Case Nos. 82467, 82552 & 83135

In the Supreme Court of Nevada

UNITE HERE HEALTH; and NEVADA HEALTH SOLUTIONS, LLC,

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, THE HONORABLE TIMOTHY C. WILLIAMS, District Court Judge,

Respondent,

and

STATE OF NEVADA ex rel. Commissioner of Insurance, BARBARA D. RICHARDSON, in her Official Capacity as Receiver for NEVADA HEALTH CO-OP,

Real Parties in Interest.

No. 83135

UNITE HERE HEALTH; and NEVADA HEALTH SOLUTIONS, LLC,

Appellants,

vs.

STATE OF NEVADA ex rel. Commissioner of Insurance, BARBARA D. RICHARDSON, in her Official Capacity as Receiver for NEVADA HEALTH CO-OP; and GREENBERG TRAURIG, LLP,

Respondents.

No. 82467

UNITE HERE HEALTH; and NEVADA HEALTH SOLUTIONS, LLC,

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, THE HONORABLE TIARA D. CLARK NEWBERRY, District Court Judge,

Respondents,

and

STATE OF NEVADA ex rel. Commissioner of Insurance, BARBARA D. RICHARDSON, in her Official Capacity as Receiver for NEVADA HEALTH CO-OP; and GREENBERG TRAURIG, LLP,

Real Parties in Interest.

No. 82552

JOINT OPPOSITION TO MOTION TO CONSOLIDATE

Barbara Richardson as the statutory receiver ("Receiver") for the Nevada Health Co-Op ("NHC") and Greenberg Traurig, LLP jointly oppose the motion to consolidate the new Petition for Extraordinary Writ Relief, Case No. 83135 (the "Second Writ Petition"), filed by Appellants/Petitioners United Here Health ("UHH") and Nevada Health Solutions, LLC ("NHS") (together, "Appellants"), with the existing consolidated appellate and writ proceeding in Case Nos. 82467 and 82552 ("Combined Appellate Proceedings").

MEMORANDUM OF POINTS AND AUTHORITIES

The Court should deny the motion to consolidate Appellants' Second Writ Petition with the Combined Appellate Proceedings because doing so would (a) unhelpfully and unfairly inject distinct issues into this action that are best addressed separately, thus undermining judicial economy, (b) counterproductively disrupt the advanced schedule of the Combined Appellate Proceedings, and (c) improperly reward Appellants' tactics and gamesmanship.

I. Consolidation Would Undermine Judicial Economy.

The Court should deny the motion to consolidate because combining the Second Writ Petition with the Combined Appellate Proceedings would undermine the interests of judicial economy and efficiency, which are better served by leaving the actions as currently presented.

The existing Combined Appellate Proceedings at Case Nos. 82467/82552 arise from a single underlying lower court matter: the delinquency proceedings in the receivership court, Case No. A-15-725244-C, presided over by Judge Tara Clark Newberry. The order appealed from was entered by the predecessor to Judge Newberry and denied Appellants' motion to disqualify the Receiver's counsel, Greenberg Traurig. The decision turned on issues related to: (a) an alleged but nonexistent conflict of interest on the part of Greenberg Traurig, (b) prejudice to the Receiver that would result from having her counsel disqualified, and (c) Nevada law regarding a Receiver's and her counsel's disclosure obligations.

On the other hand, the Second Writ Petition arises from two completely separate lawsuits pending before different judges in the district court: (1) *State of Nevada, ex rel. Commissioner of Insurance, Barbara D. Richardson, in her Official Capacity as Receiver for Nevada Health Co-Op. v. Milliman, Inc.*, Case No., A-17-760558-C ("Milliman Lawsuit"), presided over by Judge Timothy C. Williams, and (2) *State of Nevada, ex rel. Commissioner of Insurance, Barbara D. Richardson, in her Official Capacity as Receiver for Nevada Health Co-Op. v. Silver State Health Insurance Exchange*, Case. No. A-20-816161-C ("Silver State Lawsuit"), presided over by Judge Veronica M. Barisich. These matters involve additional entities who are not parties to the delinquency proceedings or the Combined Appellate Proceedings, including Milliman, Inc., Silver State Health Insurance Exchange,

Kathleen Silver, Bobbette Bond, Tom Zumtobel, Pamela Egan, Basil Dibsie, Linda Mattoon, InsureMonkey, Inc., Alex Rivlin, Martha Hayes, Dennis T. Larson, and Larson & Co, P.C.

The order for which review is sought in those matters is an order denying a motion to consolidate the Milliman and Silver State Lawsuits with each other and to implead Xerox State Healthcare, LLC ("Xerox"). That order was issued by a different judge—Judge Timothy C. Williams—in a separate department, and was motivated by issues and considerations that are completely distinct from those implicated by the denial of the disqualification motion in the delinquency court. Namely, Judge Williams' order indicates that his decision turned on issues related to: (a) the timing of the Appellants' motion to implead after three and a half years of litigation, (b) potential prejudice to the parties that would result from consolidation and impleader, (c) the likelihood of complicating the Milliman Lawsuit, which he described as "an already complex case," by "injecting tangential issues," (d) the Appellants' ability to pursue contribution claims in a separate lawsuit, and (e) trial protocol issues. (Motion to Consolidate, Ex. A).

Appellants contend the Court should nevertheless consolidate because the underlying proceedings are "related matters"—that is, they assert the delinquency proceeding is "related" to the Milliman Lawsuit and the Silver State Lawsuit. (Motion to Consolidate at 6.) But the fact that a Receiver who was appointed in the

delinquency proceeding went on to file lawsuits to recover assets is not a reason to consolidate any and every appellate proceeding spawned by such proceeding and lawsuits, no matter how varied or dispersed the issues. Judicial economy and efficiency would be ill-served by consolidating proceedings merely because the Receiver is party to both.

Appellants also contend there is a common issue between the denial of the disqualification motion in the delinquency proceeding and Judge Williams' denial of the impleader and consolidation motion in the Milliman/Silver State Lawsuits—an alleged conflict of interest. This assertion is wrong in two ways. First, Appellants' assertion that Judge Williams "denied the Motion for Leave (and the Motion to Consolidate) based solely on Greenberg's conflict of interest with Xerox" (Motion to Consolidate at 6; *see also id.* at 5) is foreclosed by the express language of Judge Williams' order. The order discusses multiple reasons for denying the motion, including Appellants' three-and-a-half-year delay in filing it, Appellants' ability to pursue contribution claims separately, the risk of unduly complicating the already complex Milliman Lawsuit by injecting tangential issues, and trial-protocol considerations. (Motion to Consolidate, Ex. A, ¶¶ 3-6.)

Second, there is no material overlap in the issues underlying the two orders. On one hand, on the disqualification motion, the delinquency court considered whether there was an existing conflict of interest based on Greenberg Traurig's prior

representation of Xerox, and correctly concluded that there was not. On the other hand, on the impleader motion, Judge Williams considered whether Appellants' proposed maneuvering (*i.e.*, tardily attempting to implead Xerox) risked *creating a conflict of interest that did not otherwise exist* and that would disrupt the lawsuits before him—and correctly concluded that it would. These are completely separate considerations.

Thus, judicial economy and efficiency would be undermined by consolidating matters arising from different lower court proceedings involving separate parties, different judges, and different kinds of orders that were motivated by distinct issues and considerations. In reviewing the two separate orders (assuming the Court reaches the merits of either one), this Court would not be taking up the same issues or even bodies of law. Indeed, in reviewing the denial of the disqualification motion, this Court will be assessing standing and jurisdictional issues, and—possibly—Nevada law and rules of professional conduct related to conflicts of interest and disclosure obligations. By contrast, on the Second Writ Petition, the Court would be assessing Judge Williams' exercise of discretion—after considering practical, procedural, and economical factors applicable to the case before him—in denying a motion to implead a third party and consolidate two lawsuits.

II. Consolidation Would Disrupt The Briefing Already In Progress In The Combined Appellate Proceeding.

The Court should deny the motion to consolidate for the additional reason that it would counterproductively disrupt the Combined Appellate Proceeding that is already under way, and inject new issues into briefing that is already in progress.

Appellants filed their notice of appeal (Case No. 82467) on February 11, 2021, and their petition for extraordinary writ relief (Case No. 82552) related to the same order ("First Writ Petition") two weeks later. They moved to consolidate the appeal and the First Writ Petition in March 2021. In April 2021, this Court deferred the jurisdictional issues raised by Greenberg Traurig, granted the motion to consolidate the proceedings, set a deadline for Appellants' opening appellate brief, and ordered Respondent Greenberg Traurig to file a combined answering brief and answer to the First Writ Petition 30 days thereafter. Appellants filed their opening appellate brief in June 2021.

As of today, Greenberg Traurig has completed an advanced draft of its combined answering brief and answer to the First Writ Petition; that combined brief is due by July 14, 2021—less than one week from the date of this submission. Granting Appellants' motion to consolidate their Second Writ Petition would unfairly inject new issues into this proceeding and counterproductively disrupt the existing schedule late in the process. Appellants have not provided any justification for doing so.

III. Consolidation Would Unfairly Reward Appellants' Attempted Gamesmanship.

The Court should deny the motion to consolidate because granting it would reward Appellants for their attempted gamesmanship and tactical maneuvering.

Judge Williams recognized that impleading Xerox into the Milliman Lawsuit would risk creating a conflict where none previously existed, which could impact the Receiver's choice of counsel and prejudice the Receiver. (5/26/21 Order ¶ 4.) Judge Williams was correct to disallow this maneuvering because, as the Receiver pointed out in her briefing below, courts in Nevada and elsewhere frequently reject such attempts by opposing parties to manufacture conflicts of interest in order to gain a tactical advantage over their adversary. *See, e.g.*, *Mirch v. Frank*, No. CV-01-0443-ECR, 2003 WL 27387830, at *4-5 (D. Nev. Oct. 24, 2003) (criticizing use of impleader "as a nefarious litigation tactic" to "spread[] chaos in the opposing camp" by "creating a conflict of interest" and denying motion to file third-party complaint against party that would create a conflict); *Nat'l Cas. Co. v. Beth Abraham Hosp.*, No. 97 Civ. 8091, 1999 WL 710780, at *6-7 (S.D.N.Y. Sept. 10, 1999) (denying motion to implead a third-party defendant where doing so would create a potential conflict of interest). Consolidating the Second Writ Petition with the Combined Appellate Proceedings would effectively reward Appellants for their attempted gamesmanship: it would allow them to attempt to use a manufactured conflict—which was improper in the Milliman Lawsuit in the first place—to

influence a second, separate proceeding. Indeed, Appellants have already done so in Case No. 82467/82552 by including in their appeal appendix materials that are not part of the record in the action from which the appeal was taken. (*See, e.g.*, 13 App. 2543 (Tab 58) (order in Case Nos. A-17-760558-C and A-20-816161-C).) *Contra* NRAP 30(c)(1) ("All documents included in the appendix . . . shall bear the file-stamp of the district court clerk, clearly showing the date the document was filed *in the proceedings below*." (emphasis added); NRAP 30(g)(1) ("Filing an appendix constitutes a representation by counsel that the appendix consists of true and correct copies of the *papers in the district court file*." (emphasis added).)[1]

The Court should not countenance Appellants' improper tactics.

IV. Without a Determination That the New Writ Petition Should Be Heard on Its Merits, Consolidation Is Premature.

Alternatively, the motion for consolidation is premature because this Court has not yet decided whether the latest bid for extraordinary relief should be heard, at all. This is especially significant because Appellants concede in their latest petition that the sole basis for their request for extraordinary, interlocutory review is this

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[1] In exceptional circumstances, this Court can "invoke judicial notice to take cognizance of the record in another case." *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009). But "[a]s a general rule," the Court does not do so, "even though the cases are connected." *Id.* (citing *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981)). Regardless, Appellants did not move this Court to take judicial notice, as *Mack* requires. Instead, they simply included the non-record materials in their appendix in violation of NRAP 30.

court's advisory mandamus jurisdiction. (*See* Pet'n in Dkt. No. 83135, at 8-9 (invoking "considerations of sound judicial economy and administration," "urgency and strong necessity," and "an important issue of law need[ing] clarification").) They do not dispute that the issues are otherwise reviewable in an appeal, giving them an adequate remedy at law. "[P]roper occasions for employing advisory mandamus are hen's-teeth rare: it is reserved for blockbuster issues, not merely interesting ones." *In re Bushkin Assocs., Inc.*, 864 F.2d 241, 247 (1st Cir. 1989), *quoted in Double Diamond v. Second Judicial Dist. Court*, 131 Nev. 557, 566, 354 P.3d 641, 647 (2015) (Pickering, J., concurring).

Appellants, however, seek to evade that high bar by simply consolidating their unproven writ petition with proceedings where this Court has already asked for merits briefing. This, in turn, gives the false impression that the issues are more related than they really are, or that Judge Williams's broad discretion in denying motions for impleader and consolidation may somehow be circumscribed by the standards governing attorney disqualification.

At the very least, a decision on whether to consolidate these distinct issues into a single proceeding should await the threshold determination whether the petition merits full briefing and a dedication of this Court's limited resources—or whether instead the latest petition should be summarily denied.

CONCLUSION

For the foregoing reasons, the Court should deny the motion to consolidate the Second Writ Petition with the Combined Appellate Proceedings.

Dated this 8th day of July 2021.

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CERTIFICATE OF SERVICE

I certify that on July 8, 2021, I submitted the foregoing "Joint Opposition to Motion to Consolidate" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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