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. Dist. Ct. Case. No. A-19-797331-C **APPENDIX TO PETITION FOR A WRIT OF MANDAMUS VOLUME 8 OF 10**

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5	Notice of Entry of Order Granting in Part and Denying in Part Motion to Dismiss, filed 2/26/2016	1	PA000172-PA000177
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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 8 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)
McDonald Carano LLP
2300 West Sahara Ave., Ste. 1200
Las Vegas, NV 89102

Attorney for Uni-Ter Defendants

Angela T. Nakamura Ochoa, Esq. (10164)
Lipson Neilson
9555 Hillwood Dr., 2nd Floor
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

RSPN
George F. Ogilvie III, Esq.
Nevada Bar No. 3552
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966
gogilvie@mcdonaldcarano.com

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
Telephone: (305) 373-9400
Facsimile: (305) 373-9443
Jon.Wilson@nelsonmullins.com
Kimberly.Freedman@nelsonmullins.com
Erin.Kolmansberger@nelsonmullins.com

Attorneys for Defendants Uni-Ter Underwriting 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 RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT

Defendants Uni-Ter Underwriting Management Corp. ("Uni-Ter UMC") and Uni-Ter Claims Services Corp. ("Uni-Ter CS" and together with Uni-Ter UMC, collectively, "Uni-Ter") and U.S. Re Corporation ("U.S. Re"), hereby submit their Response in Opposition to the Motion for Leave to File Fourth Amended Complaint ("Motion") filed by Plaintiff Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC risk Retention Group, Inc. ("Receiver"). For the reasons discussed below, Uni-Ter and U.S. Re respectfully request that this Court deny the Motion.

I. INTRODUCTION

While leave to amend should be freely given when justice so requires, "[t]his does not, however, mean that a trial judge may not, in a proper case, deny a motion to amend." *Stephens v. S. Nevada Music Co., Inc.*, 89 Nev. 104, 105, 507 P.2d 138, 139 (1973). Indeed, "[i]f that were the intent, leave of court would not be required." *Id.*

This case is a prime example of an instance in which leave to amend is not proper. This case stems from a receivership filed in late 2012, and this case, itself, was filed in 2014. Yet, nearly six years later, with trial rapidly approaching, the Receiver asks this Court to allow her to amend her complaint for a fourth time. As the proposed amended pleading relates to Uni-Ter and U.S. Re, the Receiver is untimely and improperly seeking to add new claims and a new defendant.

As discussed below, despite representing to this Court that amendment was necessary to address the Nevada Supreme Court's recent ruling on the petition for mandamus relief filed by the Director Defendants, (*see* Opinion, *Chur v. Dist. Ct. (State, Comm'r of Ins.)*, Case No. 78301 at 11 (Nev. Feb. 27, 2020) ("Mandamus Proceeding")), the Receiver is now attempting to use that ruling as an opportunity to add claims and parties she failed to do over the past several years due to her own lack of diligence and failure to properly prosecute this case. And, while the Receiver, once again, points her finger at Uni-Ter and U.S. Re as the reason for the requested amendment—arguing that Uni-Ter and U.S. Re "unexpectedly" produced over a million pages of documents in May of 2018 to the "surprise" of the Receiver—that argument is simply not supported by the record. Indeed, this Court, and Judge Gonzalez in the related 2012 receivership proceeding, have already rejected the Receiver's attempts to blame Uni-Ter and U.S. Re for her own failures to act

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

timely.

As discussed in detail below, numerous reasons exist for denying leave to amend here. Not only did the Receiver improperly delay in asserting the proposed new claims and new defendant, but she is acting in bad faith and with dilatory motive in attempting to raise them now, under the guise of remedying her allegations as a result of the Nevada Supreme Court's ruling. Further, the proposed amendment would significantly prejudice Uni-Ter and U.S. Re. Finally, the proposed new claims against Uni-Ter and U.S. Re, as well as the new claims against the new defendant, are futile because they are time-barred.

At bottom, this is yet another attempt by the Receiver to rectify her failure to properly prepare her case over the course of several years so that she could timely bring the case to trial. The Court should not, on the facts before it, provide such opportunity. As it relates to Uni-Ter and U.S. Re, the Motion should be denied in full.

II. PERTINENT FACTUAL BACKGROUND

A key contention in the Receiver's instant Motion is that she could not amend to add the current proposed claims and proposed new defendant at an earlier time due to Uni-Ter and U.S. Re's purportedly belated document production. It should be noted, however, that this is at least the ***sixth*** time[1] that the Receiver has attempted to leverage some advantage against Uni-Ter and U.S. Re by making unsubstantiated claims concerning the timeliness and adequacy of their production in this case and in the Receivership Action. These are simply a thinly-veiled attempts to conceal the Receiver's own failures.

The Discovery Commissioner has already rejected similar arguments when the Receiver attempted to interject allegations regarding the Receivership Action and the 2013 orders into this case. Further, at the September 28, 2018 hearing in this matter, the Discovery Commissioner expressed concerns about the Receiver being several years into this litigation and the need to get

[1] As discussed below, the Receiver's attempts to shift blame include: (1) Receiver's Motion to Show Cause filed in the Receivership Action; (2) Receiver's Second Motion to Show Cause in the Receivership Action; (3) Response to Uni-Ter and U.S. Re's Motion for Protective Order; (4) Receiver's Motion to Expand Deadlines; and (5) Receiver's recent Motion for Preferential Trial and Scheduling Order.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

ready for trial. Thus, as discussed below, the Receiver's so-called "surprise," (*see* Motion at 27:3), at the 2018 production is not the result of any act on the part of Uni-Ter or U.S. Re; rather, as a result of the Receiver's own actions (or inactions) in diligently prosecuting this case. The Receiver cannot now shift that blame onto Uni-Ter and U.S. Re.

To fully understand the absurdity of the claims against Uni-Ter and U.S. Re in the Receiver's Motion, and, in turn, why her Motion should be denied, it is necessary to address both the pertinent facts, motion practice, and hearings of the Receivership Action and this case.

A. Uni-Ter's production in the Receivership Action

Lewis and Clark ("L&C") was formed in December 2003 as a risk retention group to write professional and general liability coverage for long-term care facilities. Uni-Ter UMC and, subsequently, Uni-Ter CS were retained to manage Lewis & Clark. In the summer of 2011 L&C suffered adverse loss development. Ultimately, the Nevada Division of Insurance ("DOI") initiated the Receivership Action in November 2012. Uni-Ter intervened in the Receivership Action; U.S. Re did not. *See* Declaration of George F. Ogilvie III ("Ogilvie Declaration") attached as **Exhibit 1**, at ¶ 11.b. On February 28, 2013, an order of liquidation was entered in the Receivership Action ("Liquidation Order"), appointing the Commissioner of Insurance as the Receiver of L&C. *See id.,* at ¶ 10 and Exhibit B to Ogilvie Declaration.

For purposes of carrying out the Receiver's duties, the Receiver was authorized to "remove any or all records and property of L&C to the offices of the Receiver." *See id.,* at Exhibit B, at ¶ 6(h). Following the entry of the Liquidation Order, Uni-Ter worked directly with the Receiver and the Receiver's agents to fulfill the Receiver's requests for documents and other items. *See* Declaration of Walter Bush ("Bush Declaration") attached as **Exhibit 2**, at ¶ 11; *See* Declaration of Carolyn Verde ("Verde Declaration") attached as **Exhibit 3**, at ¶ 11. The Receiver often made demands upon Uni-Ter to perform certain services or provide certain information. *See* Bush Declaration, at ¶ 11; Verde Declaration, at ¶ 11. Uni-Ter employees responded directly to the Deputy Receiver, Mr. Greer, and the Receiver's agents and provided the information and records requested. *See* Bush Declaration, at ¶ 11; Verde Declaration, at ¶ 11. According to Carolyn Verde, Uni-Ter's former President and CEO, the Receiver and the Receiver's agents

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

focused their requests on information and records related to underwriting and claims. *See* Verde Declaration, at ¶ 13.

Additionally, Jonna Miller, a Uni-Ter employee and head of claims, educated the Receiver and the Receiver's agents—Betty Cordial, Michael Anderson, Mr. Greer, and Dick Darling—on the claims process over a period of several days, and she also met with Mr. Darling, Mr. Greer, and two of their assistants in mid-March 2013. *Id.* at ¶¶ 14-15. At that time, and as always, all records relating to L&C were available for the Receiver's review. *Id.* at ¶ 15.

Most of the Receiver's requests for records pertaining to L&C involved claims and underwriting. *Id.* at ¶¶ 13, 17. For example, Ms. Miller sent the Receiver and/or his agents: (a) printed claims-related e-mails; claims files; (b) historical month end documents (Bordereau reports); (c) a thumb drive of files which were identified by the Receiver or his agents as previously missing; (d) reinsurance reports; and (e) audits of individual claim files. *Id* at ¶ 17.

Uni-Ter was fully cooperative with the Receiver and her agents and complied with all requests for records and information from the Receiver, Mr. Greer, and the Receiver's agents. *See* Verde Declaration, at ¶ 19; *see also* Bush Declaration, ¶ 18.

Given its cooperation and compliance with the Receiver's requests, Uni-Ter was surprised when the Receiver filed a Motion to Compel Uni-Ter to Turn Over Records in the Receivership Action on August 30, 2013. *See* Verde Declaration, ¶ 21; Bush Declaration, ¶ 18. This was particularly surprising to Uni-Ter in light of the fact that Uni-Ter (a) believed it had been fully cooperative with the Receiver's requests; (b) was unaware of any outstanding requests for records from the Receiver or her agents; and (c) had made its office available to the Receiver and her agents to retrieve any and all records concerning L&C. *See* Bush Declaration, ¶ 18; Verde Declaration, ¶¶ 21-22. Ms. Verde's contact at the DOI, Ken Stern, was also both unaware and surprised that at a motion had been filed, given Uni-Ter's prior cooperation with the Receiver. *See* Verde Declaration, ¶ 23.

On September 5, 2013, an order ("Order to Compel") was issued in the Receivership Action requiring Uni-Ter to provide to the Receiver "any and all records and documents, in whatever form, pertaining to or belonging to Lewis & Clark, including (but not limited to)

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

readable copies of all data pertaining to Lewis & Clark's policies, policy applications, claims records, accounting, receipts and disbursements, investments, journal entries, Board of Directors records, together with any other records that were created for or involve Lewis & Clark." *See* Ogilvie Declaration, ¶ 10 and Exhibit C. The Motion to Compel did not seek relief against U.S. Re and the Order to Compel did not order any relief against U.S. Re, a non-party to the Receivership Action. *Id.*

Once again, and in compliance with the Order to Compel, Uni-Ter cooperated with the Receiver and opened its offices for the purpose of collecting records in early October 2013. *See* Verde Declaration, ¶ 25. Mr. Greer was present at Uni-Ter's offices and directed Uni-Ter as to which L&C records the Receiver wished to collect. *See id.* at ¶ 26. Contrary to the assertion in Mr. Greer's declaration, however, Walter Bush was not present at Uni-Ter's office when Mr. Greer was there, and Mr. Bush therefore did not advise Mr. Greer as to the completeness of what he collected. *See* Bush Declaration, ¶ 20. Uni-Ter provided the Receiver with everything the Receiver requested. *See* Verde Declaration, ¶ 27. Uni-Ter did not withhold, hide, or conceal any L&C records in its possession. *Id.* at ¶ 28. Uni-Ter did not destroy any L&C records in order to withhold, hide, or conceal records from the Receiver. *Id.* at ¶ 29.

On October 2, 2013, the Receiver filed a Special Interim Status Report on the Production of Records by Uni-Ter, which provided:

1. "the Deputy Receiver ha[d] made arrangements to move the records to her office in Birmingham, AL on Thursday, October 3, 2013";
2. "[t]here were approximately 125 boxes of Lewis and Clark Records packed and ready to go"; and
3. "[t]he Deputy Receiver has also been provided copies of electronic data pertaining to Lewis and Clark policyholders and claims that have been stored on UNI-TER's computer system."

See Special Interim Status Report on the Production of Records by Uni-Ter, attached as **Exhibit 4** hereto. The Receiver did not subsequently request that Uni-Ter produce any additional records, or move to compel production of any additional records, related to the production to the Receiver

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

in 2013. *See* Ogilvie Declaration, ¶ 13; Bush Declaration, ¶ 21. As far as Uni-Ter was concerned, the Receiver and the Receiver's agents were satisfied with the production of documents they had requested and obtained in the Receivership Action.

B. Uni-Ter and U.S. Re's production in this case

In December 2014, the Receiver—who was appointed in related Case No. A-12-672047-B (the "Receivership Action") of the now defunct Lewis and Clark Risk Retention Group, Inc. ("L&C")—instituted this lawsuit against former directors of L&C ("Director Defendants"), Uni-Ter UMC, Uni-Ter CS, and U.S. Re. In the initial complaint, the Receiver alleged claims of gross negligence and deepening of the insolvency against the Director Defendants, negligent misrepresentation against Uni-Ter UMC, breach of fiduciary duty against Uni-Ter UMC and Uni-Ter CS, and breach of fiduciary duty against U.S. Re. On June 13, 2016, the Receiver filed its Second Amended Complaint, and, subsequently, on August 5, 2016, the Receiver filed its Third Amended Complaint—the currently operative complaint—which contains the same claims against Defendants as the original Complaint and nearly 500 pages of exhibits.

In more than four years from when this action began to when this action was stayed in March 2019, the Receiver did not diligently or expeditiously prosecute its claims. The Receiver took very few depositions, and sought minimal discovery directed to the merits of this case. The Receiver did not even propound discovery until mid-2017, and then, instead of pursuing merits discovery, the Receiver spent a significant portion of the 2018 attempting to obtain a judgment against Uni-Ter and U.S. Re in this case, not on the merits of its claims, but as a sanction for purportedly withholding production in violation of two 2013 court orders in the underlying Receivership Action.

Specifically, in late July 2017—over two and a half years after the Receiver initiated this action and nearly four years from the time the Receiver collected documents in the Receivership action—counsel for the Receiver informed counsel for Uni-Ter and U.S. Re that she did not believe the Receiver received any emails along with the hard drive and hard copy documents obtained in 2013. *See* August 2, 2017 Letter from K. Freedman to B. Wirthlin attached as **Exhibit 5**. In an effort to be proactive and move discovery along in this action, and because the Receiver

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

was virtually unresponsive to Uni-Ter and U.S. Re's attempts to formulate an agreed-upon search protocol (*see id.*) Uni-Ter and U.S. Re ran searches consistent with the extensive and broad protocol set forth in the August 2, 2017 letter to the Receiver's counsel and reviewed documents to identify relevant, responsive, and non-privileged documents. *See id.* The Receiver never responded to the August 2, 2017 letter. Upon completing the search and review, Uni-Ter and U.S. Re produced over 1.5 million pages of documents in May 2018.

Also, in late 2017, Uni-Ter agreed to perform an analysis of the hard drive produced to the Receiver in 2013 to satisfy the Receiver's concern that Uni-Ter had not produced all documents identified in its initial disclosures in this action. *See* August 2, 2017 Letter. Uni-Ter's position in this action was that the Receiver had already obtained a significant amount of documents by way of the prior production in 2013, and Uni-Ter wanted to ensure that it was not expending unnecessary time and money to provide duplicative documents in this action. *See id.* Accordingly, Uni-Ter agreed to review the hard drive previously produced to the Receiver in the Receivership Action—once the Receiver provided it with a copy—and compare it to Uni-Ter's then-current network, to determine what, if anything, was outstanding. It did so to comply with its discovery obligations in this action. It was not until an August 27, 2018 meet and confer in this case, that the Receiver raised concerns with the purported actions or inactions by Uni-Ter and U.S. Re in the Receivership Action back in 2013. *See* Ogilvie Declaration, at ¶ 14.

Shortly thereafter, the Receiver unilaterally noticed the depositions for the Corporate Representatives for Uni-Ter and U.S. Re in this case for September 19, 2018, on the forty-seven (47) Subject Matters. *See id.* at ¶ 9. None of the Subject Matters related to the merits of this action. Rather, all of the Subject Matters pertained to Uni-Ter and U.S. Re's record keeping procedures and document productions. And, several Subject Matters sought testimony regarding the Liquidation Order and the Order to Compel entered in the Receivership Action, as well as Uni-Ter and U.S. Re's compliance with these orders. *Id.* at ¶ 10.

Uni-Ter and U.S. Re objected to Subject Matters which related to the Liquidation Order and Order to Compel on the grounds that such topics were improper and not relevant to the claims and defenses in this case. *Id.* at ¶¶ 11.a. Uni-Ter and U.S. Re also objected to those Subject

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Matters on the ground that the orders only pertained to Uni-Ter because only Uni-Ter intervened in the Receivership Action. *Id.* at ¶ 11.b.

Following a meet and confer on the Subject Matters, during which the Receiver's counsel stated that he would proceed with the depositions despite Uni-Ter and U.S. Re's valid objections, Uni-Ter and U.S. Re filed a Motion for Entry of a Protective Order on Order Shortening Time ("Motion for Protective Order"). *See id.* at ¶ 16. Counsel for Uni-Ter and U.S. Re also advised the Receiver's counsel that Uni-Ter and U.S. Re were having difficulty locating individuals with knowledge of what occurred in 2013 given the lapse of time, as well as the fact that Uni-Ter is now insolvent and has no employees. *See id.* at ¶ 23.

This led to the first of at least *six* attempts by the Receiver to shift blame and conceal her own failures to prosecute this case.

C. The Receiver's *first* attempt to shift blame

A hearing on Uni-Ter and U.S. Re's Motion for Protective Order was held on September 28, 2018 before the Discovery Commissioner. At the hearing, the Honorable Bonnie Bulla, granted the Motion for Protective Order. *See id.* at ¶ 17. Judge Bulla recognized that the issue before her related to a 30(b)(6) deposition and the associated topic areas. *Id.* Her concern, however, was why the issues relating to the disputed Subject Matters were not before Judge Gonzalez as part of the Receivership Action. *Id.* Specifically, Judge Bulla stated: "if there is a problem with the document productions as it relates to the Receivership and the order that Judge Gonzalez implemented then you need to bring that to her attention." *Id.*

Then, addressing Receiver's counsel, she stated: "This case is - obviously stands on its own. The receivership case stands on its own. These two judges are going to make their own decisions. They are not bound by each other's decisions. Do you understand that?" *See id.* at ¶ 18. The Receiver's counsel responded: "Absolutely." *Id.* He further stated: "We're not trying to go in front of Judge Gonzalez, we are not trying to enforce the order." *Id.*

The Discovery Commissioner then stated: "The purpose of the deposition is to support claims and defenses in **this** case." *Id.* at ¶ 19 (emphasis added). Accordingly, proper questioning would include, for example, how documents were managed or kept, as this would be relevant to

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

the claims of breach of fiduciary duties raised in this case. *Id.* However, the Discovery Commissioner noted that questions related to whether all documents required to be produced by the court orders in the Receivership Action were an issue for Judge Gonzalez. *Id.* Counsel for the Receiver confirmed he simply wanted to find out where documents are. *Id.* at ¶ 20. He stated: "If we need to go in there [referring to the Receivership Action] and file a 30(b)(6) action, or I'm sorry, a request for a 30(b)(6) deposition, we can certainly do that. . . . But I think ultimately what were after judge is this, this is all we're after: We want to know what documents they had when the company fell apart. We want to know what documents, how they kept them, where they were, what - what we haven't received yet. **That's all we really want to know**." *Id.* (emphasis added.)

D. The Receiver's *second* attempt to shift blame

On October 2018, the Receiver filed a Motion to Show Cause Why Intervenor Uni-Ter and Non-Party U.S. Re Should Not be Held in Contempt of Court on Order Shortening Time in the Receivership Action ("First Motion to Show Cause"). Despite the Receiver's statements in open court at the September 28, 2018 hearing in this case, it became abundantly clear that it was not the Receiver's intention to pursue the deposition of Uni-Ter and U.S. Re's Corporate Representatives—either in this case or the Receivership Action. Indeed, nowhere in the First Motion to Show Cause did the Receiver ask the court in the Receivership Action to order the deposition of a 30(b)(6) representative on the Subject Matters related to the Liquidation Order or the Order to Compel, as the Discovery Commissioner in this case stated the Receiver could do. And, as soon as the Court entered the order setting the hearing on the Receiver's First Motion to Show Cause for November 5, 2018, the Receiver cancelled the November 1 and 2 depositions she had set in this case. *See id.* at ¶ 22.

The First Motion to Show Cause also did not seek to provide any substantive relief in the Receivership Action. Rather, at the heart of the First Motion to Show Cause is the Receiver's unabashed attempt to have the court in the Receivership Action strike Uni-Ter and U.S. Re's pleadings in this case—resulting in a default judgment against them—for purported violations of the Liquidation Order and the Order to Compel in the Receivership Action. On November 26,

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

2018, an order was entered in the Receivership Action striking the First Motion to Show Cause, without prejudice, as part of the order disqualifying the Law Firm of Fennemore Craig, P.C. from representing the Receiver in the Receivership Action. *See* Ogilvie Declaration, at ¶ 6. Thus, the merits of the First Motion to Show Cause were not addressed.

E. The Receiver's *third* attempt to shift blame

On December 14, 2018, the Receiver, through the Nevada Attorney General, filed the Second Motion to Show Cause in the Receivership Action. *See id.* at ¶ 7. The Second Motion to Show Cause also failed to request the deposition of a 30(b)(6) representative on the Subject Matters related to the Liquidation Order or the Order to Compel, as the Discovery Commissioner in this case stated the Receiver could do. And, although the Second Motion to Show Cause did not include the baseless request to have this Court strike Uni-Ter and U.S. Re's pleadings in the 2014 Action, it still asked the court in the Receivership Action to issue a finding of contempt against Uni-Ter and U.S. Re for its 2013 actions.

The Second Motion to Show Cause was heard by Judge Gonzalez on January 14, 2019. During the hearing, the court was unsurprisingly critical of the Receiver and Receiver's counsel for waiting five years to question Uni-Ter's production in the Receivership Action. *Id.* Judge Gonzalez questioned the Nevada Attorney General three times about the Receiver's delay:

- "How come it took the receiver five years to file this motion" *Id.*;
- "Given the amount I've approved for bills for counsel to prosecute the recovery action, one would assume that everything had been thoroughly gone through. So how come it took five years?" *Id.*; and
- "You are not going to do an evidentiary hearing today. So I'm really trying to get a good answer. And I know you may not be the one to answer this question given the Fennemore Craig folks [meaning, the Receiver's counsel in this case], but how come it took five years?" *Id.*

In her ruling denying the Receiver's Second Motion to Show Cause, Judge Gonzalez stated: "Given the ***lack of diligence by the receiver*** in pursuing this issue, I am not going to schedule a contempt proceeding. I am certain that you are going to proceed in Judge Allf's court

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

with producing all the relevant information needed for the case." *Id.* (Emphasis added). As discussed above, Uni-Ter and U.S. Re produced all e-mails pursuant to the August 2, 2017 search protocol.

F. The Receiver's *fourth* and *fifth* attempts to shift blame

In December 2018 and despite the Court's specifically stating in the May 16, 2018 Order continuing discovery deadlines that it would be the "last stipulation to continue," the Receiver filed a fourth Motion for Extension of Discovery Deadlines and to Continue Trial. In that motion, the Receiver, once again, blamed Uni-Ter and U.S. Re for her request, claiming that they "intentionally delayed the production." *See* Motion for Extension at 1:28-2:4. The Receiver echoed the same stale claims most recently in her June 24, 2020 Motion for Preferential Trial and Scheduling Order. The basis of each of these motions—like the others discussed above—were inaccurate and baseless allegations that: (1) Uni-Ter and U.S. Re failed to comply with two court orders issued in 2013 in Receivership Action; and (2) Uni-Ter and U.S. Re have intentionally delayed production and have failed to comply with their discovery obligations in this case.

Clearly, the Receiver continues to distort the realities of the Receivership Action and this case in an attempt to shift blame and somehow paint the picture that the Receiver has been actively and continuously engaged in extensive discovery. In reality, however, the Receiver has taken little action to move the case toward trial since December 2014. Now, while the Receiver purportedly seeks leave to amend her complaint to restate her allegations against the Director Defendants in light of the Nevada Supreme Court's ruling in the Mandamus Proceeding, this Motion also seeks leave to amend in order to assert additional claims against Uni-Ter and U.S. Re and add an additional defendant, Tal Piccione. To the extent the Receiver seeks to add new claims against Uni-Ter and U.S. RE and to add a new defendant, its proposed Fourth Amended Complaint is yet another example of the Receiver's delay of this action and untimely pursuit of claims and issues the Receiver should have brought long ago.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

III. ARGUMENT

A. Legal standards

Rule 15 of the Nevada Rules of Civil Procedure provides that a court should freely give leave to amend "when justice so requires." NRCP 15(a). The "liberal policy" provided by the rule, however, "does not mean the absence of all restraint." *State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 988, 103 P.3d 8, 18–19 (2004) (quoting *Ennes v. Mori*, 80 Nev. 237, 242, 391 P.2d 737, 740 (1964)). Indeed, "were that the intention, leave of court would not be required. The requirement of judicial approval suggests that there are instances where leave should not be granted." *Id.* (concluding that the district court did not abuse its discretion in denying defendant's motion for leave to amend); *Stephens*, 89 Nev. at 105, 507 P.2d at 139 ("Rule 15(a) of the Nevada Rules of Civil Procedure clearly provides that leave to amend shall be freely given when justice so requires. This does not, however, mean that a trial judge may not, in a proper case, deny a motion to amend.").

"Sufficient reasons to deny a motion to amend a pleading include undue delay, bad faith or dilatory motives on the part of the movant." *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000) (concluding district court did not abuse its discretion in denying motion where "the parties relied on the validity of the premarital agreement, the motion was filed on the 'eve' of trial and Janet was dilatory in requesting leave to amend"); *Stephens*, 89 Nev. at 105–06, 507 P.2d at 139 (recognizing "undue delay, bad faith or dilatory motive on the part of the movant" as reasons for denying a motion for leave and concluding that denial was proper where review of the record demonstrated that "the conduct of appellant was dilatory"); *O'Neal v. Juvenile Master Lu*, 67128, 2015 WL 7523925, at *4 (Nev. App. Nov. 19, 2015) ("A denial may be warranted, however, if undue delay, bad faith, or dilatory motives are involved."); *Foman v. Davis*, 371 U.S. 178, 182

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

(1962) (recognizing undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies, and undue prejudice to the opposing party by virtue of allowance as reasons for denying a motion for leave to amend).[2]

Further, "leave to amend should not be granted if the proposed amendment would be futile." *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013), *as corrected* (Aug. 14, 2013); *see also Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 289, 357 P.3d 966, 973 (Nev. App. 2015). ("Under NRCP 15(a), leave to amend, even if timely sought, need not be granted if the proposed amendment would be 'futile.'"); *Foman*, 371 U.S. 178, 182.

This case is rife with reasons to deny the Receiver's Motion. The Receiver's misleading statements to this Court in her filings, coupled with her eleventh hour attempt to add new claims against Uni-Ter and U.S. Re and Tal Piccione, demonstrate bad faith and dilatory motive. Further, as discussed above and addressed again below, despite her attempts to (unconvincingly) shift the blame to Uni-Ter and U.S. Re, the Receiver unduly delayed in seeking to amend her complaint against the Uni-Ter and U.S. Re defendants and to add Mr. Piccione. And, allowing amendment now after the Receiver's extensive delay would result in significant prejudice to Uni-Ter and U.S. Re. Finally, the Receiver's proposed amendments with respect to Uni-Ter, U.S. Re, and Mr. Piccione are futile. For these reasons, the Motion should be denied.

B. The Receiver's misleading and inaccurate statements to the Court in her filings, coupled with the new claims she now attempts to assert and the new defendant she seeks to add, exemplify bad faith and dilatory motive.

The contrast between the Receiver's representations to this Court and her proposed Fourth Amended Complaint demonstrates that the Receiver is acting in bad faith and with dilatory motive in now attempting to add new claims against Uni-Ter and U.S. Re, as well as a new defendant, Tal Piccione. The Receiver routinely represented to this Court that her current proposed amendment would be simply to fix the allegations regarding the Director Defendants in the Third

[2] Where the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority for this court in applying the Nevada Rules. *See Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 285, 357 P.3d 966, 970 (Nev. App. 2015) (quoting *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.,* 118 Nev. 46, 53, 38 P.3d 872, 876 (2002)).

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Amended Complaint so that her pleading would comply with the Nevada Supreme Court's ruling that the Receiver did not sufficiently plead that the "Director Defendants knew their conduct to be wrongful." Opinion, *Chur v. Dist. Ct. (State, Comm'r of Ins.)*, Case No. 78301 at 11 (Nev. Feb. 27, 2020).

Indeed, just last month, in her Second Supplemental Brief to the Motion for Clarification, the Receiver expressly addressed the purpose of her proposed amendment. She represented:

> **Motion to Amend**. Given the recent decision by the Nevada Supreme Court (in Chur), Plaintiff will be filing a Motion to Amend its Complaint ***consistent with the Chur decision***. As a result of the Nevada Supreme Court disavowing *Shoen*, Plaintiff is asserting allegations ***to support its Complaint and claims previously asserted therein with respect to the Director Defendants***. This will likely result in additional motion practice and require targeted discovery.

Second Supp. Brief to Mot. for Clarification at 5 (emphasis added). The Receiver does not state that she will be adding new claims against Uni-Ter or U.S. Re or that she will seek to add an entirely new defendant. Rather, she explicitly told this Court that her proposed amendment was necessary to address the Nevada Supreme Court's ruling with respect to her claims against the Director Defendants.

Similarly, in the presently pending Motion itself, the Receiver falsely represents to this Court that "[o]ther than seeking to add Piccione as a Defendant and asserting ***a new claim against him***, the Fourth Amended Complaint ***does not add new claims against the Defendants***—it simply adds factual allegations to support the claims that have been pending against the Defendants for years and substitutes causes of action (i.e., breach of fiduciary duty in place of gross negligence)." (Motion at 30:15-18) (emphasis added). This statement is patently false. The proposed Fourth Amended Complaint, in fact, asserts: three causes of action against Mr. Piccione (Ninth, Seventeenth, and Eighteenth Claims); two *new* causes of action against Uni-Ter UMC (Ninth and Fourteenth Claims); two *new* causes of action against Uni-Ter CS (Ninth and Fifteenth Claims); and two *new* causes of action against U.S. Re (Ninth and Sixteenth Claims).[3] (*See* proposed Fourth

[3] Notably, because the Receiver fails to even mention these new causes of action in her Motion, the Motion fails to make the necessary showing under Rule 15. The proposed amendment should be denied on this basis alone.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Am. Compl., at ¶¶ 697-727).

Specifically, in the Third Amended Complaint (the current operative complaint), the Receiver asserts a claim against Uni-Ter UMC for negligent misrepresentation and claims against Uni-Ter UMC, Uni-Ter CS and U.S. Re for breach of fiduciary duty. The proposed Fourth Amended Complaint retains these claims against Uni-Ter UMC, Uni-Ter CS, and U.S. Re. However, and contrary to the Receiver's representations in her Motion, the proposed Fourth Amended Complaint indeed adds new claims for deepening of the insolvency and aiding and abetting breach of fiduciary duty claims against Uni-Ter UMC, Uni-Ter CS, U.S. Re, and Mr. Piccione. (*See* proposed Fourth Am. Compl., at ¶¶ 697-727). Such misrepresentation exemplifies bad faith, which alone is a sufficient reason to deny the Receiver's request to file the Fourth Amended Complaint in this matter. *MEI-GSR Holdings, LLC v. Peppermill Casinos*, Inc., 416 P.3d 249, 254–55 (Nev. 2018) (quoting *Kantor* and holding that "[s]ufficient reasons to deny a motion to amend a pleading include undue delay, bad faith or dilatory motives on the part of the movant.").

Additionally, the fact that the Receiver has included these new claims while professing to the Court that the purpose of the amendment was to correct the allegations with respect to the Director Defendants in light of the Nevada Supreme Court's ruling and that the Fourth Amended Complaint "does not add new claims against the Defendants" highlights the dilatory motive behind the Receiver's filing. While a mere correction of the allegations against the Director Defendants would not delay this matter, the new claims against Uni-Ter and U.S. Re—not to mention the possible addition of a new defendant—have the potential to set this action back significantly. The new claims will result in motions to dismiss being filed and will require additional discovery, including depositions of the several individuals who have already been deposed, with trial right around the corner.

Thus, while on its face the Motion would appear to have little impact on the progress of the case, the reality is that this eleventh hour filing is the Receiver's last ditch attempt to stall the progress of this case and essentially go back to the beginning of the litigation to remedy the fact that she failed to diligently prosecute this matter the first time around. *See Nutton*, 131 Nev. at

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

288, 357 P.3d at 972 (finding, as part of a Rule 16(b) analysis, that "[t]he district court reasonably concluded that Nutton acted dilatorily in failing to seek to file the amendment months earlier, especially when he apparently realized much earlier that his street shoes may have played a role in causing the fall.")

C. The Receiver's specious attempt to shift blame to Uni-Ter and U.S. Re do not hide the fact that the Motion was brought with undue delay on the part of the Receiver.

The Receiver has a history of undue delay, both in the Receivership Action and in this case. As discussed above, Uni-Ter cooperated and complied with the Receiver's requests for documents in 2013. Uni-Ter provided the Receiver with everything the Receiver requested. Uni-Ter's last production was documented in the Receiver's October 2, 2013 Special Interim Status Report. *See* Exhibit 4. The Receiver did not subsequently request that Uni-Ter produce any additional records, or move to compel production of any additional records, related to the production to the Receiver in 2013. As far as Uni-Ter was concerned, the Receiver and the Receiver's agents were satisfied with the production of documents they had requested and obtained in the Receivership Action. Uni-Ter was, therefore, rightfully surprised when the Receiver tried to claim in 2018 in this case and in 2019 in the Receivership Action that Uni-Ter had somehow concealed documents or failed to comply with its obligations in the Receivership Action.

The Receiver's undue delay did not go unnoticed by the court in the Receivership Action. During the January 14, 2019 hearing on the Second Motion to Show Cause, Judge Gonzalez was critical of the Receiver's delay in claiming that the Receiver had only recently discovered that Uni-Ter had not met its production obligations in 2013. Judge Gonzalez even stated, "[g]iven the amount I've approved for bills for counsel to prosecute the recovery action, one would assume that everything had been thoroughly gone through." *See* Ogilvie Declaration at ¶ 7. And, in the court's ruling denying the Second Motion to Show Cause, Judge Gonzalez correctly found that the Receiver lacked diligence. *Id.*

Nearly four years after being appointed, the Receiver—on the eve of the expiration of the statute of limitations—filed the initial complaint in this case. Unfortunately, the Receiver's attempts to shift blame to disguise her lack of diligence continued in this case. While the Receiver claims,

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

yet again, that Uni-Ter and U.S. Re "unexpectedly" produced over 1.5 million pages of documents in May 2018, it is disingenuous to classify the production as a surprise (Motion at 26:28-27:3), given that: (1) those documents were specifically requested by the Receiver in her requests for production beginning in mid-2017; and (2) Uni-Ter and U.S. Re expressly informed the Receiver in August 2017 that they would search for, collect, review, and produce e-mail documents in response to the Receiver's request for them to do so. Accordingly, and despite the Receiver's lack of response to Uni-Ter and U.S. Re's attempts to reach agreement on search parameters, Uni-Ter and U.S. Re ran searches across the e-mail accounts of numerous custodians, reviewed those documents to identify relevant, responsive, and non-privileged documents, and produced the documents to the Receiver.

Further, the Receiver cannot feign surprise at the production of e-mails in this case when Receiver's counsel informed counsel for Uni-Ter and U.S. Re in late July 2017 that he did not believe Uni-Ter produced e-mails as part of the production in the Receivership Action and then expressly requested them in this case. Nor can the Receiver rely on the false premise that Uni-Ter's production in the Receivership Action was somehow non-compliant. Counsel for the Receiver is well-aware of how e-mail collection occurs. The parties meet to establish a protocol, including date ranges and custodians. The parties then work together to prepare a suitable list of search terms to eliminate extraneous documents and provide the party seeking the electronic discovery with the relevant documents they need. This never occurred in 2013. Rather, and as detailed above, Uni-Ter worked with the Receiver and produced all requested documents. Accordingly, the Receiver's allegations regarding Uni-Ter and U.S. Re's non-compliance with the 2013 orders are unfounded, and the Receiver should refrain from repeatedly raising these stale and failed claims in the context of this case.

It is unnecessary, and indeed inaccurate, however, for the Receiver to point the finger at Uni-Ter and U.S. Re for purposes of diverting the Court's attention to the Receiver's undue delay in moving for leave to amend. As the above discussion shows, the Receiver is the party that has failed to diligently pursue discovery both in the Receivership Action and since the inception of this lawsuit. The Receiver's undue delay in seeking to amend the complaint against Uni-Ter and U.S. Re and to add Mr. Piccione is sufficient grounds to deny the Motion. *See MEIGSR Holdings ,LLC*

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

v. Peppermill Casinos, Inc., 134 Nev. 235 (Nev. 2018) (finding the district court did not abuse its discretion in denying motion to amend complaint based on undue delay).

D. Uni-Ter and U.S. Re will suffer serious prejudice if the Court grants the Receiver's Motion.

The Receiver's fourth amendment would prejudice Uni-Ter and U.S. RE and further delay the litigation. The proposed amendment seeks to add Mr. Piccione as a defendant and asserts five new claims for aiding and abetting, and new claim for deepening the insolvency against Uni-Ter UMC, Uni-Ter CS, U.S. Re and Mr. Piccione. These new causes of actions and the addition of Mr. Piccione will undoubtedly broaden the scope of the litigation and will require a significant amount of additional discovery. Inasmuch as the Receiver would like to broaden the scope of the litigation, it should not be permitted to continue to delay this case by attempting to interpose new causes of action and a new defendant at the eleventh hour, at the expense—and to the prejudice of—the other parties.

The Receiver's Motion is wholly lacking in any analysis of the harm that the Defendants will face should the Fourth Amended Complaint be permitted. To be sure, the amendment will be detrimental to Uni-Ter and U.S. Re's ability to properly defend themselves at the eventual trial in this case. Uni-Ter and U.S. Re have ceased doing business and now must rely on former employees, over whom they have no control, to testify on their behalf and who are outside the jurisdiction of this court for subpoena purposes. Uni-Ter and U.S. Re have consistently advised of the difficulties associated with locating former employees to depose or, presumably, call at trial. The Receiver is well-aware of these difficulties. And, these difficulties will only increase over time. 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. The Receiver unilaterally canceled those depositions. By the time the Receiver re-noticed the 30(b)(6) depositions for February of 2019, Mr. Ciervo had moved to Arizona and was unwilling to travel to New York, or even to Las Vegas, to be deposed. While Mr. Ciervo ultimately agreed to be deposed in Arizona, this is indicative of the struggle Uni-Ter and U.S. Re face in locating witnesses—and this was over a

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

year ago and without the additional delay that the amendment would cause.

Should this Court grant leave for the Receiver to file the Fourth Amended Complaint, this matter will undoubtedly be delayed further and the hardship on Uni-Ter and U.S. Re to secure witnesses will increase exponentially. "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)). This concept is extremely pertinent here, where the events at issue occurred between approximately 2009 to 2012. The Receiver was appointed at the end of that timeframe and has had significant time to prepare and build its case against Defendants. Thus, even if Uni-Ter and U.S. Re are able to locate witnesses for additional depositions and trial, which, as discussed above has not been particularly successful, their ability to accurately recall and address relevant events will only decrease as time progresses.

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 and will result in irreparable and serious injury to them.

E. Proposed amendment adding claims for aiding and abetting breach of fiduciary duty against Uni-Ter and U.S. Re is futile.

Leave to amend "should not be granted if the proposed amendment would be futile." *Halcrow,* 398, 302 P.3d at 1152. "A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim. *Nutton,* 357 P.3d at 973 (alteration in original) (internal quotation marks omitted).

1. New claims for aiding and abetting breach of fiduciary duty are barred by the statute of limitations.

In Nevada, the three-year statute of limitations in NRS § 11.190(3)(d) applies to a claim for aiding and abetting a breach of fiduciary duty. *See USA CM Liquidating Trust v. Deloitte & Touche, LLP*, 764 F.Supp.2d 1210, 1231 (D.Nev.2011), *aff'd sub nom.*, 523 Fed. Appx. 488 (9th Cir. 2013)(unpublished).

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

The Receiver's proposed claims for aiding and abetting accrued—for purposes of the statute of limitations—when the Receiver "knew or reasonably should have known, of the facts giving rise to the breach" of fiduciary duty claims. *See In re Amerco Derivative Litig.*, 252 P.3d 681, 703 (Nev. 2011). The Receiver's original Complaint filed in December 2014 included claims for breach of fiduciary duty against Uni-Ter and U.S. Re. Thus, the Receiver's proposed claims for aiding and abetting those purported breaches of fiduciary duty would have expired—at the absolute latest—three years after the filing of the original Complaint, which was December 2017. The proposed aiding and abetting claims are therefore time-barred unless they relate back to the original Complaint pursuant to NRCP 15 (c). However, as discussed below, the relation back doctrine does not save the aiding and abetting claims.

2. New claims for aiding and abetting breach of fiduciary duty do not relate back under NRCP 15(c).

In *Badger v. Eighth Jud. Dist. Ct.*, 373 P.3d 89, 94–95 (Nev. 2016), the Nevada Supreme Court noted that it has "previously refused to allow a new claim based upon a ***new theory of liability*** asserted in an amended pleading to relate back under NRCP 15(c) after the statute of limitations had run." (citing *Nelson v. City of Las Vegas*, 99 Nev. 548, 556–57, 665 P.2d 1141, 1146 (1983) (emphasis added)). Stated another way, the relation back doctrine does not apply if the new claim "requires the pleading of different factual allegations and the preparation of a substantially different defense" than the earlier-pled claims. *Scott v. Dept. of Com.*, 763 P.2d 341, 345 (Nev. 1988).

In *Scott*, a proposed new negligence claim was denied on the basis that the original claims for fraud and intentional misrepresentation failed to provide defendants with sufficient notice to defend against the new negligence claim. *Id.* at 345. Similarly, in *Nelson* the court denied an amendment adding a battery claim after the statute of limitations had run, finding that the claims in the prior complaint for false arrest, false imprisonment, and intentional infliction of emotional distress did not provide the defendant any notice of the battery claim. 665 P.2d at 1146.

Since the inception of this case in December 2014, the only claims asserted by the Receiver against Uni-Ter and U.S. Re are claims for negligent misrepresentation (Uni-Ter UMC) and

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

breach of fiduciary duty (Uni-Ter UMC, Uni-Ter CS, and U.S. Re). The proposed Fourth Amended Complaint asserts—for the first time—new causes of action for aiding and abetting breach of fiduciary duty.

A claim for aiding and abetting a breach of a fiduciary duty requires a showing that the defendant "knowingly and substantially participated in or encouraged" another party's breach of a fiduciary duty. *Guilfoyle v. Olde Monmouth Stock Transfer Co., Inc*.,130 Nev. 801, 335 P.3d 190, 198 (2014) The aiding and abetting claims will therefore require "the preparation of a substantially different defense" than the earlier-pled claims. *Scott*, 763 P.2d at 345. Because the new claims are based "upon a new theory of liability" they do not relate back under NRCP 15(c) and are barred by the statute of limitations. *Badger*, 373 P.3d at 94.

For this reason, the proposed amendment, which seeks to assert new claims for aiding and abetting a breach of fiduciary duty, should be denied.

F. Proposed amendment adding Mr. Piccione as a new defendant is futile.

1. Mr. Piccione is not being substituted for a Doe Defendant pursuant to Rule 10(d).

The Receiver improperly relies on NRCP 10(d) as basis for adding Mr. Piccione as a defendant in this action. NRCP 10(d) provides:

> If the name of a defendant is unknown to the pleader, the defendant may be designated by any name. When the defendant's true name is discovered, the pleader should promptly substitute the actual defendant for a fictitious party.

Nevada Courts have long held that the fictitious defendant rule in NRCP 10(d) provides a "narrow exception, allowing the pleading of fictitious defendants only where there is an uncertainty as to their names." *Lunn v. American Maintenance Corp*., 96 Nev. 787, 618 P.2d 343 (1980) (*citing Hill v. Summa Corporation,* 90 Nev. at 81, 518 P.2d at 1095). The fictitious defendant rule, however, does not apply to the "addition of a party defendant." *Id*.

In order to substitute a newly-named defendant for a previously named Doe defendant under NCRP 10(d), the party seeking the substitution must satisfy the requirements set forth in *Nurenberger Hercules-Werke GMBH v. Virostek*, 107 Nev. 873, 822 P.2d 1100 (1991), which include: (1) "pleading the basis for naming defendants by other than their true identity, and clearly

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

specifying the connection between the intended defendants and the conduct, activity, or omission upon which the cause of action is based;" and (2) "exercising reasonable diligence in ascertaining the true identity of the intended defendants and promptly moving to amend the complaint in order to substitute the actual for the fictional." *Id.* at 881. Satisfaction of these elements is "necessary to the granting of an amendment that relates back to the date of the filing of the original complaint." *Id*. While the Receiver vaguely pled fictitious defendants in its original Complaint, she has failed to meet the requirements of *Nurenberger*.

The original Complaint identifies Doe defendants as "individuals or business entities currently unknown to Plaintiff who claim some right, title, interest or lien in the subject matter of this action." (Compl., at ¶ 29). While vague and ambiguous, this description clearly encompasses *only* individuals or entities "who *claim* some right, title, interest or lien in the subject matter of this action." *Id*.

The proposed Fourth Amended Complaint does not allege or suggest that Mr. Piccione is an individual who "claim[s] some right, title, interest or lien in the subject matter of this action." *Id*.

Furthermore, the Receiver cannot legitimately claim that Mr. Piccione's identity was unknown. To the contrary, the proposed Fourth Amended Complaint alleges that "***at all relevant times including as of the time the Receivership Action was filed***," Mr. Piccione was the "Chairman, President, Chief Executive Officer, and a Director of U.S. RE" and "Chairman and a Director of Uni-Ter." (Fourth Am. Compl., at ¶¶ 29-30.) (emphasis added). The proposed amendment seeks to add Mr. Piccione as a new party defendant and asserts three new causes of action against him for deepening the insolvency (Ninth Claim) and aiding and abetting breach of fiduciary duty (Seventeenth and Eighteenth Claims). This is not merely a substitution of a designated but unnamed defendant with a named defendant. Mr. Piccione is not a Doe Defendant, and for the Receiver to suggest otherwise is disingenuous to say the least.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

2. Proposed claims against Mr. Piccione are Futile.

a. **The proposed Ninth, Seventeenth and Eighteenth Claims against Mr. Piccione are time-barred and do not relate back under NRCP 15 (c).**

It is clear the Receiver is intentionally conflating NRCP 10 with NRCP 15 in an attempt to avoid the stricter standard required to add a new party under NRCP 15.

"The elements of a cause of action for deepening insolvency are (1) fraud, (2) which causes the expansion of corporate debt, and (3) which prolongs the life of the corporation." *In re Felt Mfg. Co., Inc*., 371 B.R. 589, 621 (Bankr. D.N.H. 2007) (citing *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co*., 267 F.3d 340, 344 (3d Cir.2001)). Because the purported deepening insolvency claim is predicated on fraud, it is subject to the three year statute of limitations in NRS 11.190(3)(d) which applies to "an action for relief on the ground of fraud or mistake."

Likewise, as explained above, the claims for aiding and abetting a breach of fiduciary duty are also subject to the three-year statute of limitations in NRS 11.190(3)(d). *See USA CM*, 764 F.Supp.2d at 1231.

Thus, the proposed claims for deepening the insolvency and aiding and abetting against Mr. Piccione expired at the very latest in December 2017, three years from the filing of the original Complaint. These claims are, therefore, time-barred unless they relate back to the original Complaint pursuant to NRCP 15 (c). As discussed below, the relation back doctrine does not save the claims against Mr. Piccione.

Under NRCP 15 (c), an amended pleading adding a defendant that is filed after the statute of limitations has run will not relate back to the date of the original pleading unless the new defendant: (1) received actual notice of the action; (2) knows that it is the proper party; and (3) has not been misled to its prejudice by the amendment. *Costello v. Casler*, 254 P.3d 631, 634 (Nev. 2011).

In *Costello*, the court allowed an amendment in order to substitute defendant's estate as the new defendant after the statute of limitations had expired. In allowing the amendment, the *Costello* court concluded that (1) the estate had actual notice of the action through the insurance

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

company representing the interests of the deceased defendant, and (2) there would be no prejudice to the estate if it was substituted as the defendant because "the substance of the proposed amended complaint effected no real change as [plaintiff's] claim remained the same." *Id.* at 636.

Here, unlike in *Costello*, the proposed claims against Mr. Piccione are new claims based on a new a theory of liability for aiding and abetting a breach of fiduciary duty. There are no such claims in the Third Amended Complaint against any of the existing Defendants. Therefore, Mr. Piccione could not have actual notice of aiding and abetting claims as they are entirely new causes of action—asserted for the first time in the proposed Fourth Amended Complaint.

Furthermore, the operative complaint does not assert a cause of action for deepening the insolvency against Uni-Ter or U.S. Re. Therefore, Mr. Piccione could not have actual notice of the proposed claim for deepening the insolvency, as such a claim was not previously alleged against the corporate entities with which he is associated.

Moreover, Mr. Piccione would be prejudiced if he is added as a defendant at this late stage of the litigation, when the action has been pending since December 2014, and ten depositions have been taken, including the deposition of the Receiver's corporate representative, Mr. Greer.

Furthermore, the addition of Mr. Piccione would also prejudice Uni-Ter and U.S. Re. The claims against Mr. Piccione will undoubtedly broaden the scope of the litigation and will require a significant amount of additional discovery, and further delay the litigation. The Receiver should not be permitted to continue to delay this case by attempting to add a new defendant at the eleventh hour, at the expense--and to the prejudice of—the other parties.

Accordingly, the proposed amendment adding Mr. Piccione as a defendant would be futile because the proposed Ninth, Seventeenth and Eighteenth claims against Mr. Piccione are time-barred and do not relate back to the filing of the original of Complaint for purposes of NRCP 15 (c).

b. The Seventeenth and Eighteenth Claims against Mr. Piccione fail because he is not a "third-party" as is required to sustain a claim for aiding and abetting another's breach of fiduciary duty.

A claim for aiding and abetting a breach of a fiduciary duty requires that the "defendant ***third party*** knowingly and substantially participated in or encouraged" another's breach of a

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

fiduciary duty. *Guilfoyle,* 335 P.3d at 198 (emphasis added) (affirming summary judgment in favor of defendant as to aiding and abetting breach of fiduciary duty claim against him, finding that "assuming [corporation] breached a fiduciary duty to [stockholder], [stockholder] failed to present evidence that [agent] knowingly and substantially participated in or encouraged that breach.")

The Receiver's proposed claims against Mr. Piccione for aiding and abetting U.S. Re and Uni-Ter's alleged breaches of fiduciary duty fail because Mr. Piccione—according to the allegations in the proposed amendment—is not a "third-party," as is required to sustain these claims. For instance, the proposed Fourth Amended Complaint alleges that "[b]y virtue of his position as Chairman, President, Chief Executive Officer, and founder or U.S. RE, Piccione had the power, control, and authority to set policy, make employment decisions, decide all matters of business, and to oversee and manage the affairs of U.S. RE." (Fourth Am. Compl., at ¶ 560). With respect to Uni-Ter, the proposed Fourth Amended Complaint alleges that Mr. Piccione was "a founder, a Director, and the Chairman of Uni-Ter," and "[b]y virtue of his position at Uni-Ter, Piccione had the power, control and authority over Uni-Ter to set policy, provide directives to employees, and to oversee and manage the affairs of the business." (*Id*. at ¶¶ 573-574). Therefore, based on the Receiver's allegations, Mr. Piccione is not a third-party separate and apart from U.S. Re and Uni-Ter, as is required for the aiding and abetting claims.

Accordingly, the proposed claims against Mr. Piccione are futile and the Receiver's request to add Mr. Piccione as a party defendant in this action should be denied.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

IV. CONCLUSION

For the foregoing reasons, Uni-Ter and U.S. Re object to the Receiver's Motion for Leave to File the Fourth Amended Complaint, and the Court should deny the Motion in its entirety.

DATED this 17th day of July, 2020.

McDONALD CARANO LLP

By: /s/ *George F. Ogilvie III*
George F. Ogilvie III (NSBN 3552)
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

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 17th day of July, 2020, 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 RESPONSE IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT** 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.

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

RPLY
MARK A. HUTCHISON, ESQ.
Nevada Bar No. 4639
PATRICIA LEE, ESQ.
Nevada Bar No. 8287
BRENOCH R. WIRTHLIN, ESQ.
Nevada Bar No. 10282
CHRISTIAN ORME, ESQ.
Nevada Bar No. 10175
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Telephone: (702) 385.2500
Facsimile: (702) 385.2086
E-Mail: mhutchison@hutchlegal.com
plee@hutchlegal.com
bwirthlin@hutchlegal.com
corme@hutchlegal.com
Attorneys for Plaintiff

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 **OMNIBUS REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT** **Hearing Date: July 23, 2020** **Hearing Time: 10:00 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." Unless otherwise stated, all defined terms shall be given the meaning ascribed to them in the Motion to Amend.

and through its attorneys, the law firm of Hutchison & Steffen, hereby submits the following Omnibus Reply in Support of its Motion for Leave to File Fourth Amended Complaint ("Motion to Amend"). This Omnibus Reply is in response to the Defendants' Oppositions and is based on NRCP Rule 15(a)(2), the papers and pleadings on file herein, and the Memorandum of Points and Authorities which follows, all of which demonstrate that Plaintiff is entitled to an order granting leave to file the Fourth Amended Complaint.

DATED: July 21, 2020.

HUTCHISON & STEFFEN
By */s/ Brenoch Wirthlin, Esq.*
MARK A. HUTCHISON, ESQ.
Nevada Bar No. 4639
PATRICIA LEE, ESQ.
Nevada Bar No. 8287
BRENOCH R. WIRTHLIN, ESQ.
Nevada Bar No. 10282
CHRISTIAN ORME, ESQ.
Nevada Bar No. 10175
10080 W. Alta Dr., Suite 200
Las Vegas, Nevada 89145
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF REPLY ARGUMENT

Defendants[2] collectively advance two (2) basic arguments against the proposed amendment. First, Defendants argue Plaintiff has acted in bad faith. Second, Defendants argue that the proposed Fourth Amended Complaint ("FAC") is, at least in some respects, futile based on purportedly applicable statutes of limitation. Defendants' arguments fail as a matter of law and by their own admissions.

[2] Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels shall collectively be referred to as the "Director Defendants," "Directors" or "Board". Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp. and U.S. RE Corporation shall collectively be referred to as the "Uni-Ter Defendants." Defendants shall collectively refer to the Director Defendants and Uni-Ter Defendants.

First, with respect to the Defendants' bad faith arguments, it is genuinely difficult to understand how Defendants believe Plaintiff has proceeded in bad faith when the basis for amendment is by and large due to the *Chur* Opinion disavowing the prior holding in *Shoen* regarding gross negligence constituting a claim against directors and officers. This decision substantially altered the focus of the criteria necessary to allege claims against directors and officers, and Plaintiff seeks to amend its complaint accordingly. The FAC contains the same common facts as the original claims and centers on the directors' failures in operating L&C. In fact, the Director Defendants expressly admit in their opposition that the FAC is "**not based on new facts.**" *See* opposition filed by Director Defendants[3] at p. 3, ll. 8-11.[4] The Motion to Amend should be granted on this basis alone.

Moreover, it is difficult to see how the Defendants ascribe any undue delay or dilatory motive to Plaintiff, when Plaintiff moved to amend its complaint within the time frame provided by the operative scheduling order and as a result of the *Chur* Opinion. Defendants do not fairly characterize the proceedings in this matter, apparently forgetting that they requested one year to respond to the original complaint, asserting that they wanted to discuss settlement. At Defendants' request, Plaintiff's counsel provided such an extension and set a settlement conference for November/December 2015 – one year after the complaint was filed. Then, one month before the scheduled settlement conference, Defendants decided that they did not want to discuss settlement, suggesting that delay had been their plan all along. Further, Defendants still have not complied with 16.1's required initial disclosure requirements, and have obstructed Plaintiff's attempts to obtain discovery at every turn. In fact, as set forth below, Defendants did not produce the 1.7 million pages of documents which enabled Plaintiff to discover what had happened in this case until May-October, 2018 ("2018 Production"). This is not a case where two parties were both involved in the underlying factual events and have an understanding of what took place. Rather, as the Receiver, Plaintiff is required to piece together the facts from only what documents the

[3] Referred to herein as the "Directors' Opposition". The opposition filed by the Uni-Ter Defendants and U.S. RE is referred to herein as "Uni-Ter's Opposition."

Defendants have decided to provide, and even at this point Defendants have admitted they have not provided all documents in their possession which are relevant to this matter, and Plaintiff anticipates that Defendants will make substantial additional disclosures when they feel it is to their benefit despite NRCP 16.1's requirement that such disclosures were required years ago. *See* NRCP 16.1(a)(1)(C). Thus, while Plaintiff does not necessarily allege that Defendants have proceeded in bad faith, Defendants' failure to comply with even its most basic obligations in this case render their claims of bad faith hollow. Regardless, Plaintiff will be prepared to proceed to trial in late February or early March of 2021.

Second, Defendants' arguments regarding futility based on purportedly applicable statutes of limitation are legally deficient for multiple reasons. First off, the claims asserted in this case against the Director Defendants relate back to the filing of the original complaint under NRCP 15. There is no dispute the allegations in the FAC arise out of the same conduct, transactions and occurrences set out, or attempted to be set out, in the original pleadings. As noted above, the Director Defendants expressly admit in their opposition that the FAC is "not based on new facts". Further, the allegations against the Director Defendants and Mr. Piccione[5] relate to the 2018 Production and Plaintiff could not have discovered such conduct until the Defendants disclosed the documents contained in the 2018 Production. Had the Defendants made the 2018 Production in a timely manner – *i.e.* years before when said documents were required to be disclosed pursuant to NRCP 16.1 – their arguments may be more persuasive. In this case, any applicable statutes of limitation are tolled under Nevada's discovery rule. But, even then, under binding Nevada precedent, "[a] determination of '[**w]hen the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact.**' " *In re Amerco Derivative Litig*., 127 Nev. 196, 228, 252 P.3d 681, 703 (2011) (*citing Nevada State Bank v. Jamison Family P'ship*, 106 Nev. 792, 798, 801

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[4] Unless otherwise stated, all emphases herein are added.

[5] It bears noting that the Uni-Ter Defendants lack standing to oppose the Motion to Amend on behalf of Mr. Piccione, as set forth more fully herein.

P.2d 1377, 1382 (1990)). Accordingly, any argument regarding futility as to purported running of a statute of limitations is inappropriate in deciding a motion to amend as a matter of law.

Finally, Defendants fail to even address the most basic and fundamental guiding principle in determining whether leave to amend should be granted is "when justice so requires."[6] Here, the Motion to Amend was filed within the time for leave to amend provided in the operative scheduling order. In fact, the Uni-Ter Defendants also filed a motion for leave to amend which Plaintiff did not oppose. The basis for amendment, with respect to the Director Defendants, is the disavowal of the *Shoen* decision's holding that gross negligence provided a basis for claims against directors and officers. As other Nevada courts have recognized, this provides a very compelling and proper basis for amendment in the interests of justice and "**the policy of this state that cases be heard on the merits, whenever possible**." *Schulman v. Bongberg-Whitney Elec., Inc.*, 98 Nev. 226, 228, 645 P.2d 434, 435 (1982) (*citing Hotel Last Frontier v. Frontier Properties*, 79 Nev. 150, 380 P.2d 293 (1963)). This policy is consistent with, and strongly favors, allowing the proposed FAC to be filed to permit the Plaintiff to pursue its claims against the Defendants, including the Director Defendants, for the substantial harm caused to L&C, and by extension its policyholders and others.

II. LEGAL ARGUMENT

A. Justice dictates that Plaintiff be granted leave to amend its Complaint

Plaintiff respectfully submits that justice requires that Plaintiff be permitted to file its FAC. *See Ford v. Ford*, 105 Nev. 672, 676, 782 P.2d 1304, 1307 (1989) ("In order that justice be done, district courts should freely grant leave to amend…."). Here, after approximately 4 years of litigation in this action and over 13 years of the controlling case authority on the BJR (*i.e.*, *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 122 Nev. 621 (2006)), the Nevada Supreme Court disavowed the relevant holding in *Shoen* in rendering the new controlling case law on Nevada's

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[6] "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Due to the Defendants' failure to oppose Plaintiff's position that justice requires amendment, Plaintiff respectfully submits this Court should consider such failure as Defendants' waiver to argue otherwise and grant the Motion to Amend.

BJR and director/officer liability. Plaintiff could not have predicted the Supreme Court's disavowal of *Shoen* and certainly did not act in any manner evincing bad faith, undue delay or dilatory motive.

Plaintiff's Motion to Amend provides a proposed FAC (*see* Exhibit 37, attached to Appendix to Motion to Amend) which complies with the *Chur* Opinion in every respect. When reviewing the factual allegations in conjunction with the *Chur* Opinion, justice requires that the Motion to Amend be granted to permit the filing of the FAC. Contrary to Defendants' assertions, Plaintiff respectfully submits that denying Plaintiff's Motion to Amend would be a grave miscarriage of justice and constitute an abuse of discretion. *See MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016) ("[a]n abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law."); *see also Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014) (noting that the district court abuses its discretion when it "fail[s] to apply the full, applicable legal analysis").

This case is unique in that for over 13 years the controlling case law (*Shoen*) showed plaintiffs the roadmap of asserting claims against directors and officers under NRS 78.138. Now, in February of 2020, the Nevada Supreme Court disavowed *Shoen's* operative holding, leaving litigants like Plaintiff with no alternative but to adapt their complaints to meet the standard imposed in the *Chur* Opinion. Fortunately through discovery, Plaintiff had the documents and information necessary to assert valid allegations and claims that comply with the *Chur* Opinion, which is the basis for Plaintiff's Motion to Amend.

The question presented to the Court by the Motion to Amend is whether or not to allow Plaintiff to file its FAC, when the controlling Nevada case law changed. While Plaintiff could find no Nevada Supreme Court case showing how this Court should handle this situation, the Honorable Judge Boulware of the US District Court of Nevada dealt with this exact issue in *Wilmington Trust Co. v. SFR Investments Pool 1, LLC*, Case No. 2:16-cv-00326-RFB-PAL (D. Nev. 2017). In *Wilmington Trust Co.*, Judge Boulware recognized that the purpose of FRCP 15 –

upon which NRCP 15 is modeled – is "to facilitate decision on the merits rather than on the pleadings or technicalities" and that a change in the controlling case law by the Nevada Supreme Court warranted leave to amend:

> "Federal Rules of Civil Procedure ("F.R.C.P.") 15(a)(2), 15(d) and 20 in federal court permits a party to amend its pleading by leave of court and states that "leave shall be freely given when justice so requires." F.R.C.P. 15(a). The Ninth Circuit has similarly held that the policy of freely granting leave to amend "is to be applied with extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). "**In exercising its discretion a court must be guided by the underlying purpose of Rule 15 — to facilitate decision on the merits rather than on the pleadings or technicalities**." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)). Therefore, a party shall be given leave to amend freely provided there is no existing bad faith factors such as undue delay, bad faith or dilatory motive on the part of the movant seeking leave. 3 MOORE'S FEDERAL PRACTICE — CIVIL § 15.14 (2011) (analyzing F.R.C.P. 15(a) and stating that "[d]enial of leave to amend is disfavored; and a district judge should grant leave absent a substantial reason to deny").
>
> **Here, applying these well-established principles, the Court should grant Plaintiff's request for leave to amend.**
>
> …
>
> Further, **the Nevada Supreme Court's recent decision** in *Horizons at Seven Hills Homeowners Association v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35 (April 28, 2016) ("Ikon") and *Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc.*, 132 Nev. Adv. Op. 5 (Jan. 28, 2016) ("Shadow Wood") **has substantially changed the law** of HOA sales, regarding recitals, amounts that comprise the superpriority lien portion, **and the pleadings should appropriately be amended to reflect the state of the law after that decision.**"

Id.

Here, Plaintiff respectfully submits this Court should following the reasoning in *Wilmington Trust Co.* and grant leave to amend. The FAC is appropriately amended to reflect the change in controlling case law from complying with *Shoen* to complying with the *Chur* Opinion. Justice requires that Plaintiff be allowed to amend given the change in controlling Nevada case law.

Moreover, Defendants claim prejudice from the proposed amendments. Yet, they do not specify what prejudice they will suffer aside from being required to defend their unlawful actions in court. In fact, the Uni-Ter Defendants argue that "a mere correction of the allegations against the Director Defendants would not delay this matter…" *See* Uni-Ter Defendants' Opposition at p.

16. Further, the Director Defendants' misplaced assertions regarding the testimony of Plaintiff's 30(b)(6) witness or prior amendments are not relevant to the Motion to Amend.[7] Further, it is well established that being required to answer claims in the litigation process does not constitute prejudice. *See e.g., In re Lowenschuss*, 67 F.3d 1394, 1400–01 (9th Cir. 1995) (Recognizing that "[**t]he inconvenience of defending another lawsuit or the fact that the defendant has already begun trial preparations does not constitute prejudice**.").

Moreover, the Court should also consider "whether denying the amendment would prejudice the movant." *See In re Norplant Contraceptive Prod. Liab. Litig.*, 163 F.R.D. 255, 257 (E.D. Tex. 1995). Clearly it would end the Plaintiff's claims set out in the FAC to the extreme prejudice of Plaintiff and others, while granting the Motion to Amend would not prejudice the Defendants as they are free to file whatever motions they feel are appropriate once the FAC is filed. As one Court put it:

> As noted above, delay alone is an insufficient basis on which to deny a motion to amend; there must also be a showing of prejudice or bad faith. *See State Teachers*, 654 F.2d at 856; *CP Solutions*, 237 F.R.D. at 537. **In fact, the non-movant on a motion to amend "carries the burden of demonstrating that *substantial* prejudice would result were the proposed amendment to be granted."** *Saxholm AS v. Dynal, Inc.*, 938 F.Supp. 120, 123 (E.D.N.Y.1996) (emphasis added). Moreover, "[a]ny prejudice which the nonmovant demonstrates must be balanced against the court's interest in litigating all claims in a single action and any prejudice to the movant which would result from a denial of the motion." *Id.*

See The Standard Fire Ins. Co. v. Donnelly, 689 F. Supp. 2d 696, 700 (D. Vt. 2010). Defendants have not come close to meeting this burden. This factor weighs heavily in favor of granting the Motion to Amend in its entirety.

Finally, it has long been recognized by the Supreme Court of Nevada that "[i]t is the policy of this state that cases be heard on the merits, whenever possible. *Schulman v. Bongberg-Whitney*

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[7] While Plaintiff does not believe it to be beneficial to address each inaccurate assertion by Defendants regarding the discovery proceedings in this case, Plaintiff generally denies Defendants' incorrect statements contained in the Oppositions. This includes the Director Defendants' statements that Mr. Greer had possession of all documents in this case in 2012. *See* Directors' Opposition at p. 5. This is still not the case, as set forth more fully herein. In addition, as noted multiple times, Plaintiff will be ready for trial no later than February/early March of 2021.

Elec., Inc., 98 Nev. 226, 228, 645 P.2d 434, 435 (1982) (*citing Hotel Last Frontier v. Frontier Properties*, 79 Nev. 150, 380 P.2d 293 (1963)); *Passarelli v. J-Mar Dev., Inc*., 102 Nev. 283, 285, 720 P.2d 1221, 1223 (1986) ("**This court has repeatedly held that cases are to be heard on the merits if possible**."). This is consistent with controlling case law from both the Nevada Supreme Court and US Supreme Court which holds that Rule 15(a)'s mandate of leave to amend shall be freely given when justice so requires. *See Marschall v. City of Carson*, 464 P. 2d 494 (Nev. 1970); *see also In Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Justice in this matter is served by permitting the filing of the FAC.

B. Plaintiff's Motion to Amend is not futile

"The liberality embodied in NRCP 15(a) requires courts to err on the side of caution and permit amendments that appear arguable or even borderline, because denial of a proposed pleading amendment amounts to denial of the opportunity to explore any potential merit it might have had." *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 292, 357 P.3d 966, 975 (Ct. App. 2015).

Here, as explained above, as well as shown in the Motion to Amend, Plaintiff's proposed FAC fully complies with the *Chur* Opinion and Defendants' futility arguments fail for several reasons as set forth below. Denial of a motion to amend on the grounds of futility is reviewed *de novo*. *See Anderson v. Mandalay Corp.*, 358 P.3d 242 (Nev. 2015) ("Although we generally review a district court's decision on a motion for leave to amend for abuse of discretion…futility is a question of law reviewed de novo because it is essentially an NRCP 12(b)(5) inquiry, asking whether the plaintiff could plead facts that would entitle her to relief); *see also Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

1. The FAC complies with the *Chur* Opinion

The FAC meets the new legal standard set forth in the *Chur* Opinion and the two-step analysis of the BJR (also set forth in *Chur*). In fact, when the irrelevant and conclusory arguments in the Defendants' oppositions are set aside, even the Directors admit that Plaintiff's FAC alleges that the Directors knowingly violated the law. *See* Directors' Opp, at 15:2-6, 23:5-11:

> "**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"; and
>
> "**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).

While the Director Defendants attempt to assert that the FAC is nothing more than just "buzzwords and legal conclusions", the FAC contains specific, detailed factual allegations to more than sufficiently support Plaintiff's claims against the Defendants. The Director Defendants' conclusory arguments that the FAC is just "buzzwords and legal conclusions" should be disregarded in their entirety. *See Consolidated Generator v. Cummins Engine Co.*, 971 P. 2d 1251, 1256, 114 Nev. 1304, 1311 (1998) (declining to address conclusory arguments which fail to address the issues in the case); *see also SIIS v. Buckley*, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984); *see also United States v. Balcar*, 141 F.3d 1180, 1180 (9th Cir. 1988) ("None of these conclusory arguments are discussed in any depth and we thus decline to address them.").

Despite the Director Defendants' conclusory arguments, as thoroughly described in Plaintiff's Motion to Amend, the FAC satisfies the two-step analysis in that: (1) specific factual allegations properly allege the BJR has been rebutted; and (2) Plaintiff has demonstrated Director Defendants breached their fiduciary duties, which breaches involved numerous instances of intentional misconduct and/or knowing violations of the law.

In addition, the Director Defendants attempt to distract this Court from what amounts to the Directors' inability to deny that they knowingly violated the law. Brazenly, the Director Defendants argue that violating Nevada Administrative Code ("NAC") is not a violation of law. This is demonstrably inaccurate as a matter of law. In support of such an unfounded argument, the Director Defendants rely upon the case of *Price v. Sinnott*, 460 P.2d 837, 85 Nev. 600 (1969), which only addresses negligence *per se* as compared to ordinary negligence, but does not address whether Nevada's administrative code constitutes "law" for the purposes of an NRS 78.138 analysis. In fact, however, that question is answered in the affirmative by Nevada statutory law.

NRS 233B.040(1) provides as follows: "To the extent authorized by the statutes applicable to it, each agency may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law and shall adopt such regulations as are necessary to the proper execution of those functions. **If adopted and filed in accordance with the provisions of this chapter, the following regulations have the force of law** and must be enforced by all peace officers: (a) **The Nevada Administrative Code**…." *See* NRS 233B.040(1). Clearly, a violation of the NAC is a violation of law. Even if that was not case, Plaintiff alleges multiple knowing violations of additional laws, including without limitation the NRS, by the Director Defendants. The Director Defendants do not deny this.

Next, the Director Defendants provide arguments related to Country Villa, which amount to nothing more than factual disputes and an unjustified reliance upon their own deposition testimony. A factual dispute is not a basis to deny a Motion to Amend, but, rather, if the factual dispute is genuine, it would only be a basis to deny a motion for summary judgment and have the issue presented to the trier of fact (*i.e.*, the jury) for determination. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) ("The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving Party.").

Lastly, the Director Defendants attempt to avoid knowingly violating the law due to an alleged failure by the DOI in enforcing the law. To say that the DOI continued communication with the Board, while L&C was in a hazardous financial condition, does not mean that the Board did not knowingly violate the law. Instead, it is another admission by the Board of knowingly violating the law. To accept the Director Defendants' position, Plaintiff asserts this Court would then have to declare that it is not a "knowing violation of law" when a speeding driver passes a police officer but is not be pulled over or ticketed, an instance which occurs countless times every day. Just because the law is allegedly not enforced – or an officer of the law is not specifically and expressly aware of every instance of the law being violated – does not mean the Board did not knowingly violate the law. Further, as set forth in the FAC and the Motion to Amend, when the

Director Defendants were caught violating multiple laws, they generally promised to correct their actions, but then failed to do so. Regardless, in the FAC the Plaintiff has provided specific, detailed factual allegations and documentary evidence to sufficiently support that the Director Defendants breached their fiduciary duties, which involved intentional misconduct and/or knowing violations of the law.

Although the Director Defendants attempt to hide behind mere conclusory arguments, Plaintiff's Motion to Amend clearly establishes the proposed FAC is in compliance with *Chur*. As such, Plaintiff's Motion to Amend should be granted.

2. The claims asserted in the FAC are not time-barred

i. Statute of Limitations argument has already been raised and rejected by this Court.

Defendants' Oppositions are not the first time that Defendants have raised the defense of statute of limitations as an issue in this litigation. In a prior Motion to Dismiss, Director Defendants alleged that Plaintiff's claims are barred by statute of limitations and should have been brought by September 2014. *See* Director Defendants' Motion to Dismiss, attached as **Exhibit 1**. This Court ruled as follows: "With regard to the statute of limitations argument raised by the board members…**the liquidation order for receivership established deadlines and statutes of limitation, and I find that that supersedes for the purpose of the receivership. So for that reason, that argument is rejected.**" *See* transcript, attached as **Exhibit 2** (emphasis added).

Clearly, this Court has already ruled upon the statute of limitations and the Plaintiff's claims are not time-barred. Based upon the clear, unambiguous EDCR rules (EDCR 2.24(a)), the Defendants are barred from having their alleged statute of limitations issue reheard. *See* EDCR 2.24(a) ("No motions once heard and disposed of may be renewed in the same cause, **nor may the same matters therein embraced be reheard**, unless by leave of the court granted upon motion therefor, after notice of such motion to the adverse parties.")

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ii. When Plaintiff knew or should have known of facts constituting its claims is a question of fact for the Trier of Fact (i.e., the Jury)

Assuming, for argument's sake, that Defendants can assert statute of limitations as an issue in these proceedings, such arguments are not proper in response to a motion to amend. For example, the Director Defendants spend a majority of their Opposition arguing and disputing facts in the FAC. The Uni-Ter Defendants argue that Plaintiff's deadline to assert claims aiding and abetting claims expired 3 years after commencing this Action.

Nevada case law is clear that: (1) the time limit for claims does not begin to run until Plaintiff knew or should have known, or discovered or should have been discovered, of the facts giving rise to the breach (*see Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990) (holding that **"[u]nder the discovery rule, the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action**."); and (2) when Plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of claims is a question of fact for the trier of fact (i.e., the jury). *See In re Amerco Derivative Litigation*, 252 P.3d 681 (Nev. 2011), *citing Nevada State Bank v. Jamison Partnership*, 106 Nev. 792, 800, 801 P.2d 1377, 1382 (1990) (The statute of limitations for a claim for breach of fiduciary duty does not begin "to run until the aggrieved party knew, or reasonably should have known, of the facts giving rise to the breach"; A determination of "`**[w]hen the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact**.'") and *citing Golden Nugget, Inc. v. Ham*, 95 Nev. 45, 48-49, 589 P.2d 173, 175 (1979) (When a fiduciary "fails to fulfill his obligations" and keeps that failure hidden, the statute of limitations will not begin to run until the failure of the fiduciary is "discovered, or should have been discovered, by the injured party"; "Mere disclosure of a transaction by a director, without disclosure of the circumstances surrounding the transaction, is not sufficient, as a matter of law, to commence the running of the statute"). Further, Nevada case law holds that the statute of limitations is merely an affirmative defense that must be proven and decided by the trier of fact – in this case, the jury. *See, e.g., Hubbard v. State*, 110 Nev. 671, 676, 877 P.2d 519, 522 (1994)

("We conclude that **the statute of limitations is a non-jurisdictional affirmative defense** that must be asserted by the defendant or else it is waived. To make use of the defense, a defendant must present sufficient facts to demonstrate that the statute of limitations should not be tolled."). Regardless, such a question of fact is not appropriate in response to a motion to amend.

Here, it is abundantly clear that Plaintiff (as the Receiver of L&C) was not involved in L&C when the Defendants' breached their fiduciary duties, and aided and abetted others in doing so, and Defendants have failed to produce necessary documents and information during discovery so as to delay Plaintiff in asserting the allegations and claims necessary to allege breach of fiduciary duty, as well as claims of aiding and abetting. The Uni-Ter Defendants produced over 1.7 million pages with only 2 months left for Plaintiff to amend its Complaint and the Director Defendants have continuously refused to produce documents related to pre-2009 events. It is easy for the Defendants to hide from a party who was not directly involved, but when the Plaintiff asserts valid claims in its FAC, the Defendants attempt to assert that Plaintiff should have known of its claims from the very beginning. But such assertions are improper in a response to a motion to amend, and are, at best, "questions of fact for the trier of fact." Accordingly, the Motion to Amend should be granted.

iii. The allegations and claims asserted in the FAC relate back to the original Complaint

a. Director Defendants

Relation back occurs if the claim arises "out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." NRCP 15(c)(1). Claims arise from the same conduct, transaction, or occurrence, when they arise from "a common core of operative facts." *Mayle v. Felix*, 545 U.S. 644, 659 (2005) (internal quotations omitted). Such claims "will likely be proved by the same kind of evidence offered in support of the original pleading." *Asarco, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) (quoting Percy v. S.F. Gen. Hosp., 841 F.2d 975, 978 (9th Cir. 1988)) (internal quotations omitted). Within the Ninth Circuit, Rule 15(c)'s relation back provision is "liberally applied." *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259 n.29 (9th Cir. 1982).

Here, it is undisputed that the claims asserted in the FAC relate back as they arise from the same conduct, transaction or occurrence as they arise from the common core of operative facts set forth in the original Complaint. Specifically, the core factual allegations contained in the Third Amended Complaint remain in the FAC. In fact, the Director Defendants themselves expressly admit, several times, that the facts alleged in the FAC arise from the same conduct, transactions or occurrences set out, or attempted to be set out, in the original complaint:

> Only now does Plaintiff comes [*sic*] to this Court seeking leave for yet another amendment to its pleadings, **not based on new facts**, but out of a last-ditch effort to breathe life into claims that the Nevada Supreme Court already rejected.
>
> …
>
> **Plaintiff's proposed FAC is more of the same**, general allegations that the Directors, each of them, individually breached their fiduciary duties to L&C.
>
> **…**
>
> **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.

See Directors' Opposition at p 3, ll. 8-11, p. 13, ll. 19-20 and pp. 26-27.

While the Directors Defendants' assertion that the Nevada Supreme Court has "already rejected" the claims set forth in the FAC is inaccurate and impossible, the Directors Defendants' admission that the FAC is "not based on new facts" constitutes a judicial admission by the Director Defendants that the FAC relates back to the original filing date and therefore, the statute of limitations defense is unavailing to the Director Defendants. *Badger v. Eighth Jud. Dist. Ct.*, 132 Nev. 396, 403, 373 P.3d 89, 94 (2016) ("Under NRCP 15(c), '[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, **the amendment relates back to the date of the original pleading.**' The relation-back doctrine applies to both the addition and substitution of

parties, **and will be liberally construed** unless the opposing party is disadvantaged by relation back.").[8]

Further, the Director Defendants' arguments regarding NRS 679B.185 are misplaced. This statute is inapplicable in this case as Plaintiff has not brought claims seeking to impose an administrative fine, nor are Plaintiff's claims based upon the Director Defendants' violations of the statutes *per se*. Rather, Plaintiff's claims are based on the Director Defendants' breaches of their fiduciary duties that ***involve*** intentional misconduct and/or knowing violation of law. Thus, the knowing violations of law and intentional misconduct by the Directors as set forth in the FAC are not the basis for, but rather a part of, the claims for breaches of the Directors' fiduciary duties. Accordingly, any arguments regarding NRS 679B.185 are irrelevant. Accordingly, the Motion to Amend should be granted.[9]

b. Mr. Piccione

Preliminarily, it should be noted that under mandatory precedent, the Uni-Ter Defendants lack standing to oppose the Motion to Amend, or otherwise assert legal rights, on behalf of Mr. Piccione. *Beazer Homes Holding Corp. v. Dist. Ct.*, 128 Nev. 723, 731, 291 P.3d 128, 133 (2012) ("**a party generally has standing to assert only its own rights and cannot raise the claims of a third party not before the court**.") (*citing See Deal*, 94 Nev. at 304, 579 P.2d at 777; *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)); *see also Constr. Indus. Ass'n of Sonoma Cty. v. City of Petaluma*, 522 F.2d 897, 905 (9th Cir. 1975) (holding that "**appellees lack standing to assert the rights of third parties**"). The Motion to Amend should be granted with respect to Mr. Piccione on this basis alone.

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[8] Being haled into court to respond to unlawful actions is not "prejudice" to the Defendants. *Costello v. Casler*, 127 Nev. 436, 442 (2011).

[9] Prior to the conclusion of the hearing on Plaintiff's Motion to Amend, the Director Defendants served Plaintiff with premature document requests relating to Plaintiff's expert(s) and their files. *See* Document Requests, attached hereto as **Exhibit 3**. *See Black v. Nevin*, 2011 WL 13854 at *3 (D. Nev. 2011) (holding no obligation to respond to premature discovery). In serving discovery requests prior to the filing of the Fourth Amended Complaint, the Director Defendants have essentially waived any opposition to the granting of the filing of the FAC. *See Arizona v. Tohono O'odham Nation*, 818 F.3d 549 (9th Cir. 2016), *citing United States v. Amwest Sur. Ins. Co*., 54 F.3d 601, 602-03 (9th Cir.1995) ("A waiver is an intentional relinquishment or abandonment of a known right or privilege. It can preclude

Further, under binding Nevada law, "[a]n amended pleading adding a defendant that is filed after the statute of limitations has run will relate back to the date of the original pleading under NRCP 15(c) if "the proper defendant (1) receives actual notice of the action; (2) knows that it is the proper party; and (3) has not been misled to its prejudice by the amendment." *Costello v. Casler*, 127 Nev. 436, 440–41 (2011). "The relation-back doctrine applies to both the addition and substitution of parties." *Badger, supra,* 132 Nev. at 403. Further, and directly applicable to this case, "[c]ertain circumstances may give rise to the imputation of notice and knowledge, from an original defendant to a new defendant, for purposes of relation back." *Costello, supra,* 127 Nev. at 441 (2011). "**Courts are particularly amenable to imputing notice and knowledge when the new and original defendants share an 'identity of interest.'**" *Id.* "Although the relationship needed to establish an identity of interest for purposes of notice and knowledge varies depending on the underlying facts, an identity of interest has been found, for example, between a parent and subsidiary corporation, and based on shared legal counsel." *Id.* "[T]he fundamental idea is that when the original and new defendant are so closely related in their business operations or other activities[,] ... the institution of an action against one serves to provide notice of the litigation to the other." *Id.*

The Uni-Ter Defendants argue that the factors enumerated in the case of *Nurenberger Hercules–Werke v. Virostek*, 107 Nev. 873, 882, 822 P.2d1100, 1106 (1991) must be satisfied in order to substitute in Piccione in place of a Doe Defendant. *See* Uni-Ter Defendants' Opp., at pgs. 22-23. As *Costello* disavowed *Nurenberger,* Plaintiff complies with the factors set forth in *Costello*, which the Nevada Supreme Court concluded that the relation back effect of NRCP 15(c) does apply to the addition or substitution of parties. *See Costello*, 127 Nev. at 440, n. 4 (2011) ("We therefore disavow the dicta in … *Nurenberger* and conclude that the relation back effect of NRCP 15(c) does apply to the addition or substitution of parties.")

Mr. Piccione's inclusion as a defendant relates back to the original Complaint based upon the factors set forth in *Costello*. First, even if Mr. Piccione did not have actual knowledge of this

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the assertion of legal rights. An implied waiver of rights will be found where there is 'clear, decisive and unequivocal' conduct which indicates a purpose to waive the legal rights involved.")

case, which he does as set forth below, he indisputably has knowledge imputed to him due to his unity of interest with all the Uni-Ter Defendants, and U.S. RE. In fact, Piccione was not only the founder and largest shareholder of the Uni-Ter Defendants, he also was Chairman of the Board for all the organizations, as well as President and CEO of U.S. RE. Piccione used his position of power and control within the organizations to substantially assist and encourage the Uni-Ter Defendants to breach their fiduciary duties to L&C. *See* **Exhibit 4.**

Further, it cannot reasonably be disputed that Mr. Piccione has, and has had, actual knowledge of this action from its inception and cannot have been misled as to his involvement. In fact, undersigned counsel has heard Uni-Ter Defendants' counsel, Jon Wilson, expressly admit that Mr. Wilson speaks with Mr. Piccione "every week" about this case. Further, the proposed FAC properly adds and/or substitutes Piccione as a defendant and states claims against him stemming from the role he played in the events set forth therein. A new defendant who was timely put on notice by the filing of the original complaint "would not be prejudiced in defending action on the merits" after the expiration of the applicable statute of limitation. *Costello v. Casler*, 127 Nev. 436, 442 (2011) (*citing Korn v. Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397, 1401 (9th Cir.1984)).

In addition, evidence obtained from the over 1.7 million pages of documents concealed by the Uni-Ter Defendants prior to their disclosures between May and October of 2018, reveal that Piccione wanted to take his company public, and to do so, Piccione believed he needed to significantly increase the revenues of his companies. To make this happen, Piccione hired Sanford Elsass ("Elsass") to manage the Uni-Ter entities. Elsass had a proven track record building sales organizations, but lacked any education, training, or experience running an insurance company. When Piccione learned that Elsass had suppressed L&C's reserves, and that U.S. RE was operating illegally in Nevada, Piccione refused to disclose this information to the Board, but instead began spying on his employees, deleting his email correspondences, and secretly recording conversations with Uni-Ter employees and the Board in an attempt to escape liability for his actions. Piccione substantially contributed to and encouraged the Uni-Ter Defendants' and U.S. RE in their breaches of fiduciary duties to L&C.

It is important to correct the misimpression proffered by the Uni-Ter Defendants as to why the Plaintiff only recently uncovered the evidence necessary to establish these claims against Piccione. On May 7, 2018, the Uni-Ter Defendants produced over **1.5 million pages** of documents (the "May 2018 Production" which is part of the 2018 Production, defined above). Prior to this date, **just 1,258** pages of documents had been disclosed to Plaintiff by the Uni-Ter Defendants over the course of more than 3.5 years of litigation. Critically, the May 2018 Production contained **222,424** new emails. Prior to the 2018 Production, the Uni-Ter Defendants had provided only 1,751 emails to the Commissioner. Notably, **prior to May 7, 2018, Plaintiff had been provided less than 1% of the total emails produced in this matter**. Contained in the emails and other documents included in the May 2018 Production, was evidence the Plaintiff needed to both ascertain and prove Piccione's role in aiding and abetting the Uni-Ter Defendants', including U.S. RE's, breaches of fiduciary duties to L&C.

Further, the Uni-Ter Defendants had custody and control of these very same documents continuously since 2012, and were legally required on at least four occasions to turn them over to the Plaintiff, but failed to do so in a timely matter.[10] The Uni-Ter Defendants' decision to instead provide these documents to Plaintiff as part of a massive document dump **just two months before the then current deadline to amend pleadings** can only be seen as a deliberate attempt to prevent the Commissioner from finding and following the tracks that lead to Piccione. Plaintiff still does not have all documents the Uni-Ter Defendants were required to turn over pursuant to NRCP 16.1 years ago. Despite this, Plaintiff will be ready for trial in February/early March of 2021 regardless.

The Uni-Ter Defendants now seek to direct the Court's attention away from these troubling facts by offering a diversionary "shift blame" narrative, which completely fails to explain why it took so long for the Uni-Ter Defendants to turn over the May 2018 Production. The Uni-Ter

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[10] The documents contained in the May 2018 Production were never provided to the Commissioner as legally required on at least four prior occasions: (1) **November 2012**. The 2011 Management Agreement required that Uni-Ter transfer "all records and property of L&C" upon the termination of the agreement. (2) **February 2013**. The Liquidation Order required that Uni-Ter and U.S. RE, as L&C's manager and broker, turn over all of L&C's property to the Receiver, including any documents or files pertaining to L&C in their possession. (3) **September 2013**. The Order to Compel required Uni-Ter to comply with the Liquidation Order. (4) **January 2017**. Rule 16.1 requires that initial disclosure include "a copy…of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control…".

Defendants have stated that it took them nine (9) months to "identify relevant, responsive, and non-privileged documents." *See* Uni-Ter Defendants' Opp., at pg. 8, lines 3-4.

This raises the obvious question of why the Uni-Ter Defendants waited the entire nine (9) months before producing a single page of the 1.5 million page production (*i.e.* the 2018 Production)? Furthermore, couldn't the Uni-Ter Defendants produce at least some of the 1.5 million pages of documents in a rolling production rather than all at once? The answer is obvious. Of course the Uni-Ter Defendants could have provided at least some of the 1.5 million pages of documents earlier to Plaintiff. But had the Uni-Ter Defendants done so, it would have enabled Plaintiff more time to review the documents, and potentially find the evidence implicating Piccione even earlier, which is the reason why the documents were concealed by the Uni-Ter Defendants since 2012 in the first place.

The Uni-Ter Defendants further try to point the blame at Plaintiff for allegedly failing to "properly prepare her case over the course of several years so that she could timely bring the case to trial." It is important to note preliminarily that this statement by the Uni-Ter Defendants is false – Plaintiff will absolutely be prepared to timely bring this case to trial in February or March of 2021. Further, this narrative completely ignores the important fact that one year ago Plaintiff filed a motion to lift the stay in this matter for the purpose of bringing the case quickly to trial, which the Uni-Ter Defendants refused to join. In addition, Plaintiff recently requested a preferential trial setting for the end of February or early March 2021, which the Uni-Ter Defendants again refused to join, preferring instead to request from the Court a later date. Finally, conspicuously missing from the "shift blame" narrative was any mention or explanation for the **209,864 pages of additional documents** produced in September and October 2018 ("October 2018 Production"), which at the time was just **2.5 months** before the deadline for parties to file motions to amend.[11] Again, the timing of the disclosures appears clearly calculated to prevent Plaintiff from conducting a thorough review of the documents before the deadline for amending pleadings had passed.

[11] The last set of documents provided to Plaintiff was produced on October 30, 2018. At the time, the deadline for the parties to amend pleading was January 14, 2019.

In total, between the May 2018 Production and the October 2018 Production, the Uni-Ter Defendants produced **1,731,814 pages** of documents, after stating to the Commissioner in 2013 that the Receiver now "had everything the Defendants had in their possession responsive to the Liquidation Order,"[12] which we now know to have been patently false.

Dated	Documents Produced	Pages
5/7/18 & 5/10/18	LC-USRE-1070 to 1523020	1,521,950
9/6/18 & 9/7/18	LC-USRE-1523021 to 1528786; LC-USRE-1528787 to 1666511; & LC-USRE-1523880_R	143,490
9/28/2018	LC-USRE-1666512 – LC-USRE-1725071	58,559
10/30/2018	LC-USRE-1725072 – LC-USRE-1732887	7,815
	TOTAL:	**1,731,814**

The obstructionary tactics used by the Uni-Ter Defendants are not limited to concealing large amounts of documents only to disclose them immediately before scheduling order deadlines. In addition, the Uni-Ter Defendants produced documents in a format and organizational arrangement designed to further hamper Plaintiff's ability to review of the 1.7 million pages. In their disclosures, Defendants provided documents by file type, (Images, Native Files, Text Files), and labeled individual documents by their bates numbers. This production method both fails to properly identify the labeled document or provide any chronological ordering, which is not how documents are kept in the normal course of business.

In addition, the Uni-Ter Defendants have provided no indication which of the over 1.7 million pages of documents produced are responsive to Plaintiff's production requests. Instead, the Uni-Ter Defendants have provided deliberately evasive responses which serve only to obscure potentially discoverable information. The Uni-Ter Defendants have consistently answered Plaintiff's production requests by referencing to the 1.7 million of pages of documents already produced. For example:

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[12] *See* **Exhibit 5**.

Request for Production No. 46:
Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports, or contradicts Your answer to the Third Amended Complaint at paragraph 55.

Response to Request for Production No. 46:
In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's answer to the Third Amended Complaint at paragraph 55. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. **At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter**. *See* **Exhibit 6** hereto.

While the Uni-Ter Defendants' out-of-state counsel may not be familiar with the directives of Nevada's Discovery Commissioner, the Discovery Commissioner has expressly recognized that simply referring Plaintiff to discovery previously provided or alleged to have been provided is a failure to respond. "**Responses which merely say 'previously provided' or 'provided at 16.1 conference' or 'see deposition testimony' or even 'Plaintiffs already have in their possession' are simply non-answers[.]"** Discovery Commissioner Opinion No. 11 at 5. To satisfy their burden of responding to Plaintiff's Requests for Production, the Uni-Ter Defendants must either attach responsive documents or identify by Bates number which documents are responsive to each request. *See Johnson v. Kraft Foods N. Am., Inc.*, 236 F.R.D. 535, 541 (D. Kan. 2006) (plaintiff ordered to serve amended discovery responses to those requests that he responded to by referring to "previously produced" documents, and was further ordered to identify by Bates stamp number which documents are responsive to which requests). Additionally, attaching specific documents or providing bates ranges in response to Plaintiff's discovery requests is critical given the fact that Plaintiff has provided such a large number of documents to Plaintiff in such a haphazard and disorganized manner.

Further, as noted above, in Nevada, "**[u]nder the discovery rule, the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action**." Moreover, when Plaintiff knew or in the exercise of proper

diligence should have known of the facts constituting the elements of claims is "**a question of fact for the trier of fact**" (i.e., the jury). *See In re Amerco Derivative Litigation*, 252 P.3d 681 (Nev. 2011), *citing Nevada State Bank v. Jamison Partnership*, 106 Nev. 792, 800, 801 P.2d 1377, 1382 (1990).

It is clear that the Uni-Ter Defendants are making every effort to impede Plaintiff's investigation and to obscure potentially discoverable information, specifically with regard to Piccione's actions aiding and abetting the Uni-Ter Defendants' breaches to L&C. Despite their efforts, the Plaintiff has established that Piccione aided and abetted the Uni-Ter Defendants in their breach of their fiduciary duties to L&C. This fact has only came to light following an exhaustive examination of the documents contained in the Uni-Ter Defendant's 2018 Productions. Justice requires that Piccione face the allegations proposed in Plaintiff's FAC and that his actions be judged on the merits.

Finally, the Uni-Ter Defendants argue that the aiding and abetting claims against Piccione are futile because Piccione is not a third party. To establish an aiding and abetting claim, four elements must be shown: (1) a fiduciary relationship exists, (2) the fiduciary breached the fiduciary relationship, (3) the third party knowingly participated in the breach, and (4) the breach of the fiduciary relationship resulted in damages. *See In re Amerco Derivative Litigation*, 252 P.3d 681 (Nev. 2011).

Piccione is clearly a third party to the underlying fiduciary relationships alleged in the proposed Fourth Amended Complaint. Piccione's involvement as a director and officer of the Uni-Ter defendants, despite what the Uni-Ter Defendants may want to believe, does not create a fiduciary relationship between Piccione and L&C. The implication of this argument is that any officer or employee by virtue of their title and position will automatically take on the fiduciary obligations of their employer, which of course lacks any support in law or public policy.

The fiduciary relationships alleged in the proposed Fourth Amended Complaint are between Uni-Ter UMC and L&C, Uni-Ter CS and L&C, and between U.S. RE and L&C. The proposed Fourth Amended Complaint does not allege that Piccione owed a fiduciary duty to L&C. As a result, Piccione was a third party to those fiduciary relationships. Because of this, to the

extent that Piccione's actions and inactions substantially assisted and encouraged the Uni-Ter Defendants in breaching their fiduciary duty to L&C, Piccione is liable for aiding and abetting the Uni-Ter Defendants' breaches, and Plaintiff's claims are properly alleged.

c. Aiding and Abetting Claims Against the Uni-Ter Defendants and U.S. RE[13]

The proposed FAC adds aiding and abetting claims against the three Uni-Ter Defendants. The Uni-Ter Defendants argue that there was "improper delay" in seeking to amend, despite the fact that Plaintiff filed its Motion to Amend within the timeframe prescribed by the Court.[14] Evidence obtained from the 1.7 million pages of documents concealed by the Uni-Ter Defendants prior to their disclosures between May and October of 2018, reveal that the Uni-Ter Defendants worked together aiding and abetting the other entities in breaching their fiduciary duties to L&C.

The evidence supporting these claims is largely based upon emails between the entities, which the Uni-Ter Defendants withheld from Plaintiff until the 2018 Productions. In fact, as noted above, less than 1% of all emails produced in this case were disclosed to Plaintiff prior to the 2018 Production. Further, the documents comprising the 2018 Production were provided to Plaintiff with only a few months remaining before the deadline for parties to amend pleadings and add parties. Now the Uni-Ter Defendants dubiously come before this Court and oppose Plaintiff's Motion to Amend on the grounds that it is an "eleventh hour attempt to add new claims" against

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[13] The Uni-Ter Defendants correctly note that a typographical error is contained at page 30, lines 15-18 of the Motion to Amend. Plaintiff included a paragraph from an earlier iteration of the Motion to Amend which failed to clarify that additional, derivative, claims are added against the Uni-Ter Defendants regarding "aiding and abetting" breaches of fiduciary duty. *See In re Amerco Derivative Litig.*, 127 Nev. 196, 225, 252 P.3d 681, 701–02 (2011) (Recognizing a claim for aiding and abetting the breach of a fiduciary duty and finding that such action is derivative of the underlying breach of fiduciary duty.); *see also Nelson v. City of Las Vegas*, 99 Nev. 548, 665 P.2d 1141 (1983) (if the original pleadings give fair notice of fact situation from which new claims arise, the amendments relate back); *see also Deal v. 999 Lakeshore Ass'n*, 94 Nev. 301, P.2d 775 (1978)*; Blanchard v. JP Morgan Chase Bank*, No. 2:11-CV-1127 JCM PAL, 2012 WL 5198468, at *5 (D. Nev. Oct. 18, 2012) (holding that "a cause of action for aiding/abetting wrongful foreclosure is *derivative* of wrongful foreclosure.").

[14] "Delay alone does not provide sufficient grounds for denying leave to amend: Where there is lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion. *Hurn v. Ret. Fund Tr. of Plumbing, Heating & Piping Indus. of S. California*, 648 F.2d 1252, 1254 (9th Cir. 1981) (*citing Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973)). "In Howey, the denial of a motion for leave to amend was an abuse of discretion even though the motion was made 5 years after the original complaint was filed." *Id.*

the Uni-Ter Defendants. The Uni-Ter Defendants of course fail to point out that any delay in adding claims and parties to this matter are the direct result of the Uni-Ter Defendants' own improper efforts to impede Plaintiff from obtaining and reviewing documents that could lead to new claims and new parties.

Further, as noted above, in Nevada, "**[u]nder the discovery rule, the statutory period of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action**." Moreover, when Plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of claims is "**a question of fact for the trier of fact**" (i.e., the jury). *See In re Amerco Derivative Litigation*, 252 P.3d 681 (Nev. 2011), *citing Nevada State Bank v. Jamison Partnership*, 106 Nev. 792, 800, 801 P.2d 1377, 1382 (1990).

Moreover, as noted above, the aiding and abetting breach of fiduciary duty claims against the Uni-Ter Defendants relate back to the original filing date and therefore, the statute of limitations defense is unavailing to the Uni-Ter Defendants. *Badger v. Eighth Jud. Dist. Ct.*, 132 Nev. 396, 403, 373 P.3d 89, 94 (2016) ("Under NRCP 15(c), '[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, **the amendment relates back to the date of the original pleading.**' The relation-back doctrine applies to both the addition and substitution of parties, **and will be liberally construed** unless the opposing party is disadvantaged by relation back."). There can be little doubt that the derivative claims of "aiding and abetting breach of fiduciary duty arise "out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading" – which involved claims for breach of fiduciary duty against the Uni-Ter Defendants. *See* Nev. R. Civ. P. 15; *Badger supra.*, 132 Nev. at 403; *In re Amerco Derivative Litig.*, 127 Nev. 196, 225, 252 P.3d 681, 701–02 (2011) (Recognizing a claim for aiding and abetting the breach of a fiduciary duty and finding that such action is derivative of the underlying breach of fiduciary duty.); *see also Nelson v. City of Las Vegas*, 99 Nev. 548, 665 P.2d 1141 (1983) (if the original pleadings give fair notice of fact situation from which new claims arise, the amendments relate back); *see also Deal v. 999 Lakeshore Ass'n*, 94 Nev. 301, P.2d 775 (1978);

Blanchard v. JP Morgan Chase Bank, No. 2:11-CV-1127 JCM PAL, 2012 WL 5198468, at *5 (D. Nev. Oct. 18, 2012) (holding that "**a cause of action for aiding/abetting wrongful foreclosure is derivative of wrongful foreclosure**.").

Plaintiff has filed its Motion to Amend to add claims and parties to this matter within the timeframe allotted by the Court for doing so. The evidence supporting the new claims and parties in this matter was largely contained in emails that were clearly withheld from Plaintiff until such time as the Uni-Ter Defendants believed Plaintiff would have no time to conduct a proper review of the documents. For these reasons, justice requires that the Uni-Ter Defendants be required to answer to these new claims and that these claims be adjudicated on the merits.

3. Nevada policy is to have cases heard on the merits whenever possible.

In addition to the above, Plaintiff asserts this Court should hear the claims on the merits. *See Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 292, 357 P.3d 966, 975 (Ct. App. 2015) ("The liberality embodied in NRCP 15(a) requires courts to err on the side of caution and permit amendments that appear arguable or even borderline, because denial of a proposed pleading amendment amounts to denial of the opportunity to explore any potential merit it might have had."); *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003) ("Denial of leave to amend on this ground [futility] is rare. Ordinarily, courts will defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted and the amended pleading is filed.").

The Nevada Supreme Court has a long standing historical precedent of litigating a case on the merits. *See Marschall v. City of Carson*, 86 Nev. 107, 111, 464 P.2d 494, 497 (1970) (concluding that the trial court may freely give permission to amend in order to preserve movant's right to a full presentation of the merits); *Castello v. Casler*, 254 P.3d 631, 127 Nev. 436, 441 (2011) ("Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties."); *Schmidt v. Sadri*, 95 Nev. 702, 705, 601 P.2d 713, 715 (1979) (The [L]egislature envisioned that [the Nevada Rules of Civil Procedure] would serve to simplify existing judicial procedures and promote the speedy determination of litigation upon its

merits); *Hotel Last Frontier v. Frontier Prop.*, 79 Nev. 150, 155-56, 380 P.2d 293, 295 (1963) (This court has held that good public policy dictates that cases be adjudicated on their merits).

Further, the Ninth Circuit has held that "[d]eferring ruling on the sufficiency of the allegations is preferred in light of the more liberal standards applicable to motions to amend and the fact that the parties' arguments are better developed through a motion to dismiss or motion for summary judgment." *See Steward v. CMRE Fin'l Servs., Inc.*, 2015 U.S. Dist. LEXIS 141867, 2015 WL 6123202, at 2 (D. Nev. Oct. 16, 2015); citing to *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 536 F. Supp.2d 1129, 1135-36 (N.D. Cal. 2008). If this Court were to deny Plaintiff's Motion to Amend based off of futility, the Nevada Supreme Court would review it de novo. *See Anderson v. Mandalay Corp.*, 358 P.3d 242 (Nev. 2015) ("Although we generally review a district court's decision on a motion for leave to amend for abuse of discretion…futility is a question of law reviewed de novo because it is essentially an NRCP 12(b)(5) inquiry, asking whether the plaintiff could plead facts that would entitle her to relief); *see also Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

The FAC is not futile as it complies with *Chur*, the claims are not time-barred and such arguments are not appropriate in response to a motion to amend as they are questions of fact for the jury. As such, Plaintiff respectfully submits that its Motion to Amend should be granted in its entirety.

III. CONCLUSION

For all these reasons, Plaintiff respectfully requests that its Motion to Amend be granted in its entirety, that Plaintiff be permitted to file its Fourth Amended Complaint, and that the Court grant such other and further relief as the Court deems appropriate.

DATED: July 21, 2020.

HUTCHISON & STEFFEN
By */s/ Brenoch Wirthlin, Esq.*
MARK A. HUTCHISON, ESQ. – NV BAR 4639
PATRICIA LEE, ESQ. – NV BAR 8287
BRENOCH R. WIRTHLIN, ESQ. – NV BAR 10282
CHRISTIAN ORME, ESQ. – NV BAR 10175
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that I am an employee of Hutchison & Steffen, and that on this date, I served the foregoing **OMNIBUS REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT** on the parties set forth below by legally serving via Odyssey electronic service as follows:

Joseph P. Garin, Esq.
Angela Ochoa, Esq.
Lipson, Neilson, Cole, Seltzer & Garin, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
Attorneys for Director Defendants

George Oglive, III
McDonald Carano LLP
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Attorneys for Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation

Jon M. Wilson
Kimberly Freedman
Broad and Cassel
2 South Biscayne Blvd., 21st Floor
Miami Florida 33131
Attorneys for Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp.,

DATED July 21, 2020.

/s/ Danielle Kelley
An Employee of Hutchison & Steffen

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EXHIBIT PAGE ONLY

EXHIBIT 1

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

MDSM
LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.
JOSEPH P. GARIN, ESQ.
Nevada Bar No. 6653
ANGELA T. NAKAMURA OCHOA, ESQ.
Nevada Bar No. 10164
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500 - Telephone
(702) 382-1512 - Facsimile
jgarin@lipsonneilson.com
aochoa@lipsonneilson.com
Attorneys for Defendants/Third-Party Plaintiffs Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 27

DEFENDANTS ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Date of Hearing: 05/26/16

Time of Hearing: 10:30 AM

Defendants ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, and ERIC STICKELS by and through its counsel of record at the law firm of Lipson, Neilson, Cole, Seltzer & Garin, P.C., hereby submits its Motion to Dismiss First Amended Complaint.

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

This motion is based upon the attached memorandum of points and authorities, the pleadings and papers on file with this Court, and any oral argument this Court may allow at the hearing on this motion.

DATED this 15th day of April, 2016.

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

By: _____

Joseph P. Garin, Esq. (6653)
Angela T. Nakamura Ochoa, Esq. (10164)
9900 Covington Cross Dr., Suite 120
Las Vegas, NV 89144
(702) 382-1500 – Telephone
(702) 382-1512 – Facsimile
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

NOTICE OF MOTION

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that counsel for Defendants will bring the foregoing DEFENDANTS ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS' MOTION TO DISMISS FIRST AMENDED COMPLAINT on for hearing before the above-entitled Court, on the 26 day of May, 2016, at the hour of 10:30 a.m. in Department 27, of the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada, or as soon thereafter as counsel may be heard.

DATED this 18th day of April, 2016.

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

By: /s/

Joseph P. Garin, Esq. (6653)
Angela T. Nakamura Ochoa, Esq. (10164)
9900 Covington Cross Dr., Suite 120
Las Vegas, NV 89144
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

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

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a case against former directors of a corporation that is now in a liquidation receivership. Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels (collectively "BOD") were directors for Lewis & Clark, LTC Risk Retention Group, Inc. (L&C), a risk retention group of skilled nursing facilities. Plaintiff, the Commissioner of Insurance for the State of Nevada, is the court-appointed receiver for L&C and asserts claims against the BOD for gross negligence and deepening insolvency.

This Court granted in part the BOD's Motion to Dismiss the original complaint, holding that Plaintiff's claim for deepening insolvency was collateral to the claim for gross negligence, but that the claim for gross negligence failed because the Complaint alleged facts arising to mere negligence, not gross negligence.[1] Plaintiff's First Amended Complaint is no different. It is in all material respects the same complaint this Court has already dismissed, updated to include legal conclusions that this Court has already rejected. Plaintiff alleges no new facts supporting a claim for gross negligence.

In fact, the First Amended Complaint establishes another basis for dismissal. Plaintiff now alleges that the BOD's "negligence" dates to as early as 2009 and was known by the Nevada Division of Insurance (DOI) as early as September 2010.[2] Accepting these allegations as true, the applicable statute of limitations required the Plaintiff, Nevada's Division of Insurance Commissioner of Insurance, to file suit against the BOD on or before September 2014. This action, however, commenced in

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[2] *See* First Amended Complaint at ¶¶77-79.

[2] *See* First Amended Complaint at ¶¶77-79.

December 2014.

II. SUMMARY OF PLAINTIFF'S ALLEGATIONS

L&C was formed in Nevada as a risk retention group in and around 2003 for purposes of writing professional and general liability coverage for long term care facilities. First Amended Complaint (FAC), ¶ 30. The L&C board of directors at the time retained Defendants Uni-Ter UMC and Uni-Ter CS (collectively "Uni-Ter") for purposes of managing L&C. *Id.* at ¶ 33. According to Plaintiff, BOD knew that Uni-Ter was just recently formed and therefore placed undue reliance on Uni-Ter. *Id.* at ¶ 34 (new allegation).

Defendant Uni-Ter held themselves out as leaders in providing liability insurance to the healthcare industry. *Id.* at ¶ 39. Uni-Ter created at least five risk retention groups. *Id.* at ¶ 40. Over the years, L&C board of directors entered into various management agreements with Uni-Ter, where Uni-Ter was to 1) market the insurance products, 2) handle underwriting, 3) handle claims, 4) conduct audits and maintain the records for L&C, 5) facilitate re-insurance, and 6) provide the record keeping and financials for L&C. *Id.* at ¶¶ 45-50.

In 2009, at Uni-Ter's direction, BOD accepted multi-site operators, such as Sophia Palmer into the risk retention group as policy holders. *Id.* at ¶ 55 (new allegation). According to Plaintiff, in accepting Sophia Palmer into the group, along with other multi-site operators, BOD failed to "exercise a slight degree of diligence," or exercise "scant care in informing itself based upon the information available." These multi-site operators "constituted a significant divergence from the established business model." *Id.* at ¶ 58-60 (new allegation). At this time, apparently, the DOI reprimanded the BOD for a failure to submit a Conflict of Interest Statement as required under NAC 694C. *Id.* at ¶ 57 (new allegation).

According to Plaintiff, a financial disaster occurred in September 2010, evidenced by the DOI sending the BOD a letter advising BOD of the "dangerous financial position

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

of L&C." *Id.* at ¶ 77 (new allegation). According to Plaintiff, BOD "failed to exercise even slight diligence in correcting the substantial problems L&C was facing, and the alarming financial problems of L&C outlined by the DOI in its September 2010 Letter were not corrected, and in fact were dramatically worsened by the Board's actions." *Id.* at ¶ 80 (new allegation).

According to Plaintiff, on September 1, 2011, Sanford Elsass and Donna Dalton sent a memo to the BOD outlining the causes of the financial difficulties and represented that Uni-Ter would hire a consultant to perform an analysis on the claims process. *Id.* at ¶ 83 (new allegation). According to Plaintiff, the acceptance of the multi-state operators in 2009 was disastrous to the company, so it should not have relied upon Uni-Ter's representations at the time. *Id.* at ¶ 85 (new allegation). According to Plaintiff, BOD should have verified whether accurate information was provided to the consultant and "failed to exercise even a slight degree of care." *Id.* at ¶ 86 (new allegation).

The BOD approved the retention of Praxis Claim Consulting to conduct a sample review of L&C's claims handling process. *Id.* at ¶¶ 84, 87 (new allegation).

On September 23, 2011, the DOI sent another letter to BOD regarding its disastrous financial condition which the BOD had failed to take action to correct. *Id.* at ¶ 90-91 (new allegation).

Throughout L&C's existence, BOD met quarterly and were provided various reports by Uni-Ter. *Id.* at ¶¶ 99-100. In and around October, 2011, BOD received news of L&C's bad finances. At that time, BOD also approved capital contributions by shareholders Oneida, Eagle Healthcare, Pinnacle, Marquis, Elderwood, Rohm and Uni-Ter. *Id.* at ¶ 125. The capital infusion was approximately $2.2 million. *Id.* at ¶ 186. Moreover, BOD retained professionals to conduct additional audits, specifically that of L&C's claims. *Id.* at ¶¶ 128, 140.

Oneida, Eagle Healthcare, Pinnacle, Marquis, Elderwood, and Rohm were shareholders of the risk retention group, L&C. *See Id.* at ¶ 37. They were also

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

companies represented by defendant board of directors: Eric Stickels, Jeff Marshall, Mark Garber, Steve Fogg, Robert Chur, and Robert Hurlbut. *See Id.* at ¶¶ 25, 22, 11, 8, 3.

Between December 2011 through January 2012, BOD received more news (when it met more frequently than required by their by-laws) about L&C's apparent down turn, including an increase in claim reserves and a decrease in surplus. *Id.* at ¶¶ 127, 130. Near the end of January 2012, L&C's Nevada attorney (Connie Akridge) began communicating with the DOI about the state of L&C. *Id.* at ¶¶ 132-133. In May 2012, the DOI scheduled a date to examine L&C. *Id.* at ¶ 138. By July 2012, BOD received news of more increases in the claims loss reserve and decided that no new business would be written. *Id.* at ¶ 141. By September 24, 2012, the BOD decided to contact the DOI to request that L&C be placed into rehabilitation. *Id.* at ¶ 144.

On November 2012, the DOI instituted its Receivership Action before Department 11. *Id.* at ¶ 2. This instant action was not commenced until December 23, 2014.[3]

III. LEGAL ARGUMENT

A. A Motion To Dismiss is Appropriate

A defendant is entitled to dismissal of a claim when a plaintiff fails "to state a claim under which relief can be granted." NRCP 12(b)(5). "When considering a motion to dismiss made under NRCP 12(b)(5), a district court must construe the complaint liberally and draw every fair reference in favor of the plaintiff." *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003). However, due process demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 US 662, 678 (2009) (citations omitted). In reviewing a motion to dismiss, the "court can accept the plaintiffs' factual allegations as true, but the allegations must be legally sufficient to constitute elements of the claim asserted."

[3] Defendants respectfully request the Court take judicial notice of its docket, specifically the date the Complaint was filed.

Lipson, Neilson, Cole, Seltzer & Garin, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
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Munda v. Summerlin Life & Health Ins., Co., 127 Nev. Adv. Op. 83 (2011). The court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 2944 (1986). "Factual allegations must be enough to rise above the speculative level." *Bell Atlantic v Twombly*, 550 US 544, 555. To survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal,* 556 U.S. at 678 (citation omitted).

Additionally, when the defense of the statute of limitations appears on the face of the complaint, a motion to dismiss for failure to state a claim is proper. *Kellar v. Snowden*, 87 Nev. 488, 491, 489 P.2d 90, 92 (1971).

B. Plaintiff has still failed to plead factual claims to support Gross Negligence

Plaintiff's First Amended Complaint was revised to add conclusory allegations, mainly upon information and belief, despite it being the holder of all documents relevant to this action.[4] Some of the new allegations Plaintiff added, infers earlier bad acts, widening the scope of alleged bad acts to the year 2004, rather than what originally appeared to be Plaintiff's focus of September 23, 2011.

As the Court already observed, Plaintiff could not establish gross negligence arising out of the alleged failure to timely act after receipt of the September 23, 2011 news of L&C's dire finances. As previously discussed, Plaintiff's own factual allegations and documents show that indeed the BOD acted to remedy L&C's financial situation, including but not limiting to infusing capital into the risk retention group, requesting retention of another consultant/audit and asking for more frequent reporting. Although BOD was unable to save L&C and eventually asked for it to be placed into receivership, the inability to produce a successful company is by no means evidence of gross negligence. There are no factual allegations that show BOD acted or failed to act to the

[4] *See* First Amended Complaint, Exhibit 1, Order of Liquidation.

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level of gross negligence. In summary, Plaintiff's theory remains unchanged, that L&C failed, because the BOD relied too heavily on Uni-Ter's recommendations, and did not take immediate action to remedy L&C's financial position.

1. The Case Law Establishes that Gross Negligence is "want of care," and "absence of slight diligence," which is not established by the facts here.

Although there are no cases in Nevada establishing the standard of gross negligence within the context of directors and officers liability, there are cases in other jurisdictions. In a Ninth Circuit case reviewing the California's business judgment rule, the court determined gross negligence is not a well-meaning director who is "misinformed, misguided and honestly mistaken." *FDIC v. Castetter*, 184 F.3d 1040, 1046 (9th Cir. 1999). Further, a director has no duty to possess specialized knowledge. *Id.* The Ninth Circuit ultimately granted summary judgment in favor of the board of directors because the plaintiff could only muster arguments that directors made bad choices, but could not dispute that the board of directors requested and received "information, opinions, reports, or statements including financial statements and other financial data." *Id.* at 1045. The mere request and receipt of information was sufficient to insulate the board from liability.

As discussed in the first Motion to Dismiss, the Nevada Supreme Court described gross negligence as the following:

> "Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. **Gross negligence is equivalent to the failure to exercise even a slight degree of care**. It is materially **more want of care than constitutes simple inadvertence**. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or **the absence of slight diligence, or the want of even scant care**. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is, in gross negligence, magnified to a higher degree as compared with that present in ordinary negligence. Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard

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> of probable consequences as is equivalent to a willful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional conduct which is or ought to be known to have a tendency to injure." *Hart v. Kline*, 61 Nev. 96, 116 P.2d 672, 674 (1941). (Emphasis bolded).

These bolded phrases were thrown throughout Plaintiff's First Amended Complaint, but they are conclusory and do not arise to facts of gross negligence.

2. The failure to timely act cannot be gross negligence, because simple action defeats gross negligence.

Under no circumstances can failure to take immediate action be gross negligence. As discussed in *Hart*, gross negligence is failure to exercise a slight degree of care. The very act of acting is sufficient to overcome the gross negligence standard. In essence Plaintiff's claim that BOD failed to timely act is subsumed by the allegation that BOD acted without an informed basis. The inaccuracy of these allegations are discussed below.

3. Plaintiff's Factual Allegations and Documents Support the Fact that BOD received information, questioned that information at times and acted with a slight degree of care, sufficient to insulate them from liability.

As to these claims that BOD should have known that Uni-Ter was providing inadequate information, that BOD did not take the time to verify the accuracy of Uni-Ter's work and that BOD did not even understand the information provided by Uni-Ter, California has already determined gross negligence is not established when one is simply misinformed or misguided. A board of director is not charged with the duty of having specialized knowledge such as knowing the ins and outs of the insurance industry[5]. A BOD can be informed through its management company, who was Uni-Ter. According to BOD's Complaint, BOD met quarterly, received reports, questioned reports and asked for further information when necessary, infused capital into L&C, and

[5] See NRS 78.138.

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required direct handling of operations when L&C's financial problems were apparent. Had BOD not done any this, potentially Plaintiff could come to this Court and allege "gross negligence." The fact is that the Complaint is filled with factual allegations that BOD did more than simply "want of care." BOD exercised some degree, even a slight degree, based on the factual allegations set forth in the Complaint and this slight degree of care is sufficient to overcome gross negligence.

Because the first Complaint and Motion to Dismiss was focused on the BOD's acts subsequent to the September 23, 2011 news of L&C's financial condition, in which the Court has already determined was not an exemplification of gross negligence, BOD will show how Plaintiff has provided the facts to support that as early as 2004, BOD exercised some degree of care. A summary of Plaintiff's Exhibits, exemplifying the BOD acting with a slight degree of care are as follows:

On or about January 1, 2004	In entering the Management Agreement BOD retained counsel, Vernon E. Leverty, Esq. of Reno, Nevada.	FAC, Exhibit 1.
August 12, 2005	A majority of directors were present at the L&C Annual Meeting, and counsel for L&C including, Ms. Connie Akridge and Mr. Curtis Sitterson.	FAC, Exhibit 8.
September 14, 2005	A majority of directors were present at the L&C board meeting along with L&C's counsel. At the meeting the BOD received reports and took affirmative actions regarding premium rate reductions, and claims handling.	FAC, Exhibit 9.
May 30, 2006	All directors were present at the L&C audit committee meeting, in which the BOD received and approved the audit prepared by outside auditors Marcum & Khegman.	FAC, Exhibit 10.
October 30, 2006	All directors were present at the L&C board meeting, in which they were presented a number of reports and discussed a number of issues, including clarifying the calculation of the profit commission component of the Uni-Ter Management Agreement.	FAC, Exhibit 11.
March 23, 2007	In addition to holding the annual meeting, the board met in which all directors and counsel attended. The BOD were presented with various financial reports and discussed various issues including reinsurance, underwriting, marketing	FAC, Exhibit 12.

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	and the DOI's examination report for 2003-2005.	
October 12, 2007	All directors were present at the board meeting, including counsel. The BOD received various reports and based on the recommendation of L&C's actuary, reduced IBNR by $934,000.	FAC, Exhibit 13.
January 10, 2008	All directors were present at the board meeting in which the BOD was presented with various reports. In an attempt to increase policies, the BOD discussed creating an in-house retail agency.	FAC, Exhibit 14.
April 24, 2008	All directors were present for the board meeting in which various reports were presented to the BOD and a discussion of the 2007 financials.	FAC, Exhibit 15.
December 10, 2008,	A majority of directors attended the annual meeting.	FAC, Exhibit 16.
December 2, 2009,	A majority of directors, including counsel attended the annual meeting.	FAC, Exhibit 17
May 21, 2010,	All directors attended the board meeting, including counsel. The BOD reviewed and executed the Conflicts of Interest Statements for 2010. The BOD was presented with various reports, including but not limited to the audited financials prepared by outside auditor Johnson Lambert & Co. LLP, the quarterly financials, the status of claims, risk management, retention of D&O insurance and marketing.	FAC, Exhibit 18.
November 10, 2010	All directors attended the board meeting in which various reports were presented to the BOD in which the BOD affirmatively increased certain agents' commissions to increase the sale of policies and discussed the terms of Uni-Ter's Management Agreement.	FAC, Exhibit 19.
May 4-5, 2011	All directors attended the board meeting in which various reports were presented to the BOD, the Conflicts of Interest statement was executed, and other matters were discussed, including Sophia Palmer.	FAC, Exhibit 20.
September 7, 2011	The BOD had approved the retention of Praxis Consulting to perform a review of the claims process and reserve methodology. The Praxis Report stated that it was retained to "review and comment on the current administrative practices and procedures in place as well as to review and comment on the reserving methodology." It further stated that although this report was based on a sampling of claims, "Praxis feels that the observations and recommendations contained in	FAC, Exhibit 6.

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	this report accurately reflect the claims handling."	
September 21, 2011,	All directors were present at the board meeting in which various reports were presented to the BOD.	FAC, Exhibit 21.

The reality is that BOD acted with the minimum slight degree of care. BOD retained counsel who had some involvement in the formation of L&C and Uni-Ter's Management Agreement. Plaintiff has provided no factual allegation to support its conclusory claim that BOD placed undue reliance on Uni-Ter.

The BOD received reports and even questioned reports and recommendations throughout the life of L&C. This was not a case of the BOD rubber stamping all recommendations made by Uni-Ter. On the contrary, there were discussions and there were votes tabled for further information and discussion. Outside audits were conducted by various auditors. BOD questioned and reviewed Uni-Ter's compensation schedule. The BOD was concerned with growth, marketing and increasing policyholders to share risk, as exemplified in the board meeting minutes. There were consistent discussions of different areas for L&C to expand to diversify, for example, with the creation of in-house agents. Insofar as Plaintiff claims that BOD should not have accepted the multi-operators into L&C because it deviated from the original business model, that is not an example of gross negligence, but an example of how the BOD was willing to take risks in order to facilitate growth and diversification.

Plaintiff takes issue with whether BOD took sufficient efforts to verify the accuracy of the reporting, but does not acknowledge that retention of two separate auditors of claims are an example of checking Uni-Ter reports and recommendations. Plaintiff takes issue with the use of sample data, when it has provided no evidence of why a sample would be insufficient or consideration of the fact that there is a cost benefit in using sample data. Further, Plaintiff has provided no factual allegations that support that BOD should not have relied on these reports from L&C's outside auditors.

Ultimately, BOD retains professionals to provide expert advice. BOD is not

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charged with the duty of having specialized knowledge and is certainly not charged with guaranteeing the success of the corporation. BOD is only required to act in good faith and on an informed basis, which is exactly what the exhibits to Plaintiff's First Amended Complaint and the factual allegations show.

C. Plaintiff's Claims are Barred by the Statute of Limitations

Plaintiff's claims should have been brought by September 2014.[6]

NRS 11.220 is the catch-all statute of limitation. *Siragusa v. Brown*, 114 Nev. 1384, 1391 (1998). The statute states that, "an action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued." The date of accrual has been previously interpreted as the date of injury, not the date of discovery. *Siragusa*, 114 Nev at 1392.

In this case, although conclusory, Plaintiff alleges that as early as 2004, the BOD placed an undue reliance on Uni-Ter and failed to exercise even slight diligence or care in verifying or correcting the misinformation provided by Uni-Ter. FAC at ¶ 34. According to Plaintiff, an example of this failure to exercise slight diligence was in the acceptance of the multi-site operators and Sophia Palmer into the risk retention group in 2009.[7] *See id.* at ¶¶ 55-60. Plaintiff alleges that the BOD should have known of the mismanagement when it had to reprimand the BOD for failing to submit a Conflict of Interest Statement pursuant to NAC 694C. *Id.* at ¶ 57. These alleged bad acts culminated in September 2010, when the Division of Insurance had to send the BOD a letter regarding L&C's deteriorating financial condition and requiring a corrective action plan. *Id.* at ¶¶ 77-88. According to Plaintiff, significant losses occurred between 2009-2011. *Id.* at ¶ 82. According to Plaintiff, the BOD could not rely on anything presented

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[6] The Court has already determined that deepening the insolvency could not stand on its own but as a collateral claim to gross negligence. *See* Transcript of January 27, 2016 hearing attached hereto as Exhibit A.

[7] This argument was not brought in Defendants' first Motion to Dismiss because Plaintiff omitted the allegation about the BOD placing undue reliance on Uni-Ter as early as 2004, or that the cause of L&C's financial demise was because of acts that occurred in 2009. Additionally, Plaintiff omitted any fact that it was on notice of L&C's dire financial condition as early as September 2010.

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Las Vegas, Nevada 89144
(702) 382-1500 FAX: (702) 382-1512

by Uni-Ter thereafter because of the damage that already occurred as a result of the acceptance of the multi-site operators in 2009. *See id.* at ¶ 85.

Given Plaintiff's own allegations, the injury occurred in 2009 when the BOD accepted multi-state operators and Sophia Palmer into the risk retention group without adequate information. The Division of Insurance actually discovered these injuries in September 2010. Therefore, any claim for gross negligence against the BOD should have been filed at the very least by 2013, but definitely no later than September 2014. Because the Complaint was filed on December 23, 2014, it was untimely and it should be dismissed.

IV. CONCLUSION

Although L & C ultimately filed and was placed in receivership, the board of directors did not cause its demise. Board of directors are not required to be omniscient or guarantors of a corporation. They are protected by the statute of limitations and the business judgment rule. Based on the allegations set forth regarding Lewis & Clark's demise, the Complaint in this case should have been filed no later than September 2014. Because it was filed in December 2014, it was untimely, and the claims against the Board of directors should be dismissed due to the passing of the statute of limitations. Alternatively, this Court should grant the Motion to Dismiss because Plaintiff has still failed to state factual allegations to support a claim for gross negligence.

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

Based on the foregoing, Defendants ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, and ERIC STICKELS respectfully request this Court dismiss Plaintiff's Complaint, as it relates to them, specifically Plaintiff's First and Second Causes of Action.

DATED this 18th day of April, 2016.

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

By: _____

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

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

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

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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 18th day of April, 2016, I electronically transmitted the foregoing **DEFENDANTS ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS' MOTION TO DISMISS FIRST 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:

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

George F. Ogilvie III, Esq.
James W. Bradshaw, Esq.
Jeffry S. Riesenmy, Esq.
MCDONALD CARANO WILSON LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102
gogilvie@mcdonaldcarano.com
jbradshaw@mcdonaldcarano.com
jriesennmy@mcdonaldcarano.com
Attorneys for Defendants U.S. RE Corporation, Uni-Ter Underwriting Management Corp. and Uni-Ter Claims Services Corp.

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

EXHIBIT “A”

EXHIBIT “A”

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EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
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 DEPT. NO. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

WEDNESDAY, JANUARY 27, 2016

TRANSCRIPT RE:
DEFENDANTS ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL AND ERIC STICKELS' MOTION TO DISMISS

APPEARANCES:

For the Plaintiff:	BRENOCH R. WIRTHLIN, ESQ. KARL L. NIELSON, ESQ.
For Defendants U.S. RE Corporation, Uni-Ter Underwriting Management Corp., and Uni-Ter Claims Services Corp.:	GEORGE F. OGILVIE, III, ESQ.
For Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels:	ANGELA NAKAMURA OCHOA, ESQ.

RECORDED BY: Traci Rawlinson, Court Recorder

CLARK COUNTY, NEVADA WEDNESDAY, JANUARY 27, 2016

PROCEEDINGS

(PROCEEDINGS BEGAN AT 10:01:30 A.M.)

THE COURT: Calling the case of Commissioner of Insurance versus Chur.

MR. NIELSON: Good morning, Your Honor. Karl Nielson and Brenoch Wirthlin on behalf of the plaintiff.

THE COURT: Thank you.

MS. OCHOA: Good morning, Your Honor. Angela Ochoa on behalf of Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels, who I'll call the board of director defendants.

THE COURT: Thank you.

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

THE COURT: Thank you all. This is the board of directors defendants' motion to dismiss the first and second causes of action for gross negligence and for a deepening of the insolvency.

Ms. Ochoa.

MS. OCHOA: Yes, Your Honor. This is my motion to dismiss, and it's not based on an assertion of the business judgment rule. I'm asking for the Court to dismiss this case because under NRS 78.138(7) directors and officers cannot be personally liable for anything less than a breach of fiduciary duty arising out of an intentional, fraudulent or knowing violation of the law. None of those allegations are presented within the complaint as against my clients. So that's the basis. That's the gist and that's why we want it dismissed.

Alternatively, this Court can also dismiss this case because of the plaintiff's failure to state a claim. Now, the standard is to accept all factual allegations as true, but the Court can dismiss conclusory statements. And in this case there's no doubt there's a lot of factual allegations, but they all support that my clients acted, they tried to be informed, and they took immediate action upon knowing or having been informed that in September of 2011 the corporation was in financial straits. So we think there's another basis to dismiss this case.

Finally, at the very least we ask that this Court dismiss the claim for deepening insolvency. It just has not been recognized in the state of Nevada.

THE COURT: Thank you, Ms. Ochoa.

Mr. Ogilvie, do you have anything to add?

MR. OGILVIE: No, Your Honor.

THE COURT: All right. Plaintiff, your opposition, please.

MR. WIRTHLIN: Thank you, Your Honor. Your Honor, may I use the lectern?

THE COURT: Of course.

MR. WIRTHLIN: Your Honor, I'm happy to address any questions the Court has at any time. I'll just start very briefly. I believe that the key statute here is NRS 78.138. That's the business judgment rule that the Nevada Supreme Court has codified at that statute. There's really -- the two claims that are at issue are the gross negligence and deepening of the insolvency. On gross negligence the Nevada Supreme Court in Shoen that we cited has very clearly delineated what the business judgment rule covers and what it doesn't. And I think that the critical understanding for -- with respect to the defendants, individual defendants' arguments

is that what they're really doing is confusing the separate duties that they have to the company, the duty of care and the duty of loyalty. And if you look at the Shoen language, the court very clearly points that out. And they -- I don't know, I think it was just inadvertent in their motion and reply, left out the key distinction there.

If we look at that paragraph that we cited, it's 640 in Shoen; 122 Nev. 640. The Court says: "And directors and officers may only be found personally liable for breaching their fiduciary duty of loyalty if that breach involves intentional misconduct, fraud, or a knowing violation of the law." And that's true, but the issue here is the duty of care, which is a separate duty. And the preceding sentence the court says very clearly, quote: "With regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers." So those are two separate duties. It's true, as the Shoen court pointed out, that some type of allegation of fraud must be alleged for breach of the duty of loyalty, but a number of -- a director or officer could potentially be loyal to a company without being properly informed, and that would be a violation of a duty of care and that's really is what is at issue here is a duty of care. We're alleging through multiple paragraphs and allegations that the directors and officers were not properly informed.

And in fact, the individual defendants really cite only Section 7 as kind of an exclusion and assert that that's the business judgment rule or that's the provision they're relying on. The business judgment rule really is the entire section, though, and that's critical to note because Section 2 provides that, quote: "A director or officer is not entitled to rely on such information, opinions, reports, books

of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted." That's really the genesis, the basis of our complaint against them. They knew, they had information that what they were receiving wasn't accurate or complete, and yet did not properly inform themselves going forward. That's consistent with Delaware law, which much of Nevada case law is obviously based on. And we cited the Dodgers case, Los Angeles Dodgers, 457 B.R. 308, where the court says the business judgment rule will govern unless the opposing party can show one of the four elements, one of which is the directors were uninformed; another is grossly negligent. And that's really what the Shoen court was delineating in this case.

As far as the allegations, we go through it in some detail in our opposition, but obviously paragraphs 162, 63, 64, we talk about several instances in which the requisite diligence was not shown. The directors and officers knew that they were not receiving information, requested further information, didn't receive it; failed to inform themselves. That's really the basis for that claim for relief.

With respect to the deepening of the insolvency claim, that is a recognized claim in Nevada. The district court chief judge, Judge Pro, held that a trustee had standing to pursue those claims. Now, in their reply the individual defendants try to distinguish that case, saying that the court was only recognizing that as a claim or rather a measure of damages. That's inaccurate. The language actually of that case, and we cite to that, it's 319 B.R. 216. The court talks about the counts that allege acts and omissions that caused damages by permitting the effective date accounting to prolong the corporation's life. And the court said specifically, and I'm quoting here: "Accordingly, the trustee has standing to pursue

these claims."

In doing that, Judge Pro cites to Lafferty, which the defendants actually cite in their motion, as recognizing it as a separate claim. And there is a distinction between those. They're not superfluous. Gross negligence can exist without a deepening of the insolvency. But as the case law that we cited makes clear, deepening of the insolvency is itself a separate and distinct claim for relief, and we have alleged that. It is a recognized claim in Nevada. We would as that the motion to dismiss be denied.

THE COURT: Thank you, Mr. Wirthlin.

Ms. Ochoa.

MS. OCHOA: Several issues, Your Honor. NRS 78.138(7) is not the business judgment rule. It's separate and apart. You have to show a breach of fiduciary duty arising out of an intentional or fraudulent act or a knowing violation of the law. That is the threshold. In Shoen, that was not an issue. They were not looking at the validity of that limited liability provision. They were not even contesting it. The issue was what did the plaintiff have to do with respect to pleading futility in a derivative claim. They were not talking about this statute that I'm trying to have this case dismissed under, so I don't think Shoen is applicable.

You know, I gave the history of this statute and it shows, you know, in 2001 people considered NRS 78.138 a codification of the business judgment rule. But thereafter this limited liability provision was provided, which all of the Nevada Legislature understood they wanted to give more protections to board of directors and officers, more than whatever the business judgment rule had. They wanted to provide more so people would bring their businesses here. And so that's why this

is separate from that business judgment rule. And I think this Court has a basis to dismiss it under that basis -- under that statute.

Finally, I think they're reading In re Agribiotech wrong. You know, first of all, it was a case by a bankruptcy judge or by Judge Pro in a bankruptcy case.

THE COURT: It was an appeal. And frankly, I was a lawyer involved in the case years ago. So, go ahead.

MS. OCHOA: Right. And it's about -- it's against accountants, it's not against a board of directors, so I don't think it's applicable.

THE COURT: Well, it deals with the same allegations, though, made in the gross negligence cause of action here, the same type of inattention, infrequency of reporting. So, but I hate to cut you off.

MS. OCHOA: Right. So either way, I don't think it's applicable. But I think that the Court does have a basis to dismiss it under the Subsection 7 of NRS 78.138.

THE COURT: Thank you, both. This is the defendant -- rather than reciting the members, it is basically the board of directors' motion to dismiss the receiver's first two causes of action for gross negligence and for a deepening of the insolvency. The motion will be granted in part and denied in part as follows.

With regard to the motion to dismiss the first cause of action for gross negligence, the motion is granted but with leave to amend for the reason that when I first reviewed the complaint and certainly, you know, there are factual allegations that would support a negligence cause of action, but I don't see where it's kicked up into the gross negligence. The business judgment rule is applicable. Intentional conduct would have to be pled in order to proceed on that gross negligence cause of action. Just the infrequency of board meetings, the change of position from 2007

to 2009, the failure to record the computation of profit commissions in October 2010, those are negligence causes of action but it's not sufficiently pled to be pled as gross negligence. So it will be dismissed with leave to amend.

With regard to the second cause of action for the deepening of the insolvency, I think it can exist as a collateral cause of action. I don't think it can stand on its own in Nevada. I find that the district court opinion by Judge Pro is persuasive authority. And the Nevada Supreme Court hasn't recognized but they also haven't said that that cause of action doesn't exist in the state of Nevada. So if the plaintiff chooses to -- if the plaintiff chooses to amend the first cause of action, then I will allow the second cause of action to continue.

Ms. Ochoa, will you work with plaintiff's counsel to prepare an order?

MS. OCHOA: I will, Your Honor.

THE COURT: Very good. Mr. Ogilvie, do you wish to sign off on that?

MR. OGILVIE: No, that's fine, Your Honor. Thank you.

THE COURT: Very good. So approve as to form. Any questions?

MR. WIRTHLIN: No, Your Honor.

MS. OCHOA: Can we just put a date in which to amend by?

THE COURT: Thirty days.

MS. OCHOA: Okay, thank you.

THE COURT: Thirty days from entry of the order.

MS. OCHOA: Okay.

THE COURT: Thank you both.

MR. WIRTHLIN: Thank you, Your Honor.

MR. OGILVIE: Your Honor, I have a collateral matter.

THE COURT: Yes?

MR. OGILVIE: I filed a motion to associate counsel yesterday.

THE COURT: I see that.

MR. OGILVIE: And it's set for a hearing or decision on March 1st, which is after the February 25th hearing date of U.S. RE and Uni-Ter's motion to dismiss. I'd just like to advance that decision date so my --

THE COURT: In all business court cases I entertain orders shortening time. And very often we set these on chambers calendar, so if the matter was set on the court's -- it's on the chambers calendar March 1st. So if you ask for an order shortening time, I will be happy to grant it. If we know there's no opposition, I'll be happy to grant it.

MR. OGILVIE: I'll work with counsel to see if there's any opposition and I'll inform the Court.

THE COURT: Very good.

MR. OGILVIE: Thank you.

THE COURT: Thank you.

MR. WIRTHLIN: Thank you, Your Honor.

(PROCEEDINGS CONCLUDED AT 10:15 A.M.)

* * * * * *

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

Liz Garcia

Liz Garcia, Transcriber
LGM Transcription Service

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EXHIBIT PAGE ONLY

EXHIBIT 2

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

DEFENDANT UNI-TER UNDERWRITING MANAGEMENT CORP'S MOTION TO DISMISS NEGLIGENT MISREPRESENTATION CLAIM OF THIRD PARTY COMPLAINT
DEFENDANT'S ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS MOTION TO DISMISS FIRST AMENDED COMPLAINT

THURSDAY, SEPTEMBER 15, 2016

APPEARANCES:

FOR THE PLAINTIFF: BRENOCH WIRTHLIN, ESQ.

FOR THE DEFENDANTS: GEORGE F. OGILVIE, III, ESQ.
ANGELA T. NAKAMURA OCHOA, ESQ.

RECORDED BY: TRACI RAWLINSON, COURT RECORDER
TRANSCRIBED BY: JULIE POTTER, TRANSCRIBER

LAS VEGAS, NEVADA, THURSDAY, SEPTEMBER 15, 2018, 11:19 A.M.

(Court was called to order)

MS. OCHOA: Good morning, Your Honor. Angela Ochoa on behalf of the defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels.

THE COURT: Thank you.

MR. OGILVIE: Good morning, Your Honor. George Ogilvie on behalf of US Re Corporation, Uni-Ter Underwriting Management Corporation, and Uni-Ter Claims Services.

THE COURT: Thank you.

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

THE COURT: Thank you. We have two motions today. The first is the Uni-Ter motion to dismiss the negligent misrepresentation claim of the third amended complaint. And then we have the Chur motion to dismiss the first amended complaint. Let's take the Uni-Ter motion first. I'd like to argue all of Uni-Ter and then all of the Chur motion before I rule on both.

Mr. Ogilvie.

MR. OGILVIE: Thank you, Your Honor. Before I commence, Your Honor, let me compliment you on your choice of law clerks. I met --

THE COURT: Do you know Mr. Cameron?

MR. OGILVIE: I met him as a -- when he was a first-year law student and I tried to hire him when he was a second-year law student.

THE COURT: Well, I got him. I got lucky.

MR. OGILVIE: As the Court indicated, this is the Uni-Ter Underwriting Management Corporation's motion to dismiss. I know that the Court reads everything and is pretty familiar with --

THE COURT: You know, we do, but I -- I don't want to cut you off, either.

MR. OGILVIE: No, but I'm not going to belabor the factual background is what I was going to indicate. I will certainly get into the legal arguments. But just as a summary of the factual background, the receiver for Lewis and Clark brought five causes of action against the individual directors represented by Ms. Ochoa. That is the first and second claim for relief.

The third claim for relief is the one that is being challenged by this motion today, that is negligent misrepresentation, purportedly committed by Uni-Ter Underwriting Management Corp, which is a sister corporation to Uni-Ter Claims Services Corp, which is named along with Uni-Ter Underwriting Management in the fourth claim for relief. And then the fifth claim for relief is solely against US Re Corporation, which I also represent.

Both Uni-Ter Claims Services Corporation and US Re have answered the complaint, and the only matter in dispute prior to moving forward with, as it relates to my clients, before we move forward with this litigation is the motion currently brought by Uni-Ter, what we refer to as Uni-Ter UMC, but I may just refer to it as Uni-Ter. And in that reference I'm only referring to Uni-Ter Underwriting Management Corp as opposed to Uni-Ter Claims Services Corporation.

So, again, the only claim for relief that is being challenged by this motion is the claim for negligent misrepresentation brought against Uni-Ter UMC. As we stated in the motion and in our reply brief, the basis for the motion is that the allegations of negligent misrepresentation are essentially superseded by the claims brought by the receiver against the individual directors, and that is that there was no justifiable reliance on the part of the company Lewis and Clark, which is a risk retention group.

And as I get into the facts and -- the facts and the law kind of intersect as -- as we go through an analysis of the motion. We have indicated in our moving papers the allegations set forth by the receiver, the plaintiff, against the individual directors, which, as we indicate in our reply brief, essentially plead them out of an allegation of negligent misrepresentation brought against my client, Uni-Ter UMC.

And we indicated, cited, the -- the Sprewell versus

Golden State Warriors case out of the Ninth Circuit which indicated that a plaintiff can plead himself out of a claim by including factual allegations contrary to the factual elements of his claims. And Uni-Ter's position in this motion is that the receiver has done exactly that.

And we have cited the -- the allegations set forth in the third amended complaint, which -- which are entirely contradictory and completely negate any claim against -- against Uni-Ter UMC for negligent misrepresentation on the basis that the allegation set forth by the receiver in the third amended complaint indicate that there wasn't any justifiable reliance, which is one of the elements of negligent misrepresentation.

And when I say justifiable reliance, it's justifiable reliance on behalf of the board of directors of Lewis and Clark which, and this is jumping ahead a little bit, but as I say, the facts and the law intersect in this argument. It's important to point out, and it's set forth in the briefs of all the parties, there isn't any dispute as to the composition of Lewis and Clark.

Lewis and Clark is a risk retention group that is comprised of individual long-term care facilities. So the long-term care facilities get together and form this risk retention group for which Uni-Ter was essentially the manager. And -- and this gets to one of the arguments made by -- by the receiver that there can't be any imputation of the knowledge of

the board to the company.

Well, let's just examine what the company is. I mean, as I said, Lewis and Clark is comprised of these long-term care facilities. They are the members of this company. And in this instance it is a corporation, so they are the shareholders. There aren't any other shareholders other than the members which are the long -- long-term care facilities. Each one of these long-term -- well, each member of the board is a representative of these facilities.

So getting away from the law, because sometimes we cherry -- lawyers cherry pick pieces of cases and -- and make legal argument and just focus on whether there is -- there can be imputed to the company the knowledge held by the board. And if we look at it just in common sense in this instance, when we have information provided to the board, and the board is comprised of members or representatives of the shareholders, and the shareholders are the only members of the company, who are we talking about? We're talking about they're all the same. There isn't any division between directors and shareholders.

THE COURT: Well, there -- there is a legal distinction, though, is there not?

MR. OGILVIE: No.

THE COURT: Even -- even --

MR. OGILVIE: And that gets to the sole actor rule that is cited in our reply brief. And that states that when

there is -- when the corporation and its agents, in this case the agents being the board, are indistinguishable from each other, there is a uniform, for purposes of the law, the parties are the same. You can't distinguish between the corporation and its board because they are all one and the same.

And that comes straight out of the USACM Liquidating Trust case cited in our reply brief that shows that there is no difference between the board and the shareholders such that any information provided to the board is imputed to the shareholders because the board is comprised of the shareholders. So it is --

THE COURT: Well, the shareholders are individual entities and the board is individuals, and that's what I meant as far as the distinction.

MR. OGILVIE: Sure. Okay.

THE COURT: Okay. That's what I meant.

MR. OGILVIE: I see what you mean, but there is no --

THE COURT: Because it's the entities that are the members, and then there are representatives of those who I assume were the Chur group.

MR. OGILVIE: Let me -- let me draw a distinction.

THE COURT: Please.

MR. OGILVIE: We don't have a board of directors here that -- of a -- of a large corporation that is -- whether it's publicly held or privately held, it doesn't really matter --

THE COURT: And --

MR. OGILVIE: -- where you have --

THE COURT: -- I don't understand. Were the -- the individual members of the board of directors also principals of the members, or are they independent?

MR. OGILVIE: No, they weren't independent, and that was the distinction that I was going to draw.

THE COURT: Okay.

MR. OGILVIE: There aren't any third-party independent board members here. They are all selected by the individual members, the shareholders, the long-term care facilities.

THE COURT: Okay. That's what I had thought all along, but I'm sorry your argument confused me on that this morning.

MR. OGILVIE: I'm sorry.

THE COURT: Thank you for clarifying that.

MR. OGILVIE: I'm sorry. So the board of directors, and there isn't any dispute about this, the board of directors is comprised of representatives of the shareholders. They are selected by the individual shareholders.

THE COURT: Right.

MR. OGILVIE: And, you know, for instance, there is the Oneida (phonetic), which is represented by the -- by Mr. Stickels, who is the board member which is being sued. So Oneida is the long -- it's just an example, but it's the same for all of them. Oneida Health is one of the long-term care

facilities. It chose Mr. Stickels to be its representative on the board. He's on the board. He's being sued as a board member.

So there is no distinction between the board and the shareholders in that the shareholders all have representatives on the board. So that gets to one of the rules that is the exception to the adverse interest exception, that is argued by the receiver in opposition to our motion. And essentially when we look at the adverse interest exception in that information relayed to a board or another agent can't be imputed to the corporation, again, there is a vast difference to independent directors receiving information and perhaps acting on their own.

And, again, the Nevada Supreme Court case, Amerco, indicated to some very limited exceptions to that adverse interest exception. And, again, the -- the general agency rule is that information related to an agency is imputed -- in-running to an agent is imputed to the agency, is imputed to the corporation. What receiver, the receiver has relied upon is this limited exception, the adverse interest exception.

And as the Supreme Court, the Nevada Supreme Court stated in the In Re Amerco Derivative Litigation, these are -- it's a very limited exception. It's stated that the exception is very narrow, and it only occurs in a narrow exception of cases in which there may be outright theft, looting, or embezzlement of the -- by the director or the agent against the

interests of the corporation.

We don't have any allegation. We have an allegation of gross negligence, but we don't have any allegation in this instance by the receiver against the individual directors that they were somehow feathering their own nest by this gross negligence. And that's Uni-Ter's position.

THE COURT: And instead they pled a deepening of the insolvency.

MR. OGILVIE: Correct.

THE COURT: Right. In lieu of.

MR. OGILVIE: Well, in lieu of feathering their own nests? No, I don't believe so. Again, what we have is the -- the member facilities being represented by their -- their representatives on the board of directors, and any action taken by that board of directors to the detriment of the corporation is going to be a detriment to the facility that they represent. They are a principal of that facility. So they're only hurting themselves if they were taking some action. And the Court pointed out a deepening of --

THE COURT: Or failing to act.

MR. OGILVIE: Or failing to act. Okay. And any act or omission. The Court mentioned a deepening insolvency. That's only if --

THE COURT: It's collateral.

MR. OGILVIE: Yes. If -- if the deepening insolvency

hurts Lewis and Clark, it hurts each one of the members. So there isn't an action taken, and there isn't any allegation that the individual directors were pocketing money by their acts or omissions. And so what we're left with is the only -- the only benefit that would inure as a result of this act or omission would be to their own facility.

But by definition of the facts of this case and the composition of the risk retention group, any act or omission that hurts Lewis and Clark hurts the individual members. So there isn't an allegation that there was an adverse action or omission taken by the individual board members that would benefit anybody. They just simply failed to act or acted improperly.

So the adverse interest exception which is cited by the receiver doesn't apply. Even if it did apply as we argued and as I -- as I already set forth, there is no distinction, factual distinction here between the board and the -- and the individual shareholders such that the sole actor rule would take this out of the adverse -- adverse interest exception.

The other argument that the plaintiff has made in opposition to the motion to dismiss is that it is generally understood, and certainly Uni-Ter doesn't dispute the fact that a party can -- a plaintiff can assert alternative claims for relief, but that's not what we have here. An alternative -- a classic claim for alternative relief or alternative claims for

relief in a commercial context would be a claim for breach of contract and breach of the implied covenant of good faith and fair dealing.

Both claims rely and are founded upon the same set of factual allegations and it's just a matter of whether or not the -- the breach that's described in the factual allegations arise to a level of, okay, the defendant satisfied the letter of the contract, but didn't satisfy the -- the spirit of the contract. Or, alternatively, that the breach, the allegations of breach that are described in the factual allegations rise beyond that to actually constitute a material breach of the letter of the contract. That's alternative pleading.

What we have here is entirely inconsistent pleading. And as I said under the Sprewell versus Golden State Warriors case, plaintiff has essentially pled itself out of the allegations against Uni-Ter for providing purportedly inaccurate and unreliable information to the board of directors. And we cited in our moving papers several of the allegations. And I just want to focus on a few of them for purposes of the argument today.

The allegation in paragraph 122 of the third amended complaint states despite this knowledge, and, again, it's the knowledge of the information provided by Uni-Ter, the board failed to exercise even a slight degree of diligence or care with respect to accepting the information and recommendations

provided by Mr. Elsass and Uni-Ter UMC and failed to verify whether this information was accurate and whether the recommendations should be adopted.

And then the -- in paragraph 145, and they qualify paragraph 145 on information and belief. But I -- I think it's fairly apparent, and I think it's very apparent, that that qualification is -- is misplaced. Because the allegation is on information and belief, the minutes of the October 5, 2011, action taken by the board demonstrate that the board was well-aware it was not receiving accurate and complete information from Uni-Ter.

Well, the receiver, the plaintiff here, has the documents. They -- they see what the minutes of the October 5, 2011, meeting state. And in the receiver's allegations, those minutes demonstrate, in paragraph 145, the -- the plaintiff states that those minutes demonstrate that the board was well-aware it was not receiving accurate and complete information from Uni-Ter.

Whether or not they pleaded on information and belief, this is the allegation that the receiver is stating, that those minutes that the receiver is looking at indicate, demonstrate that the board was well-aware it was not receiving accurate and incomplete -- or it was not receiving accurate and complete information from Uni-Ter.

And let me also digress for just a moment. This is an

instance that the facts demonstrate that there was an order of liquidation entered by Judge Gonzalez on February 28, 2013, three and a half year ago. That order of liquidation, and its attached as Exhibit 1 to the third amended complaint, in paragraph 3 of that order of liquidation it says that the receiver is hereby authorized to collect all the property, all of the papers, all of the documents.

And so the receiver, for three and a half years, has been in possession of all of the property, all of the documents, all of the -- the board minutes. So this isn't a situation in which there is a -- an alternative claim for relief because the plaintiff is somehow deprived of the information necessary to assert the factual allegations against a defendant. The plaintiff, the receiver, for three and a half years has been in possession of all of the documentation that support.

Now, I read in -- in the receiver's opposition to the individual directors' motion to dismiss that through the actions of the board it -- it may not have all the documents that it needs to support its claims. But what we do know from the allegations set forth, and they are very precise in the documentation that is in possession of the -- of the receiver, and which the receiver based its allegations, it is very precise in -- in the documentation and what that documentation shows as it relates to the allegations against the board of directors.

And that is set forth and summarized in the receiver's

supplement to the opposition of the individual directors' motion to dismiss which the receiver filed on September 8th last week, a week ago today. And if we go to page 4 of that opposition, it -- it states -- actually, if we start at the bottom of page 3. The receiver states, however, below is a brief summary of the information supporting the claims as set forth more fully in the complaint and incorporated by reference herein.

And all of this information as the receiver states and as I reviewed the -- the -- and compared the allegations summarized in its opposition to the individual directors' motion to dismiss with the third amended complaint, all of the information set forth that I'm about to cite the Court to is included in -- in the third amended complaint.

And the receiver states, for example, as of the end of 2011 there was an overwhelming amount of information that clearly showed that L&C's, Lewis and Clark's, financial condition was in peril. The information available to the board at that time showed a rapid and drastic increase in loss reserves, reports of inadequate reserves requiring repeated capital infusions in late 2011 and early 2012, high loss rations, drastically decreasing realized premiums, absence of any adjustment of premium rates, implementation of a new underwriting philosophy that would result in a 35 to 40 percent drop in premiums, and a drastically decreasing company surplus.

Had the board properly informed itself of the

financial situation of L&C, it would have known the following, which include pertinent items from the information available to the board at that time. These are not on information and belief. The allegation is that the board had this information, and the allegation is made based on the receiver's collection of all the documents since 2013 that established these allegations.

And the receiver then goes through one, two, three, four, five, six, seven bullet points of information that the receiver has in its possession. Oh, I'm sorry, seven, eight, nine, ten, eleven, twelve pieces of information, documentation that was supplied to the board either by Uni-Ter or by the commissioner of insurance saying don't rely -- you don't have to rely on the information that Uni-Ter is providing to you.

This is the commissioner of insurance saying for this reason, this reason, and this reason, your company has real problems and you need to take immediate action to -- to avert the financial disaster that eventually occurred.

And this is the most important part here. The receiver goes on to state that the board had all of this information from Uni-Ter and from the Department of Insurance, and -- and then states if the board saw and reviewed all of this information as alleged, they were grossly negligent in not taking immediate corrective action by at least 2011, for example, by raising premium rates.

Alternatively, if the board did not review or

understand this information, they were grossly negligent by not taking action to inform themselves of the factual condition of L&C.

So what we have, Your Honor, is based on the receiver's collection of all the documentation related to L&C back during the relevant time frame, the receiver has alleged that for all of these reasons, all the documents that it cites in those 12 bullet points which are taken directly out of the third amended complaint, that the receiver had possession of these documents, knows that the board had that information, and is saying either the board failed to take action after reviewing it and was grossly negligent for that reason, or the board failed to review that information and was grossly negligent for not reviewing it.

So in essence, the board -- the receiver says -- is -- is saying this company died and the board of directors are responsible and, Uni-Ter, you're responsible. Uni-Ter, you brought a knife to the fight, but the board shot the company. There is no way that there can be an allegation that survives that Uni-Ter bring a knife to the fight constitutes the -- the basis or the reason for the corporation dying.

The board of directors, as alleged by the receiver, either took the information and disregarded it or didn't look at it. Either way, it's grossly negligent and the actions -- and those acts or omissions supersede any conduct by Uni-Ter UMC in

providing purportedly inaccurate or unreliable information. And for that reason the receiver has pleaded itself out of a claim for negligent misrepresentation asserted against Uni-Ter UMC.

THE COURT: Thank you, Mr. Ogilvie.

In order to -- for the comfort of the Court, I need a five-minute recess. We started at 9:30 this morning. And I don't want to cut you off, so we'll be in recess for about five minutes. Thank you.

(Court recessed at 11:50 a.m., until 11:56 p.m.)

THE COURT: And your opposition, please.

MR. WIRTHLIN: Thank you, Your Honor. At the outset I think -- I think it's important to point out that Uni-Ter is correct that the Court is required to take the allegations of the complaint as true for purposes of the motion to dismiss. This complaint does state that L&C, Lewis and Clark, relied justifiably on Uni-Ter. That is what this complaint states.

And really essentially what Uni-Ter is arguing is that under its, and I don't think there would be any dispute, self-serving interpretation of the facts, they don't believe that it's consistent with the other claims. But really what this complaint says is that there was some wrongdoing on multiple parts. And absolutely those claims, we believe, it's our position, can go forward for the reasons that we mentioned in our briefing which I would incorporate in the argument here. But the complaint does state that Uni-Ter -- excuse me, that

Lewis and Clark justifiably relied on the board -- excuse me, Uni-Ter.

What I want to get to preliminarily is the -- a couple of things that I think kind of permeate their motion that show that it's not appropriate for a motion to dismiss. They cite in their motion and rely pretty much exclusively for the -- for their conclusions on the facts in the case of Safeco, a Ninth Circuit unreported decision. That was a case with some pretty important distinctions to the case here.

There had been a trial and I think that that is a key issue that is presented both in the pleadings and in Uni-Ter's argument today, they're essentially arguing facts. They are asking this Court to take into account facts that are not in that complaint, well outside of the complaint, and make factual findings that are up to the -- that are within the scope of the jury's determination.

The other thing is the Safeco case involves plaintiffs who are individuals, so there's no issue regarding imputation. The motion doesn't really raise that, so we went into that. And that gets us quickly to the adverse interest exception. Nevada law does state that this is a narrow exception, absolutely. We 100 percent agree with that. However, there are no -- there are no magic words that are required for this exception to apply. It's a result of a factual determinations that are made, which, again, is improper for Uni-Ter to ask this Court to make the

determination on a motion to dismiss.

But just going down that road a little ways, Lewis and Clark would obviously request leave to amend if the Court found that there were magic words. But I don't -- I don't think that the case law that they cited, that we cited, as well, that we brought to the Court's attention requires that. What the case law says is -- and, again, I think an important distinction is that Uni-Ter focuses a lot on whether there was a benefit to the board's actions to the board. That's not the analysis. The analysis is whether there was a benefit to the company.

And we alleged -- plaintiff alleged claims against the board for gross negligence, the individual directors and officers, and as the Court rightly pointed out, deepening the insolvency. And that's critical because that claim basically says that the -- the corporation, the company was kept alive a lot longer than it should have been to its significant detriment.

And we actually have case law, we cited the Shacked (phonetic) case out of the Seventh Circuit that addresses that specific issue with that specific claim and concludes in many of the same issues that we're going on in this case loss of millions of dollars, loss of positive investments and assets. It states -- the Shacked court stated that these all, quote, aggravated reserves insolvency in no way can these results be described as beneficial to reserve.

Same thing that we have here. Clearly the board, according to the complaint, was grossly negligent, they deepen the insolvency of the company, and that cannot in any way be said to benefit Lewis and Clark, and, in fact, that's why we're here, that's why receivership was appointed.

In a separate context, and I think this goes to kind of the common sense aspect of it, and as the Court pointed out, there are legal distinctions between, you know, the company, individuals, managers, separate legal entities, and that's why we have sued the individual directors. And --

THE COURT: That brings -- that kind of begs the question, which I think I directed to Mr. Ogilvie or I heard from his argument, is can you maintain causes of action for negligent misrepresentation against Uni-Ter at the same time you maintain a cause of action against the individual board members for gross negligence? Do you have to choose a remedy?

MR. WIRTHLIN: Your Honor, I don't think that you do have to choose a remedy, particularly at this point. We're at the -- we're at the motion to dismiss stage, and I think that what -- jumping ahead to address that issue, Uni-Ter argued, well, this is kind of like a situation where you have a motion or a complaint that states a breach of contract claim and a complaint that -- and also states a claim for unjust -- or for good faith -- breach of covenant of good faith and fair dealing.

I think a better analogy here is the receiver is

coming in. We're finding out what happened. Obviously, that's the purpose of a complaint, find out -- of a lawsuit, find out what happened, make those allegations, go forward, let the -- let the jury, or the judge if it's a bench trial, make those factual determinations. A better analogy, I think, is a complaint where you have a claim for breach of an oral contract, and also a claim for breach of -- or rather, I'm sorry, not breach, but unjust enrichment.

Because ultimately, yeah, there may need to be a decision to be made. But for purposes of that complaint going forward, the fact of the matter is the Court is required, for purposes of a motion to dismiss, to take all factual allegations as true. The fact finder is not. The fact finder, the point of the fact finder is to figure out what happened.

And it's absolutely possible that the jury in this case says, well, actually, we think the board did justifiably rely on Uni-Ter, Uni-Ter is liable. It could go the other way, as well. Again, we -- our position is the adverse interest exception applies. We think that's a factual determination that would be inappropriate for Uni-Ter to ask this Court to resolve on a motion to dismiss.

But we think with the adverse interest exception applying, because the board's knowledge or lack of knowledge cannot be imputed to the plaintiff, which is a separate legal entity, that we are allowed to go forward with those claims.

It's possible that the jury determines the board justifiably relied on Uni-Ter. It's possible that they find that they didn't. But those claims can go forward at this point.

And, again, under Nevada law, if that adverse interest exception applies, and we submit that it does, and that with the claims that we've pled against the board and against Uni-Ter, those -- those are not mutually exclusive claims because of that interest, the adverse interest exception. But even if it was, that -- that jury determination can be made, and we're allowed to go forward with those alternative pleading claims.

One issue I would like to point to, as well, is the -- the sole actor exception. I think there has been quite a bit discussed with respect to the distinct legal entities and factual issues that were raised. And I believe that the statement was made there's no factual distinction between these entities and the individual board members.

Your Honor, we would submit we would disagree with that. We would submit that is an issue for trial, an issue of fact. These individuals wore multiple hats. And that's not uncommon, necessarily, but it certainly prevents a motion to dismiss when what we're asserting is a claim that the -- that Lewis and Clark justifiably relied on these individuals depending on which hats they were wearing. Very factually intensive, inappropriate for a motion to dismiss.

I wanted to hit a couple of other highlights. Other

courts in related context have held, and I think the quotation is so good, with the Court's indulgence I would read it out of the Clark case that we cited. Regardless of whether the alleged wrongdoing was intentional or merely negligent, the knowledge of officers' and directors' wrongdoing cannot be imputed to the corporation because those officers and directors' control over the corporation prevents it from learning of the misconduct that it's injuring it.

And I think from a practical standpoint it's important to remember Uni-Ter is not saying they didn't do anything wrong. They're just saying somebody else may have done something wrong, too, so let us out on the chance the jury decides that, you know, there was no justifiable reliance.

Again, the jury could go either way on that issue. And they're welcome to argue that to the jury or a motion for summary judgment if they deem that appropriate. But on a motion to dismiss, Your Honor, we would submit that is inappropriate. If the Court has any other questions.

THE COURT: I don't.

MR. WIRTHLIN: We'll rest on the pleadings.

THE COURT: Thank you.

And the reply, please.

MR. OGILVIE: Your Honor, I think the identification of this exception to the general rule of agency is -- is enlightening. And that is the adverse interest exception such

that the board or the agent, the board member or the agent had an interest, interest, that was adverse to the interests of the corporation. And there isn't any allegation here that such adverse interests exists.

There's only an allegation that the board members essentially failed to satisfy the business judgment rule. They -- there's no allegation of self-gain. There's no allegation of gain to the individual shareholders that those board members represented. There's simply an allegation that they grossly -- were grossly negligent in the performance of their duties.

There was -- there isn't any adverse interest in that they were stealing money or embezzling or -- or doing something to benefit a third-party that they somehow had a relationship with. And that's what the adverse interest rules is intended to apply to. That is the exception that the Nevada Supreme Court is referring to to the general rule of agency where information that is related to an agent is imputed to the -- the corporation.

And that is why the Supreme Court said there are -- that it is a very narrow exception, and that is why the Supreme Court referenced embezzlement and theft. There had to be more than they acted in a way that didn't benefit the corporation. Maybe they did, maybe they didn't. They certainly -- the allegations certainly are there that the board members acted in a way that didn't benefit the corporation.

But Uni-Ter submits that that is not enough to satisfy the adverse interest exception because there wasn't some ulterior motive. There isn't an allegation that there was some gain by this such that the interests of the individual board members were adverse to the interest of the corporation. And Uni-Ter submits that that is required in order to find that exception.

THE COURT: Thank you, Mr. Ogilvie.

So the first motion is submitted. Now the motion on behalf of the individuals, Ms. Ochoa.

MS. OCHOA: Good morning, Your Honor. I just wanted to make sure that I complete the record. There was some statements about that all the board members were shareholders and -- and one isn't. Dr. Carol Harter, she is not a shareholder. I just want to make sure that the Court doesn't think that I knew something and I didn't disclose it. But that's -- that's just the facts.

Just to make sure that everybody is all on the same page, this is my motion to dismiss and I'm seeking relief for the dismissal of the third amended complaint. I know when we stated this journey it was to dismiss the first amended complaint, but along the way the plaintiff filed a second amended complaint.

And so we took a look at that and we tried to supplement the record with what was changed, with in the

citations from the motion, the first initial motion, to what would have been changed in the second amended complaint. And in doing so, the second -- the supplement, the first supplement doesn't have every single citation that was in the motion or the reply. It has only the things that were changed.

So if -- so, for example, from the first to the second amended complaint, the exhibits were not changed, so I did not reflect that in that supplement. So I just wanted to make sure the Court is aware of that.

And then the third amended complaint was filed, and by the time the third amended complaint was filed, there was no changes from what we had previously cited in the record, so that's kind of where we are today.

So as to the meat of the motion to dismiss, it's really based on two things, that no reasonable person could interpret plaintiff's allegations to support a claim for gross negligence, and that the statute of limitations had passed. The complaint was supposed to be filed by September 2014 based on the allegations made in the complaint that was filed in December of 2014.

So as to the first, the first issue, I know the plaintiff claims that negligence is an issue for the jury, but all of the case law that we -- that we cited in support of a dismissal of a gross negligence claim was at either a motion to dismiss stage or before the issue went to the trier of fact. So

that does mean that it is within the Judge's province to decide whether the claims can support gross negligence. And we found that the -- that the rule is if no reasonable person could find that there was gross negligence.

So, you know, I know the complaint is over 200 paragraphs. It's filled with exhibits. So I don't want to, you know, go over every single fact that supports that my clients actually looked at the information, discussed it, asked for more information, and then ultimately made a decision. I think that's definitely within the Court's ability to go through all of that.

But I just want the Court to, if they haven't already decided, think about a few things that were alleged in the complaint, and that's this ideal that my clients are liable because they weren't informed, they were misinformed, they did not timely act, and they took the wrong actions. So under the case law, my clients cannot be liable for anything other than being uninformed. You know, this idea that they were misinformed, they're entitled to rely on what their experts advise them. So it's --

THE COURT: Isn't your argument that if they exercise any degree of care, a gross negligence cause of action can't --

MS. OCHOA: Right.

THE COURT: -- be maintained?

MS. OCHOA: And on top of that, when you look at the

actual facts, it does show that they received information, that they processed it, they talked about it in these minutes, it's reflected in these minutes. They asked questions, they discussed it, and they finally made a decision one way or another. So that -- that's -- we contend is sufficient to be more than -- more than they -- they fulfilled their requisite duty of care.

Then the other issue is this idea that my clients could not justifiably rely on Uni-Ter. When you look at the facts, this -- this risk retention group was created in 2004. It was going along just fine, and then in 2010 they were advised by the Nevada Division of Insurance that they -- they had some problems.

So from 2010 through 2011, they did things. They tried to -- they tried to increase -- increase commissions for their insurance agents to bring in more business, to bring in more policies. They sent out -- they -- they allowed for audits of the claims to see what was going on. And eventually, and it wasn't long after that, in September 2012, they were the ones that asked the Nevada Division of Insurance to put the risk retention group into rehabilitation.

So they did all these kind of acts to help the -- the plaintiff. So my point is there was no -- there was nothing to trigger them to say, oh, I shouldn't rely on Uni-Ter. At least it's not alleged in the complaint.

So this gets me to the last issue, which is that the statute of limitations had -- had lapsed in September of 2014. And the first time we came around to this case, the allegations were basically my clients did all this bad after September of 2011. The first amended complaint was expanded so that my clients did all these bad acts in like 2009, 2010, 2011.

So it wasn't really an issue the first time around, but now it is an issue because under the catchall statute, the statute of limitations is four years for the plaintiff to have brought an action. So by the pleadings in the complaint, the plaintiff claims that in September of 2010 they wrote a letter to us to tell us that our -- that the risk retention group was in trouble, and this all stems from acts done in 2009, which was the inclusion of some multi-operation groups.

So according to the math and the discovery rule, that would mean that the plaintiff was supposed to bring their complaint by September of 2014. They brought it in December of 2014. We submit that that's untimely and it should be dismissed.

THE COURT: Thank you, Ms. Ochoa.

The opposition, please.

MR. WIRTHLIN: Thank you, Your Honor. Our first argument is on the negligence issues. And I'm just going to quote from the Nevada case law, Nehls v. Leonard, 97 Nev. 325. Quote, in Nevada issues of negligence and proximate cause are

considered issues of fact and not of law and, thus, they are for the jury to resolve, end quote.

I think that, if I remember correctly, and if I'm wrong I'm sure I'll be -- opposing counsel can correct me. But I don't believe they cited any binding Nevada case law authority that -- that shows any kind of exception, particularly here where gross negligence is alleged.

And I want to clarify this. It's my understanding this motion only relates to the gross negligence. This Court has already found that deepening the insolvency is a -- is a valid claim. But after the prior motion to dismiss on the negligence issue --

THE COURT: Well, I think I said it was collateral to negligence or gross negligence.

MR. WIRTHLIN: Correct. Correct, Your Honor. And I'm sorry.

THE COURT: And this motion is directed only as to the gross negligence.

MR. WIRTHLIN: Okay. Thank you, Your Honor.

THE COURT: That's the way I understood it.

MS. OCHOA: Right.

MR. WIRTHLIN: Okay. And I say that because we -- we went back through and, at what we understood to be our direction, to go back through and -- and look for those allegations that, if we could find them, would raise -- rise to

the level of gross negligence. And we looked at the case law and it certainly is a standard that we -- that we had to look at and amend the complaint.

And, frankly, I am glad that we had that direction from this Court to go do that. We went back through more thoroughly. Obviously, there are a lot of documents in this case. There are documents we don't have. But we were able to find some pretty significant issues with respect to gross negligence. We have alleged those. I don't want to rely on our pleadings in the complaint, but in particular those letters. Particularly that 2011 letter.

And I did want to clarify one thing. If I -- if I heard the individual defendants' counsel correctly to state that we, Lewis and Clark, had written them a letter, it was -- and maybe that's -- maybe I misunderstood, it was actually the Department of Insurance that wrote that letter and -- and sent it to those individual defendants and said, you know, in September of 2011, you've got some -- some real problems here. That was a culmination of a lot that had happened.

And in our complaint we give more background back to 2009 on some of the things that had happened, but that doesn't necessarily mean that that's -- negligence began then. And not only that, I would like to point out that what we've got here is negligence that was -- that was kind of taken continual -- on a continual basis culminating in a receivership being appointed,

that didn't happen until 2012.

So even under that standard, we would submit that the discovery rule would apply here and the facts that we allege are much later than the 2009 background information we provided. The other thing is I think that before we even get there, Judge Gonzalez's liquidation order answers the question conclusively. So I guess I would -- unless the Court has any questions, I rest on the pleadings.

THE COURT: Thank you.

And your reply, please.

MS. OCHOA: Just a short issue. I didn't really bring it up in the reply because I didn't think it was that big of a deal, but, you know, the quote that negligence is only in the province of the jury is just -- it's just not quite right. It's been a long time since I've looked at that case law that was cited. But we all know negligence is made up duty, breach, causation, damages.

Duty is always -- always dismissed, is a basis to dismiss a negligence claim. And that's absolutely within the jury's -- the Judge's discretion. So, you know, it's not quite accurate that negligence is always within the trier of the facts' ability.

THE COURT: Thank you both.

All right. Both matters are now under submission. We have the Uni-Ter motion to dismiss the negligent

misrepresentation cause of action and third amended complaint under 12(b) for failure to state a claim, and then we have the individual defendants' motion to dismiss the third amended complaint with regard to gross negligence.

I'm going to deny both motions at this time for the following reasons. I'm governed by 12(b)(5), and that's if the plaintiff can state a claim for which relief can be granted, I have to assume all of the facts in the third amended complaint are true. And so I can't determine the quality of the facts at this point. I would -- in order to grant the motions that have been brought, I would have to determine whether or not there was justifiable reliance by Uni-Ter, and justifiability is a factual issue.

With regard to the board, I'd have to determine whether or not they exercised the correct degree of care. And I understand the argument very clearly, that any exercise of care exempts them from a gross negligence claim. But at this point at least, only based upon the third amended complaint, they stated a claim for which relief can be granted.

Now -- and that's with caution to the plaintiff. It may well be after some discovery that that gross negligence cause of action is going to go away. But at this point you've stated a claim, so I'm not going to dismiss the complaint, the third amended complaint with regard to that.

And I am very appreciative of the quality of briefs

all around because this is a fairly new issue for me. I had to spend a lot of time to get up to speed on the nuances of the collective insurance groups. But they've stated a complaint for which relief can be granted finally.

With regard to the statute of limitations argument raised by the board members, the statute of limitation argument, the liquidation order for receivership established deadlines and statutes of limitation, and I find that that supersedes for the purpose of the receivership. So for that reason, that argument is rejected.

And Mr. Wirthlin to prepare the orders. Make sure that your opposing counsel can review and approve to the form of those orders.

MR. WIRTHLIN: Certainly, Your Honor. Thank you.

THE COURT: And thank you all.

MS. OCHOA: Thank you.

MR. OGILVIE: Thank you, Your Honor.

(Proceedings concluded at 12:22 p.m.)

* * * * *

CERTIFICATION

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

AFFIRMATION

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

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

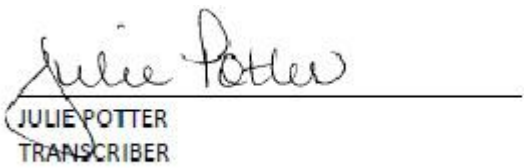

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EXHIBIT 3

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

REQT
LIPSON NEILSON P.C.
JOSEPH P. GARIN, ESQ.
Nevada Bar No. 6653
ANGELA T. NAKAMURA OCHOA, ESQ.
Nevada Bar No. 10164
JONATHAN K. WONG, ESQ.
Nevada Bar No. 13621
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
(702) 382-1500
Fax (702) 382-1512
jgarin@lipsonneilson.com
aochoa@lipsonneilson.com
jwong@lipsonneilson.com
Attorneys for Defendants/Third-Party Plaintiffs Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels

DISTRICT COURT

CLARK COUNTY, NEVADA

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

TO: COMMISSIONER OF INSURANCE, Plaintiff; and

TO: BRENNOCH WIRTHLIN, ESQ., Counsel for the Plaintiff.

Pursuant to Rule 26 of the Nevada Revised Rules of Civil Procedure, Defendants ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER,

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

ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS (hereinafter collectively referred to as "BOD") by and through their attorneys, LIPSON NEILSON P.C., hereby request that Plaintiff COMMISSIONER OF INSURANCE ("Plaintiff") respond to the following Third Set of Requests for Production of Documents within thirty (30) days of the date of receipt hereof. Defendants expressly reserve the right to submit further Requests for Production of Documents.

Each Request is to be answered on the basis of the entire knowledge of Plaintiff COMMISSIONER OF INSURANCE, including all information in the possession of any other person, acting on behalf of or under the direction or control of Plaintiff.

INSTRUCTIONS AND DEFINITIONS

These instructions are incorporated by reference into each and every request hereinafter set forth without the necessity of further reference.

A. The term **"DOCUMENT"** as used in these requests, means and will be liberally construed to include, without limitation, all originals, copies and duplicates of all tangible forms of graphic, photographic, and phonic recordings, including but not limited to correspondence, records, reports, memoranda, invoices, contracts, statements, telegrams, canceled checks, electronic communications, microfilms, photographs, tapes, discs, and all other kinds of written or documentary personal property.

B. As used herein, the term **"IDENTIFY**" when referring to a **"PERSON"** means to set forth the name, address, and phone number.

C. **"YOU"** and **"YOUR"** shall mean to include the answering party, and each of the said party's representatives, and where appropriate, the directors, firm, corporation, trust, governmental agency or other entities; and also, if relevant, the individual representing such **"PERSON"**.

D. As used herein, the term **"COMPLAINT"** refers to the operative complaint in this matter, filed on August 5, 2016.

E. As used herein, **"Case No. A-12-672047-B"** refers to the Receivership

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

Action filed in the Eighth Judicial District Court, Clark County, Nevada on 11/15/12 and entitled "*State of Nevada, ex rel. Commissioner of Insurance, in his capacity as Statutory Receiver for Delinquent Domestic Insurer vs. Lewis & Clark LTC Risk Retention Group Inc.*"

F. If an objection is made as to the production of any requested information.

(1) State the specific grounds for not producing the information;

(2) Fully identify the information for which the objection is asserted; and,

(3) If a privilege is alleged, the privilege asserted (e.g., work product, attorney/client).

G. These requests are deemed to continue consistent with NRCP 26(e) so as to require supplemental responses if **YOU** obtain further information between the time **YOUR** response is served and the time of trial.

THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF

REQUEST FOR PRODUCTION NO. 10:

Please PRODUCE a copy—or a description by category and location—of all documents, electronically stored information, and tangible things in your possession, custody, or control that contains the job file of your expert witness(s), including notes, worksheets, spreadsheets, summaries of facts.

REQUEST FOR PRODUCTION NO. 11:

Please PRODUCE all documents, facts, or data considered and relied upon by your expert witness(s) in preparing his opinions.

REQUEST FOR PRODUCTION NO. 12:

Please PRODUCE all invoices and/or billing statements from your expert witness(s) for the services and testimony provided in relation to this case.

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

REQUEST FOR PRODUCTION NO. 13:

Please PRODUCE all retention agreements or contracts from your expert witness(s) for the services and testimony provided in relation to this case.

DATED this 1st day of July, 2020.

LIPSON NEILSON P.C.

/s/ Angela Ochoa

By: _____

Joseph P. Garin, Esq. NV Bar No. 6653
Angela T. Nakamura Ochoa, Esq. NV Bar No. 10164
Jonathan K. Wong, Esq. NV Bar No. 13621
9900 Covington Cross Dr., Suite 120
Las Vegas, NV 89148

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

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

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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 1st 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' THIRD SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF** to the Clerk's Office using the Odyssey E-File & Serve System for filing and transmittal to the following Odyssey E-File & Serve registrants:

E-Service Master List
For Case

Attorney General's Office	
Contact	**Email**
Joanna Grigoriev	jgrigoriev@ag.nv.gov
Nevada Attorney General	wiznetfilings@ag.nv.gov
Broad and Cassel	
Contact	**Email**
Jon M. Wilson	jwilson@broadandcassel.com
Yusimy Bordes	ybordes@broadandcassel.com
Fennemore Craig, P.C.	
Contact	**Email**
Adrina Harris	aharris@fclaw.com
Brenoch Wirthlin	bwirthli@fclaw.com
McDonald Carano Wilson LLP	
Contact	**Email**
CaraMia Gerard	cgerard@mcdonaldcarano.com
George F. Ogilvie III	gogilvie@mcdonaldcarano.com
James W. Bradshaw	jbradshaw@mcdonaldcarano.com
Kathy Barrett	kbarrett@mcdonaldcarano.com
Nancy Hoy	nhoy@mcdonaldcarano.com
Rory Kay	rkay@mcdonaldcarano.com
Nevada Attorney General	
Contact	**Email**
Marilyn Millam	mmillam@ag.nv.gov
Nevada Division of Insurance	
Contact	**Email**
Terri Verbrugghen	verbrug@doi.nv.gov

/s/ Juan Cerezo

An employee of LIPSON NEILSON P.C.

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EXHIBIT PAGE ONLY

EXHIBIT 4

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

U.S. RE Companies, Inc.

FEDERAL EXPRESS MAIL

July 23, 2009

Ms. Julie M. Dragulski
Commercial Lines Account Manager
Bailey, Haskell & LaLonde
169 Main Street
Onedia, NY 13421-0210

RE: U.S. RE Companies, Inc.
Kidnap & Ransom Insurance
Policy No.: 464 CF 0203
Period Renewal From 9/3/09

Dear Ms. Dragulski:

Per your request of July 9th, attached please find our completed renewal application for the above captioned insurance policy effective from September 3, 2009.

As requested, we have provided you with the most recent list of officers and directors, major shareholders by name, percentage of ownership and any outside affiliations, and a list of all the companies within the U.S. RE group of companies. We are in the process of setting up a majority owned Brazilian Reinsurance broker, to be located in Sao Paolo, which has not been formally approved by SUSEP as yet and will advise when done. It will be a subsidiary of U.S. RE Corporation International in Bermuda.

We have also provided the most recent (which just received) audited financial statement for U.S. RE Corporation, the only entity whose financials are audited. It is the principle operating subsidiary of the group. Our CFO, Richard Davies, indicated that we have not received any CPA management letter in the recent past, nor do we expect one this year.

If you should any questions on the information, please do not hesitate to ask.

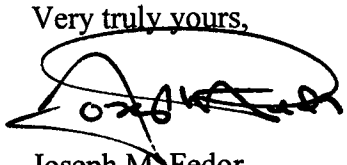
While we are quite comfortable with St. Paul Travelers, we would appreciate knowing what other markets feel is reasonable for our coverage, and whether the policy form/coverage provided can and should be improved.

One Blue Hill Plaza, 3rd Floor, P.O. Box 1574, Pearl River, New York 10965
Tel.: 845-920-7100 • Fax: 845-920-7160 • E-Mail: info@usre.com

USRE

We will await your advices on the above in due course. With kind regards.

Very truly yours,



Joseph M. Fedor
Executive Vice President & Director

JMF:dm
Att.

TRAVELERS

APPLICATION FOR
KIDNAP & RANSOM POLICY
TRAVELERS FORM FOR CORPORATIONS AND MUTUAL ASSOCIATIONS

Agency Name and Address	Licensed Individual Agent Soliciting Business *(Iowa agents only)*

Legal Name of Company (Insured) applying for coverage

U.S. RE COMPANIES, INC

Principal Address (Street, City, State, Zip)

ONE BLUE HILL PLAZA, P.O. BOX 1574 PEARL RIVER, N.Y. 10965

Coverage to be effective at 12:01 A.M. Local Time at Insured's principal address on the 3RD day of SEPT, 2009

1. a. Kidnap & Ransom Extortion Limits requested: $ 5,000,000

   b. Deductible Amount Requested: ☒ $0 ☐ $5,000 ☐ $10,000 ☐ Other $ _____

   c. Coinsurance Amount Requested: ☒ 0% ☐ 5% ☐ 10% ☐ Other _____ %

   d. Has this or similar coverage ever been declined by an Insurer or Lloyds? ☐ Yes ☒ No

2. a. Date Insured was established: 1988

   b. Standard Industrial Classification Code (4 digit number) representing primary business operations 6411

3. a. Total No. of Directors, salaried officers and full time equivalent employees. 65

   b. For latest fiscal year end:

   Consolidated revenues 12/31/08 $ 18,396,000

   Consolidated assets (deposits if financial institution) 12/31/08 $ 34,999,000

4. List the location(s) outside of the U.S., Canada & Western Europe for all subsidiaries, divisions and branches. *(Attach separate schedule if necessary.)*

City and Country	Approximate # of Employees	Number Of Locations	Nature of Business or Products Provided	Type of Operation
ISTANBUL, TURKEY	3	1	REINSURANCE BROKER	

5. Do any members of staff travel to countries outside the U.S., Canada & Western Europe? ☒ Yes ☐ No

(If so provide details. Include such information as city and country of destination, frequency, duration, business or pleasure and titles of personnel traveling. Attach separate schedule if necessary.)

City & Country of Destination	Frequency	Duration	Business or Pleasure	Titles of Personnel
TOKYO, JAPAN	2-3 times	1 week	BUSINESS	PRES., EVP, S.V.P., V.P.
ISTANBUL, TURKEY	2-3 times	"	"	" "
CARIBBEAN, BERMUDA	6-7 times	"	"	" "
SOME COUNTRIES IN E. EUROPE	1-2 times	2/3 DAYS	"	" "
SOUTH AMERICA	3-4 times	1 week	"	" "

6. List all incidents in the past that would have given rise to a claim under the coverage herein applied for: If none, please check. X

Date of Incident	Type of Incident	Total Amount of Loss	Amount Recovered From Insurance	Recovery Other Than Insurance	Location of Incident

Please provide the following information with your application as applicable:
1. Most recent annual report provided shareholders.
2. A copy of your current Kidnap & Ransom policy, inclusive of all endorsements.

Attention: Insureds in AR, CO, DC, KY, LA, NJ, NM, NY, and OH
Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance or statement of claim containing any materially false information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime, and may also be subject to a civil penalty.

(In New York, the civil penalty is not to exceed five thousand dollars and the stated value of the claim for each such violation.)

(In Colorado, any insurance company or agent of an insurance company who knowingly provides false, incomplete, or misleading facts or information to a policyholder or claimant for the purpose of defrauding or attempting to defraud the policyholder or claimant with regard to a settlement or award payable from insurance proceeds shall be reported to the Colorado Division of Insurance within the Department of Regulatory Agencies.)

Attention: Insureds in FL
Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance or statement of claim containing any materially false information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a felony of the 3rd degree, and may also be subject to a civil penalty.

Attention: Insureds in ME, TN, VA, and WA
It is a crime to knowingly provide false, incomplete, or misleading information to an insurance company for the purpose of defrauding the company. Penalties include imprisonment, fines, and denial of insurance benefits.

Attention: Insureds in PA
Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance or statement of claim containing any materially false information or conceals for the purpose of misleading, information concerning any fact material thereto commits a fraudulent insurance act, which is a crime and subjects such person to criminal and civil penalties.

Attention: Insureds in PR
Any person who knowingly and with the intention of defrauding presents false information in an insurance application, or presents, helps, or causes the presentation of a fraudulent claim for the payment of a loss or any other benefit, or presents more than one claim for the same damage or loss, shall incur a felony and, upon conviction, shall be sanctioned for each violation with the penalty of a fine of not less than five thousand (5,000) dollars and not more than ten thousand (10,000) dollars, or a fixed term of imprisonment for three (3) years, or both penalties. Should aggravating circumstances be present, the penalty thus established may be increased to a maximum of five (5) years; if extenuating circumstances are present, it may be reduced to a minimum of two (2) years.

Signing of this application does not bind the Applicant or Underwriter to complete the insurance. In support of this application for coverage, the undersigned authorized officer of the Insured represents that the statements made herein are true to the best of his/her knowledge, and it is understood the Underwriter will rely upon such statements in making it's decision to issue or renew any Policy for which this application is made.

Any indication or offer to provide coverage may include terms and conditions that are materially different from expiring coverage. The Underwriter shall not be obligated to provide terms in accordance with requested coverage and terms and conditions may be offered which are materially different from those requested.

Exact Name of Insured	Authorized Officer (Signature & Title)	Date
U.S.RE Companies, Inc	Exec. Vice President	July 29, 2009

TRAVELERS

Insurance Company Credit & Investment Questions

N/A

1) Please describe your company's investment strategy including making specific comments on each of the following:
   - ⇨ Target and current percentage of total invested assets that are in common and preferred stocks of any kind broken down by industry type?
   - ⇨ Does your company have any material private equity or venture capital fund investments?
   - ⇨ Does your company's investment portfolio contain any mortgage backed or mortgage related securities? If so, please attach a detailed breakdown of this portfolio by type of security, credit rating and unrealized losses relative to cost basis recorded to date (or please complete the chart below).
   - ⇨ Is financial guaranty insurance utilized within the investment portfolio?
     - If yes, please indicate which monoline insurers are utilized and the amounts insured?
     - Does the valuation of these insured instruments take into account the possibility of failure or downgrade of the monoline insurer(s)?
   - ⇨ Have any of the above, or any other investment holdings, been downgraded by any credit rating agency? If so, please provide details.
   - ⇨ Please comment on any plans to change, or recent changes made, to your investment philosophy overall.
   - ⇨ Please comment on any investments held at the holding company level that are not contemplated in the above responses.

2) Has any rating agency downgraded within the last 12 months, or indicated they planned to downgrade, your company's financial ratings? Please provide full details.
3) Please describe the adequacy of your company's capital position to support your business plans. If you anticipate the need to raise capital in the next 12 months, please describe your plans for raising that capital.
4) If your company sells life insurance containing an investment component, including variable, indexed or any annuity with a guaranteed income component, or other investment products, please discuss the financial performance of those products both from the impact it is having on your profitability and capital position as well as how they are performing for your customers.
5) Does your company provide any credit related, financial guarantee, title insurance product or other products or services to the mortgage or lending industry (*other than standard P&C / L&H insurance products*)?

   If so, please describe such products, services, or activity (including the premiums or revenues associated with each), explain any relationships or joint ventures you have related to this arena, and advise whether or not any of the described areas, with which you have any involvement, relate to the sub-prime market.

6) Please describe the process the Company uses to value investments that do not have a readily available market value.
7) Does your company, including at the holding company level, cede or assume liabilities, under any form of credit default swaps or other similar contract? If so, please describe in detail.
8) Has any Federal and/or State regulator or authority inquired or begun any investigation regarding the Company's subprime lending, securities lending, or investment practices?

As of date:	% AAA	% Below AAA	Cost Basis	Current carrying value
CMBS				
CLOs				
Alt-A RMBS				
Subprime RMBS				
Option ARM RMBS				
Other ABS (Credit Card, Auto Loan, Student Loan)				

U.S. RE Companies, Inc. (Group)
List of Directors & Officers

Directors: U.S. RE Companies, Inc. (Holdings)

Tal P. Piccione
Joseph M. Fedor
Peter S. Rawlings

U.S. RE Corporation

Tal P. Piccione
Joseph M. Fedor
Richard Davies
Mark Lucas
Brian R. McGuire
Larry D. Shatoff
Arthur Dougherty

UNI-TER Management (Group)

Tal P. Piccione
Sanford D. Elsass
Richard Davies

U.S. RE Securities, LLC

Peter S. Rawlings

Officers

Tal P. Piccione – Chairman, President & CEO
Joseph M. Fedor – EVP
Peter S. Rawlings – Chairman & CEO, U.S. RE Securities, LLC
Sanford D. Elsass – President of U.S. RE Agencies, Inc.; UNI-TER Management
Sandra G. Blundetto – SVP & General Counsel
Richard Davies – SVP & CFO
Arthur Dougherty – SVP
Paul B. Dzielinski – SVP
Gregory D. Nelson – SVP Investment Banking, U.S. RE Securities, LLC
William H. Joseph – Chief Compliance Officer, U.S. RE Securities, LLC
Martin Kelly – SVP
Brian R. McGuire – SVP

U.S. RE Companies, Inc.

Officers

Riccardo Nicolini – SVP
Larry D. Shatoff – SVP
Wesley J. Zeliff – SVP
Jeri Lambert – SVP, Compliance, UNI-TER Management
Nadeene Wood-Clater – SVP, Marketing, UNI-TER Management
Mark Lucas – Managing Director, U.S. RE ApS
Jean-Michel Piat – SVP, U.S. RE ApS

Joseph S. Deyhle – VP, Claims
Susan B. Lubalin – VP, Human Resources
Michael T. Marrone – VP, Controller
Ashley W. Mims – VP
Donna K. Dalton – COO & CFO, UNI-TER Management
Siobhan Davey – VP
Beatrice Ketterer – AVP, U.S. RE ApS
Henrik Skafte – AVP, U.S. RE ApS

U.S. RE Companies, Inc.
Principal Shareholders

Tal P. Piccione	38.73%
Joseph M. Fedor	30.92%
Nigel Rogers (Silver Rose Securities)	11.55%
Brian R. McGuire	6.34%
Peter S. Rawlings	5.53%
Miscellaneous, including Treasury Stock (More above 5%)	6.93%

U.S. RE Companies, Inc.

U.S. RE Group Entities

U.S. RE Companies, Incorporated (Holding Company)	
U.S. RE Corporation (Reinsurance Broker)	100%
U.S. RE ApS (Reinsurance Broker and Consultant) (Formerly Euro RE ApS)	100%
Euro RE (d/b/a) U.S. RE Europe (Reinsurance Broker and Consultant)	100%
U.S. RE Holdings, Limited (Bermuda Holding Co.)	100%
Uni-Ter International Management Company, Ltd. (Bermuda Management Company)	100%
Uni-Ter International Insurance Company (Class III Bermuda (Captive) Insurer / Reinsurer)	100%
U.S. RE Corp. International, Ltd. (Insurance / Reinsurance Broker-Bermuda)	100%
U.S. RE Agencies, Inc. (Insurance Broker)	
Uni-Ter Underwriting Management Corporation (Manager for Risk Retention Group)	100%
Uni-Ter Claims Services Corporation (Claims Handling)	100%
Uni-Ter Risk Management Service Corporation (Risk Management Consultant)	100%
U.S. RE Analytics, LLC (Provides Analytics)	100%
U.S. RE Insurance Services Corporation (MGA-Holding Company)	100%
U.S. RE Consulting Agency Services, Inc. (Insurance Brokers)	100%
U.S. RE Risk Alternatives, LLC (Captive Consultant)	100%
U.S. RE Securities, LLC (Financial Advisor and Consultant)	100%

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EXHIBIT 5

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

DEC
ADAM PAUL LAXALT
Attorney General
JOANNA N. GRIGORIEV
Senior Deputy Attorney General
Nevada Bar No. 5649
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101
P: (702) 486-3101
F: (702) 486-3416
Email: jgrigoriev@ag.nv.gov
Attorneys for the Division of Insurance

EIGHTH JUDICIAL DISTRICT COURT OF NEVADA
IN AND FOR THE COUNTY OF CLARK

STATE OF NEVADA, COMMISSIONER OF INSURANCE, IN HIS OFFICIAL CAPACITY AS STATUTORY RECEIVER FOR DELINQUENT DOMESTIC INSURERS, Plaintiff, vs. LEWIS & CLARK LTC RISK RETENTION GROUP, INC, a Nevada Domiciled Captive Insurance Company Defendant, UNI-TER Underwriting Management Corp. and UNI-TER Claims Services Corp., Intervenor.	Case No. A-12-672047-B Dept. No. XI

Robert L. Greer hereby declares as follows:

1. I am currently, the Deputy Receiver (the Deputy Receiver and staff are collectively herein referred to as the "Deputy Receiver") of Lewis & Clark, LTC RRG, Inc. ("hereinafter L&C). I make this declaration in support of the Plaintiff's Motion for Order to Show Cause ("Motion")

2. I have personal knowledge of the facts set forth in this Declaration.

3. On February 28, 2013 the Order of Liquidation was entered regarding Lewis & Clark in Case No. A-12-672047-B ("Receivership Action"). It directed all persons in control or possession of property and records of L&C to turn those over to Receiver.

4. Subsequent to the entry of the Order of Liquidation, the Respondents were uncooperative and failed to turn over the required documents, forcing the Receiver to file a Motion to Compel on August 30, 2013, which resulted in an order by this Court ordering turnover of the Required Documents ("Order to Compel").

5. US Re had possession, custody, and control of all of Uni-Ter's computer systems and electronically stored information ("ESI") – including those of L&C – at the time the Orders were issued by the Court in 2013.

6. On October, 2013, Respondents provided me with approximately 125 boxes of paper records of L&C, along with copies of electronic data pertaining to L&C stored on two hard drives. ("2013 Production"). Of those 125 boxes of records, approximately 67 boxes contained files relating to underwriting, 32 boxes contained accounting information, 15 boxes--claims files, 3 boxes contained marketing materials, and 8 boxes contained miscellaneous items. None of the boxes contained a substantive amount of communications or emails. Of those 125 boxes of records, there were approximately 67 boxes containing files relating to underwriting, 32 boxes containing accounting information, 15 boxes of claims files, 3 boxes containing marketing materials, and 8 boxes containing miscellaneous items.

7. In or around October, 2013, after receiving the above-referenced boxes and hard drives, Mr. Bush and Uni-Ter representatives on site stated to me that these items were all that the Respondents had and that with these items the Receiver had everything the Respondents had in their possession responsive to the Order of Liquidation.

8. During the process of gathering the documents and hard drives, I worked with Jonna Miller and Tanya Dugan from Uni-Ter. In addition, during the time leading up to October, 2013, the deputy receiver then and her assistants communicated with Carolyn Verde - President and CEO of both Uni-Ter and SU Re – and her counsel multiple times regarding the Order of Liquidation and the Order to Compel.

9. I understood that Mr. Bush was the attorney for Uni-Ter and US Re based upon the individuals copied on Mr. Bush's emails – including Carolyn Verde and Tal Piccione, who is the Chairman, President and CEO of US Re.

10. I have used and relied on the documents and files obtained from Respondents have been for the past five years to (a) administer the claims of the Company and (b) prepare the complaint against Uni-Ter, US Re and the Board of Directors, ("Negligence Action") A-14-711535-C, filed on December 23, 2014.

11. Prior to May 2, 2018, in the Negligence Action, U.S. Re had produced just 1,136 pages of documents in initial disclosures, and Uni-Ter had served their initial disclosures and one supplemental disclosure, producing just 122 pages of documents.

12. Between May 7, 2018, and October 31, 2018, US Re and Uni-Ter produced over 1.731,814 pages of new documents which had been in the possession, custody, and control of US Re since before the collapse of L&C from a point in 2009 until the liquidation.

13. The 2018 production contained documents I have never seen before including, no fewer than, 222,424 emails pertaining to L&C.

14. Respondents provided a chart (attached hereto as Ex A) in September 2018, in the Negligence Action, in response to Receiver's request to check approximately 350 file paths from the original 2013 Production, which shows that of the 350 file paths analyzed by Respondents, 93 no longer exist--either inadvertently or intentionally lost or destroyed since 2013.

15. I had reviewed the chart provided in the Negligence Action and conclude as follows:

a. the Uni-Ter Network file server is still available and in possession of US Re;

b. over 90 file paths (and their original ESI contents) were not located on their server (meaning the ESI was never produced to the Receiver, nor can the ESI contained in those folders ever be produced);

c. over 130 instances where ESI was never produced to the Receiver in October of 2013;

d. over 100 instances where Respondents would have had to specifically ignore on-screen "file paths being too long" alerts or other prompts during transfer of ESI to the Receiver.

e. The chart is the first time I became aware that documents pertaining to L&C have been lost or destroyed while in the possession of Respondents over the last five (5) years.

f. This development heightens the Receiver's concerns that other documents and ESI critical to both this action and the Negligence Action have already been or will be lost or destroyed as long as they remain in possession of Respondents.

16. As recently as a few months ago, counsel for Respondents requested a meet and confer to discuss additional search terms to continue the production of documents to the Receiver, which suggests that Respondents continue to maintain possession of documents pertaining to L&C, which should have been provided five years ago.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 12th day of December, 2018.

ROBERT L. GREER

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EXHIBIT 6

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

RSPN
George F. Ogilvie III, Esq.
Nevada Bar No. 3552
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102
Telephone: (702) 873-4100
Facsimile: (702) 873-9966
gogilvie@mcdonaldcarano.com

Jon M. Wilson, Esq. (Appearing *Pro Hac Vice*)
Florida Bar No. 139892
BROAD AND CASSEL
2 S. Biscayne Boulevard, 21st Floor
Miami, Florida 33131
Telephone: (305) 373-9400
Facsimile: (305) 373-9443
JWilson@BroadandCassel.com

Attorneys for Defendants Uni-Ter Underwriting 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

DEFENDANT U.S. RE CORPORATION'S RESPONSE TO PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

Pursuant to NRCP 34(b), Defendant U.S. Re Corporation ("U.S. Re"), by and through its undersigned counsel, responds to the First Set of Requests for Production of Documents served by Plaintiff Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc. ("Receiver"), and states as follows:

OBJECTIONS TO INSTRUCTIONS AND DEFINITIONS

1. Each of the following are incorporated into the response to each Request.

2. U.S. Re objects to Instruction and Definition 1, which defines every "Person or Entity defined" within the Instructions and Definitions to include "all past, present, and future acquirers, administrators, affiliates, agents, assigns, associates, attorneys, beneficiaries, business entities, directors, employees, employers, executors, guarantors, heirs, indemnitors, independent contractors, insurers, investors, legal representatives, managers, members, officers, owners, parent corporations or companies, partners, personal representatives, predecessors, representatives, series, servants, shareholders, spouses, subsidiary corporations or companies, successors, sureties, trustees, wholly owned subsidiaries, and others acting on behalf of the Person or Entity (hereinafter, collectively, 'Affiliates')." Such definition requires U.S. Re to respond on behalf of persons and entities other than U.S. Re Corporation., and requires U.S. Re to address persons and entities not expressly named below, which would include non-parties and irrelevant entities and individuals. Because such definition includes entities other than U.S. Re Corporation and the entities specifically named in the Instructions and Definitions, the definition is overly broad, unduly burdensome, harassing, oppressive, and impermissibly seeks information not within U.S. Re's legal control. U.S. Re will respond solely on its own behalf and only with respect to the Person or Entity explicitly named in the Instructions and Definitions.

3. U.S. Re objects to the definition of "Lewis & Clark" to the extent it seeks to include "Affiliates," as defined above. All responses referencing "Lewis & Clark" will address solely Lewis and Clark LTC Risk Retention Group, Inc. and no other entity or person.

4. U.S. Re objects to the definition of "Uni-Ter UMC" to the extent it seeks to include "Affiliates," as defined above. All responses referencing "Uni-Ter UMC" will address solely "Uni-Ter Underwriting Management Corporation" and no other entity or person.

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PHONE 702.873.4100 • FAX 702.873.9966

5. U.S. Re objects to the definition of "Uni-Ter CS" to the extent it seeks to include "Affiliates," as defined above. All responses referencing "Uni-Ter CS" will address solely Uni-Ter Claims Services Corp. and no other entity or person.

6. U.S. Re objects to the definition of "U.S. Re" to the extent it seeks to include "Affiliates," as defined above. All responses referencing "U.S. Re" are made by and on behalf of U.S. Re Corporation alone and no other entity or person, and such responses will address solely U.S. Re Corporation and no other entity or person.

7. U.S. Re objects to the definition of "Director Defendants" to the extent it seeks to include "Affiliates," as defined above. All responses referencing a specific director defendant will address solely that director and no other entity or person.

8. U.S. Re objects to the definition of "Sophia Palmer" to the extent it seeks to include "Affiliates," as defined above. All responses referencing "Sophia Palmer" will address solely Sophia Palmer Nurses Risk Retention Group and no other entity or person.

9. U.S. Re objects to the definition of "Act" to the extent it includes, within that definition, the phrases "instance of behavior" and the "execution, performance, or accomplishment of objectives, ideas, or goals," as such phrases are overly broad, vague, and ambiguous.

10. U.S. Re objects to the definition of "Affiliates" to the extent it seeks documents from "a Person or Entity's past, present, and future acquirers, administrators, affiliates, agents, assigns, associates, attorneys, beneficiaries, business entities, directors, employees, employers, executors, guarantors, heirs, indemnitors, independent contractors, insurers, investors, legal representatives, managers, members, officers, owners, parent corporations or companies, partners, personal representatives, predecessors, representatives, series, servants, shareholders, spouses, subsidiary corporations or companies, successors, sureties, trustees, wholly owned subsidiaries, and others acting on behalf of the Person or Entity" as overly broad, unduly burdensome, harassing, oppressive, and impermissibly seeking information not within U.S. Re's legal control. Such definition requires U.S. Re to respond on behalf of persons and entities other than U.S. Re Corporation., and requires U.S. Re to address persons and entities not expressly identified, which would include non-parties and irrelevant entities and individuals. U.S. Re will respond solely on

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2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

its own behalf and only with respect to the Person or Entity explicitly named in the Instructions and Definitions.

11. U.S. Re objects to the definition of "And" and "Or" to the extent it includes, within that definition, the phrase "as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope," as such phrase is overbroad, vague, ambiguous, and seeks information not relevant to the claims or defenses at issue in this case.

12. U.S. Re objects to the definition of "Document," "Documentation," or "Writing" to the extent it is at all inconsistent with or more liberal or broader than the term "documents" as defined in Nevada Rule of Civil Procedure 34, which includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations." Nev. R. Civ. P. 34. U.S. Re further objects to the extent this definition includes "duplicates." U.S. Re will not produce identical copies of a document if that document is stored within more than one custodian's email account, as including duplicates will result in undue burden and expense in terms of collection, storage, and review. U.S. Re's discovery vendor will be instructed to "dedupe" documents obtained prior to loading them for review and production.

13. U.S. Re objects to the definition of "Evidence" to the extent the Receiver construes it to include "all information, Documents, Communications, or all other materials or tangible things discoverable under Rule 26" including "the testimony of Witnesses." Evidence, and what is admissible evidence, is distinct and separate from what may be discoverable in this matter. By producing any document in response to these discovery requests, U.S. Re does not concede that such document may be used as admissible evidence and U.S. Re reserves its right to maintain and assert any and all objections to the admissible of such document as evidence at trial in this matter.

14. U.S. Re objects to the definition of "Fact" to the extent it includes within that definition, the phrase "all circumstances, events, and Evidence pertaining to or touching upon the item in question," as such phrase is overbroad, vague, and ambiguous.

15. U.S. Re objects to the definition of "Financial Records" as overbroad, vague, and ambiguous in that it includes forty different items within the definition of "Financial Records."

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U.S. Re also objects to the definition of "Financial Records" to the extent it seeks information not relevant to the claims or defenses in this action, including but not limited to documents related to "land you leased, sublicensed, purchased, sold, or traded," the "payment of any state or federal taxes," "securities you issued, purchased, or traded," "requests for extensions," and "worksheets."

16. U.S. Re objects to the definition of "Identify," "Identity," and "Identification" as set forth in Instructions and Definitions 35 through 47 as overly broad, unduly burdensome, harassing, and oppressive in that each of these thirteen various definitions of "Identify," "Identity," and "Identification" construe such terms to encompass between three and ten various terms and phrases. Moreover, what the Receiver seeks through its various definitions of "Identify," "Identity," and "Identification" are nonsensical and improper in the context of a request for production and requires U.S. Re to go above and beyond that required by Rule 34, in that these definitions seek to require U.S. Re to, for example, "Identify and Describe" when and how any monetary damages were suffered or incurred," "provide a general description of the title, nature, contents, and purpose of the Document," or "provide a general description of the Communication, including who said what to whom, the order in which it was said, and the decisions reached in the course of or as a result of the Communication."

17. U.S. Re objects to the definition of "Internal Communications" to the extent it includes, within that definition, the phrase "Your Communication with Your bosses, supervisors, partners, shareholders, associates, affiliates, successors, agents, officers, directors, members, attorneys, employees, co-employees, representatives, Persons acting together with You, and Persons associated or affiliated with the same Entity as Yourself" and the phrase "Communications Exchanged between Your bosses, supervisors, partners, shareholders, associates, affiliates, successors, agents, officers, directors, members, attorneys, employees, co-employees, representatives, Persons acting together with You, and Persons associated or affiliated with the same Entity as Yourself" as overly broad, unduly burdensome, harassing, and oppressive.

18. As discovery is ongoing, U.S. Re reserves the right to assert additional objections to these Instructions and Definitions, as well as to modify its individual responses below, should further discovery in this matter warrant doing so.

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PHONE 702.873.4100 • FAX 702.873.9966

OBJECTIONS AND RESPONSES

REQUEST FOR PRODUCTION NO. 1:

Produce all Documents and Communications exchanged between You and Tonya Dugan between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Tonya Dugan and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the Nevada Division of Insurance ("DOI") filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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REQUEST FOR PRODUCTION NO. 2:

Produce all Documents and Communications exchanged between You and Donna Dalton between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Donna Dalton and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 3:

Produce all Documents and Communications exchanged between You and Sandy Elsass between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Sandy Elsass and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 4:

Produce all Documents and Communications exchanged between You and Dwain Chamberlain between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Dwain Chamberlain and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 5:

Produce all Documents and Communications exchanged between You and Jeri Lambert January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Jeri Lambert and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 6:

Produce all Documents and Communications exchanged between You and Christine McCarthy between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Christine McCarthy and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 7:

Produce all Documents and Communications exchanged between You and Jonna Miller between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Jonna Miller and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 8:

Produce all Documents and Communications exchanged between You and Susan Bugg between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Susan Bugg and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 9:

Produce all Documents and Communications exchanged between You and Brian Steifel between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Brian Stiefel and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 10:

Produce all Documents and Communications exchanged between You and Elizabeth Sterling between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Elizabeth Sterling and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 11:

Produce all Documents and Communications exchanged between You and Naveed Khalid between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 11:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Naveed Khalidi and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 12:

Produce all Documents and Communications exchanged between You and Cindy Ross between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Cindy Ross and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 13:

Produce all Documents and Communications exchanged between You and Debra Kay-Volk between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 13:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Debra Kay-Volk and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 14:

Produce all Documents and Communications exchanged between You and Kathi Cavallo between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 14:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Kathi Cavallo and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 15:

Produce all Documents and Communications exchanged between You and James Martin between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 15:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between James Martin and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 16:

Produce all Documents and Communications exchanged between You and Nadine Wood-Clater between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 16:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Nadeene Wood-Clater and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 17:

Produce all Documents and Communications exchanged between You and Doc Malone between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 17:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Doc Malone and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 18:

Produce all Documents and Communications exchanged between You and Armando Vilches between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 18:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Armando Vilches and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 19:

Produce all Documents and Communications exchanged between You and Katrina Johnson between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 19:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Katrina Johnson and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 20:

Produce all Documents and Communications exchanged between You and Lynda Knowles between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 20:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Lynda Knowles and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 21:

Produce all Documents and Communications exchanged between You and Debra Keys between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 21:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Debra Keys and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 22:

Produce all Documents and Communications exchanged between You and Christina Isom between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 22:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Christina Isom and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 23:

Produce all Documents and Communications exchanged between You and Sara Berberian between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 23:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Sara Berberian and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 24:

Produce all Documents and Communications exchanged between You and any other person associated with the Uni-Ter Defendants between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 24:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" between U.S. Re and "any other person associated with the Uni-Ter Defendants" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." It is simply overbearing and impossible for U.S. Re attempt to identify and subsequently review all documents and communications with "any other person associated with the Uni-Ter." Moreover, this Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

REQUEST FOR PRODUCTION NO. 25:

Produce all Documents and Communications exchanged between You and Robert Chur between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 25:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Robert Chur and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 26:

Produce all Documents and Communications exchanged between You and Steve Fogg between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

RESPONSE TO REQUEST FOR PRODUCTION NO. 26:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Steve Fogg and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 27:

Produce all Documents and Communications exchanged between You and Mark Garber between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

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PHONE 702.873.4100 • FAX 702.873.9966

RESPONSE TO REQUEST FOR PRODUCTION NO. 27:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Mark Garber and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 28:

Produce all Documents and Communications exchanged between You and Carol Harter between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

RESPONSE TO REQUEST FOR PRODUCTION NO. 28:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Carol Harter and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 29:

Produce all Documents and Communications exchanged between You and Robert Hurlbut between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

RESPONSE TO REQUEST FOR PRODUCTION NO. 29:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Robert Hurlbut and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 30:

Produce all Documents and Communications exchanged between You and Barbara Lumpkin between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

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2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

RESPONSE TO REQUEST FOR PRODUCTION NO. 30:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Barbara Lumpkin and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 31:

Produce all Documents and Communications exchanged between You and Jeff Marshall between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

RESPONSE TO REQUEST FOR PRODUCTION NO. 31:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Jeff Marshall and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 32:

Produce all Documents and Communications exchanged between You and Eric Stickels between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

RESPONSE TO REQUEST FOR PRODUCTION NO. 32:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Rick Stickels and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 33:

Produce all Documents and Communications exchanged between You and any other person associated with the Director Defendants between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

RESPONSE TO REQUEST FOR PRODUCTION NO. 33:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" between U.S. Re and "any other person associated with the Director Defendants" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." It is simply impossible for U.S. Re to guess at or attempt to identify who "any other person associated with the Director Defendants" could possibly be. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

REQUEST FOR PRODUCTION NO. 34:

Produce all Documents and Communications exchanged between You and the Department of Business and Industry, Nevada Division of Insurance between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 34:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between the Nevada Division of Insurance and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 35:

Produce all Documents and Communications exchanged between You and any person associated with Sterns Weaver, et al. between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 35:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" between U.S. Re and "any person associated with Stearns Weaver, et al." that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." It is simply impossible for U.S. Re to guess at or attempt to identify who "any other person associated with Stearns Weaver, et al." could possibly be. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Stearns Weaver and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 36:

Produce all Documents and Communications exchanged between You and Johnson Lambert & Co. between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 36:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between Johnson Lambert & Co. and the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 37:

Produce all Documents and Internal Communications exchanged between January 1, 2003 and December 31, 2013 in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action.

RESPONSE TO REQUEST FOR PRODUCTION NO. 37:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly,

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. Moreover, the Request is overly broad in time and scope, vague and ambiguous, and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Internal Communications" that are "in any way related to Lewis & Clark, the Director Defendants, the Uni-Ter Defendants, Sophia Palmer, and/or any other matter related to the Action." This Request essentially seeks to have U.S. Re review every document or email prepared or received by any of its employees from Lewis & Clark's inception to nearly a year after the company went into receivership. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents exchanged between and among the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the DOI filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 38:

Produce all agreements and amendments thereto related in any way to Your appointment as Lewis & Clark's exclusive reinsurance intermediary/broker.

RESPONSE TO REQUEST FOR PRODUCTION NO. 38:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce agreements and amendments to such agreements appointing U.S. Re as Lewis & Clark's exclusive reinsurance intermediary/broker.

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McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 39:

Produce all Documents and Communications exchanged between You and any person related to Your appointment as Lewis & Clark's exclusive reinsurance intermediary/broker.

RESPONSE TO REQUEST FOR PRODUCTION NO. 39:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request as vague and ambiguous and unduly burdensome, harassing, and oppressive in that it calls for the production of "all Documents and Communications" that between U.S. Re and "any person" related to U.S. Re's appointment as Lewis & Clark's exclusive reinsurance intermediary/broker. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents regarding U.S. Re's appointment as Lewis & Clark's exclusive reinsurance intermediary/broker to and from the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the Nevada Division of Insurance ("DOI") filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 40:

Produce all Documents and Communications exchanged between You and any person related to the Milliman Report.

RESPONSE TO REQUEST FOR PRODUCTION NO. 40:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request as overly broad and vague and ambiguous in that it calls for the production of "all Documents and Communications" between U.S. Re and "any person" related to the Milliman Report. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents regarding the Milliman Report to or from the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the Nevada Division of Insurance ("DOI") filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 41:

Produce all Documents and Communications exchanged between You and any person related to the Praxis Report.

RESPONSE TO REQUEST FOR PRODUCTION NO. 41:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request as overly broad and vague and ambiguous in that it calls for the production of "all Documents and Communications" between U.S. Re and "any person" related to the Praxis Report. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to search for and produce relevant, non-privileged electronic communications and documents regarding the Praxis Report to or from the following U.S. Re custodians between January 1, 2009 and November 30, 2012, the month in which the Nevada Division of Insurance ("DOI") filed its receivership action related to Lewis & Clark: Dick Davies, Tal Piccione, Joseph Fedor, Larry Shatoff, Rick Cassell, Susan Lubalin, William Donnelly, and Joe Deyhle.

REQUEST FOR PRODUCTION NO. 42:

Produce Your articles of incorporation, articles of organization, operating agreements, partnership agreements, similar governing Documents, and all amendments to all such Documents from January 2003 to present.

RESPONSE TO REQUEST FOR PRODUCTION NO. 42:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re responds by stating that such documents have already been produced.

REQUEST FOR PRODUCTION NO. 43:

Produce Your tax returns and their supporting Documents, balance sheets and their supporting Documents, profit & loss statements and their supporting Documents, and other Financial Records and their supporting Documents from 2003 to the present.

RESPONSE TO REQUEST FOR PRODUCTION NO. 43:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Moreover, the Request for "tax returns" their "supporting Documents," "profit & Loss statements," their "supporting Documents," and other "Financial Records," particularly as defined in the Instructions and definitions, is unduly burdensome and harassing and the Receiver has not shown any compelling need or factual basis requiring the production of such documents.

REQUEST FOR PRODUCTION NO. 44:

Produce each shareholder stock certificate or similar Document You issued from 2003 to the present.

RESPONSE TO REQUEST FOR PRODUCTION NO. 44:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Accordingly, information between 2003 and 2009, prior to the events at issue, is not relevant and not proportional to the needs of the case. And, in any event, it is not apparent what relevance

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

shareholder stock certificates of "similar Documents" has to this action whatsoever.

REQUEST FOR PRODUCTION NO. 45:

Produce all Documents and Communications related to Your efforts to obtain reinsurance through syndicates as required under the U.S. RE Agreement regardless if a reinsurance contract was finalized.

RESPONSE TO REQUEST FOR PRODUCTION NO. 45:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request as vague and ambiguous in that it calls for the production of "all Documents and Communications" that are related to U.S. Re's "efforts" to obtain reinsurance. U.S. Re further objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

Notwithstanding and without waiver of these objections, U.S. Re agrees to produce its broker files in response to this request.

REQUEST FOR PRODUCTION NO. 46:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your answer to the Third Amended Complaint at paragraph 55.

RESPONSE TO REQUEST FOR PRODUCTION NO. 46:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's answer to the Third Amended Complaint at paragraph 55. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 47:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your answer to the Third Amended Complaint at paragraph 56.

RESPONSE TO REQUEST FOR PRODUCTION NO. 47:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's answer to the Third Amended Complaint at paragraph 56. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

REQUEST FOR PRODUCTION NO. 48:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your answer to the Third Amended Complaint at paragraph 57.

RESPONSE TO REQUEST FOR PRODUCTION NO. 48:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's answer to the Third Amended Complaint at paragraph 57. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 49:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your First Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 49:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's First Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

REQUEST FOR PRODUCTION NO. 50:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Second Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 50:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Second Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 51:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Third Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 51:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Third Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

REQUEST FOR PRODUCTION NO. 52:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Fourth Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 52:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Fourth Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 53:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Fifth Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 53:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Fifth Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

REQUEST FOR PRODUCTION NO. 54:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Sixth Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 54:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Sixth Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 55:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Seventh Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 55:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Seventh Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

REQUEST FOR PRODUCTION NO. 56:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Eighth Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 56:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Eighth Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 57:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Ninth Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 57:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Ninth Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

REQUEST FOR PRODUCTION NO. 58:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Tenth Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 58:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Tenth Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 59:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Eleventh Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 59:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Eleventh Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

REQUEST FOR PRODUCTION NO. 60:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Twelfth Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 60:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Twelfth Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

REQUEST FOR PRODUCTION NO. 61:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Thirteenth Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 61:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Thirteenth Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

REQUEST FOR PRODUCTION NO. 62:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Fourteenth Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 62:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Fourteenth Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests

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2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

REQUEST FOR PRODUCTION NO. 63:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Fifteenth Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 63:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Fifteenth Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

REQUEST FOR PRODUCTION NO. 64:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Sixteenth Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 64:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Sixteenth Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial

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2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

REQUEST FOR PRODUCTION NO. 65:

Produce all Documents and Communications which comprises, evidences, summarizes, relates to, discusses, supports or contradicts Your Seventeenth Affirmative Defense to the Third Amended Complaint.

RESPONSE TO REQUEST FOR PRODUCTION NO. 65:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this request on the ground that discovery is ongoing and U.S. Re has not yet made a final determination with respect to which "Documents or Communications" "comprises, evidences, summarizes, relates to, discusses, supports or contradicts" U.S. Re's Seventeenth Affirmative Defense to the Third Amended Complaint. U.S. Re expects its theory of the case and its defenses to develop as discovery ensues, additional documents are produced, and depositions are commenced. At this point, U.S. Re directs the Receiver to documents produced by U.S. Re along with its initial disclosure, documents produced by U.S. Re in response to this First Set of Requests for Production, and any and all documents produced by the Receiver and the remaining defendants in this matter.

REQUEST FOR PRODUCTION NO. 66:

Produce Your Financial Records for the period of January 2003 to December 2013.

RESPONSE TO REQUEST FOR PRODUCTION NO. 66:

U.S. Re objects to this request as duplicative of and subsumed within Request 43, and U.S. Re reasserts and maintains its objections to that request here.

REQUEST FOR PRODUCTION NO. 67:

Produce all Documents and Communications related to any other lawsuits and/or disciplinary action You have been involved during the period of January 2003 to the present.

RESPONSE TO REQUEST FOR PRODUCTION NO. 67:

In addition to the Objections to Instructions and Definitions set forth above, U.S. Re objects to this Request to the extent it seeks information not relevant to the claims or defenses at issue in

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2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

this case. Lewis & Clark was established as a risk retention group in or around 2003. This case, however, stems from purported actions that began in 2009, when the Receiver alleges Lewis & Clark began accepting multiple multi-site LTC operators that "constituted a significant divergence from the established business model of L&C." Third Am. Compl. ¶¶ 55, 60. Documents and communications relating to "any other lawsuits and /or disciplinary action" in which U.S. Re has been involved for nearly the past fifteen years is simply not relevant to the specific matters at issue in this case. Additionally, U.S. Re objects to the time frame of "January 2003 to the present" as overly broad. Finally, U.S. Re objects to this Request to the extent it calls for production of documents protected by the attorney-client privilege and work product privilege or constitutes confidential, proprietary, or commercial information.

DATED this 7th day of August, 2017.

McDONALD CARANO LLP

By: */s/ George F. Ogilvie III*
George F. Ogilvie III, Esq. (#3552)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102

Jon M. Wilson, Esq.
(Appearing *Pro Hac Vice*)
Florida Bar No. 139892
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

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 7th day of August, 2017, a true and correct copy of the foregoing **DEFENDANT U.S. RE CORPORATION'S RESPONSE TO PLAINTIFF'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS** 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

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

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Steven D. Grierson
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, 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

THURSDAY, JULY 23, 2020

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: PENDING MOTIONS

APPEARANCES (Via Video Conference):

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

For the Defendant(s): GEORGE F. OGILVIE III, ESQ.
JON M. WILSON, ESQ.
ERIN K. KOLMANSBERGER, ESQ.
ANGELA T. NAKAMURA OCHOA, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

LAS VEGAS, NEVADA; THURSDAY, JULY 23, 2020

[Proceedings convened at 10:22 a.m.]

THE COURT: All right. The next matter we have at 10:00 is Commissioner versus Chur. And let's take appearances starting first with the plaintiff.

MR. WIRTHLIN: Good morning, Your Honor. Brenoch Wirthlin on behalf of plaintiff. We have two paralegals with us, John Linder and Daniel Maul, as well as additional attorneys who I will allow to introduce themselves.

MR. ORME: Chris Orme here on behalf of the Commissioner of Insurances for the State of Nevada with Mr. Wirthlin.

THE COURT: Thank you.

MS. LEE: Good morning, Your Honor. Patricia Lee, Bar No. 8287, also with Mr. Wirthlin.

THE COURT: Thank you.

And for the defendants.

MS. OCHOA: Good morning, Your Honor. Angela Ochoa on behalf of the Director Defendants. That's Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels.

THE COURT: Thank you.

MR. OGILVIE: Good morning, Your Honor. This is George Ogilvie appearing on behalf of the Uni-Ter defendants as well as U.S. RE. Also appearing with me today are Jon Wilson and Erin

Kolmansberger who have been admitted pro hac in this case.

THE COURT: Thank you both.

So we have today a motion for leave to file an amended answer to the Third Party Complaint. We have got a motion for preferential trial. And late yesterday I signed an order shortening time to which I will take objection that it was not properly noticed. But let's take that motion for leave first.

MR. WIRTHLIN: Certainly, Your Honor. Did you intend the motion -- the plaintiff's motion -- for leave or the Uni-Ter defendant's motion, which we did not oppose?

THE COURT: Hang on. I keep getting disconnected from my docket here.

Let's take the unopposed motion first and then the opposed motion.

MR. WIRTHLIN: I believe -- that was -- Mr. Ogilvie, I believe, filed that, Your Honor.

THE COURT: Okay. Mr. Ogilvie.

MR. OGILVIE: The motion for leave to amend our answers, Your Honor?

THE COURT: Yes.

MR. OGILVIE: I don't believe they're opposed. I don't know what I need to add at this point, and I'd submit it.

THE COURT: I've reviewed your motion. It's an order. It's appropriate to be granted, and the motion will be granted.

MR. OGILVIE: Thank you, Your Honor.

THE COURT: All right. Let's take the next motion then.

MR. WIRTHLIN: Yes, Your Honor. Thank you. Brenoch Wirthlin on behalf of plaintiff.

I do have a fair amount of argument, and I apologize in advance for the length, but certainly I'm happy to take whatever questions the Court may have at any time.

The --

THE COURT: I have -- just to let you know -- just -- I have another hearing at 11:00, so if you can tailor your arguments -- it's 10:25 -- if you can tailor your arguments so that we can complete the argument in this matter by 11:00, I would greatly appreciate that.

I read your briefing.

MR. WIRTHLIN: Okay. Absolutely, Your Honor. I will do that as quickly as possible.

Basically, I have three arguments to make and they relate to the following: The defendants effectively and collectively make two arguments: (indiscernible) and futility, and I'll address each one of those. And then the third argument on behalf of plaintiff is that justice requires leave to amend be freely given.

As far as the bad faith and undue delay, dilatory motive accusations -- I -- it is difficult for me to determine what those are based on. The -- largely, our amendment is based on the core opinion (indiscernible) holding in Chur on which we are (indiscernible) for several years.

In addition, our motion to amend was filed within the time

remaining under the operative scheduling order. And as Mr. Ogilvie noted, the Uni-Ter defendants also filed a motion within that time frame. There was a lot of, what I would characterize as discovery issues or potential discovery disputes, raised in the defendant's oppositions. We don't -- we deny them generally, but I feel that those are not appropriate on the motion to amend, and further are really irrelevant because plaintiff will absolutely be ready for trial February 2021.

We also want to point out our motion to amend is based on that appropriately higher pleadings standards set forth in the Chur opinion. We have the documents; this is no longer a case where we are fishing for what happened as typical cases are. We know -- we put that in the motion to amend. Those facts are generally not disputed and cannot be based on the deposition testimony and documents we have.

With respect to the futility argument, Your Honor, it's based largely on assertions regarding the statute of limitations. I think those arguments generally are utterly inappropriate for a motion to amend.

As the Court's aware, Nevada Supreme Court tells us that statute of limitations is a non-jurisdictional affirmative defense. Not only that, but under the discovery rule, the period of limitations does not even begin to run until the plaintiff discovered, or reasonably should have discover, the facts supporting the cause of action. That determination as to when that -- when the plaintiff knew or should

have known is a fact determination for the trier of fact, Your Honor.

So even if -- and as we go into -- in some detail in our motion to reply -- we did not receive the vast majority of the 1.7 million documents we have in this case until May 2018. Even if we had been able to review every single document that day, we would still have three years in which to add claims for aiding and abetting breach of fiduciary duty, which were added.

So we would submit that, that is not appropriate on a motion to amend, and, of course, if the plaintiff is permitted to amend, defendants can file whatever motions they feel appropriate.

Regarding -- even if the amendments -- the statute of limitations was applicable here, Your Honor, we would submit that under Rule 15, the proposed amendments relate back because they arrived out of the conduct that are attempted to set up -- to be set up at the original pleading of the director's site. And according -- they state the Fourth Amended Complaint is quote: Not based on any new facts, end quote, and contains more of the same general allegations. We do believe that that constitutes ad admission that the amendments relate back to the Director Defendants.

With respect to the Uni-Ter defendants, the only new claims that we seek to add in the Fourth Amended Complaint are deepening the insolvency, adding them to that claim, which was in there from the beginning, and then aiding and abetting breach of fiduciary duty. We cite the *Americo* case and the Blanchard case, which made clearly that aiding and abetting are simply derivative of breach of fiduciary

duty claims and therefore would relate back under NRCP 15.

With respect to Mr. Piccione, we believe in cite case -- Your Honor, the *Beazer* case, that the Uni-Ter defendants themselves did not have standing to assert the rights of Mr. Piccione. If they could even get past that, we believe that the issue of whether and when the plaintiff knew or should have known about the tracks supporting the claims against Mr. Piccione is a question of fact, the discovery rule comes into play, and it's inappropriate for them to seek a determination of motion to amend.

Even they could get past those limitations, Your Honor, we have two bases in which to add Mr. Piccione: Either substitution or addition under Rule 15, which requires a separate motion, which we did file.

Under the substitution analysis under 10(b), you have -- basically, the idea is, Did the plaintiff allege Doe defendants? We did in this case. And even if the language may not be exactly as plaintiff -- excuse me -- as the defendants would like, there is no dispute that plaintiff plead Doe defendants and sought to amend within the time provided to add Mr. Piccione.

One point of clarification there is, is that while we may have known Mr. Piccione's positions within the Uni-Ter and U.S. RE, we did not know and could not have known until we received the appropriate documents what his involvement was in the underlying claims.

On the analysis under Rule 15 for addition, the Costello

Standard applies -- requires actual or imputed notice of -- that the defendant noted the proper party and has not been misled to its prejudice. We cited in the Costello case, the Nevada Supreme Court as stated, courts are particularly amenable to imputing notice and knowledge when a new and original defendant shared an identity of interest. Mr. Piccione is the founder of the Uni-Ter defendants, Chairman of the Board for both Uni-Ter UMC and Uni-Ter CS, as well as president, CEO, and Chairman of the Board for U.S. RE. I don't think there could be much more clear identity of interest there.

In addition, the only claims sought to add -- we seek to add Mr. Piccione for our -- deepening the insolvency, again, from the beginning of the case -- that was alleged -- and the derivative claims of aiding and abetting breach of fiduciary duty. We could not have known about the inner workings of L&C, because this isn't a typical case where you have two parties to a contract and both have underlying knowledge of the fact. We came in after the fact as a receiver and had to learn only what we could by the documents that have been produced by the defendants. We still don't believe we have all those, but we certainly have enough to know and particularly -- or excuse me -- allege with particularity of the claims that we do in the Fourth Amended Complaint.

In addition, Mr. Piccione -- or excuse me -- Uni-Ter defendants just heard that Mr. Piccione is not a proper third party for a claim of aiding and abetting breach of fiduciary duty. That is inaccurate. They don't cite any case law supporting that. But the

reality is -- there's no disputing -- is a third party to the fiduciary relationships between the Uni-Ter defendants and L&C. That makes him a third party for purposes of aiding and abetting breach of fiduciary duty.

Finally, Your Honor, I want to address an argument that the defendants gloss over or fail to directly address, and that is that leave to amend should be freely given when justice requires.

Again, I think there -- and at the outset, I do want to address -- while we would object to the Director Defendant's motion filed yesterday evening, I think from a substantive standpoint -- I appreciate counsel pointing out that we had an oversight in not attaching either a Westlaw citation or a copy of the -- of Judge Boulware's decision that we cited to.

It was, as Ms. Ochoa pointed out, answered in the docket of the Court -- Federal Court -- as an order, and it was signed by Judge Boulware. It was a -- probably unique situation with a motion, and Judge Boulware affixed his signature, which under Local Rule IA 6-2, creates -- makes it an order. But we appreciate Ms. Ochoa pointing it out, and it was an oversight on our part.

That being said, the point of that citation was simply as persuasive authority for this Court to consider or reject at the Court's discretion. But the issue was, when the Nevada Supreme Court changes the law during the pendency of a case, justice requires that the plaintiff be allowed to amend to meet that standard, and that's what we've sought to do in this case, Your Honor.

We don't believe the defendants will suffer any undue prejudice. They don't really carry their burden or come close with respect to what specific prejudice they might suffer, other than defending a lawsuit, which is not a prejudice under the *Shoen* case.

Further, if we are allowed to amend, they are -- the defendants may file whatever motions they feel are appropriate. And, finally, I just want to leave with the *Nutton* case and the policy under the -- in Nevada. As the Court is aware, the *Nutton* case states that Courts should err on the side of caution and permit amendments that appear arguable or even borderline.

We believe we have a good faith basis for what we've alleged, but if the Court feels that that is appropriate, we would urge that the Nevada Supreme Court -- and in this case court of appeals -- urge that the Court should err on the side of caution, which is consistent with the stated policy of Nevada to have cases decided on their merits whenever possible.

With that, Your Honor, we would reserve a couple of minutes for reply.

THE COURT: Good enough.

Before I hear the opposition to the plaintiff's motion to amend, there was a hearing at 10:30, Barren versus Toll. Are the parties --

[Recess taken from 10:36 a.m. until 10:39 a.m.]

THE COURT: We're now going back to Commissioner versus Chur. It's the plaintiff's motion to file a Fourth Amended

Complaint. We've heard the motion. We're ready now to hear oppositions.

Let me suggest Ms. Ochoa and then Mr. Ogilvie argue the motion -- the opposition.

MS. OCHOA: Hello, Your Honor. Since we're limited on time, did you have any specific questions for me before I begin?

THE COURT: I don't.

MS. OCHOA: Okay. So I just want to address some of the things that came up in the reply then, and there's this idea that somehow the Director Defendants were the cause of a one-year delay and that I specifically asked for an extension of a year to file a response of pleading to the complaint, and that's absolutely false.

As with any case that I have, I always ask opposing counsel, Hey, do you want to -- is this the type of case that would be good for mediation, good for settlement? And if so, can I have an extension until settlement discussions have ceased? And for whatever reason, plaintiff's counsel dragged their feet, didn't do anything for -- I think until probably October. So what is that? Nine, ten months.

They gave us a demand, and it was completely worthless. There was nothing in there new, nothing that would assist -- or to evidence that the parties would benefit from mediation. So we withdrew from settlement discussions, and we moved on promptly and accordingly. That is no way is me asking for a one year extension to file a response of pleading to the complaint. It's completely false to say that I asked for a one-year extension.

There's another argument that they make which is that because I didn't -- because the Directors didn't respond to every single minutia of the motion for leave to amend, that we admit to the merits of those arguments. And that's simply untrue. Our total -- our -- we obviously believe that justice is not served by granting the plaintiff leave to amend. Their (indiscernible) conduct throughout this whole entire case is completely evident.

One of the things that they keep harping about is how the Nevada Supreme Court overturned *Shoen* disavowed, and, you know, that's just absolutely untrue. If you read the Nevada Supreme Court opinion, it says in *Shoen*, we made dicta. Law School 101, dicta is not the law. And we said this over and over before, Your Honor, that you cannot rely on *Shoen* because all it is, is dicta.

So there is no absolutely no reason why the plaintiff could not -- from the onset of this case -- if they believed it was so, claim that my clients violated the law. These are allegedly Nevada Revised Statutes that have to do with insurance law. And the Division of Insurance was supervising my clients from the year 2004 through 2012. So we think it's absolute bad faith to come to this Court, say only now, after eight years, that my clients violated these insurance laws.

The bad faith was in addition to not commuting this at the onset of the case, not responding to written discovery, setting forth that this was their position, not bringing a 30(b)(6) witness prepared and to say these are the things that we believe that the record

defendants did wrong.

And there is massive prejudice in trying to push us into a discovery schedule with trial in February. Throughout, you know, for the past, I don't know, month or so, plaintiff keeps saying, Well, we need to have this case go to trial in February. Well, you need at least two months before trial for the close of discovery. So that puts us at something, like, December for the close of discovery. I need to be able to depose people about this new allegation that we violated statutes. I need to talk to Division of Insurance analysts, examiners, some of which are long gone. They're either dead or retired. There's a lot to do with adding this type of claim.

So just on prejudice alone, this motion for leave should be denied. I don't need to go into futility, but if, Your Honor, would like to, I can certainly do that. I know you're pressed for time; so I can just move on if that's what the Court would like.

THE COURT: No. I did read everything; so it's not necessary for you to address that.

Did that conclude your argument?

MS. OCHOA: Yes.

THE COURT: All right. Mr. Ogilvie.

Mr. Ogilvie, you have to unmute yourself if you intend to address the Court.

MR. OGILVIE: My apologies, Your Honor. I'd forgotten that I'd muted myself.

Your Honor, let me pick up where Ms. Ochoa left off, and

that is with the time left to conduct discovery and prepare for trial.

As the Court is aware, we're up against a five-year rule which expires in -- I believe on April 9th. The plaintiff has requested a trial date in February or March. As we argued on July 1, the Uni-Ter and U.S. RE defendants have no objection to a preferential trial setting, but we would prefer on -- the end of March, specifically the week of March 29th. That is the only way that even with the denial of the plaintiff's current motion for leave to amend that the parties will be able to complete the discovery that needs to be completed and to properly prepare for a trial in this matter.

So if we assume that the trial date is the end of March, as Ms. Ochoa said, there has to be at least 60 days between the close of discovery and the beginning of trial, and I submit to Court that even that is a compressed period of time.

But if we assume that, then the close of discovery would be sometime in January, and today is July 23rd. That gives us, what, five months, six months? August, September, October, November, December, January -- gives us six months to the close of discovery. We still have to complete discovery on the current operative pleading, the Third Amended Complaint. To impose upon the defendants the additional obligation of conducting discovery on the new -- newly pleaded claims by the plaintiff would be -- would impose significant prejudice to the defendants.

I heard from plaintiff's counsel that plaintiff will be ready for trial. Well, unfortunately for plaintiff, that's not the standard.

Standard is whether all parties are being afforded due process. And I am advising the Court that the defendants, U.S. RE and Uni-Ter, will not be afforded due process if the Court grants the motion for leave to amend and allows the plaintiff to amend -- to assert two new causes of action against both of the Uni-Ter parties and against U.S. RE and add a new defendant, Mr. Piccione, who has been known to the plaintiff from the inception of this. In fact, even prior to the inception of this case, this case being filed in 2014.

Let me take the Court back to November 2012, when the receivership action was filed before Judge Gonzales. As Mr. Wirthlin stated in his remarks, Mr. Piccione is the Chairman, President, Chief Executive, and Founder of U.S. RE, and he is the -- a Founder, Director, and Chairman of Uni-Ter. So there is no surprise to the plaintiff of who Mr. Piccione is and has been, since the receivership was filed in November of 2012; yet the plaintiff would like to rely on Rule 10 to substitute Mr. Piccione as an unknown Doe in this case. That is one of the most ludicrous arguments I've ever come across in arguing a motion.

He cannot be substituted in as a Rule 10 Doe defendant. There is no doubt that he was known at the time the case was filed and even prior to that, and if they -- if the plaintiff believed that it had causes of action against Mr. Piccione, they should have been asserted long ago. And then, I would get to that in a moment.

But going back to the context, again, we've got maybe, maybe six months -- five-and-a-half, six months -- to close discovery

on the current operative pleading, and the plaintiff would like to add additional party -- an additional party and additional claims.

The current claims asserted against Uni-Ter and U.S. RE are for negligent misrepresentation and breach of fiduciary duty. They're now -- the plaintiff now wants to add new claims for deepening of the insolvency and aiding and abetting the breach of fiduciary duties. They want to add those claims against all of Uni-Ter -- the two Uni-Ter defendants and U.S. RE and, as I did state, against Mr. Piccione.

There is absolutely no basis for the claim that these additional causes of action were unknown to the plaintiff until it reviewed the documents that Uni-Ter and U.S. RE produced in May of 2018. And even if they were unknown to the plaintiff at that time, to assert that they -- that the plaintiff could not have sought leave to amend its pleading, to assert these additional claims, and to assert this additional cause of -- to assert claims against an additional defendant until the very last day to seek leave to amend, is absolutely disingenuous.

The plaintiff knew the causes of action; otherwise, it wouldn't have asserted negligent misrepresentation of breach of fiduciary duty that it asserted against Uni-Ter and U.S. RE in 2014. So there's no basis to claim that the plaintiff did not know of these claims or the potential for these claims. It had the ability to assert deepening of -- deepening the insolvency against the Director Defendants but sought not to do so against Uni-Ter and U.S. RE until

now.

So the plaintiff knew of the additional claims, knew of the basis for the additional claims, knew of the identity of Mr. Piccione from the outset of this litigation in 2014. There is absolutely no basis for the plaintiff to be allowed to amend the -- to assert these new causes of action and add a new party with just five-and-a-half months of discovery left in this case.

The receiver cannot satisfy any of its obligations or any of the criteria necessary to assert these claims at this time. There is evidence of bad faith. There is dilatory motive, there is prejudice, there is improper delay, and there is -- despite what I heard Mr. Wirthlin argue, that futility isn't a proper matter for this Court to consider in hearing a motion for leave to amend -- futility absolutely is appropriate at this time. And I'll run through each one of those factors that the plaintiff fails on.

First, bad faith. Throughout the course of the motion practice that -- brought by the receiver near the end of the stay -- the receiver continued to make representations to counsel and to this Court that the proposed amendment that the Court is considering today was necessary to address the Nevada Supreme Court's ruling on the petition from written mandamus filed by the Director Defendants. At no time did the receiver make any intimation that the receiver would be bringing new causes of action against U.S. RE and Uni-Ter or adding a new party.

And, in fact, in its second supplemental brief to the motion

for clarification, the receiver stated specifically: Given the recent decision by the Nevada Supreme Court in Chur, plaintiff will be filing a motion to amend its complaint consistent with the Chur decision. As a result of the Nevada Supreme Court disavowing *Shoen*, plaintiff is asserting allegations to support its complaint and claims previously asserted therein with respect to the Director Defendants -- with respect to the Director Defendants. Absolutely no reference to U.S. RE or Uni-Ter or to adding a new party.

In fact, U.S. RE and Uni-Ter would submit to the Court that the bad faith is evidenced by an effort to sandbag U.S. RE and Uni-Ter by those very arguments that the receiver made, and, in fact, the receiver is now seeking to add three causes of action against a new defendant -- two new -- and two new causes of action against both U.S. -- Uni-Ter defendants and U.S. RE.

So there is evidence by the receiver to somehow gain an advantage by not presenting claims to U.S. RE and Uni-Ter prior to filing this motion. There was absolutely no reason, Your Honor, that the receiver couldn't have -- in March or April or May or June -- sent some communication or perhaps a proposed draft of a Fourth Amended Complaint, counsel for Uni-Ter and U.S. RE saying, Hey, would you stipulate to the amendment of the complaint, because these are the new action -- new causes of action that we intend to bring against Uni-Ter and U.S. RE? And oh, by the way, we're going to add the Chairman of the Board of Uni-Ter and U.S. RE to this litigation. And instead of doing that, the receiver did exactly the

opposite. Again, the receiver sandbagged Uni-Ter and U.S. RE by not mentioning anything about -- or giving any indication that it intended to assert additional causes of action against Uni-Ter and U.S. RE or add Mr. Piccione.

So there's evidence of bad faith that the receiver could not overcome. There's also a dilatory motive and prejudice because, as I said, just five-and-a-half months remains to complete the discovery on the existing claims.

If the motion for leave to amend is granted, some depositions will even have to be retaken on the new claims; and we will have to conduct the fact discovery on the new claims; and we will have to conduct expert discovery, which we haven't even received the receiver's experts or expert reports yet, which all defendants have complained to this Court about previously.

Further, relative to prejudice, Uni-Ter and U.S. RE has been stated in briefs filed previously with this Court. Both entities have ceased doing business and now must rely on former employees, over whom they have no control, to testify on their behalf and we're outside the jurisdiction of this Court.

So we -- as Uni-Ter and U.S. RE argued in opposition to the motion for stay that was filed by the receiver in March 2019, the Uni-Ter and U.S. RE are prejudiced by the delay that the receiver has brought or has caused, even as it relates to the Third Amended Complaint, much less the Fourth Amended Complaint. The addition of Mr. Piccione broadens the scope of the litigation and will require a

significant amount of additional discovery.

The additional claims and the increasing passage of time, as it relates to Uni-Ter and U.S. RE, will make it even more difficult for those two defendants to defend the causes of action against them. And the additional delay or the additional claims will impose additional obligations on the witnesses that we have been able to cobble together relative to the witness recall of facts that occurred in 2011 and 2012, nine and ten years ago. I mean, eight and nine years ago.

Again, the improper delay, there's no reason that the receiver could not have brought the deepening of insolvency and the aiding and abetting breach of fiduciary duty claims against Uni-Ter and U.S. RE years ago. There's -- the facts are the facts. The same facts that lead to the negligent misrepresentation and the breach of fiduciary duty are the very same facts that the -- would lead the receiver to bring claims for aiding and abetting and deepening of the insolvency against Uni-Ter, U.S. RE, and Mr. Piccione.

Finally, Your Honor, addressing the futility argument, again, as we stated in our brief, these claims that are now time-barred, contrary to what the receiver argued in its reply, U.S. RE and Uni-Ter never -- have never raised statute of limitations arguments in its motions to dismiss. This is -- we never took the position that those claims were time-barred as of 2014 when this case was originally filed.

What we are saying today is these claims do not relate back,

and again, Mr. Piccione is not a substituted defendant pursuant to Rule 10. He has to be added pursuant to Rule 15, and therefore, you have to go through a relation back factor test. The receiver cannot satisfy the criteria for relation back. The receiver doesn't dispute that there's a three-year statute of limitations under NRS 11.190 that applies to aiding and abetting a breach of fiduciary duty. And because the original complaint included claims for breach of fiduciary duty against Uni-Ter and U.S. RE, the receiver obviously had the facts, giving rise to the alleged breach of fiduciary duty since at least November -- December of 2014.

Therefore, at -- attempting to add these claims now -- and it does not relate back -- at the very latest, they should have been brought before this Court by December of 2017, two-and-a-half years ago. And they are now time-barred and therefore amending the complaint or allowing the amending of the complaint for these additional claims against U.S. RE and Uni-Ter and Mr. Piccione is futile.

And I'll submit it with that, Your Honor.

THE COURT: Thank you.

For those of us who joined for the 11:00 o'clock appearance, we're still resolving matters in another case. I ask for your patience.

And so then, let me hear then from Mr. Wirthlin. His reply is part of this motion to amend.

MR. WIRTHLIN: Thank you, Your Honor. I'll be very brief.

Just one thing that counsel said at the very end there, the

same facts that address breach of fiduciary duty address aiding and abetting. That is exactly why those claims relate back, Your Honor.

And while we certainly were aware of Mr. Piccione in name, we did not know his involvement until we received those documents in 2018. With this three-year statute of limitations, that would extend that out to 2021. That is a question of fact for the trier of fact under *Americo*. Futility is an appropriate analysis but not questions of fact related to statute of limitations defenses.

The only other claim, other than aiding and abetting, which counsel admits is subsumed almost entirely within the claims of breach of fiduciary duty, is deepening the insolvency. We didn't want to add Mr. Piccione or the other defendants under aiding and abetting or to the deepening the insolvency claim until we knew that there was an appropriate basis to do so. Knowing their identity does not equate to knowing their direct involvement.

Finally, Your Honor, there's no strategy here to gain any kind of advantage. We did say in a very recent hearing that before the amended complaint could impact the Uni-Ter defendants, but we did not know and obviously will not know until today what the Court's ruling on the motion will be, but those issues that were raised by the defendants, are time-barred.

We want to know -- just one final point -- we will be prepared to disclose experts. At the Court's direction, we would ask one week from today to do so. That would be July 30th. There were only three-and-a-half months left under the discovery operative, the

scheduling order, which would put -- excuse me -- close of discovery mid to late November, meaning plaintiff and the trial could be then scheduled beginning as early as the third week in February.

Plaintiff will be ready to do that and would submit to the Court that that would be fair to all parties, especially given the derivative nature of the claims that are sought to be added.

With that, we would submit and ask that the Court grant the motion. Thank you.

THE COURT: Thank you both. This is the plaintiff's motion for leave to amend to assert a Fourth Amended Complaint.

Now, I usually grant motions to amend, but this is one I just can't grant. I don't find that it's appropriate for me to do. I think there's been unnecessary delay, there would be unfair prejudice to the defendants in that it's untimely, that the individual who you seek to add was known to the plaintiff and was not clearly identified in the complaint so that the claims would relate back. And so for those reasons, the motion will be denied.

So, Ms. Ochoa and Mr. Ogilvie, you can flip a coin as to who prepares the order, but make sure that Mr. Wirthlin has the ability to review and approve the form of that before it's submit to me.

I will not accept any competing orders.

Are there any questions?

MR. OGILVIE: No, Your Honor.

THE COURT: All right. So where are we now in getting a trial setting for you all?

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

Again, we would request a firm trial setting immediately prior to the expiration of the five-year rule. And so we would request a firm trial setting if the Court is available the week of March 29th. I heard Mr. Wirthlin say mid February, and he would be ready for trial.

I can tell the Court that the three-and-a-half months that that provides for the remainder of discovery is completely inadequate, particularly given the fact that we still don't know -- have not seen the expert disclosures.

So we would ask that the Court push this trial commencement to the end of March.

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

We believe that under the defendant's calculation, we believe that 41(e) is still (indiscernible), but they have taken the position it is not, and it could expire as early as March 19th. For that reason we would -- and that does not include the time that will take to impanel a jury and swear a witness.

We would request that the trial be set, at latest, last week of February or first week of March, Your Honor.

THE COURT: Ms. Ochoa?

MS. OCHOA: Your Honor, based on the denial of the motion for leave to amend, we would not be in this case, so I have no position.

THE COURT: All right. So what I'm going to do is by a week ago -- let's say a week from next -- a week from tomorrow -- and I

don't have a calendar up. The -- I think that would be the 31st of July -- by the 31st of July, all parties to give me your availability to start a jury trial in March and February and March of 2021. And from that, depending on your availability, I'll set the trial. More than likely it will be February.

Any questions? Is there anything else to take up today?

Ms. Ochoa, your orders for time -- did we address the issues you wanted to address today?

MS. OCHOA: You did, Your Honor.

And I heard Mr. Wirthlin said that he did not object to the motion having been filed so --

THE COURT: Good enough. All right.

So the defendants to prepare the order from today's hearing and make sure you have the availability to meet by Friday the 31st, and we'll set a firm jury trial for you in, more than likely, February.

MR. WIRTHLIN: Your Honor, if I could, just one point of clarification. The expert deadline I believe --

THE COURT: Yes, of course.

MR. WIRTHLIN: -- in the prior order said that it would expire at the end of today's hearing or -- is that subject to the Court's scheduling order that we need to provide availability for in a week?

THE COURT: You need to do that as well and include that in the order, please.

MR. WIRTHLIN: Okay. And that is continued until that time; is that correct, Your Honor? Just to clarify.

THE COURT: That is correct. Yes, that is correct.

MR. OGILVIE: Your Honor, if I could (indiscernible).

THE COURT: You may.

MR. OGILVIE: Thank you. This is George Ogilvie.

I am troubled by that. There shouldn't be any reason for delay of the disclosure of expert witnesses given the fact that the Third Amended Complaint has now been the operative complaint for two and a half, three years, and the plaintiff has had a 15-month stay in which to evaluate its claims against U.S. RE and Uni-Ter. And before the stay was imposed, the plaintiff's expert disclosures were going to be due the very next day. So they obviously weren't waiting until the last day to prepare their expert reports.

I would submit to the Court that those expert reports are no different today than they were fifteen months ago, sixteen months ago now, and they ought to be disclosed immediately, particularly given the fact that if we're going to have a February trial date, we've got three-and-a-half months of discovery -- or three-and-a-half months to complete discovery, and any further delay of the plaintiff designating its experts is going to further prejudice U.S. RE and Uni-Ter.

So I would request that the plaintiff be directed to serve its expert disclosures tomorrow.

MR. WIRTHLIN: Your Honor, this is not (indiscernible) -- I'm sorry.

THE COURT: Mr. Wirthlin, (indiscernible).

MR. WIRTHLIN: Thank you, Your Honor.

Obviously today's ruling is going to change our expert report because we had to prepare them in the event the Fourth Amendment Complaint -- our leave to amend was granted. And obviously today with the Court's ruling, that's going to change our expert report, and we obviously will be ready to disclose as the Court directs, but we would request at a bare minimum that we have that additional week in order to prepare them based on today's ruling.

THE COURT: All right. So the -- my original ruling with regard to the plaintiff's experts will stand. The case is (indiscernible) complex. I don't think that an additional week provides actual prejudice to the defendants.

In the meantime, while I know the case has been pending for a long time, we've been in a pandemic now for four months, and that changes everything with regard to availability of people, the ability to travel. So that extra week, I find, is no extra prejudice to the defendant.

Did you have something to add?

MR. OGILVIE: I just wanted to be clear, Your Honor. The Court's order on this is that the plaintiff's initial expert disclosures are due a week from tomorrow, July 31st, 2020?

THE COURT: I believe that's correct.

Was that the day that you requested Mr. Wirthlin?

MR. WIRTHLIN: Yes, yes.

THE COURT: Yes. All right. So make sure that's

incorporated in the order that you provide, and please work collaboratively on the order, if you can.

MR. OGILVIE: Thank you, Your Honor.

THE COURT: Is there anything else on Commissioner versus Chur to take up today? Then nothing further.

Then let me ask that you all stay safe and stay healthy until I see you again.

MS. OCHOA: Thank you, Your Honor. You too, Your Honor. Thank you.

MR. WIRTHLIN: You as well.

[Proceedings adjourned at 11:13 a.m.]

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

Shannon Day
Independent Transcriber