19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

NO.: 651,069 SECTION 22

JAMES J. DONELON, COMMISSIONER OF INSURANCE
FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF
LOUISIANA HEALTH COOPERATIVE, INC.

VERSUS

TERRY S. SHILLING, GEORGE G. CROMER, WARNER L. THOMAS, IV, WILLIAM A. OLIVER, CHARLES D. CALVI, PATRICK C. POWERS, CGI TECHNOLOGIES AND SOLUTIONS, INC., GROUP RESOURCES INCORPORATED, BEAM PARTNERS, LLC, MILLIMAN, INC., BUCK CONSULTANTS, LLC, AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA

FILED: ___________________________ ___________________________
DEPUTY CLERK

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF RESPONSIVE LDI DOCUMENTS

Defendants Buck Global, LLC ("Buck"), Milliman, Inc. ("Milliman"), Group Resources Incorporated ("GRI"), Allied World Specialty Insurance Company a/k/a Darwin National Assurance Company, Atlantic Specialty Insurance Company, Evanston Insurance Company, RSUI Indemnity Company, and Zurich American Insurance Company (the "Insurer Defendants") (collectively "Defendants"), respectfully submit this Reply Memorandum in response to Plaintiff's September 17, 2020 Memorandum in Opposition to Defendants' Motion to Compel Production of Responsive Louisiana Department of Insurance ("LDI") Documents (the "Opposition").

I. The Plaintiff is the Commissioner of Insurance.

The plaintiff in this lawsuit is the Commissioner of Insurance as Rehabilitator of Louisiana Health Cooperative, Inc. ("LAHC"). While the Commissioner strains to argue otherwise, he cannot evade his own pleadings and prior briefing, which establish that Billy Bostick is not the Plaintiff in this case. It is the Commissioner, not Mr. Bostick, who has the authority under the Louisiana Statute to bring this case. *See, e.g.*, *Donelon v. Shilling*, 2019-00514, (La. 4/27/20), 2020 WL 2306075, *4 ("Louisiana Revised Statutes 22:2008 and 2009 generally give the Commissioner the right to enforce the contracts of an insolvent insurer.")

(footnotes omitted). And the Commissioner has repeatedly relied on his role as Commissioner whenever it has suited his interest in this matter. *See, e.g.*, Plaintiff's November 16, 2017 Opposition to Buck's Writ Application, p. 21, attached as Exh. E to Motion to Compel (". . . Louisiana courts have held that the Commissioner, as rehabilitator or liquidator, 'owes an overriding duty to the people of the State of Louisiana' and 'does not stand precisely in the shoes of' an insolvent insurer.'") (citations omitted).

The Louisiana Supreme Court *agreed* with the Commissioner's previous judicial admissions that he is the Plaintiff in this case, stating that "[t]his suit related to the contract between the LAHC and Milliman is 'an action brought under [the RLCA]' by 'the commissioner of insurance ...as rehabilitator.'" *Donelon v. Shilling*, 2019-00514, (La. 4/27/20), 2020 WL 2306075, at *3, *cert. filed* Sept. 8, 2020; *see also id.* at * 1 ("Louisiana Insurance Commissioner James J. Donelon ('Commissioner'), through the Deputy Commissioner of Financial Solvency, filed suit in the Nineteenth Judicial District Court seeking a permanent order of rehabilitation relative to the LAHC. The district court entered an order confirming the Commissioner as rehabilitator and vesting him with authority to enforce contract performance by any party who had contracted with the LAHC. The Commissioner then sued multiple defendants in the Nineteenth Judicial District Court, . . . ").

Mr. Bostick's role – defined by the Commissioner's own Petition – is strictly that of agent for the Commissioner. The Plaintiff, the Commissioner, as Rehabilitator, appears "through" Billy Bostick. *See* Second Amended Petition ("SAP"), ¶5, attached as Exh. A to Defendants' Motion to Compel ("Plaintiff herein is James J. Donelon, Commissioner of Insurance for the State of Louisiana in his capacity as Rehabilitator of Louisiana Health Cooperative, Inc., through his duly appointed Receiver, Billy Bostick ('Plaintiff')"). Louisiana Code of Civil Procedure article 694 *expressly* provides that "[a]n agent has the procedural capacity to sue to enforce a right of his principal, when specially authorized to do so. For all procedural purposes, the principal is considered the plaintiff in such an action . . . ."). Since the Commissioner, as Rehabilitator, not Mr. Bostick, is the Plaintiff, Mr. Bostick's affidavit is irrelevant to the question before the Court and should be disregarded.

II. The Commissioner has custody and control over his own agency's records.

The only issue germane to this instant motion to compel is whether the documents Defendants seek are in the "possession, custody, or control" of the Commissioner. While the Commissioner's devotes the bulk of his Opposition to the irrelevant (and undisputed) argument that he appears in this case in his capacity as Rehabilitator, there can be no dispute that the Commissioner can obtain documents from the very department he heads, regardless of his "separate capacities." *See* La. R.S 44:1(A)(3); La. Const. art. IV, § 11. On this point, Defendants' position is not "paper thin," as the Commissioner erroneously claims, but in line with the *overwhelming* weight of authority in Louisiana and around the nation.

A. The overwhelming authority confirms what is obvious: the Commissioner has custody and control over his own records because he can get them.

Donelon v. Herbert Clough, Inc., No. CV 03-282-A-M2, 2006 WL 8436324 (M.D. La. Oct. 19, 2006) ruled directly *against* the Commissioner on this precise issue. The Louisiana federal court could not have been clearer: "The Commissioner of Insurance may not use the distinction between his capacity as 'regulator' and 'liquidator' to avoid responding to discovery requests seeking documents concerning the supervision, rehabilitation and liquidation of an insurer when such documents are within his possession and/or control." 2006 WL 8436324, at *5. The Commissioner does not, because he cannot, offer any legitimate grounds on which to distinguish this case which is squarely on point. *See* Opposition, pp. 9-10.

Donelon v. Herbert Clough, Inc. is most certainly *not* an outlier decision, as the Commissioner would have this Court believe. To the contrary, it is in line with the *overwhelming weight* of state and federal authority around the nation on this very point in state insurance and federal bank receivership cases. When, as here, an insurance commissioner or the FDIC, acting as rehabilitator, liquidator or receiver of a failed institution, files suit accusing individuals and/or entities of wrongdoing, the courts *uniformly* refuse to permit the governmental plaintiff to interpose its "separate capacities" as a ground for avoiding its obligation to produce all records that it has access to, *including* those held in a "regulatory" capacity. *See*, *e.g.*,

- *Benjamin v. Sawicz*, 823 N.E.2d 879, 885 (Ohio App. Ct. 2004) ("The plaintiff has under his control, in the Insurance Department, special and direct knowledge vital to the action and must disclose all information material and relevant to this action whether in his capacity as Regulator or Liquidator.") (quoting *In re Ideal Mutual Ins. v. Becker*, 140 A.D.2d 62, 532 N.Y.S.2d 371, 375-76 (N.Y. App. Div. 1988));
- *In Re Ideal Mutual*, 140 A.D.2d 62, 532 N.Y.S.2d 375–76 (rejecting superintendent of insurance's argument that "the distinction between the Superintendent's dual identities should prevent the Superintendent's office as Regulator from being required to comply with the discovery requests, since the Superintendent as Regulator is not a party to the action.").
- *F.D.I.C. v. Berling*, 2015 WL 3777408, at *1 n.2 (D. Colo. June 16, 2015) ("The FDIC, when acting as a receiver, has the legal right to demand OTS records from the OCC. 12 U.S.C. § 1821(o). As a result, OTS documents are within the scope of the FDIC's discovery obligations.") (citing *Resolution Trust Corp. v. Deloitte & Touche*, 145 F.R.D. 108, 110 (D. Colo. 1992));
- *F.D.I.C. v. Bayer*, No. 213CV752FTM29DNF, 2015 WL 12830467, at *2 (M.D. Fla. Feb. 25, 2015) ("Given the broad construction of 'control' under Rule 34 and the operation of 12 U.S.C. § 1821(o), the Court finds that FDIC-R has control of the documents requested by Defendants and must produce them.");
- *F.D.I.C. v. Dosland*, No. C13-4046-MWB, 2014 WL 1347118, at *5 (N.D. Iowa Apr. 4, 2014) ("By this order, FDIC–R will be compelled to produce responsive OTS documents, whether they are currently in the possession of FDIC–R or OCC. The inter-agency procedures under which FDIC–R obtains materials from OCC pursuant to Section 1821(o) are not this court's concern.");
- *F.D.I.C. v. Appleton*, No. CV 11-476-JAK (PLAX), 2012 WL 12887400, at *6 (C.D. Cal. Aug. 27, 2012) ("[D]efendants assert that the requested documents are internal FDIC documents that are 'uniquely in the possession of the FDIC and cannot be obtained elsewhere.' Moreover, under 12 U.S.C. § 1821(o), 'whenever the [FDIC] has been appointed as receiver for an insured depository institution, the appropriate Federal banking agency shall make available all supervisory records to the receiver which may be used by the receiver in

any manner the receiver determines to be appropriate.' Thus, the Court is not persuaded that plaintiff does not have the legal right to obtain the requested documents on demand.") (second alteration original) (internal citation omitted);

- *Comeau v. Rupp*, 810 F. Supp. 1127, 1166 (D. Kan. 1992) ("Although the FDIC is part of a complex regulatory banking scheme that involves other agencies, the FDIC, as an arm of the government, is in a superior position to gain access to the documents of these other agencies. Because of this superior position, the court will not accept a naked averment by the FDIC that a particular document is not within its 'possession.'").
- *F.D.I.C. v. Wise*, 139 F.R.D. 168, 170 n.2 (D. Colo. 1991) (granting defendants' motion to compel FDIC as receiver to produce regulatory documents and rejecting argument of the Office of Thrift Supervision that defendants must subpoena regulatory documents).

All of these cases are in full accord with the seminal decision in *Resolution Tr. Corp. v. Deloitte & Touche*, 145 F.R.D. 108, 110 (D. Colo. 1992). (". . . , it is clear that RTC has the absolute and unrestricted ability to obtain OTS documents on demand. Congress has expressly so provided in 12 U.S.C. § 1821(o)."). The Commissioner's attempts to distinguish *Deloitte & Touche* make no sense. *See* Opposition, pp. 11–13. If, as that court ruled, the RTC's custody and control extended to the records of a separate regulatory agency, the OTS, because the RTC had the legal right to them – then there can be no question that the Commissioner, regardless of his capacity, has custody and control of the records of the LDI – his own agency. *See Deloitte & Touche*, 145 F.R.D. at 109–10.

As in the above-cited cases, where a federal statute gave the federal receiver the right to obtain regulatory documents, here Louisiana statutory law explicitly grants the Commissioner, regardless of capacity, the absolute right as custodian to the records of the Louisiana Department of Insurance. La. R.S. 44:1(A)(3) and Louisiana Constitution article IV, § 11. Nothing in the Louisiana Insurance Code or the Rehabilitation Order states or even remotely suggests otherwise. In fact, section 1984 of the Insurance Code, selectively quoted by the Commissioner at p. 12 of his Opposition, explicitly guarantees the Commissioner the right to full use of all Department of Insurance records in any proceeding. La. R.S. 22:1984(F).

Under unquestionable Louisiana law, the Commissioner's discovery obligations extend to LDI records because he has the statutory and legal right to get them. *See* 2 Judge Steven R. Plotkin, Louisiana Practice Series: Louisiana Civil Procedure, Commentary on La. Code Civ. Proc. Ann. art. 1461 (2020); *Landry v. Comeaux*, 07-891, 971 So. 2d 434, 440 (La. App. 3 Cir. 2007) (holding defendant in contempt for failing to produce documents that were not in his personal possession, but that he had the legal right to obtain from a third party bank).

III. <u>The Commissioner's citations are irrelevant.</u>

The cases the Commissioner cites are inapposite. The respective courts in *Koken v. One Beacon Ins*, 911 A.2d 1021, 1029–30 (Pa. Commw. Ct. 2006), *Ario v. Deloitte & Touche LLP*, 934 A.2d 1290, 1294 (Pa. Commw. Ct. 2007), and *F.D.I.C. v. Wachovia Ins. Servs., Inc.*, No. 3:05CV929 CFD, 2007 WL 2460685 (D. Conn. Aug. 27, 2007) ***did not even address the issue of whether requested documents are in the plaintiff's possession, custody or control***. Rather, *Koken* and *Ario* denied the requested discovery on relevance grounds, which the Commissioner admits are irrelevant to the custody and control issue central to this motion. *See* Opposition pp. 1–2, 13. *Wachovia* involved a Rule 30(b)(6) deposition notice and did not even suggest that FDIC corporate regulatory records were not in the custody or control of the FDIC when it acted as a Receiver. *See Wachovia*, 2007 WL 2460685, at *2

F.D.I.C. v. Nason, Yeager, Gerson, White & Lioce No. 213CV208FTM38UAM, 2014 WL 12617802 (M.D. Fla. Jan. 17, 2014) (Frazier, M. J.), cited by the Commissioner at Opposition, p. 7, was discredited and rejected by the same judge in a later decision that the Commissioner has *failed* to cite. *See F.D.I.C. v. Bayer*, No. 213CV752FTM29DNF, 2015 WL 12830467, at *2 (M.D. Fla. Feb. 25, 2015) (Frazier, M. J.) ("FDIC-R's citation to the Court's previous order dated January 17, 2014, in the case *FDIC-R Orion Bank of Naples v. Nason, Yeager, Gerson, White & Lioce*, P. A., No. 2:13-cv-208, is not dispositive. While the Court remarked that the FDIC-R was a separate legal entity from the FDIC-C and found that FDIC-R could not be compelled to produce FDIC-C documents that are not in FDIC-R's possession and control, the defendants in that case failed to present 12 U.S.C. § 1821(o) in their briefing to the Court. As a result, the Court's decision in *Orion* did not take into account the operation of 12 U.S.C. § 1821(o) as the instant Order does here. For these reasons, the Court will require FDIC-

R to produce all documents it is withholding on the basis that the documents are in the control of FDIC-C.").

Haggard v. Ossege No. 2:09-CV-0044, 2011 WL 4711926 (S.D. Ohio Oct. 4, 2011) (Opposition, p. 5) and *Nichols v. F.D.I.C.*, No. C14-1796RSM, 2017 WL 434426 (W.D. Wash. Feb. 1, 2017) (Opposition p. 7) are inapposite, as the FDIC was not even the plaintiff in those cases. Because the FDIC was not suing anyone, it was not fair to burden FDIC as Receiver with production of FDIC corporate regulatory documents. Moreover, the *Haggard* and *Nichols* courts overlooked § 1821(o), which gives the FDIC as Receiver the legal right to regulatory documents of FDIC Corporate whenever it wants or needs them, just as Louisiana statutory law gives the same right to the Commissioner, regardless of his "capacity."

Finally, the laundry list of FDIC cases that the Commissioner cites in footnote 6 of his Opposition address "separate capacity" issues having nothing to do with FDIC/Receiver's custody and control over regulatory documents of FDIC/Corporate. Those cases do not state or even suggest that FDIC/Receiver lacks custody and control of FDIC/Corporate documents.[1]

IV. <u>The Commissioner cannot avoid his discovery obligations by issuing a public records request to himself.</u>

Absurd positions often lead to absurd conduct and self-contradictions designed to justify the position. We plainly see that happening here. The Commissioner's attempt to avoid his discovery obligations by issuing a public records request to himself only underscores the absurdity of the position he has taken in this motion. He is the Plaintiff in this case and the custodian of the very records that his public records request to himself purports to obtain from

[1] *F.D.I.C. v. Harrison*, 735 F.2d 408, 410 (11th Cir. 1984) (finding FDIC was equitably estopped from asserting certain claims against guarantors of bank loan; no mention of custody/control issue); *Trigo v. F.D.I.C*, 847 F.2d 1499, 1500 (11th Cir. 1988) (deciding federal law, and not Florida state law, governs the rights and obligation of the FDIC in its corporate capacity; not relevant to custody/control issue); *F.D.I.C. v. Bay Business*, 885 F.2d 633, 636-37 (9th Cir. 1989) (finding that intra-FDIC transfer of right to sue from the FDIC/R to FDIC/C did not deprive court of subject matter jurisdiction; no mention of custody/control issues); *F.D.I.C. v. Bernstein*, 944 F.2d 101, 106 (2d Cir. 1991) (wrongful conduct of FDIC corporate cannot be attributed to FDIC as receiver; nothing to do with custody/control issue); *F.D.I.C. v. Rahn*, 116 F.3d 1142, 1146 (6th Cir. 1997) (holding RTC-Corporate did not succeed to any indemnification liability of RTC-Receiver; not a discovery case at all; does not touch custody and control issue); *F.D.I.C v. Skow*, No. 1:11-CV-0111-SCJ, 2012 WL 8503168, at *11 (N.D. Ga. Feb. 27, 2012) (granting FDIC-R's motion to strike affirmative defenses, "to the extent that those defenses are based on the pre-receivership conduct of the FDIC–C in its regulatory capacity;" but no suggestion that FDIC Corporate regulatory documents not in custody, control of FDIC, as Receiver), *aff'd in part, vacated in part, remanded* (11th Cir. 2014).

himself. And he fails to disclose that his "request" to himself seeks only a fraction of the records that his own Second Amended Petition places squarely at issue. *See* Opposition, p.3. As but one example, his "public records request" fails to include internal LDI records going directly to the issue of whether it was actually "misled" by anything that any defendant said or did – as alleged in Plaintiff's own amended Petition. Exh. A to Motion to Compel, SAP, ¶¶ 31kk, 139, 140.

This is a serious case in which the government has sued numerous defendants who believe and intend to prove that they did nothing wrong. The Commissioner should not be permitted, through bureaucratic machinations and games, to block their access to the very records that he has put at issue in this case. Fair is fair.

And the Commissioner's blatant self-contradictions further betray the illogic and unfairness of his attempt to pretend that he does not have access to the records of his own agency. In the second paragraph of his Opposition, he stipulates that the issue of the relevance and discoverability of LDI records has nothing to do with his custody and control over them: "[W]hether these regulatory records are discoverable is a separate, distinct issue that must be addressed at a later date." Opposition, p. 1–2. But then, in a full about face, later he devotes multiple pages to an attempt to convince the Court that they are *not* relevant or discoverable: "The LDI's regulatory records are not at issue and are not discoverable." Opposition, p. 13. It is as if two different Commissioners drafted different parts of the same brief.

At one point in his brief, he purports to offer to *withdraw* his claims that the defendants misled the LDI, only to argue in the same breath that their conduct did in fact mislead the LDI. Opposition, p. 15: ". . . [W]hen LAHC or others provided these inaccurate calculations to the LDI on behalf of LAHC, the regulatory body, LDI, was thereby indirectly misled." How can the Commissioner then, with any semblance of credibility, contend that internal LDI documents going to the issue of whether it was, in fact, misled, are not relevant or discoverable? He cannot.

Previously, in responding to Buck's written discovery requests, the Commissioner stipulated that LDI records were discoverable: "Without waiving these objections, to the extent that there are responsive pre-Receivership documents related to LAHC's 2014 or 2015 rates by anyone ***including LDI***, Buck and/or Milliman, which Plaintiff has in his possession and control, those documents will be produced in connection with his Electronic

Discovery Responses." Exh. B to Motion to Compel, pp. 1–2, Response to Interrogatory No. 4 (emphasis added). *See also* Plaintiff's Responses to Buck's Interrogatories Nos. 5–8, 19, 22 and Request for Production Numbers 3–4, 12–16, 28, 31–33, 34, 37, and 38, Exh. B to Motion to Compel, making the same promise to produce LDI records in the Commissioner's custody or control. But now he says LDI records are not relevant or discoverable. Here again, it seems that the Commissioner who responded to Buck's written discovery is not the same Commissioner who drafted the Opposition to the instant Motion to Compel.

The Commissioner really has no logical or legal basis for contending that he lacks the ability to get his own records, and so he talks "up and down and all around," meeting himself coming and going. But even if the Court does wish to get into the discoverability of LDI records, they plainly are, at minimum, discoverable, without regard to the issue of whether or not "regulatory defenses" are allowed in this case. As but one example, internal LDI records might well show that the Commissioner's own actuaries *agreed* with the defendant actuaries' rate projections and assumptions, tending to show that the defendant actuaries were not negligent. That issue goes to liability, *not* defenses. *See, e.g.*, *F.D.I.C. v. Dosland*, No. C13-4046-MWB, 2014 WL 1347118, at *4 (N.D. Iowa Apr. 4, 2014) ("FDIC–R must prove that the defendants' conduct violated an applicable standard of care. It is within the realm of reasonable possibility that internal OTS documents may contain information that is relevant to the defendants' denials that any such violations occurred."). The *Dosland* court found such internal OTS documents discoverable even though the court had previously "limit[ed] defendants' ability to rely on OTS's actions as an affirmative defense, ..." *Id.*; *see also F.D.I.C. v. Berling*, No. 14-CV-00137-CMA-MJW, 2015 WL 3777408, at *2 (D. Colo. June 16, 2015) ("The documents may ultimately prove inadmissible for a variety of reasons. But either way, they might nonetheless contain information leading to the discovery of admissible evidence."); *F.D.I.C. v. Clementz*, No. 2:13-CV-00737-MJP, 2014 WL 4384064, at *3 (W.D. Wash. Sept. 4, 2014) (rejecting FDIC/R's argument that former D&O's of failed bank should not be entitled to discovery relevant to affirmative defenses, even though possibly barred by state and federal law).

And state statutes protecting the confidentiality of some LDI records are a total non-issue. They cannot interfere with the discovery rights of defendants whom the Commissioner has sued, placing those records at issue. The protective order already entered in this case fully protects their confidentiality.

V. Conclusion

This Court need look no further than the Middle District of Louisiana's practical decision in *Herbert Clough*. The Commissioner's attempt to reargue a position which has previously been rejected by a Louisiana federal court should be given no credibility. Defendants are entitled to all relevant LDI documents so that they can adequately defend themselves.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been served upon all counsel of record by e-mail, this 23rd day of September, 2020.

/s/ James A. Brown