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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

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,

Respondents.

Supreme Court No. 85668

Electronically Filed
Jun 23 2023 06:00 PM
Elizabeth A. Brown
Clerk of Supreme Court
**RESPONSE TO ORDER TO
SHOW CAUSE**

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

Appellants,

vs.

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

Respondents.

Supreme Court No. 85728

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

Supreme Court No. 85907

5 Appellant,

6 vs.

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

14 Respondents.

15 Appellant COMMISSIONER OF INSURANCE FOR THE STATE OF
16 NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION
17 GROUP, INC., (“Appellant”), by and through their counsel, Hutchison & Steffen,
18 PLLC, hereby submit their opposition to the Court’s May 10, 2023 Order to Show
19 Cause (“OSC”). This response is based on the following memorandum of points
20 and authorities as well as all exhibits thereto, and all papers and pleadings on file
21 herein.
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23
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25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

27 This court’s OSC directed Appellant to “show cause why the identified
28

1 portions of this appeal should not be dismissed for lack of jurisdiction” regarding
2 the interlocutory orders related to the defendants Uni-Ter Underwriting
3 Management Corp., Uni-Ter Claims Services Corp., and U.S. Re Corporation
4 (“Corporate Defendants”). As the Court correctly noted, the final judgment in this
5 matter (“Final Judgment”) was entered based on a jury verdict in favor of Appellant
6 and against the Corporate Defendants. The Respondents Robert Chur, Steve Fogg,
7 Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and
8 Eric Stickels “Director Defendants”) had been dismissed previously, which is also
9 subject of the Appellants’ appeal from the Final Judgment.
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13 **II. STATEMENT OF FACTS**

14 1. On August 10, 2020, the trial court entered its Order Denying Plaintiff’s
15 Motion for Leave to File Fourth Amended Complaint.
16

17 2. On August 10, 2020, the trial court entered its Findings of Fact,
18 Conclusions of Law and Order Denying Plaintiff’s Motion for Leave to File Fourth
19 Amended Complaint.
20

21 3. On August 14, 2020, the trial court entered its Order granting
22 Respondents’ Motion for Judgment on the Pleadings.
23

24 4. On August 14, 2020, the trial court entered its Judgment in favor of
25 Respondents.
26

27 5. On September 10, 2020, the trial court entered its Findings of Fact,
28 Conclusions of Law and Order Denying Appellant’s Motion for Reconsideration of

1 Motion for Leave to Amend Regarding Director Defendants (*i.e.* Respondents).

2 6. On December 30, 2021, the Final Judgment on jury verdict was entered
3 against the Corporate Defendants. *See* Exhibit 1 hereto.
4

5 7. Throughout the course of the litigation, the District Court entered
6 several interlocutory orders (“Interlocutory Orders”)¹ which make findings of fact
7 and conclusions of law regarding the Corporate Defendants that would, if Appellant
8 is unable to challenge them, substantially and adversely affect Appellant’s appeal
9 against the Director Defendants. This is because, among other reasons, under
10 Nevada law, the acts of the Corporate Defendants, as managing agents of the risk
11 retention group for which Appellant served as receiver, Lewis & Clark Risk
12 Retention Group LTC, Inc. (“L&C”).
13
14
15

16 8. For example, in its Finding of Fact, Conclusions of Law and Order
17 Denying Plaintiff’s Motion for Leave to File Fourth Amended Complaint, dated
18 August 10, 2020, the District Court found that:
19

20 FINDINGS OF FACT

21 -----
22 39. Between the deposition testimony of Plaintiff’s NRCP 30(b)(6)
23 designee and Plaintiff’s responses to written discovery, there is no factual
24

25
26
27 ¹ Defined to include all interlocutory order from which Appellant seek relief,
28 whether or not such interlocutory orders are mentioned in this response.

1 basis for Plaintiff's new allegation that Director Defendants knowingly
2 violated the law, as Plaintiff's proposed Fourth Amended Complaint alleges.

3
4 40. With the great passage of time of the alleged violations of law and
5 the fact that witnesses are unavailable, the Director Defendants will be unduly
6 prejudiced in establishing their defenses to Plaintiff's new theory that the
7 Director Defendants knowingly violated the law.

8
9 -----
10 CONCLUSIONS OF LAW

11
12 17. Justice does not require granting leave to amend for Plaintiff to file
13 the proposed Fourth Amended Complaint as to the Director Defendants
14 because Plaintiff unduly delayed bringing said complaint and it would be
15 unduly prejudicial for the Director Defendants to defend such theories of
16 liability at this point.

17
18 (Emphasis added.)

19
20 -----
21 *See Exhibit 2 hereto.*

22 **III. LAW AND ARGUMENT**

23
24 **A. Even though Appellant obtained a jury verdict against the**
25 **Corporate Defendants, for purposes of an appeal the Appellant is**
26 **aggrieved by the Final Judgment as to the Interlocutory Orders**
27 **and respectfully submits that the portions of the appeal related to**
28 **the Corporate Defendants identified in the OSC should not be**
dismissed.

1 As this Court has recognized, “[a] party is ‘aggrieved’ within the meaning of
2 NRAP 3A(a) ‘when either a personal right or right of property is adversely and
3 substantially affected’ by a district court’s ruling.” *Valley Bank of Nevada v.*
4
5 *Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994) (citing *Estate of Hughes v.*
6 *First Nat’l Bank*, 96 Nev. 178, 180, 605 P.2d 1149, 1150 (1980)). In that case the
7
8 Court held that the district court’s decision to approve the settlement over appellants’
9 objection “substantially and adversely affected” their interests by purporting to
10 terminate whatever rights they may have had to bring future lawsuits against another
11 party arising out of the same transactions. Appellants were thus “aggrieved” by the
12 district court’s order. *Id.* See also *Consol. Generator–Nev., Inc. v. Cummins Engine*
13 *Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (recognizing that a party may
14 challenge interlocutory orders entered before a final judgment in an appeal from the
15 final judgment). Moreover, this Court has also recognized that the term “aggrieved”
16 means a “substantial grievance,” which “includes ‘[t]he imposition of some
17 injustice, or illegal obligation or burden, by a court, upon a party, **or the denial to**
18 **him of some equitable or legal right.’ ”** See *Webb, ex rel. Webb v. Clark Cnty.*
19 *Sch. Dist.*, 125 Nev. 611, 617, 218 P.3d 1239, 1244 (2009) (citing *Las Vegas Police*
20 *Prot. Ass’n*, 122 Nev. at 240, 130 P.3d at 189).

25 In this case, the Interlocutory Orders may be used by the Director Defendants
26 in the same way as the subject order in *Valley Bank*. For example,
27 NAC 683A.550 provides as follows:
28

1 **NAC 683A.550 Acts of agent deemed to be acts of insurer;**
2 **examination of agent.** The acts of the managing general agent are
3 deemed to be the acts of the insurer on whose behalf it is acting. A
4 managing general agent may be examined as if it were the insurer.
5 (Added to NAC by Comm’r of Insurance, eff. 9-19-90).

6 In this case, it is not in dispute that the Corporate Defendants acted as the managing
7 agents for L&C. *See, e.g.*, Exhibit 3 hereto, management agreement between L&C
8 and the Corporate Defendants stating that the Corporate Defendants are the
9 “managing agents” of L&C. Thus, provided the other requirements to meet the
10 required elements of director liability are met, the acts of the Corporate Defendants
11 “are deemed to be the acts of the insurer on whose behalf it was acting”, *i.e.*, L&C.
12 Accordingly, any findings purportedly made in the Interlocutory Orders which
13 involve the improper actions or inaction on the part of the Corporate Defendants
14 including without limitation those set forth herein – will substantially and adversely
15 affect the Appellant’s rights, including without limitation by depriving them of the
16 legal and/or equitable right to pursue the Director Defendants for those wrongs.
17 Accordingly, while it is true as the Court correctly noted in its OSC that Appellant
18 obtained a Final Judgment against the Corporate Defendants, because of the
19 intertwined nature of the liability of the Director Defendants for acts and omissions
20 of the Corporate Defendants, Appellant is “aggrieved” by the Interlocutory Orders
21 and consequently the Final Judgment. Accordingly, Appellant respectfully submits
22 that the identified portions of the appeal should not be dismissed.
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III. CONCLUSION

For all these reasons, Appellant respectfully submits that portions of the appeal identified in the OSC related to the Corporate Defendants should not be dismissed, and that the Court should grant such other and further relief as it deems appropriate.

Dated this 23rd day of June, 2023.

HUTCHISON & STEFFEN, PLLC

 /s/Brenoch Wirthlin
Mark A. Hutchison, Esq. (4639)
Brenoch R. Wirthlin, Esq. (10282)
Traci L. Cassity, Esq. (9648)
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Appellant

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 23rd day of June, 2023, I caused the above and foregoing document entitled: **RESPONSE TO ORDER TO SHOW CAUSE** to be served via NOTICE OF ELECTRONIC FILING through the Electronic Case Filing System of the Nevada Supreme Court with the submission to the Clerk of the Court, who will serve the parties electronically.

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

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EXHIBIT PAGE ONLY

EXHIBIT 1

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

1 **JGJV**

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3 BRENOCH R. WIRTHLIN, ESQ. (10282)
4 CHRISTIAN ORME, ESQ. (10175)
5 TANYA M. FRASER, ESQ. (13872)
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11 E-Mail: mhutchison@hutchlegal.com
12 E-Mail: bwirthlin@hutchlegal.com
13 *Attorneys for Plaintiff*

9 **DISTRICT COURT**

10 **CLARK COUNTY, NEVADA**

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

14 Plaintiff,

15 vs.

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

23 Defendants.

Case No.: A-14-711535-C

Dept. No.: XXVII

JUDGMENT ON JURY VERDICT

Trial: 9/20/2021 – 10/14/2021

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

Nancy L Allf
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)
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CHRISTIAN ORME, ESQ. (10175)
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10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Plaintiff

Approved as to Form:

By: /s/ George Ogilvie
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Nevada Bar No. 3552
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Telephone: (702) 873-4100
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Jon M. Wilson, Esq. (Appearing *Pro Hac Vice*)
200 Biscayne Blvd Way, Suite 5107
Miami, FL 33131
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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.

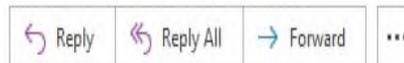
RE: Lewis & Clark



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 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 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Judgment on Jury Verdict was served via the court's electronic eFile
14 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

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EXHIBIT PAGE ONLY

EXHIBIT 2

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

MCDONALD CARANO

2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
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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
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 NRCPC 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.

1 14. In and around July, 2018, Director Defendant Barbara Lumpkin passed away.

2 15. On November 8, 2018, the deposition of the NRC 30(b)(6) witness for the
3 Commissioner of Insurance for the State of Nevada took place, in which he frequently responded
4 that the complaint spoke for itself and that he would be relying upon experts in response to the
5 Defendants questioning. Mr. Greer also testified regarding the unavailability of certain Division
6 of Insurance former employees. On March 8, 2019, the Director Defendants filed a Motion to
7 Stay Proceedings Pending Petition for Writ of Mandamus on an Order Shortening Time. The
8 Receiver joined in the request for a stay of these proceedings; Uni-Ter UMC, Uni-Ter CS and US
9 Re opposed the imposition of a stay in significant part due to the ongoing and increasing prejudice
10 it had experienced and would continue to experience in delaying the trial of the Receiver’s claims.

11 16. On March 12, 2019, the Director Defendants filed their Notice of Filing of Petition
12 for Writ of Mandamus with the Nevada Supreme Court. In their Petition for Writ of Mandamus,
13 the Director Defendants challenged this Court’s denial of the Director Defendants’ Motion for
14 Judgment on the Pleadings.

15 17. On March 14, 2019, this Court granted the Motion to Stay Proceedings Pending
16 Petition for Writ of Mandamus, and imposed an immediate stay (the “Stay”) of all proceedings in
17 this matter.

18 18. Prior to the March 14, 2019 imposition of the Stay, the deadlines for moving to
19 amend pleadings or add parties and for the Receiver to serve its initial expert reports were March
20 15, 2018.

21 19. On February 27, 2020, the Nevada Supreme Court issued its Opinion (“NSC
22 Opinion”) granting the Director Defendants’ Petition for Writ of Mandamus, and instructed this
23 Court to vacate its order denying the Director Defendants’ Motion for Judgment on the Pleadings,
24 and to enter a new order granting the Director Defendants’ Motion for Judgment on the Pleadings.
25 The NSC Opinion left to this Court’s discretion whether to grant the Receiver leave to file a fourth
26 amended complaint.

27 20. On April 6, 2020, the Receiver filed in this Court Plaintiff’s Motion for
28 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
11 allegations *to support its Complaint and claims previously asserted*
12 *therein with respect to the Director Defendants*. This will likely
13 result in additional motion practice and require targeted discovery.

14 See Second Supplemental Brief at 5 (emphasis added).

15 23. On May 14, 2020, because the writ petition proceedings before the Nevada
16 Supreme Court were not concluded, the parties entered into a stipulation continuing the hearing
17 on Plaintiff's Motion for Clarification and extending the Stay until June 18, 2020.

18 24. On May 22, 2020, the Nevada Supreme Court issued its Order Denying Rehearing,
19 thereby affirming the Opinion, and directing this Court to enter an order granting the Director
20 Defendants' Motion for Judgment on the Pleadings, but leaving to this Court's discretion whether
21 to grant the Receiver leave to file a fourth amended complaint.

22 25. At the time of the June 18, 2020 hearing on Plaintiff's Motion for Clarification, the
23 Receiver again represented its intention to seek leave to file a Fourth Amended Complaint to
24 remedy the deficiencies identified in the NSC Opinion; the Receiver did not express or intimate
25 that it would be seeking to add new claims against Uni-Ter UMC, Uni-Ter CS or US Re, or seeking
26 to add a new party.

27 26. Also at the time of the June 18, 2020 hearing, the Receiver requested that the Stay
28 be extended to July 1, 2020; the Defendants objected to the Receiver's request, and requested that
29 the Stay be lifted immediately. This Court granted Plaintiff's Motion for Clarification, and
30 ordered that the Stay be lifted as of July 1, 2020.

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.*

1 2. A denial of leave to amend may be warranted if undue delay, bad faith, or dilatory
2 motives are involved. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Kantor v. Kantor*, 116 Nev.
3 886, 891, 8 P.3d 825, 828 (2000).

4 3. Where a plaintiff has previously amended her complaint, the discretion to deny
5 further amendment is “particularly broad.” *Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047,
6 1058 (9th Cir. 2011).

7 4. Leave to amend should not be granted if the proposed amendment would be futile.
8 *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394,
9 398, 302 P.3d 1148, 1152 (2013), *as corrected* (Aug. 14, 2013).

10 5. A proposed amendment may be deemed futile if the plaintiff seeks to amend the
11 complaint in order to plead an impermissible claim. *Nutton v. Sunset Station, Inc.*, 131 Nev. 279,
12 289, 357 P.3d 966, 973 (Nev. App. 2015).

13 6. In Nevada, the three-year statute of limitations in NRS § 11.190(3)(d) applies to a
14 claim for aiding and abetting a breach of fiduciary duty. *See USA CM Liquidating Trust v. Deloitte*
15 *& Touche, LLP*, 764 F.Supp.2d 1210, 1231 (D.Nev.2011), *aff'd sub nom.*, 523 Fed. Appx. 488
16 (9th Cir. 2013)(unpublished).

17 7. The Plaintiff’s proposed claims for aiding and abetting accrued when the Plaintiff
18 “knew or reasonably should have known, of the facts giving rise to the breach” of fiduciary duty
19 claims. *See In re Amerco Derivative Litig.*, 127 Nev. 196, 252 P.3d 681 (2011).

20 8. Since the Plaintiff’s original Complaint filed in December 2014 included claims
21 for breach of fiduciary duty against Uni-Ter and U.S. Re., the Plaintiff’s proposed claims for
22 aiding and abetting those purported breaches of fiduciary duty would have expired in December
23 2017, which is three years after the filing of the original Complaint.

24 9. The proposed aiding and abetting claims are therefore time-barred unless they
25 relate back to the original Complaint pursuant to NRCP 15(c).

26 10. A new claim based upon a new theory of liability asserted in an amended pleading
27 does not relate back under NRCP 15(c) after the statute of limitations has run. *Badger v. Eighth*
28 *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).
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17. Justice does not require granting leave to amend for Plaintiff to file the proposed Fourth Amended Complaint as to the Director Defendants because Plaintiff unduly delayed bringing said complaint and it would be unduly prejudicial for the Director Defendants to defend such theories of liability at this point.

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.

ORDER

IT IS HEREBY ORDERED that Plaintiff's Motion for Leave to File Fourth Amended Complaint is **DENIED**.

DATED this ____ day of August, 2020.

Dated this 10th day of August, 2020

Nancy L Alif

NANCY L. ALIF
District Court Judge
B48 88C D21A 9B68
Nancy Alif
District Court Judge

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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 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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EXHIBIT PAGE ONLY

EXHIBIT 3

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

MANAGEMENT AGREEMENT

THIS AGREEMENT is made between Lewis & Clark LTC RISK RETENTION GROUP, INC. ("L&C"), a Nevada corporation, and UNI-TER UNDERWRITING MANAGEMENT CORPORATION ("Manager"), which is a wholly owned subsidiary of U.S. RE Companies, Inc. a Delaware corporation, and which shall continue as such wholly owned subsidiary during the term or extended term of this agreement.

ARTICLE I. Term of Agreement

This Agreement is effective as of 1/1/04. It will continue for a period of 7 years from the effective date hereof unless terminated prior thereto under the provisions of Article X of this Agreement, and shall be automatically renewed for an additional (7) years, subject to mutual agreement between the parties as to the terms of such renewal. If the parties are unable to so agree, then L&C shall be free to enter into a selection process for a new managing general agent.

ARTICLE II. Appointment of Manager; Lines of Authority

L&C appoints Manager as its underwriting, administrative, accounting, risk management and claims manager as follows:

- A. Lines of Authority: Manager's appointment and authority extends to the classes of business, policies of insurance, including all endorsements, (the "Policies"); and lines and limits of insurance described in Exhibit A attached to this Agreement (the "Business").
- B. Territory: Manager's appointment and authority extends to risks located in the states set forth in Exhibit A.
- C. Exclusions: Manager's appointment and authority is subject to any exclusions set forth in Exhibit A.
- D. Fiduciary: Manager will serve L&C in a fiduciary capacity for all legal duties.

ARTICLE III. Manager's Duties and Responsibilities

Manager will faithfully perform all of its duties to the best of its professional knowledge, skill and judgment. Manager's duties include the following:

- A. Solicitation: To solicit risks and classes of risks at limits and for lines of insurance authorized in Exhibit A, that in their pricing and insurability meet or exceed the agreed upon underwriting and pricing standards established by L&C in writing.
- B. Binding of Risks: To bind risks only in accordance with Exhibit A and any other agreed upon underwriting and pricing standards established by L&C in writing.

- C. Policy Issuance: To timely and properly issue, deliver and execute or countersign policies, certificates, endorsements, and binders on forms approved by L&C and appropriate regulatory authorities, as required by law, for the business described in Exhibit A.
- D. Risks Bound: To record on the books of L&C each risk or policy bound or written under this Agreement.
- E. Compliance with State and Federal Regulations: To comply fully, timely and promptly with all manuals, rules, guidelines, instructions and directions issued in writing by L&C relating to the business covered by this Agreement as well as to comply with all state and federal rules, regulations, and statues including those relating to privacy & confidentiality for all L&C business covered hereby.
- F. Premium Rates: To quote accurate premiums and rates for policies bound or written under this agreement in compliance with the approved and applicable rating manuals or rating plans of L&C.
- G. Statistical Reporting: To provide the necessary data processing and statistical records, including the development of any specialized programs which may be required by L&C.
- H. Accounting: To timely account for the business and for the financial affairs of L&C as follows:
1. Manager shall prepare and forward to L&C on a monthly basis, within twenty (20) calendar days of the end of each calendar month, a complete set of financial statements prepared in accordance with Generally Accepted Accounting Principles (GAAP) basis to include:
 - a. Operating Statement
 - b. Balance Sheet
 - c. Policies written for the month
 - d. Claims incurred for the month
 - e. Accounts receivable summary
 - f. Summary report of all claims, reserves and losses
 2. As of the end of each calendar quarter or calendar year as appropriate, Manager shall prepare and file, in accordance with Statutory Standards and GAAP, quarterly and annual financial statements with the Nevada Department of Insurance and any other State requiring same, including all regulatory forms necessary to keep L&C's Certificate of Authority in good standing.
- I. Fiduciary Capacity – Premium Trust Funds and Assets of L&C: To hold all premiums and assets of L&C in a bank, which is a member of the Federal Reserve System and investment custodian accounts owned by L&C. The bank accounts shall be designated by Manager in such a manner as to clearly establish that Manager is a fiduciary for L&C with respect to all funds so held. L&C funds, under fiduciary control of Manager, may be used as necessary to pay return premiums, claims, and operating expenses of L&C. These funds shall not be used for the operating expenses of Manager.

- J. Copies of Policies: Manager shall maintain copies of all policies, endorsements, policy cancellations, and underwriting file documentation.
- K. Collection of Premiums: To invoice and collect premiums and initial capital assessments on all policies. Other than making a good faith effort to collect all premiums, Manager is not responsible for uncollectable premiums other than to cancel the related policies as applicable. All funds collected for the account of L&C shall be deposited directly into bank accounts owned by L&C. These account(s) shall be used for all payments as directed by L&C and by this Agreement.
- L. Reinsurance Transactions: To pay, collect, and otherwise account for any reinsurance transactions, as authorized by L&C.
- M. L&C Property: To safeguard, maintain and account for all policies, forms, manuals, accounting and claims records, equipment, supplies or anything else furnished Manager by L&C, all of which shall remain the property of L&C. Manager will return all property to L&C promptly upon demand.
- N. Manager Expenses: To pay, assume the obligation for and to be fully responsible for all costs and expenses associated with Manager's performance under this Agreement, including: travel expense, employee and clerical salaries, benefits and expense, risk management fees, postage, advertising, etc. L&C shall be responsible for its own expenses such as license fees, income taxes, premium taxes and assessments, auditor fees, legal fees, investment advisor fees, investment custodian fees, actuarial fees, directors' fees, and salary, benefits and overhead of any direct employees of L&C.
- O. Legal Compliance: The Manager shall be responsible for the appointment of qualified agents and brokers (producers) after verification of the license of such producers to lawfully transact the designated line(s) of insurance and shall assure that such producers comply with all laws, regulations, rules and requirements applicable to Manager's activities and, in addition, all written instructions provided from time to time by L&C concerning underwriting requirements and regulatory compliance in general; provided, however, that such written instructions shall not unreasonably alter or amend the terms of this Agreement.
- P. Governmental Contacts: To promptly respond to all contacts and correspondence received from insurance regulatory or other governmental authorities that pertain to business described in Exhibit A, to respond appropriately to all summonses, complaints, subpoenas or other court documents, and to advise L&C of any such items that are of a material nature.
- Q. Claims Handling: To respond to all claims, suits and losses reported to Manager and/or L&C, and to perform the investigation, settlement and payment of each and all claims, and to collect deductibles due and salvage or subrogation. Manager's specific claim handling duties are set forth in Exhibit B.
- R. Risk Management: To arrange for or perform risk management services for the benefit of the insureds of L&C. Such risk management shall have the primary goal of reducing the frequency of medical incidents that give rise to policy claims. Specific risk management duties are set forth in Exhibit C.

- S. Competent Staff: To maintain sufficient supplies and equipment, and a staff of competent and trained personnel, to produce, develop, underwrite and supervise the business covered by this Agreement.
- T. Accurate Records: To keep and maintain separate, identifiable, orderly, accurate, complete and timely records and accounts of all business and transactions pertaining to policies bound or written under the Agreement including complete underwriting and rate files, all claims-related records, all accounting and financial records, regulatory records, and all other records relating to the operations of L&C. Such records and files shall be the property of L&C; provided that Manager may retain copies of all such records and files. In addition, any Insurance Commissioner shall have access to all books, accounts, records and files of Manager for business bound or written under this Agreement and any such books, accounts, records, and files shall be kept in a form acceptable by such Insurance Commissioner. Records of L&C shall be retained according to Section NRS 694C.410 Nevada Statutes.
- U. Electronic Files: All records maintained in electronic format shall be treated the same as hard copy records for purposes of this agreement. Manager shall maintain appropriate data backup procedures and transmit all required data on a timely basis.
- V. Audit: To permit L&C during the term of this agreement to visit, inspect, examine, audit and verify, at Manager's offices, within normal business hours, with or without prior notice any of the properties, accounts, files, documents, books, reports, work papers and other records belonging to or in the possession or control of Manager or of any other person relating to the business covered by this agreement. L&C may make copies and extracts as may be reasonably necessary. L&C may conduct any audit through any person or persons it may designate.
- W. Services: To provide for all usual and customary services to Insureds, Policyholders and subproducers including delivery of policies, return of premiums due Insureds or policyholders and timely, appropriate responses to complaints.
- X. Policy Cancellation and Non-Renewal: To cancel, non-renew or otherwise terminate policies bound or written by or through Manager as required by applicable underwriting standards and consistent with applicable regulatory and policy conditions. L&C shall always retain the right to direct the termination or non-renewal of policies by Manager or to terminate or non-renew policies by direct notice to Insureds or policyholders in accordance with the provisions of applicable state insurance regulations. Manager shall not make, permit, or cause general or indiscriminate cancellations, termination or replacements of policies. Manager shall be responsible for notifying governmental agencies or other persons for whom Manager has certified coverage or provided evidence of insurance.
- Y. Limitations of Authority: Manager shall have no authority to do any of the following acts:
1. Bind reinsurance on behalf of L&C or commit L&C to participate in insurance or reinsurance syndicates. Manager shall have authority to negotiate reinsurance on behalf of, and recommend reinsurance to L&C.

2. Collect any payment from a reinsurer or commit L&C to any claims settlement with a reinsurer without prior approval of L&C. If prior approval is given, report must be forwarded promptly to L&C.
3. Jointly employ an individual who is employed by L&C.
4. Permit any producers appointed pursuant to Article III. O. to serve on the board of directors of Manager.
5. Appoint a submanaging general agent or manager.
6. Without prior approval of L&C, pay or commit L&C to pay a claim over a specified amount, net of reinsurance, which exceeds one (1) percent of L&C's policyholder's surplus as of December 31 of the last completed calendar year.
7. Exceed the maximum policy limits set forth in Exhibit A.
8. Charge a per-policy fee to insureds or policyholders of L&C.
9. Respond to third party or bad faith claims against L&C without the expressed consent of L&C.

ARTICLE IV. Manager's Compensation

L&C will pay the Manager as full compensation for all of its duties and responsibilities under this agreement as follows:

- A. Management Fee: For all services under this Agreement other than claims handling and Risk Management Manager shall receive fees as follows:
 1. During each year of L&C's operations, a sliding scale of commissions at the rate of 22% of the gross written premiums, net of cancellations and non-renewals, between 0-\$5,000,000; 20% of the gross written premiums, net of cancellations and non-renewals, greater than \$5,000,000.
 2. When gross written premiums, net of cancellations and non-renewals, exceed \$15 million the fee is reduced to 17.5%.
- B. Claims Handling Fees: For claims handling services under this Agreement, Manager shall receive a time-and-expense fee as follows:
 1. \$250 file setup fee for each claim or significant incident investigation.
 2. \$95 per hour for claim adjuster/nurse professional time, and actual travel expenses for investigations, mediations, trials, etc.
 3. Claims handling fees shall be billed monthly by Manager, by individual claim.
- C. Payment of Management Fees: Fees are to be paid to Manager monthly within 15 days after the end of each month, based on Manager's actual services provided during the month prior to the payment date.
- D. Profit Sharing Bonus: Manager shall receive a profit sharing bonus based on underwriting profitability of L&C. Such profitability shall be based on earned premiums and incurred losses on policies issued during each calendar year of operations of L&C. Determination of the bonus for each calendar year shall be as of December 31 of the fifth year following the end of each calendar

year, and shall be calculated and paid to Manager no later than March 1 of the year following such fifth year. (For example, for policies issued during 2004, the profit sharing bonus will be calculated as of December 31, 2009 and paid by March 1, 2010.) The amount of the bonus shall be as follows:

<u>Loss Ratio</u>	<u>Profit Sharing Bonus</u>
Greater than 60.1%	None
56.1% to 60.0%	1% of earned premium for calendar year
52.1% to 56.0%	2% of earned premium for calendar year
48.1% to 52.0%	3% of earned premium for calendar year
44.1% to 48.0%	4% of earned premium for calendar year
40.1% to 44.0%	5% of earned premium for calendar year
40.0% or less	6% of earned premium for calendar year

ARTICLE V. Representation with Respect to Policies

Manager will not make nor allow any other person to make any representation to applicants, insureds, policyholders or claimants as to the existence or extent of coverage either available from L&C or under a policy that is not consistent with the terms and conditions of coverages available from L&C or of a policy. Manager shall ensure that Manager or Manager's employees will make known to any applicant, insured or policyholder the full scope and effect of all exclusions and limitations upon or under coverage provided by the Policy.

ARTICLE VI. Insurance of Manager

Manager will maintain for as long as this Agreement remains in force with insurers and on forms acceptable to L&C:

- A. Professional Errors and Omissions policy in an amount not less than \$5,000,000.
- B. Blanket Employee Dishonesty bond covering all employees of Manager in an amount not less than \$1,000,000.

L&C may require certificates of insurance or other evidence that the insurance required by this article is in force. The limits of such coverage adequacy will be reviewed annually by L&C and shall periodically be increased by Manager as the L&C shall determine.

ARTICLE VII. Indemnification

Manager shall be responsible to L&C and shall indemnify, save, defend and hold L&C, including its affiliates, and all officers, directors and employees harmless against any and all claims, suits, hearings, actions, damages of any kind, liability, fines, penalties, loss or expense, including attorney's fees, caused by or arising from any allegation of any act or negligence, misconduct, error, omission or breach of this Agreement by Manager, or Manager's employees, or representatives, and unless the conduct giving rise to the allegation was performed at the specific direction of L&C, provided Manager has not contributed to or compounded the act alleged.

L&C shall be responsible to Manager and shall indemnify, save, defend and hold Manager, including its affiliates, and all officers, directors and employees harmless against any and all claims, suits, hearings, actions, damages of any kind, liability, fines, penalties, loss or expense, including attorney's fees caused by or arising from any act or allegation of any negligence, misconduct, error, omission or breach of this Agreement by L&C, or L&C's employees, or representatives, and unless the conduct giving rise to the allegation was performed at the specific direction of Manager, provided L&C has not contributed to or compounded the act alleged.

ARTICLE VIII. Ownership of Expirations

Records of insureds, policyholders and Policies and their use and control for solicitation of business written or bound by or through Manager, as between Manager and L&C, shall be the sole and exclusive property of L&C. Manager shall be allowed, at Manager's expense, to make and keep copies of all such records.

ARTICLE IX. Termination of Agreement

A. L&C may immediately terminate this Agreement as follows:

Immediately upon written notice to Manager in the event of the following:

1. License Suspension or Revocation: An order of suspension or revocation of Manager's license by any insurance regulatory authority; or
2. Misapplication of Funds: A misapplication, misdirection or misappropriation by Manager of funds or property of L&C or funds received from Policyholders by Manager; or
3. Default: A default under this Agreement by Manager or Manager's failure to timely and fully comply with L&C directives, rules, regulations or manuals; or
4. Conviction: Of a charge brought against Manager or any of Manager's executive officers of violation of the insurance laws or regulations of any jurisdiction or of any law constituting a felony in the jurisdiction in which committed, or of any law whose violation reflects adversely upon the honesty or integrity of Manager or any of Manager's executive officers whether or not classified as a felony; or

5. Bankruptcy: A court order of bankruptcy, receivership or common law composition of creditors, whether voluntary or involuntary.

B. Manager may terminate this Agreement as follows:

Immediately upon written notice to L&C in the event of the occurrence of items 1 or 3 in this Article X, B, and with respect to item 2 of this Article X.B, a finding by a court, government regulator or tribunal pursuant to Article XII hereunder against L&C:

1. Certificate of Authority Suspension or Revocation: An order of suspension or revocation of L&C's Certificate of Authority by an insurance regulatory authority; or
2. Default: A default under this Agreement by L&C.
3. Bankruptcy: A court order of bankruptcy, receivership or common law composition of creditors, whether voluntarily or involuntarily.

ARTICLE X. Cure Provision

In the event L&C shall be entitled to terminate this Agreement pursuant to Article IX, A, 3 above and if Manager shall submit a written plan of correction to L&C (which plan of correction must specifically outline the actions to be taken and the deadline for a final cure of the event which permits L&C's termination right) and if L&C accepts the written plan of correction, then L&C may thereafter terminate this Agreement if the plan of correction fails or is not completed by the deadline specified in the plan of correction.

ARTICLE XI. Continuing Duties of Manager after Termination

Following the effective date of termination of this Agreement, and following the transfer of all records and property of L&C by Manager to L&C, Manager shall have no continuing duties under this Agreement. However, Manager shall fulfill any obligations on Policies during the pendency of any dispute regarding the cause for termination.

ARTICLE XII. Arbitration

- A. Submission to Arbitration: Any dispute arising out of this Agreement shall be submitted to the decision of a board of arbitration composed of two arbitrators and an umpire meeting at the L&C offices in Nevada unless otherwise mutually agreed.
- B. Notice: The notice requesting arbitration shall state in particulars all principal issues to be resolved and shall set a date for the hearing, which date shall be no sooner than 90 days and no later than 120 days from the date that the notice requesting arbitration is mailed.
- C. Arbitration Board Membership: The members of the board of arbitration shall be active or retired and disinterested officials of insurance companies. Each party shall appoint its own arbitrator and the two arbitrators shall chose a third arbitrator as umpire before the date set for the hearing. If a party fails to appoint its arbitrator within 30 days after having received a written request

from the other, the other shall appoint the second arbitrator. If the two arbitrators fail to agree upon the appointment of the umpire within 30 days after their appointment, then the American Arbitration Association shall make the selection of the umpire. The umpire shall promptly notify all parties to the arbitration of his selection.

- D. Submission of Briefs: The parties shall submit their initial briefs within 20 days from appointment of the umpire. Each may submit reply briefs within 10 days after filing the initial briefs.
- E. Arbitration Board: The board shall make an award of monetary damages or other relief with regard to the custom and usage of the insurance business which shall be in writing. The award shall be based upon a hearing in which evidence may be introduced without following strict rules of evidence but in which cross examination and rebuttal shall be allowed. At its own election or at the request of the board, either party may submit a post-hearing brief for consideration of the board within 20 days of the close of the hearing. The board shall make its award within 30 days following the close of the hearing or the submission of post-hearing briefs, whichever is longer, unless the parties consent to an extension. A decision by the majority of the members of the board shall become the award of the board and shall be final and binding upon all parties to the proceeding, however, the board shall have no authority to issue an award for punitive damages. Either party may apply to the United States District Court or to a Nevada State Court of competent jurisdiction for an order confirming the award; a judgment of such Court shall thereupon be entered on the award. If such an order is issued, the attorney's fees of the party so applying and court costs will be paid by the party against whom confirmation is sought.
- F. Arbitration Expense: Each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the expense of the umpire. The remaining costs of the arbitration proceedings shall be allocated by the board.
- G. Survival: This Article shall survive the termination of this Agreement.

ARTICLE XIII. Other Terms and Conditions

- A. Waiver: The failure of L&C or Manager to insist on strict compliance with this Agreement, or to exercise any right or remedy shall not constitute a waiver of any rights provided under this Agreement, nor estop the parties from thereafter demanding full and complete compliance nor prevent the parties from exercising such a remedy in the future.
- B. Conflict with Law: If any provision of this Agreement should be declared invalid by a court of general jurisdiction and suspended by specific law or regulation, such law or regulation shall control to the extent of such conflict without affecting the remaining portions of this Agreement.
- C. Assignment: This Agreement may not be assigned in whole or in part by Manager.
- D. Headings: The headings preceding the text of the articles and paragraphs of the Agreement are intended solely for the convenience of reference and shall not affect the meaning, construction or effect of this Agreement.

- E. Governing Law: This Agreement shall be governed as to performance, administration and interpretation by the laws of the State of Nevada.
- F. Honorable Undertaking: This Agreement shall be considered as an honorable undertaking made in good faith and shall be subject to a liberal construction for the purpose of giving effect to the good faith and honorable intentions of Manager and L&C.
- G. Notices: Wherever notice is required under this Agreement, it shall be in writing, sent by certified mail or express delivery, and addressed:

If to L&C:

Vernon E. Leverty
Lewis & Clark LTC Risk Retention Group, Inc.
832 Willow St.
Reno, Nevada 89502

Jeff C. Marshall
President & CEO
Eagle Healthcare Inc.
7330 Northeast Bothell Way, Suite 201
Kenmore, Washington 98028

If to Manager:

Sanford D. Elsass
President
Uni-Ter Underwriting Management Corporation
1200 Ashwood Parkway, Suite 560
Atlanta, GA 30338

- H. Independent Contractor: This Agreement is not a contract for employment and nothing contained in this Agreement shall be construed to create the relationship of joint venture, partnership, or employer and employee between L&C and Manager. Manager is an independent contractor and shall be free, subject to the terms and conditions of this Agreement, to exercise judgment and discretion with regard to the conduct of business.
- I. Entire Agreement: This Agreement supercedes all previous agreements, whether written or oral, between L&C and Manager, or their predecessors with respect to the duties under this Agreement.
 - 1. This Agreement may be amended, altered or modified only in writing signed by both parties.
 - 2. Manuals, rules, regulations, instructions and directions issued in writing by L&C and received by the manager from time to time as provided in this Agreement, shall bind the parties as though a part of this Agreement.

The Manager and L&C have executed this Agreement in duplicate, each of which shall serve as an original:

FOR L&C:

BY:

TITLE:

J. W. Marshall
President

FOR MANAGER:

BY:

TITLE:

[Signature]
President