

19<sup>th</sup> JUDICIAL DISTRICT COURT

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, et al

**OPPOSITION TO COMMISSIONER'S MOTION TO STRIKE BY  
GROUP RESOURCES, INC.**

Defendant Group Resources, Inc. ("GRI") respectfully submits this Opposition to the Motion to Strike Defenses ("Motion to Strike") filed by James J. Donelon, Commissioner of Insurance for the State of Louisiana, in his capacity as Rehabilitator of Louisiana Health Cooperative ("LAHC"), acting through his duly appointed Receiver, Billy Bostick ("Plaintiff"). The Motion to Strike asks the Court to strike certain affirmative defenses asserted by GRI—namely, GRI's third, fourth, and ninth defenses—that permissibly seek to impose comparative fault on other parties and non-parties as well as LAHC itself for its role in precipitating its own demise. Because the law permits GRI to rely on these defenses to allocate fault to LAHC and others, this Court should avoid the drastic and generally disfavored action of striking GRI's defenses.

**I. GRI'S DEFENSES**

Plaintiff argues that the Commissioner cannot face liability for actions taken (1) as part of his role as a regulator of LAHC when LAHC remained solvent; or (2) as the rehabilitator of LAHC after it failed in 2016. Based solely on this position, Plaintiff insists that the following defenses alleged by GRI "must be dismissed or stricken"<sup>1</sup>:

**THIRD AFFIRMATIVE DEFENSE:** Plaintiff is estopped from making the claims asserted due to its own actions and inactions and course and pattern of conduct over many years.

**FOURTH AFFIRMATIVE DEFENSE:** The claims asserted are barred by laches, waiver, unclean hands, ratification, and any applicable period of prescription.

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<sup>1</sup> Commissioner's Memorandum in Support of Motion for Partial Summary Judgment and Motion to Strike Defenses at 15.

**NINTH AFFIRMATIVE DEFENSE:** GRI avers that the Plaintiff has not suffered compensable damage as a result of any alleged wrongdoing on the part of GRI or any of their agents or representatives. If Plaintiff suffered any damage, as alleged, such damage was caused in whole or in part by the action or inaction of persons or entities (whether parties or non-parties) for whom GRI is not responsible.<sup>2</sup>

None of these three defenses directly target or mention the Commissioner's actions as an insurance regulator or the Court-appointed rehabilitator of LAHC. Rather, they broadly seek to attribute comparative fault for Plaintiff's alleged damages to other parties—including LAHC, the insurer on whose behalf Plaintiff asserts its claims against GRI. Because these defenses could have been raised if LAHC itself were the plaintiff and are viable regardless of whether Plaintiff prevails on his regulator- or rehabilitator-related arguments, the Court should deny Plaintiff's Motion to Strike with respect to GRI.

## **II. LAW AND ARGUMENT**

### **A. Motions to Strike under Louisiana Law**

Louisiana Code of Civil Procedure Article 964 enables the court to strike from a pleading "any insufficient demand or defense." However, a motion to strike is a "drastic remedy" that is "viewed with disfavor" and "infrequently granted." *Cole v. Cole*, 2018 0523 (La. App. 1 Cir. 09/21/18); 264 So. 3d 537, 544; *see Comeaux v. Butcher Air Conditioning Co.*, 19-154 (La. App. 3 Cir. 06/12/19); 274 So. 3d 653, 657. A motion to strike "is not an authorized or proper way to procure the dismissal of a complaint or a cause of action." *O'Connor v. Nelson*, 10-250 (La. App. 5 Cir. 01/11/11); 60 So. 3d 27, 33. A court must deny a motion to strike "if there is any question of fact or law." *Id.*; *Hazelwood Farm, Inc. v. Liberty Oil & Gas Corp.*, 01-0345 (La. App. 3 Cir. 06/20/01); 790 So. 2d 93, 98. Only if a moving party can show that "the allegations being challenged are so unrelated to a plaintiff's claims as to be unworthy of any consideration and that their presence in the pleading would be prejudicial to the moving party" should a court consider granting a motion to strike. *Cole*, 264 So. 3d at 544 (internal citations omitted).

### **B. GRI may assert any defense that it otherwise could have asserted against LAHC.**

It is undisputed that, in this case, the Plaintiff is acting in his capacity as Rehabilitator of an insolvent insurer, LAHC, and asserting alleged rights of action that LAHC held. La. R.S. 22:2008(A) ("The commissioner of insurance and his successor and successors in office shall be vested by operation of law with the ... rights of action of the insurer as of the date

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<sup>2</sup> GRI's Answer to Second Supplemental, Amending, and Restated Petition for Damages, at pp. 1-2.



of the order directing rehabilitation or liquidation."); La. R.S. 22:2009(A) ("[T]he commissioner of insurance shall immediately proceed to conduct the business of the insurer and take such steps towards removal of the causes and conditions which have made such proceedings necessary as may be expedient."); *Donelon v. Shilling*, 2020-00514 (La. 04/27/20); 2020 La. LEXIS 708, at \*5 ("Louisiana Revised Statutes 22:2008 and 2009 generally give the Commissioner the right to enforce the contracts of an insolvent insurer.").

Because Plaintiff is asserting a right of action that belonged to LAHC, it follows that Plaintiff is subject to the same affirmative defenses that could have been asserted if LAHC itself were the plaintiff. Courts interpreting substantially similar statutory schemes in other states have uniformly held as much. *See, e.g., Williams v. Continental Stock Transfer & Trust Co.*, 1 F. Supp. 2d 836, 843 (N.D. Ill. 1998) ("[Defendant] can assert any affirmative defenses, such as fraud, that it may have had against [insolvent insurer.]"); *Stephens v. American Home Assurance Co.*, 811 F. Supp. 937, 947 (S.D.N.Y. 1993) (defendant reinsurers were "free to assert any affirmative defenses, such as fraud, that they may have had against the [insolvent company].") (internal citations and quotations omitted); *North Carolina ex rel. Long v. Alexander & Alexander Services, Inc.*, 711 F. Supp. 257, 264 (E.D.N.C. 1989) ("The Commissioner as rehabilitator suing on behalf of [insurer] is similarly subject only to defenses that could be raised against [insurer]."); *Padrick v. Lyons*, 372 P.3d 528, 535 (Ore. Ct. App. 2016) ("[P]laintiff steps into [insurer]'s shoes for purposes of any affirmative defenses that might be raised by defendants[.]"); *see also* COUCH ON INSURANCE 3D 5:17 ("The receiver stands in the place of the insolvent insurer and is therefore vulnerable only to such actions as the insolvent insurer would have been.").<sup>3</sup>

In fact, in many of the cases Plaintiff cites in support of the notion that the Commissioner cannot be assessed fault for actions taken as a regulator or a rehabilitator, the courts expressly refused to strike defenses or dismiss counterclaims pertaining to actions undertaken by the liquidated insurer. *See Williams*, 1 F. Supp. 2d at 844 (motion to strike defenses that could have applied to insolvent insurer's officers, directors, or agents premature); *Alexander & Alexander Services, Inc.*, 711 F. Supp at 264 (declining to dismiss two counterclaims "since they arise out of

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<sup>3</sup> GRI does not interpret Plaintiff's Motion for Partial Summary Judgment and Motion to Strike as an argument that comparative fault cannot be allocated to LAHC at trial under Louisiana Civil Code Article 2323. To the extent Plaintiff is seeking to preclude GRI and other defendants from attributing any fault to LAHC, however, GRI is opposed to both Motions.

[insurer]'s alleged conduct"); *Corcoran v. National Union Fire Ins. Co.*, 143 A.D.2d 309, 311-12 (N.Y. Sup. Ct. 1988) (refusing to dismiss certain affirmative defenses "in view of the fact that pleadings must be liberally construed").

Accordingly, even if this Court determines that the Commissioner cannot face liability for actions taken as a regulator or a rehabilitator, the Court can—and should—preserve those defenses that GRI could have asserted in an action against LAHC.

**C. The Motion to Strike GRI's affirmative defenses should be denied.**

Each of GRI's affirmative defenses identified in the Motion to Strike support the allocation of fault to individuals or entities other than GRI, including LAHC, and could have been asserted if LAHC itself were the plaintiff. Furthermore, they remain valid even if the Commissioner cannot face liability for actions taken as a regulator or rehabilitator. Accordingly, and especially in light of the "drastic" nature of the remedy of striking pleadings, the Motion to Strike should be denied with respect to GRI.

GRI's third affirmative defense asserted that any injury Plaintiff suffered was "due to its own actions and inactions and course and pattern of conduct over many years." Given that Plaintiff is bringing this suit in its capacity as a representative of LAHC's interests, this defense can and should be construed to attribute fault to *LAHC* for its actions, inactions, and course and pattern of conduct. An important aspect of GRI's defense lies in spotlighting the myriad operational and organizational failures that plagued LAHC throughout its tenure—failures that had far more to do with LAHC's ultimate downfall than any actions or inactions by GRI in its short stint as a third-party administrator. Striking this defense would potentially hamper GRI's ability to establish that LAHC's own conduct caused its damages. Even assuming the Commissioner is inoculated from fault for his actions as a regulator or rehabilitator, GRI's third affirmative defense permissibly highlights LAHC's potential responsibility for its own damages. *See Cole*, 264 So. 3d at 544.

In its fourth affirmative defense, GRI generally asserts the equitable defenses of "laches, waiver, unclean hands, ratification, and any applicable period of prescription." Given that GRI could and would have asserted any of these defenses if LAHC were the plaintiff, there is no basis for striking this defense. Regardless of whether Plaintiff prevails on the arguments concerning the Commissioner's fault as regulator or receiver, the Court should not broadly bar GRI from raising equitable defenses that raise viable questions of fact and law with respect to the

conduct of other parties and non-parties, including LAHC. *O'Connor*, 60 So. 3d 27, 33; *see also* *FDIC v. Dosland*, 298 F.R.D. 388, 399 (N.D. Iowa 2013) ("[E]quitable defenses presents 'a question of law or fact which the court ought to hear.'" (internal quotations omitted)).

The final GRI defense Plaintiff seeks to strike is GRI's ninth affirmative defense, alleging that any damage incurred by Plaintiff "was caused in whole or in part by the action or inaction of persons or entities (whether parties or non-parties) for whom GRI is not responsible." This defense broadly preserves GRI's right to establish the fault of all other potential parties and non-parties, not just the Commissioner for actions taken as a regulator or receiver. This is another defense that GRI plainly could have raised against LAHC and remains valid regardless of the Commissioner's fault as a regulator or receiver. GRI's ninth defense should not be stricken.

Plaintiff does ask that GRI's third and ninth defenses only be stricken "to the extent that this includes regulator or receiver actions."<sup>4</sup> But Plaintiff's request to qualify or tailor its request to strike GRI's defenses betrays a fundamental misunderstanding of the governing standard for a motion to strike under Code of Civil Procedure Article 964. If the defenses, as written, present *any* question of fact or law—which they incontrovertibly do—the Court should deny the motion to strike in its entirety. Plaintiff does not have the right to seek the wholesale striking of defenses from GRI's answer, regardless of how Plaintiff arbitrarily narrows the requested relief.<sup>5</sup>

### **III. CONCLUSION**

In seeking to strike valid, broad affirmative defenses on the basis of their narrow argument regarding the Commissioner's fault as a regulator or receiver, Plaintiff essentially asks this Court to throw the baby out with the bathwater. Even if the Commissioner cannot be allocated fault for his actions as a regulator or receiver, the law allows GRI to maintain its third, fourth, and ninth affirmative defenses to attribute fault to LAHC and other parties and non-parties. Moreover, GRI's third, fourth, and ninth affirmative defenses against LAHC are viable and remain effective against the Plaintiff in this proceeding. This Court should decline to take the drastic and disfavored action of striking GRI's defenses.

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<sup>4</sup> Commissioner's Memorandum in Support of Motion for Partial Summary Judgment and Motion to Strike Defenses at 15.

<sup>5</sup> In the alternative, the Court should at least permit GRI to amend its affirmative defenses to clarify that it is asserting those defenses that could have been asserted were LAHC the plaintiff in this action.



Respectfully submitted,



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**CERTIFICATE**

I hereby certify that a copy of the above and foregoing pleading was served upon all counsel of record by electronic mail and/or United States mail, postage pre-paid and properly addressed, this 5 day of November, 2020.



W. BRETT MASON