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, Respondents, and 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.[1]	Supreme Court Case No.: 81857 District Court Case No.: A-14-711535-C **PETITION FOR REHEARING**

Hutchison & Steffen
Mark A. Hutchison, Esq. (NV Bar #4639)
Michael K. Wall, Esq. (NV Bar #2098)
Brenoch Wirthlin, Esq. (NV Bar #10282)
10080 W. Alta Dr., Suite 200, Las Vegas, Nevada 89145; Phone: (702) 385-2500
mhutchison@hutchlegal.com; mwall@hutchlegal.com; bwirthlin@hutchlegal.com
Attorneys for Petitioner

[1]The individual defendants are the real parties in interest who have had judgment entered in their favor, but the corporate defendants are also affected, and thus are listed in the caption as real parties.

NRCP 26.1 DISCLOSURE

Counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

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

Petitioner is represented by Mark Hutchison, Esq., Michael K. Wall, Esq. and Brenoch Wirthlin, Esq. at Hutchison & Steffen.

DATED: December 15, 2020. **HUTCHISON & STEFFEN**

By */s/ Brenoch Wirthlin, Esq.*

Mark A. Hutchison, Esq.
Nevada Bar No. 4639
Michael K. Wall, Esq.
Nevada Bar No. 2098
Brenoch Wirthlin, Esq.
Nevada Bar No. 10282
10080 W. Alta Dr., Suite 200
Las Vegas, Nevada 89145
Phone: (702) 385-2500
Attorneys for Petitioner

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc. ("Petitioner"), hereby files this petition for rehearing pursuant to NRAP 40 with respect to its Petition for Writ of Mandamus filed on September 29, 2020 ("Writ Petition"). On September 29, 2020, Petitioner filed its Petition for Writ of Mandamus seeking an order compelling the district court ("District Court") to allow plaintiff to file an amended complaint in direct response to this Court's prior opinion in this matter, *Chur v. Eighth Judicial Dist. Court*, 136 Nev. 68, 458 P.3d 336 (2020).

Chur substantively altered the law in Nevada, and most particularly in this case, it made the District Court's prior rulings incorrect as a matter of the changed law. But the District Court and the parties relied on the law as stated in *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006).

The District Court denied Petitioner's motion to amend.[1] As noted in the Writ Petition, the District Court's failure to permit amendment despite its own reliance on *Shoen* will result in a trial against only the remaining defendants.[2] In fact, counsel

[1] PA003324 – PA003329.

[2] The remaining defendants include Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation, collectively referred to as the

for the Remaining Defendants has expressly acknowledged that due to the Directors being removed from the case, the Remaining Defendants intend to employ the "empty chair" defense at trial which would otherwise not be available to them.[3]

In its order denying the Writ Petition, entered November 13, 2020 ("Order Denying Petition"), this Court recognized that "the right to an appeal is generally an adequate remedy precluding writ relief."[4] However, the Order Denying Petition overlooks the fact that exceptions to this general rule exist. One such exception this Court has specifically recognized is the situation in which a decision of a district court will likely impact resolution of a pending claim. In that situation, an appeal may not be an adequate remedy and writ relief should issue. As noted in the Writ Petition, the undisputed facts of this case present such a situation.

Further, on December 4, 2020, this Court issued its Order Amending Nevada Rule of Civil Procedure 41(e) ("41(e) Order"). As noted in the Writ Petition, the

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"Remaining Defendants."

[3] *See* PA003656 in which George Ogilvie, Esq., counsel for the Remaining Defendants, states the following:

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

[4] Citing *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

only issue on which the District Court relied to deny the Petitioner's motion to amend was timeliness and alleged prejudice because of the impending five year deadline. Due to the amendment of NRCP 41(e), the five year deadline has been extended for up to an entire year. Accordingly, Petitioner requests a rehearing of its Writ Petition and that the same be granted.

II. PETITION FOR REHEARING STANDARD

Under NRAP 40(c)(2), the Court may consider rehearing when "the court has overlooked or misapprehended a material fact in the record or a material question of law in the case," or "the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2); *see also Lavi v. Eighth Judicial Dist. Court*, 325 P.3d 1265, 1267 (Nev. 2014).

III. ANALYSIS

A. The instant case merits writ relief because failure to address the merits of the Writ Petition will result in irreparable harm negatively impacting resolution of the Petitioner's claims against the Remaining Defendants.

In its Order Denying Petition, this Court recognized that "the right to an appeal is generally an adequate remedy precluding writ relief." However, the Order Denying Petition overlooks the fact that exceptions to this general rule exist. For example, in *Bus. Computer Rentals v. State Treasurer*, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998) this Court recognized that "although mandamus is generally not

appropriate in the face of effective alternative remedies, extraordinary relief may be granted where the circumstances reveal urgency or a strong necessity." *See also Jeep Corp. v. Second Judicial Dist. Court of State of Nev. In & For Washoe Cty*., 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982) ("It is true that neither mandamus or prohibition is appropriate in the face of effective alternative remedies. … However, each case must be individually examined, and where circumstances reveal urgency or strong necessity, extraordinary relief may be granted.") (internal citation omitted); *Dzack v. Marshall*, 80 Nev. 345, 348, 393 P.2d 610, 611 (1964) ("The mere fact that other relief may be available does not necessarily preclude the remedy of mandamus."). Further, in *Rolf Jensen & Associates v. Dist. Ct*., 282 P.3d 743, 128 Nev. 441 (2012), this Court held that "[t]he issue of whether an appeal constitutes an adequate and speedy remedy so as to preclude mandamus relief necessarily turns on the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit Supreme Court to meaningfully review the issues presented."

In this case, an appeal does not constitute an adequate and speedy remedy for the Petitioner. One of the exceptions to the general rule that this Court has recognized which warrants writ relief is the situation presented here: where denial of writ relief will negatively impact the resolution of the remaining claims. For example, in *Smith v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 113 Nev.

1343, 1348, 950 P.2d 280, 283 (1997), despite the availability of a future appeal, this Court granted writ relief. There the defendant in a personal injury action had filed what he termed a "cross-claim" for damages but had failed to timely serve it. The district court denied a motion to dismiss the cross-claim, and the plaintiff sought writ relief. This Court held that, despite the possibility of an appeal, the district court "may have a duty to strike Chang's improper cross-claim. If so, then under the circumstances of this case, an appeal following final judgment would be an inadequate remedy, because not only will petitioners have to defend Chang's personal injury cross-claim, Chang's claim will likely impact the resolution of Lee's claim against petitioners. Therefore, mandamus is an appropriate remedy." *Smith, supra*, 113 Nev. at 1348, 950 P.2d at 283.

A similar situation warranting relief exists here which the Order Denying Petition appears to have overlooked or misapprehended. The Remaining Defendants have expressly stated that they intend to employ the "empty chair defense" given the fact that the Directors have been dismissed and the District Court improperly denied Petitioner leave to amend to meet the *Chur* standard. Given the interwoven relationship between the Remaining Defendants – who were managing the Company at issue and in some instances acting at the request of the Directors – the Remaining Defendants will attempt to blame their actions on the missing Directors. That would put the Petitioner in the position of being required to defend

the Directors' actions, despite the harm suffered by the Company due to the Directors' wrongful conduct. In addition, a significant risk will arise that the jury will become confused or misled by the Remaining Defendants' accusations against the missing Directors. Thus, the denial of the relief requested in the Writ Petition will negatively impact the resolution of the claims against the Remaining Defendants, as in *Smith*.

Further, as this Court recognized in *Archon Corp. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 133 Nev. 816, 819–20, 407 P.3d 702, 706 (2017):

> In exercising its power to entertain extraordinary writ review of district court decisions, *see* Nev. Const. art. 6, § 4(1), this court has not confined itself to policing jurisdictional excesses and refusals. It has also granted writ relief where the district court judge has committed "clear and indisputable" legal error, *Bankers Life & Cas. Co., v. Holland*, 346 U.S. 379, 384, 74 S.Ct. 145, 98 L.Ed. 106 (1953); *see Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344–45, 950 P.2d 280, 281 (1997) (writ relief may be granted when dismissal is required "pursuant to clear authority"), or an "arbitrary or capricious" abuse of discretion. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 142, 127 P.3d 1088, 1096 (2006). In considering petitions for writ relief based on clear error or manifest abuse of discretion, this court applies the statute-based rule that the right of eventual appeal from the final judgment "is generally an adequate legal remedy that precludes writ relief." *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 223, 88 P.3d 840, 841 (2004); *see In re Linee Aeree Italiane (Alitalia)*, 469 F.3d 638, 640 (7th Cir. 2006) ("[M]andamus requires not only a clear error but one that unless immediately corrected will wreak irreparable harm.").

The Order Denying Petition overlooks the fact that harm wreaked upon Petitioner by having to expend time and resources trying a case where the Remaining

Defendants have been unfairly handed an empty chair defense constitutes irreparable harm. This situation is similar to that presented in *Doe v. Med. Ctr. of Louisiana*, 612 So. 2d 1050, 1051 (La. Ct. App.), 613 So. 2d 1005 (La. 1993). In *Doe*, the court entertained an expedited appeal, akin to the interim writ relief sought by Petitioner, where the defendant hospital in a malpractice action had asserted that because the plaintiff had failed to submit to a medical review panel as required by state law, the plaintiff's suit was premature. The court there held that even though the district court's ruling was "an interlocutory decree which is not normally appealable," the court found that "defendant will suffer irreparable harm if forced to try this case before the validity of its prematurity exception is determined." 612 So.2d at 1051.

Similarly, there is little doubt that Petitioner's harm will be irreparable, and its case negatively impacted, if it is forced to try the instant case while the Remaining Defendants assert the empty chair defense, which they would not be able to do if the District Court's denial of leave to amend was corrected. Thus, while a future appeal is generally an adequate remedy, the Order Denying Petition overlooks the fact that the undisputed facts in this case – including the admission by the Remaining Defendants that they will employ the empty chair defense – warrant writ relief.

B. This Court's NRCP 14(e) Order warrants granting of the relief requested in the Writ Petition.

As noted in the Writ Petition, the transcript of the hearing on Petitioner's motion for reconsideration requesting leave to amend bears out that the District

Court denied leave to amend due to the "looming" five-year rule:

> Thank you all. This is a Motion for Reconsideration. And I realize that there's been a clarification by the Supreme Court of the *Shoen* case. And the reason I didn't grant the motion that was filed on July 2nd was simply because the complaint goes back to December 23 of 2014. And I just didn't think it was fair to the defendants to have to defend on a fourth amended complaint when it was two months before the discovery deadline[1] and we have a five-year rule looming.

PA003543 line 23 through PA003544 line 5, Transcript at 18-19. On December 4, 2020, this Court entered its Rule 41(e) Order amending NRCP 41(e)(5) to read now as follows (addition in underline):

> (5) **Extending Time; Computing Time.** The parties may stipulate in writing to extend the time in which to prosecute an action. If two time periods requiring mandatory dismissal apply, the longer time period controls. <u>When a court is unable to conduct civil trials due to compelling and extraordinary circumstances beyond the control of the court and the parties, such as an epidemic, pandemic, natural disaster, or safety or security threat, and enters a district-wide administrative order staying such trials, neither the period of the stay nor an additional period of up to one year after the termination of the stay, if ordered by the court in the same or a subsequent administrative order, shall be counted in computing the time periods under this section.</u>

See Rule 41(e) Order, ADKT 0560, entered December 4, 2020.

As noted above, the District Court's decision currently under review, was based upon Nevada's 5-Year Rule under NRCP 41(e) as it existed at the time that

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[1]The district court was mistaken. When the motion to amend was filed, more than five months remained for discovery.

decision was issued. The law has changed in Nevada allowing an additional year for Petitioner to bring this case to trial. While the recent change to NRCP 41(e) had not occurred when the Order Denying Petition was handed down, consideration of its impact is appropriate.

As this Court is aware, Governor Sisolak declared a state of emergency in Nevada in response to the COVID-19 pandemic on March 12, 2020. The following day, on March 13, 2020, the Eighth Judicial District Court ("EJDC") issued Administrative Order 20-01 staying all civil cases for purposes of the five-year rule:

> "This order shall operate to stay trial in civil cases for purposes of NRCP 41(e)."[5]

Administrative Order 20-13 issued April 16, 2020, continued the stay of all civil cases for purposes of the five-year rule:

> "NRCP 41(e). This order shall continue to toll the time for bringing a case to trial for the purposes of NRCP 41(e) for the duration of this order and for a period of 30 days after this order expires, is modified or is rescinded by a subsequent order."

On July 1, 2020, the trial court lifted the stay in the underlying action for 65 days before it was re-imposed on September 3, 2020. Administrative Order 20-17, issued June 1, 2020, reiterated the EJDC's intent to continue a stay of all civil cases with a very limited exception:

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[5] Petitioner requests this Court take judicial notice of the Administrative Orders issued by the EJDC and/or this Court pursuant to NRS § 47.130 et seq.

> "This order shall continue to stay trial in civil cases for purposes of tolling NRCP 41(e) except where a District Court Judge makes findings to lift the stay in a specific case to allow the case to be tried."

The underlying action is currently stayed pending resolution of the Writ Petition. Once the current stay is lifted, there will be not less than 219 days remaining to bring the underlying action to trial under the 5-year rule, plus an additional one year (365 days) pursuant to this Court's recent amendment to NRCP 41(e), for a total of 584 days remaining under the 5-year rule as amended.

Given the additional year allowed in this matter under amended NRCP 41(e), there can be no prejudice to the Director Defendants in allowing Plaintiff to amend its complaint, and justice requires that the District Court's decision be overturned to allow the case against the Director Defendants to be tried on the merits. Pursuant to this Court's Rule 41(e) Order, the District Court's concerns regarding the five-year rule are moot. Accordingly, the intervening amendments to NRCP 41(e) further support the writ relief requested by the Petitioner.

IV. CONCLUSION

For all these reasons, the Petitioner respectfully requests the Court grant the petition for rehearing in this case, issue a writ of mandamus compelling the District Court to allow petitioner to amend its complaint based on *Chur*, and grant such other

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and further relief as the Court deems proper.

DATED: December 15, 2020. **HUTCHISON & STEFFEN**

By */s/Brenoch Wirthlin*

Mark A. Hutchison, Esq.
Nevada Bar No. 4639
Michael K. Wall, Esq.
Nevada Bar No. 2098
Brenoch Wirthlin, Esq.
Nevada Bar No. 10282
10080 W. Alta Dr., Suite 200
Las Vegas, Nevada 89145
Phone: (702) 385-2500
Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

I, Brenoch R. Wirthlin, Esq., declare as follows:

1. I am a partner with Hutchison & Steffen, counsel of record for Petitioner.

2. I certify that I have read the foregoing **PETITION FOR REHEARING**.

3. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6).

4. I further certify that this brief complies with the page- or type- volume limitations of NRAP 40(b)(3) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is either proportionally spaced, has a type face of 14 points or more and contains no more than 4,667 words or does not exceed 10 (ten) pages.

5. Finally, I hereby certify that I have read this brief, and it is not frivolous of interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 40(a)(2) which requires any claim that the court overlooked a material fact be supported by a reference to the page of the transcript appendix or record where the matter may be found; any claim that the court has overlooked a material question of law or has overlooked or misapprehended or failed to consider controlling authority shall be

supported by a reference to the page of the brief where petitioner raised the issue. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

I declare under the penalty of perjury the statements herein are true and correct.

Executed on December 15, 2020 in Clark County, Nevada.

By: /s/ Brenoch R. Wirthlin, Esq.
Brenoch R. Wirthlin, Esq.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, pursuant to NRAP Rule 25(d), I served the foregoing **PETITION FOR REHEARING** on the following parties, via the manner of service indicated below, on December 15, 2020:

Via Electronic Service through E-Flex System:

George F. Ogilvie III, Esq.
McDonald Carano LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102
gogilvie@mcdonaldcarano.com
Attorneys for Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp. and U.S. RE Corporation

Joseph P. Garin, Esq.
Angela T. Nakamura Ochoa, Esq.
LIPSON, NEILSON, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, NV 89144
jgarin@lipsonneilson.com
aochoa@lipsonneilson.com
Attorneys for Real Parties in Interest, Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels

Via US Mail:

The Honorable Nancy Allf
District Court, Dept. 28
Regional Justice Center
200 Lewis Ave.
Las Vegas, Nevada 89155
Respondent

Kimberly Freedman, Esq.
Erin Kolmansberger, Esq.
Broad and Cassel
2 S. Biscayne Blvd., 21st Floor
Miami, FL 33131
jwilson@broadandcassel.com
kfreedman@broadandcassel.com

Jon M Wilson Attorney
200 Biscayne Blvd Way, Suite 5107
Miami, FL 33131
jonwilson@jonmwilsonattorney.com

Attorneys for Real Parties in Interest, Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp. and U.S. RE Corporation

Dated: December 15, 2020.

By: /s/Danielle Kelley
An Employee of Hutchison & Steffen