IN THE SUPREME COURT OF THE STATE OF NEVADA

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THE STATE OF NEVADA COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS COMMISSIONER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Appellant, vs. ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION, Respondents.	Case No. 85668 **RESPONDENT U.S. RE CORPORATION'S REPLY IN SUPPORT OF MOTION TO STRIKE**
ROBERT CHUR; STEVE FOGG; MARK GARBER; CAROL HARTER; ROBERT HURLBUT; BARBARA LUMPKIN; JEFF MARSHALL; AND ERIC STICKELS, Appellants, vs. THE STATE OF NEVADA COMMISSIONER OF INSURANCE AS COMMISSIONER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Respondents.	Case No. 85728

THE STATE OF NEVADA COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS COMMISSIONER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Appellant, vs. ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION, Respondents.	Case No. 85907

RESPONDENT U.S. RE CORPORATION'S REPLY IN SUPPORT OF MOTION TO STRIKE

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INTRODUCTION

This Court's October 12, 2023 Order was clear – it granted the Commissioner "leave to file a response to the reply regarding this court's order amending caption and to show cause," which the Court issued in Case No. 85907. *See* October 12 Order at p. 2. The October 12 Order did not grant leave to address the Order to Show Cause in Case No. 85668. Yet, four pages of the Commissioner's October 26, 2023 response exclusively address the Order to Show Cause issued in Case No. 85668.

The Commissioner's October 26 and November 20 submissions seek to belatedly include U.S. Re in an appeal (Case No. 85668) that does not pertain to it and in which the Corporate Defendants have never participated – *even in this Court's referral to the settlement program*. As the Commissioner has expressed, "[t]his 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." Docketing Statement at 8:9-13. Thus, this Court should strike Commissioner's October 26, 2023 response.

ARGUMENT

A. U.S. Re's Motion to Strike is not a Supplemental Response.

Contrary to the Commissioner's contention that, "[a]t its core U.S. Re's Motion to Strike is, in reality, a supplemental response to the Commissioner October 26, 2023 Reply" (Resp. at 3:10-11), U.S. Re would not have been compelled to file its Motion to Strike had the Commissioner not exceeded the leave granted by this Court. U.S. Re's Motion to Strike reveals the impropriety of the Commissioner's response and demonstrates that the Commissioner failed to challenge the June 29 Order as void.

Further, the Commissioner makes an unfounded assertion that this Court's consolidation of Case Nos. 85668, 85728, and 85907 led the Commissioner to believe that this Court "was expecting, or at least allowing, discussion on each matter subject to an OSC." Resp. at n. 3. Had the Commissioner actually believed this assertion, it would not have requested to be permitted to supplement its response in Case No. 85668, as seen in footnote 4. *Id.* at n. 4. U.S. Re filed the Motion to Strike to address the Commissioner's improper argument, inaccurate statements and procedural errors, not to supplement its prior submissions.

B. Clarification of Procedural Misstatements.

The Commissioner's Response to U.S. Re's Motion curiously states, "[h]ere, Commissioner filed a Notice of Appeal on November 9, 2022. A motion for reconsideration was filed on December 14, 2022." Resp. at 4:20-21. Neither statement is accurate. The Commissioner filed its Notice of Appeal in Case No. 85907 on December 30, 2023. As this Court correctly notes, "[t]he district court docket entries reflect that a motion to reconsider the order granting the motion for attorney fees and costs was timely filed on December 16, 2022" and "the notice of appeal appears to be premature under NRAP 4(a) because it appears that it was filed after the timely filing of a tolling motion." May 10, 2023 Order Amending Caption and to Show Cause issued in Case No. 85907 at 1-2.

Separately, while U.S. Re did prepare the June 29 Order, the decision to enter the Satisfaction of Judgment was ordered *sua sponte* by the district court. The Commissioner conceded this in seeking reconsideration of the Satisfaction of Judgment. *See* Commissioner's Reply in Support of Motion for Partial Reconsideration and Relief from the Court's June 29, 2023 Order attached hereto (excluding exhibits) as **Exhibit A** at 8:25-27 ("[T]he only relief requested by U.S. Re was for this

Court to 'vacate its April 12, 2023 Order denying U.S. Re's two motions for reconsideration.'").

Finally, instead of stating "[t]he June 29 Order was collateral to and independent from the appeal" in its Motion to Strike, U.S. Re should have stated "the tolling motion that was ultimately resolved by the June 29 Order was collateral to and independent from the appeal." As briefed and argued extensively before the district court, the tolling motion was entirely collateral to and independent from the only appeals that were pending at the time it was filed. The June 29 Order vacated a prior order denying the tolling motion, which was indisputably collateral to and independent from the appeals that were pending at the time the tolling motion was filed.

C. The Commissioner's Failure to Name U.S. Re as a Party in Appeal No. 85668 Was Not an "Oversight."

This recently conceived contention is belied not only by the Case Appeal Statement and the Docketing Statement, but by the Commissioner's prior representations to the district court and by the settlement agreement into which the Commissioner and the Corporate Defendants entered in July 2023. *See* Motion for Partial Reconsideration of Motion for Leave to Amend Regarding Director Defendants, attached

hereto as **Exhibit B** at n. 3, 8:16-18; *see also* November 10, 2022 Transcript of Hearing, attached hereto as **Exhibit C**, at 9:9-12.

D. The Commissioner Did Not Challenge the June 29 Order as Void.

Four months after the district court's entry of the June 29 Order, the Commissioner contended for the first time in its October 26, 2023 response that the June 29 Order is void. The record reveals the Commissioner did not appeal the June 29 Order, and the Commissioner's reconsideration briefs sought ***only*** reconsideration of the district court's entry of the Satisfaction of Judgment. *See* U.S. Re's Motion to Dismiss for Lack of Jurisdiction filed in Case No. 87367 and attached hereto (excluding exhibits) and incorporated herein as **Exhibit D** at 6-8. In fact, the Commissioner expressly stated, "this Motion does not request that the Court's order regarding the dismissal of U.S. Re from this action be modified or amended." *Id.* Indisputably, the Commissioner failed to challenge the June 29 Order as void.

CONCLUSION

This Court should grant U.S. Re's Motion to Strike and strike the Commissioner's October 26, 2023 response in its entirety.

DATED this 27th day of November, 2023.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDonald Carano LLP and that on November 27, 2023, I served the **RESPONDENT U.S. RE CORPORATION'S REPLY IN SUPPORT OF MOTION TO STRIKE** on the parties in said case by electronically filing via the Court's e-filing system. The participants in this case are registered e-filing users and service will be additionally accomplished by depositing a copy via U.S. Mail as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

DATED: November 27, 2023.

/s/ Jelena Jovanovic
An Employee of McDonald Carano

EXHIBIT “A”

REPL

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DISTRICT COURT OF NEVADA

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Plaintiff, vs. ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION; DOES 1-50, inclusive; and ROES 51-100, inclusive; Defendants.	Case No.: A-14-711535-C Dept. No.: XXVII **REPLY IN SUPPORT OF MOTION FOR PARTIAL RECONSIDERATION AND RELIEF FROM THE COURT'S JUNE 29, 2023 ORDER GRANTING NRCP 60 RELIEF TO U.S. RE CORPORATION, TO VACATE THE SATISFACTION OF JUDGMENT ENTERED ON JUNE 30, 2023, AND FOR A NEW TRIAL**

Plaintiff Commissioner of Insurance for the State of Nevada as Receiver of Lewis & Clark LTC Risk Retention Group, Inc. ("Plaintiff" or "Commissioner") hereby submits her reply in support of her motion ("Motion") for partial reconsideration and relief from the Court's June 29, 2023 Order granting NRCP 60 relief to Defendant U.S. Re Corporation ("Defendant" or "U.S. Re" and together with the two Uni-Ter Defendants "Corporate Defendants", and collectively with Plaintiff the "Parties") as follows:

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MEMORANDUM OF POINTS AND AUTHORITIES

I. LAW AND ARGUMENT

A. Contrary to US Re's assertion, entry of the Satisfaction of Judgment was an advisory opinion. As such it is void and should be vacated.

As the Nevada Supreme Court has held, district courts are prohibited from issuing advisory opinions:

> Just as substantive constitutional arguments, which generally must be evaluated in the context of a concrete factual situation, are improperly considered before an initiative becomes law, so did the district court improperly attempt to apply the measure to a hypothetical set of facts. **Essentially, the district court's determination was an improper advisory opinion. Thus, it is void**.

Herbst Gaming, Inc. v. Heller, 122 Nev. 877, 889, 141 P.3d 1224, 1232 (2006). The Satisfaction of Judgment is based upon the advisory opinion regarding the "acceptance of late tender." As the Court recognized in an earlier hearing (noting that the pending appeals prevented the Court from issuing the ruling US Re sought which the Satisfaction of Judgment confirms):

> But when I prepared for the hearing, I would have granted the motion to enforce the settlement agreement based upon the acceptance of the late tender, and I would have denied the motion to dismiss. It just wasn't a bargained-for term in the agreement, and the agreement itself is not ambiguous. So the matter is off calendar, but you have your advisory opinion.

See Transcript of November 10, 2022 hearing, Exhibit 7 hereto, at p. 11. Thus, because the Satisfaction of Judgment is based on the advisory opinion regarding "the acceptance of the late tender", the Satisfaction of Judgment should be vacated.

B. Determination of whether an implied waiver has occurred is a question of fact. Whether an implied waiver exists is a question of intention, and Plaintiff never intended to waive any rights. This issue has been raised by the defendants in the Federal Action as an affirmative defense and is therefore for the fact finder in the Federal Action.

US Re asserts that "[a] waiver has been implied" by the Plaintiff's conduct. *See* Opposition at p. 6, ll. 27-28. Courts across the country, including Nevada and California, have recognized that whether an implied waiver has occurred is absolutely a question of fact. *See*

Merrill v. DeMott, 113 Nev. 1390, 1399, 951 P.2d 1040, 1045 (1997) ("Issues of whether a waiver has been implied by conduct are questions for the finder of fact."; *In re Moran's Est.*, 122 Cal. App. 2d 167, 170, 264 P.2d 598, 600 (1953) ("**What acts amount to such an implied waiver is, of course, a question of fact**."); *Renovest Co. v. Hodges Dev. Corp.*, 135 N.H. 72, 79, 600 A.2d 448, 453 (1991) ("**Whether an implied waiver occurred is a question of fact**"); *Portland Fire Fighters' Ass'n, IAFF Loc. 43 v. City of Portland*, 321 Or. App. 569, 577, 518 P.3d 611, 616–17 (2022) ("Here, there was no explicit "waiver," *per se*; thus, any waiver must be implied from conduct. **If a waiver is to be implied from conduct or circumstances, it is a question of fact for the trier of fact to determine whether there has been a "clear, unequivocal, and decisive act of the party**,"); *Armstrong v. Hendrickson*, 160 Me. 230, 232, 202 A.2d 558, 560 (1964) ("**Whether there has been a waiver established when it is to be implied from numerous acts is usually a question of fact**."); *Moore v. Mut. of Enumclaw Ins. Co.*, 113 Or. App. 574, 577, 833 P.2d 1310, 1312, opinion adhered to as modified on reconsideration, 116 Or. App. 206, 840 P.2d 1320 (1992), rev'd, 317 Or. 235, 855 P.2d 626 (1993) ("**Waiver implied from circumstances is a question of fact dependent upon the particular facts of the case**, and it is usually for the jury to say whether the conduct of the party evidences a conscious and voluntary abandonment of some right or privilege.").

Waiver, especially an allegation of implied waiver, is a question of fact because "**Waiver is a matter of intent, and as such is a question of fact for the jury's determination**." *Garrett v. Neitzel*, 48 Idaho 727, 285 P. 472, 473 (1930); *Weisbart & Co. v. First Nat. Bank of Dalhart, Tex.*, 568 F.2d 391, 396 (5th Cir. 1978) ("**Intention is a prime factor in determining the question of waiver.**").

While US Re falsely asserts that the facts are "uncontested", nothing could be further from the truth. The truth is that the Plaintiff never intended to waive any right, much less the right to collect on the Judgment for the benefit of the claimants. *See* Exhibit 8. The mere fact that US Re alleges this demonstrates that there are disputed issues of fact that must be determined by the appropriate factfinder. In this case, that is the jury in the Federal Action.[1]

[1] As the Court is aware, Plaintiff filed an action in U.S. District Court, District of Nevada (Case No. 2:23-cv-00537) ("Federal Action").

Underscoring not only this point but also US Re's deception in this regard, Catlin has filed its answer in the Federal Court Action in which it alleges "satisfaction of judgment" as an affirmative defense. *See* Exhibit 9 hereto, at p. US Re's suggestion that the Satisfaction of Judgment will have no impact on other cases currently pending is belied by the fact that Catlin – represented by US Re's counsel – is attempting to use the Satisfaction of Judgment in the Federal Court Action.

Moreover, US Re would need to allege prejudice in proving waiver – which it cannot do because US Re was not prejudiced by having its insurers pay part of the judgment against it.

C. Even if it did take effect, the Agreement is unenforceable because it was procured by fraud,

US Re asserts that Plaintiff "provides no evidence" of fraud regarding the Agreement. *See* Opposition at p. 7. This statement is as brazen as it is misleading. First, this forum is not the proper forum for litigating this issue. The proper forum is the Federal Court Action where the existence, impact and enforceability – if any – of the Agreement is being currently litigated.

Second, the determination of whether fraud has occurred is unequivocally a question of fact for the jury. The Supreme Court of Nevada, along with virtually every court addressing this issue, has recognized this black letter law. *See Lutz v. Kinney*, 24 Nev. 38, 49 P. 453, 454 (1897) ("**The question of fraudulent intent is a question of fact, and not of law**."); Milton Meyer & Co. v. Curro, 239 Cal. App. 2d 480, 486, 48 Cal. Rptr. 812, 816 (Ct. App. 1966) ("**The existence of actual fraud is always a question of fact**"). Additionally, settlement agreement, and contracts generally, are unenforceable if they are procured by fraud." *Transcor Astra Grp. S.A. v. Petrobras Am. Inc.*, 650 S.W.3d 462, 473 (Tex. 2022), reh'g denied (Sept. 2, 2022), cert. denied, No. 22-518, 2023 WL 3571493 (U.S. May 22, 2023) (*citing Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 331 (Tex. 2011)); *see also Daneshmand v. City of San Juan Capistrano*, 60 Cal. App. 5th 923, 931, 275 Cal. Rptr. 3d 245, 253 (2021) ("**Where it is shown that deception has been practiced in obtaining a release it may not be considered as a satisfaction of anything not consented to by the claimant**.").

Third, US Re's assertion is false. In fact, Plaintiff has pointed out that US Re has provided, subsequent to the execution of the Agreement, confirmation that the statement contained in the Void Agreement regarding applicable insurance was false and designed to induce Plaintiff to enter into the Agreement. This is also the subject of the Federal Action and it is improper for this Court to purport to enforce a fraudulent Agreement that is the subject of the pending Federal Action. Accordingly, Plaintiff respectfully submits that the Satisfaction of Judgment must be vacated.

D. <u>Even if implied waiver and fraud were not question of fact, which they are, the Agreement never took effect and executory contracts cannot be enforced. Further, even if the Agreement did take effect, which it did not, it was null and void by its own terms.</u>

The Agreement was executory as it never took effect by its own terms. Paragraph B(1) states that "all Parties acknowledge and agree that this Agreement is of no force and effect until said Settlement Funds are actually received by the Plaintiff, and that this Agreement shall be null and void in the event such Settlement Funds are not received by the Plaintiff within the 30-day time period referenced herein." *See* Exhibit 1 to the Motion, at pp. 1-2. There is no dispute that the funds were not received within the 30-day time frame.[2] Thus, the Agreement never took effect and was therefore executory, subject to the condition precedent that the Plaintiff receive all of the required funds in the 30-day period. As such, the Agreement was never enforceable. *See Willard v. Valley Forge Life Ins. Co.*, 218 F. Supp. 2d 1197, 1201 (C.D. Cal. 2002) ("**A contract is unenforceable if a condition precedent is not met**."); *see also Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 791 (9th Cir. 2012) (executory contracts unenforceable).

Further, US Re does not and cannot dispute the language of the Agreement which states very clearly that it will be "null and void" if payment in full was not received within the 30-day

[2] On July 20, 2022, undersigned counsel forwarded a copy of the signed Agreement, a W-9, and an notice of entry of order ("NOE") as required by paragraph B(1) of the Agreement. *See* Exhibit 10. Thus, the 30 day period to receive the Settlement Funds (as defined in the Agreement) ended on August 19, 2022. On July 22, 2022, counsel for US Re responded stating that he had received these items and had "forwarded them to the client and carriers." *Id*. In addition, undersigned counsel mailed the items to counsel for US Re. *See* Exhibit 11. On August 19, 2022, Plaintiff's representative received a check in the amount of approximately $400,000 from one insurer, but did not receive the remaining amount of the Settlement Funds. *See* Exhibit 12. On August 24, 2022, five (5) days after the expiration of the strict 30-day time period for payment, Plaintiff received a check from another insurer for approximately $4.79M. *See* Exhibit 13.

time period. US Re does not dispute that such payment was not received within the required time period. US Re ignores this argument entirely because it cannot refute that paragraph B(1) of the Agreement states that the Agreement "**is of no force and effect until said Settlement Funds are actually received by the Plaintiff, and that this Agreement shall be null and void in the event such Settlement Funds are not received by the Plaintiff within the 30-day time period referenced herein**." *See* Exhibit 1 to the Motion. The Agreement never took effect, and even if it had, it was voided by its own terms when US Re violated them. Accordingly, the Satisfaction of Judgment provide to U.S. Re by the Court is contrary to Nevada law and should be vacated.

E. <u>The pending Federal Action requires the Satisfaction of Judgment be vacated.</u>

As the Court is aware, the Federal Action places the very same matters at issue in Defendant's pending motions before a federal judge and jury. The Federal Action alleges, among other things, that settlement funds were not received by Plaintiff within 30 days, and that as a result, the Agreement was rendered of no force and effect. The issues now pending before the U.S. District Court are the exact same issues underlying Defendant's motions for reconsideration, and as a result, these issues will now be adjudicated by a federal judge and jury, even though they may have been brought first in a state court action. *Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800 (1976) ("Generally, as between state and federal courts, the rule is that the pendency of an action in state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction"); *Kohn L. Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1239 (9th Cir. 2015) (Federal courts are not enabled to dismiss, stay, or transfer a case based on an earlier-filed suit pending in state court.") *See Kelley v. HCR ManorCare, In*c., 2017 WL 10441310, at *2 (C.D. Cal. Nov. 28, 2017) ("[T]**he first-to-file doctrine does not extend to state court proceedings**."); Cummins v. Lollar, CV 11-08081 DMG (MANx), 2011 WL 13134834, at *4 (C.D. Cal. Dec. 14, 2011) (finding the rule did not apply because the first-filed case was pending in state court); *Tinnin v. Sutter Valley Med. Found*., 2022 WL 17968628, at *5 (E.D. Cal. Dec. 27, 2022). As a result of Plaintiff filing the

Federal Action, Defendants will have their day in court on these issues. The Satisfaction of Judgment should be vacated to permit the same issues to be properly litigated and resolved in the Federal Action.

F. <u>The Satisfaction of Judgment must be altered or amended to exclude the Uni-ter Entities.</u>

Under EDCR 2.20(e), the "[f]ailure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same." The Nevada Supreme Court regularly affirms District Court judges' discretion to grant motions based solely on this provision. *See, e.g., Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc*., 124 Nev. 272, 278, 182 P.3d 764, 768 (2008); *King v. Cartlidge*, 121 Nev. 926, 928, 124 P.3d 1161, 1162 (2005); *Walls v. Brewster*, 112 Nev. 175, 178, 912 P.2d 261, 263 (1996).

In this case, Plaintiff filed its Motion for Partial Reconsideration on July 13, 2023. "This Motion seeks partial relief from the Court's June 29, 2023 Order providing the Corporate Defendants a Satisfaction of Judgment." *See* Motion for Partial Reconsideration at 2:14-15. These "Corporate Defendants" consist of U.S. Re Corporation, Uni-Ter Underwriting Management Corp., and Uni-Ter Claims Services Corp. ("the Uni-Ter Defendants"). *Id.* at 1:25-26. Thus, the Motion for Partial Reconsideration clearly seeks relief that negatively impacts the Uni-Ter Defendants' interests. However, the Uni-Ter Defendants failed to oppose the Motion for Partial Reconsideration. Though U.S. Re Corporation opposed the motion, the Uni-Ter Defendants did not even bother to join U.S. Re Corporation's opposition. U.S. Re Corporation's opposition was filed solely on its own behalf, as indicated in the caption and heading. *See* Defendant U.S. Re Corporation's Opposition at 1:11-17.

The Court should construe Uni-Ter Defendants' failure to oppose the Motion for Partial Reconsideration as an admission that the Motion is meritorious and a consent to granting the same. Thus, the Court should grant the Motion for Partial Reconsideration against the Uni-Ter Defendants under EDCR 2.20(e). The Court can then separately consider U.S. Re Corporation's opposition, and whether to grant the Motion for Partial Reconsideration in full.

G. This Court lacks jurisdiction to determine whether the Judgment has been satisfied

This Court was divested of jurisdiction by the currently pending appeals of this matter. *See* Appeal Nos. 85907, 85608, and 85728 currently pending before the Nevada Supreme Court. The Nevada Supreme Court has recognized that "Indeed, a timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court." *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987); *see also City of L.A., Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 884 (9th Cir. 2001) ("As long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.") But this Court was divested of jurisdiction by the currently pending appeals, as this Court previously recognized. *See* November 2022 Transcript, Exhibit 7 hereto, at p. 11. Accordingly, Plaintiff submits that the Satisfaction of Judgment should be vacated.

H. The Satisfaction of Judgment was procedurally improper

Defendant fails to respond to any of Plaintiff's arguments that a Satisfaction of Judgment was procedurally improper. Defendant does not deny and provides no response whatsoever regarding (1) U.S. Re's failure to include a prayer for relief for a Satisfaction of Judgment, (2) the failure of any proper notice being provided to Plaintiff that U.S. Re was seeking a Satisfaction of Judgment, and that (3) Plaintiff was not afforded an opportunity to be heard with respect to such relief because such relief was never requested by the Defendant.

Instead, U.S. Re's opposition provides a long and largely irrelevant narrative that appears to be just a straw man argument designed to shift the Court's attention away from what U.S. Re cannot deny. U.S. Re does not deny that it failed to properly request a satisfaction of judgment in its prayer for relief. Moreover, U.S. Re knows that it failed to make any request for general relief. Instead, the **only** relief requested by U.S. Re was for this Court to **"vacate its April 12, 2023 Order denying U.S. Re's two motions for reconsideration."** *See* U.S. Re's Motion to Vacate Order Denying Motions for Reconsideration, on file herein. As a result, this Court's decision to

issue a Satisfaction of Judgment was erroneous procedurally on fundamental due process grounds, but also procedurally improper under NRS § 17.200 and under rulings handed down by the Nevada Supreme Court.

NRS § 17.200 provides the procedure for entering a satisfaction of judgment in Nevada. A satisfaction of judgment can be entered voluntarily by the judgment creditor, or by a motion filed by the judgment debtor:

> **"Entry in docket.** Satisfaction of a judgment may be entered in the clerk's docket if an execution is returned satisfied, and if an acknowledgment of satisfaction is filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or by the attorney, unless a revocation of the attorney's authority is previously filed. Whenever a judgment is satisfied in fact, the party or attorney shall give such an acknowledgment, and **the party who has satisfied the judgment may move the court to compel it or to order the clerk to enter the satisfaction in the docket of judgment**." (Emphasis added)

Because U.S. Re did not move the Court for entry of satisfaction of judgment as provided for in Nevada under NRS § 17.200, the Court's decision to issue the Satisfaction of Judgment was procedurally improper.

Finally, the Nevada Supreme Court has ruled that full satisfaction of judgment may not be entered by a court when an attorney fees determination is pending. *Barney v. Mt. Rose Heating Air*, 124 Nev. 821 (2008). In affirming the trial court's order denying Barney's motion to compel satisfaction of judgment, the Nevada Supreme Court ruled as follows:

> "Thus, because Barney is entitled to satisfaction of judgment under NRS 17.200 only upon the payment of all awards for NRS 108.237(1) attorney fees incurred postjudgment, and those amounts apparently were not determined or tendered, he was not entitled to full satisfaction of the judgment. Instead, since attorney fees requests under NRS 108.237 remained pending when Barney tendered payment, he was entitled only to partial satisfaction of the judgment." *Id.*

As this Court is aware, Plaintiff filed a notice of appeal on December 30, 2022 of the Court's December 2, 2022, attorneys' fees order. As in *Barney*, where the attorney fees were still under adjudication, the pending appeal of the attorney fees award in this matter makes the amount of the Judgment in this matter yet to be determined. Because Judgment amounts cannot be known under such circumstances, the Nevada Supreme Court has ruled that in such situations

courts are prohibited from issuing a full satisfaction of judgment to the judgment debtor. Furthermore, as this Court is aware, the enforceability of the settlement agreement is currently pending in federal court, which makes the amount of the Judgment still under determination because it is currently under adjudication. As in *Barney*, because a portion the Judgment amount is currently under dispute, a full satisfaction of judgment is not procedurally proper and should not have been issued by this Court.

For all of these reasons, the Satisfaction of Judgment entered by this Court was procedurally improper under Nevada law, and should therefore be vacated.

I. The Satisfaction of Judgment has already been used by multiple parties to try and gain a dismissal of the Commisioner's actions pending in other venues

As the Court is aware, the Commissioner is currently prosecuting actions on other venues, and has advised this Court of the grievous harm to those cases that may result from the Satisfaction of Judgment issued in this matter. Already, multiple parties including U.S. Re have tried to use the Satisfaction of Judgment issued by this Court to get cases dismissed in other jurisdictions.

The federal action. While U.S. Re is arguing to this Court that such concerns are a "baseless falsehood"[3], counsel for U.S. Re has been retained by a Defendant in the federal action and is arguing in federal court that the Satisfaction of Judgment entered in this matter provides an affirmative defense to the claims asserted by the Commissioner in the federal action. On July 31, 2023, Catlin Specialty Insurance Company, a defendant in the federal action (Case 2:23-cv-00537-JCM-BNW) represented by U.S. Re's counsel, Mr. George Ogilvie of McDonald Carano, LLP, filed an Answer to the Commissioner's complaint which asserts as an affirmative defense the following:

> "4. **The Plaintiff is barred by** the doctrines of release, waiver, estoppel, and **satisfaction of judgment** because the Plaintiff received and has retained the Settlement Funds sent on behalf of Catlin Specialty Insurance Company, which exhausted the Catlin Policy, as well as the Settlement Funds sent on behalf of Ironshore, in full settlement of any and all claims, known and unknown, including the claims asserted in this Action."[4]

[3] *See* U.S Re's opposition to the Motion, page 9, line 12, on file herein.

[4] *See* Exhibit 9, Catlin Insurance Company's ("Catlin") Answer to Complaint, page 4, lines 21-25, filed on July 31, 2023, with counsel George F. Ogilvie III, Esq. of McDonald Carano LLP, appearing as counsel for Catlin.

Despite the language contained in the Satisfaction of Judgment that it "is not intended to have any effect on Case No. 2:23-cv-00537 pending in the U.S. District", that is exactly what is happening under the representation and direction of U.S. Re's counsel. The Commissioner finds it highly disingenuous for U.S. Re to argue in this Court that the Satisfaction of Judgment is not intended to impact the federal action, yet at the same time counsel for U.S. is arguing in the federal court action on behalf of Catlin that it does.

Nevada Supreme Court. While U.S. Re is arguing in this Court that "Satisfaction of Judgment has no impact on the Receiver's appeal against the director defendants,"[5] U.S. Re is arguing before the Nevada Supreme Court that the "Satisfaction of Judgment expressly and dispositively brings to a conclusion Appellant's pursuit of additional relief, including this appeal of the Fees Order. *See* Exhibit 14. The multiple issues on appeal before the Nevada Supreme Court are intertwined, and for this reason the liability of the corporate defendants and other parties are inexorably intertwined. For example, if the Judgment in this matter has been fully satisfied by the Corporate Defendants, then what damages remain for liability of other parties who are equally responsible for causing the insolvency of L&C? Attorney fees are part of damages caused to the Commissioner by the insolvency of L&C, and must be preserved as damages not satisfied so that other liable parties may be held accountable to pay them.

Given the efforts to use the Satisfaction of Judgment issued by this Court to derail the Commissioner's prosecution of cases pending in both the federal action and before the Nevada Supreme Court, it is clear that the Commissioner's concerns were justified. For this reason, the Commissioner respectfully requests the relief sought below.

IV. CONCLUSION

For all these reasons, Plaintiff respectfully requests that the Court grant Plaintiff's Motion for Partial Reconsideration and Relief from the Court's June 29, 2023 Order Granting NRCP 60 Relief to U.S. Re Corporation, to Vacate the Satisfaction of Judgment entered on June 30, 2023, and for a New Trial, vacate the Satisfaction of Judgment, reconsider and amend the June 29 Order accordingly, and to grant such other and further relief as the Court deems appropriate.

[5] See U.S Re's opposition to the Motion, page 9, lines 18-19, on file herein.

DATED this 2nd day of August, 2023.

HUTCHISON & STEFFEN

By: */s/ Brenoch Wirthlin*

BRENOCH R. WIRTHLIN, ESQ. (10282)
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that on this 2nd day of August, 2023, I caused the document entitled **REPLY IN SUPPORT OF MOTION FOR PARTIAL RECONSIDERATION AND RELIEF FROM THE COURT'S JUNE 29, 2023 ORDER GRANTING NRCP 60 RELIEF TO U.S. RE CORPORATION, TO VACATE THE SATISFACTION OF JUDGMENT ENTERED ON JUNE 30, 2023, AND FOR A NEW TRIAL** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Jon Linder

An Employee of Hutchison & Steffen, PLLC

EXHIBIT “B”

OST

MARK A. HUTCHISON, ESQ.
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DISTRICT COURT

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC. Plaintiff, *vs.* ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION,; DOES 1-50, inclusive; and ROES 51-100, INCLUSIVE, Defendants.	CASE NO.: A-14-711535-C DEPT. NO.: XXVII **MOTION FOR PARTIAL RECONSIDERATION OF MOTION FOR LEAVE TO AMEND REGARDING DIRECTOR DEFENDANTS** **Request for Hearing on OST Pending**

Plaintiff, COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP (the "Plaintiff")[1], by

[1] "L&C" or the "Company."

and through its attorneys, the law firm of Hutchison & Steffen, hereby submits the following Motion for Partial Reconsideration of Motion for Leave to Amend ("Motion to Amend"). This Motion seeks reconsideration of the Court's order on the Motion to Amend ("Order") with respect to the Director Defendants.[2] This motion is brought pursuant to EDCR 2.24 and is based on the following Memorandum of Points and Authorities, any argument the Court entertains at a hearing on this matter, and all papers and pleadings on file herein.

DATED: August 14, 2020.

HUTCHISON & STEFFEN
By */s/ Brenoch Wirthlin, Esq.*
MARK A. HUTCHISON, ESQ.
Nevada Bar No. 4639
PATRICIA LEE, ESQ.
Nevada Bar No. 8287
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Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respectfully, this Court's decision on Plaintiff's Motion to Amend is clearly erroneous as justice requires the Plaintiff be allowed to amend with respect to the Directors.[3]

First, with respect, the Court's finding of delay is clearly erroneous. The Plaintiff could not have moved to amend to conform to the new *Chur*[4] Opinion before the *Chur* Opinion was entered. In fact, the *Chur* Opinion incorporates the Tenth Circuit's decision in *In re Zagg*, which did not

[2] The "Director Defendants" or "Directors" include Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels.

[3] This motion does not seek reconsideration regarding the Court's decision to deny leave to amend concerning Mr. Piccione, or to add causes of action for aiding and abetting or deepening the insolvency as to the Uni-Ter Defendants and U.S. RE.

[4] 136 Nev. Adv. Op. 7 (2020).

even exist when Plaintiff filed its Complaint. A plaintiff cannot be expected to anticipate a change in the law in the future which did not exist at the time of the original complaint. This Court, as well as state and federal court in Nevada, accepted and relied on the holding in *Shoen* that gross negligence was a basis for individual liability against directors. When that language was disavowed in the *Chur* Opinion, Plaintiff moved to amend its complaint within 48 hours of the stay being lifted, and within the time set by this court to file a motion to amend. It is a grave miscarriage of justice to not even permit the Plaintiff to amend its claims against the Directors to meet the new standard under these circumstances. Justice requires that Plaintiff, who filed its complaint without the benefit of the *Chur* or *Zagg* opinions, be permitted to amend as to the Directors.

Second, the finding that the Motion to Amend was untimely is clearly erroneous. This Court provided a scheduling order which set a deadline for all parties to move to amend. In the Court's Order Granting Plaintiff's Motion for Clarification ("Clarification Order") the Court expressly stated that "the parties shall have to and including July 2, 2020, in order to move to amend pleadings." The Plaintiff filed its Motion to Amend on July 2, 2020, within the deadline set by this Court. For the Court to then determine that the Motion to Amend was untimely is very unfair and unjust. A party should be able to rely on the Court's scheduling order, and when a court says a party has until a particular date to move to amend, filing the requisite motion by that date should necessarily mean the motion is timely. In addition, any finding of delay or untimeliness is erroneous as Plaintiff filed its Motion to Lift the Stay on July 2, 2019, to move this matter forward. This Court denied it. It is unfair and unjust for Plaintiff's motion to lift the stay and proceed to be denied, then for delay to be found. Accordingly, Plaintiff respectfully requests this Court reconsider its decision on the Motion to Amend as to the Directors.

II. APPLICABLE STANDARD

"A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd*., 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). A decision may be determined to be clearly erroneous based on clarifying case law.

Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) ("Judge Breen rested his reconsideration of Judge Handelsman's arbitrability analysis on the basis that it was 'clearly erroneous,' particularly in light of what he considered to be new clarifying case law.")

III. ARGUMENT

A. Plaintiff could not have moved to amend under the *Chur/Zagg* standard until the *Chur* Opinion was handed down.

Respectfully, the Court's finding of delay is clearly erroneous. The Plaintiff could not have moved to amend to conform to the *Chur* Opinion before the *Chur* Opinion was entered. In fact, the *Chur* Opinion incorporates the Tenth Circuit's decision in *In re Zagg*, which did not even exist when Plaintiff filed its Complaint. A plaintiff cannot be expected to anticipate a change in the law in the future which did not exist at the time of the original complaint. This Court, as well as state and federal court in Nevada, accepted the holding in *Shoen* that gross negligence was a basis for individual liability against directors.[5] In fact, in addition to denying prior motions to amend – *see* orders dated February 25, 2016 and October 10, 2016[6] – this Court expressly relied on *Shoen* in denying the Directors' Motion for Judgment on the Pleadings and expressly noted *Shoen* was the controlling case law:

> IT IS HEREBY ORDERED that the Director Defendants' Motionf or Judgment on the Pleadings pursuant to NRCP 12(c) is DENIED. The Court finds the Motion deals with the same issue the Court addressed in 2016. And while the Court recognizes that NRS 78.138 was amended in 2017, **the Court believes that *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006) is still the controlling law regarding Directors' personal liability,** even with the additional case law that has come down from the Nevada Supreme Court in 2017, including *Wynn Resorts v. Eighth Judicial District Court*, 399 P.3d 334 (Nev. 2017).

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[5] *See, without limitation, FDIC v. Jacobs*, No. 3:13-cv-00084-RCJ-VPC, 2014 WL 5822873, at *2, *4 (D. Nev. 2014); *FDIC v. Johnson*, No. 2:12-CV-209-KJD-PAL, 2014 WL 5324057, at *3 (D. Nev. 2014); *FDIC v. Jones*, No. 2:13-cv-168-JAD-GWF, 2014 WL 4699511, at *9 (D. Nev. 2014); *FDIC v. Delaney*, No. 2:13-CV-924- JCM (VCF), 2014 WL 3002005, at *2 (D. Nev. 2014), *Jacobi v. Ergen*, No. 2:12-cv-2075-JAD-GWF, 2015 WL 1442223, at *4 (D. Nev. 2015).

[6] Plaintiff requests the Court take judicial notice of its docket pursuant to NRS §§ 47.130-47.170.

See Order Denying Director Defendants' Motion for Judgment on the Pleadings dated November 2, 2018, Exhibit 1 hereto, at p. 2; *see also* Transcript from October 11, 2018 hearing (filed 10/19/18), at 20:19-21:8, included in Exhibit 1 (same). Further, in denying the Directors' motion for reconsideration on February 11, 2019, the Court specifically found as follows:

> COURT FURTHER FINDS after review that Plaintiff's Third Amended Complaint has pleaded sufficient facts to rebut the business judgment rule and to state a cause of action for a breach of the fiduciary duty of care pursuant to *Jacobi v. Ergen* and *F.D.I.C. v. Jacobs.*

See Decision and Order (filed February 11, 2019) at p. 3. The Court in *Jacobi v. Ergen* held "[a] director's misconduct must rise at least to the level of gross negligence to state a breach-of-the-fiduciary-duty-of-due-care claim, **or** involve 'intentional misconduct, fraud, or a knowing violation of the law,' to state a duty-of-loyalty claim…" *Jacobi v. Ergen*, 2015 WL 1442223, at *4 (D. Nev. Mar. 30, 2015). The Court in *F.D.I.C. v. Jacobs* held that the business judgment rule "does not protect the gross negligence of uninformed directors and officers." *Fed. Deposit Ins. Corp. v. Jones*, 2014 WL 4699511, at *10 (D. Nev. Sept. 19, 2014). Up until the issuance of the *Chur* Opinion, this was the law in Nevada as multiple courts had recognized, and on which this Court and Plaintiff justifiably relied.

In fact, *Chur* sets forth a new standard for determining the definition of "intentional" and "knowing" for determining whether a director's or officer's act or failure to act constitutes a breach of fiduciary duties. *See Chur*, 136 Nev. Adv. Op. at 11 ("We agree with and adopt the Tenth Circuit's definition of 'intentional' and 'knowing,' as enunciated in *Zagg*, for determining whether a 'director's or officer's act or failure to act constituted a breach of his or her fiduciary duties…" The decision in *Zagg* was not even handed down until 2016. *See In re Zagg Inc., S'holder Derivative Action*, 826 F.3d 1222, 1232 (10th Cir. 2016). Plaintiff filed its complaint in December, 2014. It is logically impossible for Plaintiff to have met the *Zagg* standard, adopted in *Chur*, at the time it filed its complaint.

When the Nevada Supreme Court disavowed the language in *Shoen* – which it did not do until the *Chur* Opinion in early 2020 – Plaintiff moved to amend its complaint within 48 hours of the stay being lifted, and within the time set by this court to file a motion to amend. It is a grave

miscarriage of justice to not even permit the Plaintiff to amend its claims against the Directors to meet the new standard under these circumstances.

Numerous other courts facing this situation, including the Ninth Circuit, have held that when underlying law is changed, it is only fair and just to permit amendment. For example, in *Moss v. U.S. Secret Serv.*, 572 F.3d 962 (9th Cir. 2009), the Court held as follows:

> **Plaintiffs contend that, if the Supreme Court's intervening decisions altered pleading standards in a meaningful way, and their complaint is found deficient under those standards, they should be granted leave to amend**. Courts are free to grant a party leave to amend whenever "justice so requires," Fed.R.Civ.P. 15(a)(2), and requests for leave should be granted with "extreme liberality." … " '**Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment**.' " *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir.2002) (quoting *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir.1991)).
>
> We agree with Plaintiffs that they should be granted leave to amend. Prior to *Twombly*, a complaint would not be found deficient if it alleged a set of facts consistent with a claim entitling the plaintiff to relief. … Under the Court's latest pleadings cases, however, the facts alleged in a complaint must state a claim that is plausible on its face. As many have noted, this is a significant change, with broad-reaching implications. … **Having initiated the present lawsuit without the benefit of the Court's latest pronouncements on pleadings, Plaintiffs deserve a chance to supplement their complaint with factual content in the manner that *Twombly* and *Iqbal* require.**

Id., 572 F.3d 962 at 972 (internal citations omitted) (emphasis added); *see also Darney v. Dragon Prod. Co., LLC*, 266 F.R.D. 23 (D. Me. 2010) ("Maine court's recent change in law relating to strict liability claims arising from blasting activity constituted good cause to allow homeowners leave to amend complaint to add such a claim against operator of a cement-manufacturing plant near their home, even though leave was not sought until well after the scheduling order deadlines for amendment of the pleadings and designation of experts, beyond the close of the discovery period, and months after rulings on summary judgment issues"); *Gregory v. Harris-Teeter Supermarkets, Inc.*, 728 F. Supp. 1259 (W.D.N.C. 1990) (Civil rights plaintiff's motion to amend complaint and second motion to amend complaint would be granted where each motion was filed immediately after an apparent change in the law occurring after plaintiff had filed his complaint.).

Here, there was no way for the Federal courts, this Court, or Plaintiff to know of the *Chur* Opinion, the disavowal of *Shoen*, or the adoption of the new *Zagg* standard, until the *Chur* Opinion was issued. To deny even the ability to amend in this case with respect to the Directors after the *Chur* Opinion is to hold Plaintiff to a standard of anticipating what neither this Court, nor other courts in Nevada could have anticipated. Just as the plaintiffs in the above cases, Plaintiff herein "initiated the present lawsuit without the benefit" of the *Chur* Opinion, and just as to the plaintiffs in the above cases, Plaintiff herein deserves a chance to amend its complaint with factual content in the manner that the *Chur* and adopted *Zagg* opinions require.

Moreover, any claim of prejudice by the Directors is meritless. This court denied the Directors' motions to dismiss beginning February 25, 2016. The Directors could have filed their writ any time after that if they chose to. They did not. They delayed for over three (3) years and did not file their writ petition until March 13, 2019. Any prejudice is of the Directors' own making, and should not form the basis for denial of the Motion to Amend. *See Jacobs v. McCloskey & Co.*, 40 F.R.D. 486, 488 (E.D. Pa. 1966) ("To the extent that the complaining party causes the prejudice, it is not, in the judgment of this Court, 'undue' within the meaning of the rule.").[7] Accordingly, Plaintiff respectfully submits the Court's decision on the Motion to Amend should be reconsidered with respect to the Directors.

B. <u>The Motion to Amend was timely filed within the deadline set by this Court.</u>

The Court's operative scheduling order entered January 29, 2019 ("Operative Scheduling Order"), attached hereto as Exhibit 2, provided that the deadline to move to amend or add parties was March 15, 2019. *See* Exhibit 2 hereto, at p. 2. However, on March 13, 2019, the Directors filed their Petition for Writ of Mandamus ("Directors' Writ") with the Nevada Supreme Court. The Directors could have filed a writ petition at any time, but chose instead to wait until March 13, 2019, despite their numerous motions to dismiss having been denied beginning in early 2016.

[7] Moreover, the Directors have admitted that the Fourth Amended Complaint is "not based on new facts." See opposition filed by Director Defendants at p. 3, ll. 8-11.

On March 14, 2019, the Directors' Motion for Stay was heard and the stay requested by the Directors ("Stay") was granted by this Court. At that time, one judicial day remained for the parties to move to amend. The notice in lieu of remittitur with respect to the *Chur* petition proceedings was not issued until June 16, 2020. In the Court's Clarification Order, the Court expressly stated that "the parties shall have to and including July 2, 2020, in order to move to amend pleadings." The Court lifted the Stay on July 1, 2020, and Plaintiff filed its Motion to Amend on July 2, 2020, within the deadline set by this Court and the one day remaining under the Operative Scheduling Order. Other parties also filed a motion to amend on the same day, which this Court did not find to be untimely. It is unjust and unfair for a party to move to amend within the time frame set by a court, only to have the court then determine the motion to be untimely.

Moreover, Plaintiff tried to move this case forward and moved to lift the Stay on July 2, 2019. This Court denied the Plaintiff's motion. Respectfully, it is unfair and clearly erroneous for the Plaintiff's motion to lift the Stay and move the case forward to be denied, then to have a finding of delay.[8]

IV. CONCLUSION

For all these reasons, Plaintiff respectfully requests that the Court reconsider its decision on the Motion for Leave to File Fourth Amended Complaint as to the Director Defendants, permit the filing of the Fourth Amended Complaint as it relates to the Directors, and grant such other and

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[8] It bears noting that it was Directors' counsel who proposed a "global mediation" (Exhibit 3), then postponed it multiple times (Exhibits 4 and 5), then unilaterally withdrew from the mediation (Exhibit 6). Subsequently, the Directors spent nearly another year filing multiple motions to dismiss (*see* the Directors' motions to dismiss/supplements filed October 11, 2015, April 18, 2016, July 18, 2016, and September 9, 2016), finally answering the third amended complaint on October 21, 2016.

further relief as the Court deems appropriate.

DATED: August 14, 2020.

HUTCHISON & STEFFEN

By */s/ Brenoch Wirthlin, Esq.*

MARK A. HUTCHISON, ESQ.
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BRENOCH R. WIRTHLIN, ESQ.
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10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that I am an employee of Hutchison & Steffen, and that on this date, I served the foregoing **MOTION FOR PARTIAL RECONSIDERATION ON MOTION FOR LEAVE TO AMEND REGARDING DIRECTOR DEFENDANTS** on the parties set forth below by legally serving via Odyssey electronic service as follows:

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Attorneys for Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp.,

DATED August 14, 2020.

/s/ Danielle Kelley
An Employee of Hutchison & Steffen

EXHIBIT “C”

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK, Plaintiff(s), v. ROBERT CHUR, Defendant(s).	CASE NO.: A-14-711535-C DEPT. NO.: XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

THURSDAY, NOVEMBER 10, 2022

TRANSCRIPT OF HEARING RE:
MOTION TO DISMISS AND ENFORCE SETTLEMENT AGREEMENT

APPEARANCES:

FOR THE PLAINTIFF: BRENOCH WIRTHLIN, ESQ. (VIA BLUEJEANS)

FOR THE DEFENDANT: KARYNA ARMASTRONG, ESQ.
GEORGE F. OGILVIE, III, ESQ. (VIA BLUEJEANS)

RECORDED BY: BRYNN WHITE, COURT RECORDER

Las Vegas, Nevada; Thursday, November 10, 2022

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

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

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

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

THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Since Corporate Defendants can establish that there was no

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

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

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

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

expressly intends for the release and dismissal from the litigation.

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

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

THE COURT: Thank you.

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

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

THE COURT: Thank you. Opposition, please.

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

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

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

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

very specifically pointed out.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Thank you. Reply, please.

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

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

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

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

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

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

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

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

the agreement itself is not ambiguous.

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

MR. OGILVIE: Couple things --

THE COURT: Of course.

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

THE COURT: Please.

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

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

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

THE COURT: Sure.

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

THE COURT: And it was just filed yesterday.

MR. OGILVIE: Yes.

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

MR. OGILVIE: Understood.

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

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

I didn't understand the advisory opinion though.

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 “D”

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * *

THE STATE OF NEVADA COMMISSIONER OF INSURANCE AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Appellants, vs. UNI-TER UNDERWRITING MANAGEMENT CORP.; UNI-TER CLAIMS SERVICES CORP.; AND U.S. RE CORPORATION, Respondents.	No. 87367

MOTION TO DISMISS FOR LACK OF JURISDICTION

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NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel certifies that the following is an entity as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of the Supreme Court and the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Respondent U.S. Re Corporation ("U.S. Re") does not have a parent corporation and no publicly held company owns 10% or more of U.S. Re. The following law firms have appeared or expect to appear for Respondent: (1) Nelson Mullins Riley & Scarborough LLP fka Nelson Mullins Broad and Cassel, (2) Law Offices of Jon Wilson and (3) McDonald Carano LLP.

DATED this 13th day of November, 2023.

McDONALD CARANO LLP

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INTRODUCTION

Pursuant to Rule 14(f) of the Nevada Rules of Appellate Procedure, Respondent U.S. Re Corporation ("U.S. Re" and, together with Uni-Ter Underwriting Management Corp. and Uni-Ter Claims Services Corp., the "Corporate Defendants") move to dismiss the appeal filed by The State of Nevada Commissioner of Insurance as Receiver of Lewis and Clark LTC Risk Retention Group, Inc. (the "Commissioner") for lack of jurisdiction.

The Commissioner challenges the district court's August 29, 2023 Order Denying Plaintiff Commissioner's Motion for Partial Reconsideration and NRCP 60(b) Relief from the Court's June 29, 2023 Order Granting NRCP 60 Relief to U.S. Re Corporation, to Vacate the Satisfaction of Judgment Entered on June 30, 2023, and for a New Trial ("Order Denying Partial Reconsideration"). While the Commissioner titled the underlying motion, in part, as a motion for NRCP 60(b) relief and for a new trial, a simple review of the motion demonstrates that the only relief sought by the Commissioner is reconsideration of the district court's entry of a Satisfaction of Judgment. Therefore, two independent bases exist to grant this Motion and dismiss the Commissioner's appeal.

First, an order denying reconsideration is not appealable. *Phelps v. State*, 111 Nev. 1021, 1023, 900 P.2d 344, 345 (Nev. 1995); *Hettinga v. Alan T. Nahoum, Inc.*, (unpublished disposition), Case No. 84351, 2022 WL 1155038, at *1 (Nev. April 18, 2022). Second, because the underlying motion asked the district court to reconsider its entry of the Satisfaction of Judgment and to vacate the Satisfaction of Judgment, the Commissioner cannot appeal the Order Denying Partial Reconsideration since the underlying "judgment" is not an appealable order or judgment. NRAP 3A(a-b). Each of these two reasons provides an independent basis to grant the Motion; collectively, the Court unquestionably lacks jurisdiction over the Commissioner's appeal. Thus, the Motion must be granted, and the Commissioner's appeal dismissed.

FACTUAL AND PROCEDURAL HISTORY

On December 30, 2021, a Judgment on Jury Verdict was entered in favor of the Commissioner. Declaration of George F. Ogilvie III, ¶ 3, **Exhibit A**. On July 13, 2022, the Corporate Defendants and the Commissioner executed a settlement agreement ("Agreement") under which the insurance carriers for the Corporate Defendants agreed to pay the Commissioner $5,200,000.00. *Id*. Despite the execution of the

Agreement and the Commissioner's receipt of the $5,200,000.00 settlement funds, the Commissioner pursued a post-trial motion for fees and costs. *Id.*, ¶ 4. On October 21, 2022, U.S. Re moved to dismiss and enforce the Agreement. *Id.* The night before the hearing on the motion to dismiss/enforce, the Commissioner filed a notice of appeal and argued that the district court was divested of jurisdiction. *Id.* The district court agreed and denied U.S. Re's motion to dismiss. *Id.*, ¶ 5. The district court also granted the Commissioner's motion for fees and costs. *Id.*

U.S. Re moved for reconsideration of the Order Denying Motion to Dismiss and Enforce Settlement Agreement ("Reconsideration Motion No. 1") and moved for reconsideration of the Order Granting Attorney Fees and Costs ("Reconsideration Motion No. 2") on December 14 and December 16, 2022, respectively. *Id.*, ¶ 6. The district court denied U.S. Re's Reconsideration Motion No. 2 but reserved ruling on Reconsideration Motion No. 1, proposing instead that the parties negotiate and file a satisfaction of judgment to reach finality. *Id.*

The parties were unable to reach a resolution. *Id.*, ¶ 7. Despite this, on April 11, 2023, without notifying U.S. Re's counsel, the Commissioner's counsel submitted a proposed order denying U.S. Re's

two motions for reconsideration. *Id.* The district court signed the order on April 12, 2023 (the "April 12 Order"). *Id.* U.S. Re immediately filed an Emergency Request for Status Conference and, then, a Motion to Vacate Order Denying Motions for Reconsideration ("Motion to Vacate"), seeking to vacate the April 12 Order. *Id.*, ¶ 8. On June 8, 2023, after hearing argument and considering all submissions, the district court (1) vacated the April 12 Order; (2) ordered a satisfaction of judgment to be entered; and (3) closed the case without prejudice. *Id.*

In accordance with its June 8 ruling, the district court entered an Order Granting U.S. Re's Motion to Vacate (the "June 29 Order") on June 29, 2023 and the Satisfaction of Judgment on June 30, 2023. *Id.*, ¶ 9. On July 13, 2023, the Commissioner filed a motion for partial reconsideration, seeking only to vacate the Satisfaction of Judgment. Commissioner's Partial Reconsideration Motion, **Exhibit B** (excluding exhibits). The district court denied the Partial Reconsideration Motion and, on August 29, 2023, the district court entered the Order Denying Reconsideration. Order Denying Reconsideration, **Exhibit C**.

On July 31, 2023, the Commissioner filed a notice of appeal of the Satisfaction of Judgment, which the Clerk docketed on August 3, 2023.

Notice of Appeal, 23-24962, Case No. 87080; Case Appeal Statement, 23-26000, Case No. 87080 ("[T]his appeal seeks relief from the district court's Satisfaction of Judgment, dated and entered on June 30, 2023."). On August 25, 2023, this Court issued an Order to Show Cause as "[i]t does not appear that the challenged satisfaction of judgment is substantively appealable." Order to Show Case, 23-27804, Case No. 87080. Instead of demonstrating cause, the Commissioner withdrew its appeal. Notice of Withdrawal of Appeal, 23-31375, Case No. 87080.

On September 25, 2023, the Commissioner filed the instant appeal on the Order Denying Reconsideration, which is the same appeal as Case No. 87080 in that it seeks the same relief – vacating the Satisfaction of Judgment. Commissioner's Partial Reconsideration Motion, **Exhibit B**; Case Appeal Statement at 3:10-14, **Exhibit D**; Docketing Statement, 23-36112 at 5:24-28 (admitting that the Commissioner seeks relief from the Order Denying Reconsideration).

LEGAL ARGUMENT

Rule 3A of the Nevada Rules of Appellate Procedure requires that an appeal be taken from an "appealable judgment or order" and further that an appeal can only be taken from specifically enumerated judgments

and orders, none of which are present here. NRAP 3A(a-b). In addition, this Court's "previous decisions favor looking beyond the label of an order or motion, and instead, focusing on what the order or motion actually does or seeks." *Reno Hilton Resort Corp., d/b/a A Reno Hilton, et al v. Verderber*, 121 Nev. 1, 3, 106 P.3d 134, 135 (2005); *see also Bally's Grand Hotel & Casino v. Reeves*, 112 Nev. 1487, 1488, 929 P.2d 936, 937 (1996) (acknowledging that this Court "has consistently looked past labels" when interpreting NRAP 3A(b)). Thus, this Court should, respectfully, look past the label of the Commissioner's Partial Reconsideration Motion to determine if the Order Denying Reconsideration is appealable under NRAP 3A(b). It is not.

A. The Commissioner's Partial Reconsideration Motion Only Requested The District Court To Reconsider Its Entry Of The Satisfaction Of Judgment And An Order Denying Reconsideration Is Not Appealable.

Despite its title, the Commissioner's Partial Reconsideration Motion does not seek Rule 60(b) relief, nor a new trial. *See generally* Commissioner's Partial Reconsideration Motion, **Exhibit B**. Instead, the body of the brief belies any title the Commissioner gave the motion and demonstrates that the Commissioner's Partial Reconsideration Motion

sought ***only*** reconsideration of the district court's entry of the Satisfaction of Judgment:

> This Motion seeks. . .relief from the Satisfaction of Judgment entered by the Court the following day on June 30, 2023 (the "Orders"). *Id.* at 2:14-17;
>
> Why the Court should grant Plaintiff relief from entry of Satisfaction of Judgment in this matter. *Id.* at 2:23-24;
>
> In sum, this Court's decision to issue a Satisfaction of judgment should be vacated because such relief would unfairly damage the Commissioner…." *Id.* at 3:19-20;
>
> Regarding providing finality to the Corporate Defendants, *this Motion does not request that the Court's order regarding the dismissal of U.S. Re from this action be modified or amended*. The Commissioner does not want this case reopened and does not foresee any need for the Court further involvement. *Id.* at 4:10-14 (emphasis added);
>
> This Court can help provide finality to the families still waiting for full payment on their claims by vacating the Satisfaction of Judgment issued by this Court. *Id.* at 4:20-23;
>
> [T]he Court should issue an order amending its June 29, 2023 Order regarding issuance of a Satisfaction of Judgment, and to vacate the Satisfaction of Judgment on June 30, 2023. *Id.* at 5:1-3;
>
> Accordingly, the Satisfaction of Judgment provide [sic] to U.S. Re by the Court is contrary to Nevada law and should be vacated. *Id.* at 10:15-18;
>
> For this reason, the Court should vacate its Satisfaction of Judgment…. *Id.* at 12:15-16; and

> For these reasons, the Court should issue an order amending its June 29, 2023 Order regarding issuance of a Satisfaction of Judgment, and to vacate the Satisfaction of Judgment entered on June 30, 2023. *Id.* at 13:16-18.

Nowhere in the Commissioner's Reconsideration Motion does the Commissioner seek any relief other than the district court's reconsideration of its entry of the Satisfaction of Judgment and to vacate the Satisfaction of Judgment. *See generally id.* Thus, because "an order denying reconsideration is not appealable," on this basis alone, the Court should grant the instant Motion and dismiss the Commissioner's appeal. *Arnold v. Kip,* 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007).

B. The Commissioner's Reconsideration Motion, Order Denying Reconsideration And This Appeal Relate Solely To A Non-Appealable Satisfaction of Judgment.

The Commissioner's Reconsideration Motion sought reconsideration of a non-appealable "judgment or order" – the Satisfaction of Judgment – and seeks the same relief as in Case No. 87080, which sought "relief from the district court's Satisfaction of Judgment, dated and entered on June 30, 2023." *Compare* Case Appeal Statement, 23-26005 at 3:17-18, Case No. 87080 *with* Docketing Statement, 23-36112 at 5:24-28 *and with* Commissioner's Partial Reconsideration Motion, **Exhibit B**. Accordingly, the instant appeal,

which is based on the Order Denying Reconsideration to vacate the Satisfaction of Judgment is the exact same appeal the Commissioner brought but then dismissed in response to the Court's Order to Show Cause in Case No. 87080. In other words, the Commissioner is again attempting to appeal a non-appealable Satisfaction of Judgment. As the Court recognized in Case No. 87080, however, "[t]his Court 'may only consider appeals authorized by statute or court rule.'" Order to Show Cause, 23-27804, Case No. 87080 *quoting Brown v. MHC Stagecoach, LLC,* 129 Nev. 343, 345, 301 P.3d 850, 851 (2013). And "[n]o statute or court rule appears to authorize an appeal from a satisfaction of judgment." *Id.*

In *Ditech Financial LLC f/k/a Green Tree Servicing, LLC v. JJND Ent., LLC*, this Court noted that a timely motion for reconsideration may toll the time to appeal "an appealable judgment." 136 Nev. 802, 471 P.3d 751, 2020 WL 5587232 *1 (unpublished disposition), Case No. 81022 (September 17, 2020). Finding that the "motion for reconsideration was as to a non-appealable order – the order denying the motion for leave to amend the answer" – the motion did not toll the time to appeal. *Id.* While the jurisdictional question here is not to timeliness, the ruling of this

Court is still applicable. A motion for reconsideration as to a non-appealable order or judgment does not have any appellate effect. The Commissioner cannot correct the jurisdictional defect of Case No. 87080 by filing a motion for reconsideration on a non-appealable order or judgment in the hope that it will somehow convert the Satisfaction of Judgment into an appealable judgment. *See also Reno Hilton Resort Corp.*, 121 Nev. at 4,106 P.3d at 136 (in considering whether an order denying a new trial was appealable, the Court relied on cases that previously found that no appeal could be taken from an order addressed to a non-appealable intermediate order). Because the Commissioner's Partial Reconsideration Motion and, therefore, the Order Denying Reconsideration and this appeal are based on the Satisfaction of Judgment, there is an absence of an appealable order or judgment and the Commissioner's appeal must be dismissed for lack of jurisdiction.

CONCLUSION

As demonstrated above, this Court lacks jurisdiction over the Commissioner's appeal, which must be dismissed.

DATED this 13th day of November, 2023.

McDONALD CARANO LLP

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 27(d), I hereby certify that this motion complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Century Schoolbook style. I further certify that this motion complies with the page limits of NRAP 27(d)(2) because it does not exceed 10 pages.

Pursuant to NRAP 28.2, I hereby certify that I have read this motion, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this motion complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event that this motion is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 13th day of November, 2023.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDonald Carano LLP and that on November 13, 2023, I served the **MOTION TO DISMISS** on the parties in said case by electronically filing via the Court's e-filing system. The participants in this case are registered e-filing users and service will additionally be accomplished by depositing a copy via U.S. Mail as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

DATED: November 13, 2023.

/s/ Jelena Jovanovic
An Employee of McDonald Carano