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

MEMORANDUM OF BUCK GLOBAL, LLC IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING OFFICER/DIRECTOR/EMPLOYEE/ETC. FAULT DEFENSES OR, IN THE ALTERNATIVE, MOTION TO STRIKE DEFENSES PRECLUDED AS A MATTER OF LAW

I. INTRODUCTION

Defendant, Buck Global, LLC ("Buck"), respectfully submits this Memorandum in Opposition to the Plaintiff's Motion for Partial Summary Judgment Regarding Officer/Director/Employee/Etc. Fault Defenses or, In the Alternative, Motion to Strike Defenses Precluded as a Matter of Law. As set forth below, Plaintiff[1] has waived the provisions of La. R.S. § 22:2043.1(A) by filing the instant lawsuit originally naming officers, managers, directors, owners, employees, and agents of LAHC as defendants, placing their fault directly at issue and judicially admitting that they caused or substantially contributed to the losses that Plaintiff seeks to recover from Buck. Therefore, the provisions of La. R.S. 22:2043.1(A) should not be applied to Buck in this case.

Further, application of La. R.S. 22:2043.1(A) to Buck in this case – in which Plaintiff's settlement with and release of the director and officer ("D&O") defendants deprives Buck of any right or remedy to seek contribution from them – would expose Buck to liability for losses that it

[1] James J. Donelon, Louisiana Commissioner of Insurance, as Rehabilitator of Louisiana Health Cooperative, inc. ("LAHC").

did not cause with no remedy against those who actually caused or substantially contributed to the losses. That absurd result defeats any presumption that the later enacted statute (La. R.S. 22:2043.1(A)) controls over Louisiana's generally applicable comparative fault statutes. *E.g.*, *Ferrara v. Sec'y, Dep't of Revenue & Tax'n, State of La.*, 96-806 (La. App. 5 Cir. 1/28/97), 688 So. 2d 147, 148, writ denied, 97-0411 (La. 4/4/97), 692 So. 2d 418 (where application of later enacted statute would work an absurd result, presumption that it controls over the earlier statute is defeated, and the earlier statute should be applied).

And application of La. R.S. 22:2043.1(A) in this particular context – exposing Buck to liability for losses that it did not cause when Plaintiff has deprived it of any corresponding remedy against those who did cause those losses – would work a violation of Buck's fundamental due process rights, in violation of the United States and Louisiana Constitutions.

Further, as shown below, Plaintiff's motion for summary judgment is premature and inappropriate because discovery going to the causes of the insolvency of LAHC, including D&O causation and fault, remains ongoing. And Plaintiff's alternative motion to strike seeks a "drastic remedy" that is "disfavored" and should be denied because there remain disputed facts and substantial unsettled questions of law as to the legal validity of Buck's comparative fault defenses. *Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp.*, 01–345 (La. App. 3 Cir. 6/20/01), 790 So. 2d 93, 98, writ denied, 01–2115 (La. 7/26/01) 794 So. 2d 834.

Plaintiff's motion, although referring generically to former "managers" and "agents" of LAHC, does not explicitly seek to bar fault apportionment to CGI Technology and Solutions, Inc. and Beam Partners, LLC – as those entities were third party contractors of LAHC. La. R.S. 22:2043.1(A) makes no reference to "contractors." So Buck does not read Plaintiff's papers as applying to those entities – who Plaintiff also previously released. But to the extent, if any, Plaintiff's instant motion is deemed to apply to those entities, Buck opposes any prohibition on its ability to apportion fault to those "empty chair" defendants for all of the reasons that follow.

II. BACKGROUND

A. Relevant Procedural History

This lawsuit arises out of the failure of Louisiana Health Cooperative, Inc. ("LAHC"), a consumer operated and oriented health care plan created under the Patient Protection and Affordable Care Act. LAHC, a Louisiana nonprofit corporation, was formed in 2011 and was

licensed to operate as a health maintenance organization in 2013. In September 2015, LAHC was placed into rehabilitation under the control of Plaintiff, James J. Donelon, Commissioner of Insurance for the State of Louisiana, as Rehabilitator.

On August 31, 2016, the Commissioner, in his capacity as Rehabilitator of LAHC, filed his original petition for damages, naming as defendants former directors and officers of LAHC, including Terry S. Shilling; George G. Cromer; Warner L. Thomas, IV; William A. Oliver; Charles D. Calvi; and Patrick C. Powers (the "D&O Defendants"); the contract developer of LAHC, Beam Partners, LLC ("Beam"); and contract third-party administrators, CGI Technology and Solutions, Inc. ("CGI") and Group Resources, Inc. ("GRI"). On November 29, 2016, he amended his petition to name two defendants who provided actuarial services to LAHC – Milliman, Inc. ("Milliman") and Buck. Then, on October 25, 2017, Plaintiff filed his second supplemental, amending and restated petition ("SAP") to restate all of his claims and to add excess insurers of LAHC's directors and officers and related nominal defendants. See SAP, attached hereto as **Exhibit A** ("Ex. A"). Plaintiff made detailed allegations of fault of all defendants and sought to recover the entire loss to LAHC from all of them jointly. SAP, Ex. A at ¶ 22 ("Because of Defendants' gross negligence, as of December 31, 2015, LAHC had lost more than $82 million"); *Id.* at p. 42 (prayer for relief).

B. Plaintiff has deprived Buck of contribution rights.

Earlier this year, Plaintiff settled and released his claims against the D&O defendants and their insurers for substantial amounts. Previously, he had settled with and released Beam and CGI. Contemporaneous with the filing of the instant motion on April 1, 2021, the Commissioner – ever a moving target - sought leave to file a *fifth* amended and restated petition, removing all allegations of D&O fault and fault of CGI and Beam, and seeking to recover the full insolvency of LAHC from Buck and the remaining defendants. Fifth Amended Petition, attached hereto as **Exhibit G**, at ¶¶ 19, 135.

Plaintiff's settlement with and release of the D&O defendants, CGI, and Beam triggered Louisiana's "settlement bar" rule, which insulates settling defendants from contribution claims by non-settling defendants who are cast in judgment to the Plaintiff.[2] *See*

[2] Under Louisiana law, contribution rights vest when the principal defendant has been cast in judgment to the plaintiff. *E.g., Diggs v. Hood,* 772 F.2d 190, 194 (5th Cir. 1985) (Rubin, J., applying Louisiana law) ("Contribution may be demanded only by one who has paid the 'part or portion' of an obligation for which another is liable.")

Cole v. Celotex Corp., 599 So. 2d 1058, 1073 (La. 1992). But the "trade off" for the Plaintiff's deprivation of the non-settling defendant's contribution rights is that they are permitted to seek to allocate percentages of fault to the "empty chair" settling defendants. *Cole*, 599 So. 2d at 1073, n. 41 ("The reason for imposing this trade-off is that the settling tortfeasor is insulated from liability for contribution, and the contribution rights of the non-settling tortfeasor are thereby rendered unenforceable and lost.").[3]

Here, however, Plaintiff has both deprived Buck of the ability to assert contribution claims against the D&O defendants *and* now asks the Court to apply La. R.S. 22:2043.1(A) to prevent Buck from seeking to allocate fault to them at trial. Plaintiff seeks that unconscionable relief notwithstanding his prior judicial admissions that the D&O defendants directly caused and/or substantially contributed to the insolvency and failure of LAHC – the very same loss that Plaintiff seeks to recover from Buck and the other remaining defendants. Hence, Plaintiff seeks to hold Buck responsible for losses that it did not cause after having deprived it of any remedy against the actors who actually caused or substantially contributed to those losses. That smacks of the star chamber – a plainly absurd, unconscionable, and unintended result that deprives Buck of fundamental due process rights.

III. ARGUMENT AND AUTHORITIES

A. Plaintiff has waived the provisions of La. R.S. § 22:2043.1(A) by judicially admitting that D&O fault contributed directly and substantially to LAHC's losses and insolvency.

Plaintiff has waived the provisions of La. R.S. 22:2043.1(A) by joining Buck to a D&O liability suit in which he judicially admitted that D&O fault contributed directly and substantially to the loss that he seeks to recover from Buck – the entire insolvency of LAHC. Specifically,

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[3] "[W]here a plaintiff settled with one co-defendant, any recovery against the remaining defendants would be reduced under the virile share principle." *Vedros v. Pub. Grain Elevator of N.O., Inc.*, 94-0659 (La. App. 4 Cir. 4/13/95), 654 So. 2d 775, 778, writ denied, 95-1205 (La. 6/23/95), 656 So. 2d 1024 (citing *Harvey v. Travelers Insurance Co.*, 163 So. 2d 915 (La. App. 3rd Cir.1964)). "Since the settling tortfeasor is insulated from liability for contribution, and the contribution rights of the non-settling tortfeasors are rendered unenforceable, plaintiff's recovery should be reduced proportionately." *Id.*; *see also Ducre v. Avondale Indus*., No. CIV.A. 80-4388, 1993 WL 268432, at *1 (E.D. La. July 14, 1993). "There is no dispute that the jury must be allowed to consider the fault of the former parties with whom plaintiff has settled." *Ducre v. Avondale Indus*., No. CIV.A. 80-4388, 1993 WL 268432, at *1 (E.D. La. July 14, 1993) (citing *Harvey v. Travelers Insurance Co.*, 163 So.2d 915 (La. App. 3d Cir. 1964)).

Plaintiff alleged and admitted that the D&O Defendants "did not simply act negligently in the management and supervision of and [sic] 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." SAP, Ex. A at ¶27.

Plaintiff provided a nonexclusive list of **forty-five** instances in which the D&O Defendants breached their fiduciary obligations (causing losses for which Buck bears no responsibility or fault), including:

- paying LAHC executives excessive salaries and bonuses (SAP, Ex. A at ¶31);
- overseeing LAHC operations in a grossly inadequate manner (*Id.*);
- grossly failing to pay claims, bill premiums, and collect premiums (if at all) (*Id.*);
- failing to select qualified vendors and management (*Id.*);
- offering policies and services to the public knowing that LAHC would fail (*Id.*);
- concealing LAHC's true financial condition and insolvency (*Id.*);
- grossly mismanaging LAHC's affairs (*Id.*);
- failing to operate LAHC in a reasonably prudent manner (*Id.*); and
- failing to operate LAHC in compliance with applicable laws and regulations (*Id.*).

Plaintiff alleged further that "[t]he D&O Defendants also breached their fiduciary duty of loyalty, due care, and good faith by allowing, if not fostering, individuals with conflicts of interest to influence, if not control, LAHC, all to the detriment of LAHC, its members, providers, and creditors." SAP, Ex. A at ¶32. Plaintiff further admitted that as a direct and proximate result of the gross negligence and failures of the D&O Defendants to perform their fiduciary obligations, LAHC has "sustained **substantial, compensable damages for which the D&O Defendants and the Insurer Defendants are liable,** and for which Plaintiff is entitled to recover in this action." SAP, Ex. A at ¶37 (emphasis added); *see also* SAP, Ex. A at ¶38 (identifying list of "compensable damages caused by the D&O Defendants").[4]

The D&O Defendants' failures directly raise the question of whether there is any causal relationship between Buck's actions or inactions and any of Plaintiff's losses. Plaintiff is, in effect,

[4] In his SAP, Plaintiff also made detailed allegations of fault by CGI and Beam, which he asserted "directly caused" LAHC's losses and insolvency. SAP, Ex. A at ¶¶ 43-53; 61-80.

trying to handicap Buck's ability to demonstrate this lack of causal connection by preventing it from showing the jury who actually "pulled the trigger."

Furthermore, Plaintiff placed the D&O defendants' overwhelming fault *directly at issue* – thereby waiving any argument that La. R.S. 22:2043.1(A) should be applied to prohibit Buck or the other defendants from asking the jury to apportion their fault which directly caused the insolvency of LAHC. The familiar, tried and true principle of waiver is applied in numerous analogous contexts and should apply here. In *Renfro v. Burlington N. & Santa Fe RR*, 2006-952 (La. App. 3 Cir. 12/6/06), 945 So. 2d 857, 859, *writ denied sub nom. Renfro v. Burlington N. & Santa Fe R.R.*, 2007-0303 (La. 4/27/07), 955 So. 2d 684, for example, a party sought to withdraw documents it introduced on its own behalf and to preclude the opposing party from using them based on a statutory privilege. However, the Third Circuit concluded that the protections of the statute were waived when the party for whose benefit they existed voluntarily sought to use the protected information. *Id*. at 860. *See also Dean v. St. Mary Emergency Grp., LLC*, 2017-66 (La. App. 3 Cir. 5/17/17), 221 So. 3d 988, 990 (citing *Renfro*, 945 So. 2d 857).

As in *Renfro*, Plaintiff judicially admitted that D&O fault caused or substantially contributed to the losses that he seeks to recover from Buck and the other non-settling defendants. Having injected D&O fault into this case, Plaintiff cannot now – by settling with the D&O's and depriving the non-settling defendants of contribution rights against them - seek to employ La. R.S. 22:2043.1(A) to take the D&O's fault out of this case. To hold otherwise would impermissibly permit the Plaintiff to use the statute as both a shield and a sword.

B. The Commissioner and the Louisiana First Circuit have already acknowledged that D&O comparative fault must be determined in this case.

The Plaintiff himself previously judicially admitted to the Louisiana First Circuit Court of Appeal that the comparative fault of the D&O defendants and other parties must be determined in this case. He argued that enforcement of Buck's forum-selection rights was "unreasonable and unjust" due to the application of comparative fault principles: "[t]his case is a complex and massive litigation" wherein "the Commissioner has sued seventeen (17) defendants whose tortious conduct allegedly contributed to LAHC's dramatic failure." See Excerpts of Plaintiff's Response Brief, attached hereto as **Exhibit B**, at p. 26. "Not surprisingly, the D&Os blame the TPAs and actuaries

for LAHC's collapse; the TPAs blame the D&Os and the actuaries; the actuaries blame the TPAs and the D&Os. You get the picture." *Id.* at p. 27.

The Louisiana First Circuit agreed with the Plaintiff, refusing to enforce Buck's forum selection rights due to the inevitable "intersection of Louisiana's comparative fault principles," "which would require the jury to allocate a percentage of fault to all parties who may have caused injury to the plaintiff, pursuant to La. Civ. Code article 2323." *Donelon v. Shilling*, No. 2017-1483, 2019 WL 993326, at *5 (La. App. 1 Cir. 2/28/19), writ denied, 2019-00515 (La. 9/6/19), 278 So. 3d 367. The First Circuit held that "this case involves extraordinary circumstances where tort claims necessarily invoking comparative fault principles have been filed against multiple defendants." *Id*.

And in his prior briefing to the Louisiana Supreme Court opposing Buck's forum selection rights, Plaintiff judicially admitted that partial settlements in this case would open the door to allocation of fault to the "empty chairs." "By agreeing to an out-of-court settlement, the Receiver has achieved a remedy from that settling party and accepts the possibility that the jury may allocate fault at trial to the 'empty chair' caused by this settlement." Excerpts of Plaintiff' Opposition to Buck's Writ Application to the Louisiana Supreme Court, attached hereto as **Exhibit C**, at p. 10.

Now, Plaintiff reverses course, seeking to deprive Buck and the other non-settling defendants of their rights to apportion fault to the empty chair D&O defendants even though Plaintiff has deprived the remaining defendants of contribution rights against those culpable parties. Litigants simply should not be permitted to contradict themselves in this manner. They are bound to their judicial admissions in their filings with the court, lest public trust in the judicial process be eroded and ultimately lost.[5] By word, act, deed and repeated judicial admissions, Plaintiff has *waived* any arguments for application of La. R.S. 22:2043.1(A) to this case.

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[5] "The well settled jurisprudence establishes that an admission by a party in a pleading constitutes a judicial confession and is full proof against the party making it." *C.T. Traina, Inc. v. Sunshine Plaza, Inc.*, 2003-1003 (La. 12/3/03), 861 So. 2d 156, 159-160 (collecting cases) (finding statements made in an exception of no cause of action "amount[ed] to a judicial confession"). A declaration "made by a party's attorney…has the same effect as one made by the party himself." La Civ. Code art. 1853, Comment (b). "A judicial confession is binding on the court and must be applied in the case in which it is made." *Hebert v. Richard*, 2015-8 (La. App. 3 Cir. 6/17/15), 166 So. 3d 1265, 1272 (finding statements made in "multiple filings into the record" to constitute "a judicial confession"). Such a confession may only be revoked on grounds of error of fact. *Terrell v. Town of Merryville*, 2004-594 (La. App. 3 Cir. 11/10/04) (finding statement in petition to be a binding "judicial confession" because it was "never revoked on the ground of error of fact"), 886 So. 2d 1278, 1281, *writ denied*, 2004-3033 (La. 3/11/05), 896 So. 2d 66.

C. Applying La. R.S. 22:2043.1(A) in this case would work an unintended absurdity, defeating any presumption that it overrides Louisiana's comparative fault statutes.

Even if Plaintiff had not waived the provisions of La. R.S. 22:2043.1(A) in this case (which he has), the statute, if applied in this context, would work an absurdity – defeating any presumption that it should displace Louisiana's comparative fault statutes, Louisiana Civil Code articles 2323 and 2324.[6] Application of the statute as proposed by Plaintiff deprives Buck of any ability to apportion fault – thereby rendering it solidarily liable for LAHC's losses without regard to who actually caused those losses. La. Civ. Code articles 1794, 1795. But even solidary obligors enjoy the right to seek contribution from their co-obligors when they are cast in judgment to the plaintiff. La. Civ. Code art. 1804; *Diggs v. Hood*, 772 F.2d 190, 194 (5th Cir. 1985) (Rubin, J., applying Louisiana law). And they enjoy a commensurate right to apportion fault to "empty chair" defendants when, as here, Plaintiff has released those defendants and thereby deprived the solidary obligors of their contribution rights. *Cole*, *supra*, 599 So. 2d at 1073, n. 41; other cases cited in fn. 3, *supra.*

But here, Plaintiff has *both* deprived Buck of its contribution rights *and* asks the Court to apply La. R.S. 22:2043.1(A) to cut off its right to seek fault apportionment to the "empty chairs" - exposing Buck to liability for tens of millions of dollars of losses it did not cause with no rights or remedy to protect itself. Plaintiff also seeks to prevent Buck from demonstrating that a key element of his claim – causation – is missing from Plaintiff's case.

When, as here, application of the later-enacted statute would, in the particular context, work an absurd and unconscionable result, it must be presumed that the statute was not intended to be applied in that context. In *Ferrara v. Sec'y, Dep't of Revenue & Tax'n, State of La.*, 96-806 (La. App. 5 Cir. 1/28/97), 688 So. 2d 147, writ denied, 97-0411 (La. 4/4/97), 692 So. 2d 418, for example, at issue were two statutes which were in conflict as to the assessment of sales

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[6] "The fundamental purpose of Louisiana's comparative fault scheme is to ensure that each tortfeasor is responsible ***only for the portion of the damage he has caused***." *Thompson v. Winn-Dixie Montgomery, Inc.*, 2015-0477 (La. 10/14/15), 181 So. 3d 656, 664 (quoting *Miller v. LAMMICO*, 07–1352 (La. 1/16/08), 973 So. 2d 693, 706) (emphasis added). To this end, Louisiana mandates "a full apportionment of fault among all potentially reasonable parties" with no exception. *Slocum v. Anderson*, No. CV 17-01781, 2020 WL 738542, at *2 (M.D. La. Feb. 13, 2020). *See also Watson v. State Farm Fire & Casualty Ins. Co*., 469 So. 2d 967 (La. 1985).

taxes for a laundromat. In holding that the later-enacted statute did not prevail over the earlier one, the Fifth Circuit ruled:

> We have found what appears to be a conflict in two statutory provisions. **If the later provision, La. R.S. 47:305.17, is enforced** then the transaction which was excluded in La. R.S. 47:301(14)(e) would now be included as a taxable transaction by virtue of an exemption and not by virtue of a legislative imposition of tax. To hold that an exemption would confer a taxable status when there was no taxable status originally, **would lead to an absurd result**. **Further, if we view the later exemption statute as providing an irreconcilable conflict**, then the exemption statute would prevail because it would impliedly repeal the exclusion from imposition of tax. La. Civ. Code art. 8. **This too would lead to an absurd result**. We do not view the exemption as an attempt by the legislature to impose a tax on the transaction. The later statute makes no statement it is changing the law to now impose a tax.

Id. at 149 (emphasis added).

Plaintiff's own citations recognize this fundamental point. For example, in *Pumphrey v. City of New Orleans*, 2005-0979 (La. 4/4/06), 925 So. 2d 1202, 1210, cited by Plaintiff, the Supreme Court made clear that while a specific statute will *generally* prevail over a more general statute directed to the same issue, "[t]he meaning and intent of a law is determined by considering the law in its entirety and all other laws on the same subject matter and placing a construction on the provision in question that is consistent with the express terms of the law and with the obvious intent of the Legislature in enacting it." *Id.* at 1210 (citing *In re Succession of Boyter*, 99–0761, p. 9 (La. 1/7/00), 756 So. 2d 1122, 1129; *Stogner v. Stogner*, 98–3044, p. 5 (La. 7/7/99), 739 So. 2d 762, 766). The *Pumphrey* Court made clear that **a law shall not be applied as written "where such application will produce absurd or unreasonable results."** *Id*. at 1211 (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 1031, 103 L. Ed. 2d 290 (1989); La. Civ. Code art. 9) (emphasis added). An "absurd or unreasonable" result is plainly present in this case – barring application of La. R.S. 22:2043.1(A) in this context.

Moreover, Louisiana Civil Code article 9 expressly empowers this Court to decline to apply a law in a manner that would "lead to absurd consequences." Under the authority of Article 9, Louisiana courts do not hesitate to harmonize laws to achieve justice. "[W]here a literal interpretation would produce absurd consequences, the letter must give way to the spirit of the law and the statute construed so as to produce a reasonable result." *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 2000-1695 (La. 6/29/01), 808 So. 2d 294, 302 (quoting *First Nat'l Bank*

of Boston v. Beckwith Mach. Co., 94–2065, p. 8 (La. 2/20/95), 650 So. 2d 1148, 1153). *See also Winston v. Bishop*, 1999-0627 (La. App. 1 Cir. 5/12/00), 762 So. 2d 179, 180, writ denied, 2000-2889 (La. 6/29/01), 794 So. 2d 810 ("Courts should avoid constructions which will render legislation absurd.").

In *Thompson v. Winn-Dixie Montgomery, Inc.*, 2015-0477 (La. 10/14/15), 181 So. 3d 656, 662, for example, the Louisiana Supreme Court harmonized a merchant liability statute with Louisiana's comparative fault statutes to prevent the very unconscionable result that Plaintiff asks this Court to inflict upon the defendants in this case. The Supreme Court criticized the appellate court's failure to conduct a comparative fault analysis between the merchant and the nonparty subcontractor as required by articles 2323 and 2324. *Id*. at 663. "The court of appeal essentially imposed solidary liability on [the merchant] without making any finding regarding [the subcontractor's] liability, thereby rejecting the mandates of [Civil Code] Articles 2323 and 2324." *Id*. at 663. In reversing the appellate court, the *Thompson* Court stated:

> These Civil Code articles do not eliminate or make an exception for liability based on merchant fault under La. R.S. 9:2800.6. On the contrary, **the language of Articles 2323 and 2324 clearly and unambiguously provides that comparative fault principles apply in "any action for damages" and apply to "any claim" asserted under "any law or legal doctrine or theory of liability."** It is indisputable that under the express provisions of La. C.C. art. 2323, 100% of the causative fault for a harm must be allocated in actions for an injury under any theory of liability. *See* H. Alston Johnson, 12 La. Civ. L. Treatise, Tort Law §§ 8.5 & 16.29 2d ed.). As this court squarely held in *Dumas*, 828 So.2d at 537–39, Articles 2323 and 2324 require that each actor be assigned an appropriate percentage of fault regardless of the legal theory of liability asserted against each person, and that each joint tortfeasor is only liable for his degree of fault.

Id. at 664 (emphasis added).[7]

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[7] Articles 2323 and 2324 mandate "a full apportionment of fault among all potentially reasonable parties" with no exception. *Slocum v. Anderson*, No. CV 17-01781, 2020 WL 738542, at *2 (M.D. La. Feb. 13, 2020); *Watson v. State Farm Fire & Casualty Ins. Co.*, 469 So. 2d 967 (La. 1985). Accordingly, in all actions, a court must allocate one hundred percent of the fault, regardless of whether a person who bears fault is or is not a party to the action. *Pontchartrain Nat. Gas Sys. v. Texas Brine Co., LLC*, 2018-1249 (La. App. 1 Cir. 12/30/20), reh'g denied (Feb. 10, 2021) (citing La. Civ. Code art. 2323; *Thompson*, 181 So. 3d at 663-664). *See also Caruso v. Acad. Sports & Outdoors*, 18-496 (La. App. 5 Cir. 4/24/19), 271 So. 3d 355, 361 ("Under the express provisions of La. C.C. art. 2323, 100% of the causative fault for a harm must be allocated in actions for an injury under any theory of liability."); *Oliveaux v. St. Francis Med. Ctr.*, 39,147 (La. App. 2 Cir. 12/15/04), 889 So. 2d 1264, 1274, writ denied, 2005-0454 (La. 4/29/05), 901 So. 2d 1067 ("[T]he trier of fact *shall* determine the degree or percentage of fault of all persons found to have contributed to or caused the injury."); *Gordon v. Great W. Cas. Co.*, No. 2:18-CV-00967 (LEAD), 2020 WL 3472634, at *3 (W.D. La. June 25, 2020) ("The Louisiana Supreme Court [. . .] has repeatedly affirmed that Article 2323(A) makes a determination of comparative fault mandatory among all potential tortfeasors, including non-parties and those who will never be held financially responsible, under any theory of liability.").

D. The Commissioner's citations fail to support the application of La. R.S. 22:2043.1(A) in this context.

The other cases cited by Plaintiff in support of his argument that La. R.S. 22:2043.1(A) should be applied to totally cut off Buck's rights and remedies in this case are inapplicable. In those cases, applying the later-enacted laws at issue did *not* lead to absurd and unconstitutional results like those present here. To the contrary, in *LeBreton v. Rabito*, 97-2221 (La. 7/8/98), 714 So. 2d 1226, 1230, cited by Plaintiff, the Court emphasized "that the Louisiana Medical Malpractice Act took cognizance of the need to suspend prescription and fully protects plaintiffs who would otherwise suffer the detrimental effect of liberative prescription," and concluded that application of the later-enacted prescription statute would **avoid** an absurd or unreasonable result. Similarly, in *Bd. of Ethics In re Davies*, 2010-1339 (La. App. 1 Cir. 12/22/10), 55 So. 3d 918, 922, on reh'g (Dec. 30, 2010), the court's decision to give effect to the later statute did not produce an absurd consequence but simply imposed a more restrictive limitation on the amount of time within which the Board could bring charges.

Macon v. Costa, 437 So. 2d 806, 809 (La. 1983), and *State v. St. Julian*, 221 La. 1018, 61 So.2d 464 (1952), cited by Plaintiff, likewise have no application. *Macon* addressed the effect of "[a] subsequent **general** statute dealing specifically with a particular subject supersed[ing] and repeal[ing] inconsistent and conflicting provisions in an earlier statute." (emphasis added). *State v. St. Julian*, 221 La. 1018, 61 So.2d 464 (1952), too, involved a later act impliedly repealing an earlier one. The Plaintiff cannot possibly argue that La. R.S. § 22:2043.1(A) repealed Louisiana's settled statutory comparative fault regime.

Plaintiff's reliance on *White v. Louisiana Dep't of Transportation & Dev.*, 2017-629 (La. App. 3 Cir. 12/6/17), 258 So. 3d 11, 12, writ not considered *sub nom. White v. Louisiana Dep't of Transportations Dev.*, 2018-0056 (La. 3/2/18), 269 So. 3d 711, is likewise unavailing. There, the Third Circuit was asked to decide whether a co-defendant dismissed on summary judgment can be referenced for comparative fault under article 2323. Critically, *White* did not involve a settlement with the plaintiff; rather, the court actually made a finding that the parties dismissed from the litigation were "free from fault." *Id.* at 15 (emphasis added). The Third Circuit's ruling that the dismissed parties could not be considered in the allocation of fault at trial or on a jury verdict form was entirely dependent on the trial court's determination that they were free

from fault coupled with the fact that the grant of summary judgment was not appealed. *Id*. Here, there has been no determination that the D&O defendants are free from fault. To the contrary, Plaintiff's own judicial admissions establish their overwhelming fault directly causing and/or substantially contributing to the insolvency of LAHC.

And the Commissioner's reliance on *Killeen v. Jenkins* is unavailing in that the Court in that case did not conclude that the later statute prevailed over the earlier one. 98-2675 (La. 11/5/99), 752 So. 2d 146, 149. Instead, it found that two conflicting statutes could be harmonized so as to give them both effect. *Id*. at 148-49.

In sum, application of La. R.S. 22:2043.1(A) in this context would result in Buck being held liable for damages it did not cause when Plaintiff has deprived it of any remedy for relief against the culpable parties, "a result … so bizarre" that the legislature "'could not have intended' it." *Demarest v. Manspeaker*, 498 U.S. 184, 190–91, 111 S. Ct. 599, 604, 112 L.Ed.2d 608 (1991) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S. Ct. 3245, 3252, 73 L.Ed.2d 973 (1982)). Accordingly, Plaintiff's motion should be denied.

E. Applying La. R.S. 22:2043.1(A) to deprive Buck of its substantive rights and remedies would work a denial of its constitutional due process rights.

Applying La. R.S. 22:2043.1(A) to deprive Buck of its substantive rights to seek to apportion fault to the culpable D&O defendants at trial, when Plaintiff has deprived Buck of its substantive contribution rights against those culpable parties, would work a textbook denial of Buck's fundamental constitutional rights to substantive and procedural due process. Make no mistake about it: comparative fault apportionment rights are *substantive* rights enjoyed by every litigant. *See Cole v. Celotex Corp.*, 599 So. 2d 1058, 1064 (La. 1992) (agreeing with Louisiana Third Circuit's holding that comparative fault apportionment is a substantive right); *Veazey v. Elmwood Plantation Assocs., Ltd.*, 93-2818 (La. 11/30/94), 650 So. 2d 712, 715 (describing Act 431 enacting Louisiana's comparative fault system as making "substantive changes" to the Civil Code); *Wiley v. City of New Orleans*, 2000-1544 (La. App. 4 Cir. 5/16/01), 809 So. 2d 151, 158, as amended on reh'g (Nov. 30, 2002), writ denied, 2002-0616 (La. 5/10/02), 815 So. 2d 842, and writ denied, 2002-0641 (La. 5/10/02), 815 So. 2d 843 ("[I]t is clear that the substantive right to allocate fault was created in 1979 with the introduction of comparative fault.").

The ***total*** deprivation of Buck's substantive rights to comparative fault apportionment *and* any right or remedy against the culpable D&O defendants would work a gross denial of Buck's substantive and procedural due process rights guaranteed under Amend. XIV § 1 of the United States Constitution *and* Article 1, § 2 of the Louisiana Constitution.[8] It is an elementary component of our judicial system that a defendant be given a fair opportunity to assert defenses and objections to a pending legal action. *See, e.g., Brumfield v. Coody*, 303 F. App'x 217, 219 (5th Cir. 2008) (citing *Henderson v. United States*, 517 U.S. 654, 672 (1996)); *RSM Production Corp. v. Fridman*, 2007 WL 2295907 (S.D. N.Y. Aug. 10, 2007). As recognized by the Supreme Court, "the [constitutional] right to present a defense . . . is a fundamental element of due process of law." *See Washington v. Texas*, 388 U.S. 14, 19 (1967).

Plaintiff, however, seeks to leave Buck with no defense, right, or remedy. *Plaia v. Stewart Enterprises, Inc.*, 2014-0159 (La. App. 4 Cir. 10/26/16), 229 So. 3d 480, 490, writs denied, 2016-2264 (La. 2/3/17), 215 So. 3d 692, 2016-2261 (La. 2/3/17), 215 So. 3d 698, and 2016-2258 (La. 2/3/17), 215 So. 3d 699; *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (the Due Process clause requires that a litigant be provided "an opportunity to present every available defense"). *See also Nat'l Union Fire Ins. Co. of Pittsburgh v. City Savings, F.S.B.*, 28 F.3d 376, 394 (3d Cir. 1994); *Placida Prof'l Ctr., LLC v. F.D.I.C.*, 512 F. App'x 938, 949-950 (11th Cir. 2013) (barring defendants' affirmative defenses against FDIC as receiver "does not comport with due process").

The right to a defense includes the ability to show that a non-party caused the harm alleged. *See Gatlin v. Entergy Corp.*, 04-0034 (La. App. 4 Cir. 5/4/05), 904 So. 2d 31, writ denied 05-1509 (La. 12/16/05), 917 So. 2d 1114 ("[A] defendant has the right to quantify and allocate the fault of all persons causing or contributing to an injured plaintiff's damages, including the fault of [those who] would be immune.").

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[8] "The Louisiana Due Process Clause parallels the Federal Due process Clause." *Nunnery v. City of Bossier*, 822 F. Supp. 2d 620, 630 (W.D. La. 2011) (citing *Giddens v. City of Shreveport*, 901 F. Supp. 1170, 1177 (W.D. La. 1995) (citing *Delta Bank & Trust Co. v. Lassiter*, 383 So.2d 330 (La. 1980)); *see also Progressive Sec. Ins. v. Foster*, 711 So.2d 675, 688 (La. 1998). The minimum amount of due process required by the Louisiana Constitution is the same as the minimum amount required by the United States Constitution. *Nunnery v. City of Bossier*, 822 F. Supp. 2d 620, 630 (W.D. La. 2011).

In *Nat'l Union*, the Court held that barring defenses to the receiver's counterclaims would "result in an unconstitutional deprivation of due process:"

> ***Property which one stands to lose as a result of a lawsuit is a property interest protected by the Due Process Clause***, and the Due Process Clause prevents denying potential litigants use of established adjudicatory procedures, where such an action would be the equivalent of denying them an opportunity to be heard upon their claimed rights. ***If parties were barred from presenting defenses and affirmative defenses to claims which have been filed against them, they would not only be unconstitutionally deprived of their opportunity to be heard, but they would invariably lose on the merits of the claims brought against them. Such a serious deprivation of property without due process of law cannot be countenanced in our constitutional system***.

28 F.3d at 394 (3d Cir. 1994) (emphasis added; internal punctuation and citations omitted); *see also Schettler v. RalRon Capital Corp*., 128 Nev. 209, 220, 275 P.3d 933, 940 (Nev. 2012).

Due process mandates that Buck be permitted to fully defend itself against the Plaintiff's accusations, including the substantive right to apportion fault to culpable parties when, as here, Plaintiff has deprived Buck of any remedy against them. *Hicks v. Schouest*, 381 So. 2d 977, 978 (La. App. 4 Cir. 1980); *State v. Van Winkle*, 94-0947 (La. 6/30/95), 658 So. 2d 198, 202 (A defendant has a constitutional right to present a defense.); *State v. Walland*, 555 So. 2d 478, 482 (La. App. 4 Cir. 1989) (A defendant's "right to present a defense is paramount in order to have a fair trial.").

So as to fully preserve Buck's constitutional rights and arguments before both this Court and on appeal, Buck has filed herewith a motion for summary judgment seeking this Court's ruling that application of La. R.S. 22:2043.1(A) to deprive Buck of its substantive rights in this context would violate its constitutional due process rights.

F. Plaintiff's summary judgment motion is premature.

Plaintiff's motion for partial summary judgment is premature and should be denied for that reason alone. Plaintiff continues to produce voluminous relevant materials to defendants in a piecemeal fashion, and depositions have not yet commenced. So pretrial discovery remains in its infancy. Given the serious factual issues regarding comparative fault and the multiple causes for LAHC's losses and insolvency that pervade this case, summary judgment on comparative fault issues is premature and should be denied.

La. Code Civ. Proc. art. 966(A)(3) expressly precludes the granting of summary judgment until "[a]fter an opportunity for adequate discovery." The requirement that a motion for summary judgment be considered only after "adequate discovery" is intended to allow parties a "fair opportunity to carry out discovery and to present their claim." *Welch v. East Baton Rouge Parish Metro. Council*, 2010-1532 (La. App. 1 Cir. 3/25/11), 64 So. 3d 249, 254; *see also Simoneaux v. E.I. du Pont de Nemours and Co., Inc.*, 483 So. 2d 908, 913 (La. 1986).

By any measure, there has been *no* "opportunity for adequate discovery" as explicitly required by La. Code Civ. Proc. art. 966(A)(3). The Commissioner's partial summary judgment motion thus should be denied or deferred pending the substantial completion of discovery in this case. *See Roadrunner Transp. Sys. v. Brown*, 2017-0040 (La. App. 4 Cir. 5/10/17), 219 So. 3d 1265, 1272; *see also Welch*, 64 So. 3d at 254; *Leake & Andersson, LLP v. SIA Ins. Co. (Risk Retention Group), Ltd.*, 2003–1600, p. 4 (La. App. 4 Cir. 3/3/04), 868 So.2d 967, 969 (finding summary judgment premature when the information the opposing party seeks to discover pertains directly to the unresolved factual issue in the case).

G. Plaintiff's motion, treated alternatively as a motion to strike, is greatly disfavored and should be denied.

Affirmative defenses should not be stricken as a matter of law at this early stage of litigation. It is well-established that "motions to strike are viewed with disfavor and are infrequently granted." *See, e.g., Cole v. Cole*, 2018-0523 (La. App. 1 Cir. 9/21/18), 264 So. 3d 537, 544; *Carr v. Abel*, 10-835 (La. App. 5 Cir. 3/29/11), 64 So. 3d 292, 296, *writ denied*, 2011-0860 (La. 6/3/11), 63 So. 3d 1016; *Hazelwood Farm, Inc. v. Liberty Oil & Gas Corp.*, 2001-0345 (La. App. 3 Cir. 6/20/01), 790 So. 2d 93, 98, *writ denied*, 2001-2115 (La. 7/26/01), 794 So. 2d 834; *accord Cain v. Exxon Mobil Corp.*, 400 F. Supp. 3d 514, 520 (M.D. La. 2019); *Sierra Club v. Tri-State Generation & Transmission Ass'n*, 173 F.R.D. 275, 285 (D. Colo. 1997) (striking allegations or dismissing pleadings pursuant to Rule 12(f) is "a generally-disfavored, drastic remedy").[9]

[9] Because the source of La. Code of Civ. Proc. art. 964 is found in Fed. R. Civ. P. 12(f), decisions of federal courts are used for guidance. *Cole v. Cole*, 2018-0523 (La. App. 1 Cir. 9/21/18), 264 So. 3d 537, 544. *See also see also Vaughn v. Commercial Union Ins. Co. of New York*, 263 So. 2d 50, 52 (La. Ct. App. 4 Cir.), *writ denied*, 262 La. 1107, 266 So. 2d 425 (La. 1972) ("In interpreting an article of the Louisiana Code of Civil Procedure which is essentially based upon one of the federal rules, the Louisiana courts rely upon prior interpretations by the federal courts of the source federal rules as a persuasive guide to the intended meaning of such a Louisiana code article.") (citations omitted).

Plaintiff has failed to show that the affirmative defenses at issue are wholly unrelated to this case or that, as a matter of law, such defenses cannot succeed. Instead, Plaintiff has admitted that La. R.S. 22:2043.1 has not been previously applied or interpreted—much less in this context—and that these are matters of first impression before the court. See Excerpts of Transcript of MSJ Hearing on Regulator Fault attached hereto as **Exhibit D**, at p. 48 ("Case of first impression . . . no reported decision to apply 2043.1 . . . and strike defenses.").

"A court must deny a motion to strike if there is any question of fact or law." *Hazelwood Farm, Inc.*, 790 So. 2d at 98. Motions to strike cannot be used to resolve "'unsettled questions of law' that should be examined later in the proceedings." *FDIC v Stovall*, No. 2:14-CV-00029, 2014 WL 8251465, at *8 (N.D. Ga. Oct. 2, 2014). As in *FDIC v. Stovall*, in this case, the "comparative negligence, and nonparty fault issues are substantial and unsuitable to resolution via a motion to strike." *Id.* The questions presented associated with Buck's affirmative defenses are "far from clear and certainly qualify as 'unsettled questions of law' that should be examined later in the proceedings." *Id.*

A "motion to strike is only proper if it can be shown that the allegations being challenged are so unrelated to a plaintiff's claims as to be unworthy of any consideration and that their presence in the pleading would be prejudicial to the moving party." *Hazelwood Farm, Inc.*, 790 So. 2d at 98. When the sufficiency of the defense depends upon disputed issues of fact or unclear questions of law, a motion to strike an affirmative defense must be denied. *Id.; see also Holiday Hospitality Franchising, Inc. v. Grant*, 36,035 (La. App. 2 Cir. 5/8/02), 817 So. 2d 449, 453; *United States v. Marisol, Inc.*, 725 F. Supp. 833, 836 (M.D. Pa. 1989).

Accordingly, because striking affirmative defenses is a "severe remedy" and Buck has demonstrated serious questions as to the validity of the defenses Plaintiff seeks to strike, the motion should be denied. *See id.; see also Sender v. Mann*, 423 F. Supp. 2d 1155, 1163 (D. Colo. 2006) (quoting *Bobbitt v. Victorian House, Inc.*, 532 F. Supp. 734, 736-37 (N.D. Ill. 1982) ("A defense should not be stricken if there is any real doubt about its validity, and the benefit of any doubt should be given to the pleader.") (internal punctuation omitted)); *Chavaria v. Peak Vista Cmty. Health Centers*, No. 08-cv-01466, 2008 WL 4830792, at *1 (D. Colo. Nov. 5, 2008) (same); *Frisby v. Samco Enterprises, Inc., No.* CIV-19-697-G, 2019 WL 5196382, at *2 (W.D. Okla. Oct. 15, 2019) (finding that the parties' competing authorities created real legal doubt, such that striking

the defense would be inappropriate); *FDIC v. Dodson*, No. 4:13-CV-416, 2014 WL 11511069, at *6 (N.D. Fla. June 30, 2014); *Augustus v. Bd. of Pub. Instruction of Escambia Cnty.*, 306 F.2d 862, 868 (5th Cir. 1962) (Disputed questions of fact and substantial questions of law should not be decided upon a motion to strike: "Under such circumstances, the court . . . *should[]* defer action on the motion and leave the sufficiency of the [defenses] for determination on the merits.") (emphasis added).

Preemptive striking of defenses is particularly inappropriate when, as here, Buck's enumerated defenses go to issues of liability and causation upon which Plaintiff bears the burden of proof. In *Sender v. Mann*, 423 F. Supp. 2d 1155, 1163 (D. Colo. 2006), the court articulated the difference between an affirmative defense and a denial: "An affirmative defense is a basis for denying liability even if the facts of a complaint are true, while a denial simply denies the facts of a complaint." As the court ruled in *Sender v. Mann*, "[s]ince it is often unclear whether a defendant should properly plead a[n] argument as a denial or a defense, and because a defense not plead is waived, a 'cautious pleader' will often err on the side of labeling an argument as a defense." *Id.* The court concluded there "is no reason to penalize such a mistaken pleading by granting a motion to strike." *Id.* at 1163-64 (denying bankruptcy trustee's motion for summary judgment seeking to strike defendants' affirmative defenses that rebutted elements of Plaintiff's *prima facie* case).

As but one absurd example, the Commissioner asks the Court to eliminate Buck's Eleventh Defense,[10] which asserts that "Plaintiff's damages, if any, were not caused by Buck." Plaintiff's Mem., p. 4. Hence, the Plaintiff, before any real discovery has occurred, seeks to win his case by relieving himself of his burden of proving the essential element of causation and by depriving Buck of the right to rebut his case on causation.

Causation is an element of the plaintiff's *prima facie* case and therefore not subject to being stricken; thus, the Commissioner's motion must be denied. *See Stovall*, 2014 WL 8251465 at *7. Defendants are entitled to present evidence on causation questions. *Thibaut v. Thibaut*, 607 So. 2d 587, 600 (La. App. 1 Cir. 1992). Simply put, "for a plaintiff to recover damages he must first prove his case." *See Burse v. Allstate Ins.*, 00-1895, p. 3 (La. App. 5 Cir. 3/28/01), 783 So. 2d 548, 551. Following on this principle, a plaintiff also bears the burden of proving "each and every

[10] Renumbered as Buck's Twelfth Defense in its Answer to Plaintiff's Fifth Amended and Restated Petition.

element of damage claimed." *See Perez v. State Through Dep't of Transp. & Dev.*, 578 So.2d 1199, 1206 (La. App. 4 Cir. 1991); *Caruso v. Chalmette Ref., LLC*, 2016-1117 (La. App. 4 Cir. 6/28/17), 222 So. 3d 859, 865.

As another equally absurd example, Plaintiff seeks to eliminate Buck's Twelfth Defense,[11] which asserts that Buck's client, LAHC, did not rely upon Buck. Thus, before any real discovery has happened, Plaintiff seeks to relieve himself of his burden of proving reliance – an essential element of his *prima facie* case against Buck. There is no legal support of any kind for relieving Plaintiff of this element of his burden of proof or striking this issue from the case.

Because there are no grounds for granting a motion to strike (or motion for summary judgment) as to Buck's defenses, the Plaintiff's motion should be denied. *See Mann*, 423 F. Supp. 2d at 1163. *See also Cejka v. Vectrus Sys. Corp.*, No. 15-CV-02418, 2018 WL 1005859, at *2 (D. Colo. Feb. 21, 2018) (denying summary judgment as to affirmative defenses that were simply denials that may be raised at trial); *Schettler*, 128 Nev. 209 at 223 (reversing summary judgment because affirmative defense raised unresolved questions of material fact and law).

H. Plaintiff's motion, if deemed to apply to CGI and Beam, is legally erroneous and unconstitutional for all of the foregoing reasons.

Plaintiff's April 1, 2021 motion for summary judgment, although referring generically to former "managers" and "agents" of LAHC, does not explicitly seek to bar fault apportionment to CGI and Beam – as those entities were third party contractors of LAHC. La. R.S. 22:2043.1(A) makes no refence to "contractors." CGI's contract with LAHC expressly disclaims any agency relationship and confirms its status as solely an independent contractor. CGI contract, attached hereto as **Exhibit E,** at p. 9. Likewise, Beam's contract with LAHC, although titled "Management and Development Agreement," explicitly disclaims any affiliation with LAHC and is expressly limited to advice and recommendations, with all decision-making and other actions reserved to LAHC's officers and directors. Beam contract, attached hereto as **Exhibit F**, at pp. 6, 11.[12]

Hence, neither CGI nor Beam was an "agent" or manager" of LAHC within the meaning of La. R.S. 22:2043.1(A). So Buck does not read Plaintiff's papers as applying to CGI or Beam

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[11] Renumbered as Buck's Thirteenth Defense in its Answer to Plaintiff's Fifth Amended and Restated Petition.

[12] Both the CGI and Beam contracts were filed as exhibits to Plaintiff's original petition for damages, and so they are in the court record and properly considered on a summary judgment motion, per La. Code Civ. Proc. Art. 966.

– who Plaintiff also previously released. But to the extent, if any, Plaintiff's motion is deemed to apply to CGI and Beam, and were the Court to interpret La. R.S. 22:2043.1(A) to apply to them (which it should not do), preventing Buck from seeking to apportion fault to those "empty chair" defendants would be contrary to Civil Code article 9 and unconstitutional for all of the reasons set forth above – and this Court should so rule.

Buck also fully adopts and incorporates Milliman's opposition memorandum in support of its arguments against Plaintiff's motion.

IV. CONCLUSION

Because Plaintiff's motion for partial summary judgment/to strike is contrary to procedural and substantive law, it should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been served upon all counsel of record by e-mail, this 2nd day of June, 2021.

/s/ James A. Brown

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