

Case No. _____

IN THE SUPREME COURT OF NEVADA

UNITE HERE HEALTH, a multi-employer health and welfare 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, THE HONORABLE TARA CLARK
NEWBERRY, DISTRICT COURT JUDGE,

Respondent,

- 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

**APPENDIX TO PETITION FOR EXTRAORDINARY WRIT RELIEF
VOLUME 18 OF 19**

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February 25, 2021

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VOLUME 18 OF 19

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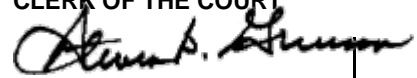
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TAB 43

TAB 43



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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

STATE OF NEVADA, EX. REL.)	
COMMISSIONER OF INSURANCE,)	CASE NO. A-15-725244-C
)	
Plaintiff,)	DEPT. NO. I
)	
vs.)	
)	
NEVADA HEALTH CO-OP, et al.,)	
)	
Defendants.)	
)	

BEFORE THE HONORABLE KENNETH CORY, DISTRICT COURT JUDGE

TUESDAY, DECEMBER 15, 2020

**RECORDER'S TRANSCRIPT OF HEARING:
ALL PENDING MOTIONS**

APPEARANCES:

FOR THE RECEIVER: MARK E. FERRARIO, ESQ.
DONALD L. PRUNTY, ESQ.

FOR THE OBJECTORS: DENNIS L. KENNEDY, ESQ.
JOSEPH LIEBMAN, ESQ.
JOHN BAILEY, ESQ.

ALSO PRESENT:

FOR GREENBERG TRAUIG, LLP: DAVID JIMENEZ-EKMAN, ESQ.
Pro Hac Vice

JIM TOLPIN, ESQ.

MARK BENNETT
Special Deputy Receiver

RECORDED BY: LISA LIZOTTE, COURT RECORDER
TRANSCRIBED BY: VERBATIM DIGITAL REPORTING, LLC
(Hearing recorded via Video Conference/Audio)

1 LAS VEGAS, NEVADA, TUESDAY, DECEMBER 15, 2020

2 (Case called at 12:15 p.m.)

3 THE CLERK: Page 11 and 12, State of Nevada
4 Commissioners of Insurance versus Nevada Health CO-OP, Case
5 No. A-725244.

6 THE COURT: Well, thank goodness we saved this easy
7 one for last. Will counsel enter your appearance, please.

8 MR. KENNEDY: Yes. Your Honor, this is Dennis
9 Kennedy, and I am here with my partners, John Bailey and
10 Joseph Liebman. We are appearing on behalf of the moving
11 parties, Unite Here Health and Nevada Health Solutions.

12 THE COURT: Okay.

13 MR. FERRARIO: Good morning, Your Honor. Mark
14 Ferrario and Don Prunty appearing on behalf of the CO-OP and
15 the Receiver.

16 THE COURT: That can't be the Mark Ferrario I knew.
17 Are you sure you're not his father?

18 MR. FERRARIO: Okay. Fair point. I'm -- I'm so
19 tired of looking at myself on these Zoom things, Judge. I get
20 older by the day is all I can tell you.

21 THE COURT: It gets you, doesn't it? It -- it just
22 -- after awhile it gets you down. I mean, look at Dennis
23 Kennedy --

24 MR. FERRARIO: You don't think.

25 THE COURT: -- for example. Gees.

1 MR. FERRARIO: Thank God the camera is not from
2 behind because I have -- my kids make fun of my -- my little
3 spot up top, so.

4 THE COURT: Um-h'm. Um-h'm. You have a pate
5 showing. Okay.

6 MR. FERRARIO: That's true.

7 THE COURT: So who else do you have here?

8 MR. FERRARIO: Don Prunty is also here with me. And
9 then we have general counsel for the firm, Jim Tolpin.
10 Also, the Special Deputy Receiver, Mark Bennett.

11 And then I will let the person who's going to argue
12 this and who represents Greenberg Traurig, to introduce
13 himself, Your Honor. He --

14 MR. JIMENEZ-EKMAN: Judge, he's -- he's concerned
15 about getting my last name wrong, which is a legitimate --
16 legitimate concern, I think.

17 MR. FERRARIO: You are exactly right.

18 MR. JIMENEZ-EKMAN: Judge, it's David Jimenez-Ekman
19 -- that's how it goes, Mark -- of Jenner & Block from Chicago,
20 appearing pro hac vice on behalf of the law firm, Greenberg
21 Traurig.

22 THE COURT: Can you say that name again?

23 MR. JIMENEZ-EKMAN: Sure, Judge. If -- you -- you
24 can pretend that the J is an H, it's David Jimenez-Ekman, just
25 like it's written.

1 THE COURT: Ekman. Ekman?
2 MR. JIMENEZ-EKMAN: Yes. Yes, Your Honor.
3 THE COURT: Like, E-k-m-a-n?
4 MR. JIMENEZ-EKMAN: E-k-m-a-n.
5 THE COURT: Well, you know what's amazing about
6 that? My wife is an Ekman.
7 MR. JIMENEZ-EKMAN: Really?
8 THE COURT: She was --
9 MR. JIMENEZ-EKMAN: With a C or no C, Judge.
10 THE COURT: She was born an Ekman. So I don't
11 perceive that that gives me any problem here. I'd be just
12 happy to rule against you as for you, at least on the basis of
13 being an Ekman.
14 All right. Shall we -- shall we tear into this?
15 Hang on a sec.
16 (Court/Law Clerk confer)
17 THE COURT: I am reminded that we also have the --
18 the Motion to Associate Counsel and Pro Hac Vice, I think, is
19 -- is on the slate for today. Am I correct, there's no
20 opposition to that?
21 MR. KENNEDY: Your Honor, Dennis Kennedy. No
22 opposition.
23 THE COURT: Well, in that case, welcome to the club.
24 You -- the motion is granted.
25 MR. JIMENEZ-EKMAN: Thank you, Your Honor.

1 Your Honor, I'm not sure if this is necessary, but
2 also we were hoping that this -- this portion of the hearing
3 could be recorded and transcribed subsequently.

4 THE COURT: Yes. It's recorded, definitely.

5 Lisa, what do they need to do to get this
6 transcribed? Just put in an order?

7 THE COURT RECORDER: Yes.

8 THE COURT: All you do is put in an order and you'll
9 get a transcript.

10 MR. JIMENEZ-EKMAN: Thank you, Your Honor.

11 THE COURT: It'll cost you a million dollars.

12 Okay. So who's going to argue? Are you going to
13 argue, Mr. Kennedy?

14 MR. KENNEDY: Yes, sir. I am.

15 THE COURT: Okay. Go for it.

16 MR. KENNEDY: All right.

17 There are two parts to the motion. The first is to
18 disqualify Greenberg Traurig and its members, and to order
19 Greenberg Traurig to disgorge and return to the receivership
20 estate the fees that it has collected in this matter, which
21 now exceed \$5 million.

22 THE COURT: Um-h'm.

23 MR. KENNEDY: The basis of the disqualification part
24 of the motion is this. At the time that Greenberg Traurig was
25 approved by this Court to act as counsel for the Receiver, it

1 labored under and suffered from two irreconcilable conflicts
2 which had they been disclosed to the Court at the time of
3 their appointment or the application for appointment to
4 represent the Receiver, it is more likely than not, in fact,
5 it's extremely likely that the Court would not have appointed
6 them.

7 Those conflicts are first, Greenberg Traurig
8 represented Valley Health Systems, UHS, a creditor of the CO-
9 OP, who had a \$5 million claim. When they -- Mr. Ferrario
10 stood before the Court and sought to be approved as the
11 counsel for the Receiver, his firm represented that creditor
12 and had put a \$5 million claim in against the estate.

13 Secondly, Xerox, whose breach of contract and
14 negligence were -- were certainly related to the CO-OP'S
15 failure, and the reason that the Receiver was appointed was
16 represented by Greenberg Traurig in three pending matters that
17 related directly to, or arose out of the failure of the CO-OP
18 and of the system.

19 Neither one of these conflicts, neither one of these
20 four things were ever disclosed to you. There was not a
21 mention, there was not a hint that these conflicts existed.
22 And it is extremely likely, if not a certainty, that had you
23 been apprised of these conflicts, that you would not have
24 approved the retention of Greenberg Traurig by the Receiver.
25 It -- it would have --

1 THE COURT: You don't --

2 MR. KENNEDY: -- been a simple matter where I am --

3 THE COURT: You don't -- you don't agree with the

4 notion that an attorney can get involved in a case, the way

5 that Greenberg Traurig did here, by having a conflict counsel

6 then? I mean, don't we hear of --

7 MR. KENNEDY: Your Honor --

8 THE COURT: -- don't we hear of conflict counsel in

9 any number of big cases?

10 MR. KENNEDY: Yes, sir. We do. And here's how that

11 works. You get conflict counsel. You get proposed retainer

12 agreements with conflict counsel and all of the other parties.

13 THE COURT: Um-h'm.

14 MR. KENNEDY: And then you know what you do with

15 that? You present it to the Court. You present it to the

16 Court. Because the parties themselves in a receivership do

17 not have the power to consent to conflicts or to waive them.

18 That's the Court's decision. And we've cited a number of

19 cases in our Brief where that argument has been made by the

20 lawyers. And the courts say, without exception, to the

21 lawyers, you don't approve conflicts, I do. I'm the Judge and

22 I have the responsibility for overseeing the Receiver --

23 THE COURT: Could you --

24 MR. KENNEDY: -- and the lawyers.

25 THE COURT: Could you --

1 MR. KENNEDY: And just because --

2 THE COURT: Could you just touch on what you would
3 consider to be the lead case that -- that holds that you can't
4 just have conflict counsel, but you must first provide it to
5 the Court and ask for the Court to okay it before you do
6 anything?

7 MR. KENNEDY: Sure. That it has to be disclosed to
8 the Court, the principal one is CFTC v. Eustace, that is where
9 the parties privately agreed that there was no conflict. And
10 the Court said, I have to -- I have to make that decision.

11 THE COURT: Can you --

12 MR. KENNEDY: In the --

13 THE COURT: Can you -- I know I'm slowing you down
14 here, but can you give me a notion of about where those cases
15 appear in your Brief?

16 MR. KENNEDY: Yeah. I will.

17 THE COURT: And I'm sorry to slow you down, but --

18 MR. KENNEDY: Okay.

19 THE COURT: -- there's been a lot of paper destroyed
20 in this case.

21 MR. KENNEDY: Starting on page 15 of the Reply, Your
22 Honor.

23 THE COURT: Oh, the Reply. Okay.

24 MR. KENNEDY: Yeah. These cases are -- are
25 discussed.

1 THE COURT: Let me just get to that.

2 Okay. So the lead case then would be down at the

3 bottom, the In Re BH&P? Is that --

4 MR. KENNEDY: Right. That's one of them. And the

5 -- in the Buckley case which is also cited, page 16 of the

6 Reply, there is a --

7 THE COURT: It's -- it's the -- oh, the -- yeah,

8 sorry. Which case is it that you're talking about? Where is

9 it?

10 MR. KENNEDY: This is Buckley versus --

11 THE COURT: Oh, yeah. Yeah. Yeah.

12 MR. KENNEDY: -- TransAmerica. In that case, I'm

13 looking at -- in the opinion, it's on -- it's at the -- it's

14 on page 19 of the -- of the opinion itself.

15 THE COURT: All right.

16 MR. KENNEDY: Well, actually, it's on page --

17 THE COURT: This is -- this is the Buckley --

18 MR. KENNEDY: -- 20, now --

19 THE COURT: -- opinion?

20 MR. KENNEDY: -- that I'm looking.

21 THE COURT: You're citing to the -- the Buckley

22 opinion that was given?

23 MR. KENNEDY: Yes.

24 THE COURT: Okay.

25 MR. KENNEDY: Yeah. It -- it -- what it says is

1 this requirement, and that is that the attorney cannot hold or
2 represent an interest that's adverse to the estate with
3 respect to the matter for which the attorney would be
4 employed.

5 It says, "This requirement prevents the employment
6 of special counsel who, on any matter of substance, represent
7 or have represented a client that is an actual or potential
8 opponent of the estate in the dispute for which counsel would
9 be engaged."

10 THE COURT: Okay.

11 MR. KENNEDY: And basically what that says is, that
12 the same conflicts principles apply to counsel as they do to
13 special counsel.

14 In other words, you -- you -- all of these conflict
15 rules apply across the board to lawyers, regardless of their
16 title, and these matters have to be presented to the Court.
17 If there is a conflict or a potential conflict, this matter
18 has to be brought before the Court, and all of this has to be
19 disclosed to the Court.

20 THE COURT: Um-h'm.

21 MR. KENNEDY: And it's the Court's decision as to
22 whether or not lawyers who either suffer from conflicts, or
23 from potential conflicts can be employed. And, of course, the
24 way that decision is made, is that if an Application for
25 Employment of Counsel or Special Counsel comes before the

1 Court, all of the creditors and other related parties are
2 given notice and have the right to appear before the Court and
3 to argue whether or not the Court should allow the retention
4 or disallow the retention.

5 THE COURT: So in this case --

6 MR. KENNEDY: And --

7 THE COURT: -- in this case when they did come
8 before the Court, about appointing Greenberg Traurig, you're
9 saying that no notice was given to the other parties?

10 MR. KENNEDY: No. There was no notice of any
11 conflict or potential conflict. That comes from two places,
12 Your Honor. And it's really not even subject to dispute. If
13 you look at the Motion for Appointment --

14 THE COURT: Uh-huh.

15 MR. KENNEDY: -- it contains nothing about any kind
16 of a conflict or a potential conflict.

17 THE COURT: Okay.

18 MR. KENNEDY: And the fact is that all these
19 conflicts existed as of that time. What we have is, first,
20 with respect to the Valley Hospital conflict, on August the
21 8th of '16, Greenberg submitted a claim to the Receiver and
22 filed with the Court saying, we have a \$5 million claim
23 against this estate. That is August of '16.

24 Well, four months later the matter -- there's a
25 motion filed in front of the Court where Greenberg Traurig

1 seeks to represent the Receiver.

2 THE COURT: Uh-huh.

3 MR. KENNEDY: And that's December 12th of 2016. Not
4 a word about any kind of a conflict or a potential conflict.
5 So if anybody read that -- that motion, you would have no idea
6 of the existence of the conflict.

7 And then -- and this is Exhibit 8 to our Motion --
8 that's the transcript of the hearing which occurred on July
9 the 10th of 2017, in front of Your Honor. And that's where
10 Mr. Ferrario --

11 UNIDENTIFIED SPEAKER: January.

12 MR. KENNEDY: Yeah, January 10th of 2017. That's
13 where Mr. Ferrario is present. And you can read that
14 transcript until you wear the ink off the page. There is not
15 a single mention of any conflict at that time, Your Honor.

16 At that time, in January of 2017, not only did
17 Greenberg Traurig represent Valley Hospital, or the Valley
18 Health System, who had a claim against the receivership of \$5
19 million, there were three other matters pending where
20 Greenberg Traurig was representing Xerox.

21 THE COURT: Uh-huh.

22 MR. KENNEDY: And Xerox, of course, as the Court
23 know --

24 THE COURT: Pending -- I assume you're saying three
25 matters pending, not in this case, but in some other case?

1 MR. KENNEDY: Yeah. In other cases, all of -- yeah.

2 THE COURT: Yeah.

3 MR. KENNEDY: All arising out of Xerox's work done
4 in this matter, in the matter of the Silver State Health
5 Program.

6 The first two -- and this is -- we describe these in
7 the motion itself, starting at page 10. There was a class
8 action brought by consumers against Xerox, called the Basich
9 Class Action.

10 THE COURT: Um-h'm.

11 MR. KENNEDY: There was a second class -- and Xerox
12 was represented by the Greenberg firm. There was a second
13 class action called Casale v. Xerox. That was a class action
14 brought by brokers. Greenberg represented Xerox in that case,
15 as well.

16 THE COURT: Um-h'm.

17 MR. KENNEDY: There was a third matter, and this is
18 Exhibit 10 to our motion, that was an Insurance Division
19 investigation and Consent Order that was ultimately entered
20 where Xerox had to pay some disputed claims to insureds.
21 Greenberg Traurig was also counsel to Xerox in that case.

22 Not one of these three cases, not one of them was
23 disclosed to the Court in the Motion for Approval, or in the
24 hearing on the Motion for Approval, where Mr. Ferrario
25 appeared. Mr. Ferrario knew about all these cases, because

1 he's the lawyer in those cases.

2 So as a -- as an aside, this is not a conflict case
3 where something pops up unknown to the lawyer, and the lawyer
4 says, oh my gosh, my -- oh, I didn't know my firm was
5 involved. He knows his firm was involved. He's the lawyer.
6 And he stands before this Court getting approved as counsel to
7 the Receiver knowing that he and his firm have four conflicts.

8 And I say it again, if those are disclosed where
9 he's adverse to the estate, or adverse to Xerox -- or
10 representing Xerox in a matter where Xerox's conduct is
11 directly at issue, if I'm standing out there, I'm going to
12 say, Judge, you can't let him do it. You have to get an
13 unconflicted lawyer.

14 Back to the Court's question; could a conflict
15 lawyer have been retained then? Maybe. Maybe. But none of
16 that happened. Not one thing was disclosed to the Court. And
17 so, of course, the Court has no idea, and nobody else has any
18 idea either. Now --

19 THE COURT: So in each of these cases --

20 MR. KENNEDY: Uh --

21 THE COURT: -- in each of these instances, you're
22 saying that at the time that Greenberg stepped in and made
23 representation, there was not conflict counsel. And --

24 MR. KENNEDY: There was not in the --

25 THE COURT: -- and so it's not just a matter of no

1 notice to the Court and letting the Court decide, you're
2 saying that, in fact, there was a conflict, because otherwise
3 they wouldn't have gotten conflict counsel.

4 MR. KENNEDY: That's right. Well, they say now, oh,
5 we had conflict counsel.

6 THE COURT: Um-h'm.

7 MR. KENNEDY: Okay. So here's what I say, going
8 back to the step one. They say, we got conflict counsel.

9 Okay. So what we said in the Reply was, if conflict
10 counsel was retained, where is the retainer agreement? I
11 mean, conflict counsel doesn't just walk in and say, I'm here.

12 THE COURT: Um-h'm.

13 MR. KENNEDY: There's got to be a retainer
14 agreement. Where is it? What were the duties of conflict
15 counsel?

16 THE COURT: Um-h'm.

17 MR. KENNEDY: And once there is a conflict involving
18 a current client, i.e. Xerox, all the parties have to consent.
19 That means Xerox had to consent. That also means that the
20 Receiver would have to consent.

21 And if all of that happened, then they had to
22 present it to the Court, because as -- as the cases we've
23 cited say, one of them very directly, the parties say -- and
24 that case is In Re Coastal Equities which -- which we cite in
25 the Brief. And I'll tell you what page that is --

1 THE COURT: In the motion itself?

2 MR. KENNEDY: -- in a minute.

3 THE COURT: You cite it in the motion itself?

4 UNIDENTIFIED SPEAKER: Both the motion and --

5 MR. KENNEDY: Motion and the Reply.

6 THE COURT: Okay.

7 MR. KENNEDY: If -- if you look at In Re Coastal

8 Equities --

9 THE COURT: Coastal Equities.

10 MR. KENNEDY: -- the lawyers are saying, hey, hey,

11 we -- we took care of everything, Judge. Judge, you didn't

12 need to know any of this, because we had it all covered, even

13 though we have nothing in writing and it was never disclosed,

14 and so all these things were waived.

15 In Footnote 2, in the last two sentence, in Footnote

16 2 of the Coastal Equities --

17 THE COURT: I'm sorry. In the last -- what did you

18 say?

19 MR. KENNEDY: In Footnote 2, the last two sentences.

20 THE COURT: Okay. Footnote 2, on what page?

21 MR. KENNEDY: It --

22 THE COURT: Oh, you're talking about Footnote --

23 MR. KENNEDY: It's --

24 THE COURT: -- in the -- in the opinion?

25 MR. KENNEDY: In the opinion.

1 THE COURT: Okay. Go ahead.

2 MR. KENNEDY: The Court in that case, in response to
3 that argument, which was, Judge, don't concern yourself with
4 any of this. We've got it covered.

5 THE COURT: Uh-huh.

6 MR. KENNEDY: And this is on page 27, we cite this.

7 UNIDENTIFIED SPEAKER: In the Reply.

8 MR. KENNEDY: In the reply.

9 THE COURT: Okay.

10 MR. KENNEDY: The Court says to the lawyers, "There
11 exists an independent duty to comply with the Code and Rules
12 and fully inform the Court. This was the applicant's
13 responsibility, and it was not discharged by informing those
14 who were not in a position to judge the fitness of an attorney
15 for employment. Only the Court can make such a determination,
16 and it has not granted a waiver."

17 So to the Court's point -- and there are other cases
18 that say the same thing. This is particularly cogent
19 statement of it.

20 To the argument that, oh, we got conflict counsel.
21 Everything was okay. All the conflicts were waived. My first
22 response is, let's see all those retainer agreement and
23 conflict waivers. They don't exist. Not a single page on all
24 of that, which suggests to me that maybe that never happened.
25 But it also confirms that these agreements don't exist. They

1 were never, ever presented to the Court.

2 And as the Court in Coastal Equities said, I don't
3 care what all you people did among yourselves. I'm the one
4 that makes the decision. I'm the Judge. And if you don't
5 disclose any of this to me, you're violating your duties and
6 I'm going to disqualify you.

7 Now, we go on. And here are -- here are the
8 consequences of Greenberg Traurig never disclosing the
9 conflicts, and this relationship never being approved by the
10 Court.

11 What happened? Well, my firm was involved in this
12 matter, the receivership matter, only as local counsel when it
13 began. We were just filing papers and formatting pleadings
14 and doing that stuff. But there came a point in this case in
15 2020, earlier this year, where my partners, Mr. Bailey and Mr.
16 Liebman, took on a larger role. And they looked at the
17 conduct of Greenberg Traurig who was suing everybody on behalf
18 of the Receiver, except Xerox, who was their client in all
19 these other matters.

20 And Mr. Bailey -- and this is Exhibit 14 to the
21 motion -- Mr. Bailey wrote to Greenberg and said -- he asked
22 the, what exactly are you guys doing? You have sued everybody
23 except Xerox, which appears to be the principal wrongdoer.

24 And if you look then, I think it's Exhibit 15, the
25 next Exhibit in order, Mr. Bailey is told by Greenberg Traurig

1 to butt out. That this is none of his business, and that this
2 is all protected by the attorney-client privilege.

3 Greenberg says, it has an attorney-client privilege
4 that prevents it from telling Mr. Bailey why Xerox was not
5 sued. And, of course, now Greenberg Traurig is saying, we
6 never represented anybody with respect to Xerox. We were not
7 involved in that.

8 Okay. If they weren't, why are they claiming the
9 privilege on Xerox's behalf? But it doesn't matter. Okay.
10 Because what we did was Mr. Liebman and Mr. Bailey asked me,
11 they said -- and this is what got me involved -- isn't there a
12 conflict here? What in the world is Greenberg doing? It's
13 defending Xerox in three cases and -- or it has defended them,
14 and was defending them at the time of his -- of their
15 appointment, and now they're not suing them, where Xerox is
16 the principal wrongdoer. What's going on?

17 I looked at it, and my words were, and my thoughts,
18 how in the world did Judge Cory ever approve this. I said,
19 this is just not possible that -- that this got approved.

20 And sure enough, the answer to the question was, It
21 wasn't Judge Cory's fault. He was never advised of any of
22 this. And you weren't, Your Honor. The motion, the hearing,
23 and on top of that, Greenberg Traurig filed 15 quarterly
24 Status Reports with this Court, 15 of them. You can search
25 through them, and we did. There is no mention in those Status

1 Reports where Greenberg Traurig says, we represent the
2 Receiver.

3 UNIDENTIFIED SPEAKER: Represents [inaudible].

4 MR. KENNEDY: Represents --

5 UNIDENTIFIED SPEAKER: [Inaudible]. Never mind.

6 MR. KENNEDY: Okay. Never mind.

7 In those Status Reports, yeah, that's right, they're
8 representing the Receiver but they never say in there, oh, we
9 also represent Xerox, and we've also retained special counsel.
10 Nowhere. But they are representing Xerox.

11 And what is really interesting is if you look -- and
12 we referenced this at page 12, in Footnote 52 of our motion.

13 THE COURT: Okay.

14 MR. KENNEDY: Xerox is mentioned. And if you look
15 at page 12 of the motion, and you look at -- actually it's --
16 it's Footnote 52, which tells you where to find the eighth
17 Status Report -- Footnote 53 contains an excerpt from the
18 Status Report.

19 And you know what? The Status Report to this Court
20 talks about some dealings with Xerox. But the Status Report
21 does not say Greenberg Traurig represents Xerox. It talks
22 about counsel for Xerox takes a certain position. That's
23 Greenberg Traurig. They're talking about the negotiations
24 they're having with themselves about the two clients they
25 represent. That's the closest they ever got to making this

1 disclosure. So, 15 quarterly Status Reports; nothing.

2 Now, they come back and say, oh, no, this was all
3 worked out. We had all this done. Retained special --

4 THE COURT: Let me --

5 MR. KENNEDY: -- counsel --

6 THE COURT: -- ask you a question. Let me ask you a
7 question, Mr. Kennedy.

8 At that point in time, was there already a conflict
9 counsel appointed for Xerox in this matter?

10 MR. KENNEDY: No. And you know why I say that?

11 THE COURT: Why?

12 MR. KENNEDY: Because the Court never appointed one.
13 The Court never approved the retention of conflict counsel.
14 And that is the only way conflict counsel gets appointed --

15 THE COURT: Okay.

16 MR. KENNEDY: -- is the Court has to approve --

17 THE COURT: Then let's --

18 MR. KENNEDY: -- it.

19 THE COURT: -- let's delve deeper though. Is -- is
20 -- are you saying that, in fact, there was no conflict counsel
21 at that point, or simply that there was conflict counsel,
22 perhaps, on paper, but never with the Court?

23 MR. KENNEDY: No. There wasn't anybody on paper,
24 Your Honor. And here's why I say that.

25 THE COURT: Okay.

1 MR. KENNEDY: Greenberg now says it was Jim Whitmire
2 who was conflict counsel.

3 THE COURT: Uh-huh.

4 MR. KENNEDY: Okay?

5 THE COURT: Whitmire was at the hearing on January
6 10th of 2017. He was approved by the Court, along with Mr.
7 Ferrario. But nobody said to the Court, he's conflict counsel
8 for any particular matters. Nobody said to the Court,
9 Greenberg can't represent Xerox. Nobody said a word.

10 What I said, once we got involved in this case was,
11 and I've said that -- I put this in the Reply; I want to see
12 the retainer agreements and the conflict consents and waivers.
13 If all of this happened, then Greenberg has a retainer
14 agreement with the State -- or with the Receiver -- that says,
15 I can represent you in the following matters, but not with
16 respect to anything having to do with Xerox. It has to be in
17 writing under the rules. both Rule 1.2, which talks about
18 limited engagements, and 1.7, which is current conflict
19 clients.

20 Where, I asked, is that agreement. Well, it's -- it
21 hasn't ever been produced, which leads to the presumption that
22 it doesn't exist. Where is Mr. Whitmire's agreement to act as
23 conflict counsel? Where is that? Because the Receiver has to
24 enter into a retainer agreement with him. He can't just come
25 walk -- walk in and say, I'm going to do certain things. That

1 agreement has to be entered into.

2 If there are conflict waivers and consents, which
3 there would be by Xerox and the Receiver, there have to be
4 written conflict disclosures and waivers generally approved by
5 an additional separate counsel. None of that exists. Zero.

6 And that leads me to conclude, and of course I cited
7 the presumptions out of Chapter 47, that it doesn't exist.
8 And if Greenberg now says, oh, all of that was in place, my
9 question is, in all these years, it was never presented to the
10 Court, it was never disclosed in one of the 15 Status Reports,
11 never even a word whispered about it.

12 If all of this exists, it had to be presented to the
13 Court, because these lawyers are riddled with conflicts. And
14 if these conflicts are going to be waived and consented to,
15 there's only one person that can do that, and that is Your
16 Honor. And that is clear, that the parties themselves in a
17 Receiver might put together a proposed agreement, but the
18 Court's the one that makes those decisions. It never happened
19 in this case.

20 So when you asked me, was special counsel ever
21 appointed, the answer is, no. There's only one guy that can
22 appoint him, and that's you and that never ever happened.
23 Whitmire was --

24 THE COURT: Okay. And what I -- I think what I was
25 really trying to ask is, was -- was special counsel or

1 conflict counsel ever engaged? Is there any evidence, is
2 there any anything that -- that indicates that -- that while
3 the Court had not approved it, that there was, in fact, a
4 conflict counsel?

5 MR. KENNEDY: The only thing that we have is
6 Greenberg's statement now that all of this happened.

7 THE COURT: Uh-huh.

8 MR. KENNEDY: But when we asked to see the retainer
9 agreements, if it happened, it's got to be in writing.

10 THE COURT: Yeah.

11 MR. KENNEDY: You can't -- you can't do this orally.
12 They don't exist.

13 THE COURT: Yeah.

14 MR. KENNEDY: If they existed, we'd be seeing them
15 right now.

16 THE COURT: Uh-huh.

17 MR. KENNEDY: And -- and there's nothing in writing.
18 And, of course, these agreements, under the Rules of
19 Professional Conduct, special counsel, conflict counsel,
20 waivers of -- they all have to be in writing.

21 THE COURT: Yeah.

22 MR. KENNEDY: This suggests to me that those
23 agreements do not exist, because these lawyers, operating at
24 the level they operate at in a case with this much money, and
25 representing clients like Xerox, these things are not done

1 with a wink and a nod. They must be in writing.

2 Now, if we had all of this done in writing and
3 somebody says, gosh, we just forgot to tell Judge Cory, well,
4 that's a different -- a different game. Not a single word on
5 paper about any of this. Zero.

6 So that's -- that's where we stand.

7 Now, what we did, because we were told in a polite
8 and professional manner by Greenberg to shut up and stop
9 asking questions, what we did was, we did our own dive into
10 public records requests, into the docket, and everywhere we
11 could look to try to figure out how this all happened. And we
12 quickly concluded, as I told you, that you didn't approve any
13 of this.

14 THE COURT: Um-h'm.

15 MR. KENNEDY: There was no notice, nothing said at
16 the hearing. So we said, okay, not surprisingly, Judge Cory
17 knew nothing about this. How'd it happen? And of course the
18 answer is pretty simple, it was all done by the Greenberg firm
19 with no notice to anybody, because if there had been notice,
20 the creditors would have appeared, there would have been a
21 hearing. Your Honor would have made a decision. And nothing
22 had --

23 THE COURT: Let me ask you this. You know what one
24 of the things that they say in response is that they say,
25 basically, well, I mean, everybody -- everybody knew that they

1 represented Xerox and that they were here representing the
2 Receiver. How come you're raising this issue three years down
3 the road?

4 MR. KENNEDY: And here's the answer to that
5 question. First off, what they're saying is everybody could
6 have known if they searched the public record as to what their
7 involvement was.

8 THE COURT: Um-h'm.

9 MR. KENNEDY: I mean, you -- you'd have to go search
10 the public record to find out what their involvement was. And
11 keep in mind that if you searched the public record, if you
12 looked at the record where you would normally go, which is the
13 record of the proceedings in this receivership matter, there
14 is not a word. Not a word about this.

15 And so when they say, you should have looked at the
16 public record; we did, and we couldn't figure out what -- how
17 this happened.

18 Secondly, this was all concealed. It was concealed
19 at the hearing January 10th of 2017 where Ferrario appears in
20 front of Your Honor at the hearing on his retention and
21 doesn't say a word, knowing of the four conflicts, the three
22 matters where they represented Xerox and the one where they
23 represented Valley. He doesn't say a word.

24 So if you search the public record, you're not going
25 to find anything about their representation of Xerox, because

1 if they're not disclosing it to the Court, or in any of the
2 Status Reports after they're retained, you can pretty much
3 conclude that this is not an issue, because you can't imagine
4 that they would be doing this, and not disclosing it, that --
5 that their lawyers would be standing in front of the Court and
6 not saying anything about this.

7 But that argument, which is, you've got to go search
8 the public records, we found a couple of cases where that was
9 raised. And it essentially was raised by lawyers who said,
10 hey, the parties should have search the public record to
11 determine whether or not we as the lawyers had a conflict.
12 Oh, and by the way, if you didn't, too bad.

13 And by the way, Judge, you should have search the
14 public records yourself, in this case. And if you didn't do
15 that, well, it's not our fault. It's your fault. And it's
16 the other party's fault. Of course, we didn't disclose it.
17 Of course, we concealed it.

18 Hey, and it took you three years to figure out that
19 that's what we had done. Those cases, Your Honor, and we --
20 we've -- we cite them in the Brief. The first is In Re Glenn,
21 G-l-e-n-n, Electric Sales, and -- at -- this is contained at
22 -- at page 9 of that opinion, of the Glenn --

23 THE COURT: Oh.

24 MR. KENNEDY: -- Electric opinion.

25 THE COURT: Do you -- before you get to that --

1 MR. KENNEDY: And --

2 THE COURT: -- before you get to that, you don't

3 happen to know where you cited it in your -- in your Brief, do

4 you?

5 MR. KENNEDY: I'll tell you in just a second.

6 THE COURT: All right.

7 MR. KENNEDY: Anyway, I'll get -- I'll get that page

8 to you --

9 THE COURT: Okay.

10 MR. KENNEDY: -- in just a minute. We're scrolling

11 through.

12 THE COURT: All right.

13 MR. KENNEDY: That argument is made, strangely

14 enough, saying, hey, this is everybody else's fault here. And

15 the Court says, on page 9 of the Glenn opinion, the reviewing

16 Court has no duty, quote, "to search a file to determine for

17 itself that a prospective attorney is not involved in actual

18 or potential conflicts of interest," end quote.

19 UNIDENTIFIED SPEAKER: Page 26 of the motion.

20 THE COURT: Okay.

21 MR. KENNEDY: Footnote 78, page 26 of the motion.

22 THE COURT: Okay.

23 MR. KENNEDY: And in that case, the -- the Court

24 says, it's not my job to search the public record to see if

25 you have a conflict. You have a duty to me, to tell me if you

1 do.

2 The second case is In Re Tinley Plaza, and we'll
3 find out what page.

4 UNIDENTIFIED SPEAKER: It's page 16 of the Reply,
5 Footnote 42.

6 MR. KENNEDY: Page 16 of the Reply, Footnote 42.

7 The same argument is made by conflicted lawyers
8 there. Those conflicted lawyers say, well, yeah, we may not
9 have disclosed it, but it was everybody else's obligation to
10 go out and search for it. And if you didn't do that, and
11 didn't find it, you know what, Judge, it's your fault, and the
12 other party's. It's your fault in that case, in the Tinley
13 Plaza case, and this is at pages 17 and 18, the quote runs
14 over, of the opinion.

15 THE COURT: Uh-huh.

16 MR. KENNEDY: I quote, "The Court has no duty to
17 rummage through files or conduct independent fact-finding
18 investigations in order to determine whether prospective
19 attorneys are involved in actual or potential conflicts of
20 interest, period."

21 And there are more cases that say that, but these
22 two suffice.

23 So that's their first argument is gee, you know, we
24 concealed this. We never disclosed it. But you didn't catch
25 us. It took you a long time to catch us.

1 And, in fact, when you asked us, when Mr. Bailey
2 wrote to Greenberg and said, hey, what's going on here, they
3 told him to be quiet. So we had to go out and do our own
4 investigation, which we did at that point, because the
5 situation was such that they were representing the Receiver
6 and they had absolutely irreconcilable conflicts, and we were
7 trying to find out what happened. So when we did, we filed
8 the motion.

9 And one of the arguments they make is, well, you
10 know, you just waived your right to raise that. Our response
11 to that is real simple.

12 First off, and this is -- well, there's, Judge, no
13 dispute as to the validity of this principle and that is that
14 the Receiver and the Receiver's lawyer both -- and this comes
15 out of the -- the CFTC, the Commodity Futures Trading
16 Commission v. Eustace, E-u-s-t-a-c-e. And there's a couple of
17 Nevada cases on this, too.

18 Joseph, what -- what is the page for CFTC versus
19 Eustace in the --

20 MR. LIEBMAN: It's discussed in the motion.

21 THE COURT: Where was that referenced?

22 MR. KENNEDY: Yeah, what -- what this says is, in
23 the Eustace case, and I'm looking at page 19 of the opinion.

24 MR. LIEBMAN: It starts on -- it -- it's first cited
25 on page [inaudible].

1 MR. KENNEDY: Begin -- first cite is page 20 of the
2 motion.

3 THE COURT: Okay.

4 MR. KENNEDY: The Court in Eustace says, The
5 Receiver and any counsel employed by him were obligated to
6 fully disclose to the Court his and his firm's prior
7 relationships with certain UBS entities -- UBS being the Bank
8 involved. And it goes on to say, The Receiver is the
9 fiduciary to the Court and to -- in this case, the investors
10 who were the creditors.

11 What that means is, is that the lawyer and the
12 Receiver are both fiduciaries to the Court and to the -- and
13 to the creditors that it would include my clients. And they
14 have an obligation to everybody involved to make these
15 disclosures. They simply never did. They never did.

16 In fact, it is reasonable to conclude that they
17 consciously concealed it. And I say that, respectfully, but
18 when you stand in front of the Court and you've got four
19 conflicts and you don't say anything to the Court, that's a
20 wilful concealment.

21 The other prong of this argument is, and it's
22 related to the waiver, and that is there's an unreasonable
23 delay in raising this issue. But we raised it as soon as we
24 could. But here's the point of that. The Court is the body
25 that has to make the decision on whether there is a waiver or

1 not by delay. This is the first time the Court has seen this,
2 I'm quite sure.

3 And as the cases that we mentioned earlier, say the
4 Judges in those cases -- and I read those quotes for the Court
5 -- to the Court -- they said, I -- I am the one. I'm the
6 Judge. I make the decision here as to what to do, and I
7 certainly have not waived anything with respect to this
8 decision.

9 The integrity of the Court is at stake here, and I
10 have just learned of this. I didn't waive anything by a
11 delay. I just found out about it.

12 And that's the same thing that we're saying,
13 although we found out about it a little bit before we filed
14 the motion.

15 Now, on to the substance of -- because these things
16 about waiver, those arguments don't go anywhere. Waiver --
17 and you should've known from looking at the public record,
18 those have been flatly rejected.

19 The substantive arguments that they make, there's
20 really two of them. They are that -- you know, there really
21 is no conflict here. And secondly, well, we've got conflicts
22 counsel, so we -- we -- we've dealt with all of that.

23 THE COURT: Say that last part --

24 MR. KENNEDY: As to the argument --

25 THE COURT: -- say that -- repeat that last part,

1 would you? I didn't quite get it.

2 MR. KENNEDY: Yeah, the first one is there's no
3 conflict.

4 THE COURT: Um-h'm.

5 MR. KENNEDY: And I'll discuss that. The second one
6 is, well, if there was a conflict, we've got conflicts counsel
7 to deal with that.

8 THE COURT: Um-h'm.

9 MR. KENNEDY: Those are the two substantive
10 arguments they make that are really worthy of consideration.

11 And what I would suggest to the Court, and this is
12 the way I analyzed it; when you look at those substantive
13 arguments and if -- if I was asking the questions, I would ask
14 him three questions about every one of these substantive
15 arguments they make.

16 Number one, it is true, you knew you had a conflict
17 when you appeared in front of me, and at -- and at all times
18 thereafter. You knew that. And, of course, they did. They
19 admitted it.

20 Second, it is also true, is it not, that you never
21 disclosed to this to me, while you had a duty to do so?

22 I mean, lawyers have the duty to full inform the
23 Court of everything that might be material to the Court's
24 decision. You knew you had a conflict. You never disclosed
25 it to me.

1 Third question, why or why not? Why not? After
2 years of both appearing here and filing Status Reports every
3 three months, not once did you disclose these things to me.
4 Why? I don't know what the answer is. But those are the
5 questions I would ask.

6 First off, Greenberg says, oh, we didn't -- there
7 was actually no conflict. That's one of the arguments they
8 made. Set aside for the -- the moment the fact they went out
9 and say they retained conflicts counsel, they say, you know
10 what, Judge, there was no conflict here.

11 Okay. So what has happened is, they have said, we
12 don't have a conflict because Xerox isn't -- isn't possibly
13 liable here. There's no liability here.

14 Let me run through what we know. When the health
15 insurance system was first set up, it was a disaster. It --
16 Xerox was hired to run it. But it was a disaster. It never
17 worked. And the CO-OP Board Minutes -- and these start at
18 Exhibit 3 to the Motion -- the CO-OP Board Minutes say, this
19 is Xerox's fault. Xerox is not performing. There is a report
20 from Deloitte, where Deloitte says, yeah, there were hundreds
21 and hundreds of problems with Xerox's performance.

22 THE COURT: Did they say what kind of problems?

23 MR. KENNEDY: Yeah, they're all -- they're all
24 detailed. There we go. It's Exhibit 3. And --

25 THE COURT: To your -- to your motion? Is it

1 Exhibit 3 to your motion?

2 MR. KENNEDY: Yeah. Exhibit 3, yes.

3 THE COURT: All right.

4 MR. KENNEDY: And I will tell you, Xerox was
5 required to handle -- its general duties were develop,
6 administrator and manage -- administrate and manage the case,
7 the system. That started with applications and enrollments,
8 getting data from consumers, and distributing it, sending it
9 to insurers and vendors. Financial management and reporting
10 of the system, providing assistance to consumers,
11 communicating with consumers and with the government.

12 These are in Exhibit 2. And if you look, there's a
13 chart as to all the duties. And it's kind of a spreadsheet.
14 And it starts, I think, at about page of Exhibit 2. Well,
15 it's -- it's Bates No. 010. And all of these are set up, all
16 the things Xerox had to do.

17 Of course, it didn't do them. Deloitte says it
18 didn't do them. The CO-OP itself writes a letter to Governor
19 Sandoval. And this -- this letter is in the series of
20 exhibits beginning with Exhibit 3 to our motion -- saying to
21 Governor Sandoval, the system's failing because of Xerox, and
22 its failure to perform. The State then fires Xerox and
23 terminates the contract.

24 At the same time -- well, not at the same time, but
25 a little bit later, the cases, the two class actions that

1 Greenberg is representing Xerox in, settled. And we -- at
2 Exhibit 10, we have the motion to settle those two
3 consolidated cases, with Xerox paying \$5 million, plus \$1.75
4 million in fees.

5 They represent Xerox. There goes in settlement \$6
6 million and \$750,000, all arising out of Xerox's failure to
7 perform.

8 THE COURT: When you say they represented Xerox, you
9 mean Greenberg?

10 MR. KENNEDY: Greenberg. Yep.

11 THE COURT: All right.

12 MR. KENNEDY: In both those cases. Both those
13 cases.

14 Then in the next matter, there is a Consent Order
15 entered in the Exhibit 10 to our motion -- thank you. There
16 is a Consent Order entered into by Xerox, in the Insurance
17 Commissioner's investigation of its performance. And Xerox,
18 in that Consent Order, represented again by Greenberg Traurig,
19 agrees to pay a series of disputed claims.

20 So at this point, okay, Greenberg has represented
21 Xerox and it cannot be said that Greenberg is unaware of the
22 deficiencies in Xerox's performance. But it gets a lot worse,
23 because Xerox then files a lawsuit, and it's called the
24 Milliman case. That's just the lead defendant or, pardon me.

25 UNIDENTIFIED SPEAKER: The Receiver is the one --

1 MR. KENNEDY: The Receiver files the lawsuit.

2 And it -- the Receiver sues everybody, except, guess
3 who? Xerox. They don't get sued. And all the defendants are
4 alleged to have contributed to the failure of the system. But
5 Xerox is not sued.

6 THE COURT: Who represented the Receiver?

7 MR. KENNEDY: Greenberg Traurig.

8 THE COURT: Okay.

9 MR. KENNEDY: Of course, they didn't sue Xerox.
10 This is the point at which Mr. Bailey, when we get involved,
11 Mr. Bailey contacts Greenberg and says, hey, you know, we have
12 a client here, who's been sued. You didn't sue Xerox.

13 I mean, they're the -- Xerox is the principal
14 wrongdoer. They didn't sue them. He's told, mind his own
15 business. In the Milliman case there are seven expert
16 witnesses. Seven of them. And we quote all of them in our
17 Reply. We quote excerpts from their reports in the Milliman
18 case. And those --

19 UNIDENTIFIED SPEAKER: Page 4.

20 MR. KENNEDY: -- begin at page 4 of the Reply.

21 Judge, there are seven experts. Every single one of
22 those experts, who have evaluated Xerox's performance, say it
23 was the cause, or the likely cause, or the principal cause of
24 the failure of the system, because it just didn't perform.

25 All of those expert witnesses say that. And yet,

1 Xerox did not get sued by the Receiver who is represented by
2 Greenberg Traurig who also represents Xerox, or who had
3 represented Xerox in at least three matters arising out of its
4 performance here.

5 Now, what does Greenberg say? Because we send an
6 interrogatory to -- in -- in the Milliman case, we sent an
7 interrogatory --

8 UNIDENTIFIED SPEAKER: For Exhibit 16.

9 MR. KENNEDY: -- Exhibit to the motion. We sent and
10 interrogatory to the Receiver and we -- we say, in light of
11 all of this, in light of all of this, which is really
12 overwhelming evidence of -- of failure of Xerox to perform,
13 after all it didn't perform, Deloitte says it didn't perform.
14 It got fired by the State and its contract was terminated.
15 There were two class actions settled against it for \$6.75
16 million. There was a Consent Order entered by the Insurance
17 Division. And there -- there's seven expert reports that say
18 the problem was Xerox.

19 Exhibit -- in Exhibit 16, this is the answer to that
20 question. And it's Exhibit 16, at page 4. Interrogatory No.
21 31: Explain why plaintiff -- that's the Receiver -- did not
22 include Xerox and/or any of its affiliates, parent entities
23 and/or subsidiaries as a defendant in this action.

24 And going down, after all the objections are made,
25 at line 23, it says, Plaintiff elected to pursue those

1 entities and individuals that were most directly responsible
2 for the damages.

3 Oh, and did I fail to mention who signed that
4 interrogatory for the Receiver? Well, it was submitted by,
5 Mark Ferrario and other members of the Greenberg firm. And,
6 at the top of the caption, they list themselves as counsel for
7 plaintiff, the Receiver.

8 So in light of all that evidence, we get a response
9 from Greenberg on behalf of the Receiver saying, well, we just
10 went after people who -- who might be responsible. And, of
11 course, that didn't include our client, Xerox.

12 And now, of course, you -- you know what has
13 happened, Your Honor. The Statute of Limitation has likely
14 run on claims against Xerox.

15 Now, what's the upshot of all of that? If they had
16 come to the Court and said, let's make a full disclosure here,
17 and this is what we're planning on doing, well, then everybody
18 could have been heard. And it's the Court's decision,
19 ultimately, as to whether or not the Receiver is going to be
20 allowed to just let defendants go.

21 And if these facts had been known to Your Honor,
22 that Greenberg Traurig had elected with its client not to sue
23 Xerox who it also represented, I believe at that point that
24 all of the creditors, I know my clients, would have said, no,
25 you can't do that. You have a conflict, and this is the most

1 culpable party.

2 But because we have conflicted counsel, this is the
3 result that we get. Xerox is now, essentially, because of the
4 Statute of Limitation, going to walk free. And if you -- you
5 can look at all of the prior activity and you can look at the
6 report of the seven experts, including the Receiver's own
7 expert who -- who acknowledges the problems, that's the
8 problem you have, when you have conflicted counsel. They have
9 conflicted loyalties. And this is an example of the result of
10 those conflicted loyalties.

11 Again, I ask the three questions; you knew you had a
12 conflict. You never disclosed the conflict to the Court, or
13 anybody else. You just let your other client walk free. Why?
14 Why? Why are you -- I mean, do whatever you want, but at
15 least disclose it to the Court. Never happened. Not a single
16 word.

17 Lastly, this idea that conflicts counsel was
18 retained, we've already discussed that. And what I'm saying
19 is, if you retain conflicts counsel and you get a waiver of
20 certain conflicts, and your engagement then becomes limited,
21 and conflicts counsel comes along and says, I'm going to
22 handle all these other matters, there's only one person that
23 can approve that. Waivers by a Receiver of claims against
24 people like Xerox, to just let them go, they can't -- they're
25 not allowed to do that. They have to come to the Court and

1 say, here's what I'm going to do, or I've retained conflicts
2 counsel. Here are the retainer agreements, can we please get
3 them approved, so the Court and all of the other parties and
4 creditors understand what's going on here. Never happened.

5 We found out about all of this after Xerox didn't
6 get sued. We had to go do our own independent investigation.
7 There was no disclosure of any of this, anywhere, anytime.
8 Nothing in writing. And now, look at the damage to the
9 estate. The principal wrongdoer who had a \$75 million
10 contract, and who -- and the estimation of all these experts
11 caused the system to fail, is walking free.

12 Sure, it got sued in a couple class actions and
13 defendant, by Greenberg, and had to pay some money. But the
14 principal claims for destroying this system will never, in no
15 likelihood, will these ever be brought because their lawyers
16 allowed them to walk free without any disclosure to anybody,
17 despite their fiduciary obligations to the Court and to all
18 the other parties.

19 This is the harm that we see, which brings me to the
20 second part of the motion, which is in light of all of this,
21 most of which can't even be disputed.

22 The second part of the motion is, the forfeiture of
23 the fees. If -- the Nevada Supreme Court has said several
24 times, and this is the law virtually everywhere; if you take
25 an engagement and you have a conflict and you don't disclose

1 the conflict, then you can't recover any fees for that
2 engagement, because bad things are likely to happen. And they
3 sure happened here.

4 The principal wrongdoer has walked away and is now
5 barred by the statute, their other client, Xerox. And so
6 where you have knowingly, taking a case in the fact of these
7 irreconcilable conflicts, and concealing it from the Court at
8 the hearing where they were approved, not a word was said.
9 Fifteen Status Reports, not a word. No notice to anybody.

10 And when we tried to find out, we were told to shut
11 up. We had to go do all the work on our own, despite the fact
12 that Greenberg is counsel for the Receiver, owed a fiduciary
13 obligation to us, as creditors and parties, and owed a
14 fiduciary obligation to the Court.

15 And what's their response now? Nah, sorry. We
16 concealed it for so long, and you didn't find it. Too bad.
17 And they're saying to you, Judge, you can't do anything
18 about it --

19 THE COURT: Let --

20 MR. KENNEDY: -- despite the fact that all of this
21 has come to your attention. As I said, that argument has been
22 made several times, and I quoted you the language out of the
23 cases. The Judges say, Nah, that's not how it works.

24 THE COURT: Let me ask you a question.

25 MR. KENNEDY: When I find out about it, I deal with

1 it.

2 THE COURT: Let me ask you a question, Mr. Kennedy,
3 about your statement that the Statute of Limitations has run,
4 and the -- whoever would be the aggrieved party can -- cannot
5 sue Xerox.

6 Is that true, if a party conceals the existence of a
7 cause of action until after the statute runs? If Xerox --

8 MR. KENNEDY: Your Honor, that's --

9 THE COURT: If Xerox participated --

10 MR. KENNEDY: Yeah.

11 THE COURT: -- let's just say --

12 MR. KENNEDY: Yeah.

13 THE COURT: -- if they participated and were
14 involved in concealing the existence of a cause of action,
15 until the statute ran, can they avail themselves of the
16 Statute of Limitations?

17 MR. KENNEDY: It -- that's why I said, in all
18 likelihood, they have escaped.

19 THE COURT: Uh-huh.

20 MR. KENNEDY: Because it's possible that if there
21 was concealment by Xerox, with the aid of its lawyers,
22 Greenberg Traurig, that that concealment would toll the
23 running of the statute. That's possible.

24 THE COURT: Uh-huh.

25 MR. KENNEDY: And once this case moves on, I think

1 you -- you can be sure there is a likelihood that those claims
2 are going to be examined, and the claims may be brought
3 against all the parties who were involved in this. But right
4 now, it -- just based on what we know, because we don't know
5 anything about what Xerox did, we just know what their lawyers
6 did, there is still some work to be done on that.

7 That's why I say, Xerox has -- it may well be that
8 they have escaped, but that's not a certainty.

9 THE COURT: Um-h'm.

10 MR. KENNEDY: And that will be looked into. But
11 right now, without the fraud exception, we -- we would be out
12 of luck.

13 So anyway, that is the sum and substance of the
14 argument. They ought to be disqualified. They had a --
15 conflicts in which they could not escape. When they were
16 retained, they concealed them, all the way up until we filed
17 this motion. And because of that, because of that, they have
18 to forfeit the fees that they have earned.

19 Last point, and this goes back to the argument they
20 make, oh, well, there'll be delay and there'll be some cost
21 associated with that if new counsel come in. That's why the
22 \$5 million that they have received goes back to the estate.
23 Because new counsel, unconflicted counsel, is going to have to
24 come in here make an evaluation of all of this, and -- I -- I
25 would say, report to you, but report to the -- to the Judge

1 who ends up being in charge of this case.

2 Disqualification, forfeiture, the only possible
3 remedies here, based on this conduct.

4 THE COURT: Uh-huh.

5 MR. KENNEDY: That -- that's my argument.

6 THE COURT: Okay. Thank you.

7 Okay. Mr. Ferrario, do you speak for your client
8 here?

9 MR. FERRARIO: At this point, I'll turn it over to
10 Mr. Jimenez-Ekman. I will be available to answer any
11 questions that the Court may have, in light of some of the
12 things that Mr. Kennedy speculates happened. Certainly,
13 Judge, I'm here at your disposal. But in terms of the legal
14 arguments, Mr. Jimenez-Ekman will handle that initially.

15 And also, Mr. Bennett is here to answer any
16 questions that you may have that touch upon, again, some of
17 the -- I -- I can't even -- I'm just going to bite my tongue --
18 -- the -- the absolute speculation, misstatements that were
19 made by Mr. Kennedy and the -- the -- the motives and things
20 like that. I'll be happy to answer any questions you have,
21 Judge. We've got nothing to hide here. We're an open book.

22 Mr. Jimenez-Ekman will now handle the argument.

23 THE COURT: All right. Thank you.

24 Mr. -- do you -- do you wish to be called Jimenez-
25 Ekman or Mr. Ekman, or how -- how do you wish to be addressed?

1 MR. JIMENEZ-EKMAN: Your Honor, whatever suits you.
2 I get called a lot worse things around my household, so as
3 long as I can figure it out.

4 Judge, I want to start where Mr. Ferrario started a
5 little bit with an observation. I'm going to go through this
6 methodically. I'm going to talk about the facts and the law.

7 But it has to be said, that what Mr. Kennedy has
8 said about the officers of the Court, and an appointed State
9 official is offensive here. It's untrue. It's unsupported
10 and it is offensive. You won't hear that kind of rhetoric
11 from me. But I -- this is not just an issue of dollars and
12 cents. This is somebody impugning the integrity of people who
13 appear before the Court and -- and it's totally unfounded.

14 Let me start off with a couple of observations, and
15 then I'm going to talk about the facts, and then I'm going to
16 go into some of the specific arguments.

17 The first observation, Judge, is I -- I don't want
18 it to be lost, how extraordinary what Mr. Kennedy is asking
19 the Court to do, is. There is an appointed Nevada official,
20 who has selected her own counsel, and the -- the undisputed
21 facts show that there -- that full disclosure was made to her
22 about what they could and couldn't do.

23 And Mr. Kennedy, whose client sat for years on these
24 issues, is now asking three years into the litigation for one
25 client, two years in another, to deprive this official of her

1 chosen counsel. It is an extraordinary remedy. It is a last
2 resort under Nevada law. And it is totally uncalled for here.

3 The second thing that --

4 THE COURT: Is there -- I would ask --

5 MR. JIMENEZ-EKMAN: -- I want to point out is --

6 THE COURT: -- I would ask this, in relation then to
7 your -- to your -- your argument here on the motion; two
8 things.

9 One, if you know of a case that -- that indicates
10 that a firm is not required to disclose the existence of
11 conflict or a potential conflict, to the Court, but rather
12 that they can simply make sure that their client has conflict
13 counsel, because I -- if there were a Nevada case,
14 particularly, but some cases somewhere that -- that
15 countenanced that resolution of the issue, then I would -- and
16 perhaps you have cited to it already in your Brief, and if so,
17 maybe you could just point it out to me.

18 Secondly --

19 MR. JIMENEZ-EKMAN: Well --

20 THE COURT: Secondly --

21 MR. JIMENEZ-EKMAN: Oh, I apologize, Your Honor.

22 THE COURT: Yeah. The second thing is, somewhere in
23 your Response, if you -- if you care to, it would be
24 interesting to me, let's put it that way, to know what your
25 answers would be to the three questions that were put out

1 there by Mr. Kennedy.

2 One is --

3 MR. JIMENEZ-EKMAN: I -- I think --

4 THE COURT: -- did -- did you know that you had a
5 conflict? Second is, is it true, you never disclosed that to
6 the Court? And number three, well, why not?

7 What that, now, I'd like to hear your -- your
8 argument.

9 MR. JIMENEZ-EKMAN: Your Honor, I figured you might
10 want to hear some answers to those questions. And I will
11 answer them directly.

12 Let -- let me start off, I'm going to go a little
13 out of my planned order here, but if you -- I haven't had a
14 chance to reply yet to Mr. Kennedy's Brief, which was the
15 Reply Brief. And if the Court looks closely, the -- the
16 opening (indiscernible), you know, the Complaint on the first
17 page of the Opening Briefing, was that Greenberg Traurig was
18 involved in evaluating claims against Xerox. And then we
19 submitted factual evidence that completely forecloses that.
20 You have three undisputed affidavits in the record.

21 And so, in the Reply Brief, what Mr. Kennedy is now
22 focusing on is a failure to disclose. But if you look
23 closely, Your Honor, these cases are all bankruptcy cases.
24 There a few --

25 THE COURT: Yeah. That's true.

1 MR. JIMENEZ-EKMAN: -- receivership cases. There's
2 not a single Nevada case. And Judge, I don't know if you can
3 see this. I realize I'm taking a risk, because it's -- the
4 screen is smaller here. But I don't know if you can see this,
5 but this is --

6 THE COURT: Yes, I can see it.

7 MR. JIMENEZ-EKMAN: -- the rule.

8 THE COURT: I can see it.

9 MR. JIMENEZ-EKMAN: This is the rule that applies in
10 bankruptcy cases. The rule says, you've got to disclose all
11 the people's connections. There is an affirmative rule that
12 says, whether it's a conflict or not, you've got to disclose
13 all of those connections.

14 And in contrast, you're familiar with the
15 receivership statute, and it doesn't say anything like that.
16 It doesn't have any affirmative requirements at all. So all
17 these cases, all these cases that are cited in the Brief from
18 these other jurisdictions and these bankruptcy cases, are
19 applying a standard that did not apply here. That's -- that's
20 the -- that is the answer to much, if not all, of the
21 arguments that Mr. Kennedy has made on these points.

22 And in fact, the Eustace case on which he
23 specifically replied -- or relies at some length, Your Honor,
24 says, specifically, it would be unfair to apply the bankruptcy
25 disclosure requirements here.

1 THE COURT: Okay.

2 MR. JIMENEZ-EKMAN: So but let me -- let me --

3 THE COURT: Well, if you -- if you don't mind, tell
4 me -- tell me why Eustace says it would be unfair.

5 MR. JIMENEZ-EKMAN: Well, because Eustace was not a
6 bankruptcy case, Your Honor. That's a case out of the -- the
7 District of Pennsylvania, and the -- it was a receivership,
8 and -- it was -- by the CFTC, and the -- the Court
9 specifically notes in that -- in -- in that Footnote -- and
10 let me -- if you give me a second, I'll -- I'll direct the
11 Court specifically to it.

12 THE COURT: Um-h'm.

13 MR. JIMENEZ-EKMAN: Well, actually, I apologize,
14 Judge. It -- it's not -- it's -- it's in the text of the
15 case.

16 THE COURT: Um-h'm.

17 MR. JIMENEZ-EKMAN: And Judge, rather than wait for
18 me to look at it, I'm going to get -- I'm going to phone a
19 friend and -- and go on with the argument because --

20 THE COURT: All right.

21 MR. JIMENEZ-EKMAN: -- but that -- that language --

22 THE COURT: Okay.

23 MR. JIMENEZ-EKMAN: -- does appear in there.

24 THE COURT: All right.

25 THE COURT: You asked, Judge, whether there are

1 cases that -- that permit the -- you know, the retention of
2 counsel with specific scope and then conflicts counsel, and we
3 -- we've cited a number of cases in our Brief. And they are
4 -- they -- they start on page 13, the Stoumbos case, the
5 Bartelt case, the Fondiller case; these are cases where --
6 that -- that make clear that it is perfectly appropriate to
7 hire counsel to -- for a specific purpose, rather than a
8 general purpose. And that furthermore, if there are conflicts
9 involved, you can also remediate those with conflicts counsel.

10 So, I think, Your Honor, I -- it would be helpful,
11 before I answer the specific three questions, however, to talk
12 a little about the facts here, because it -- it describes what
13 the answer to the questions is -- questions are.

14 As I said, there is a State official here, the
15 Commissioner of Insurance who has appointed the Receiver in
16 this case. Mr. Bennett's firm was appointed the Special
17 Deputy Receiver in October of 2015. Mr. Bennett, without the
18 help or assistance of Greenberg, or contacting Mr. Greenberg,
19 spent some time -- Mr. Bennett and his firm spent some time
20 analyzing the situation, almost a year before he contacted Mr.
21 Ferrario at Greenberg Traurig.

22 Mr. Bennett concluded that he had a number of
23 entities and people that he preliminary thought was
24 responsible, and Xerox was not among them. Among the reasons
25 for that is that Xerox, as indicated in his Declaration and as

1 a matter of public record, had no direct contractual
2 relationship with the CO-OP and therefore the -- the entity
3 under which the Receiver -- or into whose shoes the Receiver
4 stepped.

5 It was in that context that the undisputed evidence
6 -- there are three Declarations in the record, including from
7 Mr. Bennett, from Mr. Ferrario, and a corroborating
8 Declaration from -- from Mr. Whitmire. Mr. Bennett approached
9 Mr. Ferrario, because of his knowledge and skill in -- in
10 these sorts of cases, and discussed the possibility of
11 retaining him to pursue specific claims.

12 Those claims did not include claims against Xerox or
13 have anything to do with Valley. This not Mr. Bennett's first
14 rodeo. He has served as a Special Deputy Receiver before, in
15 two other receiverships, and in those receiverships he had
16 retained primary counsel, and conflicts counsel. And that's
17 exactly what he did here.

18 And it was agreed at the outset that -- that Mr. --
19 Mr. Ferrario clearly disclosed that Greenberg Traurig
20 represented Xerox, to Mr. Bennett. Mr. Ferrario clearly
21 disclosed that he had -- or not he had, but the firm had
22 previously represented -- represented Valley, to Mr. Bennett.
23 And it was agreed -- I mean, at that point, Mr. Bennett did
24 not believe that the Receiver intended to pursue any claims
25 against any of those entities.

1 At that point, it was agreed that Mr. Ferrario, and
2 Greenberg Traurig, would be retained to prosecute specific
3 claims. They would not be a general lawyer to the Receiver.
4 And that any claims, Xerox, Valley, or otherwise, or any
5 issues that implicated parties with whom Greenberg Traurig
6 might have a conflict, would be handled by Mr. Whitmire.

7 And so based on that agreement, in December of 2016,
8 the motion was filed before Your Honor, and it was granted in
9 January of 2017. And it is true, that these -- the specific
10 contours of Greenberg Traurig's retention were not
11 specifically described. That's because Mr. Bennett, as the
12 Receiver's Special Deputy, and under his authority to manage
13 the affairs of the receivership, only to be reviewed for
14 arbitrary and capricious misconduct, wanted to maintain
15 maximum flexibility. And that motion was granted.

16 Now, so the first question you want to know; is it
17 true that they knew they had a conflict? The answer to that
18 is, no, Judge. They -- they did not have a conflict, because
19 they were not retained for any purposes adverse to Xerox or
20 adverse to Valley.

21 You don't have a conflict if you're not hired to do
22 something, if it's not within the scope of your
23 representation, to take a position adverse to a different
24 party. So they did not have a conflict.

25 And they were not under the Rule that is carelessly,

1 to put it generously, cited repeatedly in Mr. Kennedy's Brief,
2 they were not under the Rule that required them to disclose
3 all of their connections.

4 So there was absolutely no intent to conceal
5 anything. Nothing was concealed. Greenberg Traurig was hired
6 to pursue the claims that it did. Mr. Bennett, in the
7 exercise of a common practice and a high level of prudence,
8 had conflicts counsel in place, to the extent any other issues
9 came up.

10 But it is undisputed there is no --

11 THE COURT: Are you -- are you -- are you indicating
12 that Mr. Bennett already had conflict counsel in place?

13 MR. JIMENEZ-EKMAN: Well, yes, Your Honor. And I
14 was quite confused by Mr. Kennedy's answer to that question,
15 because it's the same motion. It's the motion that's filed in
16 December of 2016, and it is granted in January of 2017.

17 THE COURT: Okay.

18 MR. JIMENEZ-EKMAN: So, Mr. Bennett filed a Motion
19 to retain a number of professionals that -- that included
20 Greenberg Traurig and the -- and -- and James Whitmire and his
21 firm.

22 But they weren't described specifically as conflicts
23 counsel and lead counsel, and they're not required to be.
24 There's -- there is absolutely no requirement of any kind
25 under the receivership statute or anything in Nevada law that

1 would require those specific roles to be delineated in that
2 motion. There was no intent to hide anything. But the entire
3 time, Mr. Whitmire has been in place, as needed.

4 Now, that brings us to the evidence here, Judge, on
5 -- on what happened here. Don't forget, there's no allegation
6 here, unlike in a number of the cases that Mr. Kennedy has
7 cited, there is no allegation that the Receiver herself, an
8 appointed public official, has any conflict, or that Mr.
9 Bennett, who is their Special Deputy, has any conflict.

10 They are specifically, under that statute I showed
11 you, and under the Order that appoints them, they are
12 empowered to make the decisions on their own, with whatever
13 help they desire. But they have the authority to decide who
14 to sue and who not to sue.

15 And we are here because this is not the first time
16 that these parties have disagreed with the discretionary acts
17 that the Receiver have taken -- has taken. But this has
18 nothing to do with any improprieties.

19 I don't get to the second and third questions,
20 because there was no conflict here that needed to be
21 disclosed. There's no conflict when you're not retained to do
22 something adverse to these other folks, and that is why it was
23 not disclosed at the time.

24 To suggest that these lawyers intentionally hid this
25 from you, as I said, is offensive, untrue and there is simply

1 no basis of any kind in the record.

2 So let me step back a little bit to what I -- my --
3 my -- what I had in mind. Judge, I think it's incredibly
4 telling that when you asked Mr. Kennedy during his
5 presentation what the lead cases are that support his
6 position, he gives you a case out of the Eastern District of
7 Pennsylvania, he gives you a case out of -- a bankruptcy case
8 out of the Southern District of California, and he gives you a
9 case out of the District -- a bankruptcy case out of the
10 District of Minnesota.

11 There is absolutely no authority under Nevada law
12 for you to order the kind of extraordinary relief that they
13 are requesting here. There is not a single case that has any
14 facts remotely resembling this under Nevada law. And frankly,
15 these other cases, if you take the time to read them, are also
16 very, very far afield.

17 Let me talk about the four points that we made and
18 the responses that we saw in the Reply. I mean, just as a
19 threshold matter, Judge, I know you're familiar with the --
20 the Nevada Supreme Court law, which points out that
21 disqualification is an extraordinary remedy. It's -- it's a
22 drastic measure that you should not impose unless absolutely
23 necessary, and that the party seeking disqualification bears
24 the burden of showing it's proper in presenting evidence, not
25 merely unsupported allegation -- allegations in support of its

1 claim.

2 And here, I want to point out, there's no sworn
3 evidence supported by the movants here, or by Mr. Kennedy.
4 We've submitted four Declaration. Mr. Kennedy suggested
5 apparently that Mr. Bennett, the Special Deputy Receiver, was
6 acting ultra vires. And so we submitted yesterday a very
7 short Declaration from the Receiver herself, indicating that
8 the papers we filed represent the Receiver's position in the
9 case.

10 So we have submitted affirmative evidentiary quality
11 materials that foreclose the arguments that Mr. Kennedy is
12 making. And there is not a single shred of evidentiary
13 quality materials, no Declarations at all, showing the points
14 that Mr. Kennedy has tried to make. And this becomes
15 important on the timing issue, which I'll get to later.

16 So let -- let me start off with the first issue we
17 raised, which is a threshold issue and its standing. There --
18 the movants here simply do not have standing. To be clear --
19 I think this is clear, Judge, but just to emphasize this,
20 neither -- sorry -- neither UHH or NHS were ever the client of
21 Mr. Ferrario or Greenberg Traurig. There's no allegation that
22 they provided them any -- any confidential material.

23 There's no allegation that Greenberg Traurig has any
24 fiduciary or other obligation or duty of loyalty whatsoever to
25 the movants here. So we are in a situation where we are

1 outside of --

2 THE COURT: To -- to -- to whom? I didn't quite get
3 that. To whom?

4 MR. JIMENEZ-EKMAN: I'm sorry, Judge. The movants
5 here.

6 THE COURT: Oh, okay.

7 MR. JIMENEZ-EKMAN: I mean, if you've seen these --
8 if you've seen these motions before, usually, what you have is
9 a client who comes in, or a former client who says, wait a
10 minute, that is my lawyer. Or, wait a minute, that was my
11 lawyer; right? That's not what we have here.

12 We have the very situation that all the case law
13 warns you about, which is, you have a litigation opponent who
14 is using this at the last minute to try and severely prejudice
15 its opponent.

16 So you don't have a situation -- Mr. Kennedy is --
17 is asserting that there's prejudice here because maybe the
18 Statute of Limitations has run. I'll get to that. But he's
19 not suggesting that the normal prejudice that a client or
20 former client would assert, is present, because it's
21 undisputed that Greenberg Traurig was never the -- I'm sorry,
22 that neither of the movants, UHH or NHS, was the -- was -- was
23 ever the clients of Greenberg Traurig.

24 And Judge, that should end your inquiry right there.
25 The -- the law -- the Nevada Supreme Court is pretty clear

1 that you can't come into a case like this, and as a litigation
2 opponent, assert someone else's interests, to try and get a
3 strategic advantage, which is exactly what's going on here.

4 So there's a suggestion in the Reply Brief, Your
5 Honor, I think it's at page 25, that because UHH is a creditor
6 of the receivership, that -- that it somehow has standing
7 here.

8 Well, number one, there is no Nevada law that
9 suggests that's the case.

10 Number two, the other cases that are cited in Mr.
11 Kennedy's Brief on this issue involves situations where, in
12 fact, it was the -- a former client who is -- who was making
13 the assertion. It's not just a creditor of the estate.

14 Number three, the case law -- and -- and -- shows
15 that generally speaking, the -- a lawyer can represent both
16 the -- either the Trustee, or the Receiver and the creditors
17 because they're aligned. If -- if Greenberg Traurig recovers
18 on behalf of the -- the estate, that -- that benefits all the
19 creditors here.

20 So there is no standing here. This is -- this is
21 the sort of situation that the courts constantly guard against
22 where you have a litigation opponent and they just don't have
23 standing to bring this sort of a motion under the law and for
24 very good reason.

25 There's a suggestion by Mr. Kennedy that -- in the

1 briefs, at least, that there could be standing here because
2 Greenberg Traurig's has somehow so infected the litigation,
3 that the -- the administration of justice is called into play
4 here. But I have to go back and emphasize. It is undisputed,
5 the -- there is evidence -- evidentiary -- quality evidence in
6 the record that Greenberg Traurig has had nothing to do with
7 the failure to pursue Xerox.

8 That is a decision made by Mr. Bennett on -- with
9 the authority of the Receiver herself, based on an analysis
10 that they performed before Greenberg Traurig was retained, so
11 that also does not confer any standing here. There is simply
12 no Nevada law that supports this.

13 And there are really good reasons to prevent this
14 litigation opponent, these litigation opponents after three
15 years from trying to disqualify Greenberg Traurig. That's
16 number one, Judge.

17 Number two, Greenberg Traurig does not have a
18 conflict here. I've talked about the evidence, which is
19 undisputed, that Greenberg Traurig was not retained to take
20 any actions that were in any way adverse to Xerox, or to
21 Valley. We've cited all these cases in our Opposition Brief.

22 And, Judge, you asked the question of Mr. Kennedy;
23 this a common practice. It's sometimes difficult to find
24 completely unconflicted counsel. And so --

25 THE COURT: Let me ask you --

1 MR. JIMENEZ-EKMAN: -- what you do, is you bring in
2 lawyers for specific tasks. That is what happened here.

3 There -- the evidence is --

4 THE COURT: Let me ask a question.

5 MR. JIMENEZ-EKMAN: -- completely undisputed.

6 THE COURT: Let me ask a question before you move on
7 to that point.

8 MR. JIMENEZ-EKMAN: Yes, Your Honor.

9 THE COURT: Mr. Kennedy says, well, the claim is
10 that, there's no conflict here, or was not retained for these
11 purposes, but they -- they don't show us in any retainer
12 agreement. What do you say to that? Would it be helpful to
13 the Court, to see the retainer agreements, to verify that
14 argument?

15 MR. JIMENEZ-EKMAN: Well, Judge, I don't think
16 that's required at all. There's -- you have undisputed sworn
17 testimony from -- from both the clients -- remember, Mr.
18 Bennett here is a client -- and the lawyer saying that this is
19 the case. And there is no requirement, I will add. I -- I
20 disagree with Mr. Kennedy and I challenge him to point out
21 where under Nevada law or ethics rules the scope of a limits
22 -- the scope of an engagement.

23 So, for example, if you hire me to sue Ford, okay?
24 That doesn't need to be in writing, Judge. There are -- there
25 are some things that the Rules require you to put in writing.

1 Many states, for example, a contingency fee, and so on. Some
2 aspects of engagements have to be in writing.

3 But as -- as both a -- an ethical and legal matter,
4 and as a practical matter, after doing this for almost 30
5 years, the things that hire -- that -- that clients hire
6 lawyers to do change, and they can be changed orally.

7 And what happened here is that these things were
8 discussed orally, and that is fully sufficient under Illinois
9 -- I'm sorry -- under Nevada law. I'm talking to you from
10 Chicago, Judge, right now, where I assume it's much drearier
11 than it is in Las Vegas. So --

12 THE COURT: Well, we're cutting -- we're cutting
13 into your --

14 MR. JIMENEZ-EKMAN: -- I -- I hope I'm --

15 THE COURT: -- we're cutting into your dinner hour
16 then, aren't we?

17 MR. JIMENEZ-EKMAN: Not -- not yet, Judge.

18 THE COURT: Okay. All right. Go ahead.

19 MR. JIMENEZ-EKMAN: So, that's the answer to -- to
20 that. There is absolutely no requirement that this be in
21 writing.

22 Let me speak -- focus briefly on Nevada Rule of
23 Professional Conduct 1.2, which talks about limited scope
24 representation. That is not what we're talking about here.
25 Limited scope representation is if you hire me to sue Ford,

1 and I tell you I'm going to write the Briefs, but I'm not
2 going to help with discovery, that is what that refers to.

3 And those sorts of limitations, where you take on a
4 matter such as suing the defendants here, or suing Ford, and
5 you can't do all of the steps that are necessary to completely
6 discharge your obligations for that matter, you don't have to,
7 if you're hired to sue Ford, say, by the way, I'm not going to
8 be suing Chevy for you, I'm not going to be suing GM. Those
9 -- you don't -- those are not required to be put in writing,
10 and they are not the subject of Rule 1.2.

11 And there's nothing cited in the Briefs that -- that
12 -- that establishes any sort of writing requirement for these.

13 Did I -- did I sufficiently address that, Your
14 Honor?

15 THE COURT: Yes. Yes, thank you.

16 MR. JIMENEZ-EKMAN: So what we saw in Mr. Kennedy's
17 Opening Brief is the citation of a number of cases, for
18 example, starting on page 15, where the -- the limit -- the
19 representation was not of limited scope. So if -- if it's
20 true that -- if it were true here -- it's not, it's completely
21 untrue -- but if Mr. -- if the Receiver had hired Greenberg
22 Traurig to serve as its all purpose lawyers, those are the
23 sorts of situations that are involved in the -- the cases
24 citing at page 15 of the Brief.

25 That didn't happen here. You have the client and

1 the lawyer -- and by the way, you know, you have James
2 Whitmire also swearing that he was -- he -- he was retained as
3 conflicts counsel at the time.

4 So, I guess Mr. Kennedy is asking you to believe
5 that all of these people are liars, but that's not the way
6 that the law works. It's -- he's got to come forward with
7 some evidence when he's trying to disrupt a three-year
8 attorney-client relationship. And that's exactly what he's
9 doing here.

10 I want to point out, Judge, that the Reply Brief, as
11 I said, kind of did a -- did a -- a twist. And rather than
12 dispute any of the cases that we cited where these sorts of
13 arrangements, where you had principal counsel prosecuting
14 certain claims, and you had conflicts counsel to deal with any
15 conflicts that came up, rather than say, that's not the law,
16 what -- what -- what the movant's brief did was, instead,
17 concentrate on this disclosure requirement which Mr. Kennedy
18 has blown way all -- way out of proportion, because it simply
19 does not apply here.

20 But the -- the -- none of the case law in our Brief
21 -- and I think Mr. Kennedy admitted in the response to your
22 question, that of course you can have principal counsel, and
23 of course you can have conflicts counsel. Those arrangements
24 are -- are -- are permitted all the time.

25 Judge, I -- I -- I guess, I should talk briefly on

1 this point, about some of the specific things that Mr. Kennedy
2 has put in his Brief and mentioned here, that he thinks raise
3 doubt about the accounts of the lawyers and the State official
4 who have submitted Declarations here.

5 So, for example, there's the -- there's the point
6 that Mr. Whitmire has only billed a small amount to the
7 estate. That is totally irrelevant here, because as we've
8 described, it's Mr. Bennett, and the Special Deputy Receiver,
9 which has made the determination whether to sue Xerox or not.

10 Mr. Whitmire was lined up and ready to go as
11 necessary, but so far -- so far, at least, it has not been
12 necessary.

13 I think, I've already answered the kind of -- the
14 question about producing documents that relate to this. As
15 I've said, these things are not required to be memorialized in
16 writing. Nothing is cited in the Briefs.

17 Let me move on to my third point, Your Honor, which
18 is that this qualification is unwarranted because it would
19 prejudice the Receiver. So here, we've submitted a
20 Declaration from Mr. Bennett that explains -- it's not just
21 the money that's at issue here.

22 It's not just the -- the -- the monetary investment.
23 But the Receiver has been represented by her preferred counsel
24 for just shy of three years now. That counsel has done the
25 discovery, has been -- been engaging in the strategy, has --

1 has, you know, it -- the -- Greenberg Traurig is the lawyer
2 who understands this case on behalf of the Receiver.

3 And Mr. Bennett has -- has explained in his
4 Declaration, that it would be quite prejudicial to the
5 Receiver for non-monetary reasons, if Greenberg Traurig was
6 disqualified now. So there's evidence in the record for you
7 to consider about that.

8 On the other side, you have argument and rhetoric
9 from Mr. Kennedy, and nothing else. There is no Declaration
10 about -- about prejudice. Nothing.

11 Let me talk about the one thing he did identify,
12 which is the idea that Xerox -- that -- that somehow claims
13 against Xerox are stale, and this is somehow the -- the result
14 of this conflict.

15 The -- the materials -- Judge, if you -- do you have
16 the moving papers available? Because I -- if you take a look
17 at --

18 THE COURT: I do.

19 MR. JIMENEZ-EKMAN: -- Exhibit 4 of their -- their
20 Brief, is -- you have some Meeting Minutes from February 2019.
21 I'm sorry, 2014. February 19th, 2014.

22 THE COURT: Okay. I have -- I have right here the
23 -- the Briefs, or the -- the Motion, Opposition, Reply. I
24 don't have the -- all the Exhibits attached. I wasn't --

25 MR. JIMENEZ-EKMAN: All right. Well, that's --

1 that's probably a sensible decision. But, Judge --

2 THE COURT: But I'll -- I will be looking --

3 MR. JIMENEZ-EKMAN: -- what I've --

4 THE COURT: -- I will be looking at this Exhibit
5 before -- before we come to a conclusion here. Exhibit 4 to
6 the -- to the Motion, then is what you're talking about?

7 MR. JIMENEZ-EKMAN: Correct, Judge.

8 And what these are, are Meeting Minutes from the
9 CO-OP, when -- when it was still in existence and running.
10 And it shows that one of -- one of the defendant's current
11 lawyer, James Clough, from Seyfarth Shaw, attended this
12 meeting telephonically. And in these Meeting Minutes, it is
13 quite clear that Xerox had a number of technical issues.

14 So from the time that the defendants here were sued
15 three years ago, and two years ago, if they believed that
16 Xerox was at fault, they were able to implead them, or try to
17 implead them if they thought it was -- it was proper.

18 Nothing Greenberg Traurig or the Receiver did
19 prevented them from doing that. If the claim is blown, it is
20 the fault of these parties, not the -- not Greenberg Traurig
21 or the Receiver.

22 There is no prejudice at all from -- well, I should
23 say there's no unfair prejudice, Judge.

24 THE COURT: Um-h'm.

25 MR. JIMENEZ-EKMAN: As we put in our -- in our

1 Response Brief, the defendants here have dragged out, at one
2 point, they asked for a one-year extension for completion of
3 expert discovery here. They started focusing on this highly
4 collateral and strategic issue when they started to actually
5 face the prospect of a trial on the merits. That's what's
6 going on here.

7 They would be prejudiced by Greenberg Traurig
8 staying in, but that's prejudice on the merits. It's not
9 unfair prejudice. There is no evidence, as I said, no -- no
10 Declarations, nothing demonstrating how Greenberg Traurig
11 staying in would prejudice.

12 And the way that this factor works under the case
13 law, under Nevada law, Your Honor, is that you weigh -- you
14 weigh the two showings.

15 THE COURT: Now, all of this --

16 MR. JIMENEZ-EKMAN: Let me move on to --

17 THE COURT: -- all of this argument depends upon
18 there being no authority, no Nevada authority, on their first
19 preposition that there was some obligation to disclose to the
20 Court, not just to discuss -- or disclose to Mr. Bennett;
21 correct?

22 MR. JIMENEZ-EKMAN: No, Your Honor. I respectfully
23 disagree with that.

24 THE COURT: Okay.

25 MR. JIMENEZ-EKMAN: These -- these are independent

1 factors. You -- you can --

2 THE COURT: Okay.

3 MR. JIMENEZ-EKMAN: -- you can find that there was a
4 conflict.

5 THE COURT: Uh-huh.

6 MR. JIMENEZ-EKMAN: And Courts do find that there
7 was a conflict. But that when you weigh the prejudice from
8 the disqualification against the prejudice from leaving the
9 lawyer in place, disqualification is unwarranted. And courts
10 do that, and these are -- this is what's happened in some of
11 the cases we had cited in our Brief.

12 And I want to point something out here, since you
13 raised that point, Your Honor. Ordinarily, when the courts
14 are weighing that prejudice, they're weighing the prejudice of
15 a current or former client because they share confidential
16 information, you know, those sorts of things here. Things
17 where there could be future harm to the -- the party seeking
18 disqualification.

19 THE COURT: Um-h'm. Um-h'm.

20 MR. JIMENEZ-EKMAN: Mr. Kennedy has not suggested
21 that that's even a possibility here. His -- his issue here is
22 that in the past, Xerox was not pursued. There -- there is no
23 future harm indicated. And you could -- you could rule
24 against us. I -- I don't think you should. I think the facts
25 are undisputed, there's no supporting law. But even if you

1 get to this third point here, Your Honor --

2 THE COURT: Um-h'm.

3 MR. JIMENEZ-EKMAN: -- you could find, yeah, there
4 was a conflict. You can find, hey, I think Greenberg Traurig,
5 you know, prudently should have disclosed this.

6 THE COURT: Um-h'm.

7 MR. JIMENEZ-EKMAN: I -- you can make all those
8 findings. But you still have to weigh the -- the prejudice
9 from not granting disqualification against the prejudice for
10 granting disqualification. And there's no evidence to show
11 that there is actual prejudice here.

12 THE COURT: Okay.

13 MR. JIMENEZ-EKMAN: The fourth point is on waiver.
14 And I -- I feel -- this happens around my household, as well,
15 as I mentioned. I feel a little misunderstood here, because
16 nobody is suggesting, Your Honor, that somebody had to ferret
17 this all out. It was not concealed, for all the reasons that
18 I've said.

19 But the issue here is whether there was unreasonable
20 delay. Whether there was unreasonable delay, which of course
21 is a sign of the strategic conduct that I've been talking
22 about here. And in determining whether there was unreasonable
23 delay, Mr. Kennedy suggested you ask me a question. I'm going
24 to ask that you -- I'm going to suggest, very respectfully,
25 that you ask him a question and that is, when did his clients

1 or their counsel or agents first learn -- first learn that
2 Greenberg Traurig had represented Valley and/or Xerox?

3 Because what you have very artfully in the papers is
4 a side step to that question. There is no evidence or
5 argument even as to when this first came to their attention.
6 And, of course, the Valley conflict, or alleged conflict that
7 they've proposed here, was in the pleadings, in these matters.

8 So if it's true that they really just found out
9 about this, and started writing letters about it right away,
10 and when I say "this", that Greenberg Traurig had represented
11 Xerox in these prior matters.

12 THE COURT: Um-h'm.

13 MR. JIMENEZ-EKMAN: If it's true, where is the
14 evidence of that? I don't think that's the case. I'm going
15 to speculate that they have known about it. They certainly
16 knew about Valley for quite some time. But I suggest that you
17 -- you ask for, you know, evidentiary quality materials on
18 that specific issue.

19 If you give me second, Judge, I think I'm getting
20 close to what I wanted to say here. Obviously, the most
21 important thing is, I want to make sure I've addressed any
22 questions you have, or concerns you have. But I also want to
23 check my -- my notes.

24 THE COURT: Okay. I think I've been popping my
25 questions off as they occur to me, so I don't have any

1 additional questions at this moment.

2 MR. JIMENEZ-EKMAN: I'm just checking my -- my own
3 notes here, Your Honor.

4 THE COURT: Um-h'm.

5 MR. FERRARIO: Your Honor, because we're virtual
6 here, it's hard -- I can't communicate with Mr. Ekman, and he
7 can't communicate with me.

8 THE COURT: I kind of like that notion.

9 MR. FERRARIO: I know. I know, Mr. Kennedy was able
10 to have his brain trust in his -- in his office with him, so I
11 could see them milling around. I -- I would like to speak to
12 Mr. Ekman for a second, Your Honor, about a couple of things
13 that I'm not sure that they're missed -- things that were said
14 that need to be corrected on some, you know, tangential
15 points. But --

16 THE COURT: Okay. Go ahead. Say it.

17 MR. FERRARIO: Can I just call him on the phone
18 here, real quick?

19 THE COURT: Oh, you mean, secret. You mean
20 confidential discussions.

21 MR. FERRARIO: Well, no, I'll --

22 THE COURT: Sure. But we --

23 MR. FERRARIO: Yeah. Just very --

24 THE COURT: -- we really do, of course, have to move
25 along. I've pushed my staff way beyond.

1 MR. FERRARIO: You know what, Judge, I'll -- I'll
2 let it go. It's okay.

3 THE COURT: Well, if you -- if you feel it's
4 important, Mr. Ferrario, you can do it.

5 MR. FERRARIO: Well, there were things that -- that
6 Mr. -- Mr. Kennedy said, again, for example, on the Xerox
7 settlement, he said it was a \$5 million settlement. I think
8 that's a mischaracterization of what the settlement was, Your
9 Honor.

10 I think, and again, part of -- some of the
11 difficulty I have with some of these points is -- is -- is,
12 you know, what -- when you start, you know, misstating the
13 record, and -- and you start overreaching on facts, that's --
14 the reason you do that, is because your principal argument
15 really isn't that strong. And I think this undercuts a lot of
16 what they're saying and it goes to the credibility that I
17 actually texted the associate that was working with me on
18 this. The settlement was to pay up to \$5 million. I think
19 Xerox paid out a total to the alleged claimants of \$99,000.

20 THE COURT: Okay. So that -- that's --

21 MR. FERRARIO: The biggest payout --

22 THE COURT: -- that's what they actually --

23 MR. FERRARIO: -- went to attorneys fee --

24 THE COURT: That's what they actually paid out on
25 that one?

1 MR. FERRARIO: Yeah. And I -- I'm doing this on the
2 fly, Judge. And I -- I --

3 THE COURT: Yeah.

4 MR. FERRARIO: -- I think she --

5 THE COURT: Okay.

6 MR. FERRARIO: -- she did that correctly.

7 The other thing that was troubling was when Mr.
8 Kennedy starts talking about the system failed, the system
9 failed; the case that we brought, and I stand by it, that Mr.
10 Bennett hired us to bring, was a case against people that
11 provided services to the CO-OP. The CO-OP was an insurance
12 company. The CO-OP is not the system.

13 And he starts to blur things. And he said the
14 system failure. We brought a claim against the service
15 providers because the CO-OP failed. And there's a dramatic
16 difference to that.

17 And I want to reemphasize what Mr. Ekman just said.
18 If you look at Exhibit 4, any notion that -- that Mr.
19 Kennedy's new client didn't have some knowledge of Xerox or
20 the interrelationship of Xerox is belied by the very exhibit
21 that they filed where the lawyer from Seyfarth Shaw who is
22 their co-counsel in this case, attended a Board Meeting where
23 that was discussed.

24 Furthermore, at the Board Meetings are people that
25 are affiliated with and are clients of Mr. Kennedy's now. So

1 they've known about the Xerox situation since 2013, 2014.

2 Let's see. And so, I -- I think one thing that's
3 gotten lost here is, was when we were retained, we were
4 retained by Mr. Bennett to go after people that were providing
5 services, or companies, to the CO-OP, who were -- all had, I
6 think, pretty much --

7 THE COURT: And was that --

8 MR. FERRARIO: -- a contractual relationship --

9 THE COURT: -- Mr. Ferrario, is that -- is that in
10 writing somewhere?

11 MR. FERRARIO: Your Honor, it is is -- it is
12 basically the retention agreement. And when Mr. Bennett came
13 to us, he gave us a roster of the clients, and those clients
14 are the service providers to the CO-OP. That's what we ran
15 the conflict on. And that was what Mr. Ekman spoke to.
16 And those were the defendants that ended up finding themselves
17 in the Complaint.

18 THE COURT: So Bennett --

19 MR. FERRARIO: And --

20 THE COURT: -- had his own list of -- of service
21 providers for you to look at?

22 MR. FERRARIO: Yes. And -- and Mr. Ekman --

23 THE COURT: And none of --

24 MR. FERRARIO: -- really -- I --

25 THE COURT: -- none of those on the list -- none of

1 those on the list included Xerox?

2 MR. FERRARIO: None, Your Honor.

3 THE COURT: Okay. Or --

4 MR. FERRARIO: Absolutely not.

5 THE COURT: -- or Valley?

6 MR. FERRARIO: No. Valley -- Valley, actually, we
7 -- the Valley thing is -- is kind of a -- I don't even know
8 why that's being raised, quite frankly. We filed a claim for
9 Valley. We have handled none of that. That's being handled
10 by Mr. Bennett administratively. We will never -- Greenberg
11 will never weigh in on that.

12 And I think that matter's fixed, but Mr. Bennett can
13 -- can talk to it. There's nothing further to be done on the
14 Valley issue. That's over.

15 Yeah. Mr. Bennett came to us and said, here, I want
16 you to look -- run conflicts on this group of people. We've
17 investigated this. This is who we're thinking of suing.
18 These were essentially services providers to the CO-OP. Do
19 you have any conflicts? We ran the conflicts. No.

20 But as we said in -- in the Briefing, I did disclose
21 to Mr. Bennett that I had represented Xerox previously in
22 other things, because they actually did have a contract with
23 the State to essentially develop the portal for -- for the
24 roll out of the -- of Obamacare.

25 THE COURT: Um-h'm.

1 MR. FERRARIO: But we're not suing -- we're suing
2 the service providers for their failure to discharge their
3 duties to the CO-OP. And the easiest example is that if you
4 take a look at it, we're suing the accountant who provided
5 accounting services to the CO-OP, okay, saying they failed in
6 their duties.

7 But with --

8 THE COURT: Are you saying that --

9 MR. FERRARIO: -- that I'm going -- I'm going to
10 argue --

11 THE COURT: -- are you saying that Xerox did not
12 perform any service to the CO-OP?

13 MR. FERRARIO: Xerox was not under contract to the
14 CO-OP, Judge. It provided no direct services to the CO-OP.
15 Xerox was hired to design the portal the -- and I'm -- I'm not
16 a computer guy, but it was like a computer program.

17 THE COURT: I understand.

18 MR. FERRARIO: Yeah. For -- through the State.
19 They had a contract with the State. The State hired them and
20 paid them to perform the service.

21 THE COURT: Okay. Thank you.

22 MR. FERRARIO: David, I'm sorry, I cut you off.
23 I'll shut up.

24 MR. JIMENEZ-EKMAN: No, I -- I -- I had reached a
25 pause, Mark, so -- but Judge, I -- I'm -- I can -- I think I

1 can finish up briefly. I was reminded that I had not
2 addressed the disgorgement point.

3 Judge, number one, none of the cases cited in the
4 Brief would -- would authorize or requirement disgorgement
5 under these circumstances.

6 Number two, for all the reasons that there's no
7 conflict and there should be no disqualification, disgorgement
8 is totally inappropriate here.

9 And then, let me talk briefly about the Xerox issue
10 a little bit more just to -- that dovetails with what Mr.
11 Ferrario said.

12 There is a lot of time spent in the Reply Brief
13 where Mr. Kennedy has submitted these litigation experts
14 who've not surprisingly, have a view that's favorable to his
15 new clients.

16 Well, guess what? The Receiver disagrees with that.
17 There is a big dispute about that. And the Receiver is within
18 her power to determine whether or not it is appropriate to
19 pursue Xerox. And she's made that determination with no input
20 of any kind from Greenberg Traurig.

21 Remember, Judge, this morphed from a completely
22 unfounded accusation that Greenberg Traurig just determined
23 who to sue, that was the Opening Brief. Then we, without a
24 chance to reply until now, in the Reply Brief we -- we see all
25 these allegations that really the problem was the failure to

1 disclose, and maybe it would have been approved, but maybe
2 not, but we needed to disclose. And we cite all these
3 bankruptcy cases and the bankruptcy law clearly doesn't apply
4 here.

5 So, Judge, bottom line, number one, there's no
6 standing here.

7 Number two, there's no conflict because the
8 representation does not include taking positions adverse to
9 these parties.

10 Number three, the Receiver, a State official, would
11 be very severely prejudiced by granting disqualification. And
12 the -- the movants have not shown any prejudice at all and
13 submitted no evidence on that.

14 And number four, this issue has been forfeited.
15 Waiver can be confusing, because we're not suggesting that
16 people sign waivers. We're saying they forfeited by failing
17 to timely raise it. And they've made no showing, none, Judge,
18 about when they first learned.

19 We know that they are charged with knowledge of
20 Xerox's potential involvement as early as 2014. That's from
21 Exhibit 4 to their Brief. They've made no showing when they
22 first learned that Greenberg Traurig had some prior
23 relationship with Xerox.

24 For all those reasons, Your Honor, we respectfully
25 request that you deny both aspects of this totally unfounded

1 motion.

2 THE COURT: Okay. That's a fairly dramatic ending
3 to the argument.

4 Back to you, Mr. -- I can't even remember who we've
5 got -- Kennedy.

6 MR. KENNEDY: Yes, sir. Well, I have a -- I have a
7 couple things to say. It's odd that we're hearing Greenberg
8 Traurig say that bankruptcy cases don't apply, because if you
9 look at their Brief, they cite quite a few of them.

10 But I'll let that -- let that go and direct the
11 Court's attention, once again, to the CFTC v. Eustace case
12 which we've cited several times. In that case, that that was
13 a receivership case. And it was not a bankruptcy case.

14 And the Court in Eustace said, listen, the same
15 principles apply as they do in the bankruptcy cases. It cited
16 a few bankruptcy cases.

17 And it said, A court-appointed Receiver is subject
18 to a higher standard of conduct with respect to handling
19 conflicts. As such, the Receiver and any counsel employed by
20 him, were obligated to fully disclose to the Court his and his
21 firm's prior relationships with certain UBS entities, the UBS
22 entities being those that are related to the alleged
23 wrongdoer.

24 Now, we heard several times, when the Court asked
25 the -- the three questions, we only got to the first one,

1 because counsel said, no, we're not required to disclose this.

2 Well, Your Honor, every -- every case that we've
3 cited says, you are obligated to make a full disclosure to the
4 appointing Court, because the integrity of the case and the
5 judicial process is at issue. And --

6 THE COURT: And you have indicated that the -- these
7 cases that you cite are not all bankruptcy cases anyway,
8 they're from --

9 MR. KENNEDY: That is correct. The one I just
10 talked about, Eustace is just a receivership case.

11 THE COURT: Okay.

12 MR. KENNEDY: And next we hear, well, we -- all we
13 had to do, to check for conflicts, was to look at the list
14 that we were given by the Receiver. And that's what we did.

15 Xerox wasn't on there. You know, that's the same
16 argument that was made in the Buckley v. TransAmerica case.
17 And the Court rejected that position flat out. And I'm
18 looking at the opinion in the Buckley case and --

19 THE COURT: Where is the Buckley case out of?

20 MR. KENNEDY: The Buckley case is District of
21 Minnesota Bankruptcy Court.

22 THE COURT: Okay.

23 MR. KENNEDY: And the Court in Buckley says,
24 potential conflicts on the subject dispute are just as
25 disqualifying as actual current ones. And that is at -- the

1 case is reported in two different places. This is, in the
2 Bankruptcy Reporter is page 827. In the opinion itself it's
3 page 21.

4 And it -- the Court goes on to say, Regardless of
5 whom a Trustee has identified as an opponent, if a past or
6 present client of proposed counsel was involved in any way
7 with the events that gave rise to the dispute, or could
8 otherwise be the subject of a claim based on those events, the
9 client has an interest adverse to the estate and
10 disqualification results. Several courts --

11 THE COURT: Did that say --

12 MR. KENNEDY: -- have applied --

13 THE COURT: Did that say that the client can raise
14 the issue?

15 MR. KENNEDY: It says, if you are -- if you are a
16 lawyer, regardless of what the Trustee tells you about
17 potential adverse parties --

18 THE COURT: Uh-huh.

19 MR. KENNEDY: -- you have to determine whether or
20 not a current or former client of your firm is involved in the
21 case. In other words, you can't rely on what the Trustee
22 tells you.

23 THE COURT: Who brought that case?

24 MR. KENNEDY: You've got to look at the case --

25 THE COURT: Who brought the Buckley case? Who was

1 the -- the --

2 MR. KENNEDY: The Buckley case was brought by --

3 UNIDENTIFIED SPEAKER: The company witness.

4 MR. KENNEDY: Yeah, somebody who had been sued by
5 the conflicted counsel, and said to the conflicted counsel,
6 you have -- you have a -- you have a conflict here. You're
7 not allowed to sue me, because your firm also represents
8 people with claims that are adverse to the estate.

9 THE COURT: So it was the client of the --

10 MR. KENNEDY: And that's what gave rise to --

11 THE COURT: -- law firm?

12 MR. KENNEDY: Yeah. Clients of the law firm.

13 So when Greenberg says here, hey, we didn't have a
14 conflict because we just looked at the list that was given to
15 us by the Receiver. Well, okay, but you knew you represented
16 Xerox and Xerox is involved in the middle of all of this.

17 And all they're saying is, well, the Receiver didn't
18 -- they weren't on that list, so we were fine. And the Court
19 in Buckley said, no, no, no. You can't do that. You have to
20 look at everybody who's involved, and if somebody involved,
21 who is a client currently or formerly of your firm, you've got
22 a conflict there. You can't just say, we didn't look at them,
23 and just -- just say, we closed our eyes as to that person.

24 In -- so in this case, the argument of, well, you
25 know, we were only retained to -- to sue certain people,

1 well, fine, but your client, Xerox is -- is at the heart of
2 the wrongdoing. And so you can't say, well, you know, we only
3 sued certain people. We just closed our eyes as to our other
4 client, didn't sue them, and let them go.

5 THE COURT: What do you say --

6 MR. KENNEDY: That was the --

7 THE COURT: -- about their argument --

8 MR. KENNEDY: -- argument in Buckley, you know --

9 THE COURT: -- that only the client has standing to
10 raise that?

11 MR. KENNEDY: Well, only the client is a -- is if
12 you're trying to disqualify somebody under the Rules of
13 Professional Conduct, that's the general rule.

14 The Nevada Supreme Court in a case called Liapis,
15 L-i-a-p-i-s, which we cited, said, well, that rule doesn't
16 apply. If somebody else is aware of a conflict or of
17 misconduct, that calls into question the fairness or the
18 propriety of the proceeding.

19 And Liapis says that. It says that you can --
20 anybody can raise these issues, if they're involved, and then
21 the Court decides what to do about it.

22 But more importantly here, because it's a
23 receivership case, and the Receiver, and the Receiver's lawyer
24 owe fiduciary obligations to both the Court and to the other
25 parties. What my clients are saying, you breached your

1 fiduciary obligations to us. It doesn't matter if we were
2 your clients. We weren't. But you had obligations to us and
3 you breached them. And you had obligations to the Court,
4 which you breached. We are calling those things to the
5 Court's attention.

6 Now, we heard a number of statements about, we were
7 not required to make these disclosures to the Court. We were
8 not required to make these disclosures.

9 Okay. Two things. Number one, in Rule of
10 Professional Conduct 3.3, subsection (d); 3.3 is candor to the
11 Court, and 3.3(d) deals with counsel's obligation in an ex
12 parte proceeding, where the lawyer is simply saying something
13 to the Court.

14 In this case, the appointment of the -- of the
15 lawyers to act as counsel to the Receiver was completely ex
16 parte. They just came in, said to the Court -- the Receiver
17 said, here's who I want to hire.

18 What 3.3(d) says is, "In an ex parte proceeding, a
19 lawyer shall inform the tribunal of all material facts known
20 to the lawyer that will enable the tribunal to make an
21 informed decision, whether or not the facts are adverse."
22 Rule of Professional Conduct 3.3(d).

23 Counsel says, we had no obligation to disclose these
24 things. Of course, you did, under that Rule of Professional
25 Conduct, and you have a fiduciary obligation to the Court if

1 you represent a Receiver.

2 And the statement was made, well, all of these
3 things were not specifically described. Yeah, that's right.
4 And they weren't generally described. They weren't even
5 mentioned. All of these various fee agreements and conflict
6 waivers and all this stuff, not a word was spoken.

7 Every time they filed a Status Report, which --
8 which are all ex parte, they had a duty to make these
9 disclosures. They never --

10 THE COURT: Question -- question, Mr. Kennedy.

11 Is it -- is it your understanding that in all other
12 receivership cases in Nevada that this type of disclosure is
13 going on? Is that the pattern, practice, in other words?

14 MR. KENNEDY: Yeah, it has to. It has to. If you
15 are retaining a lawyer for a particular purpose, you have to
16 go to the Court under generally -- the general receivership
17 law --

18 THE COURT: Um-h'm.

19 MR. KENNEDY: -- and get that approved. If there is
20 a conflict, or if you are waiving a conflict, or if you are
21 hiring conflict counsel, you have to take those retainer
22 agreements to the Court. Only the Court can approve the
23 hiring. Only the Court can approve the waiver. And this is
24 so important, because these things have to be set down for a
25 hearing and all of the creditors have to be given notice.

1 THE COURT: Do you have a --
2 MR. KENNEDY: And in this --
3 THE COURT: -- do you have any examples of, perhaps,
4 cases we could look at to see that that's the -- the pattern
5 and practice in -- in receivership cases in Nevada?
6 MR. KENNEDY: I -- I'd have to talk -- and I'd have
7 to do some research and talk to other people.
8 THE COURT: Okay.
9 MR. KENNEDY: What we have done is we've cited all
10 the cases from other jurisdictions where courts just simply
11 say, look, you have to do this. The closest --
12 THE COURT: Am I correct --
13 MR. KENNEDY: -- I've been involved --
14 THE COURT: Am I correct that there is no Nevada
15 case which squarely holds exactly what your position is here?
16 MR. KENNEDY: Yeah. We are not aware of any Nevada
17 cases squarely holding that. That's correct.
18 THE COURT: Okay. Nor --
19 MR. KENNEDY: Or even addressing -- yeah, or even
20 addressing it.
21 THE COURT: Yeah.
22 MR. KENNEDY: You know, what we've got is the Rule
23 of Professional Conduct and the rule is set out --
24 THE COURT: Yeah.
25 MR. KENNEDY: -- in all these other cases.

1 THE COURT: Okay. All right.

2 MR. KENNEDY: The -- the closest I can come for you
3 is a case I had in the Bankruptcy Court about two years ago
4 where the Court approved a lawyer and a law firm to represent
5 a Debtor. It turned out the lawyer had a conflict. We raised
6 it. The Court disqualified the lawyer, made him forfeit all
7 the fees, and didn't even reimburse him for his costs.

8 That was August -- the Judge, I can't remember his
9 last name. But he just said, look, I'm sorry, you had a
10 conflict which you didn't disclose to me, and you knew about
11 it. And that's that. No fees. You've --

12 THE COURT: That was --

13 MR. KENNEDY: -- your costs are gone.

14 THE COURT: -- what -- was that --

15 MR. KENNEDY: You're disqualified.

16 THE COURT: -- did you say that's a Bankruptcy
17 Court?

18 MR. KENNEDY: Yeah. I can -- I -- I'll send you a
19 copy of that opinion and order.

20 THE COURT: No. What I'm -- what I'm really
21 interested in is to see whether -- if there's no Nevada case,
22 which is precisely on point, whether it is already the pattern
23 and practice of counsel in receivership cases in Nevada to
24 always disclose any conflict to the Court at the time that
25 they're appointed.

1 MR. KENNEDY: Yeah. And I -- Your Honor, I don't
2 know the answer to that, but I -- I know some lawyers who
3 practice in this area and one of them recently retired. And
4 I'll -- I'll ask. I can't image that the practice is anything
5 other than full disclosure. It's inconceivable --

6 THE COURT: Um-h'm.

7 MR. KENNEDY: -- that -- that it's anything other
8 than full disclosure.

9 THE COURT: Okay.

10 MR. KENNEDY: What -- what else. Oh, they -- they
11 say, well, you've known about the problems with Xerox for
12 years. And the answer is, yes, we have known about these
13 problems. But our knowledge of the problem with Xerox is not
14 the issue. The question is, why didn't the Receiver sue
15 Xerox? Not whether we knew about problems, but the Receiver's
16 job was to sue these people and recover this money. Why
17 didn't the Receiver do that?

18 And the answer is, as Greenberg says in its
19 pleading, oh, we decided that Xerox didn't have any liability
20 here, which is -- is -- is pretty absurd based --

21 THE COURT: I thought --

22 MR. KENNEDY: -- on the evidence which Greenberg
23 knew.

24 THE COURT: I thought that he didn't say that "we
25 decided" but rather that either the Receiver or conflict

1 counsel decided.

2 MR. KENNEDY: Yeah. That's what they said, except
3 that if you look at the answers to interrogatories --

4 THE COURT: Um-h'm.

5 MR. KENNEDY: -- it's -- the answer to
6 interrogatories is, Greenberg's saying, here's what the
7 Receiver decided. Now, if Greenberg's not the Receiver's
8 lawyer, how can it be sending us those answers to
9 interrogatories? It doesn't say, in consultation with
10 conflict counsel. It doesn't say anything like that. It
11 lists them as the lawyer for the Receiver, and says the
12 Receiver has made the following decision. Nobody else is
13 mentioned in there.

14 THE COURT: It is true, I gather that --

15 MR. KENNEDY: So for Greenberg to say --

16 THE COURT: It is true, is it not, that if this
17 matter had been raised when Greenberg had been paid, oh, let's
18 just say \$10,000, so at the beginning of this, that it would
19 be asking the Court to put an order on them, they have to pay
20 back \$5 million, it would be --

21 MR. KENNEDY: No. And that's because if they only
22 received \$10,000 and then said, hey, we have a conflict, that
23 would be up the Court to say, tell me the circumstances under
24 which that conflict was discovered.

25 THE COURT: Uh-huh.

1 MR. KENNEDY: If they said, oh, yeah, we knew it
2 going in, but we did this anyway and never disclosed it --

3 THE COURT: Uh-huh.

4 MR. KENNEDY: -- I would argue to the Court that
5 they have to give that money back. Because as the -- the case
6 that we cite in our motion at the end, the Settelmeyer case,
7 from the Nevada Supreme Court, it says flatly, without any
8 question, if you take a case, and you are violating the Rules
9 of Professional Conduct, you may not recover fees for those
10 services. That is at page 27 of the motion.

11 THE COURT: And that is --

12 MR. KENNEDY: So when counsel says --

13 THE COURT: -- that is a Nevada Supreme Court case?

14 MR. KENNEDY: That is. And so when counsel said,
15 there is no case on this point, there is a case dead directly
16 on that point. That quote is contained in a Footnote toward
17 the end of the case. But that's generally the law everywhere.

18 If you get into a case and start taking money, and
19 you should have never been in that case in the first instance,
20 you can't keep that money. That -- that has to be refunded,
21 because you had a conflict that was disqualifying. Had it be
22 disclosed, you never would have got the money.

23 So in your hypothetical of the \$10,000, if they knew
24 going in and -- and it turns out they didn't tell Judge Cory
25 and he appointed them, I'd be back in front of Judge Cory

1 saying, they've got to give that money back, \$10,000.

2 In this case, this -- all of this stuff doesn't come
3 to light until they have billed over \$5 million. And we go
4 back and we look.

5 Now, there's, oh, elaborate explanation of all this
6 stuff, about what was going on, to which I say, and it's the
7 questions that the Court asked that never got answered, which
8 is, okay, you knew you had a conflict. And they said, oh, we
9 didn't have a conflict. Well, of course they did, it's
10 obvious conflict.

11 And they say, well, we hired conflict counsel.
12 Okay. The next question is -- I don't know how you say that.
13 We hired conflict counsel, but we didn't have a conflict.

14 The next question is, did you disclose that to the
15 Court? And the answer is, no. They say, well, it was
16 generally discussed. No, it wasn't. It's nowhere.

17 And so when I say to them, okay, if all of this
18 stuff happened, as you say, can we see the retainer agreements
19 that you have with all these lawyers outlining who is
20 responsible for what, what conflicts are waived, and -- and
21 who has what duties?

22 Now, counsel says, well, there's no rules that
23 govern that. No, there are. Supreme Court Rule 1.2 says, If
24 a lawyer --

25 UNIDENTIFIED SPEAKER: Rules of Professional --

1 MR. KENNEDY: Rules of Professional Conduct.

2 It says, If a lawyer is going to limit -- or a law
3 firm -- is going to limit the scope of its representation, if
4 the limitation is reasonable under the circumstances and the
5 client gives informed consent.

6 Okay. So they say, we retained Greenberg. And it
7 -- we limited their involvement, because we say, they're not
8 going to do anything with regard to Xerox. Okay. Where is
9 the client's informed consent? Where is the writing, okay,
10 that sets this forth? Because you don't do these things on a
11 wink and a nod and a couple people hitting elbows. These
12 things have to be in writing.

13 Again, counsel says, no rules on this.

14 Okay. Rule 1.7, conflict of interest, current
15 clients. The current clients that Greenberg has, of course,
16 are the Receiver and Xerox. You -- the rule says, you can
17 represent current clients who may have a conflict under
18 certain conditions -- and this is Rule 1.7(b)(4) -- so long as
19 each affected client gives informed consent confirmed in
20 writing.

21 Greenberg says, there's no rule that governs this.
22 Yeah, there sure is, 1.7(b)(4). It says, if you are going to
23 do this, if you are going to get conflicts waived and consents
24 between existing clients, it -- there must be an informed
25 consent confirmed in writing.

1 So when they say, you know, we never did any of this
2 in writing, and there's no rule that requires that, there sure
3 is. There sure is; 1.2 and 1.7(b) (4).

4 And, Your Honor, these lawyers are not amateurs.
5 These are not people who aren't engaged in all of -- in this
6 sort of stuff. On the call, we have the general counsel, or
7 the assistant general counsel of Greenberg. They know how to
8 do this, if they're going to do it.

9 The fact of the matter is, they didn't do it. Not
10 only did they not do it, they never disclosed a thing to the
11 Court. And, Your Honor, if -- if -- I'll conclude just by
12 saying this. If you -- and I know you will -- look through
13 the cases that we've cited and I've discussed today, it --
14 there is absolute unanimity on the point that if there is a
15 conflict or a potential conflict with the lawyers, the
16 Receiver and the lawyers have to disclose it to the Court.
17 The Court makes the decision --

18 THE COURT: And that unanimity --

19 MR. KENNEDY: -- on these matter.

20 THE COURT: -- that unanimity in the cases includes
21 Nevada?

22 MR. KENNEDY: Well, there -- there are -- there are
23 no cases. But if you read Rule 1.7(b) (4) --

24 THE COURT: Uh-huh.

25 MR. KENNEDY: -- and 1.2, subsection (c) --

1 THE COURT: Uh-huh.

2 MR. KENNEDY: -- they both say that these things
3 have to be agreed to and -- and the client has to consent, and
4 1.7 says, confirmed in writing.

5 THE COURT: All right.

6 MR. KENNEDY: Okay?

7 THE COURT: Yeah.

8 MR. KENNEDY: All that means is, once all of that is
9 done, if you go to the Court, which you have to do to hire
10 counsel, and you go to the Court and say, I want to hire
11 counsel, here are the terms of the engagement; of course, you
12 have to get the Court's consent. You can't do it without
13 doing that.

14 That's why I'm pretty sure that this is usual and
15 routine practice in receiverships, because you're not allowed
16 to retain counsel or spend money --

17 THE COURT: Does that mean --

18 MR. KENNEDY: -- if you haven't got the Court's --

19 THE COURT: Does that mean that the Receiver would
20 bear some responsibility here for --

21 MR. KENNEDY: Yes.

22 THE COURT: -- doing all of that --

23 MR. KENNEDY: And I'll tell you what the law --

24 THE COURT: -- should -- should we split the \$5
25 million and have Greenberg give back two-and-a-half and the

1 Receiver cough of two-and-a-half --

2 MR. KENNEDY: Well, I -- let me put --

3 THE COURT: -- and maybe --

4 MR. KENNEDY: -- it this way; the Receiver didn't
5 get any money, Greenberg got the money. And this is
6 disgorgement of fees, which the Supreme Court says is a proper
7 remedy. So Greenberg got the fees. So it should be required
8 to disgorge the fees back to the estate, because it wasn't
9 entitled to those fees in the first instance.

10 I will tell you that it's possible that there are
11 remedies against the Receiver for violating the fiduciary
12 duty, etcetera, etcetera. I haven't really looked at those.

13 My focus is on Greenberg. They're the people that
14 got the money and they got it wrongfully. And it should be
15 returned, and they should have no further contact with any of
16 these cases.

17 I'm done, unless the Court has questions.

18 THE COURT: No. I have none. Thank you.

19 Thank you, both. It's been a very instructive hour-
20 and-a-half, whatever it's been.

21 MR. BENNETT: Judge Cory?

22 THE COURT: Yes.

23 MR. BENNETT: This is -- this is Mark Bennett. May
24 I say a few words --

25 THE COURT: Well, let's see, who are you here for?

1 MR. BENNETT: -- as to a question you have?
2 THE COURT: Who are you here for?
3 MR. BENNETT: I'm the --
4 THE COURT: You are the --
5 MR. BENNETT: -- Special Deputy --
6 THE COURT: You are the man.
7 MR. BENNETT: -- Special Deputy Receiver.
8 THE COURT: You are, Mr. Bennett. Okay.
9 MR. KENNEDY: Your Honor, he's a party, and he -- he
10 wants to speak. I -- I object to that. He's not a lawyer in
11 the case, one of the parties wants to talk. And -- and --
12 MR. FERRARIO: Your Honor --
13 MR. KENNEDY: And (indiscernible) should not be --
14 THE COURT: Let me -- let me inquire.
15 Mr. Bennett, what -- don't tell me what it is you
16 want to say. Just tell me what it's about.
17 MR. BENNETT: It is your question, Your Honor, about
18 pattern and practice --
19 THE COURT: Yes.
20 MR. BENNETT: -- about retention of firms and
21 receiverships.
22 THE COURT: Uh-huh.
23 MR. KENNEDY: Your Honor, this is Dennis Kennedy.
24 He's not a Nevada lawyer.
25 THE COURT: Yes.

1 MR. KENNEDY: He would have no idea of what to say.

2 MR. FERRARIO: Your Honor --

3 THE COURT: And I -- under the circumstances, Mr.
4 Bennett, while I would love to -- to hear what you have to
5 say, I think over the -- I think I must sustain the objection
6 that I'd be hearing, in this instance, from a -- a non-lawyer
7 who is essentially trying to add to the argument before the
8 Court.

9 MR. FERRARIO: Your Honor, this is Mark Ferrario.

10 MR. KENNEDY: Thank you, Your Honor. This is
11 Dennis.

12 MR. FERRARIO: Your Honor, I am a lawyer and you
13 asked a question. And, again, part of this is kind of the --
14 we've heard arguments now made for the first time, again, like
15 Mr. Ekman said, in the Reply Mr. Kennedy raised arguments that
16 he didn't raise previously. Now, he's citing rules that have
17 no application and distorting them.

18 But you asked a question about pattern and practice
19 in this community.

20 THE COURT: Uh-huh.

21 MR. FERRARIO: Mr. Bennett, who's the Special Deputy
22 Receiver --

23 THE COURT: Uh-huh.

24 MR. FERRARIO: -- has been a -- has performed that
25 role in other courts in the Eighth Judicial District, other

1 Departments --

2 THE COURT: Uh-huh.

3 MR. FERRARIO: -- and can provide guidance on what
4 the practice is. And that's what he would be offering --

5 THE COURT: All right.

6 MR. FERRARIO: -- not as a lawyer, but telling you
7 what has happened in those other Departments. But if you
8 don't want to hear it, that's -- that's your prerogative.
9 That was the reason that he would do that, but we understand
10 that.

11 THE COURT: It isn't a matter of -- it isn't a
12 matter of I don't want to hear it, it's a matter of trying to
13 enforce the -- the -- both the rules and the decorum, in this
14 instance, about -- well, anyway.

15 MR. FERRARIO: I understand.

16 THE COURT: There's no -- there's no question put to
17 this -- this -- Mr. Bennett. And while it -- as I say, I
18 would be interested to hear it. This is not the time or
19 place. So --

20 MR. KENNEDY: Okay.

21 THE COURT: -- thank you, anyway.

22 MR. KENNEDY: Your Honor, if -- if we're done, thank
23 you for all your hard work today and for all the years.

24 THE COURT: Well, you'd better wait until you see my
25 ruling before you congratulate me at all, Mr. Kennedy.

1 MR. FERRARIO: Take care, Your Honor.
2 THE COURT: Thank you.
3 MR. FERRARIO: Have a good holiday season.
4 THE COURT: Thank you.
5 MR. JIMENEZ-EKMAN: Thank you, Your Honor.
6 THE COURT: Same to you all.
7 MR. FERRARIO: Take care. Thank you.
8 THE COURT: Please have a good holiday.
9 That concludes the hearing.
10 THE LAW CLERK: Are you taking it under advisement?
11 THE COURT: Oh, yeah. I guess I need to say one
12 thing. I am taking this under advisement. I will not issue a
13 ruling right now from the Bench. However, I will -- I can
14 assure you, the ruling will not linger, because I'm not going
15 to in this capacity, at least. So you will be told of the
16 ruling very quickly.
17 MR. FERRARIO: Thank you, Your Honor.
18 THE COURT: All right.
19 MR. KENNEDY: Thank you, Your Honor.
20 THE COURT: Thank you all.
21 MR. JIMENEZ-EKMAN: Thank you.
22 (Hearing concluded at 2:45 p.m.)
23 * * * * *
24
25

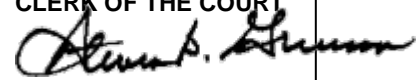
ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.

Julie Lord

VERBATIM DIGITAL REPORTING, LLC

TAB 44

TAB 44



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ex rel. Silver State Health Insurance Exchange

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL.)	Case No.: A-20-816161-C
COMMISSIONER OF INSURANCE,)	
BARBARA D. RICHARDSON, IN HER)	Dept. No.: VIII
OFFICIAL CAPACITY AS RECEIVER)	
FOR NEVADA HEALTH CO-OP,	DEFENDANT'S MOTION FOR
Plaintiff,	LEAVE TO FILE THIRD-PARTY
)	COMPLAINT
)	
)	(HEARING REQUESTED)
)	
v.	
)	
)	
SILVER STATE HEALTH INSURANCE)	
EXCHANGE,	
Defendant.	

Defendant State of Nevada, Ex. Rel. Silver State Health Insurance Exchange
(the "Exchange"), by and through counsel, AARON D. FORD, Attorney General and
MICHELLE D. BRIGGS, Senior Deputy Attorney General, submits this Motion for
Leave to File a Third Party Complaint ("Motion for Leave") pursuant to NRCP 14(a)(1).

This Motion for Leave is made and based on the papers and pleadings on file, the

...

...

...

...

1 following memorandum of points and authorities, and any oral argument this Court may
2 allow.

3 Dated: January 8, 2021.

4 AARON D. FORD
5 Attorney General

6
7 By: /s / Michelle D. Briggs
8 Michelle D. Briggs (Bar. No. 7617)
9 Senior Deputy Attorney General
Attorneys for the State of Nevada ex rel.
the Silver State Health Insurance Exchange

10 INTRODUCTION

11 Plaintiff's Complaint alleges the Exchange retained insurance premiums it
12 collected for health insurance offered by Plaintiff. Plaintiff is suing for a return of the
13 alleged retained premiums. The Exchange never collected insurance premiums. It
14 contracted with Xerox State Healthcare, LLC (now known as Conduent State
15 Healthcare, LLC) ("Xerox") to administer and operate Nevada's healthcare exchange
16 which included collecting and distributing insurance premiums.

17 Xerox has a contractual duty to indemnify, hold harmless and defend the
18 Exchange for any alleged negligent or willful acts or omissions. Furthermore, to the
19 extent Plaintiff has evidence to support the Complaint, Xerox is in a better position to
20 respond to such allegations. This case is just getting started. Bringing in Xerox would
21 not delay the proceedings and would facilitate an efficient resolution of the issues. The
22 judicial economy goals of third-party practice are served by allowing the Exchange to
23 file its third-party complaint against Xerox.¹ Accordingly, leave should be granted to
24 allow the Exchange to file its third-party complaint.

25 RELEVANT FACTS

26 Xerox administered and operated the health insurance marketplace in Nevada
27 for the Exchange beginning in October 2013 through December 2016. Xerox and the

28 ¹ A copy of the proposed third-party complaint is attached at Exhibit A.

1 Exchange entered into a Contract for Services of Independent Contractor effective
2 August 14, 2012 (the “Marketplace Contract”).² The health insurance marketplace was
3 “to help consumers and small businesses buy health insurance in a way that permits
4 easy comparison of available plan options based on price, benefits and quality.”³ Xerox
5 accepted payments for plans purchased on the marketplace and was supposed to remit
6 those payments to carriers of the plan.⁴ Plaintiff, Nevada Health Co-Op (“Co-Op”)
7 offered plans on the exchange marketplace through December 2015. The Co-Op was
8 taken over by the Insurance Commissioner in a receivership case on October 1, 2015
9 which is ongoing.⁵

10 According to Plaintiff’s complaint in this matter, premium payments for Co-Op
11 plans in the amount of \$13,058,608.15 were collected from December 2013 through
12 March 2015, but only \$12,547,956.88 was paid to the Co-Op.⁶ The Co-Op claims it is
13 owed the variance of \$510,651.27.⁷ Based solely on the alleged unpaid premiums,
14 Plaintiff’s complaint alleges causes of action for breach of contract, unjust enrichment,
15 and constructive trust.

16 Xerox has an obligation to indemnify the Exchange. The Marketplace Contract
17 indemnification section states:

18 To the fullest extent permitted by law [Xerox] shall indemnify, hold
19 harmless and defend, not excluding the State’s right to participate, the State
20 from and against all liability, claims, actions, damages, losses, and expenses,
21 including... reasonable attorneys’ fees and costs, arising out of any alleged
22 negligent or willful acts or omissions of [Xerox], its officers, employees and
23 agents.⁸

24 The Exchange did not receive premium payments during the term of the
25 Marketplace Contract. Xerox did. To the extent Xerox collected premiums for plans
26

24 ² A copy of the Marketplace Contract is attached at Exhibit B.

25 ³ Request for Proposal 2023 for Silver State Health Insurance Exchange at 5,
26 attached at Exhibit C (attachments omitted).

26 ⁴ Attachment DD Requirements Matrix attached at Exhibit D.

27 ⁵ District Court Case No.: A-15-725244-C.

27 ⁶ Plaintiff’s Complaint ¶¶21, 23.

27 ⁷ *Id.* ¶24.

28 ⁸ Exhibit B, Marketplace Contract at 4-5, § 14.

offered by the Co-Op and failed to remit those premiums to the Co-Op, Xerox is responsible.

LEGAL ARUGMENT

NRCP 14(a)(1) allows a defendant to file a third-party complaint against a nonparty if such nonparty is or may be liable to it for all or part of the claim against it. The defendant must seek leave of court if filed more than 14 days after serving its answer. NRCP 14(a)(1). “The third-party practice rule, NRCP 14, is reserved for claims based on an indemnity theory.”⁹ It allows a defendant to defend itself “and at the same time assert his [or her] right of indemnity against the party ultimately responsible for the damage.”¹⁰

In this case, the Exchange seeks to file a third-party complaint for express indemnity against Xerox. Bringing Xerox into this matter will assist in a proper resolution of the issues. Plaintiff alleges a failure to remit premium payments. Xerox received those premium payments and is in a better position to explain its own records pertaining to such premiums.

CONCLUSION

Third-party practice under NRCP 14 allows the Exchange to file a claim against Xerox for indemnity. As Xerox received the monies allegedly owed to Plaintiff, Xerox's participation in this case is critical. For all the foregoing reasons, the Exchange

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⁹ *Lund v. Eight Judicial Dist. Court of State, ex rel. County of Clark*, 127 Nev. 358, 362, 255 P.3d 280, 283 (2011).

¹⁰ *Id.*

1 respectfully requests this Court grant its motion for leave to file a third-party
2 complaint against Xerox.

3 Dated: January 8, 2021.

4 AARON D. FORD
5 Attorney General

6 By: /s/ Michelle D. Briggs
7 Michelle D. Briggs (Bar. No. 7617)
8 Senior Deputy Attorney General
9 Attorneys for the State of Nevada ex rel.
10 the Silver State Health Insurance Exchange
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/s/ Marilyn Millam
Marilyn Millam, an employee of the
Office of the Nevada Attorney General