

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

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

Appellant,

vs.

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

Respondents.

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

Appellants,

vs.

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

Respondents.

Case No. 85668 Electronically Filed
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Elizabeth A. Brown
Clerk of Supreme Court

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

Case No. 85728

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

Appellant,

vs.

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

Respondents.

Case No. 85907

Respondent U.S. Re Corporation (“U.S. Re”) hereby moves to strike Appellant’s Response to Respondent’s Reply Regarding Order Amending Caption and to Show Cause (“Commissioner’s Response”) filed on October 26, 2023 because it exceeds the scope of this Court’s October 12, 2023 Order Granting Motion.

LEGAL ARGUMENT

A. Commissioner’s Response to U.S. Re’s Reply Regarding Order Amending Caption and to Show Cause Must Be Stricken.

On May 10, 2023, the Court issued an Order Amending Caption and to Show Cause (“OSC”) directing Appellant Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc.

(“Commissioner”) to show cause why Case No. 85907 should not be dismissed for lack of jurisdiction because of a timely filed tolling motion that had not been formally resolved in the district court. OSC at p. 1. In its June 23, 2023 response to the OSC, the Commissioner misstated that the tolling motion had been resolved after the district court had vacated the order resolving the tolling motion. In its July 7, 2023 reply, U.S. Re corrected the record, advising this Court, *inter alia*, that the jurisdictional defect still existed because the district court had vacated its order. *See generally* Respondent U.S. Re Corporation’s Reply to Appellant’s Response to Order Amending Caption and to Show Cause (“Reply”). Commissioner moved for leave to respond to U.S. Re’s Reply on July 21, 2023, which this Court granted on October 12, 2023 (“October 12 Order”).

The October 12 Order granted the Commissioner the narrow relief of “leave to file a response to the reply regarding this court’s order amending caption and to show cause” in Case No. 85907. The Commissioner, however, exceeded that leave by including exhaustive supplemental arguments to its response to this Court’s May 10, 2023 Order to Show Cause in Case No. 85668. Indeed, a full section of the Commissioner’s October 26, 2023 Response is exclusively devoted to these ultra vires arguments. *See* Commissioner’s Response at 6-10. Notwithstanding the consolidation of the appeals, this Court’s October 12 Order did not grant the Commissioner leave to supplement its arguments in response to the Order to Show

Cause in Case No. 85668. Thus, Commissioner's Response must be stricken because exceeds the leave granted by this Court's October 12 Order.

B. U.S. Re Is Not A Party To Appeal No. 85668 Despite Commissioner's Contention.

Even if this Court were to determine Commissioner's Response need not be stricken, Commissioner includes irrelevant arguments pertaining to Case No. 85668 because U.S. Re is not a party in that appeal. Commissioner contends otherwise for the first time in Commissioner's Response. In Case No. 85668, Commissioner filed its Case Appeal Statement and its Docketing Statement on November 25, 2022 and December 13, 2022, respectively. Both documents clearly reflect that the Corporate Defendants are not parties to Case No. 85668, which seeks relief from the district court's "erroneous rulings" pertaining solely to the Director Defendants. The Case Appeal Statement and the Docketing Statement identify the "Director Defendants" as the sole respondents to the appeal. *See* Case Appeal Statement at ¶ 4; Docketing Statement at ¶ 3.

This Court recognized that the Corporate Defendants were not parties to Case No. 85668 when it issued the Order to Show Cause in that appeal. *See* May 10, 2023 Order to Show Cause in Case No. 85668 ("This is an appeal from a district court order granting respondents Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert . Hurlburt, Barbara Lumpkin, Jeff Marshall, and Eric Stickels' judgment on the pleadings pursuant to NRCP 12(c) and related interlocutory orders. . .

Preliminary review of the docketing statement and the documents submitted to the court pursuant to NRAP 3(g) reveals a potential jurisdictional defect. . . It appears appellant is not aggrieved with respect to the interlocutory orders relating solely to the corporate defendants. . . Following a jury trial, the district court entered judgment against corporate defendants on all claims and granted appellant her requested relief. It does not appear this court has jurisdiction over the challenged interlocutory orders as they preceded appellant's successful litigation of the claims involving corporate defendants.”)

Solely as a result of the district court’s entry of the June 29, 2023 Order, the Commissioner has reversed its course and not, belatedly, attempts to bootstrap the Corporate Defendants as respondents in Case No. 85668.

C. The Commissioner Failed to Challenge the June 29, 2023 Order.

a. Motions for Reconsideration.

U.S. Re moved for reconsideration of the Order Denying Motion to Dismiss and Enforce Settlement Agreement (“Reconsideration Motion No. 1”) and moved for reconsideration of the Order Granting Attorney Fees and Costs (“Reconsideration Motion No. 2”) on December 14 and December 16, 2022, respectively. The district court denied U.S. Re’s Reconsideration Motion No. 2 but reserved ruling on Reconsideration Motion No. 1, proposing instead that the parties negotiate and file a satisfaction of judgment to reach finality.

The parties could not reach a resolution and the district court signed an order unilaterally prepared by the Commissioner denying U.S. Re's Reconsideration Motion No. 1 and Reconsideration Motion No. 2 (the "April 12 Order"). On June 8, 2023, after hearing argument and considering all the papers on file, the district court vacated the April 12 Order. The Commissioner failed to advise this Court of the district court's June 8, 2023 action when the Commissioner filed its June 23, 2023 response to the Order Amending Caption and To Show Cause, so U.S. Re brought this to the Court's attention in its reply. *See* Respondent U.S. Re Corporation's Reply to Appellant's Response to Order Amending Caption and to Show Cause filed on July 7, 2023 ("U.S. Re's July 7 Reply"). The district court entered its written order of its June 8, 2023 action on June 29, 2023 ("June 29 Order") and entered the Satisfaction of Judgment on June 30, 2023. *See* **Exhibit B** and **Exhibit C**, respectively, to U.S. Re's July 7 Reply.

On July 13, 2023, Commissioner filed a motion for partial reconsideration of the June 29 Order, seeking only to vacate the Satisfaction of Judgment. *See* Commissioner's Motion for Partial Reconsideration and NRCP 60(b) Relief from the Court's June 29, 2023 Order Granting NRCP 60 Relief to U.S. Re Corporation, to Vacate the Satisfaction of Judgment Entered on June 30, 2023, and For a New Trial ("Commissioner's Partial Reconsideration Motion") attached hereto as **Exhibit A** (excluding exhibits). Importantly, the Commissioner did not challenge

the June 29 Order in any other respect – either by seeking reconsideration or by direct appeal. *See id.* On August 29, 2023, the district court entered its Order Denying Reconsideration.

b. The June 29 Order is not void.

Notwithstanding Commissioner’s statement that “the June 29, 2023 order referenced by Respondents is void as it was not entered pursuant to the procedures set forth in NRAP 12A” (Response at 3:14-15), the Commissioner failed to challenge the validity of the June 29 Order – either by seeking reconsideration or by direct appeal – and NRAP 12A does not apply.

In support of its NRAP 12A argument, the Commissioner extensively cites *Foster v. Dingwall* 126 Nev. 49, 228 P.3d 453 (2010) to establish the district court lacked jurisdiction to vacate the April 12 Order. However, *Foster* is inapplicable in that its two issues are not in question here. The first issue deals with a party’s challenge to the district court’s final judgment nearly two years after the challenged judgment was entered by the district court based on newly discovered evidence. *See Foster* at 126 Nev. at 50, 228 P.3d at 454. The Court ultimately determined that the perfection of an appeal does not toll the NRCP 60(b)(2) six-month time period for seeking relief. *See id.* This is not at issue in this matter.

Second, *Foster* clarified the procedure in *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978) whereby “if a party to an appeal believes a basis exists to alter,

vacate, or otherwise modify or change an order or judgment *challenged* on appeal after an appeal from that order or judgment has been *perfected* in this Court, the party can seek to have the district court certify its intent to grant the requested relief.” *Foster*, 126 Nev. at 52, 228 P.3d at 455 (emphasis added). As stated above, Commissioner failed to challenge the validity of the June 29 Order as it pertained to vacating the April 12 Order. Further, the appeal of the order was not perfected because the June 29 Order vacated the April 12 Order and thus the “remedy” for the jurisdictional defect no longer impacted this matter. Therefore, this Court’s clarification of the *Huneycutt* procedure does not affect this matter. Commissioner failed to challenge the portion of the June 29 Order that vacated the April 12 Order, and therefore the appeal was not perfected.

Further, even if the appeal had been perfected, as stated in *Foster*, “when an appeal is *perfected*, the district court is divested of jurisdiction to revisit issues that are pending before this court, *[but] the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order.*” *Foster*, 126 Nev. at 52, 228 P.3d at 455 (citing *Mack-Manley v. Manley*, 122 Nev. 849, 855 138 P.3d 525, 529-30 (2006)) (emphasis added). *Foster* emphasizes that district courts retain jurisdiction to decide matters that are collateral to and independent from the appealed order while the appeal remains pending. *Foster*, 126 Nev. at 52-53, 138 P.3d at 455. The June 29 Order was collateral to and independent

from the appeal. More importantly, however, the threshold question is whether an appeal has been “perfected”. As this Court recognized when it directed the Commissioner to show cause why the appeal should not be dismissed, this appeal has never been “perfected” in that the notice of appeal was premature under NRAP 4(a) because it was filed after the timely filing of a tolling motion and before the tolling motion was formally resolved. *See, generally*, Order Amending Caption and to Show Cause. As such, the Commissioner’s citations of NRAP 12A and *Foster* are unavailing.

The district court entered a valid order on June 29, 2023, vacating the April 12 Order. While the Commissioner sought partial reconsideration of the June 29 Order, the only reconsideration sought was relative to the Court’s entry of the Satisfaction of Judgment – the Commissioner did not challenge the district court’s vacation of the April 12 Order. *See* Ex. A; *see also* Transcript of August 9, 2023 Hearing at 3:1-7, attached hereto as **Exhibit B** (Commissioner’s counsel: “the point we’re here on today is just the satisfaction of judgment . . . but we’re not necessarily looking for reconsideration of the order [sic] just as it related to the satisfaction of judgment”). Nor did the Commissioner appeal the June 29 Order. Further, NRAP 12A and *Foster* do not apply, *inter alia*, because the Commissioner’s appeal has never been perfected. Therefore, the June 29 Order is valid and should be recognized by this Court.

CONCLUSION

The Commissioner's inappropriate attempt to supplement its response to the Order to Show Cause in Case No. 85668 exceeds the leave granted by this Court's October 12 Order and is an entirely inappropriate attempt to belatedly bootstrap the Corporate Defendants into that appeal. Accordingly, the Commissioner's Response should be stricken. Further, as this Court originally recognized, Case No. 85907 has not been properly perfected. Nor did the Commissioner challenge the June 29 Order vacating the April 12 Order. As such, Commissioner's arguments regarding the validity of the June 29 Order must be disregarded.

DATED this 13th day of November, 2023.

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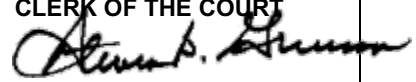
Attorneys for U.S. RE Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano, LLP, and that on this 13th day of November, a copy of the foregoing **RESPONDENT U.S. RE CORPORATION'S MOTION TO STRIKE APPELLANT'S RESPONSE TO RESPONDENT'S REPLY REGARDING ORDER AMENDING CAPTION AND TO SHOW CAUSE** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system.

/s/ Jelena Jovanovic
An employee of McDonald Carano

EXHIBIT “A”



MOT

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DISTRICT COURT OF NEVADA

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

Case No.: A-14-711535-C

Dept. No.: XXVII

**MOTION FOR PARTIAL
RECONSIDERATION AND NRCP 60(b)
RELIEF FROM THE COURT'S JUNE 29,
2023 ORDER GRANTING NRCP 60
RELIEF TO U.S. RE CORPORATION, TO
VACATE THE SATISFACTION OF
JUDGMENT ENTERED ON
JUNE 30, 2023, AND
FOR A NEW TRIAL**

Plaintiff Commissioner of Insurance for the State of Nevada as Receiver of Lewis & Clark LTC Risk Retention Group, Inc. ("Plaintiff" or "Commissioner")¹ hereby submits the following motion for partial reconsideration pursuant to EDCR 2.24 and NRCP 60(b) relief from the Court's June 29, 2023 Order granting NRCP 60 relief to Defendant U.S. Re Corporation ("Defendant" or "U.S. Re" and together with the two Uni-Ter Defendants "Corporate Defendants", and collectively with Plaintiff the "Parties"), to alter or amend the Satisfaction of Judgment entered June 30, 2023 pursuant to NRCP 59, and for a new trial

¹ Lewis and Clark LTC Risk Retention Group, Inc. shall be referred to herein at "L&C."

1 pursuant to NRCP 59 (“Motion”). This Motion is based on the following Memorandum of
2 Points and Authorities, all exhibits thereto, the pleadings and papers on file, and any
3 argument of counsel at the time of a hearing of the Motion.

4 DATED this 13th day of July, 2023.

HUTCHISON & STEFFEN

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12 MEMORANDUM OF POINTS AND AUTHORITIES

13 I. INTRODUCTION AND SUMMARY OF ARGUMENT

14 This Motion seeks partial relief from the Court’s June 29, 2023 Order providing the
15 Corporate Defendants a Satisfaction of Judgment, and for relief from the Satisfaction of
16 Judgment entered by the Court the following day on June 30, 2023 (the “Orders”). These
17 Orders overturn the Court’s April 12, 2023 Order which found that as a matter of law the
18 Court lacked jurisdiction to decide any of U.S. Re’s pending motions. Critically, the Court
19 overturned its prior decisions without any intervening change in fact or law. The Orders
20 themselves seem to corroborate this point because they provide no supporting findings of
21 fact or conclusions of law justifying the Court’s decision.

22 A. Why the Court should grant Plaintiff relief from entry of Satisfaction of 23 Judgment in this matter

24 The Court is understandably motivated to see this nearly 10-year-old case finally
25 resolved. However, the decision by the Court to provide the Corporate Defendants with a
26 Satisfaction of Judgment was made without full and fair consideration of the impact that
27 decision would have on the Commissioner and the hundreds of claimants still waiting for
28 payment from L&C. The Court’s decision also seems to overlook that nearly two years ago,

1 a three-week trial was held in which a Jury unanimously found that the Corporate
2 Defendants were responsible for causing the insolvency of L&C. That same Jury would be
3 saddened to learn today that two weeks ago this Court's Satisfaction of Judgment placed the
4 interests of providing "finality" to the Corporate Defendants above providing justice to
5 hundreds of people still waiting to receive payment of their claims from L&C. Families
6 should always come before the interests of corporations, especially corporations that are
7 defunct, dissolved, or are no longer in business like the Corporate Defendants. Instead of
8 providing a pathway that allows the Commissioner to collect additional money on behalf of
9 L&C, the Court's Satisfaction of Judgment serves only to block the Commissioner's
10 collection efforts in a multitude of ways.

11 For example, the Orders gravely impact the ability of the Commissioner to pursue
12 and collect additional money on behalf of L&C in other forums where cases are currently
13 pending. As this Court is aware, the Commissioner has cases currently pending before the
14 U.S. District Court and before the Nevada Supreme Court that allege parties other than the
15 Corporate Defendants have liability for the insolvency of L&C. The Satisfaction of
16 Judgment issued by this Court has the effect of providing defendants in those actions with a
17 defense that the claims for damages against them have all been satisfied, and that the cases
18 currently pending against them should be dismissed.

19 In sum, this Court's decision to issue a Satisfaction of Judgment should be vacated
20 because such relief would unfairly damage the Commissioner and the Receivership, and is
21 legally unsupportable on a multitude grounds, including:

22 (1) The Satisfaction Judgment unfairly and prejudicially handcuffs the
23 Commissioner's prosecution of cases currently pending in other forums.

24 (2) The Satisfaction Judgment places the interest of providing "finality" to
25 corporations no longer in business over the financial needs and interests of real families still
26 hopeful and patiently waiting for payment from the Receiver.

27 (3) The Satisfaction of Judgment modifies and adds terms to the settlement agreement
28 ("Agreement") that the Parties never bargained for and are unambiguously absent from the

1 Agreement. The settlement agreement contains no provision that a Satisfaction of Judgment
2 will be provided by Plaintiff to the Corporate Defendants. The Commissioner would never
3 have agreed to such a term for all the reasons contained herein.

4 (4) The Satisfaction Judgment was procedurally improper because it was ordered by
5 the Court unilaterally without ever being requested by any party in this matter.

6 (5) The Satisfaction of Judgment was based on the Court's determination that
7 acceptance by Plaintiff of money from U.S. Re constituted waiver. Waiver is an issue of fact
8 and was determined by the Court without an evidentiary hearing in violation of due process.

9 **B. How the Court can provide finality to the Corporate Defendants as well**
10 **as to Plaintiff and the creditors of L&C**

11 Regarding providing finality to the Corporate Defendants, this Motion does not
12 request that the Court's order regarding the dismissal of U.S Re from this action be modified
13 or amended. The Commissioner does not want this case reopened and does not foresee any
14 need for the Court's further involvement. U.S. Re has already requested that the Nevada
15 Supreme Court dismiss any pending appeal concerning the Corporate Defendants. The
16 Receivership matter is still open, and as both this Court and the U.S. Re have repeatedly
17 stated, the open Receivership case is the appropriate forum in which U.S. Re can and should
18 bring any additional matters for adjudication.

19 Regarding providing finality to Plaintiff, the Receiver is still engaged in his fiduciary
20 duty to gather the assets of L&C so that the creditors of the insolvent insurance company
21 can be fully compensated. This Court can help provide finality to the families still waiting
22 for full payment on their claims by vacating the Satisfaction of Judgment issued by this
23 Court. The Receiver has a fiduciary responsibility to secure and provide whatever assets of
24 L&C are available to the individuals and families impacted by the insolvency of L&C.
25 Finality for these individuals will not take place until they are fully paid. Cases currently
26 pending before the Nevada Supreme Court and U.S. District Court could provide the money
27 needed by the Receivership to do so, but the Receiver's efforts in this regard have been
28 placed in jeopardy by the Satisfaction of Judgment issued by this Court. For these reasons,

1 the Court should issue an order amending its June 29, 2023 Order regarding issuance of a
2 Satisfaction of Judgment, and to vacate the Satisfaction of Judgment entered on June 30,
3 2023.

4 **II. FACTS**

- 5 1. The Corporate Defendants failed to pay the amounts remaining under their insurance
6 policies despite the outcome of the trial in this matter in which the Jury handed down
7 a unanimous \$15.2 million verdict against them.
- 8 2. Instead, the Corporate Defendants began negotiating for a full release for individuals
9 and entities not parties to this action in exchange for what was represented to be the
10 amounts remaining under the Corporate Defendants only two insurance policies.
- 11 3. On July 13, 2022, the Parties executed a Settlement Agreement (“Agreement”)
12 which contained a provision that it would not become effective only if the total
13 amount \$5,200,000.00 was paid to Plaintiff within 30 days.
- 14 4. The Agreement contains no provision regarding dismissal of US Re or any other
15 defendant.
- 16 5. Paragraph B(1) of the Agreement states as follows:

17 **Within 30 days after receipt of a fully-executed copy of this Agreement, a**
18 **W-9 from Plaintiff identifying the name and address of the payee, and**
19 **service of notice of entry of an order approving this Agreement** by the
20 Eighth Judicial District Court in Clark County, Nevada, in Case no.: A-12-
21 672047-B, STATE OF NEVADA, EX REL. COMMISSIONER OF
22 INSURANCE, IN HIS OFFICIAL CAPACITY AS STATUTORY
23 RECEIVER FOR DELINQUENT DOMESTIC INSURER vs. LEWIS &
24 CLARK LTC RISK RETENTION GROUP, INC. (the “Receivership”), the
25 insurance carriers for the Corporate Defendants will pay Plaintiff the sum of
26 \$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.

27 *See Agreement, Exhibit 1 hereto, at pp. 1-2 (emphasis added).*
28

6. This strict 30-day provision was specifically negotiated between counsel for the parties. *See* emails between counsel, Exhibit 2 hereto.
7. 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. *See* Exhibit 3.
8. Thus, the 30 day period to receive the Settlement Funds (as defined in the Agreement) ended on August 19, 2022.
9. 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.” *Id.*
10. In addition, undersigned counsel mailed the items to counsel for US Re. *See* Exhibit 4.
11. 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. *See* Exhibit 5.
12. On August 24, 2022, five (5) days after the expiration of the strict 30-day time period for payment, Plaintiff received a check from another insurer for approximately \$4.79M. *See* Exhibit 6.
13. Thus, because the Corporate Defendants failed to pay the total agreed amount on time, and as a result the Settlement Agreement never had any force or effect pursuant to its own unambiguous terms.
14. On October 21, 2022, U.S. Re filed a motion to dismiss and enforce the settlement agreement in which the Court ruled that it was divested of jurisdiction by the filing of a Notice of Appeal, and could not rule on the matter and took it off calendar.
15. On December 14, 2022, U.S. Re filed a motion for reconsideration of the Court’s denial of U.S. Re’s motion to dismiss and enforce the settlement agreement.
16. On December 16, 2022, U.S. Re filed a motion for reconsideration of the Court’s decision on U.S. Re’s motion regarding attorney fees and costs.

1 17. On March 31, 2023, Plaintiff was told by counsel for U.S. Re that there was an
2 insurance policy never before disclosed to Plaintiff that could potentially provide
3 additional money to further satisfy the Judgment against the Corporate Defendants.
4 18. On April 10, 2023, Plaintiff filed an action in U.S. District Court, District of Nevada
5 (Case No. 2:23-cv-00537) (“Federal Action”).
6 19. The defendants in the Federal Action are Ironshore Specialty Insurance Company,
7 Inc. (“Ironshore”) and Catlin Insurance Company, Inc. (“Catlin”, and collectively
8 with Ironshore, “Insurance Carriers”).
9 20. Ironshore and Catlin are the two Insurance Carriers that were obligated by the terms
10 of Settlement Agreement (“Agreement”) to pay Plaintiff the settlement funds within
11 30 days. The Federal Action alleges, among other things, that settlement funds were
12 not received by Plaintiff within 30 days, and that as a result, the Agreement was
13 rendered of no force and effect.
14 21. On April 11, 2023, Plaintiff submitted to the Court a proposed order denying U.S.
15 Re’s two motions for reconsideration and provided notice to U.S. Re’s counsel by
16 copying him on the email.
17 22. On April 12, 2023, the Court again denied U.S. Re’s Motions for reconsideration,
18 again stating that the Court lacked jurisdiction because of the pending appeals.
19 23. On May 2, 2023, U.S. Re again petitioned the Court for the same relief already
20 denied twice before through an “Emergency Request for Status Conference.”
21 24. On May 19, 2023, U.S. Re filed a motion for relief under NRCP 60 from the Court’s
22 order on motions for reconsideration.
23 25. At the hearing on U.S. Re’s motion for NRCP 60 relief, the Court’s started the
24 hearing by asking Plaintiff’s counsel, “how are we going to get this case resolved.”
25 26. Also at the hearing, counsel or U.S. Re stated that the motion for NRCP 60 was
26 brought because “at the status conference Your Honor said that if we wanted to bring
27 a motion to enforce the settlement agreement, it needed to be within the
28 receivership.”

1 27. On June 29, the Court issued its Order Granting Defendant U.S. Re Corporation's
2 Motion to Vacate the Order Denying Motions for Reconsideration and on June 30,
3 2023 issued a Satisfaction of Judgment.

4 **III. ARGUMENT**

5 **A. Legal Standard**

6 EDCR 2.24(b) provides that “[a] party seeking reconsideration of a ruling of the
7 court, other than any order that may be addressed by motion pursuant to NRCP50(b), 52(b),
8 59 or 60 must file a motion for such relief withing 14 days after service of written notice of
9 the order . . .” EDCR 2.24 (emphasis added). Under NRCP 60(b) the court has the authority
10 to relieve a party from an order for various reasons, including, but not limited to, mistake,
11 inadvertence, fraud, or any other reason that justifies relief. *See* NRCP 60(b). This Court has
12 “wide discretion in deciding whether to grant or deny a motion” to set aside an order. *Cook*
13 *v. Cook*, 112 Nev. 179, 181, 912 P.2d 264, 265 (1996). Under NRCP 59, the court upon
14 motion has the authority to grant a new trial “on all or some of the issues—and to any
15 party—for any of the following causes or grounds materially affecting the substantial rights
16 of the moving party.” Various grounds are provided in Rule 59 including an “error in law
17 occurring at the trial.” NRCP 59 also provides relief upon motion to alter or amend a
18 Judgment.

19 **B. The Agreement never took effect and was null and void by its own terms** 20 **as the Corporate Defendants failed to comply with its terms. The** 21 **Satisfaction of Judgment added a new provision to the Agreement which** 22 **the Court cannot do and it must be vacated.**

23 As noted above, paragraph B(1) of the Agreement states as follows:

24 **Within 30 days after receipt of a fully-executed copy of this Agreement, a**
25 **W-9 from Plaintiff identifying the name and address of the payee, and**
26 **service of notice of entry of an order approving this Agreement by the**
27 **Eighth Judicial District Court in Clark County, Nevada, in Case no.: A-12-**
28 **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

1 \$5,200,000 (US) by company check(s) (the “Settlement Funds”) as
2 consideration. **However, all Parties acknowledge and agree that this**
3 **Agreement is of no force and effect until said Settlement Funds are**
4 **actually received by the Plaintiff, and that this Agreement shall be null**
5 **and void in the event such Settlement Funds are not received by the**
6 **Plaintiff within the 30-day time period referenced herein.**

7 The Agreement provides very clearly that it “is of no force and effect until said Settlement
8 Funds are actually received” and that it is “null and void in the event such Settlement Funds
9 are not received by the Plaintiff within the 30-day time period referenced herein.” See
10 Exhibit 1. There is no dispute that the Settlement Funds were not received within the
11 required 30-day period. Thus, but its own terms the Agreement “is of no force and effect”
12 and because “null and void” upon the expiration of the 30-day period. Thus, entering a
13 Satisfaction of Judgment on a void Agreement is not proper.

14 Further, the Agreement contains no provision regarding Plaintiff allowing a
15 Satisfaction of Judgment to be entered in this matter. In fact, such a provision was
16 intentionally left out of the Agreement by Plaintiff for the reasons stated herein. Because of
17 this, the Court’s unilateral decision to issue a Satisfaction of Judgment violated the
18 longstanding legal principle that it is not the role of courts to add terms to contracts. The
19 Nevada Supreme Court has held and it is binding precedent in Nevada that Courts cannot
20 rewrite contracts. As the Nevada Supreme Court has unequivocally held:

21 **It is axiomatic that a court will not rewrite a contract for the parties,**
22 **especially when it would have to interject terms that would change the value**
23 **of the instrument.**

24 *Gartland v. Giesler*, 96 Nev. 53, 55, 604 P.2d 1238, 1239 (1980); *see also APCO*
25 *Constr., Inc. v. Helix Elec. of Nevada, LLC*, 138 Nev. Adv. Op. 31, 509 P.3d 49, 54 (2022)
26 (“Courts ‘should not rewrite contract provisions that are otherwise unambiguous ... [] or ...
27 attempt to increase the legal obligations of the parties where the parties intentionally limited
28 such obligations.’ ”).

1 As the Nevada Supreme Court stated in *Gartland*, the prohibition against Nevada
2 courts adding terms to contract is especially important when new “terms would change the
3 value of the instrument.” The Supreme Court of Nevada has stated, “A district court may
4 reconsider a previously decided issue if [1] substantially different evidence is subsequently
5 introduced or [2] the decision is clearly erroneous.” *Masonry and Tile Contractors Ass’n of*
6 *Southern Nevada v. Jolley, Urga & Wirth, Ltd.* 113 Nev. 737, 741 (Nev. 1997). A court
7 may rehear a motion even if “the facts and the law [a]re unchanged” because “the judge i[s]
8 more familiar with the case by the time the second motion [i]s heard[.]” *Harvey’s Wagon*
9 *Wheel, Inc. V. MacSween*, 96 Nev. 215, 218 (Nev. 1980).

10 In this matter, the Plaintiff would never have entered into the Agreement with the
11 Corporate Defendants if it was conditioned upon providing to a Satisfaction of Judgment to
12 them. The value to Plaintiff of the Agreement containing such a provision would have been
13 a complete deal breaker. Despite the unambiguous absence of a Satisfaction of Judgment
14 provision being part of the Agreement, the Court provided exactly this to U.S. Re in
15 response to U.S. Re’s efforts to enforce the Settlement Agreement. Accordingly, the
16 Satisfaction of Judgment provide to U.S. Re by the Court is contrary to Nevada law and
17 should be vacated.

18 **C. The Agreement is unenforceable as it was procured by fraud.**

19 The Agreement was procured by the Corporate Defendants’ fraudulent
20 misrepresentations. As courts across the country of recognized, “settlement agreements—
21 like all other contracts—are unenforceable if they are procured by fraud.” *Transcor Astra*
22 *Grp. S.A. v. Petrobras Am. Inc.*, 650 S.W.3d 462, 473 (Tex. 2022), reh’g denied (Sept. 2,
23 2022), cert. denied, No. 22-518, 2023 WL 3571493 (U.S. May 22, 2023) (citing *Italian*
24 *Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 331 (Tex. 2011)); see
25 also *Daneshmand v. City of San Juan Capistrano*, 60 Cal. App. 5th 923, 931, 275 Cal. Rptr.
26 3d 245, 253 (2021) (“Where it is shown that deception has been practiced in obtaining a
27 release it may not be considered as a satisfaction of anything not consented to by the
28

1 **claimant.”).** Here the Agreement was procured by the false representation of the Corporate
2 Defendants that only Catlin and Ironshore had contractually agreed to provide coverage for
3 the judgment. Plaintiff learned subsequent to the Agreement that this statement was false
4 and designed to induce Plaintiff to enter into the Agreement. This is, in part, the subject of
5 the Federal Action and it is improper for this Court to purport to enforce a fraudulent
6 Agreement that is the subject of the pending Federal Action. Accordingly, the Satisfaction
7 of Judgment must be vacated.

8 **D. The Satisfaction Judgment was procedurally improper because it was**
9 **ordered by the Court unilaterally without ever being requested by the**
10 **Parties to this matter.**

11 The Satisfaction of Judgment was granted by this Court in this matter without any
12 Party first moving the Court for such relief. There is no pleading filed that any party filed
13 that U.S. Re can point to containing a request that a Satisfaction of Judgment be entered by
14 the Court. As a result, Plaintiff was not afforded adequate notice and the ability to respond
15 to such relief because it was never even requested by U.S. Re. In other words, the Court
16 unilaterally made the decision to issue a Satisfaction of Judgment without any moving
17 papers requesting such relief. Specifically, a Satisfaction of Judgment was never requested
18 by U.S. Re its Motion or in any of the underlying motions for which U.S. Re has requested
19 relief. The only relief requested by U.S. Re in the Motion was for this Court to “vacate its
20 April 12, 2023 Order denying U.S. Re’s two motions for reconsideration.” Additionally,
21 U.S. did not request any additional, relief as the court may deem appropriate, but instead
22 concluded its Motion by stating that “U.S. Re respectfully requests that this Court grant its
23 motion to vacate the April 12, 2023 Order.” See U.S. Re’s Motion for NRCP 60 Relief,
24 page 12. It is improper, therefore, for the Court to enter a Satisfaction of Judgment which
25 was never requested by U.S. Re for which Plaintiff did not receive adequate and timely
26 notice.

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1 E. **The Satisfaction of Judgment was based on the Court's determination**
2 **that acceptance by Plaintiff of money from U.S. Re constituted waiver.**
3 **Waiver is an issue of fact and was determined by the Court without an**
4 **evidentiary hearing in violation of due process.**

5 The Satisfaction of Judgment issued by the Court was based on the Court's
6 determination that acceptance by Plaintiff of money from U.S. Re constituted waiver.
7 Waiver is an issue of fact and was determined by the Court without an evidentiary hearing in
8 violation of due process. Due process requires there be an evidentiary hearing on the issue of
9 whether the actions of the Parties constituted waiver. "Issues of whether a waiver has been
10 implied by conduct are questions for the finder of fact." *Merrill v. DeMott*, 113 Nev. 1390,
11 1399, 951 P.2d 1040, 1045 (1997). Defendant has admitted that payment was not made to
12 Plaintiff within 30 days, but argues that subsequent acceptance of checks from the Insurance
13 Carrier carriers constituted a waiver of the timely payment provision contained in the
14 Agreement. As a result, any determination of Defendant's waiver argument requires a due
15 process evidentiary hearing, and because no such hearing has been afforded to Plaintiff, any
16 ruling on waiver by this Court will be in violation of Plaintiff's due process rights.

17 For this reason, the Court should vacate its Satisfaction of Judgment which was
18 based upon the Court's advisory opinion that the conduct of the Parties constituted waiver.
19 Should the Court fail to do so, Plaintiff requests that he be afforded a full evidentiary
20 hearing on the issue of waiver pursuant to NRCP 59. Had such a hearing been provided to
21 Plaintiff in this matter, the Court would have heard evidence not provided to the Court in
22 U.S. Re's numerous pleadings on the matter, such as evidence that the Corporate Defendants
23 specifically negotiated the inclusion of the provision that they only had 30 days to provide
24 the settlement funds to Plaintiff, and such provision agreed on by the Parties that the
25 Agreement would be of "no force and effect" and that the "Agreement shall be null and void
26 in the event that such Settlement Funds are not received by the Plaintiff with the 30-day time
27 period reference herein." As this Court is aware, a void contract is treated by courts as if the
28 contract had never existed, and it is impossible to waive breach of a contract that never
29 existed. Plaintiff deserves a full and fair evidentiary hearing on these issues and is confident

1 that should such a hearing be provided to Plaintiff the Court will determine that the
2 Settlement Agreement by its own terms is unenforceable in Nevada.

3 **F. The Satisfaction of Judgment jeopardizes Plaintiff's ability to perform**
4 **his fiduciary duties to gather the assets of L&C to the insurer's creditors.**

5 The Orders gravely impact the ability of the Receiver to perform his fiduciary duties
6 to gather the assets of L&C. As this Court is aware, the Commissioner has cases currently
7 pending before the U.S. District Court and before the Nevada Supreme Court that allege
8 parties other than the Corporate Defendants have liability for the insolvency of L&C. The
9 Satisfaction of Judgment issued by this Court has the effect of providing defendants in those
10 actions with a defense that the claims for damages against them have all been satisfied, and
11 that the cases currently pending against them should be dismissed. As a result, the
12 Satisfaction of Judgment issued by this Court may damage the Commissioner's ability to
13 gain relief in other courts where these cases are currently pending. Hundreds of individual
14 and families are depending on the Receiver's efforts to gather as much money to pay claims
15 as possible. The cases currently pending in other courts could provide the money needed by
16 the Receivership to do so, but the Receiver's efforts in this regard have been placed in
17 jeopardy by the Satisfaction of Judgment issued by this Court. For these reasons, the Court
18 should issue an order amending its June 29, 2023 Order regarding issuance of a Satisfaction
19 of Judgment, and to vacate the Satisfaction of Judgment entered on June 30, 2023.

20 **G. The Satisfaction of Judgment unfairly prioritizes the Corporate**
21 **Defendant's need for finality over the needs of individuals and families to**
22 **receive money owed to them by L&C.**

23 The decision by the Court to provide the Corporate Defendants with a Satisfaction of
24 Judgment was made without full and fair consideration of the impact that decision would
25 have on the Commissioner and the hundreds of claimants still waiting for payment from
26 L&C. Families should always come before the interests of corporations, especially
27 corporations that are defunct, dissolved, or are no longer in business like the Corporate
28 Defendants. Instead of providing a pathway that allows the Commissioner to collect
additional money on behalf of L&C, the Court's Satisfaction of Judgment serves only to

1 block the Commissioner's collection efforts in a multitude of ways. The Satisfaction of
2 Judgment issued by the Court placed the interests of providing "finality" to the Corporate
3 Defendants above providing justice to hundreds of people still waiting to receive payment of
4 their claims from L&C.

5 **IV. CONCLUSION**

6 For all these reasons, Plaintiff respectfully requests that the Court grant Plaintiff's
7 Motion for Partial Reconsideration and NRCP 60(b) and NRCP 59 Relief from the Court's
8 June 29, 2023 Order Granting NRCP 60 Relief to U.S. Re Corporation, to Vacate the
9 Satisfaction of Judgment entered on June 30, 2023, and for a New Trial under NRCP 59, and
10 to grant such other and further relief as the Court deems appropriate.

11 DATED this 13th day of July, 2023.

12 HUTCHISON & STEFFEN

13 By: /s/ Brenoch Wirthlin

14 BRENOCH WIRTHLIN, ESQ. (10282)

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 13th day of July, 2023, I caused the document entitled **MOTION FOR PARTIAL RECONSIDERATION AND NRCP 60(b) RELIEF FROM THE COURT’S JUNE 29, 2023 ORDER GRANTING NRCP 60 RELIEF TO U.S. RE CORPORATION, TO VACATE THE SATISFACTION OF JUDGMENT ENTERED ON JUNE 30, 2023, AND FOR A NEW TRIAL** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Jon Linder
An Employee of Hutchison & Steffen, PLLC

EXHIBIT “B”

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Case Number: A-14-711535-C

1 MR. WIRTHLIN: So I'm being brief, Your Honor. Thank
2 you again for allowing us to put those motions together. I think they
3 do relate. Basically, the point we're here on today is just the
4 satisfaction of judgment primarily and it deals with the order which
5 is why we filed the motion we did with respect to the order.

6 But we're not necessarily looking for reconsideration of
7 the order in toto, just as it relates to the satisfaction of judgment.
8 We think that the waiver issue, which ties in with the satisfaction of
9 judgment, was kind of the issue, I think, that U.S. Re had argued in
10 terms of whether the Plaintiff waived any rights under the contract,
11 under the settlement agreement, by accepting the funds late.

12 We believe that section (R) requires in writing be -- any
13 waiver be in writing. There was no writing. So we would submit
14 that under the terms of the agreement, if it is in effect then there's
15 no waiver.

16 We would also submit -- it's a little bit of a catch 22 we
17 think in this case as it relates to the satisfaction of judgment. We
18 argued that the contract was either an option contract or had a
19 condition of precedent [indiscernible] effect because of its terms, in
20 terms of the funds coming in. Or that if it did take effect and it was
21 declared null and void by the failure to pay within the 30-day period,
22 which I don't think is in dispute.

23 And so either the contract was null and void, never took
24 effect, or -- in which case there would be a waiver, or the -- if it was
25 still in effect, then that provision requirement of written waiver

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go for it.

THE COURT: Good enough.

Thanks everyone.

[Hearing concluded at 10:25 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly
transcribed the audio/video proceedings in the above-entitled case
to the best of my ability.



Petra Ziros
Transcriber