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 RECEIVER'S "MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING THE APPLICATION OF LOUISIANA LAW, OR, IN THE ALTERNATIVE, MOTION IN LIMINE REGARDING CHOICE OF LAW ISSUES"

I. INTRODUCTION

Defendant, Buck Global, LLC ("Buck") respectfully submits this Memorandum in Opposition to the Receiver's "Motion for Partial Summary Judgment Regarding the Application of Louisiana Law, or, in the Alternative, Motion in Limine Regarding Choice of Law Issues." As set forth below, the Receiver's motion should be denied. The Receiver's complex arguments on choice of law issues become potentially relevant *only* if the Receiver can meet his heavy and difficult burden of proving all of the elements of a gross negligence case. The Receiver essentially concedes that under either New York or Louisiana law, the limits on damage recoveries set forth in their respective engagement contracts are indeed enforceable against claims of simple negligence. So the choice of law issues raised by the Receiver may never present themselves to the Court. Such premature, complex, unresolved and potentially avoidable issues are not appropriate candidates for early pretrial motions devoid of the facts as they may be established through discovery and trial.

Further, numerous genuine issues of material fact preclude any summary ruling on the issue of the *lex causae* applicable to Buck (meaning the law governing the Receiver's claims against Buck without respect to the parties' contractual choice of law). The Receiver concedes that that issue must be determined first and *before* the Court can proceed to the analysis of whether

enforcement of the recovery limitations in the Buck engagement contract against a gross negligence claim would offend that *lex causae*. Receiver's brief at pp. 6-7, 17.

And the Receiver's "once size fits all" approach to determining the *lex causae* cannot possibly work. The Receiver's own brief demonstrates that the *lex causae* may well differ as to each defendant, depending upon its justifiable expectations, the place of performance, the contracting parties' connections to a particular state, and so forth.

In fact, Buck and its actuarial work had *substantial connections* to New York – the state of Buck's headquarters and where its actuarial work for LAHC was centered. Sobel Affidavit ("Aff."), exhibit ("Ex.") A hereto, ¶4. LAHC reached out to Buck to perform its actuarial work for LAHC. Ex. A, ¶3. The parties understood going in that Buck would perform the contract from those office locations, and *not* in Louisiana. Ex. A, ¶3. Therefore, they logically chose New York law to govern their relations. Ex. 4 to Receiver's motion, ¶9 (choice of law clause). So two of the most important Civil Code choice of law factors – "the policies of upholding the justified expectations of parties" (La. Civ. Code art. 3515) and the place of "performance of the contract" (art. 3537) point decisively to New York law as the *lex causae* applicable to the Receiver's claims against Buck. And other key factors also point to New York law, as set forth below. New York indeed has strong policy interests in application of its laws for the protection of its citizens and professionals whose work was centered there. Application of Louisiana law would impair those policies by depriving Buck's actuaries of the full protection of a recent decision of the highest New York Court enforcing non-nominal recovery limitations as to contract claims based on alleged gross negligence. *Matter of Part 60 Put-Back Litigation*, 165 N.E.3d 180 (N.Y. 2020).

Application of Louisiana law, contrary to the expressed desire and expectation of the parties, would also frustrate Louisiana's interest in being able to secure quality professional services on reasonable terms and for a reasonable cost.

Hence, genuine issues of material fact regarding the justified expectations of the contracting parties, their connections to each state, place of performance, the policies of New York and Louisiana, and related factual issues preclude summary judgment on the *lex causae* as between the Receiver and Buck. Louisiana courts and others across the country have routinely denied summary judgment motions on choice of law issues for this reason. Determination of the *lex causae* applicable to the Receiver's claims against Buck must therefore await trial on the merits. That trial will no doubt elucidate the facts upon which the Court could then make a reliable

determination of that issue. There is no feasible way for the Court to make those fact findings now given that they are genuinely disputed. And if the Receiver cannot prove gross negligence to the satisfaction of the trier of fact at trial, the determination of the *lex causae* will never be necessary. The Receiver's motion should be denied.

II. ARGUMENT AND AUTHORITIES

A. The Receiver bears the burden of proof.

In Louisiana, a choice-of-law provision is presumed valid. *See* La. Civ. Code art. 3540 ("All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537."). "It is well established that where parties stipulate the state law governing the contract, Louisiana conflict of laws principles *require* that the stipulation be given effect, unless there is statutory or jurisprudential law to the contrary or public policy considerations justifying the refusal to honor the contract as written." *Barnett v. Am. Const. Hoist, Inc*., 2011-1261 (La. App. 1 Cir. 2/10/12), 91 So. 3d 345, 349.

Because the Receiver seeks to nullify a presumptively valid choice of law provision, he bears the burden of proving facts sufficient to overcome it. *Id.*; *see also Armelin v. Gov't Emps. Ins. Co*., No. CV 17-4980, 2018 WL 2017585, at *4 (E.D. La. May 1, 2018). He cannot meet that burden as to Buck on the record before this Court. The many genuinely disputed issues of material fact outlined below preclude an *in limine* or summary ruling as to whether Louisiana or New York law would otherwise apply to the Receiver's claim against Buck as the *lex causae*—absent the presumptively valid choice of New York law. This Court therefore cannot proceed to the next step of determining whether the application of New York law would contravene a public policy of the *lex causae*. Therefore, the Receiver's motion should be denied as to Buck.

B. The Receiver's concessions confirm that his motion should be denied.

It is helpful to focus on the following points that the Receiver has *not* sought to dispute, as they simplify matters considerably and demonstrate that the Receiver's motion is premature, hypothetical, and totally infeasible on the current record of the case.

1. The Receiver has not pointed to any provision in the Insurance Code that can be read to remotely suggest that the mutually agreed, concededly non-nominal recovery limitations set forth in Buck's engagement contract with LAHC should not be enforced against the Receiver to the same extent that they would be enforced against any other successor to a

contract. And there is no such provision. And while the Receiver, in a footnote, purports to "reserve his right to argue the point" (Receiver's brief, fn. 5), any contrary argument would fly in the face of the settled precedent of the Louisiana First Circuit and the Receiver's own judicial admissions in this case.[1] This Circuit unmistakably *forbids* "cherry picking" of the contract to permit the Receiver to prosecute claims arising out of it while at the same time disclaiming the provisions he does not like - including the non-nominal recovery limitations set forth therein. *See Snyder v. Belmont Homes, Inc.*, 2004-0445 (La. App. 1 Cir. 2/16/05), 899 So. 2d 57, 62-63, *writ denied*, 2005-1075 (La. 6/17/05) ("[W]hen a party seeks to enforce the provisions of a contract, that party must accept all of the terms of the contract . . . . "); *Shroyer v. Foster*, 2001-0385 (La. App. 1 Cir. 3/28/02), 814 So. 2d 83, 89, *superseded by statute on unrelated grounds*, as stated in *Arkel Constructors, Inc. v. Duplantier & Meric, Architects, L.L.C.*, 2006-1950 (La. App. 1 Cir. 7/25/07), 965 So.2d 455, 458-59 (the non-signatory "cannot have it both ways; he cannot rely on the contract when it works to its advantage and then repudiate it when it works to his disadvantage."); *Green v. Regions Bank*, 2013-0771 (La. App. 1 Cir. 3/19/14), 2014 WL 3555820, at *6 ("If a non-signatory seeks to enforce the terms of a written agreement . . . , he must accept all of the terms of the agreement . . . ."). This prohibition on "cherry picking" applies fully to the Receiver as successor to a contract particularly when, as here, there is no Insurance Code provision that would permit it.[2]

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[1] Plaintiff is bound by the Agreement he seeks to enforce. By suing Buck for breach of contract, the Commissioner as Rehabilitator steps into the shoes of LAHC and is likewise bound by the terms of the Agreement. *See Dardar v. Ins. Guar. Ass'n*, 556 So. 2d 272, 274 (La. App. 1 Cir. 1990) ("[B]ecause the rehabilitator, in effect, steps into the shoes of the insurer, he is bound by the same constraints as is the insurer in the normal course of business."). Indeed, in differentiating his capacity from the regulator, Plaintiff has repeatedly conceded that "when a court appointed-Receiver files a lawsuit seeking damages from wrongdoers, ***the Receiver steps into the shoes of the failed insurance company*** and asserts claims that were available to the insurance company." Plaintiff Reply to Opposition to Motion for Summary Judgment Regulator Fault at pp. 5-6; Plaintiff's Opposition to Defendants' Motion to Compel at p. 15 (same). *See also* Plaintiff's Opposition to Defendants' Motion to Compel at p. 15 ("The Receiver's claims are for damages to LAHC only."); Sept. 25, 2020 Hearing Transcript p. 25 ("When a Receiver is appointed, or when the Commissioner is appointed . . . as Rehabilitator he is only vested with the rights to assert those claims and causes of action which are available to the failed insurance company. In effect, . . . the Receiver steps into the shoes of a failed insurance company."); *id.* at 30 ("[T]he Receiver in this case [is] asserting claims on behalf of LAHC."). Because the Plaintiff seeks to avail himself of the right to enforce the Agreement, he must also be bound by the valid and enforceable limitations of liability set forth in that Agreement.

[2] *See also Dardar v. Ins. Guar. Ass'n*, 556 So. 2d 272, 274 (La. App. 1 Cir. 1990); 1 Steven Plitt *et al.*, Couch on Ins. 3D § 5:39 (Rev. ed. 2009) ("In pursuing actions for the liquidated insurer, the statutory liquidator is bound by the terms of the contract and is subject to all defenses and setoffs to which the insurer was subject.") (collecting cases); *Martin v. General Am. Cas. Co.*, 76 So. 2d 537, 540 (La. 1954) ("The appointment of a receiver sustains the status quo of the corporation . . . . He takes the property as he finds it . . . . He stands in the shoes of the corporation.") (quoting *In re Bryce Cash Store*, 124 So. 544, 545 (La. App. 2d Cir. 1929) (internal citations omitted)); *In re Bryce Cash Store*, 124 So. at 545

2. The recovery limitations of the Buck engagement contract, including the $500,000 recovery cap, are neither exculpatory nor nominal in nature, as the Receiver concedes at p. 11 of his brief. So they cannot be invalidated on any such basis.

3. The $500,000 damages recovery cap set forth in the Buck engagement contract, and the contractual bar to recovery for lost profits, indirect damages, consequential damages, special damages, or incidental damages, apply fully "regardless of whether any such claim or claims arise by statute, contract, indemnity, this Agreement, or otherwise arising in law or equity in any jurisdiction. . . ." Buck engagement contract, Ex. 4 to Receiver's Motion, ¶7. Hence, there can be no reasonable dispute that these recovery limitations apply to *all* of the Receiver's claims against Buck, whether sounding in contract, tort, "breach of fiduciary duty," or otherwise.

4. Under both Louisiana and New York law, the concededly non-nominal recovery limitations mutually stipulated in the Buck engagement contract are fully enforceable against claims of simple negligence and any other claim that does not rise to the level of gross negligence or intentional misconduct – whether in contract or tort. *See* La. Civ. Code article 2004; *Isadore v. Interface Sec. Sys.*, 2010-1359 (La. App. 3 Cir. 3/9/11), 58 So. 3d 1071, 1074 n. 4 ("It is well settled in our jurisprudence that limitation of liability clauses [for losses due to negligence] . . . are valid and not against public policy.") (collecting cases); *Bonfiglio v. Bellsouth Adver. & Publ'g Corp.*, 619 So. 2d 135, 136 (La. App. 1 Cir.), *writ denied*, 620 So. 2d 864 (La. 1993); *accord Process Am., Inc. v. Cynergy Holdings, LLC*, 839 F.3d 125, 138 (2d Cir. 2016) ("New York courts have routinely enforced liability-limitation provisions . . . ."); *In re Lyondell Chem. Co.*, 544 B.R. 75, 84 (Bankr. S.D.N.Y. 2016); *Five Star Dev. Resort Communities, LLC v. iStar RC Paradise*

(finding that a privilege on the property of the debtor conferred prior to the appointment of the receiver was "[not] divested when the receiver was appointed and took over the property."). *Accord Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969, 972 (9th Cir. 1992) ("And because the liquidator, who stands in the shoes of the insolvent insurer, is attempting to enforce [the insurer's] contractual rights, she is bound by [the insurer's] pre-insolvency agreements."); *Bayshore Exec. Plaza P'ship v. Fed. Deposit Ins. Corp.*, 750 F. Supp. 507, 511 (S.D. Fla. 1990), aff'd, 943 F.2d 1290 (11th Cir. 1991) ("In addition, under Florida law, a receiver has the option of either accepting or rejecting executory contracts, however, once a receiver specifically elects to accept a contract, he is bound thereby."); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 272 (D. Vt. 1993) ("[I]if a liquidator seeks to enforce an insolvent company's rights under a contract, she must also suffer that company's contractual liabilities.").

Further, the law prevents a non-signatory from escaping the effects of a contractual clause when he knowingly exploits and receives a benefit from the agreement containing that clause. *See Courville v. Allied Professionals Insurance Co.*, 2016-1354 (La. App. 1 Cir. 4/12/17), 218 So. 3d 144, 148, n.3, writ denied, 2017-0783 (La. 10/27/17), 228 So. 3d 1223.

Valley, LLC, No. 09 CIV. 2085 LTS, 2012 WL 4119561, at *3, 6 (S.D.N.Y. Sept. 18, 2012).

5. In a recent decision, the New York Court of Appeals (New York's highest court) ruled that non-nominal recovery limitations extend to breach of contract claims based on gross negligence. *Matter of Part 60 Put–Back Litig.*, 36 N.Y.3d 342, 357, 141 N.Y.S.3d 410, 165 N.E.3d 180 (N.Y. 2020). The Court, however, pretermitted the issue of whether such provisions can be enforced as to claims of gross negligence in tort cases or cases that "fall into the 'borderland between tort and contract.'" *Id.* at p. 359.[3]

C. This Court cannot feasibly delve into complex, hypothetical, and genuinely disputed choice of law issues now.

The foregoing essentially indisputable points reduce the Receiver's choice of law analysis to an unnecessary scholarly exercise at this stage of the case. As regards the enforceability of the recovery limitations in the Buck contract, the differences between Louisiana and New York law are at best hypothetical. Under either state's law, unless the Receiver can prove up a very difficult case of gross negligence at trial – essentially that Buck acted recklessly and without a whit of care[4] -the admittedly non-nominal recovery limitations that it contracted for are fully enforceable as to *all* claims of the Receiver – period. This Court need not and should not address hypothetical questions that could well never present themselves.

Complex, unsettled, and potentially unnecessary issues such as those raised by the Receiver are *not* appropriate for early motions in limine or other motions especially when, as here, they require resolution of genuinely disputed factual issues. *E.g., Sawyers v. Naomi Heights Nursing Home & Rehab. Ctr., LLC*, 2019-331 (La. App. 3 Cir. 8/21/19), 279 So. 3d 404, 409, writ denied

[3] The Receiver's half-hearted suggestion at p. 13 of his brief that *Matter of Part 60* could be read to suggest that in New York non-nominal recovery limitations might not be applicable to tort claims *at all* defies the plain language and holding of that decision. The New York high Court made clear that it was pretermitting *only* the issue of "the scope of the *gross negligence public policy rule* in cases that involve cognizable tort claims or claims that straddle the line between contract and tort." 166 N.E. 3d at 180 (emphasis added). The Court in no way suggested any intent to disturb the long-established law of New York enforcing non-nominal recovery limitations as to tort claims based on ordinary negligence. *See Colnaghi, U.S.A., Ltd. v. Jewelers Prot. Servs., Ltd.*, 81 N.Y.2d 821, 823, 611 N.E.2d 282, 283 (1993); *Obremski v. Image Bank, Inc.*, 30 A.D.3d 1141, 1141–1142 (1st Dept. 2006).

[4] The definition of gross negligence is essentially the same under both New York and Louisiana law. It is a high burden of proof, requiring a showing of reckless or willful conduct. *Compare Matter of Part 60 Put-Back Litig.*, 36 N.Y.3d 342, 352, 165 N.E.3d 180 (2020) (internal quotations and citations omitted) ("Gross negligence differs in kind, not only degree, from claims of ordinary negligence. Gross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must smack of intentional wrongdoing or evince a reckless indifference to the rights of others.") *with Rabalais v. Nash*, 2006-0999 (La. 3/9/07), 952 So. 2d 653, 658 (Gross negligence is synonymous with "reckless disregard" or an "entire absence of care." "Additionally, gross negligence has been described as an 'extreme departure from ordinary care or the want of even scant care.").

sub nom. *Sawyers v. Naomi Heights Nursing Home & Rehab. Ctr. LLC*, 2019-01501 (La. 11/12/19), 282 So. 3d 228 (affirming trial court's denial of Relators' motion in limine as premature because it was based on "hypothetical scenarios"); *Plaquemines Par. Gov't v. State*, 2001-1027 (La. App. 4 Cir. 4/10/02), 826 So. 2d 14, 21, writ denied, 2002-1304 (La. 9/13/02), 824 So. 2d 1170 (the district court correctly denied the State's motion in limine because there was a genuine factual issue as to causation); *Landrum v. COSCO*, No. CIV.A. 11-424-SDD, 2013 WL 5933920, at *1 (M.D. La. Nov. 1, 2013) (denying defendant's motion in limine as premature because it would require the court to make a factual determination); *United States v. Dejean*, No. CR 17-49, 2018 WL 4853709, at *1 (E.D. La. Oct. 5, 2018) (denying the Government's motion in limine as premature: "It is inappropriate at this juncture to make the blanket ruling requested, without actual knowledge of the statements themselves, and the context in which and purpose for which the evidence or statements in question may be sought to be introduced at trial."); *Woodward v. Lopinto*, No. CV 18-4236, 2021 WL 1969450, at *3 (E.D. La. May 17, 2021) (denying motion in limine as premature given that the evidence may be relevant to other issues not known by the court at that time); *Cudd Pumping Servs., Inc. v. Coastal Chem. Co.*, LLC, No. 11-CV-1913, 2014 WL 4795174, at *1 (W.D. La. Sept. 24, 2014) (denying motion in limine as premature because the court did not know enough about the facts and the evidence); *Trafficware Grp., Inc. v. Sun Indus., L.L.C.*, No. CV 15-106-SDD-EWD, 2017 WL 1050579, at *3 (M.D. La. Mar. 20, 2017), aff'd, 749 F. App'x 247 (5th Cir. 2018) (denying motion in limine because it turned on a factual dispute that must be resolved by the trier of fact); *JH Kaspar Oil Co. v. Newton & Assocs., LLC*, No. CIV.A. 07-3723, 2008 WL 819094, at *2 (E.D. La. Mar. 25, 2008) (denying alternative motion in limine due to disputed issues of fact).

And the cases cited by the Receiver fail to support his request for in limine relief at this early stage, before any deposition discovery and well over a year and a half before the setting of any trial date and based on hypothetical issues. To the contrary, the Receiver's citations involved motions in limine filed on the eve of trial on concrete evidentiary issues that were virtually certain to arise at trial. *See, e.g., Wooley v. Lucksinger*, 2009-0571 (La. 4/1/11), 61 So. 3d 507 (motion in limine filed one month prior to trial); *Furlough v. Union Pac. R.R. Co.*, 33,658 (La. App. 2 Cir. 8/31/00), 766 So. 2d 751, 757, *writ denied*, 2000-2929 (La. 1/12/01), 781 So. 2d 556 (motion in limine filed one day prior to the commencement of trial). *See also Kelly v. Patel*, No. 1:20-CV-01291, 2021 WL 2460560, at *2 (W.D. La. June 16, 2021) (finding the motion in limine premature

based on the posture of the case and the timing of the motion—four months prior to the discovery deadline).

The Receiver's brief itself confirms that his motion in limine is completely infeasible. He asks the Court simply to assume, without proof, that the facts weigh in favor of Louisiana law as the *lex causae* governing his claims against Buck. Receiver's brief, pp. 7-8. The Receiver may well be wrong on his facts. Buck vigorously and genuinely disputes them. It simply is not true that ". . . New York really has no pertinent contacts with or interest in this dispute." Receiver's brief, p. 8. Buck contends that the opposite is, in fact, true. As set forth below, New York has substantial connections to Buck's contract and professional work in this case and strong interests in application of its law as the *lex causae* relating to Buck. These factual issues must be vetted through depositions and other discovery that has not yet occurred. An advance in limine ruling on such disputed issues of fact and law is not possible at this stage.

And the Receiver's unsupported accusations against Buck are needlessly disputatious and fail to move the ball forward on choice of law issues. Buck, of course, vigorously denies and will disprove those accusations. The evidence does not even remotely support a claim of gross negligence against Buck – or simple negligence for that matter. Buck will establish at trial that its actuarial work met and exceeded all relevant professional standards of diligence and care. If it does so, this Court will never need to address or resolve any of the complex choice of law issues raised by the Receiver.

D. Local Rule 9.10(b)(1) list of material facts that are genuinely disputed

Nor is summary judgment an appropriate means for resolving these fact issues. Pursuant to Uniform Local Rule 9.10(b)(1), Buck submits the following list of material facts that are genuinely disputed and preclude summary judgment on the issue of the *lex causae* applicable to the Receiver's claims against Buck.

1. Buck vigorously disputes and denies the Receiver's purported material fact no. 3 – that "Louisiana's connection and relationship to the parties and this dispute predominate over New York's interest in this dispute." As shown below, New York has predominating interests and relationships to the parties and contract calling for application of its law as the *lex causae* between the Receiver and Buck. And because there can be no resolution of these fact issues at this stage, the Receiver's purported material fact nos. 1 and 2 are *not* material and cannot support summary judgment in his favor.

2. As shown by the Affidavit of Buck's principal actuary, Harvey Sobel, attached as Ex. A, LAHC reached out to Buck with the understanding that it would perform the contract from its offices –and *not* in Louisiana. Sobel Aff., Ex. A, ¶3. As Buck's work was centered in New York, the parties logically chose New York law to govern their relations. *Id.*, ¶5
3. The Buck actuaries lived in and performed the contract in New York or very close by – *not* in Louisiana. Ex. A, ¶6
4. Buck believed and expected that, because its work was centered in New York, LAHC reached out to Buck, and the engagement contract logically chose New York law, New York law would govern Buck's relations with and work for LAHC. Ex. A, ¶5. Buck had no expectation whatsoever that Louisiana law would govern its professional work and relations with LAHC.

The foregoing material facts point decisively to New York law as the *lex causae* applicable to the Receiver's claims against Buck. La. Civ. Code art. 3515 – the very first Conflict of Laws article in the book – makes "the policies of upholding the justified expectations of parties" an overarching factor in all choice of law determinations. Here, LAHC and Buck justifiably expected that New York law would govern their relations. Sobel Aff., Ex. A, ¶5; Buck engagement contract, Ex. 4 to Receiver's motion, ¶9 (choice of law provision). LAHC reached out to Buck with the expectation and understanding of all parties that Buck would perform the contract in New York or just across the river from it – *not* in Louisiana. Sobel Aff., Ex. A, ¶3. They therefore chose New York law to govern their relations. Ex. A, ¶5. New York has a strong interest in application of its law. *Banco Nacional De Mexico, S.A., Integrante Del Grupo Financiero Banamex v. Societe Generale*, 34 A.D.3d 124, 130, 820 N.Y.S.2d 588 (2006) ("State of New York has a strong interest ... in protecting the justifiable expectation of the parties who choose New York law as the governing law…."). New York law should therefore apply as the *lex causae* as between the Receiver and Buck.

La. Civ. Code art. 3537, in turn, makes the place of "performance of the contract" a crucial choice of law factor. The contracting parties understood and agreed going in that that place was New York, where Buck's actuarial work was centered. Sobel Aff., Ex. A, ¶¶3, 4. Article 3575 likewise makes "the place of domicile, habitual residence, or business of the parties" important factors. Here, Buck's actuarial professionals lived and worked in New York or very close by.

Sobel Aff., Ex. A, ¶6. And their business was headquartered, managed and directed in New York City. Sobel Aff., Ex. A, ¶4.

These factors also point decisively to New York law as the *lex causae* applicable to the Receiver's claims against Buck. New York has substantial interests in the application of its law – including the recent decision of its highest court – to a contractual relationship and professional work centered in New York, undertaken by actuarial professionals who were domiciled in and worked in New York or just across the river from New York City. *See, e.g.*, Restatement (Second) of Conflict of Laws § 188 (1971) cmt. E ("The state where performance is to occur under a contract has an obvious interest in the nature of the performance and in the party who is to perform."). The state where a contract is to be performed "bears the most significant relationship to the contract." *NTL Collegiate Student Loan Tr.-1, A Delaware Statutory Tr. v. Payne*, 2020-Ohio-3553, ¶ 14 (Ohio Ct. App. 2020) (citing S*chulke Radio Prods., Ltd. v. Midwestern Broadcasting Co.*, 6 Ohio St.3d 436 (1983)).

Further, Article 3537 makes "the policies of facilitating the orderly planning of transactions, [and of] promoting multistate commercial intercourse" equally important choice of law factors. Application of New York law in accordance with the justified expectations of the contracting parties will encourage both orderly planning of transactions and badly needed "multistate commercial intercourse" with Louisiana. By contrast, a parochial application of Louisiana law against the contracting parties' expectations would discourage national companies from doing business here.[5] So Louisiana also has an important interest in honoring the justified expectations of the parties that New York law would govern their relations.

There are, at minimum, numerous genuine issues of material fact surrounding the factors to be weighed in determining the *lex causae* as between the Receiver and Buck. Nothing in the Louisiana Insurance Code suggests that the Receiver gets any special treatment on choice of law issues. If LAHC subjected itself to New York law by contracting with Buck, the Receiver of

[5] The contract with Buck demonstrates the interest that Louisiana has in being able to secure the advice of out-of-state professionals. Indeed, it is no coincidence that LAHC sought actuaries from out of state, both when it contracted with Milliman, and when it contracted with Buck. The on-line Actuarial Directory (actuarialdirectory.org) shows there are exactly 28 actuaries who reside in Louisiana. Of these, eight are retired, five work for the State, one teaches at a university, two provide consulting services to retirement plans, two provide consulting services to property-casualty insurance companies, two provide consulting services to life insurance companies, and the remaining eight work for other insurance companies. The total number of actuaries in Louisiana available to provide services to LAHC relating to health insurance: zero.

LAHC is bound by that choice like every other contractual successor and litigant. These fact issues are most certainly *not* amenable to resolution by in limine motion or partial summary judgment.

E. Courts routinely deny summary judgment on choice of law issues, when, as here, they turn on genuinely disputed issues of fact.

Louisiana courts and other courts around the nation have not hesitated to deny summary judgment motions on choice of law issues when, as here, they turn on genuinely disputed fact issues. In *Wright v. Gotte*, 2008-174 (La. App. 3 Cir. 12/10/08), 1 So. 3d 700, 705, writ denied, 2009-0060 (La. 3/6/09), 3 So. 3d 489, for example, the court reversed a trial court's grant of summary judgment upon finding a genuine issue of material fact existed as to the choice of applicable law. The plaintiff asserted that because a Louisiana citizen was impacted by the accident, Louisiana law should be applied to the interpretation of the Georgia policy to determine the existence of coverage. *Id*. Emphasizing that "the question of her [the insured's] domicile is significant in the determination of which state's law applies," the Third Circuit found a genuine issue of material fact precluded summary judgment on the issue. *Id*. *See also Ark-La-Tex Timber Co. v. Georgia Cas. & Sur. Co.*, 516 So. 2d 1217, 1222 (La. App. 2d Cir. 1987) (reversing trial court's grant of summary judgment upon finding "the question of choice of law regarding the duty to defend and the attendant interpretation of the insurance policy presents a genuine issue of material fact and prevents a determination that plaintiff is entitled to partial summary judgment as a matter of law").

Similarly, the Louisiana Third Circuit concluded that summary judgment as to whether Texas or Louisiana law applied to a particular insurance contract was premature because discovery was still needed on issues surrounding the negotiation and issuance of the policies. *In re EDC Contractor Ins. Litig.*, 2005-1064 (La. App. 3 Cir. 5/24/06), 931 So. 2d 462, 467, writ denied, 2006-1612 (La. 9/29/06), 937 So. 2d 871.

Courts across the nation likewise routinely deny summary judgment on choice of law issues that turn on genuinely disputed issues of fact that must be resolved at trial. *See, e.g., Atlas Intermodal Trucking Serv., Inc. v. United Fire & Cas. Co.*, 973 S.W.2d 174, 178 (Mo. Ct. App. 1998) (reversing grant of summary judgment in favor of plaintiff upon finding a genuine issue of material fact regarding where the work at issue was performed and stating "[t]his is a not a case where the result would be the same regardless of the choice of law"); *Surovy v. Peterson*, No. DBDCV196031147S, 2020 WL 6121715, at *13 (Conn. Super. Ct. Sept. 17, 2020) ("[T]here is a genuine issue of material facts as to the choice of law, and it is clear that summary judgment is not

appropriate . . . ."); *Rosenzweig v. Glen's Truck Serv., Inc.*, 136 A.D.2d 689, 689, 524 N.Y.S.2d 105, 106 (2d Dep't 1988) (holding genuine issue of material fact as to whether decedent was domiciled in New York or Illinois created a "sharp factual dispute" precluding summary judgment on the choice of law issue); *Lindberg Corp. v. Pneumo Abex Corp.*, No. 960403B, 1998 WL 1183957, at *1 (Mass. Super. Dec. 16, 1998) (denying motion for summary judgment based on a choice of law analysis upon determining there was a factual question under the law of both New York and Massachusetts with respect to the effect of insurer's late notice); *Diesel Injection Serv. v. Jacobs Vehicle Equip.*, No. CV 980582400S, 1999 WL 395341, at *5 (Conn. Super. Ct. June 1, 1999) (denying motion for summary judgment upon finding genuine issue of material fact as to the intended effect of a choice of law provision); *Alfano v. AAIM Mgmt. Ass'n*, 770 S.W.2d 743, 747 (Mo. Ct. App. 1989) ("Because there are genuine issues as to material facts required to resolve the choice of law question in the contract claim, the trial court erred in finding Missouri law applies and rendering summary judgment . . . ."); *Lumbermens Mut. Cas. Co. v. Bebsz*, 2003-Ohio-7072, 2003 WL 23010068, at *4-5 (Ohio Ct. App. 2003) (holding genuine issue of material fact as to choice of law rendered summary judgment inappropriate). *See also Alfano v. AAIM Mgmt. Ass'n*, 770 S.W.2d 743, 747 (Mo. Ct. App. 1989) (reversing summary judgment upon finding genuine issues of material fact remained as to where contract negotiations occurred, where the contract was entered into, and where the contract was to be performed).

F. Because the *lex causae* cannot be determined at this stage, the Receiver's motion must be denied.

As shown above, numerous genuinely disputed fact issues make it is impossible to determine on the record before the Court which state's law would apply to the Receiver's claims against Buck in the absence of a contractual choice of law. Therefore, it is not possible to determine whether enforcement of the recovery limitations in Buck's contract against claims of gross negligence would offend that law. Those factual issues must await trial on the merits. *See generally Smith v. Brown*, 2011-1749 (La. App. 1 Cir. 8/15/12), 97 So. 3d 1186, 1189–90, *writ denied*, 2012-2015 (La. 11/16/12), 102 So. 3d 39 ("Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of trial on the merits."). But, in any event, unless the Receiver can prove up his gross negligence claims against Buck at trial (an unlikely prospect, considering that the Louisiana Department of Insurance's third-party contracted actuarial consultant has already opined that Buck's work was reasonable, based on 17

different criteria), the Court will never have to adjudicate these disputed choice of law issues. So the Receiver's motion is premature at this stage and should be denied.

III. CONCLUSION

As shown above, the Court should not and cannot feasibly delve into complex and genuinely disputed factual issues of choice of law that may never present themselves to the Court. The Receiver's pointless motion should be denied.

Respectfully submitted,

/s/ James A. Brown
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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 29th day of July, 2021.

/s/ James A. Brown