

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.

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

Electronically Filed

Sep 29 2020 11:37 a.m.

Elizabeth A. Brown

Clerk of Supreme Court

APPENDIX TO PETITION

FOR A WRIT OF MANDAMUS

VOLUME 10 OF 10

Chronological Index

Doc No.	Description	Vol.	Bates Nos.
1	Complaint, filed 12/23/2014	1	PA000001-PA000133
2	Motion to Dismiss, filed 12/11/2015	1	PA000134-PA000146
3	Opposition to Motion to Dismiss, filed 1/15/2016	1	PA000147-PA000162
4	Transcript re: Directors' Motion to Dismiss, hearing held on 1/27/2016	1	PA000163-PA000171
5	Notice of Entry of Order Granting in Part and Denying in Part Motion to Dismiss, filed 2/26/2016	1	PA000172-PA000177
6	First Amended Complaint, filed 4/1/2016	1	PA000178-PA000696
7	Motion to Dismiss First Amended Complaint, filed 4/18/2016	2	PA000697-PA000723
8	Decision and Order, filed 5/4/2016	2	PA000723-PA000732
9	Opposition to Motion to Dismiss First Amended Complaint, filed 5/5/2016	2	PA000733-PA000820
10	Reply to Motion to Dismiss First Amended Complaint, filed 5/19/2016	2	PA000821-PA000831
11	Second Amended Complaint, filed 6/13/2016	2	PA000832-PA001353
12	Supplemental Motion to Dismiss First Amended Complaint, filed 7/18/2016	2	PA001354-PA001358
13	Third Amended Complaint, filed 8/5/2016	2, 3	PA001359-PA001887

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

29	Order Denying Motion for Reconsideration, filed 2/11/2019	6	PA002795-PA002798
30	Motion for Stay Pending Petition, filed 3/8/2019	6	PA002799-PA002812
31	Joinder to Motion for Stay Pending Petition, filed 3/11/2019	7	PA002813-PA002822
32	Opposition to Motion for Stay Pending Petition, filed 3/12/2019	7	PA002823-PA002856
33	Reply to Motion for Stay Pending Petition, filed 3/13/2019	7	PA002857-PA002863
34	Court Minutes re: Motion to Stay Pending Petition, 3/14/2019	7	PA002864-PA002865
35	Order Granting Motion for Stay, filed 4/4/2019	7	PA002866-PA002868
36	Motion to Lift Stay, filed 7/2/2019	7	PA002869-PA002886
37	Opposition to Motion to Lift Stay, filed 7/9/2019	7	PA002887-PA002892
38	Response to Motion to Lift Stay, filed 7/10/2019	7	PA002893-PA002897
39	Court Minutes re: Motion to Lift Stay, 7/11/2019	7	PA002898-PA002899
40	Notice of Entry of Order Denying Motion to Lift Stay, filed 8/12/2019	7	PA002900-PA002905
41	Motion for Clarification, filed 4/6/2020	7	PA002906-PA002915
42	Limited Opposition to Motion for Clarification [Directors'], filed 4/8/2020	7	PA002916-PA002920
43	Limited Opposition to Motion for Clarification [Uni-Ter], filed 4/9/2020	7	PA002921-PA002940

44	Transcript re: hearing held on 4/10/2020 re: Motion for Clarification	7	PA002941-PA002954
45	Notice of Entry of Order re: Motion for Clarification, filed on 4/28/2020	7	PA002955-PA002960
46	Transcript re: hearing held on 6/18/2020 re: Motion for Clarification	7	PA002961-PA002971
47	Notice of Entry of Order re: Motion for Clarification, filed 6/30/2020	7	PA002972-PA002981
48	Motion for Leave to File Fourth Amended Complaint, filed 7/2/2020	7	PA002982-PA003013
49	Opposition to Motion for Leave to File Fourth Amended Complaint [Directors'], filed 7/17/2020	7	PA003014-PA003044
50	Opposition to Motion for Leave to File Fourth Amended Complaint [Unit-Ter], filed 7/17/2020	8	PA003045-PA003072
51	Reply to Motion for Leave to file Fourth Amended Complaint, filed 7/21/2020	8	PA003073-PA003245
52	Transcript re: hearing held on 7/23/2020 re: all pending motions	8	PA003246-PA003273
53	Answer to Third Amended Complaint [U.S. Re Corporation], filed 8/7/2020	9	PA003274-PA003289
54	Amended Answer to Third Amended Complaint [Uni-Ter Underwriting Management Corp.], filed 8/7/2020	9	PA003290-PA003306
55	Amended Answer to Third Amended Complaint [Uni-Ter Claims Services Corp.], filed 8/7/2020	9	PA003307-PA003323
56	Order Denying Motion for Leave to File Fourth Amended Complaint, filed 8/10/2020	9	PA003324-PA003329
57	Motion for Partial Reconsideration of Motion	9	PA003330-

	for Leave, filed 8/14/2020		PA003361
58	Opposition to Motion for Partial Reconsideration, filed 8/24/2020	9, 10	PA003362-PA003515
59	Reply to Motion for Partial Reconsideration, filed 8/25/2020	10	PA003516-PA003525
60	Transcript re: hearing held on 8/26/2020 re: all pending motions	10	PA003526-PA003548
61	Motion for Stay Pending Petition, filed 8/28/2020	10	PA003549-PA003625
62	Opposition to Motion for Stay, filed 9/1/2020	10	PA003626-PA003630
63	Motion to Certify Judgment as Final, filed 9/3/2020	10	PA003631-PA003641
64	Transcript re: hearing held on 9/3/2020 re: all pending motions	10	PA003642-PA003659
65	Opposition to Motion to Certify Judgment as Final [Directors'], filed 9/8/2020	10	PA003660-PA003662
66	Opposition to Motion to Certify Judgment as Final [Uni-Ter], filed 9/8/2020	10	PA003663-PA003675
67	Notice of Entry of Order Denying Motion for Partial Reconsideration, filed 9/10/2020	10	PA003676-PA003690
68	Notice of Entry of Order Granting Motion to Stay, filed 9/17/2020	10	PA003691-PA003702
69	Order Granting Judgment on the Pleadings, filed 8/13/2020	10	PA003703-PA003707

Alphabetical Index

Doc No.	Description	Vol.	Bates Nos.
55	Amended Answer to Third Amended	9	PA003307-

	Complaint [Uni-Ter Claims Services Corp.], filed 8/7/2020		PA003323
54	Amended Answer to Third Amended Complaint [Uni-Ter Underwriting Management Corp.], filed 8/7/2020	9	PA003290-PA003306
18	Answer to Third Amended Complaint [Directors'], filed 10/21/2016	3	PA001929-PA001952
53	Answer to Third Amended Complaint [U.S. Re Corporation], filed 8/7/2020	9	PA003274-PA003289
1	Complaint, filed 12/23/2014	1	PA000001-PA000133
39	Court Minutes re: Motion to Lift Stay, 7/11/2019	7	PA002898-PA002899
34	Court Minutes re: Motion to Stay Pending Petition, 3/14/2019	7	PA002864-PA002865
8	Decision and Order, filed 5/4/2016	2	PA000723-PA000732
6	First Amended Complaint, filed 4/1/2016	1	PA000178-PA000696
31	Joinder to Motion for Stay Pending Petition, filed 3/11/2019	7	PA002813-PA002822
42	Limited Opposition to Motion for Clarification [Directors'], filed 4/8/2020	7	PA002916-PA002920
43	Limited Opposition to Motion for Clarification [Uni-Ter], filed 4/9/2020	7	PA002921-PA002940
41	Motion for Clarification, filed 4/6/2020	7	PA002906-PA002915
19	Motion for Judgment on the Pleadings, filed 8/14/2018	3, 4	PA001953-PA002232
48	Motion for Leave to File Fourth Amended Complaint, filed 7/2/2020	7	PA002982-PA003013

57	Motion for Partial Reconsideration of Motion for Leave, filed 8/14/2020	9	PA003330-PA003361
24	Motion for Reconsideration, filed 11/29/2018	6	PA002726-PA002744
30	Motion for Stay Pending Petition, filed 3/8/2019	6	PA002799-PA002812
61	Motion for Stay Pending Petition, filed 8/28/2020	10	PA003549-PA003625
63	Motion to Certify Judgment as Final, filed 9/3/2020	10	PA003631-PA003641
2	Motion to Dismiss, filed 12/11/2015	1	PA000134-PA000146
7	Motion to Dismiss First Amended Complaint, filed 4/18/2016	2	PA000697-PA000723
36	Motion to Lift Stay, filed 7/2/2019	7	PA002869-PA002886
67	Notice of Entry of Order Denying Motion for Partial Reconsideration, filed 9/10/2020	10	PA003676-PA003690
17	Notice of Entry of Order Denying Motion to Dismiss First Amended Complaint, filed 10/11/2019	3	PA001924-PA001928
40	Notice of Entry of Order Denying Motion to Lift Stay, filed 8/12/2019	7	PA002900-PA002905
5	Notice of Entry of Order Granting in Part and Denying in Part Motion to Dismiss, filed 2/26/2016	1	PA000172-PA000177
68	Notice of Entry of Order Granting Motion to Stay, filed 9/17/2020	10	PA003691-PA003702
45	Notice of Entry of Order re: Motion for Clarification, filed on 4/28/2020	7	PA002955-PA002960
47	Notice of Entry of Order re: Motion for	7	PA002972-

	Clarification, filed 6/30/2020		PA002981
20	Opposition to Motion for Judgment on the Pleadings, filed 9/19/2018	4, 5	PA002233-PA002584
49	Opposition to Motion for Leave to File Fourth Amended Complaint [Directors'], filed 7/17/2020	7	PA003014-PA003044
50	Opposition to Motion for Leave to File Fourth Amended Complaint [Unit-Ter], filed 7/17/2020	8	PA003045-PA003072
58	Opposition to Motion for Partial Reconsideration, filed 8/24/2020	9, 10	PA003362-PA003515
25	Opposition to Motion for Reconsideration, filed 12/27/2018	6	PA002745-PA002758
62	Opposition to Motion for Stay, filed 9/1/2020	10	PA003626-PA003630
32	Opposition to Motion for Stay Pending Petition, filed 3/12/2019	7	PA002823-PA002856
65	Opposition to Motion to Certify Judgment as Final [Directors'], filed 9/8/2020	10	PA003660-PA003662
66	Opposition to Motion to Certify Judgment as Final [Uni-Ter], filed 9/8/2020	10	PA003663-PA003675
3	Opposition to Motion to Dismiss, filed 1/15/2016	1	PA000147-PA000162
9	Opposition to Motion to Dismiss First Amended Complaint, filed 5/5/2016	2	PA000733-PA000820
37	Opposition to Motion to Lift Stay, filed 7/9/2019	7	PA002887-PA002892
23	Order Denying Motion for Judgment on the Pleadings, filed 11/2/2018	6	PA002723-PA002725
56	Order Denying Motion for Leave to File Fourth Amended Complaint, filed 8/10/2020	9	PA003324-PA003329

29	Order Denying Motion for Reconsideration, filed 2/11/2019	6	PA002795-PA002798
69	Order Granting Judgment on the Pleadings, filed 8/13/2020	10	PA003703-PA003707
35	Order Granting Motion for Stay, filed 4/4/2019	7	PA002866-PA002868
21	Reply to Motion for Judgment on the Pleadings, filed 10/4/2018	6	PA002585-PA002700
51	Reply to Motion for Leave to file Fourth Amended Complaint, filed 7/21/2020	8	PA003073-PA003245
59	Reply to Motion for Partial Reconsideration, filed 8/25/2020	10	PA003516-PA003525
26	Reply to Motion for Reconsideration, filed 1/4/2019	6	PA002759-PA002772
33	Reply to Motion for Stay Pending Petition, filed 3/13/2019	7	PA002857-PA002863
10	Reply to Motion to Dismiss First Amended Complaint, filed 5/19/2016	2	PA000821-PA000831
38	Response to Motion to Lift Stay, filed 7/10/2019	7	PA002893-PA002897
28	Scheduling Order, filed 1/29/2019	6	PA002792-PA002794
11	Second Amended Complaint, filed 6/13/2016	2	PA000832-PA001353
16	Second Supplement to Motion to Dismiss First Amended Complaint, filed 9/2/2016	3	PA001920-PA001923
12	Supplemental Motion to Dismiss First Amended Complaint, filed 7/18/2016	2	PA001354-PA001358
13	Third Amended Complaint, filed 8/5/2016	2, 3	PA001359-PA001887

4	Transcript re: Directors' Motion to Dismiss, hearing held on 1/27/2016	1	PA000163-PA000171
22	Transcript re: hearing held on 10/11/2018 re: all pending motions	6	PA002701-PA002722
27	Transcript re: hearing held on 1/9/2019 re: Motion for Reconsideration	6	PA002773-PA002791
44	Transcript re: hearing held on 4/10/2020 re: Motion for Clarification	7	PA002941-PA002954
46	Transcript re: hearing held on 6/18/2020 re: Motion for Clarification	7	PA002961-PA002971
52	Transcript re: hearing held on 7/23/2020 re: all pending motions	8	PA003246-PA003273
60	Transcript re: hearing held on 8/26/2020 re: all pending motions	10	PA003526-PA003548
64	Transcript re: hearing held on 9/3/2020 re: all pending motions	10	PA003642-PA003659
14	U.S. Re Corporation's Answer to Third Amended Complaint, filed 8/12/2016	3	PA001888-PA001903
15	Uni-Ter Claims Services Corp.'s Answer to Third Amended Complaint, filed 8/12/2016	3	PA001904-PA001919

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **APPENDIX TO PETITION FOR A WRIT OF MANDAMUS VOLUME 10 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

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0

- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0

3
4
5
6
7
8
9
20

19
20

1 I understand that I may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the
3 Nevada Rules of Appellate Procedure.

4 DATED this 12th day of June, 2019.

5 FENNEMORE CRAIG, P.C.

6 By: /s/ Brenoch R. Wirthlin, Esq.
7 James Wadhams (No. 1115)
8 Christopher H. Byrd (No. 1633)
9 Brenoch R. Wirthlin (No. 10282)
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Phone: (702) 692-8000
Email: jwadhams@fclaw.com
10 cbyrd@fclaw.com
11 bwirthlin@fclaw.com

12 *Attorneys for Real Party in Interest*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

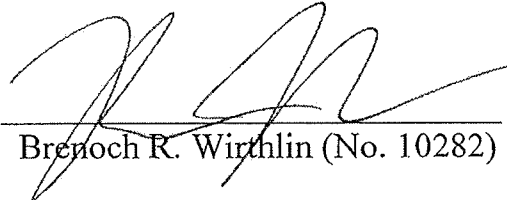
VERIFICATION

STATE OF NEVADA)

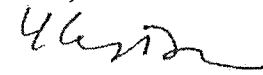
) ss

COUNTY OF CLARK)

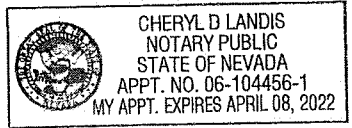
Under penalty of perjury, undersigned counsel declares that: he is an attorney of record for Real Party in Interest / Plaintiff COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS & CLARK LTC RRG, INC.; he has read the foregoing Memorandum of Points and Authorities in support of the Answering Brief to Petition for Writ of Mandamus and is familiar with its contents; the facts contained therein are within counsel's knowledge and are true of his own knowledge, except as to those matters which are stated upon information and belief, and as to those matters, he believes them to be true.

By: 
Brenoch R. Wirthlin (No. 10282)

SUBSCRIBED AND SWORN
TO ME THIS 12TH DAY OF
JUNE, 2019.



Notary Public



[NOTARY STAMP]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

PROOF OF SERVICE

I hereby certify that on the 12th day of June, 2019, I served a copy of the foregoing **REAL PARTY IN INTEREST'S ANSWERING BRIEF TO DIRECTORS' PETITION FOR WRIT OF MANDAMUS** upon the parties to this action by mailing a copy thereof, postage prepaid, via regular U.S. Mail, addressed as follows:

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

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

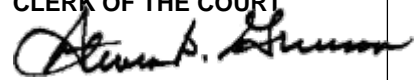
- J. Stephen Peek, Esq.
Jessica E. Whelan, Esq.
Ryan A. Semerad, Esq.
Holland & Hart LLP
9555 Hillwood Dr., 2nd Floor
Las Vegas, NV 89134

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

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

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



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
corne@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

**REPLY IN SUPPORT OF MOTION FOR
PARTIAL RECONSIDERATION OF
MOTION FOR LEAVE TO AMEND
REGARDING DIRECTOR DEFENDANTS**

Hearing Date: August 26, 2020

Hearing Time: 9:00 a.m.

Plaintiff, COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS
RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP (the "Plaintiff"), by and
through its attorneys, the law firm of Hutchison & Steffen, hereby submits the following reply in

1 support of its Motion for Partial Reconsideration (“Reconsideration Motion”) of Motion for Leave
2 to Amend (“Motion to Amend”) as follows:

3
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. THE CHUR OPINION SUBSTANTIVELY CHANGED NEVADA LAW BY**
6 **ELIMINATING THE BIFURCATED APPROACH TO DIRECTOR LIABILITY.**
7 **RESPECTFULLY, JUSTICE REQUIRES PLAINTIFF BE GIVEN LEAVE TO**
8 **AMEND REGARDING THE DIRECTORS.**

9 As the Nevada Supreme Court recognized in the *Chur* Opinion (136 Nev. Adv. Op. 7
10 (2020)), prior to the issuance of the *Chur* Opinion in 2020, “federal courts in Nevada, as well as the
11 district court in the case at bar, have relied on *Shoen* to imply a bifurcated tract for establishing
12 breaches of the fiduciary duties of care and loyalty.” *Chur*, at p. 5. Numerous cases in both federal
13 courts and state courts in Nevada, and outside of Nevada, relied on *Shoen’s* holding that “[w]ith
14 regard to the duty of care, the business judgment rule does not protect the gross negligence of
15 uninformed directors and officers.” *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d
16 1171, 1184 (2006), *abrogated by Chur v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 136
17 Nev. Adv. Op. 7, 458 P.3d 336 (2020). In fact, the Nevada Supreme Court recognized that this
bifurcated approach to fiduciary duty claims had been created by *Shoen*:

18 We are concerned that our language in *Shoen* has misled lower courts
19 about the law surrounding individual liability for directors and officers in Nevada...

20 In denying the Directors’ motion, the district court relied on our decision
21 in *Shoen*...

22 Thus, we disavow *Shoen* to the extent it implied a bifurcated approach
23 to duty-of-care and duty-of-loyalty claims...

24 *Id.*, at pp. 5-8. Yet, the “bifurcated approach” set forth in *Shoen* was exactly what this Court – and
25 numerous other courts and judges, including Chief Judge Du, Judge Dawson, Judge Dorsey, Judge

1 Mahan, Judge Jones, as well as others outside the state – relied on in confirming this was the
2 controlling law in Nevada:¹

- 3 • [Chief Judge Du] *McDonald v. Palacios*, 2016 WL 5346067, at *20 (D. Nev. Sept.
4 23, 2016) (citing *Shoen* for the proposition that “**the business judgment rule ‘does
5 not protect the gross negligence of uninformed directors and officers’**”)
- 6 • [Judge Dawson] *F.D.I.C. v. Johnson*, 2014 WL 5324057, at *3 (D. Nev. Oct. 17,
7 2014) (citing *Shoen* for the proposition that “**the business judgment rule does not
8 apply to claims of gross negligence, which constitutes a breach of the fiduciary
9 duty of care**”)
- 10 • [Judge Dorsey] *F.D.I.C. v. Jones*, 2014 WL 4699511, at *10 (D. Nev. Sept. 19,
11 2014) (citing *Shoen* for the proposition that the business judgment rule “**does not
12 protect the gross negligence of uniformed directors and officers**”)
- 13 • [Judge Mahan] *F.D.I.C. v. Delaney*, 2014 WL 3002005, at *2 (D. Nev. July 2,
14 2014) (finding that *Shoen* and federal law work in tandem for authorization for the
15 “**FDIC to sue directors for gross negligence**”)
- 16 • [Judge Jones] *F.D.I.C. v. Jacobs*, 2014 WL 5822873, at *4 (D. Nev. Nov. 10, 2014)
17 (citing *Shoen* and finding that “**[i]n Nevada, the business judgment rule defines
18 the line between unactionable ordinary negligence and actionable gross
19 negligence**”)
- 20 • [Judge Dorsey] *Jacobi v. Ergen*, 2015 WL 1442223, at *4 (D. Nev. March 30,
21 2015) (citing *Shoen* for the proposition that a “**director’s misconduct must rise at
22 least to the level of gross negligence to state a breach-of-the-fiduciary-duty-of-
23 due-care claim**”)
- 24 • *In re Galectin Therapeutics, Inc. Derivative Litigation*, 2015 WL 12806566, at *4–5
25 (N.D. Ga. Dec. 30, 2015) (citing *Shoen* for the proposition that “**[w]ith regard to
26 the duty of care, the business judgment rule does not protect the gross
27 negligence of uninformed directors and officers**”)
- 28 • *Taneja v. FamilyMeds Group, Inc.*, 2009 WL 415454, at *8 (Conn. Jan. 16, 2009)
(citing *Shoen* and finding that plaintiffs must “**provide a sufficient factual basis in
their attempt to show that the defendants acted with gross negligence**, in bad
faith or in some other deficient manner which would strip them of the business
judgment rule protection”)

///

///

¹ The cited cases are not intended to be an exhaustive list of all courts relying on the relevant language in *Shoen* regarding gross negligence constituting a claim against directors.

1 This is not an instance, as the Directors would have this Court believe, in which “judicial
2 error may occur” “from time to time.” The Directors cannot point to a single decision prior to
3 *Chur* finding that gross negligence did not state a claim against directors of a corporation. Even
4 the Westlaw citation to *Shoen*, above, states that it was “abrogated” by the *Chur* Opinion, which
5 was necessary because prior to *Chur*, whether intentionally or not, the Nevada Supreme Court
6 created a bifurcated approach to duty of care claims.

7 The Directors themselves admit that “[i]t is understandable for a court to grant leave to
8 amend when substantive changes in the law have occurred, for [*sic*] which the party could not
9 foresee.” See Directors’ Opposition at p. 5. This is exactly what happened here. The *Chur*
10 Opinion effected a substantive change in the law by eradicating one prong of the “bifurcated
11 approach” to director liability, *i.e.*, that of gross negligence. Plaintiff, like this Court as well as the
12 numerous cited judges and courts cited above, could not have known the *Chur* Opinion would
13 create the substantive changes that it did – including adopting the new *Zagg* standard – prior to the
14 issuance of the *Chur* Opinion in 2020. Accordingly, Plaintiff respectfully submits justice requires
15 it should be permitted to amend to substitute causes of action under *Chur*.

16 **II. PLAINTIFF COULD NOT HAVE MOVED TO AMEND PRIOR TO THE STAY**
17 **BEING LIFTED. PLAINTIFF MOVED TO LIFT THE STAY IN JULY, 2019, AND**
18 **SAID MOTION WAS OPPOSED BY THE DIRECTORS AND DENIED.**
19 **PLAINTIFF’S MOTION TO AMEND WAS THEREFORE TIMELY.**

20 The Directors do not deny Plaintiff filed its Motion to Amend within the time set by this
21 Court. To distract from this indisputable fact, the Directors cite to Ninth Circuit case law set forth
22 in *Amerisource Bergen Corp. v. Dialysist West, Inc.*² The Directors’ reliance on this case is
23 misplaced. The facts in *Amerisource*, unlike the instant case, did not involve a substantive change
24 to the underlying case law upon which plaintiff and the district court had relied. Rather, the
25 plaintiff in *Amerisource* could not explain why it had changed its theory, despite no underlying
26 change in the law or facts. *Id.* 4665 F.3d at 953 (holding plaintiff, who had changed its theory
27 from admitting the product at issue was genuine to suddenly asserting it was tainted, had “never

28 ² 465 F.3d 946 (9th Cir. 2006).

1 provided a satisfactory explanation of why, twelve months into the litigation, it so drastically
2 changed its litigation theory.”).

3 Conversely, the instant case could hardly be more different. The Plaintiff – and this Court,
4 along with numerous other judges and courts cited above – justifiably relied on *Shoen* to assert and
5 uphold a claim for gross negligence against the Directors. That claim was confirmed repeatedly by
6 Nevada and other courts and was not overturned until the *Chur* Opinion was handed down. In fact,
7 despite amendments to NRS 78.138 in 2017 and 2019, at no point did the Nevada Legislature
8 choose to invalidate *Shoen* despite its awareness of the decision.

9 Further, it was the Directors who moved for the Stay which was granted on March 14,
10 2019. Then, Plaintiff moved to lift the stay on July 2, 2019, to continue diligently prosecuting its
11 case. The Directors opposed Plaintiff’s motion to lift the stay. *See* The Director Defendants’
12 Opposition to Plaintiff’s Motion to Lift Stay or Alternatively Grant Plaintiff Other Relief, filed July
13 9, 2019.

14 The *Chur* Opinion was handed down in 2020, and Plaintiff sought to file a petition for
15 rehearing, which it had an absolute right to do, and during the pendency of which all parties –
16 including the Directors – agreed that the Stay remained “in full force and effect.” Plaintiff was
17 granted an extension of time to file its Petition for Rehearing in the Supreme Court due to the
18 impacts of COVID-19 as well as a severe illness suffered by lead counsel for the Plaintiff. *See* this
19 Court’s Administrative Order (“AO”) 20-13 (recognizing “the COVID-19 emergency” as
20 constituting “good cause” warranting the extension of time); *see also* AO 20-17 (same, and lasting
21 until July 1, 2020). Clearly good cause existed in this instance.

22 Further, the notice in lieu of remittitur regarding the Directors’ Writ Petition was not issued
23 until **June 16, 2020**. At a hearing **two days later** (because the parties had stipulated the Stay
24 remained in effect until the hearing on June 18, 2020) the Court accurately observed that “there are
25 challenges to all of the parties at this point in securing witnesses, there’s inability to travel, some
26 people are not working or working from home and not as efficient” and that therefore “to be fair to
27 both sides, July 1st needs to be the date” for the Stay to be lifted. *See* Transcript from June 18,
28 2020, hearing on Motion for Clarification, at p. 10, ll. 1-5. The Stay was lifted on July 1, 2020, and

1 Plaintiff filed its Motion to Amend within 48 hours afterward, on July 2, 2020. The Plaintiff, like
2 every court citing to and relying on the relevant portion of *Shoen* concerning gross negligence, did
3 not and could not have known what the outcome of the Writ Petition, or the Petition for Rehearing,
4 would be until the Supreme Court handed down its rulings.

5 Plaintiff is in agreement with the Directors that “the granting of a writ petition is
6 extraordinary and rarely done.” See Directors’ Opposition at p. 9, l. 1. However, this is all the
7 more reason that Plaintiff could not have filed its Motion to Amend to meet the *Chur* Opinion,
8 rather than the previously confirmed standard under *Shoen*, until Plaintiff knew it would need to do
9 so. Nor could it have anticipated that the Nevada Supreme Court would adopt the *Zagg* opinion
10 which did not even exist when Plaintiff filed its complaint. Thus, the Court lifted the stay at the
11 earliest possible opportunity to fairly do so, and Plaintiff filed its Motion to Amend within 48 hours
12 thereafter and within the time frame set by this Court.

13 Finally, unlike the situation in *Amerisource*, the reason for the instant Plaintiff’s proposed
14 amendments concerning the Directors is clear: since the *Chur* Opinion removed the “bifurcated
15 approach” to director liability set forth in *Shoen* – and upon which Plaintiff and numerous courts
16 had relied –Plaintiff was therefore required to move to amend to meet the *Chur* Opinion standard.
17 The reason for Plaintiff’s Motion to Amend was plain, and its Motion was filed in the time frame
18 set by this Court out of fairness to both sides. Respectfully, the Motion to Amend was not
19 untimely and should be granted as to the Directors.

20 **III. THERE IS NO UNDUE DELAY OR UNDUE PREJUDICE.**

21 The Nevada Supreme Court has emphasized that, unless “undue delay, bad faith or dilatory
22 motives on the part of the movant’ or if prejudice to the opponent results,” leave to amend should
23 generally be freely given. See also *Nutton v. Sunset Station, Inc.*, 357 P.3d 966, 970 (Nev. Ct. App.
24 2015). Here, the Directors mistakenly state “upon information and belief discovery is set to close
25 in less than three months.” See Opposition at p. 7, ll. 23-24. This is inaccurate. Rather, while the
26 new trial setting order has not yet been signed, the Court’s most recent decision on the issue
27 confirms that discovery is not set to close until mid-December, leaving approximately four (4)
28 months for discovery. Moreover, the Directors’ assertion is also misleading in that it was the

1 defendants who delayed submitting an order to this Court after the hearing on the Motion to
2 Amend in violation of local rules. Plaintiff could not file the instant motion until the order on the
3 hearing was entered.

4 Even more tellingly, the Directors have failed to point to any real or specific prejudice that
5 would result from granting leave to amend to Plaintiff. Rather, they make ambiguous assertions
6 with no support, such as supposedly having to “retake depositions” and having to “take the
7 deposition of all of Lewis & Clark’s former attorneys.” See Opposition at p. 8. However, the
8 Directors completely fail to either (1) explain how granting leave to amend would cause these
9 alleged instances of prejudice to occur, or (2) how these alleged instances of prejudice rise above
10 the inherent “prejudice” that normally results from litigation and which does not, and cannot,
11 constitute “undue prejudice” warranting denial of leave to amend. See e.g., *In re Lowenschuss*, 67
12 F.3d 1394, 1400–01 (9th Cir. 1995) (Recognizing that “[t]he inconvenience of defending another
13 lawsuit or the fact that the defendant has already begun trial preparations does not constitute
14 prejudice.”).

15 Trial in this case will not begin until February 22, 2021. The Directors are, and have been,
16 aware of the facts that would comprise Plaintiff’s proposed amended complaint. The Directors
17 have admitted that the Fourth Amended Complaint is “not based on new facts.” See opposition to
18 Motion to Amend filed by Director Defendants at p. 3, ll. 8-11. Any assertion of prejudice, or
19 futility, by the Directors regarding the Motion to Amend is therefore negated by their admission.

20 **IV. THE DIRECTORS MISSTATE APPLICABLE LAW AND FACTUAL HISTORY.**

21 The Directors also inaccurately state that “Nevada Rule of Civil Procedure 15(a) makes it
22 optional for the court to grant leave, with the word ‘should’ instead of its Federal counterpart,
23 which states ‘shall.’ ” See Directors’ Opposition at p. 6, ll. 20-23. This is false. In fact, both rules
24 stated that the court “should” freely give leave when justice so requires. See NRCP 15(a)(2);
25 FRCP 15(a)(2). The Directors’ misstatement is relevant, as their reliance on the federal case
26 *AmerisourceBergen* is clearly misplaced, as set forth above. Further, the Directors unsuccessfully
27
28

1 attempt to distinguish the holding in *Moss v. U.S. Secret Serv.*³ which held that where there is a
2 “significant change” in the law, a plaintiff who began its suit without the benefit of an appellate
3 court’s later issued intervening decision should be given leave to amend. The Directors do not
4 even try to distinguish *Darney v. Dragon Prod. Co., LLC*, 266 F.R.D. 23 (D. Me. 2010) or *Gregory*
5 *v. Harris-Teeter Supermarkets, Inc.*, 728 F. Supp. 1259 (W.D.N.C. 1990), which stand for the same
6 principle of fairness when intervening changes to the law occur. In fact, very recently in June,
7 2020, Judge Navarro granted leave to amend where the plaintiff’s complaint did not satisfy the new
8 *Chur* Opinion and in particular, the Nevada Supreme Court’s adoption of the *Zagg* standard, but
9 Judge Navarro recognized that, in that case, “leave to amend should be granted unless it is clear
10 that the deficiencies of the complaint cannot be cured by amendment.” *Geraci v. Vinson*, 2020 WL
11 2840239, at *2 (D. Nev. June 1, 2020). Here, respectfully, leave to amend should be granted as the
12 Fourth Amended Complaint meets the new *Chur* Opinion standard.

13 Moreover, the Directors also cite to the incorrect standard of the Ninth Circuit with respect
14 to when denial of a motion to amend is permissible. *See* Opposition at p. 11. Nevada’s standard
15 for permitting pleadings is slightly, but importantly, different:

16 The record reveals the original complaint was filed on November 27, 1970, some
17 two years after the last unit in the development was sold and the first leaks
18 occurred. The complaint was captioned as “Irving C. Deal, individually, and doing
19 business as . . . Incline Properties, Inc., a corporation.” **Although this by itself may**
20 **not have notified appellant as to the exact theory of liability upon which he**
ultimately was held liable, the pleadings generally gave fair notice of the fact
situation from which the claim for individual liability arose.

21 *Deal v. 999 Lakeshore Ass’n*, 94 Nev. 301, 307, 579 P.2d 775, 779 (1978). Here there is no
22 question the Directors were aware of this action as they have been parties to it from its inception.
23 As noted above, the Directors have admitted that the Fourth Amended Complaint is “not based on
24 new facts.” *See* opposition to Motion to Amend filed by Directors at p. 3, ll. 8-11. Thus, just as in
25 *Lakeshore*, while the theory of liability initially alleged – gross negligence – may not have notified
26 the Directors as to the “exact theory of liability” upon which they may ultimately be held liable, the

27 _____
28 ³ 572 F.3d 962 (9th Cir. 2009)

1 initial complaint (and amended versions) “gave fair notice of the fact situation from which the
2 claim for individual liability arose.”

3 Finally, the holding proffered by the Directors in *Jacobs v. McCloskey & Co.*, 40 F.R.D.
4 486 (E.D. Pa. 1966) is distinguishable on its face. The Directors acknowledge that in that case the
5 court held that adding a new defendant would cause prejudice, warranting denial of leave to
6 amend. *See* Opposition at p. 9. Conversely, Plaintiff does not seek reconsideration of the Court’s
7 order denying leave to add an additional party. Rather, Plaintiff merely seeks to substitute claims
8 under the *Chur* standard against the Directors in place of the previously recognized gross
9 negligence claim.

10 **V. CONCLUSION**

11 For all these reasons, Plaintiff respectfully requests that the Court reconsider its decision on
12 the Motion for Leave to File Fourth Amended Complaint as to the Director Defendants, permit the
13 filing of the Fourth Amended Complaint as it relates to the Directors, and grant such other and
14 further relief as the Court deems appropriate.

15 DATED: August 25, 2020.

16 **HUTCHISON & STEFFEN**

17 By /s/ Brenoch Wirthlin, Esq.

18 MARK A. HUTCHISON, ESQ.

19 PATRICIA LEE, ESQ.

BRENOCH R. WIRTHLIN, ESQ.

20 CHRISTIAN ORME, ESQ.

10080 West Alta Drive, Suite 200

21 Las Vegas, Nevada 89145

22 *Attorneys for Plaintiff*

1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of Hutchison & Steffen, and that on this date, I served the
3 foregoing **REPLY IN SUPPORT OF MOTION FOR PARTIAL RECONSIDERATION ON**
4 **MOTION FOR LEAVE TO AMEND REGARDING DIRECTOR DEFENDANTS** on the
5 parties set forth below by legally serving via Odyssey electronic service as follows:

6 Joseph P. Garin, Esq.
7 Angela Ochoa, Esq.
8 Lipson, Neilson, Cole, Seltzer & Garin, P.C.
9 9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
Attorneys for Director Defendants

10 George Oglive, III
11 McDonald Carano LLP
12 2300 W. Sahara Avenue, Suite 1200
13 Las Vegas, Nevada 89102
Attorneys for Defendants Uni-Ter Underwriting
Management Corp., Uni-Ter Claims Services Corp.,
14 *and U.S. RE Corporation*

15 Jon M. Wilson
16 Kimberly Freedman
17 Broad and Cassel
18 2 South Biscayne Blvd., 21st Floor
19 Miami Florida 33131
Attorneys for Defendants Uni-Ter Underwriting
Management Corp., Uni-Ter Claims Services Corp.,

20 DATED August 25, 2020.

21 /s/ Daniel Maul
22 An Employee of Hutchison & Steffen
23
24
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

[illegible]

Case Number: A-14-711535-C

1 **LAS VEGAS, NEVADA, WEDNESDAY, AUGUST 26, 2020**

2 [Proceeding commenced at 9:19 a.m.]

3
4 THE COURT: Okay. So our next case then is
5 Commissioner versus Chur.

6 And let me have appearances, starting first with the
7 plaintiff.

8 MR. HUTCHISON: Good morning, Your Honor. This is
9 Mark Hutchison on behalf of the plaintiff.

10 THE COURT: Thank you.

11 MR. WIRTHLIN: Brenoch Wirthlin. And my firm is on the
12 phone as well, Your Honor.

13 THE COURT: Very good. Thank you both.

14 And for the defendants, let's take the -- first the board
15 members and then the company.

16 MR. OGILVIE: Good morning, Your Honor. Angela Ochoa
17 on behalf of the Director defendants Robert Chur, Steve Fogg, Mark
18 Garber, Carol Harter, Bob Hurlbut, Barbara Lumpkin, Jeff Marshall,
19 and Eric Stickels.

20 THE COURT: Thank you.

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

23 THE COURT: Thanks, everyone.

24 So I set this on an Order Shortening Time. And I have
25 read the motion and the opposition.

1 Did the plaintiff wish to reply before -- or do you want to
2 go forward today?

3 MR. WIRTHLIN: Your Honor, we're prepared to go forward
4 today.

5 THE COURT: All right. Any objection, Ms. Ochoa or
6 Mr. Ogilvie?

7 MS. OCHOA: No, Your Honor.

8 MR. OGILVIE: No, Your Honor.

9 THE COURT: Okay. All right.

10 So Mr. Hutchinson and Mr. Wirthlin, your motion, please.

11 MR. HUTCHISON: Your Honor, this is Mark Hutchison. I'll
12 be addressing the Court this morning. Thank you for hearing us on
13 an order shortening time.

14 Your Honor, really, the -- and you've been through the
15 papers. The motion really boils down to whether the Chur opinion
16 handed down this year is a substantive change in the law.

17 Now, the Director's argument really is largely based on the
18 point that the operative language is shown that the business
19 judgment rule doesn't protect gross negligence of uninformed
20 directors or officers.

21 It was just dicta. It was not the law in Nevada. Nobody
22 should be relying on this dicta. Nobody should have been viewing
23 this as a law in Nevada.

24 Your Honor, that's just not a viable legal position. It
25 certainly isn't what the Nevada Supreme Court acknowledged or

1 what this Court acknowledged or what federal courts within the
2 District of Nevada had acknowledged for many years.

3 You can see, Your Honor, the language of Chur. I know
4 that you've read it. This is an opinion obviously that relates to this
5 case. The Nevada Supreme Court there said, quote, Federal courts
6 of Nevada, as well as the District Court in this case, at bar, have
7 relied on challenge to imply a bifurcated tract for establishing
8 breaches of the fiduciary duties and of -- excuse me -- fiduciary
9 duties of care and loyalty.

10 Your Honor, we attached Exhibit 1 to our motion -- in fact,
11 your order, where you, in fact, recognize and state that thought and
12 believed that *Shoen* in that decision and that standard was, in fact,
13 the operative law in this case.

14 The Nevada Supreme Court went then to recognize that
15 the bifurcated approach, though, that it had set forth in *Shoen*
16 perhaps was misleading to the lower courts. It said, We're
17 concerned that our language in *Shoen* has misled the lower courts
18 about the law surrounding individual liability for directors and
19 officers.

20 The Nevada Supreme Court also said it denied the
21 Director's motion that you had relied upon the decision in *Shoen*.
22 The Nevada Supreme Court said that they then had to, quote,
23 disavow, close quote, *Shoen* to the extent that it applied a bifurcated
24 approach to the duty-of-care and the duty-of-loyalty claims.

25 So Your Honor, the Directors, in their opposition papers,

1 even admit that it's appropriate, it's understandable for a court to
2 grant -- to amend when a substantive change in the law has occurred
3 by which the parties could not have foreseen.

4 That's on page five of their opposition papers, Your Honor.

5 But their argument, though, is that the above change in
6 the law was not a change in the law -- that it was just dicta that we
7 all should have recognized for many, many years. And I guess it's
8 our -- it's on us that we didn't recognize that, even though this court
9 and the federal courts and other courts have relied on it for years.

10 Their argument is incomplete because they assert,
11 basically, Your Honor, that the fraud -- you know, knowing violation
12 of the law standard in the statute, Your Honor, 78.138 has always
13 existed. That's accurate. But *Chur* eradicated the bifurcated
14 approach by eliminating the gross negligence standard as a basis for
15 a cause of action.

16 So before *Chur*, a gross negligence or duty of care claim
17 was valid. After *Chur* only a fraud and knowing violation of the law
18 constitutes a valid claim.

19 Your Honor, this is an absolute substantive change in the
20 law, which neither this Court nor any of the numerous Courts that
21 have relied upon this decision could have foreseen for many years.
22 Certainly, Judge, if Your Honor and other Courts have not been be
23 able to foresee that change, how could the plaintiffs foresee this?

24 Judge, I can address the timeliness, as well. I know there
25 was a timeliness issue here. I'll just briefly -- unless the Court asks

1 me for specifics, I'll just briefly note that the motion was timely filed.
2 The Motion to Amend was filed within the timeframe that Your
3 Honor had set in the operative scheduling order. In the hearing on
4 June 18th, Your Honor had expressly stated that you would lift a stay
5 on July 1st, and that all parties had until July 2nd then to file the
6 Motion to Amend. We filed our motion on July 2nd, Your Honor.

7 And by the way, Uni-Ter defendants also filed their Motion
8 to Amend on the same day. Somehow Your Honor had ruled that
9 our motion was untimely, although the Uni-Ter motion was timely.
10 Your Honor --

11 THE COURT: When I said that -- Mr. Hutchinson, when I
12 said untimely, I knew you filed it on the deadline, but, you know, the
13 case is so old. That's what I meant.

14 MR. HUTCHISON: Oh, sure. Okay. I understand, Your
15 Honor. Okay.

16 And Your Honor, I know that -- I know that on that point
17 that the Directors have cited in their oppositions to this case,
18 AmeriStore which is -- excuse me, *AmeriSource*, which is 9th Circuit
19 decision. And they held that the basic proposition that, sure, even
20 though you can file it within the scheduling time, it can still be
21 untimely. *AmeriSource* is not done on all fours, not even close in
22 this case, Your Honor.

23 In that case, the plaintiff completely changed the factual
24 allegations. They said previously the part -- the product was good
25 and then it was bad, without any explanation; and it was just that

1 they were trying to add to the party.

2 But we cited the case law, Your Honor, and I think it's
3 something that this Court should apply here, that I believe should be
4 freely granted when there's been an underlying change to the law
5 that was directly applicable. It's absolutely directly applicable to
6 what the Nevada Supreme Court did in this case.

7 But the Directors don't even address, you know, some of
8 the holdings in that citation. I included the *Darney* holding and
9 *Gregory* holding, which stands for the same principle that fairness
10 dictates that we be given an opportunity to amend when there's
11 been an intervening law -- change in the law that's occurred.

12 I know that the Court is not bound by any decisions of the
13 federal court, but just by way of information, in June of 2020, Judge
14 Navarro in federal court granted leave based on *Chur*, where the
15 plaintiff had filed the complaint prior to *Chur* and obviously didn't
16 meet the *Chur* standard, so leave to amend was granted.

17 Judge, there hasn't been real -- no prejudice shown.
18 There's been some vague language about having to redepose
19 witnesses and having to move forward with this case in an expedited
20 manner. But that basis, basically having to defend a lawsuit and
21 having to defend it on an expedited basis or in a compressed
22 timeframe, just doesn't constitute any prejudice. We cite to the
23 Court the [indiscernible] decision.

24 Finally, you ordered the -- and I think this is important.
25 The Directors have been and always were during the course of this

1 case aware of the facts that comprise the plaintiff's proposed
2 amended complaint. The Directors even admit in their opposition
3 papers on page 3, Your Honor, that the directors have known about
4 the fourth amended complaint facts and that there are no new facts
5 that comprise the factual allegations in that amended complaint.

6 So Your Honor, for those reasons, we would ask that the
7 Court reconsider and grant the motion for leave to amend.

8 MR. WIRTHLIN: Your Honor --

9 THE COURT: [Indiscernible.]

10 MR. WIRTHLIN: I apologize. I just wanted to make the
11 Court aware, the plaintiff did file a reply. We did send a copy to
12 the -- a courtesy copy to Department 27 e-mail. I don't know if the
13 Court had seen that. I just want to make that clear.

14 THE COURT: You know, I haven't, no. And I was at work
15 yesterday all day. I checked the docket before I left, but I didn't check
16 it again this morning.

17 So Mr. Wirthlin, do you want to address what's in the
18 reply then?

19 MR. WIRTHLIN: I'm happy to do that, Your Honor. We did
20 file it, just so the Court is aware, at -- I believe at about 7 a.m.
21 yesterday. We received the opposition about 3:30, I think, on
22 Monday. So we filed it at 7 a.m., Monday. We're happy to address
23 that.

24 I guess I can address the reply. I would certainly defer to
25 Mr. Hutchison. I don't think there are any other points on the motion

1 that we need to make. And unless the Court has any questions.

2 THE COURT: I do have the -- the questions I have directed
3 to the plaintiff is, can you meet -- do you have any discovery that you
4 can meet the standard required by the *Chur* case? Do you have any
5 discovery of knowing violation of law or fraud? Because you've
6 deposed all of the members of the board, I assume?

7 MR. HUTCHISON: We still have --

8 And if I could address this, Mr. Wirthlin.

9 We still have one and a half depositions. We got through
10 half of Mr. Stickles. We still have to depose Mr. Garber.

11 And the answer to Your Honor's question is, Yes, we do
12 have clear evidence of knowing violation of the law. In fact, in --
13 towards the end of 2011, when the wheels really started to come off
14 of the case for the company, the Uni-Ter actually had its lawyers
15 e-mail the Directors several statutes -- statutory provisions regarding
16 operating while insolvent or impaired.

17 And in fact, just to make sure that the Directors got that
18 information, the Uni-Ter folks sent it in a letter and in an e-mail. And
19 they said, specifically -- Uni-Ter's lawyers said, We want to make
20 sure that the Directors are aware of these statutes and that the
21 company is in very difficult financial position.

22 And in fact, they had received the -- the Directors had just
23 received a letter from the DOI that said that the company was in
24 extreme financial peril and likely insolvent -- and it turned out that it
25 was.

1 And the directors continue to operate, despite knowing
2 and having reviewed the law -- having received the law from the
3 Uni-Ter Directors' counsel that it was unlawful to operate while
4 impaired or insolvent.

5 That's one example, Your Honor. We have several. But
6 yes. And admissions from the Directors -- acknowledgment e-mails
7 that they knew about these laws. And in fact, the statutory law in
8 Nevada which requires that the company had at least a positive
9 surplus of 500,000 was referenced specifically in e-mails between the
10 Directors and other individuals, including the Uni-Ter folks.

11 So yes, in short answer to your question, Your Honor, we
12 do have several instances of knowing violations of the law. And I do
13 just -- please cut me off if I am rambling, Your Honor. But I do want
14 to say that it is a unique situation where we actually do, like I said,
15 have e-mails, letters from Uni-Ter's counsel, sending laws and
16 quoting statutory provisions saying, You should not operate while
17 impaired and you're doing that, you know, either impaired or
18 insolvent. And the Directors continue to operate in violation of those
19 laws -- knowing violation of the laws, Your Honor.

20 So yes, we do have substantial evidence of that.

21 THE COURT: Thank you.

22 All right. The opposition, please. First Ms. Ochoa and
23 then, Mr. Ogilvie, if you have one.

24 MS. OCHOA: Yes, Your Honor. You know, there is a
25 fundamental difference, in our opinion, about whether *Chur* is new

1 law. And we contend that it is absolutely not new law. Gross
2 negligence was never the standard for a violation for a breach of
3 fiduciary duty claim against the board of director in this state.

4 We -- in the 12(c) motions that we had filed, in the Motion
5 to Dismiss that we had filed, we provided you with trial court
6 decisions where those judges appropriately applied NRS 78.138.

7 And if you look at NRS -- the Nevada Supreme Court
8 cases, *In re AMERICO* and *Wynn versus 8th Judicial District Court*,
9 they properly cite NRS 78.138. So it's not like all of a sudden *Chur*
10 came out with this new standard that you have to absolutely plead
11 fraud and knowing violation of the law. Gross negligence -- it was
12 always there. It was always in that plain language of the statute.

13 And so the fact that the plaintiff didn't read the statute is
14 really not my fault.

15 Dicta is never the law. Cases of no precedence is not the
16 law.

17 And you know, I find it really interesting that
18 Mr. Hutchison wants to cite to Judge Navarro's District Court case in
19 June of 2020 where she said -- where she grants leave to amend
20 because of a change in the law in court. And that, you know, it's
21 really telling that he's going to rely on a trial court decision, because
22 the trial court decisions do not reflect what's going on in those
23 cases.

24 That case *Barachi versus Vincent*, I understand what that
25 case is about. I represent Mr. Vincent. That case has always been

1 about fraud. And that -- I filed the Motion to Dismiss because I
2 asserted that fraud claims are unassignable. In that complaint, fraud
3 was already alleged.

4 So it's not like Judge Navarro was giving this party the
5 means to refile a totally new different case with new different
6 standards. The case was in its infancy. Fraud was already pled.

7 So the point being, it's not okay to rely on other trial court
8 decisions. That's not -- that does not establish the law.

9 The other -- you know, what plaintiff continuously seems
10 to argue is that they could have never filed relief to amend before
11 *Chur*. And that's just simply untrue. Time and time again, I told
12 this -- the plaintiff that gross negligence is not the standard.

13 In 2017, the Commissioner of Insurance actually heard
14 that. In a different District Court case, the Commissioner of
15 Insurance filed a breach of fiduciary duty claim arising out of the
16 duty of care, alleging intentional misconduct, fraud, and a knowing
17 violation of the law. And that is one year before the Directors filed
18 their written petition; and that is two years before the Nevada
19 Supreme Court decided *Chur*.

20 Now, the plaintiff claims that they acted diligently, but we
21 know that just to be untrue. The facts that the plaintiff complains
22 about occurred during the period of 2004 through 2012. They had all
23 of these facts, these witnesses that they could have talked to, to
24 understand that if they so chose to allege that there was knowing
25 violations of law. And she even advised us that there was knowing

1 violations of the law.

2 But in 2014, they did not include that in their complaint. In
3 2016, when I told them gross negligence was not the standard, they
4 did not seek to leave to amend. In 2017, when there are -- when they
5 are filing for intentional misconduct, followed fraud and knowing
6 violations of the law in other District Courts, they did not seek leave
7 to amend.

8 They had all of these opportunities, and yet they waited
9 and they waited. And it's really telling because obviously it just
10 doesn't exist.

11 Plaintiff claims that in June of 2019 they sought leave to
12 amend by lifting the stay. And that -- again, that is just not true. In
13 March of 2019, when we filed our writ petition, we filed to stay the
14 case, and the plaintiff joined.

15 In June of 2019, the plaintiff apparently got anxiety about
16 how the five-year rule works and they fought to lift the stay. And to
17 clarify what we knew about existing case law and that how the
18 five-year rule gets pulled when the -- when a case is stayed. At that
19 time, the plaintiff did not move for leave to amend.

20 The plaintiff claims that they sought leave to amend, but
21 that's just simply is untrue. If you look at that June 2019 motion,
22 they only said, If we lose before the Nevada Supreme Court, then
23 we'll seek leave to amend. It doesn't say what they're going to leave
24 amend to. They just say, we're going to seek leave to amend.

25 Now that's not acting diligently. That's just doubling

1 down on faulty legal premises.

2 Acting diligently is when you have the facts, plead them;
3 seek leave to amend. When you were presented with written
4 discovery and when you were asked to be prepared to talk about all
5 of the things that you believe the defendant did incorrectly during a
6 deposition, come prepared and say it.

7 We provide you the transcript of the plaintiff's deposition
8 and all of their written responses to discovery. And nowhere,
9 nowhere do you see them ever saying that the Director committed
10 fraud, misconduct, or knowingly violated the law. And you have that
11 in the Opposition to the Motion for Leave to Amend.

12 The plaintiff claims that we -- that the Directors did not
13 establish prejudice. And again, that is just untrue. If leave were
14 granted, there's -- I had three or four months left of discovery. As set
15 forth in the opposition for the leave to amend, we would obviously
16 be amending our affirmative [indiscernible]. We would include
17 defenses such as the *in pari delicto* defense. And that's the defense
18 that, if we did anything wrong, it's because we relied to the
19 detriment of people -- of the plaintiff, such as the Division of
20 Insurance.

21 And you've seen, through the deposition transcripts that
22 we've provided, that there is numerous witnesses and documents
23 that are unavailable at this point. The plaintiff has [indiscernible]
24 that there are certain divisions of insurances of -- there's Division of
25 Insurance employees that are unavailable because they're either

1 retired or deceased.

2 And the Lewis and Clark former attorney, Connie
3 [indiscernible], also testified that some of the Division of Insurance
4 employees are unavailable because they're either deceased or
5 retired.

6 Ms. [Indiscernible] also testified that the law firm that she
7 worked at, Jones Vargas, when she represented Lewis and Clark,
8 does not exist anymore. And we all know that being in the legal
9 community. And that -- the documents from Jones Vargas no
10 longer -- where all of the e-mails do not exist anymore. She
11 [indiscernible] as much as she could, but there was no way to collect
12 everything because they're just simply gone.

13 So when you read the deposition transcripts, you get an
14 understanding that, in fact, because of the passage of time, there's a
15 lot of clouded memories. And that was -- and it's only going to be
16 worse now that it's two years later.

17 So finally, as this Court is aware, you know, passage of
18 time, people have passed. One of my defendants -- one of my
19 clients actually no longer is alive. Barbara Lumpkin passed away
20 prior to the stay of this case.

21 So it's absolutely prejudicial for the plaintiff to be granted
22 leave to amend, to now and only now tell us that they believe we
23 committed violations of the law.

24 So respectfully, we believe that this Court should deny the
25 Motion for Reconsideration and enter the findings of fact from

1 conclusions of law that we submitted to this Court previously
2 because it's pretty clear that the plaintiff intends to appeal this case.

3 THE COURT: Thank you.

4 And Mr. Ogilvie, do you have anything to add before I hear
5 from the plaintiff?

6 MR. OGILVIE: Sorry, Your Honor. I needed to take it off
7 mute. No, I have nothing to add to it.

8 THE COURT: Thank you.

9 Then Mr. Hutchinson, and Mr. Wirthlin, your reply, please.

10 MR. HUTCHISON: Your Honor, this is -- excuse me, this is
11 Mark Hutchison. Just let me -- and I don't want to -- I don't want to
12 repeat myself, but the counsel is just inaccurate in terms of arguing
13 that dicta could not be relied upon. This was not a precedential case.
14 Everybody in the world knew that *Shoen* was something that should
15 not be relied upon by parties when they were asserting claims
16 against directors of corporations.

17 I think the most telling point of that is that based on our --
18 based on our research, and certainly the Directors have pointed to
19 not a single decision prior to *Chur* finding that gross negligence did
20 not state a claim against directors of a corporation.

21 You know, even if you look at the Westlaw citation for
22 *Shoen*, it says it was abrogated by the *Chur* opinion. The Court itself
23 said that it was -- it was disavowing *Shoen*. If it was so clear to
24 everybody, it was so clear to this Court, it was so clear to the District
25 Courts, so clear to all the parties, why go to that extent and why

1 would the Court have to disavow its -- how to disavow its decision?
2 And why would there not be one single case on point that the
3 Directors could cite to, that would say that *Shoen* was bad law or
4 that somehow *Shoen* didn't support the gross negligence standard?

5 Your Honor, in fact, you know, counsel makes much of this
6 idea that we -- that she told us that the gross negligence standard
7 did not apply. But with all due respect, I don't know that we were
8 going to rely on opposing counsel to tell us what the law is. We're
9 relying what the Court tells us what the law is.

10 Exhibit 1, if you go back to that, it's the Court's order, back
11 in October of 2018. It's hereby ordered that the Director's Motion for
12 Judgment of the Pleading is denied. Why? The Court finds the
13 motion to deal with the same issues the Court addressed in 2016.
14 And while the Court recognizes that NRS 78.138 was amended in
15 2017, the Court believes that *Shoen* is still the controlling law
16 regarding Directors' personal liability, even with the additional case
17 law that's come down from the Nevada Supreme Court in 2017,
18 including *Wynn*.

19 So all the reasons that counsel has just given you as to
20 why we should have amended the complaint, why we should have
21 believed her argument that gross negligence didn't apply, is what
22 was argued previously, Your Honor, and was rejected by this Court.
23 And we relied on this Court's decision. We relied on the Supreme
24 Court's decision in *Shoen* that there's been a substantive change in
25 the law. Okay. Fair enough.

1 Fair enough -- fairness now dictates that we be given an
2 opportunity to amend the complaint and to comply now with the
3 new standard as set forth by the Court in *Chur*, Your Honor.

4 The other thing I would just make note of, Judge, is
5 counsel has spoken to prejudice. And every one of the points that
6 she makes is always present in every case that ever has to embrace
7 a new pleading. It's -- I think almost every one of the factors that she
8 just set forward in terms of clouded memories and fading views of
9 the case and the availability of witnesses, that happens in every
10 single case. It's going to happen now when we go to trial -- whether
11 or not the pleading is amended or not, those same factors are in play
12 for the Court.

13 So, Judge, under the standards of the Court, I think these
14 do apply in terms of the many pleadings under the case law, in
15 terms of what happens when there's been a substantive change in
16 the law.

17 We'd asked that the Court grant the Motion to Amend. If
18 counsel is so confident that there aren't any facts out there to
19 support our pleading, then she can engage in further motion
20 practice. But we ought to be given at least an opportunity to amend
21 our complaint, Your Honor. And we ask that the Motion for
22 Reconsideration be granted.

23 THE COURT: Thank you all. This is a Motion for
24 Reconsideration. And I realize that there's been a clarification by the
25 Supreme Court of the *Shoen* case. And the reason I didn't grant the

1 motion that was filed on July 2nd was simply because the complaint
2 goes back to December 23 of 2014. And I just didn't think it was fair
3 to the defendants to have to defend on a fourth amended complaint
4 when it was two months before the discovery deadline and we have
5 a five-year rule looming.

6 So I -- you know, I understand the hardship to the plaintiff
7 here, and I realize that. And I had more discretion earlier in the case
8 to amend -- and I almost always allow amendments because I want
9 matters to go forward on their merits. But I just don't think it's fair to
10 the defendants to allow the fourth amended complaint. It's a tough
11 call. And I -- you know, I've thought about it a lot. But I -- and I
12 realize, Mr. Hutchinson, the hardship to your client, but I just don't
13 think it's fair to the defendants.

14 And I'm going to deny the Motion to Reconsider.

15 Ms. Ochoa to prepare the --

16 Did you wish to comment?

17 MR. WIRTHLIN: If I could just add one clarifying remark.

18 THE COURT: Yes. Mr. Wirthlin. Of course.

19 MR. WIRTHLIN: The Court said -- thank you. The Court
20 said that -- first of all, in our reply, we did mention no fewer than
21 eight cases, including Judge Dawson, Judge Dew, Judge Dorsey,
22 who all said gross negligence is, you know, the basis for the law.

23 But technically, I believe the Court just mentioned that
24 there was two months left in discovery. And I don't know if that's
25 based on the scheduling trial order that was entered yesterday --

1 THE COURT: Yes.

2 MR. WIRTHLIN: -- but Mr. Ogilvie and I spoke about this
3 just before the hearing. We are all -- we are in agreement, based on
4 the -- Mr. Ogilvie, I believe, has submitted a trial, you know,
5 availability notice, requesting a March 8th setting --

6 THE COURT: Right.

7 MR. WIRTHLIN: -- and then discovery going back from
8 that. At the hearing [indiscernible] less than two weeks ago, the
9 Court granted the motion and set the trial for February 22nd, two
10 weeks back. So we moved those dates two weeks back, which
11 would put the discovery cutoff, Your Honor, at December 17th.

12 And we would submit that's more than sufficient time for
13 the Directors to do whatever they're going to do. And they certainly
14 can stipulate around the five-year rule if they feel that they need
15 additional time.

16 So with that clarification, I guess, I understand Your Honor
17 is inclined to rule it how she's going to rule. I guess the last thing I
18 would ask is if the Court is inclined to review that reply, we did file
19 that yesterday morning, and we did send a courtesy copy over. But I
20 understand.

21 THE COURT: I have my phone on a stand so that I can
22 give you my attention. I actually looked at it while I was listening to
23 the arguments, so I did -- I did have the ability to do that.

24 MR. WIRTHLIN: Thank you, Your Honor.

25 THE COURT: So I -- you know, I'm troubled with the

1 hardship to the plaintiff. And I would more than likely stay the case
2 if you take a writ on the issue.

3 MR. WIRTHLIN: Okay. Thank you.

4 MR. HUTCHISON: Okay, Your Honor. We'll consider that.
5 We greatly appreciate the Court's offer on that point.

6 THE COURT: Good enough.

7 MR. HUTCHISON: Thank you.

8 THE COURT: So Ms. Ochoa will prepare the order.
9 Plaintiff will have the ability to review and approve the form of that
10 order.

11 Mr. Ogilvie, do you wish to review and approve the form
12 of that order?

13 MR. OGILVIE: No, Your Honor. That's fine.

14 THE COURT: Good enough. So until I see you guys next,
15 everybody stay safe and stay healthy.

16 MR. OGILVIE: Your Honor, this is George Ogilvie. If I
17 could --

18 THE COURT: Yes.

19 MR. OGILVIE: -- address something else.

20 THE COURT: Of course.

21 MR. OGILVIE: Yesterday the Court issued a scheduling
22 order that included a discovery cutoff date, I believe, of October 19th.

23 As Mr. Wirthlin stated just a moment ago, we
24 had essentially agreed on discovery cutoff. I think there was
25 probably, I think you said it, a two-week difference between what

1 plaintiff proposed and what the Uni-Ter and the U S Re defendants
2 proposed. And Mr. Wirthlin circulated for our approval and a
3 proposed order granting the motion for preferential trial setting,
4 setting it for February 22nd, as the Court rules at the last hearing.

5 In that proposed order, it has a different discovery
6 schedule than what was set forth in the scheduling order issued by
7 the Court yesterday.

8 And primarily, my concern is the discovery cutoff date of
9 October 19th. The parties are proposing a December 17th discovery
10 cutoff date. And I just wanted to bring that to the Court's attention
11 and ask if the Court would reconsider the scheduling order that it
12 issued yesterday.

13 THE COURT: Of course. I wasn't aware that you guys had
14 come to an agreement on a different close of discovery deadline. I
15 was going on what we talked about on August 5th. The parties can
16 certainly stipulate to do that, and I'll adjust the scheduling order
17 accordingly.

18 MR. OGILVIE: Okay. Great. Thank you, Your Honor.

19 THE COURT: All right. Any other questions? Any other
20 comments before we adjourn?

21 All right, guys. So until I see you next, stay safe and stay
22 healthy.

23 MR. OGILVIE: Thank you, Your Honor.

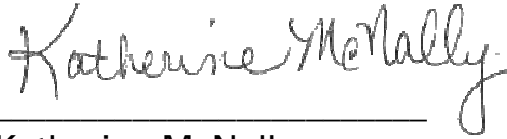
24 MR. HUTCHISON: Thank you, Your Honor.

25 [Proceeding concluded at 9:50 a.m.]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

* * * * *

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.

A handwritten signature in cursive script that reads "Katherine McNally". The signature is written in dark ink and is positioned above a horizontal line.

Katherine McNally
Independent Transcriber CERT**D-323
AZ-Accurate Transcription Service, LLC

OST

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
corne@hutchlegal.com

Attorneys for Plaintiff

ENTERED kl

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: XXVII

**MOTION TO STAY PROCEEDINGS
PENDING PETITION FOR WRIT OF
MANDAMUS
ON ORDER SHORTENING TIME**

Hearing on OST Requested

Plaintiff, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark
LTC Risk Retention Group ("Plaintiff"), by and through its attorneys, the law firm of Hutchison &
Steffen, PLLC, moves to stay the proceedings in this case pending resolution of its petition for a writ

1 of mandamus to the Nevada Supreme Court. Plaintiff intends to file its petition on entry of an order
2 denying Plaintiff's Motion for Partial Reconsideration of Motion for Leave to Amend Regarding
3 Director Defendants ("Reconsideration Motion") and denial of Plaintiff's Motion for Leave to File
4 Fourth Amended Complaint ("Motion to Amend").¹

5 The basis for the stay is that the Orders should be reversed as justice requires that leave to
6 amend be granted to Plaintiff due to the substantive change in the law effectuated by *Chur v. Eighth*
7 *Judicial Dist. Court*, 136 Nev. 68, 458 P.3d 336 (2020).

8 Plaintiff requests a stay for all purposes be imposed with respect to all proceedings with the
9 sole exception of the Court's ability to enter an order on the Reconsideration Motion. This Motion
10 is based on the following Memorandum of Points and Authorities, any argument the Court entertains
11 at a hearing on this matter, and all papers and pleadings on file herein.

12 DATED this 28th day of August, 2020.

13 **HUTCHISON & STEFFEN**

14 By /s/ Brenoch Wirthlin, Esq.

15 MARK A. HUTCHISON, ESQ.

16 PATRICIA LEE, ESQ.

17 BRENOCH R. WIRTHLIN, ESQ.

18 CHRISTIAN ORME, ESQ.

10080 West Alta Drive, Suite 200

Las Vegas, Nevada 89145

Attorneys for Plaintiff

27
28 ¹ The Court's orders on the Motion to Amend and Motion for Partial Reconsideration shall be referred to herein as the
"Orders."

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORDER SHORTENING TIME

The foregoing Motion to Stay Proceedings Pending Petition for Writ of Mandamus on Order Shortening Time will be heard in Department XXVII on the 3rd day of September, 2020, at 11:00 a.m.

Any Opposition to Plaintiff's Motion shall be filed with the Court and delivered to counsel for Plaintiff by the 1st day of September, 2020.

DATED this _____ day of _____, 2020.

Dated this 28th day of August, 2020
Nancy L Alf
DISTRICT COURT JUDGE

09B 6EF BA52 D577
Nancy Alf
District Court Judge

1 **DECLARATION OF BRENOCH R. WIRTHLIN, ESQ.**

2 I, Brenoch R. Wirthlin, Esq., declare under penalty of perjury:

3 1. I am an attorney at the law firm of Hutchison & Steffen, PLLC, counsel for Plaintiff
4 COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS
5 AND CLARK LTC RISK RETENTION GROUP.

6 2. On July 23, 2020, this Court heard and denied Plaintiff's Motion for Leave to File
7 Fourth Amended Complaint ("Motion to Amend").

8 3. Both the Order and the Notice of Entry of Order on the Motion to Amend were filed
9 and served on August 10, 2020.

10 4. Plaintiff filed its Motion for Partial Reconsideration of Motion for Leave to Amend
11 Regarding Director Defendants ("Motion for Partial Reconsideration") on August 14, 2020.

12 5. On August 26, 2020, the Court heard the Motion for Partial Reconsideration and
13 denied the motion, but stated that it would "more than likely stay the case if [Plaintiff] takes a writ
14 on the issue" of the denial of the Motion to Amend.²

15 6. Further, the Court stated that it was "troubled with the hardship to the plaintiff." *Id.*

16 7. Accordingly, for the reasons set forth herein, without limitation, Plaintiff intends to
17 file a writ petition with the Nevada Supreme Court.

18 8. A preferential trial date has been set for February 22, 2021.

19 9. Pursuant to the Court's operative scheduling order, discovery is set to close on
20 December 17, 2020.

21 10. Accordingly, time is of the essence in hearing the instant motion for a stay.

22 11. Setting the hearing on this Motion on shortened time will not prejudice Defendants.

23 12. Plaintiff requests that the hearing on its Motion be set at the Court's earliest
24 convenience for the week of August 31, 2020, if possible.

25 ///

26 ///

27 _____

28 ² See Transcript of August 26 Hearing, Exhibit 8 hereto, at pp. 20-21.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I declare under the penalty of perjury the foregoing is true and correct.

Dated this 27th day of August, 2020.

/s/ Brenoch R. Wirthlin, Esq.
BRENOCH R. WIRTHLIN, ESQ.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. LAW AND ARGUMENT**

3 NRAP 8(a)(1) generally requires a party to move for a stay in the district court pending
4 resolution of a petition for an extraordinary writ to the Nevada Supreme Court. *See Hansen v. Eighth*
5 *Jud. Dist. Court*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). When considering a stay, four factors
6 are considered:

7 (1) whether the object of the writ petition will be defeated if the stay is denied;

8 (2) whether the petitioner will suffer irreparable injury if the stay is denied;

9 (3) whether the real party in interest will suffer irreparable harm if a stay is granted; and

10 (4) whether the petitioner is likely to prevail on the merits of the writ petition.

11 *See* NRAP 8(c). No single factor is dispositive and "if one or two factors are especially strong, they
12 may counterbalance other weak factors." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89
13 P.3d 36, 38 (2004). The balancing of these interests warrants the imposition of a stay pending the
14 Supreme Court's consideration of the Plaintiff's writ petition.

15
16 **A. Plaintiff is likely prevail on the merits of its Writ Petition, and Defendants cannot**
17 **show that appellate relief is unattainable.**

18 "[A] movant does not always have to show a probability of success on the merits, the movant
19 must 'present a substantial case on the merits when a serious legal question is involved and show
20 that the balance of equities weighs heavily in favor of granting the stay." *Hansen*, 116 Nev. at 659,
21 6 P.3d at 987 (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)). Generally, writ relief is
22 available when a petition presents legal rather than factual issues. *Wynn Resorts, Ltd. v. Eighth*
23 *Judicial Dist. Court*, 133 Nev. 369, 373, 399 P.3d 334, 341 (2017). Extraordinary writ relief is
24 available when there is no plain, speedy, and adequate remedy at law. *Badger v. Eighth Jud. Dist.*
25 *Ct.*, 132 Nev. 396, 401, 373 P.3d 89, 93 (2016). Further, in *Adamson v. Bowker*, the Nevada
26 Supreme Court "subscribed completely" to the proposition that "[i]f the underlying facts or
27 circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded
28

1 an opportunity to test his claim on the merits.” 85 Nev. 115, 121, 450 P.2d 796, 800 (1969) (quoting
2 *Forman v. Davis*, 371 U.S. 178 (1962)).

3 Further, a “party opposing a stay motion can defeat the motion by making a strong showing
4 that appellate relief is unattainable.” *Mikohn*, 120 Nev. at 253, 89 P.3d at 40. Defendants can make
5 no such showing here.

6
7 **1. Plaintiff could not have moved to amend under the *Chur/Zagg* standard until the *Chur* Opinion was handed down.**

8 First, Plaintiff could not have moved to amend to conform to the *Chur* Opinion before the
9 *Chur* Opinion was entered. In fact, the *Chur* Opinion incorporates the Tenth Circuit’s decision in *In*
10 *re Zagg*, which did not even exist when Plaintiff filed its Complaint. A plaintiff cannot be expected
11 to anticipate a change in the law in the future which did not exist at the time of the original complaint.
12 This Court, as well as state and federal courts in Nevada, accepted the holding in *Shoen* that gross
13 negligence was a basis for individual liability against directors.³ In fact, in addition to denying prior
14 motions to amend – *see* orders dated February 25, 2016, and October 10, 2016,⁴ – this Court relied
15 on *Shoen* in denying the Directors’ Motion for Judgment on the Pleadings, noting that *Shoen* was the
16 controlling case law:

17
18 IT IS HEREBY ORDERED that the Director Defendants’ Motion for Judgment on
19 the Pleadings pursuant to NRCP 12(c) is DENIED. The Court finds the Motion deals
20 with the same issue the Court addressed in 2016. And while the Court recognizes
21 that NRS 78.138 was amended in 2017, **the Court believes that *Shoen v. SAC***
22 ***Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006) is still the controlling law**
23 **regarding Directors’ personal liability**, even with the additional case law that has
24 come down from the Nevada Supreme Court in 2017, including *Wynn Resorts v.*
25 *Eighth Judicial District Court*, 399 P.3d 334 (Nev. 2017).

26 ³ See *FDIC v. Jacobs*, No. 3:13-cv-00084-RCJ-VPC, 2014 WL 5822873, at *2, *4 (D. Nev. 2014); *FDIC v. Johnson*,
27 No. 2:12-CV-209-KJD-PAL, 2014 WL 5324057, at *3 (D. Nev. 2014); *FDIC v. Jones*, No. 2:13-cv-168-JAD-GWF,
2014 WL 4699511, at *9 (D. Nev. 2014); *FDIC v. Delaney*, No. 2:13-CV-924- JCM (VCF), 2014 WL 3002005, at *2
(D. Nev. 2014), *Jacobi v. Ergen*, No. 2:12-cv-2075-JAD-GWF, 2015 WL 1442223, at *4 (D. Nev. 2015).

28 ⁴ Plaintiff requests the Court take judicial notice of its docket pursuant to NRS 47.130-47.170.

1 See Order Denying Director Defendants’ Motion for Judgment on the Pleadings dated November 2,
2 2018, Exhibit 1 hereto, at p. 2; *see also* Transcript from October 11, 2018 hearing (filed 10/19/18),
3 at 20:19-21:8, included in Exhibit 1 (same). Further, in denying the Directors’ motion for
4 reconsideration on February 11, 2019, the Court specifically found as follows:

5 COURT FURTHER FINDS after review that Plaintiff’s Third Amended Complaint
6 has pleaded sufficient facts to rebut the business judgment rule and to state a cause
7 of action for a breach of the fiduciary duty of care pursuant to *Jacobi v. Ergen* and
8 *F.D.I.C. v. Jacobs*.

9 See Decision and Order (filed February 11, 2019) at p. 3.

10 As the Nevada Supreme Court recognized in the *Chur* Opinion, prior to the issuance of the
11 *Chur* Opinion in 2020, “federal courts in Nevada, as well as the district court in the case at bar, have
12 relied on *Shoen* to imply a bifurcated tract for establishing breaches of the fiduciary duties of care
13 and loyalty.” *Chur*, at p. 5. Numerous cases in both federal courts and state courts in Nevada, and
14 outside of Nevada, relied on *Shoen*’s holding that “[w]ith regard to the duty of care, the business
15 judgement rule does not protect the gross negligence of uninformed directors and officers.” *Shoen*
16 *v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006), *abrogated by Chur v. Eighth*
17 *Judicial Dist. Court in & for Cty. of Clark*, 136 Nev. Adv. Op. 7, 458 P.3d 336 (2020). In fact, the
18 Nevada Supreme Court recognized that this bifurcated approach to fiduciary duty claims had been
19 created by *Shoen* and has “misled” those relying upon it:

20 We are concerned that our language in *Shoen has misled lower courts* about
21 the law surrounding individual liability for directors and officers in Nevada...

22 In denying the Directors’ motion, the district court relied on our decision
23 in *Shoen*...

24 Thus, we disavow *Shoen* to the extent it implied a bifurcated approach to
25 duty-of-care and duty-of-loyalty claims...

26 *Id.*, at pp. 5-8. Yet, the “bifurcated approach” set forth in *Shoen* was exactly what this Court – and
27 numerous other courts and judges, including Chief Judge Du, Judge Dawson, Judge Dorsey, Judge
28

1 Mahan, Judge Jones, as well as others outside the state – relied on in confirming this was the
2 controlling law in Nevada:⁵

- 3 • [Chief Judge Du] *McDonald v. Palacios*, 2016 WL 5346067, at *20 (D. Nev. Sept.
4 23, 2016) (citing *Shoen* for the proposition that “**the business judgment rule ‘does not protect the gross negligence of uninformed directors and officers’**”)
- 5 • [Judge Dawson] *F.D.I.C. v. Johnson*, 2014 WL 5324057, at *3 (D. Nev. Oct. 17,
6 2014) (citing *Shoen* for the proposition that “**the business judgment rule does not apply to claims of gross negligence, which constitutes a breach of the fiduciary duty of care**”)
- 7 • [Judge Dorsey] *F.D.I.C. v. Jones*, 2014 WL 4699511, at *10 (D. Nev. Sept. 19, 2014)
8 (citing *Shoen* for the proposition that the business judgment rule “**does not protect the gross negligence of uninformed directors and officers**”)
- 9 • [Judge Mahan] *F.D.I.C. v. Delaney*, 2014 WL 3002005, at *2 (D. Nev. July 2, 2014)
10 (finding that *Shoen* and federal law work in tandem for authorization for the “**FDIC to sue directors for gross negligence**”)
- 11 • [Judge Jones] *F.D.I.C. v. Jacobs*, 2014 WL 5822873, at *4 (D. Nev. Nov. 10, 2014)
12 (citing *Shoen* and finding that “[i]n Nevada, the business judgment rule defines the line between unactionable ordinary negligence and actionable gross negligence”)
- 13 • [Judge Dorsey] *Jacobi v. Ergen*, 2015 WL 1442223, at *4 (D. Nev. March 30, 2015)
14 (citing *Shoen* for the proposition that a “**director’s misconduct must rise at least to the level of gross negligence to state a breach-of-the-fiduciary-duty-of-due-care claim**”)
- 15 • *In re Galectin Therapeutics, Inc. Derivative Litigation*, 2015 WL 12806566, at *4–5
16 (N.D. Ga. Dec. 30, 2015) (citing *Shoen* for the proposition that “[w]ith regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers”)
- 17 • *Taneja v. FamilyMeds Group, Inc.*, 2009 WL 415454, at *8 (Conn. Jan. 16, 2009)
18 (citing *Shoen* and finding that plaintiffs must “**provide a sufficient factual basis in their attempt to show that the defendants acted with gross negligence**, in bad faith or in some other deficient manner which would strip them of the business judgment rule protection”)

19 The Directors cannot point to a single decision prior to *Chur* finding that gross negligence
20 did not state a claim against directors of a corporation. Even the Westlaw citation to *Shoen*, above,
21 states that it was “abrogated” by the *Chur* Opinion, which was necessary because prior to *Chur*,
22

23
24
25
26
27
28 ⁵ The cited cases are not intended to be an exhaustive list of all courts relying on the relevant language in *Shoen* regarding gross negligence constituting a claim against directors.

1 whether intentionally or not, the Nevada Supreme Court created a bifurcated approach to duty of care
2 claims.

3 In fact, *Chur* sets forth a new standard for determining the definition of “intentional” and
4 “knowing” for determining whether a director’s or officer’s act or failure to act constitutes a breach
5 of fiduciary duties. *See Chur*, 136 Nev. Adv. Op. at 11 (“We agree with and adopt the Tenth Circuit’s
6 definition of ‘intentional’ and ‘knowing,’ as enunciated in *Zagg*, for determining whether a
7 ‘director’s or officer’s act or failure to act constituted a breach of his or her fiduciary duties...” The
8 decision in *Zagg* was not even handed down until 2016. *See In re Zagg Inc., S’holder Derivative*
9 *Action*, 826 F.3d 1222, 1232 (10th Cir. 2016). Plaintiff filed its complaint in December, 2014. It is
10 impossible for Plaintiff to have met the *Zagg* standard, adopted in *Chur*, at the time it filed its
11 complaint.

12 When the Nevada Supreme Court disavowed the language in *Shoen* creating the bifurcated
13 approach to liability – which it did not do until the *Chur* Opinion in early 2020 – Plaintiff moved to
14 amend its complaint within 48 hours of the stay being lifted, and within the time set by this court to
15 file a motion to amend. It is a grave miscarriage of justice to not even permit the Plaintiff to amend
16 its claims against the Directors to meet the new standard under these circumstances.

17 Numerous other courts facing this situation, including the Ninth Circuit, have held that when
18 underlying law is changed, it is only fair and just to permit amendment. For example, in *Moss v.*
19 *U.S. Secret Serv.*, 572 F.3d 962 (9th Cir. 2009), the Court held as follows:

20 **Plaintiffs contend that, if the Supreme Court's intervening decisions**
21 **altered pleading standards in a meaningful way, and their complaint is found**
22 **deficient under those standards, they should be granted leave to amend.** Courts
23 are free to grant a party leave to amend whenever “justice so requires,” Fed.R.Civ.P.
24 15(a)(2), and requests for leave should be granted with “extreme liberality.” ... “
25 **‘Dismissal without leave to amend is improper unless it is clear, upon de novo**
review, that the complaint could not be saved by any amendment.’ ” *Gompper v.*
VISX, Inc., 298 F.3d 893, 898 (9th Cir.2002) (quoting *Polich v. Burlington N., Inc.*,
942 F.2d 1467, 1472 (9th Cir.1991)).

26 We agree with Plaintiffs that they should be granted leave to amend. Prior to
27 *Twombly*, a complaint would not be found deficient if it alleged a set of facts
28 consistent with a claim entitling the plaintiff to relief. ... Under the Court's latest
pleadings cases, however, the facts alleged in a complaint must state a claim that is
plausible on its face. As many have noted, this is a significant change, with broad-
reaching implications. ... **Having initiated the present lawsuit without the benefit**

1 **of the Court's latest pronouncements on pleadings, Plaintiffs deserve a chance**
2 **to supplement their complaint with factual content in the manner that *Twombly***
3 **and *Iqbal* require.**

4 *Id.*, 572 F.3d 962 at 972 (internal citations omitted) (emphasis added); *see also Darney v. Dragon*
5 *Prod. Co., LLC*, 266 F.R.D. 23 (D. Me. 2010) (“Maine court's recent change in law relating to strict
6 liability claims arising from blasting activity constituted good cause to allow homeowners leave to
7 amend complaint to add such a claim against operator of a cement-manufacturing plant near their
8 home, even though leave was not sought until well after the scheduling order deadlines for
9 amendment of the pleadings and designation of experts, beyond the close of the discovery period,
10 and months after rulings on summary judgment issues”); *Gregory v. Harris-Teeter Supermarkets,*
11 *Inc.*, 728 F. Supp. 1259 (W.D.N.C. 1990) (Civil rights plaintiff's motion to amend complaint and
12 second motion to amend complaint would be granted where each motion was filed immediately after
13 an apparent change in the law occurring after plaintiff had filed his complaint.).

14 Here, there was no way for the Federal courts, this Court, or Plaintiff to know of the *Chur*
15 Opinion, the disavowal of *Shoen*, or the adoption of the new *Zagg* standard, until the *Chur* Opinion
16 was issued. To deny even the ability to amend in this case with respect to the Directors after the
17 *Chur* Opinion is to hold Plaintiff to a standard of clairvoyance requiring Plaintiff to anticipate what
18 neither this Court, nor other courts in Nevada could have anticipated. Just as the plaintiffs in the
19 above cases, Plaintiff herein “initiated the present lawsuit without the benefit” of the *Chur* Opinion,
20 and just as to the plaintiffs in the above cases, Plaintiff herein deserves a chance to amend its
21 complaint with factual content in the manner that the *Chur* and adopted *Zagg* opinions require.

22 Moreover, any claim of prejudice by the Directors is meritless. This court denied the
23 Directors’ motions to dismiss beginning February 25, 2016. The Directors could have filed their
24 petition for a writ any time after that if they so chose. They did not. They delayed for over three (3)
25 years and did not file their writ petition until March 13, 2019. Any prejudice is of the Directors’ own
26 making, and should not form the basis for denial of the Motion to Amend. *See Jacobs v. McCloskey*
27 *& Co.*, 40 F.R.D. 486, 488 (E.D. Pa. 1966) (“To the extent that the complaining party causes the
28

1 prejudice, it is not, in the judgment of this Court, ‘undue’ within the meaning of the rule.”).⁶
2 Accordingly, Plaintiff respectfully submits the Court’s decision on the Motion to Amend and
3 Reconsideration Motion constitutes an abuse of discretion.

4
5 **2. The Motion to Amend was timely filed within the deadline set by this Court.**

6 Second, the Motion to Amend was timely filed. The Court’s operative scheduling order
7 entered January 29, 2019 (“Operative Scheduling Order”), attached hereto as Exhibit 2, provided
8 that the deadline to move to amend or add parties was March 15, 2019. *See* Exhibit 2 hereto, at p. 2.
9 However, on March 13, 2019, the Directors filed their Petition for Writ of Mandamus (“Directors’
10 Writ”) with the Nevada Supreme Court. The Directors could have filed a writ petition at any time,
11 but chose instead to wait until March 13, 2019, despite their numerous motions to dismiss having
12 been denied beginning in early 2016.

13 On March 14, 2019, the Directors’ Motion for Stay was heard and the stay requested by the
14 Directors (“Stay”) was granted by this Court. At that time, one judicial day remained for the parties
15 to move to amend. The notice in lieu of remittitur with respect to the *Chur* petition proceedings was
16 not issued until June 16, 2020. In the Court’s Clarification Order, the Court expressly stated that
17 “the parties shall have to and including July 2, 2020, in order to move to amend pleadings.” The
18 Court lifted the Stay on July 1, 2020, and Plaintiff filed its Motion to Amend on July 2, 2020, within
19 the deadline set by this Court and the one day remaining under the Operative Scheduling Order.
20 Other parties also filed a motion to amend on the same day, which this Court did not find to be
21 untimely. It is unjust and unfair for a party to move to amend within the time frame set by a court,
22 only to have the court then determine the motion to be untimely.

23 Further, the notice in lieu of remittitur regarding the Directors’ Writ Petition was not issued
24 until **June 16, 2020**. At a hearing **two days later** (because the parties had stipulated the Stay
25 remained in effect until the hearing on June 18, 2020) the Court accurately observed that “there are
26

27
28 ⁶ Moreover, the Directors have admitted that the Fourth Amended Complaint is “not based on new facts.” See opposition filed by Director Defendants at p. 3, ll. 8-11.

1 challenges to all of the parties at this point in securing witnesses, there's inability to travel, some
2 people are not working or working from home and not as efficient" and that therefore "to be fair to
3 both sides, July 1st needs to be the date" for the Stay to be lifted. *See* Transcript from June 18, 2020,
4 hearing on Motion for Clarification, Exhibit 3 hereto, at p. 10, ll. 1-5. The Stay was lifted on July 1,
5 2020, and Plaintiff filed its Motion to Amend within 48 hours afterward, on July 2, 2020. The
6 Plaintiff, like every court citing to and relying on the relevant portion of *Shoen* concerning gross
7 negligence, did not and could not have known what the outcome of the Writ Petition, or the Petition
8 for Rehearing, would be until the Supreme Court handed down its rulings.

9 Moreover, Plaintiff tried to move this case forward and moved to lift the Stay on July 2, 2019.
10 This Court denied Plaintiff's motion. Respectfully, it is unfair and an abuse of discretion for
11 Plaintiff's motion to lift the Stay and move the case forward to be denied, then to have a finding of
12 delay.⁷

13 **B. Plaintiff Will Suffer Irreparable Harm and the Object of the Writ Petition Will**
14 **be Defeated if a Stay is Denied**

15 These two factors in the analysis can be considered together and weigh in favor of a stay.
16 "Although irreparable or serious harm remains a part of the stay analysis, this factor will not
17 generally play a significant role in the decision whether to issue a stay." *Mikohn*, 120 Nev. at 253,
18 89 P.3d at 39. A stay is warranted where a party is effectively deprived of a remedy from the Court's
19 ruling. *Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 193, 561 P.3d 1342, 1344 (1977),
20 *declined to follow on other grounds by Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350,
21 891 P.2d 1180, 1183 (1995).

22 Here, Plaintiff seeks a writ to compel the Court to permit Plaintiff to amend. This is a legal
23 issue that will have a dispositive impact on Plaintiff's entire case and will dramatically impact the
24

25 ⁷ It bears noting that it was Directors' counsel who proposed a "global mediation" (Exhibit 4), then postponed it multiple
26 times (Exhibits 5 and 6), then unilaterally withdrew from the mediation (Exhibit 7). Subsequently, the Directors spent
27 nearly another year filing multiple motions to dismiss (*see* the Directors' motions to dismiss/supplements filed October
28 11, 2015, April 18, 2016, July 18, 2016, and September 9, 2016), finally answering the third amended complaint on
October 21, 2016.

1 proceedings going forward, including trial in this matter. This is not something for which the Plaintiff
2 has "a plain, speedy and adequate remedy at law." *Millen v. Eighth Judicial Dist. Court*, 122 Nev.
3 1245, 1250-51, 148 P.3d 694, 698 (2006). That is particularly true here where the Nevada Supreme
4 Court has announced that it determines "in each particular case whether a future appeal is *sufficiently*
5 *adequate and speedy* by considering a number of factors, including 'the underlying proceedings'
6 status, the types of issues raised in the writ petition, and whether a future appeal will permit [the
7 Nevada Supreme Court] to meaningfully review the issues presented.' *Beazer Homes Holding Corp.*
8 *v. Eighth Judicial Dist. Court*, 128 Nev. 723, 730, 291 P.3d 128, 133 (2012).

9 Here the purpose of Plaintiff's writ petition is to determine whether it can be allowed to
10 amend when there is a substantive change in the underlying law upon which its complaint was
11 based, and when it timely filed its motion to amend. If the Directors are permitted to be dismissed,
12 this issue is not one that can be fairly and effectively reviewed by the Supreme Court at a later
13 point in time. Further, at the hearing on the Reconsideration Motion, this Court acknowledged the
14 "hardship to Plaintiff" effectuated by the Court's decision, which the Court stated was "troubling."
15 See Transcript, Exhibit 8 hereto, at pp. 20-21

16 In addition, Plaintiff will suffer irreparable harm absent a stay and without the Supreme
17 Court's guidance. Of course, ordinary litigation costs alone do not constitute irreparable harm.
18 *Mikohn*, 120 Nev. at 253, 89 P.3d at 39. However, without the Supreme Court's intervention, the
19 Plaintiff will proceed to trial without necessary parties, and the remaining defendants will surely
20 attempt to escape liability for their wrongs by using the "empty chair" defense the Court's Orders
21 create.

22 **C. Defendants will not suffer irreparable or serious injury if the stay is granted.**

23 This factor "will not generally play a significant role in the decision whether to issue a stay."
24 *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004). As the *Mikohn* court
25 acknowledged:

26
27 Normally, the only cognizant harm threatened to the parties is increased litigation
28 costs and delay. We have previously explained that litigation costs, even if
potentially substantial, are not irreparable harm. Similarly, a mere delay in pursuing
discovery and litigation normally does not constitute irreparable harm.

1 *Id.*

2 Defendants will not suffer irreparable harm or serious injury if the requested stay is granted.
3 Just as litigation costs alone do not constitute irreparable harm, neither does a delay in the
4 proceedings. *Mikohn*, 120 Nev. at 253, 89 P.3d at 39.

5 **II. CONCLUSION**

6 For all these reasons, Plaintiff respectfully requests that this Court should grant the Motion
7 to Stay Pending Petition for Writ of Mandamus on Order Shortening Time, and grant such other and
8 further relief as the Court deems appropriate.

9 DATED this 28th day of August, 2020.

10 **HUTCHISON & STEFFEN**

11 By /s/ Brenoch Wirthlin, Esq.

12 MARK A. HUTCHISON, ESQ.

13 PATRICIA LEE, ESQ.

14 BRENOCH R. WIRTHLIN, ESQ.

15 CHRISTIAN ORME, ESQ.

16 10080 West Alta Drive, Suite 200

17 Las Vegas, Nevada 89145

18 *Attorneys for Plaintiff*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this _____ day of _____, 2020, I caused the document entitled **MOTION TO STAY PROCEEDINGS PENDING PETITION FOR WRIT OF MANDAMUS ON ORDER SHORTENING TIME** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

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

INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT 1

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

PA003565



FENNEMORE CRAIG, P.C.
JAMES L. WADHAMS, ESQ.
Nevada Bar No. 1115
BRENOCH WIRTHLIN, ESQ.
Nevada Bar No. 10282
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Telephone: (702) 692-8000
Facsimile: (702) 692-8099
jwadhams@fclaw.com
bwirthlin@fclaw.com
Attorneys for Plaintiff

DISTRICT COURT OF NEVADA
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

Case No.: A-14-711535-C

Dept. No.: XXVII

**ORDER DENYING DIRECTOR
DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS
PURSUANT TO NRCP 12(c)**

Date of Hearing: October 11, 2018
Time of Hearing: 9:30 a.m.

This matter came before the Court for hearing on October 11, 2018; Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels' (collectively, the "Directors" or "Director Defendants") having filed their Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) ("Motion") on August 14, 2018; Plaintiff having filed its opposition to the Motion on September 19, 2018; the Director Defendants having filed their reply in support of the Motion on October 4, 2018; J. William Ebert, Esq., and Angela T. Ochoa, Esq., having appeared on behalf of the Director Defendants;

1 Brenoch Wirthlin and Dan Cereghino having appeared on behalf of the Plaintiff; George Ogilvie
2 having made an appearance on behalf of defendants Uni-ter Underwriting management Corp.,
3 Uni-ter Claims Services Corp., and U.S. Re Corp., the Court having read and considered all filed
4 pleadings regarding the Motion, having heard argument regarding the Motion, and being fully
5 advised regarding the same, good cause appearing,

6 IT IS HEREBY ORDERED that the Director Defendants' Motion for Judgment on the
7 Pleadings pursuant to NRCP 12(c) is DENIED. The Court finds the Motion deals with the same
8 issue the Court addressed in 2016. And while the Court recognizes that NRS 78.138 was
9 amended in 2017, the Court believes that *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d
10 1171 (2006) is still the controlling law regarding Directors' personal liability, even with the
11 additional case law that has come down from the Nevada Supreme Court in 2017, including *Wynn*
12 *Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 399 P.3d 334 (Nev. 2017).

13 DATED this 31 day of October, 2018.

14
15 
16 HONORABLE JUDGE NANCY ALLF

17
18 Submitted by:
19 FENMORE CRAIG, P.C.

20
21 Approved as to Form and Content:
22 LIPSON, NEILSON, COLE, SELTZER &
23 GARIN, P.C.

24
25 James Wadhams, Esq.
26 Brenoch Wirthlin, Esq.
27 Daniel Cereghino, Esq.
28 300 S. Fourth St., Suite 1400
Las Vegas, NV 89101
Attorneys for Plaintiff

J. William Ebert, Esq.
Angela Ochoa, Esq.
9900 Covington Cross Dr., Suite 120
Las Vegas, NV 89144
Attorneys for Director Defendants

25 Approved as to Form and Content:
26 MCDONALD CARANO LLP

27 
28 George Ogilvie, III, Esq.
Attorneys for Uni-Ter Defendants and U.S. Re Corp.

1 Brenoch Wirthlin and Dan Cereghino having appeared on behalf of the Plaintiff; George Ogilvie
2 having made an appearance on behalf of defendants Uni-ter Underwriting management Corp.,
3 Uni-ter Claims Services Corp., and U.S. Re Corp. the Court having read and considered all filed
4 pleadings regarding the Motion, having heard argument regarding the Motion, and being fully
5 advised regarding the same, good cause appearing,

6 IT IS HEREBY ORDERED that the Director Defendants' Motion for Judgment on the
7 Pleadings pursuant to NRCP 12(c) is DENIED. The Court finds the Motion deals with the same
8 issue the Court addressed in 2016. And while the Court recognizes that NRS 78.138 was
9 amended in 2017, the Court believes that *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d
10 1171 (2006) is still the controlling law regarding Directors' personal liability, even with the
11 additional case law that has come down from the Nevada Supreme Court in 2017, including *Wynn*
12 *Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 399 P.3d 334 (Nev. 2017).

13 DATED this ____ day of October, 2018.

14
15
16 HONORABLE JUDGE NANCY ALLF

17 Submitted by:
18 FENNEMORE CRAIG, P.C.

Approved as to Form and Content:
LIPSON, NEILSON, COLE, SELTZER &
GARIN, P.C.



20
21 James Wadhams, Esq.
22 Brenoch Wirthlin, Esq.
23 Daniel Cereghino, Esq.
300 S. Fourth St., Suite 1400
Las Vegas, NV 89101
Attorneys for Plaintiff

J. William Ebert, Esq.
Angela Ochoa, Esq.
9900 Covington Cross Dr., Suite 120
Las Vegas, NV 89144
Attorneys for Director Defendants

24
25 Approved as to Form and Content:
26 MCDONALD CARANO LLP

27
28 George Ogilvie, III, Esq.
Attorneys for Uni-Ter Defendants and U.S. Re Corp.



1 RTRAN

2

3

4

5

DISTRICT COURT

6

CLARK COUNTY, NEVADA

7

8

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

) CASE NO: A-14-711535-C

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

DEPT. XXVII

10

Plaintiff(s),

11

vs.

12

ROBERT CHUR,

13

Defendant(s).

14

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

15

THURSDAY, OCTOBER 11, 2108

16

RECORDER'S TRANSCRIPT OF PROCEEDINGS

17

RE: ALL PENDING MOTIONS

18

APPEARANCES:

19

20

For the Plaintiff(s):

DANIEL S. CEREGHINO, ESQ.
BRENOCH R. WIRTHLIN, ESQ.

21

22

For the Defendant(s):

J. WILLIAM "BILL" EBERT, ESQ.
ANGELA T. OCHOA, ESQ.
GEORGE F. OGILVIE III, ESQ.

23

24

25

RECORDED BY: BRYNN GRIFFITHS, COURT RECORDER

1 **LAS VEGAS, NEVADA; THURSDAY, OCTOBER 11, 2018**

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

3
4 THE COURT: And I thank everyone for your patience. You
5 were -- I wanted to give you guys the most time this morning
6 because your legal issues were fairly meaty. So thank you for your
7 patience in waiting.

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

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

11 THE COURT: Thank you.

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

14 THE COURT: Thank you.

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

17 THE COURT: Thank you.

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

20 THE COURT: Thank you.

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

23 THE COURT: Thank you very much. We --

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

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

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

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

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

18 THE COURT: Thank you.

19 This is the Board of Directors Defendants' Motion for
20 Judgment on the Pleadings pursuant to NRS -- I'm sorry -- NRC
21 12(c), the motion will be denied for the following reasons: This is the
22 same issue I looked at in 2016. And while I realize that 78.138 was
23 amended in 19 -- or 2017, I believe that the Shoen v. SAC is still the
24 controlling law, and that's even with the decision that came down in
25 2017, Wynn Resorts v. Eighth Judicial District Court, 399 Pacific 3rd

1 334.

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

3 Did you have something to add?

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

5 MR. EBERT: Beg your pardon, Your Honor.

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

9 Did you have something to say, you guys?

10 MS. OCHOA: No, no.

11 THE COURT: No. Okay. Very good.

12 MR. WIRTHLIN: Thank you, Your Honor.

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

15 MR. WIRTHLIN: Yes, Your Honor.

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

21 MR. WIRTHLIN: We --

22 MR. CEREGHINO: We've tried.

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

1 change. We'll see.

2 THE COURT: Yeah. Thank you all.

3 MR. WIRTHLIN: Thank you, Your Honor.

4 MR. CEREGHINO: Thank you, Your Honor.

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

9 MR. WIRTHLIN: No opposition, Your Honor.

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

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

15 MR. WIRTHLIN: Thank you, Your Honor.

16 THE COURT: Thank you, both.

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

18 * * * * *

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

22

23

24

25



Shannon D. Romero
Court Recorder/Transcriber
CET**D324

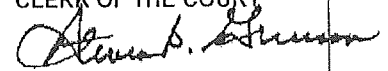
INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT 2

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

PA003574



1 **ORDG**
2 LIPSON NEILSON, P.C.
3 JOSEPH P. GARIN, ESQ.
4 Nevada Bar No. 6653
5 ANGELA T. NAKAMURA OCHOA, ESQ.
6 Nevada Bar No. 10164
7 JONATHAN K. WONG, ESQ.
8 Nevada Bar No. 13621
9 9900 Covington Cross Drive, Suite 120
10 Las Vegas, Nevada 89144
11 (702) 382-1500 - Telephone
12 (702) 382-1512 - Facsimile
13 jgarin@lipsonneilson.com
14 aocchoa@lipsonneilson.com
15 jwong@lipsonneilson.com
16 Attorneys for Defendants/Third-Party
17 Plaintiffs Robert Chur, Steve Fogg,
18 Mark Garber, Carol Harter,
19 Robert Hurlbut, Barbara Lumpkin,
20 Jeff Marshall, and Eric Stickels

21 **DISTRICT COURT**
22 **CLARK COUNTY, NEVADA**

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

27 Plaintiff,

28 vs.

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

38 Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 27

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

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

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

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

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

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

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

///

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

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

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

6
7 DATED this 25 day of January, 2019.

8
9 Nancy L. Allf
JUDGE NANCY ALLF

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

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

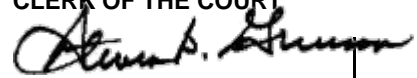
INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT 3

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

PA003578



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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

Plaintiff,)

vs.)

ROBERT CHUR, et al,)

Defendants.)

CASE NO. A-14-711535-C

DEPT NO. XXVII

**Transcript of
Proceedings**

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

PLAINTIFF'S MOTION FOR CLARIFICATION ON ORDER SHORTENING TIME

THURSDAY, JUNE 18, 2020

APPEARANCES:

FOR THE PLAINTIFF:

BRENOCH WIRTHLIN, ESQ.

FOR THE DEFENDANTS:

GEORGE F. OGILVIE III, ESQ.

ANGELA T. NAKAMURA OCHOA, ESQ.

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

PA003579

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

2 (Court was called to order)

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

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

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

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

15 THE COURT: Thank you.

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

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

20 THE COURT: Oh, right.

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

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

24 Mr. Wirthlin, are you --

25 MR. OGILVIE: Yes.

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

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

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

8 MR. OGILVIE: Go ahead, Angela.

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

10 MR. OGILVIE: No, go ahead.

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

18 MR. WIRTHLIN: Hello?

19 THE COURT: Okay. So --

20 MR. WIRTHLIN: Hello, Your Honor.

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

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

1 called in through my cell phone.

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

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

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

10 Is that correct, Ms. Ochoa?

11 MS. OCHOA: That's correct.

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

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

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

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

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

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

16 THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 THE COURT: Thank you.

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

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

13 THE COURT: Thank you.

14 And, Mr. Wirthlin, a brief reply.

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

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

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

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

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

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

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

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

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

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

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

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

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

18 MS. OCHOA: Thank you.

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

20 * * * * *

21

22

23

24

25

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**



JULIE POTTER
TRANSCRIBER

INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT 4

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

PA003590

From: Joe Garin [<mailto:JGarin@lipsonneilson.com>]
Sent: Monday, March 23, 2015 11:42 AM
To: NIELSON, KARL; WIRTHLIN, BRENOCH
Cc: Darnell Lynch
Subject: Introduction re: COI v Chur, et al, case no. A14-711535C

Karl and Brencoch:

I have been asked to represent Chur, Fogg, Garber, Harter, Hurlbrut, Lumpkin, Marshall and Stickels in the referenced matter. All of my clients have been served and I would like to explore adding parties, early mediation and setting a date for an answer or other responsive pleadings.

First, I'm wondering if you will be adding Sandy Elsass and/or Curtis Sitterson as defendants. Based on initial discussions with some of my clients, it seems that one or both should have been included as defendants.

Second, do you have any interest in pursuing an early, global mediation? If yes, I would like to put the brakes on defense expenses sooner vs. later if there is a shot with mediation.

Third, can we agree to enlarge the time for a response from my clients to Friday May 1, 2015 while we sort out other issues?

Thank you for your courtesy and attention to this matter. Please let me know your thoughts.

Lipson|Neilson
COLE, SELTZER, GARIN, P.C.
Attorneys and Counselors at Law

Joseph P. Garin, Esq.
Lipson, Neilson, Cole, Seltzer & Garin, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144

PA003591

INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT 5

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

PA003592

From: Darnell Lynch <DLynch@lipsonneilson.com>
Sent: Wednesday, April 01, 2015 5:05 PM
To: NIELSON, KARL; Joe Garin; WIRTHLIN, BRENOCH
Cc: LANDIS, CHERYL
Subject: RE: Introduction re: COI v Chur, et al, case no. A14-711535C

Dear Mr. Nielson:

On behalf of Joe Garin, thank you for your email. Unfortunately Mr. Garin's calendar is booked for the coming months; we would like to propose the 2nd week of June for an early global mediation with Judge Jackie Glass at Private Trials. Mr. Garin and Judge Glass are both available on June 9, 10, or 11.

Please note we are working with the clients and carrier to confirm availability for these dates as well and we will get back to you as soon as possible. Several of the clients reside outside of Nevada and will have to participate by phone. In the meantime, please let us know if you agree to our recommendation of Judge Glass and whether one of these dates work for you.

Best regards,

Lipson|Neilson
COLE, SELTZER, GARIN, P.C.
Attorneys and Counselors at Law

Darnell Lynch
Legal Assistant to Joseph P. Garin, Esq.
Lipson, Neilson, Cole, Seltzer & Garin, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
702-382-1500 Ext. 118
702-382-1512 (fax)
E-Mail: dlynch@lipsonneilson.com
Website: www.lipsonneilson.com

OFFICES IN NEVADA, MICHIGAN & ARIZONA

CONFIDENTIALITY NOTICE

This message is confidential, intended only for the named recipient(s) and may contain information that is privileged, attorney work product or exempt from disclosure under applicable law. If you are not the intended recipient(s), you are notified that any disclosure, copying, distribution or any action taken or omitted to be taken in reliance on the contents of this information is prohibited and may be unlawful. If you receive this message in error, or are not the named recipient(s), please notify the sender, delete this e-mail

PA003593

INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT 6

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

PA003594

From: Angela Ochoa <AOchoa@lipsonneilson.com>
Sent: Thursday, July 16, 2015 12:00 PM
To: NIELSON, KARL; Mindi Merritt; WADHAMS, JAMES; WIRTHLIN, BRENOCH; Joe Garin; Siria Gutierrez; jwilson@broadandcassel.com; gogilvie@Mcdonaldcarano.com
Cc: LANDIS, CHERYL
Subject: RE: Commissioner of Insurance for the State of Nevada vs. Churr, Robert et al., Uni-Ter Underwriting Management Corp. et al. - REF# 1260003426

All-

I just received notice from my client Jeff Marshall that he cannot make the 08/20 mediation due to a conflict. I would like to move this date and will work directly with Mindi to obtain a new date that would work with all of you.

Thank you,
Angela



Angela T. Nakamura Ochoa
Attorney
Lipson, Neilson, Cole, Seltzer & Garin, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, NV 89144-7052
(702) 382-1500
(702) 382-1512 (fax)
E-Mail: aechoa@lipsonneilson.com
Website: www.lipsonneilson.com

OFFICES IN NEVADA & MICHIGAN

*

CONFIDENTIALITY NOTICE

This message is confidential, intended only for the named recipient(s) and may contain information that is privileged, attorney work product or exempt from disclosure under applicable law. If you are not the intended recipient(s), you are notified that any disclosure, copying, distribution or any action taken or omitted to be taken in reliance on the contents of this information is prohibited and may be unlawful. If you receive this message in error, or are not the named recipient(s), please notify the sender, delete this e-mail from your computer, and destroy any copies in any form immediately. Receipt by anyone other than the named recipient(s) is not a waiver of any attorney-client, work product, or other applicable privilege.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the Internal Revenue Service, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, by any person for the purpose of (i) avoiding tax-related penalties or (ii) promoting, marketing or recommending to another person any transaction or matter addressed in this communication.

PA003595

INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT 7

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

PA003596

JEFFREY T. NEILSON^{1,2,5}
JOSEPH P. GARIN^{1,2,3,5}
PHILLIP E. SELTZER^{1,2}
SHANNON D. NORDSTROM^{1,6}
J. WILLIAM EBERT¹
KALEB D. ANDERSON¹
STEPHEN G. KEIM^{1,7}
ANGELA T. NAKAMURA OCHOA¹
JESSICA A. GREEN¹
H. SUNNY JEONG¹
SIRIA L. GUTIERREZ^{1,6}
PETER E. DUNKLEY¹
KRISTOFER D. LEAVITT¹

1 ADMITTED IN NEVADA
2 ADMITTED IN MICHIGAN
3 ADMITTED IN ILLINOIS
4 ADMITTED IN NEW YORK
5 ADMITTED IN COLORADO
6 ADMITTED IN CALIFORNIA
7 ADMITTED IN PENNSYLVANIA
8 ADMITTED IN MASSACHUSETTS
9 ADMITTED IN MARYLAND
10 ADMITTED IN ARIZONA

LAW OFFICES
Lipson|Neilson
COLE, SELTZER, GARIN, P.C.
Attorneys and Counselors at Law

9900 COVINGTON CROSS DRIVE, SUITE 120
LAS VEGAS, NEVADA 89144

TELEPHONE (702) 382-1500
TELEFAX (702) 382-1512
www.lipsonneilson.com

E-MAIL: aochoa@lipsonneilson.com

November 2, 2015

BARRY J. LIPSON
(1955-2003)

STEVEN R. COLE²
THOMAS G. COSTELLO²
DAVID B. DEUTSCH²
STEVEN H. MALACH²
DAXTON R. WATSON¹⁰
KAREN A. SMYTH^{2,4}
C. THOMAS LUDDEN²
STUART D. LOGAN²
SANDRA D. GLAZIER²
MARY T. SCHMITT SMITH²
STARR HEWITT KINCAID²
MICHAEL H. ORCUTT¹⁰
SHAWN Y. GRINNEN²
SAMANTHA K. HERAUD^{2,8}
EMILY J. SCHOLLER²
CARLY R. KOLO^{2,9}
DAVID G. MICHAEL²
JOHN F. FYKE¹⁰

VIA EMAIL ONLY:

Karl Nielsen
Brennoch Wirthlin
Fennemore Craig Jones Vargas
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101
knielsen@fclaw.com
bwirthlin@fclaw.com

Re: ***NVDIC v. Chur, Fogg, et al.***
Case No. A711535
November 20, 2015 Mediation

Dear Mr. Nielsen and Mr. Wirthlin:

Please allow this letter to respond to yours dated October 16, 2015.

As you know, I requested a demand package in preparation of the mediation so that my clients could be prepared with the appropriate authority to bring and as a starting point for discussion at mediation. Unfortunately, the demand package provided no further insight as to potential liability and specific errors and omissions alleged against my clients than what was stated in the Complaint. I believed and hoped that as the holder of all of the relevant documents in this case that you would have provided a clearer picture as to where you believe there was liability against my clients.

At this point, I do not think a mediation on November 20, 2015 will lead to resolution. Based on the documentation and analysis provided, I will not be able to recommend to my clients to be prepared to resolve this case at the policy limits, which is what your demand package seems to suggest. In addition to questionable liability, this case is further complicated with the fact that there may not be coverage under the directors and officers policy. I am enclosing the two reservation of rights letters RSUI has issued to my clients.

PA003597

Nielsen
Wirthlin
November 2, 2015
Page 2

In an effort to resolve this case, I would like to nonetheless meet with you along with your client. Even if your client is not available, the adjuster for RSUI can be available to explain to you any issues with coverage, further a board member may be available to explain facts that may not have been quite so clear from the documents in your possession. These facts include but are not limited to the following: my clients received nominal compensation for their service on the board; board members continued to use independent insurance brokers to ensure that Lewis & Clark premiums were competitive; and that the board members-none who have ever operated an insurance company, reasonably relied upon the advice and representations of Uniter.

In conclusion, we will be withdrawing from the November 20, mediation. Please let me know if you would like to meet in person with my clients to discuss moving forward from this point and the coverage issues in this case. If you are interested, I propose a meeting at your office any time during the week of December 14, 2015.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

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



ANGELA NAKAMURA OCHOA

Enclosures: Letter dated March 9, 2015, Exhibit "1"
Letter dated October 14, 2015, Exhibit "2"

AO/kg/RS4246-098

cc: Joe Garin - via email
Jon Wilson - via email
George Ogilvie, III - via email

PA003598

INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT 8

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

PA003599

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

1 **LAS VEGAS, NEVADA, WEDNESDAY, AUGUST 26, 2020**

2 [Proceeding commenced at 9:19 a.m.]

3
4 THE COURT: Okay. So our next case then is
5 Commissioner versus Chur.

6 And let me have appearances, starting first with the
7 plaintiff.

8 MR. HUTCHISON: Good morning, Your Honor. This is
9 Mark Hutchison on behalf of the plaintiff.

10 THE COURT: Thank you.

11 MR. WIRTHLIN: Brenoch Wirthlin. And my firm is on the
12 phone as well, Your Honor.

13 THE COURT: Very good. Thank you both.

14 And for the defendants, let's take the -- first the board
15 members and then the company.

16 MR. OGILVIE: Good morning, Your Honor. Angela Ochoa
17 on behalf of the Director defendants Robert Chur, Steve Fogg, Mark
18 Garber, Carol Harter, Bob Hurlbut, Barbara Lumpkin, Jeff Marshall,
19 and Eric Stickels.

20 THE COURT: Thank you.

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

23 THE COURT: Thanks, everyone.

24 So I set this on an Order Shortening Time. And I have
25 read the motion and the opposition.

1 Did the plaintiff wish to reply before -- or do you want to
2 go forward today?

3 MR. WIRTHLIN: Your Honor, we're prepared to go forward
4 today.

5 THE COURT: All right. Any objection, Ms. Ochoa or
6 Mr. Ogilvie?

7 MS. OCHOA: No, Your Honor.

8 MR. OGILVIE: No, Your Honor.

9 THE COURT: Okay. All right.

10 So Mr. Hutchinson and Mr. Wirthlin, your motion, please.

11 MR. HUTCHISON: Your Honor, this is Mark Hutchison. I'll
12 be addressing the Court this morning. Thank you for hearing us on
13 an order shortening time.

14 Your Honor, really, the -- and you've been through the
15 papers. The motion really boils down to whether the Chur opinion
16 handed down this year is a substantive change in the law.

17 Now, the Director's argument really is largely based on the
18 point that the operative language is shown that the business
19 judgment rule doesn't protect gross negligence of uninformed
20 directors or officers.

21 It was just dicta. It was not the law in Nevada. Nobody
22 should be relying on this dicta. Nobody should have been viewing
23 this as a law in Nevada.

24 Your Honor, that's just not a viable legal position. It
25 certainly isn't what the Nevada Supreme Court acknowledged or

1 what this Court acknowledged or what federal courts within the
2 District of Nevada had acknowledged for many years.

3 You can see, Your Honor, the language of Chur. I know
4 that you've read it. This is an opinion obviously that relates to this
5 case. The Nevada Supreme Court there said, quote, Federal courts
6 of Nevada, as well as the District Court in this case, at bar, have
7 relied on challenge to imply a bifurcated tract for establishing
8 breaches of the fiduciary duties and of -- excuse me -- fiduciary
9 duties of care and loyalty.

10 Your Honor, we attached Exhibit 1 to our motion -- in fact,
11 your order, where you, in fact, recognize and state that thought and
12 believed that *Shoen* in that decision and that standard was, in fact,
13 the operative law in this case.

14 The Nevada Supreme Court went then to recognize that
15 the bifurcated approach, though, that it had set forth in *Shoen*
16 perhaps was misleading to the lower courts. It said, We're
17 concerned that our language in *Shoen* has misled the lower courts
18 about the law surrounding individual liability for directors and
19 officers.

20 The Nevada Supreme Court also said it denied the
21 Director's motion that you had relied upon the decision in *Shoen*.
22 The Nevada Supreme Court said that they then had to, quote,
23 disavow, close quote, *Shoen* to the extent that it applied a bifurcated
24 approach to the duty-of-care and the duty-of-loyalty claims.

25 So Your Honor, the Directors, in their opposition papers,

1 even admit that it's appropriate, it's understandable for a court to
2 grant -- to amend when a substantive change in the law has occurred
3 by which the parties could not have foreseen.

4 That's on page five of their opposition papers, Your Honor.

5 But their argument, though, is that the above change in
6 the law was not a change in the law -- that it was just dicta that we
7 all should have recognized for many, many years. And I guess it's
8 our -- it's on us that we didn't recognize that, even though this court
9 and the federal courts and other courts have relied on it for years.

10 Their argument is incomplete because they assert,
11 basically, Your Honor, that the fraud -- you know, knowing violation
12 of the law standard in the statute, Your Honor, 78.138 has always
13 existed. That's accurate. But *Chur* eradicated the bifurcated
14 approach by eliminating the gross negligence standard as a basis for
15 a cause of action.

16 So before *Chur*, a gross negligence or duty of care claim
17 was valid. After *Chur* only a fraud and knowing violation of the law
18 constitutes a valid claim.

19 Your Honor, this is an absolute substantive change in the
20 law, which neither this Court nor any of the numerous Courts that
21 have relied upon this decision could have foreseen for many years.
22 Certainly, Judge, if Your Honor and other Courts have not been be
23 able to foresee that change, how could the plaintiffs foresee this?

24 Judge, I can address the timeliness, as well. I know there
25 was a timeliness issue here. I'll just briefly -- unless the Court asks

1 me for specifics, I'll just briefly note that the motion was timely filed.
2 The Motion to Amend was filed within the timeframe that Your
3 Honor had set in the operative scheduling order. In the hearing on
4 June 18th, Your Honor had expressly stated that you would lift a stay
5 on July 1st, and that all parties had until July 2nd then to file the
6 Motion to Amend. We filed our motion on July 2nd, Your Honor.

7 And by the way, Uni-Ter defendants also filed their Motion
8 to Amend on the same day. Somehow Your Honor had ruled that
9 our motion was untimely, although the Uni-Ter motion was timely.
10 Your Honor --

11 THE COURT: When I said that -- Mr. Hutchinson, when I
12 said untimely, I knew you filed it on the deadline, but, you know, the
13 case is so old. That's what I meant.

14 MR. HUTCHISON: Oh, sure. Okay. I understand, Your
15 Honor. Okay.

16 And Your Honor, I know that -- I know that on that point
17 that the Directors have cited in their oppositions to this case,
18 AmeriStore which is -- excuse me, *AmeriSource*, which is 9th Circuit
19 decision. And they held that the basic proposition that, sure, even
20 though you can file it within the scheduling time, it can still be
21 untimely. *AmeriSource* is not done on all fours, not even close in
22 this case, Your Honor.

23 In that case, the plaintiff completely changed the factual
24 allegations. They said previously the part -- the product was good
25 and then it was bad, without any explanation; and it was just that

1 they were trying to add to the party.

2 But we cited the case law, Your Honor, and I think it's
3 something that this Court should apply here, that I believe should be
4 freely granted when there's been an underlying change to the law
5 that was directly applicable. It's absolutely directly applicable to
6 what the Nevada Supreme Court did in this case.

7 But the Directors don't even address, you know, some of
8 the holdings in that citation. I included the *Darney* holding and
9 *Gregory* holding, which stands for the same principle that fairness
10 dictates that we be given an opportunity to amend when there's
11 been an intervening law -- change in the law that's occurred.

12 I know that the Court is not bound by any decisions of the
13 federal court, but just by way of information, in June of 2020, Judge
14 Navarro in federal court granted leave based on *Chur*, where the
15 plaintiff had filed the complaint prior to *Chur* and obviously didn't
16 meet the *Chur* standard, so leave to amend was granted.

17 Judge, there hasn't been real -- no prejudice shown.
18 There's been some vague language about having to redepose
19 witnesses and having to move forward with this case in an expedited
20 manner. But that basis, basically having to defend a lawsuit and
21 having to defend it on an expedited basis or in a compressed
22 timeframe, just doesn't constitute any prejudice. We cite to the
23 Court the [indiscernible] decision.

24 Finally, you ordered the -- and I think this is important.
25 The Directors have been and always were during the course of this

1 case aware of the facts that comprise the plaintiff's proposed
2 amended complaint. The Directors even admit in their opposition
3 papers on page 3, Your Honor, that the directors have known about
4 the fourth amended complaint facts and that there are no new facts
5 that comprise the factual allegations in that amended complaint.

6 So Your Honor, for those reasons, we would ask that the
7 Court reconsider and grant the motion for leave to amend.

8 MR. WIRTHLIN: Your Honor --

9 THE COURT: [Indiscernible.]

10 MR. WIRTHLIN: I apologize. I just wanted to make the
11 Court aware, the plaintiff did file a reply. We did send a copy to
12 the -- a courtesy copy to Department 27 e-mail. I don't know if the
13 Court had seen that. I just want to make that clear.

14 THE COURT: You know, I haven't, no. And I was at work
15 yesterday all day. I checked the docket before I left, but I didn't check
16 it again this morning.

17 So Mr. Wirthlin, do you want to address what's in the
18 reply then?

19 MR. WIRTHLIN: I'm happy to do that, Your Honor. We did
20 file it, just so the Court is aware, at -- I believe at about 7 a.m.
21 yesterday. We received the opposition about 3:30, I think, on
22 Monday. So we filed it at 7 a.m., Monday. We're happy to address
23 that.

24 I guess I can address the reply. I would certainly defer to
25 Mr. Hutchison. I don't think there are any other points on the motion

1 that we need to make. And unless the Court has any questions.

2 THE COURT: I do have the -- the questions I have directed
3 to the plaintiff is, can you meet -- do you have any discovery that you
4 can meet the standard required by the *Chur* case? Do you have any
5 discovery of knowing violation of law or fraud? Because you've
6 deposed all of the members of the board, I assume?

7 MR. HUTCHISON: We still have --

8 And if I could address this, Mr. Wirthlin.

9 We still have one and a half depositions. We got through
10 half of Mr. Stickles. We still have to depose Mr. Garber.

11 And the answer to Your Honor's question is, Yes, we do
12 have clear evidence of knowing violation of the law. In fact, in --
13 towards the end of 2011, when the wheels really started to come off
14 of the case for the company, the Uni-Ter actually had its lawyers
15 e-mail the Directors several statutes -- statutory provisions regarding
16 operating while insolvent or impaired.

17 And in fact, just to make sure that the Directors got that
18 information, the Uni-Ter folks sent it in a letter and in an e-mail. And
19 they said, specifically -- Uni-Ter's lawyers said, We want to make
20 sure that the Directors are aware of these statutes and that the
21 company is in very difficult financial position.

22 And in fact, they had received the -- the Directors had just
23 received a letter from the DOI that said that the company was in
24 extreme financial peril and likely insolvent -- and it turned out that it
25 was.

1 And the directors continue to operate, despite knowing
2 and having reviewed the law -- having received the law from the
3 Uni-Ter Directors' counsel that it was unlawful to operate while
4 impaired or insolvent.

5 That's one example, Your Honor. We have several. But
6 yes. And admissions from the Directors -- acknowledgment e-mails
7 that they knew about these laws. And in fact, the statutory law in
8 Nevada which requires that the company had at least a positive
9 surplus of 500,000 was referenced specifically in e-mails between the
10 Directors and other individuals, including the Uni-Ter folks.

11 So yes, in short answer to your question, Your Honor, we
12 do have several instances of knowing violations of the law. And I do
13 just -- please cut me off if I am rambling, Your Honor. But I do want
14 to say that it is a unique situation where we actually do, like I said,
15 have e-mails, letters from Uni-Ter's counsel, sending laws and
16 quoting statutory provisions saying, You should not operate while
17 impaired and you're doing that, you know, either impaired or
18 insolvent. And the Directors continue to operate in violation of those
19 laws -- knowing violation of the laws, Your Honor.

20 So yes, we do have substantial evidence of that.

21 THE COURT: Thank you.

22 All right. The opposition, please. First Ms. Ochoa and
23 then, Mr. Ogilvie, if you have one.

24 MS. OCHOA: Yes, Your Honor. You know, there is a
25 fundamental difference, in our opinion, about whether *Chur* is new

1 law. And we contend that it is absolutely not new law. Gross
2 negligence was never the standard for a violation for a breach of
3 fiduciary duty claim against the board of director in this state.

4 We -- in the 12(c) motions that we had filed, in the Motion
5 to Dismiss that we had filed, we provided you with trial court
6 decisions where those judges appropriately applied NRS 78.138.

7 And if you look at NRS -- the Nevada Supreme Court
8 cases, *In re AMERICO* and *Wynn versus 8th Judicial District Court*,
9 they properly cite NRS 78.138. So it's not like all of a sudden *Chur*
10 came out with this new standard that you have to absolutely plead
11 fraud and knowing violation of the law. Gross negligence -- it was
12 always there. It was always in that plain language of the statute.

13 And so the fact that the plaintiff didn't read the statute is
14 really not my fault.

15 Dicta is never the law. Cases of no precedence is not the
16 law.

17 And you know, I find it really interesting that
18 Mr. Hutchison wants to cite to Judge Navarro's District Court case in
19 June of 2020 where she said -- where she grants leave to amend
20 because of a change in the law in court. And that, you know, it's
21 really telling that he's going to rely on a trial court decision, because
22 the trial court decisions do not reflect what's going on in those
23 cases.

24 That case *Barachi versus Vincent*, I understand what that
25 case is about. I represent Mr. Vincent. That case has always been

1 about fraud. And that -- I filed the Motion to Dismiss because I
2 asserted that fraud claims are unassignable. In that complaint, fraud
3 was already alleged.

4 So it's not like Judge Navarro was giving this party the
5 means to refile a totally new different case with new different
6 standards. The case was in its infancy. Fraud was already pled.

7 So the point being, it's not okay to rely on other trial court
8 decisions. That's not -- that does not establish the law.

9 The other -- you know, what plaintiff continuously seems
10 to argue is that they could have never filed relief to amend before
11 *Chur*. And that's just simply untrue. Time and time again, I told
12 this -- the plaintiff that gross negligence is not the standard.

13 In 2017, the Commissioner of Insurance actually heard
14 that. In a different District Court case, the Commissioner of
15 Insurance filed a breach of fiduciary duty claim arising out of the
16 duty of care, alleging intentional misconduct, fraud, and a knowing
17 violation of the law. And that is one year before the Directors filed
18 their written petition; and that is two years before the Nevada
19 Supreme Court decided *Chur*.

20 Now, the plaintiff claims that they acted diligently, but we
21 know that just to be untrue. The facts that the plaintiff complains
22 about occurred during the period of 2004 through 2012. They had all
23 of these facts, these witnesses that they could have talked to, to
24 understand that if they so chose to allege that there was knowing
25 violations of law. And she even advised us that there was knowing

1 violations of the law.

2 But in 2014, they did not include that in their complaint. In
3 2016, when I told them gross negligence was not the standard, they
4 did not seek to leave to amend. In 2017, when there are -- when they
5 are filing for intentional misconduct, followed fraud and knowing
6 violations of the law in other District Courts, they did not seek leave
7 to amend.

8 They had all of these opportunities, and yet they waited
9 and they waited. And it's really telling because obviously it just
10 doesn't exist.

11 Plaintiff claims that in June of 2019 they sought leave to
12 amend by lifting the stay. And that -- again, that is just not true. In
13 March of 2019, when we filed our writ petition, we filed to stay the
14 case, and the plaintiff joined.

15 In June of 2019, the plaintiff apparently got anxiety about
16 how the five-year rule works and they fought to lift the stay. And to
17 clarify what we knew about existing case law and that how the
18 five-year rule gets pulled when the -- when a case is stayed. At that
19 time, the plaintiff did not move for leave to amend.

20 The plaintiff claims that they sought leave to amend, but
21 that's just simply is untrue. If you look at that June 2019 motion,
22 they only said, If we lose before the Nevada Supreme Court, then
23 we'll seek leave to amend. It doesn't say what they're going to leave
24 amend to. They just say, we're going to seek leave to amend.

25 Now that's not acting diligently. That's just doubling

1 down on faulty legal premises.

2 Acting diligently is when you have the facts, plead them;
3 seek leave to amend. When you were presented with written
4 discovery and when you were asked to be prepared to talk about all
5 of the things that you believe the defendant did incorrectly during a
6 deposition, come prepared and say it.

7 We provide you the transcript of the plaintiff's deposition
8 and all of their written responses to discovery. And nowhere,
9 nowhere do you see them ever saying that the Director committed
10 fraud, misconduct, or knowingly violated the law. And you have that
11 in the Opposition to the Motion for Leave to Amend.

12 The plaintiff claims that we -- that the Directors did not
13 establish prejudice. And again, that is just untrue. If leave were
14 granted, there's -- I had three or four months left of discovery. As set
15 forth in the opposition for the leave to amend, we would obviously
16 be amending our affirmative [indiscernible]. We would include
17 defenses such as the *in pari delicto* defense. And that's the defense
18 that, if we did anything wrong, it's because we relied to the
19 detriment of people -- of the plaintiff, such as the Division of
20 Insurance.

21 And you've seen, through the deposition transcripts that
22 we've provided, that there is numerous witnesses and documents
23 that are unavailable at this point. The plaintiff has [indiscernible]
24 that there are certain divisions of insurances of -- there's Division of
25 Insurance employees that are unavailable because they're either

1 retired or deceased.

2 And the Lewis and Clark former attorney, Connie
3 [indiscernible], also testified that some of the Division of Insurance
4 employees are unavailable because they're either deceased or
5 retired.

6 Ms. [Indiscernible] also testified that the law firm that she
7 worked at, Jones Vargas, when she represented Lewis and Clark,
8 does not exist anymore. And we all know that being in the legal
9 community. And that -- the documents from Jones Vargas no
10 longer -- where all of the e-mails do not exist anymore. She
11 [indiscernible] as much as she could, but there was no way to collect
12 everything because they're just simply gone.

13 So when you read the deposition transcripts, you get an
14 understanding that, in fact, because of the passage of time, there's a
15 lot of clouded memories. And that was -- and it's only going to be
16 worse now that it's two years later.

17 So finally, as this Court is aware, you know, passage of
18 time, people have passed. One of my defendants -- one of my
19 clients actually no longer is alive. Barbara Lumpkin passed away
20 prior to the stay of this case.

21 So it's absolutely prejudicial for the plaintiff to be granted
22 leave to amend, to now and only now tell us that they believe we
23 committed violations of the law.

24 So respectfully, we believe that this Court should deny the
25 Motion for Reconsideration and enter the findings of fact from

1 conclusions of law that we submitted to this Court previously
2 because it's pretty clear that the plaintiff intends to appeal this case.

3 THE COURT: Thank you.

4 And Mr. Ogilvie, do you have anything to add before I hear
5 from the plaintiff?

6 MR. OGILVIE: Sorry, Your Honor. I needed to take it off
7 mute. No, I have nothing to add to it.

8 THE COURT: Thank you.

9 Then Mr. Hutchinson, and Mr. Wirthlin, your reply, please.

10 MR. HUTCHISON: Your Honor, this is -- excuse me, this is
11 Mark Hutchison. Just let me -- and I don't want to -- I don't want to
12 repeat myself, but the counsel is just inaccurate in terms of arguing
13 that dicta could not be relied upon. This was not a precedential case.
14 Everybody in the world knew that *Shoen* was something that should
15 not be relied upon by parties when they were asserting claims
16 against directors of corporations.

17 I think the most telling point of that is that based on our --
18 based on our research, and certainly the Directors have pointed to
19 not a single decision prior to *Chur* finding that gross negligence did
20 not state a claim against directors of a corporation.

21 You know, even if you look at the Westlaw citation for
22 *Shoen*, it says it was abrogated by the *Chur* opinion. The Court itself
23 said that it was -- it was disavowing *Shoen*. If it was so clear to
24 everybody, it was so clear to this Court, it was so clear to the District
25 Courts, so clear to all the parties, why go to that extent and why

1 would the Court have to disavow its -- how to disavow its decision?
2 And why would there not be one single case on point that the
3 Directors could cite to, that would say that *Shoen* was bad law or
4 that somehow *Shoen* didn't support the gross negligence standard?

5 Your Honor, in fact, you know, counsel makes much of this
6 idea that we -- that she told us that the gross negligence standard
7 did not apply. But with all due respect, I don't know that we were
8 going to rely on opposing counsel to tell us what the law is. We're
9 relying what the Court tells us what the law is.

10 Exhibit 1, if you go back to that, it's the Court's order, back
11 in October of 2018. It's hereby ordered that the Director's Motion for
12 Judgment of the Pleading is denied. Why? The Court finds the
13 motion to deal with the same issues the Court addressed in 2016.
14 And while the Court recognizes that NRS 78.138 was amended in
15 2017, the Court believes that *Shoen* is still the controlling law
16 regarding Directors' personal liability, even with the additional case
17 law that's come down from the Nevada Supreme Court in 2017,
18 including *Wynn*.

19 So all the reasons that counsel has just given you as to
20 why we should have amended the complaint, why we should have
21 believed her argument that gross negligence didn't apply, is what
22 was argued previously, Your Honor, and was rejected by this Court.
23 And we relied on this Court's decision. We relied on the Supreme
24 Court's decision in *Shoen* that there's been a substantive change in
25 the law. Okay. Fair enough.

1 Fair enough -- fairness now dictates that we be given an
2 opportunity to amend the complaint and to comply now with the
3 new standard as set forth by the Court in *Chur*, Your Honor.

4 The other thing I would just make note of, Judge, is
5 counsel has spoken to prejudice. And every one of the points that
6 she makes is always present in every case that ever has to embrace
7 a new pleading. It's -- I think almost every one of the factors that she
8 just set forward in terms of clouded memories and fading views of
9 the case and the availability of witnesses, that happens in every
10 single case. It's going to happen now when we go to trial -- whether
11 or not the pleading is amended or not, those same factors are in play
12 for the Court.

13 So, Judge, under the standards of the Court, I think these
14 do apply in terms of the many pleadings under the case law, in
15 terms of what happens when there's been a substantive change in
16 the law.

17 We'd asked that the Court grant the Motion to Amend. If
18 counsel is so confident that there aren't any facts out there to
19 support our pleading, then she can engage in further motion
20 practice. But we ought to be given at least an opportunity to amend
21 our complaint, Your Honor. And we ask that the Motion for
22 Reconsideration be granted.

23 THE COURT: Thank you all. This is a Motion for
24 Reconsideration. And I realize that there's been a clarification by the
25 Supreme Court of the *Shoen* case. And the reason I didn't grant the

1 motion that was filed on July 2nd was simply because the complaint
2 goes back to December 23 of 2014. And I just didn't think it was fair
3 to the defendants to have to defend on a fourth amended complaint
4 when it was two months before the discovery deadline and we have
5 a five-year rule looming.

6 So I -- you know, I understand the hardship to the plaintiff
7 here, and I realize that. And I had more discretion earlier in the case
8 to amend -- and I almost always allow amendments because I want
9 matters to go forward on their merits. But I just don't think it's fair to
10 the defendants to allow the fourth amended complaint. It's a tough
11 call. And I -- you know, I've thought about it a lot. But I -- and I
12 realize, Mr. Hutchinson, the hardship to your client, but I just don't
13 think it's fair to the defendants.

14 And I'm going to deny the Motion to Reconsider.

15 Ms. Ochoa to prepare the --

16 Did you wish to comment?

17 MR. WIRTHLIN: If I could just add one clarifying remark.

18 THE COURT: Yes. Mr. Wirthlin. Of course.

19 MR. WIRTHLIN: The Court said -- thank you. The Court
20 said that -- first of all, in our reply, we did mention no fewer than
21 eight cases, including Judge Dawson, Judge Dew, Judge Dorsey,
22 who all said gross negligence is, you know, the basis for the law.

23 But technically, I believe the Court just mentioned that
24 there was two months left in discovery. And I don't know if that's
25 based on the scheduling trial order that was entered yesterday --

1 THE COURT: Yes.

2 MR. WIRTHLIN: -- but Mr. Ogilvie and I spoke about this
3 just before the hearing. We are all -- we are in agreement, based on
4 the -- Mr. Ogilvie, I believe, has submitted a trial, you know,
5 availability notice, requesting a March 8th setting --

6 THE COURT: Right.

7 MR. WIRTHLIN: -- and then discovery going back from
8 that. At the hearing [indiscernible] less than two weeks ago, the
9 Court granted the motion and set the trial for February 22nd, two
10 weeks back. So we moved those dates two weeks back, which
11 would put the discovery cutoff, Your Honor, at December 17th.

12 And we would submit that's more than sufficient time for
13 the Directors to do whatever they're going to do. And they certainly
14 can stipulate around the five-year rule if they feel that they need
15 additional time.

16 So with that clarification, I guess, I understand Your Honor
17 is inclined to rule it how she's going to rule. I guess the last thing I
18 would ask is if the Court is inclined to review that reply, we did file
19 that yesterday morning, and we did send a courtesy copy over. But I
20 understand.

21 THE COURT: I have my phone on a stand so that I can
22 give you my attention. I actually looked at it while I was listening to
23 the arguments, so I did -- I did have the ability to do that.

24 MR. WIRTHLIN: Thank you, Your Honor.

25 THE COURT: So I -- you know, I'm troubled with the

1 hardship to the plaintiff. And I would more than likely stay the case
2 if you take a writ on the issue.

3 MR. WIRTHLIN: Okay. Thank you.

4 MR. HUTCHISON: Okay, Your Honor. We'll consider that.
5 We greatly appreciate the Court's offer on that point.

6 THE COURT: Good enough.

7 MR. HUTCHISON: Thank you.

8 THE COURT: So Ms. Ochoa will prepare the order.
9 Plaintiff will have the ability to review and approve the form of that
10 order.

11 Mr. Ogilvie, do you wish to review and approve the form
12 of that order?

13 MR. OGILVIE: No, Your Honor. That's fine.

14 THE COURT: Good enough. So until I see you guys next,
15 everybody stay safe and stay healthy.

16 MR. OGILVIE: Your Honor, this is George Ogilvie. If I
17 could --

18 THE COURT: Yes.

19 MR. OGILVIE: -- address something else.

20 THE COURT: Of course.

21 MR. OGILVIE: Yesterday the Court issued a scheduling
22 order that included a discovery cutoff date, I believe, of October 19th.

23 As Mr. Wirthlin stated just a moment ago, we
24 had essentially agreed on discovery cutoff. I think there was
25 probably, I think you said it, a two-week difference between what

1 plaintiff proposed and what the Uni-Ter and the U S Re defendants
2 proposed. And Mr. Wirthlin circulated for our approval and a
3 proposed order granting the motion for preferential trial setting,
4 setting it for February 22nd, as the Court rules at the last hearing.

5 In that proposed order, it has a different discovery
6 schedule than what was set forth in the scheduling order issued by
7 the Court yesterday.

8 And primarily, my concern is the discovery cutoff date of
9 October 19th. The parties are proposing a December 17th discovery
10 cutoff date. And I just wanted to bring that to the Court's attention
11 and ask if the Court would reconsider the scheduling order that it
12 issued yesterday.

13 THE COURT: Of course. I wasn't aware that you guys had
14 come to an agreement on a different close of discovery deadline. I
15 was going on what we talked about on August 5th. The parties can
16 certainly stipulate to do that, and I'll adjust the scheduling order
17 accordingly.

18 MR. OGILVIE: Okay. Great. Thank you, Your Honor.

19 THE COURT: All right. Any other questions? Any other
20 comments before we adjourn?

21 All right, guys. So until I see you next, stay safe and stay
22 healthy.

23 MR. OGILVIE: Thank you, Your Honor.

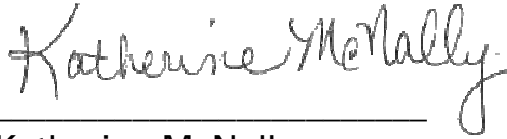
24 MR. HUTCHISON: Thank you, Your Honor.

25 [Proceeding concluded at 9:50 a.m.]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

* * * * *

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.

A handwritten signature in cursive script that reads "Katherine McNally". The signature is written in dark ink and is positioned above a horizontal line.

Katherine McNally
Independent Transcriber CERT**D-323
AZ-Accurate Transcription Service, LLC

1 **CSERV**

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

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

9 vs.

10 Robert Chur, Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

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

16 Service Date: 8/28/2020

17 Adrina Harris .

aharris@fclaw.com

18 Angela T. Nakamura Ochoa .

aochoa@lipsonneilson.com

19 Ashley Scott-Johnson .

ascott-johnson@lipsonneilson.com

20 Brenoch Wirthlin .

bwirthli@fclaw.com

21 CaraMia Gerard .

cgerard@mcdonaldcarano.com

22 George F. Ogilvie III .

gogilvie@mcdonaldcarano.com

23 Jessica Ayala .

jayala@fclaw.com

24 Joanna Grigoriev .

jgrigoriev@ag.nv.gov

25 Jon M. Wilson .

jwilson@broadandcassel.com

26 Kathy Barrett .

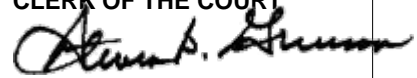
kbarrett@mcdonaldcarano.com

27
28 **PA003623**

1	Marilyn Millam .	mmillam@ag.nv.gov
2	Nevada Attorney General .	wiznetfilings@ag.nv.gov
3	Paul Garcia .	pgarcia@fclaw.com
4	Renee Rittenhouse .	rrittenhouse@lipsonneilson.com
5	Rory Kay .	rkay@mcdonaldcarano.com
6	Susana Nutt .	snutt@lipsonneilson.com
7	Yusimy Bordes .	ybordes@broadandcassel.com
8	Jelena Jovanovic .	jjovanovic@mcdonaldcarano.com
9	Christian Orme	corne@hutchlegal.com
10	Patricia Lee	plee@hutchlegal.com
11	Kimberly Freedman	kfreedman@broadandcassel.com
12	Danielle Kelley	dkelley@hutchlegal.com
13	Karen Surowiec	ksurowiec@mcdonaldcarano.com
14	Jonathan Wong	jwong@lipsonneilson.com
15	Erin Kolmansberger	erin.kolmansberger@nelsonmullins.com
16	Melissa Gomberg	melissa.gomberg@nelsonmullins.com
17	Betsy Gould	bgould@doi.nv.gov
18	Juan Cerezo	jcerezo@lipsonneilson.com
19	Heather Bennett	hshepherd@hutchlegal.com
20	Brenoch Wirthlin	bwirthlin@klnevada.com
21	Jon Linder	jlinder@klnevada.com
22	S. Dianne Pomonis	dpomonis@klnevada.com
23	Daniel Maul	dmaul@hutchlegal.com
24		
25		
26		
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Brenoch Wirthlin	bwirthlin@hutchlegal.com
Jon Linder	jlinder@hutchlegal.com



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 - Telephone
(702) 382-1512 - Facsimile
jgarin@lipsonneilson.com
aocchoa@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'
OPPOSITION TO THE MOTION TO
STAY PROCEEDINGS PENDING
PETITION FOR WRIT OF MANDAMUS
ON ORDER SHORTENING TIME**

Date of Hearing: September 3, 2020

Time of Hearing: 11:00 a.m.

Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert
Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels (collectively "Directors") by
and through their counsel, Lipson Neilson P.C. hereby file their Opposition to the Motion
to Stay Proceedings Pending Petition for Writ of Mandamus on Order Shortening time.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Directors oppose a stay of the case in its entirety because the request is overly broad and Plaintiff cannot establish that the factors set forth in *Mikohn Gaming, Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d. 36, 38 (2004) balance in favor of a stay.

Although Plaintiff has yet to file a petition for writ relief, Plaintiff seeks to stay all proceedings in this case, except the finalization and entry of an order denying the motion for reconsideration on the motion for leave to amend. While Judgment has already been entered in favor of the Directors, there are post-judgment issues that remain, which could present issues of appeal. The court should not issue a stay which prevents the Directors from seeking fees and costs, because to do so would prevent judicial efficiency.

Additionally, Plaintiff cannot establish that there is good cause for a stay of this case in its entirety. Plaintiff is not likely to prevail on the merits of the writ petition, and will not irreparably be harmed by the case proceeding.

This Court should deny Plaintiff's Motion to Stay as further set forth below.

II. LEGAL ARGUMENT

A. Plaintiff's Motion for a Stay is Premature and Must be Denied

This Court should deny the Motion to Stay because Plaintiff has not filed a Petition for Writ and is not likely to have filed a Petition for Writ by the time of the hearing on this matter. Nevada Rule of Appellate Procedure 8 is instructive in this regard as it states:

(a) Motion for stay.

A party must ordinarily move first in the district court for the following relief:
(A) A stay of the judgment or order of, or proceedings in, a district court pending appeal or resolution of a petition to the Supreme Court or Court of Appeals for an extraordinary writ;
(B) Approval of a supersedeas bond; or
(C) an order suspending, modifying, restoring or granting an injunction while an appeal or original writ petition is pending.

///
///

1 The rule evidences a petition for writ must have been filed before a stay can be entered.
2 As of the filing of this instant Opposition, Plaintiff has yet to file its writ on the Order
3 Denying Plaintiff's Motion for Leave to Amend and yet to approve the Directors Findings
4 of Fact, Conclusion of Law and Order Denying Plaintiff's Motion for Reconsideration
5 provided to it on August 28, 2020. Absent a petition for writ, the Motion to Stay must be
6 denied in its entirety.

7 **B. Plaintiff's Request is Overly Broad and Does not Promote Judicial**
8 **Efficiency**

9 The Directors should not be prevented from filing post-judgment motions such as
10 an award for fees and costs. Even if a final judgment resolving all the claims was
11 entered and appealed, this court would maintain jurisdiction to consider an award of
12 fees and costs. *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417, 2000 Nev.
13 LEXIS 48, *3, 116 Nev. Adv. Rep. 46. Further, even where there is no final order,
14 issues "collateral to and independent from the appealed order, i.e., matters that in no
15 way affect the appeal's merits" remain the jurisdiction of this court. *Mack-Manley v.*
16 *Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529-530, 2006 Nev. LEXIS 95, *7-8, 122
17 Nev. Adv. Rep. 75.

18 Where there are post-judgment matters that remain, staying this case does not
19 promote judicial efficiency.

20 **C. Plaintiff has failed to Establish that it is entitled to a Stay under *Mikohn***

21 1. Plaintiff is not likely to Prevail before the Nevada Supreme Court

22 Plaintiff claims that a stay is appropriate because it is likely to prevail before the
23 Nevada Supreme Court. As set forth in the Opposition to the Motion for Leave to
24 Amend and the Opposition to the Motion for Reconsideration, Plaintiff is unlikely to
25 prevail on the merits of a potential writ.

26 Even so, extraordinary relief is not likely to occur where the issue contains
27 dispute of facts, rather than the law. *Wynn Resorts, Ltd. V. Eighth Jud. Dist. Ct.*, 133
28 Nev. Adv. Rep. 52, ___, 399 P.3d 334, 341 (2017). Here, the denial of Plaintiff's Motion
for Leave to Amend was based on undue delay and undue prejudice. Under the

1 circumstances, the Plaintiff's potential writ could not contain issues concerning the law.
2 Therefore, Plaintiff is not likely to prevail.

3 2. Plaintiff cannot Establish Irreparable Harm Sufficient to Mandate a Stay

4 As set forth in Plaintiff's Motion, irreparable harm is not a significant factor in
5 whether to issue a stay. Plaintiff's Motion, P. 13, LI. 15-18 (*citing Mikohn Gaming Corp.*
6 *v. McCrear*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004)). Irreparable harm to the moving
7 party is found where a party is ordered to produce documents against his objection and
8 proceed with discovery. *Schlatter v. Eighth Jud. Dist. Ct.*, 93 Nev. 189, 193, 561 P.2d
9 1342, 1344 (1977). Here, there is no harm to Plaintiff in moving the case forward.

10 **III. CONCLUSION**

11 As set forth above, Plaintiff is not likely to prevail on a writ petition. The Court did
12 not err in denying Plaintiff leave to amend. Moreover, the Commissioner will not suffer
13 any irreparable harm with the case proceeding forward. Post-judgment issues remain
14 and it is inefficient to stay this case in its entirety. Moreover, granting this instant stay
15 would be procedurally improper given Plaintiff has yet to file its Petition for Writ.

16 Based thereon, this Court should deny the Motion to Stay.

17
18 Dated this 1st day of September, 2020.

19
20 LIPSON NEILSON P.C.

21 /s/ Angela Ochoa

22 By: _____

23 Joseph P. Garin, Esq. (6653)
24 Angela T. Nakamura Ochoa, Esq. (10164)
25 9900 Covington Cross Dr., Suite 120
26 Las Vegas, NV 89144
27 jgarin@lipsonneilson.com
28 aocchoa@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*

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 1st day of September, 2020, I electronically transmitted the foregoing, **DEFENDANTS ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS' OPPOSITION TO THE MOTION TO STAY PROCEEDINGS PENDING PETITION FOR WRIT OF MANDAMUS ON ORDER SHORTENING TIME** to the Clerk's Office using the Odyssey E-File & Serve System for filing and transmittal to the following Odyssey E-File & Serve registrants:

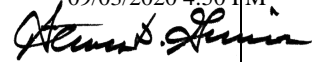
E-Service Master List For Case

Attorney General's Office	
Contact	Email
Joanna Grigoriev	jgrigoriev@ag.nv.gov
Nevada Attorney General	wiznetfilings@ag.nv.gov
Nelson Mullins	
Contact	Email
Jon M. Wilson	jon.wilson@nelsonmullins.com
Kimberly Freedman	kimberly.freedman@nelsonmullins.com
Hutchison & Steffen	
Contact	Email
Christian M. Orme	corme@hutchlegal.com
Jon Linder	jlinder@hutchlegal.com
Brenoch Wirthlin	bwirthlin@hutchlegal.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.
Page 5 of 5

PA003630


CLERK OF THE COURT

OST

MARK A. HUTCHISON, ESQ. (4639)
MICHAEL WALL, ESQ. (2098)
PATRICIA LEE, ESQ. (8287)
BRENOCH R. WIRTHLIN, ESQ. (10282)
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Telephone: (702) 385.2500
Facsimile: (702) 385.2086
E-Mail: mhutchison@hutchlegal.com
mwall@hutchlegal.com
plee@hutchlegal.com
bwirthlin@hutchlegal.com

Attorneys for Plaintiff

ENTERED kl

DISTRICT COURT

CLARK COUNTY, NEVADA

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

vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: XXVII

**MOTION TO CERTIFY
JUDGMENT AS FINAL PURSUANT
TO NRCP 54(b) ON ORDER
SHORTENING TIME**

Hearing Date: September 10, 2020

Hearing Time: 11:00 a.m.

Plaintiff Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark
LTC Risk Retention Group, by and through its attorneys, the law firm of Hutchison & Steffen, PLLC,
move on an order shortening time for an order certifying as final this Court's judgment entered on
August 13, 2020, in favor of Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut,
Barbara Lumpkin, Jeff Marshall, and Eric Stickels, the Director Defendants.

Certification will serve the purpose of allowing finality for the individual defendants, who may
otherwise have to wait years to have this matter finally resolved and to gain the repose they seek from

1 the judgment. It will also serve the purpose of allowing plaintiffs to pursue an appeal now, rather than
2 years down the road, to get a determination from the appellate court as to whether plaintiff should be
3 allowed to amend its complaint.

4 If the Director Defendants are successful on appeal, as they are confident they will be, they
5 will have finality in their favor at a much earlier date than if certification is not granted. If plaintiff is
6 successful on appeal, as it is confident it will be, this will also be to the benefit of the Director
7 Defendants, because they will be able to proceed to trial and to present their defenses years earlier
8 than if the appellate decision in this matter is delayed.

9 Only the remaining corporate defendants stand to lose from a certification, and all they lose is
10 the unfair advantage at trial of an empty chair. If plaintiff eventually prevails on appeal, even the
11 remaining defendants are benefitted, because their trial with the empty chair will be vacated, and the
12 matter will proceed to a new trial, years in the future.

13 As with many cases where a party is completely removed by a partial judgment, the prejudice
14 to the party removed of non-certification is great, and the prejudice to all of the other parties is also
15 substantial. Weighing the prejudice to the Director Defendants if the judgment in their favor is not
16 certified, combined with the prejudice to plaintiff in not having an immediate appellate remedy,
17 against the prejudice to the remaining defendants of losing an empty chair defense that is likely
18 ethereal anyway, the outcome is clear. There is no just cause to delay entry of a final judgment in
19 this case.

20 DATED this 3rd day of September, 2020.

21 **HUTCHISON & STEFFEN**

22 By /s/Brenoch Wirthlin

23 MARK A. HUTCHISON, ESQ.

24 PATRICIA LEE, ESQ.

25 BRENOCH R. WIRTHLIN, ESQ.

26 CHRISTIAN ORME, ESQ.

27 10080 West Alta Drive, Suite 200

28 Las Vegas, Nevada 89145

Attorneys for Plaintiff

ORDER SHORTENING TIME

The foregoing **MOTION TO CERTIFY JUDGMENT AS FINAL PURSUANT TO NRCP 54(b) ON ORDER SHORTENING TIME** will be heard in Department XXVII on the 10th day of September, 2020, at 11:00 a.m.

Any Opposition to Plaintiff's Motion shall be filed with the Court and delivered to counsel for Plaintiff by the 8th day of September, 2020.

DATED this _____ day of _____, 2020.

Dated this 3rd day of September, 2020

Nancy L Allf
DISTRICT COURT JUDGE

349 BFC A16C 09AA
Nancy Allf
District Court Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION OF BRENOCH R. WIRTHLIN, ESQ.

I, Brenoch R. Wirthlin, Esq., declare under penalty of perjury:

1. I am an attorney at the law firm of Hutchison & Steffen, PLLC, counsel for Plaintiff COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP.
2. On August 10, 2020, this Court entered its order denying Plaintiff's Motion for Leave to File Fourth Amended Complaint ("Motion to Amend").
3. Both the Order and the Notice of Entry of Order on the Motion to Amend were filed and served on August 10, 2020.
4. On August 13, 2020, the Court entered its Order Granting the Director Defendants Motion for Judgment on the Pleadings ("August 13 Order").
5. Plaintiff filed its Motion for Partial Reconsideration of Motion for Leave to Amend Regarding Director Defendants ("Motion for Partial Reconsideration") on August 14, 2020.
6. On August 26, 2020, the Court heard the Motion for Partial Reconsideration and denied the motion, but stated that it would "more than likely stay the case" if Plaintiff sought appellate review.
7. Further, the Court stated that it was "troubled with the hardship to the plaintiff." *Id.*
8. Accordingly, Plaintiff intends to seek appellate review with the Nevada Supreme Court.
9. On August 28, 20020, Plaintiff filed its motion to stay proceedings ("Motion to Stay").
10. On September 3, 2020, the Court granted the Motion to Stay.
11. Also on September 3, 2020, Plaintiff raised the issue of certification of the August 13 Order pursuant to Rule 54(b) of the NRCp.
12. This Court stated it would set a hearing on the instant motion for September 10, 2020, at 11:00 a.m.

1 13. Setting the hearing on this Motion on shortened time will not prejudice Defendants.

2 I declare under the penalty of perjury the foregoing is true and correct.

3 Dated this 3rd day of September, 2020.

4 /s/ Brenoch R. Wirthlin, Esq.
5 BRENOCH R. WIRTHLIN, ESQ.

6 ///

7 ///

8 ///

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. LAW AND ARGUMENT

In its present form, NRCP 54(b) provides:¹

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

NRCP 54(b) allows a district court, in its discretion, to certify that a qualifying interlocutory order (*i.e.*, an order that does not finally resolve all claims against all parties) as final if in the interest of fairness, judicial economy and the circumstances of the case it would be appropriate for the order or judgment to be final. When such an order is certified as final, it is final for all purposes; this is not a rule for allowing for appeals. That an appeal may be taken from a final judgment, and an order or judgment that is certified is a final judgment, is only one of the consequences of certification as final judgment. The judgment become final for purposes of collection, enforcement or any other purpose for which a final judgment exists.² Most importantly, it provides finality for the parties, who otherwise might have to wait years to get finality following continuing proceedings in district court and an eventual appeal.

¹In the past, NRCP 54(b) allowed certification of finality if a separate claim was fully resolved, or if a party was completely removed. In claims cases, the Nevada Supreme Court reviewed certifications *de novo*, but in parties cases, it gave great deference to the wisdom of the trial court. More than a decade ago, NRCP 54(b) was amended to apply to parties cases only; an order could not be certified based on the resolution of a separate claim. This shows the importance the Nevada Supreme Court places on certification when a party is removed. In the most recent amendments in March of 2019, the Nevada Supreme Court restored NRCP 54(b) to its prior form, so now both claims and parties orders may be certified, but there is a presumption from *Mallin* that in a parties case, certification in a parties case is proper, unless it is a manifest abuse of discretion.

²Counsel for the Director Defendants complains loudly that she should be able to proceed now with post-judgment motions for attorney's fees and other relief, but any such motion would be premature at this time, because the judgment is interlocutory in nature. With certification, the judgment would become final, allowing for post-judgment motions.

1 There are three elements to a proper certification. *Hallicrafters Co. v. Moore*, 102 Nev. 526,
2 728 P.2d 441 (1986); *Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 678 P.2d 1152 (1984). First,
3 the order must be certifiable. In our case, the order is certifiable, because it completely removes
4 several parties from the action. Second, this Court must determine (and so state in an order) that there
5 is no just cause for delay of entry of a final judgment. No additional findings are required, but there
6 must be a declaration of no just cause. *Id.* Finally, this Court's order must expressly certify an
7 otherwise interlocutory order as final, pursuant to NRCP 54(b).

8 The Nevada Supreme Court has set forth the standard for certification of an order or judgment
9 that completely removes a party, which is substantially different from the standard for a claims case.
10 In *Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 611, 797 P.2d 978, 981–82 (1990), overruled on other
11 grounds by *Matter of Estate of Sarge*, 134 Nev. 866, 432 P.3d 718 (2018),³ the Nevada Supreme Court
12 stated:

13 When a district court is asked to certify a judgment based on the elimination of a
14 party, it should first consider the prejudice to that party in being forced to wait to bring its
15 appeal. Second, the district court should consider the prejudice to the parties remaining
16 below if the judgment is certified as final. The standard from *Hallicrafters* quoted above
17 should be part of this analysis.⁴ The district court should weigh the prejudice to the
18 various parties and should certify a judgment as final in a “parties” case if the prejudice
19 to the eliminated party would be greater than the prejudice to the parties remaining below.
20 Because the district court is in the best position to consider the above factors, a
21 certification of finality pursuant to NRCP 54(b) based on the elimination of a party will
22 be presumed valid and will be upheld by this court absent a gross abuse of discretion.

23 In this case, as set forth above, the equities all favor certification. Not only is Plaintiff
24 prejudiced by a lack of finality, when the action against the Director Defendants is for all real intents
25 and purposes final, the Director Defendants are greatly prejudiced by a lack of finality. They have
26

27 ³The primary holding of *Mallin* was the standard of review for an NRCP 54(b) certification when a party has been
28 completely removed from an action by an order or judgment. That holding remains sound today, and has been cited in
multiple orders of the Nevada Supreme Court. A secondary holding of *Mallin* was that cases consolidated in district court
became a single case for purposes of determining finality for appeal. That ruling was overturned based on *Hall v. Hall*,
584 U.S. ___, 138 S.Ct. 1118, 200 L.Ed.2d 399 (2018). As related to this case, *Mallin* is the operative law.

⁴*Hallicrafters* requires consideration of the impact of immediate appeal on the issues remaining and concerns regarding
piecemeal appellate litigation, but these concerns, although paramount on a claims case, are secondary in a parties' case,
where the prejudice to the parties of a lack of finality is the primary concern.

1 no repose. Their judgment is not enforceable. They have not control of the ongoing litigation. All
2 they can do is wait, and if there is a reversal on appeal who knows how many years down the road,
3 they are right back where they started from. No one is benefitted by not certifying this Court's
4 judgment in favor of the Director Defendants as final, and allowing the law to take its ordinary course.

5 DATED this 3rd day of September, 2020.

6 **HUTCHISON & STEFFEN**

7 By /s/ Brenoch Wirthlin, Esq.

8 MARK A. HUTCHISON, ESQ.

9 PATRICIA LEE, ESQ.

10 BRENOCH R. WIRTHLIN, ESQ.

11 CHRISTIAN ORME, ESQ.

12 10080 West Alta Drive, Suite 200

13 Las Vegas, Nevada 89145

14 *Attorneys for Plaintiff*

1 **CSERV**

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

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

9 vs.

10 Robert Chur, Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

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

16 Service Date: 9/3/2020

17 Adrina Harris .

aharris@fclaw.com

18 Angela T. Nakamura Ochoa .

aochoa@lipsonneilson.com

19 Ashley Scott-Johnson .

ascott-johnson@lipsonneilson.com

20 Brenoch Wirthlin .

bwirthli@fclaw.com

21 CaraMia Gerard .

cgerard@mcdonaldcarano.com

22 George F. Ogilvie III .

gogilvie@mcdonaldcarano.com

23 Jessica Ayala .

jayala@fclaw.com

24 Joanna Grigoriev .

jgrigoriev@ag.nv.gov

25 Jon M. Wilson .

jwilson@broadandcassel.com

26 Kathy Barrett .

kbarrett@mcdonaldcarano.com

27
28 **PA003639**

1	Marilyn Millam .	mmillam@ag.nv.gov
2	Nevada Attorney General .	wiznetfilings@ag.nv.gov
3	Paul Garcia .	pgarcia@fclaw.com
4	Renee Rittenhouse .	rrittenhouse@lipsonneilson.com
5	Rory Kay .	rkay@mcdonaldcarano.com
6	Susana Nutt .	snutt@lipsonneilson.com
7	Yusimy Bordes .	ybordes@broadandcassel.com
8	Jelena Jovanovic .	jjovanovic@mcdonaldcarano.com
9	Christian Orme	corne@hutchlegal.com
10	Patricia Lee	plee@hutchlegal.com
11	Kimberly Freedman	kfreedman@broadandcassel.com
12	Danielle Kelley	dkelley@hutchlegal.com
13	Karen Surowiec	ksurowiec@mcdonaldcarano.com
14	Jonathan Wong	jwong@lipsonneilson.com
15	Erin Kolmansberger	erin.kolmansberger@nelsonmullins.com
16	Melissa Gomberg	melissa.gomberg@nelsonmullins.com
17	Betsy Gould	bgould@doi.nv.gov
18	Juan Cerezo	jcerezo@lipsonneilson.com
19	Heather Bennett	hshepherd@hutchlegal.com
20	Brenoch Wirthlin	bwirthlin@klnevada.com
21	Jon Linder	jlinder@klnevada.com
22	S. Dianne Pomonis	dpomonis@klnevada.com
23	Daniel Maul	dmaul@hutchlegal.com
24		
25		
26		
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Brenoch Wirthlin	bwirthlin@hutchlegal.com
Jon Linder	jlinder@hutchlegal.com

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

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

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS (Via Blue Jeans)

RECORDED BY: BRYNN WHITE, COURT RECORDER
TRANSCRIBED BY: KATHERINE MCNALLY, TRANSCRIBER

1 **LAS VEGAS, NEVADA, THURSDAY, SEPTEMBER 3, 2020**

2 [Proceeding commenced at 10:57 a.m.]

3
4 THE COURT: I'm going to hop off, and I'll be right back
5 at 11:00.

6 [Recess taken from 10:58 a.m., until 11:01 a.m.]

7 THE COURT: I'm calling the case of Commissioner
8 versus Chur. Let's take appearances, starting first with the plaintiff.

9 And I will politely request that when you're not
10 speaking, you mute yourself because the background noise is --
11 interferes with the hearing. Thank you.

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

14 MR. WALL: Good morning, Your Honor. Michael Wall,
15 also on behalf of the plaintiff.

16 MS. OCHOA: Good morning, Your Honor. Angela
17 Ochoa, on behalf of Bob Chur, Steve Fogg, Mark Garber, Carol
18 Harter, Bob Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric
19 Stickels.

20 THE COURT: Thank you.

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

23 THE COURT: Okay. Thank you.

24 So let me hear -- this is the plaintiff's motion for a stay,
25 so -- and let me hear from the plaintiff, please.

1 MR. WALL: Your Honor, if I may, could I take up a
2 matter that's related to this before we discuss the motion?

3 THE COURT: Of course. Yes, of course.

4 MR. WALL: Your Honor, we've had some discussions
5 with counsel for the individual defendants.

6 On August 13th, following your denial of the Motion to
7 Amend, Your Honor entered a judgment in behalf of the individual
8 plaintiffs, and that judgment removes the plaintiffs from the action
9 entirely, so it is subject to certification pursuant to NRCP 54(b).

10 And I don't believe there's going to be an objection,
11 but I'll wait and see. We're requesting that -- that the -- that order be
12 certified as final, pursuant to NRCP 54(b), so as to not prejudice the
13 individual defendants or the plaintiff in their ability to move the case
14 forward in the most productive manner that would be productive for
15 everyone.

16 That would mean, instead of filing a petition for a writ,
17 it would go through the normal process of an appeal, which is an
18 advantage to all the parties because that results in a determination --
19 more likely results in a determination that's final.

20 So we think it's -- this is precisely the kind of case that
21 should be certified. And we're requesting that you would certify that
22 or that -- that order.

23 THE COURT: Thank you.

24 Ms. Ochoa, and then Mr. Ogilvie, please.

25 MS. OCHOA: Yes, Your Honor.

1 The plaintiff did contact me I want to say maybe two
2 days ago, requesting something about a 54(b) certification. And it's
3 my opinion, after having looked at the rule, that the Court needs to
4 be apprised through a motion or a stipulation. There are certain
5 factors that the Court needs to find with respect to a 54(b)
6 certification.

7 And so I offered, if the plaintiff would like to create a
8 stipulation, if that's something that all of the parties would agree to;
9 if not, that we could do a joint motion.

10 So I'm not quite sure how this Court perceives Rule 54
11 and whether there needs to be a finding, whether the Court prefers
12 that it be in writing, whether it be a stipulation or a joint motion. But
13 I would have no objection in stipulating if that is what the parties can
14 finally agree to.

15 THE COURT: Thank you.

16 And Mr. Ogilvie, please.

17 MR. OGILVIE: Your Honor, I apologize. This catches
18 me a bit flat-footed. I don't really have a response.

19 I would say this is something of significant import that
20 should be briefed, or, at a minimum, be brought to our attention
21 before it's raised as a housekeeping matter before a significant
22 motion.

23 THE COURT: Okay.

24 Mr. Wall, your response, please?

25 MR. WALL: Yes, Your Honor. Mr. Ogilvie, we

1 apologize. We tried to contact you and were unable to get ahold of
2 you to discuss this matter.

3 As far as the suggestion that there be a stipulation,
4 *Knox versus Dick*, which is still good law, suggests that this should
5 be a determination by the Court, rather than by stipulation.

6 I have no problem with doing a joint motion if the
7 parties would like to do so or doing a separate motion. But the thing
8 is it affects the scheduling and it affects everything going forward.

9 So since -- once you remove a party, that is a per se
10 basis for 54(b) certification. I hate to see a delay, but we're willing to
11 file a motion if that's necessary. The motion is simply going to say:
12 It's unfair once a party is out to force the other parties to go to trial,
13 and it's unfair to the parties who are out because they have to wait
14 potentially for years before they have a decision that's final.

15 So you have the individual defendants who are sitting
16 out there, potentially while the writ goes on, and then -- even then
17 potentially after the case when there would be an appeal and they
18 can't get any finality.

19 So we just thought approaching the individual
20 defendants who would have as much an interest in finality as we
21 have, that they might be amenable to this. And if everyone were to
22 agree on the record -- I've seen that done all the time -- that would be
23 sufficient for the Supreme Court -- an agreement on the record.

24 But if the parties don't want to agree to that, then I
25 would just suggest that what we will do is file a motion for that relief

1 and that will have to be scheduled on an order shortening time, and
2 that's just going to delay this -- this rather simple decision out for
3 however long that takes.

4 THE COURT: So Mr. Wall, I rarely -- I mean, I don't
5 usually entertain oral motions, so I'm going to deny your oral request
6 for a 54(b) certification.

7 Actually, I agree with Ms. Ochoa, with regard to the
8 fact that usually it's done by joint motion, sometimes by stipulation.

9 But I certainly would entertain an order shortening
10 time. I was planning to close the office tomorrow at 3:00, to let you
11 know, so -- and I would -- I'll be working from home remotely
12 tomorrow, but I actually sit and work all day. So I'll be happy to set
13 this out for you, probably Wednesday or Thursday. Our regular
14 motion calendars are Wednesday and Thursday.

15 MR. WALL: I can submit the motion, immediately,
16 Your Honor. And if we could -- I wouldn't want to set out -- I mean, it
17 will definitely impact the discussion as to whether or not there
18 should be a stay pending possession or -- and/or appeal, because
19 either way it's the appellate remedy that we're going to pursue.

20 I wasn't trying to preclude Mr. Wirthlin from going on
21 and arguing the issue as to whether or not there should be a stay.

22 But as far as the issue for 54(b) certification, I will get a
23 motion on as quickly as I can and ask for an order shortening time so
24 that that can be heard.

25 THE COURT: All right.

1 So Ms. Ochoa and Mr. Ogilvie is Wednesday or
2 Thursday better for you on the regular motion calendar?

3 And please unmute yourselves so that we can hear
4 you.

5 MR. WALL: I'm sorry, Your Honor. I will be out of the
6 state on Wednesday next week. So Thursday would be better if
7 possible.

8 THE COURT: Okay. Ms. Ochoa, would you be
9 available Thursday morning on the motion calendar? Please unmute
10 yourself.

11 MS. OCHOA: Sorry. It just takes some time to go back
12 between screens. But yes, I am available in the morning only on
13 Thursday.

14 THE COURT: Mr. Ogilvie, would you be available
15 Thursday morning?

16 MR. OGILVIE: Your Honor, I have a conflict at 9 o'clock
17 that I -- in front of Judge Williams, and you know, how -- how motion
18 calendars go. I would say that's -- I should be out of that hearing by
19 10:30 in the mortgage.

20 THE COURT: We can -- we have calendars all Thursday
21 morning from -- on the half hour from 9:30 to 11:00. So you pick the
22 time --

23 MR. OGILVIE: 11 o'clock will be fine with me,
24 Your Honor.

25 THE COURT: Okay. So Mr. Wall, when you make your

1 application for order shortening time, make sure you include that
2 date of next Thursday at 11 a.m. And send it to the TPO, and I'll get it
3 turned around today if it comes in today. And if not, I'll do it
4 tomorrow.

5 MR. WALL: Yes, I will do that. Thank you, Your Honor.

6 THE COURT: Very good. So we have, on our schedule
7 today again an order shortening time. It was a Motion for Stay of
8 Proceedings Pending a Petition for a Writ of Mandamus.

9 And Mr. Wall and Mr. Wirthlin, your motion, please.

10 MR. WIRTHLIN: Thank you, Your Honor. And we
11 appreciate the Court's willingness to have these motions heard on
12 shortened time.

13 I'll be brief. There's not, I don't think, a whole lot to
14 cover that wasn't covered in the briefs, which the Court has read.
15 But we do believe that a stay is appropriate. And I guess what we
16 would ask is that a stay be entered, effective today, with the
17 exception of the Court retaining the ability to enter an order on the
18 Motion for Reconsideration, as well as the 54(b) certification issue
19 that Mr. Wall read.

20 But we do believe a stay is appropriate for the reasons
21 listed in the briefs. We do believe that plaintiff is likely to prevail.
22 Simply because there's been an underlying change in the law, with
23 an eradication of the duty of care claim under the gross negligence
24 standard in *Schoen*, which standard and confirmation of the law was
25 noted by this court, Chief Judge Du and Judges Dawson, Dorsey,

1 Mahan, Jones, and others, in Nevada, as well as others outside of the
2 state.

3 We believe that our motion to amend was timely filed.
4 We believe that this is a situation where there will be irreparable
5 harm to the plaintiff if they are required to go forward with only the
6 remaining defendants. That's going to change the entire strategy of
7 the case. It also will present issues with respect to potentially the
8 empty chair defense or other defenses that would not be available if
9 the directors remain in the case.

10 We also noted in -- or note in the opposition in the
11 director's file, they didn't assert any irreparable harm. And in fact, I
12 think, as Mr. Wall pointed out, appellate relief will provide
13 clarification and finality for the records either way.

14 We also note that the Uni-Ter defendants and U S Re
15 did not oppose our motion to stay.

16 The directors assert that our motion is premature. We
17 would disagree with that.

18 They did file their motion prior to filing a repetition.
19 They had a repetition on file, by the time of the hearing. But certainly
20 as soon as we get an order, the orders that we've discussed today
21 with the Court, which we -- we've been going back and forth with
22 directors' counsel on the order on a motion for reconsideration. You
23 know, as soon as those orders are entered, we'll be prepared to, very
24 shortly thereafter, get that appellate brief on file.

25 And we would submit that the requested stay, if not

1 overly broad, does have to be as to all parties for all purposes, with
2 respect to the five-year rule, with the exception of, again, entering
3 the orders that we've discussed today.

4 Thank you, Your Honor.

5 THE COURT: Thank you.

6 And Ms. Ochoa, your opposition, please.

7 MS. OCHOA: Yes, Your Honor.

8 We believe the Motion to Stay is premature. There is
9 no writ on file, so we couldn't possibly analyze whether the writ is
10 going to prevail. But we don't believe any writ would prevail
11 because of the fact that writs are rarely taken, and they're only taken
12 when the issue is a matter of law. In this case, the Motion for Leave
13 was denied based on undue prejudice and undue delay. So it's not a
14 legal issue.

15 And for the reasons we set forth in our opposition to
16 the Motion for Leave to Amend, we don't believe a stay is going to
17 be -- or I'm sorry -- a writ will be granted or successful.

18 As the plaintiff mentioned, in determining whether
19 there is a -- a stay is appropriate, irreparable harm is very limited. It
20 is not a big factor. And the plaintiff is not irreparably harmed in any
21 way. They can proceed forward; they can make the strategies. They
22 can file whatever motions they need to address their concerns in
23 dealing with Uni-Ter.

24 But, most of all, I don't think a stay is appropriate
25 because it's not -- it would not promote judicial efficiency. In this

1 case, we have a judgment. And we are moving forward with
2 postjudgment matters. We filed a verification of -- a verified memo
3 of costs, and the plaintiff filed his Motion to Retax. We think that
4 there's postjudgment issues that possibly could have appellate
5 issues at the end of the day.

6 Either way it is our position that we should be able to
7 move forward on those issues, and a stay preventing us from doing
8 so would just be inefficient.

9 THE COURT: Thank you, Ms. Ochoa.

10 Mr. Ogilvie, I know you didn't file anything, but this
11 was on an order shortening time.

12 Do you wish to weigh in?

13 MR. OGILVIE: Yeah. The prior discussion has kind of
14 taken me aback, Your Honor. I -- it sounds like the receiver is seeking
15 a stay of these proceedings, whether it proceeds on a writ or direct
16 appeal.

17 And if I could have clarification from the receivers'
18 counsel on that, it might benefit what I'm going to say.

19 THE COURT: Okay. Mr. Wirthlin.

20 MR. WIRTHLIN: Your Honor, I would --

21 MR. WALL: If I may, Your Honor, Michael Wall.

22 MR. WIRTHLIN: Go ahead.

23 THE COURT: Mr. Wall.

24 MR. WALL: On that limited issue, yes.

25 Whichever appellate remedy we -- we will seek

1 whichever appellate remedy is available to us.

2 We certainly would be asking this Court to stay the
3 matter while we seek that, because otherwise after -- after you go
4 forward, I understand that she argues that they can bring whatever
5 motions. But what we can't do is proceed against all of the
6 defendants in one action.

7 So we would be asking for a stay of whatever appellate
8 remedy -- while we seek whatever appellate remedy is available.

9 MR. OGILVIE: Okay. Thank you, Mr. Wall. I appreciate
10 that.

11 Your Honor, the Uni-Ter and U S Re defendants would
12 prefer the matter to go forward.

13 We understand the position the Court is in. And while
14 we would submit a -- an objection, we understand that if the Court
15 believes that a stay is appropriate, that that may be appropriate.

16 THE COURT: Thank you.

17 And then the reply, please.

18 MR. WIRTHLIN: Thank you, Your Honor.

19 Just very briefly. I think the points we've covered -- I
20 do just want to say I think -- I would counter that a stay at this point
21 promotes judicial efficiency -- rather than moving forward with trial,
22 a jury trial, particularly at this time, as to only part of the defendants
23 that could potentially be in the case. At the end of the day we would
24 have to -- you know, assuming that they -- the director defendants
25 were to come back into the case, retry the case, or have a second

1 trial -- which I think would be the anthesis of judicial economy.

2 So we would request that the stay, as requested, be
3 granted, Your Honor. Thank you.

4 THE COURT: You know, to tell all of you, I'm confused
5 a little bit because I don't think I have jurisdiction to enter a stay
6 pending appeal. You can't even do your Notice of Appeal until the
7 judgment is final.

8 So I -- I had indicated at the last hearing that I would be
9 inclined to stay the case, pending appeal, but I don't think I have the
10 jurisdiction just to stay it now.

11 So let me -- let me have a response on that.

12 MR. WALL: Yes, Your Honor. It's not a question of
13 your jurisdiction. Certainly the matters before you, you have subject
14 matter jurisdiction in a court to manage the matter before it in any
15 way that would be appropriate for judicial economy and for the
16 interests of all of the parties. So you have a -- whatever jurisdiction
17 is necessary to stay this matter now or in the future for whatever
18 period of time you think is appropriate.

19 If you think it would be more appropriate to wait until
20 the petition is filed and the Notice of Appeal -- either the petition or
21 the Notice of Appeal is filed, I can understand that, but it's not going
22 to change anything in the case because -- I mean, we are going to
23 pursue our appellate remedies, and they are going to take some
24 time. And it seems that it's to everyone's advantage if the stay
25 comes earlier than later because of its effect on the running of the

1 five-year rule, and other matters. And whether or not we're all -- at
2 the same time we're trying to pursue the appellate remedy having to
3 prepare for trial and then -- which would only be a partial trial against
4 some of the defendants.

5 So there's certainly no question about Your Honor's
6 authority to enter the stay. The rules require that we ask the district
7 court for a stay before we can ask the Supreme Court for a stay. But
8 as to the timing of that, I would leave that obviously to your
9 discretion.

10 MR. WIRTHLIN: And Your Honor, this is Brenoch
11 Wirthlin. If I could just point out, as the Court has pointed out
12 multiple times, we do have a looming five-year rule issue there. And
13 that's why we would request that the stay be entered which is --
14 Mr. Wall pointed out, nothing is going to change in the interim.

15 So we would request that it be entered sooner rather
16 than later.

17 MR. OGILVIE: Your Honor, this is -- this is --

18 THE COURT: Because --

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

20 THE COURT: I was -- I was going to give Ms. Ochoa
21 and Mr. Ogilvie both --

22 MR. OGILVIE: Oh, okay. I apologize.

23 THE COURT: -- a chance to respond. I'm not going
24 to cut you guys off.

25 MR. OGILVIE: Okay.

1 THE COURT: So but, go ahead, please, Mr. Ogilvie.

2 MR. OGILVIE: Your Honor, as I -- there are tactical
3 reasons that we would prefer to go to trial, and -- and they are no
4 secret, as Mr. Wirthlin indicated. There's the empty chair defense.
5 And so for that reason, I'll be very transparent, we would prefer to go
6 to trial.

7 But as I've said, we understand the Court's position --
8 the position the Court is in, unless if the Court deems it appropriate
9 to enter the stay, so be it.

10 My response to what Mr. Wall said and what
11 Mr. Wirthlin said is I agree. If the Court is inclined to enter a stay, I
12 would prefer that it be entered now, rather than eating away into the
13 remaining discovery period that we have. You know, rather than
14 having it entered 7 or 10 days from now, which will be virtually lost
15 in pretty --

16 THE COURT: Right.

17 MR. OGILVIE: -- critical precious discovery time, I
18 would prefer that it be entered now to save whatever days we can --
19 we have.

20 THE COURT: Good enough. Ms. Ochoa.

21 MS. OCHOA: Your Honor, I don't think that Mr. Wall is
22 wrong when he says that this Court has jurisdiction to entertain a
23 stay.

24 THE COURT: I could -- I could --

25 MS. OCHOA: [Indiscernible.]

1 THE COURT: I think I misspoke. I actually meant
2 discretion.

3 But go ahead, please.

4 MS. OCHOA: So, you know, the Court does have the
5 jurisdiction to enter a stay, if it so wishes. It's just that I believe that
6 the motion is premature. The plaintiff had even decided whether he
7 wants to file a writ or an appeal. And there's so many different
8 exceptions that the plaintiff is seeking with respect to the stay.

9 Frankly, I don't think, at this point, the five-year rule
10 gets tolled because of these various exceptions that they are already
11 seeking.

12 So my point being that there is no reason that this case
13 cannot be -- that my -- my basis, my right to move forward with
14 postpetition motions, such as a Motion for Fees to resolve the
15 Motion to Retax -- there's no reason why that can't go forward.
16 There's already so many exceptions that the plaintiff is seeking with
17 respect to the stay, that I think there would be no prejudice for my
18 motions to be able to go forward. It does not affect discovery. It
19 would not affect Mr. Ogilvie's clients, if they so choose with
20 Mr. Wirthlin, to stay the case as it -- with respect to discovery.

21 THE COURT: Thank you.

22 And plaintiff, you're the moving party. You get the last
23 word.

24 MR. WIRTHLIN: Your Honor, this is Brenoch Wirthlin.
25 The one thing I would say is the directors themselves filed their

1 motion for a stay before they had filed a writ petition.

2 We need that order. But the Court can certainly
3 reserve the ability to enter that order, as well as entertain the motion
4 with respect to certification while staying the case, which as Mr.
5 Ogilvie points out is in the party's best interests to stay it
6 immediately if the Court is inclined to do that.

7 Thank you.

8 MS. OCHOA: Your Honor, if I may --

9 THE COURT: All right. This is the -- yes, you may.

10 MS. OCHOA: You know, we did file our Motion to
11 Stay, although we did not file the writ. But by the time of the hearing
12 on the Motion to Stay, the writ, on behalf of the directors, was filed
13 before the Supreme Court. So I just want to clarify that.

14 THE COURT: I was aware of that.

15 All right. So this is Plaintiff's Motion to Stay
16 proceedings, pending the filing of a petition of Writ of Mandamus on
17 order to show time. A new wrinkle has been brought up today with
18 regard to obtaining a certification of the judgment as final.

19 Given the fact that time is so very precious in this case,
20 I am going to grant the motion. I was concerned with whether it was
21 premature and whether I had the ability to stay without the writ
22 being filed. But I think it goes to my discretion, rather than a
23 jurisdictional issue.

24 I believe that the stay would promote judicial
25 efficiency, that I think the plaintiff is entitled to a stay in this case. I

1 don't believe that the stay's [indiscernible] is overly broad, that any
2 party would be irreparably harmed. But the stay will be effective on
3 all matters, except for the Motion to Certify.

4 Now, you guys should take a look at this one too. I'm
5 not sure if that stay will continue to be effective once appellate relief
6 is sought. You may need to make a separate application. I'll leave
7 that to the lawyers to determine how to decide that matter.

8 So Mr. Wirthlin and Mr. Wall to prepare the order.

9 Ms. Ochoa and Mr. Ogilvie, do you wish to
10 [indiscernible] of that order?

11 MS. OCHOA: Yes, I would like to, Your Honor.

12 MR. OGILVIE: Yes, Your Honor, please.

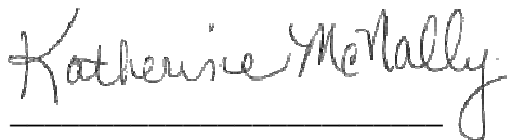
13 THE COURT: Okay. So present an order that's agreed
14 as to form and send it to the TPO inbox.

15 And until I see you guys, which will probably be next
16 week, stay safe and stay healthy. Next Thursday at 11:00. Thanks,
17 guys.

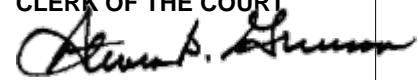
18 [Proceeding concluded at 11:25 a.m.]

19 * * * * *

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

23 

24 Katherine McNally
25 Independent Transcriber CERT**D-323
AZ-Accurate Transcription Service, LLC



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 - Telephone
(702) 382-1512 - Facsimile
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'
RESPONSE TO THE MOTION TO
CERTIFY JUDGMENT AS FINAL
PURSUANT TO NRCP 54(B) ON ORDER
SHORTENING TIME**

Date of Hearing: September 10, 2020

Time of Hearing: 11:00 a.m.

Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert
Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels (collectively "Directors") by
and through their counsel, Lipson Neilson P.C. hereby file their Response to the Motion
to Certify Judgment as Final Pursuant to NRCP 54(B) on Order Shortening time, and

1 state as follows:

2 1. The Directors do not oppose the request for NRCP 54(b) certification.

3 2. However, the Directors note that with NRCP 54(b) certification being
4 granted, there is also no just reason to prevent the Directors from proceeding with their
5 post-judgment motions and rights.

6 3. As Plaintiff states in its Motion, without the certification, Directors have no
7 repose and their judgment is not enforceable. With 54(b) certification, the Directors
8 should be able to pursue their award of fees and costs, to be able to enforce the same.

9 4. Upon entry of the Order Granting Plaintiff's Motion to Certify Judgment as
10 Final Pursuant to NRCP 54(b), this Court should lift the stay currently in place.

11 Dated this 8th day of September, 2020.

12 LIPSON NEILSON P.C.

13 /s/ Angela Ochoa

14 By: _____
15 Joseph P. Garin, Esq. (6653)
16 Angela T. Nakamura Ochoa, Esq. (10164)
17 9900 Covington Cross Dr., Suite 120
18 Las Vegas, NV 89144
19 jgarin@lipsonneilson.com
20 aochoa@lipsonneilson.com
21 jwong@lipsonneilson.com

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

CERTIFICATE OF SERVICE

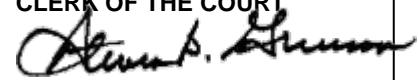
Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 8th day of September, 2020, I electronically transmitted the foregoing, **DEFENDANTS ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS' RESPONSE TO THE MOTION TO CERTIFY JUDGMENT AS FINAL PURSUANT TO NRCP 54(B) ON ORDER SHORTENING TIME** 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
Nelson Mullins	
Contact	Email
Jon M. Wilson	jon.wilson@nelsonmullins.com
Kimberly Freedman	kimberly.freedman@nelsonmullins.com
Hutchison & Steffen	
Contact	Email
Christian M. Orme	corme@hutchlegal.com
Jon Linder	ilinder@hutchlegal.com
Brenoch Wirthlin	bwirthlin@hutchlegal.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.



OPPM

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
OPPOSITION TO MOTION TO
CERTIFY JUDGMENT AS FINAL
PURSUANT TO NRCP 54(B)**

**Hearing Date: September 10, 2020
Hearing Time: 11:00 a.m.**

Defendants Uni-Ter Underwriting Management Corp. (“Uni-Ter UMC”), Uni-Ter Claims Services Corp. (“Uni-Ter CS” and, together with Uni-Ter UMC, “Uni-Ter”) and U.S. Re Corporation (“U.S. Re”), hereby submit their Opposition to Motion to Certify Judgment as Final Pursuant to NRCP 54(b) on Order Shortening Time filed by Plaintiff, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC risk Retention Group, Inc. (“Receiver”), on September 3, 2020. For the reasons discussed below, and specifically in light of the significant prejudice the requested certification will have on Uni-Ter and U.S. Re, Uni-Ter and U.S. Re respectfully request that this Court deny the Motion to Certify. Alternatively, should the Court grant the motion, Uni-Ter and U.S. Re request that the Court modify the present stay to allow for, at a minimum, completion of discovery in this matter.

I. INTRODUCTION AND RELEVANT PROCEDURAL HISTORY

The Receiver filed the initial complaint in this action nearly six years ago, on December 23, 2014. The Nevada Division of Insurance (“DOI”) initiated the underlying Receivership Action approximately two years before that, in November 2012. A significant portion of the Receiver’s allegations in the Third Amended Complaint focus on events that occurred between approximately 2009 and 2012, though her allegations and discovery requests have gone back as far as 2004. Thus, should this case proceed to trial in February 2021, as firmly set a few weeks ago, more than a decade will have passed between the time the some of the key events at issue here actually occurred and the time the case is tried.

Now, just a couple of months after this Court lifted the fifteen-month stay of the proceedings entered in March 2019, the Receiver, once again, seeks to halt this case by requesting that the Court certify the August 13, 2020 judgment in favor of the Director Defendants as final so that the Receiver can take an immediate final appeal of the Court’s order denying her motion for leave to amend her complaint. The relief now requested is very different from the limited relief the Receiver sought by way of her motion to stay, filed less than two weeks ago. Indeed, the Receiver’s motion to stay expressly asked the Court to stay the proceedings while she sought *mandamus relief* from the Nevada Supreme Court with respect to the denial of her motion for leave to amend. Conspicuously absent from that motion

1 was any indication that the Receiver was actually seeking to take an immediate appeal, from a
2 certified final judgment, to address that denial.

3 Yet, at the September 3, 2020 hearing—without any prior notice to defense counsel
4 despite several unanswered attempts by counsel for Uni-Ter and U.S. Re to confer with counsel
5 for the Receiver regarding the motion to stay¹—the Receiver moved, *ore tenus*, for the Court to
6 certify the judgment in favor of the Director Defendants as final so that it could seek an
7 immediate appeal. Counsel for the Receiver also confirmed that, despite not addressing
8 potential Rule 54(b) certification in her motion to stay, and limiting the stay request in that
9 motion to the pursuit of a writ of mandamus, she would seek a stay of this action whichever
10 path—mandamus *or* a Rule 54(b) appeal—is ultimately pursued.²

11 The impact on Uni-Ter and U.S. Re, however, is substantially greater should the
12 Receiver be allowed to pursue a final appeal from the judgment in favor of the Director
13 Defendants than it would be if the Receiver seeks limited, discretionary review by way of a
14 petition for writ of mandamus. Indeed, the direct appeal—and associated stay—the Receiver
15 now seeks will significantly impact Uni-Ter and U.S. Re’s ability to prepare for and defend
16 themselves by delaying discovery and trial for potentially *several more years*. In this case,
17 where the operative events are already a decade in the past, where memories fade and witnesses
18 have become difficult to locate, where those with knowledge of both the case and the
19 underlying facts are increasing in age, and where testimony has yet to be preserved by way of
20 depositions, such delay is severely and disproportionately prejudicial to Uni-Ter and U.S. Re.

21 Accordingly, this Court should deny the Motion to Certify. Alternatively, if the Court
22 grants certification, the Court should modify the stay presently in place to allow the case
23 against Uni-Ter and U.S. Re to proceed uninterrupted, at least through the close of discovery.

25 ¹ See Declaration of Jon M. Wilson, Esq. in Support of Defendants’ Response in
26 Opposition to the Receiver’s Motion to Certify Judgment as Final Pursuant to NRCP 54(b) on
27 Order Shortening Time (“Wilson Decl.”), attached hereto as **Exhibit A**, ¶ 14.

28 ² Interestingly, the Receiver sought a stay in this Court prior to filing the petition for writ
of mandamus she claimed she was pursuing. To date no such petition has been filed.

II. ARGUMENT IN RESPONSE

A. Rule 54(b) certification should be denied

“The determinations made pursuant to NRCP 54(b) are matters to be considered carefully and should not be entered routinely or as an accommodation to counsel.” *Knox v. Dick*, 99 Nev. 514, 516, 665 P.2d 267, 269 (1983). Indeed, “[j]udgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by the pressing needs of the litigants for an early and separate judgment as to some claims or parties.” *Metro Acquisitions, LLC v. Sunset III, L.L.C.*, 208CV00524RCJLRL, 2009 WL 10709706, at *1 (D. Nev. July 13, 2009) (denying motion for certificate of appealability and entry of final judgment pursuant to federal rule 54(b)).³

As the Receiver correctly points out, the standard for determining whether certification under Rule 54(b) in a “parties” case is set forth in *Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 611, 797 P.2d 978, 981 (1990). *Mallin* provides that, in analyzing whether certification is warranted, “[t]he district court should weigh the prejudice to the various parties and should certify a judgment as final in a “parties” case if the prejudice to the eliminated party would be greater than the prejudice to the parties remaining below.” What the Receiver wholly ignores, however, is the actual prejudice to Uni-Ter and U.S. Re should certification be granted and the case stayed for a lengthy period of time.

The Receiver’s argument that all Uni-Ter and U.S. Re stand to lose from certification is “the unfair advantage at trial of an empty chair,” (Mot. to Certify at 2), ignores the practical and actual impact of certification on Uni-Ter and U.S. Re. The Receiver’s present motion for Rule 54(b) certification and her request that this Court essentially “push pause” on the entire

³ Federal cases interpreting the Federal Rules of Civil Procedure “are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.” *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (citing *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)).

litigation for the duration of that appeal—which realistically could take two to three years—is not only highly prejudicial, but, at this point in time, would likely be irreparable.

It is well settled that “[d]elay ‘inherently increases the risk that witnesses’ memories will fade and evidence will become stale.’” *Blue Cross & Blue Shield of Alabama v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724 (9th Cir. 2007) (quoting *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002)); *see also Aspen Fin. Services v. Dist. Ct.*, 128 Nev. 635, 646–47, 289 P.3d 201, 208–09 (2012) (“The delay resulting from a stay may also duly frustrate a plaintiff’s ability to put on an effective case because as time elapses, witnesses become unavailable, memories of conversations and dates fade, and documents can be lost or destroyed.”) (internal quotation marks omitted). This concept is extremely relevant here. As discussed above, this case has been pending for nearly six years and involves issues and events that occurred a decade ago. While the Receiver was appointed in early 2013 and has had significant time to prepare its case, Uni-Ter and U.S. Re have not had that same benefit, particularly given the lengthy stay that was just recently lifted.⁴

Indeed, discovery has not yet been completed, and the parties were in the middle of expert disclosures when the matter was again stayed based on the Receiver’s recent representation that she would be seeking mandamus relief. If the Motion to Certify is granted and the case stayed for the duration of that appeal—which realistically could take two to three years—Uni-Ter and U.S. Re will be unable to pursue the several depositions that still need to be taken, and which were recently disclosed to the Receiver, in order to prepare its case and preserve testimony for trial.

Moreover, Uni-Ter and U.S. Re have ceased doing business and now must rely on former employees, over whom they have virtually no control, to testify on their behalf. *See* Wilson Decl., ¶ 10. Counsel for Uni-Ter and U.S. Re have made significant efforts to locate

⁴ Uni-Ter and U.S. Re have consistently argued, throughout these proceedings, that the Receiver’s repeated delays and failure to timely bring this case to trial has and will continue to unfairly prejudice them. *See* Uni-Ter and U.S. Re’s Opposition to the Director Defendants’ Motion to Stay and the Receiver’s Limited Joinder Thereto, filed March 12, 2019 (pointing out the significant difficulty in locating witnesses and loss of accurate recall due to the passage of time).

1 former employees, including former officers of Uni-Ter, to testify in a representative capacity
2 at deposition. *See id.* Either counsel for Uni-Ter and U.S. Re has been unable to locate or
3 contact these employees or the former employees have been unavailable or unwilling to testify
4 at deposition. *Id.* at ¶ 11. Should the Court grant the Motion to Certify, the hardship on Uni-
5 Ter and U.S. Re to secure witnesses for trial—or even for deposition to preserve testimony—
6 will only increase.

7 Further, certification and a related stay for the duration of the appeal puts Uni-Ter and
8 U.S. Re at real risk of losing the few fact witnesses that are presently available to them, as well
9 as those with deep knowledge of the case and its history. The two individuals that agreed to
10 serve as 30(b)(6) witnesses for Uni-Ter and U.S. Re, Joe Fedor and Dick Davies, are 77 and 69
11 years old, respectively. *Id.* at ¶ 12. Tal Piccione, who has knowledge of U.S. Re, Uni-Ter, and
12 Lewis & Clark since their inception, is 72. *Id.* And, Jon Wilson, who has served as lead
13 counsel in this matter since 2015 and will serve as lead trial counsel, is 75 years old. *Id.* at ¶¶
14 4-5. Uni-Ter and U.S. Re need these individuals to be available and able to testify—and to
15 try—this case. Certification under Rule 54(b) and a lengthy appeal significantly increases the
16 risk that these individuals will not be able to do so, at great prejudice to Uni-Ter and U.S. Re.

17 The balancing of the prejudices to the parties also weighs heavily against certification in
18 light of the fact that the Receiver herself has recognized another potential avenue for relief by
19 way of a petition for a writ of mandamus. As discussed above, before the Receiver’s *ore tenus*
20 motion for certification under Rule 54(b) at the September 3, 2020 hearing, the Receiver
21 represented to both the parties and the Court that she intended to seek mandamus relief for the
22 Court’s denial of her motion for leave to amend. Indeed, the purpose of the September 3
23 hearing was to address the Receiver’s motion for stay pending resolution of that writ petition.

24 While consideration of a writ petition is within the “sole discretion” of the Nevada
25 Supreme Court, the Nevada Supreme Court has recognized that such “extraordinary relief” may
26 be available “[w]here there is no plain, speedy, and adequate remedy in the ordinary course of
27 law.” *Chur v. Eighth Judicial Dist. Court in & for County of Clark*, 136 Nev. 68, 70, 458 P.3d
28 336, 339 (2020). Further, “[a] writ of mandamus is available to . . . control an arbitrary or

capricious exercise of discretion.” *Id.* (quoting *Int’l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)). If the Receiver truly believes this Court improperly exercised its discretion in denying her motion for leave, then she can pursue relief for that alleged wrong, as she initially represented she was doing, by way of a petition for writ of mandamus. The Receiver should not be able to circumvent her burden to establish entitlement to mandamus relief by urging this Court to employ Rule 54(b). As noted above, certification should be entered sparingly, and not as a matter of course or as an accommodation to a party or counsel. *See Knox*, 99 Nev. at 516, 665 P.2d at 269 (1983); *Metro Acquisitions, LLC*, 2009 WL 10709706, at *1.

Because the prejudice to Uni-Ter and U.S. Re in certifying the judgment and staying this case pending resolution of the Receiver’s appeal substantially outweighs any potential prejudice to the Director Defendants and the Receiver, the Motion to Certify and related stay should be denied.

B. Should the Court grant the Motion to Certify, Uni-Ter and U.S. Re respectfully request the Court modify the stay to allow fact and expert discovery to proceed.

As addressed at the hearing on September 3, 2020, Uni-Ter and U.S. Re did not actively oppose the Receiver’s request for a stay pending a petition for writ of mandamus. Uni-Ter and U.S. Re did not do so in light of this Court’s prior statement that it was inclined to grant a stay pending a writ proceeding, as well as their reasonable belief regarding the length of time such proceeding would take. The Nevada Supreme Court could deny the petition outright. Should it choose to consider the petition, the sole issue before the Nevada Supreme Court would be the propriety of the Court’s decision to deny the motion for leave to amend. Given the Nevada Supreme Court’s recent familiarity with the case, it is Uni-Ter and U.S. Re’s educated guess that any stay associated with a writ proceeding would be relatively short.

The same cannot be said for a stay associated with an appeal from a certified final judgment, as the Receiver now seeks. In contrast, a full length appeal could take up to two or three years before resolution. Accordingly, Uni-Ter and U.S. Re oppose the imposition of a stay of the

case if the Motion to Certify is granted, and respectfully request that this Court allow the matter to proceed, at a minimum, through the close of fact and expert discovery.

A court typically considers four factors in deciding whether to issue a stay pending resolution of an appeal (or a petition):

(1) Whether the object of the appeal or writ petition will be defeated if the stay is denied; (2) Whether appellant/petitioner will suffer irreparable or serious injury if the stay is denied; (3) Whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) Whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000) (concluding petitioner was not entitled to a stay). No one factor carries more weight than any other; however, “if one or two factors are especially strong, they may counterbalance other weak factors.” *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004) (citing *Hansen*, 116 Nev. at 659, 6 P. 3d at 987).

Here, the irreparable and serious injury that will result to Uni-Ter and U.S. Re should a stay be granted while the Receiver pursues her appeal heavily outweighs the remaining factors and counsels against the entry of a stay, for the reasons discussed at length above. In addition, the “object of the appeal” will not be defeated if the stay is denied, because Uni-Ter and U.S. Re are pursuing discovery relevant to the claims direct toward them, not the Director Defendants. The majority of the Director Defendants have already been deposed, and Uni-Ter and U.S. Re have provided the Receiver with a list of individuals and entities they wish to depose. For this same reason, there would be no prejudice to the Receiver should the case continue, through discovery, with respect to U.S. Re and Uni-Ter.

Finally, it is unlikely that the Receiver will actually prevail on the merits of the appeal. The denial of a motion for leave to amend a complaint is reviewed for an abuse of discretion. *See McInerney v. Lakes Crossing Ctr.*, 127 Nev. 1159, 373 P.3d 941 (2011) (“We perceive no abuse of discretion in the district court's order denying as futile appellant's motion for leave to amend his complaint.”). In reversing this Court’s prior order denying the Director Defendant’s motion for judgment on the pleadings, the Nevada Supreme Court expressly stated: “We leave it to the

discretion of the trial court whether to grant the Commissioner leave to amend the complaint.”
Chur, 136 Nev. at 75, 458 P.3d at 342. This Court, after extensive briefing and argument, issued
an opinion setting forth the basis for its denial. It is unlikely that the Nevada Supreme Court will
disturb this decision.

Accordingly, the relevant factors militate against the imposition of a stay pending an appeal
following certification under Rule 54(b), and the stay currently imposed should be modified to
allow the remaining parties to the case to proceed through the close of discovery.

III. CONCLUSION

For the reasons set forth above, the Receiver’s Motion to Certify should be denied.
Alternatively, should the Court grant the motion, Uni-Ter and U.S. Re respectfully request that the
Court modify the current stay to allow for the completion of both fact and expert discovery.

DATED this 8th day of September, 2020.

McDONALD CARANO LLP

By: /s/ George F. Ogilvie III

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

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

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 8th day of September, 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 RECEIVER'S MOTION OT CERTIFY JUDGMENT AS FINAL PURSUANT TO NRCP54(B) ON ORDER SHORTENING TIME** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic

An employee of McDonald Carano LLP

EXHIBIT “A”

**DECLARATION OF JON M. WILSON, ESQ. IN SUPPORT OF DEFENDANTS
UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS
SERVICES CORP. AND U.S. RE CORPORATION'S OPPOSITION TO MOTION
TO CERTIFY JUDGMENT AS FINAL PURSUANT TO NRCP 54(B)**

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

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

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

3. This Declaration is made in support of the response filed by Uni-Ter and U.S. Re in opposition to the Receiver's Motion to Certify Judgment as Final Pursuant to NRCP 54(b) on Order Shortening Time ("Motion to Certify").

4. I am presently 75 years old.

5. I have served at lead counsel in this matter since 2015, I have a deep knowledge of the case and its history, and I will serve as lead trial counsel in this matter.

6. Uni-Ter and U.S. Re have experienced significant difficulty locating witnesses who are able to testify on their behalf, and that difficulty will only increase over time.

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

8. By the time the Receiver re-noticed the 30(b)(6) depositions for February 2019, Mr. Ciervo had moved to Arizona and was unwilling to travel to New York, or even to Las Vegas, to be deposed.

9. While Mr. Ciervo ultimately agreed to appear to by telephone to testify to limited topics for purposes of the 30(b)(6) deposition, this is indicative of the struggle Uni-Ter and U.S. Re face in locating witnesses—and this is without the additional delay that the proposed

certification and related stay would cause.

10. Uni-Ter and U.S. Re have ceased doing business and now must rely on former employees, over whom they have virtually no control, to testify on their behalf. In addition to Mr. Ciervo, counsel for Uni-Ter and U.S. Re have made significant efforts to locate former employees, including former officers of Uni-Ter, to testify in a representative capacity at deposition.

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

12. The few individuals who have knowledge of the underlying facts in this case and who are presently willing to speak to or testify on behalf of Uni-Ter and U.S. Re are all in their late 60s or 70s. Specifically, the two individuals that agreed to serve as 30(b)(6) witnesses for Uni-Ter and U.S. Re, Joe Fedor and Dick Davies, are 77 and 69 years old, respectively. Tal Piccione, who has knowledge of U.S. Re, Uni-Ter, and Lewis & Clark since their inception, is presently 72 years old.

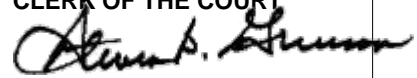
13. Should this Court grant the Motion to Certify and stay the case during the pendency of the Receiver's appeal, the prejudice to Uni-Ter and U.S. Re based on their increasing inability to secure witnesses for trial, to preserve necessary testimony and evidence, and to properly defend the case against them due to the passage of time will be significant.

14. In advance of the hearing on the Receiver's motion to stay pending her purported petition for writ of mandamus to the Nevada Supreme Court, I attempted to contact counsel for the Receiver, Brenoch Wirthlin, by both phone and email to address the requested stay. I received no response.

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

Dated this 8th day of September, 2020.

/s/ Jon M. Wilson



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 - Telephone
(702) 382-1512 - Facsimile
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

**NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER DENYING THE MOTION FOR
PARTIAL RECONSIDERATION OF
MOTION FOR LEAVE TO AMEND
REGARDING DIRECTOR DEFENDANTS**

///

///

///

///

1 Please take notice that the Findings of Fact, Conclusions of Law and Order
2 Denying the Motion for Partial Reconsideration of Motion for Leave to Amend Regarding
3 Director Defendants was filed with this court on the 9th day of September, 2020, a copy
4 of which is attached hereto, as **Exhibit A**.

5 Dated this 10th day of September, 2020.

6 LIPSON NEILSON P.C.

7 /s/ Angela Ochoa

8 By: _____

Joseph P. Garin, Esq. (6653)
Angela T. Nakamura Ochoa, Esq. (10164)
Jonathan K. Wong, Esq. (13621)
9900 Covington Cross Dr., Suite 120
Las Vegas, NV 89144
jgarin@lipsonneilson.com
aocchoa@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*

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 10th day of September, 2020, I electronically transmitted the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING THE MOTION FOR PARTIAL RECONSIDERATION OF MOTION FOR LEAVE TO AMEND REGARDING DIRECTOR DEFENDANTS** 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**

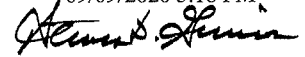
Attorney General's Office	
Contact	Email
Joanna Grigoriev	jgrigoriev@ag.nv.gov
Nevada Attorney General	wiznetfilings@ag.nv.gov
Nelson Mullins	
Contact	Email
Jon M. Wilson	jon.wilson@nelsonmullins.com
Kimberly Freedman	kimberly.freedman@nelsonmullins.com
Hutchison & Steffen	
Contact	Email
Christian M. Orme	corme@hutchlegal.com
Jon Linder	ilinder@hutchlegal.com
Brenoch Wirthlin	bwirthlin@hutchlegal.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.

EXHIBIT “A”

EXHIBIT “A”


CLERK OF THE COURT

LIPSON NEILSON 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
aocchoa@lipsonneilson.com
Attorneys for Defendants
Robert Chur, Steve Fogg,
Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin,
Jeff Marshall, and Eric Stickels

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

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

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER DENYING THE
MOTION FOR PARTIAL
RECONSIDERATION OF MOTION FOR
LEAVE TO AMEND REGARDING
DIRECTOR DEFENDANTS**

This matter came before the Court for hearing on August 26, 2020 on Plaintiff's Motion for Partial Reconsideration of Motion for Leave to Amend Regarding Director Defendants ("Motion"). Angela T. Nakamura Ochoa, Esq. appeared on behalf of Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut,

1 Barbara Lumpkin, Jeff Marshall and Eric Stickels; Mark A. Hutchison, Esq. and Brenoch
2 R. Wirthlin, Esq. appeared on behalf of Plaintiff Commissioner of Insurance for the State
3 of Nevada ("Plaintiff" or "Commissioner"); and George F. Ogilvie III, Esq., appeared on
4 behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services
5 Corp., and U.S. RE Corporation; and
6

7 Having considered the record and the briefs submitted in support of and in
8 opposition to the Motion, and having entertained the arguments of counsel, and being
9 fully informed in the premises, the Court makes the following findings of fact,
10 conclusions of law and order:

11 **FINDINGS OF FACT**

12 1. Lewis and Clark LTC Risk Retention Group, Inc. ("L&C") was formed in
13 2003. Between 2004 and February 28, 2013, L&C provided general and professional
14 liability coverage to long term care facilities and home health providers. See Third
15 Amended Complaint ("TAC") at ¶1.

16 2. The Nevada Division of Insurance ("DOI") filed a Receivership Action
17 related to L&C in November, 2012, commencing case number A-12-672047-B
18 ("Receivership Action"). Plaintiff Commissioner of Insurance for the State of Nevada
19 was appointed as the receiver.

20 3. On February 28, 2013, an order of liquidation ("Liquidation Order") was
21 entered in the Receivership Action, appointing the Commissioner as the receiver of
22 L&C. See Liquidation Order.

23 4. On December 23, 2014, the Commissioner instituted this lawsuit against,
24 among other defendants, eight of the former directors of L&C Robert Chur, Steve Fogg,
25 Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric
26 Stickels ("Director Defendants"). In the initial complaint, the Commissioner alleged
27
28

1 claims of gross negligence and deepening of the insolvency against the Director
2 Defendants.

3 5. On December 11, 2015, Director Defendants filed their Motion to Dismiss,
4 challenging the sufficiency of the allegations of gross negligence and asserting that a
5 claim for deepening insolvency required allegations of fraud such that the claims must
6 be pled with specificity.

7 6. On June 13, 2016, the Commissioner filed its Second Amended
8 Complaint, and, subsequently, on August 5, 2016, the Commissioner filed its Third
9 Amended Complaint.

10 7. On April 18, 2016, Director Defendants filed a Motion to Dismiss the First
11 Amended Complaint, asserting that claims against officers and directors needed to be
12 supported by claims of intentional misconduct, fraud or knowing violation of the law.
13 Said Motion was subsequently denied.

14 8. During the period of September 5, 2017 through April 13, 2018, Director
15 Defendants propounded written discovery upon Plaintiff.

16 9. Due to the multiple requests to extend discovery in this action and the
17 then approaching 5-year rule expiration, this Court expressly conditioned its May 16,
18 2018 Order continuing discovery deadlines that it would be the "last stipulation to
19 continue."

20 10. On August 14, 2018, the Director Defendants filed a Motion For Judgment
21 On The Pleadings Pursuant To NRCP 12(C) ("Motion For Judgment On The
22 Pleadings"). On November 2, 2018, this Court denied the Director Defendants' Motion
23 for Judgment on the Pleadings.

24 11. On December 12, 2018, the Commissioner filed Plaintiff's Motion for
25 Extension of Discovery Deadlines and to Continue Trial on Order Shortening Time
26 (Fourth Request), which this Court granted in part and denied in part, extending
27 discovery for sixty (60) days and ordering a firm trial setting.
28

1 12. In and around July, 2018, Director Defendant Barbara Lumpkin passed
2 away.

3 13. On November 8, 2018, the deposition of the NRCP 30(b)(6) witness for
4 the Commissioner of Insurance for the State of Nevada took place, in which he
5 frequently responded that the complaint spoke for itself and that he would be relying
6 upon experts in response to the Defendants questioning. Mr. Greer also testified
7 regarding the unavailability of certain Division of Insurance former employees. At no
8 time, did he state that the Director Defendants violated the law.

9 14. On March 8, 2019, the Director Defendants filed a Motion to Stay
10 Proceedings Pending Petition for Writ of Mandamus on an Order Shortening Time. The
11 Commissioner filed a Limited Joinder to Directors' Motion to Stay Proceedings Pending
12 Petition for Writ of Mandamus.

13 15. On March 12, 2019, the Director Defendants filed their Notice of Filing of
14 Petition for Writ of Mandamus with the Nevada Supreme Court. In their Petition for Writ
15 of Mandamus, the Director Defendants challenged this Court's denial of the Director
16 Defendants' Motion for Judgment on the Pleadings.

17 16. On March 14, 2019, this Court granted the Motion to Stay Proceedings
18 Pending Petition for Writ of Mandamus, and imposed an immediate stay (the "Stay") of
19 all proceedings in this matter.

20 17. On February 27, 2020, the Nevada Supreme Court issued its Opinion
21 ("NSC Opinion") granting the Director Defendants' Petition for Writ of Mandamus, and
22 instructed this Court to vacate its order denying the Director Defendants' Motion for
23 Judgment on the Pleadings, and to enter a new order granting the Director Defendants'
24 Motion for Judgment on the Pleadings. The NSC Opinion left to this Court's discretion
25 whether to grant the Commissioner leave to file a fourth amended complaint.

26 18. On May 14, 2020, because the writ petition proceedings before the
27 Nevada Supreme Court were not concluded, the parties entered into a stipulation
28

1 continuing the hearing on the Plaintiff's Motion for Clarification and extending the Stay
2 until June 18, 2020.

3 19. On May 22, 2020, the Nevada Supreme Court issued its Order Denying
4 Rehearing, thereby affirming the Opinion, and directing this Court to enter an order
5 granting the Director Defendants' Motion for Judgment on the Pleadings, but leaving to
6 this Court's discretion whether to grant the Commissioner leave to file a fourth amended
7 complaint.

8 20. At the time of the June 18, 2020 hearing, the Commissioner requested
9 that the Stay be extended to July 1, 2020; the Defendants objected to the Plaintiff's
10 request, and requested that the Stay be lifted immediately. This Court granted Plaintiff's
11 Motion for Clarification, and ordered that the Stay be lifted as of July 1, 2020.

12 21. On June 24, 2020, the Commissioner filed Plaintiff's Motion for
13 Preferential Trial Setting And For Issuance of A New Discovery Scheduling Order or, In
14 the Alternative, Motion to Stay All Discovery During the Pendency of Motion For Leave
15 to File Fourth Amended Complaint; On Order Shortening Time ("Plaintiff's Motion for
16 Preferential Trial Setting").

17 22. At the time of the July 1, 2020 hearing on Plaintiff's Motion for Preferential
18 Trial Setting, the Commissioner advised the court that it would file a Motion for Leave to
19 Amend on July 2, 2020. The Defendants requested that the Court direct the Receiver to
20 serve its initial expert disclosures on July 2. Over the Defendants' objection, this Court
21 extended the deadline for the Commissioner to serve its initial expert disclosures to the
22 conclusion of the hearing of Plaintiff's anticipated Motion for Leave to File Fourth
23 Amended Complaint¹.

24 23. On July 2, 2020, Plaintiff filed its Motion for Leave to File Fourth Amended
25 Complaint.

26
27
28 ¹ The hearing was scheduled for July 23, 2020.

1 24. The hearing on Plaintiff's Motion for Leave to File Fourth Amended
2 Complaint was held on July 23, 2020.

3 25. The court subsequently ruled that discovery would close on December 17,
4 2020.

5 26. As it relates to the Director Defendants, the Commissioner contends that
6 her proposed Fourth Amended Complaint alleges that the Director Defendants
7 knowingly violated the law. The court makes no findings as to the futility of the
8 proposed Fourth Amended Complaint.

9 27. With the passage of time, the Director Defendants will be unduly
10 prejudiced in establishing their defenses to Plaintiff's new theory that the Director
11 Defendants knowingly violated the law.

12 If any of these findings of fact should more properly be identified as a conclusion
13 of law, then it shall be deemed a conclusion of law.

14 **CONCLUSIONS OF LAW**

15 1. "A district court may reconsider a previously decided issue if substantially
16 different evidence is subsequently introduced or the decision is clearly erroneous."
17 *Masonry & Title Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev.
18 737, 741, 941 P.2d 486, 489 (1997).

19 2. "Only in very rare instances in which new issues of fact or law are raised
20 supporting a ruling contrary to the ruling already reached should a motion for rehearing
21 be granted." *Moore v. Las Vegas* (1976) 92 Nev. 402,405.

22 3. Whether to allow amendment to a pleading resides within the sound
23 discretion of the trial court. *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828
24 (2000).

25 4. In "the absence of any apparent or declared reason -- such as undue
26 delay, bad faith or dilatory motive on the part of the movant -- [leave to amend] should
27
28

1 be freely given." *Stephens v. Southern Nev. Music Co.*, 89 Nev. 104, 105-106, 507 P.2d
2 138, 139 (1973) (emphasis added) (citing *Foman v. Davis*, 371 U.S. 178 (1962)). While
3 leave to amend should be freely given when justice so requires, "[t]his does not,
4 however, mean that a trial judge may not, in a proper case, deny a motion to amend."
5 *Stephens v. S. Nevada Music Co., Inc.*, 89 Nev. 104, 105, 507 P.2d 138, 139 (1973).
6 Indeed, "[i]f that were the intent, leave of court would not be required." *Id.*
7

8 5. Where a plaintiff has previously amended her complaint, the discretion to
9 deny further amendment is "particularly broad." *Cafasso v. Gen. Dynamics C4 Sys.*, 637
10 F.3d 1047, 1058 (9th Cir. 2011).

11 6. In evaluating whether a party timely moved for leave to amend, a court is
12 not confined to solely reviewing whether a motion was filed during the time allotted by a
13 scheduling order. *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3D 946, 951-
14 952 (9th Cir. 2006).

15 7. There has been a clarification by the Supreme Court of the *Shoen* case
16 [See *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006)],
17 that despite the existence of hardship to the Plaintiff, the Court finds that it would not be
18 fair to the Director Defendants to have to defend a fourth amended complaint two
19 months before the discovery deadline and with a five-year rule looming. Justice does
20 not require granting leave to amend for Plaintiff to file the proposed Fourth Amended
21 Complaint as to the Director Defendants because Plaintiff unduly delayed bringing said
22 complaint and it would be unduly prejudicial for the Director Defendants to defend such
23 theories of liability at this point. Plaintiff did not provide any new evidence to warrant
24 reconsideration. Further, this Court did not err in denying Plaintiff's Motion for Leave to
25 Amend.

26 If any of these conclusions of law should more properly be identified as a finding
27 of fact, then it shall be deemed a finding of fact.
28

1 ORDER

2 IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration of Motion
3 for Leave to Amend Regarding Director Defendants is DENIED.

4 DATED this 9 day of September, 2020.

5 Dated this 9th day of September, 2020

6 Nancy L. Allf

7 NANCY L. ALLF

8 District Court Judge

39B 7F7 F34A 1E07

Nancy Allf

District Court Judge

NB

Submitted by:

LIPSON NEILSON P.C.

10 /s/ Angela Nakamura Ochoa

11 Joseph P. Garin, Esq. (NV Bar No. 6653)

12 Angela Ochoa, Esq. (NV Bar No. 10164)

9900 Covington Cross Dr., Suite 120

Las Vegas, NV 89144

14 *Attorneys for Defendants Robert Chur,*
15 *Steve Fogg, Mark Garber, Carol Harter,*
16 *Robert Hurlbut, Barbara Lumpkin, Jeff*
17 *Marshall & Eric Stickels*

18 Approved as to Form and Content:

HUTCHISON & STEFFEN

19 By: Would not Agree to Form or Content

20 Brenoch Wirthlin, Esq.

10080 West Alta Drive, Suite 200

Las Vegas, Nevada 89145

22 *Attorneys for Plaintiff Commissioner*
23 *of Insurance for the State of Nevada*

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

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

9 vs.

10 Robert Chur, Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
15 court's electronic eFile system to all recipients registered for e-Service on the above entitled
16 case as listed below:

17 Service Date: 9/9/2020

18 Adrina Harris .	aharris@fclaw.com
19 Angela T. Nakamura Ochoa .	aochoa@lipsonneilson.com
20 Ashley Scott-Johnson .	ascott-johnson@lipsonneilson.com
21 Brenoch Wirthlin .	bwirthli@fclaw.com
22 CaraMia Gerard .	cgerard@mcdonaldcarano.com
23 George F. Ogilvie III .	gogilvie@mcdonaldcarano.com
24 Jessica Ayala .	jayala@fclaw.com
25 Joanna Grigoriev .	jgrigoriev@ag.nv.gov
26 Jon M. Wilson .	jwilson@broadandcassel.com
27 Kathy Barrett .	kbarrett@mcdonaldcarano.com

28
PA003688

1	Marilyn Millam .	mmillam@ag.nv.gov
2	Nevada Attorney General .	wiznetfilings@ag.nv.gov
3		
4	Paul Garcia .	pgarcia@fclaw.com
5	Renee Rittenhouse .	rrittenhouse@lipsonneilson.com
6	Rory Kay .	rkay@mcdonaldcarano.com
7	Susana Nutt .	snutt@lipsonneilson.com
8	Yusimy Bordes .	ybordes@broadandcassel.com
9	Jelena Jovanovic .	jjovanovic@mcdonaldcarano.com
10	Christian Orme	corme@hutchlegal.com
11	Patricia Lee	plee@hutchlegal.com
12	Kimberly Freedman	kfreedman@broadandcassel.com
13	Danielle Kelley	dkelley@hutchlegal.com
14	Karen Surowiec	ksurowiec@mcdonaldcarano.com
15	Jonathan Wong	jwong@lipsonneilson.com
16	Erin Kolmansberger	erin.kolmansberger@nelsonmullins.com
17	Melissa Gomberg	melissa.gomberg@nelsonmullins.com
18	Betsy Gould	bgould@doi.nv.gov
19	Juan Cerezo	jcerezo@lipsonneilson.com
20	Heather Bennett	hshepherd@hutchlegal.com
21	Brenoch Wirthlin	bwirthlin@klnevada.com
22	Jon Linder	jlinder@klnevada.com
23	S. Dianne Pomonis	dpomonis@klnevada.com
24	Daniel Maul	dmaul@hutchlegal.com
25		
26		
27		
28		

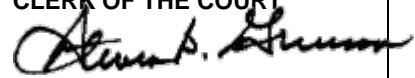
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Brenoch Wirthlin

bwirthlin@hutchlegal.com

Jon Linder

jlinder@hutchlegal.com



NEO

MARK A. HUTCHISON, ESQ. (4639)
MICHAEL WALL, ESQ. (2098)
PATRICIA LEE, ESQ. (8287)
BRENOCH R. WIRTHLIN, ESQ. (10282)

HUTCHISON & STEFFEN

10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Telephone: (702) 385.2500
Facsimile: (702) 385.2086
E-Mail: mhutchison@hutchlegal.com
E-mail: mwall@hutchlegal.com
E-Mail: plee@hutchlegal.com
E-Mail: bwirthlin@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

NOTICE OF ENTRY OF ORDER

Please take notice that an Order Granting Plaintiff's Motion to Stay Proceedings was
entered on the 17th day of September, 2020,

///

///

///

1 a copy of which is attached hereto.

2 DATED this 17th day of September, 2020.

3 HUTCHISON & STEFFEN

4
5 By /s/Brenoch Wirthlin
6 MARK A. HUTCHISON, ESQ. (4639)
7 MICHAEL WALL, ESQ. (2098)
8 PATRICIA LEE, ESQ. (8287)
9 BRENOCH R. WIRTHLIN, ESQ. (10282)
10 10080 West Alta Drive, Suite 200
11 Las Vegas, Nevada 89145
12 *Attorneys for Plaintiff*
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 17th day of September, 2020, I caused the document entitled **NOTICE OF ENTRY OF ORDER** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

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

OGM

MARK A. HUTCHISON, ESQ. (4639)
MICHAEL WALL, ESQ. (2098)
PATRICIA LEE, ESQ. (8287)
BRENOCH R. WIRTHLIN, ESQ. (10282)
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Telephone: (702) 385.2500
Facsimile: (702) 385.2086
E-Mail: mhutchison@hutchlegal.com
mwall@hutchlegal.com
plee@hutchlegal.com
bwirthlin@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

**ORDER GRANTING PLAINTIFF'S
MOTION TO STAY PROCEEDINGS**

This matter came before the Court for hearing on September 3, 2020 on Plaintiff's Motion to Stay Proceedings Pending Writ of Mandamus on Order Shortening Time ("Motion"). Brenoch R. Wirthlin, Esq. and Michael K. Wall, Esq. appeared on behalf of Plaintiff Commissioner of Insurance for the State of Nevada ("Plaintiff"); George F. Ogilvie III, Esq. appeared on behalf of

1 Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S.
2 RE Corporation (“Uni-Ter Defendants”); and Angela T. Nakamura Ochoa, Esq. appeared on behalf
3 of Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara
4 Lumpkin, Jeff Marshall and Eric Stickels (“Director Defendants”); the Director Defendants having
5 filed an opposition (“Directors’ Opposition”) to the Motion on September 1, 2020; the Uni-Ter
6 Defendants having filed no opposition to the Motion; the Court having read and considered the
7 Motion and the Directors’ Opposition, as well as having heard and considered the arguments of
8 counsel at the Hearing on the Motion, and good cause appearing, the Court hereby finds that
9 Plaintiff is entitled to stay as requested, a stay would promote the interests of judicial efficiency,
10 that the stay requested by Plaintiff is not overly broad, and that no party will be irreparably harmed
11 by issuance of a stay in the matter. For these reasons and good cause appearing therefor,

12 IT IS HEREBY ORDERED that Plaintiff’s Motion to Stay Proceedings Pending Writ of
13 Mandamus on Order Shortening Time is GRANTED.

14 IT IS HEREBY FURTHER ORDERED that, as of the date of the hearing on this Motion,
15 September 3, 2020, this matter is stayed for all purposes as to all parties, including without
16 limitation for purposes of NRCP 41(e), with the exception of the Court’s ability to rule on the
17 Plaintiff’s anticipated motion for certification pursuant to NRCP 54(b), and for the Court to enter
18 an order regarding the Plaintiff’s Motion for Reconsideration on the Motion for Leave to Amend
19 Regarding the Director Defendants.
20

21 IT IS HEREBY FURTHER ORDERED that the stay imposed by the Court pursuant to the

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 Motion will remain in effect until further order of this Court.

2 DATED this 17 day of September, 2020.

4 Dated this 17th day of September, 2020

5 Nancy L Allf
6 HONORABLE NANCY L. ALLF
7 District Court Judge

7 Respectfully submitted by:

28B 96D FE98 9252
Nancy Allf
District Court Judge

NB

8 Dated this 16th day of September, 2020.

9 HUTCHISON & STEFFEN

10 /s/ Brenoch Wirthlin
11 BRENOCH R. WIRTHLIN, ESQ.
12 Nevada Bar No. 10282
13 CHRIS ORME, ESQ.
14 Nevada Bar No. 10175
15 **HUTCHISON & STEFFEN**
16 Peccole Professional Park
17 10080 West Alta Drive, Suite 200
18 Las Vegas, Nevada 89145
19 *Attorneys for Plaintiff*

16 Dated this 16th day of September, 2020.

Dated this ____ day of September, 2020.

18 MCDONALD CARANO LLP

LIPSON NEILSON

19 /s/ George F. Ogilvie III
20 George F. Ogilvie III, Esq.
21 Nevada Bar No. 3352
22 2300 West Sahara Avenue, Ste 1200
23 Las Vegas, Nevada 89102

Refused to sign
Angela T. Nakamura Ochoa, Esq.
Nevada Bar No. 10164
9555 Hillwood Dr., 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Director Defendants

23 Jon M. Wilson, Esq.
24 NELSON MULLINS
25 2 South Biscayne Blvd. 21st Floor
26 Miami, FL 33131
27 Attorney Uni-Ter Defendants
28

Danielle Kelley

From: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Sent: Wednesday, September 16, 2020 6:09 PM
To: Brenoch R. Wirthlin
Cc: Erin Kolmansberger; Jon.Wilson@nelsonmullins.com; Kimberly Freedman; 'Angela Ochoa'; Daniel Maul; Jon Linder
Subject: RE: A-14-711535-C - ORDR - Lewis and Clark v. Chur, et al.

Yes, please do

George F. Ogilvie III | Partner

McDONALD CARANO

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

From: Brenoch R. Wirthlin [mailto:bwirthlin@hutchlegal.com]
Sent: Wednesday, September 16, 2020 6:08 PM
To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>
Cc: Erin Kolmansberger <Erin.Kolmansberger@nelsonmullins.com>; Jon.Wilson@nelsonmullins.com; Kimberly Freedman <Kimberly.Freedman@nelsonmullins.com>; 'Angela Ochoa' <AOchoa@lipsonneilson.com>; Daniel Maul <dmaul@hutchlegal.com>; Jon Linder <jlinder@hutchlegal.com>
Subject: RE: A-14-711535-C - ORDR - Lewis and Clark v. Chur, et al.

George, I circulated a revised draft yesterday within an hour of Angela's comments. I did not hear back from anyone. If you'd like us to contact the Court to add your signature let me know.

Sent via the Samsung Galaxy S8, an AT&T 5G Evolution capable smartphone

----- Original message -----

From: "George F. Ogilvie III" <gogilvie@Mcdonaldcarano.com>
Date: 9/16/20 6:06 PM (GMT-08:00)
To: "Brenoch R. Wirthlin" <bwirthlin@hutchlegal.com>
Cc: Erin Kolmansberger <Erin.Kolmansberger@nelsonmullins.com>, Jon.Wilson@nelsonmullins.com, Kimberly Freedman <Kimberly.Freedman@nelsonmullins.com>, 'Angela Ochoa' <AOchoa@lipsonneilson.com>, Daniel Maul <dmaul@hutchlegal.com>, Jon Linder <jlinder@hutchlegal.com>
Subject: RE: A-14-711535-C - ORDR - Lewis and Clark v. Chur, et al.

Because the striking of the 41(e) language was her edit and I did not have an issue with it, I figured I would let her respond. I did not have an issue with it either way, and I did not refuse to sign. But I also did not see a revised draft before it was submitted to chambers. That is why I asked to see a revised version. I would have consented to it.

George F. Ogilvie III | Partner

McDONALD CARANO

P: 702.873.4100 | E: gogilvie@mcdonaldcarano.com

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

Sent: Wednesday, September 16, 2020 4:58 PM

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

Cc: Erin Kolmansberger <Erin.Kolmansberger@nelsonmullins.com>; Jon.Wilson@nelsonmullins.com; Kimberly Freedman <Kimberly.Freedman@nelsonmullins.com>; 'Angela Ochoa' <AOchoa@lipsonneilson.com>; Daniel Maul <dmaul@hutchlegal.com>; Jon Linder <jlinder@hutchlegal.com>

Subject: RE: A-14-711535-C - ORDR - Lewis and Clark v. Chur, et al.

George, to clarify, my "no" was in response to the assertion that we only gave you 13 minutes to review. The version we submitted is what we circulated Monday with some revisions by Angela and my revisions to her revisions that were sent around yesterday afternoon. Again, if you want to sign let me know and we will let the court know and submit a version with your signature.

From: Brenoch R. Wirthlin

Sent: Wednesday, September 16, 2020 4:55 PM

To: George F. Ogilvie III

Cc: Erin Kolmansberger; Jon.Wilson@nelsonmullins.com; Kimberly Freedman; 'Angela Ochoa'; Daniel Maul; Jon Linder

Subject: RE: A-14-711535-C - ORDR - Lewis and Clark v. Chur, et al.

No. I circulated it Monday and said we would be submitting it today, which is the last day to do so. I responded to Angela's comments and received no further comments. If you want to sign let me know and I will withdraw it and submit with your signature.

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

Sent: Wednesday, September 16, 2020 4:53 PM

To: Brenoch R. Wirthlin

Cc: Erin Kolmansberger; Jon.Wilson@nelsonmullins.com; Kimberly Freedman; 'Angela Ochoa'; Daniel Maul; Jon Linder

Subject: RE: A-14-711535-C - ORDR - Lewis and Clark v. Chur, et al.

Really? You gave us 13 minutes heads up? Counsel for Uni-Ter and US Re did not refuse to sign. I simply asked that you circulate what you intended on submitting. I request that you withdraw that submission.

George F. Ogilvie III | Partner

McDONALD CARANO

P: 702.873.4100 | E: gogilvie@mcdonaldcarano.com

From: Danielle Kelley [<mailto:dkelley@hutchlegal.com>]

Sent: Wednesday, September 16, 2020 4:49 PM

To: dc27inbox@clarkcountycourts.us

Cc: Brenoch R. Wirthlin <bwirthlin@hutchlegal.com>; Erin Kolmansberger <Erin.Kolmansberger@nelsonmullins.com>; George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Jon.Wilson@nelsonmullins.com; Kimberly Freedman <Kimberly.Freedman@nelsonmullins.com>; 'Angela Ochoa' <AOchoa@lipsonneilson.com>; Daniel Maul <dmaul@hutchlegal.com>; Jon Linder <jlinder@hutchlegal.com>

Subject: A-14-711535-C - ORDR - Lewis and Clark v. Chur, et al.

Danielle Kelley
Legal Assistant



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

Notice of Confidentiality: The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking any action in reliance upon, this information by anyone other than the intended recipient is not authorized.

Brenoch R. Wirthlin
Partner



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

Notice of Confidentiality: The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking any action in reliance upon, this information by anyone other than the intended recipient is not authorized.

Brenoch R. Wirthlin
Partner



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

Notice of Confidentiality: The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking any action in reliance upon, this information by anyone other than the intended recipient is not authorized.

1 **CSERV**

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

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

9 vs.

10 Robert Chur, Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 9/17/2020

16 Adrina Harris .	aharris@fclaw.com
17 Angela T. Nakamura Ochoa .	aochoa@lipsonneilson.com
18 Ashley Scott-Johnson .	ascott-johnson@lipsonneilson.com
19 Brenoch Wirthlin .	bwirthli@fclaw.com
20 CaraMia Gerard .	cgerard@mcdonaldcarano.com
21 George F. Ogilvie III .	gogilvie@mcdonaldcarano.com
22 Jessica Ayala .	jayala@fclaw.com
23 Joanna Grigoriev .	jgrigoriev@ag.nv.gov
24 Jon M. Wilson .	jwilson@broadandcassel.com
25 Kathy Barrett .	kbarrett@mcdonaldcarano.com

26
27
28

PA003700

1	Marilyn Millam .	mmillam@ag.nv.gov
2	Nevada Attorney General .	wiznetfilings@ag.nv.gov
3	Paul Garcia .	pgarcia@fclaw.com
4	Renee Rittenhouse .	rrittenhouse@lipsonneilson.com
5	Rory Kay .	rkay@mcdonaldcarano.com
6	Susana Nutt .	snutt@lipsonneilson.com
7	Yusimy Bordes .	ybordes@broadandcassel.com
8	Jelena Jovanovic .	jjovanovic@mcdonaldcarano.com
9	Christian Orme	corne@hutchlegal.com
10	Patricia Lee	plee@hutchlegal.com
11	Kimberly Freedman	kfreedman@broadandcassel.com
12	Danielle Kelley	dkelley@hutchlegal.com
13	Karen Surowiec	ksurowiec@mcdonaldcarano.com
14	Jonathan Wong	jwong@lipsonneilson.com
15	Erin Kolmansberger	erin.kolmansberger@nelsonmullins.com
16	Melissa Gomberg	melissa.gomberg@nelsonmullins.com
17	Betsy Gould	bgould@doi.nv.gov
18	Juan Cerezo	jcerezo@lipsonneilson.com
19	Heather Bennett	hshepherd@hutchlegal.com
20	Brenoch Wirthlin	bwirthlin@klnevada.com
21	Jon Linder	jlinder@klnevada.com
22	S. Dianne Pomonis	dpomonis@klnevada.com
23	Daniel Maul	dmaul@hutchlegal.com
24		
25		
26		
27		
28		

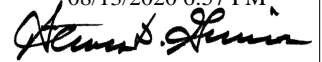
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Brenoch Wirthlin

bwirthlin@hutchlegal.com

Jon Linder

jlinder@hutchlegal.com


CLERK OF THE COURT

ORDG
LIPSON NEILSON 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
aocchoa@lipsonneilson.com
Attorneys for Defendants
Robert Chur, Steve Fogg,
Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin,
Jeff Marshall, and Eric Stickels

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 27

**ORDER GRANTING DEFENDANTS
ROBERT CHUR, STEVE FOGG, MARK
GARBER, CAROL HARTER, ROBERT
HURLBUT, BARBARA LUMPKIN, JEFF
MARSHALL, AND ERIC STICKELS'
MOTION FOR JUDGMENT ON THE
PLEADINGS PURSUANT TO NRCP
12(C)**

AND

JUDGMENT THEREON

Pursuant to the Nevada Supreme Court's Order Granting the Petition for Writ of
Mandamus and Notice in Lieu of Remittitur,

THE COURT HEREBY ORDERS that its November 2, 2018 Order Denying
Director Defendants' Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) is
hereby VACATED.

1 THE COURT FURTHER ORDERS that Defendants Robert Chur, Steve Fogg,
2 Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric
3 Stickels' Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) is GRANTED.

4 With Plaintiff's Motion for Leave to file an Amended Complaint having been
5 denied by this Court on August 10, 2020, Judgment is hereby entered in favor of
6 Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut,
7 Barbara Lumpkin, Jeff Marshall.

8 DATED this 1 day of August, 2020.

Dated this 13th day of August, 2020

Nancy L Allf

JUDGE NANCY ALLF

1FA 835 11BE 21AF
Nancy Allf
District Court Judge

NB

Submitted by:
LIPSON NEILSON P.C.

/s/ Angela Nakamura Ochoa

Joseph P. Garin, Esq. (NV Bar No. 6653)

Angela Ochoa, Esq. (NV Bar No. 10164)

9900 Covington Cross Dr., Suite 120

Las Vegas, NV 89144

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

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

9 vs.

10 Robert Chur, Defendant(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 8/13/2020

16 Adrina Harris .	aharris@fclaw.com
17 Angela T. Nakamura Ochoa .	aochoa@lipsonneilson.com
18 Ashley Scott-Johnson .	ascott-johnson@lipsonneilson.com
19 Brenoch Wirthlin .	bwirthli@fclaw.com
20 CaraMia Gerard .	cgerard@mcdonaldcarano.com
21 George F. Ogilvie III .	gogilvie@mcdonaldcarano.com
22 Jessica Ayala .	jayala@fclaw.com
23 Joanna Grigoriev .	jgrigoriev@ag.nv.gov
24 Jon M. Wilson .	jwilson@broadandcassel.com
25 Kathy Barrett .	kbarrett@mcdonaldcarano.com

26
27
28

PA003705

1	Marilyn Millam .	mmillam@ag.nv.gov
2	Nevada Attorney General .	wiznetfilings@ag.nv.gov
3	Paul Garcia .	pgarcia@fclaw.com
4	Renee Rittenhouse .	rrittenhouse@lipsonneilson.com
5	Rory Kay .	rkay@mcdonaldcarano.com
6	Susana Nutt .	snutt@lipsonneilson.com
7	Yusimy Bordes .	ybordes@broadandcassel.com
8	Jelena Jovanovic .	jjovanovic@mcdonaldcarano.com
9	Christian Orme	corne@hutchlegal.com
10	Patricia Lee	plee@hutchlegal.com
11	Kimberly Freedman	kfreedman@broadandcassel.com
12	Danielle Kelley	dkelley@hutchlegal.com
13	Karen Surowiec	ksurowiec@mcdonaldcarano.com
14	Jonathan Wong	jwong@lipsonneilson.com
15	Erin Kolmansberger	erin.kolmansberger@nelsonmullins.com
16	Melissa Gomberg	melissa.gomberg@nelsonmullins.com
17	Betsy Gould	bgould@doi.nv.gov
18	Juan Cerezo	jcerezo@lipsonneilson.com
19	Stuart Taylor	staylor@hutchlegal.com
20	Heather Bennett	hshepherd@hutchlegal.com
21	Brenoch Wirthlin	bwirthlin@klnevada.com
22	Jon Linder	jlinder@klnevada.com
23	S. Dianne Pomonis	dpomonis@klnevada.com
24		
25		
26		
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Daniel Maul	dmaul@hutchlegal.com
Brenoch Wirthlin	bwirthlin@hutchlegal.com
Jon Linder	jlinder@hutchlegal.com