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2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3 ***

4 THE STATE OF NEVADA
5 COMMISSIONER OF INSURANCE FOR
6 THE STATE OF NEVADA AS RECEIVER
7 OF LEWIS AND CLARK LTC RISK
8 RETENTION GROUP, INC.,

9 Appellant,

10 vs.

11 ROBERT CHUR, STEVE FOGG, MARK
12 GARBER, CAROL HARTER, ROBERT
13 HURLBUT, BARBARA LUMPKIN, JEFF
14 MARSHALL, ERIC STICKELS, UNI-TER
15 UNDERWRITING MANAGEMENT CORP.,
16 UNI-TER CLAIMS SERVICES CORP., and
17 U.S. RE CORPORATION,

18 Respondents.

19 ROBERT CHUR; STEVE FOGG; MARK
20 GARBER; CAROL HARTER; ROBERT
21 HURLBUT; BARBARA LUMPKIN; JEFF
22 MARSHALL; AND ERIC STICKELS,

23 Appellants,

24 vs.

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

Respondents.

Supreme Court No. 85668
Electronically Filed
Jun 16 2023 03:31 PM
Elizabeth A. Brown
Clerk of Supreme Court

EXHIBIT 1 TO
APPELLANT'S OPPOSITION
TO MOTION TO DISMISS
PAGES 1 - 90

Supreme Court No. 85728

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

5 Appellant,

6 vs.

7
8 ROBERT CHUR; STEVE FOGG; MARK
9 GARBER; CAROL HARTER; ROBERT
10 HURLBUT; BARBARA LUMPKIN; JEFF
11 MARSHALL; AND ERIC STICKELS; UNI-
12 TER UNDERWRITING MANAGEMENT
CORP.; UNI-TER CLAIMS SERVICES
CORP.; AND U.S. RE CORPORATION,

13 Respondents.
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Supreme Court No. 85907

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EXHIBIT PAGE ONLY

EXHIBIT 1

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

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

VS.

Respondents.

Appellants, by and through their counsel, Hutchison & Steffen, PLLC, hereby submit the following Docketing Statement pursuant to Nevada Rule of Appellate Procedure (NRAP) 14.

All appellants not in proper person must complete the docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

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A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

1. Judicial District:

Department: XXVII

Judge: Honorable Nancy L. Alf

2. Attorney filing this docketing statement:

Firm: Hutchison & Steffen, PLLC

Las Vegas, Nevada 89145

Client(s): Commissioner of Insurance for the State of Nevada as Receiver
of Lewis & Clark LTC Risk Retention Group, Inc.

3

concur in the filing of this statement

3. **Attorney(s) representing respondent(s):**

Attorney: Angela Nakamura Ochoa, Esq.
Joseph P. Garin, Esq.
Lipson Neilson, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, NV 89144

Client(s): Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert
Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels
(collectively "Director Defendants")

4. **Nature of disposition below (check all that apply):**

Judgment after bench trial
Judgment after jury verdict
Summary Judgment
Default Judgment

X Dismissal

Lack of Jurisdiction

**X Failure to State a
Claim**

Failure to Prosecute

Other (specify)

Grant/Denial of NRCP 60(b) relief
Grant/Denial of Injunction
Grant/Denial of Declaratory Relief
Review of Agency Determination
Divorce Decree

Original Modification

X Other disposition (specify):

- **Denial of Motion to Amend Complaint**
- **Denial of Motion for Partial Reconsideration of Denial of Motion to Amend Complaint**
- **Order Denying Motion for Leave to File Fourth Amended Complaint**
- **Findings of Fact, Conclusions of Law and Order Denying Plaintiff's Motion for Leave to File Fourth Amended Complaint**
- **Order to Strike from Record**
- **Findings of Fact, Conclusions**

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of Law and Order Denying the Motion for Reconsideration of Motion for Leave to Amend

- Order Denying Motion to Retax and Settle Costs
- Order Granting in Part and Denying in Part Motion for Declaratory Relief
- Discovery Commissioner’s Report and Recommendations
- Order Regarding Discovery Commissioner’s Report and Recommendations
- Order Granting In Part And Denying In Part Motion In Limine
- Order Granting Motion For Partial Summary Judgment
- Order Denying Motion In Limine(s)
- Order Denying Motion For Partial Summary Judgment
- Order Granting Motion to Exclude Interest
- Order of Dismissal
- Order Denying Motion to Lift Stay or Alternatively Grant Plaintiff Other Relief
- Order Denying Motion to Substitute
- Order Granting Motion to Strike
- Order Granting Motion to Dismiss

5. Does this appeal raise issues concerning any of the following:
Child custody (visitation rights only)
Venue
Termination of parental rights

1 This case does not involve child custody or visitation, venue, or termination
2 of parental rights.

- 3 6. **Pending and prior proceedings in this court.** List the case name and
4 docket number of all appeals or original proceedings presently or previously
5 pending before this court which are related to this appeal:

6 Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut,
7 Barbara Lumpkin, Jeff Marshall and Eric Stickels v. The Eight Judicial
8 District Court of the State of Nevada, in and for the County of Clark and the
Honorable Nancy L. Allf, District Court Judge, Case No. 78301.

9 Commissioner of Insurance for the State of Nevada as Receiver of Lewis &
10 Clark LTC Risk Retention Group, Inc. v. The Eight Judicial District Court of
11 the State of Nevada, in and for the County of Clark and the Honorable
Nancy L. Allf, District Court Judge, Case No. 81857.

12 Commissioner of Insurance for the State of Nevada as Receiver of Lewis &
13 Clark LTC Risk Retention Group, Inc. v. The Eight Judicial District Court of
14 the State of Nevada, in and for the County of Clark and the Honorable
15 Nancy L. Allf, District Court Judge, Case No. 84253.

- 16 7. **Pending and prior proceedings in other courts.** List the case name,
17 number and court of all pending and prior proceedings in other courts which
18 are related to this appeal (e.g., bankruptcy, consolidated or bifurcated
19 proceedings) and their dates of disposition:

20 Commissioner of Insurance for the State of Nevada as Receiver of Lewis &
21 Clark LTC Risk Retention Group, Inc. v. Robert Chur, Steve Fogg, Mark
22 Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, Eric
23 Stickels, Uni-Ter Underwriting Management Corp., Uni-Ter Claims
Services Corp., and U.S. Re Corporation, Case No. A-12-672047-B. This
matter is still open.

- 24 8. **Nature of the action.** Briefly describe the nature of the action and the result
25 below:

26 The Commissioner of Insurance relied upon existing Nevada law when
27 drafting her complaint, filed on December 24, 2014, against the former directors of
28

1 an insolvent Nevada risk retention group. Subsequently, the basis of pleading
2 director liability in Nevada changed with the Court's opinion in *Chur v. Eighth*
3 *Judicial Dist. Court*, 136 Nev. 68, 458 P.3d 336 (2020), which substantively altered
4 the law regarding director liability in Nevada. Within the time period allowed by
5 the District Court for amending her pleadings, the Commissioner of Insurance
6 moved to amend her complaint against the Director Defendants in order to comply
7 with the change to Nevada law following Court's opinion in *Chur*. The District
8 Court, however, denied Appellant's motion to amend, despite also having relied
9 upon *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006),
10 in prior rulings.

11
12 The Commissioner of Insurance seeks relief from the District Court's
13 erroneous rulings related to denying her right to amend her complaint to comply with
14 new Nevada law. Specifically, this appeal seeks relief from the District Court's
15 order dated August 10, 2020, denying leave to file an amended complaint, the
16 District Court's order dated August 1, 2020, granting the Director Defendants'
17 motion for judgment on the pleadings, and the District Court's order dated
18 September 9, 2020, denying partial reconsideration of the motion for leave to amend
19 to file a fourth amended complaint.

20
21 9. **Issues on appeal.** State concisely the principal issue(s) in this appeal (attach
22 separate sheets as necessary:

23
24 This District Court's denial of Appellant's motion to amend her complaint in
25 order to comply with new Nevada law raises important precedential, constitutional
26

1 and public policy issues regarding: (1) the right of parties to amend pleadings in
2 order to comply with changes in the underlying law which occur after a complaint
3 has been filed but before the deadline for amending pleadings as provided in the trial
4 court's scheduling order; (2) application of this Court's recent amendments to NRC
5 41(e) regarding additional time provided under Nevada's 5-year rule in which a case
6 must be brought to trial; (3) whether the District Court's factual mistake as to the
7 time remaining until the close of discovery which formed that basis for the denial of
8 a motion to amend a complaint in order to comply with new Nevada law was in
9 error; and (4) correction of legal errors made by district court in all orders and
10 judgment from which appeal is taken.

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10. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issues raised:

The Commissioner of Insurance is not aware of any similar cases pending at this time.

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

This appeal does not challenge the constitutionality of a statute.

12. **Other issues.** Does this appeal involve any of the following:

1
2 Reversal of well-settled Nevada precedent (on an attachment, identify the
3 case(s))
4 An issue arising under the United States and/or Nevada Constitutions
5 A substantial issue of first-impression
6 An issue of public policy
7 An issue where en banc consideration is necessary to maintain uniformity of
8 this court's decisions
9 A ballot question
10 If so, explain
11

12 This appeal involves the constitutional due process rights of a litigant to be
13 provided the opportunity to amend a complaint in order to comply with changes in
14 the underlying law which occur after a complaint has been filed but before the
15 deadline for amending pleadings as provided in the trial court's scheduling order
16 has passed. As a result, this appeal raises constitutional due process and public
17 policy issues of first impression in Nevada.
18

19 **13. Assignment to the Court of appeals or retention in the Supreme Court.**

20 Briefly set forth whether the matter is presumptively retained by the
21 Supreme Court or assigned to the Court of appeals under NRAP 17, and cite
22 the subparagraph(s) of the Rule under which the matter falls. If appellant
23 believes that the Supreme Court should retain the case despite its
24 presumptive assignment to the Court of Appeals, identify the specific
25 issue(s) or circumstances(s) that warrant retaining the case, and include an
26 explanation of their importance or significance:
27

28 This case is presumptively retained by the Supreme Court under both NRAP
17(a)(9) and NRAP 17(a)11. This appeal originates in business court which is a
presumptive category of retention by the Supreme Court. In addition, this appeal
raises as a principal issue a question of first impression involving the United States

1 Constitution or Nevada Constitution or common law which is a presumptive
2 category of retention by the Nevada Supreme Court.

3
4 14. **Trial.** If this action proceeded to trial, how many days did the trial last?
5 Was it a bench or jury trial?

6 Following the District Court's erroneous dismissal of the Director
7 Defendants, the underlying action proceeded to trial against the remaining
8 defendants. A jury trial against Uni-Ter Underwriting Management Corp., Uni-Ter
9 Claims Services Corp., and U.S. Re Corporation ("Corporate Defendants") began
10 on September 20, 2021, and concluded on October 14, 2021, with a unanimous
11 jury verdict in favor of the Commissioner of Insurance and a judgment against the
12 Corporate Defendants in the amount of \$15,222,853.00.

13
14 15. **Judicial disqualification.** Do you intend to file a motion to disqualify or
15 have a justice recuse him/herself from participation in this appeal. If so,
16 which Justice?

17 The Commissioner of Insurance does not anticipate at this time filing a
18 motion to disqualify or have a justice recuse him/herself from participation in this
19 appeal.

20
21 **TIMELINESS OF NOTICE OF APPEAL**

22 16. **Date of entry of written judgment or order appealed from:**

23 Order Denying Plaintiff's Motion for Leave to File Fourth Amended
24 Complaint dated August 10, 2020;

25 Findings of Fact, Conclusions of Law and Order Denying Plaintiff's Motion
26 for Leave to File Fourth Amended Complaint dated August 10, 2020;

27 Order to Strike from Record dated August 13, 2020;

28 Order Granting Defendants Robert Chur, Steve Fogg, Mark Garber, Carol

1 Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels' Motion
2 for Judgment on the Pleadings Pursuant to NRCp 12(c) and Judgment Thereon
3 dated August 13, 2020 August 14, 2020;

4 Findings of Fact, Conclusions of Law and Order Denying the Motion for
5 Reconsideration of Motion for Leave to Amend Regarding Director Defendants
6 dated September 9, 2020;

7 Order Denying Plaintiff's Motion to Retax and Settle Costs of Director
8 Defendants dated July 16, 2021;

9 Order Granting in Part and Denying in Part Plaintiff's Motion for
10 Declaratory Relief dated August 17, 2021;

11 Discovery Commissioner's Report and Recommendations dated August 23,
12 2021;

13 Order Regarding Discovery Commissioner's Report and Recommendations
14 dated September 17, 2021;

15 Order Granting In Part And Denying In Part Plaintiff s Motion In Limine
16 No. 2 dated September 20, 2021;

17 Order Granting In Part And Denying In Part Plaintiff s Motion For Partial
18 Summary Judgment As To U.S. Re Corporation dated September 20, 2021;

19 Order Denying Plaintiff's Motion In Limine Number 5 To Limit The Scope
20 Of Expert Witness Testimony Regarding Speculation Concerning The Economy
21 dated September 24, 2021;

22 Order Denying Plaintiff's Motion In Limine Number 4: To Preclude Any
23 Reference To Reinsurance Estimates dated September 24, 2021;

24 Order Denying Plaintiff s Motion In Limine Number 1 To Preclude Sam
25 Hewitt From Providing Expert Testimony Regarding Insolvency Analysis dated
26 September 24, 2021;

27 Order Denying Plaintiff's Motion In Limine Number 6 To Strike Proffered
28 Expert Witness Alan Gray dated September 24, 2021;

1 Order Denying Plaintiff s Motion For Partial Summary Judgment Regarding
2 Uni-Ter Defendants Breach Of Their Fiduciary Duties dated September 27, 2021;
3 Order Granting Motion to Exclude Interest dated December 15, 2021;
4 Order of Dismissal Without Prejudice in favor of Robert Chur, Steve Fogg,
5 Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and
6 Eric Stickels dated February 25, 2016;
7 Order of Dismissal dated May 4, 2016;
8 Judgment in favor of Robert Chur, Steve Fogg, Mark Garber, Carol Harter,
9 Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels dated August
10 13, 2020;
11 Order Denying Plaintiff's Motion to Lift Stay or Alternatively Grant
12 Plaintiff Other Relief dated August 12, 2019;
13 Order Denying Motion to Substitute dated February 21, 2019;
14 Order Granting in Part Defendants Robert Chur, Steve Fogg, Mark Garber,
15 Carol Harter, Robert Hurlbut, Barbara Limpkin, Jeff Marshall, and Eric Stickels
16 Motion to Strike dated November 6, 2018;
17 Order Granting in Part Defendants Robert Chur, Steve Fogg, Mark Garber,
18 Carol Harter, Robert Hurlbut, Barbara Limpkin, Jeff Marshall, and Eric Stickels
19 Motion to Dismiss dated February 25, 2016.
20 If no written judgment or order was filed in the district court, explain the
21 basis for seeking appellate review:
22 **17. Date written notice of entry of judgment or order served:**
23 Order Denying Plaintiff's Motion for Leave to File Fourth Amended
24 Complaint notice of entry served August 10, 2020;
25 Findings of Fact, Conclusions of Law and Order Denying Plaintiff's Motion
26 for Leave to File Fourth Amended Complaint notice of entry served August 10,
27 2020;
28 Order to Strike from Record notice of entry served August 14, 2020;

1 Order Granting Defendants Robert Chur, Steve Fogg, Mark Garber, Carol
2 Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels' Motion
3 for Judgment on the Pleadings Pursuant to NRC 12(c) and Judgment Thereon
4 notice of entry served August 14, 2020;

5 Findings of Fact, Conclusions of Law and Order Denying the Motion for
6 Reconsideration of Motion for Leave to Amend Regarding Director Defendants
7 notice of entry served September 10, 2020;

8 Order Denying Plaintiff's Motion to Retax and Settle Costs of Director
9 Defendants notice of entry served July 29, 2021;

10 Order Granting in Part and Denying in Part Plaintiff's Motion for
11 Declaratory Relief notice of entry served August 17, 2021;

12 Discovery Commissioner's Report and Recommendations served August 23,
13 2021;

14 Order Regarding Discovery Commissioner's Report and Recommendations
15 notice of entry served September 20, 2021;

16 Order Granting In Part And Denying In Part Plaintiff s Motion In Limine
17 No. 2 notice of entry served September 21, 2021;

18 Order Granting In Part And Denying In Part Plaintiff s Motion For Partial
19 Summary Judgment As To U.S. Re Corporation notice of entry served September
20 21, 2021;

21 Order Denying Plaintiff s Motion In Limine Number 5 To Limit The Scope
22 Of Expert Witness Testimony Regarding Speculation Concerning The Economy
23 dated notice of entry served September 30, 2021;

24 Order Denying Plaintiff's Motion In Limine Number 4: To Preclude Any
25 Reference To Reinsurance Estimates notice of entry served September 30, 2021;

26 Order Denying Plaintiff s Motion In Limine Number 1 To Preclude Sam
27 Hewitt From Providing Expert Testimony Regarding Insolvency Analysis notice of
28 entry served September 30, 2021;

1 Order Denying Plaintiff's Motion In Limine Number 6 To Strike Proffered
2 Expert Witness Alan Gray notice of entry served September 30, 2021;

3 Order Denying Plaintiff s Motion For Partial Summary Judgment Regarding
4 Uni-Ter Defendants Breach Of Their Fiduciary Duties notice of entry served
5 September 30, 2021;

6 Order Granting Motion to Exclude Interest notice of entry served December
7 16, 2021;

8 Order of Dismissal Without Prejudice in favor of Robert Chur, Steve Fogg,
9 Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and
10 Eric Stickels notice of entry served February 26, 2016;

11 Order of Dismissal as to U.S. RE notice of entry served May 10, 2016;

12 Judgment in favor of Robert Chur, Steve Fogg, Mark Garber, Carol Harter,
13 Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels notice of entry
14 served August 14, 2020;

15 Order Denying Plaintiff's Motion to Lift Stay or Alternatively Grant
16 Plaintiff Other Relief notice of entry served August 12, 2019;

17 Order Denying Motion to Substitute dated notice of entry served February
18 26, 2019;

19 Order Granting in Part Defendants Robert Chur, Steve Fogg, Mark Garber,
20 Carol Harter, Robert Hurlbut, Barbara Limpkin, Jeff Marshall, and Eric Stickels
21 Motion to Strike notice of entry served November 7, 2018;

22 Order Granting in Part Defendants Robert Chur, Steve Fogg, Mark Garber,
23 Carol Harter, Robert Hurlbut, Barbara Limpkin, Jeff Marshall, and Eric Stickels
24 Motion to Dismiss notice of entry served February 26, 2016.

25
26 (a) Was service by delivery _____ or by mail/electronic/fax X.\

27 Notice of entry of all orders regarding this appeal were served by electronic
28 service through the District Court's e-service system on the same day the notice of

entry of orders were filed.

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52 (b), or 59,

(a) Specify the type of motion, and the date and method of service of the motion, and date of filing.

Plaintiff's Motion to Alter or Amend Judgment Pursuant to NRCP 59 filed on February 10, 2022 and served by electronic service on the same day.

Defendant US RE's Motion to Alter or Amend Judgment filed on February 10, 2022 and served by electronic service on the same day.

NRCP 50(b) Date of filing _____

NRCP 52(b) Date of filing _____

NRCP 59 Date of filing February 10, 2022

Note: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion:

(c) Date of written notice of entry of order resolving motion served:

Was service by delivery _____ or by mail _____ (specify).

19. Date notice of appeal was filed: November 18, 2022

If more than one party has appealed from the judgment or order, list date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other: NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. **Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

Explain how each authority provides a basis for appeal from the judgment or order: The basis for appeals herein are pursuant to NRAP 3A(a) and (b), final judgment entered in an action, and all related final orders of the district court.

22. **List all parties involved in the action in the district court:**

(a) Parties:

Plaintiff/Respondent:

Commissioner of Insurance for the State of Nevada as Receiver of Lewis & Clark LTC Risk Retention Group, Inc.

Defendants/Appellants:

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.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal *e.g.*, formally dismissed, not served, or other:

Following the District Court's dismissal of the Director Defendants, the underlying action proceeded to trial against the remaining defendants. A jury trial against Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. Re Corporation ("Corporate Defendants") began on September 20, 2021, and concluded on October 14, 2021, with a unanimous jury verdict in favor of the Commissioner of Insurance and a judgment against the Corporate Defendants in the amount of \$15,222,853.00. Final Judgment was entered, and the Corporate

1 Defendants did not appeal any appealable determinations made by the District
2 Court.

3
4 **23. Give a brief description (3 to 5 words) of each party's separate claims,**
5 **counterclaims, cross-claims or third-party claims, and the date of**
6 **formal disposition of each claim.**

7 Commissioner of Insurance:

8 Against the Director Defendants: (1) Gross Negligence; and (2)
9 Deepening of the Insolvency.

10 Against the Corporate Defendants: (1) Breach of Fiduciary Duty; and
11 (2) Negligent Misrepresentation.

12 Director Defendants: No separate claims, counterclaims, cross-claims or
13 third-party claims.

14 Corporate Defendants: No separate claims, counterclaims, cross-claims or
15 third-party claims.

16 **24. Did the judgment or order appealed from adjudicate ALL the claims**
17 **alleged below and the rights and liabilities of ALL the parties to the**
18 **action or consolidated actions below:**

19 Yes X No

20 **25. If you answered "No" to question 24, complete the following:**

21 (a) Specify the claims remaining pending below:

22 (b) Specify the parties remaining below:

23
24 (c) Did the district court certify the judgment or order appealed from as a
25 final judgment pursuant to NRCP 54(b):

26 Yes No

27 (d) Did the district court make an express determination, pursuant to NRCP
28 54(b), that there is no just reason for delay and an express direction for the

entry of judgment:

Yes _____ No _____

26. **If you answered “No” to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):**

27. **Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Name of Appellants: Commissioner of Insurance for the State of Nevada as Receiver of Lewis & Clark LTC Risk Retention Group, Inc.

Name of counsel of record: Brenoch Wirthlin, Esq.
Hutchison & Steffen, PLLC
10080 W. Alta Drive, Ste. 200
Las Vegas, Nevada 89145
702-385-2500

Date: 12/13/2022

/s/Brenoch Wirthlin

Signature of counsel of record

Clark County, Nevada

State and county where signed

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON &
3 STEFFEN, PLLC and that on this 13th day of December, 2022, I caused the above
4 and foregoing document entitled: **DOCKETING STATEMENT** to be served via
5 NOTICE OF ELECTRONIC FILING through the Electronic Case Filing System
6 of the Nevada Supreme Court with the submission to the Clerk of the Court, who
7 will serve the parties electronically, and to be served by mailing via first class mail
8 with sufficient postage prepaid to the following addresses listed below.
9
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12
13 /s/ Jon Linder

14 An employee of Hutchison & Steffen, PLLC
15
16
17

18 **Lansford W. Levitt**
19 **2072 Sea Island Drive**
20 **Dana Point, CA 92629**
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EXHIBIT PAGE ONLY

EXHIBIT 1

HUTCHISON & STEFFEN

A PROFESSIONAL LLC


CLERK OF THE COURT

1 ACOM
JAMES L. WADHAMS, ESQ.
2 Nevada Bar No. 1115
BRENOCH WIRTHLIN, ESQ.
3 Nevada Bar No. 10282
FENNEMORE CRAIG, P.C.
4 300 South Fourth Street, Suite 1400
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5 Telephone: (702) 692-8000
Facsimile: (702) 692-8099
6 bwirthlin@fclaw.com
Attorneys for Plaintiff Commissioner of Insurance
7 *For the State of Nevada*

8
9 DISTRICT COURT OF NEVADA
10 CLARK COUNTY, NEVADA

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

14 Plaintiff,

15
16 vs.

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

22 Defendants.
23

Case No.: A-14-711535-C

Dept No.: XXVII

THIRD AMENDED COMPLAINT

[Request for Exemption to be Filed]
[Damages in Excess of \$50,000]

24 Plaintiff, the Court-appointed receiver ("Plaintiff") of Lewis & Clark LTC Risk Retention
25 Group, Inc. ("L&C" or the "Company"), files the Third Amended Complaint clarifying the
26 Exhibits referenced in the Complaint and hereby complains and alleges as follows:

27 ///

28 ///

PARTIES, JURISDICTION AND VENUE

1. L&C was a Nevada domiciled risk retention group formed in 2004. Between 2004 and February 28, 2013, L&C provided general and professional liability coverage to long term care facilities and home health providers.

2. The Nevada Division of Insurance ("DOI") filed a Receivership Action related to L&C in November, 2012, commencing case number A-12-672047-B in the Eighth Judicial District Court of Nevada, in and for the County of Clark ("Receivership Action"). In the Receivership Action, the court entered an Order of Liquidation ("Liquidation Order") on February 28, 2013. A copy of the Liquidation Order is attached hereto as **Exhibit 1**. In the Liquidation Order, Plaintiff was appointed as the Receiver ("Receiver") of L&C. *Id.* The express powers granted to Receiver in the Order include the power to "[p]rosecute any action which may exist on behalf of the policyholders, members or shareholders of L&C against any officer of L&C or any other person[.]" See Liquidation Order, Exhibit 1, at ¶6(g).

3. On information and belief, defendant Robert Chur ("Chur") was a director of L&C at all relevant times including as of the time the Receivership Action was filed.

4. On information and belief, Chur resides in Williamsville, New York.

5. On information and belief, Chur was also President of ElderWood Senior Care at relevant times.

6. On information and belief, defendant Steve Fogg ("Fogg") was a director of L&C at all relevant times including as of the time the Receivership Action was filed.

7. On information and belief, Fogg resides in Oregon.

8. On information and belief, Fogg was also Chief Financial Officer of Marquis Companies at relevant times.

9. On information and belief, defendant Mark Garber ("Garber") was a director of L&C at all relevant times including as of the time the Receivership Action was filed.

10. On information and belief, Garber resides in Oregon.

11. Garber was also Chief Financial Officer of Pinnacle Healthcare, Inc. ("Pinnacle") at relevant times.

1 12. On information and belief, defendant Carol Harter ("Harter") was a director of
2 L&C at all relevant times including as of the time the Receivership Action was filed.

3 13. On information and belief, Harter resides in Las Vegas, Nevada.

4 14. On information and belief, Harter was also a professor at University of Nevada,
5 Las Vegas at relevant times.

6 15. On information and belief, defendant Robert Hurlbut ("Hurlbut") was a director of
7 L&C at all relevant times including as of the time the Receivership Action was filed.

8 16. On information and belief, Hurlbut resides in New York.

9 17. On information and belief, defendant Barbara Lumpkin ("Lumpkin") was a
10 director of L&C at all relevant times including as of the time the Receivership Action was filed.

11 18. On information and belief, Lumpkin resides in Florida.

12 19. On information and belief, Lumpkin was also the Associate Executive Director of
13 the Florida Nurses Association at relevant times.

14 20. On information and belief, defendant Jeff Marshall ("Marshall") was the President
15 and CEO of L&C at all relevant times including as of the time the Receivership Action was filed.

16 21. On information and belief, Marshall resides in Washington.

17 22. On information and belief, Marshall was also President and CEO of Eagle
18 Healthcare, Inc. ("Eagle Healthcare") at relevant times.

19 23. On information and belief, defendant Eric Stickels ("Stickels") was the Secretary
20 and Treasurer of L&C at all relevant times including as of the time the Receivership Action was
21 filed.

22 24. On information and belief, Stickels resides in New York.

23 25. On information and belief, Stickels was also Chief Financial Officer of Oneida
24 Savings Bank ("Oneida") at relevant times.

25 26. On information and belief, U.S. RE Corporation ("U.S. RE") is a New York
26 corporation and is an international financial services firm with interests in reinsurance brokerage,
27 investment banking, and program business, as well as holdings in the insurance industry.

28 27. On information and belief, defendant Uni-Ter Underwriting Management

1 Corporation ("Uni-Ter UMC" or "Uni-Ter") is a Georgia corporation and is a wholly owned
2 subsidiary of U.S. RE Corporation.

3 28. On information and belief, Uni-Ter Claims Services Corp. ("Uni-Ter CS") is a
4 Georgia corporation and is a wholly owned subsidiary of Uni-Ter UMC.

5 29. On information and belief, Defendants DOE INDIVIDUALS 1 through 50 and
6 ROE COMPANIES 51 through 100 are individuals or business entities currently unknown to
7 Plaintiff who claim some right, title, interest or lien in the subject matter of this action. When the
8 names of said DOE INDIVIDUALS and ROE COMPANIES have been ascertained, Plaintiff will
9 request leave to substitute their true names and capacities and join them in this action.

10 GENERAL ALLEGATIONS

11 A. Introduction

12 30. L&C was a Nevada corporation formed in or around 2003. L&C was organized as
13 a risk retention group to write Professional and General Liability coverage for long-term care
14 facilities in the Pacific Northwest.

15 31. L&C expanded its area of operation over the years and, at the time of Receivership
16 Action in 2012, wrote coverage for long term care facilities in 46 states, although New York,
17 California, Oregon, and Washington accounted for a majority of the premiums.

18 32. The individual defendants include the directors and officers of L&C at the relevant
19 times who, among other things, were grossly negligent in performing their duties as directors and
20 officers of L&C which resulted the Receivership Action being filed.

21 33. Defendants Uni-Ter UMC and Uni-Ter CS were retained as a manager of L&C.
22 Defendant U.S. RE was retained to provide reinsurance to L&C.

23 34. On information and belief, the Defendants who were directors and officers of L&C
24 ("Board") were aware at the time it retained Uni-Ter and its affiliates that they had only recently
25 been formed and had limited operating history. Further, the Board understood that the Board
26 members had not previously organized an insurance company. Thus, on information and belief,
27 the Board placed undue reliance on Uni-Ter as its manager without properly informing itself of
28 the information provided by Uni-Ter and its affiliates. Further, on information and belief, the

1 Board continued to rely on information and recommendations from Uni-Ter despite clear
2 indications that the information was incomplete and inaccurate and the recommendations were ill
3 advised, but the Board failed to exercise even slight diligence or care in verifying or correcting
4 the misinformation provided by Uni-Ter, U.S. RE and others, and to take proper corrective action.

5 **B. Acquisitions and Growth of L&C**

6 35. During calendar year 2005, L&C acquired Henry Hudson LTC Risk Retention
7 Group, Inc. ("Henry Hudson") which wrote exclusively in New York. L&C assumed all
8 outstanding liabilities of Henry Hudson.

9 36. L&C acquired Sophia Palmer Nurses Risk Retention Group ("Sophia Palmer") in
10 2009. Sophia Palmer wrote general and professional liability policies to nurses mostly in Florida.
11 L&C assumed all outstanding liabilities of Sophia Palmer.

12 37. By the time it was placed in receivership, L&C had issued approximately 25,254
13 shares of common stock. Its directors and officers held approximately 11,720 shares. The largest
14 shareholders were Pinnacle with approximately 3663 shares and Eagle Healthcare with
15 approximately 4041 shares.

16 38. L&C was managed by Uni-Ter UMC at all times. Uni-Ter UMC also did other
17 work including private offering work on behalf of L&C such as sending out the offering
18 memoranda and offering documents on behalf of the company.

19 **C. Agreements with the Uni-Ter Entities and Brokers**

20 39. The Uni-Ter entities hold themselves out as a leading provider of liability
21 insurance to the healthcare industry.

22 40. Uni-Ter UMC has created at least five Risk Retention Groups which include L&C,
23 Ponce de Leon LTC RRG, Inc., and J.M. Woodworth RRG, Inc.

24 41. As a Managing General Underwriter, Uni-Ter's services to L&C included
25 administration, underwriting, risk management, claims, and regulatory compliance.

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1 (1) **Management Agreements**

2 42. Immediately upon formation of L&C by Uni-Ter UMC, L&C entered into
3 management agreements with Uni-Ter UMC. In 2011, Uni-Ter entered into a new management
4 agreement with Uni-Ter UMC and Uni-Ter CS.

5 a. 2004 Management Agreement

6 43. L&C and Uni-Ter UMC entered into a Management Agreement dated January 1,
7 2004 ("2004 Management Agreement") for a period of seven years. A copy of the 2004
8 Management Agreement is attached hereto as **Exhibit 2**.

9 44. In the agreement, L&C appointed Uni-Ter UMC as its exclusive underwriting,
10 administrative, accounting, risk management, and claims manager for the lines of business and
11 territories set forth in Exhibit A to that agreement.

12 45. The 2004 Management Agreement states that Uni-Ter UMC would "serve L&C in
13 a fiduciary capacity for all legal duties." *Id.*

14 46. Uni-Ter UMC's duties under the 2004 Management Agreement expressly included
15 the following: (i) Soliciting of risks and class of risks that meet L&C's underwriting and pricing
16 standards, appointing qualified brokers and agents to sell the insurance, (ii) binding of risks, (iii)
17 issuance, renewal, and cancellation of policies, (iv) collection of premiums, (v) handling of
18 claims, (vi) keeping accurate records and having audits done, (vii) maintaining electronic files,
19 (viii) providing the usual and customary services to insureds, (ix) ensuring compliance with state
20 and federal regulations, (x) determining and setting appropriate premium rates, (xi) compiling and
21 providing the needed statistical reports to L&C, (xii) holding all of L&C's assets in investment
22 custodian accounts as a fiduciary, (xiii) determining and obtaining appropriate reinsurance
23 authorized by L&C, (xiv) safeguarding and maintaining L&C property, and (xv) accounting to
24 L&C for certain financial and insurance information on a monthly basis (including operating
25 statement, balance sheet, policies written for the month, claims incurred for the month, AR
26 summary, and summary of all claims, reserves, and losses). *Id.* at Article III.

27 47. Uni-Ter's duties also specifically included "[t]o arrange for or perform risk
28 management services for the benefit of the insureds of L&C. Such risk management shall have

1 the primary goal of reducing the frequency of medical incidents that give rise to policy claims.
2 Specific risk management duties are set forth in Exhibit C.” *Id.* Art. III(R).

3 48. Uni-Ter’s duties also included filing quarterly and annual financial statements with
4 the Nevada DOI and other states requiring the same. *Id.* Art. III(H)(2).

5 49. The 2004 Management Agreement also included Exhibit B entitled Claims
6 Management Authority which stated that Uni-Ter UMC “shall handle all aspects of claim
7 processing . . . for all claims and allocated loss adjustment expenses subject to this Agreement.”
8 The Exhibit then lists specific claims handling duties of Uni-Ter including monthly reporting of
9 new claims, open reserves, paid claims, and ending reserve balance for both indemnity and
10 expense activity. *Id.*, at Exhibit B.

11 50. Regarding compensation, Uni-Ter was paid in three components.

12 (i) A management fee of 22% of gross written premiums net of cancellations
13 and non renewals up to \$5 million, 20% between \$5 million and \$15
14 million, and 17.5% above \$15 million. Management fees were to be paid
15 monthly.

16 (ii) Claims handling fees of \$250 per file setup for each claim or investigation,
17 \$95 per hour for claim adjuster/nurse professional time, and actual travel
18 expenses.

19 (iii) A profit sharing bonus on a sliding scale as a percent of earned premiums
20 based on loss ratio for each calendar year. The profit sharing bonus was to
21 be paid no later than March 1 of the year following the fifth year after the
22 year at issue.

23 *See id.*

24 51. The 2004 Management Agreement included amendments that modified these
25 payment terms. *Id.*

26 52. The Second Amendment to the 2004 Management Agreement states that for all
27 services under the 2004 Management Agreement other than claims handling, the management fee
28 will be 12% of annual gross written premiums net of cancellations and non-renewals plus the

1 amount of agency commissions (at rates approved by L&C) payable to retail and wholesale
2 agents appointed by Uni-Ter. *Id.*

3 53. Various amendments raised the hourly rate for claim adjuster/professional time.
4 *Id.*

5 54. The Fifth Amendment to the 2004 Management Agreement modified the profit
6 sharing bonus provision to be paid on March 1 of the year following the fourth year after the year
7 at issue. *Id.*

8 55. On information and belief, in or around 2009 L&C, at Uni-Ter's direction,
9 accepted multiple multi-site LTC operators ("Multi-site Operators") as policyholders. As noted
10 above, one of these operators was Sophia Palmer.

11 56. On information and belief, at the time L&C accepted Sophia Palmer, Lumpkin – a
12 director of L&C – also chaired the board of Sophia Palmer.

13 57. On information and belief, the DOI reprimanded the Board for failing to submit a
14 Conflict of Interest Statement as the officers and directors of L&C were required to do pursuant
15 to NAC 694C.

16 58. On information and belief, the Board accepted Uni-Ter's direction to obtain the
17 Multi-site Operators, including Sophia Palmer, without adequate information. In fact, the Board
18 failed to even exercise a slight degree of diligence in determining whether the acceptance of the
19 Multi-site Operators, including Sophia Palmer, was an appropriate decision.

20 59. On information and belief, had the Board exercised even scant care in informing
21 itself based upon the information available to it regarding the Multi-site Operators, it would have
22 discovered that in fact the recommendation by Uni-Ter was ill advised.

23 60. On information and belief, L&C's acceptance of the Multi-site Operators
24 constituted a significant divergence from the established business model of L&C as the Multi-site
25 Operators were large, multi-facility operators and had historical loss records outside L&C's
26 typical underwriting range. Further, on information and belief, one of the contracts at issue
27 contained an unprecedented provision that limited the claims exposure of L&C on an aggregate
28 level rather than on a claim-specific level.

1 61. Following L&C's acquisition in 2009 of the Sophia Palmer nurse/nurse
2 practitioner book of business in Florida, the Seventh Amendment stated that the existing profit
3 sharing terms were applicable to L&C's long term care facility/home health care book of
4 business, but that regarding L&C's nurse/nurse practitioner book of business produced by agents,
5 the profit sharing bonus (called "commissions") were to be paid at a rate of 37.5% of the annual
6 gross written premiums net of cancellations and non-renewals. For nurse/nurse practitioner
7 business produced by Uni-Ter UMC, the commission rate was to be 30.0%.

8 62. The Eighth Amendment to the 2004 Management Agreement stated that
9 management fees were to be paid to Uni-Ter UMC on a continuing basis as premiums are
10 collected or adjusted (as opposed to monthly previously). *Id.*

11 63. On information and belief, Uni-Ter received at least \$1,500,000 in management
12 fees in 2010.

13 b. 2011 Management Agreement

14 64. At the expiration of the 2004 Management Agreement, L&C and Uni-Ter UMC
15 (and Uni-Ter's subsidiary Uni-Ter CS) entered into a similar Management Agreement on January
16 1, 2011 ("2011 Management Agreement") for a period of five years. A copy of the 2011
17 Management Agreement is attached hereto as **Exhibit 3**.

18 65. The 2011 Management Agreement was in place when the Order of Liquidation
19 was entered.

20 66. The 2011 Management Agreement states that Uni-Ter UMC and Uni-Ter CS as
21 Manager would "serve L&C in a fiduciary capacity for all legal duties." *Id.* It sets forth similar
22 duties for Uni-Ter as under the 2004 agreement. The management fee and claims handling fees
23 portion of the compensation are the same as the amended compensation under the 2004
24 agreement.

25 67. The 2011 Management Agreements included the following revisions to the 2004
26 Management Agreement:

- 27 (i) The accounting reporting to L&C is to be done on a quarterly basis instead
28 of monthly. Art. III(H).

- (ii) Exhibit A was revised regarding the territory to include all of the U.S. except for Hawaii and Alaska and excluding long term care and home healthcare in Florida.
- (iii) The limitations of Uni-Ter's authority in Article III(Y) are revised to delete the limitations set forth in items 2, 6, and 9 of the 2004 agreement. Uni-Ter's new allowed duties (i.e., no longer a limitation) included that it had full authority to settle claims on L&C's behalf or commit L&C to pay claims.
- (iv) The profit sharing bonus provision was revised to apply from 2007 forward with 2006 being the last year under the 2004 Management Agreement. For 2007 onward, the profit sharing bonus was to be 20% of L&C's Profit as defined to be pre-tax net income as adjusted for the applicable year's loss ratio, ALAE ratio, and reinsurance payables and receivables through December 31 of the fourth year following the applicable year.
- Id.

68. The First Amendment to the 2011 Management Agreement revised the management fee for calendar year 2011 to be at a rate of 10% instead of 12% and stated that continuation of the 2% differential for subsequent periods is subject to mutual agreement of the parties. A handwritten notation on the amendment states that "This was revised on February 7th, 2011." Id.

69. The Second Amendment is dated November 15, 2011 in conjunction with additional capital contributions at that time. It states that for so long as any amounts are unpaid on the surplus debentures of L&C issued in 2011 and 2012, the profit sharing bonus payable to Uni-Ter UMC shall accrue but not be paid. Id.

70. The Third Amendment done on December 31, 2011 states that no profit sharing bonus would accrue or be paid regarding the 2008 calendar year. Id.

71. Despite the changes to Uni-Ter's management responsibilities, and despite the dire financial circumstances of L&C during 2011, on information and belief Uni-Ter received not less

1 than \$1,000,000.00 in management fees in 2011.

2 72. Milliman, Inc. ("Milliman"), an actuarial firm, provided Rate and Loss Reserve
3 analysis to Uni-Ter ("Milliman Reports"). Milliman was engaged by Uni-Ter, and not L&C, in
4 the work that it did. Milliman did premium rate and professional liability and general liability
5 rate analysis for Uni-Ter. Milliman also did loss reserve analysis for Uni-Ter.

6 (2) U.S. RE Agreement

7 73. In a Broker of Record Letter Agreement between L&C and U.S. RE, L&C
8 appointed U.S. RE as its exclusive reinsurance intermediary/broker for a period of seven years
9 and granted U.S. RE full and complete authority to negotiate the placement of reinsurance on all
10 classes of insurance with unspecified limits of coverage as requested by any underwriter of L&C,
11 *i.e.*, Uni-Ter ("U.S. RE Agreement"). A copy of the U.S. RE Agreement is attached hereto as
12 **Exhibit 4.**

13 74. The U.S. RE Agreement states that U.S. RE will handle all funds collected for
14 L&C in a fiduciary capacity. *Id.*

15 75. In each of the eleven (11) ceded reinsurance agreements between L&C and its
16 reinsurers, U.S. RE is listed as the reinsurance intermediary in each agreement via an
17 intermediary clause in the reinsurance agreements.

18 76. U.S. RE was not merely hired as some uninvolved third party broker of
19 reinsurance, although acting as a third party broker of reinsurance was included with U.S. RE's
20 duties.

21 77. On information and belief, Uni-Ter Underwriting Management Corporation ("Uni-
22 Ter Underwriting") and Uni-Ter Claims Services Corporation ("Uni-Ter Claims") were retained
23 as the managers of L&C.

24 78. On information and belief, both Uni-Ter Underwriting and Uni-Ter Claims are
25 direct or indirect subsidiaries of U.S. RE.

26 79. U.S. RE was itself engaged as L&C's "exclusive reinsurance intermediary/broker"
27 and as L&C's agent, including being granted "full and complete authority to negotiate the
28 placement of reinsurance or retrocessions on all classes of insurance with unspecified limits of

1 coverage as specifically requested by any underwriter of [L&C].” *Id.*

2 80. The U.S. RE Agreement further recognizes U.S. RE’s agency with L&C by stating
3 that U.S. RE “will exercise its best efforts in the discharge of its duties **on behalf of the**
4 **Company.**” *Id.* (emphasis added).

5 81. The Supreme Court of Nevada has held that “[a]n agency relationship is formed
6 when one who hires another retains a contractual right to control the other’s manner of
7 performance.” *Grand Hotel Gift Shop v. Granite State Ins. Co.*, 108 Nev. 811, 815, 839 P.2d
8 599, 602 (1992) (citation omitted).

9 82. U.S. RE acted as the agent of L&C, as the U.S. RE Agreement expressly states not
10 only that U.S. RE will act “on behalf of” L&C, but also that L&C has the right to control U.S.
11 RE’s manner of performance as U.S. RE promises to “comply with written standards established
12 by [L&C] for the cession or retrocession of all insured risks.” *Id.*

13 83. Further, Nevada law makes clear that “[a]n agent, such as respondent in these
14 circumstances, owes to the principal the highest duty of fidelity, loyalty and honesty in the
15 performance of the duties by the agent on behalf of the principal.” *LeMon v. Landers*, 81 Nev.
16 329, 332, 402 P.2d 648, 649 (1965) (holding that the agent breached her fiduciary obligations)
17 (emphasis added); *see also Chem. Bank v. Sec. Pac. Nat. Bank*, 20 F.3d 375, 377 (9th Cir. 1994)
18 (“The very meaning of being an agent is assuming fiduciary duties to one’s principal.”) (*citing*
19 *Restatement (Second) of Agency* § 1(1)).

20 84. Additionally, as noted above, U.S. RE was engaged not only as L&C’s exclusive
21 broker, but also as its consultant. Many courts have recognized that insurance brokers are agents
22 of, and therefore owe fiduciary duties to, their insureds. *See Capitol Indem. Corp. v. Stewart*
23 *Smith Intermediaries, Inc.*, 229 Ill. App. 3d 119, 124-25, 593 N.E.2d 872, 876 (1992) (“An
24 agency relationship is a fiduciary one; insurance brokers employed for a single transaction or
25 series of transactions are agents...”).

26 85. The Nevada Supreme Court has recognized that insurance brokers may assume
27 additional duties – including through representations by the broker upon which the insured relies
28 – thereby creating a special relationship between the broker and the insured. *Flaherty v. Kelly*,

1 2013 WL 7155078, at *2 (Nev. Dec. 18, 2013).

2 86. U.S. RE assumed such duties including “substantial and essential efforts expended
3 by U.S. RE and its affiliates in the organization and licensing of [L&C]” and serving as a
4 consultant to U.S. RE. *See* U.S. RE Agreement.

5 87. Further, as recognized in the U.S. RE Agreement, U.S. RE’s agency relationship
6 with Plaintiff extended to additional actions and bases with U.S. RE, including but not limited to
7 the “substantial and essential efforts expended by U.S. RE and its affiliates in the organization
8 and licensing of [L&C]” and to state that U.S. RE will “serve as the exclusive intermediary in
9 connection with the placement of all of [L&C’s] reinsurance.” *Id.*

10 88. The U.S. RE Agreement further recognizes U.S. RE’s agency with L&C by stating
11 that U.S. RE “will exercise its best efforts in the discharge of its duties on behalf of the
12 Company.” *Id.* (emphasis added). The U.S. RE Agreement also states that “[a]ll funds collected
13 for [L&C]’s account will be handled by U.S. RE in a fiduciary capacity in a bank which is a
14 qualified United States financial institution.” *Id.*

15 89. Thus, U.S. RE was the agent of Plaintiff in multiple aspects, including but not
16 limited to, those set forth above.

17 90. Further, U.S. RE did more than merely act as some disinterested third party
18 reinsurance broker. In fact, U.S. RE was directly involved in the activities of L&C in its capacity
19 as agent of L&C.

20 91. Moreover, U.S. RE was actively involved in management related activities,
21 including presenting financial and other pertinent information to L&C’s Board.

22 92. U.S. RE intentionally failed to obtain reinsurance through syndicates as required
23 under the U.S. RE Agreement. No facts were found that reinsurance failed to pay as required. To
24 the contrary, the reinsurance policies seemed not to be invoked because deductible amounts were
25 not reached, especially in the early years of 2004 to 2008.

26 93. Nevertheless, U.S. RE intentionally represented to L&C that it would act in L&C’s
27 best interests, creating additional duties toward L&C other than merely finding and securing
28 reinsurance, including but not limited to, fiduciary duties, as set forth herein.

1 94. In violation of such duties, U.S. RE intentionally did not find appropriate
2 reinsurance because the deductible rates were consistently too high. This is shown by the fact
3 that reinsurance did not come into play at all in the early years. Indeed, the Board approved
4 commutation of the 2007 treaty only 10 days into 2008.

5 (3) Reinsurance Contracts

6 95. U.S. RE, acting as L&C's intermediary broker, procured the following general
7 reinsurance treaties. Certain terms of such treaties are noted below the treaty name.

8 (i) April 1, 2004 to December 31, 2004 Treaty (Commutated).

9 (ii) January 1, 2005-December 31, 2006 Treaty.

- 10 - Applicable to \$750,000 excess of \$250,000 per claim
- 11 - Aggregate limit is lesser of \$3,500,000 or 225% of ceded premium.
- 12 - Ceded premium is 25% of gross net written premium income (GNWPI)

13 (iii) January 1, 2007-December 31, 2007 Treaty (Commutated in early 2008)

- 14 - Applicable to \$750,000 excess of \$250,000 per claim
- 15 - Deductible is 22% of GNWPI.
- 16 - Aggregate limit is 300% of ceded premium.
- 17 - Ceded premium is 20% of GNWPI.

18 (iv) July 1, 2005-December 31, 2006 Treaty.

- 19 - Applicable to \$1,000,000 excess of \$1,000,000 per claim
- 20 - Aggregate limit is \$3,000,000 or 300% of ceded premium.
- 21 - Ceded premium is 100% of gross premiums for policies with limits greater than \$1,000,000 per claim.

22 (v) January 1, 2008-March 31, 2009 Treaty.

- 23 - Applicable to \$650,000 excess of \$350,000 per claim
- 24 - Deductible is greater of 13% of GNWPI or \$1,274,000.
- 25 - Aggregate limit is 300% of ceded premium.
- 26 - Ceded premium is 17.08% of GNWPI for all policies subject to a minimum of \$1,575,000.

27 (vi) April 1, 2009-March 31, 2010 Treaty.

- 28 - Applicable to \$650,000 excess of \$350,000 per claim
- 29 - Deductible is greater of 11% of GNWPI or \$1,100,000.
- 30 - Aggregate limit is 300% of ceded premium.
- 31 - Ceded premium is 17.93% of GNWPI for all policies subject to a minimum of \$1,613,700.

32 (vii) April 1, 2010-May 31, 2011 Treaty.

- Applicable to \$650,000 excess of \$350,000 per claim
- Deductible is greater of 11% of GNWPI or \$1,220,000.
- Aggregate limit is 300% of ceded premium.
- Ceded premium is 17.00% of GNWPI for all policies subject to a minimum of \$1,890,000.

(viii) December 1, 2009-May 31, 2011 Treaty.

- L&C cedes 75% of losses in reinsured layer and retains 25%
- Applicable to \$1,000,000 excess of \$1,000,000 per claim
- Aggregate limit is greater of \$3,000,000 or 300% of ceded premium.
- Ceded premium is 100% of net excess premiums (gross premiums less 20%) for policies with limits greater than \$1,000,000 per claim

(ix) June 1, 2011-May 31, 2012 Treaty.

- Applicable to \$650,000 excess of \$350,000 per claim
- Deductible is greater of 18.5% of GNWPI or \$1,300,000.
- Aggregate limit is 300% of ceded premium.
- Ceded premium is 17.00% of GNWPI for all policies subject to a minimum of \$1,190,000.

(x) June 1, 2011-May 31, 2012 Treaty.

- L&C cedes 75% of losses in reinsured layer and retains 25%
- Applicable to \$1,000,000 excess of \$1,000,000 per claim
- Aggregate limit is \$1,500,000
- Ceded premium is 100% of net excess premiums (gross premiums less 20%) for policies with limits greater than \$1,000,000 per claim

(xi) June 1, 2012-May 31, 2013 Treaty.

- Applicable to \$650,000 excess of \$350,00 per claim
- Aggregate limit is 300% of ceded premium.

C. Financial Disaster in 2010 and 2011 at Uni-Ter's and U.S. RE's Direction and the Board's Gross Negligence Despite the Board's Knowledge that Reliance on the Information and Representations from Uni-Ter and U.S. RE was Unwarranted and Dangerous.

96. On or around September 8, 2010, the DOI sent a letter to Marshall, President of L&C and a member of the Board ("September 2010 Letter") advising the Board of the dangerous financial position of L&C. A copy of the "September 2010 Letter is attached hereto as **Exhibit 5**.

97. In the September 2010 Letter, captioned "Lewis & Clark Deteriorating Financial Condition", the DOI states in part the following:

Dear President Marshall:

1 The [DOI]'s review of the June 30, 2010 financial statement of [L&C]
2 revealed a deteriorating financial condition which the company's management
must address. The following are items that must be considered:

- 3 • Increase in reserves has increased liabilities \$3.1 million above
4 the 12/31/10 pro-forma accounts and has resulted in a liquidity
5 ration ... of 116.0%.
- 6 • Due to underwriting and operating losses, \$1.1 million and
7 \$792.7 thousand, respectively, policyholder surplus has
8 declined by 11.6% from December 31, 2009.
- 9 • Underwriting losses are the result of increasing loss and loss
10 administration expense coupled with high other
underwriting/administrative expenses (which exceed 12/31/10
pro-forma amounts by \$744 thousand), all of which result in a
combined ratio of 131.1%.
- Risk Based Capital (RBC) ratio of 210.5% is hardly
adequate....

11 *Id.*

12 98. The September 2010 Letter ended with an admonition from the DOI that
13 "[b]ecause of the company's capital decline revealed by the June 30, 2010 financial statement,
14 management should commence preparing a corrective action plan and an implementation
15 schedule addressing a means to enhance earnings and surplus, reduce expenses, and improve
16 liquidity." *Id.*

17 99. On information and belief, despite the DOI's recommendations regarding L&C's
18 deteriorating financial condition and need for an effective corrective action plan, the Board failed
19 to exercise even slight diligence in correcting the substantial problems L&C was facing, and the
20 alarming financial problems of L&C outlined by the DOI in its September 2010 Letter were not
21 corrected, and in fact were dramatically worsened, by the Board's actions.

22 100. On information and belief, in the first three (3) quarters of 2011, L&C experienced
23 a net loss of not less than \$3,100,000.

24 101. On information and belief, the principal reason for these losses was that the Multi-
25 Site Operators had passed on significant losses to L&C in the two policy years from 2009-2011,
26 as well as increases in claims for other insureds.

27 102. On information and belief, on or about September 1, 2011, Sanford Elsass and
28 Donna Dalton sent a memorandum to the Board purporting to outline the events causing financial

1 difficulties. Included in that memorandum was a representation that Uni-Ter would hire a
2 consultant to perform a "complete analysis" of the claims process of Uni-Ter Claims Services
3 Corporation.

4 103. On information and belief, the consultant hired by Uni-Ter was Praxis Claims
5 Consulting ("Praxis").

6 104. On information and belief, at this time the Board knew that reliance on
7 information presented to it by, or at the direction of, Uni-Ter and U.S. RE could not be relied on,
8 in part because the decision to accept the Multi-Site Operators was financially devastating to
9 L&C.

10 105. On information and belief, despite this knowledge of the Board regarding the
11 wholly inadequate and inaccurate information provided by Uni-Ter, the Board's gross negligence
12 is manifest in the fact that, the Board failed to exercise even a slight degree of care in verifying
13 whether Praxis was provided accurate information in preparing its reviewing the claims process.

14 106. On information and belief, in fact Uni-Ter did not provide Praxis with accurate
15 information and, in fact, limited the scope of Praxis's initial engagement to a review of claims-
16 related processes and of a small sample size of only nine (9) specific claims reserves. Praxis's
17 review, which was grossly inadequate due to Uni-Ter's failure to provide adequate and accurate
18 information to Praxis, resulted in a report dated September 15, 2011 ("September 2011 Praxis
19 Report"). A copy of the September 2011 Praxis Report is attached hereto as **Exhibit 6**.

20 107. On information and belief, because Uni-Ter failed to provide accurate and
21 complete information to Praxis, the September 2011 Praxis Report was substantially inaccurate
22 and incomplete.

23 108. On information and belief, the Board later learned that, in fact, Uni-Ter had not
24 provided Praxis with accurate information and that Uni-Ter had limited the scope of Praxis's
25 engagement to a review of claims-related processes and of a small sample size of only nine (9)
26 specific claims reserves. This is information which the Board, through exercise of even slight
27 diligence or scant care, could have known before the 2011 Praxis Report was issued.

28 109. Further, on information and belief, on or around September 23, 2011, the DOI sent

1 another letter to Marshall regarding the now disastrous financial condition of L&C ("September
2 2011 Letter"). A copy of the September 2011 Letter is attached hereto as **Exhibit 7**.

3 110. In the September 2011 Letter, the DOI noted several massive financial problems
4 with L&C which the Board had, on information and belief, taken improper or no action to correct,
5 including the following:

- 6 • Of particular concern is the Combined ratio which has increased
7 since prior year-end from 99.4% to 153.9% - a 54.8% increase post-
8 merger.
- 9 • A major concern is Risk Based Capital ("RBC") - 208.8%. This
10 RBC calculation results from year-end 2010 financial statement.
11 The RBC is now well below that level considering the reserve
12 (Liability) increases and net loss reducing policyholder surplus by
13 40.3% for only one-half (Six Months) of a year of operating
14 activity.
- 15 • Net underwriting loss has deteriorated to \$3.1 million
- 16 • Net loss = \$1.8 million

17 *Id.*

18 111. The September 2011 Letter further noted the following regarding the second
19 quarter of 2011:

20 Since prior year-end, **policyholder surplus has declined by 40.3%**. Company is
21 experiencing adverse claims Development and is becoming extremely leveraged.
22 **Total Liabilities have increased by 26.5%** ... Net Loss is \$1.8 million, a result
23 of \$3.1 million net underwriting loss for six months and \$1.7 million
24 underwriting loss for just the second quarter. Unassigned Funds have
25 deteriorated further to a negative (\$1.4 million). Since prior year-to-date, net
26 premiums earned have improved nominally by 5.8% while net losses incurred has
27 increased by 117.6% causing a net loss ratio of 114.4% and resulting in a
28 **153.9% combined ratio**. Company is highly leveraged. Cash and invested assets
only represent 59.2% of total assets resulting in a 148.7% liquidity ratio
coupled with gross premiums written representing 571.6% of policyholder surplus
and net premiums written representing 499.9% of policyholder surplus ...

Id. (emphasis added).

112. The September 2011 Letter noted that the DOI had sent "a prior letter advis[ing]
the Board of Directors of deteriorating financial condition and admonish[ing] the Board and
management to consider a correction plan." The letter required that "[t]he Board and

1 management must now prepare a short-term (3 month) action plan and based on this action plan
2 how they forecast their 12/31/2011 statement to appear.” *Id.*

3 113. On information and belief, the Board failed to exercise even scant care in
4 addressing the September 2011 Letter, and failed to correct the staggering financial problems
5 L&C was facing.

6 114. Subsequently, in late November 2011, on information and belief, Uni-Ter
7 conducted what purported to be a full-scale internal review of all claims reserves, and later
8 engaged Uni-Ter to conduct a full review as well.

9 115. On information and belief, the outcome of the internal review by Uni-Ter, as well
10 as the negative review by Praxis, showed that Uni-Ter had incorrectly understated the sampled
11 claims in the September 2011 Praxis Report by a net of not less than \$1,200,000.

12 116. On information and belief, Uni-Ter and/or U.S. RE informed the Board on a
13 conference call that, in fact, an increase of \$5,000,000.00 to L&C’s claims reserves was
14 necessary. This significantly increased the net loss of Lewis & Clark on a full 2011 year basis
15 and further decreased L&C’s capital to an unacceptable level for operational, regulatory, and
16 rating purposes.

17 117. On information and belief the Board, through its gross negligence, ignored or
18 improperly responded to the multiple red flags – including communications from the DOI –
19 regarding L&C’s financial position, Uni-Ter’s management and the representations of Uni-Ter
20 and U.S. RE’s, and failed to exercise even a slight degree of diligence or care in fulfilling its
21 obligations, which proximately caused and contributed to the damages suffered by Plaintiff.

22 **D. L&C Board Meeting Minutes**

23 118. On information and belief, the Board met generally once per quarter starting in late
24 2004 and continuing to September 2012 related to L&C. Minutes of said meetings were kept by
25 L&C (“Minutes”).

26 119. On information and belief, because Uni-Ter UMC was managing all of the
27 business aspects of L&C’s business, Mr. Sanford Elsass (“Elsass”), President of Uni-Ter UMC
28

1 and an officer of U.S. RE at all relevant times, attended all of the L&C Board meetings in person
2 except for the last two. On information and belief, Elsass and other Uni-Ter employees gave
3 most of the reports about the company to the Board members.

4 120. On information and belief, many of the approvals and actions of the Board were
5 done at the recommendation of Mr. Elsass.

6 121. On information and belief, the Board had knowledge concerning Mr. Elsass and
7 his recommendations that caused reliance on the reports and recommendations of Mr. Elsass and
8 Uni-Ter UMC to be unwarranted.

9 122. Despite this knowledge, the Board failed to exercise even a slight degree of
10 diligence or care with respect to accepting the information and recommendations provided by Mr.
11 Elsass and Uni-Ter UMC and failed to verify whether this information was accurate and whether
12 the recommendations should be adopted.

13 123. On information and belief, the Minutes also do not mention the monthly reports
14 that Uni-Ter UMC was supposed to provide to L&C in the 2004 Management Agreement or the
15 quarterly reports that Uni-Ter UMC was supposed to provide to L&C in the 2011 Management
16 Agreement. The Minutes do reference annual and quarterly financial results and there are
17 discussions of the claims and underwriting activities for each quarter, but no mention of the
18 reports required by the 2004 and 2011 Management Agreements.

19 124. Item 13 in the March 9, 2005 Minutes states that the Board requested that Uni-Ter
20 provide financial information to the Board monthly. On information and belief, Uni-Ter already
21 had the obligation to provide the information listed in the 2004 Management Agreement to the
22 Board monthly.

23 125. Item 10 from the August 12, 2005 Minutes, attached hereto as **Exhibit 8**, which
24 state that the Board is unhappy with the work of Uni-Ter. The Minutes state that the Board was
25 concerned regarding the lack of completion by Uni-Ter regarding marketing plans presented at
26 the March 2005 meeting, including non-receipt of periodic marketing reports, lack of contract
27 with state associations and potential new agents, and generally, a lack of production of new
28 business during 2005.

1 126. On information and belief, despite these clear indications that Uni-Ter was failing
2 to provide complete and accurate information, the Board remained indifferent to its legal duty to
3 act on an informed basis by ensuring the information and recommendations provided by Uni-Ter
4 and Mr. Elsass were complete and accurate.

5 127. One of the resolutions in L&C's first set of Minutes of December 22, 2003,
6 approves the engagement between L&C and U.S. RE to engage U.S. RE as the exclusive
7 reinsurance broker and consultant for L&C. The resolution states that confirmation was received
8 from Elsass as an officer of U.S. RE that U.S. RE would use its best efforts to obtain competitive
9 rates and terms.

10 128. On information and belief, Uni-Ter undertook the fiduciary duty of determining
11 and establishing the appropriate loss reserves for the company. Item 3 in the September 14, 2005
12 Minutes, attached hereto as **Exhibit 9**, states that Elsass reported on establishing the appropriate
13 loss reserves for the company.

14 129. On information and belief, the Board's Audit Committee ("Audit Committee")
15 was established at the February 10, 2006 meeting of the Board. On information and belief, the
16 relevant Minutes contain no discussion of why this was not done previously or why it was needed
17 at that juncture.

18 130. On information and belief, the Audit Committee generally reviewed and approved
19 L&C's financial audits. On information and belief, there are no entries stating that the Audit
20 Committee performed any auditing functions other than review of financial audits.

21 131. The May 30, 2006 Minutes, attached hereto as **Exhibit 10**, state that L&C's D&O
22 insurance was renewed, but that L&C's E&O insurance was not renewed.

23 132. On information and belief, L&C subsequently obtained E&O insurance.

24 133. Item 3 of the October 20, 2006 Minutes, attached hereto as **Exhibit 11**, states that
25 the Board directed Donna Dalton of Uni-Ter and L&C's counsel to comment to the Nevada DOI
26 regarding issues including loss reserves and Risk Retention Act requirements.

1 134. Item 9 of the March 23, 2007 Minutes, attached hereto as **Exhibit 12**, references
2 the Nevada DOI triennial examination report for 2003 to 2005, but does not state any findings
3 related to the report or what corrective actions, if any, the Board would take.

4 135. The October 12, 2007 Minutes, attached hereto as **Exhibit 13**, reference an
5 incurred but not reported ("IBNR") reduction of \$934,000 but do not explain it or why the
6 reduction occurred. The October 12, 2007 Minutes also state that L&C was beginning to offer
7 occurrence policies subject to required regulatory filings, but do not discuss the required
8 regulatory filings.

9 136. The January 10, 2008 Minutes, attached hereto as **Exhibit 14**, state that there will
10 be commutation of the 2007 reinsurance with Imagine RE, and note the change that Uni-Ter will
11 begin a retail policy sales agency to improve on the disappointing efforts by the "current agency
12 network." The entry notes that Uni-Ter will be paid commissions on L&C's retail policy
13 business at 10% of gross written premiums rather than 15% of gross written premiums. The
14 Minutes do not say which contract Uni-Ter would provide such services under. The 2004
15 Management Agreement required solicitation services by Uni-Ter. This same item mentions that
16 Uni-Ter requested an advancement of half of L&C's 2008 annual budget for Uni-Ter for "this
17 effort" with such advancement repayable from commissions earned by Uni-Ter.

18 137. Item 13 in the April 24, 2008 Minutes, attached hereto as **Exhibit 15**, references
19 insolvency gap coverage of \$1 million. Then, item 11 of the December 2, 2009 Minutes, attached
20 hereto as **Exhibit 16**, notes a renewal of insolvency gap coverage in the amount of \$2 million.

21 138. Item 4 in the December 10, 2008 Minutes, attached hereto as **Exhibit 17**, notes
22 that, based on a request from the Nevada DOI, the Board ratified clarification amendments to the
23 Oneida surplus notes.

24 139. Item 6 of the December 2, 2009 Minutes, attached hereto as **Exhibit 17**, notes a
25 report on the current triennial examination by the Nevada DOI but does not state any more
26 regarding said examination.

27 140. Item 5 of the May 21, 2010 Minutes, attached hereto as **Exhibit 18**, references the
28 Board's review of results of the Nevada DOI triennial examination and approval of responses to

1 the DOI. The Minutes do not explain or discuss the responses or any corrective actions that the
2 Board may take. Those Minutes also approved the 2009 annual audited statements and report
3 prepared by Johnson Lambert & Co. as well as the 2009 Milliman Report and calculation of
4 "Profit Sharing bonuses."

5 141. The November 2010 Minutes, attached hereto as **Exhibit 19**, contain discussion of
6 renewal of L&C's Management Agreement with Uni-Ter subject to noted revisions including a
7 requirement of clarification of significant claims notice to the Board with settlement authority
8 remaining with Uni-Ter.

9 142. The May 4-5, 2011 Minutes, attached hereto as **Exhibit 20**, approved the 2010
10 annual audited statements and report prepared by L&C's auditors, Johnson Lambert & Co.

11 143. The September 21, 2011 Minutes, attached hereto as **Exhibit 21**, contain in Item 7
12 a statement that the Board reviewed and approved a new underwriting philosophy. The Minutes
13 do not say what the new underwriting philosophy was. However, a document dated 8/31/11 and
14 entitled "Long Term Care Underwriting Philosophy & Strategic Direction" was part of the
15 directors' package for that meeting. The document lists specific requirements related to
16 consideration of long term care facilities for coverage.

17 144. On October 5, 2011 the Board held a special meeting and approved capital
18 contributions by shareholders Oneida, Eagle Healthcare, Pinnacle, Marquis, Elderwood, Rohm,
19 and Uni-Ter in exchange for surplus notes. The action of the Board in lieu of a special meeting,
20 attached hereto as **Exhibit 22** ("Action"), also noted that depending on the fourth quarter, the
21 same parties other than Oneida would commit to an additional amount of \$550,000 in the fourth
22 quarter of 2011 and first quarter of 2012 as the stated proportions (with Uni-Ter having 20/55 or
23 4/11 responsibility). The Minutes also noted approval of the new underwriting philosophy.

24 145. On information and belief, the minutes of the October 5, 2011 action by the Board
25 demonstrate that the Board was well aware it was not receiving accurate and complete
26 information from Uni-Ter as the Board requested "more frequent financial reporting to the Board
27 as discussed at the last meeting, preferably monthly." (Emphasis added). On information and
28

1 belief the Board failed to exercise even slight diligence or scant care and failed to ensure that Uni-
2 Ter did, in fact, provide more complete and accurate reporting of L&C's financial status.

3 146. Even with the bad financial news in early October, 2011, the Board was indifferent
4 to its legal obligations and did not meet again until December 20, 2011, over two and a half
5 months later. At that meeting, as reflected in the Minutes attached hereto as **Exhibit 23**, Uni-Ter
6 reported that claims reserves may have increased by \$5 million from the November 2011 figures,
7 *i.e., in one month.*

8 147. On information or belief, in or around the latter part of 2011, William Fishlinger
9 ("Fishlinger") was retained to provide claims review for L&C. Item 3 in the December 28, 2011
10 Minutes, attached hereto as **Exhibit 24**, states that the Board was advised regarding the schedule
11 for Fishlinger's claims review commencing in the first full week of January 2012. Item 4 of those
12 Minutes states that Uni-Ter's pro forma December 31, 2011 financials indicate that L&C is
13 neither impaired nor insolvent and pending receipt of the Fishlinger review, Uni-Ter should
14 process the current renewals. The Minutes also note that the Board's claims committee should
15 have a conference call with Fishlinger about his work and conclusions before the work is done to
16 finalize his written report.

17 148. On information and belief the Board failed to exercise the slightest degree of
18 diligence and care regarding this information and took no action whatsoever to verify whether the
19 information provided by Uni-Ter suggesting that L&C was "neither impaired nor insolvent" was
20 accurate, despite numerous indications that information provided by Uni-Ter was inaccurate and
21 incomplete.

22 149. At the January 16, 2012 meeting, the Minutes for which are attached hereto as
23 **Exhibit 25**, the Board was told that capital and surplus was \$1,979,730 as of December 31, 2011.
24 Thus, L&C's surplus dropped over \$2.5 million in one year.

25 150. On information and belief, the Minutes do not reflect any discussion of how that
26 relates to the approximate \$5 million additional loss reserves noted at the December 20, 2011
27 meeting.

28

1 151. On information and belief, L&C's Nevada counsel was instructed to contact
2 Nevada DOI regarding the "current inquiry." The Minutes do not say what the current inquiry
3 was.

4 152. The January 26, 2012 Minutes state in Item 2 that L&C's Nevada counsel reported
5 on her conversations with the Nevada DOI. *See Exhibit 26.* The Minutes do not include the
6 substance of those discussions. Item 3 states that the Board deferred approval of commutation of
7 reinsurance for years 2005, 2006, 2008, and 2009 pending receipt from Uni-Ter of a report
8 regarding outstanding claims for such periods. Item 5 states that the Board met in executive
9 session to discuss issues involving potential additional capital.

10 153. Further, the minutes for the January 26, 2012 meeting stated that "Mr. Elsass
11 presented a report on current claims activity in California and New York and discussions with the
12 Corporation's actuaries and auditors." *Id.* On information and belief the Board failed to exercise
13 the slightest degree of diligence and care regarding this information took no action to verify that
14 Mr. Elsass's report was accurate, despite clear indications that information provided by Mr.
15 Elsass was incomplete and inaccurate.

16 154. At the February 2, 2012 meeting, the Minutes for which are attached hereto as
17 **Exhibit 27**, the Board approved \$480,000 additional capital contributions in exchange for
18 subordinated surplus notes on the same terms used in the fall of 2011. On information and belief,
19 Elsass reported to the Board "regarding recent favorable claims activity." The Minutes do not say
20 what the alleged favorable claims activity was. On information and belief, the Board failed to
21 exercise the slightest degree of diligence and care regarding this information and did not verify
22 whether the report by Elsass regarding alleged "favorable claims activity" was accurate or
23 complete.

24 155. Notwithstanding the dire financial issues, the Board remained indifferent to its
25 legal obligations and did not meet again until April 30, 2012, almost three (3) months later. At
26 the April 30, 2012 meeting, the Minutes for which are attached hereto as **Exhibit 28**, Item 1
27 provides that L&C's submissions to the Nevada DOI were approved, but do not explain what the
28 submissions were.

1 156. There is no mention in the April 30, 2012 Minutes of the Milliman Report from
2 April 12, 2012 stating that, as of the end of 2011, the company's loss reserves were \$1.4 million
3 under what they need to be when using the mid-range number.

4 157. Item 5 of the May 14, 2012 Minutes, attached hereto as **Exhibit 29**, state that a
5 Nevada DOI examination was scheduled, but do not explain this matter further.

6 158. On information and belief, the Board did not meet for another two and a half (2
7 ½) months regarding the financial conditions of L&C. The Board met telephonically on June 6,
8 2012, the Minutes for which are attached hereto as **Exhibit 30**, but the only business noted was
9 the approval of reinsurance. There is no entry regarding a discussion of the financial status of
10 L&C.

11 159. In fact, despite the clear indications that Uni-Ter and U.S. RE were providing
12 inaccurate and/or incomplete information to L&C, the minutes of the June 6, 2012 Board meeting
13 state that the Board approved the renewal of L&C's reinsurance "[f]ollowing a presentation by
14 USRE [sic]". *Id.* There is no indication whatsoever regarding any measures taken by the Board
15 to verify the information provided by Uni-Ter and/or U.S. RE.

16 160. At the July 25, 2012 meeting, the Minutes for which are attached hereto as **Exhibit**
17 **31**, Uni-Ter and U.S. RE presented a report of second quarter financial results in which a
18 significant increase in loss reserves was reported. The Board then discussed possible courses of
19 action. The Board requested that Uni-Ter contact Fishlinger to conduct an independent roll
20 forward of its last claims reserve review preferably by August 7, 2012. The Board also resolved
21 that the preliminary second quarter results not be filed until the Fishlinger review is done and that
22 the results should be approved by the Board before filing. Finally, the Minutes noted that no new
23 business should be written by L&C and no capital raised until further notice, but that renewals
24 may be processed until notice otherwise.

25 161. The August 15, 2012 was the last meeting Elsass and Uni-Ter or U.S. RE attended.
26 At that meeting, the Board discussed the filing with the Nevada DOI of financial information with
27 notice of further deterioration of L&C's finances.
28

1 162. At the August 22, 2012 meeting, Minutes for which are attached hereto as **Exhibit**
2 **32**, L&C's counsel reported on recent discussions with Uni-Ter and U.S. RE. Uni-Ter personnel
3 were not present at the meeting.

4 163. On information and belief the Board held a telephonic meeting on September 24,
5 2012, the Minutes for which are attached hereto as **Exhibit 33**. The Board's grossly negligent
6 failure to inform itself of the basic financial condition of the Company was made clear as the
7 Board tacitly acknowledged it was not aware whether the Company was financially solvent at that
8 time, resolving that "a request be made to the Nevada Division [sic] of Insurance that the
9 Corporation be placed in rehabilitation, in view of the fact that the Corporation is or may be
10 insolvent." *Id.* (emphasis added).

11 **E. Information Available to the Officers and Directors**

12 164. On information and belief, substantial financial information regarding L&C was
13 available to the Board of which the Board failed entirely to exercise even a slight degree of care
14 to properly inform itself and understand.

15 165. On information and belief, among this available information was the Annual
16 Statement of L&C for the year ending December 31, 2006, attached hereto as **Exhibit 34**, which
17 was submitted to the Nevada DOI contains L&C's financial statement for 2006. The Notes to
18 Financial Statements (pages 14-14.3) include the reinsurance in place (note 23) as well as the
19 change of incurred losses and LAE (note 25). The Quarterly Statement for L&C for the first
20 quarter of 2007, attached hereto as **Exhibit 35**, has similar notes.

21 166. Sophia Palmer 2007 board Minutes were very similar to L&C board Minutes. On
22 information and belief, Uni-Ter was the underwriter for Sophia Palmer as well.

23 167. L&C's Internal Unaudited Financial Statements as of December 31, 2007, attached
24 hereto as **Exhibit 36**, states that unpaid losses and loss expenses were \$578,000 in 2004,
25 \$1,142,000 in 2005, \$2,636,000 in 2006, and \$3,013,000 in 2007. This is a growth of over 500%
26 in only four (4) years.

27 168. On information and belief, Uni-Ter's management fees grew from nothing in
28 2004, to \$120,000 in 2005, to \$126,000 in 2006, to \$760,000 in 2007. Between 2005 and 2007,

1 this is a growth of 633% in three years.

2 169. On information and belief, the information provided to the directors of L&C for
3 the April 2008 and May 2010 Board meetings included the following financial information for
4 L&C across the years of 2004 to 2009:

Policy Year	Written Premium	Earned Premium	Paid Losses	Reserves	Totals Incurred	Loss Ratio
2004	\$1,344,358	\$1,344,358	\$223,232	\$---	\$208,232	15.49%
2005	\$3,124,474	\$3,124,474	\$745,466	\$80,720	\$782,438	24.23%
2006	\$5,821,739	\$5,821,739	\$1,311,965	\$477,775	\$1,751,740	30.64%
2007	\$5,958,904	\$4,184,641	\$1,555,249	\$1,621,520	\$3,111,769	52.38%
2008	\$8,340,000	\$5,203,834	\$1,211,943	\$3,941,000	\$1,687,006	34.77%
2009	\$10,705,229	\$7,792,504	\$1,545,000	\$6,255,488	\$3,947,463	50.66% with Sophia Palmer being 80.96%

12 170. On information and belief, the Board wholly failed to exercise even slight
13 diligence in informing itself of the reasons behind the dangerous financial status of the company
14 or in taking timely, corrective action.

15 171. Further, L&C's Summary Balance Sheet as of December 31, 2008, attached hereto
16 as **Exhibit 37**, states that while unpaid losses and loss expenses grew from \$3,013,000 to
17 \$3,941,000 between 2007 and 2008, Uni-Ter's management fees went from \$760,312 in 2007 to
18 \$1,372,915 in 2008.

19 172. L&C's Internal Unaudited Financial Statements as of December 31, 2009, attached
20 hereto as **Exhibit 38**, state that unpaid losses and loss expenses jumped to \$6,255,488 in 2009
21 from \$3,941,000 in 2008. Uni-Ter's management fees jumped to \$1,717,482 for 2009 from
22 \$1,372,915 in 2008.

23 173. The 2009 Milliman Report, which supports the corresponding Statement of
24 Actuarial Opinion attached hereto as **Exhibit 39**, states that the existing risk factors, "coupled
25 with the variability that is inherent in any estimate of unpaid loss and loss adjustment expense
26 obligations, could result in material adverse deviation from the carried net reserve amounts." The
27 Milliman Report concludes that L&C's actual net outstanding losses and loss adjustment expense
28

1 ("LAE") exceed L&C's reserves for unpaid losses (\$5,021,810) and unpaid LAE (\$1,233,678) by
2 an amount of more than 5% of L&C's statutory surplus shown on the annual statement, which
3 was \$4,031,349. The Milliman Report also states that this materiality standard was selected
4 based on the fact that his opinion was prepared for regulatory review. Further, the corresponding
5 Statement of Actuarial Opinion provides that it is reliant on "data and related information
6 prepared by [L&C]" and that "[t]here are a variety of risk factors that expose [L&C's] reserves to
7 significant variability." Id.

8 174. On information and belief, the information provided to the directors of L&C for
9 the May 2010 Board meeting state that Sophia Palmer merged with L&C as of December 3, 2009,
10 and that the written premiums were \$8,340,000 for 2008 and \$10,705,000 for 2009.

11 175. On information and belief, in or around October 2010, Elsass, Larry Shatoff at
12 U.S. RE, Donna Dalton, John Klaus at Uni-Ter, Curtis Sitterson at Stearns Weaver, and Jim
13 Murphy at the accounting firm Johnson Lambert & Co., through email correspondence, made the
14 decision to record the twenty-five percent (25%) refund payment, in the amount of \$569,600,
15 from the commutation of the January 1, 2008 to April 1, 2009 reinsurance treaty.

16 176. On information and belief, Mr. Shatoff stated in said email correspondence that the
17 April 1, 2004 to December 31, 2004 treaty was commuted, the January 1, 2007 to December 31,
18 2007 treaty was commuted, and the January 1, 2005 to December 31, 2006 treaty was "swing
19 rated" and had been adjusted to the minimum premium. Regarding the January 1, 2008 to April
20 1, 2009 reinsurance treaty, Mr. Shatoff said that it covers all claims reported on occurrence
21 policies up to April 1, 2012. Mr. Shatoff further stated that L&C was subject to a 13% aggregate
22 deductible for an amount of \$1,690,673, and that L&C had paid reinsurance premiums of
23 \$2,278,400, which at a 25% refund rate would result in a refund of \$569,600 if no claims were
24 paid by the reinsurers. Further, Mr. Shatoff's communications state that there had been no losses
25 reported under that treaty. Mr. Shatoff noted that L&C could commute at any time before
26 January 1, 2013 to obtain the "profit commission" - how he referred to the 25% refund.

27 177. On information and belief, Mr. Shatoff encouraged L&C to commute that treaty to
28 ensure that seventy-five percent (75%) of premiums paid could be confirmed as received by the

1 reinsurers with confirmation that no claims or losses would be paid by them.

2 178. On information and belief Elsass directed that the refund for the commutation of
3 the January 1, 2008 to April 1, 2009 reinsurance treaty be recorded at that time in the third quarter
4 of 2010.

5 179. On information and belief, Mr. Shatoff noted that it would be too soon to record
6 any "profit commission" on the April 1, 2009 to April 1, 2010 treaty because the premium for
7 those policies would not be fully earned until April 1, 2011.

8 180. The Milliman Report stated that L&C reserves were \$600,000 - \$628,000 above
9 the Medium Estimate, but about \$650,000 below the High Estimate. That report also noted that
10 L&C started to write occurrence policies in the fourth quarter of 2008.

11 181. On information and belief, more than half of the policies written by Sophia Palmer
12 were occurrence policies.

13 182. The Milliman Report stated that the loss development for occurrence policies is
14 relatively immature at the current evaluation and that caused uncertainty in the loss estimates.

15 183. Further, the 2010 Milliman Report opined that the existing risk factors "coupled
16 with the variability that is inherent in any estimate of unpaid loss and loss adjustment expense
17 obligations, could result in material adverse deviation from the carried net reserve amounts." He
18 concluded that based on the calculation shown in Exhibit B that shows that L&C's actual net
19 outstanding losses and LAE exceed L&C's reserves for unpaid losses (\$7,353,289) and unpaid
20 LAE (\$1,798,188) by an amount of more than five percent (5%) of L&C's statutory surplus
21 shown on the annual statement, which was \$4,579,710. The 2010 Milliman Report states that this
22 materiality standard was selected based on the fact that his opinion was prepared for regulatory
23 review.

24 184. On information and belief, the financial information provided to the Board for the
25 September 2011 Board Meeting included a report from Brian Stiefel, President of Praxis, which
26 was the September 2011 Praxis Report. The Praxis Report provides that Uni-Ter has adopted a
27 new reserve philosophy, is revising its litigation management guidelines to reflect a more
28 aggressive approach to the litigation process, and that standardizing the claims documentation,

1 evaluation, and reporting process is recommended. The Praxis Report does not evaluate the level
2 of L&C's loss reserves. See **Exhibit 6** hereto.

3 185. On information and belief, the information provided to the directors for the
4 September 2011 Board meeting also contains a power point presentation from Milliman which
5 shows that L&C steadily decreased its reinsurance deductible across the years 2008 to 2011,
6 demonstrating that L&C's reinsurance deductible was set too high, especially in years 2009 and
7 2010.

8 186. On information and belief, in or around December 19, 2011, Milliman provided a
9 preliminary draft of certain schedules to its actuarial reports ("2011 Milliman Schedules"). The
10 Schedules provide that as of November 30, 2011, L&C's Incurred Loss & ALAE for years 2004
11 through November 2011 was \$17,858,866. That same exhibit states that Paid Loss & ALAE for
12 those same dates was a total of \$11,208,076. The exhibit states that L&C's Paid Loss & ALAE
13 was \$2,230,000.00 for 2009 and \$2,440,000.00 for 2010 but only \$198,711.00 for 2011 through
14 November.

15 187. L&C's Annual Statement for the year ending December 31, 2011 ("2011 Annual
16 Statement"), attached as **Exhibit 40**, stated a drastic increase in incurred losses and LAE and a
17 significant drop in shareholder's surplus. Pursuant to that statement, reserves for losses and LAE
18 increased from a total of \$9,181,477 at the end of 2010 to \$14,026,020 at the end of 2011, almost
19 a \$5 million increase. Note 24 to L&C's 2011 Financial Statements (which is presented below)
20 stated that unpaid losses and LAE increased from \$9,153,000 at the beginning of 2011 to
21 \$14,843,000 at the end of 2011, a \$5,700,000 increase. Meanwhile, the company's policyholder's
22 surplus amount decreased from \$4,579,710 at the end of 2010 to \$3,625,317 at the
23 end of 2011.

24 188. Note 24 to L&C's 2011 Financial Statements stated as follows:

25	Balance-January 1, 2011	\$9,153,000
26	Incurred related to:	
27	Current year	7,418,000
28	2010	3,039,000
	2009	2,284,000

1	2008	747,000
	2007	162,000
2	2006	375,000
	2005	(359,000)
3	2004	(1,000)
	Total Incurred:	13,665,000
4	Paid related to:	
5	Current year	1,878,000
6	2010	3,571,000
	2009	1,545,000
7	2008	222,000
	2007	630,000
8	2006	131,000
	2005	(1,000)
9	2004	(1,000)
	Total Paid:	7,975,000
10	Balance-December 31, 2011	\$ 14,843,000
11	(emphasis added)	

12 *Id.*

13 189. On information and belief, notwithstanding this information, the Board represented
14 in Note 14 at page 14.2 that "[T]he Company's management is not aware of any ongoing
15 litigation which would, individually or collectively, result in judgments for amounts, after
16 considering the established loss reserves, that would be material to the Company's financial
17 condition or results of operations." *Id.*

18 190. On February 2, 2012, Milliman provided a preliminary draft of certain schedules
19 to its actuarial reports ("2012 Milliman Schedules"). Exhibit 1 Page 2 states that, as of December
20 30, 2011, L&C's Discounted Net Loss & LAE Reserve (after Ceded Loss and LAE Reserve) was
21 Low Estimate of \$13,019,000, Central Estimate of \$14,973,000, and High Estimate of
22 \$18,635,000. Exhibit 3 of that document shows that Incurred Loss and ALAE had grown
23 substantially from 2005 (\$373,816) to 2010 (\$9,068,552) while showing estimated reserves only
24 growing to \$4,048,241. It also shows that for 2011, Ultimate Loss & ALAE was \$7,620,000 and
25 Incurred Loss & ALAE was \$5,744,385, but estimate reserves was only \$5,938,479, which is
26 over \$1.6 million less than the Ultimate Loss & ALAE.

27 191. The 2011 Milliman Report, attached hereto as **Exhibit 41**, in the section entitled
28

1 “Risk of Material Adverse Deviation”, provides that “[t]he Company’s carried reserves are within
2 a reasonable range, however other points within the reasonable range would cause surplus to be
3 below zero. Therefore I believe that there are significant risks and uncertainties that could result
4 in material adverse deviation in the loss and loss adjustment expense reserves, possibly by
5 amounts exceeding surplus.” The report again provides that the current risk factors, “coupled
6 with the variability that is inherent in any estimate of unpaid loss and loss adjustment expense
7 obligations, could result in material adverse deviation from the carried net reserve amounts.” The
8 report concluded that based on the calculation shown in Exhibit B that shows that L&C’s actual
9 net outstanding losses and LAE exceed L&C’s reserves for unpaid losses (\$11,766,924) and
10 unpaid LAE (\$2,259,096) by an amount of more than five percent (5%) of L&C’s statutory
11 surplus shown on the annual statement, which was \$3,625,316. The report states that this
12 materiality standard was selected based on the fact that his opinion was prepared for regulatory
13 review.

14 192. Further, in the Notes to Financial Statements for Years Ended December 31, 2011
15 and 2010 (“2011 Notes”), the management of L&C stated Uni-Ter “believes that its aggregate
16 provision for losses and loss adjustment expenses is reasonable and adequate to meet the ultimate
17 net cost of covered losses...”. On information and belief, the Board failed to exercise even the
18 slightest degree of care with respect to this information it was receiving concerning Uni-Ter’s
19 opinions and failed to take any action to verify that this information was complete or accurate.

20 193. The 2011 Notes also provide that “[a]t December 31, 2011 and 2010, management
21 determined that no premium deficiency reserve was required.” On information and belief, the
22 Board failed to exercise even the slightest degree of care with respect to this information it was
23 receiving concerning Uni-Ter’s opinions and failed to take any action to verify that this
24 information was complete or accurate.

25 194. Further, the 2011 Notes state that was a party to various lawsuits “in the normal
26 course of business” but that “[t]he Company’s management does not believe that any ongoing
27 litigation would, individually or collectively, result in judgments for amounts, after considering
28 the established loss reserves and reinsurance, that would be material to the Company’s financial

1 condition or results of operations.” On information and belief, the Board failed to exercise even
2 the slightest degree of care with respect to this information it was receiving concerning Uni-Ter’s
3 opinions and failed to take any action to verify that this information was complete or accurate.

4 195. L&C’s “NAIC Property and Casualty Financial Ratio Results for 2011”, attached
5 hereto as **Exhibit 42**, painted a very bleak picture of the L&C. It has a date stamp of 2/23/2012.
6 It states that Direct Premiums Written in 2011 totaled \$10,224,774. It states that Net Premiums
7 Written for 2011 were \$8,997,524 which was a 25% drop from Net Premiums Written in 2010 of
8 \$11,946,738. It states that Losses and LAE incurred for 2011 totaled \$12,759,779 when Losses
9 and LAE incurred for 2010 totaled \$8,183,816, about \$4.6 million less. It states that surplus for
10 2011 was \$3,625,316 when the surplus for 2010 was \$4,579,709, almost a million drop. Finally,
11 it states that L&C’s estimated current reserve deficiency was -\$752,997.5.

12 196. A spreadsheet entitled “Inforce (sic) Policies as of 2.23.2012” lists such policies.
13 It states at the bottom that the total premium amount for such in force policies was \$6,825,864.

14 197. A spreadsheet document dated February 2012 and entitled “L&C Loss Ratio
15 Report” shows a substantial reduction of loss payments for 2011. The document states that the
16 information is through 02/29/2012, but says that earned premium for 2011 dropped to \$5,209,362
17 from \$12,798,406 in 2010 and \$11,776,406 in 2009. It also shows that earned premium was only
18 \$240,573 through February which, extrapolated through December, would be only \$1,443,438.
19 Meanwhile, total incurred losses for 2011 were only \$1,573,965 even though total incurred losses
20 were almost \$9.5 million in 2010 and almost \$8 million in 2009.

21 198. On information and belief, the loss ratios shown for 2006 through 2010 were
22 78.92%, 65.33%, 67.83%, and 73.59%, respectively. The loss ratio chart in the April 2008 Board
23 meeting directors’ package states that the 2006 loss ratio was only 25.25% and the 2007 loss ratio
24 was stated to be only 22.41%. The loss ratio for 2011 was only 30.21%. Paid losses in all of
25 2011 were only \$264,000 even though those were almost \$5 million in 2010, \$5.4 million in
26 2009, and over \$3.5 million in 2008.

27 199. L&C’s Summary Balance Sheet as of February 29, 2012, attached hereto as
28 **Exhibit 43**, states that unpaid losses and loss expenses were \$14,026,019 at the end of 2011 and

1 grew to \$14,607,812 as of the end of February 2012. Uni-Ter's management fees for 2011 were
2 only \$87,617.

3 200. L&C's Comparative Summary Balance Sheet dated through March 2012, attached
4 as **Exhibit 44**, shows the growth of L&C's losses and Uni-Ter's fees. Unpaid losses and LAE
5 was \$3,624,000 as of March 2008, \$4,325,000 as of March 2009, \$7,313,000 as of March 2010,
6 \$9,953,000 as of March 2011, and \$12,381,985 as of March 2012. Uni-Ter's management fees
7 were \$728,000 as of March 2008, \$1,329,000 as of March 2009, \$1,607,000 as of March 2010,
8 \$830,000 as of March 2011, and \$104,000 as of March 2012.

9 201. The 2012 Milliman Report states that L&C reserves of \$16,333,000 were
10 \$1,367,000 below the Central Estimate of what L&C's loss reserves should be. The report states
11 that L&C's reserves were over \$7 million below the High Estimate of what L&C's reserves
12 should be. There is no mention of the report in the Board Minutes. The report states as follows:

13 The ultimate loss and ALAE estimates have increased significantly since
14 the prior report as of December 31, 2010. *Through report/accident/tail effective*
15 *year 2010, the selected ultimate loss and ALAE estimates have increased by \$9.2*
16 *million. Claims-made nursing home paid and incurred losses have been higher*
than expected during the past year due to significantly inadequate case reserves
at December 31, 2010 and exceptionally high loss ratios that were generated by
three insureds that were non-renewed during 2011. . . . (emphasis added)

17 Finally, the report states in Table 3 on page 12 that the continuing Ultimate Loss & ALAE as of
18 the report at end of 2010 was \$13,863,000 but the Ultimate Loss & ALAE as of the report at the
19 end of 2011 was \$19,229,000 for a \$5.5 million increase.

20 202. In the D&O policy application submitted by Uni-Ter on behalf of L&C on or
21 about May 23, 2012, attached as **Exhibit 45**, Uni-Ter stated in the supplement that "[t]o improve
22 the financial stability of [L&C], UUMC has reviewed the entire book of business and intends to
23 only renew accounts that have maintained a favorable historical loss ratio. This may result in a
24 35-40% reduction in its premium volume." The underwriting philosophy change completed in
25 late 2011, while stating limitations for loss ratios in soft and hard market facilities, does not state
26 that the policy would apply to renewals and also does not discuss the loss of such a large
27 premium amount. This reduction would apply to the \$6,825,864 total premiums of inforce
28 policies as of February 2012. With no new policies, that would result in total premiums for 2012

in the range of \$4,095,518 to \$4,436,800.

203. The following chart shows relevant information from L&C's Audited Financial Statements for the periods indicated:

	2009	2010	2011	March 2012	June 2012
Losses and LAE	\$6,255,488 (this was \$3,941,000 for 2008)	\$9,161,477	\$14,026,020	\$12,381,985	\$11,594,038
Premiums earned	\$10,864,100 with \$4,149,333 being new for that year.	\$12,514,066	\$11,498,294	\$1,957,716 (compared to \$2,776,612 for March 2011)	\$3,753,489 (compared to \$6,720,334 for June 2011)
Ceded reinsurance premiums payable	\$1,969,682	\$2,050,400	\$750,084	\$26,523	\$624,029
Amount recoverable from reinsurance		\$2,819,800	\$3,039,002	\$3,039,002 with \$1.553M from AR and \$1.087 from other amounts receivable	\$1,530,415
Management fees payable	\$1,717,482	\$1,084,400	\$87,617	\$104,690	\$63,164
Total liabilities	\$13,887,255	\$15,625,439	\$21,840,572	\$19,777,205	\$16,397,861
Cash and invested assets		\$13,942,322	\$13,514,557	\$13,064,932	\$9,525,379
Shareholders' equity, i.e., surplus	\$4,031,351	\$4,579,710	\$3,625,317	\$3,713,503 (versus \$3,760,925 for March 2011)	\$1,675,694 (versus \$2,732,826 for June 2011)

204. On information and belief, as of July 31, 2012, L&C's Gross Losses and LAE was \$14,786,000. As of the end of September 2012, losses and LAE totaled \$13,609,401 and surplus was negative \$1,490,085. Cash and invested assets had dropped to \$6.6 million.

F. Gross Negligence by the Board

205. On information and belief, beginning in the 3rd quarter of 2011, adverse development on claims incurred during 2009 began to appear in the financial operations of L&C. As a result, Uni-Ter (captive manager) began to get more involved in claims and reserves. In a

1 unilateral decision, Uni-Ter brought in Praxis Claims Consulting to assist with improving the
2 reserve setting process. On information and belief, the engagement involved reviewing various
3 open claims files. The owner of Praxis, Brian Stiefel took a lead role in setting reserves for L&C
4 with Uni-Ter. As a result of this engagement, a strengthening of reserves was recommended and
5 booked in the amount of approximately \$2.2 million.

6 206. On information and belief, due to the strengthening entry, and the resulting
7 downturn in the financial condition of L&C, additional capital of \$2,220,000 was raised in the
8 form of surplus notes.

9 207. On information and belief, in the October 5, 2011 Action by Unanimous Consent
10 of the Board of Directors ("Action") surplus note contributions were agreed to be paid by
11 November 15, 2011:

12	o Oneida Bank	\$750,000
13	o Eagle Healthcare	\$220,000
14	o Pinnacle Healthcare	\$220,000
15	o Marquis Companies	\$220,000
16	o Elderwood Senior Care	\$220,000
	o Rohm Services	\$220,000
	o Uni-ter	\$300,000

17 208. On information and belief, the Action indicated that an additional \$550,000 in
18 capital could be raised in additional surplus notes, "depending upon the requirements of the
19 business in the fourth quarter, 2011, as approved by the Board". The following commitments
20 were funded in the form of Surplus Notes on February 7, 2012:

21	o Eagle Healthcare	\$70,000
22	o Pinnacle Healthcare	\$70,000
23	o Marquis Companies	\$70,000
24	o Elderwood Senior Care	\$70,000
	o Rohm Services	\$70,000
	o Uni-ter	\$200,000

25 209. On information and belief, with the exception of Oneida Bank, where L&C's
26 investments are held in custody, and Uni-Ter, the captive manager, all other Surplus Note holders
27 were facilities insured by L&C and whose management is a representative on the Board of
28

1 Directors of L&C.

2 210. On information and belief, Stickels is the President of Oneida Bank.

3 211. On information and belief, prior to the second commitment coming due in the first
4 quarter of 2012, the Board determined that they wanted a second review to confirm the
5 conclusion of the reserve strengthening in late 2011. Fishlinger was hired to conduct an
6 independent analysis of the same claims reviewed by Praxis.

7 212. On information and belief, using the low end of the ranges of reserves established
8 by Praxis, Fishlinger concluded a low end of strengthening could be approximately a million
9 dollars less than determined by Praxis. Although the Board had requested that Fishlinger conduct
10 its review independently, ultimately it used the work of Praxis in coming to a similar conclusion
11 on the reserve strengthening needed. Based on these two reviews, the additional capitalization of
12 \$480,000 was determined to be adequate by the Board.

13 213. On information and belief, at the end of the second quarter of 2012, the Board
14 assumed that the reserving methodology established under Praxis had continued to be deployed.
15 The Board determined that a follow up review was necessary. Praxis completed their review in
16 July of 2012, involving review of the same estimated 150 claims reviewed at year end 2011.
17 Praxis recommended stepping up of reserves in the cases previously reviewed and indicated that
18 trouble getting case reserve information from attorneys had been one cause of the continued
19 adverse development of these claims. Praxis concluded an additional \$2 million in strengthening
20 was required at July 2012.

21 214. On information and belief, Fishlinger was also brought in for a second review,
22 which ultimately concluded some differences on the low and high end of the ranges for these
23 cases, but ultimately recommended similar cumulative reserve strengthening. An additional party
24 also reviewed the case reserves, the London Based reinsurance broker ("London Broker") for
25 U.S. RE, the reinsurance broker for L&C. The Board and Uni-Ter thought that they would have a
26 vested interest in picking accurate reserves because of the reinsurance that the London broker had
27 placed for L&C with various reinsurers. On information and belief, the London Broker
28 determined that it would be comfortable in the low end of the ranges for many of the cases.

215. On information and belief Milliman, L&C's opining actuary, booked its estimate of reserves at 6/30 and 12/31 of each year, based on its own analysis. During its June 30, 2012 analysis, Milliman determined that L&C would most likely need to increase premium rates by 12-20% on its current book of business to remain a viable entity. On information and belief this does not include capital needed to raise the current level to minimum requirements. Milliman also estimated that \$6,000,000 - \$6,500,000 million in capital would need to be raised in order to result in \$3.6 million of unimpaired capital.

CLAIMS

216. The allegations set forth above are incorporated into the claims set forth herein as is fully set forth for each claim.

FIRST CLAIM FOR RELIEF

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

217. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 216, as though fully set forth herein.

218. Under Nevada law, directors and officers must act on an informed basis and are grossly negligent if they fail to do so.

219. Under Nevada law, “[g]ross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care.” *Hart v. Kline*, 61 Nev. 96, 116 P.2d 672, 674 (1941). Further, gross negligence “amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected.” *Id.*

220. Here the Board was grossly negligent in numerous ways, including but not limited to its utter failure to properly inform itself of status of L&C and its complete failure to properly take timely corrective action.

221. As set forth above, on numerous occasions, even after clear and unmistakable indications that the information provided to the Board by Uni-Ter, U.S. RE, Mr. Elsass, Ms.

1 Dalton, and others was, at best, unreliable and incomplete, the Board failed to exercise even slight
2 diligence in informing itself of the truth of the financial status of L&C.

3 222. Further, as of the end of 2011, there was more than ample information that, in
4 combination, clearly showed that L&C's financial condition was in dangerous peril.

5 223. This information available in late 2011 included rapid and drastic increase in loss
6 reserves, reports of inadequate reserves requiring repeated capital infusions in late 2011 and early
7 2012, high loss ratios, drastically decreasing realized premiums, absence of any adjustment of
8 premium rates, implementation of a new underwriting philosophy that would result in a 35-40%
9 drop in premiums, and a drastically decreasing company surplus.

10 224. These reports included the following summarized facts:

- 11 • In September 2005, Elsass reported on appropriate loss reserves.
- 12 • L&C had substantial growth of premiums and reserves between 2004 and 2009.
13 By 2009, written premium was \$10.7 million and reserves were \$6.2 million. Uni-
14 Ter's management fees also increased rapidly to \$1.4 million in 2008 and \$1.7
15 million in 2009.
- 16 • Losses and LAE grew to \$9.1 million in 2010 and \$14 million in 2011.
- 17 • Loss ratios were generally in the 30% range and below until 2009 when the
18 addition of the Sophia Palmer work caused a loss ratio over 50% (because of
19 Sophia Palmer claims having a loss ratio over 80%).
- 20 • A new underwriting philosophy was discussed at the September 2011 meeting.
21 Although it does not appear that the Board questioned how this would affect
22 premiums earned, Uni-Ter expected this new philosophy would only renew
23 accounts that had a favorable historical loss ratio and that that could result in a 35-
24 40% reduction in premium volume.
- 25 • In the 3rd quarter 2011, adverse development on claims incurred in 2009 showed
26 up on L&C's financial results. Uni-Ter brought in Praxis to improve the reserve
27 setting process. Uni-Ter brought in Praxis to analyze and recommend reserves.
28 Praxis recommended reserve strengthening of \$2.2 million.
- Capital contributions totaling \$2.22 million were approved by the Board at the
October 5, 2011 meeting. That same meeting said that an additional \$550,000 in
capital could be raised in the 4th quarter 2011 and 1st quarter 2012.
- Financial information shows L&C was not paying losses in 2011. 12/19/11 draft
report from Milliman shows \$2.23 million paid losses and ALAE in 2009, \$2.44
million in 2010, but only \$199,000 in 2011.
- On 12/20/2011, Uni-Ter reported claims reserves increased \$5 million from the
November 2011 figures.
- Uni-Ter's pro forma 12/31/11 financials show that L&C was neither impaired nor
insolvent, but the 2011 Annual Statement shows losses and ALAE increased from
\$9.1 million at the beginning of 2011 to \$14.8 million at the end of the year.

- At January 16, 2012 meeting, surplus is only \$1,979,730, down from \$4,579,000 at end of 2010.
- At February 2, 2012 meeting, Board approved \$480,000 additional capital contributions even though Elsass reported recent favorable claims activity. Prior to this, the Board had determined that they wanted a second opinion from Fishlinger to confirm the need for reserve strengthening made by Praxis.
- A 2/23/12 report showed that L&C's net written premiums for 2011 dropped 25% (from \$12 to \$9 million). It confirmed that losses and LAE for 2011 were \$12.7 million when only \$8.1 million for 2010. It also said that L&C's current reserves were deficient by just over \$750,000.
- A 2/23/12 report on in force policies states that total premiums for those policies would be \$6.8 million for 2012.
- A 2/29/12 loss ratio report shows that earned premium for 2011 dropped to \$5,209,362 from \$12,798,406 in 2010 and \$11,776,406 in 2009 and states that earned premium for 2012 through February 2012 was only \$240,000 which, annualized, would be only about \$1.4 million. It also shows that loss ratios for 2006 through 2010 were all above 65% and as high as 79%.
- April 12, 2012 Milliman report says that L&C's loss reserves are \$1.4 million under the central estimate. That same reports says that ultimate loss and ALAE have increased by \$9.2 million from the end of 2010. Table 3 of that report (page 12) states that Ultimate Loss & ALAE increased \$5.5 million from \$13.8 million at the end of 2010 to \$19.2 million the end of 2011.

225. Under Nevada law, the business judgment rule does not protect the gross negligence of uninformed directors and officers. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006).

226. The Board and officers did not adequately review all of the information to which they had access, and was grossly negligent in failing to do so. Further, the Board failed to exercise a slight degree of care regarding the incomplete and inaccurate information provided to it by Uni-Ter and/or U.S. RE, and remained uninformed despite their knowledge that they could not rely on the representations and recommendations of Uni-Ter and U.S. RE, as set forth above.

227. As set forth above, the Board was made well aware of the extremely dangerous and deteriorating financial position of L&C at least as early as September 2010 by the DOI in its September 2010 Letter.

228. Further, the Board was again made aware of the dire financial position it had allowed L&C to reach due to its failure to exercise a slight degree of care in informing itself of

1 the position of L&C and take effective corrective action, as set forth in the DOI's September 2011
2 Letter.

3 229. To the extent the Board did review any information, the Board was grossly
4 negligent in taking ineffective actions or in not taking immediate effective corrective action by at
5 least late 2011 (e.g., raising premium rates).

6 230. The Board was in a position to see this information and knew that it had an
7 obligation to do so. Further, it knew that the information provided by Uni-Ter, U.S. RE and
8 others was incomplete and inaccurate. Indeed, the Board had the contractual right to receive the
9 information (including on a monthly basis between 2004 and 2010). It also knew at least on
10 several occasions that it was not receiving sufficient information from Uni-Ter, but failed to
11 exercise even slight diligence in properly informing itself. On several occasions between 2005
12 and 2011, the Board asked Uni-Ter to provide more and better financial and other information:

- 13 • March 2005 Minutes request for financial information monthly.
- 14 • April 2005 Minutes note nonreceipt of periodic marketing reports.
- 15 • At the October 2011 special meeting approving \$2.2 million of additional capital
16 the Board requested more frequent financial reports by Uni-Ter, preferably
monthly.

17 231. The facts show an absence of the slightest degree of diligence of the Board and
18 company officers to ascertain and assess the available information so that decisions could be
19 made and based on such information, as set forth above.

20 232. The Board failed to exercise even the slightest degree of care or diligence to
21 become properly informed and was wholly indifferent to its legal obligations in relying on
22 information and recommendations of Uni-Ter, U.S. RE and others, as set forth herein, despite the
23 Board's knowledge and reason to know that the information and recommendations provided were
24 grossly inaccurate and incomplete.

25 233. As a proximate result, Plaintiff has been damaged in an amount in excess of
26 \$10,000, the exact amount to be proven at trial in this matter.

27 234. Plaintiff has retained the undersigned law firm to represent the Receiver in this
28 matter, and is obligated to pay it a reasonable attorney's fee and costs, which it is entitled to

1 recover herein.

2 WHEREFORE, Plaintiff prays for relief as set forth herein.

3 **SECOND CLAIM FOR RELIEF**

4 **(Deepening of the Insolvency of L&C Caused by the Former Directors and Officers)**

5 235. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through
6 234, as though fully set forth herein.

7 236. The Board's inaction severely prolonged the insurance actions of L&C that led to
8 its initial insolvency and that then also increased its insolvency.

9 237. Had the Board taken action by late 2011, the substantial losses experienced by
10 L&C starting in late 2011 would not have occurred or, alternatively, would have been greatly
11 limited.

12 238. Because L&C had a surplus as of the end of 2011, according to its financial
13 statements, then all of the insolvency of L&C was arguably attributable to the directors' and
14 officers' failure to promptly identify and address the financial problems.

15 239. As a proximate result, Plaintiff has been damaged in an amount in excess of
16 \$10,000, the exact amount to be proven at trial in this matter.

17 240. Plaintiff has retained the undersigned law firm to represent the Receiver in this
18 matter, and is obligated to pay it a reasonable attorney's fee and costs, which it is entitled to
19 recover herein.

20 WHEREFORE, Plaintiff prays for relief as set forth herein.

21 **THIRD CLAIM FOR RELIEF**

22 **(Negligent Misrepresentation by Uni-Ter UMC)**

23 241. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through
24 240, as though fully set forth herein.

25 242. Uni-Ter UMC, through its employees, negligently misrepresented the specific
26 financial conditions of L&C including the level of losses and LAE.

27 243. Uni-Ter had created L&C and grown it rapidly for its own financial benefit, as
28 well as that of U.S. RE, who benefitted from the placement of reinsurance and from management

1 fees earned by its subsidiary. Uni-Ter had intimate familiarity with the financial information of
2 L&C.

3 244. However, instead of presenting all relevant financial information to the Board,
4 Uni-Ter appears to have selectively provided information such that the Board was not informed
5 of the actual financial condition of L&C. Even after a number of reports showed substantial
6 growth of L&C's losses in late 2011, Mr. Elsass even represented to the Board in early 2012 that
7 claims losses were not as bad as previously reported in late December.

8 245. Uni-Ter and Milliman told the Board that the large losses that started appearing in
9 the 3rd quarter of 2010 were primarily because of three insureds who had been non-renewed in
10 2011, thus giving the impression that this would resolve the large losses issue. These
11 representations are representative of how the Board was kept in the dark regarding the actual
12 financial condition of L&C.

13 246. L&C justifiably relied on the information presented to it by Uni-Ter, as set forth
14 herein.

15 247. As a proximate result, Plaintiff has suffered damages in excess of \$10,000, the
16 exact amount to be proven at trial herein.

17 248. Plaintiff has retained the undersigned law firm to represent her in this matter, and
18 is obligated to pay it a reasonable attorney's fee and costs, which it is entitled to recover herein.

19 WHEREFORE, Plaintiff prays for relief as set forth herein.

20 **FOURTH CLAIM FOR RELIEF**

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

22 249. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through
23 248, as though fully set forth herein.

24 250. Uni-Ter owed a fiduciary duty to L&C as set forth above.

25 251. Uni-Ter breached its fiduciary duty to L&C by recommending to the Board that
26 the 2007 treaty be commuted too soon and by failing to gain Board approval to commute the 2008
27 and 2009 treaty such that that treaty was commuted without authorization to do so from the
28 Board.

1 260. The U.S. RE Agreement further recognizes U.S. RE's agency with L&C by stating
2 that U.S. RE "will exercise its best efforts in the discharge of its duties **on behalf of the**
3 **Company.**" *Id.* (emphasis added).

4 261. The Supreme Court of Nevada has held that "[a]n agency relationship is formed
5 when one who hires another retains a contractual right to control the other's manner of
6 performance." *Grand Hotel Gift Shop v. Granite State Ins. Co.*, 108 Nev. 811, 815, 839 P.2d
7 599, 602 (1992) (citation omitted).

8 262. U.S. RE acted as the agent of L&C, as the U.S. RE Agreement expressly states not
9 only that U.S. RE will act "on behalf of" L&C, but also that L&C has the right to control U.S.
10 RE's manner of performance as U.S. RE promises to "comply with written standards established
11 by [L&C] for the cession or retrocession of all insured risks." *See Exhibit 4.*

12 263. Further, Nevada law makes clear that "[a]n agent, such as respondent in these
13 circumstances, owes to the principal the highest duty of fidelity, loyalty and honesty in the
14 performance of the duties by the agent on behalf of the principal." *LeMon v. Landers*, 81 Nev.
15 329, 332, 402 P.2d 648, 649 (1965) (holding that the agent breached her fiduciary obligations)
16 (emphasis added); *see also Chem. Bank v. Sec. Pac. Nat. Bank*, 20 F.3d 375, 377 (9th Cir. 1994)
17 ("The very meaning of being an agent is assuming fiduciary duties to one's principal.") (*citing*
18 *Restatement (Second) of Agency* § 1(1)).

19 264. Thus, as the agent of L&C, U.S. RE owed L&C fiduciary duties under Nevada
20 law, as set forth herein

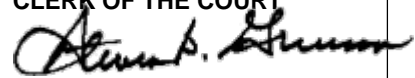
21 265. U.S. RE breached this fiduciary duty through intentional acts including, but not
22 limited to, by not obtaining reinsurance through syndicates as listed in the fact section above. No
23 facts were found that reinsurance failed to pay as required. To the contrary, the reinsurance
24 policies seemed not to be invoked because deductible amounts were not reached, especially in the
25 early years of 2004 to 2008.

26 266. Nevertheless, U.S. RE intentionally represented to L&C that it would act in L&C's
27 best interests, creating additional duties toward L&C other than merely finding and securing
28 reinsurance, including but not limited to, fiduciary duties, as set forth herein.

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EXHIBIT 2

HUTCHISON & STEFFEN
A PROFESSIONAL LLC



MOT

MARK A. HUTCHISON, ESQ. (4639)
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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

**PLAINTIFF'S MOTION TO ALTER OR
AMEND JUDGMENT PURSUANT TO
NRCP 59**

Hearing Requested

Plaintiff, Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark
LTC Risk Retention Group, Inc. ("Plaintiff" or the "Receiver"), by and through her counsel of
record, the law firm of Hutchison & Steffen, PLLC, hereby submits her Motion to Alter or Amend
Judgment Pursuant to NRCP 59.

This Motion is made and based on the following Memorandum of Points and Authorities,
any argument the Court chooses to entertain at a hearing on this matter, and all papers and pleadings

///

1 on file herein.

2 DATED this 10th day of February, 2022.

3 By: /s/ Brenoch Wirthlin

4 MARK A. HUTCHISON, ESQ. (4639)

5 BRENOCH WIRTHLIN, ESQ. (10282)

6 Hutchison & Steffen

7 10080 West Alta Drive, Suite 200

8 Las Vegas, Nevada 89145

9 Telephone: (702) 385.2500

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11 E-Mail: bwirthlin@hutchlegal.com

12 Attorneys for Plaintiff

13 MEMORANDUM OF POINTS AND AUTHORITIES

14 I. RELEVANT FACTS

15 The trial regarding Plaintiff's claims against Defendant U.S. Re Corporation ("U.S. Re"),
16 Uni-Ter Underwriting Management Corporation ("Uni-Ter UMC"), and Uni-Ter Claims Services
17 Corporation ("Uni-Ter CS", and collectively with U.S. Re and Uni-Ter UMC referred to herein as
18 the "Corporate Defendants") commenced on September 20, 2021 in this Court. On October 14, 2021,
19 the matter was submitted to the Jury, which rendered its Verdict in favor of Plaintiff that same day.
20 *See* Verdict Form (Oct. 14, 2021). Specifically, the Jury found that Plaintiff established damages in
21 the amount of \$15,222,853.00 and allocated liability for those damages to each respective Defendant
22 as follows: 55 percent to US Re; 25 percent to Uni-Ter UMC; and 20 percent to Uni-Ter CS. Based
23 upon simple math calculations, the foregoing translates to \$8,372,569.15 allocated to US Re,
24 \$3,805.713.25 allocated to Uni-Ter UMC, and \$3,044,570.60 allocated to Uni-Ter CS. A copy of
25 the judgment entered on the Jury Verdict ("Judgment") is attached hereto as Exhibit 1, reflecting the
26 allocation of damages as set forth above.

27 II. APPLICABLE STANDARD

28 The Court may grant a motion to amend a judgment under Rule 59(e), Nevada Rule of Civil
Procedure, to correct manifest errors of law or to prevent manifest injustice. *See AA Primo Builders,*
LLC v. Washington, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010); *see also Panorama Towers*
Condo. Unit Owners' Ass'n v. Hallier, 137 Nev. Adv. Op. 67, 498 P.3d 222, 224 (2021) ("An NRCPP
59(e) motion to alter or amend a judgment may be appropriate to correct 'manifest errors of law or

fact,’ address ‘newly discovered or previously unavailable evidence,’ ‘prevent manifest injustice,’ or address a ‘change in controlling law.’”). Additionally, Rule 60(b)(6) allows the Court, “[o]n motion and just terms,” to relieve a party, such as U.S. Re, from a final judgment for “any . . . reason that justifies relief.”

III. ARGUMENT

A. Joint tortfeasors are jointly and severally liable for breaches of fiduciary duty.

Courts across the country, including California, have recognized the common law holding that joint tortfeasors are jointly and severally liable for breaches of fiduciary duty. *F.D.I.C. v. Anders*, No. CIV. S-87-430EJG/PAN, 1991 WL 442874, at *6 (E.D. Cal. July 2, 1991) (“Where a principal is injured by the acts of two agents, neither may avoid liability to the principal on the ground that the other was responsible. *Oxford Shipping Co. v. New Hampshire Trading Corp.*, 697 F.2d 1, 6–7 (1st Cir.1982).); *Constr. Laborers Tr. Funds for S. California Admin. Co. v. Victory Engineers, Inc.*, No. CV 10-2134 CBM (EX), 2010 WL 11598019, at *5 (C.D. Cal. Oct. 14, 2010) (finding joint and several liability on claims of breach of fiduciary duty); *Norte & Co. v. Huffines*, 304 F. Supp. 1096, 1109 (S.D.N.Y.), *supplemented*, 288 F. Supp. 855 (S.D.N.Y. 1968), *aff’d in part, remanded in part*, 416 F.2d 1189 (2d Cir. 1969) (holding that the liability of fiduciaries who act together in breach of their fiduciary obligations is joint and several); *Anchor Reef Ass’n, Inc. v. Anchor Reef Club at Branford, LLC*, No. X07HHDCV155043896S, 2017 WL 3080882, at *2 (Conn. Super. Ct. June 14, 2017) (“This misconduct is reflected in the \$578,950.59 Ziegler was ordered to pay in the earlier opinion for the breaches of fiduciary duty that arose from Ziegler’s financial shenanigans. Rounding upward, the court doubles those damages, awarding against Ziegler and the developer **jointly and severally** an additional \$579,000 as CUTPA punitive damages.”); *Magaraci v. Espinosa*, No. 03-14-00515-CV, 2016 WL 858989, at *2 (Tex. App. Mar. 4, 2016) (“Salvatore Magaraci and Estate Protection Planning were determined to be jointly and severally liable for \$271,658.55, plus interest and attorney’s fees” with regard to claims for breach of fiduciary duty); *Abbott v. Chesley*, 413 S.W.3d 589, 599 (Ky. 2013) (CGM challenged the entry of summary judgment on the **breach of fiduciary duty claim and the assessment of joint and several liability**); *Ryder v. Bates*, No. 215CV02526SHLCGC, 2019 WL 12762965,

1 at *3 (W.D. Tenn. Mar. 5, 2019) (“The Court requested that the Receiver provide a detailed
2 calculation of damages as to each Defendant under each claim it advanced. **The calculation of**
3 **damages per Defendant is complicated somewhat by the multiple avenues of recovery,**
4 **the joint and several liability that applies to breach of fiduciary duty** and the need to insure
5 that there is no double recovery. Consequently, the Court will first address damages from
6 the breach of fiduciary duty, for which all Defendants are jointly and severally liable, before
7 moving to any additional damages that may be owed by individual Defendants.”); *Mannix v. Tighe*,
8 No. MICV 2008-0690, 2009 WL 5909266, at *2 (Mass. Super. Dec. 30, 2009) (“Finally, Tighe
9 and Callahan are jointly and severally liable for breaches of fiduciary duties. Breach of fiduciary
10 duty is considered a tort under Massachusetts law. See, *Doe v. Harbor Schools, Inc.*, 446 Mass.
11 245, 254, 843 N.E.2d 1058 (2006) and “**it is a familiar rule of law, that in cases in tort, where**
12 **two or more are liable to an action, they are liable jointly and severally....**” *Donnelly v.*
13 *Larkin*, 327 Mass. 287, 296, 98 N.E.2d 280 (1951), and cases cited.); *Kunz v. Warren*, 725 P.2d
14 794, 795 (Colo. App. 1986) (“A judgment was also entered against Bruce A. Jarnagin, Harold P.
15 Warren, and Cascade Marketing Corporation, **jointly and severally, in the amount of \$158,000**
16 **for breach of fiduciary duty.**”).

17 In this case Plaintiff prevailed on all of its claims for breaches of fiduciary duty to the
18 Company by the Corporate Defendants. Accordingly, Plaintiff requests that the Judgment be
19 amended to reflect joint and several liability for all damages by all Corporate Defendants.

20 **III. CONCLUSION**

21 For all these reasons, the Plaintiff respectfully requests that this Court grant the relief
22 requested in the motion pursuant to NRCP 59 and amend or alter the Judgment as set forth herein,

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1 and grant such other and further relief as the Court deems appropriate.

2 Dated this 10th day of February, 2022.

3 By: /s/ Brenoch Wirthlin

4 MARK A. HUTCHISON, ESQ. (4639)

5 BRENOCH WIRTHLIN, ESQ. (10282)

6 Hutchison & Steffen

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12 *Attorneys for Plaintiff*

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 10th day of February, 2022, I caused the document entitled **PLAINTIFF’S MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO NRCP 59** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

/s/Jon Linder
An Employee of Hutchison & Steffen

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EXHIBIT 1

JGJV

MARK A. HUTCHISON, ESQ. (4639)
BRENOCH R. WIRTHLIN, ESQ. (10282)
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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

JUDGMENT ON JURY VERDICT

Trial: 9/20/2021 – 10/14/2021

This matter having been tried before a jury ("Jury") beginning September 20, 2021 through October 14, 2021; Plaintiff Commissioner of Insurance for the State of Nevada as Receiver for Lewis & Clark LTC Risk Retention Group, Inc. ("Plaintiff") having been represented by Brenoch Wirthlin, Esq., Chris Orme, Esq., and Tanya Fraser, Esq. of the law firm of Hutchison & Steffen, PLLC; Defendants U.S. Re Corporation ("U.S. Re"), Uni-Ter Underwriting Management Corp. ("Uni-Ter UMC") and Uni-Ter Claims Services Corp. ("Uni-Ter CS" and collectively with U.S.

1 Re and Uni-Ter UMC referred to as the “Corporate Defendants”) having been represented by Jon
2 M. Wilson, Esq. of the Law Offices of Jon M. Wilson, George F. Ogilvie III of the law firm of
3 McDonald Carano LLP, and Kimberly Freedman and Erin Kolmansberger of the law firm of
4 Nelson Mullins; the Jury having rendered its verdict which was presented in open Court on October
5 14, 2021 (“Verdict”); the Jury having made the following findings as set forth in the Verdict:

- 6 1. The Jury having found by clear and convincing evidence that Uni-Ter UMC made a
7 negligent misrepresentation(s) to Lewis & Clark LTC Risk Retention Group, Inc. (“Lewis
8 & Clark”) regarding Lewis & Clark’s financial condition, on which Lewis & Clark
9 justifiably relied;
- 10 2. The Jury having found by clear and convincing evidence that Un-Ter UMC’s negligent
11 misrepresentation(s) was a legal cause of damages to Lewis & Clark;
- 12 3. The Jury having found by a preponderance of the evidence that a fiduciary relationship
13 existed between Uni-Ter UMC and Lewis & Clark where Uni-Ter UMC was under a duty
14 to act for or give advice for the benefit of Lewis & Clark upon matters within the scope of
15 their relationship;
- 16 4. The Jury having found by a preponderance of the evidence that Uni-Ter UMC breached its
17 fiduciary duty to Lewis & Clark;
- 18 5. The Jury having found by a preponderance of the evidence that Uni-Ter UMC’s breach of
19 its fiduciary duty to Lewis & Clark was a legal cause of damages to Lewis & Clark;
- 20 6. The Jury having found by a preponderance of the evidence that a fiduciary relationship
21 existed between Uni-Ter CS and Lewis & Clark where Uni-Ter CS was under a duty to act
22 for or to give advice for the benefit of Lewis & Clark upon matters within the scope of their
23 relationship;
- 24 7. The Jury having found by a preponderance of the evidence that Uni-Ter CS breached its
25 fiduciary duty to Lewis & Clark;
- 26 8. The Jury having found by a preponderance of the evidence that Uni-Ter CS’s breach of its
27 fiduciary duty to Lewis & Clark was a legal cause of damages to Lewis & Clark;
- 28 9. The Jury having found by a preponderance of the evidence that a fiduciary relationship

1 existed between U.S. Re and Lewis & Clark where U.S. Re was under a duty to act for or
2 to give advice for the benefit of Lewis & Clark upon matters within the scope of their
3 relationship;

4 10. The Jury having found by a preponderance of the evidence that U.S. Re breached its
5 fiduciary duty to Lewis & Clark;

6 11. The Jury having found by a preponderance of the evidence that U.S. Re's breach of its
7 fiduciary duty to Lewis & Clark was a legal cause of damages to Lewis & Clark;

8 12. The Jury having found that the amount of damages incurred by Lewis & Clark totaled the
9 principal amount of \$15,222,853.00;

10 13. The Jury having determined that the liability for Plaintiff's claims of negligent
11 misrepresentation and breach of fiduciary duty should be allocated with respect to each of
12 the Corporate Defendants as follows:

13 a. Fifty-five percent (55%) to U.S. Re Corporation;

14 b. Twenty-five percent (25%) to Uni-Ter Underwriting Management Corporation;

15 c. Twenty percent (20%) to Uni-Ter Claims Services Corporation.

16 NOW THEREFORE, based upon the findings by the Jury as set forth in its Verdict, and
17 good cause appearing,

18 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that based upon the Jury's
19 Verdict, judgment against defendant U.S. Re Corporation is hereby entered in the principal amount
20 of \$8,372,569.15.

21 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that, U.S. Re
22 Corporation having been served with the summons and complaint in this matter on March 12,
23 2015, pre-judgment interest is hereby awarded against U.S. Re Corporation pursuant to NRS §
24 17.130(2) in the additional amount of \$2,109,887.43¹, for a total principal judgment against U.S.
25 Re Corporation in the amount of \$10,482,456.58, which amount does not include post-judgment
26

27 ¹ Calculated at the rate of 5.25% over 1,752 days (March 12, 2015, when U.S. Re Corporation was
28 served with the summons and complaint, through December 23, 2021, less 726 days during periods
 of stay) pursuant to NRS § 17.130.

1 interest, attorney fees or costs, which amounts may be awarded by post trial motion.

2 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that based upon
3 the Jury's Verdict, judgment against defendant Uni-Ter Underwriting Management Corporation is
4 hereby entered in the principal amount of \$3,805,713.25.

5 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that, Uni-Ter
6 Underwriting Management Corporation having been served with the summons and complaint in
7 this matter on March 11, 2015, pre-judgment interest is hereby awarded against Uni-Ter
8 Underwriting Management Corporation pursuant to NRS § 17.130(2) in the additional amount of
9 \$959,587.14², for a total principal judgment against Uni-Ter Underwriting Management
10 Corporation in the amount of \$4,765,300.39, which amount does not include post-judgment
11 interest, attorney fees or costs, which amounts may be awarded by post trial motion.

12 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that based upon
13 the Jury's Verdict, judgment against defendant Uni-Ter Claims Services Corporation is hereby
14 entered in the principal amount of \$3,044,570.60.

15 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that, Uni-Ter
16 Claims Services Corporation having been served with the summons and complaint in this matter
17 on March 11, 2015, pre-judgment interest is hereby awarded against Uni-Ter Claims Services
18 Corporation pursuant to NRS § 17.130(2) in the additional amount of \$767,669.71³, for a total
19 principal judgment against Uni-Ter Underwriting Claims Services Corporation in the amount of
20 \$3,812,240.31, which amount does not include post-judgment interest, attorney fees or costs,
21 which amounts may be awarded by post trial motion.⁴

22 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED, pursuant to NRS
23 _____

24 ² Calculated at the rate of 5.25% over 1,753 days (March 11, 2015, when Uni-Ter Underwriting
25 Management Corporation was served with the summons and complaint, through December 23,
2021, less 726 days during periods of stay) pursuant to NRS § 17.130.

26 ³ Calculated at the rate of 5.25% over 1,753 days (March 11, 2015, when Uni-Ter Claims Services
27 Corporation was served with the summons and complaint, through December 23, 2021, less 726
days during periods of stay) pursuant to NRS § 17.130.

28 ⁴ Pursuant to NRS § 18.120, the following blank is left in this judgment for costs to be included
within the judgment once the same shall be taxed or ascertained: _____.

1 § 18.120, and other applicable law, that all said judgment amounts hereby entered against the
2 Corporate Defendants, and each of them, shall bear post-judgment interest at the Nevada statutory

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interest rate per annum from the date of award until fully satisfied, for all of which let execution and garnishment issue forthwith.⁵

DATED: December 27, 2021.

Dated this 30th day of December, 2021


HON. NANCY L. ALLF TW
DISTRICT COURT JUDGE
449 33C 9DF7 6302
Nancy Allf
District Court Judge

HUTCHISON & STEFFEN, PLLC

By: /s/ Brenoch Wirthlin
MARK A. HUTCHISON, ESQ. (4639)
BRENOCH R. WIRTHLIN, ESQ. (10282)
CHRISTIAN ORME, ESQ. (10175)
TANYA M. FRASER, ESQ. (13872)
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Las Vegas, Nevada 89145
Attorneys for Plaintiff

Approved as to Form:

By: /s/ George Ogilvie
George F. Ogilvie III, Esq.
Nevada Bar No. 3552
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Jon M. Wilson, Esq. (Appearing *Pro Hac Vice*)
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⁵ Plaintiff expressly reserves the right to seek costs against the Corporate Defendants, and each of them, pursuant to NRS § 18.110 or other applicable law, and attorney fees against the Corporate Defendants, and each of them, pursuant to NRCP 68 and NRS § 17.117 or other applicable law.

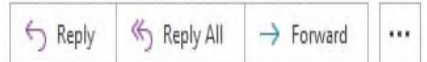
RE: Lewis & Clark



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

To: Brenoch R. Wirthlin; Christian M. Orme; Tanya M. Fraser

Cc: Jon; Jon Wilson; Kimberly Freedman; erin Kolmansberger; Amanda Yen; Jon Linder; No Scrub



Wed 12/22/2021 6:18 PM

 Click here to download pictures. To help protect your privacy, Outlook prevented automatic download of some pictures in this message.

Brenoch,

I have reviewed the revised judgment and checked your math. It is in compliance with our requested edits and the math is accurate. Therefore, you may affix my electronic signature.

I see what you are saying about NRS 18.120; however, that will lead to two different documents entitled "Judgment" in the record. I think it is cleaner to exclude the footnote and the blank in the Judgment, and then submit an Amended Judgment once the costs and attorney's fees issues are adjudicated, but I am not adamant about it.

George F. Ogilvie III | Partner

McDONALD CARANO

P: 702.873.4100 | E: gogilvie@mcdonaldcarano.com

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

Sent: Wednesday, December 22, 2021 4:36 PM

To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Christian M. Orme <COrme@hutchlegal.com>; Tanya M. Fraser <tfraser@hutchlegal.com>

Cc: Jon <jonwilson@jonmwilsonattorney.com>; Jon Wilson <jonwilson2013@gmail.com>; Kimberly Freedman <Kimberly.Freedman@nelsonmullins.com>; erin Kolmansberger <erin.kolmansberger@nelsonmullins.com>; Amanda Yen <ayen@mcdonaldcarano.com>; Jon Linder <jlinder@hutchlegal.com>; No Scrub <NoScrub@mcdonaldcarano.com>

Subject: RE: Lewis & Clark

George and Jon, I accepted all the changes you made and revised the amounts based on the calculation of pre-judgment interest through tomorrow, December 23. In addition, my reading of 18.120 says we're supposed to leave a blank for costs so I added a footnote with a blank for costs. A redline and clean copy pdf are attached.

If we can attach your electronic signature and submit to the Court, please let me know. Alternatively, we can submit a joint email to the Court's clerk and see if the judge has a preference one way or the other.

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)

9 vs.

10 Robert Chur, Defendant(s)

CASE NO: A-14-711535-C

DEPT. NO. Department 27

11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Judgment on Jury Verdict 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: 12/30/2021

16 Adrina Harris .	aharris@fclaw.com
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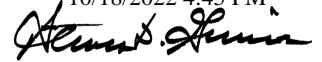
26
27
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

* * *

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

Plaintiff,

vs.

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

Defendants.

Case No.: A-14-711535-C

Dept. No.: XXVII

**ORDER GRANTING PLAINTIFF'S
MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO NRCP 59**

This matter came before the Court for hearing ("Hearing") on September 7, 2022 on Plaintiff's Motion to Alter or Amend Judgment Pursuant to NRCP 59 ("Motion"). Brenoch R. Wirthlin, Esq. appeared on behalf of Plaintiff Commissioner of Insurance for the State of Nevada ("Plaintiff"); George F. Ogilvie III, Esq. appeared on behalf of Defendant U.S. Re Corporation ("US Re").¹ No opposition to the Motion was filed. Mr. Ogilvie opposed the Motion at the

¹ Mr. Ogilvie and his firm, McDonald Carano, LLP, have withdrawn from representing Uni-Ter Underwriting

1 Hearing on behalf of U.S. Re. The Court having read and considered the Motion, as well as
2 having heard and considered the arguments of counsel at the Hearing on the Motion, and good
3 cause appearing, the Court hereby finds that Plaintiff is entitled to the relief requested in the
4 Motion and good cause appearing therefor,

5 IT IS HEREBY ORDERED that Plaintiff's Motion to Alter or Amend Judgment Pursuant
6 to NRCP 59 is hereby GRANTED in its entirety.

7 IT IS HEREBY FURTHER ORDERED that the Court finds that joint tortfeasors are jointly
8 and severally liable for breaches of fiduciary duty. *See e.g., F.D.I.C. v. Anders*, No. CIV. S-87-
9 430EJG/PAN, 1991 WL 442874, at *6 (E.D. Cal. July 2, 1991); *Constr. Laborers Tr. Funds for*
10 *S. California Admin. Co. v. Victory Engineers, Inc.*, No. CV 10-2134 CBM (EX), 2010 WL
11 11598019, at *5 (C.D. Cal. Oct. 14, 2010); *Doe v. Harbor Schools, Inc.*, 446 Mass. 245, 254, 843
12 N.E.2d 1058 (2006); *Donnelly v. Larkin*, 327 Mass. 287, 296, 98 N.E.2d 280 (1951) ("it is a
13 familiar rule of law, that in cases in tort, where two or more are liable to an action, they are
14 liable jointly and severally....").
15

16 IT IS HEREBY FURTHER ORDERED that the judgment in this matter ("Judgment") shall
17 be and is hereby amended to reflect joint and several liability among all Corporate Defendants
18

19 ///

20 ///

21 ///

22 ///

23 ///

24

25 _____
26 Management Corp., Uni-Ter Claims Services Corp. ("Uni-Ter Defendants" and collectively with US Re referred to
27 as the "Corporate Defendants"). The Uni-Ter Defendants did not file an opposition to the Motion or appear at the
28 Hearing. Defendant US Re also filed Motion to Alter or Amend Judgment Pursuant to Rule 59(e), for Relief from
Judgment and Pursuant to Rule 60(b), and for Stay of Execution Pursuant to 62(b)(3) and (4) ("US Re's Motion to
Amend"). At the Hearing US Re withdrew its Motion to Amend. Thus this order also resolves US Re's Motion to
Amend and the Court hereby acknowledges US Re's Motion to Amend is withdrawn.

for all damages and amounts awarded in the Judgment.

Dated this 18th day of October, 2022

Nancy L Allf

MA

CB9 7BD 0EDD 77EF

Nancy Allf

District Court Judge

Respectfully submitted by:

Approved as to form and content:

Dated this 18th day of October, 2022.

Dated this ____ day of October, 2022.

HUTCHISON & STEFFEN

MCDONALD CARANO LLP

/s/Brenoch Wirthlin

Did not sign

BRENOCH R. WIRTHLIN, ESQ.

George F. Ogilvie III, Esq.

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

10
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:

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

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,

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

VS.

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

Supreme Court No. 85668

EXHIBIT 1 TO
APPELLANT'S OPPOSITION
TO MOTION TO DISMISS
PAGES 91 - 300

Supreme Court No. 85728

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

5 Appellant,

6 vs.

7
8 ROBERT CHUR; STEVE FOGG; MARK
9 GARBER; CAROL HARTER; ROBERT
10 HURLBUT; BARBARA LUMPKIN; JEFF
11 MARSHALL; AND ERIC STICKELS; UNI-
12 TER UNDERWRITING MANAGEMENT
CORP.; UNI-TER CLAIMS SERVICES
CORP.; AND U.S. RE CORPORATION,

13 Respondents.
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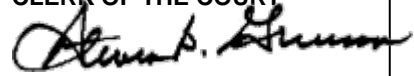
Supreme Court No. 85907

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EXHIBIT PAGE ONLY

EXHIBIT 3

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Management Corp., Uni-Ter Claims Services
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiff,
vs.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**DEFENDANT U.S. RE CORPORATION'S
MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO RULE
59(e), FOR RELIEF FROM JUDGMENT
PURSUANT TO RULE 60(b), AND FOR
STAY OF EXECUTION PURSUANT TO
62(b)(3) and (4).**

HEARING REQUESTED

Pursuant to Rules 59(e), 60(b), and 62(b)(3) and (4) of the Nevada Rules of Civil Procedure,
Defendant, U.S. Re Corporation ("U.S. Re"), through its undersigned attorneys, hereby moves for

1 relief from, and amendment to, the December 30, 2021 Judgment on Jury Verdict (“Judgment”)
2 awarding Plaintiff, the Commissioner of Insurance for the State of Nevada as Receiver of Lewis &
3 Clark LTC Risk Retention Group, Inc (“Receiver”), a total of \$10,482,456.58 against U.S. Re. U.S.
4 Re also requests that this Court stay any execution on the Judgment against U.S. Re pending
5 disposition of this motion.

6 This motion is made and based on the following Memorandum of Points and Authorities, the
7 existing record in this action, and any argument the Court may entertain at any hearing on this matter.

8 DATED this 10th day of February, 2022.

9 McDONALD CARANO LLP

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20 *Management Corp., Uni-Ter Claims Services*
21 *Corp., and U.S. RE Corporation*
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 On October 14, 2021, after a nearly four-week trial, the jury returned a verdict in favor of
4 Plaintiff, Commissioner of Insurance for the State of Nevada as Receiver of Lewis & Clark LTC
5 Risk Retention Group, Inc. (“Receiver”), finding the remaining defendants, Uni-Ter Underwriting
6 Management Corp. (“Uni-Ter UMC”), Uni-Ter Claims Services Corp. (“Uni-Ter CS”), and U.S. Re
7 Corporation (“U.S. Re”), liable for damages totaling \$15,222,853.00. *See* Verdict Form, attached
8 hereto as **Exhibit A**, at 6. The jury allocated 55% of that liability to U.S. Re. *Id.* On December 30,
9 2021, this Court entered its Judgment on Jury Verdict (“Judgment”), awarding \$8,372,569.15 (55%
10 of the total liability) against U.S. Re, plus \$2,109,887.43 in pre-judgment interest, for a total of
11 \$10,482,456.58 against U.S. Re. *See* Judgment, attached hereto as **Exhibit B**, at 3-4.¹

12 The damages imposed against U.S. Re, however, cannot stand. The only possible damages
13 attributable to U.S. Re, the reinsurance broker for Lewis & Clark (“L&C”), are damages that
14 stemmed from the reinsurance program procured by U.S. Re for L&C—referred to by the Receiver’s
15 experts as “reinsurance damages.” Yet, the Receiver’s liability expert, Mark Tharp, created a
16 reinsurance damages calculation that was based on a legally incorrect measure of damages, was
17 entirely speculative, and was not supported by the evidence. These flawed calculations were, in
18 turn, adopted *to the penny* by the Receiver’s damages expert, Mark Kuga, as the basis for his “net
19 reinsurance ceded” model, which he then testified entitled the Receiver to \$7,986,000 in reinsurance
20 damages. Because Dr. Kuga’s conclusion that L&C sustained \$7,986,000 in reinsurance damages
21 relies entirely on Mr. Tharp’s unsubstantiated reinsurance damages calculation, Dr. Kuga’s
22 conclusion is likewise flawed. Accordingly, there is no basis to impose damages against U.S. Re,
23 and the Court should relieve U.S. Re from all damages imposed against it.

24 _____
25 ¹ The Receiver served notice of entry of the Judgment on January 13, 2022. *See* Notice of
26 Entry of Order, attached hereto as **Exhibit C**. Accordingly, this motion is timely filed. *See* Nev.
27 R. Civ. P. 59(e) (“A motion to alter or amend a judgment must be filed no later than 28 days after
28 service of written notice of entry of judgment.”); Nev. R. Civ. P. 60(c)(1) (“A motion under Rule
60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than 6
months after the date of the proceeding or the date of service of written notice of entry of the
judgment or order, whichever date is later.”).

1 Even assuming, however, that this Court concludes that Mr. Tharp's computation was a
2 legally sufficient measure of damages (which it was not) and that Dr. Kuga properly relied on it
3 (which he could not), the \$8,372,569.15 awarded against U.S. Re exceeds the \$7,986,000 maximum
4 possible amount of reinsurance damages that could be awarded based on the Receiver's experts'
5 own testimony. Thus, there was no support in the record for an award of \$8,372,569.15 against U.S.
6 Re, and U.S. Re should be relieved from all damages imposed against it on this basis as well.

7 For these reasons, discussed more fully below, it would be contrary to law and unjust for the
8 Court to allow the portion of the Judgment imposed against U.S. Re to stand. Accordingly, the Court
9 should enter an order relieving U.S. Re from any obligation to satisfy the Judgment against it and
10 amend the Judgment to reflect that no damages are attributable to U.S. Re.

11 LEGAL STANDARDS

12 The Court may grant a motion to amend a judgment under Rule 59(e), Nevada Rule of Civil
13 Procedure, to correct manifest errors of law or to prevent manifest injustice. *See AA Primo Builders,*
14 *LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010); *see also Panorama Towers*
15 *Condo. Unit Owners' Ass'n v. Hallier*, 137 Nev. Adv. Op. 67, 498 P.3d 222, 224 (2021)
16 ("An NRCP 59(e) motion to alter or amend a judgment may be appropriate to correct 'manifest
17 errors of law or fact,' address 'newly discovered or previously unavailable evidence,' 'prevent
18 manifest injustice,' or address a 'change in controlling law.'"). Additionally, Rule 60(b)(6) allows
19 the Court, "[o]n motion and just terms," to relieve a party, such as U.S. Re, from a final judgment
20 for "any . . . reason that justifies relief."

21 ARGUMENT

22 **I. Mr. Tharp's Computation of the Purported Loss to L&C from the Reinsurance** 23 **Procured by U.S. Re is Legally Incorrect and Was Not Supported by the Evidence** 24 **Presented at Trial.**

25 The Receiver's liability expert, Mark D. Tharp, who conceded he is not a damages expert,
26 is actually the individual who calculated the alleged losses attributable to L&C's reinsurance
27 program. This number was then adopted by the Receiver's damages expert, Dr. Kuga. Mr. Tharp's
28 own testimony, however, demonstrates that the damages imposed against U.S. Re are flawed for
two reasons: 1) Mr. Tharp utilized an incorrect measure to determine the alleged damage from the

1 reinsurance program and 2) the amount of reinsurance damages Mr. Tharp identified is entirely
2 speculative.

3 **A. Mr. Tharp did not apply a proper measure of damages to determine what loss**
4 **to L&C, if any, was attributable to the reinsurance program procured by**
5 **U.S. Re.**

6 At trial, Mr. Tharp first testified that U.S. Re was responsible for recommending and
7 procuring the reinsurance program for L&C:

8 Q. With respect simply to the procurement aspect of Re
9 Insurance for Lewis and Clark, what obligations and actions
10 did U.S. RE take with respect to just the procurement?

11 A. Well, it -- U.S. RE recommended a reinsurance program to
12 Lewis and Clark. And that -- that reinsurance program was
13 approved by the board of directors.

14 Q. When you say that U.S. RE recommended a reinsurance
15 program, what went into the process of that
16 recommendation?

17 A. Identification of a reinsurance program that U.S. RE
18 recommended for Lewis and Clark.

19 See Sept. 28, 2021 Trial Tr., excerpts of which are attached hereto as **Exhibit D**, at 46:6-15. He
20 also testified that the reinsurance obtained by U.S. Re was “detrimental and damaging” to L&C:

21 Q. What did you see in terms of -- when you talk about the
22 scrutiny and the related party transactions, what did you see
23 in terms of U.S. RE's -- specifically, U.S. RE's brokering of
24 reinsurance for Lewis and Clark?

25 A. Yeah. What I saw was the brokering of a reinsurance
26 program that was wholly detrimental and damaging to Lewis
27 and Clark over a nine-year period of time without any
28 scrutiny whatsoever from the board of directors, because the
board of directors knew absolutely nothing about
reinsurance. They depended 100 percent on U.S. RE for
that.

See Oct. 1, 2021 Trial Tr., excerpts of which are attached hereto as **Exhibit E**, at 52:23-53:7.

Mr. Tharp then testified that—based on his review of L&C’s financial statements and
books and records—the excess of loss reinsurance program recommended by U.S. Re “contributed
significantly to the insolvency” of L&C and had an “\$8 million adverse impact” on L&C. See Oct.
5, 2021 Trial Tr., excerpts of which are attached hereto as **Exhibit F**, at 50:11-51:1. He explained

1 how he calculated the purported \$8 million in reinsurance damages as follows:

2 A. So Lewis and Clark paid 10 -- over time -- over a nine-year
3 period of time, Lewis and Clark paid \$10,000,000 of
4 premium to the excess of loss reinsurers. And during that
5 same period of time, only \$2,000,000 of losses were
 reimbursed. So it was an -- it was a -- it was a \$8,000,000
 loss to Lewis and Clark during that period of time.

6 *See* Sept. 28, 2021 Trial Tr. at 47:24-48:3. In other words, Mr. Tharp simply took the amount of
7 premiums paid by L&C over time (approximately \$10,000,000) less the amount of losses actually
8 reimbursed (approximately \$2,000,000) to arrive at the purported reinsurance damages of
9 approximately \$8,000,000—or, to be exact, \$7,986,000. *See* Oct. 12, 2021 Trial Tr., excerpts of
10 which are attached hereto as **Exhibit I**, at 39:1-6 (Tharp recognizing his computation was simply
11 the “delta” between the premiums paid and the amount reimbursed); Oct. 5, 2021 Trial Tr. at
12 79:19-25) (“So when you sum it all up -- and this number I believe is also in Mr. -- I know it is in
13 Mr. Tharp's report -- but these numbers come ultimately -- he probably got them from the same
14 place I did -- from the annual statements; there's a schedule in there that has these numbers -- is
15 \$7,986,000. So what I'm saying is they paid \$7,986,000 more for the reinsurance than they
16 received in assistance in paying the claims and expenses. So that cost them almost \$8 million”).

17 This seemingly simplistic calculation, however, is not the correct measure of damages to
18 determine what loss, if any, was sustained by L&C as a result of the reinsurance program
19 recommended by its reinsurance broker, U.S. Re. As a general rule, the liability of a broker, with
20 respect to a loss caused by a breach of said broker's duty is:

21 that which would have fallen on the company had the insurance been
22 properly effected, or, in other words, the amount that would have
23 been due under the policy, together with such other damages as
24 proximately result from the breach, less such insurance recovery as
 was in fact paid, and less the amount of unpaid premiums or cost of
 the insurance.

25 44 C.J.S. Insurance § 330.²

26
27 ² “The rules of practice in actions on original insurance policies generally are applicable to
28 actions on contracts of reinsurance.” 46A C.J.S. Insurance § 2092. Indeed, the procurement of
reinsurance by U.S. Re for L&C is analogous to an insurance broker's procurement of insurance

1 Thus, for example, in *Kearney Conv. Ctr. v. Anderson-Divan-Cottrell Ins., Inc.*, 370
2 N.W.2d 86 (Neb. 1985), the court held that “where insurance broker has negligently failed to
3 obtain adequate insurance coverage for insured, insured's measure of damages for loss caused
4 thereby is amount of actual loss as would have been covered by adequate insurance less any
5 amount paid by insurance effectuated by broker.” Similarly, in *Klonis for Use and Benefit of*
6 *Consol. Am. Ins. Co. v. Armstrong*, 436 So. 2d 213, 216 (Fla. 1st Dist. App. 1983), the court held
7 that damages recoverable from a broker who procured inadequate insurance are calculated by
8 comparing what the insured would have recovered had the proper insurance been obtained, with
9 the insured’s actual net recovery.

10 Indeed, this is precisely the calculation that **Defendants’** damages expert in this matter,
11 Sam Hewitt, found was the appropriate calculation to determine L&C’s purported reinsurance
12 damages. Mr. Hewitt testified:

13 A. Any damages calculation is a comparison of a but for world
14 . . . that would have existed but for the Defendant’s alleged
15 inappropriate actions and compares that to what actually
16 occurred and you subtract the difference.

17

18 Q. Let’s assume you want to do a but for analysis using quota
19 share as the alternative. How would you do the analysis?

20 A. You would figure out how much it would have cost you,
21 what sort of losses you would have been able to recover,
22 what the net cost of that reinsurance was and compare it to
23 the actual amount that [the Receiver’s expert] calculated.
24 ***That comparison was not done.***

25 See Oct. 11, 2021 Trial Tr. of Sam Hewitt, excerpts of which are attached hereto as **Exhibit G**, at
26 42:13-16, 44:16-21 (emphasis added). The Receiver’s damages expert, Dr. Kuga, likewise
27 acknowledged that a “but for” analysis of L&C’s reinsurance damages would involve comparing
28 the difference between the cost and the amount recovered under L&C’s excess of loss reinsurance

for an insured. Therefore, cases involving claims by insureds against their insurance brokers for
failure to procure proper insurance are instructive.

(i.e., \$10 million paid *less* \$2 million recovered) with the cost and recovery under the alternative reinsurance. *See* Oct. 5, 2021 Trial Tr. (Ex. F) at 99:11-100:8.

As Mr. Hewitt testified, Mr. Tharp’s calculation did not take into account *any* alternative reinsurance option or establish that, “but for” the excess of loss reinsurance program procured by U.S. Re, the outcome to L&C would have “been both different, and more favorable,” which would have required evidence of a better alternative reinsurance program. *See Tri-Town Marine, Inc. v. J.C. Milliken Agency, Inc.*, 924 A.2d 1066, 1070 (Me. 2007) (recognizing that, “there is abundant authority that proof of better alternative coverage in failure to procure insurance cases is required.”); *see also Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830 (Tex. 2009) (holding that to establish proximate cause, the plaintiff is required to prove the availability of an insurance policy that would have provided the requested coverage). Instead, Mr. Tharp simply took the amount of premiums paid by L&C, subtracted the amount of losses reimbursed, and concluded that the reinsurance damages were equal to the difference. Therefore, Mr. Tharp’s conclusion that L&C sustained approximately \$8 million in reinsurance damages was not based on the correct measure of damages for calculating the loss to L&C, if any, caused by U.S. Re’s failure to procure proper reinsurance.

B. Mr. Tharp’s testimony that L&C sustained \$8 million in reinsurance damages is pure speculation and unsupported by the evidence, and his testimony cannot serve as a basis for imposing damages against U.S. Re.

In addition to utilizing an improper measure of damages, Mr. Tharp’s testimony regarding the very existence of an allegedly more appropriate, alternative reinsurance program was based upon mere speculation, which is insufficient to establish damages. It is well settled that damages “cannot be based solely upon possibilities and speculative testimony.” *Franchise Tax Board of State of California v. Hyatt*, 407 P.3d 717, 749, 133 Nev. 826, 865–66 (Nev. 2017) quoting *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 425 (Nev. 1993). A plaintiff therefore has the burden to furnish “an evidentiary basis upon which [the jury] may properly determine the amount of plaintiff’s damages.” *Mort Waliin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, 784 P.2d 954, 955 (Nev. 1989) (vacating damage award finding there was insufficient evidence in the record); *see also Ezzo’s Investments, Inc. v. Royal Beauty Supply*,

1 *Inc.*, 243 F.3d 980, 991 (6th Cir. 2001) (plaintiff's damages model was insufficient to support a
2 reasonable jury verdict, where plaintiff's expert admitted he had not considered several factors
3 that could have caused the claimed injury); *Toscano v. Greene Music*, 21 Cal. Rptr. 3d 732, 740
4 (Cal. App. 4th Dist. 2004) (vacating damage award after finding plaintiff's expert's damage
5 calculations were speculative).

6 As noted above, the Receiver's own damages expert, Dr. Kuga, testified at trial that in
7 order to do a "but for" analysis of L&C's reinsurance damages he would have to know the cost
8 and recovery under the alternative reinsurance. *See* Oct. 5, 2021 Trial Tr. (Ex. F) at 99:11-100:8.
9 In addition, the defendants' damages expert, Mr. Hewitt, noted that a "but for" analysis also
10 required evidence of a reinsurer who was willing to write alternative reinsurance for L&C. He
11 testified:

12 A. . . . By the way, you know, one of the things you
13 have to keep in mind when you think about how
14 much -- how -- what kind of availability there is for
15 quota share, you have to find a reinsurer who's willing
16 to say hey I'll take a portion of your business exactly
17 the way that you're doing it, even though I'm
18 not going to have any control over you know, exactly
how you're adjusting the claims. I'm going to take
your loss ratio, your LAE ratio and a portion of your
percentages and that's if Lewis & Clark's losses were
actually as bad as Mr. Tharp has indicated. That may have
been tough to find.

19 *See* Oct. 11, 2021 Trial Tr. of Sam Hewitt (Ex. G) at 44:25-45:8.

20 At trial, Mr. Tharp testified that U.S. Re should have cancelled L&C's excess of loss
21 reinsurance program and replaced it with a quota share reinsurance program. *See* Oct. 5, 2021
22 Trial Tr. (Ex. F) at 66:9-10. However, Mr. Tharp outright admitted he had no evidence of any
23 specific quota reinsurance program that was available to L&C, nor did he analyze any quota share
24 program to determine if indeed it would have been more favorable to L&C than the reinsurance
25 actually placed for L&C by U.S. Re:

26 Q. You didn't do any analysis, did you?

27 A. *I didn't do any analysis on the quota share*, but it was
28 available in the marketplace through a negotiation process if
you wanted that type of reinsurance.

1 Q. Is quota share more expensive than excess loss?

2 A. Yes.

3 ...

4 Q. Tell me what company -- do you know any companies
5 where you could have placed quota share for Lewis and
6 Clark between 2004 and 2012? Any company. Just name
7 one.

8 A. *I don't have a specific company, but there are lots of*
9 *companies.* There are -- you know, there's 7,000-
10 plus insurance companies that do business in the United
11 States.

12 Q. I'm just asking you whether or not you can name one
13 company. You say it's available and should have been placed
14 by U.S. RE. Can you give me the name of one company
15 where it could be placed?

16 A. There were hundreds. Hundreds of insurance --

17 Q. Can you just give me a name?

18 A. *I'm not prepared to give you a name of an insurance*
19 *company,* but I can tell you that the marketplace is such that
20 if you put the word out that you want a quota share
21 reinsurance program for nursing homes, you can get -- you
22 can get companies to write that, absolutely no question
23 about it.

24 *See* Oct. 1, 2021 Trial Tr. (Ex. E) at 99:4-100:6 (emphasis added). Thus, Mr. Tharp, by his own
25 admissions, could not name *one single company* that was willing and able to place quota share
26 reinsurance for L&C, much less provide any concrete information about what that program would
27 cost or the benefits it would provide to L&C in comparison to the excess of loss reinsurance
28 program that was in place. Notably, the defendants' reinsurance expert, Richard DeCoux, testified
he actually inquired from three different sources in the reinsurance industry whether quota share
reinsurance was available from 2005 to 2012, and all three sources confirmed "there wouldn't
have been availability" for quota share reinsurance for "a company that was a startup that was
involved in the healthcare industry" such as L&C. *See* Oct. 11, 2021 Trial Tr. of Richard DeCoux,
excerpts of which are attached hereto as **Exhibit H**, at 26:7-27:4. Thus, Mr. Tharp's testimony
that because there are "7,000-plus insurance companies that do business in the United States"
there must have been some company willing to provide a quota share reinsurance program for

“nursing homes” was pure speculation, and such conjecture is insufficient to support a damage award against U.S. Re.

A recent case from the Wisconsin Supreme Court is instructive on this point. In *Emer's Camper Corral, LLC v. Alderman*, 943 N.W.2d 513, 515 (Wis. 2020), the plaintiff claimed its insurance broker procured insurance with higher damage deductible than requested. *Id.* at 515. At trial, the court entered a directed verdict in favor of the broker, finding that because the plaintiff failed to “introduce evidence that an insurer would have insured the company with the deductible limits” desired, it did not prove a “causal link between the broker’s negligence and the sustained loss.” *Id.* On appeal, the Wisconsin Supreme Court held that to establish causation the plaintiff must prove “not just that an insurance policy with the requested deductibles was commercially available, but also that an insurer would actually write that policy for [the plaintiff] in particular.” *Id.* In reaching its conclusion, the court observed that “commercial availability” is a “necessary prerequisite” to establishing causation because “if the insured requests a policy that is not available in the market, the insured’s harm comes from its unavailability, not from the broker’s failure to obtain what does not exist.” *Id.* at 519. Nonetheless, the Wisconsin Supreme Court concluded that commercial availability is not itself “sufficient for that causal link,” explaining:

An insurance policy is not a mass-produced good or service that is available to the public without regard for the circumstances of the prospective purchaser. Instead, the coverage, terms, and premium depend on factors specific to the insured company, such as, for example, its claims history. . . . So when we say a policy with certain deductible limits is “commercially available,” what we mean is that somewhere in the market there is an insurance company willing to write that policy for a hypothetical company with a hypothetical set of insurability factors.

But just because an insurance company would write a specific policy for one company does not mean it would insure all companies under the same terms. Consequently, “commercial availability” of the policy requested by [the plaintiff] establishes, at most, that some company somewhere could get the desired deductible limits. It does not answer whether such a policy was available to [the plaintiff]. So, if general commercial unavailability prevents formation of a causal link between a broker’s negligence and an insured’s loss, then it necessarily follows that the policy’s unavailability to [the plaintiff] in particular must also prevent formation of a causal link.

Whether the unavailability is general, or instead particular to

[the plaintiff], the policy's unavailability exists independently of any negligence on behalf of the broker. And if that is so, then the broker's negligence cannot be a substantial factor in producing Camper Corral's loss because it would have occurred even if the broker had not been negligent.

Id. at 519-20 (emphasis added).

Here, Mr. Tharp's testimony that quota share reinsurance programs were generally available in the marketplace is wholly insufficient and entirely speculative. As Mr. DeCoux, testified, quota share reinsurance would **not** have been available to a company like L&C. (Oct. 11, 2021 Trial Tr. at 26:7-27:4). But, even assuming (as Mr. Tharp has done) that quota share reinsurance was "commercially available" in the marketplace, he did not testify – and the Receiver presented no other evidence – that a reinsurer actually would have issued quota share reinsurance to L&C or that L&C's recovery under a quota share reinsurance program would have been more favorable. Without evidence that an alternative more favorable quota share reinsurance program was in fact available to L&C, the Receiver failed to establish that the reinsurance program procured by U.S. Re caused any damage to L&C.

II. Because the Receiver's Damages Expert, Dr. Kuga, Relied Entirely on Mr. Tharp's Flawed Reinsurance Calculations, the Reinsurance Damages Imposed Against U.S. Re Cannot Stand.

As discussed above, Mr. Tharp created a reinsurance damages calculation that is contrary to the established measure of damages used to determine the liability, if any, of a reinsurance broker, is based on speculation, and is not supported by evidence. Dr. Kuga, in turn, used this flawed calculation as the basis for the "net reinsurance ceded" model he prepared, (*see* Exhibit 3.1 to Mark Kuga's Expert Report, attached hereto as **Exhibit J**), and testified that L&C suffered \$7,986,000 in reinsurance damages based on that model.³ *See* Oct. 5, 2021 Trial Tr. (Ex. F) at 79:19-80:11, 95:24-96:4, 97:1-8. Because Dr. Kuga's reinsurance damages against U.S. Re are, to the penny, based on Mr. Tharp's flawed reinsurance damages measure, Dr. Kuga's damages model is likewise flawed, and there is no basis in law or fact for the damages imposed against U.S.

³ Dr. Kuga further testified that the \$7,986,000 in reinsurance damages was **included in** his calculation of insolvency damages, which totaled \$15,222,853, the exact amount of damages awarded by the jury. *See* Oct. 5, 2021 Trial Tr. (Ex. F) at 86:24-87:23.

1 Re.

2 As the Court may recall, Defendants previously sought to exclude Dr. Kuga's testimony
3 during pretrial motions because each and every opinion he rendered simply parroted Mr. Tharp's
4 conclusions, with no independent analysis to validate Mr. Tharp's findings. Dr. Kuga's testimony
5 at trial was no different. Indeed, at trial, Dr. Kuga testified that he relied on Mr. Tharp's
6 reinsurance calculation as the basis for the "net reinsurance ceded" model he prepared and upon
7 which he based his testimony that L&C sustained \$7,986,000 in reinsurance damages. *See* Oct.
8 5, 2021 Trial Tr. (Ex. F) at 79:19-80:11, 95:24-96:4, 97:1-8, 102:7-8). Moreover, his trial
9 testimony made clear that he did not conduct any independent analysis beyond simply checking
10 Mr. Tharp's math:

11 Q. Did you do an -- what type of analysis did you do to come
12 up with those numbers?

13 A. Well, so Mr. Tharp has a schedule similar to this, not
14 exactly like this, but with these same data -- these first two
15 columns of data. But those numbers ultimately come from
16 schedule P in the annual statements. ***So I checked to make
sure where Mr. Tharp got those numbers from was
accurate*** and it reflected the numbers that were in the annual
statements. . . .

17 *Id. at 80:4-11* (emphasis added). Further, to the extent the Receiver may argue that Dr. Kuga did,
18 in fact, conduct an independent analysis to reach his reinsurance damages number, Dr. Kuga's
19 own testimony shows that he just repeated the same insufficient calculation that Mr. Tharp did,
20 by merely taking the total amount of reinsurance premiums paid and subtracting the amount of
21 losses actually reimbursed to get the purported reinsurance damages:

22 A. So when you sum it all up -- and this number I believe is also
23 in Mr. -- I know it is in Mr. Tharp's report -- but these
24 numbers come ultimately -- he probably got them from the
25 same place I did -- from the annual statements; there's a
26 schedule in there that has these numbers -- is \$7,986,000.
***So what I'm saying is they paid \$7,986,000 more for the
reinsurance than they received in assistance in paying the
claims and expenses. So that cost them almost \$8 million.***

27 *Id. at 79:19-25* (emphasis added). Thus, it is abundantly clear, based on Dr. Kuga's trial
28 testimony, that Dr. Kuga blindly relied on and accepted Mr. Tharp's flawed and legally

insufficient calculations to conclude that L&C suffered \$7,986,000 in reinsurance damages.

It is well settled that an expert cannot blindly rely on another expert's conclusions without independently verifying that expert's work. *See Muhsin v. Pac. Cycle, Inc.*, 2010-060, 2012 WL 2062396, at *4 (D.V.I. June 8, 2012) (“[T]he rules do not permit an expert to rely upon opinions developed by another expert for purposes of litigation without independent verification of the underlying expert's work”); *Cholakyan v. Mercedes-Benz, USA, LLC*, 281 F.R.D. 534, 546 (C.D. Cal. 2012) (“The evidence he has adduced does not adequately demonstrate that Waters exercised independent judgment; rather, it strongly suggests he took Potok's conclusions, engaged in little, if any, evaluation of their merits, and reproduced Potok's declaration wholesale (*including its typographical errors*) as his own work. The court cannot rely on such ‘testimony.’”).

Likewise, where an expert's opinions are, in turn, based entirely on a legally insufficient or unreliable opinion of another expert, the opinions that are based upon the flawed underlying opinions must be disregarded, because they are without legitimate support or an evidentiary basis. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2017 WL 10434367, at *2 (“Where an expert bases her opinion on—or simply repeats—the unreliable opinion of another expert, a district court may properly exclude the first expert's testimony. . . . Defendants concede that Dr. Ordoover incorporated Dr. Carlton's overcharge estimates into his own analysis, and that those estimates are unreliable Thus, applying the rules just stated, the portions of Dr. Ordoover's report that rely on Dr. Carlton's estimates should be excluded.”). *Batchelor-Robjohns*, 03-20164-CIV, 2005 WL 1761429, at *5 (S.D. Fla. June 3, 2005) (“Without Medland's asset valuations, May and Gartrell have no evidentiary basis for the conclusions they reach. In turn, May and Gartrell's opinions are unreliable under Rule 702 because they admittedly relied on Medland's valuations without performing any independent calculations themselves.”).

As detailed above, Mr. Tharp's trial testimony established that his reinsurance calculations were based on a legally incorrect measure of damages, were entirely speculative, and were not supported by evidence. Dr. Kuga's testimony, in turn, establishes that he blindly relied on Mr. Tharp's improper reinsurance calculations to conclude that the damages stemming from U.S. Re's procurement of purportedly improper reinsurance caused L&C to suffer \$7,986,000 in damages.

1 Because the reinsurance damages presented to the jury by Dr. Kuga were based entirely on a
2 flawed reinsurance damages calculation, the jury's verdict awarding reinsurance damages against
3 U.S. Re was improper. Accordingly, the Court should grant U.S. Re relief from the Judgment and
4 amend the Judgment to reflect an award of zero damages against U.S. Re.

5 **III. The Reinsurance Damages Against U.S. Re are Improper Because They Exceed**
6 **the Amount Identified by Dr. Kuga and, Accordingly, Are Not Supported by the**
7 **Evidence.**

8 Finally, even assuming, solely for purposes of argument, that the Court were to find that
9 Mr. Tharp's computation was a legally sufficient measure of damages and that Dr. Kuga properly
10 relied on it (neither of which is supported by the record) U.S. Re must still be relieved from the
11 Judgment against it because the damages awarded against U.S. Re by the jury – 55% of the total
12 damages, or \$8,372,569.15 – exceeds \$7,986,000, the amount of damages Dr. Kuga testified were
13 incurred as a result of U.S. Re's purported failure to procure appropriate reinsurance.

14 The testimony at trial does not support the allocation of any damages to U.S. Re separate
15 and apart from damages directly related to reinsurance. Indeed, Mr. Tharp testified at trial U.S.
16 Re's involvement in L&C's insolvency was limited to U.S. Re's recommendation and
17 procurement of reinsurance. (Sept. 28, 2021 Trial Tr. at 46:6-15, 63:8-13). He also testified that,
18 while the total insolvency damages were approximately \$15 million dollars, the reinsurance
19 program's detrimental impact on the insolvency of Lewis and Clark was approximately \$8 million
20 dollars, or, more specifically, \$7,986,000. *See* Oct. 1, 2021 Trial Tr. (Ex. E) at 72:9-24; Oct. 5,
21 2021 Trial Tr. (Ex. F) at 79:19-25). Mr. Kuga then testified that the \$7,986,000 in reinsurance
22 damages were included in, or in other words were part of, his total calculation for insolvency
23 damages, which was \$15,222,853. *See* Oct. 5, 2021 Trial Tr. (Ex. F) at 86:24-87:23.

24 The maximum amount of reinsurance damages attributable to U.S. Re, therefore, is
25 \$7,986,000. The jury, however, exceeded this amount when it attributed 55% of the entire
26 insolvency—or \$8,372,569.15—to U.S. Re. Because there is no basis in the record for an award
27 of \$8,372,569.15 against U.S. Re, the damages awarded against U.S. Re cannot stand, and U.S.
28 Re should be relieved from all damages imposed against it on this basis as well.

...

CONCLUSION

U.S. Re should be relieved from the judgment entered against it because the jury relied on a flawed damages calculation, which (i) did not apply the proper measure of damages, (ii) was based on speculative testimony, and (iii) do not have a basis in the record, and the judgment should be amended to reflect that no damages against U.S. Re are proper. *See e.g. Gramanz v. T-Shirts and Souvenirs, Inc.*, 894 P.2d 342, 347, 111 Nev. 478, 485 (Nev. 1995) (vacating damage award where testimony and evidence at trial did not meet the “required evidentiary basis for determining a reasonably accurate award of damages.”) citing *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670, 682 (3d Cir.1991) (“a verdict may not be based on speculation, whether the testimony comes from the mouth of a lay witness or an expert”).

Accordingly, U.S. Re respectfully requests that the Court enter an order granting it relief from the December 30, 2021 Judgment and amending the Judgment to reflect that **no** damages shall be awarded against U.S. Re. Additionally, pursuant to Rule 62(b)(3) and (4), U.S. Re requests that this Court stay any execution of the Judgment pending disposition of this motion. *See* NRCP 62(b) (providing that the Court may stay execution on a judgment or any proceedings to enforce it pending disposition of, among other things, a motion to alter or amend a judgment under Rule 59 or a motion for relief from judgment under Rule 60).

DATED this 10th day of February, 2022.

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
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Marina Del Rey, CA. 90292

*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 10th day of February, 2022, a true and correct copy of the foregoing **MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b), TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e), AND FOR STAY OF EXECUTION PURSUANT TO 62(b)(3) and (4)** 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”

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

5:21pm

OCT 14 2021

DISTRICT COURT

BY: Nicole McDevitt
NICOLE MCDEVITT, DEPUTY

CLARK COUNTY, NEVADA

1 VER

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

9 Plaintiff,

10 vs.

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

16 Defendants.
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Case No. A-14-711535-C

Dept. No.: XXVII

VERDICT FORM

A-14-711535-C
VER
Verdict
4970826



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Negligent misrepresentation against Uni-Ter UMC:

ANSWER: YES / NO

2. Do you find by clear and convincing evidence that Uni-Ter UMC's negligent presentation was a legal cause of damages to Lewis & Clark?

ANSWER: YES X NO

Please proceed to question 3.

1 Breach of fiduciary duty against Uni-Ter UMC:

2 3. Do you find by a preponderance of the evidence that a fiduciary relationship
3 existed between Uni-Ter UMC and Lewis & Clark where Uni-Ter UMC was under a duty to act
4 for or to give advice for the benefit of Lewis & Clark upon matters within the scope of their
5 relationship?

6 ANSWER: YES X NO _____

7 **If your answer to question 3 directly above is "YES," go to question 4 directly**
8 **below. If your answer to question 3 directly above is "NO," skip to question 6.**

9
10 4. Do you find by a preponderance of the evidence that Uni-Ter UMC breached its
11 fiduciary duty to Lewis & Clark?

12 ANSWER: YES X NO _____

13 **If your answer to question 4 directly above is "YES," go to question 5 directly**
14 **below. If your answer to question 4 directly above is "NO," skip to question 6.**

15
16 5. Do you find by a preponderance of the evidence that Uni-Ter UMC's breach of
17 its fiduciary duty to Lewis & Clark was a legal cause of damages to Lewis & Clark?

18 ANSWER: YES X NO _____

19
20 **Please proceed to question 6.**

1 Breach of fiduciary duty against Uni-Ter CS:

2 6. Do you find by a preponderance of the evidence that a fiduciary relationship
3 existed between Uni-Ter CS and Lewis & Clark where Uni-Ter CS was under a duty to act for
4 or to give advice for the benefit of Lewis & Clark upon matters within the scope of their
5 relationship?

6 ANSWER: YES X NO _____

7 **If your answer to question 6 directly above is "YES," go to question 7 directly**
8 **below. If your answer to question 6 directly above is "NO," skip to question 9.**

9
10
11 7. Do you find by a preponderance of the evidence that Uni-Ter CS breached its
12 fiduciary duty to Lewis & Clark?

13 ANSWER: YES X NO _____

14 **If your answer to question 7 directly above is "YES," go to question 8 directly**
15 **below. If your answer to question 7 directly above is "NO," skip to question 9.**

16
17
18 8. Do you find by a preponderance of the evidence that Uni-Ter CS's breach of its
19 fiduciary duty to Lewis & Clark was the legal cause of damages to Lewis & Clark?

20 ANSWER: YES X NO _____

21 **Please proceed to question 9.**

1 Breach of fiduciary duty against U.S. Re:

2 9. Do you find by a preponderance of the evidence that a fiduciary relationship
3 existed between U.S. Re and Lewis & Clark where U.S. Re was under a duty to act for or to give
4 advice for the benefit of Lewis & Clark upon matters within the scope of their relationship?

5 ANSWER: YES X NO _____

6 **If your answer to question 9 directly above is "YES," go to question 10 directly**
7 **below. If your answer to question 9 directly above is "NO," skip to question 12.**

8
9
10 10. Do you find by a preponderance of the evidence that U.S. Re breached its
11 fiduciary duty to Lewis & Clark?

12 ANSWER: YES X NO _____

13 **If your answer to question 10 directly above is "YES," go to question 11 directly**
14 **below. If your answer to question 10 directly above is "NO," skip to question 12.**

15
16 11. Do you find by a preponderance of the evidence that U.S. Re's breach of its
17 fiduciary duty to Lewis & Clark was a legal cause of damages to Lewis & Clark?

18 ANSWER: YES X NO _____

19
20
21 **If your answer to question 2, 5, 8 or 11 was "YES", please proceed to question 12.**

22
23 **If your answers to questions 2, 5, 8 and 11 were "NO", please sign and date this**
24 **Special Verdict Form and notify the marshal.**

1 Damages

2 12. If your answer to question 2, 5, 8 or 11 was yes, what is the total amount of
3 damages you find Lewis & Clark incurred?

4 \$ 15,222,853

5
6 **Please proceed to question 13.**

7
8 Allocation of Liability

9 13. Using one hundred percent (100%) as the total combined percentage of liability
10 with respect to Plaintiff's claims for negligent misrepresentation and breach of fiduciary duty,
11 please allocate the percentage of that total liability to each respective Defendant, if any:

12 a. U.S. RE Corporation, Inc.:	<u>55</u>
13 b. Uni-Ter Underwriting Management Corporation:	<u>25</u>
14 c. Uni-Ter Claims Services Corporation	<u>20</u>

15 Total: 100%

16
17
18 *Please sign and date this Special Verdict Form and notify the marshal.*

19 DATED THIS 14 day of October, 2021.

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21 
22 FOREPERSON
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EXHIBIT “B”

JGJV

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

Case No.: A-14-711535-C

Dept. No.: XXVII

JUDGMENT ON JURY VERDICT

Trial: 9/20/2021 – 10/14/2021

This matter having been tried before a jury ("Jury") beginning September 20, 2021 through October 14, 2021; Plaintiff Commissioner of Insurance for the State of Nevada as Receiver for Lewis & Clark LTC Risk Retention Group, Inc. ("Plaintiff") having been represented by Brenoch Wirthlin, Esq., Chris Orme, Esq., and Tanya Fraser, Esq. of the law firm of Hutchison & Steffen, PLLC; Defendants U.S. Re Corporation ("U.S. Re"), Uni-Ter Underwriting Management Corp. ("Uni-Ter UMC") and Uni-Ter Claims Services Corp. ("Uni-Ter CS" and collectively with U.S.

1 Re and Uni-Ter UMC referred to as the “Corporate Defendants”) having been represented by Jon
2 M. Wilson, Esq. of the Law Offices of Jon M. Wilson, George F. Ogilvie III of the law firm of
3 McDonald Carano LLP, and Kimberly Freedman and Erin Kolmansberger of the law firm of
4 Nelson Mullins; the Jury having rendered its verdict which was presented in open Court on October
5 14, 2021 (“Verdict”); the Jury having made the following findings as set forth in the Verdict:

- 6 1. The Jury having found by clear and convincing evidence that Uni-Ter UMC made a
7 negligent misrepresentation(s) to Lewis & Clark LTC Risk Retention Group, Inc. (“Lewis
8 & Clark”) regarding Lewis & Clark’s financial condition, on which Lewis & Clark
9 justifiably relied;
- 10 2. The Jury having found by clear and convincing evidence that Un-Ter UMC’s negligent
11 misrepresentation(s) was a legal cause of damages to Lewis & Clark;
- 12 3. The Jury having found by a preponderance of the evidence that a fiduciary relationship
13 existed between Uni-Ter UMC and Lewis & Clark where Uni-Ter UMC was under a duty
14 to act for or give advice for the benefit of Lewis & Clark upon matters within the scope of
15 their relationship;
- 16 4. The Jury having found by a preponderance of the evidence that Uni-Ter UMC breached its
17 fiduciary duty to Lewis & Clark;
- 18 5. The Jury having found by a preponderance of the evidence that Uni-Ter UMC’s breach of
19 its fiduciary duty to Lewis & Clark was a legal cause of damages to Lewis & Clark;
- 20 6. The Jury having found by a preponderance of the evidence that a fiduciary relationship
21 existed between Uni-Ter CS and Lewis & Clark where Uni-Ter CS was under a duty to act
22 for or to give advice for the benefit of Lewis & Clark upon matters within the scope of their
23 relationship;
- 24 7. The Jury having found by a preponderance of the evidence that Uni-Ter CS breached its
25 fiduciary duty to Lewis & Clark;
- 26 8. The Jury having found by a preponderance of the evidence that Uni-Ter CS’s breach of its
27 fiduciary duty to Lewis & Clark was a legal cause of damages to Lewis & Clark;
- 28 9. The Jury having found by a preponderance of the evidence that a fiduciary relationship

1 existed between U.S. Re and Lewis & Clark where U.S. Re was under a duty to act for or
2 to give advice for the benefit of Lewis & Clark upon matters within the scope of their
3 relationship;

4 10. The Jury having found by a preponderance of the evidence that U.S. Re breached its
5 fiduciary duty to Lewis & Clark;

6 11. The Jury having found by a preponderance of the evidence that U.S. Re's breach of its
7 fiduciary duty to Lewis & Clark was a legal cause of damages to Lewis & Clark;

8 12. The Jury having found that the amount of damages incurred by Lewis & Clark totaled the
9 principal amount of \$15,222,853.00;

10 13. The Jury having determined that the liability for Plaintiff's claims of negligent
11 misrepresentation and breach of fiduciary duty should be allocated with respect to each of
12 the Corporate Defendants as follows:

- 13 a. Fifty-five percent (55%) to U.S. Re Corporation;
- 14 b. Twenty-five percent (25%) to Uni-Ter Underwriting Management Corporation;
- 15 c. Twenty percent (20%) to Uni-Ter Claims Services Corporation.

16 NOW THEREFORE, based upon the findings by the Jury as set forth in its Verdict, and
17 good cause appearing,

18 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that based upon the Jury's
19 Verdict, judgment against defendant U.S. Re Corporation is hereby entered in the principal amount
20 of \$8,372,569.15.

21 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that, U.S. Re
22 Corporation having been served with the summons and complaint in this matter on March 12,
23 2015, pre-judgment interest is hereby awarded against U.S. Re Corporation pursuant to NRS §
24 17.130(2) in the additional amount of \$2,109,887.43¹, for a total principal judgment against U.S.
25 Re Corporation in the amount of \$10,482,456.58, which amount does not include post-judgment

26
27 ¹ Calculated at the rate of 5.25% over 1,752 days (March 12, 2015, when U.S. Re Corporation was
28 served with the summons and complaint, through December 23, 2021, less 726 days during periods
 of stay) pursuant to NRS § 17.130.

1 interest, attorney fees or costs, which amounts may be awarded by post trial motion.

2 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that based upon
3 the Jury's Verdict, judgment against defendant Uni-Ter Underwriting Management Corporation is
4 hereby entered in the principal amount of \$3,805,713.25.

5 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that, Uni-Ter
6 Underwriting Management Corporation having been served with the summons and complaint in
7 this matter on March 11, 2015, pre-judgment interest is hereby awarded against Uni-Ter
8 Underwriting Management Corporation pursuant to NRS § 17.130(2) in the additional amount of
9 \$959,587.14², for a total principal judgment against Uni-Ter Underwriting Management
10 Corporation in the amount of \$4,765,300.39, which amount does not include post-judgment
11 interest, attorney fees or costs, which amounts may be awarded by post trial motion.

12 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that based upon
13 the Jury's Verdict, judgment against defendant Uni-Ter Claims Services Corporation is hereby
14 entered in the principal amount of \$3,044,570.60.

15 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that, Uni-Ter
16 Claims Services Corporation having been served with the summons and complaint in this matter
17 on March 11, 2015, pre-judgment interest is hereby awarded against Uni-Ter Claims Services
18 Corporation pursuant to NRS § 17.130(2) in the additional amount of \$767,669.71³, for a total
19 principal judgment against Uni-Ter Underwriting Claims Services Corporation in the amount of
20 \$3,812,240.31, which amount does not include post-judgment interest, attorney fees or costs,
21 which amounts may be awarded by post trial motion.⁴

22 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED, pursuant to NRS
23 _____

24 ² Calculated at the rate of 5.25% over 1,753 days (March 11, 2015, when Uni-Ter Underwriting
25 Management Corporation was served with the summons and complaint, through December 23,
2021, less 726 days during periods of stay) pursuant to NRS § 17.130.

26 ³ Calculated at the rate of 5.25% over 1,753 days (March 11, 2015, when Uni-Ter Claims Services
27 Corporation was served with the summons and complaint, through December 23, 2021, less 726
days during periods of stay) pursuant to NRS § 17.130.

28 ⁴ Pursuant to NRS § 18.120, the following blank is left in this judgment for costs to be included
within the judgment once the same shall be taxed or ascertained:_____.

1 § 18.120, and other applicable law, that all said judgment amounts hereby entered against the
2 Corporate Defendants, and each of them, shall bear post-judgment interest at the Nevada statutory

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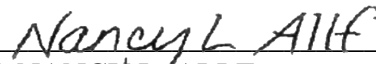
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interest rate per annum from the date of award until fully satisfied, for all of which let execution and garnishment issue forthwith.⁵

DATED: December 27, 2021.

Dated this 30th day of December, 2021


HON. NANCY L. ALLF TW
DISTRICT COURT JUDGE
449 33C 9DF7 6302
Nancy Allf
District Court Judge

HUTCHISON & STEFFEN, PLLC

By: /s/ Brenoch Wirthlin
MARK A. HUTCHISON, ESQ. (4639)
BRENOCH R. WIRTHLIN, ESQ. (10282)
CHRISTIAN ORME, ESQ. (10175)
TANYA M. FRASER, ESQ. (13872)
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Plaintiff

Approved as to Form:

By: /s/ George Ogilvie
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*)
200 Biscayne Blvd Way, Suite 5107
Miami, FL 33131
Telephone: (310) 626-2216
jonwilson@jonmwilsonattorney.com

⁵ Plaintiff expressly reserves the right to seek costs against the Corporate Defendants, and each of them, pursuant to NRS § 18.110 or other applicable law, and attorney fees against the Corporate Defendants, and each of them, pursuant to NRCP 68 and NRS § 17.117 or other applicable law.

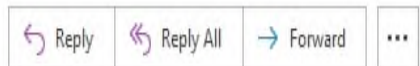
RE: Lewis & Clark



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

To: Brenoch R. Wirthlin; Christian M. Orme; Tanya M. Fraser

Cc: Jon; Jon Wilson; Kimberly Freedman; erin Kolmansberger; Amanda Yen; Jon Linder; No Scrub



Wed 12/22/2021 6:18 PM

 Click here to download pictures. To help protect your privacy, Outlook prevented automatic download of some pictures in this message.

Brenoch,

I have reviewed the revised judgment and checked your math. It is in compliance with our requested edits and the math is accurate. Therefore, you may affix my electronic signature.

I see what you are saying about NRS 18.120; however, that will lead to two different documents entitled "Judgment" in the record. I think it is cleaner to exclude the footnote and the blank in the Judgment, and then submit an Amended Judgment once the costs and attorney's fees issues are adjudicated, but I am not adamant about it.

George F. Ogilvie III | Partner

McDONALD CARANO

P: 702.873.4100 | E: gogilvie@mcdonaldcarano.com

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

Sent: Wednesday, December 22, 2021 4:36 PM

To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Christian M. Orme <COrme@hutchlegal.com>; Tanya M. Fraser <tfraser@hutchlegal.com>

Cc: Jon <jonwilson@jonmwilsonattorney.com>; Jon Wilson <jonwilson2013@gmail.com>; Kimberly Freedman <Kimberly.Freedman@nelsonmullins.com>; erin Kolmansberger <erin.kolmansberger@nelsonmullins.com>; Amanda Yen <ayen@mcdonaldcarano.com>; Jon Linder <jlinder@hutchlegal.com>; No Scrub <NoScrub@mcdonaldcarano.com>

Subject: RE: Lewis & Clark

George and Jon, I accepted all the changes you made and revised the amounts based on the calculation of pre-judgment interest through tomorrow, December 23. In addition, my reading of 18.120 says we're supposed to leave a blank for costs so I added a footnote with a blank for costs. A redline and clean copy pdf are attached.

If we can attach your electronic signature and submit to the Court, please let me know. Alternatively, we can submit a joint email to the Court's clerk and see if the judge has a preference one way or the other.

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Judgment on Jury Verdict 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: 12/30/2021

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

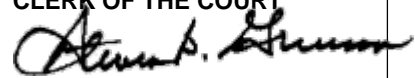
1	Marilyn Millam .	mmillam@ag.nv.gov
2	Nevada Attorney General .	wiznetfilings@ag.nv.gov
3	Paul Garcia .	pgarcia@fclaw.com
4	Renee Rittenhouse .	rrittenhouse@lipsonneilson.com
5	Rory Kay .	rkay@mcdonaldcarano.com
6	Susana Nutt .	snutt@lipsonneilson.com
7	Yusimy Bordes .	ybordes@broadandcassel.com
8	Jelena Jovanovic .	jjovanovic@mcdonaldcarano.com
9	Karen Surowiec	ksurowiec@mcdonaldcarano.com
10	Patricia Lee	plee@hutchlegal.com
11	Kimberly Freedman	kfreedman@broadandcassel.com
12	Christian Orme	corne@hutchlegal.com
13	Danielle Kelley	dkelley@hutchlegal.com
14	Jonathan Wong	jwong@lipsonneilson.com
15	Betsy Gould	bgould@doi.nv.gov
16	Erin Kolmansberger	erin.kolmansberger@nelsonmullins.com
17	Melissa Gomberg	melissa.gomberg@nelsonmullins.com
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	Brenoch Wirthlin	bwirthlin@hutchlegal.com
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Jon Linder

jlinder@hutchlegal.com

EXHIBIT “C”



1 **NEO**

2 MARK A. HUTCHISON, ESQ. (4639)

3 BRENOCH R. WIRTHLIN, ESQ. (10282)

4 CHRISTIAN ORME, ESQ. (10175)

5 **HUTCHISON & STEFFEN**

6 10080 West Alta Drive, Suite 200

7 Las Vegas, Nevada 89145

8 Telephone: (702) 385.2500

9 Facsimile: (702) 385.2086

10 E-Mail: mhutchison@hutchlegal.com

11 E-Mail: bwirthlin@hutchlegal.com

12 E-Mail: corne@hutchlegal.com

13 *Attorneys for Plaintiff*

14 **DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

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

20 Plaintiff,

21 vs.

22 ROBERT CHUR, STEVE FOGG, MARK
23 GARBER, CAROL HARTER, ROBERT
24 HURLBUT, BARBARA LUMPKIN, JEFF
25 MARSHALL, ERIC STICKELS, UNI-TER
26 UNDERWRITING MANAGEMENT CORP.,
27 UNI-TER CLAIMS SERVICES CORP., and
28 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 a Judgment on Jury Verdict was entered on the 30th day of
December, 2021,

///

///

///

1 a copy of which is attached hereto.

2 DATED this 13th day of January, 2022.

3 HUTCHISON & STEFFEN

4

5 By /s/Brenoch Wirthlin
6 MARK A. HUTCHISON, ESQ. (4639)
7 BRENOCH R. WIRTHLIN, ESQ. (10282)
8 CHRISTIAN ORME, ESQ. (10175)
9 10080 West Alta Drive, Suite 200
10 Las Vegas, Nevada 89145
11 *Attorneys for Plaintiff*
12
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 13th day of January, 2022, 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

JGJV

MARK A. HUTCHISON, ESQ. (4639)
BRENOCH R. WIRTHLIN, ESQ. (10282)
CHRISTIAN ORME, ESQ. (10175)
TANYA M. FRASER, ESQ. (13872)
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Facsimile: (702) 385.2086
E-Mail: mhutchison@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

JUDGMENT ON JURY VERDICT

Trial: 9/20/2021 – 10/14/2021

This matter having been tried before a jury ("Jury") beginning September 20, 2021 through October 14, 2021; Plaintiff Commissioner of Insurance for the State of Nevada as Receiver for Lewis & Clark LTC Risk Retention Group, Inc. ("Plaintiff") having been represented by Brenoch Wirthlin, Esq., Chris Orme, Esq., and Tanya Fraser, Esq. of the law firm of Hutchison & Steffen, PLLC; Defendants U.S. Re Corporation ("U.S. Re"), Uni-Ter Underwriting Management Corp. ("Uni-Ter UMC") and Uni-Ter Claims Services Corp. ("Uni-Ter CS" and collectively with U.S.

1 Re and Uni-Ter UMC referred to as the “Corporate Defendants”) having been represented by Jon
2 M. Wilson, Esq. of the Law Offices of Jon M. Wilson, George F. Ogilvie III of the law firm of
3 McDonald Carano LLP, and Kimberly Freedman and Erin Kolmansberger of the law firm of
4 Nelson Mullins; the Jury having rendered its verdict which was presented in open Court on October
5 14, 2021 (“Verdict”); the Jury having made the following findings as set forth in the Verdict:

- 6 1. The Jury having found by clear and convincing evidence that Uni-Ter UMC made a
7 negligent misrepresentation(s) to Lewis & Clark LTC Risk Retention Group, Inc. (“Lewis
8 & Clark”) regarding Lewis & Clark’s financial condition, on which Lewis & Clark
9 justifiably relied;
- 10 2. The Jury having found by clear and convincing evidence that Un-Ter UMC’s negligent
11 misrepresentation(s) was a legal cause of damages to Lewis & Clark;
- 12 3. The Jury having found by a preponderance of the evidence that a fiduciary relationship
13 existed between Uni-Ter UMC and Lewis & Clark where Uni-Ter UMC was under a duty
14 to act for or give advice for the benefit of Lewis & Clark upon matters within the scope of
15 their relationship;
- 16 4. The Jury having found by a preponderance of the evidence that Uni-Ter UMC breached its
17 fiduciary duty to Lewis & Clark;
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21 existed between Uni-Ter CS and Lewis & Clark where Uni-Ter CS was under a duty to act
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23 relationship;
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25 fiduciary duty to Lewis & Clark;
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27 fiduciary duty to Lewis & Clark was a legal cause of damages to Lewis & Clark;
- 28 9. The Jury having found by a preponderance of the evidence that a fiduciary relationship

1 existed between U.S. Re and Lewis & Clark where U.S. Re was under a duty to act for or
2 to give advice for the benefit of Lewis & Clark upon matters within the scope of their
3 relationship;

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5 fiduciary duty to Lewis & Clark;

6 11. The Jury having found by a preponderance of the evidence that U.S. Re's breach of its
7 fiduciary duty to Lewis & Clark was a legal cause of damages to Lewis & Clark;

8 12. The Jury having found that the amount of damages incurred by Lewis & Clark totaled the
9 principal amount of \$15,222,853.00;

10 13. The Jury having determined that the liability for Plaintiff's claims of negligent
11 misrepresentation and breach of fiduciary duty should be allocated with respect to each of
12 the Corporate Defendants as follows:

13 a. Fifty-five percent (55%) to U.S. Re Corporation;

14 b. Twenty-five percent (25%) to Uni-Ter Underwriting Management Corporation;

15 c. Twenty percent (20%) to Uni-Ter Claims Services Corporation.

16 NOW THEREFORE, based upon the findings by the Jury as set forth in its Verdict, and
17 good cause appearing,

18 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that based upon the Jury's
19 Verdict, judgment against defendant U.S. Re Corporation is hereby entered in the principal amount
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22 Corporation having been served with the summons and complaint in this matter on March 12,
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24 17.130(2) in the additional amount of \$2,109,887.43¹, for a total principal judgment against U.S.
25 Re Corporation in the amount of \$10,482,456.58, which amount does not include post-judgment
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27 ¹ Calculated at the rate of 5.25% over 1,752 days (March 12, 2015, when U.S. Re Corporation was
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16 Claims Services Corporation having been served with the summons and complaint in this matter
17 on March 11, 2015, pre-judgment interest is hereby awarded against Uni-Ter Claims Services
18 Corporation pursuant to NRS § 17.130(2) in the additional amount of \$767,669.71³, for a total
19 principal judgment against Uni-Ter Underwriting Claims Services Corporation in the amount of
20 \$3,812,240.31, which amount does not include post-judgment interest, attorney fees or costs,
21 which amounts may be awarded by post trial motion.⁴

22 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED, pursuant to NRS
23 _____

24 ² Calculated at the rate of 5.25% over 1,753 days (March 11, 2015, when Uni-Ter Underwriting
25 Management Corporation was served with the summons and complaint, through December 23,
2021, less 726 days during periods of stay) pursuant to NRS § 17.130.

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27 Corporation was served with the summons and complaint, through December 23, 2021, less 726
days during periods of stay) pursuant to NRS § 17.130.

28 ⁴ Pursuant to NRS § 18.120, the following blank is left in this judgment for costs to be included
within the judgment once the same shall be taxed or ascertained: _____.

1 § 18.120, and other applicable law, that all said judgment amounts hereby entered against the
2 Corporate Defendants, and each of them, shall bear post-judgment interest at the Nevada statutory

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interest rate per annum from the date of award until fully satisfied, for all of which let execution and garnishment issue forthwith.⁵

DATED: December 27, 2021.

Dated this 30th day of December, 2021


HON. NANCY L. ALLF TW
DISTRICT COURT JUDGE
449 33C 9DF7 6302
Nancy Allf
District Court Judge

HUTCHISON & STEFFEN, PLLC

By: /s/ Brenoch Wirthlin
MARK A. HUTCHISON, ESQ. (4639)
BRENOCH R. WIRTHLIN, ESQ. (10282)
CHRISTIAN ORME, ESQ. (10175)
TANYA M. FRASER, ESQ. (13872)
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Plaintiff

Approved as to Form:

By: /s/ George Ogilvie
George F. Ogilvie III, Esq.
Nevada Bar No. 3552
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Facsimile: (702) 873-9966
gogilvie@mcdonaldcarano.com

Jon M. Wilson, Esq. (Appearing *Pro Hac Vice*)
200 Biscayne Blvd Way, Suite 5107
Miami, FL 33131
Telephone: (310) 626-2216
jonwilson@jonmwilsonattorney.com

⁵ Plaintiff expressly reserves the right to seek costs against the Corporate Defendants, and each of them, pursuant to NRS § 18.110 or other applicable law, and attorney fees against the Corporate Defendants, and each of them, pursuant to NRCP 68 and NRS § 17.117 or other applicable law.

RE: Lewis & Clark



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

To: Brenoch R. Wirthlin; Christian M. Orme; Tanya M. Fraser

Cc: Jon; Jon Wilson; Kimberly Freedman; erin Kolmansberger; Amanda Yen; Jon Linder; No Scrub



Wed 12/22/2021 6:18 PM

 Click here to download pictures. To help protect your privacy, Outlook prevented automatic download of some pictures in this message.

Brenoch,

I have reviewed the revised judgment and checked your math. It is in compliance with our requested edits and the math is accurate. Therefore, you may affix my electronic signature.

I see what you are saying about NRS 18.120; however, that will lead to two different documents entitled "Judgment" in the record. I think it is cleaner to exclude the footnote and the blank in the Judgment, and then submit an Amended Judgment once the costs and attorney's fees issues are adjudicated, but I am not adamant about it.

George F. Ogilvie III | Partner

McDONALD CARANO

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

Sent: Wednesday, December 22, 2021 4:36 PM

To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Christian M. Orme <COrme@hutchlegal.com>; Tanya M. Fraser <tfraser@hutchlegal.com>

Cc: Jon <jonwilson@jonmwilsonattorney.com>; Jon Wilson <jonwilson2013@gmail.com>; Kimberly Freedman <Kimberly.Freedman@nelsonmullins.com>; erin Kolmansberger <erin.kolmansberger@nelsonmullins.com>; Amanda Yen <ayen@mcdonaldcarano.com>; Jon Linder <jlinder@hutchlegal.com>; No Scrub <NoScrub@mcdonaldcarano.com>

Subject: RE: Lewis & Clark

George and Jon, I accepted all the changes you made and revised the amounts based on the calculation of pre-judgment interest through tomorrow, December 23. In addition, my reading of 18.120 says we're supposed to leave a blank for costs so I added a footnote with a blank for costs. A redline and clean copy pdf are attached.

If we can attach your electronic signature and submit to the Court, please let me know. Alternatively, we can submit a joint email to the Court's clerk and see if the judge has a preference one way or the other.

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)

9 vs.

10 Robert Chur, Defendant(s)

CASE NO: A-14-711535-C

DEPT. NO. Department 27

11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Judgment on Jury Verdict 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: 12/30/2021

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Jon Linder

jlinder@hutchlegal.com

EXHIBIT “D”

1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 COMMISSIONER OF INSURANCE
9 FOR THE STATE OF NEVADA AS
10 RECEIVER OF LEWIS AND CLARK,

11 Plaintiff,

12 vs.

13 ROBERT CHUR, ET AL.,

14 Defendants.

) CASE#: A-14-711535-C

) DEPT. XXVII

15 BEFORE THE HONORABLE NANCY ALLF
16 DISTRICT COURT JUDGE
17 TUESDAY, SEPTEMBER 28, 2021

18 **RECORDER'S PARTIAL TRANSCRIPT OF JURY TRIAL -**
19 **TESTIMONY OF MARK D. THARP**

20 APPEARANCES:

21 For the Plaintiff:

22 BRENOCH WIRTHLIN, ESQ.
23 CHRISTIAN M. ORME, ESQ.
24 TONYA FRASER, ESQ.

25 For the Defendants:

GEORGE F. OGILVIE, III, ESQ.
JON M. WILSON, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

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None

FOR THE DEFENDANT

MARKED

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None

1 MR. WIRTHLIN: Yes. He simply answered the question.
2 However, I would withdraw that aspect of it and ask it separately.

3 THE COURT: So disregard the last question and answer, and
4 there will be another question.

5 BY MR. WIRTHLIN:

6 Q With respect simply to the procurement aspect of Re
7 Insurance for Lewis and Clark, what obligations and actions did U.S. RE
8 take with respect to just the procurement?

9 A Well, it -- U.S. RE recommended a reinsurance program to
10 Lewis and Clark. And that -- that reinsurance program was approved by
11 the board of directors.

12 Q When you say that U.S. RE recommended a reinsurance
13 program, what went into the process of that recommendation?

14 A Identification of a reinsurance program that U.S. RE
15 recommended for Lewis and Clark.

16 Q When we talk -- you talked a little bit about -- I think it was
17 actually brought up earlier -- different types of reinsurance. What are
18 those? And can you explain just briefly to the jury how those -- I guess,
19 what exactly the types of reinsurance are that U.S. procured or tried to
20 procure?

21 A Yeah. Sure. So the excess of loss reinsurance is reinsurance
22 that is out of reach in large part for Lewis & Clark because of the high
23 deductible on the front end, the \$350,000, or what we call retention
24 sometimes. Which is to say most claims that are incurred by Lewis and
25 Clark were within the \$350,000 deductible. So it's not until claims go

1 above \$350,000, that there's some transfer or session to the reinsurer.
2 And that was somewhat rare. There's also a quota share arrangement of
3 reinsurance, which is a percentage session on every loss. So if there's,
4 for example, a \$50,000 quota -- 50 percent quota share -- I'm sorry -- 50
5 percent quota share reinsurance treaty in place, and there's \$100,000
6 claim, Lewis & Clark keeps \$50,000 of the premium and would cover
7 \$50,000 of the losses. And the reinsurer would get 50 percent of the
8 premium and would cover 50 percent of the losses.

9 There are also various other kinds of reinsurance, one of which is
10 facultative. And it's a risk-by-risk session to a reinsurer, which doesn't
11 apply here. But at least two options for Lewis and Clark would be the
12 excess of loss that was recommended by U.S. RE, and the quota share
13 program, which was not recommended by U.S. RE.

14 Q And in developing your opinions in this case with respect to
15 reinsurance, what specific documents did you review in -- in making
16 those determinations?

17 A I used -- I reviewed the reinsurance agreements and the
18 accountings of -- under the excess of loss reinsurance program.

19 Q And what did you do in terms of the impact of the
20 reinsurance program that Lewis and Clark had?

21 A Yeah. The impact of the excess of loss reinsurance program
22 was hurtful to Lewis and Clark in a big way.

23 Q What do you mean by that?

24 A So Lewis and Clark paid 10 -- over time -- over a nine-year
25 period of time, Lewis and Clark paid \$10,000,000 of premium to the

1 excess of loss reinsurers. And during that same period of time, only
2 \$2,000,000 of losses were reimbursed. So it was an -- it was a -- it was a
3 \$8,000,000 loss to Lewis and Clark during that period of time.

4 Q Let's go back a little bit to the mergers. We talked a little bit
5 earlier about Henry Hudson and Sophia Palmer. What did -- what type of
6 business did Sophia Palmer handle?

7 A Nurses. Nurses and allied nonprofessionals.

8 Q And how did that relate to the business that Lewis and Clark
9 had been insuring up to that point?

10 A It didn't. It did not relate to the nursing home business. In
11 fact, it was a deviation under the business plan and the articles and
12 corporation of Lewis and Clark. A new line of business that Lewis and
13 Clark was unfamiliar with.

14 Q What are economies of scale?

15 A Economies of scale, it's a business term. You've all probably
16 heard of it. It has to do with being able to enjoy cost reduction in an
17 income stream that remains steady. So you might have the same
18 amount of income coming in over time. But if you're able to reduce cost,
19 then that's what's referred to as economies of scale because of the cost
20 reduction that you're able to enjoy.

21 Q And what impact, if any, with respect to economies of scale
22 did either the merger of Henry Hudson or Sophia Palmer have on Lewis
23 and Clark?

24 A The documents talk in terms of the mergers resulting in
25 certain economies of scale. But the economies of scale were not -- if

1 Insurance has for you.

2 Q And we'll talk about some of those terms, but roughly -- or I
3 guess generally, what is a -- how do you do -- perform a solvency
4 analysis?

5 A Yes. I talked a -- I talked a little bit about that this morning.
6 On Lewis and Clark, we had two adjustments. One was the deferred tax
7 asset year over year, which I can talk about in a minute, if you'd like, and
8 the other one is, you know, the adjustments to the reserves that were
9 necessary to bring them up to adequate levels.

10 Q Again, please talk about each of those.

11 A Okay. So the deferred tax asset is an -- is an asset that was
12 carried on the balance sheet of Lewis and Clark, and it was a -- it was an
13 asset in recognition of losses that had occurred previously -- operating
14 losses that had occurred previously in the history of Lewis and Clark.
15 And -- or were meant to be used to offset future income and future
16 operating losses that Lewis and Clark was projected to have.

17 But there are some very strict rules to that asset. Not the least of
18 which are the company, Lewis and Clark has to be a growing concern.
19 Lewis and Clark has to have operating income, operating gains. Lewis
20 and Clark has to be not in some form of receivership and not in a
21 position to stop writing business. And then the main requirement is that
22 it's more likely than not that Lewis and Clark will continue to be
23 profitable. And none of those were true so that asset was inappropriate
24 to be carried on Lewis and Clark's balance sheet.

25 Q We talked a little bit earlier, and you were mentioning, you

1 know, we were talking about kind of the corporate structure of Uni-Ter
2 and U.S. RE. What oversight if any was there on U.S. RE with respect to
3 Uni-Ter and U.S. RE in terms of their work that they were doing for Lewis
4 and Clark?

5 A Oversight by U.S. RE over Uni-Ter?

6 Q Yes, or vice versa or anything else related to that aspect of
7 carrying out those responsibilities for Lewis and Clark.

8 A Yeah. Well, there was -- there seemed to be autonomy as
9 between the operations of Lewis and Clark and the placement of
10 reinsurance. They were mutually exclusive, so Uni-Ter was the manager
11 -- was the management team of Lewis and Clark. U.S. RE was only
12 concerned it seemed with placing reinsurance. And so the two were
13 separate and apart.

14 Q And what overlap if any was there between the management
15 of the Uni-Ter entities and U.S. RE?

16 A There was overlap in the -- on the board of directors, and
17 then the officers and directors.

18 Q Could you talk about that a little bit?

19 A And in what regard?

20 Q Well, what overlap was there in terms of who was on those
21 boards and the management aspect of that?

22 A Yeah. So on U.S. RE companies and U.S. RE Corporation,
23 Tal Piccione was the CEO. Dick Davies was an officer. They were also
24 on the board. Same with U.S. RE Corporation. I believe Mr. Fedor was
25 on the board. Oh, Sandy Elsass by the way, was on the board of U.S. RE

EXHIBIT “E”

1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 COMMISSIONER OF INSURANCE
9 FOR THE STATE OF NEVADA AS
10 RECEIVER OF LEWIS AND CLARK,

11 Plaintiff,

12 vs.

13 ROBERT CHUR, ET AL.,

14 Defendants.

) CASE#: A-14-711535-C

) DEPT. XXVII

15
16 BEFORE THE HONORABLE NANCY ALLF
17 DISTRICT COURT JUDGE
18 FRIDAY, OCTOBER 1, 2021

19 **RECORDER'S PARTIAL TRANSCRIPT OF JURY TRIAL -**
20 **TESTIMONY OF MARK D. THARP**

21 APPEARANCES:

22 For the Plaintiff:

23 BRENOCH WIRTHLIN, ESQ.
24 CHRISTIAN M. ORME, ESQ.
25 TONYA FRASER, ESQ.

For the Defendants:

GEORGE F. OGILVIE, III, ESQ.
JON M. WILSON, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

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None		
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<u>FOR THE DEFENDANT</u>	<u>MARKED</u>	<u>RECEIVED</u>
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None		
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1 A Well, nobody within the holding company provided that
2 scrutiny.

3 Q How'd that impact Lewis and Clark?

4 A Negatively.

5 Q In what ways?

6 A Well, it's -- you know, you have the -- you have the common
7 interlocking directorates managing all aspects of Lewis and Clark, both
8 day to day to the management agreement, which is all encompassing.
9 You know, all the areas of an -- all the operational areas of an insurance
10 company. And then you have another entity in the interlocking directors,
11 U.S. RE, that's providing the reinsurance programs for Lewis and Clark,
12 recommending the reinsurance programs to Lewis and Clark, and then
13 acting as a consultant to Lewis and Clark.

14 Q And what would -- oh, I'm sorry.

15 A Well, no. I was done. Thank you.

16 Q What would you have expected to see in that kind of
17 situation?

18 MR. WILSON: Objection, Your Honor. What he expected to
19 see.

20 THE COURT: Objection sustained.

21 MR. WIRTHLIN: That's fine. I'll withdraw the question.

22 BY MR. WIRTHLIN:

23 Q What did you see in terms of -- when you talk about the
24 scrutiny and the related party transactions, what did you see in terms of
25 U.S. RE's -- specifically, U.S. RE's brokering of reinsurance for Lewis and

1 Clark?

2 A Yeah. What I saw was the brokering of a reinsurance
3 program that was wholly detrimental and damaging to Lewis and Clark
4 over a nine-year period of time without any scrutiny whatsoever from
5 the board of directors, because the board of directors knew absolutely
6 nothing about reinsurance. They depended 100 percent on U.S. RE for
7 that. And the same with regard to the day-to-day management of Lewis
8 and Clark, the suppression of reserves and the like. You know, the board
9 of directors had no knowledge whatsoever about how to run an
10 insurance company. They depended on the U.S. RE Defendants in that
11 regard, A to Z. They didn't know how to run an insurance company.
12 That's why they hired the U.S. RE Defendants.

13 And, you know, I would just say the board was very competent in
14 their own skills sets, in running a -- nursing homes and would have --
15 was a good tool for -- to assist in studying reserves and the like, but
16 certainly no knowledge whatsoever about how to run an insurance
17 company.

18 Q Look at Exhibit 399 if you could. And do you recognize that
19 document, Mr. Tharp?

20 A Yes. It's a broker authorization contract.

21 Q Okay. And you see that's -- paragraph 2 there, it's June 12,
22 2012?

23 A Yes.

24 Q And then on the last page of that document, paragraph 13,
25 both parties will comply with all statutes and regulations governing this

1 than honest. There's no evidence of any kind. And he's -- to sit there
2 and call somebody and impugn somebody that they're not honest is
3 inappropriate.

4 MR. WIRTHLIN: Your Honor, there's been sufficient evidence
5 on that issue specifically.

6 THE COURT: Objection is overruled.

7 MR. WIRTHLIN: Thank you.

8 BY MR. WIRTHLIN:

9 Q Now, Mr. Tharp -- and I'm not sure if I've asked you if I had
10 not. What was the total insolvency for Lewis and Clark that you
11 determined?

12 A Yeah, it's -- I have an exhibit on that, if it's handy. It's Exhibit
13 AB in -- in my report. So yeah. Very good. Thank you. So if you look at
14 the September 30, 2019 column, the first column. So you'll see that the
15 cert -- the line -- the line about two-thirds of the way down, it's called --
16 one more click. Thank you. It's called surplus -- to the left. And I'm
17 sorry. It's called surplus paren -- insolvency paren, and you'll see
18 \$12,082,657. That's the insolvency of Lewis and Clark with respect to the
19 nursing home claimants, the insureds that had claimants. And then
20 below that, you'll see surplus notes for 3.7 million. So if you take those
21 debt instruments into consideration, the insolvency is 15,782,000.

22 Q And what impact did the reinsurance program have on the
23 insolvency of Lewis and Clark in your opinion?

24 A It had a detrimental effect of \$8 million on Lewis and Clark.

25 Q How did you factor in, to the extent you did, approvals by the

1 not a reinsurance intermediary broker and you never have been an
2 insurance -- reinsurance intermediary broker, have you?

3 A That's correct.

4 Q Now, we talked about -- or you talked about on direct, quota
5 share. You talked about excessive loss reinsurance. You talked about
6 other types of reinsurance on an individual basis, facultative reinsurance.
7 What other reinsurance was available in the marketplace that you could
8 have placed for Lewis and Clark that would have been more financially
9 beneficial?

10 MR. WILSON: I'll just -- withdrawn, let me restate that
11 question.

12 BY MR. WILSON:

13 Q There wasn't any other reinsurance in the marketplace that
14 you could have placed Lewis and Clark that would have been more
15 beneficial than what was placed, correct?

16 A Incorrect.

17 Q Is it -- it's accurate that quota share was not available in the
18 marketplace for insuring risk retention groups, which insured long-term
19 health care facilities, nursing homes, and things of that nature, between
20 the time period of 2004 to 2012, correct?

21 A Quota share was available.

22 Q Tell me one -- do you know -- you don't know any particular
23 quota share policy or company that would have placed or could have
24 placed reinsurance for Lewis and Clark between 2004 and 2012?

25 A There would have been many.

1 Q All right, sir. You don't know for a fact that quota share was
2 available for a company like Lewis and Clark, do you?

3 A Yes. It's a negotiated process.

4 Q You didn't do any analysis, did you?

5 A I didn't do any analysis on the quota share, but it was
6 available in the marketplace through a negotiation process if you wanted
7 that type of reinsurance.

8 Q Is quota share more expensive than excess loss?

9 A Yes.

10 Q Heck of a lot more expensive, isn't it?

11 A It's more expensive.

12 Q A lot more expensive.

13 A Well, I don't know what you mean by a lot, but it's more
14 expensive.

15 Q Tell me what company -- do you know any companies where
16 you could have placed quota share for Lewis and Clark between 2004
17 and 2012? Any company. Just name one.

18 A I don't have a specific company, but there are lots of
19 companies. There are -- you know, there's 7,000-plus insurance
20 companies that do business in the United States.

21 Q I'm just asking you whether or not you can name one
22 company. You say it's available and should have been placed by U.S.
23 RE. Can you give me the name of one company where it could be
24 placed?

25 A There were hundreds. Hundreds of insurance --

1 Q Can you just give me a name?

2 A I'm not prepared to give you a name of an insurance
3 company, but I can tell you that the marketplace is such that if you put
4 the word out that you want a quota share reinsurance program for
5 nursing homes, you can get -- you can get companies to write that,
6 absolutely no question about it.

7 Q And you -- but you can't -- you cannot -- can't give me any
8 name of any company, any little town, whether it's London, Bermuda, or
9 the U.S., that would have, in fact, reinsured a thinly-capitalized company,
10 high-risk, like Lewis and Clark, between that time period, can you?

11 A No, I'm not going to give you a name. But there will be --
12 there would be many.

13 Q I'm just saying you've answered the question.

14 A Okay, fine.

15 Q Now, in your report, you had the analysis of 23 claims where
16 you made certain observations. Do you recall that?

17 A Yes.

18 Q And as it relates to those 23 claims and the observations you
19 made, you didn't read any of the files before you made the observations,
20 correct?

21 A The point I was making is -- can I just answer --

22 Q I've asked you a question. Did you read any of the files
23 before making your observations in your report?

24 A That wasn't the point of that list.

25 Q I'm asking --

EXHIBIT “F”

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

VS.

Defendants.

BEFORE THE HONORABLE NANCY ALLF
DISTRICT COURT JUDGE
TUESDAY, OCTOBER 5, 2021

APPEARANCES:

BRENOCH WIRTHLIN, ESQ.
CHRISTIAN M. ORME, ESQ.
TONYA FRASER, ESQ.

GEORGE F. OGILVIE, III, ESQ.
JON M. WILSON, ESQ.

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<u>FOR THE DEFENDANT</u>	<u>MARKED</u>	<u>RECEIVED</u>
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1 A Yeah, it was produced on the evening of July 9th, 2021. Just
2 after my deposition by Mr. Wilson.

3 Q And how many depositions were taken of you in this case?

4 A Two depositions.

5 Q When was the second one?

6 A The second one was on August 12th. And the purpose of the
7 second deposition was to look at that model so Mr. Wilson could ask me
8 questions about the model. And so that was the reason for the carryover
9 of the July 9th, 2021, deposition to August -- I believe it was August 12th,
10 2021.

11 Q You talked a little bit with Mr. Wilson about -- and I'm sorry
12 for jumping around. I'm just trying to focus on what was talked about.
13 You talked a little bit about, with Mr. Wilson, calculating reinsurance.
14 You know, I guess amounts paid and that type of thing. Viable support
15 and what they received, and so forth. How did you calculate those
16 amounts?

17 A Yeah, it was just -- you know, it was from the books and
18 records of the company. The financial statements as well as the
19 underlying records in the case. To determine that the reinsurance
20 program was a very, very bad idea for Lewis and Clark.

21 Q And what -- when you say that's a very bad idea, what do
22 you mean specifically?

23 A Yeah, it contributed significantly to the insolvency of Lewis
24 and Clark in that the reinsurer was paid \$10 million in premiums and
25 were only at risk for \$2 million in claims of the life of Lewis and Clark.

1 So it had a \$8 million adverse impact on Lewis and Clark.

2 Q Were there any other numbers or calculations that went into
3 that determination?

4 A Could you be more specific?

5 Q Specifically reinsurance recoverables?

6 A Oh, yes. Yes. Yes.

7 Q The fact they were [indiscernible].

8 A Well, there was a -- there's been some talk about a
9 reinsurance recoverable and in this case as a potential recovery that
10 remains out there. And I think that's what you're talking about.

11 Q I am, yes. How did that factor into your analysis?

12 A Yeah, I accounted for that 100 percent. In fact, during -- I
13 guess it was during my first deposition by Mr. Wilson, I went through
14 every component of that in my deposition with him, such that all of the
15 numbers were in the September 30, 2019, liquidating balance sheet,
16 which I prepared in this matter. Exhibit A-B in this case.

17 MR. WIRTHLIN: Can we take a look at that very briefly?

18 BY MR. WIRTHLIN:

19 Q While we're pulling that up, let's look to another matter, just
20 in the interest of time. You talked a little bit about claims manuals and
21 round tables and there were two claims manuals. How did the round
22 tables relate to those -- what was -- the directives in those claims
23 manuals?

24 A Yeah, all of those concepts were important to the process
25 and begins with the '05, the probable ultimate cost, and 30 days to post

1 conclusion.

2 MR. WIRTHLIN: Your Honor, they've opened the door.

3 THE COURT: Overruled.

4 THE WITNESS: In no way. And, you know, I'm just
5 reminding the jury that the board of directors are not defendants in this
6 case.

7 MR. WIRTHLIN: Thank you. No further questions.

8 THE COURT: And last bite at the apple?

9 FURTHER RECROSS-EXAMINATION

10 BY MR. WILSON:

11 Q Mr. Tharp, the board of directors were defendants in this
12 little right of appeal as Mr. Wirthlin said in his opening statement,
13 correct?

14 A I'm not a lawyer.

15 MR. WILSON: Thank you. No more questions.

16 THE COURT: One last bite at the apple?

17 MR. WIRTHLIN: No further questions, Your Honor.

18 THE COURT: Does the jury have questions for Mr. Tharp? If
19 we have -- good, we have a question. All right. Any other questions
20 being written? Come on up, you guys.

21 [Sidebar at 10:35 a.m., ending at 10:37 a.m., inaudible, not
22 transcribed]

23 THE COURT: Okay. Thank you. And I get to ask the
24 question. In your opinion or experience, is there a standard/average
25 amount or percentage of loss with reinsurance?

1 THE WITNESS: Yeah. Good question. So certainly, if you
2 are at an insurance company, and you have your hand on the pulse of
3 the reinsurance programs, you're going to monitor them very closely
4 year to year to year because they're costing you a lot of premium, \$10
5 million in this case. So I can say comfortably, if you're in charge of the
6 reinsurance programs, you would never ever sit there year after year
7 after year and ignore the results that were coming home to roost in the
8 form of losses to the insurance company.

9 So these programs should have absolutely been canceled
10 and be -- and be rewritten in the quota share, or a permitted practice that
11 I testified about. You can take your premium, place it in a trust, earn
12 interest on it, and at the end of the day, be the beneficiary of whatever
13 the trust account was to the -- to the insurance company's benefit.

14 THE COURT: Any other follow-up questions from the jury
15 based upon that? Any follow-up questions from the Plaintiff based upon
16 the jury's question?

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

18 THE COURT: Any follow-up from the Defense?

19 FURTHER RECROSS-EXAMINATION

20 BY MR. WILSON:

21 Q Mr. Tharp, U.S. RE Corp is not the insurance company, is it,
22 yes or no?

23 A That's not what I said. No. It's --

24 Q I know. I'm just asking.

25 A U.S. Re Corporation is not the insurance company.

1 had.

2 MR. ORME: Okay.

3 THE COURT: We -- do have a microphone.

4 THE WITNESS: Perfect.

5 THE MARSHAL: You want me to --

6 THE WITNESS: Yeah, why don't you just put both of them.

7 Okay. Just put that in here? Okay.

8 All right. So this is the first schedule that I prepared. If you
9 could just drop it down a little so they could see all of the heading.

10 There we go. So this -- okay. Can you bring it up to just here? Just so
11 that they can see net there, please.

12 BY MR. ORME:

13 Q Well, what is -- what is Exhibit 3.1?

14 A Exhibit 3.1 -- well, I guess you should show the heading.
15 Look at the heading. 3.1 is at the top. It's the calculation -- this is the
16 reinsurance damages. So the first of the two components that I just
17 went over. Now, if you could bring it up to the net. So this shows by
18 year the reinsurance. So the second column or first column with
19 numbers, this is the ceded premium. So that's the portion of the
20 premium -- and you may recall or know, Lewis and Clark collects
21 premiums for the insurance it sells.

22 However, they used reinsurance to try to defer some of that risk.
23 So they had to share, if you will, this portion of the premiums that they
24 collected. So they collected a larger amount of premiums. But this the
25 part that they then had to pay to the reinsurer in order for them to take

1 on some of the risk of having to pay out the money. So that's the first
2 column. And it shows from 2004 through 2011, because this is in the
3 inception of the company and this is the last year for which we have this
4 kind of data in the annual statements because once they went into
5 receivership, they stopped filing annual statements with the Department
6 of Insurance.

7 The second column is what's called the ceded loss and LAE. And
8 LAE you may have heard stands for Loss Adjustment Expense. So this is
9 the amount of claims and expenses that were then absorbed by the
10 reinsurer. So that's the part that Lewis and Clark avoided having to pay
11 out of their own pocket because she shared some of the premiums in the
12 first column. Okay.

13 These totals here are only for that first time period, from 2004
14 through the end of 2009. So if you go from 2004 to 2009, that's the
15 6.1 million -- 6.133, or 6,133,000. And I'll try to talk slower.

16 BY MR. ORME:

17 Q And, Dr. Kuga, why did you put those two years in --

18 A The two --

19 Q -- into the --

20 A The two years in later?

21 Q No. The 2010 to 2011.

22 A Oh, I'll come to that in a second.

23 Q Okay.

24 A I'm coming to that. Sorry. So it's the same for the stated
25 loss. And there should be a zero here. I just noticed this. This -- there

1 was -- there is no ceded loss really in this year. So, again, if you just
2 total those first -- it's actually six years, right, '4, '5, '6, '7, '8, '9, you get a
3 million dollars. So it excludes these last two years. And that was to just
4 show you that's how much the reinsurance had cost them, and once they
5 had been able to recover as a result of the reinsurance, this \$5,133,000.
6 So they were out of pocket \$5,133,000 as of the time they became
7 insolvent. They paid more for that reinsurance than they got back in
8 terms of sharing the risk.

9 If you take the full time periods of all of the years, including '10,
10 and '11, it tells you year by year what that difference is. So this means in
11 2004, they shared \$100,000 of the premium. The way it worked out, they
12 didn't get any assistance or any relief from the reinsurance in terms of
13 paying the claims and the expenses. So net, they were out \$100,000. In
14 the following year, \$633,000. By the third year, 2006, they did receive
15 some back of that premium. So the difference between 1,152,000 -- and I
16 won't go through all of these -- and 358,000 is the 794,000. So still in
17 that year it cost them more to buy reinsurance than they got back in
18 benefit.

19 So when you sum it all up -- and this number I believe is also in
20 Mr. -- I know it is in Mr. Tharp's report -- but these numbers come
21 ultimately -- he probably got them from the same place I did -- from the
22 annual statements; there's a schedule in there that has these numbers --
23 is \$7,986,000. So what I'm saying is they paid \$7,986,000 more for the
24 reinsurance than they received in assistance in paying the claims and
25 expenses. So that cost them almost \$8 million.

1 Q Now, you've said that you know that Dr. -- that Mr. Tharp has
2 that in his report?

3 A Yes.

4 Q Did you do an -- what type of analysis did you do to come up
5 with those numbers?

6 A Well, so Mr. Tharp has a schedule similar to this, not exactly
7 like this, but with these same data -- these first two columns of data. But
8 those numbers ultimately come from schedule P in the annual
9 statements. So I checked to make sure where Mr. Tharp got those
10 numbers from was accurate and it reflected the numbers that were in the
11 annual statements. Now, recall, these are the annual statements that are
12 prepared by Lewis and Clark, which was managed by Uni-Ter.

13 Q Okay.

14 A Because Lewis and Clark, as you know, had no employees.
15 They had no one to run the insurance company. They had to depend on
16 someone else to do that.

17 MR. ORME: Go ahead and move the table to 3.2.

18 THE WITNESS: So let's start with the heading so they can
19 see the heading. The -- Exhibit 3. -- yeah, there we go. So Exhibit 3.2 is
20 a calculation of the insolvency damages.

21 BY MR. ORME:

22 Q Okay. Can you tell us what insolvency means?

23 A So the second component that I talked about. Insolvency
24 means that basically you have more assets than liabilities. Some people
25 may refer to it as being upside down. You've heard of that analysis.

1 source of funding for Lewis and Clark. That amount was reduced,
2 because they were repaid some of that money, to a million dollars. And
3 then as Lewis and Clark got into a great deal of financial difficulty in 2011
4 or 2010, some of the members, the nursing homes that were members
5 as well as Uni-Ter, contributed an additional \$2.7 million to try to shore
6 up the finances of that institution. But those are all liabilities that
7 theoretically the receiver, if there's money left over, has a pay back to
8 those entities.

9 And just so you know, it's not like traditional equity that you might
10 think of like when you buy stock. When -- if a company goes bankrupt, if
11 you bought -- Amazon's not a good example -- but some start-up that,
12 you know -- say Tesla hadn't worked out that and you bought stock in
13 Tesla and they weren't as successful as they are now and they went
14 bankrupt, as a stockholder, you'd get nothing. You'd lose your whole
15 investment.

16 This was a little bit different because it was a surplus note. So they
17 were going to get interest and more interest that they were owed on
18 money that they contributed. So when you add that \$3.7 million that
19 was contributed plus the insolvency, you get \$15,782,657. But we're not
20 quite done. If you recall, when they were impaired, they still had
21 \$440,000 of equity. So I deducted that from that number to then come
22 up with the \$15,222,853 that I conclude is the insolvency damages in this
23 dispute.

24 Q What is the interrelationship between the damages for
25 reinsurance and the damages for insolvency?

1 A So the reinsurance is also rolled into these numbers. It's
2 included. So if the trier of fact, however the Judge instructs you to what
3 decisions you have to make, decides that there are damages for the
4 reinsurance, in my opinion, you can award up to the 8 -- or \$7,900,000,
5 whatever that was. However, if you find that there's liability for
6 insolvency itself, it's this up to 15 -- we'll call it 15.22 million. But I don't
7 want to mislead you into thinking, well, when you find liability both for
8 the reinsurance as well as for the insolvency, you should somehow
9 award both, so award something like \$23 million, because we know, at
10 most, this is how much they went in the hole.

11 But 8 million of it, 7.9, whatever that was, million of that is in this
12 number. And so you need to make sure that you don't double count and
13 award both. But, again, it will depend on what the trier of fact is
14 instructed by the jury -- or by the Judge decides -- you know, if you find
15 somebody liable and then how you want to award damages and then
16 what more -- amount you pick.

17 Q So, Dr. Kuga, the \$7,986,000 of damages associated with the
18 reinsurance damages are already in the \$15,222,853 worth of damages?

19 A Yes. It's reflected in this analysis. However you want to
20 break out this -- the reinsurance, you can look at Exhibit 3.1. If you want
21 to look at the insolvency in its entirety, you can look at 3.2. And if you
22 want to do some differencing, you can do that as well. It's however they
23 decide that -- whoever decides this case has that option.

24 Q Okay. And are your opinions to a reasonable degree of
25 economic certainty?

1 A Right. And they're -- and they're typically people that own
2 businesses.

3 Q Right.

4 A But there -- but there are some employees too as well.

5 Q And that's what you primarily have testified to in court
6 proceedings?

7 A Is commercial and personal litigation. That's correct.

8 Q Now, in terms of your area of expertise, this happens to be
9 the first reinsurance case you've ever testified in?

10 A That's correct.

11 Q And the numbers you're using in terms of the 7 million 9
12 down to the very dollar, and the 15 million down to the, what is it, 853,
13 you said -- I can't remember the exact numbers --

14 A Okay. Go ahead.

15 Q -- are the exact same dollars that Mr. Tharp came up with in
16 his report, isn't that accurate?

17 A It is with respect to the surplus, it is [sic] respect to the
18 amount when you add the 3.9 -- 7 million and surplus notes. But my
19 ultimate number I don't believe appears anywhere on Mr. Tharp's report,
20 although the differential I used, that \$440,000 credit, appears on
21 Mr. Tharp's report as well as -- well, I'll leave it at that -- on Mr. Tharp's
22 report. That's correct. Because he made ceded adjustments.

23 Q Your damages associated with reinsurance were identical?

24 A Well, I don't know that he concludes a damage figure. But
25 my schedule 3.1 is identical, at least with the underlying numbers, not

1 the totals necessarily -- I don't remember if he does the totals or not --
2 but it's to the dollar the same as his reinsurance damage -- or
3 reinsurance ceded and -- ceded premium and ceded loss figures that
4 come from the annual statements. That is true.

5 Q Now, the model you used is called, what is it net, a net ceded
6 premium?

7 A For the reinsurance?

8 Q Yes.

9 A Yes.

10 Q Yeah. I'm going to focus my questions now -- I'm sorry -- so
11 that we can be clear -- on the reinsurance component of your analysis.

12 A Okay.

13 Q It's net ceded premium, correct?

14 A Correct.

15 Q Now, at any point in time before today -- not before today --

16 A Well, at --

17 Q -- before being hired in this case -- what?

18 A Excuse me. Just to clarify, the column actually reads, net
19 reinsurance ceded. I think you're talking about the last column. So we
20 don't confuse them, that it's not just that first column, ceded premium,
21 but --

22 Q I just --

23 A -- but --

24 Q -- want to talk --

25 A -- I figured --

1 Q -- about the formula. What would be the best way to
2 describe the formulas so we're both talking about the same thing?

3 A It would be for each given year, ceded premium minus ceded
4 loss and Loss Adjustment Expense, or LAE, equals net reinsurance
5 ceded. So that net difference, that far right column, if you add all those
6 up for all the years, you get the \$7,986,000.

7 Q You call that net ceded reinsurance?

8 A Net reinsurance ceded. That's correct.

9 Q Net reinsurance ceded. Okay. That's what I'm talking about.
10 Now, you never in your life before this case had ever heard
11 of a model called net ceded -- net reinsurance ceded, have you?

12 A No. I don't know that --

13 Q You had never used it?

14 A No, I hadn't, because this is my first reinsurance -- or risk
15 retention group case and reinsurance case. That's true.

16 Q And when you looked at why somebody should be liable,
17 was it because we did not place the best insurance for Lewis and Clark
18 and some other -- either regressed -- excuse me -- reinsurance -- some
19 other reinsurance either that was available in the marketplace or
20 alternatively we could have gone without reinsurance, correct?

21 MR. ORME: Objection. Outside the scope again.

22 MR. WILSON: He's talking about --

23 THE COURT: Please approach. Please approach.

24 [Sidebar at 11:28 a.m., ending at 11:29 a.m., inaudible, not
25 transcribed]

1 THE COURT: Okay. The objection is overruled.

2 MR. WILSON: I'm not sure I remember the question
3 particularly as I can. So let me -- let me -- I'll probably ask a different
4 one.

5 BY MR. WILSON:

6 Q In terms of damages, you're familiar with what's called the
7 but-for damage, correct, theory?

8 A Yes.

9 Q And that's a recognized theory of damages among people
10 like you who do damage testimony?

11 A Yes.

12 Q And the but-for theory says as it relates to all reinsurance,
13 U.S. RE, you place excess of loss reinsurance, which costs -- as you have
14 it up there, it'd be 10 million dollars?

15 A Yes.

16 Q And that's not right. That's -- you didn't do the right thing.
17 You could have placed the quota share, correct? And I'm just using this
18 as a hypothetical.

19 A Yeah. I don't have an opinion on that.

20 Q I understand that.

21 A But that's -- okay.

22 Q I'm just using it. And I'm not going to ask you to opine on it.
23 I'm just saying --

24 A Sure.

25 Q -- it's a damage model. You used excess of loss, and that

1 costs 10 million. I could have had another product available that would
2 have cost less and saved me money; is that -- that's what Mr. Tharp was
3 saying about quota share, correct?

4 A Again, you'd have to ask Mr. Tharp.

5 Q Well, you --

6 A I'm not trying to evade your question. I just don't have an
7 opinion on that.

8 Q Let's talk about as a damage expert, a hypothetical way of
9 doing a but-for analysis.

10 A Okay.

11 Q What is the hypothetical way of doing a but-for analysis on
12 this reinsurance damage issue?

13 A I thought about that question long and hard. And I did not
14 come up with a way to do it.

15 Q You don't recall testifying to it in the deposition?

16 A If I did, I don't recall it. But please refresh my memory.

17 Q I will.

18 A Okay.

19 Q Wouldn't you look at -- this is what a cost of 10 million quota
20 share -- I mean, 10 million of excess of loss. I could have put quota share
21 in, and it would have cost me 7 million. And you look at the differences.
22 And isn't your damage the difference between what you've got and what
23 you could have gotten that was better?

24 A In your hypothetical world, I guess the only other piece of
25 information we'd have to know is what was the recovery under the

1 alternative reinsurance?

2 Q Right.

3 A So it'd be ten versus the two versus seven versus whatever --

4 Q Right.

5 A -- is the recovery.

6 Q To see what the recovery is?

7 A Sure. Sure. If you could apply that approach to that, that
8 would be potentially one way to do it.

9 Q And if you did what was called permanent practice where
10 you had notary insurance --

11 A Right.

12 Q -- you could take the excess of loss insurance that was
13 placed, and then you could look and see what it cost you by going
14 uninsured at some time period, and then doing an improvement of
15 practices, correct?

16 A Boy, I don't know on that one because it gets a little more
17 confusing as you describe it because we have this -- we have this other
18 element of the claims and the reserving. And again, that's outside my
19 area of expertise. But that factors into this, as well.

20 Q Now, you are not an expert in reinsurance, are you?

21 A No.

22 Q You're not an expert in claims reserve?

23 A No.

24 Q And you're not an expert in doing solvency analysis? You
25 said you've done them, but you've not -- you've never done one on an

1 expert basis?

2 A That's correct. This is the first time.

3 Q Do you know whether there's three accepted methods to do
4 solvency analysis?

5 A According to Mr. Hewitt, there is.

6 Q I said did you know.

7 A No.

8 Q Okay.

9 MR. WILSON: Now, if you'd look at -- if you'd pull up Exhibit
10 3.2.

11 THE WITNESS: Yup.

12 MR. WILSON: Your Honor, may I go down to the --

13 THE COURT: Certainly. You have permission to move about.

14 BY MR. WILSON:

15 Q And if you look at this exhibit, what do the numbers
16 represent here under losses? Those would be the amount -- those would
17 be the amount of reserves adjusted by Mr. Tharp?

18 A Yes.

19 Q Now, do they include the original amount that Uni-Ter had
20 reserved, plus the additional amount that he said was under reserved?

21 A Yes.

22 Q And you don't have any idea why --

23 A Well --

24 Q I'm sorry, go ahead.

25 A Yeah. Actually, the -- there is no reference to the Uni-Ter

1 amount reserve. In other words, the Uni-Ter amount reserve could be
2 anything. And it doesn't really impact this analysis. But from a dollar
3 standpoint, that is a fair point. In other words, Mr. Tharp's saying it
4 should be up here, and Uni-Ter did something down here. So implicitly
5 it's in there. But it's not explicitly anywhere in Mr. Tharp's model, as I
6 understand it.

7 Q But you accepted Mr. Tharp's model?

8 A Yes.

9 Q And to accept somebody's model, you need to test it, don't
10 you --

11 A Potent --

12 Q -- as an expert?

13 A Potentially.

14 Q If you're going to rely on another expert, you've got to test it?

15 A Yes.

16 Q How did you test the model that was created by Mr. Tharp,
17 which resulted in --

18 A The adjustments.

19 Q -- the significant adjustments?

20 A Yeah. It's a very complicated analysis because I had them
21 show me that, Mr. Tharp and his colleague, Mr. Todd, T-O-D-D. They
22 built a model, as I understand it, claim by claim. And so they looked at
23 something that was filed by Uni-Ter in 2012, that told you the ultimate
24 disposition as of that date that Uni-Ter felt each of those claims had.
25 And they looked at all that, compared it to the amount that had been

EXHIBIT “G”

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

VS.

Defendants.

BEFORE THE HONORABLE NANCY ALLF
DISTRICT COURT JUDGE
MONDAY, OCTOBER 11, 2021

APPEARANCES:

BRENOCH WIRTHLIN, ESQ.
CHRISTIAN M. ORME, ESQ.
TANYA FRASER, ESQ.

GEORGE F. OGILVIE, III, ESQ.
JON M. WILSON, ESQ.

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1 THE COURT: Thank you. Please be seated.

2 DIRECT EXAMINATION CONTINUED

3 BY MR. WILSON:

4 Q Mr. Hewitt, we were starting to get into some issues with
5 respect to damages testimony.

6 A Yes, sir.

7 Q I'd like to focus first on Dr. Kuga's reinsurance damage
8 model. Are you familiar with that?

9 A Yes.

10 Q And do you agree with that model?

11 A No.

12 Q Why do you not agree with the model?

13 A Any damages calculation is a comparison of a but for world,
14 which I'll define in a moment, that would have existed but for the
15 Defendant's alleged inappropriate actions and compares that to what
16 actually occurred and you subtract the difference. Mr. Kuga's but for
17 world was in -- in his analysis, was simply that Lewis & Clark did not buy
18 any reinsurance. As I understand it, without an exception from the
19 Nevada Department of Insurance, which Lewis & Clark never obtained,
20 they had to buy reinsurance. The statute, which -- I can't cite the
21 number -- basically says that any insurance company cannot write a risk
22 whose policy limits, the maximum loss that's payable under the policy, is
23 more than ten percent of the company's surplus.

24 Lewis & Clark was -- there's the phrase, thinly capitalized. They
25 never had a great deal of surplus. The highest their surplus was -- was --

1 ever was was about \$4,600,000. Ten percent of that is about \$460,000.
2 Lewis & Clark started out when they very first began doing business
3 writing policies with a policy limit of half a million dollars. Half a million
4 is more than 460. I understand that some of their policies, maybe even a
5 majority of their policies had policy limits of a million dollars.

6 So Mr. Kuga's -- Dr. Kuga's but for analysis would have required
7 Lewis & Clark to violate Nevada statutes, which they probably would not
8 have been allowed to do as soon of the Department of Insurance learned
9 of it through a triennial examination or presumes that they were able to
10 obtain an exception from the statute. But again, they never applied for
11 and frankly, in my opinion, doesn't look like it would be very likely that
12 they could have been able to do it.

13 You're in a situation where they're -- you know, if the
14 purpose is to keep the amount of loss that you can lose on a policy to not
15 be more than 10 percent of your surplus, well, their two largest claims
16 that we saw on the list were about a million dollars a piece. At the
17 highest point, that's almost -- you know, that's 20 -- almost 20 percent of
18 their surplus each -- with each one of those losses. They've never had
19 more than 4.6 million. The rest of the time it was less than that.
20 Insurance regulators tend to be a conservative bunch. I'm not sure that
21 they would have granted that. Have no way of knowing one way or the
22 other, but I've been arou -- I was around the insurance industry for a long
23 time.

24 Q Did Mr. Tharp or Dr. Kuga indicate that they were reasonably
25 confident that they could be permitted an exception?

1 A No. I don't think they did any research about any permitted
2 exceptions that had ever occurred. I frankly don't know. And I don't
3 know what that history is, either, but it seems unlikely in -- based off my
4 own experience.

5 Q Are you -- were you aware that Mr. Tharp testified that there
6 were a number -- maybe hundreds of possibilities in quota sharing in
7 insurance as a better alternative than the excess of loss reinsurance
8 placed by US Re Corp?

9 A Yes, I'm aware of that. And --

10 Q Did you get -- was there --

11 A I'm sorry. I didn't hear you, sir.

12 Q All right. In terms of quota share, are you aware that
13 Mr. Tharp couldn't provide or didn't provide the name of any company
14 that would provide that type of reinsurance to Lewis & Clark?

15 A Yes, I am aware of that.

16 Q Let's assume you want to do a but for analysis using quota
17 share as the alternative. How would you do the analysis?

18 A You would figure out how much it would have cost you,
19 what sort of losses you would have been able to recover, what the net
20 cost of that reinsurance was and compare it to the actual amount that Dr.
21 Kuga calculated. That comparison was not done. Instead, the -- Dr.
22 Kuga's analysis just assumes there was no reinsurance. And if you
23 actually believe there could have been a quota share policy, that's
24 overstating the amount of the damages.

25 By the way, you know, one of the things you have to keep in mind

1 when you think about how much -- how -- what kind of availability there
2 is for quota share, you have to find a reinsurer who's willing to say hey
3 I'll take a portion of your business exactly the way that you're doing it,
4 even though I'm not going to have any control over you know, exactly
5 how you're adjusting the claims. I'm going to take your loss ratio, your
6 LAE ratio and a portion of your percentages and that's if Lewis & Clark's
7 losses were actually as bad as Mr. Tharp has indicated. That may have
8 been tough to find.

9 Q Now, in terms of Dr. Kuga's analysis of reinsurance
10 damages -- and I'm using round numbers, \$10 million of premium and
11 \$2 million that were actually paid back by the reinsurers. And that leaves
12 7.9 some million dollars of damages.

13 A Yes.

14 Q Are there -- is there anything that in your opinion should
15 have been included as offset to any damages?

16 A Yes. There's another 3.1, \$3.2 million that is on the
17 receivership balance sheets sitting there right now saying that they have
18 that as an asset, which is something that can be recovered. Mr. -- Dr.
19 Kuga did not consider those assets in calculating his reinsurance
20 damages. If he did, it would reduce the damage amount. And again,
21 rough terms, it would reduce it to about or roughly eight less, 3.2. That's
22 going to reduce it to about -- what is that -- 4.2 -- 8 million dollars. I think
23 that amount's right.

24 Q So in your opinion, what should have happened with respect
25 to that \$3.1 million of anticipated recovery from the reinsurer?

EXHIBIT “H”

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

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8 COMMISSIONER OF INSURANCE
9 FOR THE STATE OF NEVADA AS
10 RECEIVER OF LEWIS & CLARK,

11 Plaintiff,

12 vs.

13 ROBERT CHUR, ET AL.,

14 Defendants.

) CASE#: A-14-711535-C

) DEPT. XXVII

15 BEFORE THE HONORABLE NANCY ALLF
16 DISTRICT COURT JUDGE
17 MONDAY, OCTOBER 11, 2021

18 **RECORDER'S PARTIAL TRANSCRIPT OF JURY TRIAL -**
19 **TESTIMONY OF RICHARD DECOUX**

20 APPEARANCES:

21 For the Plaintiff:

BRENOCH WIRTHLIN, ESQ.
CHRISTIAN M. ORME, ESQ.
TANYA FRASER, ESQ.

22 For the Defendants:

23 GEORGE F. OGILVIE, III, ESQ.
24 JON M. WILSON, ESQ.

25 RECORDED BY: BRYNN WHITE, COURT RECORDER

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1 & Clark?

2 A Well, yes. Because -- well, yes, I did investigate that. I did
3 review the terms of the -- the contract and I reviewed the reason that
4 were given for wanting to commute with Imagine Re. And apparently,
5 based on the correspondences I saw between Larry Shatoff and the -- the
6 managing company as well as between the L&C board and -- and the US
7 Re with Larry Shatoff, the -- essentially what they were saying is we
8 don't -- we don't have to submit as many special acceptances or we
9 don't have to submit as many new business opportunities to Imagine Re
10 as we did to the London markets.

11 But they are -- they are -- at this point, Imagine Re is much
12 more intrusive. They're -- they're very much more difficult for us to deal
13 with and explain why it is we want to bring this member company in or
14 we want to -- or we want to make changes to a member company that
15 we're already reinsuring. And so in that case, I felt that because of
16 Imagine Re's position relative to the -- relative to the business
17 relationship that they didn't want to have them reinsuring them
18 anymore.

19 Q Now, are you aware that Mr. Tharp has discussed that quota
20 share was a better form of reinsurance than excess of loss for Lewis &
21 Clark in the relevant time period, let's say, of 2005, 6, 7, 8, 9 time period.
22 Are you aware of that?

23 A Yes, I am. I read Mr. Tharp's report, the sections of the
24 report that deal with reinsurance, thoroughly. And I saw his -- I saw his
25 opinion that -- that quota share would have been a better product for

1 Lewis & Clark. The -- and I don't want to put this in -- in totally negative
2 terms, but the problem with -- with quota share was, first of all, Lewis &
3 Clark didn't have a large -- first of all, didn't have a large amount of -- of
4 cash or premium. And their premium projections were simply that; they
5 were just estimates of what they would eventually write.

6 But in order to place a quota share contract, you normally
7 have to have a volume of money in hand, a volume of -- of cash that
8 you're willing to share with the reinsurers. And it has to be a large
9 enough volume that the reinsurers feel that that the risk that they're
10 taking on, whatever percentage they take -- decide to take of the quota
11 share, they have to be sure that what they're getting is worth the cash
12 that's going to be given to them. Well, Lewis & Clark at the -- at the
13 outset had virtually no cash, so there was really no opportunity to do
14 a -- any kind of a quota share program.

15 Q (Indiscernible) --

16 A Second of all --

17 Q Go ahead. I'm sorry. Go ahead.

18 A I'm sorry. Yeah. Well, second of all, quota share reinsurance
19 besides requiring that kind of an outlay of cash also -- again, it's written
20 usually for companies that are writing high volumes of premium and
21 have high volumes of losses. The most typical quota shares that I've
22 seen in my reinsurance career involve companies that underwrite
23 personal auto policies.

24 Say like, you know, for an example, Progressive Insurance
25 Company, since -- since we know all -- I hope we all know who they are.

1 But Progressive would have hundreds of millions of dollars of premium
2 coming in from their -- from those people that they provide auto
3 insurance to, and they have hundreds of millions of dollars going out
4 because of losses that they have for accidents. And therefore, you know,
5 they would be a company that would be very attractive to underwriters
6 of quota share because there's large volumes of money that make it
7 worth everybody's while. In this case, that -- that didn't exist.

8 And then the market in the U.S. -- again, by 2005, the US
9 Reinsurance -- the domestic US Reinsurance market was significantly
10 smaller than it had been in the period 19 -- from 1985 or 1986 through
11 the early 2000s. And part of the reason for that was -- and it was the
12 reason that my company, PMA, ended up shutting up its reinsurance
13 division was 9/11. 9/11 was a catastrophic event that -- that caused
14 numerous reinsurance companies and numerous companies that had
15 reinsurance divisions to shut them down.

16 So not only did PMA RE quit underwriting business by -- at
17 the end of 2003, The Hartford Reinsurance Company, Allstate's
18 underwriting -- Allstate still remains as reinsurer but their underwriting
19 volume decreased significantly. Besides Hartford, the Kemper insurance
20 company was no longer in business -- the reinsurance company. The
21 Kemper Reinsurance Company was no longer in business. Continental
22 Reinsurance had decided that they were going to shut down their
23 reinsurance division.

24 So what was available in the U.S. -- those companies that
25 were available in the U.S. were not necessarily going to be, first of all,

1 enticed or have any interest in writing high-risk casualty business such
2 as the kind of bodily injury or exposures that a long term care facility
3 would put in their way. And then the second thing is it would -- if you
4 went to London, there was no -- London did not write quota share. And
5 so the only opportunities they had for placing reinsurance at that point
6 for L&C was excess of loss.

7 Q Did you make any inquiry or do any investigation or contact
8 people in the reinsurance business to determine whether or not there
9 was quota share available from the -- like 2005 to 2012?

10 A Yes, I did. So when I --

11 Q What did you do?

12 A When -- when I was writing my original report of 2020, and
13 then my subsequent rebuttal report 2021, and very recently as well. I
14 went to the gentleman who was the lead -- who was the vice -- the senior
15 vice president in charge of underwriting at PMA RE. I went to one of our
16 senior PMA RE underwriters. And I also went to the -- the gentleman
17 who was the president of PMA RE. I went to those three sources and I
18 said -- and I asked them, you know, in the broadest sense possible terms,
19 what was -- what was the quota share market like in the U.S. basically
20 from 2005 through 2011?

21 Now, two of those individuals are now no longer reinsurance
22 underwriters. They are both working for brokering -- large, international
23 brokering operations. And in both -- in all three instances, they said
24 there was -- there wouldn't have been availability for, you know, any
25 kind of a company that was a startup that was involved in the healthcare

1 industry. And then also, you know, if you were brokering it, where
2 would you have gone? And in all three cases, they said the only market
3 that was available during that period of time for this type of business
4 was London.

5 And I think there's one other -- there's one further point I'd
6 like to make, if I could? And that -- one of the -- one of the brokers I
7 spoke to -- and this is just in the last two weeks -- indicated to me, stated
8 to me that he was in the process of placing a long term healthcare
9 facility, a Risk Retention Group reinsurance program, in the companies in
10 the State of Michigan. And he said that he -- he was unable to find any
11 quota share whatsoever even in today's market.

12 And this was a company -- from what I could gather from
13 what he was telling me, that would have had -- that would have a
14 premium base far in excess of what L&C had at the time they were trying
15 to reinsure their program. And the -- you know, even in today's market,
16 he still has to go to London and he's going to have to do an excess of
17 loss reinsurance program that's probably going to look very similar to
18 what L&C -- the type of program that L&C had.

19 Q Mr. DeCoux, I have one more area. Are you aware that
20 there's a contention that US Re was not properly licensed in the State of
21 Nevada for reinsurance (indiscernible)?

22 A I'm aware of that. In my -- in my review of the various
23 correspondences, I noted that in 2009, I believe it was the -- Mr. Burge
24 (phonetic) from ranch -- from the Nevada DOI, Department of Insurance,
25 had indicated to -- that had indicated to Lewis & Clark that their

EXHIBIT “I”

1 RTRAN

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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

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8 COMMISSIONER OF INSURANCE
9 FOR THE STATE OF NEVADA AS
10 RECEIVER OF LEWIS & CLARK,

11 Plaintiff,

12 vs.

13 ROBERT CHUR, ET AL.,

14 Defendants.

) CASE#: A-14-711535-C

) DEPT. XXVII

15 BEFORE THE HONORABLE NANCY ALLF
16 DISTRICT COURT JUDGE
TUESDAY, OCTOBER 12, 2021

17 **RECORDER'S PARTIAL TRANSCRIPT OF JURY TRIAL -**
18 **TESTIMONY OF MARK THARP**

19 APPEARANCES:

20 For the Plaintiff:

BRENOCH WIRTHLIN, ESQ.
CHRISTIAN M. ORME, ESQ.
TANYA FRASER, ESQ.

22 For the Defendants:

GEORGE F. OGILVIE, III, ESQ.
JON M. WILSON, ESQ.

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25 RECORDED BY: BRYNN WHITE, COURT RECORDER

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1 BY MR. WILSON:

2 Q Take your seat, Mr. Tharp.

3 A Oh, sure.

4 Q Now, under your permitted practice approach, would Lewis
5 & Clark have any reinsurance?

6 A Well, it would depend upon the permitted practice that was
7 requested.

8 Q Okay. Well, you're the one that says it would succeed. And
9 you're the one that said that the reinsurance was awful. Would you have
10 reinsurance as part of the permitted practice?

11 A The answer to that's no if the department approved the
12 permitted practice.

13 Q So you wouldn't have reinsurance, but you would take the
14 premium dollars that would have been paid for the reinsurance that
15 would have protected you from large losses?

16 A Yeah. My testimony was in my report said that I'd put those
17 into trust as an alternative to reinsurance.

18 Q How much would you put in trust?

19 A All the premiums that would otherwise be paid to the
20 reinsurers.

21 Q That's \$10 million, right? That's what you had on the list?

22 A Well, that's how much they were paid overtime, yes.

23 Q Right. So how much would you put in in year one?

24 A Well, I would put all the premiums from the point that the
25 permitted practice was approved going forward.

1 Q Okay. So you have how much -- do you have a chart?
2 There's a chart 3.1 in Mr. Kuga's report and you also did an analysis in
3 your report where you came up with 7.9 some million dollars. A
4 difference between the premiums paid and the amount [indiscernible]
5 back from the reinsured, correct?

6 A Yeah. That was the delta between the two.

7 Q Right. So in that you have a listing of how much was the
8 premium in for example year 2004?

9 A Yeah. It would depend upon when the permitted practice
10 was approved, which is to say some of the premium may have been paid
11 already to the reinsures

12 Q Would you have reinsurance? Do you have to have
13 reinsurance?

14 A No. That's the point of the permitted practice.

15 Q If you don't have a permitted practice fee, you have to have
16 reinsurance?

17 A Well, there's a statute that indicates that if any one loss is
18 greater than 10 percent surplus, you need to have reinsurance in place.

19 Q Right. And in terms of the policies size wise in 2004, what
20 was the size of policies being written by Lewis & Clark?

21 A Million-dollar policies.

22 Q Right. So you've got to have surplus -- that's right. You got
23 to have -- well, let me ask it this way. What is the 10 percent rule you
24 just described, part of the statute?

25 A What statute is it?

EXHIBIT “J”

EXPERT WITNESS REPORT OF MARK KUGA, Ph.D.
Commissioner of Insurance for the State of Nevada
as Receiver of Lewis and Clark LTC Risk Retention Group, Inc.
v.
Uni-Ter Underwriting Management Corp.,
Uni-Ter Claims Services, Corp., and U.S. Re Corp.

I. QUALIFICATIONS

I am President of Delta Economic Consulting Corporation (Delta). Delta provides economic and valuation analyses for businesses and individuals. Delta also provides expert witness testimony services in litigated cases, applying forensic economic and valuation analyses.

A copy of my current curriculum vitae describing my education, previous professional and teaching experience, and professional affiliations is included at **Exhibit 1** with this expert witness statement. Prior to starting Delta, I was a principal and director of economic analysis and litigation services with Willamette Management Associates, a nationally recognized valuation consulting, economic analysis, and financial advisory firm. Previously, I was an economist with Economic Analysis Corporation and Lexecon, Inc., two prominent economic consulting firms.

In addition to my consulting work, I have taught finance and economics in the MBA programs at Portland State University and Marylhurst University (formerly College). I have been invited to give presentations and seminars to the American Institute for Certified Public Accountants, the American Rehabilitation Economics Association, the National Association of Business Economics, and various other accountant and attorney groups. I have been a member of the Board of Directors of the National Association of Forensic Economics and the American Academy of Economic and Financial Experts.

I have been a professional economist in the field of forensic economic and valuation analysis for more than 30 years. I have been retained as an expert witness (by both plaintiffs as well as defendants) in excess of 250 cases. I have testified at trial and in deposition at least 30 times each as an expert witness (enclosed at **Exhibit 2** is a listing of my most recent expert testimony at trial and in deposition in the past four years).

II. DESCRIPTION OF MY ASSIGNMENT

I have been asked, by the Plaintiff, the Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc. (hereafter “Receiver”), to perform the following:

1. To analyze the economic damages alleged in this matter; and
2. To review, critique, and if appropriate rebut, any expert testimony prepared on behalf of the defendants with respect to the damages alleged in this matter.

This report is only addressing the economic damages alleged in this matter based upon the facts developed thus far in the case. Any rebuttal will be prepared following disclosure of the defendants expert reports, if any, and will be produced consistent with applicable deadlines. I reserve the right to amend or supplement this report as appropriate.

III. DOCUMENTS PROVIDED FOR MY REVIEW

I have been provided with numerous documents which have been produced by the parties in the course of this litigation including:

- Financial documents relevant to my analysis including: L&C Annual Statements to the Nevada Dept. of Insurance, audited financial statements of L&C.
- Pleadings (Third Amended Complaint and Answers thereto), requests for production of documents, interrogatory requests, and responses.
- Deposition transcripts and exhibits.
- Documents produced by the parties in this litigation.
- Documents produced by relevant third parties to this litigation.
- I have been provided access (in electronic format) to search the universe of documents that have been produced in this matter.

I have also been provided with the following:

- Expert report of Mark D. Tharp, dated July 1, 2020.

I have also utilized the following references:

- *The Merriam-Webster Dictionary*, Pocket Books edition, 1974.
- Casey D. Karlsen and Jacob Jackson, Esq., “Measuring and Defending Economic Damages in Breach of Fiduciary Duty Tort Claims”, *Insights*, Spring 2018, pgs. 19-26. http://www.willamette.com/insights_journal/18/spring_2018_3.pdf

IV. SUMMARY OF MY FINDINGS AND OPINIONS

At the request of the Receiver, I have prepared an analysis of the damages alleged in this matter. The Receiver has alleged damages as a result of the claims contained in its Third Amended Complaint (“Complaint”). The Receiver’s insurance industry expert, Mark D. Tharp, has prepared a report which contains financial analyses which I have reviewed and applied as the basis for elements of my damage calculations.

Based on the information available to me to date, if called upon to testify, I expect to express the following findings and opinions:

1. Causation:

The Receiver’s Third Amended Complaint alleges breach of fiduciary duty against Uni-Ter UMC and Uni-Ter CS (hereinafter collectively referred to at times as “Uni-Ter”) as well as U.S. RE Corporation (“US RE”). Furthermore, the Complaint alleges negligent misrepresentation against Uni-Ter UMC.

The factual allegations asserted in the Third Amended Complaint, as well as evidence obtained through discovery thus far, strongly support the trier of fact ultimately determining that Defendants, and each of them, are liable for breach of fiduciary, as the facts demonstrate the

existence of the requisite elements of causation:¹ (i) L&C has sustained losses; (ii) L&C's loss could have been prevented if each of the Defendants (Uni-Ter UMC, Uni-Ter CS, and US RE) had performed their fiduciary duties as required; (iii) Each of the Defendants' acts or omissions were a substantial factor in bringing about the Receiver's losses; and (iv) L&C's loss would have been reasonably foreseeable to a person in the defendants positions under similar circumstances. Further, the factual allegations asserted in the Third Amended Complaint, as well as evidence obtained through discovery thus far, strongly support the trier of fact ultimately determining that Uni-Ter UMC made negligent misrepresentations to L&C.

The evidence of causation in this matter includes, without limitation, the Third Amended Complaint (and exhibits attached thereto) and the opinion of expert Mark Tharp as contained in his expert report dated July 31, 2020, as well as the documents relied upon by Mr. Tharp in his report. In his report, Mr. Tharp opines that L&C's reinsurance program was not in compliance with the relevant statutes and/or regulations, and that this, along with the breaches of fiduciary duty by Uni-ter and US RE, resulted in L&C operating while in a hazardous financial condition, and/or being statutorily impaired and/or insolvent (as of no later than December 31, 2009). This opinion is supported by, without limitation, the following: (i) Uni-Ter was prohibited from committing or binding L&C to enter into a reinsurance agreement;² (ii) US RE was not allowed to broker reinsurance for L&C without being licensed in Nevada; (iii) "... reinsurance ceded arrangements brokered by US RE and recommended and advocated by Uni-Ter were structured for the benefit of US RE (and the reinsurers) rather than L&C (which structure was to the detriment of L&C)", which also constituted breaches of their fiduciary duties. (emphasis added)

In addition, Mr. Tharp found in his report that there existed strong evidence to support a fact-finder determining that L&C's operation at such time that it was in a hazardous financial condition and/or was statutorily impaired and/or insolvent, constituted breaches of the Defendants Uni-Ter's fiduciary duties, as well as a failure to comply with relevant statutes and/or regulations, and that this resulted in a negative surplus which increased dramatically as L&C continued to operate in violation of law. This opinion was supported in Mr. Tharp's report,

¹ See *Commercial Torts Instruction* 15CT.18 at 15.22 citing: *Leavitt v. Leisure Sports Incorporation*, 103 Nev. 81, 734 P.2d 1221 (1987).

² NAC 683A.530 Prohibited acts of agent. (NRS 699B.130) "A managing general agent shall not: 1. Bind reinsurance or retrocessions on behalf of the insurer". Mark Tharp expert report at pg. 71.

which found, among other things, that : (i) L&C was prohibited from operating while in a hazardous financial condition and/or was statutorily impaired and/or insolvent;³ and (ii) “UniTer’s withholding of material information from L&C and the regulators and its failure to implement appropriate systems and procedures ... were also a substantial factor of the insolvency of L&C”, which also constituted breaches of their fiduciary duties.⁴ (emphasis added)

Further, as a result of the aforementioned wrongful actions by the Defendants, L&C sustained damages as further indicated below. Had the Defendants each performed their fiduciary duties mentioned above, L&C would not have sustained damages associated with reinsurance and insolvency. As explained above and opined by Mr. Tharp, each of the Defendants’ breaches, acts or omissions were a substantial factor in L&C sustaining damages. L&C damages were reasonably foreseeable to a person in Defendants’ position under similar circumstances in that, among other things, the Defendants were aware of their fiduciary duties owed to L&C, including, without limitation, compliance with reinsurance and insolvency laws, regulations and requirements, and that in Defendants breaching those duties, it was reasonably foreseeable that L&C would sustain financial harm.

2. Relevant Measures of Damages:

The factual allegations asserted in the Third Amended Complaint, as well as evidence obtained through discovery thus far, strongly support the trier of fact ultimately determining that Defendants liable for the resulting damages from their breaches of fiduciary duties and the requisite elements of measure of damages have been met in this matter.⁵ The principal amount of damages includes, without limitation, an award for each item of harm that was caused by each of the Defendants’ wrongful conduct. The Third Amended Complaint asserts claims against three Defendants: Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation.

³ Ibid., at pg. 74.

⁴ Ibid., at pg. 11.

⁵ See *Commercial Torts Instruction* 15CT.19, 15.23 citing: *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 62 P.3d 720 (2009).

The damages suffered by Plaintiff occurred in three key intervals related to wrongful conduct by the Defendants in this matter: (i) Damages from the reinsurance beginning on April 1, 2005 to September 30, 2009 – the date (determined by expert Mark Tharp) at which L&C began operating while in a hazardous financial condition and/or was statutorily impaired and/or insolvent; and (ii) Damages associated with L&C operating while in a hazardous financial condition and/or statutorily impaired and/or insolvent, which resulted in a negative surplus (which continued to grow) after December 31, 2009; and (iii) Damages from the receivership administrative expenses incurred as a result of L&C's insolvency which resulted from L&C being placed into receivership. The relevant measure of damages that are alleged in the Third Amended Complaint, therefore, includes a measure of damages related to reinsurance and a measure of damages related to the insolvency beginning on January 1, 2010.

The included measure of damages was selected because: (1) This measure comports best with the allegations contained in the Third Amended Complaint; (2) The business nature, operation, and financial reporting of an insurance company such as L&C are atypical in that premium revenues are received initially but there is typically a lag before the corresponding claims paid and loss adjustment expenses are paid out in future years; and (3) The damage measures utilized in my analysis flow naturally from: (i) the losses that occurred; (ii) which culminated in the insolvency of L&C; and (iii) L&C's resulting placement by the Nevada Dept. of Insurance into receivership.

Other measures of damages such as lost profits (or loss of business value) were considered but rejected for purposes of this analysis for the following reasons: (1) The losses suffered by an insurance company (such as L&C) do not meaningfully translate nor are conducive to the traditional lost profits or loss of business value analysis utilized in many commercial litigation disputes; (2) Other methods of measuring economic damages, such as comparing the income or the value of a company prior to and after the alleged damaging acts occurred, were not possible in this case because damaging acts occurred throughout the operating history of L&C making comparisons with other timeframes not possible; and (3) Other methods of measuring economic damages were also not possible given the unique nature risk retention

group industry in which no reliable data is available sufficient to create a benchmark for the purposes of comparison.

3. Amount of Damages:

Reinsurance

The first category of damages relates to reinsurance, and is measured by the “*net reinsurance ceded*” (loss to L&C) equal to the difference between “ceded premium” and “ceded loss & LAE” calculated by expert Mark D. Tharp. The amount of the damages resulting from reinsurance is the “*net reinsurance ceded*” by L&C which amounts to not less than **\$7,986,000**. (See Kuga **Exhibit 3.1**)

Insolvency

The second category of damages is associated with L&C operating while in a hazardous financial condition and/or statutorily impaired and/or insolvent, which caused a *negative surplus* calculated by expert Mark Tharp which occurred after the date of hazardous financial condition and/or statutory impairment and/or insolvency through the most recent available negative surplus amount (currently as of September 30, 2019). The most recent negative surplus amount is no less than **\$15,222,853**. (See Kuga **Exhibit 3.2**)

4. Allocation of Damages:

The principal amount of damages further includes an award for each item of harm that was caused by each of the defendants’ wrongful conduct. The specific items of damage claimed in the Third Amended Complaint, for which a trier of fact may find each of the defendants to be liable is as follows:

Uni-Ter Underwriting Management Corp.

The Third Amended Complaint, as well as the evidence produced and discovered thus far in this matter, strongly supports a trier of fact determining specific items of damage against Uni-Ter UMC, including, without limitation, recommending and binding inappropriate

reinsurance through an unlicensed reinsurance intermediary in 2004, 2005-2006, 2007, 2008, 2009, 2010, 2011, and 2012, which was a substantial factor in the insolvency of L&C; negligently misrepresenting the financial condition of L&C and breaches of fiduciary duty associated with L&C operating while in a hazardous financial condition and/or statutorily impaired and/or insolvent from 3Q 2009 through September 2012. In my expert opinion, based upon the itemization of damages as calculated and set forth in Kuga **Exhibit 4** hereto, the total principal amount of damages for which Uni-Ter UMC is liable⁶ is as follows: (1) as to damages associated with reinsurance, no less than **\$7,986,000**; and (2) as for damages associated with insolvency, no less than **\$15,222,853**.

Uni-Ter Claims Services Corp.

The Third Amended Complaint, as well as the evidence produced and discovered thus far in this matter, strongly support, strongly supports a trier of fact determining specific items of damage alleged in the Complaint against Uni-Ter CS, including, without limitation, recommending and binding inappropriate reinsurance through an unlicensed reinsurance intermediary in 2004, 2005-2006, 2007, 2008, 2009, 2010, 2011, and 2012, which was a substantial factor in the insolvency of L&C; breaching its fiduciary duty to L&C by, among other things, suppressing reserves and breaches of fiduciary duty associated with L&C operating while in a hazardous financial condition and/or statutorily impaired and/or insolvent from 3Q 2009 through September 2012. In my expert opinion, based upon the itemization of damages as calculated and set forth in Kuga **Exhibit 4** hereto, the total principal amount of damages for which Uni-Ter CS is liable⁷ is as follows: (1) as to damages associated with reinsurance, no less than **\$7,986,000**; and (2) as for damages associated with insolvency, no less than **\$15,222,853**.

U.S. RE Corporation

The Third Amended Complaint, as well as the evidence produced and discovered thus far in this matter, strongly support, strongly supports a trier of fact determining specific items of damage against US RE, including damages related to US RE's numerous breaches of its

⁶ All assertions of damages are dependent upon a final determination by the trier of fact.

⁷ All assertions of damages are dependent upon a final determination by the trier of fact.

fiduciary duties, including, without limitation, recommending and binding inappropriate reinsurance as an unlicensed reinsurance intermediary in 2004, 2005-2006, 2007, 2008, 2009, 2010, 2011, and 2012, which was a substantial factor in the insolvency of L&C. In my expert opinion, based upon the itemization of damages as calculated and set forth in Kuga **Exhibit 4** hereto, the total principal amount of damages for which US RE is liable⁸ is as follows: (1) as to damages associated with reinsurance, no less than **\$7,986,000**; and (2) as for damages associated with insolvency, no less than **\$15,222,853**.

These findings and opinions are based on my review of the documents produced by the parties and provided to me by counsel as well as any additional material I have identified earlier in this statement, including without limitation the expert report of Mark Tharp and the Third Amended Complaint, as well as documents and exhibits thereto. My findings and opinions are also based upon my knowledge of the relevant economic, financial, and valuation theory, my professional experience, and my analysis of the relevant data and information I have thus far identified and obtained for this matter.

Should additional documents or information become available to me prior to trial, I reserve the right to supplement this expert witness statement accordingly.

In addition, I have not yet been provided with copies of any reports of the expert witness(es) retained by the defendants in this matter. Once those reports are completed and provided to me, I may find it necessary to conduct additional analyses to evaluate the findings and opinions of the defendant's expert witness(es). I reserve the right to supplement this expert witness statement accordingly to reflect any additional analyses conducted or opinions reached in this matter.

I am compensated at my billing rate of \$350 per hour for my work in this matter. *See* Fee Schedule attached as **Exhibit 5**.

⁸ All assertions of damages are dependent upon a final determination by the trier of fact.



Mark Kuga, Ph.D.

July 31, 2020

EXHIBIT 1

Mark W. Kuga, Ph.D.

Mark Kuga is President of Delta Economic Consulting.

Dr. Kuga specializes in economic and valuation analyses for businesses and individuals. He has conducted analyses of numerous companies, industries, and business situations. Dr. Kuga also has extensive expert witness experience performing forensic economic and valuation analyses in commercial and personal litigation disputes.

EDUCATION

Doctor of Philosophy, Economics, University of California, Los Angeles.

Master of Arts, Economics, University of California, Los Angeles.

Bachelor of Arts, Economics, University of Washington.

PREVIOUS EXPERIENCE

Principal and Director of Economic Analysis and Litigation Services, Willamette Management Associates, Portland, Oregon.

Senior Economist, Economic Analysis Corporation, Los Angeles, California.

Economist, Lexecon Inc., Chicago, Illinois.

TEACHING EXPERIENCE

Adjunct Instructor, Marylhurst University (formerly College), Business and Management Department, Graduate Program, 1996, 1998.

Adjunct Instructor, Portland State University, School of Business Administration and Statewide MBA Program, 1993-94, 1996.

PROFESSIONAL AFFILIATIONS

Past Member of Board of Directors, American Academy of Economic and Financial Experts, 1999-2001.

Past Member of Board of Directors, National Association of Forensic Economics, 2000-2002.

PUBLICATIONS

“Measuring Commercial Damages Via Lost Profits or Loss of Business Value: Are These Measures Redundant or Distinguishable?” (with Kenneth M. Kolaski), *hE Journal of Law and Commerce*, Vol. 18, No. 1, Fall 1998

“Measuring the Lost Profit Damages of a New Business,” *RA Expert*, Vol. 4, No. 3, Fall 1998 (reprinted also in *uBusiness Valuation Digest*, Vol. 5, Issue 2, November 1999)

“Evaluating Damages in Business Litigation Claims.” Willamette Management Associates *valuation Insights*, Autumn 1993

“Economic Analysis and Litigation Support.” Willamette Management Associates *valuation Insights*, Summer 1993

“The Decision to Franchise: Theory and Evidence,” doctoral dissertation, 1989

EXHIBIT 2

MARK W. KUGA PREVIOUS EXPERT TESTIMONY

PREVIOUS TRIAL TESTIMONY:

Trial – Gregg Lawrence v. Oregon State Fair Council Circuit Court for the State of Oregon, County of Marion

Retained by defendant to analyze economic damages of a business owner in a personal injury dispute.

Retained by Drew K. Baumchen, Senior Assistant Attorney General, Trial Division, Civil Litigation Section, Oregon Dept. of Justice.

Provided trial testimony before court and jury on October 29, 2019.

Trial – Wendie L. Herkamp v. Jane Ann Hicks Circuit Court for the State of Oregon, County of Marion

Retained by plaintiff to analyze economic damages in a personal injury dispute.

Retained by Lance D. Youd, Attorney at Law, Salem, Oregon.

Provided trial testimony before court and jury on October 8, 2019.

Arbitration – Katherine Olson-Engel v. State Farm

Retained by defendant to analyze economic damages of a business owner in a personal injury dispute.

Retained by Bill Martin of Schulte, Anderson, Downes, Aronson & Bittner, Portland, Oregon.

Provided arbitration testimony on April 22, 2019 before three arbitrators: Molly Jo Mullen, Lawrence Schuckman and Steve Piucci.

(There is no transcript of this testimony as no reporter was present during these proceedings.)

***Trial – Saratoga Investments, LLC v. Westchester Surplus Lines Insurance Co., et al.
Circuit Court for the State of Oregon, County of Multnomah***

Retained by plaintiff to analyze economic damages in a breach of contract dispute involving a forest products firm.

Retained by William A. Drew and John D. Ostrander, of Elliott, Ostrander & Preston, PC, Portland, Oregon.

Provided trial testimony before court and jury on April 4, 2019.

Arbitration – Danny Clifton v. State Farm

Retained by defendant to analyze economic damages of a business owner in personal injury dispute.

Retained by Bill Martin of Schulte, Anderson, Downes, Aronson & Bittner, Portland, Oregon.

Provided arbitration testimony on March 21, 2019 before three arbitrators: Judge Dale R. Koch, J. Brad Lewis and Hala J. Gores.

(There is no transcript of this testimony as no reporter was present during these proceedings.)

***Trial – Tamara Trattner v. Marion County & Mike S. Harmel
Circuit Court for the State of Oregon, County of Marion***

Retained by plaintiff to analyze economic damages in a personal injury dispute.

Retained by Travis S. Prestwich, Swanson , Lathen, Prestwich, Salem, Oregon.

Provided trial testimony before court and jury on October 24, 2018.

Arbitration – Steven Heinrich v. State Farm

Retained by defendant to analyze economic damages of an estate planning and elder law attorney in a personal injury dispute

Retained by Nicole M. Nowlin of Lewis Brisbois, Portland, Oregon.

Provided arbitration testimony on September 26, 2018 before three arbitrators: Carl R. Amala, Joe Durkee and Ken Elmore.

(There is no transcript of this testimony as no reporter was present during these proceedings.)

***Trial – Stuart Wagner v. Brewer & Brewer, Inc.
Circuit Court for the State of Oregon, County of Lane
Case No. 16CV37586***

Retained by defendant to analyze economic damages in a personal injury dispute.

Retained by Kathryn R. Morton, Law Office of Kathryn Reynolds Morton, Portland, Oregon.

Provided trial testimony before court and jury on March 1, 2018.

***Trial – Ramona Abney-DeCamara v. City of Salem
Circuit Court for the State of Oregon, County of Marion
Case No. 16CV31872***

Retained by plaintiff to analyze economic damages of a computer circuit board design professional in a personal injury dispute.

Retained by Carl R. Amala of Harris, Wyatt & Amala, LLC, Salem, Oregon.

Provided trial testimony before court and jury on September 21, 2017.

***Trial – Estate of Michael Dominguez v. Jason Rodriguez, et al.
Circuit Court for the State of Oregon, County of Multnomah
Case No. 14-cv-11452***

Retained by defendants to analyze economic damages in a wrongful death dispute.

Retained by Simon J. Harding of Schulte, Anderson, Downes, Aronson & Bittner, Portland, Oregon;
Danny Hitt and James Hiller of Hitt Hiller Monfils Williams, LLP, Portland, Oregon.

Provided trial testimony before court and jury on August 3, 2017.

***Trial – Quantum, Inc. v. Akeso Health Sciences, LLC
Akeso Health Sciences, LLC v. Quantum, Inc.
United States District Court, District of Oregon, Portland Division
Case No. 3:16-cv-00334-JE***

Retained by plaintiff/counterclaim defendant to analyze the economic damages in a breach of implied contract and trademark infringement dispute regarding an exclusive and non-exclusive sales rights contract involving a patented nutritional supplement product.

Retained by Jon P. Stride of Tonkon Torp LLP, Portland, Oregon.

Provided trial testimony before court and jury on June 9, 2017.

***Trial –
District Court for Clark County, Nevada
Case No. A-12-661338-B***

Retained by plaintiff to analyze the economic damages in a breach of contract and unjust enrichment dispute regarding a supply agreement for rolled galvanized steel.

Retained by William Quinlan of Quinlan Law Firm, Chicago, Illinois.

Provided trial testimony before court on January 19, 2017.

PREVIOUS DEPOSITION TESTIMONY:

Fremont Food Emporium, LLC v. New El Portal, LLC, et al.

Retained by plaintiff to analyze and evaluate alleged economic damages in a breach of contract dispute involving a lease commercial real estate property.

Retained by Robert Ryan and Jordan Smith of Pisanelli Bice PLLC, Las Vegas, Nevada.

Provided deposition testimony on January 13, 2020.

BM-Bank JSC (f/k/a BM-Bank PJSC and Bank of Moscow) v. Marker Craig, LLC, and Marker, LLC

Retained by defendant to analyze and evaluate alleged economic damages in an alleged fraudulent transfer dispute involving a bank and a real estate investment company involving the funding of the acquisition of commercial real estate property.

Retained by Todd E. Kennedy of Kennedy & Couvillier, Las Vegas, Nevada.

Provided deposition testimony on July 11, 2019.

Witcraft v. Hix and A&R Aviation Services, Inc.

Retained by defendant to analyze and evaluate alleged economic damages in a breach of contract dispute between two shareholders in a closely-held private company.

Retained by Alan J. Wertjes of Wertjes Law Group, Olympia, Washington.

Provided deposition testimony on January 17, 2019.

Pinnacle Marketing Group, Inc. v. Golin/Harris International, Inc., et al.

Retained by plaintiff to analyze and evaluate the economic damages in a breach of contract and unjust enrichment dispute involving a marketing services firm.

Retained by John D. Ostrander, Elliott, Ostrander and Preston, Portland, Oregon.

Provided deposition testimony on July 16, 2018.

EXHIBIT 3.1**CALCULATION OF REINSURANCE DAMAGES****Commissioner of Ins. for Lewis & Clark RRG v. Uni-Ter UMC, Uni-Ter CS, & U.S. RE Corp.****Officers of L&C, Uni-Ter, & US RE:**

<u>Year</u>	<u>Ceded Premium</u>	<u>Ceded Loss & LAE</u>	<u>Net Reinsurance Ceded</u>
2004	\$100,000	\$0	\$100,000
2005	\$633,000	\$0	\$633,000
2006	\$1,152,000	\$358,000	\$794,000
2007	\$1,108,000	\$3,000	\$1,105,000
2008	\$1,343,000	\$639,000	\$704,000
2009	\$1,797,000	\$0	\$1,797,000
2010	\$2,465,000		\$2,465,000
2011	\$1,431,000	\$1,043,000	\$388,000
Total	\$6,133,000	\$1,000,000	\$7,986,000

Sources:

2011 Annual Statement, Schedule P, Part 1 -- Summary (LC001338).

Tharp report, Exhibit AD.

EXHIBIT 3.2**CALCULATION OF INSOLVENCY DAMAGES**

Commissioner of Ins. for Lewis & Clark RRG v. Uni-Ter UMC, Uni-Ter CS, & U.S. RE Corp.

Officers of L&C, Uni-Ter, & US RE:

	<u>12/31/2008</u>	<u>9/30/2009</u>	<u>12/31/2009</u>	<u>12/31/2010</u>	<u>12/31/2011</u>
<u>Assets:</u>					
Bonds (line 1)	\$8,718,960	\$9,028,839	\$10,596,542	\$12,668,070	\$10,618,359
Cash (line 5)	\$2,108,079	\$2,461,186	\$2,635,206	\$1,274,252	\$2,896,198
Investment income due and accrued (line 12/14)	\$138,521	\$67,481	\$96,184	\$95,414	\$77,287
Uncollected premiums (line 13.1/15.1-15.3)	\$1,235,706	\$227,247	\$871,340	\$2,328,164	\$122,031
Other amounts receivable under reinsurance contracts (line 14.3/16.3)	\$1,700,000	\$2,101,998	\$1,793,000	\$2,819,600	\$3,039,002
Current federal income tax receivable (line 16.1/18.1)	\$0	\$62,355	\$214,246	\$61,213	\$438,985
Net deferred tax asset (line 16.2/18.2)	\$0	\$0	\$0	\$0	\$0
Aggregate write-ins (lines 17-23/19-25)	\$1,191,771	\$933,386	\$1,420,904	\$1,432,726	\$2,455,209
Total assets	\$15,093,037	\$14,882,492	\$17,627,422	\$20,679,439	\$19,647,071
<u>Liabilities:</u>					
Losses (line 1)	\$6,013,509	\$7,153,578	\$11,845,805	\$17,956,687	\$18,483,314
Loss adjustment expense (line 3)	\$720,951	\$954,751	\$1,233,678	\$1,798,188	\$2,259,096
Other expenses (line 5)	\$1,448,456	\$1,147,348	\$1,827,168	\$1,140,454	\$200,354
Taxes, licenses and fees (line 6)	\$218,159	\$106,985	\$211,888	\$227,521	\$138,243
Current federal income taxes (line 7.1)	\$43,833	\$0	\$18,524	\$0	\$0
Unearned premiums (line 9-10)	\$3,711,768	\$4,223,356	\$4,659,935	\$4,099,449	\$3,013,041
Ceded reinsurance premiums payable (line 12)	\$1,325,517	\$825,210	\$1,372,251	\$2,050,400	\$750,084
Aggregate write-ins (line 23)	\$269,419	\$31,068	\$42,863	\$32,794	\$87,514
Total liabilities	\$13,751,612	\$14,442,296	\$21,212,112	\$27,305,493	\$24,931,646
Surplus (Insolvency)	\$1,341,425	\$440,196	(\$3,584,690)	(\$6,626,054)	(\$5,284,575)
Surplus Notes	\$1,250,000	\$1,000,000	\$1,000,000	\$1,000,000	\$3,700,000
Total	\$91,425	(\$559,804)	(\$4,584,690)	(\$7,626,054)	(\$8,984,575)

Net Insolvency from 9/30/2009:

Reported Net Income (before Federal income taxes)	\$887,115	\$715,342	\$333,017	\$548,987	(\$5,631,435)
Adjustments	(\$2,765,594)	(\$3,750,368)	(\$7,616,038)	(\$11,205,764)	(\$8,909,891)
Adjusted Net Income	(\$1,878,479)	(\$3,035,026)	(\$7,283,021)	(\$10,656,777)	(\$14,541,326)

Sources:

Annual (quarterly for 9/30/2009) statements	LC001523-24	LC001956-57	LC001523-24	LC001305-06	LC001305-06
Italicized figures are adjusted per Mark Tharp	Tharp Ex. AC	Tharp Ex. V	Tharp Ex. W	Tharp Ex. X	Tharp Ex. Y
Annual (quarterly for 9/30/2009) statements	LC001219	LC001958	LC001219	LC001307	LC001307

EXHIBIT 4

CALCULATION OF ALLEGED DAMAGES

Commissioner of Ins. for Lewis & Clark RRG v. Uni-Ter UMC, Uni-Ter CS, & U.S. RE Corp.

Officers of L&C, Uni-Ter, & US RE:

Damages Associated with Reinsurance:

\$7,986,000

Exhibit 3.1

Damages Associated with Insolvency:

(\$15,222,853)

Exhibit 3.2

EXHIBIT 5

**EXPERT WITNESS FEE SCHEDULE
Mark Kuga, Ph.D.**

Expert Witness Consulting, Reports, and Testimony \$350 per hour

Retainer Due at time of retention based on scope of assignment.

Billing Services billed at end of each calendar month and upon conclusion of case.

Travel Airfare, Hotel & Ground Transportation (with prior approval of client).

Expenses Parking and incidental expenses (all other with prior approval of client).

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EXHIBIT PAGE ONLY

EXHIBIT 4

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

ODM

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Jon M. Wilson, Esq. (Appearing *Pro Hac Vice*)
Kimberly Freedman, Esq. (Appearing *Pro Hac Vice*)
Erin Kolmansberger, Esq. (Appearing *Pro Hac Vice*)
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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.,

Plaintiffs,

v.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**ORDER DENYING PLAINTIFF'S
MOTION FOR LEAVE TO FILE
FOURTH AMENDED COMPLAINT**

1 This matter came before the Court for hearing on July 23, 2020 on Plaintiff's Motion for
2 Leave to File Fourth Amended Complaint ("Motion"). Brenoch R. Wirthlin, Esq. appeared on
3 behalf of Plaintiff Commissioner of Insurance for the State of Nevada ("Plaintiff"); George F.
4 Ogilvie III, Esq., Jon N. Wilson, Esq. and Erin Kolmansberger, Esq. appeared on behalf of
5 Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S.
6 RE Corporation; and Angela T. Nakamura Ochoa, Esq. appeared on behalf of Defendants Robert
7 Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall
8 and Eric Stickels.

9 Having considered the record and the briefs submitted in support of and in opposition to
10 the Motion, and having entertained the arguments of counsel, the Court finds that the Motion is
11 untimely; that Plaintiff unduly delayed the assertion of the new allegations and claims for relief
12 set forth in the proposed Fourth Amended Complaint; that granting Plaintiff leave to file the Fourth
13 Amended Complaint would unduly prejudice defendants; that the new defendant sought to be
14 added was known to Plaintiff at the time of the filing of the original Complaint; and that the
15 proposed new claims for relief do not relate back to the filing of the original Complaint and are,
16 therefore, time-barred. Based on these findings and good cause appearing therefor,

17 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Leave to File Fourth Amended
18 Complaint is **DENIED**.

19 DATED this ____ day of July, 2020.

Dated this 10th day of August, 2020

Nancy L Allf

NANCY L. ALLF
District Court Judge
B19 B66 6A18 37FC
Nancy Allf
District Court Judge

1 Approved as to Form and Content:

2 HUTCHISON & STEFFEN

3
4 By: /s/ Brenoch Wirthlin, Esq.
5 10080 West Alta Drive, Suite 200
6 Las Vegas, Nevada 89145

7 *Attorneys for Plaintiff Commissioner*
8 *of Insurance for the State of Nevada*

9 LIPSON NEILSON, P.C.

10 By: /s/ Angela T. Nakamura Ochoa, Esq.
11 9900 Covington Cross Drive, Ste. 120
12 Las Vegas, Nevada 89144

13 *Attorneys for Robert Chur, et al.,*

14
15 Submitted By:

16 McDONALD CARANO LLP

17
18 By: /s/ George F. Ogilvie III
19 George F. Ogilvie III, Esq. (#3552)
20 2300 West Sahara Avenue, Suite 1200
21 Las Vegas, NV 89102

22 Jon M. Wilson, Esq. (Admitted *Pro Hac Vice*)
23 Kimberly Freedman, Esq. (Appearing *Pro Hac Vice*)
24 Erin Kolmansberger, Esq. (Appearing *Pro Hac Vice*)
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27 Miami, Florida 33131

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

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)
10

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: 8/10/2020

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24 Jon M. Wilson .

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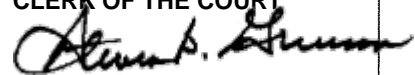
25 Kathy Barrett .

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Jon Linder	jlinder@hutchlegal.com



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5 Nevada Bar No. 10175
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14 E-mail: corne@hutchlegal.com
15 E-Mail: staylor@hutchlegal.com
16 *Attorneys for Plaintiff*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

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

17 Plaintiff,

18 vs.

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

27 Defendants.

Case No.: A-14-711535-C

Dept. No.: XXVII

NOTICE OF ENTRY OF ORDER

28 Please take notice that an Order Denying Plaintiff's Motion for Leave to File Fourth
Amended Complaint was entered on the 8th day of August, 2020, a copy of which is attached

///

///

1 hereto.

2 DATED this 8th day of August, 2020.

3 HUTCHISON & STEFFEN

4
5 By /s/Brenoch Wirthlin
6 BRENOCH R. WIRTHLIN, ESQ.
7 Nevada Bar No. 10282
8 CHRIS ORME, ESQ.
9 Nevada Bar No. 10175
10 STUART J. TAYLOR, ESQ.
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13 Las Vegas, Nevada 89145
14 *Attorneys for Plaintiff*
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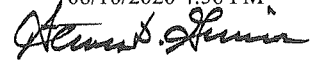
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 8th day of August, 2020, I caused the document entitled **NOTICE OF ENTRY OF ORDER** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

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



CLERK OF THE COURT

ODM

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*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.,

Plaintiffs,

v.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**ORDER DENYING PLAINTIFF'S
MOTION FOR LEAVE TO FILE
FOURTH AMENDED COMPLAINT**

This matter came before the Court for hearing on July 23, 2020 on Plaintiff's Motion for Leave to File Fourth Amended Complaint ("Motion"). Brenoch R. Wirthlin, Esq. appeared on behalf of Plaintiff Commissioner of Insurance for the State of Nevada ("Plaintiff"); George F. Ogilvie III, Esq., Jon N. Wilson, Esq. and Erin Kolmansberger, Esq. appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation; and Angela T. Nakamura Ochoa, Esq. appeared on behalf of Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels.

Having considered the record and the briefs submitted in support of and in opposition to the Motion, and having entertained the arguments of counsel, the Court finds that the Motion is untimely; that Plaintiff unduly delayed the assertion of the new allegations and claims for relief set forth in the proposed Fourth Amended Complaint; that granting Plaintiff leave to file the Fourth Amended Complaint would unduly prejudice defendants; that the new defendant sought to be added was known to Plaintiff at the time of the filing of the original Complaint; and that the proposed new claims for relief do not relate back to the filing of the original Complaint and are, therefore, time-barred. Based on these findings and good cause appearing therefor,

IT IS HEREBY ORDERED that Plaintiff's Motion for Leave to File Fourth Amended Complaint is **DENIED**.

DATED this ____ day of July, 2020.

Dated this 10th day of August, 2020

Nancy L. Allf

NANCY L. ALLF
District Court Judge
B19 B66 6A18 37FC
Nancy Allf
District Court Judge

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1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

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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
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EXHIBIT PAGE ONLY

EXHIBIT 5

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER DENYING
PLAINTIFF'S MOTION FOR LEAVE
TO FILE FOURTH AMENDED
COMPLAINT**

1 This matter came before the Court for hearing on July 23, 2020 on Plaintiff's Motion for
2 Leave to File Fourth Amended Complaint ("Motion"). Brenoch R. Wirthlin, Esq. appeared on
3 behalf of Plaintiff Commissioner of Insurance for the State of Nevada ("Plaintiff" or "Receiver");
4 George F. Ogilvie III, Esq., Jon N. Wilson, Esq. and Erin Kolmansberger, Esq. appeared on behalf
5 of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S.
6 RE Corporation; and Angela T. Nakamura Ochoa, Esq. appeared on behalf of Defendants Robert
7 Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall
8 and Eric Stickels.

9 Having considered the record and the briefs submitted in support of and in opposition to
10 the Motion, and having entertained the arguments of counsel, and being fully informed in the
11 premises, the Court makes the following findings of fact, conclusions of law and order:

12 **FINDINGS OF FACT**

13 1. Lewis and Clark LTC Risk Retention Group, Inc. ("L&C") was formed in 2004.
14 Between 2004 and February 28, 2013, L&C provided general and professional liability coverage
15 to long term care facilities and home health providers. *See* Third Amended Complaint ("TAC")
16 at ¶1.

17 2. Defendants Uni-Ter Underwriting Management Corp. ("Uni-Ter UMC") and Uni-
18 Ter Claims Services Corp. ("Uni-Ter CS"), were retained to manage Lewis & Clark.

19 3. In the summer of 2011 L&C suffered adverse loss development.

20 4. The Nevada Division of Insurance ("DOI") filed a Receivership Action related to
21 L&C in November, 2012, commencing case number A-12-672047-B ("Receivership Action").
22 Plaintiff Commissioner of Insurance for the State of Nevada was appointed as the Receiver.

23 5. On February 28, 2013, an order of liquidation ("Liquidation Order") was entered
24 in the Receivership Action, appointing the Commissioner of Insurance as the Receiver of L&C.
25 *See* Liquidation Order.

26 6. On December 23, 2014, the Receiver instituted this lawsuit against former directors
27 of L&C Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin,
28 Jeff Marshall and Eric Stickels ("Director Defendants"), Uni-Ter UMC, Uni-Ter CS, and U.S. Re.

1 In the initial complaint, the Receiver alleged claims of gross negligence and deepening of the
2 insolvency against the Director Defendants, negligent misrepresentation against Uni-Ter UMC,
3 breach of fiduciary duty against Uni-Ter UMC and Uni-Ter CS, and breach of fiduciary duty
4 against U.S. Re.

5 7. On December 11, 2015, Director Defendants filed their Motion to Dismiss,
6 challenging the sufficiency of the allegations of gross negligence and asserting that a claim for
7 deepening insolvency required allegations of fraud such that the claims must be pled with
8 specificity.

9 8. On June 13, 2016, the Receiver filed its Second Amended Complaint, and,
10 subsequently, on August 5, 2016, the Receiver filed its Third Amended Complaint—the currently
11 operative complaint—which contains the same claims against Defendants as the original
12 Complaint and nearly 500 pages of exhibits.

13 9. On April 18, 2016, Director Defendants filed a Motion to Dismiss the First
14 Amended Complaint, asserting that claims against officers and directors needed to be supported
15 by claims of intentional misconduct, fraud or knowing violation of the law. Said Motion was
16 subsequently denied.

17 10. During the period of September 5, 2017 through April 13, 2018, Director
18 Defendants propounded written discovery upon Plaintiff.

19 11. Due to the multiple requests to extend discovery in this action and the then
20 approaching 5-year rule expiration, this Court expressly conditioned its May 16, 2018 Order
21 continuing discovery deadlines that it would be the “last stipulation to continue.”

22 12. On August 14, 2018, the Director Defendants filed a Motion For Judgment On The
23 Pleadings Pursuant To NRCP 12(C) (“Motion For Judgment On The Pleadings”). On October 11,
24 2020, this Court denied the Director Defendants’ Motion for Judgment on the Pleadings.

25 13. Notwithstanding this Court’s May 16, 2018 preclusion of further extensions, on
26 December 12, 2018, the Receiver filed Plaintiff’s Motion for Extension of Discovery Deadlines
27 and to Continue Trial on Order Shortening Time (Fourth Request), which this Court granted in
28 part and denied in part, extending discovery for sixty (60) days and ordering a firm trial setting.

14. In and around July, 2018, Director Defendant Barbara Lumpkin passed away.

15. On November 8, 2018, the deposition of the NRCP 30(b)(6) witness for the Commissioner of Insurance for the State of Nevada took place, in which he frequently responded that the complaint spoke for itself and that he would be relying upon experts in response to the Defendants questioning. Mr. Greer also testified regarding the unavailability of certain Division of Insurance former employees. On March 8, 2019, the Director Defendants filed a Motion to Stay Proceedings Pending Petition for Writ of Mandamus on an Order Shortening Time. The Receiver joined in the request for a stay of these proceedings; Uni-Ter UMC, Uni-Ter CS and US Re opposed the imposition of a stay in significant part due to the ongoing and increasing prejudice it had experienced and would continue to experience in delaying the trial of the Receiver's claims.

16. On March 12, 2019, the Director Defendants filed their Notice of Filing of Petition for Writ of Mandamus with the Nevada Supreme Court. In their Petition for Writ of Mandamus, the Director Defendants challenged this Court's denial of the Director Defendants' Motion for Judgment on the Pleadings.

17. On March 14, 2019, this Court granted the Motion to Stay Proceedings Pending Petition for Writ of Mandamus, and imposed an immediate stay (the "Stay") of all proceedings in this matter.

18. Prior to the March 14, 2019 imposition of the Stay, the deadlines for moving to amend pleadings or add parties and for the Receiver to serve its initial expert reports were March 15, 2018.

19. On February 27, 2020, the Nevada Supreme Court issued its Opinion ("NSC Opinion") granting the Director Defendants' Petition for Writ of Mandamus, and instructed this Court to vacate its order denying the Director Defendants' Motion for Judgment on the Pleadings, and to enter a new order granting the Director Defendants' Motion for Judgment on the Pleadings. The NSC Opinion left to this Court's discretion whether to grant the Receiver leave to file a fourth amended complaint.

20. On April 6, 2020, the Receiver filed in this Court Plaintiff's Motion for Clarification on Order Shortening Time ("Plaintiff's Motion for Clarification").

1 21. On April 29, 2020, the Receiver filed its Petition for Rehearing ("Plaintiff's
2 Petition") regarding the Nevada Supreme Court's granting of the Director Defendants' Petition
3 for Writ of Mandamus.

4 22. On May 10, 2020, the Receiver filed its Second Supplemental Brief to the Motion
5 for Clarification ("Second Supplemental Brief"). In the Second Supplemental Brief, the Receiver
6 represented:

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

11 *See* Second Supplemental Brief at 5 (emphasis added).

12 23. On May 14, 2020, because the writ petition proceedings before the Nevada
13 Supreme Court were not concluded, the parties entered into a stipulation continuing the hearing
14 on Plaintiff's Motion for Clarification and extending the Stay until June 18, 2020.

15 24. On May 22, 2020, the Nevada Supreme Court issued its Order Denying Rehearing,
16 thereby affirming the Opinion, and directing this Court to enter an order granting the Director
17 Defendants' Motion for Judgment on the Pleadings, but leaving to this Court's discretion whether
18 to grant the Receiver leave to file a fourth amended complaint.

19 25. At the time of the June 18, 2020 hearing on Plaintiff's Motion for Clarification, the
20 Receiver again represented its intention to seek leave to file a Fourth Amended Complaint to
21 remedy the deficiencies identified in the NSC Opinion; the Receiver did not express or intimate
22 that it would be seeking to add new claims against Uni-Ter UMC, Uni-Ter CS or US Re, or seeking
23 to add a new party.

24 26. Also at the time of the June 18, 2020 hearing, the Receiver requested that the Stay
25 be extended to July 1, 2020; the Defendants objected to the Receiver's request, and requested that
26 the Stay be lifted immediately. This Court granted Plaintiff's Motion for Clarification, and
27 ordered that the Stay be lifted as of July 1, 2020.
28

1 27. On June 24, 2020, the Receiver filed Plaintiff's Motion for Preferential Trial Setting
2 And For Issuance of A New Discovery Scheduling Order or, In the Alternative, Motion to Stay
3 All Discovery During the Pendency of Motion For Leave to File Fourth Amended Complaint; On
4 Order Shortening Time ("Plaintiff's Motion for Preferential Trial Setting") seeking, *inter alia*, to
5 extend the July 2, 2020 deadline for the Receiver to serve its initial expert disclosures.

6 28. At the time of the July 1, 2020 hearing on Plaintiff's Motion for Preferential Trial
7 Setting, the Receiver sought a further extension of the July 2, 2020 deadline for the Receiver to
8 serve its initial expert disclosures. The Defendants objected to the Receiver's request, and
9 requested that the Court direct the Receiver to serve its initial expert disclosures on July 2. This
10 Court granted the Receiver's request, and extended the deadline for the Receiver to served its
11 initial expert disclosures to the conclusion of the hearing of Receiver's anticipated Motion for
12 Leave to File Fourth Amended Complaint. As of the date of the hearing on the Receiver's Motion
13 for Leave to File Fourth Amended Complaint, Plaintiff had still not made her initial expert
14 disclosure.

15 29. On July 2, 2020, the Receiver filed its Motion for Leave to File Fourth Amended
16 Complaint, falsely representing to this Court that "[o]ther than seeking to add Piccione as a
17 Defendant and asserting *a new claim against him*, the Fourth Amended Complaint *does not add*
18 *new claims against the Defendants*—it simply adds factual allegations to support the claims that
19 have been pending against the Defendants for years and substitutes causes of action (i.e., breach
20 of fiduciary duty in place of gross negligence)." *See* Motion for Leave to File Fourth Amended
21 Complaint at 30:15-18 (emphasis added).

22 30. In actuality, the Receiver's proposed Fourth Amended Complaint seeks: (i) to
23 amend the allegations against the Director Defendants in accordance with the NSC Opinion, and
24 (ii) to assert three causes of action against a new defendant, Tal Piccione, for deepening of the
25 insolvency and aiding and abetting breach of fiduciary duty (Ninth, Seventeenth, and Eighteenth
26 Claims), two *new* causes of action against Uni-Ter UMC for deepening of the insolvency and
27 aiding and abetting breach of fiduciary duty (Ninth and Fourteenth Claims); two *new* causes of
28 action against Uni-Ter CS for deepening of the insolvency and aiding and abetting breach of

1 fiduciary duty (Ninth and Fifteenth Claims); and two *new* causes of action against U.S. Re for
2 deepening of the insolvency and aiding and abetting breach of fiduciary duty (Ninth and Sixteenth
3 Claims). *See* proposed Fourth Amended Complaint at ¶¶ 697-727).

4 31. The Receiver's failure to seek to add the new defendant and the new claims against
5 Uni-Ter UMC, Uni-Ter CS or US Re in the four (4) years and three (3) months between the
6 Receiver's December 23, 2014 filing of the original Complaint and the March 14, 2019 imposition
7 of the Stay constitutes undue delay.

8 32. The Receiver's failure to disclose its intention to add a new defendant and new
9 claims against Uni-Ter UMC, Uni-Ter CS or US Re in its filings and oral representations to
10 counsel and this Court prior to the filing of its Motion for Leave to File Fourth Amended
11 Complaint constitutes bad faith and reflects dilatory motives. *See MEI-GSR Holdings, LLC v.*
12 *Peppermill Casinos, Inc.*, 416 P.3d 249, 254–55 (Nev. 2018).

13 33. The Receiver's attempt to add a new defendant and new claims against Uni-Ter
14 UMC, Uni-Ter CS and U.S. Re will further delay this litigation. Allowing the new claims will
15 broaden the scope of the litigation, will likely result in motions to dismiss being filed, and will
16 require additional discovery, including depositions of several individuals who have already been
17 deposed, with less than five (5) months remaining before discovery cutoff.

18 34. The identity of the individual whom Plaintiff seeks to add as a defendant was
19 known to Plaintiff at the time of the December 23, 2014 filing of the original Complaint. *See*
20 proposed Fourth Amended Complaint at ¶¶ 29-30 (“*at all relevant times including as of the time*
21 *the Receivership Action was filed,*” Mr. Piccione was the “Chairman, President, Chief Executive
22 Officer, and a Director of U.S. RE” and “Chairman and a Director of Uni-Ter.” (emphasis added).

23 35. The factual predicate and the legal basis for the new claims for deepening of the
24 insolvency and aiding and abetting breach of fiduciary duty Plaintiff seeks to assert against the
25 new defendant, Uni-Ter UMC, Uni-Ter CS and US Re were known or should have been known
26 to Plaintiff at the time of the December 23, 2014 filing of the original Complaint.

27 36. The Receiver acted dilatorily in failing to seek to amend the TAC to assert the new
28 claims for deepening of the insolvency and aiding and abetting breach of fiduciary duty Plaintiff

1 seeks to assert against the new defendant, Uni-Ter UMC, Uni-Ter CS and US Re much earlier.
2 *See Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 288, 357 P.3d 966, 972 (2015).

3 37. Uni-Ter UMC, Uni-Ter CS and U.S. Re have ceased doing business and now must
4 rely on former employees, over whom they have no control, to testify on their behalf and who are
5 outside the jurisdiction of this Court for subpoena purposes. Uni-Ter UMC, UniTer CS and U.S.
6 Re have consistently advised of counsel and this Court of the difficulties associated with locating
7 former employees to depose or, presumably, call to testify at trial. Allowing the Receiver to
8 amend the TAC will be detrimental to Uni-Ter UMC, Uni-Ter CS and U.S. Re's ability to properly
9 defend themselves at the eventual trial in this case, resulting in undue prejudice.

10 38. As it relates to the Director Defendants, Plaintiff's proposed Fourth Amended
11 Complaint seeks to add claims and allegations that the Director Defendants knowingly violated
12 the law.

13 39. Between the deposition testimony of Plaintiff's NRCP 30(b)(6) designee and
14 Plaintiff's responses to written discovery, there is no factual basis for Plaintiff's new allegation
15 that Director Defendants knowingly violated the law, as Plaintiff's proposed Fourth Amended
16 Complaint alleges.

17 40. With the great passage of time of the alleged violations of law and the fact that
18 witnesses are unavailable, the Director Defendants will be unduly prejudiced in establishing their
19 defenses to Plaintiff's new theory that the Director Defendants knowingly violated the law. If any
20 of these findings of fact should more properly be identified as a conclusion of law, then it shall be
21 deemed a conclusion of law.

22 **CONCLUSIONS OF LAW**

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

2. A denial of leave to amend may be warranted if undue delay, bad faith, or dilatory motives are involved. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000).

3. Where a plaintiff has previously amended her complaint, the discretion to deny further amendment is “particularly broad.” *Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1058 (9th Cir. 2011).

4. Leave to amend should not be granted if the proposed amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013), *as corrected* (Aug. 14, 2013).

5. A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim. *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 289, 357 P.3d 966, 973 (Nev. App. 2015).

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

7. The Plaintiff’s proposed claims for aiding and abetting accrued when the Plaintiff “knew or reasonably should have known, of the facts giving rise to the breach” of fiduciary duty claims. *See In re Amerco Derivative Litig.*, 127 Nev. 196, 252 P.3d 681 (2011).

8. Since the Plaintiff’s original Complaint filed in December 2014 included claims for breach of fiduciary duty against Uni-Ter and U.S. Re., the Plaintiff’s proposed claims for aiding and abetting those purported breaches of fiduciary duty would have expired in December 2017, which is three years after the filing of the original Complaint.

9. The proposed aiding and abetting claims are therefore time-barred unless they relate back to the original Complaint pursuant to NRCP 15(c).

10. A new claim based upon a new theory of liability asserted in an amended pleading does not relate back under NRCP 15(c) after the statute of limitations has run. *Badger v. Eighth Jud. Dist. Ct.*, 373 P.3d 89, 94–95 (Nev. 2016).

1 11. The fictitious defendant rule in NRCP 10(d) provides a “narrow exception,
2 allowing the pleading of fictitious defendants only where there is an uncertainty as to their names.”
3 *Lunn v. American Maintenance Corp.*, 96 Nev. 787, 618 P.2d 343 (1980). The fictitious defendant
4 rule, however, does not apply to the “addition of a party defendant.” *Id.*

5 12. In order to substitute a newly-named defendant for a previously named Doe
6 defendant under NCRP 10(d), the party seeking the substitution must satisfy the requirements set
7 forth in *Nurenberger Hercules-Werke GMBH v. Virostek*, 107 Nev. 873, 822 P.2d 1100 (1991),
8 which include: (1) “pleading the basis for naming defendants by other than their true identity, and
9 clearly specifying the connection between the intended defendants and the conduct, activity, or
10 omission upon which the cause of action is based;” and (2) “exercising reasonable diligence in
11 ascertaining the true identity of the intended defendants and promptly moving to amend the
12 complaint in order to substitute the actual for the fictional.” *Id.* at 881. Satisfaction of these
13 elements is “necessary to the granting of an amendment that relates back to the date of the filing
14 of the original complaint.” *Id.*

15 13. While the Plaintiff vaguely pled fictitious defendants in its original Complaint, she
16 has failed to meet the requirements of *Nurenberger*.

17 14. The Plaintiff’s attempt to add the new defendant, Tal Piccione, is not substitution
18 of a Doe defendant under NRCP 10(d), but an attempt to add a new party defendant under NRCP
19 15(c).

20 15. As a new claim based upon a new theory of liability asserted against a new party
21 defendant in an amended pleading does not relate back under NRCP 15(c) after the statute of
22 limitations has run, the Plaintiff’s attempt to add the new party defendant is futile.

23 16. Justice does not require granting leave to amend in this instance because the
24 Receiver acted dilatorily in failing to seek to amend the TAC to assert the new claims for
25 deepening of the insolvency and aiding and abetting breach of fiduciary duty Plaintiff seeks to
26 assert against the new defendant, Uni-Ter UMC, Uni-Ter CS and US Re much earlier. *See Nutton*
27 *v. Sunset Station, Inc.*, 131 Nev. 279, 288, 357 P.3d 966, 972 (2015).
28

1 17. Justice does not require granting leave to amend for Plaintiff to file the proposed
2 Fourth Amended Complaint as to the Director Defendants because Plaintiff unduly delayed
3 bringing said complaint and it would be unduly prejudicial for the Director Defendants to defend
4 such theories of liability at this point.


5 18. If any of these conclusions of law should more properly be identified as a finding
6 of fact, then it shall be deemed a finding of fact.

7 **ORDER**

8 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Leave to File Fourth Amended
9 Complaint is **DENIED**.

10 DATED this ____ day of August, 2020.

Dated this 10th day of August, 2020

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12 _____
13 NANCY L. ALLF
14 District Court Judge
15 B48 88C D21A 9B68
16 Nancy Allf
17 District Court Judge
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28 *Management Corp., Uni-Ter Claims Services Corp.,*
and U.S. RE Corporation

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
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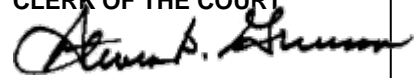
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

**NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
ORDER DENYING PLAINTIFF'S
MOTION FOR LEAVE TO FILE
FOURTH AMENDED COMPLAINT**

1 PLEASE TAKE NOTICE that Findings of Fact, Conclusions of Law and Order Denying
2 Plaintiff's Motion for Leave to File Fourth Amended Complaint was entered in the above-
3 referenced case on the 10th day of August, a copy of which is attached hereto.

4 Dated this 10th day of August, 2020.

5
6 McDONALD CARANO LLP

7 By: /s/ George F. Ogilvie III
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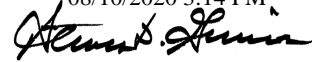
11 *Attorneys for Defendants Uni-Ter Underwriting*
12 *Management Corp., Uni-Ter Claims Services*
13 *Corp., and U.S. RE Corporation.*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 10th day of August, 2020, a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic

An employee of McDonald Carano LLP


CLERK OF THE COURT

FFCL

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

v.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER DENYING
PLAINTIFF'S MOTION FOR LEAVE
TO FILE FOURTH AMENDED
COMPLAINT**

MCDONALD CARANO

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1 This matter came before the Court for hearing on July 23, 2020 on Plaintiff's Motion for
2 Leave to File Fourth Amended Complaint ("Motion"). Brenoch R. Wirthlin, Esq. appeared on
3 behalf of Plaintiff Commissioner of Insurance for the State of Nevada ("Plaintiff" or "Receiver");
4 George F. Ogilvie III, Esq., Jon N. Wilson, Esq. and Erin Kolmansberger, Esq. appeared on behalf
5 of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S.
6 RE Corporation; and Angela T. Nakamura Ochoa, Esq. appeared on behalf of Defendants Robert
7 Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall
8 and Eric Stickels.

9 Having considered the record and the briefs submitted in support of and in opposition to
10 the Motion, and having entertained the arguments of counsel, and being fully informed in the
11 premises, the Court makes the following findings of fact, conclusions of law and order:

12 **FINDINGS OF FACT**

13 1. Lewis and Clark LTC Risk Retention Group, Inc. ("L&C") was formed in 2004.
14 Between 2004 and February 28, 2013, L&C provided general and professional liability coverage
15 to long term care facilities and home health providers. *See* Third Amended Complaint ("TAC")
16 at ¶1.

17 2. Defendants Uni-Ter Underwriting Management Corp. ("Uni-Ter UMC") and Uni-
18 Ter Claims Services Corp. ("Uni-Ter CS"), were retained to manage Lewis & Clark.

19 3. In the summer of 2011 L&C suffered adverse loss development.

20 4. The Nevada Division of Insurance ("DOI") filed a Receivership Action related to
21 L&C in November, 2012, commencing case number A-12-672047-B ("Receivership Action").
22 Plaintiff Commissioner of Insurance for the State of Nevada was appointed as the Receiver.

23 5. On February 28, 2013, an order of liquidation ("Liquidation Order") was entered
24 in the Receivership Action, appointing the Commissioner of Insurance as the Receiver of L&C.
25 *See* Liquidation Order.

26 6. On December 23, 2014, the Receiver instituted this lawsuit against former directors
27 of L&C Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin,
28 Jeff Marshall and Eric Stickels ("Director Defendants"), Uni-Ter UMC, Uni-Ter CS, and U.S. Re.

1 In the initial complaint, the Receiver alleged claims of gross negligence and deepening of the
2 insolvency against the Director Defendants, negligent misrepresentation against Uni-Ter UMC,
3 breach of fiduciary duty against Uni-Ter UMC and Uni-Ter CS, and breach of fiduciary duty
4 against U.S. Re.

5 7. On December 11, 2015, Director Defendants filed their Motion to Dismiss,
6 challenging the sufficiency of the allegations of gross negligence and asserting that a claim for
7 deepening insolvency required allegations of fraud such that the claims must be pled with
8 specificity.

9 8. On June 13, 2016, the Receiver filed its Second Amended Complaint, and,
10 subsequently, on August 5, 2016, the Receiver filed its Third Amended Complaint—the currently
11 operative complaint—which contains the same claims against Defendants as the original
12 Complaint and nearly 500 pages of exhibits.

13 9. On April 18, 2016, Director Defendants filed a Motion to Dismiss the First
14 Amended Complaint, asserting that claims against officers and directors needed to be supported
15 by claims of intentional misconduct, fraud or knowing violation of the law. Said Motion was
16 subsequently denied.

17 10. During the period of September 5, 2017 through April 13, 2018, Director
18 Defendants propounded written discovery upon Plaintiff.

19 11. Due to the multiple requests to extend discovery in this action and the then
20 approaching 5-year rule expiration, this Court expressly conditioned its May 16, 2018 Order
21 continuing discovery deadlines that it would be the “last stipulation to continue.”

22 12. On August 14, 2018, the Director Defendants filed a Motion For Judgment On The
23 Pleadings Pursuant To NRCP 12(C) (“Motion For Judgment On The Pleadings”). On October 11,
24 2020, this Court denied the Director Defendants’ Motion for Judgment on the Pleadings.

25 13. Notwithstanding this Court’s May 16, 2018 preclusion of further extensions, on
26 December 12, 2018, the Receiver filed Plaintiff’s Motion for Extension of Discovery Deadlines
27 and to Continue Trial on Order Shortening Time (Fourth Request), which this Court granted in
28 part and denied in part, extending discovery for sixty (60) days and ordering a firm trial setting.

14. In and around July, 2018, Director Defendant Barbara Lumpkin passed away.

15. On November 8, 2018, the deposition of the NRCP 30(b)(6) witness for the Commissioner of Insurance for the State of Nevada took place, in which he frequently responded that the complaint spoke for itself and that he would be relying upon experts in response to the Defendants questioning. Mr. Greer also testified regarding the unavailability of certain Division of Insurance former employees. On March 8, 2019, the Director Defendants filed a Motion to Stay Proceedings Pending Petition for Writ of Mandamus on an Order Shortening Time. The Receiver joined in the request for a stay of these proceedings; Uni-Ter UMC, Uni-Ter CS and US Re opposed the imposition of a stay in significant part due to the ongoing and increasing prejudice it had experienced and would continue to experience in delaying the trial of the Receiver's claims.

16. On March 12, 2019, the Director Defendants filed their Notice of Filing of Petition for Writ of Mandamus with the Nevada Supreme Court. In their Petition for Writ of Mandamus, the Director Defendants challenged this Court's denial of the Director Defendants' Motion for Judgment on the Pleadings.

17. On March 14, 2019, this Court granted the Motion to Stay Proceedings Pending Petition for Writ of Mandamus, and imposed an immediate stay (the "Stay") of all proceedings in this matter.

18. Prior to the March 14, 2019 imposition of the Stay, the deadlines for moving to amend pleadings or add parties and for the Receiver to serve its initial expert reports were March 15, 2018.

19. On February 27, 2020, the Nevada Supreme Court issued its Opinion ("NSC Opinion") granting the Director Defendants' Petition for Writ of Mandamus, and instructed this Court to vacate its order denying the Director Defendants' Motion for Judgment on the Pleadings, and to enter a new order granting the Director Defendants' Motion for Judgment on the Pleadings. The NSC Opinion left to this Court's discretion whether to grant the Receiver leave to file a fourth amended complaint.

20. On April 6, 2020, the Receiver filed in this Court Plaintiff's Motion for Clarification on Order Shortening Time ("Plaintiff's Motion for Clarification").

1 21. On April 29, 2020, the Receiver filed its Petition for Rehearing ("Plaintiff's
2 Petition") regarding the Nevada Supreme Court's granting of the Director Defendants' Petition
3 for Writ of Mandamus.

4 22. On May 10, 2020, the Receiver filed its Second Supplemental Brief to the Motion
5 for Clarification ("Second Supplemental Brief"). In the Second Supplemental Brief, the Receiver
6 represented:

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

11 *See* Second Supplemental Brief at 5 (emphasis added).

12 23. On May 14, 2020, because the writ petition proceedings before the Nevada
13 Supreme Court were not concluded, the parties entered into a stipulation continuing the hearing
14 on Plaintiff's Motion for Clarification and extending the Stay until June 18, 2020.

15 24. On May 22, 2020, the Nevada Supreme Court issued its Order Denying Rehearing,
16 thereby affirming the Opinion, and directing this Court to enter an order granting the Director
17 Defendants' Motion for Judgment on the Pleadings, but leaving to this Court's discretion whether
18 to grant the Receiver leave to file a fourth amended complaint.

19 25. At the time of the June 18, 2020 hearing on Plaintiff's Motion for Clarification, the
20 Receiver again represented its intention to seek leave to file a Fourth Amended Complaint to
21 remedy the deficiencies identified in the NSC Opinion; the Receiver did not express or intimate
22 that it would be seeking to add new claims against Uni-Ter UMC, Uni-Ter CS or US Re, or seeking
23 to add a new party.

24 26. Also at the time of the June 18, 2020 hearing, the Receiver requested that the Stay
25 be extended to July 1, 2020; the Defendants objected to the Receiver's request, and requested that
26 the Stay be lifted immediately. This Court granted Plaintiff's Motion for Clarification, and
27 ordered that the Stay be lifted as of July 1, 2020.
28

27. On June 24, 2020, the Receiver filed Plaintiff's Motion for Preferential Trial Setting And For Issuance of A New Discovery Scheduling Order or, In the Alternative, Motion to Stay All Discovery During the Pendency of Motion For Leave to File Fourth Amended Complaint; On Order Shortening Time ("Plaintiff's Motion for Preferential Trial Setting") seeking, *inter alia*, to extend the July 2, 2020 deadline for the Receiver to serve its initial expert disclosures.

28. At the time of the July 1, 2020 hearing on Plaintiff's Motion for Preferential Trial Setting, the Receiver sought a further extension of the July 2, 2020 deadline for the Receiver to serve its initial expert disclosures. The Defendants objected to the Receiver's request, and requested that the Court direct the Receiver to serve its initial expert disclosures on July 2. This Court granted the Receiver's request, and extended the deadline for the Receiver to served its initial expert disclosures to the conclusion of the hearing of Receiver's anticipated Motion for Leave to File Fourth Amended Complaint. As of the date of the hearing on the Receiver's Motion for Leave to File Fourth Amended Complaint, Plaintiff had still not made her initial expert disclosure.

29. On July 2, 2020, the Receiver filed its Motion for Leave to File Fourth Amended Complaint, falsely representing to this Court that "[o]ther than seeking to add Piccione as a Defendant and asserting *a new claim against him*, the Fourth Amended Complaint *does not add new claims against the Defendants*—it simply adds factual allegations to support the claims that have been pending against the Defendants for years and substitutes causes of action (i.e., breach of fiduciary duty in place of gross negligence)." *See* Motion for Leave to File Fourth Amended Complaint at 30:15-18 (emphasis added).

30. In actuality, the Receiver's proposed Fourth Amended Complaint seeks: (i) to amend the allegations against the Director Defendants in accordance with the NSC Opinion, and (ii) to assert three causes of action against a new defendant, Tal Piccione, for deepening of the insolvency and aiding and abetting breach of fiduciary duty (Ninth, Seventeenth, and Eighteenth Claims), two *new* causes of action against Uni-Ter UMC for deepening of the insolvency and aiding and abetting breach of fiduciary duty (Ninth and Fourteenth Claims); two *new* causes of action against Uni-Ter CS for deepening of the insolvency and aiding and abetting breach of

1 fiduciary duty (Ninth and Fifteenth Claims); and two *new* causes of action against U.S. Re for
2 deepening of the insolvency and aiding and abetting breach of fiduciary duty (Ninth and Sixteenth
3 Claims). *See* proposed Fourth Amended Complaint at ¶¶ 697-727).

4 31. The Receiver's failure to seek to add the new defendant and the new claims against
5 Uni-Ter UMC, Uni-Ter CS or US Re in the four (4) years and three (3) months between the
6 Receiver's December 23, 2014 filing of the original Complaint and the March 14, 2019 imposition
7 of the Stay constitutes undue delay.

8 32. The Receiver's failure to disclose its intention to add a new defendant and new
9 claims against Uni-Ter UMC, Uni-Ter CS or US Re in its filings and oral representations to
10 counsel and this Court prior to the filing of its Motion for Leave to File Fourth Amended
11 Complaint constitutes bad faith and reflects dilatory motives. *See MEI-GSR Holdings, LLC v.*
12 *Peppermill Casinos, Inc.*, 416 P.3d 249, 254–55 (Nev. 2018).

13 33. The Receiver's attempt to add a new defendant and new claims against Uni-Ter
14 UMC, Uni-Ter CS and U.S. Re will further delay this litigation. Allowing the new claims will
15 broaden the scope of the litigation, will likely result in motions to dismiss being filed, and will
16 require additional discovery, including depositions of several individuals who have already been
17 deposed, with less than five (5) months remaining before discovery cutoff.

18 34. The identity of the individual whom Plaintiff seeks to add as a defendant was
19 known to Plaintiff at the time of the December 23, 2014 filing of the original Complaint. *See*
20 proposed Fourth Amended Complaint at ¶¶ 29-30 (“*at all relevant times including as of the time*
21 *the Receivership Action was filed,*” Mr. Piccione was the “Chairman, President, Chief Executive
22 Officer, and a Director of U.S. RE” and “Chairman and a Director of Uni-Ter.” (emphasis added).

23 35. The factual predicate and the legal basis for the new claims for deepening of the
24 insolvency and aiding and abetting breach of fiduciary duty Plaintiff seeks to assert against the
25 new defendant, Uni-Ter UMC, Uni-Ter CS and US Re were known or should have been known
26 to Plaintiff at the time of the December 23, 2014 filing of the original Complaint.

27 36. The Receiver acted dilatorily in failing to seek to amend the TAC to assert the new
28 claims for deepening of the insolvency and aiding and abetting breach of fiduciary duty Plaintiff

1 seeks to assert against the new defendant, Uni-Ter UMC, Uni-Ter CS and US Re much earlier.
2 *See Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 288, 357 P.3d 966, 972 (2015).

3 37. Uni-Ter UMC, Uni-Ter CS and U.S. Re have ceased doing business and now must
4 rely on former employees, over whom they have no control, to testify on their behalf and who are
5 outside the jurisdiction of this Court for subpoena purposes. Uni-Ter UMC, UniTer CS and U.S.
6 Re have consistently advised of counsel and this Court of the difficulties associated with locating
7 former employees to depose or, presumably, call to testify at trial. Allowing the Receiver to
8 amend the TAC will be detrimental to Uni-Ter UMC, Uni-Ter CS and U.S. Re's ability to properly
9 defend themselves at the eventual trial in this case, resulting in undue prejudice.

10 38. As it relates to the Director Defendants, Plaintiff's proposed Fourth Amended
11 Complaint seeks to add claims and allegations that the Director Defendants knowingly violated
12 the law.

13 39. Between the deposition testimony of Plaintiff's NRCP 30(b)(6) designee and
14 Plaintiff's responses to written discovery, there is no factual basis for Plaintiff's new allegation
15 that Director Defendants knowingly violated the law, as Plaintiff's proposed Fourth Amended
16 Complaint alleges.

17 40. With the great passage of time of the alleged violations of law and the fact that
18 witnesses are unavailable, the Director Defendants will be unduly prejudiced in establishing their
19 defenses to Plaintiff's new theory that the Director Defendants knowingly violated the law. If any
20 of these findings of fact should more properly be identified as a conclusion of law, then it shall be
21 deemed a conclusion of law.

22 **CONCLUSIONS OF LAW**

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

2. A denial of leave to amend may be warranted if undue delay, bad faith, or dilatory motives are involved. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000).

3. Where a plaintiff has previously amended her complaint, the discretion to deny further amendment is “particularly broad.” *Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1058 (9th Cir. 2011).

4. Leave to amend should not be granted if the proposed amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013), *as corrected* (Aug. 14, 2013).

5. A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim. *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 289, 357 P.3d 966, 973 (Nev. App. 2015).

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

7. The Plaintiff’s proposed claims for aiding and abetting accrued when the Plaintiff “knew or reasonably should have known, of the facts giving rise to the breach” of fiduciary duty claims. *See In re Amerco Derivative Litig.*, 127 Nev. 196, 252 P.3d 681 (2011).

8. Since the Plaintiff’s original Complaint filed in December 2014 included claims for breach of fiduciary duty against Uni-Ter and U.S. Re., the Plaintiff’s proposed claims for aiding and abetting those purported breaches of fiduciary duty would have expired in December 2017, which is three years after the filing of the original Complaint.

9. The proposed aiding and abetting claims are therefore time-barred unless they relate back to the original Complaint pursuant to NRCP 15(c).

10. A new claim based upon a new theory of liability asserted in an amended pleading does not relate back under NRCP 15(c) after the statute of limitations has run. *Badger v. Eighth Jud. Dist. Ct.*, 373 P.3d 89, 94–95 (Nev. 2016).

1 11. The fictitious defendant rule in NRCP 10(d) provides a “narrow exception,
2 allowing the pleading of fictitious defendants only where there is an uncertainty as to their names.”
3 *Lunn v. American Maintenance Corp.*, 96 Nev. 787, 618 P.2d 343 (1980). The fictitious defendant
4 rule, however, does not apply to the “addition of a party defendant.” *Id.*

5 12. In order to substitute a newly-named defendant for a previously named Doe
6 defendant under NCRP 10(d), the party seeking the substitution must satisfy the requirements set
7 forth in *Nurenberger Hercules-Werke GMBH v. Virotek*, 107 Nev. 873, 822 P.2d 1100 (1991),
8 which include: (1) “pleading the basis for naming defendants by other than their true identity, and
9 clearly specifying the connection between the intended defendants and the conduct, activity, or
10 omission upon which the cause of action is based;” and (2) “exercising reasonable diligence in
11 ascertaining the true identity of the intended defendants and promptly moving to amend the
12 complaint in order to substitute the actual for the fictional.” *Id.* at 881. Satisfaction of these
13 elements is “necessary to the granting of an amendment that relates back to the date of the filing
14 of the original complaint.” *Id.*

15 13. While the Plaintiff vaguely pled fictitious defendants in its original Complaint, she
16 has failed to meet the requirements of *Nurenberger*.

17 14. The Plaintiff’s attempt to add the new defendant, Tal Piccione, is not substitution
18 of a Doe defendant under NRCP 10(d), but an attempt to add a new party defendant under NRCP
19 15(c).

20 15. As a new claim based upon a new theory of liability asserted against a new party
21 defendant in an amended pleading does not relate back under NRCP 15(c) after the statute of
22 limitations has run, the Plaintiff’s attempt to add the new party defendant is futile.

23 16. Justice does not require granting leave to amend in this instance because the
24 Receiver acted dilatorily in failing to seek to amend the TAC to assert the new claims for
25 deepening of the insolvency and aiding and abetting breach of fiduciary duty Plaintiff seeks to
26 assert against the new defendant, Uni-Ter UMC, Uni-Ter CS and US Re much earlier. *See Nutton*
27 *v. Sunset Station, Inc.*, 131 Nev. 279, 288, 357 P.3d 966, 972 (2015).
28

18. If any of these conclusions of law should more properly be identified as a finding of fact, then it shall be deemed a finding of fact.

IT IS HEREBY ORDERED that Plaintiff's Motion for Leave to File Fourth Amended Complaint is **DENIED**.

Dated this 10th day of August, 2020

268

1 Approved as to Form and Content:

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23 Erin Kolmansberger, Esq. (Appearing *Pro Hac Vice*)
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25 2 S. Biscayne Boulevard, 21st Floor
26 Miami, Florida 33131

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

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA
4

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)
10

11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
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case as listed below:

15 Service Date: 8/10/2020

16 Adrina Harris .	aharris@fclaw.com
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18 Angela T. Nakamura Ochoa .	aochoa@lipsonneilson.com
19 Ashley Scott-Johnson .	ascott-johnson@lipsonneilson.com
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Jon Linder	jlinder@hutchlegal.com

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EXHIBIT PAGE ONLY

EXHIBIT 6

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

* * * *

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

CASE NO.: A-18-711535-C

Plaintiff(s),

DEPARTMENT 27

v.

ROBERT CHUR

Defendant(s).

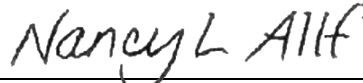
ORDER TO STRIKE FROM RECORD

COURT FINDS after review the Findings of Fact/ Conclusions of Law and Order Denying Plaintiff's Motion for Leave to File Fourth Amended Complaint was signed erroneously on August 10, 2020.

THEREFORE, COURT ORDERS for good cause appearing and after review that the Findings of Fact/Conclusions of Law and Order Denying Plaintiff's Motion for Leave to File Fourth Amended Complaint be stricken from the record.

Dated: August 13, 2020

Dated this 13th day of August, 2020



NANCY ALLF
DISTRICT COURT JUDGE
338 DD8 771A 099D
Nancy Allf
District Court Judge

1 **CSERV**

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3 DISTRICT COURT
CLARK COUNTY, NEVADA

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)
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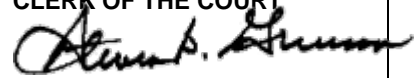
2 Brenoch Wirthlin bwirthlin@hutchlegal.com

3 Jon Linder jlinder@hutchlegal.com

4
5 If indicated below, a copy of the above mentioned filings were also served by mail
6 via United States Postal Service, postage prepaid, to the parties listed below at their last
7 known addresses on 8/14/2020

8 George Ogilvie McDonald Carano Wilson LLP
9 Attn: George F. Ogilvie, III
2300 West Sahara Avenue - Suite 1200
Las Vegas, NV, 89102

10 Joseph Garin Lipson Neilson P.C.
11 Attn: Joseph P. Garin
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12 Las Vegas, NV, 89144
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BRENOCH R. WIRTHLIN, ESQ.
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CHRIS ORME, ESQ.
Nevada Bar No. 10175
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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 to Strike from Record was entered on the 13th day of
August, 2020,

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a copy of which is attached hereto.

DATED this 14th day of August, 2020.

HUTCHISON & STEFFEN

By /s/Brenoch Wirthlin
BRENOCH R. WIRTHLIN, ESQ.
Nevada Bar No. 10282
CHRIS ORME, ESQ.
Nevada Bar No. 10175
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Las Vegas, Nevada 89145
Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 14th day of August, 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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

* * * *

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

CASE NO.: A-18-711535-C

Plaintiff(s),

DEPARTMENT 27

v.

ROBERT CHUR

Defendant(s).

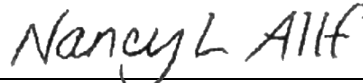
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THEREFORE, COURT ORDERS for good cause appearing and after review that the Findings of Fact/Conclusions of Law and Order Denying Plaintiff's Motion for Leave to File Fourth Amended Complaint be stricken from the record.

Dated: August 13, 2020

Dated this 13th day of August, 2020



NANCY ALLF
DISTRICT COURT JUDGE
338 DD8 771A 099D
Nancy Allf
District Court Judge

1 **CSERV**

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3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 Commissioner of Insurance for
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of Lewis and Clark, Plaintiff(s)

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

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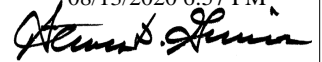
10 Joseph Garin Lipson Neilson P.C.
11 Attn: Joseph P. Garin
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12 Las Vegas, NV, 89144
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EXHIBIT PAGE ONLY

EXHIBIT 7

HUTCHISON & STEFFEN

A PROFESSIONAL LLC


CLERK OF THE COURT

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ANGELA T. NAKAMURA OCHOA, ESQ.
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Attorneys for Defendants
Robert Chur, Steve Fogg,
Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin,
Jeff Marshall, and Eric Stickels

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

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.

THE COURT FURTHER ORDERS that 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) is GRANTED.

With Plaintiff's Motion for Leave to file an Amended Complaint having been denied by this Court on August 10, 2020, Judgment is hereby entered in favor of Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall.

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)

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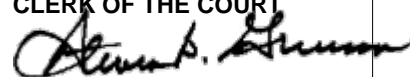
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*Attorneys for Defendants/Third-Party
Plaintiffs Robert Chur, Steve Fogg,
Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin,
Jeff Marshall, and Eric Stickels*

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 27

NOTICE OF ENTRY OF ORDER

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NOTICE OF ENTRY OF ORDER

Please take notice that the 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 Theron was filed with this court on the 13th day of August, 2020, a copy of which is attached hereto, as **Exhibit A**.

Dated this 14th day of August, 2020.

LIPSON NEILSON P.C.

/s/ Angela Ochoa

By: _____

Joseph P. Garin, Esq. (6653)
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*Attorneys for Defendants/Third-Party
Plaintiffs Robert Chur, Steve Fogg,
Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin,
Jeff Marshall, and Eric Stickels*

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 14th day of August, 2020, I electronically transmitted the foregoing **NOTICE OF ENTRY OF ORDER** 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

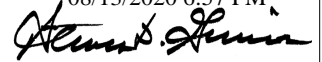
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/s/ Sydney Ochoa

An employee of LIPSON NEILSON P.C.

EXHIBIT “A”

EXHIBIT “A”


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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 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.

THE COURT FURTHER ORDERS that 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) is GRANTED.

With Plaintiff's Motion for Leave to file an Amended Complaint having been denied by this Court on August 10, 2020, Judgment is hereby entered in favor of Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall.

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:
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/s/ Angela Nakamura Ochoa

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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:

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EXHIBIT 8

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

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,

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

VS.

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

Supreme Court No. 85668

EXHIBIT 1 TO
APPELLANT'S OPPOSITION
TO MOTION TO DISMISS
PAGES 301 - 600

Supreme Court No. 85728

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

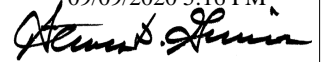
5 Appellant,

6 vs.

7
8 ROBERT CHUR; STEVE FOGG; MARK
9 GARBER; CAROL HARTER; ROBERT
10 HURLBUT; BARBARA LUMPKIN; JEFF
11 MARSHALL; AND ERIC STICKELS; UNI-
12 TER UNDERWRITING MANAGEMENT
CORP.; UNI-TER CLAIMS SERVICES
CORP.; AND U.S. RE CORPORATION,

13 Respondents.
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Supreme Court No. 85907


CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 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,

Barbara Lumpkin, Jeff Marshall and Eric Stickels; Mark A. Hutchison, Esq. and Brenoch R. Wirthlin, Esq. appeared on behalf of Plaintiff Commissioner of Insurance for the State of Nevada ("Plaintiff" or "Commissioner"); and George F. Ogilvie III, Esq., appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation; and

Having considered the record and the briefs submitted in support of and in opposition to the Motion, and having entertained the arguments of counsel, and being fully informed in the premises, the Court makes the following findings of fact, conclusions of law and order:

FINDINGS OF FACT

1. Lewis and Clark LTC Risk Retention Group, Inc. ("L&C") was formed in 2003. Between 2004 and February 28, 2013, L&C provided general and professional liability coverage to long term care facilities and home health providers. See Third Amended Complaint ("TAC") at ¶1.

2. The Nevada Division of Insurance ("DOI") filed a Receivership Action related to L&C in November, 2012, commencing case number A-12-672047-B ("Receivership Action"). Plaintiff Commissioner of Insurance for the State of Nevada was appointed as the receiver.

3. On February 28, 2013, an order of liquidation ("Liquidation Order") was entered in the Receivership Action, appointing the Commissioner as the receiver of L&C. See Liquidation Order.

4. On December 23, 2014, the Commissioner instituted this lawsuit against, among other defendants, eight of the former directors of L&C Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels ("Director Defendants"). In the initial complaint, the Commissioner alleged

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

12. In and around July, 2018, Director Defendant Barbara Lumpkin passed away.

13. On November 8, 2018, the deposition of the NRCP 30(b)(6) witness for the Commissioner of Insurance for the State of Nevada took place, in which he frequently responded that the complaint spoke for itself and that he would be relying upon experts in response to the Defendants questioning. Mr. Greer also testified regarding the unavailability of certain Division of Insurance former employees. At no time, did he state that the Director Defendants violated the law.

14. On March 8, 2019, the Director Defendants filed a Motion to Stay Proceedings Pending Petition for Writ of Mandamus on an Order Shortening Time. The Commissioner filed a Limited Joinder to Directors' Motion to Stay Proceedings Pending Petition for Writ of Mandamus.

15. On March 12, 2019, the Director Defendants filed their Notice of Filing of Petition for Writ of Mandamus with the Nevada Supreme Court. In their Petition for Writ of Mandamus, the Director Defendants challenged this Court's denial of the Director Defendants' Motion for Judgment on the Pleadings.

16. On March 14, 2019, this Court granted the Motion to Stay Proceedings Pending Petition for Writ of Mandamus, and imposed an immediate stay (the "Stay") of all proceedings in this matter.

17. On February 27, 2020, the Nevada Supreme Court issued its Opinion ("NSC Opinion") granting the Director Defendants' Petition for Writ of Mandamus, and instructed this Court to vacate its order denying the Director Defendants' Motion for Judgment on the Pleadings, and to enter a new order granting the Director Defendants' Motion for Judgment on the Pleadings. The NSC Opinion left to this Court's discretion whether to grant the Commissioner leave to file a fourth amended complaint.

18. On May 14, 2020, because the writ petition proceedings before the Nevada Supreme Court were not concluded, the parties entered into a stipulation

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
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28 ¹ The hearing was scheduled for July 23, 2020.

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

ORDER

IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration of Motion for Leave to Amend Regarding Director Defendants is DENIED.

DATED this 9 day of September, 2020.

Dated this 9th day of September, 2020

Nancy L. Allf

NANCY L. ALLF

District Court Judge

39B 7F7 F34A 1E07

Nancy Allf

District Court Judge

NB

Submitted by:
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/s/ Angela Nakamura Ochoa

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Marshall & Eric Stickels*

Approved as to Form and Content:

HUTCHISON & STEFFEN

By: Would not Agree to Form or Content

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1 **CSERV**

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3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Commissioner of Insurance for
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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:

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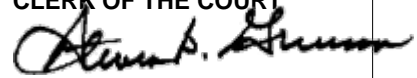
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Jeff Marshall, and Eric Stickels*

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**

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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: _____

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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

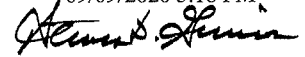
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/s/ Juan Cerezo

An employee of LIPSON NEILSON P.C.

EXHIBIT “A”

EXHIBIT “A”


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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.

25. The court subsequently ruled that discovery would close on December 17, 2020.

26. As it relates to the Director Defendants, the Commissioner contends that her proposed Fourth Amended Complaint alleges that the Director Defendants knowingly violated the law. The court makes no findings as to the futility of the proposed Fourth Amended Complaint.

27. With the passage of time, the Director Defendants will be unduly prejudiced in establishing their defenses to Plaintiff's new theory that the Director Defendants knowingly violated the law.

If any of these findings of fact should more properly be identified as a conclusion of law, then it shall be deemed a conclusion of law.

CONCLUSIONS OF LAW

1. “A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous.” *Masonry & Title Contractors Ass’n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

2. "Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. Las Vegas* (1976) 92 Nev. 402,405.

3. Whether to allow amendment to a pleading resides within the sound discretion of the trial court. *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000).

4. In “the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant – [leave to amend] should

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

ORDER

IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration of Motion for Leave to Amend Regarding Director Defendants is DENIED.

DATED this 9 day of September, 2020.

Dated this 9th day of September, 2020

Nancy L. Allf

NANCY L. ALLF

District Court Judge

39B 7F7 F34A 1E07

Nancy Allf

District Court Judge

NB

Submitted by:
LIPSON NEILSON P.C.

/s/ Angela Nakamura Ochoa

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Robert Hurlbut, Barbara Lumpkin, Jeff
Marshall & Eric Stickels*

Approved as to Form and Content:

HUTCHISON & STEFFEN

By: Would not Agree to Form or Content

Brenoch Wirthlin, Esq.

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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 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
14 court's electronic eFile system to all recipients registered for e-Service on the above entitled
15 case as listed below:

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

* * *

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

Plaintiff,

vs.

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

Defendants.

Case No.: A-14-711535-C

Dept. No.: XXVII

**ORDER DENYING PLAINTIFF'S
MOTION TO RETAX AND SETTLE
COSTS OF DIRECTOR DEFENDANTS**

This matter was set for hearing before the Court on the July 1, 2021, Motions calendar on Plaintiff Commissioner of Insurance for the State of Nevada ("Plaintiff" or "Commissioner") as Receiver of Lewis & Clark LTC Risk Retention Group, Inc.'s Motion to Retax and Settle Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall,

1 and Eric Stickels’¹ Verified Memorandum of Costs and Disbursements (“Motion to Retax”) which
2 was filed on August 21, 2020; the Director Defendants having filed their opposition (“Opposition”)
3 to the Motion on May 13, 2021; Plaintiff having filed her reply in support of the Motion on June
4 24, 2021; the Court having read and considered the Motion, Opposition, and Reply; good cause
5 appearing,

6 THE COURT HEREBY FINDS after review that NRS 696B.565(3) provides: The
7 Commissioner, all present and former deputy receivers, special deputy receivers and their
8 employees, and the other officers, agents, employees and attorneys of the Division must be
9 indemnified for all expenses, attorney s fees, judgments, settlements decrees, or amounts due or
10 paid in satisfaction of, or incurred in the defense of, such a legal action, unless it is determined
11 upon a final adjudication on the merits of the case that the alleged acts, error or omission of the
12 officer, agent, employee or attorney of the division did not arise out of or by reason of his or her
13 duties or employment and was caused by actual malice.
14

15 THE COURT HEREBY FINDS that the Director Defendants filed a motion for attorney fees
16 and costs which was denied by the Court, rendering the Motion to Retax moot.

17 THEREFORE COURT ORDERS for good cause appearing and after review that the Motion
18 to Retax is hereby DENIED and the matter scheduled on July 1, 2021 on Motions calendar is
19

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28 ¹ Collectively the “Director Defendants.”

1 hereby VACATED.

Dated this 16th day of July, 2021

2 July 15, 2021

Nancy L Alif

TW

5 Respectfully submitted by:

1E9 3D1 86DD F3FB
Nancy Alif
District Court Judge

6 Dated this 15th day of July, 2021.

7 HUTCHISON & STEFFEN

8 /s/Brenoch Wirthlin

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10 Nevada Bar No. 10282

11 CHRIS ORME, ESQ.

12 Nevada Bar No. 10175

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14 *Attorneys for Plaintiff*

16 APPROVED AS TO FORM:

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18 LIPSON NEILSON

19 Declined

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Commissioner of Insurance for
7 the State of Nevada as Receiver
of Lewis and Clark, Plaintiff(s)

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12
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14 Court. The foregoing Order was served via the court's electronic eFile system to all
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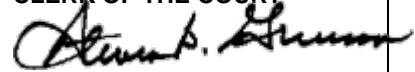
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14 **DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

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

20 Plaintiff,

21 vs.

22 ROBERT CHUR, STEVE FOGG, MARK
23 GARBER, CAROL HARTER, ROBERT
24 HURLBUT, BARBARA LUMPKIN, JEFF
25 MARSHALL, ERIC STICKELS, UNI-TER
26 UNDERWRITING MANAGEMENT CORP.,
27 UNI-TER CLAIMS SERVICES CORP., and
28 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 Denying Plaintiff's Motion to Retax and Settle Costs of
Director Defendants was entered on the 16th day of July, 2021,

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a copy of which is attached hereto.

DATED this 29th day of July, 2021.

HUTCHISON & STEFFEN

By /s/Brenoch Wirthlin
MARK A. HUTCHISON, ESQ. (4639)
BRENOCH R. WIRTHLIN, ESQ. (10282)
CHRISTIAN ORME, ESQ. (10175)
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 29th day of July, 2021, 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

ORDER

MARK A. HUTCHISON, ESQ. (4639)
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CHRISTIAN M. ORME, ESQ. (10175)
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bwirthlin@hutchlegal.com
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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 DENYING PLAINTIFF'S
MOTION TO RETAX AND SETTLE
COSTS OF DIRECTOR DEFENDANTS**

This matter was set for hearing before the Court on the July 1, 2021, Motions calendar on Plaintiff Commissioner of Insurance for the State of Nevada ("Plaintiff" or "Commissioner") as Receiver of Lewis & Clark LTC Risk Retention Group, Inc.'s Motion to Retax and Settle Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall,

1 and Eric Stickels’¹ Verified Memorandum of Costs and Disbursements (“Motion to Retax”) which
2 was filed on August 21, 2020; the Director Defendants having filed their opposition (“Opposition”)
3 to the Motion on May 13, 2021; Plaintiff having filed her reply in support of the Motion on June
4 24, 2021; the Court having read and considered the Motion, Opposition, and Reply; good cause
5 appearing,

6 THE COURT HEREBY FINDS after review that NRS 696B.565(3) provides: The
7 Commissioner, all present and former deputy receivers, special deputy receivers and their
8 employees, and the other officers, agents, employees and attorneys of the Division must be
9 indemnified for all expenses, attorney s fees, judgments, settlements decrees, or amounts due or
10 paid in satisfaction of, or incurred in the defense of, such a legal action, unless it is determined
11 upon a final adjudication on the merits of the case that the alleged acts, error or omission of the
12 officer, agent, employee or attorney of the division did not arise out of or by reason of his or her
13 duties or employment and was caused by actual malice.
14

15 THE COURT HEREBY FINDS that the Director Defendants filed a motion for attorney fees
16 and costs which was denied by the Court, rendering the Motion to Retax moot.

17 THEREFORE COURT ORDERS for good cause appearing and after review that the Motion
18 to Retax is hereby DENIED and the matter scheduled on July 1, 2021 on Motions calendar is
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28 ¹ Collectively the “Director Defendants.”

1 hereby VACATED.

Dated this 16th day of July, 2021

2 July 15, 2021

Nancy L Alif

TW

5 Respectfully submitted by:

1E9 3D1 86DD F3FB
Nancy Alif
District Court Judge

6 Dated this 15th day of July, 2021.

7 HUTCHISON & STEFFEN

8 /s/Brenoch Wirthlin

9 BRENOCH R. WIRTHLIN, ESQ.

10 Nevada Bar No. 10282

11 CHRIS ORME, ESQ.

12 Nevada Bar No. 10175

13 **HUTCHISON & STEFFEN**

14 Peccole Professional Park

15 10080 West Alta Drive, Suite 200

16 Las Vegas, Nevada 89145

17 *Attorneys for Plaintiff*

16 APPROVED AS TO FORM:

17 Dated this ____ day of July, 2021.

18 LIPSON NEILSON

19 Declined

20 Joseph P. Garin, Esq.

21 Nevada Bar No. 6653

22 Angela T. Nakamura Ochoa, Esq.

23 Nevada Bar No. 10164

24 9555 Hillwood Dr., 2nd Floor

25 Las Vegas, Nevada 89134

26 *Attorneys for the Director Defendants*

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: 7/16/2021

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Jon Linder

jlinder@hutchlegal.com

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EXHIBIT PAGE ONLY

EXHIBIT 10

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NEVADA BAR NO.: 4639

BRENOCH R. WIRTHLIN, ESQ.

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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 IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR DECLARATORY RELIEF**

This matter having come before the Honorable Nancy Allf at a hearing on August 2, 2021 ("Hearing"), on Plaintiff's Motion for Declaratory Relief ("Motion") filed herein on June 20, 2021; George F. Ogilvie III, Esq. having appeared on behalf of Defendants Uni-Ter Underwriting

1 Management Corp. and U.S. Re Corporation (collectively the “Corporate Defendants”); Brenoch
2 Wirthlin, Esq., having appeared on behalf of Plaintiff Commissioner of Insurance for the State of
3 Nevada as Receiver of Lewis and Clark LTC Risk Retention Group (“Plaintiff”); the Corporate
4 Defendants having filed an opposition (“Corporate Defendants’ Opposition”) to the Motion on July
5 6, 2021; the Plaintiff having filed its reply (“Reply”) in support of the Motion on July 19, 2021; the
6 Court having read and considered the Motion, the Corporate Defendants’ Opposition, and the Reply,
7 as well as having heard and considered the arguments of counsel at the Hearing on the Motion; good
8 cause appearing;

9 IT IS HEREBY ORDERED that the Motion is granted in part and denied in part as set forth
10 herein.

11 IT IS HEREBY FURTHER ORDERED that the Motion will be denied to the extent that
12 there was not a request in the third amended complaint for declaratory relief, which would have
13 been a remedy.

14 IT IS HEREBY FURTHER ORDERED that the Motion will be granted to the extent that
15 the admissions of the Corporate Defendants at issue are undisputed facts, with the effect of those
16 admissions to be determined.

17 IT IS HEREBY FURTHER ORDERED that it is deemed admitted by U.S. Re Corporation
18 that U.S. Re Corporation was never licensed in Nevada as a reinsurance intermediary or broker to
19 broker reinsurance on behalf of Lewis and Clark LTC Risk Retention Group, Inc.

20 IT IS HEREBY FURTHER ORDERED that it is deemed admitted by Uni-Ter
21 Underwriting Management Corp. that Uni-Ter Underwriting Management Corp., through Sanford

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

Elsass, bound reinsurance on behalf of Lewis and Clark LTC Risk Retention Group, Inc.

DATED this 17 day of August, 2021.

Dated this 17th day of August, 2021

Nancy L Alf
DISTRICT COURT JUDGE

TW

Respectfully submitted by:

HUTCHISON & STEFFEN

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

23B 741 7CC8 1B7F
Nancy Alf
Approved as to form and content by:
District Court Judge

MCDONALD CARANO LLP

Did not sign
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Las Vegas, Nevada 89102

Jon M. Wilson, Esq.
Jon M Wilson Attorney
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Suite 4405
Miami, Fl 33131
*Attorneys for Defendants U.S. Re
Corporation, Uni-Ter Management Corp.,
and Uni-Ter Claims Services Corp*

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Commissioner of Insurance for
7 the State of Nevada as Receiver
of Lewis and Clark, Plaintiff(s)

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)
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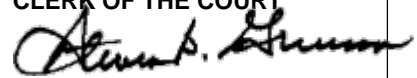
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1 **NEO**

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4 CHRISTIAN ORME, ESQ. (10175)

5 **HUTCHISON & STEFFEN**

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11 E-Mail: bwirthlin@hutchlegal.com

12 E-Mail: corne@hutchlegal.com

13 *Attorneys for Plaintiff*

14 **DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

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

20 Plaintiff,

21 vs.

22 ROBERT CHUR, STEVE FOGG, MARK
23 GARBER, CAROL HARTER, ROBERT
24 HURLBUT, BARBARA LUMPKIN, JEFF
25 MARSHALL, ERIC STICKELS, UNI-TER
26 UNDERWRITING MANAGEMENT CORP.,
27 UNI-TER CLAIMS SERVICES CORP., and
28 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 in Part and Denying in Part Plaintiff's Motion
for Declaratory Relief was entered on the 17th day of August, 2021,

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a copy of which is attached hereto.

DATED this 17th day of August, 2021.

HUTCHISON & STEFFEN

By /s/Brenoch Wirthlin
MARK A. HUTCHISON, ESQ. (4639)
BRENOCH R. WIRTHLIN, ESQ. (10282)
CHRISTIAN ORME, ESQ. (10175)
10080 West Alta Drive, Suite 200
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Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 17th day of August, 2021, I caused the document entitled **NOTICE OF ENTRY OF ORDER** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

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

ORDG

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NEVADA BAR NO.: 4639

BRENOCH R. WIRTHLIN, ESQ.

NEVADA BAR NO. 10282

CHRIS ORME, ESQ.

NEVADA BAR NO. 10175

HUTCHISON & STEFFEN

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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 IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR DECLARATORY RELIEF**

This matter having come before the Honorable Nancy Allf at a hearing on August 2, 2021 ("Hearing"), on Plaintiff's Motion for Declaratory Relief ("Motion") filed herein on June 20, 2021; George F. Ogilvie III, Esq. having appeared on behalf of Defendants Uni-Ter Underwriting

1 Management Corp. and U.S. Re Corporation (collectively the “Corporate Defendants”); Brenoch
2 Wirthlin, Esq., having appeared on behalf of Plaintiff Commissioner of Insurance for the State of
3 Nevada as Receiver of Lewis and Clark LTC Risk Retention Group (“Plaintiff”); the Corporate
4 Defendants having filed an opposition (“Corporate Defendants’ Opposition”) to the Motion on July
5 6, 2021; the Plaintiff having filed its reply (“Reply”) in support of the Motion on July 19, 2021; the
6 Court having read and considered the Motion, the Corporate Defendants’ Opposition, and the Reply,
7 as well as having heard and considered the arguments of counsel at the Hearing on the Motion; good
8 cause appearing;

9 IT IS HEREBY ORDERED that the Motion is granted in part and denied in part as set forth
10 herein.

11 IT IS HEREBY FURTHER ORDERED that the Motion will be denied to the extent that
12 there was not a request in the third amended complaint for declaratory relief, which would have
13 been a remedy.

14 IT IS HEREBY FURTHER ORDERED that the Motion will be granted to the extent that
15 the admissions of the Corporate Defendants at issue are undisputed facts, with the effect of those
16 admissions to be determined.

17 IT IS HEREBY FURTHER ORDERED that it is deemed admitted by U.S. Re Corporation
18 that U.S. Re Corporation was never licensed in Nevada as a reinsurance intermediary or broker to
19 broker reinsurance on behalf of Lewis and Clark LTC Risk Retention Group, Inc.

20 IT IS HEREBY FURTHER ORDERED that it is deemed admitted by Uni-Ter
21 Underwriting Management Corp. that Uni-Ter Underwriting Management Corp., through Sanford

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

Elsass, bound reinsurance on behalf of Lewis and Clark LTC Risk Retention Group, Inc.

DATED this 17 day of August, 2021.

Dated this 17th day of August, 2021

Nancy L Alf
DISTRICT COURT JUDGE

TW

Respectfully submitted by:

HUTCHISON & STEFFEN

/s/ Brenoch Wirthlin
Brenoch Wirthlin, Esq.
Nevada Bar No. 10282
Stuart J. Taylor, Esq.
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Las Vegas, Nevada 89145
Attorneys for Plaintiff

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Nancy Alf
Approved as to form and content by:
District Court Judge

MCDONALD CARANO LLP

Did not sign
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Jon M. Wilson, Esq.
Jon M Wilson Attorney
200 Biscayne Blvd Way
Suite 4405
Miami, Fl 33131
*Attorneys for Defendants U.S. Re
Corporation, Uni-Ter Management Corp.,
and Uni-Ter Claims Services Corp*

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

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Jon Linder

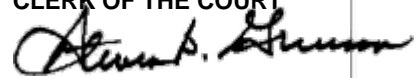
jlinder@hutchlegal.com

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EXHIBIT PAGE ONLY

EXHIBIT 11

HUTCHISON & STEFFEN

A PROFESSIONAL LLC



DCCR
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NEVADA BAR NO.: 4639
BRENOCH R. WIRTHLIN, ESQ.
NEVADA BAR NO. 10282
CHRIS ORME, ESQ.
NEVADA BAR NO. 10175
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Facsimile: (702) 385.2086
E-Mail: bwirthlin@hutchlegal.com
E-Mail: 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

**DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATION**

Hearing Date: July 29, 2021

Hearing Time: 9:30 a.m.

**DISCOVERY COMMISSIONER'S
REPORT and RECOMMENDATIONS**

Hearing Date: July 29, 2021 ("Hearing")

Hearing Time: 9:30 a.m.

Attorney for Plaintiff: Brenoch Wirthlin and Chris Orme, Hutchinson & Steffen

Attorney for Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. Re Corporation: George F. Ogilvie III, McDonald Carano LLP

I. FINDINGS

1. In November 2012, the Commissioner of Insurance for the State of Nevada initiated a receivership action, Case No. A-12-672047-B ("Receivership Action") and was appointed as Receiver of Lewis and Clark LTC Risk Retention Group, Inc. ("L&C").

2. Subsequently, on December 23, 2014, the Receiver filed this lawsuit against Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp. (collectively "Uni-Ter"), and U.S. Re Corporation ("U.S. Re"), as well as several former directors of L&C.

3. In May 2018, Uni-Ter and U.S. Re produced approximately 1.5 million pages of documents. Shortly thereafter, Uni-Ter and U.S. Re produced approximately 200,000 additional pages of documents for a total of approximately 1.7 million pages of documents.

4. Following a meet and confer, on July 13, 2021, Plaintiff filed her Motion to Compel Discovery Pursuant to NRCP 37(a)(4) on Order Shortening Time ("Motion to Compel"). The Motion to Compel requested the Court to: 1) compel Uni-Ter and U.S. Re to produce or permit for inspection all documents in their alleged "secret database" dated between January 1, 2008 through February 28, 2013; 2) compel Uni-Ter and U.S. Re to provide information necessary to identify and locate which documents are responsive to which requests for production served by Plaintiff; and 3) compel Uni-Ter and U.S. Re to produce any additional documentation that has been inappropriately withheld.

5. On July 27, 2021, Uni-Ter and U.S. Re filed their Response in Opposition to Plaintiff's Motion to Compel ("Response in Opposition").

6. A firm jury trial setting in this matter is scheduled for September 20, 2021. *At the time of the hearing of this motion, only one (1) week remained before the discovery cut-off.*

1 7. The Discovery Commissioner finds that there is insufficient time to complete the
2 requested discovery prior to the date set for the close of discovery in this matter, which is on
3 August 5, 2021.

4 8. After reviewing the Motion to Compel, the Response in Opposition, and
5 entertaining argument from counsel, the Discovery Commissioner recommends as follows:

6 **II. RECOMMENDATIONS**

7 **IT IS HEREBY RECOMMENDED** that the Motion to Compel is **GRANTED IN PART**
8 and **DENIED IN PART**.

9 **IT IS FURTHER RECOMMENDED** that the Motion to Compel is **DENIED** without
10 prejudice to the extent the Receiver seeks to compel the production of additional documents within
11 the discovery period. If the district court reopens discovery, the Discovery Commissioner may
12 reconsider this recommendation.

13 **IT IS FURTHER RECOMMENDED** that Uni-Ter UMC, Uni-Ter CS, and U.S. Re are
14 hereby required within 30 days of the date of the Hearing, on or before August 30, 2021, to provide
15 appropriate responses to the Receiver's requests for production of documents with bates numbers
16 or bates ranges responsive to the requests for production.

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The Discovery Commissioner, having met with counsel for the parties, having discussed the issues noted above and having reviewed any materials proposed in support thereof, hereby submits the above recommendations.

DATED this 20th day of August, 2021.

DISCOVERY COMMISSIONER, ERIN L. TRUMAN

Respectfully submitted by:

HUTCHISON & STEFFEN

/s/ Brenoch Wirthlin

MARK A. HUTCHISON, ESQ.

NEVADA BAR NO.: 4639

BRENOCH R. WIRTHLIN, ESQ.

NEVADA BAR NO. 10282

CHRIS ORME, ESQ.

NEVADA BAR NO. 10175

Attorneys for Plaintiff

Approved as to form and content by:

MCDONALD CARANO LLP

Did Not Sign

George F. Ogilvie III, Esq.

Nevada Bar No. 3352

2300 West Sahara Avenue, Ste 1200

Las Vegas, Nevada 89102

Jon M. Wilson, Esq.

Jon M Wilson Attorney

200 Biscayne Blvd Way

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Miami, FL 33131

Attorneys for Defendants U.S. Re

Corporation, Uni-Ter Management Corp.,

and Uni-Ter Claims Services Corp

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Objection time will expire on September 7, 2021.

____ Mailed to Plaintiff/Defendant at the following address on the ____ day of _____ 2021:

By: /s/ Sandy Gerety
COMMISSIONER DESIGNEE

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EXHIBIT PAGE ONLY

EXHIBIT 12

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

Heather S. Linn
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff(s),

v.

ROBERT CHUR. et al.,

Defendant(s).

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

HEARING DATE: July 29, 2021
HEARING TIME: 9:30 AM

ORDER

RE: DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATIONS

The Court, having reviewed the above report and recommendations prepared by the
Discovery Commissioner and,

_____ No timely objection having been filed,

☒ After reviewing the objections to the Report and Recommendations and good cause
appearing,

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AND

IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted.

X IT IS HEREBY ORDERED the Discovery Commissioner's Report and Recommendations are affirmed and adopted as modified in the following manner.
(attached hereto) Plaintiff are to prioritize 20 requests for production of documents and Defendants are required to search and provide the Bates ranges and numbers for the top 20 that they choose.

IT IS HEREBY ORDERED this matter is remanded to the Discovery Commissioner for reconsideration or further action.

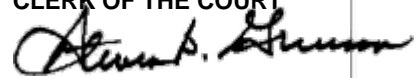
IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report is set for _____, 2021, at _____ a.m.

DATED this 17th day of September, 2021.

Dated this 18th day of September, 2021

Nancy L Alf
DISTRICT COURT JUDGE TW

B99 184 1CEF 7442
Nancy Alf
District Court Judge



DCCR
MARK A. HUTCHISON, ESQ.
NEVADA BAR NO.: 4639
BRENOCH R. WIRTHLIN, ESQ.
NEVADA BAR NO. 10282
CHRIS ORME, ESQ.
NEVADA BAR NO. 10175
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The Discovery Commissioner, having met with counsel for the parties, having discussed the issues noted above and having reviewed any materials proposed in support thereof, hereby submits the above recommendations.

DATED this 20th day of August, 2021.

DISCOVERY COMMISSIONER, ERIN L. TRUMAN

Respectfully submitted by:

HUTCHISON & STEFFEN

/s/ Brenoch Wirthlin

MARK A. HUTCHISON, ESQ.

NEVADA BAR NO.: 4639

BRENOCH R. WIRTHLIN, ESQ.

NEVADA BAR NO. 10282

CHRIS ORME, ESQ.

NEVADA BAR NO. 10175

Attorneys for Plaintiff

Approved as to form and content by:

MCDONALD CARANO LLP

Did Not Sign

George F. Ogilvie III, Esq.

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2300 West Sahara Avenue, Ste 1200

Las Vegas, Nevada 89102

Jon M. Wilson, Esq.

Jon M Wilson Attorney

200 Biscayne Blvd Way

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Miami, FL 33131


Attorneys for Defendants U.S. Re

Corporation, Uni-Ter Management Corp.,

and Uni-Ter Claims Services Corp

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Objection time will expire on September 7, 2021.

 Electronically filed and served counsel on August 23, 2021, Pursuant to N.E.F.C.R. Rule 9.

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1 **CSERV**

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3 DISTRICT COURT
CLARK COUNTY, NEVADA

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

10
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: 9/18/2021

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

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17	Melissa Gomberg	melissa.gomberg@nelsonmullins.com
18	Juan Cerezo	jcerezo@lipsonneilson.com
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20	Brenoch Wirthlin	bwirthlin@klnevada.com
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1 Jon Linder

jlinder@hutchlegal.com

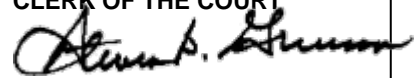
2
3 If indicated below, a copy of the above mentioned filings were also served by mail
4 via United States Postal Service, postage prepaid, to the parties listed below at their last
5 known addresses on 9/20/2021

6 George Ogilvie

McDonald Carano Wilson LLP
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2300 West Sahara Avenue - Suite 1200
Las Vegas, NV, 89102

8 Joseph Garin

Lipson Neilson P.C.
Attn: Joseph P. Garin
9900 Covington Cross Drive, Suite 120
Las Vegas, NV, 89144



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gogilvie@mcdonaldcarano.com

Jon M. Wilson, Esq. (Appearing *Pro Hac Vice*)
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Kimberly Freedman, Esq. (Appearing *Pro Hac Vice*)
Erin Kolmansberger, Esq. (Appearing *Pro Hac Vice*)
NELSON MULLINS BROAD AND CASSEL
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Facsimile: (305) 373-9443
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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
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Plaintiff,

vs.

ROBERT CHUR, STEVE FOGG, MARK
GARBER, CAROL HARTER, ROBERT
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UNDERWRITING MANAGEMENT CORP.
UNI-TER CLAIMS SERVICES CORP., and
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inclusive; and ROES 51-100, inclusive,

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**NOTICE OF ENTRY OF ORDER RE:
DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATIONS**

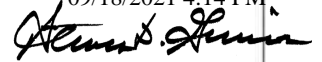
DATED this 20th day of September, 2021.

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 20th day of September, 2021, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER RE: DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS** 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


CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR THE
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The Court, having reviewed the above report and recommendations prepared by the
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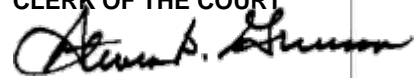
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DATED this 17th day of September, 2021.

Dated this 18th day of September, 2021

Nancy L Alf
DISTRICT COURT JUDGE TW

B99 184 1CEF 7442
Nancy Alf
District Court Judge



DCCR
MARK A. HUTCHISON, ESQ.
NEVADA BAR NO.: 4639
BRENOCH R. WIRTHLIN, ESQ.
NEVADA BAR NO. 10282
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E-Mail: corne@hutchlegal.com
Attorneys for Plaintiff

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vs.

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DATED this 20th day of August, 2021.

DISCOVERY COMMISSIONER, ERIN L. TRUMAN

Respectfully submitted by:

HUTCHISON & STEFFEN

/s/ Brenoch Wirthlin

MARK A. HUTCHISON, ESQ.

NEVADA BAR NO.: 4639

BRENOCH R. WIRTHLIN, ESQ.

NEVADA BAR NO. 10282

CHRIS ORME, ESQ.

NEVADA BAR NO. 10175

Attorneys for Plaintiff

Approved as to form and content by:

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Did Not Sign

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Jon M Wilson Attorney

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Miami, FL 33131

Attorneys for Defendants U.S. Re

Corporation, Uni-Ter Management Corp.,

and Uni-Ter Claims Services Corp

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Objection time will expire on September 7, 2021.

____ Mailed to Plaintiff/Defendant at the following address on the ____ day of _____ 2021:

By: /s/ Sandy Gerety
COMMISSIONER DESIGNEE

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Commissioner of Insurance for
7 the State of Nevada as Receiver
of Lewis and Clark, Plaintiff(s)

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

10
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: 9/18/2021

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8 Joseph Garin

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EXHIBIT PAGE ONLY

EXHIBIT 13

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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 IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION IN LIMINE NO. 2**

This matter having come before the Honorable Nancy Allf at the hearing on all pending motions on September 2, 2021 (the "Hearing"), on Plaintiff's Motion in *Limine* No. 2 to Preclude Testimony by Joseph Petrelli, Richard Lord, and Jim Murphy Regarding Unperformed Solvency Analysis (the "Motion") filed on August 13, 2021; Brenoch Wirthlin, Esq., Christian M. Orme, Esq. and Tanya M. Fraser, Esq. of Hutchison & Steffen, PLLC appearing on behalf of Plaintiff; Jon M. Wilson, Esq. of the Law Offices of Jon Wilson, and George F. Ogilvie III, Esq., of McDonald Carano, LLP, appearing on behalf of Defendants Uni-Ter Underwriting Management Corp, Uni-Ter Claims Services Corp., and U.S. RE Corporation (the "Corporate Defendants"); the Corporate Defendants having filed an opposition ("Opposition") to the Motion on August 27,

1 2021; the Plaintiff having filed its reply ("Reply") in support of the Motion on August 31, 2021;
2 the Court having read and considered the Motion, the Corporate Defendants' Opposition, and the
3 Reply, as well as having heard and considered the arguments of counsel at the Hearing on the
4 Motion; good cause appearing:

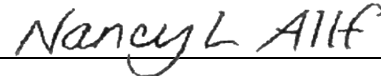
5 THE COURT HEREBY FINDS that neither Mr. Petrelli, Mr. Lord, nor Mr. Murphy
6 performed any insolvency analysis with respect to Lewis & Clark.

7 IT IS HEREBY ORDERED that the Motion is **GRANTED in part** and **DENIED in part**,
8 as set forth herein.

9 IT IS HEREBY FURTHER ORDERED that the Motion is granted to the extent to preclude
10 any testimony with regard to insolvency, because Mr. Petrelli, Mr. Lord, and Mr. Murphy didn't do
11 insolvency analyses. Mr. Petrelli, Mr. Lord, and Mr. Murphy can talk about how they rated, what
12 they did as an actuary and what they did as an auditor.

13
14
15 IT IS HEREBY ORDERED.
16 September 20, 2021

Dated this 20th day of September, 2021



8C8 8A8 EB49 9095
Nancy Alf
District Court Judge

TW

Respectfully submitted by:

HUTCHISON & STEFFEN, PLLC

/s/Brenoch Wirthlin

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

1 **CSERV**

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3 DISTRICT COURT
CLARK COUNTY, NEVADA

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

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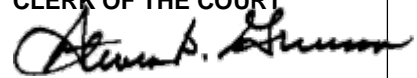
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13 *Attorneys for Plaintiff*

14 **DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

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

20 Plaintiff,

21 vs.

22 ROBERT CHUR, STEVE FOGG, MARK
23 GARBER, CAROL HARTER, ROBERT
24 HURLBUT, BARBARA LUMPKIN, JEFF
25 MARSHALL, ERIC STICKELS, UNI-TER
26 UNDERWRITING MANAGEMENT CORP.,
27 UNI-TER CLAIMS SERVICES CORP., and
28 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 in Part and Denying in Part Plaintiff's Motion in
Limine No. 2 was entered on the 20th day of September, 2021,

///

///

///

1 a copy of which is attached hereto.

2 DATED this 21st day of September, 2021.

3 HUTCHISON & STEFFEN

4

5 By /s/Brenoch Wirthlin
6 MARK A. HUTCHISON, ESQ. (4639)
7 BRENOCH R. WIRTHLIN, ESQ. (10282)
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11 *Attorneys for Plaintiff*

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CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b), I certify that on this 21st day of September, 2021, 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

ORDR

MARK A. HUTCHISON, ESQ. (4639)
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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 IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION IN LIMINE NO. 2**

This matter having come before the Honorable Nancy Allf at the hearing on all pending motions on September 2, 2021 (the "Hearing"), on Plaintiff's Motion in *Limine* No. 2 to Preclude Testimony by Joseph Petrelli, Richard Lord, and Jim Murphy Regarding Unperformed Solvency Analysis (the "Motion") filed on August 13, 2021; Brenoch Wirthlin, Esq., Christian M. Orme, Esq. and Tanya M. Fraser, Esq. of Hutchison & Steffen, PLLC appearing on behalf of Plaintiff; Jon M. Wilson, Esq. of the Law Offices of Jon Wilson, and George F. Ogilvie III, Esq., of McDonald Carano, LLP, appearing on behalf of Defendants Uni-Ter Underwriting Management Corp, Uni-Ter Claims Services Corp., and U.S. RE Corporation (the "Corporate Defendants"); the Corporate Defendants having filed an opposition ("Opposition") to the Motion on August 27,

1 2021; the Plaintiff having filed its reply ("Reply") in support of the Motion on August 31, 2021;
2 the Court having read and considered the Motion, the Corporate Defendants' Opposition, and the
3 Reply, as well as having heard and considered the arguments of counsel at the Hearing on the
4 Motion; good cause appearing:


5 THE COURT HEREBY FINDS that neither Mr. Petrelli, Mr. Lord, nor Mr. Murphy
6 performed any insolvency analysis with respect to Lewis & Clark.

7 IT IS HEREBY ORDERED that the Motion is **GRANTED in part** and **DENIED in part**,
8 as set forth herein.

9 IT IS HEREBY FURTHER ORDERED that the Motion is granted to the extent to preclude
10 any testimony with regard to insolvency, because Mr. Petrelli, Mr. Lord, and Mr. Murphy didn't do
11 insolvency analyses. Mr. Petrelli, Mr. Lord, and Mr. Murphy can talk about how they rated, what
12 they did as an actuary and what they did as an auditor.

13
14
15 IT IS HEREBY ORDERED.
16 September 20, 2021

Dated this 20th day of September, 2021



8C8 8A8 EB49 9095
Nancy Alf
District Court Judge

TW

1 Respectfully submitted by:

2 **HUTCHISON & STEFFEN, PLLC**

3
4 /s/Brenoch Wirthlin

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14 *Attorneys for Plaintiffs*

Approved as to form and content by:

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

1 **CSERV**

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

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6 Commissioner of Insurance for
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CASE NO: A-14-711535-C

DEPT. NO. Department 27

9 vs.

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EXHIBIT PAGE ONLY

EXHIBIT 14

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

ORDR

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Attorneys for Plaintiff

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CLARK COUNTY, NEVADA**

COMMISSIONER OF INSURANCE FOR
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OF LEWIS AND CLARK LTC RISK
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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 IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT AS TO U.S. RE
CORPORATION**

This matter having come before the Honorable Nancy Allf at the hearing on all pending motions on September 2, 2021 (the "Hearing"), on Plaintiff's Motion for Partial Summary Judgment as to U.S. RE Corporation (the "Motion") filed on August 13, 2021; Brenoch Wirthlin, Esq., Christian M. Orme, Esq. and Tanya M. Fraser, Esq. of Hutchison & Steffen, PLLC appearing on behalf of Plaintiff; Jon M. Wilson, Esq. of the Law Offices of Jon Wilson, and George F. Ogilvie III, Esq., of McDonald Carano, LLP, appearing on behalf of Defendants Uni-Ter Underwriting Management Corp, Uni-Ter Claims Services Corp., and U.S. RE Corporation (the "Corporate Defendants"); the Corporate Defendants having filed an opposition ("Opposition") to the Motion on August 27, 2021; Plaintiff having filed its Reply in Support of the Motion ("Reply")

1 on August 31, 2021; the Court having read and considered Plaintiff's Motion, the Corporate
2 Defendants' Opposition, and the Reply, as well as having heard and considered the arguments of
3 counsel at the Hearing on the Motion; good cause appearing:

4 THE COURT HEREBY FINDS upon the admissions that Defendant U.S. RE Corporation
5 did not obtain a Nevada license authorizing it to serve as a reinsurance broker for Lewis and Clark.

6 THE COURT HEREBY FINDS that Defendant U.S. Re Corporation brokered the
7 reinsurance contracts for Lewis and Clark.

8 Based upon the foregoing, good cause appearing, and after review:

9 IT IS HEREBY ORDERED that Plaintiff's Motion for Partial Summary Judgment as to
10 U.S. RE Corporation is **GRANTED in part** and **DENIED in part**.

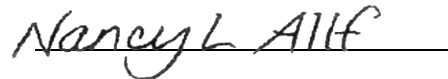
11 IT IS HEREBY FURTHER ORDERED that the Motion is granted in part based upon the
12 admissions that Defendant U.S. RE Corporation was not licensed in Nevada for the brokering of
13 reinsurance for Lewis & Clark.

14 IT IS HEREBY FURTHER ORDERED that the Motion is denied to the extent that it is a
15 question for the trier of fact to determine the effect of Defendant U.S. RE Corporation's failure to
16 obtain a Nevada license for brokering reinsurance for Lewis & Clark.

17
18
19 IT IS SO ORDERED.

20 September 19, 2021

Dated this 20th day of September, 2021

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22

TW

23 F9A 8EC C31F 73A1
Nancy Alf
District Court Judge
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Respectfully submitted by:

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

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)
10

11 **AUTOMATED CERTIFICATE OF SERVICE**

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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
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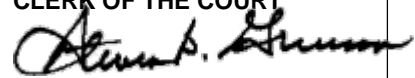
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14 **DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

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

20 Plaintiff,

21 vs.

22 ROBERT CHUR, STEVE FOGG, MARK
23 GARBER, CAROL HARTER, ROBERT
24 HURLBUT, BARBARA LUMPKIN, JEFF
25 MARSHALL, ERIC STICKELS, UNI-TER
26 UNDERWRITING MANAGEMENT CORP.,
27 UNI-TER CLAIMS SERVICES CORP., and
28 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 in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment as to U.S. Re Corporation was entered on the 20th day of September, 2021,

///

///

1 a copy of which is attached hereto.

2 DATED this 21st day of September, 2021.

3 HUTCHISON & STEFFEN

4

5 By /s/Brenoch Wirthlin
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CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b), I certify that on this 21st day of September, 2021, 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

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiff,
vs.

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

Defendants.

Case No.: A-14-711535-C

Dept. No.: XXVII

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT AS TO U.S. RE
CORPORATION**

This matter having come before the Honorable Nancy Allf at the hearing on all pending motions on September 2, 2021 (the "Hearing"), on Plaintiff's Motion for Partial Summary Judgment as to U.S. RE Corporation (the "Motion") filed on August 13, 2021; Brenoch Wirthlin, Esq., Christian M. Orme, Esq. and Tanya M. Fraser, Esq. of Hutchison & Steffen, PLLC appearing on behalf of Plaintiff; Jon M. Wilson, Esq. of the Law Offices of Jon Wilson, and George F. Ogilvie III, Esq., of McDonald Carano, LLP, appearing on behalf of Defendants Uni-Ter Underwriting Management Corp, Uni-Ter Claims Services Corp., and U.S. RE Corporation (the "Corporate Defendants"); the Corporate Defendants having filed an opposition ("Opposition") to the Motion on August 27, 2021; Plaintiff having filed its Reply in Support of the Motion ("Reply")

1 on August 31, 2021; the Court having read and considered Plaintiff's Motion, the Corporate
2 Defendants' Opposition, and the Reply, as well as having heard and considered the arguments of
3 counsel at the Hearing on the Motion; good cause appearing:

4 THE COURT HEREBY FINDS upon the admissions that Defendant U.S. RE Corporation
5 did not obtain a Nevada license authorizing it to serve as a reinsurance broker for Lewis and Clark.

6 THE COURT HEREBY FINDS that Defendant U.S. Re Corporation brokered the
7 reinsurance contracts for Lewis and Clark.

8 Based upon the foregoing, good cause appearing, and after review:

9 IT IS HEREBY ORDERED that Plaintiff's Motion for Partial Summary Judgment as to
10 U.S. RE Corporation is **GRANTED in part** and **DENIED in part**.

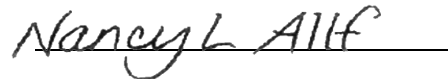
11 IT IS HEREBY FURTHER ORDERED that the Motion is granted in part based upon the
12 admissions that Defendant U.S. RE Corporation was not licensed in Nevada for the brokering of
13 reinsurance for Lewis & Clark.

14 IT IS HEREBY FURTHER ORDERED that the Motion is denied to the extent that it is a
15 question for the trier of fact to determine the effect of Defendant U.S. RE Corporation's failure to
16 obtain a Nevada license for brokering reinsurance for Lewis & Clark.

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18
19 IT IS SO ORDERED.

20 September 19, 2021

Dated this 20th day of September, 2021

21 
22

TW

23 F9A 8EC C31F 73A1
Nancy Alf
District Court Judge
24
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Respectfully submitted by:

HUTCHISON & STEFFEN, PLLC

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

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6 Commissioner of Insurance for
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8 of Lewis and Clark, Plaintiff(s)

CASE NO: A-14-711535-C

DEPT. NO. Department 27

9 vs.

10 Robert Chur, Defendant(s)

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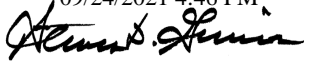
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EXHIBIT PAGE ONLY

EXHIBIT 15

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**ORDER DENYING PLAINTIFF'S
MOTION IN LIMINE NUMBER 5: TO
LIMIT THE SCOPE OF EXPERT
WITNESS TESTIMONY REGARDING
SPECULATION CONCERNING THE
ECONOMY**

Date of Hearing: September 2, 2021
Time of Hearing: 10:00 a.m.

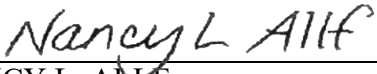
This matter came before the Court for hearing on September 2, 2021 on Plaintiff's Motion In Limine Number 5: To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy. Brenoch Wirthlin, Esq., Christian M. Orme, Esq. and Tanya M. Fraser, Esq. of Hutchison & Steffen, PLLC appeared on behalf of Plaintiff. George F. Ogilvie III, Esq. of McDonald Carano LLP and Jon N. Wilson, Esq. of the Law Offices of Jon Wilson appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation.

The Court having considered the record and the briefs filed in support of and in opposition to the Motion, having entertained the oral arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion In Limine Number 5: To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy is **DENIED**. However, the Court will prohibit cumulative evidence of the economy.

DATED this 24th day of September, 2021.

Dated this 24th day of September, 2021



NANCY L. ALLF
District Court Judge
CE8 F01 6EDB9C5C
Nancy Allf
District Court Judge

TW

Submitted By:

Approved as to Form and Content:

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Attorneys for Plaintiff

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

Subject: FW: Emailing: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline, Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witne

Attachments: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witness Alan Gray 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion For Partial Summary Judgment Regarding The Uni-Ter Defendants Fiduciary Duties 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion For Partial Summary Judgment Regarding Uni-Ter Defendants Breach Of Their Fiduciary Duties 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 1 To Preclude Sam Hewitt From Providing Expert Testimony Regarding Insolvency Analysis 091921 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 4 To Preclude Any Reference To Reinsurance Estimates 091921 - version 1 - Redline.docx

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Subject: Emailing: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline, Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witness A

We are ok with the following redline versions.

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DEPT. NO. Department 27

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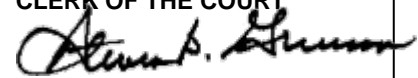
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiff,

vs.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**NOTICE OF ENTRY OF ORDER
DENYING PLAINTIFF'S MOTION IN
LIMINE NO. 5: TO LIMIT THE SCOPE OF
EXPERT WITNESS TESTIMONY
REGARDING SPECULATION
CONCERNING THE ECONOMY**

DATED this 30th day of September, 2021.

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 30th day of September, 2021, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION IN LIMINE NO. 5: TO LIMIT THE SCOPE OF EXPERT WITNESS TESTIMONY REGARDING SPECULATION CONCERNING THE ECONOMY** 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

Heather S. Hume

CLERK OF THE COURT

ODM

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

ROBERT CHUR, STEVE FOGG, MARK
GARBER, CAROL HARTER, ROBERT
HURLBUT, BARBARA LUMPKIN, JEFF
MARSHALL, ERIC STICKELS, UNI-TER
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inclusive; and ROES 51-100, inclusive,

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**ORDER DENYING PLAINTIFF'S
MOTION IN LIMINE NUMBER 5: TO
LIMIT THE SCOPE OF EXPERT
WITNESS TESTIMONY REGARDING
SPECULATION CONCERNING THE
ECONOMY**

Date of Hearing: September 2, 2021
Time of Hearing: 10:00 a.m.

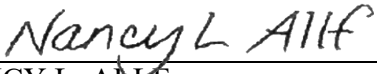
This matter came before the Court for hearing on September 2, 2021 on Plaintiff's Motion In Limine Number 5: To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy. Brenoch Wirthlin, Esq., Christian M. Orme, Esq. and Tanya M. Fraser, Esq. of Hutchison & Steffen, PLLC appeared on behalf of Plaintiff. George F. Ogilvie III, Esq. of McDonald Carano LLP and Jon N. Wilson, Esq. of the Law Offices of Jon Wilson appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation.

The Court having considered the record and the briefs filed in support of and in opposition to the Motion, having entertained the oral arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion In Limine Number 5: To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy is **DENIED**. However, the Court will prohibit cumulative evidence of the economy.

DATED this 24th day of September, 2021.

Dated this 24th day of September, 2021



NANCY L. ALLF
District Court Judge
CE8 F01 6EDB9C5C
Nancy Allf
District Court Judge

TW

Submitted By:

Approved as to Form and Content:

McDONALD CARANO LLP

HUTCHISON & STEFFEN, PLLC

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By: /s/ Brenoch R. Wirthlin
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Attorneys for Plaintiff

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

Subject: FW: Emailing: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline, Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witne

Attachments: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witness Alan Gray 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion For Partial Summary Judgment Regarding The Uni-Ter Defendants Fiduciary Duties 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion For Partial Summary Judgment Regarding Uni-Ter Defendants Breach Of Their Fiduciary Duties 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 1 To Preclude Sam Hewitt From Providing Expert Testimony Regarding Insolvency Analysis 091921 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 4 To Preclude Any Reference To Reinsurance Estimates 091921 - version 1 - Redline.docx

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Sent: Thursday, September 23, 2021 8:43 PM
To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Jon Wilson <jonwilson2013@gmail.com>
Cc: Christian M. Orme <COrme@hutchlegal.com>; Tanya M. Fraser <tfraser@hutchlegal.com>; Jon Linder <jlinder@hutchlegal.com>
Subject: Emailing: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline, Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witness A

We are ok with the following redline versions.

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Commissioner of Insurance for
7 the State of Nevada as Receiver
of Lewis and Clark, Plaintiff(s)

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order Denying Motion 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: 9/24/2021

16 Adrina Harris .	aharris@fclaw.com
17 Angela T. Nakamura Ochoa .	aochoa@lipsonneilson.com
18 Ashley Scott-Johnson .	ascott-johnson@lipsonneilson.com
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EXHIBIT PAGE ONLY

EXHIBIT 16

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

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CLERK OF THE COURT

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*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
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LEWIS AND CLARK LTC RISK RETENTION
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Plaintiffs,

v.

ROBERT CHUR, STEVE FOGG, MARK
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MARSHALL, ERIC STICKELS, UNI-TER
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inclusive; and ROES 51-100, inclusive,

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**ORDER DENYING PLAINTIFF'S
MOTION IN LIMINE NUMBER 4: TO
PRECLUDE ANY REFERENCE TO
REINSURANCE ESTIMATES**

Date of Hearing: September 2, 2021
Time of Hearing: 10:00 a.m.

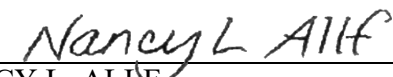
This matter came before the Court for hearing on September 2, 2021 on Plaintiff's Motion In Limine Number 4: To Preclude Any Reference To Reinsurance Estimates. Brenoch Wirthlin, Esq., Christian M. Orme, Esq. and Tanya M. Fraser, Esq. of Hutchison & Steffen, PLLC appeared on behalf of Plaintiff. George F. Ogilvie III, Esq. of McDonald Carano LLP and Jon N. Wilson, Esq. of the Law Offices of Jon Wilson appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation.

The Court having considered the record and the briefs filed in support of and in opposition to the Motion, having entertained the oral arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion In Limine Number 4: To Preclude Any Reference To Reinsurance Estimates is **DENIED**.

DATED this 24th day of September, 2021.

Dated this 24th day of September, 2021


NANCY L. ALLF
District Court Judge
348 9B3 D885 A999
Nancy Allf
District Court Judge

TW

Submitted By:

Approved as to Form and Content:

McDONALD CARANO LLP

HUTCHISON & STEFFEN, PLLC

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*Attorneys for Defendants Uni-Ter
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CLARK COUNTY, NEVADA

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6 Commissioner of Insurance for
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of Lewis and Clark, Plaintiff(s)

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)
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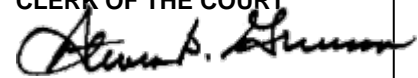
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*Attorneys for Defendants Uni-Ter Underwriting
Management Corp., Uni-Ter Claims Services
Corp., and U.S. RE Corporation*

**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
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Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

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DENYING PLAINTIFF'S MOTION IN
LIMINE NO. 4: TO PRECLUDE ANY
REFERENCE TO REINSURANCE
ESTIMATES**

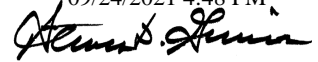
DATED this 30th day of September, 2021.

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 30th day of September, 2021, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION IN LIMINE NO. 4: TO PRECLUDE ANY REFERENCE TO REINSURANCE ESTIMATES** 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


CLERK OF THE COURT

ODM

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*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.,

Plaintiffs,

v.

ROBERT CHUR, STEVE FOGG, MARK
GARBER, CAROL HARTER, ROBERT
HURLBUT, BARBARA LUMPKIN, JEFF
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Case No. A-14-711535-C

Dept. No.: XXVII

**ORDER DENYING PLAINTIFF'S
MOTION IN LIMINE NUMBER 4: TO
PRECLUDE ANY REFERENCE TO
REINSURANCE ESTIMATES**

Date of Hearing: September 2, 2021
Time of Hearing: 10:00 a.m.

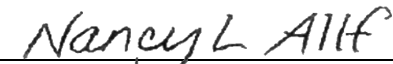
This matter came before the Court for hearing on September 2, 2021 on Plaintiff's Motion In Limine Number 4: To Preclude Any Reference To Reinsurance Estimates. Brenoch Wirthlin, Esq., Christian M. Orme, Esq. and Tanya M. Fraser, Esq. of Hutchison & Steffen, PLLC appeared on behalf of Plaintiff. George F. Ogilvie III, Esq. of McDonald Carano LLP and Jon N. Wilson, Esq. of the Law Offices of Jon Wilson appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation.

The Court having considered the record and the briefs filed in support of and in opposition to the Motion, having entertained the oral arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion In Limine Number 4: To Preclude Any Reference To Reinsurance Estimates is **DENIED**.

DATED this 24th day of September, 2021.

Dated this 24th day of September, 2021


NANCY L. ALLF
District Court Judge
348 9B3 D885 A999
Nancy Allf
District Court Judge

TW

Submitted By:

Approved as to Form and Content:

MCDONALD CARANO LLP

HUTCHISON & STEFFEN, PLLC

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Attorneys for Plaintiff

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

Subject: FW: Emailing: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline, Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witne

Attachments: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witness Alan Gray 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion For Partial Summary Judgment Regarding The Uni-Ter Defendants Fiduciary Duties 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion For Partial Summary Judgment Regarding Uni-Ter Defendants Breach Of Their Fiduciary Duties 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 1 To Preclude Sam Hewitt From Providing Expert Testimony Regarding Insolvency Analysis 091921 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 4 To Preclude Any Reference To Reinsurance Estimates 091921 - version 1 - Redline.docx

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

Sent: Thursday, September 23, 2021 8:43 PM

To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Jon Wilson <jonwilson2013@gmail.com>

Cc: Christian M. Orme <COrme@hutchlegal.com>; Tanya M. Fraser <tfraser@hutchlegal.com>; Jon Linder <jlinder@hutchlegal.com>

Subject: Emailing: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline, Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witness A

We are ok with the following redline versions.

Brenoch R. Wirthlin

Partner

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

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Jon Linder

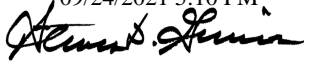
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EXHIBIT PAGE ONLY

EXHIBIT 17

HUTCHISON & STEFFEN

A PROFESSIONAL LLC


CLERK OF THE COURT

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*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.,

Plaintiffs,

v.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**ORDER DENYING PLAINTIFF'S
MOTION IN LIMINE NUMBER 1: TO
PRECLUDE SAM HEWITT FROM
PROVIDING EXPERT TESTIMONY
REGARDING INSOLVENCY
ANALYSIS**

Date of Hearing: September 2, 2021
Time of Hearing: 10:00 a.m.

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

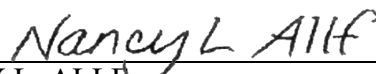
This matter came before the Court for hearing on September 2, 2021 on Plaintiff's Motion In Limine Number 1: To Preclude Sam Hewitt From Providing Expert Testimony Regarding Insolvency Analysis. Brenoch Wirthlin, Esq., Christian M. Orme, Esq. and Tanya M. Fraser, Esq. of Hutchison & Steffen, PLLC appeared on behalf of Plaintiff. George F. Ogilvie III, Esq. of McDonald Carano LLP and Jon N. Wilson, Esq. of the Law Offices of Jon Wilson appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation.

The Court having considered the record and the briefs filed in support of and in opposition to the Motion, having entertained the oral arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion In Limine Number 1: To Preclude Sam Hewitt From Providing Expert Testimony Regarding Insolvency Analysis is **DENIED**. However, a proper foundation will have to be laid if Mr. Hewitt is to testify regarding the timing of Lewis and Clark LTC Risk Retention Group, Inc.'s insolvency.

DATED this 24th day of September, 2021.

Dated this 24th day of September, 2021


NANCY L. ALLF TW
District Court Judge
1F8 DB5 80A3 E618
Nancy Allf
Appointed as Court Judge

Submitted By:

McDONALD CARANO LLP

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Attorneys for Plaintiff

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6 Commissioner of Insurance for
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CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

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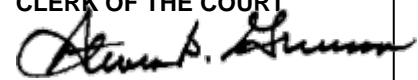
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*Attorneys for Defendants Uni-Ter Underwriting
Management Corp., Uni-Ter Claims Services
Corp., and U.S. RE Corporation*

**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

**NOTICE OF ENTRY OF ORDER
DENYING PLAINTIFF'S MOTION IN
LIMINE NO. 1: TO PRECLUDE SAM
HEWITT FROM PROVIDING EXPERT
TESTIMONY REGARDING
INSOLVENCY ANALYSIS**

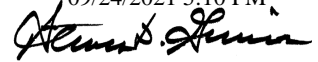
DATED this 30th day of September, 2021.

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 30th day of September, 2021, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION IN LIMINE NO. 1: TO PRECLUDE SAM HEWITT FROM PROVIDING EXPERT TESTIMONY REGARDING INSOLVENCY ANALYSIS** 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


CLERK OF THE COURT

ODM

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

ROBERT CHUR, STEVE FOGG, MARK
GARBER, CAROL HARTER, ROBERT
HURLBUT, BARBARA LUMPKIN, JEFF
MARSHALL, ERIC STICKELS, UNI-TER
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UNI-TER CLAIMS SERVICES CORP., and
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Case No. A-14-711535-C

Dept. No.: XXVII

**ORDER DENYING PLAINTIFF'S
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Date of Hearing: September 2, 2021
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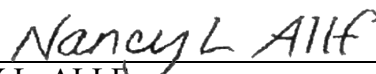
This matter came before the Court for hearing on September 2, 2021 on Plaintiff's Motion In Limine Number 1: To Preclude Sam Hewitt From Providing Expert Testimony Regarding Insolvency Analysis. Brenoch Wirthlin, Esq., Christian M. Orme, Esq. and Tanya M. Fraser, Esq. of Hutchison & Steffen, PLLC appeared on behalf of Plaintiff. George F. Ogilvie III, Esq. of McDonald Carano LLP and Jon N. Wilson, Esq. of the Law Offices of Jon Wilson appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation.

The Court having considered the record and the briefs filed in support of and in opposition to the Motion, having entertained the oral arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion In Limine Number 1: To Preclude Sam Hewitt From Providing Expert Testimony Regarding Insolvency Analysis is **DENIED**. However, a proper foundation will have to be laid if Mr. Hewitt is to testify regarding the timing of Lewis and Clark LTC Risk Retention Group, Inc.'s insolvency.

DATED this 24th day of September, 2021.

Dated this 24th day of September, 2021



NANCY L. ALLF TW
District Court Judge
1F8 DB5 80A3 E618
Nancy Allf
Appointed as District Court Judge

Submitted By:

McDONALD CARANO LLP

By: /s/ George F. Ogilvie III
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CASE NO: A-14-711535-C

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Jon Linder

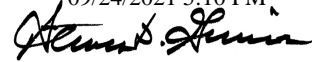
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EXHIBIT 18

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**ORDER DENYING PLAINTIFF'S
MOTION IN LIMINE NUMBER 6 TO
STRIKE PROFFERED EXPERT
WITNESS ALAN GRAY**

Date of Hearing: September 2, 2021
Time of Hearing: 10:00 a.m.

McDONALD CARANO
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PHONE 702.873.4100 • FAX 702.873.9966


This matter came before the Court for hearing on September 2, 2021 on Plaintiff's Motion In Limine Number 6 To Strike Proffered Expert Witness Alan Gray. Brenoch Wirthlin, Esq., Christian M. Orme, Esq. and Tanya M. Fraser, Esq. of Hutchison & Steffen, PLLC appeared on behalf of Plaintiff. George F. Ogilvie III, Esq. of McDonald Carano LLP and Jon N. Wilson, Esq. of the Law Offices of Jon Wilson appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation.

The Court having considered the record and the briefs filed in support of and in opposition to the Motion, having entertained the oral arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion In Limine Number 6 To Strike Proffered Expert Witness Alan Gray is **DENIED**.

DATED this 24th day of September, 2021.

Dated this 24th day of September, 2021


NANCY L. ALLF
District Court Judge
CEB 83E-1A01 89D8
Nancy Allf
District Court Judge

TW

Submitted By:

Approved as to Form and Content:

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

Subject: FW: Emailing: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline, Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witne

Attachments: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witness Alan Gray 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion For Partial Summary Judgment Regarding The Uni-Ter Defendants Fiduciary Duties 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion For Partial Summary Judgment Regarding Uni-Ter Defendants Breach Of Their Fiduciary Duties 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 1 To Preclude Sam Hewitt From Providing Expert Testimony Regarding Insolvency Analysis 091921 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 4 To Preclude Any Reference To Reinsurance Estimates 091921 - version 1 - Redline.docx

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Cc: Christian M. Orme <COrme@hutchlegal.com>; Tanya M. Fraser <tfraser@hutchlegal.com>; Jon Linder <jlinder@hutchlegal.com>
Subject: Emailing: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline, Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witness A

We are ok with the following redline versions.

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Commissioner of Insurance for
7 the State of Nevada as Receiver
of Lewis and Clark, Plaintiff(s)

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order Denying Motion 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: 9/24/2021

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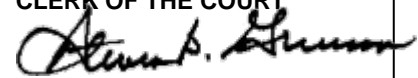
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiff,

vs.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**NOTICE OF ENTRY OF ORDER
DENYING PLAINTIFF'S MOTION IN
LIMINE NUMBER 6 TO STRIKE
PROFFERED EXPERT WITNESS ALAN
GRAY**

DATED this 30th day of September, 2021.

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 30th day of September, 2021, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION IN LIMINE NUMBER 6 TO STRIKE PROFFERED EXPERT WITNESS ALAN GRAY** 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

Heather S. Hume

CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**ORDER DENYING PLAINTIFF'S
MOTION IN LIMINE NUMBER 6 TO
STRIKE PROFFERED EXPERT
WITNESS ALAN GRAY**

Date of Hearing: September 2, 2021
Time of Hearing: 10:00 a.m.


This matter came before the Court for hearing on September 2, 2021 on Plaintiff's Motion In Limine Number 6 To Strike Proffered Expert Witness Alan Gray. Brenoch Wirthlin, Esq., Christian M. Orme, Esq. and Tanya M. Fraser, Esq. of Hutchison & Steffen, PLLC appeared on behalf of Plaintiff. George F. Ogilvie III, Esq. of McDonald Carano LLP and Jon N. Wilson, Esq. of the Law Offices of Jon Wilson appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation.

The Court having considered the record and the briefs filed in support of and in opposition to the Motion, having entertained the oral arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion In Limine Number 6 To Strike Proffered Expert Witness Alan Gray is **DENIED**.

DATED this 24th day of September, 2021.

Dated this 24th day of September, 2021


NANCY L. ALLF
District Court Judge
CEB 83E-1A01 89D8
Nancy Allf
District Court Judge

TW

Submitted By:

Approved as to Form and Content:

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Attorneys for Plaintiff

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

Subject: FW: Emailing: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline, Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witne

Attachments: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witness Alan Gray 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion For Partial Summary Judgment Regarding The Uni-Ter Defendants Fiduciary Duties 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion For Partial Summary Judgment Regarding Uni-Ter Defendants Breach Of Their Fiduciary Duties 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 1 To Preclude Sam Hewitt From Providing Expert Testimony Regarding Insolvency Analysis 091921 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 4 To Preclude Any Reference To Reinsurance Estimates 091921 - version 1 - Redline.docx

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Subject: Emailing: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline, Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witness A

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

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Jon Linder

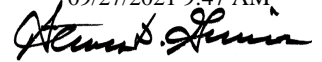
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EXHIBIT PAGE ONLY

EXHIBIT 19

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CLERK OF THE COURT

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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.,

Plaintiffs,

v.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**ORDER DENYING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT REGARDING UNI-TER
DEFENDANTS' BREACH OF THEIR
FIDUCIARY DUTIES**

Date of Hearing: September 2, 2021
Time of Hearing: 10:00 a.m.

This matter came before the Court for hearing on September 2, 2021 on Plaintiff's Motion For Partial Summary Judgment Regarding Uni-Ter Defendants' Breach Of Their Fiduciary Duties. Brenoch Wirthlin, Esq., Christian M. Orme, Esq. and Tanya M. Fraser, Esq. of Hutchison & Steffen, PLLC appeared on behalf of Plaintiff. George F. Ogilvie III, Esq. of McDonald Carano LLP and Jon N. Wilson, Esq. of the Law Offices of Jon Wilson appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation.

The Court having considered the record and the briefs filed in support of and in opposition to the Motion, having entertained the oral arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion For Partial Summary Judgment Regarding Uni-Ter Defendants' Breach Of Their Fiduciary Duties is **DENIED**.

DATED this 27th day of September, 2021.

Dated this 27th day of September, 2021

Nancy L. Alif
NANCY L. ALIF
District Court Judge
34A E03 24FF DABE
Nancy Alif
District Court Judge
Approved as to Form and Content: TW

Submitted By:

McDONALD CARANO LLP

HUTCHISON & STEFFEN, PLLC

By: /s/ George F. Ogilvie III
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Las Vegas, NV 89102

By: /s/ Brenoch R. Wirthlin
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Christian M. Orme, Esq. (NSB #10175)
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Attorneys for Plaintiff

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

Subject: FW: Emailing: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline, Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witne

Attachments: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witness Alan Gray 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion For Partial Summary Judgment Regarding The Uni-Ter Defendants Fiduciary Duties 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion For Partial Summary Judgment Regarding Uni-Ter Defendants Breach Of Their Fiduciary Duties 091921 - version 1 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 1 To Preclude Sam Hewitt From Providing Expert Testimony Regarding Insolvency Analysis 091921 - Redline.docx; Order Denying Plaintiffs Motion In Limine Number 4 To Preclude Any Reference To Reinsurance Estimates 091921 - version 1 - Redline.docx

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Sent: Thursday, September 23, 2021 8:43 PM
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Cc: Christian M. Orme <COrme@hutchlegal.com>; Tanya M. Fraser <tfraser@hutchlegal.com>; Jon Linder <jlinder@hutchlegal.com>
Subject: Emailing: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline, Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witness A

We are ok with the following redline versions.

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Commissioner of Insurance for
7 the State of Nevada as Receiver
of Lewis and Clark, Plaintiff(s)

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12
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14 Court. The foregoing Order Denying Motion 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: 9/27/2021

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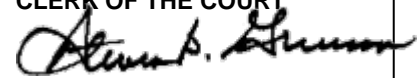
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Jon Linder

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*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

**NOTICE OF ENTRY OF ORDER
DENYING PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
REGARDING UNI-TER DEFENDANTS'
BREACH OF THEIR FIDUCIARY DUTIES**

DATED this 30th day of September, 2021.

By: /s/ George F. Ogilvie III
George F. Ogilvie III (NSBN 3552)
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Las Vegas, NV 89102

Kimberly Freedman, Esq. (Appearing *Pro Hac Vice*)
Erin Kolmansberger, Esq. (Appearing *Pro Hac Vice*)
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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 30th day of September, 2021, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING UNI-TER DEFENDANTS' BREACH OF THEIR FIDUCIARY DUTIES** 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

Heather S. Hume

CLERK OF THE COURT

ODM

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*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.,

Plaintiffs,

v.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**ORDER DENYING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT REGARDING UNI-TER
DEFENDANTS' BREACH OF THEIR
FIDUCIARY DUTIES**

Date of Hearing: September 2, 2021
Time of Hearing: 10:00 a.m.

This matter came before the Court for hearing on September 2, 2021 on Plaintiff's Motion For Partial Summary Judgment Regarding Uni-Ter Defendants' Breach Of Their Fiduciary Duties. Brenoch Wirthlin, Esq., Christian M. Orme, Esq. and Tanya M. Fraser, Esq. of Hutchison & Steffen, PLLC appeared on behalf of Plaintiff. George F. Ogilvie III, Esq. of McDonald Carano LLP and Jon N. Wilson, Esq. of the Law Offices of Jon Wilson appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation.

The Court having considered the record and the briefs filed in support of and in opposition to the Motion, having entertained the oral arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion For Partial Summary Judgment Regarding Uni-Ter Defendants' Breach Of Their Fiduciary Duties is **DENIED**.

DATED this 27th day of September, 2021.

Dated this 27th day of September, 2021

Nancy L. Alif
NANCY L. ALIF
District Court Judge
34A E03 24FF DABE
Nancy Alif
District Court Judge
Approved as to Form and Content: TW

Submitted By:

McDONALD CARANO LLP

HUTCHISON & STEFFEN, PLLC

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By: /s/ Brenoch R. Wirthlin
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Attorneys for Plaintiff

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

Subject: FW: Emailing: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline, Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witne

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Subject: Emailing: Order Denying Plaintiffs Motion In Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation Concerning The Economy 09 - Redline, Order Denying Plaintiffs Motion In Limine Number 6 To Strike Proffered Expert Witness A

We are ok with the following redline versions.

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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Jon Linder

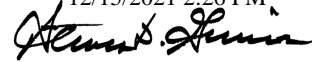
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EXHIBIT PAGE ONLY

EXHIBIT 20

HUTCHISON & STEFFEN

A PROFESSIONAL LLC


CLERK OF THE COURT

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*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.,

Plaintiffs,

v.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**ORDER GRANTING DEFENDANTS
UNI-TER UNDERWRITING
MANAGEMENT CORP., UNI-TER
CLAIMS SERVICES CORP., AND U.S.
RE CORPORATION'S MOTION FOR
ORDER EXCLUDING INTEREST
ACCRUED DURING STAY PERIODS**

Date of Hearing: November 24, 2021
Time of Hearing: 10:00 a.m.

This matter came before the Court for hearing on November 24, 2021 on Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. Re Corporation's Motion for Order Excluding Interest Accrued During Stay Periods. Brenoch Wirthlin, Esq., of Hutchison & Steffen, PLLC appeared on behalf of Plaintiff. George F. Ogilvie III, Esq. of McDonald Carano LLP appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation.

The Court having considered the record and the briefs filed in support of and in opposition to the Motion, having entertained the oral arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED that the Motion for Order Excluding Interest Accrued During Stay Periods is **GRANTED**. The computation of pre-judgment interest included in the judgment shall exclude the 726 days during which this matter was stayed pending the Nevada Supreme Court's adjudication of pre-trial writ petitions.

DATED this ____ day of December, 2021.

Dated this 15th day of December, 2021

Nancy L. Allf
NANCY L. ALLF
District Court Judge
8CB AB0 441A 42E9
Nancy Allf
District Court Judge
Approved as to Form:

Submitted By:

MCDONALD CARANO LLP

HUTCHISON & STEFFEN, PLLC

By: /s/ George F. Ogilvie III
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By: /s/ Brenoch R. Wirthlin
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Attorneys for Plaintiff

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

Subject: FW: Lewis & Clark

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

Sent: Tuesday, December 14, 2021 7:48 AM

To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Christian M. Orme <COorme@hutchlegal.com>; Tanya M. Fraser <tfraser@hutchlegal.com>

Cc: Jon <jonwilson@jonmwilsonattorney.com>; Jon Wilson <jonwilson2013@gmail.com>; Kimberly Freedman <Kimberly.Freedman@nelsonmullins.com>; erin Kolmansberger <erin.kolmansberger@nelsonmullins.com>

Subject: RE: Lewis & Clark

George, I sent that email too quickly – please change “Approved as to form and content” to “Approved as to form.” With that change my electronic signature can be added. Thanks

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

Sent: Wednesday, December 08, 2021 7:24 PM

To: Brenoch R. Wirthlin <bwirthlin@hutchlegal.com>; Christian M. Orme <COorme@hutchlegal.com>; Tanya M. Fraser <tfraser@hutchlegal.com>

Cc: Jon <jonwilson@jonmwilsonattorney.com>; Jon Wilson <jonwilson2013@gmail.com>; Kimberly Freedman <Kimberly.Freedman@nelsonmullins.com>; erin Kolmansberger <erin.kolmansberger@nelsonmullins.com>

Subject: Lewis & Clark

Brenoch,

My apologies for the delay in submitting the attached proposed Order to you. The Thanksgiving holiday immediately followed the hearing, I was traveling last week and in an arbitration hearing this week. In any event, the attached is provided for your review and comment.

George

George F. Ogilvie III | Partner

McDONALD CARANO

2300 West Sahara Avenue | Suite 1200
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P: 702.873.4100 | **F:** 702.873.9966

BIO | **WEBSITE** | **V-CARD** | **LINKEDIN**

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1 **CSERV**

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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)

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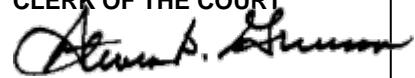
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15 Management Corp., Uni-Ter Claims Services
16 Corp., and U.S. RE Corporation*

16 **DISTRICT COURT**
17 **CLARK COUNTY, NEVADA**

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

21 Plaintiff,

21 vs.

22 ROBERT CHUR, STEVE FOGG, MARK
23 GARBER, CAROL HARTER, ROBERT
24 HURLBUT, BARBARA LUMPKIN, JEFF
25 MARSHALL, ERIC STICKELS, UNI-TER
26 UNDERWRITING MANAGEMENT CORP.
27 UNI-TER CLAIMS SERVICES CORP., and
28 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
GRANTING DEFENDANTS UNI-TER
UNDERWRITING MANAGEMENT
CORP., UNI-TER CLAIMS SERVICES
CORP., AND U.S. RE CORPORATION'S
MOTION FOR ORDER EXCLUDING
INTEREST ACCRUED DURING STAY
PERIODS**

DATED this 16th day of December, 2021.

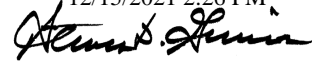
Attorneys for Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 16th day of December, 2021, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., AND U.S. RE CORPORATION'S MOTION FOR ORDER EXCLUDING INTEREST ACCRUED DURING STAY PERIODS** 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


CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**ORDER GRANTING DEFENDANTS
UNI-TER UNDERWRITING
MANAGEMENT CORP., UNI-TER
CLAIMS SERVICES CORP., AND U.S.
RE CORPORATION'S MOTION FOR
ORDER EXCLUDING INTEREST
ACCRUED DURING STAY PERIODS**

Date of Hearing: November 24, 2021
Time of Hearing: 10:00 a.m.

This matter came before the Court for hearing on November 24, 2021 on Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. Re Corporation's Motion for Order Excluding Interest Accrued During Stay Periods. Brenoch Wirthlin, Esq., of Hutchison & Steffen, PLLC appeared on behalf of Plaintiff. George F. Ogilvie III, Esq. of McDonald Carano LLP appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation.

The Court having considered the record and the briefs filed in support of and in opposition to the Motion, having entertained the oral arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED that the Motion for Order Excluding Interest Accrued During Stay Periods is **GRANTED**. The computation of pre-judgment interest included in the judgment shall exclude the 726 days during which this matter was stayed pending the Nevada Supreme Court's adjudication of pre-trial writ petitions.

DATED this ____ day of December, 2021.

Dated this 15th day of December, 2021

Nancy L. Allf
NANCY L. ALLF
District Court Judge
8CB AB0 441A 42E9
Nancy Allf
District Court Judge
Approved as to Form:

Submitted By:

McDONALD CARANO LLP

HUTCHISON & STEFFEN, PLLC

By: /s/ George F. Ogilvie III
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Las Vegas, NV 89102

By: /s/ Brenoch R. Wirthlin
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Underwriting Management Corp., Uni-Ter
Claims Services Corp., and U.S. RE
Corporation*

Subject: FW: Lewis & Clark

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

Sent: Tuesday, December 14, 2021 7:48 AM

To: George F. Ogilvie III <gogilvie@Mcdonaldcarano.com>; Christian M. Orme <COorme@hutchlegal.com>; Tanya M. Fraser <tfraser@hutchlegal.com>

Cc: Jon <jonwilson@jonmwilsonattorney.com>; Jon Wilson <jonwilson2013@gmail.com>; Kimberly Freedman <Kimberly.Freedman@nelsonmullins.com>; erin Kolmansberger <erin.kolmansberger@nelsonmullins.com>

Subject: RE: Lewis & Clark

George, I sent that email too quickly – please change “Approved as to form and content” to “Approved as to form.” With that change my electronic signature can be added. Thanks

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

Sent: Wednesday, December 08, 2021 7:24 PM

To: Brenoch R. Wirthlin <bwirthlin@hutchlegal.com>; Christian M. Orme <COorme@hutchlegal.com>; Tanya M. Fraser <tfraser@hutchlegal.com>

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Subject: Lewis & Clark

Brenoch,

My apologies for the delay in submitting the attached proposed Order to you. The Thanksgiving holiday immediately followed the hearing, I was traveling last week and in an arbitration hearing this week. In any event, the attached is provided for your review and comment.

George

George F. Ogilvie III | Partner

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1 **CSERV**

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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 Motion 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: 12/15/2021

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Jon Linder

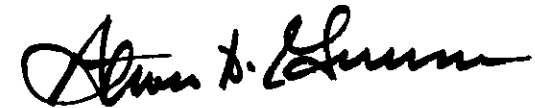
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EXHIBIT PAGE ONLY

EXHIBIT 21

HUTCHISON & STEFFEN

A PROFESSIONAL LLC



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15 Mark Garber, Carol Harter,

16 Robert Hurlbut, Barbara Lumpkin,

17 Jeff Marshall, and Eric Stickels

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

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

17 Plaintiff,

18 vs.

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

28 Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 27

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS
ROBERT CHUR, STEVE FOGG, MARK
GARBER, CAROL HARTER, ROBERT
HURLBUT, BARBARA LUMPKIN, JEFF
MARSHALL, AND ERIC STICKELS'
MOTION TO DISMISS**

Date of Hearing: January 27, 2016

Time of Hearing: 10:00 a.m.

24 Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert
25 Hurlbut, Barbara Lumpkin, Jeff Marshal and Eric Stickels' Motion to Dismiss was heard
26 on January 27, 2016. In attendance were Angela Ochoa, Esq. on behalf of Defendants
27 Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin,
28 Jeff Marshal and Eric Stickels; Karl Nielson, Esq. and 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.; 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 Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshal and Eric Stickels' Motion to Dismiss is GRANTED in PART and DENIED in PART.

Specifically, the Court grants the Motion to Dismiss without prejudice based on NRCP 12(b)(5), that Plaintiff failed to state a claim for which relief can be granted, as to the claim for gross negligence. The Court finds that Plaintiff's Complaint states a claim for mere negligence rather than gross negligence. Plaintiff shall be granted leave to amend its complaint to support a claim for gross negligence (Plaintiff's First Claim for Relief) within 30 days of the entry of this order.

The Motion to Dismiss is denied as to the second claim for relief for deepening the insolvency. The Court finds the decision in *In re AgriBioTech, Inc.*, 319 B.R. 216, 224 (D. Nev. 2004) to be persuasive law, and finds that the Complaint states a claim for deepening the insolvency which is a recognized claim in Nevada. However, the Court finds that this claim is a collateral cause of action to the gross negligence claim. Should the Plaintiff choose to amend the Complaint to state a claim for gross negligence, the

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claim for deepening the insolvency will proceed as well.

DATED this 23 day of February, 2016.

Nancy Allf
JUDGE NANCY ALLF

Submitted by:
LIPSON, NEILSON, COLE, SELTZER &
GARIN, P.C.

Approved as to Form and Content:
FENNEMORE CRAIG, P.C.

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Robert Hurlbut, Barbara Lumpkin,

Jeff Marshall, and Eric Stickels

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 27

**NOTICE OF ENTRY OF ORDER
GRANTING IN PART AND DENYING IN
PART DEFENDANTS ROBERT CHUR,
STEVE FOGG, MARK GARBER, CAROL
HARTER, ROBERT HURLBUT,
BARBARA LUMPKIN, JEFF MARSHALL,
AND ERIC STICKELS' MOTION TO
DISMISS**

PLEASE TAKE NOTICE that on the 25th day of February, 2016, an Order Granting in Part and Denying in Part Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels' Motion to Dismiss, was entered. A copy of said Order is attached hereto and made part

hereof.

DATED this 26th day of February, 2016.

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

By: /s/ Angela T. Nakamura Ochoa

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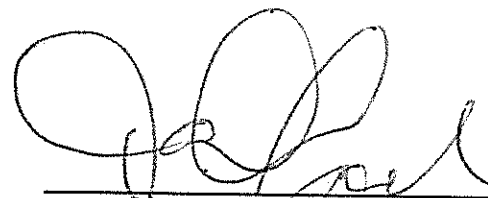
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Plaintiffs Robert Chur, Steve Fogg,
Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin,
Jeff Marshall, and Eric Stickels*

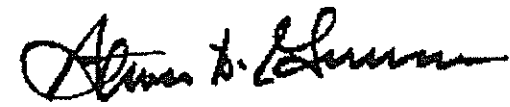
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 26th day of February, 2016, I electronically transmitted the foregoing **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS' MOTION TO DISMISS** to the Clerk's Office using the Odyssey E-File & Serve System for filing and transmittal to the following Odyssey E-File & Serve registrants:

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13 Attorneys for Defendants/Third-Party

14 Plaintiffs Robert Chur, Steve Fogg,

15 Mark Garber, Carol Harter,

16 Robert Hurlbut, Barbara Lumpkin,

17 Jeff Marshall, and Eric Stickels

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

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

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Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 27

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS
ROBERT CHUR, STEVE FOGG, MARK
GARBER, CAROL HARTER, ROBERT
HURLBUT, BARBARA LUMPKIN, JEFF
MARSHALL, AND ERIC STICKELS'
MOTION TO DISMISS**

Date of Hearing: January 27, 2016

Time of Hearing: 10:00 a.m.

Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels' Motion to Dismiss was heard on January 27, 2016. In attendance were Angela Ochoa, Esq. on behalf of Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels; Karl Nielson, Esq. and Brenoch Wirthlin, Esq. on behalf

1 of Plaintiff, Commissioner of Insurance for the State of Nevada as Receiver for the
2 Lewis & Clark Risk Retention Group, Inc.; and George Ogilvie, III, Esq. on behalf of U.S.
3 RE Corporation, Uni-Ter Underwriting Management Corp., and Uni-Ter Claims
4 Servicing Corp.

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

8 THE COURT HEREBY ORDERS that Defendants Robert Chur, Steve Fogg,
9 Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshal and Eric
10 Stickels' Motion to Dismiss is GRANTED in PART and DENIED in PART.

11 Specifically, the Court grants the Motion to Dismiss without prejudice based on
12 NRCP 12(b)(5), that Plaintiff failed to state a claim for which relief can be granted, as to
13 the claim for gross negligence. The Court finds that Plaintiff's Complaint states a claim
14 for mere negligence rather than gross negligence. Plaintiff shall be granted leave to
15 amend its complaint to support a claim for gross negligence (Plaintiff's First Claim for
16 Relief) within 30 days of the entry of this order.

17 The Motion to Dismiss is denied as to the second claim for relief for deepening
18 the insolvency. The Court finds the decision in *In re AgriBioTech, Inc.*, 319 B.R. 216,
19 224 (D. Nev. 2004) to be persuasive law, and finds that the Complaint states a claim for
20 deepening the insolvency which is a recognized claim in Nevada. However, the Court
21 finds that this claim is a collateral cause of action to the gross negligence claim. Should
22 the Plaintiff choose to amend the Complaint to state a claim for gross negligence, the

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


claim for deepening the insolvency will proceed as well.

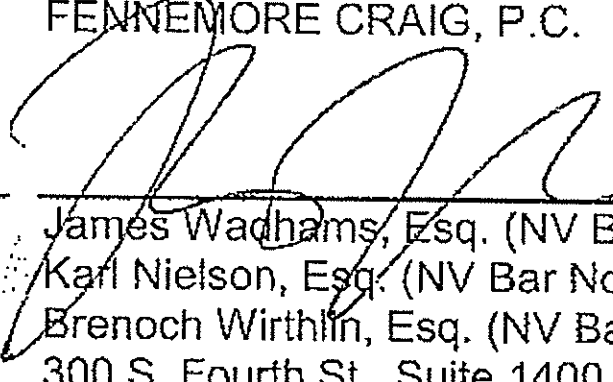
DATED this 23 day of February, 2016.

Nancy Allf
JUDGE NANCY ALLF

Submitted by:
LIPSON, NEILSON, COLE, SELTZER &
GARIN, P.C.

Approved as to Form and Content:
FENNEMORE CRAIG, P.C.


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Marshall & Eric Stickels*


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Brenoch Wirthlin, Esq. (NV Bar No. 10282)
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Attorneys for Plaintiff

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EXHIBIT PAGE ONLY

EXHIBIT 22

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

1 **ORDR**

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

4 * * * *

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

9 Plaintiff,

10 v.

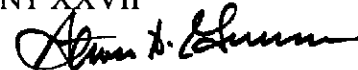
11 ROBERT CHUR; STEVE FOGG; MARK
12 GARBER; CAROL HARTER; ROBERT
13 HURLBUT; BARBARA LUMPKIN; JEFF
14 MARSHALL; ERIC STICKELS; UNI-TER
15 UNDERWRITING MANAGEMENT CORP.;
16 UNI-TER CLAIMS SERVICES CORP.; and
17 U.S. RE CORPORATION; DOES 1-50,
18 inclusive; and ROES 51-100, inclusive,

19 Defendants.

CASE NO.: A-14-711535-C

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DEPARTMENT XXVII



CLERK OF THE COURT

20 **DECISION AND ORDER**

21 These matters having come on for hearing on February 25, 2016; Brenoch
22 Wirthlin, Esq., appearing for and on behalf of Plaintiff, Commissioner of Insurance for
23 the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc.
24 (hereinafter "Plaintiff"); George F. Ogilvie, III, Esq. and Jon M. Wilson, Esq., appearing
25 for and on behalf of Defendants, Uni-Ter Underwriting Management Corp.; Uni-Ter
26 Claims Services Corp.; and U.S. RE Corporation (hereinafter collectively "Entity
27 Defendants"), and the Court having heard arguments of counsel, and being fully advised
28 of the matters herein, the **COURT FINDS** after review:

29 This action is brought by Plaintiff, the Court-appointed receiver for Lewis and
30 Clark LTC Risk Retention Group, Inc. ("L&C"). It is brought against L&C's former
31 officers and directors ("Individual Defendants") and against the Entity Defendants L&C's

1 underwriting managers and reinsurance broker. L&C was formed in 2004 and between
2 2004 and February 28, 2013 it provided general and professional liability coverage to
3 long term care facilities and home health providers. See Complaint ¶1.

4 L&C's relationship with Entity Defendant Uni-Ter Underwriting Management
5 Corp. began in 2004 when the parties entered into a Management Agreement providing
6 the specifics of their relationship. Id. ¶42. This 2004 Management Agreement was
7 amended in minor ways until 2011 when a new Management Agreement was executed.
8 Id. ¶¶50, 56. This 2011 Management Agreement was substantially similar to the prior one
9 with a few revisions and the addition of and Defendant Uni-Ter Claims Services Corp. Id.
10 ¶¶56, 58–59. The 2011 Management Agreement was also amended in minor ways. Id.
11 ¶¶60–62.

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13 The 2004 Management Agreements explicitly stated that Defendant Uni-Ter
14 Underwriting Management Corp. would “serve L&C in a fiduciary capacity for all legal
15 duties.” Id. ¶44. The 2011 Management Agreement also explicitly stated that Defendant
16 Uni-Ter Underwriting Management Corp. and Defendant Uni-Ter Claims Services Corp.
17 would “serve L&C in a fiduciary capacity for all legal duties.” Id. ¶58.

18
19 L&C's relationship with Entity Defendant U.S. RE Corporation began in
20 December, 2003 when the parties entered into a Letter Agreement whereby L&C
21 appointed U.S. RE Corporation as its exclusive reinsurance intermediary/broker. Id. ¶64.
22 The Letter Agreement specifically states “[a]ll funds collected for [L&C]'s account will
23 be handled by U.S. RE in a fiduciary capacity in a bank which is a qualified United States
24 financial institution.” Id. ¶65, Ex. 4. This is the only mention of fiduciary duty with
25 regard to U.S. RE Corporation.
26
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1 In November, 2012 the Nevada Division of Insurance filed a receivership action
2 against L&C and the Court entered a liquidation order on February 28, 2013. Id. ¶2. The
3 liquidation order gave Plaintiff, as receiver, the express power to prosecute any action
4 which may exist on behalf of the policyholders, members, or shareholders of L&C
5 against any officer of L&C or any other person. Id. ¶2, Ex. 1.

6
7 **COURT FURTHER FINDS** after review Plaintiff filed its Complaint on
8 December 23, 2014 and it stated claims for 1) Gross Negligence of the Former Officers
9 and Directors of L&C; 2) Deepening of the Insolvency of L&C Caused by the Former
10 Officers and Directors; 3) Negligent Misrepresentation by Uni-Ter Underwriting
11 Management Corp.; 4) Breach of Fiduciary Duty by Uni-Ter Underwriting Management
12 Corp. and Uni-Ter Claims Services Corp.; 5) Breach of Fiduciary Duty against U.S. RE
13 Corporation.

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15 On February 25, 2016 the Court took Defendants Uni-Ter Underwriting
16 Management Corp. and Uni-Ter Claims Services Corp.'s Motion to Dismiss and U.S. RE
17 Corporation's Motion to Dismiss under advisement. The Motions only concern claims 3,
18 4, and 5.

19 **COURT FURTHER FINDS** after review Defendants move to Dismiss
20 Plaintiff's claims 3, 4, and 5 under NRCP 5(b)(5) because the complaint does not state a
21 claim upon which relief can be granted. Nevada is a notice-pleading jurisdiction, and as
22 such does not have a strict requirement for pleading. "The test for determining whether
23 the allegations of a cause of action are sufficient to assert a claim for relief is whether the
24 allegations give fair notice of the nature of the basis of the claim and the relief
25 requested." Ravera v. City of Reno, 100 Nev. 68, 70, 675 P.2d 407, 408 (1984).
26
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1 Defendants Uni-Ter Underwriting Management Corp. and Uni-Ter Claims
2 Services Corp. argue that the economic loss doctrine requires dismissal of the claim for
3 negligent misrepresentation because Defendants duties were created by the 2004 and
4 2011 Management Agreements, so an alleged failure to provide the services in the
5 Management Agreements would lead to a breach of contract claim. Likewise, Defendants
6 argue that the economic loss doctrine requires dismissal of the claim for breach of
7 fiduciary duty because this claim arises from an alleged breach of the Management
8 Agreements.
9

10 Defendant U.S. RE Corporation also argues that the economic loss doctrine
11 requires dismissal of the claim for breach of fiduciary duty because any alleged duty was
12 created by the contract provided in the Letter Agreement. Furthermore, Defendant U.S.
13 RE Corporation argues that even if the claim is not barred by the economic loss doctrine,
14 it must be dismissed because the Complaint does not adequately describe the duties owed
15 by Defendant U.S. RE Corporation, how exactly those same duties were breached, and
16 how an alleged breach proximately caused damages and what those damages were.
17

18 Plaintiff rebuts the arguments proffered by Defendants Uni-Ter Underwriting
19 Management Corp. and Uni-Ter Claims Services Corp. by arguing that claims for
20 negligent misrepresentation are not barred by the economic loss doctrine when the
21 misstatements are regarding financial matters. Plaintiff also argues that claims for breach
22 of fiduciary duty are not barred by the economic loss doctrine because the economic loss
23 doctrine does not bar intentional torts.
24

25 Additionally, Plaintiff rebuts the arguments proffered by Defendant U.S. RE
26 Corporation by arguing that, similar to the prior argument, breach of fiduciary duty is an
27 intentional tort under NRS 78.138(7) and as such, is not barred by the economic loss
28

1 doctrine. Plaintiff also argues that it has sufficiently set forth the elements of a breach of
2 fiduciary duty; specifically, it argued that there are multiple additional bases for fiduciary
3 duties. Alternatively, Plaintiff requests leave to amend the Complaint if breach of
4 fiduciary duty is not pled with sufficient detail.

5 **COURT FURTHER FINDS** after review that the economic loss doctrine “marks
6 the fundamental boundary between contract law, which is designed to enforce the
7 expectancy interests of the parties, and tort law, which imposes a duty of reasonable care
8 and thereby [generally] encourages citizens to avoid causing physical harm to others.”
9 Terracon Consultants W., Inc. v. Mandalay Resort Grp., 125 Nev. 66, 72–73, 206 P.3d
10 81, 86 (2009). Thus, the economic loss doctrine applies to bar claims for “unintentional
11 tort actions when the plaintiff seeks to recover purely economic losses.” Id. It is accepted
12 that the economic loss doctrine does not apply to bar intentional torts. Halcrow, Inc. v.
13 Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. 42, 302 P.3d 1148, 1154 fn. 2 (2013), as
14 corrected (Aug. 14, 2013) (“Intentional torts are not barred by the economic loss
15 doctrine.”).

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18 However, there are established exceptions to the economic loss doctrine’s bar on
19 unintentional tort actions; specifically, “[l]iability is proper in cases where there is
20 significant risk that the law would not exert significant financial pressures to avoid such
21 negligence. These types of cases encompass economic losses sustained, for example, as a
22 result of defamation, **intentionally caused harm, negligent misstatements about**
23 **financial matters**, and loss of consortium.” Id. at 1153 (emphasis added) (internal
24 citations and quotations omitted).

25
26 **COURT FURTHER FINDS** after review that the economic loss doctrine does
27 not apply to bar Plaintiff’s claims for relief against Defendants Uni-Ter Underwriting
28

1 Management Corp. and Uni-Ter Claims Services Corp. for negligent misrepresentation or
2 breach of fiduciary duty. Thus, claims 3 and 4 will not be dismissed.

3 Plaintiff's claim for negligent misrepresentation is not barred because in the
4 Complaint Plaintiff alleges that the misrepresentations were regarding financial matters;
5 specifically, Plaintiff alleges "Uni-Ter UMC, through its employees, negligently
6 misrepresented the specific financial conditions of L&C including the level of losses and
7 LAE." See Complaint ¶¶174–177. Thus, under Halcrow, the allegations in the Complaint
8 are sufficient to plead an exception to the economic loss doctrine.
9

10 Plaintiff's claim for breach of fiduciary duty is likewise not barred because the
11 economic loss doctrine does not apply, because breach of fiduciary duty is an intentional
12 tort. NRS 78.138(7) is clear that only intentional conduct can form the basis for a
13 violation because "intentional misconduct, fraud or a knowing violation of law" must be
14 proven. Here, Plaintiff alleges that Defendants took actions that were not authorized by
15 the Board of L&C which caused damage to the company. See Complaint ¶¶183–186.
16 These allegations are sufficient to allege that the economic loss doctrine does not apply to
17 this claim of intentional misconduct.
18

19 **COURT FURTHER FINDS** after review that to plead a claim for breach of
20 fiduciary duty Plaintiff must allege "the existence of a fiduciary duty, the breach of that
21 duty, and that the breach proximately caused the damages." Brown v. Kinross Gold
22 U.S.A., Inc., 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008) (citing Clark v. Lubritz, 113
23 Nev. 1089, 944 P.2d 861, 866–67 (1997)). "[T]o hold a director or officer individually
24 liable, the shareholder must prove that the director's breach of his or her fiduciary duty of
25 loyalty involved intentional misconduct, fraud or a knowing violation of law." In re
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1 Amerco Derivative Litig., 127 Nev. Adv. Op. 17, 252 P.3d 681, 701 (2011) (internal
2 alterations and quotations omitted) (citing NRS 78.138(7)(b)).

3 **COURT FURTHER FINDS** after review that the Court is unable to determine at
4 this time if the economic loss doctrine bars Plaintiff's claim for relief against Defendant
5 U.S. RE Corporation for breach of fiduciary duty because the claim for breach of
6 fiduciary duty is not sufficiently plead. In order to determine whether the economic loss
7 doctrine bars the claim, the Court must determine whether the conduct states a claim for
8 an intentional tort. Here, Plaintiff alleges that Defendant failed to secure appropriate
9 reinsurance because the insurance that it did obtain contained deductible rates that were
10 consistently too high. See Complaint ¶¶190–193. It appears that Plaintiff is attempting to
11 state a claim for an intentional tort because it labeled this claim “breach of fiduciary
12 duty.” See Complaint ¶¶189–195. However, the allegations do not actually allege that
13 this was an intentional act. Indeed, NRS 78.138(7)(b), which codifies a breach of
14 fiduciary duty requires “intentional misconduct, fraud or a knowing violation of law.”
15
16

17 In the briefing in opposition to Defendant U.S. RE Corporation's Motion to
18 Dismiss, Plaintiff argues that Defendant and L&C were in an agency relationship;
19 however, this agency relationship has not been plead in the Complaint and in order to
20 state a claim for breach of fiduciary duty Plaintiff still must comply with NRS
21 78.138(7)(b). Thus, claim 5 will be dismissed with leave to amend to clarify the basis for
22 the duty owed, the actual duty owed, the actions that constituted a breach of the duty, and
23 the damages incurred by the breach.
24

25 **THEREFORE, THE COURT ORDERS** for good cause appearing and for the
26 reasons stated above, Defendants Uni-Ter Underwriting Management Corp. and Uni-Ter
27
28

1 Claims Services Corp.'s Motion to Dismiss **DENIED** and U.S. RE Corporation's Motion
2 to Dismiss under advisement **GRANTED WITH LEAVE TO AMEND**.

3 **COURT FURTHER ORDERS** for good cause appearing and for the reasons
4 stated above, Plaintiff has **30 DAYS LEAVE TO AMEND** from the Notice of Entry of
5 Order.

6 **COURT FURTHER ORDERS** for good cause appearing and for the reasons
7 stated above, the **STATUS CHECK** set for **CHAMBERS CALENDAR** on May 17,
8 2016 is **VACATED**.

9
10 Dated: April 27, 2016
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13 Nancy ALIF
14 NANCY ALIF
15 DISTRICT COURT JUDGE
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2 **CERTIFICATE OF SERVICE**

3 I hereby certify that on or about the date signed I caused the foregoing document to be
4 electronically served pursuant to EDCR 8.05(a) and 8.05(f) through the Eighth Judicial
5 District Court's electronic filing system, with the date and time of the electronic service
substituted for the date and place of deposit in the mail to:

6 Fennemore Craig – Brenoch Wirthlin, Esq. – bwirthlin@fclaw.com

7 McDonald Carano Wilson LLP – George F. Ogilvie, Esq.
8 gogilvie@mcdonaldcarano.com

9 Lipson, Neilson, Cole, Seltzer & Garin, P.C. – Angela T. Nakamura Ochoa, Esq.
10 aochoa@lipsonneilson.com

11 

12

Karen Lawrence
13 Judicial Executive Assistant
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CLERK OF THE COURT

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Nevada Bar No. 1115
KARL L. NIELSON, ESQ.
Nevada Bar No. 5082
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Attorneys for Plaintiff Commissioner of Insurance
For the State of Nevada

DISTRICT COURT

CLARK COUNTY, NEVADA

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

PLEASE TAKE NOTICE that a Decision and Order was entered by the Court on May 4,
2016, a copy of which is attached hereto.

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DATED this 10th day of May, 2016.

FENNEMORE CRAIG, P.C.

By: /s/ Karl L. Nielson
JAMES L. WADHAMS, ESQ.
Nevada Bar No. 1115
KARL L. NIELSON, ESQ.
Nevada Bar No. 5082
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knielson@fclaw.com
bwirthlin@fclaw.com
Attorneys for Plaintiff Commissioner of
Insurance For the State of Nevada

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of Fennemore Craig, P.C. and that on May 10,
3 2016, service of the foregoing NOTICE OF ENTRY OF DECISION AND ORDER was made
4 on the following counsel of record and/or parties via the Court's electronic filing system as
5 follows:

6 George F. Ogilvie III, Esq.
7 James W. Bradshaw, Esq.
8 Jeffrey S. Riesenmy, Esq.
9 McDonald Carano Wilson LLP
10 2300 West Sahara Avenue, Suite 1200
11 Las Vegas, NV 89102
12 gogilvie@mcdonaldcarano.com
jbradshaw@mcdonaldcarano.com
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Attorneys for Defendants
Uni-Ter Underwriting Management Corp.,
Uni-Ter Claims Services Corp. and U.S. RE Corporation

13 Joseph P. Garin, Esq.
14 Angela T. Nakamura Ochoa, Esq.
15 LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.
16 9900 Covington Cross Drive, Suite 120
17 Las Vegas, NV 89144
18 jgarin@lipsonneilson.com
aocchoa@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

19 and by depositing a true and correct of the same via U.S. Mail, postage prepaid addressed as
20 follows:

21 Jon M. Wilson, Esq.
22 Broad and Cassel
23 2 South Biscayne Blvd., 21st Floor
24 Miami, FL 33131
25 jwilson@broadandcassel.com
Attorneys for Defendants
Uni-Ter Underwriting Management Corp.,
Uni-Ter Claims Services Corp. and U.S. RE Corporation

26
27 /s/ Cheryl Landis
28 An employee of Fennemore Craig, P.C.

1 **ORDR**

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

4 * * * *

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

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11 ROBERT CHUR; STEVE FOGG; MARK
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18 inclusive; and ROES 51-100, inclusive,

19 Defendants.

CASE NO.: A-14-711535-C

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DEPARTMENT XXVII



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25 for and on behalf of Defendants, Uni-Ter Underwriting Management Corp.; Uni-Ter
26 Claims Services Corp.; and U.S. RE Corporation (hereinafter collectively "Entity
27 Defendants"), and the Court having heard arguments of counsel, and being fully advised
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CLERK OF THE COURT

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1 underwriting managers and reinsurance broker. L&C was formed in 2004 and between
2 2004 and February 28, 2013 it provided general and professional liability coverage to
3 long term care facilities and home health providers. See Complaint ¶1.

4 L&C's relationship with Entity Defendant Uni-Ter Underwriting Management
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23 doctrine does not bar intentional torts.

25 Additionally, Plaintiff rebuts the arguments proffered by Defendant U.S. RE
26 Corporation by arguing that, similar to the prior argument, breach of fiduciary duty is an
27 intentional tort under NRS 78.138(7) and as such, is not barred by the economic loss
28

1 doctrine. Plaintiff also argues that it has sufficiently set forth the elements of a breach of
2 fiduciary duty; specifically, it argued that there are multiple additional bases for fiduciary
3 duties. Alternatively, Plaintiff requests leave to amend the Complaint if breach of
4 fiduciary duty is not pled with sufficient detail.

5 **COURT FURTHER FINDS** after review that the economic loss doctrine “marks
6 the fundamental boundary between contract law, which is designed to enforce the
7 expectancy interests of the parties, and tort law, which imposes a duty of reasonable care
8 and thereby [generally] encourages citizens to avoid causing physical harm to others.”
9 Terracon Consultants W., Inc. v. Mandalay Resort Grp., 125 Nev. 66, 72–73, 206 P.3d
10 81, 86 (2009). Thus, the economic loss doctrine applies to bar claims for “unintentional
11 tort actions when the plaintiff seeks to recover purely economic losses.” Id. It is accepted
12 that the economic loss doctrine does not apply to bar intentional torts. Halcrow, Inc. v.
13 Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. 42, 302 P.3d 1148, 1154 fn. 2 (2013), as
14 corrected (Aug. 14, 2013) (“Intentional torts are not barred by the economic loss
15 doctrine.”).

16
17
18 However, there are established exceptions to the economic loss doctrine’s bar on
19 unintentional tort actions; specifically, “[l]iability is proper in cases where there is
20 significant risk that the law would not exert significant financial pressures to avoid such
21 negligence. These types of cases encompass economic losses sustained, for example, as a
22 result of defamation, **intentionally caused harm, negligent misstatements about**
23 **financial matters**, and loss of consortium.” Id. at 1153 (emphasis added) (internal
24 citations and quotations omitted).

25
26 **COURT FURTHER FINDS** after review that the economic loss doctrine does
27 not apply to bar Plaintiff’s claims for relief against Defendants Uni-Ter Underwriting
28

1 Management Corp. and Uni-Ter Claims Services Corp. for negligent misrepresentation or
2 breach of fiduciary duty. Thus, claims 3 and 4 will not be dismissed.

3 Plaintiff's claim for negligent misrepresentation is not barred because in the
4 Complaint Plaintiff alleges that the misrepresentations were regarding financial matters;
5 specifically, Plaintiff alleges "Uni-Ter UMC, through its employees, negligently
6 misrepresented the specific financial conditions of L&C including the level of losses and
7 LAE." See Complaint ¶¶174–177. Thus, under Halcrow, the allegations in the Complaint
8 are sufficient to plead an exception to the economic loss doctrine.
9

10 Plaintiff's claim for breach of fiduciary duty is likewise not barred because the
11 economic loss doctrine does not apply, because breach of fiduciary duty is an intentional
12 tort. NRS 78.138(7) is clear that only intentional conduct can form the basis for a
13 violation because "intentional misconduct, fraud or a knowing violation of law" must be
14 proven. Here, Plaintiff alleges that Defendants took actions that were not authorized by
15 the Board of L&C which caused damage to the company. See Complaint ¶¶183–186.
16 These allegations are sufficient to allege that the economic loss doctrine does not apply to
17 this claim of intentional misconduct.
18

19 **COURT FURTHER FINDS** after review that to plead a claim for breach of
20 fiduciary duty Plaintiff must allege "the existence of a fiduciary duty, the breach of that
21 duty, and that the breach proximately caused the damages." Brown v. Kinross Gold
22 U.S.A., Inc., 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008) (citing Clark v. Lubritz, 113
23 Nev. 1089, 944 P.2d 861, 866–67 (1997)). "[T]o hold a director or officer individually
24 liable, the shareholder must prove that the director's breach of his or her fiduciary duty of
25 loyalty involved intentional misconduct, fraud or a knowing violation of law." In re
26
27
28

1 Amerco Derivative Litig., 127 Nev. Adv. Op. 17, 252 P.3d 681, 701 (2011) (internal
2 alterations and quotations omitted) (citing NRS 78.138(7)(b)).

3 **COURT FURTHER FINDS** after review that the Court is unable to determine at
4 this time if the economic loss doctrine bars Plaintiff's claim for relief against Defendant
5 U.S. RE Corporation for breach of fiduciary duty because the claim for breach of
6 fiduciary duty is not sufficiently plead. In order to determine whether the economic loss
7 doctrine bars the claim, the Court must determine whether the conduct states a claim for
8 an intentional tort. Here, Plaintiff alleges that Defendant failed to secure appropriate
9 reinsurance because the insurance that it did obtain contained deductible rates that were
10 consistently too high. See Complaint ¶¶190–193. It appears that Plaintiff is attempting to
11 state a claim for an intentional tort because it labeled this claim "breach of fiduciary
12 duty." See Complaint ¶¶189–195. However, the allegations do not actually allege that
13 this was an intentional act. Indeed, NRS 78.138(7)(b), which codifies a breach of
14 fiduciary duty requires "intentional misconduct, fraud or a knowing violation of law."
15

16
17 In the briefing in opposition to Defendant U.S. RE Corporation's Motion to
18 Dismiss, Plaintiff argues that Defendant and L&C were in an agency relationship;
19 however, this agency relationship has not been plead in the Complaint and in order to
20 state a claim for breach of fiduciary duty Plaintiff still must comply with NRS
21 78.138(7)(b). Thus, claim 5 will be dismissed with leave to amend to clarify the basis for
22 the duty owed, the actual duty owed, the actions that constituted a breach of the duty, and
23 the damages incurred by the breach.
24

25 **THEREFORE, THE COURT ORDERS** for good cause appearing and for the
26 reasons stated above, Defendants Uni-Ter Underwriting Management Corp. and Uni-Ter
27
28

1 Claims Services Corp.'s Motion to Dismiss **DENIED** and U.S. RE Corporation's Motion
2 to Dismiss under advisement **GRANTED WITH LEAVE TO AMEND**.

3 **COURT FURTHER ORDERS** for good cause appearing and for the reasons
4 stated above, Plaintiff has **30 DAYS LEAVE TO AMEND** from the Notice of Entry of
5 Order.

6 **COURT FURTHER ORDERS** for good cause appearing and for the reasons
7 stated above, the **STATUS CHECK** set for **CHAMBERS CALENDAR** on May 17,
8 2016 is **VACATED**.

9
10 Dated: April 27, 2016
11
12

13 Nancy L Alf
14 NANCY ALF
15 DISTRICT COURT JUDGE
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1
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that on or about the date signed I caused the foregoing document to be
4 electronically served pursuant to EDCR 8.05(a) and 8.05(f) through the Eighth Judicial
5 District Court's electronic filing system, with the date and time of the electronic service
substituted for the date and place of deposit in the mail to:

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13 Karen Lawrence
14 Judicial Executive Assistant
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EXHIBIT PAGE ONLY

EXHIBIT 23

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 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:
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/s/ Angela Nakamura Ochoa

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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

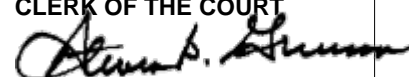
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 27

NOTICE OF ENTRY OF ORDER

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NOTICE OF ENTRY OF ORDER

Please take notice that the 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 Theron was filed with this court on the 13th day of August, 2020, a copy of which is attached hereto, as **Exhibit A**.

Dated this 14th day of August, 2020.

LIPSON NEILSON P.C.

/s/ Angela Ochoa

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Jeff Marshall, and Eric Stickels*

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 14th day of August, 2020, I electronically transmitted the foregoing **NOTICE OF ENTRY OF ORDER** 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

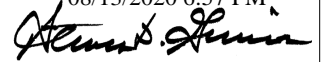
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/s/ Sydney Ochoa

An employee of LIPSON NEILSON P.C.

EXHIBIT “A”

EXHIBIT “A”


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DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 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

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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

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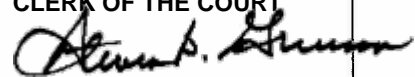
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EXHIBIT PAGE ONLY

EXHIBIT 24

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

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

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

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

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

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

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

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

4
5 DATED this 4 day of Aug, 2019.

6
7 Nancy L. Alf
DISTRICT COURT JUDGE

8 Respectfully submitted by:

9 Dated this 7th day of August, 2019.

Approved as to form and content:

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

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

11
12 [Signature]
13 Brenoch Wirthlin, Esq.
14 Nevada Bar No. 10282
15 300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101

By: [Signature]
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16 *Attorneys for Plaintiff Commissioner of Insurance*
17 *for the State of Nevada*

J. Stephen Peek, Esq.
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19 Approved as to form and content:
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21 By: _____
22 George F. Ogilvie III, Esq.
23 Nevada Bar No. 3352
24 2300 West Sahara Avenue, Suite 1200
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Barbara Lumpkin, Jeff Marshall, and Eric
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27 2 S. Biscayne Boulevard, 21st Floor
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*Attorney for Defendants Uni-Ter Underwriting Management Corp.,
Uni-Ter Services Corp. and U.S. RE Corporation*

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

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

4
5 DATED this ____ day of _____, 2019.

6
7
8 DISTRICT COURT JUDGE

8 Respectfully submitted by:

9 Dated this ____ day of July, 2019.

Approved as to form and content:

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

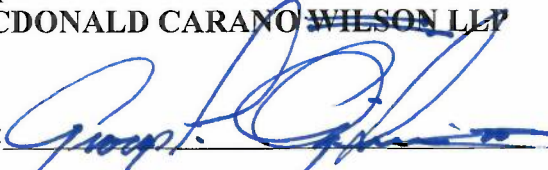
**LIPSON NEILSON COLE SELTZER
& GARIN, P.C.**

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Las Vegas, Nevada 89101

16 *Attorneys for Plaintiff Commissioner of Insurance*
17 *for the State of Nevada*

18 Approved as to form and content:

19 **MCDONALD CARANO WILSON LLP**

20
21 By: 
22 George F. Ogilvie III, Esq.
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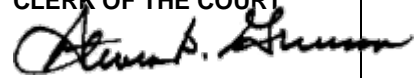
25 Jon M. Wilson, Esq.
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28 *Attorney for Defendants Uni-Ter Underwriting Management Corp.,
Uni-Ter Services Corp. and U.S. RE Corporation*

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

Case No.: A-14-711535-C

Dept. No.: XXVII

NOTICE OF ENTRY ORDER

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

DATED August 12, 2019.

FENNEMORE CRAIG, P.C.

By: /s/ Brenoch Wirthlin

Brenoch Wirthlin (NV Bar No. 10282)
300 South Fourth Street, Suite 1400
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*Attorneys for Plaintiff Commissioner of
Insurance For the State of Nevada*

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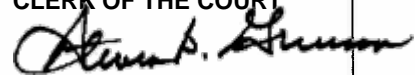
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Management Corp., Uni-Ter Claims Services Corp.,
and U.S. RE Corporation*

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



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12 *For the State of Nevada*

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

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

13 Plaintiff,

14 vs.

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

20 Defendants.

Case No.: A-14-711535-C

Dept. No.: XXVII

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

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

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

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

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

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

4
5 DATED this 4 day of Aug, 2019.

6
7 Nancy L. Alf
DISTRICT COURT JUDGE

8 Respectfully submitted by:

9 Dated this 7th day of August, 2019.

Approved as to form and content:

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

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

11
12 [Signature]
13 Brenoch Wirthlin, Esq.
14 Nevada Bar No. 10282
15 300 South Fourth Street, Suite 1400
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By: [Signature]
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16 *Attorneys for Plaintiff Commissioner of Insurance*
17 *for the State of Nevada*

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18
19 Approved as to form and content:
MCDONALD CARANO WILSON LLP

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21 By: _____
22 George F. Ogilvie III, Esq.
23 Nevada Bar No. 3352
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Garber, Carol Harter, Robert Hurlbut,
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26 BROAD AND CASSEL
27 2 S. Biscayne Boulevard, 21st Floor
28 Miami, Florida, 33131

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

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

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

4
5 DATED this ____ day of _____, 2019.

6
7
8 DISTRICT COURT JUDGE

8 Respectfully submitted by:

9 Dated this ____ day of July, 2019.

Approved as to form and content:

10 FENNEMORE CRAIG, P.C.

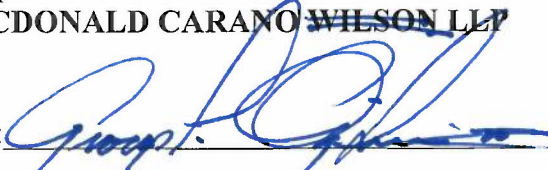
LIPSON NEILSON COLE SELTZER
& GARIN, P.C.

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14 Brenoch Wirthlin, Esq.
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16 *Attorneys for Plaintiff Commissioner of Insurance*
17 *for the State of Nevada*

18 Approved as to form and content:

19 MCDONALD CARANO WILSON LLP

20
21 By: 
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Miami, Florida, 33131

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

By: _____
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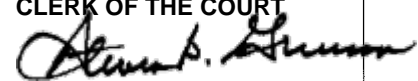
Attorneys for Robert Chur, Steve Fogg, Mark
Garber, Carol Harter, Robert Hurlbut,
Barbara Lumpkin, Jeff Marshall, and Eric
Stickels

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EXHIBIT PAGE ONLY

EXHIBIT 25

HUTCHISON & STEFFEN

A PROFESSIONAL LLC



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Plaintiffs Robert Chur, Steve Fogg,
Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin,
Jeff Marshall, and Eric Stickels*

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 27

**ORDER DENYING THE MOTION TO
SUBSTITUTE**

Date of Hearing: January 24, 2019

Time of Hearing: 9:30 a.m.

Plaintiff's Motion for Substitution of Deceased Party Pursuant to NRCP 25(a) was heard on January 24, 2019. In attendance were Angela Ochoa, Esq. on behalf of Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels; Brenoch Wirthlin, Esq. on behalf of Plaintiff, Commissioner of Insurance for the State of Nevada as Receiver for the Lewis

1 & Clark Risk Retention Group, Inc.; and George Ogilive, III, Esq. on behalf of U.S. RE
2 Corporation, Uni-Ter Underwriting Management Corp., and Uni-Ter Claims Servicing
3 Corp.

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

7 THE COURT HEREBY FINDS that the 90-day period referenced in NRCP 25
8 was not triggered by the Suggestion of Death Upon the Record Pursuant to NRCP 25(a)
9 filed on November 2, 2018.

10 THE COURT FURTHER FINDS that it is not defense counsel's duty to find a
11 personal representative for the deceased.

12 THE COURT FURTHER FINDS that the Philis Oeters declaration stating that she
13 is not the personal representative for the deceased, Barbara Lumpkin, is persuasive.

14 Therefore, THE COURT HEREBY ORDERS that the Motion to Substitute is
15 Denied.

16 DATED this 19 day of February, 2019.

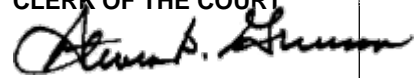
17
18 Nancy L Allf
JUDGE NANCY ALLF

19 Submitted by:
20 LIPSON NEILSON, P.C.

Approved as to Form and Content:
FENNEMORE CRAIG

21 Angela Ochoa
22 Joseph P. Garin, Esq. (NV Bar No. 6653)
23 Angela Ochoa, Esq. (NV Bar No. 10164)
24 9900 Covington Cross Dr., Suite 120
25 Las Vegas, NV 89144
26 *Attorneys for Defendants Robert Chur,
Steve Fogg, Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin, Jeff
Marshall & Eric Stickels*

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Plaintiffs Robert Chur, Steve Fogg,
Mark Garber, Carol Harter,
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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 ORDER

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NOTICE OF ENTRY OF ORDER

Please take notice that the Order Denying the Motion to Substitute was filed with this court on the 21st day of February, 2019, a copy of which is attached.

Dated this 25th day of February, 2019.

LIPSON NEILSON, P.C.

By: 

Joseph P. Garin, Esq. (6653)
Angela T. Nakamura Ochoa, Esq. (10164)
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*Attorneys for Defendants/Third-Party
Plaintiffs Robert Chur, Steve Fogg,
Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin,
Jeff Marshall, and Eric Stickels*

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 26th day of February, 2019, I electronically transmitted the foregoing **NOTICE OF ENTRY OF ORDER** 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

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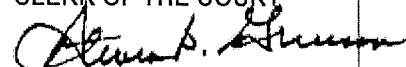
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Plaintiffs Robert Chur, Steve Fogg,
Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin,
Jeff Marshall, and Eric Stickels

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 27

**ORDER DENYING THE MOTION TO
SUBSTITUTE**

Date of Hearing: January 24, 2019

Time of Hearing: 9:30 a.m.

Plaintiff's Motion for Substitution of Deceased Party Pursuant to NRCP 25(a) was heard on January 24, 2019. In attendance were Angela Ochoa, Esq. on behalf of Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels; Brenoch Wirthlin, Esq. on behalf of Plaintiff, Commissioner of Insurance for the State of Nevada as Receiver for the Lewis

1 & Clark Risk Retention Group, Inc.; and George Ogilive, III, Esq. on behalf of U.S. RE
2 Corporation, Uni-Ter Underwriting Management Corp., and Uni-Ter Claims Servicing
3 Corp.

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

7 THE COURT HEREBY FINDS that the 90-day period referenced in NRCP 25
8 was not triggered by the Suggestion of Death Upon the Record Pursuant to NRCP 25(a)
9 filed on November 2, 2018.

10 THE COURT FURTHER FINDS that it is not defense counsel's duty to find a
11 personal representative for the deceased.

12 THE COURT FURTHER FINDS that the Philis Oeters declaration stating that she
13 is not the personal representative for the deceased, Barbara Lumpkin, is persuasive.

14 Therefore, THE COURT HEREBY ORDERS that the Motion to Substitute is
15 Denied.

16 DATED this 19 day of February, 2019.

17
18 Nancy L Allf
JUDGE NANCY ALLF

19 Submitted by:
20 LIPSON NEILSON, P.C.

Approved as to Form and Content:
FENNEMORE CRAIG

21 Angela Ochoa
22 Joseph P. Garin, Esq. (NV Bar No. 6653)
23 Angela Ochoa, Esq. (NV Bar No. 10164)
24 9900 Covington Cross Dr., Suite 120
25 Las Vegas, NV 89144
26 *Attorneys for Defendants Robert Chur,
Steve Fogg, Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin, Jeff
Marshall & Eric Stickels*

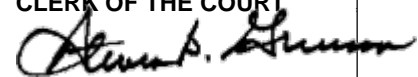
27 James Wadhams
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EXHIBIT PAGE ONLY

EXHIBIT 26

HUTCHISON & STEFFEN

A PROFESSIONAL LLC



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Jeff Marshall, and Eric Stickels

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 27

**ORDER GRANTING IN PART
DEFENDANTS ROBERT CHUR, STEVE
FOGG, MARK GARBER, CAROL
HARTER, ROBERT HURLBUT,
BARBARA LUMPKIN, JEFF
MARSHALL, AND ERIC STICKELS'
MOTION TO STRIKE**

Date of Hearing: October 11, 2018

Time of Hearing: 9:30 a.m.

Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert
Hurlbut, Barbara Lumpkin, Jeff Marshal and Eric Stickels' Motion to Strike was heard on
October 11, 2018. In attendance were Angela Ochoa, Esq. on behalf of Defendants
Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin,
Jeff Marshal and Eric Stickels; Brenoch Wirthlin, Esq., and Dan Cereghino, Esq. on

1 behalf of Plaintiff, Commissioner of Insurance for the State of Nevada as Receiver for
2 the Lewis & Clark Risk Retention Group, Inc.; and George Ogilive, III, Esq. on behalf of
3 U.S. RE Corporation, Uni-Ter Underwriting Management Corp., and Uni-Ter Claims
4 Servicing Corp.

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

8 THE COURT HEREBY ORDERS that Defendants Robert Chur, Steve Fogg,
9 Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshal and Eric
10 Stickels' Motion to Strike is GRANTED in PART.

11 Specifically, the Court grants the Motion to Strike, such that the Plaintiff's
12 Countermotion for Summary Judgment shall not be heard on October 11, 2018. Plaintiff
13 may file a Motion for Summary Judgment, to be heard in normal course.

14 DATED this 31 day of October, 2018.

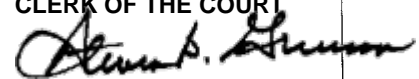
15
16 Nancy Allf
JUDGE NANCY ALLF

17 Submitted by:
18 LIPSON NEILSON, P.C.

19 Approved as to Form and Content:
20 FENNEMORE CRAIG

21 Joseph P. Garin, Esq. (NV Bar No. 6653)
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Steve Fogg, Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin, Jeff
Marshall & Eric Stickels

25 James Wadhams, Esq. (NV Bar No. 1115)
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Robert Hurlbut, Barbara Lumpkin,
Jeff Marshall, and Eric Stickels

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

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 ORDER

PLEASE TAKE NOTICE that the Order Granting in part Defendants Robert Chur,
Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff
Marshall, and Eric Stickels' Motion to Strike was filed with the court this 6th day of

\\

\\

1 November, 2018, a copy of which is attached.

2 DATED this 7th day of November, 2018.

3 LIPSON NEILSON, P.C.

4
5 By: 

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7 Angela T. Nakamura Ochoa, Esq. (10164)
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13 *Attorneys for Defendants/Third-Party*
14 *Plaintiffs Robert Chur, Steve Fogg,*
15 *Mark Garber, Carol Harter,*
16 *Robert Hurlbut, Barbara Lumpkin,*
17 *Jeff Marshall, and Eric Stickels*
18
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 7th day of November, 2018, I electronically transmitted the foregoing **NOTICE OF ENTRY OF ORDER** 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

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Nevada Attorney General

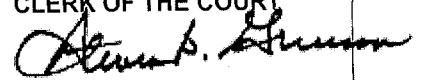
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Nevada Division of Insurance

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14 *Robert Chur, Steve Fogg,*
15 *Mark Garber, Carol Harter,*
16 *Robert Hurlbut, Barbara Lumpkin,*
17 *Jeff Marshall, and Eric Stickels*

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

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

17 Plaintiff,

18 vs.

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

28 Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 27

**ORDER GRANTING IN PART
DEFENDANTS ROBERT CHUR, STEVE
FOGG, MARK GARBER, CAROL
HARTER, ROBERT HURLBUT,
BARBARA LUMPKIN, JEFF
MARSHALL, AND ERIC STICKELS'
MOTION TO STRIKE**

Date of Hearing: October 11, 2018

Time of Hearing: 9:30 a.m.

24 Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert
25 Hurlbut, Barbara Lumpkin, Jeff Marshal and Eric Stickels' Motion to Strike was heard on
26 October 11, 2018. In attendance were Angela Ochoa, Esq. on behalf of Defendants
27 Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin,
28 Jeff Marshal and Eric Stickels; Brenoch Wirthlin, Esq., and Dan Cereghino, Esq. on

1 behalf of Plaintiff, Commissioner of Insurance for the State of Nevada as Receiver for
2 the Lewis & Clark Risk Retention Group, Inc.; and George Ogilive, III, Esq. on behalf of
3 U.S. RE Corporation, Uni-Ter Underwriting Management Corp., and Uni-Ter Claims
4 Servicing Corp.

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

8 THE COURT HEREBY ORDERS that Defendants Robert Chur, Steve Fogg,
9 Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshal and Eric
10 Stickels' Motion to Strike is GRANTED in PART.

11 Specifically, the Court grants the Motion to Strike, such that the Plaintiff's
12 Countermotion for Summary Judgment shall not be heard on October 11, 2018. Plaintiff
13 may file a Motion for Summary Judgment, to be heard in normal course.

14 DATED this 31 day of October, 2018.

15
16 Nancy ALLF
JUDGE NANCY ALLF

17 Submitted by:
18 LIPSON NEILSON, P.C.

19 Approved as to Form and Content:
20 FENNEMORE CRAIG

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22 Joseph P. Garin, Esq. (NV Bar No. 6653)
23 Angela Ochoa, Esq. (NV Bar No. 10164)
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Steve Fogg, Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin, Jeff
Marshall & Eric Stickels*

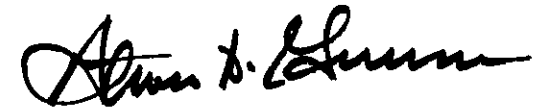
25 James Wadhams #11710 for
26 James Wadhams, Esq. (NV Bar No. 1115)
27 Brenoch Wirthlin, Esq. (NV Bar No. 10282)
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Attorneys for Plaintiff

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EXHIBIT PAGE ONLY

EXHIBIT 27

HUTCHISON & STEFFEN

A PROFESSIONAL LLC



CLERK OF THE COURT

1 **ORDG**

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

3 JOSEPH P. GARIN, ESQ.

4 Nevada Bar No. 6653

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13 *Attorneys for Defendants/Third-Party*

14 *Plaintiffs Robert Chur, Steve Fogg,*

15 *Mark Garber, Carol Harter,*

16 *Robert Hurlbut, Barbara Lumpkin,*

17 *Jeff Marshall, and Eric Stickels*

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

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

24 Plaintiff,

25 vs.

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

Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 27

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS
ROBERT CHUR, STEVE FOGG, MARK
GARBER, CAROL HARTER, ROBERT
HURLBUT, BARBARA LUMPKIN, JEFF
MARSHALL, AND ERIC STICKELS'
MOTION TO DISMISS**

Date of Hearing: January 27, 2016

Time of Hearing: 10:00 a.m.

Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshal and Eric Stickels' Motion to Dismiss was heard on January 27, 2016. In attendance were Angela Ochoa, Esq. on behalf of Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshal and Eric Stickels; Karl Nielson, Esq. and Brenoch Wirthlin, Esq. on behalf

1 of Plaintiff, Commissioner of Insurance for the State of Nevada as Receiver for the
2 Lewis & Clark Risk Retention Group, Inc.; and George Ogilvie, III, Esq. on behalf of U.S.
3 RE Corporation, Uni-Ter Underwriting Management Corp., and Uni-Ter Claims
4 Servicing Corp.

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

8 THE COURT HEREBY ORDERS that Defendants Robert Chur, Steve Fogg,
9 Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshal and Eric
10 Stickels' Motion to Dismiss is GRANTED in PART and DENIED in PART.

11 Specifically, the Court grants the Motion to Dismiss without prejudice based on
12 NRCP 12(b)(5), that Plaintiff failed to state a claim for which relief can be granted, as to
13 the claim for gross negligence. The Court finds that Plaintiff's Complaint states a claim
14 for mere negligence rather than gross negligence. Plaintiff shall be granted leave to
15 amend its complaint to support a claim for gross negligence (Plaintiff's First Claim for
16 Relief) within 30 days of the entry of this order.

17 The Motion to Dismiss is denied as to the second claim for relief for deepening
18 the insolvency. The Court finds the decision in *In re AgriBioTech, Inc.*, 319 B.R. 216,
19 224 (D. Nev. 2004) to be persuasive law, and finds that the Complaint states a claim for
20 deepening the insolvency which is a recognized claim in Nevada. However, the Court
21 finds that this claim is a collateral cause of action to the gross negligence claim. Should
22 the Plaintiff choose to amend the Complaint to state a claim for gross negligence, the

23 ///

24 ///

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claim for deepening the insolvency will proceed as well.

DATED this 23 day of February, 2016.

Nancy Allf
JUDGE NANCY ALLF

Submitted by:
LIPSON, NEILSON, COLE, SELTZER &
GARIN, P.C.

Approved as to Form and Content:
FENNEMORE CRAIG, P.C.



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Steve Fogg, Mark Garber, Carol Harter,
Robert Hurlbut, Barbara Lumpkin, Jeff
Marshall & Eric Stickels*



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Attorneys for Defendants/Third-Party

Plaintiffs Robert Chur, Steve Fogg,

Mark Garber, Carol Harter,

Robert Hurlbut, Barbara Lumpkin,

Jeff Marshall, and Eric Stickels

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CLERK OF THE COURT

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 ORDER
GRANTING IN PART AND DENYING IN
PART DEFENDANTS ROBERT CHUR,
STEVE FOGG, MARK GARBER, CAROL
HARTER, ROBERT HURLBUT,
BARBARA LUMPKIN, JEFF MARSHALL,
AND ERIC STICKELS' MOTION TO
DISMISS**

PLEASE TAKE NOTICE that on the 25th day of February, 2016, an Order
Granting in Part and Denying in Part Defendants Robert Chur, Steve Fogg, Mark
Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels'
Motion to Dismiss, was entered. A copy of said Order is attached hereto and made part

hereof.

DATED this 26th day of February, 2016.

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

By: /s/ Angela T. Nakamura Ochoa

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

CERTIFICATE OF SERVICE

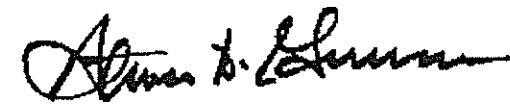
Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 26th day of February, 2016, I electronically transmitted the foregoing **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS' MOTION TO DISMISS** to the Clerk's Office using the Odyssey E-File & Serve System for filing and transmittal to the following Odyssey E-File & Serve registrants:

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



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



CLERK OF THE COURT

1 **ORDG**

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

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13 Attorneys for Defendants/Third-Party

14 Plaintiffs Robert Chur, Steve Fogg,

15 Mark Garber, Carol Harter,

16 Robert Hurlbut, Barbara Lumpkin,

17 Jeff Marshall, and Eric Stickels

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

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

24 Plaintiff,

25 vs.

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DOES 1-50, inclusive; and ROES 51-100,
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Defendants.

CASE NO.: A-14-711535-C

DEPT. NO.: 27

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS
ROBERT CHUR, STEVE FOGG, MARK
GARBER, CAROL HARTER, ROBERT
HURLBUT, BARBARA LUMPKIN, JEFF
MARSHALL, AND ERIC STICKELS'
MOTION TO DISMISS**

Date of Hearing: January 27, 2016

Time of Hearing: 10:00 a.m.

Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels' Motion to Dismiss was heard on January 27, 2016. In attendance were Angela Ochoa, Esq. on behalf of Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels; Karl Nielson, Esq. and Brenoch Wirthlin, Esq. on behalf

1 of Plaintiff, Commissioner of Insurance for the State of Nevada as Receiver for the
2 Lewis & Clark Risk Retention Group, Inc.; and George Ogilvie, III, Esq. on behalf of U.S.
3 RE Corporation, Uni-Ter Underwriting Management Corp., and Uni-Ter Claims
4 Servicing Corp.

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

8 THE COURT HEREBY ORDERS that Defendants Robert Chur, Steve Fogg,
9 Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshal and Eric
10 Stickels' Motion to Dismiss is GRANTED in PART and DENIED in PART.

11 Specifically, the Court grants the Motion to Dismiss without prejudice based on
12 NRCP 12(b)(5), that Plaintiff failed to state a claim for which relief can be granted, as to
13 the claim for gross negligence. The Court finds that Plaintiff's Complaint states a claim
14 for mere negligence rather than gross negligence. Plaintiff shall be granted leave to
15 amend its complaint to support a claim for gross negligence (Plaintiff's First Claim for
16 Relief) within 30 days of the entry of this order.

17 The Motion to Dismiss is denied as to the second claim for relief for deepening
18 the insolvency. The Court finds the decision in *In re AgriBioTech, Inc.*, 319 B.R. 216,
19 224 (D. Nev. 2004) to be persuasive law, and finds that the Complaint states a claim for
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21 finds that this claim is a collateral cause of action to the gross negligence claim. Should
22 the Plaintiff choose to amend the Complaint to state a claim for gross negligence, the

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


claim for deepening the insolvency will proceed as well.

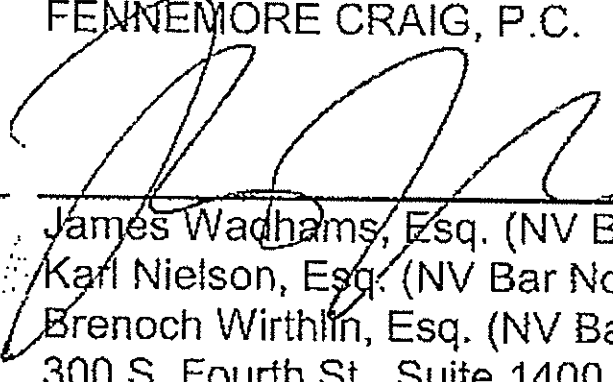
DATED this 23 day of February, 2016.

Nancy Allf
JUDGE NANCY ALLF

Submitted by:
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