

IN THE SUPREME COURT OF THE STATE OF NEVADA

COMMISSIONER OF INSURANCE
FOR THE STATE OF NEVADA AS
RECEIVER OF LEWIS AND CLARK
LTC RISK RETENTION GROUP,
INC.,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK, AND THE
HONORABLE NANCY L. ALLF,
DISTRICT JUDGE, DEPARTMENT
NO. XXVII,

Respondents,

ROBERT CHUR, STEVE FOGG,
MARK GARBER, CAROL HARTER,
ROBERT HURLBUT, BARBARA
LUMPKIN, JEFF MARSHALL, ERIC
STICKELS, UNI-TER UNDER-
WRITING MANAGEMENT CORP.,
UNI-TER CLAIMS SERVICES
CORP., and U.S. RE CORPORATION

Real Parties
in Interest

) Supreme Court No.

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) Dist. Ct. Case. No.

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Electronically Filed

Sep 29 2020 11:33 a.m.

Elizabeth A. Brown

Clerk of Supreme Court

APPENDIX TO PETITION

FOR A WRIT OF MANDAMUS

VOLUME 7 OF 10

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1	Complaint, filed 12/23/2014	1	PA000001-PA000133
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3	Opposition to Motion to Dismiss, filed 1/15/2016	1	PA000147-PA000162
4	Transcript re: Directors' Motion to Dismiss, hearing held on 1/27/2016	1	PA000163-PA000171
5	Notice of Entry of Order Granting in Part and Denying in Part Motion to Dismiss, filed 2/26/2016	1	PA000172-PA000177
6	First Amended Complaint, filed 4/1/2016	1	PA000178-PA000696
7	Motion to Dismiss First Amended Complaint, filed 4/18/2016	2	PA000697-PA000723
8	Decision and Order, filed 5/4/2016	2	PA000723-PA000732
9	Opposition to Motion to Dismiss First Amended Complaint, filed 5/5/2016	2	PA000733-PA000820
10	Reply to Motion to Dismiss First Amended Complaint, filed 5/19/2016	2	PA000821-PA000831
11	Second Amended Complaint, filed 6/13/2016	2	PA000832-PA001353
12	Supplemental Motion to Dismiss First Amended Complaint, filed 7/18/2016	2	PA001354-PA001358
13	Third Amended Complaint, filed 8/5/2016	2, 3	PA001359-PA001887

14	U.S. Re Corporation's Answer to Third Amended Complaint, filed 8/12/2016	3	PA001888-PA001903
15	Uni-Ter Claims Services Corp.'s Answer to Third Amended Complaint, filed 8/12/2016	3	PA001904-PA001919
16	Second Supplement to Motion to Dismiss First Amended Complaint, filed 9/2/2016	3	PA001920-PA001923
17	Notice of Entry of Order Denying Motion to Dismiss First Amended Complaint, filed 10/11/2019	3	PA001924-PA001928
18	Answer to Third Amended Complaint [Directors'], filed 10/21/2016	3	PA001929-PA001952
19	Motion for Judgment on the Pleadings, filed 8/14/2018	3, 4	PA001953-PA002232
20	Opposition to Motion for Judgment on the Pleadings, filed 9/19/2018	4, 5	PA002233-PA002584
21	Reply to Motion for Judgment on the Pleadings, filed 10/4/2018	6	PA002585-PA002700
22	Transcript re: hearing held on 10/11/2018 re: all pending motions	6	PA002701-PA002722
23	Order Denying Motion for Judgment on the Pleadings, filed 11/2/2018	6	PA002723-PA002725
24	Motion for Reconsideration, filed 11/29/2018	6	PA002726-PA002744
25	Opposition to Motion for Reconsideration, filed 12/27/2018	6	PA002745-PA002758
26	Reply to Motion for Reconsideration, filed 1/4/2019	6	PA002759-PA002772
27	Transcript re: hearing held on 1/9/2019 re: Motion for Reconsideration	6	PA002773-PA002791
28	Scheduling Order, filed 1/29/2019	6	PA002792-PA002794

29	Order Denying Motion for Reconsideration, filed 2/11/2019	6	PA002795-PA002798
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31	Joinder to Motion for Stay Pending Petition, filed 3/11/2019	7	PA002813-PA002822
32	Opposition to Motion for Stay Pending Petition, filed 3/12/2019	7	PA002823-PA002856
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34	Court Minutes re: Motion to Stay Pending Petition, 3/14/2019	7	PA002864-PA002865
35	Order Granting Motion for Stay, filed 4/4/2019	7	PA002866-PA002868
36	Motion to Lift Stay, filed 7/2/2019	7	PA002869-PA002886
37	Opposition to Motion to Lift Stay, filed 7/9/2019	7	PA002887-PA002892
38	Response to Motion to Lift Stay, filed 7/10/2019	7	PA002893-PA002897
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46	Transcript re: hearing held on 6/18/2020 re: Motion for Clarification	7	PA002961-PA002971
47	Notice of Entry of Order re: Motion for Clarification, filed 6/30/2020	7	PA002972-PA002981
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49	Opposition to Motion for Leave to File Fourth Amended Complaint [Directors'], filed 7/17/2020	7	PA003014-PA003044
50	Opposition to Motion for Leave to File Fourth Amended Complaint [Unit-Ter], filed 7/17/2020	8	PA003045-PA003072
51	Reply to Motion for Leave to file Fourth Amended Complaint, filed 7/21/2020	8	PA003073-PA003245
52	Transcript re: hearing held on 7/23/2020 re: all pending motions	8	PA003246-PA003273
53	Answer to Third Amended Complaint [U.S. Re Corporation], filed 8/7/2020	9	PA003274-PA003289
54	Amended Answer to Third Amended Complaint [Uni-Ter Underwriting Management Corp.], filed 8/7/2020	9	PA003290-PA003306
55	Amended Answer to Third Amended Complaint [Uni-Ter Claims Services Corp.], filed 8/7/2020	9	PA003307-PA003323
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58	Opposition to Motion for Partial Reconsideration, filed 8/24/2020	9, 10	PA003362-PA003515
59	Reply to Motion for Partial Reconsideration, filed 8/25/2020	10	PA003516-PA003525
60	Transcript re: hearing held on 8/26/2020 re: all pending motions	10	PA003526-PA003548
61	Motion for Stay Pending Petition, filed 8/28/2020	10	PA003549-PA003625
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64	Transcript re: hearing held on 9/3/2020 re: all pending motions	10	PA003642-PA003659
65	Opposition to Motion to Certify Judgment as Final [Directors'], filed 9/8/2020	10	PA003660-PA003662
66	Opposition to Motion to Certify Judgment as Final [Uni-Ter], filed 9/8/2020	10	PA003663-PA003675
67	Notice of Entry of Order Denying Motion for Partial Reconsideration, filed 9/10/2020	10	PA003676-PA003690
68	Notice of Entry of Order Granting Motion to Stay, filed 9/17/2020	10	PA003691-PA003702
69	Order Granting Judgment on the Pleadings, filed 8/13/2020	10	PA003703-PA003707

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54	Amended Answer to Third Amended Complaint [Uni-Ter Underwriting Management Corp.], filed 8/7/2020	9	PA003290-PA003306
18	Answer to Third Amended Complaint [Directors'], filed 10/21/2016	3	PA001929-PA001952
53	Answer to Third Amended Complaint [U.S. Re Corporation], filed 8/7/2020	9	PA003274-PA003289
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43	Limited Opposition to Motion for Clarification [Uni-Ter], filed 4/9/2020	7	PA002921-PA002940
41	Motion for Clarification, filed 4/6/2020	7	PA002906-PA002915
19	Motion for Judgment on the Pleadings, filed 8/14/2018	3, 4	PA001953-PA002232
48	Motion for Leave to File Fourth Amended Complaint, filed 7/2/2020	7	PA002982-PA003013

57	Motion for Partial Reconsideration of Motion for Leave, filed 8/14/2020	9	PA003330-PA003361
24	Motion for Reconsideration, filed 11/29/2018	6	PA002726-PA002744
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63	Motion to Certify Judgment as Final, filed 9/3/2020	10	PA003631-PA003641
2	Motion to Dismiss, filed 12/11/2015	1	PA000134-PA000146
7	Motion to Dismiss First Amended Complaint, filed 4/18/2016	2	PA000697-PA000723
36	Motion to Lift Stay, filed 7/2/2019	7	PA002869-PA002886
67	Notice of Entry of Order Denying Motion for Partial Reconsideration, filed 9/10/2020	10	PA003676-PA003690
17	Notice of Entry of Order Denying Motion to Dismiss First Amended Complaint, filed 10/11/2019	3	PA001924-PA001928
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68	Notice of Entry of Order Granting Motion to Stay, filed 9/17/2020	10	PA003691-PA003702
45	Notice of Entry of Order re: Motion for Clarification, filed on 4/28/2020	7	PA002955-PA002960
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20	Opposition to Motion for Judgment on the Pleadings, filed 9/19/2018	4, 5	PA002233-PA002584
49	Opposition to Motion for Leave to File Fourth Amended Complaint [Directors'], filed 7/17/2020	7	PA003014-PA003044
50	Opposition to Motion for Leave to File Fourth Amended Complaint [Unit-Ter], filed 7/17/2020	8	PA003045-PA003072
58	Opposition to Motion for Partial Reconsideration, filed 8/24/2020	9, 10	PA003362-PA003515
25	Opposition to Motion for Reconsideration, filed 12/27/2018	6	PA002745-PA002758
62	Opposition to Motion for Stay, filed 9/1/2020	10	PA003626-PA003630
32	Opposition to Motion for Stay Pending Petition, filed 3/12/2019	7	PA002823-PA002856
65	Opposition to Motion to Certify Judgment as Final [Directors'], filed 9/8/2020	10	PA003660-PA003662
66	Opposition to Motion to Certify Judgment as Final [Uni-Ter], filed 9/8/2020	10	PA003663-PA003675
3	Opposition to Motion to Dismiss, filed 1/15/2016	1	PA000147-PA000162
9	Opposition to Motion to Dismiss First Amended Complaint, filed 5/5/2016	2	PA000733-PA000820
37	Opposition to Motion to Lift Stay, filed 7/9/2019	7	PA002887-PA002892
23	Order Denying Motion for Judgment on the Pleadings, filed 11/2/2018	6	PA002723-PA002725
56	Order Denying Motion for Leave to File Fourth Amended Complaint, filed 8/10/2020	9	PA003324-PA003329

29	Order Denying Motion for Reconsideration, filed 2/11/2019	6	PA002795-PA002798
69	Order Granting Judgment on the Pleadings, filed 8/13/2020	10	PA003703-PA003707
35	Order Granting Motion for Stay, filed 4/4/2019	7	PA002866-PA002868
21	Reply to Motion for Judgment on the Pleadings, filed 10/4/2018	6	PA002585-PA002700
51	Reply to Motion for Leave to file Fourth Amended Complaint, filed 7/21/2020	8	PA003073-PA003245
59	Reply to Motion for Partial Reconsideration, filed 8/25/2020	10	PA003516-PA003525
26	Reply to Motion for Reconsideration, filed 1/4/2019	6	PA002759-PA002772
33	Reply to Motion for Stay Pending Petition, filed 3/13/2019	7	PA002857-PA002863
10	Reply to Motion to Dismiss First Amended Complaint, filed 5/19/2016	2	PA000821-PA000831
38	Response to Motion to Lift Stay, filed 7/10/2019	7	PA002893-PA002897
28	Scheduling Order, filed 1/29/2019	6	PA002792-PA002794
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13	Third Amended Complaint, filed 8/5/2016	2, 3	PA001359-PA001887

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14	U.S. Re Corporation's Answer to Third Amended Complaint, filed 8/12/2016	3	PA001888-PA001903
15	Uni-Ter Claims Services Corp.'s Answer to Third Amended Complaint, filed 8/12/2016	3	PA001904-PA001919

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **APPENDIX TO PETITION FOR A WRIT OF MANDAMUS VOLUME 7 OF 10** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

George F. Ogilvie III, Esq. (3352)
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Las Vegas, NV 89134

Attorney for Director Defendants

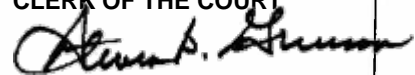
Further, a copy was mailed via U.S. Mail to the following:

The Honorable Nancy Allf
Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Department XXVII
Las Vegas, Nevada 89155

DATED this 28th day of September, 2020.

/s/ Kaylee Conradi

An employee of Hutchison & Steffen, PLLC



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8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 COMMISSIONER OF INSURANCE FOR
11 THE STATE OF NEVADA AS RECEIVER
12 OF LEWIS AND CLARK LTC RISK
RETENTION GROUP, INC.,

13 Plaintiff,

14 vs.

15 ROBERT CHUR, STEVE FOGG, MARK
16 GARBER, CAROL HARTER, ROBERT
HURLBUT, BARBARA LUMPKIN, JEFF
17 MARSHALL, ERIC STICKELS, UNI-TER
UNDERWRITING MANAGEMENT CORP.,
18 UNI-TER CLAIMS SERVICES CORP., and
U.S. RE CORPORATION; DOES 1-50,
19 inclusive; and ROES 51-100, inclusive;

20 Defendants.

Case No.: A-14-711535-C
Dept No.: 27

**LIMITED JOINDER TO DIRECTORS'
MOTION TO STAY PROCEEDINGS
PENDING PETITION FOR WRIT OF
MANDAMUS**

Hearing Date: Thursday, March 14, 2019
Hearing Time: 10:00 a.m.

21
22 Plaintiff, by and through counsel, hereby files this Limited Joinder to the Directors'
23 Motion to Stay Proceedings Pending Petition for Writ of Mandamus.

24 **I. CLARIFYING REMARKS REGARDING PLAINTIFF'S RECENT**
25 **REQUEST FOR EXTENSION OF DISCOVERY DEADLINES**

26 On the afternoon of Wednesday, March 6, 2019, the Director Defendants served a
27 courtesy copy of their Motion to Stay Proceedings Pending Petition for Writ of Mandamus on
28 Order Shortening Time ("Directors' Stay Motion"). That courtesy copy did not include a signed

1 Order Shortening Time and, therefore, provided no information as to the timing of the related
2 hearing. As of Thursday afternoon, there was still no information as to whether this Court would
3 actually shorten the time or the scheduling of the related hearing. It was within that context, of a
4 pending request for stay absent any information on the timing of a hearing that Plaintiff submitted
5 its request for extension for the purpose of setting that hearing on the Directors' Stay Motion.

6 The issue is not Plaintiff's and Plaintiff will comply with whatever the outcome of
7 Thursday's hearing on the Directors' Stay Motion. Plaintiff hereby advises that it believes its
8 context-driven request for extension which was denied via conference call on Friday, March 8,
9 2019, is moot and that it will thus not be submitting any points or authorities on that particular
10 request. Rather, the Directors' Stay Motion is the proper vehicle by which to decide matters of
11 deadlines in this case.

12 II. PLAINTIFF'S LIMITED JOINDER TO DIRECTORS' STAY MOTION

13 This case involves multiple defendants facing separate and distinct causes of action. On
14 the one hand are the UniTer Defendants (UniTer Underwriting Management Corp., UniTer
15 Claims Services Corp., and US Re Corp.). On the other hand are the individual Director
16 Defendants. The issue of the impact of the business judgment rule ("BJR") applies only to the
17 Directors. It has no bearing on the UniTer Defendants at all. To a certain extent, then, the
18 UniTer Defendants should have no say at all, or at least only minimal say, in the issue of whether
19 to stay proceedings to resolve the potentially dispositive effect of the BJR.

20 As the Directors rightfully point out, the sweep of the BJR is a matter of critical policy
21 importance in Nevada. See Directors' Stay Motion, at 2:21-3:2; see also, e.g., Nevada Lawyer,
22 January 2019, *Nevada Senate Bill 2013 (2017): An Important Development for Nevada*
23 *Corporations and Their Counsel*, attached hereto as **Exhibit "1."** While Plaintiff obviously
24 disagrees with the Directors as to their ultimate success on their petition to change existing
25 Nevada law as to the BJR, Plaintiff agrees that the issue is significant enough from a policy
26 perspective to warrant the requested stay relief.

27 Moreover, Plaintiff submits that the Directors' Stay Motion is not merely a binary
28

1 exercise. Rather, it should be considered with an eye to all of the procedural and scheduling
2 options available. For example, the pending motion to stay before this Court is not the Directors'
3 only mechanism for achieving the exact same stay relief. Rather, the Directors are merely
4 satisfying the requirement to raise the stay issue with the District Court before they seek that
5 relief from the Supreme Court itself. See NRAP 8. Thinking through the consequences of that
6 availability, the following scenario prejudicial to Plaintiff alone arises:

7 (1) This Court denies the Directors' Stay Motion;

8 (2) As a result, on the very next day, Friday, March 15, 2019, Plaintiff and Plaintiff alone
9 must make its initial expert disclosures (which expert reports will necessarily deal
10 with both sets of defendants);

11 (3) Also as a result, however, the Directors file a Motion to Stay to the Supreme Court
12 (along with their Petition for Writ of Mandamus);

13 (4) The Supreme Court then grants some measure of stay pending their resolution of the
14 Directors' Petition;

15 (5) As a result, both sets of defendants obtain a *de facto* extension of their time to prepare
16 rebuttal expert reports to Plaintiff's disclosed reports.

17 Therefore, even without the Supreme Court granting the writ, there could be manifest
18 prejudice to Plaintiff, but only to Plaintiff, in the remaining discovery and trial preparation for this
19 case.

20 The logistical impacts increase, however, in the event the Supreme Court does grant the
21 Directors' desired extraordinary relief and order them dismissed from this case entirely.
22 Obviously, then, Plaintiff's expert reports would not need to include any discussion of those
23 Directors. The remaining parties would not have nearly the same amount of documentary and
24 witness evidence to marshal and prepare for trial. Nor would this Court need to set aside nearly
25 as much time for trial given the Directors' dismissal.

26 In contrast, a stay at this juncture would not prejudice any party, least of all the UniTer
27 Defendants. As Mr. Ogilvie acknowledged during the conference call on Friday, March 8, the
28 five year rule is tolled by stays such as the one sought by the Directors here. Thus, any stay

1 would by definition have zero impact on the time available to all parties. Therefore, any
2 opposition based on purported trial preparation prejudice is meritless.

3 Also, as briefly discussed during the Friday, March 8 conference call, the UniTer
4 Defendants' complaints about the inability to organize witnesses neither have merit nor are
5 supported by the facts. The issue of corporate entities having difficulty locating consenting
6 witnesses is no excuse. "The Court understands that preparing for a Rule 30(b)(6) deposition can
7 be burdensome. However, this is merely the result of the concomitant obligation from the
8 privilege of being able to use the corporate form in order to conduct business." Int'l Ass'n of
9 Machinists & Aerospace Workers v. Werner-Masuda, 390 F. Supp. 2d 479, 487 (D. Md. 2005).
10 Moreover, to date, the UniTer Defendants have identified three (3) separate NRCP 30(b)(6)
11 designees: (1) Joseph Fedor; (2) Anthony Ciervo; and (3) Dick Davies. A fourth individual, who
12 not only has corporate knowledge but direct personal knowledge of the events relevant to this
13 case is Tal Piccione. That the UniTer Defendants do not want to designate him is understandable
14 given the underlying evidence, but that desire should not be confused with any sort of purported
15 "difficulty" in procuring a cooperating witness. Moreover, all NRCP 30(b)(6) requires is the
16 designation of anybody who is prepared and consents to testify. If the UniTer Defendants cannot
17 find anymore current or former employees who consent, that does not mean they are out of
18 options for or excused from preparing a witness. After all, the UniTer Defendants still have had
19 the benefit of years of prior preparation, as well as millions of pages of documents, numerous
20 depositions already conducted, and a prior Motion for Summary Judgment by Plaintiff to serve as
21 a roadmap for witness preparation. As a further alternative to any concern that an NRCP 30(b)(6)
22 designee would not be able to competently testify to the various underlying issues, there are still
23 literally dozens of former employee witnesses who remain available for them to depose to elicit
24 that information.

25 In addition, there are any number of structured stays this Court could impose that would
26 prevent the potentially prejudicial scenarios identified above. For example, this Court could
27 impose a phased temporary stay. Phase 1 could be only three (3) days perhaps, and be directed at
28 the Directors' filing of their writ petition. Phase 2 would be for a longer period (perhaps two (2)

1 to four (4) weeks), for the purpose of allowing some measure of evaluation and response time to
2 the Supreme Court. If the Directors fail to timely file their writ petition with the Supreme Court,
3 the precondition for Phase 2 would not be satisfied and, as a result, the temporary stay would
4 immediately lift and all related discovery deadlines would immediately continue to run (leaving
5 all parties with the exact same time constraints they face now). If the Directors timely file, but
6 the Supreme Court has provided no indication as to its position on the writ petition, the parties
7 can return to this Court on a Status Check for further discussion about the propriety of enlarging
8 the temporary stay.

9 The bottom line is that policy considerations, fairness considerations, and common sense
10 justify some measure of stay relief.

11 DATED March 9, 2019

FENNEMORE CRAIG, P.C.

12
13 By: 

JAMES L. WADHAMS, ESQ.

Nevada Bar No. 1115

BRENOCH WIRTHLIN, ESQ.

Nevada Bar No. 10282

*Attorneys for Plaintiff Commissioner of
Insurance For the State of Nevada*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of Fennemore Craig, P.C. and that service of the
3 foregoing **LIMITED JOINDER TO DIRECTORS' MOTION TO STAY PROCEEDINGS**
4 **PENDING PETITION FOR WRIT OF MANDAMUS** was made on the following counsel of
5 record and/or parties via the Court's electronic filing system as follows:

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27 *DATED: March 9, 2019*

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

EXHIBIT 1

Nevada Senate Bill

Over the course of almost three decades, the Nevada Legislature has sought to modernize Nevada's corporations law to make it clearer and more relevant to current business practice. Among other objectives, the Legislature has sought to attract new investment to Nevada by providing some measure of predictability in the conduct of corporate affairs by companies choosing to incorporate in Nevada. Unfortunately, as explained below, that effort has been hampered by court decisions that have applied the decisional law of other jurisdictions – most notably that of Delaware – and failed to give effect to the language of Nevada statutes in circumstances where that language controlled.

An Important Development for Nevada Corporations and Their Counsel

BY JIM PENROSE, ESQ. AND PAUL YOUNG, ESQ.

In response, the 2017 Legislature adopted Senate Bill (SB) 203, which clarified the intent and language of the law and became effective on October 1, 2017. Chapter 559, Statutes of Nevada 2017, at p. 3997. Attorneys who advise Nevada corporations should thoroughly familiarize themselves with the provisions of the bill. The purpose of this article is briefly to summarize and review the background of those provisions.

Nevada Law Applies

It should be self-evident that Nevada corporations and their officers and directors are to be governed by Nevada law. Nevertheless, courts in Nevada have sometimes applied, improperly, the decisional law of other states instead of the relevant provisions of the Nevada statute.

For example, *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342 (D. Nev. 1997), involved the adoption of certain defensive measures by the directors of a Nevada

corporation in response to a hostile takeover bid. At the time, NRS 78.138 authorized the officers and directors of a corporation, in exercising their powers, to consider the interests of the corporation's employees, suppliers, creditors and customers; the economy of the state and nation; the interests of the

community and society generally; and the long-term as well as the short-term interests of the corporation and its stockholders, including the possibility that those interests might best be served by the continued independence of the corporation. The same section explicitly authorized the directors to resist a proposed takeover of the corporation on the basis of those factors and the estimated financial impact of the takeover on the corporation or any successor entity.¹ Nevertheless, concluding that these statutory provisions failed to provide "clear guidance" on the propriety of the directors' action, the *Hilton Hotels* court instead applied a line of cases from the Supreme Court of Delaware. 978 F. Supp. at 1345-46. In so doing, the court established for Nevada corporations an extra-statutory distinction between the exercise of the directors' authority as it related to the assets of the corporation and what the court called the "power relationship" between the directors and stockholders of the corporation. (*Id.*, at 1346.) That distinction had no basis in Nevada law; it was created entirely from the decisional law of Delaware.

In *Shoen v. SAC Holding Corp.*, 122 Nev. 621 (2006), the Nevada Supreme Court declared in dicta that the duty of loyalty owed by the directors of a corporation "requires the board and its directors to maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests." 122 Nev. at 632 & n.9 (emphasis added). In support of this proposition, the court cited to two decisions of the



No. 203 (2017):

Supreme Court of Delaware, but made no reference to the then-existing provisions of NRS 78.138(4) or (5), which explicitly authorized directors to consider the factors and constituencies discussed above in exercising their authority and specifically relieved directors of any obligation “to consider the effect of a proposed corporate action upon any particular group having an interest in the corporation as a dominant factor.” *Id.*

In response to decisions like these, SB 203 specifically reaffirms the principle that Nevada corporations and their officers and directors are governed by Nevada law, not the law of Delaware or any other jurisdiction. Section 2 of the bill, codified as NRS 78.012, provides in relevant part:

2. The laws of this State govern the incorporation and internal affairs of a domestic corporation and the rights, privileges, powers, duties and liabilities, if any, of its directors, officers and stockholders.
3. The plain meaning of the laws enacted by the Legislature in [title 7 of NRS], including, without limitation, the fiduciary duties and liability of the directors and officers of a domestic corporation set forth in NRS 78.138 and 78.139, must not be supplanted or modified by laws or judicial decisions from any other jurisdiction.

Clearly, the Nevada Legislature wants Nevada law applied to Nevada corporations.

Given these provisions, counsel for Nevada corporations should resist any effort by opposing counsel, a judge or an arbitrator to apply the law of Delaware or any other jurisdiction in any context described by NRS 78.012. Nevada courts should likewise reject attempts to import and apply the law of other jurisdictions where that law has no proper application. Under NRS 78.012, any such law is simply irrelevant insofar as a Nevada statute speaks to the point at issue.

Relevant Factors Governing the Exercise Authority

In exercising their powers, the officers and directors of a Nevada corporation may consider all relevant factors and may give such weight to each such factor as they deem appropriate. As explained above and notwithstanding the dicta in *Shoen*, Nevada law has so provided, at least since the adoption of Assembly Bill No. 655 in 1991. Chapter 442, Statutes of Nevada 1991, at p. 1184. The former provisions of NRS 78.139(5) (*cf.* NRS 78.139(4)) made those considerations equally applicable in the context of any change or potential change in control of the corporation.

SB 203 has reaffirmed and clarified the law in this regard. Except as otherwise provided in the corporation’s articles of incorporation or any amendment to the articles, SB 203 has amended NRS 78.138(4) explicitly to authorize directors and officers to “consider all relevant facts, circumstances, contingencies or

constituencies” and “consider or assign weight to the interests of any particular person or group, or to any other relevant facts, circumstances, contingencies or constituencies.” Moreover, the “dominant factor” language of NRS 78.138(5) has been revised to provide that directors and officers “are not required to consider, as a dominant factor, the effect of a proposed corporate action upon any particular group or constituency having an interest in the corporation.” *Shoen*’s suggestion to the contrary has thereby been abrogated.

Limitations on Individual Liability for Damages

With respect, the Supreme Court’s analysis in *Shoen* is objectionable on yet another ground. The court declared that the directors of a corporation owe both a duty of loyalty and a duty of care, and held that directors could be individually liable for a breach of the latter duty because of “gross negligence.” Here again, the court relied upon a decision by the Supreme Court of Delaware as authority for this proposition. 122 Nev. at 632, 640 & n.59.

Again, this aspect of *Shoen* was simply at odds with the language of NRS 78.138(7), even as it then existed. Under the plain language of the statute, an officer or director was “not individually liable to the corporation or its stockholders for any damages as a result of *any* act or failure to act” unless it was proven that the “act or failure to act constituted a breach of his [or her] fiduciary duties ... *and* [the] breach of those duties involved *intentional* misconduct, fraud or a *knowing* violation of law.” Chapter 601, Statutes of Nevada 2001, at p. 3171 (emphasis added). Thus, not only was there no statutory basis for the court’s distinction between a duty of loyalty and a duty of care in this context, there was likewise no basis for imposing

continued on page 21

Nevada Senate Bill No. 203

individual liability in any case sounding in negligence, whether it be called “gross” or otherwise.

Even before the adoption of SB 203, the former provisions of NRS 78.138(3) codified the business judgment rule, under which the officers and directors of a corporation are ordinarily “presumed to act in good faith, on an informed basis and with a view to the interests of the corporation.” SB 203 amended this provision, in part, by adding: “A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in subsection 7.” Chapter 559, Statutes of Nevada 2017, at p. 3998. NRS 78.138(7), in turn, has been amended to add – in addition to the requirement that the defendant be shown to have committed a breach of his or her fiduciary duties involving intentional misconduct, fraud or a knowing violation of law – a requirement that any finding of individual

liability must be premised upon a determination by the trier of fact that the presumption set forth in NRS 78.138(3) has been rebutted. *Id.*

Conclusion

No one disputes that Nevada corporations and their officers and directors should be held to account for acts or omissions that violate standards of conduct expressed in Nevada’s statutory law. However, they are not and should not be responsible for adhering to the law of Delaware or any other jurisdiction, or to judicially created standards that are untethered to, or contrary to, the specific provisions of Nevada statute. This, in brief, is the policy underlying SB 203, and Nevada corporations and their counsel, and the courts of this state, should resist any erosion of that policy. **NL**

1. In 1999, the takeover provision was relocated from NRS 78.138 to a newly-enacted section, NRS 78.139. Chapter 357, Statutes of Nevada 1999, at pp. 1575, 1580. The relevant language now appears in NRS 78.139(4).

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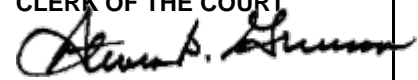
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Management Corp., Uni-Ter Claims Services
Corp., and U.S. RE Corporation*

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.: XXVII

**DEFENDANTS UNI-TER
UNDERWRITING MANAGEMENT
CORP., UNI-TER CLAIMS SERVICES
CORP. AND U.S. RE CORPORATION'S
OPPOSITION TO THE DIRECTOR
DEFENDANTS' MOTION TO STAY
AND THE RECEIVER'S LIMITED
JOINDER THERETO**

Defendants, Uni-Ter Underwriting Management Corp. (“Uni-Ter UMC”) and Uni-Ter Claims Services Corp. (“Uni-Ter CS,” and collectively “Uni-Ter”) and U.S. Re Corporation (“U.S. Re”), hereby submit their Opposition to the Motion to Stay Proceedings Pending Petition for Writ of Mandamus filed on behalf of Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, and Eric Stickels (“Director Defendants”) on March 8, 2019, as well as the limited joinder (“Limited Joinder”) to that Motion filed on behalf of Plaintiff, the Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC risk Retention Group, Inc. (“Receiver”), on March 11, 2019. For the reasons discussed below, and specifically in light of the significant prejudice the requested stay will have on these opposing defendants, Uni-Ter and U.S. Re respectfully request that this Court deny the Motion to Stay.

I. INTRODUCTION

As detailed below, the Director Defendant’s Motion to Stay fails to demonstrate that a stay should be imposed, whether by this Court or the Nevada Supreme Court. While the Director Defendants argue they will suffer irreparable harm and that the object of their petition will be defeated if the stay is denied, neither argument has merit – the cost and effort of having to proceed to trial is not irreparable harm, and the Director Defendants have the adequate and speedy legal remedy of appealing any adverse final judgment resulting from the trial. Thus, the Director Defendants fail to satisfy their burden in seeking a stay.

Additionally, the Director Defendants have not been diligent in seeking a stay – they submitted their Motion to Stay nearly a month after this Court denied the Motion for Reconsideration of the Order denying their Motion for Judgment on the Pleadings. Moreover, the Director Defendants now seek a stay of proceedings despite previously – and successfully – contesting the Receiver’s request to extend certain deadlines even further. *See* Letter from Angela Ochoa dated February 11, 2019, a copy of which is attached hereto as **Exhibit A**; Order Striking Filing, a copy of which is attached hereto as **Exhibit B**.

Separately, the Receiver’s Limited Joinder is simply the latest effort by the Receiver to delay trial and compensate for its failure to prepare its case for the last four and a half (4 ½)

1 years. Indeed, the Receiver has consistently sought to extend scheduling deadlines and
2 continue the trial, including three stipulations and one motion that was filed in the face of this
3 Court's admonition that no further extensions will be granted. *See* Stipulation and Order to
4 Extend Discovery Deadlines and to Continue Trial (Third Request), a copy of which is attached
5 hereto as **Exhibit C**; Order Granting In Part and Denying In Part Plaintiff's Motion for
6 Extension of Discovery Deadlines and To Continue Trial on an Order Shortening Time, a copy
7 of which is attached hereto as **Exhibit D**.

8 Now, the Receiver has seized upon the Director Defendants' Motion to Stay in yet
9 another attempt to stall these proceedings to the prejudice of Uni-Ter and U.S. Re. Incredibly,
10 notwithstanding the demonstrable prejudice to them, the Receiver even suggests that Uni-Ter
11 and U.S. Re "should have no say at all" as to whether a stay should be granted. *See* Limited
12 Joinder at 2:17-19. Yet, the Receiver is transparent in its attempt to further delay its expert
13 witness disclosures (due on March 15). Having disingenuously attempted to delay these
14 disclosures contrary to the ruling by this Court (*see* Exhibit A), the Receiver speciously argues
15 that it somehow will be prejudiced by having to comply with the March 15 expert disclosure
16 deadline.

17 At the request of the parties, the Court has set a firm trial date in this matter
18 commencing October 21, 2019. As discussed herein, no legitimate basis exists to stay these
19 proceedings and, other than incurring litigation fees and costs, neither the Director Defendants
20 nor the Receiver would be prejudiced by having to proceed to trial in the fall. Conversely,
21 should the Court grant the Motion to Stay, the prejudice to Uni-Ter and U.S. Re is tangible –
22 any additional delay, and in particular a delay that will likely extend the 12-18 months required
23 for the Nevada Supreme Court to adjudicate the Director Defendants' writ petition, increases
24 the very real risk that Uni-Ter and U.S. Re will not be able to adequately defend themselves at
25 trial. Accordingly, this Court should deny the Motion to Stay.

26 ...

27 ...

28 ...

II. ARGUMENT

A. Legal Standard

As the Director Defendants correctly recognize, courts typically consider four factors in deciding whether to issue a stay pending resolution of a petition to the Nevada Supreme Court: (1) whether the object of the petition will be defeated if the stay is denied; (2) whether the petitioner will suffer irreparable or serious injury if the stay is denied; (3) whether the respondent or real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether the petitioner is likely to prevail on the merits of the petition. *See Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000) (denying motion to stay).¹ No one factor carries more weight than any other; however, “if one or two factors are especially strong, they may counterbalance other weak factors.” *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004) (citing *Hansen*, 116 Nev. at 659, 6 P. 3d at 987). Here, the irreparable and serious prejudice that will inure to Uni-Ter and U.S. Re should the stay be granted heavily outweighs the remaining factors and militates against the entry of a stay.

B. Uni-Ter and U.S. Re Will Suffer Serious Prejudice at Trial if the Court Grants the Director Defendants’ Motion to Stay.

The Director Defendants argue that the Receiver will not suffer irreparable harm or significant injury if the litigation is stayed. *See* Motion to Stay, at 12:14-19. The Director Defendants’ Motion, however, is wholly lacking in any analysis of the harm that the remaining named parties to this case, Uni-Ter and U.S. Re, will face should the stay be granted. To be sure, and contrary to the Receiver’s hollow claim that a stay would not prejudice any party (“least of all the Uni-Ter Defendants” (*see* Limited Joinder at 3:26-27)), the potential delay that would result from a stay pending resolution of the Director Defendants’ petition will be detrimental to Uni-Ter and U.S. Re’s ability to properly defend themselves at the eventual trial in this case.

¹ With respect to the fourth factor – whether the petitioner is likely to prevail on the merits of the petition – this is an issue between the Director Defendants and the Receiver. Accordingly, Uni-Ter and U.S. Re do not, at this point, state a position on whether the Director Defendants’ petition is likely to succeed. Uni-Ter and U.S. Re simply submit that this is an appealable issue post trial; therefore, procedurally, even this factor weighs against imposing a stay.

The Receiver claims, without any support, that there are “still literally dozens of former employee witnesses who remain available” for Uni-Ter and U.S. Re to depose. *See* Limited Joinder at 4:15-24. This claim is incorrect and ignores the position Uni-Ter and U.S. Re have consistently advised the other parties, a position of which the Receiver is well aware. *See* Declaration of Jon M. Wilson, Esq. in Support of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp. and U.S. Re Corporation’s Opposition to the Director Defendants’ Motion to Stay and the Receiver’s Limited Joinder Thereto, which is attached hereto as **Exhibit E**, at ¶ 4. Contrary to the Receiver’s claim, Uni-Ter and U.S. Re have experienced significant difficulty locating witnesses who are able to testify on their behalf, and that difficulty will only increase over time. *Id.*, at ¶ 5. For example, when the Receiver initially noticed Uni-Ter and U.S. Re’s 30(b)(6) depositions in September 2018, Anthony Ciervo, a former employee, agreed to testify on behalf of Uni-Ter and U.S. Re in New York, where he then resided, on the noticed topics. *Id.*, at ¶ 6. The Receiver, however, unilaterally canceled those depositions. *Id.* By the time the Receiver re-noticed the 30(b)(6) depositions for February of this year, Mr. Ciervo had moved to Arizona and was unwilling to travel to New York, or even to Las Vegas, to be deposed. *Id.*, at ¶ 7.

While Mr. Ciervo ultimately agreed to appear to by telephone to testify to limited topics for purposes of the 30(b)(6) deposition, this is indicative of the struggle Uni-Ter and U.S. Re face in locating witnesses – and this is without the additional delay that the proposed stay would cause. *Id.*, at ¶ 8. Uni-Ter and U.S. Re have ceased doing business and now must rely on former employees, over whom they have ever-decreasing control, to testify on their behalf. In addition to Mr. Ciervo, counsel for Uni-Ter and U.S. Re have made significant efforts to locate former employees, including former officers of Uni-Ter, to testify in a representative capacity at deposition. *Id.*, at ¶ 9. Counsel has either been unable to locate or contact these employees or the former employees have been unavailable or unwilling to testify at deposition. *Id.*, at ¶ 10. Should this Court enter the requested stay and push the trial out for months, or even years, the hardship on Uni-Ter and U.S. Re to secure witnesses will increase exponentially. *Id.*, at ¶ 11.

The Receiver has previously requested four extensions of discovery and trial, and the

Receiver now latches onto the Director Defendants' Motion to Stay to, once again, delay trial until some indeterminable future time. "Delay 'inherently increases the risk that witnesses' memories will fade and evidence will become stale.'" *Blue Cross & Blue Shield of Alabama v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724 (9th Cir. 2007) (quoting *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002)); *see also Aspen Fin. Services v. Dist. Ct.*, 128 Nev. 635, 646–47, 289 P.3d 201, 208–09 (2012) ("The delay resulting from a stay may also duly frustrate a plaintiff's ability to put on an effective case because as time elapses, witnesses become unavailable, memories of conversations and dates fade, and documents can be lost or destroyed.") (internal quotation marks omitted). This concept is extremely pertinent here, where the events at issue occurred between approximately 2009 to 2012 – nearly ten years ago – and in which the Receiver has sought to go back as far as 2004 in discovery. The Receiver was appointed in 2012 and has had more than six years to build its case against the defendants. Thus, even if Uni-Ter and U.S. Re were able to locate witnesses for additional depositions, which, as discussed above, has not been particularly successful, their ability to accurately recall and address relevant events will only decrease as time progresses. Moreover, conducting a deposition of a witness and reading that testimony into the record at trial in no way is a substitute for presenting a live witness at trial.

Accordingly, any additional delay and, particularly, the indefinite delay caused by the issuance of a stay pending the Nevada Supreme Court's review of the Director Defendants' petition, is highly prejudicial to Uni-Ter and U.S. Re, as it will result in serious and irreparable injury to them.

C. Neither the Director Defendants Nor the Receiver Will Experience Cognizable Harm If the Stay Is Denied, and the Object of the Petition Will Not Be Defeated.

The Director Defendants argue that they will suffer irreparable harm and that the object of their petition will be defeated if the stay is denied. *See* Motion to Stay at 11:5-12:13. Yet, the Director Defendants fail to identify *any* cognizable harm. For example, the Director Defendants admit that "ordinary litigation costs alone do not constitute irreparable harm." *Id.* at 12:6-7 (citing *Mikohn*, 120 Nev. at 253, 89 P.3d at 39); *see also Hansen*, 116 Nev. at, 658, 6 P.3d at 986–87

1 (“Fritz Hansen would not suffer irreparable or serious injury if the stay is denied. It argues that it
2 should not be required to participate ‘needlessly’ in the expense of lengthy and time-consuming
3 discovery, trial preparation, and trial. Such litigation expenses, while potentially substantial, are
4 neither irreparable nor serious.”). Yet, expending costs to see this case to trial is the only “harm”
5 that the Director Defendants may incur. This is not enough to justify a stay.

6 While the Director Defendants argue that, without Supreme Court intervention, they will
7 have to “defend against claims predicated upon an unprecedented theory or individual liability
8 created for the first time in this case by judicial fiat” (Motion to Stay at 11), they ignore the fact
9 that the denial of their Motion for Judgment on the Pleadings can be, and typically would be,
10 addressed on plenary appeal following trial.

11 Indeed, it is well settled that writ relief is generally not available “when an adequate and
12 speedy legal remedy exists.” *Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. County*
13 *of Washoe*, 124 Nev. 193, 197–98, 179 P.3d 556, 558–59 (2008). Thus, courts typically decline to
14 consider writ petitions that challenge interlocutory court orders denying dispositive motions such
15 as motions to dismiss or for summary judgment, or as here, a motion for judgment on the
16 pleadings. *See id.* (“Accordingly, because an appeal from the final judgment typically constitutes
17 an adequate and speedy legal remedy, we generally decline to consider writ petitions that
18 challenge interlocutory district court orders denying motions to dismiss.”); *see also State v. Eighth*
19 *Judicial Dist. Court ex rel. County of Clark*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002) (“In *State*
20 *ex rel. Department of Transportation v. Thompson*, we determined that it was not in the best
21 interest of Nevada’s judicial system for this court to entertain writ petitions challenging district
22 court denials of motions to dismiss or motions for summary judgment.”). Thus, while it is even
23 questionable whether the Nevada Supreme Court will ultimately take jurisdiction over the
24 contemplated petition, the Director Defendants have certainly not met their burden of
25 demonstrating that they will suffer irreparable harm if the instant request for a stay is denied.

26 The Receiver’s argument that “there could be manifest injustice to Plaintiff, but only to
27 Plaintiff, in the remaining discovery and trial preparation for this case,” should this Court deny the
28 stay, (*see Limited Joinder at 3:17-19*), fares no better. In fact, the Receiver can only direct the

1 Court to the fact that the Receiver's expert witness disclosures are due on March 15. No prejudice
2 inures to the Receiver whatsoever if it is required to meet that deadline. As noted above, the
3 Receiver has had more than six years to build its case against the defendants. Certainly, as of the
4 March 11, 2019 filing of its Limited Joinder (four days before the expert disclosure deadline), the
5 Receiver's experts have had an extraordinary amount of time to prepare their reports and should be
6 in a position to produce their reports by a deadline that has been extended four times already. That
7 leaves the Receiver with only the speculative argument that some or all of the defendants will have
8 the benefit of additional time to prepare rebuttal expert reports in the event that this Court denies
9 but the Nevada Supreme Court grants some measure of a stay after the Receiver's March 15
10 deadline. Even if that conjectural outcome occurs, the Receiver would not be prejudiced
11 substantively; presumably, expert witness opinions do not change merely because they have more
12 than thirty days to prepare a rebuttal report. And an expert report is just a report; it is not
13 admissible evidence – only the expert's testimony, which is adduced months later at trial is
14 evidence. Thus, this feeble articulation of “manifest injustice” argued by the Receiver is not only
15 speculative, but specious.

16 The Receiver also ignores the fact that, even if the Director Defendants are successful on
17 their petition and are dismissed as defendants from this litigation, the Receiver will still have to
18 prepare for a trial against Uni-Ter and U.S. Re. The Receiver will still have to make expert
19 disclosures and engage in other pretrial motions and procedures. And, while the Receiver
20 contends that, if the petition is granted, “Plaintiff's expert reports would not need to include any
21 discussion of those Directors,” this is just untrue. Whether as an initial disclosure or as a rebuttal
22 to Uni-Ter and U.S. Re's expert disclosures, the Receiver's experts are going to have to address
23 the Director Defendants' liability – even if the claims against the Director Defendants were
24 dismissed, their acts and omissions in the underlying events giving rise to this lawsuit do not
25 become irrelevant. That information is still relevant to the case between the Receiver and Uni-Ter
26 and U.S. Re, and will need to be addressed by experts and by this Court at trial. Thus, the
27 Receiver's argument that she will be prejudiced if a stay is not granted is simply unfounded.

28 Further, the object of the petition will not be defeated if they stay is denied. The Director

Defendants are not waiving any defense or argument by proceeding with the litigation during the pendency of the petition. *See Hansen*, 116 Nev. at 657, 6 P.3d at 986 (“First, the object of the writ petition will not be defeated if the stay is denied. Fritz Hansen will not waive its jurisdictional defense by answering after its motion to quash was denied; as Fritz Hansen timely challenged jurisdiction, Rule 12’s waiver provisions do not apply.”). This is particularly true given that the petition challenges the denial of a motion for judgment on the pleadings, which, as discussed above, is not a type of petition the Nevada Supreme Court, in its discretion, typically considers.

D. Uni-Ter and U.S. Re Take No Position on the Merits of the Petition.

As noted above, Uni-Ter and U.S. Re do not take a position on whether the Director Defendants’ petition is likely to succeed. However, Uni-Ter and U.S. Re do note that “[n]o one factor carries more weight than any other” in the stay analysis. *Mikohn Gaming Corp.*, 120 Nev. at 251, 89 P.3d at 38. Yet, “if one or two factors are especially strong, they may counterbalance other weak factors.” *Id.* Here, it is unclear how the Nevada Supreme Court would rule on the merits (if it decides to take jurisdiction to begin with) and neither the Director Defendants nor the Receiver have been able to articulate sufficient harm to them should the litigation proceed while the Supreme Court considers the petition. On the other hand, the prejudice to Uni-Ter and U.S. Re is undeniable. Thus, this factor is “especially strong” on the facts of this case, and it should carry considerable weight in the Court’s analysis.

III. CONCLUSION

The Director Defendants fail to satisfy the four *Hansen* factors for evaluating a request for stay. Clearly, the object of the petition will not be defeated if the stay is denied since the legal issue presented in the petition is appealable post trial; the Director Defendants will suffer only the harm of incurring the cost of proceeding to trial if the request for stay is denied; and, on the other hand, Uni-Ter and U.S. Re will continue to lose witness and control over witnesses who will be needed to present a defense to the Receiver’s ten-year old claims at trial.

The Receiver joins in the request to stay in order to obtain its *fifth* extension of these proceedings, again, to the detriment to Uni-Ter and U.S. Re. Neither the Motion to Stay nor the Receiver’s Limited Joinder provide this Court with any substantive basis for staying these

proceedings. Conversely, the “especially strong” factor of the increasing prejudice to Uni-Ter and U.S. Re created by a further delay of the trial in this matter outweighs the arguments posited by the Director Defendants and the Receiver.

Accordingly, this Court should deny the Motion to Stay and direct the parties to complete discovery and prepare for the October 21, 2019 trial pending resolution of the Director Defendants’ petition to the Nevada Supreme Court.

DATED this 12th day of March, 2019.

McDONALD CARANO LLP

By: /s/ George F. Ogilvie III

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Corp., and U.S. RE Corporation*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 12th day of March, 2019, a true and correct copy of the foregoing **DEFENDANTS UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP. AND U.S. RE CORPORATION'S OPPOSITION TO THE DIRECTOR DEFENDANTS' MOTION TO STAY AND THE RECEIVER'S LIMITED JOINDER THERETO** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification on the following:

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

EXHIBIT “A”

JEFFREY T. NEILSON^{1,2,5}
JOSEPH P. GARIN^{1,2,3,5}
PHILLIP E. SELTZER^{1,2}
J. WILLIAM EBERT¹
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DAVID A. CLARK¹
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DAVID T. OCHOA¹
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KAREN KAO¹
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JONATHAN K. WONG^{1,6}

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BARRY J. LIPSON
(1955-2003)

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KAREN A. SMYTH^{2,4}
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STUART D. LOGAN²
SANDY D. GLAZIER²
MARY T. SCHMITT SMITH²
MICHAEL H. ORCUTT⁹
MICHAEL C. CURHAN^{2,*}
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ALBERT L. HOLTZ^{2,*}
BARRY L. HOWARD^{2,*}
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CARLY R. KOLO^{2,8}
DAVID G. MICHAEL²
COREY I. RICHTER⁹
JOHN J. BROWDER^{9,11}
CHRISTINA M. DiMICHELE²

1 ADMITTED IN NEVADA
2 ADMITTED IN MICHIGAN
3 ADMITTED IN ILLINOIS
4 ADMITTED IN NEW YORK
5 ADMITTED IN COLORADO
6 ADMITTED IN CALIFORNIA
7 ADMITTED IN MASSACHUSETTS
8 ADMITTED IN MARYLAND
9 ADMITTED IN ARIZONA
10 ADMITTED IN WISCONSIN
11 ADMITTED IN IDAHO
12 ADMITTED IN OKLAHOMA
13 ADMITTED IN NORTH DAKOTA
14 ADMITTED IN MISSOURI
* OF COUNSEL

February 11, 2019

VIA FACSIMILE ONLY:

Honorable Nancy L. Allf
Department 27
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

Re: *NV Commiss. of Ins. v. Marshall et. al. (Case No: A-14-711535-C)*

Dear Your Honor,

On January 29, 2019, both Plaintiff and the Director Defendants filed Orders on the Plaintiff's Motion to Extend Discovery Deadlines heard on December 27, 2018. I understand the Court was going to strike one of the orders, as they had differing deadlines. As of today, I have not seen an Order striking and am just following up on the status of the same.

Thank you for your attention to this matter.

Very truly yours,

LIPSON NEILSON, P.C.

/s/ Angela T. Ochoa

ANGELA T. OCHOA, ESQ.

cc: All Counsel On Electronic Service List

PA002835

EXHIBIT “B”

Steven D. Grierson

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(s)

vs.

ROBERT CHUR, *et al.*

Defendant(s)

CASE NO.: A-14-711535-C

DEPARTMENT 27

ORDER STRIKING FILING

COURT FINDS after review Plaintiff's Motion for Extension of Discovery Deadlines and to Continue Trial on an Order Shortening Time was heard by the Court on December 27, 2018 and both Plaintiff and Defendants submitted competing orders thereafter.

COURT FURTHER FINDS after review that on January 29, 2019 Defendants filed the Order Granting in Part and Denying in Part Plaintiff's Motion for Extension of Discovery Deadlines and to Continue Trial on an Order Shortening Time ("Defendants' Order") and Plaintiff filed the Order Granting Plaintiff's Motion for Extension of Discovery Deadlines and to Continue Trial on an Order Shortening Time ("Plaintiff's Order").

COURT FURTHER FINDS after review that Plaintiff's Order was executed by the Court in error.

///

///

///

RECEIVED
FEB 20 2019

CLERK OF THE COURT

33

HONORABLE NANCY L. ALLF

DISTRICT COURT JUDGE

DEPT XXVII

PA002837

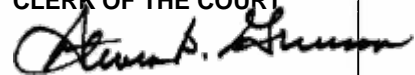
2

THEREFORE, COURT ORDERS for good cause appearing and after review that the Plaintiff's Order Granting Plaintiff's Motion for Extension of Discovery Deadlines and to Continue Trial on an Order Shortening Time filed January 29, 2019 at 4:18 p.m. is hereby **STRICKEN**.

DATED this 19 day of ^{FEB.} ~~January~~, 2019.

Nancy L Allf
NANCY ALLF
DISTRICT COURT JUDGE

EXHIBIT “C”



1 **SAO**
2 JAMES L. WADHAMS, ESQ.
3 Nevada Bar No. 1115
4 BRENOCH WIRTHLIN, ESQ.
5 Nevada Bar No. 10282
6 **FENNEMORE CRAIG, P.C.**
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12 Email: jwadhams@fclaw.com;
13 bwirthlin@fclaw.com; khejmano@fclaw.com
14 *Attorneys for Plaintiff Commissioner of Insurance*
15 *For the State of Nevada*

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

12 COMMISSIONER OF INSURANCE FOR
13 THE STATE OF NEVADA AS RECEIVER
14 OF LEWIS AND CLARK LTC RISK
15 RETENTION GROUP,

16 Plaintiff,

17 vs.

18 ROBERT CHUR, STEVE FOGG, MARK
19 GARBER, CAROL HARTER, ROBERT
20 HURLBUT, BARBARA LUMPKIN, JEFF
21 MARSHALL, ERIC STICKELS, UNI-TER
22 UNDERWRITING MANAGEMENT CORP.,
23 UNI-TER CLAIMS SERVICES CORP., and
24 U.S. RE CORPORATION,; DOES 1-50,
25 inclusive; and ROES 51-100, INCLUSIVE;

26 Defendants.

Case No.: A-14-711535-C

Dept. No.: 27

STIPULATION AND ORDER TO
EXTEND DISCOVERY DEADLINES AND
TO CONTINUE TRIAL

(THIRD REQUEST)

23 IT IS HEREBY STIPULATED AND AGREED by and between Plaintiff Commissioner
24 of Insurance for the State of Nevada ("Plaintiff"), by and through counsel of record, Fennemore
25 Craig, P.C., Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut,
26 Barbara Lumpkin, Jeff Marshall, Eric Stickels ("Director Defendants"), by and between counsel
27 of record, Lipson Neilson, P.C., and Defendants Uni-Ter Underwriting Management Corp,
28 ("Uni-Ter UMC"), Uni-Ter Claims Services Corp. ("Uni-Ter CS"), and U.S. RE Corporation

1 (“U.S. Re”) (collectively “Uni-Ter/U.S. Re Defendants”), by and through counsel of record
2 McDonald Carano LLP and Broad and Cassel, to extend the discovery deadlines as further
3 detailed in this Stipulation.

4 **1. Summary of Discovery Completed**

5 The Parties have conducted discovery as follows:

6 **A. Early Case Conference**

- 7 • The Parties attended the Early Case Conference, September 28, 2016.

8 **B. Initial and Supplemental Disclosures**

- 9 • Plaintiff served its initial disclosures and nine supplements, producing over
10 295,000 pages of documents (including native excel files) and identifying over 100
11 witnesses.
- 12 • Director Defendants served their initial disclosures, responses to request for
13 production of documents and one supplemental disclosure, producing
14 approximately 14,000 pages of documents and identifying 30 witnesses.
- 15 • Defendant U.S. Re served its initial disclosures and three supplemental
16 disclosures, producing approximately 1,500,000 pages of documents and
17 identifying 29 witnesses.
- 18 • Defendants Uni-Ter UMC and Uni-Ter CS served their initial disclosures and one
19 supplemental disclosure, approximately 100 pages of documents and identifying
20 32 witnesses.

21 **C. Written Discovery**

- 22 • Plaintiff served the following written discovery:

<u>Request</u>	<u>Propounded Upon</u>	<u>Served</u>
1 st Set RFPs	US Re	7/17/17
2 nd Set RFPs	US Re	7/19/17
1 st Set RFPs	Defendants Uni-Ter UMC and Uni-Ter CS	7/17/17

<u>Request</u>	<u>Propounded Upon</u>	<u>Served</u>
2 nd Set RFPs	Defendants Uni-Ter UMC and Uni-Ter CS	7/19/17
3 rd Set RFPs	Defendants Uni-Ter UMC and Uni-Ter CS	3/30/18
1 st Set RFPs	Director Defendants	7/17/17
2 nd Set RFPs	Director Defendants	7/19/17
3 rd Set RFPs	Director Defendants	3/30/18

- Director Defendants served the following written discovery:

<u>Request</u>	<u>Propounded Upon</u>	<u>Served</u>
1 st Set ROGs	Plaintiff	9/5/17
2 nd Set ROGs	Plaintiff	4/13/18
1 st Set RFPs	Plaintiff	4/13/18

- Defendants U.S. Re, Uni-Ter UMC, and Uni-Ter CS served the following written discovery:

<u>Request</u>	<u>Nos.</u>	<u>Propounded Upon</u>	<u>Served</u>
1 st Set RFPs	1-7	Director Defendants	3/5/18

- Defendants Uni-Ter UMC and Uni-Ter CS served the following written discovery:

<u>Request</u>	<u>Propounded Upon</u>	<u>Served</u>
1 st Set RFPs	Plaintiff	3/9/18

D. Third-Party Subpoenas

- Plaintiff served the following Third-Parties with a Subpoena Duces Tecum:

Third-Party Served

1	Catlin Insurance Services, Inc.
2	Marquis Companies I, Inc.
3	Stiefel Consulting, Inc. f/k/a Praxis Claims Consulting, LLC d/b/a Praxis Claims Consulting
4	Marcum LLP f/k/a Marcum & Kleigman LLP
5	Pinnacle Healthcare, Inc.
6	Sophia Palmer Nurses Risk Retention Group, Inc.
7	Community Bank, N.A. f/k/a Oneida Savings Bank
8	Ponce de Leon LTC Risk Retention Group, Inc.
9	J.M. Woodworth Risk Retention Group, Inc.
10	Johnson Lambert, LLP
11	Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
12	Chur Companies NY, Inc. f/k/a Elderwood Affiliates, Inc. d/b/a Elderwood Senior Care
13	Rohm Services Corporation d/b/a Hurlbut Care Communities
14	Prestige Care, Inc. f/k/a Eagle Healthcare, Inc.
15	Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, P.C.
16	Broad and Cassel, P.A.
17	Barclay Damon, LLP f/k/a Hiscock & Barclay, LLP
18	William Fahy
19	Anthony Salerno
20	Henry Hudson LTC Risk Retention Group, Inc.
21	
22	

- 23 • Defendants U.S. Re, Uni-Ter UMC, and Uni-Ter CS served the following Third-
- 24 Parties with a Subpoena Duces Tecum and/or FOIA request:

25	<u>Third-Party Served</u>
26	NV DOI - FOIA

- 27 • Uni-Ter/U.S. Re Defendants served the following Third-Parties with a Subpoena
- 28 Duces Tecum:

Third-Party Served

Milliman, Inc.

Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

2. Discovery to be Completed

The discovery that remains to be completed includes, but is not limited to:

A. Additional Production of Documents

Plaintiff caused 17 Subpoenas Duces Tecum to be served on various third-parties. As of the date of this Stipulation, Plaintiff has received over 23,000 pages of subpoenaed records from Marquis Companies, Praxis and Marcum, which are in the process of being bates labeled and produced to the Defendants. It is anticipated that Plaintiff will receive additional subpoenaed records from the other third-parties. Upon receipt of such records, they will be bates labeled and produced to the Defendants.

B. Additional written discovery

The Parties anticipate additional written discovery including interrogatories and requests for admission, as well as additional requests for production of documents.

C. Depositions and additional third-party subpoenas

The Parties intend to take the depositions of the following parties: (1) Steve Fogg; (2) Robert Chur (3) Mark Garber; (4) Carol Harter; (5) Robert Hurlbut; (6) Barbara Lumpkin; (7) Jeff Marshall; and (8) Eric Stickels. The Parties are currently working with the Director Defendants' counsel to coordinate scheduling of these depositions. Currently, Mr. Fogg's deposition is being scheduled for either June 6, 2018 at June 13, 2018.

The Parties also intend to notice the depositions of the following third-party witnesses: (1) Sanford Elsass; (2) Donna Dalton; (3) Jonna Miller; (4) Lynn Fulstone; and (5) various individuals from the Nevada Division of Insurance, including but not limited to Michael Lynch and Amy Parks. be issued. Finally, Plaintiff will cause Amended Subpoenas Duces Tecum to be issued to Milliman, Inc. and Florida Nurses Association. Finally, after Expert Disclosures and Reports have been produced, the Parties will need to take the depositions of the Experts.

1 **3. Reasons Why Discovery Dates Should Be Amended**

2 This is a case regarding the reasons for the failure of a risk retention group that insured
3 skilled nursing facilities and nurses for approximately 10 years. Prior to commencement of this
4 case, the Uni-Ter Defendants, as custodian of records for the Lewis & Clark Risk Retention
5 Group, provided thousands of files in electronic format to the Receiver of the Lewis & Clark Risk
6 Retention Group. Those documents contained among other things, sensitive HIPAA information
7 of the various claimants and confidential, attorney-client privilege type of documents which
8 included claim notes, claim files and reserves. Some of these documents were similarly provided
9 to the Board of Director Defendants while they served on the Lewis & Clark Risk Retention
10 Group board. If disclosed to third parties, this information could be detrimental to the claims
11 process currently proceeding in the Liquidation Receivership of the Lewis & Clark Risk
12 Retention Group. Processing and handling of this type of information has been time consuming
13 and has taken longer than expected, especially with Defendants refusing to produce documents
14 within their possession, custody or control.

15 During the week of May 7, 2018, Defendant U.S. Re produced documents bates labeled
16 **LC-USRE-0001070-1523020** (which appears to be approximately 1.5 million pages of
17 documents). Both Plaintiff's counsel and the Director Defendants' counsel will need to dedicate
18 substantial time in order to review the massive production of documents. Regardless of this
19 recent production, there is currently a discovery dispute related to production of documents for
20 the years of 2006 to 2009. This could require a Motion to Compel production. In any event,
21 Plaintiff believes that the records associated with the years of 2006 to 2009 could easily be
22 another 1.5 million pages of production, requiring more time for a review.

23 Between March and April 2018, Plaintiff received unredacted documents of
24 approximately 14,000 pages from the Director Defendants. Additionally, Plaintiff is starting to
25 receive subpoenaed records from third-parties (so far approximately 28,000 pages). These
26 documents will need to be reviewed and provided to Plaintiff's expert(s) in order to prepare of
27 their reports (currently due July 13, 2018). Finally, the Parties need to take depositions in this
28 case.

1 This Stipulation to extend time is brought in good faith and not for the purpose of delay.
2 The parties do not anticipate any further requests for continuance. Based on the above, there is
3 good cause to extend discovery and the trial dates as proposed below.

4 **4. Proposed Schedule For Remaining Discovery**

5 Based upon the foregoing, the Parties request that the discovery deadlines be extended for
6 an additional 6 months, as follows:

7 **A. Discovery Cut Off:**

8 Currently: October 30, 2018

9 **Proposed: April 30, 2019**

10 **B. Deadline for Parties to file Motions in Amend:**

11 Currently: July 13, 2018

12 **Proposed: January 14, 2019**

13 **C. Plaintiff shall make initial expert disclosures:**

14 Currently: July 13, 2018

15 **Proposed: January 14, 2019**

16 **D. Defendants shall make initial expert disclosures:**

17 Currently: August 13, 2018

18 **Proposed: February 13, 2019**

19 **E. All parties shall make rebuttal expert disclosures:**

20 Currently: September 14, 2018

21 **Proposed: March 15, 2019**

22 **F. Deadline for Parties to file Dispositive Motions:**

23 Currently: December 5, 2018

24 **Proposed: June 5, 2019**

25 ///

26 ///

27 ///

28 ///

1 **5. Trial date**

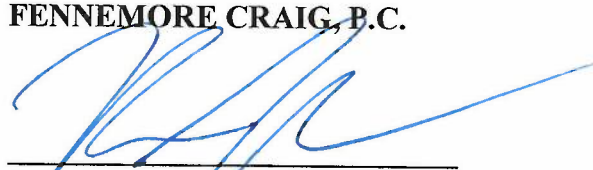
2 The case is currently set for trial to commence in a March 11, 2019 trial stack. The
3 Parties request a continuance of the trial date as the proposed discovery deadline falls after the
4 current trial date.


5 Dated this 15 day of May, 2018.

Dated this 14th day of May, 2018.

6 **FENNEMORE CRAIG, P.C.**

LIPSON NEILSON, P.C.

7 
8 _____
9 James L. Wadhams, Esq.
10 Nevada Bar No. 1115
11 Brenoch Wirthlin, Esq.
12 Nevada Bar No. 10282
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15 *Attorneys for Plaintiff Commissioner of Insurance*
16 *For the State of Nevada*



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Angela T. Nakamura Ochoa
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Las Vegas, Nevada 89144
*Attorneys for Robert Chur, Steve Fogg, Mark
Garber, Carol Harter, Robert Hurlbut,
Barbara Lumpkin, Jeff Marshall, and Eric
Stickels*

15 Dated this ____ day of May, 2018.

16 **MCDONALD CARANO LLP**

17 _____
18
19 George F. Ogilvie III, Esq.
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21 2300 West Sahara Avenue, Suite 1200
22 Las Vegas, Nevada 89102

23 Jon M. Wilson, Esq.
24 BROAD AND CASSEL
25 2 S. Biscayne Boulevard, 21st Floor
26 Miami, Florida 33131

27 *Attorney for Defendants Uni-Ter Underwriting Management Corp.,*
28 *Uni-Ter Services Corp. and U.S. RE Corporation*

1 **5. Trial date**

2 The case is currently set for trial to commence in a March 11, 2019 trial stack. The
3 Parties request a continuance of the trial date as the proposed discovery deadline falls after the
4 current trial date.

5 Dated this ____ day of May, 2018.

Dated this ____ day of May, 2018.

6 **FENNEMORE CRAIG, P.C.**

LIPSON NEILSON, P.C.

7
8
9 _____
James L. Wadhams, Esq.
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13 *For the State of Nevada*

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Las Vegas, Nevada 89144
Attorneys for Robert Chur, Steve Fogg, Mark
Garber, Carol Harter, Robert Hurlbut,
Barbara Lumpkin, Jeff Marshall, and Eric
Stickels

14
15 Dated this 14TH day of May, 2018.

16 **MCDONALD CARANO LLP**

17
18 
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21 Las Vegas, Nevada 89102

22 Jon M. Wilson, Esq.
23 BROAD AND CASSEL
2 S. Biscayne Boulevard, 21st Floor
Miami, Florida 33131

24 *Attorney for Defendants Uni-Ter Underwriting Management Corp.,*
25 *Uni-Ter Services Corp. and U.S. RE Corporation*

ORDER

Based on the stipulation of the Parties and good cause appearing,

IT IS HEREBY ORDERED that the remaining discovery deadlines in the above-captioned matter are hereby continued as follows:

A. Discovery Cut Off: **April 30, 2019;**

B. Deadline for Parties to file Motions in Amend: **January 14, 2019;**

C. Plaintiff shall make initial expert disclosures: **January 14, 2019;**

D. Defendants shall make initial expert disclosures: **February 13, 2019;**

E. All parties shall make rebuttal expert disclosures: **March 15, 2019;** and

F. Deadline for Parties to file Dispositive Motions: **June 5, 2019.**

IT IS FURTHER ORDERED that the current trial date is vacated.

IT IS SO ORDERED.

DATED: 5/16/19.

MLA
LAST STIPULATION TO
CONTINUE.

Nancy L Alf
DISTRICT COURT JUDGE

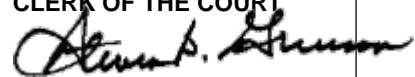
Respectfully submitted by:

FENNEMORE CRAIG, P.C.

By: 

Brenoch Wirthlin (No. 10282)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Attorneys for Plaintiff

EXHIBIT “D”



ORDG
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*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

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR EXTENSION OF
DISCOVERY DEADLINES AND TO
CONTINUE TRIAL ON AN ORDER
SHORTENING TIME**

Plaintiff's Motion for Extension of Discovery Deadlines and to Continue Trial on
an Order Shortening Time ("Motion to Extend") was heard on December 27, 2018. In
attendance were Brenoch Wirthlin, Esq. on behalf of Plaintiff, Commissioner of

Insurance for the State of Nevada as Receiver for the Lewis & Clark Risk Retention Group, Inc.; Angela Ochoa, Esq. on behalf of Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshal and Eric Stickels; and George Ogilvie, III, Esq. on behalf of U.S. RE Corporation, Uni-Ter Underwriting Management Corp., and Uni-Ter Claims Servicing Corp.

The Honorable Nancy Allf presiding, and the Court having heard oral argument, reviewed the pleadings and papers on file herein and being fully advised in the premises and for good cause appearing,

THE COURT HEREBY ORDERS that Plaintiff's Motion to Extend is GRANTED in PART and DENIED in PART.

Specifically, the Court grants the Motion to Extend to allow for a sixty (60) day extension on all discovery deadlines. The Court denies the Motion to Extend insofar as it requests an extension of more than 60 days on the discovery deadlines. The new discovery deadlines are as follows:

	Current Deadline:	New Deadline:
Discovery Cut-Off:	April 30, 2019	July 1, 2019
Last Day to Amend or Add Parties:	January 14, 2019	March 15, 2019
Plaintiff's Initial Expert Disclosures Due:	January 14, 2019	March 15, 2019
Defendant's Initial Expert Disclosures Due:	February 13, 2019	April 15, 2019
Rebuttal Expert Disclosures Due:	March 15, 2019	May 14, 2019
Last Day to File Dispositive Motions:	June 5, 2019	August 5, 2019

///

1 It is FURTHER ORDERED that there shall be no further extensions of the
2 discovery deadlines.

3 It is FURTHER ORDERED that the current trial date be vacated and that a firm
4 trial setting in this matter be set for October 21, 2019 at 10:20 a.m. through November
5 8, 2019.

6
7 DATED this 25 day of January, 2019.

8
9 Nancy L. Allf
JUDGE NANCY ALLF

10 Submitted by:
11 LIPSON NEILSON, P.C.

12 HPG
13 Joseph P. Garin, Esq. (NV Bar No. 6653)
14 Angela Ochoa, Esq. (NV Bar No. 10164)
15 Jonathan Wong, Esq. (NV Bar No. 13621)
16 9900 Covington Cross Dr., Suite 120
17 Las Vegas, NV 89144
18 *Attorneys for Defendants Robert Chur,*
19 *Steve Fogg, Mark Garber, Carol Harter,*
20 *Robert Hurlbut, Barbara Lumpkin, Jeff*
21 *Marshall & Eric Stickels*
22
23
24
25
26
27
28

EXHIBIT “E”

1 **DECLARATION OF JON M. WILSON, ESQ. IN SUPPORT OF DEFENDANTS**
2 **UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS**
3 **SERVICES CORP. AND U.S. RE CORPORATION'S OPPOSITION TO THE**
4 **DIRECTOR DEFENDANTS' MOTION TO STAY AND THE RECEIVER'S**
5 **LIMITED JOINDER THERETO**

6 I, JON M. WILSON, declare under penalty of perjury as follows:

7 1. I am an attorney for Defendants Uni-Ter Underwriting Management Corp. ("Uni-
8 Ter UMC"), Uni-Ter Claims Services Corp. ("Uni-Ter CS" and, collectively, "Uni-Ter") and U.S.
9 Re Corporation ("U.S. Re") in this case, styled *Commissioner of Insurance For the State of*
10 *Nevada As Receiver of Lewis And Clark LTC Risk Retention Group, Inc. v. Robert Chur, et. al.*,
11 Case No. A-14-711535-C.

12 2. I have personal knowledge of the matters addressed herein. I am legally competent
13 to testify to the contents of this Declaration in a court of law if called upon to testify.

14 3. This Declaration is made in support of the response filed by Uni-Ter and U.S. Re
15 in opposition to the Director Defendants' Motion to Stay and the Receiver's Limited Joinder
16 thereto.

17 4. The Receiver's claim in the Limited Joinder that there are "still literally dozens of
18 former employee witnesses who remain available" for Uni-Ter and U.S. Re to depose is incorrect.

19 5. Contrary to the Receiver's claim, Uni-Ter and U.S. Re have experienced
20 significant difficulty locating witnesses who are able to testify on their behalf, and that difficulty
21 will only increase over time.

22 6. For example, when the Receiver initially noticed Uni-Ter and U.S. Re's 30(b)(6)
23 depositions in September 2018, Anthony Ciervo, a former employee, agreed to testify on behalf
24 of Uni-Ter and U.S. Re in New York, where he then resided, on the noticed topics. The Receiver,
25 however, unilaterally canceled those depositions.

26 7. By the time the Receiver re-noticed Uni-Ter and U.S. Re's 30(b)(6) depositions
27 for February 2019, Mr. Ciervo had moved to Arizona and was unwilling to travel to New York,
28 or even to Las Vegas, to be deposed.

 8. While Mr. Ciervo ultimately agreed to appear to by telephone to testify to limited
 topics for purposes of the 30(b)(6) deposition, this is indicative of the struggle Uni-Ter and U.S.

1 Re face in locating witnesses – and this is without the additional delay that the proposed stay
2 would cause.

3 9. Uni-Ter and U.S. Re have ceased doing business and now must rely on former
4 employees, over whom they have ever-decreasing control, to testify on their behalf. In addition
5 to Mr. Ciervo, counsel for Uni-Ter and U.S. Re have made significant efforts to locate former
6 employees, including former officers of Uni-Ter, to testify in a representative capacity at
7 deposition.

8 10. Counsel for Uni-Ter and U.S. Re has either been unable to locate or contact these
9 employees or the former employees have been unavailable or unwilling to testify at deposition.

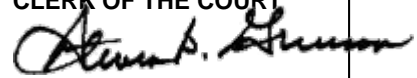
10 11. Should this Court enter the requested stay, the hardship on Uni-Ter and U.S. Re to
11 secure witnesses for trial will increase.

12 I declare under penalty of perjury under the laws of the State of Nevada that the above is
13 true and correct.

14 Dated this 12th day of March, 2019.

15
16 /s/ Jon M. Wilson

17 JON M. WILSON, ESQ.
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28



RIS

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*Attorneys for Defendants 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,

v.

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. XXVII

**REPLY IN SUPPORT OF MOTION TO
STAY PROCEEDINGS PENDING
PETITION FOR WRIT OF MANDAMUS**

HOLLAND & HART LLP
9555 HILLWOOD DRIVE
2ND FLOOR
LAS VEGAS, NV 89134

1 Defendants, Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara
2 Lumpkin, Jeff Marshall, and Eric Stickels (the “Director Defendants”) by and through their
3 undersigned counsel of record hereby submit their Reply in Support of their Motion to Stay
4 Proceedings Pending Petition for Writ of Mandamus. For the reasons discussed below, the
5 Director Defendants respectfully request that this Court grant their Motion to Stay.

6 **I. INTRODUCTION**

7 In Nevada, a prospective writ petitioner generally must seek a stay in the district court
8 before petition the Nevada Supreme Court for writ relief. *See* NRAP 8(a)(1). In considering
9 whether or not to issue a stay, Nevada courts must consider whether the object of the writ will be
10 defeated, the prospect of irreparable harm suffered by the petitioning party, the responding party,
11 and any real party in interest, and the petitioner’s likelihood of success on the merits of the writ.

12 The object of the Director Defendants’ writ petition is the proper enforcement of the plain
13 text of NRS 78.138 by dismissing the Director Defendants from this action. Without a stay, the
14 Director Defendants’ object—to be dismissed from this case—will necessarily be defeated as they
15 will have to continue litigating this dispute.

16 The Director Defendants’ likelihood of success on the merits of their petition is substantial.
17 The language of NRS 78.138 alone, particularly subparts (3) and (7), demonstrates that Plaintiff
18 Commissioner of Insurance for the State of Nevada (“Plaintiff”), a receiver of Lewis and Clark
19 Risk Retention Group, Inc. (“L&C”), failed to make sufficient allegations to state a claim for
20 individual liability against the Director Defendants.

21 Accordingly, two of the factors Nevada courts consider when determining whether a stay
22 should issue pending a petition for an extraordinary writ to the Nevada Supreme Court weigh
23 strongly in favor of issuing the writ. And, as Defendants Uni-Ter Underwriting Management
24 Corp., Uni-Ter Claims Services Corp., (collectively, “Uni-Ter”) and U.S. RE Corporation (“U.S.
25 RE”) acknowledge in their opposition to the Director Defendants’ Motion to Stay, “[n]o one factor
26 carries more weight than any other; however, ‘if one or two factors are especially strong, they may
27 counterbalance other weak factors.’” *Opp.* at 4 (quoting *Mikohn Gaming Corp. v. McCrea*, 120
28 Nev. 248, 251, 89 P.3d 36, 38 (2004)). Whatever perceived weaknesses exist as to the other factors

1 this Court may consider, the two factors described above weigh in favor of this Court issuing a
2 stay.

3 Still, the Director Defendants will suffer irreparable harm or serious injury by being forced
4 to litigate a case through a trial when a statutory bar to their liability in that case exists. To this
5 end, the Director Defendants' suffering is not the ordinary set of routine litigation expenses, but
6 an affliction that they are statutorily inoculated from having to endure.

7 Furthermore, Uni-Ter and U.S. RE's arguments that they will suffer undue prejudice from
8 a stay in the form of the reduced memories of witnesses and the increased unavailability of
9 potential, unlocatable witnesses is a problem of their own making. While Plaintiff has had "more
10 than six years to build its case against the defendants," Opp. at 8, Uni-Ter and U.S. RE have had
11 just as long to mount a defense. Uni-Ter and U.S. RE's self-inflicted witness troubles have no
12 bearing on whether a stay should issue here.

13 II. LEGAL STANDARD

14 Nevada Rule of Appellate Procedure 8(a)(1) generally requires a party to move for a stay
15 in the district court pending resolution of a petition for an extraordinary writ to the Nevada
16 Supreme Court. *See Hansen v. Eighth Jud. Dist. Court*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000).
17 When considering a stay, four factors are considered: (1) whether the object of the writ petition
18 will be defeated if the stay is denied; (2) whether the petitioner will suffer irreparable injury if the
19 stay is denied; (3) whether the real party in interest will suffer irreparable harm if a stay is granted;
20 and (4) whether the petitioner is likely to prevail on the merits of the writ petition. NRAP 8(c).
21 No single factor is dispositive and "if one or two factors are especially strong, they may
22 counterbalance other weak factors." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89
23 P.3d 36, 38 (2004).

24 III. ARGUMENT

25 A. The Hansen Factors Weigh in Favor of Issuing a Stay

26 As summarized above, each *Hansen* factor weighs in favor of granting a stay. First, if the
27 Director Defendants' stay request is denied, the Director Defendants' object of their writ—to be
28 dismissed from this litigation as required by NRS 78.138—will necessarily be defeated. Second,

1 without a stay, the Director Defendants will be forced to continue defending themselves from the
2 prospect of liability that NRS 78.138 already protects them against. Third, Plaintiff will not suffer
3 any irreparable harm from a stay, as evidenced by their filing a limited joinder to the Director
4 Defendants' Motion to Stay. Fourth, the Director Defendants are likely to prevail on the merits of
5 their writ petition given the clear statutory language of NRS 78.138 and its direct application to
6 the facts and circumstances present in Plaintiff's case against the Director Defendants.

7 Uni-Ter and U.S. RE arguments to the contrary are unpersuasive. Uni-Ter and U.S. RE
8 argue that the object the Director Defendants will not be defeated if their request for a stay is
9 denied, but, regardless, the Director Defendants have a "speedy legal remedy of appealing any
10 adverse final judgment resulting from trial." Opp. at 2. The entire object of the Director
11 Defendants' writ petition is for the claims against them to be dismissed as a matter of law, as
12 required by NRS 78.138. Forcing the Director Defendants to press on with their defense, despite
13 the presence and applicability of a statutory bar to liability, will defeat the object of the Director
14 Defendants' petition.

15 Further, the Nevada Supreme Court does not uniformly deny every writ petition based upon
16 an interlocutory order because an appeal following a final judgment is a sufficiently adequate and
17 speedy remedy. Instead, the Nevada Supreme Court takes a case-by-case approach where it must
18 determine "whether a future appeal is *sufficiently adequate and speedy* by considering a number
19 of factors, including 'the underlying proceedings' status, the types of issues raised in the writ
20 petition, and whether a future appeal will permit [the Nevada Supreme Court] to meaningfully
21 review the issues presented.'" *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court*, 128
22 Nev. 723, 730, 291 P.3d 128, 133 (2012) (quoting *D.R. Horton v. Eighth Judicial Dist. Court*, 123
23 Nev. 468, 474-75, 168 P.3d 731, 736 (2007)). Here, the purpose of the Director Defendants' writ
24 petition is to determine whether they can be liable at all even if Plaintiff fully proves all the facts
25 in the Third Amended Complaint. That is not something that can be fairly and effectively reviewed
26 by the Supreme Court at a later point in time.

27 And requiring the Director Defendants to seek relief through an appeal following final
28 judgment resulting from trial will, once more, force the Director Defendants to continue a fight

1 that NRS 78.138 establishes they cannot lose. This outcome would require an expenditure of
2 significant resources both by the Director Defendants in the form of legal fees and by the public
3 in the form of the Court's time and other resources and cause serious delays in the resolution of
4 the claims against the Director Defendants. These untoward and harmful consequences can be
5 avoided simply by issuing a stay.

6 For all these reasons, the *Hansen* factors weigh in favor of issuing a stay here.

7 **B. The Harms Uni-Ter and U.S. RE May Suffer from a Stay Are Self-Inflicted**
8 **and Insubstantial**

9 Uni-Ter and U.S. RE oppose the Director Defendants' Motion for a Stay on the grounds
10 that such a stay may cause "potential delay that . . . will be detrimental to Uni-Ter and U.S. RE's
11 ability to properly defend themselves at the eventual trial in this case." Opp. at 4. However, the
12 specific harms Uni-Ter and U.S. RE identify are only products of their own making. This Court
13 should not deny the Director Defendants' Motion to Stay on these grounds.

14 Uni-Ter and U.S. RE argue that they have "experienced significant difficulty locating
15 witnesses who are able to testify on their behalf, and that difficulty will only increase over time."
16 Opp. at 5. They argue that their counsel has "made significant efforts to locate former employees,
17 including former officers of Uni-Ter, to testify in a representative capacity at deposition," but their
18 counsel "has either been unable to locate or contact these employees or the former employees have
19 been unavailable or unwilling to testify at deposition." *Id.* Uni-Ter and U.S. RE argue these
20 troubles will be magnified if a stay is issued here.

21 These problems are self-inflicted. Uni-Ter and U.S. RE has had six years to mount a
22 defense in this case. *See* Opp. at 8. Their inability to locate and preserve the testimony of witnesses
23 over a *six year* period of time should not defeat their co-defendants' ability to seek legal relief in
24 the form of a stay and corresponding writ petition. Accordingly, this Court should not consider
25 these potential consequences when evaluating the Director Defendants' Motion to Stay.¹

26 _____
27 ¹ To the extent this Court chooses to entertain the effects of a stay on Uni-Ter and U.S. RE, the Director Defendants
28 suggest the Court could tailor a stay in such a way that allows the Director Defendants to seek relief with the Nevada
Supreme Court while the remainder of the case proceeds as scheduled against Uni-Ter and U. S. RE. While this is
not ideal, it negates UneTer's and U.S. RE concerns.

1 **IV. CONCLUSION**

2 For all these reasons, this Court should grant the Director Defendants' Motion to Stay
3 Proceedings Pending Petition for Writ of Mandamus.

4 DATED this 13th day of March 2019

5 HOLLAND & HART LLP

6
7 s/ J. Stephen Peek

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20 *Steve Fogg, Mark Garber, Carol Harter,*
21 *Robert Hurlbut, Barbara Lumpkin,*
22 *Jeff Marshall, and Eric Stickels,*
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of March 2019, a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING PETITION FOR WRIT OF MANDAMUS** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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/s/ Valerie Larsen
An Employee of Holland & Hart LLP

REGISTER OF ACTIONS

CASE No. A-14-711535-C

Commissioner of Insurance for the State of Nevada as Receiver of
Lewis and Clark, Plaintiff(s) vs. Robert Chur, Defendant(s)

§
§
§
§
§
§

Case Type: **Negligence - Other Negligence**
Date Filed: **12/23/2014**
Location: **Department 27**
Cross-Reference Case Number: **A711535**

PARTY INFORMATION

Defendant	Chur, Robert	Lead Attorneys Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	Fogg, Steve	Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	Garber, Mark	Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	Harter, Carol	Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	Hurlbut, Robert	Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	Lumpkin, Barbara	Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	Marshall, Jeff	Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	Stickels, Eric	Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	U S Re Corporation	George F. Ogilvie, III <i>Retained</i> 7028734100(W)
Defendant	Uni-Ter Claims Services Corp	George F. Ogilvie, III <i>Retained</i> 7028734100(W)
Defendant	Uni-Ter Underwriting Management Corp	George F. Ogilvie, III <i>Retained</i> 7028734100(W)
Plaintiff	Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark	Brenoch Wirthlin <i>Retained</i> 702-385-2500(W)
Third Party Defendant	Dalton, Donna	

PA002864

**Third Party
Defendant** **Elsass, Sanford**

**Third Party
Plaintiff** **Chur, Robert**

Joseph P Garin
Retained
702-382-1500(W)

**Third Party
Plaintiff** **Fogg, Steve**

Joseph P Garin
Retained
702-382-1500(W)

**Third Party
Plaintiff** **Garber, Mark**

Joseph P Garin
Retained
702-382-1500(W)

**Third Party
Plaintiff** **Harter, Carol**

Joseph P Garin
Retained
702-382-1500(W)

**Third Party
Plaintiff** **Hurlbut, Robert**

Joseph P Garin
Retained
702-382-1500(W)

**Third Party
Plaintiff** **Lumpkin, Barbara**

Joseph P Garin
Retained
702-382-1500(W)

**Third Party
Plaintiff** **Marshall, Jeff**

Joseph P Garin
Retained
702-382-1500(W)

**Third Party
Plaintiff** **Stickels, Eric**

Joseph P Garin
Retained
702-382-1500(W)

EVENTS & ORDERS OF THE COURT

03/14/2019 | **Motion to Stay** (10:00 AM) (Judicial Officer Alif, Nancy)
Defendants' Motion to Stay Proceedings Pending Petition for Writ of Mandamus on an Order Shortening Time

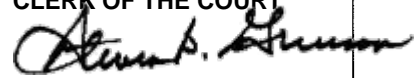
Minutes

03/14/2019 10:00 AM

- Erin Kolmansberger present telephonically. Mr. Peek submitted on the pleadings. Arguments by Mr. Ogilvie and Mr. Cereghino. COURT ORDERED, Defendants' Motion to Stay Proceedings Pending Petition for Writ of Mandamus on an Order Shortening Time GRANTED, matter SET for status check, and parties to provide an update no later than May 10, 2019. Mr. Peek to prepare the order and submit to opposing counsel for approval as to form. 5/14/2019 (CHAMBERS) STATUS CHECK

[Parties Present](#)

[Return to Register of Actions](#)



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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,

v.

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, OES 1-50,
inclusive; and ROES 51-100, inclusive;

Defendants.

Case No. A-14-711535-C
Dept. No. XXVII

**ORDER GRANTING MOTION TO STAY
PROCEEDINGS PENDING PETITION
FOR WRIT OF MANDAMUS**

Date of Hearing: March 14, 2019
Time of Hearing: 10:00 a.m.

HOLLAND & HART LLP
9555 HILLWOOD DRIVE
2ND FLOOR
LAS VEGAS, NV 89134

1 This matter came before the Court for hearing on March 14, 2019 at 10:00 a.m. with
2 appearances by Daniel Cereghino, Esq. of Fennemore Craig, P.C. on behalf of Plaintiff; George
3 F. Ogilvie III, Esq. of McDonald Carano LLP, and Erin Kolmansberger, Esq. of Nelson Mullins
4 Broad and Cassel, appearing telephonically, on behalf of Defendants Uni-Ter Underwriting
5 Management Corp., Uni-Ter Claims Services Corp. (the “Uni-Ter Defendants”), and U.S. RE
6 Corporation (“U.S. RE”), and J. Stephen Peek of Holland & Hart on behalf of Defendants Robert
7 Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall,
8 and Eric Stickels (the “Director Defendants”).

9 The Director Defendants filed their Motion to Stay Proceedings Pending Petition for Writ
10 of Mandamus on an Order Shortening Time (“Motion”) on March 8, 2019. The Motion requested
11 this Court to issue a stay of all pending proceedings pending the Nevada Supreme Court’s
12 resolution of the Director Defendants’ Petition for a Writ of Mandamus.

13 Plaintiff filed a Limited Joinder to Directors’ Motion to Stay Proceedings Pending Petition
14 for Writ of Mandamus on March 11, 2019. The Uni-Ter Defendants and U.S. RE filed an
15 Opposition to the Director Defendants’ Motion to Stay and Plaintiff’s Limited Joinder Thereto on
16 March 12, 2019. After considering the papers and pleadings on file and the arguments of counsel,
17 and good cause appearing, the Court hereby orders as follows:

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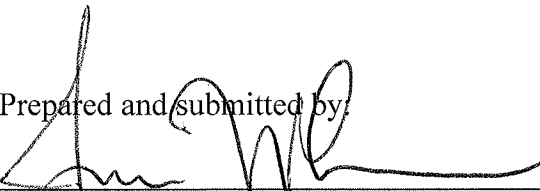
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1 IT IS ORDERED THAT Motion to Stay is GRANTED. All proceedings are stayed
2 pending the Nevada Supreme Court's resolution of the Director Defendants' Petition for a Writ of
3 Mandamus. The matter be placed on the Chambers Calendar for a Status Check on May 14, 2019.
4 The Director Defendants will prepare a Status Report to advise the Court no later than May 10,
5 2019 of the status of the Director Defendants Petition for a Writ of Mandamus.

6 DATED this 2 day of ^{April}~~March~~, 2019

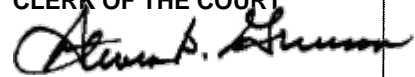
7
8 Nancy ANE
DISTRICT COURT JUDGE

9 Prepared and submitted by: 

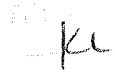
10 J. Stephen Peek, Esq.
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For the State of Nevada*



DISTRICT COURT

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR
THE STATE OF NEVADA AS RECEIVER
OF LEWIS AND CLARK LTC RISK
RETENTION GROUP,

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.: XXVII

Hearing Requested

**MOTION TO LIFT STAY OR
ALTERNATIVELY GRANT PLAINTIFF
OTHER RELIEF ON ORDER
SHORTENING TIME**

The Commissioner of Insurance for the State of Nevada ("Plaintiff" or "Commissioner")
hereby submits this Motion to Lift Stay or Alternatively Grant Plaintiff Other Relief on Order
Shortening Time ("Motion"). This Motion is made and based upon the following Memorandum of
Points and Authorities, the declaration of undersigned counsel, the pleadings and papers on file,

///

///

///

///

1 and any argument of counsel at the time of the hearing of the Motion.

2 DATED this 1st day of July, 2019.

3
4 **FENNEMORE CRAIG, P.C.**

5
6 By: /s/ Brenoch R. Wirthlin
7 BRENOCH WIRTHLIN, ESQ.
8 Nevada Bar No. 10282
9 300 South Fourth Street, Suite 1400
10 Las Vegas, Nevada 89101
11 *Attorneys for Plaintiff Commissioner of Insurance*
12 *For the State of Nevada*

13 **ORDER SHORTENING TIME**

14 Good cause appearing therefor:

15 IT IS HEREBY ORDERED that the time for the hearing on **MOTION TO LIFT STAY**
16 **OR ALTERNATIVELY GRANT PLAINTIFF OTHER RELIEF ON ORDER**
17 **SHORTENING TIME** is hereby shortened to the 11th day of July, 2019, at
18 9:30 a.m., before the honorable Judge Nancy Allf, or as soon thereafter as counsel
19 may be heard.

20 DATED this 2 day of July, 2019. 10:55am

21 By Nancy Allf
22 **DISTRICT COURT JUDGE**

1 **DECLARATION OF BRENOCH WIRTHLIN, ESQ. PURSUANT TO EDCR 2.26 IN**
2 **SUPPORT OF REQUEST FOR ORDER SHORTENING TIME**

3 I, Brenoch Wirthlin, hereby declare under penalty of perjury:

4 1. I am an attorney licensed in the State of Nevada and in good standing.

5 2. I am a Director with the law firm Fennemore Craig, P.C., retained to represent
6 Plaintiff Commissioner of Insurance for the State of Nevada ("Plaintiff" or "Commissioner") in the
7 present action.

8 3. I have personal knowledge of the matters set forth herein and I am competent to
9 testify thereto.

10 4. This action was filed on December 23, 2014.

11 5. Nevada's five-year rule, contained in NRCP 41(e), provides that all actions must be
12 brought to trial within five (5) years after being filed.

13 6. On March 8, 2019, Defendants Robert Chur, Steve Fogg, Mark Garber, Carol
14 Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels ("Director Defendants")
15 filed a motion to stay proceedings while their petition for writ of mandamus is pending before the
16 Nevada Supreme Court ("Motion for Stay").

17 7. On March 13, 2019, the Director Defendants filed a Petition for Writ of Mandamus
18 ("Writ") with the Nevada Supreme Court based upon this Court's denial of the Director
19 Defendants' motion for judgment on the pleadings pursuant to NRCP 41(e) and motion for
20 reconsideration.

21 8. On March 14, 2019, the Director Defendants' Motion for Stay was heard and
22 granted by this Court.

23 9. In the Court's Order granting the Motion for Stay ("Stay Order") no mention is made
24 of the five-year rule or whether the Stay Order is intended to toll the five-year rule under NRCP
25 41(e). *See Exhibit 1*, hereto.

26 10. On June 12, 2019, Plaintiff filed with the Nevada Supreme Court an answer to the
27 Director Defendants' Writ, and on June 17, 2019, the Director Defendants telephonically requested
28

1 and were granted an extension to July 10, 2019 to file and serve a reply to Plaintiff's Answer.

2 11. Plaintiff believes the Stay Order effectively tolls the five-year rule. However, out
3 of an abundance of caution, on June 27, 2019, Plaintiff's counsel contacted counsel for all
4 defendants regarding entering into a stipulation that the five-year rule was tolled pending the
5 outcome of the Director Defendants' Writ, or alternatively to stipulate to a trial continuance to
6 ensure this matter is "brought to trial" within the meaning of NRCP 41(e) prior to December 23,
7 2019. See **Exhibit 2**, hereto, at p. 1.

8 12. On June 28, 2019, counsel for Defendants Uni-Ter Management Corp., Uni-Ter
9 Claims Services Corp., and U.S. Re Corporation responded to Plaintiff's June 27, 2019 email by
10 refusing to stipulate to any of the several alternatives proposed by Plaintiff. *Id.* at p.2.

11 13. Despite the fact that Plaintiff believes the Stay Order effectively tolls the five-year
12 rule, because Defendants have not agreed to stipulate regarding the tolling of the five-year rule
13 under the Stay Order, and because Defendants have not agreed to stipulate to extend the date of
14 trial beyond the five-year rule, and because there is now less than six (6) months before trial in this
15 matter, out of an abundance of caution, Plaintiff now files this Motion to lift the stay to enable
16 Plaintiff to conduct important remaining discovery and prepare for a trial date prior to the December
17 23, 2019 five-year deadline.

18 14. Based on the foregoing, the undersigned submits that good cause therefor exists for
19 shortening the time for the instant Motion to Lift Stay or Alternatively Grant Plaintiff Other Relief
20 on Order Shortening Time .

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

23 EXECUTED this 1st day of July, 2019.

24
25 By: /s/ Brenoch R. Wirthlin
26 Brenoch Wirthlin, Esq.

27 ///

1
2
3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. INTRODUCTION**

5 Plaintiff believes the Stay Order tolls Nevada's five-year rule from the time the Stay Order
6 was entered. However, out of an abundance of caution, this Motion is necessitated by the
7 unwillingness of Defendants to agree to stipulate to that effect. Plaintiff has already waited
8 patiently for more than three months for the Director Defendants' Writ to be resolved by the Nevada
9 Supreme Court. Now with the Director Defendants' telephonic request and granting of an
10 extension to file their reply by July 10, 2019 (nearly four months after the Court issued the stay in
11 these proceedings), it is unlikely that the Nevada Supreme Court will resolve the matter soon
12 enough to allow Plaintiff the time needed to conduct important remaining discovery in this matter,
including expert witness disclosures and depositions.

13 **II. BRIEF STATEMENT OF FACTS AND PROCEDURAL HISTORY**

14 **A. Denial of Judgment on the Pleadings.** Defendants Robert Chur, Steve Fogg, Mark
15 Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels ("Director
16 Defendants") filed a Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) on August 14,
17 2018. The Court denied the motion on November 7, 2018. In response, the Director Defendants
18 filed a Motion for Reconsideration, which was also denied by the Court.

19 **B. Motion for Stay.** The Director Defendants decided to take the Court's denial of the two
20 motions up to the Nevada Supreme Court. Prior to doing so, on March 8, 2019, the Director
21 Defendants filed a motion to stay the proceedings ("Motion for Stay") in the instant action. Plaintiff
22 filed a limited joinder to the Director Defendants' Motion for Stay, and Defendants Uni-Ter
23 Management Corp., Uni-Ter Claims Services Corp., and U.S. Re Corporation ("Uni-Ter
24 Defendants") filed an opposition to the Motion to Stay. On March 14, 2019, the Motion for Stay
25 was heard by the Court and granted.

26 **C. Petition for Writ of Mandamus.** On March 13, 2019, the Director Defendants filed a
27 Petition for Writ of Mandamus ("Petition") with the Nevada Supreme Court following the Court's
28 denial of their motion for judgment on the pleadings and their subsequent motion for

1 reconsideration.

2 **D. Timeline of the Writ Pending before the Nevada Supreme Court.** The following is
3 a timeline of the events that have occurred with regards to the Writ pending before the Nevada
4 Supreme Court under the Stay Order:

5 *First month of stay:* The parties received no information from the Nevada Supreme
6 Court on the resolution of Writ during the first 30 days after the Director Defendants filed
7 their petition.

8 *Second month of stay:* By the end of the second month, on May 15, 2019, the
9 Nevada Supreme Court issued an Order directing Plaintiff to submit a brief in response to
10 the Director Defendants' Writ.

11 *Third month of stay:* By the end of the third month, on June 12, 2019, Plaintiff filed
12 an answering brief to Director Defendants' Writ. Then on June 17, 2019, the Director
13 Defendants telephonically requested and were granted an extension until July 10, 2019 to
14 file and serve a reply to Plaintiff's answer.

15 *Fourth month of stay:* By the end of the fourth month, the Director Defendants are
16 expected to have filed their reply in support of their Writ, which will be approximately four
17 months after the Stay Order was issued by the Court in this matter.

18 *Fifth month of stay and beyond:* Should the Nevada Supreme Court require oral
19 argument of the parties, or should a written opinion be issued in the matter, the amount of
20 time required to resolve the pending Writ and to subsequently lift the Stay Order in the
21 present action would likely be many months from the current date.

22 **III. LAW AND ARGUMENT**

23 **A. The Amount of Time Remaining for Resolution of the Writ is Uncertain.** The Stay
24 Order states in part that "[a]ll proceedings are stayed pending the Nevada Supreme Court's
25 resolution of the Director Defendants' Petition for a Writ of Mandamus." See **Exhibit 1**, hereto, p.
26 3, at ¶ 1. The length of time of the stay of proceedings in the present action, therefore, is dependent
27 on the timeframe for resolution of the Writ before the Nevada Supreme Court. Because the Nevada
28

Supreme Court does not have definite timelines for the resolution of matters it chooses to hear, it is impossible to predict when the Stay Order will be lifted in the current action. As a result, it is conceivable that the Stay Order will not be lifted until after December 23, 2019.

B. Plaintiff Needs the Remaining Five Months to Prepare for Trial. Plaintiff anticipates serving additional interrogatories and requests for admission upon the Defendants. Plaintiff may also serve additional requests for production of documents. Plaintiff will likely be filing at least one, and possibly multiple, motions to compel. Plaintiff intends to take the depositions of the following parties: (1) Robert Chur; and (2) Mark Garber. Due to the Director Defendants' states of residency, these depositions will take place out of state. Additionally, Plaintiff intends to take the depositions of the following third-party witnesses: (1) Sanford Elsass; (2) Donna Dalton; (3) Jonna Miller; and (4) Tal Piccione. These witnesses are former employees of the Uni-Ter Defendants and managed the affairs of Lewis & Clark. In order to take these depositions, it is likely that foreign deposition subpoenas will need to be issued. Finally, after Expert Disclosures and Reports have been produced, the Parties will need to take the depositions of the Experts.

Should the Stay Order be immediately lifted, there would be five months to both complete discovery and prepare for trial. As the following proposed discovery timelines suggest, the timeframes for accomplishing this in the next five months would be extremely tight but still possible:

Discovery recommences	July 8, 2019
Plaintiff shall make initial expert disclosures	July 10, 2019
Deadline for parties to file Motions to Amend (with the exception of a motion to amend the Complaint following outcome of the pending Writ before the Nevada Supreme Court.)	July 10, 2019
Defendants shall make initial expert disclosures	August 10, 2019
All rebuttal expert witness disclosures	September 10, 2019
Discovery closes	October 10, 2019
Deadline for Parties to file Dispositive Motions	October 31, 2019
Trial to begin	Approximately December 10, 2019

Because resolution of the pending Writ before the Nevada Supreme Court is unlikely to occur within any timeframe that would reasonably allow Plaintiff as well as the other parties to

1 adequately prepare for a December 10, 2019 trial date, or at worst a resolution of the pending Writ
2 will not occur until sometime *after* December 23, 2019, the Stay Order must be lifted immediately
3 in this action to enable Plaintiff to continue with important discovery and to prepare for a December
4 2019 trial date.

5 In addition, as noted in the above chart, Plaintiff strongly believes this Court's rulings
6 denying the Directors' motions to dismiss/for judgment on the pleadings were entirely consistent
7 with Nevada law. However, Plaintiff requests that in the event the Directors prevail on their Writ,
8 Plaintiff be permitted to seek leave of Court to amend its complaint and that any order lifting the
9 stay in this matter so provide.

10 **C. Defendants Refuse to Stipulate to Extend Trial Date Beyond the Five-Year Rule.**

11 Plaintiff believes the Stay Order issued by the Court effectively tolls the five-year rule. But out of
12 an abundance of caution, and to eliminate any potential uncertainty among the parties to this action,
13 Plaintiff contacted all Defendants by email on June 27, 2019 regarding entering into a stipulation
14 that the five-year rule was tolled pending the outcome of the Director Defendants' Writ, or
15 alternatively to stipulate to a trial continuance to ensure this matter is "brought to trial" within the
16 meaning of NRCP 41(e) prior to December 23, 2019. *See Exhibit 2* hereto, at p. 1. On June 28,
17 2019, counsel for Defendants Uni-Ter Management Corp., Uni-Ter Claims Services Corp., and
18 U.S. Re Corporation responded to Plaintiff's June 27, 2019 email by refusing to stipulate to any of
19 the several alternatives proposed by Plaintiff. *Id.*, at p. 2.

20 As of July 1, 2019, Defendants have not agreed to enter into a stipulation to extend the trial
21 date beyond the five-year rule. As a result, because Defendants have not agreed to stipulate to
22 extend the date of trial beyond December 23, 2019, and because Defendants have not agreed to
23 stipulate regarding the tolling of the five-year rule under the Stay Order, Plaintiff is forced to bring
24 this Motion so that Plaintiff may resume discovery and continue to prosecute this action against the
25 Defendants to bring this matter to trial before December 23, 2019.¹

26
27 ¹ Alternatively, should this Court see fit to do so, it could potentially make specific findings that its
28 Stay Order did, in fact, toll the five-year rule pursuant to *Boren v. City of N. Las Vegas*, 98 Nev. 5,
638 P.2d 404 (1982).

[illegible]

As set forth above, good cause exists to continue the trial to a setting in late November or early December, to ensure there is no question the trial may commence prior to December 23, 2019, in order to satisfy the five-year rule. Accordingly, Plaintiff requests such a trial setting pursuant to this Motion as the Defendants would not agree to stipulate to such a continuance.

For all these reasons, Plaintiff requests the Court grant the instant Motion in its entirety, and grant such other and further relief as the Court deems appropriate.

FENNEMORE CRAIG, P.C.

By: /s/ Brenoch R. Wirthlin
BRENOCH WIRTHLIN, ESQ.
Nevada Bar No. 10282
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101

*Attorneys for Plaintiff Commissioner of Insurance
For the State of Nevada*

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Fennemore Craig, P.C. and that on July 2, 2019, service of the foregoing **MOTION TO LIFT STAY OR ALTERNATIVELY GRANT PLAINTIFF OTHER RELIEF ON ORDER SHORTENING TIME** was made on the following counsel of record and/or parties via the Court's electronic filing system as follows:

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Las Vegas, NV 89102
gogilvie@mcdonaldcarano.com
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Uni-Ter Claims Services Corp. and U.S. RE Corporation

Jon M. Wilson, Esq.
Kimberly Freedman, Esq.
Broad and Cassel
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Attorneys for Defendants
Uni-Ter Underwriting Management Corp.,
Uni-Ter Claims Services Corp. and U.S. RE Corporation

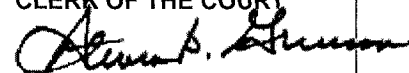
Joseph P. Garin, Esq.
Angela T. Nakamura Ochoa, Esq.
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jgarin@lipsonneilson.com
aochoa@lipsonneilson.com
Attorneys for Defendants/Third-Party Plaintiffs
Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut,
Barbara Lumpkin, Jeff Marshall, and Eric Stickels

DATED: Tue, Jul 2, 2019.

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

Exhibit “1”

Exhibit “1”



1 **OGM**

2 J. Stephen Peek, Esq. (NV Bar No. 1758)
3 Jessica E. Whelan, Esq. (NV Bar No. 14781)
4 Ryan A. Semerad, Esq. (NV Bar No. 14615)
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18 jgarin@lipsonneilson.com
19 aochoa@lipsonneilson.com

20 *Attorneys for Defendants Robert Chur,*
21 *Steve Fogg, Mark Garber, Carol Harter,*
22 *Robert Hurlbut, Barbara Lumpkin,*
23 *Jeff Marshall, and Eric Stickels,*

24 **DISTRICT COURT**

25 **CLARK COUNTY, NEVADA**

26 COMMISSIONER OF INSURANCE FOR
27 THE STATE OF NEVADA AS RECEIVER
28 OF LEWIS AND CLARK LTC RISK
RETENTION GROUP, INC.,

Plaintiff,

v.

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, OES 1-50,
inclusive; and ROES 51-100, inclusive;

Defendants.

Case No. A-14-711535-C
Dept. No. XXVII

**ORDER GRANTING MOTION TO STAY
PROCEEDINGS PENDING PETITION
FOR WRIT OF MANDAMUS**

Date of Hearing: March 14, 2019
Time of Hearing: 10:00 a.m.

HOLLAND & HART LLP
9555 HILLWOOD DRIVE
2ND FLOOR
LAS VEGAS, NV 89134

1 This matter came before the Court for hearing on March 14, 2019 at 10:00 a.m. with
2 appearances by Daniel Cereghino, Esq. of Fennemore Craig, P.C. on behalf of Plaintiff; George
3 F. Ogilvie III, Esq. of McDonald Carano LLP, and Erin Kolmansberger, Esq. of Nelson Mullins
4 Broad and Cassel, appearing telephonically, on behalf of Defendants Uni-Ter Underwriting
5 Management Corp., Uni-Ter Claims Services Corp. (the "Uni-Ter Defendants"), and U.S. RE
6 Corporation ("U.S. RE"), and J. Stephen Peek of Holland & Hart on behalf of Defendants Robert
7 Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall,
8 and Eric Stickels (the "Director Defendants").

9 The Director Defendants filed their Motion to Stay Proceedings Pending Petition for Writ
10 of Mandamus on an Order Shortening Time ("Motion") on March 8, 2019. The Motion requested
11 this Court to issue a stay of all pending proceedings pending the Nevada Supreme Court's
12 resolution of the Director Defendants' Petition for a Writ of Mandamus.

13 Plaintiff filed a Limited Joinder to Directors' Motion to Stay Proceedings Pending Petition
14 for Writ of Mandamus on March 11, 2019. The Uni-Ter Defendants and U.S. RE filed an
15 Opposition to the Director Defendants' Motion to Stay and Plaintiff's Limited Joinder Thereto on
16 March 12, 2019. After considering the papers and pleadings on file and the arguments of counsel,
17 and good cause appearing, the Court hereby orders as follows:

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1 IT IS ORDERED THAT Motion to Stay is GRANTED. All proceedings are stayed
2 pending the Nevada Supreme Court's resolution of the Director Defendants' Petition for a Writ of
3 Mandamus. The matter be placed on the Chambers Calendar for a Status Check on May 14, 2019.
4 The Director Defendants will prepare a Status Report to advise the Court no later than May 10,
5 2019 of the status of the Director Defendants Petition for a Writ of Mandamus.

6 DATED this 2 day of ^{April} March, 2019

7
8 Nancy L. Alf
DISTRICT COURT JUDGE

9 Prepared and submitted by:

10 J. Stephen Peek, Esq.
11 Jessica E. Whelan, Esq.
12 Ryan A. Semerad, Esq.
13 HOLLAND & HART LLP
9555 Hillwood Dr, 2nd Floor
Las Vegas, NV 89134, Suite 540

14 Joseph P. Garin, Esq.
15 Angela T. Nakamura Ochoa, Esq.
16 LIPSON NEILSON, P.C.
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17 *Attorneys for Defendants Robert Chur, Steve Fogg,*
18 *Mark Garber, Carol Harter, Robert Hurlbut,*
19 *Barbara Lumpkin, Jeff Marshall, and Eric Stickels*
20
21
22
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HOLLAND & HART LLP
9555 HILLWOOD DRIVE
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LAS VEGAS, NV 89134

Exhibit “2”

Exhibit “2”

LINDER, JON

From: WIRTHLIN, BRENOCH
Sent: Thursday, June 27, 2019 4:01 PM
To: George F. Ogilvie III; Jon Wilson; SPeek@hollandhart.com; aochoa@lipsonneilson.com
Cc: FREEMAN, SCOTT; PLANET, BRANDI; MAUL, DANIEL; ADAMS, CHELSIE; LINDER, JON; WESTOVER, MORGANNE
Subject: Lewis & Clark

Good afternoon all. It looks like the briefing and possibly argument schedule on the directors' writ petition may take longer than anticipated, particularly in light of the extension on the reply brief Directors requested telephonically and were granted.

The District Court issued a stay of the underlying action for all purposes at the beginning of April. Given that the Court's stay will be in place for a longer than perhaps originally anticipated, and so that parties might set the framework for a workable schedule for the conclusion of discovery and the setting of the trial, we would like to submit a stipulation whereby the parties agree to schedule hinged upon the date the writ is resolved, including the trial setting.

If you are interested in that approach, please let me know before the close of business tomorrow. If your position is that that the stay did not toll the five year rule, thereby requiring that trial begin within five years of the filing of the complaint, irrespective of the court's stay, then please let me know your position on that issue by tomorrow as we will promptly seek an order addressing the tolling and trial scheduling issues. If that is the case, please let me know if you will stipulate to continue the trial date to late November/early December. Thank you.

LINDER, JON

From: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Sent: Friday, June 28, 2019 9:13 AM
To: Steve Peek; WIRTHLIN, BRENOCH
Cc: Jon Wilson; aochoa@lipsonneilson.com; FREEMAN, SCOTT; PLANET, BRANDI; MAUL, DANIEL; ADAMS, CHELSIE; LINDER, JON; WESTOVER, MORGANNE
Subject: RE: Lewis & Clark

Brenoch,

We do not share your surprise regarding the timeframe for the resolution of the director defendants' writ petition or the fact that one of the parties requested an extension to the briefing schedule or your concern that some action must be currently taken.

We requested that Judge Allf not stay the entire case so that Uni-Ter and US Re could complete discovery and proceed to trial. We alternatively requested that Judge Allf delay the imposition of the stay so that all parties could complete specific aspects of discovery. Both the director defendants and the Receiver opposed our requested relief.

So, the stay is what it is, the status of the resolution of the writ petition is where it is at, and we see no need to take any action at this time.

George

George F. Ogilvie III | Partner

McDONALD CARANO

P: 702.873.4100 | E: gogilvie@mcdonaldcarano.com

From: Steve Peek [mailto:S.Peek@hollandhart.com]
Sent: Friday, June 28, 2019 12:18 AM
To: WIRTHLIN, BRENOCH <BWIRTHLIN@fclaw.com>
Cc: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Jon Wilson <jwilson@broadandcassel.com>; aochoa@lipsonneilson.com; FREEMAN, SCOTT <SFREEMAN@fclaw.com>; PLANET, BRANDI <BPLANET@fclaw.com>; MAUL, DANIEL <dmaul@fclaw.com>; ADAMS, CHELSIE <CADAMS@fclaw.com>; LINDER, JON <JLINDER@fclaw.com>; WESTOVER, MORGANNE <MWESTOVER@fclaw.com>
Subject: Re: Lewis & Clark

Not sure I understand what you are asking us to do. I am on vacation in Italy until June 29 and won't be able to back to you until after Monday when I return and I am able to discuss with my co-counsel.

Sent from my iPhone

On Jun 28, 2019, at 1:01 AM, WIRTHLIN, BRENOCH <BWIRTHLIN@fclaw.com> wrote:

Good afternoon all. It looks like the briefing and possibly argument schedule on the directors' writ petition may take longer than anticipated, particularly in light of the extension on the reply brief Directors requested telephonically and were granted.

The District Court issued a stay of the underlying action for all purposes at the beginning of April. Given that the Court's stay will be in place for a longer than perhaps originally anticipated, and so that parties might set the framework for a workable schedule for the conclusion of discovery and the setting of the trial, we would like to submit a stipulation whereby the parties agree to schedule hinged upon the date the writ is resolved, including the trial setting.

If you are interested in that approach, please let me know before the close of business tomorrow. If your position is that that the stay did not toll the five year rule, thereby requiring that trial begin within five years of the filing of the complaint, irrespective of the court's stay, then please let me know your position on that issue by tomorrow as we will promptly seek an order addressing the tolling and trial scheduling issues. If that is the case, please let me know if you will stipulate to continue the trial date to late November/early December. Thank you.

Brenoch R. Wirthlin, Director

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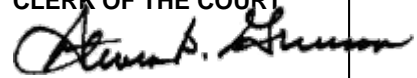
300 S. Fourth Street, Suite 1400, Las Vegas, NV 89101

T: 702.692.8005 | F: 702.692.8065

bwirthlin@fclaw.com | [View Bio](#)

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OPPM

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*Attorneys for Defendants Robert Chur,
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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,

v.

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. XXVII

**THE DIRECTOR DEFENDANTS'
OPPOSITION TO PLAINTIFF'S
MOTION TO LIFT STAY OR
ALTERNATIVELY GRANT PLAINTIFF
OTHER RELIEF**

Hearing Date: July 11, 2019
Hearing Time: 9:30 a.m.

1 Defendants, Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara
2 Lumpkin, Jeff Marshall, and Eric Stickels (the “Director Defendants”) oppose the Motion to Lift
3 Stay or Alternatively Grant Other Relief (the “Motion”) filed by Plaintiff Commissioner of
4 Insurance for the State of Nevada (“Plaintiff”), a receiver for Lewis & Clark, LTC Risk Retention
5 Group, Inc. (“L&C”).

6 This Opposition is based on the attached Memorandum of Points and Authorities all
7 papers and pleadings on file in this action, and any oral argument this Court may allow.

8 DATED this 9th day of July, 2019

9 HOLLAND & HART LLP

10
11 /s/ Ryan A. Semerad

12 J. Stephen Peek, Esq.
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14 Ryan A. Semerad, Esq.
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16 Las Vegas, NV 89134

17 Joseph P. Garin, Esq.
18 Angela T. Nakamura Ochoa, Esq.
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21 Las Vegas, NV 89144

22 *Attorneys for Defendants Robert Chur,*
23 *Steve Fogg, Mark Garber, Carol Harter,*
24 *Robert Hurlbut, Barbara Lumpkin,*
25 *Jeff Marshall, and Eric Stickels,*
26
27
28

1 **I. INTRODUCTION**

2 Under well-established Nevada caselaw, when a stay order prevents the parties from
3 bringing an action to trial, the period of time during which the stay operates is not computed in
4 determining the five-year period under NRCP 41(e). Ordinary or typical delays in the ancillary
5 proceedings that occur while the stay order is in effect do not affect this general rule. While
6 Plaintiff seems to understand this general rule and its application here, Plaintiff has filed its
7 Motion “out of an abundance of caution, and to eliminate any potential uncertainty among the
8 parties to this action” *See* Motion at 5, 8 (“Plaintiff believes the Stay Order tolls Nevada’s
9 five-year rule from the time the Stay Order was entered.”). Plaintiff’s insecurity does not
10 necessitate this Court’s intervention to ensure Plaintiff that current Nevada law continues to
11 apply in this case. Accordingly, this Court should deny Plaintiff’s Motion in full.

12 **II. FACTS**

13 The Director Defendants moved for judgment on the pleadings on August 14, 2018. This
14 Court denied that motion on November 7, 2018.

15 The Director Defendants then moved for reconsideration of the Court’s order denying
16 their motion for judgment on the pleadings. This Court denied that motion on February 11,
17 2019.

18 On March 8, 2019, the Director Defendants moved to stay all proceedings in this dispute
19 while they filed a petition for a writ of mandamus with the Nevada Supreme Court. Plaintiff
20 joined the Director Defendants motion to stay all proceedings. This Court granted the Director
21 Defendants’ motion and stayed all proceedings “pending the Nevada Supreme Court’s resolution
22 of the Director Defendants’ Petition for a Writ of Mandamus” on April 12, 2019.

23 **III. ARGUMENT**

24 ***A. Legal Standard***

25 Under NRCP 41(e)(2)(B), “[t]he court *must* dismiss an action for want of prosecution if a
26 plaintiff fails to bring the action to trial within 5 years after the action was filed.” (Emphasis
27 added). Where a case has not been brought to trial after five years, dismissal is mandatory,
28 affording the district court no discretion. *Morgan v. Las Vegas Sands, Inc.*, 118 Nev. 315, 320,

43 P.3d 1036, 1039 (2002). Still, the Nevada Supreme Court “has recognized exceptions to the mandatory nature of NRCP 41(e).” *See D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 86, 358 P.3d 925, 929-30 (2015).

“Under current Nevada law, ‘[a]ny period during which the parties are prevented from bringing an action to trial by reason of a stay order shall not be computed in determining the five-year period of [NRCP] 41(e).’” *Id.* at ___, 358 P.3d at 930 (quoting *Boren v. City of N. Las Vegas*, 98 Nev. 5, 6, 638 P.2d 404, 405 (1982)); *see also Sands China Ltd. v. Eighth Judicial Dist. Court*, 2015 WL 6829520, at *2 (Nev. Sup. Ct. Nov. 4, 2015) (“[T]he stay imposed by this court’s August 26, 2011, order served to toll NRCP 41(e)’s five-year time frame because that stay prevented the parties from bringing the action to trial while the stay was in place.”). Under this general rule, a party’s actions that may have prolonged the process necessitating the stay do not prevent or otherwise undermine the rule’s tolling of the five-year period under NRCP 41(e). *See id.* (“While High Noon may have prolonged the process, prompting D.R. Horton to file several motions to compel, the matter was stayed until the completion of the NRS 40.600 et seq. pre-litigation process. Because the stay prevented the case from proceeding, *Boren*’s rule applies, and the court-ordered August 2007 stay tolls the prescriptive period under NRCP 41(e) while the district court-ordered stay is in effect.” (internal citations and quotations marks omitted)). That is, when considering a court-ordered stay, “the district court [is] not required to evaluate the parties’ diligence” in determining whether the five-year rule in NRCP 41(e) is tolled by the stay. *See id.* at ___, 358 P.3d at 931; *see also High Sierra Ranch Homes Owners Assoc. v. Richard Joseph & Co.*, 2017 WL 1193783, 392 P.3d 165 (Table), at *2-*3 (Nev. Sup. Ct. Mar. 30, 2017).

B. Because this Court Ordered a Stay of All Proceedings, NRCP 41(e)’s Five-Year Computation is Topped Until the Resolution of the Director Defendants’ Writ Petition

This Court ordered a stay of all proceedings on April 12, 2019. This Court’s stay operates to prevent the parties from bringing this dispute to trial. Accordingly, the exception to the five-year rule in NRCP 41(e)(2)(B) recognized by the Nevada Supreme Court in *Boren* and

1 *D.R. Horton* applies and so the time period during which this Court's stay is in effect shall not be
2 calculated in determining whether the five-year period to prosecute this action has expired.

3 ***C. Because the Five-Year Computation is Tolloed, Plaintiff's Motion Should be Denied***

4 Since the time period starting with this Court's stay through the Nevada Supreme Court's
5 resolution of the Director Defendants' writ petition shall be excluded from the computation of
6 time since the date of filing to determine whether this action has been diligently prosecuted,
7 Plaintiff's request to lift the stay or for some other relief is unnecessary and/or superfluous.
8 Insofar as Plaintiff is concerned about the expiration of the five-year period prescribed by NRCP
9 41(e), this Court should not grant Plaintiff any of its requested relief to assuage those concerns.
10 Rather, this Court should do nothing as nothing more is required under *Boren* and *D.R. Horton*.¹

11 **IV. CONCLUSION**

12 For all these reasons, this Court should deny Plaintiff's Motion in full.

13
14 HOLLAND & HART LLP

15
16 /s/ Ryan A. Semerad

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28 *Attorneys for Defendants Robert Chur,
Steve Fogg, Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin,
Jeff Marshall, and Eric Stickels,*

1 The Director Defendants would also be willing to waive the provisions of NRCP 41(e) and let Plaintiff proceed against the Uni-Ter Defendants while maintaining the stay in place for the Director Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July 2019, a true and correct copy of the foregoing
**THE DIRECTOR DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO LIFT
STAY OR ALTERNATIVELY GRANT PLAINTIFF OTHER RELIEF** was served by the
following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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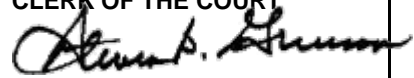
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/s/ Yalonda Dekle
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*Attorneys for Defendants Uni-Ter Underwriting
Management Corp., Uni-Ter Claims Services
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DISTRICT COURT

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.: XXVII

**DEFENDANTS UNI-TER
UNDERWRITING MANAGEMENT
CORP., UNI-TER CLAIMS SERVICES
CORP., AND U.S. RE CORPORATION'S
RESPONSE TO THE RECEIVER'S
MOTION TO LIFT STAY OR
ALTERNATIVELY GRANT PLAINTIFF
OTHER RELIEF ON ORDER
SHORTENING TIME**

PA002893

Defendants, Uni-Ter Underwriting Management Corp. (“Uni-Ter UMC”) and Uni-Ter Claims Services Corp. (“Uni-Ter CS,” and collectively “Uni-Ter”) and U.S. Re Corporation (“U.S. Re”), hereby submit their Response to the Receiver’s Motion to Lift Stay or Alternatively Grant Plaintiff Other Relief on Order Shortening Time. Uni-Ter and U.S. Re take no position with respect to the Receiver’s present request to lift the stay that the Receiver and the Director Defendants insisted the Court impose more than four years after this litigation began. Uni-Ter and U.S. Re respond to the Receiver’s present Motion, however, to preserve its position on the issues now raised in that Motion.

I. PROCEDURAL HISTORY AND IMPOSITION OF THE STAY

The Receiver has repeatedly sought to extend trial and pretrial deadlines in this matter, prompting this Court to set a firm trial date for October of this year and declare that no further extensions would be allowed. Then, on March 8, 2019, the Director Defendants filed their Motion to Stay Proceedings Pending Petition for Writ of Mandamus on an Order Shortening time. The Director Defendants sought an order of this Court staying the matter pending resolution of their petition challenging the Court’s denial of their motion for judgment on the pleadings and subsequent motion for reconsideration.

The Receiver filed a Limited Joinder to Directors’ Motion to Stay Proceeding Pending Petition for Writ of Mandamus. In that Joinder, the Receiver asserted that Uni-Ter and U.S. Re “should have no say at all, or at least only minimal say,” on whether a stay should be issued. *See* Limited Joinder at 2. The Receiver then argued in favor of the requested stay, claiming that “a stay at this juncture would not prejudice any party, least of all the Uni-Ter Defendants.” *Id.* The Receiver further claimed a stay was warranted because, should the Supreme Court ultimately dismiss the Director Defendants from the lawsuit, it would change the scope of the expert reports and the amount of preparation necessary for trial. *Id.* at 3.

As Uni-Ter and U.S. Re argued in their Opposition to the Director Defendants’ Motion to Stay and the Receiver’s Limited Joinder thereto, however, the imposition of a stay would negatively impact Uni-Ter and U.S. Re because Uni-Ter and U.S. Re have experienced significant difficulty locating witnesses who are able to testify on their behalf, which difficulty

1 will only increase over time. As Uni-Ter and U.S. Re stated, “any additional delay, and in
2 particular a delay that will likely extend the 12-18 months required for the Nevada Supreme
3 Court to adjudicate the Director Defendants’ writ petition, increases the very real risk that Uni-
4 Ter and U.S. Re will not be able to adequately defend themselves at trial.” Opposition at 3.

5 Yet, despite Uni-Ter and U.S. Re’s valid arguments, and despite the fact that the parties
6 were nearing the end of and extensive and extended discovery period (the cutoff for which was,
7 at that time, July 1, 2019), the Receiver continued to push for an immediate stay of the
8 proceedings. On April 2, 2019, this Court granted the motion to stay pending the Nevada
9 Supreme Court’s resolution of the Director Defendants’ petition.

10 **II. UNI-TER AND U.S. RE CANNOT AGREE TO STIPULATE TO A WAIVER**
11 **OF THE FIVE YEAR RULE**

12 Nothing has changed in the three months since the Court issued the stay. As expected,
13 the Nevada Supreme Court has reviewed the petition and ordered further briefing, and the
14 matter is proceeding at the pace predicted by Uni-Ter and U.S. Re in their opposition to the stay
15 motion. Yet, all of a sudden, the Receiver has done a complete about-face, apparently
16 concerned for the first time with the approaching expiration of the five-year rule.

17 As set forth in the Receiver’s motion, the Receiver recently contacted counsel for the
18 Director Defendants and Uni-Ter and U.S. Re, insisting that the defendants either a) stipulate to
19 the tolling of the five-year rule under the stay order or b) stipulate to extend the date of trial
20 beyond the five-year rule. *See* Motion at 4, 8. Being unable to secure agreement, the Receiver
21 has now sought relief from this Court, urging the Court to lift the stay so that the Receiver can
22 complete discovery and move the case to trial before December 23, 2019—five years after the
23 initial complaint was filed. The Receiver has not cited any case law in support of its position or
24 requested relief; rather, the Receiver simply states that the Motion is being filed “out of an
25 abundance of caution” due to the defendants’ “unwillingness” to stipulate to the fact that the
26 stay order tolls Nevada’s five-year rule or otherwise extend the trial date. *Id.*

27 Whether the stay imposed by this Court tolls the five-year rule is a matter of law for this
28 Court to determine, and Uni-Ter and U.S. Re take no position on that issue at this time. Uni-

1 Ter and U.S. Re will not, however, enter into any stipulation to toll the five-year rule or
2 otherwise stipulate to its extension, as the Receiver insists they must do. Should Uni-Ter and
3 U.S. Re agree to the stipulations proposed by the Receiver, they run the risk of the Receiver
4 later arguing (and the Court ruling) that they have waived the application of the five-year rule
5 to this case. This Uni-Ter and U.S. Re simply cannot do, as Uni-Ter and U.S. Re wish to
6 preserve all rights they may have with respect to this issue going forward.

7 Should the Court, however, find it appropriate to lift the stay and allow the action to
8 resume while the Director Defendants writ petition is pending, Uni-Ter and U.S. Re
9 respectfully request that the Court set a schedule for the completion of discovery with the input
10 of all parties, set a briefing schedule, and set a firm trial date. Uni-Ter and U.S. Re further
11 request that this Court expressly prohibit the Receiver from seeking any further extensions or
12 alterations to that schedule.

13 DATED this 10th day of July, 2019.

14
15 McDONALD CARANO LLP

16 By: /s/ George F. Ogilvie III

17 George F. Ogilvie III (NSBN 3552)
18 Amanda C. Yen (NSBN 9726)
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20 Kimberly Freedman, Esq. (Appearing *Pro Hac Vice*)
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22 Miami, Florida 33131

23 *Attorneys for Defendants Uni-Ter Underwriting*
24 *Management Corp., Uni-Ter Claims Services*
25 *Corp., and U.S. RE Corporation*
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 10th day of July, 2019, a true and correct copy of the foregoing **DEFENDANTS UNITER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., AND U.S. RE CORPORATION'S RESPONSE TO THE RECEIVER'S MOTION TO LIFT STAY OR ALTERNATIVELY GRANT PLAINTIFF OTHER RELIEF ON ORDER SHORTENING TIME** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification on the following:

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

REGISTER OF ACTIONS

CASE No. A-14-711535-C

Commissioner of Insurance for the State of Nevada as Receiver of
Lewis and Clark, Plaintiff(s) vs. Robert Chur, Defendant(s)

§
§
§
§
§
§

Case Type: **Negligence - Other Negligence**
Date Filed: **12/23/2014**
Location: **Department 27**
Cross-Reference Case Number: **A711535**

PARTY INFORMATION

Defendant	Chur, Robert	Lead Attorneys Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	Fogg, Steve	Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	Garber, Mark	Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	Harter, Carol	Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	Hurlbut, Robert	Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	Lumpkin, Barbara	Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	Marshall, Jeff	Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	Stickels, Eric	Joseph P Garin <i>Retained</i> 702-382-1500(W)
Defendant	U S Re Corporation	George F. Ogilvie, III <i>Retained</i> 7028734100(W)
Defendant	Uni-Ter Claims Services Corp	George F. Ogilvie, III <i>Retained</i> 7028734100(W)
Defendant	Uni-Ter Underwriting Management Corp	George F. Ogilvie, III <i>Retained</i> 7028734100(W)
Plaintiff	Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark	Brenoch Wirthlin <i>Retained</i> 702-385-2500(W)
Third Party Defendant	Dalton, Donna	

PA002898

**Third Party
Defendant** **Elsass, Sanford**

**Third Party
Plaintiff** **Chur, Robert**

Joseph P Garin
Retained
702-382-1500(W)

**Third Party
Plaintiff** **Fogg, Steve**

Joseph P Garin
Retained
702-382-1500(W)

**Third Party
Plaintiff** **Garber, Mark**

Joseph P Garin
Retained
702-382-1500(W)

**Third Party
Plaintiff** **Harter, Carol**

Joseph P Garin
Retained
702-382-1500(W)

**Third Party
Plaintiff** **Hurlbut, Robert**

Joseph P Garin
Retained
702-382-1500(W)

**Third Party
Plaintiff** **Lumpkin, Barbara**

Joseph P Garin
Retained
702-382-1500(W)

**Third Party
Plaintiff** **Marshall, Jeff**

Joseph P Garin
Retained
702-382-1500(W)

**Third Party
Plaintiff** **Stickels, Eric**

Joseph P Garin
Retained
702-382-1500(W)

EVENTS & ORDERS OF THE COURT

07/11/2019 **Motion** (9:30 AM) (Judicial Officer Alf, Nancy)
Plaintiff's Motion to Lift Stay or Alternatively Grant Plaintiff Other Relief on Order Shortening Time

Minutes

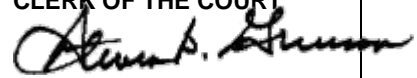
07/11/2019 9:30 AM

- Arguments by counsel regarding the merits of and opposition to the motion. COURT ORDERED, Plaintiff's Motion to Lift Stay or Alternatively Grant Plaintiff Other Relief on Order Shortening Time DENIED, the order will be enforced, and Court will enforce the Jacobs case. Mr. Wirthlin to prepare the order and submit it to opposing counsel for approval as to form.

07/18/2019 9:30 AM

[Parties Present](#)

[Return to Register of Actions](#)



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For the State of Nevada*

DISTRICT COURT

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR
THE STATE OF NEVADA AS RECEIVER
OF LEWIS AND CLARK LTC RISK
RETENTION GROUP,

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.: XXVII

NOTICE OF ENTRY ORDER

PLEASE TAKE NOTICE that on the 12th day of August, 2019, an ORDER DENYING PLAINTIFF'S MOTION TO LIFT STAY OR ALTERNATIVELY GRANT PLAINTIFF OTHER RELIEF ON ORDER SHORTENING TIME, was entered in the above case. A copy is attached hereto.

DATED August 12, 2019.

FENNEMORE CRAIG, P.C.

By: /s/ Brenoch Wirthlin

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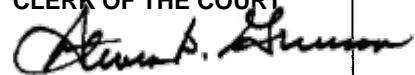
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/s/ Morganne N. Westover
An employee of **Fennemore Craig, P.C.**



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12 *For the State of Nevada*

8
9
10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

11 COMMISSIONER OF INSURANCE FOR
12 THE STATE OF NEVADA AS RECEIVER
13 OF LEWIS AND CLARK LTC RISK
14 RETENTION GROUP,

13 Plaintiff,

14 vs.

15 ROBERT CHUR, STEVE FOGG, MARK
16 GARBER, CAROL HARTER, ROBERT
17 HURLBUT, BARBARA LUMPKIN, JEFF
18 MARSHALL, ERIC STICKELS, UNI-TER
19 UNDERWRITING MANAGEMENT CORP.,
20 UNI-TER CLAIMS SERVICES CORP., and
21 U.S. RE CORPORATION; DOES 1-50,
22 inclusive; and ROES 51-100, INCLUSIVE;

20 Defendants.

Case No.: A-14-711535-C

Dept. No.: XXVII

ORDER DENYING PLAINTIFF'S
MOTION TO LIFT STAY OR
ALTERNATIVELY GRANT PLAINTIFF
OTHER RELIEF ON ORDER
SHORTENING TIME

21 This matter having come before the Honorable Nancy Allf on July 11, 2019, on Plaintiff's
22 Motion to Lift Stay or Alternatively Grant Plaintiff Other Relief on Order Shortening Time
23 ("Motion"); Steven Peek, Esq., having appeared on behalf of Defendants Robert Chur, Steve Fogg,
24 Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels
25 (collectively the "Director Defendants"); George F. Ogilvie III, Esq. having appeared on behalf of
26 Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S.
27 Re Corporation; Brenoch R. Wirthlin, Esq., having appeared on behalf of Plaintiff Commissioner
28

1 of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group;
2 the Court having read and considered the Motion and responses thereto, considered the arguments
3 of counsel, being fully advised of the premises, and good cause appearing therefore;

4 The Court finds that the prior stay order entered April 4, 2019, stayed all proceedings in
5 this matter. Furthermore, at the hearing on the Motion the parties conceded that the stay applies
6 to all parties in the case. Thus, the effect of the prior stay order as it pertains to the 5 year rule of
7 NRCP 41(e) is governed by *Las Vegas Sands Corp. et al. v. Eighth Judicial District Court*,
8 Supreme Court of Nevada case no.: 68309, wherein the Supreme Court of Nevada held that an
9 order staying all proceedings “serve[s] to toll NRCP 41(e)’s five-year time frame because the stay

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1 prevent[s] the parties from bringing the action to trial while the stay [is] in place.” (*Citing Boren*
2 *v. City of N. Las Vegas*, 98 Nev. 5, 6, 638 P.2d 404, 404 (1982)).

3 Therefore, it is hereby ordered, adjudged and decreed that the Motion is DENIED.

4
5 DATED this 4 day of Aug, 2019.

6
7 Nancy L. Alf
DISTRICT COURT JUDGE

8 Respectfully submitted by:

9 Dated this 7th day of August, 2019.

Approved as to form and content:

10 **FENNEMORE CRAIG, P.C.**

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

11
12 [Signature]
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By: [Signature]
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17 *for the State of Nevada*

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19 Approved as to form and content:
MCDONALD CARANO WILSON LLP

20
21 By: _____
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26 BROAD AND CASSEL
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*Attorney for Defendants Uni-Ter Underwriting Management Corp.,
Uni-Ter Services Corp. and U.S. RE Corporation*

1 prevent[s] the parties from bringing the action to trial while the stay [is] in place.” (*Citing Boren*
2 *v. City of N. Las Vegas, 98 Nev. 5, 6, 638 P.2d 404, 404 (1982)*)).

3 Therefore, it is hereby ordered, adjudged and decreed that the Motion is DENIED.

4
5 DATED this ____ day of _____, 2019.

6
7
8 DISTRICT COURT JUDGE

8 Respectfully submitted by:

9 Dated this ____ day of July, 2019.

Approved as to form and content:

10 FENNEMORE CRAIG, P.C.

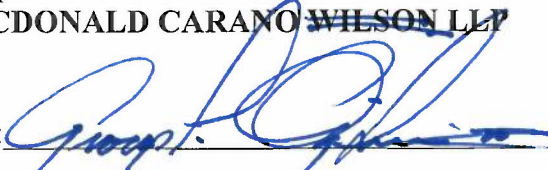
LIPSON NEILSON COLE SELTZER
& GARIN, P.C.

11
12
13 _____
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18 Approved as to form and content:

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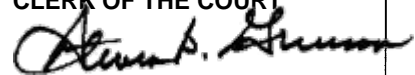
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16 *Attorneys for Plaintiff*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 * * *

14 COMMISSIONER OF INSURANCE FOR
15 THE STATE OF NEVADA AS RECEIVER
16 OF LEWIS AND CLARK LTC RISK
17 RETENTION GROUP, INC.,

18 Plaintiff,

19 vs.

20 ROBERT CHUR, STEVE FOGG, MARK
21 GARBER, CAROL HARTER, ROBERT
22 HURLBUT, BARBARA LUMPKIN, JEFF
23 MARSHALL, ERIC STICKELS, UNI-TER
24 UNDERWRITING MANAGEMENT CORP.,
25 UNI-TER CLAIMS SERVICES CORP., and
26 U.S. RE CORPORATION,; DOES 1-50,
27 inclusive; and ROES 51-100, inclusive;

28 Defendants.

Case No.: A-14-711535-C

Dept. No.: XXVII

MOTION FOR CLARIFICATION
ON ORDER SHORTENING TIME

26 Plaintiff Commissioner of Insurance for the State of Nevada as Receive of Lewis and
27 Clark LTC Risk Retention Group, Inc. "Plaintiff" or "Commissioner") hereby submits this
28

1 Motion for Clarification on Order Shortening Time (the "Motion").

2 This Motion is made and based upon the following Memorandum of Points and
3 Authorities, all exhibits thereto, including the declaration of undersigned counsel ("Wirthlin
4 Declaration"), the pleadings and papers on file, and any argument of counsel at the time of a
5 hearing of the Motion.

6 DATED this 3rd day of April, 2020.

7 HUTCHISON & STEFFEN

8 By

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Nevada Bar No. 10282

STUART J. TAYLOR, ESQ.

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13 ///

14 ///

15 ///

ORDER SHORTENING TIME

Good cause appearing therefor:

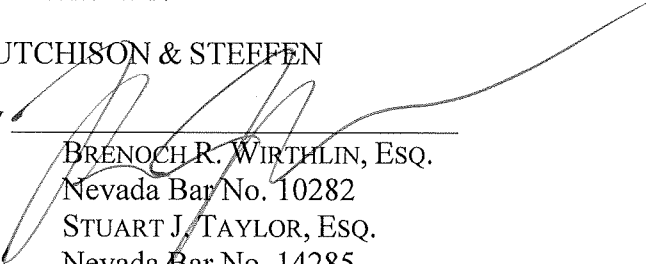
IT IS HEREBY ORDERED that the time for the hearing on **MOTION FOR CLARIFICATION ON ORDER SHORTENING TIME** is hereby shortened to the 10th day of April, 2020, at 2:00 p.m., before the honorable Judge Nancy Allf, or as soon thereafter as counsel may be heard.

DATED this 3rd day of April, 2020. The hearing will be conducted via BlueJeans.

By Nancy L Allf
DISTRICT COURT JUDGE

SUBMITTED BY:

HUTCHISON & STEFFEN

By 
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Nevada Bar No. 10282
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Attorneys for Plaintiff

1 **DECLARATION OF BRENOCH WIRTHLIN, ESQ. PURSUANT TO EDCR 2.26 IN**
2 **SUPPORT OF REQUEST FOR ORDER SHORTENING TIME**

3 I, Brenoch Wirthlin, hereby declare under penalty of perjury:

4 1. I am an attorney licensed in the State of Nevada and in good standing.

5 2. I am a Partner with the law firm Hutchison & Steffen, retained to represent
6 Plaintiff Commissioner of Insurance for the State of Nevada (“Plaintiff” or “Commissioner”) in
7 the present action.

8 3. I have personal knowledge of the matters set forth herein and I am competent to
9 testify thereto.

10 4. On March 8, 2019, Defendants Robert Chur, Steve Fogg, Mark Garber, Carol
11 Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels (“Director
12 Defendants”) filed a motion to stay proceedings while their petition for writ of mandamus is
13 pending before the Nevada Supreme Court (“Motion for Stay”).

14 5. On March 13, 2019, the Director Defendants filed a Petition for Writ of
15 Mandamus (“Directors’ Writ”) with the Nevada Supreme Court based upon this Court’s denial
16 of the Director Defendants’ motion for judgment on the pleadings and motion for
17 reconsideration.

18 6. On March 14, 2019, the Director Defendants’ Motion for Stay was heard and
19 granted by this Court. On April 4, 2019, the “Order Granting Motion to Stay Proceedings
20 Pending Petition for Writ of Mandamus” was entered on the Court’s docket (the “Stay Order”).¹

21 7. The Stay Order provided *inter alia* that “[a]ll proceedings are stayed pending the
22 Nevada Supreme Court’s resolution of the Director Defendants’ Petition for A Writ of
23 Mandamus.”

24 8. On August 12, 2019, this Court entered its Order Denying Plaintiff’s Motion to
25 Lift Stay or Alternatively Grant Plaintiff Other Relief on Order Shortening Time, in which the
26 _____

27
28 ¹ As all documents referenced herein are docket entries of this Court or the Nevada Supreme Court, Plaintiff respectfully requests this Court take judicial notice of said documents pursuant to NRS §§ 47.130 – 47.170.

1 Court held that the Stay Order “stayed all proceedings in this matter”, that “the parties conceded
2 that the stay applies to all parties in the case”, and that “the effect of the [Stay Order] as it
3 pertains to the 5 year rule of NRCP 41(e) is governed by [*Las Vegas Sands v. Dist Ct.*] wherein
4 the Supreme Court of Nevada held that an order staying all proceedings ‘serve[s] to toll NRCP
5 41(e)’s five-year time frame because the stay prevent[s] the parties from bringing the action to
6 trial while the stay [is] in place.’ ”

7 9. On February 27, 2020, the Supreme Court of Nevada entered an opinion
8 regarding the Director Defendants’ Petition (the “Opinion”).

9 10. On March 2, 2020, the Supreme Court of Nevada issued an order holding that the
10 Plaintiff’s deadline to file its petition for rehearing (“Petition for Rehearing”) was March 30,
11 2020.

12 11. On March 26, 2020, the Nevada Supreme Court issued an order holding that the
13 Plaintiff’s deadline to file its Petition for Rehearing is April 29, 2020.

14 12. On March 24, 2020, this Court issued a Minute Order (“Minute Order” and
15 collectively with the Stay Order referred to herein as the “Operative Orders”) in which it
16 determined that “[t]he Stay shall remain in place pending the Supreme Court of Nevada’s review
17 of Plaintiff’s petition for rehearing. Once the Supreme Court resolves such petition, the parties
18 shall advise the Court and a status hearing will be set shortly thereafter.”

19 13. As more fully explained below, there appears to be more than one reasonable
20 interpretation of the Operative Orders with respect to when the Stay in this matter is lifted.

21 14. For example, did the Court intend by the Operative Orders that the Stay is
22 automatically lifted when the Petition for Rehearing is decided by the Supreme Court?
23 Alternatively, did the Court intend by the Operative Orders that the Stay is automatically lifted
24 when a notice in lieu of remittitur is entered by the Supreme Court in the event the Petition for
25 Rehearing is denied? Or, did the Court intend the Stay would remain in effect until a further
26 order of this Court was entered expressly lifting the Stay? Plaintiff merely seeks clarification
27 regarding this aspect of the Operative Orders.

28

1 15. Based on the Court's previous scheduling order, prior to entry of the Stay in this
2 matter, there were two judicial days left for Plaintiff to disclose initial experts and for the parties
3 to seek leave to amend its pleadings.

4 16. In addition, because the five year rule will once again begin to run once the Stay
5 is lifted, Plaintiff will need to restart discovery in earnest as soon as the Stay is no longer in
6 place.

7 17. At any time after April 29, 2020, the Nevada Supreme Court could rule on the
8 Plaintiff's Petition for Rehearing. Given the multiple potential interpretations of the Stay Order
9 and Minute Order with respect to when the stay is lifted, and the short time remaining once that
10 occurs for Plaintiff to disclose its expert witnesses and file a motion seeking leave to amend its
11 complaint – as well as commence discovery – Plaintiff seeks clarification regarding the
12 Operative Orders in this respect.

13 18. Because of time sensitive nature of the clarification sought, Plaintiff submits that
14 good cause exists to hear the instant Motion on shortened time at the Court's earliest
15 convenience, if possible well ahead of the April 29, 2020 deadline for the Petition for Rehearing
16 since, as noted above, the Supreme Court could rule on the Petition for Rehearing at any time
17 thereafter.

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

20 EXECUTED this 3rd day of April, 2020.

21
22 By: 

23 Brenoch Wirthlin, Esq.
24
25
26
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28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF RELIEF REQUESTED**

3 The Stay Order provides for a Stay of all proceedings pending the “resolution” of the
4 Directors’ Writ. However, Plaintiff submits that the term “resolution” could have more than one
5 reasonable interpretation in this context:
6

- 7
- The Stay is automatically lifted once the Supreme Court rules on the Plaintiff’s
8 Petition for Rehearing, prior to the issuance of a notice in lieu of remittitur;
 - The Stay is automatically lifted once the Supreme Court issues a notice in lieu of
9 remittitur after it rules on the Petition for Rehearing, in the event the Petition for
10 Rehearing is denied;
 - The Stay remains in place until further order of this Court after a status hearing
11 contemplated by the Minute Order.
12

13 Plaintiff is not seeking to alter the Operative Orders in any respect, and any contrary suggestion
14 in the status reports recently filed is not accurate. With only two days remaining once the Stay is
15 lifted to disclose initial experts and move to amend the Complaint, however, Plaintiff does need
16 clarification on which of the above interpretations of the Operative Orders is accurate. Plaintiff
17 will also need to know if it is to begin discovery again once the Petition for Rehearing is decided,
18 prior to the status hearing contemplated by the Minute Order.
19

20 **II. LAW AND ARGUMENT²**

21 “A district court of the state has inherent power to construe its judgments and decrees for
22 the purpose of removing any ambiguity.” *Kishner v. Kishner*, 93 Nev. 220, 225, 562 P.2d 493,
23 496 (1977)(citing *Grenz v. Grenz*, 78 Nev. 394, 374 P.2d 891 (1962)); *Lindsay v. Lindsay*, 52
24 Nev. 26, 280 P. 95, 97 (1929); *see also Schlotfeldt v. Schlotfeldt*, 132 Nev. 1027 (2016)(“the
25 district court retains inherent authority to interpret and enforce its prior orders.”) Further, “[i]t is
26 the province of the trial court to construe its judgments and decrees.” *Grenz*, 78 Nev. at 401, 374
27

28 ² Plaintiff incorporates the factual statement set forth in the Wirthlin Declaration.

1 P.2d at 895 (citing *Murphy v. Murphy*, 64 Nev. 440, 183 P.2d 632 (1947)). The Nevada Supreme
2 Court has held that a provision is a proper subject of a motion for clarification “if it is capable of
3 more than one reasonable interpretation.” *In re Candelaria*, 126 Nev. 408, 411, 245 P.3d 518,
4 520 (2010)(discussing ambiguity of statutory language); *see also Galardi v. Naples Polaris,*
5 *LLC*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013)(providing that “[a] contract is ambiguous if
6 its terms may reasonably be interpreted in more than one way”).

7
8 **A. There appears to be more than one reasonable interpretation of the Operative Orders.**

9 As noted above, the Stay Order provided *inter alia* that “[a]ll proceedings are stayed
10 pending the Nevada Supreme Court’s resolution of the Director Defendants’ Petition for A Writ
11 of Mandamus.” Further, the Minute Order provides in pertinent part:

12 The Stay shall remain in place pending the Supreme Court of Nevada’s review of
13 Plaintiff s petition for rehearing. Once the Supreme Court resolves such petition,
14 the parties shall advise the Court and a status hearing will be set shortly thereafter.
15 In the event the petition is not resolved by the May 26, 2020 Status Check, the
16 parties shall file a Joint Status Report indicating the same in advance of the May
17 26, 2020 Status Check.

18 The Operative Orders could potentially be interpreted in than one reasonable way, including
19 *inter alia*: 1) the Stay is lifted automatically in the event the Petition for Rehearing is denied but
20 before a notice in lieu of remittitur is issued; 2) the Stay is lifted automatically only if the
21 Nevada Supreme Court issues a notice in lieu of remittitur with respect to the Directors’ Writ; or
22 3) the Stay remains in place after issuance of a notice in lieu of remittitur and is lifted when the
23 District Court issues a subsequent order declaring the Stay lifted.

24 As noted above, before the Stay was entered, two days remained to disclose experts
25 and/or amend pleadings. If the Stay is deemed to be lifted when the Nevada Supreme Court
26 either denies the Petition for Rehearing or issues the Notice in Lieu of Remittitur, it will be
27 unknown what discovery schedule is in place; however, the Plaintiff will need to immediately
28 commence discovery in the event it is later determined the five year rule began to run again upon
the automatic lifting of the Stay. This will likely result in severe prejudice to the parties as

1 important discovery deadlines³—falling only two days after the Stay is lifted—will almost
2 certainly have passed before the parties are able to obtain guidance on this issue. Thus, Plaintiff
3 respectfully requests the Court grant this Motion provide clarification on the limited issue set
4 forth herein.

5 **II. CONCLUSION**

6 For all these reasons, Plaintiff requests the Court grant the instant Motion in its entirety,
7 and grant such other and further relief as the Court deems appropriate.

8 DATED this 3rd day of April, 2020.

9 HUTCHISON & STEFFEN

10 By 

11 BRENOCH R. WIRTHLIN, ESQ.

12 Nevada Bar No. 10282

13 STUART J. TAYLOR, ESQ.

14 Nevada Bar No. 14285

15 10080 West Alta Drive, Suite 200

16 Las Vegas, Nevada 89145

17 *Attorneys for Plaintiff*

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28 ³ Respectively, the deadlines for the Initial Expert Disclosures and Last Day to Amend Pleadings.

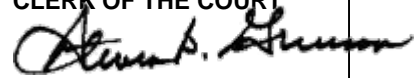
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 6th day of April, 2020, I caused the document entitled **MOTION FOR CLARIFICATION ON ORDER SHORTENING TIME** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

/s/Danielle Kelley
An Employee of Hutchison & Steffen, PLLC



OPPS

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**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,

v.

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. XXVII

**DIRECTOR DEFENDANTS' LIMITED
OPPOSITION TO PLAINTIFF'S
MOTION FOR CLARIFICATION ON AN
ORDER SHORTENING TIME**

**Hearing Date: April 10, 2020
Hearing Time: 2:00 p.m.**

HOLLAND & HART LLP
9555 HILLWOOD DRIVE
2ND FLOOR
LAS VEGAS, NV 89134

1 Defendants, Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara
2 Lumpkin, Jeff Marshall, and Eric Stickels (the “Director Defendants”), by and through their
3 undersigned counsel of record, file the following Limited Opposition to Plaintiff Commissioner of
4 Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group,
5 Inc.’s (“Plaintiff”) Motion for Clarification on an Order Shortening Time (the “Opposition”).

6 This Opposition is based on the following Memorandum of Points and Authorities, all
7 papers and pleadings on file in this action, and any oral argument this Court may allow.

8 DATED this 8th day of April, 2020

9 HOLLAND & HART LLP

10
11 /s/ J. Stephen Peek

12 J. Stephen Peek, Esq.
13 Jessica E. Whelan, Esq.
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22 *Attorneys for Defendants Robert Chur,*
23 *Steve Fogg, Mark Garber, Carol Harter,*
24 *Robert Hurlbut, Barbara Lumpkin,*
25 *Jeff Marshall, and Eric Stickels*
26
27
28

1 **I. INTRODUCTION**

2 On April 4, 2019, this Court entered an order that stayed all proceedings in this case
3 “pending the Nevada Supreme Court’s resolution of the Director Defendants’ Petition for a Writ
4 of Mandamus.” Then, on August 12, 2019, this Court denied Plaintiff’s request to lift this stay or
5 for other relief due to Plaintiff’s concerns about NRCP 41(e)’s five-year rule because it determined
6 that the prior stay order tolled the five-year rule. Now, Plaintiff asks this Court to clarify what
7 event will trigger the end of this Court’s stay so Plaintiff can submit its initial expert disclosures
8 or seek leave to amend its complaint in a timely manner.

9 Regardless of this Court’s answer as to the triggering event, the Director Defendants
10 oppose Plaintiff’s efforts insofar as they are aimed at relieving Plaintiff of its obligations to submit
11 initial expert disclosures within two days after the stay is lifted and/or extending the time for
12 Plaintiff to seek leave to amend its complaint. Plaintiff has had many months to prepare for these
13 deadlines. Plaintiff has no justification to seek an extension of either deadline.

14 Lastly, to the extent the prior motions practice has not made it clear, while the five-year
15 rule may or may not have been tolled by this Court’s stay order, the Director Defendants are in no
16 way waiving their ability to invoke the five-year rule to the extend Plaintiff fails to bring its case
17 to trial within the parameters prescribed by NRCP 41(e) and related caselaw.

18 **II. LEGAL ARGUMENT**

19 While Plaintiff is correct that “[a] district court of the state has inherent power to construe
20 its judgments and decrees for the purpose of removing any ambiguity,” *see Kishner v. Kishner*, 93
21 Nev. 220, 225, 562 P.2d 493, 496 (1977), the deadlines for Plaintiff’s initial expert disclosures and
22 for any request for leave to amend the complaint are unambiguous and require no clarification or
23 modification here. Likewise, this Court’s August 12, 2019 order concluding that the five-year rule
24 is tolled due to its stay order is unambiguous and requires no clarification or modification.

25 Plaintiff has no grounds to seek clarification of the triggering event to lift the stay of the
26 proceedings in this case to the extent this request has any effect whatsoever on any other deadlines
27 or procedural requirements in this case. Since this Court’s stay order went into effect last year,
28 nothing has changed or occurred necessitating a modification of the time remaining on any

1 deadlines. The Director Defendants oppose Plaintiff's attempts to persuade or encourage this
2 Court to relieve Plaintiff of its current obligations by extending any deadlines. Furthermore, to
3 the extent they remain in this case at all following the lifting of the stay, the Director Defendants
4 expressly reserve all rights to seek dismissal of Plaintiff's action pursuant to the five-year rule.
5 See NRCP 41(e)(2)(B); *Morgan v. Las Vegas Sands, Inc.*, 118 Nev. 315, 320, 43 P.3d 1036, 1039
6 (2002).

7 To the extent that the court's minute order needs clarification (which it does not), the
8 Director Defendants agree that the stay may be extended until the court's status hearing which the
9 court has stated in her March 24 Minute Order to occur shortly after the Nevada Supreme has
10 resolved Plaintiff's Petition for Rehearing.

11 **III. CONCLUSION**

12 For all these reasons, the Court should deny Plaintiff's Motion for Clarification to the
13 extent Plaintiff seeks an affirmative modification or extension of any deadlines in this case.

14 DATED this 8th day of April, 2020

15 HOLLAND & HART LLP

16 /s/ J. Stephen Peek

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25 *Steve Fogg, Mark Garber, Carol Harter,*
26 *Robert Hurlbut, Barbara Lumpkin,*
27 *Jeff Marshall, and Eric Stickels*
28

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April 2020, a true and correct copy of the foregoing
**DIRECTOR DEFENDANTS' LIMITED OPPOSITION TO PLAINTIFF'S MOTION FOR
CLARIFICATION ON AN ORDER SHORTENING TIME** was served by the following
method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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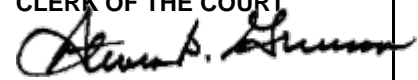
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/s/ C. Bowman
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DISTRICT COURT

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.: XXVII

**DEFENDANTS UNI-TER
UNDERWRITING MANAGEMENT
CORP., UNI-TER CLAIMS SERVICES
CORP., AND U.S. RE CORPORATION'S
LIMITED OPPOSITION TO RESPONSE
TO PLAINTIFF'S MOTION FOR
CLARIFICATION ON ORDER
SHORTENING TIME**

I. INTRODUCTION

Defendants Uni-Ter Underwriting Management Corp. and Uni-Ter Claims Services Corp. (collectively, “Uni-Ter”) and U.S. Re Corporation (“U.S. Re”) do not oppose this Court entering an order that specifically identifies the triggering event for the lifting of the current stay. In fact, Uni-Ter and U.S. Re offered to enter into such a stipulation, provided that the Receiver acknowledge and agree that said stipulation would not affect any current scheduling deadlines or the 5-year rule. Because the Receiver declined, Uni-Ter and U.S. Re are compelled to file this Limited Opposition to avoid the Receiver arguing that the defendants have waived their position.

II. ARGUMENT

This is the third instance in this litigation in which the Receiver appears to be seeking some advantage related to the current stay. The first instance was the Receiver’s curious Motion to Lift Stay or Alternatively Grant Plaintiff Other Relief on Order Shortening Time, which this Court denied. *See* August 12, 2019 Order Denying Plaintiff’s Motion to Lift Stay or Alternatively Grant Plaintiff Other Relief On Order Shortening Time (“August 12, 2019 Order”).

The second instance was the Receiver’s March 23, 2020 submission of a “Joint Status Report” to which all defendants objected due to the Receiver’s inclusion of an inappropriate paragraph in an apparent attempt to obtain the relief this Court denied in the August 12, 2019 Order. The Receiver’s refusal to remove the inappropriate paragraph from its status report prompted the submission of separate status reports by Uni-Ter/U.S. Re and the Director Defendants.

In this third instance, all defendants have agreed to stipulate to an order that specifically identifies the triggering event for the lifting of the current stay, but maintaining their position that the stipulation does not affect the current scheduling deadlines or the 5-year rule. *See* April 8, 2020 email exchange between counsel attached hereto as **Exhibit A**. Based on that position, the defendants expressed their concerns about the Receiver’s proposed stipulation, and proposed a stipulation and order that addresses those concerns. *See id.*; *see also* Defendants’

proposed Stipulation and Order, a copy of which is attached hereto as **Exhibit B**. Specifically, the defendants requested that the stipulation include the following:

2. That this Stipulation in no way affects any scheduling deadlines previously imposed by order of this Court, including, but not limited to the deadline for initial expert disclosures and the deadline to seek leave to amend pleadings, all of which shall remain as currently scheduled unless modified by further order of the Court;

3. That this Stipulation in no way affects Plaintiff's obligation to bring this action to trial within 5 years after the action was filed pursuant to NRCP 41(e)(2)(B), and Defendants expressly reserve the right to seek dismissal of this action in the event that Plaintiff fails to do so.

See Exhibit B.

Unfortunately (and, again, curiously), the Receiver rejected the defendants' proposed stipulation. In order to gain an understanding of the basis for Receiver's rejection, Uni-Ter/U.S. Re's counsel asked the Receiver's counsel directly, "Does the Receiver contend that the stipulation in some way impacts the current scheduling deadlines or the five-year rule?" *See* Exhibit A. The unwillingness of the Receiver's counsel to respond to that inquiry is telling. *See id.* As a result, Uni-Ter and U.S. Re are filing this Limited Opposition to advise the Court of their concerns, to request that the current scheduling deadlines be maintained unless modified by future order of this Court, and to expressly reserve the right to seek dismissal of this action in the event that Plaintiff fails to bring this action to trial within 5 years after the action was filed pursuant to NRCP 41(e)(2)(B).

III. CONCLUSION

Uni-Ter and U.S. Re respectfully request that the Court order:

- (i) that the current Stay Order shall remain in full force and effect until the status check contemplated by this Court's March 24, 2020 minute order is conducted;
- (ii) that all scheduling deadlines previously imposed by order of this Court, including, but not limited to the deadline for initial expert disclosures and the deadline for seeking leave to amend pleadings, shall be maintained unless and until modified by future order of this Court; and

...

(iii) that this order of the Court in no way affects Plaintiff's obligation to bring this action to trial within 5 years after the action was filed pursuant to NRC 41(e)(2)(B).

DATED this 9th day of April, 2020.

McDONALD CARANO LLP

By: /s/ George F. Ogilvie III

George F. Ogilvie III (NSBN 3552)
Amanda C. Yen (NSBN 9726)
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102

Jon M. Wilson, Esq. (Appearing *Pro Hac Vice*)
Kimberly Freedman, Esq. (Appearing *Pro Hac Vice*)
Erin Kolmansberger, Esq. (Appearing *Pro Hac Vice*)
NELSON MULLINS BROAD AND CASSEL
2 S. Biscayne Boulevard, 21st Floor
Miami, Florida 33131

*Attorneys for Defendants Uni-Ter Underwriting
Management Corp., Uni-Ter Claims Services
Corp., and U.S. RE Corporation*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 9th day of April, 2020, a true and correct copy of the foregoing **DEFENDANTS UNITER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., AND U.S. RE CORPORATION'S LIMITED OPPOSITION TO RESPONSE TO PLAINTIFF'S MOTION FOR CLARIFICATION ON ORDER SHORTENING TIME** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification on the following:

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

EXHIBIT “A”

From: [George F. Ogilvie III](#)
To: ["Brenoch R. Wirthlin"](#)
Cc: [Jon Wilson](#); [Kimberly Freedman](#); [Erin Kolmansberger](#); [Daniela Ferro](#); [Melissa Gomberg](#); [Steve Peek](#); ["aochoa@lipsonneilson.com"](#); [Jon Linder](#); [Daniel Maul](#); [Danielle Kelley](#); [Ryan A. Semerad](#); [No Scrub](#); [Christian M. Orme](#); [Christian M. Orme](#); [Stuart J. Taylor](#)
Subject: RE: Notification of Service for Case: A-14-711535-C, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s) vs. Robert Chur, Defendant(s) for filing Opposition - OPPS (CIV), Envelope Number: 5906898
Date: Wednesday, April 8, 2020 4:55:37 PM

You didn't answer the question

George F. Ogilvie III | Partner

McDONALD CARANO

P: 702.873.4100 | **E:** gogilvie@mcdonaldcarano.com

From: Brenoch R. Wirthlin [<mailto:bwirthlin@hutchlegal.com>]
Sent: Wednesday, April 8, 2020 4:47 PM
To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Cc: Jon Wilson <Jon.Wilson@nelsonmullins.com>; Kimberly Freedman <Kimberly.Freedman@nelsonmullins.com>; Erin Kolmansberger <Erin.Kolmansberger@nelsonmullins.com>; Daniela Ferro <dferro@broadandcassel.com>; Melissa Gomberg <Melissa.Gomberg@nelsonmullins.com>; Steve Peek <S.Peek@hollandhart.com>; 'aochoa@lipsonneilson.com' <aochoa@lipsonneilson.com>; Jon Linder <jlinder@hutchlegal.com>; Daniel Maul <dmaul@hutchlegal.com>; Danielle Kelley <dkelley@hutchlegal.com>; Ryan A. Semerad <RASemerad@hollandhart.com>; No Scrub <NoScrub@mcdonaldcarano.com>; Christian M. Orme <COrme@hutchlegal.com>; Christian M. Orme <COrme@hutchlegal.com>; Stuart J. Taylor <staylor@hutchlegal.com>
Subject: RE: Notification of Service for Case: A-14-711535-C, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s) vs. Robert Chur, Defendant(s) for filing Opposition - OPPS (CIV), Envelope Number: 5906898

I don't think that is part of the motion, or relevant to the stipulation. We made clear in the motion we are not seeking to extend scheduling deadlines. The only issue we raised in the motion is when the current stay is lifted according to the prior order. I think the revised versions of the stipulation I just sent over limit the resolution to that issue.

From: George F. Ogilvie III [<mailto:gogilvie@Mcdonaldcarano.com>]
Sent: Wednesday, April 08, 2020 4:27 PM
To: Brenoch R. Wirthlin
Cc: Jon Wilson; Kimberly Freedman; Erin Kolmansberger; Daniela Ferro; Melissa Gomberg; Steve Peek; 'aochoa@lipsonneilson.com'; Jon Linder; Daniel Maul; Danielle Kelley; Ryan A. Semerad; No Scrub
Subject: RE: Notification of Service for Case: A-14-711535-C, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s) vs. Robert Chur, Defendant(s) for filing Opposition - OPPS (CIV), Envelope Number: 5906898

PA002927

Does the Receiver contend that the stipulation in some way impacts the current scheduling deadlines or the five-year rule?

George F. Ogilvie III | Partner

McDONALD CARANO

P: 702.873.4100 | **E:** gogilvie@mcdonaldcarano.com

From: Brenoch R. Wirthlin [<mailto:bwirthlin@hutchlegal.com>]

Sent: Wednesday, April 8, 2020 4:23 PM

To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>

Cc: Jon Wilson <Jon.Wilson@nelsonmullins.com>; Kimberly Freedman <Kimberly.Freedman@nelsonmullins.com>; Erin Kolmansberger <Erin.Kolmansberger@nelsonmullins.com>; Daniela Ferro <dferro@broadandcassel.com>; Melissa Gomberg <Melissa.Gomberg@nelsonmullins.com>; Steve Peek <S.Peek@hollandhart.com>; 'aochoa@lipsonneilson.com' <aochoa@lipsonneilson.com>; Jon Linder <jlinder@hutchlegal.com>; Daniel Maul <dmaul@hutchlegal.com>; Danielle Kelley <dkelley@hutchlegal.com>; Ryan A. Semerad <RASemerad@hollandhart.com>; No Scrub <NoScrub@mcdonaldcarano.com>

Subject: RE: Notification of Service for Case: A-14-711535-C, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s)vs.Robert Chur, Defendant(s) for filing Opposition - OPPS (CIV), Envelope Number: 5906898

George,

The order that you suggest is outside the scope of our motion and complicates the agreement. If you are willing to remove paragraphs 2 and 3 from the stipulation you propose, and the corresponding paragraphs from the order, we are in agreement. A redline and clean copy are attached.

From: George F. Ogilvie III [<mailto:gogilvie@Mcdonaldcarano.com>]

Sent: Wednesday, April 08, 2020 3:42 PM

To: Brenoch R. Wirthlin

Cc: Jon Wilson; Kimberly Freedman; Erin Kolmansberger; Daniela Ferro; Melissa Gomberg; Steve Peek; 'aochoa@lipsonneilson.com'; Jon Linder; Daniel Maul; Danielle Kelley; Ryan A. Semerad; No Scrub

Subject: RE: Notification of Service for Case: A-14-711535-C, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s)vs.Robert Chur, Defendant(s) for filing Opposition - OPPS (CIV), Envelope Number: 5906898

Brenoch,

Generally, the stipulation you circulated was too complicated for what amounts to a very simple agreement – the stay will not be lifted until the next status check, and the stipulation

PA002928

shall have no other impact, expressed or implied. I have removed a lot of the collateral recitals and added the fact that the stipulation does not affect the scheduling deadlines or the 5-year rule. All defendants are in agreement with the attached.

George F. Ogilvie III | Partner

McDONALD CARANO

P: 702.873.4100 | **E:** gogilvie@mcdonaldcarano.com

From: Brenoch R. Wirthlin [<mailto:bwirthlin@hutchlegal.com>]

Sent: Wednesday, April 8, 2020 1:35 PM

To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>

Cc: Jon Wilson <Jon.Wilson@nelsonmullins.com>; Kimberly Freedman <Kimberly.Freedman@nelsonmullins.com>; Erin Kolmansberger <Erin.Kolmansberger@nelsonmullins.com>; Daniela Ferro <dferro@broadandcassel.com>; Melissa Gomberg <Melissa.Gomberg@nelsonmullins.com>; Steve Peek <S.Peek@hollandhart.com>; 'aochoa@lipsonneilson.com' <aochoa@lipsonneilson.com>; Jon Linder <jlinder@hutchlegal.com>; Daniel Maul <dmaul@hutchlegal.com>; Danielle Kelley <dkelley@hutchlegal.com>; Ryan A. Semerad <RASemerad@hollandhart.com>

Subject: RE: Notification of Service for Case: A-14-711535-C, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s)vs.Robert Chur, Defendant(s) for filing Opposition - OPPS (CIV), Envelope Number: 5906898

I have no problem providing a word version, please see the attached. We will not agree to inclusion of any language that is outside the very narrow scope of our motion. Please provide me a redline version so I can see what language you propose changing.

From: George F. Ogilvie III [<mailto:gogilvie@Mcdonaldcarano.com>]

Sent: Wednesday, April 08, 2020 1:30 PM

To: Brenoch R. Wirthlin

Cc: Jon Wilson; Kimberly Freedman; Erin Kolmansberger; Daniela Ferro; Melissa Gomberg; Steve Peek; 'aochoa@lipsonneilson.com'; Jon Linder; Daniel Maul; Danielle Kelley; Ryan A. Semerad

Subject: RE: Notification of Service for Case: A-14-711535-C, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s)vs.Robert Chur, Defendant(s) for filing Opposition - OPPS (CIV), Envelope Number: 5906898

Brenoch,

We do not agree with the language of the stipulation. Please circulate a Word version so we can mark it up and return it to you.

George

George F. Ogilvie III | Partner

PA002929

McDONALD CARANO

P: 702.873.4100 | E: gogilvie@mcdonaldcarano.com

From: Brenoch R. Wirthlin [<mailto:bwirthlin@hutchlegal.com>]
Sent: Wednesday, April 8, 2020 11:56 AM
To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Cc: Jon Wilson <Jon.Wilson@nelsonmullins.com>; Kimberly Freedman <Kimberly.Freedman@nelsonmullins.com>; Erin Kolmansberger <Erin.Kolmansberger@nelsonmullins.com>; Daniela Ferro <dferro@broadandcassel.com>; Melissa Gomberg <Melissa.Gomberg@nelsonmullins.com>; Steve Peek <S.Peek@hollandhart.com>; 'aochoa@lipsonneilson.com' <aochoa@lipsonneilson.com>; Jon Linder <jlinder@hutchlegal.com>; Daniel Maul <dmaul@hutchlegal.com>; Danielle Kelley <dkelley@hutchlegal.com>; Ryan A. Semerad <RASemerad@hollandhart.com>
Subject: RE: Notification of Service for Case: A-14-711535-C, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s)vs.Robert Chur, Defendant(s) for filing Opposition - OPPS (CIV), Envelope Number: 5906898

Good morning. Please see the attached stipulation.

From: Brenoch R. Wirthlin
Sent: Wednesday, April 08, 2020 10:28 AM
To: George F. Ogilvie III
Cc: Jon Wilson; Kimberly Freedman; Erin Kolmansberger; Daniela Ferro; Melissa Gomberg; Steve Peek; 'aochoa@lipsonneilson.com'; Jon Linder; Daniel Maul; Danielle Kelley
Subject: RE: Notification of Service for Case: A-14-711535-C, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s)vs.Robert Chur, Defendant(s) for filing Opposition - OPPS (CIV), Envelope Number: 5906898

Yes, I will be circulating a stipulation this morning.

From: George F. Ogilvie III [<mailto:gogilvie@Mcdonaldcarano.com>]
Sent: Wednesday, April 08, 2020 10:24 AM
To: Brenoch R. Wirthlin
Cc: Jon Wilson; Kimberly Freedman; Erin Kolmansberger; Daniela Ferro; Melissa Gomberg; Steve Peek; 'aochoa@lipsonneilson.com'
Subject: FW: Notification of Service for Case: A-14-711535-C, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s)vs.Robert Chur, Defendant(s) for filing Opposition - OPPS (CIV), Envelope Number: 5906898

Brenoch,

Are you not going to circulate a stipulation and withdraw the motion? Please advise so we know whether Uni-Ter and US Re have to prepare a response to the motion.

PA002930

George F. Ogilvie III | Partner

McDONALD CARANO

P: 702.873.4100 | E: gogilvie@mcdonaldcarano.com

From: efilingmail@tylerhost.net <efilingmail@tylerhost.net>

Sent: Wednesday, April 8, 2020 10:06 AM

To: Jelena Jovanovic <jjovanovic@mcdonaldcarano.com>

Subject: Notification of Service for Case: A-14-711535-C, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s)vs.Robert Chur, Defendant(s) for filing Opposition - OPPS (CIV), Envelope Number: 5906898

Notification of Service

Case Number: A-14-711535-C
Case Style: Commissioner of Insurance
for the State of Nevada as Receiver of
Lewis and Clark, Plaintiff(s)vs.Robert
Chur, Defendant(s)
Envelope Number: 5906898

This is a notification of service for the filing listed. Please click the link below to retrieve the submitted document.

Filing Details	
Case Number	A-14-711535-C
Case Style	Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s)vs.Robert Chur, Defendant(s)
Date/Time Submitted	4/8/2020 10:04 AM PST
Filing Type	Opposition - OPPS (CIV)
Filing Description	Director Defendants' Limited Opposition to Plaintiff's Motion for Clarification on an Order Shortening Time
Filed By	Ryan Semerad
	Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark: Chad Harrison (charrison@hutchlegal.com) Christian Orme (corme@hutchlegal.com)

PA002931

Danielle Kelley (dkelley@hutchlegal.com)

Stuart Taylor (staylor@hutchlegal.com)

Brenoch Wirthlin (bwirthlin@knevada.com)

Jon Linder (jlinder@knevada.com)

S. Dianne Pomonis (dpomonis@knevada.com)

Daniel Maul (dmaul@hutchlegal.com)

Brenoch Wirthlin (bwirthlin@hutchlegal.com)

Jon Linder (jlinder@hutchlegal.com)

Robert Chur:

Julie Linton (jlinton@hollandhart.com)

Other Service Contacts not associated with a party on the case:

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CaraMia Gerard . (cgerard@mcdonaldcarano.com)

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Jessica Ayala . (jayala@fclaw.com)

Joanna Grigoriev . (jgrigoriev@ag.nv.gov)

Jon M. Wilson . (jwilson@broadandcassel.com)

Kathy Barrett . (kbarrett@mcdonaldcarano.com)

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PA002932

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Susana Nutt . (snutt@lipsonneilson.com)

Yusimy Bordes . (ybordes@broadandcassel.com)

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Morganne Westover (mwestover@fclaw.com)

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Chelsie Adams (cadams@fclaw.com)

Jonathan Wong (jwong@lipsonneilson.com)

Erin Kolmansberger
(erin.kolmansberger@nelsonmullins.com)

Melissa Gomberg (melissa.gomberg@nelsonmullins.com)

Betsy Gould (bgould@doi.nv.gov)

Jessica Whelan (JEWhelan@hollandhart.com)

Ryan Semerad (RASemerad@hollandhart.com)

	Jon Linder (jlinder@fclaw.com) Juan Cerezo (jcerezo@lipsonneilson.com) Charlie Bowman (cbowman@hollandhart.com)
--	--

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Brenoch R. Wirthlin
Partner

HUTCHISON & STEFFEN, PLLC
(702) 385-2500
hutchlegal.com

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Brenoch R. Wirthlin
Partner

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(702) 385-2500
hutchlegal.com

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Brenoch R. Wirthlin

PA002934

Partner


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Brenoch R. Wirthlin
Partner

[HS logo](#)


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(702) 385-2500
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EXHIBIT “B”

1 **SAO**

2 BRENOCH R. WIRTHLIN, ESQ.

3 Nevada Bar No. 10282

4 CHRIS ORME, ESQ.

5 Nevada Bar No. 10175

6 STUART J. TAYLOR, ESQ.

7 Nevada Bar No. 14285

8 **HUTCHISON & STEFFEN**

9 Peccole Professional Park

10 10080 West Alta Drive, Suite 200

11 Las Vegas, Nevada 89145

12 Telephone: (702) 385.2500

13 Facsimile: (702) 385.2086

14 E-Mail: bwirthlin@hutchlegal.com

15 E-Mail: staylor@hutchlegal.com

16 *Attorneys for Plaintiff*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 * * *

14 COMMISSIONER OF INSURANCE FOR
15 THE STATE OF NEVADA AS RECEIVER
16 OF LEWIS AND CLARK LTC RISK
17 RETENTION GROUP, INC.,

18 Plaintiff,

19 vs.

20 ROBERT CHUR, STEVE FOGG, MARK
21 GARBER, CAROL HARTER, ROBERT
22 HURLBUT, BARBARA LUMPKIN, JEFF
23 MARSHALL, ERIC STICKELS, UNI-TER
24 UNDERWRITING MANAGEMENT CORP.,
25 UNI-TER CLAIMS SERVICES CORP., and
26 U.S. RE CORPORATION,; DOES 1-50,
27 inclusive; and ROES 51-100, inclusive;

28 Defendants.

Case No.: A-14-711535-C

Dept. No.: XXVII

**STIPULATION AND ORDER RESOLVING
MOTION FOR CLARIFICATION ON
ORDER SHORTENING TIME**

Plaintiff, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and
Clark LTC Risk Retention Group, Inc. ("Plaintiff") by and through counsel of record, Hutchison

1 & Steffen; Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut,
2 Barbara Lumpkin, Jeff Marshall and Eric Stickels (collectively the “Director Defendants”), by and
3 through counsel of record, Holland & Hart LLP; and Uni-Ter Underwriting Management Corp.,
4 UniTer Claims Services Corp., and U.S. Re Corporation (collectively the “Uni-Ter Defendants”),
5 by and through counsel of record, McDonald Carano LLP; hereby stipulate as follows:

6 WHEREAS, on March 8, 2019, Director Defendants filed a motion to stay proceedings
7 while their petition for writ of mandamus is pending before the Nevada Supreme Court (“Motion
8 for Stay”);

9 WHEREAS, on March 13, 2019, Director Defendants filed a Petition for Writ of
10 Mandamus (“Directors’ Writ Petition”) with the Nevada Supreme Court based upon this Court’s
11 denial of Director Defendants’ motion for judgment on the pleadings and motion for
12 reconsideration;

13 WHEREAS, on April 4, 2019, this Court entered its Order Granting Motion to Stay
14 Proceedings Pending Petition for Writ of Mandamus (the “Stay Order”), providing, *inter alia*, that
15 “[a]ll proceedings are stayed pending the Nevada Supreme Court’s resolution of the Director
16 Defendants’ Petition for A Writ of Mandamus.”;

17 WHEREAS, on February 27, 2020, the Supreme Court of Nevada entered an decision
18 granting the Director Defendants’ Writ Petition;

19 NOW THEREFORE, in consideration of the foregoing facts, the parties intending to be
20 legally bound, agree and stipulate as follows:

21 1. That the Stay Order shall remain in effect until the Status Check contemplated by
22 this Court’s March 24, 2020 minute order is conducted, and neither the entry of a decision by the
23 Supreme Court of Nevada regarding the Plaintiff’s forthcoming Petition for Rehearing, nor a
24 notice in lieu of remittitur shall have the effect of lifting the current stay;

25 2. That this Stipulation in no way affects any scheduling deadlines previously
26 imposed by order of this Court, including, but not limited to the deadline for initial expert
27 disclosures and the deadline to seek leave to amend pleadings, all of which shall remain as
28 currently scheduled unless modified by further order of the Court;

1 3. That this Stipulation in no way affects Plaintiff's obligation to bring this action to
2 trial within 5 years after the action was filed pursuant to NRCP 41(e)(2)(B), and Defendants
3 expressly reserve the right to seek dismissal of this action in the event that Plaintiff fails to do so.

4 4. That the April 10, 2020 hearing on Plaintiff's Motion for Clarification on Order
5 Shortening Time may be vacated.

6
7 Dated this ____ day of April, 2020.

8 HUTCHISON & STEFFEN

9
10 _____
11 Brenoch Wirthlin, Esq.
12 Nevada Bar No. 10282
13 Stuart J. Taylor, Esq.
14 Nevada Bar No. 14285
15 10080 West Alta Drive, Suite 200
16 Las Vegas, Nevada 89145
17 Attorneys for Plaintiff

 Dated this ____ day of April, 2020.

 HOLLAND & HART LLP

 J. Stephen Peek, Esq.
 Nevada Bar No. 1758
 Jessica E. Whelan, Esq.
 Ryan A. Semerad, Esq.
 9555 Hillwood Dr., 2nd Floor
 Las Vegas, Nevada 89134

 Joseph P. Garin, Esq.
 Angela T. Nakamura Ochoa, Esq.
 LIPSON NEILSON, P.C.
 9900 Covington Cross Drive, Suite 120
 Las Vegas, NV 891444
 Attorneys for Director Defendants

18
19 Dated this ____ day of April, 2020.

20 MCDONALD CARANO LLP

21 _____
22 George F. Ogilvie III, Esq.
23 Nevada Bar No. 3352
24 2300 West Sahara Avenue, Ste 1200
25 Las Vegas, Nevada 89102

26 Jon M. Wilson, Esq.
27 Kimberly Freedman, Esq.
28 NELSON MULLINS
 2 South Biscayne Blvd. 21st Floor
 Miami, FL 33131
 Attorney Uni-Ter Defendants

ORDER

In consideration of the foregoing stipulation between the parties, and good cause appearing therefor,

IT IS HEREBY ORDERED that this Court's April 4, 2019 Order Granting Motion to Stay Proceedings Pending Petition for Writ of Mandamus shall remain in full force and effect until such time as the status check contemplated by this Court's March 24, 2020 minute order is conducted.

IT IS HEREBY FURTHER ORDERED that the parties' foregoing stipulation and this Order of the Court in no way affect any scheduling deadlines previously imposed by order of this Court, including, but not limited to the deadline for initial expert disclosures and the deadline for seeking leave to amend pleadings, all of which shall remain as currently scheduled unless modified by further order of this Court.

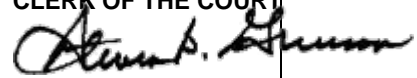
IT IS HEREBY FURTHER ORDERED that the parties' foregoing stipulation and this Order of the Court in no way affect Plaintiff's obligation to bring this action to trial within 5 years after the action was filed pursuant to NRCP 41(e)(2)(B).

DATED this ____ day of April, 2020.

DISTRICT COURT JUDGE

Respectfully submitted by:
HUTCHISON & STEFFEN

Brenoch Wirthlin, Esq.
Nevada Bar No. 10282
Stuart J. Taylor, Esq.
Nevada Bar No. 14285
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Plaintiff



RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

COMMISSIONER OF
INSURANCE FOR THE STATE
OF NEVADA AS RECEIVER OF
LEWIS AND CLARK,
Plaintiff(s),

vs.

ROBERT CHUR, ET AL,
Defendant(s).

CASE NO: A-14-711535-C
DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

FRIDAY, APRIL 10, 2020

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: PLAINTIFF'S MOTION FOR CLARIFICATION ON ORDER
SHORTENING TIME

APPEARANCES (Telephonically):

For the Plaintiff(s): BRENOCH WIRTHLIN, ESQ.

For the Defendant(s): GEORGE F. OGILVIE III, ESQ.
ANGELA T. NAKAMURA OCHOA, ESQ.
JOSEPH P. GARIN, ESQ.
JOSEPH S. PEEK, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

1 **LAS VEGAS, NEVADA; FRIDAY, APRIL 10, 2020**

2 [Proceedings convened at 2:03 p.m.]

3
4 THE COURT: -- 203 hearing scheduled in the Commissioner
5 versus Chur. Are the parties on the phone?

6 MR. WIRTHLIN: Yes, Your Honor. This is Brenoch Wirthlin
7 on behalf of plaintiff. Stuart Taylor is with me in my office, as well
8 as our paralegal Daniel Maul.

9 THE COURT: Thank you. And for the defendants?

10 MR. OGILVIE: Good afternoon, Your Honor. This is -- go
11 ahead, Steve.

12 MR. PEEK: Good afternoon, Your Honor. This is just
13 Stephen Peek, nobody else, in my home on behalf of the director
14 defendants. Just me.

15 THE COURT: Thank you.

16 MR. OGILVIE: Just Stephen Peek. You're so modest, Steve.
17 Good afternoon, Your Honor. This is George Ogilvie on
18 behalf of the Uni-Ter defendants and US Re.

19 THE COURT: Thank you.

20 Let me start with a few background -- with a few initial
21 comments because of this unique time using remote appearances.
22 [Indiscernible] if you're on your cell phone or a speakerphone, that
23 you take off speaker. And I'm going to ask everyone to please be
24 aware of background noise.

25 And I have a number of preliminary things I've been doing

1 with all of the hearings we convene just so that you guys know as
2 much as we do about the way that the Court is responding to the
3 current situation.

4 At the current time, the Court is only hearing essential
5 matters through April 30th. It's possible that that date can be
6 extended. We are granting -- and we have been told by our chief
7 judge to grant continuances very liberally due to logistical issues
8 about availability of counsel, availability of witnesses, and
9 availability of travel.

10 So civil jury trials will probably not be able to come back
11 online until August or later, because even once we get back to work,
12 it takes 45 days to summons jurors. So keep that in mind. We're --
13 as a response to that, we're increasing the number of trials set on
14 each stack with the hope that we can accommodate the cases in a
15 more convenient fashion for you.

16 Civil bench trials probably will not begin until July. We ask
17 everyone who's going to have a civil bench trial to consider alternate
18 means of presenting witnesses and testimony such as like what
19 we're doing today.

20 For all civil cases in the meantime, all of the discovery
21 protocols need to take into consideration the possibility of doing
22 things remotely and making sure that you use all social distancing
23 that is necessary for the health and safety of all of the parties.

24 We -- Rule 16s, we are resetting them for the end of May or
25 June. Although, if the parties want, I would do them telephonically.

1 But because of these unprecedented times, we are trying to make
2 sure that we keep our court staff and all of you healthy so that you
3 can continue to serve your clients.

4 For now, we are taking no defaults. And the governor told
5 all deadlines until 30 days after we've resumed -- resume our
6 nonessential services.

7 So with that in mind, I know we have an issue with regard to
8 the stay. So prefaced with that, this was the plaintiff's motion for
9 clarification.

10 Mr. Wirthlin.

11 MR. WIRTHLIN: Yes, Your Honor. Thank you.

12 I won't go over everything in the motion and the reply. I
13 think we know the Court has read everything. We -- frankly, the
14 motion raised a single issue, which was clarification of when the
15 triggering event is for the lifting of the stay.

16 And as I understand it, and opposing counsel may disagree,
17 but based on the pleadings that they filed, I think it's clear that
18 everyone's in agreement that triggering event is not necessarily the
19 entry of any decision on the petition for rehearing or the notice in
20 lieu of remittitur when the status hearing contemplated by the
21 Court's recent minute order is held.

22 I think, frankly, we're in agreement on that, and I think that's
23 the extent of the motion.

24 There is -- there are a couple of issues that were raised by
25 particularly the Uni-Ter defendants. One of those is whether or not

1 the plaintiff was seeking to extend deadlines. We are not, and we
2 attempted to make that clear in our motion. We do note in our reply
3 that the stay was imposed by the Court at the hearing on
4 March 14th, 2019. At that point, pursuant to the scheduling order in
5 effect, there was one day left for plaintiff to disclose experts and file
6 a motion to amend.

7 I believe that in our motion, we mistakenly said there were
8 two days. I hope that counsel didn't think we were trying to extend
9 that from one to two days. We were not. So we clarified that. And
10 we have no problem with that language being in the order that once
11 that status hearing is held, we have one day in order to disclose
12 experts and moved to amend.

13 The other issue raised by the Uni-Ter defendants we did see
14 as more problematic: They appear to want some language in the
15 order that discusses or addresses the five-year rule and whether or
16 not plaintiff -- I think the way that the wording was set out in what
17 was requested by the Uni-Ter defendants is a little ambiguous and
18 could be construed as a finding that the five-year rule was not told
19 by the stay. And I think the Court has already found that that is the
20 case.

21 And again, if the Uni-Ter defendants feel that there's
22 additional reliefs that they need, we would request that they file the
23 appropriate -- the motion they feel is appropriate and we have a full
24 opportunity to respond.

25 Other than that, I think that's the extent of it, unless the

1 Court has any questions.

2 THE COURT: I don't. So let's -- let me hear from Mr. Peek
3 and then Mr. Ogilvie.

4 MR. PEEK: Your Honor, I just thought about a limited
5 opposition because I was somewhat confused by the relief requested
6 in the motion. It seemed to want more than just what's the date that
7 the stay expires. It seemed to address discovery deadlines, and it
8 seemed to address the five-year rule.

9 I don't know that the five-year rule has been resolved one
10 way or the other, and so I'm going to leave that for a different day.
11 And I think it should be left for a different day. Mr. Wirthlin has
12 clarified, of course, to us and to Mr. Ogilvie that he is not seeking
13 with this motion for clarification to extend any discovery deadlines,
14 and that he has only one day left within which to meet whatever
15 requirements there are. I think he said motion to amend is one of
16 them and expert disclosure is the other.

17 If that's the case, that's the case. I just wanted to make sure
18 that we were only looking at when does the stay expire. And I said
19 that I was in agreement that the stay would expire after the Supreme
20 Court has concluded its resolution of the petition for rehearing and
21 the Court has held the status conference. So it's after that status
22 conference that the Court contemplated in its minute order when the
23 stay would expire.

24 And so that's all I have to say, Your Honor. And I think that
25 was -- Mr. Wirthlin seems to be in agreement with that now. We did

1 try to have a stipulation so we can avoid the hearing. It didn't quite
2 work out between George and me, and so that's why we're here
3 today.

4 And I'll let Mr. Ogilvie speak to his issues.

5 THE COURT: Thank you. Mr. Ogilvie.

6 MR. OGILVIE: Thank you, Your Honor. Similar to Mr. Peek, I
7 was a bit confused by the motion for the same reasons that Mr. Peek
8 has stated. And so I reached out to Mr. Wirthlin and said, hey, why
9 don't we just do a stipulation? And he submitted the stipulation to
10 the defendants that we thought was overreaching. And so I tried to
11 clarify that and say, okay, I think we're all in agreement that the stay
12 should remain in place -- and this is the third time we've heard this
13 today, Your Honor. It should remain in place until the status check
14 after remittitur.

15 Which that's fine, but we just wanted to ensure that the
16 receiver was not seeking additional relief, which, again, as Mr. Peek
17 noted, Mr. Wirthlin has confirmed that there isn't an attempt to
18 modify the currently existing scheduling deadlines.

19 I am still confused why the receiver -- what the receiver's
20 position relative to the day and the tolling of the five-year rule is.
21 And so I asked the question of the receiver's counsel, does the
22 receiver contend that this stipulation that we were contemplating at
23 the time has an effect on the five-year rule.

24 Because in my mind, Your Honor, you ruled the five-year
25 rule is what it is. The stay is what it is. This stay was a stay of all

1 proceedings. We all know how that impacts the five-year rule, and
2 I'm just wanting it to be clear that there isn't any change and that
3 there isn't any attempt by any party, specifically the receiver in this
4 instance, to somehow gain the system. And that's why we didn't
5 enter into the stipulation, and that's why I felt compelled to file our
6 limited opposition which states that we reserve our rights. Whatever
7 our rights are, we reserve our rights relative to enforcing the term of
8 the five-year rule under Rule 41.

9 THE COURT: Thank you. And the reply, please.

10 MR. WIRTHLIN: Yes, Your Honor. I think that I would have
11 to agree with, I believe, the director defendant's counsel that
12 anything related to five-year rule should remain for another day. I
13 do think that we have no objection to the inclusion of the language,
14 as I mentioned, with respect to the deadlines remaining. There was
15 a day left. And from this lifting of the stay, which it sounds like all
16 parties are in agreement about, we have one day in which to file our
17 motion to amend and do initial expert disclosures, and we're fine
18 with that.

19 THE COURT: Okay. So this is the plaintiff's motion for
20 clarification. And the Court determines that it's appropriate to lift the
21 stay. I am going to deviate slightly from what the two of you
22 discussed. The stay will be lifted -- the effective date will be the date
23 that you file notice of entry of order of this order.

24 Are there any questions?

25 MR. PEEK: I do have question.

1 THE COURT: Sure.

2 MR. PEEK: So the stay is lifted when this order -- what
3 order, Your Honor? I'm trying to understand what order.

4 THE COURT: Order granting the motion for clarification will
5 indicate that the stay will be lifted. The lifting will be effective as of
6 the date that notice of entry of the order is served.

7 MR. WIRTHLIN: Your Honor, this is Brenoch Wirthlin.

8 If I could just clarify one aspect of that. What I had intended
9 to convey was that I believe all parties are in agreement that the stay
10 will remain in effect until there is a status conference that the Court
11 mentioned in its most recent minute order.

12 We're not looking to lift a stay now because there's still a
13 pending petition for rehearing we're filing at the end of the month.
14 And it may take some time for the Court -- the Supreme Court to
15 address that. Currently, there is a status check to set for May 26th, I
16 believe. And in the Court's most recent minute order, the Court
17 directed that in the event there is a decision on the petition for
18 rehearing, all parties should file a joint status report, you know,
19 letting the Court -- Your Honor know that, at which point Your Honor
20 would set another status check.

21 And I think what -- and Mr. Peek and Mr. Ogilvie may
22 disagree, but I don't think so at this point. We're all in agreement
23 that the stay would remain in place until that status conference after
24 the petition for rehearing is decided. If that's clear.

25 THE COURT: Mr. Peek, is that correct?

1 MR. OGILVIE: I thought your ruling today -- that is. You
2 sought clarification, but I'm fine with what the Court's order is today.

3 THE COURT: Well, I'm willing to set it out until May 6th, if
4 everyone's willing.

5 MR. WIRTHLIN: Your Honor, this is Brenoch Wirthlin, we are
6 fine with that.

7 THE COURT: Mr. Peek, Mr. Ogilvie?

8 MR. OGILVIE: Your Honor, this is George Ogilvie.

9 I think -- when you say I'm going to set it out for May 6th,
10 are you suggesting that you're going to hold your ruling in advance
11 until the status check on May 6th?

12 THE COURT: That's what I heard Mr. Wirthlin was asking,
13 that he -- and we can convene telephonically May 26th.

14 MR. WIRTHLIN: Yes.

15 MR. PEEK: I hope we're in court, Your Honor, at that time,
16 but we may not.

17 THE COURT: We all do.

18 MR. WIRTHLIN: And this is Brenoch Wirthlin. Just -- I
19 thought I heard Mr. Ogilvie say May 6th; I believe the Court had said
20 the stay would remain in place through May 26th. Is that accurate,
21 Your Honor?

22 THE COURT: Let me just make sure -- that is what I said, but
23 I need to have everyone responding to that because I've got to figure
24 out when May 26th -- on my calendar.

25 MR. WIRTHLIN: If I could just -- if I could interject. And I

1 don't want to cover what the Court's already discussed, but as I
2 understand it, the -- there's kind of a moving target with respect to
3 when the Supreme Court will rule on the plaintiff's forthcoming
4 petition for rehearing.

5 In the event that they do it within, say, two weeks after we
6 file it, you know, middle of May, then as I understood the Court's
7 previous minute order, that would require all parties to file a joint
8 status report with the Court letting Your Honor know that the petition
9 for rehearing had been decided.

10 At that point, the Court would then set a status check for all
11 parties to appear. And as I understood the limited oppositions from
12 all defendants, the stay would remain in place until that status check,
13 if that make sense.

14 THE COURT: All right, guys. So let's set a date for a status
15 check and stipulate to move that if you need to.

16 Mr. Peek?

17 MR. PEEK: Yeah, Your Honor, I like the idea that the Court is
18 going to look at this case every 30 or 60 days to see what the
19 Supreme Court is doing. That seems to have been the Court's
20 practice before. I agree with that practice. So I am agreeable that
21 the stay will remain in place until we have a status hearing on or
22 about May 26th. If that's a date convenient for the Court, I am fine
23 with that.

24 THE COURT: Thank you.

25 Mr. Ogilvie?

1 MR. OGILVIE: Yes, Your Honor. I'm fine with that as well.

2 THE COURT: You know, for now, we're doing all of our
3 hearings on Friday afternoon because there's lower bandwidth than
4 what we need for the court system, and that seems to be the most
5 quiet time. So let me set this out then for May 15th at 1 p.m. And if
6 you don't have a decision by then, you can stipulate to move that. If
7 you do have a decision and want a sooner hearing, then we can do
8 that too. You guys can stipulate as to a date and work with my office
9 to get it set.

10 So this motion will be continued now until the 15th of May
11 at 1 p.m. Is that clear now?

12 MR. WIRTHLIN: On behalf of the Uni-Ter in US Re, Your
13 Honor, that's clear. Thank you.

14 MR. PEEK: And, Your Honor, I -- what I would ask is that
15 Mr. Wirthlin, who made this request, would circulate a draft order
16 based on what you had said today, I would appreciate that, so that
17 we all kind of know where we are and there's no more issues about
18 or need for clarification in court.

19 MR. WIRTHLIN: Your Honor, this is Brenoch Wirthlin. I have
20 no problem with that.

21 THE CLERK: I think we lost the judge.

22 MR. PEEK: I missed the humor. What happened?

23 THE CLERK: I think we've lost the judge.

24 MR. WIRTHLIN: We lost the judge.

25 MR. PEEK: Oh, we lost the judge? That's called bandwidth.

1 That's the bandwidth she was talking about. Oh, man.

2 THE CLERK: There she is. Are you there, Judge?

3 MR. PEEK: Georgy, are you okay with Brenoch circulating
4 the draft order?

5 MR. OGILVIE: Absolutely.

6 MR. PEEK: [Indiscernible.]

7 THE COURT: I'm lost -- I think we've had some connection
8 issues. I did not hear your comment or statement. Could you please
9 repeat it for me?

10 MR. PEEK: Yes, Your Honor.

11 All I said was that I thought it would be appropriate, so that
12 there was clarity, for Mr. Wirthlin to circulate a draft order for
13 Mr. Ogilvie and me to review and comment so that we can get this
14 nailed down and we don't have issues down the road of clarification
15 or anything else.

16 I think we all know what we're doing. We're continuing the
17 stay until May 15th, at which time the Court will be holding a status
18 conference. And if there is either a Supreme Court decision or no
19 Supreme Court decision, we will inform the Court and provide the
20 Court with at least a stipulation of some sort or a status report of
21 some sort on or before that hearing date.

22 THE COURT: Very good.

23 Mr. Wirthlin, you'll prepare the order?

24 MR. WIRTHLIN: Absolutely. Thank you, Your Honor.

25 THE COURT: And make sure that both Mr. Peek and

1 Mr. Ogilvie have the ability to review and approve the form of it
2 before it's submitted.

3 MR. WIRTHLIN: Will do.

4 THE COURT: And just one thing as I end all of the hearings
5 that we do telephonically, we're all working remotely. We actually
6 are working full-time (technical difficulties) --

7 MR. PEEK: Yes, we are.

8 THE COURT: -- of the remoteness. We always turn things
9 around as quickly as we can for you.

10 MR. WIRTHLIN: Thank you, Your Honor. Very much
11 appreciate that.

12 MR. PEEK: Thank you very much, Your Honor. Stay safe.

13 THE COURT: Thank you all.

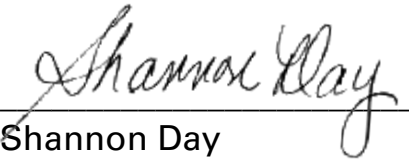
14 MR. WIRTHLIN: Thank you, Your Honor.

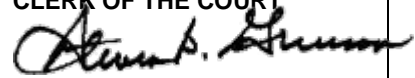
15 THE COURT: Same to everyone else.

16 [Proceedings adjourned at 2:23 p.m.]

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19
20 ATTEST: I do hereby certify that I have truly and correctly
21 transcribed the audio/video proceedings in the above-entitled case to
22 the best of my ability.

23 
24 Shannon Day
25 Independent Transcriber



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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.: XXVII

NOTICE OF ENTRY OF ORDER

Please take notice that an Order Regarding Plaintiff's Motion for Clarification on Order
Shortening Time was entered on the 27th day of April, 2020,

///

///

1 a copy of which is attached hereto.

2 DATED this 27th day of April, 2020.

3 HUTCHISON & STEFFEN

4

5 By /s/Brenoch Wirthlin
6 BRENOCH R. WIRTHLIN, ESQ.
7 Nevada Bar No. 10282
8 STUART J. TAYLOR, ESQ.
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10 10080 West Alta Drive, Suite 200
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12 *Attorneys for Plaintiff*

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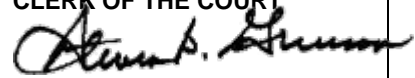
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CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b), I certify that on this 27th day of April, 2020, I caused the document entitled **NOTICE OF ENTRY OF ORDER** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

/s/Danielle Kelley
An Employee of Hutchison & Steffen, PLLC



ORDG

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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.: XXVII

**ORDER REGARDING PLAINTIFF'S
MOTION FOR CLARIFICATION ON
ORDER SHORTENING TIME**

This matter having come before the Honorable Nancy Allf at a hearing on April 10, 2020 ("Hearing"), on Plaintiff's Motion for Clarification on Order Shortening Time ("Motion") filed herein on April 6, 2020; Stephen Peek, Esq., having appeared on behalf of Defendants Robert Chur,

1 Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric
2 Stickels (collectively the “Director Defendants”); George F. Ogilvie III, Esq. having appeared on
3 behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp.,
4 and U.S. Re Corporation (collectively the “Uni-Ter Defendants”); Brenoch Wirthlin, Esq., having
5 appeared on behalf of Plaintiff Commissioner of Insurance for the State of Nevada as Receiver of
6 Lewis and Clark LTC Risk Retention Group (“Plaintiff”); the Director Defendants having filed a
7 limited opposition (“Directors’ Limited Opposition”) to the Motion on April 8, 2020; the Uni-Ter
8 Defendants having filed a limited opposition (“Uni-Ter Defendants’ Limited Opposition”) to the
9 Motion on April 9, 2020; the Plaintiff having filed its reply (“Reply”) in support of the Motion on
10 April 10, 2020; the Court having read and considered the Motion, the Directors’ Limited
11 Opposition, the Uni-Ter Defendants’ Limited Opposition, and the Reply, as well as having heard
12 and considered the arguments of counsel at the Hearing on the Motion; good cause appearing;

13 IT IS HEREBY ORDERED that the hearing on the Motion is continued to May 15, 2020.

14 IT IS HEREBY FURTHER ORDER that the status check currently set for May 26, 2020,
15 is hereby vacated.

16 IT IS HEREBY FURTHER ORDERED that a status check in this matter is hereby set for
17 May 15, 2020 at 1:00 p.m. (“May 15 Status Check”).

18 IT IS HEREBY FURTHER ORDERED that the stay previously imposed in this case
19 (“Stay”) shall remain in full force and effect until the May 15 Status Check, at which time the
20 Court may extend the Stay in the event that proceedings before the Nevada Supreme Court have
21 not been completed.

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IT IS HEREBY FURTHER ORDERED that, pursuant to the operative scheduling order in place at the time of the imposition of the Stay, once the Stay is lifted there shall remain one (1) judicial day for the Parties to move to amend pleadings or add parties, and for the Plaintiff to disclose its initial expert reports.

DATED this 27th day of April, 2020.


DISTRICT COURT JUDGE

Respectfully submitted by:

Dated this 27th day of April, 2020.

HUTCHISON & STEFFEN

/s/Brenoch Wirthlin
Brenoch Wirthlin, Esq.
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Stuart J. Taylor, Esq.
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Las Vegas, Nevada 89145
Attorneys for Plaintiff

Approved as to form and content by:

Dated this 27th day of April, 2020.

MCDONALD CARANO LLP

/s/George Ogilvie, III
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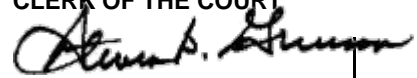
Jon M. Wilson, Esq.
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Attorney Uni-Ter Defendants

Approved as to form and content:

Dated this 27th day of April, 2020.

HOLLAND & HART LLP

/s/Stephen Peek
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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

COMMISSIONER OF INSURANCE)
FOR THE STATE OF NEVADA AS)
RECEIVER OF LEWIS AND CLARK,)

Plaintiff,)

vs.)

ROBERT CHUR, et al,)

Defendants.)

CASE NO. A-14-711535-C

DEPT NO. XXVII

**Transcript of
Proceedings**

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

PLAINTIFF'S MOTION FOR CLARIFICATION ON ORDER SHORTENING TIME

THURSDAY, JUNE 18, 2020

APPEARANCES:

FOR THE PLAINTIFF:

BRENOCH WIRTHLIN, ESQ.

FOR THE DEFENDANTS:

GEORGE F. OGILVIE III, ESQ.

ANGELA T. NAKAMURA OCHOA, ESQ.

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

PA002961

1 LAS VEGAS, NEVADA, THURSDAY, JUNE 18, 2020, 9:59 A.M.

2 (Court was called to order)

3 THE COURT: Commissioner of Insurance versus Chur.
4 Motion for clarification. Let's take appearances from the
5 plaintiff to the defendants. Everyone please remember to unmute
6 your mic when you speak. Is there anyone on the phone?

7 MS. OCHOA: Angela Ochoa on behalf of the Management
8 defendants, Your Honor.

9 THE COURT: Thank you, Ms. Ochoa. How about for the
10 plaintiffs? Is there anyone present?

11 MR. OGILVIE: Your Honor, this is George Ogilvie. I
12 was just waiting for the plaintiff to -- plaintiff's counsel to
13 state his appearance, but this is George Ogilvie appearing on
14 behalf of U S Re and the Uni-Ter defendants.

15 THE COURT: Thank you.

16 So we have Ms. Ochoa and Mr. Ogilvie. Is -- do you
17 expect Mr. Peek or someone from his office to appear?

18 MS. OCHOA: Oh, no, Your Honor. Mr. Peek has
19 withdrawn. I'm back in this case --

20 THE COURT: Oh, right.

21 MS. OCHOA: -- on behalf of the board.

22 THE COURT: Good enough. And is there, then, for the
23 plaintiff, isn't it Mr. Wirthlin?

24 Mr. Wirthlin, are you --

25 MR. OGILVIE: Yes.

1 THE COURT: -- on the phone? Mr. Wirthlin, are you on
2 the phone?

3 I don't see that he is on the phone. So, Mr. Ogilvie
4 and Ms. Ochoa, how do you wish to proceed today? My intent
5 would be, because there was a status report filed yesterday,
6 just to set the matter out or just take it off calendar.

7 MS. OCHOA: I think the question was -- sorry, George.

8 MR. OGILVIE: Go ahead, Angela.

9 MS. OCHOA: Did you want to go ahead? Okay.

10 MR. OGILVIE: No, go ahead.

11 MS. OCHOA: Okay. The question was whether the stay
12 should be lifted, and I think it was based on Mr. Wirthlin's
13 status report he thinks it's July 1st based on the
14 administrative order. It's our position that the stay was put
15 in place because of the writ, and the petition for a rehearing
16 has since been denied, so there's no more reason for a stay and
17 the stay should be lifted on June 19th, as early as tomorrow.

18 MR. WIRTHLIN: Hello?

19 THE COURT: Okay. So --

20 MR. WIRTHLIN: Hello, Your Honor.

21 THE COURT: Who -- who is speaking, please?

22 MR. WIRTHLIN: I apologize. This is Brenoch Wirthlin.
23 I have been on the phone for about half an hour, but,
24 unfortunately, my phone wasn't working and I didn't realize that
25 until Your Honor asked for appearances, so I apologize. I have

1 called in through my cell phone.

2 THE COURT: Good enough. I did begin the hearing.
3 Did you hear any part of it before you called in?

4 MR. WIRTHLIN: Yes. Yes, I did, Your Honor. I heard
5 everything. We could hear fine, but I did just get my phone
6 replaced this week and, unfortunately, it appears it's not
7 working so I had to call in through my cell phone. I apologize.

8 THE COURT: That's fine. All right. So Ms. Ochoa
9 argues that the stay should be lifted effective tomorrow.

10 Is that correct, Ms. Ochoa?

11 MS. OCHOA: That's correct.

12 THE COURT: All right. And do you have a response to
13 that, Mr. Wirthlin?

14 MR. WIRTHLIN: Yes, I do, Your Honor. We would have
15 an objection to that for a couple of reasons. I did not see any
16 response to our most recent supplement, which addressed this
17 Court's Administrative Order 20-17, which I think I would submit
18 that the request by opposing counsel violates the provision in
19 AO 20-17 regarding unwarranted -- seeking unwarranted tactical
20 advantages on recently denied continuances.

21 I do think that there is -- there are two stays at
22 issue here. There is the stay that was imposed originally
23 because of the repetition, and that has been decided by the
24 Supreme Court, but there is also the stay that is imposed under
25 this Court's order 20 -- AO 20-17, which is lifted July 1st, and

1 that relates to all discovery matters and a continuance of any
2 case.

3 In the event the Court were to determine that that
4 stay was not in place, we would submit, Your Honor, under page
5 18 of AO 20-17 that this Court has determined, along with the
6 Nevada Supreme Court, that COVID-19 does constitute good cause
7 and excusable neglect warranting the extension of time.

8 In addition, on page 17 of that same order, the Court
9 confirms that Rule 41(e) is still tolled, so there is no concern
10 about the five-year rule as that rule is still stayed. We would
11 submit that a 12-day extension -- we would submit that the AO
12 20-17 tolls those deadlines until July 1st, including
13 disclosures of experts, as well as our motion to amend. In the
14 alternative, we would submit that a stay until that day, which
15 is, I believe, 11 days away, is warranted.

16 THE COURT: Thank you.

17 Mr. Ogilvie and Ms. Ochoa, your response, please?

18 MS. OCHOA: George, did you want to go or should I go?

19 MR. OGILVIE: Yeah. No, I -- Your Honor, if I could
20 be heard. This is George Ogilvie. I would -- the Uni-Ter and U
21 S Re defendants would agree with Ms. Ochoa. I don't know any
22 reason for the stay not to be lifted, but we're only talking
23 about two weeks difference between lifting it tomorrow and it
24 being lifted effective July 1.

25 I disagree with Mr. Wirthlin's interpretation of AO

1 20-17 to the extent that he's arguing that the stay cannot be
2 lifted until July 1. As he recognizes, Rule 41 is -- continues
3 to be tolled, and certain discovery is tolled under AO 20-17.

4 I don't -- the problem here, Your Honor, is the case
5 is kind of stuck right now until the receiver does two things.
6 One, files its motion for leave to amend because the receiver's
7 recent filings indicate that, in fact, the receiver will be
8 seeking to amend its complaint to file a third amended complaint
9 to assert additional allegations to support its causes of action
10 against the director defendants.

11 Until that's done, the case is kind of stuck in the
12 water. We can't move forward with additional scheduling orders
13 because we don't know what this case is going to look like on
14 the other side of the either granting or denying of that motion
15 for leave to amend. We don't even know what that -- that new
16 pleading is going to look like.

17 So my concern is that until -- until the -- until we
18 have final operative pleadings, we don't know how to proceed
19 with this case other than to conduct some discovery that was --
20 that's going to be needed no matter what. But in terms of
21 scheduling deadlines and a trial date, we are -- we're at a
22 standstill until we see what the case actually shapes up to be.

23 So for that reason, I would ask that the Court lift
24 the stay now so we can move forward with getting the pleadings
25 in order, and then we -- and then what I would ask, Your Honor,

1 is after -- after we see what the pleadings are going to look
2 like, then the parties get together and -- and collaborate on a
3 revised scheduling order to be submitted to the Court, and then
4 the Court set a new -- another status conference as soon as
5 possible to discuss a trial date and a new scheduling order.
6 Again, so I would ask that none of that be delayed.

7 And the -- as everyone knows, there's not only the
8 obligation by the receiver to file its motion for leave to
9 amend, but also to serve the receiver's initial expert
10 disclosures. I don't -- I don't agree with the receiver's
11 counsel that there's any tactical advantage being sought here by
12 lifting the stay now because the receiver has had, I don't know,
13 what is it, 15 months now since the case was stayed to do two
14 things. One, to start preparing its amended pleading, and to
15 prepare its initial disclosure.

16 So the receiver has known, again, for 15 months that
17 they were due -- those initial disclosures were going to be due
18 a day after the stay was lifted. They were going to be due. In
19 fact, they probably should have been prepared already, and I'm
20 sure they were because they were going to be due in a day or two
21 days from the day that the stay was imposed.

22 But for the imposition of the stay, we would have had
23 the -- the receiver's initial disclosures in March of 2019. So
24 there shouldn't be any prejudice to the receiver by lifting of
25 the stay and requiring the receiver to move the case forward.

1 Again, though, it's a matter of, I guess, 12 days, not 13 days,
2 12 days between now and what the receiver is requesting.

3 So Uni-Ter and U S Re defendants are not adamant about
4 this, I just don't know why we would continue to delay,
5 particularly getting the -- the amended pleading either granted
6 or denied so we know what this case shapes up to be.

7 THE COURT: Thank you.

8 Ms. Ochoa, do you have anything to add?

9 MS. OCHOA: No, I agree with what Mr. Ogilvie has
10 stated. You know, it's not a tactical advantage to disagree
11 with the reading of AO 20-17. We're setting forth our position,
12 and it's not done in bad faith.

13 THE COURT: Thank you.

14 And, Mr. Wirthlin, a brief reply.

15 MR. WIRTHLIN: Yes, Your Honor, very briefly. I think
16 the tactical advantage here, frankly, is that we filed our
17 second supplement over a week ago. I've been in communication
18 with opposing counsel, both, and have not received any
19 indication from them that they had any objection or disagreement
20 whatsoever with the July 1st date. That would prejudice the
21 receiver.

22 I think that one thing that is not referenced is that
23 due to the Supreme Court's decision on the director's writ
24 petition, the receiver has had to change the case, effectively
25 dramatically when it comes to the directors. The language on

1 [indiscernible] which was relied on, as the Court well knows,
2 was disavowed by the Supreme Court after several years of
3 litigation on that basis.

4 So that being said, Your Honor, we would submit that
5 even if the Court found that there was a stay that should be
6 lifted at this time, we would submit that and request, and would
7 have put it into any kind of reply had we received an
8 opposition, an 11-day extension. I believe it's only 11 days
9 until July 1st pursuant to this Court's AO -- Administrative
10 Order 20-17. Thank you, Your Honor.

11 THE COURT: Thank you all. This is the Commissioner's
12 motion for clarification. I'm going to grant the motion and
13 lift the stay as of July 1 for this simple reason, we are at
14 this point only required to do essential hearings as to finding
15 the administrative order.

16 Beginning in June I've started to hold hearings simply
17 because in the business court cases particularly, the parties
18 need more certainty. And so I've found it -- and just at least
19 to move the docket forward it's beneficial for everyone. So
20 this isn't a hearing that I would have necessarily even had to
21 have heard. I chose to give the parties more certainty. So for
22 that sole reason, I will grant the motion for clarification and
23 lift the stay as of July 1st.

24 There are -- there is no -- I don't believe the
25 defendants are asking for any type of tactical advantage. They

1 want to move the case forward, as well, but there are challenges
2 to all of the parties at this point in securing witnesses,
3 there's inability to travel, some people are not working or
4 working from home and not as efficient. And so I think to be
5 fair to both sides, July 1st needs to be the date.

6 So Mr. Withlin to prepare the order. If Mr. Ogilvie
7 and Ms. Ochoa wish to sign off, please so indicate.

8 MR. OGILVIE: Yes, Your Honor, on behalf of -- this is
9 George Oglivie. Yes.

10 MS. OCHOA: I'll review it, as well. Thank you, Your
11 Honor.

12 THE COURT: Very good. So present an order that's
13 agreed as to form. No competing orders. If you have an issue
14 with the language, let me know. I'll either sign, interlineate,
15 or conduct a telephonic. Thank you all for your appearance.
16 Stay safe, stay healthy.

17 MR. WIRTHLIN: Thank you, Your Honor. You, as well.

18 MS. OCHOA: Thank you.

19 (Proceedings concluded at 10:14 a.m.)

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CERTIFICATION

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

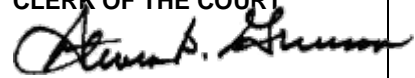
AFFIRMATION

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

**Julie Potter
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JULIE POTTER
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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.: XXVII

NOTICE OF ENTRY OF ORDER

Please take notice that an Order Granting Plaintiff's Motion for Clarification on Order
Shortening Time was entered on the 29th day of June, 2020,

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a copy of which is attached hereto.

DATED this 30th day of June, 2020.

HUTCHISON & STEFFEN

By /s/Brenoch Wirthlin
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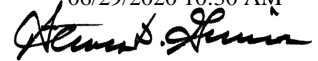
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 30th day of June, 2020, I caused the document entitled **NOTICE OF ENTRY OF ORDER** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

/s/Danielle Kelley
An Employee of Hutchison & Steffen, PLLC



CLERK OF THE COURT

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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.: XXVII

**ORDER GRANTING PLAINTIFF'S
MOTION FOR CLARIFICATION ON
ORDER SHORTENING TIME**

This matter having come before the Honorable Nancy Allf for hearing on June 18, 2020 ("Hearing"), on Plaintiff's Motion for Clarification on Order Shortening Time ("Motion") filed herein on April 6, 2020; Angela T. Nakamura Ochoa, Esq., having appeared on behalf of

1 Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara
2 Lumpkin, Jeff Marshall, and Eric Stickels (collectively the “Director Defendants”); George F.
3 Ogilvie III, Esq. having appeared on behalf of Defendants Uni-Ter Underwriting Management
4 Corp., Uni-Ter Claims Services Corp., and U.S. Re Corporation (collectively the “Uni-Ter
5 Defendants”); Brenoch Wirthlin, Esq., having appeared on behalf of Plaintiff Commissioner of
6 Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group
7 (“Plaintiff”); the Director Defendants having filed a limited opposition (“Directors’ Limited
8 Opposition”) to the Motion on April 8, 2020; the Uni-Ter Defendants having filed a limited
9 opposition (“Uni-Ter Defendants’ Limited Opposition”) to the Motion on April 9, 2020; the
10 Plaintiff having filed its reply (“Reply”) in support of the Motion on April 10, 2020, the Plaintiff
11 having filed a supplemental brief to the Motion (“First Supplement”) on May 13, 2020, and the
12 Plaintiff having filed a second supplemental brief to the Motion (“Second Supplement”) on June
13 10, 2020; the Court having read and considered the Motion, the Directors’ Limited Opposition, the
14 Uni-Ter Defendants’ Limited Opposition, the Reply, the Plaintiff’s First Supplement, and the
15 Plaintiff’s Second Supplement, as well as having heard and considered the arguments of counsel at
16 the Hearing on the Motion, and good cause appearing, the Court hereby orders as follows:

17 IT IS ORDERED that Plaintiff’s Motion for Clarification on Order Shortening Time is
18 GRANTED.

19 IT IS FURTHER ORDERED that the stay previously imposed in this case on March 14,
20 2019 (“Stay”), shall remain in full force and effect until July 1, 2020, at which time the Stay shall
21 be lifted. Pursuant to the operative scheduling order in place at the time of the imposition of the
22 Stay, once the Stay is lifted the parties shall have to and including July 2, 2020, in order to move

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Commissioner of Insurance for the State of Nevada v. Chur, et al.
Case No. A-14-711535-C

to amend pleadings or add parties, and for the Plaintiff to make its initial expert disclosures.

DATED this _____ day of _____, 2020.
Dated this 29th day of June, 2020

Nancy L Alf
DISTRICT COURT JUDGE JD

529 ADA 5EFA 2204
Nancy Alf

Respectfully submitted by:

Dated this 29th day of June, 2020.

HUTCHISON & STEFFEN

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Attorneys for Plaintiff

Approved as to form and content by:

Dated this 29th day of June, 2020.

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Attorney Uni-Ter Defendants

Approved as to form and content:

Dated this 29th day of June, 2020.

LIPSON NEILSON

/s/Angela Nakamura Ochoa
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Sent: Saturday, June 27, 2020 7:28 PM
To: Angela Ochoa; Brenoch R. Wirthlin
Cc: Jon Linder; Christian M. Orme; Stuart J. Taylor; Jon.Wilson@nelsonmullins.com; Danielle Kelley; Daniel Maul
Subject: RE: Lewis and Clark v. Chur, et al.

Mine as well

George F. Ogilvie III | Partner

McDONALD CARANO

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From: Angela Ochoa [mailto:AOchoa@lipsonneilson.com]
Sent: Friday, June 26, 2020 2:09 PM
To: Brenoch R. Wirthlin <bworthlin@hutchlegal.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Cc: Jon Linder <jlinder@hutchlegal.com>; Christian M. Orme <COrme@hutchlegal.com>; Stuart J. Taylor <staylor@hutchlegal.com>; Jon.Wilson@nelsonmullins.com; Danielle Kelley <dkelley@hutchlegal.com>; Daniel Maul <dmaul@hutchlegal.com>
Subject: RE: Lewis and Clark v. Chur, et al.

You have my authority to use my electronic signature on this draft.
Angela

From: Brenoch R. Wirthlin <bworthlin@hutchlegal.com>
Sent: Friday, June 26, 2020 2:06 PM
To: Angela Ochoa <AOchoa@lipsonneilson.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Cc: Jon Linder <jlinder@hutchlegal.com>; Christian M. Orme <COrme@hutchlegal.com>; Stuart J. Taylor <staylor@hutchlegal.com>; Jon.Wilson@nelsonmullins.com; Danielle Kelley <dkelley@hutchlegal.com>; Daniel Maul <dmaul@hutchlegal.com>
Subject: RE: Lewis and Clark v. Chur, et al.

Please see the attached revised order. Please send a confirming email that we can attach your electronic signature and submit to the Court.

PA002978

1 **CSERV**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5
6 Commissioner of Insurance for
7 the State of Nevada as Receiver
8 of Lewis and Clark, Plaintiff(s)

CASE NO: A-14-711535-C

DEPT. NO. Department 27

9 vs.

10 Robert Chur, Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order Granting was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 6/29/2020

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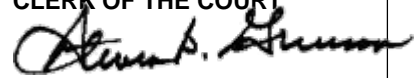
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DISTRICT COURT
CLARK COUNTY, NEVADA

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.: XXVII

**MOTION FOR LEAVE TO FILE FOURTH
AMENDED COMPLAINT**

(Hearing Requested)

Hearing Date: July 16, 2020

Hearing Time: 11:00 a.m.

Plaintiff, COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS
RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP (the "Plaintiff")¹, by

¹ Lewis and Clark LTC Risk Retention Group, Inc. shall be referred to herein as "L&C" or the "Company."

1 and through its attorneys, the law firm of Hutchison & Steffen, hereby submits the following
2 Motion for Leave to File Fourth Amended Complaint. Plaintiff's Proposed Fourth Amended
3 Complaint ("FAC") is attached hereto as required by EDCR 2.30.

4 This Motion is based on NRCP Rule 15(a)(2), the papers and pleadings on file herein, and
5 the Memorandum of Points and Authorities which follows, all of which demonstrate that Plaintiff
6 is entitled to an order granting leave to file the FAC.

7 DATED: July 2, 2020

8 **HUTCHISON & STEFFEN**
By /s/ Brenoch Wirthlin, Esq.
9 MARK A. HUTCHISON, ESQ.
Nevada Bar No. 4639
10 PATRICIA LEE, ESQ.
Nevada Bar No. 8287
11 BRENOCH R. WIRTHLIN, ESQ.
Nevada Bar No. 10282
12 CHRISTIAN ORME, ESQ.
13 *Attorneys for Plaintiff*

14 **NOTICE OF HEARING ON MOTION**

15 TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL:

16 PLEASE TAKE NOTICE the undersigned will bring the foregoing **MOTION FOR**
17 **LEAVE TO FILE FOURTH AMENDED COMPLAINT** for hearing before the above-entitled
18 Court on the 16th day of July, 2020, at the hour of 11:00 a.m., in Department XXVII, or as soon
19 thereafter as counsel can be heard.
20

21 DATED: July 2, 2020.

22 **HUTCHISON & STEFFEN**
By /s/ Brenoch Wirthlin, Esq.
23 MARK A. HUTCHISON, ESQ.
Nevada Bar No. 4639
24 PATRICIA LEE, ESQ.
Nevada Bar No. 8287
25 BRENOCH R. WIRTHLIN, ESQ.
Nevada Bar No. 10282
26 CHRISTIAN ORME, ESQ.
Nevada Bar No. 10175
27 *Attorneys for Plaintiff*
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF RELIEF REQUESTED**

3 As the Court is aware, in the Supreme Court of Nevada's ("NSC") opinion ("Opinion")²
4 issued February 27, 2020, the NSC disavowed its prior holding in *Shoen v. SAC Holding Corp.*,
5 122 Nev. 621, 137 P.3d 1171 (2006) holding that the "business judgment rule does not protect the
6 gross negligence of uninformed directors and officers." See Opinion at 2. The Third Amended
7 Complaint ("TAC") on file in this matter alleged claims for gross negligence and deepening the
8 insolvency against the Director Defendants³ based upon the language of the *Shoen* decision. In the
9 Opinion, the NSC held that "NRS 78.138(7) requires a two-step analysis to impose individual
10 liability on a director or officer. First, the presumptions of the business judgment rule, codified in
11 NRS 78.138, must be rebutted. ... Second, the 'director's or officer's act or failure to act' must
12 constitute 'a breach of his or her *fiduciary duties*,' and that breach must further involve "intentional
13 misconduct, fraud or a knowing violation of the law." *Id.* at 7. The FAC sets forth in detail the
14 required two-step analysis to impose individual liability on the Director Defendants.

15 **A. Reinsurance**

16 The Director Defendants utilized an unlicensed reinsurance broker, defendant U.S. RE
17 Corporation ("U.S. RE"), in violation of Nevada law. The Nevada Department of Insurance
18 ("DOI") brought this to the attention of the Board, even going so far as to provide the statutory text
19 to the Board that requires a reinsurance broker to be licensed. The Board continued to violate
20 Nevada law by using an unlicensed reinsurance broker to the severe detriment of the Company.

21 **B. Failure to amend business plans and unlawfully underwriting Country Villa**

22 The Director Defendants' acts and failures to act resulted in the underwriting of a facility
23 known as "Country Villa" which the Director Defendants knew was a violation of the underwriting
24 _____

25 ² 136 Nev. Adv. Op. 7 (2020).

26 ³ The terms "Director Defendants" or "Board" as used herein collectively refer to defendants Robert Chur ("Chur"),
27 Steve Fogg ("Fogg"), Mark Garber ("Garber"), Carol Harter ("Harter"), Robert Hurlbut ("Hurlbut"), Barbara Lumpkin
28 ("Lumpkin"), Jeff Marshall ("Marshall"), and Eric Stickels ("Stickels"). The terms are intended to refer to each Board
member during the time he or she was a member of the Company's Board or a director thereof. Defendants Uni-Ter
Claims Underwriting management Corp. ("Uni-Ter UMC") and Uni-Ter Claims Services Corp. ("Uni-Ter CS") will
collectively be referred to herein as the "Uni-Ter Defendants" or "Uni-Ter". Defendant U.S. RE Corporation will be
referred to as "U.S. RE".

1 guidelines of the Company, constituting intentional misconduct. Further, the underwriting of
2 Country Villa violated Nevada law – of which the Director Defendants were aware – which
3 required the Board to obtain approval of the Nevada Division of Insurance (“DOI”) regarding any
4 material change to its business plan.

5 **C. Operating L&C while knowing it was in a hazardous financial condition,**
6 **impaired, and/or insolvent in violation of Nevada and Florida law.**

7 The Director Defendants knowingly and intentionally violated Nevada and other law,
8 including Florida law, by operating L&C when it was in a hazardous financial condition, including
9 even after they were informed that the Company’s reserves were deficient in excess of \$5,000,000.
10 In doing so, the Director Defendants relied on information provided by its manager, including a
11 year-end pro forma, even after the Director Defendants were specifically warned by the manager
12 that this information was unreliable.

13 **D. Good cause exists to include Tal Piccione (“Piccione”) as a defendant.**

14 As set forth below and more fully in the FAC, Piccione was instrumental in aiding and
15 abetting the breaches of fiduciary duty committed by the Uni-Ter Defendants and U.S. RE.
16 Plaintiff respectfully submits that this Court should allow Mr. Piccione to be substituted in as a
17 Defendant (in place of a DOE Defendant) as authorized by NRCP 10(d), 20(a)(2) and 21.

18 **II. STATEMENT OF FACTS⁴**

19 **A. The Director Defendants⁵ breached their fiduciary duties to L&C with respect**
20 **to reinsurance, and such breaches involved intentional misconduct and**
21 **knowing violations of the law by the Director Defendants.**

22 **1. The Board breached its fiduciary duties to L&C by knowingly utilizing**
23 **an unlicensed reinsurance broker in direct violation of Nevada law.**

24 On December 22, 2003, the Company entered into that certain Broker of Record Letter
25 Agreement with defendant U.S. RE (“U.S. RE Agreement”). A copy of the U.S. RE Agreement is
26 attached hereto as **Exhibit 1**. Pursuant to the terms of the U.S. RE Agreement, U.S. RE was to act

27 ⁴ Due to space limitation, only some of the most severe breaches of fiduciary duty by the Board are discussed herein.
However, Plaintiff incorporates the proposed FAC in its entirety by reference.

28 ⁵ Because the Opinion relates only to claims against the Board, and not the remaining defendants, the instant Motion
focuses on the claims against the Board.

1 as the Company's "exclusive reinsurance intermediary/broker" that U.S. RE's obligations would
2 be "in a fiduciary capacity," and that U.S. RE would "comply with applicable State Insurance
3 Laws" and with "the provisions of the State Insurance Codes, Rules and Regulations governing
4 reinsurance intermediaries/brokers ...," confirming the Board's knowledge of the same. *Id.*
5 Accordingly, a fiduciary relationship existed between the Company and U.S. RE.

6 Nevada Revised Statute ("NRS") 681A.480 provides in relevant part that "[a]n insurer shall
7 not engage the services of any person to act as a broker for reinsurance on its behalf unless the
8 person is licensed pursuant to NRS 681A.430." Nev. Rev. Stat. Ann. § 681A.480 (West). Further,
9 NRS 681A.430 provides in relevant part that "[t]he Commissioner may issue a license to act as an
10 intermediary to any person who has complied with the requirements of NRS 681A.250 to
11 681A.580, inclusive, and who submits a written application for a license to act as an intermediary,
12 the appropriate fee set forth in NRS 680B.010 and, in addition to any other fee or charge, all
13 applicable fees required pursuant to NRS 680C.110." *See* NRS 681A.430 (West).

14 As authorized by these sections, Nevada Administrative Code ("NAC") section 694C.300
15 provides as follows:

16 **A person shall not act as a manager, a broker or an agent in this State for a**
17 **captive insurer without authorization of the Commissioner.** An application for
18 authorization to act as a manager, a broker or an agent must be made to the
Commissioner on a form prescribed by the Commissioner.

19 *See* Nev. Admin. Code 694C.300.

20 At no time did U.S. RE obtain a license as required by NRS 681A.480 or NAC 694C.300
21 to act as a reinsurance broker for L&C in Nevada. Despite having no license to act as a
22 reinsurance broker in Nevada for L&C, U.S. RE brokered reinsurance for L&C in each year from
23 2004 to 2012 (collectively the "Reinsurance Treaties"). The Director Defendants were aware of
24 the requirement that U.S. RE be licensed in Nevada, and were aware that U.S. RE was never
25 licensed in Nevada as required by NRS 681A.480 or NAC 694C.300.

26 Further, while the Board knew beginning in 2004 that U.S. RE was operating without the
27 required license in brokering the Reinsurance Treaties, the Nevada DOI discovered the unlawful
28 activity engaged in by the Defendants, including the Board, as a result of its investigation during

1 the DOI's 2008 Triennial Examination ("2008 Exam") of L&C. On or around April 8, 2010, the
2 DOI sent a letter via certified mail to the Board ("April 2010 Letter") enclosing the report of the
3 2008 Exam ("2008 Exam Report"). See **Exhibit 2**. The 2008 Exam Report found that the Board
4 was in violation of Nevada law in several respects:

5
6 1. **Pursuant to NAC 694C.300, "A person shall not act as a manager, a**
7 **broker or an agent in this State for a captive insurer without authorization of**
8 **the Commissioner."** The Nevada Division of Insurance ("Division") requires all
9 reinsurance intermediaries negotiating and/or placing reinsurance of behalf of a
company, to be licensed as such in Nevada. It is recommended the Company
require U.S. RE to become licensed in Nevada prior to it negotiating and/or placing
reinsurance on its behalf.

10 *Id.* at p. 9, Bates No. JLLCSEPTURL003018.12.

11 In response, on April 26, 2010, the Board confirmed that it had received and reviewed the
12 2008 Exam Report and was aware of the violations of Nevada law that all Defendants, including
13 the Board, had committed. The Board further acknowledged the violations of law committed by
14 all Defendants by noting that it had "requested that U.S. RE become licensed as a reinsurance
15 intermediary in Nevada and they [U.S. RE] have filed the application to do so." See **Exhibit 3**.
16 U.S. RE's application was never approved by the DOI.

17 However, U.S. RE's application was never approved, and the Board was again made aware
18 of its numerous violations of Nevada law by the DOI. On December 29, 2010, the DOI sent the
19 final Order and Report of Examination regarding the 2008 Exam ("2008 Exam Order") to Jeff
20 Marshall, President of the Board, via certified mail. See **Exhibit 4**. The 2008 Exam Order
21 reiterated the finding that U.S. RE was still not licensed as a reinsurance broker as required under
22 Nevada law. *Id.*

23 Finally, as part of the Financial Examination of L&C as of December 31, 2011 ("2011
24 Exam"), on July 13, 2012, the investigator for the DOI, Carolyn Maynard ("Maynard" or "DOI
25 Examiner") requested that she be provided U.S. RE's broker license with the state of Nevada. See
26 **Exhibit 5**. U.S. RE had never been licensed as a reinsurance broker for L&C, and could therefore
27 not produce a license at the request of the DOI Examiner.

1 In response, in a memorandum dated September 25, 2012 (“September 25, 2012 Memo”),
2 the DOI Examiner found that with respect to L&C, U.S. RE “has no license or specific authority to
3 do business in the State of Nevada.” See **Exhibit 6**. The DOI Examiner further found:

4 **This is an unresolved compliance issue from the prior 2008 examination**
5 **management letter.** At that time the Company assured the NVDOI that the
6 reinsurance broker was in the process of procuring a license to do business in
7 Nevada. **As of our 2011 examination, no license or specific authorization was**
8 **obtained by the reinsurance broker USRE from the State of Nevada.**

9 *Id.* The DOI Examiner concluded that the Company was in violation of Nevada law “by
10 contracting with an unlicensed reinsurance broker.” *Id.*

11 The Defendants’ multiple and knowing violations of Nevada law with respect to
12 reinsurance were not inconsequential. In fact, U.S. RE itself pointed out that L&C had sustained
13 massive losses due to the extremely unfavorable Reinsurance Treaties brokered by U.S. RE. In an
14 email dated May 9, 2011, John Klaus of U.S. RE, boasted to the reinsurers for whom it had
15 illegally brokered various treaties on behalf of L&C, that the treaties it had brokered had resulted
16 in a net gain to L&C’s reinsurers – and a net loss to L&C – of over \$8,000,000:

- 17 3. Since Lewis and Clark’s inception, there have been 2 losses that exceeded
18 their current \$350,000 retention. However, because of the aggregate
19 deductible component, no losses have been paid by reinsurers. (page 38
20 provides an “as if” exhibit displaying treaty experience for 2004-2010 using
21 current terms.).
- 22 4. **Based on current valuations, reinsurers total positive balance for all**
23 **treaties is over \$8,000,000** (pages 33 & 34).

24 See **Exhibit 7** (first emphasis in original; second emphasis added).

25 U.S. RE’s point to the reinsurers was clear: U.S. RE was brokering deals that were
26 detrimental to L&C to the tune of an \$8,000,000 loss. This, of course, benefitted U.S. RE as they
27 obtained a commission on all unlawfully brokered Reinsurance Treaties. The Board’s acts and
28 failures to act in their capacity as directors and officers with respect to reinsurance constitute a
breach of their fiduciary duties, and involved knowing violations of the law and intentional
misconduct by the Board.

1 **2. The Board’s acts and failures to act in their capacity as directors and**
2 **officers with respect to reinsurance are not protected by the BJR.⁶**

3 The Board’s acts and failures to act in their capacity as directors and officers described
4 above were not protected by the BJR, as they failed to act in good faith, on an informed basis, and
5 with a view the interests of L&C. As a preliminary matter, Nevada Jury Instruction (“NJI”) 15.16
6 provides that a board member is entitled to rely on another professional only if “[t]hose
7 professionals were properly licensed” which U.S. RE never was, and the Board knew that. *See* NJI
8 15.16. This alone renders the Board’s reliance on U.S. RE improper and not protected under
9 Nevada’s BJR contained in NRS 78.138 which provides that “a director or officer is **not entitled**
10 **to rely** on such information, opinions, reports, books of account or statements **if the director or**
11 **officer has knowledge concerning the matter in question that would cause reliance thereon to**
12 **be unwarranted.**” Nev. Rev. Stat. Ann. § 78.138 (West)

13 Further, the Board’s knowledge of its wrongful behavior is manifested by, among other
14 things, the fact that the Director Defendants knew, from the inception of their time on the Board,
15 that there were inherent conflicts of interest (“Conflicts of Interest”) between the remaining
16 defendants. As an example, in an offering memorandum prepared in 2003 (“2003 Offering
17 Memorandum”) and which the Board members reviewed (and which was contained in subsequent
18 offering memoranda), stated specifically that there were “various conflicts of interest” arising out
19 of the Company’s relationship with Uni-Ter and U.S. RE which made reliance on Uni-Ter or U.S.
20 RE unwarranted (“Conflicts of Interest”). These include the following from a section of the 2003
21 Offering Memorandum entitled “Conflicts of Interest”:

22 **Uni-Ter and U.S. RE as Affiliates**

23 Although the Company is relying on Uni-Ter for administrative and underwriting
24 services, U.S. RE, the parent of Uni-Ter, will be engaged by the Company as
25 reinsurance broker and consultant for a seven year period (with an additional seven
26 year renewal option). U.S. RE also owns a minority beneficial interest in a

27 ⁶ Further, the Director Defendants cannot invoke the BJR where they did not consider a particular issue. *In re Amerco*
28 *Derivative Litig.*, 127 Nev. 196, 222, 252 P.3d 681, 700 (2011) (“However, the business judgment rule cannot be
invoked by directors, where, as alleged here, they were not asked to consider the issue...”).

1 wholesale agency that may produce insurance business for the Company on a
2 nonexclusive basis. **Given the interlocking directorates, management, and**
3 **ownership of each of these related entities, there will be on-going conflicts of**
4 **interests between the management of these entities. For example, the**
5 **interlocking management creates risk that Uni-Ter will not review the**
6 **activities of its affiliates providing services to the Company as diligently as it**
7 **might review the activities of an independent third party.**

8 LC-USRE-00000719 (emphasis added).

9 Moreover, while depositions remain to be taken, it is clear from the deposition testimony so
10 far that the Board members knew they were not capable of determining whether the reinsurance
11 unlawfully brokered for the Company was even beneficial.⁷ Accordingly, the Board's acts and
12 failures to act in approving, ratifying and failing to act to prevent the unlawful brokering of the
13 Reinsurance Treaties by U.S. RE and Uni-Ter, are not protected by the BJR as the Board was not
14 informed about the Reinsurance Treaties to the extent they could have reasonably believed to be
15 appropriate, and did not reasonably believe them to be in the best interests of the Company.

16 **B. The Director Defendants breached their fiduciary duties to L&C with respect**
17 **to their failure to amend the Company's business plans as required by Nevada.**

18 **1. The Board was aware that under Nevada law it was required to amend**
19 **its business plan annually, as well as any time it sought to diverge from**
20 **its business plan.**

21 NRS 694C.240 provides as follows:

22 A captive insurer shall include its business plan with its application for the issuance
23 and renewal of a license. **If the captive insurer makes any changes to the**
24 **business plan, the captive insurer shall, as soon as practicable, file a copy of the**
25 **updated business plan with the Commissioner.**

26 Nev. Rev. Stat. Ann. § 694C.240 (West). In addition, NRS 694C.230 provides for annual renewal
27 of a captive insurer's business plan.

28 ⁷ By way of example, both Mr. Fogg and Mr. Hurlbut testified to not knowing or having ever heard of facultative reinsurance. In fact, Mr. Hurlbut even indicated that reinsurance was over his head and he does not know if reinsurance is always necessary for a company. See Steve Fogg Deposition ("Fogg Deposition"), attached as **Exhibit 8**, at pg. 106, lines 20-25; see also Robert Hurlbut Deposition ("Hurlbut Deposition"), attached as **Exhibit 9**, at pg. 99, lines 22-24, pg. 151, lines 21-23 and pg. 153, lines 5-15.

1 On March 14, 2007, in the triennial examination for the years of 2003-2005, the Board was
2 expressly warned of its violations of NRS 694C.240, specifically for failure to file amended
3 business plans when material changes were made to L&C's activities. Despite this clear and
4 unequivocal warning of the Board's violations, it failed to file an updated business plan to inform
5 the DOI regarding the material changes to its business model and plan, including but not limited to
6 when it agreed to bind and insure Country Villa in 2009 and then renewed in 2010. The Board
7 was again warned in 2010 by the DOI of its violations of NRS 694C.240 for failure to submit
8 amended business plans on an annual basis with its renewal. On April 26, 2010, the Board
9 specifically acknowledged such violations. See Exhibits 3-4, Bates no. LC000085-104 and
10 LC0263052-54.

11 At all relevant times, the Board, as well as the remaining Defendants, were aware of these
12 requirements. It bears noting that under Nevada law, it is well established that "[e]very one is
13 presumed to know the law and this presumption is not even rebuttable." *Smith v. State*, 38 Nev.
14 477, 151 P. 512, 513 (1915).⁸ In addition, the Board's specific knowledge of these laws is
15 evidenced by, without limitation, the fact that L&C submitted its business plan in 2003 as part of
16 its captive insurance application to the Nevada Department of Insurance for issuance of a license
17 as a Nevada captive insurer ("2003 Business Plan"). The 2003 Business Plan limited L&C to
18 providing maximum policy limits of \$500,000 per claim and \$1,000,000 aggregate without
19 reinsurance, or \$1,000,000 per claim and \$3,000,000 aggregates should L&C maintain reinsurance.

20 Further, section 7 of the 2003 Business Plan, entitled Underwriting Guidelines
21 ("Underwriting Guidelines") – of which all Director Defendants were aware – again stated that
22 L&C would limit its risk by maintaining a maximum policy limit of \$500,000 per claim, and added
23 the additional limitation that "[a]ll policies issued by L&C will have a terms no greater than 12
24 months" and that "[i]nsureds that manage, own or control more than (15) locations are unique
25 because of their higher propensity for loss." Moreover, in 2007, when all Director Defendants
26 except Lumpkin were members of the Board, the Board was expressly advised by the DOI of the
27

28 ⁸ See also *Nationstar Mortg., LLC v. BDJ Required Contributions, LLC*, 452 P.3d 410 (Nev. 2019) (Unpublished).

1 requirements to file business plans in accordance with NRS 694C.240. Lumpkin was also aware
2 of this requirement upon her membership in 2009.

3 Specifically, on March 14, 2007, following the examination of L&C performed by the
4 Nevada DOI for the years of December 31, 2003 to December 31, 2005, the Board's knowledge of
5 its wrongful and unlawful actions in failing to update its business plan as required was confirmed
6 by the DOI pertaining to NRS 694C.240, and the Board was ordered to provide an amended
7 business plan to the Commissioner. The Board's continued knowing violations of Nevada law
8 were again confirmed to the Board in 2010 by the DOI, including the Board's violation of NRS
9 694C.240 for its failure to submit amended business plans on an annual basis. On April 26, 2010,
10 the Board specifically acknowledged such violations, as set forth above.

11 **2. The Board allows Country Villa to be underwritten in violation of**
12 **Nevada law.**

13 Further, the Board's violations of its legal obligation to update its business plan and obtain
14 DOI approval of any changes in its business plan included the events in 2009 involving a
15 substantial change of the Company's business, and the Board's failure to inform the DOI through
16 an updated business plan as Nevada law required. In or around July, 2009, L&C accepted two
17 California-based multi-site long-term care operatives, referred to as Country Villa Health Services,
18 Inc. ("Country Villa") and Braswell Family Senior Care ("Braswell" and collectively with Country
19 Villa referred to herein as "California Insureds").

20 This was a divergence from the established business model of L&C, and violated L&C's
21 Underwriting Guidelines, including without limitation because it was the first time L&C chose to
22 insure a large multi-facility operator, with Country Villa operating in excess of the 15 facility
23 limitation pursuant to the Underwriting Guidelines. In addition the California Insureds had
24 historical loss records that were outside of L&C's typical underwriting range and violated L&C's
25 Underwriting Guidelines. Moreover, the agreement with Country Villa contained an aggregate
26 policy limit of \$5,000,000 on five of Country Villa's facilities which exceeded the maximum
27 aggregate policy limit of \$3,000,000 as contained in L&C's business plan.
28

1 In addition, the 2004 Management Agreement required that the Board approve all defense
2 counsel for all claims. Through the agreement with Country Villa the Board violated this
3 requirement and gave Country Villa exclusive authority to appoint defense counsel in violation of
4 the Board's obligations under the 2004 Management Agreement. Despite knowledge of this
5 requirement, and that the Board's decision to allow the underwriting of Country Villa was
6 wrongful and a violation of the Board's obligations to L&C, the Board allowed, and/or failed to act
7 to prevent the underwriting of Country Villa. Despite knowledge of these violations and acts of
8 misconduct, the Board allowed the underwriting of Country Villa in 2009, and its renewal in 2010.
9 The Board failed to ensure the filing of an updated business plan to inform the DOI regarding the
10 changes to its business model and plan the Country Villa entailed as required by Nevada law. The
11 Board's intent was clear: it knew Country Villa was a divergence from the established business
12 model of L&C, and it knew it was an extreme risk. The Board did not want to inform the DOI for
13 fear the DOI would prohibit the underwriting of Country Villa, denying the Board its "get rich
14 quick" scheme that the high premiums of the Country Villa account represented. The Board was
15 aware of the applicable laws concerning updating its business plans and obtaining the approval of
16 the DOI, and wrongfully violated those laws.

17 **3. The Board's allowance of the underwriting of Country Villa is**
18 **not protected by the BJR.**

19 In allowing, or failing to act to prevent, the underwriting of Country Villa, the Director
20 Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the
21 interests of the Company as required by applicable law, including without limitation NRS
22 78.138(3). This is manifest by, without limitation, the Board's failing to obtain proper approval
23 from the DOI regarding the change to the Company's business plan that Country Villa represented
24 in violation of Nevada law, failing to adhere to the Underwriting Guidelines, failing to retain the
25 right to choose defense counsel as required by the 2004 Management Agreement, failing to be
26 informed about Country Villa to the extent they reasonably believed appropriate, and not
27 reasonably believing that underwriting Country Villa was in the best interests of the Company.
28

1 The fact that the Board was not properly informed about Country Villa to the extent they
2 reasonably believed appropriate, and did not reasonably believe the decision to underwrite Country
3 Villa was in the best interests of the Company is evidenced by the testimony of director defendant
4 Hurlbut, who testified that the Board was not “fully briefed” on the issue of insuring Country
5 Villa, and in fact did not even have a say in the decision to insure Country Villa:

6 Q: And were you fully briefed on Country Villa?

7 A: No. It was a done deal. We were told they’re coming in. Sandy
8 brought them in.

9 ...
10 Q: If Mr. Marshall, Dr. Harter, or others said extensive presentations
11 were made to the board, the board considered it, chose to assume the risk or fully
12 briefed, they would be wrong?

13 [Objections]

14 A: It was a done deal.

15 ...
16 Q: You do not recall anybody from UniTer specifically making a
17 presentation to the board in Sonoma, California, to discuss whether or not to bring
18 Country Villa on, fully vetting the number of units it had, its underwriting of that
19 units and the risk?

20 A: There was discussion. What I’m trying to tell you, Counselor, is
21 the fact that it was a done deal. We were told that this is going to happen; it
22 doesn’t really matter.

23 ...

24 Q: Could you have undone it?

25 A: I don’t think so.⁹

26 Further, in allowing, or failing to act to prevent, the underwriting of Country Villa, the
27 Director Defendants relied on Uni-Ter and U.S. RE, among others, including information,
28 opinions, reports, or books of account or statements, including financial statements or other
financial data provided by Uni-Ter and/or U.S. RE and others, despite having knowledge
concerning the matter in question that caused reliance thereon, including without limitation, Uni-
Ter and/or U.S. RE, to be unwarranted. Such knowledge included, without limitation, the

⁹ See Hurlbut Deposition (Exhibit 9), at p.32 lines 4-7, 15-18, 23; p.33 lines 2-10, 23-24.

Conflicts of Interest among Uni-Ter and U.S. RE, the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports. Thus, the actions and/or inaction by all Director Defendants regarding Country Villa are not protected by the BJR, and the BJR is rebutted with respect thereto. The decision and/or approval of the underwriting of Country Villa in 2009, and its renewal in 2010, by the Board constitutes a breach of the Director Defendants' fiduciary duties involving intentional misconduct and knowing violations of the law by said defendants, which the Director Defendants knew was wrongful.

C. The Board operated L&C while in a hazardous financial condition, knowingly violating Nevada law.

1. The Board was aware of applicable Nevada law at all relevant times.

NRS 695E.200 provides in relevant part:

A risk retention group **shall not**:

...

3. Transact insurance or otherwise operate while financially impaired or in a hazardous financial condition;

Nev. Rev. Stat. Ann. § 695E.200 (West). The term "hazardous financial condition" is defined as:

"Hazardous financial condition" means that, based on its **present or reasonably anticipated financial condition**, a risk retention group, although not yet financially impaired or insolvent, is unlikely to be able to:

1. Meet obligations to policyholders with respect to known claims and reasonably anticipated claims; or
2. Pay other obligations in the normal course of business.

Nev. Rev. Stat. Ann. § 695E.050 (West).

At all relevant times the Board was of the meaning of the term "hazardous financial condition," including without limitation having reviewed and executed documents containing this information. The Board was aware of the prohibitions against operating L&C in a hazardous financial condition and/or financially impaired, including without limitation having reviewed and executed documents containing this information. At all relevant times the Board was aware that the minimum statutory capitalization required in Nevada was \$500,000, and such further capitalization as may be required by the DOI, including without limitation having reviewed and

1 approved documents containing this information. This information was contained in multiple
2 documents the Board saw, reviewed and approved, including the 2003 Offering Memorandum.
3 See **Exhibit 10**, at Bates LC-USRE-0000694. At all relevant times the Board was aware that
4 Florida law required that L&C have a minimum positive surplus of \$1,500,000 to operate.

5 Further, the Board's knowledge of the financial condition of L&C is acknowledged by
6 Harter in her deposition in which she admitted that the Board was responsible for approving the
7 Company's financial statements, which was done on a quarterly basis:

8 Q. And who was in charge of setting the reserves?

9 A. In my view, it's staff with the approval of the board. **And the board**
approved the financial statements, so we're all involved in that.

10 See Deposition of Carol Harter ("Harter Deposition"), **Exhibit 11** hereto, at pg. 92, lines 9-12.

11 **2. The Board continues operating L&C in a hazardous financial condition,**
12 **knowingly violating Nevada law.**

13 In mid-year, 2010, the Board, having access to all financial information of the Company,
14 approved the June 30, 2010 financial statement of the Company ("2010 2Q Financials"). A copy
15 of the 2010 2Q Financials is attached hereto as **Exhibit 12**. The 2010 2Q Financials was
16 submitted under oath that it was a "full and true statement of all the assets and liabilities and of the
17 condition and affairs of the said reporting entity." *Id.* at LC000770.

18 The 2010 2Q Financials demonstrated unequivocally that the Company was, at best,
19 operating while in hazardous financial condition within the meaning of NRS 695E.200. The Board
20 was aware of this fact at all relevant times herein, including upon review of the 2010 2Q
21 Financials. The 2010 2Q Financials were submitted to the DOI. The 2010 2Q Financials so
22 clearly demonstrated the Company was, at a minimum, in a hazardous financial condition,
23 impaired and/or insolvent, that very shortly after its receipt by the DOI, on or around September 8,
24 2010, the DOI sent a letter to the Board (*i.e.*, the September 2010 Letter) advising the Board of the
25 dangerous financial position of L&C. See **Exhibit 13**.

26 In the September 2010 Letter, captioned "Lewis & Clark Deteriorating Financial
27 Condition," the DOI sets for the hazardous financial condition in which the Company was
28 operating, based upon the 2010 2Q Financials. The September 2010 Letter ended with an

1 admonition from the DOI that “[b]ecause of the company’s capital decline revealed by the June 30,
2 2010 financial statement, management should commence preparing a corrective action plan and an
3 implementation schedule addressing a means to enhance earnings and surplus, reduce expenses,
4 and improve liquidity.” *Id.*

5 Despite having access to all financial and other information upon which the June 2010
6 Financial Statement was based, and with knowledge that continued operation of the Company in
7 such a condition was wrongful, intentional misconduct, and a violation of law, including Nevada
8 law, the Board failed to comply with their fiduciary duties to correct the substantial problems L&C
9 was facing and instead continued operating L&C in violation of Nevada law including by, without
10 limitation, transacting insurance, renewing accounts and obtaining new business.

11 **3. L&C’s financial condition continues to deteriorate.**

12 Further, Lewis & Clark experienced a net loss during the three quarters ending September
13 30, 2011, of \$3.1 million. In or around mid-year, 2011, the Board (having access to all financial
14 information) approved the June 30, 2011 financial statement of the Company (“2011 2Q
15 Financials”). *See Exhibit 14* hereto. The 2011 2Q Financials were submitted to the DOI. The
16 2011 2Q Financials so clearly demonstrated the Company was, at best, in a hazardous financial
17 condition, impaired and/or insolvent, that very shortly after its receipt by the DOI, on or around
18 September 23, 2011, the DOI sent a letter to Marshall, President of L&C and a member of the
19 Board (*i.e.* the September 2011 Letter) advising the Board of the now extremely dire position of
20 L&C. A copy of the September 2011 Letter is attached hereto as **Exhibit 15**.

21 The September 2011 Letter referenced the September 2010 Letter, noting that the
22 September 2010 Letter had been sent previously to the Board regarding the hazardous financial
23 condition, impairment and/or insolvency of the Company at that time. *Id.* Further, in the
24 September 2011 Letter, the DOI noted several massive financial problems with L&C which the
25 Board had, on information and belief, taken improper or no action to correct. The September 2011
26 Letter noted that the DOI had sent **“a prior letter advis[ing] the Board of Directors of**
27 **deteriorating financial condition and admonish[ing] the Board and management to consider**
28 **a correction plan.**” It also required that “[t]he Board and management must now prepare a short-

1 term (3 month) action plan and based on this action plan how they forecast their 12/31/2011
2 statement to appear.” *Id.*

3 **4. Knowing violations of the law by the Board in continued operation of**
4 **L&C, and continued reliance on Uni-Ter despite knowledge that made**
5 **such reliance unwarranted.**

6 The Board held a meeting on September 21, 2011 (“September 2011 Meeting”). All
7 directors were present at the September 2011 Meeting, with Fogg attending by telephone. Elsass,
8 Dalton and Jonna Miller (“Miller”) attended the September 2011 Meeting in person. The
9 packages Uni-Ter prepared for, and delivered to, each Lewis & Clark Board Member for the
10 September 2011 Meeting (“September 2011 Board Package”), included a report from the
11 consultant, the Praxis Claims Consulting (“Praxis”), dated September 15, 2011. A copy of the
12 September 2011 Board Package is attached hereto as **Exhibit 16**. At the September 2011 Meeting,
13 Brian Stiefel (“Stiefel”), CPCU of Praxis presented the September 15, 2011 report (“September
14 2011 Praxis Report”) to the Lewis & Clark Board of Directors. *Id.* At that time, Elsass of Uni-
15 Ter, reiterated to the Board the dire financial situation of the Company as set forth in the 2011 2Q
16 Financials, and reiterated to the Board in the September 2011 Letter from the DOI.

17 Uni-Ter requested that all entities with representatives on the Lewis & Clark Board of
18 Directors, make additional investments in Lewis & Clark (the “Required Contributions”), totaling
19 approximately \$2.2M, in order to try to meet the minimum financial requirements to be in
20 compliance with Nevada law and to maintain a legally acceptable premium-to-equity ratio. *See*
21 **Exhibit 17** hereto. The Director Defendants knew that at the time, L&C was, at best, continuing to
22 operate in a hazardous financial condition because it needed over two million dollars to even have
23 a chance to “[m]eet its obligations to policyholders with respect to known claims and reasonably
24 anticipated claims.” Moreover, the fact that the Required Contributions were required from
25 several of the Director Defendants confirmed to the entire Board that Uni-Ter had been improperly
26 stating reserves, resulting in inadequate reserves. Yet, the Board continued to rely on information
27 provided by Uni-Ter despite its multiple negligent misrepresentations.

28 ///

1 **5. The Board was aware of continued deterioration of L&C despite the**
2 **Required Contributions.**

3 Despite having made the Required Contributions, immediately after making the Required
4 Contributions, or even before all the Required Contributions were actually made, the Director
5 Defendants received the Company's third quarter 2011 financial statement ("2011 3Q Financials").
6 See **Exhibit 18**. The 2011 3Q Financials showed further financial deterioration of L&C, despite
7 the addition of the Required Contributions. After receipt of the 2011 3Q Financials, the DOI
8 emailed the Company stating the following:

9 Attached are questions and concerns regarding the above. **Despite the addition of**
10 **\$2.15 million in capital, capital still declined 20% in the 3rd Quarter and losses**
11 **continue to increase.**

12 Please respond in writing within 10 business days to the first paragraph of the
13 attached September 23, 2011 letter which was sent as a result of the Qtr 2 2011
14 Financial Statement.

15 See LC-USRE-0819592

16 The Board knew of this additional capital decline demonstrated by the 2011 3Q Financials
17 as it approved the Company's 2011 3Q Financials. The Board knew it was a violation of law to
18 continue operating L&C due to its hazardous financial condition. Further, notwithstanding the
19 reduced scope of the September 2011 Praxis Report and its report to the Board of Directors, on
20 information and belief, Uni-Ter, at U.S. RE's direction, conducted an internal full-scale review of
21 all claims reserves and subsequently engaged Praxis to also conduct a full-scale review. The
22 internal review was initiated based on Uni-Ter's and U.S. RE's concerns about the adequacy of
23 claims reserves raised in the September 15, 2011 Praxis report.

24 U.S. RE required Uni-Ter to retain Praxis to complete its full claims review in or around
25 November, 2011 ("Full Praxis Review") because U.S. RE had doubts about the adequacy of Lewis
26 & Clark's reserves based on the significantly adverse findings of the internal review. The Full
27 Praxis Review showed that, in fact, an additional increase of at least, and possibly in excess of,
28 \$5,000,000 of claims reserves was necessary for the Company to have the minimum reserves
 required to meet obligations to policyholders with respect to known claims and reasonably
 anticipated claims, or to pay other obligations in the normal course of business.

1 On December 20, 2011, the Board met telephonically. At that meeting, Uni-Ter and U.S.
2 RE confirmed to the Board that an addition of at least, and possibly in excess of, \$5,000,000 was
3 necessary to the Company's claims reserves to even have a chance of meeting the minimum
4 regulatory and legal requirements for operating L&C, based on the Full Praxis Review. See
5 **Exhibit 19**, Bates no. LC-USRE-0235589.

6 In fact, Uni-Ter also submitted to the Board the preliminary draft of the actuarial analysis
7 prepared by Richard Lord ("Lord") of Milliman, the Company's actuary ("Milliman December
8 2011 Report"). Lord noted that the audit of L&C had increased claim case reserves by
9 approximately \$5,000,000 and the reserves estimate had increased by that amount as well. See
10 **Exhibit 20**, Bates no. BD 0006169. In the email to the Board dated December 21, 2011, in which
11 it sent the Milliman December 2011 Report, Uni-Ter pointed out to the Board that "[t]he amount
12 of the increase in reserves is \$5,214,000." *Id.* This change significantly increased the net loss of
13 Lewis & Clark on a full 2011 year basis and further decreased Lewis & Clark's capital to an
14 unacceptable and unlawful level for operational, regulatory, and rating purposes, in violation of,
15 inter alia, NRS 695E.200. At all relevant times the Board was aware that L&C's capital was at an
16 unacceptable and unlawful level for operational, regulatory, and rating purposes in violation of
17 law, including Nevada law, and knew that continued operation was wrongful.

18 On October 5, 2011, the Board approved and agreed to make the Required Contributions
19 on or before November 15, 2011. At the time of their additional Required Contributions in
20 October/November 2011, however, the Board knew about the significant reserve concerns raised
21 in September 2011 to Uni-Ter and U.S. RE by Praxis. Further, the Board unreasonably relied
22 upon Uni-Ter's assertion that the September 2011 Praxis Report represented a complete review of
23 the claims process, which the Board easily could have done, and eventually did discover was
24 inaccurate. In fact, the Board knew it had received inaccurate financial information from Uni-Ter
25 on multiple occasion. The Board knew at the September Board Meeting that claims reserves were
26 inadequate because they were required to roughly \$2,000,000 out of their own pocket.

27 ///

28

1 **6. The Board continues to operate L&C in a hazardous financial condition**
2 **in reliance on information from Uni-Ter which Uni-Ter itself told the**
3 **Board it should not rely.**

4 The continued inaccurate representations by Uni-Ter and U.S. RE regarding the financial
5 condition of the Company were further confirmed to the Board since the Board knew, no later than
6 December 20, 2011, that the Company had a negative surplus in excess of \$5,000,000 from the
7 November 2011 figures based on the Full Praxis Review, despite \$2,000,000 having been infused
8 into the Company only a few weeks before. *See* Exhibits 17-19. Further, on December 23, 2011,
9 the Board had a conference call that became very heated regarding the financial condition of the
10 Company. During that conference call, the Board expressed anger at the dire financial situation of
11 the Company. Dalton, who was on the conference call at the time, stated that president/director
12 Marshall had “lost his cool” and said he “feels like his house has been ransacked and he wants a
13 f***ing answer as to how this happened since September.” *See* **Exhibit 21**, LC-USRE-0358905.

14 In an email dated December 24, 2011, Marshall, with copies to the other Board members as
15 well as to Curtis Sitterson (L&C’s counsel)¹⁰ and Constance Akridge (statutory counsel), emailed
16 Uni-Ter regarding the severe financial problems of L&C “that could jeopardize the very existence
17 of Lewis & Clark,” questioning L&C’s “solvency.” *See* **Exhibit 23**, Bates no. LC-USRE-
18 0235590. At that time the Board also set the next Board telephonic meeting for December 28,
19 2011. *Id.* On December 28, 2011, the Board, with Uni-Ter and U.S. RE, conducted a telephonic
20 conference call (“December 28 Meeting”). The transcript of the December 28 Telephonic
21 Conference is attached as **Exhibit 24**. As part of the December 28 Meeting, Piccione confirmed to
22 the board that the Company is very likely insolvent and advised the Board that due to the fact that
23 L&C wrote insurance in Florida, continued operation meant L&C’s Board was going to “run the
24 risk of a criminal felony.” *Id.* Sitterson stated that if Piccione thought that “there is a risk of
25 criminal penalties you should have your counsel submit a report to the board that tells them that.”
26 *Id.* Immediately after the call was over, Piccione stated that he needed to “call right now Carlton

27 _____
28 ¹⁰ Any reliance on Mr. Sitterson regarding Nevada law was unwarranted as the Board knew he was not licensed to
practice law in Nevada. *See* NJI 15.16.

1 Fields [Uni-Ter's attorneys], tell them they need to get a letter done right now to that board." *See*
2 Exhibit 24, Bates no. LC-USRE-1772538.

3 The motive for the Board to continue operating while insolvent – despite their knowledge
4 that such action was in violation of many laws, including Nevada's and Florida laws, and included
5 civil and criminal penalties – was clear: the Board wanted to maintain the façade that it was a
6 healthy company to avoid intervention by the DOI, and to attempt to deceive another company
7 named Health Cap, into taking over L&C. During the December 28 Meeting, Elsass put it this
8 way, and the Board agreed:

9 I think we want to keep Health Cap interested. **Whatever we need to do to keep**
10 **that going, I think we need to keep it going.**

11 *See* Exhibit 24, Bates no. LC-USRE-1772531. The Board was willing to do anything – **even**
12 **knowingly and feloniously violate the law** – to avoid the consequences of its breaches of duty.

13 Further, at this point, even Uni-Ter started telling the truth, at least partially. On December
14 28, 2011, Sitterson forwarded to the Board multiple emails from Uni-Ter representatives in which
15 Uni-Ter stated that it believed that it “must respectfully point out that we [Uni-Ter] are not as yet
16 confident of the ultimate level of reserves as at 31 December 2011 ... nor whether the finalized
17 level of reserves will correlate to L&C having a positive surplus as at 31 December 2011...” *See*
18 **Exhibit 25**, Bates no. BD 0000830.

19 Despite this clear warning from even Uni-Ter that, based on L&C's then present or
20 reasonably anticipated financial condition, L&C was unlikely to be able to meet obligations to
21 policyholders with respect to known claims and reasonably anticipated claims, or to pay other
22 obligations in the normal course of business, the Board directed Uni-Ter to “process the current
23 renewals.” *See* **Exhibit 26**, Bates no. BD 0005879.

24 Uni-Ter acknowledged receipt of the instructions and stated it would proceed accordingly.
25 *Id.* However, knowing that the Board's instruction was unlawful, Uni-Ter stated that there was
26 “an important issue” with respect to this instruction,” that it had “sought the advice of counsel
27 regarding the issue of processing renewals,” and informed the Board as follows:
28

1 According to legal counsel, a managing general agent such as Uni-Ter has no
2 common law liability to brokers, agents or policyholders as a result of the
3 insolvency of the insurer. **However, it is the general rule in most states that an**
4 **insurance broker has a duty not to place insurance with an insurer which the**
broker knows or reasonably should have known to be insolvent, and this duty
applies to renewal policies as well.

5 See Exhibit 27, Bates no. BD 0003872.

6 Further, Uni-Ter sent the Board a letter from Uni-Ter's attorneys, Carlton Fields, and
7 quoted the letter in the email, "to better assure" that the Board members received it. The letter
8 stated in relevant part as follows:

9 You have asked us to provide you with information concerning potential liability
10 under Florida law for Lewis & Clark LTC Risk Retention Group, Inc. ("L&C") as a
11 result of L&C becoming impaired or insolvent. Under Fla. Stat. Ann. §
12 626.9541(l)(w), the following is defined as an "unfair method[] of competition and
unfair or deceptive act[] or practice[]" that is prohibited by Fla. Stat. Ann.
§626.9541:

13 (w) Soliciting or accepting new or renewal insurance risks by
14 insolvent or impaired insurer prohibited; penalty-

15 1. Whether or not delinquency proceedings as to the insurer
16 have been or are to be initiated, but while such insolvency or impairment exists, **no**
17 **director or officer of an insurer, except with the written permission of the**
18 **office, shall authorize or permit the insurer to solicit or accept new or renewal**
insurance risks in this state after such director or officer knew, or reasonably
should have known, that the insurer was insolvent or impaired. "Impaired"
includes impairment of capital or surplus, as defined in s. 631.011(12) and (13).

19 2. Any such director or officer, upon conviction of a
20 violation of this paragraph, is guilty of a felony of the third degree, punishable as
provided in s. 775.082, s. 775.083, or s. 775.084.

21 It is our understanding that this applies to risk retention groups domiciled in other
22 states but doing business in Fla. See § 627.944(5), **and of course imposes**
23 **potential criminal liability for the individual officers and directors of the**
insolvent or impaired insurer.

24 See Exhibit 27, Bates no. BD 0003873.

25 And, in fact, as the Director Defendants were aware, the statutes cited by Carlton Fields
26 make clear that Florida law required a positive surplus of \$1,500,000.00. See Fla. Stat. Ann. §
27 624.408 (West) ("an insurer in this state must at all times maintain surplus as to policyholders at
28 least the greater of: (a) Except as provided in paragraphs (e), (f), and (g), \$1.5 million). Knowing

1 that continued operation of the Company was in violation of multiple laws, including that at least
2 one state's laws on the subject carried criminal penalties, Uni-Ter demanded the Board confirm on
3 December 29, 2011, that the Director Defendants wanted to continue operating L&C, including
4 processing renewals. *Id.*

5 Despite the knowledge the Board had that L&C was **over \$5,000,000 below** the amount
6 necessary to even cover the known and anticipated claims, the Board continued to operate L&C,
7 including ordering Uni-Ter to renew policies in direct, knowing violation of multiple laws. Each
8 of the Director Defendants knew unequivocally that this decision was wrongful.

9 In fact, despite the Board's knowledge that L&C was at least \$5,200,000 below where it
10 needed be to meet minimum requirements, and that the 3Q 2011 Financial Statement showed an
11 additional 20% capital decrease (even *after* the \$2.2 million Required Contributions), in order to
12 provide false cover for its decision to keep operating while in violation of multiple states' laws, the
13 Board minutes for the December 28, 2011, meeting stated the following:

14 Having been advised that Uni-Ter's pro forma for December 31, 2011 financials for
15 the Corporation indicate that the Corporation is neither impaired nor insolvent and
16 pending receipt of the Fishlinger review, Uni-Ter should process the current
renewals, with level monthly premium payment offered to the facilities.
See LC-USRE-0242083.

17 Noticeably absent from this decision by the Director Defendants ("December 2011
18 Resolution") is any statement by the Director Defendants that L&C is not in a hazardous financial
19 condition. The reason for this glaring omission is that the Director Defendants knew, and had
20 known for over a year, that the Director Defendants had been operating L&C in a hazardous
21 financial condition, knowing it to be wrongful and in violation of law, including Nevada law.

22 Further, the Director Defendants' knowing violations of the law and intentional misconduct
23 was further manifest by the communications between themselves and Uni-Ter. The December
24 2011 Resolution to continue operating was made in reliance on the pro forma for December 31,
25 2011 financials received from Uni-Ter (the "December 2011 Pro Forma"). This was so despite the
26 Director Defendants' knowledge concerning the matter that caused reliance thereon to be
27 unwarranted. Specifically, among other things, reliance by the Board on the December 2011 Pro
28

1 Forma was unwarranted *because Uni-Ter itself told the Director Defendants not to rely on the*
2 *December 2011 Pro Forma.*

3 Dalton sent the Director Defendants an email on December 30, 2011, stating that Uni-Ter
4 wanted to “**make sure that everyone understands that decisions should not be made based on**
5 **whatever you received [i.e. the December 2011 Pro forma] as it was an internal working**
6 **copy.**” See Exhibit 28, Bates no. LC-USRE-0359208. The Director Defendants knew the
7 statements contained in the December 2011 Resolution were inaccurate, and that the December
8 2011 Pro Forma was unreliable, but pretended to rely on it anyway to justify its wrongful decision
9 to keep operating an insolvent company, further deepening that insolvency.

10 Further, their internal communications reveal that the Director Defendants were well aware
11 they could not rely on the December 2011 Pro Forma, or any information from Uni-Ter or U.S. RE
12 for that matter. In fact, on December 29, 2011, Stickels emailed the Board stating that “[t]he
13 proforma [i.e. the December 2011 Pro Forma] doesn’t indicate insolvency **but may meet the**
14 **impaired capital test.**” See Exhibit 26, Bates no. BD 0005877. This statement by Stickels was an
15 admission that, at a minimum, the Company was operating in a hazardous financial condition –
16 and that its “reasonably anticipated financial condition” was likely impairment (or worse) – in
17 violation of law, including Nevada law, and that the Director Defendants knew it, and knew it was
18 wrongful. In truth, even Uni-Ter itself had advised the Board multiple times there was almost
19 certainly no positive surplus in L&C, and was so concerned about the negative financial condition
20 of the Board it asked its attorneys to advise the Board that processing renewals could even subject
21 the Board to criminal – not just civil – penalties.

22 And, in fact, the Board acknowledged outside the presence of Uni-Ter that it knew it could
23 not rely on anything Uni-Ter or U.S. RE provided to it, including the December 2011 Pro Forma,
24 knowing Uni-Ter to have misrepresented the financial status of L&C on numerous occasions. In
25 an email from Lumpkin to the Board dated December 30, 2011, Lumpkin stated that with respect
26 to information received from Uni-Ter, “**[a]t this point it is difficult to have any confidence in**
27 **the data/info we get.**” See Exhibit 29, Bates no. SWMLCEM012385-12388. Further, in an
28

1 email dated December 30, 2011, Marshall stated that L&C “**should not work with a mgmt. [sic]**
2 **entity that reflects incompetence in its principal duties.**” See Exhibit 30, BD0004130A.0001.

3 In response, Marshall further confirmed what the Board all knew – that it could not rely on
4 Uni-Ter’s data. In an email to the Board on December 30, 2011, Marshall ridiculed Uni-Ter and
5 the idea that the Board could rely on anything from them as follows:

6 Confused by Donna’s [Dalton] caution to not pay too much attention to internal
7 documents – **is Uni-Ter’s financial data reliable or not? (rhetorical question, do**
8 **not respond!)**.

9 See Exhibit 31, Bates no. SWMLCEM012365.

10 Further, in a letter from Sitterson on behalf of the Board to Uni-Ter dated December 30,
11 2011, Sitterson reiterated the continued dire financial situation of L&C, and the unreliability of
12 Uni-Ter’s information. In the letter, Sitterson noted that “[t]**his is a time of crisis for Lewis &**
13 **Clark**” and that the Board had just been “**convinced by Uni-Ter to invest approximately \$2.0**
14 **million two months ago, only to be told now that the claims information upon which they**
15 **relied was fundamentally inaccurate.**” See Exhibit 32, Bates no. BD 0005607.

16 Yet, despite even Uni-Ter itself telling the Director Defendants not to rely on the December
17 2011 Pro Forma, and despite the Director Defendant acknowledging repeatedly that they knew
18 they could not rely on the information provided by Uni-Ter, the Board issued the December 2011
19 Resolution to create the false narrative that it was justified in relying on information it knew to be
20 unreliable in order to continue operating L&C in its extremely hazardous financial condition,
21 impairment and/or insolvency, to the detriment of the Company, as well as the policyholders.

22 As set forth above, the Board knew that L&C had been operating while impaired, insolvent,
23 or in a hazardous financial condition for a substantial amount of time, even from mid-year 2010,
24 and the information provided at the December 2011 Board Meeting confirmed this knowledge to
25 the Board. The Board knew, beginning in mid-year 2010, that further operations of Lewis & Clark
26 were in violation of numerous laws, including NRS 695E.200. Despite this knowledge, in
27 December, 2011, the Board reaffirmed the decision to continue operating in violation of Nevada
28 and Florida law, knowing that such continued operations were a violation of multiple laws,
including without limitation, Nevada and Florida law.

1 The Board made said decision to continue operating through improper reliance on
2 information provided by Uni-Ter and/or U.S. RE, including without limitation financial statements
3 and other financial data, prepared or presented by Uni-Ter and/or U.S. RE, despite knowledge
4 concerning the matter in question that caused the Board's reliance on Uni-Ter and U.S. RE to be
5 unwarranted. Specifically, Uni-Ter itself had told the Board not to rely on this information.
6 Despite its knowledge that the Company was, at a minimum, in a hazardous financial condition,
7 and possibly impaired or insolvent, beginning no later than August, 2010, the Board continued to
8 operate the Company in violation of Nevada law until the receivership in August, 2012.

9
10 **7. The Board's decisions to continue operating L&C in violation of Nevada law are not protected by the BJR.**

11 The 2004 Management Agreement provided that Uni-Ter "shall prepare and forward to
12 L&C on a monthly basis, within twenty (20) calendar days of the end of each calendar month, a
13 complete set of financial statements prepared in accordance with Generally Accepted Accounting
14 Principles (GAAP) basis to include: a. Operating Statement, b. Balance Sheet, c. Policies written
15 for the month, d. Claims incurred for the month, e. Accounts receivable summary, f. Summary
16 report of all claims, reserves and losses." See **Exhibit 33**, Bates no. LC-USRE-00000447. The
17 Board was aware that from 2004 through 2010, Uni-Ter failed to properly provide monthly
18 reporting, and yet the Board failed to act to ensure they received the required monthly financial
19 statements. As a result, the Board engaged in intentional misconduct from 2004 through 2010 by
20 failing to review all monthly financial reports as provided in the 2004 Management Agreement.
21 This also caused the Board's actions and/or failures to act in continuing to operate the Company in
22 a hazardous financial condition to be unprotected by the BJR as the Board was not as informed
23 about the financial condition of the company to the extent they reasonably believed appropriate,
24 and did not reasonably believe their acts/failures to act were in the best interests of the Company.

25 **D. Facts supporting filing of the Fourth Amended Complaint as to adding Tal**
26 **Piccione as Defendant.**

27 Since initiation of this action through May 2018, the Uni-Ter Defendants and U.S. RE
28 produced less than 1,200 pages of documents. After 3.5 years of litigation, on May 7, 2018, Uni-

1 Ter Defendants and U.S. RE unexpectedly produced over 1.5 million pages of new documents
2 (“2018 Production”). *See* Uni-Ter/U.S. RE’s 2018 production disclosure, attached as **Exhibit 34**.
3 This production was a surprise to the Plaintiff as: (1) the production contained documents never
4 before seen by the Plaintiff, all pertaining to L&C, and had been in the possession, custody, and
5 control of Uni-Ter Defendants/U.S. RE since before the collapse of L&C;¹¹ (2) Uni-Ter
6 Defendants/U.S. RE were required to provide to L&C per the terms of the 2004 and 2011
7 Management Agreement to effectuate “transfer of all records and property of L&C by Manager to
8 L&C” subsequent to the termination of Uni-Ter as Manager of L&C; and (3) the Orders entered in
9 the Receivership action required and compelled Uni-Ter Defendants/US Re to transfer all
10 documents pertaining to L&C to Plaintiff within thirty (30) days.¹² The disparity between the
11 documents provided to the Plaintiff in the Receivership action and the 2018 Production is
12 staggering: Only 1,751 emails (less than 1%) were provided to Plaintiff in the Receivership
13 Action, whereas the Defendants provided 222,424 emails in their 2018 Production.

14 Up until receiving this 2018 Production and, more importantly, actually reviewing and
15 analyzing the over 1.5 million pages of documents in such production, Plaintiff lacked the
16 necessary evidence to assert a claim against Mr. Piccione. Further, as this Court is aware, a stay
17 has been in place for over a year (since March 14, 2019) while the Director Defendants filed their
18 Writ Petition with the Nevada Supreme Court.

19 Finally, with asserting additional factual allegations as to the Director Defendants (due to
20 the Nevada Supreme Court’s decision - *i.e.* disavowing *Shoen*), Plaintiff discovered additional
21 factual allegations to support its claims as well supporting a claim against Mr. Piccione. For this
22 reason, along with the Uni-Ter Defendants’ and U.S. RE’s late productions, Plaintiff respectfully
23 submits it should be allowed to file its FAC.

24 ///

25 ///

26 ///

27 _____

28 ¹¹ *See* Exhibit 34, at LC-USRE-00000449 (Management Agreement provides that all records belong to L&C).

1 **III. LEGAL ARGUMENT**

2 **A. Plaintiff submits the filing of the FAC should be permitted.**

3 The amendment of pleadings before trial is governed by the provisions of NRCP 15(a),
4 which states, in relevant part, as follows:

5 (2) In all other cases, a party may amend its pleading only with ... the
6 court's leave. **The court should freely give leave when justice so**
requires.

7 NRCP 15(a)(2) (in relevant part)(emphasis added).

8 Under NRCP 15, this Court has wide discretion to grant a motion for leave to amend.
9 *Adamson v. Bowker*, 85 Nev. 115, 450 P.2d 796 (1969). Further, in the absence of any apparent or
10 declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant –
11 leave to amend should be freely given. *Stephens v. Southern Nev. Music Co.*, 89 Nev. 104, 507 P.2
12 138 (1973). In fact, the Nevada Supreme Court has held that a district court abuses its discretion
13 in refusing to allow an amendment when the record does not indicate any justification for such a
14 refusal. *Adamson, supra*.

15 Nevada cases have favored leave to amend when justice will be served and the opposing
16 party will not be prejudiced. Regarding this, the Nevada Supreme Court stated:

17 While it is true that the granting of leave to amend is discretionary with
18 the trial court, it is also true that leave to amend should be permitted when
19 no prejudice to the [opposing party] will result and when justice requires
20 it.

21 *Fisher v. Executive Fund Life Ins. Co.*, 88 Nev. 704, 706, 504 P.2d 700, 702 (1972). *See also*
22 *Marschall v. City of Carson*, 86 Nev. 107, 111, 464 P.2d 494, 497 (1970)(concluding that the trial
23 court may freely give permission to amend in order to preserve movant's right to a full
24 presentation of the merits). Plaintiff has not engaged in any conduct that would preclude this
25 Court from granting it leave to its FAC.

26 **1. There has been no undue delay or dilatory motive.**

27 “Ordinarily, leave to amend pleadings should be granted regardless of the length of time of
28 delay by the moving party absent a showing of bad faith by the moving party or prejudice to the

¹² See Order for Liquidation, attached as **Exhibit 35**; see also Order to Compel, attached as **Exhibit 36**.

1 opposing party.” *See, e.g., Roberts v. Arizona Bd. of Regents*, 661 F.2d 796, 798 (9th Cir. 1981).
2 Here, Plaintiff has worked diligently to bring this instant Motion. Any delay in doing so is as a
3 result of the stay issued related to the writ proceedings and the Uni-Ter Defendants’ and U.S. RE’s
4 massive document production that occurred after 3.5 years of litigation. Upon the stay being lifted
5 on July 1, 2020, Plaintiff immediately filed this Motion on July 2, 2020. In this case, justice and
6 efficiency require that Plaintiff be allowed to file its FAC.

7 a. *The Director Defendants*

8 Given the Nevada Supreme Court’s recent decision in the Opinion, and Plaintiff’s prior
9 reasonable reliance upon Nevada law under *Shoen*, Plaintiff respectfully submits it should be
10 allowed amend its complaint to allege knowledge of wrongdoing on the part of the Director
11 Defendants. Should the Court allow Plaintiff to amend its Complaint against the Director
12 Defendants, Plaintiff will allege the Director Defendants breached their fiduciary duty to L&C,
13 that such breaches involved knowing violations of the law, and that the BJR is rebutted as to the
14 acts and inaction of the Director Defendants at issue. Specifically, the FAC alleges that the Board
15 knowingly violated, without limitation, NRS 681A.480, NRS 78.135, NRS 681A.100, NRS
16 695E.200, and NRS 694C.240. The FAC further alleges multiple instances of intentional
17 misconduct by the Board. Given the recent change in Nevada law which substantially change the
18 pleading requirements in Nevada, the gravity of the allegations against the Board and the
19 significant damages resulting therefrom, justice requires that Plaintiff be granted leave to amend.

20 b. *Tal Piccione*

21 The 2018 Production contained new documents never before seen by the Commissioner,
22 and unlike prior disclosures, consisted primarily of e-mails. By way of comparison, there were
23 only 1,751 emails provided to Commissioner in 2013. This is less than 1% of the total emails that
24 US Re and Uni-Ter have disclosed to date. The 2018 Production provided for the first time
25 evidence that Tal Piccione was the indirect owner, architect, and creator of the scheme to organize
26 and run risk retention groups from Nevada, and that his involvement and influence over L&C
27 contributed to its insolvency and ultimate demise. *See* FAC at “General Allegations”, Section H.
28 As a result of the 2018 Production, Plaintiff only recently uncovered the deep involvement of

1 Piccione in this matter, and his involvement in aiding and abetting breaches of fiduciary duty by
2 other defendants.

3 As a result, Plaintiff's request to amend the Complaint at this time to add Piccione does not
4 involve bad faith by Plaintiff, and will not prejudice defendants in any way. Tal Piccione will only
5 be added as an aider and abettor to the causes of action that currently exist, which is substantially
6 based upon the facts and discovery already produced in this matter.

7 **2. Plaintiff submits that justice requires that it be allowed to file its FAC.**

8 Plaintiff submits that justice requires it be allowed to file its FAC. Plaintiff justifiably
9 relied on *Shoen* in preparing and filing its TAC. Consistent with the Opinion, Plaintiff must
10 amend its Complaint to add factual allegations to meet the standard set forth in the Opinion.

11 Further, in its review and analysis of the 2018 production, Plaintiff has discovered new
12 factual allegations against all defendants, as well as a claim against Mr. Piccione. Justice requires
13 that Plaintiff be allowed to file its FAC.

14 **3. This Court should allow Piccione to be added as a Defendant.**

15 Other than seeking to add Piccione as a Defendant and asserting a new claim against him,
16 the Fourth Amended Complaint does not add new claims against the Defendants – it simply adds
17 factual allegations to support the claims that have been pending against the Defendants for years
18 and substitutes causes of action (*i.e.*, breach of fiduciary duty in place of gross negligence). This
19 Court should allow Mr. Piccione to be substituted in as a Defendant (in place of a DOE Defendant)
20 as authorized by NRCP 10(d), NRCP 20(a)(2) and/or NRCP 21. *See* NRCP 10(d)(If the name of a
21 defendant is unknown to the pleader, the defendant may be designated by any name. When the
22 defendant's true name is discovered, the pleader should promptly substitute the actual defendant
23 for a fictitious party); *see also* NRCP 20(a)(2); *see also* NRCP 21("On motion or on its own, the
24 court may at any time, on just terms, add or drop a party."); *see also Hill v. Summa Corporation*,
25 90 Nev. 79, 518 P.2d 1094, 1105 (1974) ("By virtue of NRCP 10(a), the designated but unnamed
26 defendants are already parties in legal contemplation. A subsequent amendment, stating their
27 actual names, therefore relates back to commencement of the action as provided in NRCP 15(c).").
28 Here, Plaintiff properly utilized NRCP 10(d) (formerly NRCP 10(a)) by asserting DOES & ROES

1 as Defendants and reserving leave to amend. Upon learning of Mr. Piccione's tortious
2 involvement in this case, which Plaintiff was only able to learn upon receipt of the 2018
3 Production, Plaintiff now seeks to amend to add him as a defendant for the reasons set forth herein
4 and in the FAC.¹³

5 **IV. CONCLUSION**

6 For all these reasons, Plaintiff respectfully requests the instant Motion to Amend be
7 granted, that Plaintiff be permitted to file its Fourth Amended Complaint, and that the Court grant
8 such other and further relief as the Court deems appropriate.

9 DATED: July 2, 2020.

10 **HUTCHISON & STEFFEN**

11 By /s/ Brenoch Wirthlin, Esq.

12 MARK A. HUTCHISON, ESQ.

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¹³ A copy of the FAC is attached hereto as **Exhibit 37**, pursuant to EDCR 2.30.

CERTIFICATE OF SERVICE

I certify that I am an employee of Hutchison & Steffen, and that on this date, I served the foregoing **MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT** on the parties set forth below by legally serving via Odyssey electronic service as follows:

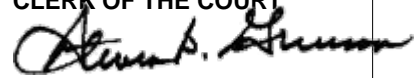
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DATED July 2, 2020.

/s/ Daniel Maul
An Employee of Hutchison & Steffen



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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'
OPPOSITION TO THE MOTION FOR
LEAVE TO FILE FOURTH AMENDED
COMPLAINT**

Date of Hearing: July 23, 2020

Time of Hearing: 10:00 a.m.

Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert
Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels (collectively "Directors") by
and through their counsel, Lipson Neilson P.C. hereby file their Opposition to the Motion
for Leave to File Fourth Amended Complaint.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff the Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTD Risk Retention Group, Inc. (hereinafter “the Commissioner” or “Plaintiff”) wants a fourth bite at the apple. The facts of which Plaintiff has continuously complained, date back from 2004 through 2012. These facts, as they developed, have been contemporaneously known to the Nevada Division of Insurance (“DOI”) since 2004 through 2012. This is the same DOI that is headed by the Commissioner of Insurance and appointed the Commissioner to serve as Lewis and Clark LTD Risk Retention Group, Inc.’s (L&C) Receiver in 2012.¹ This is the same DOI that is essentially one and the same with the Deputy Receiver for the Commissioner.² In short, the Commissioner has known the operative facts for the entire eight years over which they occurred.

What is particularly shocking is that not just the DOI, but the Commissioner, has had all of this information for eight **additional** years, and yet only now has decided to allege that there has been a “knowing violation of the law.” As set forth below, the Plaintiff’s instant motion is in patent bad faith and should be denied as futile.

II. THE COMMISSIONER HAS PROCEEDED IN BAD FAITH

For five and a half years of litigation, Plaintiff doggedly maintained that the Directors’ conduct amounted to “gross negligence” for which they were personally liable. This was despite the Directors’ legal challenge to Plaintiff’s “gross negligence” theory. Nothing precluded the Commissioner from alleging a “knowing violation” if the facts supported it.³ But such facts simply do not exist.

¹ See Deposition of Deputy Receiver Robert Greer, Ex. “A”, 11:11-19.

² See Deposition of Deputy Receiver Robert Greer, Ex. “A”, 11:20-25.

³ The Commissioner has not been reluctant in other matters to plead both “gross negligence” and “knowing violation.” See, for example, *State of Nevada, Ex Rel, Commissioner of Insurance, Barbara D. Richardson, in her Official Capacity as Receiver for Nevada Health Co-Op v. Milliman, Inc., et al.*, Case No. A-17-760558-C, pending in Department 16 of this District, the Commissioner pled both.

1 For years, the Directors correctly contended that the standard for liability was at
2 minimum, a knowing violation of the law. Finally, the Nevada Supreme Court ordered
3 that an extraordinary Writ issue, directing this Court to enter judgment in the Director's
4 favor dismissing the Commissioner's Third Amended Complaint. The law of the case is
5 thus established. *Chur v. Eighth Jud. Dist. Ct. of Nev.*, 136 Nev. Adv. Rep. 7, ___, 458
6 P.3d 336 (2020).
7

8 Only now does Plaintiff comes to this Court seeking leave for yet another
9 amendment to its pleadings, not based on new facts, but out of a last-ditch effort to
10 breathe life into claims that the Nevada Supreme Court has already rejected. Despite
11 Plaintiff's transparent efforts to transform allegations of supposedly negligent
12 mismanagement into a "knowing violation of the law," this case remains what it always
13 has been, a groundless and wasted effort to improperly impose personal liability on the
14 Directors for exercising their business judgment.
15

16 **A. Plaintiff Repeatedly Amended its Pleadings to Assert Groundless Claims**
17 **and Delayed this Case**

18 On December 23, 2014, Plaintiff filed its Complaint alleging a claim for gross
19 negligence and deepening the insolvency.⁴ Nearly five years ago, on December 11,
20 2015, the Directors filed their Motion to Dismiss, correctly asserting that conclusory
21 allegations of gross negligence did not state a valid claim. Moreover, the Directors
22 correctly noted that a claim for deepening insolvency required pleading and proof
23 beyond mere negligence. Such a claim could only be supported by pleading facts
24 amounting to a breach of fiduciary duty involving fraud.⁵ The Directors properly
25

26
27 ⁴ Except as otherwise noted, all references to pleadings and discovery refer to those filed and
served in this instant action.

28 ⁵ *Id.*

1 requested that if fraud was to be alleged, the Commissioner be required to plead the
2 facts with specificity.⁶

3 On February 25, 2016, this Court granted the Motion to Dismiss in Part and
4 Denied the Motion in Part, granting Plaintiff leave to amend its complaint to allege a
5 claim for gross negligence. On April 1, 2016, Plaintiff filed its First Amended Complaint.
6 The Directors promptly brought a Motion to Dismiss the First Amended Complaint (filed
7 over four years ago, on April 18, 2016) again correctly asserting that intentional
8 misconduct, fraud or knowing violation of the law had to be alleged and proved for any
9 claim. During the pendency of the motion, on June 13, 2016, Plaintiff filed a Second
10 Amended Complaint. In response, the Directors supplemented their Motion. On August
11 5, 2016, Plaintiff filed a Third Amended Complaint. The Directors once again
12 supplemented their Motion to Dismiss.⁷

13 On October 10, 2016, the Court denied the Director's Motion to Dismiss, on the
14 basis that Plaintiff need only plead a claim for gross negligence and finding that such
15 was adequately pled. On October 21, 2016, Directors filed their Answer to the Third
16 Amended Complaint. On December 28, 2016, discovery commenced through the filing
17 of a Joint Case Conference Report.

18 **B. The Commissioner, in Bad Faith, Refused to Engage in Discovery**

19 The Commissioner, as Receiver, has had complete control of every aspect of the
20 business of Lewis and Clark LTD Risk Retention Group, Inc. ("L&C") since 2012, when
21

22 ⁶ *Id.*

23 ⁷ Plaintiff's continuous filing of amendments and erratas during pending motion practice is not
24 only prejudicial to the responding party, but is so habitual, so as to appear purposeful and with
25 an intent to increase the cost of litigation. Despite the short time period placed on the briefing in
26 this matter, 7 days after filing its Motion for Leave to Amend, Plaintiff filed an Errata to an over
27 100 page proposed amended complaint and refused to provide a red-lined version when
28 requested by Defendant.

1 the receivership was initiated. During that eight-year period, the Commissioner had
2 complete control of every document, and access to every employee, agent, and/or
3 attorney that L&C had ever been employed.⁸ During six years of litigation, whether in a
4 response to written discovery, or in deposition testimony, the Commissioner has not
5 once even intimated that the Directors knowingly violated the law. This case has
6 always been about the Commissioner asserting “negligent” mismanagement.

7 In fact, some two years ago the Commissioner argued to this Court that that **no**
8 **genuine issues of material facts remained in this case**, and that “**no deposition**
9 **testimony that could be given so many years [after the fact] is necessary or even**
10 **useful**” in deciding the issues presented herein.⁹ Nothing has changed since then,
11 except for the fact that the Nevada Supreme Court has rejected the Commissioner’s
12 claims.

13 1. The Commissioner Refused to Provide Substantive Responses to Written
14 Discovery.

15 The Commissioner chose not to propound any substantive written discovery on
16 the Directors. Rather, the Commissioner propounded a single Interrogatory concerning
17 the attendance of board meetings, and two Requests for Admissions regarding the
18 production of documents.

19 Far more troubling, however, is the Commissioner’s continuous refusal to provide
20 responses to discovery. On September 5, 2017, Directors served their Interrogatories to
21 the Commissioner. After over two months, the Commissioner’s answers were nothing
22 more than a recitation of the Third Amended Complaint and reference to exhibits
23
24

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26 ⁸ See December 26, 2012 Order Granting Petition for Appointment of Commissioner, filed in the
Receivership Action, Case No. A-12-672047-B.

27 ⁹ See September 12, 2018 Plaintiff’s Opposition to the Motion for Judgment on the Pleadings
28 and Countermotion for Summary Judgment, 20:25-26, emphasis added.

1 attached thereto.¹⁰ This tactic continued with Plaintiff's response to the Director's
2 Second Set of Interrogatories, served April 13, 2018. The Commissioner took nearly two
3 months to respond, which consisted of objections only.¹¹ The bad faith continued when,
4 on April 13, 2018, the Directors served their Request for Production of Documents.
5 Again, the Commissioner's response was objections only. Plaintiff did not attach any
6 documents or even refer to documents that were responsive.¹²
7

8 2. The Commissioner Refused to Provide a Knowledgeable 30(b)(6) Witness

9 Worse still, the Commissioner intentionally refused to provide a knowledgeable
10 30(b)(6) witness. On November 8, 2018, Deputy Receiver for the Commissioner, Robert
11 Greer appeared as the 30(b)(6) witness for Plaintiff. Mr. Greer, as the Deputy Receiver,
12 is essentially one and the same with the Nevada Division of Insurance. This was made
13 crystal clear when the Commissioner's Counsel asserted privilege as to any
14 communications with the DOI Attorney, Ms. Parks.¹³
15

16 Mr. Greer had access to the DOI Commissioner and its employees, and could
17 interview them at his convenience.¹⁴ Likewise, Mr. Greer had full control and access to
18 every document of L&C, pre-dating the filing of this action.¹⁵ Mr. Greer was required to
19

20 ¹⁰ November 30, 2017 Amended Responses to Interrogatories, attached as Exhibit "C." Prior
21 responses served November 20, 2017. Moreover, the Responses to Interrogatories were not
22 even verified.

23 ¹¹ June 7, 2018 Responses to Second Set of Interrogatories, attached as Exhibit "D."

24 ¹² May 31, 2018 Responses to Request for Production of Documents, attached as Exhibit "E."

25 ¹³ Greer Deposition, attached as Exhibit "A", 72:2-15.

26 ¹⁴ Exhibit "A," 11:11-25, 236:10-238:21.

27 ¹⁵ See December 26, 2012 Order Granting Petition for Appointment of Commissioner, filed in the
28 Receivership Action, Case No. A-12-6720470-B. See also February 25, 2015 Motion for
Approval of Fees filed in the Receivership Case, A-12-672057-B. Excerpts from the Wyatt,
Tarrant & Combs, LLP's August 5, 2014 Invoice, noting review of corporate minutes for potential
claims against the Directors as early as May 7, 2014, attached as Exhibit "F".

1 be prepared to testify as to 14 different topics pertaining to the defendants' alleged
2 misconduct, spanning from the Directors' alleged misconduct, to reinsurance issues, to
3 alleged damages.¹⁶ At no time did Plaintiff move for a protective order.

4 Rather, four years into active litigation, Mr. Greer appeared as the Rule 30(b)(6)
5 witness intentionally and totally unprepared and unable to provide any facts in response
6 to the Director's fair questions. Mr. Greer set forth no effort to investigate the facts in
7 order to prepare to give testimony pursuant to Rule 30(b)(6). He continued with the
8 Commissioner's prior position that deposition testimony was irrelevant in moving for
9 summary judgment against the Directors.¹⁷ He made no effort to review the 295,790
10 pages of documents the Commissioner disclosed.¹⁸ Likewise, he made no effort to
11 review any of the over 1.5 million pages of documents produced by Uniter and US Re in
12 October 2018.¹⁹ Instead, Mr. Greer's sole "preparation" for acting as the
13 Commissioner's 30(b)(6) witness was to look at the Third Amended Complaint and its
14 exhibits, and have a "privileged" conversation with the DOI's attorney.²⁰

15 When presented with substantive questions, Mr. Greer simply quipped that "the
16 complaint speaks for itself" and that he would be "relying upon experts."²¹ Mr. Greer's
17 insistence that he would be "relying upon experts" makes it all the more strange that the
18 Commissioner is still utterly unprepared, or unwilling, to identify its initial experts.
19
20
21

22 ¹⁶ Notice of Deposition, attached as Exhibit "B."

23 ¹⁷ See September 12, 2018 Plaintiff's Opposition and Countermotion for Summary Judgment.

24 ¹⁸ Plaintiff's Twelfth Supplemental Disclosure (relevant pages only), attached as Exhibit "G."

25 ¹⁹ US Re's Sixth Supplemental Disclosure (relevant pages only), attached hereto as Exhibit "H."

26 ²⁰ Exhibit "A", 17:16-18:3.

27 ²¹ Exhibit "A", 69:6, 29:22-30:23, 31:16-32:3, 43:16-44:18, 131:3-17 ("Complaint speak for
28 itself"). Exhibit "A", 53:18-21, 74:24-76:35, 95:20-96:15, 99:9-100:2, 224:1-15. ("Intend to rely
on experts").

1 A Rule 30(b)(6) witness must be prepared to testify to the topics listed in its
2 deposition notice. "Moreover, clients cannot refuse to disclose facts which their
3 attorneys conveyed to them and which the attorneys obtained from independent
4 sources." *Great Am. Ins. Co. of New York v. Vegas Const. Co.*, 251 F.R.D. 534, 541 (D.
5 Nev. 2008) (discussed further, *infra*). [Federal cases can be authority or at least
6 persuasive]
7

8 In *Great Am. Ins. Co. of New York v. Vegas Const. Co.*, 251 F.R.D. 534 (D. Nev.
9 2008) the Court noted:

10 A number of courts have held that the failure to produce a Rule 30(b)(6)
11 designee who is adequately educated and prepared to testify on
12 designated topics to bind the corporation amounts to a nonappearance
13 which could warrant the imposition of sanctions.

14 . . .

15 The purpose of Rule 30(b)(6) would be frustrated if courts allowed a
16 corporate party to produce a witness who is unable or unwilling to provide
17 necessary factual information and held that producing an unprepared
18 witness is tantamount to a failure to appear, and sanctionable under Rule
37(d). The Court of Appeals observed that a Rule 30(b)(6) witness who is
unable to give useful information 'is no more present for deposition than
would be a deponent who physically appears for the deposition but sleeps
through it.'"²²

19 *Great Am. Ins. Co. of New York v. Vegas Const. Co.*, 251 F.R.D. 534, 542 (D. Nev.
20 2008) (emphasis added), citing *Bank of New York*, 171 F.R.D. at 151; *Resolution Trust*
21 *Corp.*, 985 F.2d at 197; *Taylor*, 166 F.R.D. at 363; *Black Horse Lane Assoc. v. Dow*
22 *Chemical Corp.*, 228 F.3d 275, 303 (3d Cir.2000).

23 The Nevada Court of Appeals is in accord. In *Sweet v. Harrah's Las Vegas, Inc.*,
24 the Court found that Harrah's had produced "an NRCP 30(b)(6) witness who was
25

26
27 ²² The range of sanctions can be severe, and could include preclusion of evidence for failure to
28 produce a prepared 30(b)(6) deponent. *Id.* 251 F.R.D. at 543.

1 woefully ignorant regarding the areas of inquiry specifically outlined... in her 30(b)(6)
2 notice.” *Sweet v. Harrah’s Las Vegas, Inc.*, No. 65556, 2016 WL 7635421, at *1 (Nev.
3 App. Dec. 27, 2016) (Not Reported). The Court found, “[h]ad the district court been
4 asked to strike the trial testimony of Harrah’s employees because of their failure to
5 completely disclose their opinions during their deposition prior to proffering them at trial
6 and granted that request, we would likely have affirmed the district court.” *Id.* at *2 (Nev.
7 App. Dec. 27, 2016).

8
9 The Commissioner is not some private corporation, but rather an arm of the
10 State. As a state actor, Plaintiff is charged with knowledge of the law, specifically that
11 “[n]o person shall be deprived of life, liberty, or property, without due process of law.”
12 Nev. Const. Article 1, Sec. 8.

13 Likewise, Mr. Greer is not an unsophisticated witness, but an attorney.²³ An
14 attorney serving as the Deputy Receiver certainly would be well aware of the
15 requirements of Rule 30(b)(6), the purpose of discovery and a defendant’s right to due
16 process. Moreover, Mr. Greer was represented by no less than two attorneys at his
17 deposition, both of whom were seasoned attorneys, and yet apparently instructed him
18 not to be prepared or testify to relevant evidence.²⁴

19
20 The Commissioner has now pivoted to a theory that the Directors violated
21 Nevada law based on “warnings” from the DOI going back to 2004. Yet after sixteen
22 years of DOI involvement, eight years of receivership, and nearly six years of litigation,
23 Plaintiff has not raised even an inference that the Directors **knowingly** violated any law.

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27 ²³ Exhibit “A”, 8:10-17.

28 ²⁴ Exhibit “A”, 157:19-159:11, 257:13-17 (asserting the attorney-client privilege).

While the Directors vigorously deny Plaintiff's new theory, there is no excuse for Plaintiff revealing these belated allegations so late in the game, which, if even remotely true, were known to Plaintiff no later than 2014. It is entirely implausible that a "violation" in 2004 caused L&C's demise in 2012, or that the DOI would have allowed L&C to continue while laws were knowingly being violated. But the simple, undeniable truth is that new allegations, no matter how ridiculous, were all things the DOI knew long ago and yet never raised until now. Without question, the Commissioner knew six years ago, or at least should have known, about the "new" allegations in the proposed FAC.²⁵

III. THE COMMISSIONER'S BAD FAITH CAUSES ENORMOUS PREJUDICE

A. The Proposed Amendment is Prejudicial to the Directors

The prejudice for the Directors is impossible to overstate. One Director will never be able to defend herself from Plaintiff's scurrilous claims, as she passed away in 2018.²⁶ The remaining Directors have since either retired from operating nursing facilities, or their companies have long been forced to pay on the claims that the Commissioner refuses to adjudicate. The Commissioner's new theories require it to prove that the Directors knowingly violated the law and caused injury to L&C when L&C used an unlicensed re-insurer and continued to operate while in a hazardous condition. The Directors' defense therefore necessarily depends on the testimony and documents between all parties about these new theories.

The evidence includes but is not limited to deposition testimony and documents from: Constance Akridge (L&C Attorney from 2005-2012), Gene Leverty (L&C Attorney

²⁵ See Commissioner of Insurance Motion for Approval of Attorneys Fees, filed in the Receivership Case A-12-672047-B on February 25, 2015. The Legal Fees reflect Plaintiff's non-Nevada licensed attorneys spent approximately \$65,000 researching the claims that could be brought against the Directors and looking at DOI documents since May, 2014. Excerpts of Wyatt, Tarrant & Combs, LLP Fees, attached as Exhibit "F."

²⁶ In and around July, 2018, after years of public service, for which she received accolades from the State of Florida, board of director defendant Barbara Lumpkin passed away.

1 from 2004-2005), Curtis Sitterson (L&C Attorney from 2004-2012), Budd Brittain (DOI
2 Examiner who is now deceased), John Marshall (DOI Examiner who is now retired and
3 for which Plaintiff would not disclose his whereabouts), Scott Kipper (Former
4 Commissioner of the DOI between 2008- 2014), Alice Molasky (Former Commissioner
5 of the DOI between 1995-2008 who is now deceased) and Amy Parks (during the
6 relevant time, General Counsel and Hearing Officer for the DOI).

7 With the great passage of time and the fact that witnesses are dead, retired, or
8 otherwise unavailable, the Directors will be severely impaired in establishing defenses,
9 including *in pari delicto*, given that implicit in Plaintiff's allegations is that the DOI
10 knowingly allowed "violations of law" to continue unabated for over ten years. Moreover,
11 considering the seven-year document retention period, and the fact that Plaintiff's
12 prosecuting attorney for the first 5 years of this case in fact potentially had access to
13 these documents and never produced them, the delay is crippling to the defense.²⁷
14 Finally, to the extent Directors or any of the Uni-Ter and US Re Defendants need to be
15 deposed to address Plaintiff's new allegations, this will cause extreme expense and
16 hardship for the Directors. The Directors incurred approximately \$100,000 in legal fees
17 and expense during this period of travel and depositions, crossing the U.S. several
18 times from the period of November 2018-March 2019. Moreover, all of the Directors are
19 over the age of 65, which makes another round of depositions during this pandemic a
20 health concern as well.

21 ///
22
23

24 ²⁷ In responding to a subpoena duces tecum and subpoena for deposition, former L&C attorney,
25 Constance Akridge testified that in order to comply with the subpoena, she had to get files out
26 from the Jones Vargas storage and could not testify as to all communications, because the
27 Jones Vargas network did not maintain all emails. Akridge Deposition, attached as Exhibit "I,"
28 10:22-11:22, 73:19-74:15. It is also public record that Jones Vargas has been closed since
2013 and that Plaintiff's former counsel James Wadhams had access to and was the
appropriate person for service of process upon any subpoena related to documents of L&C's
former counsel. Secretary of State Print out, attached as Exhibit "J". See *a/so*, NRS 78.750

1 Indeed, here, the prejudice rises to a violation of the Director's rights to due
2 process in being apprised of, and defending, the Commissioner's apparently ever-
3 changing theories.

4 **B. The Commissioner Has Caused the Waste of Enormous Sums to Pursue a**
5 **Groundless Case**

6 The Commissioner's tactics have been, and continue to be, not only prejudicial to
7 the Directors, but also to the Court and the administration of justice. While L&C has
8 been in the Commissioner's charge, the Commissioner has taken L&C from having \$4.3
9 million in cash assets to \$1.6 million.²⁸ The Commissioner has made no efforts to
10 adjudicate the pending claims, and made no effort to mitigate the insured's damages
11 with the acquisition of reinsurance.²⁹ Instead, the Commissioner has elected to invest
12 enormous sums into this ever-failing litigation, with approximately \$1.5 million dollars
13 having paid to Plaintiff's counsel and its experts in the year 2019 alone.³⁰

14 **IV. THIS COURT SHOULD EXERCISE ITS DISCRETION BY DENYING**
15 **THE MOTION TO FILE A FOURTH AMENDMENT TO THE COMPLAINT**

16 Whether to allow amendment to a pleading resides within the sound discretion of
17 the trial court. *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000). Of course,
18 "[in] the absence of any apparent or declared reason -- **such as undue delay, bad**
19 **faith or dilatory motive on the part of the movant** -- [leave to amend] should be freely
20 given." *Stephens v. Southern Nev. Music Co.*, 89 Nev. 104, 105-106, 507 P.2d 138, 139
21 (1973) (emphasis added) (citing *Foman v. Davis*, 371 U.S. 178 (1962)). However,
22 where a plaintiff has previously amended her complaint, the discretion to deny further
23 amendment is "particularly broad." *Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047,

24
25 ²⁸ See the Liquidation Balance Sheet of the Receiver's Thirteenth Status Report and Seventy
26 Second Status Report, filed in the Receivership Case, A-12-672047-B; Relevant pages attached
as Exhibits "K" and Exhibit "L" respectively.

27 ²⁹ See Plaintiff's Responses to Second Set of Interrogatories, attached as Exhibit "D".

28 ³⁰ See Exhibit "L."

1 1058 (9th Cir. 2011). And where there has been undue delay, bad faith, or dilatory
2 motive, leave to amend is not to be “freely given.”

3 Here, the Commissioner seeks a **fourth** amendment, no matter the prejudice
4 caused by its delay and bad faith. For years, the Directors worked diligently to obtain
5 *any* facts (as opposed to bare allegations in the pleading) to support the
6 Commissioners’ claims, and have been stonewalled at every turn.

7
8 There is no excuse for Plaintiff and its Counsel (who are all attorneys), to have
9 prevented the Directors from gathering all of Plaintiff’s facts and opinions while
10 discovery was open.³¹ The Directors, fed up with the continuous gamesmanship,
11 requested that Plaintiff stick to the discovery schedule, and this Court has **twice**
12 indicated that the discovery deadlines would not further be extended.³²

13 **V. THE PROPOSED FOURTH AMENDED COMPLAINT IS ALSO FUTILE.**

14 “Leave to amend should not be granted if the proposed amendment would be
15 futile. A proposed amendment may be deemed futile if the plaintiff seeks to amend the
16 complaint in order to plead an impermissible claim.” *Halcrow, Inc. v. Eighth Jud. Dist.*
17 *Ct.*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013) (internal citations omitted).

18
19 Plaintiff’s proposed FAC is more of the same, general allegations that the
20 Directors, each of them, individually breached their fiduciary duties to L&C. This time,
21 however, the FAC is gratuitously littered with the buzzwords and legal conclusions that
22 the Directors’ actions “were not protected by the business judgment rule, and/or the
23 business judgment rule was rebutted,” and “involved intentional and knowing
24

25
26 ³¹ See Exhibit “A.”

27 ³² See January 25, 2019 Order Granting in Part and Denying in Part Plaintiff’s Motion for
28 Extension of Discovery Deadlines and to Continue Trial on OST; see *also* Stipulation and Order
Extending Discovery (Third Request), filed May 17, 2018.

misconduct and/or knowing violations of the law.” Proposed FAC ¶¶ 587-590, 595-598, 603-604, 611-612, 619-620, 628-629, 637-638, 646-647. Legal conclusions and buzzwords are not factual allegations, and they do not cure the deficiencies in Plaintiff’s claims.

“A breach of fiduciary duty claim requires a plaintiff to show the existence of a fiduciary duty, the breach of that duty, and damages proximately caused by the breach. *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 880-81 (9th Cir. 2007) (applying Nevada law); *see also Clark v. Lubritz*, 113 Nev. 1089, 944 P.2d 861, 866-67 (Nev. 1997).” *Robinson v. Nev. Sys. of Higher Educ.*, No. 3:15-cv-00169-MMD-VPC, 2015 U.S. Dist. LEXIS 167567, at *6 (D. Nev. Dec. 15, 2015).

A breach of fiduciary duty claim requires a two-step analysis to impose individual liability on a director or officer. It is the plaintiff’s burden to allege sufficient facts that when taken as true (1) rebut the business judgment rule, and (2) constitute a breach of a fiduciary duty involving “intentional misconduct, fraud or a knowing violation of law.” *Chur v. Eighth Judicial Dist. Court of Nev.*, 136 Nev. Adv. Rep. 7, 458 P.3d 336, 340, 2020. The Nevada Supreme Court further held it is not sufficient to simply plead that the plaintiff knew he was generally committing an act but that Claimant must establish “that the director or officer had knowledge that the alleged conduct was wrongful in order to show a “knowing violation of law” or “intentional misconduct” pursuant to NRS 78.138(7)(b).” *Chur v. Eighth Judicial Dist. Court of Nev.*, 136 Nev. Adv. Rep. 7, 458 P.3d 336, 342, (2020). These claims must be pled with specificity. *Kahn v. Dodds* (In re AMERCO Derivative Litig.), 127 Nev. 196, 223 (2011). “Overcoming the presumptions of the business judgment rule on the merits is a near-Herculean task.” *In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005).

Plaintiff devotes hundreds of paragraphs on a convoluted narrative of the Directors' intentional wrongdoing, but at its core, Plaintiff now alleges that the Directors knowingly violated the law by: deviating from Management Agreements that governed Uniter's conduct (not the Directors' ability to manage L&C); failure to comply with certain statutes; and operating L&C while the company was at risk of insolvency. As set forth below, none of these allegations properly allege that the Directors committed intentional misconduct or intentionally and knowingly violated the law.

A. Plaintiff Cannot Rebut the Business Judgment Rule or Otherwise Allege a Failure to Act in Good Faith

To rebut the business judgment rule, Plaintiff must plead that the board of directors actions were (1) the product of fraud, (2) the product of self-interest, or (3) that the board of director failed to exercise due care in reaching its decision. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 636, 137 P.3d 1171, 1181 (2006). In determining whether the board of directors exercised due care, the Court may only consider "the procedural indicia of whether the directors resorted in good faith to an informed decision-making process." *Wynn Resorts v. Eighth Jud. Dist. Ct.*, 133, Nev. Adv. Rep. 52, 399 P.3d 334, 343-344. Indicia of good faith include an "inquiry into the identity and qualifications of any sources of information or advice sought which bear on the decision reached, the circumstances surrounding selection of these sources, the general topics (but not the substance) of the information sought or imparted, whether advice was actually given, whether it was followed, and if not, what sources of information and advice were consulted to reach the decision in issue." *Id.* at 343.

Plaintiff's proposed FAC is in large part another iteration of the same theme: The Directors allegedly mismanaged L&C by failing to appreciate or mitigate certain risks. In the context of any insurance company, *which is specifically designed to take on risk*,

1 such allegations are utterly meaningless. Directors are permitted to assess and accept
2 business risks otherwise, “failure to monitor ‘excessive’ risk would involve courts in
3 conducting hindsight evaluations of decisions at the heart of the business judgment of
4 directors.” *In re Citigroup, Inc. S’holder Derivative Litig.*, 964 A.2d 106, 131 (Del. Ch.
5 2009). The Directors engaged in an informed decision-making process in the
6 performance of their duties as officers of L&C, which is exactly the kind of activity that
7 the business judgment rule protects.
8

9 1. Alleged Failures to Comply with the 2004 Management Agreement Do Not
10 Evidence a Failure to Act in Good Faith to an Informed Decision-Making
11 Process

12 Plaintiff asserts a litany of actions that allegedly violated the 2004 Management
13 Agreement (proposed FAC ¶¶241, 243, 244 – 247). Specifically, Defendants allegedly
14 failed to demand monthly reports from Uni-Ter, failed to require Uni-Ter to collect
15 deductibles and allowed Uni-Ter to appoint defense counsel to defend the insureds.
16 Nowhere does the FAC allege that the Defendants made these decisions on an
17 uninformed basis. And the fact that Plaintiff failed to plead this with particularity makes
18 it almost impossible for the Directors address such claims 5 ½ years into this case.

19 Nonetheless, Plaintiff continues to misapprehend the Directors’ duties. A director
20 has two duties as it relates to a corporation, to act with due care and with loyalty to the
21 Company. The Management Agreements do not create additional or specific duties
22 upon the Directors. The Management Agreements spoke to and constrained the Uni-
23 Ter’s activities as L&C’s manager. The Directors remained free to administer the
24 Management Agreements and to manage L&C through the exercise of their business
25 judgment. The formational documents make this clear: “The business and affairs of the
26
27
28

1 corporation shall be managed by the Board of Directors of the corporation.”³³
2 Therefore, the manner in which the Directors chose to administer the Management
3 Agreements cannot be a violation of the Management Agreements, much less a
4 knowing violation of the law as Plaintiff contends.

5 Acting in good faith does not require directors to be aware of all aspects of a
6 company’s operations, but merely that a good faith effort to stay informed be made. *In*
7 *re Caremark Int’l*, 698 A.2d 959, 971, 1996 Del. Ch. LEXIS 125, *41 (Del. Ch.
8 September 25, 1996) (“the duty to act in good faith to be informed cannot be thought to
9 require directors to possess detailed information about all aspects of the operation of
10 the enterprise.”).

11
12 2. Acceptance of Country Villa as an Insured does not Equate to an
13 Uninformed Decision

14 In the same conclusory fashion, Plaintiff asserts that the Director’s agreement to
15 underwrite Country Villa (proposed FAC ¶¶393-415) was an uninformed decision and
16 knowing violation of law. This is an *ipsi dixit* argument.

17 First, Plaintiff inappropriately implies that Country Villa was the inevitable
18 downfall of L&C, and that everyone knew it when they chose to underwrite the risk.
19 Plaintiff ignores the testimony of Mr. Marshall, who clarified that the Board was
20 adequately informed about the reasons to take on an insured like Country Villa and was
21 not convinced that Country Villa was a catalyst of L&C’s financial woes.³⁴

22 Mr. Marshall testified that Country Villa may have “a little bit more adverse than
23 [their] typical underwritten potential insureds,” but saw the same as a viable business
24

25
26
27 ³³ Bylaws, attached as Exhibit “W.”

28 ³⁴ Jeff Marshall Deposition, 42:9-15, 59:25 – 60:9, attached as Exhibit “M.”

1 opportunity as 1) there was an agreement for an additional contribution by Country Villa
2 to cover any excess on their aggregate losses, and 2) “they would provide [L&C] with an
3 entr[y] into the Southern California market, which as an attractive market for
4 diversification.”³⁵ The Board was adequately informed when they made the decision to
5 underwrite Country Villa:
6

7 Q: And do you recall what documents were presented to the board as it
8 relates to Country Villas (sic)?

9 A: Details about their operations and their locations, financial statements
10 about their operations, a loss history, from a liability claims standpoint.

11 Q: Was it adequate information for you to analyze?

12 A: I believe so.

13 Exhibit “M” at 42:9-15. Likewise, Steve Fogg testified at his deposition that the Country
14 Villa matter was presented to the Board; he currently believes that Uni-Ter’s “deficit in
15 timely posting reserves” and not just the writing of Country Villa was a major factor in
16 causing L&C’s reserve deficiencies in the last years of its existence.³⁶

17 Regardless of whether the decision to insure Country Villa was ultimately
18 beneficial to L&C, the decision was unquestionably the result of a good faith reliance on
19 Uni-Ter’s presentation of financials, along with a litany of information concerning
20 Country Villa’s operations, locations, financial statements and loss history.³⁷ Nothing in
21 the FAC cogently alleges that the Directors chose to insure Country Villa knowing that it
22 could cause L&C’s demise and such an allegation would belie common sense for
23 Directors who personally (or through their companies) invested in L&C. This places the
24

25 ³⁵ See Jeff Marshall Deposition, attached as Exhibit “M” at 40:20 – 41:18.

26 ³⁶ See Steve Fogg Deposition, Plaintiff’s Exhibit 8, and relevant pages, attached as Exhibit “N,”
27 at 140:22- 141:1-20.

28 ³⁷ See Exhibit “M” at 42:9-15.

1 Directors' decision to insure Country Villa squarely within the ambit of the business
2 judgment rule.

3 Mr. Hurlbut testified that he now believes Uni-Ter misrepresented information to
4 the Directors regarding the County Villa deal.³⁸ But what Mr. Hurlbut now believes, with
5 the benefit of 20/20 hindsight and after 5 ½ years of litigation, says nothing about what
6 the Directors believed when they made the decision in 2012 for L&C to insure Country
7 Villa. The proposed FAC does not allege (outside of legal conclusions), and Plaintiff
8 cannot prove, that the Directors' decision to insure Country Villa was a knowing violation
9 of the law.
10

11 3. Plaintiff's Proposed Fourth Amended Complaint is Like the Earlier Complaints
12 filled with Misstatements of Fact and Red Herrings

13 Even though the DOI approved Uni-Ter to serve as L&C's manager, Plaintiff still
14 maintains that the Directors lacked good faith when they retained Uni-Ter to serve as
15 L&C's manager.³⁹ This allegations is belied not only by Plaintiff's own conduct, but also
16 by the contemporaneous evidence and the Directors' right to rely on information and
17 reports of its experts. See NRS 78.138(2). Mr. Marshall testified that the company was
18 doing well until 2009, particularly 2011 and thus had no reason to doubt the accuracy of
19 Uni-Ter's information.⁴⁰ Mr. Marshall also testified that L&C had a number of outside,
20 independent vendors, including its actuaries and auditors:
21

22 A: ...And, you know, our comfort was in the fact that Milliman had
23 reviewed and apparently had thought that the reserves were within a
24 reasonable range, as we discussed previously...

25 ³⁸ Robert Hurlbut Deposition, Plaintiff's Exhibit 9; Relevant Pages attached as Exhibit "O" at
26 25:17-26:15.

27 ³⁹ See Akridge Deposition, attached as Exhibit "I," at 27:20-25 (regarding the DOI approving Uni-
28 Ter as its manager). See *also* proposed FAC ¶¶43.

⁴⁰ See Deposition Transcript of Jeff Marshall, attached as Exhibit "M," at 234:8-14.

1 See Exhibit "M" at 119: 19-25.⁴¹ At this point in litigation, it is beyond disingenuous for
2 Plaintiff to continue this assault when there was no reason to doubt Uni-Ter's
3 information until 2011 at the earliest, and the Directors all testified that they felt they
4 were adequately informed.⁴²

5
6 In a bizarre series of allegations, Plaintiff asserts the Directors must have been
7 uninformed in their decision making because Uni-Ter's note was paid off through the
8 Sophia Palmer merger.⁴³ Even if Plaintiff could logically connect the dots on this theory,
9 it is belied by the application that L&C submitted to the DOI for approval of the merger
10 and Mr. Marshall's Declaration in Support of the Merger.⁴⁴ It is well-established that the
11 DOI approved the Sophia Palmer merger and the Directors were fully informed of the
12 reasons for such merger.⁴⁵ That Plaintiff singles out Director Defendant Carol Harter for
13 a failure to be informed about the specific terms of the merger between L&C and Sophia
14 Palmer is of a next level deception⁴⁶, given that Dr. Harter could not and did not vote on
15 the merger.⁴⁷

16
17 It is equally disingenuous for Plaintiff to allege that reliance on attorney Curtis
18 Sitterson was unwarranted simply because he was not licensed to practice law in
19

20
21 ⁴¹ Both Milliman and Johnson & Lambert continue to be DOI approved vendors.

22 ⁴² See Carol Harter Deposition, Plaintiff's Exhibit 11, Relevant Pages, attached as Exhibit "P" at
23 30:5-18. See also Steve Fogg Deposition, Plaintiff's Exhibit 8, Relevant Pages, attached as
24 Exhibit "N" at 28:3-29:5.

25 ⁴³ Proposed FAC ¶¶282-286.

26 ⁴⁴ Excerpts from application to Merge with Sophia Palmer, attached as Exhibit "Q".

27 ⁴⁵ Jeff Marshall's Depo., Exhibit "M" at 58:25 – 59:16.

28 ⁴⁶ Proposed FAC, ¶¶282-284.

⁴⁷ See *Id.* See also Exhibit "Q" reflecting Board Meeting Minutes voting to approve merger.

1 Nevada. For example, in 2014, the Commissioner hired and paid approximately
2 \$65,000 to a non-Nevada licensed law firm (Wyatt Tarrant & Combs, which has no
3 apparent Nevada licensed attorneys) to review the L&C and DOI documents, analyze
4 Nevada law, analyze claims to be made against the Directors, and draft the complaint to
5 be filed against them.⁴⁸ As the Commissioner's actions confirm, there is no need to hire
6 a Nevada lawyer to opine on something not specific to Nevada law.
7

8 Finally, it is sanctionable for Plaintiff to contend that the Directors failed to submit
9 amended business plans upon material change of L&C's operations.⁴⁹ Directors
10 submitted an Amended Business Plan to the DOI in 2007, 2009, 2010 and 2011.⁵⁰ And
11 it is ludicrous to suggest that the lack of an Amended Business Plan on file with the DOI
12 had anything to do with L&C's failure.
13

14 **B. Plaintiff Cannot Demonstrate Intentional and Knowing Violations of the Law**

15 Plaintiff's proposed FAC asserts numerous alleged violations of the law.
16 However, Plaintiff still seemingly fails to comprehend that for personal liability to attach,
17 a breach of fiduciary duty must actually involve a knowing violation of the law. *Chur v.*
18 *Eighth Judicial Dist. Court of Nev.*, 136 Nev. Adv. Rep. 7, 458 P.3d 336, 340, 2020. As
19 noted by the Delaware Supreme Court:
20

21 **"All good corporate governance practices include compliance with**
22 **statutory law and case law establishing fiduciary duties.** But the law
23 of corporate fiduciary duties and remedies for violation of those duties are
24 distinct from the aspirational goals of ideal corporate governance
25 practices. Aspirational ideals of good corporate governance practices for
boards of directors that go beyond the minimal legal requirements of the
corporation law are highly desirable, often tend to benefit stockholders,
sometimes reduce litigation and can usually help directors avoid liability.

26 ⁴⁸ See Proposed FAC ¶¶267. See also Exhibit "F".

27 ⁴⁹ Proposed FAC ¶¶391-392.

28 ⁵⁰ Exhibits "R", "S", "T", and "U", respectively. Specifically, Exhibit T adds "fronting agreements."

1 **But they are not required by the corporation law and do not define**
2 **standards of liability.”**

3 *Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000) (emphasis added). All Plaintiff offers is
4 legal conclusions about supposed “knowing violations of the law” that bear no
5 connection to Plaintiff’s liability and damages theories.

6 While the Nevada Supreme Court has set forth a heightened standard to plead a
7 knowing violation of law, which includes actual knowledge, even if this Court were to
8 apply a lesser standard of constructive knowledge, it could not be alleged that the
9 Directors knowingly violated the law. In Delaware, to establish liability under the
10 “knowing violation of law” standard, “a plaintiff must also plead particularized facts that
11 demonstrate that the directors acted with scienter, i.e., that they had ‘actual or
12 constructive knowledge’ that their conduct was legally improper.” *Wood v. Baum*, 953
13 A.2d 136, 141, 2008 Del. LEXIS 301, *8 (Del. July 1, 2008).

14 1. Alleged Violation of the Nevada Administrative Code is not a Violation of Law

15 Plaintiff alleges violations of both the Nevada Revised Statutes and the Nevada
16 Administrative Code throughout its proposed FAC. As a threshold matter, the
17 allegations of NAC violations are without merit, as violation of the NAC does not even
18 constitute negligence per se. *Price v. Sinnott*, 85 Nev. 600, 605, 460 P.2d 837, 839
19 (1969) (stating that “we do not agree that a violation of an administrative regulation is
20 negligence per se, since it lacks the force and effect of a substantive legislative
21 enactment,” and that “proof of a deviation from an administrative regulation is only
22 evidence of negligence; not negligence per se.”). Because Plaintiff’s allegations of NAC
23 violations, even when taken as true, can only evidence ordinary negligence, they are
24 insufficient to support finding of “intentional misconduct” or a “knowing violation of the
25 law.” Accordingly, Plaintiff’s allegations regarding violations of NAC694C.300 (FAC
26

¶332), NAC683A.530 (¶¶308, 336) and allegations of violations of law stemming therefrom are all futile.

2. Alleged Violation of Nevada Insurance Statutes are Barred by the Statute of Limitations

Plaintiff's proposed FAC alleges knowing violations of the following NRS provisions: NRS 681A.480 (proposed FAC ¶¶300, 303) (using a non-licensed reinsurer), NRS 694C.240 (proposed FAC ¶¶383, 384, 390-392) (requirement to submit a business plan and update the same when any changes are made), and NRS 695E.200 (proposed FAC ¶¶413-427) (risk retention group shall not operate while financially impaired or in a hazardous financial condition). As a threshold issue, Plaintiff's allegations for NRS violations are all futile in light of NRS 679B.185, which provides in relevant part as follows:

NRS 679B.185 Administrative fine for willfully engaging in unauthorized transaction of insurance: Limitation; enforcement.

1. If any person willfully engages in the unauthorized transaction of insurance, the Commissioner may impose an administrative fine of not more than \$10,000 for each act or violation.

4. Except as otherwise provided by specific statute, the Commissioner shall commence a proceeding to impose an administrative fine pursuant to subsection 1 **not later than 5 years after the date on which the act or violation occurred.**

See NRS 679B.180(1), (4) (emphasis added). Here, even counting from 2012 – L&C's final year of operation – any alleged violations of the NRS would have occurred well over five years ago. Plaintiff's NRS allegations are being raised for the first time in the proposed FAC; the Third Amended Complaint contains no such allegations. See generally Third Amended Complaint, on file with the Court. Plaintiff is barred from now accusing the Directors of purported violations that occurred well beyond the five-year limitation period set forth in NRS 679B.180(4), and basing breach of fiduciary duty

claims on the same. As such, all of Plaintiff's allegations regarding NRS violations are futile. Furthermore, Plaintiff's allegations regarding NRS violations do not relate back to the date of the filing of her initial Complaint. Amendments relate back "[i]f the original pleadings give fair notice of the fact situation from which the new claim for liability arises." *Nelson v. Las Vegas*, 99 Nev. 548, 556, 665 P.2d 1141, 1146 (1983). "On the other hand, where an amendment states a new cause of action that describes a new and entirely different source of damages, the amendment does not relate back, as the opposing party has not been put on notice concerning the facts in issue." *Id.* Here, no notice was given in any of Plaintiff's prior complaints regarding specific statutory violations. The same constitute "a new and entirely different source of damages." As such, the allegations do not relate back to prior complaints.

3. Plaintiff's Claims for Alleged Insurance Violations are also Futile Because L&C Could not have Known They Were Violating the Law when the DOI Allowed for Continued Communications about L&C's use of U.S. Re and to Turn Around its Financials During its "Hazardous Condition"

As exemplified above, the Board of Directors had a course of conduct, to request their Nevada attorney to work on communicating with the Division of Insurance when issues arose regarding compliance with Nevada law. To Ms. Akridge's recollection, she was retained to assist in the DOI's approval of the merger of Sophia Palmer, she communicated with the Division regarding a September 2010 issue and she communicated with the DOI in January 2012, sending it the Board's actions taken to remedy its financial condition.⁵¹ Plaintiff's own exhibits negate "knowing violations of law," as, with any administrative body, there was an open dialogue as between management and the State. At all times relevant, Ms. Akridge and the Directors knew

⁵¹ Exhibit "I" at 42:17-43:15, 88:25-89:13; 54:2-61:25.

1 that if they were acting inappropriately, the DOI could have issued orders against L&C's
2 further conduct or commence formal proceedings, placing the company in
3 conservation.⁵²

4 NRS 680A.200, entitled "Suspension, limitation or revocation of certificate of
5 authority: Grounds; notice," provides the following:
6

7 1. Except as otherwise provided in NRS 616B.472, the
8 Commissioner may refuse to continue or may suspend, limit or revoke an
9 insurer's certificate of authority if the Commissioner finds after a hearing
10 thereon, or upon waiver of hearing by the insurer, that the insurer has:

11 (a) Violated or failed to comply with any lawful order of the
12 Commissioner;

13 (b) Conducted business in an unsuitable manner;

14 (c) Willfully violated or willfully failed to comply with any lawful
15 regulation of the Commissioner; or

16 (d) Violated any provision of this Code other than one for violation of
17 which suspension or revocation is mandatory.

18 In lieu of such a suspension or revocation, the Commissioner may levy
19 upon the insurer, and the insurer shall pay forthwith, an administrative fine
20 of not more than \$2,000 for each act or violation.

21 2. Except as otherwise provided in chapter 696B of NRS, the
22 Commissioner shall suspend or revoke an insurer's certificate of authority
23 on any of the following grounds if the Commissioner finds after a hearing
24 thereon that the insurer:

25 (a) Is in unsound condition, is being fraudulently conducted, or is in
26 such a condition or is using such methods and practices in the conduct of
27 its business as to render its further transaction of insurance in this State
28 currently or prospectively hazardous or injurious to policyholders or to the
public.

...

4. No proceeding to suspend, limit or revoke a certificate of authority
pursuant to this section may be maintained unless it is commenced by the
giving of notice to the insurer within 5 years after the occurrence of the
charged act or omission. This limitation does not apply if the
Commissioner finds fraudulent or willful evasion of taxes.

At no time did the Commissioner of the Division of Insurance ever hold a hearing
or take action on the "hazardous financial conditions" for which they were wholly
charged and allowed to do. Moreover, at no time did the Commissioner instigate formal

⁵² See Exhibit "I" at 52:10-16.

1 proceedings to take control away from the Director Defendants.⁵³ See NRS 696B.210
2 The DOI has authority to commence formal proceedings taking power away from
3 management, for among other things, if the DOI believes that management is taking
4 illegal action. See NRS 696B.210(3). In fact, it was the Directors (and not the DOI)
5 that eventually commenced the receivership of L&C. All of the above statutes recognize
6 that there is a time limit upon which one can complain about violations of Nevada law.
7 After five (5) years from the occurrence of the charged act or omission, the alleged
8 violation is waived.
9

10 As evidenced in the deposition of Ms. Akridge and the communications attached
11 as exhibits to her deposition, there was a continued dialogue between L&C and the
12 DOI.⁵⁴ Quarterly statements and annual financial statements were submitted to the
13 Division. Requests to merge were submitted to the Division. Moreover L&C submitted
14 to triennial exams. Matters would often get resolved through informal emails.
15

16 At all times relevant, the DOI had the power and means to place an end to the
17 so-called violations of law. When the Commissioner does not act to stop the known
18 violations of law from continuing, no reasonable person could impute a “knowing
19 violation of law” to the Directors, for whom the DOI is charged with supervising.
20

21 Additionally, Plaintiff’s allegation that the Directors deliberately failed to require
22 U.S. RE to comply with NRS 681A.480 (§250) is directly belied by Plaintiff’s own
23 document. The April 26, 2010 letter to Commissioner Kipper, attached to Plaintiff’s
24 Motion as Exhibit 3, indicates that, pursuant to page 13 of the J.M. Woodworth RRG
25

26 ⁵³ It was the Directors who voluntarily turned over the company to the Division of
Insurance in and around September 26, 2012. Email to Ken Stern, attached as Exhibit “V”.
27

28 ⁵⁴ See Exhibit “I.”

1 Inc. Report of Exam, as of 12/31/07 U.S. RE was deemed to be authorized as L&C's
2 reinsurance broker in accordance with NAC 694C.300. Thus, the Board had believed
3 U.S. RE was in compliance with Nevada law.⁵⁵ By the time the DOI finally made up its
4 mind on how it would proceed on the re-insurance licensing issue, L&C had, for other
5 reasons, determined it was time to turn in the towel.⁵⁶

6
7 4. Plaintiff's Contention that it is a Knowing Violation to continue to Operate an
8 Insurance Company while it is in a Hazardous Condition is Nonsensical.

9 Plaintiff's allegation that it is a breach of the fiduciary duty to knowingly operate a
10 company while it is in a hazardous financial condition (NRS 695E.200) defies common
11 sense. It is so detached from reality that even Plaintiff could not answer this simple
12 question: What should the Directors have done when faced with the dire financial
13 conditions Plaintiff claims to have existed?⁵⁷ Although Plaintiff refused to testify under
14 oath that the Directors should have immediately stopped operating L&C, that is exactly
15 what the Plaintiff alleges now.⁵⁸ When Plaintiff refuses to identify a standard for an
16 insurer in financial hardship, it cannot criticize the Directors for not following that
17 standard.

18
19 Here, Plaintiff seeks to hold the Directors liable for "transact[ing] insurance or
20 otherwise operate while financially impaired or in a hazardous financial condition." NRS
21 695E.200(4). However, "hazardous financial condition," is an amorphous state, with an
22 eye towards future operations. NRS 695E.050 gives Directors the ability to reasonably
23

24 ⁵⁵ See Plaintiff's Exhibit 3, at 00018.

25 ⁵⁶ See Plaintiff's Exhibit 35. See also Exhibit "U," evidencing Directors resolved to turn over L&C
26 on September 24, 2012.

27 ⁵⁷ See Exhibit "C", Resp. 13-14.

28 ⁵⁸ See Exhibit "C", Resp. 5.

1 anticipate the future. Specifically, NRS 695E.050 states, “‘Hazardous financial
2 condition’ means that, based on its present or *reasonably anticipated financial condition*,
3 a risk retention group, although not yet financially impaired or insolvent, *is unlikely to be*
4 *able to*: 1. Meet obligations to policy holders with respect to known claims and
5 *reasonably anticipated claim*; or 2. Pay other obligations in the normal course of
6 business.” (Emphasis added).
7

8 According to this statute, the Directors were well within their rights to continue
9 operations following the course of conduct of selling policies to increase capital, while
10 implementing different underwriting policies to prevent inclusion of risky insureds. The
11 Directors were within their rights to continue operating after they infused \$2.2 million of
12 their own funds into the business. Any contrary conclusion will inevitably lead to
13 Nevada directors “throwing in the towel” long before the fight is over, simply to avoid the
14 personal liability that might attach for trying to save a troubled insurer. Any hint of
15 trouble, says the Plaintiff, means an insurer immediately cease operations.
16

17 This statute also gives the Directors the right to find buyers to purchase L&C,
18 thus reasonably solidifying its future financial position. There was nothing nefarious
19 with the Directors seeking HealthCap to acquire it at the end of 2011 through early 2012
20 and everything within Exhibit 24 of Plaintiff’s Motion, supports a thoughtful board,
21 attempting to solidify its actual financial position before proceeding with proffering
22 potentially incorrect financials to third parties. Similarly, it was not a knowing violation of
23 law for the Directors to question the accuracy of Uni-Ter’s opinions regarding the law
24 and state of finances of L&C during the period of December 24-31, 2011. This is
25 especially so, given they were told just months prior that infusion of the \$2.2 million
26 would solidify L&C finances. Plaintiff’s Exhibits 26-31 reflect Directors who were
27
28

1 questioning the accuracy of their management's information, and working through a
2 problem for the benefit of their members.⁵⁹

3 It is a fundamental principle of law that a statute cannot be impermissibly vague.
4 If it either forbids or requires the doing of an act in terms so vague that men of common
5 intelligence must necessarily guess at its meaning and differ as to its application or if a
6 penal statute is so imprecise, and vagueness so permeates its text, that persons of
7 ordinary intelligence cannot understand what conduct is prohibited, and the enactment
8 authorizes or encourages arbitrary and discriminatory enforcement, then, substantive
9 due process has been violated. *In re Lerner*, 124 Nev. 1232, 1244-45, 197 P.3d 1067,
10 1076-77 (2008). Against this backdrop, Plaintiff's allegations of the Directors willfully
11 violating Nevada Insurance statutes are futile.
12

13 **VI. CONCLUSION**

14
15 The Commissioner should not be allowed a fourth amendment to its Complaint.
16 There has been five and a half years of litigation. There is no excuse for the
17 Commissioner to not now be able to designate experts. To allow the Commissioner to
18 assert new claims will be prejudicial in the extreme in forcing the Directors to conduct
19 unreasonably compressed discovery. The Commissioner's dilatory bad faith tactics
20 should not be rewarded with yet another Amended Complaint. The motion should be
21 denied outright.

22 Moreover, Plaintiff's proposed fourth amended complaint is futile. In this case,
23 regarding the management of an insurance company, where the business is built
24 around the management of risk, the Plaintiff has failed to establish that the Directors
25 acted in bad faith and consciously disregarded information in making business
26

27 ⁵⁹ Indeed actions were taken thereafter, which included independent claims consultants hired to
28 determine the appropriate level of reserves. See Exhibit "I," Depo Exhibit 150.

1 decisions. The alleged violations of law have nothing to do with the ultimate reason for
2 L&C's downfall, which was a sharp increase of high claims in a short period of time.
3 The Directors cannot be faulted for attempting to keep the business alive, when they
4 infused their own capital into L&C, had just as much to lose as other members with their
5 facilities insured by L&C, and relied on the Division of Insurance, continuously allowing
6 for L&C to operate. Plaintiff has simply not met its heightened burden to establish that
7 the Directors breached their fiduciary duty with knowing violations of the law.

8 In what may be an overabundance of caution, should this Court consider allowing
9 a fourth amendment, Plaintiff should be precluded from alleging any fact not in the Third
10 Amended Complaint. The Commissioner asserted, through its 30(b)(6) witness, that the
11 factual basis for claims against the Directors were only those pled in the Third Amended
12 Complaint and that the 30(b)(6) witness was not going to provide any additional facts.
13 The Commissioner should be held to that, and precluded from pleading any claim or
14 theory based on any additional fact.

15 Dated this 17th day of July, 2020.

16 LIPSON NEILSON P.C.

17 /s/ Angela Ochoa

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28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 17th day of July, 2020, I electronically transmitted the foregoing **DEFENDANTS ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS' OPPOSITION TO THE MOTION FOR LEAVE TO FILE FOURTH 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:

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