IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioner,

vs.

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

Respondents,
and

MILLIMAN, INC., A WASHINGTON CORPORATION; JONATHAN L. SHREVE, AN INDIVIDUAL; AND MARY VAN DER HEIJDE, AN INDIVIDUAL,

Real Parties in Interest.

Case No. 77682

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

RESPONSE OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDAMUS

Patrick G. Byrne (NV Bar No. 7636)
Andrew M. Jacobs (NV Bar No. 12787)
Alex L. Fugazzi (NV Bar No. 9022)
Kelly H. Dove (NV Bar No. 10569)
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway,
Suite 1100
Las Vegas, Nevada 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252
pbyrne@swlaw.com, ajacobs@swlaw.com
afugazzi@swlaw.com, kdove@swlaw.com

Reid L. Ashinoff
(*Pro hac vice forthcoming*)
Justin N. Kattan
(*Admitted pro hac vice*)

DENTONS US LLP
1221 Avenue of the Americas
New York, NY 10020
Telephone: (212) 768-6700
reid.ashinoff@dentons.com
justin.kattan@dentons.com

Attorneys for Real Parties in Interest Milliman, Inc., Jonathan L. Shreve, and Mary van der Heijde

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

Real Party in Interest Milliman, Inc. does not have a parent company and no publicly held company owns ten percent or more of its stock.

Real Parties in Interest Jonathan Shreve and Mary van der Heijde are individuals and have no parent corporation and is not a part of a publicly traded company.

Milliman, Inc., Jonathan Shreve and Mary van der Heijde have been represented in this matter by the law firms of Snell & Wilmer L.L.P. and Dentons US LLP. No other firms are expected to appear on behalf of these Real Parties in Interest.

VERIFICATION

On March 20, 2019, the undersigned affiant appeared in person before me, a notary public, who knows the affiant to be the person whose signature appears on this document, who stated:

I am counsel for Real Parties In Interest Milliman, Inc., Jonathan Shreve and Mary van der Heijde. I have read the attached Answer To Petition For Writ Of Mandamus, and all factual statements in the Answer are either within the affiant's personal knowledge and true and correct, or supported by citations to the Appendix.

Justin N. Kattan

SUBSCRIBED AND SWORN to before me
this 20th day of March, 2019.

NOTARY PUBLIC

DANIELLE ROSEN
Notary Public, State of New York
No. 01RO6134211
Qualified in Queens County
Commission Expires September 26, 2021

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In her complaint against Milliman, Inc., Jonathan L. Shreve and Mary van der Heijde (collectively, "Milliman"), Petitioner asserts common law tort and contract claims that entirely relate to, and arise out of, the pre-liquidation actuarial work Milliman performed pursuant to its October 20, 2011 and September 12, 2012 Consulting Services Agreements (the "Agreements") with Nevada Health CO-OP ("NHC").[1] The Agreements contain an unambiguous arbitration provision stating that any "dispute arising out of or relating to the engagement of Milliman by [NHC]" must be resolved by final and binding arbitration. Petitioner does not, and cannot, dispute that this broad arbitration clause encompasses the common law damages claims Petitioner brings against Milliman.

Rather, Petitioner asserts that the District Court erred because the governing statutes and so-called "public policy" preclude a court from compelling a liquidator to arbitrate against its will. Petitioner's argument contravenes the controlling decisions of this Court and the U.S. Supreme Court, as well as unanimous, on-point federal appellate authority, and the applicable receivership order, which expressly

[1] The Nevada Insurance Commissioner, in her official capacity as receiver for NHC, is referred to herein as "Petitioner" or the "Liquidator."

grants Petitioner the authority to arbitrate her claims.

The District Court's March 12, 2018 Order granting Milliman's motion to compel arbitration, and August 8, 2018 Order denying Petitioner's motion for reconsideration, are sound and should be allowed to stand by denying Petitioner's writ application. That application—which Petitioner waited more than four months to file—should be denied, for the following reasons:

- Petitioner cannot sue to enforce the Agreements by bringing breach of contract and tort claims that arise exclusively from and relate to Milliman's allegedly deficient work pursuant to those Agreements, and "simultaneously avoid other portions of the agreement[s], such as the arbitration provision." *Ahlers v. Ryland Homes*, 126 Nev. 688, 367 P.3d 743 (2010) (unpublished). In such situations, federal and state courts around the country—including, just last month, a Louisiana appellate court that ***reversed*** a trial court's denial of Milliman's motion to compel arbitration pursuant to an arbitration provision identical to the one at issue here—have held that a statutory liquidator or receiver is bound to an insolvent insurer's pre-insolvency arbitration agreements. (*See* pp. 21-24, *infra*).

Petitioner ignores this dispositive authority, on which the District Court properly relied.

- This Court and the U.S. Supreme Court have both recognized, in precedents that control here, that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*. (the "FAA"), preempts state laws that purport to preclude arbitration of specific types of claims. Petitioner's writ application ignores all that controlling precedent, as well as the ***unanimous***, on-point federal appellate authority which makes clear that Petitioner's common law damages claims against Milliman do not implicate—and arbitrating those claims does not interfere with—the state's regulation of the "business of insurance." (*See* pp. 29-31, *infra*). Therefore, as the District Court correctly held, the FAA is not reverse-preempted by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq*.

- The District Court's orders accord fully with the two most recent decisions concerning Milliman's efforts to enforce the Agreements' arbitration provisions against statutory insurance liquidators for insolvent health care co-ops. In October 2018, the U.S. District Court for the Eastern District of Kentucky granted Milliman's petition to compel arbitration of the tort and contract claims brought by the liquidator of Kentucky's insolvent health care cooperative. *Milliman, Inc.v. Roof*, 353 F. Supp. 3d 588 (E.D. Ky. 2018). And on February 28, 2019, the Louisiana First Circuit Court of Appeal ***reversed*** a trial court's denial of Milliman's

motion to compel arbitration—a decision on which Petitioner relies in her writ application (*see, e.g.*, Petitioner for Writ of mandamus ("Writ application") p. 34)—and held that the Louisiana Commissioner of Insurance, as rehabilitator of the state's ACA co-op, must arbitrate its claims against Milliman. *Donelon v. Shilling*, No. 2017-1545, 2019 WL 993328 (La. App. 1 Cir. 2/28/19).[2]

- Unable to refute the above-referenced authority, Petitioner turns to supposed "public policy" arguments against arbitration, including the lack of appellate review, the purported threat of inconsistent rulings in a multi-defendant action, and the fact that arbitration will be confidential. (Writ application pp. 18-22, 30-31). The U.S. Supreme Court and this Court have expressly rejected such "policy" arguments as a basis to vitiate an otherwise valid arbitration clause. *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) ("The [FAA] ***requires*** piecemeal resolution when necessary to give effect to an arbitration agreement. Under the [FAA], an arbitration agreement must be

[2] In the only other state where claims relating to Milliman's work for ACA co-ops are pending, Milliman has appealed an Iowa trial court's denial of Milliman's motion to compel arbitration. The Iowa Supreme Court recently issued notice that it would hear Milliman's appeal, rather than exercise its right to send the matter down to Iowa's intermediate appellate court for review. As discussed below, the Iowa decision contravenes applicable Iowa and federal law, and, as the District Court properly held, it has no precedential or persuasive value here.

enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement."); *U.S. Home Corp. v. Michael Ballesteros Trt.*, 134 Nev. Adv. Op. 25, 415 P.3d 32, 42 (2018) ("Nearly all arbitration agreements forgo some procedural protections, such as the right to a trial by jury or court-monitored discovery. [The FAA] suggest[s] that public policy favors such waivers in the arbitration setting because arbitration provides a quicker and less costly means for settling disputes.") (citation omitted).

- Petitioner's attempt to analogize the Agreements' arbitration provision to a contractual forum selection clause is inapposite, because the federal policies and protections in favor of the former do not extend to the latter. As this Court has stated, an arbitration clause is "subject to an entirely different type of analysis than the forum selection clause analysis." *Tuxedo Int'l, Inc. v. Rosenberg*, 127 Nev. 11, 23, 251 P.3d 690, 698 (2011).

- New York law in no way exempts Petitioner from arbitration. Federal law and Nevada law govern here. If parties to a contract intend 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. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58–60 (1995). The Milliman-NHC

Agreements express no such intent.

Moreover, the New York precedent on which Petitioner relies precludes only the ***New York Superintendent of Insurance*** from arbitrating, when acting as liquidator of a ***New York insurer***, in ***New York***, pursuant to the ***New York Insurance law***. Here, by contrast, Petitioner is expressly authorized 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***." (10/14/15 Permanent Injunction and Order Appointing Commissioner as Permanent Receiver of Nevada Health Co-Op (the "Receivership Order"), I Appendix ("APP") 11-12 §§ 14(a), (h) (emphases added)).

We are aware of no case, and Petitioner cites none, that applies New York law to preclude a non-New York insurance liquidator or receiver from arbitrating claims initiated outside New York on behalf of a non-New York insurer. On the contrary, at least three courts have rejected the precise argument Petitioner raises here. Moreover, the state's highest court declined to extend its holding to proceedings brought outside of New York, and against nonresidents of New York. *See Knickerbocker Agency, Inc. v. Holz*, 149 N.E.2d 885, 891 (N.Y. 1958).

The District Court's orders are in complete accord with relevant, controlling

federal statutory and appellate authority, and Nevada law. None of Petitioner's arguments demonstrate that the District Court abused its discretion. Petitioner has therefore failed to meet her burden on this writ application, which should be denied.

II. STATEMENT OF FACTS

A. NHC Is Established Pursuant to the ACA

The federal Patient Care and Affordable Care Act ("ACA") established the Consumer Operated and Oriented Plan, or "Co-Op," program to fund not-for-profit health insurance companies to offer health insurance to individuals and small groups. (I APP 30, ¶34). NHC is the Nevada Co-Op established under the ACA. NHC experienced such financial hardship that insolvency proceedings before Department I of the Eighth Judicial District Court, Clark County, were instituted in September 2015.

B. Petitioner Becomes NHC's Receiver, With Authority To Sue on Behalf of NHC and To Arbitrate Such Claims.

Petitioner was appointed as NHC's permanent receiver and ordered to take possession of its assets, wherever located, and to administer them under court supervision. (*See* Receivership Order, I APP 5-17). The Receivership Order anticipated that the Petitioner might need to pursue claims in proceedings other than those in the Nevada State District Court, such as arbitrations. Specifically,

Petitioner was granted the power and authority to "initiate and maintain actions at law or equity or ***any other type of action or proceeding of any nature, in this and other jurisdictions***." *Id*. §14(a) (emphasis added). Similarly, Petitioner is authorized to "[i]nstitute and prosecute… any and all suits ***and other legal proceedings***." *Id*., §14(h) (emphasis added).

C. The NHC/Milliman Agreements Contain Broad, Unambiguous Arbitration Provisions.

Milliman, Inc. is a leading actuarial and consulting firm. Pursuant to the Agreements, Milliman provided actuarial services to NHC starting in October 2011. (Complaint, I APP 70, ¶333).

The Agreements each contain a broad and unambiguous arbitration provision, which states, in relevant part:

> DISPUTES. In the event of ***any dispute arising out of or relating to the engagement of Milliman by Company***, the parties agree that the dispute will be resolved by final and binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association.

(Agreements, I APP 1-2, ¶5; I APP 3, ¶ 4) (emphasis added).

D. All of Petitioner's Claims Arise Out of or Relate to the Engagement of Milliman Pursuant to the Agreements.

On August 25, 2017, the Petitioner filed her complaint (the "Complaint") against Milliman and four other professional service providers who performed pre-

insolvency services for NHC.

The Complaint describes the contracted-for work that Milliman provided:

> The Milliman Defendants were engaged by NHC and its predecessors in interest to provide professional actuarial services to NHC…. Such services included but were not limited to providing certification pursuant to NRS 681B, conducting a feasibility study, providing business plan support, assisting NHC in setting premium rates, participating in the preparation of financial reports and information to regulators, and establishing policies of insurance as set forth herein.

(I APP 70, ¶333-34).

To provide the contracted-for services, the Complaint asserts that Milliman prepared various reports and documents for NHC, including, among other things, feasibility studies, rate filings and federal pro formas. (*Id*., ¶334). The Complaint is replete with allegations of how Milliman's performance in providing these contracted-for services was purportedly deficient. (*Id*., ¶¶39-131).

Every one of Petitioner's 14 causes of action against Milliman is based on Milliman's alleged failure to perform these contracted-for services adequately. This is true equally of the contract and tort claims against Milliman. For example, Petitioner's claim for "Tortious Breach of the Implied Covenant" alleges that the parties "entered into a valid and enforceable contract - the Consulting Services Agreement - that required Milliman to perform professional actuarial

services…[and] Milliman owed a duty of good faith to Plaintiff arising from the contract," which duty Milliman allegedly breached. (*Id*., ¶¶ 380-82). Similarly, in the cause of action for "Professional Malpractice," Petitioner states that "[t]he Milliman Defendants were engaged by NHC…to provide professional actuarial services" including certifications, feasibility studies, financial reporting, but that Milliman allegedly breached its professional actuarial duties to NHC. (*Id*. at ¶¶ 333-36); *see also* ¶ 323 (negligence *per se* claim based on Milliman's alleged failure to provide certification required pursuant to NRS 681B); ¶¶ 340-344 (fraud claim based on alleged false statements in feasibility study); ¶¶ 355-56, 395-398 (negligence claims based on alleged failure to exercise reasonable care in preparing feasibility study, and in calculating premiums, financial projections and reserves); ¶375 (breach of contract cause of action alleges that Milliman "failed to perform under the Consulting Services Agreement"); ¶ 402 (unjust enrichment claim seeks to recoup fees NHC paid to Milliman for actuarial services required by Agreement); ¶¶ 407-413, 755, 762 (civil conspiracy and concert of action claims based on preparation of allegedly false financial information).

E. The District Court Correctly Granted Milliman's Motion To Compel Arbitration, and Denied Petitioner's Motion for Reconsideration.

On March 12, 2018, the District Court granted Milliman's motion to compel arbitration of Petitioner's claims against Milliman. (II APP 396-405). The District Court correctly determined that:

- All of Petitioner's claims against Milliman "arise from and relate to the Agreement because, but for the Agreement and the work Milliman did for NHC pursuant to it, [Petitioner] would have no claims whatsoever." (II APP 399). Relying on uncontroverted Nevada Supreme Court and federal authority, the District Court further held that an insurance liquidator cannot "seek[] to enforce rights under [an] agreement," and "simultaneously avoid other portions of the agreement, such as the arbitration provision." (*Id*. at 400).

- Petitioner cannot evade the Agreements' arbitration clause simply by claiming to act on behalf of NHC's policyholders and creditors. "While creditors or policyholders may 'benefit' from monetary damages the Liquidator recovers from third parties, in that such recoveries increase the coffers of NHC's estate, the claims here do not 'belong' to NHC's creditors or policyholders, do not implicate a state's regulation of insurance, and need not be brought in the liquidation court." (*Id*. at 403).

- The Nevada liquidation statute does not reverse-preempt the FAA under the McCarren-Ferguson Act. The District Court's order cites several on-point decisions that reject Petitioner's argument that forcing a liquidator to arbitrate common law contract and tort claims either "implicates the business of insurance or interferes with the liquidator's statutory function." (*Id*. at 403-404).

Petitioner moved for reconsideration. (II APP 412-431). After Petitioner belatedly raised the argument that New York law applied to this arbitration dispute and precluded Petitioner from arbitrating for the first time in her reconsideration ***reply*** brief (III APP 447-464), the District Court ordered additional briefing on that specific issue (III APP 489-492). On August 8, 2018, after giving careful consideration to this belatedly raised issue, the District Court denied Petitioner's motion for reconsideration (III APP 543-551), holding, in relevant part:

- New York law did not apply to this arbitration dispute under controlling U.S. Supreme Court precedent, because "no provision in the Milliman-NHC agreement states that in the event of NHC's liquidation, the parties would forgo their right to arbitration." (III APP 549).

- Even if New York law had applied, it could not preclude this Nevada liquidator from arbitrating her claims on behalf of a Nevada insurer, when the governing Receivership Order expressly authorizes her to arbitrate. (*Id*. at 549-550).

III. LEGAL ARGUMENT

A. Petitioner Does Not Satisfy the High Standard for Extraordinary Writ Review.

A party seeking "extraordinary writ relief from an order compelling arbitration" must show why an eventual post-arbitration appeal

> does not afford 'a plain, speedy and adequate remedy in the ordinary course of law,' NRS 34.170, ***and that the matter meets the other criteria for extraordinary writ relief, i.e., that***

> ***mandamus is needed 'to compel the performance of an act that the law requires or to control a manifest abuse of discretion' by the district court***."

Tallman v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op., 359 P.3d 113, 117 (2015) (emphasis added), citing *State ex rel. Masto v. Second Jud. Dist. Court*, 125 Nev. 37, 43-44, 199 P.3d 828, 832 (2009) (stating that "the decision to entertain" a petition for mandamus challenging an order compelling arbitration is not automatic, but a matter "addressed solely to [the Supreme Court's] discretion"); *see also MHC Flamingo West, LLC v, Eighth Jud. Dist. Court*, No. 77970, 2019 WL 912666, at *1 (Nev. Feb. 20, 2019) (denying petition for writ of mandamus where court was "not persuaded that petitioners have demonstrated that the order compelling arbitration qualifies for mandamus review").

Petitioner's application does not satisfy the high standard for discretionary review. As discussed below, the District Court did not "abuse [its] discretion" in granting Milliman's motion to compel arbitration.

While Petitioner contends that her ability to litigate against the remaining state court defendants will be prejudiced without Milliman's participation, the U.S. Supreme Court has held that "an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying

dispute but not to the arbitration agreement." *Moses H. Cone Mem'l Hosp.*, 461 U.S. at 20. To the extent Petitioner contends that her claims against the remaining state court defendants are dependent on the outcome of her claims against Milliman, the appropriate step would have been to "stay litigation among the non-arbitrating parties pending the outcome of the arbitration." *Id.*, n.23; *see also Fusilamp, LLC v. Littelfuse, Inc.*, No. 10-20528-CIV- ALTONAGA, 2010 WL 115047121, *4 (S.D. Fla. Sept. 9, 2010) (granting motion to compel arbitration and staying claims against non-arbitrating defendants in order to "conserve judicial resources, the resources of the parties, and prevent the possibility of inconsistent outcomes in different forums").

Petitioner could have conserved estate funds and ameliorated any inefficiencies she suggests might exist by proceeding directly and expeditiously to arbitration. Instead, defeating the objectives of speed and efficiency she claims to serve, Petitioner waited until the state court litigation was well underway before she filed this writ application—nearly five months after the District Court issued its ruling denying Petitioner's motion for reconsideration. All this belies her claimed need for urgent relief.

B. The FAA Requires Arbitration of Petitioner's Claims Against Milliman and Preempts Any Contrary State Law.

The FAA is a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.[3] In furtherance of that policy, the U.S. Supreme Court has expressly prohibited states from enacting any statute or policy that is "directly contrary to the [FAA's] language and Congress' intent" to favor arbitration. *Allied-Bruce Terminix Co., Inc., v. Dobson* 513 U.S. 265, 281 (1995) ("The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (citation omitted); *U.S. Home Corp.*, 415 P.3d at 40 (same).

Under §4 of the FAA, a court must direct parties to proceed to arbitration where there is a valid arbitration agreement that governs the claims at issue and a refusal to arbitrate. 9 U.S.C. §4. Milliman is entitled to an order compelling

[3] There is no dispute that the FAA applies to the Agreements, which "evidenc[e] a transaction involving [interstate] commerce." 9 U.S.C. §2; *see also Tallman*, 359 P.3d at 121 ("So long as 'commerce' is involved, the FAA applies."). Milliman, a company with its principal place of business in Washington state, performed its services for NHC, a Nevada company, through actuaries based in its office in Denver, Colorado.

arbitration of Petitioner's claims against Milliman because it is indisputable that: 1) the arbitration provision in the Agreements is valid and enforceable; 2) all of Petitioner's causes of action against Milliman fall within the scope of the arbitration provisions; and 3) Petitioner has refused to arbitrate.

1. The Agreements' Arbitration Clause Is Valid, Which Petitioner Underscores by Failing To Suggest Otherwise, and By Suing to Enforce the Agreements.

Petitioner does not, and cannot, dispute that the arbitration clause in the Agreements is valid. The FAA mandates that an arbitration clause is "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The U.S. Supreme Court has limited the "for the revocation of any contract" exception to "[g]enerally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996); *U.S. Home Corp.*, 415 P.2d at 40 ("Under the FAA, '[s]tates may regulate contracts, including arbitration clauses, under general contract law principles,' which include fraud, duress, and unconscionability… What a state may not do is 'decide that a contract is fair enough to enforce all of its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.'"), citing *Allied-Bruce*, 513 U.S. at 281. The statutory

protection of arbitration agreements is not subject to "any additional limitations under State law." *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984).

Petitioner has not pled, argued, or proffered evidence of fraud, duress, unconscionability, or other grounds to "revoke" the Agreements. To the contrary, Petitioner is suing to enforce them, which requires that the Agreements be valid. *See Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 972 n.4 (9th Cir. 1992).

2. All of Petitioner's Claims Are Governed by the Agreements' Arbitration Clause.

Petitioner likewise cannot contest that her common law contract and tort claims against Milliman "arise out of or relate to the engagement of Milliman" by NHC. The fact that certain of Petitioner's causes of action sound in tort, rather than contract, does not aid her. "[I]f the allegations underlying the claims ***so much as touch*** matters covered by the parties' agreements, then those claims must be arbitrated." *Helfstein v. UI Supplies,* 127 Nev. 1140, 373 P.3d 921, at *2 (2011) (citations omitted; emphasis added); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) (affirming order compelling arbitration of tort, statutory and contract claims, and stating that the factual allegations "need only 'touch matters' covered by the contract containing the arbitration clause" in order to be arbitrable), citing *Mitsubishi Motors Corp. v. Soler v. Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624,

n.13 (1985). But for Milliman's pre-insolvency work for NHC pursuant to the Agreements, Petitioner would have no claims.

The District Court correctly rejected Petitioner's argument that she cannot be compelled to arbitrate because she is a "non-signatory" to the Agreements. Because Petitioner is suing for damages based on Milliman's work done pursuant to the Agreements, she "cannot simultaneously avoid other portions of the agreement, such as the arbitration provision." *Ahlers*, 126 Nev. 688, 367 P.3d 743, at *2. Federal and state courts around the country have applied this well-settled rule where, as here, a statutory insurance liquidator's or receiver's claims arise from and relate to an insolvent insurer's contract with the defendant. As the Ninth Circuit Court of Appeals has stated, "if the liquidator wants to enforce [the insurer's] rights under its contract, she must also assume its perceived liabilities." *Bennett*, 968 F.2d at 972 n.4; *see also Poizner v. Nat. Indem. Co.*, No. 08CV772-MMA, 2009 WL 10671673, at *2 (S.D. Cal. Jan. 6, 2009) (enforcing arbitration clause against insurance liquidator); *Garamendi v. Caldwell*, No. CV-91-5912-RSWL(EEX), 1992 WL 203827, at *3 (C.D. Cal. May 4, 1992) (same); *Koken v. Cologne Reins. (Barbados), Ltd.*, 34 F. Supp. 2d 240, 256 (M.D. Pa. 1999) (same); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 272–75 (D. Vt. 1993) (same); *Rich v. Cantilo & Bennett, L.L.P.*, 492

S.W.3d 755, 762 (Tex. Ct. App. 2016) (same); *State v. O'Dom*, No. 2015CV258501, 2015 WL 10384362, at *3-4 (Ga. Super. Sept. 18, 2015) (same).

The Louisiana First Circuit Court of Appeal—in a case involving Milliman and the identical arbitration language, and identical claims, to those at issue here—is the latest court to enforce this principle against a statutory liquidator. *Donelon*, 2019 WL 993328. In reversing the trial court's denial of Milliman's motion to compel arbitration, the *Donelon* court unanimously rejected the rehabilitator's contention that it could not be bound to an arbitration agreement it did not sign:

> The non-signatory cannot have it both ways; he cannot rely on the contract when it works to his advantage and then repudiate the contract when it works to his disadvantage…. The Commissioner's breach of contract claims against Milliman seek to enforce the Agreement containing the arbitration provision. Furthermore, claims for negligence and negligent performance arising from work performed pursuant to a contract may be contractual in nature and subject to the arbitration provision in the contract.
>
> * * *
>
> The roots of each of the Commissioner's claims, whether resounding in contract or tort, are the Agreement. But for Milliman's allegedly defective performance under the Agreement, the Commissioner would have no tort claim against Milliman.

2019 WL 993328, at *9-10. Milliman is not aware of any precedent contrary to this well-settled rule, and Petitioner cites none.[4]

Petitioner is not exempt from the Agreements' arbitration clause because she purports to be "acting… to vindicate the harm caused to the policyholders" by Milliman's alleged misconduct. (Writ application, p. 31). Petitioner may wear many hats in her role as statutory liquidator: she may, among other things, pursue actions to claw back estate assets, or resolve insurance coverage disputes brought by policyholders, or address the priority of creditor claims seeking money from the estate. What matters here, however, is that Petitioner's Complaint against Milliman brings pre-insolvency tort and contract claims for damages to NHC. Therefore, Petitioner "stands in the shoes of the insolvent insurer" and "is bound by

[4] Because the facts underlying all of Petitioner's causes of action "touch matters covered by" the Agreements, there is no basis to "sever[]" Petitioner's "contract-based claims for purposes of arbitration." (Writ application, p. 34, n.4). And while Petitioner tries to recast her "negligence *per se*" cause of action as a "statutory" claim under N.R.S. 681B, Petitioner cites no support for the notion that a negligence claim cannot be arbitrated if it involves an alleged breach of a statutory duty. On the contrary, this Court has ***required*** claims based on an alleged breach of a statutory duty to be arbitrated together with tort and contract claims where, as here, the plaintiff's "basis for claiming injury and grounds for redress stem from rights he allegedly received pursuant to" an agreement containing a broad arbitration clause. *Phillips v. Parker*, 106 Nev. 415, 418, 794 P.2d 716, 718 (1990) (compelling arbitration of Civil RICO and tort claims that "'relate to' the agreement as provided in the arbitration clause").

[the insurer's] pre-insolvency agreements." *Bennett*, 968 F.2d at 972; *see also Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 626-27 (6th Cir. 2003) (a receiver "stands in the shoes of the entity in receivership," and, therefore, the receiver is "bound to the arbitration agreements to the same extent that the receivership entities would have been absent the appointment of the receiver").

As the Louisiana Court of Appeal held in *Donelon*, a liquidator "takes control of the insurer, has the authority to conduct business… steps into the shoes of the insurer" and "***is bound by the same constraints as is the insurer in the normal course of business***," 2019 WL 993328, at *13, quoting *Dardar v. Ins. Guar. Ass'n*, 556 So.2d 272, 274 (La. App. 1 Cir. 1990) (emphasis added).

C. The McCarran-Ferguson Act Does Not Reverse-Preempt the FAA Because Petitioner's Common Law Damages Claims Do Not Implicate Nevada's Regulation of the "Business Of Insurance."

Having failed to plead or demonstrate any basis to "revoke" the Agreements' arbitration provision, Petitioner instead argues that compelling a liquidator to arbitrate its common law damages claims against third parties somehow interferes with the liquidator's "powers and duties" under the Nevada Insurance Code ("NIC"). This argument is meritless.

Petitioner's argument, which would effectively preclude arbitration of claims brought by a liquidator, contravenes established principles of preemption under the FAA. As this Court stated in *U.S. Home Corp.*, "The [U.S.] Supreme Court has made unmistakably clear that, when the FAA applies, it preempts state laws that single out and disfavor arbitration." 415 P.3d at 40, citing *AT&T Mobility v. Concepcion*, 563 U.S. 333, 341 (2011); *Southland Corp.*, 465 U.S. at 10 (holding that the FAA "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration"). Any state law that "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA" is likewise preempted. *Tallman*, 359 P.3d at 120, quoting *AT&T Mobility*, 563 U.S. at 344.

The District Court properly rejected Petitioner's "reverse preemption" argument under the McCarran-Ferguson Act. The U.S. Courts of Appeals for the Third, Sixth and Ninth Circuits have unanimously held that state insurance liquidators must arbitrate their common law damages claims against third parties who performed pre-insolvency services for the insurer pursuant to a contract, ***and*** that a liquidator's prosecution of these third party claims through arbitration neither

implicates nor interferes with the state's regulation of the "business of insurance" or ongoing liquidation proceedings.

1. There Is No Conflict Between the FAA and the NIC.

As a threshold matter, McCarran-Ferguson does not apply here because the NIC does not conflict with the FAA. The District Court correctly held that neither the statute nor the Receivership Order entered pursuant to the NIC precludes Petitioner from arbitrating common law damages claims against third parties. On the contrary, the Receivership Order authorizes Petitioner to "[i]nstitute and prosecute… any and all suits and other legal proceedings," which includes arbitration. (Order, I APP 11-12, §14 (a), (h)). *See Costle*, 839 F. Supp. at 275 ("This Court interprets 'other legal proceedings' [as used in the insurance liquidation statute] to include arbitration proceedings."). Absent such a conflict, there is no reverse preemption. *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381-82 (9th Cir. 1997).

Petitioner cites no specific provision in either the NIC or the Receivership Order to support her conclusion that the Receivership Order vests Petitioner with the absolute "right ***to choose*** the forum for prosecution of claims the liquidated insurer possessed." (Writ application, p. 16) (emphasis added). Petitioner is well aware

that she does ***not*** have the unfettered right to bring a defendant into Nevada state court at her discretion. Petitioner sued the U.S. Department of Health & Human Services ("HHS") in the U.S. District Court for the District of Nevada for payments allegedly owed to NHC. *See Richardson v. U.S. Dep't of Health and Human Serv., et al.*, No. 2:17-cv-00775-JCM-PAL (D. Nev. Mar. 16, 2017). If Petitioner in fact had an absolute right to select her forum for litigation, no doubt she would have sued HHS in state court. However, just as the Receivership Order could not create jurisdiction over HHS where both federal law and a forum selection clause in the loan agreement between NHC and HHS required Petitioner to pursue her claims against HHS in federal court, the Receivership Order does not vitiate the valid and enforceable arbitration clause in the Agreements.

Furthermore, while Petitioner asserts that the NIC recognizes the need for "consolidation in a single court," (Writ application, p. 10), Judge Cory, who entered the Receivership Order and presides over the receivership proceedings, ***denied*** Petitioner's request to coordinate and consolidate this damages action against Milliman with the receivership proceedings.

2. Petitioner's Prosecution of these Claims Does Not Constitute, Nor Would Arbitration Interfere With, the "Business of Insurance."

While Petitioner details the broad, protectionist "policies" and powers the Nevada Legislature purportedly intended to foster through the NIC (Writ application, pp. 23-37), Petitioner ignores that what constitutes, or interferes with, the regulation of the "business of insurance" under the McCarran-Ferguson Act is strictly a question of ***federal*** law. *S.E.C. v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65, 69 (1959); *First Nat'l Bank of E. Arkansas v. Taylor*, 907 F. 2d 775, 780 n.8 (8th Cir. 1990). A state's "classification does not control in deciding whether an activity is the 'business of insurance' under the McCarran-Ferguson Act." *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 13 (1st Cir. 1992). Thus, Petitioner's appeal to state law characterizations of the NIC's policies, including her attempts to contrast NRS 696B with other portions of the NIC that expressly permit arbitration, even if accurate, is irrelevant.

The McCarran-Ferguson Act states that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The statute was passed

"to assure that the activities of insurance companies in ***dealing with their policyholders*** would remain subject to state regulation." *S.E.C. v. Nat'l Secs., Inc.*, 393 U.S. 453, 459-60 (1969) (emphasis added). The U.S. Supreme Court has stated that "courts should narrowly construe the McCarran-Ferguson Act," and that the focus of the act is on "the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship... are laws regulating the 'business of insurance.'" *Id.* at 460. Thus, the "proper inquiry is whether the ***particular suit being brought*** would impair state law." *AmSouth Bank v. Dale*, 386 F.3d 763, 781 (6th Cir. 2004) (emphasis added).

Decisively, the answer to this controlling inquiry is that Petitioner's common law tort and contract claims are not the "business of insurance" as a matter of well-settled law. Federal courts construing the McCarran-Ferguson Act have uniformly held that "[a]n ordinary suit against a tortfeaser by an insolvent insurance company" neither implicates nor impairs the business of insurance under McCarran-Ferguson. *AmSouth*, 386 F.3d at 783 ("Where the insolvent insurer is itself a plaintiff in an ordinary contract or tort action, courts tend to look unfavorably on claims of McCarran-Ferguson preemption of the FAA."); *Quackenbush*, 121 F.3d at 1382 (compelling arbitration of insurance liquidator's common law damages claims

against third party based upon the insolvent insurer's pre-insolvency agreement); *Bennett*, 968 F.2d at 972 (holding that "[a]pplication of the FAA" to insurance liquidator's common law damages claims against a third party "does not impair the liquidator's substantive remedy under Montana law. Instead it simply requires the liquidator to seek relief through arbitration. The liquidator has presented no evidence that enforcing the arbitration clauses here will disrupt the orderly liquidation of the insolvent insurer."); *Suter v. Munich Reins. Co.*, 223 F.3d 150, 161 (3d Cir. 2000) (compelling arbitration of liquidator's common law damages claims "to enforce contract rights for an insolvent insurer"); *Grode v. Mut. Fire, Marine and Inland Ins. Co.*, 8 F.3d 953, 959-61 (3d Cir. 1993) ("The complex regulations relating to insolvent insurance companies have to do with plans of rehabilitation and payment to policy holders. Simple contract and tort actions that happen to involve an insolvent insurance company are not matters of important state regulatory concern or complex state interests."); *Milliman*, 353 F. Supp. 3d at 604 (E.D. Ky.) ("[T]he McCarran Ferguson Act does not allow reverse-preemption of the FAA when the Liquidator of an insurance company brings suit against a third-party independent contractor for tort or breach of contract claims."); *Koken v. Reins. (Barbados) Ltd.*, 34 F. Supp. 2d at 247 (compelling arbitration where "this action

has nothing to do with Pennsylvania's statutory scheme for the regulation of the business of insurance because it is not an action against an insolvent insurer's estate that might deprive it of assets"); *Midwest Employers Cas. Co. v. Legion Ins. Co.*, No. 4:07CV870 CDP, 2007 WL 3352339, at *5 (E.D. Mo. Nov. 7, 2007) ("The ultimate issue in this case is a standard contract dispute, so the case does not involve the state's regulation of insurance."); *Costle*, 839 F. Supp. at 274.

This unbroken line of authority makes clear that compelling a liquidator to arbitrate pre-insolvency common law tort and contract claims "will not interfere with [a state's] insolvency scheme." *Quackenbush*, 121 F.3d at 1381. In *Suter*, 223 F.3d at 161, the Third Circuit compelled arbitration and rejected a liquidator's argument that "the arbitration of this controversy... will impair New Jersey's Liquidation Act," holding:

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

Id. *See also Milliman*, 353 F. Supp. 3d at 603.[5]

This weight of authority also confirms that state statutes that seek to regulate the forum in which a liquidator or insurer can sue do not regulate the "business of insurance." In *AmSouth*, the Sixth Circuit stated that even where a litigation generally is "integral to" the performance of an insurance contract—and thus implicates the business of insurance—"the choice of forum [is] not." *Id.* at 781, citing *Int'l Ins. Co. v. Duryee*, 96 F.3d 837, 838-40 (6th Cir. 1996). *See also Milliman*, 353 F. Supp. 3d at 603 (holding that Kentucky liquidation statute's "exclusive jurisdiction" provision "was not enacted for the purpose of regulating 'the business of insurance'").

Petitioner ignores all of this on-point caselaw, upon which the District Court relied in its orders, and cites no contrary federal precedent—because there is none. The limited state court authority Petitioner cites does not establish that a liquidator's

[5] Petitioner has presented no evidence that enforcing the arbitration clause here will disrupt the orderly liquidation of NHC. Neither the confidential nature of arbitration, nor the AAA's discovery rules, nor limited appellate review "interferes" with the NIC, as Petitioner contends. Petitioner's purported "right" to try this case in a public forum is made up from whole cloth—the NIC says nothing about a liquidator having a right to try its claims publicly. And, as discussed below, the U.S. Supreme Court has expressly held that the fact that Petitioner must try her case against Milliman separate from her claims against the other defendants is not a basis to deny arbitration.

so-called "heightened rights and duties" supersede the FAA. (Writ application, pp. 31-33). In both *Taylor v. Ernst & Young*, 958 N.E.2d 1203 (Ohio 2011), and *Ommen v. Milliman, Inc.*, Case No. LACL 138070, (Feb. 6, 2018, Iowa Dist. Ct., Polk County), the respective courts improperly disregarded the on-point FAA jurisprudence discussed above, and failed to conduct the requisite analysis ***under federal law*** of whether the FAA superseded the Ohio and Iowa statutes at issue.[6] And while the Iowa state trial court held that the Iowa Liquidation Act as a whole generally regulates the business of insurance, the Iowa court failed to conduct the requisite assessment of whether the "particular suit being brought" by the Iowa liquidators interferes with the business of insurance, as Milliman has argued on appeal. *AmSouth*, 386 F.3d at 781. Finally, in both *Taylor* and *Ommen*, the courts improperly determined that the liquidators' claims did not arise out of or relate to

[6] In *Taylor*, there also was apparently no governing liquidation order before the Court that expressly authorized the liquidator to arbitrate when necessary. Thus, while the Ohio Supreme Court held that the Ohio liquidation statute afforded the liquidator the unilateral right to decide where to bring claims, the applicable Receivership Order here does not afford Petitioner that unilateral discretion.

the agreements at issue, and that the liquidators thus were not seeking to enforce the agreements at issue.[7] Petitioner cannot, and does not, argue the same here.

Finally, *Arthur Andersen LLP v. Superior Court*, 67 Cal. App. 4th 1481, 1495 (1998), on which Petitioner also relies (Writ application, p. 32), does not concern either a motion to enforce a contractual arbitration provision, or arbitration at all.

3. Arbitration Does Not Threaten the Rights of NHC's Creditors or Policyholders.

There is no reason to exempt Petitioner from arbitration to "protect" NHC's creditors and policyholders because Petitioner's claims against Milliman do not "threaten" the rights of NHC's creditors or policyholders in the first place. *Covington v. Am. Chambers Life Ins. Co.*, 779 N.E.2d 833 (Ohio Ct. App. 2002), on which Petitioner relies (Writ application, p. 33), and in which an Ohio court denied arbitration of a creditor's claims ***against the insolvent insurer's estate***, demonstrates the distinction between Petitioner's claims here, and claims that in fact implicate creditor and policyholder rights:

> [T]he issues [the creditor] seeks to have resolved by arbitration primarily involve setoff and proof of claims. These are precisely the types of disputes that the Ohio insurance liquidation

[7] The Iowa Court's decision was also based on the Iowa liquidators' (improper) disavowal of the agreement with Milliman, a claimed power Petitioner does not have under the NIC or the Receivership Order.

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

Id. at 837–38 (citations omitted).

In contrast to the liquidator's claims in *Covington*, Petitioner's action against Milliman ***does not*** involve set offs or proofs of claim. This case is separate and distinct from the ongoing receivership action and it neither threatens or states an interest in NHC assets or property, nor will it affect any creditors' rights. All that will be determined in an arbitration is whether Milliman owes Petitioner damages. The District Court thus correctly held that enforcing the Agreements' arbitration clause will not disrupt the orderly liquidation of NHC, and Petitioner's action against Milliman has no bearing on the administration, allocation or ownership of NHC's property or assets, which is the province of the receivership action. *See AmSouth*, 386 F.3d at 780 (distinguishing claims by "angry creditors attempting to sue insolvent insurance companies in federal court to jump ahead in the queue of claims," from claims "where the insurance companies are themselves the natural plaintiffs").

Given the clear distinction between Petitioner's claims against Milliman, and claims that seek to recoup estate assets as part of the core delinquency proceeding, Milliman's filing of a proof of claim in the entirely separate receivership action is not an acknowledgement of the "primacy of the NIC" over the Agreements' arbitration provision, as Petitioner wrongly asserts. (Writ application, p. 43). The Ninth Circuit Court of Appeals in *Quackenbush* rejected a similar contention, recognizing that a third party's claims ***against*** the liquidation estate of an insolvent insurer "are entirely distinct" from the liquidator's common law and tort claims against that third party. 121 F.3d at 1374-75.

Nor do Petitioner's claims against Milliman implicate NHC's creditors' or policyholders' rights simply because a potential recovery would ultimately benefit NHC's estate, as Petitioner contends. There is a distinction between claims that belong to the creditors and policyholders of an insolvent insurer, on the one hand, and claims that belong to the insolvent insurer, where any recovery would increase the coffers of the estate, and therefore benefit the estate's creditors and policyholders, on the other hand. Petitioner's claims fall within the latter category, and therefore are arbitrable.

In *AmSouth*, the Sixth Circuit held that where a receiver or liquidator sues in tort or contract, such a proceeding implicates the business of insurance only "in an attenuated fashion" in that the liquidated insurer might have more assets as a result of its successful tort suit. The Sixth Circuit held that seeking to increase a defunct insurer's assets—the entire purpose of Petitioner's suit against Milliman here—was an insufficient connection to the "business of insurance" to trigger reverse preemption under McCarran-Ferguson. 386 F.3d at 783; *see also Suter*, 223 F.3d at 161 ("[T]he mere fact that policyholders may receive less money does not impair the operation of any provision of New Jersey's Liquidation Act."). In *U.S. Dept. of Treasury v. Fabe*, on which Petitioner relies (Writ application, p. 46), the U.S. Supreme Court likewise recognized that bringing additional funds into the insurer, while it may "indirect[ly]" benefit policyholders, does not constitute the business of insurance under the McCarran-Ferguson Act. 508 U.S. 491, 508-09 (1993).

D. The Recent Kentucky Federal Court Decision in *Milliman, Inc. v. Roof*, and the Louisiana Appellate Decision in *Donelon v. Shilling*, Reaffirm Milliman's Arbitration Rights.

The Eastern District of Kentucky's recent *Milliman* decision is simply the latest on-point federal authority holding that a liquidator must arbitrate common law

damages claims relating to or arising out of a third party's pre-insolvency contract work for an insolvent insurer.

As here, the Kentucky liquidator seeks common law damages from Milliman for the allegedly negligent work Milliman performed for KYHC pursuant to a contract. The Kentucky agreement includes an arbitration provision that is substantively identical to the one at issue here, yet the liquidator refused to arbitrate. Relying on the Kentucky Supreme Court's decision in *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010)—on which Petitioner here also relies (Writ application, p. 46)—the Kentucky liquidator argued that the Kentucky liquidation law (the "IRLL") confers the state court with "exclusive jurisdiction" over all claims brought by the liquidator and reverse preempts Milliman's FAA right to arbitration.[8]

[8] The relevant jurisdiction provision in the IRLL, which grants the Franklin County Circuit Court the jurisdiction "to entertain, hear, or determine all matters in any way relating to any delinquency proceeding under this subtitle, including but not limited to all disputes involving purported assets of the insurer," KRS §304.33-050(3)(a), is substantively the same NIC §696B.190(4) ("No court has jurisdiction to entertain, hear or determine any petition or complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer, or 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.")

The Kentucky federal court refused to follow *Ernst & Young*, and rejected the liquidator's contention that the IRLL's "exclusive jurisdiction" provision reverse preempts the FAA. The federal court held that aspects of a statute that merely affect a liquidator's right of forum selection, as opposed to its "substantive rights," do not interfere with the IRLL:

> Arbitration does not deprive the Liquidator of any substantive rights, only altering the forum in which the liquidator may pursue those rights. Mandating arbitration in this case does not alter the disposition of claims of the policy holders and does not "invalidate, impair, or supersede" the IRLL as a whole. The arbitration of the Liquidator's claims against a third party contractor does not impair the delinquency proceedings in state court, nor does it invalidate the protections of the IRLL.

Milliman, 353 F. Supp. 3d at 603.

The *Milliman* court also squarely addressed whether the liquidator's common law tort and contract claims implicated the state's regulation of the "business of insurance," and held that they did not:

> The outcome of this litigation does not affect the policy holders of KYHC, there is no transfer or spreading of insurance policy risk, and this has no direct effect on the relationship between KYHC and its insured policy holders. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). This litigation involves a contract dispute between a business and its [actuaries], not an insurance contract. Simply because the business is an insurance company and has become insolvent is not relevant to the regulation of the business of insurance.

Id. (citation omitted).

Petitioner's contention that the *Milliman* court "was apparently unaware" that the Kentucky Supreme Court, in *Ernst & Young*, had held that "the FAA conflicts with, and impairs, the grant of exclusive jurisdiction to the liquidating court," is false. (Writ application, p. 50). The *Milliman* court considered and expressly rejected *Ernst & Young* as contrary to controlling federal law.[9]

Milliman is also on all fours with the Louisiana First Circuit Court of Appeal's decision last month in *Donelon*, which reversed the trial court's denial of Milliman's motion to compel arbitration in an identical case. Petitioner heavily relied on the trial court's erroneous and since-reversed decision—Petitioner attaches both the oral argument transcript and the underlying briefing from the motion to compel arbitration in that case—for the proposition that a statutory liquidator or rehabilitator's "unique role" as guardian of NHC's policyholders' and the public's rights supersedes an otherwise valid and binding arbitration agreement. (Writ

[9] Petitioner also erroneously contends that the court overlooked an Ohio intermediate appellate court decision, *Benjamin v. Pipoly*, 800 N.E.2d 50, 60 (Ohio App. 2003), as well as the Iowa trial court decision denying Milliman's motion to compel arbitration, which is now on appeal. However, because the *Milliman* court correctly determined that what constitutes "the business of insurance" is a question of federal law, there was no reason for the court to consider either decision.

application, pp. 33-34). The Louisiana appellate court expressly rejected that contention:

> Citing this Court's decisions in *LeBlanc v. Bernard*, 554 So. 2d 1378, 1381 (La. App. 1 Cir. 1989), writ denied, 559 So.2d 1357 (La. 1990), and *Republic of Texas Savings Association v. First Republic Life Insurance Co.*, 417 So.2d 1251, 1254 (La. App. 1 Cir. 1982), writ denied, 422 So.2d 161 (La. 1982), the Commissioner argues that public policy prohibits arbitration because he "owes an overriding duty to the public of the State of Louisiana" and does not stand precisely in the shoes of the insolvent insurer…. In the present case, the Commissioner, as plaintiff, sued Milliman. No claims are being brought against the Commissioner, LAHC, or LAHC's property, as contrasted with the facts of *LeBlanc* and *Republic of Texas Savings Association*. Since the *LeBlanc* and *Republic of Texas* decisions, this Court has found that the Commissioner, as rehabilitator, "takes control of the insurer, has the authority to conduct business… steps into the shoes of the insurer" and "is bound by the same constraints as is the insurer in the normal course of business." *Dardar v. Insurance Guaranty Association*, 556 So.2d 272, 274 (La. App. 1 Cir. 1990).

Donelon, 2019 WL 993328, at *13.

Donelon also held that the applicable rehabilitation order, like the Receivership Order here, expressly authorized the rehabilitator to "commence and maintain all legal actions necessary, wherever necessary, for the proper administration of this rehabilitation proceeding." *Id*. at *12. By recognizing that *Donelon* presented the same issue before this Court, and by placing so much weight

on that case before it was resolved against her position, Petitioner demonstrates that *Donelon* should indeed control and result in the denial of the relief she seeks here.

E. So-called "Public Policy" Concerns Cannot Vitiate Milliman's Arbitration Rights.

Well aware that nothing in the NIC ***actually*** precludes Petitioner from arbitrating here, Petitioner contends that arbitration is contrary to the "intent" of the NIC, and therefore "contrary to public policy." (Writ application, p. 37). Petitioner's argument contravenes the U.S. Supreme Court's directive that a court cannot rely on "policy considerations" to vitiate an otherwise valid arbitration agreement. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) ("[C]ourts [should] enforce the bargain of the parties to arbitrate, and not substitute [their] own views of economy and efficiency.") (quotations omitted). A court has "no discretion to consider public-policy arguments about the state statute in deciding whether to compel arbitration under the FAA." *Quackenbush*, 121 F.3d at 1382, citing *Dean Witter Reynolds, Inc*., 470 U.S. at 218.

The U.S. Supreme Court and this Court have addressed and rejected all of the specific policy arguments Petitioner raises here as a basis to defeat arbitration. For example, in *Moses H. Cone Memorial Hospital*, 460 U.S. at 19, the U.S. Supreme Court held that the threat of inconsistent rulings or "piecemeal litigation" is not a

valid reason to deny a party its right to arbitrate. The FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement. Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Id*. (italics in original). The FAA requires arbitration even where a plaintiff has brought a conspiracy claim against multiple defendants, only one of whom is subject to an arbitration clause. *See In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007).

Petitioner's attacks on the procedural features of arbitration—*e.g.*, lack of appellate review, confidentiality, streamlined discovery—are similarly unavailing. This Court has expressly held that arbitration agreements must be enforced under the FAA, even though doing so will forego procedural protections available to litigants in court. *U.S. Home Corp.*, 415 P.3d at 42. *See also DeStephano v. Broadwing Commc'ns, Inc.*, 48 F. App'x 103, 2002 WL 31016599, *4 (5th Cir. 2002) (rejecting plaintiff's argument that a confidentiality provision "render[ed] the arbitration procedure an inadequate alternative to the judicial forum"); *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 479 n.5 (4th Cir. 2012) ("When parties consent to arbitration, and thereby consent to extremely limited appellate review, they

assume the risk that the arbitrator may interpret the law in a way with which they disagree.").

Finally, Petitioner's argument contravenes this Court's express recognition that the cost savings and efficiency of streamlined discovery in arbitration will inure to the ***benefit*** of the State and NHC's creditors. *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004) ("[A]rbitration generally avoids the higher costs and longer time periods associated with traditional litigation."). These oft-rejected arguments provide no reason to issue extraordinary writ relief here.

F. The District Court Decision Concerning a Forum Selection Clause Is Irrelevant to this Arbitration Dispute.

Petitioner's extensive reliance on the October 2017 District Court decision denying Millennium Consulting Services' motion to enforce a contractual forum selection clause is totally misplaced. This Court and others have repeatedly rejected arguments that seek to analogize forum selection clauses to arbitration provisions, because the former are not subject to the same "strong presumption" in favor of enforcement as the latter. *Tuxedo Int'l Inc.*, 127 Nev. at 23, 251 P.3d at 698 (stating that an arbitration clause is "subject to an entirely different type of analysis than the forum selection clause analysis set forth in this opinion"); *In re Orange, S.A.*, 818 F.3d 956, 964 (9th Cir. 2016) ("Arbitration clauses are, however,

distinct from the simple forum selection clause at issue here as arbitration clauses are construed liberally in favor arbitration."); *Trs. of Washington State Plumbing & Pipefitting Indus. Pension Plan v. Tremont Partners, Inc.*, 2012 WL 3537792, at *3 (S.D.N.Y. Aug. 16, 2012) ("It would seem clear that the enforcement of an arbitration agreement, in view of the very favorable attitude of the federal judiciary toward arbitration, involves something different from carrying out a forum selection clause.") Moreover, no preemptive federal statute like the FAA mandates the enforcement of contractual forum selection clauses.

G. New York Law Does Not Preclude Petitioner from Arbitrating Her Claims against Milliman.

1. New York Law Does Not Apply to this Arbitration Dispute

The Agreements' New York choice of law provision does not vitiate Milliman's right to arbitrate here. The New York Court of Appeals itself has recognized that where, as here, an arbitration dispute involves interstate commerce, "it is governed by the Federal Arbitration Act and Federal law." *Hirschfeld Prods., Inc. v. Mirvish*, 673 N.E.2d 1232, 1233 (N.Y. 1996); *see also U.S. Home Corp.*, 415 P.3d at 38 (same). As discussed above, uniform federal law compels arbitration of Petitioner's claims against Milliman.

Petitioner's contention that New York law applies to this dispute is also

contrary to the U.S. Supreme Court's decision in *Mastrobuono*, and other federal precedent, in which 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. 415 U.S. at 58-62; *Preston v. Ferrer*, 552 U.S. 346, 362–63 (2008) (same); *Highlands Wellmont Health Network, Inc.v. John Deere Health Plan, Inc.*, 350 F.3d 568, 577 (6th Cir. 2003) ("Where the arbitration clause is broad, ***only an express provision excluding a specific dispute***, or the ***most forceful evidence*** of a purpose to exclude the claim from arbitration, will remove the dispute from consideration by the arbitrators.") (quotations and citations omitted; emphasis added). *See also* 31 Thomas E. Carbonneau, *Moore's Federal Practice* § 906.02[3] (3d ed. 2016) ("[A] contractual reference to state law displaces 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."). No provision in the Agreements expressly—or even impliedly—states that in the event of NHC's liquidation, the parties would forgo their right to arbitration. The Agreements' selection of the "substantive contract law of the State of New York" (I APP 2; I APP 4) does not, in and of itself, evidence such an intent. *See Preston*, 552 U.S. at 361-63.

Petitioner's attempt to distinguish *Mastrobuono* misses the point. The relevant issue is not whether the arbitration question before this Court is "procedural" or not. The actual issue is whether the Agreements expressly provide that NHC would not continue to be bound to arbitrate post-insolvency. Nothing in the Agreements so much as even suggest that NHC or its liquidator would not be bound to its agreement to arbitrate if NHC became insolvent. In *Quackenbush*, the Ninth Circuit Court of Appeals squarely rejected a similar argument advanced by the insurance liquidator here, holding: "The parties agreed to arbitrate '*any* dispute . . . with respect to *any* transaction.' There is simply no reason to believe that the parties somehow intended to exclude post-insolvency disputes from arbitration." 121 F.3d at 1380 (italics in original).

The court in *Donelon* likewise rejected the precise argument Petitioner raises here. 2019 WL 993328, at *7-8. Nevada has adopted the Restatement (Second) of Conflict of Laws, which contains the same language on which the *Donelon* court relied in applying Louisiana law, not New York law, in enforcing the arbitration agreement. *Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mortg. Inv'rs*, 95 Nev. 811, 815, 603 P.2d 270, 273 (1979), citing Restatement (Second) of Conflict of Laws § 187.

2. New York Law Does Not Preclude a Nevada Liquidator, Appointed Pursuant to Nevada Law, From Arbitrating.

Even if New York law applied, which it does not, New York law does not prohibit arbitration here, where a non-New York liquidator who is expressly authorized to arbitrate by the governing Receivership Order, brings claims on behalf of a non-New York insurer against a non-New York resident outside of a New York liquidation. Rather, the Court of Appeals' holding in *Knickerbocker Agency, Inc.*, makes clear that the prohibition on arbitration applies only to claims by or against the New York Superintendent under Article 74 (formerly Article XVI) of the New York Insurance Law.

Here, of course, Petitioner is not acting under the New York Insurance Law. *See* Receivership Order, I APP 6-7, §§ 1, 2 (vesting Liquidator with the authority and powers expressed in NRS 896B). Rather, she brings claims against Milliman pursuant to the NIC 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 Petitioner to arbitrate. (I APP 11-12). New York law does not, and cannot, abrogate the clear terms of the Nevada Receivership Order pursuant to which this Nevada liquidator was appointed.

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 *Knickerbocker* Court 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.
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> * * *
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> 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.

While Petitioner argued below that *Knickerbocker* did not distinguish the precise scenario at issue here, that argument ignores the critical point: that the

Knickerbocker court expressly refused to extend its holding beyond the narrow parameters directly applicable in that case (which are not applicable here). Moreover, 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.

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 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. 98, 103 (S.D.N.Y. 1984); *see also 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.[10]

3. The Agreements' Arbitration Clause Covers Petitioner's Claims Against Milliman's Employees.

Petitioner erroneously contends that the arbitration provision does not apply to her claims against the individual defendants. The Agreements' broad arbitration clause applies to Milliman's employees and agents where, as here, the employees' or agents' "alleged misconduct relates to their behavior as officers or directors or in their capacities as agents of the corporation." *Hirschfeld Prods., Inc.*, 673 N.E.2d at 1233; *Tallman*, 359 P.3d at 119 ("If a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under

[10] Petitioner 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 Petitioner relies on *Stephens v. American International Ins. Co.*, 66 F.3d 41, 44 (2d Cir. 1995), the Second Circuit held in that case that a cedent's setoff claims against an insolvent reinsurer's estate were not arbitrable, particularly "[s]ince reinsurance is a practice which falls within the 'business of insurance.'" The Court held that "reinsurance is not merely 'an integral part of the policy relationship between the insurer and insured,' it *is* the policy relationship between the two parties." *Id*. (italics in original). By contrast, here it is indisputable that Petitioner's claims do not involve or implicate the "policy relationship" between NHC and its policyholders.

the terms of such agreements") (quotations and citation omitted). "The rule is necessary not only to prevent circumvention of arbitration agreements but also to effectuate the intent of the signatory parties to protect individuals acting on behalf of the principal in furtherance of the agreement." *Hirschfeld Prods, Inc.*. 673 N.E.2d at 1233. It is irrelevant that the Agreements' arbitration provision does not expressly reference claims against Milliman employees or agents. *Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1, 10-11 (1st Cir. 2014) (collecting cases).

Petitioner's contention also fails because it wrongly presumes that she should be treated as a "non-signatory" to the Agreements. For all of the reasons discussed above, Petitioner is bound to the Agreements for purposes of arbitration. *See Bennett*, 968 F.2d at 972; *Javitch*, 315 F.3d at 626-27; *Donelon*, 2019 WL 993328, at *13 (A liquidator "takes control of the insurer, has the authority to conduct business… steps into the shoes of the insurer" and "***is bound by the same constraints as is the insurer in the normal course of business***"), quoting *Dardar v. Ins. Guar. Ass'n*, 556 So.2d 272, 274 (La. App. 1 Cir. 1990) (emphasis added).

In all events, Petitioner waived this argument by failing to raise it in the District Court. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that

court, is deemed to have been waived and will not be considered on appeal.") Petitioner did not raise this issue anywhere in her ***four*** District Court briefs, or the ***three*** oral arguments relating to Milliman's arbitration motion. Nor is it "jurisdictional." Petitioner does not contend that either the District Court or this Court does not have "jurisdiction" to adjudicate this arbitration dispute.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's orders granting Milliman's motion to compel arbitration, and deny Petitioner's application for a writ of mandamus.

DATED this 20th day of March, 2019.

Respectfully submitted,
SNELL & WILMER, L.L.P.
/s/ Alex Fugazzi
Patrick G. Byrne (NV Bar No. 7636)
Andrew M. Jacobs (NV Bar No. 12787)
Alex L. Fugazzi (NV Bar No. 9022)
Kelly Dove (NV Bar No. 10569)
DENTONS US LLP
Reid L. Ashinoff (*pro hac vice* forthcoming)
Justin N. Kattan (admitted *pro hac vice*)
Attorneys for Real Parties in Interest Milliman, Inc., Jonathan L. Shreve, and Mary van der Heijde

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the Response to Petition for Writ of Mandamus, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of March, 2019.

Respectfully submitted,
SNELL & WILMER, L.L.P.
/s/ Alex Fugazzi
Patrick G. Byrne (NV Bar No. 7636)
Andrew M. Jacobs (NV Bar No. 12787)
Alex L. Fugazzi (NV Bar No. 9022)
Kelly Dove (NV Bar No. 10569)
DENTONS US LLP
Reid L. Ashinoff (*pro hac vice* forthcoming)
Justin N. Kattan (admitted *pro hac vice*)
Attorneys for Real Parties in Interest Milliman, Inc., Jonathan L. Shreve, and Mary van der Heijde

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On March 20, 2019, I caused to be served a true and correct copy of the foregoing **RESPONSE OF REAL PARTIES IN INTEREST TO PETITION FOR WRIT OF MANDAMUS** upon the following by the method indicated:

☒ **BY U.S. 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:

Judge Kathleen Delaney
Eighth Judicial District Court
Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

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

☒ **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
Attorneys for Petitioner

/s/ Ruby Lengsavath
An Employee of SNELL & WILMER L.L.P.

4836-6792-1805