19th JUDICIAL DISTRICT COURT

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, et al

OPPOSITION BY GROUP RESOURCES, INC. TO COMMISSIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO STRIKE

Defendant Group Resources, Inc. ("GRI") respectfully submits this Opposition to the Motion for Partial Summary Judgment and Motion to Strike Defenses (the "Motion") filed by James J. Donelon, Commissioner of Insurance for the State of Louisiana, in his capacity as Rehabilitator of Louisiana Health Cooperative ("LAHC"), acting through his duly appointed Receiver, Billy Bostick ("Plaintiff").[1]

I. SUMMARY OF THE ARGUMENT

Plaintiff invokes Louisiana Revised Statute (La. R.S.) 22:2043.1(A) in asking this Court to dismiss GRI's Third, Fourth, Eighth, and Ninth Affirmative Defenses ("GRI's Defenses") on the premise that these defenses are "based upon the purported actions or inactions of any present or former officer, manager, director, trustee, shareholder, employee, or agent of LAHC which could be imputed to LAHC" and that they are therefore "invalid defenses as a matter of law."[2] The Court should deny the Motion on several grounds.

First, because La. R.S. 22:2043.1(A) applies only to delinquency proceedings, it does not apply to this proceeding. The statute functions to prevent insolvent insurers from relying upon the fault of their own personnel as a defense in such proceedings, not hamstring defendants such as GRI from allocating fault to persons responsible for LAHC's failure.

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1 GRI does not contest any of the material facts pertaining to GRI that Plaintiff identifies in his Motion.

2 Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment ("Plaintiff's Memorandum") at 1.

Second, even if La. R.S. 22:2043.1(A) applies to this proceeding, GRI's Defenses are not inconsistent with the statute because they largely do not target "prior wrongful or negligent actions" of former LAHC personnel. *See* La. R.S. 22:2043.1(A). Accordingly, this Court need not undertake the draconian remedy of dismissing or striking GRI's Defenses to comport with La. R.S. 22:2043.1(A).

Plaintiff further highlights a potential "conflict" between La. R.S. 22:2043.1 and Civil Code articles 2323 and 2324, signaling Plaintiff's intent to argue that no fault whatsoever can be allocated to former LAHC personnel, including the directors and officers that Plaintiff sued ("D&O Defendants"). However, this Court can interpret La. R.S. 22:2043.1(A) in harmony with Louisiana Civil Code articles (La. C.C. arts.) 2323(A) and 2324(B). Laws on the same subject matter "must be interpreted in reference to each other" and, when they appear to conflict, be "harmonized if possible." *See* La. C.C. art. 13; *Killeen v. Jenkins*, 98-2672 (La. 11/05/99); 752 So. 2d 146, 148. Whereas La. R.S. 22:2043.1(A), in delinquency proceedings, bars parties from asserting certain affirmative defenses based on the prior wrongful actions of an insolvent insurer's former agents, art. 2323(A) imposes a ***requirement*** on the ***Court*** to apportion the degree or percentage of fault of all persons causing or contributing to the injury, notwithstanding the person's "immunity by statute." Similarly, La. C.C. art. 2324(B) codifies the absolute rule that "a joint tortfeasor **shall not be liable for more than his degree of fault.**" (emphasis added)

That La. R.S. 22:2043.1(A) prohibits certain affirmative defenses neither alleviates the Court of the obligation to apportion fault to all persons responsible for the injury nor subjects a defendant such as GRI to liability for a degree of fault higher than that for which it actually is responsible. The most sensible interpretation of La. R.S 22:2043.1(A) is that, like the other provisions of the Uniform Insurers Liquidation Law (La. R.S. §§ 22:2039-44), it applies to delinquency proceedings brought against insolvent insurers. The Court thus should not and need not interpret La. R.S. 22:2043.1(A) as superseding La. C.C. arts. 2323(A) and 2324(B). To do so would contravene Louisiana's expressed interest in maintaining a pure comparative fault system and expose GRI to liability for fault GRI does not bear.

To the extent the Court finds that La. R.S. 22:2043.1(A) is irreconcilable with La. C.C. arts. 2323(A) and 2324(B), to interpret La. R.S. 22:2043.1(A) as precluding the Court from determining the degree of fault of all responsible persons would lead to an "absurd" result. In addition to undermining this state's stated interest in maintaining a "pure comparative fault"

system, it would allow Plaintiff, acting on LAHC's behalf, to recover from the former officers and directors of LAHC due to their fault but prevent the Court from considering that ***same*** fault with respect to defendants such as GRI. Such interpretation would allow an unjust double recovery. To the extent Plaintiff argues that La. R.S. 22:2043.1(A) prevents the Court from apportioning fault altogether to LAHC, or prohibits the Court from hearing evidence on the degree of fault by LAHC, the Court should deny the Motion.

II. LAW AND ARGUMENT

A. La. 22:2043.1(A) does not Apply to this Action

When analyzed in the proper context, La. R.S. 22:2043.1(A) does not bar GRI from raising any defenses because it does not apply in this action. According to La. R.S. 22:2038, Sections 22:2039-44 comprise the "Uniform Insurers Liquidation Law" and primarily function to set rules and parameters for delinquency proceedings against insurers.[3] La. R.S. 22:2038(2) identifies and defines a "delinquency proceeding" as "any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing, or conserving such insurer." La. R.S. 22:2043.1(A) provides:

> No prior wrongful or negligent actions of any present or former officer, manager, director, trustee, owner, employee, or agent of the insurer may be asserted as a defense to a claim by the receiver under a theory of estoppel, comparative fault, intervening cause, proximate cause, reliance, mitigation of damages, or otherwise. However, the affirmative defense of fraud in the inducement may be asserted against the receiver in a claim based on a contract. A principal under a surety bond or a surety undertaking shall be entitled to credit against any reimbursement obligation to the receiver for the value of any property pledged to secure the reimbursement obligation to the extent that the receiver has possession or control of the property or the insurer or its agents misappropriated or commingled such property. Evidence of fraud in the inducement shall be admissible only if it is contained in the records of the insurer.

Nowhere does the provision state that third-party defendants such as GRI cannot invoke these defenses in actions such as this one, which is not a delinquency proceeding against an insurer.

La. C.C. art. 13 provides that "laws on the same subject matter must be interpreted in reference to each other." Given the context of the remaining provisions of the "Uniform Insurers Liquidation Law," the prohibition on defenses in La. R.S. 22:2043.1(A) is best understood as a

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[3] La. R.S. 22:2039 describes the procedure for delinquency proceedings against insurers domiciled in Louisiana; La. R.S. 22:2040 sets forth the rights of nonresidents in delinquency proceedings involving domestic insurers; La. R.S. 22:2041 discusses the procedure for delinquency claims against foreign insurers; La. R.S. 22:2042 sets forth the priority of claims in delinquency proceedings; La. R.S. 22:2043 prohibits actions for attachment or garnishment of assets during a delinquency proceeding; and La. R.S. 22:2044 provides for uniformity of interpretation among the states.

rule prohibiting the delinquent insurer itself—in this case, LAHC—from raising the fault of its own personnel as a defense in a delinquency proceeding. La. R.S. 22:2043.1(A) functions far more sensibly as a rule preventing a failed insurer from blaming the conduct of its own personnel than one that prevents third-party defendants such as GRI from apportioning fault to parties responsible for the failure of LAHC. The Court therefore should deny the Motion because the statute on which Plaintiff relies, when evaluated in reference to other laws concerning the same subject matter, does not apply to this proceeding and certainly does not mandate the dismissal or striking of any defenses of GRI.

B. GRI may assert any defense that it otherwise could have asserted against LAHC.

It is undisputed that, in this case, the Plaintiff is acting in his capacity as Rehabilitator of an insolvent insurer, LAHC, and asserting alleged rights of action that LAHC held. La. R.S. 22:2008(A) ("The commissioner of insurance and his successor and successors in office shall be vested by operation of law with the ... rights of action of the insurer as of the date of the order directing rehabilitation or liquidation."); La. R.S. 22:2009(A) ("[T]he commissioner of insurance shall immediately proceed to conduct the business of the insurer and take such steps towards removal of the causes and conditions which have made such proceedings necessary as may be expedient."); *Donelon v. Shilling*, 2020-00514 (La. 04/27/20); 2020 La. LEXIS 708, at *5 ("Louisiana Revised Statutes 22:2008 and 2009 generally give the Commissioner the right to enforce the contracts of an insolvent insurer."). Because Plaintiff is asserting a right of action that belonged to LAHC, it follows that Plaintiff is subject to the same affirmative defenses that could have been asserted if LAHC itself were the plaintiff.[4] Accordingly, the Court can—and should—preserve those defenses that GRI could have asserted in an action against LAHC.

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4 *See, e.g.*, *Williams v. Continental Stock Transfer & Trust Co.*, 1 F. Supp. 2d 836, 843 (N.D. Ill. 1998) ("[Defendant] can assert any affirmative defenses, such as fraud, that it may have had against [insolvent insurer.]"); *Stephens v. American Home Assurance Co.*, 811 F. Supp. 937, 947 (S.D.N.Y. 1993) (defendant reinsurers were "free to assert any affirmative defenses, such as fraud, that they may have had against the [insolvent company]."") (internal citations and quotations omitted); *North Carolina ex rel. Long v. Alexander & Alexander Services, Inc.*, 711 F. Supp. 257, 264 (E.D.N.C. 1989) ("The Commissioner as rehabilitator suing on behalf of [insurer] is similarly subject only to defenses that could be raised against [insurer]."); *Padrick v. Lyons*, 372 P.3d 528, 535 (Ore. Ct. App. 2016) ("[P]laintiff steps into [insurer]'s shoes for purposes of any affirmative defenses that might be raised by defendants[.]"); *see also* COUCH ON INSURANCE 3D 5:17 ("The receiver stands in the place of the insolvent insurer and is therefore vulnerable only to such actions as the insolvent insurer would have been.").

C. GRI's Defenses do not Violate or Implicate La. R.S. 22:2043.1(A)

Even assuming La. R.S. 22:2043.1(A) applies in this non-delinquency proceeding (which is denied), The Motion suffers from an inherent, fatal flaw with respect to GRI in that the defenses Plaintiff seeks to dismiss or strike do not run afoul of La. R.S. 22:2043.1(A). Plaintiff groups together GRI's Third, Fourth, Eighth, and Ninth Affirmative Defenses and broadly asks that they all be tossed out "to the extent that they assert a defense for the alleged actions or inactions of any present or former officer, manager, director, trustee, owner, employee, or agent of LAHC."[5] A particularized examination of each of GRI's Defenses reveal that they are either unrelated to or broader in scope than the defenses prohibited by La. R.S. 22:2043.1(A).

GRI's Third Affirmative Defense asserts that "Plaintiff is estopped from making the claims asserted due to its own actions and inactions and course and pattern of conduct over many years." The defense does not mention any former personnel of LAHC. The most straightforward reading of the defense is that it pertains to (1) the actions of LAHC itself; and (2) any post-receivership actions or conduct of the Plaintiff, in his capacity as Receiver, that further damaged LAHC.[6] This defense does not violate La. R.S. 22:2043.1(A).

Like the Third Affirmative Defense, GRI's Fourth Affirmative Defense does not mention any former LAHC personnel. Instead, GRI generally asserts the equitable defenses of "laches, waiver, unclean hands, ratification, and any applicable period of prescription." GRI could and would have asserted any of these defenses if LAHC were the plaintiff, and can maintain them with respect to Plaintiff's post-receivership conduct and the conduct of other defendants. The Court should not broadly bar GRI from raising equitable defenses that raise viable questions of fact and law, particularly when the defenses make no mention of the persons identified in La. R.S. 22:2043.1(A). *O'Connor v. Nelson*, 10-250 (La. App. 5 Cir. 01/11/11); 60 So. 3d 27, 33; *see also FDIC v. Dosland*, 298 F.R.D. 388, 399 (N.D. Iowa 2013) ("[E]quitable defenses presents 'a question of law or fact which the court ought to hear.'") (internal quotations omitted).

GRI's Eighth Affirmative Defense reads as follows:

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5 Plaintiff's Memorandum at 6.

6 In its January 12, 2021 Order, the Court granted Plaintiff's Motion to Dismiss and Strike GRI's Third, Fourth, and Ninth Affirmative Defenses to the extent they implicated conduct by the Commissioner in his capacity as a regulator. Plaintiff withdrew the Motion with respect to defenses targeting "Receiver Fault."

> GRI affirmatively alleges that to the extent Plaintiff has settled or should settle hereafter for any of the alleged injuries and damages with any persons, whether parties or nonparties, GRI is entitled to a credit and/or offset in the amount of the settlement(s) and/or payment(s), which are not subject to the collateral source doctrine, and/or for the amount of the settling and/or paying parties' allocated percentage of fault.

This defense does not encompass the "prior wrongful or negligent actions" of former LAHC personnel—or any party for that matter. Rather, it merely asks that, to the extent Plaintiff has reached an agreement to settle any of its claims with other parties—including the D&O Defendants with whom Plaintiff has already settled[7]—GRI is entitled to an offset, either equal to settlement or in proportion to the parties' allocated fault. As further discussed below, the Court can—and, in fact, has the obligation to—allocate fault to LAHC and any other persons responsible for LAHC's injury irrespective of any purported limitation on certain affirmative defenses imposed by La. R.S. 22:2043.1(A). Moreover, Plaintiff's settlements with the D&O Defendants have deprived GRI of any independent action for contribution under the settlement bar rule, leaving GRI without a direct remedy against these former directors and officers. *See Cole v. Celotex Corp.*, 599 So. 2d 1058, 1073 (La. 1992). GRI's Eighth Defense should neither be dismissed nor stricken on the basis that it violates La. R.S. 22:2043.1(A).

The final GRI defense Plaintiff seeks to strike is GRI's Ninth Affirmative Defense, alleging that any damage incurred by Plaintiff "was caused in whole or in part by the action or inaction of persons or entities (whether parties or non-parties) for whom GRI is not responsible." This defense broadly preserves GRI's right to introduce evidence of the fault of all other parties and non-parties—a right which, as further discussed below, La. R.S. 22:2043.1(A) does not supersede. The Court should neither dismiss nor strike GRI's Ninth Defense.

Because none of the defenses at issue directly targets or is limited to the "prior wrongful or negligent actions" of former LAHC personnel, the Court should neither dismiss nor strike GRI's defenses.

D. The Court should Harmonize La. R.S. 22:2043.1 and La. C.C. arts. 2323 and 2324

Plaintiff argues that La. R.S. 22:2043.1(A) "takes precedence over the more general comparative fault articles La. C.C. arts. 2323 and 2324."[8] However, Louisiana courts should avoid interpreting laws as conflicting or contradicting one another whenever possible. When laws on

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7 Plaintiff acknowledged as much in his Motion for Leave to File a Fifth Amended Complaint.

8 Plaintiff's Memorandum at 6-7.

the same subject matter appear to conflict, they "must be interpreted in reference to each other" and be "harmonized if possible." *See* La. C.C. art. 13; *Killeen v. Jenkins*, 98-2672 (La. 11/05/99); 752 So. 2d 146, 148.

La. R.S. 22:2043.1(A) contains no language that indicates that Louisiana's "pure comparative fault" system is inapplicable in actions brought by insurance receivers on behalf of failed insurers or that the requirement to apportion fault to all parties and non-parties does not apply in this context. In addition, by interpreting La. R.S. 22:2043.1(A) to apply to delinquency proceedings, the Court can read the statute in a way that reconciles it with Louisiana's comparative fault regime. Accordingly, and for the reasons further explained below, the Court should harmonize the statutes and only apply La. R.S. 22:2043.1(A) in a manner that does not result in a defendant such as GRI facing liability in excess of its actual responsibility for LAHC's failure—which GRI maintains is zero.

1. Civil Code articles 2323(A) and 2324(B)

"Louisiana employs a 'pure' comparative fault system, whereby the fault of all persons causing or contributing to injury is to be compared." *Landry v. Bellanger*, 2002 1443 (La. 05/20/03); 851 So. 2d 943, 952. To more precisely implement a pure comparative fault regime, the Legislature amended La. C.C. arts. 2323 and 2324 in 1996. *See* LA. CIV. LAW TREATISE, § 7:4. La. C.C. arts. 2323(A) and 2324(B) are germane to this Motion. La. C.C. art. 2323(A) provides:

> In any action for damages where a person suffers injury, death, or loss, **the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined**, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, **immunity by statute**, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.[9]

La. C.C. art. 2324(B), meanwhile, states:

> If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. **A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss**, regardless of such other person's insolvency, ability to pay, degree of fault, **immunity by statute** or

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9 (emphasis added).

> otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.[10]

Louisiana courts have interpreted these statues to impose absolute requirements with respect to the allocation of fault among persons responsible for injury, regardless of whether they are non-parties or immune. In *Dumas v. State*, 2002-0563 (La. 10/15/02); 828 So. 2d 530, the Supreme Court assessed whether the 1996 amendments to La. C.C. arts. 2323 and 2324 enabled an initial tortfeasor to introduce evidence showing the fault of allegedly negligent medical providers, despite the fact that the medical providers were immune from tort liability under the Medical Malpractice Act. Deeming the language of the statutes to be clear, unambiguous, and not leading to absurd consequences, the Supreme Court held that the articles necessitated that the trial court consider the fault of the medical providers. *See* 828 So. 2d 530, 537-38. The Supreme Court explained:

> Pursuant to Article 2323, the fault of both the State and the allegedly negligent health care providers should be determined notwithstanding the fact that the health care providers are non parties. Under Article 2324(B), if a jury determines that both the State and the health care providers negligently injured Mr. Dumas and plaintiffs, then the liability between them will be a joint and divisible obligation, they will not be solidarily liable, and each joint tortfeasor will be liable only for his portion of fault. The comparative fault article, La. C.C. art. 2323, makes no exceptions for liability based on medical malpractice; on the contrary, it clearly applies to any claim asserted under any theory of liability, regardless of the basis of liability. There is no conflict between either Article 2323 or Article 2324(B) and the Medical Malpractice Act that could be fairly classified as "absurd."

Id. at 537. Even though the holding could conceivably reduce plaintiffs' recovery, the Court held that it could not ignore the "unmistakably clear language" of the Civil Code articles. *See id.* at 537-38.

In subsequent decisions, courts have repeatedly interpreted art. 2323(A) as mandating that the court quantify and allocate the fault of all persons causing or contributing to an injured plaintiff's damages. The trial court in *Gatlin v. Entergy Corp.*, 2004-0034 (La. App. 4 Cir. 05/04/05); 904 So. 2d 31, 33, held that, in spite of the language of art. 2323(A), putting the fault of a statutorily immune party on trial would not "do anything further to serve the ends of justice." The appellate court, however, recognized that "a defendant has the right to quantify and allocate the fault of all persons causing or contributing to an injured plaintiff's damages." 904 So. 2d at 35. Accordingly, the trial court had erred in refusing to allow the defendant to introduce evidence of an immune employer's fault. *See id.*

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10 (emphasis added).

The First Circuit has similarly acknowledged that "article 2323(A) mandates that the degree or percentage of fault of all persons causing or contributing to an injury or death be determined" and that the provision "shall be applied to any claim for the recovery of damages asserted under any law or theory of liability." *Battalora v. Ficklin*, 2009-0662 (La. App. 1 Cir. 12/23/09); 2009 La. App. Unpub. LEXIS 775, at *31-32; *see also Fontenot v. Dual Drilling Co.*, 179 F.3d 969, 973 (5th Cir. 1999) ("[T]he Louisiana statute at issue in this case (§ 2323(A)) ... requires the determination of the percentage of fault of all tortfeasors[.]"); *Billeaudeau v. Opelousas Gen. Hosp. Auth.*, 17-895 (La. App. 3 Cir. 04/18/18); 2018 La. App. LEXIS 753, at *12 ("Louisiana Civil Code Article 2323(A) provides, without question, that the 'degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined.'"); *Pinsonneault v. Merchants & Farmers Bank & Trust Co.*, 99-12 (La. App. 3 Cir. 07/21/1999); 738 So. 2d 172, 196 ("Article 2323(A) mandates that we 'determine' the percentages of fault of all tortfeasors. Because we are mandated to do so, we shall.").

Courts have also, in accordance with La. C.C. art. 2324(B), refused to impose liability on defendants in excess of their actual allocated fault. In *Plaisance v. Allstate Ins. Co.*, 08-566 (La. App. 3 Cir. 11/05/08); 996 So. 2d 691, 692-93, the trial court apportioned 25 percent of fault to a driver, but refused to reduce the damages of a passenger in the other car on the basis that she bore no fault for the accident. But the Third Circuit correctly surmised that a reduction in the plaintiff's recovery against the defendant was "not based upon any imputation of fault but rather upon the legal relationship between the two tortfeasors in the accident." 996 So. 2d at 694. Because the defendant bore only 25 percent of the fault, she could not be cast with any more than 25 percent of the plaintiff's damages. *See id*; *see also 639 Julia St. Partners v. City of New Orleans*, 2002-0777 (La.App. 4 Cir. 11/13/02); 830 So. 2d 1131 (correctly applying La. C.C. art. 2324(b) by apportioning 60 percent of the damages to defendant city of New Orleans after city was deemed to be 60 percent at fault).

La. C.C. arts 2323(A) and 2324(B) thus do not confer onto courts a discretionary right to apportion fault to non-parties, insolvent parties, or statutorily immune parties. Interpreted together, they impose ***requirements*** on a court to apportion fault to all responsible persons and to avoid imposing liability on a party in excess of its fault. Absent any clear legislative statement to the contrary, the Court cannot forego this obligation to comport with Louisiana's pure comparative fault principles.

2. La. R.S. 22:2043.1(A) and La. C.C. arts. 2323 and 2324 can be harmonized.

The Motion and Memorandum in Support indicate that Plaintiff intends to rely on La. R.S. 22:2043.1(A) to object to the admission of ***any*** evidence regarding the fault of former LAHC personnel, including the D&O Defendants. The exclusion of this evidence would directly contradict the mandates imposed on courts by La. C.C. arts. 2323(A) and 2324(B). But the Court need not—and should not—construe La. R.S. 22:2043.1(A) to conflict with Louisiana's comparative fault codal articles.

Although La. R.S. 22:2043.1(A) prohibits certain affirmative defenses, nothing in its language suggests that courts cannot consider the fault of the insolvent insurer's personnel at all, or that the Legislature intended to discard Louisiana's comparative fault system in actions by a receiver on behalf of an insolvent insurer. The provision, for instance, does not state that the fault of the insolvent insurer's personnel "shall not be determined" in contradiction to La. C.C. art. 2323(A). Nor does it indicate that an alleged joint tortfeasor can face liability for more than its degree of fault in conflict with La. C.C. art. 2324(B). The lack of explicit language evincing a legislative intent to override these bedrock principles of the pure comparative fault regime reinforces the interest in harmonizing the statutes. For instance, unlike La. R.S. 22:2043.1(A), La. C.C.P. art. 966(G), provides that any party dismissed from an action "**shall not be considered** in the subsequent allocation of fault" (emphasis added). The statute on which Plaintiff relies contains no such proclamation.[11]

Applying La. R.S. 22:2043.1(A) in the manner espoused by Plaintiff would additionally contravene Louisiana's public policy in maintaining a pure comparative fault system. Since the Legislature amended La. C.C. arts. 2323 and 2324 in 1996, Louisiana courts have reiterated that the fault of ***all*** persons responsible—regardless of their status as parties or their statutory immunity—must be considered. *See Dumas*, 828 So. 2d at 537-38; *Gatlin*, 904 So. 2d at 35; *Battalora*, 2009 La. App. Unpub. LEXIS 775, at *31-32. Courts have further recognized that the rule prohibiting a party from facing liability in excess of its fault is absolute, even though adherence to the rule could conceivably reduce a Plaintiff's recovery. *See Dumas*, 828 So. 2d at 537-38; *Plaisance*, 996 So. 2d at 694.

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11 La. C.C.P. art. 966 only applies upon a finding of no fault by the dismissed party. Arguably, this supports the notion that even in such a scenario, the fault is considered and negated with respect to the dismissed party.

There is, however, a straightforward way for the Court to read La. R.S. 22:2043.1(A) in harmony with La. C.C. arts. 2323 and 2324. For the reasons explained above, La. R.S. 22:2043.1(A) should be interpreted as a as a rule prohibiting an insolvent insurer such as LAHC from raising the fault of its own personnel as a defense in a delinquency proceeding. This interpretation averts the application of La. R.S. 22:2043.1(A) in a way that broadly overrides Louisiana's comparative fault articles.

La. R.S. 22:2043.1(A) thus need not, and should not, be read in a way that precludes the Court from considering former LAHC personnel in the allocation of fault in this case. GRI maintains that it bears no fault for the failure of LAHC. However, to the extent the jury disagrees, interpreting La. R.S. 22:2043.1(A) in a manner that supersedes La. C.C. arts. 2323(A) and 2324(B) would subject GRI to liability in excess of its fault, assuming GRI is precluded from introducing evidence of the fault of LAHC's officers, directors, and other personnel. Because such an outcome directly contradicts Louisiana public policy, the Court should reconcile and harmonize the statutes to the extent possible.

E. To Interpret La. R.S. 22:2043.1(A) as Superseding Louisiana's Comparative Fault Articles would Lead to an Absurd Result.

Should the Court find it cannot reconcile La. R.S. 22:2043.1(A) and La. C.C. arts. 2323 and 2324, it should not interpret La. R.S. 22:2043.1(A) in the manner suggested by Plaintiff for another, related reason: to do so would result in an absurd and inequitable outcome.

Civil Code article 9 provides that "when a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." Interpreting La. R.S. 22:2043.1(A) in a way that completely excludes former LAHC personnel from the apportionment of fault would lead to an absurd consequence in that it would make it impossible for a factfinder to consider the fault of the people responsible for actually managing and operating LAHC in determining why LAHC met its demise.

That absurdity is laid bare in this case, **where Plaintiff sued the very people (the D&O Defendants) whose actions Plaintiff now seeks to exclude from evidence.** Under Plaintiff's interpretation of La. R.S. 22:2043.1(A), were the D&O Defendants still in this case, Plaintiff would be able to introduce evidence of their fault to the jury—but the Court would be unable to consider that same evidence with respect to other third-party defendants. Such a scenario would be inherently paradoxical. A jury could conceivably apportion 99 percent of fault to

LAHC's officers or directors with respect to Plaintiff's claim against them but be unable to apportion fault with respect to Plaintiff's claims against defendants such as GRI—resulting in a "double recovery" scenario.

As it stands, Plaintiff ***has*** already recovered from the D&O Defendants via settlement. Under Louisiana law, GRI cannot bring an action for contribution against these settling defendants but should be able to introduce evidence of these "empty chair" defendants' fault. *See Cole v. Celotex Corp.*, 599 So. 2d 1058, 1073 (La. 1992). This rule exists precisely to avert the outcome Plaintiff seeks, whereby Plaintiff can (1) settle its claims against the D&O Defendants for substantial sums before trial; but (2) exclude evidence of those defendants' fault in a trial involving the remaining defendants. If the D&O Defendants do bear any fault for LAHC's failure—which Plaintiff apparently believes, given Plaintiff's initial inclusion of the D&O Defendants in this suit—application of La. R.S. 22:2043.1(A) in the manner Plaintiffs urge would necessarily result in the fault of responsible parties (the D&O Defendants) being reallocated unjustly among other defendants, including GRI.

Plaintiff brought this Motion on the same day Plaintiff amended the Petition to remove the D&O Defendants as parties. It is clear, then, that Plaintiff's Motion is a gambit to distort the law in a manner that would enable Plaintiff to recover damages from GRI that were actually the fault of the D&O Defendants and other LAHC personnel. Such an outcome would not only directly contradict La. C.C. arts. 2323 and 2324, defying the bedrock principles of Louisiana's pure comparative fault system,[12] but also deprive GRI of its due process right to a defense and leave GRI practically incapable of introducing evidence that the people who caused the most harm to LAHC actually caused that harm.

Accordingly, to the extent the Court does regard La. R.S. 22:2043.1(A) to be in conflict with Louisiana's comparative fault law, La. C.C. arts. 2323 and 2324 should govern. To interpret La. R.S. 22:2043.1(A) as annihilating this state's comparative fault principles would lead to an absurd result.

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12 2012 Senate Bill No. 394, which resulted in Act No. 468 and the eventual enactment of La. R.S. 22:2043.1, was brought to bring Louisiana in compliance with certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The legislative history does not indicate that the Legislature intended to override La. C.C. arts. 2323 and 2324 in actions by and against a receiver. *See* SB 394 Resume Digest, LA. LEGISLATURE, https://legis.la.gov/legis/ViewDocument.aspx?d=811972.

III. CONCLUSION

For the reasons explained above, the Court should deny Plaintiff's Motion for Partial Summary Judgment and Motion to Dismiss with respect to GRI.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing pleading was served upon all counsel of record by electronic mail and/or United States mail, postage pre-paid and properly addressed, this 2nd day of June, 2021.

W. BRETT MASON