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

GROUP RESOURCES INCORPORATED, MILLIMAN, INC., and BUCK CONSULTANTS, LLC

FILED: _____ _____
DEPUTY CLERK

MEMORANDUM OF MILLIMAN, INC. 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

Defendant Milliman, Inc. ("Milliman") respectfully files this Memorandum 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 ("Motion").

I. PRELIMINARY STATEMENT

By seeking to preclude Milliman from asserting comparative fault and other defenses based on the alleged fault or negligence of LAHC's "former officers, managers, directors, trustees, shareholders, employees or agents," Plaintiff attempts to deprive Milliman of the right to litigate the very same claims of wrongful and/or negligent conduct that, until recently, were at the heart of this action. Plaintiff's Motion fails because Plaintiff placed the wrongful and/or negligent conduct of LAHC's directors and officers (the "D&O Defendants"), among others, at issue in this case by naming them as defendants, and therefore he waived his ability to prevent Milliman from asserting defenses pursuant to La. R.S. § 22:2043.1(A).[1] Louisiana law makes clear that Plaintiff cannot "undo" his waiver by amending his complaint to remove allegations concerning the D&O Defendants.

Furthermore, allowing Plaintiff to assert claims against the D&O Defendants, on the one hand, and then denying Milliman's ability to assert comparative fault and other defenses against

[1] Plaintiff does not identify any specific people or entities covered by his Motion. Milliman reserves the right to challenge Plaintiff's inclusion of any specific person or entity as falling within the ambit of La. R.S. § 22:2043.1(A).

them would lead to an absurd and unjust result. Milliman would be unable to apportion fault to those defendants at trial, and could be barred by the "settlement bar rule" from seeking contribution from them after trial. *See Cole v. Celotex Corp*., 599 So. 2d 1058, 1073 (La. 1992). Milliman (and the other remaining defendants) therefore could be left liable for wrongful actions that Plaintiff himself alleges were caused by others. Plaintiff also seeks to strike Milliman's "Fourteenth Defense," which would preclude Milliman from arguing or presenting evidence demonstrating that LAHC's damages were not caused by its reliance on Milliman's work. Plaintiff thus essentially seeks to relieve himself of his burden of proving reliance, even before discovery is complete. These absurd results defeat any presumption that the later enacted statute (La. R.S. 22:2043.1(A)) controls over Louisiana's, or any other state'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.

Finally, Plaintiff's Motion must be denied as a matter of fundamental due process. A litigant's "right to litigate the issues raised" in a complaint against the litigant is "guaranteed ... by the Due Process Clause." *United States v. Armour & Co*., 402 U.S. 673, 682, 91 S. Ct. 1752, 1757 (1971). And fundamental to that due process right is "the right to present a defense." *State v. Wilson*, 2017-0908 (La. 12/5/18), 2018 WL 6382169, at *3; *Lindsey v. Normet*, 405 U.S. 56, 66, 92 S. Ct. 862, 870 (1972) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168, 53 S. Ct. 98, 102 (1932)). To that end, Louisiana's comparative fault statute mandates that "*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*. . ." La. Civ. Code art. 2323(a) (emphasis added). Depriving Milliman of defenses based on the wrongful acts of the D&O Defendants would violate Milliman's right to litigate the issues raised by Plaintiff's claims, a right guaranteed by the Louisiana and U.S. Constitutions and also by Louisiana's comparative fault statute.

For all of the reasons set forth in this Memorandum, and in Defendant Buck Global, LLC's ("Buck") Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, which Milliman adopts and incorporates by reference herein, Plaintiff's motion should be denied in its entirety.

II. ARGUMENT

A. Plaintiff Has Waived Its Ability To Assert Defenses Under La. R.S. § 22:2043.1(A) By Placing The D&O Defendants' Conduct At Issue

Plaintiff indisputably put the D&O Defendants' conduct at issue in this litigation. Plaintiff provided a non-exclusive list of *forty-five* instances in which the D&O Defendants allegedly breached their fiduciary obligations to, or otherwise harmed, LAHC, which in no way implicate Milliman.[2] Specifically, Plaintiff alleged that the D&O Defendants breached their fiduciary obligations, including by "[p]aying excessive salaries to LAHC executives in relation to the poor, inadequate, or non-existent services rendered by them to LAHC," "[g]rossly inadequate oversight of LAHC operations," and "[g]ross negligence in hiring key management and executives with limited or inadequate health insurance experience."[3] Plaintiff further alleged that the D&O Defendants "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."[4] As a result of the gross negligence and failures of the D&O Defendants, Plaintiff alleged that "LAHC, its members, its providers and its creditors have sustained substantial, compensable damages for which the D&O Defendants … are liable,"[5] and that these damages caused by their "grossly negligent conduct, if not willful conduct," includes "damages in the form of all losses sustained by LAHC from its inception (i.e., they should have never started LAHC in the first place)," "damages in the form of lost profits (i.e., the amount LAHC would have earned, if any, but for their conduct)" and "damages in the form of deepening insolvency."[6] Plaintiff now asserts that Milliman is barred from raising ***this exact same conduct*** as defenses to Plaintiff's claims against it.

Waiver is the intentional relinquishment of a known right, power or privilege. *Steptore v. Masco Constr. Co.*, 93–2064 (La. 8/18/94), 643 So. 2d 1213, 1216. Waiver requires that there first be an existing right and that a party have knowledge of that right's existence. *Id.* A party may then waive that right through either an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished. *Taita Chem. Co. Ltd. v. Westlake Styrene Corp.*, 246 F. 3d 377, 388 (5th Cir. 2001)

[2] Petition, ¶¶ 28, 33; First Am. Pet., ¶¶ 31, 36, 45, 51, 59; Second Am. Pet., ¶¶ 31, 36, 47, 52, 58, 66.
[3] Petition, ¶ 28; First Am. Pet., ¶ 31; Second Am. Pet., ¶ 31.
[4] Petition, ¶ 29; First Am. Pet., ¶ 32; Second Am. Pet., ¶ 32.
[5] Petition, ¶ 34; First Am. Pet., ¶ 37; Second Am. Pet., ¶ 37.
[6] Petition, ¶ 35; First Am. Pet., ¶ 38; Second Am. Pet., ¶ 38.

(citing *Steptore*, 643 So. 2d at 1216; *Legier and Materne v. Great Plains Software, Inc.*, 2005 WL 1431666, at *4 (E.D. La. May 31, 2005)).

Courts have found waiver in many instances where parties have put their rights at issue. For example:

- A litigant forfeits statutory attorney-client privileges, otherwise guaranteed under La. Code of Evidence art. 506, by asserting claims and/or defenses that place attorney-client communications "at issue." By electing to introduce his attorney-client communications at trial, a party creates a "special unfairness to his adversary" and thereby waives his privilege as to such communications. *State v. Dominguez*, 2010-1868 (La. App. 1 Cir. 12/8/10), 52 So. 3d 1117, 1120 (quoting *Smith*, 513 So. 2d at 1141).
- Litigants, civil and criminal, waive statutory protections against admission of character evidence by asserting claims or defenses that place their character "at issue." "The introduction of evidence of 'good character' places character at issue, and thereby permits the state to cross examine the defendant's character witness about his or her knowledge of the defendant's particular conduct, prior arrests, or other acts relevant to the moral qualities pertinent to defendant's crime and to introduce evidence of the defendant's bad character in rebuttal of the testimony of the defendant's character witness." *State v. Taylor*, 07-869 (La. App. 5 Cir. 4/29/08), 985 So. 2d 266, 269 (citing *State v. Rault*, 445 So. 2d 1203 (La. 1984)); *see also* La. Code Evid. arts. 608(C), 405(A).
- Criminal defendants waive their constitutional Fifth Amendment privileges and immunities by testifying in their own defense, opening themselves up to cross examination. A criminal defendant who takes the stand "cannot reasonably claim that the Fifth Amendment gives him . . . an immunity from cross-examination on the matters he has himself put in dispute." *State v. Heaton*, 2000-260 (La. App. 3 Cir. 10/11/00), 770 So. 2d 477, 480 (quoting *Mitchell v. United States*, 526 U.S. 314, 119 S. Ct. 1307, 143 L.Ed.2d 424 (1999)).
- Governmental entities waive constitutional and statutory sovereign immunities when they sue private defendants. *See Reed-Salsberry v. State Through the Dep't of Pub. Safety & Corr.*, 51, 104 (La. App. 2 Cir. 2/15/17), 216 So. 3d 226,

228 ("A foundational premise of the federal system is that states, as sovereigns, are immune from suits for damages, save as they elect to waive that defense.").

Although Plaintiff now purports to "remove" his claims against the D&O Defendants by filing a Fifth Amending Petition, the facts that form the basis for Plaintiffs' allegations are still material to the quantum of Milliman's liability and cannot simply be erased by artful pleading.

B. <u>Applying La. R.S. § 22:2043.1(A) To Bar Defenses Based On The Prior Wrongful Or Negligent Actions Of The D&O Defendants Would Produce Absurd And Unreasonable Results</u>

Louisiana Courts have long held that "[w]hen the literal construction of a statute produces absurd or unreasonable results 'the letter must give way to the spirit of the law and the statute construed so as to produce a reasonable result.'" *Fontenot v. Chevron U.S.A. Inc.*, 676 So. 2d 557, 562 (La. 1996) (quoting *Green v. Louisiana Underwriters Insurance Co.*, 571 So. 2d 610, 613 (La. 1990)). Under La. Civil Code art. 9, a clear and unambiguous law shall be applied as written only "when its application does not lead to absurd consequences."

Such was the case in *Seguin v. Remington Arms Co., LLC*, 260 F. Supp. 3d 674 (E.D. La. May 16, 2017). There, the court considered the applicability of a statute that clearly barred all claims against firearm manufacturers other than manufacturing defect claims and thus precluded "design defect and failure to warn claims that are likely to affect a greater number of firearms and endanger a significantly larger number of people."[7] *Seguin*, 260 F. Supp. 3d at 682. The court consulted the statute's legislative history to understand its intent and found that the legislature actually did intend to exclude the very design defect claims at issue in Plaintiff's complaint. *Id.* at 685. Despite the legislative history, the Court held that "application of the statute would lead to absurd consequences" because "[i]f a gun manufacturer designed a gun that routinely discharged accidentally, a person injured by a third party because of that defect would not be permitted to sue the manufacturer under [the statute] as long as the gun was manufactured according to the manufacturer's specifications." *Id.* at 686. In other words, common sense prevailed. *See also Ferrara*, 688 So. 2d at 147 (holding that later enacted statute related to sales taxes could not be enforced as drafted because it "would lead to an absurd result" where transaction excluded from sales tax under earlier enacted statute would become a taxable transaction by virtue of an

[7] The statute at issue in *Seguin* stated: "No firearm manufacturer or seller shall be liable for any injury, damage, or death resulting from any shooting injury by any other person unless the claimant proves and shows that such injury, damage, or death was proximately caused by the unreasonably dangerous construction or composition of the product…" La. R.S. § 9:2800.60(B).

exemption and not a legislative imposition of tax); *c.f. Pumphrey v. City of New Orleans*, 2005-0979 (La. 4/4/06), 925 So. 2d 1202, 1210 (noting that while a specific statute will *generally* prevail over a more general statute, "[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.").

Here too, a literal application of La. R.S. § 22:2043.1(A), as Plaintiff urges, would lead to absurd results and vitiate Louisiana's comparative fault statutes. Applying La. R.S. § 22:2043.1(A) to bar Milliman from raising comparative fault defenses against the D&O Defendants when Plaintiff himself has accused the D&O Defendants of fault is absurd. Milliman should not be barred from raising defenses and putting on evidence that Plaintiff himself would have put forward to establish the D&O Defendants' "wrongful and negligent actions" especially when the consequence would be a serious constitutional due process violation that leaves Milliman responsible for losses by the D&O Defendants, not Milliman. This absurd application of La. R.S. § 22:2043.1(A) must be rejected as a matter of law.

C. Plaintiff's Interpretation Of La. R.S. § 22:2043.1(A) To Bar Defenses Based On The Prior Wrongful Or Negligent Actions Of The D&O Defendants Violates Milliman's Due Process Rights

La. R.S. § 22:2043.1(A) cannot apply to bar comparative fault and other defenses based on the wrongful or negligent actions of directors, officers, and agents ***named as defendants in this action***, because doing so would violate Milliman's constitutional "right to litigate the issues raised" as "guaranteed ... by the Due Process Clause" of the United States and Louisiana constitutions. *Armour & Co.*, 402 U.S. at 682, 91 S. Ct. at 1757; La. Const. art. 1, § 2; U.S. Const. 14th Am. § 1 ("…nor shall any state deprive any person of life, liberty, or property, without due process of laws…"). "Due process requires that there be an opportunity to present every available defense." *Lindsey*, 405 U.S. at 66, 92 S. Ct. at 870; *Wilson*, 2018 WL 6382169, at *3 ("[f]undamental to due process of law is the right to present a defense, *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), and to have it fairly considered by the jury.").

These principles are reflected in Louisiana's comparative fault statute, which states:

> In any action for damages where a person suffers [. . .] loss, **the degree or percentage of fault of all persons causing or contributing to the [. . .] 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.

La. Civ. Code art. 2323(a) (emphasis added). Louisiana's comparative fault statute created apportionment rights that are ***substantive*** rights that belong to every litigant. *See Celotex Corp.*, 599 So. 2d at 1064 (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.").

Given Louisiana's comparative fault statute and the issues of fundamental due process implicated by Plaintiff's Motion, this Court must construe La. R.S. § 22:2043.1(A) "so as to preserve its constitutionality. . ." *City of New Orleans v. Louisiana Assessors' Ret. & Relief Fund,* 2005-2548 (La. 10/1/07), 986 So. 2d 1, 12, *on reh'g* (Jan. 7, 2008) (citation omitted). Because "the constitution is the supreme law of this state, to which all legislative acts must yield…[w]hen a statute conflicts with a constitutional provision, the statute must fail." *Id.* at 12–13 (emphasis added; citation omitted).

None of the cases cited by Plaintiff hold otherwise, because none of Plaintiff's cases address the constitutional issues raised by the application of La. R.S. § 22:2043.1 to deprive a defendant of the right to raise defenses based on the wrongful acts of co-defendants in the same action.[8] Instead, other courts considering this issue have held that constitutional rights to due process bar interpretation of a statute that would eliminate a defendant's ability to present defenses to claims brought against them. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. City Sav.*,

[8] *White v. La. DOTD*, 17-629 (La. App. 3d Cir. 12/6/17), 258 So. 3d 11, 17 is also inapposite because it concerns the application of La. Code Civ. P. art. 966(G), which states that "[w]hen the court grants a motion for summary judgment in accordance with the provisions of [Louisiana's procedural rules related to summary judgment], and that a party or non-party is not negligent, is not at fault, or did not cause in whole or in part the injury or harm alleged, that party or non-party shall not be considered in any subsequent allegation of fault." Here, there has been no finding that any party or non-party is "not negligent," therefore La. Code Civ. P. art. 966(G) does not apply.

F.S.B., 28 F. 3d 376, 394 (3d Cir. 1994), as amended (Aug. 29, 1994); *Placida Pro. Ctr., LLC v. F.D.I.C.*, 512 F. App'x 938, 949–50 (11th Cir. 2013) (barring defendant's ability to raise affirmative defenses against FDIC receiver "does not comport with due process"). In interpreting a statute that arguably barred defendants from raising defenses to claims brought by the receiver for a failed financial depository institution, the Third Circuit explained that interpreting the statute to ban such defenses 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, when 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.**

Nat'l Union, 28 F. 3d at 394 (emphasis added).

Here, where Plaintiff sought to hold the defendants and **D&O Defendants** jointly and severally liable for all of LAHC's losses, barring Milliman's rights to raise comparative fault and other defenses based on the **D&O Defendants**' wrongful acts (to be proven at trial) would be tantamount to holding Milliman liable for harm that it did not commit *and an unconstitutional deprivation of property. Goldberg v. Kelly*, 397 U.S. 254, 267 (1971); *Armour & Co.*, 402 U.S. at 682, 91 S. Ct. at 1757; *Lindsey*, 405 U.S. at 66, 92 S. Ct. at 870. Such an unconstitutional reading of the statute cannot stand. *Hondroulis v. Schuhmacher*, 553 So. 2d 398, 416–17 (La. 1988); *City of New Orleans*, 986 So. 2d at 12 (requiring interpretation of statutes "so as to preserve its constitutionality when it is reasonable to do so"); *Schettler v. RalRon Capital Corp.*, 275 P. 3d 933, 940 (Nev. 2012) ("[i]f 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."). For this reason, too, Plaintiff's Motion must be denied.

D. At A Minimum, The Court Should Deny This Motion Pending The Completion Of Full And Adequate Discovery In This Case

Whether construed as a motion to strike or one for summary judgment, Plaintiff's Motion is improper at this early stage of litigation, before Defendants have had a "fair opportunity to carry out discovery" and to present their factual defenses in response to Plaintiff's motion for partial

summary judgment asserting that there are no material factual disputes. *Welch v. East Baton Rouge Parish Metro. Council*, 2010-1532 (La. App. 1 Cir. 3/25/11); 64 So. 3d 249, 254. While document discovery was scheduled to be substantially completed by March 1, 2021, Plaintiff's production is still ongoing, review of Plaintiff's production of nearly one million documents is still ongoing, and no depositions have been scheduled.

As a practical matter, resolving Plaintiff's Motion is only relevant to the parties' jury verdict form, drafts of which are not due to be exchanged until May 16, 2022. *See* Case Management Schedule § 9 (Sept. 9, 2020). The potential for prejudicial error here illustrates why Article 966 precludes summary judgment before there has been "an opportunity for adequate discovery" and why motions to strike are viewed with disfavor and infrequently granted. *Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp.*, 2001-0345 (La. App. 3 Cir. 6/20/01); 790 So. 2d 93, writ denied 2001-2115 (La. 7/26/01); 794 So. 2d 834 (noting that striking a portion of a pleading "is often sought by the movant simply as a dilatory tactic"); *O'Connor v. Nelson*, 10-250 (La. App. 5 Cir. 1/11/11); 60 So. 3d 27.

III. CONCLUSION

Plaintiff's Motion for Partial Summary Judgment or, in the alternative, Motion to Strike, should be denied.

Respectfully submitted,

/s/ Harry Rosenberg

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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/ Monica Vela-Vick

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