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

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| COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.,<br><br>Appellant,<br><br>vs.<br><br>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,<br><br>Respondents. | Supreme Court No. 85668 |
| ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS,<br><br>Appellants,<br><br>vs.<br><br>COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.,<br><br>Respondents. | Supreme Court No. 85728 |



**APPELLANT'S RESPONSE TO RESPONDENT'S REPLY REGARDING ORDER AMENDING CAPTION AND TO SHOW CAUSE**

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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.,<br><br>Appellant,<br><br>vs.<br><br>ROBERT CHUR; STEVE FOGG; MARK GARBER; CAROL HARTER; ROBERT HURLBUT; BARBARA LUMPKIN; JEFF MARSHALL; AND ERIC STICKELS; UNI-TER UNDERWRITING MANAGEMENT CORP.; UNI-TER CLAIMS SERVICES CORP.; AND U.S. RE CORPORATION,<br><br>Respondents. | Supreme Court No. 85907 |

Appellant COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., ("Commissioner"), by and through counsel, Hutchison & Steffen, PLLC, hereby files this response ("Response") to Respondent U.S. Re Corporation's Reply to Appellant's Response to Order Amending Caption and to Show Cause ("Reply"). This Response was authorized by Order of this Court filed on October 12, 2023 and is based on the following memorandum of points and authorities as well as all exhibits hereto, and all papers and pleadings on file herein.

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

The consolidation of the various appeals, the addition of a new appeal (Case No. 87367), the entry of orders by the district court after it lost jurisdiction, and the district court's ruling over matters on which it has no jurisdiction, has resulted in a fair amount of confusion. The reply is necessary to narrow and frame the issues while responding substantively to this Court's Orders to Show Cause.

Case No. 85907 is simple. The appeal was perfected when the district court entered an order denying the motion for reconsideration on April 12, 2023. The perfected appeal deprived the district court of jurisdiction to enter an order effecting that April 12, 2023 order. Thus, the June 29, 2023 order referenced by Respondents is void as it was not entered pursuant to the procedures set forth in NRAP 12A.

In Case No. 85668, despite Commissioner prevailing on all pending claims against the Corporate Defendants, it was denied the opportunity to prevail on three additional claims at trial against the Corporate Defendants when Commissioner's Motion to File Fourth Amended Complaint was denied by the district court on August 10, 2020.

Finally, in both cases Respondents raise issues related to a purported settlement agreement which was not included in this Court's Orders to Show Cause. In addition to being irrelevant, the post-judgment actions of the district court regarding the purported agreement are void and/or constitute an abuse of discretion.

Thus, the issue has no bearing on the Orders to Show Cause.

## II. FACTUAL AND LEGAL ANALYSIS

### A. Nevada Supreme Court Case No. 85907

In Nevada Supreme Court Case No. 85907 this Court issued the Order Amending Caption and to Show Cause on May 10, 2023 which directed Commissioner to "show cause why this appeal appeal should not be dismissed for lack of jurisdiction" as a motion to reconsider the order granting the motion for attorney fees and costs was timely filed with the district court on December 16, 2022.

On December 2, 2022, the district court entered its Order Granting Attorney Fees and Costs. On December 16, 2022, US RE filed its Motion for Reconsideration. On December 30, 2022, the Commissioner filed its Notice of Appeal.

On April 12, 2023, the district court filed its Order on Motions for Reconsideration. Exhibit 1. As part of its order the district court ruled:

> the Court hereby finds the Notice of Appeal divests the Court of jurisdiction to consider the Motions and the Federal Complaint addresses many issues similar to the advisory relief requested in the Motions, and therefore the Court lacks jurisdiction to decide the Motions and the Motions are hereby vacated.

pp. 2-3 of Order. Notice of entry of the order was also provided on April 12, 2023. Exhibit 1. The April 12, 2023 Order either 1) resolved the tolling motion before dismissal of the appeal, in which case the Notice of Appeal should be considered timely filed on April 12, 2023, or 2) "vacated" the motion for reconsideration *ab initio* in which case the December 30, 2022 Notice of Appeal was timely filed on

that date. Regardless, the district court was divested of jurisdiction to alter, vacate, or change the decision whenever the Notice of Appeal was deemed timely filed. *Foster v. Dingwall*, 126 Nev. 49, 52–53, 228 P.3d 453, 455 (2010).

On May 19, 2023, U.S. Re filed a Motion to Vacate Order Denying Motions for Reconsideration. Briefs were exchanged and a hearing held. On June 29, 2023 the district court entered an order providing:

> IT IS HEREBY ORDERED that U.S. Re Corporation's Motion to Vacate Order Denying Motions for Reconsideration is GRANTED.
>
> IT IS HEREBY FURTHER ORDERED that the Order on Motions for Reconsideration entered by this Court on April 12, 2023 is VACATED.

Exhibit 2, p. 2. The district court had no authority to enter such an order, however.

In considering motions to alter, vacate, or otherwise change or modify an order or judgment challenged on appeal, the district court has jurisdiction to direct briefing on the motion, hold a hearing regarding the motion, and enter an order denying the motion, **but lacks jurisdiction to enter an order granting such a motion.** *Foster*, 126 Nev. at 52–53, 228 P.3d at 455. Thus, the district court's June 29, 2023 Order Vacating the April 12, 2023 Order is void and ineffective. *See Stapp v. Hilton Hotels Corp*., 108 Nev. 209, 212, 826 P.2d 954, 956 (1992) (concluding that orders entered without jurisdiction are void). As such, it has no impact on the Commissioner's timely filed Notice of Appeal.

US RE claims "the order remedying the jurisdictional defect has been

vacated," Reply, p. 3, and faults the Commissioner for failing "to inform the Court of facts that demonstrate the substantive and procedural defects of this appeal." *Id.* Yet the order US RE references is void and ineffective, and it is US RE's duty under NRAP 12A to inform this Court of the district court's actions – and properly move for a partial remand. NRAP 12A.[1]

In conclusion, if the motion for reconsideration was vacated *ab initio*, the December 30, 2022 Notice of Appeal was timely filed, or the Notice of Appeal was considered timely filed on April 12, 2023 when the tolling motion was resolved. The June 29, 2023 Order has no bearing on jurisdiction because it is void. As such, this Court has jurisdiction over Commissioner's Appeal in Case No. 85907.

**B. Nevada Supreme Court Case No. 85668**

In Nevada Supreme Court Case No. 85668 this Court issued the Order to Show Cause why the appeal of interlocutory orders regarding Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. Re Corporation ("Corporate Defendants") should not be dismissed as the Commissioner was not aggrieved.

**1. Additional factual background**

The Commissioner sought leave to file a Fourth Amended Complaint filed, in

[1] Commissioner would likely respond to any such request as the district court lacked authority to rule on US Re's motion to dismiss which formed the basis of the district court's June 29, 2023 order.

part, based on this Court decision in *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2016) which altered the business judgment rule. Proposed Complaint attached as Exhibit 3. The Commissioner's motion was filed on July 2, 2020 and was separately opposed by both the Corporate Defendants and the Director Defendants on July 17, 2020. The order denying the motion was entered on August 10, 2020. Exhibit 4. The Findings of Fact and Conclusions of Law prepared by Corporate Defendants and adopted by the district court includes:

> the [Commissioner's] proposed Fourth Amended Complaint seeks: . . . two new causes of action against Uni-Ter UMC for deepening of the insolvency and aiding and abetting breach of fiduciary duty (Ninth and Fourteenth Claims); two new causes of action against Uni-Ter CS for deepening of the insolvency and aiding and abetting breach of fiduciary duty (Ninth and Fifteenth Claims); and two new causes of action against U.S. Re for deepening of the insolvency and aiding and abetting breach of fiduciary duty (Ninth and Sixteenth Claims).

August 10, 2020 Findings of Fact and Conclusions of Law, p. 6 (of the FFCL), ln. 22 – p. 7, ln. 3. Exhibit 5.

The August 13, 2020 order granting the Director Defendant's NRCP 12(c) motion to dismiss was granted shortly thereafter on August 13, 2020 and was directly linked to the denial of the motion to amend.[2]

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[2] The August 10, 2020 Findings of Fact and Conclusions of Law provide:

> On February 27, 2020, the Nevada Supreme Court issued its Opinion ("NSC Opinion") granting the Director Defendants' Petition for Writ of Mandamus, and instructed this Court to vacate its order denying the

**2. Law regarding an "aggrieved" party.**

In order to be aggrieved, either a personal right or right of property must be adversely and substantially affected by a district court's ruling. *Matter of T.L.*, 133 Nev. 790, 792, 406 P.3d 494, 496 (2017) *citing Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994). The grievance must be substantial in that the district court's decision imposes an injustice on the party, or denies the party an equitable or legal right. *Matter of T.L., supra*, 133 Nev. at 792, 406 P.3d 496 *citing Webb v. Clark Cty. Sch. Dist.*, 125 Nev. 611, 617, 218 P.3d 1239, 1244 (2009).

A person "is aggrieved when he or she asks for relief but that relief is denied in whole or in part [and] when someone asks for relief against him or her, which the person opposes, and the relief is granted in whole or part" *Finkelstein v. Lincoln Nat. Corp.*, 107 A.D.3d 759, 759, 967 N.Y.S.2d 733, 734 (NY. App. 2013). A basis for an appeal is that the order is binding and its injurious effect is immediate, pecuniary and substantial. *Marsh v. Mountain Zephyr, Inc.*, 50 Cal. Rptr. 2d 493, 497 (Cal.App. 1996).

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> Director Defendants' Motion for Judgment on the Pleadings, and to enter a new order granting the Director Defendants' Motion for Judgment on the Pleadings. The NSC Opinion left to this Court's discretion whether to grant the Receiver leave to file a fourth amended complaint.

Exhibit 5, p. 4 (of FFCL), lns. 21-26.

**3. Commissioner was aggrieved when its motion to amend to assert additional causes of action against the Corporate Defendants was denied.**

Causes of action are a species of property protected by the Fourteenth Amendment's Due Process Clause. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 956 (9th Cir. 2005). Thus, a cause of action is a property or legal right. Further, the leave to amend is to be freely given when justice so requires. NRCP 15. Given the reference to "justice" leave to amend is an equitable right which was denied by the district court.

Further, NAC 683A.550 provides:

> The acts of the managing general agent are deemed to be the acts of the insurer on whose behalf it is acting. A managing general agent may be examined as if it were the insurer.

Pursuant to this regulation, the Corporate Defendants would be deemed to be liable for the misdeeds of the Director Defendants. By dismissing the Director Defendants, the Corporate Defendants are arguably shielded from possible liability on the dismissed causes of action unless they remain defendants in the lawsuit.

Also, Corporate Defendants presumably would assert *res judicata* if Commissioner filed a new complaint which included the Ninth, Fourteenth, Fifteenth and Sixteenth Causes of Action contained in the Fourth Amended Complaint.

Additional causes of action against the Corporate Defendants were not brought to trial owing to the denial of Commissioner's motion to amend its

complaint. As such, the Commissioner is aggrieved by the denial as the Corporate Defendants are a proper party to the appeal. The proper mode of redress for a plaintiff aggrieved by the denial of leave to amend is to appeal that ruling upon the entry of a final judgment. *Gonsalves v. Bingel*, 5 A.3d 768, 783 (Md. App. 2010).

As such, the Corporate Defendants are properly respondents to the Commissioner's appeal in Case No. 85668.

**C. Additional discussion regarding the void and ineffective actions of the District Court.**

US RE relies on the void and ineffective June 29, 2023 Order of the District Court. Exhibit 2. Again, in its Reply US RE faults Commissioner for not informing this Court of a void order and for not performing a duty US RE was required to perform under NRAP 12A.

The district court also signed a Satisfaction of Judgment on June 30, 2023. Particularly since this action was done over the Commissioner's objection, the district court was without jurisdiction to issue the satisfaction of judgment, and this is also void and ineffective. See NRCP 60(b)(5); *Foster*, 126 Nev. at 52–53, 228 P.3d at 455. *See also Stapp*, 108 Nev. at 212, 826 P.2d at 956 (concluding that orders entered without jurisdiction are void).

Respondents raise an issue not required to be addressed in this Court's Orders to Show Cause: namely, a settlement agreement that the parties hotly contest. Indeed, federal litigation over the issue has commenced in the District of Nevada. *Commissioner v. Ironhorse Specialty Insurance Company, et al*., 23-cv-00537-JCM-

BNW. Exhibit 6. The basis for the district court's void June 29, 2023 Order and the void entry of the Satisfaction of Judgment is its summary adjudication of this purported settlement agreement.

To begin, one who suffers a breach of a settlement agreement may not ask the court before which the original action was pending for a remedy but must usually file a separate action for breach of contract. *Golden Phoenix Mins., Inc. v. Pinnacle Mins., Inc.*, No. 315CV00521RCJWGC, 2016 WL 304315, at *3 (D. Nev. Jan. 25, 2016).

To the extent a court may summarily rule on a settlement agreement[3] a court has no discretion to enforce a settlement where material facts are in dispute; an evidentiary hearing must be held to resolve such issues. *In re City Equities Anaheim, Ltd.*, 22 F.3d 954, 958 (9th Cir. 1994).

Summary enforcement is ill-suited to situations presenting complex factual issues related either to the formation or the consummation of the settlement contract, which only testimonial exploration in a more plenary proceeding is apt to satisfactorily resolve. *In re City Equities Anaheim, Ltd*., 22 F.3d 954, 957 (9th Cir. 1994) *citing Russell v. Puget Sound Tug & Barge Co*., 737 F.2d 1510, 1511 (9th Cir.1984). Accordingly, the 9th Cir. has found enforcement upon motion

[3] Typically, this is when the agreement expressly provides the court retains jurisdiction over the settlement agreement.

inappropriate where material facts concerning the existence or terms of a settlement were in dispute, *id. citing Callie v. Near*, 829 F.2d 888, 890 (9th Cir.1987)(as exists in this case), or where a settlement agreement was procured by fraud, *id. citing Russell*, 737 F.2d at 1511 (as has also been alleged in the federal litigation).[4]

The district court acted without jurisdiction to enter either the June 29, 2023 Order or the June 30, 2023 Satisfaction of Judgment, and it acted either without jurisdiction to entertain an breach of contract action not plead or properly initiated before it, or acted in abuse of discretion when summarily ruling on contested issues without an evidentiary hearing.

Regardless, this issue is not appropriate for Respondents to raise the issue in their Response to and Order to Show Cause on a completely different issue.

## III. CONCLUSION

Case No. 85907 was properly perfected when the district court resolved the motion for reconsideration on April 12, 2023.

Commissioner was aggrieved in Case No. 85668 by the denial of its motion to amend its complaint which precluded Commissioner from pursuing three additional claims against the Corporate Defendants. Further, by dismissing the Director Defendants the Commissioner was aggrieved because it may not be able to pursue the vicarious liability of the Corporate Defendants pursuant to NAC

[4] See Exhibit 6, pp. 3-5.

683A.550.

Finally, the discussion related to the summary adjudication of the disputed settlement agreement is both inappropriate in response to the Orders to Show Cause, and because the district court had no jurisdiction to do so, or abused its discretion in doing given material facts regarding the purported settlement agreement were in dispute and because a settlement agreement was allegedly procured by fraud.

As such, this Court has appropriate jurisdiction over the appeals initiated by the Commissioner.

Dated this 26th day of October, 2023.

HUTCHISON & STEFFEN, PLLC

/s/*Brenoch R. Wirthlin*

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*Attorneys for Appellant*

## CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 26th day of October, 2023, I caused the above and foregoing document entitled: **APPELLANT'S RESPONSE TO RESPONDENT'S REPLY REGARDING ORDER AMENDING CAPTION AND TO SHOW CAUSE** to be served via NOTICE OF ELECTRONIC FILING through the Electronic Case Filing System of the Nevada Supreme Court with the submission to the Clerk of the Court, who will serve the parties electronically and via United States First Class Mail, postage pre-paid to the following:

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Law Offices of Jon Wilson
4712 Admiralty Way, Unit 361
Marina Del Rey, CA 90292

Kimberley Freedman
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/s/ *Kaylee Conradi*
An employee of Hutchison & Steffen, PLLC

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EXHIBIT PAGE ONLY

# EXHIBIT 1

HUTCHISON & STEFFEN
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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.,<br><br>Plaintiff,<br><br>vs.<br><br>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;<br><br>Defendants. | Case No.: A-14-711535-C<br><br>Dept. No.: XXVII<br><br>**NOTICE OF ENTRY OF ORDER** |

Please take notice that an Order on Motions for Reconsideration was entered on the 12th day of April, 2023,

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a copy of which is attached hereto.

DATED this 12th day of April, 2023.

HUTCHISON & STEFFEN

By */s/Brenoch Wirthlin*

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that on this 12th day of April, 2023, 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

**ORD**

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.,<br><br>Plaintiff,<br><br>vs.<br><br>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;<br><br>Defendants. | Case No.: A-14-711535-C<br><br>Dept. No.: XXVII<br><br>**ORDER ON MOTIONS FOR RECONSIDERATION** |

This matter came before the Court for hearing ("Hearing") on U.S. Re Corporation's Motion for Reconsideration of Order Denying Motion to Dismiss and Enforce Settlement Agreement and Motion for Reconsideration of Order Granting Motion for Attorney Fees and Costs (collectively the "Motions") on February 16, 2023; Brenoch R. Wirthlin, Esq. appeared at the Hearing on behalf of Plaintiff Commissioner of Insurance for the State of Nevada ("Plaintiff"); George F. Ogilvie III, Esq.

and Karyna Armstrong, Esq., appeared at the Hearing on behalf of Defendant U.S. Re Corporation. The Plaintiff filed her oppositions to the Motions. The Plaintiff having filed her notice of appeal on November 9, 2022 ("Notice of Appeal") and having filed the federal complaint commencing case no. 2:23-cv-00537 ("Federal Complaint") on April 10, 2023; the Court having read and considered the Motions and Plaintiff's oppositions thereto, as well as having heard and considered the arguments of counsel at the Hearing on the Motions, and good cause appearing, the Court hereby finds the Notice of Appeal divests the Court of jurisdiction to consider the Motions[1] and the Federal Complaint[2] addresses many issues similar to the advisory relief[3] requested in the Motions, and therefore the Court

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[1] *See Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987).

[2] *See Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800 (1976) ("Generally, as between state and federal courts, the rule is that the pendency of an action in state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction")*Kohn L. Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1239 (9th Cir. 2015) (Federal courts are not enabled to dismiss, stay, or transfer a case based on an earlier-filed suit pending in state court.");

[3] *See Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 889, 141 P.3d 1224, 1232 (2006) ("Essentially, the district court's determination was an improper advisory opinion. Thus, it is void.").

lacks jurisdiction to decide the Motions and the Motions are hereby vacated.

**Dated this 12th day of April, 2023**

Nancy L Allf

MA

**0DE B08 9A5A 3043**
**Nancy Allf**
**District Court Judge**

Respectfully submitted
this 11th day of April, 2023 by:

*/s/ Brenoch Wirthlin*
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*Attorneys for Plaintiff*

**CSERV**

DISTRICT COURT
CLARK COUNTY, NEVADA

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|---|---|
| Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s)<br><br>vs.<br><br>Robert Chur, Defendant(s) | CASE NO: A-14-711535-C<br><br>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: 4/12/2023

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# EXHIBIT 2

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.,<br><br>Plaintiffs,<br>v.<br><br>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,<br><br>Defendants. | Case No. A-14-711535-C<br><br>Dept. No.: XXVII<br><br>**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**<br><br>Date of Hearing: June 8, 2023<br>Time of Hearing: 10:00 a.m. |

This matter came before the Court for hearing on June 8, 2023 on Defendant U.S. Re Corporation's Motion to Vacate Order Denying Motions for Reconsideration ("Motion") and Plaintiff's Countermotion for Sanctions for U.S. Re's Violation of NRS 48.105 ("Countermotion"). George F. Ogilvie III, Esq. and Karyna Armstrong, Esq. of McDonald Carano LLP and Jon M. Wilson, Esq. of Law Offices of Jon Wilson appeared on behalf of U.S. Re

Corporation. Brenoch R. Wirthlin, Esq. of Hutchison & Steffen, PLLC appeared on behalf of Plaintiff.

Having considered the record and the briefs filed in support of and in opposition to the Motion and Countermotion, and having entertained the oral arguments of counsel, the Court finds that the Corporate Defendants[1] 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. Good cause appearing,

**IT IS HEREBY ORDERED** that U.S. Re Corporation's Motion to Vacate Order Denying Motions for Reconsideration is **GRANTED.**

**IT IS HEREBY FURTHER ORDERED** that the Order on Motions for Reconsideration entered by this Court on April 12, 2023 is **VACATED**.

**IT IS HEREBY FURTHER ORDERED** that Plaintiff's Countermotion for Sanctions for U.S. Re's Violation of NRS 48.105 is **DENIED**.

**IT IS HEREBY FURTHER ORDERED** that a Satisfaction of Judgment evidencing the Corporate Defendants' satisfaction of the terms of the Settlement Agreement shall be entered.

**IT IS HEREBY FURTHER ORDERED** that this case shall be and is closed without prejudice and Plaintiff's appeal of this matter against the Corporate Defendants should be dismissed.

**Dated this 29th day of June, 2023**

Nancy L Allf

**597 132 B672 B349**
**Nancy Allf**
**District Court Judge**

[1] All capitalized terms not otherwise defined herein are defined in the Settlement Agreement and Mutual Release ("Settlement Agreement") attached as Exhibit A to the Motion.

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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)<br><br>vs.<br><br>Robert Chur, Defendant(s) | CASE NO: A-14-711535-C<br><br>DEPT. NO. Department 27 |

**AUTOMATED CERTIFICATE OF SERVICE**

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Granting Motion was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 6/29/2023

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EXHIBIT PAGE ONLY

# EXHIBIT 3

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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.,<br><br>Plaintiff,<br>vs.<br><br>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., U.S. RE CORPORATION, CATALDO PICCIONE, aka TAL PICCIONE; DOES 1-50, inclusive; and ROES 51-100, inclusc v sive;<br>Defendants. | Case No.: A-14-711535-C<br><br>Dept No.: XXVII<br><br>**FOURTH AMENDED COMPLAINT**<br><br>**[Request for Exemption to be Filed]**<br>**[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 Fourth Amended Complaint and hereby

complains and alleges as follows:

**PARTIES, JURISDICTION AND VENUE**

1. L&C was a Nevada domiciled risk retention group formed in 2003. Between 2004 and February 28, 2013, L&C provided general and professional liability coverage to long term care facilities and home health providers.

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. 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. Chur at all relevant times resided in Williamsville, New York.

5. Chur was also President of ElderWood Senior Care at relevant times.

6. 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. Fogg at all relevant times resided in Oregon.

8. Fogg was also Chief Financial Officer of Marquis Companies at relevant times.

9. 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. Garber at all relevant times resided in Oregon.

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

12. 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. Harter resides in Las Vegas, Nevada.

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

15. 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. Hurlbut at all relevant times resided in New York.

17. 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. Lumpkin at all relevant times resided in Florida.

19. Lumpkin was also the Associate Executive Director of the Florida Nurses Association at relevant times.

20. 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. Marshall at all relevant times resided in Washington.

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

23. 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. Stickels at all relevant times resided in New York.

25. Stickels was also Chief Financial Officer of Oneida Savings Bank ("Oneida") at relevant times.

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

28. Uni-Ter Claims Services Corp. ("Uni-Ter CS" and collectively with Uni-Ter UMC referred to herein as "Uni-Ter" or the "Uni-Ter Defendants") is a Georgia corporation and is a wholly owned subsidiary of Uni-Ter UMC.

29. Defendant Catalado Piccione aka Tal Piccione ("Piccione") was the Chairman, President, Chief Executive Officer, and a Director of U.S. RE at all relevant times including as of the time the Receivership Action was filed.

30. Piccione was Chairman and a Director of Uni-Ter at all relevant times including as of the time the Receivership Action was filed.

31. Piccione was the President, Chairman and a Director of U.S. RE Consulting Agency Services, Inc., ("U.S. RE Consulting") at all relevant times including as of the time the Receivership Action was filed.

32. U.S. RE Consulting was a "sister company" to L&C's managing general agent, Uni-Ter, and U.S. RE Consulting entered into a business relationship with Uni-Ter and L&C to work as a broker for L&C's medical liability insurance product for nurses.

33. U.S. RE Consulting was a Nevada corporation, a holder of a Nevada insurance brokerage license, and a wholly owned subsidiary of U.S. RE Companies, Inc. ("U.S. RE Companies") based in New York.

34. Piccione was a founder, Chairman, President, Chief Executive Officer, a Director, and the largest shareholder of U.S. RE Companies at all relevant times including as of the time the Receivership Action was filed.

35. Piccione was the largest shareholder of U.S. RE Companies, and as a result had the largest ownership interest in U.S. RE, Uni-Ter, and U.S. RE Consulting, due to the fact that U.S. RE, Uni-Ter, and U.S. RE Consulting were direct or indirect wholly owned subsidiaries of U.S. RE Companies.

36. In addition to Piccione's business dealings in Nevada through his U.S. RE Companies' wholly owned subsidiaries, Piccione also had direct communications with representatives at the Nevada DOI, including several telephone calls and correspondences with

Nevada DOI Deputy Director Michael Lynch, regarding L&C and its deteriorating financial condition prior to the filing of the Receivership Action.

37. Piccione at all relevant times resided in New York.

38. 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

39. 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.

40. 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.

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

42. 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.

43. The Defendants who were directors and officers of L&C (collectively referred to herein as the "Board", "Directors" or "Director Defendants," which terms include said defendants from the time they became members of L&C's Board of Directors) knew 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, 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, 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 breached its fiduciary duties in failing to verify or correct the misinformation provided by Uni-Ter, U.S. RE and others, and to take proper corrective action.

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

44. 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.

45. 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.

46. 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.

47. 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**

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

49. 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.

50. 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**

51. 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

52. 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**.

53. 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.

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

55. 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.

56. 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).

57. 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).

58. 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.

59. 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*.

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

61. 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*.

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

63. 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*.

64. 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, in or around 2009 L&C also accepted Sophia Palmer.

65. At the time L&C accepted Sophia Palmer, Lumpkin – a director of L&C – also chaired the board of Sophia Palmer.

66. 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.

67. The Board accepted Uni-Ter's direction to obtain the Multi-site Operators, including Sophia Palmer, without adequate information. In fact, the Board breached its fiduciary duties in determining to accept the Multi-site Operators, including Sophia Palmer.

68. Had the Board complied with its fiduciary duties 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.

69. 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, 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.

70. 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%.

71. 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*.

72. Uni-Ter received at least $1,500,000 in management fees in 2010.

b. 2011 Management Agreement

73. 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**.

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

75. 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.

76. 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.*

77. 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.*

78. 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.*

79. 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.*

80. Despite the changes to Uni-Ter's management responsibilities, and despite the dire financial circumstances of L&C during 2011, Uni-Ter received not less than $1,000,000.00 in management fees in 2011.

81. 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

82. In a Broker of Record Letter Agreement between L&C and U.S. RE ("U.S. RE Agreement"), 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**.

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

84. 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.

85. 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.

86. 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.

87. Both Uni-Ter Underwriting and Uni-Ter Claims are direct or indirect subsidiaries of U.S. RE.

88. 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.*

89. 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).

90. 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).

91. 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.*

92. 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)).

93. 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…").

94. 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).

95. 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.

96. 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.*

97. 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.*

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

99. 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.

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

101. 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.

102. 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.

103. 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

104. 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.

**D. <u>Financial Disaster in 2010 and 2011.</u>**

105. 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.**

106. 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.*

107. 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*.

108. Despite the DOI's recommendations regarding L&C's deteriorating financial condition and need for an effective corrective action plan, the Board intentionally and knowingly failed to fulfill their fiduciary duties to correct 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.

109. In the first three (3) quarters of 2011, L&C experienced a net loss of not less than $3,100,000.

110. A 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.

111. 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.

112. The consultant hired by Uni-Ter was Praxis Claims Consulting ("Praxis").

113. 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.

114. Despite this knowledge of the Board regarding the wholly inadequate and inaccurate information provided by Uni-Ter, the Board's breaches of their fiduciary duties is manifest in the fact that, the Board failed to verify whether Praxis was provided accurate information in preparing its reviewing the claims process.

115. 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**.

116. Because Uni-Ter failed to provide accurate and complete information to Praxis, the September 2011 Praxis Report was substantially inaccurate and incomplete.

117. 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 could have known before the 2011 Praxis Report was issued.

118. Further, 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**.

119. In the September 2011 Letter, the DOI identified several massive financial problems with L&C which the Board had, 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*.

120. 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).

121. 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*.

122. The Board failed to comply with its fiduciary duties in addressing the September 2011 Letter, and failed to correct the staggering financial problems L&C was facing.

123. Subsequently, in late November 2011, 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.

124. 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.

125. Uni-Ter and/or U.S. RE informed the Board on a conference call that, in fact, an increase of at least $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.

126. The Board, through its breaches of its fiduciary duties, 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, which proximately caused and contributed to the damages suffered by Plaintiff.

**E. L&C Board Meeting Minutes**

127. 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").

128. 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. Elsass and other Uni-Ter employees gave most of the reports about the company to the Board members.

129. Many of the approvals and actions of the Board were done at the recommendation of Mr. Elsass.

130. 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.

131. 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.

132. 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.

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

134. 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.

135. 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.

136. 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.

137. 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.

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

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

140. 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.

141. L&C subsequently obtained E&O insurance.

142. 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.

143. 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.

144. 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.

145. 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.

146. 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.

147. 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.

148. 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.

149. 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."

150. 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.

151. 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.

152. 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.

153. 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.

154. 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). 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.

155. 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.

156. 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.

157. 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.

158. 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.

159. 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.

160. 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.

161. 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.

162. 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*. the Board intentionally and knowingly failed to fulfill their fiduciary duties 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.

163. 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. Elsass reported to the

Board "regarding recent favorable claims activity." The Minutes do not say what the alleged favorable claims activity was. 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.

164. Notwithstanding the dire financial issues, the Board continued to breach its fiduciary duties, including without limitation by not meeting 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.

165. 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.

166. 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.

167. 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.

168. 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.

169. 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.

170. 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.

171. 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.

172. The Board held a telephonic meeting on September 24, 2012, the Minutes for which are attached hereto as **Exhibit 33**. The Board's failure to inform itself of the basic financial condition of the Company, as required by its fiduciary duties, 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).

**F. Information Available to the Officers and Directors**

173. Substantial financial information regarding L&C was available to the Board of which the Board intentionally and knowingly failed to fulfill their fiduciary duties to properly inform themselves and understand.

174. 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.

175. Sophia Palmer 2007 board Minutes were very similar to L&C board Minutes. Uni-Ter was the underwriter for Sophia Palmer as well.

176. 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.

177. 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.

178. 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% |

179. 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.

180. 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.

181. 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.

182. 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.*

183. 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.

184. 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.

185. 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.

186. 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.

187. 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.

188. 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.

189. 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.

190. More than half of the policies written by Sophia Palmer were occurrence policies.

191. 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.

192. 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.

193. 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.

194. 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.

195. 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.

196. 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.

197. 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.*

198. 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*.

199. 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.

200. 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.

201. 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…". 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.

202. The 2011 Notes also provide that "[a]t December 31, 2011 and 2010, management determined that no premium deficiency reserve was required." 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.

203. 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." 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.

204. 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.

205. 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.

206. 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.

207. 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.

208. 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.

209. 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.

210. 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.

211. 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.

212. 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) |

213. 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.

214. 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. 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.

215. 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.

216. 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 |

217. 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 |

218. 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.

219. Stickels is the President of Oneida Bank.

220. 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.

221. 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.

222. 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.

223. 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. the London Broker determined that it would be comfortable in the low end of the ranges for many of the cases.

224. 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. 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.

## G. The Board's Breaches of Their Fiduciary Duties Involving Intentional Misconduct and Knowing Violations of the Law.

### 1. Legal and Contractual Obligations of the Board.

225. The former members of the Board, with the exception of Barbara Lumpkin who is deceased, all held positions on the Board by 2006: Jeff Marshall and Mark Garber held positions on the Board throughout the life of L&C from 2003 through 2012; both Robert Hurlbut and Eric Stickels took positions on the Board beginning in 2005 and remained on the Board through 2012. In 2006, Robert Chur, Steve Fogg, and Carol Harter joined the Board and served through 2012. Finally, Barbara Lumpkin joined the Board in May of 2009.

226. As used herein, the terms "Board", "Director Defendants", "Directors", refers to each member's tenure on the Board, and includes only the times said individuals served as a director.

227. Further, Marshall, Garber and Stickels were officers of L&C throughout their tenure on the Board.

228. The Board's responsibilities included, without limitation, reviewing and approving quarterly financial information of the Company, ultimate authority to direct the operations of L&C, approve defense counsel, binding of all reinsurance treaties including endorsements and commutations, and to comply with all relevant obligations under the Management Agreements and applicable law, including NRS 681A.120 with which the Board knowingly failed to comply.

229. As part of their responsibilities, the Board had access to all financial information of the Company at all relevant times.

230. In addition, upon their entry on the Board, the Board members were aware of all formation documents of L&C, and were familiar with the contents thereof.

231. The Articles of Incorporation of L&C ("Articles") provide that "the corporation shall not carry on any business or exercise any power in any state, territory, or country which under the laws thereof the corporation may not lawfully carry on or exercise."

232. In addition, the Bylaws of L&C ("Bylaws") make clear that "[t]he business and affairs of the corporation shall be managed by the Board of Directors of the corporation."

233. Under Nevada law, the power to carry out the purposes and objects of the corporate charter are vested fully in the board of directors. NRS 78.120(1), states that "[s]ubject only to such limitations as may be provided by this chapter, or the articles of incorporation of the corporation, the board of directors has full control over the affairs of the corporation."

234. Under Nevada law, this creates non-delegable fiduciary duties for the board of a company to, without limitation, act in good faith, on an informed basis, with a view to the interests of the company.

235. At all relevant times, all defendants, including the Director Defendants, knew of these requirements under the Articles, Bylaws, and Nevada law.

236. All defendants, including the Director Defendants, knew of these requirements under the Management Agreements at all relevant times.

237. The Articles of L&C provide that the nature of the business of L&C is to "engage in every aspect of casualty insurance business and risk management business as it relates to long term care facilities, to the extent permitted and in accordance with the Captive Laws of the State of Nevada and The Federal Risk Retention Act of 1986, as amended from time to time."

238. In addition to Nevada law and the formative documents of the Company, the Management Agreements set forth multiple requirements by which the Board, as well as Uni-Ter and U.S. RE, were required to abide.

239. Many of the requirements under the Management Agreements were violated by the Board and Uni-Ter, constituting a breach of fiduciary duty by both the Board and Uni-Ter involving intentional and knowing misconduct.

240. For example, the Management Agreements provided that Uni-Ter shall "perform the investigation, settlement and payment of each and all claims, and to collect deductibles due and salvage or subrogation." The amount of the deductible was set at $5,000.00.

241. The Board knew that Uni-Ter was not properly collecting deductibles on all claims that were reported and settled on behalf of L&C, and yet failed to require Uni-Ter to adhere to its legal obligations, which personally benefitted many Board members who knew that their respective facilities had claims for which no deductible were paid. As a result, the Board engaged in intentional and knowing misconduct by deliberately allowing Uni-Ter to not collect deductibles as required under the Management Agreements.

242. The 2004 Management Agreement provided that Uni-Ter "will identify defense counsel by state, and will review the qualifications with L&C and obtain the approval of L&C before engaging defense counsel and such review shall be on periodic basis."

243. The Board knew that Uni-Ter was not properly obtaining the approval of the Board before engaging defense counsel, including without limitation as set forth herein. Despite this, the Board did not require that Uni-Ter to obtain approval by the Board before retaining defense counsel. As a result, the Board engaged in intentional and knowing misconduct by deliberately failing to perform its crucial role concerning the important duty of approving defense counsel as provided in the 2004 Management Agreement.

244. The 2004 Management Agreement provided that Uni-Ter "shall prepare and forward to L&C on a monthly basis, within twenty (20) calendar days of the end of each calendar month, a complete set of financial statements prepared in accordance with Generally Accepted Accounting Principles (GAAP) basis to include: a. Operating Statement, b. Balance Sheet, c. Policies written for the month, d. Claims incurred for the month, e. Accounts receivable summary, f. Summary report of all claims, reserves and losses."

245. The Board knew that from 2004 through 2010, Uni-Ter failed to provide proper monthly reporting as required, and yet the Board did not require Uni-Ter comply with the reporting requirements of the 2004 Management Agreement. As a result, the Board engaged in intentional and knowing misconduct by failing to require Uni-Ter provide all monthly reports

from Uni-Ter so that the Board could perform its critical obligation of reviewing monthly financial statements to promote and protect the interests of L&C.

246. The Management Agreements provided that Uni-Ter shall "comply fully with, timely and promptly with all manuals, rules, guidelines, instructions and directions issued in writing by L&C relating to business covered by this Agreement as well as to comply with all state and federal rules, regulations, and statutes including those relating to privacy & confidentiality for all L&C business covered hereby."

247. The Board knew that Uni-Ter was not fully complying with state and federal rules, regulations, and statutes as more fully described herein, but failed to insist that Uni-Ter comply with its crucial legal duties. The deliberate failure of the Board to require that Uni-Ter comply with state and federal rules, regulations, and statutes that it knew were being violated by Uni-Ter constitutes intentional and knowing misconduct by the Board.

248. All defendants, including the Director Defendants, knew of these requirements under the Management Agreements at all relevant times.

249. In addition, the U.S. RE Agreement acknowledged that U.S. RE would "comply with applicable State Insurance Laws" and with "the provisions of the State Insurance Codes, Rules and Regulations governing reinsurance intermediaries/brokers."

250. The Board knew that U.S. RE was not fully complying with applicable state insurance law, as well as the provision of state insurance codes, rules and regulations governing reinsurance intermediaries/brokers, but failed to insist that Uni-Ter comply with its crucial legal duties. The deliberate failure of the Board to require that U.S. RE comply with state and federal rules, regulations, and statutes that it knew were being violated by U.S. RE constitutes intentional and knowing misconduct by the Board.

**2. <u>Red Flags proving the Board knew reliance on Uni-Ter or U.S. RE was unwarranted.</u>**

**a. Conflicts of interest**

251. From the inception of L&C, and through its existence, the Board knew of numerous facts and circumstances which caused reliance by the Board on Uni-Ter or U.S. RE to be unwarranted. Some of these facts and circumstances, without limitation, are set forth herein. Collectively, these facts and circumstances, as well as others brought forth in discovery or otherwise, shall be referred to herein as "Red Flags."

252. As an example, in an offering memorandum prepared in 2003 ("2003 Offering Memorandum") and which the Board members reviewed, stated specifically that there were "various conflicts of interest" arising out of the Company's relationship with Uni-Ter and U.S. RE which made reliance on Uni-Ter or U.S. RE unwarranted ("Conflicts of Interest"). This include without limitation, the following from a section of the 2003 Offering Memorandum entitled "Conflicts of Interest":

> **Uni-Ter and U.S. RE as Affiliates**
>
> Although the Company is relying on Uni-Ter for administrative and underwriting services, U.S. RE, the parent of Uni-Ter, will be engaged by the Company as reinsurance broker and consultant for a seven year period (with an additional seven year renewal option). U.S. RE also owns a minority beneficial interest in a wholesale age ncy that may produce insurance business for the Company on a nonexclusive basis. **Given the interlocking directorates, management, and ownership of each of these related entities, there will be on-going conflicts of interests between the management of these entities. For example, the interlocking management creates risk that Uni-Ter will not review the activities of its affiliates providing services to the Company as diligently as it might review the activities of an independent third party.**

253. The 2003 Offering Memorandum spelled out that the minimum statutory capitalization required in Nevada was $500,000, "and such further capitalization as may be required by the DOI."

254. The 2003 Offering Memorandum noted that with organizational expenses of $250,000, the minimum capitalization under Nevada law was $750,000.

255. In addition, the 2003 Offering Memorandum specifically stated that if L&C experienced substantial adverse claims and its surplus was depleted below the required minimum surplus amounts, L&C would lose its ability to continue writing insurance.

256. The 2003 Offering Memorandum also noted that [t]he Company's insurance business will be administered by Uni-Ter pursuant to the Management Agreement, subject to the control and supervision of the Board of the Directors." In addition, the memorandum noted that "[u]ltimate responsibility for management of the Company will be vested in the Board of Directors."

257. The 2003 Offering Memorandum acknowledged that "[s]pecific underwriting rules" were "subject to Nevada DOI approval." .

258. The 2003 Offering Memorandum also noted that L&C would be "subject to regulation by the Nevada DOI under Nevada's insurance statutes and regulations" and that "[s]uch statutes, among other things, … prescribe solvency standards that must be met and maintained and require the Company to maintain reserves for losses, loss adjustment expenses and unearned premium."

259. The 2003 Offering Memorandum also stated that the Company would "rely on the management of Uni-Ter for administrative and underwriting consulting services" but that "Uni-Ter was only recently formed and has limited operating history…"

260. A subsequent offering memorandum prepared in or around 2008 ("2008 Offering Memorandum") also contained the same information regarding conflicts of interest inherent in the structure of Uni-Ter and U.S. RE.

261. The Board reviewed the 2003 Offering Memorandum and 2008 Offering Memorandum and knew of the pertinent information contained therein at all relevant times herein.

**b. Lack of qualifications of Uni-Ter and U.S. RE**

262. The Board knew that the President and Chief Executive Officer of Uni-Ter, Sanford Elsass ("Elsass"), lacked education, training, and experience running an insurance company, particularly with regard to managing claims and setting reserves, and that his prior experience in the insurance industry was in the area of insurance sales, marketing, brokering, and investment banking.

263. The Board was also aware that the Chief Financial Officer of Uni-Ter, Donna Dalton ("Dalton"), lacked education, training, and experience running an insurance company, particularly with regard to managing claims and setting reserves, and that her prior experience in the insurance industry was as an accounting manager.

264. As a result, at all relevant times the Board had knowledge concerning the matters set forth herein, including without limitation that Elsass or Dalton could not competently manage an insurance company, particularly with regard to managing claims and setting reserves, which made any reliance by the Board upon Uni-Ter with regard to information, opinions, reports, books of account or statements, including financial statements and other financial data that was prepared by, or at the request of, Uni-Ter and provided to the Board, unwarranted.

265. In addition, the Board could not reasonably rely, and knew reliance was unwarranted, with respect to U.S. RE as it was not properly licensed, and the Board knew this at all relevant times.

266. The Board could not reasonably rely, and knew reliance was unwarranted, with respect to Uni-Ter as it had reason to suspect Uni-Ter of mismanagement and/or wrongdoing at all relevant times herein.

267. The Board could not reasonably rely, and knew reliance was unwarranted, with respect to Curtis Sitterson at any time herein, as he was not properly licensed to practice law in Nevada, and the Board knew this at all relevant times herein.

268. Further, the Director Defendants could not reasonably rely, and knew reliance was unwarranted, with respect to each of the other Director Defendants themselves, because they lacked the experience, knowledge, training and education to run an insurance company, obtain reinsurance, or otherwise operate L&C.

**c. Knowledge of inaccurate or incomplete financial information**

269. Further, at all relevant times, the Board had knowledge concerning the matters in question set forth herein, including without limitation that the information, opinions, reports, books of account or statements, including financial statements or other financial data, provided to the Board by other directors, officers or employees of the Company, or, without limitation,

counsel, public accountants, financial advisors, valuation advisors, investments bankers, actuaries, auditors, attorneys, or other persons, was based upon financial and/or other information provided to said persons by Uni-Ter or U.S. RE, and that therefore reliance on said information was unwarranted.

270. This includes, without limitation, Milliman, Johnson Lambert, Praxis, and Fishlinger.

271. Specifically, and without limitation, the reports and additional documentation provided to the Board by its accountants, auditors, and others noted that it was prepared in reliance on data and other information provided by Uni-Ter and/or U.S. RE, which information had not been verified, and that therefore if the underlying data or information provided by Uni-Ter was inaccurate or incomplete, the results prepared by the accountants, auditors, and others would likelwise be inaccurate or incomplete.

**d. Failure to comply with obligations under the Management Agreements**

272. Further, the Board was well aware that Uni-Ter was otherwise failing to fulfill its obligations to the Company. For example, and without limitation, at the March 9, 2005 L&C Board of Directors Meeting, the Board was presented with a marketing and advertising plan, which was approved by the Board subject to specific action items and timelines.

273. Uni-Ter failed to follow through on the plan, including neglecting to provide periodic marketing reports as promised, as well as not contacting state associations on which L&C had spent substantial sums for membership, among other things.

274. The Board knew of Uni-Ter's failures under the Management Agreements, and as a result, the Board's reliance upon Uni-Ter with regard to information, opinions, reports, books of account or statements, including financial statements and other financial data that was prepared by Uni-Ter, or prepared by others based upon information provided by Uni-Ter, was unwarranted.

**e. Henry Hudson Merger**

275. Further, the first merger involving L&C between Henry Hudson and L&C and took place on April 4, 2005 ("Henry Hudson Merger"). At the time, the Board was told by Uni-

Ter that the merger with Henry Hudson would financially benefit L&C, yet by the end of 2006, L&C had sustained a net loss of approximately $494,544 as a result of the merger.

276. The Board later learned that Henry Hudson's primary insured, HCFA, had been in financial and legal trouble at the time of the merger, and that it was sued by the State of New York right after the merger for Medicaid fraud in 2006, and ultimately went bankrupt.

277. As a result of this and other information the Board learned following the Henry Hudson merger, the Board knew that Uni-Ter offered advice with self-interested motives at the expense of L&C, and therefore the Board's reliance upon Uni-Ter with regard to information, opinions, reports, books of account or statements, including financial statements and other financial data that was prepared by Uni-Ter and provided to the Board, or prepared by others with information provided by Uni-Ter, was thereafter unwarranted.

**f. Uni-Ter fires L&C's auditors**

278. On May 29, 2007, Marcum & Kliegman sent a letter to the Board informing them of "material weaknesses in the Company's system of internal control over financial reporting." The May 29, 2007 letter was hidden from the Board by Uni-Ter; however, Uni-Ter knew it would not be able to hide this information from the Board should it appear in Marcum and Kleigman's year-end financial report.

279. On December 4, 2007, Uni-Ter replaced Marcum & Kliegman with Johnson & Lambert to prepare L&C's 2007 year-end financial statements. Uni-Ter did not consult with the Board prior to making the decision, and the Board only learned of the change months after it had happened. Despite this, Uni-Ter told the Nevada Department of Insurance in a December 17, 2007 letter that "the Board of Directors of Lewis & Clark LTC Risk Retention Group, Inc., (the Company) has dismissed the auditor, Marcum & Kliegman LLP, effective December 4, 2007."

280. The Board learned shortly thereafter that Uni-Ter had terminated L&C's auditor without approval from the Board.

281. The very fact that Uni-Ter dismissed L&C's auditor without Board approval was was clear evidence that reliance on Uni-Ter was unwarranted. As a result, the Board's reliance upon Uni-Ter with regard to information, opinions, reports, books of account or statements,

including financial statements and other financial data that was prepared by Uni-Ter, or prepared by others based upon information provided by Uni-Ter, was unwarranted.

**g. Merger with Sophia Palmer to the Detriment of L&C**

282. In 2009, Uni-Ter recommended to the Board that L&C would benefit from a merger with Sophia Palmer.

283. Uni-Ter had its own interests in mind when suggesting the merger. First, Sophia Palmer was impaired and insolvent at the time and could not pay off a note to another RRG that Uni-Ter managed. Second, Sophia Palmer's management agreement with Uni-Ter provided that Uni-Ter would not receive a profit sharing bonus until the $650,000 note was paid off.

284. The Board knew of this because, without limitation, Carol Harter served as a Director of both Sophia Palmer and L&C.

285. During the merger with Sophia Palmer or very shortly thereafter, the Board learned about the self-dealing of Uni-Ter in recommending the Board merge with Sophia Palmer.

286. As a result of Uni-Ter recommending that L&C merge with an impaired and/or insolvent insurance company, the Board knew that Uni-Ter offered self-interested advice at the expense of L&C, and therefore the Board's reliance upon Uni-Ter with regard to information, opinions, reports, books of account or statements, including financial statements and other financial data that was prepared by Uni-Ter, or prepared by others based upon information provided by Uni-Ter, was unwarranted.

**h. Uni-Ter and U.S. RE conspire to unlawfully bind reinsurance for L&C in violation of the Management Agreement and Nevada law, and the Board knowingly fails to act**

287. The 2004 Management Agreement provided that Uni-Ter had no authority to "[b]ind reinsurance on behalf of L&C or commit L&C to participate in insurance or reinsurance syndicates." Beginning in 2004 and continuing each year through 2012, the Board knew that Uni-Ter committed and/or bound L&C to participate in reinsurance syndicates in violation of the 2004 Management Agreement and Nevada law.

288. By allowing Uni-Ter to bind and commit L&C to reinsurance contracts from 2004 through 2012, the Board engaged in intentional and knowing misconduct by deliberately failing to perform its crucial role and its important duty of binding and committing L&C to reinsurance agreements as provided in the Management Agreements.

**i. Uni-Ter commits additional violations of the Management Agreements of which the Board knew, and the Board fails to act.**

289. The 2004 Management Agreement provided that Uni-Ter had no authority to "pay or commit to pay a claim over a specified amount, net of reinsurance, which exceeds one (1) percent of the L&C's policyholder's surplus as of December 31 of the last completed calendar year." In 2010, the Board knew that Uni-Ter committed and/or paid claims that exceeded 1% of surplus from the prior year. As a result, the Board engaged in intentional and knowing misconduct by deliberately failing to perform its crucial role concerning the important duty of directly managing the payment of large claims that exceeded 1% of L&C's surplus as required by the 2004 Management Agreement.

290. The 2004 Management Agreement and the 2011 Management Agreement provided that Uni-Ter shall "perform the investigation, settlement and payment of each and all claims, and to collect deductibles due and salvage or subrogation." The amount of the deductible was set at $5,000.00.

291. The Board knew that Uni-Ter was not properly collecting deductibles on all claims that were reported and settled on behalf of L&C, which personally benefitted many Board members who knew that their respective facilities had claims for which no deductible were paid. As a result, the Board engaged in intentional and knowing misconduct by intentionally allowing Uni-Ter to not collect deductibles as required under the Management Agreements.

292. The 2004 Management Agreements provided that Uni-Ter "will identify defense counsel by state, and will review the qualifications with L&C and obtain the approval of L&C before engaging defense counsel and such review shall be on periodic basis." The Board knew that Uni-Ter was not properly obtaining the approval of the Board before engaging defense

counsel, and despite this the Board did not require that Uni-Ter to obtain approval by the Board before retaining defense counsel. As a result, the Board engaged in intentional and knowing misconduct by deliberately failing to perform its crucial role concerning the important duty of approving defense counsel as provided in the 2004 Management Agreement.

**j. Uni-Ter fails to provide monthly financial documents as required, and the Board knowingly fails to act.**

293. The 2004 Management Agreement provided that Uni-Ter "shall prepare and forward to L&C on a monthly basis, within twenty (20) calendar days of the end of each calendar month, a complete set of financial statements prepared in accordance with Generally Accepted Accounting Principles (GAAP) basis to include: a. Operating Statement, b. Balance Sheet, c. Policies written for the month, d. Claims incurred for the month, e. Accounts receivable summary, f. Summary report of all claims, reserves and losses." The Board knew that from 2004 through 2010, Uni-Ter failed to provide proper monthly reporting as required, and yet the Board failed to act to ensure they received the required monthly financial statements. As a result, the Board engaged in intentional and knowing misconduct from 2004 through 2010 by deliberately failing to require Uni-Ter provide all monthly reports from Uni-Ter so that the Board could perform its important duty of reviewing monthly financial statements to promote and protect the interests of L&C in the 2004 Management Agreement.

**3. <u>Reinsurance.</u>**

**a. Defendants knowingly violate Nevada law regarding reinsurance**

294. Beginning in December 2003, the Board knew of Nevada insurance laws, including without limitation that a reinsurance broker must be licensed pursuant to Nevada law.

295. Each Board member was aware of these legal requirements upon joining the Board through review of the formation documents of the Company, and because the information was conveyed to Board members as they joined the Board.

296. The Board's knowledge of these legal requirements is evidenced by their demand in 2003 that U.S. RE must comply with state insurance codes, rules and regulations governing reinsurance intermediaries/brokers as set forth in the U.S. RE Agreement.

297. On or around December 22, 2003, the Company entered into the U.S. RE Agreement.

298. Pursuant to the terms of the U.S. RE Agreement, U.S. RE was to act as the Company's "exclusive reinsurance intermediary/broker". This agreement created a fiduciary relationship between U.S. RE and the Company.

299. The U.S. RE Agreement acknowledged that U.S. RE would "comply with applicable State Insurance Laws" and with "the provisions of the State Insurance Codes, Rules and Regulations governing reinsurance intermediaries/brokers ...," confirming the Board's knowledge of such laws, rules and regulations.

300. Nevada Revised Statute ("NRS") 681A.480 provides in relevant part that "[a]n insurer shall not engage the services of any person to act as a broker for reinsurance on its behalf unless the person is licensed pursuant to NRS 681A.430." Nev. Rev. Stat. Ann. § 681A.480 (West).

301. Further, NRS 681A.430 provides in relevant part that "[t]he Commissioner may issue a license to act as an intermediary to any person who has complied with the requirements of NRS 681A.250 to 681A.580, inclusive, and who submits a written application for a license to act as an intermediary, the appropriate fee set forth in NRS 680B.010 and, in addition to any other fee or charge, all applicable fees required pursuant to NRS 680C.110." *See* NRS 681A.430 (West).

302. As authorized by these sections, Nevada Administrative Code ("NAC") section 694C.300 provides as follows:

> A person shall not act as a manager, a broker or an agent in this State for a captive insurer without authorization of the Commissioner. An application for authorization to act as a manager, a broker or an agent must be made to the Commissioner on a form prescribed by the Commissioner.

*See* Nev. Admin. Code 694C.300.

303. At no time did U.S. RE obtain a license as required by NRS 681A.480 or NAC 694C.300 to act as a reinsurance broker for L&C in Nevada.

304. At all relevant times, the Director Defendants, and each of them, knew that at no time did U.S. RE obtain a license as required by NRS 681A.480 or NAC 694C.300 to act as a reinsurance broker for L&C in Nevada.

305. Despite having no license to act as a reinsurance broker in Nevada for L&C, U.S. RE brokered reinsurance for L&C in each year from 2004 to 2012 as follows (collectively the "Reinsurance Treaties"):

a. 2004 – Treaty No. 0399-01-2004 ("2004 Treaty").

b. 2005 - 2006 – Treaty No. 0399-01-2005 ("2005-2006 Treaty"). The 2005-2006 Treaty was signed by Sanford Elsass ("Elsass") on behalf of Uni-Ter as managing general agent of L&C.

c. 2007 – Treaty No. 0399-01-2007 ("2007 Treaty"). The 2007 Treaty was signed by Elsass on behalf of Uni-Ter as managing general agent of L&C.

d. 2008 – Treaty No. 0399-01-2008 ("2008 Treaty"). The 2008 Treaty was signed by Elsass on behalf of Uni-Ter as managing general agent of L&C.

e. 2009 – Treaty No. 0399-02-2009 ("2009 Treaty"). The 2009 Treaty was signed by Elsass on behalf of Uni-Ter as managing general agent of L&C.

f. 2010 – Treaty No. 0399-01-2010 ("2010 Treaty"). The 2010 Treaty was signed by Elsass on behalf of Uni-Ter as managing general agent of L&C.

g. 2011 – Treaty No. 0399-02-2011 ("2011 Treaty"). The 2011 Treaty was signed by Elsass on behalf of Uni-Ter as managing general agent of L&C.

h. 2012 – Treaty No. 0399-01-2012 ("2012 Treaty"). The 2012 Treaty was signed by Elsass on behalf of Uni-Ter as managing general agent of L&C.

306. The inappropriateness of the reinsurance program that was recommended to L&C by U.S. RE was first pointed out the DOI in its December 31, 2005 examination report of L&C,

in which the Board was notified that "[b]ased upon the low loss experience, it is not reasonable to assume that any loss will penetrate the loss retention amount and result in a recoverable balance; therefore, we recommend the removal of this recoverable." Despite this recommendation from the DOI, the Board continued to purchase reinsurance with such a high retention amount that between 2005 and 2011, no losses were paid by reinsurers for any of L&C's claims.

307. Further, the Director Defendants could not reasonably believe they were informed about reinsurance to the extent they reasonably believed appropriate, and could not reasonably believe the Reinsurance Treaties were in the best interests of L&C, as the Director Defendants lacked sufficient knowledge to know whether the Reinsurance Treaties were appropriate.

308. NAC 683A.530 provides in relevant part:

> A managing general agent shall not:
> …
> 7. Bind reinsurance or retrocessions on behalf of the insurer.

*See* Nev. Admin. Code 683A.530(7).

309. Despite the legal prohibition against a managing general agent binding reinsurance on behalf of an insurer, with the exception of the 2004 Treaty, each of the other Reinsurance Treaties was signed by Elsass on behalf of Uni-Ter as managing general agent of L&C.

310. In addition, Elsass was an employee and agent of U.S. RE Companies, Inc., the parent company of both U.S. RE and Uni-Ter, and was otherwise affiliated with U.S. RE.

**b. In 2009, the DOI discovers the Defendants' knowing violations of the law with respect to reinsurance, and emphasizes said violations to all Defendants.**

311. While the Board knew beginning in 2004 that U.S. RE was operating without the required license in brokering the Reinsurance Treaties, the Nevada DOI discovered the unlawful activity engaged in by the Defendants, including the Board, as a result of its investigation during the DOI's 2008 Triennial Examination ("2008 Exam") of L&C.

312. As part of the 2008 Exam, on November 19, 2009, DOI examiner Bob Burch ("Burch") requested a copy of U.S. RE's Nevada reinsurance broker license.

313. In fact, in an internal email that same day, Larry Shatoff of U.S. RE admitted that "U.S. RE does not have a license."

314. On December 1, 2009, Burch made very clear that U.S. RE was, in fact, required to have a Nevada license to broker reinsurance for a Nevada entity such as L&C:

> I have forwarded this to the NVDOI for their review. I understand Connie's [Akridge] position, **however for purposes of the company entering into and/or approving or ratifying, or failing to act to prevent, any agreements including reinsurance agreements, Nevada being the domiciliary state, is the only state where these agreements are considered to be entered into** and also for purposes of any disputes must be disputed in accordance with Nevada law. **A reinsurance intermediary effecting a reinsurance agreement in Nevada would have to be licensed in Nevada**.

315. In fact, at all relevant times the Board members were well aware they had unlawfully been employing an unlicensed reinsurance broker. This knowledge – and Burch's confirmation of all Defendants' violations of Nevada law in this regard – was emphasized to the Board on December 2, 2009 at the Board meeting at which Dalton "reported on the current triennial examination by the Nevada Department of Insurance."

316. Realizing that the DOI had caught U.S. RE, Uni-Ter, and the Board in ongoing and very serious violations of Nevada law, U.S. RE submitted an application to obtain a license in Nevada to become a nonresident reinsurance intermediary/broker ("Broker Application").

317. On December 30, 2009, the DOI emailed Joseph Fedor of U.S. RE stating that it had received U.S. RE's Broker Application. The DOI attached instructions and requirements for processing the Broker Application. In addition, the DOI stated that it had "received a list of officers and directors" for L&C and directed that U.S. RE needed to provide "an affidavit for each individual on the list."

318. The Broker Application was never approved by the DOI.

**c. In 2010, the DOI again reiterates to all defendants, including the Director Defendants, that they are engaged in knowing violations of the law with respect to reinsurance.**

319. On or around April 8, 2010, the DOI sent a letter via certified mail to the Board ("April 2010 Letter") enclosing the report of the 2008 Exam ("2008 Exam Report").

320. The April 2010 Letter and 2008 Exam Report were both received, and reviewed, by all Director Defendants at or near the time it was sent.

321. The April 2010 Letter made clear that the Board was required to review and respond to the 2008 Exam Report.

322. The 2008 Exam Report found that the Board was in violation of Nevada law in several respects. With respect to U.S. RE's failure to become properly licensed as a reinsurance broker for L&C, the 2008 Exam Report found as follows:

> 1. Pursuant to NAC 694C.300, "A person shall not act as a manager, a broker or an agent in this State for a captive insurer without authorization of the Commissioner." The Nevada Division of Insurance ("Division") requires all reinsurance intermediaries negotiating and/or placing reinsurance of behalf of a company, to be licensed as such in Nevada. It is recommended the Company require U.S. RE to become licensed in Nevada prior to it negotiating and/or placing reinsurance on its behalf.

323. In response, on April 26, 2010, the Board confirmed that it had received and reviewed the 2008 Exam Report and knew of the violations all Defendants, including the Board, had committed.

324. The Board further acknowledged the violations of law committed by all Defendants, including the intentional and knowing misconduct and knowing violations of the law committed by the Board, by noting that it had "requested that U.S. RE become licensed as a reinsurance intermediary in Nevada and they [U.S. RE] have filed the application to do so."

325. At the Board meeting on May 21, 2010, the entire Board confirmed that it "reviewed the results of the Nevada triennial examination and approved the responses thereto."

326. On December 29, 2010, the DOI sent the final Order and Report of Examination regarding the 2008 Exam ("2008 Exam Order") to Jeff Marshall, President of the Board, via certified mail.

327. The 2008 Exam Order made clear that pursuant to NRS 679B.280, the attached 2008 Exam Report and L&C's response were "adopted and filed as an official public record of the Division."

328. The 2008 Exam Order included the finding that U.S. RE was still not licensed as a reinsurance broker as required under Nevada law.

329. In fact, despite the communications from the DOI to Uni-Ter, U.S. RE and L&C's Board beginning in November, 2009, confirming U.S. RE must have a broker license in Nevada, and despite the 2008 Exam Report making it clear and unequivocal to the Board that it was required under Nevada law to require U.S. RE to become licensed in Nevada "prior" to U.S. RE negotiating and/or placing reinsurance on its behalf, the Board failed to require U.S. RE to become licensed as a reinsurance broker.

330. At all relevant times the Board knew this, and its utilization of an unlicensed reinsurance broker, were violations of law, including Nevada law, and that such conduct was wrongful.

331. At no time did U.S. RE obtain a license to act as a reinsurance broker/intermediary for L&C in Nevada as required by Nevada law.

**d. In 2012, the DOI yet again reiterates to all defendants, including the Director Defendants, that they are engaged in knowing violations of the law with respect to reinsurance.**

332. As part of the Financial Examination of L&C as of December 31, 2011 ("2011 Exam"), on July 13, 2012, the investigator for the DOI, Carolyn Maynard ("Maynard" or "DOI Examiner") requested that she be provided U.S. RE's broker license with the state of Nevada.

333. Maynard also raised the issue that Uni-Ter, through Elsass, had executed several of the Treaties on behalf of L&C in violation of Nevada law and that this appeared "to be a real conflict."

334. In fact, even in his communications with the Board, Elsass's email signature block noted that he was president of "U.S. RE Agencies, Inc." a wholly owned subsidiary of U.S. RE, and the parent company of Uni-Ter.

335. Moreover, the Board knew that Elsass wore multiple conflicting hats, including on behalf of Uni-Ter, directing the operations of both Uni-Ter UMC and Uni-Ter CS, and he had even attended a Board meeting "as an officer of U.S. RE," thereby creating conflicts of interest with respect to Elsass's, Uni-Ter's and U.S. RE's duties and obligations.

336. In a memorandum dated September 17, 2012 ("September 17, 2012 Memo"), the DOI Examiner found as follows:

> During each year under examination, the reinsurance contracts were executed by Sandy Elsass, President & CEO of the management company, Uni-Ter Management Corporation (Uni-Ter), on behalf of and binding Lewis & Clark on ceded reinsurance.
>
> **This practice is in violation of the Nevada Administrative Code (NAC) 683A.530(7)**, which states that a managing general agent (MGA) shall not bind reinsurance or retrocessions on behalf of the insurer.
> …
>
> **The NV DOI has issued no specific exception to NAC 683A.530(7)**.

337. U.S. RE had never been licensed as a reinsurance broker for L&C, and could therefore not produce a license at the request of the DOI Examiner.

338. In response, in a memorandum dated September 25, 2012 ("September 25, 2012 Memo"), the DOI Examiner found that with respect to L&C, U.S. RE "**has no license or specific authority to do business in the State of Nevada**." The DOI Examiner further found:

> **This is an unresolved compliance issue from the prior 2008 examination management letter**. At that time the Company assured the NVDOI that the reinsurance broker was in the process of procuring a license to do business in Nevada. **As of our 2011 examination, no license or specific authorization was obtained by the reinsurance broker USRE from the State of Nevada**.

339. The DOI Examiner concluded that the Company was in violation of Nevada law "by contracting with an unlicensed reinsurance broker."

**e. Defendants' violations of Nevada law and intentional and knowing misconduct with respect to reinsurance caused substantial harm to the Company.**

340. The Defendants' multiple and knowing violations of Nevada law with respect to reinsurance were substantial factors in its demise. In fact, U.S. RE itself pointed out that L&C had sustained massive losses due to the extremely unfavorable Reinsurance Treaties brokered by U.S. RE.

341. In an email dated May 9, 2011, John Klaus of U.S. RE, boasted to the reinsurers for whom it had illegally brokered various treaties on behalf of L&C, that the treaties it had brokered had resulted in a net gain to L&C's reinsurers – and a net loss to L&C – of over $8,000,000:

> 3. Since Lewis and Clark's inception, there have been 2 losses that exceeded their current $350,000 retention. However, because of the aggregate deductible component, no losses have been paid by reinsurers. (page 38 provides an "as if" exhibit displaying treaty experience for 2004-2010 using current terms.).
>
> 4. **Based on current valuations, reinsurers total positive balance for all treaties is over $8,000,000** (pages 33 & 34).

342. U.S. RE's point to the reinsurers was clear: U.S. RE was brokering deals that were detrimental to L&C to the benefit of reinsurers, and of course, to the benefit of U.S. RE who obtained a commission on the unlawfully brokered transactions.

**f. Rebuttal of the business judgment rule, and breach of fiduciary duties by the Board involving intentional and knowing misconduct and knowing violations of the law regarding reinsurance.**

343. U.S. RE's violations of Nevada law, including without limitation its brokering of the Reinsurance Treaties while failing to obtain a license to broker reinsurance in Nevada on behalf of L&C, constitute breaches of its fiduciary duties to the Company.

344. Uni-Ter's violations of Nevada, including without limitation its binding of reinsurance on behalf of L&C, constitute breaches of its fiduciary duties to the Company.

345. The Director Defendants' acts, ratification, or failures to act, including without limitation its decisions to obtain, or failure to refuse, reinsurance through the services of an unlicensed broker, and to permit Uni-Ter to unlawfully bind reinsurance on its behalf, all in

violation of Nevada law of which the Director Defendants knew, constitute breaches of the Director Defendants' fiduciary duties to the Company.

346. These breaches were not protected by the business judgment rule in Nevada ("BJR"), and involved intentional and knowing misconduct and/or knowing violations of the law by the Board, including without limitation as set forth herein.

347. In intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2004 Treaty on behalf of the Company, Marshall and Garber failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by Nevada law, including without limitation, NRS 78.138(3).

348. Marshall and Garber failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2004 Treaty without ensuring that U.S. RE had obtained the appropriate license to broker reinsurance, continuing to engage the services of an unlicensed reinsurance broker/intermediary while knowing that doing so was a violation of Nevada law and/or intentional and knowing misconduct, permitting Uni-Ter to bind reinsurance on behalf of the Company while knowing that doing so was a violation of the Management Agreements and Nevada law and constituted an intentional and intentional and knowing violation of the law and/or intentional and knowing misconduct, failing to be informed about the 2004 Treaty to the extent they reasonably believed appropriate, and not reasonably believing their decision with respect to the 2004 Treaty was in the best interest of the Company.

349. In knowingly and intentionally entering into, ratifying and/or approving, or failing to act to prevent, the 2004 Treaty, Marshall and Garber relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

350. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, and the lack of expertise of Uni-Ter or U.S. RE, as well as the Red Flags occuring prior thereto. Thus, the actions and/or inaction by Marshall and Garber regarding the 2004 Treaty are not protected by the BJR, and the BJR is rebutted with respect thereto. The 2004 Treaty constitutes a breach of Marshall's and Garber's fiduciary duties which involved intentional and knowing misconduct and knowing violations of the law by Marshall and Garber, who knew such conduct was wrongful.

351. In intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2005-2006 Treaty, Marshall, Garber, Hurlbut, and Stickels failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

352. In knowingly and intentionally entering into, ratifying and/or approving, or failing to act to prevent, the 2005-2006 Treaty, Marshall, Garber, Hurlbut, and Stickels failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2005-2006 Treaty without ensuring that U.S. RE had obtained the required license in Nevada, continuing to engage the services of an unlicensed reinsurance broker/intermediary while knowing that doing so was a violation of Nevada law and/or intentional and knowing misconduct, permitting Uni-Ter to bind reinsurance on behalf of the Company while knowing that doing so was a violation of the Management Agreements and Nevada law and constituted an intentional and intentional and knowing violation of the law and/or intentional and knowing misconduct, failing to be informed about the 2005-2006 Treaty to the extent they reasonably believed appropriate, and not reasonably believing their decision with respect to the 2005-2006 Treaty was in the best interest of the Company.

353. In knowingly and intentionally entering into, ratifying and/or approving, or failing to act to prevent, the 2005-2006 Treaty, Marshall, Garber, Hurlbut, and Stickels relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-

Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

354. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the acts or failures to act at issue. Thus, the actions and/or inaction by Marshall, Garber, Hurlbut, and Stickels regarding the 2005-2006 Treaty are not protected by the BJR, and the BJR is rebutted with respect thereto. The 2005-2006 Treaty constitutes a breach of Marshall's, Garber's, Hurlbut's, and Stickels' fiduciary duties which involved intentional and knowing misconduct and knowing violations of the law, which Marshall, Garber, Hurlbut and Stickels knew was wrongful at all relevant times.

355. In intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2007 Treaty, Marshall, Garber, Hurlbut, and Stickels, Chur and Fogg failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

356. Marshall, Garber, Hurlbut, and Stickels, Chur and Fogg failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2007 Treaty without ensuring that U.S. RE had obtained the required license in Nevada, continuing to engage the services of an unlicensed reinsurance broker/intermediary while knowing that doing so was a violation of Nevada law and/or intentional and knowing misconduct, permitting Uni-Ter to bind reinsurance on behalf of the Company while knowing that doing so was a violation of the Management Agreements and Nevada law and constituted an intentional and intentional and knowing violation of the law and/or intentional and knowing misconduct, failing to be informed about the 2007 Treaty to the extent they reasonably believed appropriate, and not reasonably believing their decision with respect to the 2007 Treaty was in the best interest of the Company.

357. In knowingly and intentionally entering into, ratifying and/or approving, or failing to act to prevent, the 2007 Treaty, Marshall, Garber, Hurlbut, and Stickels, Chur and Fogg relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

358. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the acts or failures to act at issue. Thus, the actions and/or inaction by Marshall, Garber, Hurlbut, and Stickels, Chur and Fogg regarding the 2007 Treaty are not protected by the BJR, and the BJR is rebutted with respect thereto. The 2007 Treaty constitutes a breach of Marshall's, Garber's, Hurlbut's, Stickels', Chur's and Fogg's fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which Marshall, Garber, Hurlbut, Stickels, Chur and Fogg knew was wrongful at all relevant times.

359. In intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2008 Treaty, Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg and Harter failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

360. Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg and Harter failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2008 Treaty without ensuring that U.S. RE had obtained the required license in Nevada, continuing to engage the services of an unlicensed reinsurance broker/intermediary while knowing that doing so was a violation of Nevada law and/or

intentional and knowing misconduct, permitting Uni-Ter to bind reinsurance on behalf of the Company while knowing that doing so was a violation of the Management Agreements and Nevada law and constituted an intentional and intentional and knowing violation of the law and/or intentional and knowing misconduct, failing to be informed about the 2008 Treaty to the extent they reasonably believed appropriate, and not reasonably believing their decision with respect to the 2008 Treaty was in the best interest of the Company.

361. In knowingly and intentionally entering into, ratifying and/or approving, or failing to act to prevent, the 2008 Treaty, Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg and Harter relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

362. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the acts or failures to act at issue. Thus, the actions and/or inaction by Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg and Harter regarding the 2008 Treaty are not protected by the BJR, and the BJR is rebutted with respect thereto. The 2008 Treaty constitutes a breach of Marshall's, Garber's, Hurlbut's, Stickels', Chur's and Fogg's fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which Marshall, Garber, Hurlbut, Stickels, Chur, Fogg and Harter knew was wrongful at all relevant times.

363. In intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2009 Treaty, Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

364. Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2009 Treaty without ensuring that U.S. RE had obtained the required license in Nevada, continuing to engage the services of an unlicensed reinsurance broker/intermediary while knowing that doing so was a violation of Nevada law and/or intentional and knowing misconduct, permitting Uni-Ter to bind reinsurance on behalf of the Company while knowing that doing so was a violation of the Management Agreements and Nevada law and constituted an intentional and intentional and knowing violation of the law and/or intentional and knowing misconduct, failing to be informed about the 2009 Treaty to the extent they reasonably believed appropriate, and not reasonably believing their decision with respect to the 2009 Treaty was in the best interest of the Company.

365. In knowingly and intentionally entering into, ratifying and/or approving, or failing to act to prevent, the 2009 Treaty, Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

366. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, and the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the acts or failures to act at issue. Thus, the actions and/or inaction by Marshall, Garber, Hurlbut, Stickels, Chur, Fogg, Harter and Lumpkin regarding the 2009 Treaty are not protected by the BJR, and the BJR is rebutted with respect thereto. The 2009 Treaty constitutes a breach of Marshall's, Garber's, Hurlbut's, Stickels', Chur's, Fogg's, Harter's and Lumpkin's fiduciary duties involving intentional and

knowing misconduct and knowing violations of the law by said defendants, which Marshall, Garber, Hurlbut, Stickels, Chur, Fogg, Harter and Lumpkin knew was wrongful at all relevant times.

367. In intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2010 Treaty, Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

368. Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2010 Treaty without ensuring that U.S. RE had obtained the required license in Nevada, continuing to engage the services of an unlicensed reinsurance broker/intermediary while knowing that doing so was a violation of Nevada law and/or intentional and knowing misconduct, permitting Uni-Ter to bind reinsurance on behalf of the Company while knowing that doing so was a violation of the Management Agreements and Nevada law and constituted an intentional and intentional and knowing violation of the law and/or intentional and knowing misconduct, failing to be informed about the 2010 Treaty to the extent they reasonably believed appropriate, and not reasonably believing their decision with respect to the 2010 Treaty was in the best interest of the Company.

369. In knowingly and intentionally entering into, ratifying and/or approving, or failing to act to prevent, the 2010 Treaty, Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

370. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, and the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the acts or failures to act at issue. Thus, the actions and/or inaction by Marshall, Garber, Hurlbut, Stickels, Chur, Fogg, Harter and Lumpkin regarding the 2010 Treaty are not protected by the BJR, and the BJR is rebutted with respect thereto. The 2010 Treaty constitutes a breach of Marshall's, Garber's, Hurlbut's, Stickels', Chur's, Fogg's, Harter's and Lumpkin's fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which Marshall, Garber, Hurlbut, Stickels, Chur, Fogg, Harter and Lumpkin knew was wrongful at all relevant times.

371. In intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2011 Treaty, Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

372. Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2011 Treaty without ensuring that U.S. RE had obtained the required license in Nevada, continuing to engage the services of an unlicensed reinsurance broker/intermediary while knowing that doing so was a violation of Nevada law and/or intentional and knowing misconduct, permitting Uni-Ter to bind reinsurance on behalf of the Company while knowing that doing so was a violation of the Management Agreements and Nevada law and constituted an intentional and intentional and knowing violation of the law and/or intentional and knowing misconduct, failing to be informed about the 2011 Treaty to the extent they reasonably believed appropriate, and not reasonably believing their decision with respect to the 2011 Treaty was in the best interest of the Company.

373. In knowingly and intentionally entering into, ratifying and/or approving, or failing to act to prevent, the 2011 Treaty, Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

374. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the acts or failures to act at issue. Thus, the actions and/or inaction by Marshall, Garber, Hurlbut, Stickels, Chur, Fogg, Harter and Lumpkin regarding the 2011 Treaty are not protected by the BJR, and the BJR is rebutted with respect thereto. The 2011 Treaty constitutes a breach of Marshall's, Garber's, Hurlbut's, Stickels', Chur's, Fogg's, Harter's and Lumpkin's fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which Marshall, Garber, Hurlbut, Stickels, Chur, Fogg, Harter and Lumpkin knew was wrongful at all relevant times.

375. In intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2012 Treaty, Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

376. Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, the 2012 Treaty without ensuring that U.S. RE had obtained

the required license in Nevada, continuing to engage the services of an unlicensed reinsurance broker/intermediary while knowing that doing so was a violation of Nevada law and/or intentional and knowing misconduct, permitting Uni-Ter to bind reinsurance on behalf of the Company while knowing that doing so was a violation of the Management Agreements and Nevada law and constituted an intentional and intentional and knowing violation of the law and/or intentional and knowing misconduct, failing to be informed about the 2012 Treaty to the extent they reasonably believed appropriate, and not reasonably believing their decision with respect to the 2012 Treaty was in the best interest of the Company.

377. In knowingly and intentionally entering into, ratifying and/or approving, or failing to act to prevent, the 2012 Treaty, Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

378. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the acts or failures to act at issue. Thus, the actions and/or inaction by Marshall, Garber, Hurlbut, Stickels, Chur, Fogg, Harter and Lumpkin regarding the 2012 Treaty are not protected by the BJR, and the BJR is rebutted with respect thereto. The 2012 Treaty constitutes a breach of Marshall's, Garber's, Hurlbut's, Stickels', Chur's, Fogg's, Harter's and Lumpkin's fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which Marshall, Garber, Hurlbut, Stickels, Chur, Fogg, Harter and Lumpkin knew was wrongful at all relevant times.

379. In renewing the agreement with U.S. RE, Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

380. Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, renewing the agreement with U.S. RE without ensuring that U.S. RE had obtained the required license in Nevada, continuing to engage the services of an unlicensed reinsurance broker/intermediary while knowing that doing so was a violation of Nevada law and/or intentional and knowing misconduct, permitting Uni-Ter to bind reinsurance on behalf of the Company while knowing that doing so was a violation of the Management Agreements and Nevada law and constituted an intentional and intentional and knowing violation of the law and/or intentional and knowing misconduct, failing to be informed about the renewal of the agreement with U.S. RE to the extent they reasonably believed appropriate, and not reasonably believing their decision with respect to the renewal of the Agreement with U.S. RE was in the best interest of the Company.

381. In renewing the agreement with U.S. RE, Marshall, Garber, Hurlbut, and Stickels, Chur, Fogg, Harter and Lumpkin relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

382. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the acts or failures to act at issue. Thus, the actions and/or inaction by Marshall, Garber, Hurlbut, Stickels, Chur, Fogg, Harter and

Lumpkin regarding renewing the agreement with U.S. RE are not protected by the BJR, and the BJR is rebutted with respect thereto. Renewal of the agreement with U.S. RE constitutes a breach of Marshall's, Garber's, Hurlbut's, Stickels', Chur's, Fogg's, Harter's and Lumpkin's fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which Marshall, Garber, Hurlbut, Stickels, Chur, Fogg, Harter and Lumpkin knew was wrongful at all relevant times.

**4. Failure to Amend Business Plans as Required by Nevada Law and unlawful Underwriting of Country Villa**

**a. The Board is aware of applicable Nevada law at all relevant times.**

383. NRS 694C.240 provides as follows:

> A captive insurer shall include its business plan with its application for the issuance and renewal of a license. If the captive insurer makes any changes to the business plan, the captive insurer shall, as soon as practicable, file a copy of the updated business plan with the Commissioner.

Nev. Rev. Stat. Ann. § 694C.240 (West).

384. In addition, NRS 694C.230 provides for annual renewal of a captive insurer.

385. At all relevant times, the Board, as well as Uni-Ter and U.S. RE, knew of these requirements.

386. At all relevant times, the Board, as well as Uni-Ter and U.S. RE, knew that without approval from the DOI for any changes to its business model and plan, such changes were in violation of Nevada law, including without limitation the above statutes.

387. L&C submitted its business plan in 2003 as part of its captive insurance application to the Nevada Department of Insurance for issuance of a license as a Nevada captive insurer ("2003 Business Plan"). The 2003 Business Plan limited L&C to providing maximum policy limits of $500,000 per claim and $1,000,000 aggregate without reinsurance, or $1,000,000 per claim and $3,000,000 aggregates should L&C maintain reinsurance.

388. Section 7 of the 2003 Business Plan, entitled Underwriting Guidelines ("Underwriting Guidelines") again stated that L&C would limit its risk by maintaining a maximum policy limit of $500,000 per claim, and added the additional limitation that "[a]ll policies issued by L&C will have a terms no greater than 12 months" and that "[i]nsureds that manage, own or control more than (15) locations are unique because of their higher propensity for loss."

389. L&C also provided reinsurers with underwriting guidelines which deemed "any submission that could be considered a chain (preference is for those accounts that have fewer than 15 locations)" as an unacceptable risk, and that "any submission that had a claim (paid or reserved) larger than $250,000 in the last 5 years" as an unacceptable risk.

390. In 2007, when all Director Defendants except Lumpkin were members of the Board, the Board was advised of the requirements to file business plans in accordance with NRS 694C.240. Lumpkin was also aware of this requirement upon her membership on the Board

391. Specifically, on March 14, 2007, following the examination of L&C performed by the Nevada DOI for the years of December 31, 2003 to December 31, 2005, the Board's knowledge of, and knowledge of the wrongfulness of, its wrongful and unlawful actions was confirmed by the DOI pertaining to NRS 694C.240, and the Board was ordered to provide an amended business plan to the Commissioner.

392. The Board's continued intentional and knowing violations of Nevada law were again confirmed to the Board in 2010 by the DOI, including without limitation of NRS 694C.240 violations by the Board for its failure to submit amended business plans on an annual basis. On April 26, 2010, the Board specifically acknowledged such violations.

**b. The Board approves Country Villa in violation of Nevada law.**

393. Further, the Board's violations of its legal obligation to update its business plan and obtain DOI approval of any changes in its business plan included its decision in 2009 to substantially change its business without informing the DOI through an updated business plan.

394. In or around July, 2009, L&C accepted two California-based multi-site long-term care operatives, referred to as Country Villa Health Services, Inc. ("Country Villa") and Braswell Family Senior Care ("Braswell" and collectively the "California Insureds").

395. This was a divergence from the established business model of L&C, and violated L&C's underwriting guidelines, including without limitation because it was the first time L&C chose to insure a large multi-facility operator, with Country Villa operating in excess of the 15 facility limitation.

396. In addition, Country Villa had historical loss records that were outside of L&C's typical underwriting range and violated L&C's underwriting guidelines.

397. Moreover, the agreement with Country Villa contained an aggregate policy limit of $5,000,000 on five of Country Villa's facilities which exceeded the maximum aggregate policy limit of $3,000,000 as contained in L&C's business plan.

398. In addition, the 2004 Management Agreement required that the Board approve all defense counsel for all claims. Throught the agreement with Country Villa the Board violated this requirement and gave Country Villa exclusive authority to appoint defense counsel in violation of the Board's obligations under the 2004 Management Agreement. Despite knowledge of this requirement, and that the Board's intentional and knowing decision regarding the underwriting of Country Villa was wrongful and a violation of the Board's obligations to L&C, the Board approved underwriting Country Villa.

399. This decision was not protected by the BJR, and was a breach of the Board's fidudiciary duties involving intentional and knowing misconduct and knowing violations of the law by the Board.

400. Further, under the 2004 Management Agreement, the Board was required to review the monthly financial documents of L&C on a monthly basis, but had failed to comply with this requirement beginning no later than, despite knowledge that such conduct was wrongful.

401. Despite knowledge of these violations and acts of misconduct, the Board approved the underwriting of Country Villa in 2009, and its renewal in 2010, which involved intentional

misconduct by the Board, including without limitation its breach of the applicable underwriting guidelines.

402. Further, the Board failed to file an updated business plan to inform the DOI regarding the changes to its business model and plan as required by Nevada law.

403. In addition, the 2004 Management Agreement required that the Board approve all defense counsel for all claims. Through the agreement with Country Villa the Board violated this requirement and gave Country Villa exclusive authority to appoint defense counsel in violation of the Board's obligations under the 2004 Management Agreement.

404. Despite knowledge of this requirement, and that the Board's decision to allow the underwriting of Country Villa was wrongful and a violation of the Board's obligations to L&C, the Board allowed, and/or failed to act to prevent the underwriting of Country Villa. Despite knowledge of these violations and acts of misconduct, the Board allowed the underwriting of Country Villa in 2009, and its renewal in 2010.

405. The Board failed to ensure the filing of an updated business plan to inform the DOI regarding the changes to its business model and plan the Country Villa entailed as required by Nevada law.

406. The Board's intent was clear: it knew Country Villa was a divergence from the established business model of L&C, and it knew it was an extreme risk. The Board did not want to inform the DOI for fear the DOI would prohibit the underwriting of Country Villa, denying the Board its "get rich quick" scheme that the high premiums of the Country Villa account represented. The Board was aware of the applicable laws concerning updating its business plans and obtaining the approval of the DOI, and wrongfully violated those laws.

**c. Rebuttal of the BJR and breach of fiduciary duties by the Board involving intentional and knowing misconduct and knowing violations of the law with respect to Country Villa and its failure to update its business plans.**

407. In intentionally and knowingly entering into and/or approving or ratifying, or failing to act to prevent, or otherwise reject the underwriting of Country Villa, all Director

Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

408. In knowingly and intentionally entering into, ratifying and/or approving, or failing to act to prevent, or otherwise reject the underwriting of Country Villa, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, failing to obtain proper approval from the DOI regarding the change to the Company's business plan that Country Villa represented in violation of Nevada law, failing to adhere to the Underwriting Guidelines, failing to retain the right to choose defense counsel as required by the 2004 Management Agreement, failing to be informed about Country Villa to the extent they reasonably believed appropriate, and not reasonably believing the decision to underwrite Country Villa was in the best interests of the Company.

409. The Board was not properly informed about CV to the extent they reasonably believed appropriate, and did not reasonably believe he decision to underwrite CV was in the bests interests of the Company.

410. The fact that the Board was not properly informed about Country Villa to the extent they reasonably believed appropriate, and did not reasonably believe the decision to underwrite Country Villa was in the bests interests of the Company is evidenced by, without limitation, the testimony of director defendant Hurlbut, who testified that the Board was not "fully briefed" on the issue of insuring Country Villa, and in fact did not even have a say in the decision to insure Country Villa:

> Q: And **<u>were you</u>** **<u>fully briefed</u>** on Country Villa?
>
> A: **<u>No. It was a done deal.</u>** We were told they're coming in. Sandy brought them in.
>
> …
>
> Q: If Mr. Marshall, Dr. Harter, or others said extensive presentations were made to the board, the board considered it, chose to assume the risk or fully briefed, they would be wrong?
>
> [Objections]

A: **It was a done deal**.

…

Q: You do not recall anybody from UniTer specifically making a presentation to the board in Sonoma, California, to discuss whether or not to bring Country Villa on, fully vetting the number of units it had, its underwriting of that units and the risk?

A: There was discussion. **What I'm trying to tell you, Counselor, is the fact that it was a done deal. We were told that this is going to happen; it doesn't really matter**.

…

Q: Could you have undone it?

A: I don't think so.

*See* Deposition of Robert Hurlbut, at p.32 lines 4-7, 15-18, 23; p.33 lines 2-10, 23-24.

411.

412.

413.

414. In knowingly and intentionally entering into, ratifying and/or approving, or failing to act to prevent, or otherwise reject the underwriting of Country Villa, all Director Defendants relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

415. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the official conduct at issue. Thus, the actions and/or inaction by all Director Defendants regarding Country Villa are not protected by the BJR, and the BJR is rebutted with respect thereto. The decision and/or approval of the underwriting of Country Villa by the Board constitutes a breach of the Director Defendants'

fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which the Director Defendants knew was wrongful at all relevant times.

**5. Insolvency of L&C.**

**a. The Board is aware of applicable Nevada law at all relevant times.**

416. NRS 695E.200 provides in relevant part:

> A risk retention group shall not:
> …
> 3. Transact insurance or otherwise operate while financially impaired or in a hazardous financial condition;
> …

Nev. Rev. Stat. Ann. § 695E.200 (West).

417. The term "hazardous financial condition" is defined as follows:

> "Hazardous financial condition" means that, based on its present or reasonably anticipated financial condition, a risk retention group, although not yet financially impaired or insolvent, is unlikely to be able to:
>
> 1. Meet obligations to policyholders with respect to known claims and reasonably anticipated claims; or
>
> 2. Pay other obligations in the normal course of business.

Nev. Rev. Stat. Ann. § 695E.050 (West).

418. At all relevant times the Board knew of the meaning of the term "hazardous financial condition," including without limitation having reviewed and executed or approved documents containing this information, including without limitation, offering memoranda, regulatory documents, and statutes and other applicable laws. documents containing this information.

419. At all relevant times the Board knew of the prohibitions against operating L&C in a hazardous financial condition and/or financially impaired, including without limitation having

reviewed and executed or approved documents containing this information, including without limitation, offering memoranda, regulatory documents, and statutes and other applicable laws. documents containing this information.

420. At all relevant times the Board knew that the minimum statutory capitalization required in Nevada was $500,000, and such further capitalization as may be required by the DOI, including without limitation having reviewed and approved documents containing this information, including without limitation, offering memoranda, regulatory documents, and statutes and other applicable laws.

421. At all relevant times the Board knew that Florida law required that L&C have a minimum positive surplus of $1,500,000 to operate.

422. At all relevant times the Board knew that operating L&C without the minimum capital requirements was a violation of law, and was wrongful.

423. Further, as Harter acknowledged in her deposition, the Board knew it was responsible for approving the Company's financial statements:

> Q. And who was in charge of setting the reserves?
> A. In my view, it's staff with the approval of the board. And the board approved the financial statements, so we're all involved in that.

*See* Deposition of Carol Harter at 92: 9-12.

**b. The Board continues operating L&C in a hazardous financial condition, knowingly violating Nevada law.**

424. In or around mid-year, 2010, the Board, having access to all financial information of the Company, approved the June 30, 2010 financial statement of the Company ("2010 2Q Financials").

425. The 2010 2Q Financials was submitted under oath that it was a "full and true statement of all the assets and liabilities and of the condition and affairs of the said reporting entity as of the reporting period stated above."

426. The 2010 2Q Financials demonstrated unequivocally that the Company was, at best, operating while in hazardous financial condition within the meaning of NRS 695E.200. The

Board knew of this fact at all relevant times herein, including upon review of the 2010 2Q Financials.

427. The 2010 2Q Financials were submitted to the DOI. The 2010 2Q Financials so clearly demonstrated the Company was, at a minimum, in a hazardous financial condition, impaired and/or insolvent, that very shortly after its receipt by the DOI, on or around September 8, 2010, the DOI sent a letter to Marshall, President of L&C and a member of the Board (*i.e.*, the September 2010 Letter) advising the Board of the dangerous financial position of L&C.

428. As noted above, in the September 2010 Letter, captioned "Lewis & Clark Deteriorating Financial Condition," the DOI sets for the hazardous financial condition in which the Company was operating, based upon the 2010 2Q Financials.

429. 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."

430. Despite having access to all financial and other information upon which the June 2010 Financial Statement was based, and knowing that continued operation of the Company in such a condition was wrongful, intentional and knowing misconduct, and a violation of law, including Nevada law, the Board intentionally and knowingly failed to fulfill their fiduciary duties to correct the substantial problems L&C was facing and instead continued operating L&C in violation of Nevada law including by, without limitation, transacting insurance, renewing accounts and obtaining new business.

**c. L&C's financial condition continues to deteriorate.**

431. Further, Lewis & Clark experienced a net loss during the three quarters ending September 30, 2011, of $3.1 million.

432. In or around mid-year, 2011, the Board (having access to all financial information) approved the June 30, 2011 financial statement of the Company ("2011 2Q Financials").

433. The 2011 2Q Financials were submitted to the DOI. The 2011 2Q Financials so clearly demonstrated the Company was, at a minimum, in a hazardous financial condition, impaired and/or insolvent, that very shortly after its receipt by the DOI, on or around September 8, 2011, the DOI sent a letter to Marshall, President of L&C and a member of the Board (*i.e.* the September 2011 Letter) advising the Board of the now extremely dire position of L&C.

434. The September 2011 Letter referenced the September 2010 Letter, noting that the September 2010 Letter had been sent previously to the Board regarding the hazardous financial condition, impairment and/or insolvency of the Company at that time.

435. Further, in the September 2011 Letter, the DOI identified several massive financial problems with L&C which the Board had, taken improper or no action to correct.

436. 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 also 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."

**d. Knowing violation of the law by the Board in continued operation of L&C.**

437. The Board held a meeting on September 21, 2011 ("September 2011 Meeting").

438. All directors were present at the September 2011 Meeting, with Fogg attending by telephone.

439. Elsass, Dalton and Jonna Miller ("Miller") attended the September 2011 Meeting in person.

440. The packages Uni-Ter prepared for, and delivered to, each Lewis & Clark Board Member for the September 2011 Meeting ("September 2011 Board Package"), included a report from the consultant, the Praxis Claims Consulting ("Praxis"), dated September 15, 2011.

441. William Donnelly, Reinsurance Claims Manager of U.S. RE, had arranged the September 15, 2011 audit. Mr. Donnelly was on-site and took part in the meetings during the first

day of Praxis' site visit to Uni-Ter on or about September 8, 2011, and Mr. Donnelly supplied the documents Praxis reviewed before the site visit to Praxis by e-mail.

442. At the September 2011 Meeting, Brian Stiefel ("Stiefel"), CPCU of Praxis presented the September 15, 2011 report ("September 2011 Praxis Report") to the Lewis & Clark Board of Directors.

443. At that time, Elsass of Uni-Ter, emphasized to the Board the dire financial situation of the Company as set forth in the 2011 2Q Financials, and emphasized to the Board in the September 2011 Letter from the DOI.

444. Uni-Ter requested that all entities with representatives on the Lewis & Clark Board of Directors, make additional investments in Lewis & Clark (the "Required Contributions"), totaling approximately $2.2M, in order to try to meet the minimum financial requirements to be in compliance with Nevada law and to maintain a legally acceptable premium-to-equity ratio.

445. The Board knew that even more money was needed to meet reserve requirements, and that the Required Contributions would not be sufficient.

446. The Director Defendants knew that at the time, L&C was, at best, continuing to operate in a hazardous financial condition, and that continued operation of L&C was intentional misconduct and a knowing violation of the law.

447. Moreover, the fact that the Required Contributions were required from several of the Director Defendants confirmed to the entire Board that Uni-Ter had been improperly stating reserves, resulting in inadequate reserves.

448. In fact, this was not the first time that Uni-Ter, including Uni-Ter CS, had taken steps to suppress claims reserves below appropriate levels. In April 2010, Christine McCarthy assumed the role of Vice President-Claims for Uni-Ter. She immediately overhauled. Uni-Ter's claims handling, reserve setting, and litigation management policies, resulting in increases in claims reserves from $6.3 million at the end of 2009, to $8.0 million at June 30, 2010, to $9.2 million at the end of 2010.

449. In May 2011, Uni-Ter terminated Ms. McCarthy for, among other reasons, her unwillingness to suppress reserves.

450. Notwithstanding Ms. McCarthy's termination, and the fact that her policies were put in place during 2010, Uni-Ter represented to Praxis that Ms. McCarthy's policies were newly instituted corrective measures in August of 2011, which is a representation recounted in the September 15, 2011 Praxis report.

451. Further, Uni-Ter used an accounting software program, known as Pyramid, throughout the existence of L&C which was obsolete, no longer had developer support, and was considered to be "extremely outdated" by Uni-Ter's IT Director. This was known to both the President of Uni-Ter and U.S. RE, whom respectively referred to Pyramid as the "inept system" and a "patchwork quilt." In addition, Uni-Ter senior management reported to a third-party IT auditor that Pyramid was "only approximately 50% accurate/complete; therefore the data has to be compared to documents outside of Pyramid to reconcile the data to approximately 90% accuracy/completeness." Despite the fact that both Uni-Ter and U.S. RE knew that Pyramid provided inaccurate data, and that at least 10% of the data being provided to L&C was not accurate, both U.S. RE and Uni-Ter nevertheless allowed this data to be provided to L&C, thereby negligently misrepresenting the accuracy of the data to the Board, and breaching their fiduciary duties to L&C.

**f. Continued deterioration of L&C despite the Required Contributions.**

452. Despite having made the Required Contributions, immediately after making the Required Contributions, or even before all the Required Contributions were actually made, the Director Defendants received the Company's third quarter 2011 financial statement ("2011 3Q Finacials").

453. The 2011 3Q Financials showed further financial deterioration of L&C, despite the addition of the Required Contributions.

454. After receipt of the Company's 2011 3Q Financials, the DOI emailed the Company stating the following:

> Attached are questions and concerns regarding the above. **Despite the addition of $2.15 million in capital, capital still declined 20% in the 3rd Quarter and losses continue to increase.**
>
> Please respond in writing within 10 business days to the first paragraph of the attached September 23, 2011 letter which was sent as a result of the Qtr 2 2011 Financial Statement.

455. The Board knew of this additional capital decline demonstrated by the 2011 3Q Financials as it approved the Company's 2011 3Q Financials.

456. The Board knew it was a violation of law, including without limitation Nevada law, to continue operating L&C due to its financial condition, and that such conduct was wrongful.

457. Further, notwithstanding the reduced scope of the September 2011 Praxis Report and its report to the Board of Directors, Uni-Ter, at U.S. RE's direction, conducted an internal full-scale review of all claims reserves and subsequently engaged Praxis to also conduct a full-scale review. The internal review was initiated based on Uni-Ter's and U.S. RE's concerns about the adequacy of claims reserves raised in the September 15, 2011 Praxis report.

458. U.S. RE required Uni-Ter to retain Praxis to complete its full claims review in or around November, 2011 ("Full Praxis Review") because U.S. RE had doubts about the adequacy of Lewis & Clark's reserves based on the significantly adverse findings of the internal review.

459. The Full Praxis Review showed that, in fact, an additional increase of at least, and possibly in excess of, $5,000,000 of claims reserves was necessary for the Company to have the minimum reserves required to meet obligations to policyholders with respect to known claims and reasonably anticipated claims, or to pay other obligations in the normal course of business.

460. On December 20, 2011, the Board met telephonically. At that meeting, Uni-Ter and U.S. RE confirmed to the Board that an addition of at least, and possibly in excess of, $5,000,000 was necessary to the Company's claims reserves to even have a chance of meeting the minimum regulatory and legal requirements for operating L&C, based on the Full Praxis Review.

461. In fact, Uni-Ter also submitted to the Board the preliminary draft of the actuarial analysis prepared by Richard Lord ("Lord") of Milliman, the Company's actuary ("Milliman December 2011 Report").

462. Lord noted that the audit of L&C had increased claim case reserves by approximately $5,000,000 and the reserves estimate had increased by that amount as well.

463. In the email to the Board dated December 21, 2011, in which it sent the Milliman December 2011 Report, Uni-Ter pointed out to the Board that "[t]he amount of the increase in reserves is $5,214,000."

464. This change significantly increased the net loss of Lewis & Clark on a full 2011 year basis and further decreased Lewis & Clark's capital to an unacceptable and unlawful level for operational, regulatory, and rating purposes, in violation of, inter alia, NRS 695E.200.

465. At all relevant times herein, the Board knew that L&C's capital was at an unacceptable and unlawful level for operational, regulatory, and rating purposes in violation of law, including Nevada law, and that continuing to operate L&C in such a condition was wrongful.

466. On or around October 5, 2011, the Board approved and agreed to make the Required Contributions on or before November 15, 2011.

467. At the time of their additional Required Contributions in October/November 2011, however, the Board had access to all financial information related to the Company and knew about the significant reserve concerns raised in September 2011 to Uni-Ter and U.S. RE by Praxis.

468. Further, the Board unreasonably relied upon Uni-Ter's assertion that the September 2011 Praxis Report represented a complete review of the claims process, which the Board easily could have done, and eventually did discover was inaccurate.

469. The Board had no basis to rely on Uni-Ter's and U.S. RE's representations at the September Board Meeting.

470. In fact, the Board knew it had received inaccurate financial information and other representations from Uni-Ter on multiple occasion.

471. The Board knew at the September Board Meeting that claims reserves were in fact, inadequate, because they were required to provide nearly two million ($2,000,000) out of their own pocket or from their entities.

472. The Board also knew that Uni-Ter was contributing an additional $300,000 due to the inadequate reserves and other serious financial problems L&C was experiencing.

473. Further, in or around November, 2011, Uni-Ter prepared and issued an Offering Memorandum dated November 2011 (the "2011 Offering Memorandum") seeking equity investments in Lewis & Clark. Uni-Ter issued this offering memorandum to long-term care facilities, home health care businesses, and individuals engaged in nursing or allied health care practice in an attempt to sell securities to additional insured parties.

474. The 2011 Offering Memorandum failed to disclose material adverse information, specifically the existence of the review by the Praxis Group.

475. The 2011 Offering Memorandum failed to disclose that the Company was insolvent.

476. The Memorandum further stated that:

> It is expected that the net proceeds generated from this Offering of the Company's Shares will provide additional funds for the Company to continue operations and to comply with all applicable capitalization requirements under the laws of Nevada.

In this sentence, the Offering Memorandum was careful not to state that Lewis & Clark's capital was sufficient or that Lewis & Clark was solvent, because the Board, Uni-Ter and U.S. RE knew the Company was impaired or insolvent.

**e. Continued deterioration of L&C's financial status, and the Board's decision to continue operating in violation of law.**

477. The financial situation regarding L&C clearly demonstrated the Company was in such a hazardous financial condition, on December 21, 2011, Uni-Ter put its own professional liability insurers on notice, stating that the surplus of L&C was potentially "exhausted", and that the "Board of L&C is being kept informed" and a further telephonic conference with the Board was set for December 23, 2011.

478. The continued inaccurate representations by Uni-Ter and U.S. RE regarding the financial condition of the Company were further confirmed to the Board since the Board knew, no later than December 20, 2011, that the Company had a negative surplus in excess of $5,000,000 from the November 2011 figures based on the Full Praxis Review, despite $2,000,000 having been infused into the Company only a few weeks before.

479. On December 23, 2011, the Board had a conference call that became very heated regarding the financial condition of the Company ("December 23 Conference Call"). During that conference call, the Board expressed anger at the dire financial situation of the Company. Dalton, who was on the conference call at the time, stated that Marshall had "lost his cool" and said he "feels like his house has been ransacked and he wants a f***ing answer as to how this happened since September."

480. The Board recognized formally what it had known all along, which was that it could not trust or rely on Uni-Ter or U.S. RE. As an acknowledgement of this fact, the meeting minutes for the December 23, 2011 Board meeting reflect that the Board resolved that "all actions which Uni-Ter or U.S. RE, directly or indirectly, wish to take or recommend on behalf of the Corporation which are outside the ordinary course of business, or inconsistent with the Corporation's historic day to day business practices, should receive prior approval from the Board."

481. In an email dated December 23, 2011, Marshall, with copies to the other Board members as well as to Sitterson and Akridge, emailed Uni-Ter regarding the severe financial problems of L&C "that could jeopardize the very existence of Lewis & Clark," questioning L&C's "solvency."

482. At that time the Board also set the next Board telephonic meeting for December 28, 2011.

483. On December 28, 2011, the Board, with Uni-Ter and U.S. RE, conducted a telephonic conference call ("December 28 Meeting").

484. As part of the December 28 Meeting, Piccione confirms to the board that the Company was very likely insolvent:

> For whatever it's worth, we are concerned fundamentally that notwithstanding the fact that you have a monthly calibration of premiums, the effect is that by putting those policies into force it's not just a question of responsibility to return the unearned premiums, but if you have a loss that takes place during that period during the effect of that cancelation, you run the potential that you've got an insurance company that's potentially insolvent to pay that claim.

485. Piccione further advised the Board that due to the fact that L&C wrote insurance in Florida, continued operation meant L&C was going to "run the risk of a criminal felony."

486. Sitterson stated that if Piccione thought that "there is a risk of criminal penalties you should have your counsel submit a report to the board that tells them that."

487. Immediately after the call was over, Piccione stated that he needed to "call right now Carlton Fields [Uni-Ter's attorneys], tell them they need to get a letter done right now to that board."

488. The motive for the Board to continue operating while insolvent – despite their knowledge that such action was in violation of many laws, including Nevada's and Florida laws, and included civil and criminal penalties – was clear: the Board wanted to maintain the façade that it was a healthy company to avoid intervention by the DOI, and to attempt to deceive another company, namely Health Cap, into taking over L&C.

489. During the December 28 Meeting, Elsass put it this way, and the Board agreed:

> I think we want to keep Health Cap interested. **Whatever we need to do to keep that going, I think we need to keep it going.**

490. Sitterson confirmed that Health Cap was the only entity even considering taking over L&C, stating that "[t]he only option that's on the table is Health Cap."

491. Further, later on December 28, 2011, Sitterson forwarded to the Board multiple emails from Uni-Ter representatives in which Uni-Ter stated that it believed that it "must respectfully point out that we [Uni-Ter] are not as yet confident of the ultimate level of reserves as at 31 December 2011 … nor whether the finalized level of reserves will correlate to L&C having a positive surplus as at 31 December 2011..."

492. Despite this clear warning from even Uni-Ter that, based on L&C's then present or reasonably anticipated financial condition, L&C was unlikely to be able to meet obligations to policyholders with respect to known claims and reasonably anticipated claims, or to pay other obligations in the normal course of business, the Board directed Uni-Ter to "process the current renewals."

493. Each of the Director Defendants knew unequivocally that this decision was wrongful and a direct, knowing violation of both Nevada and Florida law.

494. Uni-Ter acknowledged receipt of the instructions and stated it would proceed accordingly. However, knowing that the Board's instruction was unlawful, Uni-Ter stated that there was "an important issue" with respect to this instruction," that it had "sought the advice of counsel regarding the issue of processing renewals," and informed the Board as follows:

> According to legal counsel, a managing general agent such as Uni-Ter has no common law liability to brokers, agents or policyholders as a result of the insolvency of the insurer. However, it is the general rule in most states that an insurance broker has a duty not to place insurance with an insurer which the broker knows or reasonably should have known to be insolvent, and this duty applies to renewal policies as well.

495. Further, Uni-Ter noted that in the previous day's Board meeting, "concern was expressed by us over issues having to do with Florida Statutes dealing with potential liability (beyond civil), as a result of L&C becoming impaired or insolvent." Accordingly, Uni-Ter sent the Board a letter from Uni-Ter's attorneys, Carlton Fields, and quoted the letter in the email, "to better assure" that the Board members received it. The letter stated in relevant part as follows:

> You have asked us to provide you with information concerning potential liability under Florida law for Lewis & Clark LTC Risk Retention Group, Inc. ("L&C") as a result of L&C becoming impaired or insolvent. Under Fla. Stat. Ann. § 626.9541(l)(w), the following is defined as an "unfair method[] of competition and unfair or deceptive act[] or practice[]" that is prohibited by Fla. Stat. Ann. §626.9541:
>
> (w) Soliciting or accepting new or renewal insurance risks by insolvent or impaired insurer prohibited; penalty-
>
> 1. Whether or not delinquency proceedings as to the insurer have been or are to be initiated, but while such insolvency or impairment exists, no

> director or officer of an insurer, except with the written permission of the office, shall authorize or permit the insurer to solicit or accept new or renewal insurance risks in this state after such director or officer knew, or reasonably should have known, that the insurer was insolvent or impaired. "Impaired" includes impairment of capital or surplus, as defined in s. 631.011(12) and (13).
>
> 2. Any such director or officer, upon conviction of a violation of this paragraph, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> It is our understanding that this applies to risk retention groups domiciled in other states but doing business in Fla. See § 627.944(5), and of course imposes potential criminal liability for the individual officers and directors of the insolvent or impaired insurer.

496. And, in fact, as the Director Defendants knew, the statutes cited by Carlton Fields make clear that Florida law required a positive surplus of $1,500,000.00. *See* Fla. Stat. Ann. § 624.408 (West) ("an insurer in this state must at all times maintain surplus as to policyholders at least the greater of: (a) Except as provided in paragraphs (e), (f), and (g), $1.5 million).

497. Knowing that continued operation of the Company was in violation of multiple laws, including at least one states laws that carried criminal penalties, Uni-Ter demanded the Board confirm on December 29, 2011, that the Director Defendants wanted to continue operating L&C, including processing renewals.

498. Despite this clear statement of law, and the knowledge the Board had that L&C was over $5,000,000 below the amount necessary to even cover the minimum statutory reserves, the Board continued to operate L&C, including ordering Uni-Ter to renew policies coming due for renewal January, 2012, in direct, knowing violation of multiple laws.

499. In fact, despite the Board's knowledge that L&C was at least $5,200,000 below where it needed be to meet minimum statutory requirements, that the 3Q 2011 Financial Statement showed an additional 20% capital decrease (even including the $2.2 million Required Contributions), in order to provide false cover for its decision to keep operating while in violation of multiple states' laws, the Board minutes for the December 28, 2011, meeting stated the following:

> Having been advised that Uni-Ter's pro forma for December 31, 2011 financials for the Corporation indicate that the Corporation is neither impaired nor insolvent and pending receipt of the Fishlinger review, Uni-Ter should process the current renewals, with level monthly premium payment offered to the facilities.

500. Noticeably absent from this decision by the Director Defendants ("December 2011 Resolution") is any statement by the Director Defendants that L&C is not in a hazardous financial condition. the reason for this glaring omission is that the Director Defendants knew, and had known for over a year, that the Director Defendants had been operating L&C in a hazardous financial condition, knowing it to be wrongful and in violation of law, including without limitation, Nevada law.

501. The December 2011 Resolution to continue operating in reliance on the pro forma for December 31, 2011 financials received from Uni-Ter (the "December 2011 Pro Forma"), was made in reliance on information provided by Uni-Ter despite the Director Defendants' knowledge concerning the matter in question that caused reliance thereon to be unwarranted.

502. Specifically, among other things, reliance by the Board on the December 2011 Pro Forma was unwarranted because Uni-Ter itself told the Director Defendants not to rely on the December 2011 Pro Forma.

503. Dalton sent the Director Defendants an email on December 30, 2011, stating that Uni-Ter wanted to "make sure that everyone understands that decisions should not be made based on whatever you received [*i.e* the December 2011 Pro forma] as it was an internal working copy."

504. The Director Defendants knew the statements contained in the December 2011 Resolution were inaccurate, and that the December 2011 Pro Forma was unreliable.

505. Further, the Board's internal communications reveal that the Board was well aware it could not rely on the December 2011 Pro Forma.

506. In fact, on December 29, 2011, Stickels emailed the Board stating that "[t]he proforma [*i.e.* the December 2011 Pro Forma] doesn't indicate insolvency but may meet the impaired capital test."

507. This statement by Stickels was an admission that, at a minimum, the Company was operating in a hazardous financial condition in violation of law, including without limitation Nevada law, and that the Director Defendants knew it, and knew it was wrongful.

508. In truth, even Uni-Ter itself had advised the Board multiple times that it was concerned there was no positive surplus in L&C, and was so concerned about the negative financial condition of the Board it asked its attorneys to advise the Board that processing renewals could even subject the Board to criminal – not just civil – penalties.

509. And, in fact, the Board acknowledged outside the presence of Uni-Ter that it knew it could not rely on anything Uni-Ter provided to it, including the December 2011 Pro Forma, knowing Uni-Ter to have misrepresented the financial status of L&C on numerous occasions.

510. In an email from Lumpkin to the Board dated December 30, 2011, Lumpkin stated that with respect to information received from Uni-Ter, "[a]t this point it is difficult to have any confidence in the data/info we get."

511. In an email dated December 30, 2011, Marshall stated that L&C "should not work with a mgmt. [*sic*] entity that reflects incompetence in its principal duties."

512. In response to this, Marshall further confirmed what the Board all knew – that the Board could not rely on Uni-Ter's data. In an email to the Board on December 30, 2011, Marshall stated as follows:

> Confused by Donna's [Dalton] caution to not pay too much attention to internal documents – is Uni-Ter's financial data reliable or not? (rhetorical question, do not respond!).

513. Yet, despite even Uni-Ter itself telling the Director Defendants not to rely on the December 2011 Pro Forma, despite the Director Defendant acknowledging in internal emails that they knew they could not rely on the information provided by Uni-Ter, the Board issued the December 2011 Resolution to create the false narrative that it was justified in relying on information it knew to be unreliable from Uni-Ter in order to continue operating L&C in its extremely hazardous financial condition, impairment and/or insolvency, to the detriment of the Company, as well as others, and in breach of the Director Defendants' fiduciary duties.

514. Further, in a letter from Sitterson on behalf of the Board to Uni-Ter dated December 30, 2011, Sitterson emphasized the continued dire financial situation of L&C, and the unreliability of Uni-Ter's information. In the letter, Sitterson noted that "[t]his is a time of crisis for Lewis & Clark" and that the Board had just been "convinced by Uni-Ter to invest approximately $2.0 million two months ago, only to be told now that the claims information upon which they relied was fundamentally inaccurate."

515. In a response dated the same day, Uni-Ter's lawyers made clear that Uni-Ter was assuming "that the Board has made an independent judgment based upon not only information from Uni-Ter, but information from all other sources including appropriate laws, regulations and accounting rules and conventions in order to make the representation that the Board has reached the conclusions that L&C neither is, or is likely to be "insolvent or impaired."

516. Communication between the Board and Uni-Ter had broken down so severely that Sitterson informed the Board he could not even communicate directly with anyone at Uni-Ter "without permission from their counsel."

517. The Board knew that L&C had been operating while impaired, insolvent, or in a hazardous financial condition for a substantial amount of time, even from mid-year 2010, and the information provided at the December 2011 Board Meeting confirmed this knowledge to the Board.

518. The Board knew, beginning in mid-year 2010, that further operations of Lewis & Clark were in violation of numerous laws, including NRS 695E.200.

519. Despite this knowledge, in December, 2011, the Board reaffirmed the decision to continue operating in violation of Nevada and Florida law, knowing that such continued operations were a violation of multiple laws, including without limitation, Nevada and Florida law.

520. The Board made said decision to continue operating through improper reliance on information provided by Uni-Ter and/or U.S. RE, including without limitation financial statements and other financial data, prepared or presented by Uni-Ter and/or U.S. RE, or by others based on information provided by Uni-Ter and/or U.S. RE, despite knowledge concerning

the matter in question that caused the Board's reliance on Uni-Ter and U.S. RE to be unwarranted.

521. Despite its knowledge that the Company was, at a minimum, in a hazardous financial condition, and possibly impaired or insolvent, beginning no later than August, 2010, the Board continued to operate the Company in violation of Nevada law until September, 2012.

**f. Rebuttal of the Business Judgment Rule and Breach of Fiduciary Duties by the Board involving Intentional Misconduct and Knowing Violations of the Law.**

522. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2010 2Q Financials, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

523. In determining to continue operating L&C, or failing to act to cease its operation, after review of the 2010 2Q Financials, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, continuing to operate L&C, or failing to act to cease its operation, while knowing it was in a hazardous financial condition, impaired and/or insolvent, knowingly violating Nevada law, failing to be informed about the exact nature of the Company's financial condition to the extent they reasonably believed appropriate, not reasonably believing that continuing to operate the Company, or failing to act to cease its operation, while it was impaired, insolvent, and/or in a hazardous financial condition was in the best interests of the Company.

524. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2010 2Q Financials, all Director Defendants relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared by others with information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

525. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, and the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the official conduct at issue. Thus, the actions and/or inaction by all Director Defendants regarding the decision to continue operating L&C, or failure to act to cease its operation, after review of the 2010 2Q Financials are not protected by the BJR, and the BJR is rebutted with respect thereto. Such official conduct constitutes a breach of all Director Defendants' fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which all Director Defendants knew was wrongful at all relevant times.

526. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2011 1Q Financials, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

527. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2011 1Q Financials, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, continuing to operate L&C, or failing to act to cease its operation, while knowing it was in a hazardous financial condition, impaired and/or insolvent, knowingly violating Nevada law, failing to be informed about the exact nature of the Company's financial condition to the extent they reasonably believed appropriate, not reasonably believing that continuing to operate the Company, or failing to act to cease its operation, while it was impaired, insolvent, and/or in a hazardous financial condition was in the best interests of the Company.

528. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2011 1Q Financials, all Director Defendants relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite

having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

529. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, and the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the official conduct at issue. Thus, the actions and/or inaction by all Director Defendants regarding the decision to continue operating L&C, or failure to act to cease its operation, after review of the 2011 1Q Financials are not protected by the BJR, and the BJR is rebutted with respect thereto. Such official conduct constitutes a breach of all Director Defendants' fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which all Director Defendants knew was wrongful at all relevant times.

530. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2011 2Q Financials, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

531. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2011 2Q Financials, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, continuing to operate L&C, or failing to act to cease its operation, while knowing it was in a hazardous financial condition, impaired and/or insolvent, knowingly violating Nevada law, failing to be informed about the exact nature of the Company's financial condition to the extent they reasonably believed appropriate, not reasonably believing that continuing to operate the Company, or failing to act to cease its operation, while it was impaired, insolvent, and/or in a hazardous financial condition was in the best interests of the Company.

532. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2011 2Q Financials, all Director Defendants relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or

statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

533. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, and the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the official conduct at issue. Thus, the actions and/or inaction by all Director Defendants regarding the decision to continue operating L&C, or failure to act to cease its operation, after review of the 2011 2Q Financials are not protected by the BJR, and the BJR is rebutted with respect thereto. Such official conduct constitutes a breach of all Director Defendants' fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which all Director Defendants knew was wrongful at all relevant times.

534. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2011 3Q Financials, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

535. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2011 3Q Financials, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, continuing to operate L&C, or failing to act to cease its operation, while knowing it was in a hazardous financial condition, impaired and/or insolvent, knowingly violating Nevada law, failing to be informed about the exact nature of the Company's financial condition to the extent they reasonably believed appropriate, not reasonably believing that continuing to operate the Company, or failing to act to cease its operation, while it was impaired, insolvent, and/or in a hazardous financial condition was in the best interests of the Company.

536. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2011 3Q Financials, all Director Defendants relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

537. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, and the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the official conduct at issue. Thus, the actions and/or inaction by all Director Defendants regarding the decision to continue operating L&C, or failure to act to cease its operation, after review of the 2011 3Q Financials are not protected by the BJR, and the BJR is rebutted with respect thereto. Such official conduct constitutes a breach of all Director Defendants' fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which all Director Defendants knew was wrongful at all relevant times.

538. In deciding to continue operating L&C, or failing to act to cease its operation, after the December 28, 2011 Board Meeting, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

539. In deciding to continue operating L&C, or failing to act to cease its operation, after the December 28, 2011 Board Meeting, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, continuing to operate L&C, or failing to act to cease its operation, while knowing it was in a hazardous financial condition, impaired and/or insolvent, knowingly violating Nevada law, failing to be informed about the exact nature of the Company's financial condition to the extent they reasonably believed appropriate, not reasonably believing that continuing to operate

the Company, or failing to act to cease its operation, while it was impaired, insolvent, and/or in a hazardous financial condition was in the best interests of the Company.

540. In deciding to continue operating L&C, or failing to act to cease its operation, after the December 28, 2011 Board Meeting, all Director Defendants relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, including without limitation the December 2011 Pro Forma, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

541. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, and the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the official conduct at issue. Thus, the actions and/or inaction by all Director Defendants regarding the decision to continue operating L&C after the December 28, 2011 Board Meeting are not protected by the BJR, and the BJR is rebutted with respect thereto. Such official conduct constitutes a breach of all Director Defendants' fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which all Director Defendants knew was wrongful at all relevant times.

542. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2011 4Q Financials, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

543. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2011 4Q Financials, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, continuing to operate L&C, or failing to act to cease its operation, while knowing it was in a hazardous financial condition, impaired and/or insolvent, knowingly violating Nevada law, failing

to be informed about the exact nature of the Company's financial condition to the extent they reasonably believed appropriate, not reasonably believing that continuing to operate the Company, or failing to act to cease its operation, while it was impaired, insolvent, and/or in a hazardous financial condition was in the best interests of the Company.

544. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2011 4Q Financials, all Director Defendants relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

545. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, and the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the official conduct at issue. Thus, the actions and/or inaction by all Director Defendants regarding the decision to continue operating L&C, or failure to act to cease its operation, after review of the 2011 4Q Financials are not protected by the BJR, and the BJR is rebutted with respect thereto. Such official conduct constitutes a breach of all Director Defendants' fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which all Director Defendants knew was wrongful at all relevant times.

546. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2012 1Q Financials, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

547. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2012 1Q Financials, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation,

continuing to operate L&C, or failing to act to cease its operation, while knowing it was in a hazardous financial condition, impaired and/or insolvent, knowingly violating Nevada law, failing to be informed about the exact nature of the Company's financial condition to the extent they reasonably believed appropriate, not reasonably believing that continuing to operate the Company, or failing to act to cease its operation, while it was impaired, insolvent, and/or in a hazardous financial condition was in the best interests of the Company.

548. In knowingly and intentionally entering into, ratifying and/or approving, or failing to act to prevent, or otherwise reject the underwriting of Country Villa, all Director Defendants relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

549. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, and the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the official conduct at issue. Thus, the actions and/or inaction by all Director Defendants regarding the decision to continue operating L&C, or failure to act to cease its operation, after review of the 2012 1Q Financials are not protected by the BJR, and the BJR is rebutted with respect thereto. Such official conduct constitutes a breach of all Director Defendants' fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which all Director Defendants knew was wrongful at all relevant times.

550. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2012 2Q Financials, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

551. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2012 2Q Financials, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, continuing to operate L&C, or failing to act to cease its operation, while knowing it was in a hazardous financial condition, impaired and/or insolvent, knowingly violating Nevada law, failing to be informed about the exact nature of the Company's financial condition to the extent they reasonably believed appropriate, not reasonably believing that continuing to operate the Company, or failing to act to cease its operation, while it was impaired, insolvent, and/or in a hazardous financial condition was in the best interests of the Company.

552. In deciding to continue operating L&C, or failing to act to cease its operation, after review of the 2012 2Q Financials, all Director Defendants relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

553. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, and the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the official conduct at issue. Thus, the actions and/or inaction by all Director Defendants regarding the decision to continue operating L&C, or failure to act to cease its operation, after review of the 2012 2Q Financials are not protected by the BJR, and the BJR is rebutted with respect thereto. Such official conduct constitutes a breach of all Director Defendants' fiduciary duties involving intentional and knowing misconduct and knowing violations of the law by said defendants, which all Director Defendants knew was wrongful at all relevant times.

554. In deciding to renew the management agreement with Uni-Ter, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the

interests of the Company as required by applicable law, including without limitation NRS 78.138(3).

555. In determining to renew the management agreement with Uni-Ter, all Director Defendants failed to act honestly and in good faith, on an informed basis, and with a view to the interests of the Company by, without limitation, continuing to operate L&C, or failing to act to cease its operation, while knowing it was in a hazardous financial condition, impaired and/or insolvent, knowingly violating Nevada law, failing to be informed about the exact nature of the Company's financial condition to the extent they reasonably believed appropriate, not reasonably believing the decision to renew the management agreement with Uni-Ter was in the best interests of the Company.

556. in determining to renew the management agreement with Uni-Ter, all Director Defendants relied on Uni-Ter and U.S. RE, among others, including without limitation information, opinions, reports, or books of account or statements, including financial statements or other financial data provided by Uni-Ter and/or U.S. RE and others, or prepared based on information provided by Uni-Ter and/or U.S. RE, despite having knowledge concerning the matter in question that caused reliance thereon, including without limitation, Uni-Ter and/or U.S. RE, to be unwarranted.

557. Such knowledge included, without limitation, the Conflicts of Interest among Uni-Ter and U.S. RE, and the lack of expertise of Uni-Ter and U.S. RE, the failure to provide all relevant monthly financial reports to the Board, as well as the Board's knowledge they had failed to review all such reports, and the Red Flags occurring prior to the official conduct at issue. Thus, the actions and/or inaction by all Director Defendants regarding the decision to in determining to renew the management agreement with Uni-Ter are not protected by the BJR, and the BJR is rebutted with respect thereto. Such official conduct constitutes a breach of all Director Defendants' fiduciary duties involving intentional and knowing misconduct, including without limitation the violations of the Management Agreements set forth herein, and potentially others, and knowing violations of the law by said defendants, including without limitation knowing violation of the statutes set forth herein, and potentially others, which all Director Defendants

knew was wrongful and constituted intentional misconduct and/or knowing violation of the law at all relevant times.

558. As a proximate result of the Defendants' breaches of fiduciary duties, Plaintiff sustained damages which could have been prevented had the Defendants performed their fiduciary duties as required.

559. The Defendants' acts and failures to act, as set forth herein, were a substantial factor in L&C's damages which were reasonably foreseeable to another in Defendants' position under similar circumstances.

**H. Piccione's Aiding and Abetting Defendants' breaches of their fiduciary duties.**

**1. U.S. RE.**

560. By virtue of his position as Chairman, President, Chief Executive Officer, and founder or U.S. RE, Piccione had the power, control, and authority to set policy, make employment decisions, decide all matters of business, and to oversee and manage the affairs of U.S. RE.

561. By virtue of his position at U.S. RE, Piccione had detailed knowledge of the affairs of U.S. RE in regard to its relationship with L&C.

562. L&C was incorporated and organized at the direction of Piccione.

563. The U.S. RE Agreement made U.S. RE the exclusive reinsurance broker for L&C for seven (7) years, and was entered into at the direction of Piccione.

564. Employees under the direction and control of Piccione were responsible for initial licensing and license renewal at U.S. RE, and as a result had knowledge that U.S. RE was not a licensed insurance intermediary in Nevada.

565. Piccione knew that U.S. RE was never licensed as a reinsurance broker for L&C.

566. On or around July of 2011, U.S. RE employee Bill Joseph provided Piccione with a comprehensive list of all licenses held by U.S. Re, including insurance intermediary licenses, which showed that U.S. RE did not hold a reinsurance intermediary license in Nevada.

567. Despite Piccione's knowledge that U.S. RE needed and did not have a Nevada reinsurance intermediary license to act as a reinsurance broker for L&C, Piccione knowingly participated in the breach of U.S. RE's fiduciary duties to L&C by acting as L&C's reinsurance broker each year from 2004 to 2012.

568. Piccione actively participated in recommending and negotiating reinsurance programs for L&C, including without limitation in 2012, and did so knowing that U.S. RE did not hold a Nevada license as a reinsurance intermediary in breach of its fiduciary duty to L&C.

569. Piccione knew that U.S. RE provided L&C improper advice on reinsurance in breach of its fiduciary duty to L&C, including but not limited to recommending to L&C reinsurance programs that had inappropriate excess of loss and retention levels.

570. Piccione knowingly participated in said breach of U.S. RE's fiduciary duties to L&C, including but not limited to failing to notify L&C or its Board, or taking other corrective action.

571. Piccione knew that U.S. RE failed to advise the Board that L&C had options outside of buying reinsurance that would have been more appropriate for L&C, and that such failure by U.S. RE constituted a breach of U.S. RE's fiduciary duties to L&C.

572. Piccione knowingly participated in said breach of U.S. RE's fiduciary duties to L&C, including but not limited to failing to notify L&C or its Board, or taking other corrective action.

**2. <u>Uni-Ter</u>.**

573. As a founder, a Director, and the Chairman of Uni-Ter, Piccione had detailed knowledge of the affairs of Uni-Ter in regard to its relationship with L&C.

574. By virtue of his position at Uni-Ter, Piccione had the power, control and authority over Uni-Ter to set policy, provide directives to employees, and to oversee and manage the affairs of the business.

575. Piccione was deeply involved in the day to day affairs of Uni-Ter, was frequently consulted and made decisions on behalf of Uni-Ter, closely monitored and had knowledge of the

daily operations of Uni-Ter, and was known by the employees of Uni-Ter as the individual who had the final say on all matters related to Uni-Ter.

576. L&C was incorporated and organized at the direction of Piccione for the purpose of providing a captive source of management fees to Uni-Ter, to benefit Piccione personally, because Uni-Ter was an indirect wholly owned subsidiary of U.S. RE Companies, of which Piccione was the largest shareholder.

577. Piccione created L&C with the intention that L&C would be managed by Uni-Ter, and caused that Uni-Ter enter into the 2004 Management Agreement with L&C, despite that fact that Piccione knew he had no background or experience in running an insurance company and had no reasonable belief that he could do so competently.

578. Piccione caused that the Board of L&C would be composed of individuals that had no education, training, or experience running an insurance company, and that Uni-Ter would be headed by individuals that had no education, training, or experience running an insurance company.

579. Piccione put Elsass in charge of running Uni-Ter, who Piccione knew had a background in sales, brokering and investment banking, but had never run or managed an insurance company, and had no experience in handling claims or setting reserves.

580. Piccione caused that compensation for Elsass to include incentives to increase the amount of premiums underwritten by Uni-Ter on behalf of L&C, and to increase the net profits of Uni-Ter, but failed to include any incentives to Elsass to provide for the financial strength and stability of L&C, thereby placing undue emphasis and focus on L&C's rapid growth at the expense of L&C's solvency and ability to pay claims.

581. In or around 2011, Piccione became aware that Elsass had been suppressing L&C's claims reserves in breach of Uni-Ter's fiduciary duty to L&C, but did not notify the Board or take appropriate corrective action.

582. In or around 2010 or 2011, Piccione became aware that L&C was in a hazardous financial condition, but did not notify the Board or take appropriate corrective action in time to avert the events leading up to the Receivership Action.

583. Piccione knew that U.S. RE was not licensed in Nevada as an insurance intermediary, and that Uni-Ter was advising L&C to use U.S. RE as its exclusive reinsurance broker in breach of is fiduciary duty to L&C, but did not inform the Board of this fact or take appropriate corrective action.

584. Piccione became aware no later than May 2012 that there was an employee "whistle blower" at Uni-Ter that had likely "kept detailed records of all e-mails and conversations specific to the issues of reserves being suppressed." Despite this, Piccione intentionally failed to disclose this information to the Board, or take other corrective action, which purposely aided and abetted Uni-Ter's breach of fiduciary duties and negligent misrepresentations to L&C as more fully detailed herein.

**CLAIMS**

585. 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**

**(Breach of Fiduciary Duties – Robert Chur)**

586. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 585, as though fully set forth herein.

587. As a director of L&C, a fiduciary relationship existed between Plaintiff and Chur at the time of the acts or inaction alleged herein.

588. As such, Chur owed fiduciary duties to Plaintiff, including without limitation the duties of care, honesty, loyalty, confidentiality, full disclosure, fairness, and good faith.

589. Chur breached one or more of those duties, as set forth herein.

590. Such breaches were not protected by the business judgment rule, and/or the business judgment rule was rebutted with respect thereto, as set forth herein.

591. Such breaches involved intentional and knowing misconduct and/or knowing violations of the law by said defendant, which said defendant knew was wrongful at all relevant times, as set forth herein.

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

593. 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.

**SECOND CLAIM FOR RELIEF**

**(Breach of Fiduciary Duties – Steve Fogg)**

594. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 593, as though fully set forth herein.

595. As a director of L&C, a fiduciary relationship existed between Plaintiff and Fogg at the time of the acts or inaction alleged herein.

596. As such, Fogg owed fiduciary duties to Plaintiff, including without limitation the duties of care, honesty, loyalty, confidentiality, full disclosure, fairness, and good faith.

597. Fogg breached one or more of those duties, as set forth herein.

598. Such breaches were not protected by the business judgment rule, and/or the business judgment rule was rebutted with respect thereto, as set forth herein.

599. Such breaches involved intentional and knowing misconduct and/or knowing violations of the law by said defendant, which said defendant knew was wrongful at all relevant times, as set forth herein.

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

601. 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.

**THIRD CLAIM FOR RELIEF**

**(Breach of Fiduciary Duties – Mark Garber)**

602. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 601, as though fully set forth herein.

603. As a director of L&C, a fiduciary relationship existed between Plaintiff and Garber at the time of the acts or inaction alleged herein.

604. As such, Garber owed fiduciary duties to Plaintiff, including without limitation the duties of care, honesty, loyalty, confidentiality, full disclosure, fairness, and good faith.

605. Garber breached one or more of those duties, as set forth herein.

606. Such breaches were not protected by the business judgment rule, and/or the business judgment rule was rebutted with respect thereto, as set forth herein.

607. Such breaches involved intentional and knowing misconduct and/or knowing violations of the law by said defendant, which said defendant knew was wrongful at all relevant times, as set forth herein.

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

609. 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.

**FOURTH CLAIM FOR RELIEF**

**(Breach of Fiduciary Duties – Carol Harter)**

610. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 609, as though fully set forth herein.

611. As a director of L&C, a fiduciary relationship existed between Plaintiff and Harter at the time of the acts or inaction alleged herein.

612. As such, Harter owed fiduciary duties to Plaintiff, including without limitation the duties of care, honesty, loyalty, confidentiality, full disclosure, fairness, and good faith.

613. Harter breached one or more of those duties, as set forth herein.

614. Such breaches were not protected by the business judgment rule, and/or the business judgment rule was rebutted with respect thereto, as set forth herein.

615. Such breaches involved intentional and knowing misconduct and/or knowing violations of the law by said defendant, which said defendant knew was wrongful at all relevant times, as set forth herein.

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

617. 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.

**FIFTH CLAIM FOR RELIEF**

**(Breach of Fiduciary Duties – Robert Hurlbut)**

618. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 617, as though fully set forth herein.

619. As a director of L&C, a fiduciary relationship existed between Plaintiff and Hurlbut at the time of the acts or inaction alleged herein.

620. As such, Hurlbut owed fiduciary duties to Plaintiff, including without limitation the duties of care, honesty, loyalty, confidentiality, full disclosure, fairness, and good faith.

621. Hurlbut breached one or more of those duties, as set forth herein.

622. Such breaches were not protected by the business judgment rule, and/or the business judgment rule was rebutted with respect thereto, as set forth herein.

623. Such breaches involved intentional and knowing misconduct and/or knowing violations of the law by said defendant, which said defendant knew was wrongful at all relevant times, as set forth herein.

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

625. 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.

626. WHEREFORE, Plaintiff prayse for relief and judgment as set forth herein.

**SIXTH CLAIM FOR RELIEF**

**(Breach of Fiduciary Duties – Jeff Marshall)**

627. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 626, as though fully set forth herein.

628. As a director of L&C, a fiduciary relationship existed between Plaintiff and Marshall at the time of the acts or inaction alleged herein.

629. As such, Marshall owed fiduciary duties to Plaintiff, including without limitation the duties of care, honesty, loyalty, confidentiality, full disclosure, fairness, and good faith.

630. Marshall breached one or more of those duties, as set forth herein.

631. Such breaches were not protected by the business judgment rule, and/or the business judgment rule was rebutted with respect thereto, as set forth herein.

632. Such breaches involved intentional and knowing misconduct and/or knowing violations of the law by said defendant, which said defendant knew was wrongful at all relevant times, as set forth herein.

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

634. 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.

635. WHEREFORE, Plaintiff prayse for relief and judgment as set forth herein.

**SEVENTH CLAIM FOR RELIEF**

**(Breach of Fiduciary Duties – Eric Stickels)**

636. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 635, as though fully set forth herein.

637. As a director of L&C, a fiduciary relationship existed between Plaintiff and Stickels at the time of the acts or inaction alleged herein.

638. As such, Stickels owed fiduciary duties to Plaintiff, including without limitation the duties of care, honesty, loyalty, confidentiality, full disclosure, fairness, and good faith.

639. Stickels breached one or more of those duties, as set forth herein.

640. Such breaches were not protected by the business judgment rule, and/or the business judgment rule was rebutted with respect thereto, as set forth herein.

641. Such breaches involved intentional and knowing misconduct and/or knowing violations of the law by said defendant, which said defendant knew was wrongful at all relevant times, as set forth herein.

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

643. 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.

644. WHEREFORE, Plaintiff prayse for relief and judgment as set forth herein.

**EIGHTH CLAIM FOR RELIEF**

**(Breach of Fiduciary Duties – Barbara Lumpkin)**

645. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 644, as though fully set forth herein.

646. As a director of L&C, a fiduciary relationship existed between Plaintiff and Lumpkin at the time of the acts or inaction alleged herein.

647. As such, Lumpkin owed fiduciary duties to Plaintiff, including without limitation the duties of care, honesty, loyalty, confidentiality, full disclosure, fairness, and good faith.

648. Lumpkin breached one or more of those duties, as set forth herein.

649. Such breaches were not protected by the business judgment rule, and/or the business judgment rule was rebutted with respect thereto, as set forth herein.

650. Such breaches involved intentional and knowing misconduct and/or knowing violations of the law by said defendant, which said defendant knew was wrongful at all relevant times, as set forth herein.

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

652. 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.

653. WHEREFORE, Plaintiff prayse for relief and judgment as set forth herein.

**NINTH CLAIM FOR RELIEF**

**(Deepening of the Insolvency of L&C Caused by all Defendants)**

654. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 653, as though fully set forth herein.

655. Defendants' actions and/or failures to act severely and unlawfully prolonged the life of L&C, led to its initial insolvency and, also increased its insolvency.

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

657. 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.

658. WHEREFORE, Plaintiff prayse for relief and judgment as set forth herein.

**TENTH CLAIM FOR RELIEF**

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

659. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 658, as though fully set forth herein.

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

661. Uni-Ter had participated in the creation of 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.

662. 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 at certain times. 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.

663. 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.

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

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

666. 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.

667. WHEREFORE, Plaintiff prayse for relief and judgment as set forth herein.

**ELEVENTH CLAIM FOR RELIEF**

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

668. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 667, as though fully set forth herein.

669. A fiduciary relationship between L&C and Uni-Ter UMC pursuant to which Uni-Ter UMC owed fiduciary duties to L&C because, without limitation, such a fiduciary relationship was set forth in the 2004 Management Agreement and the 2011 Management Agreement, as well as because L&C had the right to expect trust and confidence in the integrity and fidelity of Uni-Ter UMC.

670. As a result, Uni-Ter UMC owed fiduciary duties to L&C, including without limitation the duties of care, honesty, loyalty, confidentiality, full disclosure, fairness, and good faith.

671. Uni-Ter UMC breached one or more of those duties, including without limitation as set forth herein.

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

673. 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.

674. WHEREFORE, Plaintiff prayse for relief and judgment as set forth herein.

**TWELFTH CLAIM FOR RELIEF**

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

675. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 674, as though fully set forth herein.

676. A fiduciary relationship between L&C and Uni-Ter CS pursuant to which Uni-Ter CS owed fiduciary duties to L&C because, without limitation, such a fiduciary relationship was set forth in the 2011 Management Agreement, as well as because L&C had the right to expect trust and confidence in the integrity and fidelity of Uni-Ter CS.

677. As a result, Uni-Ter CS owed fiduciary duties to L&C, including without limitation the duties of care, honesty, loyalty, confidentiality, full disclosure, fairness, and good faith.

678. Uni-Ter CS breached one or more of those duties, as set forth herein, including without limitation by suppressing reserves and failing to correct the problem.

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

680. 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.

681. WHEREFORE, Plaintiff prayse for relief and judgment as set forth herein.

**THIRTEENTH CLAIM FOR RELIEF**

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

682. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 681, as though fully set forth herein.

683. L&C engaged U.S. RE as its agent and exclusive broker and consultant 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).

684. 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.

685. 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).

686. 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).

687. 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.

688. 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)).

689. Thus, as the agent of L&C, U.S. RE owed L&C fiduciary duties under Nevada law, as set forth herein. These fiduciary duties included without limitation the duties of care, honesty, loyalty, confidentiality, full disclosure, fairness, and good faith.

690. U.S. RE breached these fiduciary duties through intentional acts, including without limitation, as set forth herein.

691. 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.

692. 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.

693. 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.

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

695. 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.

696. WHEREFORE, Plaintiff prays for relief and judgment as set forth herein.

**FOURTEENTH CLAIM FOR RELIEF**

**(Aiding and Abetting Breach of Fiduciary Duty by Uni-Ter UMC)**

697. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 696, as though fully set forth herein.

698. Defendant Uni-Ter UMC owed fiduciary duties to Plaintiff, as set forth herein.

699. Defendant Uni-Ter UMC breached it fiduciary duties to Plaintiff, as set forth

herein.

700. Defendant Uni-Ter UMC substantially assisted or encouraged Uni-Ter CS's and U.S. RE's conduct in breaching their fiduciary duties to Plaintiff, as set forth herein.

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

702. 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.

703. WHEREFORE, Plaintiff prays for relief and judgment as set forth herein.

**FIFTEENTH CLAIM FOR RELIEF**

**(Aiding and Abetting Breach of Fiduciary Duty by Uni-Ter CS)**

704. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 703, as though fully set forth herein.

705. Defendant Uni-Ter CS owed fiduciary duties to Plaintiff, as set forth herein.

706. Defendant Uni-Ter CS breached its fiduciary duties to Plaintiff, as set forth herein.

707. Defendant Uni-Ter CS substantially assisted or encouraged Uni-Ter UMC's and U.S. RE's conduct in breaching their fiduciary duties to Plaintiff, as set forth herein.

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

709. 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.

710. WHEREFORE, Plaintiff prays for relief and judgment as set forth herein.

**SIXTEENTH CLAIM FOR RELIEF**

**(Aiding and Abetting Breach of Fiduciary Duty by U.S. RE)**

711. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 710, as though fully set forth herein.

712. Defendant U.S. RE owed fiduciary duties to Plaintiff, as set forth herein.

713. Defendant U.S. RE breached its fiduciary duties to Plaintiff, as set forth herein.

714. Defendant substantially assisted or encouraged Uni-Ter UMC's and Uni-Ter CS's

conduct in breaching their fiduciary duties to Plaintiff, as set forth herein.

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

716. 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.

717. WHEREFORE, Plaintiff prays for relief and judgment as set forth herein.

**SEVENTEENTH CLAIM FOR RELIEF**

**(Aiding and Abetting U.S. RE's Breach of Fiduciary Duty Against Piccione)**

718. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 717, as though fully set forth herein.

719. As a result of the relationship that existed between U.S. RE and L&C, U.S. RE owed a fiduciary duty to L&C at all time relevant herein.

720. As a result of the fiduciary relationship that existed between U.S. RE and L&C, U.S. RE breached its fiduciary duty to L&C as more fully described herein.

721. Piccione knew of U.S. RE's fiduciary obligations to L&C, knew of U.S. RE's breaches of fiduciary duties to L&C, and substantially assisted or encouraged in U.S. RE's breach of fiduciary duty to L&C by aiding and abetting U.S. RE's breaches. These actions include, without limitation, aiding and abetting U.S. RE acting as L&C's reinsurance broker without having a Nevada reinsurance intermediary license, with respect to recommending inappropriate reinsurance programs to L&C, and with respect to failing to advise L&C that there may options outside of buying reinsurance that may have been more appropriate for L&C.

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

723. 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.

724. WHEREFORE, Plaintiff prayse for relief and judgment as set forth herein.

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**EIGHTEENTH CLAIM FOR RELIEF**

**(Aiding and Abetting Uni-Ter's Breach of Fiduciary Duty Against Piccione)**

725. Plaintiff repeats and realleges all allegations contained herein, including without limitation Paragraphs 1 through 724, as though fully set forth herein.

726. L&C engaged Uni-Ter to act as its managing general agent pursuant to the terms of the 2004 Managing Agreement and later the 2011 Management Agreement.

727. As a result of the relationship that existed between Uni-Ter and L&C, Uni-Ter owed a fiduciary duty to L&C at all time relevant herein.

728. As a result of the fiduciary relationship that existed between Uni-Ter and L&C, Uni-Ter breached its fiduciary duty to L&C as more fully described herein.

729. Piccione knew of Uni-Ter's fiduciary obligations to L&C, knew of Uni-Ter's breaches of fiduciary duties to L&C, and substantially assisted or encouraged in Uni-Ter's breach of fiduciary duty to L&C by aiding and abetting Uni-Ter's breaches. These actions include, without limitation, not informing the Board and taking appropriate actions when Uni-Ter suppressed L&C's reserves, when Uni-Ter failed to provide material, timely or accurate information to the Board, when L&C was in a hazardous financial position, and by recommending that L&C use U.S. RE as its reinsurance broker knowing that needed but did not have a Nevada reinsurance intermediary license.

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

731. 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, including without limitation general, compensatory and special damages, sustained by Plaintiff in an amount in excess of $15,000 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: July 2, 2020.

**HUTCHISON & STEFFEN**

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

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# 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.,<br><br>Plaintiff,<br><br>vs.<br><br>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;<br><br>Defendants. | Case No.: A-14-711535-C<br><br>Dept. No.: XXVII<br><br>**NOTICE OF ENTRY OF ORDER** |

Please take notice that an Order Denying Plaintiff's Motion for Leave to File Fourth Amended Complaint was entered on the 8th day of August, 2020, a copy of which is attached

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hereto.

DATED this 8th day of August, 2020.

HUTCHISON & STEFFEN

By */s/Brenoch Wirthlin*

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Las Vegas, Nevada 89145
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that on this 8th day of August, 2020, I caused the document entitled **NOTICE OF ENTRY OF ORDER** to be served on the following by Electronic Service to:

**ALL PARTIES ON THE E-SERVICE LIST**

*/s/Danielle Kelley*
An Employee of Hutchison & Steffen, PLLC

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08/10/2020 4:56 PM
CLERK OF THE COURT

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*Attorneys for Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation*



**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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|---|---|
| COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.,<br><br>Plaintiffs,<br><br>v.<br><br>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,<br><br>Defendants. | Case No. A-14-711535-C<br><br>Dept. No.: XXVII<br><br>**ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT** |

McDONALD CARANO
2300 WEST SAHARA AVENUE, SUITE 1200 • LAS VEGAS, NEVADA 89102
PHONE 702.873.4100 • FAX 702.873.9966

This matter came before the Court for hearing on July 23, 2020 on Plaintiff's Motion for Leave to File Fourth Amended Complaint ("Motion"). Brenoch R. Wirthlin, Esq. appeared on behalf of Plaintiff Commissioner of Insurance for the State of Nevada ("Plaintiff"); George F. Ogilvie III, Esq., Jon N. Wilson, Esq. and Erin Kolmansberger, Esq. appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation; and Angela T. Nakamura Ochoa, Esq. appeared on behalf of Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels.

Having considered the record and the briefs submitted in support of and in opposition to the Motion, and having entertained the arguments of counsel, the Court finds that the Motion is untimely; that Plaintiff unduly delayed the assertion of the new allegations and claims for relief set forth in the proposed Fourth Amended Complaint; that granting Plaintiff leave to file the Fourth Amended Complaint would unduly prejudice defendants; that the new defendant sought to be added was known to Plaintiff at the time of the filing of the original Complaint; and that the proposed new claims for relief do not relate back to the filing of the original Complaint and are, therefore, time-barred. Based on these findings and good cause appearing therefor,

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

DATED this ____ day of July, 2020.

Dated this 10th day of August, 2020

Nancy L Allf

NANCY L. ALLF
District Court Judge

B19 B66 6A18 37FC
Nancy Allf
District Court Judge

Approved as to Form and Content:

HUTCHISON & STEFFEN

By: /s/
Brenoch Wirthlin, Esq.
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145

*Attorneys for Plaintiff Commissioner of Insurance for the State of Nevada*

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*Attorneys for Robert Chur, et al.,*

Submitted By:

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DISTRICT COURT
CLARK COUNTY, NEVADA

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|---|---|
| Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark, Plaintiff(s)<br><br>vs.<br><br>Robert Chur, Defendant(s) | CASE NO: A-14-711535-C<br><br>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: 8/10/2020

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.,<br><br>Plaintiff,<br><br>vs.<br><br>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,<br><br>Defendants. | Case No. A-14-711535-C<br>Dept. No.: XXVII<br><br>**NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT** |

PLEASE TAKE NOTICE that Findings of Fact, Conclusions of Law and Order Denying Plaintiff's Motion for Leave to File Fourth Amended Complaint was entered in the above-referenced case on the 10th day of August, a copy of which is attached hereto.

Dated this 10th day of August, 2020.

McDONALD CARANO LLP

By: /s/ *George F. Ogilvie III*
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*Attorneys for Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation.*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 10th day of August, 2020, a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT** was electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

*/s/ Jelena Jovanovic*
An employee of McDonald Carano LLP

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.,<br><br>Plaintiffs,<br><br>v.<br><br>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,<br><br>Defendants. | Case No. A-14-711535-C<br><br>Dept. No.: XXVII<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT** |

This matter came before the Court for hearing on July 23, 2020 on Plaintiff's Motion for Leave to File Fourth Amended Complaint ("Motion"). Brenoch R. Wirthlin, Esq. appeared on behalf of Plaintiff Commissioner of Insurance for the State of Nevada ("Plaintiff" or "Receiver"); George F. Ogilvie III, Esq., Jon N. Wilson, Esq. and Erin Kolmansberger, Esq. appeared on behalf of Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation; and Angela T. Nakamura Ochoa, Esq. appeared on behalf of Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels.

Having considered the record and the briefs submitted in support of and in opposition to the Motion, and having entertained the arguments of counsel, and being fully informed in the premises, the Court makes the following findings of fact, conclusions of law and order:

**FINDINGS OF FACT**

1. Lewis and Clark LTC Risk Retention Group, Inc. ("L&C") was formed in 2004. Between 2004 and February 28, 2013, L&C provided general and professional liability coverage to long term care facilities and home health providers. *See* Third Amended Complaint ("TAC") at ¶1.

2. Defendants Uni-Ter Underwriting Management Corp. ("Uni-Ter UMC") and Uni-Ter Claims Services Corp. ("Uni-Ter CS"), were retained to manage Lewis & Clark.

3. In the summer of 2011 L&C suffered adverse loss development.

4. The Nevada Division of Insurance ("DOI") filed a Receivership Action related to L&C in November, 2012, commencing case number A-12-672047-B ("Receivership Action"). Plaintiff Commissioner of Insurance for the State of Nevada was appointed as the Receiver.

5. On February 28, 2013, an order of liquidation ("Liquidation Order") was entered in the Receivership Action, appointing the Commissioner of Insurance as the Receiver of L&C. *See* Liquidation Order.

6. On December 23, 2014, the Receiver instituted this lawsuit against former directors of L&C Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels ("Director Defendants"), Uni-Ter UMC, Uni-Ter CS, and U.S. Re.

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In the initial complaint, the Receiver alleged claims of gross negligence and deepening of the insolvency against the Director Defendants, negligent misrepresentation against Uni-Ter UMC, breach of fiduciary duty against Uni-Ter UMC and Uni-Ter CS, and breach of fiduciary duty against U.S. Re.

7. On December 11, 2015, Director Defendants filed their Motion to Dismiss, challenging the sufficiency of the allegations of gross negligence and asserting that a claim for deepening insolvency required allegations of fraud such that the claims must be pled with specificity.

8. On June 13, 2016, the Receiver filed its Second Amended Complaint, and, subsequently, on August 5, 2016, the Receiver filed its Third Amended Complaint—the currently operative complaint—which contains the same claims against Defendants as the original Complaint and nearly 500 pages of exhibits.

9. On April 18, 2016, Director Defendants filed a Motion to Dismiss the First Amended Complaint, asserting that claims against officers and directors needed to be supported by claims of intentional misconduct, fraud or knowing violation of the law. Said Motion was subsequently denied.

10. During the period of September 5, 2017 through April 13, 2018, Director Defendants propounded written discovery upon Plaintiff.

11. Due to the multiple requests to extend discovery in this action and the then approaching 5-year rule expiration, this Court expressly conditioned its May 16, 2018 Order continuing discovery deadlines that it would be the "last stipulation to continue."

12. On August 14, 2018, the Director Defendants filed a Motion For Judgment On The Pleadings Pursuant To NRCP 12(C) ("Motion For Judgment On The Pleadings"). On October 11, 2020, this Court denied the Director Defendants' Motion for Judgment on the Pleadings.

13. Notwithstanding this Court's May 16, 2018 preclusion of further extensions, on December 12, 2018, the Receiver filed Plaintiff's Motion for Extension of Discovery Deadlines and to Continue Trial on Order Shortening Time (Fourth Request), which this Court granted in part and denied in part, extending discovery for sixty (60) days and ordering a firm trial setting.

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

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

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

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

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

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

20. On April 6, 2020, the Receiver filed in this Court Plaintiff's Motion for Clarification on Order Shortening Time ("Plaintiff's Motion for Clarification").

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21. On April 29, 2020, the Receiver filed its Petition for Rehearing ("Plaintiff's Petition") regarding the Nevada Supreme Court's granting of the Director Defendants' Petition for Writ of Mandamus.

22. On May 10, 2020, the Receiver filed its Second Supplemental Brief to the Motion for Clarification ("Second Supplemental Brief"). In the Second Supplemental Brief, the Receiver represented:

> **Motion to Amend**. Given the recent decision by the Nevada Supreme Court (in Chur), Plaintiff will be filing a Motion to Amend its Complaint ***consistent with the Chur decision***. As a result of the Nevada Supreme Court disavowing *Shoen*, Plaintiff is asserting allegations ***to support its Complaint and claims previously asserted therein with respect to the Director Defendants***. This will likely result in additional motion practice and require targeted discovery.

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

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

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

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

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

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27. On June 24, 2020, the Receiver filed Plaintiff's Motion for Preferential Trial Setting And For Issuance of A New Discovery Scheduling Order or, In the Alternative, Motion to Stay All Discovery During the Pendency of Motion For Leave to File Fourth Amended Complaint; On Order Shortening Time ("Plaintiff's Motion for Preferential Trial Setting") seeking, *inter alia*, to extend the July 2, 2020 deadline for the Receiver to serve its initial expert disclosures.

28. At the time of the July 1, 2020 hearing on Plaintiff's Motion for Preferential Trial Setting, the Receiver sought a further extension of the July 2, 2020 deadline for the Receiver to serve its initial expert disclosures. The Defendants objected to the Receiver's request, and requested that the Court direct the Receiver to serve its initial expert disclosures on July 2. This Court granted the Receiver's request, and extended the deadline for the Receiver to served its initial expert disclosures to the conclusion of the hearing of Receiver's anticipated Motion for Leave to File Fourth Amended Complaint. As of the date of the hearing on the Receiver's Motion for Leave to File Fourth Amended Complaint, Plaintiff had still not made her initial expert disclosure.

29. On July 2, 2020, the Receiver filed its Motion for Leave to File Fourth Amended Complaint, falsely representing to this Court that "[o]ther than seeking to add Piccione as a Defendant and asserting ***a new claim against him***, the Fourth Amended Complaint ***does not add new claims against the Defendants***—it simply adds factual allegations to support the claims that have been pending against the Defendants for years and substitutes causes of action (i.e., breach of fiduciary duty in place of gross negligence)." *See* Motion for Leave to File Fourth Amended Complaint at 30:15-18 (emphasis added).

30. In actuality, the Receiver's proposed Fourth Amended Complaint seeks: (i) to amend the allegations against the Director Defendants in accordance with the NSC Opinion, and (ii) to assert three causes of action against a new defendant, Tal Piccione, for deepening of the insolvency and aiding and abetting breach of fiduciary duty (Ninth, Seventeenth, and Eighteenth Claims), two ***new*** causes of action against Uni-Ter UMC for deepening of the insolvency and aiding and abetting breach of fiduciary duty (Ninth and Fourteenth Claims); two ***new*** causes of action against Uni-Ter CS for deepening of the insolvency and aiding and abetting breach of

fiduciary duty (Ninth and Fifteenth Claims); and two ***new*** causes of action against U.S. Re for deepening of the insolvency and aiding and abetting breach of fiduciary duty (Ninth and Sixteenth Claims). *See* proposed Fourth Amended Complaint at ¶¶ 697-727).

31. The Receiver's failure to seek to add the new defendant and the new claims against Uni-Ter UMC, Uni-Ter CS or US Re in the four (4) years and three (3) months between the Receiver's December 23, 2014 filing of the original Complaint and the March 14, 2019 imposition of the Stay constitutes undue delay.

32. The Receiver's failure to disclose its intention to add a new defendant and new claims against Uni-Ter UMC, Uni-Ter CS or US Re in its filings and oral representations to counsel and this Court prior to the filing of its Motion for Leave to File Fourth Amended Complaint constitutes bad faith and reflects dilatory motives. *See MEI-GSR Holdings, LLC v. Peppermill Casinos*, Inc., 416 P.3d 249, 254–55 (Nev. 2018).

33. The Receiver's attempt to add a new defendant and new claims against Uni-Ter UMC, Uni-Ter CS and U.S. Re will further delay this litigation. Allowing the new claims will broaden the scope of the litigation, will likely result in motions to dismiss being filed, and will require additional discovery, including depositions of several individuals who have already been deposed, with less than five (5) months remaining before discovery cutoff.

34. The identity of the individual whom Plaintiff seeks to add as a defendant was known to Plaintiff at the time of the December 23, 2014 filing of the original Complaint. *See* proposed Fourth Amended Complaint at ¶¶ 29-30 ("***at all relevant times including as of the time the Receivership Action was filed***," Mr. Piccione was the "Chairman, President, Chief Executive Officer, and a Director of U.S. RE" and "Chairman and a Director of Uni-Ter." (emphasis added).

35. The factual predicate and the legal basis for the new claims for deepening of the insolvency and aiding and abetting breach of fiduciary duty Plaintiff seeks to assert against the new defendant, Uni-Ter UMC, Uni-Ter CS and US Re were known or should have been known to Plaintiff at the time of the December 23, 2014 filing of the original Complaint.

36. The Receiver acted dilatorily in failing to seek to amend the TAC to assert the new claims for deepening of the insolvency and aiding and abetting breach of fiduciary duty Plaintiff

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seeks to assert against the new defendant, Uni-Ter UMC, Uni-Ter CS and US Re much earlier. *See Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 288, 357 P.3d 966, 972 (2015).

37. Uni-Ter UMC, Uni-Ter CS and U.S. Re have ceased doing business and now must rely on former employees, over whom they have no control, to testify on their behalf and who are outside the jurisdiction of this Court for subpoena purposes. Uni-Ter UMC, UniTer CS and U.S. Re have consistently advised of counsel and this Court of the difficulties associated with locating former employees to depose or, presumably, call to testify at trial. Allowing the Receiver to amend the TAC will be detrimental to Uni-Ter UMC, Uni-Ter CS and U.S. Re's ability to properly defend themselves at the eventual trial in this case, resulting in undue prejudice.

38. As it relates to the Director Defendants, Plaintiff's proposed Fourth Amended Complaint seeks to add claims and allegations that the Director Defendants knowingly violated the law.

39. Between the deposition testimony of Plaintiff's NRCP 30(b)(6) designee and Plaintiff's responses to written discovery, there is no factual basis for Plaintiff's new allegation that Director Defendants knowingly violated the law, as Plaintiff's proposed Fourth Amended Complaint alleges.

40. With the great passage of time of the alleged violations of law and the fact that witnesses are unavailable, the Director Defendants will be unduly prejudiced in establishing their defenses to Plaintiff's new theory that the Director Defendants knowingly violated the law.If any of these findings of fact should more properly be identified as a conclusion of law, then it shall be deemed a conclusion of law.

## CONCLUSIONS OF LAW

1. While leave to amend should be freely given when justice so requires, "[t]his does not, however, mean that a trial judge may not, in a proper case, deny a motion to amend." *Stephens v. S. Nevada Music Co., Inc.*, 89 Nev. 104, 105, 507 P.2d 138, 139 (1973). Indeed, "[i]f that were the intent, leave of court would not be required." *Id*.

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

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

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

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

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

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

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

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

10. A new claim based upon a new theory of liability asserted in an amended pleading does not relate back under NRCP 15(c) after the statute of limitations has run. *Badger v. Eighth Jud. Dist. Ct.*, 373 P.3d 89, 94–95 (Nev. 2016).

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11. The fictitious defendant rule in NRCP 10(d) provides a "narrow exception, allowing the pleading of fictitious defendants only where there is an uncertainty as to their names." *Lunn v. American Maintenance Corp*., 96 Nev. 787, 618 P.2d 343 (1980). The fictitious defendant rule, however, does not apply to the "addition of a party defendant." *Id*.

12. In order to substitute a newly-named defendant for a previously named Doe defendant under NCRP 10(d), the party seeking the substitution must satisfy the requirements set forth in *Nurenberger Hercules-Werke GMBH v. Virostek*, 107 Nev. 873, 822 P.2d 1100 (1991), which include: (1) "pleading the basis for naming defendants by other than their true identity, and clearly specifying the connection between the intended defendants and the conduct, activity, or omission upon which the cause of action is based;" and (2) "exercising reasonable diligence in ascertaining the true identity of the intended defendants and promptly moving to amend the complaint in order to substitute the actual for the fictional." *Id.* at 881. Satisfaction of these elements is "necessary to the granting of an amendment that relates back to the date of the filing of the original complaint." *Id*.

13. While the Plaintiff vaguely pled fictitious defendants in its original Complaint, she has failed to meet the requirements of *Nurenberger*.

14. The Plaintiff's attempt to add the new defendant, Tal Piccione, is not substitution of a Doe defendant under NRCP 10(d), but an attempt to add a new party defendant under NRCP 15(c).

15. As a new claim based upon a new theory of liability asserted against a new party defendant in an amended pleading does not relate back under NRCP 15(c) after the statute of limitations has run, the Plaintiff's attempt to add the new party defendant is futile.

16. Justice does not require granting leave to amend in this instance because the Receiver acted dilatorily in failing to seek to amend the TAC to assert the new claims for deepening of the insolvency and aiding and abetting breach of fiduciary duty Plaintiff seeks to assert against the new defendant, Uni-Ter UMC, Uni-Ter CS and US Re much earlier. *See Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 288, 357 P.3d 966, 972 (2015).

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

18. If any of these conclusions of law should more properly be identified as a finding of fact, then it shall be deemed a finding of fact.

**ORDER**

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

DATED this ____ day of August, 2020.

Dated this 10th day of August, 2020

Nancy L Allf

NANCY L. ALLF
District Court Judge

B48 88C D21A 9B68
Nancy Allf
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DISTRICT COURT
CLARK COUNTY, NEVADA

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

**AUTOMATED CERTIFICATE OF SERVICE**

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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EXHIBIT PAGE ONLY

# EXHIBIT 6

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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

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| COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.,<br><br>Plaintiff,<br><br>vs.<br><br>IRONSHORE SPECIALTY INSURANCE COMPANY; CATLIN INSURANCE COMPANY, INC.;<br><br>Defendants. | Case No.:<br><br>**COMPLAINT** |

Plaintiff, COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., ("Plaintiff" or "Commissioner"), files this Complaint against Defendants, IRONSHORE SPECIALTY INSURANCE COMPANY ("Ironshore"), and CATLIN INSURANCE COMPANY, INC. ("Catlin", and collectively with Ironshore "Defendants" or "Insurance Providers"), alleging the following:

## INTRODUCTION

1. This diversity action for declaratory judgment and injunctive relief arises out of the Commissioner's claim to be owed the full amounts remaining under insurance

policies ("Policy Limits") sold by Defendants Ironshore and Catlin to U.S. Re Corporation.

2. U.S. Re Corporation, along with their wholly-owned subsidiaries, Uni-Ter Underwriting Management Corp and Uni-Ter Claims Services Corp (collectively "Judgment Debtors"), ran a nationwide insurance scheme out of New York and Atlanta that involved setting up risk retention groups ("RRGs"), and then making themselves the managers and reinsurance brokers for the RRGs so they could control and systematically drain money from them until they collapsed.

3. Lewis and Clark LTC Risk Retention Group, Inc. ("L&C") was a Nevada insurer that was just one of the RRGs set up and run into the ground by the Judgment Debtors. After L&C become insolvent, the Commissioner took over L&C in 2012 pursuant to Nevada law.

4. The Commissioner filed an action on behalf of L&C on December 23, 2014, in the Eighth Judicial District Court, Clark County, Nevada (Case No. A-14-7111535-C) naming the Judgment Debtors as Defendants. The case went to trial on September 20, 2021, and on October 14, 2021, the matter was submitted to the Jury, which rendered a unanimous Verdict in favor of the Commissioner. The district court subsequently entered Judgment against the Judgment Debtors totaling $20,874,860.89 in damages ("Judgment").

5. Despite their promise to pay the available policy limits for covered claims that the Judgment Debtors become legally obligated to pay, Defendants Ironshore and Catlin refuse to stand by the insurance policies that they issued and to honor their contractual undertakings.

## PARTIES

### A. PLAINTIFF

6. Plaintiff COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., is an appointed state executive position in the Nevada state government that oversees the Division of Insurance.

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**B. DEFENDANTS**

7. Defendant IRONSHORE SPECIALTY INSURANCE COMPANY is an Arizona corporation with its principal place of business in Boston, Massachusetts.

8. Defendant CATLIN INSURANCE COMPANY INC is a Texas corporation with its principal place of business in Stamford, Connecticut.

**JURISDICTION AND VENUE**

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332, as the parties are completely diverse in citizenship and the amount in controversy exceeds $75,000, exclusive of interests and costs.

10. Venue is proper in this District under 28 U.S.C. § 1391 because the Commissioner's place of business is in this District and a substantial portion of the events and omissions giving rise to the claims and losses occurred within the District.

**GENERAL ALLEGATIONS**

11. Judgment was entered against the Judgment Debtors in Dept. 27 of the Eighth Judicial District Court on December 30, 2021, in the amount of $19,059,997.28. On December 2, 2022, the Court further awarded Plaintiff $1,814,863.61 in attorneys' fees and costs, for a total judgment in favor of Plaintiff and against the Judgment Debtors jointly and severally in the amount of $20,874,860.89.

12. The Judgment Debtors had multiple insurance policies that together should have covered more than half the amount of the Judgment. Catlin issued a $5,000,000 primary layer of insurance (Policy Number IAP-97329-0514) to U.S. Re ("Catlin Policy"), and Ironshore issued a $5,000,000 excess layer of insurance (Policy Number 000703604) to U.S. Re ("Ironshore Policy").

13. On information and belief, the Judgment Debtors falsely represented to the Commissioner that the Catlin Policy and the Ironshore Policy are the only two policies providing coverage that had not been exhausted.

14. Based upon this representation, Plaintiff executed a Settlement Agreement and Mutual Release with the Judgment Debtors on or about July 13, 2022 ("Agreement").

15. The Agreement provided that Ironshore and Catlin will pay to Plaintiff the sum of $5,200,000 ("Settlement Amount") within 30 days after receipt of a fully-executed copy of the Agreement, a W-9 from Plaintiff identifying the name and address of the payee, and service of notice of entry of order approving the Agreement by the Eight Judicial District Court (Case No. A-12-672047-B).

16. The Agreement also included a strict 30-day provision that was specifically negotiated by counsel for the parties that made the Agreement of nor force and effect and to be null and void should the settlement funds ("Settlement Funds") not be received within 30 days.

17. The Agreement contains no provision regarding dismissal of US Re or any other defendant.

18. Paragraph B(1) of the Agreement states as follows:

> **Within 30 days after receipt of a fully-executed copy of this Agreement, a W-9 from Plaintiff identifying the name and address of the payee, and service of notice of entry of an order approving this Agreement** by the Eighth Judicial District Court in Clark County, Nevada, in Case no.: A-12-672047-B, STATE OF NEVADA, EX REL. COMMISSIONER OF INSURANCE, IN HIS OFFICIAL CAPACITY AS STATUTORY RECEIVER FOR DELINQUENT DOMESTIC INSURER vs. LEWIS & CLARK LTC RISK RETENTION GROUP, INC. (the "Receivership"), the insurance carriers for the Corporate Defendants will pay Plaintiff the sum of $5,200,000 (US) by company check(s) (the "Settlement Funds") as consideration. **However, all Parties acknowledge and agree that this Agreement is of no force and effect until said Settlement Funds are actually received by the Plaintiff, and that this Agreement shall be null and void in the event such Settlement Funds are not received by the Plaintiff within the 30-day time period referenced herein.**

19. This strict 30-day provision was specifically negotiated between counsel for the parties.

20. On July 20, 2022, undersigned counsel forwarded a copy of the signed Agreement, a W-9, and an notice of entry of order ("NOE") as required by paragraph B(1) of the Agreement.

21. Thus, the 30 day period to receive the Settlement Funds (as defined in the

Agreement) ended on August 19, 2022.

22. On July 22, 2022, counsel for US Re responded stating that he had received these items and had "forwarded them to the client and carriers."

23. In addition, Plaintiff's counsel mailed the items to counsel for US Re.

24. On August 19, 2022, Plaintiff's representative received a check in the amount of approximately $400,000 from one insurer, but did not receive the remaining amount of the Settlement Funds.

25. On August 24, 2022, five (5) days after the expiration of the strict 30-day time period for payment, Plaintiff received a check from Ironshore for approximately $4.79M ("Ironshore Check").

26. The Ironshore Check did not contain any notation that it was in full satisfaction of the debts owed to Plaintiff, or any other notation.

27. Accordingly, on information and belief, Plaintiff did not waive its right to collect the remaining amount of the Judgment from the Defendants.

28. On information and belief, Defendants have additional policies other than what has been paid to Plaintiff which are required to be paid to Plaintiff to satisfy the outstanding unpaid amounts of the Judgment.

## FIRST CAUSE OF ACTION

**(By Plaintiffs against all Defendants)**

29. Plaintiff incorporates by this reference each of the allegations set forth in each and every paragraph set forth in this Complaint as if fully set forth herein.

30. This Court has the power and authority to declare the rights, status and interests of the parties.

31. A justifiable controversy exists between Plaintiff and Defendants regarding their respective rights and obligations such that Plaintiff asserts a claim of a legally protected right.

32. This issue is ripe for judicial determination.

33. Plaintiff is therefore entitled to and requests that this Court issue a declaratory judgment finding, without limitation, that:

i. Defendants owe Plaintiff the remaining unpaid amounts of the Judgment pursuant to the applicable insurance contracts.

ii. Plaintiffs are entitled to the damages sought, including without limitation herein;

iii. Such other and further relief as deemed appropriate.

34. Plaintiffs have been forced to retain the law firm of Hutchison & Steffen to prosecute this action and is entitled to an award of reasonable attorneys' fees and costs of suit incurred herein. Wherefore, Plaintiffs pray for relief including without limitation as set forth herein.

WHEREFORE, Plaintiffs pray for relief and judgment as follows:

A. For damages, including without limitation general, compensatory and punitive damages, in an amount in excess of $75,000, the exact amount to be proven at trial;

B. For declaratory relief, including without limitation as set forth herein;

C. For prejudgment interest from the date said sums first became due at the highest rate allowed under applicable law;

D. For an award of costs and reasonable attorney fees pursuant to applicable law, with interest at the highest rate allowed by law; and

E. For such other and further relief as the Court deems just and proper.

DATED this 10th day of April, 2023.

*/s/Brenoch Wirthlin*

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