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 CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC, and CRITERION CLAIMS SOLUTIONS OF OMAHA

Docket 82701 Document 2021-29480

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

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 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

<u>/s/ Tami D. Cowden</u>
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Statutes

Nevada Statutes

Other Authorities

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 to Petition for Writ Of Mandamus Filed by Real Parties In Interest ("RPIs[1]) CTC Transportation Insurance Services of Missouri, LLC; CTC Transportation Insurance Services LLC; CTC Transportation Insurance Services of Hawaii LLC, (collectively, "CTC") and Criterion Claims Solutions of Omaha ("Criterion").

INTRODUCTION

The RPIs have created a blueprint for a swindle so exceptional, that it would not be surprising if others do not attempt similar schemes. In fact, the RPIs could publish a manual to assist others in setting up a profitable con. That manual might say something like this:

Want a perfect scam? Here's how:

Create a risk retention insurance group ("RRG" or "insurer").

Then, using other companies in one's control to manage all operations

[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, and the stay of all proceedings against the remaining parties. This Reply is directed at the arguments presented in the Answering Briefs filed by CTC and Criterion in support of the orders granting the motions to compel and dismissing these parties from the action. A companion Reply responds to the Answering Briefs filed by the other RPIs referred to as the "Stay RPIs".

of that insurer, sell millions in dollars in premiums to unsuspecting consumers by offering what appear to be bargain rates. Plenty of customers will be sign up—target those who are high risk!

Use your managing companies to skim high fees for every conceivable service. Mingle all the funds of the various companies under your control together and have multiple companies theoretically performing the same tasks. Bring in a lot of fellow conspirators to help spread around the cash.

To prolong the scam, when recording claims downgrade risk assessments to far below the actual potential liability. This will allow you to keep your state-required reserves low and skim even more money from the insurer.

Now, of course, your puppet insurer will run into financial difficulty, and the state regulators will take over the company and try and take back the millions of dollars you managed to steal. But here is how to get around them. First, make sure you start the RRG in a state that does not EXPRESSLY forbid an insurance receiver from arbitration claims and make sure the agreements that your puppet insurer "signs" with the other companies you control have arbitration provisions.

When the state insurance regulator takes over the puppet insurer as a receiver, the receiver will be bound by that arbitration provision. Another great thing is that an arbitration provision can delay any court proceeding, because you and all your coconspirators can ask for a stay of any court proceedings until the arbitrations with the companies you controlled are completed. That could buy you years and will allow you to keep the millions of dollars you took from the RRG. Plan things right, and the Receiver will likely run out of any funds, making it impossible to continue the litigation.

See **I APP 1-70.**

Sadly, this is not mere hyperbole. The roadmap for a successful fraud described above is *exactly* what is alleged here. Using this same roadmap, a fraudster could contract around discovery of insulate itself from punitive damages or otherwise avoid repercussions for contract breaches. Ironically, the most protective form of insurance that Spirit ever produced was not the liability policies sold to its customers, who are facing the grim reality that Spirit lacks the resources to fully pay their liability claims. Instead, the founders of Spirit found protection in the arbitration provisions placed by the scammers in the CTC and Criterion Agreements, as those provisions have brought the Receiver's efforts to recover the millions of dollars taken by the RPIs to a complete halt. Only the intervention of this Court to correct the District Court's abuses of discretion will keep the RPIs from walking away with their loot.

Fortunately, such intervention is appropriate. The Receiver's efforts here have been hindered by the District Court's misapplication of the law, but that abuse of discretion may be rectified through mandamus relief. The arbitration provisions here were essentially agreements by Mulligan to arbitrate with himself. They were not arms-length transactions, they were instruments of fraud. Moreover, they are not only preempted by federal law, but were executory in nature, so the receiver had the authority to disavow them. Furthermore, even if the arbitration clauses were enforceable, not all of the claims against CTC and Criterion actually fell within the scope of the arbitration provisions, which were limited to claims relating to the contract performance. The claims for fraud breach of fiduciary, and the statutory claw back claims, all stem from duties arising by law, rather than the Arbitration Agreements.

LEGAL ARGUMENT

The Receiver has satisfied the requirements for mandamus relief. Mandamus is appropriate an eventual appeal does not provide the petitioner a plain plain, speedy and adequate remedy and the writ is necessary to correct a manifest abuse, or arbitrary and capricious exercise, of discretion. Additionally, mandamus is necessary to clarify an important issue of law and considerations of sound judicial economy and administration militate in favor of granting the petition. *See* NRS 34.160; NRS 34.170*;*

Archon Corp. v. Eighth Judicial Dist. Ct., 407 P.3d 702, 706 (Nev. 2017); *Tallman v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 71, 359 P.3d 113, 118 (2015); *State v. Eighth Judicial Dist. Court*, 118 Nev. 140, 147, 42 P.3d 233, 237-38 (2002). The receiver has shown that these requirements are met.

I. THE GRANT OF THE MOTIONS TO COMPEL AND DISMISSALS OF CTC AND CRITERION WERE ARBITRARY AND CAPRICIOUS EXERCISES OF DISCRETION.

The District Court's rulings on the Motions to Compel were arbitrary and capricious. Only the equitable principle of estoppel is proffered to justify forcing the Receiver, who did not execute an agreement to arbitrate, to arbitrate the issues. But equitable theories cannot overcome statutory rights and privileges. NRS Chapter 696B and the Receivership Order provide that the District Court is to have jurisdiction over the claims involving the receivership estate. Additionally, the Receiver has no authority to initiate arbitration proceedings, and thus, the Arbitration Orders leave her unable to pursue the claims against CTC and Criterion. Additionally, the rulings deprive the Receiver of her right to reject executory contract provisions. The Receiver's efforts to marshal the estate assets are critically important to liquidation proceedings, and accordingly, the FAA is reverse-preempted.

While purportedly justified by application of the doctrine of equitable estoppel, the Arbitration Orders imposed arbitration upon a nonsignatory. An equitable principle cannot overcome statutory provisions or rules of law. *Mello v. Woodhouse*, 110 Nev.

366, 373 (Nev. 1994) ("[I]t is well established that courts of equity can no more disregard statutory and constitutional requirements than can courts of law."). The orders to arbitration were imposed in the face of the rule of law. Accordingly, the Arbitration Orders were abuses of discretion.

A. The Receiver Has No Authority to Initiate Arbitration.

There is no reasonable argument that any provision in NRS Chapter 696B authorizes a receiver to initiate arbitration proceedings. Nor does the Receivership Order here grant such authority. That order authorizes the Receiver to *abandon or further prosecute any "suits, legal proceedings and claims" but to institute only "suits."* **APP0541-556, ¶¶ ¶¶6(f), 15(a), (h).** The use of both "suits" and "legal proceedings" in one grant of authority, while using only the term "suits" in another, expresses a clear intent that the latter authority was more limited. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("[A] material variation in terms suggests a variation in meaning."), *cited with approval in Harris v. State*, 407 P.3d 348, 353 (Nev. App. 2017). The term "suits" is generally understood to refer to actions filed in a court. Black's Law Dict. (6th ed. 1990) p. 1434 ("suit" is a proceeding by one person against another person "in a court of law in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or enforcement of a right"); Webster's Tenth New Collegiate Dict. (1987)("suit" is "an action or process in a court for the recovery of a right or claim").

The Receiver has no powers beyond those granted by the Receivership Court. *Anes v. Crown Partnership, Inc.,* 113 Nev. 195, 201, 932 P.2d 1067, 1070 (1997). "A receiver must not exceed the limits of the authority granted. " *Fullerton v. District Court*, 111 Nev. 391, 400 (Nev. 1995). A receiver who acts outside the scope of granted authority may be held personally liable. *Anes,* 113 Nev. at 201, 932 P.2d at 1070.

Remarkably, both CTC and Criterion contend that the Receiver did not raise the issue of her authority to commence arbitration proceedings in the court below. Such a claim is puzzling. Furthermore, the Receivership Order was provided to the court, **IV APP 690**, and the exclusive jurisdiction of the Receivership Court over liquidating insurer claims was 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 expressly responded to the argument that the Receiver had no authority to commence arbitration. **VI APP 1100-1101.**

In fact, CTC cited the language of the Receivership Order from the *Milliman* case, coyly referring to it as "nearly identical" to the Receivership Order here, and asserting that Milliman order made clear that the *Milliman* Receiver had the authority to commence arbitration. *Id.* Of course, CTC did not point out that the difference between the two orders was the *omission* in the Receivership Order here, of the critical words "and other legal proceedings" from the authorization to institute proceedings. But it is *that* language (which CTC emphasized in its quotation) that provided the sole basis for a contention that the receivership was authorized to commence arbitrations. Given this discussion in the briefing below, CTC and Criterion's claims that this argument was not previously raised are without merit.

A decision is arbitrary or capricious when it is established of law." *City of Las Vegas v. Eighth Judicial Dist. Ct.*, 133 Nev. 658, 659-60, 405 P.3d 110, 112 (2017). Moreover, it is an abuse of discretion to order an unlawful act. *AHA v. Price*, 432 U.S. App. D.C. 172, 179, 867 F.3d 160, 167 (2017) (abuse of discretion to order official to perform an act with which order the official could not lawfully comply). The District Court's Orders compel the Receiver to choose between exceeding the scope of her authority, and abandoning all claims against all defendants. Accordingly, the Orders are arbitrary and capricious.

B. The District Court Abused its Discretion in Enforcing an Executory Agreement that Receiver had Clearly Disaffirmed.

The Receiver has the authority to disaffirm all or part of any executory contract. APP 0552, ¶15(p), see also NRS 32.320. Here, the executory portions of the CTC and Criterion Contracts were disaffirmed.

CTC and Criterion contend that the arbitration provisions were not executory. However, their reasoning is unclear. Indeed, the arbitration provisions in the CTC and

Criterion Agreements fully satisfy the definitions cited by CTC. *See* CTC Answer, p. 22. Under the CTC and Criterion Agreements, arbitration of disputes was an obligation that was "so far unperformed" as of the time of the Receivership Order, and a "contractual expectation . . . yet to be done." *See* CTC Answer, p. 22, citing *In re Rehbein,* 60 B.R. 436, 430 (B.A. 9th Cir. 1986) and Black's Law Dictionary.

CTC and Criterion also contend that the performance of the obligation to arbitrate was not in the future, relying on cases that did not consider the issue. CTC Answer, pp. 22-23, Criterion Answer, pp. 22. For example, in *Verizon Wireless Pers. Commc'ns, LP v. Bateman*, 264 So. 3d 345, 350 5 (Fla. Dist. Ct. App. 2019), a discharged bankruptcy debtor sued Verizon, who had attempted collection for a pre-bankruptcy phone service bill. Verizon moved to compel arbitration pursuant to the terms of the service agreement, and the debtor argued that the arbitration provision had been discharged. The Court held that because the purpose of bankruptcy is to relive the personal debt of the debtor, the discharge did not apply to the arbitration provision. CTC and Criterion's reliance on *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth,* 473 U.S. 614 (1985) is inexplicable. In that case, the Supreme Court was addressing the propriety of arbitrating claims related to statute rights. Neither of these cases dispute the fact that an arbitration provision creates an obligation of performance— adjudication of disputes in a specified forum— upon the parties thereto. Indeed, since both CTC and Criterion fileD a motion seeking to enforce their Agreements, it is obvious that performance of the obligation to arbitrate had yet to occur.

Similarly, the contention that because the NRS 696B.400 fixes a date on which a liquidating insurer's rights and liabilities the arbitration provisions somehow became non-executory is mystifying. The fact that an unperformed obligation becomes ripe does not changed the fact that it has not yet been performed.

Finally, CTC and Criterion contend that the FAA was intended to eliminate the concept of arbitration agreements being executory. However, this argument appears to be based on a misunderstanding of what an executory contract is, as in this argument they seem to equate an equitable contract with one terminable at will. CTC and Criterion's confusion appears to stem from a misreading of a trial court decision from Connecticut, *Silverstone v. Conn. Eye Surgery Ctr. S., LLC*, No. NNHCV186080472S, 2018 Conn. Super. LEXIS 3621 (Super. Ct. Oct. 23, 2018). In that decision, the trial court discussed the history of arbitration provisions, noting the under English common law, "agreements to arbitrate were revocable, by any party, at any time prior to the rendering of an award," a circumstance that continued until the passage of a statute that made arbitration provisions irrevocable in 1855. *Id.* at 19, 25.

However, the English common law tradition carried over to the U.S. The FAA was adopted in order to "to make the contracting party live up to his agreement" and so he can "no longer refuse to perform his contract . . ." An arbitration agreement is placed upon the same footing as other contracts, where it belongs.. " Id. at 27 (citations omitted). Thus, it was the non-binding aspect of arbitration agreements, rather than their executory nature, that was addressed by the FAA.

With the adoption of the FAA, the arbitration provisions in a contract must be treated like the provision of any other contract, and may be defeated by only "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S. §102. Receivers in Nevada *are* granted the authority to reject executory agreements. NRS 32.340. Such action does not come without penalty. The other party to the contract will have an unsecured claim for damages resulting from what is essentially a breach of the agreement. Nevertheless, disavowal by a receiver is a "ground that exists at law and in equity for the revocation of any contract. Accordingly, such a disaffirmance is entirely consistent with the FAA. *See also, McGill v. Citibank, N.A.*, *393 P.3d 85, 94 (Cal. 2017)*, permitting revocation of a contract that violated a statutory right to seek public injunctive relief. In *Morgan v. Sanford Brown Institute*, 137 A.3d 1168, 1177, 1181 (N.J. 2016), the New Jersey Supreme Court stated that § 2 of the FAA preserved generally applicable contract defenses, including a state statute imposing requirements on consumer contracts generally, as well as defenses to the elements of contract formation. And, of course, this Court has held that an arbitration agreement can be waived by the conduct of the parties. *Principal Invs., Inc. v. Harrison*, 132 Nev. 9, 15, 366 P.3d 688, 693 (2016) ("The right to enforce an agreement to arbitrate, like any contract right, can be waived.").

As the U.S. Supreme Court has stated, "State law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability and enforceability of contracts generally. . . . Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. " *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 685, 687 (1996). Here, both the Receivership Order, and Nevada statutory law, do not limit a Receiver's ability to reject contracts to arbitration provisions. Accordingly, this defense is not preempted by the FAA.

Criterion and CTC both contend that the Receiver did not properly disaffirm the arbitration provisions in a timely manner. However, significantly, the Receivership Order here expressly grants the Receiver the authority to reject contracts "at such time as she deemed appropriate." Moreover, CTC's reliance on *Anes v. Crown P'ship*, 113 Nev. 195, 932 P.2d 1069 (1997) is misplaced, as pursuant to NRS 32.320(1)[2], unless a receiver obtains the approval of the court to *continue* a contract, the contract

[2] While NRS 32.100 *et seq*., is entitled "Uniform Commercial Real Estate Property Act, nothing therein limits is scope to Receivers of Commercial Real Estate. To the contrary, its definition of "property" includes both real and personal property, and its definition of "receiver" includes all persons appointed by court order to "take possession of, manage . . . transfer, sell, lease, license, exchange, collect or otherwise dispose of receivership property." . *See* NRS 32 170 and 32.175.

is deemed rejected. Accordingly, *Anes's* requirement of rejection of leases within a "reasonable time" has been abrogated by statute.

Finally, CTC and Criterion contend that this issue was not raised in the lower court. However, both concede that the Receiver raised the issue of the rights of receivers to reject executory agreements in her Oppositions to the Motions to Compel Arbitration. CTC Answer, 20, n.1; Criterion Answer, p. 20. Additionally, the Receivership Order was provided as an exhibit. **IV APP 702.** According. The issues were presented below.

C. Granting Arbitration Where the Arbitration Provisions Perpetuate Fraud Was an Abuse of Discretion.

The arbitration provisions here are being used to perpetuate a fraud, and accordingly, it was an abuse of discretion to enforce them. There can be no dispute that the CTC Agreement was an agreement that was executed by two companies that were controlled by the same person: Thomas Mulligan. Specifically, Mulligan was the 100 percent owner of CTC and CTC was the "controlling person" of Spirit. **APP0708-709.** Accordingly, Mulligan controlled Spirit, as well as CTC. The Receiver alleged that Mulligan similarly exercised control over Criterion and that CTC used Spirit's relationship with Criterion to deceive insureds and conceal Spirit's true financial condition from the Division. **APP0025-28, ¶ 141-157.**

"Arbitration agreements may be rejected when they are instruments of a criminal enterprise …." *Janvey v. Alguire*, 847 F.3d 231, 246 (5th Cir. 2017) (Higginbotham,

J. concurring). In *Janvey*, as here, the conspirators had complete control over the receivership entities before their scheme finally collapsed, and thus, in the exercise of that control, had the entities execute contracts containing arbitration provisions. *Id.* at 250.

It is well settled that a man cannot contract with himself. This is so because when there is but one contracting party, there cannot be a meeting of the minds. *See, e.g, People's Bank of Butler v. Allen*, 344 Mo. 207, 212, 125 S.W.2d 829, 831-32 (1939). When a contract has been made in such a fashion, the court can look at the legal relations of the maker of the contract, and rule accordingly. *Bobbitt v. Alamo Cas. Co.*, 241 S.W.2d 464, 467 (Tex. Civ. App. 1951). In *Bobbitt,* a man had owned a one-man corporation. Following his death in an altercation arising over a debt owed to the corporation, his widow sought workers compensation. Citing the principle that a man cannot contract with himself, the Court held that he was not an employee of the company. The Court further explained that no court would hear a case where a person sued himself, stating:

> No court would not do so vain a thing as to try a case to determine whether an individual, acting in his capacity as the owner of a one-man corporation, could force himself, in his individual capacity, to carry out what, in reality would be but a resolve of such a supposed plaintiff, but in form only would be a contract of the one-man corporation with its owner.

241 S.W.2d at 467

When the CTC Agreement was executed, there was but one mind involved in the making—Mulligan's. Mulligan also positioned himself to control Criterion. Accordingly, these agreements were not the products of bargaining between independent entities, but were tools of fraud, made amongst companies with joint ownership and control, and now being used to delay the reckoning for their conduct. In these circumstances, applying an equitable doctrine to impose arbitration upon a nonsignatory to the arbitration agreements was an abuse of discretion.

D. The FAA is Reverse-Preempted.

Reverse-preemption of federal law through McCarran-Ferguson, 15 U.S.C. 15 § 1101, *et seq.*, occurs when: 1) the state statute was enacted for the purpose of regulating the business of insurance; 2) the federal statute involved "does not specifically relat[e] 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. 299, 307 (1999). Of these three factors, the only issue in dispute regarding the applicability of the FAA is whether arbitration would impair the Receiver's efforts to marshal the assets of an estate as provided in NRS Chapter 696B. This Court, in an unpublished, and therefore, nonbinding, decision, noted that other courts have found the Receiver's efforts were not part of the regulation of the business of insurance where those efforts involved breach-of-contract and tort claims against several third parties on behalf of the [liquidating insurer], which happens to be in receivership." *Comm'r of Ins. v. Eighth Judicial Dist. Ct.*, 454 P.3d 1260 (Nev. 2019) ("*Milliman*") (citations omitted). Leaving aside the fact that here, Spirit is in receivership *because* of the torts committed by insiders CTC and Criterion and the other RPIs, the analysis of these other courts cannot be reconciled with the U.S. Supreme Court precedent.

1. Nevada's jurisdictional limitations are for the purpose of regulating the business if insurance by protecting the insurer-policyholder relationship.

Nevada's insurance statutes impose jurisdictional limitations on claims relating to the insolvent insurer's estate. NRS 696B.190. The legislature further established that the receivership court has jurisdictions over persons against whom the receivership estate has claims. NRS 696B.200. Nevada also provides that the receiver can recover fraudulent transfers and preference payments to controlling entities, third parties, and insiders, within various time frames with respect to the initiation of the receivership. NRS 692C.402, 696B.410, and 696B.412. These jurisdictional limitations are in keeping with the Nevada Insurance Code's expressly stated purposes of protecting policyholders and providing the state with a comprehensive, modern and adequate body of law, for the effective regulation and supervision of insurance business" transacted in Nevada. NRS 679A.140 (1)(a) and (i). The provisions in the NIC are to be given a liberal construction in order to effect the Code's purpose. NRS 679A.140(2).

A statute regulates the "business of insurance" to the extent it is "aimed at protecting or regulating" the performance of an insurance contract." *United States Dep't of Treasury v. Fabe*, (1993). In *Fabe*, a statute setting the priority of payments was deemed aimed at protecting or regulating" the performance of the insurance contract. The Court found that the state's claim's priority schedule reversed preempted a federal tax priority statute to the extent the state's schedule favored the receivership's administrative costs and policyholder claims, because those priorities protected the insurer-policyholder relationship. The Court stated:

> The Ohio statute is enacted "for the purpose of regulating the business of insurance" to the extent that it serves to ensure that, if possible, policyholders ultimately will receive payment on their claims.

508 U.S. 491, 505-506. Accordingly, state insurance statutes that similarly serve to increase the possibility that policyholders will be paid satisfies the "regulation the business of insurance" requirement. The jurisdictional limitations in NRS 696B satisfy this requirement.

Numerous courts have determined that jurisdictional limitations in insurance liquidation statutes are targeted at protecting the insurer-policyholder relationship. The application of such limitations to cases involving claims against the receivership estate obviously satisfies this requirement. *See, e.g. Davister Corp. v. United Republic Life Insurance Co.,* 152 F.3d 1277, 1280-82 (10th Cir.1998); *Stephens v. Am. Int'l Ins. Co.,* 66 F.3d 41, 43-45 (2d Cir. 1995). However, numerous federal courts have *also* determined that reverse preemption of federal statutes occurs when the claims in question are brought by the Receiver for the insolvent insurer, particularly where, as here, the claims against the third parties include preferential and fraudulent transfers claims. *Covington v. Sun Life of Can. (U.S.) Holdings, Inc.*, No. C-00-069, 2000 U.S. Dist. LEXIS 20902, 2000 WL 33964592 (S.D. Ohio May 17, 2000) (federal removal statute reverse preempted in action by liquidator to invalidate preferential transfer); *Amwest Sur. Ins. Co. v. J.A. Jones Constr. Co.*, 245 F. Supp. 2d 1038 (D. Neb. 2002) (same); and *Wagner v. Amwest Ins. Group (In re Amwest Ins. Group),* 285 B.R. 447 (Bankr. CD. Cal. 2002) (bankruptcy jurisdiction reverse-preempted where insurance liquidator seeks to recover estate property from debtor).

In *Covington, supra*, the Court explained why reverse-preemption applied to statutes that vest jurisdiction in the receivership court:

> By vesting exclusive jurisdiction over all claims relating to insolvent insurance companies in the Franklin County Court of Common Pleas, the State of Ohio aims to protect the relationship between insurer and insured (1) by eliminating the risk of conflicting rulings, piecemeal litigation of claims, and unequal treatment of claimants, all of which are of particular interest to insurance companies and policyholders, who are often relying on policies with the same or similar provisions, (2) by assuring both the insurance company and its policyholders that the insurance company will be liquidated in an organized fashion, and (3) by preventing the unnecessary and wasteful dissipation of the insolvent insurance company's funds that would occur if the Liquidator had to litigate unconnected suits in different forums across the country.

Covington v. Sun Life of Can. (U.S.) Holdings, Inc., Case No. C-2-00-069, 2000 U.S. Dist. LEXIS 20902, at *23-24 (S.D. Ohio May 17, 2000). The jurisdictional limitations here are similarly targeted at protecting the relationship between policyholder and insurer by the same means.

Significantly, Courts have also found that statutes similar to those here reverse-preempted the FAA. See *Donelon v. Shilling*, 2020-00514 (La. 04/27/20) *Donelon v. Shilling*, No. 2019-C-00514, 2020 La. LEXIS 708, at *5 (La. Apr. 27, 2020) (FAA reverse preempted because liquidation statute's express grant of right to bring action in district court confers right to choose forum on Receiver is consistent with protective spirit of Louisiana's insurance laws); *Taylor v. Ernst & Young*, 130 Ohio St. 3d 411, 419 (Ohio 2011) ("The fact that any judgments in favor of the liquidator accrue to the benefit of insureds, policyholders, and creditors means that the liquidator's unique role is one of public protection….").

The protective purpose of the jurisdictional limitations are further heightened when considered with the creation of jurisdiction in the receivership court over the insolvent's insurers insiders and their transactions with the insolvent insurer. *See* NRS 696B.200. Such jurisdiction applies to "[p]ast or present officers, managers, trustees, directors, organizers and promoters of the insurer, and other persons in positions of similar responsibility with the insurer." NRS 696B 200(1)(c). This creation of jurisdiction establishes the clear intent of the legislature that claims against insiders be heard in the receivership court, to allow for a more organized marshalling of assets.

Indeed, the fact that CTC and Criterions were controlling persons, managers, and/or organizers of Spirit presents a significant distinction between this matter, and the facts in *Milliman*, where the parties seeking arbitration were mere actuaries. The District Court, however, apparently gave no consideration to this material distinction.

2. The Arbitration Orders invalidate and impair the Receiver's rights under Chapter 696B, and thus, impair Nevada's regulation of insurance.

Reverse preemption is appropriate where the application of a federal law "invalidates, supercedes, or impairs" the state regulation of insurance. 15 U.S.C. § 1012(b). The Arbitration Orders here have invalidated and impaired the Receiver's ability to marshal Spirit's assets. As noted above, the Receiver has no authority to initiate an arbitration. Accordingly, the application of the FAA wholly prevents the Receiver from seeking recovery of funds from CTC and Criterion, including the recovery of preferential and fraudulent transfers pursuant to NRS 692C.402, 696B.410, and 696B.412. That impairment is exacerbated by the District Court's imposition of a stay against all other defendants.

Furthermore, even if the Receiver did have the authority to initiate arbitration proceedings, her rights and ability to pursue her duties as Receiver have been impaired. First, the Receiver's ability to contribute to Nevada's body of insurance law will be impaired, as the claims against the insurance licensees CTC and Criterion for the preferential and fraudulent transfers claims will not occur within the Nevada court systems. Moreover, arbitrators who are not required to follow Nevada law will determine the scope of pretrial discovery, creating the possibly that the Receiver will be hampered in presenting her claims. Such lack of assurance that Nevada law will govern the procedural aspects of the Receiver's pursuit of Spirit's assets prevents any assurance to the policyholders that liquidation will proceed in an organized fashion. Finally, application of the FAA will require the Receiver to engage in wasteful and unnecessary dissipation of Spirit's limited assets by litigating suits in in different forums across the country.

The Nevada legislature adopted the Nevada Insurance Code for the expressly stated purpose of ensuring that Nevada had a body of Law as expected by McCarren Ferguson. NRS 679A.140(1)(i) (citing to McCarran Ferguson).

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING ALL CLAIMS AGAINST CTC AND CRITERION

Even if arbitration could be imposed on the Receiver, dismissal of all claims against CTC and Criterion was an abuse of discretion as the claims arising from duties that arose as a matter of law were not within the scope of the arbitrations.

CTC contends that because the CTC Agreement used the language, "arise out of and relating to" the agreement, any and all claims must necessarily be within the scope of the provision. But courts have long held that claims that are based on breaches of duties that arise by virtue of law are not included within the scope of contractual arbitration provisions without explicit inclusion. As the Supreme Court of Delaware stated:

> When contracting parties provide for the arbitration of claims in their agreement, the arbitration provision, no matter how broadly drafted, can reach only the claims within the scope of the contract, and the fiduciary duty claims here are beyond that scope.

Parfi Holding v. Mirror Image, 817 A.2d 149, 1516 (Del. 2002). Accordingly, claims that do not require a reference to the terms of the contracts do not "arise out of or relate to" the agreement. *Seifert v. U.S. Home Corporation,* 750 So. 2d 633 (Fla. 1999). Fiduciary duty claims do not arise out of contract. *Gibbs v. Lowe's Cos.*, No. 6:16-cv-00932-AA, 2017 U.S. Dist. LEXIS 48680, at *19 (D. Or. Mar. 29, 2017).

Here, CTC's status as a controlling person is sufficient to give rise to the fiduciary duties. *See* NRS 680A.320(1) (a) and (3) and NRS 696B 410 and 692B.412. Similarly, Criterion, as an entity that was similarly controlled, at least at times, by CTC and/or Mulligan, was therefore an affiliate of Spirit, and therefore, similarly had fiduciary obligations imposed by statute. *Id.* Accordingly, the breach of fiduciary duty claims are not within the scope of the CTC and Criterion Agreements. Moreover, the control over Spirit that CTC had presents a particularly significant distinction between this matter, and the facts in the *Milliman* case.

Similarly, the Receiver's fifteenth through eighteenths causes of action alleged the Receiver's right to recover, under various Nevada statutes, including NRS 292C.402, NRS 696B.410, and 696B.412 for transfers while within certain time periods of the filing or the Receivership Petition, or with knowledge of Spirit's insolvency. These obligations are not dependent on the contractual obligations, but instead, arise by operation of law under the respective statutes. Reference to the CTC and Criterion Agreements is unnecessary to resolve these claims.

As the above claims are beyond the scope of either arbitration provisions, the District Court abused its discretion in granting the motions to compel as to these causes of action. And because there was never any contractual agreement between Spirit and CTC of Hawaii, it was an abuse of discretion to grant CTC's motion as to that entity.

III. THE RECEIVER HAS NO ADEQUATE, PLAIN AND SPEEDY REMEDY.

This Court has previously held that because a party can appeal the grant of arbitration following the issuance of a final judgment in that arbitration, an adequate remedy exists. However, an eventual appeal cannot not provide an adequate remedy here.

Whether an appeal provides an adequate remedy must be determined in each particular case, and the court should consider a number of factors, including "the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court of Nev.*, 123 Nev. 468, 475, 168 P.3d 731, 737 (2007).

First, given that the Receiver has no authority to initiate arbitration, no eventual appeal can occur. Next, even if there could be a final judgment eventually, this remedy would be far from speedy. Indeed, in order to reach a final judgment, not only would the two separate appeals have to be concluded, but also, the trial of the claims against the other defendants will have to conclude. Thus, the Receiver's right to appeal would arrive until arbitrations of the dozen and a half or so claims against CTC and Criterions have been fully resolved in arbitration. And then, once those two arbitrations are complete, the claims of all the remaining defendants must be litigated. Accordingly, the time frame here for an eventual appeal is considerably longer.

Throughout this time, the Receiver's rights in her position will be impaired as set forth in Part I D above. Throughout this time, the liquidation proceedings, including the claims payment process, will be necessarily, extensively delayed. This Court has previously recognized that where a case is in the preliminary stages below, as is true here, an eventual appeal would not offer an adequate remedy. *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court of Nev.*, 128 Nev. 723, 730, 291 P.3d 128, 133 (2012)("Since the district court proceedings are merely in the preliminary stages, neither judicial economy nor the parties' interests would be served by awaiting a future appeal."). This is particularly true here, where the Receiver, unlike an ordinary plaintiff, is not seeking recovery for her own behalf, but on behalf of the policyholders and their tort victims. This court has previously determined that where the issues to be resolved in writ proceedings implicate the concerns of more than the just the parties to the existing case, early review is appropriate. *D.R. Horton, Inc. v. supra* (noting the existence of many homeowner cases for which the writ issues would be relevant); *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court of Nev supra,* (same).

An eventual appeal does not offer an adequate, plain and speedy remedy to the Receiver. Accordingly, this court should resolve the issues raised in these proceedings.

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 5861 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 25,1 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 filed by Real Parties in Interest CTC Transportation Insurance Services of Missouri, LLC; CTC Transportation Insurance Services LLC; CTC Transportation Insurance Services of Hawaii LLC, and Criterion Claims Solutions of Omaha*** 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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via email on October 13, 2021 to Dept13lc@clarkcountycourts.us

/s/ Andrea Lee Rosehill
An Employee of Greenberg Traurig LLP