NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

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| JAMES J. DONELON, COMMMISIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.,<br>Plaintiff<br><br>vs.<br><br>TERRY S. SHILLING ET AL.,<br>Defendants | Number: 651,069<br><br>Section: 22<br><br>Judge: TIMOTHY E. KELLEY |

**REPLY MEMORANDUM IN SUPPORT OF CGI'S MOTION FOR SUMMARY JUDGMENT**

Defendant CGI Technologies and Solutions Inc. ("CGI") respectfully submits this Reply Memorandum in Support of its Motion for Summary Judgment. As set forth below, this Court should reject the counter-arguments raised in the Receiver's opposition memo, and should grant CGI's motion.

**Objections to Documents Filed in Support of Plaintiff's Opposition**

Pursuant to Code of Civil Procedure article 966(D)(2), CGI notes its objection to the following supporting documents submitted with the Plaintiff's Opposition:

1. Affidavit of Receiver, Paragraphs 5 & 6:

> "The purported signature of Greg Cromer found on attached Exhibit 1A is not identical to the purported signature of Greg Cromer found on Exhibit B attached to CGI's Motion for Summary Judgment."
>
> *and*
>
> "A simple comparison of the signatures on these documents to the purported signature of Greg Cromer found on Exhibit B attached to CGI's Motion for Summary Judgment reveals that they are not the same."

*Objection*: Billy Bostick is not a handwriting expert and he does not have any familiarity with the variants of Greg Cromer's signature. This statement in the Receiver's affidavit accordingly lacks any foundation and should be struck.

2. Affidavit of Receiver, Paragraphs 7 & 8:

> "CGI did substantial work for LAHC after April 30, 2014 during the transitional or 'wind down' period as GRI assumed the role of third party administrator of LAHC."
>
> *and*
>
> "During this transitional or 'wind down' period after April 30, 2014, CGI continued to provide grossly negligent services to LAHC and failed to perform its obligations to LAHC in a reasonable, competent, and professional manner, all of which caused compensable damages to LAHC. For example, both before and after April 30, 2014, CGI failed to ensure that its personnel who performed services for LAHC were adequately and appropriately trained, licensed, and certified to perform the services and functions delegated by LAHC to CGI; failed to accurately process and pay claims on LAHC's behalf in a timely manner at the correct rates and amounts; failed to cause LAHC to accurately process and pay health insurance claims in a timely manner at the correct rates and amounts; and, in general, failed to provide for a smooth and seamless transition of LAHC's ongoing business to GRI."

*Objection*: Billy Bostick did not assume control of LAHC until September 2015. *See* Opposition at 2. He nonetheless testifies about generic acts or omissions of CGI between June and November 2014. Not having been present then, Billy Bostick obviously has no personal knowledge about such work, and his affidavit also does not claim any familiarity with CGI's 2014 work or any review of relevant business records. The Court should therefore strike the referenced statement in its entirety.

Additionally, the entire statement quoted above is conclusory and lacks reference to a single specific act, fact, or incident. Indeed, Billy Bostick's statement does not in any way expand upon the generic allegations of the petition. *See* Am. & Res. Pet. at ¶ 44. It is precisely such non-specific and conclusory allegations that Code of Civil Procedure article 967(B) forbids. *See id.* ("[A]n adverse party . . . must set forth specific facts showing that there is a genuine issue for trial."). More relevant to this objection, such statements should not even be considered. *See, e.g.*, *Thomas v. Comfort Center of Monroe, LA, Inc.*, 2010-0494 (La. Ct. App. 1st 10/29/10), 48 So. 3d 1228, 1236 ("[P]laintiffs' conclusory statements and opinions on the issue of negligence in their affidavits may not properly be considered for purposes of summary judgment."); *Thompson v. South Central Bell Tel. Co.*, 411 So. 2d 26, 28 (La. 1982) ("[T]he conclusory statement of ultimate fact or law contained in the affidavit cannot be utilized on a summary judgment motion.").

## I. CGI'S MOTION FOR SUMMARY JUDGMENT AND THE RECEIVER'S OPPOSITION

In September 2015, the plaintiff ("the Receiver") assumed control of LAHC and subsequently filed the above-captioned lawsuit on LAHC's behalf. CGI has moved for summary judgment on the basis that LAHC previously released and compromised its claims against CGI. In particular, CGI relies upon a June 19, 2014, agreement (the "Amendment") between CGI and LAHC containing the following release:

> 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.

Exhibit B to MSJ at 2.

The Receiver has opposed CGI's motion for summary judgment, making the four following arguments:

1. The June 19, 2014, Amendment containing the above release has not been properly authenticated;
2. CGI's summary judgment motion is premature;
3. The release in the Amendment is limited and does not release claims against CGI arising out of acts or omissions occurring after April 30, 2014; and
4. The Receiver has the authority to disavow the Amendment.

This Reply Memorandum addresses each of these arguments in turn.

## II. CGI'S REPLY ARGUMENTS

For the reasons set forth below, the Court should reject the arguments made by the Receiver and grant CGI's motion for summary judgment as previously prayed for.

### A. The June 19, 2014, Amendment has been properly authenticated.

The Receiver's foremost attack on the Amendment's release is the assertion that the Amendment has not been properly authenticated. The Receiver's argument is two-fold: (1) the CGI affiant who authenticated the document does not have the requisite personal knowledge, and (2) the signature of Greg Cromer (LAHC's CEO) on the Amendment does not match another Amendment document signed by Greg Cromer.

In truth, this Court does not need to consider either of the Receiver's authentication

arguments. That is because, in support of the Receiver's opposition memo, he has himself attached "an additional copy of the Letter Agreement [(the Amendment)]." *See* Opposition at 5; Exhibit 1A to Opposition. According to the Receiver, he located the Amendment in "the LAHC corporate database" and what he appended to his affidavit was "a true and accurate copy of this document." Affidavit of Receiver at ¶ 2. In turn, the Receiver's authenticated copy of the Amendment is identical[1] to the copy submitted with CGI's motion for summary judgment. To the extent that CGI's Amendment document is at issue or was not properly authenticated, the Receiver's authenticated Amendment document may therefore be relied upon in its place. Alternatively, the Code of Evidence expressly recognizes that an authenticated document (such as the Receiver's) can be used to authenticate other similar documents. *See* LA. CODE EVID. art 901(B)(3) ("[T]he following are examples of authentication . . . . Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.").

Despite the Receiver's suggestions, there is nothing suspicious about the existence of two signed copies of the Amendment. Indeed, the Receiver appears not to have read the final sentence of the Amendment, which states:

> [I]f the foregoing accurately states our agreement to amend the Original Agreement, please sign below in the space provided **(two signed originals enclosed) and return one fully executed original to me.**

Exhibit B to MSJ at 2; Exhibit 1A to Opposition at 2 (bold added). In keeping with the Amendment's own text, CGI received one of the two original documents executed. Thankfully, the Receiver has now provided the second executed original, proving beyond any doubt that the Amendment is authentic.

Even ignoring the Receiver's executed Amendment document, CGI properly authenticated its Amendment document by affidavit. In particular, CGI representative Daniel Neice affirmed that he is an Account Executive at CGI, where has worked for four years. *See* Affidavit of Daniel Neice at ¶ 2. In his role at CGI, Daniel Neice further stated, he oversees the provision of consulting and managed services, and, more specifically, he is "familiar with CGI's business relationship with . . . LAHC." *See id.* The Receiver's authenticity objection is therefore baseless. *See generally*

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[1] The only difference between the documents is the appearance of Greg Cromer's signature. *Compare* Exhibit 2 to MSJ *with* Exhibit 1A to Opposition.

Affidavit of Daniel Neice.

Dismissing CGI's affidavit, the Receiver suggests that Daniel Neice could only have authenticated the Amendment (or other corporate record) if he can personally verify the signatures of all signing parties. *See* Opposition at 5. The Receiver, however, cites no authority for such a burdensome rule. Rather, the legal requirement is simply that there be "evidence sufficient to support a finding that the matter in question is what its proponent claims." LA. CODE EVID. art. 901. Here the unrebutted and uncontroversial testimony of Daniel Neice—the verification of a business record with which he is familiar—is sufficient to establish that the Amendment document submitted by CGI is genuine. Far from rebutting this evidence, the Receiver has actually submitted *corroborating* evidence in the form of LAHC's matching contract counterpart. The Receiver's evidentiary objection should accordingly be overruled.

In one form or another, there is more than sufficient proof—from the records of both parties—that the Amendment agreed to by CGI and LAHC is genuine. This Court should therefore reject the Receiver's objection to the Amendment's admission.

**B. CGI's Motion for Summary Judgment is Not Premature.**

In conjunction with his attack on the Amendment's authenticity, the Receiver has additionally argued that CGI's summary judgment motion is premature. The Receiver cites Code of Civil Procedure article 966 for the general rule that summary judgment should only be granted "after an opportunity for adequate discovery." In this case, the Receiver contends, it is simply too soon: discovery is incomplete, no discovery scheduling order has been entered, and too many questions remain unanswered. *See* Opposition at 6.

Conspicuously absent from the Receiver's prematurity argument is reference to the fact that this case has already been pending for eleven months. Moreover, CGI filed its motion for summary judgment on April 13—more than four months ago. Five days later, the Court held an "in-person status conference to discuss the above-captioned case and set hearing dates for certain exceptions and motions." *See* April 26, 2017, Order of Court. Among the attorneys present was counsel for the Receiver. *See id.* As the Court will recall, specifically discussed at this status conference was CGI's motion for summary judgment and the potential discovery needed in light thereof. The fruit of these discussions was ultimately incorporated into a corresponding order,

which stated: "IT IS FURTHER ORDERED that general discovery regarding the merits of this litigation is stayed absent further order of this Court; any discovery prior to September 25, 2017, is limited to specific issues involved in the Motion for Summary Judgment filed by CGI." *Id.*

Despite what were essentially instructions to conduct discovery, the Receiver failed to do so. There no pending motion to compel against CGI, and the Receiver is owed no documents or discovery responses from CGI. In fact, the Receiver never submitted any discovery requests and never took, noticed, or even requested any depositions. He cannot seriously now contend that he needs additional time to conduct discovery. The Receiver's prematurity complaint is particularly unconvincing in the present circumstances, where CGI's summary judgment motion is based upon a binding settlement agreement. As the very function of such agreements is to allow parties to avoid litigation, CGI is entitled to have its compromise agreement recognized and enforced immediately.

### C. The Receiver has neither alleged nor offered evidence of any claims against CGI that were not compromised in the Amendment.

Proceeding to the wording of the Amendment, the Receiver next argues that his claims are beyond the scope of the relevant release. In particular, the Receiver relies upon the release's introductory qualification:

> **Except for obligations assumed herein**, LAHC and CGI hereby release each other . . . from any and all claims that either may have against the other arising out of or relating to the Original Agreement.

Exhibit B to MSJ at 2 (bold added). Citing this language, the Receiver argues that he has numerous claims against CGI arising out of the Amendment and the "obligations assumed [t]herein." As explained below, however, the Receiver has not stated any claims against CGI arising out of the Amendment, nor has he offered any evidence of such claims.

After extinguishing all existing claims between CGI and LAHC, the Amendment provided that there would be a six-month "wind-down" period during which CGI would have only very limited obligations.[2] In May and June 2014, CGI would phase out of its few remaining[3]

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[2] *See* Exhibit B to MSJ at ¶¶ 1-2 ("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. . . . The general scope and structure of the wind down period is as specified in Attachment 1 to this Letter Agreement.").

[3] Importantly, the Amendment was preceded by an April 17, 2014, letter from LAHC that immediately terminated CGI's primary administrative responsibilities. *See* Exhibit 1J to Opposition. In particular, LAHC revoked CGI's

administrative roles while transferring data to a new third-party administrator; after June, CGI would effectively do nothing unless separately retained. Exhibit B to MSJ at 3-4. Concerning any such subsequent retention, CGI representative Daniel Neice stated the following in his affidavit:

> The June 19 agreement [(the Amendment)] further provided that CGI might provide additional future services if LAHC submitted a written service request and CGI responded with a cost estimate acceptable to LAHC. However, LAHC never submitted any such requests, and CGI provided no third-party administration or claims management services beyond June 30, 2014.

Affidavit of Daniel Neice at ¶ 5.

Given the lack of any allegation or evidence of a claim that LAHC had not compromised, CGI asked this Court to "dismiss with prejudice all of Receiver's and LAHC's claims against CGI." *See* MSJ's Prayer for Relief. The Receiver's response was to submit an affidavit blindly asserting that he has many claims against CGI arising out of the wind-down period:

> CGI did substantial work for LAHC after April 30, 2014 during the transitional or 'wind down' period as GRI assumed the role of third party administrator of LAHC.
> . . . .
> During this transitional or 'wind down' period after April 30, 2014, CGI continued to provide grossly negligent services to LAHC and failed to perform its obligations to LAHC in a reasonable, competent, and professional manner, all of which caused compensable damages to LAHC. For example, both before and after April 30, 2014, CGI failed to ensure that its personnel who performed services for LAHC were adequately and appropriately trained, licensed, and certified to perform the services and functions delegated by LAHC to CGI; failed to accurately process and pay claims on LAHC's behalf in a timely manner at the correct rates and amounts; failed to cause LAHC to accurately process and pay health insurance claims in a timely manner at the correct rates and amounts; and, in general, failed to provide for a smooth and seamless transition of LAHC's ongoing business to GRI.

Affidavit of Receiver at ¶¶ 7-8.

As noted in CGI's objections, the Receiver's above statement is a classic example of a conclusory assertion that lacks "specific facts showing that there is a genuine issue for trial." LA. CODE CIV. PROC. art. 967(B). Assuming that the statement is even admissible, it thus fails to establish that there is a genuine issue of material fact precluding summary judgment.

To be clear, the Receiver is the plaintiff and he bears the burden of ultimately proving his claims against CGI. At this point, CGI has offered solid evidence of a compromise, explained that "[a]ll of the claims that the receiver has made against CGI were the subject of th[at] settlement

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authority to oversee "(1) Claims Processing, (2) Printing and Fulfillment (New Member Kits and Materials), (3) Premium Billing (on Exchange), and (4) Member/Provider Support Services." *See id.*

agreement," and requested dismissal of all claims. MSJ at ¶ 7, Prayer for Relief. In such a situation, Code of Civil Procedure article 966(D)(1) is clear: "The burden is on [the Receiver] to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law." *Id.* at (D)(1).

To meet his burden, the Receiver has offered almost nothing. Indeed, in support of the assertion that he has viable wind-down-period claims, the Receiver provided only one thing: his own conclusory affidavit. Rather than describe the claims with any specificity, the Receiver's affidavit essentially charges that CGI continued to do "lots of things" wrong from April 30 to October 31, 2014. For good reason, such blanket statements are not enough to survive summary judgment. *Cheramie Services, Inc. v. Shell Deepwater Production, Inc.*, 2009-1633 (La. 4/23/10), 35 So. 3d 1053, 1062 ("[A]ffidavits with conclusory allegations of fact which are devoid of specific facts are not sufficient to defeat summary judgment."); *Christakis v. Clipper Const., LLC*, 2012-1638 (La. Ct. App. 1st 4/26/13), 117 So. 3d 170-71 (same).

Further detracting from the Receiver's generic affidavit is the affidavit's inconsistency with the Receiver's own exhibits. For instance, the Receiver broadly claims in his affidavit that, for six months beyond April 30, 2014, CGI "failed to accurately process and pay claims on LAHC's behalf in a timely manner at the correct rates and amounts" and "failed to cause LAHC to accurately process and pay health insurance claims." Affidavit of Receiver at ¶ 8. In contrast, a letter submitted by the Receiver (Exhibit 1J) shows that CGI's claims-processing, premium-billing, and support-services authority was completely "revoked" on April 17, 2014.[4] As the Receiver is apparently unfamiliar with the limited duties CGI even had beyond April 2014, his blanket allegations of misconduct carry no weight.[5]

Despite the time, resources, and company records available to him, the Receiver did not muster a single document, affidavit, or piece of data to show that he has any claims against CGI

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[4] *See* Exhibit 1J to Opposition at 1 ("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.").

[5] The Receiver also complains about CGI's assigned personnel during the wind-down period, whereas the Amendment explicitly specifies that "no additional CGI personnel will be assigned to the LAHC account for purposes of improving CGI's performance." Exhibit B to MSJ at 1.

arising out of the wind-down period.[6] He has accordingly failed to provide the minimal evidence necessary to demonstrate the existence of any uncompromised claim. The Court must therefore grant the pending motion for summary judgment and dismiss the Receiver's suit.

**D. The Receiver cannot disavow the June 19, 2014, Amendment and its releases.**

The Receiver's final argument is that he can simply disavow the Amendment, thus dispensing with the compromise it contains. According to the Receiver, this authority comes from La. R.S. § 22:2009, which states:

> 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.**

*Id.* (bold added). Relying on the default prescriptive period of ten years, the Receiver suggests that this disavowal power may be used to rescind LAHC's completed contracts as far back as 2005. *See* Opposition at 12.

In arguing that he can unwind contracts for ten years, the Receiver has specifically sought to distance himself from the receivership statutes limiting his ability to: (1) void past preferential transfers of property to creditors (reach-back of four months) and (2) void past obligations incurred "without fair consideration" (reach-back of twelve months). *See* La. R.S. §§ 22:2019, 22:2020. According to the Receiver, his authority to undo completed contracts is distinct from his other avoidance powers and not subject to any statutory limitation.

As the Receiver bases his claim upon the scope of his statutory authority, he has raised a basic question of statutory interpretation. Among other things, of course, "[t]he rules of statutory interpretation require that a statute's meaning and intent are determined after consideration of the entire statute and all other statutes on the same subject matter." *Boudreaux v. Louisiana Dept. of Public Safety and Corrections*, 2011-1087 (La. Ct. App. 1st 12/21/11), 80 So. 3d 767, 770. Here,

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[6] The Receiver has emphasized that an accounts-payable schedule shows that CGI received payments from LAHC from May 2014 through November 2014. *See* Exhibit 1H & 1I to Opposition. What this schedule does not show, however, is when CGI performed the corresponding work. More importantly, nothing about the payment schedule indicates that CGI failed to perform its obligations or act appropriately during the relevant wind-down period.

the relevant statute does not expressly state how far back the Receiver's disavowal power may be exercised. However, the statute does state the following:

> Every transfer made or suffered **and every obligation incurred by an insurer within one year prior** to the filing of a successful petition for rehabilitation or liquidation pursuant to this Chapter **is fraudulent as to then existing and future creditors if made or incurred without fair consideration**, or with actual intent to hinder, delay, or defraud either existing or future creditors. A transfer made or an obligation incurred by an insurer . . . which is fraudulent pursuant to this Section, **may be avoided by the receiver.**

La. R.S. § 22:2021 (bold added). In other words, the Receiver is only permitted to avoid an obligation incurred without fair consideration[7] if such an obligation was incurred in the year preceding the rehabilitation petition. Where property—such as a contractual right[8]—has been transferred *for* consideration, the reach-back is reduced to four months. La. R.S. § 22:2020.

Notwithstanding these statutes, the Receiver contends that he can nonetheless use his "disavowal" power to void contracts completed up to ten years ago. If this were true, however, then Section 2021's limitations would be meaningless or senseless—the Receiver could only avoid fraudulent obligations for up to one preceding year, but he could avoid *any* contracts he wants to for up to ten preceding years. *See Hoag v. State ex rel. Kennedy*, 2001-1076 (La. Ct. App. 1st 11/20/02), 836 So. 2d 207, 219 ("Rendering a part, or the entirety, of a statute meaningless or unconstitutional is the last option available to a court when it interprets a statute under this jurisprudence.").

Given this context, it is clear that the Receiver has vastly exaggerated his contract-disavowal authority. Yes, he may generally disavow contracts, but only *prospectively*. To the extent an insurer's contracts have already been performed, the Receiver can only reach back in limited situations and, even then, no further than the statute permits. Unlike the Receiver's suggested interpretation, this understanding harmonizes the entire receivership statute. CGI's reading is also consistent with judicial references to the Receivership's disavowal authority as

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[7] For purposes of this motion, the question of consideration given for the release is immaterial because the time period for avoiding such an obligation has expired under either the four-month period for obligations incurred with consideration or the one-year period for "fraudulent" transfers given without consideration. However, to the extent the issue becomes material, CGI submits that the mutual release is by its very nature an exchange of consideration. Moreover, this release included a waiver of fees and interest payments otherwise due to CGI. *See* Exhibit 1A, at paragraph 2.

[8] *See, e.g., Davis v. St. Francisville Country Manor, L.L.C.*, 2013-0190 (La. Ct. App. 1st 11/1/13), 136 So. 3d 20, 24 n.4 (recognizing that contractual rights are considered a "property interest"); *City of Thibodeaux v. Louisiana Power & Light Co.*, 126 So. 2d 24, 38 ("[A] contract is property.").

applying to "executory" contracts. *See, e.g., Weber v. Press of H. N. Cornay, Inc.*, 144 So. 2d 581 (La. Ct. App. 4th 1962) ("It is a well recognized principle of law that a receiver has the right to either adopt or reject **executory** contracts of the corporation entered into prior to the receivership.") (bold added). Finally, enforcing the statutory limitation avoids the substantial due process and judicial efficiency issues that would arise if a receiver could simply undo every contract to which an insurer was ever party.[9]

## III. CONCLUSION

For the reasons set forth above, CGI urges the Court to reject the Receiver's referenced arguments and grant summary judgment dismissing with prejudice all of Receiver's and LAHC's claims against CGI.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing pleading has been sent to all counsel of record by electronic delivery or parcel via U.S. mail, properly addressed and postage prepaid, this 21st day

[9] The Receiver cites *Brown v. Risk Exchange, Inc.* for the proposition that he can reach back up to ten years to disavow LAHC's contracts. 95-2199 (La. Ct. App. 1st 5/10/96), 674 So. 2d 484. However, the Receiver's reliance upon *Brown* is misplaced. The *Brown* court did not hold or suggest that receivers for insurers may broadly disavow contracts; rather, the court held only that, in addition to the receiver's limited rights to avoid certain transfers, a receiver can also exercise any cause of action belonging to the insurer. *Id.* at 487. The *Brown* court thus held that a receiver could assert the insurer's cause of action for "payment of a thing not due," subject to the 10-year prescriptive period applicable to such claims.

In this case, the Receiver is not purporting to assert LAHC's cause of action, but is purporting to disavow the Amendment pursuant to his statutory authority. The 10-year prescriptive period discussed in *Brown* therefore has nothing to do with the Receiver's claims here.

of August, 2017.

Robert W. Barton