COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

NO. _____ - CW - _____

JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, in his capacity as Rehabilitator of Louisiana Health Cooperative, Inc.,

Plaintiff-Respondent

VERSUS

CGI TECHNOLOGIES AND SOLUTIONS INC.,

Defendant-Applicant

ON APPLICATION FOR WRIT OF SUPERVISORY REVIEW OF THE JUDGMENT OF THE NINETEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA
SUIT NUMBER 651,069 - SECTION "22"
HONORABLE TIMOTHY E. KELLEY

A CIVIL PROCEEDING

ORIGINAL APPLICATION FOR WRIT OF SUPERVISORY REVIEW

ON BEHALF OF

CGI TECHNOLOGIES AND SOLUTIONS INC.

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MASTER INDEX **Pages**

TABLE OF CONTENTS – BRIEF IN SUPPORT OF APPLICATION

Page

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

I. STATEMENT OF JURISDICTION

Jurisdiction is vested in this Court pursuant to Article V, Section 10 of the Louisiana Constitution of 1974 and Article 2201 of the Louisiana Code of Civil Procedure, which authorize this Court to review an interlocutory judgment of a lower court and grant supervisory writs. In turn, a Court of Appeal may exercise supervisory jurisdiction if an error by the trial court has caused the applicant an injury that, in the interest of judicial efficiency and fundamental fairness, should be remedied immediately. *See, e.g., Herlitz Const. Co. v. Hotel Inv'rs of New Iberia, Inc.*, 396 So. 2d 878 (La. 1981); *Brown v. Sander*s, 2006-1171 (La. Ct. App. 1st 3/23/07), 960 So. 2d 931, 933; LA. CODE CIV. PROC. art. 2083, cmt. (c).

The error that is the subject of the instant writ application arose out of a hearing held on August 25, 2017. The Court subsequently issued a written judgment on September 19, 2017. On October 6, 2017, the Applicant herein (CGI Technologies and Solutions Inc.) submitted a notice of intention to apply for supervisory writs. On October 10, 2017, the Court signed an order mandating that CGI Technologies and Solutions Inc. file its application for supervisory writs no later than October 24, 2017. This writ application is therefore timely in accord with both the trial court's order and Louisiana Courts of Appeal Uniform Rule 4-3.

II. STATEMENT OF THE CASE

The issue before the Court is the enforcement of a straightforward and binding settlement agreement. The trial court has declined to rule upon the settlement agreement's validity, forcing CGI Technologies and Solutions Inc. ("CGI") to litigate a claim that it paid hundreds of thousands of dollars to compromise. So that CGI's settlement agreement is not nullified entirely, this Court should immediately intervene.

On February 15, 2013, CGI executed a third-party-administration agreement with a nascent Louisiana insurer, the Louisiana Health Cooperative, Inc.

("LAHC"). That relationship quickly became strained, however, with both parties wishing to terminate the partnership. To resolve their differences permanently and amicably, CGI and LAHC agreed to a mutual release of all claims against each other in June 2014.

Fifteen months later, LAHC became insolvent and was placed under the control of a court-appointed Receiver. On August 31, 2016, the Receiver filed a lawsuit against numerous individuals and entities previously associated with LAHC, including CGI. According to the Receiver, CGI had been negligent as a third-party administrator and had breached its 2013 administration contract in multiple ways.

Several months after the Receiver filed suit, CGI filed a motion for summary judgment, pointing out that LAHC had already settled all of its claims against CGI. The trial court subsequently entered an order limiting discovery concerning CGI to the "specific issues involved in the Motion for Summary Judgment." Over the next four months, however, the Receiver elected to conduct no discovery whatsoever. To CGI's surprise, the trial court then *rewarded* the Receiver for his inaction. At an August 25, 2017, hearing, though a year had passed since the Receiver filed his suit, the Court denied CGI's motion "to allow for sufficient discovery to take place to flesh out the issues." Writ Attachment 7 at R-218 (Transcript).

The trial court committed legal error and abused its discretion when it denied CGI's summary judgment motion. Twelve months is more than sufficient time to determine whether a plaintiff's claims are within the scope of an unambiguous written release. As there was no evidentiary basis for the Court to deny CGI's motion, and because the prejudice to CGI is great, this Court should grant the instant writ application.

III. ISSUE PRESENTED FOR REVIEW

(1) Whether CGI is entitled to judgment as a matter of law on the basis of a settlement agreement releasing the very claims now asserted by the Receiver.

IV. SPECIFICATION OF ERROR

(1) The trial court erred in determining that CGI was not entitled to summary judgment despite proof of a settlement agreement, the passage of twelve months since the filing of suit, and no efforts by the Receiver to conduct any discovery.

V. STATEMENT OF FACTS

A. Relevant Factual Background

In 2011, LAHC was formed as an experimental insurance "CO-OP" pursuant to the federal Patient Protection and Affordable Care Act ("ACA"). After securing approximately $65 million in federal loans, LAHC commenced the business preparations necessary for it to provide health insurance beginning on January 1, 2014. On February 15, 2013, LAHC executed a third-party-administration agreement ("the Original Agreement") with CGI. *See* Writ Attachment 4 at R-69 (MSJ Exhibits). According to the terms of the Original Agreement, CGI was to provide policy administration services to LAHC from January 2014 to December 2016. *See id*. at R-74.

On January 1, 2014, LAHC's first insurance policies became active, and CGI assumed its corresponding administrative obligations. Not even three months later, LAHC became dissatisfied and indicated that it wished to replace CGI.[1] On April 17, 2014, LAHC notified CGI of "the immediate revocation" of its primary

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[1] *See* Writ Attachment 3 at R-19, R-23 (Receiver's Petition ¶¶ 34, 45) ("By approximately March 2014, just three (3) months after its ill-advised roll-out, the D&O Defendants compounded an already bad situation by deciding to replace CGI with GRI as [third-party administrator].").

administrative responsibilities, including CGI's claims-processing, premium-billing, and customer-support duties.[2] By June 19, 2014, LAHC and CGI had agreed to part ways and sever all ties. In a compromise agreement signed that day ("the Release"), CGI and LAHC formally terminated the Original Agreement, effective April 30, 2014. *See id*. at R-123 (Release). The two parties further agreed that CGI would only provide limited transitional or "wind-down" services through the end of June 2014. *Id*. at R-123, R-125.[3] As of July 1, 2014, CGI ceased all third-party administrator functions for LAHC.[4]

A significant part of the Release agreement was, of course, its release-of-claims provision. Given the Original Agreement's early termination, both LAHC and CGI wished to be relieved of any potential liability to the other party. The Release consequently contained the following provision:

> Except for obligations assumed herein, **LAHC and CGI hereby release each other**, and their respective directors, officers, agents, employees, representatives, insurers, parents and subsidiaries, **from any and all claims that either may have against the other arising out of or relating to the Original Agreement**.

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[2] *See* Writ Attachment 5 at R-169 (Receiver's MSJ Exhibits) ("LAHC hereby notifies CGI of the immediate revocation of the following Delegated Functions: (1) Claims Processing, (2) Printing and Fulfillment (New Member Kits and Materials), (3) Premium Billing (on Exchange), and (4) Member/Provider Support Services.").

[3] The Release provides, "For the convenience of LAHC, the Original Agreement shall terminate on April 30, 2014. CGI shall continue to perform the Delegated Functions through April 30, 2014, to be followed by a six month wind-down period as specified in Section 2.5 of the Original Agreement. For the six month wind-down period, CGI shall provide such wind-down services as the parties may agree in a wind-down plan, all in accordance with Sections 2.5 and 2.5.1 of the Original Agreement. . . . The general scope and structure of the wind down period is as specified in Attachment 1 to this Letter Agreement."). Writ Attachment 4 at R-123 (MSJ Exhibits).

[4] The Release specified that, beyond June 30, 2014, CGI's only obligation was to provide document printing services and access to an identified software program. Writ Attachment 4 at R-123, R-99, R-100 (MSJ Exhibits). Any other third-party administrator services would be provided only if LAHC submitted a written request and CGI's estimate was acceptable. *Id*. at R-126. LAHC never submitted any such requests, however, and CGI thus ceased serving as third-party administrator on June 30. *Id*. at R-67 (MSJ Exhibits).

Writ Attachment 4 at R-124 (MSJ Exhibits) (bold added). Also included in the Release was CGI's waiver of approximately $399,000.00 in "deferred implementation fees" due to CGI from LAHC. *See id*. at R-123, R-98.

On June 30, 2014, ten days after the Release was executed, CGI completed its few remaining wind-down obligations. LAHC subsequently operated for another fourteen months, during which CGI provided no claims-administration or processing services to LAHC. Then, in July 2015, LAHC announced that it was discontinuing all insurance coverage at the end of the year. In September 2015, LAHC, like nearly all other such "CO-OP's" created under the Affordable Care Act,[5] was declared a failing insurance company.

On September 1, 2015, LAHC was placed under the control of a receiver ("the Receiver") appointed by the Louisiana Department of Insurance. A year later, the Receiver filed a consolidated lawsuit on LAHC's behalf against every person or entity with whom LAHC had ever had any relationship. The Receiver more specifically claimed that LAHC's failure was the fault of its officers, its directors, its consultants, its actuaries, and its third-party administrator. The Receiver also sued CGI, alleging that during CGI's brief stint as third-party administrator, it had breached the Original Agreement in various ways.[6] Absent from the Receiver's

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[5] To give the proper context to the Receiver's lawsuit, it should be noted that, of 23 CO-OPs created at the prompting of the ACA, at least 18 have failed (so far). Much of the blame for the notoriously-unsuccessful CO-OP model has been placed on the ACA itself, which attempted to simultaneously limit insurance rates, spread risk between CO-OPs, and promise reimbursement to CO-OPs afflicted with high expenses. However, artificially-limited premiums, unexpected "risk-adjustment" bills from the CO-OP program, and undelivered federal payments have combined to effectively destroy most CO-OPs. *See, e.g.*, "*Obamacare's Co-Op Disaster: Only 7 Remain*," FORBES MAGAZINE, July 25, 2016, accessed at https://www.forbes.com/sites/sallypipes/2016/07/25/obamacares-co-op-disaster-an-unfunny-comedy-of-errors/#71abdcab5d5b; "*Two more Obamacare health insurance plans collapse*," THE WASHINGTON POST, October 16, 2015, accessed at https://www.washingtonpost.com/national/health-science/two-more-obamacare-health-insurance-plans-collapse/2015/10/16/cc324fd0-7449-11e5-8d93-0af317ed58c9_story.html?utm_term=.319c1183a7e7.

[6] *See* Writ Attachment 3 at R-22 – R-23 (Receiver's Petition, ¶¶ 41-44) ("LAHC and CGI entered into an Administrative Services Agreement ('Agreement') whereby CGI agreed to

lawsuit was any reference to the Release or the fact that LAHC had already compromised its claims against CGI.

B. CGI's Motion for Summary Judgment and the Receiver's Opposition

In April 2017, approximately eight months after the Receiver filed suit, CGI filed a motion for summary judgment. The basis of CGI's motion was simple: the Receiver was, on LAHC's behalf, asserting the very claims that CGI and LAHC had already settled in the Release.[7] To support its motion, CGI naturally submitted the Release as its primary exhibit. Writ Attachment 4 at R-123. Among other documents, CGI also submitted the affidavit of CGI representative and account executive Daniel Neice, who confirmed: (a) that the Release document was valid and authentic, and (b) that "CGI provided no third-party administration or claims-management services beyond June 30, 2014." Writ Attachment 4 at R-67.[8] In reliance on this evidence, CGI sought dismissal of all claims asserted by the Receiver.

Shortly after CGI filed its summary judgment motion, the trial court held a status conference with all parties. *See* Writ Attachment 2 at R-6 (April 26, 2017, Order). So as to give the Receiver sufficient time to respond to CGI's motion, the trial court set a date four months away—August 25—for the summary judgment hearing. *See id*. at R-7. The court additionally restricted any further discovery during that period to the issues raised in CGI's motion:

> IT IS FURTHER ORDERED that general discovery regarding the merits of this litigation is stayed absent further order of this Court; any

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perform certain administrative and management services . . . . CGI breached its obligations and warranties set forth in the Agreement in a grossly negligent manner.").

[7] E-mail correspondence confirms that the Receiver has been aware of the Release since at least January 2017, several months before CGI filed its motion for summary judgment.

[8] To ensure the completeness of the record, CGI also submitted the Original Agreement between CGI and LAHC (*see* R-69) and the judicial order charging the Receiver with the management of LAHC's affairs (*see* R-127).

> discovery prior to September 25, 2017, is limited to specific issues involved in the Motion for Summary Judgment filed by CGI [and] any exception of prescription set for hearing on August 25, 2017.

Id.

Over the next four months, the Receiver did nothing. He did not request a single document from CGI; he did not send any written discovery requests to CGI; he did not attempt to conduct any third-party discovery concerning CGI; and he did not take or notice any depositions. Indeed, the Receiver did not even informally request information from CGI. He certainly did not file a motion to compel, he did not amend his petition, and, importantly, he did not request any extension or continuance of the upcoming summary judgment hearing.

Fifteen days before the summary judgment hearing, the Receiver circulated his opposition, which offered four arguments:

1. *The Release submitted by CGI might have been forged* – the Receiver's first and foremost argument was that the Release might be a forgery. The Receiver's only evidence was his own opinion that the signature of LAHC's CEO on the Release did not match other signatures of LAHC's CEO. Significantly, however, the Receiver also attached LAHC's separately-executed counterpart of the same Release, which was identical. *See* Writ Attachment 5 at R-157 (Receiver's MSJ Exhibits – LAHC's execution copy of Release).

2. *CGI's motion was premature* – the Receiver argued that it was too soon to consider CGI's motion, because "[m]ultiple questions exist as to the circumstances surrounding the execution of the [Release], as well as whether [LAHC's signatory] (assuming he did, in fact, sign the document) was authorized to bind LAHC."

3. *CGI may have breached its obligations under the Release* – Citing the wind-down obligations of CGI in the Release, the Receiver argued that CGI could be liable for misconduct occurring after the Release was signed. The Receiver's only evidence was his own conclusory affidavit, which alleged that "CGI continued to provide grossly negligent services to LAHC." The Receiver's affidavit non-specifically alleged things like, "[CGI] failed to accurately process and pay claims on LAHC's behalf in a timely manner at the correct rates and amounts" and "CGI failed to ensure that its personnel who performed services for LAHC were adequately and appropriately trained."

4. *The Receiver can unilaterally void the Release* – failing his other arguments, the Receiver made one, final argument: if he does not like the Release (entered fifteen months before LAHC was placed in receivership), he can simply void it.

See Writ Attachment 5 at R-140 (Receiver's Opposition to MSJ).

C. The Trial Court Disposition

On August 25, 2017—almost a full year after the Receiver filed his lawsuit—the trial court held a hearing to decide whether the Receiver's claims had, in fact, already been settled.

As an initial matter, the trial court overruled the Receiver's challenge to the Release's authenticity. *See* Writ Attachment 7 at R-192 (Transcript). The court then recognized that the Receiver's petition only complained of misconduct occurring prior to the Release being signed. *See id*. at R-211 ("**Court:** [H]ere is the problem. Your Paragraph 11(A) in your amended petition sets forth a time period over which you are complaining, and it goes until March of 2014, which is a couple months ahead, three months before this amendment and Release."). Amid the arguments of both parties, the Court then challenged the Receiver's contention that CGI's motion was "premature":

> **Court:** You suggest insufficient discovery has had an opportunity to take place, but how would discovery in any way change that [Release], the terms of that amendment and its effectiveness? I mean, what could change that would get rid of that mutual release through discovery?
>
> . . . .
>
> **Court:** Mr. Cullens, here is my concern, okay. This summary judgment was filed April 13. Today is August 25, all right.
>
> **Counsel:** Correct.
>
> **Court:** Four months ago, almost four-and-a-half months ago. During that time, you knew that this was the issue. How could you have not, A, filed the second amended [petition] if you agreed with them, or, B, conduct the discovery you needed, because right now in front of me, I have a document that has been authenticated that releases each other from the Original Agreement, actions on the Original

> Agreement. That is troublesome, right? I know it is a big case, and I know you had another huge matter that took up a great deal of your time on a case in Texas. No doubt, I am not unsympathetic to allocation of time that attorneys have to make choices for with regard – this is not your only case, I do understand that, but this is a long time.

Writ Attachment 7 at R-200, R-209 – R-210 (Transcript). The Receiver's response to the Court's questioning was unhelpful, to say the least:

> **Counsel:** And I am not even going there, Your Honor. I believe the specific factual procedural status of this case dictated that the kind of discovery that we need to flesh this out was not opportune. These exceptions and summary judgments were filed, I believe March/April. We had a hearing divvying up in May, no one's problem. That was continued until today. Your Honor issued an order staying all discovery with the exception of that related to the pending exception, summary judgment. There has been no production of documents other than insurance policies . . . .

Id. at R-210.

Notwithstanding the trial court's observations, it nonetheless found that CGI's motion should be denied. Although the Receiver had not submitted competent summary judgment evidence, the court lamented that it just would not be "fair" to dismiss the Receiver's claims:

> **Court**: Here is the problem in my head from an administration-of-justice-to-all-parties issue. What is the effect of my granting their summary judgment and dismissing them? It would be with prejudice, and then you could not amend to bring them back in on claims you might have under the letter agreement, right? That is not fair. *If I deny the summary judgment, it is contrary to the evidence before me based upon the pleadings and the evidence I have, right?* So, I think your only escape here, and I think you are actually – sorry, Skip, but I think he is right, that I think that there is just insufficient discovery here in the interest of justice.

Id. at R-202 – R-203 (emphasis added). The Court ultimately concluded:

> **Court:** Unfortunately in this, there are so many different issues, and, yes, I said "do discovery on the summary judgment," but I think what I am going to do at this point is I am going to deny the summary judgment without prejudice to allow for sufficient discovery to take place to flesh out the issues that we have talked about that are in question.

Id. at R-217 – R-218.

CGI now seeks immediate review of the trial court's denial of summary judgment.

VI. SUMMARY OF THE ARGUMENT

The trial court erred by refusing to enforce the Release and dismiss CGI from an already-settled lawsuit. That error is contrary to established law and greatly prejudices CGI, and this Court should therefore exercise its supervisory jurisdiction and immediately reverse.

As a threshold matter, this case is a quintessential example of when an appellate court should exercise its supervisory authority. For fourteen months now, CGI has been trapped in an $82 million lawsuit that paid to settle years ago. Despite the Receiver's inexplicable failure to conduct discovery, the trial court has refused to dismiss CGI, in order "for sufficient discovery to take place." Absent some justification for delay, however, a trial court cannot deny an otherwise-proper motion for summary judgment. Code of Civil Procedure article 967 also mandates that any party opposing summary judgment as premature substantiate that position in the form of an "article-967" affidavit. In this case, the Receiver has provided neither a reason for delay nor an affidavit to support such a contention.

Progressing to the merits of CGI's underlying motion, there can be no reasonable dispute that CGI is entitled to summary judgment. CGI has submitted proof of an agreement in which it settled the very same claims now asserted by the Receiver. The Receiver cannot disavow this settlement agreement, as it was consummated well beyond the statutory timeframe within which the Receiver can unilaterally void LAHC's contracts. CGI is thus entitled to immediate summary judgment dismissing the Receiver's claims as compromised.

VII. ARGUMENT

As set forth below, supervisory intervention is appropriate in this matter due to the unfairness of forcing CGI to continue to litigate. Moreover, this Court should further find CGI's summary judgment to be well-founded and dismiss the Receiver's claims. Each of these issues is addressed separately below.

A. This Court Should Exercise its Supervisory Jurisdiction in This Matter.

1. The circumstances of this case justify the Court's immediate intervention.

While action on a supervisory writ is discretionary, this Court has previously recognized the propriety of intervention when a dispositive exception or motion is wrongly denied. In particular,

> [T]he appellate court appropriately exercises its supervisory jurisdiction when the trial court's ruling is arguably incorrect, a reversal will terminate the litigation, and there is no dispute of fact to be resolved. In such instances, judicial efficiency and fundamental fairness to the litigants dictate that the merits of the application for supervisory writs should be decided, in an attempt to avoid the waste of time and expense of a possibly useless future trial on the merits. This supervisory jurisdiction may also be exercised to reverse a trial court's denial of a motion for summary judgment, and to enter summary judgment in favor of the mover.

Charlet v. Legislature of State of La., 97-0212 (La. Ct. App. 1st 6/29/98), 713 So. 2d 1199, 1202 (quoting *Herlitz Const. Co., Inc. v. Hotel Investors of New Iberia, Inc*., 396 So.2d 878 (La.1981)).

In the instant matter, judicial efficiency and fundamental fairness unequivocally dictate that CGI's writ application be granted. The Receiver has sued CGI and alleged its joint liability for "more than $82 million" in damages. Writ Attachment 3 at R-15 – R-16 (Receiver's Petition ¶ 22). Since the Receiver's lawsuit was filed fourteen months ago, CGI has incurred tens of thousands of dollars in attorneys' fees. Most troublingly, CGI has faced this litigation burden and these expenses *in spite of* the settlement it bound itself to in 2014. Though CGI

gave up its claims against LAHC, and though CGI waived its entitlement to $399,000 in already-earned fees, CGI is now facing the very litigation it paid to avoid.

2. A trial court cannot deny summary judgment based on the unsupported assertion that more time is necessary to complete discovery.

It bears emphasizing that CGI's summary judgment motion is governed by Code of Civil Procedure article 966. In turn, the mandate of that article is clear: "After an opportunity for adequate discovery, a motion for summary judgment *shall* be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact." *Id*. at (A)(3) (emphasis added). In this case, the denial of CGI's motion rested on the bald assertion that more time was needed to conduct "adequate discovery." This Court, however, has categorically rejected such unsupported claims. Indeed, this Court has specifically held that a party cannot escape summary judgment by simply claiming that more time is needed to conduct discovery:

> The requirement that a summary judgment should be considered only after "adequate discovery" has been construed to mean that there is no absolute right to delay action on a summary judgment motion until discovery is complete; rather, the requirement is only that parties have a fair opportunity to carry out discovery and to present their claim. Unless plaintiff shows a probable injustice a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of fact. . . . *The mere contention of an opponent that he lacks sufficient information to defend a motion for summary judgment because of movant's failure to comply with discovery is insufficient to defeat the motion*.

Welch v. E. Baton Rouge Par. Metro. Council, 2010-1532 (La. Ct. App. 1st 3/25/11), 64 So. 3d 249, 254 (emphasis added); *Vanderbrook v. Coachmen Indus., Inc*., 2001-0809 (La. Ct. App. 1st 5/10/02), 818 So. 2d 906, 911 ("The mere claim by an opponent to a motion for summary judgment that he does not have in his possession the facts and information necessary to counter such a motion will not defeat a summary judgment motion.").

Importantly, this is not a case in which the moving party failed to cooperate in discovery; the Receiver did not even attempt to conduct discovery. Although the Receiver had twelve months to conduct discovery—four of which were specifically reserved for discovery related to CGI's motion—he chose not to do anything. To defend the Receiver's inaction, his counsel offered only a cryptic answer: "the kind of discovery that we need to flesh this out was not opportune." Writ Attachment 7 at R-210 (Transcript). That, however, is not a valid basis for denying summary judgment.

A close comparison to this case can be found in a recent decision of the Louisiana Third Circuit, *Arceneaux v. Lafayette General Medical Center*, 17-516 (La. Ct. App. 3d 7/26/2017), ____ So. 3d. _____ (publication forthcoming) (accessed at http://www.la3circuit.org/Opinions/2017/07/072617/17-0516opi.pdf). In *Arceneaux*, the defendant filed a motion for summary judgment approximately seven months after the plaintiff filed her lawsuit. *Id*. at 2. The trial court subsequently gave the plaintiff four months to conduct the necessary discovery. *Id*. During that time, however, the plaintiff failed to obtain the particular expert testimony necessary to oppose the defendant's motion. At the ensuing summary judgment hearing, the court recognized that the plaintiff had failed to submit essential evidence. *Id*. at 3. Nonetheless, the court gave the plaintiff ninety additional days to retain an expert. *Id*. Considering the defendant's subsequent writ application, the appellate court reversed and rendered summary judgment. The court explained, "it is not in the discretion of the court to grant a continuance of a case, except when a party applies for it, and alleges sufficient cause to justify the same." *Id*. at 6. Where a plaintiff has not sought or established a justification for a continuance, the *Arceneaux* court held, the trial court cannot deny summary judgment so as to permit additional discovery. *Id*. at 10 (citing LA. CODE CIV. PROC. art. 966).

3. A party opposing summary judgment on the basis of inadequate discovery must support that assertion with an appropriate "article-967 affidavit."

Not only is the trial court's prematurity finding unfounded, but is also not supported in the manner required by statute. Under Code of Civil Procedure article 967(C), the court may only continue a summary judgment hearing to permit additional discovery "[*i]f it appears from the affidavits of a party* opposing the motion that for reasons stated he cannot present by affidavit facts essential to justify his opposition."

Even in this context, the requirement of affidavit testimony should not be surprising. It is a basic principle of summary judgment that the trial court is required to grant or deny summary judgment based only on the summary judgment evidence in the record. *See* LA. CODE CIV. PROC. art 966(D)(2) ("The court may consider only those documents filed in support of or in opposition to the motion for summary judgment."). Thus, a party opposing summary judgment on the basis of inadequate discovery must submit an appropriate affidavit setting forth the facts relevant to that defense. *See Dardar v. Bridgestone/Firestone, Inc.*, 2003-1462 (La. Ct. App. 1st 5/14/04), 879 So. 2d 735, 736 ("Louisiana Code of Civil Procedure art. 967 C provides that a party may oppose a motion for summary judgment by filing an affidavit asserting that 'for reasons stated he cannot present by affidavit facts essential to justify his opposition.' Plaintiff here failed to file such an affidavit."); *Hoover v. Hoover*, 1999-3055 (La. Ct. App. 1st 6/22/01), 798 So. 2d 165, 169[9] ("Anne did not file an affidavit stating that she could not present by

[9] *Hoover v. Hoover* was reversed on other grounds by 2001-2200 (La. 4/3/02), 813 So. 2d 329.

affidavit facts essential to justify her opposition to summary judgment as provided in LSA–C.C.P. art. 967.").[10]

As the Receiver failed to offer an Article-967 affidavit concerning the need for further discovery, it was legal error for the trial court to deny summary judgment on those grounds.

B. CGI and LAHC Agreed to a Compromise in the Release, and CGI is Accordingly Entitled to Judgment Dismissing the Receiver's Claims.

Turning to the merits of CGI's motion, it is indisputable that CGI and LAHC compromised the claims now asserted by the Receiver. Upon consideration of the evidence, this Court should accordingly grant summary judgment in favor of CGI.

1. The Release is a settlement and compromise of the very claims now brought by the Receiver.

In the instant case, it is undisputed that CGI agreed to serve as LAHC's third-party administrator from 2014 to 2016. It is also undisputed that, only three months into CGI's tenure, LAHC sought to terminate CGI's contract. So that they could simply part ways, CGI and LAHC executed the Release. Once again, the relevant language from that Release is as follows:

> Except for obligations assumed herein, LAHC and CGI hereby release each other, and their respective directors, officers, agents, employees, representatives, insurers, parents and subsidiaries, from any and all claims that either may have against the other arising out of or relating to the Original Agreement.

Writ Attachment 4 at R-124 (MSJ Exhibits). Importantly, the Release recognizes that CGI's obligations under the Original Agreement ceased as of April 30, 2014.

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[10] *See also McCastle-Getwood v. Prof'l Cleaning Control*, 2014-0993 (La. Ct. App. 1st 1/29/15), 170 So. 3d 218, 222–23 ("La. C.C.P. art. 967(C) provides that if it appears from *the affidavits of a party opposing the motion for summary judgment* that for reasons stated he cannot present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment, order a continuance or permit affidavits to be obtained.") (emphasis in original); *Vanderbrook v. Coachmen Indus., Inc.*, 2001-0809 (La. Ct. App. 1st 5/10/02), 818 So. 2d 906, 911 ("[The defendant] failed to file an affidavit showing facts essential to justify its opposition or why it could not justify its opposition as required pursuant to LSA–C.C.P. art. 967.").

Id. at R-123. Moreover, the Parties executed the Release on June 19, 2014, only days before CGI ceased even the few remaining obligations it had assumed in the Release.

Two years later, the Receiver filed its lawsuit against CGI, asserting the authority to "pursue all legal remedies available to LAHC." Writ Attachment 3 at R-11 (Petition ¶ 8). The basis of the Receiver's claims against CGI was clear: "From approximately March 2013 to approximately May 2014, CGI served as the Third Party Administrator of LAHC." *Id*. at R-12 (Petition ¶ 11(a)). Attached as Exhibit 1 to the Receiver's petition was the Original Agreement between CGI and LAHC. *Id*. at R-22 (Petition ¶ 41). CGI was liable, the petition exclusively alleged, because "CGI breached its obligations and warranties set forth in the [Original] Agreement in a grossly negligent manner." *Id*. at R-22 – R-23 (Petition ¶ 44).

To be clear, the agreement attached to the Receiver's petition is the very same agreement referenced in the Release. Writ Attachment 4 at R-69 (MSJ Exhibits). Having so released CGI, LAHC's claims related to the Original Agreement were thereby extinguished:

> A release of a claim, when given in exchange for consideration, is a compromise. A compromise is a contract whereby the parties, through concessions made by one or more of them, settle a dispute or an uncertainty concerning an obligation or other legal relationship. A compromise precludes the parties from bringing a subsequent action based upon the matter that was compromised.

Garrison v. James Const. Grp., LLC, 2014-0761 (La. Ct. App. 1st 5/6/15), 174 So. 3d 15, 18. Importantly, "[c]ompromise agreements between parties to avoid litigation are favored by law, and courts will not declare a settlement void without a clear showing that it violates good morals or public interest." *Walton v. Walton*, 597 So. 2d 479, 484 (La. Ct. App. 1st 1992).

As the Receiver's claims against CGI have already been compromised, CGI is entitled to the immediate enforcement of the compromise and the dismissal of

the Receiver's claims. *See e.g., Smith v. Isle of Capri Casino & Hotel*, 2010-0161 (La. Ct. App. 1st 9/10/10), 47 So. 3d 642, 647 ("The claim for which plaintiff now seeks recovery clearly falls under this language of the compromise agreement.").

2. The Receiver is bound to, and cannot disavow, the Release between CGI and LAHC.

The Receiver's only substantive challenge to the Release was the suggestion that, as a court-appointed receiver, he has unlimited authority to disavow the Release. In making this argument, however, the Receiver vastly overstates his powers.

Because receivership is a statutory creation, it is the receivership statute that outlines the authority of the Receiver. *See* La. R.S. § 22:2001 *et seq*. That statute states, in relevant part:

> The [Receiver as] rehabilitator, in addition to other powers, shall have the following powers:
>
> (1) To avoid fraudulent transfers.
> . . . .
> (4) To enter into such agreements or contracts as necessary to carry out the full or partial plan for rehabilitation or the order to liquidate and to affirm or disavow any contracts to which the insurer is a party.

La. R.S. § 22:2009.

In his summary judgment opposition, the Receiver asserted that his contract-disavowal authority (subsection 4) is not just prospective, but retrospective. The Receiver argued that he could thus "unwind" any contract ever entered by LAHC, regardless of how long ago the contract was completed.

The Receiver's position is neither reasonable nor supported by the receivership statute. A receiver's authority to "affirm or disavow any contracts" relates, as those terms suggest, to *incomplete* or executory contracts.[11] While a

[11] *See Weber v. Press of H. N. Cornay, Inc.*, 144 So. 2d 581, 588 (La. Ct. App. 4th 1962)

receiver can unwind some already-completed contracts or transfers, his ability to do so is severely limited by the receivership statute. In particular, a receiver can only undo arms-length business transactions or transfers of property occurring in the four months preceding the receivership petition. *See* La. R.S. § 22:2020(B). Even fraudulent "obligations" or "transfers" are not subject to recall unless the transaction occurred within one year preceding the receivership petition. *See* La. R.S. § 22:2021.

In the present case, the Commissioner of Insurance filed LAHC's receivership petition on September 1, 2015. Writ Attachment 4 at R-127 (MSJ Exhibits). Any transactions occurring prior to September 2014, are thus completely beyond the Receiver's power to unwind. Because CGI and LAHC completed the relevant transaction—the execution of the Release—on June 19, 2014, it is simply not subject to a receivership challenge.

VIII. CONCLUSION

For the reasons set forth above, CGI requests that the Court GRANT this writ application, REVERSE the judgment of the trial court, and RENDER judgment in favor of CGI, dismissing the Receiver's claims with prejudice.

Respectfully submitted,

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("[A] receiver has the right to either adopt or reject executory contracts of the corporation entered into prior to the receivership.").

AFFIDAVIT OF VERIFICATION AND CERTIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared:

Ryan K. French

who stated that he is counsel of record for Defendant-Applicant, CGI Technologies and Solutions Inc., in this matter; that all of the allegations in the foregoing Writ Application are true and correct to the best of his information and belief; and that copies of the foregoing Writ Application have been mailed or electronically transmitted to the trial court judge in the underlying action, the appellate court and all opposing counsel and parties at the below listed addresses:

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East Baton Rouge Parish, Louisiana
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Baton Rouge, Louisiana 70801
Telephone: 225.389.4728

Trial Court Judge

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SWORN TO AND SUBSCRIBED before me, Notary, this 24th day of October, 2017.

Ne'Shira Millender
Ne'Shira Millender, Bar Roll # 35919, Notary Public
My Commission expires at death.

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