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

\* \* \*

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

Appellant,

vs.

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

Respondents.

Supreme Court No. 85668

Electronically Filed  
Jun 23 2023 05:33 PM  
Elizabeth A. Brown

Clerk of Supreme Court

**RESPONSE TO ORDER**  
**AMENDING CAPTION AND TO**  
**SHOW CAUSE**

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

Appellants,

vs.

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

Respondents.

Supreme Court No. 85728

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

5 Appellant,

6 vs.

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

14 Respondents.

Supreme Court No. 85907

15 Appellant COMMISSIONER OF INSURANCE FOR THE STATE OF  
16 NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION  
17 GROUP, INC., (“Appellant”), by and through their counsel, Hutchison & Steffen,  
18 PLLC, hereby submit their response to the Court’s May 10, 2023 Order Amending  
19 Caption and to Show Cause (“OSC”). This response is based on the following  
20 memorandum of points and authorities as well as all exhibits thereto, and all papers  
21 and pleadings on file herein.  
22  
23  
24

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

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

27 This court’s OSC directed Appellant to “provide this court with a file-stamped  
28

1 copy of any order resolving the tolling motion.” This Court further advised that  
2 should the district court enter a written order resolving the tolling motion, then “the  
3 notice of appeal shall be considered timely filed on the date of entry of the order.”  
4  
5 On April 12, 2023, the district court resolved Appellant’s motion for reconsideration  
6 of order granting motion for attorney fees and costs by issuing an order vacating the  
7 motion. *See* the district court’s Order on Motions for Reconsideration (“Order”)  
8 attached as Exhibit 1. Accordingly, since the tolling motion has been resolved and  
9 a file-stamped copy of the district court’s Order provided to this court, Appellant  
10 respectfully submits that sufficient cause demonstrates why the subject appeal  
11 should not be dismissed.  
12  
13

## 14 **II. STATEMENT OF FACTS**

15  
16 The district court entered an order granting Appellant’s motion for attorney  
17 fees and costs on December 2, 2022. Appellant filed a motion for reconsideration  
18 of this order on December 16, 2022 (“Appellant’s Reconsideration Motion”).  
19 Appellant filed a Notice of Appeal of the district court’s December 2, 2022 order on  
20 December 30, 2022. The district court resolved Appellant’s Reconsideration Motion  
21 on April 12, 2023. *See* Exhibit 1. On May 10, 2023, this court entered the OSC  
22 based upon a “[p]reliminary review of the docketing statement and the documents  
23 submitted to the court pursuant to NRAP 3(g)” which indicated that there was “no  
24 indication as to whether the motion has been resolved by the district court.”  
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1 **III. LAW AND ARGUMENT**

2  
3 **A. The Reconsideration Motion was not a tolling motion as it did not**  
4 **invoke rule 59. Further, even if it was a tolling motion, the**  
5 **Reconsideration Motion has been resolved and the notice of appeal**  
6 **is deemed to not be premature.**

7 In *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190,  
8 1193 (2010) this Court recognized that a motion for reconsideration can be  
9 considered a tolling motion such as a motion under NRCP 59 where it “invoke[s]  
10 NRCP 59.” *Id.* However, in this case, the Reconsideration Motion did not invoke  
11 NRCP 59 and would not qualify as a tolling motion under *AA Primo Builders*. *See*  
12 Exhibit 2 hereto. Further, as this Court has recognized, where the district court enters  
13 a written order resolving a tolling motion prior to dismissal of an appeal based on  
14 the premature filing of a notice of appeal, the notice of appeal shall be considered  
15 timely on the date of entry of the order. *See Knox v. Dick*, 99 Nev. 514, 517, 665  
16 P.2d 267, 269 (1983) (“Thus, when the trial court has not been divested of its  
17 jurisdiction due to a purported appeal from a non-appealable order, and when it  
18 enters an order which corrects the defect in appealability, a notice of appeal from the  
19 first order will be regarded as directed to the subsequently-entered final judgment.”);  
20 *see also* NRAP 4(a)6).

21  
22 On April 12, 2023, the district court resolved the Appellant’s Reconsideration  
23 Motion, approximately one month prior to this court’s OSC being issued. *See*  
24 Exhibit 1. As a result, the Notice of Appeal is deemed not to be prematurely filed  
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1 as of the date that the Order was entered.

2 **III. CONCLUSION**

3  
4 For all these reasons, Appellant respectfully submits that good cause exists as  
5 to why this appeal should not be dismissed.

6 Dated this 23rd day of June, 2023.

7  
8 HUTCHISON & STEFFEN, PLLC  
9           /s/Brenoch Wirthlin            
10 Mark A. Hutchison, Esq. (4639)  
11 Brenoch R. Wirthlin, Esq. (10282)  
12 Traci L. Cassity, Esq. (9648)  
13 10080 West Alta Drive, Suite 200  
14 Las Vegas, Nevada 89145  
15 *Attorneys for Appellant*

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**CERTIFICATE OF SERVICE**

Pursuant to NRAP 25, I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 23rd day of June, 2023, I caused the above and foregoing document entitled: **RESPONSE TO ORDER 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.

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

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EXHIBIT PAGE ONLY

# EXHIBIT 1

HUTCHISON & STEFFEN  
A PROFESSIONAL LLC

1 **ORD**  
2 BRENOCH R. WIRTHLIN, ESQ.  
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4 HUTCHISON & STEFFEN  
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12 *Attorneys for Plaintiff*

13 **DISTRICT COURT**  
14 **CLARK COUNTY, NEVADA**

15 \* \* \*

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

20 Plaintiff,

21 vs.

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

Defendants.

Case No.: A-14-711535-C

Dept. No.: XXVII

**ORDER 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.

1 and Karyna Armstrong, Esq., appeared at the Hearing on behalf of Defendant U.S. Re Corporation.  
2 The Plaintiff filed her oppositions to the Motions. The Plaintiff having filed her notice of appeal on  
3 November 9, 2022 (“Notice of Appeal”) and having filed the federal complaint commencing case no.  
4 2:23-cv-00537 (“Federal Complaint”) on April 10, 2023; the Court having read and considered the  
5 Motions and Plaintiff’s oppositions thereto, as well as having heard and considered the arguments of  
6 counsel at the Hearing on the Motions, and good cause appearing, the Court hereby finds the Notice  
7 of Appeal divests the Court of jurisdiction to consider the Motions<sup>1</sup> and the Federal Complaint<sup>2</sup>  
8 addresses many issues similar to the advisory relief<sup>3</sup> requested in the Motions, and therefore the Court

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21 *Commissioner of Insurance for the State of Nevada v. Chur, et al.*

22  
23 \_\_\_\_\_  
24 <sup>1</sup> See *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987).

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

<sup>3</sup> 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.”).

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

Dated this 12th day of April, 2023

Nancy L Alif  
MA

Respectfully submitted  
this 11<sup>th</sup> day of April, 2023 by:

**ODE B08 9A5A 3043  
Nancy Alif  
District Court Judge**

/s/ Brenoch Wirthlin  
Brenoch Wirthlin, Esq.  
Nevada Bar No. 10282  
10080 West Alta Drive, Suite 200  
Las Vegas, Nevada 89145  
*Attorneys for Plaintiff*

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 Commissioner of Insurance for  
7 the State of Nevada as Receiver  
of Lewis and Clark, Plaintiff(s)

CASE NO: A-14-711535-C

DEPT. NO. Department 27

8 vs.

9 Robert Chur, Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

12  
13 This automated certificate of service was generated by the Eighth Judicial District  
14 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:

15 Service Date: 4/12/2023

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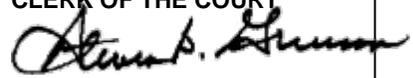
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## EXHIBIT 2

HUTCHISON & STEFFEN  
A PROFESSIONAL LLC



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9 *Attorneys for Defendant*  
10 *U.S. RE Corporation*

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

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

15  
16 Plaintiff,

17 vs.

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

22  
23 Defendants.

Case No. A-14-711535-C

Dept. No.: XXVII

**DEFENDANT U.S. RE  
CORPORATION'S MOTION  
FOR RECONSIDERATION OF  
ORDER GRANTING MOTION  
FOR ATTORNEY FEES AND  
COSTS**

**(HEARING REQUESTED)**

24 Pursuant to EDCR 2.24,<sup>1</sup> Defendant U.S. Re Corporation ("U.S. Re"), by and through its  
25 undersigned counsel, hereby moves this Court for reconsideration of the Order Granting Attorney Fees  
26 and Costs ("Order").

27  
28 <sup>1</sup> In accordance with EDCR 2.24, this Motion is filed within 14 days of the December 2, 2022  
service of written notice of the Order.

1 In the Motion for Attorney Fees and Costs (“Motion”) filed on behalf of Plaintiff Commissioner  
2 of Insurance for the State of Nevada as Receiver of the Lewis and Clark LTC Risk Retention Group,  
3 Inc. (“Plaintiff Commissioner”), Plaintiff Commissioner argued that attorney fees and costs of  
4 \$1,509,820.00 be “awarded jointly and severally, or alternatively divided among the Corporate  
5 Defendants in accordance with the liability percentages set by the jury at trial.” Motion at 19:13-16.  
6 However, on July 13, 2022, Plaintiff Commissioner and U.S. Re, Uni-Ter Underwriting Management  
7 Corp., and Uni-Ter Claims Services Corp. (collectively, “Corporate Defendants”) agreed upon and fully  
8 executed a settlement agreement whereby Corporate Defendants would pay Plaintiff Commissioner the  
9 total amount of \$5,200,000.00 (“Settlement Funds”). See Settlement Agreement at p. 1, attached hereto  
10 as **Exhibit A**. Corporate Defendants fully satisfied their obligations under the Settlement Agreement  
11 and, therefore, should be released and not subjected to pay the attorney fees and costs as Plaintiff  
12 Commissioner asserts. At the November 10, 2022 hearing regarding U.S. Re’s Motion to  
13 Enforce Settlement Agreement and Dismiss (“Motion to Enforce”), the Court gave its advisory  
14 opinion that it would enforce the settlement agreement. See November 10, 2022 Transcript of  
15 Proceeding Regarding Motion to Enforce at 13:1-3, attached hereto as **Exhibit B**.

16 U.S. Re therefore moves for reconsideration of this Courts’ December 2, 2022 Order awarding  
17 Plaintiff Commissioner attorney fees and costs. U.S. Re bases its Motion on the following  
18 Memorandum of Points and Authorities, the transcript from the hearing, all the papers and pleadings  
19 on file herein, and the arguments of counsel at any hearing that this Court may entertain on the Motion.

20 DATED this 16th day of December, 2022.

21 McDONALD CARANO LLP

22 By: /s/ George F. Ogilvie III

23 George F. Ogilvie III (NSBN 3552)  
24 Karyna M. Armstrong (NSBN 16044)  
25 2300 West Sahara Avenue, Suite 1200  
26 Las Vegas, NV 89102

27 Jon M. Wilson, Esq. (*Pro Hac Vice*)  
28 LAW OFFICES OF JON WILSON  
13924 Marquesas Way, Unit 1308  
Marina Del Rey, CA. 90292

*Attorneys for Defendant U.S. RE Corporation*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND RELEVANT FACTS**

3 On February 3, 2022, Plaintiff Commissioner filed its Motion requesting the Court to award  
4 Plaintiff Commissioner “\$1,509,820.00 in attorney fees, as well as costs, awarded jointly and severally,  
5 or alternatively divided among the Corporate Defendants in accordance with the liability percentages  
6 set by the jury at trial.” Motion at 19:13-16. At the September 7, 2022 hearing, the Court directed  
7 counsel to submit any supplemental pleadings within thirty days as to fees and costs. On October 7,  
8 2022, Plaintiff Commissioner filed a Supplement to Motion for Attorney Fees and Costs which  
9 indicated that “after review of the records at issue, Plaintiff [Commissioner] now requests  
10 \$1,449,685.69 (\$60,131.31 less than the original request) in attorney fees.” October 7, 2022  
11 Supplement to Motion for Attorney Fees and Costs (“Supplement”) at 2:3-5.

12 U.S. Re did not oppose the Motion or the Supplement because the parties had previously  
13 executed the Settlement Agreement, and the Corporate Defendants had fully satisfied the obligations  
14 of the Settlement Agreement by tendering \$5,200,000.00 to Plaintiff Commissioner. While at the  
15 November 10, 2022 hearing for U.S. Re’s Motion to Enforce, this Court stated in its advisory opinion  
16 that it would enforce the settlement agreement had Plaintiff Commissioner not filed the appeal the day  
17 before the hearing on November 9, 2022. *See Ex. B* at 11:19-25. U.S. Re’s Motion is entirely  
18 independent of Plaintiff’s Commissioner’s appeal, so this Court has jurisdiction to reconsider the  
19 Order. Because the Settlement Agreement includes a lump sum amount, Plaintiff Commissioner  
20 should not have been awarded attorney fees and costs.

21 Thus, U.S. Re respectfully requests this Court reconsider its December 2, 2022 Order (“Order”)  
22 awarding Plaintiff Commissioner attorney fees in the amount of \$1,449,685.69, and costs in the amount  
23 of \$365,177.92. *See Order* at 2:18-22.

24 **II. LEGAL STANDARD**

25 The Court has the inherent authority to “amend, correct, resettle, modify, or vacate, as the case  
26 may be, an order previously made and entered on motion.” *Trail v. Faretto*, 91 Nev. 401, 403, 536  
27 P.2d 1026, 1027 (1975); *City of L.A., Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 884 (9th  
28 Cir. 2001) (“As long as a district court has jurisdiction over the case, then it possesses the inherent

1 procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be  
2 sufficient.”); *see also Halverson v. Hardcastle*, 123 Nev. 245, 270, 163 P.3d 428, 446 (2007) (trial  
3 court judges possess inherent power “of equity and of control over the exercise of their jurisdiction”).  
4 All that is required is “sufficient cause,” which exists “if substantially different evidence is  
5 subsequently introduced or the decision is clearly erroneous.” *Masonry & Tile Contractors Ass’n of*  
6 *S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997); *see also United*  
7 *States v. Matelabi*, No. 2:17-cv-34-JCM(NJK), 2021 WL 2583548 at \*1 (D. Nev. June 23, 2021)  
8 (stating no “precise rule” governs a district court’s “inherent power” to reconsider prior rulings).

9 Generally, “a timely notice of appeal divests the district court of jurisdiction to act and vests  
10 jurisdiction” in the Nevada Supreme Court. *Kantor v. Kantor*, 116 Nev. 886, 894, 8 P.3d 825, 830  
11 (2000) (citation omitted). But when the issue is “entirely collateral to and independent from that part  
12 of the case taken up by appeal, and in no way affect[s] the merits of the appeal” the Nevada Supreme  
13 Court allows district courts to grant relief while the case is on appeal. *See id.* (citation omitted); *see*  
14 *also Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529 (2006) (“the district court retains  
15 jurisdiction to enter orders on matters that are collateral to and independent from the appealed order,  
16 *i.e.*, matters that in no way affect the appeal’s merit”).

17 **III. ARGUMENT**

18 **A. This Court is Not Divested of Jurisdiction Because this Motion is Entirely**  
19 **Collateral and Independent From the Receiver’s Appeal.**

20 On November 9, 2022, Plaintiff Commissioner filed its Notice of Appeal with the Nevada  
21 Supreme Court. *See* Notice of Appeal on file with this Court. On November 18, 2022 Plaintiff  
22 Commissioner filed its Amended Notice of Appeal (“ANOA”) seeking relief on appeal for twenty-four  
23 separate issues. *See* Amended Notice of Appeal on file with this Court. On November 25, 2022,  
24 Plaintiff Commissioner filed its Case Appeal Statement, a copy of which is attached hereto as **Exhibit**  
25 **C.** On December 13, 2022, Plaintiff Commissioner filed its Docketing Statement for the appeal a copy  
26 of which is attached hereto as **Exhibit D.** In both its Case Appeal Statement and its Docketing  
27 Statement, Plaintiff Commissioner clearly identifies that the appeal does not seek any relief related to  
28 the Corporate Defendants; the appeal seeks relief from the Nevada Supreme Court due to the District

1 Court’s “erroneous rulings” on twenty-four issues pertaining solely to the previously dismissed  
2 Director Defendants. More specifically, the Case Appeal Statement and the Docketing Statement  
3 identify the “Director Defendants” as the sole respondents to the appeal. *See* Ex. C at ¶ 4; Ex. D at ¶  
4 3. Both the Case Appeal Statement and the Docketing Statement indisputably reflect Plaintiff  
5 Commissioner’s appeal does not pertain to the Corporate Defendants. Because the instant Motion is  
6 “entirely collateral to and independent from” Plaintiff’s Commissioner’s appeal, this Court is not  
7 divested of jurisdiction and should make its ruling on U.S. Re’s Motion. *Kantor*, 116 Nev. at 894, 8  
8 P.3d at 830 (citation omitted).

9 **B. This Court Should Reconsider Its Order Awarding Attorney Fees and Costs**  
10 **Because the Parties Have Entered and Fully Executed an Enforceable Settlement**  
11 **Agreement.**

12 On July 13, 2022, Plaintiff Commissioner and Corporate Defendants agreed upon and fully  
13 executed a settlement agreement whereby Corporate Defendants would pay Plaintiff Commissioner the  
14 total amount of \$5,200,000.00. *See* Ex. A at p. 1. Corporate Defendants fully satisfied the obligations  
15 of the Settlement Agreement by August 24, 2022 when the \$5,200,000.00 was delivered to Plaintiff  
16 Commissioner and the Settlement Funds were tendered and cleared. However, despite Plaintiff  
17 Commissioner receiving the Settlement Funds, in full, on August 24, 2022, Plaintiff Commissioner  
18 proceeded to argue that it was entitled to an award of \$1,449,685.69 by filing the October 7, 2022  
19 Supplement. *See* Supplement at 2:3-5. Nearly a month and half after the parties satisfied their  
20 requirements and obligations under the Settlement Agreement.

21 Consistent with its advisory opinion, if the Settlement Agreement is enforced, an award of  
22 attorney fees in the amount of \$1,449,685.69, and costs in the amount of \$365,177.92 (*see* Order at  
23 2:18-22) is improper. U.S. Re did not oppose the Motion or the Supplement because the parties had  
24 entered into the Settlement Agreement, and the Corporate Defendants had satisfied all obligations of  
25 the Settlement Agreement by August 24, 2022.

26 Accordingly, U.S. Re respectfully asks this Court to reconsider its December 2, 2022 Order and  
27 issue a new order excluding the Corporate Defendants from the award of attorney’s fees and costs.

28 ...  
...

1 **IV. CONCLUSION**

2 For the foregoing reasons, U.S. Re, respectfully requests that this Court reconsider its December  
3 2, 2022 Order awarding attorney fees and costs by enforcing the Settlement Agreement and excluding  
4 the Corporate Defendants from the Order.

5 DATED this 16th day of December, 2022.

6 McDONALD CARANO LLP

7 By: /s/ George F. Ogilvie III

8 George F. Ogilvie III (NSBN 3552)  
9 Karyna M. Armstrong (NSBN 16044)  
10 2300 West Sahara Avenue, Suite 1200  
11 Las Vegas, NV 89102

12 Jon M. Wilson, Esq. (*Pro Hac Vice*)  
13 LAW OFFICES OF JON WILSON  
14 13924 Marquesas Way, Unit 1308  
15 Marina Del Rey, CA. 90292

16 *Attorneys for Defendant 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 the 16th day of December 2022, I caused a true and correct copy of the foregoing **DEFENDANT U.S. RE CORPORATION'S MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION FOR ATTORNEY FEES AND COSTS** to be 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

# **EXHIBIT “A”**

## SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Confidential Settlement Agreement and Mutual Release (the “Agreement”) is entered into by and between the Commissioner of Insurance for the State of Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc. (“Plaintiff” or “Commissioner”)<sup>1</sup> on the one hand and U.S. Re Corporation (“U.S. Re”), Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp. (collectively, the “Uni-Ter Defendants” and, together with U.S. Re, the “Corporate Defendants”) on the other (collectively, the “Parties”). In consideration of the mutual covenants and agreements of the Parties, and other good and valuable consideration, it is warranted and agreed as follows:

### A. RECITALS

1. On or about December 23, 2014, Plaintiff filed her complaint commencing Case no. A-14-711535-C (the “Lawsuit”) against the Corporate Defendants and other defendants, including Robert Chur (“Chur”), Steve Fogg (“Fogg”), Mark Garber (“Garber”), Carol Harter (“Harter”), Robert Hurlbut (“Hurlbut”), Barbara Lumpkin (“Lumpkin”), Jeff Marshall (“Marshall”), and Eric Stickels (“Stickels” and, collectively, with Chur, Fogg, Garber, Harter, Hurlbut, Lumpkin, and Marshall referred to herein as the “Director Defendants”).

2. On December 30, 2021, a Judgment on Jury Verdict was entered granting Judgment in favor of Plaintiff and against the Corporate Defendants (“Judgment”).

3. Wherefore, the Parties intend to resolve the present dispute, including any and all issues relating to the allegations that were or could have been made in the Lawsuit.

### B. TERMS OF AGREEMENT

The Parties hereby stipulate and agree that the foregoing recitals are true and correct in all respects and are incorporated herein and made a part hereof by this reference. The Parties hereby further agree to the following terms and conditions and further agree to perform any and all acts and execute any and all documents necessary or appropriate to implement the following Agreement.

1. 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

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<sup>1</sup> Lewis and Clark LTC Risk Retention Group, Inc. shall be referred to herein as the “Company.”

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.

2. Catlin Specialty Insurance Company (“Catlin”) issued a \$5,000,000 primary layer of insurance (Policy Number IAP-97329-0514) to U.S. Re (“Catlin Policy”). Ironshore Insurance Company (“Ironshore”) issued a \$5,000,000 excess layer of insurance (Policy Number 000703604) to U.S. Re (“Ironshore Policy”). The Corporate Defendants hereby represent that the Catlin Policy and the Ironshore Policy are the only two policies issued by insurers that have agreed to provide coverage to the Corporate Defendants that have not been exhausted.

3. The Corporate Defendants represent that they have been out of business since 2018 and have no ongoing business interests.

4. Subject to the obligations set forth in this Agreement, Plaintiff hereby releases Tal Piccione, U.S. Re, U.S. Re Companies, Inc., the Uni-Ter Defendants, and the entities identified on Exhibit A hereto, and each of their respective agents, assigns, affiliates, entities (and agents, members, managers, directors, officers, employees, trusts, representatives, and attorneys of such related entities) employees, former employees, representatives, owners, insurers, attorneys, predecessors, and successors, and each of them (the “Defendant Released Parties”), from any and all charges, complaints, claims, promises, agreements, controversies, liabilities, obligations, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses (including attorney’s fees and costs actually incurred), of any nature whatsoever, known or unknown, whether based on tort, subrogation, contract, quasi-contract, or any other theory of recovery or responsibility, that the Plaintiff now has or could have had against the Defendant Released Parties. Further, all Parties acknowledge that nothing in this Agreement, including without limitation this release, in any way releases any applicable claims Plaintiff may have with respect to reinsurers that have issued reinsurance contracts or agreements for the benefit of Lewis & Clark LTC Risk Retention Group, Inc.

5. Subject to the obligations set forth in this Agreement, the Corporate Defendants hereby release Plaintiff, and its respective agents, assigns, affiliates, entities (and agents, members, managers, directors, officers, employees, trusts, representatives, and attorneys of such related entities) employees, former employees, representatives, owners, insurers, attorneys, predecessors, and successors, and each of them (the “Plaintiff Released Parties”), Tal Piccione and the officers and directors of the Corporate Defendants and U.S. Re Companies from any and all charges, complaints, claims, promises, agreements, controversies, liabilities, obligations, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses (including attorney’s fees and costs actually incurred), of any nature whatsoever, known or unknown, whether based on tort, subrogation, contract, quasi-contract, or any other theory of recovery or responsibility, the Corporate Defendants now has or could have had against the Plaintiff Released Parties.

6. On February 17, 2022, Plaintiff filed a notice of appeal commencing appeal Case no. 84253 in the Supreme Court of Nevada (“Appeal”) against the Director Defendants. The Appeal is not being prosecuted against the Corporate Defendants or Tal Piccione, and is asserted against the Director Defendants only.

7. Nothing in this Agreement is or shall be construed to constitute a release in any way against any and all claims Plaintiff has or may have against the Director Defendants, or any of them.

**C. UNKNOWN CLAIMS.**

The Parties understand and agree that there is a risk that subsequent to the execution of the Agreement, the Parties may discover claims which were unknown or unanticipated at the time the Agreement was executed, which if known by the Parties on the date the Agreement is executed may have materially affected their decision to execute the Agreement. The Parties understand and agree that by reason of the Agreement, they are assuming the risk of such unknown claims and agree that the releases contained herein apply to any and all such claims.

**D. ADEQUACY OF CONSIDERATION.**

The Parties agree and acknowledge that the covenants and promises made by them in this Agreement are sufficient, just and adequate consideration for their respective covenants and promises.

**E. COSTS AND ATTORNEY FEES**

If any legal action or other proceeding is brought by any of the Parties hereto relating to this Agreement or to recover damages or equitable relief for a breach or threatened breach thereof, the prevailing party shall recover its costs and reasonable attorneys' fees incurred in such an action or proceeding.

**F. ENTIRE AGREEMENT**

All prior or contemporaneous understandings or agreements between the Parties as they relate to the Agreement are merged into this Agreement, and it alone expresses the agreement of the Parties. This Agreement may be modified only in writing, signed by all the Parties hereto, and no term or provision may be waived except by such writing. There are no other agreements or representations, express or implied, either oral or in writing, between the Parties, concerning the subject matter of this Agreement, except as specifically set forth in this Agreement. There are no promises, agreements or expectations of the Parties unless otherwise stated in this Agreement.

**G. APPLICABLE LAW**

This Agreement was drafted through the joint efforts of the Parties and/or through counsel, and shall not be read for or against any Party to this Agreement on that account. This Agreement is intended to be enforced according to its written terms under the laws of the State of Nevada. Venue for any legal action concerning this Agreement shall lie exclusively in the state Courts of Nevada. All Parties consent to jurisdiction and venue in those Courts.

## H. COUNTERPARTS

This Agreement may be executed in any number of counterparts, and each counterpart executed by any of the undersigned together with all other counterparts so executed shall constitute a single instrument and agreement of the Parties. Facsimile and Portable Document Format ("PDF") copies hereof, as well as facsimile and PDF signatures hereon, shall have the same force and effect as originals.

## I. MUTUAL WARRANTIES

Each Party to this Agreement warrants and represents to the other that they have not assigned or transferred to any person or entity not a Party hereto any claim or other released matter, or any part or portion thereof, and that each Party has the authority to sign this Agreement, and each individual executing this Agreement on behalf of any entity or person specifically warrants that he or she has the authority to sign this Agreement.

## J. NOTICE

All notices or demands of any kind that any Party is required to or desires to give in connection with this Agreement shall be in writing and shall be delivered by facsimile and/or by depositing the notice or demand in the United States mail, postage prepaid, and addressed to the Parties as follows:

- 1) If to Plaintiff:  
Hutchison & Steffen  
Attn: Brenoch R. Wirthlin, Esq.  
Peccole Professional Park  
10080 West Alta Drive, Suite 200  
Las Vegas, NV 89145  
Email: [bwirthlin@hutchlegal.com](mailto:bwirthlin@hutchlegal.com)
  
  - 2) If to the Corporate Defendants:  
George F. Ogilvie III, Esq.  
Nevada Bar No. 3552  
MCDONALD CARANO LLP  
2300 West Sahara Avenue, Suite 1200  
Las Vegas, NV 89102  
Telephone: (702) 873-4100  
Facsimile: (702) 873-9966  
[gogilvie@mcdonaldcarano.com](mailto:gogilvie@mcdonaldcarano.com)
- Jon M. Wilson, Esq. (Appearing *Pro Hac Vice*)  
LAW OFFICES OF JON WILSON  
13924 Marquesas Way, Unit 1308  
Marina Del Rey, CA. 90292  
Telephone: (310) 626-2216

**L. ADDITIONAL WARRANTIES**

The Parties represent and warrant as follows:

- a. They have full power and authority to execute this Agreement and this Agreement constitutes a legal, valid and binding obligation, enforceable in accordance with its terms and conditions;
- b. They have not sold, assigned or otherwise transferred any interest in the Lawsuit settled herein;
- c. They represent and agree that they have had full and fair opportunity to discuss all provisions, terms and conditions of this Agreement with their legal counsel, they have read and fully understand all of the provisions, terms and conditions of this Agreement, and that they are voluntarily entering into this Agreement;
- d. They represent and agree that they have had the opportunity to be represented throughout the negotiation and documentation of this Agreement by attorneys or financial advisors of their choice and have had the opportunity to be advised by such attorneys or financial advisors with respect to this Agreement and the effect of the releases given in this Agreement; and
- e. They warrant that no promise or inducement has been offered except as herein set forth; that this Agreement is executed without reliance upon any statement or representation by either party and/or their representatives, concerning the nature and extent of any damages, and/or legal liability therefore; that they are of legal age, legally competent to execute this Agreement, and accept full responsibility therefor.

**M. BINDING EFFECT, SUCCESSORS, AND ASSIGNS.**

This Agreement shall be binding upon and inure to the benefit of the successors, assigns, subsidiaries, parent corporations, partners, and affiliates, as well as all other persons or entities claiming through them.

**N. GOVERNING LAW AND CONSENT TO PERSONAL JURISDICTION.**

The laws of the state of Nevada shall govern this Agreement. The Parties further understand and agree that, in any legal proceeding arising under this Agreement, venue shall be in Clark County, Nevada.

**O. MODIFICATION.**

This Agreement may not be amended, altered, modified, or otherwise changed in any respect whatsoever, except by a subsequent writing executed by all Parties to the Agreement.

**P. TAX CONSEQUENCES.**

The Parties acknowledge that this Agreement may have tax or other consequences, and they are not relying on any other party for advice or communications as to any potential consequences. This Agreement is enforceable regardless of its tax consequences. The Parties make no representations regarding the Agreement's tax consequences.

**Q. ENFORCEABILITY.**

The Parties understand and agree that if any provision of this Agreement is determined to be wholly or partially illegal, invalid, contrary to public policy or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby, and said illegal, unenforceable, or invalid part, term, or provision shall be first amended to give it/them the greatest effect allowed by law and to reflect the intent of the Parties. If this modification is not possible under applicable law, such term shall be deemed not to be a part of this Agreement and the remainder of this Agreement shall not be affected by such invalidity or unenforceability but shall remain in full force and effect.

**R. WAIVER.**

The provisions of this Agreement may not be waived by either party except by a subsequent writing executed by all Parties. The waiver by either party of any term, condition or provision of this Agreement shall not be construed as a waiver of any other or subsequent term, condition or provision.

**S. HEADINGS.**

The headings of each paragraph shall not be given any meaning, are not intended to be used to interpret this Agreement, are not to be used to explain, expand, contract or limit the language of this Agreement in any way, and are only included for the purpose of easy reference.

**T. DISPUTES.**

In the event that the Parties have any disagreement or dispute arising from or relating to the performance or breach of this Agreement and/or any additional documents which may be necessary to carry on the purposes of this Agreement, any such action shall be brought in the District Court of Clark County, Nevada and all Parties agree to submit to said Court's jurisdiction. In the event it is necessary for the aggrieved party or their authorized representative, successor, or assign to institute suit

in connection with this Agreement or its breach, the prevailing party in such suit or proceeding shall be entitled to reimbursement for its reasonable costs, expenses and attorneys' fees incurred, in addition to appropriate damages and equitable relief.

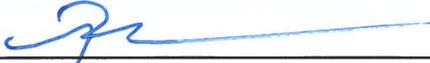
[SIGNATURE PAGES TO FOLLOW]

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IN WITNESS WHEREOF, THE UNDERSIGNED PARTIES HAVE CAREFULLY READ AND CONSIDERED THE FOREGOING SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS IN ITS ENTIRETY AND KNOW AND FULLY UNDERSTAND ITS CONTENTS AND THE SIGNIFICANCE OF ITS CONTENTS.

Dated: 7/13/2022   
COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA

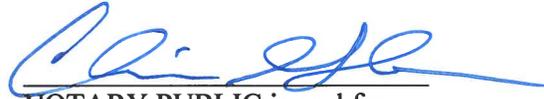
BY Barbara Richardson, its Commissioner

STATE OF NEVADA

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§  
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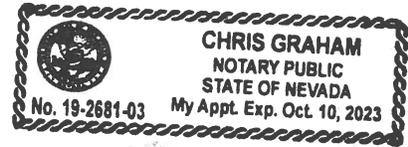
~~COUNTY OF CLARK~~  
Carson City CA

ACKNOWLEDGED, AGREED, SUBSCRIBED, AND SWORN TO BEFORE ME in person by Barbara Richardson, as Commissioner, on behalf of COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA, a Nevada corporation, on this 13<sup>th</sup> day of July, 2022, to certify which witness my hand and seal of office.



NOTARY PUBLIC in and for  
said County and State

My commission expires:  
10-10-23



IN WITNESS WHEREOF, THE UNDERSIGNED PARTIES HAVE CAREFULLY READ AND CONSIDERED THE FOREGOING SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS IN ITS ENTIRETY AND KNOW AND FULLY UNDERSTAND ITS CONTENTS AND THE SIGNIFICANCE OF ITS CONTENTS.

Dated: JUNE 29, 2022 TAL FICONE

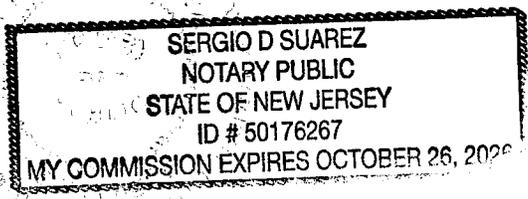
U.S. RE CORPORATION

STATE OF NEVADA New Jersey  
COUNTY OF CLARK Berger  
BY TAL FICONE CHAIRMAN  
§  
§  
§

ACKNOWLEDGED, AGREED, SUBSCRIBED, AND SWORN TO BEFORE ME in person by TAL FICONE, as Chairman, on behalf of U.S. RE CORPORATION, on this 29 day of June, 2022, to certify which witness my hand and seal of office.

Sergio D Suarez  
NOTARY PUBLIC in and for  
said County and State

My commission expires:  
10/26/2024



Dated: 6/29/2022 TAL PROCTOR  
UNI-TER UNDERWRITING MANAGEMENT CORP.

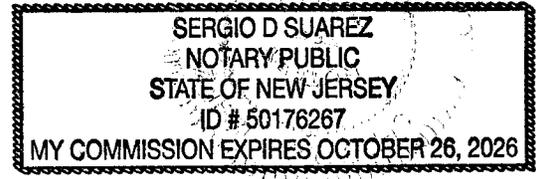
BY TAL PROCTOR CHAIRMAN

STATE OF NEVADA §  
COUNTY OF CLARK §

ACKNOWLEDGED, AGREED, SUBSCRIBED, AND SWORN TO BEFORE ME in person by TAL PROCTOR, as CHAIRMAN, on behalf of UNI-TER UNDERWRITING MANAGEMENT CORP., on this 29 day of JUNE, 2022, to certify which witness my hand and seal of office.

Sergio D Suarez  
NOTARY PUBLIC in and for said County and State

My commission expires: 10/26/2026



Dated: 6/29/2022 TAL PROCTOR  
UNI-TER CLAIMS SERVICES CORP.

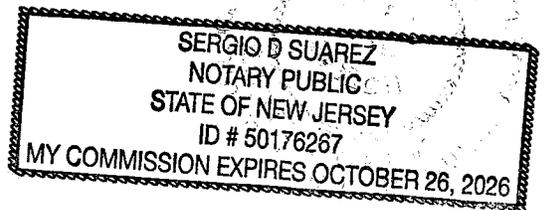
BY TAL PROCTOR CHAIRMAN

STATE OF NEVADA §  
COUNTY OF CLARK §

ACKNOWLEDGED, AGREED, SUBSCRIBED, AND SWORN TO BEFORE ME in person by TAL PROCTOR, as Chairman, on behalf of UNI-TER CLAIMS SERVICES CORP., on this 29 day of JUNE, 2022, to certify which witness my hand and seal of office.

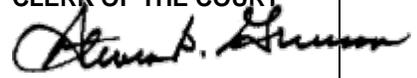
Sergio D Suarez  
NOTARY PUBLIC in and for said County and State

My commission expires: 10/26/2026





# **EXHIBIT “B”**



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DISTRICT COURT

6

CLARK COUNTY, NEVADA

7

COMMISSIONER OF INSURANCE FOR THE STATE OF )

8

NEVADA AS RECEIVER OF LEWIS AND CLARK, )

9

Plaintiff(s), )

CASE NO.: A-14-711535-C

DEPT. NO.: XXVII

10

v. )

11

ROBERT CHUR, )

12

Defendant(s). )

13

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

14

THURSDAY, NOVEMBER 10, 2022

15

**TRANSCRIPT OF HEARING RE:**

16

**MOTION TO DISMISS AND ENFORCE SETTLEMENT AGREEMENT**

17

APPEARANCES:

18

FOR THE PLAINTIFF:

BRENOCH WIRTHLIN, ESQ.

19

(VIA BLUEJEANS)

20

FOR THE DEFENDANT:

KARYNA ARMASTRONG, ESQ.

21

GEORGE F. OGILVIE, III, ESQ.

22

(VIA BLUEJEANS)

23

24

25

RECORDED BY: BRYNN WHITE, COURT RECORDER

1 Las Vegas, Nevada; Thursday, November 10, 2022

2 [Proceeding commenced at 10:01 a.m.]

3  
4 THE COURT: *Commissioner of Insurance versus Chur.* Have  
5 appearances, please, starting first with the plaintiff.

6 MR. WIRTHLIN: Good morning, Your Honor. Brenoch Wirthlin  
7 on behalf of plaintiff.

8 MS. ARMSTRONG: Good morning, Your Honor. Karyna  
9 Armstrong from McDonald Carano on behalf of Defendant U.S. Re  
10 Corporation.

11 THE COURT: Thank you.

12 MR. OGILVIE: Good morning, Your Honor. George Ogilvie  
13 also on behalf of U.S. Re.

14 THE COURT: Thank you. All right. Defendants, your  
15 motion to enforce settlement.

16 MS. ARMSTRONG: Good morning, Your Honor. As a  
17 preliminary matter, this Court is aware that McDonald Carano has  
18 withdrawn from representing the Uni-Ter defendants, and this motion  
19 is brought by and on behalf of U.S. Re Corporation. Nevertheless,  
20 the settlement agreement anticipates the resolution of all claims for  
21 both U.S. Re Corporation and Uni-Ter defendants as herein stated as  
22 corporate defendants. So as I move forward, I'm just going to refer  
23 to them as corporate defendants.

24 Your Honor, Plaintiff's opposition begs question, are they  
25 seeking settlement funds over the \$5.2 million as previously agreed

1 upon in the party settlement agreement? And if they are not seeking  
2 more in damages, then what is the point of keeping us in this  
3 litigation? However, if they are seeking more in damages in the  
4 amount more than the 5.2 million, their actions are improper and  
5 disingenuous.

6           The parties executed a settlement agreement whereby the  
7 insurance carriers of Corporate Defendants agreed to pay Plaintiff  
8 \$5.2 million. Approximately 400,000 would come from Catlin Specialty  
9 Insurance Company, and approximately 4.79 million from Ironshore  
10 Insurance Company.

11           Under paragraph B1 of the settlement agreement, the  
12 corporate defendants agreed to a 30-day limitation of when those  
13 settlement agreement funds should be given. Catlin Speciality  
14 Insurance paid on August 19th, 2022, and Ironshore insurance paid on  
15 August 24th, 2022. Both checks were accepted and cashed.

16           In its opposition, Plaintiff argues that because Corporate  
17 Defendants were just five days late on the settlement payment they  
18 have breached the settlement and, therefore, they do not have to  
19 waive and release Corporate Defendants from all potential claims.  
20 Yet, the basic premise of breach of contract includes a valid  
21 contract, a material breach of that contract, and the damages from  
22 the result of that breach.

23           Here, it's been established that a settlement agreement is  
24 a contract. And while a valid contract does exist between the  
25 parties, Plaintiff cannot claim breach of contract for two reasons.

1 First, Corporate Defendants did not materially breach the contract.  
2 When determining a party materially breached the contract, the Court  
3 must determine whether the failure to perform is so fundamental to a  
4 contract that it negates the essential purpose of that settlement  
5 agreement.

6 Corporate Defendants do not dispute that they gave the  
7 insured the Ironshore check for \$4.79 million on August 24th, 2022.  
8 But a late payment of just five days does not negate the essential  
9 purpose of the settlement agreement, nor does it negate the parties'  
10 intent when entering into the settlement agreement to begin with.

11 Second, Plaintiff did not incur any damages. A breach of  
12 contract without damages is not actionable. Plaintiff accepted and  
13 cashed both settlement checks. The five-day delay did not cause any  
14 other damages to Plaintiff.

15 Even if Your Honor believes that a five-day delay is a  
16 material breach of the settlement agreement which Corporate  
17 Defendants contend it is not, Plaintiff accepting and cashing the  
18 checks constitutes as a waiver of the claimed breach. Plaintiff  
19 cannot both accept the consideration from the settlement and then  
20 continue to pursue Corporate Defendants for additional damages.

21 When a non breaching party accepts defective performance,  
22 they choose to waive the claim of breach. Therefore, when Plaintiff  
23 accepted the benefit of the settlement agreement, Plaintiff chose to  
24 waive the Corporate Defendants' defective payment.

25 Since Corporate Defendants can establish that there was no

1 breach of contract claim, and even if there was the acceptance and  
2 cashing of the settlement checks constitutes Plaintiff's waiver of  
3 the defective performance, this Court should immediately dismiss  
4 Corporate Defendants from the litigation pursuant to the settlement  
5 agreement.

6           While in its opposition Plaintiff argues that the  
7 settlement agreement contains no provision regarding dismissal,  
8 section 8.3 expressly states the parties intend to resolve the  
9 present dispute including and all issues relating to the allegations  
10 that were or could have been made in the lawsuit. While the Court  
11 can look into the contracting party's intent when the intent is not  
12 clearly expressed in the contractual language, they can consider the  
13 circumstances surrounding the settlement agreement.

14           But this Court doesn't even have to do that. The -- the  
15 settlement agreement expressly put that Corporate Defendants should  
16 be released and dismissed. Section B.4 of the agreement states,  
17 Plaintiff hereby releases U.S. Re and the Uni-Ter defendants,  
18 defendant-released parties, from any and all charges, complaints,  
19 claims, actions, causes of action, suits, rights, demands, costs,  
20 losses, debts, and expenses, whether based on tort, subrogation,  
21 contract, quasi-contract, or any other theory of recovery or  
22 responsibility that the plaintiff now has or could have against the  
23 defendant-released parties.

24           The -- the release of the defendant-released parties  
25 includes the corporate defendants and the settlement agreement

1 expressly intends for the release and dismissal from the litigation.

2 THE COURT: But it doesn't specify that dismissal is  
3 required?

4 MS. ARMSTRONG: It says that they should be released. And  
5 when you look at the surrounding circumstances of their intent of  
6 releasing the parties, U.S. Re and Uni-Ter collectively as the  
7 defendant-released parties paired with section 8.3 that says the  
8 parties intend to resolve the present dispute including any and all  
9 issues relating to the allegations that have been made in the  
10 lawsuit, I think when you take the two of those and what the  
11 settlement agreement intended when they entered it, was to dismiss  
12 them out of litigation or they shouldn't have accepted the settlement  
13 funds in the first place if they didn't agree to those terms.

14 THE COURT: Thank you.

15 MS. ARMSTRONG: So Your Honor, as I stated before,  
16 Plaintiff's opposition begs the question, are they seeking settlement  
17 funds over the \$5.2 million as previously agreed upon in the party  
18 settlement agreement. Corporate Defendants fully satisfied the  
19 essential terms of the settlement agreement. No material breach  
20 occurred, and acceptance of the settlement funds by Plaintiff waives  
21 the claimed breach.

22 Therefore, Your Honor should enforce the settlement  
23 agreement and dismiss Defendants with prejudice as the settlement  
24 agreement intended. Thank you.

25 THE COURT: Thank you. Opposition, please.

1 MR. WIRTHLIN: Thank you, Your Honor. Brenoch Wirthlin on  
2 behalf of Plaintiff. I'll be brief.

3 Initially, one of the -- the Commissioner has filed a  
4 notice of appeal in this case and as the Court notes and for the  
5 record, the *Rust versus Clark County School District* case states  
6 that -- and according, a timely notice of appeal divests the District  
7 Court of jurisdiction to act and vests jurisdiction in this court,  
8 meaning the Supreme Court. And that is 103 Nev. 686. So Your Honor,  
9 we would submit that the -- the motion must be vacated. The hearing  
10 and -- cannot be decided as the notice of appeal has been filed in a  
11 timely manner.

12 As far as the substance of the argument, Your Honor, we  
13 believe that it's -- it's premature what -- what the U.S. Re is  
14 requesting. At this point, the -- the settlement agreement itself is  
15 very clear Your Honor, that -- and it states, and I'm just quoting  
16 very briefly, I know the Court's read all the pleadings, that the  
17 agreement, quote, shall be null and voiding in the event such  
18 settlement funds are not received by Plaintiff within the 30-day time  
19 period referenced herein.

20 And Your Honor, what the Commissioner was giving up, and  
21 again without waiving the argument on the appeal issue and the  
22 divestiture of jurisdiction should the Court consider the merits of  
23 the motion, what the Commissioner was giving up was effectively  
24 pursuit of the additional \$15 million in the judgment against the  
25 corporate defendants. And this was a heavily negotiated provision,

1 very specifically pointed out.

2           And in fact, during the negotiations, there was some  
3 question the Commissioner had -- had intended to exchange the  
4 settlement check for a signed copy of the settlement agreement. U.S.  
5 Re would not agree to that.

6           The Commissioner then suggested that a -- in exchange of  
7 the settlement funds when there was a notice of entry of order  
8 approving the settlement agreement in the receivership. U.S. Re  
9 would not agree to that.

10           The Commissioner requested that a certified check be  
11 prepared so that she could be sure that the funds were going to be  
12 delivered and U.S. Re would not agree to that.

13           So this provision was what the parties both negotiated,  
14 went back and forth on. We've attached those exhibits to our motion.  
15 And was -- was specifically and -- and very clearly negotiated, that  
16 this 30-day period would be the time frame for delivery of this  
17 entire amount that was going to be paid.

18           I don't think there's any dispute. In fact, I think  
19 Counsel acknowledged that the -- the funds were not delivered within  
20 that time frame. They were late. And therefore, whatever the impact  
21 of that is, though, Your Honor, is not before the Court. There is  
22 no -- excuse me.

23           Effectively what U.S. Re's trying to do is get some type  
24 of advisory opinion about whether or not the contract was breached,  
25 whether or not there were damages, whether or not there was an

1 effective release. And I think the -- the comments were very clearly  
2 made about intent of the parties.

3           Your Honor's question was exactly right on. The contract  
4 does -- the settlement agreement nowhere permits or  
5 even -- even -- or certainly, much less requires dismissal. And  
6 that's -- that's on purpose, Your Honor. The -- the dismissal of the  
7 corporate defendants would not be appropriate after the entry of a  
8 judgment, especially at this point with an appeal having been filed.

9           But that could impact -- dismissal of the corporate  
10 defendants could very negatively impact the appeal going forward as  
11 it pertains to the -- to the director defendants, which as the Court  
12 recalls were dismissed.

13           So dismissal would have never been something that the  
14 Commissioner would have agreed to. The Commission did not agree to  
15 that. And questions, Your Honor, about the intent of the parties,  
16 whether or not they -- the surrounding circumstances suggest that the  
17 parties may have contemplated dismissal are completely inappropriate.  
18 Those are raising issues of fact, questions of fact about issues  
19 that -- that are not before the Court that don't relate to anything.

20           If -- if U.S. Re feels like it needs to take some further  
21 action or -- or take some additional action, then it is free to do  
22 so, but to suggest that the Court can -- and request by U.S. Re that  
23 the Court rewrite the contract, dismiss the corporate defendants in a  
24 way that would -- would negatively impact the appeal against the  
25 director defendants is completely inappropriate, Your Honor, and

1 contrary to law and contrary to the very heavily negotiated terms of  
2 the agreement.

3           And finally, Your Honor, again, I think there is no  
4 dispute, although this issue is not in front of the Court, there's no  
5 dispute that those funds were not delivered in time, that the  
6 provisions of the agreement make it very clear that that was a -- a  
7 material term.

8           But again, we would submit that this motion cannot be  
9 decided. And certainly happy to answer any questions the Court may  
10 have. Thank you.

11           THE COURT: Thank you. Reply, please.

12           MS. ARMSTRONG: Despite what Plaintiff's counsel issued --  
13 despite what Plaintiff's counsel said, this issue is in front of this  
14 Court. And Your Honor, Plaintiff still has not answered the  
15 question, are they seeking settlement funds over the agreed-upon  
16 \$5.2 million? If not, then what's the purpose of keeping Corporate  
17 Defendants in this litigation? They received the settlement funds of  
18 5.2 million. They accepted and cashed it.

19           I think the facts here are very clear. The settlement  
20 agreement is a valid contract. The five-day delay is not a material  
21 breach because they received the amount of money that they intended  
22 to give and intended to receive. It doesn't negate the essential  
23 purpose of the settlement agreement was for the insurance -- the  
24 Corporate Defendants' insurance company to pay Plaintiff the  
25 \$5.2 million and they received those. Even if this Court believes

1 that was a breach, the breach was waived in the Plaintiff accepting  
2 and cashing the settlement checks.

3           Once the settlement checks were tendered and cleared,  
4 counsel tried to get Plaintiff to agree and sign the stipulation and  
5 order dismissing Corporate Defendants from the litigation with  
6 prejudice, and Plaintiff refused.

7           But section T of the settlement agreement, the dispute  
8 section, makes reference to any additional documents which may be  
9 necessary to carry on the purposes of this agreement, further  
10 indicating an anticipation that a stipulation to dismiss may be  
11 necessary to carry out the party's intent.

12           Therefore, Your Honor, this Court has the inherent  
13 authority to dismiss Corporate Defendants with prejudice. Even if  
14 the Court finds that the settlement agreement doesn't call for it or  
15 that the parties didn't agree to it, because Corporate Defendants  
16 have satisfied the obligations under the settlement agreement, they  
17 should be dismissed with prejudice. Thank you.

18           THE COURT: Thank you. This is the defendant's motion to  
19 dismiss and enforce settlement agreement. Due to the filing of the  
20 notice of appeal yesterday, I'm divested of jurisdiction so I can't  
21 consider the motion.

22           But when I prepared for the hearing, I would have granted  
23 the motion to enforce the settlement agreement based upon the  
24 acceptance of the late tender, and I would have denied the motion to  
25 dismiss. It just wasn't a bargained-for term in the agreement and

1 the agreement itself is not ambiguous.

2 So the matter is off calendar, but you have your advisory  
3 opinion.

4 MR. OGILVIE: Couple things --

5 THE COURT: Of course.

6 MR. OGILVIE: -- Your Honor, if I may.

7 THE COURT: Please.

8 MR. OGILVIE: A notice of appeal does not exhaustively  
9 divest the court.

10 THE COURT: But there's some things you can do --

11 MR. OGILVIE: If -- if it's not central -- if the issue  
12 before the Court is not central to the appeal, then the Court is not  
13 divested of authority. We will brief it --

14 THE COURT: Sure.

15 MR. OGILVIE: -- in a motion for reconsideration because I  
16 don't believe the Court is divested of --

17 THE COURT: And it was just filed yesterday.

18 MR. OGILVIE: Yes.

19 THE COURT: So it's not something that I --

20 MR. OGILVIE: Understood.

21 THE COURT: I would have taken a real close look at.

22 MR. OGILVIE: I -- I understand that completely. And I  
23 understand that we need to file a motion for reconsideration and  
24 that's just a hoop that we will jump through.

25 I didn't understand the advisory opinion though.

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THE COURT: The settlement agreement, it would be appropriate for me to enforce it because the Plaintiff accepted the late tender.

MR. OGILVIE: Okay. Thank you.

THE COURT: All right. So I will task the plaintiff with preparing order to -- just that the matter is -- is not considered today due to the notice of appeal. And I -- if you guys need further briefing, happy to entertain it. Any questions --

MR. WIRTHLIN: Thank you, Your Honor. We'll prepare that and circulate it to opposing counsel.

THE COURT: Thank you, both.

MR. OGILVIE: Thank you, Your Honor.

MS. ARMSTRONG: Thank you, Your Honor.

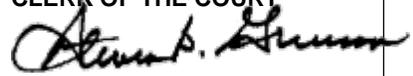
[Court recessed at 10:18 a.m.]

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.



Karisa J. Ekenseair  
Court Reporter/Transcriber

# **EXHIBIT “C”**



1 Brenoch R. Wirthlin, Esq. (10282)  
2 **Hutchison & Steffen**  
3 Peccole Professional Park  
4 10080 West Alta Drive, Suite 200  
5 Las Vegas, Nevada 89145  
6 Telephone: (702) 385.2500  
7 Facsimile: (702) 385.2086  
8 E-Mail: [bwirthlin@hutchlegal.com](mailto:bwirthlin@hutchlegal.com)  
9 *Attorneys for Plaintiff*

10 **DISTRICT COURT**  
11 **CLARK COUNTY, NEVADA**

12 \* \* \*

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

17 Plaintiff,

18 vs.

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

27 Defendants.

Case No.: A-14-711535-C  
Dept. No.: XXVII

Nevada Supreme Court Docket No. 85668

**CASE APPEAL STATEMENT**

28  
1. **Name of appellant filing this case appeal statement:** Commissioner of Insurance for the State of Nevada as Receiver for Lewis and Clark LTC Risk Retention Group, Inc. (“Appellant” or “Commissioner of Insurance”).

2. **Identify the judge issuing the decision, judgment, or order appealed from:** Honorable Nancy L. Allf, Department XXVII, of the Eighth Judicial District Court.



1           **10. Provide a brief description of the nature of the action and result in the district**  
2 **court, including the type of judgment or order being appealed and the relief granted by the**  
3 **district court:**

4           The Commissioner of Insurance of Nevada was appointed receiver of an insolvent Nevada  
5 insurer named Lewis and Clark LTC Risk Retention Group, Inc. (“L&C”), and filed suit against  
6 L&C’s directors, managers, and reinsurance broker, relying upon existing Nevada law when  
7 drafting her complaint, which was filed on December 24, 2014. Subsequently, the basis of  
8 pleading director liability in Nevada changed with the Court’s opinion in *Chur v. Eighth Judicial*  
9 *Dist. Court*, 136 Nev. 68, 458 P.3d 336 (2020), which substantively altered the law regarding  
10 director liability in Nevada. Within the time period allowed by the District Court for amending  
11 her pleadings, the Commissioner of Insurance moved to amend her complaint against the Director  
12 Defendants in order to comply with the change to Nevada law following Court’s opinion in *Chur*.  
13 The District Court, however, denied Appellant’s motion to amend, despite also having relied upon  
14 *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006), in its prior rulings.  
15 As a result of the District Court’s refusal to allow Plaintiff to amend her pleadings within the time  
16 period allowed by the District Court, the Director Defendants were dismissed from the action. The  
17 Commissioner of Insurance proceeded in the action against the remaining defendants, Uni-Ter  
18 Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. Re Corporation  
19 (“Corporate Defendants”), and on October 14, 2021 following a three-week trial, was awarded a  
20 unanimous jury verdict in the amount of \$15,222,853.00.  
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24           The Commissioner of Insurance seeks relief from the District Court’s erroneous rulings  
25 related and/or leading to the dismissal of the Director Defendants from the District Court action,  
26 and appeals the following judgments and orders granted by the District Court: (1) Order Denying  
27 Plaintiff’s Motion for Leave to File Fourth Amended Complaint dated and entered August 10,  
28 2020, which denied Plaintiff leave to file a fourth amended complaint; (2) Findings of Fact,

1 Conclusions of Law and Order Denying Plaintiff's Motion for Leave to File Fourth Amended  
2 Complaint dated and entered August 10, 2020, which denied Plaintiff leave to file a fourth  
3 amended complaint; (3) Order to Strike from Record dated August 13, 2020, which struck from  
4 the record a second version of the order inadvertently filed by the Court; (4) Order Granting  
5 Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara  
6 Lumpkin, Jeff Marshall, and Eric Stickels' Motion for Judgment on the Pleadings Pursuant to  
7 NRCP 12(c) and Judgment Thereon dated August 13, 2020 and entered August 14, 2020, granting  
8 judgment to the Director Defendants on the pleadings; (5) Findings of Fact, Conclusions of Law  
9 and Order Denying the Motion for Reconsideration of Motion for Leave to Amend Regarding  
10 Director Defendants dated September 9, 2020 and entered September 10, 2020, denying Plaintiff's  
11 motion for reconsideration of the District Court order denying Plaintiff leave to file a fourth  
12 amended complaint; (6) Order Denying Plaintiff's Motion to Retax and Settle Costs of Director  
13 Defendants dated July 16, 2021 and entered July 29, 2021, denying Plaintiff's motion to retax and  
14 settle costs with respect to the Director Defendants; (7) Order Granting in Part and Denying in Part  
15 Plaintiff's Motion for Declaratory Relief dated and entered August 17, 2021, which denied in part  
16 Plaintiff's motion for declaratory relief to the extent that there was no request for declaratory relief  
17 in the third amended complaint; (8) Discovery Commissioner's Report and Recommendations  
18 dated, filed and served on August 23, 2021, recommending denial of Plaintiff's motion to compel  
19 additional discovery; (9) Order Regarding Discovery Commissioner's Report and  
20 Recommendations dated September 17, 2021 and filed on September 18, 2021, adopting the  
21 recommendation of the discovery commissioner and denying Plaintiff's motion to compel  
22 additional discovery; (10) Order Granting In Part And Denying In Part Plaintiff's Motion In Limine  
23 No. 2 dated September 20, 2021, which denied in part testimony regarding unperformed solvency  
24 analysis; (11) Order Granting In Part And Denying In Part Plaintiff's Motion For Partial Summary  
25 Judgment As To U.S. Re Corporation dated September 20, 2021, which denied the motion to the  
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1 extent that it is a question for the trier of fact to determine the effect of U.S. Re Corporation's  
2 failure to obtain a Nevada license to broker reinsurance; (12) Order Denying Plaintiff's Motion In  
3 Limine Number 5 To Limit The Scope Of Expert Witness Testimony Regarding Speculation  
4 Concerning The Economy dated September 24, 2021, which allowed speculative testimony by  
5 expert witnesses regarding the economy at trial; (13) Order Denying Plaintiff's Motion In Limine  
6 Number 4: To Preclude Any Reference To Reinsurance Estimates dated September 24, 2021,  
7 which allowed testimony at trial regarding reinsurance estimates; (14) Order Denying Plaintiff's  
8 Motion In Limine Number 1 To Preclude Sam Hewitt From Providing Expert Testimony  
9 Regarding Insolvency Analysis dated September 24, 2021, which allowed expert witness  
10 testimony by Sam Hewitt regarding insolvency analysis at trial; (15) Order Denying Plaintiff's  
11 Motion In Limine Number 6 To Strike Proffered Expert Witness Alan Gray dated September 24,  
12 2021, which allowed expert witness testimony by Alan Gray at trial; (16) Order Denying Plaintiff  
13 s Motion For Partial Summary Judgment Regarding Uni-Ter Defendants Breach Of Their  
14 Fiduciary Duties dated September 27, 2021, which denied summary judgment to Plaintiff  
15 regarding breach of fiduciary duties by Uni-Ter Underwriting Management Corp. and Uni-Ter  
16 Claims Services Corp.; (17) Order Granting Motion to Exclude Interest dated December 15, 2021,  
17 which denied interest to accrue to Plaintiff during periods of stay; (18) Order of Dismissal Without  
18 Prejudice in favor of Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut,  
19 Barbara Lumpkin, Jeff Marshall, and Eric Stickels dated February 25, 2016 and docketed March  
20 3, 2016, granting the Director Defendants' motion for dismissal; (19) Order of Dismissal dated  
21 May 4, 2016, and docketed May 12, 2016, granting the Director Defendants' motion for dismissal;  
22 (20) Judgment in favor of Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut,  
23 Barbara Lumpkin, Jeff Marshall, and Eric Stickels dated August 13, 2020 and docketed August  
24 14, 2020, granting the Director Defendants judgment on the pleadings; (21) Order Denying  
25 Plaintiff's Motion to Lift Stay or Alternatively Grant Plaintiff Other Relief dated and entered  
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1 August 12, 2019, denying Plaintiff's motion to lift stay or grant other relief; (22) Order Denying  
2 Motion to Substitute dated February 21, 2019 and entered February 26, 2019, denying Plaintiff's  
3 motion to substitute the proper party in place of deceased Defendant Barbara Lumpkin; (23) Order  
4 Granting in Part Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut,  
5 Barbara Lumpkin, Jeff Marshall, and Eric Stickels Motion to Strike dated November 6, 2018,  
6 granting in part the Director Defendants' motion to strike Plaintiff's countermotion for summary  
7 judgment; and (24) Order Granting in Part Defendants Robert Chur, Steve Fogg, Mark Garber,  
8 Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels Motion to Dismiss  
9 dated February 25, 2016 and entered February 26, 2016, granting in part the Director Defendants'  
10 motion to dismiss.  
11

12 **11. Indicate whether the case has previously been the subject of an appeal to or**  
13 **original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court**  
14 **docket number of the prior proceeding:**  
15

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

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

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

25 Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara  
26 Lumpkin, Jeff Marshall and Eric Stickels vs. Commissioner of Insurance for the State of  
27 Nevada as Receiver of Lewis and Clark LTC Risk Retention Group, Inc.,  
Case No. 84311  
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**12. Indicate whether this appeal involves child custody or visitation:** This case does not involve child custody or visitation.

**13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:** The Commissioner of Insurance is willing to discuss settlement.

DATED this 25th day of November, 2022.

HUTCHISON & STEFFEN, PLLC

/s/Brenoch Wirthlin  
Brenoch R. Wirthlin, Esq. (10282)  
Nevada Bar No. 14285  
10080 West Alta Drive, Suite 200  
Las Vegas, Nevada 89145  
*Attorneys for Plaintiff*

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that on this 25th day of November, 2022, I caused the document entitled **CASE APPEAL STATEMENT** 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 “D”**

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

2 \* \* \*

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

8 Appellant,

9 vs.

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

20 Respondents.

Supreme Court No. 85668  
District Court Case No. A751535  
Dec 13 2022 11:18 PM  
Electronically Filed  
Elizabeth A. Brown  
Clerk of Supreme Court  
**DOCKETING STATEMENT**

21 Appellants, by and through their counsel, Hutchison & Steffen, PLLC, hereby  
22 submit the following Docketing Statement pursuant to Nevada Rule of Appellate  
23 Procedure (NRAP) 14.

24 **GENERAL INFORMATION**

25 All appellants not in proper person must complete the docketing statement.  
26 NRAP 14(a). The purpose of the docketing statement is to assist the Supreme  
27 Court in screening jurisdiction, classifying cases for en banc, panel, or expedited  
28 treatment, compiling statistical information and identifying parties and their  
counsel.



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concur in the filing of this statement

3. **Attorney(s) representing respondent(s):**

Attorney: Angela Nakamura Ochoa, Esq.  
Joseph P. Garin, Esq.  
Lipson Neilson, P.C.  
9900 Covington Cross Drive, Suite 120  
Las Vegas, NV 89144

Client(s): Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels  
(collectively "Director Defendants")

4. **Nature of disposition below (check all that apply):**

- |   |  |
|---|--|
| Judgment after bench trial  | Grant/Denial of NRCP 60(b) relief  |
| Judgment after jury verdict   | Grant/Denial of Injunction   |
| Summary Judgment  | Grant/Denial of Declaratory Relief   |
| Default Judgment  | Review of Agency Determination   |
| <input checked="" type="checkbox"/> <b>Dismissal</b>                | Divorce Decree   |
| Lack of Jurisdiction  | Original      Modification   |
| <input checked="" type="checkbox"/> <b>Failure to State a Claim</b> | <input checked="" type="checkbox"/> <b>Other disposition (specify):</b>  |
| Failure to Prosecute  | • <b><u>Denial of Motion to Amend Complaint</u></b>  |
| Other (specify)   | • <b><u>Denial of Motion for Partial Reconsideration of Denial of Motion to Amend Complaint</u></b>                                  |
|   | • <b><u>Order Denying Motion for Leave to File Fourth Amended Complaint</u></b>  |
|   | • <b><u>Findings of Fact, Conclusions of Law and Order Denying Plaintiff's Motion for Leave to File Fourth Amended Complaint</u></b> |
|   | • <b><u>Order to Strike from Record</u></b>  |
|   | • <b><u>Findings of Fact, Conclusions</u></b>  |

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- of Law and Order Denying the Motion for Reconsideration of Motion for Leave to Amend
- Order Denying Motion to Retax and Settle Costs
- Order Granting in Part and Denying in Part Motion for Declaratory Relief
- Discovery Commissioner's Report and Recommendations
- Order Regarding Discovery Commissioner's Report and Recommendations
- Order Granting In Part And Denying In Part Motion In Limine
- Order Granting Motion For Partial Summary Judgment
- Order Denying Motion In Limine(s)
- Order Denying Motion For Partial Summary Judgment
- Order Granting Motion to Exclude Interest
- Order of Dismissal
- Order Denying Motion to Lift Stay or Alternatively Grant Plaintiff Other Relief
- Order Denying Motion to Substitute
- Order Granting Motion to Strike
- Order Granting Motion to Dismiss

5. **Does this appeal raise issues concerning any of the following:**  
Child custody (visitation rights only)  
Venue  
Termination of parental rights

1 This case does not involve child custody or visitation, venue, or termination  
2 of parental rights.

3 **6. Pending and prior proceedings in this court.** List the case name and  
4 docket number of all appeals or original proceedings presently or previously  
5 pending before this court which are related to this appeal:

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

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

12 Commissioner of Insurance for the State of Nevada as Receiver of Lewis &  
13 Clark LTC Risk Retention Group, Inc. v. The Eight Judicial District Court of  
14 the State of Nevada, in and for the County of Clark and the Honorable  
15 Nancy L. Allf, District Court Judge, Case No. 84253.

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

20 Commissioner of Insurance for the State of Nevada as Receiver of Lewis &  
21 Clark LTC Risk Retention Group, Inc. v. Robert Chur, Steve Fogg, Mark  
22 Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, Eric  
23 Stickels, Uni-Ter Underwriting Management Corp., Uni-Ter Claims  
Services Corp., and U.S. Re Corporation, Case No. A-12-672047-B. This  
matter is still open.

24 **8. Nature of the action.** Briefly describe the nature of the action and the result  
25 below:

26 The Commissioner of Insurance relied upon existing Nevada law when  
27 drafting her complaint, filed on December 24, 2014, against the former directors of  
28

1 an insolvent Nevada risk retention group. Subsequently, the basis of pleading  
2 director liability in Nevada changed with the Court's opinion in *Chur v. Eighth*  
3 *Judicial Dist. Court*, 136 Nev. 68, 458 P.3d 336 (2020), which substantively altered  
4 the law regarding director liability in Nevada. Within the time period allowed by  
5 the District Court for amending her pleadings, the Commissioner of Insurance  
6 moved to amend her complaint against the Director Defendants in order to comply  
7 with the change to Nevada law following Court's opinion in *Chur*. The District  
8 Court, however, denied Appellant's motion to amend, despite also having relied  
9 upon *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006),  
10 in prior rulings.

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14 The Commissioner of Insurance seeks relief from the District Court's  
15 erroneous rulings related to denying her right to amend her complaint to comply with  
16 new Nevada law. Specifically, this appeal seeks relief from the District Court's  
17 order dated August 10, 2020, denying leave to file an amended complaint, the  
18 District Court's order dated August 1, 2020, granting the Director Defendants'  
19 motion for judgment on the pleadings, and the District Court's order dated  
20 September 9, 2020, denying partial reconsideration of the motion for leave to amend  
21 to file a fourth amended complaint.

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

27 This District Court's denial of Appellant's motion to amend her complaint in  
28 order to comply with new Nevada law raises important precedential, constitutional

1 and public policy issues regarding: (1) the right of parties to amend pleadings in  
2 order to comply with changes in the underlying law which occur after a complaint  
3 has been filed but before the deadline for amending pleadings as provided in the trial  
4 court's scheduling order; (2) application of this Court's recent amendments to NRCP  
5 41(e) regarding additional time provided under Nevada's 5-year rule in which a case  
6 must be brought to trial; (3) whether the District Court's factual mistake as to the  
7 time remaining until the close of discovery which formed that basis for the denial of  
8 a motion to amend a complaint in order to comply with new Nevada law was in  
9 error; and (4) correction of legal errors made by district court in all orders and  
10 judgment from which appeal is taken.  
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14 **10. Pending proceedings in this court raising the same or similar issues.** If  
15 you are aware of any proceeding presently pending before this court which  
16 raises the same or similar issues raised in this appeal, list the case name and  
17 docket number and identify the same or similar issues raised:

18 The Commissioner of Insurance is not aware of any similar cases pending at  
19 this time.  
20

21 **11. Constitutional issues.** If this appeal challenges the constitutionality of a  
22 statute, and the state, any state agency, or any officer or employee thereof is  
23 not a party to this appeal, have you notified the clerk of this court and the  
24 attorney general in accordance with NRAP 44 and NRS 30.130?  
25

26 This appeal does not challenge the constitutionality of a statute.  
27

28 **12. Other issues.** Does this appeal involve any of the following:

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- Reversal of well-settled Nevada precedent (on an attachment, identify the case(s))
- An issue arising under the United States and/or Nevada Constitutions
- A substantial issue of first-impression
- An issue of public policy
- An issue where en banc consideration is necessary to maintain uniformity of this court's decisions
- A ballot question
- If so, explain

This appeal involves the constitutional due process rights of a litigant to be provided the opportunity to amend a complaint in order to comply with changes in the underlying law which occur after a complaint has been filed but before the deadline for amending pleadings as provided in the trial court's scheduling order has passed. As a result, this appeal raises constitutional due process and public policy issues of first impression in Nevada.

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

This case is presumptively retained by the Supreme Court under both NRAP 17(a)(9) and NRAP 17(a)11. This appeal originates in business court which is a presumptive category of retention by the Supreme Court. In addition, this appeal raises as a principal issue a question of first impression involving the United States

1 Constitution or Nevada Constitution or common law which is a presumptive  
2 category of retention by the Nevada Supreme Court.

3  
4 14. **Trial.** If this action proceeded to trial, how many days did the trial last?  
5 Was it a bench or jury trial?

6 Following the District Court's erroneous dismissal of the Director  
7 Defendants, the underlying action proceeded to trial against the remaining  
8 defendants. A jury trial against Uni-Ter Underwriting Management Corp., Uni-Ter  
9 Claims Services Corp., and U.S. Re Corporation ("Corporate Defendants") began  
10 on September 20, 2021, and concluded on October 14, 2021, with a unanimous  
11 jury verdict in favor of the Commissioner of Insurance and a judgment against the  
12 Corporate Defendants in the amount of \$15,222,853.00.

13  
14 15. **Judicial disqualification.** Do you intend to file a motion to disqualify or  
15 have a justice recuse him/herself from participation in this appeal. If so,  
16 which Justice?

17 The Commissioner of Insurance does not anticipate at this time filing a  
18 motion to disqualify or have a justice recuse him/herself from participation in this  
19 appeal.

20  
21 **TIMELINESS OF NOTICE OF APPEAL**

22 16. **Date of entry of written judgment or order appealed from:**

23 Order Denying Plaintiff's Motion for Leave to File Fourth Amended  
24 Complaint dated August 10, 2020;

25 Findings of Fact, Conclusions of Law and Order Denying Plaintiff's Motion  
26 for Leave to File Fourth Amended Complaint dated August 10, 2020;

27 Order to Strike from Record dated August 13, 2020;

28 Order Granting Defendants Robert Chur, Steve Fogg, Mark Garber, Carol

1 Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels' Motion  
2 for Judgment on the Pleadings Pursuant to NRC 12(c) and Judgment Thereon  
3 dated August 13, 2020 August 14, 2020;

4 Findings of Fact, Conclusions of Law and Order Denying the Motion for  
5 Reconsideration of Motion for Leave to Amend Regarding Director Defendants  
6 dated September 9, 2020;

7 Order Denying Plaintiff's Motion to Retax and Settle Costs of Director  
8 Defendants dated July 16, 2021;

9 Order Granting in Part and Denying in Part Plaintiff's Motion for  
10 Declaratory Relief dated August 17, 2021;

11 Discovery Commissioner's Report and Recommendations dated August 23,  
12 2021;

13 Order Regarding Discovery Commissioner's Report and Recommendations  
14 dated September 17, 2021;

15 Order Granting In Part And Denying In Part Plaintiff s Motion In Limine  
16 No. 2 dated September 20, 2021;

17 Order Granting In Part And Denying In Part Plaintiff s Motion For Partial  
18 Summary Judgment As To U.S. Re Corporation dated September 20, 2021;

19 Order Denying Plaintiff's Motion In Limine Number 5 To Limit The Scope  
20 Of Expert Witness Testimony Regarding Speculation Concerning The Economy  
21 dated September 24, 2021;

22 Order Denying Plaintiff's Motion In Limine Number 4: To Preclude Any  
23 Reference To Reinsurance Estimates dated September 24, 2021;

24 Order Denying Plaintiff s Motion In Limine Number 1 To Preclude Sam  
25 Hewitt From Providing Expert Testimony Regarding Insolvency Analysis dated  
26 September 24, 2021;

27 Order Denying Plaintiff's Motion In Limine Number 6 To Strike Proffered  
28 Expert Witness Alan Gray dated September 24, 2021;

1 Order Denying Plaintiff s Motion For Partial Summary Judgment Regarding  
2 Uni-Ter Defendants Breach Of Their Fiduciary Duties dated September 27, 2021;

3 Order Granting Motion to Exclude Interest dated December 15, 2021;

4 Order of Dismissal Without Prejudice in favor of Robert Chur, Steve Fogg,  
5 Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and  
6 Eric Stickels dated February 25, 2016;

7 Order of Dismissal dated May 4, 2016;

8 Judgment in favor of Robert Chur, Steve Fogg, Mark Garber, Carol Harter,  
9 Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels dated August  
10 13, 2020;

11 Order Denying Plaintiff’s Motion to Lift Stay or Alternatively Grant  
12 Plaintiff Other Relief dated August 12, 2019;

13 Order Denying Motion to Substitute dated February 21, 2019;

14 Order Granting in Part Defendants Robert Chur, Steve Fogg, Mark Garber,  
15 Carol Harter, Robert Hurlbut, Barbara Limpkin, Jeff Marshall, and Eric Stickels  
16 Motion to Strike dated November 6, 2018;

17 Order Granting in Part Defendants Robert Chur, Steve Fogg, Mark Garber,  
18 Carol Harter, Robert Hurlbut, Barbara Limpkin, Jeff Marshall, and Eric Stickels  
19 Motion to Dismiss dated February 25, 2016.

20 If no written judgment or order was filed in the district court, explain the  
21 basis for seeking appellate review:

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

23 Order Denying Plaintiff’s Motion for Leave to File Fourth Amended  
24 Complaint notice of entry served August 10, 2020;

25 Findings of Fact, Conclusions of Law and Order Denying Plaintiff’s Motion  
26 for Leave to File Fourth Amended Complaint notice of entry served August 10,  
27 2020;

28 Order to Strike from Record notice of entry served August 14, 2020;

1 Order Granting Defendants Robert Chur, Steve Fogg, Mark Garber, Carol  
2 Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels' Motion  
3 for Judgment on the Pleadings Pursuant to NRC 12(c) and Judgment Thereon  
4 notice of entry served August 14, 2020;

5 Findings of Fact, Conclusions of Law and Order Denying the Motion for  
6 Reconsideration of Motion for Leave to Amend Regarding Director Defendants  
7 notice of entry served September 10, 2020;

8 Order Denying Plaintiff's Motion to Retax and Settle Costs of Director  
9 Defendants notice of entry served July 29, 2021;

10 Order Granting in Part and Denying in Part Plaintiff's Motion for  
11 Declaratory Relief notice of entry served August 17, 2021;

12 Discovery Commissioner's Report and Recommendations served August 23,  
13 2021;

14 Order Regarding Discovery Commissioner's Report and Recommendations  
15 notice of entry served September 20, 2021;

16 Order Granting In Part And Denying In Part Plaintiff s Motion In Limine  
17 No. 2 notice of entry served September 21, 2021;

18 Order Granting In Part And Denying In Part Plaintiff s Motion For Partial  
19 Summary Judgment As To U.S. Re Corporation notice of entry served September  
20 21, 2021;

21 Order Denying Plaintiff s Motion In Limine Number 5 To Limit The Scope  
22 Of Expert Witness Testimony Regarding Speculation Concerning The Economy  
23 dated notice of entry served September 30, 2021;

24 Order Denying Plaintiff's Motion In Limine Number 4: To Preclude Any  
25 Reference To Reinsurance Estimates notice of entry served September 30, 2021;

26 Order Denying Plaintiff s Motion In Limine Number 1 To Preclude Sam  
27 Hewitt From Providing Expert Testimony Regarding Insolvency Analysis notice of  
28 entry served September 30, 2021;

1 Order Denying Plaintiff's Motion In Limine Number 6 To Strike Proffered  
2 Expert Witness Alan Gray notice of entry served September 30, 2021;

3 Order Denying Plaintiff s Motion For Partial Summary Judgment Regarding  
4 Uni-Ter Defendants Breach Of Their Fiduciary Duties notice of entry served  
5 September 30, 2021;

6 Order Granting Motion to Exclude Interest notice of entry served December  
7 16, 2021;

8 Order of Dismissal Without Prejudice in favor of Robert Chur, Steve Fogg,  
9 Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and  
10 Eric Stickels notice of entry served February 26, 2016;

11 Order of Dismissal as to U.S. RE notice of entry served May 10, 2016;

12 Judgment in favor of Robert Chur, Steve Fogg, Mark Garber, Carol Harter,  
13 Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels notice of entry  
14 served August 14, 2020;

15 Order Denying Plaintiff's Motion to Lift Stay or Alternatively Grant  
16 Plaintiff Other Relief notice of entry served August 12, 2019;

17 Order Denying Motion to Substitute dated notice of entry served February  
18 26, 2019;

19 Order Granting in Part Defendants Robert Chur, Steve Fogg, Mark Garber,  
20 Carol Harter, Robert Hurlbut, Barbara Limpkin, Jeff Marshall, and Eric Stickels  
21 Motion to Strike notice of entry served November 7, 2018;

22 Order Granting in Part Defendants Robert Chur, Steve Fogg, Mark Garber,  
23 Carol Harter, Robert Hurlbut, Barbara Limpkin, Jeff Marshall, and Eric Stickels  
24 Motion to Dismiss notice of entry served February 26, 2016.

25  
26 (a) Was service by delivery \_\_\_\_\_ or by mail/electronic/fax X.\

27 Notice of entry of all orders regarding this appeal were served by electronic  
28 service through the District Court's e-service system on the same day the notice of

1 entry of orders were filed.

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**18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52 (b), or 59,**

(a) Specify the type of motion, and the date and method of service of the motion, and date of filing.

Plaintiff’s Motion to Alter or Amend Judgment Pursuant to NRCP 59 filed on February 10, 2022 and served by electronic service on the same day.

Defendant US RE’s Motion to Alter or Amend Judgment filed on February 10, 2022 and served by electronic service on the same day.

NRCP 50(b) Date of filing \_\_\_\_\_  
NRCP 52(b) Date of filing \_\_\_\_\_  
NRCP 59 Date of filing February 10, 2022

**Note: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. \_\_\_\_, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion:  
(c) Date of written notice of entry of order resolving motion served:  
Was service by delivery \_\_\_\_\_ or by mail \_\_\_\_\_ (specify).

**19. Date notice of appeal was filed: November 18, 2022**

If more than one party has appealed from the judgment or order, list date each notice of appeal was filed and identify by name the party filing the notice of appeal:

**20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other: NRAP 4(a)**



1 Defendants did not appeal any appealable determinations made by the District  
2 Court.

3  
4 **23. Give a brief description (3 to 5 words) of each party's separate claims,  
5 counterclaims, cross-claims or third-party claims, and the date of  
6 formal disposition of each claim.**

6 Commissioner of Insurance:

7 Against the Director Defendants: (1) Gross Negligence; and (2)  
8 Deepening of the Insolvency.

9 Against the Corporate Defendants: (1) Breach of Fiduciary Duty; and  
10 (2) Negligent Misrepresentation.

11 Director Defendants: No separate claims, counterclaims, cross-claims or  
12 third-party claims.

13 Corporate Defendants: No separate claims, counterclaims, cross-claims or  
14 third-party claims.

15 **24. Did the judgment or order appealed from adjudicate ALL the claims  
16 alleged below and the rights and liabilities of ALL the parties to the  
17 action or consolidated actions below:**

18 Yes  X  No

19  
20 **25. If you answered "No" to question 24, complete the following:**

21 (a) Specify the claims remaining pending below:

22 (b) Specify the parties remaining below:

23  
24 (c) Did the district court certify the judgment or order appealed from as a  
25 final judgment pursuant to NRCP 54(b):

26 Yes   No

27 (d) Did the district court make an express determination, pursuant to NRCP  
28 54(b), that there is no just reason for delay and an express direction for the

1 entry of judgment:

2 Yes \_\_\_\_\_ No \_\_\_\_\_

3 26. **If you answered “No” to any part of question 25, explain the basis for**  
4 **seeking appellate review (e.g., order is independently appealable under**  
5 **NRAP 3A(b)):**

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

- 7 ● The latest-filed complaint, counterclaims, cross-claims, and third-
- 8 party claims
- 9 ● Any tolling motion(s) and order(s) resolving tolling motion(s)
- 10 ● Orders of NRCP 41(a) dismissals formally resolving each claim,
- 11 counterclaims, cross-claims and/or third-party claims asserted in the
- 12 action or consolidated action below, even if not at issue on appeal
- 13 ● Any other order challenged on appeal
- 14 ● Notices of entry for each attached order

15 **VERIFICATION**

16 I declare under penalty of perjury that I have read this docketing statement,  
17 that the information provided in this docketing statement is true and complete to  
18 the best of my knowledge, information and belief, and that I have attached all  
19 required documents to this docketing statement.

20 Name of Appellants: Commissioner of Insurance for the State of Nevada as  
21 Receiver of Lewis & Clark LTC Risk Retention Group,  
22 Inc.

23 Name of counsel of record: Brenoch Wirthlin, Esq.  
24 Hutchison & Steffen, PLLC  
25 10080 W. Alta Drive, Ste. 200  
26 Las Vegas, Nevada 89145  
27 702-385-2500

28 Date: 12/13/2022 /s/Brenoch Wirthlin  
Signature of counsel of record

Clark County, Nevada  
State and county where signed

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 13th day of December, 2022, I caused the above and foregoing document entitled: **DOCKETING STATEMENT** 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 to be served by mailing via first class mail with sufficient postage prepaid to the following addresses listed below.

*/s/ Jon Linder*  
An employee of Hutchison & Steffen, PLLC

**Lansford W. Levitt  
2072 Sea Island Drive  
Dana Point, CA 92629**