

JOHN R. BAILEY

Nevada Bar No. 0137

DENNIS L. KENNEDY

Nevada Bar No. 1462

SARAH E. HARMON

Nevada Bar No. 8106

JOSEPH A. LIEBMAN

Nevada Bar No. 10125

BAILEY ♦ KENNEDY

8984 Spanish Ridge Avenue

Las Vegas, Nevada 89148-1302

Telephone: 702.562.8820

Facsimile: 702.562.8821

JBailey@BaileyKennedy.com

DKennedy@BaileyKennedy.com

SHarmon@BaileyKennedy.com

JLiebman@BaileyKennedy.com

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Elizabeth A. Brown
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*Attorneys for Appellants Unite Here Health
and Nevada Health Solutions, LLC*

IN THE SUPREME COURT OF THE STATE OF NEVADA

UNITE HERE HEALTH; AND
NEVADA HEALTH SOLUTIONS,
LLC,

Appellants,

vs.

THE STATE OF NEVADA
COMMISSIONER OF INSURANCE,
BARBARA D. RICHARDSON, IN
HER OFFICIAL CAPACITY AS
STATUTORY RECEIVER FOR
DELINQUENT DOMESTIC
INSURER; NEVADA HEALTH CO-

Supreme Court No. 82467/82552
District Court No. A-15-725244-C

**APPELLANTS' REPLY IN
SUPPORT OF MOTION TO
CONSOLIDATE**

OP, AND GREENBERG TRAUIG,
LLP,

Respondents,

UNITE HERE HEALTH, A MULTI-
EMPLOYER HEALTH AND
WELFARE TRUST, AS DEFINED IN
ERISA SECTION 3(37); AND
NEVADA HEALTH SOLUTIONS,
LLC, A NEVADA LIMITED
LIABILITY COMPANY,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK, THE
HONORABLE TARA D. CLARK
NEWBERRY, DISTRICT JUDGE,

Respondent,

and

THE STATE OF NEVADA
COMMISSIONER OF INSURANCE,
BARBARA D. RICHARDSON, IN
HER OFFICIAL CAPACITY AS
STATUTORY RECEIVER FOR
DELINQUENT DOMESTIC
INSURER; NEVADA HEALTH CO-
OP, AND GREENBERG TRAUIG,
LLP,

Real Parties in Interest.

MEMORANDUM OF POINTS AND AUTHORITIES

Appellants' Impleader Writ Petition stems from the same core issue as the Conflicts Appeal¹: Greenberg's conflict of interest. While representing the Receiver in the Receivership and Asset Recovery Actions, Greenberg concurrently represented Xerox in three related matters, whose actions detrimentally impacted the launch of Nevada Health Link – the online marketplace where the CO-OP sold its insurance policies – and contributed in whole, or in large part, to the demise of the CO-OP. The repercussions of Greenberg's conflict continue to reverberate through the Receivership and the Asset Recovery Actions, impacting Appellants and the other defendants in the Asset Recovery Actions as well as the policyholders and creditors of the receivership estate.

Because the Proceedings stem from the same conflict of interest, concurrent review of these matters will preserve judicial resources. Neither party will be prejudiced as the briefing schedule currently in place will be unaffected. Therefore, Appellants respectfully request that the Court grant this Motion.

1. The Issues in the Proceedings Stem from the Same Conflict of Interest.

Respondents suggest that Judge Williams did not mean what he said: that his primary basis for denying the Motions for Leave/Consolidation was Greenberg's

¹ The Conflicts Appeal and Impleader Writ Petition are jointly referred to as "the Proceedings."

conflict of interest. Contrary to Respondents’ assertions, impleader was not denied because Appellants filed an untimely motion. (Opp’n at 3.) Judge Williams expressly found the Motion for Leave to be “***timely and not the result of dilatory factors.***” (Ex. A to Mot. at ¶ 1.) The only “complication” that Judge Williams foresaw was Greenberg’s conflict of interest — specifically, his only concern was that impleader would “inject[] tangential issues such as **potential conflicts resulting in the disqualification of Plaintiff’s counsel.**” (*Id.* at ¶ 4. (emphasis added).)² However, Appellants did not “create”³ a conflict of interest where none existed; as set forth in the Conflicts Appeal, *Greenberg* created a conflict the instant that it accepted representation of the Receiver.⁴ Thus, this conflict of interest forms the basis for both of the Proceedings.

Although Respondents claim that district court proceedings are distinct and unrelated, (Opp’n at 2), this analysis ignores the substantial links between the cases. First, the Receiver instituted the Asset Recovery Actions to *fund* the

² While Judge Williams noted that trial protocol issues were a consideration in the denial of the Motion to Consolidate, it is clear from the express terms of his order, that his primary basis for denying this Motion was also Greenberg’s conflict of interest. (Ex. A to Mot. at ¶ 8.)

³ See Opp’n at 5.

⁴ See, e.g., *El Camino Res., Ltd. v. Huntington Nat’l Bank*, 623 F. Supp. 2d 863, 886 (W.D. Mich. 2007); *Truckstop.Net, LLC v. Sprint Commc’ns Co.*, No. CV-04-561-S-BLW, 2006 U.S. Dist. LEXIS 107818, at *13-14 (D. Idaho Jan. 3, 2006).

receivership estate and satisfy the creditors' claims. Second, as set forth in detail in the Conflicts Appeal, Greenberg's conflict not only affects the creditors in the Receivership Action, but has also severely impacted the Receiver's choice of parties sued and claims alleged in the Asset Recovery Actions. *See Matter of Bohack Corp.*, 607 F.2d 258, 263 (2d Cir. 1979) ("The conflict . . . affects not merely a determination of the proper defendants in the action but whether it should have been commenced in the first place."). Despite the abundance of evidence that Xerox—not Appellants—was responsible for the CO-OP's demise, Greenberg's prior representation of Xerox continues to insulate Xerox from suit. Greenberg seeks to keep the Proceedings separate—not to promote judicial economy—but to keep the consequences of its conflict an amorphous hypothetical. However, the Impleader Writ Petition demonstrates that Appellants; the other defendants in the Asset Recovery Actions; and the policyholders and creditors of the receivership estate will be severely prejudiced by Greenberg's conflict so long as Greenberg remains counsel for the Receiver.

Finally, while consolidation of the Proceedings would require the Court to consider various issues of law, (Opp'n at 5), such is the nature of any appeal. Here, at least the issues raised in both Proceedings require the application of the same standard of review (*i.e.*, abuse of discretion).

2. Consolidation Would Not Affect the Briefing Schedule.

Respondents disingenuously assert that Appellants' timing in filing the Impleader Writ Petition will affect the briefing schedule in the Conflicts Appeal and impact Greenberg's answering brief due on July 28, 2021. Not so.

Should the Court take up the Impleader Writ Petition for review and consolidate the Proceedings, it "may order the respondent or real party in interest to answer within a fixed time." NRAP (b)(1). Therefore, it is expected that Respondents will respond to the Impleader Writ Petition in a separate brief regardless of consolidation of the Proceedings, and consolidation will not impact or delay Respondents' answering brief in the Conflicts Appeal in any way.

3. Consolidation of the Appellate Proceedings Promotes Judicial Economy, Not Gamesmanship.

Finally, Appellants seek consolidation of the Proceedings in the interest of judicial economy and efficiency, not gamesmanship or "tactical maneuvering." (Opp'n at 7.) Respondents' argument is premised on the basis that Appellants created a conflict of interest where *none previously existed*. (*Id.*) However, ***as this Court will address in the Conflicts Appeal***, Greenberg created the conflict, Appellants merely exposed it. Judge Williams correctly recognized this conflict, but incorrectly determined that Appellants, rather than the Receiver, should be prejudiced by Greenberg's actions.

This decision was an abuse of discretion, and this Court's decision in the Conflicts Appeal will directly impact the Impleader Writ Petition. Thus, consideration of the two matters at the same time will conserve judicial resources.⁵

DATED this 15th day of July, 2021.

BAILEY ❖ KENNEDY

By: /s/ Dennis L. Kennedy
JOHN R. BAILEY
DENNIS L. KENNEDY
SARAH E. HARMON
JOSEPH A. LIEBMAN

*Attorneys for Appellants Unite Here
Health and Nevada Health Solutions, LLC*

⁵ Respondents also assert that Appellants improperly included documents in its Appendix that were not part of the record in the action from which the Conflicts Appeal was taken. Respondents have failed to properly raise this issue in a motion or bring a counter-motion in their Opposition; therefore, this discussion is improper here. However, to the extent that judicial notice is required, Appellants will address this issue when it is proper to do so.

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY ❖ KENNEDY and that on the 15th day of July, 2021, service of the foregoing **APPELLANTS' REPLY IN SUPPORT OF MOTION TO CONSOLIDATE** was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

MARK E. FERRARIO
DONALD L. PRUNTY
TAMI D. COWDEN
GREENBERG TRAURIG, LLP
10845 Griffith Peak Drive
Suite 600
Las Vegas, Nevada 89135

Email: ferrariom@gtlaw.com
pruntyd@gtlaw.com
cowdent@gtlaw.com

*Attorneys for Real Parties in Interest
State of Nevada, Ex Rel. Commissioner
of Insurance, Barbara D. Richardson,
in Her Official Capacity as Receiver
for Nevada Health Co-Op; and
Greenberg Traurig, LLP*

MICHAEL P. MCNAMARA
JENNER & BLOCK LLP
633 West Fifth Street, Suite 3600
Los Angeles, California 90071

Email: mmcnamara@jenner.com

*Attorney for Respondent
Greenberg Traurig, LLP*

DAVID JIMENEZ-EKMAN
JENNER & BLOCK LLP
353 North Clark Street, Suite 3900
Chicago, Illinois 60654

Email: djimenez-ekman@jenner.com

*Attorney for Respondent
Greenberg Traurig, LLP*

VIA E-MAIL:

HONORABLE TARA CLARK NEWBERRY
**EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK**

Department XXI
200 Lewis Avenue
Las Vegas, Nevada 89155

E-mail:

DC21Inbox@ClarkCountyCourts.us
Dept21LC@ClarkCountyCourts.us
Dept21JEA@ClarkCountyCourts.us

Respondent

/s/ *Angelique Mattox*

Employee of BAILEY ❖ KENNEDY