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IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

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CHEMEON SURFACE TECHNOLOGY, LLC, A NEVADA LIMITED LIABILITY COMPANY; DEAN MEILING; AND MADYLON MEILING,

Appellants,

v.

MARC HARRIS; JEFF MACKINEN; JERRY ALEXANDER; MARTY COHEN; CHARLES DELLE DONNE; RICHARD SCOTT ELDER; ARNIE GETTELSON; JERRY HOLLANDER; ELIAS KASOUF; DON MARSHALL; JERRY MCDONALD; RON MELANSON; KEN MILES; MARVIN MILLS; MARC MORIN; ROBERT PARKER; DENNIS POULSEN; RON SMITH; ANDREW TANNER; CRAIG TIEFENTHALER; VIRGINIA WALLACE; AND GERALD WOLFE,

Respondents.

Supreme Court Case No. 75370

District Court Case No. 17-CV-0100

APPELLANTS' PETITION FOR EN BANC RECONSIDERATION

Appellants CHEMEON Surface Technology, LLC, Dean Meiling, and Madylon Meiling, by and through their undersigned counsel, Holland & Hart, LLP, file this Petition for En Banc Reconsideration pursuant to Nevada Rule of Appellate Procedure 40A.

Docket 75370 Document 2019-38874

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POINTS & AUTHORITIES

I. INTRODUCTION

This Appeal concerns the denial of a motion for preliminary injunction filed by Appellants CHEMEON Surface Technology, LLC, Dean Meiling, and Madylon Meiling (collectively the "Meilings"), which sought to protect the jurisdiction and orders of the Ninth Judicial District Court issued in a 2013 receivership action, Case No. 13-CV-0114 (Dept. II) (the "Receivership Action"). J.A. 0182-0204. Further, the Meilings brought this action seeking to protect the District Court's appointed Receiver and their own First Amendment petitioning activities before the Receivership Court. The Meilings obtained the assets of Metalast International, LLC ("Metalast"), by way of a judicially approved credit bid sale in the Receivership Action. J.A. 0229-0238. Respondents, who were investors and members of Metalast, sought to re-litigate, undermine, attack, and substantively set aside the findings and orders issued by the District Court in the Receivership Action when they filed *Alexander v. Meiling*, Case No. 3:16-cv-00572-MMD-CBC (the "Federal Action"), which alleges that the Receivership Action and the orders issued therein were unlawful. J.A. 0252-0275. The Members seek relief from the United States District Court that will impact and affect the title of those assets, as well as seeking alleged damages in direct contradiction the state court's prior findings and orders. The Meilings' motion for

preliminary injunction sought to protect the orders issued in the Receivership Action, including the order approving the credit bid process and sale, by showing that the Members' Federal Action violated the prior exclusive jurisdiction doctrine. J.A. 0021-0023. The District Court denied the Meilings' motion for preliminary injunction, finding, in part, that because the Federal Action sought money damages, the claims were in personam and the Federal Action was not barred by the prior exclusive jurisdiction doctrine. J.A. 0684-0694.

On July 24, 2019, this Court's Panel affirmed the District Court's ruling. The Panel held that the "fraud" claims alleged in the Federal Action were strictly in personam, citing *Markham v. Allen*, 326 U.S. 490, 495 (1946). Additionally, the Panel held that because the District Court terminated the Receivership, the District Court no longer had jurisdiction over the assets of Metalast and the prior exclusive jurisdiction doctrine was inapplicable. Finally, the Panel held that because the prior exclusive jurisdiction doctrine was inapplicable, no other legal basis existed for the issuing of an injunction of the Federal Action.

The Meilings timely filed a Petition for Panel Rehearing on August 12, 2019, pursuant to Nevada Rule of Appellate Procedure 40. The Petition for Panel Rehearing argued that the Panel's reliance on *Markham* in holding that the Federal Action alleges strictly in personam claims was misplaced as the United States Supreme Court had explicitly overruled the portion of *Markham* relied on by the Panel. Pet. for Panel Reh'g 4-5. Additionally, the Petition argued that the

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Panel misapplied *Chapman v. Deutsche Bank National Trust*, 129 Nev. 314, 317, 302 P.3d 1103, 1105 (2013), and overlooked the nature of the claims in the Federal Action in finding that those claims are strictly in personam. Pet. for Panel Reh'g 5-9. Further, the Meilings argued that the Panel overlooked *Barton v. Barbour*, 104 U.S. 126 (1881), as the Federal Action seeks to hold the Ninth Judicial District Court's Receiver liable for actions performed within the scope of receiver's duties and the Members failed to obtain leave before filing the suit. Pet. for Panel Reh'g 9-12. Finally, the Meilings argued that because the Federal Action asserts at a minimum quasi in rem claims and the Federal Action violates *Barton*, the Panel errored in holding that termination of the Receivership Action warranted denying the motion for preliminary injunction. *Id.* at 12-15.

On September 3, 2019, the Panel issued its Order Denying Rehearing. The Panel denied rehearing on the grounds that *Barton* was raised by the Meilings in their Reply Brief for the first time and that this case is distinguishable from *Bertsch v. Eighth Judicial District Court*, 133 Nev. 240, 396 P.3d 769 (2017), where this Court considered the *Barton* doctrine raised for the first time in a reply brief. Order Denying Reh'g 1-2. Pursuant to NRAP 40A(b), the filing of this Petition for En Banc Reconsideration is proper.[1]

The Meilings file this Petition for En Banc Reconsideration on the grounds

[1] The Meilings' Opening Brief cited to NRS 32.325(2), which bars any suit against a receiver without prior approval of the state district court that appointed the receiver. Opening Br. 58 n.9. NRS 32.325(2) is the codification of the *Barton* doctrine.

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that reconsideration by the full Court is necessary to maintain uniformity of decisions by this Court and that this case involves substantial public policy issues. The Panel's Order of Affirmance deviates from this Court's previous rulings on the prior exclusive jurisdiction doctrine. Specifically, the Panel's decision cannot be reconciled with this Court's decision in *Chapman*, 129 Nev. 314, 302 P.3d 1103. Additionally, the district court's order and the Panel's Affirmance creates substantial public policy issues, and both eviscerates the finality of receivership proceedings and encourages litigants unhappy with the outcome of a Nevada receivership proceeding to raise the same baseless "fraud" claims as Respondents do in their Federal Action. The continued possibility of such baseless suits will discourage investors from initiating and using Nevada receivership proceedings, prevent qualified persons from serving as receivers in Nevada, and dissuade investors from buying assets at Nevada court sanctioned sales, all in fear of being subject to the same type of suit as that filed the Members. Accordingly, the full Court's reconsideration of the Panel's decision is warranted.

II. APPLICABLE STANDARD

Nevada Rule of Appellate Procedure 40A(c) provides the following requirements for the contents of a petition for en banc reconsideration:

> A petition based on grounds that full court reconsideration is necessary to secure and maintain uniformity of the decisions of the Supreme Court or Court of Appeals shall demonstrate that the panel's decision is contrary to prior, published opinions of the Supreme Court or Court of Appeals and

shall include specific citations to those cases. If the petition is based on grounds that the proceeding involves a substantial precedential, constitutional or public policy issue, the petition shall concisely set forth the issue, shall specify the nature of the issue, and shall demonstrate the impact of the panel's decision beyond the litigants involved.

III. LEGAL ARGUMENTS

A. The Panel's Decision is Contrary to *Chapman* & Disregards this Court's Rulings on Quasi in Rem Suits

The Panel's decision conflicts with this Court's published opinion in *Chapman v. Deutsche Bank National Trust* and the full Court's reconsideration is warranted to secure uniformity of decisions from the Nevada Supreme Court. In *Chapman*, this Court held that a quiet title action is in rem or quasi in rem as such a suit affects the interests of property and "its essential purpose is to establish superiority of title in property." 129 Nev. at 319, 302 P.3d at 1106 (citing *Arndt v. Griggs*, 134 U.S. 316, 321 (1890)). This Court defined an in rem proceeding as "'one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants…." *Chapman*, 129 Nev. at 318, 302 P.3d 1106 (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877), *overruled in part on other grounds by Shaffer v. Heitner*, 433 U.S. 186, 205-06 (1977)). "Quasi in rem proceedings are 'a halfway house between in rem and in personam jurisdiction,' because the 'action is not really against the property' but rather is used 'to determine rights in certain property.'" *Chapman*, 129 Nev. at 318, 302 P.3d at 1106 (quoting 4A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1070 (3d ed. 2002)). This Court in *Chapman*

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held that a quiet title action is in rem or quasi in rem because it ***affects*** property based on another published opinion:

> Although we decided *Robinson* more than 100 years ago, its holding that quiet title affects property and thus is in rem (or quasi in rem) remains good law. *See Cent. Pac. R.R. Co.*, 10 Nev. at 80 ("A judgment in rem is founded on a proceeding not as against the person as such, but against the thing or subject-matter itself whose state or condition is to be determined." (internal quotations omitted)).

129 Nev. at 319, 302 P.3d at 1106 (citing *Robinson v. Kind*, 23 Nev. 330, 343, 47 P. 977, 978-79 (1987)).

The Panel's decision that a court can "adjudicate rights" in property and that such a suit is "strictly in personam" is contrary to *Chapman*. *Chapman* and the cases its rests on establishes the exact opposite. Thus, the Panel's decision that the Members' Federal Action claims are "strictly in personam" is in direct contract to prior, published opinions from this Court and reconsideration by the full Court is necessary.

Pursuant to *Chapman*, the Members' Federal Action is at a minimum quasi in rem. The Members' Federal Action includes a claim for conversion, which like a quiet title action, relates to and seeks to affect the title of property. J.A. 0273-0274. *See Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000) ("Conversion is 'a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights.'") (quoting

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Wantz v. Redfield, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958)). In order for the Members to prevail on their conversion claim in the Federal Action, they will be required to prove that their title and interest in Metalast's assets is currently superior to that of the Meilings. According to *Chapman*, the Members' Federal Action should be classified as in rem or quasi in rem; however, the Panel classified this action as "strictly in personam," thus conflicting with *Chapman*. In addition to the claim for conversion, the Panel's classification of the Members' other claims as in personam is in direct contrast with *Chapman* as the entire Federal Action seeks to litigate, disturb, and affect the Meilings' interest in the assets purchased at the credit bid sale conducted by in the District Court in the Receivership Action. The Panel's decision that a claim can adjudicate and affect rights in property while being considered in personam clashes with *Chapman*.

The Panel's decision essentially eliminates quasi in rem from the prior exclusive jurisdiction analysis, which again conflicts with *Chapman*. *Chapman* holds that when a second suit is not strictly in personam (i.e. in rem or quasi in rem), the jurisdiction of the second court must yield to the jurisdiction of the first court. 129 Nev. at 317, 302 P.3d at 1105. *Chapman* defined a quasi in rem suit as one that "is used to ***determine*** rights in certain property." *Id.* at 318, 302 P.3d at 1106 (quotation marks and citation omitted) (emphasis added). One synonym for adjudicate is determine. *See Adjudicate*, Thesaurus.com, https://www.thesaurus.com/browse/adjudicate (last visited Sep. 12, 2019). The

Panel's decision conflicts with *Chapman* as it defines an in personam claim as one that can determine rights in property, whereas *Chapman* defined a quasi in rem claim as one that determines rights in property. The Panel's decision to classify in personam claims as those that are used to determine rights in property essentially eliminates quasi in rem suits and *Chapman*'s definition of such suits, thus the full Court's reconsideration is warranted to maintain uniformity of the decisions of this Court. NRAP 40A(c).

B. The Members' Federal Action Encourages Litigants to Disregard the Finality of Receivership Actions and to Assert Claims Against Parties that Participate in Receivership Proceedings

The Members' Federal Action and the Panel's affirmance of the District Court's order denying the motion for preliminary injunction will result in litigants filing similar "fraud actions" when they are dissatisfied with the results of a Nevada receivership action. Instead of participating in a receivership action and appealing the rulings entered in such a case, an investor of a business that is placed into the hands of a neutral third-party receiver will purposefully decline to participate in that action, instead deciding to sue everyone involved in that action in a separate court for alleged "fraud" claims if in anyway dissatisfied with the results.

The factual pattern displayed here by the Members will be repeated by other dissatisfied investors whose investments in a business were impacted by a receiver. Metalast was duly placed into a receivership without appeal of such a

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finding as it had no ability to pay its obligations, including payroll to its employees and had secured creditors owed in excess of $9 million. J.A. 0291. Once the Receiver was appointed, he found that approximately 1,000 members of Metalast had contributed more than $95 million, the accumulated losses exceeded $119 million, and the accounts payable to its vendors, landlord, suppliers, and employees totaled nearly $1 million. J.A. 0099. The Receiver reported that there was evidence of self-dealing by the executives of Metalast in the form of excessive benefits, large travel and entertainment expenses, and reimbursements. *Id.*

Based on Metalast's losses and poor management, the District Court found that establishing procedures to bid on the sale of Metalast's remaining assets was "in the best interests of the Company, its creditors, and all parties of interest," including the other members. J.A. 0129. Metalast's known members were notified of the sale procedures and invited to submit bids or objections. J.A. 0130. The District Court held that the receiver in fact had "notified known members" of the sale. J.A. 0143. Finally, after a full hearing and consideration of all objections, the District Court held that selling of certain of Metalast's assets to CHEMEON was "in the best interest of the receivership estate." J.A. 0148-0149.

Over two and half years after the District Court approved sale, the Members filed the Federal Action against the Meilings and every other party involved in the Receivership Action, including the Meilings' former counsel Jan

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Chubb, the Receiver James Proctor, and his company Meridian Advantage. J.A. 0252-0275. The crux of the Federal Action is that the Receiver James Proctor, the Meilings and their counsel engaged in a "fraudulent scheme" to take the assets of Metalast through the Receivership Action. J.A. 0261. The Members never appealed any ruling from the Receivership Action.

The prior exclusive jurisdiction exists for these types of suits; however, the non-application of the doctrine in this suit will only encourage parties to sue parties who initiate Nevada receivership proceedings, the attorney's representing those parties, and the appointing court's receiver. Accordingly, there will never be any finality to Nevada receivership proceedings as dissatisfied parties will sue for the alleged "fraud" to recover assets in other courts throughout the country. Further, parties will be discouraged to stop initiating Nevada receivership proceedings to protect their investments, even when their investment is in danger of being lost. *See* NRS 32.010(1), (6). Instead of an incentive to participate in and use applicable Nevada receivership proceedings, another investor party can simply monitor the Nevada receivership proceeding, see the results, then sue that party in another forum to recover the assets or its perceived value of the disposed of assets. Additionally, Nevada district courts will be unable to find or protect receivers or other parties willing to participate in Nevada receivership proceedings as they will be rightfully afraid of being sued in another forum for their involvement in a Nevada receivership proceeding. Finally, without

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significant post-sale protections for prospective purchasers of Nevada Receivership assets, they will have a strong disincentive to participate in any court sanctioned sale as they may find themselves the target of meritless litigation by dissatisfied non-participating investors of the sold company. Likewise, should any party be willing to purchase assets at a court sanctioned receivership sale, the status of the title of those assets and their value will forever be in question as a dissatisfied investor could sue the buyer for their alleged title and value of such assets. This proceeding and the precedent established is likely to affect businesses, investors, potential receivers, and parties willing to purchase assets at court sanctioned sales in Nevada.[2]

The public policy issues in stopping litigants from undermining the finality of cases involving the disposition of property rights pursuant to the prior exclusive jurisdiction doctrine has been fully embraced by federal courts. In State Engineer, the Ninth Circuit Court of Appeals applied the prior exclusive

[2] One of the Members, Marc Harris, has filed a second lawsuit, originally in California state court, attacking the Orders entered in the Receivership Action, seeking the assets of Metalast be returned to the Members, and seeking damages against the Receiver, the Meilings, and the Meilings' former counsel for their participation in the Receivership Action. The second lawsuit attacking the Receivership Action is captioned *Harris v. Meiling*, Case No.: 3:19-cv-00339-MMD-CBC, and has been transferred to the United States District Court for the District of Nevada. Pursuant to NRS 41.130, the Meilings request this Court take judicial notice of *Harris v. Meiling*. The Meilings and the District Court's Receiver, James Proctor, have filed *Proctor v. Harris*, Case No. 19CV0150, in the Ninth Judicial District Court seeking to stop Mr. Harris' second lawsuit seeking to undo the Receivership Action and obtain the assets of Metalast by attacking the Receivership Court's Orders and jurisdiction. Pursuant to NRS 41.130, the Meilings request that this Court take judicial notice of *Proctor v. Harris*. These lawsuits disregarding the finality of receivership proceedings and suing to recover the assets sold at court's sanctioned sales will continue without this Court's intervention.

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jurisdiction doctrine to a final decree entered seventy years before the case before it. *State Eng'r of State of Nev. v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nev.*, 339 F.3d 804, 809 (9th Cir. 2003)). The Ninth Circuit stated, "[b]ecause this is not a case where the court hearing the second suit can adjudicate personal claims to property without disturbing the first court's jurisdiction over the res, see *Kline*, 260 U.S. at 230, 43 S.Ct. 79, the contempt proceeding cannot be termed 'strictly in personam[.]'" *State Eng'r of State of Nevada*, 339 F.3d at 811 (quoting *Penn. Gen. Cas. Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935)). The court noted that contempt proceedings are in personam, but concluded that because the parties' interest in the property was the basis of the suit, the suit was quasi in rem and the prior exclusive jurisdiction applied. *State Eng'r of State of Nevada*, 339 F.3d at 811. Based on the policy goal of promoting finality in decisions, former Magistrate Judge Cooke stayed the Federal Action based on the belief that the Members' claims were in rem or quasi in rem. J.A. 0653-0656. The policy expressed by the federal courts in promoting finality and preventing dissatisfied parties from attempting to undermine courts in other jurisdiction is consistent with this Court's policy and will protect Nevada business and Nevada receivership proceedings.

The full Court has the authority to stop such meritless suits from going forward and impacting Nevada businesses by rightfully applying the prior exclusive jurisdiction doctrine to this case. Parties who believe improper conduct

has occurred in a receivership proceeding possess the ability to challenge those proceedings in the appointing court. The full Court should reconsider the Panel's decision and protect the District Court's Orders and jurisdiction as well as Nevada's receivership proceedings.

IV. CONCLUSION

For the above reasons, the Meilings respectfully request that the full Court grant this Petition for En Banc Reconsideration.

DATED this 17th day of September, 2019.

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 40 AND 40A

1. I hereby certify that this petition for rehearing/reconsideration or answer 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:

[X] It has been prepared in a proportionally spaced typeface using Times New Roman in font size of 14; or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:
[X] Proportionately spaced, has a typeface of 14 points or more, and contains 3768 words; or
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[ ] Does not exceed ___ pages.

DATED this 17th day of September, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Holland & Hart, LLP, and that on the 17th day of September, 2019, I caused to be served a true and correct copy of the foregoing **APPELLANTS' PETITION FOR EN BANC RECONSIDERATION** in the following manner:

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