IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS;

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and the HONORABLE NANCY ALLF, District Court Judge, Dept. 27,

Respondent,

AND

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS & CLARK LTC RRG, INC.,

Real Party in Interest.

Supreme Court Case No.: 78301

APPENDIX TO REAL PARTY IN INTEREST'S ANSWERING BRIEF VOLUME 1 (RPIA0000001-125)

FENNEMORE CRAIG, P.C.
Christopher H. Byrd (No. 1633)
Brenoch R. Wirthlin (No. 10282)
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101
(702) 692-8000
Attorneys for Real Party in Interest
COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS & CLARK LTC RRG, INC.

14939360/037881.0001

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PROOF OF SERVICE

I hereby certify that on the 12th day of June, 2019, I served a copy of the foregoing **APPENDIX TO REAL PARTY IN INTEREST'S ANSWERING BRIEF VOLUME 1 (RPIA0000001-125)** upon the parties to this action by mailing a copy thereof, postage prepaid, via regular U.S. Mail, addressed as follows:

Honorable Nancy Allf
Regional Justice Center
200 Lewis Avenue, Dept. 27
Courtroom 3A
Las Vegas, NV 89155

Joseph P. Garin, Esq.
Angela T. Nakamura Ochoa, Esq.
LIPSON, NEILSON, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, NV 89144

J. Stephen Peek, Esq.
Jessica E. Whelan, Esq.
Ryan A. Semerad, Esq.
Holland & Hart LLP
9555 Hillwood Dr., 2nd Floor
Las Vegas, NV 89134

George F. Ogilvie III, Esq.
McDonald Carano LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102
gogilvie@mcdonaldcarano.com

Jon M. Wilson, Esq.
Kimberly Freedman, Esq.
Broad and Cassel
2 South Biscayne Blvd., 21st Floor
Miami, FL 33131

/s/ Morganne Westover
An Employee of Fennemore Craig, P.C.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ONEIDA SAVINGS BANK; MARQUIS COMPANIES I, INC.; PINNACLE HEALTHCARE, INC.; ROHM SERVICES CORPORATION; HEATHWOOD HEALTH CARE CENTER, INC.; and EAGLE HEALTHCARE, INC.,

Plaintiffs,

-vs-

UNI-TER UNDERWRITING MANAGEMENT CORPORATION; UNI-TER CLAIMS SERVICES CORPORATION; U.S. RE COMPANIES, INC.; SANFORD ELSASS; DONNA DALTON; JONNA MILLER; and RICHARD DAVIES,

Defendants.

Civil Action No.
5:13-CV-0476 (MAD/ATB)

Oral Argument Requested

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

HISCOCK & BARCLAY, LLP
Attorneys for Plaintiffs
Office and Post Office Address
One Park Place
300 South State Street
Syracuse, New York 13202
Telephone: (315) 425-2836
Facsimile: (315) 703-7361
E-mail: gnugent@hblaw.com
dburch@hblaw.com

GABRIEL M. NUGENT
DAVID G. BURCH
of Counsel

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Plaintiffs Oneida Savings Bank; Marquis Companies I, Inc.; Pinnacle Healthcare, Inc.; Rohm Services Corporation; Heathwood Health Care Center, Inc.; and Eagle Healthcare, Inc. ("Plaintiffs"), by and through their attorneys, Hiscock & Barclay, LLP, submit this Memorandum of Law in opposition to the motions of Defendants to dismiss Plaintiffs' Complaint, and in support of Plaintiffs' cross-motion for leave to file an amended complaint. For the reasons set forth below, Defendants' motions should be denied. Alternatively, Plaintiffs should be granted leave to file an amended complaint.

PRELIMINARY STATEMENT

This case is about a systematic fraud scheme carried out by defendants to induce Plaintiffs to invest $2.2 million in a captive insurance company known as Lewis & Clark LTC Risk Retention Group, Inc. ("Lewis & Clark"), despite their knowledge that Lewis & Clark was destined to fail. The Defendants are Uni-Ter Underwriting Management Corporation ("Uni-Ter"); Uni-Ter Claims Services Corporation ("UCSC"); their parent company U.S. Re Companies, Inc. ("U.S. Re"); and individual defendants Sanford Elsass, then CEO of Uni-Ter; Donna Dalton, then CFO of Uni-Ter; Jonna Miller, Vice President—Claims of Uni-Ter; and Richard Davies, CFO of U.S. Re. (collectively, "Defendants"). All Defendants played an integral role in defrauding Plaintiffs through a series of misrepresentations and omissions.

Defendants, as detailed in the Complaint, perpetrated this fraud to keep Lewis & Clark—which was managed by Uni-Ter and UCSC as fiduciaries—a going concern so that Uni-Ter and USCS could continue to earn management fees, and so U.S. Re could mitigate exposure to certain reinsurance policies U.S. Re had brokered.

The individual defendants actively participated in the scheme by knowingly making materially false statements about the adequacy of Lewis & Clark's capitalization and reserves to

cover contingent claims from its insureds. Ms. Dalton issued a financial statement shortly before asking Plaintiffs to make their investments purporting to show Lewis & Clark had no capitalization problems and adequate claims reserves. Ms. Miller and Mr. Elsass followed by affirming, ***twice***, that there were no unreported claims developments, even after the Plaintiffs specifically asked for this confirmation before committing to their investments. Mr. Davies, as CFO of U.S. Re, actively monitored the meetings in which Uni-Ter's officers made false statements, but made no effort to correct the misrepresentations although he knew they were false. Moreover, U.S. Re controlled all these actions as Uni-Ter's parent, beginning with Mr. Davies' monitoring and guidance, continuing on to active participation in the fraud, and concluding with unfettered assumption of control over the management of Lewis & Clark.

Defendants have asked this Court to dismiss the Complaint, primarily because they assert their misrepresentations have been pleaded without sufficient particularity, and because they argue they lacked scienter. However, as set forth below, Plaintiffs have more than adequately pleaded their claims.

Although securities fraud claims must meet heightened pleading standards, the Second Circuit has routinely cautioned district courts not to "impos[e] . . . exceedingly onerous burden[s] on the plaintiffs with respect to their obligation to plead facts with particularity." *See e.g., Novak v. Kasaks*, 216 F.3d 300, 303 (2d Cir. 2000). Plaintiffs have met the particularity standard with their allegations, providing a significant amount of factual detail regarding oral misrepresentations made by the people Plaintiffs trusted to run the business they invested in, during meetings and on telephone calls at a time when Plaintiffs did not realize they were being defrauded.

Plaintiffs also have established scienter in their Complaint. The allegations demonstrate

Defendants undertook this scheme for a number of specific reasons, each of which alone is sufficient to satisfy the scienter pleading standards: (a) Uni-Ter stood to earn $1 million from additional management fees if it could keep Lewis & Clark alive for just a short period of time; (b) U.S. Re stood to protect itself from claims of self-dealing from the reinsurer with whom it placed the Lewis & Clark reinsurance coverage—if that policy was triggered, the reinsurer could have uncovered the plot in which Uni-Ter and U.S. Re had engaged to string Lewis & Clark slowly along to its inevitable dissolution in an effort to collect additional management fees; and (c) the individual defendants, each an officer of a corporate defendant, had strong motives to carry out the scheme supported by their misrepresentations. As a result, Defendants' challenges to Plaintiffs' securities fraud claims must fail. Defendants' challenges to the state law claims pleaded by Plaintiffs must fail for similar reasons.

Ms. Miller has also moved to dismiss for lack of personal jurisdiction. But, the allegations of her conduct, including many phone calls, e-mails, other correspondence, and, of course, the fraudulent statements directed to New York, readily defeat any claim that her contacts to New York are too attenuated or that her being haled into New York to account for her conduct was unforeseeable.

For these reasons and those more fully set forth below, Defendants' arguments must fail, and their motions should be denied. Alternatively, to the extent the Court were to determine a pleading deficiency exists, Plaintiffs request leave to file an amended complaint, a copy of which is attached to the accompanying Declaration of Gabriel M. Nugent, dated November 27, 2013.

STATEMENT OF FACTS

The following timeline, which is based on facts taken from the Complaint, and, as noted, Plaintiffs' proposed amended complaint, establishes Defendants fraud:

- 2004 – Uni-Ter formed Lewis & Clark to operate as a Risk Retention Group, which subsequently merged with another Risk Retention Group in which Plaintiffs had invested. (Complaint, ¶¶ 39, 41, 42.) Lewis & Clark sought to offer insurance to small health care providers. (Complaint, ¶ 24-26.) Five of the six plaintiffs are themselves small long-term care providers. (Complaint, ¶ 8-12.) None of the plaintiffs had any prior experience managing an insurance company. (Complaint, ¶ 45-46.)

- 2004-2012 – Uni-Ter managed all aspects of Lewis & Clark's business from its inception to the time it entered into dissolution proceedings, and Plaintiffs relied completely on Uni-Ter for complete and accurate information regarding the operations of Lewis & Clark. (Complaint, ¶¶ 45-46.) The management agreement between Lewis & Clark, Uni-Ter and UCSC, required Uni-Ter and UCSC to act as fiduciaries to "manage every aspect of Lewis & Clark's business." (Complaint, ¶ 28.)

- July 2009 – Lewis & Clark, at Uni-Ter's direction, accepted two California-based multi-site long-term care providers, a move that diverged from the established business model of Lewis & Clark because it had not previously insured a large multi-facility operator, which had loss records that were worse than Lewis & Clark's typical underwriting range. (Complaint, ¶ 48.)

- July 2009-July 2011 – The California insureds passed on significant losses to Lewis & Clark, resulting in a net loss to Lewis & Clark of $3.1 million during the three quarters ending September 20, 2011. (Complaint, ¶ 51.) The claims of the California insureds triggered coverage under the reinsurance treaty between Lewis & Clark and BeazleyRe, which U.S. Re had brokered. This was the first time ever that a Lewis & Clark reinsurance contract was triggered. (Complaint, ¶ 54.) As of December 31, 2011, the total shareholders' equity in Lewis & Clark was only $3,545,437. (Proposed Amended Complaint, ¶ 53.)

- September 1, 2011 – Uni-Ter represented to Plaintiffs it was obtaining a full claims review of Lewis & Clark. (Complaint, ¶ 57.) Uni-Ter represented that the one-time operating loss would not result in a financial disruption of Lewis & Clark and that Lewis & Clark retained sufficient capital to support its operations and payment of the Plaintiffs' outstanding debentures. (Complaint, ¶ 55.)

- September 8-9 – U.S. Re Reinsurance Claims Manager William Donnelly arranged for Praxis Claims Consulting ("Praxis") to conduct an audit of Lewis & Clark's claims reserves. Mr. Donnelly scheduled the audit and coordinated travel. Mr. Donnelly was on-site and took part in the meetings during the first day of Praxis' site visit to Uni-Ter on or about September 8, 2011, and Mr. Donnelly supplied all the documents Praxis reviewed before the site visit to Praxis by e-mail. (Declaration of Brian Rosner dated September 30, 2013 ("Rosner Declaration"), Ex. 1 (Docket No. 35); Proposed Amended Complaint, ¶ 76.)

- September 15, 2011 – Uni-Ter provided Plaintiffs with a copy of a claims review report Praxis prepared. (Complaint, ¶ 61.)

- September 21, 2011 – At the Lewis & Clark board meeting in Las Vegas, Nevada, Uni-Ter, through Ms. Miller and Mr. Elsass, told Plaintiffs there were no claims developments not previously reported. This representation was consistent with the findings in the Praxis report that Uni-Ter provided to Plaintiffs prior to the board meeting. (Complaint, ¶¶ 62, 64.) Mr. Davies (of U.S. Re) and Ms. Dalton were both present at the meeting at the time of these statements and said nothing to correct them. (Complaint, ¶ 64.)

- September 21, 2011 – Also at the Board meeting, Ms. Dalton presented the "GAAP Proforma Financial Statement for Period Ending December 31, 2011," prepared for Lewis & Clark by Uni-Ter. This Financial Statement did not raise any question of Lewis & Clark's ability to continue as a going concern and reflected a healthy capital structure, including only the existing claims reserves. (Complaint, ¶ 63.)

- November 7, 2011 – During a telephonic Lewis & Clark board meeting, Uni-Ter, with U.S. Re's acquiescence, reassured Plaintiffs that the capital infusion from the November 2011 Debentures would satisfy Lewis & Clark's capital needs and that the claims reserves were adequate. (Complaint, ¶ 65.)

- November 2011 – Plaintiffs irrevocably committed to investing $2.2 million in Lewis & Clark through November 2011 Debentures. (Complaint, ¶¶ 66-67.) The Plaintiffs subsequently transfer the funds to Lewis & Clark. (Rosner Declaration, Ex. 3 (Docket 35); Proposed Amended Complaint, ¶ 70-71.)

- November 2011 – Uni-Ter issued an Offering Memorandum to the general public that was silent regarding whether existing capital commitments were adequate, but referenced the Plaintiffs' $2.2 million investments as though they already had been made. (Complaint, ¶¶ 82-87.)

- Late November 2011 – U.S. Re required Uni-Ter to conduct an internal full-scale review of all claims reserves. Uni-Ter performs the review without obtaining approval of or notifying Lewis & Clark's board. (Complaint, ¶¶ 71-76.)

- December 2011 – U.S. Re required Uni-Ter to retain Praxis to complete Lewis & Clark's claims review, providing more evidence of control. (Complaint, ¶¶ 71-76.)

- December 17, 2011 – One day after receiving Praxis's audit findings detailing the inadequacies of Lewis & Clark's claims reserves, Ms. Dalton submits a draft of the November 2011 Lewis & Clark financial statements to the Board reflecting that (a) claims reserves had actually decreased since September 2011; (b) the company was profitable; and (c) the company's capital had reached a healthy level. (Complaint, ¶ 73.)

- December 20, 2011 – During a telephonic Lewis & Clark board meeting, Uni-Ter and

U.S. Re, for the first time, informed the Board on a conference call that $5 million must be added to the claims reserves to meet all of Lewis & Clark's obligations and avoid liquidation. (Complaint, ¶¶ 92-93.)

- January 12-14, 2012 – A new third party conducted a claims review at U.S. Re's direction. The result was no change in the reserves booked. (Complaint, ¶¶ 94-95.)

- January – November 2012 – Uni-Ter, led by Tal Piccione CEO of U.S. Re, institutes a number of actions it claims are required to turn Lewis & Clark around. None were successful. (Complaint, ¶¶ 94-96.)

- January 2010-November 2012 – Uni-Ter earned $1.5 million in management fees in 2010, and $1.0 million in management fees during 2011. (Proposed Amended Complaint, ¶ 88.)

- November 2012 – Plaintiffs lose all of their investments in Lewis & Clark and determine that Defendants lied on September 21 and November 7, 2011 about the adequacy of Lewis & Clark's claims reserves and capitalization. (Complaint, ¶¶ 96.)

ARGUMENT

Plaintiffs submit this Memorandum in opposition to the Motions to Dismiss made by all Defendants, who filed two separate motions (Docket Nos. 33 and 35). The Memorandum addresses the Defendants' arguments regarding Defendants' allegations that the Complaint does not meet the pleading standards of the Private Securities Litigation Reform Act of 1995 ("PSLRA") in Point I; U.S. Re's argument that Plaintiffs failed to state a claim for control person liability in Point II; the arguments regarding Plaintiffs' state law claims in Point III; the arguments regarding Plaintiffs' claim for punitive damages in Point IV; and Ms. Miller's argument regarding the Court's personal jurisdiction over her in Point V. Point VI addresses Plaintiffs' alternative request for leave to file an amended complaint.

I. PLAINTIFFS STATED A CLAIM UNDER THE EXCHANGE ACT

A complaint sounding in securities fraud must allege the defendant (1) made a misstatement or omission; (2) of a material fact; (3) with scienter; (4) upon which plaintiff justifiably relied; and (5) which proximately caused plaintiff's damages. *Lattanzio v. Deloitte &*

Touche, 476 F.3d 147, 153 (2d Cir. 2007).

Plaintiffs have alleged facts that, if true, would establish each of these elements as against each Defendant. Defendants make various arguments regarding the quality of Plaintiffs' allegations, contending the Complaint is not particular enough on some topics. However, as set forth below, the Complaint meets the requirements set forth in the PSLRA.

A. Plaintiffs have stated the Defendants' misrepresentations with the particularity the PSLRA requires.

Although the PSLRA imposes a heightened pleading standard for securities fraud claims, it is well settled that a misrepresentation allegation is proper if the complaint contains sufficient detail regarding the statement, when it was made, and why it was misleading. *Gabriel Capital, L.P. v. NatWest Fin., Inc.*, 94 F. Supp. 2d 491, 504 (S.D.N.Y. 2000) (motion to dismiss denied where plaintiffs could not quote defendants' oral representations, but identified the relevant dates, the individuals present, and the specifics of the statements); *Nathel v. Siegal*, 592 F. Supp. 2d 452, 463 (S.D.N.Y. 2008) (motion to dismiss denied where plaintiffs' allegations of fraud were based on unrecorded statements of defendants, stated to the best of the plaintiffs' recollection); *Vento & Co., LLC v. Metromedia Fiber Network*, No. 97-CV-7751 (JGK), 1999 U.S. Dist. LEXIS 3020, at *17-18, 21 (S.D.N.Y. March 18, 1999) (motion to dismiss denied where the plaintiff's allegations of fraud were based on information and belief of defendants' statements because the plaintiff specified the dates and facts about the involvement of each defendant); *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 485 (S.D.N.Y. 2011) (motion to dismiss denied where defendants were officers, giving rise to a presumption that statements in published information, such as annual reports, were the collective work of those individuals with direct involvement in the everyday business of the company); *In re WorldCom, Inc. Sec. Litig.,* 294 F. Supp. 2d 392, 427 (S.D.N.Y. 2003); *Goldstein v. Solucorp*

Indus., No. 11-CV-6227 (VB), 2013 U.S. Dist. LEXIS 64231, at *15-16 (S.D.N.Y. March 19, 2013) (holding that plaintiffs sufficiently pleaded a Rule 10b-5 claim where plaintiffs specified the dates, times, and places where each defendant made false material statements); *Patriot Exploration, LLC v. Sandridge Energy, Inc.*, No. 11-CV-01234 (AWT), 2013 U.S. Dist. LEXIS 92249, at *68-69 (D. Conn. June 29, 2013) (motion to dismiss denied despite the fact the complaint did not attribute any false or misleading statements directly to one defendant, because moving defendant was an upper level officer). Furthermore, omissions by corporate officers are actionable. *In re Bristol Myers Squibb Co. Sec. Litig.*, 586 F. Supp. 2d 148, 170 (S.D.N.Y. 2008) (denying motion to dismiss where corporate officer failed to correct misstatement made by the company in describing a settlement of a patent infringement lawsuit he had negotiated).

The cases cited above demonstrate that photographic recitation and attribution of the misrepresentation is not required when pleading a violation of Rule 10b-5. For example, in *Gabriel Capital, L.P*, the Southern District of New York allowed a claim to proceed where the plaintiff alleged only the date of an oral misrepresentation, did not quote the words spoken or specify the particular person who spoke them, and named only one person present when the misrepresentation was uttered. 94 F. Supp. 2d at 504.

Similarly, in *Patriot Exploration*, the court held a complaint pleaded a 10b-5 claim with sufficient particularity against an officer of a company even though it did not identify the speaker. 2013 U.S. Dist. LEXIS 92249, at *68-69. The court found that the moving defendant officer was involved in a series of investor presentations and negotiation discussions with the plaintiffs regarding investing, and drawing inferences in the light most favorable to plaintiffs, the allegations in the complaint could support a conclusion that he knew of the alleged misstatements and omissions and failed to disclose or correct the fraud. *Id*.

Under these standards, Plaintiffs stated the Defendants' misrepresentations and omissions with the particularity the PSLRA requires. As alleged in the Complaint:

- "[D]uring the September 21, 2011 meeting [between the Plaintiffs and Defendants], Ms. Dalton presented the "GAAP Proforma Financial Statement for Period Ending December 31, 2011" that Uni-Ter had prepared for Lewis & Clark. This Financial Statement did not raise any question of Lewis & Clark's ability to continue as a going concern and reflected a healthy capital structure, including only the existing claims reserves." (Complaint, ¶ 63.)

- "During the September 21, 2011 meeting, the directors representing the Plaintiffs asked Uni-Ter's representatives, Mr. Elsass and Ms. Miller, whether there were any claims developments not previously reported. Ms. Miller replied that there were none, and Mr. Elsass agreed. Mr. Davies of U.S. Re said nothing. Ms. Dalton also remained silent." (Complaint, ¶ 64.)

- "Subsequently, on November 7, 2011, the Board of Directors held a telephonic board meeting to discuss the November 2011 Debentures, and again Uni-Ter, with U.S. Re's acquiescence, reassured the Plaintiffs that the capital infusion from the November 2011 Debentures would satisfy Lewis & Clark's capital needs and that the claims reserves were adequate." (Complaint, ¶ 65.)

- "[D]espite Uni-Ter's earlier representation that Praxis had been retained to do a complete claims analysis, the Lewis & Clark Board of Directors later learned that Uni-Ter limited the scope of Praxis' engagement that resulted in the September15, 2011 report to a review of claims-related processes and of that small sample size of nine specific claims reserves." (Complaint, ¶ 70.)

- "U.S. Re, Uni-Ter, Mr. Elsass, Ms. Miller, and Mr. Davies before the September 21, 2011 meeting knew that Praxis was going to be evaluating the amount of Lewis & Clark's loss reserves because it was likely that the reserves needed to be materially larger. They intentionally misrepresented this material claims development information to the representatives of the Plaintiffs at the September 21, 2011 meeting." (Complaint, ¶ 72.)

- "U.S. Re required Uni-Ter to retain Praxis in December 2011 to complete its full claims review, because U.S. Re had doubts about the adequacy of Lewis & Clark's reserves based on the significantly adverse findings of the internal review. Neither Uni-Ter nor U.S. Re disclosed these doubts to the Plaintiffs despite U.S. Re's knowledge at the time that Uni-Ter's internal review was very negative." (Complaint, ¶ 73.)

Defendants ignore these facts, and focus only on the allegations regarding the adequacy of the claims reserves made during the November 7, 2011 meeting, which is only one part of the

series of misrepresentations they made to Plaintiffs. (Uni-Ter Memorandum, pp. 4-5; Elsass & Dalton Memorandum, pp. 11-13.)

In fact, the all of the misrepresentations and omissions set forth in the Complaint are actionable, including (a) the representation that a full claims review was forthcoming, and Defendants only provided Plaintiffs with a review based on a sample of existing claims; (b) the statement that the claims reserves were adequate in the financial statement Ms. Dalton prepared and circulated; (c) the statement that there were no undisclosed claims developments, which was made by Ms. Miller, agreed to by Mr. Elsass, and acquiesced to by Ms. Dalton and Mr. Davies; and (d) the confirmation from all the Defendants that Lewis & Clark remained financially stable on November 7, 2011.

For each of these statements and omissions, Plaintiffs have alleged who made the statement or omission, the date and occasion of the statement or omission, and why the statements or omissions were false. As a result, Plaintiffs' allegations satisfy the particularity standards of the PSLRA.

B. Plaintiffs have adequately alleged each Defendants' scienter.

Defendants next take issue with the allegations of Defendants' scienter. The PSLRA requires that the complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind." 15 U.S.C. § 78u-4(b)(2). In the Second Circuit, a plaintiff need only allege facts that give rise to a "strong inference" of scienter to meet this standard. *Shields v. Citytrust Bancorp*, 25 F.3d 1124, 1128 (2d Cir. 1994). A plaintiff may establish the strong inference either "(a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Id*. As the Second Circuit

has instructed, "securities fraud claims typically have sufficed to state a claim based on recklessness when they have specifically alleged defendants' knowledge of facts or access to information contradicting their public statements." *Novak,* 216 F.3d at 311. The Second Circuit also has stated that "great specificity" is not required with regard to scienter allegations so long as a plaintiff alleges "enough facts to support a strong inference of fraudulent intent." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 169 (2d Cir. 2000).

The "strong inference" standard is met when the complaint sufficiently alleges that defendants benefited in a concrete and personal way from the purported fraud; engaged in deliberately illegal behavior; knew facts or had access to information suggesting their statements were inaccurate; or failed to check information they had a duty to monitor. *Novak*, 216 F.3d at 311; *see also In re J.P. Morgan Chase Securities Litigation*, 363 F. Supp. 2d 595, 623-624 (S.D.N.Y. 2005); *In re CIT Group, Inc. Securities Litigation*, No. 08-CV-6613 (BSJ), 2010 U.S. Dist. LEXIS 57467, at *11-12 (S.D.N.Y. June 10, 2010) (plaintiffs adequately alleged scienter by alleging that defendants knew about CIT's lowered lending standards and in some cases affirmatively approved them – while publicly touting the company's conservative and disciplined approaches); *Dobina v. Weatherford Int'l Ltd.*, 909 F. Supp. 2d 228, 246-248 (S.D.N.Y. 2012) (plaintiffs adequately pleaded scienter of CFO's alleged misstatements regarding company internal controls based on the personal participation of the CFO in the design and evaluation of the controls). For example, in *Novak*, the Second Circuit held that plaintiffs satisfied the pleading requirements by alleging the defendants refused to mark down inventory they knew to be worthless, obsolete and unsaleable, and acted intentionally and deliberately to artificially inflate the company's reported financial results. 216 F.3d at 311.

The Complaint meets these pleading standards, as it lays out Defendants' motives and

opportunities in detail, and, in the alternative, alleges facts providing strong circumstantial evidence of conscious misbehavior, or at least recklessness. As evidence of motive, the Complaint details the financial incentives Uni-Ter and U.S. Re, and the individual defendants as officers and employees of those entities, had for misleading the Plaintiffs and inducing their $2.2 million investment.

Defendants contend that the Complaint's allegations of scienter are undermined by Uni-Ter's investment of $500,000 in Lewis & Clark at approximately the same time as the Plaintiffs' investments. However, Defendants' overlook the fact that the management fees Uni-Ter stood to receive by keeping Lewis & Clark operating after the Plaintiffs' $2.2 million investment would far exceed Uni-Ter's $500,000 investment. In fact, Uni-Ter received compensation at 12% of Gross Written premium plus Claims Management fees. (Complaint, ¶ 30.) In 2010, Uni-Ter earned at least $1.5 million in management fees, and earned at least $1.0 million in fees during 2011. Defendants knew that these fees would be automatic for as long as Lewis & Clark continued in operation. Thus, at the time Uni-Ter made its investment along with Plaintiffs, Uni-Ter was guaranteed a 100% return on its $500,000 investment so long as the Plaintiffs' investments could delay Lewis & Clark's inevitable demise.

Despite Defendants' attempt to spin Uni-Ter's investment as one made by an innocent party, it actually provides strong evidence of Defendants' motives for misrepresenting the condition of Lewis & Clark to secure Plaintiffs' investments. By making an investment Defendants further reassured Plaintiffs that Lewis & Clark remained able to continue its operations, even though they knew it was not and that the investments would be lost. Uni-Ter, on the other hand, would double its money as it watched Plaintiffs lose everything.

There are other motives for Uni-Ter's fraud. As alleged in the Complaint, "Uni-Ter, as a

manager of other Risk Retention Groups servicing the same market, was in a position to capture additional business for its other Risk Retention Groups from the new insured parties obtained through the November 2011 offering, which was made possible only by the Plaintiffs' investments." (Complaint, ¶ 88.) Accordingly, "The November 2011 Debentures delayed the inevitable dissolution of Lewis & Clark long enough for Uni-Ter to expand its market share and gain additional insured parties that it could simply service through other Risk Retention Groups Uni-Ter controlled after Lewis & Clark dissolved." (*Id*.)

The Complaint pleads a similar motive for U.S. Re's participation in the fraud. U.S. Re earned commissions for reinsurance placed through it as the reinsurance broker. The longer Lewis & Clark survived its inevitable fate, the more reinsurance policies Lewis & Clark would need, the more commissions U.S. Re would receive. At the same time, injecting $2.2 million of new capital into Lewis & Clark "lowered the exposure of the reinsurance policy U.S. Re had brokered by a similar amount [and] mitigated any claims of self-dealing BeazelyRe may have against U.S. Re for self dealing in a policy U.S. Re knew would be triggered, and protected U.S. Re's reputation in the reinsurance business." (Complaint, ¶ 80.)

The Complaint also details the strong circumstantial evidence of the Defendants' conscious misbehavior, or at least recklessness, by Uni-Ter, U.S. Re, and the individual defendants. The definition of conscious misbehavior is "conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." *Honeyman v. Hoyt*, 220 F. 3d 36, 39 (2d Cir. 2000). Defendants clearly engaged in such behavior.

For example, Uni-Ter had engaged in a pattern of falsifying claims reserves for years,

which Plaintiffs realized only in hindsight after their investments were lost. Plaintiffs now know, and have alleged in their Complaint, that Christine McCarthy, Vice President-Claims for Uni-Ter, began raising reserves by more than 30% in mid-2010, only to be terminated shortly thereafter for, among other reasons, her "tendency to over-reserve for claims without justification." (Complaint, ¶¶ 89-90.) Then, 18 months later, and only after Praxis found the claims reserves to be inadequate, Uni-Ter represented that Ms. McCarthy's policies were newly instituted corrective measures and undertook to raise the reserves. (Complaint, ¶ 91.) This convenient reversal strongly suggests Defendants' long-term plan was to deceive investors with misstated claims reserves as long as possible to attract new investments, while at the same time Uni-Ter earned management fees as long as Lewis & Clark kept operating and U.S. Re earned commissions on reinsurance policies it brokered.

Uni-Ter also falsified the Offering Memorandum it issued days after securing Plaintiffs' investment commitments. (Complaint, ¶¶ 83-87.) When Uni-Ter prepared and issued the Offering Memorandum, Uni-Ter knew the Offering Memorandum failed to disclose material adverse information—specifically, the existence of the Praxis's review. (Complaint, ¶ 83.) Moreover, despite telling Plaintiffs just days earlier that Lewis & Clark's capital would be sufficient after the Plaintiffs' investment of $2.2 million was made, Uni-Ter stated in the Offering Memorandum to the general public that Lewis & Clark required an investment of $50 million to be adequately capitalized. (Complaint, ¶¶ 85-86.) Given its representations to the general public, it is simply unbelievable that Uni-Ter was innocent when it lied to the Plaintiffs. These contrasting representations, made by the same small group of actors, all with a common interest in seeing that Plaintiffs' $2.2 million in new money was invested in Lewis & Clark, are yet more circumstantial evidence demonstrating that the Defendants acted intentionally

improper.

And, perhaps most indicative of Defendants' ongoing misconduct, Defendant Donna Dalton, Uni-Ter's Chief Financial Officer, prepared a financial statement for Lewis & Clark in late-December – ***after receiving the final Praxis report*** establishing conclusively the inadequacies of Lewis & Clark's capitalization – purporting to show that claims reserves and capitalization were adequate. (Complaint, ¶ 73.) This fact alone is enough to defeat Defendants' claims of innocent intent. Defendants claim the Complaint does not adequately plead scienter, in part, because it does not include enough facts to demonstrate Defendants knew their representations were false. However, Ms. Dalton's preparation and distribution of a financial statement, after receiving the final Praxis report, demonstrates Defendants were acting in a continuing scheme to defraud Plaintiffs through misstated financial statements and other false representations.

Meanwhile, as Uni-Ter was convincing Plaintiffs to pour more money into a losing venture based on misrepresentations of the financial health of the company, U.S. Re continued to monitor developments with Lewis & Clark's claims load, but never brought any of the adverse developments to Plaintiffs' attention. Moreover, U.S. Re continued to exert an ever-growing authority over Uni-Ter's management of Lewis & Clark, peaking with U.S. Re's direction to obtain the Praxis review. (Complaint, ¶¶ 60, 64, 71,73, 84, 94.)

These actions all provide a strong circumstantial evidence that the Defendants were consciously, or at the very least recklessly, misleading Plaintiffs.

C. Plaintiffs adequately pleaded their reliance on the Defendants' misrepresentations.

Contrary to Defendants' arguments, the Complaint's allegations regarding Plaintiffs' reliance are both factually accurate and sufficiently particular. To make out a fraud claim, a

plaintiff must show that it reasonably relied on the misrepresentations of the defendant. *Securities and Exchange Commission v. DiBella,* 587 F.3d 553, 563 (2d Cir. 2009). The Second Circuit has stated that "our evaluation of the reasonable-reliance element has involved many factors to 'consider[] and balance[],' no single of which is 'dispositive.'" *Id.* (*citing Brown v. E.F. Hutton Grp., Inc.*, 991 F.2d 1020, 1032 (2d Cir. 1993)). These factors include but are not limited to (1) the sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of longstanding business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) the concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated the stock transaction; and (8) the generality or specificity of the misrepresentations. *Id.*; *CredSights, Inc. v. Ciasullo,* 05-CV-9345 (DAB), 2007 U.S. Dist. LEXIS 25850 at *36-37 (S.D.N.Y. March 26, 2007).

The Second Circuit has cautioned that the word "reasonable" is inherently imprecise and, thus, is often a question of fact for a jury rather than a question of law for the court. *STMircoelectronics, N.V. v. Credit Suisse Sec. (USA) LLC* , 648 F.3d 68, 81 (2d Cir. 2011); *Aiena v. Olsen*, 69 F. Supp. 2d 521, 538 (S.D.N.Y. 1999); *Miller v. Genesco, Inc.*, 93-CV-0096 (LMM), 1996 U.S. Dist. LEXIS 13069 at *25-26 (S.D.N.Y. Sept. 9, 1996). For example, in *Aiena*, the court denied a motion for judgment on the pleadings finding that the reasonableness of reliance was not determinable as a matter of law. 69 F. Supp. 2d at 538. There, plaintiffs alleged a longstanding business and personal relationship with the defendants and that the defendants owed plaintiffs a fiduciary duty. *Id.* Similarly, in *Miller*, the court denied a motion for summary judgment based on a lack of reliance because there was a triable issue of fact because the parties had a longstanding business relationship, only the

defendants had access to certain relevant information, and defendants owed a fiduciary duty to the plaintiffs as shareholders. 1996 U.S. Dist. LEXIS at *25-26.

The standards for reliance on an omission are even more favorable to plaintiffs. As held by the Supreme Court, where a fiduciary in a face-to-face transaction elected to "stand mute" and failed to disclose material facts, "positive proof of reliance is not necessary to recovery . . . [a]ll that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this [investment] decision." *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 154 (1972), *reh'g denied*, 407 U.S. 916, and 408 U.S. 931 (1972). In fact, there is a rebuttable presumption that plaintiffs relied on defendants' omissions. *In re Beacon Assocs. Litig.,* 745 F. Supp. 2d 386, 409 (S.D.N.Y. 2010); *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta,* 522 U.S. 148, 159 (2008) ("[I]f there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance.") (*citing Affiliated Ute Citizens of Utah*, 406 U.S. at 154; *see also Du Pont v. Brady*, 828 F.2d 75, 78 (2d Cir. 1987) ("[I]f the plaintiff proves that the facts withheld are material in the sense that a reasonable investor might have considered them important, reliance will be presumed." (internal citation omitted)).

Finally, allegations of reliance are not subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b) and the PSLRA—all that is necessary to properly plead reliance is for the complaint to connect the defendants' fraud with the plaintiffs' purported loss in a manner consistent with the "short and plain statement" standard of Fed. R. Civ. P. 8(a). *In re Bristol Myers Squibb Co. Sec. Litig.*, 586 F. Supp. 2d at 163.

Plaintiffs' pleading meets these standards. As alleged in the Complaint, "Plaintiffs did actually and justifiably rely to their detriment upon Defendants' fraudulent misrepresentations by

investing $2.2 million in Lewis & Clark, and, in the case of Oneida Savings Bank, by not taking action to collect its outstanding $1 million surplus debenture. (Complaint, ¶ 105.) This allegation follows the detailed pleading of why the Plaintiffs were reasonable in their reliance:

- "Lewis & Clark engaged Uni-Ter pursuant to a management agreement to provide all of the insurance company services necessary to run Lewis & Clark, including the placement of reinsurance with third parties." (Complaint, ¶ 28.)

- "Pursuant to the terms of the management agreement, which Lewis & Clark and Uni-Ter renewed in January 2011 …, ***Uni-Ter was to act as a fiduciary*** of Lewis & Clark and ***manage every aspect of Lewis & Clark's business***." (*Id*.) (Emphasis added.)

- "The Plaintiffs were…dependent upon defendant Uni-Ter for complete and accurate information regarding the operations of Lewis & Clark. Knowing this, Uni-Ter and UCSC agreed, in a written Management Agreement, to provide this, as well as other services, to Lewis & Clark." (Complaint, ¶ 45.)

- "Plaintiffs reasonably relied on Uni-Ter's superior expertise in the insurance business at all relevant times." (Complaint, ¶ 46.)

- "[O]n or about September 1, 2011, Mr. Elsass and Ms. Dalton sent a memorandum to the Lewis & Clark Board of Directors to outline the recent events causing financial difficulties and to outline 'Uni-Ter's proposed action plan.' (Complaint, ¶ 57.) Included in that action plan, was that Uni-Ter would hire '[a] consultant…to do a complete analysis of the claims process of Uni-Ter Claims Services Corp' and that '[w]e should have his report to share with the board at the September 21st meeting.'" (*Id*.)

- The packages Uni-Ter prepared for each Lewis & Clark Board Member for the September 21, 2011 meeting included a report from the consultant, the Praxis Claims Consulting [Group], dated September 15, 2011"—the same report Uni-Ter committed to commissioning in its "action plan" to address Lewis & Clark's financial struggles. (Complaint, ¶ 61.)

- After the report was presented, Uni-Ter requested the Plaintiffs commit to invest $2.2 million, collectively, and confirmed that the investment would return Lewis & Clark to an adequate level of capitalization through the presentation of a "GAAP Proforma Financial Statement for Period Ending December 31, 2011" prepared by Ms. Dalton of Uni-Ter. (Compliant, ¶¶ 61-63.)

- Uni-Ter made the same requests and representations again at a subsequent meeting on November 7, 2011. (Complaint, ¶ 65.)

- Thereafter, the Plaintiffs committed, irrevocably, to make the investments that are the

subject of this action. (Complaint, ¶ 66.)

Defendants argue that the allegation of reliance is "factually inaccurate" because Marquis, Pinnacle, Rohm, and Heathwood funded a portion of their investments after they were informed that the second Praxis audit had found that claims reserves were inadequate. Although it is true that the actual transfer of a portion of the cash occurred for these Plaintiffs in February 2012, each had fully committed to the investments in November 2011, and these Plaintiffs, each board members of a closely-held entity, could not break their commitments. To fail to honor their commitments would have, at a minimum, opened these plaintiffs to liability to their fellow directors and investors who already had acted in reliance on the fact that all the plaintiffs were making investments, and that the aggregate of their investments was $2.2 million—an amount Defendants told the Plaintiffs was a threshold that needed to be crossed to keep Lewis & Clark adequately capitalized.

Moreover, Uni-Ter already had issued the Offering Memorandum to the general public in November 2011, which stated as follows:

> The Company has experienced significant underwriting losses in 2011 and has increased its capital by $2,220,000 as a result of surplus not contributions and, as a result, had a capital and surplus of approximately $3.7 million as of September 30, 2011.

(Complaint, ¶ 84.)

Accordingly, the Defendants put those four Plaintiffs in the position of causing the Offering Memorandum to be false if they failed to honor their commitments, which would potentially have opened them, Lewis & Clark (and Defendants) to liability to those who made additional investments in reliance on the Offering Memorandum. And, this liability could have been much greater to each of the Plaintiffs than the loss of their doomed investments.

Through deliberate misrepresentations designed to enrich themselves, Defendants forced

Plaintiffs to face the Hobson's choice of abandoning their promise to their partners and potentially incurring significant damages, or completing the funding on their investment commitment. Defendants should not now be permitted to benefit from their own misconduct simply because Plaintiffs made what seemed to be the least worse of these choices.

Indeed, Defendants continued to make it seem like the latter choice in fact was the least worse of Plaintiffs' sorry options. In December 2011 and January 2012, Mr. Piccione, CEO of U.S. Re had assumed control of Uni-Ter and UCSC's management of Lewis & Clark and had instituted a number of actions he said were designed to return Lewis & Clark to stability. (Complaint, ¶ 94.) Defendants were only beginning to implement those turn-around plans in February 2012 at the time the last of the Plaintiffs had transferred the funds for their investments. Defendants, including Uni-Ter and UCSC as fiduciaries under the Management Agreement, represented they had a plan to fix Lewis & Clark's claims reserve problems, effectively stating, "just trust us." Of course, Plaintiffs now know with the benefit of hindsight what Defendants concealed from them: that the turn-around plans were doomed to fail. Accordingly, Defendants arguments regarding the timing of Plaintiffs' investments do not defeat Plaintiffs' reliance on Defendants' misrepresentations.

Finally, Defendants argue that Plaintiffs could not rely on the September 15, 2011 Praxis Report as an indication that the claims reserves were adequate because it contained language regarding the fact that it was only based on a sample. This argument is unavailing to Defendants. "[W]arnings of specific risks . . . do not shelter defendants from liability if they fail to disclose hard facts critical to appreciating the magnitude of the risks described." *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.,* 763 F. Supp. 2d 423, 495 (S.D.N.Y. 2011) (*citing In re Am. Int'l Group, Inc.,* 741 F. Supp. 2d 511, 531 (S.D.N.Y. 2010)). "True

cautionary language must 'warn investors of exactly the risk that plaintiffs claim was not disclosed.'" *Milman v. Box Hill Sys. Corp.*, 72 F. Supp. 2d 220, 230 (S.D.N.Y. 1999) (*quoting Olkey v. Hyperion*, 98 F.3d 2, 5 (2d Cir. 1996)). The fact that the Praxis report stated it was based on a sample and was not a full claims review does not rise to the level of a cautionary statement, and does not undermine Plaintiffs reliance on the report or the Defendants' subsequent misrepresentations about Lewis & Clark's financial stability.

D. Plaintiffs adequately pleaded that the Defendants' misrepresentations caused Plaintiffs' losses.

To state a claim under the PSLRA, a plaintiff must plead that the defendant's misrepresentations proximately caused the plaintiff's loss. *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336, 242-244 (2005). There is no requirement that the loss occur immediately after the misrepresentation—indeed, such a rule would defy logic. *Id*. (holding that "as a matter of pure logic" the plaintiff does not suffer loss at the moment the plaintiff purchases shares at an artificially inflated price). "The loss causation inquiry typically examines how directly the subject of the fraudulent statement caused the loss, and whether the resulting loss was a foreseeable outcome of the fraudulent statement." *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 96 (2d Cir. 2001). Thus, "a misstatement or omission is the 'proximate cause' of an investment loss if the risk that caused the loss was within the zone of risk concealed by the misrepresentations and omissions alleged by the disappointed investor"). *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 173 (2d Cir. 2005); *see also Teamsters Local 445 Freight Division Pension Fund v. Bombardier*, No. 05-CV-1898 (SAS), 2005 U.S. Dist. LEXIS 19506 (S.D.N.Y. Sept. 6, 2005) , *aff'd*, 546 F.3d 196 (2d Cir. 2008) (loss causation sufficiency pleaded where prospectus concealed a condition which then occurred, and the materialization of that condition allegedly caused the loss); *In re Parmalat Securities Litigation*,

375 F. Supp. 2d 278 (S.D.N.Y. 2005) (loss causation sufficiently pleaded where company's inability to pay off maturing bonds was the materialization of the risk concealed by allegedly false financial statements).

Plaintiffs have met the standard for pleading that the Defendants' misrepresentations and omissions "proximately caused" Plaintiffs' losses. The Complaint pleads that Defendants' fraudulent representations induced Plaintiffs to commit to a purchase of securities, and in the case of Oneida Savings Bank, defer collecting a prior debt Lewis & Clark owed to it. (Complaint, ¶ 66, 77, 78.)

Defendants argue that the passage of time—the investments were formally lost approximately one year when Lewis & Clark entered receivership—and intervening events caused Plaintiffs' losses. This argument fails to recognize that Defendants put the chain of events leading to Plaintiffs' losses into motion in the fall of 2011 when they made misrepresentations to Plaintiffs and induced their investments. At that time, Defendants knew that it was inevitable that Lewis & Clark would dissolve and was hopelessly undercapitalized. That one year passed between the time Plaintiffs committed to the investments does not sever causation, and a review of what occurred during that year confirms this. As alleged in the Complaint:

- Plaintiffs committed to the investments in November 2011. (Complaint, ¶ 66.)
- "It was not until a telephonic Lewis & Clark Board of Directors meeting on or about December 20, 2011, that Uni-Ter and U.S. Re informed the Plaintiffs of Praxis' full claims review, its findings, and the resulting adverse financial developments of Lewis & Clark." (Complaint, ¶ 92.)
- "Citing to the Praxis Group audit findings, Uni-Ter and U.S. Re informed the Lewis & Clark Board of Directors that Lewis & Clark's reserves were inadequate and that urgent action was required to preserve Lewis & Clark's capital structure." (Complaint, ¶ 93.)
- "Prior to December 31, 2011, at the direction of U.S. Re's Chief Executive Officer, Tal

Piccione, Uni-Ter initiated three parallel approaches to address the negative developments and preserve Lewis & Clark's capital structure. The approaches were:

a. Retaining another third-party expert (not Praxis Group) to evaluate all open claims and reserves.

b. Contacting Lewis & Clark's reinsurer (Beazely Re) for capital contribution and/or a structured transaction.

c. Participating in discussions with the Nevada Department of Insurance regarding whether to dissolve or recapitalize Lewis & Clark." (Complaint, ¶ 94.)

- "None of Uni-Ter's or U.S. Re's efforts in preserving Lewis & Clark's capital structure succeeded, and Lewis & Clark ultimately entered a dissolution proceeding pursuant to Nevada law on or about November 11, 2012." (Complaint, ¶ 96.)

- "All of Plaintiffs' investments in Lewis & Clark, including the aggregate $2,200,000 investment in November 2011, [were] lost." (Complaint, ¶ 97.)

The passage of time alone from the misrepresentation to ultimate loss does not absolve Defendants of liability. This is not a case where a down market, separate from a defendant's misrepresentations, led to or increased a plaintiff's loss. Plaintiffs' losses were immediate, as Plaintiffs would not have committed to invest and followed through with funding the investments but for Defendants' misrepresentations.

II. PLAINTIFFS STATED A CLAIM FOR CONTROL PERSON VIOLATION

Defendants challenge Plaintiffs' claim for control person liability against U.S. Re based on their arguments that there is no primary Rule 10b-5 claim against Defendants and because Plaintiffs have purportedly not alleged adequate control by U.S. Re over the primary defendants. Both arguments are incorrect. First, as set forth above, Plaintiffs have stated a claim against Defendants Uni-Ter, UCSC and the individual Defendants for violation of Rule 10b-5. (*See* Point I, *supra*.)

Second, Plaintiffs have stated a claim against U.S. Re under Section 20(a) of the Exchange Act. Section 20(a) of the Exchange Act provides that "[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter . . . shall also be

liable jointly and severally with and to the same extent as such controlled person" unless the purported control person can demonstrate he "acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." 15 U.S.C. § 78t.

Courts in the Second Circuit generally apply the following standard when evaluating whether a plaintiff has stated a claim under Section 20(a) : "a plaintiff must allege (1) a primary violation by the controlled [entity], (2) control of the primary violator by the defendant, and (3) that the defendant was, in some meaningful sense, a culpable participant in the controlled person's fraud." *In re Scottish Re Group Sec. Litig.*, 524 F. Supp. 2d 370, 386 (S.D.N.Y. 2007) (quotations and citations omitted). Control person liability need not be pleaded with particularity and is generally analyzed under the "short and plain" statement standard of Rule 8(a). *See Sedona Corp. v. Ladenburg Thalmann & Co., Inc.*, No. 03 Civ. 3120 (LTS) (THK), 2005 U.S. Dist. LEXIS 16382, at *16 (S.D.N.Y. Aug. 9, 2005) ("neither the PSLRA (because scienter is not an essential element), nor Rule 9(b) (because fraud is not an essential element), apply to a Section 20(a) claim").

To plead control, Plaintiffs are required to allege actual control over the controlled person and the transactions at issue. *In re Satyam Computer Services Ltd. Sec. Litig.*, 915 F.Supp.2d 450, 482 (S.D.N.Y. 2013); *Cromer Fin. Ltd. v. Berger*, 137 F.Supp. 2d 452, 484 (S.D.N.Y. 2001). Plaintiffs detailed U.S. Re's extensive involvement and control over the other defendants starting in early fall 2011 with direction to obtain the Praxis Group audit, followed by Mr. Davies, U.S. Re's CFO, participating in update calls to Plaintiffs as they were induced to invest, and continuing through 2012 with Tal Piccione, U.S. Re's CEO, assuming complete and unfettered control over Uni-Ter's management of Lewis & Clark. As set forth in the Complaint:

- "***[U.S. Re], Uni-Ter's parent company, directed Uni-***Ter to make these representations, and to refrain from disclosing known adverse material information."

(Complaint, ¶ 4.) (Emphasis added.)

- "As a direct result of Uni-Ter's intentional misrepresentations and material omissions made at ***U.S. Re's direction***, which Uni-Ter and U.S. Re designed to induce Plaintiffs' investments in Lewis & Clark, Plaintiffs lost all of their investments in Lewis & Clark." (Complaint, ¶ 6.) (Emphasis added.)

- U.S. Re Reinsurance Claims Manager Mr. Donnelly arranged for Praxis to conduct an audit of Lewis & Clark's claims reserves. Mr. Donnelly scheduled the audit and coordinated travel. Mr. Donnelly was on-site and took part in the meetings during the first day of Praxis' site visit to Uni-Ter on or about September 8, 2011, and Mr. Donnelly supplied all the documents Praxis reviewed before the site visit to Praxis by e-mail. (Rosner Declaration, Ex. 1 (Docket No. 35); Proposed Amended Complaint, ¶ 76.)

- Mr. Davies, ***U.S. Re's CFO, attended the Board meetings*** at which the relevant misrepresentations were made. (Complaint, ¶¶ 60, 111.) Mr. Davies did not correct a misrepresentation he knew was false during the September 21, 2011 Board Meeting. (Complaint, ¶ 64.)

- "Notwithstanding the reduced scope of the September 15, 2011 Praxis report and its report to the Board of Directors that the reserves were adequate, Uni-Ter, ***at U.S. Re's direction***, conducted in late November 2011 an internal full-scale review of all claims reserves and subsequently engaged Praxis to also conduct a full-scale review. The internal review was initiated based on Uni-Ter's and U.S. Re's concerns about the adequacy of claims reserves raised in the September 15, 2011 Praxis report." (Complaint, ¶ 71.) (Emphasis added.)

- "U.S. Re, Uni-Ter, Mr. Elsass, Ms. Miller, and Mr. Davies before the September 21, 2011 meeting knew that Praxis was going to be evaluating the amount of Lewis & Clark's loss reserves because it was likely that the reserves needed to be materially larger. They intentionally misrepresented this material claims development information to the representatives of the Plaintiffs at the September 21, 2011 meeting." (Complaint, ¶ 72.)

- "***U.S. Re required Uni-Ter*** to retain Praxis in December 2011 to complete its full claims review, because U.S. Re had doubts about the adequacy of Lewis & Clark's reserves based on the significantly adverse findings of the internal review. Neither Uni-Ter nor U.S. Re disclosed these doubts to the Plaintiffs despite U.S. Re's knowledge at the time that Uni-Ter's internal review was very negative." (Complaint, ¶ 73.) (Emphasis added.)

- ***U.S. Re directed Uni-Ter*** to make material representations and omissions utilizing instrumentalities of interstate commerce in connection with the solicitation of Plaintiffs' purchases of the November 2011 Debentures…" (Complaint, ¶ 110.) (Emphasis added.)

- "In fact, U.S. Re's representative Mr. Davies even attended the November 7, 2011 Board of Directors meeting during which the material misstatements and omissions occurred, and Mr. Davies remained silent despite knowing that Uni-Ter's statements during the meeting were false and that there were material facts not disclosed." (Complaint, ¶ 110-111.)

Accordingly, U.S. Re, as alleged in the Complaint, exercised dominion and control over Uni-Ter, UCSC, and the individual defendants throughout the relevant time period.

Also, Uni-Ter answered to U.S. Re regarding the financial condition of Lewis & Clark and the need to raise capital, notwithstanding that it should have been reporting and responding to the Plaintiffs, as directors of Lewis & Clark (to whom Uni-Ter owed a fiduciary duty), regarding these issues and the reasons the issues arose. Instead, Uni-Ter, at U.S. Re's direction, fraudulently induced Plaintiffs to invest $2.2 million, which investments solely benefited Uni-Ter and U.S. Re by extending the life of Lewis & Clark so Uni-Ter could receive management fees and U.S. Re could proportionately reduce the exposure of the reinsurance it had brokered.

III. PLAINTIFF'S STATE LAW CLAIMS SHOULD NOT BE DISMISSED

The crux of Defendants' arguments regarding Plaintiffs' state law causes of action is that Plaintiffs alleged no misrepresentation. (Uni-Ter Memorandum of Law, pp. 17-18; Elsass & Dalton Memorandum of Law, pp. 9-13.) Defendants argue that the Complaint's inclusion of facts that contradict the alleged misrepresentations undermines Plaintiffs state law claims. (Uni-Ter Memorandum of Law, pp. 17-19; Elsass & Dalton Memorandum of Law, pp. 13.) This is incorrect, as the Complaint is clear that Plaintiffs did not know those facts at the time they committed to their investments. Plaintiffs pleaded that they only knew the following at the time that the Defendants made their misrepresentations:

- Defendants presented a memorandum dated September 1, 2011 to outline "Uni-ter's proposed action plan" following an unanticipated operating loss. "Included in that

action plan, was that Uni-Ter would hire '[a] consultant…to do a complete analysis of the claims process of Uni-ter Claims Services Corp." (Complaint, ¶ 57.)

- Praxis completed that report, and Defendants provided it to the Plaintiffs in September 2011. The report found that there was no fault with any of the sampled claims and found the claims reserves methodology appropriate. (Complaint, ¶¶ 61-62.)

- Defendants…confirmed to Plaintiffs that there were no claims developments not previously reported on September 21, 2011. (Complaint, ¶ 64.) Uni-ter, through Ms. Dalton, also presented the "GAAP Proforma Financial Statement for Period Ending December 31, 2011," which reported only existing claims reserves and did not raise any question of Lewis & Clark's ability to continue as a going concern and reflected a healthy capital structure. (Complaint, ¶ 63.)

- Also, "on December 17, 2011 . . . Donna Dalton submitted a draft of the November 2011 financial statements to the Board reflecting that claims reserves had actually decreased since September 2011, the Company was profitable, and the capital had reached a healthy level." (Complaint, ¶ 73.)

That Plaintiffs also pleaded what Defendants actually knew at the time they made the above detailed misrepresentations (*e.g.*, that Praxis was not formally retained to complete the full review, that the initial Praxis review was only a sample review and a review of process, or that Defendants knew all along that the claims reserves were inadequate), does not contradict the factual allegations underlying the misrepresentation as Defendants argue.

A. Common Law Fraud

A plaintiff states a claim for common law fraud if the Complaint alleges facts establishing the following elements: (1) misrepresentation or a material omission of fact which was false and known to be false by the defendant; (2) that the misrepresentation was made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury. *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 316 (1995); *Peach Parking Corp. v. 346 West 40th Street, LLC*, 42 A.D.3d 82, 86 (1st Dep't 2007).

As detailed extensively above, Plaintiffs pleaded facts meeting each of these elements, including that (1) Defendants knowingly stated to Defendants that Lewis & Clark was adequately capitalized and did not have any adverse claims developments not reported, or failed to correct the misrepresentation in the case of U.S. Re, Mr. Davies, and Ms. Dalton; (2) that Defendants made these false statements to induce Defendants to purchase $2.2 million in convertible debentures; (3) Plaintiffs justifiably relied on the misrepresentation as it relied on Defendants for all analysis of Lewis & Clark's financial condition; and (4) Plaintiffs were injured when they lost their $2.2 million investments. (*See* Point I, *supra*); *see also Pilarczyk v. Morrison Knudsen Corp.*, 965 F. Supp. 311, 322 (N.D.N.Y. 1997) *aff'd* 162 F.3d 1148 (2d Cir. 1998) (stating that "[t]he elements of fraud under New York law and Section 10b are essentially the same").

B. Constructive Fraud

To plead a claim for constructive fraud, a plaintiff must state facts establishing the same elements as those for fraud, except there is no requirement of scienter. *Brown v. Lockwood*, 76 A.D.2d 721, 730-731 (2d Dep't 1980); *see also Schneiderman v. Barandes*, 105 A.D.3d 602 (1st Dep't 2013) (holding that lower court improper dismissed constructive fraud claim because there existed issues of fact regarding both elements of claim: misrepresentation, and reliance). Again, as discussed above, Plaintiffs have stated detailed facts establishing the requisite elements. (*See* Point I, *supra*.)

C. Negligent Misrepresentation

A plaintiff alleging negligent misrepresentation must allege that "the defendant made a false representation that he or she should have known was incorrect . . . [,and that] the plaintiff reasonably relied on it to his or her detriment." *Anschutz Corp. v. Merrill Lynch & Co.*, 690

F.3d 98, 114 (2d Cir. 2012). The Complaint details facts, extensively discussed above, that if true, establish that Defendants knew or should have known Lewis & Clark was inadequately capitalized and had insufficient claims reserves, but stated that its capitalization was sufficient in a financial statement and orally confirmed claims reserves were sufficient. Based on these statements, Plaintiffs invested in Lewis & Clark, and subsequently lost their entire investments because the truth was that Lewis & Clark was hopelessly insolvent because its claims reserves were underfunded. These allegations state a claim for negligent misrepresentation.

D. Fraudulent Inducement

To state a claim for fraudulent inducement, a plaintiff must allege "(1) the defendant made a material, false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance. *Gander Mountain Co. v. Islip U-Slip LLC*, 923 F. Supp. 2d 351 (N.D.N.Y. 2013). These elements are identical to those for common law fraud, and, as discussed above, the Complaint alleges facts establishing each of them.

E. Unjust Enrichment

An unjust enrichment claim is stated on allegations that "(1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004).

The Complaint pleads facts establishing these elements, as follows: "By engaging in the conduct alleged above, Uni-Ter and UCSC have been unjustly enriched by receiving and retaining management fees from Lewis & Clark by prolonging Lewis & Clark's operations funded by the fraudulently induced November 2011 Debentures." (Complaint, ¶ 149.) This

allegation, combined with the other detailed allegations regarding Defendants' deceit and resulting profit are sufficient to support Plaintiffs' claim for unjust enrichment.

Defendants also argue that the unjust enrichment claim is not viable because contracts—the Management Agreement and the debentures—governed their obligations. (Uni-Ter Memorandum of Law, p. 22.) This assertion is incorrect, as Plaintiffs had no contract with Uni-Ter. Lewis & Clark was the party that contracted with Uni-Ter. Further, Plaintiffs claim does not arise under any contract. *See In re First Cent. Fin. Corp*., 377 F.3d 209, 213 (2d Cir. 2004). Neither the Management Agreement nor the debentures gave Defendants the right to the misrepresentations that induced the investments, and those misrepresentations that form the basis for Plaintiffs' claims, including their unjust enrichment claim.

IV. PLAINTIFFS ADEQUATELY STATED A CLAIM FOR PUNITIVE DAMAGES

A claim for punitive damages is proper if a plaintiff alleges the defendant committed an "egregious tort directed at the public at large." *New York Univ.*, 87 N.Y.2d at 316. Thus, a complaint states a claim for punitive damages if (1) defendant's conduct is actionable as an independent tort; (2) the tortious conduct is of an egregious nature; (3) that egregious conduct is directed at plaintiff; and (4) is part of a pattern directed at the public generally. *Rocanova v. Equitable Life Assurance Society*, 83 NY2d 603, 613 (1994).

The Complaint easily meets this standard. Plaintiffs allege throughout the Complaint that Defendants engaged in willful, fraudulent, and malicious conduct in a scheme to defraud Plaintiffs of their investments. Moreover, the Complaint details how Defendants broadened the scope of their fraud on Plaintiffs to the public at large by citing Plaintiffs' investments as providing Lewis & Clark adequate capitalization in the Offering Memorandum seeking investments from the general public. (*See* Complaint, ¶¶ 82-87.) This allegation is sufficient to

support Plaintiffs' claim for punitive damages.

V. JONNA MILLER IS SUBJECT TO THIS COURT'S PERSONAL JURISDICTION

When responding to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff need only make a *prima facie* showing that the court possesses personal jurisdiction. *DiStefano v. Carozzi N. Am., Inc.*, 286 F.3d 81, 84 (2d Cir. 2001); *Litton v. Avomex Inc.*, 08-CV-1340 (NAM/DRH), 2010 U.S. Dist. LEXIS 2881 at *7 (N.D.N.Y. Jan. 14, 2010); *Park West Galleries, Inc. v. Franks*, No. 12-CV-3007 (CM), 2012 U.S. Dist. LEXIS 86629, at *7 (S.D.N.Y. June 20, 2012).

A. Securities Exchange Act Personal Jurisdiction Standard

The first of Plaintiffs' claims against Ms. Miller is based on the Securities Exchange Act of 1934, which provides for worldwide service of process and permits the exercise of personal jurisdiction to the limits of the Fifth Amendment's Due Process Clause. *See* 15 U.S.C. § 77v(a); 15 U.S.C. § 78aa; *Securities and Exchange Commission v. Unifund Sal*, 910 F.2d 1028, 1033 (2d Cir. 1990). Defendant does not argue that Plaintiffs improperly served her. Accordingly, Ms. Miller is subject to this Court's jurisdiction unless its exercise would violate her Fifth Amendment due process rights. *See Securities and Exchange Commission v. Syndicated Food Servs. Int'l*, No. 04-CV-1301 (NGG), 2010 U.S. Dist. LEXIS 91916, at *5 (E.D.N.Y. Sept. 3, 2010).

The due process test for personal jurisdiction has two related components: (1) a minimum contacts inquiry, and (2) a reasonableness inquiry. *See Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996). In federal question cases brought under a statute where Congress has provided for worldwide service of process, a defendant's aggregate contacts with the United States govern the minimum contacts inquiry. *See Chew v.*

Dietrich, 143 F.3d 24, 28 n.4 (2d Cir. 1988); *Syndicated Food*, 2010 U.S. Dist. LEXIS 91916, at *6; *see also Securities and Exchange Commission v. Softpoint Inc.*, No. 95-CV-2951 (GEL), 2001 U.S. Dist. LEXIS 286, at *15 (S.D.N.Y. Jan. 17, 2001); *Securities and Exchange Commission v. Boock*, No. 09-CV-8261 (DLC), 2010 U.S. Dist. LEXIS 59498, at *4 (S.D.N.Y. June 15, 2010). The minimum contacts requirement is satisfied where a defendant's conduct and connection with the United States are such that she should reasonably anticipate being haled into court there. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980); *see also Syndicated Food*, 2010 U.S. Dist. LEXIS 91916, at *7.

The Complaint alleges sufficient contacts by Ms. Miller. She is a citizen and resident of the United States, and all of her alleged unlawful conduct took place in the United States. *See Syndicated Food*, 2010 U.S. Dist. LEXIS 91916, at *7. Indeed, Ms. Miller does not assert she lacks sufficient contacts with the United States; rather, she focuses on her more limited connections to New York. *Id.*

The reasonableness inquiry asks whether the assertion of personal jurisdiction in a particular case comports with "fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). These factors include "[1] the burden on the defendant, [2] the forum state's interest in adjudicating the dispute, [3] the plaintiff's interest in obtaining convenient and effective relief, [4] the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and [5] the shared interest of the several states in furthering fundamental substantive social policies . . . ." *Burger King v. Rudzewicz*, 471 U.S. 462, 476-477 (1985); *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

Where a plaintiff demonstrates sufficient minimum contacts, a defendant must present "a compelling case that the presence of some other considerations would render jurisdiction

unreasonable." *Syndicated Food*, 2010 U.S. Dist. LEXIS 91916, at *8 (*citing Burger King*, 471 U.S. at 477, and *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 116 (1987)). The reasonableness inquiry is "largely academic in non-diversity cases brought under a federal law which provides for nationwide service of process" because of the strong federal interests involved. *Syndicated Food*, 2010 U.S. Dist. LEXIS 91916, at *8 (*citing Softpoint, Inc.*, 2001 U.S. Dist. LEXIS 286, at *20). Most courts continue to apply this test as a constitutional floor to protect litigants from truly undue burdens, but few (and none in the Second Circuit) have ever declined jurisdiction on fairness grounds in similar cases. *Id.* at *89 (*citing Softpoint, Inc.*, 2001 U.S. Dist. LEXIS 286, at *20).

In *Syndicated Food*, the defendants resided in Florida and were subjected to the jurisdiction of federal district court for the Eastern District of New York. *Id.* at 9. The court recognized that this imposed some burden on the defendants, at least relative to other possible forums, but that this burden was relatively minor given the realities of modern transportation and communication as well as the nature of civil litigation. *Id.* Moreover, the court stated that claims brought under the federal securities laws are an area of strong federal concern that fall at the center of Congress' commerce power. *Id.*

This Court has jurisdiction over Ms. Miller under these standards. First, Ms. Miller would be minimally burdened if subjected to federal jurisdiction in the Northern District of New York, given the realities of modern transportation and communications. Additionally, many of the pre-trial conferences may be completed telephonically, almost exclusively by Ms. Miller's New York based counsel, and Ms. Miller herself may never need to visit New York except ofr depositions or trial testimony. Second, New York has a strong interest in litigating this dispute since several of the Plaintiffs suffered the harm caused by Ms. Miller's unlawful conduct in New

York. Third, there is a strong incentive to obtain convenient and effective relief.

Fourth, the interstate judicial system's interest in obtaining the most efficient resolution of controversies urges a New York forum. Ms. Miller states, "there is no reason why Plaintiffs could not pursue their claims against Ms. Miller in Georgia." (Uni-Ter Memorandum of Law, p. 30.) The interstate judicial system has a strong interest in litigating the claims against Ms. Miller with the claims against the other Defendants because they have the same nucleus of operative facts, and litigation against Ms. Miller in Georgia could result in an inconsistent decision with the litigation in New York.

Fifth, the states have a unified interest in encouraging citizens to interact in good faith and legally, and neither Georgia nor New York permits fraud. By dismissing the suit against Ms. Miller, the Court would be disregarding the unified interest of the states in discouraging fraud.

Accordingly, the Court should assert personal jurisdiction over Ms. Miller because the due process requirements are more than satisfied.

B. Claims Based on New York Common Law

Plaintiffs' remaining four claims against Ms. Miller are based on New York State common law. Personal jurisdiction exists with regard to the state law claims based on pendent personal jurisdiction and under the laws of New York.

1. Pendent Personal Jurisdiction

Under the doctrine of pendent personal jurisdiction, where a federal statute authorizes nationwide service of process, and the federal and state claims "derive from a common nucleus of operative fact," a district court may assert personal jurisdiction over the parties to the related state law claims even if personal jurisdiction is not otherwise available. *Comprehensive Inv.*

Servs. v. Mudd (In re Fannie Mae 2008 Sec. Litig.), 891 F. Supp. 2d 458, 480 (S.D.N.Y. 2012) (*quoting United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), and *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056 (2d Cir. 1993)). In other words, once a district court has personal jurisdiction over a defendant for one claim, it may piggyback onto that claim other claims that lacks independent personal jurisdiction, if all the claims arise from the same facts as the claim over which it has proper personal jurisdiction. *Id.* (*citing Rolls-Royce Corp. v. Heros, Inc.*, 576 F. Supp. 2d 765, 783 (N.D. Tex. 2008)). The reasoning for this rule is that a defendant who is already before a court to defend a federal claim is unlikely to be severely inconvenienced by being forced to defend a state claim where the issues are nearly identical or substantially overlap the federal claim. *Id.* (*citing Rolls-Royce*, 576 F. Supp. 2d at 783).

Here, as discussed above, there is a federal claim against Ms. Miller. The basis of the federal claim is identical to the bases for the state claims. Accordingly, the Court should assert pendant personal jurisdiction over Ms. Miller for the state law claims.

2. New York CPLR Bases for Jurisdiction

In the alternative, the Court may also assert jurisdiction over Ms. Miller under New York Civil Practice Law and Rules ("CPLR") 302(a)(3) and 302(a)(1)).

CPLR 302(a)(3) provides for personal jurisdiction over a non-domiciliary when that person commits a tortious act outside of New York causing injury to person or property within New York if that person (i) regularly solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in New York; or (ii) expects or should reasonably expect the act to have consequences in New York and derives substantial revenue from interstate or international commerce.

In *Park West Galleries*, the court determined that the plaintiff adequately alleged

CPLR 302(a)(3)(ii) by asserting that the defendants called, e-mailed, or chatted online with the plaintiff's New York customers and knowingly caused those customers to breach their contracts with the plaintiff by telling them defamatory lies. 2012 U.S. Dist LEXIS 86629, at *21) ".

At the September 21, 2011 meeting with Plaintiffs, including several from New York, Ms. Miller fraudulently stated that there were no claims developments not previously reported in the Praxis report. In addition, Ms. Miller was a party to the November 7, 2011, telephonic board meeting to discuss the November Debentures and, again, reassure Plaintiffs that the capital infusion from the November 2011 Debentures would satisfy Lewis & Clark's capital needs and that the claims reserves were adequate. Accordingly, Ms. Miller's fraudulent acts outside of New York caused injury in New York to Plaintiffs.

Ms. Miller had reason to know that her fraud would cause injury in New York. Plaintiffs and Defendants agreed in writing that Defendants would provide its superior expertise in the insurance business and provide complete and accurate information regarding the operations of Lewis & Clark. Plaintiffs depended on Defendants for this information. Thus, Ms. Miller knew or reasonably should have known that Plaintiffs would rely on her inaccurate information and, hence, have effects in New York. Moreover, Ms. Miller is the Vice President of Uni-Ter—a provider of nationwide claims management services, and, therefore, derives substantial revenue from interstate commerce.

Contrary to Ms. Miller's contention, Plaintiffs do not impute the actions of her employer, Uni-Ter, to her. During the September 21, 2011, meeting, Ms. Miller stated that there were no claim developments not previously reported in the Praxis report. Hence, this is not a situation where the Complaint names Ms. Miller as a defendant simply because her name appears at the top of the corporation's masthead. *See King County, Wash. v. IKB Deutsch Industriebank, AG*,

769 F. Supp. 2d 309, 321 (S.D.N.Y. 2011).

Accordingly, the Court should assert personal jurisdiction over Ms. Miller based on CPLR 302(a)(3).

CPLR 302(a)(1) provides for personal jurisdiction over a non-domiciliary when that person transacts any business within the state or contracts anywhere to supply goods or services in the state.

Courts must look to the totality of the circumstances when determining the existence of a purposeful activity. *Eaton & Van Winkle LLP v. Midway Oil Holding Ltd.*, No. 102759/09, 2010 N.Y. Misc. LEXIS 2594, at *19 (Sup. Ct., N.Y. Cnty., March 15, 2010) (*citing SAS Group, Inc. v. Worldwide Inventions, Inc.*, 245 F. Supp. 2d 543, 548 (S.D.N.Y. 2003)). Such purposeful acts may include contract negotiations between the parties, meetings at which the defendant was present, or letters sent and telephone calls made by the defendant to the plaintiff. *Id.* at 20 (*citing Scholastic, Inc. v. Stouffer*, No. 99-CV-11480 (AGS), 2000 U.S. Dist. LEXIS 11516 (S.D.N.Y. 2000)).

Proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities in New York were purposeful and there is a substantial relationship between the transaction and the claim asserted. *Deutsch Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 71 (2006) (*citing Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988)). Moreover, commercial actors and investors using electronic and telephonic means to project themselves into New York to conduct business transactions are subject to long-arm jurisdiction. *Deutsch Bank*, 7 N.Y.3d at 71.

In *Deutsch Bank*, the Court of Appeals found personal jurisdiction over a defendant where the defendant was a sophisticated institutional trader that knowingly initiated and pursued

negotiations with the plaintiff's employee, communicating by instant messages. *Id.* at 69-71.

Similarly, here, Ms. Miller is the Vice President of Uni-Ter. She is a sophisticated individual, particularly with regard to the insurance business and the setting of claims reserves. Ms. Miller projected herself into New York throughout the various e-mails she sent to Plaintiffs and during the November 7, 2011, teleconference where she and others purposefully reassured Plaintiffs that the capital infusion would satisfy Lewis & Clark's capital needs and that the claims reserves were adequate. When a sophisticated individual knowingly enters New York, whether by phone, through electronic communications or otherwise, to negotiate and conclude a substantial transaction, it is within the embrace of the New York long-arm statute. *Id.* at 72.

Ms. Miller's contacts with Plaintiffs have been anything but temporary, random, or tenuous. Rather her contacts with Plaintiffs and New York have been continual, repetitive, and essential to Uni-Ter's business. *See Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 29 (2d Cir. 1996).

Accordingly, the Court should assert personal jurisdiction over Ms. Miller based on CPLR 302(a)(1).

3. Due Process

In addition to the requirements of the CPLR, to assert personal jurisdiction over a plaintiff based on the CPLR, the court must also find that the assertion comports with due process. *See King County, Wash.*, 769 F. Supp. 2d 309. As discussed above, subjecting Ms. Miller to the jurisdiction of this Court satisfies due process.

V. PLAINTIFFS' MOTION FOR LEAVE TO AMEND THEIR COMPLAINT SHOULD BE GRANTED

Plaintiffs submit that Defendants' Motions to Dismiss should be denied in all respects. In the alternative, and if the Court determines the Complaint is deficient in any way, Plaintiff

respectfully requests leave to file an amended complaint.

Under Fed. R. Civ. P. 15, leave to amend a pleading should be "freely give[n] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). In line with this liberal standard, "[t]he rule in [this] circuit is to allow a party to amend its [pleadings] unless the nonmovant demonstrates prejudice or bad faith." *City of New York v. Grp. Health Inc.*, 649 F.3d 151, 157 (2d Cir. 2011).

Underpinning this rule is the longstanding principle that claims and defenses should be *fully* adjudicated on the merits whenever fair and possible. *See S.S. Silberblatt, Inc. v. E. Harlem Pilot Block-Bldg. 1 Hous. Dev. Fund Co.*, 608 F.2d 28, 43 (2d Cir. 1979) (recognizing "the policy of Rule 15(a) in favor of permitting the parties to obtain an adjudication of the merits"). In determining whether prejudice would result from amendment, courts consider whether the newly asserted claim or defense would: (1) "require the opponent to expend significant additional resources to conduct discovery and prepare for trial"; (2) "significantly delay the resolution of the dispute"; or (3) "prevent the plaintiff from bringing a timely action in another jurisdiction." *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993).

Plaintiffs' proposed amended complaint, attached as Exhibit A to the Declaration of Gabriel M. Nugent, simply adds additional detail to respond to Defendants' criticisms of the Complaint's particularity about certain elements of the claims. It does not seek to assert any new or different claims. At this early stage of the litigation, allowing Plaintiffs to amend the Complaint to cure any perceived deficiencies will neither require Defendants to expend resources to conduct additional discovery, nor delay the resolution of the dispute. Accordingly, in the event the Court determines the Complaint fails to state one or more claims, Plaintiffs respectfully request leave to file an amended complaint.

CONCLUSION

For the reasons set forth above, and in the accompanying affidavit, Defendants' Motions to Dismiss should be denied. In the alternative, Plaintiffs respectfully request leave to serve the proposed amended complaint, together with any such other and further relief as the court deems just and proper.

DATED: November 27, 2013 **HISCOCK & BARCLAY, LLP**

By: /s/ Gabriel M. Nugent
Gabriel M. Nugent
Bar Roll No. 513947

David G. Burch
Bar Roll No. 514487

Attorneys for Plaintiffs
One Park Place
300 South State Street
Syracuse, New York 13202
Telephone (315) 425-2700
Facsimile (315) 425-2701
gnugent@hblaw.com
dburch@hblaw.com

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TPC
LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.
JOSEPH P. GARIN, ESQ.
Nevada Bar No. 6653
ANGELA OCHOA, ESQ.
Nevada Bar No. 10164
SIRIA L. GUTIERREZ, ESQ.
Nevada Bar No. 11981
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500
(702) 382-1512 - fax
jgarin@lipsonneilson.com
aochoa@lipsonneilson.com
sgutierrez@lipsonneilson.com

Attorneys for Defendants/Third-Party Plaintiffs Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels

LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
Telephone: (702) 382-1500 Facsimile: (702) 382-1512

DISTRICT COURT

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Plaintiff, vs. ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, Uni-Ter UNDERWRITING MANAGEMENT CORP., Uni-Ter CLAIMS SERVICES CORP., and U.S. RE CORPORATION,; DOES 1-50, inclusive; and ROES 51-100, inclusive, Defendants.	Case No.: A-14–711535-c DEPT. NO.: 27 **DEFENDANTS AND THIRD-PARTY PLAINTIFFS ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS' THIRD-PARTY COMPLAINT**

ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS

Third-Party Plaintiffs

vs.

SANFORD ELSASS, an individual; DONNA DALTON, an individual; and DOES 1-50, inclusive; and ROES 51-100, inclusive.

Third-Party Defendants.

Defendants/Third-Party Plaintiffs ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL and ERIC STICKELS (collectively "Third-Party Plaintiffs" or "the Board") by and through their attorneys at the law firm of Lipson Neilson Cole Seltzer & Garin, PC, hereby allege against Third-Party Defendants SANFORD ELASASS and DONNA DALTON (collectively "Third-Party Defendants") as follows:

GENERAL ALLEGATIONS

1. Third-Party Plaintiff Jeff C. Marshall is a resident of the State of Washington, and served as the Chairman of the Board for Lewis and Clark LTC Risk Retention Group, Inc. ("L&C") at all times relevant.

2. Third-Party Plaintiff Steve Fogg is a resident of the State of Oregon, and served as a Director for L&C at all times relevant.

3. Third-Party Plaintiff Mark Garber is a resident of the State of Oregon and served as a Director for L&C at all times relevant.

4. Third-Party Plaintiff Robert Hurlbut is a resident of the State of New York and served as a Director for L&C at all times relevant.

5. Third-Party Plaintiff Carol C. Harter is a resident of the State of Nevada and served as a Director for L&C at all times relevant.

LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
Telephone: (702) 382-1500 Facsimile: (702) 382-1512

LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.
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Las Vegas, Nevada 89144
Telephone: (702) 382-1500 Facsimile: (702) 382-1512

6. Third-Party Plaintiff Eric Stickels is a resident of the State of New York and served as Secretary and Treasurer for L&C at all times relevant.

7. Third-Party Plaintiff Robert Chur is a resident of the State of New York and served as a Director for L&C at all times relevant.

8. Third-Party Plaintiff Barbara Lumpkin is a resident of the State of Florida and served as a Director for L&C at all times relevant.

9. Upon information and belief, Third-Party Defendant Sanford Elsass ("Elsass") is a resident of Massachusetts and served as CEO of Unit-Ter at all times relevant.

10. Upon information and belief, Third-Party Defendant Donna Dalton ("Dalton") is a resident of Georgia and served as COO and CFO of Unit-Ter at all times relevant.

11. Third-Party Plaintiffs are presently unaware of the true names or capacities of Third-Party Defendants herein designated as DOES 1 through 50 and ROES 51-100, inclusive, which Third-Party Plaintiffs are informed and believe, and based upon such information and belief, allege that Third-Party Defendants, designated as DOES and ROES, in some manner, are responsible for the occurrences and damages as alleged herein and as alleged in Plaintiff's Complaint. Third-Party Plaintiffs will seek leave of this Court to amend this Third-Party Complaint to allege their true names and capacities after the same have been ascertained.

12. Upon information and belief, each of the Third-Party Defendants, including DOES and ROES, are legally responsible for the acts and omissions alleged herein and as alleged in Plaintiffs' Complaint, and actually and proximately caused and contributed to the damages referred to herein and in Plaintiffs' Complaint.

13. Without admitting the allegations contained in Plaintiff's Complaint, Third-Party Plaintiffs allege that if they are found liable for any alleged damages to Plaintiffs, such damages were primarily and ultimately caused by the acts, breaches, and/or omissions of Third-Party Defendants, where Third-Party Plaintiffs' acts, if any, were secondary, passive, or derivative in nature.

LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.
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14. Third-Party Plaintiffs hereby incorporate, without admitting or denying, paragraphs 30 through 154 of Plaintiff's Complaint for purpose of judicial economy and to establish the general allegations of the initial Complaint and overall lawsuit.

15. Due to the acts, breaches, and/or omissions of Third-Party Defendants, The Nevada Commissioner of Insurance appointed a Receiver for L&C. The Receiver has asserted four causes of action: 1) Gross negligence of the former Officers and Directors of L&C; 2) Deepening of the insolvency of L&C caused by former Directors and Officers; 3) Negligent misrepresentation by Uni-Ter; 4) Breach of fiduciary duty by Uni-Ter UMC and Uni-Ter CS; 5) Breach of fiduciary duties against U.S. Re Corporation.

16. The Receiver alleges only the first two causes of action against Third-Party Plaintiffs.

BACKGROUND OF L&C

17. L&C was established in late 2003 to early 2004 in Nevada. L&C was organized as a risk retention group to write professional and general liability coverage for long-term care facilities in the Pacific Northwest.

18. In 2004, L&C executed a Management Agreement with Uni-Ter Underwriting Management Corp., a wholly owned subsidiary of U.S. Re Companies, Inc. and entered into a new agreement in 2011. L&C appointed Uni-Ter UMC ("Uni-Ter") as its underwriter.

19. Uni-Ter was responsible for numerous items, including claims handling, providing reporting, serving as L&C's fiduciary, complying with State and Federal regulations, and risk management.

20. Uni-Ter was compensated based on 1) a commission percentage, 2) claims handling fees, and 3) profit sharing. Uni-Ter and L&C modified the compensation terms several times throughout the management agreement periods.

21. Uni-Ter's President, Third-Party Defendant Sanford Elsass held himself out and is known as an industry "expert" in the insurance world and specifically the Risk Retention Group Model.

LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.
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22. Uni-Ter attended all but two of the L&C Board meetings. Third-Party Defendants Elsass and Dalton, as well as other Uni-Ter employees, provided reports about the company to the Board members.

23. Third-Party Plaintiffs reasonably relied upon Third-Party Defendants' advice and expertise in the insurance business at all relevant times.

24. Upon information and belief, Third-Party Defendants repeatedly made false and/or misleading representations to Third-Party Plaintiffs regarding the financial stability and posture of L&C. Third-Party Plaintiffs reasonably relied on Third-Party Defendants representations.

25. Upon information and belief, Third-Party Defendants concealed material adverse information regarding the true financial position of L&C.

26. Many of the approvals and actions of Third-Party Plaintiffs were made based upon the acts, breaches and/or omissions of Third-Party Defendants.

27. All of the acts, errors or omissions of Third-Party Defendants Elsass and Dalton underlying the claims herein were completed within the course and scope of their employment and/or agency on behalf of Uni-Ter, and/or ratified those acts was by Uni-Ter.

28. As a direct and proximate result of the acts and omissions of Third Party Defendants, Third-Party Plaintiffs have been required to retain the services of attorneys and other professionals to prosecute these claims, and is entitled to an award of its attorneys' fees and coss, including collection costs, incurred in connection herewith.

FIRST CAUSE OF ACTION
(BREACH OF CONTRACT)

29. Third-Party Plaintiffs incorporate all prior allegations in the prior paragraphs as though fully set forth herein.

30. Uni-Ter was obligated by contract to provide reasonable and appropriate guidance, and assumed a fiduciary responsibility with respect to Third-Party Plaintiffs.

31. Uni-Ter breached the contract hereby causing damages to Third–Party Plaintiffs.

LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.
9900 Covington Cross Drive, Suite 120
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32. Third-Party Defendants' acts have caused Third-Party Plaintiffs to suffer economic and non-economic damages in excess of $10,000.

SECOND CAUSE OF ACTION
(BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING)

33. Third-Party Plaintiffs incorporate all prior allegations in the prior paragraphs as though fully set forth herein.

34. A duty of good faith and fair dealing is implied in every contract.

35. Third-Party Defendant's breached the covenant of good faith and fair dealing implied in the contacts.

36. As a direct and proximate result of this breach of the implied covenant of good faith and fair dealing, Third Party-Plaintiffs have suffered damages, the exact amount of which will be proven at trial.

THIRD CAUSE OF ACTION

(INTENTIONAL MISREPRESENTATION)

37. Third-Party Plaintiffs incorporate all prior allegations in the prior paragraphs as though fully set forth herein.

38. In *Rocker v KPMG LLP,* 122 Nev 1185 (2006), the Nevada Supreme Court recognized that a relaxed pleading standard for fraud claims where a party cannot plead with more particularity because the required information is in the opposing party's possession. This relaxed pleading standard is appropriate under the circumstances since Third-Party Defendants likely possess information and knowledge needed to plead the claim with particularity.

39. Upon information and belief, Third-Party Defendants made representations to Third-Party Plaintiffs, which were false.

40. Upon information and belief, Third-Party Defendants made promises to Third-Party Plaintiffs, which they knew to be false.

41. Upon information and belief, Third-Party Defendants knew, or should have known, the representations were false when they made them.

LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.
9900 Covington Cross Drive, Suite 120
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42. Upon information and belief, Third-Party Defendants intended to induce Third-Party Plaintiffs to rely upon their false representations and promises to act and agree to various business decisions.

43. At the time of the approvals and actions of Third-Party Plaintiffs, they were unaware of the false representations and promises made by Third-Party Defendants.

44. Third-Party Plaintiffs acted in reliance upon Third-Party Defendants' false representations and promises.

45. Third Party Defendants made these false representations, Third-Party Plaintiffs were unaware of their falsity and promises.

46. Third-Party Plaintiffs were justified in relying upon Third-Party Defendants' representations and promises.

47. As a result of Third-Party Defendants' unlawful action, Third-Party Plaintiffs have suffered, and will continue to suffer from emotional distress and anxiety.

48. Third-Party Defendants' acts have caused Third-Party Plaintiffs to suffer economic and non-economic damages in excess of $10,000.

49. Third-Party Defendants' acts were done with malice, having an intent to injure Third-Party Plaintiffs or with conscious or reckless disregard for the rights and well being of Third-Party Plaintiffs. Accordingly, Third-Party Plaintiffs are entitled to punitive damages.

50. Third-Party Plaintiffs are informed and believe and on that basis allege that Plaintiff's damages, if any, were proximately caused by Third-Party Defendants and that Third-Party Defendants are liable for the damages sought by Plaintiff in its Complaint.

51. Third-Party Plaintiffs have been required to engage the services of an attorney, incurring attorney's fees and costs to defend Plaintiff's Complaint and to prosecute this Third-Party Complaint, and are therefore entitled to reasonable attorney's fees and costs.

LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
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FOURTH CAUSE OF ACTION
(NEGLIGENT MISREPRESENTATION)

52. Third-Party Plaintiffs incorporates all prior allegations in the prior paragraphs as though fully set forth herein.

53. Third-Party Defendants are experts and professionals in the business of Risk Retention Group Model.

54. Third-Party Defendants had a pecuniary interest in Third-Party Plaintiffs' business L&C at all times during the relevant period.

55. Third-Party Defendants supplied false information to Third-Party Plaintiffs for their guidance in making business decisions regarding L&C.

56. Third-Party Plaintiffs justifiably relied on the information Third-Party Defendants provided.

57. Third-Party Defendants failed to exercise reasonable care or competence in obtaining or communicating information to Third-Party Plaintiffs.

58. Third-Party Defendants provided the false information for the benefit and guidance of Third-Party Plaintiffs.

59. Third-Party Defendants provided the false information with the intent to influence Third Party Plaintiff's decisions concerning L&C.

60. Third-Party Defendants' false information caused Third-Party Plaintiffs to suffer economic and non-economic damages in excess of $10,000.

61. Third-Party Plaintiffs have been required to engage the services of an attorney, incurring attorney's fees and costs to defend Plaintiff's Complaint and to prosecute this Third-Party Complaint, and are therefore entitled to reasonable attorney's fees and costs.

FIFTH CAUSE OF ACTION
(BREACH OF FIDUCIARY DUTY)

62. Third-Party Plaintiffs incorporates all prior allegations in the prior paragraphs as though fully set forth herein.

63. There existed a special relationship of trust and confidence between and among Third-Party Plaintiffs and Third-Party Defendants.

64. Upon information and belief, for their own financial gain and advantage, Third-Party Defendants knowingly breached fiduciary duties owed to Third-Party Plaintiffs including but not limited to: (a) the misappropriation of [funds]; and (b) the mismanagement and running of L&C into the ground.

65. Third-Party Defendants' acts have caused Third-Party Plaintiffs to suffer economic and non-economic damages in excess of $10,000.

66. Third-Party Defendants' acts were done with malice, having an intent to injure Third-Party Plaintiffs or with conscious or reckless disregard for the rights and well-being of Third-Party Plaintiffs. Accordingly, Third-Party Plaintiffs are entitled to punitive damages.

67. Third-Party Plaintiffs are informed and believe and on that basis allege that Plaintiff's damages, if any, were proximately caused by Third-Party Defendants and that Third-Party Defendants are liable for the damages sought by Plaintiffs in their Complaint.

68. Third-Party Plaintiffs have been required to engage the services of an attorney, incurring attorney's fees and costs to defend Plaintiff's Complaint and to prosecute this Third-Party Complaint, and are therefore entitled to reasonable attorney's fees and costs.

SIXTH CAUSE OF ACTION
(NEGLIGENCE)

69. Third-Party Plaintiffs incorporate all of the foregoing paragraphs as if fully set forth herein.

70. Third-Party Defendants owed a duty to Third-Party Plaintiffs to exercise due and reasonable care in the management of L&C.

71. Upon information and belief, Third-Party Defendants breached said duty by repeatedly making false representations to the Board regarding the financial stability and posture of L&C upon which the Third-Party Plaintiffs relied.

LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
Telephone: (702) 382-1500 Facsimile: (702) 382-1512

LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
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72. Upon information and belief, Third-Party Defendants further breached said duty by concealing material adverse information regarding the true financial position of L&C.

73. Third-Party Defendants' acts have caused Third-Party Plaintiffs to suffer economic and non-economic damages in excess of $10,000.

74. Third-Party Defendants' acts were done with malice, having an intent to injure Third-Party Plaintiffs or with conscious or reckless disregard for the rights and well being of Third-Party Plaintiffs. Accordingly, Third-Party Plaintiffs are entitled to punitive damages.

75. Third-Party Plaintiffs are informed and believe and on that basis allege that Plaintiff's damages, if any, were proximately caused by Third-Party Defendants and that Third-Party Defendants are liable for the damages sought by Plaintiff in its Complaint.

76. Third-Party Plaintiffs have been required to engage the services of an attorney, incurring attorney's fees and costs to defend Plaintiff's Complaint and to prosecute this Third-Party Complaint, and are therefore entitled to reasonable attorney's fees and costs.

SEVENTH CAUSE OF ACTION
(INDEMNIFICATION)

77. Third-Party Plaintiffs incorporate all of the foregoing paragraphs as if fully set forth herein.

78. As a result of the acts and/or omissions of Third-Party Defendants, Plaintiffs claim damages against Third-Party Plaintiffs in excess of $10,000, the exact amount to be proven at trial.

79. Upon information and belief, the damages which have been alleged and the claims made against Third-Party Plaintiffs are not the result of any acts and/or omissions by Third-Party Plaintiffs, but are the result, in whole or in part, of the acts and/or omissions of Third-Party Defendants, and each of them.

LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.
9900 Covington Cross Drive, Suite 120
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80. As a result of the claims made by Plaintiff against Third-Party Plaintiffs, they may be held liable to Plaintiffs for all or part of said damages, in which event Third-Party Plaintiffs are entitled indemnification from Third-Party Defendants, based upon principles of contract law, common law, and/or equity, for any and all loss or damage they may sustain as a result of any settlement, compromise, judgment or award which may occur in this matter.

81. Third-Party Plaintiffs have been required to engage the services of an attorney, incurring attorney's fees and costs to defend Plaintiff's Complaint and to prosecute this Third-Party Complaint, and are therefore entitled to reasonable attorney's fees and costs.

EIGHTH CAUSE OF ACTION
(CONTRIBUTION)

82. Third-Party Plaintiffs incorporate all of the foregoing paragraphs as if fully set forth herein.

83. In the event Third-Party Plaintiffs are found liable for Plaintiff's damages alleged in their Complaint, by way of judgment, settlement or otherwise, Third-Party Plaintiffs are informed and believe, and thereon allege, that any injuries and/or damages are due to Third-Party Defendants' negligence or other fault and Third-Party Defendants are culpable in causing the damages.

84. If Third-Party Plaintiffs pay money in settlement or judgment to Plaintiff for the alleged damages in Plaintiff's Complaint, Third-Party Plaintiffs are entitled to contribution from Third-Party Defendants in an amount proportionate to the amount of negligence and/or culpability attributable to each of them, joint and severally, as well as the costs and fees incurred in answer to and defending against Plaintiff's allegations.

85. Third-Party Plaintiffs have been required to engage the services of an attorney, incurring attorney's fees and costs to defend Plaintiff's Complaint and to prosecute this Third-Party Complaint, and are therefore entitled to reasonable attorney's fees and costs.

WHEREFORE, Third-Party Plaintiffs pray for judgment as follows:

1. That Third-Party Plaintiffs be awarded actual damages, consequential damages, and incidental damages in excess of $10,000;

2. That Third-Party Plaintiffs be awarded double damages or treble damages, as allowed by law;

3. That Third-Party Plaintiffs be awarded punitive and exemplary damages;

4. That Third-Party Plaintiffs be fully indemnified and contribution made by Third-Party Defendants for any and all settlements or compromises and/or judgments entered into or against Third-Party Plaintiffs as a result of this action;

5. For an award of attorneys' fees, costs, and other expenses; and

6. For such other and further relief as the Court may deem just and proper under the circumstances.

DATED this 29th day of June, 2015.

LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.

JOSEPH P. GARIN, ESQ.
Nevada Bar No. 6653
ANGELA OCHOA, ESQ.
Nevada Bar No. 10164
SIRIA L. GUTIERREZ, ESQ.
Nevada Bar No. 11981
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500
(702) 382-1512 - fax
jgarin@lipsonneilson.com
aochoa@lipsonneilson.com
sgutierrez@lipsonneilson.com

Attorneys for Defendants/Third-Party Plaintiffs Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels

LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
Telephone: (702) 382-1500 Facsimile: (702) 382-1512

LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
Telephone: (702) 382-1500 Facsimile: (702) 382-1512

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 29th day of June, 2015, I electronically transmitted the foregoing **DEFENDANTS AND THIRD-PARTY PLAINTIFFS ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS' THIRD-PARTY COMPLAINT** to the Clerk's Office using the Odyssey E-File and Serve system for filing and transmittal to the following E-File and Serve registrants:

James L. Wadhams, Esq.
Karl L. Nielson, Esq.
Brenoch, Wirthlin, Esq.
FENNEMORE CRAIG, P.C.
300 S. Fourth St., Suite 1400
Las Vegas, NV 89101
knielson@fclaw.com
bwirthlin@fclaw.com
Attorneys for Plaintiff

Jason B. Trauth, Esq.
LYDECKER DIAZ
1221 Brickwell Ave., 19th Floor
Miami, FL 33131
Attorney for Defendants
Unit-ter Underwriting Management Corp., Uni-ter Claims Services, Corp., and U.S. RE Corporation

Renee M. Ritterhaus

An Employee of LIPSON, NEILSON, COLE SELTZER & GARIN, P.C.

ANS
LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.
JOSEPH P. GARIN, ESQ.
Nevada Bar No. 6653
ANGELA T. NAKAMURA OCHOA, ESQ.
Nevada Bar No. 10164
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500
Fax (702) 382-1512
jgarin@lipsonneilson.com
aochoa@lipsonneilson.com

Attorneys for Defendants/Third-Party Plaintiffs Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels

DISTRICT COURT

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Plaintiff, vs. ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION; DOES 1-50, inclusive; and ROES 51-100, inclusive, Defendants.	CASE NO.: A-14-711535-C DEPT. NO.: 27 **DEFENDANTS ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS' ANSWER TO THE THIRD AMENDED COMPLAINT**

Defendants ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, and ERIC STICKELS (collectively "Answering Defendants") by and through its counsel of record at the law firm of Lipson, Neilson, Cole, Seltzer & Garin, P.C., hereby responds to the Third Amended Complaint as follows:

Lipson, Neilson, Cole, Seltzer & Garin, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 FAX: (702) 382-1512

PARTIES, JURISDICTION AND VENUE

1. As to paragraph 1 of the Third Amended Complaint, Answering Defendants admits that L&C was formed in Nevada as a risk retention group, and that it provided general and professional insurance to skilled nursing facilities. As to the remainder of the allegations, Answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and therefore deny the same. The Nevada Secretary of State website shows that L&C filed its governing documents on December 15, 2013.

2. As to paragraph 2 of Third Amended Complaint, Answering Defendants admit that the Nevada Division of Insurance filed a Receivership Action for L&C in November, 2012 and was assigned case number A-12-672047-B in the Eighth Judicial District Court of Nevada, in Clark County, and an Order of Liquidation was entered on February 28, 2013. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied. Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein and denies the same.

3. As to paragraph 3 of the Third Amended Complaint, Answering Defendants admit that Robert Chur served as a director of L&C at the time the Receivership Action was filed. As to the remainder of the allegations contained therein, Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

4. As to paragraph 4 of the Third Amended Complaint, Answering Defendants admit that Robert Chur resides in Williamsville, New York.

5. As to paragraph 5 of the Third Amended Complaint, Answering Defendants admit that Robert Chur served as President of ElderWood Senior Care. As to the remainder of the allegations contained therein, Answering Defendants lack

knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

6. As to paragraph 6 of the Third Amended Complaint, Answering Defendants admit that Steve Fogg served as a director of L&C at the time the Receivership Action was filed. As to the remainder of the allegations contained therein, Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

7. As to paragraph 7 of the Third Amended Complaint, Answering Defendants admit.

8. As to paragraph 8 of the Third Amended Complaint, Answering Defendants admit that Steve Fogg served as Chief Financial Officer of Marquis Companies. As to the remainder of the allegations contained therein Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

9. As to paragraph 9 of the Third Amended Complaint, Answering Defendants admit that Mark Gerber served as a director of L&C at the time the Receivership Action was filed. As to the remainder of the allegations contained therein, Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

10. As to paragraph 10 of the Third Amended Complaint, Answering Defendants admit.

11. As to paragraph 11 of the Third Amended Complaint, Answering Defendants admit that Mark Garber served as Chief Financial Officer of Pinnacle Healthcare, Inc. As to the remainder of the allegations contained therein Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

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Lipson, Neilson, Cole, Seltzer & Garin, P.C.
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12. As to paragraph 12 of the Third Amended Complaint, Answering Defendants admit that Carol Harter served as a director of L&C at the time the Receivership Action was filed. As to the remainder of the allegations contained therein, Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

13. As to paragraph 13 of the Third Amended Complaint, Answering Defendants admit.

14. As to paragraph 14 of the Third Amended Complaint, Answering Defendants admit that Carol Harter was associated with the University of Nevada Las Vegas. As to the remainder of the allegations contained therein, Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

15. As to paragraph 15 of the Third Amended Complaint, Answering Defendants admit that Robert Hurlbut served as a director of L&C at the time the Receivership Action was filed. As to the remainder of the allegations contained therein, Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

16. As to paragraph 16 of the Third Amended Complaint, Answering Defendants admit.

17. As to paragraph 17 of the Third Amended Complaint, Answering Defendants admit that Barbara Lumpkin served as a director of L&C at the time the Receivership Action was filed. As to the remainder of the allegations contained therein, Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

18. As to paragraph 18 of the Third Amended Complaint, Answering Defendants admit.

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9900 Covington Cross Drive, Suite 120
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19. As to paragraph 19 of the Third Amended Complaint, Answering Defendants admit that Barbara Lumpkin served as an Associate Executive Director of the Florida Nurses Association. As to the remainder of the allegations contained therein, Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

20. As to paragraph 20 of the Third Amended Complaint, Answering Defendants admit.

21. As to paragraph 21 of the Third Amended Complaint, Answering Defendants admit.

22. As to paragraph 22 of the Third Amended Complaint, Answering Defendants admit.

23. As to paragraph 23 of the Third Amended Complaint, Answering Defendants admit.

24. As to paragraph 24 of the Third Amended Complaint, Answering Defendants admit.

25. As to paragraph 25 of the Third Amended Complaint, Answering Defendants admit that Eric Stickels was associated with Oneida Savings Bank. As to the remainder of the allegations contained therein, Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

26. As to paragraph 26, 27, 28 and 29, Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

27. As to paragraph 30 of the Third Amended Complaint, Answering Defendants admit.

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9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 FAX: (702) 382-1512

28. As to paragraph 31 of the Third Amended Complaint, Answering Defendants admits that it expended the areas in which it wrote policies. As to the remainder of the allegations, Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

29. As to paragraph 32 of the Third Amended Complaint, Answering Defendants deny.

30. As to paragraph 33 of the Third Amended Complaint, Answering Defendants admit.

31. As to paragraph 34 of the Third Amended Complaint, Answering Defendants deny.

32. As to paragraph 35 of the Third Amended Complaint, Answering Defendants admit.

33. As to paragraph 36 of the Third Amended Complaint, Answering Defendants admit.

34. As to paragraph 37 of the Third Amended Complaint, Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

35. As to paragraph 38 of the Third Amended Complaint, Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

36. As to paragraph 39 of the Third Amended Complaint, Answering Defendants admit that it wrote professional liability policies to Sophia Palmer. As to the claim that it wrote general liability policies, Answering Defendants deny such characterization as the insureds were not facilities.

37. As to paragraph 40 of the Third Amended Complaint, Answering Defendants admit that they were advised that Uni-Ter UMC had created other risk retention groups. As to the remaining allegations Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

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38. As to paragraph 41 of the Third Amended Complaint, Answering Defendants admit that in summary, Uni-Ter was to manage L&C, including handling underwriting, risk management, claims handling and regulatory compliance. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied. Answering Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained therein.

39. As to paragraph 42 of the Third Amended Complaint, Answering Defendants admit.

40. As to paragraphs 43, 44, 45, 46, 47, 48, 49 and 50 of the Third Amended Complaint, Answering Defendants admit that the parties entered into the 2004 Management Agreement. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

41. As to paragraphs 51, 52, 53 and 54, of the Third Amended Complaint, Answering Defendants admit that the parties entered into amendments to the 2004 Management Agreement. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

42. As to paragraph 55 of the Third Amended Complaint, Answering Defendants admit that in and around 2009, at Uni-Ter's recommendation, it accepted multi-site skilled nursing facilities as policyholders of L&C. Answering Defendants deny that Sophia Palmer was a multi-site operator, and that "multiple" multi-site operators were accepted into the risk retention group.

43. As to paragraph 56 of the Third Amended Complaint, Answering Defendants admit.

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44. As to paragraph 57 of the Third Amended Complaint, Answering Defendants lack sufficient information to form a belief as to the truth of the allegation contained therein. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

45. As to paragraphs 58 and 59 of the Third Amended Complaint, Answering Defendants deny.

46. As to paragraph 60 of the Third Amended Complaint, Answering Defendants admit that the multi-site operators were larger than the original participants, were comprised of multi-facilities and thus had more claims. As to the remainder of the allegations, Answering Defendants are without sufficient information to form a belief as to the truth of the allegation contained therein and therefore denies the same.

47. As to paragraphs 61, 62 and 63 of the Third Amended Complaint, to the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

48. As to paragraph 64 of the Third Amended Complaint, Answering Defendants admit to the entry of the 2011 Management Agreement. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

49. As to paragraph 65 of the Third Amended Complaint, Answering Defendants lack sufficient information to form a belief as to the truth of the allegation contained therein.

50. As to paragraphs 66, 67, 68, 68, 69, and 70 of the Third Amended Complaint, to the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

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51. As to paragraph 71 of the Third Amended Complaint, Answering Defendants lack sufficient information to form a belief as to the truth of the allegation contained therein.

52. As to paragraph 72 of the Third Amended Complaint, Answering Defendants understood Milliman was engaged to perform work on behalf of L&C. Insofar as Plaintiff asserts that Milliman was working for Uni-Ter, Answering Defendants lack sufficient information to form a belief as to the truth of the allegation contained therein.

53. As to paragraph 73, 74, and 75 of the Third Amended Complaint, to the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

54. As to paragraph 76 of the Third Amended Complaint, Answering Defendants understands that an insurance producer such as U.S. RE owes certain duties to its client as set forth in common law and contract. As to the remainder of the allegations, Answering Defendants are without sufficient information to form a belief as to the truth of the allegation contained therein.

55. As to paragraphs 77 and 78 of the Third Amended Complaint, Answering Defendants admit.

56. As to paragraphs 79 and 80 of the Third Amended Complaint, Answering Defendants admit that an agreement was entered into with US RE. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

57. As to paragraph 81 of the Third Amended Complaint, Answering Defendants state that the allegations call for legal conclusion to which no response is required.

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58. As to paragraph 82 of the Third Amended Complaint, Answering Defendants admit that US RE was retained to act as L&C's agent. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

59. As to paragraphs 83, 84, and 85 of the Third Amended Complaint, Answering Defendants state that the allegations call for legal conclusion to which no response is required.

60. As to paragraphs 86, 87, and 88 of the Third Amended Complaint, Answering Defendants admit that US RE was retained to act as L&C's agent. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

61. As to paragraph 89 of the Third Amended Complaint, Answering Defendants admit that US RE was retained to act as L&C's agent with respect to the procurement of insurance, as to the remainder of the allegations Answering Defendants lack sufficient information to form a belief as to the truth of the allegation contained therein.

62. As to paragraphs 90 and 91 of the Third Amended Complaint, Answering Defendants lack sufficient information to form a belief as to the truth of the allegation contained therein.

63. As to paragraph 92 of the Third Amended Complaint, Answering Defendants lack sufficient information to form a belief as to the truth of the allegation contained therein. Answering Defendants were represented that re-insurance was obtained for years. Prior to the Rehabilitation, Answering Defendants understood US RE did not obtain re-insurance as was represented that L&C could not be insured.

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64. As to paragraph 93 of the Third Amended Complaint, Answering Defendants state that US RE represented that re-insurance was in place for years. As to the remainder of the allegations, Answering Defendants lack sufficient information to form a belief as to the truth of the allegations.

65. As to paragraph 94 of the Third Amended Complaint, Answering Defendants state that the re-insurance obtained were represented as appropriate for L&C. As to the remainder of the allegations Answering Defendants lack sufficient information to form a belief as to the truth of the allegation contained therein.

66. As to paragraph 95 of the Third Amended Complaint, Answering Defendants state that to the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

67. As to paragraph 96 of the Third Amended Complaint, Answering Defendants lack sufficient information to form a belief as to the truth of the allegation contained therein.

68. As to paragraphs 97 and 98 of the Third Amended Complaint, Answering Defendants state that to the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

69. As to paragraph 99 of the Third Amended Complaint, Answering Defendants deny.

70. As to paragraph 100 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegation.

71. As to paragraph 101 of the Third Amended Complaint, Answering Defendants were advised that losses identified in September 2011 were due to a number of factors including the multi-site operators and increased claims. As to the remainder of the allegations, Answering Defendants lack sufficient information to form a belief as to the truth of the allegation.

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72. As to paragraph 102 of the Third Amended Complaint, Answering Defendants received a memorandum purporting to come from Sanford Elsass and Donna Dalton. As to the remainder of the allegations, Answering Defendants submit that the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

73. As to paragraph 103 of the Third Amended Complaint, Answering Defendants admits the same.

74. As to paragraphs 104 and 105 of the Third Amended Complaint, Answering Defendants deny.

75. As to paragraphs 106 and 107 of the Third Amended Complaint, Answering Defendants lack sufficient information to form a belief as to the truth of the allegation.

76. As to paragraph 108 of the Third Amended Complaint, Answering Defendants deny.

77. As to paragraph 109 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegation.

78. As to paragraph 110, 111 and 112 Third Amended Complaint, Answering Defendants state that to the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

79. As to paragraph 113 of the Third Amended Complaint, Answering Defendants deny.

80. As to paragraphs 114, 115 and 116 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegation.

81. As to paragraph 117 of the Third Amended Complaint, Answering Defendants deny.

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82. As to paragraph 118 of the Third Amended Complaint, Answering Defendants admit that the Board generally met once per quarter until September 2012 and that Uni-Ter was contracted to maintain the minutes. As to the remainder of the allegations, Answering Defendants are without sufficient information to form a belief as to the truth of the allegation.

83. As to paragraph 119 of the Third Amended Complaint, Answering Defendant are without sufficient information to form a belief as to the truth of the allegation.

84. As to paragraph 120 of the Third Amended Complaint, Answering Defendants admit that they followed many recommendations that were made by Mr. Elsass and upon the information provided by him and contracted vendors. As to the remainder of the allegations contained therein, Answering Defendants are without sufficient information to form a belief as to the truth of the allegation.

85. As to paragraphs 121 and 122 of the Third Amended Complaint, Answering Defendants deny.

86. As to paragraph 123 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegation.

87. As to paragraphs 124 and 125 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations contained therein. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

88. As to paragraph 126 of the Third Amended Complaint, Answering Defendants deny.

89. As to paragraphs 127, 128 and 129 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations contained therein. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

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90. As to paragraph 130 of the Third Amended Complaint, Answering Defendants admit that the auditing committee did not do a separate and independent audit from those done by contracted vendors of L&C. As to the remainder of the allegations, Answering Defendants are without sufficient information to form a belief as to the truth of the allegation.

91. As to paragraph 131 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations contained therein. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

92. As to paragraph 132 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegation.

93. As to paragraphs 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, and 143 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations contained therein. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

94. As to paragraph 144 of the Third Amended Complaint, Answering Defendants admit having met on or about October 5, 2011, in which they approved capital contributions. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

95. As to paragraphs 145 and 146 of the Third Amended Complaint, Answering Defendants deny.

96. As to paragraph 147 of the Third Amended Complaint, Answering Defendants admit that they understood William Fishlinger was retained to provide a claims review for L&C, as to the remainder of the allegations, Answering Defendants are without

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Las Vegas, Nevada 89144
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sufficient information to form a belief as to the truth of the allegation. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

97. As to paragraph 148 of the Third Amended Complaint, Answering Defendants deny.

98. As to paragraph 149 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations contained therein. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

99. As to paragraphs 150 and 151 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations contained therein.

100. As to paragraph 152 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations contained therein. To the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

101. As to paragraph 153 of the Third Amended Complaint, Answering Defendants specifically deny the allegation that they failed to exercise a slight degree of diligence and care regarding the information from Mr. Elsass. As to the remainder of the allegations, to the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

102. As to paragraph 154 of the Third Amended Complaint, Answering Defendants deny having failed to exercise the slightest degree of care regarding information reported by Elsass. As to the remainder of the allegations, to the extent Plaintiff purports

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to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

103. As to paragraph 155 of the Third Amended Complaint, Answering Defendants deny having been indifferent to their legal obligations. As to the remainder of the allegations, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations therein.

104. As to paragraphs 156, 157 and 158 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations therein.

105. As to paragraph 159 of the Third Amended Complaint, Answering Defendants deny that there were clear indications that Uni-Ter and U.S. RE were providing inaccurate and/or incomplete information to L&C and deny having any obligation to verify the information provided by Uni-Ter and U.S. R.E. As to the remainder of the allegations, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations therein.

106. As to paragraph 160 of the Third Amended Complaint, Answering Defendants state that to the extent Plaintiff purports to recite the contents of a written document, the document is the best evidence and speaks for itself. Insofar as the allegations are inconsistent with the document, those allegations are denied.

107. As to paragraphs 161 and 162 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations therein.

108. As to paragraph 163 of the Third Amended Complaint, Answering Defendants deny being grossly negligent, or failing to inform itself. As to the remainder of the allegations, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations therein.

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109. As to paragraph 164 of the Third Amended Complaint, Answering Defendants deny the allegations therein.

110. As to paragraphs 165, 166, 167, 168, and 169 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations therein.

111. As to paragraph 170 of the Third Amended Complaint, Answering Defendants deny the allegations therein.

112. As to paragraphs 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190 and 191 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations therein.

113. As to paragraphs 192, 193, 194 of the Third Amended Complaint, Answering Defendants deny having failed to exercise a slight degree of care with Uni-Ter's opinions. As to the remainder of the allegations, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations therein.

114. As to paragraphs 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, and 206 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations therein.

115. As to paragraphs 207, 208 and 209 of the Third Amended Complaint, Answering Defendants admit.

116. As to paragraph 210 of the Third Amended Complaint, Answering Defendants admit that at one time Stickels was President of Oneida Savings Bank. As to the remainder of the allegations, Answering Defendants deny.

117. As to paragraphs 211, 212, 213, 214 and 215 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations therein.

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CLAIMS

118. As to paragraph 216 of the Third Amended Complaint, Answering Defendants incorporate their answers to paragraphs 1 through 215 as if fully set forth herein.

FIRST CLAIM FOR RELIEF

(Gross Negligence of the Former Officers and Directors of L&C)

119. As to paragraph 217 of the Third Amended Complaint, Answering Defendants incorporate their answers to paragraphs 1 through 216 as if fully set forth herein.

120. As to paragraphs 218 and 219 of the Third Amended Complaint, Answering Defendants respond that the allegations call for legal conclusion to which no response is required.

121. As to paragraphs 220 and 221 of the Third Amended Complaint, Answering Defendants deny the allegations therein.

122. As to paragraphs 222, 223 and 224 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations therein.

123. As to paragraph 225 of the Third Amended Complaint, Answering Defendants respond that the allegations call for legal conclusion to which no response is required.

124. As to paragraph 226 of the Third Amended Complaint, Answering Defendants deny the allegations therein.

125. As to paragraph 227 of the Third Amended Complaint, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations therein.

126. As to paragraph 228 and 229 of the Third Amended Complaint, Answering Defendants deny the allegations therein.

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127. As to paragraph 230 of the Third Amended Complaint, Answering Defendants deny having known that Uni-Ter, U.S. RE was providing incomplete or inaccurate information. As to the remainder of the allegations, Answering Defendants are without sufficient information to form a belief as to the truth of the allegations therein.

128. As to paragraphs 231, 232, 233 and 234 of the Third Amended Complaint, Answering Defendants deny the allegations therein.

SECOND CLAIM FOR RELIEF

(Deepening the Insolvency of L&C Caused by the Former Directors and Officer)

129. As to paragraphs 235 of the Third Amended Complaint, Answering Defendants incorporate their answers to paragraphs 1 through 234 as if fully set forth herein.

130. As to paragraphs 236, 237, 238, 239 and 240 of the Third Amended Complaint, Answering Defendants deny the allegations therein.

THIRD CLAIM FOR RELIEF

(Negligent Misrepresentation by Uni-Ter UMC)

As to paragraphs 241 through 248 of the Third Amended Complaint, Answering Defendants state that the Claim for Relief is not directed at Answering Defendants. Therefore, no response is required.

FOURTH CLAIM FOR RELIEF

(Breach of Fiduciary Duty by Uni-Ter UMC and Uni-Ter CS)

As to paragraphs 249 through 256 of the Third Amended Complaint, Answering Defendants state that the Claim for Relief is not directed at Answering Defendants. Therefore, no response is required.

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9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
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FIFTH CLAIM FOR RELIEF

(Breach of Fiduciary Duty Against U.S. RE)

As to paragraphs 257 through 269 of the Third Amended Complaint, Answering Defendants state that the Claim for Relief is not directed at Answering Defendants. Therefore, no response is required.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's claim against Answering Defendants is barred, in whole or in part, because the Third Amended Complaint fails to state a cause of action against Answering Defendants upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claim against Answering Defendants is barred, in whole or in part, because Answering Defendants have not breached any duty, contractual, fiduciary, or otherwise, owed to Plaintiff or L&C.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, because Answering Defendants did not engage in any willful, fraudulent, intentional, or any other behavior resulting in a breach of any fiduciary duty owed to Plaintiff or L&C.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claim against Answering Defendants is barred, in whole or in part, because of a lack of causation. Plaintiff has not suffered any injury or harm as a result of any action or omission of Answering Defendants.

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9900 Covington Cross Drive, Suite 120
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FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claim against Answering Defendants is barred, in whole or in part, because the alleged damages were the result of intervening and superseding conduct of others.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claim against Answering Defendants is barred, in whole or in part, by the applicable statute of limitations.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claim against Answering Defendants is barred for failure to join indispensable parties.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claim against Answering Defendants is barred, in whole or in part, because any action taken or decision made by Answering Defendants was within its sound business judgment.

NINTH AFFIRMATIVE DEFENSE

Plaintiff's claim against Answering Defendants is barred, in whole or in part, because Answering Defendants reasonably believed in good faith that its actions were lawful, necessary and justified.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claim against Answering Defendants is barred, in whole or in part, because Plaintiff has failed to mitigate its alleged damages.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands.

Lipson, Neilson, Cole, Seltzer & Garin, P.C.
9900 Covington Cross Drive, Suite 120
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(702) 382-1500 FAX: (702) 382-1512

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, because Plaintiff has waived its right to seek damages.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, due to discharge in bankruptcy.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims may be barred by other affirmative defenses enumerated in or allowed under NRCP 8(c). Answering Defendant hereby reserves the right to amend this list of Affirmative Defenses to add new defenses should discovery or investigation reveal facts giving rise to such defenses should discovery or investigation reveal facts giving rise to such defenses.

WHEREFORE, having fully responded to the Third Amended Complaint, Answering Defendants respectfully prays as follows:

1. That Plaintiff take nothing by virtue of its Third Amended Complaint, that the Third Amended Complaint be dismissed with prejudice as it relates to the Answering Defendants, and that the Court enter judgment in favor of the Answering Defendants;

2. For an award of reasonable attorneys' fees and costs incurred in connection with this litigation; and

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3. For such other and further relief as the Court deems fair and just under the circumstances.

Dated this 21st day of October, 2016.

LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.

By: _____

Joseph P. Garin, Esq. NV Bar No. 6653
Angela T. Nakamura Ochoa, Esq. NV Bar No. 10164
9900 Covington Cross Dr., Suite 120
Las Vegas, NV 89148

Attorneys for Defendants/Third-Party Plaintiffs Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels

Lipson, Neilson, Cole, Seltzer & Garin, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 FAX: (702) 382-1512

Lipson, Neilson, Cole, Seltzer & Garin, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 FAX: (702) 382-1512

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 21ST day of October, 2016, I electronically transmitted the foregoing ***Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels' Answer to Plaintiff's Third Amended Complaint,*** to the Clerk's Office using the Odyssey E-File & Serve System for filing and transmittal to the following Odyssey E-File & Serve registrants:

E-Service Master List
For Case

Attorney General's Office	
Contact	**Email**
Joanna Grigoriev	jgrigoriev@ag.nv.gov
Nevada Attorney General	wiznetfilings@ag.nv.gov

Broad and Cassel	
Contact	**Email**
Jon M. Wilson	jwilson@broadandcassel.com
Yusimy Bordes	ybordes@broadandcassel.com

Fennemore Craig, P.C.	
Contact	**Email**
Adrina Harris	aharris@fclaw.com
Brenoch Wirthlin	bwirthli@fclaw.com

McDonald Carano Wilson LLP	
Contact	**Email**
CaraMia Gerard	cgerard@mcdonaldcarano.com
George F. Ogilvie III	gogilvie@mcdonaldcarano.com
James W. Bradshaw	jbradshaw@mcdonaldcarano.com
Kathy Barrett	kbarrett@mcdonaldcarano.com
Nancy Hoy	nhoy@mcdonaldcarano.com
Rory Kay	rkay@mcdonaldcarano.com

Nevada Attorney General	
Contact	**Email**
Marilyn Millam	mmillam@ag.nv.gov

Nevada Division of Insurance	
Contact	**Email**
Terri Verbrugghen	verbrug@doi.nv.gov

Employee of LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.

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DISTRICT COURT

CLARK COUNTY, NEVADA

COMMISSIONER OF INURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK, Plaintiff(s), vs. ROBERT CHUR, Defendant(s).	CASE NO: A-14-711535-C DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 11, 2108

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: ALL PENDING MOTIONS

APPEARANCES:

For the Plaintiff(s): DANIEL S. CEREGHINO, ESQ.
BRENOCH R. WIRTHLIN, ESQ.

For the Defendant(s): J. WILLIAM "BILL" EBERT, ESQ.
ANGELA T. OCHOA, ESQ.
GEORGE F. OGILVIE III, ESQ.

RECORDED BY: BRYNN GRIFFITHS, COURT RECORDER

LAS VEGAS, NEVADA; THURSDAY, OCTOBER 11, 2018

[Proceedings commenced at 10:13 a.m.]

THE COURT: And I thank everyone for your patience. You were -- I wanted to give you guys the most time this morning because your legal issues were fairly meaty. So thank you for your patience in waiting.

Let's take appearances from the right -- your right to left.

MR. CEREGHINO: Good morning, Your Honor. Daniel Cereghino, 11534, on behalf of plaintiff.

THE COURT: Thank you.

MR. WIRTHLIN: Good morning, Your Honor. Brenoch Wirthlin on behalf of plaintiff.

THE COURT: Thank you.

MS. OCHOA: Good morning, Your Honor. Angela Ochoa on behalf of the Re Corp. defendants.

THE COURT: Thank you.

MR. EBERT: Good morning, Your Honor. Bill Ebert on behalf of the Re Corp. Defendants.

THE COURT: Thank you.

MR. OGILVIE: Good morning, Your Honor. George Ogilvie on behalf of the Uni-Ter defendants and U.S. Re.

THE COURT: Thank you very much. We --

MR. CEREGHINO: Real quick, Your Honor, if I could just get rid of my gum.

THE COURT: Yes, of course.

MR. CEREGHINO: Sorry. Thank you.

THE COURT: All right. Were there any other preliminary matters?

So this is -- first, we have the Board of Directors' Motion for Judgment on the Pleadings, then we have a countermotion by the plaintiff, and then a motion to strike. I think we can take them all together.

Ms. Ochoa, does that work for you or do you wish to take them separately?

MS. OCHOA: Your Honor, I wish to take them separately. I'd like to do the motion to strike first, then the motion for judgment on the pleadings, and then the motion for summary judgment.

THE COURT: Very good.

MS. OCHOA: I think if we do that, then, you know, if the motion to strike is granted, then the countermotion is moot.

THE COURT: Yeah.

MS. OCHOA: Okay.

THE COURT: So let's -- everyone in accord that we will take the motion to strike first?

No objection. Thank you.

MS. OCHOA: So, Your Honor, when I received the opposition and countermotion for the summary judgment, I wasn't particularly concerned. Yes, the subject matter on the countermotion did not cover the same topic subject as my motion,

and it irked me a little bit that here I was, with my motion for judgment on the pleadings, about a legal standard fairly short in length.

I gave the plaintiff two extensions, moved my hearing as a professional courtesy, and then I was slapped with a countermotion for summary judgment on issues of fact, where we were going to discuss facts. That's not the same topic. That's not the same subject as my motion.

But I was ready to proceed. It really -- I really didn't start thinking about this motion the strike until I noticed in the plaintiff's countermotion that there were Bates stamp numbers that they were referring to that I had never seen before, that just -- it -- I had to look for them, and they were nowhere to be found.

In the countermotion, it indicated that there were at least 8,000 pages that they were -- they had in their possession that had not been disclosed. And the subject of that countermotion was there is no evidence, Your Honor. There is no evidence to support the director defendant's position. Well, I don't know that. There's 8,000 pages that you haven't provided to us.

You know, it's not fair, it flies in the face of justice, and it's almost borderline fraud upon the court. In a recent case called Valley Health Systems v. The Estate of Jane Doe, and that's 134 Nev. Advanced Opinion 76 issued on September 27, 2018.

THE COURT: I'm familiar with it.

MS. OCHOA: Right. It states that if you come to this Court

and you say there's no evidence, but you've been withholding those documents, that's a fraud upon the Court.

Now, I don't know if that's what arises to an -- I don't believe that that's what's happening here. I don't know that, though. Because after I filed that motion to strike, I was served with 22,000 pages of documents that I had not yet received.

And that was just served last week Thursday. And so I haven't had a chance to look at them. I don't know if there's something in there that is evidence to support my director defendant's position, but all that aside, it is the plaintiff's burden to show that they complied with EDCR 2.20. And (f), we talked about how it's not the same topic; it's not the same subject as my motion.

EDCR 2.20(g) says that a movant must provide courtesy copies five days before the hearing. I'm sure they didn't do that, because (h) also says that a reply must be filed five days before the hearing.

Now, I know they filed a reply just yesterday. The rule also says that in order before -- in order to file an untimely reply, leave must first be granted, and that didn't happen here.

So, you know, the fact that a reply has to be filed to a countermotion just shows that this was not a proper countermotion. That's not what's contemplated in EDCR 2.20, and thus we request that the motion -- the countermotion for summary judgment be stricken altogether.

THE COURT: Thank you. And before I hear the

opposition, did any other defendant wish to weigh in?

MR. OGILVIE: No, Your Honor.

MR. EBERT: Your Honor, I'm co-counsel with Ms. Ochoa.

THE COURT: Very good.

Then the opposition, please.

MR. CEREGHINO: Thank you, Your Honor.

So real quick, the subject matter is not what defendants present. The subject matter is liability. So our countermotion is absolutely on the same subject as the 12(c) motion. To say that our countermotion has to be on specifically the legal standard, well, number one, it is, because it incorporates it into the discussion, but number two, that's called the opposition. So we did that. But so the real issue is the subject matter is liability, personal liability. It's not this narrow reading of 78.138. The broad issue is liability. So our position is it is on the same subject matter.

Having said that, we note that on the issue of time, we offered additional time for whatever opposition to our countermotion. It was rejected. So I don't think timing should be an argument. It's a little disingenuous when we, in fact, recognized, hey, countermotion here, there's a lot here, take whatever time you need. And they just say no. Well, that's the bed they chose. They can lay in it.

Now, with respect to documents, again, a little bit of a misleading position. The documents -- while the Bates number reference may have been to a set that wasn't produced, the

document itself was in their possession the whole time. And there have been many, many, many documents, millions produced in this case. So this notion after years of discovery that, oh, my gosh, we don't have this one document. We identify in our reply that, yes, in fact, they are -- or in the opposition to the motion to strike, yes, in fact, they've been produced elsewhere under different numbers. So mea culpa for not providing the right Bates number, but substantively, they have the document, and they have had it for years.

Now, finally, if Your Honor wants to give them additional time to go ahead and look through those documents, that's fine. So with that, thank you.

THE COURT: Thank you.

Mr. Wirthlin, did you have anything?

MR. WIRTHLIN: No, Your Honor. Thank you.

THE COURT: And the reply, please.

MS. OCHOA: Your Honor, there was never a request to see if this hearing would be moved. There's no email. I certainly didn't take a call. I did not have a call asking me if I wanted to move the motion for judgment on the pleadings. I think the Uni-Ter defendants asked me, but we have depositions coming forward and so I wanted to get this matter heard.

I did advise them that I thought the countermotion was improper at the time, but there was no one asking us to separate and parse out these issues. This idea that I've had 22,000 pages in my

possession this whole time, that's -- I don't know that to be true. I just got them last Thursday.

And this idea that somehow all of these emails that they're providing in their countermotion is something that I had in my possession, again, I just didn't have the time to look through them. You know, I think that's pretty disingenuous.

If you look at -- I want to say it was Exhibit 16 that they point to -- in order to say that I have Exhibit 16 in my possession, they took the body of an email from a U.S. Re production, and they took attachment from their production. So they took two separate documents, put them together, and said that's the same document that was in the Curtis Sitterson emails. It's just beyond the pale.

But, you know, if the Court -- I request that the Court strike the motion as previously.

THE COURT: Thank you.

The matter is submitted. This is the Board of Directors' Motion to Strike the Plaintiff's Countermotion for Summary Judgment, order [indiscernible] in time. I'm going to grant it for the following reasons: I take a dim view -- and it's not to be critical of anyone, but dispositive motions as a countermotion are very difficult to process for me. I'm concerned about the due process to all parties. And in this case, I don't take any offense to the fact that a countermotion is filed. But even if a motion for summary judgment had been filed and a late production was made after an opposition was due, I would consider under 56(f), the fairness to the responding

party. So I'm going to grant the motion to strike.

If the plaintiff believes you have the grounds for a summary judgment, then tee it up and give them the chance to respond, make sure they've had a chance to review all of the documents. But it's hard to ask the parties to respond in a vacuum. So I'm going to go ahead and grant the motion to strike, without taking -- without any criticism of the fact that a countermotion was made, because very often in summary judgment motions, if it is based on the law and the facts are determined, one side is entitled to win. And I understand that. This isn't one of those, in my opinion, with regard to this issue. So I'll go ahead and grant the motion to strike.

Where does that take us now?

MS. OCHOA: The Motion for Judgment on the Pleadings, Your Honor.

THE COURT: Very good.

MS. OCHOA: The -- so this is your -- this is our Motion for Judgment on the Pleadings. In 2017, the legislature clarified NRS 78.138 by way of its preambles to be clear to the courts that they must apply the statute as written and the Courts can no longer look to other jurisdictions to supplant the plain language of NRS 78.138.

Now, the plain language states that in order for a director or officer to be personally liable for breaching his or her fiduciary duties, he or she must have committed an intentional misconduct, fraud, or a knowing violation of the law.

The motion -- thus, the plaintiffs must prove that the director defendants are not just protected by the business judgment rule or not protected by the business judgment rule, but they also committed that fraud. This is something more than gross negligence, and gross negligence is all that is pled in the third amended complaint. This motion is not about the business judgment rule. We are not seeking for this Court to make a determination that the business judgment rule protects our clients. And for purposes of this motion, we can also assume that the director defendants committed gross negligence. We are asking for this Court to look at the pleadings, and assuming all of the facts to be true, to determine that as a matter of law, my clients cannot be personally liable for their alleged errors and omissions. And that's because NRS 78.1387 says there must be more than gross negligence.

My clients must have done something that arose to fraud, intentional misconduct, or knowing violation of the law. Nothing is pled to support any of that. There's no cause of action called fraud. There's no cause of action called intentional misrepresentation. There's no facts that arise to the level of fraud or intentional misconduct. There's not even conclusory allegations where you see the word fraud, intentional misrepresentation, or anything like that in the third amended complaint.

What there is, is conclusory allegations of gross negligence, but that's not sufficient to trigger a personal liability.

The policy behind NRS 78.138 is clear, and that is to provide more protections to officers and directors in Nevada. And the legislature history is also clear that the intent of the 2017 amendments is not to undo existing case law, but to make sure that courts do not overstep and create law inconsistent with the plain language of the statute.

The plaintiff has not come to this court with any case law indicating that courts since 2017 have read the amendment in anything less than how it has been presented to you by us.

What they have done, again, is to try to confuse and mishmash the business judgment rule with the personal liability rule by presenting you cases where there's a discussion of the application of the business judgment rule, but that's not what we're talking about here.

Like the Wynn case we presented, that case is solely about whether a court must look at the substance of the advice or the information. It was about whether you could breach the attorney/client privilege when the business judgment rule is asserted. It does not interpret the personal liability aspect of 78.1387.

The plaintiff makes another argument. It sounds like they're conceding that under 78.1387 that they have to plead a knowing violation of the law. And they said that they did that. But -- and they also said, but we don't have to plead that with specificity. But that's not really correct.

If you look at the third amended complaint, again, there is

no reference to a knowing violation of the law, and in In Re: Amerco Derivative Litigation, it specifically says, In claims where the breach of fiduciary duty is pled, because the plaintiff must also prove intentional misconduct, fraud, or knowing violation of law, the fraud must be pled with particularity pursuant to NRCP 9(b).

Plaintiff also makes this argument that fraud, intentional misconduct, only apply to the breach of duty of loyalty. But that is also wrong. If you look at In Re: Amerco Derivative Litigation, it specifically acknowledges that pursuant to NRS 78.1387, to show that a director breached his or her fiduciary duty, a shareholder must prove that the Directors' act or failure to act constituted a breach of his or her fiduciary duties, and that involved a knowing violation of the law, intentional misconduct. The Court does not confine it just to the breach of the duty of loyalty. It's not specific. It's duties, plural. And that's what the plain language of 78.1387 says as well.

There's some really irrelevant arguments and comments. And I think I adequately address them in the briefs, but if you have any questions, I'm happy to take them now.

THE COURT: I don't. Thank you.

Anything from other defendants before I hear the opposition?

MR. OGILVIE: No, Your Honor.

THE COURT: The opposition, please.

MR. WIRTHLIN: Thank you, Your Honor. I'd like to tell the Court basically -- and I appreciate the Court allowing us to go last, to

have a little bit of time to address these issues.

THE COURT: Well, it turned out that some of the other matters were lengthy. I thought I was doing you a favor, so --

MR. WIRTHLIN: That's okay. No, that's fine. We appreciate that.

I just want to hear three main points, in addition to what we put in the pleadings. The first is this Court has addressed the issues related to the business judgment rule a couple of times already, and we amended our complaint. We have a third amended complaint on file.

But the sole basis for their motion, as I understand it, is the -- an amendment in 2017. First of all, that amendment is not retroactive, and we'll show that. Secondly, even if it was retroactive, which it isn't, it doesn't address this issue with respect to liability, personal liability, directors and officers for the breach of the duty of care.

And the Nevada Supreme Court in Shoen, as well as additional Nevada case law passed that point, as well as reaffirming case law after 2017 has all affirmed that for personal liability to be in effect for directors and officers for breach of the duty of care, that standard is different.

And finally, Your Honor, we do allege -- and opposing counsel mentioned this, that we've made this argument -- we do allege in our complaint that there was no knowing violation of law by the directors and officers.

We had certainly -- and I'll get to those in a minute, but just briefly, with respect to the fact that the statute is not retroactive, Your Honor, we would point to the legislative history, which is instructive -- and the directors opened the door to that and mentioned the legislative history, and it's perfectly appropriate to that.

The Nevada Supreme Court has determined that State v. Pullin, 188 P.3d 1079, you could absolutely look at this -- at the legislative history. In this case, Your Honor, I want to quote just one brief quote here, quote: The other point that I want to put on the record is that there is no retroactive effect in this bill. There are no issues that I know of or cases that point to the need to change. This bill simply looks forward, end quote. And those were in the May 25th, 2017, assembly judiciary committee minutes.

In addition to that, Your Honor, the Nevada law is very clear that statutes should be construed, prospective only -- prospectively only unless the language employed conclusively negatively negates that construction -- that's Clark City v. Roosevelt, 80 Nev. 530.

The language they cite to, and we'll get to this a little bit, isn't even about the amendment -- or rather the amendment that they address doesn't even touch on this specific issue, personal liability of directors and officers. It relates to other things, and really isn't a substantive amendment to any degree. So frankly, Your Honor, we submit the motion must be denied on that ground

alone.

Even if the statute or the amendment was retroactive, which it wasn't, it doesn't say what they say it does. There's a couple of cases that they cite, and those cases quote portions of the statute directly. And they say, well, that supports our interpretation of the statute. We would submit, Your Honor, it -- they do not. Parametric and Newport are the two cases that they rely on. And those were motions to dismiss -- where motions to dismiss were denied to try to knock out director and officer liability. Shoen in the law in Nevada and effectively what they're asking this Court to do is overrule Shoen. Shoen says, With -- With regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers. Then it distinguishes: And directors and officers may only be found personally liable for breaching their fiduciary duty of loyalty if that breach involves intentional misconduct, fraud, or knowing violation of the law.

FDIC v. Johnson, Your Honor, in case there was any doubt, the federal district of Nevada says very clearly, quotes that language from Shoen and then says, However Shoen -- let me put it -- one sentence before that -- "The business judgment rule -- they're talking about duty of care -- The business judgment rule typically requires -- excuse me -- back up -- one fiduciary duty of directors and officers is the duty of care. With regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers, citing to Shoen.

Then it says, The business judgment rule typically requires that breach of fiduciary duty involve intentional misconduct, fraud, or knowing violation of the law. However, Shoen makes clear that gross negligence suffices and further [indiscernible] is not required.

And Your Honor, I have a handout. I think we asked the Court to take judicial notice of it, but I didn't specifically include it as an exhibit, I believe. If the Court would like to look at it or I could just read it into the record.

THE COURT: What is it?

MR. WIRTHLIN: It's -- Your Honor, I apologize. It is Senate Committee Minutes from April 10, 2017. May I approach?

THE COURT: No. But you can read it into the record.

MR. WIRTHLIN: Just read it? Okay.

That basically says very clearly on page 3, there was a proposed amendment to state the following: Simple negligence alone is insufficient to rebut this presumption -- business judgment rule -- as provided in subsection 6 rebuttal of this presumption alone is also insufficient to establish the individual liability of a director or officer. That language was stricken.

So there was an attempt to change that, based on Shoen. And I think it's probably fair to say, as the directors point out, there were some individuals who were upset about the language in Shoen, but that is the law in Nevada. And it has survived the amendment, as we point out in Wynn, Your Honor. Wynn resorts case, which is postamendment, where the Court says very clearly,

quote: Either that decision was the product -- in other words, you can find liability -- either that decision was the product of fraud or self-interest or that the director failed to exercise due care in reaching that decision.

And effectively, from a practical standpoint, if you look at what their argument is, as I understand it, and I'm sincerely trying to give it a fair reading, that if we -- a director officer could be entirely grossly negligent, do absolutely nothing, and liability would increase due to their lack of compliance with the duty of care until they reached a point of ignorance where they literally can't know what their duties were, and then they would somehow be absolved of liability.

Your Honor, that's not what the statute says or what the Nevada Supreme Court has held.

And finally, even if we were required to comply with that standard, Your Honor, we would submit that the complaint very clearly and with substantial specificity does make those allegations. And I would like to read just a few brief quotes from the complaint. These are certainly not an exhaustive list. Paragraph 104, on information and belief at this time the board knew that reliance on information presented to it by or at the direction of Uni-Ter/U.S. Re could not be relied on.

Your Honor, NRS 78.1382 states specifically that a director officer cannot and is not entitled to rely on information when it has reason to know that reliance is inappropriate. That is a knowing

violation of the law. Paragraph 105: Despite this knowledge regarding the board -- of the board, regarding the wholly inadequate and inaccurate information provided by Uni-Ter, paragraph 121, 145. And then the claims themselves, paragraph 228: Further, the board was again made aware of the dire financial position it allows the LLC to reach due to its failure to exercise a slight degree of care.

Paragraph 30, we allege it multiple times: The board was in a position to see this information and knew that it had an obligation to do so. Further, it knew that the information provided by Uni-Ter U.S. Re and others is incomplete and inaccurate. It also knew that on at least several occasions that it was not receiving sufficient information.

It goes on, Your Honor, paragraph 232, as well alleges those actions that constitute knowing violation of the law.

So we would certainly -- if the Court felt that it was an appropriate request and reserve the right to amend, that deadline has not passed. If the Court felt like it was a close question, we would submit that the Court would defer it until trial under NRCP 58, but Your Honor, I don't think that needs to happen here. I think it's clear that and incorporating the papers, the duty of care has been adequately pled -- a breach of that duty by the directors and officers.

And we would ask in denying the Directors' motion, Your Honor, that Your Honor can put this issue to bed in the sense that it make a ruling that -- which I believe has inherently already been made, but expressly, that if the facts alleged in the third

amended complaint are proven at trial, the directors and officers are personally liable.

Thank you, Your Honor.

THE COURT: And the reply, please.

MS. OCHOA: Yes, Your Honor.

Do you want to take this?

MR. WIRTHLIN: Oh, thank you.

MS. OCHOA: Your Honor, on this issue of Shoen, if you look specifically -- this idea that Shoen says that the fiduciary duty of loyalty is the only duty that the plaintiff must show is also subject to intentional misconduct, fraud, or knowing violation of the law, that's not what it says.

It says, With regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers. It doesn't say that they're personally liable.

In our interpretation of 78.138, it says you breach the fiduciary duty, plus you must show fraud, intentional misconduct. That's not what Shoen is saying. Shoen is just saying that gross negligence overcomes the breach of the fiduciary duty.

So again, Shoen is not on point to what -- to the interpretation of what we're seeking. And even if you wanted to look at what the Court was looking at in Shoen -- if you notice in 2 -- this case was from 2006, but if you look at the footnote, Footnote 60 --

THE COURT: I just pulled it up.

MS. OCHOA: -- what they're talking about --

THE COURT: So I'll take -- give me a minute, and I'll take a look at that. 60?

MS. OCHOA: Footnote 60. They're actually talking about the amendments from 2001. They're looking at 78.1387, while -- and the operative language is, while this section applies only to claims arising after June 15, 2001.

Since 2003, that statute has been amended twice, 2003 amendments and the 2017 amendments. And they all say, Since October of 2003, this is the standard that you apply. So we don't think that state -- that Shoen is on point.

Your Honor, again, so the only knowing violation that I heard is this -- is the alleged you weren't supposed to rely on your experts, that you knew your experts are wrong. Well, that's just built into the same 78.138, but you're not supposed to breach your fiduciary duty. I'm sure that's not what the knowing violation of the law was intended to be. So for those bases, we think that the motion should be granted.

THE COURT: Thank you.

This is the Board of Directors Defendants' Motion for Judgment on the Pleadings pursuant to NRS -- I'm sorry -- NRCP 12(c), the motion will be denied for the following reasons: This is the same issue I looked at in 2016. And while I realize that 78.138 was amended in 19 -- or 2017, I believe that the Shoen v. SAC is still the controlling law, and that's even with the decision that came down in 2017, Wynn Resorts v. Eighth Judicial District Court, 399 Pacific 3rd

334.

So there's -- in my mind there's no new analysis.

Did you have something to add?

MS. OCHOA: Oh, no, no, Your Honor.

MR. EBERT: Beg your pardon, Your Honor.

THE COURT: All right. So the same analysis that I used previously, I believe still is the applicable analysis. So the motion will be denied for the reason that we've already looked at it. So --

Did you have something to say, you guys?

MS. OCHOA: No, no.

THE COURT: No. Okay. Very good.

MR. WIRTHLIN: Thank you, Your Honor.

THE COURT: So Mr. Cereghino and Mr. Wirthlin, if you would prepare the order, I think actually Mr. Wirthlin --

MR. WIRTHLIN: Yes, Your Honor.

THE COURT: And with regard to the motion the strike, Ms. Ochoa, all I don't have you make sure that everyone has the ability to review and approve the form of those orders. And I see that you guys are set for trial next year. Would it do any good to send you to a settlement conference, guys?

MR. WIRTHLIN: We --

MR. CEREGHINO: We've tried.

MR. WIRTHLIN: Yeah. We -- we're certainly open to whatever defendants would like to address. We did do a mediation in July, I believe, and weren't able to resolve it. But that may

change. We'll see.

THE COURT: Yeah. Thank you all.

MR. WIRTHLIN: Thank you, Your Honor.

MR. CEREGHINO: Thank you, Your Honor.

THE COURT: Let me ask one last thing, there was a motion to associate on the 16th of October. If there's not going to be an opposition, I can go ahead and grant that and vacate to the [indiscernible].

MR. WIRTHLIN: No opposition, Your Honor.

MS. OCHOA: There's no opposition from us.

THE COURT: All right. So go ahead. The motion to associate will be granted. The heairing on October 16th, well, it's in chambers, but it'll be vacated. Go ahead and submit an order to that effect.

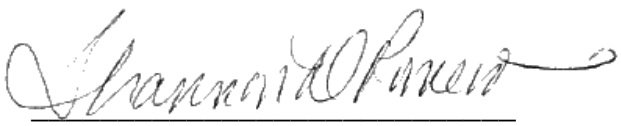
MR. WIRTHLIN: Thank you, Your Honor.

THE COURT: Thank you, both.

[Proceedings adjourned at 10:43 a.m.]

* * * * * * * *

ATTEST: Pursuant to Rule 3C (d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.



Shannon D. Romero
Court Recorder/Transcriber
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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK,	)	CASE NO. A-14-711535-C
Plaintiff,	)	DEPT NO. XXVII
vs.	)	
ROBERT CHUR, et al,	)	
Defendants.	)	**Transcript of Proceedings**

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

PLAINTIFF'S OPPOSITION TO DIRECTOR DEFENDANTS' MOTION FOR RECONSIDERATION AND COUNTERMOTION FOR ATTORNEY'S FEES REQUEST FOR HEARING ON DEFENDANTS' MOTION FOR RECONSIDERATION

WEDNESDAY, JANUARY 9, 2019

APPEARANCES:

FOR THE PLAINTIFF: JAMES L. WADHAMS, ESQ.
BRENOCH WIRTHLIN, ESQ.

FOR THE DEFENDANTS: JOSEPH STEPHEN PEEK, ESQ.
RYAN A. SEMERAD, ESQ.
ANGELA T. NAKAMURA OCHOA, ESQ.
GEORGE F. OGILVIE III, ESQ.

RECORDED BY: BRYNN GRIFFITHS, COURT RECORDER
TRANSCRIBED BY: JULIE POTTER, TRANSCRIBER

LAS VEGAS, NEVADA, WEDNESDAY, JANUARY 9, 2019, 9:35 A.M.

(Court was called to order)

THE COURT: Commissioner versus Chur. And we'll take appearances, please, from your right to left.

MR. WIRTHLIN: Good morning, Your Honor. Brenoch Wirthlin on behalf of plaintiff.

THE COURT: Thank you.

MR. WADHAMS: Good morning, Your Honor. Jim Wadhams on behalf of plaintiff.

THE COURT: Thank you.

MR. PEEK: Good morning, Your Honor. Stephen Peek on behalf of the director defendant.

THE COURT: Thank you.

MR. SEMERAD: Ryan Semerad on behalf of the director defendants.

THE COURT: Thank you.

MS. OCHOA: Angela Ochoa on behalf of the director defendants.

THE COURT: Thank you.

MR. OGILVIE: Good morning, Your Honor. George Ogilvie on behalf of the Uni-Ter defendants and U.S. Re.

THE COURT: Thank you all. And this is the board of director defendants' motion for reconsideration. Plaintiff's countermotion for attorney's fees. Thank you all.

MR. PEEK: Thank you, Your Honor. And I prefer the

lectern rather than the desk.

THE COURT: Wherever anyone prefers to argue.

MR. PEEK: Your Honor, the only issue before you today is narrow and straightforward. It is what law prescribes the circumstances in which a director of a Nevada company may be held personally liable for his or her conduct as a director. Is it the plain text of NRS 78.138 or a single sentence from a Nevada Supreme Court case concerning pleading demand futility?

NRS 78.138 governs here. And because plaintiff failed to allege with particularity sufficient facts in its operative complaint, operative third amended complaint, to satisfy the requirements or NRS 78.138. The defendants' motion for judgment on the pleadings should have been granted.

Plaintiff recognizes the consequences of this Court applying the clear language of 78.138. As a result, plaintiff goes to great lengths in its opposition to the defendants' motion before the Court to characterize 78.138 as inapplicable to the required pleadings in this case. However, plaintiff's efforts to warp 78.138 do not change its plain meaning or plain text. Plaintiffs must make sufficient allegations to demonstrate that the defendants are personally liable under 78.138.

In its attempt to hold several directors of a Nevada company personally liable for the gross negligence, they fail to plead fraud, intentional misconduct, or knowing violation of the

law. However, to hold a director personally liable for damages as a result of an act or failure to act in his or her capacity as a director, plaintiff must plead and prove the circumstances described in both 78.138(3) and 78.138(7). Plaintiff has failed to plead fraud, intentional misconduct, or a knowing violation of law as required by 78.138(7).

We start with 78.138(3) which is a business judgment rule. A director or officer is not individually liable for damages as result of an act or failure to act in his or her capacity as a director or officer, except in circumstances described in subsection (7).

Then subsection (7) repeats the same part from (3) and provides that a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless three elements are met, 1) that the business judgment rule has been rebutted, 2) that the director's relevant act or failure to act constitutes a breach of his or her fiduciary duty, and 3) that the breach involved intentional misconduct, fraud, or a knowing violation of the law. Plaintiffs must plead and prove each of these three elements before a director can be personally liable as a matter of law.

Plaintiff's only response to the plain text of NRS 78.138 is a single sentence from *Shoen*. In *Shoen* -- this is

Shoen one, actually, Your Honor -- the Nevada Supreme Court established the pleading requirements for pleading demand futility in a shareholder derivative action, not liability, demand futility.

The Court did not consider, address, or modify 78.138. And although *Shoen* discussed gross negligence and the business judgment rule, it did not discuss or state anything that a director's gross negligence and the director's personal liability for that so-called gross negligence. In short, *Shoen* generally -- and the sentence on which plaintiff relies in *Shoen* does not govern this case. The plain text of NRS 78.138 does.

Nevertheless, plaintiff continues to argue that this single sentence in *Shoen*, which focused on the pleading standard to demonstrate demand futility either modified, added to, or changed the plain text of NRS 78.138(7) which would allow its complaint alleging a director is personally liable for her gross negligence as a director to go forward without pleading the full circumstances required by NRS 78.138(7)(b).

So here's the sentence in *Shoen* upon which they're relying. With regard to the duty of care, the business judgment rule -- which is subpart (3) -- does not protect the gross negligence of uninformed directors and officers. And that is so because, Your Honor, NRS 78.138 only gives the directors the protection of the business judgment rule if they act in good faith, duty of loyalty, and on an informed basis, the duty of

care.

Yet plaintiff ignores the second sentence in this very same paragraph from *Shoen* which reads, quote, and directors and officers may only be found personally liable for breaching their fiduciary duty of loyalty if that breach involves intentional misconduct, fraud, or a knowing violation of the law.

And interestingly, there's a footnote right after this second sentence, this Footnote 60. And Footnote 60 supported this second sentence with a citation to NRS 78.138(7). In doing so, the Court expressly endorsed the principle that 78.138(7) governs the requirements to hold directors -- to hold a director personally liable. Footnote 60.

To be sure gross negligence is not, as plaintiffs characterize in their reply brief on page 7, quote, equivalent to a willful and intentional wrong, ordinary and gross negligence, they say, differ in degree of inattention, while both differ in kind from willful and intentional conduct.

They alone acknowledge that in this case there has not been willful and intentional conduct. Because the sentence on which plaintiff relies in *Shoen* says nothing about 78.138(7), let alone (a), (b). It does not change the meaning, the scope, the application, or the effects of that statute. The *Shoen* court recognized as much by affirmatively approving 78.138(7) as the guiding law on the personal liability of directors in that very next sentence.

Whatever consequences may flow from the gross negligence sentence in the *Shoen* decision on the pleading requirements in a demand futility case, a plaintiff who seeks to hold a director liable of a Nevada company, personally liable for damages because of his or her conduct, must still comply with 78.138(7) because that -- before that director can be found personally liable. Gross negligence may rebut the protection of the business judgment rule that directors acted on an informed basis or may affect the independence of a direction in a demand excused case, but it does not create personal liability for directors.

Still, however, this Court chose to follow plaintiff's interpretation of *Shoen* over the plain text of NRS 78.138(7) when it denied the director defendants' motion for judgment on the pleadings. As a result, this Court applied an erroneous legal standard to decide that the motion -- decide that motion and the director defendants now request this Court to reconsider its decision and dismiss the third amended complaint.

To be sure, the legislature modified 78.138 after *Shoen* was decided; however, the relevant elements of that statute did not change. Under the prior version of 78.138, as with the current version, the business judgment was presumed, and a shareholder would have to overcome this presumption. And if overcome, a director was still entitled to protection and not individually liable for her conduct as a director unless that

conduct involved a breach of her fiduciary duty, and the breach involved intentional misconduct, fraud, or a knowing violation of the law.

The issue before this Court is simple. What law governs the pleadings required to show a director of a Nevada company is personally liable for her conduct as a director? The answer is simple, NRS 78.138. Once there is proper application of 78.138 in deciding the motion for judgment of the pleadings, the Court must dismiss plaintiff's third amended complaint.

Plaintiff has only made allegations of defendants' gross negligence stemming from their failure to inform themselves about the company, without pleading any facts to support the defendants' inaction in failing to inform itself involved intentional misconduct, fraud, or a knowing violation of the law. It may rebut the business judgment rule, but it does not create liability. Thus, plaintiff's third amended complaint does not satisfy NRS 78.138(7)(b), and so even if all of its facts are accepted as true, the director defendants cannot be held personally liable.

With respect to deepening of insolvency, the Court has already addressed that and has held that it's not a separate claim and it's only part of any claim that might exist against directors for breach of fiduciary duty. Consequently, I see no need to address this already dismissed and non-existing claim for relief. This Court should grant the defendants' motion for

reconsideration, and accordingly grant the 12(c) motion by dismissing the third amended complaint.

And, Your Honor, I'll address whether or not this motion for reconsideration was made in good faith as the plaintiff claims and that I should be sanctioned and they should be awarded attorney's fees after I hear from them.

THE COURT: Thank you.

Did anyone else have anything to add? Mr. Ogilvie?

MR. OGILVIE: No, Your Honor.

THE COURT: Thank you.

The opposition, please.

MR. WIRTHLIN: Thank you, Your Honor. I do agree with opposing counsel that this issue is fairly straight forward. I think what we disagree on is whether this Court should continue to follow the law in Nevada, or the directors' personal interpretation of the business judgment rule and its effects.

And I understand and I don't fault them for taking that position. They've taken it in multiple motions to dismiss. They filed their Rule 12(c) motion in an attempt to really impose conditions for stating a claim for breach of the duty of care that do not exist in Nevada law. And I think one of the key issues is there's not a single Nevada case that they cite to from the Supreme Court of Nevada that supports their position.

Preliminarily I would like to note that technically the 12(c) motion, since that's what they're asking this Court to

reconsider, was very untimely. It was filed two years after the pleadings were closed. I believe the directors answered in October 2016.

But more to the -- to the merits of it, Your Honor, there's a reason that they cite several Nevada Federal District Court cases. There is no Nevada Supreme Court that supports their position. And I don't think we need to go down that road because the Nevada Supreme Court case law is clear, but if we do, as we pointed out in our opposition, that doesn't help the director defendants, Your Honor.

They cite to a couple of key cases there. *McFarland*, which doesn't involve the duty of care whatsoever. They cite to *Israni*, which is a 2012 case, and that involved a derivative action under NRCP 23.1. Inapplicable. In that case the court said that it looks to Delaware law for guidance on the requirements for pleading demand futility. Again, not at issue here. The *Las Vegas Sands* case, they cite to Judge Earl's trial court order in 2009 which relied on a *Citigroup* case, a Delaware case also from 2009.

We would disagree with their interpretation of those cases, but if we're going to look at Federal District Court case law, let's look at something more recent. Three cases, Your Honor, I want to point to.

The first is *Jacobi versus Ergen*, that's a 2015 case, and that is Judge Dorsey where she says unequivocally, and I'm

quoting, a director's misconduct must rise at least to the level of gross negligence to state a breach of the fiduciary duty of care claim or involve intentional misconduct, fraud, or a knowing violation of law to state a duty of loyalty claim. Again, distinguishing between those two claims which the directors attempt to conflate and collapse.

Second, *FDIC versus Jacobs*, again, a 2014 case. Judge Jones, so we have another -- a different federal judge stating, quote, in Nevada the business judgment rule defines the line between unactionable ordinary negligence and actionable gross negligence.

And finally, Your Honor, *FDIC versus Johnson*, 2014, Westlaw 5324057. Judge Dawson, yet another Federal Court judge stating, quote, the business judgment rule does not apply to claims of gross negligence which constitutes a breach of the fiduciary duty of care, and then cites to *Shoen*.

And, again, I don't want to bring up too much that was -- it seems was not, I don't want to say maybe abandoned or at least not focused on by the directors, but legislature did address this issue or could have addressed this issue in 2017. They looked at the amendments and we cited this back in our opposition to their initial motion.

The proponent of the changes was asked point blank, is there a case that's a problem you think needs to be over -- you know, overruled or overturned? The answer was no. The question

was is this statute in any way retroactive? The answer was no. And post-2017, and, again, further confirming the plaintiff's position and rejecting the director defendants' position, the Nevada Supreme Court, again, in *Wynn Resorts* has reaffirmed *Shoen* as the central case on this issue.

They have stated -- stated there clearly, and I quote, either that the decision, meaning the board of directors' decision which results in personal liability or can result in personal liability, quote, either that the decision was the product of fraud or self-interest, or that the director failed to exercise due care in reaching that decision.

And I think if we step back just a bit from a logical standpoint, the directors' argument really doesn't make a lot of sense. What they're saying is that even with a duty of care claim, there must be some -- this heightened showing of fraud or intentional misconduct and -- or a knowing violation of the law, three separate issues, which, frankly, Your Honor, would eviscerate a duty of care claim.

There would be no duty of care claim because any duty of care claim would necessarily require that this showing -- heightened showing of fraud or some other similar standard be met, and that would -- there would be no point. A director could effectively do absolutely nothing during his entire -- his or her entire tenure on the board and then say, well, okay, maybe the judgment rule is rebutted, but I still have no

personal liability even though I did absolutely nothing because you can't show that I committed fraud. That's not what the legislature intended, that's not what the Nevada Supreme Court has said.

Even if -- even if the directors were right in their argument, which we -- we strongly dispute. They have not cited a single Nevada Supreme Court case law to support them. And, frankly, Federal District Court case law also rejects their position. But even if they were right, we're talking about two different things.

They want to talk exclusively about this plain language of the statute. Well, the plain language, if we're going to -- if we're going to parse that language, it states very clearly that this issue of intentional misconduct must be proven. That's what the statute says, proven, not necessarily subject to some heightened pleading standard, which is where we're at at this point. 23.1, Rule 9, those do have heightened pleading standards.

That's not where the duty of care claim comes in. Even if that were accurate, which we do not believe that it is, Your Honor, we have met this standard within our complaint, in our third amended complaint. We cite to, I don't know, I want to say maybe a couple dozen paragraphs in our opposition that show time, persons, nature, place that would meet any pleading standard that -- that apply.

The directors' response is simply one paragraph in the reply. They say we don't think you've met the standard. Well, we understand that that's their position, but, frankly, Your Honor, we have met that standard and -- even if that was the standard that we had to meet.

Finally, as to the opposition, Your Honor, this deepening of insolvency claim, the director defendants take the position inaccurately that it's fraud based. The Ninth Circuit has clearly held that it is not. Just quoting from that decision in *Smith versus Arthur Andersen*, deepening of the insolvency in that case, quote, was accomplished by, among other things, misrepresenting, not necessarily intentionally, the firm's financial condition to its outside directors. That's exactly the claim that we have pled, Your Honor. That does not -- it is not fraud based. It does not require allegations of fraud.

Finally, with our countermotion for attorney's fees, Your Honor, I don't generally file those. We decided not to do one with the motion for reconsideration, even though we felt like it was untimely and it was a third bite at the apple. At this point we're not impugning any character or bad faith. It's simply we've had to do this four times, and we would request that the Court reimburse us for those fees. Thank you, Your Honor.

THE COURT: And your reply, please.

MR. PEEK: Thank you, Your Honor. Judicial activism cannot overcome the clear intent and statements of the legislature. I've not heard from plaintiff an understanding of how a pleading of gross negligence can get them beyond the clear language of subsection (7) which says a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act. The inaction about which they described, that they described, in his or her capacity as a director or officer unless three elements are met.

If the judgment rule has been rebutted, that would be their inaction. Directors' relevant act or failure to act constitutes a breach -- constitutes a breach of his or her fiduciary duty and the breach involved intentional misconduct, fraud, or a knowing violation of the law.

You can't say that's just a pleading -- or that's just to proof. You have to create a claim for relief that has to be a claim for relief which sets forth the elements of the claim for relief in order to then get to a jury. It's not a proof standard. Yes, it is a proof standard, but it is a pleading standard. Just like you're required to say you have a contract if you're going to plead a proof -- or, excuse me, plead a breach of a contract. You don't say breach of contract and say, oh, well, that's just proof down the road. No.

And certainly, Your Honor, there really was no

judicial activism on the part of Justice Hardesty when he wrote *Shoen*. If you focus and you read the language of *Shoen*, it is internally consistent with the statutory scheme. First of all, it's in a demand futility pleading standard. Secondly, Your Honor, you have to read the whole subject matter of that one paragraph, which describes, first of all, gross negligence, and then describes breach of fiduciary duty, the duty of loyalty, citing to NRS 78.138(7).

When you ignore all of that language, you can do as they say and take one sentence from Justice Hardesty's opinion in 2006 and say, oh, that created a new claim for relief, I don't need to plead intentional misconduct, fraud, or knowing violation.

Your Honor, I read Justice -- or Judge Dorsey's opinion, also a pleading standard. I read Judge Jones's opinion, which confirmed liability on the basis of a federal statute. 12 U.S.C 1821(k), which says that an officer or director acting in this manner in a bank may be held liable for gross negligence because it's a breach of a federal statute.

The cases that they cite, Your Honor, do not support a judicial activism that would take away the requirements of the legislature's protection of officers and directors in stating in subpart (3) they shall not be individually liable for act or failure to act unless you plead and prove the elements of subsection (7).

I'm not going to respond, Your Honor, to the remarks about third bite at the apple. They're on their fourth bite at the apple on pleading.

THE COURT: Thank you both. This is the defendants' motion for reconsideration with the plaintiff's countermotion for attorney's fees. I'm going to take it under advisement. It will be on my chambers calendar for January 29th. While the motion is untimely, I am going to consider the merits and write something for you both so that in the event a writ is taken, my position will be clarified.

MR. PEEK: Why is it untimely, Your Honor? Why is the motion untimely? I filed it within 10 days. So I don't -- I'm trying to understand when you say the motion is untimely.

THE COURT: I think it's untimely. You know, I'd have to go back to the specifics with the dates in my brief to answer that for you. I'm going to ask plaintiff's counsel to do that.

MR. PEEK: Because, Your Honor, I --

MR. WIRTHLIN: Your Honor --

MR. PEEK: -- from the notes of entry of judgment to the time of the motion for reconsideration was 10 days.

MR. WIRTHLIN: Your Honor, I think there's a little bit of confusion there on opposing counsel. We're not saying that their motion for reconsideration was untimely. The 12(c) motion was untimely.

THE COURT: I think that was my --

MR. PEEK: Yeah, if that's what you said, Your Honor, I -- a 12(c) motion can be filed at any time.

THE COURT: Good enough. Well, I'm going to disregard that argument and consider the matter, and I will have something to you. It should be by the 29th. If it's not, I'll enter a minute order that week giving you a date certain.

MR. WIRTHLIN: Thank you, Your Honor.

MR. PEEK: And thank you, Your Honor, because you do anticipate a writ.

THE COURT: I do.

MR. PEEK: Thank you very much.

THE COURT: I see the handwriting on the wall. And can I politely remind you guys that when you have motions in this case, please ask for a special setting because I don't want you to ever feel you've been jammed through. I've got 20 people back there waiting to be heard, and I want to make sure everyone gets their time. So always ask for a special setting. We're happy to accommodate that.

MR. WIRTHLIN: Thank you, Your Honor. Will do.

MR. PEEK: Thank you, Your Honor.

THE COURT: Thank you both.

(Proceedings concluded at 10:03 a.m.)

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

Julie Potter
Kingman, AZ 86402
(702) 635-0301