**IN THE SUPREME COURT OF THE STATE OF 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.

Petitioner,

vs.

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

Respondents,

And Concerning,

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

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Clerk of Supreme Court

**Supreme Court No.: 82701**
**District Court Case No.: A-20-809963-B**

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

Real Parties in Interest.

# THOMAS MULLIGAN'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

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## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

1. Thomas Mulligan is an individual and is not using a pseudonym.

2. The law firm Jolley Urga Woodbury & Holthus has represented Thomas Mulligan in the District Court and will continue to appear and represent him in this Court.

DATED this 25th day of August, 2021.

JOLLEY URGA WOODBURY & HOLTHUS

By: /s/ *William R. Urga*
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Defendant and Real Party in Interest Thomas Mulligan ("Mulligan"), by and through his attorneys, Jolley Urga Woodbury & Holthus, hereby files his Answer to the Petition for Writ of Mandamus ("Petition") of Plaintiff/Petitioner State of Nevada, Ex Rel. Barbara D. Richardson, In Her Official Capacity As Receiver For Spirit Commercial Auto Risk Retention Group, Inc. (the "Receiver").

## INTRODUCTION AND SUMMARY

The Receiver's Complaint alleges that CTC[1] and Criterion[2] worked together to benefit themselves and other interrelated companies and related persons to the detriment of Spirit Commercial Auto Risk Retention Group, Inc. ("Spirit" or "SCARRG"), and that Mulligan took part in orchestrating the scheme. *See generally* APP0001-79. As a result of this scheme, the Receiver alleges that Spirit became insolvent and was placed into Receivership and liquidation. APP0003. The Complaint seeks to recoup the losses the Receiver claims Spirit suffered as a result of this "fraudulent enterprise."

The Receiver acknowledges and has argued that CTC is at the center of the scheme: "The allegations in the Complaint arise from a vast fraudulent enterprise

[1] "CTC" refers to Defendants/Real Parties in Interest CTC Transportation Insurance Services of Missouri, LLC, CTC Transportation Insurance Services LLC, and CTC Transportation Insurance Services of Hawaii LLC.

[2] "Criterion" refers to Defendant/Real Party in Interest Criterion Claims Solutions of Omaha, Inc.

and CTC, like a hub of a wheel, was at the center of the scheme that caused the insolvency of Spirit. . . .” APP0721. Mulligan denies the allegations of wrongdoing alleged in the Complaint, but the Receiver’s characterization of the allegations is accurate – the fraudulent enterprise the Receiver depicts puts CTC as the “hub of the wheel” with the remaining defendants as the “spokes.” In other words, every allegation of wrongdoing in this case involves an action CTC (and, to a lesser extent, Criterion) is alleged to have taken, and none of the allegations of wrongdoing could have occurred in the absence of CTC. All of the claims against each of the defendants are inextricably intertwined with and dependent upon the claims against CTC and Criterion.

The agreements between Spirit and CTC and Spirit and Criterion contain arbitration provisions, and those parties successfully moved the district court to compel arbitration. APP997-1040. Certain of the remaining defendants then moved to stay the litigation on the basis that the claims asserted against them are dependent upon, intertwined with, and premised on the claims subject to arbitration against CTC and Criterion and that judicial economy is best served by staying the litigation to protect against the risk of inconsistent results. APP1181-93. The remaining defendants, including Mulligan, joined in that motion. APP1205-57. The district court considered the arguments presented by the parties and ordered that the

litigation against the non-arbitrating defendants be stayed pending the conclusion of the arbitrations against CTC and Criterion. APP1412-30.

In the Petition, the Receiver seeks extraordinary relief to vacate the orders compelling arbitration and staying the litigation. In doing so, the Receiver fails to show why this Court's exercise of an extraordinary remedy is appropriate, fails to show how the district court erred, and inappropriately presents arguments to this Court that were never raised before the district court. As to those new arguments, it can hardly be said that the district court committed clear error by failing to rule on arguments that were never presented to it.

## FACTUAL BACKGROUND

The Complaint alleges that Spirit was a Nevada captive insurance company specializing in providing insurance to commercial truck owners, that CTC was its Program Administrator, and Criterion was its Third-Party Administrator. APP0004-5. Defendant Real Party in Interest Chelsea[3] was a company specializing in financing insurance premiums and was used to collect premiums from Spirit's insureds. APP0005-6. Mulligan is alleged to own or control these entities. APP0004-6.

[3] "Chelsea" refers to Defendants/Real Parties in Interest Chelsea Financial Group, Inc., a California Corporation; Chelsea Financial Group, Inc., a Missouri Corporation; and Chelsea Financial Group, Inc., a New Jersey Corporation d/b/a Chelsea Premium Finance Corporation.

As detailed in the Complaint, CTC was the appointed agent for Spirit to solicit new business; underwrite, bind, and issue insurance policies; collect premiums; and hold funds it collected on Spirit's behalf in trust. APP0017-18. The Program Administrator Agreement between CTC and Spirit detailed these responsibilities and contained a provision requiring arbitration of all disputes. APP0507, APP0529-30.

Criterion was to provide claims management services on behalf of Spirit with the authority to recommend loss reserves, settle claims, and issue loss payments. APP0025. The Claims Administration Agreement between Criterion and Spirit detailed these responsibilities and contained a provision requiring arbitration of all disputes. APP0468.

In general, the Receiver claims that CTC and Criterion damaged Spirit by siphoning funds from it and improperly distributing them to the other defendants. Mulligan is alleged to be the "primary architect" behind this scheme that led to Spirit's insolvency. APP0003.

Specifically, the Receiver alleges:

- That Spirit and CTC failed to give accurate and complete financial information related to a loss portfolio transfer and that Mulligan orchestrated this conduct. APP0016.

· That CTC failed to cancel policies even when premiums were delinquent or unpaid, and that Mulligan instructed CTC not to cancel those policies. APP0021.

· That CTC issued policies that posed an unreasonable risk, and that this was caused by Mulligan's exercise of undue influence to override controls of CTC to the detriment of Spirit and for his own benefit. APP0023.

· That Criterion contracted with Spirit to provide claims management services and that Mulligan was involved in the operation of Criterion, including the reserve setting process. APP0025.

· That Criterion is alleged to have accepted a $2.8 million loan from CTC at a time when those funds were owed to Spirit, and that this loan was caused by some conduct undertaken by Mulligan and Defendant/Real Party in Interest Daniel George. *Id.*

· That Criterion made repeated material misrepresentations to state regulators, failed to properly report and maintain claims reserves, failed to maintain and enforce an appropriate governance structure, and delayed payments on claims settlements. APP0027. The Receiver alleges that Mulligan influenced Criterion in this improper conduct. *Id.*

- That Chelsea Financial purported to finance premiums and was to provide those premiums to CTC on Spirit's behalf. APP0028. The Receiver alleges that Chelsea either failed to pay those premiums to CTC and/or that CTC failed to collect or that it returned excess premiums to Chelsea, all to enrich Mulligan and Defendant/Real Party in Interest Pavel Kapelnikov. APP0028-31.
- That the Spirit directors (somehow including Mulligan, though he never was one) breached their fiduciary duties and contracts with Spirit by allowing the allegedly wrongful conduct perpetuated by CTC, Criterion, and Chelsea to take place. APP0034-39.
- That CTC made "unusual" payments to Mulligan. APP0045-46.

Based on these allegations, the Receiver has asserted the following causes of action against Mulligan: Breach of Contract as a Spirit Director (Fourth), Breach of Fiduciary Duty as a Spirit Director (Sixth), Nevada RICO (Tenth), Unjust Enrichment (Eleventh), Fraud (Twelfth), Civil Conspiracy (Thirteenth), Alter Ego (Fourteenth), Avoidance of Transfers under NRS 112 (Fifteenth), Voidable Transfers under NRS 696B (Sixteenth), Recovery of Distributions and Payments under NRS 696B (Seventeenth), Recovery of Distributions and Payments under NRS 692C.402 (Eighteenth), and Recovery of Unlawful Distribution as a Spirit Director under NRS 78.300 (Nineteenth). APP0048-77.

## ARGUMENT

## I. WRIT RELIEF IS NOT JUSTIFIED

As this Court has recognized when dismissing a petition for writ of mandamus, "extraordinary remedies 'are reserved for really extraordinary causes.'" *Greenspun v. Eighth Judicial Dist. Court*, 91 Nev. 211, 217, 533 P.2d 482, 486 (1975) (quoting *Ex parte Fahey*, 332 U.S. 258, 260 (1947)). The Receiver bears the burden of showing that this Court's intervention by way of extraordinary writ is warranted. *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). No such extraordinary cause exists here to justify the extraordinary remedy the Receiver seeks.

### A. The Issues Here Are Factual And Inappropriate for Extraordinary Relief

Considering a petition for writ of mandamus is inappropriate if its resolution depends on this Court's determination of disputed questions of fact or if the petitioner has a plain, speedy, and adequate remedy at law. *See* NRS 34.160 and 34.170. *See also Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603–04, 637 P.2d 534, 536 (1981), holding:

> A writ of mandamus will issue when the respondent has a clear, present legal duty to act. Mandamus will not lie to control discretionary action unless discretion is manifestly abused or is exercised arbitrarily or capriciously.
>
> . . .

> As we have repeatedly noted, an appellate court is not an appropriate forum in which to resolve disputed questions of fact. When disputed factual issues are critical in demonstrating the propriety of a writ of mandamus, the writ should be sought in the district court, with appeal from an adverse judgment to this court. The discretion of this court to entertain a petition for a writ of mandamus when important public interests are involved will not be exercised unless legal, rather than factual, issues are presented.

(internal citations omitted).

Moreover, "[a]n arbitrary or capricious exercise of discretion is one 'founded on prejudice or preference rather than on reason,' *Black's Law Dictionary* 119 (9th ed. 2009) (defining 'arbitrary'), or 'contrary to the evidence or established rules of law,' *id.* at 239 (defining 'capricious')." *State v. Eighth Judicial Dist. Court of Nev.*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011).

The Receiver contends that the district court here acted arbitrarily and capriciously when it exercised its discretion to stay the litigation against the non-arbitrating defendants. As explained below, the decision to stay litigation pending arbitration is within the sound discretion of the district court. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 n.23 (1983). And the district court's exercise of discretion was necessarily the result of its application of the facts as set forth in the Receiver's Complaint, rendering it inappropriate for this Court to entertain writ relief and substitute its judgment for that of the district court. *See*

*Walker v. Second Judicial Dist. Court*, 136 Nev. Adv. Op. 80, 476 P.3d 1194, 1197 (2020):

> Were we to issue traditional mandamus to "correct" any and every lower court decision, we would substitute our judgment for the district court's, subverting its "right to decide according to its own view of the facts and law of a case which is still pending before it" and ignoring that there would almost always be "an adequate remedy for any wrongs which may be done or errors which may be committed, by appeal or writ of error."

(internal citation omitted).

Moreover, the district court's decision was not founded on prejudice or preference rather than on reason, and the Receiver does not contend as much. Thus, its exercise of discretion was not arbitrary. Nor was its decision contrary to the evidence or established rules of law and, thus, it was not capricious.

### B. The Receiver Will Not Be Harmed By The Denial Of Extraordinary Relief

Further, the district court order here will not cause irreparable harm meriting this Court's intervention prior to final judgment and appeal. *Okada v. Eighth Judicial Dist. Court of Nev.*, 134 Nev. 6, 9, 408 P.3d 566, 569 (2018). Intervention by extraordinary writ may be warranted when the bell "cannot be unrung" or there is otherwise no remedy. No such concern is present here. The staying of litigation does not raise the same concerns as, for example, blanket discovery orders or orders requiring disclosure of privileged information. *See id.; see also Hetter v. Dist. Court*,

110 Nev. 513, 515, 874 P.2d 762, 763 (1994). Accordingly, this Court should not exercise its discretion to review the Receiver's Petition for Writ of Mandamus.

**C. There Are No Urgent Circumstances Meriting This Court's Review**

Finally, there is no urgency requiring an extraordinary remedy here. The Receiver claims that "immediate review is needed" because she does not have the authority to arbitrate and is precluded from litigating against the remaining defendants until the arbitrations are concluded. Petition, 16. As a result, the Receiver claims that circumstances of urgency are present. The facts belie this claim of urgency.

The orders compelling arbitration were entered on July 16 and July 22, 2020, respectively. APP1003-1029; APP1034-1040. The orders denying the Receiver's request for reconsideration were entered September 16 and September 29, 2020, respectively. APP1309-1316; APP1407-1410. At the September 28, 2020 hearing on the Motion to Stay and Joinders thereto, the Receiver's counsel indicated that "[w]e may actually challenge Your Honor's ruling, quite frankly, with a Writ, because we – we disagree with it. But absent some relief from the Supreme Court, we're going to have to go forward with that." APP 1387.

Certainly, the Receiver began considering challenging the arbitration orders shortly after they were entered in July 2020. Indeed, her first step was filing the two Motions for Reconsideration on July 30 and August 5, 2020, respectively. APP1041-

1061; APP1062-1077. And it is plain that the Receiver considered seeking relief from this Court by the time of the September 28, 2020 hearing before the district court. Nevertheless, the Receiver waited until April 1, 2021 to file the instant Petition – eight and one-half months after entry of the first order compelling arbitration and four and one-half months after the Order Granting Motion to Stay Pending Arbitration and Joinders Thereto.[4] APP1412-1430.

The length of time that passed before the instant Petition was filed controverts the Receiver's claim of urgency. The Receiver would have acted quicker if urgent relief from this Court were truly needed. Moreover, there is nothing "urgent" here as that term has been used by this Court. For instance, in *Ashokan v. Dep't of Ins.*, 109 Nev. 662, 667, 856 P.2d 244, 247 (1993), this Court cited urgency as a reason for entertaining writ relief because it was confronted with an issue of first impression regarding privileges and "that hospitals should be made aware as soon as possible of the privilege's limited scope so that they can take appropriate measures to safeguard their files against misappropriation by unauthorized persons." And in *Jeep Corp. v. Second Judicial Dist. Court*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982), this Court held urgent writ relief was necessary to compel a district court judge to vacate and expunge a judgment wrongfully entered against a defendant after the parties had

[4] The district court entered a minute order granting the Motion to Stay on October 2, 2020 (APP1411) but the formal written order was not entered until November 17, 2020.

settled the case and dismissed the lawsuit. In doing so, this Court cited the "threat of continuing mischief" to the petitioners caused by publicity of the judgment and findings of fact. *Id.*

Here, there are no such strong policy considerations or tangible harm being caused to the Receiver by the orders compelling arbitration or the stay of litigation. Indeed, the Receiver has not proffered any such urgent pleas. Instead, she merely concludes that immediate review is needed because the district court's orders require her to arbitrate (which she claims she cannot do) and prevent her from litigating against the remaining defendants. Petition at 16. This is not a case where the public needs to be made aware of an important interpretation of law quickly or where a petitioner's finances and reputation are being harmed by the district court's decision. Rather, this is a case of a petitioner who would prefer not to litigate claims in arbitration. There is no urgency here warranting extraordinary writ relief.

## II. THIS COURT SHOULD NOT CONSIDER ARGUMENTS THAT WERE NOT RAISED BEFORE THE DISTRICT COURT

As an initial matter, this Court should not consider the arguments the Receiver raises for the first time in this writ proceeding. Here, three of the four arguments the Receiver proffers for why the district court abused its discretion when staying litigation were never raised before the district court. First, the Receiver contends that 9 U.S.C. § 3 has no application in state courts and, thus, a stay cannot be justified

under the Federal Arbitration Act.[5] Petition, 38. Second, the Receiver argues that NRS 38.221(7)[6] is inapplicable because the district court dismissed the claims that were subject to arbitration rather than ordering arbitration.[7] Petition, 39. Third, the Receiver claims that it lacks the ability to arbitrate claims and that this inability undercuts the basis for granting a stay.[8] *Id.* None of these arguments were raised before the district court.

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[5] The Receiver does not, however, argue that a stay is prohibited under the FAA. Moreover, the cases the Receiver cites in this regard are inapposite. Both *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468 (1989) and *Cronus Invs., Inc. v. Concierge Servs.*, 35 Cal. 4th 376 (2005) involved the conflict between a California statute providing for a stay of arbitration pending litigation and the FAA's provision for a stay of litigation pending arbitration. No similar situation is present here.

[6] Erroneously referred to in the Petition as NRS 38.291(7).

[7] This contention is simply wrong in any event. The district court did not dismiss "the claims it deemed subject to arbitration." Petition, 39. Rather, it granted the motions to compel arbitration and dismissed CTC and Criterion as parties from the case. APP0997-1029; APP1030-40. But no claims were dismissed.

[8] This, too, is an incorrect assertion. And, even if it were correct, it could easily be remedied if the Receiver so chose by seeking to amend The Permanent Injunction and Order Appointing Commissioner as Permanent Receiver of Spirit Commercial Auto Risk Retention Group, Inc. ("Appointment Order") to allow her to comply with the orders granting the motions to compel arbitration.

But such amendment is not necessary because the Appointment Order gave the Receiver broad authority. *See generally* APP0541-APP0556. Section 4 of the Appointment Order gave the Receiver (1) all powers and authority under NRS Chapter 696B and other applicable law to do all acts necessary or appropriate for the conservation, rehabilitation, or liquidation of Spirit (APP0544-45); (2) authorization to collect all debts due to Spirit by using such acts as are necessary or expedient,

In *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 822-23, 407 P.3d 702, 708 (2017), this Court recognized that it is inappropriate to consider arguments raised for the first time in a writ proceeding before it:

> "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). This rule is not absolute; nor is it so demanding that it outlaws citation of additional authority to support an argument incompletely or imperfectly presented in district court. But in the context of extraordinary writ relief, consideration of legal arguments not properly presented to and resolved by the district court will almost never be appropriate. *See Califano v. Moynahan*, 596 F.2d 1320, 1322 (6th Cir. 1979) ("We decline to employ the extraordinary remedy of mandamus to require a district judge to do that which he was never asked to do in a proper way in the first place."); *United States v. U.S. Dist. Court for S. Dist of Cat*, 384 F.3d 1202, 1205 (9th Cir. 2004) ("[W]e will not find the district court's decision so egregiously wrong as to constitute clear error where the purported error was never brought to its attention."); *Ex parte*

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including initiating actions at law or equity and to pursue *any* creditor's remedies available (APP0549); (3) authorization to initiate and abandon the prosecution of suits, legal proceedings and claims (APP0550-51); and (4) authorization to "Perform such further and additional acts as she may deem necessary or appropriate for the accomplishment of or in the 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**." APP0551 (emphasis added).

Given this broad grant of authority, it is shocking that the Receiver would argue that the Appointment Order stopped short of authorizing her to initiate an arbitration. This is especially true where the Receiver not only sought the Appointment Order but also prepared it for the district court's signature and could have expressly included authorization to arbitrate. APP0555. Taking the Receiver's argument to its logical conclusion, the Appointment Order also does not authorize the Receiver to file a petition for a writ of mandamus with this Court.

> *Green*, 108 So. 3d 1010, 1013 (Ala. 2012) (refusing to hear an argument in a mandamus petition that was not raised in the district court).
>
> . . .
>
> To efficiently and thoughtfully resolve such an important issue of law demands a well-developed district court record, including legal positions fully argued by the parties and a merits-based decision by the district court judge. *See Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 5-6, 106 P.3d 134, 136-37 (2005) (stressing the benefit of a fully developed district court record); *Dilliplaine v. Lehigh Valley Tr. Co.*, 457 Pa. 255, 322 A.2d 114, 116-17 (Pa. 1974) (noting that appellate consideration of arguments not presented to the district court makes the district court "merely a dress rehearsal," "erodes the finality of [district] court holdings," denies the district court the opportunity to avoid or correct its own error, and "encourages unnecessary appeals"). Entertaining an argument raised for the first time in this court also deprives the opposing party of the opportunity to "develop theories and arguments and conduct research on an issue that it otherwise would have had months or years to develop had the issue been raised in the [district] court." Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 Vand. L. Rev. 1023, 1039 (1987).

Here, the Receiver filed (1) an Opposition to CTC Defendants' Motion to Compel Arbitration (APP0719-751), (2) an Opposition to Criterion Claim Solutions of Omaha Inc.'s Motion to Compel Arbitration (APP0670-718), (3) a Motion for Reconsideration and/or Clarification of the Court's July 17, 2020 Order Regarding CTC Defendants' Motion to Compel Arbitration (APP1041-1061), (4) a Motion for Reconsideration and/or Clarification of the Court's July 20, 2020 Order Regarding Criterion Claim Solutions of Omaha Inc's [sic] Motion to Compel Arbitration

(APP1062-1077), and (5) an Opposition to Motion to Stay Pending Arbitration and Joinders Thereto (APP1259-1289). None of those briefs contained any argument that (a) 9 U.S.C. § 3 is inapplicable to proceedings in state court, (b) that the district court dismissed claims subject to arbitration rather than compel arbitration, or (c) that the Receiver lacked the authority to initiate an arbitration proceeding. None of these issues were raised in oral argument during the district court's hearing on the Motion to Stay either. *See generally* APP1359–APP1401.

In fact, far from placing these contentions squarely before the district court, the Receiver avoided raising them even when asked by the district court:

> THE COURT: Yeah. Mr. Ferrario, what's – you mentioned a Writ possibility. I understand that. But where are we in terms of getting arbitrations set up? In other words, selecting arbitrators, etcetera?
>
> . . .
>
> MS. HENDRICKS: So, Your Honor, as you know, we filed motions for reconsideration. One of the motion -- the order was issued on the Motion for Reconsideration in the last week or so. I received the other draft order last week and we'll respond to that.
>
> So those arbitrations have not been initiated. We are just getting through the briefing and the orders related to the motions that -- for reconsider that have been filed. So neither one of the arbitrations have been initiated by either party at this point.

APP1394, lines 4-7, 16-25. Thus, when directly asked whether an arbitration had been initiated following the district court's orders granting the motions to compel

arbitration, the Receiver never mentioned that she lacked the ability or authority to arbitrate. Rather, she merely stated that no party had done so yet.

Here, three of the four bases for seeking extraordinary relief regarding the stay have been raised for the first time before this Court. These claims of error by the district court that the Receiver asks this Court to correct were never brought to the district court's attention. Under these circumstances, it would be highly inappropriate for this Court to entertain these arguments and ascribe clear error to the district court's supposed failure to rule on issues that were never brought before it. *Archon Corp.*, 133 Nev. at 822, 407 P.3d at 708. *See also United States v. United States Dist. Court (In re United States)*, 384 F.3d 1202, 1205 (9th Cir. 2004):

> [W]hile we review legal issues on appeal de novo, whether or not they were raised below, we generally require clear error to justify a writ of mandamus. Clear error is a deferential standard of review which presupposes a decision to which we might defer. Since we do not require district courts to imagine every conceivable challenge that a party could bring, we will not find the district court's decision so egregiously wrong as to constitute clear error where the purported error was never brought to its attention. *Cf. Califano v. Moynahan*, 596 F.2d 1320, 1322 (6th Cir. 1979) ("We decline to employ the extraordinary remedy of mandamus to require a district judge to do that which he was never asked to do in a proper way in the first place.").

(internal citations omitted).

## III. THE DISTRICT COURT'S DECISION TO STAY THE LITIGATION PENDING ARBITRATION WAS CORRECT

### A. The District Court Had The Discretion To Stay The Litigation

The United States Supreme Court has recognized,

> In some cases, of course, it may be advisable to stay litigation among the non-arbitrating parties pending the outcome of the arbitration. That decision is one left to the district court (or to the state trial court under applicable state procedural rules) as a matter of its discretion to control its docket.

*Moses H. Cone Mem'l Hosp.*, 460 U.S. at 20 n.23. There is certainly no doubt that the district court had the authority and discretion to stay the state-court litigation involving Mulligan and the remaining defendants pending conclusion of the arbitrations between the Receiver and CTC and between the Receiver and Criterion.

In a case involving claims between two parties, certain of which were compelled to arbitration and one which remained in district court for trial, the Ninth Circuit addressed the question of the propriety of staying the district court proceedings as follows:

> A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case. This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court. . . In such cases the court may order a stay of the action pursuant to its power to control its docket and calendar and to provide for a just determination of the cases before it.

. . .

> It would waste judicial resources and be burdensome upon the parties if the district court in a case such as this were mandated to permit discovery, and upon completion of pretrial proceedings, to take evidence and determine the merits of the case at the same time as the arbitrator is going through a substantially parallel process.

*Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979). *See also Mediterranean Enters. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) (affirming a district court order compelling arbitration of three counts of the complaint and staying litigation of three others, noting: "By deciding those issues necessary to resolve [the counts subject to arbitration], the arbitrator might well decide issues which bear in some way on the court's ultimate disposition of [the stayed counts]. Nothing in the district court's order, or in this opinion, would bar such a result.")

The analysis does not change when deciding whether to stay litigation of claims against nonparties to an arbitration agreement. Indeed, in *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097 (C.D. Cal. 2002), class plaintiffs brought an antitrust case against DirectTV and others. The district court granted DirectTV's motion to compel arbitration as to the claims asserted against it. *Id.* at 1101. DirectTV, joined by defendants such as Best Buy, RadioShack, and Circuit City who were not parties to an arbitration agreement with plaintiff, moved to stay litigation pending conclusion of the arbitration. *Id.* The court granted that motion as well. *Id.*

The court held that while the other defendants were not signatories to the contract containing the arbitration agreement, a stay of all issues as to all parties was warranted because questions of fact common to all would be involved in both the litigation and the arbitration. *Id.* at 1114. The court was not persuaded by the plaintiffs' arguments against a stay:

> Plaintiffs argue that the entire action should not be stayed because many of the plaintiffs are not subject to the arbitration provision. A stay of the entire action, Plaintiffs contend, will not promote judicial efficiency because the arbitration between [named Plaintiff] and DirectTV will be private, "with no record and no precedential value," and the results of the arbitration "will not be binding in any way on DirectTV, Bischoff, or the other class members in this action" . . . The Court acknowledges that while the results of the arbitration will not be binding on DirectTV, Bischoff or the other class members, a failure to stay the action may lead to inconsistent findings which will hinder the pursuit of judicial efficiency. *See Contracting Northwest, Inc. v. City of Fredericksburg, Iowa*, 713 F.2d 382 (8th Cir.1983) (upholding the stay of an action and noting that "[w]hile it is true that the arbitrator's findings will not be binding as to those not parties to the arbitration, considerations of judicial economy and avoidance of confusion and possible inconsistent results nonetheless militate in favor of staying the entire action.") *Id.* at 386.

*Id.* at 1114-15.

The court concluded by holding that "the similarity of the issues of law and fact in this case to those that will be considered during arbitration, as well as the potential for inconsistent findings absent a stay, persuade the Court that a stay is warranted in the instant matter." *Id.* at 1115.

This result makes a great deal of sense given the competing interests the court must balance when determining whether a stay is appropriate. "These competing interests include: (1) possible damage resulting from granting a stay; (2) hardship or inequity to a party if the proceedings go forward; and (3) simplification or complication of issues, proof and questions of law from a stay. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)." *RB Prods. v. Ryze Capital, L.L.C.*, No. 3:19-cv-00105-MMD-WGC, 2019 U.S. Dist. LEXIS 191576, at *6 (D. Nev. Nov. 4, 2019). In *RB Prods.*, the court ordered a stay of litigation against the non-arbitrating defendants because the claims against them involved the same witnesses and evidence as that in the arbitration proceeding and, absent a stay, both plaintiff and the remaining defendants would "expend unnecessary resources on duplicative litigation that will involve nearly identical evidence to prove overlapping claims." *Id.* Moreover, "[a] stay on this proceeding would benefit all parties by giving them 'more complete information regarding whether and how Plaintiff [] might pursue [its] claims which promotes the orderly course of justice'" and that "[t]his would further 'increase[] judicial economy and the crystallization of the factual issues.'" *Id.* The court further noted that the plaintiff would benefit by the stay even if its claims were dismissed in arbitration because it would "be spared the expense of pursuing doomed claims." *Id.* at *6-7.

### B. The Claims Against The Non-Arbitrating Defendants Are Inextricably Intertwined With The Claims Against CTC and Criterion

As set forth above, the initial consideration when deciding to stay litigation here is whether the claims remaining to be litigated are dependent upon and inextricably intertwined with those being arbitrated. The central wrong asserted in this case is the Receiver's allegation that CTC wrongfully siphoned more than $40 million from Spirit and distributed those funds to the remaining defendants. *See, e.g.* APP0043-48. Because of an agreement between Spirit and CTC, the claims against CTC must be arbitrated. The same is true of the claims against Criterion.

The claims against the remaining defendants are that they either orchestrated the scheme by which CTC allegedly took Spirit's money, operated Spirit in a manner that allowed CTC's allegedly wrongful conduct, or were the recipients of money CTC allegedly took from Spirit. *See generally* APP0001-77. These claims certainly arise out of CTC's conduct and, as such, are inextricably intertwined with it. The Receiver herself was forthright about this when opposing CTC's Motion to Compel:

> 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.

APP0749.

The district court did not err when it found that the Receiver's claims against Mulligan and the remaining defendants "are inextricably intertwined with and dependent upon the claims against CTC and Criterion." APP1418. As set forth above, the Receiver claims that CTC engaged in a scheme to misappropriate more than $40 million from Spirit. The Receiver alleges that Mulligan is liable for orchestrating that scheme and/or benefitting from it. The arbitrator will decide whether CTC did, in fact, misappropriate any money from Spirit. It makes little sense to litigate the remaining defendants' liability for either orchestrating the scheme or benefitting from it before there is a determination whether there actually was such a scheme in the first place. There is plainly a risk of inconsistent findings if the litigation were to proceed before the arbitrations are concluded.

There are also similar issues of law and fact in the case against Mulligan and the arbitration against CTC. In fact, of the twelve causes of action asserted against Mulligan, eight are also expressly asserted against CTC.[9] While it is not clear whether CTC is a party to the Nineteenth cause of action (Recovery of Unlawful

[9] The following claims are expressly asserted against CTC and Mulligan: Nevada RICO (Tenth), Unjust Enrichment (Eleventh), Fraud (Twelfth), Civil Conspiracy (Thirteenth), Avoidance of Transfers under NRS 112 (Fifteenth), Voidable Transfers under NRS 696B (Sixteenth), Recovery of Distributions and Payments under NRS 696B (Seventeenth), and Recovery of Distributions and Payments under NRS 692C.402 (Eighteenth). APP0048-77.

Distribution under NRS 78.300), the allegations involve questions of fact and law related to accounting classifications and distributions involving CTC. APP0076-77. Even the Fourth and Sixth causes of action asserting claims for breach of contract and breach of fiduciary duty against the Spirit Director Defendants involve questions of fact and law related to CTC's alleged conduct. APP0050-53 (alleging that the Spirit Directors' failure to institute sufficient internal controls and oversight resulted in CTC's and Criterion's alleged bad acts). The Alter Ego claim (Fourteenth cause of action) also necessarily depends upon and is intertwined with the claims against CTC, expressly alleging that there is a unity of interest between the individual defendants and "the entities." APP0068.

Notably, though the Receiver claims that Mulligan was the "principal architect" of the "fraudulent enterprise," at no point in the Complaint is there an allegation that Mulligan himself wrongfully took money from Spirit. Instead, the allegation is that he orchestrated the scheme by which CTC allegedly took the money and that Mulligan was the recipient of money from CTC. Certainly, before liability can attach to Mulligan for devising a scheme or benefitting from it, there must be a determination that there was such a wrongful scheme in the first place. The threshold questions of whether CTC and/or Criterion engaged in a wrongful scheme to misappropriate Spirit's money will be answered in arbitration. Because the remaining matters to be decided in this case are so inextricably intertwined with and

dependent upon the result of those arbitrations, the district court properly exercised its discretion by staying the litigation pending the conclusion of the arbitration proceedings.

**C. No Harm Will Come From A Stay**

The district court properly considered whether possible damage would result from a stay. APP1418 (citing *CMAX, Inc.*, 300 F.2d at 268). The district court did not err when it found that a stay would not prejudice or harm the Receiver and, in fact, that the Receiver "would ostensibly benefit from such a stay" because the "claims against CTC and Criterion overlap with its claims against the Defendants because both sets of claims rest on the same alleged conduct and involve the same issues and facts." APP1418.

Indeed, the Receiver will benefit from an orderly processing of its asserted claims by first determining in arbitration whether there was, in fact, a scheme resulting in the misappropriation of money from Spirit. The Receiver's resources will be preserved by waiting until that issue is determined before litigating issues related to who orchestrated that scheme and who benefitted from it. *See Rupracht v. Union Sec. Ins. Co.*, No. 3:07-cv-00231-BES (RAM), 2007 U.S. Dist. LEXIS 112456, at *17 (D. Nev. Dec. 20, 2007) (staying litigation against non-arbitrating defendants because the arbitration might resolve similar questions facing both

defendants and may eliminate further litigation and, at a minimum, the arbitration was likely to streamline subsequent proceedings before the court).

The only harm the Receiver purported to identify was delay in her ability to recover funds on behalf of Spirit's creditors. APP1275. But as Mulligan pointed out to the district court, it was the Receiver herself who sought to delay both the payment and processing of creditors' claims by seeking to extend the claims filing deadline from October 31, 2020 to May 31, 2021. APP1323. Thus, the district court examined the issues and properly found that the Receiver would not be harmed by a stay.

**D. Mulligan Will Be Harmed If The Proceedings Go Forward**

The district court properly found that, absent a stay, both the Receiver and the remaining defendants would be harmed by expending unnecessary resources, including substantial attorney's fees, on duplicative litigation involving nearly identical evidence to prove overlapping and intertwined claims. APP1419. Indeed, the district court found that the defendants would "suffer great hardship" by being required to actively litigate the case before the district court while also being potentially subjected to duplicative third party discovery in arbitrations in Washington, D.C. involving CTC and Nebraska involving Criterion. *Id.* The district court's decision on this issue was neither arbitrary nor capricious.

As other courts have recognized, in cases such as this, the results of the arbitration will inform the district court on matters at issue in this litigation even if

those results are not binding. *RB Prods.*, 2019 U.S. Dist. LEXIS 191576, at *7, *Wells Fargo Clearing Servs., L.L.C. v. Foster*, No. 3:18-cv-00032-MMD-VPC, 2018 U.S. Dist. LEXIS 61356, at *8 (D. Nev. Apr. 11, 2018) (issuing a stay pending arbitration, finding that the results of the arbitration would likely "narrow if not eliminate issues before this Court.").

Proceeding with litigating claims first when that litigation could otherwise benefit from the findings of the arbitrations with CTC and Criterion is a hardship to all parties, including the Receiver. It costs nothing to wait and obtain the benefits of the results of the arbitrations. The expense of proceeding, however, will be immense. The district court's determination in this regard was not an abuse of discretion.

**E. A Stay Will Simplify The Issues**

The district court found that a stay would increase judicial economy and simplify the issues, and further found that there is a risk of inconsistent results under the same set of facts if a stay is not granted. APP1419.

In the Petition, the Receiver contends that it would promote judicial economy to use Spirit's resources to first proceed with litigating claims against the remaining defendants and later arbitrate against CTC and Criterion. Petition, 40. In other words, the Receiver believes it benefits Spirit's creditors to *first* establish that the remaining defendants received money from CTC and *later* establish that the money transferred to those defendants was wrongfully misappropriated by CTC. Though the Receiver

characterizes her allegations as established fact, nothing in the Complaint has yet been proven. The Receiver must still prove that money was misappropriated from Spirit, that CTC misappropriated that money, that the misappropriation was part of a "fraudulent enterprise," the identity of the participants in the "fraudulent enterprise," and that the defendants received money improperly taken from Spirit. It makes little sense to do that in reverse order.

As noted in subsection B above, the claims against Mulligan and the remaining defendants are dependent upon and inextricably intertwined with those against CTC and Criterion. There is plainly a risk of inconsistent findings in such a scenario, and the district court here properly granted a stay to avoid that scenario.

## CONCLUSION

The Receiver has not come close to meeting the high burden she carries in bringing her Petition. For all the reasons set forth herein, the Petition should be denied in its entirety.

DATED this 25th day of August, 2021.

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## CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2 AND 32

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 font size and Times New Roman font face.

I further certify that this brief complies with the type-volume limitations of NRAP 21(d) and NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 6,904 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript of appendix where the matter relied on is to be found. I understand that I may be subject to sanctions

in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 25th day of August, 2021.

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## CERTIFICATE OF SERVICE

This is to certify that on the 25th day of August, 2021, a true and correct copy of the foregoing **THOMAS MULLIGAN'S ANSWER TO PETITION FOR WRIT OF MANDAMUS** was submitted for filing via the Court's eFlex electronic filing system, and electronic notification will be sent to the following:

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*/s/ Linda Schone*
An employee of JOLLEY URGA WOODBURY & HOLTHUS