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.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT COURT JUDGE,

Respondent,

- and -

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

Real Party in Interest.

District Court Case No. A-17-760558-B, Department XVI

REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT RELIEF

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March 16, 2022

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REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT RELIEF

I. INTRODUCTION

UHH[1] seeks issuance of a writ of mandamus to correct a manifest abuse of discretion. Specifically, the District Court denied UHH's Motion for Leave, despite the judicial efficiencies created by litigating contribution claims in the main action, merely to protect the Receiver's counsel, Greenberg, from disqualification.[2] There was no other factual or legal basis for the District Court's denial of the Motion for Leave.

- The Motion was timely filed within the deadline set forth in the governing Scheduling Order.

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[1] The short names and abbreviations set forth in the Petition are incorporated by reference herein in the interest of judicial economy and efficiency. However, because the Order Denying the Motion for Consolidation is now moot and will not be addressed in this brief, UHH will refer to the Order Denying Motions for Leave and Consolidation merely as "Order Denying Motion for Leave."

[2] The Receiver dismisses the seriousness of Greenberg's undisclosed (and actively concealed) conflicts of interest in this case, referring to them as a "side show" and a mere "conspiracy theory." (Answer at 1.) However, as set forth in detail in UHH's Petition for Extraordinary Relief, No. 82552 (Feb. 25, 2021), Opening Brief, No. 82467 (June 14, 2021) and Consolidated Reply Nos. 82552 & 82467 (Sept. 10, 2021), it is undisputed that Greenberg and the Receiver actively concealed and failed to disclose Greenberg's conflict of interest as counsel for Xerox to the District Court in the Receivership Action, in violation of the overwhelming legal authorities in other jurisdictions requiring such disclosure.

- Any alleged prejudice to the Receiver would have been self-inflicted by her knowing and voluntary retention of conflicted counsel.
- The addition of the contribution claims would not have unreasonably delayed the trial or prolonged discovery, given that the trial and the discovery schedule have been continued over five times at the Receiver's request and/or consent (and this Court has stayed the litigation pending the outcome of the Petition).
- The addition of the contribution claims would not unduly complicate this action, as the issues relating to Xerox's and Silver State's liability for the CO-OP's damages attributed to UHH are already being explored in discovery and will play a central role at trial given UHH's affirmative defenses.
- The contribution claims were proper and meritorious derivative claims.
- The Receiver has failed to dispute that UHH will suffer severe and irreparable prejudice by forcing UHH to wait to seek contribution from Xerox and Silver State in a separate action, as (i) UHH now faces a higher burden of proof for its affirmative defenses relating to

Xerox's and Silver State's liability for the CO-OP's damages, and (ii) UHH could face possible insolvency (as a result of satisfying a judgment entered in the Receiver's favor) before it can even consider filing a separate action for contribution.

Therefore, the District Court's decision to place greater weight on preserving the Receiver's (intentional) choice of (conflicted) counsel — over the judicial efficiencies of impleading contribution claims and the prejudice to UHH of forcing contribution to be tried in a separate action — demonstrates that the District Court arbitrarily and capriciously chose to ignore the law and manifestly abused its discretion.

II. ARGUMENT

A. Writ Relief Is Warranted to Vacate the Order Denying the Motion for Leave.

1. Issuance of a Writ of Mandamus Is Proper Because the District Court Manifestly Abused Its Discretion.

Contrary to the Receiver's assertion, UHH is not seeking advisory mandamus. (Answer at 34-35.) Rather, UHH's Petition challenges the District Court's manifest abuse of discretion in denying a motion for leave to implead Xerox and Silver State in the Receiver's asset recovery action against UHH and

other defendants. Pet. at 10-11; s*ee also Walker v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, 136 Nev. 678, 680, 476 P.3d 1194, 1196 (2020) ("Where a district court is entrusted with discretion on an issue, . . . we can issue traditional mandamus only where the lower court has manifestly abused that discretion or acted arbitrarily or capriciously.") (emphasis in original omitted); *Archon Corp. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 133 Nev. 816, 819-20, 407 P.3d 702, 706 (2017) (recognizing that this Court does not limit writ review to "policing jurisdictional excesses and refusals," it also "grant[s] writ relief where the district court judge has committed . . . an 'arbitrary or capricious' abuse of discretion") (internal quotations and citations omitted). The issuance of a writ of mandamus to vacate the Order Denying the Motion for Leave is proper because the District Court's arbitrary and capricious decision overrode and/or misapplied the law. *Walker*, 136 Nev. at 680-81, 476 P.3d at 1197 ("[M]andamus is available only where the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias, or ill will.") (internal quotation and citation omitted).

Typically, motions for impleader are freely granted in order to promote judicial efficiency and economy. *Shafarman v. Ryder Truck Rental, Inc.*, 100

F.R.D. 454, 459 (S.D.N.Y. 1984).[3] As set forth in the Petition and this Reply, UHH satisfied every element for the impleader of third-party defendants, and the District Court arbitrarily and capriciously denied the Motion for Leave merely to try to protect the Receiver's choice of (conflicted) counsel from disqualification. This partiality to the Receiver and/or the Receiver's counsel in contravention of clear facts and evidence warranting impleader constitutes a manifest abuse of discretion necessitating writ relief.

2. Writ Relief Is Necessary to Prevent UHH From Suffering Irreparable Harm From the District Court's Manifest Abuse of Discretion.

The Receiver contends that writ relief is inappropriate for the Order Denying Motion for Leave because: (i) UHH has the right to appeal upon entry of a final judgment in the asset recovery action; and/or (ii) UHH has the right to seek contribution from Xerox and Silver state in a separate action upon payment of any award or judgment to the Receiver in this action. (Answer at 35.) However, writ relief is necessary to correct the District Court's manifest abuse of discretion in this instance because UHH will suffer irreparable harm if forced to await entry of final judgment for review by this Court. *See Double Diamond v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, 131 Nev. 557, 565, 354 P.3d 641, 647 (2015) (holding that

[3] Federal cases interpreting rules of civil procedure are "strong persuasive authority" in Nevada courts. *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotation omitted).

mandamus requires a "clear error" that will "wreak irreparable harm" unless it is "immediately corrected").

As set forth in the Petition, if Xerox and Silver State are not impleaded as third-party defendants, the factfinder will be precluded from apportioning any fault to them for the harm they caused the CO-OP. (Pet. 28-30.) Thus, UHH will be limited to arguing that Xerox and Silver State are ***entirely*** at fault for the damages that the CO-OP attributes to UHH — which is a significantly more difficult burden of proof to satisfy. *Banks ex rel. Banks v. Sunrise Hospital*, 120 Nev. 822, 844-45, 102 P.3d 52, 67 (2004). Moreover, UHH cannot commence a separate contribution action against Xerox and Silver State until it has paid the judgment entered against it and in favor of the CO-OP. NRS 17.225(2). Given that the CO-OP is seeking over $142 million in damages from UHH, (7P.A.30 at 1183), UHH could be driven into insolvency before it ever has the opportunity to commence a separate contribution action against either Xerox and/or Silver State.

It is because of this potential for prejudice and irreparable harm that this Court previously granted writ relief to correct a district court's manifest abuse of discretion in denying a motion for leave to add parties. *See Lund v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 127 Nev. 358, 363, 255 P.3d 280, 284 (2011). Therefore, UHH respectfully requests that this Court grant its Petition and issue a

writ of mandamus directing the District Court to vacate the Order Denying the Motion for Leave and to grant UHH the right to implead Xerox and Silver State.

B. UHH Satisfied All of the Factors Necessary to Obtain Leave to File a Third-Party Complaint.

When exercising its discretion to determine whether to grant or deny a motion for leave to file a third-party complaint, district courts should consider: "(1) potential prejudice to plaintiffs or [the third-party defendant[s]]; (2) whether the impleader will add new and complicated issues that will threaten the orderly and prompt resolution of the case and delay the trial; (3) whether defendants unreasonably delayed in filing the third-party complaint; and (4) whether the third-party complaint is so insubstantial that it fails to state a claim." *Millers Capital Ins., Co. v. Hydrofarm, Inc.*, ___ F.R.D. ___, No. 1:21-cv-321 (GMH), 2022 WL 390139 at *6 (D.D.C. Jan. 31, 2022) (internal quotation and citation omitted).

Because the purpose of permitting third-party claims is to "avoid circuity of action and eliminate duplication of suits based on closely related matters," motions for leave to implead third-party defendants should be freely granted. *Id.* (internal quotation and citation omitted); *see also* 6 Charles Alan Wright, et al., *Federal Practice & Procedure* § 1443 (3d ed. 2007) (noting that "if the claim is a proper third-party action and will not prejudice the other parties or unduly complicate the litigation, there is no reason to deny an application under Rule 14(a)"). Thus, the District Court manifestly abused its discretion in denying UHH's Motion for Leave

merely to shield Greenberg from disqualification and to protect the Receiver who knowingly retained conflicted counsel.

1. The Motion for Leave Was Timely and Not Unreasonably Delayed.

The Receiver repeatedly, and erroneously, asserts that UHH was "late" to allege third-party claims against Xerox and Silver State. (Answer at 1, 7, 11, 15, 17-19.) However, it is well-settled that if a motion for leave to implead third parties is filed prior to the expiration of the scheduling order deadline for adding parties and/or amending claims, the motion is timely. *Brahma Group, Inc. v. Ames Constr., Inc.*, No. 15-cv-01538-WJM-KLM, 2016 WL 1266973 at *2 (D. Colo. Apr. 1, 2016) (holding that the motion was timely "because it was filed prior to the deadline for joinder of parties and amendment of pleadings"); *Kormylo v. Forever Resorts, LLC*, No. 13-cv-0511 JM (WVG), 2014 WL 3849910 at *3 (S.D. Cal. Aug. 5, 2014); *In re Mission Constr. Litig.*, No. 10 Civ. 4262 (LTS) (HBP), 2013 WL 4710377 at *10 (S.D.N.Y. Aug. 30, 2013); *iBasis Global, Inc. v. Diamond Phone Card, Inc.*, 278 F.R.D. 70, 74 (E.D.N.Y. 2011); *Berman v. Amex Assurance Co.*, No. SACV 08-1051 DOC (RNBx), 2009 WL 10674761 at *2 (C.D. Cal. Feb. 25, 2009) (finding that the impleader motion was not unreasonably delayed, despite the third-party plaintiff having known about the third-party defendant's role in causing the alleged damages for over one year, because the motion was filed within the deadline to join parties or amend pleadings).

In fact, district courts only consider the reasonableness of the delay in moving for leave to implead third parties where the motion for leave was filed ***after*** the deadline in the scheduling order. *Millers Capital Ins., Co. v. Hydrofarm, Inc.*, ___ F.R.D. ___, No. 1:21-cv-321, 2022 WL 390139 at *15 (D.D.C. Jan. 31, 2022) (holding that "to the extent an impleader motion is filed after a deadline set by a Rule 16 Scheduling Order, courts consider whether the movant has shown 'good cause' to modify the scheduling order"); *City of Murray, Ky. v. Robertson Inc. Bridge & Grading Div.*, No. 5:17-CV-00008-TBR, 2018 WL 1612850 at *2 (W.D. Ky. Apr. 3, 2018); *Gutierrez-Morales v. Planck*, 318 F.R.D. 332, 334 (E.D. Ky. 2016); *iBasis Global, Inc. v. Diamond Phone Card, Inc.*, 278 F.R.D. 70, 76 (E.D.N.Y. 2011); *Scoran v. Overseas Shipholding Group, Inc.*, No. 07 Civ. 10307(DF), 2008 WL 4499472 at *1 (S.D.N.Y. Oct. 7, 2008); *see also Dos Santos v. Terrace Place Realty, Inc.*, 433 F. Supp. 2d 326, 336 (S.D.N.Y. 2006) (analogizing untimely motion for impleader to untimely motion to amend pleadings filed after deadline set in scheduling order, and holding that movant must establish good cause for the delay).

It is undisputed that UHH filed the Motion for Leave prior to the expiration of the deadline for amending pleadings and adding parties. (2P.A.22 at 0399:7; 6P.A.28, a 1116.) Therefore, the Motion for Leave was timely, and the District Court manifestly abused its discretion when it determined that the Motion for

Leave was "timely and not the result of dilatory conduct," yet still determined that it could "consider[] the timing of the filed motion" and the fact that it was filed "after three-and-a-half years of litigation." (11P.A.46 at 1997:16-24.)

2. UHH Had Good Cause for Any Alleged Delay in Filing the Motion for Leave.

To the extent that this Court is concerned that UHH unreasonably delayed in filing the Motion for Leave — despite filing the Motion prior to the expiration of the deadline to add parties and claims in the Scheduling Order — UHH had good cause for any such delay. Specifically, while UHH suspected that Xerox and Silver State were responsible, at least in part, for the CO-OP's damages, it was first ethically obligated (under NRCP 11) to first review the Receiver's expert reports to determine the exact allegations and claims against UHH and, then, conduct additional discovery to obtain the facts and evidence necessary to support any third-party claims against Xerox and Silver State. (10P.A.43 at 1885:1-15.)

In *Millers Capital Insurance, Company*, the district court found that there was no unreasonable delay in filing an impleader motion — despite filing after the expiration of the deadline to add parties and claims — because the third-party plaintiff needed to first conduct discovery to obtain the necessary evidence to support the third-party claims. Specifically, the court stated:

> [W]hile it is true that Holistic Remedies' potential as a joint tortfeasor has existed since the beginning of the case, sufficient facts were not developed until much later.

> Hydrofarm was not required to bring its third-party claims at an earlier date if it lacked a factual basis to do so — that itself would be unreasonable.

2022 WL 390139 at *15; *see also iBasis Global, Inc. v. Diamond Phone Card, Inc.*, 278 F.R.D. 70, 75 (E.D.N.Y. 2011) (holding that there was no unreasonable delay in impleading third parties where the defendant was confused by the allegations in the complaint and unable to initially determine the extent of the claims against it).

Moreover, UHH delayed filing a third-party complaint because it believed, given the evidence uncovered in discovery, that the Receiver would later add Xerox and Silver State as defendants in the asset recovery action — just as she did with Unite Here Health (added in September of 2018). (1P.A.6.) Other district courts have found such an explanation to constitute good cause for any delay. *Salomon v. Burr Manor Estates, Inc.*, 635 F. Supp. 2d 196, 200-01 (E.D.N.Y. 2009).

Therefore, if this Court determines that good cause is necessary to explain any delay in the filing of the Motion for Leave, UHH provided sufficient evidence of good cause, and the District Court manifestly abused its discretion when it implicitly determined that UHH had unreasonably delayed seeking impleader by filing the Motion for Leave after three years of litigation.

3. Impleader Would Not Have Prejudiced the Receiver, Increased Litigation Costs, or Delayed the Trial.

The Receiver makes several arguments regarding the alleged prejudice it would suffer if the Motion for Leave were granted. However, each of these arguments is belied by the evidence or foreclosed by the case law. First, the Receiver makes the conclusory claim that "[a]dding a new defendant . . . would have significantly impaired the parties' ability to prepare for trial on the existing claims and defenses." (Answer at 18.) However, such conclusory complaints should be disregarded. *See Millers Capital Ins., Co.*, 2022 WL 390139 at *13 (ignoring conclusory arguments as to prejudice caused by having to "restart the litigation" or restart discovery); *Salomon*, 635 F. Supp.2d at 201 (finding complaints of an accelerated discovery schedule to constitute "a minimal degree of prejudice" unworthy of denying the third-party claims).

Second, the Receiver asserts that the delay caused by the new claims will harm the claimants of the receivership estate, as they "must await a recovery in litigation to obtain a distribution." (Answer at 19.) However, there have been numerous continuances and delays in this case to date,[4] (1R.A.1[5]; 1R.A.3; 1R.A.5;

[4] Including this Court's Order staying the underlying action pending regarding this Petition.

[5] For citations to the Reply Appendix, the number preceding "R.A." refers to the applicable volume of the Appendix, while the number succeeding "R.A." refers to the applicable tab.

1R.A.6; 1.R.A.7; 1R.A.9; 1R.A.17), and nearly every one of extensions of discovery and continuances of trial was consented to or requested by the Receiver. (1R.A.2; 1R.A.4; 1R.A.8; 2R.A.18.)[6] "Conclusory allegations of 'delay and inefficiencies' are not moving, and ring a bit hollow given that the parties, with [the plaintiff's] consent, have already sought several extensions of time that have pushed back the deadlines in this case by months." *Millers Capital Ins., Co.*, 2022 WL 390139 at *13; *BRG Harrison Lofts Urban Renewal LLC v. Gen. Elec. Co.*, No. 2:16-CV-06577, 2020 WL 4932755 at *5 (D.N.J. Aug. 24, 2020) (finding claims of prejudice "unpersuasive" where the "case has already been delayed several times at the requests of" the plaintiffs and defendants). Some "delay is expected with the majority of Rule 14 motions[, and i]f such delay was dispositive in dismissing Rule 14 Motions, few impleader motions would be granted." *Hitachi Cap. Am. Corp. v. Nussbaum Sales Corp.*, No. 09-731 (SDW), 2010 WL 1379804 at *5 (D.N.J. Mar. 30, 2010).

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[6] The Receiver suggests that once this Petition is resolved and the stay is lifted, it will be subject to a tight timeline to get the case to trial within the five-year period set forth in NRCP 41(e). (Answer at 19 n.4.) ***However, the Receiver actually has 715 days (or nearly two years) to bring this case to trial***. This case was commenced on August 25, 2017. (1P.A.5 at 0026.) On March 13, 2020, the Eighth Judicial District Court suspended all jury trials and stayed all civil cases pursuant to NRCP 41(e), due to the COVID pandemic. Admin Order 20-01 (Mar. 13, 2020), at 2:23-24, 27. The COVID-related stay was lifted on July 1, 2021. Admin Order 21-04 (June 4, 2021), at 16:8-10. However, on December 28, 2021, this Court stayed the litigation again, pending the outcome of this writ petition and a related appeal. Therefore, only 1,111 days of the 1,826 days in the five-year period commencing from August 25, 2017, have passed to date.

Finally, the Receiver asserts that for every month of delay in this asset recovery action, it must pay "substantial costs for an electronic discovery database, that take[s] away from the ultimate recovery for the receivership's claimants." (Answer at 19.) It is ironic that the Receiver complains about a monthly expense of $25,000.00 depleting the Receivership Estate's assets the longer this action is delayed, considering the exorbitant amount of costs and fees the Receiver has paid its conflicted counsel, Greenberg — nearly $5 million when UHH filed its motion to disqualify Greenberg, and now in excess of $6 million. (10P.A.42 at 1800:12-13; Opening Br. in No. 82467 (June 14, 2021) at 16:7-15.) Thus, "[f]rom the perspective of judicial economy and litigation expense for the parties, a reasonable delay of trial in this case is ultimately more efficient than relegating such similar factual and legal issues to a separate lawsuit." *Kormylo v. Forever Resorts, LLC*, No. 13-cv-0511 JM (WVG), 2014 WL 3849910 at *2 (S.D. Cal. Aug. 5, 2014).

Therefore, the Receiver has not raised any issues which would support the District Court's denial of UHH's Motion for Leave.

4. The Third-Party Claims Against Xerox and Silver State Would Not Unduly Complicate the Asset Recovery Action.

In denying UHH's Motion for Leave, the District Court stated that it was "concerned about whether the impleader of a third party based on contribution claims would unduly complicate the pending action . . . ." (11P.A.46 at 1997:25-27.) However, "in most cases, 'basic contribution or indemnification claims are

not found to complicate matters at trial because those third-party claims typically involve the same factual circumstances as the underlying complaint.'" *Millers Capital Ins., Co.*, 2022 WL 390139 at *16 (quoting *Campbell v. N.J. Transit Rail Operations, Inc.*, No. 17-5250 (KM) (MAH), 2021 WL 5413983 at *3 (D.N.J. Nov. 18, 2021) (internal quotations and citations omitted)); *Ecommission Sols., LLC v. CTS Holdings, Inc.*, No. 15 Civ. 2671, 2016 WL 6901318 at *4 (S.D.N.Y. Nov. 23, 2016) (finding that impleader would not complicate the issues in the action because they "arise from the same facts that are set forth in plaintiff's . . . complaint"); *Kormylo v. Forever Resorts, LLC*, No. 13-cv-0511 JM (WVG), 2014 WL 3849910 at *2 (S.D. Cal. Aug. 5, 2014) (same). The same is true in this case.

The Receiver contends that Unite Here Health and NHS negligently performed their duties and responsibilities as third-party administrator and medical utilization manager, respectively, by failing to "confirm the eligibility of insureds, paying claims outside of eligibility, not properly tracking and reporting insurance data, mishandling record keeping and computer systems, and generating inaccurate reports that were relied upon by [the CO-OP] and others." (1P.A.6 at 0127:20-21, 0128:7-10, 15-22.) UHH contends that Silver State developed and oversaw Nevada's health exchange, and retained Xerox to develop, administer, and manager the Exchange. (5P.A.25 at 0762:5-9.) Two of Xerox's primary duties were to transfer (i) consumer data, and (ii) consumer premium payments to

insurers (like the CO-OP) and the insurers' vendors (like UHH). (*Id.* at 0762:10-13.) Xerox's development, administration, and management of the Exchange was an unmitigated disaster, and Xerox routinely failed to transmit timely or accurate, or complete information to the insurers or the insurers' vendors regarding consumer data or consumer premium payments. (*Id.* at 0762:14-0763:8.) As a result of Silver State's and Xerox's negligence, the CO-OP and UHH suffered substantial harm which ultimately caused the CO-OP to fail. (*Id.* at 0764:4-15.)

Moreover, issues relating to Xerox's and Silver State's liability will be presented in this case regardless of UHH's ability to allege third-party claims for contribution, as UHH intends to present evidence of Xerox's and Silver State's liability at trial in support of UHH's affirmative defenses. (2R.A.20 at 305:21-25.) In fact, UHH has already conducted extensive discovery regarding Silver State's and Xerox's liability for the damages the Receiver attributes to UHH. (1R.A.10; 1R.A.11; 1R.A.12; 1R.A.13; 1R.A.14; 1R.A.15; 1R.A.16 at 139:14-140:18.) It is well settled that "an overlap between the affirmative defenses asserted by the defendant and the defendant's theories in a third-party complaint suggest that impleader will not spawn undue complication." *Millers Capital Ins., Co.*, 2022 WL 390139 at *16; *Kraus v. Kemp Furniture Indus., Inc.*, No. CIV. A. 93-5777, 1994 WL 196606 at *1 (E.D. Pa. May 13, 1994); *Henn v. Fidelity Nat'l Title Ins.*

Co., No. 12-cv-03077-RM-KLM, 2013 WL 2237491 at *3 (D. Colo. May 21, 2013).

In fact, as the District Court noted, the only "complication" UHH's third-party claims could cause is "by injecting tangential issues such as potential conflicts resulting in the disqualification of [the Receiver's] counsel and impacting [the Receiver's] choice of counsel in the pending matter, potentially prejudicing the [Receiver]." (11P.A.46 at 1997:25-1998:2.) However, as set forth in the Petition, this "prejudice" to the Receiver is self-inflicted and results from the Receiver's knowing and voluntary retention of conflicted counsel. (Pet. at 24-28.) The Receiver has failed to refute this argument; therefore, the fact that impleader of Xerox and Silver State could ultimately result in the disqualification of the Receiver's conflicted counsel is irrelevant and cannot support the denial of the Motion for Leave.

5. <u>It Is Undisputed That UHH Will Suffer Significant Prejudice if Forced to Seek Contribution in a Separate Action.</u>

In determining whether to grant leave for impleader, "courts have also considered whether allowing or denying impleader would impact the interests of the defendant/third-party plaintiff and the third-party defendant." *Millers Capital Ins., Co.*, 2022 WL 390139 at *14. The Receiver has not raised any concerns about impleader having a prejudicial effect on Xerox or Silver State, and, in this case, impleader would likely be beneficial considering the discovery related to

Xerox and Silver State which is already occurring in this action. (*See* Section II(B)(4), *supra*.) However, as set forth in the Petition, UHH will suffer significant prejudice if it is forced to allege its contribution claims in a separate action. (Pet. at 28-31.)

The Receiver has utterly failed to respond to UHH's arguments regarding: (1) the higher burden of proof that must be satisfied to prove its affirmative defenses regarding Xerox's and Silver State's liability; and (2) the fact that UHH could be driven into insolvency attempting to satisfy any judgment the Receiver may obtain against UHH in this action before it commences a separate action against Xerox and Silver State for contribution.[7] Given the undisputed and substantial prejudice to be suffered by UHH, in comparison to the self-inflicted prejudice to be suffered by the Receiver, the District Court abused its discretion in denying the Motion for Leave.

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[7] "'The Second Circuit has stated that the purpose of Rule 14(a) is "to avoid two actions which should be tried together to save the time and cost of a re-duplication of evidence, to obtain consistent results from identical or similar evidence, and ***to do away with the serious handicap to a defendant of a time difference between a judgment against him and a judgment in his favor against the third-party defendant***."'" *iBasis Global, Inc. v. Diamond Phone Card, Inc.*, 278 F.R.D. 70, 75-76 (E.D.N.Y. 2011) (quoting *Hicks v. Long Island R.R.*, 165 F.R.D. 377, 379 (S.D.N.Y. 1996) (quoting *Dery v. Wyer*, 265 F.2d 804, 806-07 (2d Cir. 1959)) (emphasis added).

6. The Proposed Third-Party Complaint Alleges Proper Third-Party Claims Against Xerox and Silver State.

Finally, in an apparent misapprehension of the nature of UHH's proposed third-party claims, the Receiver asserts that UHH's Motion for Leave was properly denied because: (i) UHH is not entitled to contribution for contract-based claims or intentional torts; and (ii) UHH and Xerox do not share a "common obligation" supporting joint liability. (Answer at 23-28.) This is patently false.

UHH is ***not*** seeking contribution for contract-based claims or intentional tort claims. The Receiver's Amended Complaint[8] alleges the following negligence-based tort claims against UHH:

- Forty-Seventh Cause of Action – Professional Malpractice Against NHS;
- Forty-Eight Cause of Action - Negligence against NHS;
- Forty-Ninth Cause of Action – Gross Negligence against NHS;
- Fifty-Third Cause of Action – Negligent Performance of an Undertaking Against NHS
- Sixty-Fourth Cause of Action – Professional Malpractice Against Unite Here Health;

[8] Since the filing of the Petition, the Receiver filed a Second Amended Complaint. The amended pleading does not omit any claims against UHH; rather it alleges new claims for vicarious liability against Unite Here Health and seeks a declaratory judgment that Unite Here Health's contracts are void. (2R.A.19 at 292:24-28, 298:18-299:18.)

- Sixty-Fifth Cause of Action – Negligence Against Unite Here Health;
- Sixty-Sixth Cause of Action – Gross Negligence Against Unite Here Health; and
- Seventy-First Cause of Action – Negligent Performance of an Undertaking Against Unite Here Health.

(1P.A.6, at 0219:2-0221:6, 0223:12-0224:12, 0234:4-0236:3, 0239:1-20.) Moreover, the Receiver alleges that she is entitled to recover punitive damages from UHH based on her claims for gross negligence. (*Id.* at 0221:1-3, 0235:25-27.) However, the Receiver is not entitled to punitive damages for contract-based claims. *Ins. Co. of the West v. Gibson Tile Co.*, 122 Nev. 455, 464, 134 P.3d 698, 703 (2006).[9] Therefore, the Receiver's attempt to paint these negligence claims as contract-based claims or intentional torts fails as a matter of law.

The Receiver further contends there is no "common obligation" to support contribution claims because her claims against Unite Here Health and NHS are based on their failure to perform their "contractual obligations" to the CO-OP based on their vendor contracts; whereas, the third-party claims are based merely

[9] Notably, the Receiver's Second Amended Complaint seeks a declaratory judgment that the contracts between Unite Here Health and the CO-OP are void. (2R.A.19 at 237:14-18, 298:18-299:18.) If successful, the only basis for the Receiver's negligence-based claims is an alleged breach of industry, professional and/or statutory standards.

on Xerox's and Silver State's "obligation" to develop, administer, and/or manage the Exchange. (Answer at 25-26.) However, this is a mischaracterization and over-simplification of the Receiver's claims and the third-party claims. First, each of the Receiver's negligence-based claims explicitly alleges that Unite Here Health and NHS breached their duties of care by failing to perform their services in accordance with contractual standards, as well as ***applicable statutory, professional, and/or industry standards***. (1P.A.6 at 0219:14-17, 0220:1-4, 15-19, 0224:1-8, 0234:13-17, 26-27, 0235:1-2, 13-17, 0239:10-15) (emphasis added). Second, Nevada does not require that "joint torfeasors . . . share[] some responsibility for the failure to carry out a 'common obligation.'" (Answer at 22) (citing *Rio Grande Gas Co. v. Stahmann Farms, Inc.*, 457 P.2d 364, 368 (N.M. 1969)).[10] Nevada's contribution statute merely requires that two tortfeasors be jointly ***or*** severally liable for the same injury to person or property. NRS 17.225(1).

While Xerox and Silver State had an obligation to develop, administer, and/or manage the Exchange, that is not the beginning and end of their liability. As set forth in Section II(B)(4), *supra*, Xerox and Silver State had duties to transfer consumer data and consumer premium payments to insurers and their vendors.

[10] Noticeably, the Receiver failed to cite to a single Nevada legal authority requiring two tortfeasors to have a common obligation in order to qualify for contribution. (Answer a 21-26.)

(5P.A.25 at 0762:10-13.) Xerox and Silver State failed to perform these services in accordance with applicable statutory, professional, and industry standards, in that they routinely failed to transmit accurate, complete, or timely information regarding consumer data or consumer premium payments to the CO-OP and UHH. (*Id*. at 0762:14-0763:8.) Xerox's and Silver State's negligence severely impacted the CO-OP's operations, prevented Unite Here Health and NHS from adequately performing their duties, and materially contributed to the CO-OP's ultimate demise. (*Id.* at 0764:4-15.) In sum, Xerox and Silver State had a duty to provide accurate, complete, and timely consumer data and premium payments to the CO-OP and UHH. Xerox and Silver State breached this duty, which affected Unite Here Health's and NHS' ability to fully and adequately perform their third-party administrative and medical review utilization services for the CO-OP and ultimately contributed to the CO-OP's failure. As such, UHH, Xerox, and Silver State are jointly or severally liable in tort for the same injury to the CO-OP, and UHH has stated a proper claim for contribution against Xerox and Silver State. NRS 17.225(1).

III. CONCLUSION

For the foregoing reasons, this Court should issue an extraordinary writ of mandamus vacating the District Court's Order Denying UHH's Motion for Leave,

and it should instruct the District Court to grant the Motion for Leave and to allow UHH to implead Xerox and Silver State into the asset recovery action.

DATED this 16th day of March, 2022.

BAILEY❖KENNEDY

By: /s/ *Dennis L. Kennedy*
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VERIFICATION

STATE OF NEVADA)

COUNTY OF CLARK)

I, Dennis L. Kennedy, am a partner of the law firm of Bailey❖Kennedy, counsel of record for UHH, and the attorney primarily responsible for handling this matter for and on behalf of UHH. I make this verification pursuant to NRS 34.170, NRS 53.045, and NRAP 21(a)(5).

I hereby declare under penalty of perjury under the laws of the State of Nevada, that the facts relevant to this Reply in Support of Petition for Extraordinary Writ Relief are within my knowledge as attorney for UHH and are based on the proceedings, documents, and papers filed in the underlying action, *State of Nevada ex rel. Nevada Health Co-Op v. Milliman, Inc.*, No. A-17-760558-B, pending in Department XVI of the Eighth Judicial District Court, Clark County, Nevada.

I know the contents of the foregoing Reply in Support of Petition for Extraordinary Writ Relief, and the facts stated therein are true of my own knowledge except as to those matters stated on information and belief. As to any

matters identified as being stated on information and belief, I believe them to be true.

True and correct copies of the orders and papers served and filed by the parties in the underlying action that may be essential to an understanding of the matters set forth in the Reply in Support of Petition for Extraordinary Writ Relief are contained in the Appendix to the Petition and/or the Reply Appendix.

Executed this 16th day of March, 2022.

/s/ Dennis L. Kennedy
DENNIS L. KENNEDY

NRAP 21(e) CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply in Support of Petition for Extraordinary Writ Relief complies with the formatting requirements of NRAP 21(d), NRAP 32(a)(4) and NRAP 32(c)(2), as well as the reproduction requirements of NRAP 32(a)(1), the binding requirements of NRAP 32(a)(3), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because:

[x] This Reply in Support of Petition for Extraordinary Writ Relief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman font 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) because it contains 5,213 words.

3. I further hereby certify that I have read this Reply in Support of Petition for Extraordinary Writ Relief, 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 Reply in Support of Petition for Extraordinary Writ Relief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Reply regarding matters in

the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying Reply in Support of Petition for Extraordinary Writ Relief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of March, 2022.

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 16th day of March, 2022, service of the foregoing **REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT RELIEF and PETITIONERS' REPLY APPENDIX, VOLUMES 1 AND 2,** was made by electronic service through 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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