CASE NO. 82701

IN THE SUPREME COURT OF NEVADA

THE STATE OF NEVADA COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC.,

Petitioner,

vs.

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,

Respondents,

-and-

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; 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; 195 GLUTEN FREE LLC, A NEW JERSEY LIMITED LIABILITY,

Real Parties in Interest.

District Court Case No. A-20-809963-B

REAL PARTY IN INTEREST CRITERION CLAIM SOLUTIONS OF OMAHA, INC.'S APPENDIX TO ANSWER TO PETITION FOR WRIT OF MANDAMUS

VOLUME I OF II

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REAL PARTY IN INTEREST CRITERION CLAIM SOLUTIONS OF OMAHA, INC.'S APPENDIX TO ANSWER TO PETITION FOR WRIT OF MANDAMUS

VOLUME I of II

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TAB 1

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CLERK OF THE COURT

ORD
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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

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

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NOTICE TO BE PROVIDED TO:

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Special Deputy Receiver
Nevada Health CO-OP
3900 Meadows Lane
Las Vegas, NV 89107

Copy to:
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TAB 2

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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 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. 27

MOTION TO COMPEL ARBITRATION

Defendants Milliman, Inc., Jonathan L. Shreve, and Mary van der Heijde (collectively "Milliman" for purposes of this motion only), by and through their attorneys, Snell & Wilmer L.L.P., move the Court to compel the Commissioner of Insurance, Barbara D. Richardson, in her official capacity as Receiver for Nevada Health CO-OP ("Plaintiff" or "Commissioner") to arbitration, consistent with the mandatory dispute resolution clause in the parties' October 20, 2011 Consulting Services Agreement. This motion is based on the pleadings and papers on file, the attached memorandum of points and authorities, with its exhibits, and any oral argument this court may entertain.

DATED this 6th day of November, 2017.

SNELL & WILMER L.L.P.

By: _____

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

Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5200

NOTICE OF HEARING

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL:

PLEASE TAKE NOTICE that the undersigned will bring this **MOTION TO COMPEL ARBITRATION** on for hearing in Department 27 of the above-entitled Court on the 7 day of DECEMBER, 2017 at 10:00 a.m.

DATED this 6th day of November, 2017.

SNELL & WILMER L.L.P.

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff's claims against Milliman arise out of, and relate to, the actuarial work Milliman performed pursuant to Milliman's October 20, 2011 Consulting Services Agreement (the "Agreement") with Nevada Health CO-OP ("NHC").[1] That Agreement contains a broad, mandatory arbitration clause by which the parties agreed to arbitrate "any dispute arising out of or relating to the engagement of Milliman by" NHC. The Commissioner, in her Complaint, expressly relies on the Agreement to set out her allegations and claims against Milliman, and affirmatively asserts that it is "a valid and enforceable contract." (*See, e.g.,* Compl. ¶¶ 372, 380, 388). Therefore, under controlling, on-point precedent from the Nevada and U.S. Supreme Courts, Plaintiff must abide by ***all*** terms of the Agreement, including the arbitration clause. Plaintiff cannot seek to enforce provisions of the Agreement while simultaneously disavowing the arbitration clause. *Ahlers v. Ryland Homes Nevada, LLC*, 126 Nev. 688, 367 P.3d 743 (2010) (unpublished); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995). Simply put, the Court should compel Plaintiff to arbitration as contractually bound and stay this action pending resolution.

II. FACTUAL BACKGROUND

A. The NHC

The Patient Protection and Affordable Care Act ("ACA") overhauled the American medical system by attempting to increase competition in the health insurance markets and increase access to healthcare to individuals previously excluded from the healthcare system. One element of that new system was the creation of Consumer Operated and Oriented Plans, or "Co-Ops," which were intended to provide an alternative to both publicly-funded and single-payer healthcare systems.

NHC is the Nevada Co-Op established under the ACA. Formed to "provide health insurance to individuals and small business," (Compl. ¶ 2), NHC experienced such financial hardship that insolvency proceedings before Department I of this Court were instituted in

[1] A copy of the Agreement is attached as **Exhibit A**.

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September 2015. (*See* 9/25/15 Pet. for Appointment of Commissioner as Receiver, on file in case number A-15-7252444-C.)

B. The NHC Insolvency Proceedings

The Nevada Insurance Commissioner was appointed as NHC's Permanent Receiver and ordered to take possession of its assets, wherever located, and to administer them under court supervision. (*See* 10/14/15 Permanent Injunction and Order Appointment Commissioner as Permanent Receiver of Nevada Health Co-Op, on file in case number A-15-725244-C (the "Receivership Order" or "Order")).

The Receivership Order anticipated that the Commissioner may need to pursue claims in forums other than this Court, such as arbitration. Specifically, the Commissioner was granted the power and authority to "[c]ollect all debts and monies due and claims belonging to [NHC], ***wherever located***," and 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***." *Id.* § 14(a) (emphasis added). Similarly, the Receiver is authorized to "[i]nstitute and prosecute… any and all suits ***and other legal proceedings***." *Id.* §14(h) (emphasis added).

C. The Complaint Against Milliman

On August 25, 2017 the Commissioner filed the current lawsuit as part of her efforts to obtain assets for the benefit of the estate. (*See* 10/14/15 Permanent Injunction Order Appointing Commissioner as Permanent Receiver of Nevada Health Co-Op, Case No. A-15-725244-C). While maintaining this suit, the Commissioner is also litigating in federal court against the U.S. Department of Health and Human Services, asking the court there for declaratory relief against the federal government. Unsurprisingly, the Commissioner's strategy is to avoid financial obligations it owes others, while simultaneously seeking money from defendants like Milliman to pay obligations it owes and cannot avoid.

Milliman is one of five professional service providers named in the instant case. In asserting the Milliman claims, the Commissioner liberally references the Agreement between NHC and Milliman and even identifies it as the basis for NHC's relationship with the company. (*See* Compl. ¶¶ 42, 45–56). Each of the 14 causes of actions brought against the company arise

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out of NHC's engagement of Milliman to provide actuarial services to NHC. (*See, e.g.*, Compl. ¶ 333 ("[t]he Milliman Defendants were engaged by NHC…to provide professional actuarial services to NHC")). Based in varied tort and contract theories, several of Plaintiff's claims rely upon specific provisions and obligations purportedly owed to NHC by virtue of the relationship and Agreement. For instance, Plaintiff's ninth cause of action for "Tortious Breach of the Implied Covenant" alleges that the parties "entered into a valid and enforceable contract - the Consulting Services Agreement - that required Milliman to perform professional actuarial services…[and] Milliman owed a duty of good faith to Plaintiff arising from the contract." (Compl. ¶¶ 380–82.) Similarly, in the second cause of action for "Professional Malpractice" Plaintiff states that "[t]he Milliman Defendants were engaged by NHC…to provide professional actuarial services" including certifications, feasibility studies, financial reporting, but that Milliman allegedly breached its professional actuarial duties to NHC. (Compl. ¶¶ 333–36; *see also*, Compl. ¶ 48 (stating the Agreement "provides that 'Milliman will perform all services in accordance with applicable professional standards.'"). In yet another example, Plaintiff's eighth cause of action, titled "Breach of Contract," alleges that Milliman "failed to perform under the Consulting Services Agreement." (Compl. ¶ 375).

While the Commissioner's complaint is over 95 pages in length and references various contractual obligations between NHC and Milliman, it is silent on the binding arbitration clause contained in the Agreement governing that same relationship.

D. NHC's Agreement With Milliman and its Mandatory Arbitration Provision

The initial actuarial consulting agreement dated October 20, 2011 was originally entered into by Milliman and Culinary Health Fund. *See* Agreement, Ex. A.[2] The Culinary Health Fund later created Hospitality Health, Ltd. and "assigned and transferred all rights, title, and interest" in the Agreement to Hospitality Health, Ltd. (Compl. ¶ 45). Then, NHC was formed in October

[2] A letter from Milliman to the Culinary Health Fund dated the same day and referenced in the Agreement explains the scope of Milliman's contractual relationship with the Culinary Health Fund, which included participating in creating portions of the feasibility study and business plan for Plaintiff's application to the federal government for start-up and solvency loans. *See* October 20, 2011 Letter, attached as **Exhibit B**.

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2012, and all assets and agreements of Hospitality Health, including the Agreement, were subsequently assigned to NHC. (Compl. ¶ 49).

As alleged in the complaint, the Commissioner, as Receiver for NHC, "was assigned all rights benefits and interests in the Consulting Services Agreement" (Compl. ¶ 374) and "brought this action on behalf of NHC." (Compl. ¶ 1). The Agreement contains a mandatory arbitration clause that provides:

> **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 arbitration shall take place before a panel of three arbitrators. Within 30 days of the commencement of the arbitration, each party shall designate in writing a single neutral and independent arbitrator. The two arbitrators designated by the parties shall then select a third arbitrator. 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 shall have no power or authority to award punitive or exemplary damages. The arbitrators may, in their discretion, award the cost of the arbitration, including reasonable attorney fees, to the prevailing party. Any award made may be confirmed in any court having jurisdiction. 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.

Agreement ¶ 5, Ex. A (emphasis added). This binding provision is prominently featured as part of the main body of the contract. The clause is located in the middle of the contract, and is not buried or otherwise difficult to locate. The entire contract is short, taking up only two pages, uses the same size font throughout, and is written in similarly plain language. *Id.* -The Agreement was fully executed by Mary van der Heijde of Milliman and Bobbette Bond of Culinary Health Fund. *Id.* Both are sophisticated parties, with experience in their respective fields, and with access to counsel.

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III. ANALYSIS

A. The Nevada Uniform Arbitration Act and the Federal Arbitration Act Require Arbitration of Plaintiff's Claims against Milliman, and the Limited Exception in Those Statutes Does Not Apply

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."

The NAA states:

> An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except as otherwise provided in NRS 597.995 or ***upon a ground that exists at law or in equity for the revocation of a contract***.

NRS 38.219(1) (emphasis added).[3]

Section 2 of the FAA similarly states:

> A written provision in… a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction… shall be valid, irrevocable, and enforceable, save ***upon such grounds as exist in law or equity for the revocation of any contract.***

As the Nevada Supreme Court has stated, 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); *see also State ex rel. Masto v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009) ("As a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration.").[4]

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[3] The reference to NRS 597.995 was added to the statute in 2013, and applies "only to agreements entered into or renewed on or after October 1, 2013." *See* Assembly Bill 326 (2013). That clause therefore does not apply to the 2011 Agreement at issue here.

[4] The Agreement contains a choice of law provision, where the parties agreed that interpretation and enforcement of the Agreement would be governed by the substantive contract law of the State of New York. Agreement § 5, Ex. A. The enforcement of the arbitration provision is a procedural matter and should be governed by Nevada law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77–78 (1938); *Tipton v. Heeren*, 109 Nev. 920, 922 & n.3 (1993) (noting that Nevada law governs procedural questions regardless of choice of law provisions). To the extent the Court chooses to apply New York law, New York similarly supports liberal enforcement of arbitration agreements. N.Y. ARBITRATION § 7503

Where, as here, a contractual arbitration clause is broadly worded, absent an express clause excluding a particular grievance from arbitration, Nevada courts must resolve any questions regarding the arbitrability of a dispute in favor of arbitration. *Int'l Ass'n of Firefighters, Local No. 1285 v. City of Las Vegas*, 112 Nev. 1319, 1324 (1996). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.*; *see also Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999). In evaluating the enforceability of an arbitration clause, the court's role is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). Here, (1) a binding arbitration clause is contained in the Agreement, which contract Plaintiff concedes is valid and binding, and (2) the dispute between the parties unquestionably arises from and relates to NHC's engagement of Milliman, and therefore the arbitration clause encompasses Plaintiff's causes of action against Milliman. As a result, the arbitration clause is enforceable, and Plaintiff must arbitrate its claims.[5]

Critically, 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). Here, the Commissioner is suing to ***enforce*** the Agreement, not to revoke it. At no point anywhere in the extensive complaint, does the

(McKinney); *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 48 (1997) (holding New York courts have long recognized strong public policy, similar to the Federal Arbitration Act, for liberal enforcement of arbitration agreements).

[5] Nevada's public policy in favor of arbitration is consistent with the U.S. Supreme Court precedent that has expressly prohibited states from enacting any statute or "policy" that is "directly contrary to the [FAA's] language and Congress' intent" to favor arbitration. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress' intent." (citation omitted)); *see also Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) ("In enacting §2 of the federal Act, Congress declared a national policy favoring arbitration ***and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration***.") (emphasis added).

Receiver lay out any grounds to revoke either the Agreement as a whole, or any specific provisions. Nor does she plead for the revocation of the Agreement.

B. The Fact That the Commissioner Is the Plaintiff Does Not Preclude Enforcement of the Mandatory Arbitration Clause.

Since Milliman has established the existence of a valid arbitration agreement, it is the Commissioner'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). Milliman anticipates that the Commissioner may argue that her status as Receiver allows her to avoid the binding arbitration requirement of the contract she seeks to enforce. That argument is wrong for the following reasons.

First, the Commissioner, as Receiver for NHC, is bound by the Agreement, including the arbitration clause. A receiver steps into the shoes of its predecessor. *See O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 82 (1994); *Anes v. Crown P'ship, Inc.*, 113 Nev. 195, 199 (1997) (citing 66 Am. Jur. 2d *Receivers* § 223 (1973)); *see also First Fin. Bank v. Lane*, 130 Nev. Adv. Op. 96, 339 P.3d 1289, 1290, 1293 (2014) (noting the Federal Deposit Insurance Corporation gained the rights of an assignee when it was appointed receiver and that the assignee steps into the shoes of the assignor). Because a receiver steps into the shoes of the represented entity, the receiver has no rights separate from the represented entity. 65 Am. Jur. 2d *Receivers* § 116; *see also Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787 (6th Cir. 2009). The insurance commissioner is a public official acting on behalf of the state when dealing with insolvent insurers in general, but once appointed conservator of a particular insolvent insurer, the commissioner steps into the shoes of that insurer. *Texas Commerce Bank v. Garamendi*, 28 Cal. App. 4th 1234, 1245 (1994).

That the Receiver is herself a non-signatory to the Agreement is irrelevant. Plaintiff, as Receiver for NHC, "was assigned all rights benefits and interests in the Consulting Services Agreement by Hospitality Health." (Compl. ¶¶ 1, 374). She concedes that the Agreement is "valid and enforceable." (Compl. ¶¶ 372, 380, 388). Thus, just as NHC would have been obligated to arbitrate its claims relating to the work Milliman performed pursuant to the Agreement, the Commissioner is similarly bound.

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Moreover, non-signatories of arbitration agreements can be bound by the agreement under ordinary contract and agency principles, including assumption and estoppel. *Ahlers v. Ryland Homes Nevada, LLC*, 126 Nev. 688, 367 P.3d 743 (2010) (reversing and remanding to district court to enter an order granting motion to compel arbitration); *Bridge v. Credit One Fin.*, 2016 WL 1298712, *2 (D. Nev. Mar. 31, 2016); *Hernandez v. Allied Interstate, Inc.*, 2013 WL 12123682, *4 (C.D. Cal. Aug. 27, 2013).

Courts around the country routinely hold that Insurance Commissioners acting as liquidators, receivers, or rehabilitators are bound by arbitration provisions in the contracts they assume and seek to enforce. For example, in *Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969, 972–73 (9th Cir. 1992), the Ninth Circuit enforced an arbitration clause where the dispute "is in essence a contractual one," even though "Montana has conferred on the liquidator broad jurisdiction over insurance insolvency proceedings and complete control and authority over the insolvent's assets." *See also Rich v. Cantilo & Bennett*, 492 S.W.3d 755, 762 (Tex. Ct. App. 2016) ("However, for the actions accruing independently of the Receiver's appointment and arising under the legal services agreement—in this case, the common-law claims asserting breach of fiduciary duty, conspiracy, and negligence—the Receiver, standing in the shoes of Santa Fe, is bound by the arbitration agreement to the same extent that Santa Fe is bound."), *reh'g denied* (Apr. 5, 2016), *review denied* (July 22, 2016); *Koken v. Cologne Reinsurance (Barbados), Ltd.*, 34 F. Supp. 2d 240, 256 (M.D. Pa. 1999); *Foster v. Philadelphia Mfrs.*, 592 A.2d 131(Pa. Cmwlth. 1991).

Second, the Receiver cannot pick and choose certain provisions of the Agreement to abide, and certain other ones to ignore. It is indisputable that the Receiver's claims arise from and relate to the work Milliman performed pursuant to the Agreement, and that the Receiver is suing to enforce the Agreement. The Nevada Supreme Court has expressly held that where a party "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 at *2. 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

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underlying enactment of the Arbitration Act." *Id.*; *see also FDIC v. Ernst & Young, LLP*, 374 F.3d 579, 584 (7th Cir. 2004), (FDIC, as Receiver, could not "cherry pick" contract to avoid arbitration clause).

Third, 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. Moreover, section 14(a) of the Receivership Order expressly provides that the Receiver has 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***." Likewise section 14(h) states that the Receiver can "[i]nstitute and prosecute… any and all suits ***and other legal proceedings***." (emphasis added). This Court's Order ***supports*** Milliman's right to arbitrate here.

While the Receiver may argue that the Receivership Order grants this Court exclusive jurisdiction "over any claims or rights respecting the Property… exclusive jurisdiction being hereby found to be essential to the safety of the public and of the claimants against the CO-OP," (*id.* § 3), that portion of the Order does not apply here, where the Receiver's claims do not affect the administration, allocation, or ownership of NHC's property or assets, and Milliman is bringing no claims "***against***" NHC. On the contrary, Plaintiff seeks to recover monetary damages from Milliman—not the recovery of NHC's property or assets—as contract and consequential damages. In all events, extending this Court's "exclusive jurisdiction" to cover the contract and tort claims against Milliman would contravene the several other express provisions of the Receivership Order that plainly allow the Receiver to litigate in this forum or "any other type of action or proceeding."

It is instructive that federal courts in the bankruptcy context routinely distinguish preference claims and other "core" insolvency matters which must proceed in the bankruptcy court, as distinct from basic contract and tort actions, in deciding to enforce arbitration agreements. It is well settled that if the proceeding involves claims like those the Commissioner

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brings against Milliman, which arise from a debtor's pre-petition common law and contract rights, and in which there is no substantive right created by bankruptcy law at issue, bankruptcy courts have ***no discretion to deny arbitration***. *See, e.g.*, *Gandy v. Gandy* (*In re Gandy)*, 299 F.3d 489, 495 (5th Cir. 2002) (stating that courts have "no discretion to refuse to compel arbitration of matters not involving 'core' bankruptcy proceedings"); *Microbilt Corp. v. Chex Sys. (In re Microbilt Corp.)*, 588 Fed. Appx. 179 (3d Cir. 2014); *Crysen/Montenay Energy Co. v. Shell Oil Co. (In re Crysen/Montenay Energy Co.)*, 226 F3.d 160 (2d Cir. 2000); *Hays & Co. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989).

C. <u>The AAA Is an Adequate Forum To Adjudicate all of Plaintiff's Claims against Milliman</u>

Plaintiff's claims are arbitrable under the Agreement. Pre-dispute agreements to arbitrate must be enforced if the party may effectively vindicate those rights in the arbitral forum. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). Here, the Agreement's arbitration clause specifies the details of the arbitration proceeding and provides for a fair and adequate forum to resolve this dispute. The arbitration clause specifies that arbitration will take place under the Commercial Arbitration Rules of the American Arbitration Association before three neutral arbitrators. Agreement ¶ 5, Ex. A. Each party will choose one neutral and independent arbitrator, each of whom will select a third. *Id.* Discovery is guided by the Federal Rules of Civil Procedure and the arbitrators have the power to award attorneys' fees and costs to the prevailing party. *Id.* The arbitration award may be confirmed in any court with jurisdiction. *Id.* Because the Agreement properly allows Plaintiff to pursue, and Milliman to defend, all claims in AAA arbitration, the forum is adequate.

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IV. CONCLUSION

Plaintiff must pursue her alleged claims against Milliman in arbitration. Nevada and federal law favor arbitration as an expedient and cost-effective method of resolving disputes, so much so that questions of arbitrability are resolved in favor of arbitration. Plaintiff and Milliman here agreed to a simple and concise Agreement that requires AAA arbitration of any dispute arising out of related to the Agreement. Plaintiff's claims against Milliman are based on the Agreement, as evidenced by the numerous times Plaintiff references it in her complaint, as well as her breach of contract claim regarding the Agreement. In sum, this Court should compel Plaintiff to arbitration and to stay this action pending resolution.

DATED this 6th day of November, 2017.

SNELL & WILMER L.L.P.

By: _____

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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3883 Howard Hughes Parkway, Suite 1100, Las Vegas, Nevada 89169. On the below date, I served the above **MOTION TO COMPEL ARBITRATION** as follows:

☐	**BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
☐	**BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
☐	**BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
☐	**BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail address(es) set forth below.
☐	**BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
☐	**BY PERSONAL DELIVERY:** by causing personal delivery by _____, a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.
X	**BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

Mark E. Ferrario, Esq. Eric W. Swanis, Esq. Donald L. Prunty, Esq. GREENBERG TRAURIG, LLP 3773 Howard Hughes Parkway, Suite 400 N Las Vegas, NV 89169 *Attorneys for Plaintiff*	Samuel A. Schwartz, Esq. Frank M. Flansburg, III, Esq. SCHWARTZ FLANSBURG PLLC 6623 S. Las Vegas Blvd., Suite 300 Las Vegas, NV 89119 *Attorneys for Defendants InsureMonkey, Inc. and Alex Rivlin*
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DATED: November 6, 2017.

/s/ Gaylene Kim
An Employee of Snell & Wilmer L.L.P.

4838-1972-9492.1

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EXHIBIT A

EXHIBIT A

Milliman

Consulting Services Agreement

This Agreement is entered into between Milliman, Inc. (Milliman) and the **Culinary Health Fund** (Company) as of **October 20, 2011**. Company has engaged Milliman to perform consulting services as described in the letter dated **October 20, 2011** and attached hereto. Such services may be modified from time to time and may also include other general actuarial consulting services. These terms and conditions will apply to all subsequent engagements of Milliman by Company unless specifically disclaimed in writing by both parties prior to the beginning of the engagement. In consideration for Milliman agreeing to perform these services, Company agrees as follows.

1. Billing Terms Initial 6 Months. Company acknowledges the obligation to pay Milliman for services rendered, whether arising from Company's request or otherwise necessary as a result of this engagement, at Milliman's fixed fee arrangement for the personnel utilized plus all out-of-pocket expenses incurred. Milliman understands that the initial funding may not be immediately available but expects prompt payment once they become available. In the event that the health cooperative is dissolved and does not receive funds to become a going concern, Milliman will not pursue payment from individuals associated with the dissolved health cooperative for the work done for feasibility studies and business plans.

2. Billing Terms After 6 Months. Company acknowledges the obligation to pay Milliman for services rendered, whether arising from Company's request or otherwise necessary as a result of this engagement, at Milliman's normal billing rate for the personnel utilized plus all out-of-pocket expenses incurred. Milliman will bill Company periodically for services rendered and expenses incurred. All invoices are payable upon receipt. Milliman reserves the right to stop all work if any bill goes unpaid for 60 days. In the event of such termination, Milliman shall be entitled to collect the outstanding balance, as well as charges for all services and expenses incurred up to the date of termination.

3. Tool Development. Milliman shall retain all rights, title and interest (including, without limitation, all copyrights, patents, service marks, trademarks, trade secret and other intellectual property rights) in and to all technical or internal designs, methods, ideas, concepts, know-how, techniques, generic documents and templates that have been previously developed by Milliman or developed during the course of the provision of the Services provided such generic documents or templates do not contain any Company Confidential Information or proprietary data. Rights and ownership by Milliman of original technical designs, methods, ideas, concepts, know-how, and techniques shall not extend to or include all or any part of Company's proprietary data or Company Confidential Information. To the extent that Milliman may include in the materials any pre-existing Milliman proprietary information or other protected Milliman materials, Milliman agrees that Company shall be deemed to have a fully paid up license to make copies of the Milliman owned materials as part of this engagement for its internal business purposes and provided that such materials cannot be modified or distributed outside the Company without the written permission of Milliman or except as otherwise permitted hereunder.

4. Limitation of Liability. Milliman will perform all services in accordance with applicable professional standards. The parties agree that Milliman, its officers, directors, agents and employees, shall not be liable to Company, under any theory of law including negligence, tort, breach of contract or otherwise, for any damages in excess of three (3) times the professional fees paid to Milliman with respect to the work in question. In no event shall Milliman be liable for lost profits of Company or any other type of incidental or consequential damages. The foregoing limitations shall not apply in the event of the intentional fraud or willful misconduct of Milliman.

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

Milliman

Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall take place before a panel of three arbitrators. Within 30 days of the commencement of the arbitration, each party shall designate in writing a single neutral and independent arbitrator. The two arbitrators designated by the parties shall then select a third arbitrator. 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 shall have no power or authority to award punitive or exemplary damages. The arbitrators may, in their discretion, award the cost of the arbitration, including reasonable attorney fees, to the prevailing party. Any award made may be confirmed in any court having jurisdiction. 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.

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.

7. No Third Party Distribution. Milliman's work is prepared solely for the internal business use of Company. Milliman's work may not be provided to third parties without Milliman's prior written consent. Milliman does not intend to benefit any third party recipient of its work product, even if Milliman consents to the release of its work product to such third party.

8. Confidentiality. Any information received from Company will be considered "Confidential Information." However, information received from Company will not be considered Confidential Information if (a) the information is or comes to be generally available to the public through no fault of Milliman, (b) the information was independently developed by Milliman without resort to information from the Company, or (c) Milliman appropriately receives the information from another source who is not under an obligation of confidentiality to Company. Milliman agrees that Confidential Information shall not be disclosed to any third party.

9. Use of Milliman's Name. Company agrees that it shall not use Milliman's name, trademarks or service marks, or refer to Milliman directly or indirectly in any media release, public announcement or public disclosure, including in any promotional or marketing materials, customer lists, referral lists, websites or business presentations without Milliman's prior written consent for each such use or release, which consent shall be given in Milliman's sole discretion.

Milliman, Inc.

By: Mary vander Heyde 11/7/11
Signature and Date

Mary vander Heyde, Principal & Consulting Actuary
Print Name and Title

Culinary Health Fund

By: Bobbette Bond
Signature and Date

Bobbette Bond
Print Name and Title

EXHIBIT B

EXHIBIT B

Milliman

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October 20, 2011

Bobbette Bond
Director of Public Policy
Culinary Health Fund
1901 Las Vegas Boulevard South
Las Vegas, NV 89104

Re: Proposal to Provide Actuarial Services in Support of CO-OP Funding Application

Dear Bobbette:

Thank you for the opportunity to present this proposal in response to your need for actuarial services in support of the CO-OP application. This letter provides some background information about Milliman in general as well as Denver practice and outlines potential proposed services given the Funding Opportunity Announcement (FOA), Funding Opportunity Number: OOCOO-11-001, CFDA: 93.545, from U.S. Department of Health and Human Services released on July 28, 2011.

Milliman is uniquely positioned to provide these studies and work with the Culinary Health Fund for a number of important reasons:

- Milliman is one of the nation's largest consulting firms with an extensive professional staff. With over 2,500 employees working from over 50 offices (30 in the United States), we have enough geographic dispersion to provide local consultants who are equipped with sophisticated resources that only a large firm can provide.

- Milliman has significant experience and expertise with developing feasibility studies that are submitted to regulators including:
    - State Department of Insurance (DOI) pro formas financial statement for organizations attempting to become licensed insurance companies.
    - Medicare Part D prescription drug plan (PDP) sponsors seeking to become risk bearing entities including assistance with all necessary exhibits for CMS.
    - Medicare Advantage feasibility studies for start-up organizations including pro forma financial statements and assistance with the DOI application.
    - Expansion of business filings for existing insurance companies that want to offer new product lines or expand geographically into new areas.

  The common elements in these projects are clients who are starting a new organization or who plan on offering new products, the need for both technical projections and innovative business solutions, and strong collaboration with senior leaders of the organizations with whom we are working.

- Milliman has extensive knowledge and experience in health care reform and the development of state health exchanges. We are working with several states to help them determine the structure

of their exchange. Our risk adjuster (Milliman Advanced Risk Adjusters – MARA) is used by the Massachusetts Health Connector and is a likely candidate for state health exchanges.

- Milliman's technical resources are highly regarded and used by the actuaries at most health insurers in the United States. Our *Health Cost Guidelines* are a comprehensive data set of medical, pharmacy and dental claim costs for commercial and senior segment insurance. In addition, the guidelines have rating models and other resources that are essential for projecting claims costs. For a new entity with no claims experience with which to create premiums, this tool provides the needed basis for rate development.

- Milliman developed the Healthcare Reform Financing Model (HCRFM) to assess, quantify, and understand the potential impact of specific health care reform proposals. The HCRFM projects the potential costs and movements of individuals and the interaction between competing medical cost payers and providers within and between the various insurance markets that comprise the health care system. This model can be used to study and project the potential covered population for a new CO-OP. The Milliman Denver practice conducted the research and development of the population take up rates associated with an introduction of new health plan option in the market as a result of healthcare reform.

- Milliman is an independent firm and is wholly owned by the firm's principals.

- Milliman has a diverse staff of professionals with extensive experience as actuaries, clinicians (physicians, pharmacists, nurses, etc.), underwriters, benefit consultants, information technology specialists, contracting experts, and many other areas.

Milliman Denver health practice has been actively involved in the CO-OP and healthcare reform implementation support for other clients. We have included the biographies of the key members of our staff here in Denver in Appendix C to provide you with a better sense of the breadth of our expertise and experience in the healthcare market. Other Milliman consultants from those offices who are participating in CO-OP work will be involved in our feasibility work as well.

We are currently performing several actuarial feasibility studies for CO-OP applicants from other states applying for the October 17th application submission, and hence already have an established process in place to complete this type of work.

Statement of Situation

The Culinary Health Fund is a multi-employer Taft-Hartley fund, established in 1981 governed by a board of trustees. It is funded by collective bargaining agreements that are negotiated by unions and funded by employers. The mission of the Culinary Health Fund is to create and maintain a delivery system of health benefits that are affordable to participants and cost-effective for employers. To achieve this, the Culinary Health Fund works actively with its network of healthcare providers and facilities.

The Culinary Health Fund made a decision to form a CO-OP as defined under Patient Protection and Affordable Care Act (PPACA). The vision of the CO-OP is to enhance access to coverage for its current membership, but also to make the plan attractive for new members. The geographic focus of this CO-OP

consists of the whole state of Nevada, with consideration of the best strategy for developing the CO-OP needs regionally in New Jersey, New York, California, and the Chicago areas.

The Culinary Health Fund has existing provider relationships in Nevada, Chicago and Atlantic City. They have attempted to have conversations with the Nevada Department of Insurance, but has received little support or interest from the department. Conversations with HHS have been encouraging, however. The fund currently employs two actuaries, one of which is a former developer of an HMO in Nevada and has been through the Nevada DOI licensing process in the past.

Scope

The attached Appendices A and B provide an outline of the feasibility study and analytic elements of the business plan that we would conduct in support of an application for joint Start-up and Solvency Loans for the Consumer Operated and Oriented Plan [CO-OP] Program.

The feasibility study and the business plan must fit together and elements from one are required in the other. For example, the business plan will provide details on proposed provider arrangements and the expected cost associated with the proposed provider arrangements is a component of the total administrative cost which will be needed in the financial projections contained in the feasibility study.

We understand that the scope of work needed to support a new CO-OP may vary from the one presented in the Appendices A and B and we will be happy to finalize it in further discussions with the CO-OP. To the extent the scope is reduced, so will be our fees, subject to the maximum not-to-exceed amount specified in the "Timing and Budget" section of the proposal.

Our planned approach to highlighting the questions and issues for weekly discussion and ongoing analysis is to develop an early version of the proforma, and continually update/revise this proforma into which all of the analytical elements of the application will feed. We believe this will be an effective way to keep track of the elements required to complete the application, many of which inform each other and therefore need to be developed in an environment of iterative review and collaboration. Our proposed project plan includes the following:

1) We will begin with a kick-off meeting/call between Milliman and the Culinary Health Fund to gain a more in depth understanding of how the health CO-OP plans on operating. This will include the health CO-OP's vision for how they will serve the insurance needs of their target population as well as any details regarding its structure and operations that it has established. Specifically, Milliman and the Culinary Health Fund will discuss and finalize how the CO-OP may operate in several states and specifics of the roll-out.

2) Our lead consultants will help the Culinary Health Fund leadership think through issues that may be currently unresolved that need to be included in the feasibility study or the business plan. In some cases this may result in additional work that is beyond the initial scope of services (e.g., assistance with selecting a claims processor) and Milliman may provide a separate engagement letter if requested. Sometimes resolution of the issue can be put aside for the time being and a reasonable assumption made in order to be able to move forward with completing the feasibility study or the business plan.

3) We will conduct the analyses necessary to assess the feasibility of the health CO-OP competing in the state exchange for membership and the potential for long term viability. Our deliverables will include a proforma and tables of results accompanied by a write up of our methods, assumptions, and observations regarding areas that are critical for success. This material may be incorporated into the health CO-OP's submission to CMS for federal loans (if the outlook is favorable). We will discuss our findings with the Culinary Health Fund leadership throughout the process.

4) Milliman will review the fully assembled application once the Culinary Health Fund has it drafted, providing editing and feedback.

We envision this engagement as a strategic partnership between Milliman and Culinary Health Fund in order to assess the viability of the CO-OP and prepare materials needed as part of the application submission process. We will answer questions related to the development of a business plan and will coordinate the exchange of necessary elements between the business plan and the feasibility study.

Timing and Budget

We recognize that we are working in a very fluid environment and are agile enough to quickly deploy appropriate resources to meet aggressive timeframes. We are prepared to begin as soon as possible in order to meet the December 31st application submission deadline.

We are coordinating the efforts of the various Milliman consulting teams that will be working on these projects and are able to reflect that efficiency in our proposed rate structure. The estimated discounted professional fees associated with analytics in support of the CO-OP applications as described in this proposal will not exceed $65,000, with $20,000 paid upon delivery of our report. We understand that our ability to collect payment for a portion of our work might be contingent upon the successful application for CO-OP start up funding. Any follow-up analyses would be estimated and billed separately.

Milliman is potentially willing to discount our fees for our work in this phase of a CO-OP's development. We do this understanding that many have little or no initial funding prior to a successful application to HHS for funds and that an ongoing consulting relationship with the successful applicant is our ultimate reward.

We understand that this work must be completed in order to meet the December 31st application submission deadline, and anticipate delivering our results by December 15th.

Milliman bills on a time and expense basis for consulting services. We bill according to the resources required for a given project. Each consultant and each member of the staff has an hourly billing rate. Time spent on a particular client project is recorded to the nearest quarter of an hour, and the client billed accordingly. We bill ongoing clients monthly for the work completed in the preceding month. Charges are due upon receipt.

Staffing

Milliman has put together a comprehensive team of subject matter experts to provide services to the State for this effort including a project manager, principal-in-charge, and project leaders.

Each of the major deliverables will have a Project Leader who will head up the team of consultants responsible for leading the work effort for that particular work stream. Those project leaders are critical to the success of this project, as they have many years of experience across the spectrum of the entire health insurance market (i.e., commercial, Medicare, Medicaid, uninsured, group, and individual).

LEAD CONSULTANT

Jill Van Den Bos, MA, is a consultant in the Denver office of Milliman with over 18 years of experience as a healthcare consultant and will serve as the project manager and a lead consultant for this project. She had a central role in developing population change factors for the Milliman Healthcare Reform Financing Model, using detailed analysis to construct underlying factors used to model changes in health insurance status during the implementation of reform.

KEY STAFF

Jonathan Shreve, FSA, MAAA, is an Equity Principal in the Denver office of Milliman as well as the CEO of Care Guidelines, a Milliman company that produces evidence-based clinical decision-making tools. He also participated heavily in the development of the Milliman Healthcare Reform Financing Model. With several decades of actuarial experience, Jonathan will provide expert review and insight in the course of this project.

Mary van der Heijde, FSA, MAAA, is a Principal in the Denver office of Milliman. She has a detailed knowledge of Health Insurance Exchanges and their potential impacts on all areas of the market. Her experience includes detailed analysis of healthcare pricing and underwriting. She will provide expert review in the course of this project.

Ksenia Draaghtel, ASA, MAAA, is a consultant in the Denver office of Milliman and an expert in predictive modeling. She has over six years of experience as a healthcare actuary and was actively involved in the creation of the Milliman Healthcare Reform Financing Model. Ksenia will assist in this project.

Michael Halford, ASA, MAAA, is a project manager in the Denver office. His key responsibility involves managing the lead consultant's projects internally to ensure that the projects smoothly from all perspectives. Michael will also assist in this project.

Appendix C presents biographies of the senior Denver consultants who will be involved in this project. Milliman's Denver, Colorado office will be the primary provider of services to the State. Milliman will utilize all appropriate staff using in-house technology services (e.g., web-based meeting tools) to reduce the need for travel.

Terms

Milliman reserves the right to evaluate the Culinary Health Fund and its leadership team to determine whether or not Milliman is willing to contract with them for this engagement due to the contingent nature of the payment for our work. We will also run our standard checks (including conflict checks) before beginning work. Contract terms will be negotiated with the Culinary Health Fund and a copy of Milliman's Consulting Services Agreement (CSA) is attached for your review and signature. We recognize that payment may be delayed beyond the normal terms written in the CSA but expect payment to be made promptly once funds are available.

We welcome the opportunity to become acquainted directly in order to gain a better understanding of the unique goals and needs of your organization. After that, we will provide you with a tailored proposal.

We look forward to the opportunity to work collaboratively with you to support the Culinary Health Fund in this effort. This proposal is based upon our best understanding of your situation, and we welcome opportunity to discuss and refine the scope if needed.

Sincerely,

Jill Van Den Bos, MA
Consultant

APPENDIX A - HEALTH COOPERATIVE FEASIBILITY STUDY

The feasibility study in CFDA: 93.545 is described as follows:

> *"The applicant must submit a feasibility study, supported by actuarial analysis, which examines the likelihood of success for the CO-OP envisioned and the applicant's ability to repay the loan. The feasibility study should address the target market, products to be offered, regulatory scheme, market impact, financial solvency, economic viability, State solvency requirements and other regulations, and any other key factors. The feasibility study should identify and justify any key assumptions. It should also include pro forma financial statements with sensitivity testing for alternative enrollment scenarios and other changes in business assumptions. The professional responsible for preparing the feasibility study must certify its accuracy and objectivity."*

1) Target market assessment / Competitive analysis

a. Insurance Coverage – State Level Including Projection of Exchange Enrollment
- Individual
- Small Group
- Uninsured
- Large Group
- Medicare
- Medicaid

b. Carriers – State Level Including Projection of Exchange Participants
- Individual
- Small Group

c. Geography (Rating Areas) for the State
- Hospital Networks
- Physician Groups

d. Network Strength of Competitors
- Range of Network Discounts
- Options available to Cooperative for Contracting (Direct Contracting, Network Lease,
- Provider Partnership)

e. Prevailing Premiums for Individual Coverage

2) Products to be offered

a. Benefit designs required to comply with State Health Insurance Exchange requirements
- Basic Silver Plan
- Silver Plan Benefit designs consistent with cost sharing subsidy level requirements
- Basic Gold Plan
- Any Others

b. Premium/claim estimates for all benefit designs

3) Regulatory scheme

4) Market impact

a. Baseline population projections (from Step 1)
b. Penetration in uninsured population (uptake rates)
c. Switching from previously insured populations (switching rates)
   - Individual
   - Small group
   - Large group, as applicable

5) Financial solvency

a. Revenue projections based on covered population and premium levels
b. Claim projections based on covered population and contracting levels
c. Expense projection based on covered population

6) Economic viability

7) State solvency requirements and other regulations

a. Projected capital given state RBC requirements

APPENDIX B - HEALTH COOPERATIVE ACTUARIAL ELEMENTS OF THE BUSINESS PLAN

These include the following elements from the Business Plan description in the FOA:

- *"The applicant should explain its process for determining accurate and appropriate pricing of premiums."*
- *"Enrollment Forecast: Quantitative forecast of the enrollment totals and composition for the first 20 years of the CO-OP. Forecast numbers should be detailed, and tie to the key activities of the business plan. Assumptions used to forecast enrollment in the out-years should be documented and justified. In addition to the base case forecast, this section should include alternative scenarios upon which sensitivity analysis can be built. "*
- *"Regulatory Capital Requirements Forecast: The applicant should provide an estimation of the annual total regulatory capital requirements associated with each of the base case and alternative enrollment forecasts."*
- *"The applicant must submit pro forma financials covering the period from award through the life of the loan(s). Forecast numbers should be detailed and tie to the key activities of the business plan, including clearly articulated assumptions underlying forecasts of revenues and costs over time.*
- *The financials will include:*
  - *Cash Flow Statement that summarizes all sources and uses of cash including but not limited to the loan awards, any third party financial awards or support, start-up development costs, as well as the on-going business operations of the CO-OP;*
  - *Balance Sheet that reflects the year end assets and liabilities of the CO-OP including core regulatory capital; and*
  - *Income Statement that reflects the annual income or losses of the CO-OP consistent with their business operations and governance."*
- *"The applicant's strategy for bearing risk, including the percent of risk it plans to bear and its plan to purchase reinsurance and/or share risk with providers (if applicable)"*

1. ***Description of premium development***
2. ***Enrollment forecast***
3. ***Regulatory Capital Requirements Forecast***
4. ***Pro Forma***

APPENDIX C - RESUMES

Following you will find resumes for key staff proposed for this project.

Jill Van Den Bos, MA
Healthcare Consultant

Professional Experience

Milliman, Inc.; Denver, CO; 1992-Present; Consultant

University of Colorado at Boulder; Boulder, CO; 1988-1992

Education and Certifications

B.A. (Cum Laude), Psychology (with Honors), Davidson College, 1985

M.A., Experimental Social Psychology, University of California, Los Angeles, 1987

Professional Affiliations

Member, International Society for Pharmacoeconomics and Outcomes Research (ISPOR)

Member, Phi Beta Kappa

Awards

2nd Place Award SOA essay contest, 2010, "Providers: Reorganize and Refinance"

CDC Charles C. Shepard Award, 2009, for paper titled "Cost effectiveness of community-based physical activity interventions."

Jill works as a consultant performing traditional health actuarial functions such as claim cost evaluation, rate filings, pricing, and budget impact modeling. Clients she has served in this capacity include health plans, long term care insurance companies, employers, and providers.

She has also focused on bringing an actuarial perspective to the field of pharmacoeconomics. Experience in this area includes collaborative research with other disciplines where her roles have been the co-investigator managing the analysis and a manuscript editor. She has also done practice pattern and reimbursement research and aided in developing responses for FDA interactions. Her clients for this work have included pharmaceutical companies, the Centers for Disease Control, and academic institutions.

Her work in long-term care insurance has included typical actuarial analysis in support of pricing, product development, valuations of blocks of business, filings, and self-funded employer coverage. She co-authored the book "True Group Long-Term Care" with Jon Shreve. In this book they presented methods by which employers could offer long-term care coverage in a cost-effective fashion by using principles similar to those used for other true group employee benefits such as pension.

Selected Publications

Van Den Bos, J., Rustagi, K., Gray, T., Halford, M., Ziemkiewicz, E., Shreve, J.L. (2011). The $17.1 billion problem: The annual cost of measurable medical errors. Health Affairs; 30(4): 593-603.

Van Den Bos, J. (2010). Providers: Reorganize and refinance. SOA Health Watch; 64:44.

Perlman D., Van Den Bos, J. (2010). Medical claims database analysis of off-label prescribing: Examining off-label use by highly prescribed drugs reveals factors that differ from the usual criticism of such usage. Pharmaceutical Commerce; http://www.pharmaceuticalcommerce.com/frontEnd/1500-off_label_Milliman_PMPM_medical_claims_Van_Den_Bos_Perlman.html

Malone D.C., Waters H.C., Van Den Bos J., Popp J., Draaghtel K., Rahman M.I. (2010). A claims based Markov model for Crohn's disease. Alimentary Pharmacology & Therapeutics; 32:448 458.

Kane-Gill, S.L., Van Den Bos, J., Handler, S.M. (2010) Adverse drug reactions in hospital and ambulatory care settings identified using a large administrative database. The Annals of Pharmacotherapy; 44: 983-993.

Van Den Bos, J. (2009). Globalization of the pharmaceutical supply chain: What are the risks? SOA Health Watch; 61:1.

Nair, K.V., Tang, B., Van Den Bos, J., Zhang, V., Saseen, J.J., Naim, A., Rahman, M. (2009). Categorization of infliximab dose changes and healthcare utilization and expenditures for patients with rheumatoid arthritis in commercially insured and Medicare-eligible populations. Current Medical Research and Opinion; 25(2): 303-314.

Roux, L., Pratt, M., Tengs, T.O., Yore, M.M., Yanagawa, T.L., Van Den Bos, J., Rutt, C., Brownson, R.C., Powell, K.E., Heath, G., Kohl, H.W., Teutsch, S., Cawley, J., Lee, I., West, L., Buchner, D.M. (2008). Cost effectiveness of community-based physical activity interventions. American Journal of Preventive Medicine; 35(6):578-88.

Van Den Bos, J. (2008). Want to be in a health plan? Think like one. Pharmaceutical Executive; 28(5):36.

Van Den Bos, J., Shreve, J.L. (2008). The case for "cash" LTC insurance products. National Underwriter Life and Health; February 11, 2008.

Shreve, J.L., Van Den Bos, J. (2007). Long-term care coverage: employers' perspective. Milliman Health Perspectives; 6-8.

Selected Presentations

"Pharmacy Benefit Pricing Issues", Society of Actuaries Health Spring Meeting, Toronto, Ontario Canada, June, 2009.

"Genetic technology: Practical issues for health plans," Applied Pharmacoeconomics and Outcomes Research Forum, San Diego, California, June, 2009.

Jonathan Shreve, FSA, MAAA
Principal and Consulting Actuary

Professional Experience

Milliman, Inc.; Denver, CO; 1992-Present; Consulting Actuary
Milliman & Robertson; Radnor, PA; 1987-1991; Consulting Actuary
UNUM Life Insurance Company; Portland, ME; 1982-1987; Actuarial Analyst

Education and Certifications

Completed Society of Actuaries Fellowship Exams, 1985

B.A., Mathematics; Carleton College; Magna Cum Laude with distinction in mathematics; 1982

Professional Affiliations

Fellow, Society of Actuaries, 1985

Member, American Academy of Actuaries, 1986

Jon was elected Equity Principal in 1995 and started and leads Denver Health Practice for Milliman. He advises HMOs, insurance companies, hospitals, physician groups, and employers, especially in areas of government contracting.

At Milliman, Jon has made significant contributions to Milliman's research, including primary authorship of the Small Group Medical Underwriting Guidelines, developer of Retiree Medical Guidelines, contributor to Long-Term Care Guidelines, and developer of interactive provider capitation models.

Jon manages several groups within Milliman, including its Care Guidelines Division, and its Mexico and Brazil practices. Jon served on Milliman's Board of Directors between 2004 and 2007.

Selected Publications

True Group Long-Term Care. International Foundation of Employee Benefit Plans, Spring 2004. ISBN 0-89154-586-7

Change The Expectations In Health Care. Society of Actuaries: Visions for the Future of the U.S. Health Care System, June, 2009.

Shreve, J.L., Whittal, K. Analyze This. Best's Review, October, 2008.

Key Question: Health Insurance Optimal Rating and Underwriting Strategy for Mid-Sized Groups. Milliman Health Perspectives, Spring, 2009.

The Case for 'Cash' LTC Insurance Products. National Underwriter, February, 2008.

Selected Presentations

"Underwriting: What's Next? Opportunities and Pitfalls in a post-reform environment." HUSG, San Antonio Texas, April, 2010.

"The State of International Health Care Data-Calculating Health Insurance Liabilities." IAAHS, Capetown South Africa, March, 2010.

Selected Presentations (Continued)

"Lifestyle Based Analytics – A Practical Guide for Underwriting." Society of Actuaries Annual Meeting, Boston, Massachusetts, October, 2009.

"Best Practices in Private Healthcare Insurance Around the Globe," Joint Colloquium of the IACA, PBSS, and the IAAHS Sections, Boston, Massachusetts, May, 2008.

Mary van der Heijde, FSA, MAAA

Principal and Consulting Actuary

Professional Experience

Milliman, Inc.; Denver, CO; 2001-Present; Principal and Consulting Actuary

Education and Certifications

B.S. (with Distinction), Applied Mathematics; University of Colorado; Boulder, CO

Certificate in Actuarial Sciences; University of Colorado; Boulder, CO

Professional Affiliations

Fellow, Society of Actuaries

Member, American Academy of Actuaries

Mary's primary area of expertise includes individual and small group pricing and underwriting. She has recently done significant work assisting insurers in the individual market, including pricing, design, medical underwriting implementation, and other market and competitive considerations. Her recent projects include rate development for large insurers, researching and pricing changes in benefit coverage, and plan analysis. She leads the development of the Milliman *Medical Underwriting Guidelines* product, which is a commercially available medical underwriting guideline used by over 120 insurers in the United States.

Mary advises HMOs and insurance companies, especially in areas of individual and small group underwriting implementation and pricing. She has considerable experience in pricing, having worked intensively on pricing healthcare costs for the federal government's multi-billion dollar TRICARE program and assisting health plans with pricing for their commercial products. She has also worked with health plans in the area of predictive modeling, including the use of risk adjusters.

Mary has been heavily involved in healthcare reform with focus on both current required changes and pricing and strategy for entry to the Health Insurance Exchanges. She has two upcoming whitepapers on (1) the impact of health plan benefit changes on cost and utilization and (2) the impact of the unisex and 3:1 age ratio rate requirement on insurers.

As a Fellow in the Society of Actuaries and a Member of the American Academy of Actuaries, she actively participates in national professional organizations and meetings, including serving as the editor-in-chief of the Society of Actuaries *Health Watch* publication.

Examples of Mary's relevant experience include the following:

Commercial Products and Rate Setting: provided services to health plans for the development of annual pricing for commercial plan products and actuarial opinions on sufficiency of reserves; provided services to managed behavioral health organizations in the development of annual targets and experience monitoring; and supported the development of strategic and detailed plans for compliance with current and future changes stemming from healthcare reform. These projects are focused both on compliance and strategic planning and have included working with plans to develop strategies for planning entry to the Health Insurance Exchange market.

Medicaid and Other Capitation Rate Setting: provided services to health plans to review the adequacy of Medicaid capitation rates developed by the state and to evaluate partnership arrangements with collaborating plans; provided services to hospitals in the development of global capitation rates under an Affordable Care Act (ACA) pilot program to cover care for Medicaid and uninsured populations; provided services to state behavioral health organizations in the verification of the suitability of annual state-proposed capitation rates; and provided services to TRICARE regional providers in the development of future cost projections and negotiations with the government regarding capitation rates for future periods.

In addition, Mary has participated in projects that provided services to health plans in the strategic development of individual and small group product designs. These projects have included a full review of the underwriting workflow and rating processes, as well as development and implementation of these processes for new markets. She has also provided services to health plans and TRICARE regional providers in the use of management reporting and benchmarking to reduce waste and improve the quality of care provided and has supported the Center of Medicare and Medicaid Services (CMS) as part of Milliman's ACRP Audit team.

TAB 3

OPPS

MARK E. FERRARIO, ESQ.
Nevada Bar No. 1625
ERIC W. SWANIS, ESQ.
Nevada Bar No. 6840
DONALD L. PRUNTY, ESQ.
Nevada Bar No. 8230
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Counsel for Plaintiff

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

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

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

/s/ Donald L. Prunty, Esq.
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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.

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> 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*

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

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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***.

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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.

/ / /

[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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Counsel for Plaintiff

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
2017

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

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 Buck Jr. V. E. Cullens, Matthew Farley, James Brown, 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 Bourdais, Ryan Friend, Justin Marocco, Mirais Holden, Alexander Breitenfeld

2017 SEP 15 PM 12:32
DEPUTY CLERK OF COURT

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

V. Thomas Clark, Jr.
Adams and Reese, LLP
450 Laurel Street
Suite 1900
Baton Rouge, LA 70801

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.

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

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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.
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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.

TAB 4

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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 Individual; BASIL C. DIBSIE, an Individual;

Case No. A-17-760558-B

Dept. No. XXV

MILLIMAN'S REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION

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.

I. INTRODUCTION[1]

Plaintiff does not, and cannot, refute the determinative arguments and controlling precedent that require arbitration of Plaintiff's claims against Milliman.

First, Plaintiff cannot simultaneously sue for damages based on Milliman's work done pursuant to the Agreement yet evade the Agreement's arbitration clause, as the Nevada Supreme Court has held. *Ahlers v. Ryland Homes Nevada, LLC*, 126 Nev. 688, 367 P.3d 743 (2010) (unpublished). While Plaintiff asserts that an insurance liquidator is exempt from this bedrock principle because it is a "non-signatory" to the insolvent insurer's contracts, courts around the country uniformly compel arbitration against "non-signatory" liquidators who, like Plaintiff here, sue to enforce an insolvent insurer's contract that includes an arbitration clause. Plaintiff cites ***no*** contrary precedent.

Nor can Plaintiff evade the Agreement's arbitration provision by asserting that she is acting on behalf of NHC's "creditors and policyholders." All of Plaintiff's causes of action against Milliman are pre-insolvency, common law claims that ***belonged solely to NHC***. Plaintiff has not pled facts or viable causes of action against Milliman that belong to any creditor or policyholder. It is well-established, including by the authority cited in Plaintiff's Opposition, that straightforward common law claims on behalf of an insolvent insurer, which do not arise out of the liquidation statute or otherwise belong to the liquidator herself, are not "creditor or policyholder" claims, and can be arbitrated.

Second, Plaintiff does not dispute that she has no basis to "revoke" the Agreement, and therefore the arbitration clause is "valid, irrevocable and enforceable" under both the Federal

[1] Capitalized terms not defined herein shall have the meaning ascribed to them in Milliman's Memorandum of Points and Authorities in support of its Motion to Compel Arbitration.

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Arbitration Act ("FAA") and Nevada Arbitration Act ("NAA"). Plaintiff instead contends that these statutes "interfere" with the Nevada liquidation act, and are therefore "reverse preempted" under the McCarren-Ferguson Act or otherwise superseded—an argument that the U.S. Courts of Appeal for the Ninth, Third, and Sixth Circuits, among several other courts, have expressly rejected. This on-point precedent holds that the standard for reverse preemption is not met where, as here, a liquidator brings straightforward common law claims on behalf of an insolvent insurer, because such claims do not interfere either with the State's regulation of insurance, or with a state court's liquidation proceedings. Again, Plaintiff cites no on-point caselaw to the contrary. Nor does Plaintiff offer any evidence that arbitrating her claims would "interfere" with the orderly liquidation of NHC.

Finally, Plaintiff is well aware that the Receivership Order does not confer "exclusive jurisdiction" over any and all claims Plaintiff brings on NHC's behalf. In fact, Plaintiff has taken full advantage of the provisions in the Order that authorize Plaintiff to, *inter alia*, "initiate and maintain actions at law or equity ***or any other type of action or proceeding of any nature***, in this ***and other jurisdictions***," (Order, § 14(a) (emphases added)), and has sued the U.S. Department of Health & Human Services ("HHS") in federal court in Nevada. Just as the Receivership Order could not supersede either federal law or the contractual forum selection clause in the NHC-HHS agreement that required Plaintiff to bring her case in federal court—if it could, no doubt Plaintiff would have filed its suit in state court—the Order cannot vitiate an otherwise valid contractual arbitration provision that both federal and Nevada law uniformly hold should be enforced.

For all of the reasons discussed below and in Milliman's opening brief, Milliman's motion to compel arbitration should be granted.

II. ANALYSIS

A. <u>The Arbitration Clause Binds Plaintiff and Encompasses All of Plaintiff's Claims Against Milliman</u>

1. Because Plaintiff is Suing to Enforce the Agreement, Plaintiff Must Abide by the Agreement's Arbitration Provision

Plaintiff cites no authority to contravene the well-established rule, affirmed by the Nevada Supreme Court in *Ahlers*, 126 Nev. 688, 367 P.3d 743, at *2, that a party cannot sue to enforce an

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agreement and "simultaneously avoid other portions of the agreement, such as the arbitration provision."

Plaintiff attempts to evade this rule by contending that "equitable estoppel" does not apply to a "non-signatory." (Opposition, p. 16). Yet federal and state courts around the country have held that where, as here, a statutory insurance liquidator's or receiver's claims arise from and relate to an insolvent insurer's contract with the defendant, the liquidator cannot avoid that contract's arbitration provision, even though it did not sign the agreement. As the Ninth Circuit stated in *Bennett v. Liberty Nat. Fire Ins. Co.*, "if the liquidator wants to enforce [the insurer's] rights under its contract, she must also assume its perceived liabilities." 968 F.2d 969, 972 n.4 (9th Cir. 1992) (enforcing arbitration clause against insurance liquidator seeking to enforce insolvent insurer's contractual rights).[2] Likewise, in *Poizner v. Nat. Indem. Co.*, the Court granted a motion to compel arbitration, holding that:

> 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.

No. 08CV772-MMA, 2009 WL 10671673, at *2 (S.D. Cal. Jan. 6, 2009); *see also Garamendi v. Caldwell*, No. CV-91-5912-RSWL(EEX), 1992 WL 203827, at *3 (C.D. Cal. May 4, 1992) (enforcing arbitration clause against insurance liquidator); *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); *Rich v. Cantilo & Bennett, L.L.P.*, 492 S.W.3d 755, 762 (Tex.

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[2] Plaintiff tries to distinguish *Bennett* by arguing that "the liquidator in that case 'presented no evidence that enforcing the arbitration clauses here will disrupt the orderly liquidation of the insolvent insurer.'" (Opposition, p. 15 n.7). Yet Plaintiff has similarly presented no such evidence here. While Plaintiff asserts—without any support—that arbitrating against Milliman will "be an unnecessary drain on the NHC estate," (*id.*), that position ignores the Nevada Supreme Court's express recognition that "arbitration generally avoids the higher costs and longer time periods associated with traditional litigation." *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004).

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Ct. App. 2016) (same); *State v. O'Dom*, No. 2015CV258501, 2015 WL 10384362, at *3–4 (Ga. Super. Sept. 18, 2015) (same).[3]

The cases Plaintiff cites to support her "non-signatory" argument ***affirm*** that a receiver suing to enforce a contract must abide by that contract's arbitration clause. In *Javitch v. First Union Sec., Inc.*, 315 F.3d 619 (6th Cir. 2003) (cited at Opposition, p. 16), the receiver brought tort and statutory claims on behalf of two insolvent businesses, and the defendants moved to compel arbitration. The Sixth Circuit ***reversed*** the District Court's denial, and held that the receiver, although not itself a signatory to any agreement with an arbitration clause, "***is bound to the arbitration agreements to the same extent that the receivership entities would have been absent the appointment of the receiver.***" *Id.* at 627 (emphasis added). On remand, the District Court granted the motion to compel arbitration, holding:

> As the Receiver acknowledges, his claims in this suit all arise from the relationship between Capwill and Defendants. That relationship was created and governed by brokerage agreements subject to arbitration provisions. The Receiver cannot both seek to benefit in this suit from the relationships created by those agreements, while disavowing the arbitration provisions.

Javitch v. First Union Sec., No. 3:01 CV 780, 2011 WL 665727, at *4 (N.D. Ohio Feb. 15, 2011) (citation removed). The same logic applies foursquare here. Having sought to enforce NHC's rights and obligations relating to the Agreement, Plaintiff must abide by the Agreement's arbitration clause. By contrast, in *Taylor v. Ernst & Young, LLP*, 958 N.E.2d 1203, 1213 (Ohio 2011), another "nonsignatory" case on which Plaintiff heavily relies, the court held that the

[3] The Louisiana trial court's denial of Milliman's motion to compel arbitration, which Milliman has appealed, does not vitiate the well-settled rule that a party cannot simultaneously seek to enforce an agreement and evade that agreement's arbitration clause. The Louisiana court's decision erroneously failed to address whether the Rehabilitator's claims arose out of or related to the contract at issue. Milliman has applied for an immediate interlocutory appeal of the Louisiana trial court's erroneous order.

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liquidator was not bound by a contractual arbitration clause where its claims did not arise from or relate to the contract at issue.[4]

2. All of Plaintiff's Claims Against Milliman Are Arbitrable

Plaintiff knows full well, given the law cited above, that she cannot both sue to enforce the Agreement and evade its arbitration clause. Thus she tries to argue that because "many" of her claims—she does not specify which ones—either "do not arise out of the contract," or "are not brought on behalf of NHC, but instead on behalf of its creditors or policyholders," therefore "only a narrow subset of claims could be arbitrated," resulting in a waste of resources. (Opposition, p. 3; *see also id.*, p. 15 n.7). Both contentions are wrong.

a. All of Plaintiff's Claims Arise from and Relate to the Agreement

It is indisputable that Plaintiff's claims arise from and relate to the Agreement since, but for the Agreement and the work Milliman did under 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." (Compl., ¶ 334). Every cause of action Plaintiff brings is based on Milliman's alleged failure to perform at least one of these services adequately. (*See, e.g.*, Compl., ¶¶ 333–36 (malpractice cause of action based on allegation that "Milliman Defendants were engaged by NHC and its predecessors to provide actuarial services to NHC" and failed to provide those services adequately); *id.*, ¶ 323 (negligence per se claim based on Milliman's alleged failure to provide certification required pursuant to NRS 681B); ¶¶ 340–44 (fraud claim based on alleged false statements in feasibility study); ¶¶ 356, 395–98 (negligence claims based on alleged failure to exercise reasonable care in preparing

[4] Similarly, in *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 638, 189 P.3d 656, 661 (2008), and *Thompson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 780 (2d Cir. 1995) (cited at Opposition, p. 16), the courts determined that the non-signatory plaintiffs were "***not*** attempting to assert any rights under the written agreement to arbitrate" and did ***not*** bring claims "arising out of" the agreement. Therefore the plaintiffs were not bound by the contractual arbitration clauses at issue. *Id.* (emphasis added). These rulings thus were not dependent on the non-signatory's status, but rather on the arbitrability of the issues in dispute.

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feasibility study, and in calculating premiums, financial projections and reserves); ¶ 402 (unjust enrichment claim seeks to recoup fees NHC paid to Milliman for actuarial services required by Agreement); ¶¶ 407–13, 755, 762 (civil conspiracy and concert of action claims based on preparation of allegedly false financial information)).

The fact that certain of Plaintiff's causes of action sound in tort, rather than contract, is irrelevant. Courts in Nevada routinely compel parties to arbitrate tort, contract and statutory claims together where those causes of action relate to the same contractual relationship, as Plaintiff's claims do. *See Phillips v. 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.")

a. Plaintiff's Claims Against Milliman Are Pre-Solvency Damages Claims that Belonged Solely to NHC, Therefore Plaintiff Stands in NHC's Shoes and Must Abide by NHC's Contractual Obligations

Plaintiff's contention that she is acting "on behalf of" NHC's creditors and policyholders, and therefore she does not "step in [NHC'] shoes," (Opposition, pp. 14-15), does not overcome the arbitration clause. Where, as here, a liquidator assumes an insurer's contracts, and then asserts common law claims that belonged to the insolvent insurer by virtue of its pre-insolvency contractual relationships, those claims are arbitrable. As the Court stated in *Bennett*, 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." 968 F.2d at 972. *See also Hays & Co. v.*

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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) (cited at Opposition, p. 19); *Dardar v. Ins. Guar. Ass'n*, 556 So. 2d 272, 274 (La. Ct. App. 1990) ("[B]ecause the rehabilitator, in effect, steps into the shoes of the insurer, he is bound by the same constraints as is the insurer in the normal course of business.")(cited at Opposition, p. 10).

The cases on which Plaintiff relies are not to the contrary.[5] In both *Hays & Co. v. Merrill Lynch*, 885 F.2d at 1155, and *Jaime Torres Int'l Sports Mgmt., Inc. v. Kapila*, 2016 WL 8585339, at *6 (S.D. Fla. May 11, 2016), the trustee was not required to arbitrate causes of action that, as a matter of law, ***belonged*** to the creditors of the insolvent debtors. Here, Plaintiff has not pled any viable causes of action that belong to NHC's "creditors and policyholders."[6] Rather, Plaintiff's claims against Milliman ***belonged*** solely to NHC and accrued to NHC pre-insolvency. Plaintiff thus stands directly in NHC's shoes, and must abide by all of NHC's contractual obligations.

In *Covington v. Am. Chambers Life Ins. Co.*, 779 N.E.2d 833 (Ohio Ct. App. 2002), on which Plaintiff relies, the court focused on the statutory, rather than contractual, nature of a creditor's action ***against*** the insolvent insurer's estate and its potential impact on other creditors in denying the creditor's motion to compel arbitration:

> [T]he issues [the creditor] seeks to have resolved by arbitration primarily involve setoff and proof of claims. These are precisely the types of disputes that the Ohio insurance liquidation statutes were designed to resolve. The liquidator is required under R.C.

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[5] The case on which Plaintiff most heavily relies, *Arthur Andersen LLP v. Superior Court*, 67 Cal. App. 4th 1481, 1495 (1998), (Opposition, p. 14), does not concern a motion to enforce a contractual arbitration provision, or arbitration at all. Thus it in no way contravenes the rule that a receiver suing to enforce an insolvent insurer's contract must abide by that contract's arbitration clause.

[6] Any alleged harm suffered by "creditors and policyholders" is derivative of the alleged harm to NHC, (*see, e.g.*, Compl. ¶ 3 ("This complaint concerns certain providers of services to, and management of, NHC, and how their conduct... caused substantial losses to NHC and, ***ultimately***, the other parties represented by Commissioner." (emphasis added))), and therefore is not directly actionable. *See Pompei v. Clarkson*, No. 66459, 2016 WL 3486375, at *2 (Nev. June 23, 2016) (holding that creditors of an insolvent corporation do not have standing to "assert derivative claims on behalf of insolvent corporations"). Likewise, an actuary cannot be liable for negligence to anyone other than the "affected insurer or the [Insurance] Commissioner." NRS 681B.250.

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> 3903.43(A) to review, investigate, and value all claims filed in a liquidation. . . . . [E]nforcement of an arbitration provision is not mandatory if it would affect the priority of claims of creditors or adversely affect a party to the liquidation proceeding. Under these circumstances, compelling arbitration would affect the rights of other creditors and frustrate the purpose of the liquidation statute.

Id. at 837–38. In contrast to the Liquidator's claims in *Covington*, Plaintiff's action against Milliman encompasses contract and tort claims relating to Milliman's pre-insolvency relationship with NHC, not set offs, or proofs of claim, or causes of action 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.

While Plaintiff asserts that it would be "not fair" to NHC's creditors and policyholders to enforce the arbitration clause, because it limits the scope of discovery and precludes punitive damages, (Opposition, p. 15), this Court cannot vitiate an otherwise valid arbitration clause simply to improve the perceived strength of Plaintiff's case. *See 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."). 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.").[7] In any event, a court cannot rely on such public policy

[7] Plaintiff raises the same meritless arguments to support her contention that the American Arbitration Association is not an adequate forum in which to litigate Plaintiff's claims against Milliman. (Opposition, p. 20). There can be no legitimate dispute concerning the adequacy of the AAA. Courts in Nevada routinely enforce AAA arbitration agreements. *See, e.g., Phillips v. Parker*, 106 Nev. 415, 416, 794 P.2d 716, 717 (1990); *Lane-Tahoe, Inc. v. Kindred Const. Co., Inc.*, 91 Nev. 385, 388 n.2, 536 P.2d 491, 493 n.2 (1975); *Cox v. Station Casinos, LLC*, No. 2:14–cv–638–JCM–VCF, 2014 WL 3747605, at *5 (D. Nev. June 25, 2014).

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considerations to vitiate a binding arbitration clause. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–42 (2011).

Finally, Plaintiff's assertion that she at all times acts to protect NHC's creditors is particularly unavailing given that Plaintiff has sued NHC's "predominant creditor," the U.S. Department of Health and Human Services, seeking over $43 million in damages. *See* Complaint and Demand for Jury Trial, *Richardson v. U.S. Dep't of Health and Human Serv., et al.*, No. 2:17-cv-00775-JCM-PAL (D. Nev. Mar. 16, 2017), ECF No. 1, at ¶13.

B. The FAA and NAA Mandate Arbitration of Plaintiff's Claims Against Milliman

Plaintiff does not, and cannot, refute that under both the FAA and the NAA, arbitration agreements are "valid, irrevocable and enforceable, save upon such grounds as exist in law or equity for the revocation of a contract." 9 U.S.C. § 2, NRS 38.219(1). Nor does Plaintiff address that the U.S. Supreme Court has limited the exception in the FAA and NAA to "[g]enerally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996). Plaintiff asserts none of these defenses in her Complaint or Opposition.

Plaintiff's contention that the Nevada Liquidation Act reverse-preempts the FAA under the McCarren-Ferguson Act, 15 U.S.C. §§ 1011-1015, fails for three reasons. First, nothing in the Nevada Liquidation Act precludes a liquidator from arbitrating its claims, and the Receivership Order entered pursuant to the Act expressly authorizes Plaintiff to prosecute "suits ***and other legal proceedings***" on behalf of NHC. (Order, §14(h) (emphasis added)).[8] Absent such a conflict, there is no reverse preemption. *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381-82 (9th Cir. 1997).

Second, several courts, including the U.S. Ninth Circuit Court of Appeals in *Quackenbush v. Allstate Insurance Co.*, 121 F.3d at 1381-82, have rejected Plaintiff's argument that forcing a statutory liquidator to arbitrate straightforward breach of contract claims either implicates the

[8] As discussed above, courts in jurisdictions with liquidation statutes similar to Nevada's routinely enforce contractual arbitration provisions against liquidators where they are pursuing claims that relate to the agreement at issue. *See, e.g., Bennett*, 968 F.2d at 972; *Costle*, 839 F. Supp. at 272; *Koken*, 34 F. Supp. 2d at 247; *O'Dom*, 2015 WL 10384362, at *4.

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business of insurance or interferes with the liquidator's statutory function. *See also 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*, 34 F. Supp. 2d at 247 (granting motion to 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.

In *Quackenbush*, as here, the California liquidator of an insolvent insurer brought common law tort and contract claims against a reinsurer in an action that was separate from the statutory insolvency proceedings. *Id.* at 1374. The reinsurance agreements at issue contained broad arbitration language that encompassed the liquidator's claims, just as the Milliman-NHC Agreement does. *Id.* at 1380. Hoping to avoid arbitration, the liquidator argued that under the McCarren-Ferguson Act, "the FAA cannot preempt any state insurance law that prohibits arbitration of the Liquidator's claims." *Id.* at 1381. The Ninth Circuit disagreed, holding that arbitration of the liquidator's common law tort and contract "claims against Allstate—which [the liquidator] has pursued outside the statutory insolvency proceedings—will not interfere with California's insolvency scheme." *Id.*

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Similarly, in *Suter v. Munich Reins. Co.*, the Third Circuit Court of Appeals rejected a liquidator's argument that "the arbitration of this controversy . . . will impair New Jersey's Liquidation Act," holding:

> This is not a delinquency proceeding or a proceeding similar to one [nor] a suit by a party seeking to access the assets of the insurer's estate. . . . What this proceeding is is a suit instituted by the Liquidator against a reinsurer to enforce contract rights for an insolvent insurer, which, if meritorious, will benefit the insurer's estate. Accordingly, we fail to perceive any potential for interference with the Liquidation Act proceedings before the Superior Court.

223 F.3d at 161. The Court thus held that, under the McCarren-Ferguson Act, the New Jersey liquidation statute did not reverse preempt the FAA.

Plaintiff cites no relevant authority to contravene this on-point precedent. *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998) (cited at Opposition, p. 9), involved a claim brought by a reinsurer ***against*** the assets of an insolvent insurer's estate as part of a liquidation proceeding. And both *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995) and *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682 (Ky. 2010), were decided pursuant to the Kentucky liquidation and arbitration statutes, which differ from Nevada's law in several critical respects.

Plaintiff also offers no evidence to show that arbitration will "interfere" with either the liquidation of NHC or the liquidation statute. While Plaintiff asserts that the Nevada liquidation statute "recognizes the need for consolidation in one court," (Opposition, p. 10), 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. *See* Notice of Entry of Order Denying Plaintiff's Motion to Coordinate Cases attached hereto as **Exhibit A.**

As in *Quackenbush* and *Suter*, arbitrating Plaintiff's common law damages claims against Milliman will not "disrupt the orderly liquidation of an insolvent insurer" or otherwise interfere with Nevada's insolvency scheme. 121 F.3d at 1381. Therefore, there is no reverse preemption.

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Finally, Plaintiff ignores that, even if the FAA is somehow inapplicable, the NAA, which is not pre-empted, is substantively identical and mandates enforcement of the Agreement's arbitration clause. While Plaintiff invokes the rule of construction that a specific statute governs over a conflicting general one, that rule does not apply where, as here, there is no conflict between the two statutes. *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1016 (9th Cir. 2017) (applying "the familiar rule of construction that, where possible, provisions of a [regulation] should be read so as not to create a conflict.") (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986) (brackets in original)).

C. The Receivership Order Permits Arbitration and Does Not Mandate That This Court Try Plaintiff's Claims Against Milliman

Plaintiff is well aware that the Receivership Order does not provide for "exclusive jurisdiction" over any and all claims that Plaintiff brings on NHC's behalf, or allow her to haul any defendant into Nevada State Court at her discretion. Consider, for example, if Milliman was not subject to personal jurisdiction in Nevada. Surely Plaintiff would not concede that it lacked the authority under the Order to bring suit in the appropriate out-of-state forum, nor would the Receivership Order confer jurisdiction over Milliman. To that end, Plaintiff has sued HHS in the U.S. District Court for the District of Nevada for more than $43 million in payments allegedly owed to NHC. *See* Complaint and Demand for Jury Trial, *Richardson v. U.S. Dep't of Health and Human Serv., et al.*, No. 2:17-cv-00775-JCM-PAL (D. Nev. Mar. 16, 2017), ECF No. 1. Just as the Receivership Order could not create jurisdiction over HHS where both federal law and a forum selection clause in the loan agreement between NHC and HHS (quoted at *id.*, ¶ 11) required Plaintiff to pursue its claims against HHS in federal court in Nevada, the Receivership Order does not vitiate either the valid and enforceable arbitration clause in the Agreement or the well-settled federal and state law requiring its enforcement.

On the contrary, the Order expressly authorizes Plaintiff to "[c]ollect all debts and monies due and claims belonging to [NHC], ***wherever located***," and 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***

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proceedings." (Order, §§ 14(a), (h) (emphases added)). Plaintiff contends that while these provisions of the Receivership Order afford her "discretion to choose a forum" in which to litigate, she cannot be compelled to litigate outside of this Court. (Opposition, p. 18). However, ***nothing*** in the Order grants Plaintiff such exclusive "discretion."

Contrary to Plaintiff's assertion, Milliman's filing of a proof of claim in the Receivership Action is not an acknowledgement of the Court's "exclusive jurisdiction." *Quackenbush* rejected a similar contention, recognizing that a third party's claims ***against*** the liquidation estate of an insolvent insurer "are entirely distinct" from the liquidator's common law and tort claims against that third party. 121 F.3d at 1374–75. The Court therefore the affirmed the district court's granting of the defendant's motion to compel arbitration of the liquidator's action against it, and it also denied the defendant's request to enjoin certain aspects of the state court liquidation proceeding that could affect the arbitration. *Id.*

Finally, granting Milliman's motion to compel arbitration is appropriate even assuming, *arguendo*, the Receivership Order had conferred this Court with exclusive jurisdiction. The Nevada Supreme Court has held that arbitration does not "divest" a state court of jurisdiction over the underlying action. *Henderson v. Watson*, No. 64545, 2015 WL 2092073, at *1 (Nev. Apr. 29, 2015). This Court will retain jurisdiction to, *inter alia*, confirm and enforce the arbitrators' decision.

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III. CONCLUSION

For all of the reasons discussed above, Milliman respectfully requests that the Court enter an order compelling arbitration pursuant to the Agreement.

DATED this 3rd day of January, 2018.

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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3883 Howard Hughes Parkway, Suite 1100, Las Vegas, NV 89169. On the below date, I served the above **MILLIMAN'S REPLY IN SUPPORT OF MOTION TO COMPEL ARBITRATION** as follows:

☐	**BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
☐	**BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
☐	**BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
☐	**BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail address(es) set forth below.
☐	**BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
☐	**BY PERSONAL DELIVERY:** by causing personal delivery by _____, a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.
X	**BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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DATED: January 3, 2018.

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4826-9866-0186.1

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EXHIBIT A

Notice of Entry of Order Denying Plaintiff's
Motion to Coordinate Cases

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EIGHTH JUDICIAL DISTRICT COURT
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 **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION TO COORDINATE CASES**
AND STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, BARBARA D. RICHARDSON, IN HER OFFICIAL CAPACITY AS RECEIVER FOR NEVADA HEALTH CO-OP, Plaintiff, vs.	Case No. A-17-760558-B Dept. No. 25

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.

PLEASE TAKE NOTICE that the Order Denying Plaintiff's Motion to Coordinate Cases was entered with this Court on December 11, 2017, a copy of which is attached hereto.

DATED this 12 day of December 2017.

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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3883 Howard Hughes Parkway, Suite 1100, Las Vegas, Nevada 89169. On the below date, I served the above **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION TO COORDINATE CASES** as follows:

☐	**BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
☐	**BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
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X	**BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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DATED: December 13, 2017.

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Defendants.

On September 15, 2017, the Commissioner of Insurance, Barbara D. Richardson, in her official capacity as receiver for Nevada Health CO-OP ("Plaintiff" or "Commissioner") filed her motion to coordinate cases ("Motion"). On October 26, 2017, Defendants Milliman, Inc., Jonathan L. Shreve, and Mary van der Heijde (collectively "Milliman") filed their Opposition. On October 30, 2017, Nevada Health Solutions, LLC ("NHS") and InsureMonkey, Inc. and Alex Rivlin (collectively "InsureMonkey") filed joinders to Milliman's Opposition. On October 31, 2017, Kathleen Silver, Bobbette Bond, Tom Zumtobel, Pam Egan, Basil Dibsie, and Linda Mattoon filed a joinder to Milliman's Opposition. On November 1, 2017, Martha Hayes, Dennis T. Larson, and Larson & Company P.C. (collectively "Larson") filed a joinder to Milliman's Opposition. On November 6, 2017, Plaintiff filed her Reply.

The Motion came on for hearing on November 7, 2017, at 9:00 a.m. in Department I of the Eighth Judicial Court. Donald L. Prunty, Esq. of Greenberg Traurig, LLP appeared on behalf of Plaintiff. Patrick G. Byrne, Esq. of Snell & Wilmer L.L.P. appeared on behalf of Milliman. Evan L. James, Esq. of Christensen, James & Martin appeared on behalf of NHS. Brian Blankenship, Esq. of Schwartz Flansburg PLLC appeared on behalf of InsureMonkey. Russell B.

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Brown, Esq. of Meyers McConnell Reisz Siderman appeared via telephonically for Larson.

Having considered the relevant briefing and exhibits, having heard the arguments of counsel, for all of the reasons contained in the Opposition and the joinders thereto, and with good cause appearing, the Court hereby enters the following Order:

IT IS HEREBY ORDERED that Plaintiff's Motion to Coordinate Cases is DENIED without prejudice for the reasons stated on the record;

IT IS FURTHER ORDER that pursuant to EDCR 1.61, the Business Court of the Eighth Judicial Court has the power to decide whether the removal of case number A-17-760558-B to the Business Court was proper; if the Business Court later finds that it does not have jurisdiction over case number A-17-760558-B, the Commissioner may refile her Motion.

IT IS SO ORDERED.

DATED this 8 day of Dec, 2017.

DISTRICT COURT JUDGE

Submitted by:

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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 Individual; BASIL C. DIBSIE, an Individual;

Case No. A-17-760558-B

Dept. No. 25

NOTICE OF ENTRY OF ORDER GRANTING MILLIMAN'S MOTION TO COMPEL ARBITRATION

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.

PLEASE TAKE NOTICE that the Order Granting Milliman's Motion to Compel Arbitration was entered with this Court on March 12, 2018, a copy of which is attached hereto.

DATED this 12th day of March 2018.

SNELL & WILMER L.L.P.

By: _____

Patrick G. Byrne (NV Bar No. 7636)
Alex L. Fugazzi (NV Bar No. 9022)
Aleem A. Dhalla (NV Bar No. 14188)
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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3883 Howard Hughes Parkway, Suite 1100, Las Vegas, Nevada 89169. On the below date, I served the above **NOTICE OF ENTRY OF ORDER GRANTING MILLIMAN'S MOTION TO COMPEL ARBITRATION** as follows:

☐	**BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
☐	**BY HAND:** by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
☐	**BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
☐	**BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail address(es) set forth below.
☐	**BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
☐	**BY PERSONAL DELIVERY:** by causing personal delivery by _____, a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.
X	**BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

Mark E. Ferrario, Esq. Eric W. Swanis, Esq. Donald L. Prunty, Esq. GREENBERG TRAURIG, LLP 3773 Howard Hughes Parkway, Suite 400 N Las Vegas, NV 89169 ferrariom@gtlaw.com swanise@gtlaw.com pruntyd@gtlaw.com *Attorneys for Plaintiff*	Kurt R. Bonds, Esq. ALVERSON, TAYLOR MORTENSEN & SANDERS 6605 Grand Montecito Parkway, Suite 200 Las Vegas, NV 89149 kbonds@alversontaylor.com *Attorneys for Defendants InsureMonkey, Inc. and Alex Rivlin*

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Evan L. James, Esq. CHRISTENSEN JAMES & MARTIN 7440 W. Sahara Avenue Las Vegas, NV 89117 elj@cjmlv.com SEYFARTH SHAW LLP SUZANNA C. BONHAM, ESQ. (Admitted Pro Hac Vice) Texas Bar No. 24012307 700 Milam, Suite 1400 Houston, Texas 77002 Tel. (713) 225-2300 SBonham@seyfarth.com *Attorneys for Defendant Nevada Health Solutions, LLC*	John E. Bragonje, Esq. LEWIS ROCA ROTHGERBER CHRISTIE LLP 3993 Howard Hughes Parkway, Suite 600 Las Vegas, NV 89169 jbragonje@lrrc.com jhostetler@lrrc.com *Attorneys for Defendant Millennium Consulting Services, LLC*

DATED: March 12, 2018.

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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**

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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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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Approved as to Form by:

GREENBERG TRAURIG, LLP

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Attorneys for Plaintiff

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TAB 6

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

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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
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Tami D. Cowden, Esq., NBN 8994
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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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NEVADA CASELAW

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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
Donald L. Prunty, Esq., NBN 8230
10845 Griffith Peak Drive, Ste. 600
Las Vegas, Nevada 89135
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
10845 Griffith Peak Drive, Ste. 600
Las Vegas, Nevada 89135
Telephone (702) 792-3773
Facsimile (702) 792-9002
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

TAB 7

Electronically Filed
3/5/2019 8:51 AM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, COMMISSIONER OF INSURANCE, Plaintiff, vs. SPIRIT COMMERCIAL AUTO RISK RETENTION GROUP, INC, Defendant.	CASE NO. A-19-787325-B DEPT. NO. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

WEDNESDAY, FEBRUARY 27, 2019

RECORDER'S TRANSCRIPT OF HEARING
STATUS CHECK

APPEARANCES:

For the Plaintiff:	RICHARD P. YIEN, ESQ. KARA B. HENDRICKS, ESQ. MARK BENNETT, ESQ. MARK E. FERRARIO, ESQ. AMY PARKS, ESQ.
For the Defendant:	KIRK BANKS LENHARD, ESQ. TRAVIS F. CHANCE, ESQ. REW R. GOODENOW, ESQ.

RECORDED BY: BRYNN GRIFFITHS, COURT RECORDER

TRANSCRIBED BY: MANGELSON TRANSCRIBING

Las Vegas, Nevada, Wednesday, February 27, 2019

[Case called at 10:38 a.m.]

THE COURT: Calling the case of State of Nevada Commissioner of Insurance versus Spirit Commercial Auto Risk Retention Group. Appearances, please, from the right to left.

MS. PARKS: Good morning, my name is Amy Parks and I'm the Chief Insurance Counsel for the State of Nevada Division, of Insurance.

THE COURT: Thank you.

MS. RICHARDSON: Morning, my name is Barbara Richardson, I'm the Commissioner of Insurance for the State of Nevada.

THE COURT: Thank you.

MR. FERRARIO: Morning, Your Honor. Mark Ferrario and Kara Hendricks, appearing on behalf of the State as well.

THE COURT: Thank you. Are there any other appearances for the Petitioner?

MR. YIEN: Good morning, Your Honor. Deputy Attorney General Richard Yien on behalf of the State of Nevada.

THE COURT: Thank you. And --

MR. GOODENOW: Rew Goodenow.

THE COURT: -- on this side.

MR. LENHARD: Go ahead.

MR. GOODENOW: Thanks. Rew Goodenow for Accredited Surety and Casualty Company.

MR. LENHARD: Good morning, Your Honor. Kirk Lenhard and Travis Chance on behalf of the named defendants.

THE COURT: Thank you. Mr. Lenhard and Mr. Chance is there any update?

MR. LENHARD: I'm going to apologize to the Court and Counsel. I had called Mr. Ferrario last night and of course emailed him at about 9:00 I had not received anything yet. This morning at about 8:00 or 8:30 I received a term sheet -- and let, let me identify what they are, so I'm clear. We filed at -- what time did this get filed, Travis?

MR. CHANCE: About 8:45.

MR. LENHARD: 8:45 this morning. And, again, this is not the way I normally do things but that's when I got it.

THE COURT: Would that be a supplement?

MR. LENHARD: Yes. It's the supplement to the Opposition to the Notice of Accredited's Decision to Act on Default and Request for Immediate Hearing. There are two exhibits to the supplement. Exhibit A is a Premium Acknowledgement Agreement that is signed.

Second, is a term sheet, which is also signed. I'm going to be candid with the Court, as I must, there are certainly a number of exclusions and exceptions to both documents. I cannot represent to the Court that they are final agreements.

All I can represent to the Court is that they show an interest of a party of attempting to step into the shoes of the holder of the LPT. The difficulty, of course, is I cannot tell the Court that it would be one day, to turn the turn sheet into a final agreement or one month. I simply

do not know. All I have to present to the Court is what I have is Exhibit A and Exhibit B.

The only thing I can state in opposition to the anticipated comments of Mr. Ferrario would be, it still would appear to be superior to a receivership if we get a new party in to take place of the LPT. And my issue would, of course, be what is the harm at this point of time; everything is Stayed.

We are reporting our cash on a daily basis, it's remaining the same. No claims have been paid, nothing has occurred. And I'll submit it at that.

THE COURT: So let me -- it says that the term shade is -- the term sheet is dated February 26th, 2018? Is it a new one, executed yesterday with the wrong date?

MR. LENHARD: Judge.

MR. CHANCE: It was executed this morning.

MR. LENHARD: My understanding was it was executed this morning. And again I -- this is second hand.

THE COURT: And it's only signed by Anapolis Consulting.

MR. LENHARD: That's correct.

THE COURT: The term sheet?

MR. CHANCE: No, they're both --

MR. LENHARD: No, wait.

MR. CHANCE: -- they signed it.

MR. LENHARD: No. Excuse me, page 4 of 7 there are two -- it's signed in counter pints [sic]. There is a signature by Spirit by

Matthew Simon.

THE COURT: I see. And CTT would be obligated under this?

MR. LENHARD: That's my understanding.

THE COURT: This is signed by them.

MR. LENHARD: Yes. Let me, let me identify where it is so I can -- as to the premium agreement it is attached as a separate signature page, following the signature of Annapolis Consulting Group. I don't think they're signatories to the term sheet. No, they're not. Just Spirit and Annapolis.

THE COURT: And what would the performance time be under the performance time?

MR. LENHARD: Your Honor, I can't say. Because I don't know.

THE COURT: Thank you for your candor. Mr. Ferrario and --

MR. FERRARIO: I appreciate --

THE COURT: -- Ms. Hendricks.

MR. FERRARIO: I appreciate Mr. Lenhard's candor. I really think at this point, the decision for the Court is an easy one quite frankly. I think, I think we need to go back to kind of where we were when the State petitioned for the appointment of a Receiver in the first instance. I think the Court was generous with Spirit, giving them a chance to salvage this situation.

It didn't happen. The life line that they had was Accredited that life line has been cut. I looked at this information that came though

this morning and as I'm talking to you, I'm getting emails from folks that are looking at it and pointing out all of the problems. But I think if you just look at what's been submitted it starts off with -- and as Mr. Lenhard said there's number of exceptions in here. Without even studying it it's non-binding. I mean, they make that clear. They go out of their way to say non-binding.

So, you know someone characterizes it as a Hail Mary pass. It's not a Hail Mary pass. I don't know if they even broke the huddle yet. So, at this point I really think under the statutes that govern these proceedings, under the regulations, I don't think the Court has much discretion at this point, quite frankly.

But you know, I think you were generous, as I said, giving them a chance. We have here, an agreed upon order that we've been circulating in anticipation of the situation we find ourselves in now. I think it's incumbent upon this Court, it's incumbent upon the Commissioner to protect all of the stake holders here; Creditors, policy holders, claimants. And the only way that can be done at this point, given the fact there is no longer an LPT in place, is for the imposition of a Receiver.

Now, if they cut a deal. If they -- if everything comes together, be it -- you know Mr. Lenhard said it could be a week, could be a month, they can still come back to the Receiver and say, here we have a better plan. If that's better for the stake holders, then it's going to be incumbent upon the Receiver to consider that. So it doesn't preclude them from doing that Your Honor. And we may be back in front of you if

everything falls into place saying hey, we've reached a new agreement. And this is a preferable path to just a straight up receivership liquidation.

So that, that would be -- what I would tell you. I can read you the various emails I'm getting and all the problems with this document. But at this point, Accredited's gone. That was their life line. Without Accredited there is no question this company is insolvent. And so I would request that the Court grant our petition to appoint a Receiver and sign the order we've agreed to. And I have a copy for Your Honor I can present.

THE COURT: Mr. Goodenow can you confirm that Accredited -- that the agreement in fact expired at midnight last night?

MR. GOODENOW: Yes, Your Honor I can confirm that, and I do.

THE COURT: And the breach has turned into a default?

MR. GOODENOW: Correct. The breach has turned into termination.

THE COURT: Termination. Very good. And so, Mr. Lenhard are there any conditions in the paperwork now that say that the agreement would fall through in the event of the appointment of a receivership?

MR. LENHARD: You're talking --

THE COURT: Or a Receiver.

MR. LENHARD: -- about the papers I submitted this morning?

THE COURT: Yeah.

MR. LENHARD: No.

THE COURT: Because I'm just looking at them at -- on the screen.

MR. LENHARD: And I --

THE COURT: I didn't see them.

MR. LENHARD: -- like I said, again, it's not normally how I do business and I apologize to the Court --

THE COURT: It's not to be critical.

MR. LENHARD: -- for that. There is nothing in the two documents that I submitted that says all negotiations stop in the event of a receivership. In reality, I think we all know if a Receiver is appointed, most likely the negotiations will fail. But there is nothing in the documents that is a stand still or a stop as a result of a Receiver being appointed.

THE COURT: All right. You know this is a tough call guys because nobody benefits from a business failure. What I tried to do is protect the citizens of Nevada in the meantime, but just it's – it's just a day late and a dollar short, Mr. Lenhard. You know I could proceed with the evidentiary hearing tomorrow, but they've already made a *prima fascia* case.

MR. LENHARD: We had agreed, Your Honor, if you recall -- to make it clear, we agreed this hearing would take the place of an evidentiary hearing. So that should be on the record.

THE COURT: All right. So, I am going to go ahead a grant the receivership request in all respects. First, with regard to -- on the -- I find that the insurer is insolvent. I appoint the Commissioner as the

temporary Receiver, pending further orders of the Court to enter the business and immediately oversee the operation, and conservation, rehabilitation and liquidation of the business. Pursuant to the 696B.220(2).

Pursuant to 696B.270 and pending further order of the Court, immediately enjoin SCARRG, the Officers, Directors, Stock Holders, Members, Subscribers, Agents, and Employees and all other persons from transacting any further business on behalf of the company or wasting or disposing of any assets or property.

Three, pursuant to 696B.340, pending further orders by the Court enjoin any and all persons from the commencement or prosecution of any actions by or on behalf of SCARRG or against SCARRG. Further, all persons shall be restrained from obtaining any preferences, judgements, attachments or other liens as to any property the company or making any -- a levy against the company or against their assets or any part of.

And pursuant to 696B.270, pending further orders of the Court, enjoin all persons, other than the Receiver, from withdrawal of any from -- funds from the company's accounts or removal of any property from the company.

Now, I would also order the issues, any other relief requested in the original petition.

MR. FERRARIO: Thank you, Your Honor. If I could approach Mr. Lenhard to get him -- this is the order we've agreed on --

THE COURT: Has he seen --

MR. FERRARIO: -- I'd like to submit that.

THE COURT: -- it before now?

MS. HENDRICKS: Yes.

MR. FERRARIO: He has, yes.

THE COURT: Good enough.

MR. FERRARIO: And --

THE COURT: Please take a moment.

MR. FERRARIO: -- if he signs that, then I can submit this.

MR. LENHARD: We, we --

MR. FERRARIO: The only --

MR. LENHARD: We had already agreed to the modifications of the order, so I think we're fine.

MR. FERRARIO: This is the same --

MR. LENHARD: I'm not going to --

THE COURT: And your signature is --

MR. LENHARD: -- read it right now. Same order.

THE COURT: -- just as in agreement as to form, not as to content.

MR. FERRARIO: That's true, Your Honor.

MR. LENHARD: That's correct.

MR. FERRARIO: And in my only other clarification would be, I think Your Honor said temporary Receiver. The order is for a permanent Receiver; that was what our petition was for.

THE COURT: Ah, the petition. I just used the language --

MR. FERRARIO: I understand.

THE COURT: -- from the petition. But it would be a permanent Receiver unless -- unless other -- unless otherwise modified by further order.

MR. FERRARIO: May I approach, Your Honor, with the --

THE COURT: You may.

MR. FERRARIO: -- agreed upon order.

THE COURT: And I'm going to sign it now, so that you can take the order with you --

MR. FERRARIO: Thank you, Your Honor.

THE COURT: -- so there will be no further delay.

MR. LENHARD: Your Honor so we are clear, it just dawned on me Mr. Ferrario had represented that we could continue to attempt negotiate with the third party with the idea of coming back to the Court. That negotiation would not be considered a violation of the receivership order, I assume?

THE COURT: I can carve out from that, your ability to attempt to continue to negotiate and if you come to terms to notify --

MR. LENHARD: Okay.

THE COURT: -- the petitioner immediately. And I would set anything on a very short order shortening --

MR. LENHARD: Thank you.

THE COURT: -- time.

MR. LENHARD: Thank you.

MR. FERRARIO: And what I said was you could continue and

present it first to us --

MR. LENHARD: Of course.

MR. FERRARIO: -- and then, we'd be okay.

THE COURT: Okay. If that needs to be clarified in this order you can submit a modified order.

MR. LENHARD: I don't see a need to, unless you do?

THE COURT: If that -- Mr. Ferrario, if that needs to be clarified in an amended order, I would -- I would sign such an order. Mr. Lenhard said he didn't think that was necessary.

MR. FERRARIO: No, I don't think it's necessary. As I said, now that you know we're, we're in effect taking over the company in light of Your Honor's order, if they bring us a proposal, we would evaluate it. If it's acceptable, we could -- we would agree to it, then we'd have to come to court and you'd have to approve it.

If, for some reason we don't, there's nothing that prevents Mr. Lenhard's client from petitioning the court at that point and saying hey, we have a better deal and we want to modify that. So.

THE COURT: I'll --

MR. FERRARIO: You guys okay with that?

THE COURT: -- entertain all orders shortening time in the case.

THE COURT: Anything further? If -- Mr. Goodenow?

MR. GOODENOW: Yes, thank you, Your Honor. Rew Goodenow, appearing especially for Accredited. There is one final thing concerning the LPT and it's a procedural matter. I have read the terms

of the order and they seem both necessary and sufficient to me, but I don't believe that they govern our performance -- Accredited's performance in connection with returning unused premium to the -- I think now the Trust -- the Receiver.

And I just wanted to confirm that from a procedural standpoint, we do not have to come back for a further order to put that procedure in place.

THE COURT: I would not think so.

MR. FERRARIO: No.

THE COURT: Mr. Ferrario?

MR. FERRARIO: I don't see any need for that Your Honor.

THE COURT: Mr. Lenhard?

MR. LENHARD: I don't know that I have standing at this point, so.

THE COURT: Well, if you are concerned with that you may stipulate to that relief with whatever parties exist at this point and I would sign such a stipulation.

MR. GOODENOW: Thank you, Your Honor.

THE COURT: All right.

…

…

…

…

…

…

MR. LENHARD: Thank you, Your Honor.

THE COURT: Best wishes to everyone.

[Hearing concluded at 10:53 a.m.]

* * * * * * *

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

Brittany Mangelson
Independent Transcriber

TAB 8

DECLARATION OF JOSHUA M. DICKEY

I, Joshua M. Dickey, declare as follows:

1. I am a partner with the law firm of Bailey❖Kennedy, counsel of record for Criterion Claim Solutions of Omaha, Inc. in *Richardson v. Mulligan, et al.*, Case No A-20-809963-B, and *State of Nevada ex rel. Commissioner of Insurance v. Eighth Judicial District Court*, Nevada Supreme Court Case No. 82701, which is pending before this Court. I have personal knowledge of and am competent to testify to the facts contained in this declaration.

2. On May 11, 2020, I sent an email to Kara Hendricks, Esq. ("Ms. Hendricks") at Greenberg Traurig, counsel of record for Barbara Richardson in *State of Nevada ex rel. Commissioner of Insurance v. Spirit Commercial Auto Risk Retention Group, Inc.*, Case No. A-19-787325-B, *Richardson v. Mulligan, et al.*, Case No A-20-809963-B, and *State of Nevada ex rel. Commissioner of Insurance v. Eighth Judicial District Court*, Nevada Supreme Court Case No. 82701, requesting that the Receiver agree to arbitrate her claims against Criterion Claim Solutions of Omaha, Inc., pursuant to Section 13 of the Claims Administration Agreement.

3. On May 13, 2020, Ms. Hendricks responded to my email.

4. A true and correct copy of my correspondence with Ms. Hendricks is attached hereto at Tab 9.

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

EXECUTED on this 25th day of August, 2021.

JOSHUA M. DICKEY

TAB 9

From:	Joshua Dickey
To:	Rebecca Crooker
Cc:	John Bailey
Subject:	FW: Richardson as Statutory Receiver for Spirit Commercial Auto Risk Retention Group, Inc. v. Mulligan et al. , Case No A-20-809963-C
Date:	Wednesday, May 13, 2020 9:15:15 AM

REDACTED

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

From: hendricksk@gtlaw.com <hendricksk@gtlaw.com>
Sent: Tuesday, April 14, 2020 2:31 PM
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

Extension confirmed. We look forward to working with you.

Kara

Kara Hendricks
Shareholder

T 702.938.6856

From: Joshua Dickey <JDickey@baileykennedy.com>
Sent: Tuesday, April 14, 2020 2:30 PM
To: Hendricks, Kara (Shld-LV-LT) <hendricksk@gtlaw.com>
Cc: John Bailey <JBailey@baileykennedy.com>
Subject: Richardson as Statutory Receiver for Spirit Commercial Auto Risk Retention Group, Inc. v. Mulligan et al. , Case No A-20-809963-C
EXTERNAL TO GT

Hi Kara, it was good speaking with you earlier. As discussed, we have just been retained as counsel for Criterion Claims Solutions of Omaha, Inc. ("Criterion") in the above referenced matter. Thank you for granting Criterion a 30 day extension of time to respond to the complaint. I have calendared Criterion's response as being due on May 14, 2020. Your professional courtesy is greatly appreciated. Should you have any questions or comments, please do not hesitate to contact me.

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 25th day of August, 2021, service of the foregoing **REAL PARTY IN INTEREST CRITERION CLAIM SOLUTIONS OF OMAHA, INC.'S APPENDIX TO ANSWER TO PETITION FOR WRIT OF MANDAMUS-VOLUME I** was made by electronic service through the Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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With a courtesy copy via email (pursuant to March 20, 2020 Order of the Chief Judge of the Eighth Judicial District Court that courtesy copies be submitted via email):

Judge Mark R. Denton
Eighth Judicial District Court
Clark County, Nevada
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155

via email on August 25, 2021, to Dept13lc@clarkcountycourts.us

/s/Karen J. Rodman
An Employee of BAILEY❖KENNEDY

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