No. 82701

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioner,

vs.

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

Respondents,

And Concerning,

THOMAS MULLIGAN, an individual; CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC, a Missouri Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES LLC, a California Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC, a Hawaii Limited Liability Company; CRITERION CLAIMS 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; and 195 GLUTEN FREE LLC, a New Jersey Limited Liability Company,

Real Parties in Interest.

Petition for Writ of Mandamus from the Eighth Judicial District Court, The Honorable Mark R. Denton, District Court Case No. A-20-809963-B

REAL PARTIES IN INTEREST MATTHEW SIMON JR. AND SCOTT MCCRAE'S JOINDER TO REAL PARTIES IN INTEREST THE SIX ELEVEN PARTIES' ANSWER TO PETITION FOR WRIT OF MANDAMUS

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Real Parties in Interest Matthew Simon Jr. ("Mr. Simon") and Scott McCrae ("Mr. McCrae"), by and through their attorneys of record, the law firm of Peterson Baker, PLLC, hereby join in the "Real Parties in Interest the Six Eleven Parties' Answer to Petition for Writ of Mandamus" filed on September 15, 2021 (Doc. 2021-26746) ("Answer"), by Real Parties in Interest Six Eleven LLC, Quote My Rig LLC, New Tech Capital LLC, 195 Gluten Free LLC, 10-4 Preferred Risk Managers Inc., Ironjab LLC, Fourgorean Capital LLC, Chelsea Holding Company LLC and Chelsea Financial Group Inc. ("Six Eleven Parties"). *See* Nev. R. App. P. 21(b)(2) ("Two or more respondents or real parties in interest may answer jointly."). In this regard, pursuant to the Answer and this joinder thereto, Messrs. Simon and McCrae respectfully request that the Court deny Petitioner Barbara D. Richardson's ("Plaintiff") Petition for Writ of Mandamus (Doc. 2021-09465) ("Petition").

Messrs. Simon and McCrae incorporate in this joinder the crux of the Answer, which is complemented by the following:

A. Plaintiff's Delay in Challenging the District Court's Orders Precludes the Requested Writ Relief.

In addition to the reasons detailed in the Answer, there is yet another reason why Plaintiff is not entitled to writ relief now. That is, given the delay in filing the Petition, Plaintiff has demonstrated no urgency, strong necessity or "really extraordinary cause[ ]" for the Court to intervene at this time. *See Greenspun v. Eighth*

Jud. Dist. Ct., In & For Clark Cty., 91 Nev. 211, 217–18, 533 P.2d 482, 486 (1975) (stating that "extraordinary remedies 'are reserved for really extraordinary causes'" and finding "no such occasion for intervention here") (citation omitted).

As set forth in the Answer, the District Court entered the two orders granting the motions to compel on July 16, 2020, and July 22, 2020, respectively. (Vol. V, APP0997-1040.) Additionally, the District Court entered the order granting the motion to stay, and the joinders thereto, on November 17, 2020. (Vol. VII, APP1431-54.) However, Plaintiff did not file the Petition until April 1, 2021.

While Nevada law does not prescribe a specific period within which a writ petition must be filed, Plaintiff did not have unlimited time to file the Petition. *See State of Nevada v. Eighth Judicial Dist. Court*, 116 Nev. 127, 134-35, 994 P.2d 692, 697 (2000); *see also Bldg. & Constr. Trades Council of N. Nevada v. State ex rel. Pub. Works Bd.*, 108 Nev. 605, 612-13, 836 P.2d 633, 637 (1992) (finding that a delay as short as one month is sufficient to bar petition for writ of mandamus when the resulting prejudice is severe); *Oregon v. Peekema*, 976 P.2d 1128, 1131 (Ore. 1999) (stating that "laches generally requires that a mandamus proceeding be filed within the statutory limitation required for the filing of an appeal"). Rather, the equitable doctrine of laches governs the time for filing a petition for a writ of mandamus. *See State of Nevada*, 116 Nev. at 135, 994 P.2d at 697.

Laches denies relief to a dilatory party when it would be inequitable to allow recovery. *See Bldg. & Constr. Trades Council of N. Nevada*, 108 Nev. at 612-13, 836 P.2d at 637. In determining whether to apply laches to a writ petition, a court must determine: "(1) whether there was an inexcusable delay in seeking the petition, (2) whether an implied waiver arose from the petitioner's knowing acquiescence in existing conditions, and (3) whether there were circumstances causing prejudice to the respondent." *Id.* (citation omitted). The application of laches here supports the denial of the Petition.

By waiting over eight months after the orders granting the motions to compel were entered and over four months after the order granting the motion to stay was entered, Plaintiff unreasonably delayed filing the Petition. Following entry of the relevant orders, Plaintiff was obligated to proceed diligently if she disagreed with the District Court's orders, by seeking the Court's intervention in a reasonable amount of time. *See e.g.*, *In re Moore*, 615 S.W.3d 162, 171 (Tex. App. 2019) ("Mandamus is an equitable remedy designed to 'aid the diligent and not those who slumber on their rights,' and an unreasonable delay in filing a mandamus petition may be grounds for denying relief."). But, Plaintiff did not.

This lack of diligence demonstrates Plaintiff's acquiescence to the District Court's orders and establishes that her request for extraordinary writ relief is neither necessary nor appropriate. And, Messrs. Simon and McCrae have been prejudiced by

this delay. Due to Plaintiff's dilatory conduct, the underlying action has remained pending, yet stayed, and the arbitration proceedings have not moved forward, despite that the orders compelling Plaintiff to arbitrate certain claims were entered well over a year ago. With the passage of time, memories fade, witnesses disappear, and evidence may be lost, which may prejudice Messrs. Simon and McCrae's ability to defend against Plaintiff's claims. The Court can, and should, find that the doctrine of laches warrants the denial of Plaintiff's Petition in its entirety.

B. The District Court Did Not Abuse its Discretion in Granting a Stay Because Plaintiff's Claims Against Messrs. Simon and McCrae Are Intertwined With and Dependent On Plaintiff's Claims Against CTC and Criterion.

Just as the claims against the Six Eleven Parties are " intertwined with the claims asserted against CTC and Criterion," justifying a stay of those claims pending arbitration of the claims against CTC[1] and Criterion[2], the claims asserted against Messrs. Simon and McCrae are intertwined with the claims asserted against CTC and Criterion. Therefore, the arguments set forth in the Answer equally apply to Messrs. Simon and McCrae.

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

[2] The term "Criterion" means and refers to Real Party in Interest Criterion Claim Solutions of Omaha, Inc.

In the Complaint, Plaintiff averred that Mr. Simon was "at relevant times, President of and a director of Spirit and the Chief Operating Officer of" CTC Transportation Insurance Services, LLC. (Vol. I, APP0008 at ¶ 36.) Plaintiff alleged that Mr. Simon "has held many executive positions at CTC and its many related entities." (*Id*.)

For Mr. McCrae's part, Plaintiff alleged in the Complaint that he "was an Executive Vice-President of CTC Transportation Services from August 2015 through January of 2019 and in January of 2019 became the President of CTC Transportation Services and upon information and belief likely had a leading role with other CTC entities." (Vol. I, APP0009 at ¶ 42.) Plaintiff also claimed that Mr. McCrae was the President of Criterion. (*Id*.) Plaintiff then asserted claims against Messrs. Simon and McCrae that involve acts or omissions by them while they held executive positions with the entities that are subject to arbitration.

By way of an example, which is by no means exhaustive, Plaintiff asserted that "Simon, as a director of Spirit and Chief Operating Officer of CTC California—and while holding other executive positions at CTC and its many related entities—participated negligently, knowingly and/or intentionally in initiating, approving, executing, effecting and/or hiding the improper transfers or withholdings of Spirit funds by CTC and Chelsea Financial, as alleged above and below, at the direction and under the control of Mulligan." (Vol. I, APP0042 at ¶ 237.) Therefore, in the

arbitration involving CTC, the parties would presumably conduct discovery concerning any "transfers or withholdings of Spirit funds" by CTC, including Mr. Simon's role in any transfers or withholdings. Yet, based on the claims asserted against Mr. Simon, individually, the parties in the underlying action would undertake the same discovery, if a stay were not granted.

Similarly, Plaintiff alleged that "McCrae, as Executive Vice President and later President of CTC, participated negligently, knowingly and/or intentionally in initiating, approving, executing, effecting and/or hiding the improper transfers or withholdings of Spirit funds by CTC and Chelsea Financial, …, at the direction and under the control of Mulligan." (Vol. I, APP0040 at ¶ 228.) Thus, the parties in the CTC arbitration will conduct discovery on any "transfers or withholdings of Spirit funds" by CTC, including Mr. McCrae's role in any transfers or withholdings. However, based on the claims asserted against Mr. McCrae, individually, the parties in the underlying action would undertake the same discovery, if a stay were not granted.

In sum, Messrs. Simon and McCrae are not parties to the arbitration agreement between Spirit and CTC. Nor are they parties to the arbitration agreement between Spirit and Criterion. As non-parties, Messrs. Simon and McCrae would not be bound by any adverse rulings in those arbitrations under the doctrine of issue or claim

preclusion.[3] Nevertheless, the claims in the arbitration proceedings and the claims in the underlying action are so intertwined that Messrs. Simon and McCrae are potentially subject to three depositions each—a deposition in each of the arbitrations and a deposition in the underlying action—and other duplicative discovery.

Allowing the underlying action to move forward against Messrs. Simon and McCrae while the arbitrations proceeded against CTC and Criterion would have resulted in wasteful, expensive, and duplicative discovery efforts and may have resulted in divergent rulings on the same issues. Judicial economy and sound judicial administration justified staying the claims against Messrs. Simon and McCrae in the underlying action pending the resolution of the arbitrated claims against CTC and Criterion. In short, the District Court got it right. (Vol. VII, APP1431-54.) The Court should deny the Petition.

Respectfully submitted this 15th day of September, 2021.

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[3] *See Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) ("The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'").

CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the type-volume limitations of NRAP 21(e) and 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 1,619 words.

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

DATED this 15th day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed and served the foregoing **REAL PARTIES IN INTEREST MATTHEW SIMON JR. AND SCOTT MCCRAE'S JOINDER TO SIX ELEVEN PARTIES' ANSWER TO PETITION FOR WRIT OF MANDAMUS** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on September 15, 2021, 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):

Judge Mark R. Denton
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via email on September 15, 2021 to Dept13lc@clarkcountycourts.us

/s/ Erin Parcells
an employee of Peterson Baker, PLLC