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 FOR THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE MARK R. DENTON, DEPT. 13,

Respondents,
And Concerning,

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

Supreme Court Case No:
82701

District Court Case No.:
A-20-809963-B

ANSWER TO PETITION FOR WRIT OF MANDAMUS

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

Real Parties in Interest.

MATTHEW T. DUSHOFF, ESQ.
Nevada Bar No. 004975
JORDAN A. WOLFF, ESQ.
Nevada Bar No. 014968
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CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; and CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC

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 Justices of this Court may evaluate possible disqualification or recusal.

1. 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 hereinafter collectively referred to with CTC-MO and CTC-CA as "CTC") are not publicly traded companies, nor are more than 10% of their stock owned by a publicly-traded company.

The above-named Real Parties in Interest are represented in the District Court and in this Court by Matthew T. Dushoff, Esq., Jordan D. Wolff and William A. Gonzales, Esq. of Saltzman Mugan Dushoff.

DATED this 25th day of August, 2021.

SALTZMAN MUGAN DUSHOFF

By _____

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Barbara D. Richardson (the "Receiver") in her capacity as the statutory receiver for Spirit Commercial Auto Risk Retention Group, Inc. ("Spirit" and hereinafter collectively with the Receiver referred to as "Petitioner") brings the present Writ of Mandamus (the "Petition") before this Court with respect to a civil action she has commenced, outside of Spirit's receivership proceeding, in which she alleges claims against numerous third-parties concerning their business dealings with Spirit prior to the receivership. Specifically, Petitioner seeks to overturn a series of orders issued by the District Court compelling her to arbitrate claims that she is pursuing against two such parties, CTC and Criterion Claims Solutions of Omaha, Inc. ("Criterion"), and dismissing those parties from the case. Spirit entered into contracts with CTC and Criterion, both of which contain a broad arbitration provision that directly relates to Petitioner's allegations against those parties. In addition, Petitioner also contests the District Court's subsequent order staying the claims against the remaining Defendants until the arbitration proceedings against CTC and Criterion are resolved.

The District Court did not abuse its discretion in issuing any of these aforementioned orders, and Petitioner is not entitled to the relief that she now seeks through this Petition. While Petitioner's arguments suffer from a myriad of shortcomings, her most egregious failure is her blatant refusal to recognize the clear

guidance this Court has already provided in considering an essentially identical set of facts in *State ex rel. Comm'r of Ins. v. Eighth Judicial Dist. Court of Nev.*, 454 P.3d 1260 (Nev. 2019).

The similarities between these two cases cannot be overstated, as they both concern the same Receiver, represented by the same attorneys, in the same jurisdiction, with regards to insurance companies regulated under the same Nevada insurance laws, in the context of identical receivership actions wherein an order of liquidation has been entered, concerning claims against third-parties performing similar services subject to agreements with broad arbitration provisions, and in which the Receiver is pursuing almost identical causes of action. Despite the fact that this Court's order in *State ex rel. Comm'r of Ins.* was succinct and clear, Petitioner stubbornly refuses to read and acknowledge the dispositive guidance included therein.

First, as this Court previously explained in *State ex rel. Comm'r of Ins.*, Petitioner's right to appeal a final judgment constitutes an adequate legal remedy which generally precludes writ relief, and she cannot satisfy her burden that exceptional circumstances exist by arguing that she is inconvenienced by the fact that her remaining claims against the other Defendants were stayed pending arbitration. In fact, in *State ex rel. Comm'r of Ins.*, this Court explicitly noted that a stay of the remaining claims is a prudent way for the District Court to mitigate Petitioner's inconvenience while her requisite arbitrations are carried out. In this case, Petitioner has the same adequate legal

remedy (*i.e.* the right to appeal a final judgment) that existed in *State ex rel. Comm'r of Ins.*, and so this Court may deny her entire Petition on that basis alone.

Notably, Petitioner's complaints of delay and judicial prejudice are even more absurd. She waited until April 1, 2021 to file this Petition despite the fact that the District Court granted CTC's Motion to Compel Arbitration through a Minute Order on July 6, 2020. If Petitioner had simply obeyed the District Court's order (as well as the prior guidance Petitioner already received from this Court only seven months earlier in *State ex rel. Comm'r of Ins.*) and proceeded directly to arbitration, she would have avoided the purportedly prejudicial scenario of which she now complains.

Second, this Court determined in *State ex rel. Comm'r of Ins.* that Petitioner was unable to demonstrate clear error by the District Court, as needed to show the exceptional circumstances required for interlocutory writ review of an order compelling arbitration, by arguing that the Federal Arbitration Act (the "FAA") is reverse-preempted by the McCarran-Ferguson Act. Specifically, Petitioner previously argued that "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 [] to concentrate creditor claims in a single, exclusive forum." *Id.*, at 3.

This Court disagreed with Petitioner's argument, explaining that while reverse preemption may apply with respect to a claim brought by a creditor against a party in receivership, the same argument would not apply to breach of contract and tort claims against third parties which are brought on behalf of a party which happens to also be in receivership, further noting "Courts elsewhere that have considered Richardson's argument have rejected it." *Id.*, at 4.

As in *State ex rel. Comm'r of Ins.*, the present case also involves breach of contract and tort claims against third parties (*e.g.* CTC) which are brought on behalf of a party which also happens to be in receivership (*e.g.* Spirit), and so it is obvious that the FAA compels arbitration between CTC and Spirit without reverse preemption under the McCarran-Ferguson Act. However, Spirit unconscionably ignores this Court's bright line distinction between claims brought by creditors and claims brought by receivers, instead simply parroting her exact same argument that was already rejected in *State ex rel. Comm'r of Ins.*

Importantly, when CTC states that Petitioner is repeating the same arguments from her prior case, this is not hyperbole. Aside from some minor formatting changes, at least seven pages of Petitioner's opposition to CTC's Motion to Compel were cut and pasted directly from her prior opposition in *State ex rel. Comm'r of Ins.*, word for word. *See, e.g.*, **APP0777,** p. 4:23 – **APP0778,** p. 5:4; **APP0782,** p. 9:20-21; **APP0784, fn. 3; APP0785,** p. 12:27-28. It is impossible for Petitioner to make a credible

argument that her position is meritorious given the fact this this Court has already rejected this same argument in a prior Petition under identical circumstances.

While Petitioner does make a few arguments that were not previously raised in the prior action, they are also wholly without merit. For example, Petitioner argues that the arbitration provisions which CTC and Criterion wish to enforce are void as products of fraud. However, Petitioner relies almost exclusively on a concurring opinion from a Fifth Circuit case which is easily distinguishable. *See Janvey v. Alguire*, 847 F.3d 231 (5th Cir. 2017). Specifically, the concurring opinion in *Janvey* opines that arbitration provisions in a series of employment agreements between a sham entity used to carry out a Ponzi Scheme and its principal employees (who at the time had already convicted by a federal prosecutor) may be considered void if they were used purely as an instrument to hide the existence of the criminal enterprise. Notwithstanding, the law is clear that the civil claims Petitioner is alleging against CTC do not provide any basis for the annulment of an arbitration provision, and that such agreements are routinely enforced with respect to such claims. Further, Petitioner's attempt to paint the provision at issue here as some sort of secret, backdoor agreement becomes even more ludicrous given the fact that she herself approved the CTC Agreement, including its arbitration provision, on June 29, 2016. **APP0515**.

Petitioner goes on to argue that the Receiver was not granted the authority to initiate an arbitration against CTC, but in doing so, blatantly ignores language in the

receivership order explicitly granting the Receiver the right to do so. Similarly, Petitioner tries to argue that Nevada law gives the District Court exclusive jurisdiction over civil cases, but again ignores both Nevada statutory law, as well as the fact that this very Court has already refused to grant writ relief in *State ex rel. Comm'r of Ins.*, thereby compelling the Receiver to arbitrate third-party claims under identical circumstances.

Petitioner also claims (improperly, for the first time in this Petition) that the Receiver has a right to disaffirm an arbitration provision while still suing to enforce the remainder of a contract, yet her argument runs afoul of the laws concerning executory contracts, the FAA, and equitable estoppel, all of which are fatal to her position.

Finally, Petitioner argues that at least some of her claims against CTC fall outside of the arbitration provision and therefore must be litigated in District Court. However, Petitioner again ignores the wealth of caselaw that a broad arbitration provision such as the one between Spirit and CTC will include all actions arising out of a breach of contract, and routinely includes the same claims that Petitioner alleges against CTC here.

Ultimately, Petitioner does little more than repackage her previously unsuccessful arguments from *State ex rel. Comm'r of Ins.* in the hopes that this Court will ignore its prior decision entirely, despite the fact that this matter presents the same Petitioner facing the same set of circumstances. As explained herein, Petitioner has

neither satisfied the legal requirements for relief through a writ of mandamus, nor has she provided any reasonable argument that the District Court's orders were incorrect, let alone any rational argument why this Court should reverse course from the clear legal standards set forth in *State ex rel. Comm'r of Ins.*

For all of these reasons, the Court should deny the Petition in its entirety.

II. COUNTERSTATEMENT OF ISSUES PRESENTED

A. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE RECEIVER IS BOUND BY THE ARBITRATION CLAUSE IN THE CTC AGREEMENT WHEN SHE IS PURSUING THIRD PARTY CLAIMS AGAINST CTC ON BEHALF OF SPIRIT WHILE SPIRIT IS ALSO IN RECEIVERSHIP.

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING ALL OF SPIRIT'S CLAIMS AGAINST CTC AS EACH CAUSE OF ACTION BROUGHT BY SPIRIT AGAINST CTC ARISES OUT OF THE CTC AGREEMENT AND IS SUBJECT TO ARBITRATION.

C. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY STAYING ALL PROCEEDINGS AGAINST THE REMAINING DEFENDANTS.

III. STATEMENT OF FACTS

A. THE CTC AGREEMENT BETWEEN SPIRIT AND CTC INCLUDES A MANDATORY ARBITRATION PROVISION.

Spirit is a Nevada-domiciled associative captive insurance company that operates a commercial auto liability insurance business and specializes in providing insurance to commercial truck owners. **APP0004, at ¶6; APP0011, ¶52.** On

November of 2011, Spirit and CTC-CA entered into a Program Administrator Agreement, pursuant to which CTC-CA would act as the Program Administrator for Spirit (the "PAA"). **APP0494 - APP0513**.

Section 18 of the PAA provides, in pertinent part, the following mandatory arbitration provision:

> SECTION 18
> ARBITRATION
>
> A. Any controversy or claims of either of the parties arising out of or relating to this Agreement, or the breach of any term, condition, or obligation, may, upon the mutual consent of all parties, be submitted to non-binding mediation under the supervision of the American Arbitration Association or any other agency for alternative dispute resolution. In the event that mutual consent to mediation shall not be obtained within thirty (30) days of written notice from any party to the other concerning the existence of a claim or controversy, the application of this paragraph shall be null and void.
>
> B. **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, which is not resolved by non-binding mediation, shall be settled by final and binding arbitration before three (3) arbitrators chosen under and governed by the Commercial Arbitration Rules of the American Arbitration Association** to be held in the District of Columbia, and judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction....

APP0507 (emphasis added).

In 2016, CTC-CA sought to assign the PAA to CTC-MO, and also make certain amendments to the PAA, both of which would be subject to approval by the

Nevada Division of Insurance (the "NVDOI"). On June 29, 2016, the NVDOI issued a letter approving both the assignment of the PAA from CTC-CA to CTC-MO and the amendment of the PAA. **APP0515**. Upon receiving the approval of the NVDOI, CTC-MO and Spirit executed the amended Program Administration Agreement which became effective on July 1, 2016 (the "CTC Agreement"). **APP0516 – APP0536**.

Importantly, Section 17 of the CTC Agreement contains a mandatory arbitration provision that is identical to the one found in Section 18 of the PAA. *See* **APP0529 – APP0530**.[1]

B. CTC'S OBLIGATIONS TO SPIRIT PURSUANT TO THE CTC AGREEMENT AND THEIR RELATION TO PETITIONER'S CLAIMS.

1. CTC's Duties Pursuant to the CTC Agreement

Pursuant to Section 1 of the CTC Agreement, CTC was appointed to be Spirit's general agent for the following purposes: (i) to solicit applications for new

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[1] Notably, Petitioner makes all of the allegations in her Complaint against CTC-CA, CTC-MO, and CTC-HI collectively, referring to them almost exclusively as "CTC" and, in doing so, alleges that CTC-HI has also breached the CTC Agreement. As explained above, the initial PAA between Spirit and CTC-CA, as well as the CTC Agreement between CTC-MO, both contain identical arbitration provisions. As Petitioner alleges that CTC-HI was a party to and breached the CTC Agreement, Petitioner is also compelled to arbitrate her claims against CTC-HI in accordance with its terms. Petitioner made arguments to the contrary before the District Court which were rejected, and which she subsequently abandoned in this Petition.

and renewal liability insurance policies on the blank forms of application; (ii) receive, evaluate, reject and accept requests for such policies; (iii) to underwrite, bind, and issue insurance policies in accordance with CTC's guidelines, as approved by Spirit; (iv) to make customary endorsements, changes, transfers, and modifications of existing policies; (iv) to charge and collect payments for such policies in accordance with the CTC Agreement or as directed by Spirit; and (v) to adjust and pay certain claims. *See* **APP0517-APP0518**.

Pursuant to Section 5 of the CTC Agreement, the general duties of CTC included the marketing and underwriting of policies, endorsements, notices of cancellation, notices of nonrenewal, coding, premium collection, and all related activities incidental to the issuance of policies in the authorized classes of business and the marketing of the program. *See* **APP0519-APP0520**.

Pursuant to Section 7 of the CTC Agreement, CTC was responsible for collecting and paying to Spirit all premiums due on the business written pursuant to the CTC Agreement. CTC was to hold all funds received by it in connection with the CTC Agreement as a fiduciary of Spirit, and could deposit said funds into a holding account, which could include premiums due to other carries as well as commissions due to CTC. Spirit was to receive monthly reports concerning the assets held by CTC on its behalf, and monthly payments of the amount due to Spirit. In the event that CTC did not collect enough premiums to cover the amount owed,

Spirit would be entitled to interest at a rate of 1.5% per month. *See* **APP0521-APP0523**.

Pursuant to Section 8 of the CTC Agreement, CTC agreed to accept and pay all expenses incurred by it in connection with the underwriting, production marketing, billing, accounting, and servicing of business written pursuant to the Agreement. *See* **APP0523-APP0524**.

Pursuant to Section 10, Addendum A, and Addendum B of the CTC Agreement, CTC was to receive compensation in the form of a management fee equal to twenty-three and one-half percent (23.5%), later reduced by subsequent amendment to twenty percent (20%), on all policies. *See* **APP0525, APP0532-APP0534.**

2. The Nature of Spirit's Claims Against CTC

It is undisputed Spirit was a functioning insurance company that issued policies to insureds, and that CTC carried out its duties as Spirit's program administrator pursuant to the CTC Agreement. The crux of Petitioner's claims concern whether Spirit received the proper amount of premiums from CTC, and whether CTC retained the proper amount of compensation in accordance with the CTC Agreement.

Petitioner judiciously relies on a third-party report created by FTI, dated December 20, 2019 (the "FTI Report") (**APP0558-APP0603**), which purports that

while CTC paid Spirit a total of $288,500,472 in its capacity as program administrator over the life of their relationship, it still owes Spirit an additional payment of $30,839,150; a claim that CTC vehemently disputes. *See* **APP0571**, at Table 2.

Put simply, the case is about whether or not CTC properly performed its obligations as program administrator pursuant to the CTC Agreement, or whether it underpaid Spirit by approximately 10%. In other words, we are dealing with an accounting dispute. Petitioner goes out of her way to sensationalize this case, waive her arms in the air, and proclaim that a terrible conspiracy has taken place. However, at the end of the day, this is a simple breach of contract action – and the contract in question has an arbitration provision.

As discussed herein, Petitioner does little more than recycle old arguments from the last time she argued an identical case before this same Court. This Court should abide by its prior order and deny the Petition in its entirety.

IV. LEGAL ARGUMENT

A. PETITIONER HAS FAILED TO SATISFY THE REQUISIT STANDARD FOR RELIEF THROUGH THE ISSUANCE OF A WRIT OF MANDAMUS.

This Court has held that a party seeking extraordinary writ relief from an order compelling arbitration must satisfy two threshold questions in order to show such relief is warranted: (i) explain why an eventual appeal does not afford her a plain,

speedy and adequate remedy in the ordinary course of law; and (ii) demonstrate that the matter presents the exceptional circumstances required for interlocutory writ review of an order compelling arbitration, which normally requires a showing of clear legal error. *State ex rel. Comm'r of Ins.*, at 1-3; *Tallman v. Eighth Judicial Dist. Court*, 131 Nev. 713, 719, 359 P.3d 113, 117-18 (2015)). *See State ex rel. Masto v. Second Judicial Dist. Court*, 125 Nev. 37, 43-44, 199 P.3d 828, 832 (2009) (explaining that the decision to entertain a petition for mandamus challenging an order compelling arbitration is not automatic, and instead a matter to be resolved at the discretion of this Court).

Petitioner cannot satisfy either prong of the *Tallman* analysis. First, as discussed *infra*, Petitioner has a plain, speedy, and adequate remedy in the ordinary course of law – the right to appeal a final judgment. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 223, 88 P.3d 840, 840 (2004) ("The Nevada Supreme Court has pointed out, on several occasions, that the right to appeal is generally an adequate legal remedy that precludes writ relief."). As this Court already explained to Petitioner in *State ex rel. Comm'r of Ins.*, any inconvenience that Petitioner faces by being forced to first arbitrate its claims against CTC and Criterion "may be mitigated by staying litigation while arbitration runs its course" and her complaints, "inherent in any order compelling arbitration, do not demonstrate that an eventual appeal would not be an adequate legal remedy." *State ex rel. Comm'r of Ins.*, at 3.

The District Court followed this Court's prior guidance when it stayed Petitioner's claims against the other Defendants, and any further delay was solely the fault of Petitioner for failing to accept the ruling in *State ex rel. Comm'r of Ins.* timely proceed to arbitration.

Second, as stated throughout the Petition, it is Petitioner's position that the district court abused its discretion for a plethora of reasons that will be discussed *infra*. For brevity, CTC will not address each of Petitioner's arguments in this section, but asserts that the District Court's decision to compel arbitration was a sound and well-reasoned decision under the law and the facts, and again, also in accordance with this Court's prior guidance in *State ex rel. Comm'r of Ins.*

Finally, Petitioner's last argument, that mandamus relief is appropriate because this Petition concerns an important legal issue that needs clarification, is particularly offensive because this Court has already ruled upon this exact circumstance. Petitioner simply chooses to ignore controlling caselaw (despite the fact that she was a party in the earlier case in which she was represented by the same attorneys), and once again makes the same previously unsuccessful arguments to this Court hoping for a different result.

For all these reasons, the Court should deny the Petition in its entirety, just as it did in *State ex rel. Comm'r of Ins.*, because there is no basis for mandamus relief.

B. THE ARBITRATION PROVISION IN THE CTC AGREEMENT IS NOT AN INVALID INSTRUMENT OF FRAUD.

Petitioner argues that the District Court abused its discretion by failing to reject the arbitration provision of the CTC Agreement as an instrument in a criminal enterprise. Petitioner relies solely on the concurring opinion in *Janvey* to support of her argument.[2] However, despite the fact that Petitioner lobs a multitude of baseless allegations towards CTC (both in English and French), *Janvey* is easily distinguishable and has no bearing on the enforceability of the CTC Agreement.

Janvey concerns a federal receiver who was appointed at the behest of the Securities and Exchange Commission to preserve and recover corporate assets that were stolen from investors through the commission of a Ponzi scheme. The scheme was organized by R. Allen Stanford and James Davis, both of whom pled guilty to a number of federal crimes and were incarcerated by the time the *Janvey* court issued the decision at issue. Specifically, the *Janvey* court was tasked with adjudicating the

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[2] Notably, the majority opinion in *Janvey* was decided on entirely different grounds that are irrelevant to this case. Specifically, 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. 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 also waited until almost three years into the litigation before seeking to invoke his right to arbitration. *Id.,* at 243-244.

validity of several employment agreements containing arbitration clauses between the companies used by Stanford and Davis to carry out their crimes and employees whose actual job was to assist with the commission of those crimes.

Unlike *Janvey*, this case is not premised on a criminal matter wherein numerous principals of a sham enterprise have already been convicted by the federal government for running an illicit scheme. Petitioner concedes that Spirit was a fully functioning insurance company which wrote policies and paid out claims on behalf of its insureds, and that CTC acted as CTC's program administrator in accordance with the CTC Agreement. Further, pursuant to the FTI Report upon which Spirit relies, CTC paid Spirit a total of $288,500,472 in its capacity as program administrator. *See* **APP0571**, at Table 2. As noted above, 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%.

Embellishments aside, Petitioner refuses to recognize that her claims against CTC are exclusively civil in nature. Even the concurring opinion in *Javney* is ultimately in favor of resolving such 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)"). Curiously, the one portion of the concurring opinion that is arguably relevant here is ignored by Petitioner.

Petitioner's argument that the purpose of the arbitration clause in the CTC Agreement was to "conceal Spirit's true financial condition from the [Nevada Department of Insurance]" is equally deceptive. Spirit and CTC have been subject to the regulation of the Nevada Department of Insurance (the "Department"), and specifically Petitioner herself in her role as Commissioner of the Department, for almost a decade. As such, Spirit and CTC's underlying financials have already been made available to her. For example, in order to create the FTI Report, FTI was permitted to review CTC's primary financial records, financial systems, and records of its thirty-party providers. *See* **APP0564 – APP0565**, at Sections 4 and 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 using the arbitration provisions as an instrument to conceal anything from Petitioner.

Further, Petitioner was also afforded the opportunity to review and approve agreements between Spirit and CTC, including the CTC Agreement, which she herself approved on June 29, 2016. *See* **APP0515**. Again, any argument that the CTC Agreement was used to somehow avoid regulatory scrutiny is patently absurd.

To the contrary, it was entered into only after receiving regulatory approval.

For all these reasons, the District Court did not abuse its discretion in determining that arbitration provision in the CTC Agreement is valid and enforceable.

C. THE RECEIVERSHIP ORDER GRANTS PETITIONER THE AUTHORITY TO PURSUE CLAIMS AGAINST CTC THROUGH AN ARBITRATION.

Petitioner is simply wrong in arguing that the Order appointing her as Receiver in the related Receivership proceedings, Case No. A-19-787325 (the "Receivership Order"), does not permit her to pursue claims against third parties through arbitration. The plain language of the Receivership Order says otherwise.

The Receivership Order states that the Receiver has "the power to **initiate and maintain actions at law or equity, in this and other jurisdictions**" and to "[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**." **APP0549**, at Section 15(a)(ii) (emphasis added); **APP0550 – APP0551, at Section 15(h)** (emphasis added).

The power to commence an arbitration is undeniably included in the above grant of authority. In order to conceal this dispositive language from this Court, Petitioner simply excludes it when quoting from the Receiver Order, instead giving only a truncated version of the text that blatantly misrepresents its intended effect. *See* Petition, at p. 20.

In further support, *State ex rel. Comm'r of Ins.*, as well as the underlying District Court matter, *Nevada Commissioner of Insurance, v. Milliman Inc, et al.*, Case No. A-17-760558-C, also considered essentially identical language with respect to the receivership order in that action, again confirming that such language does indeed grant a receiver the authority to arbitrate claims against third parties. To that end, the *Milliman* Court stated the following:

> 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.

APP0827, p. 9:16-20 (internal citations omitted). Further, this Court tacitly agreed that the *Milliman* receiver had the authority to commence an arbitration when it denied Petitioner's request for relief in *State ex rel. Comm'r of Ins.*, thereby leaving in place the District Court's order compelling her to arbitrate her claims against Milliman.

Finally, it should be noted that the Receivership Order was drafted and submitted as a Proposed Order by the same attorneys representing Petitioner in this action. As explained herein, it is evident that the Receivership Order does not prohibit Petitioner from initiating an arbitration against CTC, but even if it did, it would be an artificial restriction placed on Petitioner by her own attorneys, not a requirement of Nevada law. If that were the case (and again, it is not), Plaintiff and her attorneys would be more than capable of asking Judge Alf to modify that order to remove the extra-judicial limitation that they themselves placed on their own client for no reason.

One would also hope that when drafting the Receivership Order, Petitioner's counsel did not intentionally try to exclude her ability as Receiver to initiate an arbitration solely for the purpose of trying to evade compliance with the arbitration provision of the CTC Agreement. However, even if that was their goal, it must fail.

D. PETITIONER DID NOT HAVE THE RIGHT TO DISAFFIRM THE CTC AGREEMENT.[3]

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[3] The Court should disregard this entire argument because Petitioner did not properly preserve the issue for appeal. Petitioner only mentioned that she was disaffirming the arbitration provisions to the district court with a single, passing comment in the Introductions to her Oppositions, stating that "[c]ourts have long held that trustees for bankruptcy debtors may reject executory contracts like arbitration provisions." **APP0673**, p. 4:7–8; **APP0722**, p. 2:7–8. This statement was unsupported by law and contained no citation to the Receivership Order, or any other authority. Thus, CTC "had no opportunity to respond and the district court had no chance to intelligently consider during proceedings below." *Oliver v. Barrick Goldstrike*

As an initial matter, the Court should disregard this entire argument because Petitioner did not properly preserve the issue for appeal. Petitioner only mentioned that she was disaffirming the arbitration provisions to the district court with a single, passing comment in the Introductions to her Oppositions, stating that "[c]ourts have long held that trustees for bankruptcy debtors may reject executory contracts like arbitration provisions." **APP0673**, at 7–8; **APP0722**, at 7–8. This statement was unsupported by law and contained no citation to the Receivership Order, or any other authority. Thus, CTC "had no opportunity to respond and the district court had no chance to intelligently consider during proceedings below." *Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1345, 905 P.2d 168, 182 (1995). Petitioner has no basis to disaffirm the arbitration provision of the CTC Agreement.

Even if this argument was properly preserved, it would still fail. While the Receivership Order does grant Petitioner the power to "affirm, reject, or disavow part or all of any leases or executory contracts to which [Spirit] is a party," the CTC Agreement does not qualify because it is neither a lease nor an executory contract. Petitioner's argument also runs afoul of the FAA's presumption in favor of arbitration, as well as the doctrine of equitable estoppel, which is particularly relevant given the fact that Petitioner alleges the CTC Agreement is valid and

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Mines, 111 Nev. 1338, 1345, 905 P.2d 168, 182 (1995).

enforceable while at the same time trying to avoid her own obligation to arbitrate pursuant to that same contract.

1. The Arbitration Provision in the CTC Agreement is not Executory and Cannot be Disaffirmed.

As previously adopted in the Ninth Circuit, "executory contracts are those in which the obligations of both parties are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." *In re Rehbein*, 60 B.R. 436, 440 (B.A.P. 9th Cir. 1986) (citing Countryman, Executory Contracts in Bankruptcy: Part 1, 57 Minn.L.Rev. 439, 460 (1973); *In re Pacific Exp., Inc.*, 780 F.2d 1482, 1487 (9th Cir. 1986)). Black's Law Dictionary likewise defines an "executory contract" as "Contractual obligation fulfillment actively being done. Some contractual expectations are yet to be done by one or more parties. An ongoing lease agreement is an example." Executory Contract, BLACK'S LAW DICTIONARY (2d ed.).

Petitioner incorrectly claims that the arbitration clauses "placed *future* obligations on both parties to each agreement, remained executory as of that date [of the Receivership Order]," and that she accordingly had the authority to reject these isolated provisions while seeking enforcement of the remainder of the Agreements. Petition, at p. 23. However, the law is clear that an arbitration provision does not contain such future obligations, and instead it "merely defines the venue where the parties will resolve a claim...." *Verizon Wireless Pers. Communs., LP v. Bateman*,

264 So. 3d 345, 350 (Fla. Dist. Ct. App. 2019). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate …, a party does not forgo [] substantive rights …; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

Moreover, the Petitioner's assertion that the arbitration provision is executory is also contradicted by the express language of NRS 696B. In particular, Chapter 696B.400 explains that "[t]he rights and liabilities of the insurer … shall, unless otherwise directed by the court, **be fixed as of the date on which the order directing the liquidation of the insurer is filed**…." NRS 696B.400 (emphasis added). A court will have jurisdiction over a petition to compel arbitration under the FAA if there is "a ripe 'dispute within the scope of the arbitration agreement.'" *Allstate Ins. Co. v. A.O. Smith Corp.*, No. 15 C 6574, 2015 U.S. Dist. LEXIS 143995, at *16 (N.D. Ill. Oct. 23, 2015) (quoting *Zurich Am. Ins. Co. v. Watts Indus.*, 417 F.3d 682, 687 (7th Cir. 2005)). "A controversy is 'ripe' when it has reached … the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." *California Water & Telephone Co. v. Cty. of Los Angeles*, 61 Cal. Rptr. 618, 623 (Cal. Ct. App. 1967).

Thus, even if CTC breached the CTC Agreement (and it did not), the duty to arbitrate would arise at the time of the breach when the dispute became ripe. *Allstate Ins. Co. v. A.O. Smith Corp.*, No. 15 C 6574, 2015 U.S. Dist. LEXIS 143995, at *16

(N.D. Ill. Oct. 23, 2015) ("A dispute is ripe if 'the facts alleged, under all the circumstances, show that there is substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'") (quoting *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 127 (2007)).

Here, because Spirit's rights were fixed ***no later than the date of the Receivership Order***, all disputes necessarily become ripe at that time (if they weren't already) and would be appropriate for judicial determination (or arbitration) on that same date. *See Lower Colo. River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 923 (5th Cir. 201&) (finding that a court's ability to compel arbitration arises when a dispute is ripe). Thus, Spirit's obligation to arbitrate became fixed as of the date of the Receivership Order and was not a future obligation that could potentially be executory in nature as Petitioner claims. *Bayou Constr. v. Brown*, 693 So. 2d 1249, 1253 (La. Ct. App. 1997) ("The appointment of a receiver sustains the status quo of the corporation.... He takes the property as he finds it, burdened with all the liens and privileges which affected it in the hands of the corporation, and to the same extent....") (quoting *In re Bryce Cash Store,* 124 So. 544 (La. Ct. App. 1929)).

Moreover, even if the arbitration provision in the CTC Agreement was executory in nature (and again, it is not), Petitioner's argument that she has somehow implicitly disaffirmed the provision also runs contrary to relevant caselaw from other

jurisdictions requiring her to provide appropriate notice to the affected party. *See e.g., First Hartford Partners II v. FDIC*, No. 93 Civ. 0933 (RPP), 1993 U.S. Dist. LEXIS 14651, at *10 (S.D.N.Y. Oct. 15, 1993) (finding that receiver did not take proper steps to repudiate contract where formal notice was not provided); *see also Bunn v. FDIC*, 908 F.3d 290, 294 (notifying bank executive by letter that the receiver intended to disaffirm his benefits agreement); *Mulholland v. FDIC*, No. 12-cv-01415-CMA-MEH, 2014 U.S. Dist. LEXIS 78806, at 5 (D. Colo. June 9, 2014) (notifying plaintiffs by letter that the receiver had disaffirmed their agreements); *New Hampshire Assocs. Ltd. P'ship v. FDIC*, 978 F. Supp. 650, 652 (D. Md. 1997) (informing third-party in writing of disaffirmation of lease).

Finally, even if the arbitration provision could be disaffirmed, there can be no doubt that waiting until almost a year into the receivership proceedings to do so is manifestly unreasonable, and thus would be ineffective. *See Anes v. Crown P'ship, Inc.*, 113 Nev. 195, 199 (1997) (holding that "a receiver, stepping into the shoes of a lessor, *which fails to use its court-authorized powers to cancel or modify an existing executory lease within a reasonable time*... impliedly adopts that lease").

2. The FAA Requires that Arbitration Provision in the CTC Agreement Must be Enforced.

The FAA also makes it clear that arbitration clauses are not viewed as executory, and thus cannot be disaffirmed. Prior to the FAA, this was not always the case, as arbitration agreements were viewed as executory under common law,

and prior to the rendering of an arbitration award, either party to an arbitration provision could freely revoke the agreement to arbitrate, rendering such provisions essentially unenforceable. *Silverstone v. Conn. Eye Surgery Ctr. South, LLC*, No. NNHCV186080472S, 2018 Conn. Super. LEXIS 3621, at *19 (Conn. Sup. Ct. Oct. 23, 2018) ("'The courts of law in England held that the parties were at liberty to revoke the authority given to an arbiter, under the submission, at any time before an award was made'") (citation omitted).

However, "***this denial of enforceability nullified the practical value of arbitration agreements***." *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 449 (4th Cir. 1997) (emphasis added). As a result, the modern judicial climate evolved to recognize the benefits of arbitration, and the FAA was ultimately enacted "to alter the judicial atmosphere previously existing." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288–89 (2002). Specifically, the FAA terminated the common law treatment of arbitration clauses, under which they had been regarded as executory and therefore revocable. "***Section 2 of the FAA [directly] responded to this hostility by making written arbitration agreements 'valid, irrevocable, and enforceable.***'" *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 593 (2008) (Stevens, J., dissenting) (citing 9 U.S.C. § 2) (emphasis added).

Petitioner's arguments would functionally overturn the FAA and revert the law back to its original, outdated position, thereby creating an outcome that is neither

contemplated under federal law nor in NRS 696B. As such, the Court should reject the Petitioner's argument that the Arbitration Provisions are executory, and thus subject to disaffirmance, in accordance with both their express language and the express purpose of the FAA. *See Silverstone*, 2018 Conn. Super LEXIS 3621, at *27 (Conn. Sup. Ct. Oct. 23, 2018) (emphasis added) ("The report of the House Committee stated, in part: Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. ***He can no longer refuse to perform his contract when it becomes disadvantageous to him***.").

3. Equitable Estoppel Prohibits Petitioner from Disaffirming the Arbitration Provision in the CTC Agreement.

Even assuming, *arguendo*, that the arbitration provision of the CTC Agreement was executory, that Petitioner gave reasonable notice of her disaffirmance, and that such disaffirmance did not run afoul of the FAA, Petitioner's argument would still fail based on the principal of equitable estoppel.

The doctrine of estoppel prevents parties, such as Petitioner, from maintaining the validity of and bringing claims based upon the CTC Agreement while contemporaneously contending that she herself (on behalf of Spirit) is somehow exempt from the terms of the CTC Agreement. *See, e.g.*, *Phillips v. Parker*, 106 Nev. 415, 418, 794 P.2d 716, 718 (1990) ("Parker may not rely on the agreement to prove ownership and simultaneously disavow the applicability of the arbitration

clause."). *See Inter. Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 418 (4th Cir. 2000) ("A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a "direct benefit" from a contract containing an arbitration clause.'") (quoted with approval by *Truck Ins. Exch. v. Swanson*, 124 Nev. 629, 634–35, 189 P.3d 656, 660 (2008)).

Although Petitioner's role as Receiver is governed by statute, her claims and defenses are solely derivative of Spirit's. Hence, Petitioner stands in the shoes of Spirit, and the equitable principles that would apply to Spirit in this action apply to her equally. *See Ommen v. Ringlee*, 941 N.W.2d 310, 312 (Iowa 2020) ("[W]e conclude the court-appointed liquidator is bound by the arbitration provision because, under the principles of contract law …, the liquidator stands in the shoes of the health-insurance provider and is bound by the preinsolvency arbitration agreement."); *In re Rehab. of Manhattan Re Ins. Co.*, No. C.A. No. 2844-VCP, 2011 Del. Ch. LEXIS 146, at *22 (Dela. Ch. Oct. 4, 2011) ("[W]here, as in this case, there is a valid and enforceable arbitration agreement between the insurer and the claimant, the receiver, by stepping into the shoes of the insurer, may be required at the behest of a claimant who obtains the permission of this Court, to submit to arbitration just as the insurer would have been so required absent the receivership.").

Recognizing that equitable estoppel is a problem for her, Petitioner argues that estoppel should not apply because it is precluded by the existence of a statutory

scheme governing the separate receivership action (*i.e.* NRS 696B). *See* Petition, at p. 25-26. Petitioner's argument lacks any cognizable support, however, it should be recognized that her ability to disaffirm contracts arises from a court order drafted by her own counsel, and not NRS 696B itself.[4] While it makes no sense to allow a receiver to prohibit the performance of certain executory contracts whose continuation would result in waste via an injunction in a receivership action, as provided for in NRS 696B.270, the Receivership Order cannot be used by Petitioner as a tool to affirmatively expand her power outside the bounds of the statute in order to grant her authority to disavow an arbitration clause applicable in a separate litigation against parties who are not even party to the receivership action. Again, this is particularly true when Petitioner's claims against CTC stem from the CTC Agreement between Spirit and CTC, and Petitioner's claims against CTC are exclusively related to allegations arising out of other provisions of that same agreement. Thus, equitable estoppel clearly applies, and provides yet another reason why Petitioner's alleged revocation of the arbitration provision in the CTC Agreement must fail.

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[4] NRS 696B does not grant Petitioner the power to disaffirm contractual provisions, instead simply providing that "the Commissioner shall be vested by operation of law with the title to all of the property, contracts and rights of action." NRS 696B.290. Similarly, NRS 696B also does not forbid Petition from participating in arbitration proceedings.

E. THE ARBITRATION PROVISION OF THE CTC AGREEMENT IS ENFORCEABLE IN ACCORDANCE WITH THE FEDERAL ARBITRATION ACT.

Petitioner argues that the FAA does not require arbitration of her claims against CTC because they are reverse-preempted by the McCarran-Ferguson Act and Nevada state insurance laws. However, this same argument was previously rejected by this Court in *State ex rel. Comm'r of Ins.*, and courts in numerous other jurisdictions have agreed with this result.

1. The McCarran-Ferguson Act Does Not Reverse Preempt the FAA.

"The FAA provides for the enforcement of arbitration agreements in any contract affecting interstate commerce." *Ellison v. Am. Homes 4 Rent, LP*, No. 2:19-CV-1137 JCM (DJA), 2019 U.S. Dist. LEXIS 221543, at *4-5 (D. Nev. Dec. 27, 2019). The FAA reflects a liberal federal policy in favor of arbitration and the fundamental principal that arbitration is a matter of contract. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 1745 (2011). The parties do not dispute that the CTC Agreement is a contract affecting interstate commerce to which the FAA would ordinarily apply.

Regardless, Petitioner argues that the FAA should still not apply as a result of reverse preemption under the McCarran-Ferguson Act because compelling her to arbitrate Spirit's claims against CTC would impair her statutory powers and the general policy under NRS 696B to concentrate creditor claims in a single, exclusive

forum. Petitioner is incorrect.

In order for reverse-preemption to occur, a state statute at issue must be: (1) for the purpose of regulating the business of insurance; (2) the federal statute involved must not specifically relate 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. 599, 307 (1999). Petitioner's preemption argument cannot satisfy the third prong of the *Humana* test. As this Court already explained to Petitioner the last time she proffered this identical argument, the issue in this case is not a creditor's claim which is brought against the insurance company she is liquidating (*i.e.* Spirit), but instead concerns Petitioner's own breach of contract claims against several third parties on behalf of the insurer, which just so happens to be in receivership. *State ex rel. Comm'r of Ins.*, at 3-4 ("…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.").

The rational underlying this Court's prior decision is easy to unpack. The statute at issue, NRS 696B, provides that "[t]he district court has original jurisdiction of delinquency proceedings." NRS 696B.190(1). "Delinquency proceedings" are defined as "[a]ny proceeding commenced against an insurer pursuant to this chapter for the purpose of conserving, rehabilitating, reorganizing or liquidating the insurer."

NRS 696B.060. Thus, preemption under the McCarran-Ferguson Act could potentially apply if a federal law impaired a Nevada liquidation proceeding from being carried out in accordance with NRS 696B.

However, as this Court correctly reasoned, the present action is distinct from Spirit's liquidation proceeding, which is currently being litigated in a completely separate action, in front a different judge, in District Court. This case is not a delinquency proceeding. It does not invoke NRS 696B, and the fact that the FAA requires Petitioner to arbitrate her claims against CTC does not invalidate, impair or supersede NRS 696B. *See AmSouth Bank v. Dale*, 386 F.3d 763, 780 (6th Cir. 2004) (distinguishing claims by "angry creditors attempting to sue insolvent insurance companies in federal court to jump ahead in the queue of claims," from claims "where the insurance companies are themselves the natural plaintiffs").

Put another way, if Spirit was acting on its own behalf in the same action, the Nevada Insurance Code would not come into play merely because Spirit happens to be an insurer. The fact that Petitioner is standing in Spirit's shoes does not transform the nature of these proceedings. *SEC v. National Sec., Inc.*, 393 U.S. 453, 459 (1969) ("Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the McCarran-Ferguson Act] apply.").

Further, this Court went on to observe in *State ex rel. Comm'r of Ins.* that

other courts who considered Petitioner's argument "have rejected it." *State ex rel. Comm'r of Ins.*, at 4 (citing *Milliman, Inc. v. Roof*, 353 F. Supp. 3d 588, 603 (E.D. Ky. 2018); *Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 161 (3d Cir. 2000)). In the interim, even more courts have confirmed this correct result. *See e.g., Ommen v. Ringlee*, 941 N.W.2d 310, 317 (Iowa 2020) ("The liquidator's claims cannot be detached from the contractual relationship between Milliman and CoOportunity, pursuant to which all of the work was performed. Therefore, under the principles of contract law, we conclude the liquidator stands in CoOportunity's shoes; his claims are merely derivative of CoOportunity's claims...Accordingly, the liquidator is bound by the preinsolvency arbitration agreement.").

This Court has already provided Petitioner with a clear, bright line distinction as to whether or not a claim brought during a liquidation proceeding concerns NRS 696B. Claims brought by creditors against the insurer being liquidated fall within the statute, while claims brought on the insurer's behalf against third parties do not. This case concerns the latter, not the former. There is simply no room for argument. The plain application of this rule requires the Petition to be denied in its entirety.

2. Even if Nevada State law Applies, the NAA still Requires Arbitration.

It has always been CTC's position that the arbitration provision of the CTC Agreement is enforceable pursuant to the FAA, and this Court previously adopted that same view in *State ex rel. Comm'r of Ins.*, as already discussed herein. Thus,

any discussion of the NAA with respect to this Petition is moot.

Regardless, in the event that Nevada state law was to somehow apply, the result under the NAA would be the same. *See Clark Cty. Pub. Emps. Ass 'n v. Pearson*, 106 Nev. 587, 591, 798 P.2d 136, 138 (1990) ("Disputes are presumptively arbitrable, and courts should order arbitration of particular grievances unless it may be said with positive assurance that the arbitration clause is not susceptible of and interpretation that covers the asserted dispute."); *Int' Ass 'n of Firefighters, Local #1285 v. Las Vegas*, 104 Nev. 615, 618, 764 P.2d 478,480 (1988) (stating that all doubts concerning the arbitrability of the subject matter of a dispute are resolved in favor of arbitration).

Petitioner wrongly argues that NRS 696B, and in particular subsections NRS 696B.190, NRS 696B.200, and NRS 696B.270, grant exclusive jurisdiction over this dispute to the District Court, thereby causing a direct conflict between the application of NRS 696B and the NAA. Plaintiff then claims that NRS 696B should take precedence over the NAA as it is a more specific grant of authority. However, there is no conflict between the NRS 696B and the NAA, and in trying to support her argument, Petitioner blatantly misreads all three sections of NRS 696B upon which she relies.

First, NRS 696B.190 concerns claims for delinquency proceedings brought against an insurer, but has no bearing on civil claims brought by Petitioner against

third-parties on behalf of an insurance company that just happens to be in receivership, as is the case here. Second, while 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, there is absolutely nothing in the statute that would support an argument that this grant of jurisdiction is exclusive, or that it otherwise prohibits the enforcement of an agreement to arbitrate. Finally, NRS 696B.270 gives the District Court very narrow jurisdiction over the issuance of a particular subset of injunctions, but again, those limited circumstances are wholly unrelated to Spirits' claims in this case.

Thus, NRS 696B does not prohibit Petitioner from pursuing Spirit's claims against CTC through arbitration in accordance with the NAA. Moreover, Petitioner is also explicitly given the authority to initiate such an arbitration pursuant to the Receivership Order, as already explained in Section IV.C above. Petitioner's alleged conflict between the NAA and NRS 696B simply does not exist. In any event, this Court already rejected these same arguments when Petitioner previously made them in *State ex rel. Comm'r of Ins.*, and nothing here compels a different result.

F. ALL OF PETITIONER'S CLAIMS AGAINST CTC ARISE OUT OF THE CTC AGREEMENT AND ARE SUBJECT TO ARBITRATION.

Section 18 of the CTC Agreement contains an expansive arbitration provision which covers "Any controversy or claims of either of the parties arising out of or

relating to this Agreements, or the breach of any term, condition, or obligations…" **APP0507**. Caselaw further provides that such provisions should also be interpreted broadly when examining whether a specific claim falls within the purview of the provision. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Bank of NY. 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). To require arbitration, the factual allegations need only "touch matters" covered by the contract containing the arbitration clause. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999). In sum, a tort claim will be arbitrable if it arises out of the agreement containing the arbitration provision. *Id.* at 724.[5]

Beyond tort claims, arbitration agreements are equally enforceable with respect to statutory claims, such as claims for civil racketeering and those arising under the Nevada Revised Statues. *See Shearson/American Express v. McMahon*, 482 U.S. 220, 242, 107 S. Ct. 2332, 2345 (1987) (stating that civil RICO claims are arbitrable and that parties who bargain to arbitrate such claims "will be held to their

[5] Rather than rely on irrelevant caselaw from outside of this State as Petitioner does, CTC with the clear law from this State, the 9th Circuit, and the United States Supreme Court holding that such an arbitration provision should be interpreted broadly and includes any claim that is related to the CTC Agreement, regardless of whether the claim sounds in contract, tort, or statute.

bargain"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 624 n.13, 105 S. Ct. 3346, 3352 (1985) ("insofar 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 arbitrability"); *Lozano v. AT&T Wireless Servs.*, 504 F .3d 718, 725 (9th Cir. 2007) ("Contractual arbitration agreements are equally applicable to statutory claims as to other types of common law claims.").

Petitioner seeks to analogize Spirit's non-contractual claims against CTC to an independent "assault," arguing that they have nothing to do with the respective duties of the parties under the CTC Agreement. However, Petitioner is betrayed by her own allegations in the Complaint. Tellingly, Petitioner specifically references CTC's obligations and performance under the CTC Agreement in each of its non-contractual claims, easily satisfying the aforementioned standard. **APP0001- 0079**. Moreover, the substance of all these claims directly relates to subject matter of the CTC Agreement, which is itself the lynchpin of the entire relationship between CTC and Spirit.

First, Petitioner's claim for breach of fiduciary duty against CTC explicitly alleges that a fiduciary duty existed between CTC and Spirit "pursuant to the agreements between the parties…", which obviously includes the CTC Agreement. **APP0051**, at §287. Additionally, many of the same actions are included as

allegations in both the breach of contract claim and the breach of fiduciary duty claim, including but not limited to, "leav[ing] tens of millions of dollars unaccounted for and owing to Spirit", "failing to disclose financial records to Spirit", and "failing to safeguard or account for Spirit's funds," all of which directly relate to CTC's duties under the CTC Agreement, and its alleged breach of the same. *Cf.* **APP0048-0049**, with, **APP0051-52.**

Second, Petitioner's claim for tortious breach of the implied covenant of good faith and fair dealing also hinges on the CTC Agreement. Petitioner again alleges that it and CTC entered into the CTC Agreement; that a special element of reliance existed in the CTC Agreement; that the CTC Agreement contains an implied covenant of good faith and fair dealing; and that CTC acted in manner unfaithful to the purpose of the CTC Agreement, thereby denying Petitioner's justified expectations in the CTC Agreement. **APP0053-0054.** The CTC Agreement is truly the crux of this claim. As such, Petitioner's claim for tortious breach of the implied covenant of good faith definitively arises from the CTC Agreement and is subject to arbitration.

Third, Petitioner's claim for unjust enrichment similarly relies on the CTC Agreement. In support of its claim, Petitioner alleges that CTC transferred funds and/or other property rightfully belonging to Spirit and improperly "wrote-off" and "reclassified debt". **APP0060-0061.** To be clear, any claim for amounts due to

Petitioner stem directly from the CTC Agreement. As such, Petitioner's claim for unjust enrichment concerning such amounts inarguably arises out of the CTC Agreement and is subject to arbitration.

Fourth, Petitioner's claim for fraud also arises from the CTC Agreement. Importantly, the specific acts attributed to CTC in perpetuating this alleged fraud relate solely to CTC's duties under the CTC Agreement. For example, "CTC failing to remit premiums to Spirit consistent with the CTC" and "CTC failing to collect certain premiums due to Spirit and misreporting those failures" again also constitute purported breaches of the CTC Agreement. **APP0063-0064**, at ¶ 362(b). Thus, Petitioner's claim for fraud indisputably arises out of the CTC Agreement and is subject to arbitration.

Fifth, Petitioner's statutory claims under the Nevada Revised Statutes concerning fraudulent transfers and improper distributions also relate to the CTC Agreement. Here, Petitioner essentially argues that Spirit's money was misused or diverted by CTC in a variety of ways, however, the sole reason that CTC was entrusted with the management of Spirit's funds in the first place was in its role as program administrator pursuant to the CTC Agreement, and CTC's duties with respect to managing those funds (*e.g.* remitting them to Spirit) are also set forth therein. Again, there is simply no way to credibly claim the CTC Agreement is unrelated to these claims.

Lastly, Petitioners' Civil RICO and Civil Conspiracy claims also arise from the CTC Agreement. Similar to the claims discussed above, both have identical supporting allegations as Petitioner's breach of contract claim. *Supra;* **APP0057-0059 at ¶ 335(a) – (c)**. Once more, all of these allegations definitively arise from the CTC Agreement. Accordingly, Petitioner's claims for Civil Rico and Civil Conspiracy are subject to arbitration as well.

Ultimately, Petitioner is suing CTC for the purported underpayment of premiums it claims Spirit is owed in accordance with the CTC Agreement. While Petitioner may try to dress up these allegations in a variety of ways, a close look at Petitioner's supporting allegations for each "non-contractual" claim show that they indeed arise directly from the CTC Agreement and easily satisfy the requisite legal standard to fall within the scope of its arbitration provision.

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V. CONCLUSION

As outlined in this Answer, Petitioner has failed to satisfy the requisite standard for writ relief, and further, the District Court did not abuse its discretion in ruling that CTC Agreement is a valid, enforceable agreement pursuant to which Spirit must pursue all of its claims against CTC through arbitration. Petitioner's arguments are wholly without merit, and this Court should deny the Petition in its entirety.

DATED this 25th day of August, 2021.

SALTZMAN MUGAN DUSHOFF

By_____

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VERIFICATION

DECLARATION OF MATTHEW T. DUSHOFF, ESQ.

I, Matthew T. Dushoff, Esq., being first duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of Nevada.

2. I am a shareholder at the law firm of Saltzman Mugan Dushoff and am the attorney of record for Real Parties in Interest CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; and CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC., in the above-captioned action.

3. If called upon to testify, I could and would testify competently to the facts set forth herein that are true within my personal knowledge.

4. This declaration is made in support of the CTC Parties' Answer to Petition for Writ of Mandamus.

I declare under penalty of perjury under the laws of the State of Nevada (NRS §53.045) that the foregoing is true and correct.

DATED this 25th day of August, 2021.

MATTHEW T. DUSHOFF, ESQ.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition 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 14 point, double-spaced Times New Roman font.

2. I further certify that this Petition complies with the page-or type-volume limitations of NRAP 32(a)(7)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 9,326 words.

3. I hereby certify that I have read this Answer to Petition for Writ of Mandamus, 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 Answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions

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

DATED this 25th day of August, 2021.

SALTZMAN MUGAN DUSHOFF

By _____

MATTHEW T. DUSHOFF, ESQ.
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1)(B), I hereby certify that I am an employee of Saltzman Mugan Dushoff, and that on the 25th day of August, 2021, I submitted the foregoing **ANSWER TO PETITION FOR WRIT OF MANDAMUS** to the Supreme Court of Nevada's electronic docket for filing and service upon the following:

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

The Honorable Mark R. Denton
Eighth Judicial District Court, Dept. 13
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89155

via email on August 25, 2021 to Dept13lc@clarkcountycourts.us

Cindy Kuhn

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