Case No. 82467 and 82552

IN THE SUPREME COURT OF NEVADA

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,

Appellants,

vs.

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

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

Respondents, and

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

Real Parties in Interest.

District Court Case No. A-15-725244-C, Department XXI

JOINT COMBINED ANSWERING BRIEF (IN DOCKET NO. 82467) AND ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF (IN DOCKET NO. 82552)

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NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to Nevada Rule of Appellate Procedure 26.1, the Respondents/Real Parties in Interest, Barbara Richardson, as Receiver for delinquent insurer NHC, and Greenberg Traurig, LLP ("Greenberg Traurig"), submit this Disclosure Statement:

Respondent/Real Party in Interest Barbara Richardson was appointed as Receiver by the district court under NRS Chapter 696B to administer the delinquent domestic insurer NHC. NHC was a Nonprofit Cooperative Corporation without stock and a member-owned Health Maintenance Organization ("HMO") that operated as a mutual insurer under the laws of the State of Nevada. NHC had no parent company, and no publicly held companies owned ten percent or more of its stock.

The following law firms have represented the Receiver below:

Greenberg Traurig, LLP

Santoro Whitmore, LLP

Lewis Roca Rothgerbie Christie, LLP.

Respondent/Real Party in Interest Greenberg Traurig is a limited liability partnership. It has no parent company, and no publicly held companies own ten percent or more of its stock.

The following law firm represented Greenberg Traurig, LLP in Receiver in this action below:

Jenner & Block, LLP.

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Respondent/Real Parties in Interest Barbara Richardson, as Receiver for delinquent insurer NHC (the "Receiver"), by and through counsel fo record, Greenberg Traurig, LLP and Lewis Roca Rothgerber Christie, LLP, and Respondent/Real Parties in Interest Greenberg Traurig, LLP ("Greenberg Traurig" or "GT"), by and through counsel of record, Jenner & Block, LLP, submit their combined (1) answer to the writ petition in Docket No. 82552 (the "Writ Petition") and (2) answering brief in response to Appellants' Opening Brief in Docket No. 82467 (the "Appeal").

I. JURISDICTIONAL STATEMENT

As discussed in more detail in the argument and in GT's Countermotion To Dismiss Appeal (Dkt. No. 82467 at Doc. 21-07316),[1] jurisdiction is lacking because the district court's order denying the appellants' disqualification motion is not a final order under NRAP 3A(b)(1) or NRS 696B.190(5) and therefore is not appealable.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Is jurisdiction lacking because the order denying the disqualification motion is not appealable as a final judgment?

[1] The Court deferred ruling on Greenberg Traurig's Countermotion to Dismiss. (Dkt. No. 82467 at Doc. 21-10395.)

2) Do the appellants lack standing to seek Greenberg Traurig's disqualification because they are not current or former clients of Greenberg Traurig?

3) Should this Court decline to entertain the Writ Petition?

4) Did the receivership court correctly deny the disqualification motion on the basis that Greenberg Traurig did not have a "clear and substantial enough possible conflict to justify disqualifying Greenberg Traurig as counsel in this Receivership matter"?

5) Was the order denying the disqualification motion correct for the additional reason that, even if Greenberg Traurig had an actual or potential conflict of interest, the prejudice to the Receiver of disqualifying her counsel at this stage of the litigation far outweighs any prejudice to appellants?

6) Was the order denying the disqualification motion correct for the additional reason that the appellants, through undue delay, waived any objection to Greenberg Traurig's serving as counsel to the Receiver?

7) Did the receivership court correctly deny the disqualification motion on the basis that the appellants "have not been able to point to any binding authority that mandates the Receiver and her counsel, Greenberg Traurig, disclose all possible conflicts to the Court"?

III. STATEMENT OF THE CASE

This is an appeal from an order (the "Order") denying a Motion To (1) Disqualify Greenberg Traurig, LLP As Counsel For The Statutory Receiver Of The Nevada Health CO-OP; And (2) Disgorge Attorneys' Fees Paid By Nevada Health CO-OP To Greenberg Traurig, LLP (the "Disqualification Motion"), filed by Unite Here Health ("UHH") and Nevada Health Solutions, LLC ("NHS," and together, "Appellants"). (7App.1364.) The Order was entered in the Eighth Judicial District Court, Clark County, by the Honorable Tara Clark Newberry.

IV. STATEMENT OF FACTS

A. The Appointment of a Receiver and Special Deputy Receiver with Authority to Engage Counsel under Nevada Law.

NHC was a Nevada health insurance provider that was placed into receivership on October 1, 2015, under NRS 696B.290. (1App.0056.) On October 14, 2015, the court entered an order appointing then-Commissioner of Insurance Parks as receiver of NHC, and Cantilo & Bennett as the Special Deputy Receiver ("SDR"). (1App.0059.) The appointment was updated to replace the Receiver with the new Commissioner of Insurance, Barbara Richardson, in April 2016. (*See* 10App.1865, Declaration of Mark Bennett in Support of Greenberg Traurig's Opposition ("Bennett Decl.") ¶8.)

Under NRS 696B.290, the order granted the Receiver and SDR broad authority to rehabilitate or liquidate NHC's business and affairs as they saw fit.

(1App.0059, October 14, 2015 Order ¶¶1-2) The order expressly authorized the Receiver and SDR to "[i]nstitute and to prosecute" all "suits and other legal proceedings," and to "abandon the prosecution or defense of such suits, legal proceedings and claims … on such terms and conditions as she deems appropriate." (1App.0059, October 14, 2015 Order, ¶14(h).) The Receiver also has the power to "employ and to fix the compensation of … counsel" "as she considers necessary." (*Id.* ¶4; *see also* NRS 696B.255(6).) Under NRS 696B.290(7), the Receiver has broad discretion so long as she does not take actions that are "unlawful, arbitrary or capricious."

The SDR is staffed with professionals with long years of experience in insolvency and receivership matters. (*See* 10App.1865, Bennett Decl. ¶¶4, 7-8.) Mr. Bennett, the lead authorized representative of the SDR, has decades of experience in restructuring and insolvency matters, including serving as counsel to the Deputy Liquidator of two health maintenance organization insolvencies. (*Id*. ¶4.) Mr. Bennett has been supported by a qualified team of professionals that includes his partners Patrick Cantilo and Kristen Johnson, associate Josh Lively, and support staff. (*Id.* ¶7.) UHS and NHS have not alleged that either the Receiver or SDR has a conflict of interest in their Opening Brief (App.Br.) or in their Writ Petition

B. The Receiver's Limited-Scope Retention of Greenberg Traurig to Pursue Specific Claims and Retention of Whitmire as Conflicts Counsel.

On December 19, 2016, pursuant to NRS 696B.290(6), the Receiver sought leave to engage several "Service Providers" to "assist the Receiver, according to their specialized expertise, in connection with general receivership, claims, and asset recovery matters." (1App.0188, Motion to Approve Professional Fee Rates, at 5.) The Receiver sought leave to retain and pay "the law firms of Greenberg Traurig, L.L.P. ("GT") and Santoro Whitmire, Ltd., the consulting firm of FTI Consulting, Inc. and the consulting firm of DeVito Consulting, Inc." (*Id.*) On January 17, 2017, the Court granted the motion to engage these advisors. (2App.0236.)

The Receiver retained GT for the limited purpose of prosecuting certain claims on behalf of the Receiver, including claims against NHS, later UHH, and the other defendants in the matter *Nevada Commissioner of Insurance v. Milliman Inc. et al.*, No. A-17-76055-B. (10App.1874, Declaration of Mark Ferrario in Support of Greenberg Traurig's Opposition ("Ferrario Decl.") ¶10; 10App.1865, Bennett Decl. ¶18.) GT's limited representation of the Receiver did not include any matters relating to Xerox State Healthcare, LLC ("Xerox") or Valley Health System ("Valley").

Before GT's retention, the SDR provided GT with a list of parties—not including Xerox or Valley—the Receiver was contemplating asserting claims against, (10App.1874, Ferrario Decl. ¶8; 10App.1865, Bennett Decl. ¶11, 13, 14, 16.)

Nevertheless, before its retention, GT notified the SDR that GT had represented Valley in connection with claims for medical reimbursement from NHC that were submitted by some of Valley's medical provider members. (10App.1874, Ferrario Decl. ¶7; 10App.1865, Bennett Decl. ¶13.) Accordingly, GT and the SDR agreed that the scope of GT's representation did *not* include any work relating to claims brought by member facilities of Valley against the Receiver. (10App.1874, Ferrario Decl. ¶¶7, 10; 10App.1865, Bennett Decl. ¶¶13, 18.) Nor did the scope of GT's work include advising the Receiver as to distribution or allocation of the receivership's assets to the creditors. (10App.1874, Ferrario Decl. ¶¶7, 10; 10App.1865, Bennett Decl. ¶¶13, 18.) These responsibilities were handled by the Receiver, the SDR, and their experienced professional teams. (10App.1874, Ferrario Decl. ¶10; 10App.1865, Bennett Decl. ¶¶19-21.)

Akso before its retention, GT notified the Receiver of its representation of Xerox in other matters. (10App.1874, Ferrario Decl. ¶5; 10App.1865, Bennett Decl. ¶14.) Accordingly, GTr and the Receiver agreed that GT's representation did not include evaluating or prosecuting claims against Xerox. (10App.1874, Ferrario Decl. ¶5; 10App.1865, Bennett Decl. ¶14.) Instead, the Receiver also retained another law firm—Santoro Whitmire—as conflicts counsel to assist the Receiver and SDR, if necessary, with prosecution of claims against companies as to which GT—an international law firm with a broad range of clients—had a potential

conflict. (10App.1874, Ferrario Decl. ¶6; 10App.1865, Bennett Decl. ¶15; Ex. 3, 10App.1883, Declaration of James E. Whitmire ("Whitmire Decl."), ¶¶8, 14.)[2] Such arrangements with conflicts counsel are commonplace in complex receivership matters like the NHC receivership. (10App.1865, Bennett Decl. ¶15.)

In sum, the scope of GT's and Santoro Whitmire's retention was crafted to avoid potential conflicts of interest while ensuring the Receiver obtained all the legal representation it needed. (*See* 10App.1874, Ferrario Decl. ¶¶4-26; 10App.1865, Bennett Decl. ¶¶10-23.) Because these professionals were not retained to perform services for which they were conflicted, there was no conflict to disclose to the receivership court when the Receiver asked for approval to retain them. (*See id.*)

C. Greenberg Traurig's Prior Representation of Xerox.

GT represented Xerox in prior matters that are unrelated to GT's representation of the Receiver. Specifically, GT represented Xerox *in Basich v. State of Nevada ex rel. Silver State Health Insurance Exchange et al.*, a class action brought by Nevada residents who alleged that they had paid health insurance premiums but did not receive health insurance coverage, and in *Casale v. State of Nevada ex rel. Silver State Health Insurance Exchange et al.*, a class action brought by Nevada insurance brokers alleging, among other things, that they were denied

[2] In 2021, the SDR retained the law firm of Lewis Roca Rothgerber Christie LLP to replace Santoro Whitmire as conflicts counsel. *See* 13App.Appx.2420, Motion to Approve Professional Fee Rates, at 8-10.

commissions because of Xerox. (*See* 10App.1887, Class Action Complaint, No. A-14-698567-C (Eighth Judicial District Court, Nevada); 10App.1903, Class Action Complaint, No. A-14-706171-C (Eighth Judicial District Court, Nevada). The plaintiffs' claims against Xerox were based on Xerox's contractual relationship with the Silver State Health Insurance Exchange (the "Exchange"). (*E.g.*, *id.* ¶2.) Neither NHC nor the Receiver (who had not yet been appointed) were party to either of these cases. (*See* 10App.1874, Ferrario Decl. ¶¶12-13.)[3] On May 25, 2017, the *Basich* and *Casale* cases were settled with no findings or admissions of liability. (*Id.* ¶14; 10App.1924, May 25, 2017 Notice of Entry of Order Granting Final Approval of Class Settlement and Attorneys' Fees.)

GT also represented Xerox in connection with an investigation initiated by the Nevada Department of Business and Industry, Division of Insurance, which investigation focused primarily on Xerox's licensing under Nevada law. (*See* 10App.1874, Ferrario Decl. ¶15*;* 9App.1692, Consent Order, ¶¶3-6.) NHC had no involvement or interest in this investigation. (*See* 10App.1874, Ferrario Decl. ¶15.) And once again, this investigation was unrelated to Greenberg Traurig's representation of the Receiver. (*See id., see also* 9App.Appx.1692, Consent Order.)

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[3] Although Xerox had a contractual relationship with the Exchange (*see* 8App.Appx.1399, Contract for Services of Independent Contractor), and NHC had a contractual relationship with the Exchange, Xerox had no contractual relationship with NHC. (*See* 10 App.Appx.1865, Bennett Decl. ¶14.)

GT also represented affiliates of Xerox—though not Xerox itself—in other litigation with no relationship whatsoever to the NHC receivership or the Nevada healthcare insurance market. (10App.1874, Ferrario Decl. ¶16.) GT does not currently represent Xerox in any matters. (*Id.* ¶17.)

D. GT 's Prior Limited Representation of Valley.

GT represented Valley in its submission of a pleading in response to the Receiver's motion for a finding of insolvency of NHC. (1App.0100, Response to Motion for Final Order, at 3.) The response noted that Valley held "a potential claim against the receivership estate in excess of $5 million." (*Id.*) This represented claims by several of Valley's member facilities for medical reimbursement from NHC (the "Valley claims"). (*See* 10App.1874, Ferrario Decl. ¶7; 10App.1865, Bennett Decl. ¶13.) On September 21, 2016, the Court granted the Receiver's motion, declared NHC insolvent, and placed NHC into liquidation. (1App.0113, Final Order Finding and Declaring Nevada Health Co-Op to Be Insolvent and Placing Nevada Health Co-Op into Liquidation.) GT did not perform any work on behalf of Valley in this matter after December 13, 2016; in other words, GT work for Valley ceased *before* the receivership court approved GT retention. (10App.1874, Ferrario Decl. ¶20.)

Meanwhile, the SDR handled the claims administration process without any involvement of GT, and through that process approved and finalized the Valley claims along with those of other medical service providers. (10App.1865, Bennett

Decl. ¶20; 10App.1874, Ferrario Decl. ¶21.) Valley was not and is not the subject of any claims by NHC or the Receiver. (10App.1874, Ferrario Decl. ¶22.)

E. GT's Lack of Involvement or Input in the SDR's Determination Thus Far Not to Pursue Claims Against Xerox.

To date, the Receiver has neither asked for nor received advice from GT on whether she should pursue claims against Xerox. (10App.1065, Bennett Decl. ¶23; 10App.1874, Ferrario Decl. ¶25.) Nor does the Receiver or SDR rely on GT for any information that would inform their decision of whether to pursue claims against Xerox; the SDR has independent access to such information. (*See* 10App.1065, Bennett Decl. ¶¶10-11, 14, 22-23.) The SDR and its experienced team of professionals have evaluated and continue to evaluate potential claims against Xerox (and other parties) independently of GT. (*Id.* ¶¶22-23.) The precise reasons the Receiver has determined not to pursue Xerox to date are protected as confidential work product, mental impressions, and legal strategies. (*Id.* ¶22.)

However, in evaluating whether to pursue potential claims, the Receiver and her SDR consider, among other things: the strength of potential claims, the strength of potential defenses, the relative culpability of other potentially responsible parties, the magnitude of the contribution to the loss of any particular party, the likely expense and difficulty in pursuing claims, and any other factors rationally related to the decision of whether to pursue a particular potentially responsible party. (*Id*. ¶10.) Any number of these factors might make Xerox an undesirable

target for asset recovery. The Receiver's decision not to sue Xerox to date has nothing to do with GT. (*Id.* ¶¶22-23.)

F. The Undisputed Evidence That There is No Conflict of Interest.

In the district court, the Receiver submitted competent evidence responding to the allegations raised in Appellants' Disqualification Motion. This included a declaration from the SDR; by Mark Bennett, swearing to facts related to, among other things: the Receiver's limited scope retention of GT; the Receiver's retention of conflicts counsel, discussions regarding GT's prior representation of Xerox and Valley; the SDR's consideration of entities to pursue in litigation; GT's lack of involvement in considering whether to pursue Xerox; GT's lack of involvement in handling Valley's claims or allocating funds among creditors; and the prejudice that would result from disqualifying GT as the Receiver's counsel. (10App.1865, Bennett Decl.)

The Receiver also submitted a declaration from Mark Ferrario, swearing to facts related to, among other things: the Receiver's limited scope retention of GT; the Receiver's retention of conflicts counsel; GT's prior representation of Xerox and Valley; discussions with Mr. Bennett regarding GT's prior representation of Xerox and Valley; the SDR's consideration of entities to pursue in litigation; GT's lack of involvement in considering whether to pursue Xerox; GT's lack of involvement in handling Valley's claims or allocating funds among creditors; and

the prejudice that would result from disqualifying GT as the Receiver's counsel. (10App.1874 Ferrario Decl.)

The evidence from the Receiver also included a declaration of attorney James E. Whitmire, swearing to facts related to his retention as conflicts counsel for the Receiver. (10App.1883, Whitmire Decl.) In addition, the Receiver submitted her own declaration, swearing that the opposition to the Disqualification Motion, and Mark Bennett's declaration, represented her position. (Respondent's Supplemental Appendix Vol. 1 at p. 52 (hereinafter "R.App. [page number]"), Dec. 14, 2020 Declaration of Barbara Richardson.)

Appellants did not offer rebuttal declarations or produce any evidence that contradicts any statement in these declarations.

G. Greenberg Traurig's Fees.

GT has performed and is performing complex work for the Receiver, litigating at least four different contentious lawsuits on behalf of the Receiver in state and federal courts. (*See* 10App.1865, Bennett Decl. ¶¶18-19, 24-27; 10App.1874, Ferrario Decl. ¶¶23, 27, 29, 32.) GT's work thus far has spanned four and a half years, and aspects of the various pieces of litigation have made their way to appellate courts. (*See* 10App.1865, Bennett Decl. ¶19; 10App.1874, Ferrario Decl. ¶23; *see also, e.g.*, *State ex rel. Richardson v. Eighth Jud. Dist. Ct.*, 454 P.3d 1260 (Nev. 2019).)

GT's fees are reasonable. The district court considered GT's rates and determined that they were acceptable when it approved the engagement. (*See* App.Br. 9, 16; 1App.0188, Motion to Approve Professional Fee Rates, at Ex. A; 1R.App.1, Jan. 10, 2017 Hearing Transcript, at 2-3; 2App.Appx.0236, Order, ¶2.) Appellants do not contest that determination. (Nor do they contend that another law firm equally equipped to handle the engagement would have charged lower fees. (*See generally* App.Br.) Nor do they contend that the amount of Greenberg Traurig's legal fees has anything to do with the alleged conflict of interest. (*See generally id.*)

H. The Receiver's Sale of the Federal Receivables.

In 2019, the Receiver negotiated to sell a portion of NHC's interest in certain federal receivables, the collectability of which was very uncertain due to both pending litigation and political factors. (*See* 6App.1021, Motion for Determination of Good Faith Sale; 1R.App. 38-39, Oct. 16, 2019 Hearing Transcript.) The litigation relating to the federal receivables is complex, and even today, far from settled: the critical issue of offset is still being actively litigated in the matter of *Barbara D. Richardson v. United States*, Case No. 18-1731-C (U.S. Ct. Fed. Cl.).[4] As a result, the potential value of the federal receivables remains uncertain. *See id.*

[4] The parties in that proceeding have outstanding motions to dismiss and cross-motions for summary judgment on file; oral argument was held in May 2021, but the Court has not yet ruled. *See Richardson v. United States*, Case No. 18-1731-C (U.S. Ct. Fed. Cl.) at Dkts. 11, 20, 32, 34, 36, 46.

Before selling the receivables, the Receiver petitioned the receivership court for approval. (6App.1021, Motion for Determination of Good Faith Sale.) UHH opposed the sale and made the same arguments that Appellants reiterate here regarding the discounted sale price and the likely use of proceeds on administrative expenses including legal fees. (R.App. 12, Objection.) After full briefing (R.App.16), and a hearing (R.App.35-50), the receivership court approved the sale, finding it was "in the best interests of the Receivership estate[.]" (R.App.32-34.)

Appellants do not contend that the alleged conflict of interest underlying their Disqualification Motion influenced the Receiver's decision to sell the receivables, or the SDR's process for handling the proceeds of the sale. (*See generally* App.Br.)

I. The Receiver's Claims Against Appellants and Appellants' Related Dilatory Tactics.

On August 25, 2017—nearly *four years ago*—the Receiver filed a complaint against NHS and several other parties. (2App.0350, *Nevada Comm'r of Ins. v. Milliman et al.*, No. A-17-760558-B (Eighth Jud. Dist. Ct.) At that time, GT's representation of Valley was on the public docket in the receivership matter (Case No. A-15-725244-C) and its prior representation of Xerox in the *Basich* and *Casale* matters and related investigation was public knowledge. (10App.1874, Ferrario Decl. ¶27.)

For the next three years, neither NHS nor any other defendant objected to Greenberg Traurig's representation of the Receiver or even suggested that a conflict

of interest existed. (10App.1874, Ferrario Decl. ¶27.) On September 24, 2018—more than *two and a half years ago*—the Receiver amended the complaint to add UHH as a defendant. (*See* 4App.0649.) UHH likewise did not object to GT's representation or raise an alleged conflict of interest. (10App.1874, Ferrario Decl. ¶27.) Moreover, neither UHH, NHS, nor any other defendant sought to implead Xerox as a third-party defendant (*id.* ¶28), even though UHH's counsel was well aware of the facts related to Xerox since at least 2014. (*See* 8App.1542 (NHC board of director meeting minutes reflecting presence of counsel for UHH).)

As discovery progressed and the Receiver prepared for trial, UHH and NHS sought to delay the case. In 2019, UHH and NHS sought an extension of *one full year* to serve their expert reports. (*See* 11App.2028, August 21, 2020 Motion to Extend Expert Disclosure Deadline; 10App.1874, Ferrario Decl. ¶30.) Next, they moved to stay the entire case during the pendency of a Supreme Court case with no potential impact on the trial. (*See* 11App.2046, Oct. 1, 2019 Hearing Transcript; 10App.1874, Ferrario Decl. ¶30.) Then, in June 2020, with trial approaching, UHH and NHS began their current campaign to further delay a reckoning on the merits, first by serving discovery about the Receiver's decision-making process as to Xerox, and then by filing their Disqualification Motion and a belated motion to implead Xerox. (*See* 10App.1874, Ferrario Decl. ¶31; 7App.1257, July 10, 2020 Nineteenth Status Report at 8; 9App.306-326, Exhibits to Disqualification Motion; 10App.1760,

Motion to File Third-Party Complaint (Case No. A-17-760558-B); 12App.2306, Motion to File Third-Party Complaint (Case No. A-20-816161-C).)

During the years this litigation has been ongoing, GT has accumulated extensive knowledge of the complex factual and legal issues in the case. (10App.1874, Ferrario Decl. ¶29; 10App.1865, Bennett Decl. ¶25.) The Receiver and SDR rely heavily on GT's legal advice and institutional knowledge. (10App.1874, Ferrario Decl. ¶29; 10App.1865, Bennett Decl. ¶26.) GT's disqualification at this critical stage would cause the Receiver, the SDR, and the receivership immense prejudice. (*See* 10App.1065, Bennett Decl. ¶¶26-27.)

J. The Disqualification Motion and the Court's Order Denying It.

Appellants filed their Disqualification Motion on October 8, 2020. (7App.1364.) In opposing it, GT pointed out the fatal flaw in its core premise: the notion that GT supposedly was retained as all-purpose counsel for the Receiver is flat-out wrong. (10App.1838, Opposition to Disqualification Motion at 2.) GT demonstrated that because it had been retained only to pursue specific litigation on behalf of the Receiver, and not to do anything related to Valley or Xerox, there was no conflict of interest. (*Id.* at 3, 5-6, 12-18, Exs. 1, 2, 3; R.App 51-52, Richardson Decl.) In their reply brief, Appellants argued for the first time that the district court should apply bankruptcy rules and out-of-jurisdiction bankruptcy case law in the receivership context to require GT to have disclosed before retention all of its

relationships with any entity that might conceivably be a party in interest in the delinquency proceeding. (12App.2103, Reply Brief at 15-18, 19, 20-21.)

The receivership court allowed two and a half hours or oral argument on the Disqualification Motion. (12App.2205, Dec. 15, 2020 Hearing Transcript.) At the argument, the court and the parties discussed whether the bankruptcy rules and principles cited by Appellants were applicable. (*See id.* at 47-50, 53-55, 56, 80, 86.) The court asked Appellants if there was any Nevada case squarely addressing the disclosure obligations that they sought the court to impose on GT, and Appellants conceded that there was not. (*Id.* at 87; *see also id.* at 94.) The court's comments at the argument also demonstrate that it considered Appellants' contentions not just as to Xerox, but also as to Valley (*id.* at 75-76), contrary to Appellants' fourth proffered "issue presented for review" (App.Br. xv).

On December 16, 2020, the receivership court issued a minute order denying the Disqualification Motion, which included a summary of its reasoning. (R.App.53, Minute Order.) The court did not purport to set forth an exhaustive recitation of every rationale underlying its decision. (*See id.*) The final order, which recited the same language from the minute order, was entered on January 15, 2021. (13App.2383.)

V. SUMMARY OF THE ARGUMENT

The Court should either dismiss the Appeal and the Writ Petition,[5] or alternatively, affirm the denial of the Disqualification Motion, for four independent reasons.

First, jurisdiction over the Appeal is lacking because the order denying the Disqualification Motion does not have the character of a final order.

Second, Appellants have no standing to raise the supposed conflict of interest at the heart of their Appeal and Writ Petition. Under Nevada law, only a current or former client of an attorney may seek the attorney's disqualification. It is undisputed that UHH and NHS are neither current nor former clients of GT, so they lack standing as a matter of law. The Court need not go any further to dispose of this entire consolidated proceeding.

Third, the Court should not entertain the Writ Petition for multiple additional reasons, including that: Appellants have not met the high standard for extraordinary writ relief or "advisory" mandamus; and there is no published precedent establishing that a writ petition should be entertained for an order *denying*, as opposed to

[5] Greenberg Traurig filed a countermotion to dismiss this appeal. (Dkt. No. 82467 at Doc. 21-07316.) The Court deferred that motion. (Dkt. No. 82467 at Doc. 21-10395.)

granting, a disqualification motion; and Appellants have another available legal remedy, which bars writ relief.

Fourth, even if the Court does reach the merits on the Appeal or Writ Petition, despite the prior three foreclosing barriers, Appellants' arguments fail in four fundamental respects.

As discussed in Part D.1, GT has no disqualifying conflict of interest because the scope of its representation does not include being adverse to either Xerox or Valley. Fiduciaries like the Receiver routinely and properly retain court-approved counsel for specific purposes even if those counsel would have conflicts performing other duties for the fiduciary. Here, the Receiver retained GT only to pursue specific claims against entities with which it had no conflict, and separately retained conflicts counsel for the precise purpose of handling potential claims against parties as to whom a potential conflict existed—like Xerox and Valley. Accordingly, the district court properly concluded that GT did not have a conflict of interest, and this Court should affirm that conclusion.

As discussed in Part D.2, even if a conflict of interest existed—and it does not—disqualification would be inappropriate because it would cause extreme prejudice to the Receiver. GT has represented the Receiver for over three years in several cases, accumulating extensive knowledge of the complex factual and legal

issues at play and preparing for trial. Depriving the Receiver of her trial counsel at the current late, critical stages of these cases would greatly prejudice her.

As discussed in Part D.3, Appellants waived and forfeited their argument for disqualification by failing to raise it during three years of litigation. UHH and NHS offer no explanation for their delay in alleging a conflict based on information long publicly available, and the true reason is obviously tactical: UHH and NHS seek to delay the trial and unfairly prejudice the Receiver.

Finally, as discussed in Part D.4, Appellants' belated (and therefore waived) argument that GT was required to disclose all its connections with Xerox and Valley to the receivership court, notwithstanding the absence of any conflict, is not supported by the law. The Appellants conceded and the receivership court properly concluded that there is no requirement in Nevada that potential counsel for a receiver disclose to the court every relationship it has with every potentially interested party.[6]

VI. ARGUMENT

A. This Court Does Not Have Jurisdiction Over the Appeal Because the Order is Not an Appealable Final Order.

[6] Appellants dedicate significant space to accusations and complaints about GT's legal fees and the Receiver's decision to sell certain federal receivables. (*E.g.*, App.Br. 16-17, 25-28, 35-36, 60-61.) However, these complaints have nothing to do with the alleged (but nonexistent) conflict of interest or the Receiver's disclosure obligations, and are thus irrelevant to the legal questions at issue on this appeal.

This proceeding is an improper interlocutory appeal, and it should be dismissed for lack of jurisdiction.[7] "[Nevada Rule of Appellate Procedure] 3A(b) designates the judgments and orders from which an appeal may be taken, and where no statutory authority to appeal is granted, no right exists." *Taylor Constr. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209 (1984) (dismissing appeal where order appealed from was not listed in NRAP 3A(b)). Rule 3A does not include orders on a motion to disqualify counsel. Rather, the rule provides that generally, an appeal may be taken only from a final judgment. NRAP 3A(b)(1). "[A] final judgment is one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court . . . ." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). If any claims are unresolved in the district court, an order is not the final resolution of all the claims of all the parties under NRCP Rule 54, a nd it is therefore, not an appealable order.

Here, unresolved claims remain outstanding in the district court. In fact, the Order resolves only a tangential issue, not even any claim of the parties. As such, the Order is not a final judgment and not appealable.

Appellants nonetheless argue that NRS 696B.190, applicable to delinquency proceedings, confers a right to appeal here. (App.Br. xi-xiii.) That statute states in

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This Supreme Court reviews jurisdictional issues *de novo*. *See, e.g.*, *In re Aboud Inter Vivos Tr.*, 129 Nev. 915, 921 (2013) ("We review jurisdictional issues de novo.").

part, "[a]n appeal . . . may be taken . . . from every order in delinquency proceedings having the character of a final order as to the particular portion of the proceedings embraced therein." NRS 696B.190(5). But this statute does not authorize an appeal here because the district court's ruling denying the Disqualification Motion is plainly an interlocutory order that does not "hav[e] the character of a final order."

This Court has not previously interpreted the meaning of the words "having the character of a final order as to the particular portion of the proceedings embraced therein" in NRS 696B.190(5). However, the Court has often found persuasive guidance from other jurisdictions interpreting similar statutes. *See, e.g.*, *Cohen v. Mirage Resorts*, 119 Nev. 1, 10 n.10 (2003). The courts of several states with identically worded provisions have rejected Appellants' proposed interpretation of this phrase.

For example, in *Pac. Marine Insurance Co. v. Harvest States Coop.*, 877 P.2d 264, 268 (Alaska 1994), the Alaska Supreme Court interpreted the same language and held that no orders in a receivership proceeding are appealable until the receivership action is terminated, unless the trial court enters a Rule 54(b) certificate, because "[w]ithout either a final judgment or a Civil Rule 54(b) direction by the trial court, intermediate orders of the superior court do not have the character of a final order." Similarly, in *Protective Life Insurance Co. v. Navarro*, 238 A.3d 193 (Del. 2020), the Delaware Supreme Court interpreted the same phrase and held that an

order dismissing a creditor's claim for a set-off process did not have the characteristics of a final order, because the creditor's set-off claims were not resolved by the order and would be taken up again as part of the final rehabilitation plan. And in *Moody v. State*, 351 So. 2d 547, 548 (Ala. 1977), the court considered the same language in Alabama's delinquency statute and held that a civil contempt order entered in the delinquency action was not final, as it did not resolve all the claims between the parties. These interpretations are consistent with Nevada's general requirement that a final judgment "dispose[] of all the issues presented in the case, and leave[] nothing for the future consideration of the court . . . ." *Lee v. GNLV Corp.*, 116 Nev. 424, 426 (2000).

Here, the challenged order does not dispose of *any* claims between NHC and Appellants. To the contrary, NHC's claims against Appellants will be resolved in EJDC A-17-760558-B, and Appellants' claims against NHC will be resolved in the claims process authorized by the receivership court. Therefore, the Order does not "hav[e] the character of a final order."

Appellants contend that the Order resolved the specific issues raised in its "Motion to Disqualify GT and to Disgorge Fees," and therefore, it operates as a final judgment as to the issues in that "particular portion of the proceedings." (App.Br. xii.) That slices the onion far too thinly. Under Appellants' theory, every motion decided in any delinquency proceeding would be final as to a "particular portion of

the proceedings" and yield an immediately appealable order. Thus, Appellants would have this Court believe that the legislature intended to convey piecemeal appellate jurisdiction over every issue raised in delinquency proceedings, an absurd interpretation of the statutory language that should be rejected. *See State v. Tatalovich*, 129 Nev. 588, 590 (2013) (courts should avoid interpretations that would lead to absurd results).

Appellant's citation to *Fewell v. Pickens*, 39 S.W.3d 447, 451 (Ark. 2001), is unavailing. In that case, the order sought to be appealed was one that granted a permanent injunction and appointed a receiver. In deciding that the order could be appealed, the court emphasized the finality of an order appointing a receiver and awarding permanent relief. *Id.* But unlike the order on the Disqualification Motion, the order in *Fewell* represented perhaps the most significant step in any delinquency proceeding—the determination that a receivership should be instituted at all. Thus, it is not surprising that the court found that critical step to qualify as a "portion" of the delinquency proceedings from which an interlocutory appeal was justified. *See id.*

Fewell is different from this situation. Here, Appellants' failed attempt to disqualify the Receiver's counsel does not have nearly the significance of an order that establishes the receivership itself. Nor can a motion directed at the attorneys rather than any claims, filed just prior to trial, fairly be characterized as a distinct

"portion" of the delinquency proceedings. The motion is, at most, one small episode in the "portion" of the receivership proceedings in which the Receiver is attempting to recover assets for the receivership estate. This "portion" of the delinquency proceeding has not been resolved by the order denying the Disqualification Motion, and remains ongoing. Therefore, there is no jurisdiction for this appeal.

B. UHH and NHS Lack Standing to Seek Disqualification Because They Are Not Current or Former Clients of Greenberg Traurig.

"[S]tanding to bring the underlying claims affects the district court's jurisdiction over this matter, and accordingly this court's jurisdiction[.]" *Cotter ex rel. Reading Int'l, Inc. v. Kane*, 136 Nev. Adv. Op. 63, 473 P.3d 451, 456 (2020). Therefore, this Court should dismiss the Appeal and Writ Petition based on Appellants' lack of standing to bring their Disqualification Motion in the district court in the first instance.[8]

"The general rule is that only a former or current client has standing to bring a motion to disqualify counsel on the basis of a conflict of interest." *Liapis v. Second Jud. Dist. Ct.*, 128 Nev. 414, 420 (2012) (quoting annotation to Model Rules of Professional Conduct, Rule 1.7). It is undisputed that neither Appellant is now, or has ever been, a client of GT. That dooms both their Appeal and Writ Petition.

[8] Standing is a question of law reviewed *de novo*. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368 (2011).

This Court has soundly rejected attempts by non-client movants to disqualify their adversary's attorneys. *See, e.g.*, *Liapis*, 128 Nev. at 419-23 (vacating disqualification order where movant did not have attorney-client relationship with counsel); *see also Practice Mgmt. Sols., LLC v. Eighth Jud. Dist. Ct.*, No. 68901, 2016 WL 2757512, at *2 (Nev. May 10, 2016) (unpublished disposition) (same). Just last year, this Court reiterated that standing to seek disqualification of counsel requires a current or former attorney-client relationship. *State ex rel. Cannizzaro v. First Jud. Dist. Ct.*, 136 Nev. Adv. Op. 34, 466 P.3d 529, 532 (2020) ("[P]laintiffs lack standing to seek LCB Legal's disqualification because they do not have an attorney-client relationship with LCB Legal[.]"). Indeed, the first element that a party seeking disqualification must establish is "that it had an attorney-client relationship with the lawyer" it seeks to disqualify. *Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*, 123 Nev. 44, 50 (2007) (stating elements that must be shown for disqualification); *accord PennyMac Corp. v. Eighth Jud. Dist. Ct.*, No. 78810, 2019 WL 6840113, at *1 (Nev. Dec. 13, 2019) (unpublished disposition).

Given that UHH and NHS have no attorney-client relationship with Greenberg Traurig, they have no standing to raise their motion to disqualify. *See Cannizzaro*, 466 P.3d at 534. Appellants are nonclients seeking to derail litigation brought against them by the Receiver and her SDR. This Court should not countenance Appellants' continued attempts to misuse a motion to disqualify as an

"instrument[] of harassment or delay." *See Brown v. Eighth Jud. Dist. Ct.*, 116 Nev. 1200, 1205 (2000) (discussing the impropriety of using disqualifications as a litigation tactic).

Appellants argue that they have standing because they are creditors of NHC and the Receivership estate. (App.Br. 59.) But they cite no case, nor is GT aware of any, that establishes that a creditor, without more, has standing to seek the disqualification of the debtor's attorney. (App.Br. 59-62.) To the contrary, this proposition is belied by the well-settled rule that only a former or current client has standing to bring a motion to disqualify counsel. *Cannizzaro*, 466 P.3d at 532; *Liapis*, 128 Nev. at 419-23. Appellants alternatively claim that they fall within one of the narrow potential exceptions to this rule, as discussed in *dicta* in *Liapis*. (App.Br. 60.) But they do not: GT's prior representation of Xerox and Valley does not impact Appellants' "interest in a just and lawful determination" of the Receiver's claims against Appellants, which have nothing to do with Valley's claims against the estate, and where the Receiver evaluated whether to pursue Xerox completely independently of GT. (*See* 10App.1865, Bennett Decl. ¶¶22-23.) *Liapis*, 128 Nev. at 420.[9]

[9] Appellants cannot credibly claim that the other potential exception discussed in *Liapis* applies. GT has never represented the Appellants, so it cannot have their "privileged, confidential information." 128 Nev. at 421. (10App.Appx.1874, Ferrario Decl. ¶23.)

C. The Court Should Decline to Entertain the Writ Petition.

The Court should decline to entertain the Writ Petition for at least four reasons.

1. Appellants Have Not Met the High Standard for Mandamus.

"Mandamus is an extraordinary remedy which 'will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously.'" *Min. Cty. v. State, Dep't of Conservation & Nat. Res.*, 117 Nev. 235, 242–43 (2001) (denying petition for writ); *accord NAD, Inc. v. Eighth Jud. Dist. Ct.*, 115 Nev. 71, 76, (1999) ("Mandamus will generally not lie to control discretionary action[.]"). In other words, "mandamus relief does not lie where a discretionary lower court decision 'result[s] from a mere error in judgment'; instead, mandamus is available only where 'the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will.'" *Walker v. Second Jud. Dist. Ct.*, 136 Nev. Adv. Op. 80, 476 P.3d 1194, 1197 (2020). Writ petitioners carry the burden of demonstrating that this high standard has been met, *Pan*, 120 Nev. at 228, but Appellants have not come anywhere close to meeting that burden here. They concede that the district court had "broad discretion" in deciding their Disqualification Motion (*see* Writ Petition 19), and they do not contend, let alone show, that the receivership court exercised its discretion "arbitrarily or capriciously." (*See* Writ Petition 7-10.)

Instead, Appellants argue that the receivership court "ignored" cases from *other* jurisdictions, and contend—without citing any authority whatsoever—that declining to follow such cases constitutes a "manifest" abuse of discretion. (Writ Petition 9-10.) But declining to apply nonbinding out-of-jurisdiction authority—which also is inapposite for multiple reasons—is neither an abuse of discretion, nor arbitrary, nor capricious. *See, e.g.*, *TMX, Inc. v. Volk*, 448 P.3d 574 n.2 (Nev. 2019) (unpublished disposition) (declining appellant's invitation to apply authorities from outside jurisdictions to refine Nevada's established elements of abuse of process); *see also Kosor v. Olympia Companies, LLC*, 136 Nev. Adv. Op. 83, 478 P.3d 390, 396 (2020) (declining to follow California's approach to anti-SLAPP provision, explaining that where the language of a Nevada rule differs from a rule in another state, "foreign precedent applying that language—by which we are not bound in any case—becomes even less persuasive").

To the contrary, this Court recently held that the *converse*—applying foreign case law rather than binding precedent from Nevada—was a manifest abuse of discretion. *Atl. Specialty Ins. Co. v. Eighth Jud. Dist. Ct.*, No. 81418, 2021 WL 1191318, 483 P.3d 1118 (Table) (Nev. Mar. 26, 2021) (unpublished disposition). By resting their argument on foreign authority, Appellants by definition fail to demonstrate that the district court overrode or misapplied binding Nevada law in an arbitrary or capricious exercise of discretion. *Walker*, 476 P.3d at 1198.

Appellants alternatively argue that they will "suffer irreparable harm" if they are not granted writ relief, but without any explanation of how that is so. (Writ Petition 8-9.) They do not claim that the Receiver cannot sue Xerox in the future, or that they themselves cannot seek contribution from Xerox in a separate action. (*See id.*) Appellants' bald assertion that they will suffer unidentified future irreparable harm does not provide a basis for the Court to take up a writ petition. *See, e.g.*, *NAD, Inc.*, 115 Nev. at 78 (denying petition for writ of mandamus where petitioner failed to show irreparable harm).

2. Appellants Have Not Met the Standard for Advisory Mandamus.

Appellants also fail to meet the high standard for "advisory" mandamus. This Court recently explained that there are strict judicial limitations placed upon advisory mandamus, lest it "virtually [] nullify the final decision rule and [] allow interlocutory review by mandamus freely in [our] own discretion." *Walker*, 476 P.3d at 1199. Advisory mandamus is appropriate only where there are "legal issues of statewide importance requiring clarification" *and* where the Court's decision would "promote judicial economy and administration by assisting other jurists, parties, and lawyers." *Id.* Advisory mandamus is not appropriate where the underlying decision is fact-bound and the appellate court's involvement is unlikely to resolve any issues beyond the immediate dispute. *Id.*

Here, Appellants urge the Court to take up their Writ Petition by making the boilerplate assertion that "important issues of law need clarification." (Writ Petition 10.) But Appellants do not explain how the law is actually unclear as to those issues. (*Id.*) To the contrary, the questions Appellants raise actually have clear answers under Nevada law—and the district court ruled against them on that very basis. (*See* 14App.2383.) This Court frequently denies petitions for mandamus where the petitioner attempts to couch a straightforward challenge to the lower court's ruling as an issue that needs clarification. *See, e.g.*, *Walker*, 476 P.3d at 1199 (denying writ petition where petitioners had not cogently argued that mandamus would clarify an issue of broader application); *Mitchell v. Nevada Legis. Couns.*, 134 Nev. 983 (2018) (unpublished disposition) (same). Nor do Appellants show how writ relief here would advance judicial economy, assist other jurists, or resolve disputes outside of this one. (*See* Writ Petition 7-10.) Accordingly, advisory mandamus is not warranted. *Walker*, 476 P.3d at 1199.

3. Extraordinary Review Is Not Appropriate Where Disqualification Was Denied.

Next, the Court should decline to consider the merits of the Writ Petition because, while it has been established that a decision *granting* a motion to disqualify counsel can be reviewed on a petition for a writ of mandamus, it is less clear that a decision *denying* such a motion is immediately reviewable. The only published Nevada cases that GT has identified where a court entertained a petition for

mandamus in connection with a motion for the disqualification of counsel are cases where the lower court had *granted* the disqualification. *See, e.g.*, *Cannizzaro*, 466 P.3d at 530; *Prac. Mgmt. Sols.*, 2016 WL 2757512, at *1; *Liapis*, 128 Nev. at 417; *Nevada Yellow Cab*, 123 Nev. at 48; *Waid v. Eighth Jud. Dist. Ct.*, 121 Nev. 605, 606 (2005); *Brown*, 116 Nev. at 1203-04.

Because denying a party her counsel of choice is a drastic measure that has significant and immediate ramifications in the context of ongoing litigation, it is understandable that this Court would consider an extraordinary writ in the context of an order *granting* a disqualification motion. The same rationale does not apply in the context of an order *denying* disqualification—especially where, as here, Appellants cannot articulate any unfair prejudice that would result to *them* from the Receiver's continuing with her counsel of choice or contend that GT has any of their confidential information. (*See* Writ Petition 7-10.) Indeed, on multiple occasions in recent years, this Court has determined that its intervention was not appropriate where the lower court denied disqualification. *See, e.g.*, *Barnhart v. Eighth Jud. Dist. Ct.*, No. 82619, 2021 WL 1116286 (Nev. Mar. 23, 2021) (unpublished disposition); *see also JMB Cap. Partners Master Fund, L.P. v. Eighth Jud. Dist. Ct.*, No. 78008, 2019 WL 1324853 (Nev. Mar. 21, 2019) (unpublished disposition) (declining to consider merits of writ petition stemming from lower court's denial of disqualification motion).

4. Mandamus Is Barred Because Appellants Have an Adequate Remedy at Law.

Finally, a writ of mandamus "is proper only when there is no plain, adequate and speedy legal remedy." *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 224–25 (2004). This Court has determined that "even if an appeal is not immediately available because the challenged order is interlocutory in nature, the fact that the order may ultimately be challenged on appeal from the final judgment generally precludes writ relief." *Id*.; *accord Walker v. Second Jud. Dist. Ct.*, 136 Nev. Adv. Op. 80, 476 P.3d 1194, 1198 (2020) (denying writ where the challenged order would be appealable at the conclusion of the matter). Here, Appellants do have a "plain, adequate and speedy legal remedy": they can appeal the final judgment at the appropriate time. *Pan*, 120 Nev. at 224–25; *Walker*, 476 P.3d at 1197-98. Even though that time is not now, the ability to pursue an appeal later still precludes writ relief. *Id*.

D. The Court Should Affirm the Order Denying Appellants' Disqualification Motion.

If the Court decides to reach the merits in this proceeding, which it need not, it should affirm the receivership court's Order denying the Disqualification Motion. This Court reviews the district court's factual findings for abuse of discretion, and reviews the district court's interpretation of the law and disciplinary rules *de novo*. *See Cannizzaro*, 466 P.3d at 531. The Court should affirm for four independent reasons.

1. The District Court Correctly Found There Was Not a "Clear and Substantial Enough Possible Conflict to Justify Disqualifying Greenberg Traurig"; In Fact, Greenberg Traurig Has No Conflict of Interest.

The Disqualification Motion was a baseless attempt by litigation adversaries to use disqualification to cause delay and obtain a strategic advantage. The core premise of the Disqualification Motion was the assumption that GT was retained to represent the Receiver in all her affairs, including those in which GT could have been conflicted.

But the undisputed evidence in the record shows that assumption was simply wrong. GT was retained by the Receiver for the limited purpose of pursuing specific claims only. Before GT was retained, it fully advised the Receiver that it had a potential conflict with pursuing any claim against Xerox or handling any claims by Valley. For that reason, the Receiver did not retain GT to evaluate or pursue any claims against Xerox, to defend or administer the claims of Valley, or to allocate assets among creditors. The Receiver retained separate conflicts counsel to handle any matters that are outside the scope of GT's retention due to potential conflicts.

Thus, the central thesis of the Disqualification Motion—and this follow-on proceeding—lacks any foundation.

a. Fiduciaries Routinely and Properly Retain Limited-Scope Counsel Who Have Potential Conflicts with Other Stakeholders.

Fiduciaries like the Receiver routinely retain limited-scope counsel like GT to provide legal advice on specific matters—but not *all* matters—relating to a receivership or estate. Indeed, it is commonplace for counsel to a creditor to also serve as counsel to a fiduciary bringing claims against third parties, given their aligned interest in asset recovery. *See Stoumbos v. Kilimnik*, 988 F.2d 949, 964 (9th Cir. 1993) ("[T]he interests of [the creditor] and the trustee coincide: if money is recovered for the estate, [the creditor's] pro rata recovery will ultimately be greater."). Courts have consistently rebuffed attempts to disqualify such limited-purpose counsel to a fiduciary because of an alleged conflict of interest that is *outside* the scope of their engagement. *See, e.g.*, *Bartelt v. Smith*, 129 N.W. 782, 784 (Wis. 1911) (no conflict of interest exists "where it is made clear that [counsel's] services to the receiver were of such a nature that no clash of interests was involved between their duties as counsel for the party and as counsel for the receiver"); *Stoumbos*, 988 F.2d at 964 ("[W]here the trustee seeks to appoint counsel only as 'special counsel' for a specific matter, there need only be no conflict between the trustee and counsel's creditor client with respect to the specific matter itself.").

For example, in *In re Arochem Corp.*, the Second Circuit rejected an asserted conflict that, like here, the movant asserted prevented counsel from bringing claims

the movant thought appropriate, explaining that any alleged conflicts "must be evaluated only with respect to the scope" of the special counsel's engagement. 176 F.3d 610, 622-25 (2d Cir. 1999).[10] For similar reasons, courts routinely approve of a fiduciary's use of multiple law firms, or "conflicts counsel," to cure potential conflicts of interest. *See*, *e.g.*, *Secs. & Exch. Comm'n v. Nadel*, No. 8:09-cv-87-T-26, 2012 WL 12910270, at *8 (M.D. Fla. Apr. 25, 2012) (motion to disqualify denied because conflicts counsel obviated conflict); *In re REA Holding Corp.*, 2 B.R. 733, 734 (S.D.N.Y. 1980) (affirming bankruptcy court finding of no conflict where conflicts counsel "eliminate[d] any question of divided loyalty"); *In re Lee Way Holding Co.*, 102 B.R. 616, 622 (S.D. Ohio 1988) (no conflict for trustee's counsel because it "can be dealt with through designation of a special counsel" in the "unlikely event that a conflict arises").

b. The Receiver's Fully-Informed Retention of Greenberg Traurig to Pursue Specific Claims Against Parties Other than Xerox Was Proper Under Settled Law.

Under settled principles of fiduciary law, GT's prior representation of Xerox did not constitute a conflict of interest because potential claims against Xerox are

[10] Similar decisions abound. *See, e.g.*, *In re Fondiller*, 15 B.R. 890, 892-93 (B.A.P. 9th Cir. 1981); *In re Decade, SAC, LLC*, Bankr. No. 18-1880, 2020 WL 564903, at *7 (D. Del. Feb. 5, 2020) (noting that courts "regularly permit a chapter 7 trustee to retain a creditor's attorney as his own to pursue claims designed to augment the debtor's estate"); *In re Midway Motor Sales, Inc.*, 355 B.R. 26, 32-33 (Bankr. N.D. Ohio 2006) (chapter 7 trustee properly employed as special counsel law firm that represented creditors).

outside the scope of GT's limited representation of the Receiver. *See Stoumbos*, 988 F.2d at 964; *Bartelt v. Smith*, 129 N.W. at 784; *Arochem*, 176 F.3d at 622-25. The Receiver and GT agreed that the scope of GT's representation would not include evaluating or pursuing claims against Xerox, and the Receiver retained Santoro Whitmire as conflicts counsel for the specific purpose of pursuing any such conflict claims that may arise (if necessary). (10App.1874, Ferrario Decl. ¶¶5-6, 10; 10App.1865, Bennett Decl. ¶¶14-15, 18; 10App.1883, Whitmire Decl., ¶¶8, 11, 14.) The Receiver and SDR, who are unconflicted fiduciaries, properly exercised the discretion they are afforded under Nevada law—completely independent of GT—and have so far decided not to pursue claims against Xerox. (*See* 10App.1865, Bennett Decl. ¶¶22-23; 10App.1874, Ferrario Decl. ¶25.) *See In re Arochem*, 176 F.3d at 624-25. Moreover, the Receiver's employment of Santoro Whitmire (subsequently replaced with Lewis Roca Rothgerber Christie, LLP) as conflicts counsel independently remediates any concern about GT's loyalties. *See Nadel*, 2012 WL 12910270, at *8; *In re REA Holding Corp.*, 2 B.R. at 734; *In re Lee Way Holding Co.*, 102 B.R. at 622.

All the cases relied on by Appellants involved situations where, unlike here, counsel had a conflict *within* the scope of its representation. In particular, *CFTC v. Eustace*—the primary case on which Appellants rely—shows exactly why GT should not be disqualified here. Nos. 05-2973, 06-1944, 2007 WL 1314663 (E.D.

Pa. May 3, 2007). There, defendant sought to disqualify the *receiver* and his counsel, because they (unlike the Receiver and SDR here) had represented a target (UBS Cayman) of the receiver's claims, in other matters. *Id.* at *2-4. The court disqualified the *receiver himself*, but allowed his law firm to stay in place as counsel, given its "significant knowledge" of the case, and required a receiver *ad litem* to (1) "independently investigate and arrive at an independent judgment as to what course of action should be taken with regard to UBS Cayman in this case"; and (2) employ additional counsel on the matter to "exclusively advise the Receiver ad litem as to UBS Cayman issues." *Id.* at *12-13. Here, the Receiver and SDR—both of whom are unconflicted—have *already done both*: they evaluated (and continue to evaluate) potential claims against Xerox independent of GT, and they retained conflicts counsel to assist with the prosecution of claims that might arise against any parties as to whom GT had a conflict, including Xerox. (10App.1874, Ferrario Decl. ¶¶6, 10, 25; 10App.1865, Bennett Decl. ¶¶15, 18, 22-23; 10App.1883, Whitmire Decl. ¶¶8, 11, 14.)

Appellants' other cases similarly involve conflicts of interest that were plainly *within* the scope of the engagement of the receivers or attorneys who were disqualified. *See, e.g.*, *Hilti, Inc. v. HML Dev. Corp.*, No. 9-01029-B, 2007 WL 6366486 (Mass. Super. Ct. Feb. 5, 2007) (disqualifying the receiver, who also represented a creditor, because "it would be his duty to see that all creditors and

parties are treated alike"); *KeyBank Nat'l Ass'n v. Michael*, 737 N.E.2d 834, 852 (Ind. Ct. App. 2000) (disqualifying receiver's counsel who had represented debtor corporation and its successor *in the same litigation*, adverse to the receiver's interest); *In re Bohack Corp.*, 607 F.2d 258, 262-63 (2d Cir. 1979) (disqualifying counsel for debtor who was responsible for determining if litigation was necessary against company because counsel was close personal friends and business associates with the chairman of company); *In re Git-N-Go, Inc.*, 321 B.R. 54, 59 (Bankr. N.D. Okla. 2004) (disapproving "general bankruptcy counsel" who had represented both the debtor and its creditors regarding the transactions at issue in the bankruptcy and thus could not "provide the objective and independent advice" on these transactions); *Pressman-Gutman Co. v. First Union Nat'l Bank*, No. 02-8442, 2004 WL 2743582, at *1 (E.D. Pa. Nov. 30, 2004) (disqualifying counsel for profit-sharing plan who also represented, in the same action, third-party defendants who, in turn, were directing the litigation on behalf of the plan while also being accused of violating duties to the plan). These cases simply do not apply here to GT's limited-scope engagement by the Receiver.

Appellants also rely heavily on *In re S. Kitchens, Inc.*, 216 B.R. 819 (Bankr. D. Minn. 1998), but that case, too, is inapposite. There, the court's analysis turned on a violation of 11 U.S.C. § 327(e)—a rule specific to bankruptcy proceedings that does not apply here. There is no comparable statutory violation in this case.

Furthermore, in *Kitchens*, unlike here, there is no indication that the trustee had a separate conflicts counsel who was hired specifically to evaluate and pursue any matters in which its special counsel might have a conflict of interest. This is a critical distinction that alleviates any concern in this case about the Receiver's ability to adequately assess potential liability by Xerox.

Nor does GT's representation of the Receiver violate NRPC 1.7 or 1.9. (App.Br. 36 n.8; *see also* 7App.1364, Disqualification Motion at 23.) Rule 1.7 does not apply because GT does not have a current attorney-client relationship with Xerox and, even if it did, GT is not representing the Receiver adverse to Xerox. (10App.1874, Ferrario Decl. ¶¶10, 17.) Rule 1.9 is similarly inapplicable, because (1) GT's current representation is not "substantially related" to any matter in which GT formerly represented Xerox, none of which involved the Receiver, UHH or NHS; and (2) the Receiver's interests are not "materially adverse" to Xerox's, given that Xerox is not a party and the Receiver *independently determined* to not yet bring claims against Xerox. (10App.1865, Bennett Decl. ¶¶22-23.)[11]

[11] UHH and NHH's belated motion to implead Xerox in the case was a transparent attempt to delay the case and gain a strategic advantage by manufacturing a conflict of interest. Courts in Nevada and elsewhere have rejected such attempts to implead third-party defendants in order to create a conflict. *See, e.g.*, *Mirch v. Frank*, No. CV-01-0443, 2003 WL 27387830, at *4-5 (D. Nev. Oct. 24, 2003) (criticizing use of impleader "as a nefarious litigation tactic" to "spread[] chaos in the opposing camp" by "creating a conflict of interest"); *Nat'l Cas. Co. v. Beth Abraham Hosp.*, No. 97 Civ. 8091, 1999 WL 710780, at *6-7 (S.D.N.Y. Sept. 10, 1999) (denying motion to implead a third-party defendant where doing so would create a potential

Appellants offer only pure speculation—and no evidence—about the impact of GT's representation of the Receiver on the Receiver's decision not to sue Xerox, and claim that GT has failed to produce evidence that conclusively disproves their speculation. (App.Br. 13-15; *see also* 7App.1364, Disqualification Motion at 22-24.) For one, speculation is plainly inadequate to show a conflict of interest under the Nevada Rules. *See, e.g.*, *Liapis*, 128 Nev. at 420 ("[S]peculative contentions of conflict of interest cannot justify disqualification of counsel."); *State v. Eighth Jud. Dist. Ct.*, 473 P.3d 1020, 2020 WL 5888026, at *1 (2020) (unpublished disposition) (reversing disqualification of counsel based on speculation regarding potential litigation). More importantly, though, Appellants' speculation is refuted entirely by the actual undisputed facts that were before the district court when it rendered its decision: GT has had no role in the decision whether to pursue litigation against Xerox. (10App.1874, Ferrario Decl. ¶25; 10App.1865, Bennett Decl. ¶¶22-23.) Contrary to Appellants' assertion, GT *did* produce concrete evidence establishing that the representation was limited in such a way that there was no conflict of interest: namely, unrefuted declarations from both the attorney and the client. (10App.1874, Ferrario Decl.; 10App.1865, Bennett Decl.) There is no ethical rule requiring GT to have memorialized the facts set forth in the declarations in a formal

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conflict of interest). In any event, even if Appellants were allowed to implead Xerox, the Receiver's use of conflicts counsel to handle the portions of the litigation involving Xerox would avoid any potential conflict.

engagement letter at the outset of the representation. *See generally*, NEV. R. PROF'L CONDUCT.

c. GT's Prior Representation of Valley Is Not a Conflict of Interest.

GT's prior representation of Valley does not constitute a conflict of interest, because Valley's claim against the estate, and the distribution of assets, are outside the scope of GT's representation.

Courts have repeatedly held that counsel to a creditor can subsequently serve as counsel to a fiduciary where counsel's responsibilities to the fiduciary do not involve disputing the creditor's claims or pursuing claims against the creditor. *See In re Arochem*, 176 F.3d at 624; *Stoumbos*, 988 F.2d at 964. Indeed, as courts have noted, the interests of the creditor and the interests of the Receiver are in fact *aligned* in these circumstances, as both seek a greater recovery for the estate to provide greater recovery to the creditors. *See Stoumbos*, 988 F.2d at 964 ("[T]he interests of [the creditor] and the trustee coincide: if money is recovered for the estate, [the creditor's] pro rata recovery will ultimately be greater."); *In re Midway Motor Sales*, 355 B.R. at 34 (noting that the trustee's and creditor's interests were "aligned" in "collecting assets for the benefit of all creditors of the estate").

Here, there is no conflict because GT's representation of the Receiver is limited to prosecuting specific claims on behalf of the Receiver and does not include defending or administering the Valley claims or allocating assets among creditors.

(10App.1874, Ferrario Decl. ¶¶21, 24; 10App.1865, Bennett Decl. ¶¶13, 20.) Valley's claim was approved by the Receiver completely independent of GT. (10App.1874, Ferrario Decl. ¶¶20-21; 10App.1865, Bennett Decl. ¶20.) Contrary to Appellants' assertion (App.Br. 56-58), GT has no role in assuring equal treatment among creditors or allocating "a limited pot of money" to creditors, as the cases Appellants cite on this point assume.[12]

Nor does GT's former representation of Valley implicate NRPC 1.7 or 1.9. The first, Rule 1.7, does not apply because GT's representation of Valley in this matter was concluded in December 2016—prior to its appointment as counsel in January 2017—and because GT's limited-scope representation of the Receiver is not "directly adverse" to Valley or "materially limited" by GT's former representation of Valley. Rule 1.9, likewise, does not apply because GT's limited-scope

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12 *See, e.g.*, *Scholes v. Tomlinson*, No. 90-cv-1350, 1991 WL 152062, at *7 (N.D. Ill. July 29, 1991) (receiver's counsel disqualified where it represented a creditor class and counsel "undoubtedly will play some role in the SEC's plan of distribution" to creditors); *Real Estate Cap. Corp. v. Thunder Corp.*, 31 Ohio Misc. 169, 188 (Ohio Ct. Com. Pl. 1972) (conflict existed for counsel to receiver who would have to "decide which of the creditors he will pay and which of the creditors he will not pay"); *Hilti*, 2007 WL 6366486, at * (disqualifying the receiver, who also represented a creditor, because "it would be his duty to see that all creditors and parties are treated alike"); *In re Envirodyne Indus., Inc.*, 150 B.R. 1008, 1019 (Bankr. N.D. Ill. 1993) (counsel to trustee also actively represented a substantial creditor of debtor and representation of trustee would "necessitate negotiation" with creditor); *In re Am. Printers & Lithographers, Inc.*, 148 B.R. 862, 865-66 (Bankr. N.D. Ill. 1992) (denying application for law firm to serve as general, all-purpose bankruptcy counsel for the debtor where firm would have to "vigorously negotiate" against its longstanding client "in order to fulfill its duties to debtor").

representation of the Receiver is not "materially adverse" to Valley, who has the same interest the Receiver has in recovering assets for the receivership estate. Moreover, GT is neither bringing claims against Valley nor defending Valley's claims against the receivership. *See* NRPC 1.7(a); *Stoumbos*, 988 F.2d at 964. And finally, even if a conflict had existed—and it did not—Valley provided written consent to GT's limited representation of the Receiver, curing any possible conflict under Rule 1.9. (10App.1874, Ferrario Decl. ¶7.)

2. Even If There Were a Conflict, Disqualifying GT Would Be Improper Because It Would Cause the Receiver Substantial Prejudice.

Even if there were a conflict of interest—there is not—disqualification of GT would be unwarranted because it would cause significant prejudice to the Receiver. Under Nevada law, even if a conflict of interest exists, disqualification of counsel is only proper where the moving party shows that "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Brown*, 116 Nev. at 1205. Put otherwise, a court must "balance the prejudices that will inure to the parties as a result of its decision." *Id.*

Here, the balancing of prejudices weighs heavily against disqualification. On one hand, GT has served as primary litigation counsel for the Receiver in this matter for over three years, accumulating extensive knowledge of the complex factual and legal issues underlying the Receiver's claims. (10App.1874, Ferrario Decl. ¶¶29, 32; 10App.1865, Bennett Decl. ¶¶25-26.) GT has served as lead counsel at all stages of the litigation, including preparation for the coming trial. (10App.1874, Ferrario Decl. ¶29.) Disqualification would deprive the Receiver of GT's institutional knowledge of the case, leaving the Receiver at a great litigation disadvantage. (10App.1865, Bennett Decl. ¶26.) *See Openwave Sys. Inc. v. Myriad France S.A.S.*, No. C 10–02805, 2011 WL 1225978, at *6 (N.D. Cal. Mar. 31, 2011) (prejudice prevented disqualification where counsel had "developed a strong understanding of the facts" and the disqualification motion "appeared to be motivated by a desire to derail" litigation); *see also Imperial Credit v. Eighth Jud. Dist. Ct.*, 130 Nev. 558, 562 (2014) ("[T]his court has also recognized the importance of allowing parties to be represented by the counsel of their choice."). Moreover, Appellants' Disqualification Motion was not limited to the *Milliman* case, and disqualifying GT from representing the Receiver in other cases would also impose a significant burden on the Receiver and receivership estate. (10App.1865, Bennett Decl. ¶27.)

On the other hand, Appellants have presented no real countervailing interests. They have demonstrated no unfair prejudice that would be caused by allowing the

Receiver to continue with her chosen counsel. GT has no potential loyalty to Appellants and has none of their confidential information. (10App.1874, Ferrario Decl. ¶23.) *See Brown*, 116 Nev. at 1205-06 (denying motion to disqualify where movants made no showing that counsel acquired their privileged, confidential information and opposing party would "be greatly prejudiced" by disqualification). Appellants have asserted that the alleged conflict is "detrimental to all Defendants in the Milliman Lawsuit because Xerox's misconduct would not be fully considered by the jury with respect to potential liability against the other Defendants." (7App.1364, Disqualification Mot. at 23.) This is nonsense. While Appellants' last minute attempt to implead Xerox into an asset recovery case was properly denied, Appellants are still free to attempt to show that it was Xerox, and not them, who caused the Receiver's damages.

Appellants also assert that they could be prejudiced if they were held liable in the underlying lawsuits "merely because conflicted counsel prevented the Receiver from pursuing claims against Xerox." (App.Br. 32-33.) This is also nonsense: Appellants have offered not a shred of evidence that GT has "prevented" the Receiver from pursuing Xerox. On the contrary, GT and the Receiver have presented unrebutted evidence that, *prior to* engaging GT, the Receiver had already decided on a group of defendants to pursue that did not include Xerox, and that GT has not been involved in any further consideration the Receiver has given to that

topic since then. (10App.1874, Ferrario Decl. ¶¶5, 8, 10, 25; 10App.1865, Bennett Decl. ¶¶14, 16, 22.) GT has neither stood in the way of the Receiver's obtaining non-conflicted advice about whether to pursue Xerox, nor impeded the Receiver's ability to, in fact, pursue Xerox. Furthermore, Appellants have not argued and cannot credibly argue that substitute counsel would necessarily advise the Receiver to pursue Xerox, so there is no reason to speculate that disqualifying GT would actually have the practical effect that Appellants assume.[13]

3. Appellants Waived Their Disqualification Argument by Unreasonably Delaying Raising It.

A party's unreasonable delay in moving to disqualify an attorney constitutes de facto consent to an attorney's representation and waiver of the right to object. *See Tr. Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85, 87-88 (9th Cir. 1983); *Nadel*, 2012 WL 12910270, at *8. Courts determining whether a party has waived its right to object consider the following factors: (1) the length of the delay; (2) when the movant learned of the conflict; (3) whether the movant was represented by counsel during the delay; (4) why the delay occurred; (5) whether the motion was delayed for tactical reasons; and (6) whether disqualification would prejudice the non-moving party. *See Nadel*, 2012 WL 12910270, at *8; *United States v. Kincade*,

[13] Disqualifying Greenberg Traurig would also unfairly prejudice Greenberg Traurig, who has represented the Receiver in good faith for over four years in the absence of any law, guidance, or order indicating that it was improper to do so.

No. 2:15–cr–00071, 2016 WL 6154901, at *6 (D. Nev. Oct. 21, 2016). These factors all weigh in favor of waiver here.

After being named a defendant, UHH waited over two years, and NHS waited over three, before bringing their motion to disqualify. Courts have found delays far shorter than this to amount to a waiver. *See, e.g.*, *Nadel*, 2012 WL 12910270, at *8 (one year and nine months too long); *Openwave Sys.*, 2011 WL 1225978, at *6 (four months too long); *Kincade*, 2016 WL 6154901, at *6-7 (eight months too long). UHH and NHS were on notice of the alleged conflict years ago, as Valley is listed as represented by GT on the docket in the receivership case, and GT's representation of Xerox in the *Basich* and *Casale* matters is a matter of public record. Nevertheless, Appellants did not allege a conflict, even as discovery advanced and the matter was set for trial twice. (10App.1874, Ferrario Decl. ¶28.) UHH and NHS have been represented by experienced counsel throughout this litigation. They have offered *no explanation whatsoever*, either in the district court or on appeal, for their delay in raising this supposed conflict that they have known about for years. The true reason is obviously tactical.

Appellants should be deemed to have waived their right to object to GT's representation of the Receiver, and the Court should affirm the Order denying the Disqualification Motion for that additional reason.

4. The District Court Correctly Held There Is No Law Requiring the Expansive Disclosure Appellants Advocate.

In the district court, after being confronted with the limited scope of GT's retention and the retention of conflicts counsel, Appellants argued for the first time in their reply brief that, even if GT did not have an actual conflict of interest, it was required to disclose to the receivership court its prior representations of Xerox and Valley. (*Compare* 7App.1364, Disqualification Motion at 18-27 (arguing that alleged conflicts of interest warrant disqualification), *with* 12App.2103, Reply In Support of Disqualification Motion at 15-23 (arguing that failure to disclose alleged potential conflicts is grounds for disqualification).) In support of this new argument, raised for the first time on reply, Appellants cited bankruptcy cases from other jurisdictions. (12App.2103, Reply In Support of Disqualification Motion at 15-23.) Appellants now reiterate that argument and rely on the same authority in their Opening Brief (App.Br. 37-49) and Writ Petition (Writ Petition 20-28).

Arguments raised for the first time in a reply brief are waived and need not be considered. *See, e.g.*, *Smith v. Zilverberg*, 137 Nev. Adv. Op. 7, 481 P.3d 1222, 1228 n.3 (2021) ("[H]e raises this argument for the first time in his reply brief. Thus, it is waived."); *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 (2011) (declining to consider argument raised for the first time in the reply brief); *Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502 (2005) (holding arguments raised for the first time in reply briefs need not be considered). An argument not

properly raised below need not be considered on appeal either. *See, e.g.*, *State v. Inzunza*, 135 Nev. 513, 522 (2019) ("Because the State raises an issue on appeal that was not properly raised (or preserved) before the district court, we need not consider it."). Accordingly, the Court need not even consider Appellants' disclosure argument.

If the Court nevertheless considers this argument, it should affirm the district court's order because the district court properly concluded that there is no law in Nevada requiring the kind of disclosure that Appellants advocate. Indeed, Appellants conceded, both at oral argument below and in their opening appellate brief, that there is no Nevada authority mandating that a Receiver or her potential counsel disclose every possible connection they have to any party in interest. (12App.2205, Dec. 15, 2020 Hearing Tr. at 87,[14] 94;[15] *see also* App.Br. 43 (conceding that the receivership court was correct that "there is not an explicit Nevada rule or statute which addresses the disclosure of conflicts of interest in a receivership. . . .")

Notwithstanding this concession, Appellants cite a hodgepodge of non-binding, out-of-jurisdiction, and inapposite cases to try to persuade this Court to

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[14] "THE COURT: Am I correct that there is no Nevada case which squarely holds exactly what your position is here? MR. KENNEDY: Yeah. We are not aware of any Nevada cases squarely holding that. That's correct."

[15] "THE COURT: And that unanimity -- . . . that unanimity in the cases includes Nevada? MR. KENNEDY: Well, there -- there are -- there are no cases."

make new law requiring a receiver and her counsel to disclose all their relationships and connections to all potential parties in interest in the receivership, the way a bankruptcy trustee must. None of Appellants' authority is apt, and certainly none of it justifies disqualifying the Receiver's counsel of choice because she did not comply with laws that admittedly do not apply to her.

Appellants first cite a number of cases for general propositions about duties owed by counsel to receivers (App.Br. 38), but each is inapposite. For instance, in *KeyBank Nat'l Ass'n v. Michael*, 737 N.E.2d 834, 852 (Ind. Ct. App. 2000), an Indiana state statute disqualified the attorney from acting as a receiver, and the court reasoned that if the attorney could not act as a receiver himself, he should not be allowed to be counsel to the receiver. There is no equivalent state statute that applies here. *In re Coastal Equities, Inc.*, 39 B.R. 304, 309 (Bankr. S.D. Cal. 1984), fares no better because its holding hinged upon bankruptcy rules specifically requiring the disclosure of every possible connection between the potential trustee and the parties in interest. Again, there is no equivalent rule that applies to receivers or their counsel in Nevada. And *McPherson v. U.S. Physicians Mut. Risk Retention Group*, 99 S.W.3d 462, 468 (Mo. Ct. App. 2003), is inapposite because it had nothing to do

with disclosing connections between the receiver's counsel and potential parties in interest.[16]

Appellants next rely heavily on *CFTC v. Eustace*, 2007 WL 1314663, at *1. (App.Br. 38-40.) But in addition to being out of jurisdiction and nonbinding, *Eustace* does not help them because the court did *not* hold that a receiver has the same disclosure obligations as a bankruptcy trustee. The Court in *Eustace* did *examine* cases from the bankruptcy context, but also repeatedly pointed out that such cases did *not* apply to receiverships and were useful only for examining general principles. *Id.* at *6-10.[17] And ultimately, the court neither disqualified the receiver's attorney, nor premised the disqualification on a failure to disclose. *Id.* at *11-12. Rather, the court disqualified the *receiver* himself, though only as to a part of the proceedings, and premised the disqualification on the fact that the receiver had represented an actual target of the receiver's claims. *Id.* at *2-3, 10-12. Here, by contrast, it is undisputed that the Receiver and SDR themselves are not conflicted: neither the Receiver nor the SDR represented Xerox. Further, (a) Xerox is not a current target of the Receiver's claims, (b) the Receiver has separate counsel to

[16] Appellants also cite *Crites, Inc. v. Prudential Ins. Co. of Am.*, 322 U.S. 408, 414-15 (1944), but that case, too, is entirely inapposite. There, a co-receiver concealed a secret deal he had made to personally profit from his official position, to the detriment of the court and other parties in interest. There are no such allegations here.

[17] For instance, the court noted, "[T]his is obviously not a bankruptcy proceeding, and Rule 2014 and § 327(a) are inapplicable for that reason." *Id.* at *6.

advise it as to whether to pursue Xerox, and (c) if Xerox becomes a target, the Receiver has separate counsel to handle that litigation. Thus, *Eustace* does not support Appellants' arguments.

Appellants' next tack is to argue that bankruptcy proceedings are "similar" to receivership proceedings and that receivership courts sometimes look to bankruptcy cases for guidance. (App.Br. 41-42.) But Appellants cite no authority for the idea that the Court should therefore import and apply statutory bankruptcy rules to disqualify counsel where there is no such rule governing receiverships. (*See id.*) Indeed, in Nevada, insurance insolvency is covered by a specific state statute, and insurance companies are prohibited from filing for bankruptcy or using the protections afforded by the bankruptcy rules. *See generally* NRS 696B.010 *et seq.* On the other hand, the bankruptcy cases Appellants cite all spring from a statutory provision that is specific and unique to the bankruptcy scheme. That provision requires:

> The application [for approval of employment of professionals] shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Fed. R. Bankr. P. 2014. There is no dispute that the Nevada legislature has not seen fit to impose any similar, broad disclosure obligation on statutory receivers. There may be policy arguments in favor of, or against, imposing such an obligation in

Nevada. But the lawmakers have not done it. In the absence of the same statutory requirement in Nevada, the federal requirement cannot provide a basis to impose the draconian action of disqualification.

Moreover, none of the cases Appellants cite assists them in importing this requirement. For instance, in *Jo Ann Howard & Assocs., P.C. v. Cassity*, No. 4:09CV01252, 2012 WL 1247271, at *4 (E.D. Mo. Apr. 13, 2012), the court merely observed that the receivership context is "similar" to the bankruptcy context; it did not impose a bankruptcy statute on a receivership proceeding. Similarly, in *Kreidler v. Cascade Nat'l Ins. Co.*, 329 P.3d 928, 933 (Wash. Ct. App. 2014), the court merely noted that it would look to other jurisdictions to help it interpret statutory language; the court did *not* suggest that it would be appropriate to apply a bankruptcy rule where there was no equivalent in the receivership context.

Thus, the host of out-of-jurisdiction bankruptcy cases that Appellants cite (App.Br. 42-43), grounded in statutory bankruptcy rules that do not apply to receiverships, provide no basis for reversing the district court's holding here. The district court correctly held that Appellants "have not been able to point to any binding authority that mandates the Receiver and her counsel, GT, disclose all

possible conflicts to the Court."[18] Accordingly, the Court should affirm the district court's Order.

VII. CONCLUSION

For the foregoing reasons, Respondent/Real Parties in Interest, the Receiver and GT respectfully requests that the Court dismiss the Appeal and the Writ Petition for lack of jurisdiction, or alternatively, affirm the District Court's Order denying

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[18] Furthermore, even if the Court saw fit to impose a new disclosure requirement akin to the bankruptcy rules, any nondisclosure here was harmless because, as discussed in Part D.1, there was no actual conflict of interest.

the Disqualification Motion and deny the Writ Petition on the merits.

Respectfully submitted this 28th day of July, 2021

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VIII. CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), 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 2003 in Times New Roman 14.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 12,991 words.

Finally, I hereby certify that I have read this appellate brief, 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 28th day of July 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Greenberg Traurig, LLP, that in accordance therewith, I caused a true and correct copy of the foregoing *Joint Combined Answering Brief (in Docket No. 82467) and Answer to Petition for Extraordinary Writ Relief (In Docket No. 82552)* to be served via this Court's e-filing system, on counsel of record for all parties to this matter on July 28, 2021.

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