IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, EX. REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, in her official capacity as Receiver for NEVADA HEALTH CO-OP,

Petitioner,

v.

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

Respondents,

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

Real Parties in Interest,

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Supreme Court Case No.: 77682
Dist. Court Case No.: A-17-760558-C

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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

REASONS THE WRIT SHOULD ISSUE

This Court should issue a writ of mandamus directing the District Court to exercise subject matter jurisdiction over the Commissioner's claims against the Real Parties in Interest, Milliman, Inc. ("Milliman"), Jonathan L. Shreve, and Mary Van der Heijde (collectively, the "Milliman Defendants"). Mandamus relief is necessary here to protect the rights of the policyholders of the Nevada Health Co-Op ("NHC").

The Milliman Defendants pretend that the claims against them are nothing more than "ordinary" claims brought by a liquidating insurer against debtors. However, the claims here are brought to allow the Commissioner, and through her, the policyholders, to impose responsibility upon the architects of an immense scheme that was at best, the product of egregious professional negligence, and at worst, a deliberate fraud, and regardless of motivation, doomed NHC from the start. Resolution of these claims will require interpretation of numerous Nevada insurance laws and regulations concerning financial reporting, the obligations of actuaries, and the requirements for licensure of insurers. Resolution of these claims in

confidential arbitration proceedings will invalidate, impair, and supersede the NIC, and accordingly, the arbitration provision upon which the District Court based its decision is reverse preempted by the McCarren Ferguson Act. Furthermore, even if there were no reverse preemption, the arbitration agreement here could not be enforced under New York law, and thus, there is nothing to indicate that the parties ever agreed or intended that, in the event of liquidation, such claims might be arbitrated.

Mandamus is appropriate to remedy a district court's manifest abuse of discretion when an eventual appeal cannot offer a remedy that is plain, speedy and adequate. NRS 34.160; NRS 34.170*; Tallman v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 71, 359 P.3d 113, 118 (2015). As shown below, both conditions are satisfied here, and accordingly, this Court should issue the requested mandamus relief.

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

Respondents failed to present any argument in opposition to the Commissioner's contention that she has no plain, speedy, and adequate remedy; instead, respondents merely challenged the merits of the Petition. In the Order directing an answer, this Court expressly instructed that said answer should "address the propriety of writ relief, in addition to the merits of the petition." See Order, dated February 20, 2019. As the Respondents failed to address this issue, they have

conceded that Commissioner has no plain, speedy, and adequate remedy. *See Polk v. State,* 126 Nev. 180, 185, 233 P. 3d 357, 360 (2010) (treating the respondent's failure to respond to the appellant's argument as a confession of error); *Bates v. Chronister*, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984) (same); *A Minor v. Mineral Co. Juv. Dep't,* 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (same).

Furthermore, Respondents have ignored the point of the Commissioner's concern over piecemeal litigation. The prospect of such piecemeal litigation, with its risk of conflicting outcomes, was not posed as a basis for voiding the arbitration agreement. Instead, this risk---which, due to the confidentiality provision contained in the arbitration provision (also conveniently ignored by Respondents), justifies the request for writ review, as it further shows that an eventual appeal offers an inadequate remedy. Dicta from *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) notwithstanding,[1] a stay of the litigation against the other defendants will not change the prospect the Commissioners' inability to disclose the outcome of the arbitration in such litigation, as the arbitration provision requires. **I APP 163-163, ¶ 5.**

[1] At issue in *Moses* was whether, under the abstention doctrine, the federal district court had properly stayed a federal action seeking to compel arbitration, pending the outcome of a state court action which sought declaratory relief that the arbitration provision was invalid or that the provision had been waived. The reference to staying litigation in the state court had no part in the Court's reasoning on the abstention issue.

Furthermore, a "careful balance of the case specific benefits and detriments," *see In re Gulf Exploration, LLC,* 289 S. W. 3d 836, 842 (Tex. 2009), *cited with approval* in *Tallman,* 359 P.3d at 118, shows that writ review is appropriate here. Writ review will allow the Commissioner to avoid any unnecessary duplication of efforts and other waste of the limited resources obviously present in a liquidation proceeding. Additionally, writ review affords the opportunity for this Court to resolve an "important issue of law that needs clarification." *D.R. Horton, Inc. v. Eighth Judicial Dist. Ct.* 131, Nev. 865, 869, 358 P.3d 928 (2015).

The Milliman Defendants cited no detriment arising from writ review. Because the benefits of writ review outweigh any detriments, this Court should entertain the writ.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN COMPELLING ARBITRATION.

The District Court abused its discretion in enforcing the arbitration provisions contained in the agreement between Milliman and NHC's predecessor. *Appropriate* application of the legal principles that underlie the very authorities upon which the District Court's decision and the Milliman Defendants' arguments rely establish that the arbitration agreement is not enforceable under the circumstances here.

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

The District Court's determination that the FAA is not reverse preempted here is based on upon the faulty premise that the Commissioner's claims here are not brought in furtherance of laws regulating the insurance industry in Nevada. In support of this premise, Milliman Defendants cite to federal authority that has found that certain suits brought by receivers against third parties were simply "ordinary suit[s] against a tortfeasor by an insolvent insurance company." *See, e.g.*, *Response Brief,* p. 26, *quoting AmSouth Bank v. Dale,* 386 F. 3d 763, 783 (6th Cir. 2004). While it asserts the claims here represent such an "ordinary suit," the Milliman Defendants have made no attempt to explain what an "ordinary suit" is. Review of the cited caselaw is therefore instructive.

In *AmSouth Bank,* the receiver was attempting to recover funds embezzled from insurance companies by suing a bank that had been used as part of a money laundering scheme. The receiver's theory was that the bank was negligent in not recognizing the fraudulent use to which the accounts were being put. Resolution of such claims would obviously be based on the common law of torts prevailing in the underlying jurisdiction, and not on any insurance regulations.

Similarly, in *Quackenbush v. Allstate Insurance Company*, 121 F.3d 1372, 1381 (9th Cir. 1997); *Suter v. Munich Reinsurance Co.*, 223 F.3d 150 (3d Cir. 2000); *Koken v. Cologne Reinsurance (Barbados), Ltd.*, 34 F. Supp. 2d 240 (M.D. Pa.

1999); and *Bennett v. Liberty Nat. Fire Ins.,* 968 F.2d 969 (9th Cir. 1992), the receivers all sought to recover contractual sums due to the insolvent insurers under reinsurance agreements. A similar dispute over the amount due under a reinsurance agreement was the underlying issue in *Midwest Emplrs. as. Co. v. Legion Ins. Co. (In Liquidation)*, No. 4:07CV870 CDP, 2007 U.S. Dist. LEXIS 82857, at *18 (E.D. Mo. Nov. 7, 2007), but in that case, the receiver sought to arbitrate the claims, and the court found that the issue of whether such agreements contained arbitration provisions was a "standard contract dispute." None of these cases referred to any insurance regulatory measures whose interpretation would be significant in determining these claims; instead, common law contract principles would be determinative.

However, unlike the above cases, the allegations here do not involve "simple contract or tort actions," but instead, the claims are inextricably tied to the requirements of the NIC. Moreover, the breach of contracts alleged here are subsumed by the professional negligence claims. *See e.g.*, *Egan v. Chambers*, 299 P.3d 364, 366 (Nev. 2013) (breach of contract claims against doctor based on failure to provide appropriate case was professional negligence claim); *Stoffel v. Eighth Judicial Dist. Ct.*, 391 P.3d 759 (Nev. 2017) (holding that breach of contract, reach of covenant of good faith and fair dealing, negligence hiring, and respondeat superior

were all subsumed by legal malpractice claim). Such claims can only be resolved through interpretation of the requirements of the NIC.

Furthermore, none of the cases on which Plaintiffs rely involved suits where the receiver sought to recover for a third party's wrongful conduct that related to the *very creation* of the insolvent insurance company. The Milliman Defendants provided a feasibility study that falsely projected that NHC could not only operate profitably, but also repay significant loans from the federal government; but for these false projections, no federal loan would have been possible, and NHC would likely never have even existed. **I APP 31, ¶ 43-62.** The Milliman Defendants made inappropriate assumptions, failed to consider likely scenarios, underreported actuarial items, and filed reports with discrepancies as to actual performance, and used improper and unauthorized financial information. **I APP 34-43, ¶¶ 74-131.** The actions alleged here implicate the most fundamental aspects of Nevada's insurance regulatory scheme: the required provision of truthful information to the Commission so that the financial viability of the insurer is assured. *See, e.g.,* NRS 680A.080 (requiring compliance will all provisions in NIC); 680A.165 (requiring notification of change of information in application); 681B.080 (setting reserve requirements for health insurance); 681A 105, *et seq.* (setting asset valuation standards); 681A.200, *et seq.* (setting actuarial requirements); 681A.350, *et seq.* (setting reserve valuation standards), and the regulations adopted in furtherance of

these statutory provisions. No insurance regulations could be more directly crucial to the protection of the relationship between the insurer and the policyholder and these statutory requirements. Inconsistent interpretations of these statutory standards will fundamentally impair Nevada's NIC.

There can be no reasonable dispute that the provisions of the NIC that impose specific standards and obligations on actuaries constitute the regulation of insurance. "Statutes aimed at protecting or regulating [the]s relationship [between insurer and insured], directly or indirectly, are laws regulating the 'business of insurance,' within the meaning of the phrase." *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969) (a statute that required the Commissioner to determine that an insurance company merger would not impair the security of the service to policyholders was regulation of insurance). Statutory provisions setting standards by which actuarial duties are to be performed are aimed at protecting the relationship between the policyholder and insurer, because they are intended to ensure that the insurer can provide the promised services.

The Milliman Defendants proudly proclaim that in some of the other jurisdictions where they engaged in their wrongful conduct, they have persuaded the courts as they did they lower court here. Thus, for example, they cite *Milliman, Inc. v. Roof*, 353 F. Supp. 3d 588, 596 (E.D. Ky. 2018). However, the *Roof* court made no analysis of the specific claims alleged against Milliman in that litigation. Indeed,

that court did not even bother to draft a separate analysis of the reverse preemption issue as applied to the claims against Milliman; instead, as it freely confessed, it merely copied verbatim its analysis of a case involving the same insolvent insurer and its management company. *Id. citing*, Beam *Partners, LLC, v. Atkins*, 340 F. Supp. 3d 627, [642-643] (E.D. Ky. Sept. 11, 2018). This copy and paste job explains why in *Roof,* the claims against Milliman, who had served as the Kentucky insurer's actuary, were referred to as a "contract dispute between a business and its management company." 353 F. Supp. 3d at 603.

The United States Supreme Court has interpreted reverse preemption under McCarren-Ferguson as follows:

> When federal law does not directly conflict with state regulation, and *when application of the federal law would not frustrate any declared state policy* or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.

Humana Inc. v. Forsyth, 119 S. Ct. 710, 717 (1999) (noting dictionary definition of impair as "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.") (emphasis added). The Milliman Defendants' argument that a state's public policy considerations cannot override the FAA under McCarren-Ferguson is based on caselaw that both predates *Humana,* and did not address McCarren-Ferguson reverse preemption.

Here, application of the FAA would unquestionably frustrate, weaken, make worse, diminish and/or injuriously affect Nevada's declared policy regarding the

development of Nevada's body of insurance law through interpretation of the NIC. It would similarly injuriously affect the express jurisdiction granted the liquidating court over third parties for claims related to the liquidating insurer. NRS 696B.200(1)(a). It would lessen the power of the apparent legislative intent that the Commissioner be able to recover for the benefit of policyholders the damages that result from professional negligence, even though such claims are denied to the policyholders themselves. NRS 681B.250(2).

As application of the FAA would frustrate Nevada's state policies regarding insurance regulation, the FAA cannot be applied.

B. The NIC Grants the Commission Greater Powers than an Ordinary Receiver, thereby Indicating the Commissioner Has Not Merely Stepped into the NHC's Shoes.

As shown above, the Commissioner is acting, through the sole means created by the legislature, to vindicate the harm caused to the policyholders by the Milliman Defendants' misfeasance or malfeasance in their submission of financial information and actuarial opinions to the Commissioner; the policyholders are not permitted, under NRS Chapter 681B.250, to recover damages for negligent or even reckless conduct by these Defendants. Courts in California, Ohio, Iowa, and New York have noted the extensive oversight granted to their respective state insurance regulators as indicating they act as more than mere receivers, but also and protectors of the public. *Ommen v. Milliman, Inc*., Case No. LACL 138070 (February 6, 2018, Iowa

District Court, Polk County); *Taylor v. Ernst & Young*, 130 Ohio St. 3d 411, 419 (Ohio 2011); *Arthur Andersen v. Superior Court*, 67 Cal. App. 4th 1481, 1495 (Cal. Ct. App. 1998); *Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d 225, 233, 567 N.E.2d 969, 973 (1990). The *Ommen* decision involved the same arbitration agreement that the Milliman Defendants seek to enforce here.

The Milliman Defendants correctly note that the Louisiana Court of Appeals has reversed the trial court decision that had been, and was consistent with the above authority, and cited by the Commissioner in the Petition. See *Response of Real Parties in Interest to Petition for Writ of Mandamus*, p. 4, *citing Donelon v. Shilling*, 2019 WL 993328, 2017-1545 (La. App. 1 Cir. 2/28/19) (NSOP). There, as here, the receiver had cited *Taylor v. Ernst and* Young, *supra,* in support of the contention that a receiver has heightened obligations, and hence, heightened powers, compared to an ordinary receiver. Significantly, however, in rejecting this theory, the *Donelon* court distinguished *Taylor* by noting that, in the litigation before that Louisiana court:

> The Commissioner's claims for negligence and negligent misrepresentation are not determinable by reference to any particular statutory duty of actuaries, and the Commissioner cites no statutory duty that Milliman allegedly breached. As such, **Taylor** is distinguishable.

Donelon v. Shilling, at *21. Here, in contrast, as shown above, there are multiple statutory duties that are implicated in the professional negligence claims here.

Because the Commissioner has not merely stepped into NHC's shoes, but is protecting the public, the Commissioner should not be obligated to arbitrate claims for which she never agreed to arbitrate.

C. Milliman and NHC Never Intended that a Liquidating Receiver would be Obligated to Arbitrate Claims, as the Agreed Application of Substantive New York Law to Does Not Permit Such Arbitration.

The Agreement between Milliman and NHC's predecessor expressly provided that the substantive law of New York was to govern the enforcement of the Agreement. Agreement, § 5. In holding that New York law would not apply to the enforceability of the arbitration clause, the District Court's misinterpreted *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 64 (1995). The District Court failed to acknowledge that *Mastrobuono* affirmed that the parties' choice of *substantive* governing law should be honored, even when that choice would not be consistent with the FAA. 514 U.S. at 56-58. The *Mastrobuono* court noted that, under *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 478 (1989), the FAA cannot operate in disregard to the parties' own expressed wishes.

Further, the District Court failed to perceive that *Mastrobuono* had determined that an arbitrator's ability to award punitive damages was a procedural rule, not a substantive rule, *and* that the parties had chosen a *different* set of rules to govern procedure. New York's substantive law is clear that the liquidator of an insolvent insurer cannot be compelled to arbitrate claims. *See, e.g., Corcoran v. Ardra Ins.*

Co., 77 N.Y.2d at 232, 566 N.Y.S.2d at 578, 567 N.E.2d at 972 (1990) ("Although the Legislature has granted the Superintendent plenary powers to manage the affairs of the insolvent and to marshal and disburse its assets, the statutory scheme does not authorize his participation in arbitration proceedings."); *Washburn v. Corcoran*, 643 F. Supp. 554, 557 (S.D.N.Y. 1986) (New York "legislature . . . never contemplated turning over liquidation proceedings, and incidental actions and proceedings, to private arbitrators to administer."); *Matter of Knickerbocker*, 4 N.Y.2d 245, 149 N.E.2d 885 (N.Y. 1958) (rejecting dissent's argument that statutes did not require court jurisdiction over claims by the liquidator against third parties).

While the Milliman Defendants contend that such cases do not speak to the abilities of a Nevada Commissioner as in New York, the Nevada legislature has never authorized the Commissioner to arbitrate claims in liquidation proceedings. Thus, a New York judge, applying New York law to this matter, would undoubtedly find these claim unarbitrable. Given that the purpose of the UILA, adopted by both Nevada and New York, is that the insurance liquidation statutes be interpreted uniformly across the states adopting it, there is no reasonable basis for a different interpretation here.

Given that the parties agreed to governing law that would not allow the claims alleged here to be arbitrated, the District Court abused its discretion in compelling arbitration.

CONCLUSION

This Court should grant the requested writ relief, as the District Court abused its discretion in compelling arbitration under the circumstances here. Application of the FAA to compel arbitration here impairs multiple provisions of the NIC, and frustrates Nevada's expressly stated policy protecting policyholders, preventing misleading actions, enforcing its standards, and providing a comprehensive and adequate body of law regarding such insurance regulations. Accordingly, the FAA is reverse preempted by the McCarran Ferguson Act. Grant of the writ will allow the Receivership Court to have confidence that the assets of the estate have been properly marshalled, for the benefit of the policyholders first, then claimants for unearned premiums, and then finally other creditors of the failed insurer.

Respectfully submitted this 1st day of May, 2019.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this Petition complies with the formatting requirements of NRAP 32(c)(2), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2010 in Times New Roman 14, with double spacing. The brief contains approximately 3088 words.

Finally, I hereby certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 21(a)(3). I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day of May, 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25,1 certify that I am an employee of GREENBERG TRAURIG, LLP, that in accordance therewith, I caused a copy of *this* ***Reply in Support of Petition Under NRAP 21 For Writ of Mandamus*** to be served to the Real Parties Interest via the Supreme Court's e-filing system on May 1, 2019, and

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With a courtesy copy to

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(As the Judge to which this matter is currently assigned)

via U.S. Mail, first class postage prepaid, on May 1, 2019.

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