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.: 77682

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

PETITIONER'S APPENDIX

VOLUME II of III

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I	APP00001-2	10/20/11	Consulting Services Agreement between Milliman, Inc. and the Culinary Health Fund
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I	APP00180-229	12/11/17	Plaintiff's Opposition to Milliman's Motion to Compel Arbitration

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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 ***Petitioner's Appendix Volumes I – III*** 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
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Judge Timothy C. Williams
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(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

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DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP,

Plaintiff,

v.

MILLIMAN, INC., a Washington Corporation; JONATHAN L. SHREVE, an Individual; MARY VAN DER HEIJDE, an Individual; MILLENNIUM CONSULTING SERVICES, LLC, a North Carolina Corporation; LARSON & COMPANY P.C., a Utah Professional Corporation; DENNIS T. LARSON, an Individual; MARTHA HAYES, an Individual; INSUREMONKEY, INC., a Nevada Corporation; ALEX RIVLIN, an Individual; NEVADA HEALTH SOLUTIONS, LLC, a Nevada Limited Liability Company; PAMELA EGAN, an Individual; BASIL C. DIBSIE, an Individual; LINDA MATTOON, an Individual; TOM ZUMTOBEL, an Individual; BOBBETTE BOND, an Individual; KATHLEEN SILVER, an Individual; DOES I through X inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO. A-17-760558-C
DEPT. NO. XXV

PLAINTIFF'S OPPOSITION TO DEFENDANT MILLENNIUM CONSULTING SERVICES, LLC'S MOTION TO DISMISS

Plaintiff, Barbara D. Richardson, Commissioner of Insurance in the State of Nevada, in her official capacity as Permanent Receiver of Nevada Health CO-OP ("Plaintiff" or "Receiver"), by and through her undersigned counsel, Greenberg Traurig, LLP, hereby submits this opposition to Defendant Millennium Consulting Services, LLC's ("Millennium") motion to dismiss ("Motion"). This opposition is based upon the following memorandum of points and authorities, the pleadings and papers on file herein, and any oral argument the Court may entertain at the time of hearing of this matter.

DATED this 18th day of December, 2017.

GREENBERG TRAURIG, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Millennium seeks to have this Court relinquish its exclusive jurisdiction over NHC's receivership proceedings in favor of a piecemeal transfer of one of the 16 named defendants to North Carolina. However, that would be contrary to Nevada's complex and comprehensive statutory scheme for winding down insurance companies as laid out in Nevada's Liquidation Act, NRS 696B, and the Receivership Court's[1] Permanent Injunction and Order Appointing Commissioner as Permanent Receiver of Nevada Health Co-Op (the "Receivership Order"). This statutory scheme – and the Receivership Order issued under that statutory authority – have one overriding purpose: maximizing the value of the estate of the defunct insurance company for the

[1] The Hon. Judge Kenneth Cory, Clark County Nevada Eighth Judicial District, Dept. 1.

benefit of members, insureds, creditors, and the general public. The Commissioner, having been appointed the statutory receiver, must carry out that goal to attempt to recover NHC from parties, such as Millennium here, who have breached their duties and caused NHC to sustain tens of millions of dollars in damages. To state the obvious, wresting various fragments of this lawsuit into piecemeal faraway jurisdictions under another state's law is not in line with the purposes of the statute.

Further, Millennium's view is not in line with the law. As an initial matter, the Receiver, as a ***non-signatory*** to the Agreement, is not bound by the procedural terms – the forum selection clause and choice of law provision – upon which Millennium bases its motion. To hold otherwise would be contrary to the exclusive jurisdiction of this Court. Even if this Court were to find that the Receiver was effectively a signatory to the Agreement, bound to the clauses the same as NHC would have been, Millennium's argument still fails. Evaluating the clauses on the merits, the choice-of-law provision and the forum selection clause are invalid and should not be enforced. As such, this Court should deny the Motion.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

During late 2014, NHC sought out an accounting firm that was an expert in insurance accounting, reporting, and consulting. *See* Complaint at ¶ 136, on file herein. Based on Millennium's self-proclaimed expertise in statutory accounting and reporting regulations for the insurance industry, NHC entered into a service agreement (the "Agreement") with Millennium on January 7, 2015 to provide such services specifically to comply with Nevada insurance regulatory requirements. *Id.* at ¶¶ 137-140. The Agreement outlined Millennium's contractual obligations to NHC. *Id.* at ¶¶ 140-142. It contained a limited choice of law provision and a forum selection clause:

> "This Agreement shall be governed in regards to its execution, interpretation or enforcement in accordance with the laws of the State of North Carolina. Venue for its enforcement or any action or proceeding based on this Agreement shall be in Wake County, North Carolina."

See Nevada Health CO-OP Agreement, dated January 7, 2015, attached as Exhibit 1 to Millennium's Motion to Dismiss, § 8.4.

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The services provided by Millennium did not meet applicable statutory, professional, and contractual standards. *See* Complaint at ¶¶ 143-151. NHC began to incur significant losses for the year ending December 31, 2014, and Millennium failed to adequately disclose information relevant to NHC's ability to continue or to address the severity of NHC's financial position. *Id.* at ¶¶ 152-157. But for Millennium's failures, the Nevada Division of Insurance ("NDOI") would have been able to step in sooner and thus minimize the public's losses. *Id.* at ¶ 7.

As a result of Millennium's failure, as well as the failure of other named defendants, NHC was incapable of continuing, and the NDOI was forced to step in. *Id.* at 315. Amy L. Parks (the then acting Nevada Commissioner of Insurance) commenced the receivership action in the Receivership Court against NHC by filing a petition to appoint herself as the receiver of NHC under NRS 696B. *Id.* at ¶¶ 316. Thereafter, on October 14, 2015, the Receivership Court issued an order naming the Commissioner as permanent receiver of NHC (the "Receivership Order"). *Id.* at ¶ 318; *see* **Exhibit A**, Receivership Order. Cantilo & Bennett, L.L.P. was named as Special Deputy Receiver ("SDR").

Pursuant to the Court's Receivership Order and subsequent Final Order of Liquidation, the Receiver and the SDR are authorized to liquidate the business of NHC and wind up its ceased operations, including prosecuting suits on behalf of the numerous individuals and entities harmed by NHC's failure, including its members, insureds, creditors, and the general public. *See generally* Receivership Order; Complaint at ¶¶ 317-321.

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…

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(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.

…

(8) All claims against CO-OP its assets or the Property must be submitted to the Receiver as specified herein ***to the exclusion of any other method of submitting or adjudicating such claims in any forum, court, or tribunal subject to the further Order of this Court***. The Receiver is hereby authorized to establish a Receivership Claims and Appeal Procedure, for all receivership claims. The Receivership Claims and Appeal Procedures shall be used to facilitate the orderly disposition or resolution of claims or controversies involving the receivership or the receivership estate.

…

(11) The officers, directors, trustees, partners, affiliates, brokers, agents, creditors, insureds, employees, members, and enrollees of CO-OP, and all of the 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;

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…

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…

…

(19) No judgment, order, attachment, garnishment sale, assignment, transfer, hypothecation, lien, security interest or other legal process of any kind with respect to or affecting CO-OP or the Property shall be effective or enforceable or form the basis for a claim against CO-OP or the Property ***unless entered by the court, or unless the Court has issued its specific order***, upon good cause shown and after due notice and hearing, permitting same.

…

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

See **Exhibit A**, Receivership Order (emphasis added).

On August 25, 2017, the Receiver instituted a contract and tort action on behalf of the numerous people and entities harmed by NHC's failure, asserting 63 causes of action against 16 defendants, including Millennium. *See generally* Complaint. Pursuant to the Receivership Order, the action was initiated in the Eighth Judicial District Court, the situs of the receivership proceedings and the ***only court*** with jurisdiction over NHC's Property. As to Millennium, the Receiver asserts nine claims, including: (1) professional malpractice; (2) intentional misrepresentation (fraud); (3) negligent misrepresentation; (4) negligence; (5) breach of contract; (6) tortious breach of the implied covenant; (7) breach of the implied covenant of good faith and fair dealing; (8) negligent performance of an undertaking; and (9) unjust enrichment. *Id.* at ¶¶ 418-477.

Additionally, the Receiver asserts two additional causes of action against Millennium and all other defendants, asserting that all defendants acted jointly as part of a civil conspiracy and in concert of action and, thus, are jointly and severally liable for the damages described in the complaint. *Id.* at ¶¶ 754-769.

III. ARGUMENT

Millennium was engaged to assure that financial reporting by NHC would be accurate and in compliance with Nevada's insurance laws. Had those requirements been met, NDI would have learned of NHC's deepening insolvency much earlier and been able to institute remedial measures long before it actually did, thereby avoiding much of the economic loss that followed. Millennium

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wants to treat this case like a garden-variety dispute between two private entities that signed a contract with a forum selection clause and choice-of-law clause. Accordingly, Millennium jumps right in to a discussion of the substance of the forum selection clause and choice-of-law provision. However, Millennium misses the mark.

First, this Court must determine whether to give any weight to the clauses ***at all***. In other words, this Court does not even need to evaluate the clauses as the Receiver is not a signatory to the Agreement. Second, even if the Court finds that the Agreement's choice of law and forum selection provisions apply, this Court should nevertheless elect not to enforce those provisions where doing so would violate Nevada public policy, namely, the uniform and orderly winding-up of the affairs of insolvent insurers for the benefit of Nevada citizens and creditors. Finally, the choice of law/choice of venue provision is not broad enough to encompass the claims of this case and, at a minimum, there is simply no basis for transferring the Receiver's non-contract claims outside of Nevada.

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A. <u>The Provisions of the Private Agreement Do Not Bind the Receiver Where the Receiver is Not a Signatory to the Agreement and Where this Court has Exclusive Jurisdiction</u>.

For the reasons stated below, the provisions of the private agreement do not bind the Receiver where the Receiver is not a signatory to that agreement and where this Court has exclusive jurisdiction. As such, this Court should deny Millennium's Motion.

1. As a Non-Signatory, the Receiver is Not Bound by the Agreement's Provisions.

It is black-letter law that absent special circumstances, the provisions of a contract only bind the signatories to that contract. *See County of Clark v. Bonanza No. 1*, 96 Nev. 643, 648-49, 615 P.2d 939, 943 (Nev. 1980) ("As a general rule, none is liable upon a contract except those who are parties to it."). While Nevada courts recognize the presumptive validity of forum selection clauses and choice of law provisions, there is a presumption *against* compelling non-signatories to abide by such clauses. *See e.g. Martin v. DeMauro Constr. Corp.*, 104 Nev. 506, 507, 761 P.2d 848, 849 (1988) (declining to consider the applicability of a forum selection clause against a nonsignatory who was the executrix of a will); *V.C.X., Ltd. v. Burge*, No. 2:06-CV-00641-PMP-RJJ, 2006 U.S. Dist. LEXIS 88050, at *9 (D. Nev. Nov. 30, 2006) (forum selection clause had no force or effect as to nonsignatory); *Rivercard, LLC v. Post Oak Prods., Inc.*, No. 2:12-CV-1150 JCM (CWH), 2012

U.S. Dist. LEXIS 168712, at *12 (D. Nev. Nov. 28, 2012) (choice of law clause not binding). Indeed, where a signatory seeks to enforce a forum selection clause against a non-signatory, "that party bears the burden to prove the theory upon which it relies to bind the nonsignatory to the contract." *CNOOC Se. Asia Ltd. v. Paladin Res. (Sunda) Ltd.*, 222 S.W.3d 889, 895 (Tex. Ct. App. 2007). In avoiding this threshold issue, Millennium has failed to meet its own burden, and its Motion therefore fails as a matter of law.

Here, the Receiver is not a signatory – in reality or in legal effect – to the Agreement. As such, this Court should not dismiss the action under the forum selection clause. Millennium makes two unpersuasive arguments to the contrary: (1) because a receiver "steps into the shoes" of its predecessor, the Receiver here is bound; and (2) the Receiver cannot seek to enforce some parts of the Agreement, but at the same time disavow others. Both arguments fail.

a. The Receiver Did Not Simply Step into the Shoes of NHC.

Because the Receiver is not a signatory to the Agreement, this Court should not require her – and by extension, the members, creditors, policyholders, and the general public that she represents – to be bound by choice-of-law and forum selection clauses that she did not know about and did not agree to at the time the Agreement was executed. Although the Receiver has the ability to bring causes of action for the benefit of the NHC estate, courts have held that liquidators or receivers of defunct insurers do not simply "stand in the shoes" of an insolvent insurer, because he or she also represents the members, insureds, creditors, and the general public. *See Taylor v. Ernst & Young*, 130 Ohio St. 3d 411, 419, 958 N.E.2d 1203, 2012 (Ohio 2011) ("[t]he 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…"); *see generally Cordial v. Ernst & Young*, 483 S.E.2d 248, 257 (W.Va. 1996) (insurance commissioner as receiver for an insurer "acts as the representative of interested parties, such as the defunct insurer, its policyholders, creditors, shareholders, and other affected members of the public," not simply as the defunct insurer). In other words, the position of the Receiver in this case is inherently one established in the interest of the public, and this public interest cannot be limited by an agreement signed by private parties. *See e.g. In re Freestone Ins. Co.*, 143 A.3d 1234, 1260-61 (Del. Ch. 2016) (private parties are not

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allowed to "trump the statutory provisions and public policies of the domiciliary state, such as the public policy of centralizing proceedings in the domiciliary jurisdiction and the statutory provisions that implement that policy"). For example, in *Arthur Andersen v. Superior Court*, the court rejected the defendant's argument that an insurance liquidator acts as a typical receiver, holding:

> 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. (See, e.g., Ins. Code, § 730, subd. (b).) 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.

67 Cal. App. 4th at 1495.

Such is the case here. Nevada's statutory framework was not designed to primarily protect insurance companies, but rather their insureds and their creditors, *i.e.*, persons other than NHC who were damaged as a result of Millennium's actions. The Receiver is suing "on behalf of" NHC's members, insured enrollees, creditors and others. *See* Complaint, at ¶ 1. While Millennium may argue it is fair to bind ***NHC*** to such clauses in an agreement that its predecessor signed, it is not fair to bind those that had absolutely no say in that agreement – *e.g.*, members, insureds, creditors, and the general public – to those terms. This is especially true here, where the gravamen of the agreement was compliance with Nevada law and enforcement of the clauses would result in litigation occurring piecemeal in a faraway jurisdiction under North Carolina state law and be a waste of the Receiver's limited resources. Because the Receiver is not merely acting on behalf of NHC here, but rather on behalf of the defunct insurance company's members, insureds, creditors, and the general public, it would be unjust to force application of the choice of law and forum selection clauses.

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Millennium's cited cases do not substantiate its assertion that the liquidation proceedings play no part in the analysis. As they all involve issues surrounding removal to federal court and conflicts involving state and federal law under the Federal Arbitration Act (the "FAA"), they are not applicable.[2] As more fully discussed in the Receiver's Opposition to Milliman's Motion to Compel Arbitration, which is hereby incorporated by reference, the FAA is reverse pre-empted under the McCarran-Ferguson Act. Furthermore, the unique case law that has developed regarding federal arbitration is not directly applicable to the analysis of contractual choice of law provisions or choice of venue provisions and Millennium has failed to cite any cases that establish such a connection.

b. The Receiver is Not Estopped from Disavowing the Forum Selection and Choice-of-Law Provisions.

Millennium's second argument is that the Receiver cannot "assert a claim that arises from and is intertwined with the contract while at the same time disavowing a provision in that contract requiring litigation in the forum selected by the parties when the bargain was struck." *See* Motion, at 12. Again, it bears repeating that the general rule is that a party ***cannot*** be bound to a contract it did not sign. *See County of Clark v. Bonanza No. 1*, 615 P.2d at 943 ("As a general rule, none is liable upon a contract except those who are parties to it."). The principle hinted at by Millennium – known as equitable estoppel or direct benefits estoppel – is an exception to this general rule; it provides that a non-signatory may be bound if it seeks to enforce rights under an agreement, as it cannot disavow portions of that same agreement. *See* Motion, at 11; *Truck Ins. Exch. v. Swanson*, 124 Nev. 629, 636, 189 P.3d 656, 661 (2008) (holding nonsignatory law firm not estopped from refusing to comply with arbitration clause where it received no direct benefits under agreement).

[2] In *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir. 1991), the defendant sought removal to federal court, and the Commissioner sought remand. The court found the defendant had waived his right to remove pursuant to the forum selection clause and that a forum selection clause is not a ground for remand. Likewise, in *Dinallo v. Dunay Ins. Co.,* 672 F. Supp. 2d 368 (S.D. N.Y. 2009), the court found that the forum selection clauses operated as waiver of removal rights to federal court. In *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 973 (9th Cir. 1992), the court enforced an arbitration agreement against a receiver where the receiver was unable to articulate how arbitration interfered with a valid state regulatory purpose. Here, however, the existence of numerous parties to the action and, in particular, the claims involving all defendants, are sufficient to distinguish the cited cases and illustrate the necessity of consolidation of this action in one forum.

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However, estoppel has its limits. Courts have found that while certain contractual provisions may be enforced against a non-signatory where the non-signatory "receives a direct benefit from the contract containing an arbitration clause," this exception ***does not apply*** to non-signatories whose interests might be related to, but do not flow from, the contractual interest of a signatory to the agreement. *See e.g. Truck Ins. Exch.*, 124 Nev. at 637, 189 P.3d at 661-62 (finding that party who was not signatory to written agreements, and who did not directly benefit from those agreements in initiating its cause of action, was not estopped from repudiating arbitration agreement).[3] Where any benefit to the non-signatory is indirect, even where the claims are "intertwined with the underlying contract," only the signatory is estopped from avoiding the clause. *See Javitch v. First Union Sec., Inc*., 315 F.3d 619, 629 (6th Cir. 2003), citing *Thomson-CSF v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995) ("When only an indirect benefit is sought…it is only the signatory that may be estopped from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to resolve are intertwined with the underlying contract," and vacating the lower court's decision for further consideration of this issue).

Here, this logic applies. The Receiver is not the direct beneficiary of the Agreement. The Receiver represents a number of other interests, such as the failed insurer's members, insureds, creditors, as well as the general public, and does not herself receive a "direct benefit" from the Agreement. She did not utilize Millennium to draft changes to her financial statements or to assist in regulatory filings by ensuring her filings were compliant with statutory law. As such, equitable estoppel does not apply here.

Finally, equitable estoppel is by its nature a creature of equity: it is an exception that seeks to do what is fair. Here, it would not be fair to send the claims against a single defendant, Millennium, to North Carolina in this case having 15 other defendants who are litigating here in Nevada. This would increase litigation costs and reduce the funds remaining for distribution to claimants – the policyholders and creditors that never agreed to such an arrangement.

[3] *See also Cole v. Am. Cmty. Servs., Inc.*, 2006 U.S. Dist. LEXIS 75431, 2006 WL 2987815, at *3 (S.D. Ohio Oct. 17, 2006) (non-signatory not bound to choice-of-law clause where it was bargained for years before the incident such that it would not be foreseeable to bind the non-signatory); *Am. S.S. Owners Mut. Prot. & Indem. Ass'n v. Henderson*, 2013 U.S. Dist. LEXIS 43547, at *14 (S.D. N.Y. Mar. 26, 2013) (applying direct benefits estoppel to choice of law clauses).

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2. Millennium's Argument that Nothing in Chapter 696B Mandates Exclusive Jurisdiction in this Court Fails.

Millennium next argues that "nothing in Chapter 696B mandates that a Nevada court have exclusive jurisdiction over this case." *See* Motion, at 12. Millennium goes on to argue that the Receivership Order permits the Receiver to litigate anywhere, and that the Receivership Order "pave[s] the way for enforcement of the forum-selection clause." This strained reading of the Receivership Order is not tenable.

Chapter 696B, Nevada's Liquidation Act, incorporates the Uniform Insurers Liquidation Act ("UILA"). *See* NRS 696B.280. 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) (emphasis added). Similarly, the UILA's overall purpose is to protect the interests of members, insureds, creditors, and the general public. *See e.g*. NRS 696B.210, 696B.530, 696B540; *see also* Joint Meeting of the Assembly and Senate Standing Committees on Commerce, March 25, 1977 (summarizing statements by Richard Rottman, Insurance Commissioner, and Dr. Tom White, Director of Commerce Department) (Nevada's insurance law was "designed to help the Insurance Division regulate the industry on behalf and primarily in the interests of the public of the State of Nevada"). Applying the law of the domiciliary state, as well as having centralized proceedings in one state's court, advances these purposes. *See Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585, 593 (5th Cir. 1988) ("[Consolidating claims in one court] eliminates the risk of conflicting rulings, piecemeal litigation claims, and unequal treatment of claimants, all of which are of particular interest to insurance companies and policyholders, as well as other creditors."); *Frontier Ins. Serv*., 109 Nev. at 236, 849 P.2d at 3341; *In re Freestone Ins. Co.*, 143 A.3d at 1260-61; *see also Benjamin v. Pipoly*, 184, 800 N.E.2d 50, 60 (Ohio Ct. App. 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.").

Indeed, Nevada's Liquidation Act recognizes the need for consolidation ***in one court*** via various statutory provisions. *See e.g*. NRS 696B.190(1) (district court has original jurisdiction over

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delinquency proceedings under NRS 696B.010 to 696B.565, inclusive, and any court with jurisdiction may make all necessary or proper orders to carry out the purposes of those sections); 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…").[4] Likewise, the Receivership Court, acting within its statutory authority, ordered that it would exercise "sole and exclusive jurisdiction" over all NHC property – which includes choses in action - "to the exclusion of any other court or tribunal."

Further, there is no dispute that the Receivership Order governs this action. A review of the Receivership Order states that it provides the Receiver, consistent with the Nevada law, with broad power to "conserve and preserve the affairs of" NHC, including performing "all acts necessary or appropriate for the conservation, rehabilitation, or liquidation" of NHC. In other words, the Receiver is tasked with maximizing the value of the estate of NHC for the purposes of those with claims against the estate. It gives the Receiver legal and equitable title to all NHC "Property," which explicitly includes causes of action, defenses, and rights to participate in legal proceedings. *See* **Exhibit A**, Receivership Order, at (2)(b). It also places all property, and any claims or rights respecting the property in the "sole and exclusive jurisdiction" of the Court, ***to the exclusion of any other court or tribunal***. *See id*., at (3). The fact that later in the order, the Receiver is "authorized" to "collect all debts and monies due and claims belonging to [NHC], and for this purpose:…to do such other acts as are necessary or expedient to marshal, collect, conserve, or protect its assets or

[4] North Carolina has adopted UILA. *See State ex rel. Ingram v. Reserve Ins. Co.*, 281 S.E.2d 16, 20 (N.C. 1981), citing 25 N.C. L. Rev. 429 (1947); *see also* G.S. 58-155.10 to 58-155.17. Indeed, under the UILA, domiciliary courts can issue injunctions against third-party claims against insurers in liquidation, which foreign courts will recognize to facilitate the purpose of centralizing proceedings involving defunct insurers. *Integrity Ins. Co. v. Martin*, 105 Nev. 16, 19 n.1, 769 P.2d 69, 70 (1989); *In re Freestone Ins. Co.*, 143 A.3d 1234, 1249 (Del. Ch. 2016).

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property, including 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…" *id*., at (14)(a), does not negate the Court's exclusive jurisdiction. By authorizing the Receiver to litigate in other jurisdictions when necessary, the Receivership Order simply provides the Receiver with the authority to marshal assets when she can only do so in another court for jurisdictional reasons (such as when exclusive federal jurisdiction or personal jurisdiction issues exist).

A similar situation arose in Ohio in *Taylor v. Ernst & Young*. There, the Ohio statute provided that all liquidation actions were to be brought in the court of common pleas of Franklin County, and other statutory provisions were in accord, but still other provisions stated that as part of the liquidator's power to collect debts, the liquidator may institute actions in other jurisdictions, litigate "elsewhere," and submit the value of a security to arbitration. *See Taylor*, 130 Ohio St.3d. 411, 415-16. The Ohio Supreme Court addressed the arguably conflicting provisions by noting that "***when allowed***, ***forum selection belongs to the liquidator and the liquidator alone***." *Id*. at 416 (emphasis added). Here, the complementary provisions in the Receivership Order are similar: they simply provide that where there is ***discretion*** to choose a forum, that discretion belongs to the Receiver. *See also Bard v. Charles R. Myers Ins. Agency, Inc.*, 839 S.W.2d 791, 796-97 (Tex. 1992) (the Receiver's ability to sue outside the receivership court does not open up the receivership estate to lawsuits in foreign jurisdictions). Here, the Receiver has appropriately initiated against Millennium litigation in the Eighth Judicial District Court, and Section (14) does not come into play.

As such, jurisdiction is exclusive in the Eighth Judicial District Court, and this Court should deny the Motion.

B. <u>Even if This Court Finds that the Receiver is Bound to the Extent a Signatory Would be by the Forum Selection and Choice-of-Law Clauses, this Court Should Decline to Enforce Them</u>.

Millennium argues that this Court should accept the North Carolina choice-of-law provision, then use it to evaluate – under North Carolina law – whether the forum selection clause is valid. This puts the cart before the horse. As noted above, there are significant and valid reasons why

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these clauses should not even be considered. Even considering them, however, this Court should evaluate whether the choice-of-law provision is valid prior to applying it.

1. The Choice-of-Law Provision is Invalid.

Millennium assumes that the choice-of-law provision is valid. However, a choice-of-law provision is valid only where (1) "[t]he situs fixed by the agreement [has] a substantial relation with the transaction," and (2) the agreement is not contrary to the public policy of the forum. *Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mortgage Investors*, 95 Nev. 811, 815, 603 P.2d 270, 273 (1979); *Pentax Corp. v. Boyd*, 111 Nev. 1296, 1299, 904 P.2d 1024, 1026 (1995); *Sievers v. Diversified Mtg. Investors*, 95 Nev. 811, 815, 603 P.2d 270, 273 (1979).[5] Additionally, parties are required to "act in good faith and not for the purpose of evading the law of the real situs of the contract" in choosing choice of law provisions. *Engel v. Ernst*, 102 Nev. 390, 395, 724 P.2d 215, 217 (1986).

Choice of law provisions are not enforced where "application of the law of the chosen state would be contrary to a fundamental policy of the state which has a materially greater interest than the chosen state in the determination of the particular issue and which…would be the state of the applicable law in the absence of an effective choice of law by the parties." *Restat. 2d of Conflict of Laws*, § 187(2)(b) (2nd 1988) (emphasis added); *see also Progressive Gulf Ins. Co. v. Faehnrich*, 327 P.3d 1061, 1064 (Nev. 2014) (quoting Restatement regarding public policy).

Here, application of North Carolina law in this situation is unreasonable, as the chosen situs here has almost no relation with the transaction, and the significant contacts are almost exclusively grouped in Nevada. NHC – *Nevada's* state-run health cooperative – is a non-profit Nevada corporation, located exclusively in Nevada, which existed for the sole purpose of providing health insurance for Nevada's residents within Nevada's health insurance market in accordance with Nevada law. *See* Complaint at ¶¶ 15, 34, 37-38. Millennium was engaged by NHC to prepare and file its financial statements and supplemental reports with the Nevada Division of Insurance, "in

[5] North Carolina law is substantially similar to Nevada law in this area, stating a choice of law provision is not enforceable unless: (1) the parties had a reasonable basis for their choice of law, and (2) the law of the chosen state cannot sanction a violation of a fundamental public policy of the state or otherwise applicable law. *Torres v. McClain*, 535 S.E.2d 623, 625 (N.C. Ct. App. 2000). *See also Cable Tel Servs. v. Overland Contracting*, 574 S.E.2d 31, 34 (N.C. Ct. App. 2002) (stating the circumstances where North Carolina courts will not honor a choice of law provision, as contained in the Restatement (Second) of Conflicts of Law, § 187).

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accordance with statutory accounting and reporting rules prescribed and permitted by the State of *Nevada*," and it misreported the financial accounting to Nevada's regulators. *See id*., ¶¶ 7, 135, 140-41 (emphasis added). These actions occurred in Nevada. The damages occurred in the state of Nevada. The public interest of North Carolina is not substantially related to this action. The true situs of this Agreement is Nevada. Moreover, Nevada has a "materially greater interest" than North Carolina does in the determination of these particular issues. As such, the choice of law provision in the Agreement is unenforceable, and Nevada law governs in this case.

Additionally, public policy weighs heavily against enforcing the choice of law provision at issue here. NRS 696B establishes a public policy to protect the innocent victims of a delinquent insurance company, including NHC's members, insureds, creditors, and the general public, who virtually all reside in the state of Nevada. Nevada has an overwhelming interest to protect its own citizens in this matter, under its own laws. *See G.C. Murphy Co. v. Reserve insurance Co.*, 429 N.E.2d 111, 117 (N.Y. 1981) (The states have a paramount interest "in seeing that insurance companies domiciled within their respective boundaries are liquidated in a uniform, orderly and equitable manner without interference from external tribunals.").

2. Absent a Valid Choice-of-Law Provision, this Court Must Determine What Law to Apply; Here, That Law is Nevada's.

In the absence of a valid choice of law by the parties, a court must determine which law to apply under choice-of-law principles. Nevada follows the Restatement (Second) of Conflicts of Laws in determining choice-of-law questions involving contracts. *See Progressive Gulf Ins. Co. v. Faehnrich*, 327 P.3d 1061, 1063 (Nev. 2014), citing *Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mortgage Investors*, 95 Nev. 811, 815, 603 P.2d 270, 273 (1979); *Behr v. Behr*, 266 S.E.2d 393, 395 (N.C. Ct. App. 1980) (citing Restatement (Second) of Conflicts of Law, § 187). In explaining this section of the Restatement, the commentators explain, "Fulfillment of the parties' expectations is not the only value in contract law; regard must also be had for state interests and for state regulation. The chosen law should not be applied without regard for the interests of the state which would be the state of the applicable law with respect to the particular issue involved in the absence of an effective choice by the parties." *Restat 2d of Conflict of Laws*, § 187, cmt. g.

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Nevada considers the following five factors to determine which law has the most significant relationship with the transaction: the place of contracting, the place of negotiation of the contract, the place of performance of the contract, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation, and place of business of the parties. *See Sotirakis v. United Serv. Auto. Ass'n*, 106 Nev. 123, 126, 787 P.2d 788, 790 (1990); *Williams v. United Servs. Auto. Ass'n*, 109 Nev. 333, 334, 849 P.2d 265, 266 (1993) (applying the five factors to an insurance contract and finding, *inter alia,* that the "location of the insured risk embodies a significant criterion in deciding which law governs…[T]he local law of the state which the parties understood as the principal location of the insured risk during the term of the policy determines the rights and duties under the insurance contract.").

In this instance the subject matter of the contract predominates among the five factors. While NHC was a Nevada company and Millennium was from North Carolina, the subject matter of the contract was for Millennium to prepare and file statutory statements with the Nevada Division of Insurance and to respond to regulatory letters from the Nevada Division of Insurance, among other services. *See* Nevada Health CO-OP Agreement, dated January 7, 2015, attached as Exhibit 1 to Millennium's Motion to Dismiss, at 1. Delivery was also to the Nevada Division of Insurance, a governmental unit of the State of Nevada. None of the services performed related to North Carolina. Thus under Nevada law, Nevada has the most significant relationships with the Agreement, and Nevada law should apply.

3. The Forum Selection Clause is Invalid Under Nevada Law and Should Not be Enforced.

Although forum selection clauses are enforceable if they are "freely negotiated and not "unreasonable or unjust," they are not inviolate; there are many circumstances in which they will not be enforced. *See Tandy Computer Leasing, a Div. of Tandy Elecs., Inc. v. Terina's Pizza, Inc.*, 105 Nev. 841, 843, 784 P.2d 7, 8 (1989) (forum selection clause unenforceable because it was not negotiated and it contravened Nevada public policy); *see also Tuxedo Int'l Inc. v. Rosenberg*, 127 Nev. 11, 22, 251 P.3d 690, 697 (2011) (forum selection clause inapplicable to tort claims unless the parties intended otherwise); *Cory v. eBET Ltd. (In re Sona Mobile Holdings Corp.)*, No. 2:12-cv-

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00252-PMP-NJK, 2013 U.S. Dist. LEXIS 94206, at *10 (D. Nev. July 5, 2013) (internal citation omitted) (stating that courts find forum selection clauses unreasonable where, *inter alia*, "enforcement would contravene a strong public policy in the forum in which suit is brought").

Here, this case is a textbook example of where the public policy of the state should take precedence over a forum selection clause. As noted above, Nevada's Liquidation Act establishes a comprehensive system for the orderly winding-down and distribution of the assets of a defunct insurer. It is meant 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 (1993) (referencing the Uniform Act), quoting *Dardar v. Ins. Guaranty Ass'n*, 556 So. 2d 272, 274 (La. Ct. App. 1990). Its overall purpose is to protect the interests of the liquidated insurer's members, insureds, creditors, and the general public. *See e.g.* NRS 696B.210, 696B.530, 696B.540; *see also* Joint Meeting of the Assembly and Senate Standing Committees on Commerce, March 25, 1977 (summarizing statements by Richard Rottman, Insurance Commissioner, and Dr. Tom White, Director of Commerce Department) (Nevada's insurance law was "designed to help the Insurance Division regulate the industry on behalf and primarily in the interest of the public of the State of Nevada"). Applying the law of the domiciliary state, as well as centralizing proceedings in one state's court, advances these purposes. *See Frontier Ins. Serv.*, 109 Nev. at 236, 849 P.2d at 331; *In re Freestone Ins. Co.*, 143 A.3d at 1260-61. Moving part of this litigation to North Carolina, under North Carolina law, would be in direct contravention to the public policy of Nevada.

4. Even if This Court Were to Apply North Carolina Law as Millennium Suggests, It Would Yield the Same Result.

Even if the Court were to apply North Carolina law, the Court would reach the same result. Under North Carolina law, a choice of law provision is not enforceable unless: (1) the parties had a reasonable basis for their choice of law, and (2) the law of the chosen state cannot violate a fundamental public policy of the state or otherwise applicable law. *Torres v. McClain*, 535 S.E.2d 623, 625 (N.C. Ct. App. 2000). *See also Cable Tel Servs. v. Overland Contracting*, 574 S.E.2d 31, 34 (N.C. Ct. App. 2002) (stating the circumstances where North Carolina courts will not honor a choice of law provision, as contained in the Restatement (Second) of Conflicts of Law, § 187).

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However, even if the Court were to use North Carolina law in determining whether the forum selection clause is valid, the forum selection clause would still be unenforceable. Under North Carolina law, a forum selection clause is invalid where fraud or overreaching are present, or where enforcement would otherwise be unreasonable or unjust. *Perkins v. CCH Computax, Inc.*, 423 S.E.2d 780, 783 (N.C. 1992) (internal citation omitted). Additionally, a forum selection clause is invalid "if enforcement would contravene a strong public policy in the forum in which suit is brought." *Id*. For all the reasons already stated herein, enforcement of a forum selection clause here would be "unreasonable and unjust" and would violate Nevada's public policy to regulate its insolvent insurance industry in the interest of its own citizens.

C. <u>At Minimum, this Court Must Retain Non-Contract Claims</u>

At minimum, the Court should determine that the Receiver's tort-based claims are not subject to the forum selection clause and must be litigated before this Court. The Receiver has asserted the following tort claims against Millennium: professional malpractice (15th cause of action), fraud and intentional misrepresentation (16th cause of action), negligent misrepresentation (17th cause of action), negligence (18th cause of action), negligent performance (22nd cause of action), unjust enrichment (23rd cause of action), civil conspiracy (62nd cause of action), and concert of action (63rd cause of action). *See generally* Complaint. Bifurcation is appropriate whether the Court applies Nevada law or North Carolina law.

The intent-of-the-parties approach is utilized to determine which claims a forum selection clause encompasses. *See Tuxedo Int'l, Inc. v. Rosenberg*, 251 P.3d 690 (Nev. 2011) (describing courts' approaches to determining issue).[6] In *Tuxedo Int'l*, the Nevada Supreme Court explained that the initial step of the analysis includes determining whether the parties intended tort-based claims to be subject to a forum selection clause is a thorough textual review of the language of the subject form selection clause and the facts of the case. *See id*. at 697 (quoting *Berrett v. Life Insurance Co. of the Southwest*, 623 F. Supp. 946, 948-49 (D. Utah 1985) . If the issue cannot be resolved through a textual analysis, the next step is to determine whether resolution of the tort-based

[6] North Carolina law does not apply to determine choice of venue. The Agreement specifies North Carolina law only as to the "execution, interpretation or enforcement" of the Agreement. Procedural issues such as choice of venue are therefore beyond the limited scope of the choice of law provision.

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claims relates to the interpretation of the contract. *See id*. at 699. If this still does not resolve the issue, then the Court must determine whether the tort-related claims directly concern the formation or enforcement of the contract containing the forum selection clause. *See id*. The plaintiff has the burden of demonstrating that the tort-based claims related to a contract are not subject to a forum selection clause. *See id*. In the event the Court determines that the forum selection clause is applicable to this action, the Receiver's tort-based claims should be bifurcated and remain in this action because they are not subject to the forum selection clause. *See Awada v. Shuffle Master, Inc.*, 173 P.3d 707, 712 (Nev. 2007) (decision whether to bifurcate rests in sound discretion of district court) (citations omitted).

The language of the forum selection clause demonstrates that the parties did not intend that the parties' tort claims be subject to it. Specifically, the Agreement states that any action or proceeding "based on" the agreement shall occur in North Carolina. Unlike broader forum selection clause language such as "arising out of or relating to," the language of the forum selection clause at issue here is much narrower in scope. *See e.g. Wade v. Ilisagvik Coll.*, No. A05-86 CV (JWS), 2005 U.S. Dist. LEXIS 48172, at *5-8 (D. Alaska Sep. 19, 2005) (finding that "arising under" clause is much narrower than "arising out of or relating to," and as such, it did not encompass tort claims that did not "directly relate to the contract's interpretation and performance"); *Prod. Res. Grp. v. Martin Prof'l*, 907 F. Supp. 2d 401, 412 (S.D. N.Y. 2012) (discussing broad versus narrow forum selection clauses).

Moreover, the Receiver's tort claims are not solely "**based on**" the underlying agreement. Rather, the tort claims are based on, *inter alia*, Millennium's failure to comply with "statutory" and "professional" standards:

- Millennium failed "to comply with applicable statutory and professional standards" (*see* Complaint, ¶ 423);
- Millennium knowingly and falsely represented that its services would be performed in accordance with applicable statutory and professional standards (*id*. at ¶¶ 427-28);
- Millennium failed to exercise reasonable care and competence in obtaining and communicating information to NHC (*id*. at ¶¶ 433-34);

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- Millennium failed to perform its work to applicable "statutory" and "professional" standards (*id*. at ¶ 440); and
- Millennium acted in concert with other defendants "to falsify operating results and reserves, to conceal internal control weaknesses and other wrongdoing, and to avoid statutory supervision by their use of untruthful and/or unreliable financial data and other information they knew to be false and not in accordance with required statutory and professional standards in order to continue the flow of money to … [various defendants] … for their own personal gain" (*id*. at ¶¶ 755, 762).

In other words, it was not intended that the parties' tort claims be subject to the forum selection clause, and they are not "based on" the agreement between NHC and Millennium. This is akin to the situation in the *Berrett* case, which found that the plaintiff's tort-based claims did not arise "hereunder" the agreement. *See Berrett v. Life Insurance Co. of the Southwest*, 623 F. Supp. at 947, 949. This ends the analysis under *Tuxedo Int'l*. Nonetheless, resolution of the Receiver's tort-based claims does not relate to the "interpretation" of the contract. Instead, resolution of the claims relates to whether Millennium complied with its statutory and professional obligations. Likewise, the Receiver's tort-based claims do not directly concern the formation or enforcement of the contract. Therefore, at minimum and because the Receiver's claims are not inextricably combined with her contract-based claims, this Court must bifurcate and retain jurisdiction over the tort-based claims.

Additionally, the Receiver is enforcing independent claims for violations of Nevada law against Millennium, not merely attempting to enforce rights under the contract between the signatories. Where a third-party is not a party to a contract, the disputes that arise thereto are based in tort law, not contract law. *See e.g Lopez v. Corral*, Nos. 51541, 51972, 2010 Nev. LEXIS 69, at *9 (Dec. 20, 2010). Even if the Court were to determine that all claims "arising under" the contract were subject to the clauses contained therein, Millennium's motion could only partially be granted, as only three of the eleven claims against Millennium expressly reference and rely upon the Agreement, *i.e*., the Receiver's claims for breach of contract, tortious breach of implied covenant, and breach of implied covenant of good faith and fair dealing. *See* Complaint, ¶¶ 444-463.

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IV. CONCLUSION

For the above reasons, the Receiver respectfully submits that the Court should deny Millennium's motion to dismiss in its entirety.

DATED this 18th day of December, 2017.

GREENBERG TRAURIG, LLP

/s/ Eric W. Swanis, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2017, a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT MILLENNIUM CONSULTING SERVICES, LLC'S MOTION TO DISMISS** was filed with the Clerk of the Court using the Odyssey eFileNV Electronic Service system and served on all parties with an email address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

The date and time of the electronic proof of service is in place of the date and place of deposit in the U.S. Mail.

/s/ Shayna Noyce
An employee of Greenberg Traurig, LLP

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EXHIBIT A

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CLERK OF THE COURT

ORD
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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, IN HER OFFICIAL CAPACITY AS STATUTORY RECEIVER FOR DELINQUENT DOMESTIC INSURER, Plaintiff, vs. NEVADA HEALTH CO-OP, Defendant.	Case No. A-15-725244-C Dept. No. 1

PERMANENT INJUNCTION AND ORDER APPOINTING COMMISSIONER AS PERMANENT RECEIVER OF NEVADA HEALTH CO-OP

A Petition For Appointment Of Commissioner as Receiver and Other Permanent Relief; Request for Injunction Pursuant to NRS 696B.270(1) by the Commissioner of Insurance, Amy L. Parks, in her official capacity as Temporary Receiver of NEVADA HEALTH CO-OP ("CO-OP") was filed with the consent of CO-OP's board of directors on September 25, 2015; a Non Opposition to Petition For Appointment Of Commissioner as Receiver and Other Permanent Relief and a waiver of the opportunity to appear at a show cause hearing was filed by CO-OP through its counsel on September 29, 2015; an Order Appointing the Acting Commissioner of

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Insurance, Amy L. Parks, as Temporary Receiver Pending Further Orders of the Court, Granting Temporary Injunctive Relief Pursuant to NRS 696B.270, and authorizing the Temporary Receiver to appoint a special deputy receiver was filed on October 1, 2015; the Commissioner, as Temporary Receiver, appointed the firm of Cantilo & Bennett, L.L.P. ("C&B"), as Special Deputy Receiver ("SDR") of CO-OP on October 1, 2015 .

The Court having reviewed the points and authorities submitted by counsel and exhibits in support thereof, and for good cause,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) Acting Commissioner of Insurance, Amy L. Parks, is hereby appointed Permanent Receiver ("Receiver"), and C&B is appointed Permanent SDR of CO-OP. The SDR shall have all the responsibilities, rights, powers, and authority of the Receiver subject to supervision and removal by the Receiver and the further Orders of this Court. 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. Whenever this Order refers to the Receiver, it will equally apply to the Special Deputy Receiver.

(2) Pursuant to NRS 696B.290, the Receiver is hereby vested with exclusive title both legal and equitable to all of CO-OP's property (referred to hereafter as the "Property") and consisting of all:

a. Assets, books, records, property, real and personal, including all property or ownership rights, choate or inchoate, whether legal or equitable of any kind or nature;

b. Causes of action, defenses, and rights to participate in legal proceedings;

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c. Letters of credit, contingent rights, stocks, bonds, cash, cash equivalents, contract rights, reinsurance contracts and reinsurance recoverables, in force insurance contracts and business, deeds, mortgages, leases, book entry deposits, bank deposits, certificates of deposit, evidences of indebtedness, bank accounts, securities of any kind or nature, both tangible and intangible, including but without being limited to any special, statutory or other deposits or accounts made by or for CO-OP with any officer or agency of any state government or the federal government or with any banks, savings and loan associations, or other depositories;

d. All of such rights and property of CO-OP described herein now known or which may be discovered hereafter, wherever the same may be located and in whatever name or capacity they may be held.

(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 the *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 essential to the safety of the public and of the claimants against CO-OP.

(4) The Receiver is authorized to employ and to fix the compensation of such deputies, counsel, employees, accountants, actuaries, investment counselors, asset managers, consultants, assistants and other personnel as she considers necessary. Any Special Deputy Receiver appointed by the Receiver pursuant to this Order shall exercise all of the authority of the Receiver pursuant hereto subject only to oversight by the Receiver and the Court. All compensation and expenses of such persons and of taking possession of CO-OP and conducting this proceeding shall be paid out of the funds and assets of CO-OP in accordance with NRS 696B.290.

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(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 or right therein and from interfering in any manner with the conduct of the receivership of CO-OP. Said persons, corporations, partnerships, associations and all other entities are hereby enjoined and restrained from wasting, transferring, selling, disbursing, disposing of, or assigning the Property and from attempting to do so except as provided herein.

(6) All providers of health care services, including but not limited to physicians hospitals, other licensed medical practitioners, patient care facilities, diagnostic and therapeutic facilities, pharmaceutical companies or managers, and any other entity which has provided or agreed to provide health care services to members or enrollees of CO-OP, directly or indirectly, pursuant to any contract, agreement or arrangement to do so directly with CO-OP or with any other organization that had entered into a contract, agreement, or arrangement for that purpose with CO-OP are hereby permanently enjoined and restrained from:

a. Seeking payment from any such member or enrollee for amount owed by CO-OP;

b. Interrupting or discontinuing the delivery of health care services to such members or enrollees during the period for which they have paid (or because of a grace period have the right to pay) the required premium to CO-OP except as authorized by the Receiver or as expressly provided in any such contract or agreement with CO-OP that does not violate applicable law;

c. Seeking additional or unauthorized payment from such CO-OP members or enrollees for health care services required to be provided by such agreements, arrangements, or contracts beyond the payments authorized by the agreements, arrangements, or contracts to be collected from such members or enrollees; and

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d. Interfering in any manner with the efforts of the Receiver to assure that CO-OP's members and enrollees in good standing receive the health care services to which they are contractually entitled.

(7) All landlords, vendors and parties to executory contracts with CO-OP are hereby enjoined and restrained from discontinuing services to, or disturbing the possession of premises and leaseholds, including of equipment and other personal property, by CO-OP or the Receiver on account of amounts owed prior to October 1, 2015, or as a result of the institution of this proceeding and the causes therefor, provided that CO-OP or the Receiver pays within a reasonable time for premises, goods, or services delivered or provided by such persons on and after October 1, 2015, at the request of the Receiver and provided further that all such persons shall have claims against the estate of CO-OP for all amounts owed by CO-OP prior to October 1, 2015.

(8) All claims against CO-OP its assets or the Property must be submitted to the Receiver as specified herein to the exclusion of any other method of submitting or adjudicating such claims in any forum, court, or tribunal subject to the further Order of this Court. The Receiver is hereby authorized to establish a Receivership Claims and Appeal Procedure, for all receivership claims. The Receivership Claims and Appeal Procedures shall be used to facilitate the orderly disposition or resolution of claims or controversies involving the receivership or the receivership estate.

(9) The Receiver may change to her own name the name of any of CO-OP' accounts, funds or other property or assets, held with any bank, savings and loan association, other financial institution, or any other person, wherever located, and may withdraw such funds, accounts and other assets from such institutions or take any lesser action necessary for the proper conduct of the receivership.

(10) All secured creditors or parties, pledge holders, lien holders, collateral holders or other persons claiming secured, priority or preferred interest in any property or assets of CO-OP, including any governmental entity, are hereby enjoined from taking any steps whatsoever

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to transfer, sell, encumber, attach, dispose of or exercise purported rights in or against the Property.

(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:

a. Conducting any portion or phase of the business of CO-OP;

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;

c. Making or executing any levy upon, selling, hypothecating, mortgaging, wasting, conveying, dissipating, or asserting control or dominion over the Property or the estate of CO-OP;

d. Seeking or obtaining any preferences, judgments, foreclosures, attachments, levies, or liens of any kind against the Property;

e. Interfering in any way with these proceedings or with the Receiver, any successor in office, or any person appointed pursuant to Paragraph (4) hereinabove in their acquisition of possession of, the exercise of dominion or control over, or their title to the Property, or in the discharge of their duties as Receiver thereof; or

f. Commencing, maintaining or further prosecuting any direct or indirect actions, arbitrations, or other proceedings against any insurer of CO-OP for proceeds of any policy issued to CO-OP.

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(12) However, notwithstanding any other provision of this Order, the commencement of conservatorship, receivership, or liquidation proceedings against CO-OP in another state by an official lawfully authorized by such state to commence such proceeding shall not constitute a violation of this Order.

(13) No bank, savings and loan association or other financial institution shall, without first obtaining permission of the Receiver, exercise any form of set-off, alleged set-off, lien, or other form of self-help whatsoever or refuse to transfer the Property to the Receiver's control.

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

a. Collect all debts and monies due and claims belonging to CO-OP, wherever located, and for this purpose: (i) to institute and maintain actions in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts; (ii) to 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 creditor's remedies available to enforce her claims;

b. Conduct public and private sales of the assets and property of CO-OP, including any real property;

c. Acquire, invest, deposit, hypothecate, encumber, lease, improve, sell, transfer, abandon, or otherwise dispose of or deal with any asset or property of CO-OP, and to sell, reinvest, trade or otherwise dispose of any securities or bonds presently held by, or belonging to, CO-OP upon such terms and conditions as she deems to be fair and reasonable, irrespective of the value at which such property was last carried on the books of CO-OP. She shall also have the power to execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary or proper to

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effectuate any sale of property or other transaction in connection with the receivership;

d. Borrow money on the security of CO-OP' assets, with or without security, and to execute and deliver all documents necessary to that transaction for the purpose of facilitating the receivership;

e. Enter into such contracts as are necessary to carry out this Order, and to affirm or disavow as more fully provided in subparagraph p., below, any contracts to which CO-OP is a party;

f. Designate, from time to time, individuals to act as her representatives with respect to affairs of CO-OP for all purposes, including, but not limited to, signing checks and other documents required to effectuate the performance of the powers of the Receiver.

g. Establish employment policies for CO-OP employees, including retention, severance and termination policies as she deems necessary to effectuate the provisions of this Order;

h. Institute and to prosecute, in the name of CO-OP or in her own name, any and all suits and other 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, to abandon the prosecution or defense of such suits, legal proceedings and claims which she deems inappropriate, to pursue further and to compromise suits, legal proceedings or claims on such terms and conditions as she deems appropriate;

i. Prosecute any action which may exist on behalf of the members, enrollees, insureds or creditors, of CO-OP against any officer or director of CO-OP, or any other person;

j. Remove any or all records and other property of CO-OP to the offices of the Receiver or to such other place as may be convenient for the purposes of the efficient and orderly execution of the receivership; and to dispose of or

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destroy, in the usual and ordinary course, such of those records and property as the Receiver may deem or determine to be unnecessary for the receivership;

k. File any necessary documents for recording in the office of any recorder of deeds or record office in this County or wherever the Property of CO-OP is located;

l. Intervene in any proceeding wherever instituted that might lead to the appointment of a conservator, receiver or trustee of CO-OP or its subsidiaries, and to act as the receiver or trustee whenever the appointment is offered;

m. Enter into agreements with any ancillary receiver of any other state as she may deem to be necessary or appropriate;

n. Perform such further and additional acts as she may deem necessary or appropriate for the accomplishment of or in aid of the purpose of the receivership, it being the intention of this Order that the aforestated enumeration of powers shall not be construed as a limitation upon the Receiver;

o. Terminate and disavow the authority previously granted CO-OP' agents, brokers, or marketing representatives to represent CO-OP in any respect, including the underlying agreements, and any continuing payment obligations created therein, as of the receivership date, with reasonable notice to be provided and agent compensation accrued prior to any such termination or disavowal to be deemed a general creditor expense of the receivership; and

p. Affirm, reject, or disavow part or all of any leases or executory contracts to which CO-OP is a party. The Receiver is authorized to reject, or disavow any leases or executory contracts at such times as she deems appropriate under the circumstances, provided that payment due for any goods or services received after appointment of the Receiver, with her consent, will be

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deemed to be an administrative expense of the receivership, and provided further that other unsecured amounts properly due under the disavowed contract, and unpaid solely because of such disavowal, will give rise to a general unsecured creditor claim in the Receivership proceeding.

(15) CO-OP, its officers, directors, partners, agents, brokers and employees, any person acting in concert with them, and all other persons, having any property or records belonging to CO-OP, including data processing information and records of any kind such as, by way of example only, source documents and electronically stored information, are hereby ordered and directed to surrender custody and to assign, transfer and deliver to the Receiver all of such property in whatever name the same may be held, and any persons, firms or corporations having any books, papers or records relating to the business of CO-OP shall preserve the same and submit these to the Receiver for examination at all reasonable times. Any property, books, or records asserted to be simultaneously the property of CO-OP and other parties, or alleged to be necessary to the conduct of the business of other parties though belonging in part or entirely to CO-OP, shall nonetheless be delivered immediately to the Receiver who shall make reasonable arrangements for copies or access for such other parties without compromising the interests of the Receiver or CO-OP.

(16) Nothing in this Order may be construed as to prevent the Nevada Life and Health Insurance Guaranty Association and the Nevada Insurance Guaranty Association from exercising their respective powers under Title 57 of the NRS.

(17) In addition to that provided by statute or by CO-OP's policies or contracts of insurance, and to the extent not in conflict with the other provisions of this Paragraph (17), the Receiver may, at such time she deems appropriate, without prior notice, subject to the following provisions, impose such full or partial moratoria or suspension upon disbursements owed by CO-OP, provided that

a. Any such suspension or moratorium shall apply in the same manner or to the same extent to all persons similarly situated. However, the Receiver may, in

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her sole discretion, impose the same upon only certain types, but not all, of the payments due under any particular type of contract; and

b. Notwithstanding any other provision of this Order, the Receiver may implement a procedure for the exemption from any such moratorium or suspension, those hardship claims, as she may define them, that she, in her sole discretion, deems proper under the circumstances.

c. The Receiver shall only impose such moratorium or suspension when the same is not specifically provided for by contract or statute:

i. As part, or in anticipation, of a plan for the partial or complete rehabilitation of CO-OP;

ii. When necessary to assure the delivery of health care services to covered persons pending the replacement of underlying coverage; or

iii. When necessary to determine whether partial or complete rehabilitation is reasonably feasible.

d. Under no circumstances shall the Receiver be liable to any person or entity for her good faith decision to impose, or to refrain from imposing, such moratorium or suspension.

e. Notice of such moratorium or suspension, which may be by publication, shall be provided to the holders of all policies or contracts affected thereby.

(18) It is hereby ordered that all evidences of coverage, insurance policies and contracts of insurance of CO-OP are hereby terminated effective on December 31, 2015, unless the Receiver determines that any such contracts should be cancelled as of an earlier date.

(19) No judgment, order, attachment, garnishment sale, assignment, transfer, hypothecation, lien, security interest or other legal process of any kind with respect to or affecting CO-OP or the Property shall be effective or enforceable or form the basis for a claim against CO-OP or the Property unless entered by the Court, or unless the Court has issued its specific order, upon good cause shown and after due notice and hearing, permitting same.

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(20) All costs, expenses, fees or any other charges of the Receivership, including but not limited to fees and expenses of accountants, peace officers, actuaries, investment counselors, asset managers, attorneys, special deputies, and other assistants employed by the Receiver, the giving of the Notice required herein, and other expenses incurred in connection herewith shall be paid from the assets of CO-OP. Provided, further, that the Receiver may, in her sole discretion, require third parties, if any, who propose rehabilitation plans with respect to CO-OP to reimburse the estate of CO-OP for the expenses, consulting or attorney's fees and other costs of evaluating and/or implementing any such plan.

(21) The Commissioner is part of the government of the State of Nevada, acting in her official capacity, and as such, should be exempt from any bond requirements that might otherwise be required when seeking the relief sought in this proceeding. Accordingly, it is Ordered that no bond shall be required from the Commissioner as Receiver.

(22) If any provision of this Order or the application thereof is for any reason held to be invalid, the remainder of this Order and the application thereof to other persons or circumstances shall not be affected thereby.

(23) The Receiver may at any time make further application for such further and different relief as she sees fit.

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

(25) The Receiver is authorized to deliver to any person or entity a copy or certified copy of this Order, or of any subsequent order of the Court, such copy, when so delivered, being deemed sufficient notice to such person or entity of the terms of such Order. But nothing herein shall relieve from liability, nor exempt from punishment by contempt, any person or entity that, having actual notice of the terms of any such Order, shall be found to have violated the same.

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(26) Notice of any filings in this proceeding shall additionally be provided by electronic delivery to the email addresses provided by the Special Deputy Receiver and counsel for the Receiver.

IT IS SO ORDERED

DATED this 14 day of October, 2015.

DISTRICT COURT JUDGE

Respectfully submitted by:

ADAM PAUL LAXALT
Attorney General

By: _____
JOANNA N. GRIGORIEV
Senior Deputy Attorney General
Attorneys for the Division of Insurance

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NOTICE TO BE PROVIDED TO:

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Attorneys for Defendants Milliman, Inc., Jonathan L. Shreve, and Mary van der Heijde

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP,

Plaintiff,

vs.

MILLIMAN, INC., a Washington Corporation; JONATHAN L. SHREVE, an Individual; MARY VAN DER HEIJDE, an Individual; MILLENNIUM CONSULTING SERVICES, LLC, a North Carolina Corporation; LARSON & COMPANY P.C., a Utah Professional Corporation; DENNIS T. LARSON, an Individual; MARTHA HAYES, an Individual; INSUREMONKEY, INC., a Nevada Corporation; ALEX RIVLIN, an Individual; NEVADA HEALTH SOLUTIONS, LLC, a Nevada Limited Liability Company; PAMELA EGAN, an Individual; BASIL C. DIBSIE, an Individual;

Case No. A-17-760558-B

Dept. No. XXV

MILLIMAN'S REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION

LINDA MATTOON, an Individual; TOM ZUMTOBEL, an Individual; BOBBETTE BOND, an Individual; KATHLEEN SILVER, an Individual; DOES I through X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

I. INTRODUCTION[1]

Plaintiff does not, and cannot, refute the determinative arguments and controlling precedent that require arbitration of Plaintiff's claims against Milliman.

First, Plaintiff cannot simultaneously sue for damages based on Milliman's work done pursuant to the Agreement yet evade the Agreement's arbitration clause, as the Nevada Supreme Court has held. *Ahlers v. Ryland Homes Nevada, LLC*, 126 Nev. 688, 367 P.3d 743 (2010) (unpublished). While Plaintiff asserts that an insurance liquidator is exempt from this bedrock principle because it is a "non-signatory" to the insolvent insurer's contracts, courts around the country uniformly compel arbitration against "non-signatory" liquidators who, like Plaintiff here, sue to enforce an insolvent insurer's contract that includes an arbitration clause. Plaintiff cites ***no*** contrary precedent.

Nor can Plaintiff evade the Agreement's arbitration provision by asserting that she is acting on behalf of NHC's "creditors and policyholders." All of Plaintiff's causes of action against Milliman are pre-insolvency, common law claims that ***belonged solely to NHC***. Plaintiff has not pled facts or viable causes of action against Milliman that belong to any creditor or policyholder. It is well-established, including by the authority cited in Plaintiff's Opposition, that straightforward common law claims on behalf of an insolvent insurer, which do not arise out of the liquidation statute or otherwise belong to the liquidator herself, are not "creditor or policyholder" claims, and can be arbitrated.

Second, Plaintiff does not dispute that she has no basis to "revoke" the Agreement, and therefore the arbitration clause is "valid, irrevocable and enforceable" under both the Federal

[1] Capitalized terms not defined herein shall have the meaning ascribed to them in Milliman's Memorandum of Points and Authorities in support of its Motion to Compel Arbitration.

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Arbitration Act ("FAA") and Nevada Arbitration Act ("NAA"). Plaintiff instead contends that these statutes "interfere" with the Nevada liquidation act, and are therefore "reverse preempted" under the McCarren-Ferguson Act or otherwise superseded—an argument that the U.S. Courts of Appeal for the Ninth, Third, and Sixth Circuits, among several other courts, have expressly rejected. This on-point precedent holds that the standard for reverse preemption is not met where, as here, a liquidator brings straightforward common law claims on behalf of an insolvent insurer, because such claims do not interfere either with the State's regulation of insurance, or with a state court's liquidation proceedings. Again, Plaintiff cites no on-point caselaw to the contrary. Nor does Plaintiff offer any evidence that arbitrating her claims would "interfere" with the orderly liquidation of NHC.

Finally, Plaintiff is well aware that the Receivership Order does not confer "exclusive jurisdiction" over any and all claims Plaintiff brings on NHC's behalf. In fact, Plaintiff has taken full advantage of the provisions in the Order that authorize Plaintiff to, *inter alia*, "initiate and maintain actions at law or equity ***or any other type of action or proceeding of any nature***, in this ***and other jurisdictions***," (Order, § 14(a) (emphases added)), and has sued the U.S. Department of Health & Human Services ("HHS") in federal court in Nevada. Just as the Receivership Order could not supersede either federal law or the contractual forum selection clause in the NHC-HHS agreement that required Plaintiff to bring her case in federal court—if it could, no doubt Plaintiff would have filed its suit in state court—the Order cannot vitiate an otherwise valid contractual arbitration provision that both federal and Nevada law uniformly hold should be enforced.

For all of the reasons discussed below and in Milliman's opening brief, Milliman's motion to compel arbitration should be granted.

II. ANALYSIS

A. <u>The Arbitration Clause Binds Plaintiff and Encompasses All of Plaintiff's Claims Against Milliman</u>

1. Because Plaintiff is Suing to Enforce the Agreement, Plaintiff Must Abide by the Agreement's Arbitration Provision

Plaintiff cites no authority to contravene the well-established rule, affirmed by the Nevada Supreme Court in *Ahlers*, 126 Nev. 688, 367 P.3d 743, at *2, that a party cannot sue to enforce an

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agreement and "simultaneously avoid other portions of the agreement, such as the arbitration provision."

Plaintiff attempts to evade this rule by contending that "equitable estoppel" does not apply to a "non-signatory." (Opposition, p. 16). Yet federal and state courts around the country have held that where, as here, a statutory insurance liquidator's or receiver's claims arise from and relate to an insolvent insurer's contract with the defendant, the liquidator cannot avoid that contract's arbitration provision, even though it did not sign the agreement. As the Ninth Circuit stated in *Bennett v. Liberty Nat. Fire Ins. Co.*, "if the liquidator wants to enforce [the insurer's] rights under its contract, she must also assume its perceived liabilities." 968 F.2d 969, 972 n.4 (9th Cir. 1992) (enforcing arbitration clause against insurance liquidator seeking to enforce insolvent insurer's contractual rights).[2] Likewise, in *Poizner v. Nat. Indem. Co.*, the Court granted a motion to compel arbitration, holding that:

> As the liquidator of FPIC, the Commissioner ultimately seeks to enforce contractual provisions requiring the payment of reinsurance proceeds, yet on the other hand, he seeks to avoid enforcement of arbitration provisions contained in the same contracts. This inconsistent approach has been rejected by the Ninth Circuit, as well as other circuit courts. If a liquidator seeks to enforce an insolvent company's rights under a contract, he must also suffer that company's contractual liabilities.

No. 08CV772-MMA, 2009 WL 10671673, at *2 (S.D. Cal. Jan. 6, 2009); *see also Garamendi v. Caldwell*, No. CV-91-5912-RSWL(EEX), 1992 WL 203827, at *3 (C.D. Cal. May 4, 1992) (enforcing arbitration clause against insurance liquidator); *Koken v. Cologne Reins. (Barbados), Ltd.*, 34 F. Supp. 2d 240 (M.D. Pa. 1999) (same); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 272–75 (D. Vt. 1993) (same); *Rich v. Cantilo & Bennett, L.L.P.*, 492 S.W.3d 755, 762 (Tex.

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[2] Plaintiff tries to distinguish *Bennett* by arguing that "the liquidator in that case 'presented no evidence that enforcing the arbitration clauses here will disrupt the orderly liquidation of the insolvent insurer.'" (Opposition, p. 15 n.7). Yet Plaintiff has similarly presented no such evidence here. While Plaintiff asserts—without any support—that arbitrating against Milliman will "be an unnecessary drain on the NHC estate," (*id.*), that position ignores the Nevada Supreme Court's express recognition that "arbitration generally avoids the higher costs and longer time periods associated with traditional litigation." *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004).

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Ct. App. 2016) (same); *State v. O'Dom*, No. 2015CV258501, 2015 WL 10384362, at *3–4 (Ga. Super. Sept. 18, 2015) (same).[3]

The cases Plaintiff cites to support her "non-signatory" argument ***affirm*** that a receiver suing to enforce a contract must abide by that contract's arbitration clause. In *Javitch v. First Union Sec., Inc.*, 315 F.3d 619 (6th Cir. 2003) (cited at Opposition, p. 16), the receiver brought tort and statutory claims on behalf of two insolvent businesses, and the defendants moved to compel arbitration. The Sixth Circuit ***reversed*** the District Court's denial, and held that the receiver, although not itself a signatory to any agreement with an arbitration clause, "***is bound to the arbitration agreements to the same extent that the receivership entities would have been absent the appointment of the receiver***." *Id.* at 627 (emphasis added). On remand, the District Court granted the motion to compel arbitration, holding:

> As the Receiver acknowledges, his claims in this suit all arise from the relationship between Capwill and Defendants. That relationship was created and governed by brokerage agreements subject to arbitration provisions. The Receiver cannot both seek to benefit in this suit from the relationships created by those agreements, while disavowing the arbitration provisions.

Javitch v. First Union Sec., No. 3:01 CV 780, 2011 WL 665727, at *4 (N.D. Ohio Feb. 15, 2011) (citation removed). The same logic applies foursquare here. Having sought to enforce NHC's rights and obligations relating to the Agreement, Plaintiff must abide by the Agreement's arbitration clause. By contrast, in *Taylor v. Ernst & Young, LLP*, 958 N.E.2d 1203, 1213 (Ohio 2011), another "nonsignatory" case on which Plaintiff heavily relies, the court held that the

[3] The Louisiana trial court's denial of Milliman's motion to compel arbitration, which Milliman has appealed, does not vitiate the well-settled rule that a party cannot simultaneously seek to enforce an agreement and evade that agreement's arbitration clause. The Louisiana court's decision erroneously failed to address whether the Rehabilitator's claims arose out of or related to the contract at issue. Milliman has applied for an immediate interlocutory appeal of the Louisiana trial court's erroneous order.

liquidator was not bound by a contractual arbitration clause where its claims did not arise from or relate to the contract at issue.[4]

2. All of Plaintiff's Claims Against Milliman Are Arbitrable

Plaintiff knows full well, given the law cited above, that she cannot both sue to enforce the Agreement and evade its arbitration clause. Thus she tries to argue that because "many" of her claims—she does not specify which ones—either "do not arise out of the contract," or "are not brought on behalf of NHC, but instead on behalf of its creditors or policyholders," therefore "only a narrow subset of claims could be arbitrated," resulting in a waste of resources. (Opposition, p. 3; *see also id.*, p. 15 n.7). Both contentions are wrong.

a. All of Plaintiff's Claims Arise from and Relate to the Agreement

It is indisputable that Plaintiff's claims arise from and relate to the Agreement since, but for the Agreement and the work Milliman did under it, Plaintiff would have no claims whatsoever. Plaintiff's Complaint identifies the contracted-for work that Milliman performed, including "providing certification required pursuant to NRS 681B, conducting a feasibility study, providing business plan support, assisting NHC in setting premium rates, [and] participating in the preparation of financial reports and information to regulators." (Compl., ¶ 334). Every cause of action Plaintiff brings is based on Milliman's alleged failure to perform at least one of these services adequately. (*See, e.g.*, Compl., ¶¶ 333–36 (malpractice cause of action based on allegation that "Milliman Defendants were engaged by NHC and its predecessors to provide actuarial services to NHC" and failed to provide those services adequately); *id.*, ¶ 323 (negligence per se claim based on Milliman's alleged failure to provide certification required pursuant to NRS 681B); ¶¶ 340–44 (fraud claim based on alleged false statements in feasibility study); ¶¶ 356, 395–98 (negligence claims based on alleged failure to exercise reasonable care in preparing

[4] Similarly, in *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 638, 189 P.3d 656, 661 (2008), and *Thompson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 780 (2d Cir. 1995) (cited at Opposition, p. 16), the courts determined that the non-signatory plaintiffs were "***not*** attempting to assert any rights under the written agreement to arbitrate" and did ***not*** bring claims "arising out of" the agreement. Therefore the plaintiffs were not bound by the contractual arbitration clauses at issue. *Id.* (emphasis added). These rulings thus were not dependent on the non-signatory's status, but rather on the arbitrability of the issues in dispute.

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feasibility study, and in calculating premiums, financial projections and reserves); ¶ 402 (unjust enrichment claim seeks to recoup fees NHC paid to Milliman for actuarial services required by Agreement); ¶¶ 407–13, 755, 762 (civil conspiracy and concert of action claims based on preparation of allegedly false financial information)).

The fact that certain of Plaintiff's causes of action sound in tort, rather than contract, is irrelevant. Courts in Nevada routinely compel parties to arbitrate tort, contract and statutory claims together where those causes of action relate to the same contractual relationship, as Plaintiff's claims do. *See Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990) (compelling arbitration of tort and RICO claims that "relate to" agreement containing arbitration provision where plaintiff's "basis for claiming injury and grounds for redress stem from rights he allegedly received pursuant to the agreement"); *Helfstein v. UI Supplies*, 127 Nev. 1140, 373 P.3d 921, at *2 (2011) (unpublished) (granting motion to compel arbitration of tort and contract claims and stating that "if the allegations underlying the claims so much as touch matters covered by the parties' agreements, then those claims must be arbitrated" (citation omitted)); *Rodriguez v. AT&T Servs., Inc.*, No. 2:14-cv-01537, 2015 WL 6163428, at *8 (D. Nev. Oct. 20, 2015) ("[S]o long as the phone call that allegedly triggered the offending credit inquiry collaterally touches upon the Business Agreement or has some roots in the contractual relationship between the parties, Plaintiff's claims fall within the scope of the arbitration provision.")

a. Plaintiff's Claims Against Milliman Are Pre-Solvency Damages Claims that Belonged Solely to NHC, Therefore Plaintiff Stands in NHC's Shoes and Must Abide by NHC's Contractual Obligations

Plaintiff's contention that she is acting "on behalf of" NHC's creditors and policyholders, and therefore she does not "step in [NHC'] shoes," (Opposition, pp. 14-15), does not overcome the arbitration clause. Where, as here, a liquidator assumes an insurer's contracts, and then asserts common law claims that belonged to the insolvent insurer by virtue of its pre-insolvency contractual relationships, those claims are arbitrable. As the Court stated in *Bennett*, if a "dispute is in essence a contractual one, it should be arbitrated. And because the liquidator, who stands in the shoes of the insolvent insurer, is attempting to enforce [the insurer's] contractual rights, she is bound by [the insurer's] pre-insolvency agreements." 968 F.2d at 972. *See also Hays & Co. v.*

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Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1154 (3d Cir. 1989) (holding that bankruptcy trustee's claims against debtor's securities broker for state and federal securities violations were arbitrable because they were based on debtor's pre-bankruptcy rights, and did not arise from the Bankruptcy Code) (cited at Opposition, p. 19); *Dardar v. Ins. Guar. Ass'n*, 556 So. 2d 272, 274 (La. Ct. App. 1990) ("[B]ecause the rehabilitator, in effect, steps into the shoes of the insurer, he is bound by the same constraints as is the insurer in the normal course of business.")(cited at Opposition, p. 10).

The cases on which Plaintiff relies are not to the contrary.[5] In both *Hays & Co. v. Merrill Lynch*, 885 F.2d at 1155, and *Jaime Torres Int'l Sports Mgmt., Inc. v. Kapila*, 2016 WL 8585339, at *6 (S.D. Fla. May 11, 2016), the trustee was not required to arbitrate causes of action that, as a matter of law, ***belonged*** to the creditors of the insolvent debtors. Here, Plaintiff has not pled any viable causes of action that belong to NHC's "creditors and policyholders."[6] Rather, Plaintiff's claims against Milliman ***belonged*** solely to NHC and accrued to NHC pre-insolvency. Plaintiff thus stands directly in NHC's shoes, and must abide by all of NHC's contractual obligations.

In *Covington v. Am. Chambers Life Ins. Co.*, 779 N.E.2d 833 (Ohio Ct. App. 2002), on which Plaintiff relies, the court focused on the statutory, rather than contractual, nature of a creditor's action ***against*** the insolvent insurer's estate and its potential impact on other creditors in denying the creditor's motion to compel arbitration:

> [T]he issues [the creditor] seeks to have resolved by arbitration primarily involve setoff and proof of claims. These are precisely the types of disputes that the Ohio insurance liquidation statutes were designed to resolve. The liquidator is required under R.C.

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[5] The case on which Plaintiff most heavily relies, *Arthur Andersen LLP v. Superior Court*, 67 Cal. App. 4th 1481, 1495 (1998), (Opposition, p. 14), does not concern a motion to enforce a contractual arbitration provision, or arbitration at all. Thus it in no way contravenes the rule that a receiver suing to enforce an insolvent insurer's contract must abide by that contract's arbitration clause.

[6] Any alleged harm suffered by "creditors and policyholders" is derivative of the alleged harm to NHC, (*see, e.g.*, Compl. ¶ 3 ("This complaint concerns certain providers of services to, and management of, NHC, and how their conduct... caused substantial losses to NHC and, ***ultimately***, the other parties represented by Commissioner." (emphasis added))), and therefore is not directly actionable. *See Pompei v. Clarkson*, No. 66459, 2016 WL 3486375, at *2 (Nev. June 23, 2016) (holding that creditors of an insolvent corporation do not have standing to "assert derivative claims on behalf of insolvent corporations"). Likewise, an actuary cannot be liable for negligence to anyone other than the "affected insurer or the [Insurance] Commissioner." NRS 681B.250.

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> 3903.43(A) to review, investigate, and value all claims filed in a liquidation. . . . . [E]nforcement of an arbitration provision is not mandatory if it would affect the priority of claims of creditors or adversely affect a party to the liquidation proceeding. Under these circumstances, compelling arbitration would affect the rights of other creditors and frustrate the purpose of the liquidation statute.

Id. at 837–38. In contrast to the Liquidator's claims in *Covington*, Plaintiff's action against Milliman encompasses contract and tort claims relating to Milliman's pre-insolvency relationship with NHC, not set offs, or proofs of claim, or causes of action arising from the Nevada liquidation statute. This case is separate and distinct from the ongoing Receivership Action and it neither threatens or states an interest in NHC assets or property, nor will it affect any creditors' rights.

While Plaintiff asserts that it would be "not fair" to NHC's creditors and policyholders to enforce the arbitration clause, because it limits the scope of discovery and precludes punitive damages, (Opposition, p. 15), this Court cannot vitiate an otherwise valid arbitration clause simply to improve the perceived strength of Plaintiff's case. *See Suter v. Munich Reins. Co.*, 223 F.3d 150, 161 (3d Cir. 2000) ("It is true, as the Liquidator stresses, that if the District Court or an arbitrator should decide the reinsurance agreement does not cover the disputed expenses, the estate will be smaller than if that issue was resolved in the Liquidator's favor. But the mere fact that policyholders may receive less money does not impair the operation of any provision of New Jersey's Liquidation Act."). Plaintiff's argument also contravenes the Nevada Supreme Court's express recognition that the cost savings and efficiency of streamlined discovery in arbitration will inure to the ***benefit*** of the State and NHC's creditors. *D.R. Horton, Inc.*, 120 Nev. at 553, 96 P.3d at 1162. ("[A]rbitration generally avoids the higher costs and longer time periods associated with traditional litigation."). [7] In any event, a court cannot rely on such public policy

[7] Plaintiff raises the same meritless arguments to support her contention that the American Arbitration Association is not an adequate forum in which to litigate Plaintiff's claims against Milliman. (Opposition, p. 20). There can be no legitimate dispute concerning the adequacy of the AAA. Courts in Nevada routinely enforce AAA arbitration agreements. *See, e.g., Phillips v. Parker*, 106 Nev. 415, 416, 794 P.2d 716, 717 (1990); *Lane-Tahoe, Inc. v. Kindred Const. Co., Inc.*, 91 Nev. 385, 388 n.2, 536 P.2d 491, 493 n.2 (1975); *Cox v. Station Casinos, LLC*, No. 2:14–cv–638–JCM–VCF, 2014 WL 3747605, at *5 (D. Nev. June 25, 2014).

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considerations to vitiate a binding arbitration clause. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–42 (2011).

Finally, Plaintiff's assertion that she at all times acts to protect NHC's creditors is particularly unavailing given that Plaintiff has sued NHC's "predominant creditor," the U.S. Department of Health and Human Services, seeking over $43 million in damages. *See* Complaint and Demand for Jury Trial, *Richardson v. U.S. Dep't of Health and Human Serv., et al.*, No. 2:17-cv-00775-JCM-PAL (D. Nev. Mar. 16, 2017), ECF No. 1, at ¶13.

B. The FAA and NAA Mandate Arbitration of Plaintiff's Claims Against Milliman

Plaintiff does not, and cannot, refute that under both the FAA and the NAA, arbitration agreements are "valid, irrevocable and enforceable, save upon such grounds as exist in law or equity for the revocation of a contract." 9 U.S.C. § 2, NRS 38.219(1). Nor does Plaintiff address that the U.S. Supreme Court has limited the exception in the FAA and NAA to "[g]enerally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996). Plaintiff asserts none of these defenses in her Complaint or Opposition.

Plaintiff's contention that the Nevada Liquidation Act reverse-preempts the FAA under the McCarren-Ferguson Act, 15 U.S.C. §§ 1011-1015, fails for three reasons. First, nothing in the Nevada Liquidation Act precludes a liquidator from arbitrating its claims, and the Receivership Order entered pursuant to the Act expressly authorizes Plaintiff to prosecute "suits ***and other legal proceedings***" on behalf of NHC. (Order, §14(h) (emphasis added)).[8] Absent such a conflict, there is no reverse preemption. *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381-82 (9th Cir. 1997).

Second, several courts, including the U.S. Ninth Circuit Court of Appeals in *Quackenbush v. Allstate Insurance Co.*, 121 F.3d at 1381-82, have rejected Plaintiff's argument that forcing a statutory liquidator to arbitrate straightforward breach of contract claims either implicates the

[8] As discussed above, courts in jurisdictions with liquidation statutes similar to Nevada's routinely enforce contractual arbitration provisions against liquidators where they are pursuing claims that relate to the agreement at issue. *See, e.g., Bennett*, 968 F.2d at 972; *Costle*, 839 F. Supp. at 272; *Koken*, 34 F. Supp. 2d at 247; *O'Dom*, 2015 WL 10384362, at *4.

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business of insurance or interferes with the liquidator's statutory function. *See also AmSouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004) (finding no reverse preemption where liquidator's "ordinary [tort and contract] suit against a tortfeasor" did not implicate the "regulation of the business of insurance"); *Grode v. Mut. Fire, Marine and Inland Ins. Co.*, 8 F.3d 953, 959–60 (3d Cir. 1993) (finding no reverse preemption because liquidator's "[s]imple contract and tort actions" against third party have "nothing to do with [the State's] regulation of insurance"); *Koken*, 34 F. Supp. 2d at 247 (granting motion to compel arbitration where "this action has nothing to do with Pennsylvania's statutory scheme for the regulation of the business of insurance because it is not an action against an insolvent insurer's estate that might deprive it of assets; instead, it is an action by the Liquidator against a third party, here a reinsurer for the insolvent insurer, to recover money for the estate on a breach-of-contract claim"); *Midwest Employers Cas. Co. v. Legion Ins. Co.*, No. 4:07CV870 CDP, 2007 WL 3352339, at *5 (E.D. Mo. Nov. 7, 2007) ("The ultimate issue in this case is a standard contract dispute, so the case does not involve the state's regulation of insurance."); *Northwestern Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 321 B.R. 120, 126 (Bankr. D. Del. 2005); *Nichols v. Vesta Fire Ins. Corp.*, 56 F. Supp. 2d 778, 780 (E.D. Ky. 1999); *Costle*, 839 F. Supp. at 275.

In *Quackenbush*, as here, the California liquidator of an insolvent insurer brought common law tort and contract claims against a reinsurer in an action that was separate from the statutory insolvency proceedings. *Id.* at 1374. The reinsurance agreements at issue contained broad arbitration language that encompassed the liquidator's claims, just as the Milliman-NHC Agreement does. *Id.* at 1380. Hoping to avoid arbitration, the liquidator argued that under the McCarren-Ferguson Act, "the FAA cannot preempt any state insurance law that prohibits arbitration of the Liquidator's claims." *Id.* at 1381. The Ninth Circuit disagreed, holding that arbitration of the liquidator's common law tort and contract "claims against Allstate—which [the liquidator] has pursued outside the statutory insolvency proceedings—will not interfere with California's insolvency scheme." *Id.*

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Similarly, in *Suter v. Munich Reins. Co.*, the Third Circuit Court of Appeals rejected a liquidator's argument that "the arbitration of this controversy . . . will impair New Jersey's Liquidation Act," holding:

> This is not a delinquency proceeding or a proceeding similar to one [nor] a suit by a party seeking to access the assets of the insurer's estate. . . . What this proceeding is is a suit instituted by the Liquidator against a reinsurer to enforce contract rights for an insolvent insurer, which, if meritorious, will benefit the insurer's estate. Accordingly, we fail to perceive any potential for interference with the Liquidation Act proceedings before the Superior Court.

223 F.3d at 161. The Court thus held that, under the McCarren-Ferguson Act, the New Jersey liquidation statute did not reverse preempt the FAA.

Plaintiff cites no relevant authority to contravene this on-point precedent. *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998) (cited at Opposition, p. 9), involved a claim brought by a reinsurer ***against*** the assets of an insolvent insurer's estate as part of a liquidation proceeding. And both *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) and *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010), were decided pursuant to the Kentucky liquidation and arbitration statutes, which differ from Nevada's law in several critical respects.

Plaintiff also offers no evidence to show that arbitration will "interfere" with either the liquidation of NHC or the liquidation statute. While Plaintiff asserts that the Nevada liquidation statute "recognizes the need for consolidation in one court," (Opposition, p. 10), Judge Cory, who entered the Receivership Order and presides over the liquidation proceedings, ***denied*** Plaintiff's request to coordinate and consolidate Plaintiff's action against Milliman with the liquidation proceeding. *See* Notice of Entry of Order Denying Plaintiff's Motion to Coordinate Cases attached hereto as **Exhibit A.**

As in *Quackenbush* and *Suter*, arbitrating Plaintiff's common law damages claims against Milliman will not "disrupt the orderly liquidation of an insolvent insurer" or otherwise interfere with Nevada's insolvency scheme. 121 F.3d at 1381. Therefore, there is no reverse preemption.

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Finally, Plaintiff ignores that, even if the FAA is somehow inapplicable, the NAA, which is not pre-empted, is substantively identical and mandates enforcement of the Agreement's arbitration clause. While Plaintiff invokes the rule of construction that a specific statute governs over a conflicting general one, that rule does not apply where, as here, there is no conflict between the two statutes. *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1016 (9th Cir. 2017) (applying "the familiar rule of construction that, where possible, provisions of a [regulation] should be read so as not to create a conflict.") (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986) (brackets in original)).

C. The Receivership Order Permits Arbitration and Does Not Mandate That This Court Try Plaintiff's Claims Against Milliman

Plaintiff is well aware that the Receivership Order does not provide for "exclusive jurisdiction" over any and all claims that Plaintiff brings on NHC's behalf, or allow her to haul any defendant into Nevada State Court at her discretion. Consider, for example, if Milliman was not subject to personal jurisdiction in Nevada. Surely Plaintiff would not concede that it lacked the authority under the Order to bring suit in the appropriate out-of-state forum, nor would the Receivership Order confer jurisdiction over Milliman. To that end, Plaintiff has sued HHS in the U.S. District Court for the District of Nevada for more than $43 million in payments allegedly owed to NHC. *See* Complaint and Demand for Jury Trial, *Richardson v. U.S. Dep't of Health and Human Serv., et al.*, No. 2:17-cv-00775-JCM-PAL (D. Nev. Mar. 16, 2017), ECF No. 1. Just as the Receivership Order could not create jurisdiction over HHS where both federal law and a forum selection clause in the loan agreement between NHC and HHS (quoted at *id.*, ¶ 11) required Plaintiff to pursue its claims against HHS in federal court in Nevada, the Receivership Order does not vitiate either the valid and enforceable arbitration clause in the Agreement or the well-settled federal and state law requiring its enforcement.

On the contrary, the Order expressly authorizes Plaintiff to "[c]ollect all debts and monies due and claims belonging to [NHC], ***wherever located***," and 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***," and to "[i]nstitute and prosecute . . . any and all suits ***and other legal***

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proceedings." (Order, §§ 14(a), (h) (emphases added)). Plaintiff contends that while these provisions of the Receivership Order afford her "discretion to choose a forum" in which to litigate, she cannot be compelled to litigate outside of this Court. (Opposition, p. 18). However, ***nothing*** in the Order grants Plaintiff such exclusive "discretion."

Contrary to Plaintiff's assertion, Milliman's filing of a proof of claim in the Receivership Action is not an acknowledgement of the Court's "exclusive jurisdiction." *Quackenbush* rejected a similar contention, recognizing that a third party's claims ***against*** the liquidation estate of an insolvent insurer "are entirely distinct" from the liquidator's common law and tort claims against that third party. 121 F.3d at 1374–75. The Court therefore the affirmed the district court's granting of the defendant's motion to compel arbitration of the liquidator's action against it, and it also denied the defendant's request to enjoin certain aspects of the state court liquidation proceeding that could affect the arbitration. *Id.*

Finally, granting Milliman's motion to compel arbitration is appropriate even assuming, *arguendo*, the Receivership Order had conferred this Court with exclusive jurisdiction. The Nevada Supreme Court has held that arbitration does not "divest" a state court of jurisdiction over the underlying action. *Henderson v. Watson*, No. 64545, 2015 WL 2092073, at *1 (Nev. Apr. 29, 2015). This Court will retain jurisdiction to, *inter alia*, confirm and enforce the arbitrators' decision.

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III. CONCLUSION

For all of the reasons discussed above, Milliman respectfully requests that the Court enter an order compelling arbitration pursuant to the Agreement.

DATED this 3rd day of January, 2018.

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By: _____

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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3883 Howard Hughes Parkway, Suite 1100, Las Vegas, NV 89169. On the below date, I served the above **MILLIMAN'S REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION** as follows:

☐	**BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
☐	**BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
☐	**BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
☐	**BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail address(es) set forth below.
☐	**BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
☐	**BY PERSONAL DELIVERY:** by causing personal delivery by _____, a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.
X	**BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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DATED: January 3, 2018.

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4826-9866-0186.1

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EXHIBIT A

Notice of Entry of Order Denying Plaintiff's
Motion to Coordinate Cases

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, IN HER OFFICIAL CAPACITY AS STATUTORY RECEIVER FOR DELINQUENT DOMESTIC INSURER, Plaintiff, vs. NEVADA HEALTH CO-OP, Defendant.	Case No. A-15-725244-C Dept. No. 1 **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION TO COORDINATE CASES**
AND STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP, Plaintiff, vs.	Case No. A-17-760558-B Dept. No. 25

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MILLIMAN, INC., a Washington Corporation; JONATHAN L. SHREVE, an Individual; MARY VAN DER HEIJDE, an Individual; MILLENNIUM CONSULTING SERVICES, LLC, a North Carolina Corporation; LARSON & COMPANY P.C., a Utah Professional Corporation; DENNIS T. LARSON, an Individual; MARTHA HAYES, an Individual; INSUREMONKEY, INC., a Nevada Corporation; ALEX RIVLIN, an Individual; NEVADA HEALTH SOLUTIONS, LLC, a Nevada Limited Liability Company; PAMELA EGAN, an Individual; BASIL C. DIBSIE, an Individual; LINDA MATTOON, an Individual; TOM ZUMTOBEL, an Individual; BOBBETTE BOND, an Individual; KATHLEEN SILVER, an Individual; DOES I through X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

PLEASE TAKE NOTICE that the Order Denying Plaintiff's Motion to Coordinate Cases was entered with this Court on December 11, 2017, a copy of which is attached hereto.

DATED this 12 day of December 2017.

SNELL & WILMER L.L.P.

By: _____

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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3883 Howard Hughes Parkway, Suite 1100, Las Vegas, Nevada 89169. On the below date, I served the above **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION TO COORDINATE CASES** as follows:

☐	**BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
☐	**BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
☐	**BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
☐	**BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail address(es) set forth below.
☐	**BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
☐	**BY PERSONAL DELIVERY:** by causing personal delivery by _____, a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.
X	**BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

Mark E. Ferrario, Esq. Eric W. Swanis, Esq. Donald L. Prunty, Esq. GREENBERG TRAURIG, LLP 3773 Howard Hughes Parkway, Suite 400 N Las Vegas, NV 89169 ferrariom@gtlaw.com swanise@gtlaw.com pruntyd@gtlaw.com *Attorneys for Plaintiff*	Samuel A. Schwartz, Esq. Frank M. Flansburg, III, Esq. SCHWARTZ FLANSBURG PLLC 6623 S. Las Vegas Blvd., Suite 300 Las Vegas, NV 89119 *Attorneys for Defendants InsureMonkey, Inc. and Alex Rivlin*

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DATED: December 19, 2017.

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Defendants.

On September 15, 2017, the Commissioner of Insurance, Barbara D. Richardson, in her official capacity as receiver for Nevada Health CO-OP ("Plaintiff" or "Commissioner") filed her motion to coordinate cases ("Motion"). On October 26, 2017, Defendants Milliman, Inc., Jonathan L. Shreve, and Mary van der Heijde (collectively "Milliman") filed their Opposition. On October 30, 2017, Nevada Health Solutions, LLC ("NHS") and InsureMonkey, Inc. and Alex Rivlin (collectively "InsureMonkey") filed joinders to Milliman's Opposition. On October 31, 2017, Kathleen Silver, Bobbette Bond, Tom Zumtobel, Pam Egan, Basil Dibsie, and Linda Mattoon filed a joinder to Milliman's Opposition. On November 1, 2017, Martha Hayes, Dennis T. Larson, and Larson & Company P.C. (collectively "Larson") filed a joinder to Milliman's Opposition. On November 6, 2017, Plaintiff filed her Reply.

The Motion came on for hearing on November 7, 2017, at 9:00 a.m. in Department I of the Eighth Judicial Court. Donald L. Prunty, Esq. of Greenberg Traurig, LLP appeared on behalf of Plaintiff. Patrick G. Byrne, Esq. of Snell & Wilmer L.L.P. appeared on behalf of Milliman. Evan L. James, Esq. of Christensen, James & Martin appeared on behalf of NHS. Brian Blankenship, Esq. of Schwartz Flansburg PLLC appeared on behalf of InsureMonkey. Russell B.

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Brown, Esq. of Meyers McConnell Reisz Siderman appeared via telephonically for Larson.

Having considered the relevant briefing and exhibits, having heard the arguments of counsel, for all of the reasons contained in the Opposition and the joinders thereto, and with good cause appearing, the Court hereby enters the following Order:

IT IS HEREBY ORDERED that Plaintiff's Motion to Coordinate Cases is DENIED without prejudice for the reasons stated on the record;

IT IS FURTHER ORDER that, pursuant to EDCR 1.61, the Business Court of the Eighth Judicial Court has the power to decide whether the removal of case number A-17-760558-B to the Business Court was proper; if the Business Court later finds that it does not have jurisdiction over case number A-17-760558-B, the Commissioner may refile her Motion.

IT IS SO ORDERED.

DATED this 8 day of Dec, 2017.

DISTRICT COURT JUDGE

89

Submitted by:

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TRAN
CASE NO.A-17-760558-B
DEPT. NO. 25

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

NEVADA COMMISSIONER OF INSURANCE, Plaintiff, vs. MILLIMAN INC., Defendant.	)	REPORTER'S TRANSCRIPT OF MOTION TO COMPEL ARBITRATION

BEFORE THE HONORABLE KATHLEEN DELANEY
DISTRICT COURT JUDGE

DATED: TUESDAY, JANUARY 9, 2018

REPORTED BY: SHARON HOWARD, C.C.R. NO. 745

APPEARANCES:

For the Plaintiff: MARK FERRARIO, ESQ.
DONALD PRUNTY, ESQ.

For the Defendant: JUSTIN KATTAN, ESQ.
BRIAN BLANKENSHIP, ESQ.
PATRICK BYRNE, ESQ.

* * * * *

LAS VEGAS, NEVADA; TUESDAY, JANUARY 9, 2018

P R O C E E D I N G S

* * * * *

THE COURT: Page 15, Nevada Commissioner of Insurance vs. Milliman.

Let's have appearances, please.

MR. FERRARIO: Mark Ferrario and Donald Prunty for Plaintiff.

MR. PRUNTY: Good morning, your Honor.

MR. BYRNE: Pat Byrne and Defendant, Milliman. It's our motion. With me from New York, he said he didn't bring the letter, is Justin Kattan from the Dentons Law Firm. He'll be arguing the motion.

THE COURT: I don't believe that he about the weather.

MR. BLANKENSHIP: Brian Blankenship from Schwartz Flansburg on behalf of InsureMonkey and Alex Rivlin today.

THE COURT: Thank you. Welcome to all of you.

This is on calendar I see for a motion to compel arbitration. It's been very well and thoroughly briefed. This is always an important issue in my opinion to have a thorough discussion because, well, all know under circumstances there are contracts and contracts have

provisions. One of the things that I think the court always must be vigilant on is not taking away someone's right access to the court when that shouldn't be the case. And sometimes these situations are between sophisticated parties on what they bargained for and this is where they go. Sometimes they are not. But each case begs its own ultimate review to determine if the court should allow the matter to not be within the court system and to be elsewhere.

Just with those general ruminations we're going to obviously proceed with argument, and I do sort of want to set up argument that way in that we do have nuances here as to who the parties are that are proceeding and what capacity they're proceeding, which way the wind blows on that.

Let's get started with any argument that you want to highlight that makes sure the court didn't misapprehend or not connect to.

Mr. Kattan.

MR. KATTAN: Thank you, your Honor.

As Mr. Byrne said, my name is Justin Kattan. I'm from Dentons US, LLP, on behalf of the Defendants Milliman, and individual actual Defendants John Shreve and Mary Van Der Heijde.

To start with I want to focus on a couple of the

aspects of the motion that are not in dispute as they go to some of the things you just raised, your Honor.

First of all, the arbitration clause at issue here, which is found at paragraph 5 of the consulting services agreement by and between Milliman and NHC -- Nevada Health Co-op -- is both broad and ambiguous. It covers all disputes that relate to or arise from the engagements of Milliman by NHC.

It's also undisputed that this agreement was entered into by sophisticated parties. It is not a contract of adhesion. It's not an unconscionable agreement. It's not an agreement secured by fraud or duress or any other grounds the Plaintiff raises in this case for revoking the agreement. Plaintiff does not provide evidence of or raise any of these defenses, either in their complaint or opposition papers on this motion.

That's important because under both the Federal Arbitration Act, the FAA, and the Nevada Arbitration Act, which has relevant wording, as well as the governing US Supreme Court case law. Those are the grounds on which a party can vitiate an otherwise valid, binding arbitration agreement. They don't exist here.

So what happens here is Plaintiff is raising several arguments in an effort to argue why, not withstanding the language of the FAA and the NAA, she should be allowed to

evade arbitration here. Every single one of the arguments that Plaintiff raises here has been squarely rejected by several on-point decisions that Milliman cites both in its opening brief as well as in its reply.

The Plaintiff -- and I think this goes to what you were just saying, your Honor, in your opening remarks. The Plaintiff tries to portray a statutory liquidator as beyond the reach of a typical -- then the typical settled law concerning arbitration by virtue of the fact that a liquidator generally acts not for the insolvent insurer alone, but for also all of the insolvent insurance policy holders, creditors, and other estate holders. But it is simply not true. It is simply not true that the liquidator status puts her beyond the reach of the settlement arbitration law. Courts around the country have repeatedly rejected the notion that the liquidator can in all instances evaded a contractual arbitration clause. And there is a unifying thread that Milliman has cited that compels the liquidator to arbitrate. And that is when a liquidator's claims arise from and relate to insolvent insurers contractual relationship with a third party. And here, Plaintiff indisputably is bringing contract and tort claims arising for the agreement and the work that Milliman performed pursuant to it. The liquidator is bound to that agreement, including,

including an applicable arbitration clause just like the insolvent insurer would have been.

The basic rule underlying those cases was laid out by the Nevada Supreme Court in Ahlers vs. Ryland Homes, that a party cannot sue to enforce an agreement and, quote, simultaneously avoid other portions of the agreement, such as the arbitration provision. And that Black Letter Rule applies equally and statutorily for insurance liquidators.

The Ninth Circuit in Bennett vs. Liberty National Fire Insurance Company held, quote, if the liquidator wants to enforce the insurer's right under a contract, it must also assume its perceived liabilities.

In our reply brief we also cite a Southern District of California case, Points vs. National Indemnity Company, holds the same thing. In that case the court noted that the inconsistent approach, the idea of trying to enforce an insolvent insurer's agreement and simultaneously evade the arbitration clause has been rejected by the Ninth Circuit and several other courts.

THE COURT: Counsel, I'm sure you're getting there, but one thing that maybe is the elephant in the room is the order that exists in this case that purported to say that the matter had to be exclusive jurisdiction of the court. How does that reconcile with this.

I don't want you to not hit all your high points, but talking about sort of the general lay of the land, we still need to make sure we are touching upon what's happening.

MR. KATTAN: I'm happy to get to that now.

So there is no exclusive jurisdiction over any and all claims that the liquidator brings. The order clearly, clearly allows the liquidator to bring actions outside of Nevada State Court, clearly allows the liquidator to prosecute claims, quote, in other legal proceedings rather then State court litigation. Why is that language necessary.

That language is necessary because the order cannot create jurisdiction or supersede federal law or vitiate an otherwise valid arbitration clause. It's important not to tie the liquidator's hands, so she is precluded from bringing a claim altogether in a situation where she has to litigate out side of Nevada state court in order to pursue NHC's claims. The provisions of that order I was referring to is paragraph 14, 14 (a), and 14 (h).

The Plaintiff knows this. The Plaintiff knows that there is no exclusive jurisdiction created by the -- what we've called in the papers, receivership. Plaintiff has sued the US Department of Health and Human Services in

Nevada federal court because, number one, there is no jurisdiction in Nevada state court under federal law, and two, a contractual form selection clause. The Plaintiff herself cites in her federal complaint, that there is a contractual form selection clause that dictated the Plaintiff had to file that suit in Nevada federal court.

A contract arbitration clause and the related federal/state law mandating enforcement of that contract arbitration clause should be treated no differently then the contractual clause in the contract between HHS and the Plaintiff that required her to file in Nevada federal court.

The Plaintiff's idea of exclusive jurisdiction vastly overstates what the liquidation court oversees. This case, the one that brings us here today, the one that Plaintiff brought against Milliman, is not a liquidation proceeding and it was not brought as part of the liquidation proceeding. In fact, the Plaintiff moved to try to coordinate and consolidate it with the liquidation and that motion was denied.

What this is, this is a -- there was a clear difference between a liquidation proceeding and what we have here, which is a claim brought by a liquidator against a third party based on straightforward, pre-insolvency common law and tort and contract claims.

What the order covers in its exclusive jurisdiction language are claims brought in the context of a liquidation proceeding.

So that, your Honor, I hope that answers your question.

THE COURT: It does. I just wanted to make sure that we acknowledge that and didn't just leave that for the response and then give you rebuttal, you know.

We can see the language in the injunction order and Subsection 14 and some debate as to what that was intended to mean or not mean. We see Chapter 696 (b) provisions and how they play. So I think you have encapsulated what the basic argument is.

Is there anything else you want to highlight or do you want to wait in rebuttal.

MR. KATTAN: I would like to highlight one point. I mentioned the rule about you can't both enforce a contract and vitiate a contract arbitration clause.

I would point out two things. Number one, the Plaintiff does not cite a single case, not one, that is contrary to the case law that we cite that stands for that rule that applies to a liquidator. There is no case that exempts the statutory liquidator from that rule and this idea that it's a non-signatory has been dismissed by the Ninth Circuit and all the other cases that we cited at

pages 4 and 5 of our reply brief.

The other thing I would say is in their brief the Plaintiff pushes the idea that the McCarren Ferguson Act gives her and out here. And it means -- she raises the McCarren Ferguson Act to bolster the idea that the general policy on arbitration cannot apply here. The general presumption in favor of arbitration cannot apply here.

That argument is a side shows in terms of Milliman's argument and the law that binds the statutory liquidators to arbitration clauses. It is not based on grand general policy pronouncements. It's based on specific case law and specific federal and state law that applies these arbitration clauses to these liquidators, not withstanding the fact that they may technically be non-signatory, not withstanding the fact they have to bring claims on behalf of creditors.

Not to belabor the point, they're in our brief about why a non-signatory doesn't work and why the idea that they're bringing claims they don't stand in the shoes. They're bringing claims on behalf of creditors. That argument doesn't work.

But the idea that the McCarren Ferguson Act supercedes Milliman's attempt to enforce the arbitration clause really doesn't work here, because again, these are not general policy arguments. They are specific arguments

based on point, binding precedents that vitiates Plaintiff's argument.

I will take time to respond to Plaintiff's arguments on rebuttal.

THE COURT: I'll give you rebuttal.

Mr. Ferrario, are you trying to enforce the contract on one hand and vitiate the arbitration clause on the other.

MR. FERRARIO: I don't think that's what we're trying to do. I think we're acting as a receiver under the Nevada Insurance Code, and we're trying to protect creditors, claimants. We're trying to marshal assets for an estate. That's all we are doing.

What's interesting is Milliman is a sophisticated insurance business. They understand this. This isn't something that's a secret to them how this works. You look around the country and talks about cases around the country, Kentucky, Louisiana, Ohio, Fifth Circuit, Tenth Circuit where this is very common place. This isn't a surprise to Milliman, okay.

THE COURT: Does seem though the case law you cited where it focuses on the non-signatory issue, those cases still stand for the proposition that if you are suing to enforce a contract that you have to abide by the totality of the contract.

MR. FERRARIO: They are in a different context, your Honor. They never cited one case that's in this context where that applies. That's really the issue here. You hit the nail on the head.

Most of what they are arguing is outside of the context that we are in, which is a liquidation here of a failed insurance company. Okay. If you look at the cases that deal with this issue and you start -- I think you started from the right place. Look at the order that was entered by Judge Corey. All property is within the control of this court. If you look at this -- this is what I found interesting as I was preparing for this. Look at page 12 of the Defendant's motion.

THE COURT: Okay.

MR. FERRARIO: They actually argue for a minute, but I don't think it really gets them there, that a claim is not property. Of course it is. I don't have to argue that to your Honor. Any claim that we have is property of the estate, if you will. Here a property of the receiver. Here that is exclusively under the jurisdiction of this court. That is without dispute. If you read the order, which they tap dance around, they want to read Sections 14 and 16. Look at paragraph 3. We cite this on page 5 of our pleading. It says clearly, property is hereby placed in custodial lien and list of this court and a receiver.

So we have exclusive control, this court has exclusive control as to how we go after her property, which is our claims. Okay.

And so I think your Honor went to the right place. You went right to the order. This is a statutory scheme that is integrated into the regulation of insurance companies. And, again, in other courts where the same arguments have been made -- in fact, he talks about -- that the reverse preemption argument is sort of a red herring. Well, the Tenth Circuit didn't think that. Where you have a comprehensive regulatory scheme like we do here is McCarren Ferguson makes it clear that State law controls.

Now, some other interesting things that they talk about here. They argue about arbitration being more efficient. How is it more efficient that I now have to pay for 3 people to hear this claim. What they're advocating for is dissipation of assets of the estate. This is something you touched on early about access to the court. They want us to have to dissipate assets of the estate to pursue our claims. They argue without any evidentiary support that that's more efficient. I'm here to tell you I've been through a number of 3 panel arbitrations. Typically they're anything but efficient, and they are very costly.

So if you look at that in terms of the overall principles behinds what it is my client is doing, which is, again, stepping into the shoes, to some extent, of the failed company. But also vindicating rights of creditors, policy holders, and everyone else. And the way the statute is to work is we have the choice, okay, this court has the obligation to enforce that choice of where we litigate these claims.

Again, your Honor, for Milliman to come in and say this the unfair to me, again shows a lack of sophistication -- and probably we shouldn't be surprised how they performed under this contract -- of what it is they were doing here. They were jumping into the insurance industry in Nevada. They should not be surprised that this may vitiate this provision that they had in their contract.

And the other thing that's footnoted here, and they skipped it a little in their argument. Remember, Milliman wanted New York law to apply here. Under New York law -- we cite that in our footnote. Under New York law arbitration in this context are struck down. So the very choice of law that they want to apply knocks them out of box. But they don't mention it. They say, well, this is a procedural thing and that's substantive. That's nonsense. If they want to enforce all of the contract

under one set of laws, then they ought to be bound by that set of law. They said New York. New York says you don't get arbitration.

So I would answer any questions the court has. I think between the two parties we have scorched the earth on cases that have dealt with this.

THE COURT: It was very thorough.

MR. FERRARIO: I don't think we left anything to chance. If you have any questions -- I think your Honor started in the right place. I think Judge Corey's order is absolutely correct. It's consistent with the statute. We are here to marshal assets in the most efficient and effective way to protect creditors and claimants and policy holders and that's what we do. And forcing us to litigate parts of this in other forums is not consistent with that public policy and purpose.

Thank you, your Honor.

THE COURT: I'll let you head where you want to because I'm sure you have some thoughts in your head, but I may have questions.

MR. KATTAN: I'm happy to start wherever you want me too.

THE COURT: When the focus was on, well, yeah, the order says exclusive jurisdiction, relying on receivership statute. It says the certain things it says.

But then it focuses on 14 with sub-parts where it purports to give the receiver the option to do things other ways then somehow that's a recognition that we don't have to stay in court. Isn't that really something that enures to the benefit of the receiver. Is it necessarily something that can be argued here to support your side of the coin.

MR. KATTAN: Sure. Let me make two responses to that argument.

Let's look at the plain language of the order. There is nothing, nothing in the plain language of the order that gives the liquidator that kind over unfettered unilateral discretion.

Second, if the liquidator had that kind of sole discretion, why would the liquidator ever choose to litigate elsewhere, or, in quote, other legal proceedings like arbitration. And assuming the answer to that question is because there are circumstances where a liquidator must pursue claims outside of Nevada state courts. Well, this is one of those times. This is one of those times. There's no reason why federal law and state law mandating enforcement of an arbitration clause should be treated with any less sanctity then in federal law conferring jurisdiction over claims against the federal government in federal courts. Nor is there a reason why

contractual arbitration provision in Milliman's agreement with NHC should be treated any differently then contractual venue selection in a jurisdiction provision that was in the contract that the Plaintiff are trying to enforce between NHC and the Department of Health and Human Services. That's why this idea of -- it just gives the liquidator the right to do whatever they want. (a), there's nothing in the order that say that. (b), practice, their own actions make clear that they don't believe that.

Unless you have any question.

THE COURT: I don't have a question about that. I wanted you to have the opportunity to respond to Mr. Ferrairo's comment.

MR. KATTAN: If you have a question on a different topic, I'd be happy to go over it. Because there is some things about Plaintiff's argument I would like to address. The last impact there.

First, the idea that we don't cite a single case in this context. I'm not sure what Counsel meant by that, but if you look at pages 4 and 5 of our relay brief, we cite a dozen cases from all around the country where contractual arbitration clauses were enforced against statutory liquidators and jurisdiction that have limitation statutes that are similar to Nevada.

THE COURT: But you'd admit there is nothing that requires that in Nevada, yet.

MR. KATTAN: Yet. You are correct there was not an on-point case law that -- there is none in Nevada.

THE COURT: Just as a side note, because I know you're visiting our jurisdiction. When I first moved back here -- I practiced in California -- I remember walking into -- if everyone is old enough to remember the law library that used to be at the base of the FIB building -- the stacks in there. I walked in and I said to the guy, where are the Nevada Reporters, where's the stuff. There was a bookshelf like that, with 3 shelves and that was it. That's it. It hasn't grown much since.

MR. KATTAN: We noticed in putting this together there is sometimes an absence of Nevada jurisdiction on a lot of things. In this case there was really good Nevada law that supports or position, including in a liquidation context, Ahlers vs. Ryland Homes, which stands for the proposition you can't both enforce and evade an arbitration clause. There is no reason not to apply that to the insurance liquidation context. There are a dozen or so cases we cite on pages 4 and 5 of our reply brief that states -- unless you want me to go them, I'll stand on my brief on that point.

THE COURT: Your case law cited is persuasive.

It's non-binding, of course. But there is persuasion to that.

Really where the court is going to make the call is, I think, going to have to make the call that best serves the purposes of our statutes and our situation. And I think while we do have this conflict, for lack of a better word, between contract and the efforts that are being undertaken in part to enforce the contract and the unique context that we have arising, I think still comes down to what is best suited for the needs of the folks involved. And if you want to comment on that, or anything else you want to comment on.

MR. KATTAN: Sure. I would like to comment on that. I commented both from a legal perspective and a practical perspective.

First, let's address the idea that somehow arbitrating would --

THE COURT: Dissipate the assets.

MR. KATTAN: I can start there if you'd like to. Fine.

Frankly, that just -- the Nevada Supreme Court held otherwise. The Nevada Supreme Court held in the DR Horton case that arbitration is more cost effective and more efficient then traditionally litigation. That's not my opinion. That's Nevada Supreme Court juris prudence.

Moreover, this idea that on the one hand -- think of their argument. Think about how internally inconsistent it is. One of the main arguments they raises today is try to say that arbitration is inappropriate here. Is that arbitration has far more limited discovery then discovery in this court would allow. That just goes exactly to what the Nevada Supreme Court is saying, it's written into the contract. It's a far more efficient and cost effective process. I suppose you have to pay the arbitrators. As your Honor I'm sure well knows attorneys from Greenberg Traurig and every other attorney who's dealt with civil discovery in a multi-defendant case such as this, the real costs get run up during discovery. That's going to be far more costly then simply paying 3 arbitrators. So their own argument proves why this idea that they're going to be dissipating estate assets is frankly wrong.

The idea that, well, there is other Defendants. Look, that is an issue in any arbitration where multiple Defendants or one Defendant has an arbitration clause and other Defendants don't. That's not a normal reason to initiate an otherwise valid, binding arbitration clause. So why is it a reason to vitiate an arbitration clause here.

The Supreme Court said you can't use -- the US Supreme Court has said you can't use those kind of general

public policy arguments to knockout a -- knockout a valid and binding arbitration clause. AT&T vs. Ascension case, the Southland Corp case, the Ninth Circuit, the Quackenbush case you can't use these sort of general pronouncements of public policy to vitiate an otherwise valid and binding arbitration clause. So for all those reasons this idea that, you know, it might be more expensive or it might run up costs, (a) not true, (b), if it was true that's an issue always with arbitration when you have these multiple Defendants. And it's still not a reason to get rid of an arbitration clause that's binding. Multiple jurisdictions including the US Supreme Court and the Ninth Circuit have upheld that.

The other thing I think that's important to recognize and this is the something that the Plaintiffs did throughout their papers and Counsel did it again here. This idea that they're acting on behalf of the State, that they're acting on behalf of creditors. That's an argument that has been expressly rejected by several jurisdictions that have addressed that very issue -- the Ninth Circuit, the Third Circuit, the Sixth Circuit and severe federal district courts that we cite on page 10 and 11 of our papers. They all stand for the proposition that where a statutory liquidator is bringing straightforward tort contract claims against a third party that is not a

situation that implicates the State regulation of he insurance. That is not a situation that threatens creditors' right or priorities, that is not that kind of situation. The plaintiff throughout their papers tries to conflate two very, very different things. They try to conflate a claim that belongs to creditors with claims that simply if they recover money there will be more money in the pot and that will ultimately benefit creditors.

The former maybe that is a situation that implicates State regulation of insurance, but the latter which is what we have here, again, we cite a dozen cases in our reply brief that expressly hold that those kinds of situation, the situations we have here, do not, do not implicate the kind of creditors' rights and the liquidator's statutory function. So really, enforcing the arbitration clause here does not raise or does not implicate the kind of parade of horribles that the Plaintiff is raising here.

Frankly, the Plaintiff talked about evidence -- that's the last thing I'll mention on this point -- where is the evidence, where is the evidence of inconsistent rulings, where is the evidence. There is nothing. There is not one specific idea that the Plaintiff mentions that will suffer for having Milliman -- the claims against Milliman be arbitrated here. This is a situation where

again we have a case that is very distinct from the liquidation proceeding, a claim is not being made against estate assets. Plaintiff's counsel tries to gloss over that distinction, but the case law we cited in our reply brief and our open brief makes a critical distinction between claims that are made against estate assets and claims like here, tort contract claims against third parties. Even the case the Plaintiff cites makes those distinctions, the Covington case from Ohio. We blocked that in our reply.

So for all those reasons, this idea that enforcing the arbitration clause is going to make the estate suffer, make creditors suffer has really roundly been rejected.

Unless your Honor has anything else specific, I want to read one quote because really that argument was expressly raised before and rejected by the Third Circuit. I want to leave your Honor with the quote from Sooter because I think when you look at this, it really shows why there is no harm. And certainly no harm in arbitrating a case here. In fact the federal law enures, requires that the arbitration clause be enforced here.

What the Third Circuit in Sooter said rejecting this very argument is, "This the not a delinquency proceeding or a proceeding similar to one. Nor is it a suit by the party seeking access to the estate -- seeking to access

the assets of the insurer's estate. What this proceeding is a suit instituted by the liquidator against there re-insured's enforce contract rights for insolvent insurer, which if meritorious will benefit the insurer's estate. Accordingly, we fail to perceive any potential for interference with the liquidation proceeding before the Supreme Court."

"If it's true, as the liquidator stresses, that if a district court or arbitrator should decides the reinsurance agreement does not cover the disputed expenses, the estate will be smaller than if that issue was resolved in the liquidator's favor. But the mere fact that policy holders may receive less money does not impair the operation of any provision of New Jersey's Liquidation Act."

For that reason the Third Circuit said there was no reverse preemption to enforce the arbitration clause. That rational applies 4 square here. Again, unless your Honor has any questions.

THE COURT: I do not. Thank you. Thank you for your rebuttal.

I appreciate the very thorough briefing. I very much appreciate the opportunity to see, as you said, Mr. Byrne said, to scorch the earth here and find the case law. I think the tricky part about this one, I'll be very

candid, I was on a panel at a business court conference a few years ago where we were talking about arbitration clauses and the difficulty it's creating with business courts and other courts because taking things out of the court's jurisdiction and maybe on occasion that shouldn't be the case. But I think in this particular case, it really does squarely rest on is this a situation where what a receiver is doing is something that's within the statutory scheme that somehow should be reverse preempting the arbitration clause or really is this an effort to increase the estate's coffers to pay creditors and otherwise.

When the dust settles on everything here, as much as it goes against my personal feelings of we need to have access to court always, there's some concerns with over-arbitrating, if you will, these matters.

I think in this particular case what's happening here is the liquidator is enforcing the contract and enforcing circumstances that at the end of the day do not invalidate, impair, or supersede, as argued by the Plaintiff, to any kind of impact of Nevada liquidation. I think what's happening here does fall squarely within the need to support the arbitration presumption.

I do not believe that it is reverse preempted in the actual factual circumstances of what is occurring here. I

do believe that although it's possible that our Supreme Court would not follow these other precedents that are set or persuasive decisions made in these other jurisdictions, I think it's equally possible they would follow them. Because over their evolution of time the arbitration statute and the presumption of arbitration has gotten stronger, not weaker. Again, much -- somewhat, to personal concern. But again, just enforcing the laws as I see them and development of the laws and the underpinnings of what happened here, I do believe it's appropriate to grant the motion at this time to allow the arbitration to be compelled.

I don't, again, perceive that it runs afoul of or otherwise regulatory scheme, because I believe what is occurring I don't necessarily disagrees with the opposition that we are dealing with obviously State statute that was enacted for the purpose of regulating insurance and that there is a federal statute that may have been interpreted to not necessarily relate to insurance, but at the end of the day the application of the federal statute as it's applying here in this context, again, I don't believe is related to or invalidated by State salutatory regulation of insurance.

It's not the exact quote you read from the Third Circuit be any means, but ultimately I'm persuaded that

this is a matter that is appropriate to be placed in arbitration pursuant to the contract clause and efforts to enforce the contracts with third parties to add to the coffers. It does not again invalidate or otherwise impact or statutory liquidation scheme.

I'm going to ask Mr. Kattan to prepare the order. Give Mr. Ferrario an opportunities to see it. Again, my personal concerns aside about taking it out of our court system, at the end of the day I think it's appropriate in this context.

MR. FERRARIO: One clarification so I don't have to bring a motion. In our papers we pointed out some things were extra contractual that we didn't think would fall within the scope, such as negligence per se claim which is on page 47 of our complaint; violation of State statute.

I understand the straight contract. I understand your ruling in regard to that claim, conspiracy claim. We don't think it's involved in the scope of that.

THE COURT: Here is how I'll answer this, Mr. Ferrario. To the extent you need a motion for clarification because it can't be worked out or not agreed with, we can deal with it then.

It's not necessarily driven by all the myriad of claims filed. It's being driven by who is doing what on

behalf of whom and standing in their shoes and how they're doing it. So I don't know that it matters what the claims are titled in this circumstance where the liquidator is seeking to go after assets from third parties to increase the coffers, and that's really the context of what's happening regardless of what we call the claims. That's what I believe is required to go to arbitration. It's not a situation of something outside of it or inside of it. It's really who is doing what to whom that drives the train here.

MR. FERRARIO: To the extent we need to bring it back, we will. Understand.

THE COURT: I won't quibble with that in a case like this. I'm going to require and request respectfully Mr. Kattan, Mr. Byrne that you give some detail in the order as to what the court has found persuasive in the argument so that we have that so that to the extent it's challenged this could very well be the case that ultimately sets the law on this issue for the State of Nevada. I want to make sure we're complete with that.

MR. KATTAN: Mr. Ferrario will have every opportunity to have what would be a joint submission.

THE COURT: I'm not sure my articulation was as well done as perhaps the pleadings were, but if you need a transcript I'm sure we can take care of that in normal

course.

MR. PRUNTY: When would you like the order.

THE COURT: It should be 10 days, but we'll see what happens with that transcript.

* * * * *

CERTIFICATE

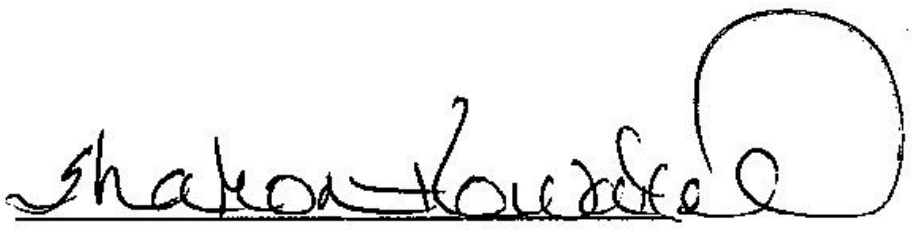
OF

CERTIFIED COURT REPORTER

* * * * *

I, the undersigned certified court reporter in and for the State of Nevada, do hereby certify:

That the foregoing proceedings were taken before me at the time and place therein set forth; that the testimony and all objections made at the time of the proceedings were recorded stenographically by me and were thereafter transcribed under my direction; that the foregoing is a true record of the testimony and of all objections made at the time of the proceedings.



Sharon Howard
C.C.R. #745

TRAN
CASE NO. A-17-760558-B
DEPT. NO. 25

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

NEVADA COMMISSIONER OF INSURANCE, Plaintiff, vs. MILLIMAN INC., Defendant.	REPORTER'S TRANSCRIPT OF MOTION TO COMPEL ARBITRATION

BEFORE THE HONORABLE KATHLEEN DELANEY
DISTRICT COURT JUDGE

DATED: TUESDAY, JANUARY 9, 2018

REPORTED BY: SHARON HOWARD, C.C.R. NO. 745

APPEARANCES:

For the Plaintiff: MARK FERRARIO, ESQ.
DONALD PRUNTY, ESQ.

For the Defendant: JUSTIN KATTAN, ESQ.
BRIAN BLANKENSHIP, ESQ.
PATRICK BYRNE, ESQ.

* * * * *

LAS VEGAS, NEVADA; TUESDAY, JANUARY 9, 2018

P R O C E E D I N G S

* * * * *

THE COURT: Page 15, Nevada Commissioner of Insurance vs. Milliman.

Let's have appearances, please.

MR. FERRARIO: Mark Ferrario and Donald Prunty for Plaintiff.

MR. PRUNTY: Good morning, your Honor.

MR. BYRNE: Pat Byrne on behalf of Defendant, Milliman. It's our motion. With me from New York, he said he didn't bring the weather, is Justin Kattan, from the Dentons Law Firm. He'll be arguing the motion.

THE COURT: I don't believe that he about the weather.

MR. BLANKENSHIP: Brian Blankenship from Schwartz Flansburg on behalf of InsureMonkey and Alex Rivlin today.

THE COURT: Thank you. Welcome to all of you.

This is on calendar I see for a motion to compel arbitration. It's been very well and thoroughly briefed. This is always an important issue in my opinion to have a thorough discussion about because, well, we all know those circumstances, there are contracts and contracts have

provisions. One of the things that I think the court always must be vigilant on is not taking away someone's right to or access to the court when that shouldn't be the case. And sometimes these situations are between sophisticated parties and are what they bargained for and this is where they go. Sometimes they are not. But each case begs its own ultimate review to determine if the court should allow the matter to not be within the court system and to be elsewhere.

Just with those general ruminations we're going to obviously proceed with argument, but I do, sort of, want to set it up that way. We do have nuances here as to who the parties are that are proceeding and in what capacity they're proceeding, which way the wind blows on that.

Let's get started with any argument that you want to highlight that makes sure the court didn't misapprehend or not connect to.

Mr. Kattan.

MR. KATTAN: Thank you, your Honor.

As Mr. Byrne said, my name is Justin Kattan. I'm here from Dentons US, LLP, on behalf of the Defendants, Milliman, and the individual actuarial Defendants John Shreve and Mary Van Der Heijde.

To start with I want to focus on a couple of the

aspects of this motion that are not in dispute, and they go to some of the things you just raised, your Honor.

First of all, the arbitration clause at issue here, which is found at paragraph 5 of the consulting services agreement by and between Milliman and NHC -- Nevada Health Co-op -- is both broad and ambiguous. It covers all disputes that relate to or arise from the engagement of Milliman by NHC.

It's also undisputed that this agreement was entered into by sophisticated parties. It is not a contract of adhesion. It's not an unconscionable agreement. It's not an agreement secured by fraud or duress, nor any other grounds the Plaintiff raises in this case for revoking the agreement. Plaintiff does not provide any evidence of or raise any of these defenses, either in her complaint or in her opposition papers on this motion.

That's important because under both the Federal Arbitration Act, the FAA, and the Nevada Arbitration Act, which has the same relevant wording, as well as the governing US Supreme Court case law, those are the grounds on which a party can vitiate an otherwise valid, binding arbitration agreement. They don't exist here.

So what happens here is Plaintiff is raising several arguments in an effort to argue why, not withstanding the plain language of the FAA and the NAA, she should be

allowed to evade arbitration here. Every single one of the arguments that Plaintiff raises here has been squarely rejected by several on-point decisions that Milliman cites both in its opening brief as well as in its reply.

The Plaintiff -- and I think this goes to what you were just saying, your Honor, in your opening remarks. The Plaintiff tries to portray a statutory liquidator as beyond the reach of a typical -- then the typical settled law concerning arbitration by virtue of the fact that a liquidator generally acts not for the benefit of the insolvent insurer alone, but also for all of the insolvent insurers, policy holders, creditors, and other estate holders. But it is simply not true. It is simply not true that the liquidator status puts her beyond the reach of the settlement arbitration law. Courts around the country have repeatedly rejected the notion that the liquidator can in all instances evaded a contractual arbitration clause. And there is a unified thread in the case law that Milliman has cited that compels a liquidator to arbitrate. And that is when a liquidator's claims arise from and relate to an insolvent insurer's contractual relationship with a third party. And here, Plaintiff indisputably is bringing contract and tort claims arising for the agreement and the work that Milliman performed pursuant to it. The liquidator is

bound to that agreement, including any applicable arbitration clause just like the insolvent insurer would have been.

The basic rule underlying those cases, it was laid out by the Nevada Supreme Court in Ahlers vs. Ryland Homes, that a party cannot sue to enforce an agreement and, quote, simultaneously avoid other portions of the agreement, such as the arbitration provision. And that Black Letter Rule applies equally to statutorily appointed insurance liquidators.

The Ninth Circuit in Bennett vs. Liberty National Fire Insurance Company held, quote, "if the liquidator wants to enforce the insurer's rights under its contract, she must also assume its perceived liabilities."

In our reply brief we also cite a Southern District of California case, Point vs. National Indemnity Company, holds the same thing. In that case the court noted that the inconsistent approach, the idea of trying to enforce an insolvent insurer's agreement and simultaneously evade the arbitration clause has been rejected by the Ninth Circuit and several other courts.

THE COURT: Counsel, I'm sure you're getting there, but one of the things that is maybe the elephant in the room is the order that exists in this case that purported to say that the matter had to be the exclusive

jurisdiction of the court and how does that reconcile with this.

I don't want you to not hit all your high points, but talking about sort of the general lay of the land, we still need to make sure we are touching upon what's happening.

MR. KATTAN: I'm happy to get to that now.

So simply put, there is no exclusive jurisdiction over any and all claims that the liquidator brings. The order clearly, clearly allows the liquidator to bring actions outside of Nevada State Court, and clearly allows the liquidator to prosecute claims, quote, "in other legal proceedings, rather then State court litigation."

Why is that language necessary. That language is necessary because the order cannot create jurisdiction or supersede federal law or vitiate an otherwise valid arbitration clause. It's important not to tie the liquidator's hands, so she is precluded from bringing a claim altogether in a situation where she has to litigate outside a Nevada state court in order to pursue NHC's claims. The provisions of that order I was referring to is paragraph 14, 14 (a), and 14 (h)

The Plaintiff knows this. The Plaintiff knows that there is no exclusive jurisdiction created by the -- what

we've called in the papers, the receivership court. Plaintiff has sued the US Department of Health and Human Services in Nevada federal court because, number one, there is no jurisdiction in Nevada state court under federal law, and two, a contractual form selection clause. The Plaintiff herself cites it in her federal complaint, that there is a contractual form selection clause that dictated the Plaintiff had to file that suit in Nevada federal court.

A contractual arbitration clause and the related federal and state law mandating the enforcement of that contractual arbitration clause should be treated no differently then the contractual clause in the contract between HHS and the Plaintiff that required her to file in Nevada federal court.

The Plaintiff's idea of exclusive jurisdiction vastly overstates what the liquidation court oversees. This case, the one that brings us here today, the one that Plaintiff brought against Milliman, is not a liquidation proceeding and it was not brought as part of the liquidation proceeding. In fact, the Plaintiff moved to try to coordinate and consolidate it with the liquidation proceedings and that motion was denied.

What this is, this is a -- there is a clear difference between a liquidation proceeding and what we

have here, which is a claim brought by a liquidator against a third party based on straightforward, pre-insolvency common law tort and contract claims. What the order covers in its exclusive jurisdiction language are claims brought in the context of a liquidation proceeding.

So that, your Honor, I hope that answers your question.

THE COURT: It does. I just wanted to make sure that we acknowledge that and didn't just leave that for the response and then give you rebuttal, you know.

We can see the language in the injunction order and Subsection 14 and some debate as to what that was intended to mean or not mean. We see Chapter 696 (b) provisions and how they play. So I think you have encapsulated what your basic argument is.

Is there anything else you want to highlight or do you want to wait in rebuttal.

MR. KATTAN: I would like to highlight one other point, which is I mentioned the rule about you can't both enforce a contract and vitiate a contract's arbitration clause.

I would point out two things. Number one, the Plaintiff does not cite a single case, not one, that is contrary to the case law that we cite that stands for that

rule and that applies to a liquidator. There is no case that exempts the statutory liquidator from that rule and this idea that it's a non-signatory has been dismissed by the Ninth Circuit and all these other cases that we cited at pages 4 and 5 of our reply brief.

The other thing I would say is in their brief the Plaintiff pushes the idea that the McCarren Ferguson Act gives her an out here. And it means -- she raises the McCarren Ferguson Act to bolster the idea that the general policy on arbitration cannot apply here. The general presumption in favor of arbitration cannot apply here.

I want to be clear. That argument is a side show in terms of Milliman's argument and the law that binds the statutory liquidators to arbitration clauses. It is not based on grand general policy pronouncements. It's based on specific case law and specific federal and state law that applies these arbitration clauses to these liquidators, not withstanding the fact that they may technically be a non-signatory, not withstanding the fact they have the capacity to bring claims on behalf of creditors.

I'm not going to belabor the point, they're in our brief, about why the non-signatory argument doesn't work and why the idea that they're bringing claims -- they don't stand in the shoes and they're bringing claims on

behalf of the creditors. That argument doesn't work.

But the idea that the McCarren Ferguson Act supercedes Milliman's attempt to enforce the arbitration clause really doesn't work here, because again, these are not general policy arguments. These are specific arguments based on on-point, binding precedents that vitiates Plaintiff's argument.

I will take time to respond to Plaintiff's arguments on rebuttal.

THE COURT: I'll give you rebuttal.

Mr. Ferrario, are you trying to enforce the contract on one hand and vitiate the arbitration clause on the other.

MR. FERRARIO: I don't think that's what we're trying to do. I think what we're trying to do is we're acting as a receiver under the Nevada Insurance Code, and we're trying to protect creditors, claimants. We're trying to marshal assets for an estate. That's all we are doing.

What's interesting is Milliman is a sophisticated in the insurance business. They understand this. This isn't something that's a secret to them how this works. You look around the country, he talks about cases around the country, we cited a number of cases -- Kentucky, Louisiana, Ohio, cases from the Fifth Circuit, cases from

the Tenth Circuit where this is very common place. This isn't a surprise to Milliman. Okay.

THE COURT: Does seem though the case law you cited where it focuses on the non-signatory issue, those cases still stand for the proposition that if you are suing to enforce a contract that you have to abide by the totality of the contract.

MR. FERRARIO: They are in a different context, your Honor. They never cited one case that's in this context where that applies. That's really the issue here. You hit the nail on the head.

Most of what they are arguing is outside of the context that we are in, which is a liquidation here of a failed insurance company. Okay. If you look at the cases that deal with this issue and you start -- I think you started from the right place. Look at the order that was entered by Judge Cory. All property is within the control of this court. If you look at this -- this is what I found interesting as I was preparing for this. Look at page 12 of the Defendant's motion.

THE COURT: Okay.

MR. FERRARIO: They actually argue for a minute, but I don't think it really gets them there, that a claim is not property. Of course it is. I don't have to argue that to your Honor. Any claim that we have is property of

the estate, if you will. Here a property of the receiver. Here that is exclusively under the jurisdiction of this court. That is without dispute. If you read the order, which they tap dance around, they want to read Sections 14 and 16. Look at paragraph 3. We cite this on page 5 of our pleading. It says clearly, property is hereby placed in custodial list (ph) of this court and the receiver. So we have exclusive control. This court has exclusive control as to how we go after her property, which is our claims. Okay.

And so I think your Honor went to the right place. You went right to the order. This is a statutory scheme that is integrated into the regulation of insurance companies. And, again, in other courts where the same arguments have been made -- in fact, he talks about -- that the reverse preemption argument is sort of a red herring. Well, the Tenth Circuit didn't think that. Where you have a comprehensive regulatory scheme like we do here the McCarren Ferguson Act makes it clear that State law controls.

Now, some other interesting things that they talk about here. They argue about arbitration being more efficient. How is it more efficient that I now have to pay for 3 people to hear this claim. What they're advocating for is dissipation of assets of the estate.

This is something you touched on early about access to the court. They want us to have to dissipate assets of the estate to pursue our claims. They argue without any evidentiary support that somehow that's more efficient. I'm here to tell you having been through a number of 3 panel arbitrations, typically they're anything but efficient, and they are very costly.

So if you look at that in terms of the overall principles behind what it is my client is doing, which is, again, stepping into the shoes, to some extent, of the failed company, but also vindicating rights of creditors, policy holders, and everyone else. And the way the statute is to work is we have the choice, okay. This court has the obligation to enforce that choice on where we litigate these claims.

Again, your Honor, for Milliman to come in and say this is unfair, to me, again, shows a lack of sophistication -- and probably we shouldn't be surprised at how they performed under this contract -- of what it is they were doing here. They were jumping into the insurance industry in Nevada. They should not be surprised that this may vitiate this provision that they had in their contract.

And the other thing -- and it's footnoted here, and they skipped it a little in their argument. But remember,

Milliman wanted New York law to apply here. Under New York law -- we cite that in our footnote -- under New York law arbitration in this context are struck down. So the very choice of law that they want to apply knocks them out of box. But they don't mention it. They say, well, this is a procedural thing and that's substantive. That's nonsense. If they want to enforce all of the contract under one set of law, then they ought to be bound by that set of law. They said New York. New York says you don't get arbitration.

So I would answer any questions the court has. I think between the two parties we have scorched the earth on cases that have dealt with this.

THE COURT: It was very thorough.

MR. FERRARIO: I don't think we left anything to chance. If you have any questions -- I think your Honor started in the right place. I think Judge Cory's order is absolutely correct. It's consistent with the statute. We are here to marshal assets in the most efficient and effective way to protect creditors and claimants and policy holders, and that's what we do. And forcing us to litigate or litigate parts of claims in other forums is not consistent with that public policy purpose.

Thank you, your Honor.

THE COURT: I'll let you head where you want to

because I'm sure you have some thoughts in your head, but I may have questions.

MR. KATTAN: I'm happy to start wherever you want me to.

THE COURT: When the focus was on, well, yeah, the order says exclusive jurisdiction, relying on receivership statute and it says certain things it says, but then focuses on 14 and sub-parts where it purports to give the receiver the option to do things other ways that somehow that's a recognition that we don't have to stay in court. Isn't that really something that enures to the benefit of the receiver. Is it necessarily something that can or should be argued here to support your side of the coin.

MR. KATTAN: Sure. Let me make two responses to that argument.

Let's look at the plain language of the order. There is nothing, nothing in the plain language of the order that gives the liquidator that kind of unfettered unilateral discretion.

Second, if the liquidator had that kind of sole discretion, why would the liquidator ever choose to litigate elsewhere, or, in quote, other legal proceedings like arbitration. And assuming the answer to that question is because there are circumstances where a

liquidator must pursue claims outside of Nevada state courts. Well, this is one of those times. This is one of those times. There's no reason why federal law and state law mandating enforcement of an arbitration clause should be treated with any less sanctity then a federal law that confers jurisdiction over claims against the federal government in federal courts. Nor is there any reason why the contractual arbitration provision in Milliman's agreement with NHC should be treated any differently then a contractual venue selection, a jurisdiction provision. That was in the contract that the Plaintiffs are trying to enforce between NHC and the Department of Health and Human Services. That's why this idea of -- it just gives the liquidator the right to do whatever they want. (a), there's nothing in the order that say that. (b), practice, their own actions make clear that they don't believe that.

Unless you have any questions.

THE COURT: I don't have a question about that. I wanted you to have the opportunity to respond to Mr. Ferrairo's comment.

MR. KATTAN: If you have a question on a different topic, I'd be happy to go over it. Because there are a couple of things about Plaintiff's argument I would like to address. A last impact here.

First, the idea that we don't cite a single case in this context. I'm not sure what Counsel meant by that, but if you look at pages 4 and 5 of our reply brief, we cite a dozen cases from all around the country where contractual arbitration clauses were enforced against statutory liquidators and jurisdictions that have limitation statutes that are similar to Nevada.

THE COURT: But you'd admit there is nothing that requires that in Nevada, yet.

MR. KATTAN: Yet. You are correct there was not an on-point case law that -- there is none in Nevada.

THE COURT: Just as a side note, because I know you're visiting our jurisdiction. When I first moved back here -- I practiced in California -- I remember walking into -- if everyone is old enough to remember the law library that used to be at the base of the FIB building -- the stacks in there -- I walked in and I said to the guy, where are the Nevada Reporters, where's the stuff. There was a bookshelf like that, with 3 shelves and that was it. I'm sorry. That's it. And it hasn't grown much since.

MR. KATTAN: We noticed in putting this together there is sometimes an absence of Nevada jurisdiction on a lot of things. In this case there was really good Nevada law that supports our position, including in a liquidation context, Ahlers vs. Ryland Homes, which stands for the

proposition you can't both enforce and evade an arbitration clause. There is no reason not to apply that to the insurance liquidation context. There are a dozen or so cases we cite on pages 4 and 5 of our reply brief that state so. Unless you want me to go them, I can stand on my brief on that point.

THE COURT: Your case law you cited is persuasive. It's non-binding, of course. But there is persuasion to that.

Really where the court is going to make the call is, I think, going to have to make the call that best serves the purposes of our statutes and our situation. And I think while we do have this conflict, for lack of a better word, between the contract and the efforts that are being undertaken in part to enforce the contract and the unique context that we have arising, I think it still comes down to what's best suited for the needs of the folks involved. And if you want to comment on that, or anything else you want to comment on.

MR. KATTAN: Sure. I would like to comment on that. I'll comment both from a legal perspective and a practical perspective.

First, let's address the idea that somehow arbitrating would --

THE COURT: Dissipate the assets.

MR. KATTAN: I can start there if you'd like to. Fine.

Frankly, that just -- the Nevada Supreme Court held otherwise. The Nevada Supreme Court has held in the DR Horton case that arbitration is more cost effective and more efficient then traditionally litigation. That's not my opinion. That's Nevada Supreme Court juris prudence.

Moreover, this idea that on the one hand -- think of their argument and think about how internally inconsistent it is. One of the main arguments they raises to try to say that arbitration is inappropriate here, is that arbitration has far more limited discovery then the discovery this court would allow. That just goes exactly to what the Nevada Supreme Court is saying. Written into the contract is a far more efficient and cost effective process. I suppose you have to pay the arbitrators. As your Honor I'm sure well knows, attorneys from Greenberg Traurig and every other attorney who's dealt with civil discovery, particularly in a multi-defendant cases such as this, the real costs get run up during discovery. That's going to be far more costly then simply paying 3 arbitrators. So their own argument proves why this idea that they're going to be dissipating estate assets is frankly wrong.

The idea that, well, there is other Defendants.

Look, that is an issue in any arbitration where multiple Defendants or one Defendant has an arbitration clause and other Defendants don't. That's not a normal reason to vitiate an otherwise valid, binding arbitration clause. So why is it a reason to vitiate an arbitration clause here.

The Supreme Court said you can't use -- the US Supreme Court has said you can't use those kind of general public policy arguments to knockout a -- knockout a valid and binding arbitration clause. That's the AT&T vs. Ascension case, the Southland Corp case. The Ninth Circuit said that in the Quackenbush case. You can't use these sort of general pronouncements of public policy to vitiate an otherwise valid and binding arbitration clause. So for all those reasons this idea that, you know, it might be more expensive or it might run up costs, (a) it's not true, (b), if it was true, that's an issue always with arbitration when you have these multiple Defendants. And it's still not a reason to get rid of an arbitration clause that's binding. Multiple jurisdictions, including the US Supreme Court and the Ninth Circuit have held that.

The other thing I think that's important to recognize, and this is the something that the Plaintiffs did throughout their papers and Counsel did it again here.

This idea that they're acting on behalf of the State, that they're acting on behalf of creditors. That's an argument that has been expressly rejected by several jurisdictions that have addressed that very issue -- the Ninth Circuit, the Third Circuit, the Sixth Circuit and several federal district courts that we cite on pages 10 and 11 of our papers. They all stand for the proposition that where a statutory liquidator is bringing straightforward tort and contract claims against a third party that is not a situation that implicates the States regulation of insurance. That is not a situation that threatens creditors' right or priorities issues. That is not that kind of situation.

The Plaintiff throughout their papers tries to conflate two very, very different things. They try to conflate claims that belongs to creditors with claims that simply, if they recover money there will be more money in the pot and that will ultimately benefit creditors.

The former, maybe that's a situation that implicates the State regulation of insurance, but the latter, which is what we have here, again, we cite a dozen cases in our reply brief that expressly hold that those kinds of situations, the situation we have here, do not, do not implicate the kind of creditors' rights and the liquidator's statutory function. So really, enforcing the

arbitration clause here does not raise or does not implicate the kind of parade of horribles that the Plaintiff is raising here.

Frankly, the Plaintiff talked about evidence -- that's the last thing I'll mention on this point -- where is the evidence, where is the evidence of inconsistent rulings, where is the evidence. There is nothing. There is not one specific item that the Plaintiff mentions that will suffer for having Milliman -- the claims against Milliman be arbitrated here. This is a situation where again we have a case that is very distinct from the liquidation proceeding, a claim is not being made against estate assets. Plaintiff's counsel tries to gloss over that distinction, but the case law we cited in our reply brief and our opening brief makes a critical distinction between claims that are made against estate assets and claims like here, that are tort and contract claims against third parties. Even the case the Plaintiff cites makes those distinctions, the Covington case from Ohio the Plaintiff cites, we blocked that in our reply brief.

So for all of those reasons, this idea that enforcing the arbitration clause is going to make the estate suffer, it will make creditors suffer has really roundly been rejected.

Unless your Honor has anything else specific, I want

to read one quote because really that argument was expressly raised before and rejected by the Third Circuit in Sooter (ph). I want to leave your Honor with a quote from Sooter, because I think when you look at this, it really shows why there is no harm. And certainly no harm in arbitrating the case here. In fact the federal law enures, requires that the arbitration clause be enforced here.

What the Third Circuit in Sooter said rejecting this very argument is, "This is not a delinquency proceeding or a proceeding similar to one. Nor is it a suit by the party seeking access to the estate -- seeking to access the assets of the insurer's estate. What this proceeding is is a suit instituted by the liquidator against a re-insured to enforce contract rights for an insolvent insurer, which if meritorious, will benefit the insurer's estate. Accordingly, we fail to perceive any potential for interference with the liquidation act proceeding before the Supreme Court."

"If it's true, as the liquidator stresses, that if a district court or arbitrator should decide the reinsurance agreement does not cover the disputed expenses, the estate will be smaller than if that issue was resolved in the liquidator's favor. But the mere fact that policy holders may receive less money does not impair the operation of

any provision of New Jersey's Liquidation Act."

For that reason the Third Circuit said there was no reverse preemption to enforce the arbitration clause. That rational applies four square here. Again, unless your Honor has any questions.

THE COURT: I do not. Thank you.

Thank you for your rebuttal.

I appreciate the very thorough briefing. I very much appreciate the opportunity to see, as you said, Mr. Byrne said, we scorched the earth here to find the case law.

I think the tricky part about this one, I'll be very candid, I was on a panel at a business court judge's conference a few years ago where we were talking about arbitration clauses and the difficulty it's creating with business courts and other courts because it's taking things out of the court's jurisdiction and maybe on occasion that shouldn't be the case. But I think in this particular case, it really does squarely rest on is this a situation where what a receiver is doing is something that's within the statutory scheme that somehow should be reverse preempting the arbitration clause, or really is this an effort to increase the estate's coffers to pay creditors and otherwise.

When the dust settles on everything here, as much as

it goes against my personal feelings of, we need to have access to the courts always and some concerns with over-arbitrating, if you will, these matters, I think in this particular case what's happening here is the liquidator is enforcing the contract and enforcing circumstances that at the end of the day do not invalidate, impair, or supersede, as argued by the Plaintiff, to any kind of impact of Nevada liquidation. I think what's happening here does fall squarely within the need to support the arbitration presumption.

I do not believe that it is reverse preempted in the actual factual circumstances of what is occurring here. I do believe that although it's possible that our Supreme Court would not follow these other precedents that are set or persuasive decisions that have been made in these other jurisdictions, I think it's equally possible they would follow that, because over the evolution of time the arbitration statute and the presumption of arbitration has gotten stronger, not weaker.

Again, much, somewhat to my personal concern, but again, just enforcing the laws as I see them and development of the laws and the actual factual underpinnings of what happened here, I do believe it's appropriate to grant the motion at this time to allow the arbitration to be compelled.

I don't, again, perceive that it runs afoul of or otherwise regulatory scheme, because I believe what is occurring I don't necessarily disagree with the opposition that we are dealing with, obviously, a State statute that was enacted for the purpose of regulating insurance and that there is a federal statute that may have been interpreted to not necessarily relate to insurance, but at the end of the day the application of the federal statute as it's applying here in this context, again, I don't believe is related to or invalidating the State statute that's regulating insurance.

If it's not the exact quote you read from the Third Circuit, be any means, but ultimately I'm persuaded by that argument that this is a matter that is appropriate to be placed in arbitration pursuant to the contract clause. And the efforts to enforce the contracts with third parties to add to the coffers does not, again, invalidate or otherwise impact our statutory liquidation scheme.

I'm going to ask Mr. Kattan to prepare the order. Give Mr. Ferrario an opportunity to see it. Again, my personal concerns aside about taking things out of our court system, at the end of the day, I think it's appropriate in this context.

MR. FERRARIO: One clarification so I don't have to bring a motion. In our papers we pointed out some

things were extra contractual that we didn't think would fall within the scope, such as negligence per se claim which is on page 47 of our complaint; violation of State statute.

I understand the straight contract claims. I understand your ruling in regard to that. There were claims like conspiracy claims that we don't think are involved in the scope of that.

THE COURT: Here is how I'll answer this, Mr. Ferrario. To the extent you need a motion for clarification because somehow the order can't be worked out and the court signs off on an order that's not agreed with, we can deal with it then.

It's not necessarily being driven by all the myriad of claims that have been filed. It's being driven by who is doing what on behalf of whom and standing in their shoes and how they're doing it. So I don't know that it matters what the claims are titled in this circumstance where the liquidator is seeking to go after assets from third parties to increase the coffers, and that's really the context of what's happening here regardless of what we call the claims. That's what I believe is required to go to arbitration. It's not a situation of something being outside of it or something being inside of it. It's really who is doing what to whom that drives the train

here.

MR. FERRARIO: To the extent we need to bring it back, we will. Understood.

THE COURT: I won't quibble with that in a case like this. I'm going to require and request respectfully Mr. Kattan and Mr. Byrne that you give some detail in the order as to what the court has found persuasive in the argument so that we have that so that to the extent it's challenged this could very well be the case that ultimately sets the law on this issue for the State of Nevada. I want to make sure we're complete with that.

MR. KATTAN: We'll request a transcript and give Mr. Ferrario every opportunity to have what would be a joint submission.

THE COURT: I'm not sure my articulation was as well done as perhaps the pleadings were, but if you need a transcript I'm sure we can take care of that in normal course.

MR. PRUNTY: When would you like the order.

THE COURT: It should be 10 days, but we'll see what happens with that transcript.

* * * * *

CERTIFICATE

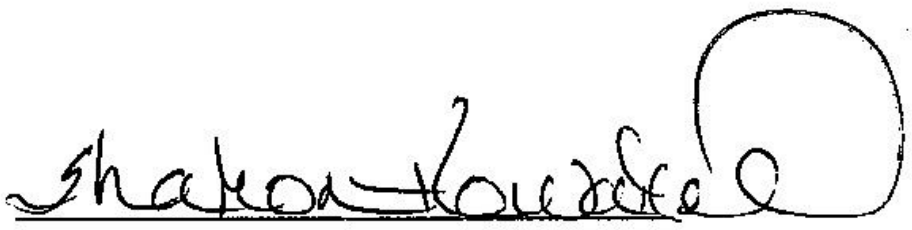
OF

CERTIFIED COURT REPORTER

* * * * *

I, the undersigned certified court reporter in and for the State of Nevada, do hereby certify:

That the foregoing proceedings were taken before me at the time and place therein set forth; that the testimony and all objections made at the time of the proceedings were recorded stenographically by me and were thereafter transcribed under my direction; that the foregoing is a true record of the testimony and of all objections made at the time of the proceedings.



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DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP,

Plaintiff,

vs.

MILLIMAN, INC., a Washington Corporation, JONATHAN L. SHREVE, an Individual; MARY VAN DER HEIJDE, an Individual; MILLENNIUM CONSULTING SERVICES, LLC, a North Carolina Corporation; LARSON & COMPANY P.C., a Utah professional corporation; DENNIS T. LARSON, an Individual; MARTHA HAYES, an Individual; INSUREMONKEY, INC., a Nevada Corporation; ALEX RIVLIN, an Individual; NEVADA HEALTH SOLUTIONS, LLC, a Nevada limited liability company; PAMELA EGAN, an Individual; BASIL C. DIBSIE, an Individual; LINDA MATTOON, an Individual; TOM ZUMTOBEL, an Individual; BOBBETTE BOND, an Individual; KATHLEEN SILVER, an Individual; DOES I through X inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

Case No. A-17-760558-C

Dept. No. XVIII

MILLENNIUM CONSULTING SERVICES, LLC'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Date of Hearing: January 16, 2018

Time of Hearing: 9:00 a.m.

I. INTRODUCTION

The Health Co-Op's opposition focuses on three principal issues:

The Majority Rule Is Assumption. This lawsuit proceeds under the Uniform Insurance Liquidation Act, NRS Chapter 696B. The Ninth Circuit and all courts but one considering forum-selection or arbitration provisions under this uniform act enforce such agreements against statutory receivers such as the Health Co-Op under the doctrine of assumption. This Court should also. The Health Co-Op's discussion of equitable estoppel, which it gleans from non-insurance cases, is inapplicable.

Nevada Policy. The Health Co-Op argues that various asserted Nevada policies forbid the application of the North Carolina forum-selection clause. However, the most important policy is that stated by the uniform act itself: its purpose is to ensure similar treatment of issues by all states that have adopted the law. This most relevant policy consideration is best achieved by adopting the overwhelming majority rule, which requires the enforcement of the North Carolina selection term.

The Forum Selection Clause Includes Tort Claims. The Health Co-Op says its tort claims fall outside the forum-selection clause's scope. However, the Service Agreement states that Millennium would indemnify for damages and costs for any negligent acts or violation of applicable professional, statutory standards (if any). Because the remedy for any torts arises out of the Service Agreement, the tort claims are also subject to the forum-selection clause.

This Court should enforce the North Carolina forum selection clause and dismiss this case in its entirety.

II. THE HEALTH CO-OP IS BOUND BY THE FORUM-SELECTION CLAUSE BECAUSE IT HAS SUED TO ENFORCE THE SERVICES AGREEMENT CONTAINING THAT CLAUSE

This Court should enforce the North Carolina provision against the Health Co-Op even though it did not sign the Services Agreement because of the legal rule called assumption.

A. A Non-Signatory Is Bound by the Clauses of a Contract It Sues to Enforce by "Assumption"

The title of this subsection is true law. The legal principle is called "assumption," and it signifies "the act of taking (esp. someone else's debt or other obligation) for oneself; the agreement to so take." *Black's Law Dictionary*, 120 (7th ed. 1999). If one assumes a contract by suing to enforce it, one assumes all of it. *E.g.*, *Trans-Bay Eng'rs & Builders, Inc. v. Hills*, 551 F.2d 370, 378 (D.C. Cir. 1976) (when, as here, nonsignatories bring suit against a signatory to enforce an agreement, they are "bound by the terms and conditions of the contract that [they] invoked."); *Ackman v. N. States Contracting Co.*, 110 F.2d 774, 776 (6th Cir. 1940) (stressing

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that "[t]he principle is too elementary to require citation" that when plaintiffs "sue as third party beneficiaries" of a contract "[t]hey are therefore bound by the terms of the contracts.").

1. Assumption of Contracts Includes Forum-Selection and Choice-of-Law Clauses

The assumption principle includes forum-selection, *e.g. Holland Am. Line Inc. v. Wärtsilä N. Am., Inc.*, 485 F.3d 450, 456-57 (9th Cir. 2007) (applying forum-selection clause against nonparties), and choice-of-law clauses, *e.g. Am. Patriot Ins. Agency, Inc. v. Mut. Risk Mgmt., Ltd.*, 364 F.3d 884, 890 (7th Cir. 2004) (applying choice-of-law provision against nonparties). So while the Health Co-Op demands over and over for pages that "the general rule is that a party cannot be bound to a contract id did not sign (*e.g.*, Opp'n 10:14–15), by suing to enforce the Millennium Service Agreement, the Health Co-Op became a signatory as far as the law is concerned. In other words, the Court need not consider the "general rule" because an exception applies.

2. The Health Co-Op's "General Rule" Cases Are Inapplicable

While the Health Co-Op promotes a long string of cases to the effect that non-signatories are not bound to contracts (Opp'n 7:13–8.11), not one of those decisions concerns the issue here—the assumption effected by suing to enforce a contract. The Health Co-Op's lead case, *County of Clark v. Bonanza No. 1*, 96 Nev. 643, 648-49, 615 P.2d 939, 943 (Nev. 1980), illustrates our point. There, the court simply ruled that a party that had not signed an indemnity agreement was not bound by it. This Court should enforce the North Carolina provision.

III. THE HEALTH CO-OP'S ATTEMPTS TO MISLEAD THIS COURT ONLY REINFORCE THE PROPRIETY OF ENFORCING THE NORTH CAROLINA SELECTION TERM

We know attorneys throw around the straw man fallacy pretty freely, but here the Health Co-Op really did it. The Health Co-Op spends pages arguing about "equitable estoppel," charging that Millennium "hinted" (Opp'n 10:16) at this concept in its opening brief. Actually, the Health Co-Op assumed the clause by suing to enforce the Service Agreement containing the clause. The overwhelming majority of courts that have examined the question of forum-selection under the "assumption" rule have forced liquidating insurers to live up to forum-selection clauses.

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Millennium asks this Court to adopt the majority rule here and dismiss this lawsuit in favor of a North Carolina venue.

A. Millennium Argued for "Assumption" Not "Equitable Estoppel"

As the seminal case the Health Co-Op itself vaunts over and over shows, equitable estoppel is but one of five methods for enforcing clauses (in that case an arbitration clause) against non-signatories. "[V]arious courts have adopted theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) *assumption*; 3) agency; 4) veil-piercing/alter ego; and estoppel." *Truck Ins. Exchange v. Palmer J. Swanson, Inc.*, 124 Nev. 629., 635 189 P.3d 656, 660 (2008) (emphasis supplied); *see also Ahlers v. Ryland Homes Nev., LLC*, 126 Nev. 688, 367 P.3d 743 (2010) (unpublished) (repeating again the five modes for binding non-signatories to forum-selection clauses, including "assumption").

The *Swanson* case explicitly refused to discuss "assumption" because the facts did not implicate that doctrine. *Swanson*, 124 Nev. 635, 635 189 P.3d 660. In that case, a Nevada law firm had an oral agreement for legal services with an insurance carrier; a legally separate but affiliated California law firm had a separate, written agreement to which the Nevada law firm was not a party. *Swanson*, 124 Nev. 632-33, 635 189 P.3d 658-59. When a dispute arose, the carrier attempted (but failed) to compel the Nevada law firm to arbitrate under the California firm's written arbitration agreement, arguing alter ego and estoppel. *Swanson*, 124 Nev. 635-38, 635 189 P.3d 660-62.

The death of this straw man has three important consequences. First, we will not defend an argument Millennium never made. So the Court need not concern itself with the "direct"/"indirect" benefit dichotomy that is a feature of "equitable estoppel" only, not "assumption." (Though we must add that the Health Co-Op seeks a multi-million dollar judgment against Millennium and its co-defendants, and it is hard to image a more direct benefit than that.) Second, the real argument— "assumption"—is effectively unopposed, giving this Court additional grounds to grant this motion. *See* EDCR 2.20(e). And third we can again emphasize, in the following section, why "assumption" requires enforcement of the North Carolina selection clause here.

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B. The Vast Majority of Courts Enforce Form-Selection or Arbitration Clauses against Statutory Insurance Receivers Such as the Health Co-Op

When the Health Co-Op sued Millennium, it assumed all of the obligations in the Service Agreement it seeks to enforce. When faced with similar circumstances, courts around the country have overwhelmingly required a statutory insurance liquidator to abide by forum-selection or arbitration clauses in contracts so assumed. The Ninth Circuit, for example stated "if a liquidator wants to enforce [the insurer's] rights under its contract, she must also assume its perceived liabilities." *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F2d 969, 972 n.4 (9th Cir. 1992). This rule holds true whether insurance liquidators seek to enforce[1] or resist[2] forum-selection or arbitration provisions. Even the cases that the Health Co-Op urges upon this Court reach this same conclusion.[3]

C. This Court Should Apply the Majority Rule and Enforce the North Carolina Selection Clause

Several factors recommend this Court's adoption of the majority rule.

1. The Ninth Circuit Follows the Majority Rule

We acknowledge that the Health Co-Op has located a single court, *Taylor v. Ernst & Young, L.L.P.*, 958 N.E. 2d 1203 (Ohio 2011), which declines to enforce an arbitration provision against a statutory insurance receiver. This Court should dismiss this stray precedent for three reasons. First, *Taylor* is the faraway minority position. While no Nevada court has weighed this cause, our Ninth Circuit follows the majority rule:

---

[1] *See Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1216–19 (3rd Cir. 1991) (granting the Pennsylvania insurance commissioner's motion to remand a case to state court in which commissioner, as receiver, sought $4 million allegedly due under a reinsurance agreement that included a forum-selection clause eliminating the right to remove to federal court); *Dinallo v. Dunav Ins. Co.*, 672 F. Supp. 2d 368, 370–71 (S.D.N.Y. 2009) (same).

[2] *Garamendi v. Caldwell*, No. cv-91-5912, 1992 WL 203827, at *3 (C.D. Cal. May 4, 1992) ("Plaintiff, as liquidator in the immediate case, is also empowered to bring claims which would have been allowed before taking possession of [the defunct insurer]. Therefore, it too should be subject to the same defenses as might have been brought had [the insurer] initiated the action. The Court finds that [liquidation receiver] is subject to the arbitration provision."); *Koken v. Cologne Reins. (Barbados), Ltd.*, 265, 272-75 (D. Vt. 1993) (same); *Rich v. Cantilo & Bennett*, 492 S.W.3d 755, 762 (Tex. Ct. App. 2016) (same); *State vs. O'Dom*, No. 15-cv-258501, 2015 WL 10384362, at *3-4 (Ga. Super. Ct. Sept. 18, 2015) (same).

[3] *Javitch v. First Union Sec., Inc.*, 315 F3.d 619, 627 (6th Cir. 2003) (cited at Opp'n 11) (holding that the statutory receiver was "bound to the arbitration agreement to the same extent that the receivership entities would have been absent the appointment of the receiver."); *see also Javitch v. First Union Sec.*, No. 3:01-cv-780, 2001 WL 665727, at *4 (N.D. Ohio Feb. 15 2011) (compelling arbitration on remand because the "Receiver cannot both seek to benefit in the suit crated by those agreements, while disavowing the arbitration provisions.").

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> As the liquidator of FPIC, the Commissioner ultimately seeks to enforce contractual provisions requiring the payment of reinsurance proceeds, yet on the other hand, he seeks to avoid enforcement of arbitration provisions contained in the same contracts. *This inconsistent approach has been rejected by the Ninth Circuit, as well as other circuit courts.* If a liquidator seeks to enforce an insolvent company's rights under a contract, he must also suffer that company's contractual liabilities.

Poizner v. Nat'l Indem. Co., No. 08-cv-772, 2009 WL 10671673, at *2 (S.D. Cal. Jan. 6, 2009) (emphasis supplied) (citing *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1380 (9th Cir. Cal. 1997); *Bennett*, 968 F.2d 972 n.4 (citing state cases holding same); *Selcke v. New England Ins. Co.*, 995 F.2d 688 (7th Cir. 1993) (holding liquidator of insolvent insurer bound to pre-insolvency arbitration agreement with reinsurer)).

2. Bankruptcy Courts Follow the Majority Rule

Second, federal bankruptcy law enforces arbitration against trustees who assume pre-bankruptcy contracts. *E.g.*, *Garamendi*, 1992 WL 203827, at *3. Traditional bankruptcy courts face the same concerns that the Health Co-Op emphasizes in its opposition, namely that the trustee represents all creditors to maximize recovery for persons who can no longer, because of the bankruptcy automatic stay, sue the bankrupt directly. The same rule that applies in bankruptcy court should apply to insurance insolvency lawsuits because they concern similar subject matters.

3. Predictability Is the Most Important Policy Consideration

Finally, the policy of upholding parties' "settled expectations," *Atl. Marine Constr. Co. v. United States Dist. Ct.*, 134 S. Ct. 568, 580 (2013)—a chief motivator for enforcing venue provisions as recognized by the High Court—is more critical than the competing policy of receiver convenience. While the Health Co-Op does indeed represent policy holders and creditors, none of those persons are actually in court. Whether the case is litigated here or in North Carolina makes no difference to these persons. And the receiver herself should not have expected to litigate her offensive claims in Nevada only: nothing in Nevada's insolvency statute or the cases addressing this uniform act dictate such a result and the order appointing her specifically contemplates litigation in "any jurisdiction." On the other hand, Millennium is a small business, and it would not have executed the Service Agreement without assurance of litigation at its headquarters where it conducted its business, including the work for the Health Co-Op.

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IV. THE ORDER FROM DEPARTMENT I APPOINTING THE RECEIVER DOES NOT FORBID APPLICATION OF THE FORUM SELECTION CLAUSE

The Health Co-Op attempts for three pages to undermine Millennium's position that noting in NRS Chapter 696B mandates that a Nevada court have exclusive jurisdiction over this case. (Opp'n 12-15.) The Nevada statutes the Health Co-Op quotes, however, relate to the rehabilitation and liquidation proceedings that have been pending for over two years now in Department I, not to the *offensive* claims against Millennium in this new lawsuit. The statutes do empower the receiver to enjoin claims made against the bankrupt insurer and consolidate those claims into one Nevada action, a fact we ourselves emphasized in the our opening motion. However, there simply is no provision in statute that compels *offensive* claims made by the receiver to be litigated in Nevada. We guarantee it does not exist.

The decisions the Health Co-Op promotes also relate to *defensive* claims against a bankrupt insurer. For example, there is no danger of "unequal treatment of claimants" or "conflicting rulings," to single out some of its parade of horribles (Opp'n 12:20-22), if the parties litigate the Millennium claims in North Carolina. In that case, the asset marshaling and distribution to creditors according to statutory priority will continue unchanged here in Nevada.

Enforcing the North Carolina venue term will also give effect to all provisions Department I's prior order. In the liquidation case, Department I itself of this Court repeatedly stressed in its order appointing the Commissioner as receiver that she had power to file lawsuits "in other jurisdictions" and "in this state or elsewhere." (*See* 10/14/15 Permanent Injunction and Order Appointing Commissioner as Permanent Receiver of Nevada Health Co-Op, on file in case number A-15-725244-C, §§ 14(a), 14(h).) "When a court is called on to choose between a construction which gives significance to all clauses of an order and another which makes one of the clauses meaningless, the former is preferred." 60 C.J.S. MOTIONS AND ORDERS § 74 (Westlaw 2018). If this Court rules in the Health Co-Op's favor, the multiple provisions of the receiver appointment order allowing for litigation in all jurisdictions will be rendered meaningless.

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V. NEVADA POLICY DOES NOT INVALIDATE THE CHOICE-OF-LAW PROVISION, IT AFFIRMS IT

One of the purposes of Nevada's adopting the Uniform Insurance Liquidation Act ("UILA") was to "to make uniform the laws of those states which enact it." NRS 696B.280; *see also Frontier Ins. Serv. Inc. v. State ex rel. Gates*, 109 Nev. 231, 235, 849 P.2d 328, 331 (1993) (same). As shown above, the overwhelming majority of states and courts require enforcement of forum-selection or arbitration clauses. The Health Co-Op spends five pages of briefing arguing that the choice-of-law and forum selection clauses are "invalid" under sundry Nevada decisions and asserted Nevada policies that have nothing to do with the UILA in general and say nothing about forum-selection clauses in particular. (Opp'n 14–18.) This extended argument misses the relevant point.

If the forum-selection clause at issue here were such wicked policy, then its exact analogues in the majority of cases across this entire nation that have considered this precise issue would not have been upheld. But they were. Millennium is asking this Court to adopt the far-and-away majority approach. The most directly relevant Nevada policy for this Court's consideration is that to make "uniform the laws of the states," including Nevada, that have enacted this uniform law. *See Integrity Ins. Co. v. Martin*, 105 Nev. 16, 19, 769 P.2d 69, 70 (1989) (reversing the trial court summary judgment because "[a]ny other interpretation of the UILA would frustrate its purpose to make uniform the laws of those states which enact it."). Following the well-reasoned majority position most minimizes the chances of this Court's reversal and promotes the most relevant policy consideration—uniformity.

VI. THIS COURT SHOULD FIND THAT ALL THE TORT CLAIMS ALSO FALL WITHIN THE AMBIT OF THE NORTH CAROLINA SELECTION CLAUSE AND DISMISS THE ENTIRE ACTION

The Service Agreement provides that "[v]enue for its enforcement or any action or proceeding based on this Agreement shall be in Wake County, North Carolina." (Exhibit 1 to Millennium's opening motion, on file herein, § 8.4.) The parties agree that seven of the eleven claims lodged against Millennium sound in tort. (Opp'n 21:26.)

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The tort claims are "based on" the Service Agreement because the parties intended for the contract to be the exclusive method of relief for tort-related harms. The Service Agreement contains a mutual indemnification clause that covers all torts. It states that

> [Millennium] shall indemnify and hold [the Health Co-Op] harmless for losses, costs, and expenses, including reasonable attorney fees, arising in connection with the following:
>
> 7.1.1 the *negligence* or *misconduct* by [Millennium];
>
> 7.1.3 any violation or alleged violation by [Millennium] or its employees of *applicable federal, state and local laws or regulations* . . . .
>
> 7.1.4 [the Health Co-Op] shall hold harmless and indemnify [Millennium] from and against any and all claims or causes of action for damages arising out of [the Health Co-Op's] providing inaccurate written information to [Millennium] which [Millennium] uses in connection with the services provided by [Millennium] under this agreement.

(Exhibit 1 to Millennium's opening motion, on file herein, § 7.1. (emphasis supplied).) When the bargain was struck, the parties agreed that—if Millennium was culpable, which it denies—it would indemnify the Health Co-Op pursuant to Services Agreement section 7.1

Sure the Health Co-Op repeats in the complaint and its motion Millennium's supposed violation of unidentified "statutory and professional standards," which it invokes five times alone in its opposition to describe its torts claims. (Opp'n 19–21.) But, whatever these mystery standards are (and we think they do not exist or they would be explicit), they provide no remedy to the Health Co-Op in and of themselves. If there were any violations of Nevada law or professional duties (there are not), the remedy would come from the Services Agreement's indemnity provision, which reimburses all damages and costs for negligence or statutory violations. Therefore all the torts the Health Co-Op lodges are "based upon" the Services Agreement and subject to its forum-selection clause. Another straw man has died.

The cases that interpret the scope of forum-selection clauses command courts to look first to the parties' intent. *See Tuxedo Int'l Inc. v. Rosenberg*, 127 Nev. 11, 22, 251 P.3d 690, 697 (2011) (requiring courts to first look to the parties' intent, based on the language of the forum selection clause, to determine whether such a clause will apply to torts claims).[4] The Health Co-

[4] We do not concede that Nevada law applies to construe the scope of the forum-selection clause. However, the result is no different under North Carolina law. *See, e.g.*, *Speedway Motorsports v. Bronwen Energy Trading*, 2009 WL

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Op's argument misses because it ignores the indemnity clause and examines the forum-selection term in isolation without consideration of all applicable terms. Of course, this Court must consider all relevant provisions. *See Rosenberg*, 127 Nev. 24, 251 P.3d 698 (analyzing not just the forum-selection clause itself but also several other related contractual provisions). This Court should reject the Health Co-Op's attempt to render this clause "meaningless by allowing parties to disingenuously back out of their contractual obligations through attempts at artful pleading." *Rosenberg*, 127 Nev. 15, 251 P.3d 693 (citing *Lambert v. Kysar*, 983 F.2d 1110 (1st Cir. 1993) (rejecting arguments that tort-based claims related to a contract are not subject to a contractual forum selection clause on this basis)).

Even if looking at the text itself did not resolve the question, analysis of the Tuxedo court's "secondary factors" would also bring the torts within the selection clause's scope. *See Rosenberg*, 127 Nev. 25, 251 P.3d 699. The Ninth Circuit rule asks whether "resolution of the tort-based claims pleaded by the plaintiff relates to the interpretation of the contract, and if they are, then the claims are within the scope of the forum selection clause." *Rosenberg*, 127 Nev. 25, 251 P.3d 699 (*citing Manetti–Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988)). Here, the alleged violations of unidentified statutes provide no remedy; the indemnity clause is the remedy; securing this remedy thus "relates" to the Service Agreement.

Finally, the last-ditch interpretation method, the First Circuit rule, asks whether the plaintiff "could have brought a parallel breach of contract claim and yet did not" and "whether the plaintiff's cause of action directly concerns the formation or enforcement of the contract containing the forum selection clause." *Rosenberg*, 127 Nev. 25, 251 P.3d 699 (citing 2011) (*Lambert*, 983 F.2d at 1121–22). Here of course, the Health Co-Op did bring contract claims. The complaint itself categorizes Millennium's claimed sins under a heading that reads "Millennium Fails to Live Up to Its Contractual Obligations" and which concludes by summarizing that "Millennium failed to perform its work in accordance with the NAIC rules prescribed and permitted by the State of Nevada, as required by the Service Agreement." (Compl. ¶ 157.) In the complaint, the Health Co-Op describes the alleged torts in terms of a failure to live

406688, at *17 (N.C. Super. Ct. Feb. 18, 2009) (construing a forum-selection clause to include tort claims because it's "plain language . . . easily encompasses [the tort claims] because they have their genesis in" the contracts sued upon).

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up to professional standards as promised in the Service Agreement. Under any rubric, this Court should find the torts within the North Carolina litigation clause's scope.

VII. CONCLUSION

This entire lawsuit should therefore be dismissed so that it can be litigated in North Carolina.

DATED this 9th day of January, 2018.

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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P., 5(b), I hereby certify that on the 9th day of January, 2018, I electronically filed the foregoing document with the Clerk of the Court and caused a true and accurate copy of the same to be served via Court's E-Filing Systems upon the following counsel of record.

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DATED this 9th day of January, 2018.

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP,

Plaintiff,

vs.

MILLIMAN, INC., a Washington Corporation; JONATHAN L. SHREVE, an Individual; MARY VAN DER HEIJDE, an Individual; MILLENNIUM CONSULTING SERVICES, LLC, a North Carolina Corporation; LARSON & COMPANY P.C., a Utah Professional Corporation; DENNIS T. LARSON, an Individual; MARTHA HAYES, an Individual; INSUREMONKEY, INC., a Nevada Corporation; ALEX RIVLIN, an Individual; NEVADA HEALTH SOLUTIONS, LLC, a Nevada Limited Liability Company; PAMELA EGAN, an

Case No. A-17-760558-B

Dept. No. 25

ORDER GRANTING MILLIMAN'S MOTION TO COMPEL ARBITRATION

JAN 31 2018

Individual; BASIL C. DIBSIE, an Individual; LINDA MATTOON, an Individual; TOM ZUMTOBEL, an Individual; BOBBETTE BOND, an Individual; KATHLEEN SILVER, an Individual; DOES I through X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

The Motion To Compel Arbitration of defendants Milliman, Inc., Jonathan L. Shreve and Mary Van Der Heijde (collectively for purposes of this Motion only, "Milliman") came on for hearing before this Honorable Court on January 9, 2018. Justin N. Kattan, Esq. of Dentons US LLP and Patrick Byrne, Esq. of Snell & Wilmer, L.L.P., appeared on behalf of Milliman; Mark E. Ferrario, Esq., of Greenberg Traurig, LLP appeared on behalf of the Commissioner of Insurance, Barbara D. Richardson, in her official capacity as Receiver ("Plaintiff" or the "Liquidator") for Nevada Health CO-OP ("NHC"). The Court, having reviewed and considered the papers submitted by the parties and heard the argument of counsel, and otherwise being fully apprised in the premises and good cause appearing therefor, hereby GRANTS Milliman's Motion, for the reasons set forth herein:

A. The Nevada Health CO-OP

NHC was established under the Patient Protection and Affordable Care Act in October 2012. NHC experienced such financial hardship that insolvency proceedings before Department I of this Court were instituted in September 2015. By Order dated October 14, 2015 (the "Receivership Order"), the Court appointed Plaintiff as NHC's Permanent Receiver, and vested Plaintiff with exclusive title to all of NHC's property, including NHC's "contract rights." (Receivership Order, §2(c)). The Order further authorized Plaintiff 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," and to "[i]nstitute and prosecute ... any and all suits and other legal proceedings." *Id.* § 14(a), (h).

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By order dated September 21, 2016, Plaintiff was authorized "to liquidate the business of NHC and wind up its ceased operations pursuant to" the Nevada Liquidation Act.

B. The Applicable Arbitration Provision

Plaintiff's claims all seek monetary damages arising from Milliman's performance of actuarial and consulting services pursuant to an October 20, 2011 Consulting Services Agreement (the "Agreement") entered into by Culinary Health Fund and Milliman.[1] Paragraph 5 of the Agreement contains a broad and unambiguous arbitration provision, which states, in relevant part:

> 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.

This provision is prominently featured as part of the main body of the contract. The Agreement was executed by sophisticated parties, with experience in their respective fields, and with access to counsel.

C. The Arbitration Provision in the Agreement is Valid and Enforceable, Reflecting The Strong Presumption Favoring Arbitration Under Federal and Nevada Law

The arbitration clause in the Agreement is fully valid and enforceable. Both the Nevada Arbitration Act ("NAA"), NRS 38.206, *et seq.*, and the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, contain virtually identical language mandating that contractual arbitration clauses are fully "valid, irrevocable, and enforceable, save upon which grounds as exist at law or in equity for the revocation of any contract." Both the NAA and FAA express a "fundamental policy favoring the enforceability of arbitration agreements." *Tallman v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 71, 359 P.3d 113, 118 (2015); *State ex rel. Masto v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009). The "strong presumption in favor of

[1] Culinary Health Fund later created Hospitality Health, Ltd. and "assigned and transferred all rights, title, and interest" in the Agreement to Hospitality Health, Ltd. Hospitality Health, Ltd. subsequently assigned all of its assets and agreements, including the Agreement, to NHC.

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arbitratbility applies with even greater force" where, as here, "a broad arbitration clause is at issue." *Rodriguez, v. AT&T Servs., Inc.*, No. 2:14-cv-01537, 2015 WL 6163428, at * 9 (D. Nev. Oct. 20, 2015) (citations omitted).

The exception in the NAA and FAA for "grounds as exist at law or in equity for the revocation of any contract" does not apply here. The U.S. Supreme Court has defined that phrase to mean that only "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2" of the FAA. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996); *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 892 (9th Cir. 2001). Plaintiff neither pled any such grounds to revoke the Agreement in the Complaint nor raised any such grounds in her opposition to the Motion.

Since Milliman has established the existence of a valid arbitration agreement, it is Plaintiff's burden to establish a defense to enforcement. *Gonski v. Second Judicial Dist. Court of State ex rel. Washoe*, 126 Nev. 551, 245 P.3d 1164, 1168-69 (2010). Plaintiff fails to do so.

D. All of Plaintiff's Claims Arise from and Relate Directly to Milliman's Work Under the Agreement

Plaintiff's claims all arise from and relate to the Agreement because, but for the Agreement and the work Milliman did for NHC pursuant to it, Plaintiff would have no claims whatsoever. Plaintiff's Complaint identifies the contracted-for work that Milliman performed, including "providing certification required pursuant to NRS 681B, conducting a feasibility study, providing business plan support, assisting NHC in setting premium rates, [and] participating in the preparation of financial reports and information to regulators." (Complaint, ¶ 334). Every cause of action Plaintiff brings, whether styled in tort or contract, is based on Milliman's alleged wrongful conduct in performing one or more of these services.

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E. Because the Plaintiff's Claims Arise Under and Relate to the Agreement, Plaintiff Is Bound by the Agreement's Arbitration Clause

The Nevada Supreme Court has held that where a plaintiff "is seeking to enforce rights under [an] agreement, it cannot simultaneously avoid other portions of the agreement, such as the arbitration provision." *Ahlers v. Ryland Homes,* 126 Nev. 688, 367 P.3d 743 (2010) (unpublished). Otherwise, "to allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act." *Id.* at *2.

This rule applies with equal force to claims brought by a statutory liquidator or receiver. That Plaintiff is herself a non-signatory to the Agreement is irrelevant. Because Plaintiff's claims arise from Milliman's work done pursuant to the Agreement, Plaintiff is bound to that Agreement, including any applicable arbitration clause, just like the insolvent insurer would have been. *See, e.g., Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969, 972 n.4 (9th Cir. 1992) (enforcing contractual arbitration clause and stating that "if the liquidator wants to enforce [the insurer's] rights under its contract, she must also assume its perceived liabilities"); *Rich v. Cantilo & Bennett, L.L.P.*, 492 S.W.3d 755, 762 (Tex. Ct. App. 2016) (same); *Poizner v. Nat. Indem. Co.*, No. 08CV772-MMA, 2009 WL 10671673, at *2 (S.D. Cal. Jan. 6, 2009) (enforcing arbitration clause against insurance liquidator); *Garamendi v. Caldwell*, No. CV-91-5912-RSWL(EEX), 1992 WL 203827, at *3 (C.D. Cal. May 4, 1992) (same); *Koken v. Cologne Reins. (Barbados), Ltd.*, 34 F. Supp. 2d 240 (M.D. Pa. 1999) (same); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 272–75 (D. Vt. 1993) (same); *State v. O'Dom*, No. 2015CV258501, 2015 WL 10384362, at *3–4 (Ga. Super. Sept. 18, 2015) (same).

It is irrelevant that Plaintiff styles certain of her claims in tort rather than contract. Where, as here, a plaintiff's tort, contract and statutory claims relate to and arise from the work done pursuant to the contractual relationship, they all should be arbitrated together. *See Phillips v.*

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Parker, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990) (compelling arbitration of tort and RICO claims that "relate to" agreement containing arbitration provision where plaintiff's "basis for claiming injury and grounds for redress stem from rights he allegedly received pursuant to the agreement"); *Helfstein v. UI Supplies*, 127 Nev. 1140, 373 P.3d 921, at *2 (2011) (unpublished) (granting motion to compel arbitration of tort and contract claims and stating that "if the allegations underlying the claims so much as touch matters covered by the parties' agreements, then those claims must be arbitrated" (citation omitted)); *Rodriguez, v. AT&T Servs., Inc.*, No. 2:14-cv-01537, 2015 WL 6163428, at * 8 (D. Nev. Oct. 20, 2015) ("[S]o long as the phone call that allegedly triggered the offending credit inquiry collaterally touches upon the Business Agreement or has some roots in the contractual relationship between the parties, Plaintiff's claims fall within the scope of the arbitration provision.").

F. Plaintiff's Claims Against Milliman Are Pre-Insolvency, Common Law Damages Claims that Belonged to NHC, And Need Not Be Brought in the Liquidation Court

Plaintiff argues that, as Liquidator, she is bringing claims "on behalf of" creditors and policyholders, and therefore she does not stand strictly in the shoes of the insolvent insurer. She further contends that these claims must be brought in the liquidation court, and are not constrained by any contractual provisions that would have limited NHC. While it is true that virtually everything the Liquidator does is for the benefit of the insolvent insured's creditors and policyholders, this does not mean that the Liquidator may ignore and avoid the contractual, statutory, and judicial limitations applicable to the particular claims she brings against Milliman.

There is a distinction between claims that belong to the creditors and policyholders of an insolvent insurer, on the one hand, as distinct from claims that belong to the insolvent insurer, where any recovery would increase the coffers of the estate, and therefore benefit the estate's creditors and policyholders, on the other hand. Plaintiff's claims fall within the latter category, and therefore are arbitrable.

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All of Plaintiff's claims here belonged only to NHC because they are ordinary common law and contractual damages claims based on NHC's pre-insolvency rights. Plaintiff seeks monetary damages from Milliman, not the return of NHC assets, and not the clawing back and redistribution among creditors of estate assets. Plaintiff's action against Milliman does not involve set offs, or proofs of claim, or claims arising from the Nevada liquidation statute. This case is separate and distinct from the ongoing Receivership Action and it neither threatens or states an interest in NHC assets or property, nor will it affect any creditors' rights. Plaintiff has not pled any viable causes of action that actually belong to NHC's creditors.

This Court is thus persuaded that arbitrating Plaintiff's damages claims against Milliman will not interfere with, invalidate, impair or supersede this state's statutory liquidation scheme, the NHC liquidation proceedings, or the State's regulation of insurance. *See, e.g., Bennett, supra*, 968 F.2d at 972 (stating that if a "dispute is in essence a contractual one, it should be arbitrated. And because the liquidator, who stands in the shoes of the insolvent insurer, is attempting to enforce [the insurer's] contractual rights, she is bound by [the insurer's] pre-insolvency agreements"); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381-82 (9th Cir. 1997) (same); *Suter v. Munich Reins. Co.*, 223 F.3d 150, 161 (3d Cir. 2000) ("It is true, as the Liquidator stresses, that if the District Court or an arbitrator should decide the reinsurance agreement does not cover the disputed expenses, the estate will be smaller than if that issue was resolved in the Liquidator's favor. But the mere fact that policyholders may receive less money does not impair the operation of any provision of New Jersey's Liquidation Act."); *Koken, supra*, 34 F. Supp. 2d at 247; *see also Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1154 (3d Cir. 1989) (holding that bankruptcy trustee's claims against debtor's securities broker for state and federal securities violations were arbitrable because they were based on debtor's pre-bankruptcy rights, and did not arise from the Bankruptcy Code).

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While creditors or policyholders may "benefit" from monetary damages the Liquidator recovers from third parties, in that such recoveries increase the coffers of NHC's estate, the claims here do not "belong" to NHC's creditors or policyholders, do not implicate a state's regulation of insurance, and need not be brought in the liquidation court.

While Plaintiff asserts that it would be unfair to NHC's creditors and policyholders to enforce the arbitration clause, because it limits the scope of discovery and precludes punitive damages, this Court cannot vitiate an otherwise valid arbitration clause simply to improve the perceived strength of Plaintiff's case. Plaintiff's argument also contravenes the Nevada Supreme Court's express recognition that the cost savings and efficiency of streamlined discovery in arbitration will inure to the benefit of the State and NHC's creditors. *D.R. Horton, Inc.*, 120 Nev. at 553, 96 P.3d at 1162. ("[A]rbitration generally avoids the higher costs and longer time periods associated with traditional litigation.").

G. The McCarran-Ferguson Act does not reverse preempt the Federal Arbitration Act

Finally, the Nevada Liquidation Act does not reverse-preempt the FAA under the McCarren-Ferguson Act, 15 U.S.C. §§ 1011-1015. The standard for reverse preemption is not satisfied here because forcing a statutory liquidator to arbitrate ordinary, pre-insolvency breach of contract and tort claims, such as Plaintiff's damages claims against Milliman, neither implicates the business of insurance nor interferes with the liquidator's statutory function. *Quackenbush, supra,* 121 F.3d at 1381-82; *AmSouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004) (finding no reverse preemption where liquidator's "ordinary [tort and contract] suit against a tortfeasor" did not implicate the "regulation of the business of insurance"); *Grode v. Mut. Fire, Marine and Inland Ins. Co.*, 8 F.3d 953, 959–60 (3d Cir. 1993) (finding no reverse preemption because liquidator's "[s]imple contract and tort actions" against third party have "nothing to do with [the State's] regulation of insurance"); *Koken, supra*, 34 F. Supp. 2d at 247 (granting motion to

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compel arbitration where "this action has nothing to do with Pennsylvania's statutory scheme for the regulation of the business of insurance because it is not an action against an insolvent insurer's estate that might deprive it of assets; instead, it is an action by the Liquidator against a third party, here a reinsurer for the insolvent insurer, to recover money for the estate on a breach-of-contract claim"); *Midwest Employers Cas. Co. v. Legion Ins. Co.*, No. 4:07CV870 CDP, 2007 WL 3352339, at *5 (E.D. Mo. Nov. 7, 2007) ("The ultimate issue in this case is a standard contract dispute, so the case does not involve the state's regulation of insurance."); *Northwestern Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 321 B.R. 120, 126 (Bankr. D. Del. 2005); *Nichols v. Vesta Fire Ins. Corp.*, 56 F. Supp. 2d 778, 780 (E.D. Ky. 1999); *Costle*, 839 F. Supp. at 275. NHC is no longer a functioning entity engaged in the business of insurance. Enforcing the Agreement's arbitration clause will not disrupt the orderly liquidation of NHC, and Plaintiff's action against Milliman has no bearing on the administration, allocation or ownership of NHC's property or assets, which is the province of the Receivership Action.

Moreover, nothing in the Nevada Liquidation Act precludes a liquidator from arbitrating its claims. On the contrary, the Receivership Order entered pursuant to the Act expressly authorizes Plaintiff 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," and to "[i]nstitute and prosecute . . . any and all suits ***and other legal proceedings***" on behalf of NHC. (Order, §§ 14(a), (h) (emphasis added). Absent such a conflict, there is no reverse preemption. *Quackenbush*, 121 F.3d at 1381-82. Judge Cory, who entered the Receivership Order and presides over the liquidation proceedings, denied Plaintiff's request to coordinate and consolidate Plaintiff's action against Milliman with the liquidation proceeding.

Finally, the Nevada Arbitration Act, which is not pre-empted, is substantively identical to the FAA and mandates enforcement of the Agreement's arbitration clause.

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Accordingly, the Court hereby GRANTS Milliman's Motion To Compel Arbitration.

IT IS SO ORDERED

DATED: March 8, 2018

DISTRICT COURT JUDGE

Respectfully prepared and submitted by:

SNELL & WILMER L.L.P.

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Approved as to Form by:

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ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP,

Plaintiff,

v.

MILLIMAN, INC., a Washington Corporation; JONATHAN L. SHREVE, an Individual; MARY VAN DER HEIJDE, an Individual; MILLENNIUM CONSULTING SERVICES, LLC, a North Carolina Corporation; LARSON & COMPANY P.C., a Utah Professional Corporation; DENNIS T. LARSON, an Individual; MARTHA HAYES, an Individual; INSUREMONKEY, INC., a Nevada Corporation; ALEX RIVLIN, an Individual; NEVADA HEALTH SOLUTIONS, LLC, a Nevada Limited Liability Company; PAMELA EGAN, an Individual; BASIL C. DIBSIE, an Individual; LINDA MATTOON, an Individual; TOM ZUMTOBEL, an Individual; BOBBETTE BOND, an Individual; KATHLEEN SILVER, an Individual; DOES I through X inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

CASE NO. A-17-760558-C
DEPT. NO. XXV

ORDER DENYING MILLENNIUM CONSULTING SERVICES, LLC'S MOTION TO DISMISS

This matter having come before the Court[1] on January 16, 2018 on Defendant Millennium Consulting Services, LLC ("Millennium's) Motion to Dismiss (the "Motion"). Present before the Court were Mark E. Ferrario, Esq., on behalf of Plaintiff; John E. Bragonje, Esq., on behalf of

[1] Pursuant to EDCR 1.30(b)(5), Chief Judge Elizabeth Gonzalez heard this matter due to the unavailability of the assigned judge due to illness. That rule provides in pertinent part:

Rule 1.30. Chief judge.

(b) The chief judge must:

(5) Make regular and special assignments of all judges, and hear or reassign emergency matters when a judge is absent or otherwise unavailable.

Defendant Millennium; Brian Blankenship, Esq., on behalf of Defendants Alex Rivlin and Insuremonkey; and Alexander L. Fugazzi, Esq., on behalf of Defendants Mary Van Der Heijde, Jonathan L. Shreve, and Milliman, Inc.. Now therefore, having reviewed and considered the pleadings and papers on file herein and the arguments of counsel at the hearing, and for good cause appearing therefore, the Court hereby FINDS and ORDERS as follows:

FINDINGS OF FACT

1. On January 7, 2015, Nevada Health CO-OP ("NHC") entered into a service agreement (the "Agreement") with Millennium to provide services in compliance with Nevada's insurance regulatory requirements.

2. The Agreement contained a limited choice of law provision and a forum selection clause:

> "This Agreement shall be governed in regards to its execution, interpretation or enforcement in accordance with the laws of the State of North Carolina. Venue for its enforcement or any action or proceeding based on this Agreement shall be in Wake County, North Carolina."

3. The acting Nevada Commissioner of Insurance (the "Receiver") later commenced the receivership action in the Department 1, Eighth Judicial District, Clark County, Nevada (the "Receivership Court") against NHC by filing a petition to appoint herself as the receiver of NHC under NRS 696B, as NHC was incapable of continuing.

4. Thereafter, on October 14, 2015, the Receivership Court issued an order naming the Commissioner as permanent receiver of NHC (the "Receivership Order").

5. Pursuant to the Court's Receivership Order and subsequent Final Order of Liquidation, the Receiver and the SDR were authorized to liquidate the business of NHC and wind up its ceased operations, including prosecuting suits on behalf of the numerous individuals and entities harmed by NHC's failure, including its members, insureds, creditors, and the general public.

6. 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.

...

(8) All claims against CO-OP its assets or the Property must be submitted to the Receiver as specified herein ***to the exclusion of any other method of submitting or adjudicating such claims in any forum, court, or tribunal subject to the further Order of this Court***. The Receiver is hereby authorized to establish a Receivership Claims and Appeal Procedure, for all receivership claims. The Receivership Claims and Appeal Procedures shall be used to facilitate the orderly disposition or resolution of claims or controversies involving the receivership or the receivership estate.

...

(11) The officers, directors, trustees, partners, affiliates, brokers, agents, creditors, insureds, employees, members, and enrollees of CO-OP, and all of the 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...

...

(19) No judgment, order, attachment, garnishment sale, assignment, transfer, hypothecation, lien, security interest or other legal process of any kind with respect to or affecting CO-OP or the Property shall be effective or enforceable or form the basis for a claim against CO-OP or the Property ***unless entered by the court, or unless the Court has issued its specific order***, upon good cause shown and after due notice and hearing, permitting same.

...

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

7. On August 25, 2017, the Receiver instituted the present action on behalf of the numerous people and entities harmed by NHC's failure, asserting causes of action against 16 defendants, including Millennium.

8. Pursuant to the Receivership Order, the action was initiated in the Eighth Judicial District Court, the situs of the receivership proceedings and the only court with jurisdiction over NHC's Property.

CONCLUSIONS OF LAW

1. Nevada's Insurers Conservation, Rehabilitation and Liquidation Law (the "Nevada's Liquidation Act") permits the Receivership Court to issue orders governing a receivership, including injunctions permitting the Receiver to elect to consolidate all claims related to the insurance receivership in District Courts within Nevada.

2. Nevada's Liquidation Act provides:

a. The District Courts in Nevada "have original jurisdiction over delinquency proceedings under NRS 696B.010 to 696B.565, inclusive and any court with jurisdiction may make all necessary or proper orders to carry out the purposes of those sections." NRS 696B.190(1).

b. "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.190(4).

c. "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..." NRS 696B.270.

3. Nevada's Liquidation Act is silent on whether forum selection clauses may be adopted or rejected by the Insurance Commissioner.

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

5. 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."

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

7. 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.

8. 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.

9. 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.

10. 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.

11. 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, such as the claims against Millennium, 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.

ORDER

Given the foregoing, **IT IS ORDERED, ADJUDGED, AND DECREED** that Millennium's Motion to Dismiss is hereby **DENIED**.

IT IS SO ORDERED.

DATED this 23rd day of February, 2018.

Elizabeth Gonzalez
CHIEF DISTRICT COURT JUDGE

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DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP,

Plaintiff,

v.

MILLIMAN, INC., a Washington Corporation, JONATHAN L. SHREVE, an Individual; MARY VAN DER HEIJDE, an Individual; MILLENNIUM CONSULTING SERVICES, LLC, a North Carolina Corporation; LARSON & COMPANY P.C., a Utah Professional Corporation; DENNIS T. LARSON, an Individual; MARTHA HAYES, an Individual; INSUREMONKEY, INC., a Nevada Corporation; ALEX RIVLIN, an Individual; NEVADA HEALTH SOLUTIONS, LLC, a Nevada Limited Liability Company; PAMELA EGAN, an Individual; BASIL C. DIBSIE, an Individual; LINDA MATTOON, an Individual; TOM ZUMTOBEL, an Individual; BOBBETTE BOND, an Individual; KATHLEEN SILVER, an Individual; DOES I through X inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

Case No.: A-17-760558-C
Dept. No.: XXV

PLAINTIFF'S MOTION FOR RECONSIDERATION

Date of Hearing:

Time of Hearing:

Plaintiff, Commissioner of Insurance BARBARA D. RICHARDSON ("Commissioner"), in her capacity as Receiver of Nevada Health CO-OP ("NHC" or "CO-OP"), by and through her undersigned counsel, hereby moves for the Court to reconsider its Order regarding Defendant Milliman, Inc.'s ("Milliman") motion to compel arbitration ("Motion") pursuant to EDCR 2.24.

This Motion is based upon the following memorandum of points and authorities, the pleadings and papers on file herein, any exhibits attached hereto, and any oral argument this Court should choose to entertain at the time of hearing.

DATED this 29th day of March, 2018.

GREENBERG TRAURIG, LLP

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NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing **PLAINTIFF'S MOTION FOR RECONSIDERATION** will come on for hearing before this Honorable Court on the _____ day of May 1, 2018, at the hour of 9:00 am.m., or as soon thereafter as counsel may be heard.

DATED this 29th day of March, 2018.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On March 12, 2018, this Court entered an Order granting Milliman's motion to compel arbitration. The Commissioner submits respectfully that the Court should reconsider its Order for the following reasons. First, Plaintiff respectfully notes that the Court's ruling in regard to Milliman's motion to compel arbitration is inconsistent with and contrary to a recent ruling against Milliman involving similar facts in the Iowa District Court for Polk County. Secondly, Plaintiff contends that the scope of the Court's Order, as drafted, is outside of the Court's authority; as per the Court's Order, determinations regarding the merits of the claims must be made by an arbitrator, and that it is tantamount to a ruling on a motion for summary judgment. Finally, Plaintiff respectfully requests that the Court reconsider or clarify its ruling in regards to claims against Milliman that do not arise out of or relate to the agreement at issue. In the event that the Court is not inclined to reconsider its Order granting arbitration, Plaintiff respectfully requests that the Court either revise its written Order or accept Plaintiff's competing order.

II. ARGUMENT

A. Reconsideration is Warranted under the Circumstances.

A Court may reconsider a previously decided issue when the decision is clearly erroneous or if substantially different evidence is introduced. *See Masonry & Tile Contractors v. Jolley, Urga & Wirth, Ltd.,* 113 Nev. 737, 941 P.2d 486, 489 (1997) ("A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous"); *Mustafa v. Clark County School District,* 157 F.3d 1169, 1178-79 (9th Cir. 1998) (generally, leave for reconsideration is granted upon showing of newly discovered evidence, clear error or manifest injustice, or an intervening change in controlling law); *Trail v. Faretto,* 91 Nev. 401, 403, 536 P.2d 1026 (1975) (court may "for sufficient cause shown, amend, correct, resettle, modify, or vacate, as the case may be, an order previously made and entered on motion in the progress of the cause or proceeding"). The Nevada Supreme Court has explained that rehearing is appropriate where "new issues of fact or law are raised supporting a ruling contrary to the ruling already reached." *See Moore v. City of Las Vegas*, 92 Nev. 402, 551 P.2d 244, 246

(1976) In short, a motion for reconsideration directs the court's "attention to some controlling matter which the court has overlooked or misapprehended." *In re Ross*, 99 Nev. 657, 659, 668 P.2d 1089, 1091 (1983).

Here, the Court's findings and subsequent Order are clearly erroneous and otherwise result in manifest errors of law or fact necessitating reconsideration.

1. The Court Should Reconsider its Order Due to a Recent Order Involving Similar Subject Matter

This Court should reconsider its Order due to a recent order from another jurisdiction denying Milliman's motion to compel arbitration under similar facts.

In February, another motion filed by Milliman, similar to this one, was decided ***against*** Milliman in another jurisdiction. This is now the second court decision denying arbitration involving Milliman with essentially identical arbitration provisions in the context of Affordable Care Act Co-Ops under the Uniform Insurance Liquidators Act (the "UILA"). Cases like this one are proceeding around the country; the recent decision – entered after briefing, argument, and ruling on this matter – further speaks to the issues here.[2] Although not binding, given the similar circumstances, it is certainly persuasive and warrants consideration.

In that case, the plaintiffs were liquidators of a CO-OP called CoOportunity. *Ommen v. Milliman, Inc.*, Case No. LACL 138070 (Iowa District Court, Polk County) ("Iowa Order"), attached as **Exhibit A**. They sued Milliman for malpractice, breach of fiduciary duty, negligent misrepresentation, intentional misrepresentation, aiding and abetting breach of fiduciary duty, and conspiracy on the basis that statements made by Milliman regarding the viability of the CO-OP were inaccurate, misleading, and incomplete. *Id.* at 2. As here, the liquidators brought suit on behalf of the estate, policyholders, creditors, and other impacted parties. *Id.* Milliman moved to dismiss the litigation and proceed in a confidential arbitration proceeding pursuant to an agreement between Milliman and a CO-OP predecessor (an individual founder). *Id.* at 3. And, as here, the

[2] As noted in NHC's Opposition to Milliman's motion to compel arbitration, a similar motion by Milliman was also denied in Louisiana in September. *See* Exhibit A to Opposition to Milliman's motion to compel arbitration.

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purported result would have been a private proceeding under New York law with limited discovery and no punitive damages.

The court denied Milliman's motion for several reasons, three of which are relevant here. First, the Court held that the liquidators – who, as here, were not direct signatories to the agreement – did not "stand in the shoes" of the failed CO-OP. *Id.* at 4. The Court found that the causes of action did not arise out of or relate to the agreement, but instead arose out of the statutory right to bring claims as the liquidator and Milliman's malpractice and public statements.[3] *Id.* at 4. The same or similar causes of action (and others) have been brought here.[4] *See* generally Complaint. Likewise, similar to the Iowa statute that provides the liquidator with authority to "[p]rosecute an action on behalf of the creditors, members, policyholders, or shareholders of the insurer against…any other person," the Receivership Order entered pursuant to NRS 696B likewise vested the Receiver with broad power to "conserve and preserve the affairs of" NHC, including performing "all acts necessary or appropriate for the conservation, rehabilitation, or liquidation" of NHC. *See* Receivership Order, at ¶ 1.

Second, the court relied on public policy and the language of the Iowa Act, explaining that the clear intent of the legislature in enacting "this comprehensive statute" was to "protect the interest of [the CO-OP's] policyholders. *See* Iowa Order at 5. The court held that the Act requires the liquidators' claims be resolved in a public forum of the liquidators' choosing, and 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 CoOpportunity policyholders and creditors; and (5) the Liquidators' authority to disavow the Agreement." *Id.* As described in detail in NHC's Opposition to Milliman's motion to compel arbitration, most of the same policy considerations are at issue here.

---

[3] As a separate reason, the court noted that the liquidator had disavowed the contract. Although in NHC's case the contract has not been disavowed, the other reasons given by the court stand independently of this one. *See id.* at 5 (noting this is an "independent alternative ground" for the denial of the motion).

[4] As discussed further below, at a minimum, the claims that do not arise out of the contract should proceed in litigation.

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Finally, the court held that the Act expressly involves the "business of insurance," with the result that pursuant to the McCarran-Ferguson Act, the Federal Arbitration Act must give way to the rights and remedies prescribed in the Iowa Act. *Id.* at 6. As with the Iowa Act, there is no real dispute that NRS 696B regulates the business of insurance. *See, e.g.*, NRS 696B.290(5) (the Liquidation Act provides that "upon taking possession of the assets of an insurer, the domiciliary receiver shall immediately proceed to *conduct the business of the insurer* or to take such steps as are authorized by this chapter for the purpose of rehabilitating, liquidating, or conserving the affairs or assets of the insurer."); *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010) (holding that this prong was "clearly satisfied"). As in the Iowa Order, the presumption in favor of arbitration under the FAA must give way to the Nevada Act for this reason.

Between the Iowa Order, a Louisiana court's denial of a similar motion by Milliman, and *Taylor v. Ernst & Young*, 130 Ohio St. 3d 411, 419 (Ohio 2011), discussed at length in NHC's Opposition to Milliman's motion to compel arbitration, this Court's determination that arbitration is appropriate in this case is an outlier, and should be reconsidered.

2. This Court Should Reconsider its Order Where, in Ruling on the Motion to Compel Arbitration, This Court Made a Substantive Ruling Regarding Creditors' Rights.

This Court should reconsider its Order where, in ruling on the Motion to Compel Arbitration, this Court appeared to have made a substantive ruling regarding creditors' rights. To the extent that the Court did not intend to make a substantive ruling outside the scope of the Motion to Compel Arbitration, this Court should revise its Order accordingly.

The motion before the Court was a Motion to Compel Arbitration; the scope of the determination before the Court was not the merits of the case, but instead simply whether or not the claims against Milliman were subject to arbitration. Milliman argued that the claims should be subject to arbitration, and NHC argued that they should not be subject to arbitration. Nevertheless, the Order submitted by Milliman and signed by this Court is troubling, as it appears to go to the merits of the dispute.

Essentially, the following two paragraphs in this Court's Order could be construed as a motion for summary judgment ruling – the kind of ruling that should not be entered without

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discovery, full briefing, and/or an evidentiary hearing:

> There is a distinction between claims that belong to the creditors and policyholders of an insolvent insurer, on the one hand, as distinct from claims that belong to the insolvent insurer, where any recovery would increase the coffers of the estate, and therefore benefit the estate's creditors and policyholders, on the other hand. Plaintiff's claims fall within the latter category, and therefore are arbitrable.
>
> All of Plaintiff's claims here belonged only to NHC because they are ordinary common law and contractual damages claims based on NHC's pre-insolvency rights. Plaintiff seeks monetary damages from Milliman, not the return of NHC assets, and not the clawing back and redistribution among creditors of estate assets. Plaintiff's action against Milliman does not involve set offs, or proofs of claim, or claims arising from the Nevada liquidation statute. This case is separate and distinct from the ongoing Receivership Action and it neither threatens or state an interest in NHC assets or property, nor will it affect any creditor's rights. **Plaintiff has not pled any viable causes of action that actually belong to NHC's creditors**.

See Order, at 6-7 (emphasis added).

To the extent that this language is meant to rule on the validity of NHC's claims, as it appears to do, it goes well beyond the arbitrability of the causes of action at issue and into a determination of the merits. This is improper, given that the motion was not a merits motion. Indeed, if the proper venue is an arbitral forum, this Court would be usurping the position of the arbitrators in making a ruling on the merits. Further, even if this Court could make a merits-based decision despite having found the claims arbitrable, it should not endeavor to do so without (at least) briefing as to the validity of the claims.

To the extent that this language is merely meant to reject NHC's argument that because the Receiver represents creditors, insureds, policyholders, etc., it is not bound by the arbitration clause, it should be clarified to so state.

Additionally, contrary to the language in the Order, Plaintiff has clearly asserted claims on behalf of creditors and others. *See* Complaint, at ¶ 1 ("Plaintiff…has brought this action on behalf of NHC, NHC's members, insured enrollees, ***and creditors***") (emphasis added). Further, there are other factual problems with these paragraphs; for example, Milliman ***has*** asserted a proof of claim.

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See Opposition to Motion to Compel Arbitration, at Exhibit C.

As such, this portion of the ruling should be reconsidered, or clarified, as appropriate.

3. This Court Should Reconsider its Order Where the Court Did Not Specifically Address Bifurcation of Claims

This Court should also reconsider its Order where the Court did not address whether the claims involving other parties should be arbitrated. In her discretion, the Receiver brought the claims against Milliman and all of its codefendants in Nevada state court; this makes sense. The purpose of this was to consolidate all cases in a central court in the state of the statutory liquidation; conducting one litigation conserves the assets of NHC for the benefit of insureds and other Nevadans. Piecemeal litigation is duplicative and costly, and private arbitration lacks the public visibility appropriate for this dispute.

There are four categories of claims at issue, for the purposes of determining arbitrability. First, there are the claims that directly involve the contract at issue; for example, breach of contract and breach of the implied covenant of good faith and fair dealing. *See* Complaint, at pp. 52-54. Second, there are the tort claims against Milliman. *See* Complaint, at pp. 47-55. Third, there is a statutory claim arising out of Milliman's failure to comply with state statutory requirements. *See id.* Finally, there are two claims that are asserted based on Milliman's illicit cooperation with other named defendants (e.g., Millennium, InsureMonkey) to deceive, defraud, and ultimately destroy NHC, namely, civil conspiracy (sixty-second cause of action) and concert of action (sixty-third cause of action). *See* Complaint, at pp. 94-96.

The contract-related claims (category one). NHC explained the various reasons why none of the claims – even the contract claims – should be subject to arbitration in its Opposition to Milliman's motion to compel arbitration. Specifically, that the presumption in favor of arbitration does not apply where the Insurer's Liquidation Law reverse-preempts the FAA under the McCarran-Ferguson Act; the specific provisions of the Liquidation Law and the Receivership Order preclude contrary application of the NAA; the fact that the Receiver, as a non-signatory, does not merely "step into the shoes" of NHC where the claims are brought on behalf of creditors, policyholders, and others; where the comprehensive statutory scheme and the Receivership Order's

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language mandates that the Receiver's decision to litigate in this Court be respected; and where the AAA is not an adequate forum to resolve this dispute, given the arbitration clause's limits on discovery and damages and its inability to adjudicate claims involving other parties. Nevertheless, even if this Court finds that category one claims must be arbitrated, this Court should find that the other categories of claims should be litigated in Nevada.

The tort claims (category two).

This Court held in section D of its Order that "Plaintiff's claims all arise from and relate to the Agreement because, but for the Agreement and the work Milliman did for NHC pursuant to it, Plaintiff would have no claims whatsoever." *See* Order, at 4. The recent Iowa Order, interpreting the same language, held differently; it held that the claims at issue – for malpractice, breach of fiduciary duty, negligent misrepresentation, intentional misrepresentation, aiding and abetting breach of fiduciary duty, and conspiracy – did not "arise from or relate to the Agreement" with Milliman. *See* Iowa Order, at 4. Rather, the court held, the claims arose from "Milliman's alleged malpractice and public statements certifying the viability of [the CO-OP]," as well as the liquidator's statutory right to bring claims on behalf of the creditors, policyholders, and others.

Here, the non-contract claims are similar to those outlined in the Iowa Order, and the reasoning is in accord. Accordingly, those claims should be litigated in Nevada.

The statutory claim (category three).

At the very least, the statutory claim should not be arbitrated. One of NHC's primary claims against Milliman is that it violated its obligations pursuant to NRS 681B. *See* Complaint, at p. 47. Milliman's statutory obligations are separate from its contractual obligations; in other words, a party cannot "contract around" Nevada's statutory obligations, nor should a party be able to "contract around" answering to those harmed by a failure to comply with such statutory obligations via an arbitration clause. This claim should not be deemed to "arise out of or relate to" the Agreement here.

Claims that involve other parties not subject to the Agreement (category four).

Even if this Court finds that all of the above claims should be arbitrated, this Court should find that the claims that involve parties not subject to the arbitration clause cannot be arbitrated.

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As noted above, some causes of action involve not only Milliman, but other named defendants in the Nevada litigation. NHC respectfully requests that this Court clarify whether the conspiracy and concert of action claims brought not only against Milliman, but involving coordinated and concerted action on behalf of Milliman and other named defendants, are also to be arbitrated, or if these claims are to be bifurcated and litigated with the rest of the Nevada litigation.

If this Court finds that any of the above claims are inappropriate for arbitration, this Court should bifurcate the proceedings accordingly. *See generally Law Offices of Bradley J. Hofland, P.C. v. McFarling*, 2007 WL 1074096, at *2 (D. Nev. Apr. 9, 2007) (explaining that under the FAA, where some issues are subject to arbitration and some are not, bifurcation is appropriate).

III. CONCLUSION

Based on the foregoing, the Commissioner respectfully requests that the Court reconsider its Order in its entirety. If the Court is unwilling to reconsider its Order in its entirety, the Court should still reconsider its Order and either remove its statements regarding the Creditor's rights or order briefing and a hearing addressing the issues related thereto. Finally, NHC respectfully requests that this Court reconsider potentially bifurcating the claims, or at the very least, clarify how the claims against Milliman that necessarily involve defendants other than Milliman be treated under the order.

DATED this 29th day of March, 2018.

GREENBERG TRAURIG, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2018, a true and correct copy of the foregoing Plaintiff's Motion for Reconsideration was filed with the Clerk of the Court using the Odyssey eFileNV Electronic Service system and served on all parties with an email-address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

The date and time of the electronic proof of service is in place of the date and place of deposit in the U.S. Mail.

/s/Sandy Jackson
An Employee of GREENBERG TRAURIG, LLP

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EXHIBIT A

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DOUG OMMEN, et al., Plaintiffs, vs. MILLIMAN, INC., et al., Defendants.	Case No. LACL 138070 **ORDER DENYING MILLIMAN, INC., ET AL.'S MOTION TO DISMISS AND COMPEL ARBITRATION**

Under authority provided by the Insurers Supervision, Rehabilitation, and Liquidation Act, Iowa Code chapter 507C (2017) (the Act)[1], Plaintiffs Doug Ommen, et al. (the Liquidators) filed a Petition on June 5, 2017, against Defendants Milliman, Inc., et al. (Milliman) alleging claims arising from the fall of failed insurance company CoOportunity Health, Inc. (CoOportunity). Before the court is Milliman's Motion to Dismiss and Compel Arbitration (the Motion), resisted by the Liquidators.

Hearing on the Motion and Resistance was held on Friday, December 8, 2017. Representing Milliman was attorney Steven Eckley. Representing the Liquidators was attorney Kirsten Byrd.

The court, having considered Milliman's Motion to Dismiss and Compel Arbitration, the Liquidators' Resistance, Milliman's Reply, the Liquidators' Supplemental Brief and Milliman's Supplemental Authority, and having heard oral argument by the parties on December 8, 2017, denies Milliman's Motion to Dismiss and Compel Arbitration for the following reasons:

[1] All references are to the 2017 Iowa Code unless otherwise indicated.

OVERVIEW OF THE LIQUIDATORS' CLAIMS

Plaintiffs are the statutory liquidators of CoOportunity. Plaintiffs brought this lawsuit as part of their statutory mandate to preserve and collect the assets of the company and to protect the interests of policyholders, creditors, and the public. The Liquidators' First Amended Petition asserts claims against Milliman for (1) malpractice, (2) breach of fiduciary duty, (3) negligent misrepresentation, (4) intentional misrepresentation, (5) aiding and abetting breach of fiduciary duty, and (6) conspiracy. The First Amended Petition also asserts related tort and other claims against the company's founders/directors/officers.

The Liquidators' claims against Milliman focus on Milliman's alleged malpractice and statements to CoOportunity and regulators regarding the viability of the company. The Liquidators allege these statements were inaccurate, incomplete, and misleading. As permitted by Iowa Code section 507C.21, the Liquidators assert their claims on behalf of the company, policyholders, creditors, and other impacted parties because the Liquidators allege they were damaged by the insolvency. The Liquidators confirm any recovery in the action will inure to the general benefit of all policyholders and creditors. *See* Iowa Code §§ 507C.21(1)(*m*) and 507C.18.

MILLIMAN'S MOTION TO DISMISS AND COMPEL ARBITRATION

Milliman[2] asks the court to compel the Liquidators to pursue their claims against Milliman in a confidential arbitration proceeding, based upon a Consulting Services Agreement (the Agreement) signed by a CoOportunity founder in 2011 before the company was formed.

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[2] "Milliman" refers to Defendants Milliman, Inc., Kimberley Hiemenz, and Michael Sturm.

The Agreement purports to require a confidential arbitration and application of New York law. It attempts to limit any malpractice recovery to three times fees paid, and to insulate Milliman from punitive damages, lost profits, and consequential damages. The Liquidators allege Milliman offered the founders a personal incentive to enter into the Agreement by agreeing Milliman would not seek to collect against the founders personally if the federal government did not approve the funding application for CoOportunity. The Liquidators allege the Agreement is evidence of a tainted relationship, lack of independence, conflict of interest, and motive.

ANALYSIS

It is undisputed that the Liquidators are not signatories to the Agreement. It is fundamental that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 646 (1986) (citation omitted); *Wells Enters., Inc. v. Olympic Ice Cream*, 903 F. Supp. 2d 740, 746 (N.D. Iowa 2012) ("[A] party who has not agreed to arbitrate a dispute cannot be forced to do so."). The enforceability of an agreement to arbitrate "flows from the consent of the parties to the agreement." *Rent-A-Center, Inc. v. Iowa Civil Rights Comm'n*, 843 N.W.2d 727, 732–33 (Iowa 2014) (citation omitted); *see also EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("Arbitration under the [Federal Arbitration Act] is a matter of consent, not coercion. . . . It goes without saying that a contract cannot bind a nonparty."); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.").

State law governs the question of whether there is a binding agreement to arbitrate. *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 946 (8th Cir. 2001) (citations omitted). There may be a presumption in favor of arbitration in certain circumstances. This presumption does not apply where, as in this case, a non-party to the agreement disputes the agreement is binding and enforceable against the non-party. *See e.g., Jacks v. CMH Homes, Inc.*, 856 F.3d 1301, 1304–05 (10th Cir. 2017); *White v. Sunoco, Inc.*, No. 16-2808, 2017 WL 38641616, at *3 (3d Cir. Sept. 5, 2017); *Griswold v. Coventry First LLC*, 762 F.3d 264, 271 (3d Cir. 2014); *Taylor v. Ernst & Young, LLP*, 958 N.E.2d 1203, 1210 (Ohio 2011). A non-signatory may be bound by an arbitration agreement *only* if traditional principles of state law allow the contract to be enforced against the nonparty. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009).

Milliman claims that the Liquidators are bound as successors. Under Iowa law the Liquidators are not mere successors of CoOportunity. As a matter of law they do not stand only in CoOportunity's shoes. Rather, the Liquidators brought this action pursuant to the Iowa Legislature's broad grant of statutory authority to the Liquidators under Iowa Code section 507C.21(1)(*m*) to bring claims on behalf of policyholders and creditors, as well as on behalf of CoOportunity.[3] Other courts confronting this issue have held that the liquidator is not a mere successor and is not bound by the defunct insurer's arbitration agreement. *See e.g., Taylor*, 958 N.E.2d at 1211.

The Liquidators do not seek to enforce or recover under the Agreement. Their claims do not arise from or relate to the Agreement. Rather, the Liquidators' claims arise from Milliman's alleged malpractice and public statements certifying the viability

[3] Iowa Code section 507C.21(1)(*m*) permits the liquidator to "[p]rosecute an action on behalf of the creditors, members, policyholders, or shareholders of the insurer against an officer of the insurer, or any other person."

of CoOportunity, as well as the Liquidators' statutory right under section 507C.21(1)(*m*) to assert claims on behalf of the company, policyholders, creditors, and others.

In addition, the Liquidators have disavowed the Agreement in its entirety, as authorized under Iowa Code section 507C.21(1)(*k*).[4] The Liquidators' disavowal is an independent alternative ground upon which the court refuses to compel arbitration as provided for in section 2 of the Federal Arbitration Act (the FAA). The court rejects Milliman's argument that the Liquidators' authority to disavow contracts applies only to executory or ongoing contractual obligations. This is not supported by the plain language of the statute, cases construing an insurance liquidator's disavowal authority, and the express purpose of the Act to effectuate the goals of policyholder and creditor protection.

Further, the language of the Act confirms that the Legislature enacted this comprehensive statute to protect the interests of CoOportunity's policyholders. The Act requires the Liquidators' claims be resolved in a public forum of the Liquidators' choosing, subject to the rules and procedures established by the Legislature. Forcing the Liquidators to arbitrate would interfere with (1) the public's interest in the proceeding; (2) the Liquidators' right of forum selection under the Act; (3) the Act's purposes of economy and efficiency; (4) the protection of CoOportunity policyholders and creditors; and (5) the Liquidators' authority to disavow the Agreement. It is not lost upon this court that the Legislature could have chosen to restrain the reach of a liquidator in situations such as the instant matter and require the result Milliman

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4 Iowa Code section 507C.21(1)(*k*) permits the liquidator to "enter into contracts as necessary to carry out the order to liquidate and affirm or disavow contracts to which the insurer is a party."

argues for here. It is telling to the court that the Legislature has not done so. The court will not supply that which is within the authority of the Legislature to provide.[5]

Finally, the Act expressly involves the "business of insurance."[6] It falls within the meaning of that phrase in accordance with the United States Supreme Court's opinion in *United States Department of Treasury v. Fabe*, 508 U.S. 491, 500-09 (1993). The court cannot compel arbitration under the FAA because, under the McCarran-Ferguson Act, the Act reverse preempts the FAA, such that the FAA must give way to the rights and remedies prescribed in the Act. *See* 15 U.S.C. § 1012(*b*).

CONCLUSION

For all of the reasons stated above, the court finds and concludes that the Liquidators have exercised their statutory authority properly. They are not bound by the arbitration clause discussed above, which they have disavowed. Milliman's Motion to Dismiss and Compel Arbitration should therefore be denied.

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[5] In this vein the court also observes that the liquidation statutes in most other states do not approximate the depth and breadth of the authority granted to the Liquidators by the Legislature under the Act.

[6] The plain language of Iowa Code section 507C.1(4)(*g*) confirms this:

> The purpose of this chapter is the protection of the interests of insureds, claimants, creditors, and the public . . . through all of the following:
> . . . .
> *g*. Providing for a comprehensive scheme for the rehabilitation and liquidation of insurance companies and those subject to this chapter as part of the regulation of the business of insurance, the insurance industry, and insurers in this state. Proceedings in cases of insurer insolvency and delinquency are deemed an integral aspect of the business of insurance and are of vital public interest and concern.

Iowa Code § 507C.1(4)(*g*).

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ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Milliman, Inc., et al.'s Motion to Dismiss and Compel Arbitration is **DENIED.**

Costs are assessed to Defendant Milliman, Inc., et al.

E-FILED 2018 FEB 06 5:41 PM POLK - CLERK OF DISTRICT COURT

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACL138070	DOUG OMMEN ET AL VS MILLIMAN INC ET AL

So Ordered

Jeanie Vaudt, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2018-02-06 17:41:37 page 8 of 8

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP, Plaintiff, vs. MILLIMAN, INC., a Washington Corporation; JONATHAN L. SHREVE, an Individual; MARY VAN DER HEIJDE, an Individual; MILLENNIUM CONSULTING SERVICES, LLC, a North Carolina Corporation; LARSON & COMPANY P.C., a Utah Professional Corporation; DENNIS T. LARSON, an Individual; MARTHA HAYES, an Individual; INSUREMONKEY, INC., a Nevada Corporation; ALEX RIVLIN, an Individual; NEVADA HEALTH SOLUTIONS, LLC, a Nevada Limited Liability Company; PAMELA EGAN, an Individual; BASIL C. DIBSIE, an Individual; LINDA MATTOON, an Individual; TOM	Case No. A-17-760558-C Dept. No. 27 **MILLIMAN'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION**

ZUMTOBEL, an Individual; BOBBETTE BOND, an Individual; KATHLEEN SILVER, an Individual; DOES I through X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

Defendants Milliman, Inc., Jonathan L. Shreve, and Mary van der Heijde (collectively "Milliman" for purposes of this motion only), by and through their attorneys, Snell & Wilmer L.L.P. and Dentons US LLP, hereby submit this Opposition to Plaintiff, the Commissioner of Insurance, Barbara D. Richardson, in her official capacity as Receiver for Nevada Health CO-OP's ("Plaintiff") Motion for Reconsideration. This Motion is based on the pleadings and papers on file, the attached memorandum of points and authorities, and any exhibits referenced therein, and any oral argument this court may entertain.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION[1]

Plaintiff's motion should be denied because there is neither any "clear error," nor any "controlling matter" that this Court erroneously "overlooked or misapprehended," in the March 12, 2018 Order (the "Order"), as Plaintiff contends. (Plaintiff's Br., p. 4, citing *In re Ross*, 99 Nev. 657, 659, 668 P.2d 1089, 1091 (1983)). On the contrary, the Order comports with controlling Nevada Supreme Court authority, and on-point precedent from the U.S. Court of Appeals for the Ninth Circuit and other federal courts, which hold that: 1) Plaintiff cannot simultaneously sue for damages based on Milliman's work done pursuant to the Agreement yet evade the Agreement's arbitration clause; 2) Plaintiff must arbitrate her tort, contract and statutory claims together because they all arise from and relate to the same work done pursuant to the Agreement; and 3) the standard for "reverse preemption" under the McCarren-Ferguson Act is not met where, as here, a liquidator brings straightforward common law claims on behalf of an insolvent insurer, because compelling a liquidator to arbitrate such claims does not interfere with the State's regulation of insurance.

[1] Capitalized terms not defined herein shall have the meaning ascribed to them in this Court's Order Granting Milliman's Motion To Compel Arbitration.

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An Iowa trial court's February 6, 2018 Order (the "Iowa Order") does not warrant a change to this Court's analysis or holding. While Milliman believes that the Iowa Order contravenes applicable Iowa and federal law, and it is appealing the Iowa decision, that decision has no precedential or persuasive value here in light of several important differences between the liquidators' respective cases, and between the Iowa and Nevada liquidation statutes.

First, unlike the Iowa Liquidators, who did not sue Milliman for breach of contract, Plaintiff here brings several contract claims against Milliman. This action therefore falls squarely within the line of cases this Court cites in its Order (*see* Order, p. 5) which hold that "if the liquidator wants to enforce [an insurer's] rights under its contract, she must also assume its perceived liabilities." *Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969, 972, n.4 (9th Cir. 1992). Neither Plaintiff, nor the Iowa Court, have cited a single case that holds otherwise. Plaintiff rehashes her contention that her tort claims cannot be arbitrated, however Milliman conclusively established—and this Court agreed—that ***all*** of Plaintiff's causes of action, regardless of how Plaintiff labeled them, arise from and relate to the work Milliman performed pursuant to the Milliman-NHC Agreement, without which Plaintiff would have no claims whatsoever. (*See* Milliman Motion To Compel Arbitration, p. 6; Milliman Reply Br., pp 6-7). Plaintiff's bifurcation argument thus contravenes the Nevada Supreme Court's controlling holding that "if the allegations underlying the claims so much as touch matters covered by the parties' agreements, then those claims must be arbitrated." *Helfstein v. UI Supplies*, 127 Nev. 1140 (2011) (unpublished) (citation omitted). All of Plaintiff's claims can and should be arbitrated together, and Plaintiff cites no law to justify bifurcation under these circumstances.

Second, the Iowa Court's decision was based, in part, on the Iowa Liquidators' purported exercise of their statutory right to "disavow" the contract. (Iowa Order, p. 5, citing Iowa Code § 507C.21(1)(k)). Plaintiff neither claims to have, nor has purported to exercise, such a right.[2] Of course, Plaintiff cannot "disavow" the Agreement given that a party cannot simultaneously disavow and sue to enforce a contract.

[2] The Receivership Order permits Plaintiff to disavow only "leases or executory contracts." (Receivership Order, §14(p)).

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Third, the Iowa and Nevada liquidation statutes are not "uniform," as Plaintiff asserts, and the Iowa Court based its decision on provisions of the Iowa Liquidation Act that have no corollary under Nevada law. For example, the Iowa Court's holding that the Iowa Liquidation Act reverse preempts the FAA was based on the Iowa Act's statement that "[p]roceedings in cases of insurer insolvency and delinquency are deemed an integral aspect of the business of insurance and are of vital public interest and concern." (*Id*. at 6, n.6). While the Iowa Court erred because this language does not justify reverse preemption of the FAA, neither the Nevada liquidation statute nor the Receivership Order contains the same or similar language. This Court, unlike the Iowa Court, correctly rejected Plaintiff's reverse preemption argument based on on-point appellate precedent holding that compelling a liquidator to arbitrate straightforward contract and tort claims does not implicate the State's regulation of insurance or interfere with a liquidator's statutory functions. (Order, p. 8, citing, *inter alia*, *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381-82 (9th Cir. 1997)).

The Iowa Order reflects nothing more than one court's (incorrect) interpretation of Iowa law, and specifically that court's view that "the liquidation statutes in most other states do not approximate the depth and breadth of the authority granted to the Liquidators by the [Iowa] Legislature under the Act." (Iowa Order, p. 6, n.5). ***This*** Court's Order is entirely consistent with ***Nevada*** statutory and case law, as well as relevant federal precedent.

Finally, Plaintiff's request for this Court to "clarify" its statement that "Plaintiff has not pled any viable causes of action that actually belong to NHC's creditors" (Order, p. 7) is meritless. This finding was not intended to be a substantive determination concerning the viability of Plaintiff's claims against Milliman, but rather a determination that those claims belonged solely to NHC (and now to Plaintiff) and do not belong to NHC's creditors. Plaintiff raised this precise argument in its January 31, 2018 letter to this Court, which urged the Court not to include the language now at issue in its final Order. Notwithstanding Plaintiff's request, this Court correctly included the relevant language. Both a directly applicable Nevada statute and controlling Nevada Supreme Court authority (*see infra*, pp. 13-14) make clear that Plaintiff has pled no viable causes of action that belong to NHC's creditors.

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For all of the reasons articulated below, as well as in Milliman's briefs supporting its motion to compel arbitration, and at the January 9, 2018 hearing on the motion, this Court's Order is entirely correct. Plaintiff's motion for reconsideration should be denied.

II. ANALYSIS

A. There Is No Basis To Reconsider This Court's Order, Which Is Correct and Fully Supported By Controlling and Persuasive Authority

Reconsideration of this Court's Order is not warranted because nothing in it is "clearly erroneous," and Plaintiff has not introduced "substantially different evidence" to support a contrary ruling. *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth Ltd.*, 113 Nev. 737, 741 P.2d 486, 489 (1997). Rather, every holding in the Order is well-supported by on-point, controlling or persuasive precedent that Plaintiff cannot refute, either in its opposition to Milliman's motion to compel, at oral argument, or again on this motion. We highlight this Court's key rulings, and the precedent behind them, in order to demonstrate that Plaintiff has failed to meet her burden on this motion.

1. This Court Correctly Held That Because Plaintiff is Suing to Enforce the Agreement, Plaintiff Must Abide by the Agreement's Arbitration Provision

The Order comports with the Nevada Supreme Court's holding in *Ahlers v. Ryland Homes*, 126 Nev. 688, 367 P.3d 743 (2010) (unpublished), that a party cannot seek to enforce an agreement and "simultaneously avoid other portions of the agreement, such as the arbitration provision." (Cited at Order, p. 5).

The Court also correctly determined this well-settled rule applies with equal force against insurance liquidators, as courts around the country have uniformly held. *See, e.g., Bennett*, 968 F.2d at 972, n.4 (9th Cir. 1992); *Poizner v. National Indem. Co.*, No. 08CV772-MMA, 2009 WL 10671673, at *3-4 (S.D. Cal. Jan. 6, 2009); *Garamendi v. Caldwell*, No. CV-91-5912-RSWL(EEX), 1992 WL 203827, at *3 (C.D. Cal. May 4, 1992); *Koken v. Cologne Reins. (Barbados), Ltd.*, 34 F. Supp. 2d 240, 256 (M.D. Pa. 1999); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 275 (D. Vt. 1993); *Rich v. Cantilo & Bennett*, 492 S.W.3d 755, 762 (Tex. Ct. App. 2016); *State v. O'Dom*, No. 2015CV258501, 2015 WL 10384362, at *5 (Ga. Super. Ct. Sept. 18, 2015) (cited at Order, p.5).

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Plaintiff cites ***no*** authority to show that this Court's holdings were wrong. In both *Taylor v. Ernst & Young, LLP*, 958 N.E.2d 1203 (Ohio 2011), and the Iowa Order—in which the respective liquidators did not bring contract claims on behalf of the insolvent insurer—the courts determined that the liquidators were not seeking to enforce the agreement at issue.[3] Plaintiff cannot argue the same here given she has brought several contract claims arising from Milliman's alleged failure to perform its work pursuant to the Agreement, as well as tort claims that relate to the very same work. With respect to the Louisiana trial court decision on which Plaintiff relies, the Louisiana court improperly ignored whether the Rehabilitator's claims arose out of or related to the contract. Moreover, the Louisiana First Circuit Court of Appeal recently granted Milliman's application for a writ of certiorari for an expedited interlocutory appeal, stayed further proceedings in the trial court, and set the appeal for oral argument on May 16, 2018.

2. This Court Correctly Held That Plaintiff's Claims Against Milliman Are Pre-Insolvency Damages Claims that Belonged Solely to NHC, Therefore Plaintiff Stands in NHC's Shoes and Must Abide by NHC's Contractual Obligations

This Court correctly held that Plaintiff cannot evade the Agreement's arbitration clause simply by claiming to act on behalf of NHC's policyholders and creditors. Because Plaintiff's claims against Milliman ***belonged*** solely to NHC, not to its creditors or policyholders, Plaintiff here stands directly in NHC's shoes, and must abide by all of NHC's contractual obligations. *See, e.g.*, *Bennett*, 968 F.2d at 972 (stating that if a "dispute is in essence a contractual one, it should be arbitrated. And because the liquidator, who stands in the shoes of the insolvent insurer, is attempting to enforce [the insurer's] contractual rights, she is bound by [the insurer's] pre-insolvency agreements"); *Quackenbush*, *supra*, 121 F.3d at 1380 (same); *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1154 (3d Cir. 1989) (holding that bankruptcy trustee's claims against Debtor's securities broker for state and federal securities violations were arbitrable because they were based on debtor's pre-bankruptcy rights, and did not arise from the Bankruptcy Code) (cited at Order, p. 7).

[3] The Iowa Court's decision was also based on the liquidators' disavowal of the agreement (Iowa Order, p. 5), a power Plaintiff does not have under Nevada law or the Receivership Order.

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This Court also properly recognized the distinction between claims that ***belong*** to NHC's creditors or policyholders, and claims that belong to NHC but may ultimately ***benefit*** its creditors or policyholders by increasing the "coffers" of NHC's estate. (Order, p. 8). Plaintiff's claims irrefutably fall within the latter category, and are arbitrable. *See, e.g., Suter v. Munich Reins. Co.*, 223 F.3d 150, 161 (3d Cir. 2000).

3. This Court Correctly Rejected Plaintiff's "Reverse Preemption" Argument

This Court correctly rejected Plaintiff's contention that the Nevada Liquidation Act reverse-preempts the FAA under the McCarren-Ferguson Act, 15 U.S.C. §§ 1011-1015. The Order cites several on-point decisions that reject the argument Plaintiff raises here that forcing a statutory liquidator to arbitrate straightforward breach of contract claims either implicates the business of insurance or interferes with the liquidator's statutory function. (Order, pp. 8-9, *citing, inter alia, Quackenbush, supra*, 121 F.3d at 1381-82 (holding that arbitration of the liquidator's common law tort and contract "claims against Allstate—which [the liquidator] has pursued outside the statutory insolvency proceedings—will not interfere with California's insolvency scheme"); *AmSouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004) (no reverse preemption where liquidator's "ordinary [tort and contract] suit against a tortfeasor" did not implicate the "regulation of the business of insurance").

Plaintiff's contention that the Nevada Liquidation Act generally "regulates the business of insurance" (Plaintiff's Br., p. 6, *citing* Iowa Order, p. 6) does not speak to, much less refute, this Court's holding, and the holdings cited above, that a liquidator's standard contract and tort action against a third party does not implicate or conflict with a state's regulation of insurance. As the U.S. Third Circuit Court of Appeals stated in *Grode v. Mutual Fire, Marine and Inland Insurance Co.*:

> The complex regulations relating to insolvent insurance companies have to do with plans of rehabilitation and payment to policy holders. Simple contract and tort actions that happen to involve an insolvent insurance company are not matters of important state regulatory concern or complex state interests.

8 F.3d 953, 959 (3d Cir. 1993). Section 696B.290(5) of the Nevada Liquidation Act, on which Plaintiff erroneously relies, affirms that certain aspects of liquidation do not involve the "business

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of insurance," as it confers on a receiver the power to "to conduct the business of the insurer ***or*** to take such steps as are authorized by this chapter for the purpose of rehabilitating, liquidating, or conserving the affairs or assets of the insurer." (emphasis added).

In all events, Plaintiff ignores this Court's holding that the standard for reverse preemption is not satisfied for the additional reason that there is no conflict between the Nevada Liquidation Act and the FAA. (Order, p. 9). Plaintiff also ignores this Court's holding that, even if the FAA is somehow inapplicable, the ***Nevada*** Arbitration Act, which is not pre-empted, is substantively identical to the FAA and mandates enforcement of the Agreement's arbitration clause. (*Id*.).

4. So-Called "Policy Considerations" Cited in the Iowa Order Cannot Supersede the Agreement's Arbitration Clause

While Plaintiff argues that "policy considerations" outlined in the Iowa Order require this Court to reconsider its decision (Plaintiff's Br., p. 5), the Iowa Order was based on that Court's interpretation of elements of Iowa law that are not applicable in Nevada. For example, the Iowa Court held that "[f]orcing the Liquidators to arbitrate would interfere with," *inter alia*, "the Liquidators' authority to disavow the Agreement." (Iowa Order, p. 5). Plaintiff has no right to disavow non-executory contracts under Nevada law.[4] The Court also held that arbitration would contravene the Iowa Liquidation Act's express statement that the Act's "purpose… is the protection of the interests of insureds, claimants, creditors, and the public." (*Id*. at 6, n.6, *quoting* Iowa Code §507C.1(4)). Neither the Nevada statute nor the Receivership Order includes such language. Finally, the Iowa Court held that compelling arbitration would vitiate the Iowa Liquidators' purported "right of forum selection under the [Iowa Liquidation] Act." (*Id*. at 5). Plaintiff does not have the unilateral right of forum selection under Nevada law, as evidenced by the fact that: 1) Plaintiff was compelled to sue the U.S. Department of Health & Human Services ("HHS") in federal court as required by federal law and a contractual forum selection clause in the NHC-HHS agreement; and 2) Judge Cory, who entered the Receivership Order and presides over the liquidation proceedings, denied Plaintiff's request to coordinate and consolidate Plaintiff's action against Milliman with the liquidation proceeding.

[4] Milliman disputes the Iowa Court's holding that the Iowa Liquidators have the power to disavow non-executory contracts or the unilateral right to choose where to litigate.

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Moreover, the Iowa Court erred by relying on so-called "policy considerations" to vitiate an otherwise binding arbitration clause. *See Quackenbush*, 121 F.3d at 1382 (holding that trial court "had no discretion to consider public-policy arguments in deciding whether to compel arbitration under the FAA"), citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). This Court should decline Plaintiff's invitation to make the same error.

While Plaintiff tries to portray this Court's Order as an "outlier," the abundant authority discussed above, as well as in the Order itself, definitively belie Plaintiff's position. The Order is in complete accord with Nevada caselaw and relevant federal authority, and neither the Iowa Order—which cites no law other than the Iowa Liquidation Act—nor any of Plaintiff's other arguments for reconsideration demonstrate "clear error" in any aspect of this Court's analysis. Plaintiff has therefore failed to meet her burden on this motion.

B. Plaintiff's Request for Bifurcation of Certain Claims Is Without Merit

There is no basis to bifurcate any of Plaintiff's claims. Plaintiff does not, and cannot, dispute that every cause of action she brings against Milliman is based on Milliman's alleged failure to perform its contracted-for services adequately. *See, e.g.*, Compl. ¶¶ 333-336 (malpractice cause of action based on allegation that "Milliman Defendants were engaged by NHC and its predecessors to provide actuarial services to NHC" and failed to provide those services adequately); *id*. at ¶ 323 (negligence *per se* claim based on Milliman's alleged failure to provide certification required pursuant to NRS 681B); ¶¶ 340-344 (fraud claim based on alleged false statements in feasibility study); ¶¶ 355-56, 395-398 (negligence claims based on alleged failure to exercise reasonable care in preparing feasibility study, and in calculating premiums, financial projections and reserves); ¶ 402 (unjust enrichment claim seeks to recoup fees NHC paid to Milliman for actuarial services required by Agreement); ¶¶ 407-413, 755, 762 (civil conspiracy and concert of action claims based on preparation of allegedly false financial information).

Because Plaintiff's causes of action all arise from and relate to Milliman's work under the Agreement, they all fall within the Agreement's broad arbitration provision, which encompasses all claims relating to Milliman's "engagement" by NHC. As the Nevada Supreme Court stated in

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DR Partners v. Las Vegas Sun, Inc., "[c]ourts should… order arbitration of particular grievances unless it may be said with *positive assurance* that the arbitration clause is not susceptible of *an* interpretation that covers the asserted dispute." No. 68700, 2016 WL 2957115, *2 (Nev. May 19, 2016) (quoting *City of Reno v. Int'l Ass'n of Firefighters, Local 731*, 340 P.3d 589, 593 (Nev. 2014)) (emphases in original); *Helfstein, supra*, 373 P.3d 921, at *2 (granting motion to compel arbitration of tort and contract claims and stating that "if the allegations underlying the claims so much as touch matters covered by the parties' agreements, then those claims must be arbitrated" (citation omitted)); *Rodriguez v. AT&T Servs., Inc.*, No. 2:14-cv-01537, 2015 WL 6163428, at *8 (D. Nev. Oct. 20, 2015) ("[S]o long as the phone call that allegedly triggered the offending credit inquiry collaterally touches upon the Business Agreement or has some roots in the contractual relationship between the parties, Plaintiff's claims fall within the scope of the arbitration provision."). Here, there is ***no*** reasonable interpretation of the Agreement's arbitration clause that would allow Plaintiff to evade arbitration. Once again, Plaintiff offers no legal authority to support her contention that certain of her claims cannot be arbitrated.[5]

There is no reason to bifurcate Plaintiff's so called "statutory" claim, which is actually a negligence *per se* cause of action that simply re-asserts Plaintiff's core allegation that Milliman failure to perform properly the work called for by the Agreement. Plaintiff cites no support for the notion that a negligence claim cannot be arbitrated if it involves an alleged breach of a statutory duty. On the contrary, the Nevada Supreme Court has ***required*** claims based on an alleged breach of a statutory duty to be arbitrated together with tort and contract claims where, as here, the plaintiff's "basis for claiming injury and grounds for redress stem from rights he allegedly received pursuant to" an agreement containing a broad arbitration clause. *Phillips v. Parker*, 106 Nev. 415, 418, 794 P.2d 716, 718 (1990) (compelling arbitration of Civil RICO and tort claims that "'relate to' the agreement as provided in the arbitration clause"). Additionally, enforcing the arbitration clause will not allow Milliman to "contract around" its statutory

[5] The only case Plaintiff cites in support of her bifurcation argument ***rejects*** bifurcation. *See Law Offices of Bradley J. Hofland, P.C. v. McFarling*, 2007 WL 1074096 (D. Nev. Apr. 9. 2007) (Plaintiff's Br., p. 10).

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obligations, as Plaintiff erroneously contends. Plaintiff can present her negligence *per se* claim in full at an arbitration.

Plaintiff's contention that her conspiracy claims cannot be arbitrated is likewise unavailing. The Nevada Supreme Court's decision in *Helfstein v. UI Supplies* is instructive here. There, the respondents argued that their cross-claims arising under an asset purchase and sale agreement ("PSA"), which contained an arbitration clause, had to be litigated in the District Court together with plaintiffs' claims arising under a separate consulting agreement, because the cross-claim defendants were "indispensable to the consulting agreement dispute and to respondents' defense against plaintiffs' claims." 373 P.3d 921, at *1. The Supreme Court rejected that argument, and required the cross-claims to be arbitrated as required by the PSA. *Helfstein* thus stands for the proposition that an otherwise valid and binding arbitration clause is enforceable, even if it requires a plaintiff to litigate in multiple forums. Of course, if the law were otherwise, a plaintiff could defeat an arbitration clause simply by suing multiple defendants, some of whom are governed by an arbitration agreement, some of whom are not. Clearly, that is not the law.

This Court did not "overlook" or "misapprehend" any of the arguments Plaintiff raises on this motion to support bifurcation. In the Order, and at the oral argument on Milliman's motion, the Court expressly—and correctly—stated that the substance of Plaintiff's claims matters more than the labels Plaintiff chose to attach to them.

C. <u>There Is No Need For This Court To "Clarify" Its Statement That "Plaintiff Has Not Pled Any Viable Causes of Action that Actually Belong to NHC's Creditors"</u>

This Court's statement that "Plaintiff has not pled any viable causes of action that actually belong to NHC's creditors" is neither a substantive determination on the merits of Plaintiff's claims, nor an infringement on the arbitration panel's jurisdiction. It does not affect the proofs either party will have to submit, the applicable legal standards, or the damages Plaintiff can claim. The holding is merely an acknowledgement that Plaintiff's claims against Milliman belonged to NHC, and do not belong to NHC's creditors.

Moreover, the Court's statement fully accords with Nevada law. As Milliman demonstrated in its motion to compel (*see* Reply Br., p. 8), any alleged harm NHC's creditors

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suffered is not actionable because it is derivative of the alleged harm to NHC. *See Pompei v. Clarkson*, No. 66459, 2016 WL 3486375, at *2 (Nev. June 23, 2016) (holding that creditors of an insolvent corporation do not have standing to "assert derivative claims on behalf of insolvent corporations"); *see also* Compl. ¶ 3 ("This complaint concerns certain providers of services to, and management of, NHC, and how their conduct . . . caused substantial losses to NHC and, ***ultimately***, the other parties represented by Commissioner.") (emphasis added). Likewise, an actuary cannot be liable for negligence to anyone other than the "affected insurer or the [Insurance] Commissioner." NRS 681B.250.

Notably, Plaintiff still has never specified which of their causes of action they contend belong to NHC's creditors, despite having had two briefs and an oral argument in which to do so. In support of this motion, Plaintiff merely cites to the first paragraph of its Complaint, which states generally that "Plaintiff… has brought this action on behalf of NHC, NHC's members, insured enrollees, and creditors." (Plaintiff's Br., p. 7). That generalized statement is not enough to state an actionable claim against Milliman on behalf of NHC's creditors.

The fact that Milliman has filed a proof of claim in the Receivership Action does not contradict the language at issue. This Court stated that "***Plaintiff's action against Milliman*** does not involve set offs or proofs of claim." (Order, p. 7) (emphasis added). As this Court correctly determined, "[t]his action is separate and apart from the Receivership Action and it neither threatens or states an interest in NHC assets or property." (*Id.*)

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CONCLUSION

For all of the reasons discussed above, Milliman respectfully requests that the Court enter an order denying Plaintiff's motion for reconsideration.

DATED this 16th day of April, 2018.

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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3883 Howard Hughes Parkway, Suite 1100, Las Vegas, Nevada 89169. On the below date, I served the above **MILLIMAN'S OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION** as follows:

☐	**BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
☐	**BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
☐	**BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
☐	**BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail address(es) set forth below.
☐	**BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
☐	**BY PERSONAL DELIVERY:** by causing personal delivery by _____, a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.
X	**BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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DATED: April 16, 2018.

/s/ Lyndsey Luxford
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