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 NEVADA HEALTH CO-OP,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE KATHLEEN DELANEY, DISTRICT JUDGE, DEPT. 25,

Respondents,

MILLIMAN, INC., a Washington Corporation; JONATHAN L. SHREVE, an individual; and MARY VAN DER HEIJDE, and individual,

Real Parties in Interest,

Supreme Court Case No.:

Dist. Court Case No.: A-17-760558-C

PETITION UNDER NRAP 21 FOR WRIT OF MANDAMUS

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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, 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 17th day of December 2018

GREENBERG TRAURIG, LLP

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VERIFICATION

The undersigned declares under the penalty of perjury that she is counsel for STATE OF NEVADA, EX. REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP, and has read the attached 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 filed herewith, 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 17th day of December 2018.

/s/ Tami D. Cowden
Tami D. Cowden

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Petitioner, STATE OF NEVADA, EX. REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP ("Commissioner," "Petitioner," or "Receiver") presents her Petition for Writ of Mandamus ("Petition").

STATEMENT OF RELIEF SOUGHT

This Petition requests the Supreme Court to issue a writ of mandamus directing the District Court to exercise subject matter jurisdiction over the claims raised by Petitioner against Real Parties in Interest. The District Court dismissed such claims, based upon an arbitration provision that 1) is reverse preempted by the McCarren Ferguson Act, and 2) under the applicable state law, cannot be enforced against Petitioner. The Petitioner raises significant issues of first impression in Nevada involving the authority of the Nevada's Insurance Commissioner, and whether liquidation proceedings conducted pursuant to that authority are taken to carry out the purposes of the Nevada Insurance Code ("NIC"). The Petitioner's claims against the Real Parties in Interest are based upon such parties' multiple failures to perform their contractual and statutory obligations as the "qualified actuary" for the delinquent insurer, Nevada Health Co-op ("NHC" or "Co-op").

By determining that the Commissioner's claims must be resolved through confidential arbitration, rather than litigated in the Court that has jurisdiction over the liquidation of the delinquent insurer as provided by the Nevada Insurance Code,

the District Court manifestly abused its discretion. Under New York law, which governs the agreement, the Commissioner cannot be required to arbitrate such claims. Furthermore, even if the Commissioner could otherwise be required to arbitrate, the Federal Arbitration Act is reverse-preempted by Nevada's Insurance Code, and that Code leaves the choice of forum for dispute resolution exclusively to the Commissioner.

Accordingly, the District Court's dismissal of the claims based on the arbitration provision was a manifest abuse of discretion; this Court should issue appropriate writ relief to remedy the District Court's action.

ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding, as this case presents issues of first impression on matters involving Nevada statutory and common law, and also implicates questions of statewide public importance, as it involves the interpretation of Nevada's Insurance Code ("NIC"), Title 57. NRAP 17(a)(10)-(11). Resolution of the issues herein will require the interpretation of multiple Nevada statutes not previously addressed by the appellate courts of this state, including Chapters 679A, 681B, and 696B of Title 57, as well as a determination of the interplay of such statutes with the laws of New York that govern the agreement at issue here, and the reverse preemption of the Federal Arbitration Act by the McCarran Ferguson Act.

STATEMENT OF ISSUES PRESENTED

I. **A WRIT OF MANDAMUS IS APPROPRIATE AS THE COMMISSIONER HAS NO PLAIN, SPEEDY, AND ADEQUATE REMEDY FOR THE DISTRICT COURT'S ABUSE OF DISCRETION, SUCH ABUSE AFFECTED SIGNIFICANT ISSUES OF PUBLIC POLICY, AND RESOLUTION OF THIS MATTER REQUIRES INTERPRETATION OF NUMEROUS NEVADA STATUTES NOT PREVIOUSLY ADDRESS BY THE APPELLATE COURTS**.

II. **THE DISTRICT COURT MANIFESTLY ABUSED ITS DISCRETION BY COMPELLING ARBITRATION WHERE, UNDER THE APPLICABLE STATE LAW, NO VALID AGREEMENT TO ARBITRATE EXISTED BETWEEN THE COMMISSIONER AND MILLIMAN.**

III. **THE DISTRICT COURT MANIFESTLY ABUSED ITS DISCRETION BY COMPELLING ARBITRATION WHERE NEVADA'S INSURANCE CODE REVERSE PREEMPTS THE FEDERAL ARBITRATION ACT, PURSUANT TO THE MCCARREN FERGUSON ACT.**

STATEMENT OF RELEVANT FACTS

The ACA Permits the Creation of Health Insurance Co-ops.

This Petition arises from the liquidation of a health insurer that had been formed following Congress's passage of the Affordable Care Act ("ACA"). The ACA contemplated the creation of "Consumer Operated and Oriented Plans," which were health insurance cooperatives ("co-ops") in which the members of the organization are insured by it. **I APP 23-118, ¶ 34.** Under the ACA, qualified co-ops were eligible for federal loans to become established. Qualification for such loans required the submission of a feasibility study and a business plan. ***Id. at* ¶ 35.**

The health insurers co-ops established under the ACA were also required to comply with state law insurance requirements.

NHC's Predecessors Enter into Agreement with Milliman, Inc.

Against the above legislative backdrop, the Culinary Health Fund, the health insurance affiliate of the Culinary Union, contemplated establishing a qualifying co-op under the ACA. ***Id. at* ¶ 40.** To that end, and mindful of the above requirements, on October 20, 2011, Culinary Health Fund sought out an actuarial expert. ***Id.* at ¶ 42.**

Real Party in Interest Milliman, Inc. ("Milliman") had held itself and its employees, including Real Parties in Interest Jonathan L. Shreve ("Shreve") and Mary van der Heijde ("van der Heijde"), out as experts in the provision of actuarial opinions and other services (collectively, Milliman, Inc., Shreve, and van der Heijde will be referred to as the "Milliman Defendants."). ***Id.* at ¶ 50.** In 2011, Culinary Health Fund entered into a Consulting Services Agreement with Milliman, Inc. (the "Agreement"). **I APP 163.** Under the Agreement, the initial work that Milliman was to provide was to conduct the health cooperative feasibility study and the analytical portions of the business plan required for the federal funding. **I APP 168-169.** Payment for such work to Milliman was contingent upon receipt of the funding. **I APP 163, ¶ 1.**

The Agreement contained an arbitration provision that states, as relevant here:

> **5. Disputes.** In the event of any dispute arising out of or relating to the engagement of Milliman by Company, the parties agree that the dispute

> will be resolved by final and binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. . . . The Arbitrators shall have a background in either insurance, actuarial science or law. The Arbitrators shall have the authority to permit limited discovery, including depositions, prior to the arbitration hearing, and such discovery shall be conducted consistent with the Federal Rules of Civil Procedure. . . . The arbitrators may, in their discretion, award the cost of the arbitration, including reasonable attorney fees, to the prevailing party. . . . Any arbitration shall be confidential, and except as required by law, neither party may disclose the content or results of any arbitration hereunder without the prior written consent of the other parties, except that disclosure is permitted to a party's auditors and legal advisors.

***Id.* at ¶ 5.** There is no provision providing that agents or employees of Milliman may enforce the agreement as to claims against them personally. The Agreement also contained a choice of law provision for New York, providing:

> **6. Choice of Law.** The construction, interpretation, and enforcement of this Agreement shall be governed by the substantive contract law of the State of New York without regard to its conflict of laws provisions. In the event any provision of this agreement is unenforceable as a matter of law, the remaining provisions will stay in full force and effect.

I APP 164, ¶ 6.

Additionally, the Agreement provided that Milliman would perform its services in accordance with applicable professional standards. **I APP 163, ¶ 4**. The liability of Milliman and its "officers, directors, agents and employees" was limited to three times the professional fees paid to Milliman, absent fraud of willful misconduct. *Id.* Milliman, (but *not* its "officers, directors, agents, or employees") was also exonerated of any liability for lost profits, or incidental or consequential damages. *Id.* These

limitations on liability do not apply in the event of fraud or willful misconduct. *Id.* The Agreement does *not* contain any provision that binds the successors or affiliates of either party to the Agreement.

In its proposal, Milliman described its work as offering an "interactive partnership in order to ensure the viability of the CO-OP in a short timeframe." **I APP 169.** Milliman promised "significant assistance" in areas of actuarial tasks within an insurer, as well as development, strategy and training. **I APP 165-179**.

The Milliman Defendants Performs Services

After execution of the Agreement, the Culinary Health Fund formed Hospitality Health, Ltd., and transferred its right, title, and interest in the Agreement to that entity. **I APP 31, ¶¶ 44-45**. Milliman performed work for Hospitality Health after that assignment; and on September 10, 2012, Milliman and Hospitality Health also directly entered into a Consulting Services Agreement, with terms essentially identical to those in the 2011 Agreement, except that the later agreement did not contain the contingent billing provision. **See I APP 3-4.** Both of the agreements were executed on Milliman's behalf by van der Heijde, as "Principal and Consulting Actuary." ***Id.***; **I APP 164.** Neither van der Heijde nor Shreve signed the agreements on their individual behalves.

In December 2011, Milliman issued a document entitled "Hospitality Health Feasibility Study and Business Support for Consumer Operated and Oriented Plan

(CO-OP) Application (the "Feasibility Study") that was used for the application for federal loans. **I APP 32, ¶ 61.** The Feasibility Study included financial projections under various scenarios, as well as an analysis of the co-op's ability to repay loans. ***Id.*** All scenarios projected by Milliman indicated that the co-op would be successful and able to repay loans as well as to pay for policy holder claims. **I APP 33, ¶¶ 62-64, 121.** Based on Milliman's Feasibility Study, the federal government approved the co-op's loan application. **I APP 390, ¶¶ 99-100, 105.**

NHC was formed in October 2012, and in December 2012, assumed the assets and obligations of Hospitality Health, including the federal loans, and the Milliman Agreement. **I APP 33, ¶ 67.** Based on the Feasibility Study, and the funding provided by the federal loans, the Nevada Department of Insurance licensed NHC to sell insurance as of January 1, 2014. **I APP 34, ¶ 71.**

Milliman continued to provide services to NHC. Among the services that Milliman provided to NHC was the valuation of reserves, setting premiums, participation in financial reporting, and serving as the Co-op's statutorily required appointed actuary to provide certification to the state and other entities. **I APP 32, ¶ 59.**

Milliman's Work was Substandard

Unfortunately, Milliman's services as a consulting actuary failed to meet applicable statutory, professional, and contractual standards. Among other issues,

Milliman produced deficient forecasts and studies for loan applications, recommended inadequate insurance premium levels, provided faulty actuarial guidance to NHC management, promoted and incorporated in its assumptions accounting entries that were neither proper nor authorized without appropriate disclosure, participated in financial misreporting, and improperly calculated and certified NHC's projections and reserves to regulators. **I APP 34-43, ¶¶ 72-131.**

Among the many problems in Milliman's Feasibility Study, for which Shreve had signed off as Consulting Actuary, was the utter failure to consider such possibilities as low enrollment, high medical costs and high administration expenses. **I APP 37, ¶ 89.** While Milliman's estimate of administrative expenses was $6.8 million in 2014, the actual administrative costs were $23.6 million. **I APP 35-36, ¶ 80 (vi).** Moreover, in 2014, medical payments alone exceeded the entirety of premiums received, before the payment of administrative costs. **I APP 37, ¶ 88.**

Milliman's deficient work continued in its services to NHC, particularly with respect to valuing and reporting reserves to the Commissioner; van Der Heijde acted as Consulting Actuary for such reports. **I APP 35-43, ¶¶ 95-131.** Van der Heijde underreported NHC's potential liabilities to policy holders, artificially maintaining higher surplus levels than appropriate, and also misreported income. ***Id.*** Such misreporting masked NHC's insolvency, and prevented the Commissioner from stepping in earlier to prevent further losses. **I APP 43, ¶ 126**.

NHC Enters Receivership

Because of Milliman's failures, as well as the failures of other defendants named in the Complaint, NHC was incapable of continuing, and the Nevada Department of Insurance was forced to step in. Amy L. Parks (the then acting Nevada Commissioner of Insurance) commenced the receivership action against NHC by filing a petition to appoint herself as the receiver of NHC under NRS 696B in the Eighth Judicial District ("Receivership Court"), Case No. A-15-725244-C; the Petition was granted in October 2015. "**Receivership Order," I APP5-17.**

Pursuant to the Court's Receivership Order and subsequent Final Order of Liquidation, the Commissioner as Receiver and any special deputy receivers ("SDR") are authorized to liquidate the business of NHC and wind up its ceased operations, including prosecuting suits on behalf of the thousands of injured people and entities associated with NHC's liquidation, including NHC's members, its formerly insured patients, unpaid hospitals, doctors, other creditors, and the public at large. *See generally id*.; Final Order of Liquidation.

As relevant here, the Receivership Order provides the following:

> (1) ... The Receiver and the SDR are hereby directed to ***conserve and preserve the affairs*** of CO-OP and are vested, in addition to the powers set forth herein, with all the powers and authority expressed or implied under the provisions of chapter 696B of the Nevada Revised Statute ("NRS"), and any other applicable law. The Receiver and Special Deputy Receiver are hereby authorized to rehabilitate or liquidate CO-OP's business and affairs ***as and when they deem appropriate under the circumstances and for that purpose may do all acts necessary or***

appropriate for the conservation, rehabilitation, or liquidation of CO-OP....

(2) Pursuant to NRS 696B.290, the Receiver is hereby authorized with ***exclusive title to all of CO-OP's property*** (referred to hereafter as the "Property") and ***consisting of all…[c]auses of action***, defenses, and rights to participate in legal proceedings…

(3) The Receiver is hereby directed to take immediate and exclusive possession and control of the Property except as she may deem in the best interest of the Receivership Estate. In addition to vesting title to all of the Property in the Receiver or her successors, the said ***Property is hereby placed in custodia legis of this Court and the Receiver***, and the Court hereby assumes and ***exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting the Property to the exclusion of any other court or tribunal***, such exercise of sole and exclusive jurisdiction being hereby found to be central to the safety of the public and of the claimants against CO-OP.

…

(5) All persons, corporations, partnerships, associations and all other entities wherever located, are hereby ***enjoined and restrained from interfering in any manner*** with the Receiver's possession of the Property or her title to her right therein and from interfering in any manner with the conduct of the receivership of CO-OP.]

…

(11) The officers, directors, trustees, partners, affiliates, brokers, agents, creditors, insureds, employees, members, and enrollees of CO-OP, and all other persons or entities of any nature including, but not limited to, claimants, plaintiffs, petitioners, and any governmental agencies who have claims of any nature against CO-OP, including cross-claims, counterclaims and third party claims, are hereby permanently enjoined and restrained from doing or attempting to do any of the following, except in accordance with the express instructions of the Receiver or by Order of this Court:

…

b. Commencing, bringing, maintaining or further prosecuting any action at law, suit in equity, arbitration, or special or other proceeding against CO-OP or its estate, or the Receiver and her successors in office, or any person appointed pursuant to

Paragraph (4) hereinabove;

(14) The Receiver shall have the power and is hereby authorized to:

a. Collect all debts and monies due in claims belonging to CO-OP, wherever located, and for this purpose:(i) institute and maintain actions in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts; (ii) ***do such other acts as are necessary or expedient to marshal, collect, conserve or protect its assets or property***, including the power to sell, compound, compromise or assign debts for purposes of collection upon such terms and conditions as she deems appropriate, and the ***power to initiate and maintain actions at law or equity or any other type of action or proceeding of any nature, in this and other jurisdictions***; (iii) to pursue any creditors remedies available to enforce her claims;

…

h. Institute and to prosecute, in the name of CO-OP or in her own name, any and all suits and of the legal proceedings, to defend suits in which CO-OP or the Receiver is a party in this state or elsewhere, whether or not such suits are pending as of the date of this Order…

…

(24) The Court shall ***retain jurisdiction for all purposes necessary to effectuate and enforce this Order***.

I APP 5-17 (emphasis added).

Milliman Files a Proof of Claim

Milliman submitted a Proof of Claim on January 16, 2016, seeking payment for services rendered. **I App 18-22.**

The Receiver Files a Complaint on Behalf of NHC and Others Injured by NHC's Receivership

In August 2017, in the Receivership Court, the Receiver instituted a contract and tort action on behalf of NHC and the thousands of people and entities who were

injured by NHC's liquidation, asserting 63 causes of action against sixteen defendants, including Milliman and its actuaries. *See generally* **I APP 23-118.**[1] As relevant here, the Receiver asserted four contract and ten tort claims against Milliman, Shreve, and van der Heijde, including claims that Milliman, Shreve, and van der Heijde acted jointly with other defendants, who included NHC's directors and others, as part of a civil conspiracy and in concert of action.[2] ***Id.***

MILLIMAN DEFENDANTS SEEK TO COMPEL ARBITRATION

On November 6, 2017, the Milliman Defendants filed a motion to compel arbitration ("Motion to Compel") based on the arbitration clause in the Agreement. **I APP 46.** The Commissioner opposed the motion, but following briefing and a hearing, the District Court granted the Motion to Compel, dismissing the claims

[1] The civil action was originally assigned to Judge Mark Bailus in Department XVIII. On September 15, 2017, the Receiver filed a motion to coordinate the civil action with the receivership in Judge Cory's court. Before the motion to consolidate was heard by Judge Cory, upon Milliman's request, the civil action was transferred to business court on September 28, 2017. Initially assigned to business court Justice Nancy Allf, it was later reassigned to Judge Kathleen Delaney in Department XXV. Judge Cory determined that the civil matter should be heard in business court and denied the motion to consolidate on December 11, 2017. The civil action remained in with Judge Delaney in Department XXV until it was reassigned to Judge Timothy Williams in Department XVI on July 18, 2018.

[2] The Receiver's claims against Milliman include: (1) negligence per se – Violation of NRS 681B; (2) professional malpractice; (3) intentional misrepresentation; (4) constructive fraud; (5) negligent misrepresentation; (6) breach of fiduciary duty; (7) negligence; (8) breach of contract; (9) tortious breach of the implied covenant of good faith and fair dealing; (10) breach of the implied covenant of good faith and fair dealing; (11) negligent performance of an undertaking; (12) unjust enrichment; (13) civil conspiracy; and (14) concert of action.

against Milliman, Shreve and van der Heijde. **II APP 180-229, 340-383, 396-405.** Judge Delaney ruled that the arbitration provision was not reverse-preempted by the McCarren Ferguson Act. **II APP 396-405.**

The Commissioner sought reconsideration, based on (1) the Order's inconsistency with a recent ruling against Milliman involving similar facts; (2) the overextended scope of the Order's language concerning substantive matters not before the Court; and (3) and the inclusion of claims based on Milliman's statutory obligations. **II APP 412-431.** At the hearing of the reconsideration motion, the Commissioner argued that New York law must be considered, and supplemental briefing was ordered. **II APP 465-505.** Following such briefing, Judge Delaney upheld her prior ruling, finding that: (1) the Receiver could not sue for damages based on Milliman's work under the Agreement while evading the arbitration clause; (2) all of the Receiver's tort, contract, and statutory claims must be heard together because they arose from and related to the same work done under the Agreement, and (3) that compelling a liquidator to arbitrate such claims does not interfere with the State's regulation of the business of insurance. Judge Delaney further determined that New York law did not apply to determine the enforceability of the arbitration provision. **III APP 543-551.**

Another Challenge to the Receivership Court Forum, with a Different Result.

On October 26, 2017, Millennium Consulting Services, LLC ("Millennium"), another named defendant in the action, filed a motion to dismiss pursuant to Rule 12(b) related to a forum-selection clause in its relevant contact with NHC. **I APP 119-145**. The Commissioner opposed this Motion as well. **II APP 230-266.** Following briefing and a hearing, Judge Gonzales, standing in for Judge Delaney, denied the Motion, find the clause inapplicable due to the receivership court having exclusive jurisdiction under the NIC, and more specifically, the Liquidation Act. **II APP 384-395.**

The Order denying Millennium's Motion included the following relevant conclusions of law:

* * *

1. Nevada's Liquidation Act is silent on whether offensive claims are required to be litigated in Nevada.

2. The Receivership Court, acting within its statutory authority and consistent with Nevada law, issued a Receivership Order, providing that the Receivership Court would exercise "sole and exclusive jurisdiction" over all NHC Property – including causes of action, defenses, and rights to participate in legal proceedings – "to the exclusion of any other court or tribunal."

3. The Receivership Order and Nevada's Liquidation Act govern this action.

4. Pursuant to the Receivership Order, the Receiver has discretion to choose a forum for all proceedings related to the receivership, including claims that she brings in her capacity as Receiver.

5. Nothing in Nevada's Liquidation Act strips the Receiver of her right to choose a forum or whether to adopt the forum selection choices of the defunct insurer, even where the Receiver is the Plaintiff.

6. The position of the Receiver is inherently one established in the interest of the general public, including NHC members, insureds, and creditors, for the purpose of maximizing recovery for innocent victims of a delinquent insurance company.

7. It is consistent with public policy and Nevada's Liquidation Act to allow the Receiver to "marshal, collect, conserve, or protect the assets of NHC," including, in her discretion, "the power to initiate and maintain actions at law or equity" in this jurisdiction.

8. Consistent with public policy, and given the silence of Nevada's Liquidation Act to the contrary, claims related to the management of the receivership of NHC are better litigated in the jurisdiction where the Commissioner of Insurance is acting as the Receiver of the defunct insurance company and where all claims that are related to the management of the receivership may be handled in one location.

Id.

This Order, which interprets NRS 696B as granting the Commission the right to choose a forum, regardless of a forum selection clause in the underlying contract, is inconsistent with the Order compelling arbitration with the Milliman Defendants.

REASONS THE WRIT SHOULD ISSUE

This Court should grant the requested writ of mandamus here, as the District Court engaged in a manifest abuse of discretion by failing to apply the appropriate

legal standards, resulting in the order to arbitrate. Under the applicable law, no arbitration should have been ordered in this matter, as no enforceable agreement to arbitrate existed between the Commissioner and any of the Milliman Defendants, as Nevada's Insurance Code grants the Commissioner the right to choose the forum for prosecution of claims the liquidated insurer possessed. Additionally, even if an agreement to arbitrate could be said to have existed, the Federal Arbitration Act was reverse preempted by the McCarren Ferguson Act, as Nevada's Insurance Code governs insurance-related law in Nevada.

A writ should issue in this case, as a direct appeal of an eventual arbitration award will not provide an adequate remedy to the Commissioner under the circumstances here. The Commissioner will not only be put to the expense and delay of the arbitration proceeding, but her case against the remaining defendants will also be prejudiced by the absence of the Milliman Defendants. Additionally, given the contradictory rulings that have resulted in in this same matter, this Court should exercise its discretion to review, as fundamental questions involving Nevada's insurance law should be resolved.

I. THE COMMISSIONER DOES NOT HAVE A PLAIN, SPEEDY, AND ADEQUATE REMEDY.

This Court has original jurisdiction to issue writs of mandamus. Nev. Const., art. 6, § 4. Mandamus may be granted where the party seeking extraordinary writ relief demonstrates that: (1) an eventual appeal does not afford "a plain, speedy and

adequate remedy in the ordinary course of law," and (2) mandamus is needed either to compel the performance of an act that the law requires or to control the district court's manifest abuse of discretion. NRS 34.160; NRS 34.170*; Tallman v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 71, 359 P.3d 113, 118 (2015).

In *Tallman,* this Court acknowledged that the unavailability of *immediate* appellate review appeal may render the situation one where an eventual appeal is not a plain, speedy, or adequate remedy. This Court has not set forth a test for when an eventual appeal is not an adequate remedy. However, in *Tallman*, this Court cited, with approval, *In re Gulf Exploration*, LLC, 289 S.W.3d 836, 842 (Tex. 2009), in which decision it was noted that determining the adequacy of an eventual appeal "depends on a careful balance of the case-specific benefits and detriments" of writ review.

As discussed in more detail below, writ review offers many benefits, including the avoidance of prejudice of the Commissioner's case against the other defendants in the underlying litigation; prevention of a waste of limited resources; the avoidance of inconsistent outcomes; assurance that the same standards will be applied in the prosecution of claims on behalf of NHC; and conformity with the intent of the Nevada Insurance Code. In contrast, the potential detriments of writ review are limited to the immediate expenditure of resources to resolve the writ petition.

Weighing the case specific benefits and detriments of writ review here, it is clear that an eventual appeal will not provide a plain, speedy, or adequate remedy.

A. Writ Review Will Prevent the Commissioner's Ability to Prosecute Her Claims Against the Other Defendants from Being Compromised Because of the Milliman Defendants' Absence from Those Proceedings.

Immediate review will permit minimal disruption of the litigation against the remaining defendants. The order to arbitrate the claims against the Milliman Defendants significantly hampers the ability of the Commissioner to prosecute her claims against the other defendants in the litigation below. This Court has held that an appeal is an inadequate remedy when the challenged district court action has an adverse effect on a party's case against third parties. *Smith v. District Court*, 113 Nev. 1343, 1348 (Nev. 1997) (granting writ review where otherwise the resolution of the petitioner's claims against third parties would also be impacted).

Here, the claims against the Milliman Defendants were alleged as part of a larger complaint against twelve other defendants. Those other defendants include members of NHC's board of directors, as well as persons and entities who provided accounting and other services to NHC and its predecessors. The Complaint alleges claims for both conspiracy and concerted action against all the defendants, including the Milliman Defendants. Among the allegations are assertions that members of NHC's board of directors and its officers knew, or should have known, about Milliman's false reserves and financial reporting and its provision of misleading

information to Nevada's Department of Insurance. ***See e.g.,* I APP 77-78, ¶¶ 407-408, 412-415**.

The District Court has cut Milliman out of the litigation against the other conspirators, significantly handicapping the Commissioner's ability to prosecute her theory of recovery against all the defendants. The trier of fact in the case against these defendants will not be permitted to determine the liability of the Milliman Defendants. At a minimum, the absence of claims against parties central to the purported conspiracy would be confusing to the jury.

Furthermore, if the confidentiality provisions of the arbitration agreement are strictly enforced, the trier of fact in the litigation below could be precluded from learning of the outcome of any arbitration proceedings, or indeed, even the fact that such arbitration is occurring or had occurred, as such matters are required to be kept confidential under the terms of the Agreement. ***See* I APP 162-164, ¶ 5.**

That same confidentiality requirement could also prevent the Commissioner from using any discovery obtained in arbitration proceedings in the litigation against the remaining defendants. Since discovery of non-parties is more limited than that permitted against parties, the Commissioner's ability to prepare her case against all the defendants will be impacted. Writ review is appropriate when it protects important procedural rights. *In re Rocket,* 256 S.W.3d 257, 262 (Tex. 2008) ("In

evaluating benefits and detriments, we consider whether mandamus will preserve important substantive and procedural rights from impairment or loss.").

B. Writ Review Will Prevent the Commissioner from Being Forced to Engage in Wasteful Duplicative Expenses, Even Before the Eventual Appeal.

Writ review is proper when it "will spare litigants and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *In re Rocket*, 256 S.W.at 262. If the Commissioner is required to go through the arbitration process, and then an appeal of whatever order results therefrom, a considerable waste of resources will result.

Moreover, waste will not be limited solely to expenditures arising from the arbitration proceeding, as the parties here will also be required to engage in duplicative discovery, as discovery will be required within both the arbitration proceeding and the litigation against the remaining defendants. As noted above, the confidentiality requirements of the arbitration provision would allow the Milliman Defendants to prevent the use of any discovery obtained in the arbitration proceeding in the litigation. Accordingly, the Commissioner will need to engage in "third party" discovery directed at the Milliman Defendants, resulting in much duplicative work.

Double expenditures are particularly burdensome in the circumstances here, where the costs of the litigation will be borne by a liquidating estate. Even if she prevails, the Commissioner has no assurance of an award of fees, as such an award

is discretionary with the arbitrators under the arbitration agreement. **I APP 162-164, ¶ 5.**

C. Writ Review Will Ensure That the Same Standards Are Applied to the Resolution of the Conspiracy and Concerted Action Claims, and Avoid Inconsistent Results.

If the claims against the Milliman Defendants are arbitrated, there is a substantial risk that inconsistent outcomes will result. Despite the absence of the Milliman Defendants as parties in the litigation, the jury that decides the claims against the other defendants will still need to make a determination of whether the Milliman Defendants were part of a conspiracy and whether they acted in concert with the other defendants. There is an obvious risk that the arbitrators and the jury could make conflicting conclusions on that issue. Such a risk is amplified here, where the arbitrators are required to have certain types of expertise, which member of a jury need not possess. As discussed in greater detail below, this is consistent with the legislature's intent that proceedings related to the liquidation of insurers be consolidated in a single court.

Significantly, the parties have *already* been subjected to differing standards on the issue of the Commissioner's right to select the forum in which to pursue claims, as the District Court (Gonzales, J.) ruled that the Nevada Insurance Code and the Receivership Order evidenced the Commissioner would have the choice to select a forum, while the District Court (Delaney, J.) ruled to the contrary. The fact that

two judges reached opposite conclusions on very similar issues –in the same case-- demonstrates that it is in the public interest for this Court to undertake writ review of the Order granting the Milliman's Defendants' Motion to Compel Arbitration.

Additionally, the resolution of the issues herein requires interpretation of numerous Nevada statutes that have not previously been reviewed by Nevada's Appellate Courts. This Court has previously exercised discretion to intervene "under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 131 Nev. 865, 869-70, 358 P.3d 925, 928 (2015).

For all the above reasons, the benefits of writ review outweigh any detriments. Accordingly, this Court should entertain the writ.

II. THE COMMISSIONER CANNOT BE COMPELLED TO ARBITRATE UNDER NEVADA OR NEW YORK LAW.

Prior to enforcing a purported agreement to arbitrate, the District Court is required to determine whether the party entered into a valid agreement to arbitrate. *See* NRS 38.219; 9 U.S.C. ¶ 2. Here, there is no dispute that the Commissioner was not a signatory to the Agreement.[3] Accordingly arbitration can be compelled only where there is a basis to enforce the provision against a non-signatory. Here, the

[3] Van der Heijde was a signatory, but only on behalf of Milliman, and not on her own behalf. Shreve was not a signatory.

District Court determined that enforcement against the Commissioner was appropriate because the Commissioner was bound to the same contractual obligations as NHC would have been. The District Court's decision was based upon Nevada law (albeit, to a large extent, by citation to unpublished decisions by this Court) and on federal law. The District Court found that, even though the Agreement provided that its enforcement was to be governed by New York law, New York law was not applicable. The District Court's failure to apply the appropriate law to this decision was a manifest abuse of discretion, and warrants writ relief.

A. The Arbitration Provision Is Unenforceable as Against the Commissioner, Because Private Arbitration of the Commissioner's Claims is Contrary to the Nevada Insurance Code.

The Nevada Legislature has adopted a comprehensive scheme governing insurance in this state, *i.e.*, the Nevada Insurance Code. NRS Title 57. All types of insurance, including, as relevant here, health insurance, are included within the scope of the NIC. When the entirety of the NIC is considered, and in particular, the provisions of the portions of the NIC relating to the duties of actuaries and to the rights and obligations of the Commissioner of Insurance with respect to the liquidation of insolvent insurers, it is apparent that the Commissioner cannot be compelled to arbitration claims arising in liquidation proceedings.

1. Nevada's Insurance Code is intended to protect policy holders and to provide for fair, consistent, and public regulation of the insurance industry.

When the legislature adopted the Nevada Insurance Code, NRS Title 57, in 1971, it listed the many purposes of the code. As relevant here, the NIC is intended to:

- Protect policyholders and all who have an interest under insurance policies;
- Implement the public interest in the business of insurance;
- Improve, and thereby preserve, state regulation of insurance;
- Insure that policyholders, claimants, and insurers are treated fairly and equitably;
- Prevent misleading, unfair, and monopolistic practices in insurance operations; and
- Continue to provide the State of Nevada with a comprehensive, modern, and adequate body of law, in response to the McCarran Act (Public Law 15, 79th Congress, 15 U.S.C. §§ 1011 to 1015, inclusive), for the effective regulation and supervision of insurance business transacted within Nevada, or affecting interests of the people of this state.

NRS 679A.140(1)(a), (b), (d), (e), (h) and (i). To ensure these purposes were met, the legislature directed that the provisions of the NIC, "shall be given reasonable and liberal construction for the fulfillment of these purposes." NRS 679A140(2).

The NIC includes numerous statutes addressing oversight of insurance companies, including the creation of the office and position of the Commissioner of Insurance. NRS 679B.020, *et. seq*. The Commissioner's powers and duties are set forth as follows:

> 1. Organize and manage the Division, and direct and supervise all its activities;
>
> 2. Execute the duties imposed upon him or her by this Code;
>
> 3. Enforce the provisions of this Code;
>
> 4. Have the powers and authority expressly conferred upon him or her by or reasonably implied from the provisions of this Code;
>
> 5. Conduct such examinations and investigations of insurance matters, in addition to examinations and investigations expressly authorized, as he or she may deem proper upon reasonable and probable cause to determine whether any person has violated any provision of this Code or to secure information useful in the lawful enforcement or administration of any such provision; and
>
> 6. Have such additional powers and duties as may be provided by other laws of this State.

NRS 679B.120; *see also, Allstate Ins. Co. v. Thorpe,* 123 Nev. 565, 572 (Nev. 2007) ("Under NRS 679B.120(3), the Nevada Insurance Commissioner has express authority to enforce the provisions of the Nevada Insurance Code, NRS Title 57. . . .") (internal quotations and citations omitted).

Among the oversight provisions contained in the NIC is NRS Chapter 681B, which imposes obligations on insurers to demonstrate to the Commissioner their financial viability. As more specifically relevant here, the NIC requires insurers to submit opinions by a qualified actuary as whether the insurer's financial reserves are sufficient to satisfy claims; this opinion must be supported by a memorandum, and

the valuations and calculations disclosed in the memorandum must be performed in accordance with specific standards. NRS 681B.200-681B.240.

The information contained in the opinion and support memorandum is considered confidential, and may be disclosed by the Commissioner only in certain circumstances. While the Commissioner may use the confidential information in the furtherance of any "legal action" brought as part of the Commissioner's duties, neither the Commissioner nor or any person who receives the confidential information under the Commissioner's authority, is permitted to testify about such documents in "any private civil action." NRS 681B260(4) and (5). Moreover, such documents are subject to subpoena only for the purpose of *defending* an action seeking damages for violation of the requirements of Chapter 681B and any regulations thereunder. NRS 681B260(1). An actuary who submits an opinion under these regulations is not liable to any person *other than* the insurer or the Commissioner, except in cases of fraud or willful misconduct. NRS 681B.250(2).

Submission of false records or financial statements is a deceptive trade practice under the NIC. NRS 686A.070. The Commissioner's authority to regulate the trade obligations of insurers is exclusive. *Allstate Ins. Co. v. Thorpe*, 123 Nev. at 572 ("Additionally, NRS 686A.015(1) grants the Insurance Commissioner 'exclusive jurisdiction in regulating the subject of trade practices in the business of insurance in this state.'") (internal citation omitted).

Another key component of the NIC is Chapter 696B, which governs the liquidation of insolvent insurers. This Chapter incorporates provisions from the Uniform Insurers Liquidation Act ("UILA"); *see* NRS 696B.280 (noting that NRS 696B:030-696B.180 and 696B.290-696B.340 may be referred to as the UILA). The general purpose of the UILA is to "centraliz[e] insurance rehabilitation and liquidation proceedings in one state's court so as to protect all creditors equally." *Frontier Ins. Serv. v. State*, 109 Nev. 231,236, 849 P.2d 328, 331 (1992), *quoting Dardar v. Ins. Guaranty Ass'n*, 556 So. 2d 272, 274 (La. Ct. App. 1990).

As shown above, while Chapter 681B establishes the Commissioner's oversight obligations and duties to insure, based on the financial reporting and actuarial opinions submitted to it, that an insurer maintains its financial stability, Chapter 696B authorizes the Commissioner to act when it appears that the insurer's financial stability is at risk. Specifically, the Commissioner is granted the right to take on the role of receiver, conservator, or rehabilitator when it appears possible that the insurer might continue operations, or as here, a liquidator, when continued operations are not financially viable. NRS 696B.210, 696B.220.

The Commissioner is to institute an action for the liquidation of the insurer in the Nevada District Court, which has *exclusive* jurisdiction over such actions. NRS 696B.190. If the delinquency is shown, the Commissioner will be appointed as the liquidator or receiver, and is then authorized to take possession of all property of the

insurer, including choses in action, to marshal the assets for payment to claimants. NRS 696B.290(2).

Significantly, the receivership court is granted jurisdiction over any person against whom the Commissioner institutes an action based on or arising out of any obligation of such person stemming from "agency, brokerage or transactions" between the person and the insurer. NRS 696B.200((1)(a). This statute thus unequivocally expresses an intent by the Nevada Legislature that the liquidating court have jurisdiction over claims brought by the Commissioner on behalf of the liquidating insurer. Similarly, all claims brought by third parties against the insurer must be presented under the procedure set forth by the Commissioner. NRS 696B.330. And, where the delinquent insurer and a claimant have mutual claims against each other, an offset must be applied, and the claimant may receive on any amounts due after the offset of the insurer's claim against it. NRS 696B.440. These requirements are in keeping with this Court's interpretation of the UILA's purpose to centralize the processing of the insolvent insurer's assets and liabilities. *See Frontier Ins. Serv.*, *supra.*

When the Commissioner has marshalled the assets of the insurer, after administrative expenses, claimants for unpaid policy benefits are first in priority, followed by the repayment of unearned premiums. NRS 696B.420. Only when those claims are satisfied may the assets be used to pay other debts of the insurer, including

federal and state tax and wage claims, and claims by other creditors. *Id.* Thus, the primary purpose for granting the Commissioner the right to liquidate the insolvent insurer is for the protection of policyholders, and by extension, the public.

2. The interplay of the actuarial requirements and Chapter 696B oversight and liquidation provisions indicate a legislative preference for in-court prosecution of claims brought on behalf of a liquidating insurer.

When the entirety of this statutory scheme is considered, it becomes apparent that the legislature intended that, in the event of an insolvency, the Commissioner would have broad powers to enforce the rights of a failed insurer, for the benefit of the policyholders. When an insurer fails, it is a likely circumstance that the actuarial opinions were, for whatever reason, inaccurate. Claims against the actuaries are thus an easily foreseeable part of any liquidation proceeding. The provisions set forth in Chapter 696B make clear that the Commissioner may seek damages from those who breached actuarial duties owed to the insurer, and that in so doing, the Commissioner is also defending the rights of the policyholders.

The legislature expressed a clear preference that claims against actuaries for failure of their statutory duties be brought by the Commissioner (or the insurer), rather than by policyholders, and in court proceedings. Indeed, absent fraud or willful misconduct, policyholders do not even have a right of recovery against an actuary who has failed in its duties; thus, only the insurer or Commissioner can bring negligence-based claims. And even where fraud or willful misconduct is alleged,

policy holders would be unable to subpoena the actuary's opinion or supporting documents, or even compel the Commissioner to testify about any such information in any "private civil action." However, the Commissioner *is* permitted to make use of such documents in "any regulatory or legal action" brought in the course of her official duties. NRS 681B.260. This would obviously include a legal action brought by the Commissioner, as the statutory liquidator, of claims against third parties, over which the liquidating court is expressly granted jurisdiction. NRS 696B.200.

Having such claims brought by the Commissioner in the liquidation process furthers the overarching purposes of the NIC. The policyholders are provided protection, and will be treated fairly. NRS 679A.140(1)(a) and (e). The Commissioner is implementing the public interest and is preserving state regulation of insurance. NRS 679A.140(1)(b) and (e). Publicly bringing claims against actuaries will serve as a deterrent for misleading opinions from actuaries in the future. NRS 679A.140(h). And litigation of such claims will contribute to Nevada's body of insurance law.

In contrast, pursuit of such claims in confidential arbitration proceedings will do little or nothing to advance these purposes. The limited appellate review of arbitration proceedings decreases the prospect of fair treatment, as errors of law cannot be corrected in arbitration proceedings. *See e.g.*, *Health Plan of Nevada v. Rainbow Med*, 120 Nev. 689, 695 (Nev. 2004) ("the scope of judicial review of

an arbitration award is limited and is nothing like the scope of an appellate court's review of a trial court's decision."); *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist*, 122 Nev. 337, 342 (Nev. 2006) (noting that mere incorrect interpretation of law will not justify vacation of an arbitrator's award, but instead, the arbitrator must have consciously disregarded the law).

And, of course, the secrecy attendant upon arbitration proceedings will do nothing to preserve state regulation or contribute to the Nevada's body of insurance law. But enriching that body of law is one of the express purposes of the NIC. NRS 679A.140.

a. *Multiple jurisdictions have determined that statutes permitting the head of the state's insurance agency to take control of delinquent insurers confers heightened rights and duties on that agency head.*

The District Court's ruling was based on the premise that the Commissioner, like any ordinary receiver, merely steps into the shoes of NHC. Such a receiver, the District Court contends, may therefore be estopped from denying enforceability of the arbitration clause. But that theory does not acknowledge that the Commissioner here is not merely prosecuting a claim for nonperformance of the Agreement. As shown above, the Commissioner is also acting, through the sole means created by the legislature, to vindicate the harm caused to the policyholders by the Milliman Defendants' misfeasance or malfeasance in their submission of financial information and actuarial opinions to the Commissioner; the policy holders are not permitted,

under NRS Chapter 681B, to recover damages for negligence or even reckless conduct by these Defendants.

Nevada is not alone in entrusting such duties to those who occupy the position equivalent to the Commissioner. Numerous states have recognized that a statutory insurance liquidator does more than simply act as a receiver collecting any sums due to the failed insurer.

For example, the California Court of Appeals noted many differences between an ordinary receiver and a receiver in the insurance context, citing, *inter alia,* the Commissioner's pre-delinquency oversight obligations:

> No authority is offered for the proposition that the Insurance Commissioner acts merely as an ordinary receiver. Ordinary receivers do not become involved until control of a business is taken away from its officers or owners due to insolvency, deadlock or other causes. Ordinary receivers do not monitor the solvency of an entity on behalf of persons, such as policyholders, who do business with the entity. The Insurance Code, by contrast, assigns such pre-conservatorship duties to the Insurance Commissioner. . . . In carrying out these duties, the Insurance Commissioner acts not in the interests of the equity owners of the insurance company, but rather in the interests of policyholders. Thus the Insurance Commissioner in this case is not seeking merely to prosecute claims of an entity under receivership. To the contrary, the essence of the Insurance Commissioner's claim is that AA damaged the policyholders. Thus even though a receivership may bear some points of analogy to a statutory insurance company liquidation (primarily in that each can involve the marshalling of the assets of an estate), an ordinary receivership is a different procedure for a different situation.

Arthur Andersen v. Superior Court, 67 Cal. App. 4th 1481, 1495 (Cal. Ct. App. 1998).

Ohio courts have also noted that an insurance liquidator plays an exceptional part, different from that of an ordinary receiver. The Ohio Supreme Court stated:

> 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….

Taylor v. Ernst & Young, 130 Ohio St. 3d 411, 419 (Ohio 2011). *See also Covington v. Am. Chambers Life Ins. Co*, 779 N.E.2d 833, 838 (Ohio Ct. App. 2002) (holding liquidator not bound by arbitration agreement because the dispute involved setoff and proof of claims, which impacted the rights of creditors). And, as discussed in greater detail below, under New York law, an insurance liquidator cannot be compelling to engage in private arbitrate due to the insurance liquidator's protection of the public. *See, e.g., Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d 225, 233, 567 N.E.2d 969, 973 (1990).

Significantly, thus far, courts in two jurisdictions have determined that claims against Milliman, Inc., brought by the liquidators of health insurance co-ops for failures similar to those here, need not be arbitrated, despite the language in agreements substantially identical to that here. In the most recent, *Ommen v. Milliman, Inc*., Case No. LACL 138070 (February 6, 2018, Iowa District Court, Polk County) (A copy of the decision in *Ommen v. Milliman, Inc.* is attached here as Supplement 3). Among the reasons cited by the Iowa court was the clear public policy represented by the provisions of Iowa's insurance code. The court held that

forcing the liquidators to arbitrate would interfere with "(1) the public's interest in the proceeding; (2) the Liquidators' right of forum selection; (3) the Act's purposes of economy and efficiency; (4) the protection of the [health insurance co-op's] policyholders and creditors; and (5) the Liquidators' authority to disavow the Agreement." *Id*.[4]

In the other*, Donelon v. Shilling*, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, Suit No. 651,069 (September 15, 2017), the trial court did not make written findings. (A copy of the decision in *Donelon v. Shilling* is attached here as Supplement 2). Milliman, Inc.'s "Declinatory Exception of Lack of Subject Matter" (*i.e*., a claim that the court lacked subject matter jurisdiction due to the arbitration provision) was denied, with the Court referring to the briefing and arguments at the hearing. *Id.* p. 3 However, in that case, the statutory "rehabilitator" based his opposition upon his unique role as the statutory rehabilitator of the health insurance co-op, under Louisiana's Insurance Code. (A copy of the Rehabilitator's Opposition to Milliman's "Declinatory Exception" is attached here as Supplement 3.]

[4] The Iowa liquidators had formally disavowed the contract, but the clams brought against Milliman included malpractice, breach of fiduciary duty, negligent misrepresentation, intentional misrepresentation, aiding and abetting breach of fiduciary duty, and conspiracy. Here, while the Commissioner contends that all of her claims are *best* addressed in a single judicial forum, the Commission would not object to the severance of the contract-based claims for purposes of arbitration.

And, in this same proceeding, another defendant's motion to dismiss based upon a forum selection clause contained in its agreement with NHC and its predecessors was denied. The District Court (albeit, a different judge presiding) denied the motion. The Order denying Millennium's Motion stated the Commissioner, as Receiver had discretion to choose a forum for all proceedings related to the receivership, including claims that she brings in her capacity as Receiver," and nothing in the Act strips her of her right to choose a forum or whether to adopt the forum selection choices of the defunct insurer. Moreover, as the Receiver's position is inherently one established in the interest of the general public, it was consistent with public policy and the Act to allow the Receiver to have discretion to initiate and maintain acts in this jurisdiction, and moreover, that such claims were better litigated in the jurisdiction in which the Commissioner of Insurance is "acting as the Receiver of the defunct insurance company and where all claims that are related to the management of the receivership may be handled in one location." **Order Denying Millennium Consulting Services, LLC's Motion to Dismiss.**

b. *The unique role granted to the Commissioner in the liquidation proceedings indicates that the Commissioner was intended to determine the nature and forum of the proceedings.*

As shown above, the Commissioner occupies a unique role, acting first and foremost to recover the insurer's assets to pay the claims of the policy holders. In the proceedings below, Judge Gonzales, who stood in for Judge Delaney with respect

to Millennium's Motion to dismiss, recognized this unique role in determining that a forum selection clause was unenforceable as to the Commissioner. The same reasoning applies with respect to the arbitration clause.

Significantly, nothing in Chapter 696B indicates that the legislature intended to permit the Commissioner to be compelled to arbitrate any claims she might bring for that purpose. Yet, in other portions of the NIC, the legislature did expressly provide that, in some situations, arbitration agreements are enforceable. *See, e.g.,* NRS 695C.267 (permitting HMO insurer to require policy holders to submit disputes over coverage to arbitration). Even more significantly, in a section of the NIC that, like Chapter 696B, provides for court jurisdiction over an entity assuming certain obligations of an insurer, the legislature expressly stated that the section's provisions were *not* intended to interfere with agreements to arbitrate between parties. *See, e.g.,* NRS 681A.210(2) (noting that the granting of court jurisdiction over an unlicensed assuming insurer "does not conflict with or override the obligation of the parties to an agreement for reinsurance to arbitrate their disputes if such an obligation is created in the agreement."). The doctrine "*expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another," *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967), dictates that the legislature's failure to expressly note that arbitration agreements to which the liquidating insurer was party would remain in effect, despite the grant of jurisdiction to the district courts, indicates that

such arbitration provisions must fail. Application of this doctrine is especially appropriate here, where the legislature has shown its ability to affirm the continuing viability of arbitration provisions. *Ashokan v. State, Dep't of Ins*, 109 Nev. 662, 956 P.2d 244 (Nev. 1993).

Because arbitration of claims brought by the Commissioner is contrary to the intent and purposes of the NIC, compelling the Commissioner to arbitrate the claims against the Milliman Defendants is contrary to public policy. Therefore, the District Court abused its discretion in compelling arbitration of the claims against the Milliman Defendants.

B. Under New York Law, a Statutory Liquidator Cannot Be Compelled to Arbitrate the Claims Against the Milliman Defendants.

As shown above, Nevada's Insurance Code does not permit the compulsion of the Commissioner to Arbitrate. Similarly, New York law, which governs the enforcement of the Agreement, does not permit such compulsion. Accordingly, it was a manifest abuse of discretion to compel the Commissioner to arbitrate.

1. New York law properly governs the issue of the enforceability of the Agreement.

The Agreement between Milliman and NHC's predecessor provided that the substantive law of New York was to govern the enforcement of the Agreement. Agreement, § 5. However, the District Court determined that New York's substantive law did not apply to the issue of whether the Commissioner could be

deemed to have agreed to the arbitration provision. **III APP 543-551.** The District Court based this ruling on *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 64 (1995). In *Mastrobuono*, the U.S. Supreme Court, applied the Federal Arbitration Act ("FAA") to a contract governed by New York law, which the parties agreed required arbitration. The Court determined that a New York statute that precluded arbitrators from awarding punitive would not be applied to the contract because the agreement provided that National Associate of Securities Dealers ("NASD") rules governed the arbitration. The Court distinguished between the substantive law of the State of New York, and the procedural law regarding the types of damages that an arbitrator can award. Because the NASD rules did not prohibit arbitrators from awarding punitive damages, the Court determined that New York's procedural rule to that effect did not apply.

Here, however, *procedural* law was not at issue. Instead, the Commissioner invoked the substantive law of New York to hold the arbitration provision itself unenforceable as to the Commissioner. Significantly, the Agreement expressly provides that New York's substantive law governs, *inter alia*, the *enforcement* of the Agreement. Agreement, ¶ 5. In *Mastrobuono*, the Court noted that the choice of law provision governed "the rights and duties" of the parties. 514 U.S. at 64. Here, the *right* to enforce an arbitration clause is precisely what is at issue here.

In *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 478 (1989), the U.S. Supreme Court held that the choice of California law by the parties to govern the agreement required reference to such law to determine the enforceability of the arbitration provision. *Volt* was not overturned by *Mastrobuono*; to the contrary, the *Mastrobuono* Court cited *Volt* as authority several times, and expressly noted that *Volt* stood for the proposition that FAA does not operate in disregard to the parties' own expressed wishes. 514 U.S. at 56-58. Whether a valid agreement exists between the parties is an issue that, under the FAA itself, is one that must be determined in accordance with the *substantive law regarding contracts*. 9 U.S.C. ¶ 2.

Furthermore, the Court's decision in *Mastrobuono* was supported, in part, by the general contract principal that an ambiguity in a contract should be construed against the drafter. 514 U.S. at 63. Here, however, the party seeking to enforce the arbitration provision is the drafter of the Agreement. Milliman, not the Commissioner or her predecessors, was the drafter (*see* Opposition to Motion to Compel), and accordingly, to the extent any ambiguity could be said to have existed therein, it must be construed in favor of the Commissioner.

A district court abuses its discretion when it fails to apply the correct legal standard. *Staccato v. Valley Hosp*., 123 Nev. 526, 530, 170 P.3d 503, 506 (2007).

Accordingly, the District Court abused its discretion by holding that New York did not govern the enforceability of the arbitration provision as to the Commissioner.

2. *New York law is clear that the liquidator of an insolvent insurer cannot be compelled to arbitrate claims.*

There is no reasonable argument that the Milliman Defendants had any intent or expectation that, in the event of NHC's liquidation, the arbitration provision would be effective as against a statutory liquidator. This is because New York's substantive law is clear that the liquidator of an insolvent insurer cannot be compelled to arbitrate claims. *See, e.g., Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d at 232, 566 N.Y.S.2d at 578, 567 N.E.2d at 972 (1990) ("Although the Legislature has granted the Superintendent plenary powers to manage the affairs of the insolvent and to marshal and disburse its assets, the statutory scheme does not authorize his participation in arbitration proceedings."); *Washburn v. Corcoran*, 643 F. Supp. 554, 557 (S.D.N.Y. 1986) (New York "legislature . . . never contemplated turning over liquidation proceedings, and incidental actions and proceedings, to private arbitrators to administer."); *Matter of Knickerbocker*, 4 N.Y.2d 245, 149 N.E.2d 885 (N.Y. 1958) (rejecting dissent's argument that statutes did not require court jurisdiction over claims by the liquidator against third parties).

Significantly, New York's caselaw is *not* based on an express statutory provision contained in the insurance liquidation statutes. Instead, the *Knickerbocker* court interpreted the UILA (the same uniform law adopted by Nevada) as failing to

grant to the statutory liquidator the power to arbitrate claims. The *Corcoran* court noted that, in the intervening years since the *Knickerbocker* decision, the New York legislature had not seen fit to amend the liquidation statutes to permit arbitration. The Court further noted that this interpretation conformed with New York's public policy that their trial courts have exclusive jurisdiction over liquidation proceedings. The Court stated:

> Arbitrators are private individuals, selected by the contracting parties to resolve matters important only to them. They have no public responsibility and they should not be in a position to decide matters affecting insureds and third-party claimants after the contracting party has failed to do so. Resolution of such disputes is a matter solely for the Superintendent, subject to judicial oversight, acting in the public interest.

Corcoran, 77 N.Y.2d at 233, 567 N.E.2d at 973.

Significantly, the legislatures of New York and Nevada, in adopting the UILA, expressly intended that the statutes should be interpreted uniformly across the states adopting it. *See* N.Y. Ins. Law § 7415 ("The uniform insurers liquidation act shall be interpreted and construed to effectuate its general purpose to make uniform the law of those states that enact it."); NRS 696B.280(3) ("The Uniform Insurers Liquidation Act shall be so interpreted as to effectuate its general purpose to make uniform the laws of those states which enact it."). And, both legislatures adopted provisions that granted the receivership court exclusive jurisdiction over liquidation claims. Thus, even if, as the District Court found, the choice of law

provision was not intended to govern the arbitration provision, the Milliman Defendants could not have expected that Nevada, which, like New York, had adopted the UILA, would permit a statutory liquidator to arbitrate claims.

3. *Under New York law, the arbitration provision cannot be enforced by van der Heijde or Shreve.*

The District Court decided, without analysis, that the two employees of Milliman named in the Complaint, Shreve and van der Heijde, were entitled to enforce the arbitration provision. However, neither of these persons were parties to the Agreement, and accordingly, they are not entitled to enforce the arbitration provision. Under New York law, "the right to compel arbitration does not extend to a party that has not signed the agreement pursuant to which arbitration is sought unless the right of the non-signatory is expressly provided for in the agreement." *Greater N.Y. Mut. Ins. Co. V. Rankin*, 298 A.D.2d 263, 263, 748 N.Y.S.2d 381, 382, (N.Y. App. Div. 2002). Here, nothing in the Agreement provides that Shreve and van der Heijde are entitled to enforce the Agreement.

Nor is there any New York authority that would authorize a non-signatory to rely upon an equitable estoppel theory to compel another non-signatory to arbitrate. *See Rosenbach v. Diversified Grp., Inc*., 39 A.D.3d 271 (N.Y. App. Div. 2007) (expressing doubt that "the doctrine of equitable estoppel [is] available in this jurisdiction to enable a non-signatory to compel signatories to an arbitration agreement to arbitrate"). Indeed, numerous jurisdictions have held that a non-

signatory to an arbitration agreement may not compel another non-signatory to arbitrate claims. *See Paragon Litig. Tr. v. Noble Corp.*, Case No.: 16-10386 (CSS), at *26 n. 99 (Bankr. D. Del. Aug. 6, 2018); *Reilly v. Meffe*, 6 F. Supp. 3d 760, 778 (S.D. Ohio 2014); *Chemence, Inc. v. Quinn*, No. 1:11-CV-01366-RLV, 2012 U.S. Dist. LEXIS 198723, at *14 (N.D. Ga. Oct. 15, 2012). *See also Invista S.à.r.l. v. Rhodia, SA*, 625 F.3d 75, 85 (3d Cir. 2010) (dismissing appeal as moot on other grounds, but noting that party had offered "no authority for its contention that a non-signatory to an arbitration agreement can compel another non-signatory to arbitrate certain claims, and [the court] found none").

There is no New York authority allowing a non-signatory to enforce an arbitration agreement against another non-signatory. Most courts addressing the issue have concluded that arbitration may not be compelled under these circumstances. The only New York court to address the prospect expressed doubt that a non-signatory may rely on an estoppel theory to compel another non-signatory to arbitrate claims. *See Rosenbach v. Diversified Grp., Inc*., *supra*. Given these circumstances, there is no reason to conclude that, under New York law, Shreve or van der Heijde may compel the Commissioner to arbitrate her claims against them.

C. The Milliman Defendants Have Themselves Acknowledged the Primacy of the NIC over the Arbitration Provisions.

Finally, Milliman itself has acknowledged that not all claims "arising out of or relating to the engagement" must be arbitrated, but instead, may be determined

by the procedure determined by the Commissioner. Milliman filed a claim with the Commissioner, pursuant to the requirements of NRS 696B.330, seeking payment of sums purported to be due for services performed for NHC. Obviously, a claim for payment under the Agreement arises out or relates to the engagement. By filing the claim, Milliman acknowledged that the arbitration provision must yield to the requirements of Chapter 696B for purposes of its claim against NHC.

Pursuant to NRS 696B.440, the amount for which Milliman should be liable to NHC would need to be determined before Milliman's claim could be resolved. Accordingly, by filing a claim against NHC, Milliman acquiesced to resolution of the its own liability outside of arbitration.

III. NEITHER THE FAA NOR THE NAA APPLY TO REQUIRE ARBITRATION HERE.

As discussed above, the Commissioner cannot be compelled to arbitrate, as private arbitration of the claims here would be contrary to public policy. Neither the Federal Arbitration Act ("FAA") nor the Nevada Arbitration Act ("NAA") require arbitration here. The Nevada Insurance Code reverse-preempts the FAA pursuant to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ("McCarran-Ferguson"). The NAA applies only when another statutory scheme does not supplant it. Accordingly, neither arbitration act requires arbitration here.

A. The FAA Is Preempted Pursuant to McCarren-Ferguson and the NIC.

The FAA cannot require arbitration here, because it is reverse preempted by the McCarran-Ferguson Act, 15 U.S. §1012, and the Nevada Insurance Code. The McCarren-Ferguson Act states that

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b). Reverse-preemption of federal law through McCarran-Ferguson 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). Here, each of these criteria is met, and accordingly, Nevada's Insurance Code reverse-preempts the FAA under McCarran-Ferguson.

1. The Nevada Insurance Code was enacted for the purpose of regulating insurance.

There can be no reasonable dispute that Nevada's Insurance Code was enacted for the purpose of regulating the business of insurance. The stated purpose of the NIC expressly includes the intent to regulate insurance within the state. NRS

679A.140(1)(c) and (i). Moreover, those stated purposes expressly refer to the development of a body of regulatory law pursuant to the federal statutes now known as McCarren Ferguson. NRS 679A.140(1)(i).

Additionally, the specific provisions of the NIC relevant to the issues here, Chapters 696B, are specifically directed at the regulation of insurance, including the financial viability of the insurers, and protecting and compensating those harmed by an insurer's insolvency. As one court has stated, a liquidation act is "the ultimate measure of the state's regulation of the insurance business: the take-over of a failing insurance company." *See Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010) (holding that the first prong of the *Forsyth* test was clearly satisfied by a state's insurance liquidation statutes).

In *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993), the U.S. Supreme Court determined that state insurer liquidation provisions were specifically directed at the regulation of insurance, because laws directed at protecting or regulating the relationship between the insured and insurer were laws regulating the "business of insurance." 508 U.S. at 501. The Court further noted that where the state statute "furthers the interests of policyholders," the federal statute must yield. *Id.* at 502.

Here, the provisions contained in Chapter 696B are directed at furthering the interests of policyholders of delinquent insurers. Accordingly, the first prong of the *Forsyth* test is satisfied.

2. The FAA is not directed at the regulation of insurance.

Nor can there be any reasonable dispute that the FAA is not specifically related to the business of insurance. *See, e.g. S. Pioneer Life Ins. Co. v. Thomas*, 2011 Ark. 490, 385 S.W.3d 770, 774 (2011) (finding that FAA does not specifically relate to insurance); *Cont'l Ins. Co. v. Equity Residential Props. Tr.*, 255 Ga.App. 445, 565 S.E.2d 603, 605-06 (2002) (same); *Munich Am Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998) (same); *Stephens v. Am. Int'l Ins. Co*., 66 F.3d 41, 44 (2d Cir. 1995) (same). The U.S. Supreme Court has said that "the FAA's primary purpose [is] ensuring that private agreements to arbitrate are enforced according to their terms." *Volt Information Sciences,* 489 U.S. at 479.

Accordingly, the second prong of the *Forsyth* test is satisfied.

3. Requiring the Commissioner to arbitrate "invalidates, impairs, or supersedes" the NIC.

The application of the FAA to force the Commissioner to arbitrate the claims against the Milliman Defendants would "invalidate, impair, or supersede" Nevada's Liquidation Act. As shown in Part II above, the Nevada Legislature did not grant the Commissioner any right to arbitrate claims involving the assets of the liquidated insurer. To the contrary, the legislature showed its clear intent that such claims be

litigated in court proceedings, by granting the liquidating court jurisdiction over any persons against whom the Commissioner could bring claims as part of the liquidation. NRS 696B.200. The legislature's adoption of the UILA further ensured not only that the liquidating court would have exclusive jurisdiction over claims, but that such jurisdiction would be honored by courts of other states adopting the UILA. *See* NRS 696B.190(4) ("No court has jurisdiction to entertain, hear or determine any petition or complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer…or other relief…relating to such proceedings, other than in accordance with NRS 696B.010 to 696B.565, inclusive."); NRS 696B.270 ("The court may at any time during a proceeding...issue such other injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions…").

A preference for consolidation of proceedings within a single court is further evidenced by the legislature's limitation of certain claims based on an actuary's statutory obligations, set forth in Chapter 681B, as belonging only to the insurer or the Commissioner. NRS 681B.250(1). This prevents a multitude of claims being brought in various courts, by various policyholders. The only means policyholders have for recompense is through the liquidator's action. The Receivership Court acknowledged this intent by ordering that it would exercise "sole and exclusive

jurisdiction" over all Property (including lawsuits), "to the exclusion of any other court or tribunal."[5]

Here, the District Court reasoned that requiring arbitration of claims brought on behalf of the liquidating insurer does not "invalidate, impair, or supersede" Nevada's insurance law; some courts have agreed with this view. For example, the Milliman Defendants will likely cite *Milliman v. Roof*, Case. No. 3:18-cv-00012-GFVT (E.D. KY. October 23, 2018), where the Court reasoned that requiring the arbitration does not deprive the Liquidator of any rights, but merely alters the forum. However, arbitration would significantly impair the Commissioner's right to appellate review to correct error. *See Health Plan of Nevada v. Rainbow Med*, 120 Nev. at 695 (noting that appellate review of arbitration awards is limited and very different from review of district court decision); *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist*, 122 Nev. at 342 (arbitrator's errors of law cannot be corrected on appeal).

Furthermore, the claims raised here are not simply claims for breach of contract, but also negligence and fraud claims which will directly involve interpretations of portions of the NIC, including NRS Chapter 681B. Accordingly,

[5] Both the District Court and the Milliman Defendants point to language in the Receivership Order as indicating that the Commissioner has the right to arbitrate claims, while no claims against the receiver can be arbitrated. However, the overall intent of the Receivership Order is that the Commissioner should choose the forum, with the permission of the Court. There is nothing to suggest that the Receivership Court contemplated that the Commissioner would be forced to arbitrate any of its claims, contrary to the Receivership Court's exclusive jurisdiction.

resolution of the claims through confidential arbitration would not contribute to the development of Nevada's body of insurance law, which is an intended purpose of the NIC. See NRS 679A.140.

Moreover, the *Roof* Court was apparently unaware that other jurisdictions, addressing whether requiring arbitration by a receiver against a third party impairs the state's insurance law, have determined that the third requirement of the *Forsyth* test is satisfied because the preference for arbitration in the FAA conflicts with, and impairs, the grant of exclusive jurisdiction to the liquidating court. *See Earnst Young v. Clark,* 323 S.W.3d at 692 (finding *Forsyth* test satisfied to preclude compulsion of insurance liquidator to arbitrate claims); *Benjamin v. Pipoly*, 155 Ohio App. 3d 171, 184, 800 N.E.2d 50, 60 (2003) ("[C]ompelling arbitration against the will of the liquidator will always interfere with the liquidator's powers and will always adversely affect the insurer's assets."); *Ommen, supra*, at p. 6 ("The Court cannot compel arbitration under the FAA because, under the McCarran-Ferguson Act, the [insurance code] reverse preempts the FAA, such that the FAA must give way to the rights and remedies prescribed in the [insurance code].").

Because all three elements of the *Forsyth* test are satisfied, the FAA cannot require the Commissioner to arbitrate the claims here.

B. The NAA Cannot Be Applied to Override Nevada's Insurance Liquidation Law and the Receivership Order.

The District Court also held that the NAA would require arbitration here.

However, the NAA does not apply here. It is well-settled that where a general statute conflicts with a specific one, the specific one governs. *See, e.g*., *State Dep't of Taxation v. Masco Builder*, 129 Nev. Adv. Op. 83, 312 P.3d 475, 478 (2013) ("A specific statute controls over a general statute"). "Under the general/specific canon, the more specific statute will take precedence, and is construed as an exception to the more general statute, so that, when read together, the two provisions are not in conflict and can exist in harmony." *Williams v. State Dep't of Corr*., 402 P.3d 1260, 1265 (Nev. 2017) (internal citations and quotations omitted).

Here, although the NAA provides a general policy in favor of arbitration, the Liquidation Act creates a specific and detailed statutory scheme for winding down insolvent insurance companies for the benefit of NHC's members, its formerly insured patients, unpaid hospitals, doctors, other creditors, and the public at large. NRS Chapter 696B. As discussed above, the Nevada Legislature showed its intent that the receivership court have exclusive jurisdiction over claims, both by granting that court jurisdiction exclusive over claims against the liquidating insurer, and by granting the receivership court jurisdiction over persons against whom the Commissioner chose to bring claims. NRS 696B.190 and 696B .200. Additionally, the receivership court has the power to issue injunctions to prevent any interference with the Commissioner's efforts to complete the liquidation. NRS 696B.270.

CONCLUSION

This Court should grant the requested writ relief. The District Court abused its discretion in compelling arbitration under the circumstances here. Nevada's Insurance Code expresses the public policy that, for the protection of the policyholders and the public, claims involving a liquidating insurer's estate should be resolved in the Receivership Court. This will allow the proceeding to be public, rather than confidential, as required by the Agreement, and will therefore contribute to the body of law regulating insurance, as the legislature intended. It will also allow the Receivership Court to have confidence that the assets of the estate have been properly marshalled, for the benefit of the policyholders first, then claimants for unearned premiums, and then finally other creditors of the failed insurer.

Respectfully submitted this 17th day of December 2018.

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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 12,148 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 17th day of December 2018

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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, I caused a copy of ***Petition Under NRAP 21 For Writ of Mandamus*** to be served to the Real Parties Interest via the Supreme Court's e-filing system on December 17, 2018, and upon

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With a courtesy copy to

Judge Kathleen Delaney Eighth Judicial District Court Clark County, Nevada Regional Justice Center 200 Lewis Avenue Las Vegas, NV 89155	Judge Timothy C. Williams Eighth Judicial District Court Clark County, Nevada Regional Justice Center 200 Lewis Avenue Las Vegas, NV 89155 (As the Judge to which this matter is currently assigned)

via hand delivery on December 18, 2018.

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