Case No. 83135

In the Supreme Court of Nevada

UNITE HERE HEALTH, a multi-employer health and welfare trust, as defined in ERISA Section 3(37); and NEVADA HEALTH SOLUTIONS, LLC, a Nevada limited liability company,

Petitioners,

vs.

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

Respondents,

and

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

Real Party in Interest.

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District Court Case No. A-17-760558-B

ANSWER TO WRIT PETITION

With Supporting Points and Authorities

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Real party in interest Barbara Richardson, in her official capacity as the receiver for Nevada Health Co-Op, was appointed under NRS chapter 696B to administer the delinquent domestic insurer Nevada Health Co-op ("NHC"). NHC was (1) a nonprofit cooperative corporation without stock and (2) a member-owned health maintenance organization that operated as a mutual insurer under Nevada law. NHC had no parent company, and no publicly held companies owned ten percent or more of its stock.

The receiver has been represented by Mark E. Ferrario, Donald L. Prunty, and Tami D. Cowden of Greenberg Traurig, LLP; Daniel F. Polsenberg, J Christopher Jorgensen, Joel D. Henriod, and Abraham G. Smith at Lewis Roca Rothgerber Christie, LLP; and James E. Whitmire of Santoro Whitmire Ltd.

Dated this 16th day of February, 2022.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*
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ANSWER TO WRIT PETITION

This writ petition should be decided on the factors governing impleader and consolidation of actions. The district court properly considered these factors and exercised its broad discretion not to disrupt its docket with the late introduction of a new third-party defendant whose liability may never arise and, even if it does, is appropriately addressed in a separate contribution action. The district court also correctly rejected consolidation, as confirmed by the dismissal of the other action, which moots the issue.

Instead, petitioners give us a side show. They hope to distract this Court with a conspiracy theory involving the receiver, her counsel Greenberg Traurig, and Xerox State Healthcare, LLC ("Xerox")—a theory that was rejected by multiple courts below. Petitioners slur the receiver's counsel of their choice, slinging without evidence accusations that this highly respected firm and its attorneys have committed ethical misconduct.

Those lower courts correctly rejected the conspiracy theory, and no court has endorsed petitioners' notion that Greenberg Traurig's prior representation of other clients had any effect on the receiver's decision

to sue petitioners.[1] Instead, the district court found that adding Xerox to the receiver's asset-recovery case would only further delay its resolution.

Now petitioners have asked for this Court's extraordinary intervention to keep the district court from making the very determinations about its docket that permit cases like this to move forward.

Petitioners' conspiracy theory is without merit, and the lower court correctly denied petitioners the ability to further postpone resolution of this case. This Court should not countenance petitioners' tactics and should reject their invitation to invade one of the most basic decisions a trial court can make in managing a case. This Court should deny the petition.

ROUTING STATEMENT

Although the receiver disagrees with petitioners' characterizations about the record, the receiver agrees that it makes sense for the Su-

[1] The disqualification issue is more fully developed in the receiver's and Greenberg Traurig's answering brief in a separate appeal and writ petition (consolidated Docket Nos. 82467 & 82552).

preme Court to retain the petition because of its familiarity with the issues in the consolidated appeal/writ petition, Docket Nos. 82467 and 82552.

ISSUES PRESENTED

1. Did the district court abuse its discretion in denying a motion for leave to file a third-party complaint, when the complaint was both meritless and prejudicial to the other parties, and petitioners remain free to file a separate contribution action against the third party?

2. Did the district court abuse its discretion in denying a motion to consolidate this action with a separate, less-complex action that has now been dismissed?

STATEMENT OF FACTS

A. Receivership Action: Motion for Disqualification

1. Petitioners Move to Disqualify the Receiver's Attorneys in the Receivership Action

In the receivership action (Case No. A-15-725244), the district court approved the receiver's choice of Greenberg Traurig, LLP as her counsel. (1 P. App. 24:25-27.)

In October 2020, petitioner Unite Here Health ("UHH"), a defendant in the receiver's asset-collection action (Case No. A-17-760558-B) who does not claim any present or past attorney-client relationship with Greenberg Traurig, sought to disqualify the firm for two purported conflicts of interest. First, it noted that Greenberg Traurig had represented Xerox in two different class actions and an administrative proceeding stemming from Xerox's role as a vendor to the Silver State Health Insurance Exchange, Nevada's effort to establish a state-specific health insurance portal as part of the Affordable Care Act. Second, it noted that Greenberg Traurig had represented a creditor of the receivership estate, Valley Health Systems ("Valley") in the preparation and submission of an administrative claim against the Estate. UHH claimed that both of these prior relationships prevented Greenberg Traurig from acting as counsel for the receiver.

In response to the motion to disqualify, Greenberg Traurig demonstrated multiple reasons why the disqualification arguments were flawed. *First*, the firm demonstrated that Nevada law clearly holds that only past or present clients of a lawyer have standing to claim dis-

qualification of that lawyer based on conflict of interests. *Second*, it established that in receivership actions it is not unusual for the same counsel to represent both a creditor of the estate and also represent the receiver in pursuing recovery from third parties. In such a situation the creditor's interests and the receiver's interests are the same: to maximize the recovery of assets which can be paid to creditors. There is no conflict of interest. *Third*, Greenberg Traurig proved that it was not retained to evaluate potential claims against Xerox. In the event that the receiver decided to bring a litigation claim against Xerox, the claim would be handled by legal counsel other than Greenberg Traurig. (8 P. App. 1365, ¶ 22; 8 P. App. 1370-71, ¶¶ 6, 10.) The receiver retained Santoro Whitmire as conflicts counsel to assist the receiver, as necessary, with the prosecution of claims against any party as to whom Greenberg Traurig may have a conflict. (9 P. App. 1609-11; 8 P. App. 1370-71, 1373, ¶¶ 6, 10, 25; 8 P. App. 1363-65, ¶¶ 15, 18, 22-23; 8 P. App. 1378, ¶¶ 8, 11, 14.)

2. District Judge Cory Denies the Motion to Disqualify

The receivership court denied the motion to disqualify. (9 P. App. 1739-1750.) The receivership court noted that UHH failed "to point to any binding authority that mandates the receiver and her counsel, Greenberg Traurig, disclose all possible conflicts to the Court," an absence of legal authority that continues to this day. (*Id.* at 1744:17-18.) The court further noted that it was not in the best position to determine conflicts in the related lawsuits and left the decision of whether to allow UHH to implead Xerox to the sound discretion of the other courts. (*Id.* at 1744:12-1745:2.)

B. The Asset-Recovery Action

1. The Receiver Sues Petitioners

The receiver filed suit against NHS and several other defendants (not included as real parties in interest here) on August 25, 2017, as part of her asset-recovery action with respect to Nevada Health Co-op. (1 P. App. 26-121.) On September 24, 2018, the complaint was amended to add UHH as a defendant. (1 P. App. 122-241.)

Petitioners' representatives had formerly controlled the board of Nevada Health Co-op's while petitioners were contracted to perform its third-party administration and utilization-management services. (1 P. App. 169-70, 177.)

2. Petitioners Seek to Delay Discovery and Trial

A year later, petitioners asked for a *year-long* extension to discovery deadlines, purportedly to analyze the data underlying the receiver's claims. (R.P. App. 1.) Although they did not get the full extension, the receiver was unable to proceed to trial before the onset of COVID. Altogether, there have been six trial settings, three of which—May 20, 2019, October 14, 2019, and January 9, 2020—would have all occurred before COVID protocols were implemented. (10 P. App. 1801-02.)

3. Petitioners Move to Implead Xerox in the Asset-Recovery Action and Consolidate that Case with One against the Silver State Exchange

More than two years after the complaint naming UHH, on October 15, 2020, petitioners moved for leave to file a third-party complaint against Xerox. Although Xerox was a subcontractor of the Silver State Exchange and had no direct contractual ties to Nevada Health Co-op or to petitioners, petitioners argued that Xerox was ultimately responsible

for Nevada Health Co-op's failure and thus should be brought into the case. (6 P. App. 1116-1129.) Xerox had not participated in the years of discovery. Given petitioners' own request for discovery extensions to analyze the data, petitioners did not dispute that impleading Xerox—a party without direct contractual ties to Nevada Health Co-op—would significantly delay the trial of this 2017 action.

Petitioners also filed a motion to consolidate the asset-recovery action with a separate breach-of-contract action against the Silver State Health Insurance Exchange (the "Silver State Exchange action"),[2] the state's health-insurance marketplace established under the Affordable Care Act. (7 P. App. 1278-89.) The motion to consolidate was filed solely in the asset-recovery action, however, and was served neither on the district judge presiding over the Silver State Exchange action nor on the Silver State Exchange itself. (*See* 10 App. 1944-1945; *see also* R.P. App. 66.) Consequently, the Silver State Exchange had no notice or opportunity to be heard on the question of its case—with a trial date just

[2] *State of Nevada, ex. rel. Commissioner of Insurance as Receiver for Nevada Health Co-Op v. Silver State Health Insurance Exchange*, Case No. A-20-816161-C.

months away from the hearing on the motion (R.P. App. 24)—being consolidated with the more complex asset-recovery case, in which trial was set for early 2022.

4. District Judge Williams Denies Petitioners' Motions

The district court denied the motions. (11 P. App. 1993-2008.) Contrary to petitioners' claims, the impleader motion was not denied "solely on the potential prejudice to the receiver resulting from Greenberg's disqualification" (Pet'n 7 (emphasis omitted)), but was rather denied after a careful weighing of impleader factors, including the complexity of the case and the potential prejudice to the parties. (11 P. App. 1993-2008.) Specifically, the district court noted that even if the motion was brought within the time for amending pleadings under the court's scheduling order, the court could still

> consider[] the timing of the filed motion for leave to file third-party complaint and motion to implead after three-and-a-half years of litigation and the potential prejudice to the parties.

(11 P. App. 1997.) In particular, the district court was

> concerned about whether the impleader of a third party based on contribution claims would unduly complicate the pending action by injecting tangential issues such

> as potential conflicts resulting in the disqualification of plaintiff's counsel and impacting plaintiff's choice of counsel in the pending matter, potentially prejudicing the plaintiff.

(11 P. App. 1997-98.) The district court also noted that

> [i]n contrast, under Nevada law, defendants' contribution claims against third parties could be pursued in an independent action pursuant to NRS 17.285 after trial, if necessary.

(11 P. App. 1998.)

Thus, the district court concluded that after "[b]alancing the potential prejudice to the parties and whether impleader would unduly complicate an already complex case, and the fact that defendant may still pursue an independent contribution claim if they are unsuccessful in defense of this action," it was appropriate to deny the motion. (*Id.* at 1998:6-9.)

UHH and NHS filed this petition. They named none of their co-defendants as real parties in interest, nor did they serve the petition on the Silver State Exchange or the district court in the action that they seek to consolidate.

C. The Parties Dismiss the Silver State Exchange Action

On September 21, 2021, District Judge Barisich entered a stipulation and order dismissing the Silver State Exchange action. (R.P. App. 61.)

SUMMARY OF THE ARGUMENT

The district court properly exercised its discretion to reject an impleader "after three-and-a-half years of litigation" when adding a new party would prejudice the remaining parties, and while petitioners remain able to bring a separate contribution action. In addition, the district court would have been justified because the proposed third-party complaint asserts a claim for contribution that fails as a matter of law.

Without the third-party complaint, the motion to consolidate became irrelevant. The request is also moot in light of the dismissal of the Silver State Exchange action. Regardless, the district court would have had no discretion to consolidate the action without notice to the affected parties.

This Court should deny the petition.

ARGUMENT

PART ONE:

THE MERITS

Standard of review: "The district court has broad discretion to allow or deny joinder of parties." *Cummings v. Charter Hosp. of Las Vegas, Inc.*, 111 Nev. 639, 645, 896 P.2d 1137, 1140 (1995); *cf. United States v. One 1977 Mercedes Benz, 450 SEL, VIN 11603302064538*, 708 F.2d 444, 452 (9th Cir. 1983) ("The decision to allow a third-party defendant to be impleaded under rule 14 is entrusted to the sound discretion of the trial court. Thus, we review the trial court's action for an abuse of that discretion."). This Court must review the district court's decision for an abuse of discretion and should "not reverse except on a showing that the decision is manifestly incorrect." *Flowers v. State*, 136 Nev. 1, 5, 456 P.3d 1037, 1043 (2020). Furthermore, a writ of mandamus is generally not available to control the exercise of judicial discretion. *Willmes v. Reno Mun. Court*, 118 Nev. 831, 835, 59 P.3d 1197, 1200 (2002).

Similarly, a district court enjoys "broad, but not unfettered, discretion in ordering consolidation." *Nalder v. Eighth Judicial Dist. Court*, 136 Nev. 200, 207, 462 P.3d 677, 684 (2020) (finding consolidation was improper). Consolidation's goal is to promote judicial efficiency; however, consolidating cases can "undermine[] that goal by permitting relitigation of resolved issues and requiring parties to spend unnecessary additional court costs." *Id.*

I.

PETITIONERS' CONSPIRACY THEORY IS IRRELEVANT

Most of petitioners' writ petition is dedicated to smearing the receiver's counsel of choice, Greenberg Traurig. Petitioners argue that the district court abused its discretion by considering prejudice to the parties—all of the parties, not just the receiver or petitioners—because of Greenberg Traurig's alleged conflicts vis-à-vis Xerox. Here, as in the district court below and in the receivership court, petitioners have presented neither "binding authority that mandates the receiver and her counsel, Greenberg Traurig, disclose all possible conflicts to the Court," nor any evidence that Greenberg Traurig was involved in the receiver's decision not to pursue claims against Xerox. (9 P. App. 1744:17-18.)

Petitioners have never offered evidence to support their scandalous allegations. And the receiver put forth unrebutted evidence that there *is* no conflict, notwithstanding petitioners' efforts to create one with the last-ditch effort to shoehorn Xerox into this litigation. (8 P. App. 1362-66, 1369-75, 10 P. App. 1800, 1804; 9 P. App. 1739; R.P. App. 29-31.)[3] In short, petitioners put forth an unsupported conspiracy theory that is neither accurate nor relevant.

The issue before this Court is whether the district court abused its broad discretion in denying petitioners' motion to implead a new defendant considering the timing of the motion, the complexity of the action, and the prejudice to the parties. It did not. The district court properly considered the factors governing a motion to implead, finding (1) the plaintiff would be prejudiced by the potential disqualification of her chosen counsel; (2) "impleader of a third party based on contribution

[3] Judge Williams declined petitioners' invitation to find that Greenberg Traurig was conflicted. Nonetheless, the underlying order denying disqualification should be reviewed in the context of the separate appeal and writ petition in Docket Nos. 82467 and 82552. The receiver's and Greenberg Traurig's answering brief in that proceeding fully addresses the absence of any disqualifying conflict.

claims would unduly complicate the action by injecting tangential issues" into the lawsuit; (3) "impleader would unduly complicate an already complex case;" and (4) that the motion to implead was technically timely under the case-management order, though made more than three-and-a-half years into the litigation. (11 P. App. 1998.)

The district court's concern regarding delay and the injection of tangential and irrelevant issues into the lawsuit has proved prescient. The court ruled based on concerns of delay and irrelevance, and Greenberg Traurig's alleged conflicts have no relationship to that decision. Petitioners' transparent effort to use impleader as a means to pursue that conspiracy theory, however, highlights the district court's wisdom in keeping that tangential issue out of the already complex litigation. This Court should deny the petition.

II.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING IMPLEADER

There can be little dispute that the district court acted within its broad discretion to deny petitioners' motion to implead Xerox. Petitioners argue that the district court erred by weighing the relative prejudice

to the parties. Petitioners are wrong; prejudice is a proper consideration. Regardless, the district court would have alternatively been justified in denying impleader because petitioners' proposed complaint did not state a claim. *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason."). Indeed, granting petitioners' motion would have been an abuse of discretion.

A. The Standard for Impleader

When considering a motion for leave to bring a third-party complaint, a court should consider four factors: "(1) prejudice to the original plaintiff; (2) complication of issues at trial; (3) likelihood of trial delay; and (4) timeliness of the motion to implead." *Stephens v. Comenity, LLC*, 287 F. Supp. 3d 1091, 1095 (D. Nev. 2017).

In addition, "[i]mpleader also is proper only when a right to relief exists under the applicable substantive law;[] if it does not, the impleader claim must be dismissed." 6 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1446 (3d ed. updated Apr. 2021) (footnote omitted). This parallels the standard for amending the complaint: a district

court properly denies a proposed amendment that would not survive a motion to dismiss. *E.g.*, *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 394, 398, 302 P.2d 1148, 1152 (2013) (ordering district court to vacate order granting leave to file amended complaint and stating that a proposed amended complaint should be disallowed "if the plaintiff seeks to amend the complaint in order to plead an impermissible claim"); *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 289, 357 P.3d 966, 973 (App. 2015) (stating that "leave to amend, even if timely sought, need not be granted if the proposed amendment would be 'futile'").

B. The District Court Properly Exercised its Discretion Based on the Disruption that Adding Third-Party Defendants Would Cause to Already-Complex Litigation

1. The District Court Properly Considered the Timing of the Motion—Years after Petitioners Could Have Brought a Third-Party Complaint

This Court recently clarified that delay alone is "[s]ufficient reasons to deny a motion to amend a pleading." *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 239-40, 416 P.3d 249, 254-55 (2018) (quoting *Kantor v. Kantor*, 116 Nev. 886, 891-93, 8 P.3d 825, 828-29 (2000)) (rejecting casino's argument that "delay alone is insufficient

grounds to deny a motion to amend"). Similar to petitioners' arguments here, the plaintiff in *MEI-GSR* waited a year and half before seeking leave to amend the complaint. *Id.*

The *MEI-GSR* Court cited to *Kantor*, and noted there that "the information supporting [the plaintiff's] amended complaint was available to [her] when she filed her original complaint." *Id.*

Here, petitioners' representatives, who controlled Nevada Health Co-op, have known since at least 2014 about potential issues involving Xerox and the Exchange. (10 P. App. 1801-1802, 1854-73.) Nothing prevented petitioners from moving to bring Xerox into this case as soon as UHH was named as a defendant. Instead, they waited more than two years, in the midst of discovery in a complex case involving multiple defendants, to bring the motion.

And although the timing of the motion alone would justify denying the motion, the prejudice to the receivership and the other defendants is significant. Adding a new defendant at this stage—while discovery has been ongoing for years—would have significantly impaired the parties' ability to prepare for trial on the existing claims and defenses. (*Id.* at 1799-1800, 1803-1804.)

That delay is particularly pernicious in the context of this receivership, as the delay does not merely harm the interests of the litigant itself, but all those claimants of the receivership who must await a recovery in litigation to obtain a distribution. (*Id.* at 1805.)

Finally, the "mere" delay is imposing significant costs on the receivership. Its litigation expenses depend, in part, on how quickly the case proceeds to trial. Every month of delay is a month that the receivership has to pay for costs, such as the substantial costs for an electronic discovery database, that take away from the ultimate recovery for the receivership's claimants. (*Id.*)

The fact that the district court had previously extended discovery deadlines and the trial date was further reason to reject petitioners' belated request to implead Xerox. *See MEI-GSR Holdings, LLC*, 134 Nev. at 239-40, 416 P.3d at 255 (citing *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 106, 507 P.2d 138, 139 (1973)) (noting that a prior extension of discovery deadlines and trial continuance "severely undermined" the plaintiff's allegation that it would be prejudiced if not permitted to amend).[4]

[4] Indeed, once this petition is resolved and the stay is lifted, the receiver will be on a tight timeline to bring this 2017 case to trial—even without

2. The District Court Properly Weighed the Prejudice to the Receiver and Other Parties—Especially Considering the Availability of a Separate Contribution Action

The district court also properly considered the potential prejudice to petitioners and found it did not outweigh the prejudice to the other parties. That is because while a contribution claim *may* be brought "in the same action in which [the] judgment is entered against two or more tortfeasors," such a claim may equally be enforced in a "*separate* action following entry of judgment." *Pack v. LaTourette*, 128 Nev. 264, 269-70, 277 P.3d 1246, 1249–50 (2012) (emphasis added) (quoting *Bell & Gossett Co. v. Oak Grove Investors*, 108 Nev. 958, 963, 843 P.2d 351, 354 (1992)) and citing NRS 17.285(1), (2)). In fact, regardless of the statute of limitations on the underlying tort claim, the statute of limitations on a contribution claim does not even begin to run until "after the judgment has become final by lapse of time for appeal or after appellate review." *Saylor v. Arcotta*, 126 Nev. 92, 96, 225 P.3d 1276, 1279 (2010) (citing NRS 17.285(3)).

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the disruption that Xerox's impleader would cause. *See* NRCP 41(e).

Thus, the district court appropriately found that denying petitioners' motion to add a contribution claim against Xerox at this late stage would not forfeit their claim, if such a claim existed. It would merely ensure that the claim would be brought at a time and in a forum when it would not disrupt the claims already set for trial.

In light of the years of delay for petitioners to add Xerox to this case, and in light of petitioners' ability to pursue Xerox in a separate action, the district court correctly denied the motion to implead.

C. Impleader Was Unavailable to Petitioners[5]

If a contribution action exists with respect to the receiver's tort claims, petitioners are fully protected in their ability to bring it in a separate action. They do not need to disrupt the trial here. The district court acted within its broad discretion to avoid that kind of disruption.

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[5] Logically, the existing parties to the action can defeat an application for impleader by pointing out the futility of the proposed third-party complaint. *Nat'l Indep. Theatre Exhibitors, Inc. v. Charter Fin. Group, Inc.*, 747 F.2d 1396, 1404 (11th Cir. 1984) ("[T]he plaintiffs, in moving for leave to amend, made no showing in their factual allegations as to how the additional parties could be held liable on any of the claims they were asserting . . . ."); 6 WRIGHT & MILLER, FED. PRAC. & PRO. § 1443 (3d ed. updated Apr. 2021) (application for impleader may be denied where "the third-party claim obviously lacks merit"). There is no requirement that the district court perform the fruitless theater of bringing in the

The outcome here is further supported by the fact that petitioners' proposed third-party complaint fails to state a claim for contribution.[6] Contribution is available only against a joint tortfeasor who shares some responsibility for the failure to carry out a "common obligation." *Rio Grande Gas Co. v. Stahmann Farms, Inc.*, 80 N.M. 432, 436, ¶ 13, 457 P.2d 364, 368 (1969) ("[W]ith contribution, an obligation is imposed by law upon one joint tortfeasor to contribute his share to the discharge of the common liability.").[7] None of the receiver's claims against petitioners are tied to any joint obligation that petitioners shared with either of the proposed third party-defendants. Instead, those claims against petitioners arise out of obligations for which petitioners were solely responsible.

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third-party defendant only to have that newcomer move to strike or dismiss the third-party complaint for its lack of merit.

[6] The proposed third-party defendants were Conduent State Healthcare, LLC, which was previously known as Xerox State Healthcare, and the State of Nevada ex rel. Silver State Health Insurance Exchange.

[7] *See also Republic Silver State Disposal, Inc. v. Cash*, 136 Nev., Adv. Op. 88, 478 P.3d 362, 363 (2020) (clarifying that "joint tortfeasor" in this context means parties sharing "joint or several liability," not that they literally acted simultaneously or in concert).

Thus, the motion to bring a third-party complaint could also have been rejected for the alternative reason that it did not state a cognizable contribution claim. The request for amendment was futile. *See Halcrow, Inc.*, 129 Nev. at 398, 302 P.3d at 1152 ("Leave to amend should not be granted if the proposed amendment would be futile.").

1. Contribution Requires Joint Liability for a Common Obligation

Petitioners' proposed third-party complaint overlooked that a claim for contribution exists only when two or more tortfeasors "become jointly or severally liable in tort for the same injury." *Republic Silver State Disposal, Inc. v. Cash*, 136 Nev., Adv. Op. 88, 478 P.3d 362, 364 (2020) (quoting NRS 17.225(1)); *see also* RESTATEMENT (SECOND) OF TORTS § 886A cmt. b (1979). The joint liability arises out of a "common obligation." *E.g.*, *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 472 (3d. Cir. 2006) (stating that contribution is "an attempt by equity to distribute equally among those who have *a common obligation*, the burden of performing *that obligation*" (citation and internal quotation

marks omitted, emphasis added)).[8] Without a common obligation, a contribution claim fails. *See Berg Chilling Sys.*, 435 F.3d at 472.

This limitation also applies to third-party practice, because otherwise it would infringe on the plaintiff's right to choose whom to sue:

> As a general proposition the third-party practice device is *not* available in a case involving joint or concurrent tort-feasors having no legal relation to one another, and each owing a duty of care to the injured party. In such a case the plaintiff has the right to decide for himself whom he shall sue. Rule 14 shall not be used by a defendant for the purposes of offering another defendant to the plaintiff.

Reid v. Royal Ins. Co., 80 Nev. 137, 141, 390 P.2d 45, 47 (1964) (citations omitted) (emphasis in original).

Nova Info. Sys., Inc. v. Greenwich Ins. Co., is instructive here, where on facts far more compelling than the facts of this case, the court rejected a contribution claim because it did not arise from a common obligation. 365 F.3d 996, 1006 (11th Cir. 2004). Nova maintained that it

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[8] *See also Huggins v. Graves*, 337 F.2d 486, 489 (6th Cir. 1964) (recognizing that a "basic element[]" of a contribution claim is "that both parties be under a common obligation"); *Ford Motor Co. v. Edgewood Props., Inc.*, Civil Action Nos. 06-1278, 06-4266, 2008 WL 4559770, at *18 (D.N.J. Oct. 8, 2008) (stating that the "majority view" recognizes a common obligation as an element of a contribution claim).

was entitled to contribution from Greenwich for reimbursing passengers of a failed ocean cruise line who had used their credit cards to prepay for cruises that never occurred. Nova, however, was contractually obligated to reimburse only the cruise line's merchant bank, which processed the credit card charges, while Greenwich, unlike Nova, was obligated to reimburse the passengers. "Accordingly, no 'common obligation' existed between [Nova and Greenwich] sufficient to maintain a claim for contribution," even though the money paid by Nova to the merchant bank was "ultimately paid to [the] passengers." 365 F.3d at 1006.[9]

Here, petitioners' proposed complaint all but conceded that the asserted contribution claim was not predicated on a common obligation for which joint liability exists. The complaint acknowledged (at 5 P. App. 764, ¶ 38) that the receiver's pending claims against petitioners are

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[9] *See also Erickson v. Erickson*, where, as here, the defendant/third-party plaintiff and the third-party defendants all owed duties to the same plaintiff, but those duties were not common obligations, thus compelling the dismissal of the third-party complaint for failure to state a claim: "[T]he right to contribution only arises when parties having a common obligation are sued on that obligation." 849 F. Supp. 453, 457-59 (S.D. W.Va. 1994).

based on petitioners' direct contractual obligations to Nevada Health Co-op itself to provide medical utilization services and third-party administration of insurance claims. At the same time, the proposed complaint alleged (at 5 P. App. 765, ¶ 43) that petitioners' contribution claim was based on a different obligation—to "develop[], administer[], and manag[e]" the health insurance marketplace, or exchange, that Nevada elected to create.[10]

2. Petitioners Cannot Claim Contribution for the Receiver's Contractual Claims

Even if petitioners had established a common liability, however, that would support a contribution claim only to the extent the receiver prevails on a *tort* theory.[11] (*See, e.g.*, 1 P. App. 234-39.)

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[10] Petitioners conclusorily allege that this duty was owed "to the CO-OP and its vendors (including UHH)" (5 P. App. 765, ¶ 43), despite that Xerox's contractual obligations ran to the Silver State Exchange, not petitioners or Nevada Health Co-op.

[11] Even then, liability for intentional torts such as "intentional misconduct, fraud, and/or a knowing violation of the law" (1 P. App. 232-33) is not subject to a claim for contribution. NRS 17.255; *see also Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 611, 5 P.3d 1043, 1051 (2000).

The focus of the receiver's complaint, however, is petitioner's liability based on petitioners' breaches of their contracts to provide consulting services and third-party administrative services. (1 P. App. 236-38.) Contribution is unavailable for such claims. NRS 17.225(1).[12]

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[12] NRS 17.225(1) states that, except for reasons not applicable here, "where two or more persons become jointly or severally *liable in tort* for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them." (emphasis added); *see also Hospital Auth. of Rockdale Cnty. v. GS Capital Partners V Fund, L.P.*, No. 09 Civ. 8716(PAC), 2011 WL 182066, at *4 (S.D.N.Y. Jan. 20, 2011) (plaintiff could not benefit from liquidated damages paid under contract to which it was not a party: two separate contracts meant there were two separate injuries); *Knight v. Docu-Fax, Inc.*, 838 F. Supp. 1579, 1580 (N.D. Ga. 1993) (recognizing that two separate contracts meant there were "two separate alleged sources of injury"); *see generally Techreations, Inc. v. Nat'l Safety Council*, 650 F. Supp. 337, 340 (N.D. Ill. 1986) ("[I]f a plaintiff is the victim of the breach of two separate contracts on the same day, this may constitute two injuries").

Courts elsewhere have recognized repeatedly that, as here, there is no right to contribution for a claim that seeks compensatory damages attributable to a contract breach. *E.g.*, *Nat'l Fire Ins. Co. v. Johnson Controls Fire Prot. LP*, 2019 WL 3766880, at *1 (S.D. Fla. Aug. 9, 2019); *Wells Fargo Fin. Leasing, Inc. v. Tulley Auto. Grp., Inc.*, 2017 WL 3841840, at *4 (D. N.H. Sept. 1, 2017); *United States ex rel. Ryan v. Staten Island Univ. Hosp.*, 2011 WL 1841795, at *7 (E.D.N.Y. May 13, 2011); *AutoZone, Inc. v. Glidden Co.*, 737 F.Supp.2d 936, 946 (W.D. Tenn. 2010); *Pine Grove Mfr. Homes v. Ind. Lumbermens Mut. Ins. Co.*, 2009 WL 4810560, at *3 (M.D. Pa. Dec. 8, 2009); *Maxwell v. Phillips*, 2007 WL 2156337, at *8 (M.D.N.C. July 25, 2007); *In re Crazy Eddie Sec. Lit.*, 802 F. Supp. 804, 815 (E.D.N.Y. 1992).

* * *

Petitioners' contribution claim against Xerox is highly contingent, if it can exist at all—arising only if (1) the receiver prevails against petitioners at trial, (2) the theory of recovery arises from a common obligation between petitioners and Xerox, and (3) the judgment is with respect to a negligence tort, not contract claims or an intentional tort. If the contingency occurs and petitioners can prove a common obligation, petitioners are fully protected with the right to bring a separate contribution action. Given the contingent nature of the contribution claim, the district court was within its discretion to let this case proceed with the parties the receiver elected to sue.

III.

THE DISTRICT COURT CORRECTLY DENIED CONSOLIDATION

A. The Request to Consolidate Is Moot Following the Dismissal of the Silver State Exchange Action

1. A Writ Petition that Does Not Present a Live Question Must Be Dismissed as Moot

"This court's duty is 'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions.'" *Degraw v. Eighth Judicial Dist. Court*, 134 Nev. 330, 332,

419 P.3d 136, 139 (2018) (quoting *NCAA v. Univ. of Nev.*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981)).

This element of justiciability must be assessed at all stages, including on a petition for extraordinary writ relief: "even though a case may present a live controversy at its beginning, subsequent events may render the case moot." *Solid v. Eighth Judicial Dist. Court*, 133 Nev. 118, 120, 393 P.3d 666, 670 (2017) (quoting *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010)). As this Court has recognized for more than a century, when a writ petition becomes moot, it must be dismissed. *State v. Dist. Court of Sixth Judicial Dist.*, 43 Nev. 320, 184 P. 1023, 1023 (1919); *see also Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. 155, 158, 460 P.3d 976, 981 (2020); *Degraw*, 134 Nev. at 332, 419 P.3d at 139; *Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1162 & n.32, 146 P.3d 1130, 1140 & n.32 (2006) (citing *Univ. of Nev. v. Tarkanian*, 95 Nev. 389, 394, 594 P.2d 1159, 1162 (1979)); *Binegar v. Eighth Judicial Dist. Court*, 112 Nev. 544, 548, 915 P.2d 889, 892 (1996).

2. Consolidation Is Improper after a Resolution of All Claims in One of the Cases

Consolidation under NRCP 42(a) "may be invoked only to consolidate actions already pending." *Nalder*, 136 Nev. at 206–07, 462 P.3d at 684–85 (quoting *Pan Am. World Airways, Inc. v. U.S. Dist. Court*, 523 F.2d 1073, 1080 (9th Cir. 1975)). In *Nalder*, this Court rejected consolidation of one action that had already reached a final judgment with a newer action filed on the basis of that judgment: "when a final judgment is reached, there necessarily is no 'pending' issue left" to permit consolidation. *Id.* (citing *Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 127 Nev. 86, 91 n.2, 247 P.3d 1107, 1110 n.2 (2011) and *Pending*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

This is true even when the actions "share common legal issues and facts": the resolution of the claims in one of the actions means "no issue or fact is pending . . . that permits it to be consolidated with another case." *Id.* A different rule would undermine the goal of judicial efficiency "by permitting relitigation of resolved issues and requiring parties to spend unnecessary additional court costs." *Id.*

3. Consolidation Became Impossible After the Dismissal of the Silver State Exchange Action

Although the Silver State Exchange action was pending at the time petitioners filed their motion, that case has since resolved with a stipulated dismissal of all claims. (R.P. App. 61.) Even assuming the district court would have had discretion to consolidate at some earlier point, petitioners' request became moot with the dismissal.[13]

This Court should therefore dismiss as moot the portion of the petition seeking consolidation.

B. The District Court Correctly Exercised its Discretion Not to Consolidate

Alternatively, the district court was correct even at the time to deny consolidation of this asset-recovery action with the Silver State Exchange action, which concededly would have disrupted the trial protocol for the two actions.

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[13] Although the dismissal is nominally without prejudice, there is no avenue for petitioners to force the revival of that suit. They were never parties to that action and cannot intervene in it. *See Nalder*, 136 Nev. at 203, 462 P.3d at 682 (no intervention after final judgment); *Arnold v. Kip*, 123 Nev. 410, 416, 168 P.3d 1050, 1054 (2007) (dismissal without prejudice is a final judgment).

The district court appropriately noted that consolidation would have been costly and improper. While it was pending, the 2020 case against the Exchange did not involve UHH or NHS, at all. The case against the Exchange was on a discrete, simple issue—the Exchange's alleged failure to remit insurance premiums that it collected on the Co-op's behalf. (10 P. App. 1804.) Because of the simplicity of the issues in that case, the district court there ordered an efficient case management schedule, with trial beginning in November 2021. (*Id.*)

Consolidating those claims with this asset-recovery litigation—which, due to its complexity and the difference in the claims involved, began in 2017 but was not headed to trial until 2022[14]—would vastly hamper the receiver's ability to timely recover on the claims against the Exchange. (*Id.* at 1805.) Not only would the addition of the Exchange lawsuit to this case have increased the complexity of this case, but it would have also required the district court to become familiar with an entirely new set of claims, involving different parties and a different

[14] This Court ordered a stay of the underlying asset-recovery litigation.

contract, and would thwart the track that the Exchange lawsuit was already on.

"Courts have routinely denied consolidation motions where there is a stark difference in the procedural posture of the actions, finding that judicial economy would not be served by consolidating two actions at disparate stages of litigation." *KGK Jewelry LLC v. ESDNetwork*, 2014 WL 7333291, at *2 (S.D.N.Y. Dec. 24, 2014). Even if there were an overlap in the issues to be tried—and there are not—the relatively simpler premium-collection case against the Exchange should not have been derailed. Moreover, the delay from consolidation would have imposed unacceptable costs on claimants of the receivership, including for increased discovery and administrative costs. (10 P. App. 1800, 1805.)

The correctness of the district court's decision is apparent from the outcome: the resolution of that other case through a stipulated dismissal. The district court properly exercised its discretion in denying consolidation.

PART TWO:

THE IMPROPRIETY OF WRIT RELIEF

Petitioners' attacks on the district court's discretionary decision whether to implead a third-party defendant are meritless. They are also inappropriate for resolution in a petition for extraordinary relief.

A. The Petition Raises No Novel Legal Issue; It Just Asks this Court to Overrule the District Court's Application of a Multi-Factor Test to the Facts of this Case

Here, the district court's order rested on its balancing of complex fact questions related to the substance of the parties' claims and the need to manage control of the court's docket. The petition presents no novel or interesting questions of law; at most, in exercising advisory mandamus this Court would be reweighing the factors under the specific facts of this case, hardly the "hen's-teeth rare" issue that merits such an extraordinary intervention. *See Double Diamond v. Second Judicial Dist. Court*, 131 Nev. 557, 566, 354 P.3d 641, 647 (2015) (Pickering, J., concurring) ("proper occasions for employing advisory mandamus are hen's-teeth rare: it is reserved for blockbuster issues, not

merely interesting ones" (quoting *In re Bushkin Assocs., Inc.*, 864 F.2d 241, 247 (1st Cir. 1989))).

B. The Issue Can Be Resolved without this Court's Extraordinary Intervention on a Writ Petition

More important, the sole remaining live issue—whether the district court should have been compelled to implead Xerox and the Silver State Exchange into the receiver's action—may be resolved in at least three ways that do not require this Court to exercise advisory mandamus:

First, if petitioners prevail in the underlying action or lose solely with respect to contractual or intentional-tort claims, their stated need for a third-party complaint will evaporate.

Second, even if judgment is entered against petitioners, they may immediately pursue a contribution action directly against the putative third-party defendants, as discussed above. *See Pack*, 128 Nev. at 269–70, 277 P.3d at 1249–50.

Third, even if petitioners somehow found that equivalent relief to be inadequate, they could raise the discretionary denial of their impleader application in an appeal from the final judgment.

This Court should deny the petition, lift the stay, and let the litigation proceed.

CONCLUSION

The district court appropriately exercised its broad discretion not to cloud already complex litigation with new, and highly contingent, claims and parties years after those claims could have been brought. In contrast, granting the petition would invite litigants dissatisfied with all kinds of case-management decisions—the denial of a trial continuance, the bifurcation of claims, even the management of discovery deadlines—to petition for this Court's intervention. For these reasons, this Court should deny the petition as to the request for impleader and dismiss as moot the petition as to the request for consolidation.

Dated this 16th day of February, 2022.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)-(6) because it was prepared in Microsoft Word 2016 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 6,819 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 16th day of February, 2022.

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