No. _____

IN THE

Supreme Court of the United States

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.,

Applicant,

v.

CITIZENS OF HUMANITY, LLC ET AL.,

Respondents.

APPLICATION TO THE HON. NEIL M. GORSUCH FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE NEBRASKA SUPREME COURT

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Applicant Applied Underwriters Captive Risk Assurance Company ("Applicant") hereby moves for an extension of time of 45 days, up to and including August 19, 2018, for the filing of a petition for a writ of certiorari to review the decision of the Nebraska Supreme Court dated April 6, 2018 (attached as Appendix A). The jurisdiction of this Court is based on 28 U.S.C. § 1257.

1. The date within which a petition for a writ of certiorari would be due, if not extended, is July 5, 2018. This application is being filed more than 10 days before that date.

2. This case presents important and recurring questions of federal law that have divided federal and state courts of appeals regarding the effect of state anti-arbitration rules on arbitration agreements under the Federal Arbitration Act

("FAA"). In particular, this case concerns the enforceability of an arbitration provision in a contractual agreement between sophisticated companies. Respondents Citizens of Humanity, LLC and CM Laundry, LLC ("Respondents") entered into a contract with Applicant. The contract is known as the Reinsurance Participation Agreement ("RPA" or "Agreement"). The RPA allowed Respondents to enter into a loss-sensitive workers' compensation program, in which workers' compensation insurance policies were issued by Applicant and affiliated companies.

3. The RPA explicitly requires that "[a]ll disputes arising with respect to any provision of th[e] Agreement" shall be arbitrated. *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co.*, 909 N.W.2d 614, 622 (Neb. 2018). The RPA also states that any question regarding arbitrability should be resolved by the arbitrator in the first instance. *Id.* Separately, the RPA contains a general choice-of-law provision referring to Nebraska law. *Id.* The general choice-of-law provision does not appear in the arbitration provision. A Nebraska arbitration statute, the Nebraska Uniform Arbitration Act ("NUAA"), prohibits the enforcement of arbitration provisions in "any agreement concerning or relating to an insurance policy." Neb. Rev. Stat. § 25-2602.01(f)(4).

4. In February 2015, Respondents filed a complaint against Applicant and related parties in the Superior Court of California, County of Los Angeles, alleging a variety of claims. All of the claims related to the Agreement. Complaint, *Citizens of Humanity v. Applied Underwriters, Inc.*, BC 571593 (Cal. Super. Ct. Feb.

11, 2015). On April 11, 2016, however, Respondents dismissed Applicant from the California action.

5. The next day, Respondents filed suit against Applicant in Nebraska state court—while continuing their litigation against the other parties related to Applicant in California state court. Complaint, *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co.*, No. CI 16-3070 (Neb. Dist. Ct., Apr. 12, 2016). Respondents subsequently filed an amended complaint against Applicant in the Nebraska action. Am. Complaint, *Citizens of Humanity*, No. CI 16-3070 (July 25, 2016).

6. Pursuant to the Agreement, Applicant filed a motion to dismiss or to stay this action pending arbitration. Motion, *Citizens of Humanity*, No. CI 16-3070 (Aug. 4, 2016).

7. On January 19, 2017, the Nebraska court granted Applicant's motion, and stayed the action pending arbitration of the parties' dispute. *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co., Inc.*, No. CI 16-3070, 2017 WL 9251551 (Neb. Dist. Ct. Jan. 19, 2017), *rev'd*, 909 N.W.2d 614 (Neb. 2018). The court found that the FAA governed because the parties "are organized under and have their principal places of business in different states" and the "financial transactions involved . . . constitute commerce and implicate the FAA under the expansive reach intended by Congress." *Id.* at *4. Relying on *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), the court concluded that, "[i]n light of the arbitration agreement's broad and sweeping language, along with the

incorporation of the [American Arbitration Association] rules," the parties "clearly and unmistakably delegated threshold issues of arbitrability to an arbitrator." *Citizens of Humanity*, 2017 WL 9251551, at *5. The court also determined that Respondents had failed to specifically challenge the Agreement's delegation provision. *Id.* at *7-8.

8. Respondents appealed this case to the Nebraska Court of Appeals and asked that court to bypass review and transfer the case to the Nebraska Supreme Court. Brief of Appellants, *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co.*, No. A-17-000178 (Neb. Ct. App. May 22, 2017); Petition to Bypass, *Citizens of Humanity*, No. A-17-000178 (May 22, 2017). The Nebraska Court of Appeals granted Respondents' petition to bypass. Order, *Citizens of Humanity*, No. A-17-000178 (May 26, 2017).

9. On April 6, 2018, the Nebraska Supreme Court reversed the Nebraska District Court's decision. *Citizens of Humanity*, 909 N.W.2d 614. Applying the general choice-of-law provision in the Agreement, the court concluded that (1) Nebraska law, including its anti-arbitration rule, applies to the arbitration provision; (2) another federal statute (the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq*.) allows Nebraska's anti-arbitration law to "reverse preempt" the FAA and render it inapplicable; and (3) the contractual arbitration provision's delegation of questions of arbitrability is unenforceable. The court thus rejected Applicant's argument that, under *Mastrobuono v. Shearson Lehman Hutton, Inc*, 514 U.S. 52 (1995), the arbitration provision should be enforced. *See* Appellee's Brief, *Citizens of*

Humanity, No. A-17-000178 (June 21, 2017) ("Appellee's Brief"), at 20-25. *Mastrobuono*, which this Court reaffirmed and applied in *Preston v. Ferrer*, 552 U.S. 346 (2008), established that, where a contract contains a general choice-of-law clause and an arbitration provision, the choice-of-law clause "encompass[es] substantive principles that [the chosen state's courts] would apply, but not . . . special rules limiting the authority of arbitrators." *Mastrobuono*, 514 U.S. at 64. Based on *Mastrobuono*, Applicant argued that the parties' choice of Nebraska law "only sets forth an agreement to apply Nebraska law to substantive claims, but not rules limiting arbitration." Appellee's Brief at 23. In concluding that Nebraska's anti-arbitration statute barred enforcement of the arbitration agreement, the Nebraska Supreme Court also rejected Applicant's argument, based on *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960), that Nebraska's anti-arbitration statute could not be given extraterritorial effect and should not govern a California contract. *See* Appellee's Brief at 26-32.

10. The Nebraska Supreme Court further found that the question of whether the dispute between Applicant and Respondents was arbitrable was for the court to decide, not for the arbitrator, despite the Agreement's express delegation of questions of arbitrability to an arbitrator. *See Citizens of Humanity*, 909 N.W.2d at 627-31. The court thus rejected Applicant's argument that this Court's decision in *Rent-A-Center* required the court to enforce the delegation clause. *Rent-A-Center* established that, where an agreement includes a delegation clause, a court may determine questions of arbitrability only if the party opposing arbitration has

specifically challenged the delegation provision. *See Citizens of Humanity*, 909 N.W.2d at 629. The Court held that *Rent-A-Center* did not apply because Respondents' arguments for invalidating the arbitration agreement as a whole constituted "a sufficiently specific challenge to the validity of the delegation clause." *Citizens of Humanity*, 909 N.W.2d at 630.

11. This case presents legal questions of substantial importance regarding the scope of the FAA. Those questions implicate multiple conflicts of authority among appellate courts. By applying the general choice-of-law provision in the RPA to invalidate the arbitration agreement, the Nebraska Supreme Court undermined the FAA and contravened this Court's decision in *Mastrobuono*. The Nebraska Supreme Court violated *Mastrobuono*'s command that state anti-arbitration rules should not be read into arbitration agreements merely by virtue of a general choice-of-law provision. 514 U.S. at 64. The Nebraska Supreme Court's holding, and the holding of the California Court of Appeal in *Citizens of Humanity v. Applied Underwriters, Inc.*, 226 Cal. Rptr. 3d 1 (Ca. Ct. App. 2017), *review denied* (Mar. 14, 2018), create a clear conflict with numerous appellate courts, including multiple federal courts of appeal. *See, e.g.*, *Hudson v. ConAgra Poultry Co.*, 484 F.3d 496, 499-500 (8th Cir. 2007); *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 709-12 (6th Cir. 2005), *abrogated on other grounds by Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 341-43 (5th Cir. 2004); *Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1269-70 (9th Cir. 2002). In *Hudson v. ConAgra Poultry Co.*, for example, the

Eighth Circuit refused to apply an Arkansas law barring arbitration of tort claims based on a contract's general choice-of-law provision incorporating Arkansas law. 484 F.3d at 499-503. In so holding, the Eighth Circuit relied on *Mastrobuono*. It reasoned that this Court's admonishment "to interpret 'any doubts concerning the scope of arbitrable issues' under the contract 'in favor of arbitration'" required it to "give the direct statement of the parties' intent in the arbitration provision greater weight than the indirect insinuation of a contrary intent that arguably arises from the choice-of-law provision." *Id.* at 503 (citation omitted). That holding squarely conflicts with the Nebraska Supreme Court's conclusion in this case.

12. Further, in deciding the question of whether the parties' dispute should be arbitrated, rather than allowing the arbitrator to address issues of arbitrability, the Nebraska Supreme Court's decision ran afoul of yet another of this Court's FAA precedents: *Rent-A-Center*. That holding, too, is in tension with precedent from multiple courts of appeal. *See, e.g.*, *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1146-49 (11th Cir. 2015); *see also Lefoldt v. Horne, LLP*, 853 F.3d 804 (5th Cir. 2017), *as revised* (Apr. 12, 2017).

13. The Nebraska Supreme Court's holdings evince a clear hostility to arbitration and are in conflict with this Court's precedent, as well as with the FAA's "federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)—as is the Nebraska Supreme Court's determination that the McCarran-Ferguson Act necessarily trumps the FAA in this case.

14. Applicant's Counsel of Record in this case, Clifford M. Sloan, became involved in the case only recently. He requires additional time to research the extensive factual record and complex legal issues presented in order to prepare a petition that fully addresses the important questions raised by the decision below.

15. Furthermore, Mr. Sloan must become familiar with an extensive body of case law concerning this very agreement, as numerous policyholders have sought to evade applicability of the explicit arbitration provision. Federal courts of appeals have divided on the enforcement of this provision. *Compare, e.g.*, *S. Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co.*, 840 F.3d 138 (3d Cir. 2016) (enforcing the arbitration provision in the RPA); *Milan Express Co. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 590 F. App'x. 482 (6th Cir. 2014) (same); *with Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 867 F.3d 449 (4th Cir. 2017) (refusing to enforce the arbitration provision), *cert. denied*, 138 S. Ct. 926 (2018). Indeed, the California Court of Appeal recently took sides in this Circuit split, agreeing with the Fourth Circuit and disagreeing with the Third and Sixth Circuits. *See Citizens of Humanity*, 226 Cal. Rptr. 3d at 821 ("Section 25-2602.01(f) of the NUAA applies to the RPA and renders the arbitration provision contained in the RPA unenforceable."). The California Court of Appeal's decision, moreover, involves not only the same Agreement, but the same dispute with the same Respondents. Further, as previously noted, Applicant initially was included as a defendant in the California litigation. Like the California Court of Appeal and the Fourth Circuit,

and unlike the Third and Sixth Circuits, the Nebraska Supreme Court concluded that the RPA's arbitration provision is invalid. *Citizens of Humanity*, 909 N.W.2d at 633.

16. In addition, Mr. Sloan has substantial existing obligations in advance of and near the current due date of the petition, including in cases before this Court. Among other responsibilities, Mr. Sloan is counsel of record for the petitioner in *Five Star Senior Living Inc. v. Lefevre*, No. 17-1470 (docketed Apr. 25, 2018), for which a certiorari-stage reply brief will be filed on or before June 29, 2018; counsel for petitioner in *Segovia v. United States*, No. 17-1463 (docketed Apr. 23, 2018), for which a certiorari-stage reply brief will be filed on or before July 12, 2018; and counsel for an appellee in a case before the United States Court of Appeals for the District of Columbia Circuit, for which a brief is due in July.

17. With regard to the California Court of Appeal's decision issued before the Nebraska Supreme Court's decision in this case, moreover, the parties related to Applicant will be seeking certiorari, with Mr. Sloan as counsel of record. The petition is due on or before August 11, 2018. (Justice Kennedy previously granted a 60-day extension for that certiorari petition. *Applied Underwriters, Inc. v. Citizens of Humanity, LLC*, 17A1315). Again, Mr. Sloan has not been involved in the lower court proceedings in that case. Because the two cases raise similar questions presented, Applicant respectfully submits that it would be of assistance for the Court to receive and consider the petitions around the same date.

18. To the extent that this case has involved issues regarding the intersection of two federal statutes (the FAA and the McCarran-Ferguson Act), it also will be of assistance to this Court's consideration of the petition if Applicant has adequate time to evaluate the possible impact of *Epic Systems Corp. v. Lewis*, slip. op. (U.S. May 21, 2018).

19. An extension of time will not prejudice Respondents.

For the foregoing reasons, Applicant hereby respectfully requests that an extension of time up to and including August 19, 2018, be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,

s/ Clifford M. Sloan

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicant Applied Underwriters Captive Risk Assurance Company, Inc. is a wholly owned subsidiary of Applied Underwriters, Inc., which is a wholly owned subsidiary of AU Holding Company, Inc., which is wholly owned by Berkshire Hathaway Inc. Berkshire Hathaway Inc. is a publicly traded company. No publicly traded corporation other than Berkshire Hathaway Inc. owns 10% or more of any of Applicant's stock.