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 III of III

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CHRONOLOGICAL INDEX OF APPELLANT'S APPENDIX

VOL.	PAGES	DATE FILED	DESCRIPTION
I	APP00001-2	10/20/11	Consulting Services Agreement between Milliman, Inc. and the Culinary Health Fund
I	APP00003-4	9/10/12	Consulting Services Agreement between Milliman, Inc. and Hospitality Health
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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:

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via hand delivery on December 18, 2018.

/s/ Andrea Lee Rosehill
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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 REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

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 files her reply in support of her motion for the Court to reconsider its order regarding Defendant Milliman, Inc.'s ("Milliman") motion to compel arbitration ("Motion") pursuant to EDCR 2.24.

This reply 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 24th day of April, 2018.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff filed a brief motion for reconsideration to bring to this Court's attention three discrete issues: first, that there had been, in the interim between the oral argument in this case and the issuance of this Court's order, a decision involving almost identical facts that denied Milliman's motion to compel arbitration (making that two such decisions involving Milliman since September); second, that language in this Court's order should be clarified, as it could be read as a ruling on the merits of the claims instead of merely arbitrability; and third, that this Court's order should be clarified regarding claims that do not arise out of or relate to the agreement at issue (for example, claims that

Milliman conspired with other named defendants who are not subject to an arbitration agreement). Because each of these issues are grounds for reconsideration of this Court's order, this Court should grant Plaintiff's motion.

II. ARGUMENT

1. The Court Should Reconsider its Order in Light of the Iowa Order

This Court should reconsider its order in light of the Iowa Order. It is important to note that the Iowa Order involved an essentially identical arbitration provision, a contract between Milliman and a defunct CO-OP, many of the same causes of action asserted here, and the same policy considerations at issue here. As here, Milliman attempted to compel a private arbitration under New York law with limited discovery and no punitive damages, but the court rejected the effort. The court held that the liquidators were not bound to arbitrate, where they did not "stand in the shoes" of the failed CO-OP, where the causes of action (which again, are similar to those here) did not arise out of or relate to the agreement, and where the liquidator was vested with broad power to bring claims on behalf of policyholders and creditors, as well as on behalf of the defunct CO-OP. Second, the court relied on public policy and the language of the "comprehensive statute." 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.

Instead of facing the Iowa Order head on, Milliman "highlight[s] this Court's key rulings, and the precedent behind them…" *See* Opp., at 5. Although such an exercise is arguably beyond the scope of the original motion for reconsideration, Plaintiff briefly addresses these arguments in turn.

a. Milliman's Argument That Because Plaintiff is Suing to Enforce the Agreement, Plaintiff Must Abide by the Agreement's Arbitration Provision is Meritless Where Plaintiff Does Not "Stand in the Shoes" of NHC.

Milliman makes much of the idea that because Plaintiff is suing to enforce the contract, Plaintiff cannot disclaim the arbitration clause. Milliman's argument relies on *Ahlers v. Ryland Homes*, 126 Nev. 688, 367 P.3d 743 (2010) (unpublished), which held that a signatory to an

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agreement cannot simultaneously seek to enforce the agreement and avoid the arbitration clause. However, Plaintiff is not a signatory to the agreement, but a non-signatory; Milliman's argument puts the cart before the horse. The general rule is that a party ***cannot*** be bound to an arbitration provision in an agreement that it did not sign. *See, e.g. Truck Ins. Exch. v. Swanson*, 124 Nev. 629, 635, 189 P.3d 656, 659-60 (2008).

Milliman argues that Plaintiff should nevertheless be bound, because she "stands in the shoes" of NHC, and thus must abide by all of NHC's contractual obligations, including arbitration. Although Milliman cites to some case law to this effect, the law is not uniform. Plaintiff cited a number of cases in its Opposition to the Motion to Compel that held that a liquidator does not necessarily "stand in the shoes" of the insolvent insurer. Further, the Iowa Order – the subject of this Motion for Reconsideration – held the same.

An exception to the rule that non-signatories are not bound 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. *Id*. at 661. As explained in the Opposition to Milliman's Motion to Compel Arbitration, that exception requires the non-signatory to receive a direct benefit from the contract containing the arbitration clause. 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. Again, as noted in the Opposition to Milliman's Motion to Compel Arbitration, this logic applies. The Receiver is not the direct beneficiary of the Agreement. The Receiver represents a number of other interests (e.g., creditors, policyholders) and does not herself receive a "direct benefit" from the Agreement.

Although Milliman cites several cases where an insurance liquidator was compelled to arbitrate, many of these cases are distinguishable. For example, *Rich v. Cantilo & Bennett* specifically held that "for the actions belonging solely to the Receiver in its representative capacity or to parties other than [the insurance company] (such as [the insurance company's] creditors)…the Receiver is ***not bound*** by the arbitration agreement." 492 S.W.3d 755, 762 (Tex. Ct. App. 2016). The court ***rejected*** the argument that "because the 'factual underpinnings' of the Receiver's statutory claims are 'closely intertwined' with the common-law claims, the entire case is subject to arbitration, 'lock,

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stock, and barrel.'" *Id*. at n. 4.[1] Further, Milliman's cited cases are not binding, and the law in this area is not "uniform." The point of the motion for reconsideration was to bring to this Court's attention a case that specifically *denied* Milliman's Motion to Compel Arbitration; although in that case the contract was disavowed, that was a separate ground for denial of the motion to compel arbitration.[2] Regardless of whether it is now being heard by an appellate court, the Louisiana case reached the same conclusion.

Likewise, even under the Consulting Services Agreement, the arbitration provision would not be enforceable. Section 5 of the Consulting Services Agreement provides that New York law will govern the enforcement of the agreement. *See* Consulting Services Agreement at § 5, attached hereto as Exhibit A. It is clear that under New York law, an insurer's agreement to arbitrate is unenforceable against a statutory liquidator, even in actions where the same contract terms are in dispute. *See, e.g*., *Corcoran v. Ardra Insurance Co*., 567 N.E.2d 969 (N.Y. 1990) (refusing to compel arbitration in an action by the liquidator to recover reinsurance proceeds); *In re: Allcity Ins. Co.*, 66 A.D.2d 531, 535 (N.Y. App. Div. 1979) (refusing to enforce arbitration agreement in an insurance rehabilitation proceeding because "nowhere in [the New York liquidation statute] is there any indication that the Legislature intended to have rehabilitation effected in any forum but a *court* of law") (emphasis added); *Skandia Am. Reinsurance Corp. v. Schenck*, 441 F. Supp. 715, 723 n. 11 (S.D.N.Y., 1977)

[1] Other cases are likewise distinguishable. Milliman cites *Bennett v. Liberty Nat. Fire Ins. Co*., but that case is inapposite where the liquidator in that case "presented no evidence that enforcing the arbitration clauses here will disrupt the orderly liquidation of the insolvent insurer." *See* 968 F.2d 969, 972 (9th Cir. 1992). In *State v. O'Dom*, the plaintiff Commissioner was already supervising the insurance company when the agreements containing arbitration clauses were entered. *See State v. O'Dom*, 2015 WL 10384362, *4 (Ga.Super. 2015) ("As the Commissioner oversaw Southern Casualty during the formation of these Agreements, he should be subject to their obligations, including the obligation to arbitrate disputes.").

[2] Although the court found that the Liquidator was not trying to enforce the agreement, that was because the court found that the causes of action asserted did not "arise out of" or "relate to" the agreement. Other than the breach of contract and breach of the implied covenant of good faith and fair dealing claims that are asserted here, the claims asserted are similar. Likewise, in *Taylor*, the court found that the malpractice claim and the preference claim (the only two claims asserted) did not arise out of the agreement at issue. *See generally Taylor v. Ernst & Young, L.L.P*., 958 N.E.2d 1203 (Ohio 2011).

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("These arbitration clauses do not deprive this court of jurisdiction. Once a New York insurer is placed in liquidation, it may not be compelled to arbitrate . . . Indeed, the order of liquidation terminates the company's existence."); *Ideal Mut. Ins. Co. v. Phoenix Greek Gen. Ins. Co*., No. 83-CV-4687, 1987 WL 28636, at *2 (S.D.N.Y. Dec. 11, 1987) ("The liquidators of insurance companies are simply not bound to arbitrate claims involving the companies.") Indeed, in *Corcoran*, the court noted the "strong public policy concerns" in maintaining exclusive jurisdiction in state courts, explaining that "[a]rbitrators are private individuals, selected by the contracting parties to resolve matters important only to them. They have no public responsibility and they should not be in a position to decide matters affecting insureds and third-party claimants after the contracting party has failed to do so." *See Corcoran*, 567 N.E.2d 969, 973.

Finally, Milliman repeatedly states that there are no common claims brought by the Receiver on behalf of creditors or others. Although Milliman argues that simply alleging in the complaint that the claims are brought "on behalf of NHC, NHC's members, insured enrollees, and creditors" is insufficient, Nevada is a notice-pleading state. *See W. States Const., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992) ("Nevada is a notice-pleading state; thus, our courts liberally construe pleadings to 'place into issue matters which are fairly noticed to the adverse party.' A complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief sought.") (internal citations omitted). Here, the statutory claim is a claim properly asserted by creditors and policyholders. The first claim asserted against Milliman is based in NRS 681B, which provides standards for actuaries to hold to in their reporting to the Insurance Commissioner and is a statute designed to protect consumers, not the insurance companies. Further, actuarial opinions are public record; insureds and creditors rely upon their accuracy because absent the opinions showing that the insurance companies met certain standards, the public relies on the Insurance Commissioner to close the insurer.

Further, health care providers are due millions of dollars from members of NHC because of health care services provided to the members before the receivership. The health care providers have not been able to pursue those amounts because of the injunction language in the Receivership Order.

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These providers would have no recourse if it were not for the Receiver pursuing asset collection of the amounts due to the providers. The Receiver is pursuing those claims against third parties, such as Milliman, that contributed to the demise of NHC.

b. Milliman's Argument that Reverse Preemption Does Not Apply is Also Unavailing.

Milliman's argument that reverse preemption does not apply is also unavailing. As outlined in the Opposition to the Motion to Compel Arbitration, the McCarran-Ferguson Act exempts state laws regulating the business of insurance from preemption by federal statutes that do not specifically relate to the business of insurance, such as the FAA. 15 U.S.C. § 1012(b). The Supreme Court has created a three-part test to determine whether reverse-preemption of federal law through McCarran-Ferguson occurs. Specifically, a court is to examine whether: 1) the state statute was enacted for the purpose of regulating the business of insurance; 2) the federal statute involved "does not specifically relat[e] to the business of insurance"; and 3) the application of the federal statute would "invalidate, impair, or supersede" the state statute regulating insurance. *Humana Inc. v. Forsyth*, 525 U.S. 299, 307, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999). Here, as the Iowa Order found, each of these criteria is met, and accordingly, Nevada's Liquidation Act reverse-preempts the FAA under McCarran-Ferguson.

Milliman argues that the first and third of the criteria laid out by the Supreme Court have not been met. First, it argues, that the Nevada Liquidation Act was not enacted for the purpose of regulating the business of insurance. However, the Liquidation Act has everything to do with regulating the business of insurance; indeed, it authorizes the receiver to "conduct the business of the insurer" if appropriate. *See* NRS 696B.290(3).[3] *See also Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010) (holding that this prong was "clearly satisfied" and noting that "[w]e can hardly overstate the degree to which the regulation of insurance permeates this controversy. The very claims which [the defendant] would take to arbitration arise directly out of Kentucky's intense interest in the regulation of worker's compensation insurance... The [liquidation act at issue] is itself

[3] The fact that the statute also permits the receiver to do other things, like "take such steps as are authorized by this chapter for the purpose of rehabilitating, liquidating, or conserving the affairs or assets of the insurer" does not mean that the statute does not regulate the business of insurance.

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the ultimate measure of the state's regulation of the insurance business: the take-over of a failing insurance company."); *Washburn v. Corcoran*, 643 F. Supp. 554, 557 (S.D.N.Y. 1986) (explaining that the article of the New York Insurance Law which regulates the liquidation of domestic insurance companies is a law enacted by a State for the purpose of regulating the business of insurance, and that the FAA must yield to the state law). As the Iowa Order noted, the Supreme Court has reached the same conclusion, rejecting the argument that a state insurance liquidation statute is not an insurance law but a bankruptcy law, "because it comes into play only when the insurance company has become insolvent and is in liquidation, at which point the insurance company no longer exists." *See U.S. Dept. of Treasury v. Fabe*, 113 S. Ct. 2202, 2210 (1993). Instead, the Supreme Court held that "[t]he primary purpose of a statute that distributes the insolvent insurer's assets to policyholders in preference to other creditors is identical to the primary purpose of the insurance company itself: the payment of claims made against policies." *Id*. The Court went on to explain that "[t]he Ohio statute is enacted 'for the purpose of regulating the business of insurance' to the extent that it serves to ensure that, if possible, policyholders ultimately will receive payment on their claims. That the policyholder has become a creditor and the insurer a debtor is not relevant." *Id*.

Milliman also argues that there is no conflict between the Nevada Liquidation Act and the FAA. However, this was likewise addressed in the Opposition to the Motion for Reconsideration, where it was explained that application of the FAA would absolutely "invalidate, impair, or supersede" Nevada's Liquidation Act. 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). Applying the law of the domiciliary state, as well as centralized proceedings in one state's court, advances these purposes. *See Frontier Ins. Serv.*, 109 Nev. at 236, 849 P.2d at 3341; *In re Freestone Ins. Co.*, 143 A.3d 1234, 1260-61 (Del. Ch. 2016); *see generally Benjamin v. Pipoly*, 2003-Ohio-5666, ¶45, 155 Ohio App. 3d 171, 184, 800 N.E.2d 50, 60 ([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.") (emphasis in original).

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Finally, Milliman notes that even if the FAA was reverse-preempted by McCarran-Ferguson, the Nevada Arbitration Act is not. However, as explained in the Opposition to the Motion to Compel Arbitration, it is well-settled that where a general statute conflicts with a specific one, the specific one governs. *See, e.g.*, *State Dep't of Taxation v. Masco Builder*, 129 Nev. Adv. Op. 83, 312 P.3d 475, 478 (2013) ("A specific statute controls over a general statute"). Although Nevada has a general policy in favor of arbitration, the Liquidation Act creates a specific and detailed statutory scheme; this general policy in favor of arbitration cannot trump the specific statutory scheme laid out in the Liquidation Act.

c. Milliman's Argument that "Policy Considerations" Do Not Supersede the Agreement's Arbitration Clause is Meritless.

As in the Iowa Order, strong policy considerations weigh against arbitration. The Iowa Order explained 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*.

Plaintiff agrees that (5) is not relevant here, as Plaintiff has not sought to disavow the agreement. However, the other policy considerations are salient. Milliman argues that there is no express statement of purpose in Nevada's statute, as there is in Iowa's statute, that the goal is the "protection of the interests of insureds, claimants, creditors, and the public." *See* Opposition, at 8. However, the purpose of Nevada's statute is clearly the same. Nevada's statute incorporates the UILA, which has a general purpose 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). Similarly, the UILA's overall purpose is to protect the interests of policyholders, creditors and the public. *See, e.g*. NRS 696B.210, 696B.530, 696B540; *see also* Joint

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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").

Milliman also argues that there is no "unilateral" right of forum selection on behalf of the Receiver. However, the fact that the Receivership Order *authorizes* the receiver to proceed in various jurisdictions if necessary does not mean that the Receiver may be *compelled* to do so.[4] Indeed, the Ohio Supreme Court has held similarly, noting that "when allowed, forum selection belongs to the liquidator and the liquidator alone." *Taylor*, 130 Ohio St.3d. 411, 416. Likewise, Judge Cory's decision not to consolidate the action with the liquidation proceeding has no bearing on this inquiry.

Importantly, Milliman does not and cannot argue three of the policy considerations, which would clearly be disserved by private arbitration with limited damages: the public's interest in the proceeding, the Act's purposes of economy and efficiency, and the protection of the CO-OP's policyholders and creditors. Arbitration in a private forum would guarantee that the public has no way to monitor or observe the proceedings for the public to protect its own interests. It would also contravene the purposes of economy and efficiency, and permit only limited discovery. Finally, it would insufficiently protect the policyholders and creditors, who may be unable to recover damages that are purportedly limited by the arbitration agreement.

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

Milliman argues that bifurcation of claims – sending the contract claims to arbitration and keeping claims not arising out of or relating to the contract in this Court – is unnecessary here, where all claims arise out of or relate to the contract at issue. Specifically, Milliman argues that

[4] As Milliman points out, the Receiver did choose to proceed in federal court against the United States Department of Health and Human Services ("HHS"), although the suit was for declaratory relief, not money damages as Milliman suggests. The Receiver's case against HHS was dismissed by the Court on March 30, 2018.

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every cause of action is based on Milliman's "alleged failure to perform its contracted-for services adequately." However, courts examining similar claims have found them not to arise out of or relate to the contract at issue. For example, the Iowa Order found that claims for malpractice, breach of fiduciary duty, negligent misrepresentation, intentional misrepresentation, aiding and abetting breach of fiduciary duty, and conspiracy did not "arise out of" or "relate to" the same arbitration clause as at issue here, because 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. Similarly, in *Taylor*, the court held that a malpractice claim did not "arise from" the engagement letter where it instead arose from the powers given to the liquidator by the legislature and the false or misleading audit report filed with the Ohio Department of Insurance. *See Taylor v. Ernst & Young, L.L.P.*, 130 Ohio St. 3d 411, 421 (Ohio 2011).

Although the Ninth Circuit and the Nevada Supreme Court have interpreted language such as that at issue here broadly, Milliman cites no authority for a "but for" test: "but for the Agreement and the work Milliman did for NHC pursuant to it, Plaintiff would have no claims whatsoever." *See* Order, at 4. Indeed, the Ninth Circuit has held that the terms "arising out of" and "related to" "mark a boundary by indicating some direct relationship." *See United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 798 (9th Cir. 2017) (false claims act case had no direct connection to employment agreement and thus was not arbitrable, where legal basis of case would exist regardless of employment relationship). Although "relate to" is considered broad, there must be a boundary, "otherwise the term would stretch to the horizon and have no limiting purpose…" *Id*. (internal quotations omitted).

As noted above, the *Rich* court rejected an argument that the claims are so intertwined that they must all go to arbitration, instead holding that "for the actions belonging solely to the Receiver in its representative capacity or to parties other than [the insurance company] (such as [the insurance company's] creditors)…the Receiver is ***not bound*** by the arbitration agreement." 492 S.W.3d 755, 762. Here, as noted above, the statutory claim is a claim that does not arise out of the Agreement but rather state statute. The purpose of the statutory requirements is to protect

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policyholders and the state. Insureds and creditors rely upon actuarial records' accuracy to protect their interests. Parties cannot bargain away these statutory protections of third parties.

Finally, Milliman argues that the claims involving other defendants – conspiracy and concert of action – are also subject to arbitration, because if they were not, "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." *See* Opposition, at 11. This is a red herring. Plaintiff is not arguing that merely because Milliman is a co-defendant that ***no*** claims cannot be adjudicated in arbitration. Plaintiff is arguing that the claims which will necessarily involve discovery from other parties will not be able to be adequately adjudicated in a private forum with no jurisdiction over those parties.

Milliman's cited case, *Helfstein v. U.I. Supplies*, is not persuasive. *See* 127 Nev. 1140 (2010) (unpublished). In *Helfstein*, there were two agreements, one with an arbitration clause and one without. The *Helfstein* court found that the arbitration clause required arbitration even though the suit had originated over the agreement without the clause, despite one party's argument that the other party was indispensable to the dispute over the contract that did not contain an arbitration clause, and the defense against claims not involving the agreement with the arbitration clause. However, that case is not similar to the case at bar; this case involves a claim of conspiracy between multiple defendants, only one of whom is seeking to arbitrate the dispute, and only one of whom is party to an agreement containing an arbitration clause. Evidence regarding the interactions between all of the defendants will be relevant to proving the conspiracy and concert of action claims. As the other defendants will not be subject to the arbitrators' jurisdiction, Plaintiff will be unjustly prejudiced. Plaintiff can attempt to get discovery as to Milliman's involvement in the multi-defendant conspiracy, but will lack information regarding the other defendants, in the arbitration. Plaintiff can get discovery as to the other defendants in the Nevada litigation, but even if she gets a judgment, may not be able to enforce the judgment against Milliman, who will not be a party to the Nevada litigation. This result would be prejudicial to Plaintiff's ability to prove her claims and, ultimately, Plaintiff's ability to recover monies on behalf of policyholders and creditors.

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3. 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 consider clarifying its order where it is unclear as to whether the Court made a substantive ruling regarding creditors' rights. The parties agree that this Court's Order contained the statement that "Plaintiff has not pled any viable causes of action that actually belong to NHC's creditors." *See* Order, at 6-7. The parties also apparently agree that this statement is not meant to be a substantive determination of the merits of Plaintiff's claims, nor an infringement upon the arbitrators' jurisdiction. *See* Opp., at 11. Essentially, it seems that the purpose of this portion of the order was to reject Plaintiff's argument that because Plaintiff has alleged that she is bringing claims on behalf of creditors, insureds, policyholders, etc., she is not bound by the arbitration clause. However, the wording of the Order is problematic; a determination of whether the claims are "viable" or not is beyond the scope of a ruling on a Motion to Compel Arbitration.

This is especially so where there has been no discovery or briefing regarding the facts underlying these issues. As noted above, Milliman repeatedly says that there are no creditor claims, but health care providers are due millions of dollars from members of NHC because of health care services provided to the members before the receivership, and Plaintiff is pursuing litigation like this to ensure that those providers are paid. Furthermore, the statutory claims are based upon statutes designed to protect policyholders and creditors, not insurance companies.

As noted above, courts have held that common claims brought by a receiver (i.e., on behalf of others) are not arbitrable in this situation. *See Rich v. Cantilo & Bennett*, 492 S.W.3d 755, 762 ("for the actions belonging solely to the Receiver in its representative capacity or to parties other than [the insurance company] (such as [the insurance company's] creditors)…the Receiver is ***not bound*** by the arbitration agreement.").

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

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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 24th day of April, 2018.

GREENBERG TRAURIG, LLP

/s/ Donald L. Prunty, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2018, a true and correct copy of the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF 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/ Shayna Noyce
An Employee of GREENBERG TRAURIG, LLP

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EXHIBIT A

Milliman

Consulting Services Agreement

This Agreement is entered into between Milliman, Inc. ("Milliman") and **Hospitality Health** ("Company") as of **September 10, 2012.** Company has engaged Milliman to perform consulting services as described in the letter dated **April 24, 2012** and attached hereto. Such services may be modified from time to time and may also include general actuarial consulting services. These terms and conditions will apply to all subsequent engagements of Milliman by Company unless specifically disclaimed in writing by both parties prior to the beginning of the engagement. In consideration for Milliman agreeing to perform these services, Company agrees as follows.

1. **BILLING TERMS.** Company acknowledges the obligation to pay Milliman for services rendered, whether arising from Company's request or otherwise necessary as a result of this engagement, at Milliman's standard hourly billing rates for the personnel utilized plus all out-of-pocket expenses incurred. Milliman will bill Company periodically for services rendered and expenses incurred. All invoices are payable upon receipt. Milliman reserves the right to stop all work if any bill goes unpaid for 60 days. In the event of such termination, Milliman shall be entitled to collect the outstanding balance, as well as charges for all services and expenses incurred up to the date of termination.

2. **TOOL DEVELOPMENT.** Milliman shall retain all rights, title and interest (including, without limitation, all copyrights, patents, service marks, trademarks, trade secret and other intellectual property rights) in and to all technical or internal designs, methods, ideas, concepts, know-how, techniques, generic documents and templates that have been previously developed by Milliman or developed during the course of the provision of the Services provided such generic documents or templates do not contain any Company Confidential Information or proprietary data. Rights and ownership by Milliman of original technical designs, methods, ideas, concepts, know-how, and techniques shall not extend to or include all or any part of Company's proprietary data or Company Confidential Information. To the extent that Milliman may include in the materials any pre-existing Milliman proprietary information or other protected Milliman materials, Milliman agrees that Company shall be deemed to have a fully paid up license to make copies of the Milliman owned materials as part of this engagement for its internal business purposes and provided that such materials cannot be modified or distributed outside the Company without the written permission of Milliman or except as otherwise permitted hereunder.

3. **LIMITATION OF LIABILITY.** Milliman will perform all services in accordance with applicable professional standards. The parties agree that Milliman, its officers, directors, agents and employees, shall not be liable to Company, under any theory of law including negligence, tort, breach of contract or otherwise, for any damages in excess of three (3) times the professional fees paid to Milliman with respect to the work in question. In no event shall Milliman be liable for lost profits of Company or any other type of incidental or consequential damages. The foregoing limitations shall not apply in the event of the intentional fraud or willful misconduct of Milliman.

4. **DISPUTES.** In the event of any dispute arising out of or relating to the engagement of Milliman by Company, the parties agree that the dispute will be resolved by final and binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall take place before a panel of three arbitrators. Within 30 days of the commencement of the arbitration, each party shall designate in writing a single neutral and independent arbitrator. The two arbitrators designated by the parties shall then select a third arbitrator. The arbitrators shall have a background in either insurance, actuarial science or law. The arbitrators shall have the authority to permit limited discovery, including depositions, prior to the arbitration hearing, and such discovery shall be conducted consistent with the Federal Rules of Civil Procedure. The arbitrators shall have no power or authority to award punitive or exemplary damages. The arbitrators may, in their discretion, award the cost of the arbitration, including

Milliman

reasonable attorney fees, to the prevailing party. Any award made may be confirmed in any court having jurisdiction. Any arbitration shall be confidential, and except as required by law, neither party may disclose the content or results of any arbitration hereunder without the prior written consent of the other parties, except that disclosure is permitted to a party's auditors and legal advisors.

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

6. **NO THIRD PARTY DISTRIBUTION.** Milliman's work is prepared solely for the internal business use of Company. Milliman's work may not be provided to third parties without Milliman's prior written consent. Milliman does not intend to benefit any third party recipient of its work product, even if Milliman consents to the release of its work product to such third party.

7. **USE OF MILLIMAN'S NAME.** Company agrees that it shall not use Milliman's name, trademarks or service marks, or refer to Milliman directly or indirectly in any media release, public announcement or public disclosure, including in any promotional or marketing materials, customer lists, referral lists, websites or business presentations without Milliman's prior written consent for each such use or release, which consent shall be given in Milliman's sole discretion.

8. **CONFIDENTIALITY.** Any information received from Company will be considered "Confidential Information." However, information received from Company will not be considered Confidential Information if (a) the information is or comes to be generally available to the public through no fault of Milliman, (b) the information was independently developed by Milliman without resort to information from the Company, or (c) Milliman appropriately receives the information from another source who is not under an obligation of confidentiality to Company. Milliman agrees that Confidential Information shall not be disclosed to any third party.

Milliman, Inc.	**Hospitality Health**
By: Mary van der Heijde 10/12/12	By: Bobbette Bond
Signature and Date	Signature and Date
Mary van der Heijde, Principal & Consulting Actuary	Bobbette Bond, Director of Public Policy
Print Name and Title	Print Name and Title

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 PLAINTIFF'S MOTION FOR RECONSIDERATION

BEFORE THE HONORABLE KATHLEEN DELANEY
DISTRICT COURT JUDGE

DATED: TUESDAY, MAY 1, 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.
PATRICK BYRNE, ESQ.
MATTHEW PRUITT, ESQ.

* * * * *

LAS VEGAS, NEVADA; TUESDAY, MAY 1, 2018

P R O C E E D I N G S

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THE COURT: Page 13, Nevada Commissioner of Insurance vs. Milliman.

Let's have appearances, please.

MR. FERRARIO: Mark Ferrario for Commissioner, your Honor.

MR. PRUNTY: Don Prunty for Commissioner.

THE COURT: Good to see you all.

MR. BYRNE: Good morning, your Honor. Pat Byrne, and with me is Justin Kattan from the law firm of Dentons, on behalf of Milliman.

MR. KATTAN: Good morning, your Honor.

THE COURT: Good morning.

MR. PRUITT: Good morning, your Honor. Matthew Pruitt for Insure Monkey and Alex Rivlin.

THE COURT: Good to see you all this morning.

This is on for Plaintiff's motion for reconsideration. Of course as always with this matter, very thoroughly briefed. Always appreciate it. It makes it much easier for us to prepare. There's a lot of information here that's being revisited. Obviously, I'm just going to start, before we get going Mr. Ferrario, by

saying I'm looking at this from the standpoint of really is there something to reconsider. Did I misapprehend the law. Did I misapply the facts. I think the focus is more on the legal argument, but come on up and you tell me.

I have no qualms, if I have made an error, and upon further review I will not hesitate to reconsider myself. If I'm looking at it and what I'm basically seeing is an argument that is just revisiting the same argument but asking me to decide in a different way, I'm not sure that meets the standard. In any event, you tell me why I should see this as the former and not the latter.

MR. FERRARIO: Sure.

These are always tough motions to bring to try to convince a court that perhaps they missed something, or they got it wrong the first time.

I guess I'm going to start with really what sparked the motion, which was, quite frankly, the breadth of the Court's order. On a very simple motion to remand or to send the case to arbitration, which should have been a 2-line order, we end up with this multi-page, multi-paragraph document that quite frankly went beyond what was in front of the court. We've addressed that in our pleadings.

I think it's incumbent upon the court to make it clear what exactly was involved there. All we're saying

is the claims that were asserted against Milliman need to be arbitrated, which was the issue presented to your Honor. Then this should have been a 2-line order. And so you can see where we've addressed that. We wanted to make it clear, and I think, maybe, perhaps some of the pleadings that were filed by Defendants have made it clear that these weren't rulings on the merits, they were ruling on substantive matters. For example, we were talking in anticipation of arguing this motion this morning. We have claims by providers that didn't get paid. Those are third parties. We're charged with recovering that. You know, I don't think that this court is meaning to say that in that context we may have to go to arbitration. Those are the things we need clarified just on a very basic level.

I think that had this been the one sentence order I think it should have been, one paragraph order, some of what we argue here we wouldn't have to bring to your Honor's attention. That's the first thing I would articulate.

In terms of, you know, the other reason why we brought the motion is as you can see we -- after the argument we got a case from Iowa. Now, granted this is an Iowa --

THE COURT: That wasn't a one- or two-line order.

MR. FERRARIO: Because they granted my position, which you would have to actually say more then just it goes there. In that case I think it is -- look, the point I was going to call to your Honor's attention, just to cut to the chase. If you look at the section in that opinion where the court talks about the policy interest involved, which is on -- it's attached to our brief as Exhibit 1. It's 1, 2, 3, 4, 5 pages in.

I guess this is -- that court took, I think, a hard look at this situation, and it was a situation that we have presented here, quite frankly, and articulated for policy concerns, which we think militate in favor of this court reconsidering its order.

The first one was the public interest in the proceeding. I don't think there can be any question that this isn't the State of Nevada. Those that were effected by the demise of the co-op have an interest in this proceeding. The only reason I'm standing here is because of the statutory scheme that allows a receiver to come in and try to, in effect, clean up a mess in an insurance context.

2, the liquidator's right of forum selection under the act. We addressed that previously. And the policy reasons behind that are usually quite simple. We're looking for efficient, effective way to bring these things

to a close.

3, the act's purposes of economy and efficiency. Again that is why, at least in Ohio, Louisiana, now Iowa, and even in other departments in this court, when you're going to deal with actions involving those related to a failed insurance company, they are typically handled in one forum. And that would be here in the State of Nevada, by splitting things off, by forcing us to pay for 3 arbitrators, by doing all the rest we're going against the very purpose of the statute which is diminishing the statute, or diminishing the assets of the estate. I think that's contrary to the policy.

Then the protection of their, the insurance policy holders and creditors. Again, if we keep that as the paramount purpose -- which I think it is under the Act -- protection of the policy holders and creditors, that's why we're here. For no other reason. Then the court's order sending us off to New York violates that protection.

The fifth one, which doesn't apply here, was there they had the liquidator's authority to disavow the agreement. That's in only one of the policies in Iowa. It doesn't apply here.

Having said that, I think what the Iowa decision, which is new authority, your Honor, and granted it's not the Nevada Supreme Court, but counsel here at the last

hearing on his replay stood up and rattled off 5 cases or so saying they all stood for this proposition. We've gone back through that and if you look at them -- I didn't have the chance to because I'd already argued, and I didn't have a chance to look at the replay, but when you boil it down he's got one or two federal cases that, you know, I quite frankly think pale in comparison to the cases we have here now coming out of the state courts dealing with the state policy issues. That starts with the Ohio or goes to Louisiana. Now we have Iowa. We, I think, correctly characterize the court's decision in this context as an outlier.

You asked for some errors of law. The thing that I guess we probably didn't focus on -- I'll confess to the court -- that we didn't focus enough on this in the original briefing. But you will look at the agreement requires the application of New York law. In New York arbitration provisions, like, such as this, are not given effect in this context.

THE COURT: They're disfavored or not allowed.

MR. FERRARIO: You do not have to abide by the arbitration provision by statute in New York. We addressed that in our reply. They're just gone. That I think is something that does need to be visited here. I confess to the court, we did not focus enough on that in

the original pleading. We dealt with that in the reply. I'll point the court to that section.

I apologize here, Judge. I had kid duty this morning. I rushed to get my daughter off. I left my stuff at home and I'm going off of Mr. Prunty's. In our reply we deal with the New York issues, your Honor. We cite the agreement. So that's something this court needs to revisit.

So I think we're asking for, one, if the court is going to maintain a referral to arbitration, which we think violates the policy consideration behind that, then we would want the court to clarify exactly the scope of what claims are referred so that we're not arguing down the road that perhaps this arbitration might encompass things that were not intended.

It seems to me from reading the pleadings that they concede these were not just considerations on the merits and no one is being precluded from raising issues in the future. And the situation I raised with your Honor in terms of, like, provider claims, which are third-party claims and those are something we're going to go out and try to get money so that we can pay. Okay. Those are claims for third parties.

Your Honor, on the New York issue on page 5 of our reply -- and they selected New York law -- you can see

there we cite a number of cases where New York courts refused to enforce arbitration agreements and insurance rehabilitation proceeding, because no where in the New York liquidation statute is there an indication that the legislate intended to have rehabilitation effective in any forum but a court of law. And so that is just one cited. We have many there. So that's an issue of law that I think the court needs to revisit again. That was something we did not feature prominently enough in our original brief.

So I understand the analogy you used with the other fellow that was here. You were kind of way over here and had to move him a long way. He was unsuccessful. I don't know, judging your facial expression, if I'm successful in moving the needle.

THE COURT: I wasn't as far away from your analysis. His was very creative, but there was very little legal support for it, if any.

But here, as you said, you may not have focused -- we may not have focused on New York law indicating a comparison to Nevada law to New York law though. Is that something that has a nuance.

Those decisions that you point to focused on what that distinction is and that New York law compels and appears to indicate that really court of law has to deal

with these issues. Nevada has a very strong preference to have things be in arbitration, if they appropriately belong there.

MR. FERRARIO: I want to -- look, I believe you have to be candid with the court when you argue. If we were not in the receivership context, in the context that we are, then I think the arguments that Milliman were making would be compelling.

I have argued arbitration on both sides, you know. One lost and the court pointed that out. That's where I think we kind of got lost. You can look at all the statutes around the country that deal with rehabilitating insurance companies, and we've certainly done it. We have cases. The one overarching purpose of all the statutes is to maximize recovery for creditor and policy holders, shareholders, to minimize the loss that occurs. That's where it all starts. There are variants around the country where, you know, some have express provisions that say certain things and other don't. But the one overarching principle is what I just said. And a lot of the distinctions that are being brought to light by Milliman simply really don't have any merit in terms of the analysis we're doing here, if you go back to the overarching concern.

If you look at the policy considerations that the

Iowa court looked at, okay, then I think the result is fairly clear. And one thing that troubled me when I was reading the pleadings is Milliman comes to this court and says look what Judge Corey did. We asked Judge Corey to consolidate these cases and he didn't do it. And somehow they want to infer that that was a decision by Judge Corey that might be anything more then, hey, go to another department. I've got enough on my plate. Judge Corey didn't say that you had to go arbitrate. Judge Corey didn't on that. He simply said I'm not going to consolidate all these cases in one department.

The interesting thing is had he done that would Milliman be saying -- would they abandon their argument that there had to be arbitration. Because if that's the case, then I'll go back to Judge Corey and say, look, what is going on down here in Judge Delaney's department is going to result in a diminution of the value of the estate. We need you to reconsider.

THE COURT: I only have a smile on my face because this is reminiscent of another completely unrelated case. Judge Corey had a piece. I had a piece. Judge Corey actually issued an injunction against my piece of the puzzle, which the Supreme Court said, you can't do. So I was appreciative of that. He and I had a chuckle over it.

MR. FERRARIO: I looked at that and I'm saying why are they citing that. That was a simple motion for Judge Corey. He didn't opine on the merits.

THE COURT: That wasn't what I was really hanging my hat on my decision making, but fair enough.

MR. FERRARIO: So they cite that. I thought it was --

THE COURT: The bigger point you're making that resinates with the court is is our decision an outlier decision when we look at how other folks have addressed this. We can see in the Iowa decision differences of opinion obviously how the -- whether there was reverse preemption related here. Whether this is a business of insurance and has to go a certain way. Whether or not we discount those things.

In signing off on the order, yes, it is a voluminous order. The court perceived it more as a, these were the arguments and ultimately the outcome of the court was to grant it to go to arbitration, not necessarily intended to be an everything under the sun goes into the arbitration. So I don't disagree that we definitely need clarification there. But whether or not we need to change our opinion entirely on going to arbitration, you have compelling arguments. I want to hear from counsel.

MR. FERRARIO: Then I can deal with the rest.

THE COURT: You may have some rebuttal.

All right.

MR. KATTAN: Morning, your Honor. Thank you for having me again.

I am in the enviable position, I think, of standing here trying to justify an order that was, first of all, correct. And second of all, well supported by persuasive, and times on point controlling case law.

The Plaintiff's position here is essentially that this court should substitute the judgment of an Iowa trial court for its own well considered judgment. And not only is there no legal basis to do so, should the court do so, it would be an error of law. That would be an error of law.

THE COURT: I know you have a place you want to go.

MR. KATTAN: I'm happy to hear.

THE COURT: I'm only looking at my clock. I have a business court CLE that I have to get across -- not across town, but down town for here in a bit. I'm just trying to cut to the chase.

One of the things I will admit that didn't resinate with me but did come up in these arguments and in the pleadings was if we are supposed to be looking at this New York law, did we really do a good service from the New

York law perspective. Now, I don't disagree, or I think I said a minute ago and I'll repeat it again, that there very well may be different policy considerations that play, public policy from New York as far as arbitration versus Nevada. I'm not sure I had a chance to look at that sufficiently. But if you have argument on that point, I'd sure like to hear that. Otherwise, whatever you want to touch upon.

MR. KATTAN: Sure. And the first thing I'd just point out, and I think this is telling about the strength of this argument actually, not only as counsel conceded did they not really raise it in their original motion, they didn't even raise it on our motion for reconsideration. They brought it up for the first time in the middle of their reply brief on this motion for reconsideration. We didn't even have the chance to respond to that. So I think that speaks volumes to the strength of that argument.

What I'd say is that New York law categorically does not stand for the proposition they say it does, which is that under no circumstances can a rehabilitator or liquidator anywhere, when the claim is arising under New York law, be forced to arbitrate their claims. What those cases hold is --

THE COURT: The reason I focus on that is that's

where you're from. You ought to know about that more so then we do. Go ahead.

MR. KATTAN: So what those cases hold is that absent express permission to do so by the legislature, the New York superintendent of insurance, not liquidators everywhere, but New York superintendent of insurance does not have authority to arbitrate claims brought by or against him in New York. The legislator had not given that express authority.

Here, by contract, the receivership order that's in place -- and it's pursuant to which the liquidator here was appointed -- expressly authorizes the Plaintiff to prosecute, quote, "suites and other legal proceedings," end quote, on behalf of NHC. That's the receivership order Section 14.

So already the whole basis for New York law, which is that the insurance law, Article 16 of the insurance law, does it expressly provide or authorize the New York superintendent of insurance to arbitrate. Here you have the opposite. You have this liquidator expressly authorized to arbitrate.

So those cases do not hold that statutory liquidator generally or in another state cannot be compelled to arbitrate. In fact, the seminal case on this issue notably was not cited in their brief. Although the cases

they do cite rely on it. It's a 1958 case called Knickerbocker Agency vs. Holz. It's a decision by our Court of Appeals, which in New York is the highest court. But that case expressly declined to address the issue of whether the bar on the superintendent of insurance arbitrating would apply if the superintendent was forced to go litigate in another state that required arbitration. So the court was asked to address that issue in Knickerbocker and the court said, well, no. We're not touching that. If the Superintendent of insurance has to go sue a party in another state where they require arbitration and arbitration is authorized, we're not touching that issue. That's not what this is based on.

So truly we're even one step removed from that here. This is not a situation where the New York superintendent of insurance was authorized to arbitrate in New York, that case and that line of cases has no bearing on whether an out-of-state liquidator, in an out-of-New-York jurisdiction is precluded from arbitrating claims just because they happen to -- the substance of those claims happens to arise under New York law. So I hope that answers your question about the substance of New York law.

The other thing I would just point out is obviously there is a question we haven't gotten into, but New York law under the contract applies to the substantive claims.

The only case I was able to find on point on this issue about what law applies, that applies in Nevada law. There's a Ninth Circuit case called Dees vs. Billy. In Dees vs. Billy the Ninth Circuit case from 2009, in that case the parties entered into an agreement that a California choice of law provision and the Ninth Circuit said that, no, you have to apply Nevada law. You have to apply Nevada law to the question of enforceability of an arbitration provision regardless of whether there is a another state's choice of law provision. So not only does New York law not stand for the proposition that they say it does, I'm not -- based on the case law that we've seen, not even -- I don't even think it's correct that New York law would apply to the question of enforceability of an agreement.

So I think if that addresses your Honor's questions on that --

THE COURT: Okay. Fair enough.

You know, obviously I spent a little time looking at the Iowa decision. There's a lot of language in there that talks about really the liquidator's ability to disavow certain things and take a different tact. And there's all kinds of public policy reasons from the Iowa court's perspective as to why that should be the case. Much of that was argued by Mr. Ferrario. I don't want to

belabor the argument, and I don't want to extend the argument too long, but maybe it would be beneficial to touch on that.

MR. KATTAN: I'm happy to address those.

Let me first, before I go into the specific policy issues that he raised, let me first say under no uncertain terms Plaintiff has never cited one case, and the Iowa case is included in this, where a Plaintiff has sued to enforce an agreement, like the Plaintiff concededly does here, yet, has been allowed to evade that contract's arbitration provision.

Remember in the Iowa decision the Iowa court found -- we disagreed with its decision, but we'll have to deal with that on appeal. The Iowa court found apparently because they didn't bring contract claims that the claims didn't arise under the contract. Here the Plaintiff cannot raise that argument. They haven't raised that argument. And when you look at all the case law that was cited in your order, in this court's order, uniformly the cases in which the courts have held that a litigator who sues to enforce the insolvent insurer's agreement they must abide by that contract arbitration provision. There's not a case that has been cited either in the Iowa order or in Plaintiff's brief to the contrary.

So now let's get to the Iowa policy issues that the

Plaintiff raised here. And let's look at the 5 policy issues. The first, as this court just mentioned, is disavowed here. There is no right to disavow. That isn't a small thing.

The liquidators in Iowa have the ability under the statute to disavow contracts, not only executive contracts, the court found. We disagreed with that ruling, but we'll have to deal with that on appeal. It's not an issue here because here concededly the Plaintiff doesn't have that ability. That's policy issue number 1.

The second policy issue is economy and efficiency. I take it from Plaintiff's argument they've now abandoned their request to bifurcate, since they talk about streamlining and efficiency. But the Nevada Supreme Court -- this is something we dealt with in the last oral argument, the original briefing and something that's in this court order. The Nevada Supreme Court has expressly recognized that the cost savings and efficiency of streamlining discovery and arbitration that's going to enure to the benefit of NHC's creditors here. That's the DR Horton case. That takes care of economy and efficiency. No law that the Plaintiff has cited that says that arbitration is somehow going to vitiate the efficiency or harm the economy of their ability to

prosecute these claims.

The third issue, this idea of the right to choose forum. Again, we respectfully disagree with the Iowa court's decision on that. But that aside, here, clearly the liquidator does not have the unilateral right to choose what forum they go to. The rehabilitation order, receivership order in this case, no where in that is that right granted.

As we discussed at the last oral argument, the Plaintiffs here went and sued the federal government in federal court. They didn't do that because they thought they'd gain some tactical advantage. It's because they had no choice. They had to sue the federal government in federal court because they don't have the unilateral right to create jurisdiction where it otherwise doesn't exist.

As was raised earlier the third issue is the Plaintiff wanted to litigate this in the liquidation court as part of the liquidation proceedings, and they didn't have the right to dictate the forum there either, as Judge Corey found. So that policy point, the unilateral right to choose the forum clearly doesn't apply here.

Finally, the protection of the public. Counsel went on at length about protecting the public, but this is again something that was dealt with on the original order. The fact that the arbitration provision may limit damages,

may limit discovery is not an appropriate consideration when considering whether or not to enforce an arbitration clause.

In this court's order, this court cited the Third Circuit in Sutter. The Third Circuit in Sutter said, it is true, as the liquidator stresses, that if the district court or an arbitrator should decide the insurance agreement does not cover the disputed expenses, the estate will be smaller and that issue was resolved in the liquidator's favor. But the mere fact that the policy holders may receive less money does not impair the operation of any provision of New Jersey Liquidation Act. It's the same thing here.

You cannot vitiate an arbitration clause just because the liquidator claims, hey, it's going to make my case worse. That's not a valid consideration.

So that deals with the Iowa court's public policy issues one by one. The other point that the Plaintiff did not respond to and is something we raised in our opposition to their motion is that, frankly, the Iowa court erred by considering those public policy arguments to begin with. The Ninth Circuit in Quackenbush, the US Supreme Court in AT&T vs. Concepcion and the Southland case expressly held that general public policy arguments cannot be considered to vitiate an otherwise valid and

binding arbitration clause.

So whatever else this court does, this court cannot -- doesn't have discretion to consider these state court public policy issues to vitiate an otherwise binding arbitration clause under Ninth Circuit law, under Supreme Court law. Admittedly, it's not a decision by the Nevada Supreme Court, but those decisions are certainly on point and persuasive. And this court was correctly persuaded by them and cited them in its original order.

THE COURT: Thank you. I appreciate that very much.

Mr. Ferrario, any comments.

MR. FERRARIO: Your Honor, I'm going to go right to the cases Counsel cited at the end. If this were outside the receivership context, those cases might have merit. They don't speak to what we have here. That's the starting point for all of this. We made this point earlier, and we made it again in our pleadings. The only reason the receiver is here is because of statutory scheme that has been developed in Nevada for the rehabilitation of insurance companies. The receiver is indisputably not a party to the agreement. Okay. That's a major distinction that you see in the case we cited the first time around.

The cases he talks about in a private arbitration

context, where we're not in a receivership status under insurance rehabilitation context, I would agree. I conceded that the first time around. Because we're here, it changes everything. Which is why you have the Iowa decision, which they may not like. You have the decision in Louisiana. You have the decision in Ohio that we cited. And we have decisions in other departments in the Eighth Judicial District Court that say where you have this situation, you have to get deference to the choice of forum by the receiver. That's the first point that he made when he is trying to distinguish New York law. And this is a point I made in my argument. They come up with these fine distinctions, but they're distinctions without a difference.

The fact that Nevada gives the option to us to choose what we think is the most efficient forum doesn't mean that it -- you somehow ignore what exists in New York. That it's somehow different. That's a distinction without a difference. I would encourage your Honor rather then listen to me quote the New York cases or listen to counsel talk about it, read the New York cases. They also address, as Mr. Prunty said during the argument, in those cases there were arbitration agreements that were not enforced.

THE COURT: As was pointed out Counsel, not only

did this not come up in the original argument, it didn't even come up in the motion. We now have something on reply. Perhaps the easiest thing for the court to do is give each counsel the opportunity to spend a little bit of additional time briefing that issue to put that to bed once and for all. Otherwise, I am basically making a call on something that just came up in the reply for the first time.

MR. FERRARIO: Again, I think that's a great idea. You know what --

THE COURT: I'm not trying to make extra work, but I think this record, whatever it ultimately ends up being, does need to address this choice of law issue squarely. I appreciate counsel was prepared here today, Mr. Kattan, to talk about it, but I will be candid, you know, when the court looks at it and sees it coming up in the reply that way, it raised the eyebrow, but it didn't prompt the court to go spend a bunch of time. Because by the time I'm preparing this yesterday, I didn't have the time to go look into that. But there is some concern there of making a complete record as to how that choice of law, if at all, effects. And there was a recitation to a Ninth Circuit case that's very compelling. I wrote it down as it was being made. It's something that the court would want to see. But it would be easier for the court

to defer to counsel to put that in briefing then for the court to try and do it on its own.

MR. FERRARIO: I'll never tell a judge not to give additional briefing when you want it. How long will it take us to give a supplemental brief.

MR. PRUNTY: What, 2 weeks.

MR. BYRNE: Your Honor, how do you want to proceed. The argument has been initially briefed in their reply. So what we can do to short circuit this is we could do -- they could do a new motion or we --

THE COURT: A sur-opposition, that would address the item raised in the reply. And we could do a sur-reply.

MR. PRUNTY: One point I would like to raise, not quite right, is those arguments as to New York law were originally in the motion. If the court would like, I can point out where those cite cases --

THE COURT: You might need to do that.

MR. FERRARIO: We didn't properly feature it. I think we footnoted it. We were looking at other issues. That was our issue. I think Mr. Byrne's suggestion is good.

MR. BYRNE: Your concern is if this goes up you want to make sure the record is fleshed out for the Supreme Court.

THE COURT: Correct.

MR. BYRNE: Since they keyed the issue up in their reply, we'll do a sur-opposition. They can then do a sur-reply. And we can come back and argue.

THE COURT: Let's do that. I'm not anticipating a lot of lengthy argument. I want to make it convenient for the parties. I appreciate having you come back is not convenient regardless for Mr. Kattan, but if you can do this, I'm happy to do it as quickly as possible.

MR. KATTAN: If I may. I have to confer with my colleagues in terms of when they can get their papers in. We'll reach out to --

MR. BYRNE: We'll coordinate. Does that make sense.

THE COURT: What I'll do then is I will -- let me continue this out 30 days, just for something to be in the system so it's not completely off. Then when you all communicate with each other and you tell me the brief time you want and what you've agreed upon and when you want to come back to calendar, we'll do a quick adjustment to the calendar.

MR. BYRNE: Can I clarify for the record that this briefing is not to address any issue other then the question of (a), whether New York law applies. And (b), assuming that we do have to look at New York law, whether

New York law says what the Plaintiff say it does.

THE COURT: Correct.

And what would come into that, whether it applies or not, the Ninth Circuit case.

MR. BYRNE: We'll restrict it to application of choice of law principle.

MR. FERRARIO: And the Ninth Circuit, as indicated.

THE COURT: Yeah.

MR. KATTAN: And the substance of New York law.

THE COURT: Substance of New York law.

What you said, Mr. Kattan. I'm not trying to deviate from that. I just want to indicate part of whether or not the choice of law applies. I was, again, compelled by your recitation to the Ninth Circuit case and there might be some other aspect of that and how that would work. And then ultimately if we are to assume arguendo New York applies, then, again, what that stands for and delve into those things and give the court the opportunity to look at those cases. But that's only limited to that.

So 30-day continuation for this argument. Subject to change base on the parties agreement to what their briefing schedule is.

THE CLERK: May 29th at 9:00.

CERTIFICATE

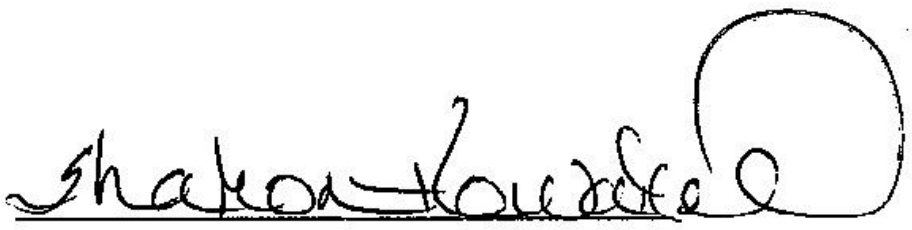
OF

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
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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 SUPPLEMENTAL BRIEF IN 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 Supplemental Brief in Opposition to the Motion for Reconsideration filed by Plaintiff, the Commissioner of Insurance, Barbara D. Richardson, in her official capacity as Receiver for Nevada Health CO-OP ("Liquidator").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION[1]

The Liquidator's eleventh-hour reliance on New York law does not warrant reconsideration or reversal of this Court's March 8, 2018 Order granting Milliman's motion to compel arbitration. First, although there is no relevant conflict between Nevada and New York law, the Court correctly relied on Nevada and federal law in its Order. *See Dees v. Billy*, 357 F. App'x 813, 815 (9th Cir. 2009). The Liquidator's position also contravenes the U.S. Supreme Court decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58–60 (1995), which holds that if parties to a contract intended for a choice-of-law provision to eliminate, impair or alter an otherwise enforceable arbitration provision, they must explicitly state that intention in the relevant agreement. The Milliman-NHC Agreement expresses no such intent.

In any event, New York law does not preclude arbitration of this Liquidator's claims against Milliman. Rather, the cases the Liquidator cites, and other relevant authority from the New York Court of Appeals (the State's highest court), hold that the ***New York Superintendent of Insurance*** (the "Superintendent"), when acting as liquidator pursuant to ***New York*** 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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Law § 7401, *et seq.*, cannot be compelled to arbitrate claims brought on behalf of or against ***a New York insurer*** because the New York statute does not expressly authorize him to do so. *Knickerbocker Agency, Inc. v. Holz*, 149 N.E.2d 885, 890 (N.Y. 1958) ("[T]he Legislature, in its wisdom, has seen fit to withhold the requisite statutory authorization for arbitration in controversies where one of the parties is an insurance company in liquidation."); *Corcoran v. Ardra Ins. Co., Ltd.*, 567 N.E.2d 969, 972–73 (N.Y. 1990). This rule does not apply here, where the Nevada Liquidator was appointed pursuant to the Nevada liquidation statute and a Nevada Receivership Order that expressly authorizes her to "initiate and maintain actions at law or equity ***or any other type of action or proceeding of any nature***," and to "[i]nstitute and prosecute… any and all suits ***and other legal proceedings***." (Receivership Order, §§ 14(a)(ii), (h) (emphasis added)). The New York Court of Appeals' interpretation of the New York Insurance Law does not, and cannot, abrogate the very Receivership Order that grants the Nevada Liquidator her power to litigate against Milliman on NHC's behalf.

Moreover, we are aware of no case—and the Liquidator cites none—where either the New York Court of Appeals, or any other court, has applied New York law to preclude a non-New York liquidator from arbitrating claims initiated outside of New York on behalf of or against a non-New York insurer. On the contrary, in *Knickerbocker*—the seminal case which held that the Superintendent-as-liquidator cannot arbitrate claims brought under the New York liquidation statute—the Court of Appeals declined to extend its holding to claims brought outside of New York, and against nonresidents of New York. 149 N.E.2d at 891. And at least two courts—including one in New York—have rejected such an application of New York law. *See Bernstein for & on Behalf of Com'r of Banking & Ins. of State of Vt. v. Centaur Ins. Co.*, 606 F. Supp. 98, 103 (S.D.N.Y. 1984) ("Because this case is not within the exclusive jurisdiction of the state Supreme Court and is not one brought under Article XVI of the New York Insurance Law, it is

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not governed by *Knickerbocker*."); *Fla. Dept. of Ins. v. Debenture Guaranty*, No. 95.-1826-CIV-T-17E, 1996 WL 173008, at *3 (M.D. Fla. Apr. 1, 1996).

For all of the reasons articulated below, as well as in Milliman's briefs supporting its motion to compel, in its opposition to the Liquidator's motion for reconsideration, and at the hearings on the respective motions, the Liquidator's motion for reconsideration must be denied.

II. ANALYSIS

A. Federal Law and Nevada Law Apply To the Issue of Enforceability of the Agreement's Arbitration Provision

The Liquidator's position concerning choice of law is directly contrary to Nevada law, *see Dees*, 357 F. App'x at 815 (holding that, under Nevada choice of law rules, "Nevada law applies to the question whether the arbitration agreement is enforceable," even where the relevant agreement contained a California choice-of-law provision), and U.S. Supreme Court precedent. *Mastrobuono*, 514 U.S. at 58-62.

In *Mastrobuono*, the Court held that a contractual choice-of-law provision cannot vitiate an otherwise enforceable arbitration provision unless the parties expressly state that intention in the relevant agreement. *Id*.; *Preston v. Ferrer*, 552 U.S. 346, 362–63 (2008) (same); *see also* 31 Thomas E. Carbonneau, *Moore's Federal Practice* § 906.02[3] (3d ed. 2016) ("[A] contractual reference to state law will displace the FAA only when the parties expressly recognized that the state law contained a restriction on the right to arbitrate, and expressly agreed that the restriction applied to their arbitration."). Here, no provision in the Agreement expressly—or even impliedly—states that in the event of NHC's liquidation, the parties would forgo their right to arbitration. The Agreement's selection of the "substantive contract law of the State of New York" (Agreement, ¶ 6, Ex. A to Milliman's Motion To Compel Arbitration) does not, in and of itself, evidence such an intent. *See Preston*, 552 U.S. at 361-63.

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B. New York Law Does Not Preclude the Liquidator from Arbitrating Her Claims Against Milliman

In all events, the Liquidator grossly misstates New York law. New York law does not prohibit arbitration where, as here, a non-New York liquidator brings claims against a non-New York resident outside of a New York liquidation. Rather, the New York Court of Appeals has made clear that the prohibition on arbitration 1) applies to claims by or against the New York Superintendent under Article 74 (formerly Article XVI) of the New York Insurance Law, and 2) is tied directly to the limits of the New York Superintendent's statutory authority.

1. The New York Insurance Law does not apply here, where the governing Nevada liquidation statute and Receivership Order authorize the Liquidator to arbitrate

Simply put, the New York Superintendent cannot arbitrate claims brought under the New York liquidation statute because the New York legislature has not expressly allowed it. In *Knickerbocker Agency, Inc.*, the Court of Appeals stated that the Superintendent would need the express authorization of the New York legislature to arbitrate such claims. The Court further held that, unlike the Nevada Liquidator here, the New York Superintendent lacks the requisite authorization, and therefore he was not bound by a contractual arbitration provision:

> While it is true that the Superintendent of Insurance, as statutory liquidator, for all practical purposes takes the place of the insolvent insurer, and would thus seem to be subject to the contractual provision requiring arbitration, as Preferred would have been, it may nevertheless be fairly said that ***the Legislature never contemplated turning over liquidation proceedings, and incidental actions and proceedings, to private arbitrators*** to administer. In the words of Judge Van Voorhis, when writing for the Appellate Division in Matter of *Kingswood Management Corp*…., "It was not intended ***without express statutory authorization*** that arbitrators, who are private individuals, who are subject to selection by the parties themselves, and who are charged with the execution of no public trust, should determine these matters."
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> * * *
>
> [I]n view of the fact that Article XVI contains no statutory authorization for arbitration, [the Supreme Court] may not be ousted of jurisdiction in favor of an arbitrative tribunal.

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149 N.E.2d at 889–90 (citations and quotation marks omitted; emphasis added).

The Court drew a relevant distinction between the New York liquidation statute and the U.S. Bankruptcy Code—the latter of which, like the Nevada Receivership Order, expressly permits a receiver to arbitrate:

> That Congress, by making express provision for arbitration in the Bankruptcy Act, in certain instances, may have regarded arbitration as helpful, is not of moment here. The plain fact is that our Legislature, in enacting article XVI of the Insurance Law, relating to, *inter alia*, the liquidation of insolvent insurance companies, saw fit to withhold the requisite statutory authorization for arbitration. Such a withholding of permission by our Legislature, in the light of Congress' express grant of authorization in bankruptcy matters, serves to aptly point up the fact that the arbitration forum was never intended by our Legislature to supersede the Supreme Court in proceedings affecting insolvent insurance companies in liquidation.

Id. at 891.

The Liquidator here is not acting under the restrictive New York Insurance Law. *See* Receivership Order, §§ 1, 2 (vesting Liquidator with the authority and powers expressed in NRS 896B). Rather, she brings claims against Milliman pursuant to the Nevada liquidation statute and Receivership Order which do not confer "exclusive jurisdiction" over claims collateral to the liquidation proceeding on any court (and certainly not the New York Supreme Court), and which expressly allow the Liquidator 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***." (Order, §§ 14(a)(ii), (h) (emphases added)). New York law does not, and cannot, abrogate the clear terms of the Nevada Receivership Order pursuant to which this Nevada Liquidator was appointed.[2]

[2] In *Costle v. Freemont Indemnity Co.*, 839 F. Supp. 265, 275 (D. Vt. 1993), which this Court cites in its Order (*see* p. 5), the court rejected a similar attempt, by the Vermont insurance liquidator, to rely on New York law to avoid arbitration. The court held that, unlike the New York statute, the Vermont liquidation order "gives the liquidator the power to pursue collection in other jurisdictions and to institute 'any and all suits and other legal proceedings.' This Court interprets 'other legal proceedings' to include arbitration proceedings." *Id*. (citation omitted).

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The cases the Liquidator cites in her reconsideration reply brief simply reaffirm the inapposite *Knickerbocker* rule that the New York Superintendent cannot arbitrate claims brought under the New York liquidation statute because the New York legislature has not allowed it. For example, in *Corcoran v. Ardra Ins. Co., Ltd.*, the New York Court of Appeals stated:

> Although the Legislature has granted the Superintendent plenary powers to manage the affairs of the insolvent and to marshal and disburse its assets, the statutory scheme does not authorize his participation in arbitration proceedings. Over 30 years ago this Court held, when examining an earlier version of the Insurance Law, that absent express authority to do so the Superintendent could not engage in arbitration when acting as a liquidator (*see, Matter of Knickerbocker . . .*). ***Despite that ruling and periodic amendments to the Insurance Law, the Legislature has not granted the Superintendent the authority to arbitrate disputes***. Under the statute's provisions, the subject matter of the claims against Ardra must be litigated in Supreme Court.

567 N.E.2d at 972–73 (emphasis added). *See also Matter of Allcity Ins. Co.*, 66 A.D.2d 531, 535 (N.Y. App. Div. 1979) ("Nowhere in the [New York Insurance Law] is there any indication that the legislature intended to have rehabilitation effected in any forum but a court of law.").

Thus, the New York courts have not precluded arbitration based on esoteric "public policy concerns," as the Liquidator wrongly contends (Reconsideration Reply, p. 6). On the contrary, the New York Court of Appeals has expressly acknowledged—as this Court did in its Order—there is no "public policy exception from the general rule of arbitrability mandated by the FAA." *Fletcher v. Kidder Peabody & Co., Inc.*, 619 N.E.2d 998, 1006 (N.Y. 1993). While the New York ***liquidation statute*** may reflect that state's policy to have the all of the Superintendent's liquidation-related claims be tried in a single forum, that statute is inapplicable here. The relevant ***Nevada*** statute, and the Receivership Order entered pursuant to it, reflects a different policy choice—*i.e.*, to allow the Nevada liquidator to litigate in other jurisdictions and "other legal proceedings," including arbitration.

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2. New York law does not bar an out-of-state liquidator from arbitrating claims against non-New York residents

Recognizing that the New York Insurance Law governs liquidation-related claims "by the Superintendent of Insurance," 149 N.E.2d at 889, and that other state and federal statutes allow an insurance liquidator to arbitrate, the New York Court of Appeals in *Knickerbocker* limited its holding in two meaningful respects. The court stated that the statutory preclusion on arbitration did not apply to claims either brought outside of New York or involving New York nonresidents:

> Plainly, we cannot foresee, and, in any event, we cannot control, what disposition would be made by the courts of sister States assuming they had jurisdiction of the parties and subject matter of arbitration provisions in suits there between nonresidents of New York and insolvent insurance companies in liquidation. Their disposition of such cases would be their own concern, and in no event, would their determinations be controlling upon us.
>
> * * *
>
> Petitioners' argument that the Legislature has no power to grant to the courts of this State exclusive jurisdiction over claims of an insurance company in liquidation against nonresidents has no relevancy here. We are not here concerned with nonresidents. Both petitioners are residents of the State of New York; Preferred was an insurance corporation which was organized under the laws of the State of New York; and the Supreme Court of the State of New York has jurisdiction both over the parties and the subject matter.

Id. at 891.

No subsequent New York decision—or any other case—has extended *Knickerbocker*'s holding to preclude arbitration of claims brought by a liquidator outside of New York, which claims do not arise under the New York liquidation statute, against New York nonresidents.[3] To the contrary, at least one New York federal court decision has rejected a liquidator's attempt to extend *Knickerbocker* in such circumstances. In *Bernstein v. Centaur Ins. Co.*, the court held:

> [N]o state law explicitly precludes arbitration of insurance cases and the case law inferring such a rule does so with reference to

[3] The cases the Liquidator cites in her Reconsideration reply brief involve only claims brought by or against the New York Superintendent.

> cases brought within the jurisdiction of the state Supreme Court. Because this case is not within the exclusive jurisdiction of the state Supreme Court and is not one brought under article XVI of the New York Insurance Law, it is not governed by *Knickerbocker*.

606 F. Supp. at 103; *Fla. Dept. of Ins. v. Debenture Guaranty*, 1996 WL 173008, at *3 (compelling arbitration of claims brought by Florida insurance commissioner as receiver of insolvent Florida insurer even though contract containing the applicable arbitration clause also included a New York choice of law provision). Here, like in *Bernstein*, New York's exclusive jurisdiction rule is inapplicable because "[n]either of the parties has claimed that this case is under the exclusive jurisdiction of the New York State Supreme Court[.]" 606 F. Supp. at 103.[4]

3. New York law accords with relevant Nevada and federal authority and therefore mandates arbitration of the Liquidator's claims against Milliman

Because New York law does not preclude arbitration of the Nevada Liquidator's claims brought under the Nevada liquidation statute, New York law mandates arbitration just as Nevada and federal law do. *See State v. Philip Morris Inc.*, 30 A.D.3d 26, 31 (N.Y. App. Div. 2006) ("Arbitration is strongly favored under New York law. . . . Any doubts as to whether an issue is arbitrable will be resolved in favor of arbitration."), *aff'd*, 869 N.E.2d 636 (N.Y. 2007).

The New York Court of Appeals has held that where, as here, a party is seeking to enforce a contract, it must abide by that agreement's arbitration clause. *See God's Battalion of Prayer*

[4] The *Bernstein* court also rejected the liquidator's argument that New York public policy "weighs against enforcement of the arbitration clause." *Id.* The court held that because the McCarran-Ferguson Act only preempts state *laws*, not policy, the FAA mandated arbitration. *Id.* Likewise, the Liquidator cites no New York decision contravening the well-settled rule that 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. While the Liquidator relies on *Washburn v. Corcoran*, 643 F. Supp. 554, 557 (S.D.N.Y. 1986), in her Reconsideration reply brief for the proposition that the New York liquidation statute was enacted "for the purpose of regulating the business of insurance," (*see* p. 8), that decision is inapposite because: 1) the New York Insurance Law does not govern the Liquidator's claims here; and 2) the court found that the action concerned "the relationship between the insurance company and the policyholder," which is not true of the Liquidator's claims against Milliman. *Id.* at 556. Although not relevant to the Liquidator's motion here, Milliman does not concede that New York law would reverse-preempt the FAA in an action involving the New York Superintendent as plaintiff against a third-party defendant like Milliman in an ordinary breach of contract or tort action.

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Pentecostal Church, Inc. v. Miele Assocs., LLP, 845 N.E.2d 1265, 1267 (N.Y. 2006) (plaintiff claiming breach of contract is bound by that agreement's arbitration clause because "it may not pick and choose which provisions suit its purposes, disclaiming part of a contract while alleging breach of the rest"); *Arrowhead Golf Club, LLC v. Bryan Cave, LLP*, 59 A.D.3d 347, 347 (N.Y. App. Div. 2009) (same). And where, as here, a plaintiff's contract and tort claims arise from the same facts, those claims must be arbitrated together. *See Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987) ("If the allegations underlying the claims 'touch matters' covered by the parties' . . . agreements, then those claims must be arbitrated, whatever the legal labels attached to them."); *Szabados v. Pepsi-Cola Bottling Co. of New York*, 174 A.D.2d 342, 343 (N.Y. App. Div. 1991) ("[T]ort claims which are integrally linked to an arbitrable dispute [must] be submitted for resolution in arbitration.").

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 1st day of June, 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 SUPPLEMENTAL BRIEF IN 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: June 1, 2018.

/s/ Gaylene Kim
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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 SUR-REPLY IN SUPPORT OF 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, pursuant to this Court's Order, hereby files her sur-reply in support of her motion for the Court to reconsider its Order regarding Defendant Milliman, Inc.'s ("Milliman") motion to compel arbitration ("Motion").

This sur-reply 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 June, 2018.

GREENBERG TRAURIG, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Following oral argument on Plaintiff's motion for reconsideration, this Court ordered additional briefing on two issues: first, whether New York law applies to govern the dispute between Plaintiff and Milliman, and second, if New York law applies, what it requires under these circumstances.[1] Pursuant to this Court's Order, Milliman filed its sur-opposition on June 1, and Plaintiff files this sur-reply on June 29. For the reasons outlined below, including the prohibition on

[1] Milliman makes much of the idea that this is an "eleventh-hour" argument by Plaintiff. While the bulk of Plaintiff's Opposition to Milliman's Motion to Compel Arbitration was focused on the Receiver's ability to litigate the dispute in the courts of Nevada as opposed to being compelled to arbitrate, Plaintiff did include cases and argument as to New York law in its Opposition. *See* Opposition, at 18, n. 9.

compelling insurance receiver arbitration under New York law, this Court should reconsider its Order and deny Milliman's Motion to Compel Arbitration.

II. ARGUMENT

A. For the Reasons Stated in the Original Opposition to Milliman's Motion to Compel Arbitration, and Motion for Reconsideration, this Court Should Find Nevada Law Does Not Support Arbitration.

As discussed in the original Opposition to the Motion to Compel Arbitration, the Motion for Reconsideration, and the Reply in support of the same, this Court should find that Plaintiff is not bound by the arbitration clause. Specifically, as already briefed, (1) the McCarran-Ferguson Act operates to reverse-preempt the FAA, (2) Plaintiff, as a non-signatory, is not bound to arbitrate where she never agreed to do so, and (3) the statutory scheme, the Receivership Order and public policy considerations dictate that the case should be heard in the courts of Nevada. Further, as explained in the Motion for Reconsideration, the recent Iowa Order, as well as the September Louisiana Order, both denied Milliman's efforts to compel arbitration under similar circumstances which included the same contract language, making this Court's decision an outlier. As such, this Court should hold that the case should proceed in this Court.

B. If This Court Orders That Plaintiff is Otherwise Bound by the Arbitration Provision, that Provision must be read in Conjunction with the Choice of Law Provision Requiring New York Law, Which Refuses to Compel Arbitration Against Receivers.

If this Court determines that the parties are otherwise bound by the Agreement's arbitration clause, that clause must be read in conjunction with the Agreement's choice of law provision – which requires application of New York law to the "construction, interpretation, and enforcement" of the Agreement without regard to its conflicts of law provisions. New York law, under a long line of cases beginning with *Matter of Knickerbocker Agency (Holtz)*, 4 N.Y.2d 245, 149 N.E.2d 885 (N.Y. 1958) ("*Knickerbocker*"), set forth in the Motion for Reconsideration and herein, prohibits the compelling of arbitration against an insurance receiver. Thus, the parties themselves adopted the general New York law principal that would prohibit compelling the Insurance Commissioner, as

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Plaintiff in this case, into arbitration. As stated in *Ardra v. Corcoran*, "the parties had reason to anticipate at the time the contracts were executed that New York law applied to them and ***to know from established precedent that arbitration was not an authorized remedy under [receivership actions] in the event of [the company's] insolvency***." *Ardra v. Corcoran*, 567 N.E. 2d 969, 973, 77 N.Y.2d 225 (N.Y. 1990) (emphasis added).

1. The Choice-of-Law Provision must be read with the Arbitration Provision.

Milliman argues, in a cursory fashion, that Plaintiff's position concerning choice-of-law is "directly contrary to Nevada law…and U.S. Supreme Court precedent." *See* Sur-Opposition, at 4. This is not accurate; the original parties chose New York Law, the case law that Milliman cites is distinguishable, and the choice-of-law provision must be read in conjunction with the arbitration provision.

a. Dees v. Billy is Not Controlling

Milliman points to *Dees v. Billy*, an unpublished Ninth Circuit case, to show that Plaintiff's position is "directly contrary to Nevada law." *See* 357 F. App'x 813 (9th Cir. 2009) (unpublished disposition). However, *Dees* is not published, not binding, and in any event, not on point. In that case, a magistrate judge had held that a California choice-of-law provision within an agreement containing an arbitration provision meant that the question of whether the arbitration provision was enforceable should be decided under California law. The Ninth Circuit reversed in a very brief decision, finding that the court must apply Nevada's "substantial relationship" test to determine whether the arbitration clause was enforceable. Applying that test, the Court held that where a Nevada citizen signed the agreement in a Nevada doctor's office, where he was referred by his Nevada primary physician, and had no reason to believe that he would be undergoing any type of treatment in California at the time he signed the agreement, Nevada law should apply to the question of whether the arbitration agreement is enforceable. The court then found that the arbitration provision was not enforceable because it was a contract of adhesion.

In *Dees*, the court does not analyze the choice-of-law provision itself, but simply notes there was a California choice-of-law provision in the agreement. Here, the provision specifically states that New York law is to be applied ***without regard to its conflicts of law analysis***; there is no mention

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of such a phrase in the *Dees* order. Given the plain language of the clause itself, no conflicts of law analysis is required. *See OrbusNeich Medical Co., Ltd., BVI v. Boston Scientific Corp.*, 694 F.Supp.2d 106 (D. Mass. 2010) ("...the phrase "without regard for the conflicts of laws provisions" unambiguously expresses the parties' intention to exclude consideration of all conflicts of law provisions in determining which law to apply..." and explaining that "[t]his, in and of itself, indicates to this court that the parties have selected Massachusetts law to govern all aspects of their dispute, without regard to their substantive or procedural nature."); *Brill v. Regent Communications, Inc.*, 12 N.E.3d 299, 308 (Ind. Ct. App. 2014) ("What the additional phrase [without regard to conflicts of law provisions thereof] accomplishes is to place not only the substantive matters but also the procedural matters under the law of the specified state," as the "additional phrase 'without regard...' must be given meaning"); *see also In re Sterba*, 852 F.3d 1175 (9th Cir. 2017), Tashima, J. concurring (choice-of-law provision stating "without regard to conflicts of law principles" means "without regard to any analysis that would otherwise be called for under § 142 of the Restatement"); *see generally Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 465, 306 P.3d 360, 364 (2013) ("A basic rule of contract interpretation is that every word must be given effect if at all possible. A court should not interpret a contract so as to make meaningless its provisions.") (internal quotations and citations omitted).[2]

Further, in Dees, the Ninth Circuit found that the Magistrate Judge erred when he or she "used the choice-of-law provisions within the arbitration agreement to determine the foundational question of whether the arbitration agreement itself was enforceable." Again, the Dees court did not discuss whether the clause itself specifically addressed what law to apply to the enforcement of the

[2] In *IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A.*, 20 N.Y.3d 310, 314 (N.Y. 2012) the court held that a conflicts of law provision need not state "without regard to conflicts of law principles" in order to take advantage of New York's substantive law. *Id.* at 315. In that case, there were two choice-of-law provisions in two different contracts. One said that it was to be applied "without regard to conflicts of law principles" and one did not. One party argued that the failure to include the "without regard" language had the effect of only permitting New York *conflicts-of-law principles* to apply, *not* New York *substantive* law. So, for the purpose of that case, the court held that there was no difference between the two clauses: both would accomplish the application of New York substantive law. Interestingly, New York law in regards to conflict of law is very broad, to encourage parties to choose New York for their transactions. One statute states that the parties to a contract covering $250,000.00 or more may choose New York law whether or not the contract bears a relationship to the state of New York. *See id.*

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agreement. Here, however, the choice of law provision states that "[t]he construction, interpretation, **and enforcement** of this Agreement shall be governed by the substantive contract law of the State of New York without regard to its conflicts of law provisions." *See* Agreement, attached to the original Motion to Compel Arbitration as **Exhibit A**. Again, because the language of the agreement is plain, there is no need for further analysis.

Finally, this agreement was *Milliman's* form agreement. It is black-letter law that a contract must be construed against the drafter; Milliman, having presumably insisted on including this provision it the contract it drafted and used throughout the country, cannot now seek to avoid its consequences. *See generally Dickenson v. State, Dept. of Wildlife*, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994) ("when a contract is ambiguous, it will be construed against the drafter."). As such, this Court should respect the parties' choice of New York law, including its exemption from insurance receivership arbitration as more fully addressed below.

b. Mastrobuono is Not Controlling

Next, Milliman turns to the Supreme Court cases *Mastrobuono* and *Preston*, citing them for the proposition that a choice-of-law provision cannot vitiate an otherwise-enforceable arbitration provision unless specifically stated. *See* Sur-Opposition, at 4. Again, this is not persuasive.

In *Mastrobuono*, the Supreme Court was faced with a situation where the parties had agreed on New York law via a choice-of-law provision, and had also agreed to arbitration in accordance with the rules of the National Association of Securities Dealers. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). However, under New York law, arbitrators were not permitted to award punitive damages. *Id.* at 54. Accordingly, after the arbitrator awarded punitive damages, the defendant filed a motion to vacate the punitive damages award. *Id.* The Court granted certiorari because of a circuit split regarding "whether a contractual choice-of-law provision may preclude an arbitral award of punitive damages that would otherwise be proper." *Id.* at 55. Ultimately, the Court concluded that the award of punitive damages was proper. It focused on the fact that the conflicting provisions created an ambiguity, explaining that courts must construe ambiguous language against the drafter, and that the drafter cannot claim the benefit of the doubt, having drafted an ambiguous document. *Id.* at 62-63. Further, the Court explained that the document

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must be read to give effect to all provisions, so the Court "read 'the laws of the State of New York to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators.'"[3]

Preston, decided in 2008, addressed a circumstance where the parties' agreement provided for arbitration, but disputes regarding California's Talent Agency Act were within the California Labor Commissioner's exclusive administrative jurisdiction. The Court held that "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." *See Preston v. Ferrer*, 552 U.S. 346, 350 (2008).

However, both of these cases dealt with situations where the arbitration clause and the choice-of-law clause were arguably in conflict from the outset. In *Mastrobuono*, the arbitration clause by requiring adherence to a particular set of securities arbitration rules impliedly permitted punitive damages, and the law of New York prohibited arbitrators from awarding them.[4] Likewise, in *Preston*, the parties agreed to arbitrate something that was typically within the exclusive jurisdiction of the Labor Commissioner.

Here, however, there is no inherent conflict in the agreement. Had NHC, prior to receivership, had a dispute with Milliman, the parties may have been bound by the arbitration clause. However, as briefed previously and further discussed below, Plaintiff, as receiver, is not bound to the same extent that the original signatory would have been. The conflict was not inherent. Rather the two provisions read together merely limited the application of arbitration as to the receiver and arose *because of the receivership*. The question is whether, under New York law, a receiver can be forced to arbitrate. New York courts have repeatedly said that absent express statutory authorization for arbitration in an

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[3] Nevada has applied *Mastrobuono*, but only in a circumstance where the conflicts of law provision was different from that here. *See WPH Architecture, Inc. v. Vegas VP, LP*, 360 P.3d 1145 (2015). It stated that the contract would be "governed by the law of [Nevada], unless otherwise provided." Elsewhere, it said that AAA rules would apply. Thus, it was logical for the court to find that Nevada law governed the substantive aspects and the AAA rules governed the procedural aspects.

[4] In *Mastrobuono*, the court found that the conflict gave rise to an ambiguity, which was resolved by both construing the contract against the drafter and by giving effect to every word and reading the two provisions in a way that was consistent. *See* 514 U.S. 52, 63-64. To the extent there is any ambiguity, Milliman was the drafter and as such "cannot now claim the benefit of the doubt." *Id.* at 63.

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insurance receivership, arbitration is not permitted. "Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1748 (2011) ("The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements *according to their terms* so as to facilitate streamlined proceedings.") (emphasis added); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 1806 n. 12 (1967) ("...the purpose of Congress in [adopting the FAA] was to make arbitration agreements as enforceable as other contracts, but not more so.").

Further, neither of these cases had a conflicts of law provision like the one here. The choice-of-law provision in this case states that "[t]he construction, interpretation, and enforcement of this Agreement shall be governed by the substantive contract law of the State of New York without regard to its conflicts of law provisions." Where a choice-of-law provision specifically mentions "enforcement," at least one court has held that whether the court should compel arbitration is a question of enforcement to be resolved under the law selected. *See Mount Diablo Medical Center v. Health Net of California, Inc.*, 101 Cal.App.4th 711, 724 (Cal. 2002). There, the court found that that language in the choice-of-law clause was "unquestionably" broad enough to include state law on the subject of arbitrability. *Id.* The next step, according to that court, is to determine whether the provision of state law reflects a hostility to the enforcement of arbitration agreements that the FAA was designed to overcome; if it is, it contravenes the FAA, but if not, it should be interpreted to incorporate the state's law governing the enforcement of arbitration agreements. *Id.* at 724-25. Here, the New York law is not one that reflects a hostility toward arbitration; instead, it simply involves statutory interpretation by New York's highest court (discussed further below) that claims for or against insurance receivers must be litigated in the trial courts. *See generally Diamond Waterproofing Systems, Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 253 (N.Y. 2005) (where parties provide that New York law will govern the agreement and its enforcement, it adopts New York's rule that statute of limitations questions are for the courts).

Finally, where the challenge is to the validity of the arbitration provision *itself*, such as a

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McCarran-Ferguson challenge, *Mastrobuono* is inapposite. As one recent decision pointed out, *Mastrobuono* concerned the "*scope* of a *valid* arbitration agreement," and its analysis applies "only to an agreement covered by the FAA." *See Milmar Food Group II, LLC v. Applied Underwriters, Inc.*, 58 Misc.3d 497, 504-505 (N.Y. Sup. Ct. 2017) (emphasis in original). Where there was a claimed McCarran-Ferguson challenge, the court held, *Mastrobuono* was inapplicable. *Id.* at 505. The court explained that "… the very point at issue is whether the FAA applies at all, or whether, to the contrary, the FAA is reverse preempted by virtue of the McCarran–Ferguson Act and the arbitration agreement invalidated by [Nebraska law]."[5] Likewise here, the parties do not agree that the arbitration provision is valid, but instead Plaintiff disputes that she is bound by the provision, for reasons including the McCarran-Ferguson Act.

2. Under New York Law, Arbitration Would Not be Permitted in These Circumstances.

Under New York law, arbitration would not be permitted in these circumstances. Milliman makes three arguments as to why New York law would not prohibit arbitration here: specifically, (1) that unlike New York, Nevada law authorizes a receiver to arbitrate, (2) that New York law does not bar an out-of-state liquidator from arbitrating claims against non-New York residents, and (3) that New York law would in fact mandate arbitration here. Each of these arguments should be rejected. The Court should find that New York law would preclude arbitration here.

a. Milliman's Argument that New York and Nevada Law are Different in Meaningful Ways Fails.

Milliman's first argument is that New York and Nevada law are different in ways that matter here. Milliman is wrong. Milliman concedes, as it must, that there is a long line of New York cases disallowing arbitration in receivership proceedings. Beginning at least as early as 1958, with the seminal *Knickerbocker* case, 4 N.Y.2d 245, 149 N.E.2d 885 (N.Y. 1958), the highest court in New York (the Court of Appeals of New York) has held that the New York trial court (the Supreme

[5] Under the Nebraska Uniform Arbitration Act, agreements to arbitrate future controversies in insurance contracts are invalid. *Id.* at 502.

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Court), together with the Superintendent of Insurance, was intended to have exclusive jurisdiction over claims ***both for and against*** an insurance company in liquidation.[6] *Id.* at 250. Although Milliman implies that New York has some specific statutory provision prohibiting arbitration in this context, that is not accurate. The New York statute, like the Nevada statute, is silent on the issue of arbitration. Like Nevada's statute,[7] the New York statute simply vests jurisdiction in the New York Supreme Court for all claims involving an insolvent insurance carrier.[8] The *Knickerbocker* court reasoned from the ***absence of express statutory authority to arbitrate***: given the public interest at stake in insurance receiverships, an arbitrator's limited record and limited judicial review, and "in keeping with the overall scheme and plan" of the statute, the courts are the appropriate place for receivership proceedings. *Id.* at 252.[9] In *Washburn v. Corcoran*, the court explained that "Article

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[6] The holding that claims both by and against the liquidator were not subject to arbitration was not simply a careless statement. The holding was over a dissent that expressly raised the issue that Milliman does here, namely, that "there is nothing [in New York law] requiring that claims *by* the liquidator be determined in the liquidation proceedings." *Id.* at 255 (emphasis in original). Nevertheless, the majority rejected this distinction, finding that claims *by and against* the liquidator were meant to be litigated in the Supreme Court.

[7] *See* NRS 696B.190, entitled "Jurisdiction of delinquency proceedings; venue; exclusiveness of remedy; appeal." That statute provides that "[t]he district court has original jurisdiction of 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." Further, it provides that "[n]o court has jurisdiction to entertain, hear or determine any petition or complaint praying for the dissolution, liquidation, … or receivership of any insurer, or for… other relief preliminary, incidental or relating to such proceedings, other than in accordance with NRS 696B.010 to 696B.565, inclusive." Likewise, the Receivership Order held that for the safety of the public and the claimants against NHC, all Property – including claims and defenses of NHC – is within the sole and exclusive jurisdiction of the Eighth Judicial District Court, to the exclusion of all other tribunals. *See* Exhibit B to the Opposition, Receivership Order ("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 [NHC].") This exercise of jurisdiction is consistent with Nevada law. See NRS 696B.190 (court may make all necessary or proper orders to carry out the purposes of the delinquency proceedings); NRS 696B.200 (providing for jurisdiction over persons obligated to the insurer due to transactions between themselves and the insurer).

[8] New York's statute vests jurisdiction in the Supreme Court via section 7417: "The superintendent represented by the attorney general shall commence any proceeding under this article by an application to the supreme court, in the judicial district in which the principal office of the insurer is located, for an order directing such insurer to show cause why the superintendent should not have the requested relief. On the return of such order, and after a full hearing, which shall be held without delay, such court shall either deny the application or grant it together with such other relief as the nature of the case and the interests of policyholders, creditors, shareholders, members, or the public may require." Nevada's analogous statute is similar, stating that "[t]he Commissioner shall commence a delinquency proceeding authorized under this chapter, the Attorney General representing the Commissioner, by filing a petition in a court of proper jurisdiction praying for appointment of the Commissioner as receiver of the insurer." *See* NRS 696B.250.

[9] "Experience has demonstrated that, in order to secure an economical, efficient, and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders, it is essential that the title, custody, and control of the assets be intrusted to a single management under the supervision of one court. Hence other courts, except when called upon by the court of primary jurisdiction for assistance, are excluded from participation. This should be particularly true as to proceedings for the liquidation of insolvent insurance companies. Since, therefore, another *court* should not be permitted to interfere with the jurisdiction of the court in which the liquidation proceeding is pending,

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74 requires that the liquidation of an insurance company be conducted within the jurisdiction of the New York Supreme Court," and cited several statutory provisions: §§ 7417, 7403, 7405, 7409, 7432, 7434. The court then explained that New York's highest court had held "that this grant of jurisdiction was exclusive and further required that all proceedings in liquidation be unified under the single management of one court." *Id.* at 556.[10]

Numerous New York courts have since agreed that arbitration is inappropriate in this context. For example, in *Ardra v. Corcoran*, 567 N.E. 2d 969, 77 N.Y.2d 225 (N.Y. 1990), the New York Superintendent of Insurance, on behalf of a defunct insurer, brought suit against a Bermuda reinsurance corporation seeking reinsurance balances owed to the defunct insurer. The Bermuda company moved to dismiss and compel arbitration. *Id.* at 970. The Court of Appeals held that the statutory scheme governing insurance liquidation "does not authorize [the Superintendent's] participation in arbitration proceedings." *Id.* at 972. In so holding, the court noted that "[a]rbitrators are private individuals, selected by the contracting parties to resolve matters important only to them. They have no public responsibility and they should not be in a position to decide matters affecting insureds and third-party claimants after the contracting party has failed to do so. Resolution of such disputes is a matter solely for the Superintendent, subject to judicial oversight, acting in the public interest." *Id.* at 973. Importantly, the court also recognized that "the parties had reason to anticipate at the time the contracts were executed that New York law applied to them and ***to know from established precedent that arbitration was not an authorized remedy under article 74 of the Insurance Law in the event of [the company's] insolvency***." *Id.* (emphasis added); *see Washburn v. Corcoran*, 643 F.Supp. 554 (1986) (collecting authorities, adopting *Knickerbocker*'s holding that the "legislature [in enacting Article 74] never contemplated turning over liquidation proceedings, and incidental actions and proceedings, to private arbitrators to administer); *Skandia America*

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a fortiori, an arbitrative tribunal may not interfere with the exercise of such jurisdiction." 4 N.Y.2d at 252–253 (internal citations and quotations omitted).

[10] As laid out in **Exhibit A**, these statutory provisions cited in *Washburn* are comparable to Nevada law; neither expressly states that claims both by and against liquidators must be adjudicated in state court, but both accomplish that effect by thoroughly outlining a scheme for liquidation that is comprehensive. Additionally, although specific language differs, both Nevada and New York have adopted the Uniform Insurers Liquidation Act. *See* NRS 696B.280; N.Y. Ins. Law 7408.

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Reinsurance Corp. v. Schenck, 441 F.Supp. 715, 723 n. 11 (1977) ("Once a New York insurer is placed in liquidation, it may not be compelled to arbitrate.... Indeed, the order of liquidation terminates the company's existence."). Even where an arbitration had ***already been ordered*** and was in the "initial stages," a New York court ordered that once the company was in receivership, the arbitration must cease, because "[t]he liquidators of insurance companies are simply not bound to arbitrate claims involving the companies." *Ideal Mutual Insurance Company v. Phoenix Greek General Insurance Company*, 1987 WL 28636 (S.D. N.Y. 1987).[11]

Faced with the fact that neither the Nevada statute nor the New York statute authorize arbitration, Milliman then turns to the Receivership Order. Milliman points to 14(a)(ii) and 14(h) of the Receivership Order, which state that the Receiver has the power to "[c]ollect all debts and monies due in claims belonging to CO-OP, wherever located, and for this purpose… do such other acts as are necessary or expedient to marshal, collect, conserve or protect its assets or 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…" (14(a)(ii), and "[i]nstitute 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…" (14(h)). These provisions consistent with Nevada public policy, like the rest of the Receivership Order, are intended to give the Receiver as much power and discretion as possible in marshalling the assets of NHC for the benefit of creditors, policyholders, and others. The provisions merely state that the Receiver ***may institute*** legal proceedings in other jurisdictions; they do not directly speak to whether or not arbitration is authorized, and they certainly do not say that the Receiver may be ***compelled*** to arbitrate. Whether or not the Receiver could have ***chosen*** to arbitrate is a diversion; the Receiver did not so choose.

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[11] Courts applying New York law have also held that McCarran-Ferguson reverse preempts the FAA and thus bars arbitration. *See Ideal*, 1987 WL 28636 ("McCarren–Ferguson states a clear congressional mandate that regulation of the insurance industry be left to the individual states. It is for that reason that arbitration clauses, binding upon insurance companies themselves under pertinent state or federal arbitration statutes, are not binding upon liquidators of insurance companies.") (internal citations and quotations omitted); *Washburn*, 643 F.Supp. 554 ("The application of the Federal Arbitration Act to require arbitration in spite of the contrary command of Article 74 is therefore barred by McCarran-Ferguson").

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As noted in the original Opposition, a similar situation arose in Ohio in *Taylor v. Ernst & Young*, 130 Ohio St.3d 411 (Ohio 2011). 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 explained 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 Commissioner as Receiver. Here, the Commissioner has initiated litigation in the Eighth Judicial District Court, and (14) does not come into play.[12]

Put simply, no one is arguing that the Receiver here is actually the New York Superintendent of Insurance, or that the New York Insurance Law applies to this Nevada receivership. However, under New York law, where a state legislature has not specifically authorized arbitration, given the public interest at stake, arbitration is inappropriate.

b. Milliman's Argument that New York Law Does Not Bar an Out-of-State Liquidator from Arbitrating Claims Against Non-New-York Residents Fails.

Likewise, Milliman's argument that New York law does not bar an out-of-state liquidator from arbitrating claims against non-New-York-residents also fails. Milliman makes two arguments, neither of which have merit.

i. Knickerbocker does not distinguish the current situation

Realizing that the vast weight of New York law is against it, Milliman turns to the penultimate paragraph in the seminal *Knickerbocker* decision to argue that because this is a Nevada

[12] Milliman points to *Costle v. Fremont Indem. Co.*, 839 F.Supp. 265 (D. Vt. 1993) as a "similar attempt, by the Vermont insurance liquidator, to rely on New York law to avoid arbitration." *See* Sur-Opposition, at 6. However, there was no New York choice-of-law provision in that case, the liquidator was simply pointing out that the New York courts had declined to permit arbitration. Further, Plaintiff respectfully disagrees with that court's holdings, which are not binding here.

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Receiver and under the Nevada statute, New York law should not apply. This argument likewise fails, as the two additional situations contemplated by the *Knickerbocker* court are not relevant here.

As to the first situation, the concern was that the legislature could not simply legislate into existence jurisdiction over nonresidents that the Superintendent may wish to sue. The court declined to reach the issue because all parties in that case were residents and there was no dispute regarding jurisdiction over the parties or the subject matter. *See* 4 N.Y.2d 245, 254. Here, there is likewise no dispute of this nature.

As to the second situation, the concern was that a discriminatory effect against New York residents might occur whereby a non-resident sued by the Superintendent out of state was subject to arbitration (if that state chose to enforce it under its laws) and a resident was not. *Id.* The court held that the issue was beyond the court's control. *Id.* Again, this is not the situation here. This is not a situation where the Superintendent has reached outside of the state to sue a non-resident of New York, and that other state's law applies. Here, two non-residents have "chosen" to be governed by New York law. The question is whether, applying New York law, arbitration is appropriate.

ii. Bernstein is not dispositive.

Milliman also cites to *Bernstein v. Centaur Ins. Co.,* 606 F. Supp. 98 (S.D. N.Y. 1984), but it is inapposite.[13] In *Bernstein*, a New York insurance company sued a nonresident reinsurance company in New York federal court.[14] 606 F. Supp. 98. Thereafter, the state of New York declared the company insolvent and appointed the Superintendent as rehabilitator. *Id.* at 100. A year later, the Superintendent was substituted as a plaintiff. *Id.* The defendant moved to stay the action pending arbitration, and the Superintendent argued that arbitration was barred by the McCarran-Ferguson Act. The court found that because New York does not have a law prohibiting arbitration in disputes involving the insurance business, as it is only case law (*Knickerbocker* and its progeny) that prohibits it, and as such, McCarran-Ferguson did not prohibit arbitration. *See id.* at 103 ("It may be that New York's policy against arbitrating this kind of suit weighs against enforcement of the arbitration

[13] Milliman also cites to *Fla. Dept. of Ins. v. Debenture Guaranty*, 1996 WL 173008 (M.D. Fla. 1996), which is not binding and relies on a flawed interpretation of *Bernstein*.

[14] A second plaintiff, a Vermont insurance company, also sued the defendant, but did not put forth the argument regarding arbitration.

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clause, but the McCarran-Ferguson Act exempts state practices from preemption only if a state's *law* would be invalidated, impaired, or superseded.").[15]

Several things distinguish *Bernstein*. As an initial matter, it is a federal case and thus not binding New York law. Further, other New York cases have continued to rely on *Knickerbocker* and its progeny, including *Matter of Union Indem. Ins.*, 137 Misc.2d 575 (N.Y. S.Ct. 1987), which strongly disagreed with *Bernstein*'s distinction between law and policy, calling the distinction "erroneous" and explaining that the "reading of the statute by the high court is the law of the state and will remain such until the legislature sees fit to amend the statute." *Id.* at 579-580. The court then held that arbitration would be "inappropriate, and will only lead to piecemeal determination of the relevant issues and possible duplication of efforts and inconsistent results." *Id.* at 580.[16] As recently as 2016, New York's highest court implied that McCarran-Ferguson would reverse-preempt the FAA in this context. *See Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 47 N.E.3d 463, 471 (N.Y. 2016) (finding that McCarran-Ferguson does not reverse preempt the FAA with respect to a provision of the California insurance code, but contrasting situations such as *Washburn v. Corcoran* where a statute provides exclusive jurisdiction over insurance disputes.).

The facts are different as well. In *Bernstein*, the insurance company itself sued (not the receiver), and was thus bound by the arbitration clause (as opposed to here, where the Commissioner has initiated the lawsuit). It was only later that the Superintendent was substituted for the company. Had the Superintendent initiated the suit (as here), arbitration would not have been permitted.

c. Milliman's Argument That New York Law is in Accord With Relevant Nevada and Federal Authority and Therefore Mandates Arbitration Fails.

Finally, Milliman's argument that New York law is in accord with relevant Nevada and federal authority and therefore mandates arbitration fails. Milliman argues that various New York state court decisions mandate arbitration, but these are not receivership cases. While New York, like Nevada,

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[15] *Knickerbocker* did not govern directly, according to the court, because the case was not within the exclusive jurisdiction of the New York Supreme Court and was not brought under article XVI (which is now Article 74) of the New York Insurance law.

[16] *Matter of Union Indem. Ins.* held that the state statutory scheme as interpreted by *Knickerbocker* reverse-preempts the FAA under McCarran-Ferguson. *Id.* at 581.

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"strongly favor[s]" arbitration and courts resolve all doubts as to whether an issue is arbitrable in favor of arbitration, *see State v. Philip Morris Inc.*, 30 A.D.3d 26, 31 (N.Y. App. Div. 2006), *courts* are to determine whether the parties agreed to submit their disputes to arbitration (here, the receiver and Milliman have not), and if so, whether the disputes generally come within the scope of the arbitration agreement (here, because of the New York law provision exempting receivers from arbitration among other reasons, it does not). *Id.*, *quoting Sisters of St. John the Baptist, Providence Rest Convent v Geraghty Constructor*, 67 NY 2d 997, 998 [1986]). In this case, by agreeing to New York law, the parties excluded actions by a receiver from arbitration. It is telling that despite the strong preference for arbitration, New York's legislature has not seen fit to alter the *Knickerbocker* rule regarding receivership. The public policy reasons for the *Knickerbocker* decision are equally applicable in Nevada. *See generally, 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.").

Likewise, the case Milliman points to for the proposition that a party seeking to enforce a contract must abide by its arbitration clause also notes that "[a] party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties' clear, explicit and unequivocal agreement to arbitrate." *See God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 845 N.E.2d 1265, 1267 (N.Y. 2006) (internal quotations omitted). And, while generally speaking, a party must not "pick and choose" provisions in a contract, disclaiming part of the contract but alleging breach of the rest, here, where a receiver that acts on behalf of a defunct insurance company is not bound to arbitrate under New York law, this case law is simply inapposite. By adopting New York law, where receivers are not required to arbitrate, it is not picking and choosing for the receiver to have this case heard in a Nevada court – rather it is enforcement of all of the provisions of the contract taken together, including the choice of law provision.

Further, as laid out in the Reply in Support of Plaintiff's Motion for Reconsideration, ***nonsignatories*** (such as Plaintiff here) are generally not bound to an arbitration agreement. *Belzberg v. Verus Investments Holdings Inc.*, 999 N.E.2d 1130, 1133 (N.Y. 2013). It is only under limited

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circumstances that nonparties may be compelled to arbitrate. *Id.*[17] One of these circumstances is what Milliman has argued here: estoppel. This occurs when a nonsignatory "knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement." *Id.* at 1134. This fact-intensive inquiry requires more than "extended causality." *Id.* at 1136. The court explained that the "guiding principle is whether the benefit gained by the nonsignatory is one that can be traced directly to the agreement containing the arbitration clause. The mere existence of an agreement with attendant circumstances that prove advantageous to the nonsignatory would not constitute the type of direct benefits justifying compelling arbitration by a nonparty to the underlying contract." *Id.* For example, in *Belzberg*, an individual acting as a financial advisor had access to profits of an investment due to a contract between two other individuals. Although the advisor received access to (and appropriated) the profits, this was not based on the agreement between the two individuals, but was based on the advisor's relationship vis-à-vis one of the contracting parties. *Id.* This type of "direct benefit" was insufficient. *Id.* Likewise, here, Plaintiff, as receiver, has a relationship with Milliman only through her statutory duties as receiver, and does not receive any "direct benefit" from the agreement between NHC's predecessor and Milliman. Milliman performed no services for the receiver under agreements with Milliman. Any award as a result of this lawsuit will not be Plaintiff's to keep, but will be passed on to creditors, policyholders, and the like.

Finally, Milliman makes the same arguments it has made in the past regarding tort and contract claims being arbitrated together, although this time under New York law. Again, however, courts examining similar claims in this context have found them not to arise out of or relate to the contract at issue. *See* Reply in Support of Motion for Reconsideration, at 10-11 (citing authorities). Further, although "relate to" is a broad term, Milliman has cited no authority under New York law for the "but for" test Milliman proposes ("but for the Agreement and the work Milliman did for NHC pursuant to it, Plaintiff would have no claims whatsoever").

[17] The situations are: incorporation by reference; assumption; agency; alter ego/veil-piercing; and estoppel. *See* § 61:15.Compelling arbitration—Non-signatories, 4A N.Y.Prac., COM. LITIG. IN NEW YORK STATE COURTS § 61:15 (4th ed.) Milliman has not argued any of these apply other than estoppel.

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3. Even if this Court Finds that Nevada Law Should Govern the Agreement, Arbitration is Not Appropriate.

Even if this Court declines to find that New York law would apply here, it remains persuasive authority. Nevada's law is similar to New York's, and New York's interpretations provide powerful persuasive authority. As such, even if this Court declines to apply New York law, this Court should find that under Nevada law, Milliman cannot compel Plaintiff to arbitrate.

III. CONCLUSION

Based on the foregoing, the Commissioner respectfully requests that the Court grant her Motion for Reconsideration and DENY Milliman's motion to compel arbitration.

DATED this 29th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 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

New York Provision (in relevant part, emphasis added)	Comparable Nevada Law (in relevant part, emphasis added)
N.Y. Ins. Law § 7417 Commencement of a proceeding The **superintendent** represented by the attorney general **shall commence any proceeding under this article by an application to the supreme court, in the judicial district in which the principal office of the insurer is located**, for an order directing such insurer to show cause why the superintendent should not have the requested relief. On the return of such order, and after a full hearing, which shall be held without delay, such court shall either deny the application or grant it together with such other relief as the nature of the case and the interests of policyholders, creditors, shareholders, members, or the public may require.	**NRS 696B.250 Commencement of proceeding.** 1. The **Commissioner shall commence a delinquency proceeding authorized under this chapter**, the Attorney General representing the Commissioner, **by filing a petition in a court of proper jurisdiction**[1] praying for appointment of the Commissioner as receiver of the insurer. 2. Upon the filing of the petition the court shall issue an order directing the insurer to appear in court on the day fixed in the order and show cause why the petition should not be granted. Unless good cause is shown for a shorter period, the order shall require the insurer so to show cause not less than 15 days nor more than 30 days from the date of the order. 3. The order to show cause and service thereof on the insurer shall constitute due and legal process and shall be in lieu of any other process otherwise provided by law or court rule.

[1] NRS 696B.190 Jurisdiction of delinquency proceedings; venue; exclusiveness of remedy; appeal.

1. **The district court has original jurisdiction of 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.

2. The venue of delinquency proceedings against a domestic insurer must **be in the county in this state of the insurer's principal place of business** or, if the principal place of business is located in another state, in any county in this state selected by the Commissioner for the purpose. The venue of proceedings against foreign insurers must be in any county in this state selected by the Commissioner for the purpose.

3. At any time after commencement of a proceeding, the Commissioner or any other party may apply to the court for an order changing the venue of, and removing, the proceeding to any other county of this state in which the proceeding may most conveniently, economically and efficiently be conducted.

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 for an injunction or restraining order or other relief preliminary, incidental or relating to such proceedings, other than in accordance with NRS 696B.010 to 696B.565, inclusive.**

5. An appeal to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution may be taken from any court granting or refusing rehabilitation, liquidation, conservation or receivership, and from every order in delinquency proceedings having the character of a final order as to the particular portion of the proceedings embraced therein.

New York Provision (in relevant part, emphasis added)	Comparable Nevada Law (in relevant part, emphasis added)
N.Y. Ins. Law § 7403 Order of Rehabilitation (a) An order **to rehabilitate** a domestic insurer **shall direct the superintendent and his successors in office, as rehabilitator, forthwith to take possession of the property of such insurer and to conduct the business thereof, and to take such steps toward the removal of the causes and conditions which have made such proceeding necessary as the court shall direct.** [remainder omitted] **N.Y. Ins. Law § 7405 Order of Liquidation; Rights and Liabilities** (a) An order to **liquidate** the business of a domestic insurer shall **direct the superintendent and his successors in office, as liquidator, forthwith to take possession of the property of such insurer and to liquidate the business of the same and deal with such property and business of such insurer in their own names as superintendents or in the insurer's name as the court may direct**, and to give notice to all creditors to present their claims. The superintendent and his successors shall be **vested by operation of law with the title to all property, contracts and rights of action of such insurer as of the date of the entry of the order so directing them to liquidate**. The filing or recording of such order in any record office of the state shall impart the same notice that a deed, bill of sale or other evidence of title duly filed or recorded by such insurer would have imparted. The rights and liabilities of any such insurer and of its creditors, policyholders, shareholders, members and all other persons interested in its estate shall, unless otherwise directed by the court, be fixed as of the date the order is entered in the office of the clerk of the county where such insurer had its principal	**NRS 696B.290 Conduct of Delinquency Proceedings Against Domestic Insurers and Certain Alien Insurers** 1. Whenever under this chapter a receiver is to be appointed in delinquency proceedings[2] for an insurer, **the court shall appoint the Commissioner as such receiver. The court shall order the Commissioner forthwith to take possession of the assets of the insurer and to administer the assets under the orders of the court**. 2. As a domiciliary receiver, the Commissioner shall be **vested by operation of law with the title to all of the property, contracts and rights of action, and all of the books and records of the insurer, wherever located, as of the date of entry of the order directing the Commissioner to conserve, rehabilitate or liquidate a domestic insurer** or to liquidate the United States branch of an alien insurer domiciled in this state, and the **Commissioner shall have the right to recover the same and reduce the same to possession**; but ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are prescribed in this chapter for ancillary receivers appointed in this state as to assets located in this state. 3. The filing or recording of the order directing possession to be taken, or a certified copy thereof, in any office where instruments affecting title to property are required to be filed or recorded shall impart the same notice as would be imparted by a deed, bill of sale or other evidence of title duly filed or recorded. 4. The Commissioner as domiciliary receiver shall be responsible for the proper administration of all assets coming into the possession or control of the Commissioner. The court may at any time require a bond from the Commissioner or the deputies of the Commissioner if deemed desirable for the protection of such assets.

[2] NRS 696B.060 "Delinquency proceeding" defined. "Delinquency proceeding" means:

1. Any proceeding commenced against an insurer pursuant to this chapter for the purpose of conserving, rehabilitating, reorganizing or liquidating the insurer; or
2. The summary proceedings authorized by NRS 696B.500 to 696B.565, inclusive.

New York Provision (in relevant part, emphasis added)	Comparable Nevada Law (in relevant part, emphasis added)
office on the date the proceeding commenced, subject, however, to the provisions of section seven thousand four hundred thirty-three of this article to the rights of claimants holding contingent claims. [remainder omitted]	5. 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**. [remainder omitted]
N.Y. Ins. Law § 7409 Conduct of Delinquency Proceedings Against Insurers Domiciled in this State a) Whenever under the laws of this state a receiver is to be appointed in delinquency proceedings for an insurer domiciled in this state, **the court shall appoint the superintendent as such receiver and direct the superintendent forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court**. b) As domiciliary receiver the superintendent and his successors in office shall be **vested by operation of law with the title to all property, contracts, and rights of action, and all books and records of the insurer wherever located....and he shall have the right to recover the same and reduce the same to possession**; except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers hereinafter prescribed for ancillary receivers appointed in this state as to assets located in this state. The filing or recording of the order directing possession to be taken, or a certified copy thereof, in the office where instruments affecting title to property are required to be filed or recorded shall impart the same notice as would be imparted by a deed, bill of sale, or other evidence of title duly filed or recorded. The superintendent as domiciliary receiver shall be responsible for the proper administration of all assets coming into his possession or control. The court may at any time require bond from him or his deputies if deemed desirable for the protection of the assets. c) Upon taking possession of the assets of a delinquent insurer the domiciliary receiver shall, subject to the direction of the court,	NRS 696B.290 (above) is similar.

New York Provision (in relevant part, emphasis added)	Comparable Nevada Law (in relevant part, emphasis added)
immediately proceed to conduct the business of the insurer or to take such steps as are authorized by the laws of this state for the purpose of liquidating, rehabilitating, reorganizing, or conserving the affairs of the insurer. [remainder omitted]	
N.Y. Ins. Law § 7432 Adjudication of insolvency of insurer; time to file claims. (a) If upon the granting of an order of liquidation pursuant to section seven thousand four hundred four of this article or at any time thereafter during such liquidation proceeding, such insurer shall not be clearly solvent, the court shall, after such notice and hearing as it deems proper, make an **order declaring such insurer to be insolvent.** (b) Where a liquidation, rehabilitation or conservation order has been entered in a proceeding against an insurer under this article, all persons who may have claims against such insurer shall present the same to the liquidator, rehabilitator or conservator at a place specified by him within four months from the date of the entry of such order, or, if the superintendent shall certify that it is necessary, within such longer time as the court shall prescribe. The **superintendent shall notify all persons who may have claims against such insurer** as disclosed by its books and records, to present the same to him within the time as fixed. The last day for the filing of proofs of claim shall be specified in the notice. Such notice shall be given in a manner determined by the court. (c) Proofs of claim may be filed subsequent to the date specified, but, no such claim shall share in the distribution of the assets until all allowed claims, proofs of which were filed before such specified date, have been paid in full with interest.	**NRS 696B.220 Grounds for liquidation of domestic insurer or domiciled alien insurer.** The Commissioner may apply to the court for an **order** appointing the Commissioner as receiver (if his or her appointment as receiver is not then in effect) and **directing the Commissioner to liquidate the business of a domestic insurer** or of the United States branch of an alien insurer having trusteed assets in this state, whether or not there has been a prior order directing the Commissioner to conserve or rehabilitate the insurer, upon any one or more of the following grounds: 1. That the insurer has failed to cure an impairment of surplus, or capital, or assets within the time allowed therefor by any lawful order of the Commissioner; 2. **That the insurer is insolvent**, or has commenced voluntary liquidation or dissolution, or attempts to commence or prosecute or is the object, in this state or elsewhere, of any action or proceeding to liquidate its business or affairs, or to dissolve its corporate charter, or to procure the appointment of a receiver, trustee, custodian or sequestrator under any law except this Code. This subsection does not apply to the conversion of a stock insurer to an ordinary business corporation as authorized under NRS 693A.300, or to voluntary dissolution of the insurer pursuant to NRS 692B.250; [remainder omitted] **NRS 696B.460 Time to file claims.** 1. If upon the entry of an order of liquidation under this chapter or at any time thereafter during liquidation proceedings the insurer is not clearly solvent, the court shall, upon a hearing after such notice as it deems proper, make and enter an **order adjudging the insurer to be insolvent.** 2. After the entry of the order of insolvency, regardless of any prior notice that may have been given to creditors, the Commissioner shall **notify all persons who may have claims against the insurer** to file such claims with him or her, at a place

New York Provision (in relevant part, emphasis added)	Comparable Nevada Law (in relevant part, emphasis added)
	and within the time specified in the notice, or that such claims shall be forever barred. The time specified in the notice shall be as fixed by the court for filing of claims, which shall be not less than 6 months after the entry of the order of insolvency. The notice shall be given in such manner and for such reasonable period of time as may be ordered by the court.
N.Y. Ins. Law § 7434 Distribution of Assets (a) (1) Upon the recommendation of the superintendent, and under the direction of the court, distribution payments shall be made in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims. The priority of distribution of claims from an insolvent property/casualty insurer in any proceeding subject to this article shall be in accordance with the order in which each class of claims is set forth in this paragraph and as provided in this paragraph. [remainder omitted]	**NRS 696B.420 Order of distribution of claims from estate of insurer on liquidation.** 1. The order of distribution of claims from the estate of the insurer on liquidation of the insurer must be as set forth in this section. Each claim in each class must be paid in full or adequate money retained for the payment before the members of the next class receive any payment. No subclasses may be established within any class. Except as otherwise provided in subsection 2, the order of distribution and of priority must be as follows… [remainder omitted]

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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;	Case No. A-17-760558-B Dept. No. 25 **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION**

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 FOR RECONSIDERATION was entered with this Court on August 8, 2018, a copy of which is attached.

DATED this 8th day of August 2018.

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 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.

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*	Kurt R. Bonds, Esq. ALVERSON, TAYLOR MORTENSEN & SANDERS 6605 Grand Montecito Parkway, Suite 200 Las Vegas, NV 89149 kbonds@alversontaylor.com *Attorneys for Defendants InsureMonkey, Inc. and Alex Rivlin*

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DATED: August 8, 2018.

/s/Gaylene Kim
An Employee of Snell & Wilmer L.L.P.

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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;

Case No. A-17-760558-C

Dept. No. 25

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

4839-2280-0238

AUG 03 2018

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 for reconsideration of Plaintiff, the Commissioner of Insurance, Barbara D. Richardson, in her official capacity as Receiver ("Plaintiff" or the "Liquidator") for Nevada Health CO-OP ("NHC"), came on for hearing before this Honorable Court on May 1, 2018 and July 24, 2018. Mark E. Ferrario, Esq., of Greenberg Traurig, LLP, appeared on behalf of Plaintiff; Justin N. Kattan, Esq., of Dentons US LLP, and Patrick G. Byrne, Esq. and Aleem A. Dhalla, Esq., of Snell & Wilmer, L.L.P., appeared on behalf of Defendants Milliman, Inc., Jonathan L. Shreve and Mary Van Der Heijde (collectively, for purposes of this Order only, "Milliman"). 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 DENIES the motion, for the reasons set forth herein.

By order entered on March 12, 2018, this Court granted Milliman's motion to compel arbitration of all of Plaintiff's claims against Milliman (the "March 12 Order"). "A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors v. Jolley, Urga & Wirth, Ltd.,* 113 Nev. 737, 941 P.2d 486, 489 (1997); *see also In re Ross*, 99 Nev. 657, 659, 668 P.2d 1089, 1091 (1983); (reconsideration is appropriate if there is "some controlling matter which the court has overlooked or misapprehended"). "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Unionamerica Mortgage & Equity Trust v. McDonald,* 97 Nev. 210, 211-212 (Nev. 1981).

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Plaintiff's motion is 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 March 12 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 the business of insurance.

At the May 1, 2018 hearing on the motion for reconsideration, this Court requested that the parties each submit an additional brief concerning whether New York law applies to this arbitration dispute, and, if so, whether it requires any change to the court's original ruling. Having reviewed the parties' supplemental submissions and having heard additional oral argument on July 24, 2018, this Court holds that New York law does not apply to the question of whether Plaintiff's claims against Milliman are arbitrable. In *Mastrobuono v. Shearson Lehman Hutton, Inc.* 514 U.S. 52, (1995), the United States Supreme Court held that a contractual choice-of-law provision cannot vitiate an otherwise enforceable arbitration provision in the same contract unless the parties expressly state that intention in the relevant agreement. Here, no provision in the Milliman-NHC agreement states that in the event of NHC's liquidation, the parties would forgo their right to arbitration.

Even if New York law applied, this Court holds that it does not preclude arbitration of Plaintiff's claims against Milliman. The New York Court of Appeals has held that the New York

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Superintendent of Insurance, when acting as liquidator pursuant to New York Insurance Law § 7401, *et seq.*, cannot be compelled to arbitrate claims brought on behalf of or against a New York insurer because the New York statute does not expressly authorize him to do so. *Knickerbocker Agency, Inc. v. Holz*, 149 N.E.2d 885, 890 (N.Y. 1958) ("[T]he Legislature, in its wisdom, has seen fit to withhold the requisite statutory authorization for arbitration in controversies where one of the parties is an insurance company in liquidation."); *Corcoran v. Ardra Ins. Co., Ltd.*, 567 N.E.2d 969, 972–73 (N.Y. 1990). This rule does not apply here, where the Nevada Liquidator was appointed pursuant to the Nevada liquidation statute, and the Receivership Order expressly authorizes her to "initiate and maintain actions at law or equity or any other type of action or proceeding of any nature," and to "[i]nstitute and prosecute… any and all suits and other legal proceedings." (Receivership Order, §§ 14(a)(ii), (h).

Accordingly, the Court hereby DENIES Plaintiff's Motion for Reconsideration of the Court's March 12, 2018 Order granting Milliman's Motion to Compel Arbitration.

IT IS SO ORDERED

DATED: August 7, 2018

DISTRICT COURT JUDGE

Respectfully prepared and submitted by:

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