

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

DECLINATORY EXCEPTION OF IMPROPER VENUE

NOW INTO COURT, through undersigned counsel, comes Defendant, Buck Consultants, LLC (hereinafter "Buck"), to assert the Declinatory Exception of Improper Venue pursuant to Louisiana Code of Civil Procedure article 925(A)(4). For the reasons more fully explained in the accompanying memorandum, the Court should maintain the exception and dismiss without prejudice all claims against Buck asserted in the First Supplemental, Amending and Restated Petition for Damages and Request for Jury Trial (hereinafter "Amended Petition"), filed by Plaintiff, James J. Donelon, Commissioner of Insurance for the State of Louisiana, in his capacity as Rehabilitator of Louisiana Health Cooperative, Inc. ("Plaintiff").

In further support of this exception, Buck attaches hereto the Affidavit of Harvey Sobel as Exhibit "A." Two documents to which Mr. Sobel refers in his affidavit are attached as Exhibits "1" and "2" to the affidavit.

In compliance with Local Rule 9.8(a), Buck represents that this case is not set for trial, and that live testimony will not be offered at the hearing of this exception.

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EAST BATON ROUGE PARISH, LA

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DEPUTY CLERK OF COURT

Respectfully submitted,



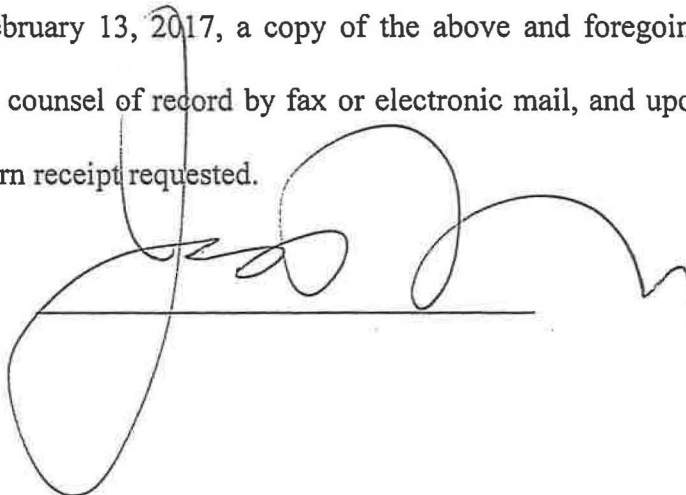
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Attorneys for Buck Consultants, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 13, 2017, a copy of the above and foregoing pleading has been served upon all known counsel of record by fax or electronic mail, and upon counsel for Plaintiff by certified mail, return receipt requested.



19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

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SURETY COMPANY OF AMERICA

FILED: _____

DEPUTY CLERK

AFFIDAVIT OF HARVEY SOBEL

STATE OF New Jersey
COUNTY OF Hudson

BEFORE ME, the undersigned Notary Public in and for the County and State set forth
above, personally came and appeared Harvey Sobel, who, after being duly sworn, attested as
follows:

1. I am above the age of majority, and this Affidavit is made of my own personal knowledge and information.
2. I am employed as a Principal and Consulting Actuary by Buck Consultants, LLC ("Buck"). I managed and directed the actuarial work for Louisiana Health Cooperative, Inc. ("LAHC") at issue in this case. In that capacity, I directed the actuarial work of all members of the Buck team who performed actuarial work for LAHC.
3. I live in New Jersey and work in Buck's offices in Secaucus, New Jersey.
4. Buck's principal place of business and official headquarters is in New York City. This official headquarters is where all major decisions regarding Buck's business are made.
5. Buck's President, John Gentry, its Senior Vice President and lead in house counsel, John Gliedman, and its Chief Compliance Officer, Nicolas Medina, all work in Buck's New York City headquarters.
6. On April 4, 2014, Buck and LAHC executed an Engagement Agreement, pursuant to the terms of which Buck provided certain actuarial and consulting services to LAHC. That Engagement Agreement governed the parties' relationship from April 1, 2014 to March 31, 2015. The Engagement Agreement is attached hereto as Exhibit "1."
7. On December 1, 2014, Buck and LAHC executed an Addendum to the Engagement Agreement. The Addendum extended the relationship between Buck and LAHC through November 30, 2015, subject to the terms of the original Engagement Agreement. The Addendum is attached hereto as Exhibit "2."



8. The members of Buck's team who performed actuarial work for LAHC pursuant to the Engagement Agreement include me, Janet DenBleyker, Scott Bush, David Billig, Rich Stover, Ashley Rodriguez, and Lauren Taylor, all of whom live and/or work in either New Jersey or New York. Two other Buck employees who performed some of the actuarial work live and work in Pittsburgh, Pennsylvania.
9. Because Buck and its key employees and witnesses are located in or near New York, New York is the most convenient venue for Buck and its witnesses to litigate this matter.

FURTHER affiant sayeth not.


Harvey Sobel
Harvey Sobel

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 8th DAY OF FEBRUARY, 2017.

Kathleen DeVivo
NOTARY PUBLIC

Kathleen DeVivo
NOTARY PUBLIC
STATE OF NEW JERSEY
ID # 2399329
MY COMMISSION EXPIRES AUG. 12, 2020

buckconsultants

March 31, 2014

Pat Powers
Chief Financial Officer
Louisiana Health Cooperative
3445 N. Causeway Blvd., Suite 800
Metairie LA 70002

Dear Pat:

This letter agreement ("Agreement") confirms the terms under which Louisiana Health Cooperative, Inc. ("Client") has engaged Buck Consultants, LLC ("Buck Consultants") to perform certain actuarial and consulting services as more particularly described in Section 1 below and Exhibit A hereto (the "Services"). The agreed terms and conditions under which Buck Consultants and Client are undertaking this engagement are as follows:

1. Services. In consideration for, and subject to, the mutual undertakings set forth herein, Buck Consultants agrees to provide the Services described in Exhibit A hereto.
2. Client Materials, Information, Data and Cooperation. To enable Buck Consultants to perform the Services, Client will promptly provide Buck Consultants with such direction, materials, information, data and access to its representatives as Buck Consultants reasonably requests. Buck Consultants is not responsible for verifying the accuracy or completeness of information supplied to it by Client representatives. If Buck Consultants receives inaccurate, incomplete or improperly formatted information, Buck Consultants shall have no liability for relying on the same, and any additional time and expense required to correct the information will be billed to and paid by Client as additional Services. The Services Buck Consultants has agreed to provide are solely those tasks specified in Exhibit A. Buck Consultants shall not be responsible for administration of Client's business or internal affairs in any fashion. Performance of the Services does not imply additional or ancillary functions or obligations on the part of Buck Consultants. The Services provided by Buck Consultants are advisory, and in the nature of consulting services; Buck Consultants is not providing legal, trust or accounting services and is not taking on any fiduciary duties or obligations to Client. All of the Services provided by Buck Consultants will be rendered in its capacity as an arm's length independent contractor and not as an agent.
3. Fees. For and during the term of this Agreement, Client will pay Buck Consultants the Fees specified in Exhibit B hereto ("Schedule of Fees"). All such Fees shall be paid in accordance with the payment terms set forth in Exhibit B. In the event that, during the term of this Agreement, Buck Consultants performs services in addition to those described in Exhibit A at the request of Client, then Client shall pay Buck Consultants for such additional services at Buck Consultants' then-current time and material rates, or such other amounts as the parties may agree in writing. All such additional services shall be considered "Services" hereunder. Also, in the event that Buck Consultants,

11 Stanwix Street Suite 700 Pittsburgh, PA 15221



during or after the term of this Agreement, is requested to respond to a third party's request for information or documents relating to work provided hereunder and including without limitation pursuant to a subpoena or to a request to coordinate with Client's successor actuary or consultant, then Client shall pay Buck Consultants for its Services with respect to responding to such request at Buck Consultants' then current time and material rates, together with any reasonable out of pocket expenses incurred by Buck Consultants (including but not limited to counsel fees if responding to a subpoena) or such other amounts as the parties may agree in writing.

4. Term and Termination. The initial term of this Agreement will be twelve (12) months beginning April 1, 2014 and ending March 31, 2015. This Agreement will automatically be extended for additional terms of twelve (12) months each unless Client or Buck Consultants gives written notice to the other at least ninety (90) days before the expiration of the initial or any subsequent term. In the event of a material breach of this Agreement which remains uncured for 30 days following written notice of the breach describing such breach in reasonable detail, the non-breaching party will have the right to terminate this Agreement upon ten (10) days prior written notice.
5. Confidentiality. Both Buck Consultants and Client recognize that in the course of this Agreement information will be exchanged consisting of confidential trade secret or business information ("Confidential Information"). Each party shall treat the other party's Confidential Information as it would treat its own confidential trade secret or business information, and with at least reasonable care as is appropriate to avoid unauthorized use or disclosure. Buck Consultants may provide Confidential Information to any of its agents and affiliates that need to know such information for the performance of the Services. In addition, Buck Consultants reserves the right to use non-confidential Client information for press releases and marketing materials. The obligations set forth in this Section 5 shall not apply to information that (i) is or becomes generally known to the public, other than as a result of a disclosure of a party's Confidential Information by the other party, (ii) is rightfully in the possession of the other party prior to disclosure, free of any obligation of confidentiality, (iii) is received by a party in good faith and without restriction from a third party not under a confidentiality obligation to the other party and having the right to make such disclosure, or (iv) is independently developed without reference to the other party's Confidential Information.
6. Buck Consultants' Proprietary Rights. The work product Buck Consultants delivers to Client in connection with this engagement is intended for Client's internal use as specifically contemplated when Buck Consultants was engaged to prepare it, and Client will retain ownership of the work product, and any information, specific to Client's employees or business, and as such, Client shall have the exclusive right to use, reproduce and adapt it for internal purposes within its organization as Client deems appropriate, provided that Buck Consultants shall have no responsibility or liability for use of its work product in any manner other than as contemplated when Buck Consultants was engaged to prepare it.

All materials, information, processes, software and products used by Buck Consultants to perform the Services under this Agreement (including without limitation specifications, database structures, report formats, templates, software, techniques, know-how, methods, algorithms, procedures and documentation), all additions, improvements and modifications made thereto in the course of Buck Consultants performing Services, and Buck Consultants' work papers and records are Buck Consultants' proprietary information (hereinafter, "Proprietary Information"). Proprietary Information belongs

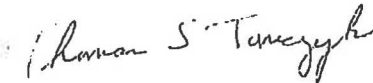
exclusively to Buck Consultants, its affiliates or third-party licensors, and the Client shall not have any proprietary or other right or interest in or to the Proprietary Information. To the extent Proprietary Information is incorporated into work product Buck Consultants delivers to Client hereunder, Client shall have a fully paid, non-exclusive, non-transferable and non-sublicensable right to use such Proprietary Information in conjunction with such work product.

7. Remedies. Client shall not assert or seek, and Buck Consultants shall not be liable to Client for, any damages or other monetary claim or claims on any legal or equitable theory of liability or recovery exceeding, in the aggregate, \$500,000. Client hereby waives and agrees not to assert any claims for lost profits, indirect damages, consequential damages, special damages, incidental damages, exemplary damages, and punitive damages, regardless of whether such claims arise pursuant to this Agreement or pursuant to another legal or equitable claim or relationship between the parties. The provisions of this Section 7 shall apply 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. The statute of limitations with respect to the assertion of any claims against Buck Consultants shall expire one year following the earliest date when the alleged error or omission or other event giving rise to the alleged claim first occurred, and, if not timely asserted by Client by initiation of a claim in a court of competent jurisdiction, shall be forever barred. No act of Buck Consultants other than the execution of an express waiver of the provisions of this Section 7 shall be effective to toll or extend the aforesaid one year limitation period or otherwise increase Buck Consultants liability with respect to any claims asserted against Buck.
8. Non-Solicitation Personnel. During the term of this Agreement and for one year following the effective date of its termination, Client agrees that, without the prior written consent of Buck Consultants, it shall not knowingly solicit for employment, any employee or former employee of Buck Consultants who was engaged in the performance of the Services during the twelve (12) month period immediately preceding such solicitation. The preceding sentence shall not prohibit Client from considering for employment any such employee or former employee of Buck Consultants who (i) seeks employment with Client in response to a general advertisement by Client (so long as the advertisement is not directed toward employees of Buck Consultants) or (ii) is identified in the course of employment searches by an independent third party retained by Client (so long as the search is not directed toward employees of Buck Consultants).
9. Miscellaneous. This Agreement is the product of mutual negotiation and drafting among sophisticated business people. Each party has been represented by competent counsel of such party's own choosing. Accordingly, no party shall be deemed to be the draftsman of this Agreement. This Agreement constitutes the full, complete and final expression of the parties' understanding with respect to the subject matter hereof and supersedes all prior oral or written understandings between the parties. Neither party has relied on any promises, representations or warranties except as expressly set forth in this Agreement. The parties hereto intend that no third party shall have any rights or claims hereunder or be entitled to any benefits under or on account of this Agreement as a third-party beneficiary or otherwise. The parties hereto expressly agree that this Agreement will be construed and enforced in accordance with the internal laws of the State of New York, without regard to New York choice of law provisions. The parties hereby consent to the exclusive jurisdiction and venue of the federal and state courts situated in and for the State of New York, County of New York with respect to any dispute arising between the parties, regardless of whether such dispute arises pursuant

to this Agreement or otherwise. The parties consent to the waiver of trial by jury in any dispute arising between the parties. This Agreement may be amended only by a writing signed manually in pen and ink by the parties hereto, it being understood that an exchange of emails not bearing pen and ink signatures (or a replica of a manual signature) shall not be sufficient to modify or amend this Agreement. If any provision of this Agreement is declared invalid or unenforceable, by judicial determination or otherwise, such provision shall not invalidate or render unenforceable the entire Agreement but rather the provision in question shall be construed only so narrowly as is required in order to be enforceable; or if such more narrow construction of the provision in question is not possible, then the entire Agreement shall be construed as if not containing the particular invalid or unenforceable provision and the rights and obligations of the parties shall be construed and enforced accordingly. In each instance, such construction or "blue-penciling" of the Agreement shall be effected in such a manner as to give effect to the intent of the parties as expressed within the four corners of this Agreement. This Agreement may be executed in any number of counterparts. Each executed counterpart shall be conclusively deemed to be an original. All executed counterparts taken together shall constitute one and the same agreement. A transmission by facsimile or other electronic means of communication of this Agreement bearing a pen and ink signature on behalf of a party hereto shall be legal and binding on such party. Sections 2, 3, 5, 6, 7, 8 and 9, and Client's obligation to pay all amounts due to Buck Consultants under this Agreement, shall survive the termination or expiration of this Agreement.

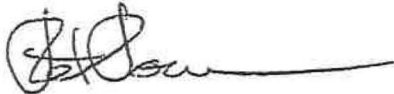
If the foregoing accurately reflects your understanding and agreement, please acknowledge by signing below and returning a duplicate of this Agreement to the undersigned at the address above.

Sincerely,



Thomas S. Tomczyk
Buck Consultants, LLC

The Agreement set forth herein is hereby agreed to and accepted this 4 day of April, 2014.



Pat Powers
Louisiana Health Cooperative, Inc.

Exhibit A

Scope of Services

During the term and subject to the conditions set forth in the accompanying Agreement, Buck Consultants will provide the following Services to the Louisiana Health Cooperative, Inc.

- Review current plan designs and calculate the Average Benefit Value for each plan
- Review previous documents filed with CMS for the 2014 rates
- Review current demographics and adjust rates to reflect population enrolled
- Develop cost models to prepare 2015 rates for Public Exchange
- Adjust rates to reflect network discounts
- Prepare rates by Region
- Prepare smoke and non-smoker rates
- Present target rates for review and revision
- Adjust plan designs to meet market objections
- Review and price new plan designs
- Review proposed administrative budget and commissions and incorporate into 2015 rates
- Review rate filing requirements
- Prepare and submit rate filings and assist Louisiana Health Cooperative, Inc with state rate filing
- Review competitive products and rates
- Prepare rates for commercial group quotes as requested (Off exchange quotes)
- Prepare Incurred But Not Reported (IBNR estimates)
- Assist with Commercial rate filing
- Meet with The Louisiana Health Cooperative, Inc. as needed

Exhibit B

Schedule of Fees

For the services outlined in Exhibit A, Buck Consultants will charge the following not-to-exceed fee. Buck will bill the Client actual time charges as they are incurred but not to exceed the annual fee below.

April 1, 2014 – March 31, 2015

\$260,000

Client shall pay all invoiced amounts within thirty (30) days of the receipt of Buck's invoice. Any amount not paid by Client when due shall bear interest at the rate of one and one half percent (1.5%) per month.

Buck Consultants will invoice Client periodically, generally on a monthly basis, for all fees and expenses due and payable by Client. Client shall pay all invoiced amounts within thirty (30) days of the receipt by Client of Buck Consultants' invoice. Any amount not paid by Client when due shall bear interest at the rate of one and one half percent (1.5%) per month or the highest permissible rate under applicable law, whichever is less, until paid in full.

Buck Consultants, LLC
11 Stanwix Street, Suite 700
Pittsburgh, PA 15222-1312

November 4, 2014

Mr. Greg Cromer
Chief Executive Officer
Louisiana Health Cooperative, Inc.
3445 N. Causeway Blvd
Metairie, LA 70002

Dear Greg:

This letter (the "Addendum") modifies the terms and conditions of the existing contractual relationship dated March 31, 2014 between Buck Consultants, LLC ("Buck Consultants") and Louisiana Health Cooperative, Inc. ("Client") (the "Agreement").

- 1) Scope of Services. The parties agree to replace the services described in Exhibit A ("Services") to this Addendum as the Services under the Agreement.
- 2) Fees and Expenses. Client agrees to pay Buck Consultants for these services as provided in Exhibit B to this letter.
- 3) Effective date of this Addendum This Addendum shall be in effect December 1, 2014.

This Addendum also extends the terms of the Engagement Letter to November 30, 2015.

- 4) Effect of this Addendum. The Agreement, as modified hereby, remains and continues in full force and effect, provided, however, that in the event of conflict between the terms of this Addendum and the Agreement, the terms of the Addendum shall prevail.

If the foregoing correctly reflects our understandings with respect to this Addendum, please acknowledge by signing below.

Sincerely,

Thomas S. Tomczyk
Principal

The Addendum set forth herein is
hereby agreed to and accepted this 4
day of 12, 14.



Mr. Greg Cromer, Louisiana Health Cooperative, Inc.



Exhibit B

Schedule of Fees

For the services outlined in Exhibit A, Buck Consultants will bill the Client actual time charges as they are incurred but not to exceed the annual fee below.

December 1, 2014 – November 30, 2015

\$380,000

After November 30, 2015 Buck Consultants may modify the Schedule of Fees specified above by giving Client thirty (30) days written notice of such change. In addition to the fees specified above, Client will pay reasonable travel expenses.

Buck Consultants will invoice Client periodically, generally on a monthly basis, for all fees and expenses due and payable by Client. Client shall pay all invoiced amounts within thirty (30) days of the receipt by Client of Buck Consultants' invoice. Any amount not paid by Client when due shall bear interest at the rate of one and one half percent (1.5%) per month or the highest permissible rate under applicable law, whichever is less, until paid in full.

19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

NO.: 651,069

SECTION 22

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FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF
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FILED: _____

DEPUTY CLERK

RULE TO SHOW CAUSE

CONSIDERING the foregoing Declinatory Exception of Improper Venue, along with the supporting Memorandum, filed by Defendant, Buck Consultants, LLC, to Plaintiff's First Supplemental, Amending and Restated Petition for Damages and Request for Jury Trial;

IT IS HEREBY ORDERED that Plaintiff, James J. Donelon, Commissioner of Insurance for the State of Louisiana, in his capacity as Rehabilitator of Louisiana Health Cooperative, Inc., show cause on the _____ day of _____, 2017, at ____ o'clock ____m. why the Exception should not be maintained.

Baton Rouge, Louisiana, this _____ day of _____, 2017.

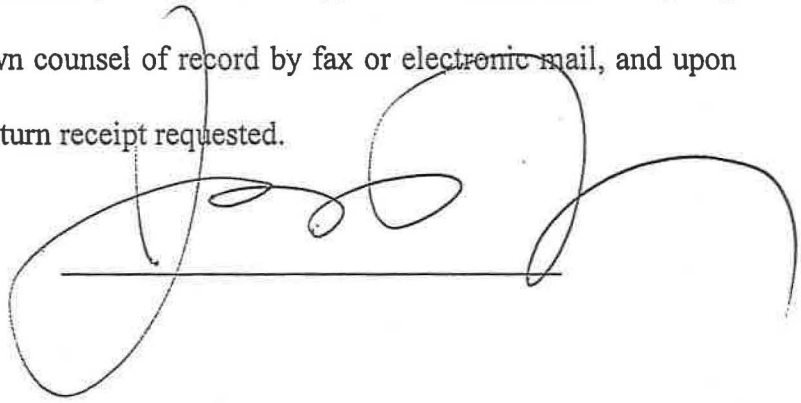
JUDGE, 19th JUDICIAL DISTRICT COURT

FILED
EAST BATON ROUGE PARISH, LA
2017 FEB 13 PM 2:36

DEPUTY CLERK OF COURT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 13, 2017, a copy of the above and foregoing pleading has been served upon all known counsel of record by fax or electronic mail, and upon counsel for Plaintiff by certified mail, return receipt requested.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

NO.: 651,069

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FILED: _____

DEPUTY CLERK **RECEIVED**

FEB 13 2017

MEMORANDUM IN SUPPORT OF
DECLINATORY EXCEPTION OF IMPROPER VENUE

DEPUTY CLERK OF COURT

MAY IT PLEASE THE COURT:

Defendant, Buck Consultants, LLC (hereinafter "Buck"), respectfully submits this Memorandum in Support of its Declinatory Exception of Improper Venue. For the reasons set forth below, this Court should maintain the exception and dismiss without prejudice all claims against Buck asserted in the First Supplemental, Amending and Restated Petition for Damages and Request for Jury Trial (hereinafter "Amended Petition"), filed by Plaintiff, James J. Donelon, Commissioner of Insurance for the State of Louisiana, in his capacity as Rehabilitator of Louisiana Health Cooperative, Inc. ("Plaintiff").

Buck and Louisiana Health Cooperative, Inc. (hereinafter "LAHC") entered into an Engagement Agreement by which Buck agreed to perform certain actuarial and consulting services for LAHC. That Engagement Agreement contains a valid and enforceable forum selection and choice of law clause, which selected New York law and designated the state of New York as the exclusive forum for all disputes between the parties, including the claims asserted against Buck in the instant suit. Plaintiff cannot meet his heavy burden of proof to resist enforcement of the forum selection clause because the clause is not invalid due to fraud or overreaching, and because enforcement of the clause is reasonable and supported by Louisiana

public policy. The parties logically selected the New York forum because Buck's official headquarters is in New York, and Buck's key witnesses in this matter are located either in New York or in the immediately adjacent New Jersey. Further, litigating this matter in New York will allow a New York court to apply and interpret New York law, and will not deprive Plaintiff of any of his claims. Plaintiff cannot be heard to challenge the convenience of the forum to which his predecessor, LAHC, expressly agreed. The law entitles Buck to enforce the forum selection clause against Plaintiff, as Rehabilitator of LAHC, in the same manner that Buck would be entitled to enforce the clause against LAHC itself. For these reasons, this Court should enforce the forum selection clause, grant this exception, and dismiss Plaintiff's claims against Buck without prejudice.

I. STATEMENT OF FACTS

LAHC was a qualified nonprofit health insurer organized in 2011.¹ Buck is a Delaware LLC with its principal place of business and official headquarters in New York City.² Buck and LAHC entered into an Engagement Agreement, and a subsequent Addendum to that agreement, pursuant to which Buck provided certain actuarial and consulting services to LAHC.³ Plaintiff's allegations against Buck, stated in the Amended Petition, arise from Buck's provision of those services.⁴

Buck and LAHC effectuated the Engagement Agreement on April 4, 2014, and that agreement governed the parties' relationship from April 1, 2014 to March 31, 2015.⁵ Section 9 of the Engagement Agreement contains the following choice of law and exclusive forum selection clause:

The parties hereto expressly agree that this Agreement will be construed and enforced in accordance with the internal laws of the State of New York, without regard to New York choice of law provisions. The parties hereby consent to the exclusive jurisdiction and venue of the federal and state courts situated in and for the State of New York, County of New York with respect to any dispute arising between the parties, regardless of whether such dispute arises pursuant to this Agreement or otherwise.⁶

¹ Amended Petition at ¶6.

² Affidavit of Harvey Sobel at ¶4, attached to the Declinatory Exception of Improper Venue as Exhibit "A" (hereinafter "Sobel Affidavit"). Sobel managed and directed all of the actuarial work for LAHC at issue in this case. *Id.* at ¶2.

³ *Id.* at ¶¶6-7.

⁴ Amended Petition at ¶¶104-127, 134-138.

⁵ Engagement Agreement at ¶4, attached as Exhibit "1" to Sobel Affidavit (which is attached to the Declinatory Exception of Improper Venue as Exhibit "A").

⁶ *Id.* at ¶9.

The Addendum, signed on December 1, 2014, extended the parties' relationship through November 30, 2015.⁷ The Addendum altered the scope of services and the schedule of fees, but did not modify, replace, or supplant Section 9 of the original Engagement Agreement, which remained in full force and effect after the Addendum.⁸

II. LAW AND ARGUMENT

The Court should grant this exception, and dismiss Plaintiff's claims against Buck, because (A) the forum selection clause in the Engagement Agreement is valid and enforceable; (B) Plaintiff's claims against Buck fall within the scope of the clause; and (C) the clause must be enforced against Plaintiff as Rehabilitator, just as it would be enforced against LAHC.

A. THE FORUM SELECTION CLAUSE IS VALID AND ENFORCEABLE.

The Louisiana Supreme Court has adopted the general rule set forth by the United States Supreme Court in *Bremen* – that “contractual forum selection clauses are *prima facie* valid” and thus are “generally enforceable.” *Shelter Mut. Ins. Co. v. Rimkus Consulting Group, Inc. of Louisiana*, 2013-1977 (La. 7/1/14); 148 So. 3d 871, 881-82 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)). A forum selection clause must be enforced unless the party resisting enforcement meets a “heavy burden of proof” to “clearly show” that: (i) enforcement would be unreasonable and unjust, (ii) the clause is invalid for such reasons as fraud or overreaching, or (iii) enforcement would contravene a strong public policy of the forum in which suit is brought. *Id.* at 881 (internal citations omitted); *Bremen*, 407 U.S. at 17; *Haynsworth v. The Corp.*, 121 F.3d 956, 963 (5th Cir. 1997).

Thus, the instant forum selection clause is *prima facie* enforceable, and Plaintiff has a *heavy* burden of proof to *clearly* show that the clause should not be enforced. As discussed below, Plaintiff cannot meet this heavy burden.

1. Plaintiff Cannot Show That Enforcement of the Forum Selection Clause is Unreasonable.

Plaintiff cannot meet his heavy burden to show that enforcement of the forum selection clause is unreasonable. “The term ‘unreasonable’ is equated in the jurisprudence with the terms ‘unfair’ and ‘unjust.’” *Mosing v. Boston*, No. 14-2608, 2015 WL 3911798, at *3 (W.D. La. June 25, 2015) (citing *Bremen*, 407 U.S. at 18, and *Calix-Chacon v. Global Int’l Marine, Inc.*, 493

⁷ Addendum to Engagement Agreement at p. 1, attached as Exhibit “2” to Sobel Affidavit (which is attached to the Declinatory Exception of Improper Venue as Exhibit “A”).

⁸ *Id.* at p. 1 (“The Agreement, as modified hereby, remains and continues in full force and effect, provided, however, that in the event of conflict between the terms of this Addendum and the [Engagement] Agreement, the terms of the Addendum shall prevail.”).

F.3d 507, 511 (5th Cir. 2007)). The Louisiana Second Circuit has cited to *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545, 548-49 (N.D. Tex. 1982), for “an excellent explanation of the *Bremen* factors.” *Pitts, Inc. v Ark-La Resources, L.P.*, 30,836 (La. App. 2 Cir. 8/19/98); 717 So. 2d 268, 270. The *Hoffman* court discussed those factors in pertinent part as follows:

The consideration of whether the enforcement of a forum clause might be “unreasonable” appears to be a variation on the doctrine of forum non conveniens, with the burden placed on the party seeking to avoid enforcement of the clause. The Supreme Court ruled in this connection that the chosen forum must be shown to be “*seriously* inconvenient for the trial of the action” (emphasis in original), 407 U.S. at 16, 92 S.Ct. at 1916, and that the resisting party should bear “a heavy burden of proof.” 407 U.S. at 17, 92 S.Ct. at 1917. Since the claimed inconvenience would generally be foreseeable at the time the freely negotiated agreement was entered, “it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be [so] gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.” 407 U.S. at 18, 92 S.Ct. at 1917.

...

Again, the hardship must be significant for the enforcement of the clause to be unjust. “Mere inconvenience or additional expense” will not suffice, *Anastasi Bros. Corp. v. St. Paul Fire and Marine Ins. Co.*, 519 F. Supp. 862 (E.D. Pa. 1981); *Full-Sight*, 466 F. Supp. at 73, since these are burdens which were allocated by the parties' private bargain.

Hoffman, 571 F. Supp. at 548-49.

More recently, the U.S. Supreme Court, following its prior decision in *Bremen*, has held that “[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation.” *Atlantic Marine Construction Co. v. U.S. District Court*, 134 S. Ct. 568, 582 (2013).

Here, application of the *Bremen* factors reveals that enforcing the parties' agreement to litigate this dispute in New York is not unreasonable, unfair, or unjust, and all factors mitigate in favor of enforcing the forum selection clause. LAHC and Buck logically agreed to New York as the exclusive jurisdiction for their disputes because New York has a reasonable and appropriate connection to Buck's business and the actuarial work that Buck performed for LAHC. Buck has its principal place of business and official headquarters in New York City, where all of Buck's major business decisions are made.⁹ Buck's President, Senior Vice President and lead in house counsel, and Chief Compliance Officer all work in Buck's New York City headquarters.¹⁰ Buck's Principal and Consulting Actuary, who managed and directed all of the actuarial work for

⁹ Sobel Affidavit at ¶4.

¹⁰ *Id.* at ¶5.

LAHC at issue in this case, lives in New Jersey and works in Buck's Secaucus, New Jersey office (just across the Hudson River from New York City).¹¹ Further, the bulk of the other Buck employees who performed the actuarial work at issue live and/or work either in New York or in New Jersey.¹²

Because Buck and its key employees and witnesses are located in or near New York, New York is the most convenient venue for Buck and its witnesses to litigate this matter.¹³ Even if litigating in New York might expose Plaintiff to inconvenience or additional expense, these are burdens that LAHC knowingly undertook at the time of contracting. Plaintiff will not suffer significant hardship or inconvenience that would practically deprive him of his day in court.¹⁴ In any event, the contracting parties waived any right to challenge the convenience of the New York forum when they executed the forum selection agreement, as the U.S. Supreme held in *Atlantic Marine*, 134 S. Ct. at 582.

Furthermore, in Section 9 of the Engagement Agreement, *supra*, the parties agreed not only to litigate this dispute in New York, but also to the application of New York law. Thus, enforcement of the forum selection clause will allow a New York court to apply and interpret its own law, a factor strongly weighing in favor of enforcement of the clause. *Hoffman*, 571 F. Supp. at 549.

Lastly, Plaintiff has alleged claims of professional negligence, breach of contract, and negligent misrepresentation against Buck. Plaintiff cannot show that litigating this matter in New York would render him unable to recover on those claims. For these reasons, Plaintiff cannot satisfy his heavy burden to show that enforcement of the forum selection clause is unreasonable.

2. The Clause is Not a Product of Fraud or Overreaching.

Plaintiff cannot show that the forum selection clause is a product of fraud or overreaching. "The consideration of whether fraud or overreaching was involved deals with whether the agreement was in fact freely bargained for." *Hoffman*, 571 F. Supp. at 548. Here,

¹¹ *Id.* at ¶¶2-3.

¹² *Id.* at ¶8.

¹³ *Id.* at ¶9.

¹⁴ In *Hoffman*, the court enforced a forum selection clause selecting California as the exclusive forum, in part because the defendant company had its headquarters, employees, and necessary witnesses in California, and because a choice of law provision provided for the application of California law. *Hoffman*, 571 F. Supp. at 549-50.

Section 9 of the Engagement Agreement – the same section containing the forum selection clause – makes clear that:

This Agreement is the product of mutual negotiation and drafting among sophisticated business people. Each party has been represented by competent counsel of such party's own choosing. Accordingly, no party shall be deemed to be the draftsperson of this Agreement.¹⁵

Thus, both parties expressly acknowledged that they contracted freely, negotiated together to arrive at mutually satisfactory terms, and were represented by competent attorneys. Plaintiff therefore cannot meet his burden of proof to show any of fraud or overreaching.

3. Louisiana Public Policy Supports Enforcement of the Clause.

Enforcing the forum selection clause serves the public policy considerations set forth by the Louisiana Supreme Court in *Rimkus*. In that case, the plaintiff retained the defendant consulting company to provide an engineering evaluation and certain expert witness services. *Rimkus*, 148 So. 3d at 872. The parties' engagement agreement included a forum selection clause. *Id.* The Court enforced the clause against the plaintiff and reversed the judgments of the lower courts, reasoning as follows:

This court has long recognized that the freedom to contract is an important public policy. We have explained:

[P]arties are free to contract for any object that is lawful, possible, and determined or determinable. La. C.C. art. 1971. "Freedom of contract" signifies that parties to an agreement have the right and power to construct their own bargains. In a free enterprise system, parties are free to contract except for those instances where the government places restrictions for reasons of public policy. The state may legitimately restrict the parties' right to contract if the proposed bargain is found to have some deleterious effect on the public or to contravene some other matter of public policy.

The right of parties to freely contract must encompass the correlative power to agree to bring suit under that contract in a particular forum. Upholding the lower courts' rulings would undermine the ability of parties to freely contract and would thereby impair the ability of companies to do business in this state. *The parties in this case are commercially sophisticated entities* who have a history of conducting business together. We find no prohibition under the facts of this case to prevent the parties from contracting to limit their disputes to any forum of their choosing, and there is nothing in the record which would support a refusal to enforce this particular forum selection clause. As the Court recognized in *Bremen*, the elimination of uncertainties relative to the location of litigation by agreement in advance on an acceptable forum to both parties is an indispensable element of trade, commerce and contracting. Our ruling, holding forum selection clauses *prima facie* valid and generally enforceable, serves these important principles of free enterprise and commerce.

¹⁵ Engagement Agreement at ¶ 9.

Rimkus, 148 So. 3d at 881-82 (internal citations omitted) (emphasis added).

The same reasoning applies in the instant case. Here, LAHC engaged Buck to perform actuarial consulting services, and both parties are, as stated in the Engagement Agreement itself, “sophisticated business people” who were “represented by competent counsel of each party’s own choosing.”¹⁶ The Louisiana public policy interests of free contract and free enterprise thus favor enforcement of this forum selection clause.¹⁷

B. PLAINTIFF’S CLAIMS FALL WITHIN THE SCOPE OF THE FORUM SELECTION CLAUSE.

All of Plaintiff’s claims against Buck fall within the scope of the forum selection clause, which states, in pertinent part:

The parties hereby consent to the exclusive jurisdiction and venue of the federal and state courts situated in and for the State of New York, County of New York *with respect to any dispute arising between the parties, regardless of whether such dispute arises pursuant to this Agreement or otherwise.*¹⁸

This language encompasses all of Plaintiff’s claims against Buck, whether sounding in contract or in tort. *See Mosing*, 2015 WL 3911798, at *5 (finding a forum selection clause that applied to “any action” by “either party” was broad enough to encompass all types of claims). Thus, Buck is entitled to enforce this valid forum selection clause against LAHC with respect to all claims alleged here. As shown below, Buck is also entitled to enforce the clause against Plaintiff, who brings these claims in his capacity as Rehabilitator of LAHC.

C. THE FORUM SELECTION CLAUSE MUST BE ENFORCED AGAINST THE COMMISSIONER AS REHABILITATOR, JUST AS IT WOULD BE ENFORCED AGAINST LAHC.

Plaintiff is vested with the title to all property and contracts of LAHC as of the date of the order directing rehabilitation or liquidation. LA. REV. STAT. § 22:2008(A) (2012). Thus, as a matter of Louisiana statutory law, Plaintiff is vested with title to the Engagement Agreement, and the terms of that contract are enforceable against Plaintiff as Rehabilitator, just as they would be enforceable against LAHC. *See* 1 Steven Plitt et. al, *Couch on Ins.* § 5:39 (3d 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.”),

¹⁶ *Id.*

¹⁷ A forum selection clause does not violate Louisiana public policy merely because enforcement of the clause would prevent a resident from bringing an action in his home state. *Pitts*, 717 So. 2d 268, 270.

¹⁸ Engagement Agreement at ¶ 9 (emphasis added).

The relevant jurisprudence is fully consistent with the controlling Louisiana statute. *See, e.g., Crist v. Drake Concrete Co. of Belle Chase*, No. 87-5808, 1988 WL 104831, at *1-2 (E.D. La. Sept. 29, 1988) (applying Louisiana law and finding that receiver is bound to the contractual obligations of insurer, and therefore, insurer's breach of contract was imputed to receiver); *Martin v. General American Casualty Co.*, 76 So. 2d 537, 540 (La. 1954) (recognizing that a receiver cannot enjoin the execution of a judgment when the seizure was perfected prior to the appointment of the receiver) ("The appointment of a receiver sustains the status quo of the corporation. ... His taking over of the property brings about no change of title and cannot prejudice the rights of any creditor. He takes the property as he finds it....") (quoting *In re Bryce Cash Store*, 124 So. 544, 545 (La. App. 2 Cir. 1929) (internal citations omitted)); *In re Bryce Cash Store*, 124 So. at 545 (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.").

The law of "reciprocal" states is the same. In *All Star Advert. Agency, Inc. v. Reliance Ins. Co.*, the Louisiana Supreme court held that Pennsylvania is a "reciprocal state" in the context of insurance receiverships, due to Louisiana's adoption of the Uniform Insurer's Liquidation Act (La. Rev. Stat. § 22:2038, et seq.) and Pennsylvania's adoption of a law with the same substance and effect. 2004-1544 (La. 4/12/05); 898 So. 2d 369, 375-76, 382. In interpreting Louisiana's version of the Uniform Insurer's Liquidation Act, "resort may be had to the jurisprudence of sister states which have adopted the statute and which are therefore 'reciprocal states.'" *State v. Preferred Accident Ins. Co. of N.Y.*, 149 So. 2d 632, 638 (La. App. 1 Cir. 1963). The Uniform Act provides that "[t]he domiciliary receiver for the purpose of liquidating an insurer domiciled in a reciprocal state, shall be vested by operation of law with the title to all of the property, contracts, and rights of action . . . of the insurer located in this state... ." La. R.S. 22:2039(B). Thus, Pennsylvania jurisprudence is highly persuasive in interpreting this statutory provision.¹⁹

Pennsylvania courts squarely confirm that the terms of an insurer's contract must be enforced against the Commissioner of Insurance acting as Rehabilitator or Liquidator. *See Commonwealth ex rel. Kelly v. Commonwealth Mut. Ins. Co.*, 299 A.2d 604, 605-06 (Pa. 1973) (finding Commissioner as Liquidator was bound by explicit language of insurer's contract;

¹⁹ La. R.S. 22:2044 provides that "[t]his Uniform Insurers Liquidation Law, . . . shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it."

stating that “a valid and enforceable provision as between the insurance carrier and the policyholders, retains its full contractual validity even upon the appointment of the statutory liquidator” and that the Commissioner’s “power should be subject to the same limitations” as the insurer’s power); *Kaiser v. Monitrend Inv. Mgmt., Inc.*, 672 A.2d 359, 364 n.5 (Pa. Commw. Ct. 1996) (“[B]ecause the Statutory Liquidator is seeking to enforce a contract via the rights of the insurer, the Statutory Liquidator is just as bound by the terms of that contract as would be the insurer. ... In other words, the Statutory Liquidator has no greater rights under the contract than the insurer and would be subject to any defenses that may be asserted against the insurer by the other party to the contract.”) (citing *Kelly*, 299 A.2d at 604); *Koken v. Cologne Reinsurance (Barbados), Ltd.*, 34 F. Supp. 2d 240, 256 (M.D. Pa. 1999) (applying Pennsylvania law and finding that the Liquidator “is bound by the insurer’s contractual agreements”); *Koken v. Lederman*, 00-755, 2002 WL 32348318, at *1 (E.D. Pa. July 31, 2002) (similar).

Therefore, under controlling Louisiana statutory law and relevant jurisprudence, Plaintiff as Rehabilitator is bound by the forum selection clause in the Engagement Agreement, just as LAHC would have been bound. For that reason, the Court should grant this exception against Plaintiff.

III. CONCLUSION

The forum selection clause entered into between Buck and LAHC is valid and enforceable, and Plaintiff cannot meet his heavy burden of proof to show otherwise. The clause is not a product of fraud or overreaching, and enforcement of the clause is reasonable and supported by Louisiana public policy. Additionally, the claims asserted in the Amended Petition fall within the scope of the clause, which must be enforced against Plaintiff just as it would be enforced against LAHC. For the foregoing reasons, the Court should enforce the forum selection clause against Plaintiff, grant this exception, and dismiss all of Plaintiff’s claims against Buck without prejudice.

Respectfully submitted.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 13, 2017, a copy of the above and foregoing pleading has been served upon all known counsel of record by fax or electronic mail, and upon counsel for Plaintiff by certified mail, return receipt requested.

