

# Exhibit A

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

**AMENDED NOTICE OF RECORDS ONLY DEPOSITION**

TO: Louisiana Department of Insurance  
Through its custodian of records:  
James J. Donelon  
1702 N. Third Street  
Baton Rouge, LA 70802

PLEASE TAKE NOTICE that Milliman, Inc. ("Milliman") will take the records-only deposition of the Louisiana Department of Insurance ("LDI") **on December 9, 2020, beginning at 10:00 AM at the offices of Phelps Dunbar LLP, 400 Convention Street, Suite 1100, Baton Rouge, LA or, through coordination of counsel, via Zoom or other virtual meeting platform,** continuing from day to day until completed. LDI is hereby requested to designate and to make available for deposition at the stated time and place one or more officers, directors, or managing

agents, or other persons designated to testify on its behalf concerning the production of and identification of the documents specified in Exhibit A.

All counsel are invited to participate as they deem fit.

**THIS IS A RECORDS ONLY DEPOSITION. NO APPEARANCE WILL BE NECESSARY IF THE DOCUMENTS REQUESTED ON EXHIBIT A ARE PRODUCED BY THE ABOVE SPECIFIED DATE AND TIME.** This subpoena and deposition may be satisfied by producing certified copies via secure FTP to Milliman's counsel of record at [justine.margolis@dentons.com](mailto:justine.margolis@dentons.com) and [catharine.luo@dentons.com](mailto:catharine.luo@dentons.com) or, if necessary, mailing certified copies to the offices of Dentons US LLP, Attn: Steven Clark 4520 Main Street, Suite 1100, Kansas City, MO 64111-7700, unless a different place is established by mutual agreement of the parties hereafter, before the date set for the deposition in lieu of the designated deponent's appearance at the deposition.

A copy of article 1354 of the Louisiana Code of Civil Procedure is attached as Exhibit B.

Respectfully submitted,

**PHELPS DUNBAR LLP**

/s/ Harry Rosenberg  
HARRY ROSENBERG (Bar #11465)  
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/s/ Justin N. Kattan

**Dentons US LLP**

Reid L. Ashinoff (admitted *pro hac vice*)  
Justin N. Kattan (admitted *pro hac vice*)  
Justine N. Margolis (admitted *pro hac vice*)  
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*Counsel for Milliman, Inc.*

**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 19<sup>th</sup> day of November, 2020.

/s/ Harry Rosenberg

Harry Rosenberg

**EXHIBIT A TO NOTICE OF RECORDS DEPOSITION**  
**INSTRUCTIONS AND DEFINITIONS**

1. **Compliance with the Louisiana Code of Civil Procedure:** The Requests below should be answered by the above-identified party, and the documents and evidence requested below should be produced to Milliman in accordance with the Louisiana Code of Civil Procedure.
2. **Location of Production:** Milliman requests that all documents and evidence produced in response to these Requests be produced via secure FTP to Milliman's counsel of record at justine.margolis@dentons.com and catharine.luo@dentons.com or, if necessary, at the offices of **Dentons US LLP, Attn: Steven Clark** 4520 Main Street, Suite 1100, Kansas City, MO 64111-7700, unless a different place is established by mutual agreement of the parties hereafter.
3. **Claims of Privilege/Privilege Log:** If any information requested herein is claimed to be privileged or otherwise protected from discovery, the respondent is requested to identify in writing, with particularity, the basis for such claim, and in the case of any document not produced, to identify in writing:
  - a. its author;
  - b. the date of its creation;
  - c. the names, positions and capacities of all persons to whom each document was addressed or by whom it was seen, read, disclosed or examined;
  - d. its general nature and subject matter and the basis upon which it is claimed to be privileged or otherwise protected from discovery; and
  - e. its present location and custodian.
4. **Form of Production.** Absent mutual agreement to an alternative form of production, documents and evidence shall be delivered in an industry-standard manner and with common load files (.DAT/.OPT) to facilitate the loading into databases and the ability to search. As further described below, the production must be image-based, with extracted text/OCR delivered for each file, but with certain file types (Spreadsheets, media files) provided in native format. The load files should contain standard structural and associated metadata, including, but not limited to, production numbers and ranges, Parent ID, Attach ID, Begin Bates, End Bates, Begin Attach, End Attach, Date Sent, Date Received, Date Modified, Date Created, Email Subject, To, From, CC, BCC, Filename, Application, File Path, Custodian/Source, Author, MD5Hash

**Image-Based Productions**

- Group IV
- Single Page

- Black and White
- 300 dpi Compression
- Each image shall contain a (branded) unique identifier - typically a Bates Number - and any associated Confidentiality or other designation
- A link/path to each image shall be contained in the delivered load files
- Certain files, such as those that are not conducive to imaging or cannot be imaged at all (Spreadsheets, media files, etc.), shall be represented by a branded slipsheet and provided in native format
  - A link/path to both the slipsheet image and the native file shall be in the delivered load files

#### **Extracted Text/OCR**

- Each produced document/record shall have a corresponding file containing the file's extracted text (for ESI) or OCR for hard copy or image-based files
    - The text files shall be generated at the document and not page-level.
    - The text files shall be named after the Begin Bates of each delivered document
    - A link/path to this file shall be contained in the delivered load files
5. **Labeling.** As set forth in the Paragraph 5 above, each document shall be produced with a bates-number and an appropriate party-specific bates-label, and any applicable confidentiality or PHI designation pursuant to the protective order in this action.
  6. **Definition of “Documents”:** Wherever used in these Requests, the term “documents” shall mean all writings, records and recordings of any memoranda, reports, handwritten notes, logs, formal or informal minutes, tape recordings, photographs, photocopies, telegrams, telefaxes, transcripts, drawings, graphs, charts, maps, electronic word processing and spreadsheet documents and other computer files, and email messages, wherever such “documents” are located and however produced or reproduced. A request for all “documents” includes a request for any and all non-identical copies of any such “documents” which may differ to any extent because of alterations, attachments, blanks, comments, notes, underlining or otherwise.
  7. **Definition of “Communication”:** Wherever used in these Requests, “communication” includes any transmittal or receipt of information, whether by chance or prearranged, formal or informal, oral, written or electronic. “Communication” includes without limitation conversations, meetings, and discussions in person; conversations, meetings, and discussions by telephone; and written correspondence through the use of mails, courier services, electronic media (such as electronic mail and instant and text messages), and telephone lines and wires.

8. **A Request for Information:** Documents or communications “referencing,” “referring,” “concerning,” “reflecting” or “related to” any given subject means any documents or communications that constitute, contain, discuss, embody, evidence, identify, state, refer to, deal with, bear upon, or are in any way pertinent to that subject, including documents concerning the preparation of other documents.
9. **Definition of “You” and “Your” and “LDI:”** As used in these Requests, the term “LDI” shall refer to the Louisiana Department of Insurance, its employees, directors, officers, members, agents and/or representatives (including but not limited to Lewis & Ellis or any other consulting actuary used by LDI).
10. **Definition of “LAHC”:** As used in these Requests, the term “LAHC” shall refer to Louisiana Health Cooperative, Inc., its predecessors, successors, employees, directors, officers, members, agents and/or representatives.
11. **Definition of “Beam”:** As used in these Requests, the term “Beam” refers to Beam Partners, LLC, its employees, directors, officers, members, agents and/or representatives.
12. **Definition of “Buck”:** As used in these Requests, the term “Buck” refers to Defendant Buck Consultants, LLC (n/k/a Buck Global, LLC) its employees, directors, officers, members, agents and/or representatives.
13. **Definition of “CGI”:** As used in these Requests, the term “CGI” refers to CGI Technologies and Solutions, Inc., its employees, directors, officers, members, agents and/or representatives.
14. **Definition of “CMS”:** As used in these Requests, the term “CMS” refers to the U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services.
15. **Definition of “GRI”:** As used in these Requests, the term “GRI” refers to Group Resources Incorporated, its employees, directors, officers, members, agents and/or representatives.
16. **Definition of “Milliman”:** As used in these Requests, the term “Milliman” refers to Milliman, Inc., its employees, directors, officers, members, agents and/or representatives.
17. The term “**Risk Corridors Payment**” shall refer to any payment pursuant to the program set forth in Section 1342 of the Patient Protection and Affordable Care Act (“ACA”), 42 U.S.C. § 18062.
18. The term “**Risk Adjustment Transfer Payment**” shall refer to any payment pursuant to Section 1343 of the ACA, 42 U.S.C. § 18063.

19. The term “**Transitional Reinsurance Payment**” shall refer to any payment pursuant to the program set forth Section 1341 of the ACA, 42 U.S.C. § 18061.
20. The term “**Individual Mandate**” shall refer to the ACA’s requirement for applicable individuals to maintain minimum essential coverage as set forth in 26 U.S.C. § 5000A.
21. The term “**CO-OP Program**” shall refer to the Consumer Oriented and Operated Plan as established under the ACA.
22. **Rules of Construction:** The following rules of construction apply:
  - a. “And” and “or” shall be construed either disjunctively or conjunctively as necessary to make the request more inclusive rather than exclusive.
  - b. “All” includes each, any, and all.
  - c. The use of the singular form of any word includes the plural and vice versa.



### **REQUESTS FOR PRODUCTION OF DOCUMENTS**

1. All Documents and Communications referencing or related to LAHC's filings with the LDI, including form and rate filings.
2. All Documents and Communications reflecting Milliman's professional services and work for LAHC.
3. All Documents and Communications reflecting Buck's professional services and work for LAHC.
4. All Documents and Communications reflecting Communications between LDI and Milliman related to LAHC.
5. All Documents and Communication reflecting Communications between LDI and Buck related to LAHC.
6. All Documents and Communications reflecting Communications between LAHC and LDI. This request includes but is not limited to Communications sent directly to or from LAHC or on LAHC's behalf.
7. All engagement agreements and/or other agreements entered into between LDI and Lewis & Ellis or any other actuary or actuarial services firm who performed any services concerning LAHC.
8. All Documents and Communications reflecting Communications between LDI and any federal government agency, employee, agent or other representative, including but not limited to, with CMS, concerning LAHC.

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9. All Documents and Communications concerning LAHC's: a) CO-OP Program application (including any feasibility study or business plan), b) pro forma submissions, c) startup or solvency loans, d) requests for additional funding, or e) any corrective action plan.
10. All Documents and Communications concerning: a) LAHC's retention of any consulting actuary, third-party administrator or other consultant, b) LAHC's termination of any consulting actuary, third-party administrator or other consultant, c) the hiring of any of LAHC's directors, officers or other managers, and d) the termination of any of LAHC's directors, officers or other managers.
11. All Documents and Communications, including but not limited to policies, procedures, reports, instructions, and guidelines, concerning LDI's process for reviewing and approving filed health insurance rates that were applicable to 2014 or 2015 rates.
12. All Documents and Communications concerning LDI's assessment, review, findings, conclusions and/or approval of LAHC's 2014 or 2015 rates.
13. All Documents and Communications concerning LDI's review, assessments, findings and/or conclusions relating to Milliman's actuarial analyses, reports and other work for LAHC.
14. All Documents and Communications concerning LDI's review, assessments, findings and/or conclusions relating to Buck's actuarial analyses, reports and other work for LAHC.
15. All Documents and Communications concerning any attempt by LAHC, LDI, and/or any other person or entity to lower or raise LAHC's 2014 or 2015 rates.
16. All 2014 and 2015 rate filings for ACA-compliant plans sold or to be sold in Louisiana by any insurer.

17. All Documents and Communications comparing, contrasting or otherwise discussing the 2014 or 2015 rates, rate filings or other actuarial analyses prepared by or on behalf of LAHC in relation to the 2014 or 2015 rates, rate filings or other actuarial analyses for any other ACA-compliant plan sold or to be sold in Louisiana by any other insurer.
18. All Documents and Communications concerning the role and impact of Risk Corridor Payments on the operations or financial condition of LAHC or health insurers generally.
19. All Documents and Communications concerning the impact of the failure to make Risk Corridor Payments upon the operations or financial condition of LAHC or health insurers generally.
20. All Documents and Communications concerning the role and impact of Risk Adjustment Transfer Payments, the Transitional Reinsurance Payment, and/or the Individual Mandate upon the operations and financial condition of LAHC or health insurers generally.
21. All Documents and Communications referring or relating to pent up demand for health insurance and its impact or potential impact on claims costs, pricing, or enrollment for the 2014 or 2015 policy years for LAHC or health insurers generally.
22. All Documents and Communications referring or relating to the impact on LAHC or health insurers generally from any changes to the ACA, regulations promulgated pursuant to the ACA, or changes to the implementation or enforcement of the ACA or such regulations.
23. All Documents and Communications concerning LAHC's enrollment for policy years 2014 and 2015, including but not limited to enrollment strategy, enrollment projections,

enrollment mix or demographics, enrollment of previously uninsured persons, or actual or expected enrollment of insureds.

24. Documents sufficient to show statewide enrollment in ACA compliant plans sold in Louisiana for policy years 2014 and 2015, the demographics of such enrollees, and the number of such enrollees who were previously uninsured.
25. Documents sufficient to show enrollment in each ACA compliant plan sold in Louisiana for policy years 2014 and 2015, the demographics of such enrollees, and the number of such enrollees who were previously uninsured.
26. All Documents and Communications concerning any analyses or other discussion of expected versus actual enrollment of insureds in ACA-compliant plans sold in Louisiana for the 2014 and 2015 policy years.
27. Documents sufficient to show the provider discount, coding intensity and enrollment assumptions used by each ACA compliant plan for which rates were filed in Louisiana for policy years 2014 and 2015, including but not limited to the assumptions used by Blue Cross Blue Shield of Louisiana.
28. All Documents submitted by or on behalf of LAHC in connection with LAHC's effort to secure licensure from LDI, including but not limited to LAHC's HMO license.
29. All Documents and Communications reflecting or analyzing LAHC financial statements for the 2014, 2015, 2016 and 2017 calendar years, including: (a) GAAP financial statements; (b) Financial statements prepared in accordance with statutory accounting principles, including convention statements filed with LDI; (c) Actuarial memoranda supporting the calculation

of claim reserves, IBNR (incurred but not reported) liabilities, and any other liabilities used in the preparation of the LAHC financial statements.

30. All Documents and Communications concerning LAHC's financial condition and solvency.
31. All Documents and Communications concerning LAHC's operations, including but not limited to the performance of LAHC's officers, directors or other management and/or its agents GRI and/or CGI.
32. All Documents and Communications concerning the onsite market conduct and financial examination of LAHC that commenced in or around March 2015.
33. All Documents and Communications concerning the decision to place LAHC into rehabilitation or liquidation.
34. All Documents and Communications concerning LAHC's rehabilitation.
35. All Documents and Communications reflecting any assessment of the CO-OP Program.
36. All Documents and Communications concerning the November 5, 2015 testimony of the Louisiana Commissioner of Insurance Before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, United States House of Representatives Regarding: "Examining the Costly Failures of Obamacare's CO-OP Insurance Loans."
37. All Documents and Communications concerning *Health Republic Insurance Company v. United States of America*, No. 1:16-cv-00259-MMS, United States Court of Federal Claims ("*Health Republic*").

38. All Documents and Communications concerning any settlements or other relinquishment of claims or potential claims involving LAHC and the United States federal government, including but not limited to settlements in *Health Republic*.

## **EXHIBIT "B" TO NOTICE OF RECORDS DEPOSITION**

### **Louisiana Code of Civil Procedure Article 1354**

A. A subpoena may order a person to appear and produce at the trial, deposition, or hearing, books, papers, documents, any other tangible things, or electronically stored information, in his possession or under his control, if a reasonably accurate description thereof is given. A subpoena may specify the form or forms in which electronically stored information is to be produced. A party or an attorney requesting the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or cost on a person subject to that subpoena. The court in which the action is pending in its discretion may vacate or modify the subpoena if it is unreasonable or oppressive. Except when otherwise required by order of the court, certified copies, extracts, or copies of books, papers, and documents may be produced in obedience to the subpoena duces tecum instead of the originals thereof. If the party or attorney requesting the subpoena does not specify that the named person shall be ordered to appear, the person may designate another person having knowledge of the contents of the books, papers, documents, other things, or electronically stored information, to appear as his representative.

B. A person commanded to respond to a subpoena duces tecum may within fifteen days after service of the subpoena or before the time specified for compliance, if such time is less than fifteen days after service, send to the party or attorney designated in the subpoena written objections, with supporting reasons, to any or all of the requests, including objection to the production of electronically stored information in the form or forms requested. If objection is so made, the party serving the subpoena may file a motion to compel compliance with the subpoena and may move for sanctions for failure to reasonably comply.

C. A person responding to a subpoena to produce books, papers, or documents shall produce them as they are kept in the usual course of business or may organize and label them to correspond with the categories in the demand.

D. If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena may produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably useable.

E. A person responding to a subpoena need not produce the same electronically stored information in more than one form.

F. A person responding to a subpoena need not produce books, papers, documents, or electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel production or to quash, the

person from whom production is sought shall show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order production from such sources if the requesting party shows good cause. The court may specify conditions, including an allocation of the costs, for the production.

G. When the person subpoenaed is an adverse party, the party requesting the subpoena duces tecum may accompany his request with a written request under oath as to what facts he believes the books, papers, documents, electronically stored information, or tangible things will prove, and a copy of such statement shall be attached to the subpoena. If the party subpoenaed fails to comply with the subpoena, the facts set forth in the written statement shall be taken as confessed, and in addition the party subpoenaed shall be subject to the penalties set forth in Article 1357.

H. Subpoenas duces tecum shall reproduce in full the provisions of this Article.



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

**AMENDED SUBPOENA DUCES TECUM**

TO: Louisiana Department of Insurance  
Through its custodian of records:  
James J. Donelon  
1702 N. Third Street  
Baton Rouge, LA 70802

The Louisiana Department of Insurance ("LDI") is hereby commanded to designate and to make available on the **9<sup>th</sup> day of December, 2020**, at 10:00 o'clock a.m. at the offices of Phelps Dunbar, LLP, located at II City Plaza, 400 Convention Street, Suite 1100, in Baton Rouge, Louisiana, Telephone Number: 225-346-0285, one or more officers, directors, or managing agents, or other persons designated to testify on its behalf concerning the production of and identification of the documents specified in Exhibit A.

**This subpoena and deposition may be satisfied by producing certified copies via secure FTP to Milliman, Inc.'s counsel of record at [justine.margolis@dentons.com](mailto:justine.margolis@dentons.com) and [catharine.luo@dentons.com](mailto:catharine.luo@dentons.com) or, if necessary, mailing certified copies to the offices of Dentons US LLP, Attn: Steven Clark 4520 Main Street, Suite 1100, Kansas City, MO 64111-7700, unless a different place is established by mutual agreement of the parties hereafter, before the date set for the deposition in lieu of the designated deponent's appearance at the deposition.**

Should you decline to produce any document otherwise responsive to this subpoena based upon a claim of privilege, you are ordered to produce, at the place and time designated above, a log of all documents for which such privilege is claimed, including the basis for the privilege claimed, a description of said document, the authors and recipients thereof, and the date such document was created and/or transmitted. Furthermore, to the extent there are documents that contain communications that you claim are privileged and other communications or writings, you are ordered to produce the document in a form where all communications that you allege to be privileged have been redacted.

This subpoena complies with and is issued pursuant to the provisions of Article 1354 et. seq., and 1463(B) of the Louisiana Code of Civil Procedure.

In accordance with La. C.C.P. Articles 1462 (C) and 1463, each document should be produced as it is kept in the usual course of business. Parameters for production under this subpoena duces tecum are contained in Exhibit A attached hereto. Your failure to comply with this subpoena shall subject you to the penalties prescribed by law.

By Order of the 19<sup>th</sup> Judicial District Court, Parish of East Baton Rouge, this \_\_\_\_ day of \_\_\_\_\_, 2020.

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**DEPUTY CLERK OF COURT**

**REQUESTED ON BEHALF OF MILLIMAN, INC.:**

**Dentons US LLP**

Reid L. Ashinoff (admitted *pro hac vice*)  
Justin N. Kattan (admitted *pro hac vice*)  
Justine N. Margolis (admitted *pro hac vice*)  
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Baton Rouge, LA 70302

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Facsimile: 225-381-9197

Email: [johnsona@phelps.com](mailto:johnsona@phelps.com)

**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 19<sup>th</sup> day of November, 2020.

/s/ Harry Rosenberg  
Harry Rosenberg

# Exhibit B

JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.	:	SUIT NO.: 651,069 SECTION: 22
	:	
	:	19 <sup>TH</sup> JUDICIAL DISTRICT COURT
	:	
versus	:	PARISH OF EAST BATON ROUGE
	:	
TERRY S. SHILLING, <i>ET AL.</i>	:	STATE OF LOUISIANA

**PLAINTIFF’S RESPONSE TO BUCK GLOBAL, LLC’S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

NOW INTO COURT, through undersigned counsel, comes Plaintiff, James J. Donelon, Commissioner of Insurance for the State of Louisiana in his capacity as Rehabilitator of Louisiana Health Cooperative, Inc. (“LAHC”), through his duly appointed Receiver, Billy Bostick (“Plaintiff”), who, in response to Buck Global, LLC’s (“Buck’s”) First Set of Interrogatories and Requests for Production of Documents, states as follows:

**INTERROGATORIES**

**INTERROGATORY NO. 1:**

Explain in detail your understanding and position with respect to the role and impact of expected risk corridor payments in the formation of LAHC and in the planning and projections for its financial performance following its formation.

**RESPONSE TO INTERROGATORY NO. 1:**

Plaintiff objects to this request to the extent to it calls for the production of information prepared in anticipation of litigation, attorney work-product or attorney-client privileged communications. Further, Plaintiff objects to the extent that it seeks discovery of expert information beyond that which is made discoverable under La. C.C.P. art. 1425. In particular, this interrogatory appears to call for analysis from experts consulted by LAHC, without regard to whether the expert’s opinions may be presented at trial. Plaintiff will not provide information about any expert who is not expected to be called as a witness at trial unless and until defendant satisfied the requirements set out in La. C.C.P. art. 1425(D)(2)-(3). Plaintiff also objects on the grounds that this request is premature. Discovery is ongoing, and this analysis has not been finalized. Plaintiff will respond to this request in compliance with the deadline set by the above-captioned court to produce expert reports. Please see the Receiver’s Status Report Regarding Risk Corridor Expectations filed on June 15, 2020 and his Reply Report Regarding the Status of Risk Corridor Payments and Monthly Status Report Regarding *Health Republic* dated July 31, 2020. Furthermore, and subject to these objections, the Receiver will supplement this response after

communications. Further, Plaintiff objects to the extent that it seeks discovery of expert information beyond that which is made discoverable under La. C.C.P. art. 1425. In particular, this interrogatory appears to call for analysis by experts consulted by the Receiver, without regard to whether the expert's opinions may be presented at trial. Plaintiff will not provide information about any expert who is not expected to be called as a witness at trial unless and until defendant satisfied the requirements set out in La. C.C.P. art. 1425(D)(2)-(3). Plaintiff also objects on the grounds that this request is premature. Discovery is ongoing, and this analysis has not been finalized. Plaintiff will respond to this request in compliance with the deadline set by the above-captioned court to produce expert reports. Without waiving these objections, see the Receiver's Status Report Regarding Risk Corridor Expectations filed on June 15, 2020 and his Reply Report Regarding the Status of Risk Corridor Payments and Monthly Status Report Regarding *Health Republic* dated July 31, 2020. Without waiving his objections, the Receiver will supplement this response after conducting the electronic review of agreed-upon search terms in accordance with an Electronic Review Protocol agreed upon by the parties. Without waiving these objections, the Receiver will produce all responsive, relevant, discoverable, non-privileged documents and communications as part of his Electronic Discovery Responses along with a privilege log if any documents are withheld, pursuant to the Case Management Schedule.

**INTERROGATORY NO. 4:**

Explain in detail LDI's review and approval of LAHC's 2014 and 2015 rates.

**RESPONSE TO INTERROGATORY NO. 4 SERVED ON AUGUST 10, 2020:**

Plaintiff objects to this request on the grounds that it seeks information that is irrelevant and not likely to lead to the discovery of admissible information. Plaintiff in this matter is the Receiver of LAHC, not LDI or the Commissioner of Insurance in his capacity as regulator. Plaintiff was appointed as the representative of LAHC by order of the Receivership Action court. Put simply, Plaintiff is not a representative of LDI in this litigation. "The receiver appointed by a court of this state for a domestic insurer is the proper plaintiff to sue to enforce a right of the domestic insurer, or of its receiver." La. C.C.P. art. 693. Moreover, there is no cause of action against the Receiver, Commissioner Donelon, LDI, its employees or agents and these entities have no liability for any action taken by them in the performance of their powers and duties under the Louisiana Insurance Code. La. R.S. 22:2043.1. More importantly, "no action or inaction by the insurance regulatory authorities may be asserted as a defense to a claim by the receiver." *Id.* See

also, *Wooley v. Lucksinger*, 61 So.3d at 132-33 (footnotes omitted) citing *Meyers v. Moody*, 693 F.2d 1196, 1210 n. 11 (5th Cir.1982), cert. denied, 464 U.S. 920, 104 S.Ct. 287, 78 L.Ed.2d 264 (1983); *A-1 Nursery Registry Inc. v. United Teacher Associates Insurance Company*, 96-488 (La. App 3d Cir. 11/6/96), 682 So. 2d 929, 931-32. 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.

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 4:**

Plaintiff is not in possession, custody or control of documents exclusively in the possession of the Louisiana Department of Insurance. See Opposition Memorandum to Defendants' Motion to Compel filed on September 17, 2020 and the Motion for Partial Summary Judgment Regarding "Regulator Fault" or "Receiver Fault" Defenses or, in the Alternative, Motion to Strike Defenses Precluded as a Matter of Law." Without waiving his objections, the Receiver will supplement this response after conducting the electronic review of agreed-upon search terms in accordance with an Electronic Review Protocol agreed upon by the parties. Without waiving these objections, the Receiver will produce all responsive, relevant, discoverable, non-privileged documents and communications as part of his Electronic Discovery Responses along with a privilege log if any documents are withheld.

**INTERROGATORY NO. 5:**

Explain in detail LDI's and/or its consultants' review, assessments, findings and/or conclusions relating to Milliman's actuarial analyses, reports and other work for LAHC.

**RESPONSE TO INTERROGATORY NO. 5 SERVED ON AUGUST 10, 2020:**

Plaintiff objects to this request on the grounds that it seeks information that is irrelevant and not likely to lead to the discovery of admissible information. Plaintiff in this matter is the Receiver of LAHC, not LDI or the Commissioner of Insurance in his capacity as regulator. Plaintiff was appointed as the representative of LAHC by order of the Receivership Action court. Put simply, Plaintiff is not a representative of LDI in this litigation. "The receiver appointed by a court of this state for a domestic insurer is the proper plaintiff to sue to enforce a right of the domestic insurer, or of its receiver." La. C.C.P. art. 693. Moreover, there is no cause of action against the Receiver, Commissioner Donelon, LDI, its employees or agents and these entities have no liability for any action taken by them in the performance of their powers and duties under the

Louisiana Insurance Code. La. R.S. 22:2043.1. More importantly, “no action or inaction by the insurance regulatory authorities may be asserted as a defense to a claim by the receiver.” *Id.* See also, *Wooley v. Lucksinger*, 61 So.3d at 132-33 (footnotes omitted) citing *Meyers v. Moody*, 693 F.2d 1196, 1210 n. 11 (5th Cir.1982), cert. denied, 464 U.S. 920, 104 S.Ct. 287, 78 L.Ed.2d 264 (1983); *A-1 Nursery Registry Inc. v. United Teacher Associates Insurance Company*, 96-488 (La. App 3d Cir. 11/6/96), 682 So. 2d 929, 931-32. Without waiving these objections, to the extent that there are responsive pre-Receivership documents reflecting actuarial documents 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.

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 5:**

See Response to Interrogatory No. 4.

**INTERROGATORY NO. 6:**

Explain in detail LDI's and/or its consultants' review, assessments, findings and/or conclusions relating to Buck's actuarial analyses, reports and other work for LAHC.

**RESPONSE TO INTERROGATORY NO. 6 SERVED ON AUGUST 10, 2020:**

Plaintiff objects to this request on the grounds that it seeks information that is irrelevant and not likely to lead to the discovery of admissible information. Plaintiff in this matter is the Receiver of LAHC, not LDI or the Commissioner of Insurance in his capacity as regulator. Plaintiff was appointed as the representative of LAHC by order of the Receivership Action court. Put simply, Plaintiff is not a representative of LDI in this litigation. “The receiver appointed by a court of this state for a domestic insurer is the proper plaintiff to sue to enforce a right of the domestic insurer, or of its receiver.” La. C.C.P. art. 693. Moreover, there is no cause of action against the Receiver, Commissioner Donelon, LDI, its employees or agents and these entities have no liability for any action taken by them in the performance of their powers and duties under the Louisiana Insurance Code. La. R.S. 22:2043.1. More importantly, “no action or inaction by the insurance regulatory authorities may be asserted as a defense to a claim by the receiver.” *Id.* See also, *Wooley v. Lucksinger*, 61 So.3d at 132-33 (footnotes omitted) citing *Meyers v. Moody*, 693 F.2d 1196, 1210 n. 11 (5th Cir.1982), cert. denied, 464 U.S. 920, 104 S.Ct. 287, 78 L.Ed.2d 264 (1983); *A-1 Nursery Registry Inc. v. United Teacher Associates Insurance Company*, 96-488 (La. App 3d Cir. 11/6/96), 682 So. 2d 929, 931-32. Without waiving these objections, to the extent that there are responsive pre-Receivership documents reflecting actuarial documents 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.

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 6:**

See Response to Interrogatory No. 4.

**INTERROGATORY NO. 7:**

Explain in detail all assessments and reviews by LDI's consulting actuaries and/or any other third party of LAHC's rates arising from or related to Milliman's actuarial work for LAHC.

**RESPONSE TO INTERROGATORY NO. 7 SERVED ON AUGUST 10, 2020:**

Plaintiff objects to this request on the grounds that it seeks information that is irrelevant and not likely to lead to the discovery of admissible information. Plaintiff in this matter is the Receiver of LAHC, not LDI or the Commissioner of Insurance in his capacity as regulator. Plaintiff was appointed as the representative of LAHC by order of the Receivership Action court. Put simply, Plaintiff is not a representative of LDI in this litigation. "The receiver appointed by a court of this state for a domestic insurer is the proper plaintiff to sue to enforce a right of the domestic insurer, or of its receiver." La. C.C.P. art. 693. Moreover, there is no cause of action against the Receiver, Commissioner Donelon, LDI, its employees or agents and these entities have no liability for any action taken by them in the performance of their powers and duties under the Louisiana Insurance Code. La. R.S. 22:2043.1. More importantly, "no action or inaction by the insurance regulatory authorities may be asserted as a defense to a claim by the receiver." *Id.* See also, *Wooley v. Lucksinger*, 61 So.3d at 132-33 (footnotes omitted) citing *Meyers v. Moody*, 693 F.2d 1196, 1210 n. 11 (5th Cir.1982), cert. denied, 464 U.S. 920, 104 S.Ct. 287, 78 L.Ed.2d 264 (1983); *A-1 Nursery Registry Inc. v. United Teacher Associates Insurance Company*, 96-488 (La. App 3d Cir. 11/6/96), 682 So. 2d 929, 931-32. Without waiving these objections, to the extent that there are responsive pre-Receivership documents reflecting actuarial documents 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.

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 7:**

See Response to Interrogatory No. 4.

**INTERROGATORY NO. 8:**

Describe in detail all assessments and reviews by LDI's consulting actuaries and/or any other third party of LAHC's rates arising from or related to Buck's actuarial work for LAHC,

including but not limited to, Lewis & Ellis's October 1, 2014 review of LAHC's 2015 QHP (Individual Health) filings for individual and catastrophic products and review of LAHC's 2015 filings for Small Group products.

**RESPONSE TO INTERROGATORY NO. 8 SERVED ON AUGUST 10, 2020:**

Plaintiff objects to this request on the grounds that it seeks information that is irrelevant and not likely to lead to the discovery of admissible information. Plaintiff in this matter is the Receiver of LAHC, not LDI or the Commissioner of Insurance in his capacity as regulator. Plaintiff was appointed as the representative of LAHC by order of the Receivership Action court. Put simply, Plaintiff is not a representative of LDI in this litigation. “The receiver appointed by a court of this state for a domestic insurer is the proper plaintiff to sue to enforce a right of the domestic insurer, or of its receiver.” La. C.C.P. art. 693. Moreover, there is no cause of action against the Receiver, Commissioner Donelon, LDI, its employees or agents and these entities have no liability for any action taken by them in the performance of their powers and duties under the Louisiana Insurance Code. La. R.S. 22:2043.1. More importantly, “no action or inaction by the insurance regulatory authorities may be asserted as a defense to a claim by the receiver.” *Id.* See also, *Wooley v. Lucksinger*, 61 So.3d at 132-33 (footnotes omitted) citing *Meyers v. Moody*, 693 F.2d 1196, 1210 n. 11 (5th Cir.1982), cert. denied, 464 U.S. 920, 104 S.Ct. 287, 78 L.Ed.2d 264 (1983); *A-1 Nursery Registry Inc. v. United Teacher Associates Insurance Company*, 96-488 (La. App 3d Cir. 11/6/96), 682 So. 2d 929, 931-32. Without waiving these objections, to the extent that there are responsive pre-Receivership documents reflecting actuarial documents 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.

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 8:**

See Response to Interrogatory No. 4.

**INTERROGATORY NO. 9:**

Explain in detail the reasons for LAHC's decision to contract for Buck's actuarial and consulting services in April 2014, including but not limited to the need for review of Milliman's actuarial work for LAHC.

**RESPONSE TO INTERROGATORY NO. 9:**

Plaintiff has no first-hand knowledge of this information and such information is discernable by review of contemporaneous documents and witness depositions. Without waiving his objections, the Receiver will supplement this response after conducting the electronic review

**RESPONSE TO REQUEST FOR PRODUCTION NO. 11:**

See Response to Interrogatory No. 3.

**REQUEST FOR PRODUCTION NO. 12:**

All documents reflecting or pertaining to LDI's review and approval of LAHC's 2014 and 2015 rates.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 12 SERVED ON AUGUST 10, 2020:**

See Response to Interrogatory No. 4.

**SUPPLEMENTAL RESPONSE TO REQUEST FOR PRODUCTION NO. 12:**

See Supplemental Response to Interrogatory No. 4.

**REQUEST FOR PRODUCTION NO. 13:**

All documents reflecting or pertaining to LDI's and/or its consultants' review, assessments, findings and/or conclusions relating to Milliman's actuarial analyses, reports and other work for LAHC.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 13 SERVED ON AUGUST 10, 2020:**

See Response to Interrogatory No. 5.

**SUPPLEMENTAL RESPONSE TO REQUEST FOR PRODUCTION NO. 13:**

See Supplemental Response to Interrogatory No. 3.

**REQUEST FOR PRODUCTION NO. 14:**

All documents reflecting or pertaining to LDI's and/or its consultants' review, assessments, findings and/or conclusions relating to Buck's actuarial analyses, reports and other work for LAHC.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 14 SERVED ON AUGUST 10, 2020:**

See Response to Interrogatory No. 6.

**SUPPLEMENTAL RESPONSE TO REQUEST FOR PRODUCTION NO. 14:**

See Supplemental Response to Interrogatory No. 3.

**REQUEST FOR PRODUCTION NO. 15:**

All documents reflecting or pertaining to all assessments and reviews by LDI's consulting actuaries and/or any other third party of LAHC's rates arising from or related to Milliman's actuarial work for LAHC.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 15 SERVED ON AUGUST 10, 2020:**

See Response to Interrogatory No. 7.

been finalized. Plaintiff will respond to this request in compliance with the deadline set by the above-captioned court to produce expert reports and trial exhibits.

Respectfully submitted,



J. E. Cullens, Jr., T.A., La. Bar #23011  
Edward J. Walters, Jr., La. Bar #13214  
Darrel J. Papillion, La. Bar #23243  
Andrée M. Cullens, La. Bar #23212  
S. Layne Lee, La Bar #17689  
**WALTERS, PAPILLION,  
THOMAS, CULLENS, LLC**  
12345 Perkins Road, Bldg One  
Baton Rouge, LA 70810  
Phone: (225) 236-3636  
cullens@lawbr.net

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing has been furnished via e-mail and U.S. Mail, postage prepaid, and via e-mail to all counsel of record as follows:

W. Brett Mason  
Michael W. McKay  
Stone Pigman  
301 Main Street, #1150  
Baton Rouge, LA 70825

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Phelps Dunbar  
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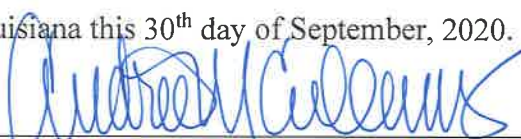
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Schonekas, Evans, McGoey  
909 Poydras Street, Suite 1600  
New Orleans, LA 70112

Robert B. Bieck, Jr.  
Jones Walker LLP  
201 St. Charles Avenue  
49th Floor  
New Orleans, LA 70170

Baton Rouge, Louisiana this 30<sup>th</sup> day of September, 2020.



Andree Matherne Cullens

# Exhibit C

TESTIMONY OF THE LOUISIANA  
COMMISSIONER OF INSURANCE

Before the Subcommittee on Oversight and Investigations  
Committee on Energy and Commerce  
United States House of Representatives

Regarding:  
“Examining the Costly Failures of Obamacare’s CO-OP Insurance  
Loans”

Thursday, November 5, 2015

James J. Donelon  
Commissioner of Insurance  
State of Louisiana

organization by the Louisiana Department of Insurance in May 2013, only about a year and a half away from the start of open enrollment for 2014—the first year that the market reforms of the Affordable Care Act were to take effect.

The Louisiana Health Cooperative had secured \$13 million in start-up loans from CMS under the Co-Op program, and also secured millions more in solvency loans as its start-up capital. The total commitment from CMS under the Co-Op program to the Louisiana Health Cooperative was just shy of \$65,800,000. From the start, the Louisiana Health Cooperative had difficulty preparing for the first open enrollment period in the fall of 2014, which was not overly surprising to us on account of the short time frame between licensing and open enrollment. At the conclusion of the open enrollment period for 2014, the Louisiana Health Cooperative had failed to meet its target enrollment, quite substantially in fact. The rates that were developed for the Louisiana Health Cooperative were designed to achieve certain economies of scale which obviously did not materialize. As a result, the Louisiana Health Cooperative suffered a \$20.6 million loss in 2014, with an expense ratio of 35%, which was far out of line with the industry standard.

Furthermore, near the end of the 2014 calendar and plan year, the Louisiana Department of Insurance was alerted to the Louisiana Health Cooperative's failure to give timely notice to its enrollees that many of the existing 2014 health plans offered would not be renewed. Rather, enrollees would have to pick a new plan that would be offered by the Louisiana Health Cooperative, or the enrollees could pick a new plan offered by a different health insurance issuer. Both state and federal law requires at least 90 days notice for plan termination, which was to take effect on December 31, 2014. The Louisiana Health Cooperative, however, had failed to give notice until the first week of December 2014. Most enrollee plans were to terminate on December 31. As a result, enrollees needed to have a new plan in place for January 1. In order for anyone picking a health insurance plan through a federally-facilitated Marketplace, or Exchange, to have coverage on the first of the month, an enrollee must pick a plan no later than the 15<sup>th</sup> day of the prior month. As such, by giving notice in the first few days of December, the Louisiana Health Cooperative had given its enrollees only about a week to pick a new health insurance plan. This failure was alarming to us.

During the same time frame, the number of consumer and health care provider complaints filed with the Louisiana Department of Insurance against the Louisiana Health Cooperative were also alarming. The Louisiana Department of Insurance has a process through which anyone, whether a consumer or a health care provider, can file a complaint with the Department of Insurance against a health insurance company, or any other insurer or licensed entity for that matter. Despite having approximately 2-3% of the total market share with its 12,000-15,000 enrollees, the Louisiana Health Cooperative was the target of 27 percent of all complaints received by the Louisiana Department of Insurance against health insurance issuers operating in the same markets in state of Louisiana. These two alarming issues, taken together, compelled state regulators to initiate a full on-site market conduct and financial examination of the Louisiana Health Cooperative beginning in March 2015, following internal preparations and analysis.

Later that same month, March of this year, the Louisiana Department of Insurance had determined that the Louisiana Health Cooperative had triggered several provisions of the state's Hazardous Financial Condition Regulation. The Louisiana Health Cooperative was informed of this on March 30, and was instructed to disclose its current business plan along with financial projections. By May, it was obvious that the Louisiana Health Cooperative had continued to suffer losses in the first quarter of 2015, but had balance sheets showing that the company still had minimum financial reserves required by law. That projection was based upon assumptions regarding monies that were to be received by the company from the premium stabilization programs of the Affordable Care Act, which you are hopefully familiar with—the Transitional Reinsurance Program, the Risk Corridor Program, and the Risk Adjustment Program. On June 30, 2015, after announcements by CMS, it was clear that the Louisiana Health Cooperative was to receive less money from two of these programs than it had projected. In fact, between the two programs, the Louisiana Health Cooperative would have to pay out a total of approximately \$5.3 million. This unexpected payable produced a severe strain on the company's balance sheets. That day a team of regulators from the Louisiana Department of Insurance summoned senior executives from the company to a meeting the following day, July 1, 2015. At that meeting, our regulatory staff asked pointed questions about the company's viability, and suggested that the best result for enrollees would be for the Louisiana Health Cooperative to voluntarily wind down its operations over the remainder of the 2015 calendar and plan year, rather than risk insolvency in 2016 and force enrollees to find new coverage in the beginning of the 2016 plan year. Less than a week later, the board of directors voted to wind down the company's operations.

Throughout this time, the full examination of the company continued. During the course of the examination, the magnitude of the operational problems with the Louisiana Health Cooperative came fully into view. As a result, we reached the decision that in the best interests of the enrollees of the Louisiana Health Cooperative, the company needed to be placed into receivership so that the company's limited remaining resources could be conserved and be used to pay claims. We took that action on September 1, 2015. Now, the court-appointed receiver in charge of winding down the affairs of the Louisiana Health Cooperative has the unenviable task of simultaneously trying to wind down a company while trying to correct the many operational problems that contributed to its demise. The financial condition and the ability of the Louisiana Health Cooperative is of particular concern to us because in Louisiana, health maintenance organizations, "HMOs", which this company was organized as, is not subject to the Louisiana Life and Health Insurance Guaranty Association, and as a result, the company is not backed by that guaranty fund. This means that if the company cannot satisfy all of its claims liabilities, enrollees, and mostly health care providers could be stuck with unpaid bills. We are doing everything in our power to make sure that that does not happen.

## 2. The Relationship between the Louisiana Department of Insurance and CMS

Before I conclude my testimony, I have been asked, and assume you want to hear about the different roles of state and federal regulators that oversaw the Louisiana Health Cooperative. You have heard of the general activity of the Louisiana Department of Insurance as the company's chief



# Exhibit D

JAMES J. DONELON, COMMISSIONER	:	SUIT NO.: 651,069 SECTION: 22
OF INSURANCE FOR THE STATE OF	:	
LOUISIANA, IN HIS CAPACITY AS	:	
REHABILITATOR OF LOUISIANA	:	
HEALTH COOPERATIVE, INC.	:	
	:	
versus	:	19 <sup>TH</sup> JUDICIAL DISTRICT COURT
	:	
TERRY S. SHILLING, GEORGE G.	:	
CROMER, WARNER L. THOMAS, IV,	:	
WILLIAM A. OLIVER, CHARLES D.	:	
CALVI, PATRICK C. POWERS, CGI	:	
TECHNOLOGIES AND SOLUTIONS,	:	PARISH OF EAST BATON ROUGE
INC., GROUP RESOURCES	:	
INCORPORATED, BEAM PARTNERS,	:	
LLC, MILLIMAN, INC., BUCK	:	
CONSULTANTS, LLC. AND	:	
TRAVELERS CASUALTY AND	:	
SURETY COMPANY OF AMERICA	:	STATE OF LOUISIANA

**SECOND SUPPLEMENTAL, AMENDING AND RESTATED PETITION FOR DAMAGES AND REQUEST FOR JURY TRIAL**

NOW INTO COURT, through undersigned counsel, comes 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, who respectfully requests that this SECOND SUPPLEMENTAL, AMENDING AND RESTATED PETITION FOR DAMAGES AND REQUEST FOR JURY TRIAL be filed herein and served upon all named Defendants; and respectfully represents:

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

1.

That the caption of this matter be amended to read as follows:

JAMES J. DONELON, COMMISSIONER	:	SUIT NO.: 651,069 SECTION: 22
OF INSURANCE FOR THE STATE OF	:	
LOUISIANA, IN HIS CAPACITY AS	:	
REHABILITATOR OF LOUISIANA	:	
HEALTH COOPERATIVE, INC.	:	
	:	
versus	:	
	:	
	:	
	:	PARISH OF EAST BATON ROUGE
CGI TECHNOLOGIES AND	:	
SOLUTIONS, INC., GROUP	:	
RESOURCES INCORPORATED, BEAM	:	
PARTNERS, LLC, MILLIMAN, INC.,	:	
BUCK CONSULTANTS, LLC. WARNER	:	
L. THOMAS, IV, WILLIAM A. OLIVER,	:	
SCOTT POSECAI, PAT QUIINLAN,	:	
PETER NOVEMBER, MICHAEL	:	
HULEFELD, ALLIED WORLD	:	
SPECIALTY INSURANCE	:	
COMPANY a/k/a DARWIN NATIONAL	:	19 <sup>TH</sup> JUDICIAL DISTRICT COURT
ASSURANCE COMPANY,	:	
ATLANTIC SPECIALTY INSURANCE	:	
COMPANY, EVANSTON INSURANCE	:	
COMPANY, RSUI INDEMNITY	:	
COMPANY AND ZURICH AMERICAN	:	
INSURANCE COMPANY	:	STATE OF LOUISIANA

### JURISDICTION AND VENUE

2.

This Court has jurisdiction over this dispute involving Louisiana Health Cooperative, Inc., (“LAHC”) a Louisiana Nonprofit Corporation that holds a health maintenance organization (“HMO”) license from the Louisiana Department of Insurance, is domiciled, organized and doing business in the State of Louisiana, and maintains its home office in Louisiana.

3.

This Court has jurisdiction over all of the named Defendants because each of them has transacted business or provided services in Louisiana, has caused damages in Louisiana, and because each of them is obligated to or holding assets of Louisiana Health Cooperative, Inc.

4.

Venue is proper in this Court pursuant to the provision of the Louisiana Insurance Code, including La. R.S. 22:257, which dictates that the Nineteenth Judicial District Court has exclusive jurisdiction over this proceeding and La. R.S. 22:2004, which provides for venue in this Court and Parish, as well as other provisions of Louisiana law.

19.

The actuaries hired by LAHC to determine the CO-OP's feasibility, assess its funding needs, and set the premium rates to be charged by LAHC in both 2014 and 2015, breached their respective duties owed to LAHC. The actuaries hired by LAHC grossly underestimated the level of expenses that LAHC would incur, made erroneous assumptions regarding LAHC's relative position in the marketplace, and grossly misunderstood or miscalculated how the risk adjustment component of the ACA would impact LAHC. Rather than LAHC either receiving a risk adjustment payment or LAHC not being assessed any such risk adjustment payment at all, as the actuaries erroneously predicted, in actuality, LAHC incurred significant risk adjustment payments in both 2014 and 2015. These failures of the actuaries who served LAHC were a significant factor in causing LAHC's ultimate collapse.

20.

Not only did LAHC lose a tremendous amount of money, but, from its inception, LAHC was unable to process and manage the eligibility, enrollment, and claims handling aspects of the HMO competently. Almost every aspect of LAHC's eligibility, enrollment, and claims handling process was deficient, resulting in numerous unpaid claims, untimely paid claims, and erroneously paid claims.

21.

By July 2015, only eighteen months after it started issuing policies, LAHC decided to stop doing business. The LDI placed LAHC in rehabilitation in September 2015, and a Receiver, Billy Bostick, was appointed by this Court to take control of the failed Louisiana CO-OP.

22.

The various parties who created, developed, managed, and worked for LAHC (i.e., the Defendants named herein) completely failed to meet their respective obligations to the subscribers, providers, and creditors of this Louisiana HMO. From the beginning of its existence, LAHC was completely ill-equipped to service the needs of its subscribers (i.e., its members / policyholders), the healthcare providers who provided medical services to its members, and the vendors who did business with LAHC. As described in detail herein, the conduct of the Defendants named herein went way beyond simple negligence. For instance, when the LDI took over the operations of LAHC, the CO-OP had a backlog of approximately 50,000 claims that had not been processed.

Because of Defendant's gross negligence, as of December 31, 2015, LAHC had lost more than \$82 million.

23.

As set forth herein, Defendants are liable to Plaintiff for all compensatory damages caused by their actionable conduct.

## **CAUSES OF ACTION**

### **Count One: Breach of Fiduciary Duty (Against the D&O Defendants and Insurer Defendants)**

24.

Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs as if fully set forth herein.

25.

The D&O Defendants owed LAHC, its members, and its creditors, fiduciary duties of loyalty, including the exercise of oversight as pleaded herein, due care, and the duty to act in good faith and in the best interest of LAHC. The D&O Defendants stand in a fiduciary relation to LAHC and its members and creditors and must discharge their fiduciary duties in good faith, and with that diligence, care, judgment and skill which the ordinarily prudent person would exercise under similar circumstances in like position.

26.

At all times when LAHC was insolvent and/or in the zone of insolvency, the D&O Defendants owed these fiduciary duties to the creditors of LAHC as well.

27.

The conduct of the D&O Defendants of LAHC, as pled herein, went beyond simple negligence. The conduct of the D&O Defendants constitutes gross negligence, and in some cases, willful misconduct. In other words, the D&O Defendants did not simply act negligently in the management and supervision of and their dealings with LAHC, but the D&O Defendants acted grossly negligently, incompetently in many instances, and deliberately, in other instances, all in a manner that damaged LAHC, its members, providers and creditors.

28.

The D&O Defendants knew or should have known that Beam Partners was unqualified and unsuited to develop and manage LAHC.

Benefits, Accident & Health Insurance, and Entities Providing Health Benefits. The following paragraphs are applicable:

- Paragraph 3.4.2 of ASOP No. 8 states that the actuary “should consider the impact of future changes in the underlying covered population on the projected claims. These changes may include, but are not limited to, changes in demographics, risk profile, or family composition”. In the context of this feasibility study, Milliman should have considered the possibility that LAHC would not be able to successfully attract the level of enrollment necessary for LAHC to remain viable as an entity.
- Paragraphs 3.4.3 and 3.4.6 of ASOP No. 8 deal with claim morbidity and health cost trends. Given the enormous level of uncertainty with respect to the claim morbidity of the population that would be covered under the ACA (including many individuals who were previously uninsurable due to known medical conditions), Milliman should have generated economic scenarios that considered the possibility that the loss ratio of LAHC would have exceeded 91%. Established insurance entities with statistically credible claim experience will occasionally misprice their insurance products with resulting loss ratios exceeding 100%. Milliman should have recognized that high loss ratios were a very real possibility (given the known uncertainty of the covered population) for LAHC and illustrated such scenarios in the feasibility study.

87.

Milliman’s failure to consider the possibility of these adverse enrollment and/or medical loss ratio scenarios resulted in a feasibility study where every single scenario illustrated that LAHC would be generating significant cash earnings over the mid to long term time period. The only question to the reader of the feasibility study was how much money would be earned by LAHC.

88.

Upon information and belief, Milliman conditioned payment for its preparation of LAHC’s feasibility study upon LAHC being awarded a loan by CMS. That is, Milliman would only receive payment for its services if LAHC’s efforts to secure a loan from CMS were successful. By conditioning payment upon a successful result, Milliman may have compromised its independence as an actuary and thereby breached its duty to LAHC.

89.

Based in large part on the work performed by Milliman and relied upon by LAHC, in September 2012, LAHC was awarded a loan to become a qualified nonprofit health insurance issuer under the Consumer-Operated and Oriented Plan (CO-OP) Program established by Section 1322 of the ACA and applicable regulations. In other words, based in large part on the work performed by Milliman and relied upon by LAHC, the federal government authorized a Start-up Loan of \$12,426,560 to LAHC, and a Solvency Loan of \$54,614,100 to LAHC.

90.

In or around November 2012, Milliman was engaged by Shilling on behalf of LAHC to “develop 2014 premium rates in Louisiana” for LAHC. This engagement letter dated November 13, 2012, was addressed to Shilling as “Chief Executive” of LAHC and was signed by Shilling on behalf of LAHC on November 14, 2012.

91.

In the “Three Year Pro Forma Reports” dated August 15, 2013, prepared by Milliman and relied upon by LAHC, Milliman concluded and projected that, in general, LAHC would be economically viable, able to remain financially solvent, able to pay back federal loans within the required time periods, and would be able to meet Louisiana’s solvency and reserve requirements. In reliance upon Milliman’s professional services and actuarial estimates and projections, LAHC set its premium rate for 2014.

92.

The actuarial work performed by Milliman for LAHC, including the feasibility study and pro forma reports, were unreliable, inaccurate, and not the result of careful, professional analysis.

93.

For instance, according to the actuarial work performed by Milliman and relied upon by LAHC and the federal government as part of the ACA process, Milliman estimated that LAHC would lose \$1,892,000 in 2014 (i.e., that LAHC’s net income in 2014 would be negative \$1,892,000). In actuality, LAHC reported a statutory loss of more than \$20 million in 2014 (i.e., LAHC’s statutory net income in 2014 was actually negative \$20 million+). Milliman and LAHC’s projections for 2014 were off by a factor of more than 10. For 2015, Milliman’s projections were even more inaccurate: although Milliman projected that LAHC would earn \$1,662,000 in 2015 (i.e., LAHC’s net income in 2015 would be positive \$1,662,000), in actuality, LAHC reported a statutory loss of more than \$54 million in 2015 (i.e., LAHC’s statutory net income in 2015 was actually negative \$54 million+). Milliman and LAHC’s projections for 2015 were off by a factor of more than 32.

94.

Milliman owed a duty to LAHC to exercise reasonable care, and to act in accordance with the professional standards applicable to actuaries in providing its services to LAHC.

95.

Milliman's actuarial memorandums prepared as part of the 2014 rate filings for the individual and small group lines of business indicate that they assumed that LAHC would achieve provider discounts on their statewide PPO product that were equal to Blue Cross Blue Shield of Louisiana ("BCBSLA"). No support was provided for the basis of this assumption.

96.

Provider discounts are a key driver of the unit costs of medical (non-pharmacy) expenses that are incurred by LAHC members. Since providers (hospitals and physicians) typically provide the largest insurance carriers with the highest (compared to smaller carriers) discounts off billed charges, it was not reasonable for Milliman to assume that a start-up insurance entity with zero enrollment would be in a position to negotiate provider discounts as large as BCBSLA. Since LAHC was utilizing a rental network in 2014 (rather than building their own network), Milliman should have analyzed the level of discounts that would be present in the selected network (Verity Healthnet, LLC) and quantify the difference between these discounts and the BCBSLA discounts since a primary basis of the 2014 rate manual was the level of 2013 BCBSLA rates for their most popular individual and small group products.

97.

When developing estimates of the level of insured claims expense loads for 2014, Milliman would be guided by Actuarial Standard of Practice (ASOP) No. 5 – Incurred Health and Disability Claims. Paragraph 3.2.2 of ASOP No. 5 states that the actuary should consider economic influences that affect the level of incurred claims. ASOP No. 5 specifically says that should consider changes in managed care contracts and provider fee schedule changes when developing estimates of incurred claims.

98.

Based on a review of the LAHC actuarial memorandums for individual and small group, upon currently available information and belief, no support has been provided for the assumption that LAHC would achieve provider discounts equal to BCBSLA. This assumption was not reasonable; if Milliman assumed a lower level of provider discounts, the calculated premium rates would have been higher. As a result, LAHC's statutory losses in 2014 would have been lower.



small group) in the first year of operation. While assuming a lower level of enrollment would have resulted in higher premiums, Milliman was aware that a significant percentage of the individual enrollment would be receiving government subsidies and thus would have limited sensitivity to pricing differences between the various plans offered on the ACA exchange.

103.

Assuming 100% individual members, the impact of this expense miscalculation is 111,689 times (\$145.70 - \$70.85), or about \$8.4 million.

104.

When developing their estimate of the level of Risk Adjustment (“RA”) transfer payments to build into the 2014 premium rates, Milliman assumed that there would be no difference in coding intensity between LAHC and the other insurance carriers in the State of Louisiana. This assumption was not reasonable as Milliman should have known that a small start-up health insurance carrier would be in no position to code claims as efficiently as Blue Cross Blue Shield of Louisiana (“BCBSLA”) and other established insurance carriers.

105.

Whatever difference that Milliman assumed as the true morbidity difference between the members that LAHC would enroll and the average state enrollment, it was not reasonable to assume that there would be no difference in claim coding intensity. If Milliman had assumed a lower level of coding intensity for LAHC, this would have resulted in a lower assumed average risk score for LAHC for 2014. As a result, the calculated premiums would have been higher.

106.

When developing estimates of average LAHC risk scores for 2014, Milliman would have been guided by Actuarial Standard of Practice (ASOP) No. 45 – The Use of Health Status Based Risk Adjustment Methodologies. The following sections of ASOP No. 45 are relevant for LAHC with respect to the estimation of relative coding intensity:

- Paragraph 3.2.3 states that “Because risk adjustment model results are affected by the accuracy and completeness of diagnosis codes or services coded, the actuary should consider the impact of differences in the accuracy and completeness of coding across organizations and time periods.”

107.

There is no indication that any meaningful assessment of LAHC claim coding capabilities took place by Milliman which resulted in the unreasonable assumption that LAHC’s coding efficacy would be the same as larger established health insurance carriers which have years of

experience paying claims optimizing the RA coding for some of those claims under other RA programs such as the long established RA program in the Medicare Advantage product.

108.

In their 2014 rating, Milliman assumed that LAHC would actually receive \$3.20 PMPM for the individual line of business and \$0.00 for the small group line of business. In actuality, the company was assessed a 2014 RA liability of \$7,456,986 and \$36,622 for the individual and small group lines of business respectively in June 2015 by the Center for Medicare and Medicaid Services (CMS). If Milliman had used a more reasonable assumption with respect to claim coding intensity, some of this liability would have been built into the 2014 premium rates.

109.

Milliman breached its duty by failing to discharge its duties to LAHC with reasonable care, and to act in accordance with the professional standards applicable to actuaries, by failing to produce a feasibility study that was accurate and reliable, by failing to set premium rates for LAHC that were accurate and reliable, and, in general, by failing to exercise the reasonable judgment expected of professional actuaries under like circumstances.

110.

Milliman's failure to exercise reasonable care, and its failure to act in accordance with the professional standards applicable to actuaries, and its breach of contract, was the legal cause of all of, or substantially all of, LAHC's damages as set forth herein.

**Buck**

111.

At all relevant times, Buck held itself out as having expertise to provide actuarial services and advice to health insurers like LAHC.

112.

In or around March 2014, Buck was engaged by LAHC to perform "certain actuarial and consulting services" for LAHC, including but not limited to: a review of the actuarial work previously performed by Milliman, "develop cost models to prepare 2015 rates for Public Exchange," "present target rates for review and revision," "review and price new plan designs," and "prepare and submit rate filings and assist" LAHC with "state rate filing" with LDI. Buck's engagement letter was signed by Powers on behalf of LAHC on April 4, 2014, and had an effective date of April 1, 2014. On or about December 1, 2014, this contract was amended, inter alia, to

extend the term of Buck's engagement through November 30, 2015, and provided for an additional fee of \$380,000 to be paid to Buck for its actuarial services provided to LAHC.

113.

On or about April 2, 2015, Buck issued its "Statement of Actuarial Opinion" to LAHC which was relied upon by LAHC and used to support its periodic ACA reporting requirements to the federal government. In Buck's actuarial opinion, "the March 2015 pro forma financial report is a reasonable projection of LAHC's financial position, subject to the qualifications noted below." In effect, Buck vouched for LAHC's economic health and continuing viability. Buck's professional opinion was clearly inaccurate and unreliable. LAHC would close its doors about three (3) months after Buck issued its April report, and LAHC would ultimately lose more than approximately \$54 million in 2015 alone.

114.

The actuarial work performed by Buck was unreliable, inaccurate, and not the result of careful, professional analysis. Furthermore, upon information and belief, Buck may have been unqualified, given its limited experience with insurers like LAHC, to provide actuarial services to LAHC.

115.

Buck owed a duty to LAHC to exercise reasonable care, and to act in accordance with the professional standards applicable to actuaries in providing its services to LAHC.

116.

When Buck developed individual and small group premium rates for 2015, they essentially disregarded the claim experience that had emerged from the start of LAHC operations on January 1, 2014 until the filing was finalized in August 2014. Buck's explanation for not utilizing the claim experience was that it was not statistically credible. Although the claim data was not fully credible, it was unreasonable for Buck to completely disregard LAHC's claim data and incurred claim estimates that were made for statutory financial reporting.

117.

When analyzing credibility of claim data, the actuary would be guided by Actuarial Standard of Practice (ASOP) No. 25 – Credibility Procedures. ASOP No. 25 discusses the concept of two types of experience:

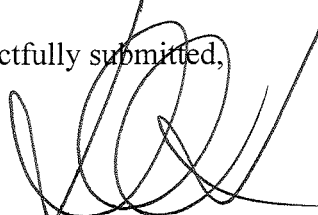
- Subject experience - A specific set of data drawn from the experience under consideration for the purpose of predicting the parameter under study.

## PRAYER FOR RELIEF

**WHEREFORE**, Plaintiff, 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, prays and demands that the following Defendants named herein, CGI Technologies and Solutions, Inc., Group Resources Incorporated, Beam Partners, LLC, Milliman, Inc., Buck Consultants, LLC, 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, be cited to appear and answer, and that upon a final hearing of the cause, judgment be entered against Defendants and in favor of Plaintiff for all compensable damages in an amount reasonable in the premises, including:

- a. All compensatory damages allowed by applicable law caused by Defendants' actionable conduct;
- b. the recovery from Defendants of all administrative costs incurred as a result of the necessary rehabilitation and/or liquidation proceedings;
- c. all fees, expenses, and compensation of any kind paid by LAHC to the D&O Defendants, Beam Partners, CGI, GRI, Milliman, and Buck;
- d. all recoverable costs and litigation expenses incurred herein;
- e. all judicial interest;
- f. any and all attorneys' fees recoverable pursuant to statute and/or contract;
- g. any and all equitable relief to which Plaintiff may appear properly entitled; and
- h. all further relief to which Plaintiff may appear entitled.

Respectfully submitted,



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J. E. Cullens, Jr., T.A., La. Bar #23011  
Edward J. Walters, Jr., La. Bar #13214  
Darrel J. Papillion, La. Bar #23243  
David Abboud Thomas, La. Bar #22701  
Jennifer Wise Moroux, La. Bar #31368  
**WALTERS, PAPILLION,  
THOMAS, CULLENS, LLC**  
12345 Perkins Road, Bldg One  
Baton Rouge, LA 70810  
Phone: (225) 236-3636  
Facsimile: (225) 236-3650

[SERVICE INFORMATION ON FOLLOWING PAGES]

# Exhibit E

NINETEENTH JUDICIAL DISTRICT COURT  
PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA  
CIVIL SECTION 22

. . . . .  
JAMES DONELON, COMM. OF INSURANCE .  
V. . NO. 651069  
TERRY S. SHILLING, ET AL .  
. . . . .

FRIDAY, SEPTEMBER 25, 2020

\* \* \* \* \*

HEARING AND ORAL REASONS FOR JUDGMENT

\* \* \* \* \*

THE HONORABLE TIMOTHY KELLEY, JUDGE PRESIDING

APPEARANCES FOR

J. E. CULLENS

PLAINTIFF

JAMES A. BROWN

DEFENDANTS

REPORTED AND TRANSCRIBED BY KRISTINE M. FERACHI, CCR  
#87173

2

FRIDAY, SEPTEMBER 25, 2020

\* \* \* \* \*

THE COURT: ALL RIGHT. GOOD MORNING,  
GUYS. WHAT WE WILL DO IS, I AM GOING TO WALK  
THROUGH APPEARANCES RATHER THAN HAVE YOU JUST  
MAKE AN APPEARANCE BECAUSE WE HAVE GOT SO MANY  
PEOPLE YOU MIGHT TALK OVER EACH OTHER. I AM  
JUST GOING TO GO THROUGH THEM IN THE ORDER THAT  
THEY ARE ON MY SCREEN, OKAY.

THIS IS CASE NUMBER 651069, DONELON VS  
SCHILLING, ET AL. WE ARE HERE BOTH FOR A  
MOTION TO COMPEL, AND ALSO, ONCE WE ARE DONE  
WITH THAT, WE WILL DO A STATUS CONFERENCE.

THANK Y'ALL FOR COMING. WE WILL

US. I AM NOT A PART OF IT, BUT Y'ALL ARE. THE BATTLE IS BEING FOUGHT OVER THE CUSTODY AND CONTROL ISSUE BECAUSE THERE IS NOT AN ALTERNATIVE AVENUE THROUGH WHICH TO OBTAIN THE INFORMATION. ISN'T THAT BASICALLY THE CRUX OF IT? ON THE FACE ONE WOULD SAY, WHY THE HELL ARE Y'ALL FIGHTING ABOUT THIS, BUT IN REALITY THERE IS A BIG DISTINCTION BETWEEN WHAT YOU ARE ABLE TO OBTAIN THROUGH DISCOVERY VERSUS WHAT YOU ARE ABLE TO OBTAIN THROUGH A PUBLIC RECORDS REQUEST, AND THAT IS WHY WE ARE BATTLING OVER SOMETHING THAT SEEMS TO BE SO MEANINGLESS.

MR. BROWN: YES, YOUR HONOR, THAT IS EXACTLY CORRECT.

THE COURT: IT IS VERY MUCH MEANINGFUL (SIC) IS THE CRUX OF WHAT YOU ARE SAYING.

MR. BROWN: THAT IS EXACTLY CORRECT.

THE COURT: OKAY. WELL, I UNDERSTAND THAT. WHAT I WOULD LIKE TO DO IS ASK MR. CULLENS, BECAUSE I UNDERSTAND YOUR POSITION VERY WELL, AND OF COURSE, HIS POSITION IS GOING

20

TO BE THAT THE RECEIVER ONLY HAS CUSTODY AND CONTROL OVER THOSE MATTERS ASSOCIATED WITH THE



RECEIVERSHIP, AND NOT OVER REGULATORY MATERIALS, AND SO, I WILL LET HIM EXPLAIN THAT TO ALL OF US. MR. CULLENS.

MR. CULLENS: THANK YOU, YOUR HONOR, AND I WILL START ON THE VERY BIG POINT THAT MR. JAMES, MR. BROWN AND I AGREE ON, THAT THE SOLE ISSUE BEFORE THIS COURT TODAY IS THE ISSUE OF THE LEGAL CUSTODY OF THE REGULATORY DOCUMENTS SOUGHT. I DID NOT PLAN TO START HERE, BUT I WILL ADDRESS YOUR HONOR'S INSIGHT, WHICH IS A GOOD ONE. THAT ISSUE, THAT IS THE REAL CRUX OF THIS FIGHT, IS OVER WHETHER THESE ARE DISCOVERABLE OR NOT. I WOULD SUGGEST TO YOU REGARDLESS OF THE ULTIMATE DECISION ON CUSTODY, THAT ISSUE IS NOT ONLY FOR ANOTHER DAY, THERE ARE OTHER VEHICLES. I MEAN, A THIRD-PARTY SUBPOENA. YOU DO NOT HAVE TO NECESSARILY DO A PUBLIC RECORDS REQUEST, ALTHOUGH THAT WOULD BE THE MOST EFFICIENT. NOTHING PREVENTS THE DEFENDANTS FROM ISSUING A THIRD-PARTY SUBPOENA TO THE DEPARTMENT OF INSURANCE, WHICH WOULD BE BOUND BY THE DISCOVERY RULES SET BY YOUR HONOR.

THE COURT: I WAS KIND OF HOLDING THAT IN MY POCKET FOR WHEN HE DID HIS REPLY, BUT THAT

WAS GOING TO BE ONE OF MY QUESTIONS ON THE  
REPLY IS, DON'T YOU HAVE RELIEF THROUGH A  
SUBPOENA, BUT GO AHEAD.

MR. CULLENS: WELL, YES.

SO, THIS AGAIN, TRYING TO KEEP OUR EYES ON

21

THE BALL, IT IS THEIR ABILITY (INAUDIBLE) LEGAL  
CUSTODY, AND I APPRECIATE THE DEFENDANTS  
AGREEING NOT TO PUT US THROUGH LIVE TESTIMONY,  
BUT THE FACTUAL STATEMENTS IN THE AFFIDAVIT,  
WHICH IS NOW IN EVIDENCE, MAKE IT CLEAR THAT  
BILLY BOSTICK AS RECEIVER DOES NOT HAVE  
POSSESSION, AND IN HIS EXPERIENCE AS A  
RECEIVER, DOES NOT HAVE CONTROL. HE CANNOT --  
IN FACT, HE DID IN THIS CASE, AFTER THIS CAME  
AHEAD, PICKED UP THE PHONE --

THE COURT: I AM SORRY TO INTERRUPT, BUT  
YOU MAKE THAT DISTINCTION OF BOSTICK VERSUS THE  
COMMISSIONER, BUT ISN'T THE PERSON WITH  
AUTHORITY AND RESPONSIBILITY OVER THE  
RECEIVERSHIP, AND IN FACT, THE COMMISSIONER,  
AND HE APPOINTS SOMEONE TO HANDLE THAT MATTER  
FOR HIM; IN THIS CASE, MR. BOSTICK. SO, ISN'T  
THE REAL PARTY AND INTEREST THE COMMISSIONER?

OF THOSE CASES THAT WE HAVE CITED, EACH OF THOSE FEDERAL CASES IN TWO PENNSYLVANIA STATE COURTS IN THE CONTEXT OF INSURANCE RECEIVERSHIP RECOGNIZED VERY CLEARLY THAT WHEN ACTING IN ITS CAPACITY -- F.D.I.C., WHEN ACTING IN ITS CAPACITY AS REGULATOR, IS TO BE TREATED AS A SEPARATE, LEGAL ENTITY PURSUANT TO THE SEPARATE CAPACITY DOCTRINE. THEN THE F.D.I.C., THE SAME CORPORATION, WHEN ACTING AS A RECEIVER.

LOOKING TO A FAIRLY RECENT DECISION THAT WAS QUOTED, THE HAGGARD CASE, WHICH IS OHIO FEDERAL COURT 2011, CLEARLY RECOGNIZING AND APPLYING THE SEPARATE CAPACITY DOCTRINE, THIS IS WHAT THAT FEDERAL COURT SAID. THE F.D.I.C. FUNCTIONS IN SEVERAL DIFFERENT GUISES, PARENS, AS RECEIVER, AS CONSERVATOR AND AS CORPORATION, CLOSE PARENS, AND EACH ORGANIZATION CAN CONDUCT ARMS-LENGTH TRANSACTIONS WITH ITSELF IN THESE

28

VARIOUS CAPACITIES. ON THE ONE HAND, THE F.D.I.C. ACTS AS RECEIVER FOR A FAILED BANK MARSHALING ITS ASSETS IN ORDER TO PAY THE BANK'S CREDITORS. ON THE OTHER HAND, F.D.I.C. CORPORATE ACTS AS THE INSURER OF MEMBER BANKS.

COURTS HAVE APPLIED THIS DISTINCTION IN THE  
CONTEXT OF DISCOVERY. THE F.D.I.C. IN ITS  
CORPORATE CAPACITY IS SIMPLY NOT A PARTY TO  
THIS LAWSUIT. AS SUCH, THE DOCUMENTS CREATED  
ARE SUBMITTED DURING THE COURSE OF THE  
ADMINISTRATIVE PROCEEDING INITIATED BY THE  
F.D.I.C. IN ITS CORPORATE CAPACITY ARE NOT IN  
THE POSSESSION OR CONTROL OF F.D.I.C. (SIC),  
WHICH IS THE RECEIVER, AND THE DEFENDANTS  
CANNOT OBTAIN THEM THROUGH A RULE 34 REQUEST TO  
THE RECEIVER.

OF COURSE, THE DEFENDANTS MAY PURSUE THESE  
DOCUMENTS FROM THE F.D.I.C. IN ITS CORPORATE  
CAPACITY THROUGH WHATEVER LEGAL MEANS ARE  
AVAILABLE JUST AS THEY WOULD BE PERMITTED TO DO  
WITH RESPECT TO ANY OTHER DISCOVERY SOUGHT FROM  
A NON-PARTY. AND THAT INCAPSULATES EXACTLY THE  
SITUATION HERE. ACCEPTING THE SEPARATE  
CAPACITY DOCTRINE, WHICH IS NOT, IT IS NOT  
UNCONTROVERSIAL. IT IS THE PRACTICE, CUSTOM  
AND PROCEDURE OF THE WAY RECEIVERSHIPS HAVE  
ALWAYS BEEN HANDLED, AT LEAST AS LONG AS I HAVE  
BEEN INVOLVED WITH THEM, AND THAT IS THE  
PRACTICE OF THE LOUISIANA DEPARTMENT OF  
INSURANCE.

IT HAS BEEN RECOGNIZED BY INNUMERABLE  
FEDERAL CASES IN THE CONTEXT OF F.D.I.C.

29

LITIGATION, AND I AM NOT GOING TO GO THROUGH  
EVERY CASE, YOUR HONOR, BUT SOME OF THE  
LANGUAGE FROM THESE CASES I THINK ARE WORTH  
REPEATING. THE WACHOVIA CASE IN WHICH F.D.I.C.  
WAS, IN FACT, THE PLAINTIFF. THIS IS 2007  
FEDERAL COURT IN CONNECTICUT. ACCORDING TO  
THAT COURT, AFTER RECOGNIZING THE SEPARATE  
CAPACITY DOCTRINE IT WROTE THAT THE, QUOTE,  
DISTINCTION PLAINTIFF DRAWS BETWEEN THE  
F.D.I.C. AS A RECEIVER AS AND THE F.D.I.C. AS A  
CORPORATE REGULATOR IS A VALID ONE. IT IS NOT  
AS WACHOVIA, THE DEFENDANTS, SUGGESTS, MERELY A  
PLOY TO OBSTRUCT DISCOVERY. SO, I MEAN, THERE  
IS JUST ONE 2007 CASE DIRECTLY ON POINT WHERE  
F.D.I.C. IS, IN FACT, PLAINTIFF IN A DISCOVERY  
DISPUTE WHERE OUR POSITION WAS UPHELD.

THE LAST ONE I AM GOING TO READ FROM, YOUR  
HONOR; WE COULD READ FROM MORE BECAUSE WE HAVE  
CITED THEM ALL IN OUR BRIEF, IS THIS ONE IS  
FROM ACTUALLY -- IT IS NOT AN F.D.I.C. CASE.  
THIS IS IN THE CONTEXT OF A RECEIVERSHIP CASE

UP IN PENNSYLVANIA. THIS IS THE ARIO VERSUS  
DELOITTE AND TOUCHE CASE, PENNSYLVANIA 2007.  
THAT STATE COURT WROTE --

THE COURT: DO YOU HAVE A CITATION ON THAT  
SO I CAN LOOK AT THAT?

MR. CULLENS: CERTAINLY, YOUR HONOR. THE  
CITATION IS 934 A SECOND, ATLANTIC SECOND,  
1290, PENNSYLVANIA 2007. IT IS CITED AT PAGE 7  
OF OUR OPPOSITION MEMO.

ACCORDING TO THAT STATE COURT, WHICH  
RECOGNIZED THE SEPARATE CAPACITY DOCTRINE,

30

QUOTE, UNDER THE SEPARATE CAPACITY DOCTRINE, A  
GOVERNMENTAL ENTITY WHEN ACTING IN ONE CAPACITY  
IS TREATED AS A SEPARATE ENTITY WHEN ACTING IN  
ANOTHER CAPACITY. THAT IS SOLID, GOOD, RECENT  
LAW THAT HAS BEEN AFFIRMED BY THE NUMEROUS  
CASES THAT WE HAVE CITED TO YOUR HONOR, AND IT  
SHOULD APPLY WITH FULL EFFECT HERE IN THIS  
CASE. YES, YOUR HONOR.

THE COURT: I APOLOGIZE FOR INTERRUPTING,  
BUT DID YOU CITE THAT IN YOUR BRIEF, THAT CASE?

MR. CULLENS: YES, YOUR HONOR. IT IS  
CITED AT PAGE 7.

THE COURT: OKAY. FOR SOME REASON I DID NOT HAVE A COPY, I JUST DID NOT REMEMBER THAT ONE. I AM GOING TO TAKE A QUICK LOOK AT IT. GO AHEAD, MR. CULLENS, YOU CAN CONTINUE. IT IS ONE I DO NOT REMEMBER. I READ A LOT OF THEM, BUT I DO NOT REMEMBER THAT ONE.

MR. CULLENS: YES. I MEAN, THAT ONE IS VERY COMPELLING, AND THE POINT HERE IS, RECOGNIZING THE VERY WELL-ESTABLISHED SEPARATE CAPACITY DOCTRINE, IT IS NOT FARFETCHED, ABSURD, ILLOGICAL. I FORGET SOME OF THE WORDS THAT DEFENSE USED IN THEIR REPLY MEMORANDUM. THIS IS STRAIGHTFORWARD CONVENTIONAL. THIS IS HOW IT WORKS IN RECEIVERSHIPS.

SO, WE ARE NOT TRYING TO OBSTRUCT ANYTHING. WE ARE NOT TRYING TO DO ANYTHING OTHER THAN RECOGNIZE WHAT IS VERY PLAIN ACCORDING TO LOUISIANA LAW IN THESE OTHER CASES, OTHER COURTS AROUND THE NATION WHO HAVE ADDRESSED THE ISSUE THAT THE COMMISSIONER

31

QUA (SIC) -- I AM A RECOVERING PHILOSOPHY MAJOR, SO COMMISSIONER QUA REGULATOR VERSUS COMMISSIONER QUA RECEIVER ARE VERY DIFFERENT.

THEY ARE SEPARATE, DISTINCT, LEGAL ENTITIES THAT TRANSACTS ARMS-LENGTH BUSINESS BETWEEN EACH OTHER, AND THE RECEIVER IN THIS CASE ASSERTING CLAIMS ON BEHALF OF L. A. H. C. STANDS IN DIRECT RELATION TO THE DEPARTMENT OF INSURANCE AS REGULATOR, AS DO DEFENDANTS, AS DO THE PUBLIC, AS DO THE MEDIA. THE ISSUE OF WHETHER DEFENDANTS HAVE GREATER DISCOVERY RIGHTS AS TO THE DEPARTMENT OF INSURANCE GIVEN THE SPECIFIC ALLEGATIONS, THE POSTURE OF THIS SUIT IS AN ISSUE FOR ANOTHER DAY. THAT MAY VERY WELL BE THE CASE, BUT THAT DOES NOT INFORM IN ANY WAY THE DISCREET ISSUE BEFORE THIS COURT THIS MORNING, WHICH IS WHETHER OR NOT BILLY BOSTICK AS THE COURT-APPOINTED RECEIVER FOR THE REHABILITATOR OF THE COMMISSIONER OF INSURANCE IN THAT CAPACITY IS THE LEGAL CUSTODIAN OF THESE REGULATORY RECORDS.

THE COURT: ALL RIGHT. I AM GOING TO INTERRUPT YOUR TRAIN OF THOUGHT A SECOND. WOULD YOU JUST GIVE ME A MOMENT TO LOOK AT SOMETHING ON HIS SCREEN?

MR. CULLENS: SURE.

THE COURT: JAY, READ OUT THE CITE AGAIN FOR ME, PLEASE.



MR. CULLENS: IT IS 934 A SECOND, ATLANTIC SECOND, 1290, PENNSYLVANIA 2007.

MR. BROWN: IS THAT THE ARIO CASE OR THE COKIN CASE YOU ARE REFERRING TO?

32

MR. CULLENS: THE ARIO CASE.

THE COURT: (PERUSING CASE PREVIOUSLY CITED.

MR. CULLENS: AND THE PINPOINT CITE IS 1293, 94.

THE COURT: I APOLOGIZE FOR THE DELAY. IT IS A SHORT CASE, SO I HAD TO CHECK IT OUT. THE HEAD NOTES I THINK ARE SEVEN AND EIGHT OR WHATEVER. BUT, YES, I HAVE REVIEWED IT.

GO AHEAD, JAY, I APOLOGIZE. THAT PARTICULAR CASE, FOR SOME REASON I DID NOT READ AND I WANT TO MAKE SURE I READ ALL OF THEM, SO WE ARE GOOD NOW.

MR. CULLENS: NO PROBLEM, YOUR HONOR.

AGAIN, SO JUST TO KIND OF RECAP WHAT I HAVE ARGUED ALREADY, THE INSURANCE CODE OF LOUISIANA CLEARLY CONTEMPLATES AND EMBODIES A SEPARATE CAPACITY, DEPENDING ON WHETHER THE COMMISSIONER IS ACTING AS REGULATOR AS OPPOSED

TO REHABILITATOR, LIQUIDATOR, CONSERVATOR OR RECEIVER. THE CODE OF CIVIL PROCEDURE ARTICLE 693 RECOGNIZES THAT SEPARATE CAPACITY, AND THE NUMEROUS CASES AND THE ANALOGOUS F.D.I.C./R.T.C. CASES CITED THROUGHOUT THE COUNTRY RECOGNIZE THE SEPARATE CAPACITY DOCTRINE AND APPLY IT WITHOUT ANY CONSTERNATION OR PROBLEM.

THE BASIS OF DEFENDANT'S ARGUMENT, THAT YOU SHOULD IGNORE THE SEPARATE CAPACITIES THAT THE COMMISSIONER PROTECTS THE PUBLIC'S INTEREST IN THE INSURANCE CONTEXT, THEY BOIL DOWN TO TWO CASES, THE HERBERT CLOUGH CASE, MIDDLE DISTRICT

33

2006, AND THE R.T.C. VERSUS DELOITTE AND TOUCHE CASE, THAT IS A COLORADO FEDERAL COURT OPINION FROM 1992.

THE COURT: THE HERBERT CLOUGH CASE THOUGH WAS NEVER REVIEWED BY AN APPELLATE COURT IN ANY WAY, WAS IT?

MR. CULLENS: NO. HERBERT CLOUGH WAS A MAGISTRATE DECISION THAT WAS NOT APPEALED TO THE DISTRICT BENCH. IT WAS NOT APPEALED OBVIOUSLY TO THE FIFTH CIRCUIT. IT HAS NOT

BEEN CITED BY ANY COURT IN THE LAST 14 YEARS.  
SIGNIFICANTLY, I CANNOT STRESS ENOUGH --

THE COURT: JAMES, HOW THE HELL DID YOU  
FIND THAT CASE? THAT IS PRETTY GOOD RESEARCH  
RIGHT THERE, FINDING THAT CASE, MR. BROWN.

MR. BROWN: A'DAIR FLYNT IS THE BRAINS  
BEHIND MY OPERATION, YOUR HONOR. SHE GETS ALL  
THE CREDIT. I DO NOT THINK IT WAS TOO HARD TO  
FIND, BUT.

THE COURT: SHE GETS A GOLD STAR. GO  
AHEAD, MR. CULLENS.

MR. CULLENS: AND THIS IS A DIRECT QUOTE  
AT -- IT IS NOT A REPORTED DECISION, SO I  
CANNOT GIVE YOU A PINPOINT, BUT IT IS AT PAGE 1  
OF THE HERBERT CLOUGH DECISION, QUOTE, THE  
COMMISSIONER IN HIS OR HER CAPACITY AS  
REGULATOR OR DIRECTOR IS TECHNICALLY A THIRD  
PARTY TO THIS ACTION, CLOSED QUOTE.

SO, EVEN THE UNAPPEALED MAGISTRATE JUDGE  
IN HERBERT CLOUGH RECOGNIZED WHAT WE ARE  
ARGUING OVER TODAY. IT IS NOT A TECHNICALITY.  
IT IS VERY MUCH A REALITY. THE COMMISSIONER OF

INSURANCE AS REGULATOR IS A THIRD PARTY TO THIS

ACTION. AS A PRACTICAL MATTER IN THE CLOUGH CASE, THE DEFENDANTS THERE DID WHAT THE DEFENDANTS IN THIS CASE CATEGORICALLY REFUSE TO DO, WHICH IS TO ISSUE A THIRD-PARTY SUBPOENA, PUBLIC RECORDS REQUEST, WHICHEVER DISCOVERY VEHICLE THEY CHOOSE TO DO TO THE DEPARTMENT OF INSURANCE, AND THE DEPARTMENT OF INSURANCE ENGAGED THEIR COUNSEL, IN-HOUSE COUNSEL ARLENE KNIGHTEN WHO MADE AN APPEARANCE AND WHO REPRESENTED AND ARGUED IN FRONT OF THE FEDERAL COURT, MAGISTRATE COURT ON BEHALF OF THE COMMISSIONER OF INSURANCE AS REGULATOR. SO, THEY HAD SEPARATE COUNSEL OF RECORD IN THAT CASE WHO REPRESENTED THE RECEIVER. ARLENE KNIGHTEN REPRESENTED THE COMMISSIONER OF INSURANCE, AND I TRIED TO AS BEST I CAN CUT THROUGH THESE -- THIS IS AN IMPORTANT ISSUE, BUT IT IS A VERY LEGAL-DRIVEN ISSUE.

AS A PRACTICAL MATTER, IN THAT CASE, BECAUSE THE INTEREST OF THE COMMISSIONER OF INSURANCE AS REGULATOR WAS BEING PROTECTED BY OTHER ATTORNEYS, I BELIEVE THE MAGISTRATE RECOGNIZED HER LANGUAGE WAS, THIS IS A SEMANTIC DIFFERENCE. SHE BASICALLY CAUGHT THE DISPUTE AS AN ACADEMIC BECAUSE THE COMMISSIONER OF

INSURANCE, WHATEVER HIS CAPACITY, WAS IN FRONT OF THE COURT.

THE HEBERT COURT VERY -- THE CLOUGH COURT VERY SIGNIFICANTLY DOES NOT GET INTO THE ISSUE OF WHAT WAS ULTIMATELY DETERMINED TO BE DISCOVERABLE OR WHAT WAS PRODUCED. IT IS

35

SIMPLY, I RESPECTFULLY SUGGEST YOU ERRONEOUSLY DISREGARDED THE VERY REAL APPLICATION OF THE SEPARATED CAPACITIES DOCTRINE IN CASES LIKE THIS WHERE FOR WHATEVER REASON DEFENDANTS REFUSE TO SIMPLY DO A PUBLIC RECORDS REQUEST, ISSUE A THIRD-PARTY SUBPOENA, TRY TO GET DOCUMENTS THAT THEY BELIEVE ARE RELEVANT, WHETHER THEY WERE OR NOT, FROM THE CUSTODIAN OF THOSE RECORDS, THE COMMISSIONER OF INSURANCE IN HIS CAPACITY AS REGULATOR. THE FACT THAT IT HAS NOT BEEN CITED BY ANYONE IN 14 YEARS, I RESPECTFULLY SUGGEST TO YOUR HONOR SPEAKS VOLUMES.

THE CASES THAT WE HAVE CITED, THE DOZEN OR SO THAT WE HAVE CITED HAVE BEEN CITED ROUGH-HANDEDLY. THE SECOND CASE, AND THIS CASE IS THE BASIS -- IN THEIR REPLY MEMO, YOUR

HONOR, THEY CITE ABOUT A DOZEN OR SO CASES THAT WERE NOT CITED IN THEIR ORIGINAL BRIEF. THEY ALL STEM OUT OF R.T.C. VERSUS DELOITTE CASE, THAT FEDERAL COLORADO 1992. IT WAS A CASE, AS YOUR HONOR MAY KNOW, RESOLUTION TRUST CORPORATION. R.T.C. AS PLAINTIFF SUES SOME FOLKS, AND THE DEFENDANTS TAKE THE POSITION IN THAT CASE EXACTLY THE SAME POSITION THEY DO IN THIS CASE. HEY, WE NEED THE REGULATORY DOCUMENTS WHICH R.T.C. AS RECEIVER CLAIMS ARE BEING HELD BY A SEPARATE GOVERNMENTAL ENTITY, THE OFFICE OF THRIFT SUPERVISION, RIGHT? THE DEFENDANTS ARGUE, YOU SHOULD DO SEPARATE CAPACITY DOCTRINE, IT IS ONE IN THE SAME. THE COURT ESSENTIALLY, IF YOU READ THE OPINION, I

36

AM SURE YOUR HONOR HAS, IT WAS NOT DECIDED -- THEY ACCEPTED THEIR SEPARATE LEGAL ENTITIES. THE COURT DID NOT DECIDE IT SAYING, NO, O.T.S. AND THE R.T.C. ARE ONE IN THE SAME. THEY RECOGNIZE AND ACCEPT THAT THEY ARE TWO SEPARATE, LEGALLY DISTINCT ENTITIES. ONE IS A REGULATOR, ONE IS A RECEIVER. IN THAT CASE, AND IN EVERY OTHER CASE CITED BY DEFENDANTS,

COULD NOT BE MORE NIGHT AND DAY. SO, THE SUGGESTION THAT THESE 12 OR SO CASES CITED BY DEFENDANTS IN THEIR REPLY BRIEF SOMEHOW UNDERMINE OUR POSITION BECAUSE OF A LOUISIANA STATUTE THAT IS EQUIVALENT TO THE FEDERAL STATUTE IS FLAT WRONG. THAT IS NOT THE CASE. IT IS THE EXACT OPPOSITE, YOUR HONOR.

THE COURT: ANYTHING ELSE, JAY?

38

MR. CULLENS: JUST VERY QUICKLY, YOUR HONOR, TO WRAP IT UP. I AM NOT GOING TO GET INTO THE DISCOVERABILITY ISSUE. THAT IS FOR ANOTHER DAY. I DO APPRECIATE DEFENDANTS WAIVING THEIR HEARSAY OBJECTION.

THE DEFINITION OF CONTROL AS SUGGESTED BY DEFENDANTS IN THEIR MEMO, WE ACCEPT IT. IT IS CORRECT. IT IS WHETHER YOU HAVE POSSESSION. WE DO NOT HAVE POSSESSION OF THESE RECORDS AS TESTIFIED TO THROUGH THAT AFFIDAVIT. CONTROL, WE DO NOT HAVE CONTROL. THAT IS TESTIFIED BY THE RECEIVER IN THIS CASE. THERE IS NO STATUTORY AUTHORITY IN LOUISIANA THAT ALLOWS THE RECEIVER TO DEMAND FROM THE L.D.I. TO PRODUCE THOSE DOCUMENTS. WHEN WE CONTACTED THE

L. D. I. AFTER DEFENDANTS MADE THESE REQUESTS, WE CALLED THEM AND SAID, HEY, THEY WANT ALL THESE REGULATORY RECORDS AND WE WERE TOLD JUST LIKE IN EVERY OTHER CASE, WELL, HAVE THEM ISSUE A THIRD-PARTY SUBPOENA OR DO A PUBLIC RECORDS REQUEST THAT THOSE MAY OR MAY NOT BE DISCOVERABLE. IN DETERMINING YOUR ROLE, IN DETERMINING YOUR ROLE, YOUR HONOR, AS YOU WELL KNOW, FIRST PRONG OF THE CONTROL TEST IS THE COURTS SHOULD PAY PARTICULAR ATTENTION TO THE FOCUS ON THE PRACTICABILITY TO OBTAIN RECORDS. I MEAN, GIVEN THE TRUTHFUL STATEMENTS IN EXHIBIT 1, THE AFFIDAVIT, THERE MAY BE PRIVILEGE. THERE PROBABLY ARE PRIVILEGED DOCUMENTS. WE DO NOT KNOW. WE HAVE NOT SEEN THEM. THERE MAY NOT BE THE STATUTORY GROUNDS FOR NOT PRODUCING THIS STUFF THAT WE HAVE

39

IDENTIFIED, BUT THERE MAY BE OTHERS. WE DO NOT KNOW. AS A PRACTICAL MATTER, BECAUSE WE DO NOT HAVE POSSESSION OR THE ABILITY TO DEMAND THEM, HOW ARE WE -- WE ARE NOT THE CUSTODIAN OF THESE RECORDS. MR. BROWN CITES THE COMEAUX LANDRY CASE. THAT CASE IS A RECALCITRANT PARTY



AND JUST TO WRAP IT UP, THAT IS ALL. I

40

MEAN, ANYTHING I THINK IS REPETITIVE AT THIS POINT, YOUR HONOR. THIS IS NOT -- I BELIEVE THIS IS A GOOD-FAITH LEGAL DISPUTE. I AGREE WITH MR. BROWN, THIS IS A BIG CASE, IT IS A SIGNIFICANT CASE. I ASSURE YOU EVERYONE IN THIS HEARING ON THIS ZOOM CALL IS TAKING IT SERIOUSLY. THIS IS AN IMPORTANT ISSUE. IT IS NOT JUST AN IMPORTANT ISSUE IN THIS CASE. IT IS AN IMPORTANT ISSUE TO THE DEPARTMENT OF INSURANCE, AND TO THE EXTENT THERE HAS BEEN ANY SUGGESTION THAT WE HAVE TAKEN A POSITION TO OBSTRUCT OR IN ANY WAY DELAY DISCOVERY, I CATEGORICALLY REJECT THAT, JUST AS I REJECT ANY SUGGESTION I WILL TAKE DEFENDANT'S POSITION IN GOOD FAITH THAT THEY ARE TRYING -- THEY BELIEVE THAT THEIR POSITION IS A GOOD-FAITH ARGUMENT FOR THE CUSTODIAN ISSUE, BUT I RESPECTFULLY REQUEST AND I RESPECTFULLY PRAY, YOUR HONOR, THAT THIS COURT RECOGNIZES THE SEPARATE CAPACITY DOCTRINE AND STRAIGHTFORWARDLY SAY, THESE DOCUMENTS, THE RECEIVER, BILLY BOSTICK, IS NOT THE CUSTODIAN OF THESE RECORD, AND ANY

DISCOVERY REQUESTS RELATING TO THESE REGULATORY RECORDS SHOULD BE AND MUST BE PROPERLY DIRECTED TO THE DEPARTMENT OF INSURANCE AS REGULATOR. THANK YOU, YOUR HONOR.

THE COURT: MR. BROWN, I AM SURE YOU HAVE GOT A RESPONSE.

MR. BROWN: BRIEFLY. IT SEEMS TO ME THAT JAY AND I ARE JUST TWO SHIPS PASSING IN THE NIGHT.

THE COURT: YOU ARE SPEAKING DIFFERENT

41

LANGUAGES, AREN'T YOU?

MR. BROWN: WE ARE NOT ARGUING ABOUT THE COMMISSIONER'S SEPARATE CAPACITY. WE DO NOT DISPUTE THAT HE APPEARS IN THIS CASE IN A CAPACITY AS REHABILITATOR. IT IS DIFFERENT FROM HIS CAPACITY AS REGULATOR. THE QUESTION IS, WHAT CAN HE GET IN HIS CAPACITY AS REHABILITATOR? WHAT IS IN HIS POSSESSION, CUSTODY AND CONTROL? WHAT DOES HE HAVE THE RIGHT TO GET, AND WHAT JAY IS TRYING TO CONVINCE YOU OF IS THAT THE COMMISSIONER AS REHABILITATOR CANNOT PRACTICALLY GET THE RECORDS OF THE DEPARTMENT OF INSURANCE. NOW,

OCCUPIES THOSE TWO POSITIONS, BUT WITH DIFFERENT CAPACITIES. TWENTY-TWO 2008 AND 22: 2009 SET FORTH THE DISTINCTIONS BETWEEN A RECEIVER AND A REGULATOR; ALBEIT THEY MAY BE THE SAME HUMAN BEING.

AND ALSO, THE CAPACITY UNDER WHICH AN ACTION IS BROUGHT BY THAT ONE HUMAN BEING, THE HAT THAT HE HAS TO PUT ON IN ORDER TO BRING CERTAIN ACTIONS IS UNDER CODE OF CIVIL PROCEDURE ARTICLE 693. CAN THE REGULATOR BRING THIS ACTION? NO, THE REGULATOR CANNOT. THE RECEIVER -- THE REHABILITATOR MUST BRING IT. THERE IS A DISTINCTION BETWEEN THE JURIDICAL ENTITY THAT IS BRINGING THIS ACTION AND THAT WITH WHICH HE WEARS HIS OTHER HAT. THE REGULATOR IS ONE THING. THE REHABILITATOR IS A

50

SEPARATE, DISTINCT ENTITY, LEGAL ENTITY AND HAS CERTAIN RESTRICTIONS ON IT THAT THE REGULATOR DOES NOT, AND THE REGULATOR HAS RESTRICTIONS ON IT THAT ARE ACTUALLY AVAILABLE TO THE REGULATOR -- TO THE REHABILITATOR, BUT NOT TO THE REGULATOR.

SO, IT IS CLEAR WHEN YOU LOOK THROUGH THE

STATUTORY CONSTRUCTION OF ALL OF THIS THAT WE ARE TALKING ABOUT TWO JURIDICAL ENTITIES, ALBEIT THE SAME PERSON, THE SECRETARY -- COMMISSIONER OF INSURANCE, OKAY, AND WHILE THE COMMISSIONER OF INSURANCE HAS CUSTODY, CONTROL AS A REGULATOR, HE DOES NOT HAVE CUSTODY AND CONTROL AS A REHABILITATOR, AND I BELIEVE THAT -- I KNOW Y'ALL THINK I AM WRONG AND THE APPELLATE COURT MIGHT THINK I AM WRONG, BUT IT IS A VERY, VERY DISTINCT DIFFERENCE. THERE HAS TO BE RESPECT IN THE LAW. THE ARGUMENTS THAT THE DEFENDANTS DO NOT HAVE RELIEF OTHER THAN THROUGH THIS DISCOVERY UPON THE REHABILITATOR RINGS HOLLOW.

THE COURT AGREES THAT THEY ARE LIMITED WITH REGARD TO THEIR RELIEF AVAILABLE UNDER TITLE 44 FOR PUBLIC RECORDS REQUESTS. THEY ARE NOT HOWEVER LIMITED WITH REGARD TO A THIRD-PARTY SUBPOENA, WHICH THE COURT BELIEVES IS THE PROPER VEHICLE THROUGH WHICH TO OBTAIN THE DOCUMENTATION. IS IT FORM OVER SUBSTANCE? NO, IT IS NOT. IT MAY SEEM AS THOUGH IT IS FORM OVER SUBSTANCE, BUT IT IS NOT. IT IS A VERY IMPORTANT DISTINCTION; OTHERWISE, THE OBLIGATIONS AND AUTHORITY OF THE REHABILITATOR

WILL FAR EXTEND PAST WHAT THE LEGISLATURE INTENDED ITS AUTHORITY TO BE WHEN YOU BLUR THE DISTINCTIONS BETWEEN THE TWO CAPACITIES. SO, I AGREE WITH THE PLAINTIFF'S POSITION ON THIS, THAT THERE IS A SEPARATE CAPACITY. THE SEPARATE CAPACITY DOCTRINE HAS TO BE RESPECTED, AND AS ADDITIONAL REASONS FOR RULING, I WILL ADOPT THE WELL-BRIEFED MEMORANDA OF THE PLAINTIFF IN THIS MATTER. SO, MOTION TO COMPEL DENIED. COSTS FOR THIS HEARING, FOR THE PAPERWORK WITH THE CLERK OF COURT ARE CAST AGAINST THE MOVER.