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,

v.

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

Respondents,

And Concerning,

THOMAS MULLIGAN, an individual; CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC, a Missouri Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES LLC, a California Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC, a Hawaii Limited

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SUP. CT CASE. NO.: 82701

DIST. CT. CASE NO.: A-20-809963-B

REPLY TO OPPOSITION BRIEFS TO PETITION FOR WRIT OF MANDAMUS FILED BY REAL PARTIES IN INTEREST 1) ICAP MANAGEMENT SOLUTIONS, DANIEL GEORGE, AND LEXICON INSURANCE MANAGEMENT, LLC; 2) IGOR KAPELNIKOV, YANINA KAPELNIKOV, PAVEL KAPELNIKOV, CHELSEA FINANCIAL GROUP INC., GLOBAL FORWARDING ENTERPRISES LIMITED LIABILITY COMPANIES; KAPA MANAGEMENT CONSULTING, INC, AND KAPA VENTURE'S INC.; 3) BRENDA GUFFEY; 4) THOMAS MULLIGAN; 5) JOHN MALONEY, JAMES MARX, VIRGINIA TORRES, AND CARLOS TORRES; 6) SCOTT MCCRAE AND MATTHEW SIMON; AND 7) SIX ELEVEN LLC, QUOTE MY RIG LLC, NEW TECH CAPITAL LLC, 195 GLUTEN FREE LLC, 10-4 PREFERRED RISK MANAGERS

Liability Company; CRITERION CLAIMS SOLUTIONS OF OMAHA, INC., a Nebraska Corporation; PAVEL KAPELNIKOV, an individual; CHELSEA FINANCIAL GROUP, INC., a California Corporation; CHELSEA FINANCIAL GROUP, INC., a Missouri Corporation; CHELSEA FINANCIAL GROUP, INC., a New Jersey Corporation d/b/a CHELSEA PREMIUM FINANCE CORPORATION; CHELSEA FINANCIAL GROUP, INC., a Delaware Corporation; CHELSEA HOLDING CO., LLC, a Nevada Limited Liability Company; FOURGOREAN CAPITAL, LLC, a New Jersey Limited Liability Company; KAPA MANAGEMENT CONSULTING, INC. a New Jersey Corporation; KAPA VENTURES, INC., a New Jersey Corporation; GLOBAL FOR-WARDING ENTERPRISES LIMITED LIABILITY COMPANY, a New Jersey Limited Liability Company; GLOBAL CAPITAL GROUP, LLC, a New Jersey Limited Liability Company; GLOBAL CONSULTING; NEW TECH CAPITAL, LLC, a Delaware Limited Liability Company; LEXICON INSURANCE MANAGEMENT LLC, a North Carolina Limited Liability Company; ICAP MANAGEMENT SOLUTIONS, LLC, a Vermont Limited Liability Company; SIX ELEVEN LLC, a Missouri Limited

INC., IRONJAB LLC, FOURGOREAN CAPITAL LLC, CHELSEA HOLDING COMPANY LLC AND CHELSEA FINANCIAL GROUP

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,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Petitioner, Barbara D. Richardson, through her undersigned counsel, states that she is an official of the government of the State of Nevada, acting herein in such capacity as the Receiver for an insolvent insurer, and accordingly, no corporate disclosure statement is necessary.

Petitioner has been represented by the following law firm in the proceedings below:

GREENBERG TRAURIG, LLP.

DATED this 13th day of October, 2021

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden
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VERIFICATION

The undersigned declares under the penalty of perjury that she is counsel for Petitioner, Commissioner Of Insurance, Barbara D. Richardson, In Her Official Capacity As Receiver ("Commissioner," Or "Receiver") for Spirit Commercial Auto Risk Retention Group, Inc. and has read the attached Reply to Opposition Briefs to Petition for Writ of Mandamus and that the factual assertions therein are true of her own knowledge, or supported by exhibits contained in the Appendix previously filed herein, and that as to such matters so supported, she believes them to be true. This verification is made pursuant to NRS 15.010.

DATED this 13th day of October 2021.

GREENBERG TRAURIG, LLP

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Petitioner, Barbara D. Richardson, as Receiver ("Commissioner," or "Receiver") for Spirit Commercial Auto Risk Retention Group, INC. ("Spirit" or "SCARRG"), presents her Reply to the Opposition Briefs[1] to Petition for Writ Of Mandamus filed by Real Parties In Interest ("RPIs") 1) ICAP Management Solutions, Daniel George, and Lexicon Insurance Management, LLC (the "George Parties"); 2) Igor Kapelnikov, Yanina Kapelnikov, Pavel Kapelnikov, Chelsea Financial Group Inc., Global Forwarding Enterprises Limited Liability Companies; Kapa Management Consulting, Inc, and Kapa Venture's Inc. ("the Kapelnikov Parties"); 3) Brenda Guffey; 4) Thomas Mulligan; 5) John Maloney, James Marx, Virginia Torres, and Carlos Torres; 6) Scott McCrae and Matthew Simon; 7) 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

[1] Collectively, all of the Defendants in the proceedings below shall be referred to herein as "RPIs." The Petition challenged several separate orders of the District Court, including the grant of CTC and Criterion's respective Motions to Compel Arbitration, the dismissal of CTC and Criterion from the proceedings (collectively, the "Arbitration Orders"), and the stay of all proceedings against the remaining parties (the "Stay Order"). With the exception of CTC and Criterion, the above RPIs (the "Stay RPIs") responded only to the challenge to the stay, and this Reply is accordingly directed to that issue. A companion Reply responds to the Answers to the Petitioner filed by CTC and Criterion.

Holding Company LLC and Chelsea Financial Group ("the Six-Eleven Parties"), and 8) Criterion Claims Solutions of Omaha (Criterion).[2]

INTRODUCTION

British statesman William E. Gladstone recognized long ago that "justice delayed is justice denied."

Weddell v. Stewart, 127 Nev. 645, 261 P.3d 1080, 1084 (Nev. 2011) (citations omitted).

The RPIs—Mr. Mulligan, his many companies, and his many cohorts— have hit upon the perfect method of ensuring that justice is denied. Without this Court's intervention, the Stay RPIs will succeed in getting away with millions of dollars rightfully belonging to Spirit poliy holders, with the Receiver powerless to take any action to recover those funds. Without recovery of these funds, claims of policy-holders will not be fully paid, inevitably causing financial harm to policyholders who must somehow pay for liablity claims for which they had purchased insurance, and/or, to the innocent parties who suffered injuries caused by the negligence of Spirit policy holders.

This ongoing harm caused by the District Court's abuses of discretion cannot be remedied by an eventual appeal. Indeed, as long as the stay is in force,

[2] While Criterion responded to the stay issue in its Answer to the Petition, because Criterion had been dismissed from the case, it is not a real party in interest with respect to the stay.

there can never *be* an eventual appeal, because it will not be possible to proceed to final judgment.

The companion Reply addresses the objections to mandamus relief presented by CTC and Criterion with respect to the grant of their motions to compel and their dismissals from the the Distgrict Court proceedings. For the reasons stated in that Reply, the District Court's orders regarding arbitration and dismissal should be vacated, in which event, the issue of the stay of proceedings against the Stay RPIs would be mooted. Thus, solely for purposes of this Reply, it is presumed that the Arbiration Orders will remain in effect.

Given such presumption, this Court's intervention is necessary, as this court should issue a writ of mandamus to the Disrict Court, directing that the stay of proceedings against the Stay RPIs be lifted.

I. A WRIT OF MANDAMUS SHOULD ISSUE BECAUSE THE RECEIVER HAS NO PLAIN SPEEDY AND ADEQUATE REMEDY FOR THE DISTRICT COURT'S MANIFEST ABUSE OF DISCRETION IN GRANTING A STAY OF PROCEEDINGS AGAINST ALL REMAINING PARTIES.

The District Court abused its discretion in staying all remaining proceedings. Ironically, through the Stay Order, the District Court did what it *had not* done in its prior orders, *i.e.,* impose an obligation on the Receiver to initiate the arbitration. In so doing, the Court transformed the arbitration provisions contained in the CTC and Criterion Agreements from an agreement as to the forum in which disputes against

the entities can be made, into a requirement that the disputes *must* be prosecuted to a conclusion before the Receiver can pursue claims against third-parties. Indeed, as the Ninth Circuit succinctly explained,

> While it is true that the FAA compels arbitration of claims against an unwilling defendant or requires that a plaintiff pursue claims through arbitration rather than litigation in court, the FAA does not compel a plaintiff to pursue arbitration rather than not pursuing the claims at all.

Capon v. Ladenburg, Thalman Co. Inc., 92 F. App'x 400, 401 (9th Cir. 2004). The same, of course, is true of the NAA. Nothing in NRS Chapter 38 *requires* that a party to an agreement containing an enforceable arbitration provision must arbitrate disputes. Instead, if they choose to adjudicate the dispute, they must do so in arbitration.

Here, without the intervention of this Court, the Receiver will be forced to choose between taking an action that is not even within the authority granted to her by the Receivership Court, *i.e.,* initiating two arbitration proceedings—(and thereby risking liability to Spirit's policyholders for taking unauthorized actions), or allowing the persons and entities who received the millions of dollars belonging to Spirit and leading to its liquidation to escape liability—and thereby, failing in her duty to marshal Spirit's assets.

Despite this stark choice imposed on the Receiver, the Stay RPIs contend that the Receiver failed to establish an abuse of discretion by the District Court. In so contending, the Stay RPIs, like the District Court, ignore the overwhelming

prejudice caused by the stay, which prejudice far outweighs any purportedly suffered harm if a stay were not imposed. The Stay RPIs also contend that the Receiver failed to show a lack of an adequate plain, and speedy remedy, ignoring the reality that, even if an appeal could somehow occur where there is no prospect of a final judgment, there can be no appeal of order granting a stay.

A. The Stay of All Claims Against the Stay RPIs was an Abuse of Discretion.

The District Court granted an indefinite stay of proceedings against the Stay RPIs, with the stay to be terminated only when arbitrations that had not even been mandated, let alone commenced, were concluded. The stay was issued even though the only potential harm to be suffered by those requesting the stay was that they might be required to participate in multiple simultaneous proceedings—a circumstances unchanged by the grant of the stay. Conversely, the risk of harm to the policy holders and claimants of Spirit from an indefinite delay in recovery of the funds needed by the Receiver to pay Spirit policyholders' claims was wholly disregarded. Even leaving aside the fact that the Receiver has no authority to initiate an arbitration, the issuance of the stay was a manifest abuse of discretion.

1. A District Court's discretion to grant a stay is not unlimited.

It is, as the Stay RPIs contend, undisputed that a trial court has the discretion to grant a stay of proceedings where warranted. See, e.g., *Landis v. North American Co.*, 299 U.S. 248, 256 (1936) (finding courts have inherent power to control their

own dockets). But despite the apparent belief of the Stay RPIs, the existence of this discretion does not end the analysis. A district court's discretion is not boundless. "Overriding principles of equity and fairness govern a district court's exercise of **discretion**." *Kilgore v. Kilgore*, 449 P.3d 843, 847 (Nev. 2019). A court considering a stay of all proceedings "exercise sound discretion after considering competing interests." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).

In determining whether a stay should be imposed, a court must "weigh the competing interests which will be affected by the granting or refusal to grant a stay, among which are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Sharp Corp. v. Hisense USA Corp.*, 2017 WL 6017897, (N.D. Cal. 2017) (setting forth favors for stay pending arbitration). *See also*, *Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Ct.*, 289 P.3d 201, 206 (Nev. 2012) (adopting similar factors, plus the interests of the public for determining whether to stay civil proceedings pending criminal proceedings). Here, the District Court's grant of a stay failed to give proper consideration to the possible damage to the interests of Spirit's policy holders and claimants from a stay.

The party requesting a stay has the burden of demonstrating why a stay should be granted. *See Clinton v. Jones*, 520, U.S. 681, 708, 117 S. Ct. 1636, (1997). "[I]f there is even a fair possibility that the stay for which [the requesting party] prays will work damage to [someone] else," then the party seeking a stay "must make out a clear case of hardship or inequity in being required to go forward." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). "The heavy presumption should be that the arbitration and the lawsuit will each proceed in its normal course." *Dean Witter Reynolds Inc., v. Byrd,* 470 U.S. 213, 225, (J. White, concurring opinion).

Here, the District Court's weighing of the competing interests was tainted by an unsupported conclusion regarding the dependence of the claims against the Stay RPIs on those against CTC and Criterion. Once that incorrect assumption is eliminated, it cannot be disputed that the competing interest dictate heavily against a stay. Accordingly, the District Court's decision was the product of an arbitrary and capricious abuse of discretion.

2. The grant of a stay all proceedings was arbitrary and capricious because not all claims against the Stay RPIs are dependent upon the Claims against CTC and/or Criterion.

A fundamental flaw with the District Court's Stay Order is its conclusion that exoneration of CTC and Criterion in the arbitrations would eliminate the claims against the Stay RPIs because the claims remaining in the case are "inextricably intertwined and dependent" on the claims against CTC and Criterion. *See, e.g.,* **VII**

APP 1367-17-21. However, "inextricable" is defined as "cannot be disentangled or disengage; from which one cannot disengage oneself." *The Compact Edition of the Oxford English Dictionary*, p. 1425 (1971). And a claim is dependent on another claim when proof of one claims depend on the other being proven. Neither circumstance exists here.

The individuals and entities sued in addition to CTC and Criterion can each be held liable for their own misconduct including the acceptance of payments from Spirit, regardless of the liability of Criterion and/or CTC.

For example, there is no reasonable basis for contending that the liability of the claims against the former officers and directors of Spirit is inextricably intertwined with that of CTC and Criterion. Mulligan, Simon, George, Maloney, Guffey, Marx, C. Torres and V. Torres (collectively, the "Spirit Director Defendants") were officers and/or directors of Spirit, each of whom failed to discharge his or her duties to govern the Company appropriately, independently, and in good faith on an informed basis. **I APP 34, ¶ 197.** They violated Spirit's code of ethics by permitting insider transactions; failed to collect substantial balances in accounts receivable owed to Spirit; failed to obtain premiums owed to Spirit; failed to accurately report financials; misguided the Division as to the financial and operating status of Spirit; failed to maintain reserve requirements, leaving the company in precarious financial condition; approved a $500,000 "investment" from

Spirit to New Tech Capital, LLC an entity owned and controlled by Mulligan and Pavel Kapelnikov in violation of NRS Chapter 692C, and failed to monitor or follow up on said "investment." Id. at p. 35, ¶¶ 201-203. Additionally, these Stay RPIs failed to disclose critical information to state insurance regulators regarding the financial condition of Spirit, including collateral for a $3 million "Letter of Credit"; reinsurance agreements; Spirit's loan transaction with Chelsea Financial; Spirit's lack of resources to honor the Loss Portfolio Transfer agreement; Spirit's claims reserves; the lack of collection of collection of premium funds from Chelsea; Spirit's overpayments of claims; Spirit's underwriting capabilities; and numerous other circumstances that would have brought Spirit's dire financial circumstances to light sooner. Establishing liability for any of the above misconduct would require no proof that the corporate entities of CTC or Criterion had breached obligations to Spirit. Nor would the exoneration of CTC or Criterion require the dismissal of the claims asserted against these Stay RPIs.

Similarly, claims against Lexicon (partly owned and controlled by George) arise from its breach of its contractual obligations for management services provided to Spirit, including failing to maintain and operate Spirit's banking and investment accounts to protect Spirit assets; allowing Spirit funds to be comingled with accounts of other insurance companies; concealing the true financial condition of Spirit to the Division; failing to properly implement and oversee Spirit's claim reserve handling

which resulted in the overpayment of claims when Spirit's policies should have been cancelled; failing to properly collect premium balances due Spirit; failing to remit payments due Spirit until its indebtedness grew to over $30 million dollars for unpaid premiums alone; and deceiving Spirit's policy holders by aiding and abetting the schemes of the Chelsea entities. ***Id.* at 49-50 , ¶ 271**. Proof of these failures does not require proof of any breach of obligations by CTC or Criterion. A failure by the Receiver to establish liability of CTC or Criterion will not force dismissal of claims against the Lexicon group of defendants.

The allegations against Stay RPIs Chelsea Holding, Chelsea Financial MO, Chelsea Financial California, and Chelsea Financial New Jersey ("Chelsea Defendants"), owned by Stay RPIs Kapelnikov and Mulligan, are that these companies represented to Spirit and its policyholders that they would finance the yearly policy premiums due Spirit, in return for recurring payments and interest at rates ranging from 8 to 19%, however, they failed to provide the requisite funds to Spirit. ***Id.* at 28-29, ¶¶160-162.** Moreover, the Chelsea Defendant not only pocketed all of the unearned interest paid by the unsuspecting policyholders, but often did not even pay the monthly premiums received to Spirit. *Id.* While CTC and Criterion likely participated in and encouraged this scheme, even if there were a determination that CTC and Criterion were unaware of the Chelsea Defendants wrongdoing, it would not result in exoneration of the Chelsea Defendants. The

Receiver has a separate and distinct right to recover against the Chelsea Defendants, and those who controlled those companies. Exoneration of CTC or Criterion would not extinguish this right.

The Kapelnikov Group of Stay RPIs also received other payments from Spirit. In addition to his participation in the Chelsea Defendants' schemes, P. Kapelnikov used Kapa Management and Kapa Ventures as shell entities to unlawfully receive Spirit's funds. *Id.* ¶¶ 26. 34. Igor Kapelnikov was paid substantial amounts of Spirit funds for purported expense reimbursements that are not documented. *Id.* at ¶ 41. Yanina Kapelnikov received approximately $354,000 of Spirit funds for no known reason. *Id.* at ¶ 256 (l). To put the amount of money the Kapelnikov Group siphoned from Spirit into context: over $6.5 million was paid to Chelsea Financial; payments of more than $2.3 million were made to Kapa Management, another $1.5 million is believed to have been paid to Kapa Management that was coded wrong; Global Forwarding (another Kapelnikov company) received approximately $719,000; and Kapa Ventures was paid approximately $35,889. *Id.* at ¶ 256. None of these claims are dependent upon findings of liability against CTC or Criterion.

Finally, Stay RPI Mulligan has liability for the nearly $5 million he received from Spirit. *Id.* at ¶ 256. While Mulligan is believed to the mastermind of the vast fraudulent scheme described in the Complaint and the Petition, his liability for the transfers he received are not dependent upon proof of the existence of such a scheme,

but instead, simply upon the basis of his breach of his own obligations as a fiduciary of Spirit, for which he was a controlling person. *See* NRS 681A.310 (defining controlling person as one who has the power to direct, or cause to be directed, the management of an intermediary.) The documented unlawful transfers which padded Mulligan's pockets include, but are not limited to payments to Chase Bank for Mulligan's personal credit card bills in the amount of $2.67 million dollars, three transfers directly to Mulligan's personal account(s) of more than $1.8 million dollars, and direct additional payment of Mulligan's personal credit cards of $363,000. *Id.* at ¶ 256 Such amounts do not include the additional transfers referenced herein to other entities that were owned and controlled by Mulligan.

Given that the above claims can be established independently of any liability of CTC or Criterion, and can continue regardless of any speculative exoneration of CTC or Criterion in arbitration proceedings, the District Court's conclusion that the arbitrations could eliminate the claims against the Stay RPIs is unsupported by the record. Yet, the bulk of the justifications cited by the District Court for the stay, including purported judicial economy, efficiency, even the supposed "benefit" to the Receiver by potential elimination of claims, all are based on the clearly erroneous conclusion the claims against the Stay RPIs cannot be extricated from and are dependent on the claims against CTC and Criterion. **VII App 1418, ¶ 22**.

"An arbitrary or capricious exercise of discretion is one "founded on prejudice or preference rather than on reason . . . or contrary to the evidence or established rules of law" *State v. Eighth Judicial Dist. Court of Nevada*, 127 Nev. 929, 931-932, 267 P.3d 777, 780 (2011) (citations omitted). The District Court abused its discretion in ordering the stay.

3. The Interests of Spirit's policyholders outweigh those of the Stay RPIs.

In addition to justifying the stay on an unfounded conclusion, the District Court abused its discretion in failing to properly weigh the injury to the receivership estate and Spirit's policyholders resulting from the stay, merely stating in a summary fashion that the Receiver failed to show any harm from a stay. **VII APP 1273, ¶ 23.** The record does not support this conclusion.

Indeed, it is inconceivable that an indefinite delay in the recovery of millions of dollars belonging to Spirit from the persons and entities who *actually* received that money could be perceived as anything *other* than prejudicial. As this Court recognized:

> Plaintiffs to civil suits have an obvious interest in proceeding expeditiously . . . this is particularly true in the context of complex litigation which must proceed in an efficient manner. . . . The delay resulting from a stay may also duly frustrate a plaintiff's ability to put on an effective case" because as time elapses, "witnesses become unavailable, memories of conversations and dates fade, and documents can be lost or destroyed.

Aspen Fin. Servs., 128 Nev. at 646, 289 P.3d at 208 2 (citations omitted) (determining a stay pending the conclusion of related litigation would greatly prejudice plaintiffs).

Here, the stay has prevented the Receiver from fulfilling her duty to recover funds from the more than twenty-eight parties who are the last known persons to have possession of Spirit's funds. Spirit insured trucking companies, and some of its policyholders and those injured by policyholders have made claims involving severe, traumatic, or wrongful death cases in which claimants are in dire need of material financial distributions from the Spirit receivership (and much more money than what the receivership now can offer them). Spirit policyholders have also been injured, indeed, in many cases they have been required to take on the very significant costs of their own defense in Spirit's absence. Staying these proceedings has caused long-term consequences and has damaged individuals that are not directly apart of these proceedings.

a. The District Court stripped the Receiver of her right to determine how best to marshal the assets of the Receivership Estate.

In addition to the "prejudice that naturally arises from delay, the District Court's order also prejudices the Receiver due to its interference with her duties in that capacity. Significantly, the Court's order eliminates any choice the Receiver has in determining how limited resources left in Spirit's accounts should be best

expended to recover the millions of dollars that are missing. The District Court's rulings on the Motions to Compel Arbitration forced the Receiver to weigh the respective risk and benefits from first pursuing the corporate entities who were used to pillage Spirit, as opposed to pursuing the individuals (and their other companies) ***who actually received Spirit's money***. The Receiver is entitled to decide if Receivership estate's limited resources are better expended through litigating in the Nevada District Court against those who profited from the injuries inflicted on Spirit, rather than in paying more than double the costs, in two separate arbitrations in Nebraska and Washington, D.C., to obtain findings against the corporate shells used to facilitate the plunder. But the District Court arbitrarily and capriciously deprived the Receiver of her choice, insisting she engage in the far more expensive option first.

b. The Receiver's lack of authority to initiate arbitration was disregarded.

Furthermore, even though the briefings on the Motions to Compel Arbitration had included the Receivership Order; even though there had been extensive discussion about the exclusive jurisdiction of the Receivership Court over the litigation involving liquidating insurers; and even though the District Court itself had not actually ordered that arbitrations be initiated, the Stay Order simply assumes that

the two arbitrations will actually proceed, failing to consider that that the Receiver has no authority to initiate arbitrations of Spirit's claims.[3]

Significantly, in assuming that two separate arbitrations would proceed, the District Court apparently deemed it acceptable for the fraud, conspiracy, unjust enrichment and RICO claims against CTC and Criterion to proceed in different forums, even though the allegations were that these entities had acted in in concert to pillage Spirit of its assets and are, or were, controlled by the same person or group. Yet, despite having reached such conclusions in ruling on the Motions to Compel, the District Court then contradicted itself by asserting that it would a waste of resources to proceed with discovery and prosecution of the claims in multiple forums. However, piecemeal litigation is a product that is a natural result of the application of the FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 4, 103 S. Ct. 927, 930 (1983) (stating that the FAA :requires piecemeal resolution when necessary to give effect to an arbitration agreement"). .

[3] Some of the Stay RPI assert that the Receiver's lack of authority to arbitration was not raised below. However, the Receivership Order was provided to the court, **IV APP 690**, and the exclusive jurisdiction of the Receivership Court over liquidating insurer claims were briefed for the Motions to Compel Arbitration. **IV APP 682-683; 733-734** Additionally, the Receiver expressly argued that the CTC Order granting the Motion to Compel contradicted the Receivership Order regarding arbitration in the motion seeking reconsideration. **V APP 1058; VI APP 1136.** CTC responded to the argument that the Receiver had no authority to commence litigation. **VI APP 1101.** The District Court was advised of the Receiver's inability to initiate arbitration, but was unpersuaded. The Receiver did not waive the argument by refraining from raising it before the District Court again.

The District Court also cited the risk of inconsistent results as a factor favoring a stay. However, there is no actual risk of inconsistent results, because despite the possibility of three separate adjudicative proceedings, the liability of each defendant will be determined in only one proceeding. If CTC were to be found liable in one proceeding, and Criterion found to not be liable, there would be no "inconsistency."

Moreover, even if there were a risk of inconsistency, the stay will not eliminate that risk. Even if both CTC and Criterion were exonerated in their respective arbitrations, the claims against the Stay RPIs for their own breaches of obligations to Spirit, and for their receipt of transfers of Spirit's funds in the requisite statutory time periods prior to the filing of the Petition for Receivership under the claw back provisions of the NIC, would be unaffected. Thus, the claims of prejudice to the Stay RPIs in the absence of a stay were illusory.

The District Court also noted that Stay RPIs would be prejudiced by facing the claims against themselves in litigation while there was also the possibility that they would be required to participate in third party discovery in the two arbitrations in Nebraska and Washington D.C. Here, again, the stay does not eliminate this purported problem; instead, if the arbitrations proceeded, the stay would merely delay the time during which the Stay RPIs would be facing the claims against themselves.

Against this molehill of phantom prejudice, none of which will be actually be avoided through the stay, the District Court found that the Receiver's show of prejudice from delay wanting. Such a determination can only be termed arbitrary and capricious.

4. The grant of a stay of all proceedings was arbitrary and capricious because the District Court relied on patently inapplicable authority.

The District Court appeared to rely on the FAA and the NAA as requiring a the issuance of a stay. **See VII APP 1417-1419 ¶¶ 18 and 19**. However, not only does neither statute mandate imposition of a stay, but neither statutory scheme is applicable under the circumstances here.

The provisions of 9 U.S.C §§ 3 and 4 do not apply in state courts, unless the agreement expressly adopts the FAA enforcement provisions. *Valencia v. Smyth,* 185 Cal.App.4th 153, 173-174 (2010), see also *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477 n.6 (1989) ("[W]e have never held that [9 U.S.C.] §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court.")(citations omitted).

The plain language of NRS 38.221 limits its application to situations where the 1) court ordered arbitration of the claims, and 2) the action involves claims subject to arbitration. See NRS 38.291(7) ("***If the court orders arbitration***, the Court

on just terms shall stay any judicial proceedings that ***involve a claim that is subject to arbitration***.") (emphasis added).

But neither circumstance exists here. The Court did not order that arbitration must occur, and therefore, that requirement is not met. And, because the District Court dismissed CTC and Criterion from the case—and only *the claims as to them* were arbitral—*none* of the claims that remain in this litigation, *i.e.,* the claims against the Stay RPIs, are subject to arbitration.

Because regardless of the FAA or NAA, a district court has discretion to stay proceedings, the inapplicability of these statutes is not determinative of the issues here. But the fact that a District Court relied on procedural rules applicable only in other jurisdictions, and on a quotation of a statute that *on its face* reveals its inapplicability to the present case indicates that the exercise of discretion here was less than sound.

The Stay RPIs appear to believe that in addition to preserving issues, it is necessary that every single argument supporting such issues must have been raised in the lower court, or such argument is waived. They contend that the issue of the whether the arbitration statutes required a stay was not properly preserved, because the Receiver, who did not bear the burden of proof on the issue, did not advise the District Court that federal procedural encompassed in 9 U.S.C. 3 and 4 do not apply

in state courts, or that the wording of NRS 38.221 patently does not apply to the circumstances here. This argument is without merit.

The Receiver argued that neither the FAA nor the NAA apply to require arbitration in her the briefs on the Motion to Compel Arbitration. **IV APP 679-686; 730-740**. In the briefing on the stay, the Receiver noted that the authorities cited by the Stay RPIs do not mandate stays, and distinguished case law interpreting the FAA cited in the RPI's briefing supporting a stay. **VI APP 1273-1274** Thus, there can be no reasonable argument that the issue of applicability of the FAA and NAA was not preserved.

Moreover, litigants are not required to make the same arguments at each stage of the proceeding. Where an *issue* is preserved, new *arguments* relating to the issue may be raised. *Wolk v. Sch. Dist. of Lower Merion*, 228 A. 3d 595, 599 (Pa. Commw. Ct. 2020) ("The issue must be preserved, but that does not mean every argument is written in stone at the initial stage of litigation. Thus, logic dictates that an appellant can raise new arguments so long as they relate to the same issue."), see also, *Gadda v. Gadda* , 341 Or. 1, 7, 136 P.3d 1099 (2006) (concluding that the appellant had sufficiently preserved alternative arguments that were "encompassed by th[e] broader legal issue" raised below, where the same "sources of law are at issue in both arguments")." *State v. Gonzales*, 423 P.3d 149, 152 (Or. Ct. App. 2018).

The stay is preventing the Receiver from pursuing the millions of dollars missing from Spirit on behalf of the Receivership estate which amounts are needed to pay claims of policyholders. The District Court made no reference in its order to the Receiver having documented transfers of Spirits funds to and on behalf of Mulligan in amounts approaching $5 million; of more than $3 million to the Six-Elven Defendants, and the Kapelnikov Group having pocketed more than $11 million. VI APP 1269. Spirit has a right to directly recovery these amounts from the party that received the funds pursuant to NRS 112.210 (b), NRS 112.220 (2), NRS 696B.410, NRS 696B.412, and/or NRS 692C.402. Such statutes authorize direct claims against parties that received unlawful payments; neither CTC nor Criterion would need to be found liable for the liability to attach to these claimants.

B. The Receiver has No Plain, Speedy or Adequate Remedy.

Where there is no plain, speedy and adequate remedy available, mandamus relief is warranted. NRS 34.330. Absent writ review, the receiver has no remedy for the District Court's abuse discretion. There is no right of appeal from the grant or denial of a stay. *Sullivan v. Au-Reka Gold Corp.*, 484 P.3d 951 (Nev. 2021). This Court has uniformly held that writ relief is appropriate where there is no right of appeal. *See e.g Detwiler v. Eighth Judicial Dist. Court*, 486 P.3d 710, 715 (Nev. 2021) ("Where no rule or statute provides for an appeal of a contempt order, the order may properly be reviewed by writ petition."); *Haley v. Eighth Judicial Dist.*

Ct., 273 P.3d 855 (Nev. 2012) (allowing writ review where aggrieved nonparties had no right of appeal); *Cashill v. Second Judicial Dist. Ct*., 381 P.3d 600 (Nev. 2012) (same).

Furthermore, even if there were a right to appeal a stay of proceedings, there is no prospect of an appeal while a stay is in place, because so long as the stay is in effect, a final judgment cannot be attained.

C. Laches do not prevent the issuance of a writ here.

RPIs Simon and McCrae argue that because the writ petitioner was filed several months after the Stay order was entered, the Receiver delayed too long to bring the writ petition. However, laches may only be invoked when delay by one party causes a change in circumstances that works to the disadvantage of another party. *Building Constr. Trades v. Public Works, 108 Nev. 605, 610-11, 836 P.2d 633, 636-37* (1992). Here, given that a stay of the proceedings was already in place, there has been no change in circumstances causing prejudice to Simon and McCrae. Since Simon and McCrae sought a stay of proceedings, and thus, undertook the risk of the eventualities of which they now complain, they are estopped from claiming prejudice based on delay.

/ / /

CONCLUSION

Because the District Court's Orders have left the receiver without a remedy, and thus, unable to fulfill her statutory duty of marshaling the assets of Spirit for the benefit of Spirit's policyholders and other creditors of the failed insurer, the writ of mandamus should issue.

Respectfully submitted this 13th day of October 2021.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this Petition complies with the formatting requirements of NRAP 32(c)(2), 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 MS Word 2010 in Times New Roman 14, with double spacing. The brief contains approximately 5137 words.

Finally, I hereby certify that I have read this Petition, 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 21(a)(3). I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13th day of October, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of GREENBERG TRAURIG, LLP, that in accordance therewith, that on October 13, 2021, I caused a copy of ***Reply to Opposition Briefs to Petition for Writ of Mandamus*** to be served via U.S. Mail, first class postage prepaid, and via the 8th Judicial District Court's e-service system, upon the below identified Real Parties:

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With a courtesy copy to

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