

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 TH JUDICIAL DISTRICT COURT
TERRY S. SHILLING, GEORGE G.	:	
CROMER, WARNER L. THOMAS, IV,	:	
WILLIAM A. OLIVER, CHARLES D.	:	
CALVI, PATRICK C. POWERS, CGI	:	PARISH OF EAST BATON ROUGE
TECHNOLOGIES AND SOLUTIONS,	:	
INC., GROUP RESOURCES	:	
INCORPORATED, BEAM PARTNERS,	:	
LLC, AND TRAVELERS CASUALTY	:	
AND SURETY COMPANY OF	:	
AMERICA	:	STATE OF LOUISIANA

MEMORANDUM IN SUPPORT OF LDI AND LEWIS & ELLIS' OPPOSITION TO BUCK AND MILLIMAN'S MOTIONS TO COMPEL

MAY IT PLEASE THE COURT:

Plaintiff herein, 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” or “Receiver”), respectfully files this brief Memorandum in Support of LDI and Lewis & Ellis’ Opposition to Buck and Milliman’s Motions to Compel (“Motions”), currently set for Zoom hearing before this Honorable Court on Friday, February 12, 2021. In addition to the reasons presented in LDI’s opposition memorandum to defendants’ Motions, the Receiver respectfully suggests that the internal regulatory materials of LDI sought by defendants are immaterial to this case, confidential as a matter of law, and should not be considered discoverable.

1. Discovery Directed at Regulator Conduct is Unfounded

Given the clear dictates of La. R.S. 22:2043.1(B), and this Honorable Court’s prior order striking all of defendants’ “Regulator Fault” defenses, what LDI did or did not do (i.e., the regulator’s “action or inaction”) cannot be a legal defense to the Receiver’s claims against Buck and Milliman or any other defendant for that matter. Without a legal basis for any defense of “Regulator Fault,” defendants’ discovery efforts directed to LDI and its agents regarding what the regulators did or did not do are unfounded.

Buck and Milliman hope to use LDI’s presumptive “OK” of their pre-receivership work as a defense to the Receivers’ claims against them. “See,” defendants want to argue to the jury and this Court, “LDI agreed with our analysis, therefore our conduct should not be considered unreasonable or substandard.” Defending their conduct by relying on such “positive” evaluations by the LDI, however, would directly contradict the prohibition of §2043.1(B) that the regulator’s “action or inaction” cannot be a legal defense to the Receiver’s claims. Despite defendants’ lengthy protestations and insistence that what the regulators did or did not do is material to their defense, positive Louisiana law says unequivocally that it is not. The trier of fact will be asked to decide whether Buck and Milliman acted wrongly when evaluating the financial condition and future premium needs of LAHC. How “well or poorly” the regulator may have performed his respective job, does not and cannot lessen the actuaries’ professional responsibility to do the job it was hired by LACH to perform. Whether the regulators agreed with Buck and Milliman, disagreed with Buck and Milliman, “ratified” their analysis, “rejected” their analysis, or quite frankly, did or did not do anything regarding Buck and Milliman’s analysis, is completely immaterial to the issue of whether these actuarial defendants are liable to the Receiver.

For example, the October 1, 2014, “Rate Review Summary” (Ex. J to Buck’s Motion), issued by Lewis & Ellis, Inc., does not and cannot provide a basis for any defense advanced by Buck and Milliman. Putting aside whether this document is a confidential one not subject to disclosure pursuant to Louisiana law (see Section 3, *infra*), that LDI’s agent (Lewis & Ellis) conducted a rate review of LAHC pursuant to the regulatory authority of the LDI, does not reasonably lead to the discovery of admissible evidence. Neither Buck nor Milliman can rely upon this LDI report to defend their conduct. In short, other than causing the LDI to incur considerable legal expenses and related expenses, the production of such an internal regulatory document does not advance the proverbial ball.

2. Material Unknown to Milliman and Buck When They Worked for LAHC is Immaterial

Moreover, and perhaps more significantly, internal regulatory material maintained by LDI that was unknown to Milliman and Buck at the time they evaluated the financial condition of LAHC is immaterial to the issues and defenses involved in this case. The trier of fact will be asked to decide whether Buck and Milliman acted wrongly when evaluating the financial condition and future premium needs of LAHC. Buck and Milliman’s work product will be evaluated by the jury according to what Buck and Milliman took into account (i.e., what each knew) at the time each set

LAHC's premiums and commented on LAHC's financial condition. What LDI knew or did not know at the time defendants did their work for LAHC does not matter. Information that was unknown to Buck and Milliman at the time they did their work cannot inform either the applicable standard of care against which their conduct will be judged or form the basis of defendants' knowledge when working for LAHC. In other words, what internal regulatory analysis and/or review may have been undertaken "contemporaneously" (or subsequently for that matter) by LDI, whether positive or negative, which was not shared with Buck and Milliman at the time is not only inadmissible at trial, but does not and cannot inform either the applicable standard of care against which their conduct will be judged or form the basis of defendants' knowledge when working for LAHC. As such, the internal regulatory materials that may be maintained by LDI—which were not contemporaneously shared with defendants when they did their work for LAHC—is immaterial to any issue or defense in this case and should therefore be considered non-discoverable.

3. LDI Regulatory Records are Confidential and Non-Discoverable

The Louisiana Legislature has made it clear that all examination reports, working papers, recorded information, and documents of any kind related to the regulatory work undertaken by the LDI is strictly "confidential" and "not subject to subpoena."

La. R.S. 22:256 permits the Commissioner to examine the affairs of an HMO as often as "reasonably necessary," and requires such examination at least every five years, all in accordance with La. R.S. 22:1981 to 1995. La. R.S. 22:1983(J) protects examination work papers and all related documents from disclosure. According to La. R.S. 22:1983(J):

J. All working papers, recorded information, documents, and copies thereof produced by, obtained by, or disclosed to the commissioner, or any other person, in the course of an examination made under this Chapter, **shall be given confidential treatment and are not subject to subpoena** and may not be made public by the commissioner or any other person, except to the extent provided in R.S. 22:1981(E) and Subsection I of this Section. Any access may be granted to the National Association of Insurance Commissioners. The parties shall agree, in writing prior to receiving the information, to provide to it the same confidential treatment as required by this Section, unless the prior written consent of the company to which it pertains has been obtained.

Id. (emphasis added). La. R.S. 22:1984 also permits LDI to conduct financial and market conduct examinations with the same confidentiality safeguards as examinations. See La. R.S. 22:1984(D). LDI correctly considers all examination work papers and related documents to be absolutely confidential pursuant to Louisiana law. The regulatory records sought by defendants which have

been deemed confidential by statute may not be subpoenaed or otherwise used by defendants in this or any other proceeding.

4. Any Costs Should be Paid by Defendants

Whether some or all of the regulatory records sought by defendants are privileged is a battle that should never occur, because these regulatory materials are immaterial, confidential, and non-discoverable as a matter of law. Clearly, however, if LDI is ordered to produce regulatory records in response to defendants' discovery requests, LDI will need to conduct a thorough review and analysis to identify those regulatory documents that are non-discoverable pursuant to Louisiana's confidentiality and non-disclosure statutes and/or the deliberative process privilege and/or other privileges that the Receiver is not in a position to know or assert. To the extent this Honorable Court may order LDI to expend the considerable time, money, and effort to undertake such a task, the Receiver respectfully suggests that Buck and Milliman should be ordered to pay all reasonable expenses associated with this dubious-at-best undertaking. The better course, as prayed for by LDI, is to deny defendants' unfounded Motions and prevent such a waste of resources in the first place.

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

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished via e-mail to all counsel of record as follows, this 4th day of February, 2021, in Baton Rouge, Louisiana.

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

Harry Rosenberg
Phelps Dunbar
365 Canal Street
Suite 2000
New Orleans, LA 70130

James A. Brown
Sheri Corales
Liskow & Lewis
One Shell Square
701 Poydras Street, #5000
New Orleans, LA 70139

Michael A. Balascio
Barrasso Usdin Kupperman
909 Poydras Street
24th Floor
New Orleans, LA 70112

Seth A. Schmeeckle
Lugenbuhl, Wheaton, Peck
601 Poydras Street
Suite 2775
New Orleans, LA 70130

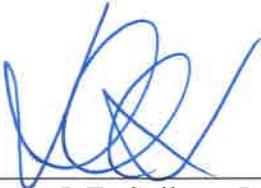
Karl H. Schmid
Degan, Blanchard, & Nash
400 Poydras Street
Suite 2600
New Orleans, LA 70130

George D. Fagan
Leake & Andersson
1100 Poydras Street
Suite 1700
New Orleans, LA 70163

Mr. John W. Hite, III
Salley, Hite, Mercer & Resor, LLC
365 Canal Street
Suite 1710
New Orleans, LA 70130

Thomas McEachin
Schonekas, Evans, McGoeys
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



J. E. Cullens, Jr.