IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HE OFFICIAL CAPACITY AS RECEIVEI FOR SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE, MARK R. DENTON, DISTRICT JUDGE, DEPT. 13

Respondents,

And Concerning,

THOMAS MULLIGAN, an individual; CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC, a Missouri Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES LLC, a California Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC, Hawaii Limited Liability Company; CRITERION CLAIMS SOLUTIONS OF OMAHA, INC., a Nebraska Corporation; PAVEL KAPELNIKOV, an individual; CHELSEA FINANCIAL GROUP, INC., a California Corporation; CHELSEA FINANCIAL GROUP, INC., a Missouri Corporation; CHELSEA FINANCIAL GROUP, INC., a New Jersey Corporation d/b/a

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Supreme Court Case No.:

Dist. Ct. Case No.: **A-20-809963-B**

PETITIONER'S APPENDIX

Volume V (APP0847-1077)

CHELSEA PREMIUM FINANCE CORPORATION; FOURGOREAN CAPITAL, LLC, a New Jersey Limited Liability Company; KAPA MANAGEMENT CONSULTING, INC. a New Jersey Corporation; KAPA VENTURES, INC., a New Jersey Corporation; GLOBAL FORWARDING ENTERPRISES LIMITED LIABILITY COMPANY, a New Jersey Limited Liability Company; NEW TECH CAPITAL, LLC, a Delaware Limited Liability Company; LEXICON INSURANCE MANAGEMENT LLC, a North Carolina Limited Liability Company; ICAP MANAGEMENT SOLUTIONS, LLC, a Vermont Limited Liability Company; SIX ELEVEN LLC, a Missouri Limited Liability Company; 10-4 PREFERRED RISK MANAGERS INC., a Missouri Corporation; IRONJAB LLC, a New Jersey Limited Liability Company; YANINA G. KAPELNIKOV, an individual; IGOR KAPELNIKOV, an individual; QUOTE MY RIG LLC, a New Jersey Limited Liability Company; MATTHEW SIMON, an individual; DANIEL GEORGE, an individual; JOHN MALONEY, an individual; JAMES MARX, an individual; CARLOS TORRES, an individual; VIRGINIA TORRES, an individual; SCOTT McCRAE, an individual; BRENDA GUFFEY, an individual; and 195 GLUTEN FREE LLC, a New Jersey Limited Liability Company,

Real Parties in Interest,

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25,1 certify that I am an employee of GREENBERG TRAURIG, LLP, that in accordance therewith, that on April 1, 2021, I caused a copy of ***Petitioner's Appendix*** to be served via U.S. Mail, first class postage prepaid, and via the 8th Judicial District Court's e-service system, upon the below identified Real Parties:

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With a courtesy copy to

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Clark County, Nevada
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via email on April 1, 2021 to Dept13lc@clarkcountycourts.us

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

BARBARA D. RICHARDSON IN HER CAPACITY AS THE STATUTORY RECEIVER FOR SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC., Plaintiff, vs. THOMAS MULLIGAN, an individual; CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC, a Missouri Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES LLC, a California Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC, a Hawaii Limited Liability Company; CRITERION CLAIMS SOLUTIONS OF OMAHA, INC., a Nebraska Corporation; PAVEL KAPELNIKOV, an individual; CHELSEA FINANCIAL GROUP, INC., a California Corporation; CHELSEA FINANCIAL GROUP, INC., A Missouri Corporation; CHELSEA FINANCIAL GROUP, INC., a New Jersey Corporation d/b/a CHELSEA PREMIUM FINANCE CORPORATION; CHELSEA FINANCIAL GROUP, INC., a Delaware Corporation; CHELSEA HOLDING COMPANY, LLC, a Nevada Limited Liability Company; CHELSEA HOLDINGS, LLC, a Nevada Limited Liability Company;	Case No. A-20-809963-B Dept. No. XIII HEARING REQUESTED **DEFENDANT CRITERION CLAIM SOLUTIONS OF OMAHA, INC.'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION**

FOURGOREAN CAPITAL, LLC, a New Jersey Limited Liability Company; KAPA MANAGEMENT CONSULTING, INC., a New Jersey Corporation; KAPA VENTURES, INC., a New Jersey Corporation; GLOBAL FORWARDING ENTERPRISES LIMITED LIABILITY COMPANY, a New Jersey Limited Liability Company; GLOBAL CAPITAL GROUP, LLC, a New Jersey Limited Liability Company; GLOBAL CONSULTING; NEW TECH CAPITAL, LLC, a Delaware Limited Liability Company; LEXICON INSURANCE MANAGEMENT LLC, a North Carolina Limited Liability Company; ICAP MANAGEMENT SOLUTIONS, LLC, a Vermont Limited Liability Company; SIX ELEVEN LLC, a Missouri Limited Liability Company; 10-4 PREFERRED RISK MANAGERS INC., a Missouri Corporation; IRONJAB LLC, a New Jersey Limited Liability Company; YANINA G. KAPELNIKOV, an individual; IGOR KAPELNIKOV, an individual; QUOTE MY RIG LLC, a New Jersey Limited Liability Company; MATTHEW SIMON, an individual; DANIEL GEORGE, an individual; JOHN MALONEY, an individual; JAMES MARX, an individual; CARLOS TORRES, an individual; VIRGINIA TORRES, an individual; SCOTT McCRAE, an individual; BRENDA GUFFEY, an individual; 195 GLUTEN FREE LLC, a New Jersey Limited Liability Company, DOE INDIVIDUALS I-X; and ROE CORPORATE ENTITIES I-X,

Defendants.

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I. INTRODUCTION

Notwithstanding that: (i) the Nevada Supreme Court recently rejected the very same arguments against arbitration, made by this very same Receiver, in a very similar case, and (ii) the Receiver acknowledges in the Complaint that the Spirit/Criterion Agreement – which contains the arbitration clause and which was entered into in 2011, well before, as the Receiver alleges, Mr. Mulligan acquired Criterion in 2016 – is valid and enforceable, the Receiver has stubbornly and unjustifiably refused to arbitrate its claims against Criterion. The Receiver's arguments against arbitration are ill-conceived and simply meritless.

As recently as December 2019, the Nevada Supreme Court rejected the majority of the arguments the Receiver proffers here in a remarkably similar case. For instance, Judge Delaney and then the Nevada Supreme Court rejected plaintiff's arguments that the McCarran-Ferguson Act reverse-preempts the Federal Arbitration Act and that Nevada's insurance liquidation statutes somehow override valid arbitration clauses and the Federal Arbitration Action. (Notably, the plaintiff in that case is the Receiver herein.) While the Receiver attempts to minimize the effect of the Nevada Supreme Court's decision in *State ex rel. Comm'r of Ins. v. Eighth Jud. Dist. Ct.*, No. 77682, 2019 Nev. Unpub. LEXIS 1366 (Nev. Dec. 19, 2019) (the "Definitive Decision"), in its Opposition it nonetheless copied and pasted 7 entire pages from its briefing in front of Judge Delaney.

Faced with the Definitive Decision, the Receiver conjures a new argument: That the arbitration clause in the Spirit/Criterion Agreement – which it otherwise contends is enforceable and upon which it asserts claims for breach of contract – is somehow the "instrument of a criminal enterprise" and therefore unenforceable. Ridiculous! The Receiver's argument is the product of its own fanciful efforts to transform what is a straight-forward dispute over contractual performance into a civil RICO claim. Beyond the undisputed fact that the Spirit/Criterion Agreement was entered into years before Mr. Mulligan acquired Criterion, there exist no criminal charges. Moreover, the only "law" cited by the Receiver in support of this absurd argument is a concurring opinion from a Fifth Circuit case. Notably, however, each point that the Receiver highlights in the concurrence is expressly denounced in the majority opinion in that case.

In sum, neither law nor fact supports a single argument by the Receiver. Further, the Receiver's refusal to arbitrate these claims coupled with her perversion of the law (here and elsewhere) establishes that the Receiver is acting in bad faith. For these reasons and those set forth below, the Court should grant Criterion's Motion to Compel Arbitration, and award Criterion the fees associated with having to bring this Motion.

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II. ARGUMENT

A. The Arguments Rejected by Judge Delaney and the Nevada Supreme Court in Milliman Fail Here for Precisely the Same Reasons

In the Opposition, the Receiver cuts and pastes nearly seven pages from its Opposition to Milliman's Motion to Compel Arbitration in *State of Nevada Ex Rel. Commissioner of Insurance v. Milliman, Inc.*, No. A-17-760558-B, 2019 Nev. Unpub. LEXIS 1366, at *3 (Nev. Dec. 19, 2019) (attached hereto as Exhibit A) in urging the Court to disregard the arbitration clause in an agreement the Receiver admitted was valid and sought to otherwise enforce. As the Receiver's arguments failed in *Milliman*, so do they fail here. *See*, the Definitive Decision.

1. The McCarran-Ferguson Act Does Not Reverse-Preempt the Federal Arbitration Act.

As correctly set forth in the Opposition, reverse preemption under the McCarran-Ferguson Act only occurs when: 1) the state statute at issue was enacted for the purpose of regulating the business of insurance; 2) the federal statute involved "does not specifically relat[e] to the business of insurance"; and 3) the application of the federal statute would "invalidate, impair, or supersede" the state statute regulating insurance. *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999). While it is clear that NRS 696B regulates insurance and the Federal Arbitration Act ("FAA") does not, the FAA is no more preempted here than it was in *Milliman*.

First, the FAA reflects "both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract[.]" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quotation marks omitted) (citations omitted). The only exceptions provided under the FAA are "[g]enerally applicable contract defenses, such as fraud, dress, or unconscionability." *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996). Therefore, the FAA does not provide the Receiver with a valid exception to arbitration.

Second, this action does not involve a creditor's claim against Spirit, but rather contract and tort claims by the Receiver, standing in the shoes of Spirit, against third parties, including Criterion. The Nevada Liquidation Act contains no provisions prohibiting a liquidator from pursuing claims in arbitration—as has been unequivocally demonstrated by the holdings of the District Court and the

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Nevada Supreme Court in *Milliman*. *See State ex rel. Comm'r of Ins. v. Milliman, Inc.*, No. A-17-760558-B, slip op. (Nev. Dist. Ct. Mar. 12, 2018); and the Definitive Decision at *2–*3. Simply put, there is no conflict between the Nevada Liquidation Act and the FAA, and accordingly, no preemption. *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381–82 (9th Cir. 1997); *see also Ommen v. Ringlee*, 941 N.W.2d 310, 312 (Iowa 2020) ("[T]he McCarran-Ferguson Act does not permit reverse preemption of the FAA when the liquidator asserts common law tort claims against a third-party contractor. Courts in other states have unanimously required liquidators to arbitrate their claims against the same third-party contractor under the same arbitration provision."); *Milliman, Inc. v. Roof*, 353 F. Supp. 3d 588, 604 (E.D. Ken. 2018) ("[T]he McCarran—Ferguson Act does not allow reverse-preemption of the FAA when the Liquidator of an insurance company brings suit against a third-party independent contractor for tort or breach of contract claims.").

2. Nevada's Insurance Liquidation Statutes Do Not "Take Precedence" Over the FAA.

In a sleight-of-hand based upon a footnote in Criterion's Motion noting that the Nevada Uniform Arbitration Act is very similar to the FAA, the Receiver argues that the arbitration clause should not be enforced because a "specific statute," the Nevada Liquidation Act, trumps the "general statute," the Nevada Uniform Arbitration Act. (Opp., 14:25–15:9). This argument is disingenuous and simply wrong.

First, Criterion moved to compel arbitration under the FAA, not the Nevada Uniform Arbitration Act. As the Court is well-aware, state law cannot override federal law. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States … shall be the supreme Law of the Land.").

Second, even assuming, *arguendo*, Criterion did move to compel arbitration based upon the Nevada Uniform Arbitration Act, the Receiver's argument would nonetheless fail. Although the Liquidation Act sets forth a statutory scheme for the winding down of insolvent insurers, the Receiver is free to pursue arbitration claims against third-parties without implicating that scheme. As the Nevada Supreme Court recently stated in rejecting the very same argument from this very same Receiver:

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> In [the Receiver's] view, enforcement of an arbitration agreement against an insurance liquidator pursuing contract and tort damages against third parties would thwart the insurance liquidator's broad statutory powers and the general policy under Nevada's Uniform Insurance Liquidation Act (VILA), *see* NRS 696B.280, to concentrate creditor claims in a single, exclusive forum. However, at issue here is not a creditor's claim against the Co-Op; at issue is Richardson's breach-of-contract and tort claims against several third parties on behalf of the Co-Op, which happens to be in receivership.

Definitive Decision at *3.

3. Rulings from the Nevada Supreme Court Are Not Mere Suggestions.

Although the Receiver goes to great lengths to try to distance herself from *Milliman*, the facts and posture are nearly identical to those in this matter. In *Milliman*, the Commissioner of the Nevada Department of Insurance was appointed Receiver of the Nevada Health Co-Op, an insurance co-op established at the inception of the federal Affordable Care Act. Milliman, one of the defendants,[1] moved to compel arbitration under an arbitration clause contained in its Consulting Services Agreement with Nevada Health Co-Op.[2] The District Court (Judge Delaney) rejected the very same arguments raised here by the Receiver and granted Milliman's motion to compel arbitration. The Receiver sought a writ of mandamus from the Nevada Supreme Court, contending that:

> Under the applicable law, no arbitration should have been ordered in this matter, as no enforceable agreement to arbitrate existed between the Commissioner and any of the Milliman Defendants, as Nevada's Insurance Code grants the Commissioner the right to choose the forum for prosecution of claims the liquidated insurer possessed. Additionally, even if an agreement to arbitrate could be said to have existed, ***the Federal Arbitration Act was reverse preempted by the McCarran-Ferguson Act, as Nevada's Insurance Code governs insurance-related law in Nevada***.

(Petition for a Writ of Mandamus, at 16, attached hereto as Exhibit C) (emphasis added).

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[1] The Receiver's claims against Milliman were: (1) negligence per se – Violation of NRS 681B; (2) professional malpractice; (3) intentional misrepresentation; (4) constructive fraud; (5) negligent misrepresentation; (6) breach of fiduciary duty; (7) negligence; (8) breach of contract; (9) tortious breach of the implied covenant of good faith and fair dealing; (10) breach of the implied covenant of good faith and fair dealing; (11) negligent performance of an undertaking; (12) unjust enrichment; (13) civil conspiracy; and (14) concert of action.

[2] While not pertinent to the outcome of this Motion, the original agreement was between Milliman and the Culinary Health Fund. The Culinary Health Fund formed Hospitality Health, Ltd., transferring its rights, title, and interest in the Consulting Services Agreement. Nevada Health Co-Op was later formed and assumed Hospitality Health's rights and obligations under the Consulting Services Agreement.

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The Nevada Supreme Court denied the Receiver's Petition for a Writ of Mandamus, finding that:

> Richardson has not carried her "burden of demonstrating that extraordinary relief is warranted." Richardson chiefly complains that arbitration affords more limited discovery and appellate review than judicial proceedings and that not all parties to the case can be compelled to arbitrate. But these are characteristic of any arbitration and not themselves a basis to conclude that an eventual appeal will not be an adequate legal remedy. The burden of simultaneous arbitration and litigation arises where, as here, not all persons involved in a dispute are subject to arbitration, an inconvenience that may be mitigated by staying litigation while arbitration runs its course.

Definitive Decision at *2–*3. The Nevada Supreme Court further held that:

> Richardson claims the district court committed legal error by ordering arbitration despite her argument that the McCarran-Ferguson Act, 15 U.S.C. § 1012, reverse-preempts the FAA. In her view, enforcement of an arbitration agreement against an insurance liquidator pursuing contract and tort damages against third parties would thwart the insurance liquidator's broad statutory powers and the general policy under Nevada's Uniform Insurance Liquidation Act (VILA), *see* NRS 696B.280, to concentrate creditor claims in a single, exclusive forum. ***However, at issue here is not a creditor's claim against the Co-Op; at issue is Richardson's breach-of-contract and tort claims against several third parties on behalf of the Co-Op, which happens to be in receivership. Courts elsewhere that have considered Richardson's argument have rejected it***.

Id. at *3–*4.

Despite the Nevada Supreme Court's thorough and unequivocal rejection of her arguments, the Receiver now asserts that "the unpublished decision is not binding on the Court and may be cited only "for its persuasive value, *if any* …." (Opp., 14:13–14). The Receiver adds that "the decision has no persuasive value because it did not announce any holdings of law," but "merely observed that the district court did not commit "clear error" by relying on persuasive authority from other jurisdictions." (Opp., 14:15–19).

Not unsurprisingly, the Receiver is wrong. As demonstrated above, the Nevada Supreme Court rejected the very arguments made by the Receiver in its Opposition. This cavalier attitude undermines the authority of Nevada's highest court and attributes to it unpredictability that does not exist. Should the Receiver again seek to avoid arbitration by petitioning the Nevada Supreme Court for a writ of mandamus, the Court's decision would undoubtedly be the same. The Nevada Supreme Court has provided clear direction on this issue. That direction simply must be followed.

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4. Each of the Receiver's Claims Against Criterion is Subject to Arbitration.

Because the Agreement's arbitration clause is binding, the Receiver may only pursue claims against Criterion in arbitration. The Agreement's arbitration clause states:

> 13. ***Binding arbitration shall be the exclusive method for resolving disputes between the parties***. Any dispute concerning the terms of this agreement or performance by the parties under this agreement which cannot be resolved by agreement of the parties shall be submitted to binding arbitration before an arbitrator agreed upon by the parties.[3]

Under the plain language of the very agreement the Receiver otherwise seeks to enforce, all disputes between the parties must be submitted to binding arbitration. Thus, each and every one of the Receiver's claims must be arbitrated. *See, e.g.*, *Mentor Capital, Inc. v. Bhang Chocolate Co.*, No. 3:14-CV-3630 LB, 2014 U.S. Dist. LEXIS 162857, at *7–*8 (N.D. Cal. Nov. 19, 2014) ("The arbitration clause covers 'any dispute' between the parties. ***Any dispute***. Strictly speaking, this text does not even apply the usual limitation, containing the arbitration clause to disputes arising out of this particular contract.") (internal citations omitted) (emphasis added)); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011) (enforcing arbitration agreement providing "for arbitration of all disputes between the parties"); *Henderson v. Watson*, No. 64545, 2015 Nev. Unpub. LEXIS 525, at *1 (Nev. April 29, 2015) (enforcing an arbitration agreement "providing that all disputes would be resolved through binding arbitration.")

The United States Supreme Court has affirmed that the general presumption in favor of arbitration extends to ***all*** claims, even those created by statute.

> It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we have held enforceable arbitration agreements relating to claims arising under the Sherman Act, 15 U.S.C. §§ 1-7; § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq.; and § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2). In these cases we recognized that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."
>
> Although all statutory claims may not be appropriate for arbitration, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."

[3] Mot. to Compel Arb., Ex. A §13 (emphasis added).

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Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (citations omitted).

Further, it is well established that a Receiver may arbitrate claims sounding in either contract or tort without implicating its statutory role. For example, in *Quackenbush v. Allstate Insurance Company*, the liquidator of an insolvent insurer attempted to avoid arbitration by arguing that the McCarran-Ferguson Act preempted it from being compelled to arbitrate claims against a reinsurer. 121 F.3d 1372, 1381 (9th Cir. 1997). The Ninth Circuit held that arbitration of the liquidator's common law and tort claims "which [the liquidator] has pursued outside the statutory insolvency proceedings—will not interfere with California's insolvency scheme." *Id.*; *see also Bennet v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 973 ("Our rejection of the McCarran-Ferguson presumption in liquidation proceedings …should extend to the case before us because the liquidator is unable to explain why she is entitled to an advantage that the insolvent company whose position she now occupies did not have."); *Poizner v. Nat'l Indemn. Co.*, No. 2009 U.S. Dist. LEXIS 146894, at *6 (S.D. Cal. Jan. 6, 2009) ("As the liquidator of FPIC, the Commissioner ultimately seeks to enforce contractual provisions requiring the payment of reinsurance proceeds, yet on the other hand, he seeks to avoid enforcement of arbitration provisions contained in the same contracts. This inconsistent approach has been rejected by the Ninth Circuit, as well as other circuit courts. If a liquidator seeks to enforce an insolvent company's rights under a contract, he must also suffer that company's contractual liabilities."); *Selcke v. New England Ins. Co.*, 995 F.2d 688 (7th Cir. 1993) (finding that liquidator of insolvent insurer bound to arbitration agreement with reinsurer); *Milliman, Inc. v. Roof*, 535 F. Supp.3d 588, 603 (E.D. Ken. 2018) ("Arbitration does not deprive the Liquidator of any substantive rights, only altering the forum in which the Liquidator may pursue those rights. Mandating arbitration in this case does not alter the disposition of claims of the policy holders and does not 'invalidate, impair, or supersede' the [liquidation act] as a whole."); *Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 161 (3d Cir. 2000) ("It is true, as the Liquidator stresses, that if the District Court or an arbitrator should decide the reinsurance agreement does not cover the disputed expenses, the estate will be smaller than if that issue was resolved in the Liquidator's favor. But the mere fact that policyholders may receive less money does not impair the operation of any provision of New Jersey's Liquidation Act."); *Garamendi v. Caldwell*, No. CV-91-5912-RSWL (Eex), 1992

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U.S. Dist. LEXIS 11678, at *8–*9 (C.D. Cal. May 4, 1992) ("[T]he Plaintiff, as liquidator in the immediate case, is also empowered to bring claims which would have been allowed before taking possession of First California. Therefore, it too should be subject to the same defenses as might have been brought had First California initiated the action. The Court finds that Plaintiff is subject to the arbitration provision.").

Similarly, Nevada has also held that where a valid arbitration clause exists, a party may not avoid arbitration through artful styling of their claims. *See Phillips v. Parker*, 106 Nev. 415, 418. 794 P.2d 716, 718 (1990) ("However, despite this clear effort to avoid the agreement, [appellant's] basis for claiming injury and grounds for redress stem from rights he allegedly received pursuant to the agreement. His alleged rights therefore 'relate to' the agreement as provided in the arbitration clause."). Thus, the Receiver cannot avoid the result dictated by *Milliman* and the Definitive Decision by simply pleading different claims.

The Receiver's only argument that arbitration will "interfere" with the liquidation proceedings is her claim that to arbitrate "would be a tremendous waste of resources and the Receiver, who is pursuing claims for the victims of a fraudulent scheme that Criterion was instrumental in, will directly bear the expense of both proceedings." (Opp., 18:19–21). Notwithstanding the fact that the Receiver filed this action *outside* of the liquidation proceedings, the Nevada Supreme Court has recognized that "arbitration generally avoids the higher costs and longer time periods associated with traditional litigation."[4] Further, the Receiver thus far has not demonstrated concern over her liberal spending of Spirit's assets in pursuit of this litigation. Regardless of the cost and potential burden to both parties, "this Court cannot vitiate an otherwise valid arbitration clause simply to improve the perceived strength of Plaintiff's case." (*State ex rel. Comm'r of Ins. v. Milliman*, Order Granting Mot. to Compel Arbitration, 8:8–9, attached hereto as Exhibit B); *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218, (1985) (The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has

[4] *D.R. Horton Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004).

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been signed."); Definitive Decision at *2–*3 (Nev. Dec. 19, 2019) ("The burden of simultaneous arbitration and litigation arises where, as here, not all persons involved in a dispute are subject to arbitration, an inconvenience that may be mitigated by staying litigation while arbitration runs its course.").

B. The Receiver's Attempt to Dodge The Arbitration Clause By Arguing It Is An "Instrument of a Criminal Enterprise" Strains Credulity.

The Receiver does not dispute that the arbitration clause is valid and binding. In fact, the Complaint acknowledges that "the Criterion Agreement was a valid and enforceable contract[]"[5] and asserts a claim against Criterion for breach of it. (Compl. at ¶¶ 274 – 279.) Nevertheless, the Receiver urges the Court to disregard the arbitration clause because the Receiver, on behalf of Spirit, has concocted an argument that it – apparently as opposed to the remainder of the Agreement – is an "instrument of a criminal enterprise."[6] In other words, the Receiver appears to contend that Tom Mulligan, acting on behalf of Spirit, somehow knew that a dispute between Spirit and Criterion would arise in the future, and desiring to keep his allegedly fraudulent acts out of the spotlight, he schemed to include an arbitration clause in the Agreement which would ensure his business dealings remained private. (Opp. at 8–10). This argument by the Receiver is ludicrous.

First, it has no factual basis. In 2011, when the Spirit/Criterion Agreement was signed, Criterion was owned and operated by a third-party (not Mulligan). Indeed, the Receiver acknowledges that Criterion was initially owned and controlled by a "third party" and that Mulligan purchased Criterion in 2016—five years after the Agreement was signed. (Opp. at 6:21–26). Spirit and Criterion were separate entities that mutually agreed that all disputes between them would be subject to arbitration. Where parties "have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability and to withdraw from one party benefits for which he has bargained and to which he is entitled." *Wal-Noon Corp. v. Hill*, 119 Cal. Rptr. 646, 651 (Cal. Ct. App. 1975).[7]

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[5] Compl. at ¶ 275.

[6] Contrary to the Receiver's argument, the Complaint does not allege that "the Agreement was an instrument of Defendant Mulligan's Fraud." *See* Compl. at ¶¶ 149-53.

[7] Further, Mr. Mulligan's subjective intent has no effect on a binding contractual provision. It

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Second, the Receiver's own Complaint contradicts its argument. The Receiver's acknowledgement in the Complaint that the Spirit/Criterion Agreement is valid and its assertion of breach of contracts claims based upon it vitiates any credible argument that the arbitration clause is the product of a "criminal enterprise." The Receiver cannot, on one hand, contend the Agreement is valid and has been breached, while, on the other hand, asserting that the arbitration clause contained in the Agreement is unenforceable because it is product of a "criminal enterprise." *See, e.g.*, *Phillips v. Parker*, 106 Nev. 415, 418, 794 P.2d 716, 718 (1990) ("Parker may not rely on the agreement to prove ownership and simultaneously disavow the applicability of the arbitration clause."); *see also Truck Ins. Exch. V. Swanson*, 124 Nev. 629, 636, 189 P.3d 656, 661 (2008) (under the doctrine of estoppel, "[a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a 'direct benefit' from a contract containing an arbitration clause.'" (quoting *Inter. Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 418 (4th Cir. 2000)).

Third, the sole case on which the Receiver relies does not support her position. In *Janvey v. Alguire*, 847 F.3d 231 (5th Cir. 2017), the facts involved the demise of a business which had been operating a Ponzi scheme for the better part of a decade, resulting in its perpetrator serving time in prison and the Securities and Exchange Commission ("SEC") stepping in as a federal equity receiver. *Id.* at 236–37. The SEC receiver brought claims against employee-defendants, seeking to recover fraudulently transferred funds on behalf of a Bank, *which was not a signatory to any of the arbitration agreements*. *Id.* at 237, 241–42. Notably, in its actual opinion, as opposed to the concurring opinion on which the Receiver relies, the court refused to find that the arbitration agreement was unenforceable as the "instrument of a criminal enterprise." It stated:

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is a fundamental principle of contractual law that "[i]n the field of contracts, as generally elsewhere, '[w]e must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. 'The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.'" *Lucy v. Zehmer*, 84 S.E.2d 516, 521 (Va. 1954) (quoting *First Nat. Bank v. Roanoke Oil Co.*, 192 S.E. 764, 770 (Va. 1937). Here, two sophisticated business entities entered into a valid arbitration agreement which provides that "Binding arbitration shall be the exclusive method for resolving disputes between the parties." (Mot. to Compel Arbitration, Ex. A.) The Court must honor that agreement. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218, (1985) (The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.").

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> The Receiver makes a strong argument that if we hold that he is bound by the terms of the contracts involved in Stanford's Ponzi scheme, there would be no basis for recovering the funds that were fraudulently transferred to the scheme's net winners pursuant to their employment contracts. ***We need not reach this issue as we have already determined, on other grounds***, that the Receiver cannot be compelled to arbitrate its claims against any of the defendants.

Id. at 244. Significantly, the court rejected the very argument made by the Receiver here: "that the underlying purpose of the federal equity receivership statutes is at odds with the FAA's mandate in favor of arbitration." *Id.*at 245. Instead, the court stated "we are wary of endorsing these broad policy arguments in the absence of specific direction from the Supreme Court," and noted the "federal policy favoring arbitration." *Id.* at 245 (quoting *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (quotation marks omitted).

Indeed, *Janvey* could not be more inapposite to the facts of the instant litigation. *Janvey* involved an actual "criminal enterprise." The Stanford enterprises perpetrated a $7 billion Ponzi scheme over a ten year period, and both Stanford and his CFO were incarcerated after pleading guilty to a series of federal offenses. In comparison, the facts of this case involve an insurance company placed into receivership after paying every single claim in approximately seven years of operation, while having over $40 million in assets.[8] Unlike *Janvey*, there have been no criminal charges, let alone convictions here. Rather, the Receiver has merely manufactured a ***civil*** RICO claim from a dispute over business operations and from there she self-servingly characterized business operations as a "criminal enterprise" in an effort to dodge a valid arbitration clause. Such machinations fail to overcome the FAA's mandate of arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we have held enforceable arbitration agreements relating to claims arising under … the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO)").

[8] With the exception of the claims pending at the inception of the Receivership which the Receiver is presumably preparing to pay.

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Ultimately, the only takeaway from *Janvey* is the Receiver's desire to re-write Nevada law by citing to a *concurring* opinion[9] from another circuit, all the while minimizing the rulings in *Milliman* and the Definitive Decision, where the District Court and Nevada Supreme Court, respectively, rejected the same arguments the Receiver makes here. This tactic, coupled with the Receiver's blatant copying of arguments rejected in both *Milliman* and the Definitive Decision, demonstrates that the Receiver is proceeding in bad faith.

NRS 18.010 provides that the court may award attorneys' fees to a prevailing party "when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party ***was brought or maintained without reasonable ground*** or to harass the prevailing party." NRS 18.010(2)(b) (emphasis added). The Court is instructed to "liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations." *Id.* Here, the Receiver has refused to adhere to a valid arbitration clause,[10] squandering judicial resources through needless motion practice—and wasting the assets of Spirit and Criterion. Accordingly, the Court should award Criterion its fees associated with having to bring and defending this Motion.

III. CONCLUSION

Criterion has established the existence of a valid arbitration agreement, and the Receiver has not met her burden to establish a defense to its enforcement. *Gonski v. Second Judicial Dist. Court of State ex rel. Washoe*, 126 Nev. 551, 557, 245 P.3d 1164, 1168–69 (2010). The Nevada Supreme Court has already rejected the vast majority of arguments made by the Receiver, and the Receiver's argument that the Court should disregard the arbitration clause because it is the product of a "criminal enterprise" strains credulity and the bounds of Rule 11. Criterion's Motion should be granted. The Receiver should be compelled to arbitrate Spirit's claims against Criterion and this

[9] While the Receiver's only acknowledgment that she is not relying on *Janvey's* majority opinion is contained in a footnote; she nonetheless fails to note that each point she relies upon in the concurring opinion was soundly rejected in the majority opinion. (Opp. 8 n.6).

[10] Prior to filing this Motion, Criterion requested that the Receiver agree to arbitrate her claims. The Receiver refused, based solely on an argument already rejected by Nevada courts. *See* correspondence between Joshua M. Dickey, Esq. and Kara Hendricks, Esq., attached hereto as Exhibit D.

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action should either be stayed pending arbitration or dismissed. Moreover, due to the Receiver's refusal to honor the arbitration clause in an Agreement it concedes is valid based upon frivolous arguments, Criterion asks the Court to award it the attorneys' fees and costs it incurred in having to bring this Motion.

DATED this 11th day of June, 2020.

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By: */s/ Joshua M. Dickey*
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 11th day of June, 2020, service of the foregoing **DEFENDANT CRITERION CLAIM SOLUTIONS OF OMAHA, INC.'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL ARBITRATION** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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EXHIBIT A

OPPS

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DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP,

Plaintiff,

v.

MILLIMAN, INC., a Washington Corporation; JONATHAN L. SHREVE, an Individual; MARY VAN DER HEIJDE, an Individual; MILLENNIUM CONSULTING SERVICES, LLC, a North Carolina Corporation; LARSON & COMPANY P.C., a Utah Professional Corporation; DENNIS T. LARSON, an Individual; MARTHA HAYES, an Individual; INSUREMONKEY, INC., a Nevada Corporation; ALEX RIVLIN, an Individual; NEVADA HEALTH SOLUTIONS, LLC, a Nevada Limited Liability Company; PAMELA EGAN, an Individual; BASIL C. DIBSIE, an Individual; LINDA MATTOON, an Individual; TOM ZUMTOBEL, an Individual; BOBBETTE BOND, an Individual; KATHLEEN SILVER, an Individual; DOES I through X inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

Case No.: A-17-760558-C
Dept. No.: 25

PLAINTIFF'S OPPOSITION TO MILLIMAN'S MOTION TO COMPEL ARBITRATION

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Plaintiff, Commissioner of Insurance BARBARA D. RICHARDSON ("Commissioner"), in her capacity as Receiver of Nevada Health CO-OP ("NHC" or "CO-OP"), by and through her undersigned counsel, hereby submits this Opposition to Defendant Milliman's Motion to Compel Arbitration. This Opposition is based on the pleadings and papers on file herein, the attached memorandum of points and authorities, and any exhibits attached hereto, and any oral argument this Court should choose to entertain.

DATED this 11th day of December, 2017.

GREENBERG TRAURIG, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Milliman seeks to have this Court relinquish its exclusive jurisdiction over proceedings relating to the receivership of NHC in favor of private, confidential, arbitration. However, relinquishing this jurisdiction would be contrary to the complex statutory scheme for winding down of insurance companies as laid out in Nevada's Liquidation Act, NRS 696B, and the Receivership Court's[1] prior Permanent Injunction and Order Appointing Commissioner as Permanent Receiver of Nevada Health Co-Op (the "Receivership Order"). This statutory scheme – and the Receivership Order issued under that statutory authority – have one purpose: maximizing the value of the estate of the defunct insurance company for the benefit of policyholders and creditors. The Commissioner, having been appointed receiver, must carry out that goal. To that end, she has asserted claims against numerous entities, including Milliman, in the instant lawsuit. Wresting

[1] The Hon. Judge Kenneth Cory, Clark County Nevada Eight Judicial District, Dept. 1.

various fragments of this lawsuit into piecemeal private tribunals for confidential proceedings outside public view is not in line with the purposes of the statute. Mere months ago, another court considering Milliman's ability to compel arbitration under an identical contract provision and similar circumstances denied Milliman's motion.[2]

Further, Milliman's view is not in line with the law; Milliman's legal arguments are meritless. Milliman argues that the general policy favoring arbitration mandates arbitration here, but the Federal Arbitration Act (the "FAA") is reverse-preempted by the McCarran-Ferguson Act, which expressly leaves insurance regulation to the states. The Nevada Arbitration Act (the "NAA") conflicts with the specific statutory scheme laid out in Nevada's Liquidation Act, and as the specific takes precedence over the general under Nevada law, the exclusive jurisdiction of the district court provided for in the statute and the Receivership Order entered under the statute prevails.

Moreover, the Receiver is not a signatory to the contract containing the arbitration clause, and therefore Milliman must show that an exception applies to the rule that arbitration only binds signatories. Milliman's attempts to invoke an exception fall flat.

Finally, even if this Court were inclined to enforce the arbitration clause, under applicable law it could only do so with respect to the claims arising out of the contract at issue. Many of the claims here do not arise out of the contract. Likewise, many of the claims are not brought on behalf of NHC, but instead on behalf of its creditors or policyholders. In both of these situations, arbitration is inappropriate. As such, only a narrow subset of claims could be arbitrated. Under those circumstances it would be wasteful, duplicative, and create the possibility of inconsistent results to bifurcate the claims against Milliman. In sum, this Court should deny Milliman's motion to compel arbitration for the reasons that follow.

II. FACTUAL BACKGROUND

When NHC's predecessor, the Culinary Health Fund, considered the possibility of establishing a CO-OP under the ACA, it sought out an actuarial expert. The Culinary Health Fund entered into a contract with Milliman, dated October 20, 2011 (the "2011 Agreement"). The 2011

[2] *See* Judgment on Exceptions, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, September 19, 2017, attached hereto as **Exhibit A**. Although couched as a motion related to subject matter jurisdiction, the nature of the motion was to compel arbitration.

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Agreement contained an arbitration clause requiring arbitration of "any dispute arising out of or relating to the engagement of Milliman…" *See* Motion to Compel Arbitration, Exhibit A, at 5. As more specifically laid out in the Complaint, the Culinary Health Fund's assets were assigned to NHC.

Unfortunately, Milliman's services as a consulting actuary failed to meet applicable statutory, professional, and contractual standards. Among other issues, Milliman produced deficient forecasts and studies for loan applications, recommended inadequate insurance premium levels, provided faulty actuarial guidance to NHC management, promoted and incorporated in its assumptions accounting entries that were neither proper nor authorized without appropriate disclosure, participated in financial misreporting, and improperly calculated and certified NHC's projections and reserves to regulators.

Further, as more specifically described in the Complaint, Milliman was not merely a contractor performing outsourced tasks, but an "interactive partner" of NHC; it served as the key partner providing budget forecasts, planning, premium pricing, opinions, and judgments that were justifiably relied on by the new CO-OP. In fact, the CO-OP relied on the superior knowledge and expertise of its self-proclaimed "interactive partner" Milliman and Milliman's actuaries - Shreve and Heijde - to establish and run the enterprise.

As a result of Milliman's failures, as well as the failures of other named defendants in this action, NHC was incapable of continuing, and the Nevada Department of Insurance was forced to step in. Amy L. Parks (the then acting Nevada Commissioner of Insurance) commenced the receivership action against NHC by filing a petition to appoint herself as the receiver of NHC under NRS 696B. Thereafter, on October 14, 2015, the Receivership Court issued the Receivership Order naming the Commissioner as permanent receiver of NHC. *See* Receivership Order, attached hereto as **Exhibit B**. Cantilo & Bennett, L.L.P. was named as Special Deputy Receiver ("SDR").

Pursuant to the Court's Receivership Order and subsequent Final Order of Liquidation, the Commissioner as Receiver and the SDR are authorized to liquidate the business of NHC and wind up its ceased operations, including prosecuting suits on behalf of the thousands of injured people and entities associated with NHC's liquidation, including NHC's members, its formerly insured patients, unpaid hospitals, doctors, other creditors, and the public at large. *See generally id.*

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As relevant here, the Receivership Order provides the following:

> (1) ... The Receiver and the SDR are hereby directed to ***conserve and preserve the affairs*** of CO-OP and are vested, in addition to the powers set forth herein, with all the powers and authority expressed or implied under the provisions of chapter 696B of the Nevada Revised Statute ("NRS"), and any other applicable law. The Receiver and Special Deputy Receiver are hereby authorized to rehabilitate or liquidate CO-OP's business and affairs ***as and when they deem appropriate under the circumstances and for that purpose may do all acts necessary or appropriate for the conservation, rehabilitation, or liquidation*** of CO-OP....
>
> (2) Pursuant to NRS 696B.290, the Receiver is hereby authorized with ***exclusive title to all of CO-OP's property*** (referred to hereafter as the "Property") and ***consisting of all…[c]auses of action***, defenses, and rights to participate in legal proceedings…
>
> (3) The Receiver is hereby directed to take immediate and exclusive possession and control of the Property except as she may deem in the best interest of the Receivership Estate. In addition to vesting title to all of the Property in the Receiver or her successors, the said ***Property is hereby placed in custodia legis of this Court and the Receiver***, and the Court hereby assumes and ***exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting the Property to the exclusion of any other court or tribunal***, such exercise of sole and exclusive jurisdiction being hereby found to be central to the safety of the public and of the claimants against CO-OP.
>
> …
>
> (5) All persons, corporations, partnerships, associations and all other entities wherever located, are hereby ***enjoined and restrained from interfering in any manner*** with the Receiver's possession of the Property or her title to her right therein and from interfering in any manner with the conduct of the receivership of CO-OP.
>
> …
>
> (8) All claims against CO-OP its assets or the Property must be submitted to the Receiver as specified herein ***to the exclusion of any other method of submitting or adjudicating such claims in any forum, court, or tribunal subject to the further Order of this Court***.[3] The Receiver is hereby authorized to establish a Receivership Claims and Appeal Procedure, for all receivership claims. The Receivership Claims and Appeal Procedures shall be used to facilitate the orderly disposition or resolution of claims or controversies involving the receivership or the receivership estate.
>
> …
>
> 11) The officers, directors, trustees, partners, affiliates, brokers, agents, creditors, insureds, employees, members, and enrollees of CO-OP, and all of the persons or entities of any nature including, but not limited to, claimants,

[3] Milliman submitted a Proof of Claim on January 16, 2016.

> plaintiffs, petitioners, and any governmental agencies who have claims of any nature against CO-OP, including cross-claims, counterclaims and third party claims, are ***hereby permanently enjoined and restrained from doing or attempting to do any of the following***, except in accordance with the express instructions of the Receiver or by Order of this Court:
> …
>
> b. Commencing, bringing, maintaining or further prosecuting any action at law, suit in equity, ***arbitration***, or special or other proceeding against CO-OP or its estate, or the Receiver and her successors in office, or any person appointed pursuant to Paragraph (4) hereinabove;
>
> …
> (14) The Receiver shall have the power and is hereby authorized to:
> a. Collect all debts and monies due in claims belonging to CO-OP, wherever located, and for this purpose:(i) institute and maintain actions in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts; (ii) ***do such other acts as are necessary or expedient to marshal, collect, conserve or protect its assets or property***, including the power to sell, compound, compromise or assign debts for purposes of collection upon such terms and conditions as she deems appropriate, and the ***power to initiate and maintain actions at law or equity or any other type of action or proceeding of any nature, in this and other jurisdictions***; (iii) to pursue any creditors remedies available to enforce her claims;
> …
> h. Institute and to prosecute, in the name of CO-OP or in her own name, any and all suits and of the legal proceedings, to defend suits in which CO-OP or the Receiver is a party in this state or elsewhere, whether or not such suits are pending as of the date of this Order…
> …
> (19) No judgment, order, attachment, garnishment sale, assignment, transfer, hypothecation, lien, security interest or other legal process of any kind with respect to or affecting CO-OP or the Property shall be effective or enforceable or form the basis for a claim against CO-OP or the Property ***unless entered by the court, or unless the Court has issued its specific order***, upon good cause shown and after due notice and hearing, permitting same.
> …
> (24) The Court shall ***retain jurisdiction for all purposes necessary to effectuate and enforce this Order***.

See Receivership Order, **Exhibit B** (emphasis added).

Accordingly, on August 25, 2017, the Receiver instituted a contract and tort action on behalf of NHC and the thousands of people and entities who were injured by NHC's liquidation, asserting 63 causes of action against sixteen defendants, including Milliman and its actuaries. *See generally*

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Complaint. Pursuant to the Receivership Order, the Receiver initiated this action in the Eighth Judicial District Court, the situs of the receivership proceedings and the only courts with jurisdiction over the Property of NHC. As relevant here, the Receiver asserted numerous claims solely against Milliman, including: (1) negligence per se – Violation of NRS 681B; (2) professional malpractice; (3) intentional misrepresentation; (4) constructive fraud; (5) negligent misrepresentation; (6) breach of fiduciary duty; (7) negligence; (8) breach of contract; (9) tortious breach of the implied covenant of good faith and fair dealing; (10) breach of the implied covenant of good faith and fair dealing; (11) negligent performance of an undertaking; (12) unjust enrichment; (13) civil conspiracy; and (14) concert of action.

Additionally, the Receiver brought two additional causes of action against Milliman and all other defendants, asserting that all defendants acted jointly as part of a civil conspiracy and in concert of action, and thus, are jointly and severally liable for the damages described in the complaint.

III. LEGAL ARGUMENT

As noted above, the Eighth Judicial District Court has exclusive jurisdiction over this litigation, as the Receivership Order held that for the safety of the public and the claimants against NHC, all Property – including claims and defenses of NHC – is within the sole and exclusive jurisdiction of the Eighth Judicial District Court, to the exclusion of all other tribunals.[4] *See* **Exhibit B**, Receivership Order ("the Court hereby assumes and exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting the Property to the exclusion of any other court or tribunal, such exercise of sole and exclusive jurisdiction being hereby found to be essential to the safety of the public and of the claimants against [NHC].") This exercise of jurisdiction is consistent with Nevada law. *See* NRS 696B.190 (court may make all necessary or proper orders to carry out the purposes of the delinquency proceedings); NRS 696B.200 (providing for jurisdiction over persons obligated to the insurer due to transactions between themselves and the insurer). Although Milliman argues that this Court should compel arbitration despite this clear grant of exclusive jurisdiction, Milliman's arguments are meritless, as outlined below.

[4] The Receivership Court has declined without prejudice to coordinate this case with the Receivership Case. Jurisdiction remains appropriate within the Eighth Judicial District pursuant to NRS 696B.190. References to exclusive jurisdiction relate to the Eighth Judicial District courts unless otherwise indicated by the context.

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A. The General Policy in Favor of Arbitration Does Not Apply, and None of the Claims Should be Arbitrated.

Milliman makes much of the state and federal policies in favor of arbitration; however, the general policy in favor of arbitration does not apply here, for several reasons. First, the FAA and NAA's policy in favor of arbitration are inapplicable here, where Nevada's Liquidation Act reverse-preempts the FAA and precludes any contrary application of the NAA. Second, the presumption in favor of arbitration does not apply where the Receiver was not a signatory to the Agreement at issue, and does not simply "step into the shoes" of NHC. Because there is no applicable policy in favor of arbitration, this Court should retain the Receiver's claims against Milliman in this Court to effectuate the purposes of the Liquidation Act.

1. The General Policy in Favor of Arbitration Does Not Apply Where Nevada's Insurers Liquidation Law Reverse-Preempts the FAA and Precludes Contrary Application of the NAA.

Milliman contends that the general policy in favor of arbitration under the FAA and NAA should apply to mandate arbitration here. However, the FAA is reverse-preempted by the McCarran-Ferguson Act, and the NAA does not apply where any general policy in favor of arbitration evidenced by the NAA conflicts with the more specific statute governing insurance receivership proceedings. As such, arbitration is not required.

a. Nevada's Insurer's Liquidation Law Reverse-Preempts the FAA

The Court should refuse to compel arbitration under the FAA as the controlling Liquidation Act[5] reverse-preempts the FAA under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ("McCarran-Ferguson").

In the McCarran-Ferguson Act, Congress declared that the continued regulation by the states of the business of insurance is in the public interest. *See* 15 U.S.C. § 1011. Congress concluded that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the . . . States which relate to the regulation . . . of such business." *Id*. at §1012(a). No

[5] Nevada's Liquidation Act may be cited as the Uniform Insurers Liquidation Act. NRS 696B.280. The Act is set forth at NRS 696B.030 to 696B.180 and 696B 290 to 696B.340. *Id.*

federal law "shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the Business of insurance. . . unless such Act specifically relates to the business of insurance." *Id*. at §1012(b). Thus, McCarran-Ferguson exempts state laws regulating the business of insurance from preemption by federal statutes that do not specifically relate to the business of insurance, such as the FAA. 15 U.S.C. § 1012(b). The Supreme Court has created a three-part test to determine whether reverse-preemption of federal law through McCarran-Ferguson occurs. Specifically, a court is to examine whether: 1) the state statute was enacted for the purpose of regulating the business of insurance; 2) the federal statute involved "does not specifically relat[e] to the business of insurance"; and 3) the application of the federal statute would "invalidate, impair, or supersede" the state statute regulating insurance. *Humana Inc. v. Forsyth*, 525 U.S. 299, 307, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999). Here, each of these criteria is met, and accordingly, Nevada's Liquidation Act reverse-preempts the FAA under McCarran-Ferguson.

First, there can be no real dispute that Nevada's statute was enacted for the purpose of regulating the business of insurance. The Liquidation Act provides that "upon taking possession of the assets of an insurer, the domiciliary receiver shall immediately proceed *to conduct the business of the insurer* or to take such steps as are authorized by this chapter for the purpose of rehabilitating, liquidating, or conserving the affairs or assets of the insurer. NRS 696B.290(3); *see Ernst & Young, LLP v. Clark,* 323 S.W.3d 682 (Ky. 2010) (holding that this prong was "clearly satisfied" and noting that "[w]e can hardly overstate the degree to which the regulation of insurance permeates this controversy. The very claims which [the defendant] would take to arbitration arise directly out of Kentucky's intense interest in the regulation of worker's compensation insurance... The [liquidation act at issue] is itself the ultimate measure of the state's regulation of the insurance business: the take-over of a failing insurance company.").

Second, courts have determined that the FAA is not a federal statute that specifically relates to the business of insurance. *See, e.g. Munich Am Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998) (there is no question that the FAA does not relate specifically to the business of insurance."); *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 44 (2d Cir. 1995) ("No one disputes the fact that the FAA does not specifically relate to insurance.")

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Third, the application of the FAA would "invalidate, impair, or supersede" Nevada's Liquidation Act. Nevada's Liquidation Act incorporates the Uniform Insurers Liquidation Act ("UILA"). *See* NRS 696B.280. The general purpose of the UILA is to "centraliz[e] insurance rehabilitation and liquidation proceedings in one state's court so as to protect all creditors equally." *Frontier Ins. Serv. V. State*, 109 Nev. 231,236, 849 P.2d 328, 331 (1992), *quoting Dardar v. Ins. Guaranty Ass'n*, 556 So. 2d 272, 274 (La. Ct. App. 1990). Similarly, the UILA's overall purpose is to protect the interests of policyholders, creditors and the public. *See, e.g*. NRS 696B.210, 696B.530, 696B540; *see also* Joint Meeting of the Assembly and Senate Standing Committees on Commerce, March 25, 1977 (summarizing statements by Richard Rottman, Insurance Commissioner, and Dr. Tom White, Director of Commerce Department) (Nevada's insurance law was "designed to help the Insurance Division regulate the industry on behalf and primarily in the interests of the public of the State of Nevada"). Applying the law of the domiciliary state, as well as centralized proceedings in one state's court, advances these purposes. *See Frontier Ins. Serv*., 109 Nev. at 236, 849 P.2d at 3341; *In re Freestone Ins. Co.*, 143 A.3d 1234, 1260-61 (Del. Ch. 2016); *see also Benjamin v. Pipoly*, 2003-Ohio-5666, ¶45, 155 Ohio App. 3d 171, 184, 800 N.E.2d 50, 60 ([C]ompelling arbitration against the will of the liquidator will always interfere with the liquidator's powers and will always adversely affect the insurer's assets."). Indeed, Nevada's Liquidation Act recognizes the need for consolidation in one court via various statutory provisions. *See, e.g*., NRS 696B.190(1) (District court has original jurisdiction over delinquency proceedings under NRS 696B.010 to 696B.565, inclusive, and any court with jurisdiction may make all necessary or proper orders to carry out the purposes of those sections); NRS 696B.190(4) ("No court has jurisdiction to entertain, hear or determine any petition or complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer…or other relief …relating to such proceedings, other than in accordance with NRS 696B.010 to 696B.565, inclusive."); NRS 696B.270 ("The court may at any time during a proceeding...issue such other injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions…"). Likewise, the Court, acting within its statutory

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authority, ordered that it would exercise "sole and exclusive jurisdiction" over all Property (including lawsuits), "to the exclusion of any other court or tribunal."

The Kentucky Supreme Court held that "the third part of the *Forsyth* test is satisfied because the Federal Arbitration Act's preference for arbitration conflicts with, and impairs, the [liquidation act's] grant of broad and exclusive jurisdiction to the Franklin Circuit Court… the federal policy favoring arbitration is subordinated to the state's superior interest in having matters relating to the rehabilitation of an insurance company adjudicated in the Franklin Circuit Court." *See Clark*, 323 S.W.3d 682, 692. Likewise, Nevada's Liquidation Act relates directly to the business of insurance and thus reverse-preempts the FAA. As the Court in *Taylor v. Ernst & Young* held when interpreting that states statutes which were also based on the Uniform Insurers Liquidation Act, "when allowed, forum selection ***belongs to the liquidator*** and the liquidator ***alone***." 958 N.E.2d at 1209 (emphasis added). Accordingly, the cases cited by Milliman based on the FAA are inapposite, and the Receiver's chosen forum – this Court – has jurisdiction over the claims.

b. Nevada's Insurance Liquidation Law and the Receivership Order Precludes Contrary Application of the NAA.

Milliman also argues that the general policy in favor of arbitration implicit in the ***Nevada*** Arbitration Act ("NAA") governs. *See* Motion, at 8. However, it is well-settled that where a general statute conflicts with a specific one, the specific one governs. *See, e.g.*, *State Dep't of Taxation v. Masco Builder*, 129 Nev. Adv. Op. 83, 312 P.3d 475, 478 (2013) ("A specific statute controls over a general statute"). "Under the general/specific canon, the more specific statute will take precedence, and is construed as an exception to the more general statute, so that, when read together, the two provisions are not in conflict and can exist in harmony." *Williams v. State Dep't of Corr.*, 402 P.3d 1260, 1265 (Nev. 2017) (internal citations and quotations omitted).

Here, although the NAA provides a general policy in favor of arbitration, the Liquidation Act creates a specific and detailed statutory scheme for winding down insolvent insurance companies for the benefit of NHC's members, its formerly insured patients, unpaid hospitals, doctors, other creditors, and the public at large. *See* NRS 696B. Under this scheme, the district court has original jurisdiction over delinquency proceedings (including liquidation), and may make

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all necessary or proper orders to carry out the purposes of the Liquidation Act. *See* NRS 696B.190. Likewise, the statute provides that "[n]o court has jurisdiction to entertain, hear or determine any petition or complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer…or other relief preliminary, incidental or relating to such proceedings, other than in accordance with NRS 696B.010 to 696B.565, inclusive. *Id*. The Court may issue injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof. *See* NRS 696B.270.

Pursuant to its statutory authority, the district court entered an order – the Receivership Order – that comprehensively addresses the receivership of NHC. It states that the Court has exclusive jurisdiction. Milliman now argues that this exclusive jurisdiction is not exclusive, but subject to an arbitration clause due to the general policy in favor of arbitration that arises by virtue of the NAA. This general policy in favor of arbitration cannot trump the specific statutory scheme laid out in the Liquidation Act, and this Court should not apply the policy in favor of arbitration.

2. The Presumption in Favor of Arbitration Does Not Apply to the Non-Signatory Commissioner and Should Not be Applied Here.

Even assuming that the Court considered the policy in favor of arbitration laid out in the FAA and the NAA applicable here, the policy in favor of arbitration could not apply on these facts where the Receiver is not a signatory to the Agreement. It is fundamental that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (citation omitted); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("Arbitration under the [FAA] is a matter of consent, not coercion. . . . It goes without saying that a contract cannot bind a nonparty."); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.").

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Here, the Receiver is not a signatory to the Agreement at issue – in reality or in legal effect – and as such, this Court should not compel arbitration. Milliman makes three arguments to the contrary, none of which are persuasive. First, Milliman argues that because a receiver "steps into the shoes" of its predecessor, the Receiver here is bound. Second, Milliman argues that equitable estoppel prevents the Receiver from seeking to enforce some parts of the agreement but not others. Finally, Milliman argues that the Receivership Order does not require consolidation of all claims in this Court. None of these arguments has merit.

a. The Receiver Does Not Simply "Step Into the Shoes" of NHC.

Milliman argues that the Receiver is bound by the arbitration clause because she has simply stepped into the shoes of NHC by virtue of the receivership. There is no dispute that the Receiver is not ***actually*** a signatory to the Agreement that contains the arbitration clause. However, Milliman seeks to get around this by arguing that the Receiver is ***effectively*** a signatory to the Agreement because she has "stepped into the shoes" of NHC. This is not accurate.

Milliman cites a number of cases supposedly standing for the proposition that a receiver simply steps into the shoes of the insolvent entity and must therefore be bound as the insolvent entity would have been. However, Milliman's cases are not on point, as they do not involve receivership under a state insurance code where the FAA is reverse preempted by the McCarran-Ferguson Act or under circumstances like these. *See O'Melveny & Myers v. F.D.I.C*, 512 U.S. 79, 82 (1994) (FDIC as receiver for a savings and loan); *Anes v. Crown P'ship, Inc.*, 113 Nev. 195, 199 (1997) (private company as receiver for property owner/lessor); *First Fin. Bank v. Lane*, 130 Nev. Adv. Op. 96, 339 P.3d 1289, 1290, 1293 (2014) (assignee steps into shoes of assignor); *Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787 (6th Cir. 2009) (individual receiver for private investment company).[6]

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[6] Although Milliman's citation to *Texas Commerce Bank v. Garamendi* does involve a receiver for an insolvent insurer, in making the cited statement, the court was drawing a distinction between an insurance commissioner acting as a public official versus acting as a receiver, and was not commenting on the issue before the Court here. 28 Cal. App. 4th 1234, 1245 (Cal Ct. App. 1994) (defendant receiver was not acting as a public official, but as a receiver, when he made determination affecting payment priority).

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On the contrary, a liquidator or receiver of a defunct insurance company does not simply "stand in the shoes" of an insolvent insurer, because he or she also represents the insureds, policyholders, and creditors of that entity. *See Taylor v. Ernst & Young*, 130 Ohio St. 3d 411, 419 (Ohio 2011) ("[t]he fact that any judgments in favor of the liquidator accrue to the benefit of insureds, policyholders, and creditors means that the liquidator's unique role is one of public protection…"); *see generally Cordial v. Ernst & Young*, 199 W. Va. 119, 128 (W.Va. 1996) (insurance commissioner as receiver for an insurer "acts as the representative of interested parties, such as the defunct insurer, its policyholders, creditors, shareholders, and other affected members of the public," not simply as the defunct insurer). In *Arthur Andersen v. Superior Court*, a California court rejected the defendant's argument that an insurance liquidator acts as a typical receiver, holding:

> No authority is offered for the proposition that the Insurance Commissioner acts merely as an ordinary receiver. Ordinary receivers do not become involved until control of a business is taken away from its officers or owners due to insolvency, deadlock or other causes. Ordinary receivers do not monitor the solvency of an entity on behalf of persons, such as policyholders, who do business with the entity. The Insurance Code, by contrast, assigns such pre-conservatorship duties to the Insurance Commissioner. (See, e.g., Ins. Code, § 730, subd. (b).) In carrying out these duties, the Insurance Commissioner acts not in the interests of the equity owners of the insurance company, but rather in the interests of policyholders. Thus the Insurance Commissioner in this case is not seeking merely to prosecute claims of an entity under receivership. To the contrary, the essence of the Insurance Commissioner's claim is that AA damaged the policyholders. Thus even though a receivership may bear some points of analogy to a statutory insurance company liquidation (primarily in that each can involve the marshalling of the assets of an estate), an ordinary receivership is a different procedure for a different situation.

67 Cal. App. 4th at 1495.

This fact is important to courts when determining whether or not to enforce an arbitration clause. For example, the *Taylor* court called the defendant's attempt at compelling arbitration "a garden-variety attempt to enforce an arbitration clause against a nonsignatory" and applied a presumption ***against*** arbitration. 130 Ohio St. 3d 411, 420; *see generally Covington v. Am. Chambers Life Ins. Co*, 779 N.E.2d 833, 838 (Ohio Ct. App. 2002) (holding liquidator not bound by arbitration agreement because the dispute involved setoff and proof of claims, which impacted the

rights of creditors); *Jaime Torres Int'l Sports Mgmt., Inc. v. Kapila*, 2016 WL 8585339, at *7 (S.D. Fla. May 11, 2016) (in bankruptcy context, because the trustee stood in the shoes of both the debtor and the creditors, and the creditors were not parties to the agreement containing the arbitration clause, the claims were not subject to the arbitration clause).

Such is the case here. Nevada's statutory framework was not designed to primarily protect insurance companies, but rather their insureds and their creditors. For example, violations of statutory requirements concerning certifications of Milliman to the Department of Insurance, and other claims as alleged, damaged persons other than just NHC. The Receiver is suing not only on behalf of NHC, but "on behalf of…NHC's members, insured enrollees, and creditors." *See* Complaint, at ¶ 1. She has not simply "stepped into the shoes" of NHC. While Milliman may argue it is fair to bind ***NHC*** to an arbitration clause in an agreement that its predecessor signed, it is not fair to bind those that had no say in that agreement – e.g., creditors and policyholders – to those terms. That is especially true here, where the arbitration clause limits discovery and precludes punitive damages. *See* Motion to Compel Arbitration, Exhibit A, at ¶ 5. Because the Receiver is not merely acting on behalf of NHC here, it would be unjust to force application of the arbitration clause. Courts have held similarly with regard to those claims that do not arise out of the agreement itself. *See Taylor*, 130 Ohio St. 3d 411 (malpractice claim and fraudulent transfer claim were not subject to arbitration, as malpractice claim did not arise from engagement letter and fraudulent transfer claim sprung to life upon the issuance of the liquidation order).[7]

[7] Milliman offers *Rich v. Cantilo & Bennett* for the proposition that receivers are bound by arbitration provisions in the agreements that they assume to enforce. *See* Motion, at 11; 492 S.W.3d 755 (Tex. Ct. App. 2016). This case is not binding and is factually distinguishable; for example, the Texas receivership statute specifically states that "nothing in this chapter deprives a party of any contractual right to pursue arbitration." *See id*., at 762, citing Tex. Ins. Code § 443.005(e). However, even in *Rich*, the court acknowledged that arbitration was warranted ***only*** for those claims "accruing independently of the Receiver's appointment and arising under the…agreement."). Many of the Receiver's claims here either accrued as a result of the Receiver's appointment, or are unrelated to the Agreement. As such, a finding in Milliman's favor would not result in the entirety of the claims against Milliman being arbitrated, but would at most result in bifurcation of the case (some claims to arbitration and some claims litigated here). This is an unnecessary waste of the resources of the NHC estate, would be duplicative, and could potentially result in inconsistent findings. Likewise, *Bennett v. Liberty Nat. Fire Ins. Co*., also cited by Milliman, is inapposite where the liquidator in that case "presented no evidence that enforcing the arbitration clauses here will disrupt the orderly liquidation of the insolvent insurer." *See* 968 F.2d 969, 972 (9th Cir. 1992). As explained herein, sending some claims to arbitration will undoubtedly disrupt the orderly liquidation of NHC and be an unnecessary drain on the NHC estate, to the detriment of policyholders, creditors, and the public. Further, according to the arbitration clause, the arbitrator would not have the ability to award punitive damages and would only be able to conduct limited discovery (unlike this Court). In any event, neither of these cases is binding on this Court.

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b. Equitable Estoppel Does Not Mandate Arbitration Here.

Milliman's next argument is that the doctrine of equitable estoppel mandates arbitration. Again, the general rule is that a party ***cannot*** be bound to an arbitration provision in an agreement that it did not sign. *See, e.g. Truck Ins. Exch. v. Swanson*, 124 Nev. 629, 635, 189 P.3d 656, 659-60 (2008). However, equitable estoppel is an exception to this general rule: it provides that a non-signatory may be bound if it seeks to enforce rights under an agreement, as it cannot disavow portions of that same agreement. *See* Motion, at 11; *Truck Ins. Exch*., 124 Nev. 629, 636, 189 P.3d 656, 661.[8]

However, estoppel has its limits. Courts have found that while certain contractual provisions may be enforced against a non-signatory where the non-signatory "receives a direct benefit from the contract containing an arbitration clause," this exception ***does not apply*** to non-signatories whose interests might be related to, but do not flow from, the contractual interest of a signatory to the agreement. *See, e.g. Truck Ins. Exch.*, 124 Nev. 629, 637, 189 P.3d 656, 661-62 (finding that a party who was not a signatory to the written agreements, and who did not directly benefit from those agreements in initiating its cause of action, was not estopped from repudiating the arbitration agreement). Where any benefit to the non-signatory is indirect, even where the claims are "intertwined with the underlying contract," only the signatory is estopped from avoiding the clause. *See Javitch v. First Union Sec., Inc*., 315 F.3d 619, 629 (6th Cir. 2003), citing *Thomson-CSF v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995) ("When only an indirect benefit is sought…it is only the signatory that may be estopped from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to resolve are intertwined with the underlying contract," and vacating the lower court's decision for further consideration of this issue).

Here, this logic applies. The Receiver is not the direct beneficiary of the Agreement. The Receiver represents a number of other interests and does not herself receive a "direct benefit" from the Agreement. The Receiver did not have a business plan drafted for her that obtained federal funding. The Receiver did not have its reserves calculated and certified. Milliman did not calculate rates for the Receiver's insurance company. As such, equitable estoppel does not apply here.

[8] The *Ahlers* case cited by Milliman is inapposite. In addition to being unpublished and therefore noncitable as precedent, it involves a situation where a plaintiff ***signatory*** to a contract with an arbitration clause attempts to avoid an arbitration clause. Here, the plaintiff, the Receiver, is a ***non-signatory***.

Finally, equitable estoppel is by its nature a creature of equity: it is an exception that seeks to do what is fair. Here, it would not be fair to send the claims against Milliman to arbitration with limited discovery and limited damages further expanding litigation costs and reducing the amount remaining for distribution to claimants; the policyholders and creditors never agreed to such an arrangement.

c. Nevada's Statutory Scheme and the Receivership Court's Order Mandate that the Receiver's Decision to Litigate in the Eighth Judicial District Court be Respected.

Milliman's final argument also fails. Milliman argues that "there is no statutory provision that requires the Receiver to litigate contract and tort claims against a third-party in any particular forum or jurisdiction." *See* Motion, at 12. Milliman goes on to argue that section 14(a) of the Receivership Order permits the Receiver to litigate anywhere, and that the portion of the Receivership Order that gives exclusive jurisdiction to the Eighth Judicial District Court is not applicable. This strained reading of the Receivership Order is not tenable.

i. The Receivership Order Provides for Exclusive Jurisdiction.

The parties agree that the Receivership Order governs this action. A review of the Receivership Order reveals that, consistent with the Nevada law, the Order provides the Receiver with broad power to "conserve and preserve the affairs of" NHC, including performing "all acts necessary or appropriate for the conservation, rehabilitation, or liquidation" of NHC. In other words, the Receiver is tasked with maximizing the value of the estate of NHC for the purposes of those with claims against the estate. It gives the Receiver legal and equitable title to all NHC "Property," which explicitly includes causes of action, defenses, and rights to participate in legal proceedings. *See* **Exhibit B**, Receivership Order, at (2)(b). It also places all Property, and any claims or rights respecting the Property in the "sole and exclusive jurisdiction" of the Court, ***to the exclusion of any other court or tribunal***. *See id*., at (3). The fact that later in the order, the Receiver is "authorized" to "collect all debts and monies due and claims belonging to [NHC], and for this purpose:…to do such other acts as are necessary or expedient to marshal, collect, conserve, or protect its assets or property, including the power…to initiate and maintain actions at law or

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equity or any other type of action or proceeding of any nature, in this, and other jurisdictions…" *id*., at (14)(a), does not negate the Court's exclusive jurisdiction. By authorizing the Receiver to litigate in other jurisdictions when necessary, the Receivership Order simply provides the Receiver the ability to marshal assets when she can only do so in another court for jurisdictional reasons (such as exclusive federal jurisdiction or out-of-state proceedings).

A similar situation arose in Ohio in *Taylor*, 130 Ohio St.3d 411. There, the Ohio statute provided that all liquidation actions were to be brought in the court of common pleas of Franklin County, and other statutory provisions were in accord, but still other provisions stated that as part of the liquidator's power to collect debts, the liquidator may institute actions in other jurisdictions, litigate "elsewhere," and submit the value of a security to arbitration. *See Taylor*, 130 Ohio St.3d. 411, 415-16. The Ohio Supreme Court explained the arguably conflicting provisions by noting that "***when allowed***, ***forum selection belongs to the liquidator and the liquidator alone***." *Id*. at 416 (emphasis added). Here, the complementary provisions in the Receivership Order are similar: they simply provide that where there is ***discretion*** to choose a forum, that discretion belongs to the Receiver. Here, the Receiver has initiated litigation in the Eighth Judicial District Court, and (14) does not come into play. [9]

ii. Milliman's Arguments to the Contrary Fail.

Perhaps recognizing that the Receivership Order's statement of exclusive jurisdiction is fatal to its motion to compel arbitration, Milliman attempts to argue that it does not apply because (1) the Receiver's claims against Milliman do not affect the administration, allocation, or ownership of NHC's property or assets, and (2) Milliman is bringing no claims "against" NHC.

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[9] To the extent that Milliman argues that New York law may apply, under New York law, an insurer's agreement to arbitrate is unenforceable against a statutory liquidator, even in those actions wither the same contract terms are in dispute. *See, e.g. Corcoran v. Ardra Insurance Co.*, 567 N.E.2d 969 (N.Y. 1990) (refusing to compel arbitration in an action by the liquidator to recover reinsurance proceeds); *In re: Allcity Ins. Co.*, 66 A.D.2d 531, 535 (N.Y. App. Div. 1979) (refusing to enforce arbitration agreement in an insurance rehabilitation proceeding because "nowhere in [the New York liquidation statute] is there any indication that the Legislature intended to have rehabilitation effected in any forum but a *court* of law") (emphasis added); *Skandia Am. Reinsurance Corp. v. Schenck*, 441 F. Supp. 715, 723 n. 11 (S.D.N.Y., 1977) ("These arbitration clauses do not deprive this court of jurisdiction. Once a New York insurer is placed in liquidation, it may not be compelled to arbitrate . . . Indeed, the order of liquidation terminates the company's existence."); *Ideal Mut. Ins. Co. v. Phoenix Greek Gen. Ins. Co.*, No. 83-CV-4687, 1987 WL 28636, at *2 (S.D.N.Y. Dec. 11, 1987) ("The liquidators of insurance companies are simply not bound to arbitrate claims involving the companies."); *Washburn v. Corcoran*, 643 F. Supp. 554, 557 (S.D.N.Y. 1986).

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Milliman's first argument is nonsensical. Put simply, money damages are property of the NHC estate, as are causes of action (claims for money damages). *See* **Exhibit B**, Receivership Order, at (2)(a) and (b) ("assets" are Property; "causes of action" are Property). Whatever money damages are recovered will go directly into the NHC estate and be paid out as appropriate. Further, the Receivership Order specifically provides that no judgment, order or legal process of any kind affecting NHC or the Property shall be effective or enforceable unless entered by the Court, or unless the Court permits the same. *See id.*, at (19). Any money damages awarded by an arbitrator would certainly be Property of the NHC estate.

Second, whether or not Milliman is bringing any claims ***"against"*** NHC (emphasis in original) is irrelevant to the plain fact that the Court has sole and exclusive jurisdiction over claims or rights respecting the NHC estate Property. In any event, however, Milliman ***is*** bringing a claim against NHC: it filed a proof of claim recognizing the jurisdiction of Nevada courts. *See* Proof of Claim dated January 16, 2016, attached hereto as **Exhibit C**.

Finally, Milliman's analogy to the bankruptcy context is unavailing. Whether or not bankruptcy courts have discretion to deny arbitration of non-core pre-petition common law claims is irrelevant here. McCarran-Ferguson preempts insurance-related claims rather than the bankruptcy claims cited by Milliman, and Nevada's Liquidation Act governs these proceedings, not the Bankruptcy Code. Further, as noted above, the Receiver here is not simply acting on behalf of NHC, but on behalf of creditors and policyholders. Bankruptcy cases have not forced arbitration in that context. *See Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1154 (3d Cir. 1989) (holding bankruptcy trustee's claims under § 541 of the Bankruptcy Code were subject to arbitration only to the extent that the trustee stands in the shoes of the debtor, but the trustee is not bound to arbitrate claims brought on behalf of creditors); *Javitch v. First Union Secs., Inc.*, 315 F.3d 619, 625–27 (6th Cir. 2003) (holding that a receiver was bound to arbitrate because the court order appointing him as receiver only authorized him to assert actions on behalf of the receivership entities (and not creditors) and the actions were, in fact, on behalf of the entities rather than creditors); *see also In re EPD Inv. Co., LLC*, 821 F.3d 1146, 1152 (9th Cir. 2016) (holding that where a bankruptcy trustee asserts claims on behalf of a creditor he is not bound by the debtor's

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agreement to arbitrate); *In re Salander-O'Reilly Galleries, LLC*, 475 B.R. 9 (S.D.N.Y. 2012) ("a trustee's claims asserted as a lien creditor under §544…are not subject to a pre-petition agreement between the debtor and another party to arbitrate"); *Boedeker v. Rogers*, 736 N.E.2d 955 (Ohio Ct. App. 1999) (holding a class action by and on behalf of policyholders against the former directors and officers of an insurer was not subject to an arbitration clause in their employment agreement); *Jaime Torres Int'l Sports Mgmt., Inc. v. Kapila*, 2016 WL 8585339, at* 7 (S.D. Fla. May 11, 2016) (holding that where a trustee brings claims on behalf of the debtor and creditors, the trustee is not bound to arbitrate because the creditors were not parties to the arbitration agreement).

Even Milliman's primary case citation for this proposition did not compel arbitration; the Fifth Circuit held that where the underlying nature of the case derives exclusively from the provisions of the Bankruptcy Code, a bankruptcy court *does* have discretion to refuse to enforce an arbitration agreement if it conflicts with the purposes of the Code. *See In re Gandy*, 299 F.3d 489, 495 (5th Cir. 2002). The court in *Gandy* determined that where the "heart" of the debtor's complaint concerns bankruptcy issues, as opposed to pre-petition contract or tort issues, where the equitable and expeditious distribution of assets would be better served by litigation in one tribunal, where a proof of claim had been filed, thus invoking the powers of the bankruptcy court, and the debtor had requested a bankruptcy-specific remedy that the arbitrator may not be able to provide, the court would not order arbitration. *Id*. at 496-99. The court held that "[p]arallel proceedings would be wasteful and inefficient, and potentially could yield different results and subject the parties to dichotomous obligations." *Id*. at 499.

The same is true here. Even if there is a hard-and-fast rule that would permit arbitration in the bankruptcy context, Milliman has pointed to no such rule under Nevada law. Furthermore, unlike in a bankruptcy action, McCarran-Ferguson reverse-preempts the FAA, upon which these cases are based. However, the considerations of waste, inefficiency, and different results are very real. Further, Milliman has already subjected itself to the jurisdiction of the Court by filing a proof of claim.

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3. The AAA is Not an Adequate Forum to Resolve This Dispute.

Milliman cites *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* for the proposition that pre-dispute agreements to arbitrate are enforceable if the party may effectively vindicate its rights in the arbitral forum. *See* 473 U.S. 614 (1985). The "effective vindication" doctrine "provides courts with a means to invalidate, on public policy grounds, arbitration agreements that operate as a prospective waiver of a party's right to pursue statutory remedies." *See Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1212 (9th Cir. 2016), *quoting Am. Exp. Co. v. Italian Colors Rest.*, ––U.S. ––, 133 S.Ct. 2304, 2310, 186 L.Ed.2d 417 (2013). In other words, where rights ***cannot*** be effectively vindicated, arbitration is inappropriate.

However, the AAA would not be an adequate forum for effectively vindicating the Receiver's rights here. The arbitration clause provides for only limited discovery and no punitive damages; this Court has the power both to order full discovery and to award punitive damages if appropriate. This Court acts in the public interest, whereas an arbitrator's role is to act in the interests of the parties. Further, as some of the claims involve joint and several liability of all defendants – e.g., conspiracy and concert of action – none of whom are parties to the Agreement. These joint claims would be impossible for an arbitrator to adjudicate and the parties would risk inconsistent judgments.

IV. CONCLUSION

In light of the foregoing, NHC respectfully requests that this Court DENY Milliman's Motion to Compel Arbitration.

DATED this 11th day of December, 2017.

GREENBERG TRAURIG, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2017, a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO MILLIMAN'S MOTION TO COMPEL ARBITRATION** was filed with the Clerk of the Court using the Odyssey eFileNV Electronic Service system and served on all parties with an email address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

The date and time of the electronic proof of service is in place of the date and place of deposit in the U.S. Mail.

/s/ Shayna Noyce
An employee of Greenberg Traurig, LLP

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DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP,

Plaintiff,

v.

MILLIMAN, INC., a Washington Corporation; JONATHAN L. SHREVE, an Individual; MARY VAN DER HEIJDE, an Individual; MILLENNIUM CONSULTING SERVICES, LLC, a North Carolina Corporation; LARSON & COMPANY P.C., a Utah Professional Corporation; DENNIS T. LARSON, an Individual; MARTHA HAYES, an Individual; INSUREMONKEY, INC., a Nevada Corporation; ALEX RIVLIN, an Individual; NEVADA HEALTH SOLUTIONS, LLC, a Nevada Limited Liability Company; PAMELA EGAN, an Individual; BASIL C. DIBSIE, an Individual; LINDA MATTOON, an Individual; TOM ZUMTOBEL, an Individual; BOBBETTE BOND, an Individual; KATHLEEN SILVER, an Individual; DOES I through X inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

Case No.: A-17-760558-C
Dept. No.: 25

DECLARATION IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MILLIMAN'S MOTION TO COMPEL ARBITRATION

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I, Donald L. Prunty, declare under penalty of perjury under the laws of the United States and the State of Nevada that the facts contained herein are true to the best of my personal knowledge and belief, and if called upon, I could and would competently testify to them.

1. I am an attorney duly licensed to practice law in the State of Nevada with the law firm of Greenberg Traurig, LLP, counsel for Plaintiff Barbara D. Richardson, Commissioner of Insurance, as the Permanent Receiver for Nevada Health CO-OP ("Plaintiff").

2. Except as otherwise indicated, all facts set forth in this Declaration are based on my personal knowledge and belief, and, if called as a witness, I could and would competently testify to the facts set forth in this Declaration.

3. This Declaration is submitted in support of Plaintiff's Opposition to Defendant Milliman's Motion to Compel Arbitration.

4. Exhibit A to the Opposition is a true and correct copy of the Judgment on Exceptions, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, dated September 19, 2017.

5. Exhibit B to the Opposition is a true and correct copy of the Receivership Court's Permanent Injunction and Order Appointing Commissioner as Permanent Receiver of Nevada Health Co-Op ("Receivership Order"), dated October 14, 2015.

6. Exhibit C to the Opposition is a true and correct copy of Milliman's Proof of Claim (redacted).

7. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 11th day of December, 2017.

/s/ Donald L. Prunty, Esq.
DONALD L. PRUNTY, ESQ.

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EXHIBIT A

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

22-SEP-2017

TO: J E CULLENS JR
WALTERS PAPILLION THOMAS
12345 PERKINS RD BLDG 1
BATON ROUGE, LA 70810

JAMES J DONELON VS TERRY S SHILLING ETAL

CASE NUMBER: C651069

JUDGE: TIMOTHY E KELLEY

DIVISION: SECTION 22

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION FOR THE

AFOREMENTIONED CASE: SEE ENCLOSED COPY OF JUDGMENT SIGNED 9/19/17
REGARDING HEARING OF 8/25/17

PAULA DENNIS
JUDICIAL ASSISTANT TO JUDGE
TIMOTHY E KELLEY

NOTIFIED:

Form 4522

JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.	:	SUIT NO.: 651,069 SECTION: 22
versus	:	19TH JUDICIAL DISTRICT COURT
TERRY S. SHILLING, GEORGE G. CROMER, WARNER L. THOMAS, IV, WILLIAM A. OLIVER, CHARLES D. CALVI, PATRICK C. POWERS, CGI TECHNOLOGIES AND SOLUTIONS, INC., GROUP RESOURCES INCORPORATED, BEAM PARTNERS, LLC, MILLIMAN, INC., BUCK CONSULTANTS, LLC. AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA	:	PARISH OF EAST BATON ROUGE
	:	STATE OF LOUISIANA

STATE
SEP 15 2017
DEPUTY CLERK OF COURT

JUDGMENT

A contradictory hearing regarding the following matters:

1. **DECLINATORY EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION**, filed herein by defendant, Milliman, Inc. ("Milliman");

2. **DECLINATORY EXCEPTION OF IMPROPER VENUE**, filed herein by defendant, Buck Consultants, LLC ("Buck");

3. **PEREMPTORY EXCEPTION OF PRESCRIPTION**, filed herein by defendant, Group Resources Incorporated ("GRI"); and

4. **CGI'S MOTION FOR SUMMARY JUDGMENT**, filed herein by defendant, CGI Technologies and Solutions, Inc. ("CGI").

was held pursuant to applicable law on August 25, 2017, in Baton Rouge, Louisiana, before the Honorable Timothy Kelley; present at the hearing were:

J. E. Cullens, Jr., attorney for plaintiff, James J. Donelon, Commissioner of Insurance for the State of Louisiana, in his capacity as Rehabilitator of Louisiana Health Cooperative, Inc.

James A. Brown, attorney for defendant, Buck Consultants, LLC

W. Brett Mason, attorney for defendant, Group Resources Incorporated

V. Thomas Clark, Jr., attorney for defendant, Milliman, Inc.

Frederick Theodore Le Clercq, attorney for defendant, Beam Partners, LLC

Harry J. Philips, Jr., attorney for defendant, CGI Technologies and Solutions, Inc.

Considering the evidence and exhibits admitted at this hearing, the pleadings and memoranda filed by the parties, applicable law, the argument of counsel, and for the reasons stated in open court at the hearing of this matter:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that MILLIMAN INC.'S DECLINATORY EXCEPTION OF LACK OF SUBJECT MATTER JURISDICTION is **DENIED.**

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that BUCK CONSULTANTS, LLC'S DECLINATORY EXCEPTION OF IMPROPER VENUE is **DENIED.**

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that GROUP RESOURCES INCORPORATED'S PEREMPTORY EXCEPTION OF PRESCRIPTION is **DENIED.**

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that CGI TECHNOLOGIES AND SOLUTIONS, INC.'S MOTION FOR SUMMARY JUDGMENT is **DENIED, WITHOUT PREJUDICE.**

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that this Court's previous order staying general discovery regarding the merits of this litigation dated April 26, 2017, is hereby **LIFTED**; furthermore, it is contemplated that all parties will timely confer and propose a **CASE SCHEDULING ORDER** it is contemplated that all parties will timely confer and propose and acceptable case scheduling order to be adopted by this Court.

IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED that each defendant shall have 30 days from the date of the mailing of the signed judgment to file a notice of intent to seek supervisory writs.

SIGNED this 19 day of September, 2017, at Baton Rouge, Louisiana.

HON. JUDGE TIMOTHY KELLEY, 19th JDC

PLEASE PROVIDE NOTICE OF JUDGMENT
PURSUANT TO LSA–CCP ART. 1913

FILED
EAST BATON ROUGE PARISH, LA
2017 SEP 15 PM 12:35
DEPUTY CLERK OF COURT

I HEREBY CERTIFY THAT ON THIS DAY A COPY OF THE WRITTEN REASONS FOR JUDGMENT / JUDGMENT / ORDER / WAS MAILED BY ME, WITH SUFFICIENT POSTAGE AFFIXED TO: Robert Bickford, V. E. Cullens, Matthew Farley, James Brom, V. Thomas Clark, Jr., Henry Olinde, Jr., Robert David, Jr.
DONE AND SIGNED ON 9-25-17
DEPUTY CLERK OF COURT
W. Britt Mann, Robert Barton, Frederic Le Clercq, Thomas McEachin, Richard Boudreaux, Ryan French, Justin Marocco, Mirais Hobden, Alexander Breckinridge V

RULE 9.5 CERTIFICATION

Pursuant to Uniform Local Rule 9.5, I certify that I first circulated this proposed JUDGMENT to counsel for all parties via email on August 30, 2017, and then circulated a revised version on September 7, 2017, and that:

X No opposition was received; or

__ The following opposition was received:

I have allowed at least five (5) working days before presentation to the court.

Certified this 15th day of September, 2017.

J. E. Cullens, Jr.

Respectfully submitted,

J. E. Cullens, Jr., T.A., La. Bar #23011
Edward J. Walters, Jr., La. Bar #13214
Jennifer Wise Moroux, La. Bar #31368
WALTERS, PAPILLION,
THOMAS, CULLENS, LLC
12345 Perkins Road, Bldg One
Baton Rouge, LA 70810
Phone: (225) 236-3636
Facsimile: (225) 236-3650
Email: cullens@lawbr.net

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished via U.S. Mail, postage prepaid, and via e-mail, to all counsel of record as follows:

I hereby certify that a true copy of the foregoing has been furnished via via e-mail to all counsel of record as follows:

Thomas McEachin
Schonekas, Evans, McGoey & McEachin, LLC
909 Poydras Street, Suite 1600
New Orleans, Louisiana 70112

Robert J. David, Jr.
Juneau David, APLC
Post Office Drawer 51268
Lafayette, LA 70505

Robert B. Bieck, Jr.
Jones Walker
201 St. Charles Avenue, 49th Floor
New Orleans, LA 70170

Henry D.H. Olinde, Jr.
Olinde & Mercer, LLC
8562 Jefferson Highway, Suite B
Baton Rouge, LA 70809

Harry (Skip) J. Philips, Jr.
Taylor Porter
Post Office Box 2471
Baton Rouge, LA 70821

W. Brett Mason
Stone Pigman
301 Main Street, #1150
Baton Rouge, LA 70825
225-490-5812

Frederic Theodore 'Ted' Le Clercq
Deutsch Kerrigan, LLP
755 Magazine Street
New Orleans, LA 70130

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James A. Brown
Liskow & Lewis
One Shell Square
701 Poydras Street, #5000
New Orleans, LA 70139

Matt J. Farley
Krebs Farley
400 Poydras Street, #2500
New Orleans, LA 70130

Baton Rouge, Louisiana this 15th day of SEPTEMBER, 2017.

J. E. Cullens, Jr.

FILED
EAST BATON ROUGE PARISH, LA
2017 SEP 15 PM 12:34
DEPUTY CLERK OF COURT

EXHIBIT B

Electronically Filed
10/14/2015 03:52:52 PM

CLERK OF THE COURT

ORD
ADAM PAUL LAXALT
Attorney General
JOANNA N. GRIGORIEV
Senior Deputy Attorney General
Nevada Bar No. 5649
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101
P: (702) 486-3101
Email: jgrigoriev@ag.nv.gov
Attorney for the Division of Insurance

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, IN HER OFFICIAL CAPACITY AS STATUTORY RECEIVER FOR DELINQUENT DOMESTIC INSURER, Plaintiff, vs. NEVADA HEALTH CO-OP, Defendant.	Case No. A-15-725244-C Dept. No. 1

PERMANENT INJUNCTION AND ORDER APPOINTING COMMISSIONER AS PERMANENT RECEIVER OF NEVADA HEALTH CO-OP

A Petition For Appointment Of Commissioner as Receiver and Other Permanent Relief; Request for Injunction Pursuant to NRS 696B.270(1) by the Commissioner of Insurance, Amy L. Parks, in her official capacity as Temporary Receiver of NEVADA HEALTH CO-OP ("CO-OP") was filed with the consent of CO-OP's board of directors on September 25, 2015; a Non Opposition to Petition For Appointment Of Commissioner as Receiver and Other Permanent Relief and a waiver of the opportunity to appear at a show cause hearing was filed by CO-OP through its counsel on September 29, 2015; an Order Appointing the Acting Commissioner of

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Insurance, Amy L. Parks, as Temporary Receiver Pending Further Orders of the Court, Granting Temporary Injunctive Relief Pursuant to NRS 696B.270, and authorizing the Temporary Receiver to appoint a special deputy receiver was filed on October 1, 2015; the Commissioner, as Temporary Receiver, appointed the firm of Cantilo & Bennett, L.L.P. ("C&B"), as Special Deputy Receiver ("SDR") of CO-OP on October 1, 2015 .

The Court having reviewed the points and authorities submitted by counsel and exhibits in support thereof, and for good cause,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) Acting Commissioner of Insurance, Amy L. Parks, is hereby appointed Permanent Receiver ("Receiver"), and C&B is appointed Permanent SDR of CO-OP. The SDR shall have all the responsibilities, rights, powers, and authority of the Receiver subject to supervision and removal by the Receiver and the further Orders of this Court. The Receiver and the SDR are hereby directed to conserve and preserve the affairs of CO-OP and are vested, in addition to the powers set forth herein, with all the powers and authority expressed or implied under the provisions of chapter 696B of the Nevada Revised Statute ("NRS"), and any other applicable law. The Receiver and Special Deputy Receiver are hereby authorized to rehabilitate or liquidate CO-OP's business and affairs as and when they deem appropriate under the circumstances and for that purpose may do all acts necessary or appropriate for the conservation, rehabilitation, or liquidation of CO-OP. Whenever this Order refers to the Receiver, it will equally apply to the Special Deputy Receiver.

(2) Pursuant to NRS 696B.290, the Receiver is hereby vested with exclusive title both legal and equitable to all of CO-OP's property (referred to hereafter as the "Property") and consisting of all:

a. Assets, books, records, property, real and personal, including all property or ownership rights, choate or inchoate, whether legal or equitable of any kind or nature;

b. Causes of action, defenses, and rights to participate in legal proceedings;

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c. Letters of credit, contingent rights, stocks, bonds, cash, cash equivalents, contract rights, reinsurance contracts and reinsurance recoverables, in force insurance contracts and business, deeds, mortgages, leases, book entry deposits, bank deposits, certificates of deposit, evidences of indebtedness, bank accounts, securities of any kind or nature, both tangible and intangible, including but without being limited to any special, statutory or other deposits or accounts made by or for CO-OP with any officer or agency of any state government or the federal government or with any banks, savings and loan associations, or other depositories;

d. All of such rights and property of CO-OP described herein now known or which may be discovered hereafter, wherever the same may be located and in whatever name or capacity they may be held.

(3) The Receiver is hereby directed to take immediate and exclusive possession and control of the Property except as she may deem in the best interest of the Receivership Estate. In addition to vesting title to all of the Property in the Receiver or her successors, the said Property is hereby placed in the *custodia legis* of this Court and the Receiver, and the Court hereby assumes and exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting the Property to the exclusion of any other court or tribunal, such exercise of sole and exclusive jurisdiction being hereby found to be essential to the safety of the public and of the claimants against CO-OP.

(4) The Receiver is authorized to employ and to fix the compensation of such deputies, counsel, employees, accountants, actuaries, investment counselors, asset managers, consultants, assistants and other personnel as she considers necessary. Any Special Deputy Receiver appointed by the Receiver pursuant to this Order shall exercise all of the authority of the Receiver pursuant hereto subject only to oversight by the Receiver and the Court. All compensation and expenses of such persons and of taking possession of CO-OP and conducting this proceeding shall be paid out of the funds and assets of CO-OP in accordance with NRS 696B.290.

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(5) All persons, corporations, partnerships, associations and all other entities wherever located, are hereby enjoined and restrained from interfering in any manner with the Receiver's possession of the Property or her title to or right therein and from interfering in any manner with the conduct of the receivership of CO-OP. Said persons, corporations, partnerships, associations and all other entities are hereby enjoined and restrained from wasting, transferring, selling, disbursing, disposing of, or assigning the Property and from attempting to do so except as provided herein.

(6) All providers of health care services, including but not limited to physicians hospitals, other licensed medical practitioners, patient care facilities, diagnostic and therapeutic facilities, pharmaceutical companies or managers, and any other entity which has provided or agreed to provide health care services to members or enrollees of CO-OP, directly or indirectly, pursuant to any contract, agreement or arrangement to do so directly with CO-OP or with any other organization that had entered into a contract, agreement, or arrangement for that purpose with CO-OP are hereby permanently enjoined and restrained from:

a. Seeking payment from any such member or enrollee for amount owed by CO-OP;

b. Interrupting or discontinuing the delivery of health care services to such members or enrollees during the period for which they have paid (or because of a grace period have the right to pay) the required premium to CO-OP except as authorized by the Receiver or as expressly provided in any such contract or agreement with CO-OP that does not violate applicable law;

c. Seeking additional or unauthorized payment from such CO-OP members or enrollees for health care services required to be provided by such agreements, arrangements, or contracts beyond the payments authorized by the agreements, arrangements, or contracts to be collected from such members or enrollees; and

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d. Interfering in any manner with the efforts of the Receiver to assure that CO-OP's members and enrollees in good standing receive the health care services to which they are contractually entitled.

(7) All landlords, vendors and parties to executory contracts with CO-OP are hereby enjoined and restrained from discontinuing services to, or disturbing the possession of premises and leaseholds, including of equipment and other personal property, by CO-OP or the Receiver on account of amounts owed prior to October 1, 2015, or as a result of the institution of this proceeding and the causes therefor, provided that CO-OP or the Receiver pays within a reasonable time for premises, goods, or services delivered or provided by such persons on and after October 1, 2015, at the request of the Receiver and provided further that all such persons shall have claims against the estate of CO-OP for all amounts owed by CO-OP prior to October 1, 2015.

(8) All claims against CO-OP its assets or the Property must be submitted to the Receiver as specified herein to the exclusion of any other method of submitting or adjudicating such claims in any forum, court, or tribunal subject to the further Order of this Court. The Receiver is hereby authorized to establish a Receivership Claims and Appeal Procedure, for all receivership claims. The Receivership Claims and Appeal Procedures shall be used to facilitate the orderly disposition or resolution of claims or controversies involving the receivership or the receivership estate.

(9) The Receiver may change to her own name the name of any of CO-OP' accounts, funds or other property or assets, held with any bank, savings and loan association, other financial institution, or any other person, wherever located, and may withdraw such funds, accounts and other assets from such institutions or take any lesser action necessary for the proper conduct of the receivership.

(10) All secured creditors or parties, pledge holders, lien holders, collateral holders or other persons claiming secured, priority or preferred interest in any property or assets of CO-OP, including any governmental entity, are hereby enjoined from taking any steps whatsoever

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to transfer, sell, encumber, attach, dispose of or exercise purported rights in or against the Property.

(11) The officers, directors, trustees, partners, affiliates, brokers, agents, creditors, insureds, employees, members, and enrollees of CO-OP, and all other persons or entities of any nature including, but not limited to, claimants, plaintiffs, petitioners, and any governmental agencies who have claims of any nature against CO-OP, including cross-claims, counterclaims and third party claims, are hereby permanently enjoined and restrained from doing or attempting to do any of the following, except in accordance with the express instructions of the Receiver or by Order of this Court:

a. Conducting any portion or phase of the business of CO-OP;

b. Commencing, bringing, maintaining or further prosecuting any action at law, suit in equity, arbitration, or special or other proceeding against CO-OP or its estate, or the Receiver and her successors in office, or any person appointed pursuant to Paragraph (4) hereinabove;

c. Making or executing any levy upon, selling, hypothecating, mortgaging, wasting, conveying, dissipating, or asserting control or dominion over the Property or the estate of CO-OP;

d. Seeking or obtaining any preferences, judgments, foreclosures, attachments, levies, or liens of any kind against the Property;

e. Interfering in any way with these proceedings or with the Receiver, any successor in office, or any person appointed pursuant to Paragraph (4) hereinabove in their acquisition of possession of, the exercise of dominion or control over, or their title to the Property, or in the discharge of their duties as Receiver thereof; or

f. Commencing, maintaining or further prosecuting any direct or indirect actions, arbitrations, or other proceedings against any insurer of CO-OP for proceeds of any policy issued to CO-OP.

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(12) However, notwithstanding any other provision of this Order, the commencement of conservatorship, receivership, or liquidation proceedings against CO-OP in another state by an official lawfully authorized by such state to commence such proceeding shall not constitute a violation of this Order.

(13) No bank, savings and loan association or other financial institution shall, without first obtaining permission of the Receiver, exercise any form of set-off, alleged set-off, lien, or other form of self-help whatsoever or refuse to transfer the Property to the Receiver's control.

(14) The Receiver shall have the power and is hereby authorized to:

a. Collect all debts and monies due and claims belonging to CO-OP, wherever located, and for this purpose: (i) to institute and maintain actions in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts; (ii) to do such other acts as are necessary or expedient to marshal, collect, conserve or protect its assets or property, including the power to sell, compound, compromise or assign debts for purposes of collection upon such terms and conditions as she deems appropriate, and the power to initiate and maintain actions at law or equity or any other type of action or proceeding of any nature, in this and other jurisdictions; (iii) to pursue any creditor's remedies available to enforce her claims;

b. Conduct public and private sales of the assets and property of CO-OP, including any real property;

c. Acquire, invest, deposit, hypothecate, encumber, lease, improve, sell, transfer, abandon, or otherwise dispose of or deal with any asset or property of CO-OP, and to sell, reinvest, trade or otherwise dispose of any securities or bonds presently held by, or belonging to, CO-OP upon such terms and conditions as she deems to be fair and reasonable, irrespective of the value at which such property was last carried on the books of CO-OP. She shall also have the power to execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary or proper to

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effectuate any sale of property or other transaction in connection with the receivership;

d. Borrow money on the security of CO-OP' assets, with or without security, and to execute and deliver all documents necessary to that transaction for the purpose of facilitating the receivership;

e. Enter into such contracts as are necessary to carry out this Order, and to affirm or disavow as more fully provided in subparagraph p., below, any contracts to which CO-OP is a party;

f. Designate, from time to time, individuals to act as her representatives with respect to affairs of CO-OP for all purposes, including, but not limited to, signing checks and other documents required to effectuate the performance of the powers of the Receiver.

g. Establish employment policies for CO-OP employees, including retention, severance and termination policies as she deems necessary to effectuate the provisions of this Order;

h. Institute and to prosecute, in the name of CO-OP or in her own name, any and all suits and other legal proceedings, to defend suits in which CO-OP or the Receiver is a party in this state or elsewhere, whether or not such suits are pending as of the date of this Order, to abandon the prosecution or defense of such suits, legal proceedings and claims which she deems inappropriate, to pursue further and to compromise suits, legal proceedings or claims on such terms and conditions as she deems appropriate;

i. Prosecute any action which may exist on behalf of the members, enrollees, insureds or creditors, of CO-OP against any officer or director of CO-OP, or any other person;

j. Remove any or all records and other property of CO-OP to the offices of the Receiver or to such other place as may be convenient for the purposes of the efficient and orderly execution of the receivership; and to dispose of or

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destroy, in the usual and ordinary course, such of those records and property as the Receiver may deem or determine to be unnecessary for the receivership;

k. File any necessary documents for recording in the office of any recorder of deeds or record office in this County or wherever the Property of CO-OP is located;

l. Intervene in any proceeding wherever instituted that might lead to the appointment of a conservator, receiver or trustee of CO-OP or its subsidiaries, and to act as the receiver or trustee whenever the appointment is offered;

m. Enter into agreements with any ancillary receiver of any other state as she may deem to be necessary or appropriate;

n. Perform such further and additional acts as she may deem necessary or appropriate for the accomplishment of or in aid of the purpose of the receivership, it being the intention of this Order that the aforestated enumeration of powers shall not be construed as a limitation upon the Receiver;

o. Terminate and disavow the authority previously granted CO-OP' agents, brokers, or marketing representatives to represent CO-OP in any respect, including the underlying agreements, and any continuing payment obligations created therein, as of the receivership date, with reasonable notice to be provided and agent compensation accrued prior to any such termination or disavowal to be deemed a general creditor expense of the receivership; and

p. Affirm, reject, or disavow part or all of any leases or executory contracts to which CO-OP is a party. The Receiver is authorized to reject, or disavow any leases or executory contracts at such times as she deems appropriate under the circumstances, provided that payment due for any goods or services received after appointment of the Receiver, with her consent, will be

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deemed to be an administrative expense of the receivership, and provided further that other unsecured amounts properly due under the disavowed contract, and unpaid solely because of such disavowal, will give rise to a general unsecured creditor claim in the Receivership proceeding.

(15) CO-OP, its officers, directors, partners, agents, brokers and employees, any person acting in concert with them, and all other persons, having any property or records belonging to CO-OP, including data processing information and records of any kind such as, by way of example only, source documents and electronically stored information, are hereby ordered and directed to surrender custody and to assign, transfer and deliver to the Receiver all of such property in whatever name the same may be held, and any persons, firms or corporations having any books, papers or records relating to the business of CO-OP shall preserve the same and submit these to the Receiver for examination at all reasonable times. Any property, books, or records asserted to be simultaneously the property of CO-OP and other parties, or alleged to be necessary to the conduct of the business of other parties though belonging in part or entirely to CO-OP, shall nonetheless be delivered immediately to the Receiver who shall make reasonable arrangements for copies or access for such other parties without compromising the interests of the Receiver or CO-OP.

(16) Nothing in this Order may be construed as to prevent the Nevada Life and Health Insurance Guaranty Association and the Nevada Insurance Guaranty Association from exercising their respective powers under Title 57 of the NRS.

(17) In addition to that provided by statute or by CO-OP's policies or contracts of insurance, and to the extent not in conflict with the other provisions of this Paragraph (17), the Receiver may, at such time she deems appropriate, without prior notice, subject to the following provisions, impose such full or partial moratoria or suspension upon disbursements owed by CO-OP, provided that

a. Any such suspension or moratorium shall apply in the same manner or to the same extent to all persons similarly situated. However, the Receiver may, in

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her sole discretion, impose the same upon only certain types, but not all, of the payments due under any particular type of contract; and

b. Notwithstanding any other provision of this Order, the Receiver may implement a procedure for the exemption from any such moratorium or suspension, those hardship claims, as she may define them, that she, in her sole discretion, deems proper under the circumstances.

c. The Receiver shall only impose such moratorium or suspension when the same is not specifically provided for by contract or statute:

i. As part, or in anticipation, of a plan for the partial or complete rehabilitation of CO-OP;

ii. When necessary to assure the delivery of health care services to covered persons pending the replacement of underlying coverage; or

iii. When necessary to determine whether partial or complete rehabilitation is reasonably feasible.

d. Under no circumstances shall the Receiver be liable to any person or entity for her good faith decision to impose, or to refrain from imposing, such moratorium or suspension.

e. Notice of such moratorium or suspension, which may be by publication, shall be provided to the holders of all policies or contracts affected thereby.

(18) It is hereby ordered that all evidences of coverage, insurance policies and contracts of insurance of CO-OP are hereby terminated effective on December 31, 2015, unless the Receiver determines that any such contracts should be cancelled as of an earlier date.

(19) No judgment, order, attachment, garnishment sale, assignment, transfer, hypothecation, lien, security interest or other legal process of any kind with respect to or affecting CO-OP or the Property shall be effective or enforceable or form the basis for a claim against CO-OP or the Property unless entered by the Court, or unless the Court has issued its specific order, upon good cause shown and after due notice and hearing, permitting same.

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(20) All costs, expenses, fees or any other charges of the Receivership, including but not limited to fees and expenses of accountants, peace officers, actuaries, investment counselors, asset managers, attorneys, special deputies, and other assistants employed by the Receiver, the giving of the Notice required herein, and other expenses incurred in connection herewith shall be paid from the assets of CO-OP. Provided, further, that the Receiver may, in her sole discretion, require third parties, if any, who propose rehabilitation plans with respect to CO-OP to reimburse the estate of CO-OP for the expenses, consulting or attorney's fees and other costs of evaluating and/or implementing any such plan.

(21) The Commissioner is part of the government of the State of Nevada, acting in her official capacity, and as such, should be exempt from any bond requirements that might otherwise be required when seeking the relief sought in this proceeding. Accordingly, it is Ordered that no bond shall be required from the Commissioner as Receiver.

(22) If any provision of this Order or the application thereof is for any reason held to be invalid, the remainder of this Order and the application thereof to other persons or circumstances shall not be affected thereby.

(23) The Receiver may at any time make further application for such further and different relief as she sees fit.

(24) The Court shall retain jurisdiction for all purposes necessary to effectuate and enforce this Order.

(25) The Receiver is authorized to deliver to any person or entity a copy or certified copy of this Order, or of any subsequent order of the Court, such copy, when so delivered, being deemed sufficient notice to such person or entity of the terms of such Order. But nothing herein shall relieve from liability, nor exempt from punishment by contempt, any person or entity that, having actual notice of the terms of any such Order, shall be found to have violated the same.

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(26) Notice of any filings in this proceeding shall additionally be provided by electronic delivery to the email addresses provided by the Special Deputy Receiver and counsel for the Receiver.

IT IS SO ORDERED

DATED this 14 day of October, 2015.

DISTRICT COURT JUDGE

Respectfully submitted by:

ADAM PAUL LAXALT
Attorney General

By: _____
JOANNA N. GRIGORIEV
Senior Deputy Attorney General
Attorneys for the Division of Insurance

Office of the Attorney General
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101

NOTICE TO BE PROVIDED TO:

Cantilo & Bennett, L.L.P.
Special Deputy Receiver
Nevada Health CO-OP
3900 Meadows Lane
Las Vegas, NV 89107

Copy to:
11401 Century Oaks Terrace
Suite 300
Austin, TX 78758

EXHIBIT C

Nevada Health CO-OP

JAN 16 2016

Received

PROOF OF CLAIM FORM

For Internal Office Use Only: POC # _____, Claim Type: _____, Date Received: By _____

Claimant Name & Address	Policy Information (if applicable)
Name	Insured Name
Date of Birth SSN	Insured DOB
Company Name and Tax ID (if applicable) Milliman, Inc. [redacted]	Member ID
Street Address 1400 Wewatta St. Ste 300	Coverage Date(s)
City/State/Zip Denver CO 80202	Alternate Contact Name & Telephone No.
Phone 303 299 9400 E-Mail heather.irias@milliman.com	
If Claimant is represented by an attorney, please complete this section and attach copy of Power of Attorney	
Name of Attorney & Attorney's Firm	Bar Card No.
Street Address	Tax ID No.
City/State/Zip	Ph.
E-mail Address	Fax

All claims submitted to the Special Deputy Receiver ("SDR") shall set forth in reasonable detail: (1) the amount of each of the claims; (2) the facts and basis upon which each of the claims and claim amounts is based; and (3) the priority level for the claims being submitted to the SDR (i.e. "priorities" mean a secured creditor claim, a policyholder claim, an unsecured general creditor claim, etc.). All such claims must be verified by the claimant's affidavit, or someone authorized to act on behalf of the claimant and having knowledge of the facts (and must include adequate documentation). All claims and documentation supportive of each of the claims should be submitted to the SDR. The SDR reserves the right to request additional documentation, as needed, to make a determination of your claim. Health Care Providers ("Providers"), such as physicians or hospitals, are exempt from using this POC form for existing claims that they have already filed with NHC or new claims that they may file. Providers should not submit the POC form for their claims, but should closely review the POC Instructions for detailed guidance regarding deadlines and submission requirements for Provider claims. See the pages that follow for the POC Instructions to use when completing this POC form and for information about Provider claims.

Explanation of Claim: **(Attach additional pages if necessary)**

Milliman served as the COOP's actuaries. The work in question included a lot of analysis requested by the Nevada DOI.

JERI ALLSUP
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20034004450
MY COMMISSION EXPIRES NOVEMBER 29, 2019

State of Colorado §
§
County of Denver §

Unless otherwise expressly noted in this Proof of Claim Form, I alone am entitled to file this Proof of Claim Form, no others have an interest in the claims being submitted through this Proof of Claim Form, no payments have been made on the claim or claims herein submitted, no third party is liable on this debt, the sums claimed in this Proof of Claim Form are justly owing, and there is no set-off or other defense to the payment of this claim. I declare, under penalty of perjury, that all of the statements made in this Proof of Claim Form and all the documents attached to this form are true, complete, and correct.

Jill Van Den Bos
Signature of Claimant or Authorized Agent

Jill Van Den Bos
Printed Name

Sworn to and subscribed before me this 6 day of December 2016

Jeri Allsup
Notary Public Signature

NOTE: ATTACH DOCUMENTATION TO SUPPORT YOUR CLAIM.

Milliman

1400 Wewatta Street, Suite 300
Denver, CO 80202-5549
Tel+1 303 299 9400 Fax+1 303 299 9018
milliman.com

September 11, 2015

Basil Dibsie
Chief Financial Officer
Nevada Health CO-OP
3900 Meadows Lane, Suite 214
Las Vegas, NV 89107

Invoice No. 0154NVH 09 0915

Nevada Health CO-OP August 1-31, 2015 Consulting Services Details				
Project	**Staff**	**Hours**	**Rate**	**Charges**
2015 Operational Support	Mary van der Heijde	26.25	510.00	13,387.50
	Jill Van Den Bos	41.75	475.00	19,831.25
	Daniel Perlman	2.50	365.00	912.50
	TJ Gray	56.75	360.00	20,430.00
	Colleen Norris	18.00	330.00	5,940.00
	Jordan Paulus	0.25	315.00	78.75
	Katie Matthews	40.50	205.00	8,302.50
	Amy Baldor	0.75	180.00	135.00
	Charles Kaminer	1.00	160.00	160.00
Subtotal				$ 69,177.50
2016 Rate Filing Objection Responses	Jill Van Den Bos	2.00	475.00	950.00
	Katie Matthews	3.75	205.00	768.75
	Charles Kaminer	5.25	160.00	840.00
Subtotal				$ 2,558.75
Individual and Small Group Pricing	Jill Van Den Bos	4.75	475.00	2,256.25
	Ksenia Whittal	4.75	375.00	1,781.25
	TJ Gray	12.75	360.00	4,590.00
	Scott Katterman	1.25	325.00	406.25
	Jorge Torres	13.50	260.00	3,510.00
	Blaine Miller	7.25	220.00	1,595.00
	Jason McEwen	8.50	215.00	1,827.50
	Katie Matthews	11.50	205.00	2,357.50
	Charles Kaminer	1.00	160.00	160.00
Subtotal				$ 18,483.75
IBNR and Reserving	Jill Van Den Bos	1.00	475.00	475.00
Subtotal				$ 475.00
Large Group	Jill Van Den Bos	0.75	475.00	356.25
	TJ Gray	0.50	360.00	180.00
	Jordan Paulus	0.25	315.00	78.75
	Katie Matthews	1.50	205.00	307.50
	Charles Kaminer	2.25	160.00	360.00
Subtotal				$ 1,282.50
Total Due				$ 91,977.50

Milliman

Task Details for this invoice:

August

Assistance with with PartnerRe discussions, including:
Excess of loss analysis (delivered August 6th)
2016 Scenario testing (delivered August 7th)
PartnerRE excess of loss proposal (delivered August 13th)

PDR work, including:
PDR analysis (delivered August 5th)

IBNR work, including:
Estimated IBNR and RC projections for internal planning (delivered August 21st)
Projections in response to DOI request (delivered August 27th)
Projections in response to DOI request (delivered August 28th)

2016 Rate Refiling
2016 rate refiling reflecting 20% rate increase (delivered August 13th)

Minimum Value Work
Minimum value testing (delivered August 5th)

Planned September Tasks
Assistance with plan wind-down, CO-OP, DOI, and CMS requests.

Estimated September Charges: $25,000 - $40,000

Terms: Due within 30 days of invoice date.
Please make checks payable to: Milliman
Please contact Heather Irias at (303) 672-9085 with any questions.

Milliman

1400 Wewatta Street, Suite 300
Denver, CO 80202-5549
Tel+1 303 299 9400 Fax+1 303 299 9018
milliman.com

October 7, 2015

Basil Dibsie
Chief Financial Officer
Nevada Health CO-OP
3900 Meadows Lane, Suite 214
Las Vegas, NV 89107

Invoice No. 0154NVH 10 1015

Nevada Health CO-OP September 1-30, 2015 Consulting Services Details				
Project	**Staff**	**Hours**	**Rate**	**Charges**
2015 Operational Support	Tom Snook	1.00	550.00	550.00
	Mary van der Heijde	9.00	510.00	4,590.00
	Jill Van Den Bos	16.75	475.00	7,956.25
	Ksenia Whittal	1.75	375.00	656.25
	Colleen Norris	57.50	330.00	18,975.00
	Katie Matthews	19.75	205.00	4,048.75
	Ally Weaver	0.25	180.00	45.00
2016 ACA Model Research Fee				12,500.00
Total Due				$ 49,321.25

Task Details for this invoice:

September

IBNR, PDR, and Claims analysis support.
Various discussions with the DOI and CMS.

Planned October Tasks

Ad hoc support, as needed.

Estimated October Charges: $1,000 - $4,000

Terms: Due within 30 days of invoice date.
Please make checks payable to: Milliman
Please contact Heather Irias at (303) 672-9085 with any questions.

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November 10, 2015

Basil Dibsie
Chief Financial Officer
Nevada Health CO-OP
3900 Meadows Lane, Suite 214
Las Vegas, NV 89107

Invoice No. 0154NVH 11 1115

Nevada Health CO-OP October 1-31, 2015 Consulting Services Details				
Project	**Staff**	**Hours**	**Rate**	**Charges**
2015 Operational Support	Jill Van Den Bos	0.25	475.00	118.75
	Colleen Norris	0.50	330.00	165.00
	Abigail Caldwell	0.50	275.00	137.50
	Katie Matthews	0.25	205.00	51.25
Total Due				$ 472.50

Task Details for this invoice:

October

Responses to CO-OP and DOI requests regarding solvency and reserves.

Planned November Tasks

Responses to ad hoc requests.

Estimated November Charges: N/A

Terms: Due within 30 days of invoice date.
Please make checks payable to: Milliman
Please contact Heather Irias at (303) 672-9085 with any questions.

EXHIBIT B

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Attorneys for Defendants Milliman, Inc., Jonathan L. Shreve, and Mary van der Heijde

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP,

Plaintiff,

vs.

MILLIMAN, INC., a Washington Corporation; JONATHAN L. SHREVE, an Individual; MARY VAN DER HEIJDE, an Individual; MILLENNIUM CONSULTING SERVICES, LLC, a North Carolina Corporation; LARSON & COMPANY P.C., a Utah Professional Corporation; DENNIS T. LARSON, an Individual; MARTHA HAYES, an Individual; INSUREMONKEY, INC., a Nevada Corporation; ALEX RIVLIN, an Individual; NEVADA HEALTH SOLUTIONS, LLC, a Nevada Limited Liability Company; PAMELA EGAN, an

Case No. A-17-760558-B

Dept. No. 25

ORDER GRANTING MILLIMAN'S MOTION TO COMPEL ARBITRATION

JAN 31 2018

Individual; BASIL C. DIBSIE, an Individual; LINDA MATTOON, an Individual; TOM ZUMTOBEL, an Individual; BOBBETTE BOND, an Individual; KATHLEEN SILVER, an Individual; DOES I through X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

The Motion To Compel Arbitration of defendants Milliman, Inc., Jonathan L. Shreve and Mary Van Der Heijde (collectively for purposes of this Motion only, "Milliman") came on for hearing before this Honorable Court on January 9, 2018. Justin N. Kattan, Esq. of Dentons US LLP and Patrick Byrne, Esq. of Snell & Wilmer, L.L.P., appeared on behalf of Milliman; Mark E. Ferrario, Esq., of Greenberg Traurig, LLP appeared on behalf of the Commissioner of Insurance, Barbara D. Richardson, in her official capacity as Receiver ("Plaintiff" or the "Liquidator") for Nevada Health CO-OP ("NHC"). The Court, having reviewed and considered the papers submitted by the parties and heard the argument of counsel, and otherwise being fully apprised in the premises and good cause appearing therefor, hereby GRANTS Milliman's Motion, for the reasons set forth herein:

A. The Nevada Health CO-OP

NHC was established under the Patient Protection and Affordable Care Act in October 2012. NHC experienced such financial hardship that insolvency proceedings before Department I of this Court were instituted in September 2015. By Order dated October 14, 2015 (the "Receivership Order"), the Court appointed Plaintiff as NHC's Permanent Receiver, and vested Plaintiff with exclusive title to all of NHC's property, including NHC's "contract rights." (Receivership Order, §2(c)). The Order further authorized Plaintiff to "initiate and maintain actions at law or equity or any other type of action or proceeding of any nature, in this and other jurisdictions," and to "[i]nstitute and prosecute ... any and all suits and other legal proceedings." *Id.* § 14(a), (h).

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By order dated September 21, 2016, Plaintiff was authorized "to liquidate the business of NHC and wind up its ceased operations pursuant to" the Nevada Liquidation Act.

B. The Applicable Arbitration Provision

Plaintiff's claims all seek monetary damages arising from Milliman's performance of actuarial and consulting services pursuant to an October 20, 2011 Consulting Services Agreement (the "Agreement") entered into by Culinary Health Fund and Milliman.[1] Paragraph 5 of the Agreement contains a broad and unambiguous arbitration provision, which states, in relevant part:

> DISPUTES. In the event of any dispute arising out of or relating to the engagement of Milliman by Company, the parties agree that the dispute will be resolved by final and binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association.

This provision is prominently featured as part of the main body of the contract. The Agreement was executed by sophisticated parties, with experience in their respective fields, and with access to counsel.

C. The Arbitration Provision in the Agreement is Valid and Enforceable, Reflecting The Strong Presumption Favoring Arbitration Under Federal and Nevada Law

The arbitration clause in the Agreement is fully valid and enforceable. Both the Nevada Arbitration Act ("NAA"), NRS 38.206, *et seq.*, and the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, contain virtually identical language mandating that contractual arbitration clauses are fully "valid, irrevocable, and enforceable, save upon which grounds as exist at law or in equity for the revocation of any contract." Both the NAA and FAA express a "fundamental policy favoring the enforceability of arbitration agreements." *Tallman v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 71, 359 P.3d 113, 118 (2015); *State ex rel. Masto v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009). The "strong presumption in favor of

[1] Culinary Health Fund later created Hospitality Health, Ltd. and "assigned and transferred all rights, title, and interest" in the Agreement to Hospitality Health, Ltd. Hospitality Health, Ltd. subsequently assigned all of its assets and agreements, including the Agreement, to NHC.

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arbitratbility applies with even greater force" where, as here, "a broad arbitration clause is at issue." *Rodriguez, v. AT&T Servs., Inc.*, No. 2:14-cv-01537, 2015 WL 6163428, at * 9 (D. Nev. Oct. 20, 2015) (citations omitted).

The exception in the NAA and FAA for "grounds as exist at law or in equity for the revocation of any contract" does not apply here. The U.S. Supreme Court has defined that phrase to mean that only "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2" of the FAA. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996); *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 892 (9th Cir. 2001). Plaintiff neither pled any such grounds to revoke the Agreement in the Complaint nor raised any such grounds in her opposition to the Motion.

Since Milliman has established the existence of a valid arbitration agreement, it is Plaintiff's burden to establish a defense to enforcement. *Gonski v. Second Judicial Dist. Court of State ex rel. Washoe*, 126 Nev. 551, 245 P.3d 1164, 1168-69 (2010). Plaintiff fails to do so.

D. All of Plaintiff's Claims Arise from and Relate Directly to Milliman's Work Under the Agreement

Plaintiff's claims all arise from and relate to the Agreement because, but for the Agreement and the work Milliman did for NHC pursuant to it, Plaintiff would have no claims whatsoever. Plaintiff's Complaint identifies the contracted-for work that Milliman performed, including "providing certification required pursuant to NRS 681B, conducting a feasibility study, providing business plan support, assisting NHC in setting premium rates, [and] participating in the preparation of financial reports and information to regulators." (Complaint, ¶ 334). Every cause of action Plaintiff brings, whether styled in tort or contract, is based on Milliman's alleged wrongful conduct in performing one or more of these services.

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E. Because the Plaintiff's Claims Arise Under and Relate to the Agreement, Plaintiff Is Bound by the Agreement's Arbitration Clause

The Nevada Supreme Court has held that where a plaintiff "is seeking to enforce rights under [an] agreement, it cannot simultaneously avoid other portions of the agreement, such as the arbitration provision." *Ahlers v. Ryland Homes,* 126 Nev. 688, 367 P.3d 743 (2010) (unpublished). Otherwise, "to allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act." *Id.* at *2.

This rule applies with equal force to claims brought by a statutory liquidator or receiver. That Plaintiff is herself a non-signatory to the Agreement is irrelevant. Because Plaintiff's claims arise from Milliman's work done pursuant to the Agreement, Plaintiff is bound to that Agreement, including any applicable arbitration clause, just like the insolvent insurer would have been. *See, e.g., Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969, 972 n.4 (9th Cir. 1992) (enforcing contractual arbitration clause and stating that "if the liquidator wants to enforce [the insurer's] rights under its contract, she must also assume its perceived liabilities"); *Rich v. Cantilo & Bennett, L.L.P.*, 492 S.W.3d 755, 762 (Tex. Ct. App. 2016) (same); *Poizner v. Nat. Indem. Co.*, No. 08CV772-MMA, 2009 WL 10671673, at *2 (S.D. Cal. Jan. 6, 2009) (enforcing arbitration clause against insurance liquidator); *Garamendi v. Caldwell*, No. CV-91-5912-RSWL(EEX), 1992 WL 203827, at *3 (C.D. Cal. May 4, 1992) (same); *Koken v. Cologne Reins. (Barbados), Ltd.*, 34 F. Supp. 2d 240 (M.D. Pa. 1999) (same); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 272–75 (D. Vt. 1993) (same); *State v. O'Dom*, No. 2015CV258501, 2015 WL 10384362, at *3–4 (Ga. Super. Sept. 18, 2015) (same).

It is irrelevant that Plaintiff styles certain of her claims in tort rather than contract. Where, as here, a plaintiff's tort, contract and statutory claims relate to and arise from the work done pursuant to the contractual relationship, they all should be arbitrated together. *See Phillips v.*

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Parker, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990) (compelling arbitration of tort and RICO claims that "relate to" agreement containing arbitration provision where plaintiff's "basis for claiming injury and grounds for redress stem from rights he allegedly received pursuant to the agreement"); *Helfstein v. UI Supplies*, 127 Nev. 1140, 373 P.3d 921, at *2 (2011) (unpublished) (granting motion to compel arbitration of tort and contract claims and stating that "if the allegations underlying the claims so much as touch matters covered by the parties' agreements, then those claims must be arbitrated" (citation omitted)); *Rodriguez, v. AT&T Servs., Inc.*, No. 2:14-cv-01537, 2015 WL 6163428, at * 8 (D. Nev. Oct. 20, 2015) ("[S]o long as the phone call that allegedly triggered the offending credit inquiry collaterally touches upon the Business Agreement or has some roots in the contractual relationship between the parties, Plaintiff's claims fall within the scope of the arbitration provision.").

F. Plaintiff's Claims Against Milliman Are Pre-Insolvency, Common Law Damages Claims that Belonged to NHC, And Need Not Be Brought in the Liquidation Court

Plaintiff argues that, as Liquidator, she is bringing claims "on behalf of" creditors and policyholders, and therefore she does not stand strictly in the shoes of the insolvent insurer. She further contends that these claims must be brought in the liquidation court, and are not constrained by any contractual provisions that would have limited NHC. While it is true that virtually everything the Liquidator does is for the benefit of the insolvent insured's creditors and policyholders, this does not mean that the Liquidator may ignore and avoid the contractual, statutory, and judicial limitations applicable to the particular claims she brings against Milliman.

There is a distinction between claims that belong to the creditors and policyholders of an insolvent insurer, on the one hand, as distinct from claims that belong to the insolvent insurer, where any recovery would increase the coffers of the estate, and therefore benefit the estate's creditors and policyholders, on the other hand. Plaintiff's claims fall within the latter category, and therefore are arbitrable.

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All of Plaintiff's claims here belonged only to NHC because they are ordinary common law and contractual damages claims based on NHC's pre-insolvency rights. Plaintiff seeks monetary damages from Milliman, not the return of NHC assets, and not the clawing back and redistribution among creditors of estate assets. Plaintiff's action against Milliman does not involve set offs, or proofs of claim, or claims arising from the Nevada liquidation statute. This case is separate and distinct from the ongoing Receivership Action and it neither threatens or states an interest in NHC assets or property, nor will it affect any creditors' rights. Plaintiff has not pled any viable causes of action that actually belong to NHC's creditors.

This Court is thus persuaded that arbitrating Plaintiff's damages claims against Milliman will not interfere with, invalidate, impair or supersede this state's statutory liquidation scheme, the NHC liquidation proceedings, or the State's regulation of insurance. *See, e.g., Bennett, supra*, 968 F.2d at 972 (stating that if a "dispute is in essence a contractual one, it should be arbitrated. And because the liquidator, who stands in the shoes of the insolvent insurer, is attempting to enforce [the insurer's] contractual rights, she is bound by [the insurer's] pre-insolvency agreements"); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381-82 (9th Cir. 1997) (same); *Suter v. Munich Reins. Co.*, 223 F.3d 150, 161 (3d Cir. 2000) ("It is true, as the Liquidator stresses, that if the District Court or an arbitrator should decide the reinsurance agreement does not cover the disputed expenses, the estate will be smaller than if that issue was resolved in the Liquidator's favor. But the mere fact that policyholders may receive less money does not impair the operation of any provision of New Jersey's Liquidation Act."); *Koken, supra*, 34 F. Supp. 2d at 247; *see also Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1154 (3d Cir. 1989) (holding that bankruptcy trustee's claims against debtor's securities broker for state and federal securities violations were arbitrable because they were based on debtor's pre-bankruptcy rights, and did not arise from the Bankruptcy Code).

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Las Vegas, Nevada 89169
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While creditors or policyholders may "benefit" from monetary damages the Liquidator recovers from third parties, in that such recoveries increase the coffers of NHC's estate, the claims here do not "belong" to NHC's creditors or policyholders, do not implicate a state's regulation of insurance, and need not be brought in the liquidation court.

While Plaintiff asserts that it would be unfair to NHC's creditors and policyholders to enforce the arbitration clause, because it limits the scope of discovery and precludes punitive damages, this Court cannot vitiate an otherwise valid arbitration clause simply to improve the perceived strength of Plaintiff's case. Plaintiff's argument also contravenes the Nevada Supreme Court's express recognition that the cost savings and efficiency of streamlined discovery in arbitration will inure to the benefit of the State and NHC's creditors. *D.R. Horton, Inc.*, 120 Nev. at 553, 96 P.3d at 1162. ("[A]rbitration generally avoids the higher costs and longer time periods associated with traditional litigation.").

G. The McCarran-Ferguson Act does not reverse preempt the Federal Arbitration Act

Finally, the Nevada Liquidation Act does not reverse-preempt the FAA under the McCarren-Ferguson Act, 15 U.S.C. §§ 1011-1015. The standard for reverse preemption is not satisfied here because forcing a statutory liquidator to arbitrate ordinary, pre-insolvency breach of contract and tort claims, such as Plaintiff's damages claims against Milliman, neither implicates the business of insurance nor interferes with the liquidator's statutory function. *Quackenbush, supra,* 121 F.3d at 1381-82; *AmSouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004) (finding no reverse preemption where liquidator's "ordinary [tort and contract] suit against a tortfeasor" did not implicate the "regulation of the business of insurance"); *Grode v. Mut. Fire, Marine and Inland Ins. Co.*, 8 F.3d 953, 959–60 (3d Cir. 1993) (finding no reverse preemption because liquidator's "[s]imple contract and tort actions" against third party have "nothing to do with [the State's] regulation of insurance"); *Koken, supra*, 34 F. Supp. 2d at 247 (granting motion to

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compel arbitration where "this action has nothing to do with Pennsylvania's statutory scheme for the regulation of the business of insurance because it is not an action against an insolvent insurer's estate that might deprive it of assets; instead, it is an action by the Liquidator against a third party, here a reinsurer for the insolvent insurer, to recover money for the estate on a breach-of-contract claim"); *Midwest Employers Cas. Co. v. Legion Ins. Co.*, No. 4:07CV870 CDP, 2007 WL 3352339, at *5 (E.D. Mo. Nov. 7, 2007) ("The ultimate issue in this case is a standard contract dispute, so the case does not involve the state's regulation of insurance."); *Northwestern Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 321 B.R. 120, 126 (Bankr. D. Del. 2005); *Nichols v. Vesta Fire Ins. Corp.*, 56 F. Supp. 2d 778, 780 (E.D. Ky. 1999); *Costle*, 839 F. Supp. at 275. NHC is no longer a functioning entity engaged in the business of insurance. Enforcing the Agreement's arbitration clause will not disrupt the orderly liquidation of NHC, and Plaintiff's action against Milliman has no bearing on the administration, allocation or ownership of NHC's property or assets, which is the province of the Receivership Action.

Moreover, nothing in the Nevada Liquidation Act precludes a liquidator from arbitrating its claims. On the contrary, the Receivership Order entered pursuant to the Act expressly authorizes Plaintiff to "initiate and maintain actions at law or equity or any other type of action or proceeding of any nature, in this and other jurisdictions," and to "[i]nstitute and prosecute . . . any and all suits ***and other legal proceedings***" on behalf of NHC. (Order, §§ 14(a), (h) (emphasis added). Absent such a conflict, there is no reverse preemption. *Quackenbush*, 121 F.3d at 1381-82. Judge Cory, who entered the Receivership Order and presides over the liquidation proceedings, denied Plaintiff's request to coordinate and consolidate Plaintiff's action against Milliman with the liquidation proceeding.

Finally, the Nevada Arbitration Act, which is not pre-empted, is substantively identical to the FAA and mandates enforcement of the Agreement's arbitration clause.

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Accordingly, the Court hereby GRANTS Milliman's Motion To Compel Arbitration.

IT IS SO ORDERED

DATED: March 8, 2018

DISTRICT COURT JUDGE

Respectfully prepared and submitted by:

SNELL & WILMER L.L.P.

By: _____
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Attorneys for Defendants
Milliman, Inc., Jonathan L. Shreve, and
Mary van der Heijde

Approved as to Form by:

GREENBERG TRAURIG, LLP

By: _____
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Attorneys for Plaintiff

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EXHIBIT C

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioner,

v.

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

Respondents,

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

Real Parties in Interest,

Supreme Court Case No.:

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

PETITION UNDER NRAP 21 FOR WRIT OF MANDAMUS

Tami D. Cowden, Esq., NBN 8994
Mark E. Ferrario, Esq., NBN 1625
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10845 Griffith Peak Drive, Ste. 600
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Telephone (702) 792-3773
Facsimile (702) 792-9002
Attorneys for Petitioner

CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Petitioner, Barbara D. Richardson, through her undersigned counsel, states that she is an official of the government of the State of Nevada, acting herein such capacity, and accordingly, no corporate disclosure statement is necessary.

Petitioner has been represented by the following law firm in the proceedings below:

GREENBERG TRAURIG, LLP.

DATED this 17th day of December 2018

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden
Mark E. Ferrario, Esq., NBN 1625
Tami D. Cowden, Esq., NBN 8994
Donald L. Prunty, Esq., NBN 8230
10845 Griffith Peak Dr., Suite 600
Las Vegas, Nevada 89135
Telephone (702) 792-3773
Facsimile (702) 792-9002
Attorneys for Petitioner Barbara D. Richardson

VERIFICATION

The undersigned declares under the penalty of perjury that she is counsel for STATE OF NEVADA, EX. REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP, and has read the attached Petition for Writ of Mandamus and that the factual assertions therein are true of her own knowledge, or supported by exhibits contained in the Appendix filed herewith, and that as to such matters so supported, she believes them to be true. This verification is made pursuant to NRS 15.010.

DATED this 17th day of December 2018.

/s/ Tami D. Cowden
Tami D. Cowden

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TABLE OF AUTHORITIES

NEVADA CASELAW

FEDERAL AND OTHER STATE CASELAW

NEVADA Constitution, Statutes and Rules

Federal and Other Statutes

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

STATEMENT OF RELIEF SOUGHT

This Petition requests the Supreme Court to issue a writ of mandamus directing the District Court to exercise subject matter jurisdiction over the claims raised by Petitioner against Real Parties in Interest. The District Court dismissed such claims, based upon an arbitration provision that 1) is reverse preempted by the McCarren Ferguson Act, and 2) under the applicable state law, cannot be enforced against Petitioner. The Petitioner raises significant issues of first impression in Nevada involving the authority of the Nevada's Insurance Commissioner, and whether liquidation proceedings conducted pursuant to that authority are taken to carry out the purposes of the Nevada Insurance Code ("NIC"). The Petitioner's claims against the Real Parties in Interest are based upon such parties' multiple failures to perform their contractual and statutory obligations as the "qualified actuary" for the delinquent insurer, Nevada Health Co-op ("NHC" or "Co-op").

By determining that the Commissioner's claims must be resolved through confidential arbitration, rather than litigated in the Court that has jurisdiction over the liquidation of the delinquent insurer as provided by the Nevada Insurance Code,

the District Court manifestly abused its discretion. Under New York law, which governs the agreement, the Commissioner cannot be required to arbitrate such claims. Furthermore, even if the Commissioner could otherwise be required to arbitrate, the Federal Arbitration Act is reverse-preempted by Nevada's Insurance Code, and that Code leaves the choice of forum for dispute resolution exclusively to the Commissioner.

Accordingly, the District Court's dismissal of the claims based on the arbitration provision was a manifest abuse of discretion; this Court should issue appropriate writ relief to remedy the District Court's action.

ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding, as this case presents issues of first impression on matters involving Nevada statutory and common law, and also implicates questions of statewide public importance, as it involves the interpretation of Nevada's Insurance Code ("NIC"), Title 57. NRAP 17(a)(10)-(11). Resolution of the issues herein will require the interpretation of multiple Nevada statutes not previously addressed by the appellate courts of this state, including Chapters 679A, 681B, and 696B of Title 57, as well as a determination of the interplay of such statutes with the laws of New York that govern the agreement at issue here, and the reverse preemption of the Federal Arbitration Act by the McCarran Ferguson Act.

STATEMENT OF ISSUES PRESENTED

I. **A WRIT OF MANDAMUS IS APPROPRIATE AS THE COMMISSIONER HAS NO PLAIN, SPEEDY, AND ADEQUATE REMEDY FOR THE DISTRICT COURT'S ABUSE OF DISCRETION, SUCH ABUSE AFFECTED SIGNIFICANT ISSUES OF PUBLIC POLICY, AND RESOLUTION OF THIS MATTER REQUIRES INTERPRETATION OF NUMEROUS NEVADA STATUTES NOT PREVIOUSLY ADDRESS BY THE APPELLATE COURTS**.

II. **THE DISTRICT COURT MANIFESTLY ABUSED ITS DISCRETION BY COMPELLING ARBITRATION WHERE, UNDER THE APPLICABLE STATE LAW, NO VALID AGREEMENT TO ARBITRATE EXISTED BETWEEN THE COMMISSIONER AND MILLIMAN.**

III. **THE DISTRICT COURT MANIFESTLY ABUSED ITS DISCRETION BY COMPELLING ARBITRATION WHERE NEVADA'S INSURANCE CODE REVERSE PREEMPTS THE FEDERAL ARBITRATION ACT, PURSUANT TO THE MCCARREN FERGUSON ACT.**

STATEMENT OF RELEVANT FACTS

The ACA Permits the Creation of Health Insurance Co-ops.

This Petition arises from the liquidation of a health insurer that had been formed following Congress's passage of the Affordable Care Act ("ACA"). The ACA contemplated the creation of "Consumer Operated and Oriented Plans," which were health insurance cooperatives ("co-ops") in which the members of the organization are insured by it. **I APP 23-118, ¶ 34.** Under the ACA, qualified co-ops were eligible for federal loans to become established. Qualification for such loans required the submission of a feasibility study and a business plan. ***Id. at* ¶ 35.**

The health insurers co-ops established under the ACA were also required to comply with state law insurance requirements.

NHC's Predecessors Enter into Agreement with Milliman, Inc.

Against the above legislative backdrop, the Culinary Health Fund, the health insurance affiliate of the Culinary Union, contemplated establishing a qualifying co-op under the ACA. ***Id. at* ¶ 40.** To that end, and mindful of the above requirements, on October 20, 2011, Culinary Health Fund sought out an actuarial expert. ***Id.* at ¶ 42.**

Real Party in Interest Milliman, Inc. ("Milliman") had held itself and its employees, including Real Parties in Interest Jonathan L. Shreve ("Shreve") and Mary van der Heijde ("van der Heijde"), out as experts in the provision of actuarial opinions and other services (collectively, Milliman, Inc., Shreve, and van der Heijde will be referred to as the "Milliman Defendants."). ***Id.* at ¶ 50.** In 2011, Culinary Health Fund entered into a Consulting Services Agreement with Milliman, Inc. (the "Agreement"). **I APP 163.** Under the Agreement, the initial work that Milliman was to provide was to conduct the health cooperative feasibility study and the analytical portions of the business plan required for the federal funding. **I APP 168-169.** Payment for such work to Milliman was contingent upon receipt of the funding. **I APP 163, ¶ 1.**

The Agreement contained an arbitration provision that states, as relevant here:

> **5. Disputes.** In the event of any dispute arising out of or relating to the engagement of Milliman by Company, the parties agree that the dispute

> will be resolved by final and binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. . . . The Arbitrators shall have a background in either insurance, actuarial science or law. The Arbitrators shall have the authority to permit limited discovery, including depositions, prior to the arbitration hearing, and such discovery shall be conducted consistent with the Federal Rules of Civil Procedure. . . . The arbitrators may, in their discretion, award the cost of the arbitration, including reasonable attorney fees, to the prevailing party. . . . Any arbitration shall be confidential, and except as required by law, neither party may disclose the content or results of any arbitration hereunder without the prior written consent of the other parties, except that disclosure is permitted to a party's auditors and legal advisors.

***Id.* at ¶ 5.** There is no provision providing that agents or employees of Milliman may enforce the agreement as to claims against them personally. The Agreement also contained a choice of law provision for New York, providing:

> **6. Choice of Law.** The construction, interpretation, and enforcement of this Agreement shall be governed by the substantive contract law of the State of New York without regard to its conflict of laws provisions. In the event any provision of this agreement is unenforceable as a matter of law, the remaining provisions will stay in full force and effect.

I APP 164, ¶ 6.

Additionally, the Agreement provided that Milliman would perform its services in accordance with applicable professional standards. **I APP 163, ¶ 4**. The liability of Milliman and its "officers, directors, agents and employees" was limited to three times the professional fees paid to Milliman, absent fraud of willful misconduct. *Id.* Milliman, (but *not* its "officers, directors, agents, or employees") was also exonerated of any liability for lost profits, or incidental or consequential damages. *Id.* These

limitations on liability do not apply in the event of fraud or willful misconduct. *Id.* The Agreement does *not* contain any provision that binds the successors or affiliates of either party to the Agreement.

In its proposal, Milliman described its work as offering an "interactive partnership in order to ensure the viability of the CO-OP in a short timeframe." **I APP 169.** Milliman promised "significant assistance" in areas of actuarial tasks within an insurer, as well as development, strategy and training. **I APP 165-179**.

The Milliman Defendants Performs Services

After execution of the Agreement, the Culinary Health Fund formed Hospitality Health, Ltd., and transferred its right, title, and interest in the Agreement to that entity. **I APP 31, ¶¶ 44-45**. Milliman performed work for Hospitality Health after that assignment; and on September 10, 2012, Milliman and Hospitality Health also directly entered into a Consulting Services Agreement, with terms essentially identical to those in the 2011 Agreement, except that the later agreement did not contain the contingent billing provision. **See I APP 3-4.** Both of the agreements were executed on Milliman's behalf by van der Heijde, as "Principal and Consulting Actuary." ***Id.***; **I APP 164.** Neither van der Heijde nor Shreve signed the agreements on their individual behalves.

In December 2011, Milliman issued a document entitled "Hospitality Health Feasibility Study and Business Support for Consumer Operated and Oriented Plan

(CO-OP) Application (the "Feasibility Study") that was used for the application for federal loans. **I APP 32, ¶ 61.** The Feasibility Study included financial projections under various scenarios, as well as an analysis of the co-op's ability to repay loans. ***Id.*** All scenarios projected by Milliman indicated that the co-op would be successful and able to repay loans as well as to pay for policy holder claims. **I APP 33, ¶¶ 62-64, 121.** Based on Milliman's Feasibility Study, the federal government approved the co-op's loan application. **I APP 390, ¶¶ 99-100, 105.**

NHC was formed in October 2012, and in December 2012, assumed the assets and obligations of Hospitality Health, including the federal loans, and the Milliman Agreement. **I APP 33, ¶ 67.** Based on the Feasibility Study, and the funding provided by the federal loans, the Nevada Department of Insurance licensed NHC to sell insurance as of January 1, 2014. **I APP 34, ¶ 71.**

Milliman continued to provide services to NHC. Among the services that Milliman provided to NHC was the valuation of reserves, setting premiums, participation in financial reporting, and serving as the Co-op's statutorily required appointed actuary to provide certification to the state and other entities. **I APP 32, ¶ 59.**

Milliman's Work was Substandard

Unfortunately, Milliman's services as a consulting actuary failed to meet applicable statutory, professional, and contractual standards. Among other issues,

Milliman produced deficient forecasts and studies for loan applications, recommended inadequate insurance premium levels, provided faulty actuarial guidance to NHC management, promoted and incorporated in its assumptions accounting entries that were neither proper nor authorized without appropriate disclosure, participated in financial misreporting, and improperly calculated and certified NHC's projections and reserves to regulators. **I APP 34-43, ¶¶ 72-131.**

Among the many problems in Milliman's Feasibility Study, for which Shreve had signed off as Consulting Actuary, was the utter failure to consider such possibilities as low enrollment, high medical costs and high administration expenses. **I APP 37, ¶ 89.** While Milliman's estimate of administrative expenses was $6.8 million in 2014, the actual administrative costs were $23.6 million. **I APP 35-36, ¶ 80 (vi).** Moreover, in 2014, medical payments alone exceeded the entirety of premiums received, before the payment of administrative costs. **I APP 37, ¶ 88.**

Milliman's deficient work continued in its services to NHC, particularly with respect to valuing and reporting reserves to the Commissioner; van Der Heijde acted as Consulting Actuary for such reports. **I APP 35-43, ¶¶ 95-131.** Van der Heijde underreported NHC's potential liabilities to policy holders, artificially maintaining higher surplus levels than appropriate, and also misreported income. ***Id.*** Such misreporting masked NHC's insolvency, and prevented the Commissioner from stepping in earlier to prevent further losses. **I APP 43, ¶ 126**.

NHC Enters Receivership

Because of Milliman's failures, as well as the failures of other defendants named in the Complaint, NHC was incapable of continuing, and the Nevada Department of Insurance was forced to step in. Amy L. Parks (the then acting Nevada Commissioner of Insurance) commenced the receivership action against NHC by filing a petition to appoint herself as the receiver of NHC under NRS 696B in the Eighth Judicial District ("Receivership Court"), Case No. A-15-725244-C; the Petition was granted in October 2015. "**Receivership Order," I APP5-17.**

Pursuant to the Court's Receivership Order and subsequent Final Order of Liquidation, the Commissioner as Receiver and any special deputy receivers ("SDR") are authorized to liquidate the business of NHC and wind up its ceased operations, including prosecuting suits on behalf of the thousands of injured people and entities associated with NHC's liquidation, including NHC's members, its formerly insured patients, unpaid hospitals, doctors, other creditors, and the public at large. *See generally id*.; Final Order of Liquidation.

As relevant here, the Receivership Order provides the following:

> (1) ... The Receiver and the SDR are hereby directed to ***conserve and preserve the affairs*** of CO-OP and are vested, in addition to the powers set forth herein, with all the powers and authority expressed or implied under the provisions of chapter 696B of the Nevada Revised Statute ("NRS"), and any other applicable law. The Receiver and Special Deputy Receiver are hereby authorized to rehabilitate or liquidate CO-OP's business and affairs ***as and when they deem appropriate under the circumstances and for that purpose may do all acts necessary or***

appropriate for the conservation, rehabilitation, or liquidation of CO-OP....

(2) Pursuant to NRS 696B.290, the Receiver is hereby authorized with ***exclusive title to all of CO-OP's property*** (referred to hereafter as the "Property") and ***consisting of all…[c]auses of action***, defenses, and rights to participate in legal proceedings…

(3) The Receiver is hereby directed to take immediate and exclusive possession and control of the Property except as she may deem in the best interest of the Receivership Estate. In addition to vesting title to all of the Property in the Receiver or her successors, the said ***Property is hereby placed in custodia legis of this Court and the Receiver***, and the Court hereby assumes and ***exercises sole and exclusive jurisdiction over all the Property and any claims or rights respecting the Property to the exclusion of any other court or tribunal***, such exercise of sole and exclusive jurisdiction being hereby found to be central to the safety of the public and of the claimants against CO-OP.

…

(5) All persons, corporations, partnerships, associations and all other entities wherever located, are hereby ***enjoined and restrained from interfering in any manner*** with the Receiver's possession of the Property or her title to her right therein and from interfering in any manner with the conduct of the receivership of CO-OP.]

…

(11) The officers, directors, trustees, partners, affiliates, brokers, agents, creditors, insureds, employees, members, and enrollees of CO-OP, and all other persons or entities of any nature including, but not limited to, claimants, plaintiffs, petitioners, and any governmental agencies who have claims of any nature against CO-OP, including cross-claims, counterclaims and third party claims, are hereby permanently enjoined and restrained from doing or attempting to do any of the following, except in accordance with the express instructions of the Receiver or by Order of this Court:

…

b. Commencing, bringing, maintaining or further prosecuting any action at law, suit in equity, arbitration, or special or other proceeding against CO-OP or its estate, or the Receiver and her successors in office, or any person appointed pursuant to

Paragraph (4) hereinabove;

(14) The Receiver shall have the power and is hereby authorized to:

a. Collect all debts and monies due in claims belonging to CO-OP, wherever located, and for this purpose:(i) institute and maintain actions in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts; (ii) ***do such other acts as are necessary or expedient to marshal, collect, conserve or protect its assets or property***, including the power to sell, compound, compromise or assign debts for purposes of collection upon such terms and conditions as she deems appropriate, and the ***power to initiate and maintain actions at law or equity or any other type of action or proceeding of any nature, in this and other jurisdictions***; (iii) to pursue any creditors remedies available to enforce her claims;

…

h. Institute and to prosecute, in the name of CO-OP or in her own name, any and all suits and of the legal proceedings, to defend suits in which CO-OP or the Receiver is a party in this state or elsewhere, whether or not such suits are pending as of the date of this Order…

…

(24) The Court shall ***retain jurisdiction for all purposes necessary to effectuate and enforce this Order***.

I APP 5-17 (emphasis added).

Milliman Files a Proof of Claim

Milliman submitted a Proof of Claim on January 16, 2016, seeking payment for services rendered. **I App 18-22.**

The Receiver Files a Complaint on Behalf of NHC and Others Injured by NHC's Receivership

In August 2017, in the Receivership Court, the Receiver instituted a contract and tort action on behalf of NHC and the thousands of people and entities who were

injured by NHC's liquidation, asserting 63 causes of action against sixteen defendants, including Milliman and its actuaries. *See generally* **I APP 23-118.**[1] As relevant here, the Receiver asserted four contract and ten tort claims against Milliman, Shreve, and van der Heijde, including claims that Milliman, Shreve, and van der Heijde acted jointly with other defendants, who included NHC's directors and others, as part of a civil conspiracy and in concert of action.[2] ***Id.***

MILLIMAN DEFENDANTS SEEK TO COMPEL ARBITRATION

On November 6, 2017, the Milliman Defendants filed a motion to compel arbitration ("Motion to Compel") based on the arbitration clause in the Agreement. **I APP 46.** The Commissioner opposed the motion, but following briefing and a hearing, the District Court granted the Motion to Compel, dismissing the claims

[1] The civil action was originally assigned to Judge Mark Bailus in Department XVIII. On September 15, 2017, the Receiver filed a motion to coordinate the civil action with the receivership in Judge Cory's court. Before the motion to consolidate was heard by Judge Cory, upon Milliman's request, the civil action was transferred to business court on September 28, 2017. Initially assigned to business court Justice Nancy Allf, it was later reassigned to Judge Kathleen Delaney in Department XXV. Judge Cory determined that the civil matter should be heard in business court and denied the motion to consolidate on December 11, 2017. The civil action remained in with Judge Delaney in Department XXV until it was reassigned to Judge Timothy Williams in Department XVI on July 18, 2018.

[2] The Receiver's claims against Milliman include: (1) negligence per se – Violation of NRS 681B; (2) professional malpractice; (3) intentional misrepresentation; (4) constructive fraud; (5) negligent misrepresentation; (6) breach of fiduciary duty; (7) negligence; (8) breach of contract; (9) tortious breach of the implied covenant of good faith and fair dealing; (10) breach of the implied covenant of good faith and fair dealing; (11) negligent performance of an undertaking; (12) unjust enrichment; (13) civil conspiracy; and (14) concert of action.

against Milliman, Shreve and van der Heijde. **II APP 180-229, 340-383, 396-405.** Judge Delaney ruled that the arbitration provision was not reverse-preempted by the McCarren Ferguson Act. **II APP 396-405.**

The Commissioner sought reconsideration, based on (1) the Order's inconsistency with a recent ruling against Milliman involving similar facts; (2) the overextended scope of the Order's language concerning substantive matters not before the Court; and (3) and the inclusion of claims based on Milliman's statutory obligations. **II APP 412-431.** At the hearing of the reconsideration motion, the Commissioner argued that New York law must be considered, and supplemental briefing was ordered. **II APP 465-505.** Following such briefing, Judge Delaney upheld her prior ruling, finding that: (1) the Receiver could not sue for damages based on Milliman's work under the Agreement while evading the arbitration clause; (2) all of the Receiver's tort, contract, and statutory claims must be heard together because they arose from and related to the same work done under the Agreement, and (3) that compelling a liquidator to arbitrate such claims does not interfere with the State's regulation of the business of insurance. Judge Delaney further determined that New York law did not apply to determine the enforceability of the arbitration provision. **III APP 543-551.**

Another Challenge to the Receivership Court Forum, with a Different Result.

On October 26, 2017, Millennium Consulting Services, LLC ("Millennium"), another named defendant in the action, filed a motion to dismiss pursuant to Rule 12(b) related to a forum-selection clause in its relevant contact with NHC. **I APP 119-145**. The Commissioner opposed this Motion as well. **II APP 230-266.** Following briefing and a hearing, Judge Gonzales, standing in for Judge Delaney, denied the Motion, find the clause inapplicable due to the receivership court having exclusive jurisdiction under the NIC, and more specifically, the Liquidation Act. **II APP 384-395.**

The Order denying Millennium's Motion included the following relevant conclusions of law:

* * *

1. Nevada's Liquidation Act is silent on whether offensive claims are required to be litigated in Nevada.

2. The Receivership Court, acting within its statutory authority and consistent with Nevada law, issued a Receivership Order, providing that the Receivership Court would exercise "sole and exclusive jurisdiction" over all NHC Property – including causes of action, defenses, and rights to participate in legal proceedings – "to the exclusion of any other court or tribunal."

3. The Receivership Order and Nevada's Liquidation Act govern this action.

4. Pursuant to the Receivership Order, the Receiver has discretion to choose a forum for all proceedings related to the receivership, including claims that she brings in her capacity as Receiver.

5. Nothing in Nevada's Liquidation Act strips the Receiver of her right to choose a forum or whether to adopt the forum selection choices of the defunct insurer, even where the Receiver is the Plaintiff.

6. The position of the Receiver is inherently one established in the interest of the general public, including NHC members, insureds, and creditors, for the purpose of maximizing recovery for innocent victims of a delinquent insurance company.

7. It is consistent with public policy and Nevada's Liquidation Act to allow the Receiver to "marshal, collect, conserve, or protect the assets of NHC," including, in her discretion, "the power to initiate and maintain actions at law or equity" in this jurisdiction.

8. Consistent with public policy, and given the silence of Nevada's Liquidation Act to the contrary, claims related to the management of the receivership of NHC are better litigated in the jurisdiction where the Commissioner of Insurance is acting as the Receiver of the defunct insurance company and where all claims that are related to the management of the receivership may be handled in one location.

Id.

This Order, which interprets NRS 696B as granting the Commission the right to choose a forum, regardless of a forum selection clause in the underlying contract, is inconsistent with the Order compelling arbitration with the Milliman Defendants.

REASONS THE WRIT SHOULD ISSUE

This Court should grant the requested writ of mandamus here, as the District Court engaged in a manifest abuse of discretion by failing to apply the appropriate

legal standards, resulting in the order to arbitrate. Under the applicable law, no arbitration should have been ordered in this matter, as no enforceable agreement to arbitrate existed between the Commissioner and any of the Milliman Defendants, as Nevada's Insurance Code grants the Commissioner the right to choose the forum for prosecution of claims the liquidated insurer possessed. Additionally, even if an agreement to arbitrate could be said to have existed, the Federal Arbitration Act was reverse preempted by the McCarren Ferguson Act, as Nevada's Insurance Code governs insurance-related law in Nevada.

A writ should issue in this case, as a direct appeal of an eventual arbitration award will not provide an adequate remedy to the Commissioner under the circumstances here. The Commissioner will not only be put to the expense and delay of the arbitration proceeding, but her case against the remaining defendants will also be prejudiced by the absence of the Milliman Defendants. Additionally, given the contradictory rulings that have resulted in in this same matter, this Court should exercise its discretion to review, as fundamental questions involving Nevada's insurance law should be resolved.

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

This Court has original jurisdiction to issue writs of mandamus. Nev. Const., art. 6, § 4. Mandamus may be granted where the party seeking extraordinary writ relief demonstrates that: (1) an eventual appeal does not afford "a plain, speedy and

adequate remedy in the ordinary course of law," and (2) mandamus is needed either to compel the performance of an act that the law requires or to control the district court's manifest abuse of discretion. NRS 34.160; NRS 34.170*; Tallman v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Op. 71, 359 P.3d 113, 118 (2015).

In *Tallman,* this Court acknowledged that the unavailability of *immediate* appellate review appeal may render the situation one where an eventual appeal is not a plain, speedy, or adequate remedy. This Court has not set forth a test for when an eventual appeal is not an adequate remedy. However, in *Tallman*, this Court cited, with approval, *In re Gulf Exploration*, LLC, 289 S.W.3d 836, 842 (Tex. 2009), in which decision it was noted that determining the adequacy of an eventual appeal "depends on a careful balance of the case-specific benefits and detriments" of writ review.

As discussed in more detail below, writ review offers many benefits, including the avoidance of prejudice of the Commissioner's case against the other defendants in the underlying litigation; prevention of a waste of limited resources; the avoidance of inconsistent outcomes; assurance that the same standards will be applied in the prosecution of claims on behalf of NHC; and conformity with the intent of the Nevada Insurance Code. In contrast, the potential detriments of writ review are limited to the immediate expenditure of resources to resolve the writ petition.

Weighing the case specific benefits and detriments of writ review here, it is clear that an eventual appeal will not provide a plain, speedy, or adequate remedy.

A. Writ Review Will Prevent the Commissioner's Ability to Prosecute Her Claims Against the Other Defendants from Being Compromised Because of the Milliman Defendants' Absence from Those Proceedings.

Immediate review will permit minimal disruption of the litigation against the remaining defendants. The order to arbitrate the claims against the Milliman Defendants significantly hampers the ability of the Commissioner to prosecute her claims against the other defendants in the litigation below. This Court has held that an appeal is an inadequate remedy when the challenged district court action has an adverse effect on a party's case against third parties. *Smith v. District Court*, 113 Nev. 1343, 1348 (Nev. 1997) (granting writ review where otherwise the resolution of the petitioner's claims against third parties would also be impacted).

Here, the claims against the Milliman Defendants were alleged as part of a larger complaint against twelve other defendants. Those other defendants include members of NHC's board of directors, as well as persons and entities who provided accounting and other services to NHC and its predecessors. The Complaint alleges claims for both conspiracy and concerted action against all the defendants, including the Milliman Defendants. Among the allegations are assertions that members of NHC's board of directors and its officers knew, or should have known, about Milliman's false reserves and financial reporting and its provision of misleading

information to Nevada's Department of Insurance. ***See e.g.,* I APP 77-78, ¶¶ 407-408, 412-415**.

The District Court has cut Milliman out of the litigation against the other conspirators, significantly handicapping the Commissioner's ability to prosecute her theory of recovery against all the defendants. The trier of fact in the case against these defendants will not be permitted to determine the liability of the Milliman Defendants. At a minimum, the absence of claims against parties central to the purported conspiracy would be confusing to the jury.

Furthermore, if the confidentiality provisions of the arbitration agreement are strictly enforced, the trier of fact in the litigation below could be precluded from learning of the outcome of any arbitration proceedings, or indeed, even the fact that such arbitration is occurring or had occurred, as such matters are required to be kept confidential under the terms of the Agreement. ***See* I APP 162-164, ¶ 5.**

That same confidentiality requirement could also prevent the Commissioner from using any discovery obtained in arbitration proceedings in the litigation against the remaining defendants. Since discovery of non-parties is more limited than that permitted against parties, the Commissioner's ability to prepare her case against all the defendants will be impacted. Writ review is appropriate when it protects important procedural rights. *In re Rocket,* 256 S.W.3d 257, 262 (Tex. 2008) ("In

evaluating benefits and detriments, we consider whether mandamus will preserve important substantive and procedural rights from impairment or loss.").

B. Writ Review Will Prevent the Commissioner from Being Forced to Engage in Wasteful Duplicative Expenses, Even Before the Eventual Appeal.

Writ review is proper when it "will spare litigants and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *In re Rocket*, 256 S.W.at 262. If the Commissioner is required to go through the arbitration process, and then an appeal of whatever order results therefrom, a considerable waste of resources will result.

Moreover, waste will not be limited solely to expenditures arising from the arbitration proceeding, as the parties here will also be required to engage in duplicative discovery, as discovery will be required within both the arbitration proceeding and the litigation against the remaining defendants. As noted above, the confidentiality requirements of the arbitration provision would allow the Milliman Defendants to prevent the use of any discovery obtained in the arbitration proceeding in the litigation. Accordingly, the Commissioner will need to engage in "third party" discovery directed at the Milliman Defendants, resulting in much duplicative work.

Double expenditures are particularly burdensome in the circumstances here, where the costs of the litigation will be borne by a liquidating estate. Even if she prevails, the Commissioner has no assurance of an award of fees, as such an award

is discretionary with the arbitrators under the arbitration agreement. **I APP 162-164, ¶ 5.**

C. Writ Review Will Ensure That the Same Standards Are Applied to the Resolution of the Conspiracy and Concerted Action Claims, and Avoid Inconsistent Results.

If the claims against the Milliman Defendants are arbitrated, there is a substantial risk that inconsistent outcomes will result. Despite the absence of the Milliman Defendants as parties in the litigation, the jury that decides the claims against the other defendants will still need to make a determination of whether the Milliman Defendants were part of a conspiracy and whether they acted in concert with the other defendants. There is an obvious risk that the arbitrators and the jury could make conflicting conclusions on that issue. Such a risk is amplified here, where the arbitrators are required to have certain types of expertise, which member of a jury need not possess. As discussed in greater detail below, this is consistent with the legislature's intent that proceedings related to the liquidation of insurers be consolidated in a single court.

Significantly, the parties have *already* been subjected to differing standards on the issue of the Commissioner's right to select the forum in which to pursue claims, as the District Court (Gonzales, J.) ruled that the Nevada Insurance Code and the Receivership Order evidenced the Commissioner would have the choice to select a forum, while the District Court (Delaney, J.) ruled to the contrary. The fact that

two judges reached opposite conclusions on very similar issues –in the same case-- demonstrates that it is in the public interest for this Court to undertake writ review of the Order granting the Milliman's Defendants' Motion to Compel Arbitration.

Additionally, the resolution of the issues herein requires interpretation of numerous Nevada statutes that have not previously been reviewed by Nevada's Appellate Courts. This Court has previously exercised discretion to intervene "under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 131 Nev. 865, 869-70, 358 P.3d 925, 928 (2015).

For all the above reasons, the benefits of writ review outweigh any detriments. Accordingly, this Court should entertain the writ.

II. THE COMMISSIONER CANNOT BE COMPELLED TO ARBITRATE UNDER NEVADA OR NEW YORK LAW.

Prior to enforcing a purported agreement to arbitrate, the District Court is required to determine whether the party entered into a valid agreement to arbitrate. *See* NRS 38.219; 9 U.S.C. ¶ 2. Here, there is no dispute that the Commissioner was not a signatory to the Agreement.[3] Accordingly arbitration can be compelled only where there is a basis to enforce the provision against a non-signatory. Here, the

[3] Van der Heijde was a signatory, but only on behalf of Milliman, and not on her own behalf. Shreve was not a signatory.

District Court determined that enforcement against the Commissioner was appropriate because the Commissioner was bound to the same contractual obligations as NHC would have been. The District Court's decision was based upon Nevada law (albeit, to a large extent, by citation to unpublished decisions by this Court) and on federal law. The District Court found that, even though the Agreement provided that its enforcement was to be governed by New York law, New York law was not applicable. The District Court's failure to apply the appropriate law to this decision was a manifest abuse of discretion, and warrants writ relief.

A. The Arbitration Provision Is Unenforceable as Against the Commissioner, Because Private Arbitration of the Commissioner's Claims is Contrary to the Nevada Insurance Code.

The Nevada Legislature has adopted a comprehensive scheme governing insurance in this state, *i.e.*, the Nevada Insurance Code. NRS Title 57. All types of insurance, including, as relevant here, health insurance, are included within the scope of the NIC. When the entirety of the NIC is considered, and in particular, the provisions of the portions of the NIC relating to the duties of actuaries and to the rights and obligations of the Commissioner of Insurance with respect to the liquidation of insolvent insurers, it is apparent that the Commissioner cannot be compelled to arbitration claims arising in liquidation proceedings.

1. Nevada's Insurance Code is intended to protect policy holders and to provide for fair, consistent, and public regulation of the insurance industry.

When the legislature adopted the Nevada Insurance Code, NRS Title 57, in 1971, it listed the many purposes of the code. As relevant here, the NIC is intended to:

- Protect policyholders and all who have an interest under insurance policies;
- Implement the public interest in the business of insurance;
- Improve, and thereby preserve, state regulation of insurance;
- Insure that policyholders, claimants, and insurers are treated fairly and equitably;
- Prevent misleading, unfair, and monopolistic practices in insurance operations; and
- Continue to provide the State of Nevada with a comprehensive, modern, and adequate body of law, in response to the McCarran Act (Public Law 15, 79th Congress, 15 U.S.C. §§ 1011 to 1015, inclusive), for the effective regulation and supervision of insurance business transacted within Nevada, or affecting interests of the people of this state.

NRS 679A.140(1)(a), (b), (d), (e), (h) and (i). To ensure these purposes were met, the legislature directed that the provisions of the NIC, "shall be given reasonable and liberal construction for the fulfillment of these purposes." NRS 679A140(2).

The NIC includes numerous statutes addressing oversight of insurance companies, including the creation of the office and position of the Commissioner of Insurance. NRS 679B.020, *et. seq*. The Commissioner's powers and duties are set forth as follows:

> 1. Organize and manage the Division, and direct and supervise all its activities;
>
> 2. Execute the duties imposed upon him or her by this Code;
>
> 3. Enforce the provisions of this Code;
>
> 4. Have the powers and authority expressly conferred upon him or her by or reasonably implied from the provisions of this Code;
>
> 5. Conduct such examinations and investigations of insurance matters, in addition to examinations and investigations expressly authorized, as he or she may deem proper upon reasonable and probable cause to determine whether any person has violated any provision of this Code or to secure information useful in the lawful enforcement or administration of any such provision; and
>
> 6. Have such additional powers and duties as may be provided by other laws of this State.

NRS 679B.120; *see also, Allstate Ins. Co. v. Thorpe,* 123 Nev. 565, 572 (Nev. 2007) ("Under NRS 679B.120(3), the Nevada Insurance Commissioner has express authority to enforce the provisions of the Nevada Insurance Code, NRS Title 57. . . .") (internal quotations and citations omitted).

Among the oversight provisions contained in the NIC is NRS Chapter 681B, which imposes obligations on insurers to demonstrate to the Commissioner their financial viability. As more specifically relevant here, the NIC requires insurers to submit opinions by a qualified actuary as whether the insurer's financial reserves are sufficient to satisfy claims; this opinion must be supported by a memorandum, and

the valuations and calculations disclosed in the memorandum must be performed in accordance with specific standards. NRS 681B.200-681B.240.

The information contained in the opinion and support memorandum is considered confidential, and may be disclosed by the Commissioner only in certain circumstances. While the Commissioner may use the confidential information in the furtherance of any "legal action" brought as part of the Commissioner's duties, neither the Commissioner nor or any person who receives the confidential information under the Commissioner's authority, is permitted to testify about such documents in "any private civil action." NRS 681B260(4) and (5). Moreover, such documents are subject to subpoena only for the purpose of *defending* an action seeking damages for violation of the requirements of Chapter 681B and any regulations thereunder. NRS 681B260(1). An actuary who submits an opinion under these regulations is not liable to any person *other than* the insurer or the Commissioner, except in cases of fraud or willful misconduct. NRS 681B.250(2).

Submission of false records or financial statements is a deceptive trade practice under the NIC. NRS 686A.070. The Commissioner's authority to regulate the trade obligations of insurers is exclusive. *Allstate Ins. Co. v. Thorpe*, 123 Nev. at 572 ("Additionally, NRS 686A.015(1) grants the Insurance Commissioner 'exclusive jurisdiction in regulating the subject of trade practices in the business of insurance in this state.'") (internal citation omitted).

Another key component of the NIC is Chapter 696B, which governs the liquidation of insolvent insurers. This Chapter incorporates provisions from the Uniform Insurers Liquidation Act ("UILA"); *see* NRS 696B.280 (noting that NRS 696B:030-696B.180 and 696B.290-696B.340 may be referred to as the UILA). The general purpose of the UILA is to "centraliz[e] insurance rehabilitation and liquidation proceedings in one state's court so as to protect all creditors equally." *Frontier Ins. Serv. v. State*, 109 Nev. 231,236, 849 P.2d 328, 331 (1992), *quoting Dardar v. Ins. Guaranty Ass'n*, 556 So. 2d 272, 274 (La. Ct. App. 1990).

As shown above, while Chapter 681B establishes the Commissioner's oversight obligations and duties to insure, based on the financial reporting and actuarial opinions submitted to it, that an insurer maintains its financial stability, Chapter 696B authorizes the Commissioner to act when it appears that the insurer's financial stability is at risk. Specifically, the Commissioner is granted the right to take on the role of receiver, conservator, or rehabilitator when it appears possible that the insurer might continue operations, or as here, a liquidator, when continued operations are not financially viable. NRS 696B.210, 696B.220.

The Commissioner is to institute an action for the liquidation of the insurer in the Nevada District Court, which has *exclusive* jurisdiction over such actions. NRS 696B.190. If the delinquency is shown, the Commissioner will be appointed as the liquidator or receiver, and is then authorized to take possession of all property of the

insurer, including choses in action, to marshal the assets for payment to claimants. NRS 696B.290(2).

Significantly, the receivership court is granted jurisdiction over any person against whom the Commissioner institutes an action based on or arising out of any obligation of such person stemming from "agency, brokerage or transactions" between the person and the insurer. NRS 696B.200((1)(a). This statute thus unequivocally expresses an intent by the Nevada Legislature that the liquidating court have jurisdiction over claims brought by the Commissioner on behalf of the liquidating insurer. Similarly, all claims brought by third parties against the insurer must be presented under the procedure set forth by the Commissioner. NRS 696B.330. And, where the delinquent insurer and a claimant have mutual claims against each other, an offset must be applied, and the claimant may receive on any amounts due after the offset of the insurer's claim against it. NRS 696B.440. These requirements are in keeping with this Court's interpretation of the UILA's purpose to centralize the processing of the insolvent insurer's assets and liabilities. *See Frontier Ins. Serv.*, *supra.*

When the Commissioner has marshalled the assets of the insurer, after administrative expenses, claimants for unpaid policy benefits are first in priority, followed by the repayment of unearned premiums. NRS 696B.420. Only when those claims are satisfied may the assets be used to pay other debts of the insurer, including

federal and state tax and wage claims, and claims by other creditors. *Id.* Thus, the primary purpose for granting the Commissioner the right to liquidate the insolvent insurer is for the protection of policyholders, and by extension, the public.

2. The interplay of the actuarial requirements and Chapter 696B oversight and liquidation provisions indicate a legislative preference for in-court prosecution of claims brought on behalf of a liquidating insurer.

When the entirety of this statutory scheme is considered, it becomes apparent that the legislature intended that, in the event of an insolvency, the Commissioner would have broad powers to enforce the rights of a failed insurer, for the benefit of the policyholders. When an insurer fails, it is a likely circumstance that the actuarial opinions were, for whatever reason, inaccurate. Claims against the actuaries are thus an easily foreseeable part of any liquidation proceeding. The provisions set forth in Chapter 696B make clear that the Commissioner may seek damages from those who breached actuarial duties owed to the insurer, and that in so doing, the Commissioner is also defending the rights of the policyholders.

The legislature expressed a clear preference that claims against actuaries for failure of their statutory duties be brought by the Commissioner (or the insurer), rather than by policyholders, and in court proceedings. Indeed, absent fraud or willful misconduct, policyholders do not even have a right of recovery against an actuary who has failed in its duties; thus, only the insurer or Commissioner can bring negligence-based claims. And even where fraud or willful misconduct is alleged,

policy holders would be unable to subpoena the actuary's opinion or supporting documents, or even compel the Commissioner to testify about any such information in any "private civil action." However, the Commissioner *is* permitted to make use of such documents in "any regulatory or legal action" brought in the course of her official duties. NRS 681B.260. This would obviously include a legal action brought by the Commissioner, as the statutory liquidator, of claims against third parties, over which the liquidating court is expressly granted jurisdiction. NRS 696B.200.

Having such claims brought by the Commissioner in the liquidation process furthers the overarching purposes of the NIC. The policyholders are provided protection, and will be treated fairly. NRS 679A.140(1)(a) and (e). The Commissioner is implementing the public interest and is preserving state regulation of insurance. NRS 679A.140(1)(b) and (e). Publicly bringing claims against actuaries will serve as a deterrent for misleading opinions from actuaries in the future. NRS 679A.140(h). And litigation of such claims will contribute to Nevada's body of insurance law.

In contrast, pursuit of such claims in confidential arbitration proceedings will do little or nothing to advance these purposes. The limited appellate review of arbitration proceedings decreases the prospect of fair treatment, as errors of law cannot be corrected in arbitration proceedings. *See e.g.*, *Health Plan of Nevada v. Rainbow Med*, 120 Nev. 689, 695 (Nev. 2004) ("the scope of judicial review of

an arbitration award is limited and is nothing like the scope of an appellate court's review of a trial court's decision."); *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist*, 122 Nev. 337, 342 (Nev. 2006) (noting that mere incorrect interpretation of law will not justify vacation of an arbitrator's award, but instead, the arbitrator must have consciously disregarded the law).

And, of course, the secrecy attendant upon arbitration proceedings will do nothing to preserve state regulation or contribute to the Nevada's body of insurance law. But enriching that body of law is one of the express purposes of the NIC. NRS 679A.140.

a. Multiple jurisdictions have determined that statutes permitting the head of the state's insurance agency to take control of delinquent insurers confers heightened rights and duties on that agency head.

The District Court's ruling was based on the premise that the Commissioner, like any ordinary receiver, merely steps into the shoes of NHC. Such a receiver, the District Court contends, may therefore be estopped from denying enforceability of the arbitration clause. But that theory does not acknowledge that the Commissioner here is not merely prosecuting a claim for nonperformance of the Agreement. As shown above, the Commissioner is also acting, through the sole means created by the legislature, to vindicate the harm caused to the policyholders by the Milliman Defendants' misfeasance or malfeasance in their submission of financial information and actuarial opinions to the Commissioner; the policy holders are not permitted,

under NRS Chapter 681B, to recover damages for negligence or even reckless conduct by these Defendants.

Nevada is not alone in entrusting such duties to those who occupy the position equivalent to the Commissioner. Numerous states have recognized that a statutory insurance liquidator does more than simply act as a receiver collecting any sums due to the failed insurer.

For example, the California Court of Appeals noted many differences between an ordinary receiver and a receiver in the insurance context, citing, *inter alia,* the Commissioner's pre-delinquency oversight obligations:

> No authority is offered for the proposition that the Insurance Commissioner acts merely as an ordinary receiver. Ordinary receivers do not become involved until control of a business is taken away from its officers or owners due to insolvency, deadlock or other causes. Ordinary receivers do not monitor the solvency of an entity on behalf of persons, such as policyholders, who do business with the entity. The Insurance Code, by contrast, assigns such pre-conservatorship duties to the Insurance Commissioner. . . . In carrying out these duties, the Insurance Commissioner acts not in the interests of the equity owners of the insurance company, but rather in the interests of policyholders. Thus the Insurance Commissioner in this case is not seeking merely to prosecute claims of an entity under receivership. To the contrary, the essence of the Insurance Commissioner's claim is that AA damaged the policyholders. Thus even though a receivership may bear some points of analogy to a statutory insurance company liquidation (primarily in that each can involve the marshalling of the assets of an estate), an ordinary receivership is a different procedure for a different situation.

Arthur Andersen v. Superior Court, 67 Cal. App. 4th 1481, 1495 (Cal. Ct. App. 1998).

Ohio courts have also noted that an insurance liquidator plays an exceptional part, different from that of an ordinary receiver. The Ohio Supreme Court stated:

> The fact that any judgments in favor of the liquidator accrue to the benefit of insureds, policyholders, and creditors means that the liquidator's unique role is one of public protection….

Taylor v. Ernst & Young, 130 Ohio St. 3d 411, 419 (Ohio 2011). *See also Covington v. Am. Chambers Life Ins. Co*, 779 N.E.2d 833, 838 (Ohio Ct. App. 2002) (holding liquidator not bound by arbitration agreement because the dispute involved setoff and proof of claims, which impacted the rights of creditors). And, as discussed in greater detail below, under New York law, an insurance liquidator cannot be compelling to engage in private arbitrate due to the insurance liquidator's protection of the public. *See, e.g., Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d 225, 233, 567 N.E.2d 969, 973 (1990).

Significantly, thus far, courts in two jurisdictions have determined that claims against Milliman, Inc., brought by the liquidators of health insurance co-ops for failures similar to those here, need not be arbitrated, despite the language in agreements substantially identical to that here. In the most recent, *Ommen v. Milliman, Inc*., Case No. LACL 138070 (February 6, 2018, Iowa District Court, Polk County) (A copy of the decision in *Ommen v. Milliman, Inc.* is attached here as Supplement 3). Among the reasons cited by the Iowa court was the clear public policy represented by the provisions of Iowa's insurance code. The court held that

forcing the liquidators to arbitrate would interfere with "(1) the public's interest in the proceeding; (2) the Liquidators' right of forum selection; (3) the Act's purposes of economy and efficiency; (4) the protection of the [health insurance co-op's] policyholders and creditors; and (5) the Liquidators' authority to disavow the Agreement." *Id*.[4]

In the other*, Donelon v. Shilling*, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, Suit No. 651,069 (September 15, 2017), the trial court did not make written findings. (A copy of the decision in *Donelon v. Shilling* is attached here as Supplement 2). Milliman, Inc.'s "Declinatory Exception of Lack of Subject Matter" (*i.e*., a claim that the court lacked subject matter jurisdiction due to the arbitration provision) was denied, with the Court referring to the briefing and arguments at the hearing. *Id.* p. 3 However, in that case, the statutory "rehabilitator" based his opposition upon his unique role as the statutory rehabilitator of the health insurance co-op, under Louisiana's Insurance Code. (A copy of the Rehabilitator's Opposition to Milliman's "Declinatory Exception" is attached here as Supplement 3.]

[4] The Iowa liquidators had formally disavowed the contract, but the clams brought against Milliman included malpractice, breach of fiduciary duty, negligent misrepresentation, intentional misrepresentation, aiding and abetting breach of fiduciary duty, and conspiracy. Here, while the Commissioner contends that all of her claims are *best* addressed in a single judicial forum, the Commission would not object to the severance of the contract-based claims for purposes of arbitration.

And, in this same proceeding, another defendant's motion to dismiss based upon a forum selection clause contained in its agreement with NHC and its predecessors was denied. The District Court (albeit, a different judge presiding) denied the motion. The Order denying Millennium's Motion stated the Commissioner, as Receiver had discretion to choose a forum for all proceedings related to the receivership, including claims that she brings in her capacity as Receiver," and nothing in the Act strips her of her right to choose a forum or whether to adopt the forum selection choices of the defunct insurer. Moreover, as the Receiver's position is inherently one established in the interest of the general public, it was consistent with public policy and the Act to allow the Receiver to have discretion to initiate and maintain acts in this jurisdiction, and moreover, that such claims were better litigated in the jurisdiction in which the Commissioner of Insurance is "acting as the Receiver of the defunct insurance company and where all claims that are related to the management of the receivership may be handled in one location." **Order Denying Millennium Consulting Services, LLC's Motion to Dismiss.**

b. *The unique role granted to the Commissioner in the liquidation proceedings indicates that the Commissioner was intended to determine the nature and forum of the proceedings.*

As shown above, the Commissioner occupies a unique role, acting first and foremost to recover the insurer's assets to pay the claims of the policy holders. In the proceedings below, Judge Gonzales, who stood in for Judge Delaney with respect

to Millennium's Motion to dismiss, recognized this unique role in determining that a forum selection clause was unenforceable as to the Commissioner. The same reasoning applies with respect to the arbitration clause.

Significantly, nothing in Chapter 696B indicates that the legislature intended to permit the Commissioner to be compelled to arbitrate any claims she might bring for that purpose. Yet, in other portions of the NIC, the legislature did expressly provide that, in some situations, arbitration agreements are enforceable. *See, e.g.,* NRS 695C.267 (permitting HMO insurer to require policy holders to submit disputes over coverage to arbitration). Even more significantly, in a section of the NIC that, like Chapter 696B, provides for court jurisdiction over an entity assuming certain obligations of an insurer, the legislature expressly stated that the section's provisions were *not* intended to interfere with agreements to arbitrate between parties. *See, e.g.,* NRS 681A.210(2) (noting that the granting of court jurisdiction over an unlicensed assuming insurer "does not conflict with or override the obligation of the parties to an agreement for reinsurance to arbitrate their disputes if such an obligation is created in the agreement."). The doctrine "*expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another," *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967), dictates that the legislature's failure to expressly note that arbitration agreements to which the liquidating insurer was party would remain in effect, despite the grant of jurisdiction to the district courts, indicates that

such arbitration provisions must fail. Application of this doctrine is especially appropriate here, where the legislature has shown its ability to affirm the continuing viability of arbitration provisions. *Ashokan v. State, Dep't of Ins*, 109 Nev. 662, 956 P.2d 244 (Nev. 1993).

Because arbitration of claims brought by the Commissioner is contrary to the intent and purposes of the NIC, compelling the Commissioner to arbitrate the claims against the Milliman Defendants is contrary to public policy. Therefore, the District Court abused its discretion in compelling arbitration of the claims against the Milliman Defendants.

B. Under New York Law, a Statutory Liquidator Cannot Be Compelled to Arbitrate the Claims Against the Milliman Defendants.

As shown above, Nevada's Insurance Code does not permit the compulsion of the Commissioner to Arbitrate. Similarly, New York law, which governs the enforcement of the Agreement, does not permit such compulsion. Accordingly, it was a manifest abuse of discretion to compel the Commissioner to arbitrate.

1. New York law properly governs the issue of the enforceability of the Agreement.

The Agreement between Milliman and NHC's predecessor provided that the substantive law of New York was to govern the enforcement of the Agreement. Agreement, § 5. However, the District Court determined that New York's substantive law did not apply to the issue of whether the Commissioner could be

deemed to have agreed to the arbitration provision. **III APP 543-551.** The District Court based this ruling on *Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 64 (1995). In *Mastrobuono*, the U.S. Supreme Court, applied the Federal Arbitration Act ("FAA") to a contract governed by New York law, which the parties agreed required arbitration. The Court determined that a New York statute that precluded arbitrators from awarding punitive would not be applied to the contract because the agreement provided that National Associate of Securities Dealers ("NASD") rules governed the arbitration. The Court distinguished between the substantive law of the State of New York, and the procedural law regarding the types of damages that an arbitrator can award. Because the NASD rules did not prohibit arbitrators from awarding punitive damages, the Court determined that New York's procedural rule to that effect did not apply.

Here, however, *procedural* law was not at issue. Instead, the Commissioner invoked the substantive law of New York to hold the arbitration provision itself unenforceable as to the Commissioner. Significantly, the Agreement expressly provides that New York's substantive law governs, *inter alia*, the *enforcement* of the Agreement. Agreement, ¶ 5. In *Mastrobuono*, the Court noted that the choice of law provision governed "the rights and duties" of the parties. 514 U.S. at 64. Here, the *right* to enforce an arbitration clause is precisely what is at issue here.

In *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 478 (1989), the U.S. Supreme Court held that the choice of California law by the parties to govern the agreement required reference to such law to determine the enforceability of the arbitration provision. *Volt* was not overturned by *Mastrobuono*; to the contrary, the *Mastrobuono* Court cited *Volt* as authority several times, and expressly noted that *Volt* stood for the proposition that FAA does not operate in disregard to the parties' own expressed wishes. 514 U.S. at 56-58. Whether a valid agreement exists between the parties is an issue that, under the FAA itself, is one that must be determined in accordance with the *substantive law regarding contracts*. 9 U.S.C. ¶ 2.

Furthermore, the Court's decision in *Mastrobuono* was supported, in part, by the general contract principal that an ambiguity in a contract should be construed against the drafter. 514 U.S. at 63. Here, however, the party seeking to enforce the arbitration provision is the drafter of the Agreement. Milliman, not the Commissioner or her predecessors, was the drafter (*see* Opposition to Motion to Compel), and accordingly, to the extent any ambiguity could be said to have existed therein, it must be construed in favor of the Commissioner.

A district court abuses its discretion when it fails to apply the correct legal standard. *Staccato v. Valley Hosp*., 123 Nev. 526, 530, 170 P.3d 503, 506 (2007).

Accordingly, the District Court abused its discretion by holding that New York did not govern the enforceability of the arbitration provision as to the Commissioner.

2. *New York law is clear that the liquidator of an insolvent insurer cannot be compelled to arbitrate claims.*

There is no reasonable argument that the Milliman Defendants had any intent or expectation that, in the event of NHC's liquidation, the arbitration provision would be effective as against a statutory liquidator. This is because New York's substantive law is clear that the liquidator of an insolvent insurer cannot be compelled to arbitrate claims. *See, e.g., Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d at 232, 566 N.Y.S.2d at 578, 567 N.E.2d at 972 (1990) ("Although the Legislature has granted the Superintendent plenary powers to manage the affairs of the insolvent and to marshal and disburse its assets, the statutory scheme does not authorize his participation in arbitration proceedings."); *Washburn v. Corcoran*, 643 F. Supp. 554, 557 (S.D.N.Y. 1986) (New York "legislature . . . never contemplated turning over liquidation proceedings, and incidental actions and proceedings, to private arbitrators to administer."); *Matter of Knickerbocker*, 4 N.Y.2d 245, 149 N.E.2d 885 (N.Y. 1958) (rejecting dissent's argument that statutes did not require court jurisdiction over claims by the liquidator against third parties).

Significantly, New York's caselaw is *not* based on an express statutory provision contained in the insurance liquidation statutes. Instead, the *Knickerbocker* court interpreted the UILA (the same uniform law adopted by Nevada) as failing to

grant to the statutory liquidator the power to arbitrate claims. The *Corcoran* court noted that, in the intervening years since the *Knickerbocker* decision, the New York legislature had not seen fit to amend the liquidation statutes to permit arbitration. The Court further noted that this interpretation conformed with New York's public policy that their trial courts have exclusive jurisdiction over liquidation proceedings. The Court stated:

> Arbitrators are private individuals, selected by the contracting parties to resolve matters important only to them. They have no public responsibility and they should not be in a position to decide matters affecting insureds and third-party claimants after the contracting party has failed to do so. Resolution of such disputes is a matter solely for the Superintendent, subject to judicial oversight, acting in the public interest.

Corcoran, 77 N.Y.2d at 233, 567 N.E.2d at 973.

Significantly, the legislatures of New York and Nevada, in adopting the UILA, expressly intended that the statutes should be interpreted uniformly across the states adopting it. *See* N.Y. Ins. Law § 7415 ("The uniform insurers liquidation act shall be interpreted and construed to effectuate its general purpose to make uniform the law of those states that enact it."); NRS 696B.280(3) ("The Uniform Insurers Liquidation Act shall be so interpreted as to effectuate its general purpose to make uniform the laws of those states which enact it."). And, both legislatures adopted provisions that granted the receivership court exclusive jurisdiction over liquidation claims. Thus, even if, as the District Court found, the choice of law

provision was not intended to govern the arbitration provision, the Milliman Defendants could not have expected that Nevada, which, like New York, had adopted the UILA, would permit a statutory liquidator to arbitrate claims.

3. *Under New York law, the arbitration provision cannot be enforced by van der Heijde or Shreve.*

The District Court decided, without analysis, that the two employees of Milliman named in the Complaint, Shreve and van der Heijde, were entitled to enforce the arbitration provision. However, neither of these persons were parties to the Agreement, and accordingly, they are not entitled to enforce the arbitration provision. Under New York law, "the right to compel arbitration does not extend to a party that has not signed the agreement pursuant to which arbitration is sought unless the right of the non-signatory is expressly provided for in the agreement." *Greater N.Y. Mut. Ins. Co. V. Rankin*, 298 A.D.2d 263, 263, 748 N.Y.S.2d 381, 382, (N.Y. App. Div. 2002). Here, nothing in the Agreement provides that Shreve and van der Heijde are entitled to enforce the Agreement.

Nor is there any New York authority that would authorize a non-signatory to rely upon an equitable estoppel theory to compel another non-signatory to arbitrate. *See Rosenbach v. Diversified Grp., Inc*., 39 A.D.3d 271 (N.Y. App. Div. 2007) (expressing doubt that "the doctrine of equitable estoppel [is] available in this jurisdiction to enable a non-signatory to compel signatories to an arbitration agreement to arbitrate"). Indeed, numerous jurisdictions have held that a non-

signatory to an arbitration agreement may not compel another non-signatory to arbitrate claims. *See Paragon Litig. Tr. v. Noble Corp.*, Case No.: 16-10386 (CSS), at *26 n. 99 (Bankr. D. Del. Aug. 6, 2018); *Reilly v. Meffe*, 6 F. Supp. 3d 760, 778 (S.D. Ohio 2014); *Chemence, Inc. v. Quinn*, No. 1:11-CV-01366-RLV, 2012 U.S. Dist. LEXIS 198723, at *14 (N.D. Ga. Oct. 15, 2012). *See also Invista S.à.r.l. v. Rhodia, SA*, 625 F.3d 75, 85 (3d Cir. 2010) (dismissing appeal as moot on other grounds, but noting that party had offered "no authority for its contention that a non-signatory to an arbitration agreement can compel another non-signatory to arbitrate certain claims, and [the court] found none").

There is no New York authority allowing a non-signatory to enforce an arbitration agreement against another non-signatory. Most courts addressing the issue have concluded that arbitration may not be compelled under these circumstances. The only New York court to address the prospect expressed doubt that a non-signatory may rely on an estoppel theory to compel another non-signatory to arbitrate claims. *See Rosenbach v. Diversified Grp., Inc*., *supra*. Given these circumstances, there is no reason to conclude that, under New York law, Shreve or van der Heijde may compel the Commissioner to arbitrate her claims against them.

C. The Milliman Defendants Have Themselves Acknowledged the Primacy of the NIC over the Arbitration Provisions.

Finally, Milliman itself has acknowledged that not all claims "arising out of or relating to the engagement" must be arbitrated, but instead, may be determined

by the procedure determined by the Commissioner. Milliman filed a claim with the Commissioner, pursuant to the requirements of NRS 696B.330, seeking payment of sums purported to be due for services performed for NHC. Obviously, a claim for payment under the Agreement arises out or relates to the engagement. By filing the claim, Milliman acknowledged that the arbitration provision must yield to the requirements of Chapter 696B for purposes of its claim against NHC.

Pursuant to NRS 696B.440, the amount for which Milliman should be liable to NHC would need to be determined before Milliman's claim could be resolved. Accordingly, by filing a claim against NHC, Milliman acquiesced to resolution of the its own liability outside of arbitration.

III. NEITHER THE FAA NOR THE NAA APPLY TO REQUIRE ARBITRATION HERE.

As discussed above, the Commissioner cannot be compelled to arbitrate, as private arbitration of the claims here would be contrary to public policy. Neither the Federal Arbitration Act ("FAA") nor the Nevada Arbitration Act ("NAA") require arbitration here. The Nevada Insurance Code reverse-preempts the FAA pursuant to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 ("McCarran-Ferguson"). The NAA applies only when another statutory scheme does not supplant it. Accordingly, neither arbitration act requires arbitration here.

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

The FAA cannot require arbitration here, because it is reverse preempted by the McCarran-Ferguson Act, 15 U.S. §1012, and the Nevada Insurance Code. The McCarren-Ferguson Act states that

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b). Reverse-preemption of federal law through McCarran-Ferguson occurs when: 1) the state statute was enacted for the purpose of regulating the business of insurance; 2) the federal statute involved "does not specifically relat[e] to the business of insurance"; and 3) the application of the federal statute would "invalidate, impair, or supersede" the state statute regulating insurance. *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999). Here, each of these criteria is met, and accordingly, Nevada's Insurance Code reverse-preempts the FAA under McCarran-Ferguson.

1. The Nevada Insurance Code was enacted for the purpose of regulating insurance.

There can be no reasonable dispute that Nevada's Insurance Code was enacted for the purpose of regulating the business of insurance. The stated purpose of the NIC expressly includes the intent to regulate insurance within the state. NRS

679A.140(1)(c) and (i). Moreover, those stated purposes expressly refer to the development of a body of regulatory law pursuant to the federal statutes now known as McCarren Ferguson. NRS 679A.140(1)(i).

Additionally, the specific provisions of the NIC relevant to the issues here, Chapters 696B, are specifically directed at the regulation of insurance, including the financial viability of the insurers, and protecting and compensating those harmed by an insurer's insolvency. As one court has stated, a liquidation act is "the ultimate measure of the state's regulation of the insurance business: the take-over of a failing insurance company." *See Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010) (holding that the first prong of the *Forsyth* test was clearly satisfied by a state's insurance liquidation statutes).

In *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993), the U.S. Supreme Court determined that state insurer liquidation provisions were specifically directed at the regulation of insurance, because laws directed at protecting or regulating the relationship between the insured and insurer were laws regulating the "business of insurance." 508 U.S. at 501. The Court further noted that where the state statute "furthers the interests of policyholders," the federal statute must yield. *Id.* at 502.

Here, the provisions contained in Chapter 696B are directed at furthering the interests of policyholders of delinquent insurers. Accordingly, the first prong of the *Forsyth* test is satisfied.

2. The FAA is not directed at the regulation of insurance.

Nor can there be any reasonable dispute that the FAA is not specifically related to the business of insurance. *See, e.g. S. Pioneer Life Ins. Co. v. Thomas*, 2011 Ark. 490, 385 S.W.3d 770, 774 (2011) (finding that FAA does not specifically relate to insurance); *Cont'l Ins. Co. v. Equity Residential Props. Tr.*, 255 Ga.App. 445, 565 S.E.2d 603, 605-06 (2002) (same); *Munich Am Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998) (same); *Stephens v. Am. Int'l Ins. Co*., 66 F.3d 41, 44 (2d Cir. 1995) (same). The U.S. Supreme Court has said that "the FAA's primary purpose [is] ensuring that private agreements to arbitrate are enforced according to their terms." *Volt Information Sciences,* 489 U.S. at 479.

Accordingly, the second prong of the *Forsyth* test is satisfied.

3. Requiring the Commissioner to arbitrate "invalidates, impairs, or supersedes" the NIC.

The application of the FAA to force the Commissioner to arbitrate the claims against the Milliman Defendants would "invalidate, impair, or supersede" Nevada's Liquidation Act. As shown in Part II above, the Nevada Legislature did not grant the Commissioner any right to arbitrate claims involving the assets of the liquidated insurer. To the contrary, the legislature showed its clear intent that such claims be

litigated in court proceedings, by granting the liquidating court jurisdiction over any persons against whom the Commissioner could bring claims as part of the liquidation. NRS 696B.200. The legislature's adoption of the UILA further ensured not only that the liquidating court would have exclusive jurisdiction over claims, but that such jurisdiction would be honored by courts of other states adopting the UILA. *See* NRS 696B.190(4) ("No court has jurisdiction to entertain, hear or determine any petition or complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation or receivership of any insurer…or other relief…relating to such proceedings, other than in accordance with NRS 696B.010 to 696B.565, inclusive."); NRS 696B.270 ("The court may at any time during a proceeding...issue such other injunctions or orders as may be deemed necessary to prevent interference with the Commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions…").

A preference for consolidation of proceedings within a single court is further evidenced by the legislature's limitation of certain claims based on an actuary's statutory obligations, set forth in Chapter 681B, as belonging only to the insurer or the Commissioner. NRS 681B.250(1). This prevents a multitude of claims being brought in various courts, by various policyholders. The only means policyholders have for recompense is through the liquidator's action. The Receivership Court acknowledged this intent by ordering that it would exercise "sole and exclusive

jurisdiction" over all Property (including lawsuits), "to the exclusion of any other court or tribunal."[5]

Here, the District Court reasoned that requiring arbitration of claims brought on behalf of the liquidating insurer does not "invalidate, impair, or supersede" Nevada's insurance law; some courts have agreed with this view. For example, the Milliman Defendants will likely cite *Milliman v. Roof*, Case. No. 3:18-cv-00012-GFVT (E.D. KY. October 23, 2018), where the Court reasoned that requiring the arbitration does not deprive the Liquidator of any rights, but merely alters the forum. However, arbitration would significantly impair the Commissioner's right to appellate review to correct error. *See Health Plan of Nevada v. Rainbow Med*, 120 Nev. at 695 (noting that appellate review of arbitration awards is limited and very different from review of district court decision); *Clark Cty. Educ. Ass'n v. Clark Cty. Sch. Dist*, 122 Nev. at 342 (arbitrator's errors of law cannot be corrected on appeal).

Furthermore, the claims raised here are not simply claims for breach of contract, but also negligence and fraud claims which will directly involve interpretations of portions of the NIC, including NRS Chapter 681B. Accordingly,

[5] Both the District Court and the Milliman Defendants point to language in the Receivership Order as indicating that the Commissioner has the right to arbitrate claims, while no claims against the receiver can be arbitrated. However, the overall intent of the Receivership Order is that the Commissioner should choose the forum, with the permission of the Court. There is nothing to suggest that the Receivership Court contemplated that the Commissioner would be forced to arbitrate any of its claims, contrary to the Receivership Court's exclusive jurisdiction.

resolution of the claims through confidential arbitration would not contribute to the development of Nevada's body of insurance law, which is an intended purpose of the NIC. See NRS 679A.140.

Moreover, the *Roof* Court was apparently unaware that other jurisdictions, addressing whether requiring arbitration by a receiver against a third party impairs the state's insurance law, have determined that the third requirement of the *Forsyth* test is satisfied because the preference for arbitration in the FAA conflicts with, and impairs, the grant of exclusive jurisdiction to the liquidating court. *See Earnst Young v. Clark,* 323 S.W.3d at 692 (finding *Forsyth* test satisfied to preclude compulsion of insurance liquidator to arbitrate claims); *Benjamin v. Pipoly*, 155 Ohio App. 3d 171, 184, 800 N.E.2d 50, 60 (2003) ("[C]ompelling arbitration against the will of the liquidator will always interfere with the liquidator's powers and will always adversely affect the insurer's assets."); *Ommen, supra*, at p. 6 ("The Court cannot compel arbitration under the FAA because, under the McCarran-Ferguson Act, the [insurance code] reverse preempts the FAA, such that the FAA must give way to the rights and remedies prescribed in the [insurance code].").

Because all three elements of the *Forsyth* test are satisfied, the FAA cannot require the Commissioner to arbitrate the claims here.

B. The NAA Cannot Be Applied to Override Nevada's Insurance Liquidation Law and the Receivership Order.

The District Court also held that the NAA would require arbitration here.

However, the NAA does not apply here. It is well-settled that where a general statute conflicts with a specific one, the specific one governs. *See, e.g.*, *State Dep't of Taxation v. Masco Builder*, 129 Nev. Adv. Op. 83, 312 P.3d 475, 478 (2013) ("A specific statute controls over a general statute"). "Under the general/specific canon, the more specific statute will take precedence, and is construed as an exception to the more general statute, so that, when read together, the two provisions are not in conflict and can exist in harmony." *Williams v. State Dep't of Corr.*, 402 P.3d 1260, 1265 (Nev. 2017) (internal citations and quotations omitted).

Here, although the NAA provides a general policy in favor of arbitration, the Liquidation Act creates a specific and detailed statutory scheme for winding down insolvent insurance companies for the benefit of NHC's members, its formerly insured patients, unpaid hospitals, doctors, other creditors, and the public at large. NRS Chapter 696B. As discussed above, the Nevada Legislature showed its intent that the receivership court have exclusive jurisdiction over claims, both by granting that court jurisdiction exclusive over claims against the liquidating insurer, and by granting the receivership court jurisdiction over persons against whom the Commissioner chose to bring claims. NRS 696B.190 and 696B .200. Additionally, the receivership court has the power to issue injunctions to prevent any interference with the Commissioner's efforts to complete the liquidation. NRS 696B.270.

CONCLUSION

This Court should grant the requested writ relief. The District Court abused its discretion in compelling arbitration under the circumstances here. Nevada's Insurance Code expresses the public policy that, for the protection of the policyholders and the public, claims involving a liquidating insurer's estate should be resolved in the Receivership Court. This will allow the proceeding to be public, rather than confidential, as required by the Agreement, and will therefore contribute to the body of law regulating insurance, as the legislature intended. It will also allow the Receivership Court to have confidence that the assets of the estate have been properly marshalled, for the benefit of the policyholders first, then claimants for unearned premiums, and then finally other creditors of the failed insurer.

Respectfully submitted this 17th day of December 2018.

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden
Mark E. Ferrario, Esq., NBN 1625
Tami D. Cowden, Esq., NBN 8994
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Telephone (702) 792-3773
Facsimile (702) 792-9002
Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this Petition complies with the formatting requirements of NRAP 32(c)(2), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2010 in Times New Roman 14, with double spacing. The brief contains approximately 12,148 words.

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

DATED this 17th day of December 2018

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden
Mark E. Ferrario, Esq., NBN 1625
Tami D. Cowden, Esq., NBN 8994
Donald L. Prunty, Esq., NBN 8230
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Attorneys for Petitioner

CERTIFICATE OF SERVICE

Pursuant to NRAP 25,1 certify that I am an employee of GREENBERG TRAURIG, LLP, that in accordance therewith, I caused a copy of ***Petition Under NRAP 21 For Writ of Mandamus*** to be served to the Real Parties Interest via the Supreme Court's e-filing system on December 17, 2018, and upon

Patrick G. Byrne, Esq. (NV Bar No. 7636) Alex L. Fugazzi, Esq. (NV Bar No. 9022) Aleem A. Dhalla, Esq. (NV Bar No. 14188) Snell & Wilmir 3883 Howard Hughes Parkway, # 1100 Las Vegas, NV 89169 pbyrne@swlaw.com; afugazzi@swlaw.com; adhalla@Wswlaw.com *Attorneys for Real Parties in Interest*	Justin N. Kattan, Esq. (Pro Hac Vice) Dentons US, LLP 1221 Avenue of the Americas New York, NY 10020 Justin.kattan@dentons.com *Attorneys for Real Parties in Interest*

With a courtesy copy to

Judge Kathleen Delaney Eighth Judicial District Court Clark County, Nevada Regional Justice Center 200 Lewis Avenue Las Vegas, NV 89155	Judge Timothy C. Williams Eighth Judicial District Court Clark County, Nevada Regional Justice Center 200 Lewis Avenue Las Vegas, NV 89155 (As the Judge to which this matter is currently assigned)

via hand delivery on December 18, 2018.

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

EXHIBIT D

From: hendricksk@gtlaw.com <hendricksk@gtlaw.com>
Sent: Wednesday, May 13, 2020 9:09 AM
To: Joshua Dickey <JDickey@baileykennedy.com>
Cc: John Bailey <JBailey@baileykennedy.com>
Subject: RE: Richardson as Statutory Receiver for Spirit Commercial Auto Risk Retention Group, Inc. v. Mulligan et al. , Case No A-20-809963-C

Josh,

Based on the claims asserted and NRS 696B.200 we believe jurisdiction is proper. Accordingly, my client will not agree to arbitration.

Best,
Kara

Kara Hendricks
Shareholder

T 702.938.6856

From: Joshua Dickey <JDickey@baileykennedy.com>
Sent: Monday, May 11, 2020 4:00 PM
To: Hendricks, Kara (Shld-LV-LT) <hendricksk@gtlaw.com>
Cc: John Bailey <JBailey@baileykennedy.com>

Subject: RE: Richardson as Statutory Receiver for Spirit Commercial Auto Risk Retention Group, Inc. v. Mulligan et al. , Case No A-20-809963-C

Hi Kara, I hope you are well. Section 13 of the Claims Administration Agreement between Spirit and Criterion requires that all disputes between Spirit and Criterion be resolved through arbitration. Accordingly, we request that your client agree to arbitrate all the claims it has asserted against Criterion. Please advise by 4 p.m. on May 13, 2020 whether your client will do so. In the absence of such an agreement, Criterion will file a motion to compel arbitration. Thank you.

Joshua M. Dickey
Bailey Kennedy
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Office Phone: (702) 562-8820
Direct Phone: (702) 851-0050
Fax: (702) 562-8821

jdickey@baileykennedy.com

ELECTRONICALLY SERVED
7/6/2020 12:20 PM

A-20-809963-B

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Business Court Matters **COURT MINUTES** **July 06, 2020**

A-20-809963-B Barbara Richardson, Plaintiff(s)
vs.
Thomas Mulligan, Defendant(s)

July 06, 2020 **11:45 AM** **Minute Order**

HEARD BY: Denton, Mark R. **COURTROOM:** Chambers

COURT CLERK: Madalyn Kearney

JOURNAL ENTRIES

HAVING reviewed and considered the parties' filings pertaining to Defendant Criterion Claim Solutions of Omaha, Inc.'s Motion to Compel Arbitration deemed submitted and under advisement as of June 18, 2020 pursuant to the Minute Order of June 15, 2020, and being fully advised in the premises, and being persuaded that the Motion has merit, and considering the Order Denying Petition for Writ of Mandamus in State ex rel. Comm r of Ins. v. Eighth Judicial District Court, Nevada Supreme Court Case No. 77682 to be persuasive, if not binding, authority in what appears to be a case involving Plaintiff addressing similar issues regarding arbitration that have been proffered by Plaintiff in this case, and determining that the distinctions urged by Plaintiff no not warrant a different result, the Court GRANTS Defendant's subject Motion and will dismiss this action as against Defendant without prejudice. However, the Court is not persuaded by Defendant's contention that Plaintiff's positions are frivolous, and it thus denies Defendant's request for attorneys' fees.

Counsel for Defendant is directed to submit a proposed order consistent herewith and with briefing supportive of the same. Such proposed order is to be submitted to opposing counsel for review and signification of approval/disapproval. Instead of seeking to clarify or litigate meaning or any disapproval through correspondence to the Court or to counsel with copies to the Court, any such clarification or disapproval should be the subject of appropriate motion practice.

IT IS SO ORDERED.

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Madalyn Kearney, to all registered parties for Odyssey File & Serve. /mk 7/6/20

ELECTRONICALLY SERVED
7/6/2020 12:11 PM

A-20-809963-B

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Business Court Matters	**COURT MINUTES**	**July 06, 2020**

A-20-809963-B	Barbara Richardson, Plaintiff(s) vs. Thomas Mulligan, Defendant(s)

July 06, 2020 **11:45 AM** **Minute Order**

HEARD BY: Denton, Mark R. **COURTROOM:** Chambers

COURT CLERK: Madalyn Kearney

JOURNAL ENTRIES

HAVING reviewed and considered the parties filings pertaining to the CTC Defendants' Motion to Compel Arbitration deemed submitted and under advisement as of June 18, 2020 pursuant to the Minute Order of June 15, 2020, and being fully advised in the premises, and being persuaded that the Motion has merit, and considering the Order Denying Petition for Writ of Mandamus in State ex rel. Comm'r of Ins. v. Eighth Judicial District Court, Nevada Supreme Court Case No. 77682 to be persuasive, if not binding, authority in what appears to be a case involving Plaintiff addressing similar issues regarding arbitration that have been proffered by Plaintiff in this case, and determining that the distinctions urged by Plaintiff do not warrant a different result, the Court GRANTS Defendants' subject Motion.

Counsel for Defendants is directed to submit a proposed order consistent herewith and with briefing supportive of the same. Such proposed order is to be submitted to opposing counsel for review and signification of approval/disapproval. Instead of seeking to clarify or litigate meaning or any disapproval through correspondence to the Court or to counsel with copies to the Court, any such clarification or disapproval should be the subject of appropriate motion practice.

IT IS SO ORDERED.

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Madalyn Kearney, to all registered parties for Odyssey File & Serve. /mk 7/6/20

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

BARBARA D. RICHARDSON IN HER CAPACITY AS THE STATUTORY RECEIVER FOR SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC., Plaintiff, vs. THOMAS MULLIGAN, an individual; CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC, a Missouri Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES LLC, a California Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC, a Hawaii Limited Liability Company; CRITERION CLAIMS SOLUTIONS OF OMAHA, INC., a Nebraska Corporation; PAVEL KAPELNIKOV, an individual; CHELSEA FINANCIAL GROUP, INC., a California Corporation; CHELSEA FINANCIAL GROUP, INC., a Missouri Corporation; CHELSEA FINANCIAL GROUP, INC., a New Jersey Corporation d/b/a CHELSEA PREMIUM FINANCE CORPORATION; CHELSEA FINANCIAL GROUP. INC., a Delaware	CASE NO. A-20-809963-B DEPT NO. XIII **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; AND CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC'S MOTION TO COMPEL ARBITRATION**

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Corporation; CHELSEA HOLDING COMPANY, LLC, a Nevada Limited Liability Company; CHELSEA HOLDINGS, LLC, a, Nevada Limited Liability Company; FOURGOREAN CAPITAL, LLC, a New Jersey Limited Liability Company; KAPA MANAGEMENT CONSULTING, INC., a New Jersey Corporation; KAPA VENTURES, INC., a New Jersey Corporation; GLOBAL FORWARDING ENTERPRISES LIMITED LIABILITY COMPANY, a New Jersey Limited Liability Company; GLOBAL CAPITAL GROUP, LLC, a New Jersey Limited Liability Company; GLOBAL CONSULTING; NEW TECH CAPITAL, LLC, a Delaware Limited Liability Company; LEXICON INSURANCE MANAGEMENT LLC, a North Carolina Limited Liability Company; ICAP MANAGEMENT SOLUTIONS, LLC, a Vermont Limited Liability Company; SIX ELEVEN LLC, a Missouri Limited Liability Company; 10-4 PREFERRED RISK MANAGERS INC., a Missouri Corporation; IRONJAB LLC, a New Jersey Limited Liability Company; YANINA G. KAPELNIKOV, an individual; IGOR KAPELNIKOV, an individual; QUOTE MY RIG LLC, a New Jersey Limited Liability Company; MATTHEW SIMON, an individual; DANIEL GEORGE, an individual; JOHN MALONEY, an individual; JAMES MARX, an individual; CARLOS TORRES, an individual; VIRGINIA TORRES, an individual; SCOTT McCRAE, an individual; BRENDA GUFFEY, an individual; 195 GLUTEN FREE LLC, a New Jersey Limited Liability Company, DOE INDVIDUALS I-X; and ROE CORPORATE ENTITIES I-X,

Defendants.

NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; AND CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC'S MOTION TO COMPEL ARBITRATION

Please take notice that the Order Granting Defendants CTC Transportation Insurance Services of Missouri, LLC; CTC Transportation Insurance Services LLC; and CTC Transportation

//

//

Insurance Services of Hawaii LLC's Motion to Compel Arbitration was entered with the above court on the 16th day of July, 2020, a copy of which is attached hereto as **Exhibit A**.

DATED this 17 day of July, 2020.

SALTZMAN MUGAN DUSHOFF

By _____
MATTHEW T. DUSHOFF, ESQ.
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Attorneys for Defendants
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SALTZMAN MUGAN DUSHOFF, and that on the 17th day of July, 2020, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; AND CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC'S MOTION TO COMPEL ARBITRATION** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed below:

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Susan Owens (sao@h2law.com)
Kirill Mikhaylov (kvm@h2law.com)
William Gonzales (wag@h2law.com)

//

//

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Cindy Kuhl

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Exhibit A

(Order Granting Defendants' Motion to Compel Arbitration)

OGM
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JORDAN D. WOLFF, ESQ.
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Attorneys for Defendants
CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; and CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

BARBARA D. RICHARDSON IN HER CAPACITY AS THE STATUTORY RECEIVER FOR SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC., Plaintiff, vs. THOMAS MULLIGAN, an individual; CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC, a Missouri Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES LLC, a California Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC, a Hawaii Limited Liability Company; CRITERION CLAIMS SOLUTIONS OF OMAHA, INC., a Nebraska Corporation; PAVEL KAPELNIKOV, an individual; CHELSEA FINANCIAL GROUP, INC., a California Corporation; CHELSEA FINANCIAL GROUP, INC., a Missouri Corporation; CHELSEA FINANCIAL GROUP, INC., a New Jersey Corporation d/b/a CHELSEA PREMIUM FINANCE CORPORATION; CHELSEA FINANCIAL GROUP, INC., a Delaware	CASE NO. A-20-809963-B DEPT NO. XIII **ORDER GRANTING DEFENDANTS CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; AND CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC'S MOTION TO COMPEL ARBITRATION**

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Corporation; CHELSEA HOLDING COMPANY, LLC, a Nevada Limited Liability Company; CHELSEA HOLDINGS, LLC, a, Nevada Limited Liability Company; FOURGOREAN CAPITAL, LLC, a New Jersey Limited Liability Company; KAPA MANAGEMENT CONSULTING, INC., a New Jersey Corporation; KAPA VENTURES, INC., a New Jersey Corporation; GLOBAL FORWARDING ENTERPRISES LIMITED LIABILITY COMPANY, a New Jersey Limited Liability Company; GLOBAL CAPITAL GROUP, LLC, a New Jersey Limited Liability Company; GLOBAL CONSULTING; NEW TECH CAPITAL, LLC, a Delaware Limited Liability Company; LEXICON INSURANCE MANAGEMENT LLC, a North Carolina Limited Liability Company; ICAP MANAGEMENT SOLUTIONS, LLC, a Vermont Limited Liability Company; SIX ELEVEN LLC, a Missouri Limited Liability Company; 10-4 PREFERRED RISK MANAGERS INC., a Missouri Corporation; IRONJAB LLC, a New Jersey Limited Liability Company; YANINA G. KAPELNIKOV, an individual; IGOR KAPELNIKOV, an individual; QUOTE MY RIG LLC, a New Jersey Limited Liability Company; MATTHEW SIMON, an individual; DANIEL GEORGE, an individual; JOHN MALONEY, an individual; JAMES MARX, an individual; CARLOS TORRES, an individual; VIRGINIA TORRES, an individual; SCOTT McCRAE, an individual; BRENDA GUFFEY, an individual; 195 GLUTEN FREE LLC, a New Jersey Limited Liability Company, DOE INDVIDUALS I-X; and ROE CORPORATE ENTITIES I-X,

Defendants.

ORDER GRANTING DEFENDANTS CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC; CTC TRANSPORTATION INSURANCE SERVICES LLC; AND CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC'S MOTION TO COMPEL ARBITRATION

This matter came before the Court on June 18, 2020 in Chambers with respect to the motion of Defendants CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC ("CTC-MO"); CTC TRANSPORTATION INSURANCE SERVICES LLC ("CTC-CA"); and CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC ("CTC-HI" and

hereafter collectively referred to with CTC-MO and CTC-CA as "CTC") seeking to compel arbitration of all claims brought against CTC as set forth in Plaintiff's Complaint (the "Complaint") as they are each subject to a binding arbitration agreement entered into by the parties and dismissing all such claims against CTC in this action (the "Motion").

For the following reasons, CTC's Motion is granted in its entirety.

I. FINDINGS OF FACT

Spirit is a Nevada-domiciled associative captive insurance company that operates a commercial auto liability insurance business and specializes in providing insurance to commercial truck owners. On November of 2011, Spirit and CTC-CA entered into a Program Administrator Agreement, pursuant to which CTC-CA would act as the Program Administrator for Spirit (the "PAA").

In 2016, CTC-CA sought to assign the PAA to CTC-MO, and also make certain amendments to the PAA, both of which would be subject to approval by the Nevada Division of Insurance (the "NVDOI" or "Department"). On June 29, 2016, the NVDOI issued a letter approving both the assignment of the PAA from CTC-CA to CTC-MO and the amendment of the PAA.

Upon receiving the approval of the NVDOI, CTC-MO and Spirit executed the amended Program Administration Agreement which became effective on July 1, 2016 (the "CTC Agreement"). Barbara D. Richardson ("Plaintiff") admitted that "[t]he CTC Agreement was a valid and enforceable contract," and she has alleged a breach of contract claim against CTC premised upon its enforcement.

Section 17 of the CTC Agreement contains the following mandatory arbitration provision:

> **SECTION 17**
> **ARBITRATION**
>
> A. Any controversy or claims of either of the parties arising out of or relating to this Agreement, or the breach of any term, condition, or obligation, may, upon the mutual consent of all parties, be submitted to non-binding mediation under the supervision of the American Arbitration Association or any other agency for alternative dispute resolution. In the event that mutual consent to mediation shall not be obtained within thirty (30) days of written notice from any party to the other concerning the existence of a claim or controversy, the application of this paragraph shall be null and void.

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B. **Any controversy or claim of either of the parties arising out of or relating to this Agreement, or the breach of any term, condition, or obligation, which is not resolved by non-binding mediation, shall be settled by final and binding arbitration** before three (3) arbitrators chosen under and governed by the Commercial Arbitration Rules of the American Arbitration Association to be held in the District of Columbia, and judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction.

C. All expenses of mediation or arbitration shall be borne equally by the parties, provided that each party shall be responsible for its own legal fees, expenses and costs. However, the mediators or arbitrators may, at their sole discretion, award reasonable attorney's fees, costs and expenses related to the mediation or arbitration to the prevailing party and such amounts will be in additional to any settlement.

Section 19(D) of the CTC Agreement provides that "[t]his Agreement, **including the provisions relating to arbitration,** shall be governed by the laws of the District of Columbia."

Spirit was placed into receivership pursuant to an order entered in the Eighth Judicial District Court of Clark County, Nevada, Case No. A-19-787325, on February 27, 2019 (the "Receivership Order"). Pursuant to the Receivership Order, the Court appointed Plaintiff as Spirit's Permanent Receiver and vested her with exclusive title to all of Spirit's property, including Spirit's "contract rights." Pursuant to the Receivership Order, Plaintiff was authorized, *inter alia*, to initiate and prosecute, in the name of Spirit or in her own name, any and all suits, to defend suits in which Spirit or Plaintiff is a party in Nevada or elsewhere, and to pursue further and to compromise suits, legal proceedings or claims on such terms and conditions as she deems appropriate. Spirit was subsequently placed into liquidation on November 6, 2019.

On February 6, 2020, Plaintiff initiated the present action by filing the Complaint alleging numerous causes of action against many different parties, including CTC, to recover monies that are purportedly owed to Spirit. Specifically, Plaintiff brought the following causes of action against CTC: (i) breach of contract; (ii) breach of fiduciary duty; (iii) breach of the implied covenant of good faith and fair dealing – tortious; (iv) breach of the implied covenant of good faith and fair dealing – contract; (v) Nevada RICO; (vi) unjust enrichment; (vii) fraud; (viii) civil conspiracy; (ix) fraudulent transfer pursuant to NRS 112; (x) voidable transfer pursuant to NRS 696B; (xi) recovery of distributions and payments pursuant to NRS 696B; and (xii) recovery of distributions and payments pursuant to NRS 692C.402.

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On May 11, 2020, CTC requested that Plaintiff voluntarily consent to arbitrate all its claims against CTC alleged in the Complaint in accordance with the arbitration provisions of the CTC Agreement and the PAA. On May 13, 2020, CTC was informed by Plaintiff's counsel that Plaintiff had declined CTC's request to consent to arbitration, following which CTC filed the present Motion to compel arbitration pursuant to NRS 38.221.

II. CONCLUSIONS OF LAW

A. The Arbitration Provision in the CTC Agreement is Valid and Enforceable Pursuant to the Federal Arbitration Act, and the Result Would be the Same Pursuant to Both District of Columbia and Nevada Law.

This Court has the authority to compel Spirit to arbitrate all claims against CTC arising out of or relating to the CTC Agreement. Specifically, NRS 38.221 provides, in pertinent part, the following:

> 1. On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
>
> (a) If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and
>
> (b) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.
>
> ****
>
> 5. If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under this section must be made in that court

As CTC previously requested that Plaintiff agree to arbitrate the claims brought against it in the Complaint and Plaintiff subsequently refused to do so, this Motion was properly brought before this Court pursuant to NRS 38.221.

"The FAA provides for the enforcement of arbitration agreements in any contract affecting interstate commerce." *Ellison v. Am. Homes 4 Rent, LP*, No. 2:19-CV-1137 JCM (DJA), 2019 U.S. Dist. LEXIS 221543, at *4-5 (D. Nev. Dec. 27, 2019). The FAA reflects a liberal federal policy in favor of arbitration and the fundamental principal that arbitration is a matter of contract. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 1745 (2011). As the CTC Agreement is a contract between Spirit, a Nevada corporation, and CTC-MO, a Missouri limited liability company, for the purpose of operating a nationwide insurance business, which Plaintiff

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alleges also includes the approval and paying of claims for insureds in Mexico (*see, e.g.*, Complaint, at ¶ 211), it is evident that the CTC Agreement affects interstate commerce, and so the FAA requires enforcement of the arbitration provision.

Even if the FAA did not govern the arbitration provision, it would still be enforceable pursuant to the District of Columbia's own arbitration act. *See* D.C. Code § 16-4401, *et seq.* "Under the District's arbitration act, a written agreement to 'submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.'" *Giron v. Dodds*, 35 A.3d 433, 437 (D.C. 2012) (quoting D.C. Code § 16-4406(a)). "Once it is established that the parties intended a particular dispute to be arbitrated, 'a court may not override that agreement by itself deciding such a dispute.'" *Giron*, 35 A.3d at 437 (quoting *Hercules & Co. v. Beltway Carpet Serv., Inc.*, 592 A.2d 1069, 1072 (D.C. 1991)).

Applying Nevada law with respect to the arbitration provision, the result would still be the same. *See Clark Cty. Pub. Emps. Ass'n v. Pearson*, 106 Nev. 587, 591, 798 P.2d 136, 138 (1990) ("Disputes are presumptively arbitrable, and courts should order arbitration of particular grievances unless it may be said with positive assurance that the arbitration clause is not susceptible of and interpretation that covers the asserted dispute."); *Int'l Ass'n of Firefighters, Local #1285 v. Las Vegas*, 104 Nev. 615, 618, 764 P.2d 478, 480 (1988) ("Nevada courts resolve all doubts concerning the arbitrability of the subject matter of a dispute in favor of arbitration."). *See also, See, e.g. MMAWC v. Zion Wood Obi Wan Tr.*, 448 P.3d 568, 572 (Nev. 2019) (holding that NRS 597.995 is preempted by the Federal Arbitration Act and therefore concluding that arbitration clause in a licensing agreement applies to claims alleged in the underlying complaint).

Therefore, the arbitration provision found in Section 17 of the CTC Agreement is valid and enforceable pursuant to the FAA, and the result would be the same pursuant to either District of Columbia or Nevada law.

B. The Arbitration Provision is Not the Product of a "Criminal Enterprise."

Plaintiff argued that she should not be bound by the arbitration provision in the CTC Agreement because it is "merely an instrument in a criminal enterprise" allegedly perpetrated by

CTC and the other Defendants. In doing so, Plaintiff cited to a single case, *Janvey v. Alguire*, 847 F.3d 231 (5th Cir. 2017), a fifth circuit decision which has no bearing on this action. Unlike *Janvey*, this case is not premised on a criminal matter wherein numerous principals of a sham enterprise have been convicted by the federal government for running an illicit scheme.

Plaintiff's claim that the arbitration clause in the CTC Agreement could be used to "conceal" evidence of a fraudulent scheme is equally unpersuasive. Spirit and CTC have been subject to the Department's regulation, and specifically the Receiver herself for almost a decade, and their underlying financials have been previously made available to the Receiver.

Therefore, the arbitration provision of the CTC Agreement is valid and enforceable, and not the product of a "criminal enterprise."

C. The FAA is not Reverse Preempted by the Nevada Insurers Liquidation Act Under the McCarren-Ferguson Act.

Plaintiff argued that the FAA should not apply because it is reverse preempted by the Nevada Insurers Liquidation Act ("NILA"). Notably, the Trial Court previously rejected a similar argument in its decision in *Nevada Commissioner of Insurance, v. Milliman Inc, et al.*, Case No. A-17-760558-C. A copy of the *Milliman* Trial Court's order is annexed hereto as **Exhibit A.** Specifically, the *Milliman* Court stated the following:

> **[T]he Nevada Liquidation Act does not reverse-preempt the FAA under the McCarren-Ferguson Act**, 15 U.S.C. §§ 1011-1015. The standard for reverse preemption is not satisfied here because forcing a statutory liquidator to arbitrate ordinary, pre-insolvency breach of contract and tort claims, such as Plaintiff's damages claims against Milliman, neither implicates the business of insurance nor interferes with the liquidator's statutory function. NHC is no longer a functioning entity engaged in the business of insurance. Enforcing the Agreement's arbitration clause will not disrupt the orderly liquidation of NHC, and Plaintiff's action against Milliman has no bearing on the administration, allocation or ownership of NHC's property or assets, which is the province of the Receivership Action. Moreover, nothing in the Nevada Liquidation Act precludes a liquidator from arbitrating its claims. On the contrary, the Receivership Order entered pursuant to the Act expressly authorizes Plaintiff to "initiate and maintain actions at law or equity or any other type of action or proceeding of any nature, in this and other jurisdictions," and to "[i]nstitute and prosecute ... any and all suits and other legal proceedings" on behalf of NHC. Absent such a conflict, there is no reverse preemption…

Exhibit A, at pp. 8-9. (emphasis added) (internal cites omitted).

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When Plaintiff sought to overturn the *Milliman* decision through a writ to the Nevada Supreme Court, the Court declined to overturn the Trial Court's ruling, stating the following:

> Richardson claims the district court committed legal error by ordering arbitration despite her argument that the McCarran Ferguson Act, 15 U.S.C. § 1012, reverse-preempts the FAA. In her view, enforcement of an arbitration agreement against an insurance liquidator pursuing contract and tort damages against third parties would thwart the insurance liquidator's broad statutory powers and the general policy under Nevada's Uniform Insurance Liquidation Act (VILA), *see* NRS 696B.280, to concentrate creditor claims in a single, exclusive forum. However, at issue here is not a creditor's claim against the Co-Op; at issue is Richardson's breach-of-contract and tort claims against several third parties on behalf of the Co-Op, which happens to be in receivership. Courts elsewhere that have considered Richardson's argument have rejected it.

State ex rel. Comm'r of Ins. v. Eighth Judicial Dist. Court of Nev., 454 P.3d 1260 (Nev. 2019) (internal cites omitted). A copy of the *State ex rel. Comm'r of Ins.* opinion is annexed hereto as **Exhibit B**. Here, as in the prior action, Plaintiff asserted breach of contract, tort, and statutory claims against third parties on behalf of Spirit, as opposed to a creditor's claim against Spirit. In the present context, the FAA is not reverse preempted by the NILA, and so Plaintiff's claims may only be brought in arbitration.

Plaintiff sought to distinguish this case by noting that the Receivership Order states that this Court has "exclusive jurisdiction over all the Property and any claims or rights respecting the Property to the exclusion of any other Court or tribunal, such exercise of sole and exclusive jurisdiction being hereby found to be essential to the safety of the public and of the claimants against [Spirit]." However, Plaintiff ignored the fact that this same language also appeared word for word in the prior order appointing Richardson as the permanent receiver for Milliman.

Plaintiff also tried to distinguish this case on the basis that CTC was registered as an insurance holding company with the Department. However, Plaintiff provided no cognizable rational as to why this should cause the Court to deviate from the prior decision and does not cite a single case in support of her argument. Plaintiff concludes her argument by once again claiming that this Court should disregard the prior decision, claiming that this case is different because "Spirit was merely an instrument in a criminal enterprise," however, as already discussed herein, this criminal instrument standard has no relation to the present facts, and in any event, comes solely from a concurring opinion in an easily distinguished fifth circuit case.

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Plaintiff then made an argument that Nevada law should preempt District of Columbia law (the controlling law pursuant to the terms of CTC Agreement) because "arbitration is procedural," and then proceeded to reiterate its prior claim that the NILA preempts the Nevada Arbitration Act's general proposition that arbitration clauses are enforceable. This Court again looks to the aforementioned prior decisions in stating that the FAA preempts state law in its entirety. As such, it is of no import which state law, Nevada or District of Columbia, would theoretically apply in its absence.

In sum, this Court finds the Order Denying Petition for Writ of Mandamus in *State ex rel. Comm'r of Ins. v. Eighth Judicial District Court* to be persuasive, if not binding, authority in what appears to be a case involving Plaintiff addressing similar issues regarding arbitration that have been proffered by Plaintiff in this case. The Court has determined that the distinctions urged by Plaintiff do not warrant a different result here.

Therefore, the FAA is not reverse preempted by the NILA and Plaintiff's claims against CTC may only be pursued in arbitration pursuant to the CTC Agreement.

D. NRS 696B.200 has No Bearing on the Enforceability of the Arbitration Provision Pursuant to the FAA

Plaintiff argued that her claims are "appropriately" brought in this Court against CTC pursuant NRS 696B.200(1)(c). NRS 696B.200 provides that a Nevada court "has jurisdiction" in an action brought by an insurance receiver against certain persons, including managers, organizers, and promoters of an insurer. Plaintiff claimed that this Court has jurisdiction because she believed that CTC must fall into one of those three aforementioned categories.

As the Nevada Supreme Court and the *Milliman* Trial Court have already stated, the FAA preempts Nevada state law concerning arbitration in this context, and so Plaintiff's claims against CTC must be brought in arbitration regardless of what other courts could potentially hear the matter in the absence of such a provision.

E. The Receiver Stands in the Shoes of Spirit

The fact that this Complaint is brought on Spirit's behalf by Richardson, in her capacity as receiver, has no bearing on the enforceability of the arbitration provision in the CTC Agreement

as she "stands in the shoes" of Spirit. Again, the *Milliman* court noted that "[w]hile it is true that virtually everything the Liquidator does is for the benefit of the insolvent insured's creditors and policyholders, this does not mean that the Liquidator may ignore and avoid the contractual, statutory, and judicial limitations applicable to the particular claims she brings against Milliman." **Exhibit A**, at p. 6, ln. 19-22. The Nevada Supreme Court upheld the Trial Court's decision. **Exhibit B**. Therefore, the Plaintiff stands in the shoes of Spirit and is bound by the arbitration provision in the CTC Agreement in carrying out her duties as Receiver for Spirit.

F. All of Plaintiff's claims against CTC arise out of the CTC Agreement and are subject to the Arbitration

The FAA controls whether Plaintiff's claims are subject to arbitration. The FAA reflects a "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 1745 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983)). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Bank of N.Y. Mellon v. Christopher Cmtys. at S. Highlands Golf Club Homeowners Ass'n*, No. 2:17-CV-1033 JCM (GWF), 2019 U.S. Dist. LEXIS 152830, at *8 (D. Nev. Sep. 9, 2019) (citations omitted).

"In construing arbitration clauses, courts should first determine the breadth of the arbitration clause." *Rupracht v. Union Sec. Ins. Co.*, No. 3:07-cv-00231-BES (RAM), 2007 U.S. Dist. LEXIS 112456, at *12 (D. Nev. Dec. 20, 2007) (internal cites omitted). "An arbitration clause is broad if it covers "all disputes arising out of a contract" and is a narrow clause if it covers only specific types of disputes. *Id.*

When interpreting the scope of a broad arbitration clause "factual allegations need only 'touch matters covered by the contract containing the arbitration clause, and all doubts are to be resolved in favor of arbitrability.'" *Rupracht*, 2007 U.S. Dist. LEXIS 112456, at *13 (quoting *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) (internal citations omitted) (emphasis added)). *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 624 n.13, 105 S. Ct. 3346, 3352 (1985) ("[I]nsofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any

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doubts in favor of arbitrability."); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987) ("If the allegations underlying the claims 'touch matters' covered by the parties' sales agreements, then those claims must be arbitrated, whatever the legal labels attached to them.").

As the arbitration provision in the CTC Agreement covers "any controversy or claim of either of the parties arising out of or relating to" the agreement, it is a "broad" arbitration provision. Therefore, the arbitration provision covers all of Plaintiff's claims against CTC, CTC-CA and CTC-MO.

G. CTC is Not a Necessary Party to this Proceeding and Judicial Economy Does Not Compel CTC to Remain a Party to this Action.

Plaintiff argued that CTC is so closely intertwined with the other allegations in her Complaint, that the Court should disregard the arbitration provision because judicial economy and Plaintiff's own convenience somehow trumps Nevada law. Relevant caselaw is squarely opposed to this argument. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 1745 (2011) (stating that the FAA reflects a liberal federal policy in favor of arbitration and the fundamental principal that arbitration is a matter of contract); *Seasons Homeowners Ass'n v. Richmond Am. Homes of Nev., Inc.*, No. 2:11-cv-01875-RCJ-PAL, 2012 U.S. Dist. LEXIS 100859, at *26 (D. Nev. July 19, 2012) (recognizing that Nevada law favors the lower costs and faster resolution afforded by arbitration when compared to traditional litigation).

Plaintiff's claim that as the "star witness," CTC must remain a party to this action is also unpersuasive. Plaintiff can seek CTC's testimony through NRCP Rule 30 should she so choose.

Therefore, CTC is Not a Necessary Party to this Proceeding and Judicial Economy Does Not Compel CTC to Remain a Party to this Action.

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IT IS HEREBY ORDERED that the Motion is GRANTED and CTC is dismissed with prejudice from this case.

DATED this 16th day of July, 2020.

DISTRICT JUDGE

Respectfully submitted by:

SALTZMAN MUGAN DUSHOFF

By
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Exhibit A

(*Milliman* Order)

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP,

Plaintiff,

vs.

MILLIMAN, INC., a Washington Corporation; JONATHAN L. SHREVE, an Individual; MARY VAN DER HEIJDE, an Individual; MILLENNIUM CONSULTING SERVICES, LLC, a North Carolina Corporation; LARSON & COMPANY P.C., a Utah Professional Corporation; DENNIS T. LARSON, an Individual; MARTHA HAYES, an Individual; INSUREMONKEY, INC., a Nevada Corporation; ALEX RIVLIN, an Individual; NEVADA HEALTH SOLUTIONS, LLC, a Nevada Limited Liability Company; PAMELA EGAN, an

Case No. A-17-760558-B

Dept. No. 25

ORDER GRANTING MILLIMAN'S MOTION TO COMPEL ARBITRATION

JAN 31 2018

Individual; BASIL C. DIBSIE, an Individual; LINDA MATTOON, an Individual; TOM ZUMTOBEL, an Individual; BOBBETTE BOND, an Individual; KATHLEEN SILVER, an Individual; DOES I through X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Defendants.

The Motion To Compel Arbitration of defendants Milliman, Inc., Jonathan L. Shreve and Mary Van Der Heijde (collectively for purposes of this Motion only, "Milliman") came on for hearing before this Honorable Court on January 9, 2018. Justin N. Kattan, Esq. of Dentons US LLP and Patrick Byrne, Esq. of Snell & Wilmer, L.L.P., appeared on behalf of Milliman; Mark E. Ferrario, Esq., of Greenberg Traurig, LLP appeared on behalf of the Commissioner of Insurance, Barbara D. Richardson, in her official capacity as Receiver ("Plaintiff" or the "Liquidator") for Nevada Health CO-OP ("NHC"). The Court, having reviewed and considered the papers submitted by the parties and heard the argument of counsel, and otherwise being fully apprised in the premises and good cause appearing therefor, hereby GRANTS Milliman's Motion, for the reasons set forth herein:

A. The Nevada Health CO-OP

NHC was established under the Patient Protection and Affordable Care Act in October 2012. NHC experienced such financial hardship that insolvency proceedings before Department I of this Court were instituted in September 2015. By Order dated October 14, 2015 (the "Receivership Order"), the Court appointed Plaintiff as NHC's Permanent Receiver, and vested Plaintiff with exclusive title to all of NHC's property, including NHC's "contract rights." (Receivership Order, §2(c)). The Order further authorized Plaintiff to "initiate and maintain actions at law or equity or any other type of action or proceeding of any nature, in this and other jurisdictions," and to "[i]nstitute and prosecute ... any and all suits and other legal proceedings." *Id.* § 14(a), (h).

By order dated September 21, 2016, Plaintiff was authorized "to liquidate the business of NHC and wind up its ceased operations pursuant to" the Nevada Liquidation Act.

B. The Applicable Arbitration Provision

Plaintiff's claims all seek monetary damages arising from Milliman's performance of actuarial and consulting services pursuant to an October 20, 2011 Consulting Services Agreement (the "Agreement") entered into by Culinary Health Fund and Milliman.[1] Paragraph 5 of the Agreement contains a broad and unambiguous arbitration provision, which states, in relevant part:

> DISPUTES. In the event of any dispute arising out of or relating to the engagement of Milliman by Company, the parties agree that the dispute will be resolved by final and binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association.

This provision is prominently featured as part of the main body of the contract. The Agreement was executed by sophisticated parties, with experience in their respective fields, and with access to counsel.

C. The Arbitration Provision in the Agreement is Valid and Enforceable, Reflecting The Strong Presumption Favoring Arbitration Under Federal and Nevada Law

The arbitration clause in the Agreement is fully valid and enforceable. Both the Nevada Arbitration Act ("NAA"), NRS 38.206, *et seq.*, and the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, contain virtually identical language mandating that contractual arbitration clauses are fully "valid, irrevocable, and enforceable, save upon which grounds as exist at law or in equity for the revocation of any contract." Both the NAA and FAA express a "fundamental policy favoring the enforceability of arbitration agreements." *Tallman v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 71, 359 P.3d 113, 118 (2015); *State ex rel. Masto v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009). The "strong presumption in favor of

[1] Culinary Health Fund later created Hospitality Health, Ltd. and "assigned and transferred all rights, title, and interest" in the Agreement to Hospitality Health, Ltd. Hospitality Health, Ltd. subsequently assigned all of its assets and agreements, including the Agreement, to NHC.

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arbitratbility applies with even greater force" where, as here, "a broad arbitration clause is at issue." *Rodriguez, v. AT&T Servs., Inc.*, No. 2:14-cv-01537, 2015 WL 6163428, at * 9 (D. Nev. Oct. 20, 2015) (citations omitted).

The exception in the NAA and FAA for "grounds as exist at law or in equity for the revocation of any contract" does not apply here. The U.S. Supreme Court has defined that phrase to mean that only "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2" of the FAA. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996); *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 892 (9th Cir. 2001). Plaintiff neither pled any such grounds to revoke the Agreement in the Complaint nor raised any such grounds in her opposition to the Motion.

Since Milliman has established the existence of a valid arbitration agreement, it is Plaintiff's burden to establish a defense to enforcement. *Gonski v. Second Judicial Dist. Court of State ex rel. Washoe*, 126 Nev. 551, 245 P.3d 1164, 1168-69 (2010). Plaintiff fails to do so.

D. All of Plaintiff's Claims Arise from and Relate Directly to Milliman's Work Under the Agreement

Plaintiff's claims all arise from and relate to the Agreement because, but for the Agreement and the work Milliman did for NHC pursuant to it, Plaintiff would have no claims whatsoever. Plaintiff's Complaint identifies the contracted-for work that Milliman performed, including "providing certification required pursuant to NRS 681B, conducting a feasibility study, providing business plan support, assisting NHC in setting premium rates, [and] participating in the preparation of financial reports and information to regulators." (Complaint, ¶ 334). Every cause of action Plaintiff brings, whether styled in tort or contract, is based on Milliman's alleged wrongful conduct in performing one or more of these services.

E. Because the Plaintiff's Claims Arise Under and Relate to the Agreement, Plaintiff Is Bound by the Agreement's Arbitration Clause

The Nevada Supreme Court has held that where a plaintiff "is seeking to enforce rights under [an] agreement, it cannot simultaneously avoid other portions of the agreement, such as the arbitration provision." *Ahlers v. Ryland Homes*, 126 Nev. 688, 367 P.3d 743 (2010) (unpublished). Otherwise, "to allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act." *Id.* at *2.

This rule applies with equal force to claims brought by a statutory liquidator or receiver. That Plaintiff is herself a non-signatory to the Agreement is irrelevant. Because Plaintiff's claims arise from Milliman's work done pursuant to the Agreement, Plaintiff is bound to that Agreement, including any applicable arbitration clause, just like the insolvent insurer would have been. *See, e.g., Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969, 972 n.4 (9th Cir. 1992) (enforcing contractual arbitration clause and stating that "if the liquidator wants to enforce [the insurer's] rights under its contract, she must also assume its perceived liabilities"); *Rich v. Cantilo & Bennett, L.L.P.*, 492 S.W.3d 755, 762 (Tex. Ct. App. 2016) (same); *Poizner v. Nat. Indem. Co.*, No. 08CV772-MMA, 2009 WL 10671673, at *2 (S.D. Cal. Jan. 6, 2009) (enforcing arbitration clause against insurance liquidator); *Garamendi v. Caldwell*, No. CV-91-5912-RSWL(EEX), 1992 WL 203827, at *3 (C.D. Cal. May 4, 1992) (same); *Koken v. Cologne Reins. (Barbados), Ltd.*, 34 F. Supp. 2d 240 (M.D. Pa. 1999) (same); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 272–75 (D. Vt. 1993) (same); *State v. O'Dom*, No. 2015CV258501, 2015 WL 10384362, at *3–4 (Ga. Super. Sept. 18, 2015) (same).

It is irrelevant that Plaintiff styles certain of her claims in tort rather than contract. Where, as here, a plaintiff's tort, contract and statutory claims relate to and arise from the work done pursuant to the contractual relationship, they all should be arbitrated together. *See Phillips v.*

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Parker, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990) (compelling arbitration of tort and RICO claims that "relate to" agreement containing arbitration provision where plaintiff's "basis for claiming injury and grounds for redress stem from rights he allegedly received pursuant to the agreement"); *Helfstein v. UI Supplies*, 127 Nev. 1140, 373 P.3d 921, at *2 (2011) (unpublished) (granting motion to compel arbitration of tort and contract claims and stating that "if the allegations underlying the claims so much as touch matters covered by the parties' agreements, then those claims must be arbitrated" (citation omitted)); *Rodriguez, v. AT&T Servs., Inc.*, No. 2:14-cv-01537, 2015 WL 6163428, at * 8 (D. Nev. Oct. 20, 2015) ("[S]o long as the phone call that allegedly triggered the offending credit inquiry collaterally touches upon the Business Agreement or has some roots in the contractual relationship between the parties, Plaintiff's claims fall within the scope of the arbitration provision.").

F. Plaintiff's Claims Against Milliman Are Pre-Insolvency, Common Law Damages Claims that Belonged to NHC, And Need Not Be Brought in the Liquidation Court

Plaintiff argues that, as Liquidator, she is bringing claims "on behalf of" creditors and policyholders, and therefore she does not stand strictly in the shoes of the insolvent insurer. She further contends that these claims must be brought in the liquidation court, and are not constrained by any contractual provisions that would have limited NHC. While it is true that virtually everything the Liquidator does is for the benefit of the insolvent insured's creditors and policyholders, this does not mean that the Liquidator may ignore and avoid the contractual, statutory, and judicial limitations applicable to the particular claims she brings against Milliman.

There is a distinction between claims that belong to the creditors and policyholders of an insolvent insurer, on the one hand, as distinct from claims that belong to the insolvent insurer, where any recovery would increase the coffers of the estate, and therefore benefit the estate's creditors and policyholders, on the other hand. Plaintiff's claims fall within the latter category, and therefore are arbitrable.

All of Plaintiff's claims here belonged only to NHC because they are ordinary common law and contractual damages claims based on NHC's pre-insolvency rights. Plaintiff seeks monetary damages from Milliman, not the return of NHC assets, and not the clawing back and redistribution among creditors of estate assets. Plaintiff's action against Milliman does not involve set offs, or proofs of claim, or claims arising from the Nevada liquidation statute. This case is separate and distinct from the ongoing Receivership Action and it neither threatens or states an interest in NHC assets or property, nor will it affect any creditors' rights. Plaintiff has not pled any viable causes of action that actually belong to NHC's creditors.

This Court is thus persuaded that arbitrating Plaintiff's damages claims against Milliman will not interfere with, invalidate, impair or supersede this state's statutory liquidation scheme, the NHC liquidation proceedings, or the State's regulation of insurance. *See, e.g., Bennett, supra*, 968 F.2d at 972 (stating that if a "dispute is in essence a contractual one, it should be arbitrated. And because the liquidator, who stands in the shoes of the insolvent insurer, is attempting to enforce [the insurer's] contractual rights, she is bound by [the insurer's] pre-insolvency agreements"); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381-82 (9th Cir. 1997) (same); *Suter v. Munich Reins. Co.*, 223 F.3d 150, 161 (3d Cir. 2000) ("It is true, as the Liquidator stresses, that if the District Court or an arbitrator should decide the reinsurance agreement does not cover the disputed expenses, the estate will be smaller than if that issue was resolved in the Liquidator's favor. But the mere fact that policyholders may receive less money does not impair the operation of any provision of New Jersey's Liquidation Act."); *Koken, supra*, 34 F. Supp. 2d at 247; *see also Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1154 (3d Cir. 1989) (holding that bankruptcy trustee's claims against debtor's securities broker for state and federal securities violations were arbitrable because they were based on debtor's pre-bankruptcy rights, and did not arise from the Bankruptcy Code).

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While creditors or policyholders may "benefit" from monetary damages the Liquidator recovers from third parties, in that such recoveries increase the coffers of NHC's estate, the claims here do not "belong" to NHC's creditors or policyholders, do not implicate a state's regulation of insurance, and need not be brought in the liquidation court.

While Plaintiff asserts that it would be unfair to NHC's creditors and policyholders to enforce the arbitration clause, because it limits the scope of discovery and precludes punitive damages, this Court cannot vitiate an otherwise valid arbitration clause simply to improve the perceived strength of Plaintiff's case. Plaintiff's argument also contravenes the Nevada Supreme Court's express recognition that the cost savings and efficiency of streamlined discovery in arbitration will inure to the benefit of the State and NHC's creditors. *D.R. Horton, Inc.*, 120 Nev. at 553, 96 P.3d at 1162. ("[A]rbitration generally avoids the higher costs and longer time periods associated with traditional litigation.").

G. The McCarran-Ferguson Act does not reverse preempt the Federal Arbitration Act

Finally, the Nevada Liquidation Act does not reverse-preempt the FAA under the McCarren-Ferguson Act, 15 U.S.C. §§ 1011-1015. The standard for reverse preemption is not satisfied here because forcing a statutory liquidator to arbitrate ordinary, pre-insolvency breach of contract and tort claims, such as Plaintiff's damages claims against Milliman, neither implicates the business of insurance nor interferes with the liquidator's statutory function. *Quackenbush, supra*, 121 F.3d at 1381-82; *AmSouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004) (finding no reverse preemption where liquidator's "ordinary [tort and contract] suit against a tortfeasor" did not implicate the "regulation of the business of insurance"); *Grode v. Mut. Fire, Marine and Inland Ins. Co.*, 8 F.3d 953, 959–60 (3d Cir. 1993) (finding no reverse preemption because liquidator's "[s]imple contract and tort actions" against third party have "nothing to do with [the State's] regulation of insurance"); *Koken, supra*, 34 F. Supp. 2d at 247 (granting motion to

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compel arbitration where "this action has nothing to do with Pennsylvania's statutory scheme for the regulation of the business of insurance because it is not an action against an insolvent insurer's estate that might deprive it of assets; instead, it is an action by the Liquidator against a third party, here a reinsurer for the insolvent insurer, to recover money for the estate on a breach-of-contract claim"); *Midwest Employers Cas. Co. v. Legion Ins. Co.*, No. 4:07CV870 CDP, 2007 WL 3352339, at *5 (E.D. Mo. Nov. 7, 2007) ("The ultimate issue in this case is a standard contract dispute, so the case does not involve the state's regulation of insurance."); *Northwestern Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 321 B.R. 120, 126 (Bankr. D. Del. 2005); *Nichols v. Vesta Fire Ins. Corp.*, 56 F. Supp. 2d 778, 780 (E.D. Ky. 1999); *Costle*, 839 F. Supp. at 275. NHC is no longer a functioning entity engaged in the business of insurance. Enforcing the Agreement's arbitration clause will not disrupt the orderly liquidation of NHC, and Plaintiff's action against Milliman has no bearing on the administration, allocation or ownership of NHC's property or assets, which is the province of the Receivership Action.

Moreover, nothing in the Nevada Liquidation Act precludes a liquidator from arbitrating its claims. On the contrary, the Receivership Order entered pursuant to the Act expressly authorizes Plaintiff to "initiate and maintain actions at law or equity or any other type of action or proceeding of any nature, in this and other jurisdictions," and to "[i]nstitute and prosecute . . . any and all suits ***and other legal proceedings***" on behalf of NHC. (Order, §§ 14(a), (h) (emphasis added). Absent such a conflict, there is no reverse preemption. *Quackenbush*, 121 F.3d at 1381-82. Judge Cory, who entered the Receivership Order and presides over the liquidation proceedings, denied Plaintiff's request to coordinate and consolidate Plaintiff's action against Milliman with the liquidation proceeding.

Finally, the Nevada Arbitration Act, which is not pre-empted, is substantively identical to the FAA and mandates enforcement of the Agreement's arbitration clause.

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Accordingly, the Court hereby GRANTS Milliman's Motion To Compel Arbitration.

IT IS SO ORDERED

DATED: March 8, 2018

DISTRICT COURT JUDGE

Respectfully prepared and submitted by:

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Exhibit B

(*State ex rel. Comm'r of Ins.* Opinon)

State ex rel. Comm'r of Ins. v. Eighth Judicial Dist. Court of Nev.

Supreme Court of Nevada

December 19, 2019, Filed

No. 77682

Reporter
2019 Nev. Unpub. LEXIS 1366 *; 454 P.3d 1260; 2019 WL 7019006

STATE OF NEVADA, EX REL COMMISSIONER OF INSURANCE, BARBARA RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KATHLEEN E. DELANEY, DISTRICT JUDGE, Respondents, and MILLIMAN, INC., A WASHINGTON CORPORATION; JONATHAN L. SHREVE, AN INDIVIDUAL; AND MARY VAN DER HEIJDE, AN INDIVIDUAL, Real Parties in Interest.

Core Terms

arbitration, order compelling arbitration, Liquidation, adequate legal remedy, arbitration agreement, extraordinary writ, district court, legal error, interlocutory, affords, exceptional circumstances, regulation of a business, creditor's claim, final judgment, third party, writ relief, writ review, receivership, automatic, discovery, MANDAMUS, ordering, receiver, damages, parties, cases

Judges: [*1] Pickering, J., Parraguirre, J., Cadish, J.

Opinion

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

Petitioner Barbara Richardson is the Nevada Commissioner of Insurance. She brought the underlying case as court-appointed receiver to recover damages from real parties in interest, collectively Milliman, on behalf of Nevada Health Co-Op, the subject insurance provider of the receivership. The district court concluded that Richardson was bound to Nevada Health Co-Op's arbitration agreement with Milliman and entered an order compelling arbitration of her claims. Richardson seeks a writ of mandamus from this court interdicting the order compelling arbitration with Milliman.

"[T]he right to appeal [a final judgment] is generally an adequate legal remedy that precludes writ relief." *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). In the arbitration context, NRS 38.247(1)(a) affords a

right of interlocutory appeal from an order *denying* a motion to compel arbitration but not from an order *granting* such a motion. This legislative distinction supports that interlocutory writ review of orders compelling arbitration is not automatic but, rather, limited to cases that present exceptional circumstances. *See Tallman v. Eighth Judicial Dist. Court*, 131 Nev. 713, 719 n.1, 359 P.3d 113, 117 n.1 (2015) (clarifying that NRS 38.247 does not make writ relief automatically appropriate [*2] for an order compelling arbitration and noting, "[w]hile the unavailability of an immediate appeal from an order compelling arbitration *may* present a situation in which an eventual appeal from the order confirming the award or other final judgment in the case will not be plain, speedy, or adequate, it is an overstatement to say this holds true in all cases where arbitration has been compelled").

Richardson has not carried her "burden of demonstrating that extraordinary relief is warranted." *Pan*, 120 Nev. at 228, 88 P.3d at 844. Richardson chiefly complains that arbitration affords more limited discovery and appellate review than judicial proceedings and that not all parties to the case can be compelled to arbitrate. But these are characteristic of any arbitration and not themselves a basis to conclude that an eventual appeal will not be an adequate legal remedy. *Cf. U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 189-90, 415 P.3d 32, 40 (2018) ("[T]he [Federal Arbitration Act, 9 U.S.C. §§ 1-16,] preempts laws that invalidate an arbitration agreement as unconscionable for failing to provide for judicially monitored discovery, not heeding the Federal Rules of Evidence, or not affording a right to jury trial."). The burden of simultaneous arbitration and litigation arises where, as here, not all persons involved [*3] in a dispute are subject to arbitration, an inconvenience that may be mitigated by staying litigation while arbitration runs its course. Richardson's complaints, inherent in any order compelling arbitration, do not demonstrate that an eventual appeal would not be an adequate legal remedy.

Nor has Richardson otherwise demonstrated that this matter presents the exceptional circumstances required for interlocutory writ review of an order compelling arbitration. *See Tallman*, 131 Nev. at 719 n.1, 359 P.3d at 117 n.1. Extraordinary writ relief normally requires clear legal error. *See Archon v. Eighth Judicial Dist. Court*, 133 Nev. 816, 819-20, 407 P.3d 702, 706 (2017). Richardson claims the district court committed legal error by ordering arbitration despite her argument that the McCarran Ferguson Act, 15 U.S.C. § 1012, reverse-preempts the FAA. In her view, enforcement of an arbitration agreement against an insurance liquidator pursuing contract and tort damages against third parties would thwart the insurance liquidator's broad statutory powers and the general policy under Nevada's Uniform Insurance Liquidation Act (VILA), *see* NRS 696B.280, to concentrate creditor claims in a single, exclusive forum. However, at issue here is not a creditor's claim against the Co-Op; at issue is Richardson's breach-of-contract and tort claims against several third [*4] parties on behalf of the Co-Op, which happens to be in receivership. Courts elsewhere that have considered Richardson's argument have rejected it. *E.g., Milliman, Inc. v. Roof*, 353 F. Supp. 3d 588, 603 (E.D. Ky. 2018) (concluding that "[s]imply because the business is an insurance company and has become insolvent is not relevant to the regulation of the business of insurance"); *see also Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 161 (3d Cir. 2000) (even assuming that a liquidation act regulated the business of insurance, enforcing an arbitration clause against a receiver would not impair the regulation of the business of insurance under the act because the "proceeding [was] a suit instituted by the Liquidator . . . to enforce contract rights for an insolvent insurer"). Thus, we cannot say the district court committed clear legal error such that extraordinary writ relief is appropriate.

For these reasons, we deny the petition for extraordinary writ relief.

/s/ Pickering, J.

Pickering

/s/ Parraguirre, J.

Parraguirre

/s/ Cadish, J.

Cadish

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DISTRICT COURT

CLARK COUNTY, NEVADA

BARBARA D. RICHARDSON IN HER CAPACITY AS THE STATUTORY RECEIVER FOR SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC., Plaintiff, vs. THOMAS MULLIGAN, an individual; CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC, a Missouri Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES LLC, a California Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC, a Hawaii Limited Liability Company; CRITERION CLAIMS SOLUTIONS OF OMAHA, INC., a Nebraska Corporation; PAVEL KAPELNIKOV, an individual; CHELSEA FINANCIAL GROUP, INC., a California Corporation; CHELSEA FINANCIAL GROUP, INC., A Missouri Corporation; CHELSEA FINANCIAL GROUP, INC., a New Jersey Corporation d/b/a CHELSEA PREMIUM FINANCE CORPORATION; CHELSEA FINANCIAL GROUP, INC., a Delaware Corporation; CHELSEA HOLDING COMPANY, LLC, a Nevada Limited Liability Company; CHELSEA HOLDINGS, LLC, a Nevada Limited Liability Company;	Case No. A-20-809963-B Dept. No. XIII **NOTICE OF ENTRY OF ORDER GRANTING CRITERION CLAIM SOLUTIONS OF OMAHA, INC.'S MOTION TO COMPEL ARBITRATION**

FOURGOREAN CAPITAL, LLC, a New Jersey Limited Liability Company; KAPA MANAGEMENT CONSULTING, INC., a New Jersey Corporation; KAPA VENTURES, INC., a New Jersey Corporation; GLOBAL FORWARDING ENTERPRISES LIMITED LIABILITY COMPANY, a New Jersey Limited Liability Company; GLOBAL CAPITAL GROUP, LLC, a New Jersey Limited Liability Company; GLOBAL CONSULTING; NEW TECH CAPITAL, LLC, a Delaware Limited Liability Company; LEXICON INSURANCE MANAGEMENT LLC, a North Carolina Limited Liability Company; ICAP MANAGEMENT SOLUTIONS, LLC, a Vermont Limited Liability Company; SIX ELEVEN LLC, a Missouri Limited Liability Company; 10-4 PREFERRED RISK MANAGERS INC., a Missouri Corporation; IRONJAB LLC, a New Jersey Limited Liability Company; YANINA G. KAPELNIKOV, an individual; IGOR KAPELNIKOV, an individual; QUOTE MY RIG LLC, a New Jersey Limited Liability Company; MATTHEW SIMON, an individual; DANIEL GEORGE, an individual; JOHN MALONEY, an individual; JAMES MARX, an individual; CARLOS TORRES, an individual; VIRGINIA TORRES, an individual; SCOTT McCRAE, an individual; BRENDA GUFFEY, an individual; 195 GLUTEN FREE LLC, a New Jersey Limited Liability Company, DOE INDIVIDUALS I-X; and ROE CORPORATE ENTITIES I-X,

Defendants.

TO: ALL INTERESTED PARTIES

PLEASE TAKE NOTICE that an Order Granting Criterion Claim Solutions of Omaha, Inc.'s Motion to Compel Arbitration was entered on the 22nd day of July, 2020. A true and correct copy of which is attached hereto.

Dated this 23rd day of July, 2020.

BAILEY❖KENNEDY

By: */s/ Joshua M. Dickey*
JOHN R. BAILEY
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 23rd day of July, 2020, service of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING CRITERION CLAIM SOLUTIONS OF OMAHA, INC.'S MOTION TO COMPEL ARBITRATION** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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DISTRICT COURT

CLARK COUNTY, NEVADA

BARBARA D. RICHARDSON IN HER CAPACITY AS THE STATUTORY RECEIVER FOR SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC.,

Plaintiff,

vs.

THOMAS MULLIGAN, an individual; CTC TRANSPORTATION INSURANCE SERVICES OF MISSOURI, LLC, a Missouri Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES LLC, a California Limited Liability Company; CTC TRANSPORTATION INSURANCE SERVICES OF HAWAII LLC, a Hawaii Limited Liability Company; CRITERION CLAIMS SOLUTIONS OF OMAHA, INC., a Nebraska Corporation; PAVEL KAPELNIKOV, an individual; CHELSEA FINANCIAL GROUP, INC., a California Corporation; CHELSEA FINANCIAL GROUP, INC., A Missouri Corporation; CHELSEA FINANCIAL GROUP, INC., a New Jersey Corporation d/b/a CHELSEA PREMIUM FINANCE CORPORATION; CHELSEA FINANCIAL GROUP, INC., a Delaware Corporation; CHELSEA HOLDING COMPANY, LLC, a Nevada Limited Liability Company; CHELSEA HOLDINGS, LLC, a Nevada Limited Liability Company;

Case No. A-20-809963-B

Dept. No. XIII

ORDER GRANTING CRITERION CLAIM SOLUTIONS OF OMAHA, INC.'S MOTION TO COMPEL ARBITRATION

FOURGOREAN CAPITAL, LLC, a New Jersey Limited Liability Company; KAPA MANAGEMENT CONSULTING, INC., a New Jersey Corporation; KAPA VENTURES, INC., a New Jersey Corporation; GLOBAL FORWARDING ENTERPRISES LIMITED LIABILITY COMPANY, a New Jersey Limited Liability Company; GLOBAL CAPITAL GROUP, LLC, a New Jersey Limited Liability Company; GLOBAL CONSULTING; NEW TECH CAPITAL, LLC, a Delaware Limited Liability Company; LEXICON INSURANCE MANAGEMENT LLC, a North Carolina Limited Liability Company; ICAP MANAGEMENT SOLUTIONS, LLC, a Vermont Limited Liability Company; SIX ELEVEN LLC, a Missouri Limited Liability Company; 10-4 PREFERRED RISK MANAGERS INC., a Missouri Corporation; IRONJAB LLC, a New Jersey Limited Liability Company; YANINA G. KAPELNIKOV, an individual; IGOR KAPELNIKOV, an individual; QUOTE MY RIG LLC, a New Jersey Limited Liability Company; MATTHEW SIMON, an individual; DANIEL GEORGE, an individual; JOHN MALONEY, an individual; JAMES MARX, an individual; CARLOS TORRES, an individual; VIRGINIA TORRES, an individual; SCOTT McCRAE, an individual; BRENDA GUFFEY, an individual; 195 GLUTEN FREE LLC, a New Jersey Limited Liability Company, DOE INDIVIDUALS I-X; and ROE CORPORATE ENTITIES I-X,

Defendants.

Defendant Criterion Claim Solutions of Omaha, Inc. ("Criterion")'s Motion to Compel Arbitration ("Motion") having been presented to the Court and taken under advisement; the Court, after having reviewed and considered the papers submitted by the parties, being fully apprised in the premises, and for good cause appearing, hereby makes the following findings of fact and conclusions of law:

A. <u>The Criterion/Spirit Relationship</u>

Spirit Commercial Auto Risk Retention Group, Inc. ("Spirit") is an insurance company formed to transact commercial auto liability insurance and it specialized in insuring commercial truck owners. Criterion is a Nebraska entity hired by Spirit to act as a third-party administrator.

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On January 11, 2019, the Nevada Insurance Commissioner (the "Commissioner") filed a Petition for Appointment of Commissioner as Receiver in the Eighth Judicial District Court (the "Petition"). On February 27, 2019, the Court – Judge Nancy L. Allf, presiding – granted the Petition and appointed the Commissioner as Spirit's Permanent Receiver.

B. The Applicable Arbitration Provision

In this case, Plaintiff asserted nine claims against Criterion which all arise from a contractual relationship between Criterion and Spirit; specifically, a Claims Administration Agreement dated September 1, 2011 (the "Criterion/Spirit Agreement").

Section 13 of the Criterion/Spirit Agreement contains a mandatory arbitration clause, which states:

> Binding arbitration shall be the exclusive method for resolving disputes between the parties. Any dispute concerning the terms of this agreement or performance by the parties under this agreement which cannot be resolved by agreement of the parties shall be submitted to binding arbitration before an arbitrator agreed upon by the parties. If the parties cannot agree, then each party shall select an arbitrator and these two arbitrators shall select a third arbitrator. The decision of the arbitrator or arbitrators shall be final. The arbitrator or arbitrators selected pursuant to this paragraph shall have significant property and casualty insurance company background and experience. Each party shall pay its own attorneys' fees and any other expenses in connection with the resolution of any dispute relating to this agreement. Notwithstanding the provisions of paragraph 21, "Choice of Law,"4 this agreement to arbitrate is governed by the Federal Arbitration Act, 9 U.S.C. 1 through 15 (1988).

C. The Arbitration Clause is Valid and Enforceable

The Arbitration Clause in the Criterion/Spirit Agreement is valid and enforceable. Under the Federal Arbitration Act ("FAA"), a written provision in a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision reflects "both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract[.]" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quotation marks omitted) (citations omitted).

The purpose of the FAA is "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). The role of the courts is to "consider only issues relating to the

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making and performance of the agreement to arbitrate." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). Thus, where there is a written agreement to arbitrate and the dispute at issue is within the scope of the arbitration agreement, the court must compel arbitration. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218, (1985) (The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."); *accord Kindred v. Second Judicial Dist. Ct.*, 116 Nev. 405, 410, 996 P.2d 903, 907 (2000) (stating that a court, in determining whether to compel arbitration, must only consider "(1) whether the parties have made an agreement to arbitrate; (2) the scope of the agreement; and (3) whether the claims are arbitrable"). "The standard for demonstrating arbitrability is not high[]" and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25.

Because Criterion has established the existence of a valid agreement to arbitrate, Plaintiff has the burden to establish a defense to enforcement. *Gonski v. Second Judicial Dist. Ct.*, 126 Nev. 551, 557, 245 P.3d 1164, 1168–69 (2010). Plaintiff fails to meet her burden.

D. The Arbitration Agreement Encompasses Each of Plaintiff's Claims

Here, the arbitration provision in the Spirit/Criterion Agreement provides that "[b]inding arbitration shall be the exclusive method for resolving disputes between the parties." Under the clear and unambiguous language of this clause, the sole method for resolving disputes between Spirit and Criterion is arbitration. This clause accordingly encompasses each of the Plaintiff's claims against Criterion. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994). Since Spirit would have been bound to arbitrate any claims it had against Criterion; so too is the Plaintiff, who is acting on Spirit's behalf. *See Milliman, Inc. v. Roof*, 353 F. Supp. 3d 588 (E.D. Ken. 2018) (finding that the Insurance Commissioner, as Liquidator, was bound to the terms of the arbitration agreement between Milliman and the insolvent insurer).

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E. Plaintiff is Bound by the Agreement's Arbitration Clause

The Plaintiff's status as Spirit's receiver does not vitiate the FAA's mandate that the subject claims be arbitrated. The Plaintiff "stands in the shoes" of Spirit, and her claims and defenses against Criterion are derivative of Spirit's. *Ommen v. Ringlee*, No. 18-0335, 2020 Iowa Sup. LEXIS 36, at *3 (Iowa April 3, 2020) (holding that "the court-appointed liquidator is bound by the arbitration provision because, under the principles of contract law and as pled, the liquidator stands in the shoes of the health-insurance provider and is bound by the preinsolvency arbitration agreement.").

Further, the Plaintiff's Complaint acknowledges that the Spirit/Criterion Agreement is valid and her assertion of breach of contract claims based upon the Agreement negates any argument that the arbitration clause is invalid. *See, e.g.*, *Phillips v. Parker*, 106 Nev. 415, 418, 794 P.2d 716, 718 (1990) ("Parker may not rely on the agreement to prove ownership and simultaneously disavow the applicability of the arbitration clause."); *see also Truck Ins. Exch. v. Swanson*, 124 Nev. 629, 636, 189 P.3d 656, 661 (2008) (under the doctrine of estoppel, "[a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a 'direct benefit' from a contract containing an arbitration clause.'") (quoting *Inter. Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 418 (4th Cir. 2000).

F. The McCarran-Ferguson Act Does Not Reverse-Preempt the FAA and Nevada's Insurance Liquidation Statutes Do Not Take Precedence Over the FAA

Plaintiff's argument that the FAA is reverse-preempted by the McCarran-Ferguson Act, and that the Nevada Liquidation Act, as a "specific statute" trumps the "general statute," the Nevada Uniform Arbitration Act is unavailing.

In *State of Nevada ex rel. Commissioner of Insurance v. Milliman, Inc.*, No. A-17-760558-B, 2019 Nev. Unpub. LEXIS 1366, at *3 (Nev. Dec. 19, 2019), the Plaintiff, in her role as Receiver, filed a Petition for Writ of Mandamus to the Nevada Supreme Court, urging it to overturn the district court's grant of Milliman's Motion to Compel Arbitration. There, the Commissioner of the Nevada Department of Insurance was appointed Receiver of the Nevada Health Co-Op, an insurance co-op established at the inception of the federal Affordable Care Act. Milliman, one of the defendants,

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moved to compel arbitration under an arbitration clause contained in its Consulting Services Agreement with Nevada Health Co-Op. In *Milliman*, the Plaintiff raised the same arguments made here, which were rejected by the District Court. The Plaintiff then sought a writ of mandamus from the Nevada Supreme Court overturning the District Court's decision.

The Court denied Plaintiff's writ petition, finding that she had "not carried her 'burden of demonstrating that extraordinary relief is warranted,'" and that the district court did not commit clear legal error in compelling arbitration. *Id.* at *2–*3. Specifically, the Supreme Court held:

> Richardson claims the district court committed legal error by ordering arbitration despite her argument that the McCarran Ferguson Act, 15 U.S.C. § 1012, reverse-preempts the FAA. In her view, enforcement of an arbitration agreement against an insurance liquidator pursuing contract and tort damages against third parties would thwart the insurance liquidator's broad statutory powers and the general policy under Nevada's Uniform Insurance Liquidation Act (VILA), *see* NRS 696B.280, to concentrate creditor claims in a single, exclusive forum. However, at issue here is not a creditor's claim against the Co-Op; at issue is Richardson's breach-of-contract and tort claims against several third parties on behalf of the Co-Op, which happens to be in receivership.

Id. at *3–*4.

The Court's decision in *Milliman* is persuasive, if not binding authority, and Plaintiff offers no distinction between *Milliman* and the instant facts which would warrant a different result. This Court therefore finds that the McCarran-Ferguson Act does not preempt the FAA and that the Nevada Arbitration Act is inapplicable here. Further, the Plaintiff's pursuit of claims against Criterion in arbitration neither thwarts the Plaintiff's statutory powers as receiver nor frustrates the policy of Nevada's Uniform Insurance Liquidation Act.

G. Criterion May Not Recover Attorneys' Fees

Although Plaintiff recycles many of the same arguments that the Court rejected in *Milliman*, the Court is not persuaded that Plaintiff's positions are frivolous.

ORDER

Based on the foregoing findings of fact and conclusions of law, and for good cause appearing,

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IT IS HEREBY ORDERED that the Motion shall be, and hereby is, GRANTED. Criterion is dismissed from this action without prejudice.

IT IS FURTHER ORDERED that Criterion's request for attorneys' fees shall be, and hereby is, DENIED.

DATED this 22 day of July, 2020.

HONORABLE MARK R. DENTON
DISTRICT COURT JUDGE

Respectfully prepared and submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC., Plaintiff, v. THOMAS MULLIGAN, et al. Defendants.	Case No.: A-20-809963-B Dept. No.: XIII **HEARING REQUESTED** **PLAINTIFF'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION OF THE COURT'S JULY 17, 2020 ORDER REGARDING CTC DEFENDANTS' MOTION TO COMPEL ARBITRATION**

COMES NOW, Plaintiff Barbara D. Richardson, in her capacity as the Statutory Receiver for Spirit Commercial Auto Risk Retention Group, Inc., (hereafter "Receiver") by and through her attorneys of record, the law firm of Greenberg Traurig, LLP, and hereby files this Motion for Reconsideration and/or Clarification of the Court's July 17, 2020 Order Regarding the CTC Defendants' Motion to Compel Arbitration.

/ /

This Motion is based upon the pleadings and papers on file herein, the following Memorandum of Points & Authorities, and any and all oral arguments allowed by this Court at the time of hearing.

Dated this 30th day of July, 2020.

By: */s/ Kara B. Hendricks*
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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

This matter arises from a vast fraudulent enterprise that was facilitated by the CTC Defendants[1] who unabashedly owe Spirit Commercial Auto Risk Retention Group, Inc. ("Spirit") more than $43 million that was siphoned to related entities and company principals. Despite opposing counsel's attempt to argue this case presents issues identical to what Judge Delaney considered in the *Millman* case, it does not and the Court's decision to adopt and incorporate the findings in *Milliman* was an error the must be corrected.[2] Indeed, there are clear discrepancies between this case and the *Milliman* case that affect the viability of the arbitration provisions at issue.

Here, the Receiver is asking that an arbitration provision that was procured by fraud and misdeeds of the entities and principal that controlled Spirit not be validated as the agreements at issue were themselves vehicles utilized to perpetuate a criminal enterprise. As detailed in the Complaint, the CTC Defendants were created as instruments to control Spirit, collect its money from insureds and siphon that money to related individuals and entities controlled primarily by Defendant Thomas Mulligan. CTC

[1] Defendant CTC Transportation Insurance Service of Missouri, LLC ("CTC Missouri"); Defendant CTC Transportation Insurance, LLC ("CTC California"); and Defendant CTC Transportation Insurance Service of Hawaii, LLC ("CTC Hawaii") (Collectively "CTC" or "CTC Defendants").

[2] The CTC Defendants relied heavily on an unpublished decision of District Court Judge Delaney in Case No. 17-760558 brought by the Receiver of the Nevada Health Co-Op against actuary Milliman, Inc. ("Milliman") and other defendants and attached a copy of the non-binding order Judge Delaney signed to the order submitted in support of their Motion to Compel Arbitration herein.

Missouri controlled Spirit and at different times CTC California and CTC Missouri "served" as Spirit's program administrator.[3] The program administrator agreements were an at attempt to legitimize the actions of CTC California and CTC Missouri but were utilized to hide the Spirit's assets and move funds as further detailed in an independent audit report commissioned by CTC Missouri and the Receiver that was prepared and issued by FTI Consulting, Inc. ("FTI").[4] Allowing the CTC Defendants to hide behind an arbitration provisions sanctions the scam and misconduct that occurred.

As the Court is aware, the CTC Defendants, jointly filed a Motion to Compel Arbitration. Although a hearing was originally set for the matter, a minute order issued on June 15, 2020 determining the matter to be submitted on the briefs and under advisement due to the continuing coronavirus situation.[5] Thereafter, a separate one page minute order issued on July 6, 2020 ("July Minute Order") granting CTC's Motion and indicating that the Court considered one specific case in reaching it decision and directing counsel for CTC to prepare the order. As is relevant here, the July Minute Order specifically states the Court considered:

> ***the Order Denying Petition for Writ of Mandamus in State ex rel. Comm'r of Ins. v. Eighth Judicial District Court, Nevada Supreme Court Case No. 77682 to be persuasive, if not binding, authority in what appears to be a case involving Plaintiff addressing similar issues that have been proffered by Plaintiff in this case, and determining that the distinctions urged by Plaintiff do not warrant a different result.***

(July 6, 2020 Minute Order.)

Despite the limited scope of the July Minute Order, counsel for CTC prepared a twelve page order that cited to case law and arguments in its brief, that were not addressed in the Minute Order including issues that were not even addressed in the Writ of Mandamus referenced by the Court. Counsel for CTC refused to acknowledge the overbreadth of the draft order and submitted the same to the Court noting that

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[3] CTC California was the program administrator for Spirit from 2011-2016. Thereafter, CTC Missouri served as Spirit's program administrator from 2016 to 2019. During the time CTC California served as Spirit's program administrator, CTC Missouri controlled Spirit. And during the time CTC Missouri served in the program administrator role, CTC California was utilized to record Spirit's business even though its program administration agreement was terminated and it had no contractual relationship with Spirit.

[4] *See,* Audit report prepared by FTI, attached as Exhibit 2 to Opposition to Motion to Compel. Opp. Ex. Pages 017-062.

[5] *See*, June 25, 2020 Minute Order Vacating Hearing on file herein.

counsel for Plaintiff disapproved of the same. Despite the overbreadth of the draft order that includes factual conclusions that the CTC Defendants were not part of a fraudulent scheme, the Court adopted and signed CTC's proposed order on July 16, 2020 ("CTC Order to Compel").

Because the CTC Order to Compel avoids addressing the charade perpetrated by the CTC Defendants in controlling Spirit, does not accurately reflect a number of the facts of this matter, goes far beyond what was set forth in the July Minute Order, includes findings that would require evidentiary submittals, does not explain how a party that did not contract with Spirit (CTC Hawaii) can be compelled to arbitration, and does not identify how claims arising before a contract was signed or after a contract was terminated can be compelled to arbitration, Plaintiff is required to file the instant motion for reconsideration and/or clarification.

II. RELEVANT FACTS

Plaintiff is the Receiver of the defunct insurance company Spirit and filed suit on behalf of Spirit, Spirit's members, insured enrollees, and creditors. Prior to being placed into receivership, Spirit provided insurance policies to commercial trucking companies and would typically provide insurance coverage in the event of an automobile accident involving a commercial vehicle. Spirt was structured as a risk retention group by which the policyholders of Spirit are members of the company and the collective funds contributed by the members of Spirit were to be utilized to pay claims. Spirit was also a part of an insurance holding company that included the CTC Defendants, Tomas Mulligan, Criterion Claims Solutions of Omaha, Inc. ("Criterion") Chelsea Financial Group ("Chelsea") and others who conspired to fleece Spirit.[6] Sprit's program manager and the ultimate controlling entity of Spirit was CTC Missouri.

In an effort to take control of Spirit's operations and assets, CTC California was the program administrator for Spirit from 2011-2016. Thereafter, CTC Missouri served as Spirit's program

[6] The Insurance Holding Company System Summary Statement (for year end 2017) provided to the Division of Insurance ("DOI") included an organizational chart indicating that the Spirit Insurance Holding Company Group included Thomas Mulligan, CTC Missouri, Criterion Claims Solutions of Omaha Inc., Chelsea Financial Group, Inc., CTC Hawaii, CTC California, Whitehall Swan & Adams Freight Forwarding and three independent trucking companies as the holding company[6] ("Insurance Holding Group").

administrator from 2016 up to the time of Spirit's insolvency. During the time CTC Missouri served in the program administrator role, CTC California was utilized to record Spirit's business even though its program administration agreement was terminated and it had no contractual relationship with Spirit. Spirit and CTC Hawaii never had a contractual relationship.

The CTC Defendants relationship with Spirit was such that they were obligated to hold in trust all funds received as a fiduciary of Spirit and failed to do so. Instead, it appears the CTC Defendants never intended to protect Spirit and were serving only their own interests and that of their principal and affiliates. The CTC Defendants disregarded their obligations to Spirit and acted on their own accord to pillage and blunder away Spirit's assets and transfer Spirit's money to CTC affiliates and other individuals and entities at the direction of Mulligan and thereby created unlawful payment preferences which Plaintiff is seeking the Court to unwind in addition to other claims. Indeed, the claims asserted in the Complaint go far beyond the arbitration provisions and were identified and are detailed in an independent audit of CTC's book and records that was conducted after Spirit's insolvency.[7] This independent audit report was issued by FTI Consulting, Inc. ("FTI") on December 20, 2019, after being jointly engaged on May 21, 2019, for the audit by both CTC Missouri and Spirit's Receiver.

III. LEGAL ARGUMENT

A. Reconsideration is Warranted

Reconsideration of a court's ruling is contemplated under EDCR 2.24 upon the filing of a motion by the affected party. In such cases, "a court may, for sufficient cause show, amend, correct, resettle, modify, or vacate, as the case may be, an order previously made. *Trail v. Faretto,* 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975). Such relief is appropriate where an order containing mistaken language is entered or where the misrepresentations of an adverse party affect the content of the order. *See*, NRCP 60(b)(1) and (3). Here, both conditions for reconsideration exist. Moreover, a court has the inherent authority to reconsider its prior orders. *See Trail v. Faretto*, 91 Nev. 401, 536 P.2d 1026 (1975) ("[A] court may, for sufficient cause shown, amend, correct, resettle, modify, or vacate, as the case may be, an

[7] *See,* Audit report prepared by FTI, attached as Exhibit 2 to Opposition to Motion to Compel. Opp. Ex. Pages 017-062.

order previously made . . . ."). This Court also contemplated the filing of a motion to clarify and/or resolve issues related to the CTC Order Compel as the July Minute Order specifically indicates that "disapproval of the order should be the subject of appropriate motion practice." As detailed below, cause exists to reconsider, amend, correct and/or modify the CTC Order to Compel.

B. The CTC Order to Compel Goes Far Beyond the Direction Provided by the Court.

As there was no hearing related to the CTC Motion to Compel, the July Minute Order provides the only specific insight regarding the scope of the Court's decision. Specifically, the Court indicated that it was persuaded that CTC's Motion had merit based on the Court's consideration of the *Writ of Mandamus in State ex rel. Comm'r of Ins. v. Eighth Judicial District Court*, Nevada Supreme Court Case No. 77682, which the Court found to be persuasive, if not binding authority. *See* July Minute Order. The Court also indicated that the current case "appears to be a case involving Plaintiff addressing similar issues regarding arbitration that have been proffered by Plaintiff in this case, determining that the distinctions urged by Plaintiff to not warrant a different result" and the Court granted the Motion. Id.

Although the CTC Order to Compel briefly reference the unpublished Writ of Mandamus and attaches it as an Exhibit, the bulk of the order prepared by CTC's counsel references findings by Judge Delaney of the Eighth Judicial District Court relating to Milliman who provided actuarial services to Nevada Health Co-Op ("Milliman Order"). However, the Milliman Order was not referenced in the July Minute Order. Attaching and incorporating the Milliman Order to the order on CTC's Motion to Compel has no factual or legal basis.[8] Additionally, the CTC Order to Compel adopts arguments and other case law from the CTC Defendants' briefs which grossly misconstrues the issues at hand. Because the CTC Defendants, unilaterally added self-serving arguments and caselaw to the order submitted to the Court, without any indication this Court reviewed, considered and/or intended to include the same, reconsideration and/or clarification is needed.

/ / /

[8] There is no indication that this Court reviewed the Milliman Order and summarily adopted the same.

C. The Facts of this Case are Distinct from those Considered in the Milliman Order.

There is absolutely no reference to the Milliman Order in the July Minute Order, yet, it is attached as Exhibit A, to the CTC Order to Compel submitted by counsel as purported binding authority. The use of Milliman Order in this regard is wholly improper.

As a preliminary matter, this Court was first presented with the Milliman Order when it was attached to the Reply brief the CTC Defendants filed in support of their motion to compel. Due to its late submission, the Receiver did not get a chance to respond to its inclusion and/or address its precedential value or lack thereof. Although, counsel has the upmost respect for Judge Delaney, the Milliman Order should not form the basis for this Court's opinion as the case is factual distinct and the opinion of another District Court judge is not binding or precedential.[9]

Importantly, the issues before Judge Delaney are distinguishable from the issues at hand because there was a different underlying contract at issue and because the defendant Milliman was not controlled by the same persons and entities as the insolvent insurance company (Nevada Co-Op). Indeed, Milliman provided actuarial and consulting services as an independent party to Nevada Co-Op and was not owned, managed and/or controlled by the same persons and/or entities of Nevada Co-Op. And although, there allegations in the Nevada Co-Op matter of fraud involving Milliman, the claims are different because the fraud likely arose after the arbitration agreement was signed whereas here, the CTC Defendants controlled Spirit at its inception and facilitated the arbitration provision as part of the complex scheme that was put in place to utilize the CTC Defendants to siphon money away from Spirit and facilitate a criminal enterprise. In other words, the nature of the contract, the parties to the contract, and the services to be provided under the contract are significantly different between the two cases and distinguish the findings reached. An evaluation of the difference must be conducted prior to summarily adopting the same.

[9] NRAP 36 (c)(1)(3) specifies that a party cite, for persuasive value only, unpublished decisions by the Nevada Supreme Court. No reference is made in the Rule to a District Court relying on an unpublished decision reached by another District Court judge, but certainly there is no basis to concluded its value is anything more than persuasive, at best.

D. The Nevada Supreme Court Writ Order Relied on by the Court was limited and the CTC Order to Compel Overstates the Same Warranting Reconsideration.

The cases referenced by the Court as the primary basis to grant the Motion to Compel was the unpublished *Writ of Mandamus in State ex rel. Comm'r of Ins. v. Eighth Judicial District Court,* Nevada, Supreme Court Case No. 77682 ("the Writ"). Not only, is the unpublished decision not binding pursuant to NRAP 36, but the applicability of the Writ to the facts of this matter, given the differences in the underlying cases is concerning. Notably, the Writ itself was only two pages and addressed limited issue and the CTC Order to Compel is twelve pages long and goes well beyond the issues decided in the Writ. The table below illustrates the narrow issues and findings of the Nevada Supreme Court in the Writ and their applicability to the issues the Court was asked to address in the Motion to Compel.

Issue in Writ	**Applicability to Current Matter**
The right to appeal and the applicable standard of review is addressed and the Supreme Court opined that the petitioner did not carry her burden of demonstrating that extraordinary relief was warranted. Writ at 2.	The standard of review for a writ is not at issue here.
Per the Writ, the primary or chief issue examined by the Supreme Court was the concern regarding arbitration having more limited discovery and appellate review than judicial proceeding. Writ at 2. And the Supreme Court found that petitioner did not demonstrate an eventual appeal would not be an adequate legal remedy. Id.	Such issues were not raised as part of the briefing of the Motion to Compel.
The Nevada Supreme Court did not find legal error in the underlying district court decision which found that the McCarran Ferguson Act reverse-preempted the Federal Arbitration Act based on the facts presented and the tort and contract claims being asserted by the receiver for Nevada Co Op. Writ at 3.	The Supreme Court did not opine regarding the application of the McCarran Ferguson Act and the FAA, other than to note that the claims brought by the Nevada Co-Op receiver were contractual and tort based, rather than a creditor's claim. The CTC Order to Compel goes much farther and does not account for the creditor claims that were asserted in the Complaint.
In finding that Judge Delaney did not commit clear error, the Nevada Supreme Court also cited authority from other jurisdictions finding that enforcing an arbitration clause against a receiver would not impair the regulation of insurance. Writ at 3-4.	The Supreme Court did not issue an opinion that forecloses the ability of a statutory receiver to challenge arbitration clause when the regulation of insurance is impaired or the provision at issues is part of a criminal scheme or fraud as is alleged here.

Because the issues addressed in the Writ were narrowly construed, anything beyond such issues that was unilaterally included in the CTC Order to Compel should be stricken.

Furthermore, to the extent the Court's decision is based on the premise that the underlying issues addressed in the Writ were similar to the issues the Receiver brought in this matter, reconsideration is necessary as the distinctions between the two cases warrants a different result and arbitration should not be compelled.

1. Reconsideration is Warranted Based on the Fraud Facilitated by the CTC Defendants.

The Receiver should not be bound by an arbitration agreement that was an instrument in a criminal enterprise. As detailed in the Receiver's Opposition to the CTC Defendants' Motion to Compel, the Court should not enforce an arbitration provision that is the product of a criminal enterprise. "Simply put, arbitration agreements may be rejected when they are instruments of a criminal enterprise …." *Janvey v. Alguire*, 847 F.3d 231, 246 (5th Cir. 2017) (concurring opinion).[10] Here, the relationship between the CTC Defendants and their control of Spirit is a critical component of the evaluation that the Court must undertake before requiring arbitration. Indeed, CTC Missouri controlled Spirit per documents filed with the Division of Insurance and Tom Mulligan controlled the CTC Defendants as well as being identified as the "ultimate controlling person" for Spirit and set-up an Insurance Holding Company structure wherein related entities were responsible for handling Spirit's day to day operations as well as the handling of Spirit claims.[11] The combination of which facilitated siphoning away Spirit funds leaving funds unavailable to pay claims and leaving the company insolvent as detailed in the complaint.

The situation here, is much like the one found in *Janvey* where a receiver – charged with conserving Stanford assets for victims of the fraud – brought claims against former Stanford employees. The employee-defendants sought to enforce arbitration provisions in contracts with various receivership

[10] The *Janvey* court's majority affirmed the district court's denial of a motion to compel a statutory receiver – the SEC – on separate grounds not urged by Plaintiff here. *Janvey*, 847 F.3d at 236–46. Judge Higginbotham issued the concurring opinion discussed here because the broader criminal enterprise encompassing the arbitration provisions at issue was a more "fundamental reason" for rejection of arbitration. *Id.* at 246.

[11] Insurance Holding documents filed with the Division show that Mulligan was Spirit's ultimate controlling person and also the owner of 100% of the membership interests in CTC Missouri which directly managed Spirit's commercial auto insurance program. *See,* appendix to Opp. Ex. page 089.

entities and the court rejected the same finding that the receiver was not bound by the arbitration agreements because those agreements were instruments of Stanford's fraud. *Janvey* at 250 (5th Cir. 2017).

Issues considered by the *Janvey* court include that the parties seeking arbitration were co-conspirators who exercised complete control over the entities placed into receivership before the scheme collapsed. Id. The court also noted that the same people that controlled the agreements to arbitrate. Id. As in *Janvey*, Plaintiff alleges that the CTC Agreement was an instrument of Defendant Mulligan and CTC's fraud. Compl. ¶ 131. As in *Janvey*, Plaintiff alleges here that Mulligan "exercised complete control over" Spirit. Compl. ¶¶ 55–63, 131. Here, the Receiver also alleges that Mulligan exercised control over CTC and used Spirit's relationship with CTC to deceive creditors and customers and conceal Spirit's true financial condition from the Nevada Division of Insurance. *Id.* Like in *Janvey,* the appointment of the Receiver removed the wrongdoer from the scene and the Receiver should not be bound to an arbitration provision that effectuated the scheme, which the *Janvey* court likened to "evil zombies". *Id.* at 250 n. 40 (citing *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995) ("The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more [the scheme's perpetrator's] evil zombies.") The evil zombies should not win and Court should reconsider its ruling compelling arbitration because of the control Mulligan and the CTC Defendants exercised over Spirit and the arbitration provision at issue.[12]

The impact of allegations in the Complaint that the arbitration provision was an instrument in a criminal enterprise, was not something addressed in the Writ and was not even an issue raised in the *Milliman* case. This issue is unique given the CTC Defendants and Mulligan's control of Spirit and the exercise of that control at the inception of the program administrator agreements. The same parties are now using that provision to avoid the ramifications of a public litigation. Accordingly, reconsideration

[12] In their Reply in Support of the Motion to Compel, the CTC Defendants attempt to justify arbitration stating that the agreements between Spirit and the CTC Defendants were approved by the Division of Insurance. However, at the time of the approval the Division had no knowledge of the fraudulent scheme that was being put into place and at nowhere in the documents did the Division approve the notion that if Spirit was insolvent, the arbitration provision in the contract would be binding on a court appointed receiver.

is warranted and the Court should undertake an evaluation of the allegations in the Complaint where include fraud, conspiracy and RICO claims and the scheme perpetrated by the very parties that now want to hide behind the arbitration provision and keep the extent of their wrongdoings from the Court.

2. At a minimum the Court Must Remove Findings Indicating the Arbitration Provision Was Not a Product of a Criminal Enterprise.

Although there are clear grounds for reconsideration, to the extent the Court opts not to reconsider this issue, at a minimum, the language in the CTC Order that boldly concludes the arbitration provision is not a product of a criminal enterprise must be removed. Notably on pages 6-7 of the CTC Order to Compel, counsel for CTC unabashedly included purported "findings of fact" concluding the arbitration provision is not the product of a criminal enterprise. To the extent the Court intended to make such findings evidence and testimony would have needed to be offered in support of the same. No such evidence was provided. Moreover, the self-serving conclusions that because Spirit and CTC were subject to department regulation and filed financial statements with the Division of Insurance ("Division") illustrates there was not fraud - is not based in fact. It was also not an issue the Court was asked to decide.

Furthermore, as alleged in the Complaint, the financials that were provided to the Division were found deficient by an independent actuary during an examination conducted at the request of the Division pursuant to NRS 694C.410.[13] The exam suggested significant deficiencies in reserves and despite promises that measures were being taken to strengthen the financial condition of the company, a follow-up report by the examining actuary showed otherwise.[14] Additionally, on June 1, 2018, Spirit's former external auditor provided the Division with notice of material misstates in Spirit's annual financial statements including concerns regarding deferred tax assets, contributed capital, loss reserves, bad debts, poor collection history, failure to collect premiums amounts due from CTC, failure of CTC to make payments on recorded assets, bad debt, and concerns regarding policy cancellation dates and premium adjustments.[15] Such allegations illustrate only a sliver of the wrong doing that forms the basis for the

[13] Complaint, ¶¶ 64-69.
[14] Complaint ¶¶ 64-68.
[15] Complaint ¶ 69.

Receiver's RICO, fraud, civil conspiracy and other claims.[16] Certainly, no evidence has been presented that suggests the program administrator agreements and the arbitration provisions therein were not a tool intended to facilitate the fraudulent scheme by which the CTC Defendants fleeced Spirit.

As there is no evidence supporting the CTC Defendants' position and self-serving conclusion the provisions were not the product of a criminal enterprise, all such language must be removed from the CTC Order to Compel. Illustrative of the problem is the last sentence in this section of the CTC Order that erroneously concludes, "the arbitration provision of the CTC Agreement is valid and enforceable, and ***not the product of a "criminal enterprise."***[17] (Emphasis added.) Even if the Court were to find the arbitration agreement valid and enforceable, no evidence has been presented by the CTC Defendants indicating that the agreement was not the product of a criminal enterprise. The "criminal enterprise" determination is not mutually exclusive of a valid and enforceable agreement and such language must be removed from the CTC Order to Compel.

3. The CTC Order is Inaccurate in Concluding all Claims Arise out of the CTC Agreements and that Appointment of a Receiver is Immaterial.

Even if the Court were to ignore, the fraud and allegations that the arbitration provisions were an instrument in a criminal enterprise, reconsideration is still warranted. On pages 9 and 10 of the CTC Order to Compel unsupported and erroneous conclusions are made regarding the impact of a Receiver being appointed for Spirit, and that all claims asserted against the three CTC entities are subject to arbitration. Reconsideration and/or clarification is required.

First, the conclusion that a receiver being appointed "has no bearing on the enforceability of the arbitration provision in the CTC Agreement as she stands in the shoes of Spirit" is not factually accurate.[18] Notably, here the Receiver is distinct from Spirit and did not sign the contract or agree to the arbitration provision at issue. Additionally, as detailed herein, the Receiver should not be bound by an arbitration agreement that was an instrument in a fraudulent scheme and the agreement itself an instrument in a

[16] *See e.g.* Complaint tenth cause of action (RICO), twelfth cause of action (fraud), thirteen cause of action (civil conspiracy).
[17] CTC Order to Compel, at 7.
[18] *See* CTC Order to Compel at 10.

criminal enterprise. *See, Janvey v. Alguire*, 847 F.3d 231, 246 (5th Cir. 2017) (concurring opinion). This issue was not addressed in the Writ or the *Milliman* case and summarily adopting the orders rendered in such matter is nonsensical. Moreover, the claims asserted in this matter are factually and legally distinguishable from *Milliman* and an independent analysis by the Court is necessary.

Second, the blanket conclusions that all claims asserted by the Receiver against CTC arise out of the CTC Agreements and are subject to arbitration does not address the fact that Spirit did not have a contractual relationship with CTC Hawaii or the fact that Spirit's contractual relationships with CTC California and CTC Missouri were of limited duration. This is significant because the allegations in the Complaint include claims outside the duration of the contract. As previously indicated, CTC California was the program administrator for Spirit from 2011-2016. Thereafter, CTC Missouri served as Spirit's program administrator from 2016 to 2019. During the time CTC California served as Spirit's program administrator, CTC Missouri controlled Spirit. And during the time CTC Missouri served in the program administrator role, CTC California was utilized to record Spirit's business even though its program administration agreement was terminated and it had no contractual relationship with Spirit. The order signed by the Court does not address these issues nor does it provide any authority in support of the conclusion that claims arising before parties entered a contract (in the case of CTC Missouri) of after a contract terminated (in the case of CTC California) are subject to arbitration. Nor does the CTC Order to Compel justify how claims against CTC Hawaii who did not have a contractual relationship with Spirit are subject to arbitration.

Given the scope of the claims asserted, reconsideration is warranted or, at a minimum, clarification must be provided as to how the discrete arbitration provisions cover claims against CTC Hawaii, and claims arising before and after the term of CTC California and CTC Missouri contracts. Indeed, when construing arbitration clauses the Court is required to first determine the breadth of the arbitration clause. That analysis has not been done in this case and is problematic because "[t]he right to compel arbitration stems from a contractual right, which generally may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration." *Britton v.*

Co-op Banking Group, 4 F.3d 742, 744 (9th Cir. 1993) (citation omitted). Is the Court opining that CTC Hawaii had a right to invoke arbitration even through it did not sign an agreement with Spirit? Is the Court concluding that the provisions in the agreements are so broad that claims prior to and/or after a contract term are subject to arbitration? Or is the Court simply concluding that because the CTC Defendants are related and/or affiliated with each other all claims must be arbitrated? Clarification and/or reconsideration is needed.

Furthermore, the claims asserted in the complaint do not arise solely out of a contract nor are they brought simply on behalf of Spirit. The complaint clearly asserts claims on behalf of Spirit's members, insured enrollees, and creditors. Spirit is seeking the return of company assets and clawing back preferential distributions that were made to a number of individuals and parties associated with CTC and Mulligan for the benefit of other creditors of the estate. These claims are clearly articulated in causes of action 15-18 of the complaint in which Plaintiff is seeking to void the transfers. Such actions are expressly authorized under the Nevada liquidation statutes and directly affects creditor's rights and should not be subject to arbitration.

4. The FAA and Nevada Law Do Not Require that all CTC Claims be Arbitrated and the Court Should Reconsider and/or Clarify the CTC Order in this Regard.

The CTC Order to Compel cites to the Federal Arbitration Act ("FAA"), NRS 38.221 and the District of Columbia's arbitration act in support of self-serving conclusions the CTC Defendants wants the Court to make.[19] However, the CTC Defendants have gone too far and the analysis provided and conclusions reached are incomplete warranting reconsideration and/or clarification.

First, there is no indication that the Court relied on the FAA, NRS 38.221 and the District of Columbia's arbitration act in reaching its decision.[20] As indicated above, the July Minute Order

[19] CTC Order to Compel, at 5-6.

[20] The CTC Defendants argued that arbitration is proper pursuant to the District of Columbia's arbitration act and Nevada law. However, the enforcement of the arbitration is procedural and is thus governed by Nevada law. *Tipton v. Heeren*, 109 Nev. 920, 922 n.3 (1993) (holding Nevada law governs the procedural inquiry.) Additonally, it is unclear why either party to the program administrator agreements would have agreed to the application of law from the District of Columbia given that Spirit was issued a Certificate of Insurance in Nevada, CTC is a part of a Nevada Insurance Holding Company, and neither party had its primary place of business in the

referenced only the unpublished Writ. Furthermore, although the Writ references the FAA and the McCarren Ferguson Act, the Supreme Court did not adopt the authority cited by the CTC Defendants and the Writ makes no reference to NRS 38.221 or District of Columbia's arbitration act. At a minimum, the Court should clarify the basis of its ruling and if its findings are based on the FAA, Nevada or District of Columbia law.

Second, the analysis and findings in the CTC Order to Compel are incomplete and erroneous. Notably, said Order does not account for the fact that many of the allegations in the Complaint arise outside any contract period that CTC Missouri or CTC California had with Spirit or address the fact that CTC Hawaii never had a contractual relationship with Spirit. The CTC Defendants did not dispute this fact nor did they offer any authority in their briefs suggesting that the Court can compel to arbitration claims brought outside the time limit for services in a contract or against an affiliate entity that did not have an arbitration provision. Furthermore, if the Court contends the FAA is applicable, it would still be required to analyze the applicability of the McCarran-Ferguson Act set forth in 15 U.S.C. §§ 1011-1015 to the facts of this matter. Notably, the facts of this matter are distinct from the Writ and the *Milliman* case in large part due to the CTC Defendants role in overseeing Spirit's insurance business as well as their role as part of an insurance holding company. The CTC Order to Compel completely misconstrues the arguments made by the Receiver in this respect and fails to address the test set forth by the U.S. Supreme Court to determine if reverse-preemption is warranted in this matter.[21]

As the Court is aware, in the McCarran-Ferguson Act Congress declared that the continued regulation by the states of the business of insurance is in the public interest. *See* 15 U.S.C. § 1011. Congress concluded that "[t]he business of insurance, and ***every person engaged therein***, shall be subject to the laws of the . . . States which relate to the regulation . . . of such business." *Id*. at §1012(a) (emphasis added). The Supreme Court created a three-part test to determine whether reverse-preemption of federal

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District of Columbia. Further, the standard for an evaluation of an arbitration provision under the laws of District of Columbia is that of summary judgment. *See Mobile Now, Inc., v. Sprint Corp.*, 393 F. Supp. 3d 56 (2019). Here there are issues of fact regarding the provision that would need to be resolved prior to the Court reaching a decision in this regard.

[21] CTC Order to Compel, pages 7-9.

law through McCarran-Ferguson occurs. Specifically, a court is to examine whether: 1) the state statute was enacted for the purpose of regulating the business of insurance; 2) the federal statute involved "does not specifically relat[e] to the business of insurance"; and 3) the application of the federal statute to the facts of the case would "invalidate, impair, or supersede" the state statute regulating insurance. *Humana Inc. v. Forsyth*, 525 U.S. 299, 307, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999). Here, each of these criteria is met, especially because of CTC's role in forming, organizing and managing Spirit. Additionally, CTC was also an integral part of a regulated Insurance Holding Group. This factual scenario was not addressed in the Writ, nor were such issues raised or addressed in the *Milliman* case and the Milliman Order that is attached to the CTC Order to Compel. Accordingly reconsideration and/or clarification is necessary.

As detailed in the Receiver's Opposition, there can be no real dispute that the provisions of NRS 696B that make up the Nevada Liquidation Act were enacted for the purpose of regulating the business of insurance. The Liquidation Act provides that "upon taking possession of the assets of an insurer, the domiciliary receiver shall immediately proceed *to conduct the business of the insurer* or to take such steps as are authorized by this chapter for the purpose of rehabilitating, liquidating, or conserving the affairs or assets of the insurer. NRS 696B.290(3); *see Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010). Here, the claims the CTC Defendants seek to arbitrate relate to the administration of Spirit's insurance business including the underwriting and issuance of insurance which is regulated by the Division. The CTC Defendants were also instrumental in forming and organizing Spirit and were themselves subject to insurance regulation as they were part of a registered insurance holding company. Thus the first prong of the *Humana v. Forsyth* test is met.

There was no dispute that the second prong of the test was met as numerous courts have determined that the FAA is not a federal statute that specifically relates to the business of insurance. *See, e.g. Munich Am Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998) (there is no question that the FAA does not relate specifically to the business of insurance."); *Stephens v. Am. Int'l Ins. Co*., 66 F.3d 41, 44 (2d Cir. 1995) ("No one disputes the fact that the FAA does not specifically relate to insurance.")

The third prong is also met because of the unique facts of this case which are not addressed in the CTC Order to Compel. Importantly, given the CTC Defendant's role in forming Spirit and the regulation they are subject to due to their role in the insurance holding company, the application of the FAA would "invalidate, impair, or supersede" Nevada's Liquidation Act. Indeed, Nevada's Liquidation Act incorporates the Uniform Insurers Liquidation Act ("UILA")[22] and has an overall purpose of protecting the interests of policyholders, creditors and the public. *See, e.g.* NRS 696B.210, 696B.530, 696B540. Here, the claims asserted include claims brought on behalf of Spirit's creditors including claims to claw back preferential payments to affiliates and cohorts of the CTC Defendants.

The required three part test is not included in the CTC Order to Compel. Instead, the CTC Defendants boldly cut and paste from the non-binding Milliman Order issued by Judge Delaney analyzing different facts including a defendant (Milliman) that did not exercise control of the defunct insurance company and was not part of an insurance holding company. Illustrative of the problem is the block citation to Judge Delaney's analysis of the *Milliman* matter wherein she found that enforcing the arbitration clause she was presented with would "not disrupt the orderly liquidation of NHS, and Plaintiff's action against Milliman has no bearing on the administration, allocation or ownership of NHC's property or assets, which is the province of the Receivership Action."[23] Here, the orderly liquidation of Spirit will be disrupted as the CTC Defendants were responsible for administrating Spirit's property and assets prior to the insolvency and transferred millions of dollars to third parties instead of paying Spirit. The role of an actuary is markedly different than the role of the CTC Defendants who controlled Spirit's operations and its bank accounts.

Additionally, the Receiver's claims in part, seek to recover the transferred funds on behalf of Spirit's creditors and are not limited to contract issues.[24] Notably, the claims asserted against the CTC Defendants directly correlate to the administration and allocation of Spirit property which CTC controlled and distributed to third parties. Even if the Receiver is required to pursue claims against the CTC

[22] *See* NRS 696B.280.
[23] CTC Order to Compel, page 7, citing Milliman Order.
[24] *See,* Complaint.

Defendants in arbitration, the claims against the other parties named in the subject lawsuit will continue in this forum. Counsel for several of the remaining defendants have already expressed concerns to counsel for the Receiver about their need to testify in two forums and suggested this matter should be stayed. The Receiver will not agree to any such stay and doing so would clearly disrupt the liquidation proceedings. Such issues put this case in a different posture than *Milliman*. Based on the forgoing, Judge Delaney's analysis in *Milliman*, is not applicable and is not a substitute for an independent analysis of the *Humana v. Forsyth* factors.

In addition to conducting its own analysis of the *Humana v. Forsyth* factors, the Court should strike all references in the CTC Order to Compel in which counsel for defendants opines as to what Plaintiff "sought" or "tried" to do. The underlying briefs speak for themselves and the self-serving conclusion have no place the Court's ultimate order.

5. The Purported Legal Conclusions regarding NRS 696B Should Be Stricken from the CTC Order to Compel.

The language in the CTC Order to Compel referencing NRS 696B is also out of place and should be stricken.[25] Once again the language presented to the Court is not consistent with the July Minute Order and goes well beyond the issues initially presented to the Court. By including such language in the draft order, the CTC Defendants are attempting to rewrite the provisions of NRS 696B.200 and stripping the jurisdiction provided to Nevada courts by the legislature to hear claims brought by a receiver and directly contradicts the Receivership Order issued by Judge Allf in Case No. A-19-787325.[26] This Court does not have the authority to reconsider and/or rewrite Judge Allf's Receivership Order or alter the statutory framework of NRS 696B. Not only are the issues Judge Allf considered in entering the Receivership Order not before the Court, but the CTC Defendants have provided no justification for altering Chapter 696B of the Nevada Revised Statutes which was promulgated to govern delinquent insurers, conservation and rehabilitation.

[25] CTC Order to Compel at 9.
[26] *See* Order, attached to Opposition, exhibit pages 001- 015.

Further, the statement that the "Nevada Supreme Court and the *Milliman* Trial Court have already stated the FAA preempts Nevada State law concerning arbitration in this context"[27] is erroneous. And even if the Court's had addressed similar issues, neither decision is binding on this Court. As detailed above, neither court addressed a factual scenario like the one present where the party seeking arbitration was itself subject to insurance regulation and had control of the finances and operation of the defunct insurance company prior to insolvency. In documents submitted to the Division, CTC California and CTC Missouri made it clear that in addition to serving at times as Spirit's program administrator, each entity was "integrally involved" in the Spirit's initial formation and organization."28 Further, CTC Missouri was reported as "ultimate controlling entity" and "program manager" of Spirit.29 Accordingly, there is an extra basis for jurisdiction pursuant to NRS 696B.200 which was not present in the cases relied on by the CTC Defendants and reconsideration and/or clarification of such "legal conclusions" are warranted.

IV. CONCLUSION

For the reasons set forth herein, reconsideration and/or clarification of CTC Order to Compel is warranted. The July Minute Order did not provide a basis for the majority of the factual and legal conclusions that found their way into the subject order and there is no basis for the Court to summarily adopt the findings in *Milliman*. Moreover, the Court must look at the alleged fraud that was present when the arbitration agreements were signed as legal grounds exist not to require arbitration in such circumstances. If the Court does not reconsider the impact the fraud had on the underlying contract and arbitrability of the claims, the Court must opine how claims asserted against CTC Hawaii who did not have a written agreement with Spirit are compelled to arbitration. Similarly, clarification is needed as to how claim brought against CTC California and CTC Missouri that are outside the timeframe of the applicable contracts are also compelled to arbitration.

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[27] CTC Order to Compel at 9.

[28] June 29, 2017 Insurance Holding Company System Annual Registration Statement for year ending 2016. *See* Exhibit 5 to Opposition at exhibit pages 073-083

[29] Id.

WHEREFORE, the Receiver respectfully requests the court GRANT its Motion for Reconsideration and/or Clarification of the Court's July 17, 2020 Order Regarding the CTC Defendants' Motion to Compel Arbitration and allow the claims asserted against the CTC Defendants to proceed herein.

Dated this 30th day of July, 2020.

By: */s/ Kara B. Hendricks*

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 2020, a true and correct copy of the foregoing ***Plaintiff's Motion for Reconsideration and/or Clarification of the Court's July 17, 2020 Order Regarding CTC Defendants' Motion to Compel Arbitration*** was served electronically using the Odyssey eFileNV Electronic Filing system upon all parties with an email address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R. The date and time of the electronic proof of service is in place of the date and place of deposit in the U.S. Mail.

/s/ Andrea Lee Rosehill
An employee of Greenberg Traurig, LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC.,

Plaintiff,

v.

THOMAS MULLIGAN, et al.

Defendants.

Case No.: A-20-809963-B
Dept. No.: XIII

HEARING REQUESTED

PLAINTIFF'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION OF THE COURT'S JULY 22, 2020 ORDER REGARDING CRITERION CLAIM SOLUTIONS OF OMAHA INC'S MOTION TO COMPEL ARBITRATION

COMES NOW, Plaintiff Barbara D. Richardson, in her capacity as the Statutory Receiver for Spirit Commercial Auto Risk Retention Group, Inc., (hereafter "Receiver") by and through her attorneys of record, the law firm of Greenberg Traurig, LLP, and hereby files this Motion for Reconsideration and/or Clarification of the Court's July 22, 2020 Order Regarding Criterion Claim Solutions of Omaha Inc.'s Motion to Compel Arbitration.

This Motion is based upon the pleadings and papers on file herein, the following Memorandum of Points & Authorities, and any and all oral arguments allowed by this Court at the time of hearing.

Dated this 5th day of August, 2020.

By: */s/ Kara B. Hendricks*

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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Criterion Claim Solutions of Omaha, Inc. ("Criterion") played a critical role in a scheme to defraud Spirit Commercial Auto Risk Retention Group, Inc. (hereafter "Spirit") and its insureds. Criterion was directly responsible to Spirit's insured as it acted as a third-party claims manager and was to establish loss reserves, settle claims, and issue loss payments on behalf entities and individuals that purchased insurance from Spirit.[1] However, as detailed in the Complaint, Criterion knowingly and intentionally manipulated the reserves which left Spirit grossly underfunded to pay claims and hid the extent of Spirit's insolvency from regulators.

After Thomas Mulligan took over the operations of Criterion he utilized the company as a vehicle in his scheme to defraud creditors and siphon money to himself and individuals and entities under his control.[2] To perpetrate the fraud, Criterion was identified as part of an Insurance Holding Company and registered with the state of Nevada. In doing so, Criterion itself became subject to Nevada law and its role in Spirit's insolvency gives this Court jurisdiction over the claims asserted by

[1] The CTC Defendants (CTC California, CTC Missouri and CTC Hawaii) who filed a separate motion to compel, manipulated Spirit's books and records and handled the operation side of Sprit's business.

[2] Although Criterion was initially owned and controlled by a third party, Mulligan immediately began asserting himself into the business and reserve setting process and ultimately in or around 2016 Mulligan and/or an entity he is affiliated with purchased the Criterion name and took overs its operations to ensure complete control of the reserve setting and claim settlement process.

the Receiver. Because it is a member of the Insurance Holding Company and was the exclusive claims manager for Spirit, Criterion is subject to Nevada laws and regulations. This issue is not contemplated in the Criterion Order to Compel and must be considered by the Court.

As the Court is aware, Criterion filed a Motion to Compel Arbitration. Although a hearing was originally set for the matter, a minute order issued on June 15, 2020 determining the matter to be submitted on the briefs and under advisement due to the continuing coronavirus situation.[3] Thereafter, a separate one page minute order issued on July 6, 2020 ("July Minute Order") granting Criterion's Motion and indicating the Court was persuaded that Criterion Motion had merit based on the Court's consideration of the *Writ of Mandamus in State ex rel. Comm'r of Ins. v. Eighth Judicial District Court*, Nevada Supreme Court Case No. 77682 (the "Writ"), which the Court found to be persuasive, if not binding authority. *See* July Minute Order. The Court also indicated that the Writ "appears to be a case involving Plaintiff addressing similar issues regarding arbitration that have been proffered by Plaintiff in this case, determining that the distinctions urged by Plaintiff do not warrant a different result" and the Court granted the Motion, but denied Criterion's request for attorneys' fees. Id.

Unfortunately, the ordered prepared by counsel for Criterion, went far beyond the scope of the Minute Order and the seven page order submitted and signed by the Court makes findings that are not supported by the record and leaves out critical analysis if the Court's intent was to making findings regarding the FAA and its applicability to the facts of this matter. Failure to consider Criterion's role as the claims manager of Spirit given the scope of the issues presented is clear error. Accordingly, the subject Motion seeks reconsideration of the order submitted by Criterion that was filed on July 22, 2010 ("Criterion Order to Compel").

II. RELEVANT FACTS

Plaintiff is the Receiver of the defunct insurance company Spirit and filed suit on behalf of Spirit, Spirit's members, insured enrollees, and creditors. Prior to being placed into receivership, Spirit provided insurance policies to commercial trucking companies and would typically provide insurance

[3] *See*, June 15, 2020 Minute Order Vacating Hearing on file herein.

coverage in the event of an automobile accident involving a commercial vehicle. Spirt was structured as a risk retention group by which the policyholders of Spirit are members of the company and the collective funds contributed by the members of Spirit were to be utilized to pay claims. Spirit was also a part of an insurance holding company that included Criterion, the CTC Defendants, Thomas Mulligan, Chelsea Financial Group ("Chelsea") and others who conspired to fleece Spirit.[4]

Playing the role of claims manager, Criterion's part in the scheme had a direct impact on the claims of the individuals and entities that Spirit insured. Indeed, Criterion was to establish loss reserves, settle claims, and issue loss payments, on behalf of Spirit insureds and was critical to Spirit's ongoing operations and viability. However, as detailed in the Complaint, Criterion knowingly and intentionally manipulated the reserves which left Spirit grossly underfunded to pay claims and led to its insolvency. For example, Criterion would set the claim reserves at an artificially low amount, sometimes as low as $100, even when the severity of the loss by the party making a claim was far beyond the reserve amount, and in some cases involved a fatality. Thus, when financial reports were made to the Nevada Division of Insurance ("Division"), it appeared that Spirit had sufficient funds to pay claims, when it did not.

III. LEGAL ARGUMENT

A. Reconsideration is Warranted.

Reconsideration of a court's ruling is contemplated under EDCR 2.24 upon the filing of a motion by the affected party. In such cases, "a court may, for sufficient cause show, amend, correct, resettle, modify, or vacate, as the case may be, an order previously made. *Trail v. Faretto,* 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975). Such relief is appropriate where an order containing mistaken language is entered or where the misrepresentations of an adverse party affect the content of the order. *See*, NRCP 60(b)(1) and (3). Here, both conditions for reconsideration exist. Moreover, a court has the

[4] The Insurance Holding Company System Summary Statement (for year end 2017) provided to the Division of Insurance ("Division") included an organizational chart indicating that the Spirit Insurance Holding Company Group included Thomas Mulligan, CTC Missouri, Criterion Claims Solutions of Omaha Inc., Chelsea Financial Group, Inc., CTC Hawaii, CTC California, Whitehall Swan & Adams Freight Forwarding and three independent trucking companies as the holding company ("Insurance Holding Group").

inherent authority to reconsider its prior orders. *See Trail v. Faretto*, 91 Nev. 401, 536 P.2d 1026 (1975) ("[A] court may, for sufficient cause shown, amend, correct, resettle, modify, or vacate, as the case may be, an order previously made . . . ."). This Court also contemplated the filing of a motion to clarify and/or resolve issues related to the Criterion Order Compel as the July Minute Order specifically indicates that "disapproval of the order should be the subject of appropriate motion practice." As detailed below, cause exists to reconsider, amend, correct and/or modify the Criterion Order to Compel.

B. The Criterion Order to Compel Goes Far Beyond the Direction Provided by the Court.

As there was no hearing related to the Criterion Motion to Compel, the July Minute Order provides the only specific insight regarding the scope of the Court's decision. Therein, the Court referenced the unpublished Writ filed in the Nevada Co-Op case. Not only, is the unpublished decision not binding pursuant to NRAP 36,[5] but the applicability of the Writ to the facts of this matter, given the differences in the underlying cases is concerning.[6] Notably, the Writ itself was only two pages and addressed limited issue and the Criterion Order to Compel is seven pages long and goes well beyond the issues decided in the Writ. The table below illustrates the narrow issues and findings of the Nevada Supreme Court in the Writ and their applicability to the issues the Court was asked to address in the Criterion Motion to Compel.

Issue in Writ	Applicability to Current Matter
The right to appeal and the applicable standard of review is addressed and the Supreme Court opined that the petitioner did not carry her burden of demonstrating that extraordinary relief was warranted. Writ at 2.	The standard of review for a writ is not at issue here.
Per the Writ, the primary or chief issue examined by the Supreme Court was the	Such issues were not raised as part of the briefing of the Motion to Compel.

[5] NRAP 36 (c)(1)(3) specifies that citations to unpublished decisions by the Nevada Supreme Court have only persuasive authority and are not binding.

[6] The underlying motion and order prompting the Writ was brought by Milliman Inc. ("Milliman") and actuary hired by Nevada Co-Op that was not controlled by the same person or entities as Nevada Co-Op.

concern regarding arbitration having more limited discovery and appellate review than judicial proceeding. Writ at 2. And the Supreme Court found that petitioner did not demonstrate an eventual appeal would not be an adequate legal remedy. Id.	
The Nevada Supreme Court did not find legal error in the underlying district court decision which found that the McCarran Ferguson Act reverse-preempted the Federal Arbitration Act based on the facts presented and the tort and contract claims being asserted by the receiver for Nevada Co Op. Writ at 3.	The Supreme Court did not opine regarding the application of the McCarran Ferguson Act and the FAA, other than to note that the claims brought by the Nevada Co-Op receiver were contractual and tort based, rather than a creditor's claim. The Criterion Order to Compel goes much farther and does not account for the creditor claims that were asserted in the Complaint.
In finding that Judge Delaney did not commit clear error, the Nevada Supreme Court also cited authority from other jurisdictions finding that enforcing an arbitration clause against a receiver would not impair the regulation of insurance. Writ at 3-4.	The Supreme Court did not issue an opinion that forecloses the ability of a statutory receiver to challenge arbitration clause when the regulation of insurance is impaired or the provision at issues is part of a criminal scheme or fraud as is alleged here or where the party seeking arbitration is subject to regulation under Nevada law.

Because the issues addressed in the Writ were narrow, anything beyond such issues that was unilaterally included in the Criterion Order to Compel should be stricken. Furthermore, to the extent the Court's decision is based on the premise that the underlying issues addressed in the Writ were similar to the issues the Receiver brought in this matter, reconsideration is necessary as the distinctions between the two cases warrants a different result and arbitration should not be the forum to resolve claims asserted against Criterion. Indeed, as explained in greater detail below, Criterion acted as Spirit's claims manager and was not an outside actuary like the party seeking arbitration in the Writ. This distinction is important because as the claims manager for Spirit, Criterion is subject to the provisions of NRS 696B.200. Criterion's managerial role along with its relationship with the CTC Defendants and other entities that were part of an insurance holding company created by Thomas Mulligan to defraud creditors and siphon money away from Spirit must be evaluated by the Court and affects the arbitration provision Criterion is trying to hide behind.

1. Criterion's role as claims manager provides independent ground for the Court to retain jurisdiction

The Criterion Order to Compel does not address the role Criterion played in managing Spirit's claims and its significance to the issues at hand. In the Writ the Supreme Court noted two reasons for allowing arbitration to proceed that are not present here. First, the Court note the relief sought was not based on a creditor's claim and second, the Court cited authority indicating if the claim was relevant to the regulation of the business of insurance, there would be a different result. *Writ* at 2. These distinctions are significant. Notably, the party seeking arbitration in the Nevada Co-Op case was Milliman Inc. ("Milliman"). Defendant Milliman was not controlled by the same persons and entities as the insolvent insurance company (Nevada Co-Op). Milliman provided actuarial and consulting services as an independent party to Nevada Co-Op and was not owned, managed and/or controlled by the same persons and/or entities of Nevada Co-Op. Additionally, Milliman as an actuary did not act as a manager to the defunct insurance company whereas here, Criterion was managing Spirit's claims and subject to additional regulation.

Criterion was directly responsible for setting Spirit's insurance reserves in a manner that would ensure that sufficient funds were available to pay claims made by someone in an automobile accident involving an entity or person who purchased insurance from Spirit. The underlying agreement between Criterion and Spirit specified that Criterion was to provide "claims management services on behalf of Spirit…in accordance with applicable law and generally accepted industry standards."[7] Criterion did not do so and the applicable law requires this Court to retain jurisdiction and hear the claims asserted against Spirit's claims manager.

This Court should hear the claims asserted against Criterion pursuant to NRS 696B.200(c) which provides courts in Nevada jurisdiction over persons and entities that served as managers, trustees, directors, organizers and promoters of the insurer or others with similar positions and responsibilities. *See* NRS 696B.200(c). Specifically, the statue states:

[7] Criterion Agreement at ¶ 2.

> **A court of this state in which an order of rehabilitation or liquidation has been entered in delinquency proceedings against a domestic insurer or alien insurer domiciled in this state, has jurisdiction also over persons, served as provided in subsection 2, in an action brought by the insurer's receiver on or arising out of such obligation or relationship, as follows:**
>
> (a) Persons obligated to the insurer as a result of agency or brokerage or transactions between such persons and the insurer;
>
> (b) Reinsurers of the insurer and their representatives; and
>
> (c) **Past or present** officers, **managers**, trustees, directors, organizers and promoters of the insurer, and other persons in positions of similar responsibility with the insurer.

NRS 696B.200(1) (Emphasis Added.) Because Criterion was the manager of Spirit, this Court has jurisdiction over claims brought by the Receiver arising out of Criterion's manger role and duties to Spirit, reconsideration is warranted.

If there was any doubt as to the critical role Criterion played as the entity responsible for evaluating and assessing claims and setting reserves as part of the insurance holding company orchestrated by Mulligan, NRS 692C provides further clarity. Indeed, as a member of an insurance holding company, Criterion is also subject to the provisions Chapter 692C of the Nevada Revised Statutes and required to register with the Division of Insurance ("Division") and disclose certain information to the Division. The importance of the claim administer role is illustrated by NRS 697C.370 which identifies factors regulators consider to determine the adequacy of surplus an insurance company must maintain.

> NRS 692C.370 Adequacy of surplus. For the purposes of this chapter, in determining whether or not an insurer's surplus as regards policyholders is reasonable in relation to the insurer's outstanding liabilities and adequate to its financial needs, the following factors among others must be considered:
>
> 1. The size of the insurer as measured by its assets, capital and surplus, reserves, premium writings, operating results, insurance in force and other appropriate criteria.
> 2. The extent to which the insurer's business is diversified among the several lines of insurance.
> 3. The number and size of risks insured in each line of business.
> 4. The extent of the geographical dispersion of the insurer's insured risks.
> 5. The nature and extent of the insurer's reinsurance program.
> 6. The quality, diversification and liquidity of the insurer's investment portfolio.
> **7. The recent past and projected future trend in the size of the insurer's surplus as regards policyholders.**
> **8. The surplus as regards policyholders maintained by other comparable insurers.**
> **9. The adequacy of the insurer's reserves.**

10. The quality and liquidity of investments in affiliates or subsidiaries made pursuant to NRS 692C.180 to 692C.250, inclusive. The Commissioner may treat any such investment as a disallowed asset for purposes of determining the adequacy of surplus as regards policyholders whenever in the judgment of the Commissioner such investment so warrants.

11. The quality of the insurer's earnings and the extent to which the reported earnings of the insurer include extraordinary items. As used in this subsection, the term "extraordinary item" means a nonrecurring occurrence or event.

(Emphasis added)

As set forth in NRS 697C.370 (1), (7), (8), and (9), insurance reserves are an important competent to continued operations by an insurance company. Indeed, "[r]eserving is an important business function, and its goal is to set aside money for paying out claims. In the reserving process, claim adjusters determine the ultimate value of a claim. To do so, they deploy learning from the past cases, and the settlement they had for similar cases, and use this information in their estimation of reserves. The ability to correctly predict the final claim amount is key for insurers and has significant impact on financial statements, as the reserve amount is reported in Quarterly Earnings statements."[8] Here, as alleged in the Complaint, Criterion failed to adequately set reserves which has regulatory repercussions and directly injured insureds of Spirit.[9] Such conduct does not just give rise to a simple breach of contract claim as Criterion wants the Court to believe. Accordingly, the summary statements in the Writ do not provide a basis for requiring arbitration and reconsideration is necessary.

2. Criterion's Role in Fraud Invalidates Purported Need for Arbitration.

Not only does Criterion's role as the claim manager invalidate the analysis in the Writ, but arbitration should not be required due to Criterion role in the scheme to defraud creditors. To be clear,

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[8] https://www.propertycasualty360.com/2019/02/11/modeling-approaches-to-claims-reserving-in-general-insurance/?slreturn=20200429120153

[9] In a recent report prepared by the claims third-party administrator (TRISTAR) who was hired by the Receiver to replace Criterion, TRISTAR determined that Spirit was woefully under-reserved for its claim obligations as set by the former claims manager, Criterion. In this connection, TRISTAR recommended whopping claim reserve increases of $35,395,619.12 for bodily injury claims and $6,400,417.82 for property damage claims—and both of these reserve increases were an 80% increase over the claim reserves that Criterion had established. The report also found that claim files were not fully investigated or documented, and that Criterion's reserving practice that was "formulaic at best, utilizing relatively low standard rates for reported claims even when substantive investigatory material was available to allow posting of more accurate reserves." The report further found that "[t]here were numerous instances where known claimants were ignored, documents not acted upon and basic claim practices not followed."

the Receiver's argument is not simply that arbitration is not proper because the Receiver is a distinct entity from Spirit. However, Plaintiff, as statutory receiver for Spirit, is not bound by the arbitration agreement between Spirit and Criterion when Criterion and its contractual relationship with Spirit were merely instruments in a criminal enterprise. "Simply put, arbitration agreements may be rejected when they are instruments of a criminal enterprise …." *Janvey v. Alguire*, 847 F.3d 231, 246 (5th Cir. 2017) (concurring opinion).

Although Mulligan did not control Criterion at the time the initial arbitration agreement was signed (unlike the agreements signed by the CTC Defendants), the reasoning in *Janvey* for not requiring arbitration is persuasive because of Criterion's role in the fraud perpetrated after Mulligan took control of the company. The court in *Janvey* noted that the receivership entities [like Spirit], are not responsible for actions directed by the party perpetuating the fraudulent scheme. *Id.* at 250 n. 40 (citing *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995) ("The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more [the scheme's perpetrator's] evil zombies.") Here, the Receiver is tasked with cleaning up the mess left by Criterion and the other defendants that left Spirit insolvent. The arbitration provision at issue furthers the scheme and allows Criterion to hide from the public the wrongdoings it facilitated. Accordingly, reconsideration of the Criterion Order to Compel is warranted.

3. Applicability of FAA & McCarren-Ferguson Act is Not Fully Addressed in the Criterion Order to Compel.

Reconsideration and/or clarification of the Criterion Order to Compel and findings regarding the applicability of the Federal Arbitration Act ("FAA") is also necessary if the Court intended to rely on the FAA as part of its decision. Indeed, it is improper for the Court to summarily find the FAA applicable without looking at the parties to the arbitration agreement, the claims asserted and independently determining if the parameters of the FAA are met and analyzing the requested exemption under the McCarran- Ferguson Act. Here, if the Court contends the FAA is applicable, it would still be required to analyze the applicability of the McCarran-Ferguson Act set forth in 15 U.S.C. §§ 1011-

1015 to the facts of this matter. Notably, the facts of this matter are distinct from those in the Writ and the underlying *Milliman* case because Criterion was responsible for setting reserves in a manner that would allow the Division to evaluate the adequacy of Spirit's surplus pursuant to NRS 692C.370 and this Court has jurisdiction over claims relating to the management and administration of the claims consistent with NRS 696B.200(c) as further detailed above. Because NRS 696B.200(c) specifically indicates that claims brought against managers of an insolvent insurance company are properly brought in a court in the state in which an order of rehabilitation is entered, a different analysis than that provided in the Writ and underlying *Milliman* case is required.

As the Court is aware, in the McCarran-Ferguson Act, Congress declared that the continued regulation by the states of the business of insurance is in the public interest. *See* 15 U.S.C. § 1011. Congress concluded that "[t]he business of insurance, and *every person engaged therein*, shall be subject to the laws of the . . . States which relate to the regulation . . . of such business." *Id*. at §1012(a) (emphasis added). Here, Nevada regulates insurance including parties such as Criterion that manage insurance claims. The Supreme Court created a three-part test to determine whether reverse-preemption of federal law through McCarran-Ferguson occurs. Specifically, a court is to examine whether: 1) the state statute was enacted for the purpose of regulating the business of insurance; 2) the federal statute involved "does not specifically relat[e] to the business of insurance"; and 3) the application of the federal statute to the facts of the case would "invalidate, impair, or supersede" the state statute regulating insurance. *Humana Inc. v. Forsyth*, 525 U.S. 299, 307, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999). Here, each of these criteria is met as Criterion was responsible for setting reserves for Spirit and overseeing claims brought by third parties. Additionally Criterion was a part of a regulated Insurance Holding Group. This factual scenario was not addressed in the Writ, nor were such issues raised or addressed by the court in the underlying *Milliman* case.

As detailed in the Receiver's Opposition, there can be no real dispute that the provisions of NRS 696B that make up the Nevada Liquidation Act were enacted for the purpose of regulating the business of insurance. The Liquidation Act provides that "upon taking possession of the assets of an insurer, the

domiciliary receiver shall immediately proceed *to conduct the business of the insurer* or to take such steps as are authorized by this chapter for the purpose of rehabilitating, liquidating, or conserving the affairs or assets of the insurer. NRS 696B.290(3); *see Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010). Here, the claims asserted against Criterion relate to its claims management for Spirit, which included setting of reserves and handling of third-party claims seeking insurance coverage for incidents involving Spirit insureds. Criterion was also a member of a Nevada Insurance Holding Company, thus the first prong of the *Humana v. Forsyth* test is met.

There was no dispute that the second prong of the test was met as numerous courts have determined that the FAA is not a federal statute that specifically relates to the business of insurance. *See, e.g. Munich Am Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998) (there is no question that the FAA does not relate specifically to the business of insurance."); *Stephens v. Am. Int'l Ins. Co*., 66 F.3d 41, 44 (2d Cir. 1995) ("No one disputes the fact that the FAA does not specifically relate to insurance.")

The third prong is also met because of the unique facts of this case which are not addressed by the Court. As stated above, given Criterion's role in an Insurance Holding Company and its obligation to set reserves and handle claims as the exclusive claims manager for the benefit of Spirit's insureds, the application of the FAA would "invalidate, impair, or supersede" Nevada's Liquidation Act. Indeed, Nevada's Liquidation Act incorporates the Uniform Insurers Liquidation Act ("UILA")[10] and has an overall purpose of protecting the interests of policyholders, creditors and the public. *See, e.g*. NRS 696B.210, 696B.530, 696B540. Allowing, the claims asserted against Criterion to proceed in arbitration undercuts the legislative directive that Courts, not arbitrators resolve such matters.

The Criterion Order to Compel does not address the required three-part test and instead relies primarily on the Writ. However, as explained above, reliance on the Writ is insufficient because of Criterion's distinct role that itself is subject to insurance rules and regulations. Because Criterion managed and handled insurance claims on behalf of Spirit, requiring arbitration in this case would

[10] *See* NRS 696B.280.

thwart the insurance liquidator's broad statutory powers under Nevada's Uniform Liquidation Act. Further, unlike the claims asserted against Milliman, the claims asserted against Criterion are not simple contract and tort damages, Milliman did not have a role in exclusive management over a key aspect of running the insurance company (*i.e.*, claims management), and Milliman was not the owner or controlling party of the insurance company and subject to the Nevada Insurance Holding Company—as is the case here for the relationship among Spirit, Mulligan, and Criterion. Accordingly, clarification and/or reconsiderations is warranted.

4. Not All Claims Arise from a Contractual Relationship

Notwithstanding the analysis above, if the Court finds the arbitration provision in the Criterion agreement valid and not pre-empted by the McCarran-Ferguson Act, the arbitration clause at issue is narrow and does not encompass Plaintiff's claims for fraud, RICO, and conspiracy warranting reconsideration. Fundamental to a determination of the applicability of an arbitration provision is review of the same to determine its scope. There is no indication that the Court reviewed the subject provision and deemed it applicable to all claims asserted. Here, the arbitration language is specific to disputes "*concerning the terms of this agreement* or performance by the parties *under this agreement*." Claims Admin. Agreement, at Section. 13 (emphasis added). Many the claims made by the Receiver have nothing to do with the terms or performance of the Agreement and thus fall outside of the arbitration limitation in the Agreement. *See, e.g.*, Comp. ¶¶ 147–56.

Separate from its contract claims, Spirit alleges that Criterion participated in an extra-contractual criminal conspiracy to defraud Spirit, its insureds, and the Nevada Division of Insurance. Spirit's tenth, eleventh, twelfth, and thirteenth claims for relief – for Nevada RICO, unjust enrichment, fraud, and civil conspiracy – are based on allegations of a sprawling criminal conspiracy, in which Defendants Mulligan, Simon, McCrae, and others caused Criterion to affect a pattern of underserving claims against Spirit to mislead insureds and regulators alike and obscure Spirit's descent into deepening insolvency. *See* Comp. ¶¶ 147–56. Similarly, a fair reading of Plaintiff's fifteenth through eighteenths claims against Criterion to avoid certain transfers or distributions hinge on Criterion's

knowing involvement in this greater fraudulent scheme, not a failure to perform under the Agreement. *See* Comp. ¶¶ 388, 401, 412, 424. All such claims fall outside the arbitration provision.

Other Court's looking at similar arbitration provisions and claims have denied requests for arbitration noting that when the litigation does not involve a controversy arising under the agreement itself, but rather a conspiracy in which the conspirators drove the company into insolvency claims relating to such conduct were outside the arbitration agreement. *See, Washburn v. Societe Commerciale De Reassurance*, 831 F.2d 149, 151 (7th Cir. 1987). In *Washburn*, as here, the parties' agreement required arbitration of disputes "with respect to the interpretation of this Agreement or the performance of the respective obligations of the parties under this Agreement." *Id.* at 150. The Court distinguished the arbitration provision at issue from broader arbitration provisions that might encompass "all" disputes as Criterion urges when it selectively quotes the Parties' Agreement. *Id.* Accordingly, Plaintiff's fraud, RICO, conspiracy, and fraudulent conveyance claims against Criterion fall outside of the narrow bounds of Paragraph 13 of the Spirit-Criterion Agreement. Therefore, at most, it is only Plaintiff's claims against Criterion for breach of contract and the implied duty of good faith and fair dealing that should be dismissed in favor of arbitration and reconsideration of the Criterion Order to Compel holding otherwise is necessary.

IV. CONCLUSION

For the reasons set forth herein, reconsideration and/or clarification of Criterion Order to Compel is warranted. Spirit was part of an insurance holding company that included Criterion, the CTC Defendants, Thomas Mulligan, Chelsea and others who conspired to fleece and defraud Spirit. In being a member of the Insurance Holding Company and for its work as the exclusive claims manager, Criterion is subject to Nevada laws and regulations. This Court has jurisdiction over claims relating to Criterion's management and administration of the claims as specifically referenced by NRS 696B.200(c), and this statute specifically confers jurisdiction by this Court when an entity has a role as a manager for the insurance company—and Criterion was the exclusive claims manager here for Spirit. The legislature understood the sensitivity of being sure that related parties of an insurance company

who controlled management, and who contributed to the demise of an insurance company, all had to be before the exclusive jurisdiction of the Court. Criterion's role as the exclusive claims manager, and its handling claims on Spirit's behalf as a corporate owner insider, was utilized to defraud creditors and siphon money away from Spirit, making this situation distinct from anything the District Court considered in the *Milliman* case and the Writ that followed. An independent analysis is required.

WHEREFORE, the Receiver respectfully requests the court GRANT its Motion for Reconsideration and/or Clarification of the Court's July 12, 2020 Order Regarding Criterion's Motion to Compel Arbitration and allow the claims asserted against Criterion to proceed herein.

Dated this 5th day of August, 2020.

By: */s/ Kara B. Hendricks*

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of August, 2020, a true and correct copy of the foregoing ***Plaintiff's Motion for Reconsideration and/or Clarification of the Court's July 22, 2020 Order Regarding Criterion Claim Solutions of Omaha Inc.'s Motion to Compel Arbitration*** was served electronically using the Odyssey eFileNV Electronic Filing system upon all parties with an email address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R. The date and time of the electronic proof of service is in place of the date and place of deposit in the U.S. Mail.

/s/ Andrea Lee Rosehill
An employee of Greenberg Traurig, LLP