (tmcgrath@tysonmendes.com)
Scarlett Fisher (sfisher@tysonmendes.com)
Christopher Lund (clund@tysonmendes.com)
Christina Espinosa (cespinosa@tysonmendes.com)
Denise Doyle (service@cb-firm.com)

Cindy Krishi

An Employee of SALTZMAN MUGAN DUSHOFF

SALTZMAN MUGAN DUSHOFF PLLC
1835 Village Center Circle
Las Vegas, Nevada 89134
Tel: (702) 405-8500 / Fax: (702) 405-8501

Exhibit A

(Opposition to Motion to Compel Arbitration)

OPPS

MARK E. FERRARIO, ESQ.
Nevada Bar No. 1625
ERIC W. SWANIS, ESQ.
Nevada Bar No. 6840
DONALD L. PRUNTY, ESQ.
Nevada Bar No. 8230
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, Suite 400 N
Las Vegas, NV 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002
Email: ferrariom@gtlaw.com
swanise@gtlaw.com
pruntyd@gtlaw.com
Counsel for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP,

Plaintiff,

v.

MILLIMAN, INC., a Washington Corporation; JONATHAN L. SHREVE, an Individual; MARY VAN DER HEIJDE, an Individual; MILLENNIUM CONSULTING SERVICES, LLC, a North Carolina Corporation; LARSON & COMPANY P.C., a Utah Professional Corporation; DENNIS T. LARSON, an Individual; MARTHA HAYES, an Individual; INSUREMONKEY, INC., a Nevada Corporation; ALEX RIVLIN, an Individual; NEVADA HEALTH SOLUTIONS, LLC, a Nevada Limited Liability Company; PAMELA EGAN, an Individual; BASIL C. DIBSIE, an Individual; LINDA MATTOON, an Individual; TOM ZUMTOBEL, an Individual; BOBBETTE BOND, an Individual; KATHLEEN SILVER, an Individual; DOES I through X inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

Case No.: A-17-760558-C
Dept. No.: 25

PLAINTIFF'S OPPOSITION TO MILLIMAN'S MOTION TO COMPEL ARBITRATION

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

Plaintiff, Commissioner of Insurance BARBARA D. RICHARDSON ("Commissioner"), in her capacity as Receiver of Nevada Health CO-OP ("NHC" or "CO-OP"), by and through her undersigned counsel, hereby submits this Opposition to Defendant Milliman's Motion to Compel Arbitration. This Opposition is based on the pleadings and papers on file herein, the attached memorandum of points and authorities, and any exhibits attached hereto, and any oral argument this Court should choose to entertain.

DATED this 11th day of December, 2017.

GREENBERG TRAURIG, LLP

/s/ Donald L. Prunty, Esq.
MARK E. FERRARIO, ESQ.
Nevada Bar No. 1625
ERIC W. SWANIS, ESQ.
Nevada Bar No. 6840
DONALD L. PRUNTY, ESQ.
Nevada Bar No. 8230
3773 Howard Hughes Parkway, Suite 400 N
Las Vegas, NV 89169
Counsel for Plaintiff

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Milliman seeks to have this Court relinquish its exclusive jurisdiction over proceedings relating to the receivership of NHC in favor of private, confidential, arbitration. However, relinquishing this jurisdiction would be contrary to the complex statutory scheme for winding down of insurance companies as laid out in Nevada's Liquidation Act, NRS 696B, and the Receivership Court's[1] prior Permanent Injunction and Order Appointing Commissioner as Permanent Receiver of Nevada Health Co-Op (the "Receivership Order"). This statutory scheme – and the Receivership Order issued under that statutory authority – have one purpose: maximizing the value of the estate of the defunct insurance company for the benefit of policyholders and creditors. The Commissioner, having been appointed receiver, must carry out that goal. To that end, she has asserted claims against numerous entities, including Milliman, in the instant lawsuit. Wresting

[1] The Hon. Judge Kenneth Cory, Clark County Nevada Eight Judicial District, Dept. 1.

various fragments of this lawsuit into piecemeal private tribunals for confidential proceedings outside public view is not in line with the purposes of the statute. Mere months ago, another court considering Milliman's ability to compel arbitration under an identical contract provision and similar circumstances denied Milliman's motion.[2]

Further, Milliman's view is not in line with the law; Milliman's legal arguments are meritless. Milliman argues that the general policy favoring arbitration mandates arbitration here, but the Federal Arbitration Act (the "FAA") is reverse-preempted by the McCarran-Ferguson Act, which expressly leaves insurance regulation to the states. The Nevada Arbitration Act (the "NAA") conflicts with the specific statutory scheme laid out in Nevada's Liquidation Act, and as the specific takes precedence over the general under Nevada law, the exclusive jurisdiction of the district court provided for in the statute and the Receivership Order entered under the statute prevails.

Moreover, the Receiver is not a signatory to the contract containing the arbitration clause, and therefore Milliman must show that an exception applies to the rule that arbitration only binds signatories. Milliman's attempts to invoke an exception fall flat.

Finally, even if this Court were inclined to enforce the arbitration clause, under applicable law it could only do so with respect to the claims arising out of the contract at issue. Many of the claims here do not arise out of the contract. Likewise, many of the claims are not brought on behalf of NHC, but instead on behalf of its creditors or policyholders. In both of these situations, arbitration is inappropriate. As such, only a narrow subset of claims could be arbitrated. Under those circumstances it would be wasteful, duplicative, and create the possibility of inconsistent results to bifurcate the claims against Milliman. In sum, this Court should deny Milliman's motion to compel arbitration for the reasons that follow.

II. FACTUAL BACKGROUND

When NHC's predecessor, the Culinary Health Fund, considered the possibility of establishing a CO-OP under the ACA, it sought out an actuarial expert. The Culinary Health Fund entered into a contract with Milliman, dated October 20, 2011 (the "2011 Agreement"). The 2011

[2] *See* Judgment on Exceptions, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, September 19, 2017, attached hereto as **Exhibit A**. Although couched as a motion related to subject matter jurisdiction, the nature of the motion was to compel arbitration.

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

Agreement contained an arbitration clause requiring arbitration of "any dispute arising out of or relating to the engagement of Milliman..." *See* Motion to Compel Arbitration, Exhibit A, at 5. As more specifically laid out in the Complaint, the Culinary Health Fund's assets were assigned to NHC.

Unfortunately, Milliman's services as a consulting actuary failed to meet applicable statutory, professional, and contractual standards. Among other issues, Milliman produced deficient forecasts and studies for loan applications, recommended inadequate insurance premium levels, provided faulty actuarial guidance to NHC management, promoted and incorporated in its assumptions accounting entries that were neither proper nor authorized without appropriate disclosure, participated in financial misreporting, and improperly calculated and certified NHC's projections and reserves to regulators.

Further, as more specifically described in the Complaint, Milliman was not merely a contractor performing outsourced tasks, but an "interactive partner" of NHC; it served as the key partner providing budget forecasts, planning, premium pricing, opinions, and judgments that were justifiably relied on by the new CO-OP. In fact, the CO-OP relied on the superior knowledge and expertise of its self-proclaimed "interactive partner" Milliman and Milliman's actuaries - Shreve and Heijde - to establish and run the enterprise.

As a result of Milliman's failures, as well as the failures of other named defendants in this action, NHC was incapable of continuing, and the Nevada Department of Insurance was forced to step in. Amy L. Parks (the then acting Nevada Commissioner of Insurance) commenced the receivership action against NHC by filing a petition to appoint herself as the receiver of NHC under NRS 696B. Thereafter, on October 14, 2015, the Receivership Court issued the Receivership Order naming the Commissioner as permanent receiver of NHC. *See* Receivership Order, attached hereto as **Exhibit B**. Cantilo & Bennett, L.L.P. was named as Special Deputy Receiver ("SDR").

Pursuant to the Court's Receivership Order and subsequent Final Order of Liquidation, the Commissioner as Receiver and the SDR are authorized to liquidate the business of NHC and wind up its ceased operations, including prosecuting suits on behalf of the thousands of injured people and entities associated with NHC's liquidation, including NHC's members, its formerly insured patients, unpaid hospitals, doctors, other creditors, and the public at large. *See generally id.*

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

As relevant here, the Receivership Order provides the following:

> (1) ... The Receiver and the SDR are hereby directed to ***conserve and preserve the affairs*** of CO-OP and are vested, in addition to the powers set forth herein, with all the powers and authority expressed or implied under the provisions of chapter 696B of the Nevada Revised Statute ("NRS"), and any other applicable law. The Receiver and Special Deputy Receiver are hereby authorized to rehabilitate or liquidate CO-OP's business and affairs ***as and when they deem appropriate under the circumstances and for that purpose may do all acts necessary or appropriate for the conservation, rehabilitation, or liquidation*** of CO-OP....
>
> (2) Pursuant to NRS 696B.290, the Receiver is hereby authorized with ***exclusive title to all of CO-OP's property*** (referred to hereafter as the "Property") and ***consisting of all...[c]auses of action***, defenses, and rights to participate in legal proceedings...
>
> (3) The Receiver is hereby directed to take immediate and exclusive possession and control of the Property except as she may deem in the best interest of the Receivership Estate. In addition to vesting title to all of the Property in the Receiver or her successors, the said ***Property is hereby placed in custodia legis of this Court and the Receiver***, and the Court hereby assumes and ***exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting the Property to the exclusion of any other court or tribunal***, such exercise of sole and exclusive jurisdiction being hereby found to be central to the safety of the public and of the claimants against CO-OP.
>
> ...
>
> (5) All persons, corporations, partnerships, associations and all other entities wherever located, are hereby ***enjoined and restrained from interfering in any manner*** with the Receiver's possession of the Property or her title to her right therein and from interfering in any manner with the conduct of the receivership of CO-OP.
>
> ...
>
> (8) All claims against CO-OP its assets or the Property must be submitted to the Receiver as specified herein ***to the exclusion of any other method of submitting or adjudicating such claims in any forum, court, or tribunal subject to the further Order of this Court.***[3] The Receiver is hereby authorized to establish a Receivership Claims and Appeal Procedure, for all receivership claims. The Receivership Claims and Appeal Procedures shall be used to facilitate the orderly disposition or resolution of claims or controversies involving the receivership or the receivership estate.
>
> ...
>
> 11) The officers, directors, trustees, partners, affiliates, brokers, agents, creditors, insureds, employees, members, and enrollees of CO-OP, and all of the persons or entities of any nature including, but not limited to, claimants,

[3] Milliman submitted a Proof of Claim on January 16, 2016.

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

> plaintiffs, petitioners, and any governmental agencies who have claims of any nature against CO-OP, including cross-claims, counterclaims and third party claims, are ***hereby permanently enjoined and restrained from doing or attempting to do any of the following***, except in accordance with the express instructions of the Receiver or by Order of this Court:
>
> ...
>
> b. Commencing, bringing, maintaining or further prosecuting any action at law, suit in equity, ***arbitration***, or special or other proceeding against CO-OP or its estate, or the Receiver and her successors in office, or any person appointed pursuant to Paragraph (4) hereinabove;
>
> ...
>
> (14) The Receiver shall have the power and is hereby authorized to:
>
> a. Collect all debts and monies due in claims belonging to CO-OP, wherever located, and for this purpose:(i) institute and maintain actions in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts; (ii) ***do such other acts as are necessary or expedient to marshal, collect, conserve or protect its assets or property***, including the power to sell, compound, compromise or assign debts for purposes of collection upon such terms and conditions as she deems appropriate, and the ***power to initiate and maintain actions at law or equity or any other type of action or proceeding of any nature, in this and other jurisdictions***; (iii) to pursue any creditors remedies available to enforce her claims;
>
> ...
>
> h. Institute and to prosecute, in the name of CO-OP or in her own name, any and all suits and of the legal proceedings, to defend suits in which CO-OP or the Receiver is a party in this state or elsewhere, whether or not such suits are pending as of the date of this Order...
>
> ...
>
> (19) No judgment, order, attachment, garnishment sale, assignment, transfer, hypothecation, lien, security interest or other legal process of any kind with respect to or affecting CO-OP or the Property shall be effective or enforceable or form the basis for a claim against CO-OP or the Property ***unless entered by the court, or unless the Court has issued its specific order***, upon good cause shown and after due notice and hearing, permitting same.
>
> ...
>
> (24) The Court shall ***retain jurisdiction for all purposes necessary to effectuate and enforce this Order***.

See Receivership Order, **Exhibit B** (emphasis added).

Accordingly, on August 25, 2017, the Receiver instituted a contract and tort action on behalf of NHC and the thousands of people and entities who were injured by NHC's liquidation, asserting 63 causes of action against sixteen defendants, including Milliman and its actuaries. *See generally*

Complaint. Pursuant to the Receivership Order, the Receiver initiated this action in the Eighth Judicial District Court, the situs of the receivership proceedings and the only courts with jurisdiction over the Property of NHC. As relevant here, the Receiver asserted numerous claims solely against Milliman, including: (1) negligence per se – Violation of NRS 681B; (2) professional malpractice; (3) intentional misrepresentation; (4) constructive fraud; (5) negligent misrepresentation; (6) breach of fiduciary duty; (7) negligence; (8) breach of contract; (9) tortious breach of the implied covenant of good faith and fair dealing; (10) breach of the implied covenant of good faith and fair dealing; (11) negligent performance of an undertaking; (12) unjust enrichment; (13) civil conspiracy; and (14) concert of action.

Additionally, the Receiver brought two additional causes of action against Milliman and all other defendants, asserting that all defendants acted jointly as part of a civil conspiracy and in concert of action, and thus, are jointly and severally liable for the damages described in the complaint.

III. LEGAL ARGUMENT

As noted above, the Eighth Judicial District Court has exclusive jurisdiction over this litigation, as the Receivership Order held that for the safety of the public and the claimants against NHC, all Property – including claims and defenses of NHC – is within the sole and exclusive jurisdiction of the Eighth Judicial District Court, to the exclusion of all other tribunals.[4] *See* **Exhibit B**, Receivership Order ("the Court hereby assumes and exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting the Property to the exclusion of any other court or tribunal, such exercise of sole and exclusive jurisdiction being hereby found to be essential to the safety of the public and of the claimants against [NHC].") This exercise of jurisdiction is consistent with Nevada law. *See* NRS 696B.190 (court may make all necessary or proper orders to carry out the purposes of the delinquency proceedings); NRS 696B.200 (providing for jurisdiction over persons obligated to the insurer due to transactions between themselves and the insurer). Although Milliman argues that this Court should compel arbitration despite this clear grant of exclusive jurisdiction, Milliman's arguments are meritless, as outlined below.

[4] The Receivership Court has declined without prejudice to coordinate this case with the Receivership Case. Jurisdiction remains appropriate within the Eighth Judicial District pursuant to NRS 696B.190. References to exclusive jurisdiction relate to the Eighth Judicial District courts unless otherwise indicated by the context.

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

A. The General Policy in Favor of Arbitration Does Not Apply, and None of the Claims Should be Arbitrated.

Milliman makes much of the state and federal policies in favor of arbitration; however, the general policy in favor of arbitration does not apply here, for several reasons. First, the FAA and NAA's policy in favor of arbitration are inapplicable here, where Nevada's Liquidation Act reverse-preempts the FAA and precludes any contrary application of the NAA. Second, the presumption in favor of arbitration does not apply where the Receiver was not a signatory to the Agreement at issue, and does not simply "step into the shoes" of NHC. Because there is no applicable policy in favor of arbitration, this Court should retain the Receiver's claims against Milliman in this Court to effectuate the purposes of the Liquidation Act.

1. The General Policy in Favor of Arbitration Does Not Apply Where Nevada's Insurers Liquidation Law Reverse-Preempts the FAA and Precludes Contrary Application of the NAA.

Milliman contends that the general policy in favor of arbitration under the FAA and NAA should apply to mandate arbitration here. However, the FAA is reverse-preempted by the McCarran-Ferguson Act, and the NAA does not apply where any general policy in favor of arbitration evidenced by the NAA conflicts with the more specific statute governing insurance receivership proceedings. As such, arbitration is not required.

a. Nevada's Insurer's Liquidation Law Reverse-Preempts the FAA

The Court should refuse to compel arbitration under the FAA as the controlling Liquidation Act[5] reverse-preempts the FAA under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ("McCarran-Ferguson").

In the McCarran-Ferguson Act, Congress declared that the continued regulation by the states of the business of insurance is in the public interest. *See* 15 U.S.C. § 1011. Congress concluded that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the . . . States which relate to the regulation . . . of such business." *Id.* at §1012(a). No

[5] Nevada's Liquidation Act may be cited as the Uniform Insurers Liquidation Act. NRS 696B.280. The Act is set forth at NRS 696B.030 to 696B.180 and 696B 290 to 696B.340. *Id.*

federal law "shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the Business of insurance. . . unless such Act specifically relates to the business of insurance." *Id.* at §1012(b). Thus, McCarran-Ferguson exempts state laws regulating the business of insurance from preemption by federal statutes that do not specifically relate to the business of insurance, such as the FAA. 15 U.S.C. § 1012(b). The Supreme Court has created a three-part test to determine whether reverse-preemption of federal law through McCarran-Ferguson occurs. Specifically, a court is to examine whether: 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, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999). Here, each of these criteria is met, and accordingly, Nevada's Liquidation Act reverse-preempts the FAA under McCarran-Ferguson.

First, there can be no real dispute that Nevada's statute was enacted for the purpose of regulating the business of insurance. The Liquidation Act provides that "upon taking possession of the assets of an insurer, the domiciliary receiver shall immediately proceed *to conduct the business of the insurer* or to take such steps as are authorized by this chapter for the purpose of rehabilitating, liquidating, or conserving the affairs or assets of the insurer. NRS 696B.290(3); *see Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010) (holding that this prong was "clearly satisfied" and noting that "[w]e can hardly overstate the degree to which the regulation of insurance permeates this controversy. The very claims which [the defendant] would take to arbitration arise directly out of Kentucky's intense interest in the regulation of worker's compensation insurance... The [liquidation act at issue] is itself the ultimate measure of the state's regulation of the insurance business: the take-over of a failing insurance company.").

Second, courts have determined that the FAA is not a federal statute that specifically relates to the business of insurance. *See, e.g. Munich Am Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998) (there is no question that the FAA does not relate specifically to the business of insurance."); *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 44 (2d Cir. 1995) ("No one disputes the fact that the FAA does not specifically relate to insurance.")

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

Third, the application of the FAA would "invalidate, impair, or supersede" Nevada's Liquidation Act. Nevada's Liquidation Act incorporates the Uniform Insurers Liquidation Act ("UILA"). *See* NRS 696B.280. The general purpose of the UILA is to "centraliz[e] insurance rehabilitation and liquidation proceedings in one state's court so as to protect all creditors equally." *Frontier Ins. Serv. V. State*, 109 Nev. 231,236, 849 P.2d 328, 331 (1992), *quoting Dardar v. Ins. Guaranty Ass'n*, 556 So. 2d 272, 274 (La. Ct. App. 1990). Similarly, the UILA's overall purpose is to protect the interests of policyholders, creditors and the public. *See, e.g.* NRS 696B.210, 696B.530, 696B540; *see also* Joint Meeting of the Assembly and Senate Standing Committees on Commerce, March 25, 1977 (summarizing statements by Richard Rottman, Insurance Commissioner, and Dr. Tom White, Director of Commerce Department) (Nevada's insurance law was "designed to help the Insurance Division regulate the industry on behalf and primarily in the interests of the public of the State of Nevada"). Applying the law of the domiciliary state, as well as centralized proceedings in one state's court, advances these purposes. *See Frontier Ins. Serv.*, 109 Nev. at 236, 849 P.2d at 3341; *In re Freestone Ins. Co.*, 143 A.3d 1234, 1260-61 (Del. Ch. 2016); *see also Benjamin v. Pipoly*, 2003-Ohio-5666, ¶45, 155 Ohio App. 3d 171, 184, 800 N.E.2d 50, 60 ([C]ompelling arbitration against the will of the liquidator will always interfere with the liquidator's powers and will always adversely affect the insurer's assets."). Indeed, Nevada's Liquidation Act recognizes the need for consolidation in one court via various statutory provisions. *See, e.g.*, NRS 696B.190(1) (District court has original jurisdiction over delinquency proceedings under NRS 696B.010 to 696B.565, inclusive, and any court with jurisdiction may make all necessary or proper orders to carry out the purposes of those sections); NRS 696B.190(4) ("No court has jurisdiction to entertain, hear or determine any petition or complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer…or other relief …relating to such proceedings, other than in accordance with NRS 696B.010 to 696B.565, inclusive."); NRS 696B.270 ("The court may at any time during a proceeding...issue such other injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions…"). Likewise, the Court, acting within its statutory

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

authority, ordered that it would exercise "sole and exclusive jurisdiction" over all Property (including lawsuits), "to the exclusion of any other court or tribunal."

The Kentucky Supreme Court held that "the third part of the *Forsyth* test is satisfied because the Federal Arbitration Act's preference for arbitration conflicts with, and impairs, the [liquidation act's] grant of broad and exclusive jurisdiction to the Franklin Circuit Court... the federal policy favoring arbitration is subordinated to the state's superior interest in having matters relating to the rehabilitation of an insurance company adjudicated in the Franklin Circuit Court." *See Clark*, 323 S.W.3d 682, 692. Likewise, Nevada's Liquidation Act relates directly to the business of insurance and thus reverse-preempts the FAA. As the Court in *Taylor v. Ernst & Young* held when interpreting that states statutes which were also based on the Uniform Insurers Liquidation Act, "when allowed, forum selection ***belongs to the liquidator*** and the liquidator ***alone***." 958 N.E.2d at 1209 (emphasis added). Accordingly, the cases cited by Milliman based on the FAA are inapposite, and the Receiver's chosen forum – this Court – has jurisdiction over the claims.

b. Nevada's Insurance Liquidation Law and the Receivership Order Precludes Contrary Application of the NAA.

Milliman also argues that the general policy in favor of arbitration implicit in the ***Nevada*** Arbitration Act ("NAA") governs. *See* Motion, at 8. However, 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 Liquidation Act creates a specific and detailed statutory scheme for winding down insolvent insurance companies for the benefit of NHC's members, its formerly insured patients, unpaid hospitals, doctors, other creditors, and the public at large. *See* NRS 696B. Under this scheme, the district court has original jurisdiction over delinquency proceedings (including liquidation), and may make

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

all necessary or proper orders to carry out the purposes of the Liquidation Act. *See* NRS 696B.190. Likewise, the statute provides that "[n]o court has jurisdiction to entertain, hear or determine any petition or complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer…or other relief preliminary, incidental or relating to such proceedings, other than in accordance with NRS 696B.010 to 696B.565, inclusive. *Id.* The Court may issue injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof. *See* NRS 696B.270.

Pursuant to its statutory authority, the district court entered an order – the Receivership Order – that comprehensively addresses the receivership of NHC. It states that the Court has exclusive jurisdiction. Milliman now argues that this exclusive jurisdiction is not exclusive, but subject to an arbitration clause due to the general policy in favor of arbitration that arises by virtue of the NAA. This general policy in favor of arbitration cannot trump the specific statutory scheme laid out in the Liquidation Act, and this Court should not apply the policy in favor of arbitration.

2. The Presumption in Favor of Arbitration Does Not Apply to the Non-Signatory Commissioner and Should Not be Applied Here.

Even assuming that the Court considered the policy in favor of arbitration laid out in the FAA and the NAA applicable here, the policy in favor of arbitration could not apply on these facts where the Receiver is not a signatory to the Agreement. It is fundamental that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (citation omitted); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("Arbitration under the [FAA] is a matter of consent, not coercion. . . . It goes without saying that a contract cannot bind a nonparty."); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.").

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

Here, the Receiver is not a signatory to the Agreement at issue – in reality or in legal effect – and as such, this Court should not compel arbitration. Milliman makes three arguments to the contrary, none of which are persuasive. First, Milliman argues that because a receiver "steps into the shoes" of its predecessor, the Receiver here is bound. Second, Milliman argues that equitable estoppel prevents the Receiver from seeking to enforce some parts of the agreement but not others. Finally, Milliman argues that the Receivership Order does not require consolidation of all claims in this Court. None of these arguments has merit.

a. The Receiver Does Not Simply "Step Into the Shoes" of NHC.

Milliman argues that the Receiver is bound by the arbitration clause because she has simply stepped into the shoes of NHC by virtue of the receivership. There is no dispute that the Receiver is not ***actually*** a signatory to the Agreement that contains the arbitration clause. However, Milliman seeks to get around this by arguing that the Receiver is ***effectively*** a signatory to the Agreement because she has "stepped into the shoes" of NHC. This is not accurate.

Milliman cites a number of cases supposedly standing for the proposition that a receiver simply steps into the shoes of the insolvent entity and must therefore be bound as the insolvent entity would have been. However, Milliman's cases are not on point, as they do not involve receivership under a state insurance code where the FAA is reverse preempted by the McCarran-Ferguson Act or under circumstances like these. *See O'Melveny & Myers v. F.D.I.C*, 512 U.S. 79, 82 (1994) (FDIC as receiver for a savings and loan); *Anes v. Crown P'ship, Inc.*, 113 Nev. 195, 199 (1997) (private company as receiver for property owner/lessor); *First Fin. Bank v. Lane*, 130 Nev. Adv. Op. 96, 339 P.3d 1289, 1290, 1293 (2014) (assignee steps into shoes of assignor); *Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787 (6th Cir. 2009) (individual receiver for private investment company).[6]

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[6] Although Milliman's citation to *Texas Commerce Bank v. Garamendi* does involve a receiver for an insolvent insurer, in making the cited statement, the court was drawing a distinction between an insurance commissioner acting as a public official versus acting as a receiver, and was not commenting on the issue before the Court here. 28 Cal. App. 4th 1234, 1245 (Cal Ct. App. 1994) (defendant receiver was not acting as a public official, but as a receiver, when he made determination affecting payment priority).

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

On the contrary, a liquidator or receiver of a defunct insurance company does not simply "stand in the shoes" of an insolvent insurer, because he or she also represents the insureds, policyholders, and creditors of that entity. *See Taylor v. Ernst & Young*, 130 Ohio St. 3d 411, 419 (Ohio 2011) ("[t]he 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..."); *see generally Cordial v. Ernst & Young*, 199 W. Va. 119, 128 (W.Va. 1996) (insurance commissioner as receiver for an insurer "acts as the representative of interested parties, such as the defunct insurer, its policyholders, creditors, shareholders, and other affected members of the public," not simply as the defunct insurer). In *Arthur Andersen v. Superior Court*, a California court rejected the defendant's argument that an insurance liquidator acts as a typical receiver, holding:

> No authority is offered for the proposition that the Insurance Commissioner acts merely as an ordinary receiver. Ordinary receivers do not become involved until control of a business is taken away from its officers or owners due to insolvency, deadlock or other causes. Ordinary receivers do not monitor the solvency of an entity on behalf of persons, such as policyholders, who do business with the entity. The Insurance Code, by contrast, assigns such pre-conservatorship duties to the Insurance Commissioner. (See, e.g., Ins. Code, § 730, subd. (b).) In carrying out these duties, the Insurance Commissioner acts not in the interests of the equity owners of the insurance company, but rather in the interests of policyholders. Thus the Insurance Commissioner in this case is not seeking merely to prosecute claims of an entity under receivership. To the contrary, the essence of the Insurance Commissioner's claim is that AA damaged the policyholders. Thus even though a receivership may bear some points of analogy to a statutory insurance company liquidation (primarily in that each can involve the marshalling of the assets of an estate), an ordinary receivership is a different procedure for a different situation.

67 Cal. App. 4th at 1495.

This fact is important to courts when determining whether or not to enforce an arbitration clause. For example, the *Taylor* court called the defendant's attempt at compelling arbitration "a garden-variety attempt to enforce an arbitration clause against a nonsignatory" and applied a presumption ***against*** arbitration. 130 Ohio St. 3d 411, 420; *see generally Covington v. Am. Chambers Life Ins. Co*, 779 N.E.2d 833, 838 (Ohio Ct. App. 2002) (holding liquidator not bound by arbitration agreement because the dispute involved setoff and proof of claims, which impacted the

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

rights of creditors); *Jaime Torres Int'l Sports Mgmt., Inc. v. Kapila*, 2016 WL 8585339, at *7 (S.D. Fla. May 11, 2016) (in bankruptcy context, because the trustee stood in the shoes of both the debtor and the creditors, and the creditors were not parties to the agreement containing the arbitration clause, the claims were not subject to the arbitration clause).

Such is the case here. Nevada's statutory framework was not designed to primarily protect insurance companies, but rather their insureds and their creditors. For example, violations of statutory requirements concerning certifications of Milliman to the Department of Insurance, and other claims as alleged, damaged persons other than just NHC. The Receiver is suing not only on behalf of NHC, but "on behalf of...NHC's members, insured enrollees, and creditors." *See* Complaint, at ¶ 1. She has not simply "stepped into the shoes" of NHC. While Milliman may argue it is fair to bind ***NHC*** to an arbitration clause in an agreement that its predecessor signed, it is not fair to bind those that had no say in that agreement – e.g., creditors and policyholders – to those terms. That is especially true here, where the arbitration clause limits discovery and precludes punitive damages. *See* Motion to Compel Arbitration, Exhibit A, at ¶ 5. Because the Receiver is not merely acting on behalf of NHC here, it would be unjust to force application of the arbitration clause. Courts have held similarly with regard to those claims that do not arise out of the agreement itself. *See Taylor*, 130 Ohio St. 3d 411 (malpractice claim and fraudulent transfer claim were not subject to arbitration, as malpractice claim did not arise from engagement letter and fraudulent transfer claim sprung to life upon the issuance of the liquidation order).[7]

[7] Milliman offers *Rich v. Cantilo & Bennett* for the proposition that receivers are bound by arbitration provisions in the agreements that they assume to enforce. *See* Motion, at 11; 492 S.W.3d 755 (Tex. Ct. App. 2016). This case is not binding and is factually distinguishable; for example, the Texas receivership statute specifically states that "nothing in this chapter deprives a party of any contractual right to pursue arbitration." *See id.*, at 762, citing Tex. Ins. Code § 443.005(e). However, even in *Rich*, the court acknowledged that arbitration was warranted ***only*** for those claims "accruing independently of the Receiver's appointment and arising under the...agreement."). Many of the Receiver's claims here either accrued as a result of the Receiver's appointment, or are unrelated to the Agreement. As such, a finding in Milliman's favor would not result in the entirety of the claims against Milliman being arbitrated, but would at most result in bifurcation of the case (some claims to arbitration and some claims litigated here). This is an unnecessary waste of the resources of the NHC estate, would be duplicative, and could potentially result in inconsistent findings. Likewise, *Bennett v. Liberty Nat. Fire Ins. Co.*, also cited by Milliman, is inapposite where the liquidator in that case "presented no evidence that enforcing the arbitration clauses here will disrupt the orderly liquidation of the insolvent insurer." *See* 968 F.2d 969, 972 (9th Cir. 1992). As explained herein, sending some claims to arbitration will undoubtedly disrupt the orderly liquidation of NHC and be an unnecessary drain on the NHC estate, to the detriment of policyholders, creditors, and the public. Further, according to the arbitration clause, the arbitrator would not have the ability to award punitive damages and would only be able to conduct limited discovery (unlike this Court). In any event, neither of these cases is binding on this Court.

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

b. Equitable Estoppel Does Not Mandate Arbitration Here.

Milliman's next argument is that the doctrine of equitable estoppel mandates arbitration. Again, the general rule is that a party ***cannot*** be bound to an arbitration provision in an agreement that it did not sign. *See, e.g. Truck Ins. Exch. v. Swanson*, 124 Nev. 629, 635, 189 P.3d 656, 659-60 (2008). However, equitable estoppel is an exception to this general rule: it provides that a non-signatory may be bound if it seeks to enforce rights under an agreement, as it cannot disavow portions of that same agreement. *See* Motion, at 11; *Truck Ins. Exch.*, 124 Nev. 629, 636, 189 P.3d 656, 661.[8]

However, estoppel has its limits. Courts have found that while certain contractual provisions may be enforced against a non-signatory where the non-signatory "receives a direct benefit from the contract containing an arbitration clause," this exception ***does not apply*** to non-signatories whose interests might be related to, but do not flow from, the contractual interest of a signatory to the agreement. *See, e.g. Truck Ins. Exch.*, 124 Nev. 629, 637, 189 P.3d 656, 661-62 (finding that a party who was not a signatory to the written agreements, and who did not directly benefit from those agreements in initiating its cause of action, was not estopped from repudiating the arbitration agreement). Where any benefit to the non-signatory is indirect, even where the claims are "intertwined with the underlying contract," only the signatory is estopped from avoiding the clause. *See Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 629 (6th Cir. 2003), citing *Thomson-CSF v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995) ("When only an indirect benefit is sought…it is only the signatory that may be estopped from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to resolve are intertwined with the underlying contract," and vacating the lower court's decision for further consideration of this issue).

Here, this logic applies. The Receiver is not the direct beneficiary of the Agreement. The Receiver represents a number of other interests and does not herself receive a "direct benefit" from the Agreement. The Receiver did not have a business plan drafted for her that obtained federal funding. The Receiver did not have its reserves calculated and certified. Milliman did not calculate rates for the Receiver's insurance company. As such, equitable estoppel does not apply here.

[8] The *Ahlers* case cited by Milliman is inapposite. In addition to being unpublished and therefore noncitable as precedent, it involves a situation where a plaintiff ***signatory*** to a contract with an arbitration clause attempts to avoid an arbitration clause. Here, the plaintiff, the Receiver, is a ***non-signatory***.

Finally, equitable estoppel is by its nature a creature of equity: it is an exception that seeks to do what is fair. Here, it would not be fair to send the claims against Milliman to arbitration with limited discovery and limited damages further expanding litigation costs and reducing the amount remaining for distribution to claimants; the policyholders and creditors never agreed to such an arrangement.

c. Nevada's Statutory Scheme and the Receivership Court's Order Mandate that the Receiver's Decision to Litigate in the Eighth Judicial District Court be Respected.

Milliman's final argument also fails. Milliman argues that "there is no statutory provision that requires the Receiver to litigate contract and tort claims against a third-party in any particular forum or jurisdiction." *See* Motion, at 12. Milliman goes on to argue that section 14(a) of the Receivership Order permits the Receiver to litigate anywhere, and that the portion of the Receivership Order that gives exclusive jurisdiction to the Eighth Judicial District Court is not applicable. This strained reading of the Receivership Order is not tenable.

i. The Receivership Order Provides for Exclusive Jurisdiction.

The parties agree that the Receivership Order governs this action. A review of the Receivership Order reveals that, consistent with the Nevada law, the Order provides the Receiver with broad power to "conserve and preserve the affairs of" NHC, including performing "all acts necessary or appropriate for the conservation, rehabilitation, or liquidation" of NHC. In other words, the Receiver is tasked with maximizing the value of the estate of NHC for the purposes of those with claims against the estate. It gives the Receiver legal and equitable title to all NHC "Property," which explicitly includes causes of action, defenses, and rights to participate in legal proceedings. *See* **Exhibit B**, Receivership Order, at (2)(b). It also places all Property, and any claims or rights respecting the Property in the "sole and exclusive jurisdiction" of the Court, ***to the exclusion of any other court or tribunal***. *See id.*, at (3). The fact that later in the order, the Receiver is "authorized" to "collect all debts and monies due and claims belonging to [NHC], and for this purpose:...to do such other acts as are necessary or expedient to marshal, collect, conserve, or protect its assets or property, including the power...to initiate and maintain actions at law or

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

equity or any other type of action or proceeding of any nature, in this, and other jurisdictions..." *id.*, at (14)(a), does not negate the Court's exclusive jurisdiction. By authorizing the Receiver to litigate in other jurisdictions when necessary, the Receivership Order simply provides the Receiver the ability to marshal assets when she can only do so in another court for jurisdictional reasons (such as exclusive federal jurisdiction or out-of-state proceedings).

A similar situation arose in Ohio in *Taylor*, 130 Ohio St.3d 411. There, the Ohio statute provided that all liquidation actions were to be brought in the court of common pleas of Franklin County, and other statutory provisions were in accord, but still other provisions stated that as part of the liquidator's power to collect debts, the liquidator may institute actions in other jurisdictions, litigate "elsewhere," and submit the value of a security to arbitration. *See Taylor*, 130 Ohio St.3d. 411, 415-16. The Ohio Supreme Court explained the arguably conflicting provisions by noting that "***when allowed, forum selection belongs to the liquidator and the liquidator alone***." *Id.* at 416 (emphasis added). Here, the complementary provisions in the Receivership Order are similar: they simply provide that where there is ***discretion*** to choose a forum, that discretion belongs to the Receiver. Here, the Receiver has initiated litigation in the Eighth Judicial District Court, and (14) does not come into play. [9]

ii. Milliman's Arguments to the Contrary Fail.

Perhaps recognizing that the Receivership Order's statement of exclusive jurisdiction is fatal to its motion to compel arbitration, Milliman attempts to argue that it does not apply because (1) the Receiver's claims against Milliman do not affect the administration, allocation, or ownership of NHC's property or assets, and (2) Milliman is bringing no claims "against" NHC.

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[9] To the extent that Milliman argues that New York law may apply, under New York law, an insurer's agreement to arbitrate is unenforceable against a statutory liquidator, even in those actions wither the same contract terms are in dispute. *See, e.g. Corcoran v. Ardra Insurance Co.*, 567 N.E.2d 969 (N.Y. 1990) (refusing to compel arbitration in an action by the liquidator to recover reinsurance proceeds); *In re: Allcity Ins. Co.*, 66 A.D.2d 531, 535 (N.Y. App. Div. 1979) (refusing to enforce arbitration agreement in an insurance rehabilitation proceeding because "nowhere in [the New York liquidation statute] is there any indication that the Legislature intended to have rehabilitation effected in any forum but a *court* of law") (emphasis added); *Skandia Am. Reinsurance Corp. v. Schenck*, 441 F. Supp. 715, 723 n. 11 (S.D.N.Y., 1977) ("These arbitration clauses do not deprive this court of jurisdiction. Once a New York insurer is placed in liquidation, it may not be compelled to arbitrate . . . Indeed, the order of liquidation terminates the company's existence."); *Ideal Mut. Ins. Co. v. Phoenix Greek Gen. Ins. Co.*, No. 83-CV-4687, 1987 WL 28636, at *2 (S.D.N.Y. Dec. 11, 1987) ("The liquidators of insurance companies are simply not bound to arbitrate claims involving the companies."); *Washburn v. Corcoran*, 643 F. Supp. 554, 557 (S.D.N.Y. 1986).

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

Milliman's first argument is nonsensical. Put simply, money damages are property of the NHC estate, as are causes of action (claims for money damages). *See* **Exhibit B**, Receivership Order, at (2)(a) and (b) ("assets" are Property; "causes of action" are Property). Whatever money damages are recovered will go directly into the NHC estate and be paid out as appropriate. Further, the Receivership Order specifically provides that no judgment, order or legal process of any kind affecting NHC or the Property shall be effective or enforceable unless entered by the Court, or unless the Court permits the same. *See id.*, at (19). Any money damages awarded by an arbitrator would certainly be Property of the NHC estate.

Second, whether or not Milliman is bringing any claims ***"against"*** NHC (emphasis in original) is irrelevant to the plain fact that the Court has sole and exclusive jurisdiction over claims or rights respecting the NHC estate Property. In any event, however, Milliman ***is*** bringing a claim against NHC: it filed a proof of claim recognizing the jurisdiction of Nevada courts. *See* Proof of Claim dated January 16, 2016, attached hereto as **Exhibit C**.

Finally, Milliman's analogy to the bankruptcy context is unavailing. Whether or not bankruptcy courts have discretion to deny arbitration of non-core pre-petition common law claims is irrelevant here. McCarran-Ferguson preempts insurance-related claims rather than the bankruptcy claims cited by Milliman, and Nevada's Liquidation Act governs these proceedings, not the Bankruptcy Code. Further, as noted above, the Receiver here is not simply acting on behalf of NHC, but on behalf of creditors and policyholders. Bankruptcy cases have not forced arbitration in that context. *See Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1154 (3d Cir. 1989) (holding bankruptcy trustee's claims under § 541 of the Bankruptcy Code were subject to arbitration only to the extent that the trustee stands in the shoes of the debtor, but the trustee is not bound to arbitrate claims brought on behalf of creditors); *Javitch v. First Union Secs., Inc.*, 315 F.3d 619, 625–27 (6th Cir. 2003) (holding that a receiver was bound to arbitrate because the court order appointing him as receiver only authorized him to assert actions on behalf of the receivership entities (and not creditors) and the actions were, in fact, on behalf of the entities rather than creditors); *see also In re EPD Inv. Co., LLC*, 821 F.3d 1146, 1152 (9th Cir. 2016) (holding that where a bankruptcy trustee asserts claims on behalf of a creditor he is not bound by the debtor's

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

agreement to arbitrate); *In re Salander-O'Reilly Galleries, LLC*, 475 B.R. 9 (S.D.N.Y. 2012) ("a trustee's claims asserted as a lien creditor under §544...are not subject to a pre-petition agreement between the debtor and another party to arbitrate"); *Boedeker v. Rogers*, 736 N.E.2d 955 (Ohio Ct. App. 1999) (holding a class action by and on behalf of policyholders against the former directors and officers of an insurer was not subject to an arbitration clause in their employment agreement); *Jaime Torres Int'l Sports Mgmt., Inc. v. Kapila*, 2016 WL 8585339, at* 7 (S.D. Fla. May 11, 2016) (holding that where a trustee brings claims on behalf of the debtor and creditors, the trustee is not bound to arbitrate because the creditors were not parties to the arbitration agreement).

Even Milliman's primary case citation for this proposition did not compel arbitration; the Fifth Circuit held that where the underlying nature of the case derives exclusively from the provisions of the Bankruptcy Code, a bankruptcy court *does* have discretion to refuse to enforce an arbitration agreement if it conflicts with the purposes of the Code. *See In re Gandy*, 299 F.3d 489, 495 (5th Cir. 2002). The court in *Gandy* determined that where the "heart" of the debtor's complaint concerns bankruptcy issues, as opposed to pre-petition contract or tort issues, where the equitable and expeditious distribution of assets would be better served by litigation in one tribunal, where a proof of claim had been filed, thus invoking the powers of the bankruptcy court, and the debtor had requested a bankruptcy-specific remedy that the arbitrator may not be able to provide, the court would not order arbitration. *Id.* at 496-99. The court held that "[p]arallel proceedings would be wasteful and inefficient, and potentially could yield different results and subject the parties to dichotomous obligations." *Id.* at 499.

The same is true here. Even if there is a hard-and-fast rule that would permit arbitration in the bankruptcy context, Milliman has pointed to no such rule under Nevada law. Furthermore, unlike in a bankruptcy action, McCarran-Ferguson reverse-preempts the FAA, upon which these cases are based. However, the considerations of waste, inefficiency, and different results are very real. Further, Milliman has already subjected itself to the jurisdiction of the Court by filing a proof of claim.

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GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

3. The AAA is Not an Adequate Forum to Resolve This Dispute.

Milliman cites *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* for the proposition that pre-dispute agreements to arbitrate are enforceable if the party may effectively vindicate its rights in the arbitral forum. *See* 473 U.S. 614 (1985). The "effective vindication" doctrine "provides courts with a means to invalidate, on public policy grounds, arbitration agreements that operate as a prospective waiver of a party's right to pursue statutory remedies." *See Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1212 (9th Cir. 2016), *quoting Am. Exp. Co. v. Italian Colors Rest.*, ––U.S. ––, 133 S.Ct. 2304, 2310, 186 L.Ed.2d 417 (2013). In other words, where rights ***cannot*** be effectively vindicated, arbitration is inappropriate.

However, the AAA would not be an adequate forum for effectively vindicating the Receiver's rights here. The arbitration clause provides for only limited discovery and no punitive damages; this Court has the power both to order full discovery and to award punitive damages if appropriate. This Court acts in the public interest, whereas an arbitrator's role is to act in the interests of the parties. Further, as some of the claims involve joint and several liability of all defendants – e.g., conspiracy and concert of action – none of whom are parties to the Agreement. These joint claims would be impossible for an arbitrator to adjudicate and the parties would risk inconsistent judgments.

IV. CONCLUSION

In light of the foregoing, NHC respectfully requests that this Court DENY Milliman's Motion to Compel Arbitration.

DATED this 11th day of December, 2017.

GREENBERG TRAURIG, LLP

/s/ Donald L. Prunty, Esq.
MARK E. FERRARIO, ESQ.
Nevada Bar No. 1625
ERIC W. SWANIS, ESQ.
Nevada Bar No. 6840
DONALD L. PRUNTY, ESQ.
Nevada Bar No. 8230
3773 Howard Hughes Parkway, Suite 400 N
Las Vegas, NV 89169
Counsel for Plaintiff

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2017, a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO MILLIMAN'S MOTION TO COMPEL ARBITRATION** was filed with the Clerk of the Court using the Odyssey eFileNV Electronic Service system and served on all parties with an email address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

The date and time of the electronic proof of service is in place of the date and place of deposit in the U.S. Mail.

/s/ Shayna Novce
An employee of Greenberg Traurig, LLP

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

Exhibit B

(Order Granting Milliman's Motion to Compel Arbitration)

Patrick G. Byrne, Esq. (NV Bar No. 7636)
Alex L. Fugazzi, Esq. (NV Bar No. 9022)
Aleem A. Dhalla, Esq. (NV Bar No. 14188)
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252
Email: pbyrne@swlaw.com
afugazzi@swlaw.com
adhalla@swlaw.com

Justin N. Kattan, Esq.
(Admitted Pro Hac Vice)
DENTONS US LLP
1221 Avenue of the Americas
New York, NY 10020
Telephone: (212) 768-6923
Facsimile: (212) 768-6800
Email: justin.kattan@dentons.com

Attorneys for Defendants Milliman, Inc., Jonathan L. Shreve, and Mary van der Heijde

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP,

Plaintiff,

vs.

MILLIMAN, INC., a Washington Corporation; JONATHAN L. SHREVE, an Individual; MARY VAN DER HEIJDE, an Individual; MILLENNIUM CONSULTING SERVICES, LLC, a North Carolina Corporation; LARSON & COMPANY P.C., a Utah Professional Corporation; DENNIS T. LARSON, an Individual; MARTHA HAYES, an Individual; INSUREMONKEY, INC., a Nevada Corporation; ALEX RIVLIN, an Individual; NEVADA HEALTH SOLUTIONS, LLC, a Nevada Limited Liability Company; PAMELA EGAN, an

Case No. A-17-760558-B

Dept. No. 25

ORDER GRANTING MILLIMAN'S MOTION TO COMPEL ARBITRATION

JAN 31 2018

Individual; BASIL C. DIBSIE, an Individual; LINDA MATTOON, an Individual; TOM ZUMTOBEL, an Individual; BOBBETTE BOND, an Individual; KATHLEEN SILVER, an Individual; DOES I through X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

The Motion To Compel Arbitration of defendants Milliman, Inc., Jonathan L. Shreve and Mary Van Der Heijde (collectively for purposes of this Motion only, "Milliman") came on for hearing before this Honorable Court on January 9, 2018. Justin N. Kattan, Esq. of Dentons US LLP and Patrick Byrne, Esq. of Snell & Wilmer, L.L.P., appeared on behalf of Milliman; Mark E. Ferrario, Esq., of Greenberg Traurig, LLP appeared on behalf of the Commissioner of Insurance, Barbara D. Richardson, in her official capacity as Receiver ("Plaintiff" or the "Liquidator") for Nevada Health CO-OP ("NHC"). The Court, having reviewed and considered the papers submitted by the parties and heard the argument of counsel, and otherwise being fully apprised in the premises and good cause appearing therefor, hereby GRANTS Milliman's Motion, for the reasons set forth herein:

A. The Nevada Health CO-OP

NHC was established under the Patient Protection and Affordable Care Act in October 2012. NHC experienced such financial hardship that insolvency proceedings before Department I of this Court were instituted in September 2015. By Order dated October 14, 2015 (the "Receivership Order"), the Court appointed Plaintiff as NHC's Permanent Receiver, and vested Plaintiff with exclusive title to all of NHC's property, including NHC's "contract rights." (Receivership Order, §2(c)). The Order further authorized Plaintiff to "initiate and maintain actions at law or equity or any other type of action or proceeding of any nature, in this and other jurisdictions," and to "[i]nstitute and prosecute ... any and all suits and other legal proceedings." *Id.* § 14(a), (h).

Snell & Wilmer LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

By order dated September 21, 2016, Plaintiff was authorized "to liquidate the business of NHC and wind up its ceased operations pursuant to" the Nevada Liquidation Act.

B. The Applicable Arbitration Provision

Plaintiff's claims all seek monetary damages arising from Milliman's performance of actuarial and consulting services pursuant to an October 20, 2011 Consulting Services Agreement (the "Agreement") entered into by Culinary Health Fund and Milliman.[1] Paragraph 5 of the Agreement contains a broad and unambiguous arbitration provision, which states, in relevant part:

> DISPUTES. In the event of any dispute arising out of or relating to the engagement of Milliman by Company, the parties agree that the dispute will be resolved by final and binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association.

This provision is prominently featured as part of the main body of the contract. The Agreement was executed by sophisticated parties, with experience in their respective fields, and with access to counsel.

C. The Arbitration Provision in the Agreement is Valid and Enforceable, Reflecting The Strong Presumption Favoring Arbitration Under Federal and Nevada Law

The arbitration clause in the Agreement is fully valid and enforceable. Both the Nevada Arbitration Act ("NAA"), NRS 38.206, *et seq.*, and the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, contain virtually identical language mandating that contractual arbitration clauses are fully "valid, irrevocable, and enforceable, save upon which grounds as exist at law or in equity for the revocation of any contract." Both the NAA and FAA express a "fundamental policy favoring the enforceability of arbitration agreements." *Tallman v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 71, 359 P.3d 113, 118 (2015); *State ex rel. Masto v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009). The "strong presumption in favor of

[1] Culinary Health Fund later created Hospitality Health, Ltd. and "assigned and transferred all rights, title, and interest" in the Agreement to Hospitality Health, Ltd. Hospitality Health, Ltd. subsequently assigned all of its assets and agreements, including the Agreement, to NHC.

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arbitratbility applies with even greater force" where, as here, "a broad arbitration clause is at issue." *Rodriguez, v. AT&T Servs., Inc.*, No. 2:14-cv-01537, 2015 WL 6163428, at * 9 (D. Nev. Oct. 20, 2015) (citations omitted).

The exception in the NAA and FAA for "grounds as exist at law or in equity for the revocation of any contract" does not apply here. The U.S. Supreme Court has defined that phrase to mean that only "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2" of the FAA. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996); *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 892 (9th Cir. 2001). Plaintiff neither pled any such grounds to revoke the Agreement in the Complaint nor raised any such grounds in her opposition to the Motion.

Since Milliman has established the existence of a valid arbitration agreement, it is Plaintiff's burden to establish a defense to enforcement. *Gonski v. Second Judicial Dist. Court of State ex rel. Washoe*, 126 Nev. 551, 245 P.3d 1164, 1168-69 (2010). Plaintiff fails to do so.

D. All of Plaintiff's Claims Arise from and Relate Directly to Milliman's Work Under the Agreement

Plaintiff's claims all arise from and relate to the Agreement because, but for the Agreement and the work Milliman did for NHC pursuant to it, Plaintiff would have no claims whatsoever. Plaintiff's Complaint identifies the contracted-for work that Milliman performed, including "providing certification required pursuant to NRS 681B, conducting a feasibility study, providing business plan support, assisting NHC in setting premium rates, [and] participating in the preparation of financial reports and information to regulators." (Complaint, ¶ 334). Every cause of action Plaintiff brings, whether styled in tort or contract, is based on Milliman's alleged wrongful conduct in performing one or more of these services.

Snell & Wilmer LLP. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5200

E. Because the Plaintiff's Claims Arise Under and Relate to the Agreement, Plaintiff Is Bound by the Agreement's Arbitration Clause

The Nevada Supreme Court has held that where a plaintiff "is seeking to enforce rights under [an] agreement, it cannot simultaneously avoid other portions of the agreement, such as the arbitration provision." *Ahlers v. Ryland Homes,* 126 Nev. 688, 367 P.3d 743 (2010) (unpublished). Otherwise, "to allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act." *Id.* at *2.

This rule applies with equal force to claims brought by a statutory liquidator or receiver. That Plaintiff is herself a non-signatory to the Agreement is irrelevant. Because Plaintiff's claims arise from Milliman's work done pursuant to the Agreement, Plaintiff is bound to that Agreement, including any applicable arbitration clause, just like the insolvent insurer would have been. *See, e.g., Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969, 972 n.4 (9th Cir. 1992) (enforcing contractual arbitration clause and stating that "if the liquidator wants to enforce [the insurer's] rights under its contract, she must also assume its perceived liabilities"); *Rich v. Cantilo & Bennett, L.L.P.*, 492 S.W.3d 755, 762 (Tex. Ct. App. 2016) (same); *Poizner v. Nat. Indem. Co.*, No. 08CV772-MMA, 2009 WL 10671673, at *2 (S.D. Cal. Jan. 6, 2009) (enforcing arbitration clause against insurance liquidator); *Garamendi v. Caldwell*, No. CV-91-5912-RSWL(EEX), 1992 WL 203827, at *3 (C.D. Cal. May 4, 1992) (same); *Koken v. Cologne Reins. (Barbados), Ltd.*, 34 F. Supp. 2d 240 (M.D. Pa. 1999) (same); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 272–75 (D. Vt. 1993) (same); *State v. O'Dom*, No. 2015CV258501, 2015 WL 10384362, at *3–4 (Ga. Super. Sept. 18, 2015) (same).

It is irrelevant that Plaintiff styles certain of her claims in tort rather than contract. Where, as here, a plaintiff's tort, contract and statutory claims relate to and arise from the work done pursuant to the contractual relationship, they all should be arbitrated together. *See Phillips v.*

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Parker, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990) (compelling arbitration of tort and RICO claims that "relate to" agreement containing arbitration provision where plaintiff's "basis for claiming injury and grounds for redress stem from rights he allegedly received pursuant to the agreement"); *Helfstein v. UI Supplies*, 127 Nev. 1140, 373 P.3d 921, at *2 (2011) (unpublished) (granting motion to compel arbitration of tort and contract claims and stating that "if the allegations underlying the claims so much as touch matters covered by the parties' agreements, then those claims must be arbitrated" (citation omitted)); *Rodriguez, v. AT&T Servs., Inc.*, No. 2:14-cv-01537, 2015 WL 6163428, at * 8 (D. Nev. Oct. 20, 2015) ("[S]o long as the phone call that allegedly triggered the offending credit inquiry collaterally touches upon the Business Agreement or has some roots in the contractual relationship between the parties, Plaintiff's claims fall within the scope of the arbitration provision.").

F. Plaintiff's Claims Against Milliman Are Pre-Insolvency, Common Law Damages Claims that Belonged to NHC, And Need Not Be Brought in the Liquidation Court

Plaintiff argues that, as Liquidator, she is bringing claims "on behalf of" creditors and policyholders, and therefore she does not stand strictly in the shoes of the insolvent insurer. She further contends that these claims must be brought in the liquidation court, and are not constrained by any contractual provisions that would have limited NHC. While it is true that virtually everything the Liquidator does is for the benefit of the insolvent insured's creditors and policyholders, this does not mean that the Liquidator may ignore and avoid the contractual, statutory, and judicial limitations applicable to the particular claims she brings against Milliman.

There is a distinction between claims that belong to the creditors and policyholders of an insolvent insurer, on the one hand, as distinct from claims that belong to the insolvent insurer, where any recovery would increase the coffers of the estate, and therefore benefit the estate's creditors and policyholders, on the other hand. Plaintiff's claims fall within the latter category, and therefore are arbitrable.

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LLP.
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3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

All of Plaintiff's claims here belonged only to NHC because they are ordinary common law and contractual damages claims based on NHC's pre-insolvency rights. Plaintiff seeks monetary damages from Milliman, not the return of NHC assets, and not the clawing back and redistribution among creditors of estate assets. Plaintiff's action against Milliman does not involve set offs, or proofs of claim, or claims arising from the Nevada liquidation statute. This case is separate and distinct from the ongoing Receivership Action and it neither threatens or states an interest in NHC assets or property, nor will it affect any creditors' rights. Plaintiff has not pled any viable causes of action that actually belong to NHC's creditors.

This Court is thus persuaded that arbitrating Plaintiff's damages claims against Milliman will not interfere with, invalidate, impair or supersede this state's statutory liquidation scheme, the NHC liquidation proceedings, or the State's regulation of insurance. *See, e.g., Bennett, supra,* 968 F.2d at 972 (stating that if a "dispute is in essence a contractual one, it should be arbitrated. And because the liquidator, who stands in the shoes of the insolvent insurer, is attempting to enforce [the insurer's] contractual rights, she is bound by [the insurer's] pre-insolvency agreements"); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381-82 (9th Cir. 1997) (same); *Suter v. Munich Reins. Co.*, 223 F.3d 150, 161 (3d Cir. 2000) ("It is true, as the Liquidator stresses, that if the District Court or an arbitrator should decide the reinsurance agreement does not cover the disputed expenses, the estate will be smaller than if that issue was resolved in the Liquidator's favor. But the mere fact that policyholders may receive less money does not impair the operation of any provision of New Jersey's Liquidation Act."); *Koken, supra*, 34 F. Supp. 2d at 247; *see also Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1154 (3d Cir. 1989) (holding that bankruptcy trustee's claims against debtor's securities broker for state and federal securities violations were arbitrable because they were based on debtor's pre-bankruptcy rights, and did not arise from the Bankruptcy Code).

While creditors or policyholders may "benefit" from monetary damages the Liquidator recovers from third parties, in that such recoveries increase the coffers of NHC's estate, the claims here do not "belong" to NHC's creditors or policyholders, do not implicate a state's regulation of insurance, and need not be brought in the liquidation court.

While Plaintiff asserts that it would be unfair to NHC's creditors and policyholders to enforce the arbitration clause, because it limits the scope of discovery and precludes punitive damages, this Court cannot vitiate an otherwise valid arbitration clause simply to improve the perceived strength of Plaintiff's case. Plaintiff's argument also contravenes the Nevada Supreme Court's express recognition that the cost savings and efficiency of streamlined discovery in arbitration will inure to the benefit of the State and NHC's creditors. *D.R. Horton, Inc.*, 120 Nev. at 553, 96 P.3d at 1162. ("[A]rbitration generally avoids the higher costs and longer time periods associated with traditional litigation.").

G. The McCarran-Ferguson Act does not reverse preempt the Federal Arbitration Act

Finally, the Nevada Liquidation Act does not reverse-preempt the FAA under the McCarren-Ferguson Act, 15 U.S.C. §§ 1011-1015. The standard for reverse preemption is not satisfied here because forcing a statutory liquidator to arbitrate ordinary, pre-insolvency breach of contract and tort claims, such as Plaintiff's damages claims against Milliman, neither implicates the business of insurance nor interferes with the liquidator's statutory function. *Quackenbush, supra,* 121 F.3d at 1381-82; *AmSouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004) (finding no reverse preemption where liquidator's "ordinary [tort and contract] suit against a tortfeasor" did not implicate the "regulation of the business of insurance"); *Grode v. Mut. Fire, Marine and Inland Ins. Co.*, 8 F.3d 953, 959–60 (3d Cir. 1993) (finding no reverse preemption because liquidator's "[s]imple contract and tort actions" against third party have "nothing to do with [the State's] regulation of insurance"); *Koken, supra*, 34 F. Supp. 2d at 247 (granting motion to

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compel arbitration where "this action has nothing to do with Pennsylvania's statutory scheme for the regulation of the business of insurance because it is not an action against an insolvent insurer's estate that might deprive it of assets; instead, it is an action by the Liquidator against a third party, here a reinsurer for the insolvent insurer, to recover money for the estate on a breach-of-contract claim"); *Midwest Employers Cas. Co. v. Legion Ins. Co.*, No. 4:07CV870 CDP, 2007 WL 3352339, at *5 (E.D. Mo. Nov. 7, 2007) ("The ultimate issue in this case is a standard contract dispute, so the case does not involve the state's regulation of insurance."); *Northwestern Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 321 B.R. 120, 126 (Bankr. D. Del. 2005); *Nichols v. Vesta Fire Ins. Corp.*, 56 F. Supp. 2d 778, 780 (E.D. Ky. 1999); *Costle*, 839 F. Supp. at 275. NHC is no longer a functioning entity engaged in the business of insurance. Enforcing the Agreement's arbitration clause will not disrupt the orderly liquidation of NHC, and Plaintiff's action against Milliman has no bearing on the administration, allocation or ownership of NHC's property or assets, which is the province of the Receivership Action.

Moreover, nothing in the Nevada Liquidation Act precludes a liquidator from arbitrating its claims. On the contrary, the Receivership Order entered pursuant to the Act expressly authorizes Plaintiff to "initiate and maintain actions at law or equity or any other type of action or proceeding of any nature, in this and other jurisdictions," and to "[i]nstitute and prosecute . . . any and all suits ***and other legal proceedings***" on behalf of NHC. (Order, §§ 14(a), (h) (emphasis added). Absent such a conflict, there is no reverse preemption. *Quackenbush*, 121 F.3d at 1381-82. Judge Cory, who entered the Receivership Order and presides over the liquidation proceedings, denied Plaintiff's request to coordinate and consolidate Plaintiff's action against Milliman with the liquidation proceeding.

Finally, the Nevada Arbitration Act, which is not pre-empted, is substantively identical to the FAA and mandates enforcement of the Agreement's arbitration clause.

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L.L.P.
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3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

Accordingly, the Court hereby GRANTS Milliman's Motion To Compel Arbitration.

IT IS SO ORDERED

DATED: March 8, 2018

DISTRICT COURT JUDGE

Respectfully prepared and submitted by:

SNELL & WILMER L.L.P.

By: _____

Patrick G. Byrne, Esq. (NV Bar No. 7636)
Alex L. Fugazzi, Esq. (NV Bar No. 9022)
Aleem A. Dhalla, Esq. (NV Bar No. 14188)
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Justin N. Kattan, Esq.
(Admitted Pro Hac Vice)
DENTONS US LLP
1221 Avenue of the Americas
New York, NY 10020

Attorneys for Defendants
Milliman, Inc., Jonathan L. Shreve, and
Mary van der Heijde

Approved as to Form by:

GREENBERG TRAURIG, LLP

By: _____

Mark E. Ferrario, Esq.
Eric W. Swanis, Esq.
Donald L. Prunty, Esq.
3773 Howard Hughes Pkwy., Suite 400 N
Las Vegas, NV 89169

Attorneys for Plaintiff

Snell & Wilmer L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

Exhibit C

(Supreme Court Opinon)

State ex rel. Comm'r of Ins. v. Eighth Judicial Dist. Court of Nev.

Supreme Court of Nevada

December 19, 2019, Filed

No. 77682

Reporter
2019 Nev. Unpub. LEXIS 1366 *; 454 P.3d 1260; 2019 WL 7019006

STATE OF NEVADA, EX REL COMMISSIONER OF INSURANCE, BARBARA RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN E. DELANEY, DISTRICT JUDGE, Respondents, and MILLIMAN, INC., A WASHINGTON CORPORATION; JONATHAN L. SHREVE, AN INDIVIDUAL; AND MARY VAN DER HEIJDE, AN INDIVIDUAL, Real Parties in Interest.

Core Terms

arbitration, order compelling arbitration, Liquidation, adequate legal remedy, arbitration agreement, extraordinary writ, district court, legal error, interlocutory, affords, exceptional circumstances, regulation of a business, creditor's claim, final judgment, third party, writ relief, writ review, receivership, automatic, discovery, MANDAMUS, ordering, receiver, damages, parties, cases

Judges: [*1] Pickering, J., Parraguirre, J., Cadish, J.

Opinion

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

Petitioner Barbara Richardson is the Nevada Commissioner of Insurance. She brought the underlying case as court-appointed receiver to recover damages from real parties in interest, collectively Milliman, on behalf of Nevada Health Co-Op, the subject insurance provider of the receivership. The district court concluded that Richardson was bound to Nevada Health Co-Op's arbitration agreement with Milliman and entered an order compelling arbitration of her claims. Richardson seeks a writ of mandamus from this court interdicting the order compelling arbitration with Milliman.

"[T]he right to appeal [a final judgment] is generally an adequate legal remedy that precludes writ relief." *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). In the arbitration context, NRS 38.247(1)(a) affords a

right of interlocutory appeal from an order *denying* a motion to compel arbitration but not from an order *granting* such a motion. This legislative distinction supports that interlocutory writ review of orders compelling arbitration is not automatic but, rather, limited to cases that present exceptional circumstances. *See Tallman v. Eighth Judicial Dist. Court*, 131 Nev. 713, 719 n.1, 359 P.3d 113, 117 n.1 (2015) (clarifying that NRS 38.247 does not make writ relief automatically appropriate **[*2]** for an order compelling arbitration and noting, "[w]hile the unavailability of an immediate appeal from an order compelling arbitration *may* present a situation in which an eventual appeal from the order confirming the award or other final judgment in the case will not be plain, speedy, or adequate, it is an overstatement to say this holds true in all cases where arbitration has been compelled").

Richardson has not carried her "burden of demonstrating that extraordinary relief is warranted." *Pan*, 120 Nev. at 228, 88 P.3d at 844. Richardson chiefly complains that arbitration affords more limited discovery and appellate review than judicial proceedings and that not all parties to the case can be compelled to arbitrate. But these are characteristic of any arbitration and not themselves a basis to conclude that an eventual appeal will not be an adequate legal remedy. *Cf. U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 189-90, 415 P.3d 32, 40 (2018) ("[T]he [Federal Arbitration Act, 9 U.S.C. §§ 1-16,] preempts laws that invalidate an arbitration agreement as unconscionable for failing to provide for judicially monitored discovery, not heeding the Federal Rules of Evidence, or not affording a right to jury trial."). The burden of simultaneous arbitration and litigation arises where, as here, not all persons involved **[*3]** in a dispute are subject to arbitration, an inconvenience that may be mitigated by staying litigation while arbitration runs its course. Richardson's complaints, inherent in any order compelling arbitration, do not demonstrate that an eventual appeal would not be an adequate legal remedy. Nor has Richardson otherwise demonstrated that this matter presents the exceptional circumstances required for interlocutory writ review of an order compelling arbitration. *See Tallman*, 131 Nev. at 719 n.1, 359 P.3d at 117 n.1. Extraordinary writ relief normally requires clear legal error. *See Archon v. Eighth Judicial Dist. Court*, 133 Nev. 816, 819-20, 407 P.3d 702, 706 (2017). Richardson claims the district court committed legal error by ordering arbitration despite her argument that the McCarran Ferguson Act, 15 U.S.C. § 1012, reverse-preempts the FAA. In her view, enforcement of an arbitration agreement against an insurance liquidator pursuing contract and tort damages against third parties would thwart the insurance liquidator's broad statutory powers and the general policy under Nevada's Uniform Insurance Liquidation Act (VILA), *see* NRS 696B.280, to concentrate creditor claims in a single, exclusive forum. However, at issue here is not a creditor's claim against the Co-Op; at issue is Richardson's breach-of-contract and tort claims against several third **[*4]** parties on behalf of the Co-Op, which happens to be in receivership. Courts elsewhere that have considered Richardson's argument have rejected it. *E.g., Milliman, Inc. v. Roof*, 353 F. Supp. 3d 588, 603 (E.D. Ky. 2018) (concluding that "[s]imply because the business is an insurance company and has become insolvent is not relevant to the regulation of the business of insurance"); *see also Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 161 (3d Cir. 2000) (even assuming that a liquidation act regulated the business of insurance, enforcing an arbitration clause against a receiver would not impair the regulation of the business of insurance under the act because the "proceeding [was] a suit instituted by the Liquidator . . . to enforce contract rights for an insolvent insurer"). Thus, we cannot say the district court committed clear legal error such that extraordinary writ relief is appropriate.

For these reasons, we deny the petition for extraordinary writ relief.

/s/ Pickering, J.

Pickering

/s/ Parraguirre, J.

Parraguirre

/s/ Cadish, J.

Cadish

End of Document

Exhibit D

(Permanent Injunction and Order Appointing Commissioner as Permanent Receiver of Nevada Health Co-Op)

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ORD
ADAM PAUL LAXALT
Attorney General
JOANNA N. GRIGORIEV
Senior Deputy Attorney General
Nevada Bar No. 5649
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101
P: (702) 486-3101
Email: jgrigoriev@ag.nv.gov
Attorney for the Division of Insurance

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, IN HER OFFICIAL CAPACITY AS STATUTORY RECEIVER FOR DELINQUENT DOMESTIC INSURER, Plaintiff, vs. NEVADA HEALTH CO-OP, Defendant.	Case No. A-15-725244-C Dept. No. 1

PERMANENT INJUNCTION AND ORDER APPOINTING COMMISSIONER AS PERMANENT RECEIVER OF NEVADA HEALTH CO-OP

A Petition For Appointment Of Commissioner as Receiver and Other Permanent Relief; Request for Injunction Pursuant to NRS 696B.270(1) by the Commissioner of Insurance, Amy L. Parks, in her official capacity as Temporary Receiver of NEVADA HEALTH CO-OP ("CO-OP") was filed with the consent of CO-OP's board of directors on September 25, 2015; a Non Opposition to Petition For Appointment Of Commissioner as Receiver and Other Permanent Relief and a waiver of the opportunity to appear at a show cause hearing was filed by CO-OP through its counsel on September 29, 2015; an Order Appointing the Acting Commissioner of

Insurance, Amy L. Parks, as Temporary Receiver Pending Further Orders of the Court, Granting Temporary Injunctive Relief Pursuant to NRS 696B.270, and authorizing the Temporary Receiver to appoint a special deputy receiver was filed on October 1, 2015; the Commissioner, as Temporary Receiver, appointed the firm of Cantilo & Bennett, L.L.P. ("C&B"), as Special Deputy Receiver ("SDR") of CO-OP on October 1, 2015 .

The Court having reviewed the points and authorities submitted by counsel and exhibits in support thereof, and for good cause,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) Acting Commissioner of Insurance, Amy L. Parks, is hereby appointed Permanent Receiver ("Receiver"), and C&B is appointed Permanent SDR of CO-OP. The SDR shall have all the responsibilities, rights, powers, and authority of the Receiver subject to supervision and removal by the Receiver and the further Orders of this Court. The Receiver and the SDR are hereby directed to conserve and preserve the affairs of CO-OP and are vested, in addition to the powers set forth herein, with all the powers and authority expressed or implied under the provisions of chapter 696B of the Nevada Revised Statute ("NRS"), and any other applicable law. The Receiver and Special Deputy Receiver are hereby authorized to rehabilitate or liquidate CO-OP's business and affairs as and when they deem appropriate under the circumstances and for that purpose may do all acts necessary or appropriate for the conservation, rehabilitation, or liquidation of CO-OP. Whenever this Order refers to the Receiver, it will equally apply to the Special Deputy Receiver.

(2) Pursuant to NRS 696B.290, the Receiver is hereby vested with exclusive title both legal and equitable to all of CO-OP's property (referred to hereafter as the "Property") and consisting of all:

a. Assets, books, records, property, real and personal, including all property or ownership rights, choate or inchoate, whether legal or equitable of any kind or nature;

b. Causes of action, defenses, and rights to participate in legal proceedings;

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c. Letters of credit, contingent rights, stocks, bonds, cash, cash equivalents, contract rights, reinsurance contracts and reinsurance recoverables, in force insurance contracts and business, deeds, mortgages, leases, book entry deposits, bank deposits, certificates of deposit, evidences of indebtedness, bank accounts, securities of any kind or nature, both tangible and intangible, including but without being limited to any special, statutory or other deposits or accounts made by or for CO-OP with any officer or agency of any state government or the federal government or with any banks, savings and loan associations, or other depositories;

d. All of such rights and property of CO-OP described herein now known or which may be discovered hereafter, wherever the same may be located and in whatever name or capacity they may be held.

(3) The Receiver is hereby directed to take immediate and exclusive possession and control of the Property except as she may deem in the best interest of the Receivership Estate. In addition to vesting title to all of the Property in the Receiver or her successors, the said Property is hereby placed in the *custodia legis* of this Court and the Receiver, and the Court hereby assumes and exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting the Property to the exclusion of any other court or tribunal, such exercise of sole and exclusive jurisdiction being hereby found to be essential to the safety of the public and of the claimants against CO-OP.

(4) The Receiver is authorized to employ and to fix the compensation of such deputies, counsel, employees, accountants, actuaries, investment counselors, asset managers, consultants, assistants and other personnel as she considers necessary. Any Special Deputy Receiver appointed by the Receiver pursuant to this Order shall exercise all of the authority of the Receiver pursuant hereto subject only to oversight by the Receiver and the Court. All compensation and expenses of such persons and of taking possession of CO-OP and conducting this proceeding shall be paid out of the funds and assets of CO-OP in accordance with NRS 696B.290.

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(5) All persons, corporations, partnerships, associations and all other entities wherever located, are hereby enjoined and restrained from interfering in any manner with the Receiver's possession of the Property or her title to or right therein and from interfering in any manner with the conduct of the receivership of CO-OP. Said persons, corporations, partnerships, associations and all other entities are hereby enjoined and restrained from wasting, transferring, selling, disbursing, disposing of, or assigning the Property and from attempting to do so except as provided herein.

(6) All providers of health care services, including but not limited to physicians hospitals, other licensed medical practitioners, patient care facilities, diagnostic and therapeutic facilities, pharmaceutical companies or managers, and any other entity which has provided or agreed to provide health care services to members or enrollees of CO-OP, directly or indirectly, pursuant to any contract, agreement or arrangement to do so directly with CO-OP or with any other organization that had entered into a contract, agreement, or arrangement for that purpose with CO-OP are hereby permanently enjoined and restrained from:

a. Seeking payment from any such member or enrollee for amount owed by CO-OP;

b. Interrupting or discontinuing the delivery of health care services to such members or enrollees during the period for which they have paid (or because of a grace period have the right to pay) the required premium to CO-OP except as authorized by the Receiver or as expressly provided in any such contract or agreement with CO-OP that does not violate applicable law;

c. Seeking additional or unauthorized payment from such CO-OP members or enrollees for health care services required to be provided by such agreements, arrangements, or contracts beyond the payments authorized by the agreements, arrangements, or contracts to be collected from such members or enrollees; and

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d. Interfering in any manner with the efforts of the Receiver to assure that CO-OP's members and enrollees in good standing receive the health care services to which they are contractually entitled.

(7) All landlords, vendors and parties to executory contracts with CO-OP are hereby enjoined and restrained from discontinuing services to, or disturbing the possession of premises and leaseholds, including of equipment and other personal property, by CO-OP or the Receiver on account of amounts owed prior to October 1, 2015, or as a result of the institution of this proceeding and the causes therefor, provided that CO-OP or the Receiver pays within a reasonable time for premises, goods, or services delivered or provided by such persons on and after October 1, 2015, at the request of the Receiver and provided further that all such persons shall have claims against the estate of CO-OP for all amounts owed by CO-OP prior to October 1, 2015.

(8) All claims against CO-OP its assets or the Property must be submitted to the Receiver as specified herein to the exclusion of any other method of submitting or adjudicating such claims in any forum, court, or tribunal subject to the further Order of this Court. The Receiver is hereby authorized to establish a Receivership Claims and Appeal Procedure, for all receivership claims. The Receivership Claims and Appeal Procedures shall be used to facilitate the orderly disposition or resolution of claims or controversies involving the receivership or the receivership estate.

(9) The Receiver may change to her own name the name of any of CO-OP' accounts, funds or other property or assets, held with any bank, savings and loan association, other financial institution, or any other person, wherever located, and may withdraw such funds, accounts and other assets from such institutions or take any lesser action necessary for the proper conduct of the receivership.

(10) All secured creditors or parties, pledge holders, lien holders, collateral holders or other persons claiming secured, priority or preferred interest in any property or assets of CO-OP, including any governmental entity, are hereby enjoined from taking any steps whatsoever

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to transfer, sell, encumber, attach, dispose of or exercise purported rights in or against the Property.

(11) The officers, directors, trustees, partners, affiliates, brokers, agents, creditors, insureds, employees, members, and enrollees of CO-OP, and all other persons or entities of any nature including, but not limited to, claimants, plaintiffs, petitioners, and any governmental agencies who have claims of any nature against CO-OP, including cross-claims, counterclaims and third party claims, are hereby permanently enjoined and restrained from doing or attempting to do any of the following, except in accordance with the express instructions of the Receiver or by Order of this Court:

a. Conducting any portion or phase of the business of CO-OP;

b. Commencing, bringing, maintaining or further prosecuting any action at law, suit in equity, arbitration, or special or other proceeding against CO-OP or its estate, or the Receiver and her successors in office, or any person appointed pursuant to Paragraph (4) hereinabove;

c. Making or executing any levy upon, selling, hypothecating, mortgaging, wasting, conveying, dissipating, or asserting control or dominion over the Property or the estate of CO-OP;

d. Seeking or obtaining any preferences, judgments, foreclosures, attachments, levies, or liens of any kind against the Property;

e. Interfering in any way with these proceedings or with the Receiver, any successor in office, or any person appointed pursuant to Paragraph (4) hereinabove in their acquisition of possession of, the exercise of dominion or control over, or their title to the Property, or in the discharge of their duties as Receiver thereof; or

f. Commencing, maintaining or further prosecuting any direct or indirect actions, arbitrations, or other proceedings against any insurer of CO-OP for proceeds of any policy issued to CO-OP.

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(12) However, notwithstanding any other provision of this Order, the commencement of conservatorship, receivership, or liquidation proceedings against CO-OP in another state by an official lawfully authorized by such state to commence such proceeding shall not constitute a violation of this Order.

(13) No bank, savings and loan association or other financial institution shall, without first obtaining permission of the Receiver, exercise any form of set-off, alleged set-off, lien, or other form of self-help whatsoever or refuse to transfer the Property to the Receiver's control.

(14) The Receiver shall have the power and is hereby authorized to:

a. Collect all debts and monies due and claims belonging to CO-OP, wherever located, and for this purpose: (i) to institute and maintain actions in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts; (ii) to do such other acts as are necessary or expedient to marshal, collect, conserve or protect its assets or property, including the power to sell, compound, compromise or assign debts for purposes of collection upon such terms and conditions as she deems appropriate, and the power to initiate and maintain actions at law or equity or any other type of action or proceeding of any nature, in this and other jurisdictions; (iii) to pursue any creditor's remedies available to enforce her claims;

b. Conduct public and private sales of the assets and property of CO-OP, including any real property;

c. Acquire, invest, deposit, hypothecate, encumber, lease, improve, sell, transfer, abandon, or otherwise dispose of or deal with any asset or property of CO-OP, and to sell, reinvest, trade or otherwise dispose of any securities or bonds presently held by, or belonging to, CO-OP upon such terms and conditions as she deems to be fair and reasonable, irrespective of the value at which such property was last carried on the books of CO-OP. She shall also have the power to execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary or proper to

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effectuate any sale of property or other transaction in connection with the receivership;

d. Borrow money on the security of CO-OP' assets, with or without security, and to execute and deliver all documents necessary to that transaction for the purpose of facilitating the receivership;

e. Enter into such contracts as are necessary to carry out this Order, and to affirm or disavow as more fully provided in subparagraph p., below, any contracts to which CO-OP is a party;

f. Designate, from time to time, individuals to act as her representatives with respect to affairs of CO-OP for all purposes, including, but not limited to, signing checks and other documents required to effectuate the performance of the powers of the Receiver.

g. Establish employment policies for CO-OP employees, including retention, severance and termination policies as she deems necessary to effectuate the provisions of this Order;

h. Institute and to prosecute, in the name of CO-OP or in her own name, any and all suits and other legal proceedings, to defend suits in which CO-OP or the Receiver is a party in this state or elsewhere, whether or not such suits are pending as of the date of this Order, to abandon the prosecution or defense of such suits, legal proceedings and claims which she deems inappropriate, to pursue further and to compromise suits, legal proceedings or claims on such terms and conditions as she deems appropriate;

i. Prosecute any action which may exist on behalf of the members, enrollees, insureds or creditors, of CO-OP against any officer or director of CO-OP, or any other person;

j. Remove any or all records and other property of CO-OP to the offices of the Receiver or to such other place as may be convenient for the purposes of the efficient and orderly execution of the receivership; and to dispose of or

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destroy, in the usual and ordinary course, such of those records and property as the Receiver may deem or determine to be unnecessary for the receivership;

k. File any necessary documents for recording in the office of any recorder of deeds or record office in this County or wherever the Property of CO-OP is located;

l. Intervene in any proceeding wherever instituted that might lead to the appointment of a conservator, receiver or trustee of CO-OP or its subsidiaries, and to act as the receiver or trustee whenever the appointment is offered;

m. Enter into agreements with any ancillary receiver of any other state as she may deem to be necessary or appropriate;

n. Perform such further and additional acts as she may deem necessary or appropriate for the accomplishment of or in aid of the purpose of the receivership, it being the intention of this Order that the aforestated enumeration of powers shall not be construed as a limitation upon the Receiver;

o. Terminate and disavow the authority previously granted CO-OP' agents, brokers, or marketing representatives to represent CO-OP in any respect, including the underlying agreements, and any continuing payment obligations created therein, as of the receivership date, with reasonable notice to be provided and agent compensation accrued prior to any such termination or disavowal to be deemed a general creditor expense of the receivership; and

p. Affirm, reject, or disavow part or all of any leases or executory contracts to which CO-OP is a party. The Receiver is authorized to reject, or disavow any leases or executory contracts at such times as she deems appropriate under the circumstances, provided that payment due for any goods or services received after appointment of the Receiver, with her consent, will be

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deemed to be an administrative expense of the receivership, and provided further that other unsecured amounts properly due under the disavowed contract, and unpaid solely because of such disavowal, will give rise to a general unsecured creditor claim in the Receivership proceeding.

(15) CO-OP, its officers, directors, partners, agents, brokers and employees, any person acting in concert with them, and all other persons, having any property or records belonging to CO-OP, including data processing information and records of any kind such as, by way of example only, source documents and electronically stored information, are hereby ordered and directed to surrender custody and to assign, transfer and deliver to the Receiver all of such property in whatever name the same may be held, and any persons, firms or corporations having any books, papers or records relating to the business of CO-OP shall preserve the same and submit these to the Receiver for examination at all reasonable times. Any property, books, or records asserted to be simultaneously the property of CO-OP and other parties, or alleged to be necessary to the conduct of the business of other parties though belonging in part or entirely to CO-OP, shall nonetheless be delivered immediately to the Receiver who shall make reasonable arrangements for copies or access for such other parties without compromising the interests of the Receiver or CO-OP.

(16) Nothing in this Order may be construed as to prevent the Nevada Life and Health Insurance Guaranty Association and the Nevada Insurance Guaranty Association from exercising their respective powers under Title 57 of the NRS.

(17) In addition to that provided by statute or by CO-OP's policies or contracts of insurance, and to the extent not in conflict with the other provisions of this Paragraph (17), the Receiver may, at such time she deems appropriate, without prior notice, subject to the following provisions, impose such full or partial moratoria or suspension upon disbursements owed by CO-OP, provided that

a. Any such suspension or moratorium shall apply in the same manner or to the same extent to all persons similarly situated. However, the Receiver may, in

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her sole discretion, impose the same upon only certain types, but not all, of the payments due under any particular type of contract; and

b. Notwithstanding any other provision of this Order, the Receiver may implement a procedure for the exemption from any such moratorium or suspension, those hardship claims, as she may define them, that she, in her sole discretion, deems proper under the circumstances.

c. The Receiver shall only impose such moratorium or suspension when the same is not specifically provided for by contract or statute:

i. As part, or in anticipation, of a plan for the partial or complete rehabilitation of CO-OP;

ii. When necessary to assure the delivery of health care services to covered persons pending the replacement of underlying coverage; or

iii. When necessary to determine whether partial or complete rehabilitation is reasonably feasible.

d. Under no circumstances shall the Receiver be liable to any person or entity for her good faith decision to impose, or to refrain from imposing, such moratorium or suspension.

e. Notice of such moratorium or suspension, which may be by publication, shall be provided to the holders of all policies or contracts affected thereby.

(18) It is hereby ordered that all evidences of coverage, insurance policies and contracts of insurance of CO-OP are hereby terminated effective on December 31, 2015, unless the Receiver determines that any such contracts should be cancelled as of an earlier date.

(19) No judgment, order, attachment, garnishment sale, assignment, transfer, hypothecation, lien, security interest or other legal process of any kind with respect to or affecting CO-OP or the Property shall be effective or enforceable or form the basis for a claim against CO-OP or the Property unless entered by the Court, or unless the Court has issued its specific order, upon good cause shown and after due notice and hearing, permitting same.

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(20) All costs, expenses, fees or any other charges of the Receivership, including but not limited to fees and expenses of accountants, peace officers, actuaries, investment counselors, asset managers, attorneys, special deputies, and other assistants employed by the Receiver, the giving of the Notice required herein, and other expenses incurred in connection herewith shall be paid from the assets of CO-OP. Provided, further, that the Receiver may, in her sole discretion, require third parties, if any, who propose rehabilitation plans with respect to CO-OP to reimburse the estate of CO-OP for the expenses, consulting or attorney's fees and other costs of evaluating and/or implementing any such plan.

(21) The Commissioner is part of the government of the State of Nevada, acting in her official capacity, and as such, should be exempt from any bond requirements that might otherwise be required when seeking the relief sought in this proceeding. Accordingly, it is Ordered that no bond shall be required from the Commissioner as Receiver.

(22) If any provision of this Order or the application thereof is for any reason held to be invalid, the remainder of this Order and the application thereof to other persons or circumstances shall not be affected thereby.

(23) The Receiver may at any time make further application for such further and different relief as she sees fit.

(24) The Court shall retain jurisdiction for all purposes necessary to effectuate and enforce this Order.

(25) The Receiver is authorized to deliver to any person or entity a copy or certified copy of this Order, or of any subsequent order of the Court, such copy, when so delivered, being deemed sufficient notice to such person or entity of the terms of such Order. But nothing herein shall relieve from liability, nor exempt from punishment by contempt, any person or entity that, having actual notice of the terms of any such Order, shall be found to have violated the same.

555 East Washington Avenue, Suite 3900
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(26) Notice of any filings in this proceeding shall additionally be provided by electronic delivery to the email addresses provided by the Special Deputy Receiver and counsel for the Receiver.

IT IS SO ORDERED

DATED this 14 day of October, 2015.

DISTRICT COURT JUDGE

Respectfully submitted by:

ADAM PAUL LAXALT
Attorney General

By:
JOANNA N. GRIGORIEV
Senior Deputy Attorney General
Attorneys for the Division of Insurance

555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101

NOTICE TO BE PROVIDED TO:

Cantilo & Bennett, L.L.P.
Special Deputy Receiver
Nevada Health CO-OP
3900 Meadows Lane
Las Vegas, NV 89107

Copy to:
11401 Century Oaks Terrace
Suite 300
Austin, TX 78758