IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT CHUR; STEVE FOGG; MARK GARBER; CAROL HARTER; ROBERT HURLBUT; BARBARA LUMPKIN; JEFF MARSHALL; and ERIC STICKELS, Appellants, v. COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RICK RETENTION GROUP, INC., Respondents.	**Supreme Court Case No. 85728** District Court Case No. A711535 **APPELLANTS' DOCKETING STATEMENT**

1. Judicial District:

Judicial District: Eighth Judicial District Court
Department: 27
County: Clark
Judge: The Honorable Nancy L. Allf
District Court Case No.: A-14-711535-C

2. Attorneys filing this docketing statement:

Attorney:	Joseph P. Garin, Esq. Angela Nakamura Ochoa, Esq.
Telephone:	(702) 382-1500
Firm:	LIPSON NEILSON P.C.
Address:	9900 Covington Cross Dr., Suite 120 Las Vegas, NV 89144
Clients:	Robert Chur; Steve Fogg; Mark Garber; Carol Harter; Robert Hurlbut; Barbara Lumpkin; Jeff Marshall; and Eric Stickels (collectively, "Director Defendants").

3. Attorneys representing respondents:

Attorney: Brenoch R. Wirthlin, Esq.
Firm: Hutchison & Steffen, PLLC
Address: 10080 W. Alta Drive, Ste. 200
Las Vegas, NV 89145
Telephone: (702) 385-2500
Clients: Commissioner of Insurance for the State of Nevada as Receiver of Lewis & Clark LTC Risk Retention Group, Inc.

4. Nature of Disposition Below (check all that apply):

☐ Judgment after bench trial
☐ Judgment after jury verdict
☐ Summary judgment
☐ Default Judgment
☐ Grant/Denial of NRCP 60(b) relief
☐ Grant/Denial of injunction
☐ Grant/Denial of declaratory relief
☒ Other disposition (specify):

☐ Dismissal:
☐ Lack of jurisdiction
☐ Failure to state a claim
☐ Failure to prosecute
☐ Other (specify): _____
☐ Divorce Decree:
☐ Original ☐Modification

Order denying the Director Defendants' Motion for Attorneys Fees and Costs and the related order, denying Plaintiff's Motion to Retax and Settle Costs of Director Defendants based on the District Court's holding that statutory immunity prevented Director Defendants from an award of fees and costs.

5. Does this appeal raise issues concerning child support, venue, or termination of parental rights?

No.

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending

before this court which are related to this appeal:

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

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

Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc. v. Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels, Case No. 84253.

Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels v. Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc., Case No. 84311.

Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc. v. Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels, Case No. 85668.

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

Nevada Commissioner of Insurance v. Lewis & Clark LTC Risk Retention Group, Inc., Case No. A-12-672047-B. The case is docketed as statistically closed.

8. Nature of the action. Briefly describe the nature of the action and the result

below:

The Commissioner of Insurance as receiver of the defunct risk retention group called Lewis & Clark filed suit against Appellants who served on the board of directors and other defendants who managed Lewis & Clark.

On August 13, 2020, the District Court entered 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 Thereon.

The Director Defendants filed a Motion for Attorneys Fees and Costs based on an unbeaten offer of judgment. The District Court denied the motion, finding that the fees and costs were reasonable but denying the motion based on statutory immunity. The District Court also denied the Plaintiff's Motion to Retax Costs as moot.

The Plaintiff subsequently obtained a Judgment on Jury Verdict against the remaining defendants.

This is an appeal of the District Court's Order denying the Director Defendants' Motion for Attorneys Fees and Costs and the related order, denying Plaintiff's Motion to Retax and Settle Costs of Director Defendants based on the District Court's holding that statutory immunity prevented Director Defendants from an award of fees and costs.

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

Whether the District Court erred in denying Defendants' Motions for Attorneys' Fees and Costs, and the related order, denying Plaintiff's Motion to Retax Costs when it held that NRS 696B.565 precludes Defendants from recovering their reasonable fees and costs despite an unbeaten offer of judgment.

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

None.

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?

None. This appeal does not challenge the constitutionality of a statute.

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

☐ Reversal of well-settled Nevada precedent (identify the cases)
☐ An issue arising under the United States and/or Nevada Constitutions
☒ A substantial issue of first impression
☒ An issue of public policy
☐ An issue where en banc consideration is necessary to maintain uniformity of this

court's decisions
☐ A ballot question. If so explain:

This appeal concerns whether NRS 696B.565 prevents an award of fees and costs to a defendant who prevailed in a civil action commenced by the Commissioner of Insurance. Does a plaintiff in a civil lawsuit waive any claim for immunity when it commences the suit?

13. Assignment to the Court of Appeals or retention in the Supreme Court.

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

This case is presumptively retained by the Supreme Court under both NRAP 17(a)(9). This appeal originates in business court which is a presumptive category of retention by the Supreme Court.

14. Trial.

If this action proceeded to trial, how many days did the trial last?
☐Bench or ☒ Jury Trial?

After the District Court entered judgment in favor of the Director Defendants, the plaintiff proceeded against defendants Uni-Ter Underwriting Management, Uni-ter Claims

Services Corp., and U.S. Re Corporation in a jury trial that began September 20, 2021, and concluded on October 14, 2021.

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

Yes. In November 2022, this Court announced that Patricia Lee was selected to be a justice of the Supreme Court. Ms. Lee is a partner of Hutchison Steffen, PLLC, who represents the Commissioner of Insurance and appeared in the District Court on its behalf.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written Judgement or order appealed from is:

The Order Denying Director Defendants' Motions for Attorneys' Fees was filed on July 21, 2021.

The Order Denying Plaintiff's Motion to Retax and Settle Costs of Director Defendants was filed on July 16, 2021.

17. Date of written notice of entry of judgment or order was served:

The Notice of Entry of Order Denying Defendants' Motions for Attorneys' Fees was filed and electronically served on July 26, 2021.

The Notice of Entry of Order Denying Plaintiff's Motions to Retax and Settle Costs of Director Defendants was filed and electronically served on July 29, 2021.

18. If the time for filing the notice of appeal was tolled by a post-judgment motion

(NRCP 50(b), 52(b), or 59)

None of these apply.

19. Date of Notice of Appeal filed:

Director Defendants filed Notice of Appeal in District Court on November 21, 2022.

20. Statute or rule governing time limit to file notice of appeal:

NRAP 4(a)(2). Plaintiff filed a Notice of Appeal on November 9, 2022. Less than 14 days thereafter, the Director Defendants filed their Notice of Appeal on November 21, 2022.

21. Statute granting this Court jurisdiction to review judgment or order appealed from: Explain how each authority provides a basis for appeal from the judgment or order:

Under NRAP 4(a)(2), the Director Defendants filed a timely appeal. The Director Defendants contend that Plaintiff did not effectively file a Notice of Appeal on the final order that vests jurisdiction in this Court pursuant to NRAP 3(a). Its intent not to appeal the final judgment or amendment to final judgment is reflected in its Case Appeal and Docketing Statement filed in Case No. 85668.

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

a. Parties:

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

Defendants

Director Defendants/Appellants:
Robert Chur;

Steve Fogg;
Mark Garber;
Carol Harter;
Robert Hurlbut;
Barbara Lumpkin;
Jeff Marshall;
Eric Stickels;

Corporate Defendants:

Uni-Ter Underwriting Management Corp;
Uni-ter Claims Services Corp.;
U.S. RE Corporation.

b. If all parties in district court are not parties to the appeal, explain why:

Corporate Defendants are not parties to this appeal where Director Defendants seek an award of attorney fees and costs against the Plaintiff, Commissioner of Insurance. The Corporate Defendants did not file a brief or argue at the hearing concerning this matter.

23. Brief Description of each parties claims and counterclaims and cross-claims or third-party claims and disposition of each claim:

Commissioner of Insurance:
Against the Director Defendants: (1) Gross Negligence; and (2) Deepening of the Insolvency.
Against the Corporate Defendants: (1) Breach of Fiduciary Duty; and (2) Negligent Misrepresentation.

Director Defendants: A third-party complaint was initially filed against certain Corporate Defendants that was not served.

Corporate Defendants: No separate counterclaims, cross-claims or third-party claims were filed by the Corporate Defendants.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged and

rights and liabilities of ALL the parties to the action?

No. This is not an appeal regarding a judgment.

25. If No to question 24, which claims and parties remain:

a. **Claims**: none

b. **Parties:** none

c. **Did the court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?** no

d. **Did the district court make an express determination that there is no just reason for delay and an express direction for the entry of judgment?** no

26. If you answered no to 25, explain: The orders concerning the Director Defendants' request for attorneys fees and costs became final when a judgment was entered against the remaining defendants after a jury trial.

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

a. The latest filed complaint, counterclaims, cross-claims, and third-party claims;

b. Any tolling motions and orders resolving tolling motions;

c. Any order of NRCP 41(a) dismissals formally resolving each claim, counterclaim, cross-claim, or third-party claim asserted in the action or consolidated action below, even if not at issue on appeal;

d. Any other order challenged on appeal;

e. 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:

Robert Chur	Steve Fogg
Mark Garber	Carol Harter
Robert Hurlbut	Barbara Lumpkin
Jeff Marshall	Eric Stickels.

Counsel of Record of Appellants:

LIPSON NEILSON, P.C.
Joseph P. Garin, Esq.
Nevada Bar No. 6653
Angela Nakamura Ochoa, Esq.
Nevada Bar No. 10164
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144

Dated this 27th day of December, 2022.

Clark County, Nevada
State & County where signed

By: */s/ Angela Ochoa*
ANGELA NAKAMURA OCHOA, ESQ.
Counsel of record for Appellants

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of LIPSON NEILSON P.C. and on the 27th day of December, 2022, a true and correct copy of the foregoing **APPELLANT'S DOCKETING STATEMENT** IN CASE NO. 85728 was filed and served electronically with the Clerk of the Nevada Supreme Court in accordance with the master service list as follows:

Brenoch R. Wirthlin, Esq.
Hutchison & Steffen, PLLC
10080 W. Alta Drive, Ste. 200
Las Vegas, NV 89145

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

And by United States First Class Mail, in a properly addressed envelope with adequate postage affixed thereon, addressed as follows:

Lansford W. Levitt
32072 Sea Island Drive
Dana Point, CA 92629

Settlement Judge

/s/ Juan Cerezo
An employee of Lipson Neilson P.C.

INDEX OF EXHIBITS

Exhibits	Description
1.	Plaintiff's Third Amended Complaint-Filed 08/05/2016
2.	Notice of Entry of Order Denying Director Defendants' Motion for Attorney Fees and Costs-Filed 07/26/2021
3.	Notice of Entry of Order Denying Plaintiff's Motion to Retax and Settle Costs of Director Defendants-Filed 07/29/2021
4.	Notice of Entry of Order of Granting Motion to Alter Amend 10/19/2022

“EXHIBIT 1”

“EXHIBIT 1”

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CLERK OF THE COURT

ACOM
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DISTRICT COURT OF NEVADA

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Plaintiff, vs. ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION,; DOES 1-50, inclusive; and ROES 51-100, incluse v sive; Defendants.	Case No.: A-14-711535-C Dept No.: XXVII **THIRD AMENDED COMPLAINT** **[Request for Exemption to be Filed]** **[Damages in Excess of $50,000]**

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

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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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GENERAL ALLEGATIONS

A. Introduction

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

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

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

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

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

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

B. Acquisitions and Growth of L&C

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

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

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

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

C. Agreements with the Uni-Ter Entities and Brokers

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

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

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

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(1) Management Agreements

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

a. 2004 Management Agreement

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

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

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

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

47. Uni-Ter's duties also specifically included "[t]o 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." *Id.* Art. III(R).

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

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

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

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

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

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

See id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. 2011 Management Agreement

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

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

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

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

(i) The accounting reporting to L&C is to be done on a quarterly basis instead 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

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

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

(2) U.S. RE Agreement

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

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

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

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

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

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

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

coverage as specifically requested by any underwriter of [L&C]." Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) Reinsurance Contracts

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

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

(ii) January 1, 2005-December 31, 2006 Treaty.
- Applicable to $750,000 excess of $250,000 per claim
- Aggregate limit is lesser of $3,500,000 or 225% of ceded premium.
- Ceded premium is 25% of gross net written premium income (GNWPI)

(iii) January 1, 2007-December 31, 2007 Treaty (Commuted in early 2008)
- Applicable to $750,000 excess of $250,000 per claim
- Deductible is 22% of GNWPI.
- Aggregate limit is 300% of ceded premium.
- Ceded premium is 20% of GNWPI.

(iv) July 1, 2005-December 31, 2006 Treaty.
- Applicable to $1,000,000 excess of $1,000,000 per claim
- Aggregate limit is $3,000,000 or 300% of ceded premium.
- Ceded premium is 100% of gross premiums for policies with limits greater than $1,000,000 per claim.

(v) January 1, 2008-March 31, 2009 Treaty.
- Applicable to $650,000 excess of $350,000 per claim
- Deductible is greater of 13% of GNWPI or $1,274,000.
- Aggregate limit is 300% of ceded premium.
- Ceded premium is 17.08% of GNWPI for all policies subject to a minimum of $1,575,000.

(vi) April 1, 2009-March 31, 2010 Treaty.
- Applicable to $650,000 excess of $350,000 per claim
- Deductible is greater of 11% of GNWPI or $1,100,000.
- Aggregate limit is 300% of ceded premium.
- Ceded premium is 17.93% of GNWPI for all policies subject to a minimum of $1,613,700.

(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:

> The [DOI]'s review of the June 30, 2010 financial statement of [L&C] revealed a deteriorating financial condition which the company's management must address. The following are items that must be considered:
>
> - Increase in reserves has increased liabilities $3.1 million above the 12/31/10 pro-forma accounts and has resulted in a liquidity ration … of 116.0%.
> - Due to underwriting and operating losses, $1.1 million and $792.7 thousand, respectively, policyholder surplus has declined by 11.6% from December 31, 2009.
> - Underwriting losses are the result of increasing loss and loss 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….

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

> Since prior year-end, **policyholder surplus has declined by 40.3%**. Company is experiencing adverse claims Development and is becoming extremely leveraged. **Total Liabilities have increased by 26.5%** ... Net Loss is $1.8 million, **a result of $3.1 million net underwriting loss for six months and $1.7 million underwriting loss for just the second quarter**. Unassigned Funds have deteriorated further to a negative ($1.4 million). Since prior year-to-date, net premiums earned have improved nominally by 5.8% while net losses incurred has increased by 117.6% **causing a net loss ratio of 114.4% and resulting in a 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

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

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

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

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

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

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

D. <u>L&C Board Meeting Minutes</u>

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

119. On information and belief, because Uni-Ter UMC was managing all of the business aspects of L&C's business, Mr. Sanford Elsass ("Elsass"), President of Uni-Ter UMC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Information Available to the Officers and Directors

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

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

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

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

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

this is a growth of 633% in three years.

169. On information and belief, the information provided to the directors of L&C for the April 2008 and May 2010 Board meetings included the following financial information for 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%

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The ultimate loss and ALAE estimates have increased significantly since the prior report as of December 31, 2010. ***Through report/accident/tail effective year 2010, the selected ultimate loss and ALAE estimates have increased by $9.2 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)

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

202. In the D&O policy application submitted by Uni-Ter on behalf of L&C on or about May 23, 2012, attached as **Exhibit 45**, Uni-Ter stated in the supplement that "[t]o improve the financial stability of [L&C], UUMC has reviewed the entire book of business and intends to only renew accounts that have maintained a favorable historical loss ratio. This may result in a 35-40% reduction in its premium volume." The underwriting philosophy change completed in late 2011, while stating limitations for loss ratios in soft and hard market facilities, does not state that the policy would apply to renewals and also does not discuss the loss of such a large premium amount. This reduction would apply to the $6,825,864 total premiums of inforce 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

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

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

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

o Oneida Bank	$750,000
o Eagle Healthcare	$220,000
o Pinnacle Healthcare	$220,000
o Marquis Companies	$220,000
o Elderwood Senior Care	$220,000
o Rohm Services	$220,000
o Uni-ter	$300,000

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

o Eagle Healthcare	$70,000
o Pinnacle Healthcare	$70,000
o Marquis Companies	$70,000
o Elderwood Senior Care	$70,000
o Rohm Services	$70,000
o Uni-ter	$200,000

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

Directors of L&C.

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

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

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

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

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

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

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

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

224. These reports included the following summarized facts:

- In September 2005, Etsass reported on appropriate loss reserves.
- L&C had substantial growth of premiums and reserves between 2004 and 2009. By 2009, written premium was $10.7 million and reserves were $6.2 million. Uni-Ter's management fees also increased rapidly to $1.4 million in 2008 and $1.7 million in 2009.
- Losses and LAE grew to $9.1 million in 2010 and $14 million in 2011.
- Loss ratios were generally in the 30% range and below until 2009 when the addition of the Sophia Palmer work caused a loss ratio over 50% (because of Sophia Palmer claims having a loss ratio over 80%).
- A new underwriting philosophy was discussed at the September 2011 meeting. Although it does not appear that the Board questioned how this would affect premiums earned, Uni-Ter expected this new philosophy would only renew accounts that had a favorable historical loss ratio and that that could result in a 35-40% reduction in premium volume.
- In the 3rd quarter 2011, adverse development on claims incurred in 2009 showed up on L&C's financial results. Uni-Ter brought in Praxis to improve the reserve setting process. Uni-Ter brought in Praxis to analyze and recommend reserves. 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

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

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

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

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

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

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

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

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

recover herein.

WHEREFORE, Plaintiff prays for relief as set forth herein.

SECOND CLAIM FOR RELIEF

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

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

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

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

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

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

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

WHEREFORE, Plaintiff prays for relief as set forth herein.

THIRD CLAIM FOR RELIEF

(Negligent Misrepresentation by Uni-Ter UMC)

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

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

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

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

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

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

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

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

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

WHEREFORE, Plaintiff prays for relief as set forth herein.

FOURTH CLAIM FOR RELIEF

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

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

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

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

252. Approval of commutation of the 2007 treaty was done at the January 10, 2008 board meeting.

253. Commutation benefitted U.S. RE, the parent of Uni-Ter, because the syndicate insurers get to keep 75% of the premiums paid without any requirement to pay any claims. U.S. RE also appears to have done an unapproved commutation for the 2008-2009 treaty at the direction of Uni-Ter.

254. October 2010 emails between U.S. RE and Uni-Ter discuss booking the commutation amount, but the February 2, 2012 Minutes state that the Board deferred approval of commutation of certain treaties including the 2008 and 2009 treaties. *See* **Exhibit 26.**

255. As a proximate result, Plaintiff has been damaged in an amount in excess of $10,000, the exact amount to be proven at trial herein.

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

WHEREFORE, Plaintiff prays for relief as set forth herein.

FIFTH CLAIM FOR RELIEF

(Breach of Fiduciary Duty Against U.S. RE)

257. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 256, as though fully set forth herein.

258. L&C engaged U.S. RE as its agent and exclusive broker to find and secure appropriate reinsurance. The U.S. RE Agreement appointed U.S. RE as L&C's exclusive reinsurance intermediary/broker and granted U.S. RE full and complete authority to negotiate the placement of reinsurance on all classes of insurance with unspecified limits of coverage as requested by the underwriter of L&C (i.e., Uni-Ter).

259. U.S. RE was itself engaged as L&C's "exclusive reinsurance intermediary/broker" and as L&C's agent, including being granted "full and complete authority to negotiate the placement of reinsurance or retrocessions on all classes of insurance with unspecified limits of coverage as specifically requested by any underwriter of [L&C]." *See* **Exhibit 4**, the U.S. RE Agreement.

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

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

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

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

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

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

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

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

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

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

WHEREFORE, Plaintiff prays for relief and judgment as follows:

A. For actual damages sustained by Plaintiff in an amount in excess of $10,000 in an amount to be more specifically established at trial in accordance with proof;

B. For reasonable attorney's fees pursuant to statute or as special damages, or as provided in the agreement between the parties;

C. For pre-judgment and post-judgment interest; and

D. For such other and further relief at law or in equity as the Court may deem just and proper.

DATED this 5th day of August, 2016.

FENNEMORE CRAIG, P.C.

By: */s/ Brenoch Wirthlin*

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Attorneys for Plaintiff Commissioner of Insurance For the State of Nevada

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Fennemore Craig, P.C., and that on the 5th day of August, 2016, service of **THIRD AMENDED COMPLAINT** was made on the following counsel of record and/or parties by electronic transmission to all parties appearing on the electronic service list in Odyssey E-File & Serve (Wiznet) as follows:

Select All Select None

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

“EXHIBIT 2”

“EXHIBIT 2”

NEO

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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 Denying Director Defendants' Motion for Attorney Fees and Costs was entered on the 21st day of July, 2021,

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a copy of which is attached hereto.

DATED this 26th day of July, 2021.

HUTCHISON & STEFFEN

By */s/Brenoch Wirthlin*

MARK A. HUTCHISON, ESQ. (4639)
BRENOCH R. WIRTHLIN, ESQ. (10282)
CHRISTIAN ORME, ESQ. (10175)
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 26th 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

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7/21/2021 1:24 PM

Electronically Filed
07/21/2021 1:24 PM
CLERK OF THE COURT

ORDER

MARK A. HUTCHISON, ESQ. (4639)
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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 DIRECTOR DEFENDANTS' MOTION FOR ATTORNEY FEES AND COSTS**

This matter came before the Court for hearing on July 1, 2021 ("Hearing"), on Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels' (collectively the "Director Defendants") Motion for Attorneys' Fees and Costs Pursuant to NRCP 68 and NRS Chapter 18 ("Motion") which was filed on May 13, 2021; Plaintiff Commissioner of Insurance for the State of Nevada ("Commissioner" or "Plaintiff") as Receiver of Lewis and Clark LTC Risk Retention Group, Inc. filed her

Case Number: A-14-711535-C

opposition ("Opposition") to the Motion on June 10, 2021; the Director Defendants having filed their reply ("Reply") in support of the Motion on June 24, 2021; the Court having read and considered the Motion, Opposition, and Reply; Angela T. Nakamura Ochoa, Esq. having appeared at the Hearing on behalf of the Director Defendants; Brenoch R. Wirthlin, Esq. and Christian M. Orme, Esq. having appeared on behalf of Plaintiff; 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 ("Uni-Ter Defendants); the Court having heard and considered the arguments of counsel at the Hearing on the Motion; good cause appearing,

THE COURT HEREBY FINDS that NRS § 696B.565(1), "[t]he Commissioner, as receiver, all present and former deputy receivers, special deputy receivers and their employees, and the other officers, agents, employees and attorneys of the Division [of Insurance] are immune from liability, both personally and in their official capacities, for any claim for damage to or loss of property or personal injury or other civil liability caused by or resulting from any alleged act, error or omission of the officers, agents, employees and attorneys of the Division arising out of or by reason of their duties or employment."

THE COURT HEREBY FURTHER FINDS that pursuant to NRS § 696B.565(3), "[t]he Commissioner, all present and former deputy receivers, special deputy receivers and their employees, and the other officers, agents, employees and attorneys of the Division must be indemnified for all expenses, attorney's fees, judgments, settlements, decrees, or amounts due or paid in satisfaction of, or incurred in the defense of, such a legal action, unless it is determined upon a final adjudication on the merits of the case that the alleged acts, error or omission of the officer, agent, employee or attorney of the division did not arise out of or by reason of his or her duties or employment and was caused by actual malice."

THE COURT HEREBY FURTHER FINDS that if the Director Defendants' request was not otherwise barred by statutory immunity, the Offer of Judgment was both reasonable in amount and timing, as it was made after a mediation and almost four years after the filing of the

Complaint. Additionally, the fees and costs sought were reasonable in light of the qualities of counsel, the character of the work done, the work actually performed, and the rates charged and the results.

Based upon the foregoing, good cause appearing, and after review,

IT IS HEREBY ORDERED that the Director Defendants' Motion for Attorneys' Fees and Costs Pursuant to NRCP 68 and NRS Chapter 18 is hereby DENIED in its entirety.

DATED this 21 day of July, 2021.

Dated this 21st day of July, 2021

Nancy L Allf

AD9 260 B818 D6E9
Nancy Allf
District Court Judge

Respectfully submitted by:

TW

Dated this 15th day of July, 2021.

HUTCHISON & STEFFEN

/s/

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APPROVED AS TO FORM:

Dated this ___ day of July, 2021.

LIPSON NEILSON

_____

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DISTRICT COURT
CLARK COUNTY, NEVADA

Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s) vs. Robert Chur, Defendant(s)	CASE NO: A-14-711535-C DEPT. NO. Department 27

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District 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:

Service Date: 7/21/2021

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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 7/22/2021

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“EXHIBIT 3”

“EXHIBIT 3”

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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 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*

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

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An Employee of Hutchison & Steffen, PLLC

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CLERK OF THE COURT

Case No.: A-14-711535-C
Lewis & Clark v. Chur

ORDER

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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,

and Eric Stickels'[1] Verified Memorandum of Costs and Disbursements ("Motion to Retax") which was filed on August 21, 2020; the Director Defendants having filed their opposition ("Opposition") to the Motion on May 13, 2021; Plaintiff having filed her reply in support of the Motion on June 24, 2021; the Court having read and considered the Motion, Opposition, and Reply; good cause appearing,

THE COURT HEREBY FINDS after review that NRS 696B.565(3) provides: The Commissioner, all present and former deputy receivers, special deputy receivers and their employees, and the other officers, agents, employees and attorneys of the Division must be indemnified for all expenses, attorney s fees, judgments, settlements decrees, or amounts due or paid in satisfaction of, or incurred in the defense of, such a legal action, unless it is determined upon a final adjudication on the merits of the case that the alleged acts, error or omission of the officer, agent, employee or attorney of the division did not arise out of or by reason of his or her duties or employment and was caused by actual malice.

THE COURT HEREBY FINDS that the Director Defendants filed a motion for attorney fees and costs which was denied by the Court, rendering the Motion to Retax moot.

THEREFORE COURT ORDERS for good cause appearing and after review that the Motion to Retax is hereby DENIED and the matter scheduled on July 1, 2021 on Motions calendar is

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[1] Collectively the "Director Defendants."

hereby VACATED.

July 15, 2021

Dated this 16th day of July, 2021

Nancy L Allf

TW

1E9 3D1 86DD F3FB
Nancy Allf
District Court Judge

Respectfully submitted by:

Dated this 15th day of July, 2021.

HUTCHISON & STEFFEN

/s/Brenoch Wirthlin

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APPROVED AS TO FORM:

Dated this ___ day of July, 2021.

LIPSON NEILSON

Declined

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s) vs. Robert Chur, Defendant(s)	CASE NO: A-14-711535-C DEPT. NO. Department 27

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“EXHIBIT 4”

“EXHIBIT 4”

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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**

Please take notice that an Order Granting Plaintiff's Motion to Alter or Amend Judgment Pursuant to NRCP 59 was entered on the 18th day of October, 2022,

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a copy of which is attached hereto.

DATED this 19th day of October, 2022.

HUTCHISON & STEFFEN

By */s/Brenoch Wirthlin*

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 19th day of October, 2022, I caused the document entitled **NOTICE OF ENTRY OF ORDER** to be served on the following by Electronic Service to:

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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

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

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

IT IS HEREBY FURTHER ORDERED that the Court finds that joint tortfeasors are jointly and severally liable for breaches of fiduciary duty. *See e.g., F.D.I.C. v. Anders*, No. CIV. S-87-430EJG/PAN, 1991 WL 442874, at *6 (E.D. Cal. July 2, 1991); *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); *Doe v. Harbor Schools, Inc.,* 446 Mass. 245, 254, 843 N.E.2d 1058 (2006); *Donnelly v. Larkin,* 327 Mass. 287, 296, 98 N.E.2d 280 (1951) ("it is a familiar rule of law, that in cases in tort, where two or more are liable to an action, they are liable jointly and severally....").

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

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Management Corp., Uni-Ter Claims Services Corp. ("Uni-Ter Defendants" and collectively with US Re referred to as the "Corporate Defendants"). The Uni-Ter Defendants did not file an opposition to the Motion or appear at the 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:

Dated this 18th day of October, 2022.

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/s/Brenoch Wirthlin

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Dated this ____ day of October, 2022.

MCDONALD CARANO LLP

Did not sign

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DISTRICT COURT
CLARK COUNTY, NEVADA

Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s) vs. Robert Chur, Defendant(s)	CASE NO: A-14-711535-C DEPT. NO. Department 27

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