

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

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

Respondents.

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

Appellants,

vs.

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

Respondents.

Case No. 85668

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**RESPONDENT U.S. RE
CORPORATION'S REPLY TO
APPELLANT'S RESPONSE TO
ORDER AMENDING CAPTION
AND TO SHOW CAUSE**

Case No. 85728

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

Appellant,

vs.

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

Respondents.

Case No. 85907

On May 10, 2023, the Court issued the Order Amending Caption and to Show Cause (“OSC”) directing Appellant Commissioner of Insurance for the State of Nevada as Receiver of the Lewis and Clark LTC Risk Retention Group, Inc. to show cause why Appeal No. 85907 should not be dismissed for lack of jurisdiction. Specifically, the Court found “the notice of appeal appears to be premature under NRAP 4(a) because it appears that it was filed after the timely filing of a tolling motion and before the tolling motion was formally resolved.” OSC at p. 1.

On June 23, 2023, Appellant filed its response to the OSC, stating, “[o]n April 12, 2023, the district court resolved the Appellant’s [sic] Reconsideration Motion,¹

¹ Appellant’s reference to “Appellant’s Reconsideration Motion” is inaccurate. On

approximately one month prior to this court’s OSC being issued.” Response to Order Amending Caption and to Show Cause (“Response”) at p. 4. The Response concludes, “the Notice of Appeal is deemed not to be prematurely filed as of the date that the Order was entered” pursuant to NRAP 4(a)(6). *Id.* at pp. 4-5.

Appellant’s Response, however, fails to inform the Court of facts that demonstrate the substantive and procedural defects of this appeal. As an initial matter, Appellant fails to inform the Court that Appellant and the Corporate Defendants² entered into a settlement agreement that was executed by Appellant on July 13, 2022. *See* Settlement Agreement and Mutual Release (“Settlement Agreement”) included in the Appendix as **Exhibit A**. Secondly, Appellant fails to inform the Court that the order remedying the jurisdictional defect has been vacated. *See* June 29, 2023 Order Granting Defendant U.S. Re Corporation’s Motion to Vacate Order Denying Motions for Reconsideration and Denying Plaintiff’s Countermotion for Sanctions for U.S. Re’s Violation of NRS 48.105 (“Vacating Order”) included in the Appendix as **Exhibit B**. Finally, Appellant fails to inform

December 16, 2022, Respondent U.S. Re Corporation (“Respondent”) filed Defendant U.S. Re Corporation’s Motion for Reconsideration of Order Granting Motion for Attorney Fees and Costs (“Tolling Motion”). Presumably, the reference in the Response to “Appellant’s Reconsideration Motion” was intended to be a reference to the Tolling Motion.

² Throughout the district court proceedings and in filings before this Court, “Corporate Defendants” have included U.S. Re Corporation, Uni-Ter Underwriting Management Corp. and Uni-Ter Claims Services Corp. Respondent incorporates that defined term herein.

the Court that the district court entered a Satisfaction of Judgment in this matter. *See* June 30, 2023 Satisfaction of Judgment included in the Appendix as **Exhibit C**.³ As a result of the Settlement Agreement, the Vacating Order and the Satisfaction of Judgment, this appeal should be dismissed in its entirety. At a minimum, the jurisdictional defect has not been cured as the order denying the Tolling Motion has been vacated.

The Settlement Agreement

Under the Settlement Agreement, Appellant expressly released the Corporate Defendants and related individuals and entities (the “Defendant Released Parties”)

from any and all charges, complaints, claims, promises, agreements, controversies, liabilities, obligations, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses (including attorney’s fees and costs actually incurred), of any nature whatsoever, known or unknown, whether based on tort, subrogation, contract, quasi-contract, or any other theory of recovery or responsibility, that the Plaintiff now has or could have had against the Defendant Released Parties.

³ Granted, both the Vacating Order and the Satisfaction of Judgment were entered after the June 23, 2023 filing of Appellant’s Response, but both emanated from the June 8, 2023 hearing before the district court on Defendant U.S. Re Corporation’s Motion to Vacate Order Denying Motions for Reconsideration. At the conclusion of that hearing, the district court announced:

All right. So for good cause of caring [sic] the motion will be granted. I direct the Defendants to prepare a satisfaction of judgment, which indicates it is based on a settlement amount that is now in dispute.

See June 8, 2023 Recorder’s Transcript of Hearing: All Pending Motions included in the Appendix as **Exhibit D** at 9:18-22. As such, it is curious that Appellant failed to inform this Court that, while the Vacating Order and the Satisfaction of Judgment had not been entered, the district court had announced its ruling vacating the order denying the Tolling Motion and finding that the Judgment has been satisfied.

Settlement Agreement at p. 2.

While Appellant contends that the Settlement Agreement is null and void due to its receipt of a portion of the settlement funds five days after the 30-day window for payment closed, the district court concluded that Appellant's acceptance of the belated tender of the settlement funds waived Appellant's claim of breach of the Settlement Agreement. *See* Vacating Order at 2:4-7 (“[T]he Court finds that the Corporate Defendants fully satisfied the Settlement Agreement and that the belated tender of the Settlement Funds does not void the Settlement Agreement because Plaintiff indisputably accepted and deposited the Settlement Funds.”). Accordingly, this appeal should be dismissed as having been resolved through settlement.

The Vacating Order

On December 2, 2022, the district court entered an order granting Receiver's motion for attorney fees and costs (“Fees Order”). On December 14, 2022, Respondent filed Defendant U.S. Re Corporation's Motion for Reconsideration of Order Denying Motion to Dismiss and Enforce Settlement Agreement (“Reconsideration Motion to Dismiss/Enforce Settlement Agreement”). On December 16, 2022, Respondent filed the Tolling Motion. Copies of the Reconsideration Motion to Dismiss/Enforce Settlement Agreement and the Tolling Motion (collectively, “Respondent's Reconsideration Motions”) are included in the Appendix as **Exhibit E** and **Exhibit F**, respectively. On December 30, 2022,

Appellant prematurely filed its Notice of Appeal of the district court's Fees Order.

Appellant contends that the jurisdictional defect identified in the OSC was remedied when the district court entered an order denying Respondent's Reconsideration Motions on April 12, 2023. However, Appellant fails to provide the Court with Paul Harvey's *The Rest of the Story*. Respondent then filed a motion seeking to vacate that April 12, 2023 order. *See* Defendant U.S. Re Corporation's Motion to Vacate Order Denying Motions for Reconsideration ("Motion to Vacate"), included in the Appendix as **Exhibit G**.

As stated above, at the June 8, 2023 hearing on Respondent's Motion to Vacate, the district court granted Respondent's motion, thereby vacating the April 12, 2023 order upon which Appellant's Response is based. *See* Ex. D at 9:18-22. On June 29, 2023 the district court entered the Vacating Order, which formally vacated the April 12, 2023 order (upon which Appellant's Response relies in contending the jurisdictional defect has been remedied), ordered that a satisfaction of judgment be entered, and ordered the district court case be closed without prejudice and the Receiver's "appeal against the Corporate Defendants should be dismissed." *See* Vacating Order at 2:16-18.

The Satisfaction of Judgment

Lastly, on June 30, 2023, the district court entered a Satisfaction of Judgment in which the court acknowledged the full satisfaction of the Judgment under the

Settlement Agreement:

FOR AND IN CONSIDERATION of the \$5,200,000.00 payment received by Plaintiff Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc. (“Plaintiff” or “Commissioner”) pursuant to that certain Settlement Agreement and Mutual Release into which the Commissioner, U.S. Re Corporation, Uni-Ter Underwriting Management Corp., and Uni-Ter Claims Services Corp. (together with U.S. Re Corporation and Uni-Ter Underwriting Management Corp., the “Corporate Defendants”) (collectively, the “Parties”) entered on or about July 13, 2022, full satisfaction is hereby acknowledged of the Judgment on Jury Verdict in the amount of \$15,222,853.00 entered in said action in favor of Plaintiff and against the Corporate Defendants on December 30, 2021, as well as the Order Granting Attorney Fees And Costs entered on December 2, 2022 in the amount of \$1,449,685.69 in attorney’s fees, and \$365,177.92 in costs, and all interest having accrued thereon through the entry of this Satisfaction of Judgment.

Ex. C, Satisfaction of Judgment. The Satisfaction of Judgment expressly and dispositively brings to a conclusion Appellant’s pursuit of additional relief, including this appeal of the Fees Order.

Certainly, Appellant may challenge the Vacating Order. At this time, however, contrary to Appellant’s contention, this appeal (i.e., Appellant’s appeal of the Fees Order) should not only be dismissed pursuant to the Settlement Agreement or dismissed for lack of jurisdiction pursuant to the OSC, but the Satisfaction of Judgment has rendered this appeal moot.

DATED this 7th day of July, 2023.

McDONALD CARANO LLP

By: /s/ George F. Ogilvie III

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano, LLP, and that on this 7th day of July, a copy of the foregoing **RESPONDENT U.S. RE CORPORATION'S REPLY TO APPELLANT'S RESPONSE TO ORDER AMENDING CAPTION AND TO SHOW CAUSE** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system.

/s/ Jelena Jovanovic
An employee of McDonald Carano