JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC.	:	SUIT NO.: 651,069 SECTION: 22
VERSUS	:	19TH JUDICIAL DISTRICT COURT
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, AND TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA	:	PARISH OF EAST BATON ROUGE
	:	STATE OF LOUISIANA

OPPOSITION MEMORANDUM TO DEFENDANTS' MOTION TO COMPEL

MAY IT PLEASE THE COURT:

Plaintiff herein, 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 ("Plaintiff" or "Receiver"), respectfully files this Opposition Memorandum to Defendants' Motion to Compel Production of Responsive LDI Documents ("Motion to Compel"), currently set for Zoom hearing before this Honorable Court on Friday, September 25, 2020. For all of the following reasons, defendants' Motion to Compel should be DENIED because, as a matter of law and fact, the Receiver of LAHC, Plaintiff herein, is not the legal custodian of the regulatory records sought by defendants.

A. Introduction

As correctly stated by defendants in their supporting memorandum, defendants' motion to compel is limited to the discrete issue of whether, according to Louisiana law, the Receiver of LAHC is the custodian of all records, including the internal regulatory documents maintained by LDI, relating to LAHC.[1] The immediate issue of custody is separate and distinct from the issue of whether the regulatory records maintained by LDI are discoverable. Regardless of whether the Receiver is deemed to be the custodian of these regulatory records—records which the Receiver does not have possession of and has not reviewed—whether these regulatory records are

[1] "Hence, the ***sole*** issue for resolution by the Court is whether or not responsive records of the LDI are within Plaintiff's 'possession and control.'" Memo., p. 4 (emphasis in original)..

discoverable is a separate, distinct issue that must be addressed at a later date. In other words, who has legal custody of these regulatory records does not answer the separate, and much more important, issue of whether these regulatory records are discoverable. That much more important fight is for another day.

Rather than make a simple public records request to the Louisiana Department of Insurance ("LDI") requesting the production of regulatory documents maintained by LDI regarding LAHC, defendants erroneously insist that the Receiver of LAHC is the custodian of these regulatory records and that, therefore, their discovery requests seeking these regulatory records are appropriately directed to him as Receiver. Defendants refuse to accept the legal "separate capacity doctrine" which treats the Commissioner as regulator as a separate and distinct legal entity from the Commissioner as receiver, and refuse to accept the Receiver of LAHC's factual representations that he neither has possession or control over the regulatory records regarding LAHC which are maintained by the LDI in its regulatory capacity. Further, defendants erroneously argue in their motion to compel that, because the Receiver has acknowledged that he has produced all LDI records found within LAHC's records (i.e., all LDI records within his possession, custody, and control as the Receiver of LAHC), that if the Receiver is deemed to be the custodian of all internal regulatory documents maintained by LDI, then it necessarily follows that these requested records are discoverable.[2] Defendants' logic and argument is clearly flawed. Regardless of whether LDI or the Receiver is deemed to be the legal custodian of the regulatory documents sought by defendants, these regulatory records are not discoverable pursuant to Louisiana law.

As will be shown below, the Commissioner in his capacity as the Rehabilitator of LAHC, through the duly appointed Receiver of LAHC (Plaintiff here), is not the custodian of the regulatory records maintained by the Commissioner in his capacity as the regulator of LAHC (i.e., LDI) before its collapse.

B. Specific Discovery Requests and Response

In short, defendants have propounded numerous discovery requests to Plaintiff requesting all of the regulatory records maintained by the LDI regarding LAHC. In general, Plaintiff responded to defendants' requests by asserting that he, as the Receiver of LAHC, does not have

[2] "The responsive LDI records thus are, at a minimum, discoverable," argue defendants, "and the Commissioner, in response to Buck's discovery requests, has already agreed to produce LDI records to the extent they are 'in his possession and control.'" Memo, p. 3. Of course, the Receiver does not agree that he has custody of these regulatory records, much less has he has agreed that these regulatory records are discoverable regardless of who has custody of them.

possession, custody, or control over these regulatory records—LDI does. Furthermore, to the extent that any LDI documents, communications, or records of any kind are found in the LAHC database which Plaintiff does have custody and control of, all of these LDI records have previously been produced by Plaintiff. Furthermore, on September 3, 2020 (the same day defendants filed their Motion to Compel), the Receiver submitted a formal public records request to LDI seeking production of those documents he believes are relevant and discoverable herein; basically, all communications between LDI, on the one hand, and LAHC, all defendants, CMS, and a number of other entities. LDI formally responded to the Receiver's public records request on September 11, 2020; Plaintiff immediately forwarded all responsive documents produced by LDI to all defendants herein. To Plaintiffs knowledge, no one else has made a public records request or issued any type of discovery demand to LDI. As of this date, LDI has not appeared in this proceeding.

C. The Commissioner acting as Regulator and the Commissioner acting as Receiver are legally distinct and separate entities as a matter of law and fact

As a matter of law, the Commissioner of Insurance when acting in his capacity of a regulator, is considered a distinct legal entity separate and apart from when he is acting in his capacity of a receiver.[3] And as a matter of fact and practice in Louisiana, court-appointed receivers effectively conduct arms' length transactions with the LDI and do not have possession of or control over any regulatory records maintained by the Commissioner in his capacity as regulator (i.e., LDI).

1. As a matter of law: the Commissioner qua regulator and the Commissioner qua receiver are two separate and distinct legal entities

a. The RLCA recognizes that the Commissioner should be considered a separate legal entity when acting as regulator as opposed to receiver

In the Louisiana Rehabilitation, Liquidation, Conservation Act ("RLCA"), La. R.S. 22:2001, *et seq*., the Louisiana Legislature comprehensively set forth the Commissioner's rights and obligations relative to insolvent insurers, including the principle that the Commissioner acts in different and separate capacities: regulator and rehabilitator. The RLCA creates a court-appointed position of Receiver that is legally distinguishable from the Commissioner of Insurance

[3] As used herein, the general term "Receiver" is used to refer to all separate capacities (i.e., Liquidator, Rehabilitator, or Conservator) that the Commissioner may be acting through appointees in post-receivership proceedings, other than in a regulatory capacity. *See* La. CCP art. 693. Technically, the Commissioner was appointed as the Rehabilitator of LAHC by the Receivership Court; the Commissioner chose Billy Bostick to serve as the Receiver of LAHC; and in September 2015, the Receivership Court approved of Billy Bostick and appointed him as the Receiver of LAHC.

in his capacity as regulator. La. R.S. 22:2008(A). Although the Commissioner is the statutorily designated appointee who serves as a Receiver of an insolvent insurance company, it does not follow that these two positions—Receiver and Regulator—are one and the same for all purposes. To the contrary, that the RLCA mandates a court order appointing the Commissioner to serve as a receiver strongly evidences that the legislature contemplated and mandated that the Commissioner as receiver acts in a separate and distinct capacity than he does when he acts in his capacity as regulator.

The Commissioner, as Receiver, must account to, and is responsible to, the district court which appoints him. La. R.S. 22:2009(B)(C) and (D). The receivership process is not subject to administrative review. In contrast, the Commissioner, as regulator, is not directly accountable to any district court, although his regulatory rulings are subject to administrative review. If, as defendants erroneously argue, there is no legal distinction between the Commissioner as regulator and the Commissioner as Receiver, then there would have been no need or reason for the legislature to create a special capacity of Receiver that is subject to court supervision.

For example, La. R.S. 22:2004(A), a venue provision, governs where the Commissioner may bring an action. This statute includes a recognition that regardless of the separate capacities in which the Commissioner may bring a lawsuit, suit is proper in the same forum. "An action under this Chapter brought by the commissioner of insurance, in that capacity, or as conservator, rehabilitator, or liquidator may be brought in the Nineteenth Judicial District Court for the parish of East Baton Rouge or any court where venue is proper under any other provision of law." Id. The Louisiana Legislature founded this dual capacity on the understanding that "[i]nsurance is an industry affected with the public interest and it is the purpose of this Code to regulate that industry in all its phases." La. R.S. 22:2(A)(1). One phase includes rehabilitation or liquidation of insolvent insurers.[4]

Even the Louisiana Code of Civil Procedure recognizes that the receiver for a failed insurance company is the proper part plaintiff to bring suit—not the Commissioner in his capacity as regulator. La. CCP art. 693 provides that "The receiver appointed by a court of this state for a domestic insurer is the proper plaintiff to sue to enforce a right of the domestic insurer, or of its

[4] The Louisiana Supreme Court recognized in this case that any distinction between liquidation and rehabilitation "is immaterial when considering the overall statutory scheme, as both are legal devices used by the Commissioner to manage insolvent insurers." Thus, the phase in which this case is presented is the management of insolvent insurers. *Donelon v. Shilling*, 2019-00514 * 10 (La. 4/27/20); __So.3d __.

receiver." Both the RLCA and the CCP recognize and embody the relatively simple principle that the Commissioner qua regulator is not the same as the Commissioner qua receiver.

Defendants' refusal to recognize the legal distinction between these two capacities (as evidenced by Louisiana's comprehensive statutory scheme) reveals their fundamental misunderstanding of Louisiana Receivership law and practice. This fundamental misunderstanding of Receivership law and practice also explains their erroneous insistence that the Receiver of LAHC is the custodian of all regulatory records maintained by the LDI (i.e., by the Commissioner of Insurance in his regulatory capacity). Properly understood, the Commissioner (i.e., LDI) is the custodian of regulatory records relating to all insurance companies doing business in Louisiana, and the Receiver of LAHC is the custodian of all records maintained by LAHC.[5]

b. "Separate Capacity Doctrine"

Despite defendants' unsupported and uninformed insistence that the Commissioner as Regulator and the Commissioner as Receiver are one and the same for discovery purposes, the vast majority of courts which have addressed the immediate issue recognize the legally distinct and separate capacity of the Commissioner as Regulator and the Commissioner as Receiver, and correctly conclude that discovery requests seeking regulatory records must be directed to the Commissioner in his capacity as regulator (i.e., LDI)—and not to the Commissioner as receiver. Numerous cases, none of which are cited or discussed by defendants in their motion to compel, recognize and apply the "separate capacities doctrine," which provides that a governmental entity, like the Commissioner, when acting in one capacity (as a regulator), is treated as a separate entity when acting in another capacity (as a receiver), and conclude that a Receiver is not the custodian of "confidential" regulatory records.

In *Haggard v. Ossege*, 2011 WL 4711926 (S.D. Ohio 2011), defendants sought regulatory records regarding an enforcement action brought by the Federal Deposit Insurance Corporation (FDIC) prior to suit being filed against certain bank officers by the FDIC as Receiver. Defendants in *Haggard* made essentially the same argument that defendants make here: the FDIC, in its corporate capacity as regulator which conducted the pre-suit enforcement action, is the same FDIC who filed suit in its capacity as Receiver of the failed bank; therefore, it follows, according to

[5] *See Stephens v. Park Broadcasting*, 913 S.W.2d 330 (Ky. App. 1996), for an informative discussion of how the comprehensive receivership statutory framework of state insurance codes provides for the Commissioner acting in multiple, separate capacities.

defendants' flawed reasoning, that both the FDIC as Receiver is the custodian of the regulatory records maintained by the FDIC as corporate regulator. In essence, according to defendants' argument, FDIC as regulator is synonymous with FDIC as Receiver, so both iterations of FDIC are the custodian of all records relating to the failed bank.

The federal district court in *Haggard* correctly rejected defendants' erroneous argument by recognizing the legally distinct and separate capacities of FDIC, as corporate actor, and FDIC, as receiver. According to the court:

> The FDIC functions "in several different guises (as receiver, as conservator, and as a corporation)" and "each organization can conduct arm's length transactions with itself in these various capacities." "On the one hand, the FDIC acts as receiver of a failed bank, marshalling its assets in order to pay the bank's creditors. On the other hand, the FDIC-Corp. acts as an insurer of member banks. . . ." Courts have applied this distinction in the context of discovery. . . . The FDIC, in its corporate capacity, is simply not a party to this lawsuit. As such, the documents created or submitted during the course of the administrative proceeding initiated by the FDIC in its corporate capacity are not in the "possession or control" of FDIC-R and the Ossegee Defendants cannot obtain them through a Rule 34 request [to the Receiver]. ... Of course, the Ossegee Defendants may pursue these documents from the FDIC, in its corporate capacity, through whatever legal means available, just as they would be permitted to do with respect to any other discovery sought from a non-party.

Id. at p. 3 (citations omitted). The rationale and conclusion reached in *Haggard* is the same in the immediate case. The Commissioner when regulating LACH prior to receivership, acted in his capacity as regulator; once LAHC was placed into receivership, the Commissioner's designated representative was appointed by the court to administer the failed insurance company in his capacity as Receiver. The Commissioner as regulator is not directly involved in the administration of LAHC; and the Commissioner as Receiver was not involved in the regulation of LAHC. Discovery requests seeking regulatory records must be directed to the Commissioner in his capacity as regulator (i.e., LDI), while discovery requests regarding the pre-receivership administration of LAHC must be directed to the Commissioner in his capacity as receiver (i.e., the Receiver of LAHC).

In *FDIC v. Wachovia Ins. Services, Inc.*, 2007 WL 2460685 (D.Conn. 2007), the federal district court recognized the separate capacities of FDIC as regulator and FDIC as receiver, and refused to order the FDIC as receiver to reply to discovery requests that should have been directed to FDIC as regulator. According to *Wachovia*:

> The plaintiff in this case is the Federal Deposit Insurance Corporation in its Capacity as Receiver for CBC. The distinction plaintiff draws between the FDIC as a Receiver and the FDIC as a corporate regulator is a valid one. It is not, as Wachovia suggests, merely a ploy to obstruct discovery. The distinction pertains not just to liability, but to the *reasonableness* of the deposition notices at issue. The FDIC as Receiver is not the same thing as the FDIC Corporate, and cannot be transformed into it by a Rule 30(b)(6) notice.

> Nor is the plaintiff the Department of Justice or any other agency or entity of the federal government.

Id. at 2 (citations omitted)(emphasis in original). Again, the reasoning and result in *Wachovia* should be the same here.

In another case directly on point, *Nichols v. FDIC*, 2017 WL 434426 (W.D. Wash. 2017), the federal district court once again corrected addressed and rejected defendants' erroneous position taken here. In *Nichols*, as here, plaintiff propounded numerous discovery requests to the FDIC in its capacity as receiver which sought the production of regulatory records maintained by the FDIC in its corporate capacity as regulator. According to *Nichols*:

> As an initial matter, the Court points out the distinction between the FDIC as receiver and as a corporate entity. The FDIC has three main responsibilities: (1) to act as an insurer, (2) to act as a supervisor, and (3) to act as a receiver. As a rule, the FDIC's role as receiver is independent of its corporate roles as supervisor and insurer. . . . The courts have long recognized the FDIC's legal ability to operate in different capacities, with its different capacities conducting arms' length transactions with each other. . . . Because FDIC Corporate and FDIC Receiver perform two different functions and protect wholly different interests, courts have been careful to keep the rights and liabilities of these two entities legally separate. . . . This distinction is important for discovery purposes. In fact, federal courts have applied this distinction in the context of discovery. . . . In this case it appears that Plaintiff has requested information from FDIC coprporate as to any investigations it may have conducted into WaMu's lending practices. To the extent that the FDIC-Receiver has objected to discovery on the basis that it seeks information in the possession, custody or control of FDIC corporate, the objection is valid and it is not required to produce information sought from that entity.

Id. at pp. 7-8 (citations omitted). The distinction recognized and embraced by the court in *Nichols* applies here: The Commissioner's role as regulator is independent of his role as Receiver. To the extent that defendants seek the production of regulatory records, they must direct their requests to the Commissioner in his capacity as regulator (i.e., the LDI)—not to the Receiver of LAHC.

Similarly, in *FDIC v. Nason Yeager*, 2014 WL 12617802 (M.D. Fla. 2014), the legally distinct and separate capacity of the FDIC as regulator as opposed to the FDIC as receiver was recognized to block defendants' discovery requests seeking regulatory records which were erroneously directed to the receiver.

> The FDIC "has the authority to serve in two separate and legally distinct capacities: (1) in its corporate capacity as an insurer of deposits and a regulator of member banks (the "FDCI-C") and (2) in its receivership capacity as a receiver of failed banks (the "FDIC-R")." The FDIC-R is a separate legal entity from the FDIC-C and cannot be compelled to produce documents that are not in the FDIC-R's possession or control.

Id. at 2 (citations omitted).

In a case involving a discovery dispute between an accounting defendant and an Insurance Commissioner in his capacity as Liquidator of a failed insurance company, *Ario v. Deloitte & Touche*, 934 A.2d 1290 (Pa. 2007), the district court correctly recognized and applied the "separate

capacities doctrine" to shield the Liquidator from discovery requests that were improperly directed to him, instead of to the Commissioner in his capacity as regulator. According to *Ario*:

> In addition, the information that is sought occurred at the time in which the Insurance Commissioner was acting in her regulatory capacity. "Under the 'separate capacities doctrine' a governmental entity, when acting in one capacity, is treated as a separate entity when acting in another capacity." Since the Defendants seek to learn of communications that occurred during the decision making process while the Insurance Commissioner was acting in her Regulatory capacity and the information is protected not only by the deliberative process privilege but it is also shielded from disclosure as it is not relevant. The information is not relevant because pre-liquidation, regulatory conduct of the Insurance Commissioner cannot be raised against a Statutory Liquidator enforcing those rights.

Id. at 1293-94 & fn. 2 (citations omitted).

Similarly, in *Koken v. One Beacon*, 911 A.2d 1021 (Pa. 2006), defendants propounded discovery requests to the Commissioner of Insurance in her capacity as Liquidator of a failed insurance company, seeking production of regulatory records maintained by the Commissioner in her capacity as regulator. The Liquidator objected to defendants' discovery requests, in part, because "the Insurance Department, in its regulatory capacity, is not a party to this litigation and examination materials obtained by the Department are protected from disclosure by the regulatory privilege." *Id.* at 1025. In sustaining the Liquidator's objection to defendants' discovery requests, the court recognized and applied the "separate capacities doctrine," which provides that "a governmental entity, when acting in one capacity, is treated as a separate entity when acting in another capacity." *Id.* at 1028 (citations omitted). According to *Koken*, "Our courts have consistently found that pre-liquidation, pre-rehabilitation, regulatory conduct of the Insurance Commissioner cannot be raised against a Statutory Liquidator enforcing those rights. Furthermore, the information One Beacon requests can be 'relevant' only if it is based on a legally cognizable argument. Therefore, One Beacon's application to compel discovery, as it pertains to questions regarding the Insurance Department's pre-rehabilitation dealings with Legion, is denied." *Id.* at 1030.

The vast majority of courts which have addressed the immediate issue, like *Haggard, Wachovia, Nichols, Nason Yager,* and *Koken,* and many others,[6] recognize the legally distinct and separate capacity of the Commissioner as regulator and the Commissioner as receiver, and

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[6] For other cases recognizing the legally distinct and separate capacities of an entity acting as regulator, in certain instances, and as receiver, in others, *see FDIC v. Harrison*, 735 F.2d 408 (11th Cir. 1984); *Trigo v. FDIC,* 847 F2d 1499 (11th 1988); *FDIC v. Bay Business*, 885 F.2d 633, 636 (9th Cir. 1989)("under federal law, the FDIC is empowered to act in two entirely separate and distinct capacities in proceedings involving an insured state bank"); *FDIC v. Berstein*, 944 F.2d 101 (2d Cir 1991); *FDIC v. Rahn*, 116 F.3d 1142 (6th Cir. 1997); *FDIC v. Skow*, 2012 WL 8503168 (N.D. Ga. 2012).

correctly conclude that discovery requests seeking regulatory records must be directed to the Commissioner as regulator (i.e., LDI)—and not to the Commissioner as receiver. This Honorable Court should do the same.

c. The legal basis for Defendants' position is paper-thin

Rather than endorse the "separate capacity doctrine" embraced by a majority of courts and accept that the Receiver is not the custodian of the Regulator's records, defendants instead champion the minority view that the Commissioner, regardless of what capacity he may be acting, is the custodian of all regulatory and receivership records. Defendants primarily rely upon *Donelon v. Herbert Clough, Inc.*, 2006 WL 8436324 (M.D. La. 10/19/2006) and *RTC v. Deloitte & Touche*, 145 F.R.D. 108 (D. Colo. 1992) to support their erroneous position.[7] Defendants reliance on *Herbert Clough* and *Deloitte* is clearly misplaced.

Herbert Clough is a fourteen-year-old unpublished opinion by a federal magistrate judge, that was never appealed even to the district judge, and which has not been cited even obliquely in any subsequent opinion. It applied federal concepts of discovery that have been radically amended since then. And it was decided before the Louisiana Supreme Court's decision in *Wooley v. Lucksinger*, 2009-0571 (La. 4/1/11), 61 So.3d 507, 606, and before the enactment of La. R.S. 22:2043.1 in 2012. Moreover, the vast majority of cases involving Louisiana receiverships are litigated in Louisiana state courts; it is rare that a suit filed by a Louisiana receiver is removed to and decided by a federal court. It should therefore not be surprising that a federal magistrate, who is relatively unfamiliar with Louisiana receivership law, would not fully understand or appreciate the well-established "separate capacity doctrine" and how it applies in practice. Needless to say, but *Herbert Clough* should be given little if any weight in light of the numerous and well-reasoned cases cited in Section C.1.b, *supra*, that contradict its reasoning and holding.

Moreover, unlike the current situation in this case, in *Herbert Clough* defendants simultaneously issued a subpoena duces tecum to the LDI that tracked and was identical to the discovery requests propounded to the Commissioner in his capacity as liquidator. *Id.* at 1. This third-party subpoena prompted a Staff Attorney with the LDI, Arlene Knighten, to submit an

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[7] Defendants also cite *Landry v. Comeaux*, 07-891 (La. App. 3rd Cir. 12/05/97); 971 So.2d 434, and devote a single paragraph to it; however, *Comeaux* is a family law case dealing with the Court's authority to issue sanctions against an ex-spouse who refused to obtain his personal banking records from his bank despite the trial court's order directing him to do so. The other two cases briefly mentioned by defendants in their memo, *Benjamen v. Sawicz*, 823 N.E.2d 879 (Ohio App. Ct. 2004) and *In re Ideal v. Becker*, 140 A.D.2d 62 (N.Y. App. Div. 1988) are addressed at pp. 14-15, *infra*.

affidavit in support of the Commissioner's position in his capacity as regulator. In a very real sense, by issuing the identical discovery requests to both LDI and the Receiver, the issue of whether the Commissioner was custodian of the regulatory records in his regulatory capacity or his receiver capacity was rendered academic. One way or the other, the Commissioner was present, was represented by counsel, and was in a position to protect the disclosure of confidential regulatory records according to Louisiana law in 2006. Even the magistrate judge in *Herbert Clough* acknowledged that the "Commissioner in his or her capacity as 'regulator' or 'director,' is technically a third party to the action." *Id.* at 1. Given that the Commissioner was before her in both capacities at the time, the magistrate judge considered the argument regarding whether the Commissioner as regulator or the Commissioner as receiver was the proper custodian of the subject records to be a "semantical problem." *Id.* at 6. Here, however, unlike the situation in *Herbert Clough*, defendants refuse to issue a subpoena to LDI or to make a public records request and the LDI and the Commissioner in his capacity of regulator is not currently before this Honorable Court.

Furthermore, although the magistrate judge in *Herbert Clough* ordered the Commissioner, whether in his capacity as regulator or liquidator, to produce "all non-privileged documents responsive to the subpoena directed to it," we do not know whether, what, and when the Commissioner produced any such documents. *Herbert Clough* only addressed in passing (and erroneously) the preliminary issue of whether the Commissioner, in any capacity, has custody over the records sought by defendants; the federal magistrate did not address the more substantive issue of what regulatory records—regardless of who has custody of them—are discoverable.

In fact, it is telling that the magistrate judge admonished defense counsel and advised them that they should have "attempted to confer with counsel for the DOI, Staff Attorney Arlene D. Knighten, prior to filing this motion to compel." *Id.* at 6. In other words, defendants needed to work with independent, outside counsel for LDI in its regulatory capacity (as opposed to counsel of record for the Commissioner in his capacity as Liquidator in the federal proceeding) in an effort to determine which records were privileged and/or non-discoverable for any reason. This makes sense given that, as a practical matter and as explained in greater detail in Section C.2, *infra*, neither the Receiver nor his counsel have access to or control over the regulatory records sought by defendants in *Herbert Clough* or here. See the attached Affidavit of the Receiver for LAHC (Ex. 1). Unless and until the Commissioner in his capacity of regulator is presented a request to produce regulatory records, neither the Receiver for LAHC nor his counsel are in a position to access or

review any such regulatory records—much less determine whether they are privileged, subject to some statutory or jurisprudential rule, and are otherwise non-discoverable for any reason.

Defendants also cite, but do not discuss in great detail, another case that undermines their position, *RTC v. Deloitte & Touche*, 145 F.R.D. 108 (D. Colo. 1992). In *Deloitte*, the Resolution Trust Corporation ("RTC") filed suit against the auditing and financial consulting firm of Deloitte & Touche. The RTC was a U.S. government-owned asset management company charged with liquidating assets, primarily real estate-related assets such as mortgage loans, that had been assets of savings and loan associations (S&Ls) declared insolvent by the Office of Thrift Supervision (OTS) as a consequence of the savings and loan crisis of the 1980s. The OTS was an office of the U.S. Department of Treasury that was responsible for regulating and supervising S&Ls. As observed by the federal court in Deloitte, the RTC "may act as a conservator or receiver of a savings association when appointed to do to by the director of the OTS." *Id.* at 112, fn. 1 (citations omitted). In essence, the OTS served as the regulator or S&Ls (comparable to the LDI here), and the RTC served as the receiver to manage and administer the assets of failed S&Ls (comparable to the Receiver of LAHC).

The custody issue raised in *Deloitte*, given the comparable regulatory role of OTS and the receivership role of RTC, is very instructive to the immediate issue before this Honorable Court. Defendant in *Deloitte* filed a motion to compel RTC to produce "relevant documents that [RTC] had obtained or could obtain from OTS." *Id.* at 109. RTC, like the Receiver here, took the position that RTC and OTS "are separate and distinct legal entities" and that defendants must direct their discovery requests regarding regulatory records to OTS, a non-party to the pending suit, as OTS was the custodian of these regulatory records. Significantly, the federal court in *Deloitte* did not reject RTC's separate and distinct capacity position; that OTS and RTS are legally distinct and separate entities was accepted by the federal court. Instead, in reaching its decision to order RTC to produce these regulatory records typically maintained by OTS, the federal court pointed out and relied upon a specific federal statute, 12 U.S.C. § 1821(o),[8] that gave RTC the "absolute and unrestricted right to obtain OTS documents on demand." *Id.* at 110. Because RTC was statutorily authorized to demand production and obtain possession of these regulatory records with a phone

[8] 12 U.S.C. § 1821(0) provides, in pertinent part, "[W]henever the Corporation [RTC] has been appointed as receiver for an insured depository institution, the appropriate Federal banking agency [OTS] shall make available all supervisory records to the receiver which may be used by the receiver in any manner the receiver determines to be appropriate."

call or formal request to OTS, the federal court in *Deloitte* correctly concluded that RTC had "control" over these regulatory records and should be considered the custodian of these records pursuant to Rule 34.

Deloitte is readily distinguishable and actually supports plaintiff's position here—not defendants'. There is no comparable Louisiana law to 12 U.S.C. § 1821(o) which authorizes the Receiver of LAHC to demand the production of these regulatory records from LDI. In fact, Louisiana law provides just the opposite. According to statutory Louisiana law, the Commissioner in his capacity as regulator (i.e., LDI) has exclusive control over all regulatory records sought herein by defendants.

La. R.S. 22:1984(D) provides that:

> D. All work papers, recorded information, documents, and copies thereof produced by, obtained by, or disclosed to the commissioner, or any other person in the course of conducting a regulatory review, financial, or market analysis, including market conduct annual statement information, performed under this Section, as well as the review and analysis of such information, shall be given confidential treatment and are not subject to subpoena or to discovery and may not be made public by the commissioner or any other person, except that access may be granted to the National Association of Insurance Commissioners, insurance department of other states, international, federal, or state law enforcement agencies or international, federal, or state regulatory agencies with statutory oversight over the financial services industry, if the recipient agrees to maintain the confidentiality of those documents which are confidential under the laws of this state. Any documents, materials, or other information which are disclosed by the commissioner to a third party shall not be admissible in evidence in a private civil action and shall be exempt from any applicable freedom of information law, public records law, or similar statute. No person or entity which receives or has access to documents, materials, or other information under this Section shall be permitted or required to testify in a private civil action concerning such documents, materials, or other information. No waiver of an applicable privilege or a claim of confidentiality in the documents, materials, or other information shall occur as a result of disclosure to the commissioner or to any other person granted access under this Section as a result of sharing such documents, materials, or other information as provided in this Section. Nothing in this Section shall require an insurer to disclose documents, materials, or other information to a third party that is not otherwise required by law to be disclosed.

Moreover, not only does this statute deem the regulatory records of LDI "confidential" and not subject to disclosure, La. R.S. 22:1984(F) gives the Commissioner the "sole discretion" to determine whether to disclose any of these "confidential" regulatory records. Indeed, contrary to defendants' illogical and self-serving suggestion, even if one were to determine that the Commissioner in his capacity as Receiver somehow has possession and control over these "confidential" regulatory records (he does not), the resolution of the custody issue does not resolve or in any way limit the Commissioner's statutory authority to decide whether to disclose these regulatory records in any event. The legislature has vested the Commissioner with the exclusive control to manage all "confidential" regulatory records at his discretion.

Furthermore, La. R.S. 22:1983(J) provides:

> J. All working papers, recorded information, documents, and copies thereof produced by, obtained by, or disclosed to the commissioner, or any other person, in the course of an examination made under this Chapter, shall be given confidential treatment and are not subject to subpoena and may not be made public by the commissioner or any other person, except to the extent provided in R.S. 22:1981(E) and Subsection I of this Section. Any access may be granted to the National Association of Insurance Commissioners. The parties shall agree, in writing prior to receiving the information, to provide to it the same confidential treatment as required by this Section, unless the prior written consent of the company to which it pertains has been obtained.

And La. R.S. 22:1981(E) gives the Commissioner "sole discretion" whether to use or disclose any such regulatory records "in the furtherance of any legal or regulatory action." Again, the legislature gave exclusive authority to the Commissioner to secure and manage the use and disclosure of these "confidential" regulatory records now sought by defendants. Defendants' unconventional attempt here to conflate the legally distinct regulatory and receiver capacities within which the Commissioner acts, does not and cannot overcome the statutory dictates of the Louisiana Insurance Code which make these confidential regulatory records non-discoverable.

According to the reasoning of *Deloitte*, because the Receiver of LAHC does not have the legal right to demand production of these regulatory records from LDI, plaintiff here does not have "control" over the regulatory records sought by defendants. If defendants believe these regulatory records are both relevant (they are not) and are discoverable (they are not), nothing prevents them from issuing a subpoena duces tecum or making a public records request directly to LDI.[9]

d. The LDI's regulatory records are not at issue and are not discoverable

The other two cases cited and briefly discussed by defendants, *Benjamen v. Sawicz*, 823 N.E.2d 879 (Ohio App. Ct. 2004) and *In re Ideal v. Becker*, 140 A.D.2d 62 (N.Y. App. Div. 1988), are distinguishable and have more to do with whether regulatory records are discoverable—a related, and very important issue, that is not currently before this Honorable Court. Recall, and as discussed in Section A, *supra*, according to defendants' motion to compel, the "sole" issue before this Honorable Court for determination at the hearing set for September 25th is whether the Receiver of LAHC, acting in his receiver capacity, has possession, custody, or control over the regulatory records sought by defendants' discovery requests.[10] Although plaintiff is reluctant to

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[9] During recent telephone conferences with "all counsel" to discuss this and other discovery issues, undersigned counsel has been repeatedly asked why the Receiver does not make a public records request to LDI regarding these regulatory records. As explained herein, the Receiver considers these confidential regulatory records to be both irrelevant to this suit and non-discoverable pursuant to applicable law.

[10] "Hence, the ***sole*** issue for resolution by the Court is whether or not responsive records of the LDI are within Plaintiff's 'possession and control.'" Memo., p. 4 (emphasis in original).

address the ultimate discoverability issue at this time and in the context of defendants' motion to compel, plaintiff will discuss these two cases briefly.

e. Regulator Fault is not a permissible defense according to Louisiana law

In both *Sawicz* and *Becker*, the courts found that, according to applicable state law and the specific facts involved in each case, because the issue of "regulator fault" was placed squarely at issue before the court, regulatory records would be subject to discovery. Neither *Sawic* (decided pursuant to Ohio law) nor *Becker* (decided pursuant to New York law) is controlling here as they do not address or apply applicable Louisiana law in any way. In *Becker*, defendants asserted as an affirmative defense that the regulators' negligence or other questionable conduct was an intervening and superseding cause that precluded or limited the Receiver's recovery against them. In *Sawic*, the court concluded that because the Liquidator had not yet moved to strike defendants' defenses based upon "regulator fault," all regulatory records maintained by the Commissioner in either her regulatory or receiver capacity, were relevant and should be produced. *Sawic*, 823 N.E.2d at 887, fn. 4.

In *Sewic*, after acknowledging that "cases from other jurisdictions have recognized … the distinct roles performed by the superintendent / director as regulator of insurance and as liquidator or reabiliatotor," the Ohio court erroneously concluded that the "separate capacity doctrine" does not apply to discovery disputes. *Id.* at 883. As discussed in detail in Section C.1.b, *supra*, the courts in *Haggard, Wachovia, Nichols, Nason Yeager, Koken, Harrison, Trigo, Bay Business, Berstein, Rahn, and Skow*, all recognize and apply the "separate capacity doctrine" in discovery disputes like this one.

More importantly, neither *Sawic* nor *Becker* address Louisiana law which unequivocally precludes any "regulator fault" defense from being asserted or used as a basis to preclude or limit any defendants' liability in the context of a suit brought by an insurance Receiver. La. R.S. 22:2043.1(B) & (C), effective 2012, provide:

> B. No action or inaction by the insurance regulatory authorities may be asserted as a defense to a claim by the receiver.
>
> C. There shall be no liability on the part of, and no cause of action of any nature shall arise against, the department or its employees, or the commissioner or his designee in his capacity as receiver, liquidator, rehabilitator or conservator, or otherwise, or any special deputy, the receiver's assistants or contractors, or the attorney general's office for any action taken by them in performance of their powers and duties under this Code.

Furthermore, unlike the plaintiffs in *Sawic* and *Becker*, the Receiver of LACH has this date filed a Motion for Partial Summary Judgment Regarding "Regulator Fault" or "Receiver Fault"

Defenses or, in the Alternative, Motion to Strike Defenses Precluded as a Matter of Law, which seeks to strike all of defendants' defenses rooted in or related to "regulator fault" or "receiver fault" pursuant to La.R.S. 22:2043.1 and other controlling law, including *Wooley v. Lucksinger*, 2009-0571 (La. 4/1/11), 61 So.3d 507, 606.

Rather that repeat and discuss all of the reasons why defendants' allegation regarding "regulator fault" cannot be an issue in this case, plaintiff refers to and adopts by reference his memorandum filed this date in support of his Motion for Partial Summary Judgment, etc.

f. Plaintiff has not placed the issue of regulatory conduct at issue

When a court-appointed Receiver files a lawsuit seeking damages from wrongdoers, the Receiver steps into the shoes of the failed insurance company and asserts claims that were available to the insurance company at the time of receivership in an attempt to protect the rights of its creditors, policyholders, and shareholders; the Receiver does not premise his claims upon any rights asserted by the Commissioner of Insurance acting as regulator or the LDI. Here, the Receiver asserted claims that were available to LAHC; he did not assert any claims on behalf of the LDI or the Commissioner for any conduct by defendants which may have injured LDI or given rise to a cognizable claim that could have been asserted by LDI.

Although defendants point to two (2) allegations found in the Receivers' 44-page Petition in an effort to convince this Honorable Court that the Receiver has opened the door to regulator discovery by suggesting that the defendants made fraudulent or otherwise misleading statement directly to the LDI, defendants are mistaken. When read in context, any plain and fair reading of the Receiver's Petition alleges that the actuarial defendants misstated the accurate premiums that should have been calculated for LAHC; when LAHC or others provided these inaccurate calculations to the LDI on behalf of LAHC, the regulatory body, LDI, was thereby indirectly misled. The failure of the actuarial defendants to correctly set the premiums for LAHC did, in fact, mislead LAHC and anyone else who relied upon their calculations. This is not a case where the Receiver has alleged specific fraudulent statements made to a regulator that caused damages to the failed insurance company. While the actuarial calculations were made both to LAHC and LDI, the Receivers' claims are for damages to LAHC only.

In an abundance of caution, and in a continuing effort to narrow and focus the nature and scope of plaintiffs' claims asserted herein, to the extent any of the factual allegations found in the Receiver's most recent Petition are construed to make it seem like plaintiff is attempting to assert

damages claims against defendants for any statement they may have made directly to the LDI before LAHC collapsed, plaintiff hereby represents his intent and willingness to amend his petition to remove or otherwise clarify that plaintiff is not asserting claims against defendants on behalf of LDI or because of any statements made by defendants directly to LDI. Plaintiff is suing defendant for their respective failures of their professional duties owed to LAHC—not LDI.

2. As a matter of fact: the Receiver of LAHC (plaintiff here) does not have possession of, access to, or control over the regulatory records sought by defendants

Attached hereto as Exhibit 1, is a sworn Affidavit of the Receiver of LAHC, Billy Bostick,[11] who essentially represents and states, *inter alia*, that he was not involved in regulating LAHC, that he does not have the authority to demand that LDI produce the regulatory records sought by defendants, that he does not have possession of or access to these regulatory records maintained by LDI, that LDI informed him that he, as Receiver, should make a public records request if LAHC—or anyone else including defendants—wanted these regulatory records, and that, in general, his duties and work as Receiver for LAHC do not encompass any party of the regulatory work done by LDI, including being the custodian of regulatory records. In effect, and as a matter of fact, the Receiver occupies essentially the same relationship to the subject regulatory records as do defendants. Despite defendants' allegations and insistence to the contrary, the Receiver has no significantly different or greater rights than defendants do to demand that the LDI produce these "confidential" regulatory records.

Defendants represent to this Court that the appropriate test to determine whether a party is the custodian of certain records is not simply whether he has possession of the subject records. Instead, defendants suggest that this Court must determine whether the party has sufficient "control" over the subject documents to warrant him being considered the custodian of the same. To resolve this issue of sufficient "control" according to defendants, this Court should determine whether the party (1) has a legal right to obtain the records; (2) has the ability to obtain the records on demand; and (2) when making these "control" determinations, the Court should "focus on the practical ability to obtain" the records. Plaintiff accepts and has no issued with defendants' recitation of applicable law regarding this "control" issue.

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[11] Plaintiff respectfully gives notice to this Honorable Court and all defendants that plaintiff will formally request that defendants waive objection to this Affidavit *in lieu* of live testimony via Zoom or otherwise. If defendants will not agree, plaintiff intends to call the Receiver of LAHC, Billy Bostick, to testify in accord with the facts set forth in his attached Affidavit (Ex. 1) either live or via Zoom at the hearing of defendants' Motion to Compel, currently scheduled for September 25, 2020, at 10:00 a.m.

Applying these factors to this case, it is abundantly clear that the Receiver here (1) does not have a legal right to obtain these "confidential" records pursuant to La. R.S. 22:1984, as discussed *supra*; (2) the legislature has statutorily determined that these regulatory records are "confidential" and that the Commissioner, in his capacity as regulator, not receiver, has the exclusive discretion to discloser the same upon demand pursuant to La. R.S. 22:1984; clearly, given that the LDI has informed the Receiver to make a public records request if he believes these regulatory records should be disclosed, the Receiver certainly lacks any legal authority to demand that LDI produce them; (3) as a practical matter, defendants should simply make a public records request to the LDI for whatever regulatory records they believe are discoverable. The Receiver has not made such a public records request to the LDI for these regulatory records because the Receiver believes that they are both irrelevant and non-discoverable. However, assuming the Receiver does make such a public records request, according to the Receiver's Affidavit (Ex. 1), the LDI's response to such a request would be the same regardless of who makes it.

Finally, any requests for the Commissioner's confidential regulatory records or for querying of the Commissioner's internal databases should be directed to the Commissioner in his capacity as regulator (i.e., LDI) simply as a matter of efficiency, cost saving, time saving and reduction of errors, and to insure that the Commissioner as regulator is given full ability to defend the requests against any privileges, confidentiality statutes, or other bases for non-production.

Despite defendants' protestations to the contrary, undersigned counsel represents the Receiver in this case only, not the Commissioner as regulator. Neither undersigned counsel nor his client, Billy Bostick as Receiver, has any direct access to the Commissioner's internal databases as regulator or to the general pre-receivership regulatory documents of the regulator. Seeking to demand such documents and database access through the Receiver is bound to introduce errors in communication, not to mention imposing unreasonable burdens upon the Receiver to protect interests in those documents that are not the Receiver's province to protect. It is simply better and more sensible for any discovery requests for pre-receivership regulatory documents to be sought from the regulator itself.

The Receiver further shows and respectfully represents that many of the discovery requests for regulatory documents would probably violate confidentiality and non-disclosure statutes and/or the deliberative process privilege and other privileges that the Receiver is not yet in a position to know or assert. *See, e.g., Ario v. Deloitte & Touche LLP*, 934 A.2d 1290 (Pa. Cmwlth.

10/30/2007). As revealed by the Receiver's Affidavit (Ex. 1), the Receiver does not possess these "confidential" regulatory records, has not reviewed them, and therefore does not know what they contain. But whether some or all of these regulatory records are privileged is a battle that should never occur (as the documents requested from the regulator are irrelevant and non-discoverable); in any event, this discovery battle is one for the regulator, not the Receiver, to fight on another day.

D. Conclusion and Prayer

Defendants' representation to this Honorable Court that "Other state and federal courts have **uniformly held** the same on this very issue," is grossly inaccurate. Memo., p. 6 (emphasis added). Defendants fail to cite or discuss the numerous, on-point cases cited by plaintiff herein in Section C.1.b, *supra*, which recognize the "separate capacity doctrine" and represent the majority view of courts which have addressed this custody issue. After review of the scant authority submitted to this Court in support of their position, one is left with only *Herbert Clough*. That this unreported magistrate ruling has never been cited in another case over the last fourteen years speaks volumes. Instead of being the first and only court to rely on *Herbert Clough*, plaintiff respectfully suggests that this Court is better advised to follow the courts in *Haggard, Wachovia, Nichols, Nason Yeager, Koken, Harrison, Trigo, Bay Business, Berstein, Rahn, and Skow*. For all of the foregoing reasons, plaintiff respectfully requests that this Honorable Court DENY defendants' motion to compel, and rule as a matter of law and fact, that the Receiver of LAHC is not the custodian of the "confidential" regulatory records regarding LAHC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished via e-mail and U.S. Mail to all counsel of record as follows, this 17th day of SEPTEMBER, 2020, in Baton Rouge, Louisiana.

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