CASE NO. 82701

IN THE SUPREME COURT OF NEVADA

THE STATE OF NEVADA 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,

Respondents,

-and-

THOMAS MULLIGAN, AN INDIVIDUAL; CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC, A MISSOURI LIMITED LIABILITY COMPANY; CTC TRANSPORTATION INSURANCE SERVICES LLC, A CALIFORNIA LIMITED LIABILITY COMPANY; CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC, A HAWAII LIMITED LIABILITY COMPANY; CRITERION CLAIMS SOLUTIONS OF OMAHA, INC., A NEBRASKA CORPORATION; PAVEL KAPELNIKOV, AN INDIVIDUAL; CHELSEA FINANCIAL GROUP, INC., A CALIFORNIA CORPORATION; CHELSEA FINANCIAL GROUP, INC., A MISSOURI CORPORATION; CHELSEA FINANCIAL GROUP, INC., A NEW JERSEY CORPORATION D/B/A CHELSEA PREMIUM FINANCE CORPORATION; 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,

Real Parties in Interest.

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

REAL PARTY IN INTEREST CRITERION CLAIM SOLUTIONS OF OMAHA, INC.'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

Pursuant to Nevada Rule of Appellate Procedure 26.1, Real Party in Interest CRITERION CLAIM SOLUTIONS OF OMAHA, INC. ("Criterion")[1] submits this 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. CRITERION CLAIM SOLUTIONS OF OMAHA, INC. has no parent company, and no publicly held companies own ten (10) percent or more of its stock.

2. The law firm of Bailey❖Kennedy represents Criterion in the underlying action and continues to represent it for the purposes of this Petition.

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[1] Criterion was incorrectly identified as "Criterion Claims Solutions of Omaha, Inc." in the below proceedings.

3. Criterion is not using a pseudonym for the purposes of this Petition.

DATED this 25th day of August, 2021.

BAILEY❖KENNEDY

By: */s/ John R. Bailey*
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CRITERION CLAIM SOLUTION OF OMAHA, INC.

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Pursuant to the Court's Order, dated July 14, 2021, Real Party in Interest Criterion presents this Answer to the Petition for Writ of Mandamus (the "Petition") filed on April 1, 2021, by Petitioner Barbara D. Richardson, in her capacity as the statutory Receiver ("Receiver") for Spirit Commercial Auto Risk Retention Group, Inc. ("Spirit"). Criterion respectfully requests that this Court deny Receiver's Petition in its entirety because:

1) The District Court[2] acted well-within its discretion in enforcing an arbitration clause (the "Provision") freely entered into in an arms-length transaction and dismissing without prejudice the claims asserted by Receiver on behalf of Spirit against Criterion outside the Receivership Action[3] pending the outcome of the arbitration.

2) The District Court acted well within its discretion in concluding that the Provision – which provides that "Binding arbitration shall be the exclusive method for resolving disputes between the parties." – encompassed all claims asserted on behalf of Spirit against Criterion.

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[2] "District Court" refers to Department XIII of the Eighth Judicial District Court, which is presiding over the underlying action of *Richardson v. Mulligan, et al.*, Case No. A-20-809963-B (the "Underlying Action")

[3] "Receivership Action" or the "Receivership Proceedings" refers to Department XXVII of the Eighth Judicial District Court (the "Receivership Court"), which is presiding over *State of Nevada ex rel. Commissioner of Insurance v. Spirit Commercial Auto Risk Retention Group, Inc.*, Case No. A-19-787325-B.

3) Although the Receiver did not abuse its discretion in staying claims against other third parties, the issue concerning the stay is irrelevant to whether the Provision between Spirit and Criterion is enforceable.

I. INTRODUCTION

The District Court correctly granted Criterion's Motion to Compel Arbitration, and Receiver's Petition falls far short of establishing that the District Court abused its discretion. Receiver, on behalf of Spirit, brought claims against third parties arising from Spirit's pre-insolvency relationships with them in a civil action commenced outside of Spirit's Receivership Proceedings. Specifically, Receiver – who otherwise seeks to enforce the Agreement[4] – now seeks to escape a mandatory arbitration clause contained in an arms-length, pre-insolvency agreement between Spirit and Criterion, in contravention of not only the Federal Arbitration Act ("FAA") but clear guidance from this Court.

Receiver is not entitled to extraordinary relief, as her right to appeal a final judgment constitutes an adequate legal remedy, and the District Court did not abuse its discretion in compelling arbitration. Moreover, the Provision contained in the Agreement was not, as Receiver suggests, a tool deployed in

[4] The Claims Administration Agreement (the "Agreement").

furtherance of a conspiracy to commit fraud. Rather, it was the product of an arms-length transaction between two sophisticated commercial entities, who agreed that "[b]inding arbitration shall be the exclusive method for resolving disputes between [them]." Receiver's efforts to undermine long-standing and well entrenched policies honoring the freedom of contract and favoring arbitration, simply fail.

Receiver first argues that the District Court should have declined to enforce the Provision as an "instrument in a criminal enterprise." Receiver's (unfounded) theory is that Spirit and Criterion were jointly controlled, and, therefore, on both sides of the transaction when the Agreement was bargained for and executed. However, Receiver's theory lacks any basis, as Spirit and Criterion were owned and operated by separate individuals at the time the Agreement was entered into.

Further, Receiver's sole authority supporting this argument is a concurring opinion from the Fifth Circuit, which contradicts clear law from other jurisdictions specifying that a party seeking to avoid an arbitration must show that the *provision itself* was fraudulently induced. It is not enough to allege that an arbitration provision is an "instrument in a criminal enterprise.

Receiver then attempts to extricate herself from the terms of this binding Provision by making an argument she failed to make in the District Court; to

wit: that the *Receivership Order*[5] prevents her from participating in arbitration. However, this argument likewise fails.

The Receivership Order provides Receiver with broad power to pursue claims on behalf of Spirit, which power undeniably encompasses arbitration. Even if the Receivership Order could reasonably be read to prohibit the Receiver from arbitrating (it cannot), this is a problem of the Receiver's own making as the Receivership Order was drafted by her own counsel. Indeed, it appears counsel for the Receiver drafted the Receivership Order in this manner in an effort to contrive an argument around this Court's prior decision in *State ex rel. Comm'r of Ins. v. Eighth Judicial Dist. Court of Nev.*, No. 77682 (Dec. 19, 2019), which involved the same Receiver and nearly identical facts. However, this self-created "problem" – if one truly exists – can be easily resolved by seeking modification of the Receivership Order in the Receivership Court. This is particularly true given that the Nevada Liquidation Act provides no basis for prohibiting a Receiver from arbitrating claims against third parties. Consequently, the language of the Receivership Order simply cannot be a basis for extraordinary relief.

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[5] The Permanent Injunction and Order Appointing Commissioner as Permanent Receiver of Spirit Commercial Auto Risk Retention Group, Inc. (Feb. 27, 2019) in the Receivership Action (III.APP540–556.)

Receiver then argues that the Provision is "executory," and that she impliedly "disaffirmed" the same by filing the Underlying Action in the District Court. However, the arbitration clause is not "executory" and not subject to disaffirmance. In fact, this argument contravenes the language and purpose of the FAA, which was enacted to prohibit arbitration clauses from being deemed executory and unenforceable. Likewise, because the Nevada Liquidation Act provides that Spirit's rights were *fixed* as of the date of the Receivership Order, Spirit's obligation to arbitrate was also fixed on that date. Finally, as Receiver otherwise seeks to enforce the Agreement it is estopped from avoiding the Arbitration Provision contained therein.

Receiver then recycles an argument recently rejected by this Court in *State ex rel. Commissioner of Insurance v. Eighth Judicial District Court*:[6] that the McCarran Ferguson Act reverse preempts the FAA. This Court recently and correctly rejected this same argument, by this same Receiver, based upon essentially the same facts. In sum, Receiver's claims for torts and breach of contract against third parties in an action separate from the delinquency proceedings do not impair the Nevada Liquidation Act.

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[6] Ord. Den. Pet. for Writ of Mandamus, No. 77682, at *1 (Dec. 19, 2019).

Next, Receiver argues that even if the Provision is valid, binding, and applicable to her, certain of her claims are outside of the scope of the Provision. However, the Provision clearly provides that arbitration is the "exclusive method for resolving disputes between the parties." Such sweeping language encompasses each of Receiver's claims against Criterion.

Finally, Receiver argues that the District Court abused its discretion in staying her claims against the remaining parties while she arbitrates her claims against Criterion. This decision was not an abuse of discretion; but, regardless, the Court's decision to stay does not impact the validity of the Provision or its enforceability against Receiver.

Simply put, Receiver cannot show that she is entitled to extraordinary relief. The District Court applied the plain language of the Provision and relied on clear guidance from this Court and the weight of authority from other jurisdictions in compelling arbitration. As such, the decision of the District Court did not constitute a manifest abuse of discretion, and the Court should deny the Petition in its entirety.

II. STATEMENT OF THE FACTS

A. The Agreement

Spirit is an insurance company formed to transact commercial auto liability insurance and that specialized in insuring commercial truck owners.

(III.APP0455.) On February 24, 2012, Spirit received its Nevada Certificate of Authority and was permitted to commence operations under the authority of NRS 694C. (*Id.*) Spirit conducted business in Nevada until approximately January 2019. (*Id.*)

Spirit hired Criterion, a Nebraska entity, to act as third-party administrator. (III.APP0456.) On September 1, 2011, Spirit and Criterion entered into the Agreement for a three-year duration, with the option of renewal thereafter. (*Id.*) The Agreement provided that Criterion would provide claims management services to Spirit, and that Spirit would fund the payment of all claims and claim related expenses, as well as compensate Criterion for its fees and expenses. (III.APP0456.) The Agreement also contained a mandatory arbitration clause; which expressly states:

> 13. Binding arbitration shall be the exclusive method for resolving disputes between the parties. Any dispute concerning the terms of this agreement or performance by the parties under this agreement which cannot be resolved by agreement of the parties shall be submitted to binding arbitration before an arbitrator agreed upon by the parties. If the parties cannot agree, then each party shall select an arbitrator and these two arbitrators shall select a third arbitrator. The decision of the arbitrator or arbitrators shall be final. The arbitrator or arbitrators selected pursuant to this paragraph shall have significant property and casualty insurance company background and experience. Each party shall pay its own attorneys' fees and any other expenses in connection with the resolution of any dispute relating to this agreement. Notwithstanding the provisions of

> paragraph 21, "Choice of Law," this agreement to arbitrate is governed by the Federal Arbitration Act, 9 U.S.C. 1 through 15 (1988).[7]

At the time the Agreement was entered into, Spirit was owned and operated by Tom Mulligan ("Mr. Mulligan"). (IV.APP0675, V.APP0857.) Criterion was independently owned and operated by another individual. (*Id.*) In 2016—five years after the parties entered into the Agreement, and four years after Spirit was under the regulation of the Nevada Division of Insurance—Mr. Mulligan purchased Criterion.

B. The Receivership

On January 11, 2019, the Nevada Commissioner of Insurance filed a Petition for Appointment of Commissioner as Receiver of Spirit in the Eighth Judicial District Court. (III.APP0541.) Despite Spirit's holding over $40 million in cash assets, and having never failed to pay a valid claim on behalf of its policy holders, the lower court granted the Petition on February 27, 2019. (*Id.*)

C. The Litigation

On February 6, 2020, Spirit's Receiver filed a complaint in the District Court asserting various breach of contract and tort claims against Spirit's contractors, third-party administrators, and the individual directors and owners

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[7] III.APP0456, APP0468.

of those entities. (I.APP0001–79.) In total, Receiver sued 24 entities, including Criterion. (*Id.*) Despite filling 79 pages with spurious allegations against the parties, Receiver's accusations against Criterion boil down to an assertion that Criterion under-reserved certain claims.[8] However, Receiver also asserts that *Spirit* set claims reserves at artificially low amounts in order to misrepresent its financial condition to the Division. (*Id.* at ¶¶ 65, 67-69, 147, 154.)

Despite straightforward allegations against Criterion and conflicting representations regarding Spirit, Receiver asserts nine separate claims against Criterion ranging from breach of contract to civil RICO. (*Id.* at ¶¶ 274–79, 320–79, 385–96, 385–34.) However, *each* of Receiver's claims stems from the Agreement and Criterion's obligations to Spirit thereunder.[9] In fact, Receiver

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[8] Receiver also asserts that Criterion was obligated to perform coverage verification on Spirit claim files but failed to provide this service. However, Receiver cites no basis for this assertion, nor could she, as the Agreement does not obligate Criterion to provide coverage verification services. *See id.* at ¶¶ 157–58; III.APP0474.

[9] Receiver asserts the following claims against Criterion:

- Breach of Contract (alleging that the "Agreement was a valid and enforceable contract," and that "Criterion failed to perform under the Criterion Agreement.") *Id.* at ¶¶ 275, 277–78;
- Breach of the Implied Covenant of Good Faith and Fair Dealing arising out of the Agreement. *Id.* at ¶ 322;
- Nevada RICO (alleging that Criterion acted in contravention of the Agreement by "set[ting] claim reserves at artificially low amounts…with the intent of overstating Spirit's financial performance and the effect of exposing Spirit to claim excessive exposure for policy losses without reserving sufficient funds to pay the losses.") *Id.* at ¶ 335(f);

acknowledges that "[o]n or about September 1, 2011, Criterion entered into a Claims Administration Agreement with Spirit" which "was *a valid and enforceable contract*." (I.APP0025 at ¶ 141, I.APP0050 at ¶ 275) (emphasis added).

Despite admitting that the Agreement is "valid and enforceable," and despite basing her claims against Criterion upon the Agreement, Receiver asks this Court to overrule the District Court's order compelling arbitration. In doing so, Receiver invites this Court to contravene the fundamental bedrock of

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- Unjust Enrichment (alleging that Criterion wrongfully retained "funds and/or other property rightfully belonging to Spirit" which it received in connection with the Agreement.) *Id.* at ¶ 346;
- Fraud (alleging that Criterion, who set claims reserves for Spirit pursuant to the Agreement, did so "at artificially low amounts… with the intent of overstating Spirit's financial performance.") *Id.* at ¶ 354, 363;
- Civil Conspiracy (alleging that Criterion "set claim reserves at artificially low amounts… with the intent of overstating Spirit's financial performance.") *Id.* at ¶ 374(g);
- Avoidance of Transfers (alleging that Criterion, through its performance under the Agreement, received from CTC "funds and/or other property rightfully belonging to Spirit.") *Id.* at ¶ 388;
- NRS 696B Voidable Transfers (alleging that Criterion, through its performance under the Agreement, "transferred funds and/or other property rightfully belonging to Spirit.") *Id.* at ¶ 401;
- NRS 696B Recovery of Distributions and Payments (alleging that Criterion, through its performance under the Agreement, "transferred funds and/or other property rightfully belonging to Spirit.") *Id.* at ¶ 412; and
- NRS 692C.402 Recovery of Distributions and Payments (alleging that Criterion, through its performance under the Agreement, "transferred funds and/or other property rightfully belonging to Spirit.") *Id.* at ¶ 424.

law honoring the freedom of contract and enforcing arbitration provisions. *See Phillips v. Parker*, 106 Nev. 415, 417, 794 P.d 716, 718 (1990) ("There is a strong public policy favoring contractual provisions requiring arbitration as a dispute resolution mechanism."). The Court should adhere to its prior decisions reinforcing the presumption in favor of arbitration and deny the Petition in its entirety.

III. ARGUMENT

A. Receiver Failed to Demonstrate an Entitlement to Extraordinary Relief through the Issuance of a Writ of Mandamus.

A party seeking extraordinary writ relief from an order compelling arbitration must show: (1) "why an eventual appeal does not afford 'a plain, speedy and adequate remedy in the ordinary course of law,'" and (2) "that mandamus is needed 'to compel the performance of an act that the law requires or to control a manifest abuse of discretion' by the district court." *Tallman v. Eighth Judicial Dist. Ct.*, 131 Nev. 713, 719, 359 P.3d 113, 117–18 (2015) (citations omitted). *See also State ex rel. Comm'r of Insurance*, Ord. Den. Pet. for Writ of Mandamus, No. 77682, at *1 (Dec. 19, 2019); *Walker v. Second Judicial Dist. Ct.*, 136 Nev. Adv. Rep. 80, 476 P.3d 1194, 1197–98 (2020); *State ex rel. Masto v. Second Judicial Dist. Ct.*, 125 Nev. 37, 43–44, 199 P.3d 828, 832 (2009). An abuse of discretion is "[a] decision that lacks support in the form of substantial evidence [and] is arbitrary or capricious[.]" *Stratosphere*

Gaming Corp. v. Las Vegas, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004) (quotation omitted).

Here, Receiver fails both prongs of the *Tallman* test. First, as explained *infra*, Receiver has a plain, speedy, and adequate remedy in the ordinary course of law—the right to appeal a final judgment—and the right to seek immediate relief from the Receivership Court. *State ex rel. Comm'r*, No. 77682, at *1; *see Walker v. Second Judicial Dist. Ct.*, 136 Nev. Adv. Rep. 80, 476 P.3d 1194, 1197 (2020); *Pan v. Eighth Judicial Dist. Ct*, 120 Nev. 222, 223, 88 P.3d 840, 840 (2004).

Second, Receiver cannot show that a writ of mandamus is necessary to control a manifest abuse of discretion by the District Court. Indeed, *this Court* has already rejected the same arguments raised here, determining that Receiver had not carried her "'burden of demonstrating that extraordinary relief is warranted,'" as 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*, No. 77682, at *2.

The District Court followed the guidance of this Court and other jurisdictions in determining that Receiver was bound to the terms of the pre-insolvency Agreement to arbitrate. That decision was based on substantial evidence and was not an abuse of discretion.

Receiver's final argument, that mandamus relief is warranted because this Petition concerns *an important legal issue requiring clarification*, is stunning coming from Receiver, because this Court has already considered an identical set of issues in a Petition for Writ of Mandamus brought by the *same Receiver* less than two years ago. *Id.* Moreover, Receiver has failed to sufficiently explain why this Court should issue "advisory" mandamus where clear guidance, under *State ex rel. Comm'r* already exists. *See Walker v. Second Judicial Dist. Ct.*, 136 Nev. Adv. Rep. 80, 476 P.3d 1194, 1199 (2020).

For these reasons, and those set forth below, the Court should deny the Petition in its entirety, concluding once again that Receiver lacks any basis for mandamus relief.

B. The District Court Did Not Abuse Its Discretion as the Provision Is Not the Product of Fraud.

Receiver's argument that the District Court abused its discretion by failing to reject the Provision as an "instrument in a criminal enterprise" is baseless and her reliance on a *concurring opinion* from the 5th Circuit *Janvey* case,[10] is misplaced. (Pet. at 18.) To begin, the majority in *Janvey* refused to find what Receiver urges here: that the arbitration agreement was unenforceable as the "instrument of a criminal enterprise." In doing so, it expressly rejected

[10] *Janvey v. Alguire*, 847 F.3d 231 (5th Cir. 2017).

the receiver's argument "that the underlying purpose of the federal equity receivership statutes is at odds with the FAA's mandate in favor of arbitration," and noted it was "wary of endorsing these broad policy arguments in the absence of specific direction from the Supreme Court" and the "federal policy favoring arbitration."[11] *Id.* at 245 (citations omitted).

Moreover, the facts of *Janvey* are completely inapposite. *Janvey* involved an actual "criminal enterprise," whereby the Stanford enterprises perpetuated a $7 billion Ponzi scheme over the course of a decade, resulting in the incarceration of both Stanford and his CFO after they pled guilty to a series of federal offenses. Here, an insurance company was placed into receivership after paying every claim over approximately seven years of operation, while having over $40 million in cash assets at the time the receivership was put in place. Unlike *Janvey*, there have been no criminal charges (let alone convictions), and no findings of liability. Rather, Receiver has taken a dispute over business operations and labeled it as a "criminal enterprise" in an effort to avoid a valid arbitration clause. These machinations fail to overcome the FAA's mandate of arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*,

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[11] The *Janvey* court declined to enforce the arbitration provision because the employee who sought to compel arbitration actively participated in the civil case brought against him, and waited three years into the litigation before invoking his right to arbitration. *Id.* at 243–44.

500 U.S. 20, 26 (1991) ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we have held enforceable arbitration agreements relating to claims arising under…the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO)").

Further, the underlying premise of Receiver's argument is demonstrably false. Receiver's argument is based on the premise that "Defendants…were on both sides of the transactions," and accordingly, "the arbitration agreements were not products of bargaining between independent entities, but were "tools of fraud, made amongst companies with joint control and ownership." (Pet. at 18–19.) The basis for this argument is that Mr. Mulligan controlled both Spirit and Criterion, at the time the Agreement was bargained for and entered into. (Pet. at 18.) Untrue.

The Agreement – which includes the Provision – was entered into in 2011—***five years*** before Mr. Mulligan purchased Criterion. (IV.APP0675, V.APP0857.) Criterion and Spirit were not under shared ownership when the Agreement was entered into. Rather, the Agreement, including the Provision, was the product of an arms-length transaction between two sophisticated commercial entities. (V.APP0857.)[12] Where, as here, parties "have freely,

[12] Moreover, Receiver's argument that the Provision "perpetuates fraud" is

fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability and to withdraw from one party benefits for which he has bargained and to which he is entitled." *Wal-Noon Corp. v. Hill*, 119 Cal. Rptr. 646, 651 (Cal. Ct. App. 1975).

Therefore, the District Court did not abuse its discretion in determining that the Provision is valid and enforceable.

C. The Receivership Order Did Not Preclude Receiver from Instituting Arbitration Proceedings Against Criterion.

Receiver's argument that the Order appointing her as Receiver in the Receivership Action does not permit her to pursue claims against third parties through arbitration fails for several reasons. (Pet. at 20.) But first, this Court should decline to entertain this argument which Receiver raises *for the first time* on appeal. *See Emerson v. Eighth Judicial Dist. Ct. ex rel. Cnty. of Clark*, 127 Nev. 672, 680, 263 P.3d 224, 229 (2011) (finding, in the context of a writ

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insufficient to overcome the presumption in favor of arbitration. Instead, Receiver must show that the Provision itself was a *product of fraud*, which she fails to do here. *See Graber v. Comstock Bank*, 111 Nev. 1421, 1430, 905 P.2d 1112, 1117 (1995); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967).

petition, an argument to be without merit "because neither party raised this issue…in the district court.")

Second, Receiver has failed to demonstrate that she has no adequate remedy at law. Assuming the Receivership Order somehow prevents Receiver from arbitrating as she now asserts, Receiver has a readily available legal remedy: seek modification of the Receivership Order in the Receivership Court to permit participation in arbitration. *See* NRS 696B.190(1) ("The district court has original jurisdiction of delinquency proceedings … and … may make ***all necessary or proper orders to carry out the purposes of those sections***.") (emphasis added). However, the Receiver has failed to raise (or mention) this issue in the Receivership Court. Despite assertions that the Receivership Order handicaps her from arbitrating against Criterion, Receiver has filed *four* status reports in the Receivership Action since the motion to compel arbitration was granted in the Underlying Action—yet failed to mention that she has not initiated arbitration because the ***Receivership Order prevents her from doing so***. (*See* IIR.A.10–13 at RA000224–RA000473.)

Indeed, Receiver appears to have purposefully created the "problem" about which she now complains in an apparent effort to contrive this very argument. The Receivership Order *was drafted by the Receiver's own counsel*. (I.APP055.) In fact, in 2017, Receiver (represented by the same counsel)

opposed a Motion to Compel Arbitration in *State ex rel. Commissioner of Insurance v. Milliman*,[13] another case where Receiver, on behalf of an insurer, brought claims for torts and breach of contract against third parties. (IR.A.2–4 at RA000014–RA000126.) On March 12, 2018, the district court granted the motion to compel arbitration, and on December 27, 2018, Receiver filed a petition for a writ of mandamus with this Court. (IR.A.5 at RA000127–RA000140; IR.A.6 at RA000141–RA000205.) On February 27, 2019—two months later—the Commissioner of Insurance was appointed Receiver of Spirit. (III.APP0541–556.) Her counsel, in drafting the Receivership Order, *changed* the language pertaining to arbitration as set forth in the *Milliman* Order—and now asserts this purposeful choice deprives Receiver of authority to arbitrate against Criterion.[14] Nonsense! Receiver's argument is nothing more than "a variation of the old shibboleth of the individual who murders both his parents and then throws himself on the mercy of the court as an orphan." *Sutton v. State*, 776 A.2d 47, 71 (Md. Ct. Spec. App. 2001). The Court should reject this argument by the "orphan."

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[13] Case No. A-17-760558-B, Eighth Jud. Dist. Ct., Clark Cnty., Nev.

[14] *Compare* I.R.A.1 at RA000002 at §2 (b), *with* III.APP0545 at § 6(c); *see also* III.APP0541–556 (showing that the Order was submitted by Greenberg Traurig, LLP); *see also* IR.A.7 at 7:6–9 ("And so I would request that the Court grant our petition to appoint a Receiver and sign the order we've agreed to. And I have a copy for Your Honor I can present.").

Third, Receiver's argument is devoid of any factual or legal support. NRS 696B provides that "the Commissioner shall be vested by operation of law with the title to all of the property, contracts and *rights of action*… of the insurer, wherever located, … and the Commissioner shall have the right to recover the same and reduce the same to possession[.]" NRS 696B.290(2) (emphasis added). Notably, NRS 696B contains no restrictions on arbitration (or any mention of arbitration whatsoever). To interpret NRS 696B in a way that *precludes* Receiver from participating in arbitration on behalf of Spirit would produce an absurd result. *Int'l Game Tech., Inc. v. Second Judicial Dist. Ct.*, 124 Nev. 193, 202, 179 P.3d 556, 561 (2008) ("'[a] fundamental rule of statutory interpretation is that the unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another that would produce a reasonable result.'") (citation omitted).

Moreover, the Receivership Order does not, in fact, do so. The Receivership Order grants Receiver "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… to pursue further and to compromise ***suits, legal proceedings or claims*** on such terms and conditions

as she deems appropriate." (III.APP0550–0551 at §§ 15(a), (h)) (emphasis added); (emphasis added). Such broad language plainly encompasses arbitration. *See Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 161 (3d Cir. 2000) (finding receiver empowered to arbitrate and noting, "What this proceeding is is a suit instituted by the Liquidator against a reinsurer to enforce contract rights for an insolvent insurer...) (emphasis added).

The power to initiate arbitration is unequivocally included in Receiver's enumerated powers, and the District Court did not abuse its discretion in compelling Receiver to arbitrate Spirit's claims against Criterion.

D. Because Receiver Cannot "Disaffirm" a Binding Arbitration Clause, the District Court Did Not Abuse Its Discretion in Finding that Receiver is Bound to the Provision.

No basis exists for Receiver to "disaffirm" the Provision. To begin, the Receiver did not properly preserve this issue for appeal. The Receiver's only "argument" that she was disaffirming the Provision in the lower court, was her passing comment in the Introduction to her Opposition that "[c]ourts have long held that trustees for bankruptcy debtors may reject executory contracts like arbitration provisions." (IV.APP0673, at 7–8.) This comment was unsupported by law and contained no citation to the Receivership Order. Criterion accordingly "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). *See Old Aztec Mine v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010); *see also Ford v. Warden*, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995).

Even if Receiver had preserved the issue, her argument fails. While the Receivership Order bestowed upon Receiver the authority to "affirm, reject, or disavow part or all of any leases or executory contracts to which [Spirit] is a party," the Agreement simply does not qualify.

1. The Provision Is Not Executory and Not Subject to Disaffirmance.

"[E]xecutory 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 Vern 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)).; *see Executory Contract*, BLACK'S LAW DICTIONARY (2d ed.) (defining 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.").

Here, Receiver argues that "the arbitration clause[], which placed *future* obligations on both parties to [the] agreement, remained executory as of that date [of the Receivership Order]," and that she accordingly had the authority to reject this isolated provision while seeking to enforce the remainder of the Agreement. (Pet. at 23.) However, an arbitration provision does not contain future obligations, but "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.").

Indeed, the FAA was enacted so that arbitration clauses are not viewed as executory. At early common law, arbitration agreements ***were*** viewed as executory. Prior to the rendering of an arbitration award, either party could freely revoke the agreement to arbitrate, rendering arbitration agreements 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).

Accordingly, the FAA was enacted "to alter the judicial atmosphere previously existing." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 288–89 (2002). The FAA terminated the common law treatment of arbitration clauses as executory and unenforceable. *See, e.g., 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) ("Section 2 of the FAA [directly] responded to this hostility by making written arbitration agreements 'valid, irrevocable, and enforceable.'")

Receiver's arguments, if accepted, would turn the FAA on its head and set the clock back nearly one hundred years, creating an outcome that is neither contemplated under federal law nor in NRS 696B.[15] Therefore, the Court should reject Receiver's argument that the Provision is executory, and thus subject to disaffirmance.

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[15] As discussed in Section II.C, the Nevada Liquidation Act does not grant Receiver express power to disaffirm *any* contractual provisions, rather, it simply provides 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. Nor does NRS 696B forbid a Receiver to participating in arbitration proceedings.

2. The Plain Language of NRCS 696B Exposes the Fallacy of Receiver's Assertion that the Provision Was Executory.

Further belying Receiver's assertion that the Provision is executory is the express language of NRS 696B. Receiver argues that because the obligation to arbitrate was a *future* obligation of Spirit and Criterion, and neither party had acted on this obligation by the date that the Receivership was instituted, the Provision was executory and subject to disaffirmation.

Chapter 696B provides that "The 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). In order "for a court to have jurisdiction over a petition to compel arbitration under the FAA there must be 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).

Assuming, *arguendo*, that Criterion breached its Agreement with Spirit (it did not), the duty to arbitrate would arise at the time of the breach, or the

"dispute" between the parties. *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***, its disputes (if not already ripe)[16] would be appropriate for judicial determination (or arbitration) on that date. *See Lower Colo. River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 923 (5th Cir. 2017) (finding that a court's ability to compel arbitration arises when a dispute is ripe). Therefore, Spirit's obligation to arbitrate was **fixed** as of the date of the Receivership Order and could therefore no longer be considered executory. *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

[16] Moreover, each of the Receiver's claims against Criterion stem from events transpiring *prior to* the Receivership Order, therefore Spirit's purported claims against Criterion were ripe before the Receivership Action commenced. *See e.g.*, I.APP0005 ¶¶ 14, 57, 64, 141–59, 195, 210–13, 256(t).

of the corporation, and to the same extent.…") (quoting *In re Bryce Cash Store,* 124 So. 544 (La. Ct. App. 1929)).

3. Even if the Arbitration Clause Were Somehow Executory (It Is Not), the Receiver Failed to Timely Disaffirm It.

Even assuming *arguendo,* the Arbitration Clause was executory, Receiver failed to disaffirm it. To begin, Receiver's assertion that she can *impliedly* disaffirm a contract is contrary to the weight of authority from other jurisdictions holding that a receiver disavowing a contract should provide 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 (7th Cir. 2018) (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).

Moreover, while the Receivership Order gives Receiver authority to disavow any leases or executory contracts "at such times as she deems appropriate under the circumstances," Receiver's decision to wait a year to

attempt to "disavow" the Provision is wholly unreasonable.[17] *See Anes v. Crown P'ship, Inc.*, 113 Nev. 195, 199, 932 P.2d 1067, 1069 (1997) ("As a general rule, state law allows receivers to reject, within a reasonable time, outstanding executory contracts of the owner of the estate which is being administered. However, adoption of existing executory contracts may be inferred by the actions of the receiver or acceptance of the benefits of the contract. We find this line of law equitable and now hold 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.").

Receiver's argument that she may wait a year and then file an action in which she attests to the validity of the Agreement, yet simultaneously disaffirms the Provision contained in that very Agreement is absurd.

4. Receiver is Estopped from Disaffirming the Provision Because She is Seeking to Enforce the Remainder of the Agreement.

Moreover, even if Receiver (erroneously) believed the Provision to be executory, she has waived the right to disaffirm it by seeking to benefit from the remaining terms and conditions in the Agreement.

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[17] Moreover, Receiver failed to tell Criterion that she had disaffirmed the Provision when Criterion tendered its demand for arbitration. IR.A.8-9 at RA000220–223.

The doctrine of estoppel prevents parties, such as Receiver, from—on the one hand—maintaining the validity of and bringing claims based upon the Agreement—while on the other hand—*contending that they are exempt from the contract's terms*. *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 the District Court correctly determined that Receiver was estopped from suing for breach of the Agreement while rejecting the Provision therein, Receiver argues, *for the first time on appeal*,[18] that the existence of a statutory scheme governing the Receivership Action precludes the court in the

[18] *See Emerson v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark,* 127 Nev. 672, 680, 263 P.3d 224, 229 (2011) (finding, in the context of a writ petition, an argument to be without merit "because neither party raised this issue . . . in the district court.").

Underlying Action from relying upon equitable principles in granting the Motion.[19] (Pet. at 25–26.) Wrong.

Although Receiver's role is governed by statute, her claims and defenses in the Underlying Action are solely derivative of Spirit's. As such, Receiver 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. Therefore, the liquidator's claims cannot be detached from the contractual relationship between the health-insurance provider and the third-party contractor, pursuant to which all of the preinsolvency work was performed."); *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

[19] Moreover, Receiver's assertion that equity cannot apply is contradicted by her statements elsewhere that this Court should disregard the statutory scheme set forth in the FAA, because "[t]he arbitration provisions, as applied support an illegal enterprise, and therefore *equity demands they be voided*." Pet. at 14 (emphasis added).

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.").

Accordingly, the District Court did not abuse its discretion in finding that Receiver was bound to the Provision.

E. The District Court Correctly Determined that the McCarran-Ferguson Act Does Not Reverse Preempt the FAA.

Receiver's argument that the FAA is reverse preempted by the McCarran-Ferguson Act and the Nevada Insurance Code ("NIC") has been soundly rejected, both in Nevada and in other jurisdictions. (Pet. at 27–31.)

1. The Underlying Action Does Not Implicate the Regulation of Insurance.

In order for reverse-preemption under the McCarran-Ferguson Act to occur, the 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) (commonly known as the *Humana* test). Here, Receiver's argument fails the third prong of the *Humana* test, because the application of the FAA here will not "invalidate, impair or supersede" the Nevada Liquidation Act.

First, the Agreement falls squarely within the purview of the FAA. The Agreement expressly provides that the "agreement to arbitrate is governed by the Federal Arbitration Act."[20] Under the FAA, a written provision in a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision reflects "both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract[.]" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quotation marks omitted) (citations omitted). The only exceptions that the FAA provides are "[g]enerally applicable contract defenses, such as fraud, duress, or unconscionability," none of which are at issue here. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996).

Second, the existence of a statutory scheme governing the Receivership Action does not invalidate an arbitration clause's applicability in a *separate action* involving Receiver's assertion of torts and breach of contract claims against third parties. The thrust of Receiver's argument is that because the Nevada Liquidation Act governs the Receivership Action, it somehow precludes the possibility of arbitration in a separate action against third parties.

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However, Receiver's arbitration of claims against Criterion neither impacts, invalidates, nor supersedes Nevada's regulation of insurance, nor does it have any effect on the Receivership Action; hence, the *Humana* test is not met.

The McCarran-Ferguson Act was passed "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *S.E.C. v. Nat'l Secs., Inc.*, 393 U.S. 453, 459-60 (1969) (emphasis added). The focus of the Act is "the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship... are laws regulating the 'business of insurance.'" *Id.* at 460. Accordingly, the "proper inquiry is whether the particular suit being brought would impair state law." *AmSouth Bank v. Dale*, 386 F.3d 763, 781 (6th Cir. 2004).

The statute relevant for this inquiry is NRS 696B, which 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. The delinquency proceedings involving Spirit are being conducted in a separate action in the district court.[21]

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[21] *State of Nevada ex rel. Commissioner of Insurance v. Spirit Commercial*

This case is not a delinquency proceeding. It involves claims brought, not against the insurer, but by an insurer (through Receiver) against third parties, based upon purported breaches of contract and various alleged torts arising from contractual relationships. Were Spirit acting on its own behalf in the same action, the NIC would not come into play merely because Spirit happens to be an insurer. The fact that Receiver is standing in Spirit's shoes does not transform the nature of the 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."). Simply put, the Nevada Liquidation Act is not implicated by Receiver's claims against Criterion. *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").

2. Courts, Including This One, Have Rejected Receiver's Argument.

Courts considering the same facts at issue here have held that the FAA is not preempted merely because a receiver brings claims against third parties in

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Auto Risk Retention Grp., No. A-19-787325-C (Nev. Dist. Ct. Jan. 11, 2019)

the stead of an insolvent insurer. For instance, in *Ommen v. Ringlee*, the Iowa Supreme Court analyzed the same question, and unequivocally found that reverse preemption did not occur. The Court stated:

> We disagree with the liquidator that requiring arbitration under the FAA would invalidate, impair, or supersede operation of the Iowa Liquidation Act…. The arbitration forum does not impede the liquidator's ability to conduct an orderly dissolution….
>
> [T]he McCarran-Ferguson Act does not permit reverse preemption of the FAA when the liquidator asserts common law tort claims against a third-party contractor. Courts in other states have unanimously required liquidators to arbitrate their claims against the same third-party contractor under the same arbitration provision.

941 N.W. 2d 310, 312, 320 (Iowa 2020). Likewise, in Kentucky, the Court rejected the idea that reverse preemption precluded the receiver from arbitrating claims against third parties, finding that "[m]andating arbitration in this case does not alter the disposition of claims of the policy holders and does not 'invalidate, impair, or supersede' the [Kentucky Liquidation Act] as a whole." *Milliman v. Roof*, 353 F. Supp. 3d 588, 603 (E.D. Ky. 2018).

Indeed, this Court has already rejected the very same argument made by the very same Receiver in a factually indistinguishable case. Recently, in *State ex rel. Commissioner of Insurance v. Eighth Judicial District Court ex rel. County of Clark*, Receiver argued that the McCarran-Ferguson Act reverse

preempted the FAA because arbitration would "thwart the insurance liquidator's broad statutory powers and the general policy under Nevada's Uniform Insurance Liquidation Act ([U]ILA)… to concentrate creditor claims in a single, exclusive forum." Ord. Den. Pet. for Writ of Mandamus, No. 77682, at *2–*3 (Dec. 19, 2019). Consistent with the weight of authority that has addressed this issue, this Court correctly concluded that the FAA was not reverse preempted, reasoning that "at issue here is not a creditor's claim against the Co-Op; at issue is [Receiver's] breach-of-contract and tort claims against several third parties on behalf of the Co-Op, which happens to be in receivership." *Id.* at *3–*4.

Here, the same Receiver is making the same arguments, based on the same facts, regarding the same types of claims, in front of the same Court. The Underlying Action does not involve a *creditor or policyholder's* claims against Spirit. Rather, it involves contract and tort claims brought by Receiver—standing in the shoes of Spirit—against third parties, including Criterion, in a separate action. *See Milliman, Inc. v. Roof*, 353 F. Supp. 3d 588, 596 (E.D. Ky. 2018) ("If the Liquidator is successful in its tort claims against Milliman, the Liquidator will likely be able to collect monetary damages from Milliman, thus increasing the amount of assets that can be distributed among its creditors. However, …. [t]he cases cited by the Liquidator involve creditors suing the

insolvent company, whereas in the tort action here, the insolvent company is the plaintiff. By the Liquidator's logic, all suits brought by an insolvent company would need to be heard by the court of liquidation simply because those suits could increase assets available for distribution during liquidation. The Court is not convinced."). The District Court correctly found that the Nevada Liquidation Act does not control the Underlying Action and does not reverse preempt the FAA.[22]

F. The District Court Acted Well Within Its Discretion In Finding that The Provision Applies to All Disputes Between the Parties.

The Provision specifically provides that the "agreement to arbitrate is governed by the [FAA]." Under the FAA, a written provision in a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "The

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[22] Additionally, Receiver argues that as a "specific statute, the NIC takes precedence over the more "general" Nevada Arbitration Act ("NAA"). (Pet. at 32.) This argument fails at the outset as the FAA, not the NAA, governs the Provision. Even so, no conflict exists between the NIC and NAA. As discussed *supra*, NRS 696B.190 concerns "delinquency proceedings," which are being conducted in the Receivership Action—not the Underlying Action. Further, NRS 696B contains no language preventing Receiver from participating in arbitration. *See generally* NRS 696B.010 et seq. In fact, were there a conflict, the NAA—as the statute specifically governing arbitration, should take precedence over the NIC—which is silent as to arbitration.

standard for demonstrating arbitrability is not high[]"[23] and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. at 24–25.[24]

Receiver's attempt to exclude certain claims from arbitration fails. "Courts have found that language calling for 'binding' 'final' and/or 'exclusive' arbitration" sufficiently informs a party that it is waiving its right to pursue a claim in court." *Brody v. Culturesource, Costaff, H.R. Servs.*, No. 20-11663, 2020 U.S. Dist. LEXIS 209067, at *11 (E.D. Mich. Nov. 9, 2020); *see also Dist. No. 1, Pac. Coast Dist. v. Am. Mar. Officers*, 75 F. Supp. 3d 294, 303, 310 (D.D.C. 2014) (finding "no genuine dispute regarding whether [the plaintiff] was bound to arbitrate" where agreement provided that arbitration be "'the sole and exclusive method for settlement and determination' of disputes[.]"); *Garnick v. Interstate Batteries, Inc.*, No. 17-12026, 2018 U.S. Dist. LEXIS 41432, at *20–*21 (E.D. Mich. Mar. 14, 2018) (granting motion to compel

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23 *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999).

24 *Accord Exber, Inc. v. Sletten Constr. Co.*, 92 Nev. 721, 729, 558 P.2d 517, 522 (1976).

arbitration where agreement stated that arbitration was the "sole and exclusive means" of resolving disputes and was "final and binding.")

"[T]he FAA creates a presumption in favor of arbitrability; … parties must clearly express their intent to *exclude* categories of claims from their arbitration agreement." *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1220, 1222 (11th Cir. 2000) (emphasis added) (citation omitted); *see also First Options of Chicago, Inc. v. Kent*, 514 U.S. 938, 945 (1945) ("[I]ssues will be deemed arbitrable unless 'it is clear that the arbitration clause has not included' them.") (citation omitted). Where parties agree to submit "disputes" to arbitration, and do not utilize limiting language, "[i]t expresses that any dispute whatsoever between the parties be arbitrated." *CaringOnDemand, LLC v. Ventive LLC*, No. 18-cv-80211-BLOOM/Reinhart, 2018 U.S. Dist. LEXIS 104434, at *11 (S.D. Fla. June 22, 2018). "Such sweeping arbitration language means that all disputed issues, … are all arbitrable issues." *Id.* at *11–*12. This includes tort and statutory claims. *See Shearson/American Express v. McMahon*, 482 U.S. 220, 242 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 624 n.13, 105 S. Ct. 3346, 3352 (1985); *Lozano v. AT&T Wireless Servs.*, 504 F.3d 718, 725 (9th Cir. 2007).

Here, the Provision is unequivocal and all-encompassing: "**Binding arbitration shall be the exclusive method for resolving disputes between the**

parties."[25] It does not qualify which disputes are subject to arbitration, nor does it exempt certain disputes from arbitration. Thus, the District Court did not err in compelling Receiver to arbitrate the claims she asserted against Criterion.

While this Court's analysis can (and should) end with this "brief, unequivocal, and all-encompassing" language, Receiver tries (but fails) to divorce several of her claims against Criterion from the express language of the Provision. (Pet. at 36–37.) In doing so, she points to the second sentence of the Provision which provides that "Any dispute concerning the terms of this agreement or performance by the parties under this agreement which cannot be resolved by agreement of the parties shall be submitted to binding arbitration." Receiver's argument that this sentence somehow narrows the scope of arbitrable issues completely misses the mark.

"A court should not interpret a contract so as to make meaningless its provisions." *Phillips v. Mercer*, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978). The second sentence of the Provision must, therefore, be read in a way that harmonizes with the unequivocal mandate of the first sentence.

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Contrary to Receiver's assertions, the second sentence does not provide a loophole permitting the parties to arbitrate *some* claims, yet file suit over others. *See Ocwen Fin. Corp. v. Holman*, 769 So. 2d 481, 483 (Fla. Dist. Ct. App. 2000) ("The clause does not say that only those claims are subject to arbitration; it does not say that other claims are not."). Instead, it permits the parties to utilize other alternative dispute resolution mechanisms (including informal discussions) *prior* to submitting claims concerning the Agreement to arbitration. *See id.* at 482 (finding that arbitration provision stating "[i]t is the intention of the parties that disputes arising under this agreement, if not resolved by discussion among the parties, shall be resolved through arbitration" required arbitration of *all* claims); *see also Segal v. Silberstein*, 67 Cal. Rptr. 3d 426, 429, 432 (Cal. Ct. App. 2007) (finding that provision stating that "Arbitration shall be the exclusive dispute resolution process in the State of California, but [] shall be a nonexclusive process elsewhere" required that arbitration be the sole means of dispute resolution in California, and in other jurisdictions, permitted only "less costly and time-consuming alternative dispute resolution processes such as mediation and conciliation" as an alternate to arbitration).

Even assuming, *arguendo*, that the parties had expressly agreed to arbitrate only disputes concerning the Agreement, Receiver would *still* be

required to arbitrate her claims against Criterion. "Arbitrability depends on the relationship between the claim and the agreement, not the legal label attached to the dispute." *Id.* at 266. Even "tort claims based on duties created by a contractual relationship between the parties are normally arbitrable under broad arbitration provisions." *Id.*

Here, each of Receiver's claims against Criterion stem from the parties' contractual relationship. *See Phillips v. Parker*, 106 Nev. 415, 418, 794 P.2d 716, 718 (1990) ("However, despite this clear effort to avoid the agreement, [appellant's] basis for claiming injury and grounds for redress stem from rights he allegedly received pursuant to the agreement. His alleged rights therefore 'relate to' the agreement as provided in the arbitration clause."). Without the existence of the Agreement, there would be no relationship between Criterion and Spirit. Spirit—and thus its Receiver—would have no standard against which to measure Criterion's performance as Third-Party Administrator to Spirit. *See Simula, Inc. v. Autoliv, Inc.* 175 F.3d 716, 720–21 (9th Cir. 1999) (finding that arbitration provision covering "[a]ll disputes arising in connection with [an] [a]greement" between an investor of air bag systems and a supplier of components "reache[d] every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract."). This is not a case in which it is a "'mere coincidence that the

parties in dispute have a contractual relationship.'" *Maguire v. King*, 917 So. 2d 263, 266 (Fla. Dist. Ct. App. 2005) (quoting *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 638 (Fla. 1999). The Agreement is the touchstone of the Spirit/Criterion relationship, without which ***Receiver would lack any basis for her claims***. *See Simula, Inc.*, 175 F.3d at 721 (stating that factual allegations need only "touch matters" covered by the contract containing the arbitration clause to mandate arbitration).[26]

The District Court did not abuse its discretion in finding that the scope of the Agreement encompassed each of Receiver's claims against Criterion.

G. The District Court's Decision to Stay Claims Against Other Third Parties Was Not an Abuse of Discretion and Does Not Impact the Validity of the Provision.

The District Court's decision to stay claims against other third parties was made after the District Court compelled Receiver to litigate her claims against Criterion. While Criterion believes the District Court did not abuse its discretion in issuing this stay, it will leave this argument to the Third Parties who pursued this stay. However, whether the stay of claims against the other third parties was within the District Court's discretion is a separate and distinct

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[26] Each of Receiver's claims, including her tenth through thirteenth, and fifteenth through eighteenth, depend on the contractual relationship created by the Agreement. *See supra* note 3.

issue from whether the District Court acted within its discretion in compelling Receiver to arbitrate her claims against Criterion. As demonstrated above, the District Court did not abuse its discretion in compelling arbitration of Receiver's claims against Criterion.

IV. CONCLUSION

Receiver failed to demonstrate that she meets the standard for extraordinary relief that is a writ of mandamus. Receiver has an adequate remedy at law, and the District Court did not abuse its discretion in granting the Motion. Substantial evidence demonstrates that the Spirit/Criterion Agreement was valid, binding, and encompasses each of Receiver's claims against Criterion. Therefore, the Court should deny this Petition in its entirety.

DATED this 25th day of August, 2021.

BAILEY❖KENNEDY

By: */s/ John R. Bailey*
JOHN R. BAILEY
JOSHUA M. DICKEY
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Attorneys for Real Party In Interest Criterion Claim Solutions of Omaha, Inc.

NRAP 21(E) CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answer to Petition for Writ of Mandamus complies with the formatting requirements of NRAP 21(d), NRAP 32(a)(4) and NRAP 32(c)(2), as well as the reproduction requirements of NRAP 32(a)(1), the binding requirements of NRAP 32(a)(3), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because: [X] This Answer to Petition for Writ of Mandamus has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman font 14.

2. This Answer to Petition for Writ of Mandamus contains 9645 words, and has been filed concurrently with a Motion for Permission to File Answer in Excess of 7000 Words.

3. I further 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 to Petition for Writ of Mandamus complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Answer regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or 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 Answer to Petition for Writ of Mandamus is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 25th day of August, 2021.

BAILEY❖KENNEDY

By: */s/ John R. Bailey*
JOHN R. BAILEY
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REBECCA L. CROOKER

Attorneys for Real Party In Interest Criterion Claim Solutions of Omaha, Inc.

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 25th day of August, 2021, service of the foregoing **REAL PARTY IN INTEREST CRITERION CLAIM SOLUTIONS OF OMAHA, INC.'S ANSWER TO PETITION FOR WRIT OF MANDAMUS** was made by electronic service through the Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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With a courtesy copy via email (pursuant to March 20, 2020 Order of the Chief Judge of the Eighth Judicial District Court that courtesy copies be submitted via email):

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

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

/s/ Karen Rodman
An Employee of BAILEY❖KENNEDY