

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

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SUPPLEMENTAL APPENDIX OF REAL PARTIES IN INTEREST
VOLUME I

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DATED this 20th day of March, 2019.

Respectfully submitted,
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/s/ Alex Fugazzi

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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 **SUPPLEMENTAL APPENDIX OF REAL PARTIES IN INTEREST – VOLUME I** 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
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(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.

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1 TRAN
2 CASE NO. A-17-760558-B
3 DEPT. NO. 25
4

5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 * * * * *

8
9 NEVADA COMMISSIONER OF)
10 INSURANCE,)
11 Plaintiff,) REPORTER'S TRANSCRIPT
12 vs.) OF
13) MOTION FOR RECONSIDERATION
14)
15 MILLIMAN INC.,)
16 Defendant.)
17 _____)

18 BEFORE THE HONORABLE KATHLEEN DELANEY
19 DISTRICT COURT JUDGE

20 DATED: TUESDAY, JULY 24, 2018
21
22
23
24

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

1 APPEARANCES:

2 For the Plaintiff:

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4
5 For the Defendant:

JUSTIN KATTAN, ESQ.

6 EVAN JAMES, ESQ.

7 ALEEM DHALLA, ESQ.

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15 * * * * *

1 LAS VEGAS, NEVADA; TUESDAY, JULY 24, 2018

2 P R O C E E D I N G S

3 * * * * *

4

5 THE COURT: Nevada Commission of Insurance vs.
6 Milliman.

7 Let's have appearances.

8 MR. FERRARIO: Mark Ferrario and Donald Prunty,
9 your Honor, for Plaintiff.

10 MR. KATTAN: Good morning, your Honor. For
11 Milliman, Justin Kattan, from Dentons US, LLP.

12 MR. DHALLA: Aleem Dhalla for Milliman.

13 MR. JAMES: Evan James for Nevada Health
14 Solutions.

15 THE COURT: Thank you.

16 I appreciate this. Sorry for the confusion.
17 This ended up being on our 9 o'clock calendar and our 11
18 o'clock calendar. It doesn't matter how we got there.

19 Mr. Ferrario contacted chambers indicating his
20 availability was better suited for 11:00. We actually
21 thought we'd get those calendar calls done to get started
22 at 11:00. It went longer than I anticipated. Sadly, I
23 still have a telephonic appearance from my 9 o'clock
24 calendar. I attempted to give them a heads-up, and we'd
25 be calling them later. So you have my undivided attention

1 at this time.

2 I also want to apologize for the confusion about the
3 case and who was going to hear the case and where the case
4 belongs. I think that it kind of caught us all by
5 surprise the way the reshuffling of assignments was going
6 to take place.

7 We were ultimately given the opportunity to look at
8 our list of matters to be reassigned and hold back those
9 where we had had significant motion practice, or motion
10 for reconsideration pending or other circumstances that
11 would really mean we shouldn't have the case move to
12 another judge. Because of the timing of when the
13 reconsideration had been filed and the circumstances of
14 how it continued, it just got missed by everyone in terms
15 of what it was and when it was, and so when the matter
16 moved forward, we just missed it. We're sorry about that.

17 We're happy to be able to sort of address it now and
18 at least bring that matter to a close before the case
19 proceeds. There was quite a bit of back and forth between
20 whether or not it would stay in this department once
21 returned for this purpose or whether it remains
22 transferred to Judge Williams and will only return for
23 this purpose. I did not have much input on the final call
24 on that. It was ultimately the court administration and
25 the chief judge that made the final call. The case will

1 stay transferred to Judge Williams. It's only here for
2 this determination today.

3 For purposes of motion for reconsideration, we have,
4 obviously, received supplements that focus on the
5 questions the court had with regard to New York law
6 application. I know there was some issues as we were
7 going along in terms of the additional information
8 provided and when. But we have everything here. I have
9 reviewed everything here today. I think I just want to
10 see what argument you have you would like to make.

11 I'll start with Mr. Ferrario.

12 MR. FERRARIO: Thank you, your Honor. I thank
13 the court and counsel for accommodating me on the start
14 time.

15 You know, going through this again this morning, as
16 we have I think on pretty much every one of the briefs, we
17 had really done scorched earth on cases and arguments and
18 everything.

19 THE COURT: Fantastic job. I really appreciate
20 the time everybody took to do this research and provide
21 information. There is obviously a difference of opinion
22 in the supplements as to how New York law would be
23 interpreted. Then there are some references to US Supreme
24 Court cases, out-of-state cases, but, yes, I think we have
25 it all here. So somewhere down the road, if it arises as

1 an opportunity to our appellate court, they ought to be
2 able to settle issue.

3 MR. FERRARIO: I agree. I think that, I guess,
4 what struck me as I was going through this again today was
5 that we started this process with I think a very basic
6 premise, and that is, what's the most efficient, effective
7 way for a receiver to marshal assets, bring claims in a
8 receivership context. We argued that in front of you. We
9 went back and forth over what the scope of Judge Corey's
10 order was. All of that stuff. You ultimately decided,
11 and I think you said it was a close call, that, you know,
12 in this context you would order arbitration.

13 Then we had additional decisions come down. And
14 quite frankly, one from this court, with Judge Gonzales
15 sitting in your position, that took a contrary position to
16 the one you did in a similar setting and refused to kick
17 the case out to arbitration in another forum. We brought
18 these cases to your attention that now we appear to be
19 somewhat of an outlier jurisdiction. Then we got into the
20 topic of New York law and that has taken us down, yet,
21 another path. I guess what struck me, when I was reading
22 the cases, is when I see citations that say see this, or
23 see that, or e.g., and that's what their brief is riddled
24 with. They're taking A mish-mash of cases and picking
25 different things to try to desperately hold on to an

1 arbitration forum that they do not contest they would not
2 have if New York law applies. There is no contest to
3 that. Okay.

4 Now, that takes me back to the contract. And when we
5 look at the contract, I don't think it could be any
6 clearer as to what law applies to the construction, the
7 interpretation, and more importantly, the enforcement of
8 the agreement. And it says New York law. And who chose
9 that. Milliman chose that.

10 As we said in the prior hearing, as we've said in our
11 brief, as I think we've done a great job of distinguishing
12 all the cases they tried to cite to deflect the court's
13 attention away from the very basic principle that under
14 New York law where you have an insolvent insurance company
15 and a receiver, or an insolvency proceeding, however you
16 want to phrase it, you go to court. You let the court
17 marshal the assets with the receiver.

18 Another thing that struck me as I was reading through
19 the briefs again today -- and I think it's the Corchran
20 case -- I believe it cites to the public policy reasons
21 for that. There isn't overarching public policy concern
22 to have these things done in public. To have the
23 marshalling of assets where you have a defunct insured
24 done in public. You do that with the assistance of the
25 court. You don't do it in private in an arbitration

1 context.

2 Again, I was -- that struck me again and I wished I
3 would have highlighted that more forcefully on our initial
4 brief. But when all the arguments are sliced and diced
5 and all the cases are put to rest, we come back to the
6 very simple proposition of what law applies. New York law
7 applies. They don't stand up in front of you, and they
8 don't say it in their brief. They don't disavow New York
9 law. This isn't a situation where --

10 THE COURT: You said a minute ago -- I'm not
11 trying to interrupt you -- I don't know that they
12 necessarily -- you say in the beginning they do not
13 contest that arbitration would not be available if New
14 York law applies. I don't think they said that in their
15 argument.

16 MR. KATTAN: My grave concern hearing this is
17 maybe we served half a brief on that. Because as your
18 Honor points out, the second half, out of the 8 pages of
19 our brief, 7 pages are devoted to the point what New York
20 law really stands for is not what they say.

21 THE COURT: Don't argue it now, because you'll
22 have the opportunity.

23 MR. KATTAN: I want to make sure we -- yes, you
24 are correct, your Honor, we did contest.

25 MR. FERRARIO: They make arguments like, well,

1 it only apply to the New York Commission of Insurance.
2 They cut the cases up and try to parse them to say what
3 they don't say. What the cases don't stand for. I don't
4 think counsel is going to stand up for you and say that in
5 New York if you have an insolvent insurer that you don't
6 have to arbitrate claims. I don't think they'll tell you
7 that. Unless he's going to tell you Knickerbocker is not
8 still good law and all it's progeny is not still good law.
9 Or he's going to tell you that New York State courts have
10 not found one instance -- we can't find one state court
11 case from New York that's talking about New York State law
12 where in a receivership context they ordered a case to go
13 to arbitration. He'll correct me if I'm wrong on that.

14 He cites -- cherry picks the federal court cases and
15 things like that with the "C" citations, but he's not
16 going to stand up and tell you that. Their big argument
17 is this. That New York law would only apply to the New
18 York Commissioner of Insurance, or the superintendent of
19 insurance, or whatever it is. We take that apart in our
20 brief. I think it was pages 11 and 12 of our brief that
21 the New York statutory scheme and the Nevada statutory
22 scheme or strikingly similar. And this whole notion that
23 they say, well, Nevada is different because we had an
24 order from Judge Corey that they cherry picked from. They
25 say, well, we could file suits in any forum. Yes. The

1 receiver has the option to do that. But what can't happen
2 is the receiver can't be forced to go to arbitration.
3 That's the important point.

4 THE COURT: As you said, we went off on this
5 discussion about it because I wanted to flesh it out
6 because I think there's a benefit, no matter what the
7 outcome is today, to have this scorched earth look. But
8 we asked about, okay, let's look at New York law to see if
9 that gives us more guidance. But at the end of the day,
10 as we start this process, it is a Nevada entity, Nevada
11 insurance commissioner, Nevada circumstances.

12 MR. FERRARIO: With New York law applying.

13 THE COURT: New York law applying, which
14 arguably wouldn't preclude arbitration. It's just that
15 we're arguing that we really -- you're arguing that Nevada
16 law makes us an outlier. I don't know.

17 MR. FERRARIO: I'm saying -- what we said when
18 we brought the other decisions to your Honor is this case
19 now became an outlier as your Honor decided it.

20 If you want to go back to this situation this is
21 where this gets quirky. I don't think we should be down
22 this path. Because when you're talking about receiver
23 marshalling assets, you should invoke the most efficient,
24 and, I think, public process that you can, which is what
25 the Corchran case stands for. And by sending us now off

1 on the arbitration track, we now get into these strained
2 arguments, and we're now looking at, okay, the contract
3 they drafted. You say it's Nevada Commissioner of
4 Insurance. You're right. You say we're here in Nevada
5 courts. You're right.

6 I argued to you that if you look at Judge Corey's
7 order and you look at the cases from the other states,
8 then everything should be in Nevada courts. Your Honor
9 disagreed and said we go to arbitration. That's where we
10 now get into this contract. This contract indisputably
11 says, New York law applies. Under New York law -- we've
12 cited the cases. In a receivership context in New York
13 you can't be forced to arbitrate. I don't think he's
14 going to get up and say that.

15 Now, what he's going to say is, well, that doesn't
16 apply to Nevada Commissioner of Insurance. So in New
17 York, where their public policy kicks in, no
18 arbitration.

19 So a New York insolvent insurer, okay, operates by a
20 different set of rules than Nevada insurance insolvency.
21 From a public policy, it makes no sense.

22 THE COURT: You're arguing, Mr. Ferrario, as if
23 there's no such thing as arbitration in New York.

24 MR. FERRARIO: There is.

25 THE COURT: Okay.

1 MR. FERRARIO: There is arbitration in New York.
2 I would agree with you. There is arbitration in New York,
3 but not when you have an insolvency proceeding. They
4 can't be forced. That's the distinction, your Honor.
5 There's arbitration in Nevada. There's arbitration in New
6 York. The issue is where you have an insolvent insurer
7 and you have a receivership situation, can the receiver be
8 forced to arbitrate. In New York, that doesn't happen.
9 Under New York law, under Knickerbocker and all the cases
10 that have been decided since that. And they are the ones
11 that chose New York law, not us.

12 Now the parties agreed to that. And I'll point out
13 this isn't a case where there is an ambiguity in the
14 contract on that issue. Unless they are going to argue,
15 or the court's going to say there's an ambiguity as to the
16 term enforcement. Then what did the parties intend. I
17 don't see any declarations or affidavits from the folks
18 saying that when they signed this they didn't intend for
19 the New York pronouncement in Knickerbocker to apply here.
20 There's nothing like that. We go all over the place, but
21 you come back to the agreement. Your Honor asked some
22 good questions. It's in Nevada. It's an insolvency
23 proceeding. You're right. They choose New York law. And
24 we talked about this in the briefing. That's without
25 regard to conflict of laws. So we don't even get to that

1 analysis under New York law.

2 So what this court must do is look to New York law
3 and say in a receivership context, if I'm applying New
4 York, Knickbocker and its progeny, can I force a
5 proceeding into arbitration. That's the question for this
6 court to ask. That's the question for this court to
7 answer. We believe when you look at the case law and
8 policy consideration surrounding that, and you look at the
9 New York case law that applies here, the answer is clear.
10 You don't force the insolvent insurer, the receiver, if
11 you will, to arbitration. That's the New York law.
12 That's what they choose to apply and that's what should
13 happen here. We should be allowed to proceed in court and
14 not be forced into a private situation in arbitration.

15 THE COURT: Thank you, Mr. Ferrario.

16 Mr. Kattan.

17 MR. KATTAN: Thank you, your Honor. Appreciate
18 once again for the opportunity to be heard.

19 I think this issue has certainly been briefed
20 thoroughly. I don't want to take up any more of the
21 court's time. As your Honor pointed out, our position is
22 no court anywhere has applied Knickbocker's holding to say
23 that any insurance commissioner, other than New York
24 superintendent, acting pursuant to the New York insurance
25 law, to liquidate a New York insurer in New York State

1 cannot arbitrate.

2 THE COURT: I don't think there's any doubt,
3 Counsel, that case says that, right. The question
4 becomes, you know -- if you look at this in layers.

5 The parties chose in their contract to apply New York
6 law and now this issue may not have been contemplated. It
7 may have been some argument, well, things were potentially
8 contemplated, but really at the end of the day -- I'm
9 going to assume for purposes of this argument it wasn't
10 contemplated -- that we'd find ourselves in this
11 insolvency place. And now we're looking at New York law
12 and it's a New York case that says if you apply New York
13 law to facts similar to this that you can't do arbitration
14 in that circumstance.

15 You know, to couple that up we then, if you step back
16 and look at policy consideration -- you argued in your
17 supplement -- you argued initially, really maybe we're
18 silent as to what the policy consideration could be here.
19 But at the end of the day we have a situation where we are
20 spending public monies, and it's not in the light of day.
21 Something that Mr. Ferrario just said resonates in that
22 regard.

23 When you look at those things taken together is the
24 court's decision erroneous in that it really is a
25 situation where we should consider allowing this to go

1 forward. I guess what I'm trying to get at is I'm not
2 persuaded in your argument that we have to read
3 Knickbocker so narrowly. I think I really need to hear
4 the argument as to why we should not reconsider what we
5 choose in light of the fact we have a contact provision
6 that says New York law will apply.

7 MR. KATTAN: Sure.

8 Let me make three points in response to that.
9 The first is that I think this is critical. You said we
10 did make the point in our original motion, and we do make
11 it in our supplement. And that is New York Court of
12 Appeals, just like the United States Supreme Court, and
13 just like your Honor held in the original March 8th order,
14 that there is no, quote, public policy exception from the
15 general rule of arbitrability mandated by the FAA. That's
16 the New York Court of Appeal, Fletcher vs. Peabody and
17 Company, 619 NE2nd 998 at 1006. It's a decision from
18 1993.

19 So the New York Court of Appeals is fully in accord
20 with the law that your Honor cited, the Ninth Circuit law
21 in Quackenbush, the US Supreme Court that you can't just
22 rely on public policy consideration to vitiate and
23 otherwise valid arbitration clause. That's point number
24 one.

25 So number two, then, you go and you look at what

1 Knickerbocker does. What Knickerbocker and Corchran vs.
2 Argon do is they say not -- they talk about public policy
3 consideration. I'm not going to deny that. But what they
4 say is that based on the decision that the New York
5 legislature made to not authorize arbitration, the court
6 could not hold that the New York superintendent, when
7 acting pursuant to the New York insurance law when
8 liquidating a New York insurer, in those situations, the
9 New York Court of Appeal couldn't give that authority to
10 the New York State superintendent.

11 It's interesting, in her brief the liquidator
12 argued -- I'm just going to quote -- "that under New York
13 law where a state legislature has not specifically
14 authorized arbitration given the public interest at state,
15 arbitration is inappropriate." That's what they say at
16 page 13. But you contrast that with the actual language
17 of Knickbocker, which repeatedly refers to our
18 legislature. And a quote from Knickerbocker is, "such
19 withholding by our legislature, serves to apply point out
20 that the arbitration forum was never intended by our
21 legislature to supercede the Supreme Court in proceedings
22 effecting insolvent insurance companies." Nothing in
23 these cases, certainly not Knickerbocker, which did not
24 lay out a blanket rule that said that even a New York
25 superintendent could arbitrate.

1 The Knickerbocker court expressly limited its holding
2 to situations involving the New York State Insurance
3 superintendent liquidating New York insurance companies
4 where the parties are residents of New York. It's express
5 in the language of Knickbocker.

6 What you do is, you look and say, okay. What is this
7 insurance commission here in Nevada authorized to do. And
8 when you look at what the Nevada statute says, the Nevada
9 law states that the district court has exclusive
10 jurisdiction over delinquency proceedings. Quote, "any
11 court with jurisdiction to make all necessary or proper
12 orders to carry out the purposes of those actions," end
13 quote.

14 Here the district court with Judge Corey entered such
15 an order and expressly authorized his liquidator to
16 arbitrate. The liquidator had never argued that that
17 order was improper or inconsistent with the statute. No
18 Nevada court ever held that the commissioner is not
19 permitted to arbitrate. And so what you are left with is
20 the liquidator then falling back on its old argument which
21 this court rejected, which says, that's not really an
22 authorization to arbitrate. That really gives us the
23 choice. Your Honor correctly rejected that argument for
24 various reasons in the original March 8th order.

25 So point number two is that when you look at

1 Knickerbocker it's not a matter of reading it narrowly,
2 not narrowly. It's holding really just its own plain
3 terms. It does not apply to this type of situation,
4 particularly, you know, where you have the language of the
5 order and the language of the Nevada statute that you
6 have.

7 The third thing I would say -- and this is something
8 that liquidator, counsel's argument glossed over -- is
9 under Mastrobono (ph) the US Supreme Court decision is you
10 cannot utilize the New York choice of law provision like
11 the liquidator is advocating it be utilized here. They
12 attempt to distinguish Mastrobono by saying, oh, it's
13 holding is narrower. If I may, your Honor, I would like
14 to just read for you an excerpt from Mastrobono. This
15 will give you an idea of how broad it is and how broad
16 that holding is. Our position is Mastrobono stands for
17 the proposition that unless the parties expressly
18 intended, and expressed that intent in the contract, to
19 use the choice of law clause to vitiate an otherwise valid
20 arbitration clause, you can't use the choice of law clause
21 that way.

22 Look at what Mastrobono says. It says, petitioners
23 rely on Southland Corp. vs. Keeting and Perry vs. Thomas
24 in which we held that the FAA preempted two California
25 statutes that reported to require judicial resolution of

1 certain disputes. In Southland we explained that the FAA
2 not only declared a national policy favoring arbitration,
3 but actually withdraw the power of the States to require a
4 judicial forum for resolution of claims which the
5 contracting parties agree to resolve by arbitration.
6 Respondents answer the choice of law provision in their
7 contract expresses agreement that punitive damages should
8 not be awarded in the arbitration of any dispute arising
9 under their contract.

10 The court then goes on to say, we think our decisions
11 in Allied, Bruce, Southland, and Perry make clear that
12 contracting parties agreed to include claims for punitive
13 damages within the issues to be arbitrated, the FAA
14 assures that their agreement will be enforced, according
15 to its terms, even if a rule of state law would otherwise
16 exclude such claims from arbitration. Thus, the case
17 before us comes down to what the contract has to say about
18 the arbitrability of petitioner's claims for punitive
19 damages.

20 So let me stop there for a moment and set the stage.
21 So admittedly the decision in Mastrobono dealt with the
22 power of the arbitrators, but think about it. In our
23 situation -- so the Supreme Court says you can't even use
24 a choice of law clause unless it's expressly laid out in
25 the contract. You can't even use a choice of law clause

1 to limit the powers of an arbitrator. That ruling should
2 apply with even greater force set stripping the
3 arbitrator's powers altogether. That -- this is a holding
4 that frankly shows that using a choice of law clause to
5 vitiate an arbitration provision is more difficult than
6 what the court was talking about here in Mastrobono.
7 Ultimately the court went and decided that the reference
8 to the laws of the State of New York in the choice of law
9 provision was to encompass substantive principles that New
10 York courts would apply, but not to include special rules
11 limiting the authority of the arbitrators.

12 Look at what the contract says in our case, your
13 Honor. What the contract says in our case is that the
14 matter will be governed by the substantive contract law of
15 the State of New York. It's not even a blanket rule
16 saying, all right, New York law applies. It specifically
17 states that the substantive contract law of New York will
18 apply. They are not arguing nor have they ever argued
19 that the New York insurance law is somehow the substantive
20 contract law of the State of New York. Clearly what the
21 agreement intended -- Mr. Ferrario is right -- there is no
22 ambiguity here.

23 Clearly what the agreement intended was that for
24 underlying claims, the substantive contract law of New
25 York applies. But it does not vitiate, there is nothing

1 in the contract that expresses an acknowledgment or intent
2 that, okay, we understand that New York law applies and
3 that means that if this case goes to liquidation or this
4 matter goes to liquidation, we can't arbitrate because New
5 York law says that. There is nothing in the contract that
6 even remotely, even remotely espouses that intent or that
7 acknowledgement. So there is nothing -- and that's what
8 the Supreme Court in Mastrobono and other cases has said.
9 You need to have that express recognition, that express
10 knowledge of the intent to have the choice of law
11 provision vitiate the arbitration clause.

12 So that simply doesn't happen here. This court was
13 correct in applying Nevada law, in applying federal law to
14 its original March 8th decision. Again, our position, as
15 your Honor correctly pointed out earlier, is that even if
16 you did apply New York, it wouldn't change the outcome of
17 your March 8th decision. But frankly, there is no basis
18 to apply New York law. Your Honor's March 8th decision
19 was correct in that regard in its original formulation.

20 So those are the three bases to answer your Honor's
21 questions. I hope I did answer your Honor's questions. I
22 don't know if you have any follow up.

23 THE COURT: No, I don't have follow-up
24 questions. I appreciate the argument. I think I -- what
25 always helps me with the oral argument is to make sure

1 there isn't anything I've misapprehended in terms of what
2 has been argued, missed something, but I think what we've
3 covered tracks to what I saw in your supplement, what I've
4 seen in terms of argument. I don't have questions.

5 I did want to give Mr. Ferrario an opportunity to
6 make any final argument he'd like. He relies heavily on
7 Knickerbocker and feels very strongly and differently than
8 you do as far as what New York law dictates.

9 I'm complete. Thank you.

10 MR. KATTAN: Thank you, your Honor.

11 MR. FERRARIO: Again, I would call your
12 attention to pages 11 and 12 -- it goes on a bit in our
13 brief -- where we talk about Corchran, what the law in New
14 York is. You call it the contract law, the arbitration
15 law, or law of New York, the one thing that I know is that
16 in New York, at least today, a Plaintiff in the position
17 of my client can't be forced to arbitrate. There are a
18 number of reasons for that. I think, again, the Corchran
19 case sets that out.

20 One of the many overarching reasons Counsel cited was
21 the notion you don't handle public proceedings like this
22 where you have a receiver put in by an insurance statute
23 in private. There is real value to having it done in a
24 public forum, which is why -- one of the reasons why in
25 New York you don't push people off to arbitrate. We've

1 already distinguished the Mastrobono case. There was a
2 conflict there. There is no conflict here. Somebody is
3 not trying to import something into a situation where the
4 arbitrator -- give the arbitrator jurisdiction over
5 something they didn't have. That is not an issue here.
6 The issue is in New York, if you apply New York law, can
7 you force a receiver in the position of my client, to
8 arbitrate. The answer to that is no. Counsel did nothing
9 to dispel that. Knickbocker and its progeny make it very
10 clear what this court should do. And it's consistent with
11 Nevada law. It's consistent with the other cases we
12 cited. We shouldn't be an outlier. We shouldn't have
13 splintered proceedings. We shouldn't have a less
14 efficient process than they do in other states.

15 With that, I'll rest. Thank you.

16 THE COURT: All right.

17 Just been one of those days where I feel quite
18 certain that everybody that's left here today is not happy
19 with the outcomes. It's unique to be in that position.

20 I really have spent quite a bit of time looking
21 at this to see first and foremost to apply the standard
22 that would apply for a motion for reconsideration, which
23 is that we -- I won't misspeak it. I'll speak to it
24 directly.

25 That if we're going to exercise the inherent

1 authority that we have, then we really need to be certain
2 that, you know, I haven't misapplied the law or we --
3 there were facts that we failed to consider that were not
4 available or for whatever reason were not argued. This
5 really comes down squarely to looking at the law and
6 whether we've properly applied the law.

7 One of the things that come up in the motion for
8 consideration that intrigued me to want to look at was
9 does New York law control this and would New York law
10 require different a result. It's this court's finding,
11 however, that the -- I am persuaded that the Mastrobono
12 case does stand for the proposition and it is controlling
13 over all the cases we would otherwise consider for this
14 proposition anyway that when you have a choice of law
15 provision you cannot, as stated, vitiate the enforceable
16 arbitration provision.

17 I think ultimately when we look at that I believe
18 that although we did go down this path, we did seek this
19 additional briefing, that really at the end of the day the
20 court made the correct call to begin with that this is to
21 be decided the way the court originally decided and the
22 court did not decide it in error.

23 I haven't seen anything either in the original motion
24 for reconsideration or in the supplements that would point
25 the court to the requirement to make an opposing ore

1 reversal decision, if you will.

2 I think if New York law were to apply, then I am
3 persuaded that it would not preclude arbitration in the
4 context of this case. I appreciate the Knickerbocker
5 decision and its progeny. I appreciate the argument that
6 is made under Corchran. At the end of the day, I think
7 there can be a reading that in the totality of the
8 circumstances that we have, the parties were not
9 necessarily contemplating these circumstance, but
10 ultimately these circumstances are what arose, that when
11 you look at that, the arbitration clause still carries the
12 day.

13 I am concerned about the idea that as Mr. Ferrario
14 argued that we are not essentially having a public hearing
15 when use of public money is being used in this insolvency
16 action. I don't see anything that completely closes the
17 door, New York law or otherwise, as to the ability to
18 arbitrate a case such as this. Again, the totality of the
19 circumstances of the agreement of the parties and what we
20 are dealing with here, the court did correctly decide this
21 matter in its unique circumstances. I don't believe it's
22 necessarily outlier. I think it is what it is in this
23 context, and the court's ultimate determination is not to
24 reconsider this matter for the reasons argued persuasive
25 of Mr. Kattan. It's a very close call. I know that

1 doesn't satisfy Mr. Ferrario, Mr. Prunty or Commissioner
2 of Insurance in any way. I can appreciate that.

3 I do think the court does not have -- has not been
4 provided persuasive argument that would ultimately show it
5 that it misapplied to law in this context. It's simply a
6 legal determination. The court did get it correct the
7 first time.

8 I respect if any of my colleagues see otherwise, I do
9 think we need to have this decision in the final forum and
10 do have to give the opportunity for it to be challenged.
11 I know you have pending matters with claims that will be
12 effected by this, so the sooner we get the order signed
13 off on and figure out if there is a challenge as to that
14 the better we be.

15 Mr. Kattan, you'll prepare the order, please, since
16 you did prevail today. Give Mr. Ferrario an opportunity
17 to review. I'd like it to be provided to the court as
18 soon as possible.

19 MR. KATTAN: My pleasure, your Honor. The last
20 time, back in January, you asked our office to provide
21 some detail like we had had in our briefs in the order.
22 Do you want the same sort of thing this time.

23 THE COURT: Not the similar details we had
24 before. Reference to Nevada law in the reconsideration
25 and the court's determination that the standard was not

1 met and ultimately the court is not finding that New York
2 law is prevailing. Relying on the Mastrobono decision.
3 But to the extent New York law would prevail, it's still
4 not this court's determination to preclude the matter
5 going to arbitration.

6 The details of the arguments made, I think we can
7 limit that at this point. The record is clearly made for
8 the briefings. We have today's hearing transcript.
9 That's sufficient.

10 I'm more interested in expediency than I am
11 details.

12 MR. KATTAN: Thank you, very much, your Honor.

13 MR. FERRARIO: Thank you, your Honor.

14 THE COURT: Thank you.

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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.

A handwritten signature in cursive script, appearing to read "Sharon Howard", is written over a horizontal line. The signature is fluid and includes a large, looping flourish at the end.

Sharon Howard
C.C.R. #745

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