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

BUCK CONSULTANTS, LLC'S REPLY MEMORANDUM IN SUPPORT OF DECLINATORY EXCEPTION OF IMPROPER VENUE

Buck Consultants, LLC ("Buck") respectfully submits this Reply Memorandum in Support of its Declinatory Exception of Improper Venue (the "Declinatory Exception"). As set forth below, the Receiver's[1] Opposition Memorandum (the "Opposition") raises a host of non-issues that are easily disposed of and cites precedents that plainly call for enforcement of the forum selection clause at issue in this case. Here, the Receiver explicitly asserts claims in its First Supplemental, Amending and Restated Petition (the "Amended Petition") against Buck arising under the very contract that contains the operative forum selection clause – including a claim for breach of that contract. *See* Amended Petition, at 23 (Count Four). The Receiver's contrary assertions conflict with the face of its own pleading.

As the court recognized in *Taylor v. Ernst & Young, L.L.P.,*[2] cited by the Receiver, in such cases, the Receiver cannot cherry pick the provisions of the contract it likes while disavowing other provisions. *See also FDIC v. Ernst & Young LLP*, 374 F.3d 579, 584 (7th Cir. 2004) (FDIC, as Receiver, could not "cherry pick" contract, enforcing some provisions while

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[1] James J. Donelon, Commissioner of Insurance for the State of Louisiana in his capacity as Rehabilitator of Louisiana Health Cooperative, Inc. ("LAHC"), through his duly appointed Receiver, Billy Bostick.

[2] 958 N.E.2d 1203, 1213 (Ohio 10/18/11).

disavowing the arbitration clause in it). Having asserted claims arising under and based upon the engagement agreement between Buck and LAHC, the Receiver is bound to the entire contract, including the forum selection clause. No court has held otherwise.

The foregoing indisputable point renders the Receiver's entire discussion of whether or not the Receiver steps "precisely into the shoes" of the failed insurance company irrelevant. Opposition, at 11–13. Here, the Receiver has stepped into and affirmatively asserted claims arising under a contract. No Louisiana court has suggested that any provision of the Insurance Code, or Louisiana public policy in general, would permit any party, including the Receiver, to assert rights and claims arising under some provisions of a contract while disavowing others. The very notion offends the most basic principles of contract, equity, and public policy.

The Louisiana Supreme Court, in *Shelter Mut. Ins. Co. v. Rimkus Consulting Group, Inc. of Louisiana*, pronounced in unmistakable terms the public policy and law that should govern the Court's ruling in this case. 2013-1977 (La. 7/1/14); 148 So. 3d 871, 881–82. In Louisiana, forum selection clauses are presumptively valid and enforceable. *Id.* Refusal to enforce them "would undermine the ability of parties to freely contract and would thereby impair the ability of companies to do business in this state." *Id.* at 882. Were the Court to refuse to enforce all of the provisions of the operative contract, and allow the Receiver to pick and choose from it at will, companies like Buck, Milliman, and others could not be expected to contract in Louisiana much longer.

Tellingly, the Receiver makes no mention of *Shelter* and has failed to meet its heavy burden of showing how adherence to the controlling principles of that case would work a manifest injustice on the Receiver. The Court should grant Buck's Declinatory Exception and dismiss the Receiver's claims against it without prejudice.

ARGUMENT

I. The Receiver's Objection to the Sobel Affidavit is a Non-Issue

Given that the Receiver has had the affidavit of Buck's principal consulting actuary, Mr. Harvey Sobel, since last February and has not sought to controvert any of his factual averments, Buck had hoped that it would not be necessary to require him to appear as a live witness at the hearing of the Declinatory Exception. However, in order to moot the Receiver's technical objection to the admission of his affidavit, Buck will have Mr. Sobel travel to Louisiana in order to be present in court at the hearing to present live testimony as needed.

II. The Receiver Has Failed to Meet Its Heavy Burden to Resist Enforcement of the Forum Selection Clause

The Receiver attempts to reverse the burden of proof that the Louisiana Supreme Court imposed upon it in *Shelter*, contending that "Buck voluntarily chose to do business with LAHC . . . and should not complain now . . . ." Opposition, at 3. The Receiver has it backwards. Under *Shelter,* the party *resisting* enforcement of the forum selection clause must meet a "heavy burden of proof" to "clearly show" that enforcement of the clause would be unreasonable, unjust or contravene a strong public policy of the forum. *Shelter*, 148 So.3d at 874, 881.

The Receiver has failed to meet that heavy burden. It has failed to cite any Louisiana precedent holding or even implying that the Insurance Commissioner or his Receiver may affirmatively seek relief arising under a contract while at the same time disavowing a binding forum selection clause in that very contract. Nothing in the Insurance Code or any other statute provides any support for that notion or would suggest that there is a "public policy" to that effect.

Had the Louisiana legislature desired to allow the insurance Receiver to enforce contracts while at the same time disavowing forum selection clauses in them, it could have done so – but has *not*. *Shelter* therefore dictates enforcement of the forum selection clause. *Id.* at 881 ("[I]t is clear the legislature has only declared forum selection clauses unenforceable and against public policy in very limited circumstances . . . Louisiana's public policy only militates against the use of forum selection clauses in these particular circumstances."). The Louisiana Supreme Court has ruled that the public policy of Louisiana is that contracts should be enforced as written. *Id.* at 881–82.

The Receiver's reliance on La. R.S. 22:257(F) (providing this Court with exclusive jurisdiction over post-liquidation HMO administrative matters) is a total non-issue because the operative forum selection clause overrides it, as courts have long held. *See* Opposition, at 6.[3] The Receiver correctly likens forum selection clauses to arbitration agreements – "[a]n arbitration agreement is a 'kind of forum-selection clause.'" Opposition, at 9 (citing both Louisiana and federal precedents). Buck agrees. The courts uniformly hold that such contractual agreements displace otherwise applicable exclusive venue/jurisdiction provisions. In other words, parties are free, by contract, to select a forum for resolution of their disputes other than a

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[3] The Court therefore need not decide whether or not the Receiver is correct in suggesting that La. R.S. 22:257(F) deprives the Receiver of the option to bring suit on pre-failure claims of the HMO in "any court where venue is proper under any other provision of law" pursuant to La. R.S. 22:2004 – a doubtful construction at best. *See* Opposition, at 5–6.

venue that the law would otherwise dictate. *See e.g.*, *In re Fireman's Fund Insurance Companies,* 588 F.2d 93, 94–95 (5th Cir. 1979) (forum selection clause displaced otherwise applicable federal exclusive venue statute); *Preston v. Ferrer,* 128 S.Ct. 978, 981 (2008) ("[W]hen parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded . . . .").

Lacking any support for its unfounded arguments in Louisiana law, the Receiver relies heavily upon the Ohio state court's decision in *Taylor v. Ernst & Young, L.L.P.*, 958 N.E.2d 1203. *See* Opposition, at 9–14. But the *Taylor* decision supports enforcement of the forum selection clause in this case. In *Taylor,* both the majority and dissenters agreed that the Receiver could not pick and choose from the provisions of the contract, accepting some while disavowing others. *See Taylor*, 958 N.E.2d at 1213, 1222. Thus, if the claims arose under the contract, the Receiver would have been bound to the forum selection clause in the contract. *Id.* at 1213 ("The test is whether the liquidator, a non-signatory, has asserted claims that arise from the contract containing the arbitration clause.") (majority opinion); *id.* at 1222 ("[T]he duties imposed by Ohio law that E&Y allegedly failed to perform are the same as those set forth in the engagement letter . . . Thus, because this claim arises from the engagement letter, the arbitration provision is enforceable against the liquidator.") (dissent); *see also FDIC v. Ernst & Young LLP*, 374 F.3d at 584 (FDIC, as Receiver, could not "cherry pick" contract to avoid arbitration clause).

While the *Taylor* majority engaged in illogical gymnastics in an attempt to portray the claims as *not* arising under the contract (as the dissent forcefully pointed out), this Court need not engage in any such gyrations in this case. Here, the Receiver's Amended Petition relies explicitly upon the contract's provisions (quoting the scope of Buck's undertaking) and accuses Buck of breaching the contract. Amended Petition, at 30 ¶105; Amended Petition, at 23 (Count Four). How then, can the Receiver with any semblance of credibility argue that "[t]he Commissioner's claims do not arise from the engagement letter?" Opposition, at 13. The Receiver cannot do so, betraying the lack of merit of all of the Receiver's arguments.

CONCLUSION

For the foregoing reasons and those set forth in Buck's original briefing, this Court should grant Buck's Declinatory Exception and dismiss the Receiver's claims against it without prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 25, 2017, a copy of the above and foregoing pleading has been served upon all counsel of record by fax or electronic mail.

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