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

REPLY MEMORANDUM TO DEFENDANTS' OPPOSITION MEMORANDA REGARDING "REGULATOR FAULT" OR "RECEIVER FAULT" DEFENSES OR, IN THE ALTERNATIVE, MOTION TO STRIKE DEFENSES AS A MATTER OF LAW

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 Reply Memorandum to Defendants' Opposition Memoranda Regarding "Regulator Fault" or "Receiver Fault" Defenses or, in the Alternative, Motion to Strike Defenses as a Matter of Law ("Motion"), currently set for Zoom hearing before this Honorable Court on Friday, November 20, 2020. For all of the following reasons, Plaintiff's Motion should be GRANTED insofar as it relates to "regulator fault" and all of defendants' defenses pleading "regulator fault" or conduct should be stricken as a matter of law. After consideration of defendants' opposition memoranda, and as stated in Section B, *infra*, Plaintiff respectfully withdraws that portion of his Motion which seeks the dismissal of defendants' defense relating to the post-receivership conduct of the Receiver.

Although each defendant has filed separate opposition memoranda to Plaintiff's Motion,[1] rather than file multiple, piecemeal reply memoranda, Plaintiff files only this single reply memorandum which addresses all of the arguments advanced by defendants. To the extent

[1] Buck Opp. Memo (22 pages); Milliman Opp. Memo. (21 letter-sized pages); RSUI Opp. Memo. (5 pages); Atlantic Opp. Memo (11 pages); Evanston Opp. Memo. (5 pages); GRI Opp Memo. (6 pages); and Allied World (9 pages).

possible, Plaintiff has tried to delineate which portions of this reply memorandum address which portions of each defendant's opposition memorandum.

A. Defenses Regarding "Regulator Fault" Must be Stricken as a Matter of Law

Although defendants collectively filed more than 79 pages of briefing in opposition to Plaintiff's Motion, they do not seriously contest that all of their defenses regarding "regulator fault" are categorically prohibited by La. R.S. 22:2043.1(B). Indeed, any fair reading of defendants' opposition memoranda reveals that they have essentially conceded that all of their defenses regarding "regulator fault" must be stricken as a matter of law.[2]

1. La. R.S. 22:2043.1(B) Controls

La. R.S. 22:2043.1(B), enacted by the Louisiana Legislature in 2012, provides as follows:

> No action or inaction by the insurance regulatory authorities may be asserted as a defense to a claim by the receiver.

As defendants' convincingly argue, the Louisiana Legislature's use of the word "defense" in Section (B) is dispositive of the immediate issue of whether "regulator fault" may be alleged as a defense: it cannot. Whatever "action or inaction" taken by the "insurance regulatory authorities" regarding LAHC cannot be asserted as a defense to any "claim by the receiver" as a matter of law. All of defendants' attempts to circumvent this clear statement of positive law (whether couched as a "waiver" or as an "unconstitutional" violation of due process or as an unfair limitation on discovery, etc.) are futile.

Defendants' argument that La. C.C. art. 2323 precludes the application of La. R.S. 22:2043.1(B) to bar "regulator fault" defenses is without merit.[3] Article 2323, which provides, *inter alia*, that the fault of "immune" parties should be considered and allocated by the trier of fact, was last amended in 1996. La. R.S. 22:2043.1(B) was enacted in 2012. Whereas Article 2323 addresses the allocation of fault between parties and non-parties in a general way, §2043.1(B) specifically addresses and provides that any allegations regarding regulator fault shall not be

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[2] *See, e.g.,* Buck Opp. Memo., p. 16 ("Post-receivership, the Commissioner, as rehabilitator/receiver, acts as a separate, exclusively non-regulatory capacity . . . ."); Milliman Opp. Memo., p. 10 ("Nor can Plaintiff rely on La. R.S. §22:2043.1(B) to preclude Milliman from asserting defenses based on Receiver conduct. By its plan terms, Section B only relates to 'regulatory' conduct, not 'receiver' conduct."); RSUI Opp. Memo., p. 4; Evanston Opp. Memo., p. 4; Allied Opp. Memo., p. 2 ("Based on the text of the statute—which itself distinguishes between the Receiver and the protected regulatory authorities—as well as the very cases Plaintiff cites, only defenses based on the pre-rehabilitation regulatory conduct of the Commissioner of Insurance are banned.").

[3] *See* Buck Opp. Memo., p. 16; RSUI Opp. Memo., p. 4; Atlantic Opp. Memo., pp. 6-9; GRI Opp. Memo., p. 3; Allied World Opp. Memo., p. 7.

allowed as a defense to the receiver's claims. As a matter of hornbook law and statutory construction, "the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character." *LeBreton v. Rabito*, 97-2221, p. 7 (La. 7/8/98), 714 So2d. 1226 (citations omitted). A subsequent statute dealing specifically with a particular subject supersedes and prevails over inconsistent and conflicting provisions in an earlier statute addressing those issues. *Macon v. Costa*, 437 So.2d 806 (La. 1983); *State v. St. Julian*, 221 La. 1018, 61 So.2d 464 (1952). If there is a conflict between two statutes, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character. *Pumphrey v. City of New Orleans*, 2005-0979 (La. 4/4/06), 925 So.2d 1202; *Killeen v. Jenkins*, 98-2675 (La. 11/5/99), 752 So.2d 146; *Board of Ethics In re Davies*, 2010-1339 (La.App. 1 Cir. 12/22/10), 55 So.3d 918. By enacting §2043.1(B) in 2012 to specifically prevent defendants from using "regulator fault" or regulatory conduct as a defense to a receiver's claims, the Louisiana legislature clearly and deliberately circumscribed the application of Art. 2323 in Receivership cases like the present one. *See, e.g., White v. La. DOTD*, 17-629 (La.App. 3d Cir. 12/6/17), 258 So.3d 11, 17 ("La. Code Civ. P. art. 966(G) is a clarification of La. Civ. Code art. 2323, and must prevail as a later introduced amendment and as a clarification of the legislature's intent on the issue of comparative fault when a party has been dismissed from litigation upon a finding that the party was not at fault."). Defendants' arguments to the contrary are misplaced.

Although defendants suggest that the unanimous Louisiana Supreme Court opinion in *Wooley v. Lucksinger*, 2009-0571 (La. 4/1/11), 61 So.2d 507 is "of no use to the Court,"[4] because it applied Texas law and only addressed pre-receivership conduct, defendants are mistaken. As correctly asserted by defendants, *Wooley* only addresses regulator conduct, not receiver conduct, given that the defendants in *Wooley* did not raise any post-receivership acts of the Receiver as a defense. It is also true that *Wooley* was decided under Texas substantive law; however, there is no reason whatsoever to think that the Louisiana Supreme Court would rule differently regarding regulator fault under Louisiana substantive law. Indeed, the Supreme Court found it important that the Texas Legislature had passed Tex Ins. Code Ann. § 443.011 to address "regulator fault," which provides:

> (b) *A prior wrongful or negligent action of any present or former officer, manager, director, trustee, owner, employee, or agent of the insurer may not be asserted as a defense to a claim by the receiver under a theory of* estoppel, *comparative fault, intervening cause,*

[4] Buck Opp. Memo., p. 19; *see also*, Evanston Opp. Memo., p. 3.

> *proximate cause, reliance, mitigation of damages, or otherwise,* except that the affirmative defense of fraud in the inducement may be asserted against the receiver in a claim based on a contract, and a principal under a surety bond or a surety undertaking is entitled to credit against any reimbursement obligation to the receiver for the value of any property pledged to secure the reimbursement obligation to the extent that the receiver has possession or control of the property or that the insurer or its agents commingled or otherwise misappropriated the property. Evidence of fraud in the inducement is admissible only if the evidence is contained in the records of the insurer.
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> (c) *An action or inaction by the department or the insurance regulatory authorities in any state may not be asserted as a defense to a claim by the receiver.* ... (Emphasis added)

Id. at 607 (emphasis in original). This language, of course, was later directly enacted, *verbatim*, in 2012 by the Louisiana Legislature in La. R.S. 22:2043.1(A) and (B). Indeed, the enactment of §2043.1(B) codified the holding of *Wooley* regarding the exact issue before this Court. Far from being of "no use" to this Honorable Court, *Wooley* hammers the proverbial nail in defendants' attempts to plead "regulator fault" or conduct as a defense to the Receivers' claims.

2. Plaintiff has Not "Waived" §2043.1(B)

In a rather desperate attempt to circumvent the clear language of §2043.1(B), defendants continue to insist that Plaintiff has somehow placed regulator conduct at issue in this case.[5] Defendants' contention is completely without basis or merit.

Most significantly, defendants' self-serving reading of Plaintiff's Second Amended Petition ("SAP") to mean that the Receiver is asserting a claim against them because they made false or misleading statements to the regulator is simply not accurate. Back in August 2020, defendants asserted in their Motion to Compel regarding the "custody" issue that two (2) allegations found in the Receivers' 44-page, SAP had somehow opened the door to regulator discovery by suggesting that the defendants made fraudulent or otherwise misleading statements directly to the Louisiana Department of Insurance ("LDI"). Defendants were mistaken then and remain mistaken now. The Receiver has never alleged that any defendant made false or misleading statements directly to the LDI. When read in context, any plain and fair reading of the Receiver's SAP 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

[5] *See* Buck Opp. Memo., pp. 2-4; 11-14; Milliman Opp. Memo., p. 4; 15.

specific fraudulent statements made to a regulator that caused damages to the failed insurance company.

Indeed, in response to defendants' suggestion to this Court several months ago that regulator conduct has been put at issue, in his opposition to defendants' Motion to Compel, filed herein on September 17, 2020, the Receiver stated:

> In an abundance of caution, and in a continuing effort to narrow and focus the nature and scope of plaintiff's 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.

Plaintiff's Opp. Memo to Motion to Compel, pp. 15-16. Defendants either ignored or forgot this express representation by the Receiver, as they now feign outrage at the Receiver's filing of his Fourth Amended Petition last week.[6] In keeping with his prior representations to both defense counsel and this Court, the Receiver has now in fact clarified his factual allegations regarding any negligent misrepresentations made by either Buck or Milliman:

> In Buck's [and Milliman's] reports concerning LAHC's funding needs and premium rates, Buck [and Milliman] negligently misrepresented the actual funding needs and premium rates required of LAHC. Buck's [and Milliman's] negligent misrepresentations regarding LAHC's actual funding needs and premium rates were made to LAHC. LAHC relied upon these negligent misrepresentations to its detriment.

Plaintiff's Fourth Amended Petition, p. 2 and new and amended ¶s 31, 139, & 144, filed herein on November 4, 2020. Buck and Milliman first wrongly interpret the Receiver's allegations to mean that they were being accused of directly misleading or making false statements to the regulator. Then, when the Receiver corrects their inaccurate reading of his Petition and clarifies his allegations to make it absolutely clear that he is not accusing them of making false claims to the regulator, defendants reserve "all rights to oppose the amendment"[7] filed by the Receiver. So, in effect, defendants are now insisting that the Receiver accuse them of making false statements directly to the regulator. How dare the Receiver, according to defendants' faulty logic, not accuse us of misleading the regulator! This is the epitome of a strawman argument.

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

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[6] *See* Buck Opp. Memo., pp. 2-4; 11-14; Milliman Opp. Memo., p. 4.

[7] Buck Opp. Memo., p. 3.

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 has 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.[8] Defendants know this (or should know this), and their continuing insistence that the Receiver has somehow placed regulator conduct at issue here is disingenuous. Even more unfortunate is defendants' accusation of "gamesmanship" by the Receiver.[9] Someone is playing games here, but it is not the Receiver.[10]

3. Regulator Conduct is Not at Issue

§2043.1(B) clearly prohibits defendants from alleging any "action or inaction by the insurance regulatory authorities" as a defense to their alleged wrongful conduct. Despite defendants' lengthy protestations and insistence that what the regulators did or did not do is material to their defense, positive Louisiana law says unequivocally that it is not. Indeed, as the unanimous Louisiana Supreme Court recognized in *Wooley* about a year before §2043.1(B) codified its ruling:

> Finally, we hold the district court did not err in failing to instruct the jury as to regulator fault. "An insurance company may not delegate responsibility for valuation of its assets to a state agency, and the mere fact that an insurance commissioner accepts a company's asset valuation does not immunize the company from liability arising from that valuation." *Meyers v. Moody*, 693 F.2d 1196, 1210 n. 11 (5th Cir.1982), *cert. denied*, 464 U.S. 920, 104 S.Ct. 287, 78 L.Ed.2d 264 (1983). As shown by the record in this case, the state insurance regulators must rely on the honesty and integrity of the financial statements filed with them. By accepting these filings, the regulators do not displace the insurance company's fiduciaries or controlling parties or owners by performing their statutory role. Health Net's argument in this regard seeks to hold the "police" liable because they did not sooner catch the "robber" or prevent the robbery in the first place. As argued by the Receivers on appeal, "how the regulators performed their respective jobs—whether well or poorly—does not in any way lessen" Health Net's responsibility for its role in the conspiracy and in its subsequent tortious actions.

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[8] *See, e.g.*, La. R.S. 22:1994 which provides that the LDI may collect significant statutory penalties against any party who knowingly makes false or misleading statements to the regulator.

[9] "Buck provides notice that it reserves all rights to oppose the amendment and to seek recovery of attorneys' fees, costs and expenses resulting from the Commissioner's gamesmanship." Buck Opp. Memo., p. 3.

[10] For example, presumably to cast the Receiver in a poor light, Milliman writes at p. 18 of its Opp. Memo. that "Plaintiff has produced only 150 documents responsive to the defendants' outstanding discovery requests." This is categorically inaccurate. As Your Honor knows well, to date, the Receiver has produced more than a terabyte of data to defendants, and all parties are working to manage this voluminous database.

Wooley, 61 So.3d at 606 (footnotes omitted). The trier of fact will be asked to decide whether Buck and Milliman acted wrongly when evaluating the financial condition and future premium needs of LAHC. How "well or poorly" the regulator may have performed his respective job, does not and cannot lessen the actuaries' professional responsibility to do the job it was hired by LACH to perform. Whether the regulators agreed with Buck and Milliman, disagreed with Buck and Milliman, "ratified" their analysis, "rejected" their analysis, or quite frankly, did or did not do anything regarding Buck and Milliman's analysis, is completely immaterial to the issue of whether these actuarial defendants are liable to the Receiver. Given the clear dictates of §2043.1(B), what the regulator did or did not do (i.e., the regulator's "action or inaction") cannot be a legal defense to the Receiver's claims against Buck and Milliman or any other defendant for that matter. Without a legal basis for any defense of "regulator fault," defendants' discovery efforts directed to what the regulator did or did not do are unfounded. This discover issue, however, is for another day.[11]

In cases such as this one, where the law is clear that a party cannot prevail (here, on a "regulator fault" defense) regardless of what discovery it may do, there is no functional difference between a partial summary judgment under La. Code Civ. Proc. art. 966 or an order striking legally insufficient defenses under La. Code Civ. Proc. art. 964. Under either procedural vehicle, the question is whether the defense being addressed is deficient as a matter of law, and under either standard, the answer here is "yes."

Defendants argue that with regard to a Motion for Partial Summary Judgment, art. 966 requires that "adequate" discovery be completed first.[12] While this is true as a general rule, the Louisiana Supreme Court has instructed that unless the Summary Judgment opponent "shows a probable injustice a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of fact." *Simoneaux v. E.I. du Pont de Nemours & Co.*, 483 So.2d 908, 913 (La. 1986). Consistent with that principle, the jurisprudence has recognized that, despite pending discovery requests, summary judgment is not premature when the issue presented is purely a legal one and additional discovery cannot change the result. *See Whitney Bank v. Garden Gate New Orleans, L.L.C.*, 17-362, pp. 6-7 (La. App. 5 Cir. 12/27/17), 236 So.3d 774, 781

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[11] Indeed, defendants have recently issued third-party subpoena's to LDI and others in an attempt to obtain these regulatory materials; the issue of whether and to what extent any of these regulatory materials may be discoverable is not currently before this Court.

[12] *See* Buck Opp. Memo., p. 6; Milliman Opp. Memo., p. 5; Atlantic Opp. Memo., p. 5-6.

(observing, in a suit on a promissory note, that "defendants have not shown there are any genuine issues of material fact for which discovery is necessary, and thus, defendants have not shown that a probable injustice has occurred" in denying motion to continue); *River Bend Capital, LLC v. Lloyd's of London,* 10-1317, p. 5 (La. App. 4 Cir. 4/13/11), 63 So.3d 1092, 1096 (observing that "[f]urther discovery to verify what Lloyd's meant by 'full and final settlement' is unnecessary where the language is clear and unambiguous as here"); *Hamilton v. Willis*, 09-0370, p. 3 (La. App. 4 Cir. 11/4/09), 24 So.3d 946, 948 (observing that "[a]dditional discovery cannot change the motorsports exclusion, which we find to be clear and unambiguous and not leading to absurd consequences"); *Orleans Par. Sch. Bd. v. Lexington Ins. Co.*, 12-1686, p. 30 (La. App. 4 Cir. 6/5/13), 118 So.3d 1203, 1223 (observing that "[w]hen the words of an insurance contract are clear and explicit and lead to no absurd consequences … additional discovery cannot change the result"). In cases, like these, it has been observed that additional discovery would be "fruitless" and that there are no material issues of fact that will delay a summary judgment. *SBN V FNBC LLC v. Vista Louisiana, LLC*, 2018-1026, pp 8-9 (La.App. 4 Cir. 3/27/19), 267 So.3d 655, 662. Louisiana law does not provide defendants with a legal defense based upon regulatory conduct regardless of much discovery defendants may want to undertake.

4. Objection to Buck's Exhibit B (Affidavit of Attorney Godofsky)

Pursuant to La. C.C.P. art. 966(D)(2), the Receiver timely objects to Exhibit B attached to Buck's Opposition Memo., the Affidavit of David R. Godofsky, on the grounds of relevancy, lack of personal knowledge (foundation), and improper opinion testimony. David Godofsky, an attorney admitted *pro hac vice* to represent Buck in this case, has signed and submitted an affidavit stating, in essence, that he has "reviewed the pleadings and briefs in this case" and has "personal knowledge" of several "genuine, material factual issues for which discovery is necessary." Mr. Godofsky does not state that he has any personal knowledge of any of the factual issues he believes should be explored through discovery; that is, Mr. Godofsky does not state that he was involved personally in any way in Buck's dealings with LAHC and/or LDI. Instead, Mr. Godofsky simply offers his legal opinion, based upon the "pleadings and briefs" that he has reviewed, that discovery should be allowed regarding regulator conduct. Given Mr. Godofsky's lack of any personal involvement in the facts giving rise to this suit, he is in no better or worse position than any other attorney in this case to have an opinion regarding whether discovery should be allowed. Indeed, Your Honor is quite capable of and is in the best position to review the pleadings and briefs herein

and determine any issue relating to discovery. As such, Mr. Godofsky's opinions do not add anything to the mix and Exhibit B should be excluded in its entirety. Specifically, pursuant to La. C.E. arts. 401 & 403, Exhibit B is not probative of any material issue before the Court; pursuant to La. C.E. arts. 601 & 602 Mr. Godofsky lacks personal knowledge of any relevant fact and therefore there is an insufficient factual foundation for Exhibit B; and pursuant to La. C.E. art. 702(A), the opinion testimony contained in Exhibit B will not "help the trier of fact to understand the evidence or determine a fact in issue," and should therefore not be admitted into evidence or considered by Your Honor when ruling on Plaintiff's Motion.

5. Defendants do Not have a Constitutional Claim Regarding § 2043.1

The "due process" argument advanced by defendants,[13] is patently deficient, both substantively and procedurally. To begin with, there never was a "regulator fault" defense in the first place, as numerous cases cited in the Receiver's original memorandum (including *Wooley* from the Louisiana Supreme Court) have held. Eliminating a nonexistent defense violates no right at all, much less a constitutional right.

Second, if a "regulator fault" defense otherwise existed in Louisiana prior to the enactment of La. R.S. 22:2043.1, the Louisiana legislature is free to modify substantive rights of civil litigants prospectively however it reasonably may choose, without violating the constitution. It is only when a substantive modification violates an existing *vested* right that constitutional concerns may be implicated. See La. Civ. Code art. 6; *Segura v. Frank*, 630 So.2d 714 (La. 1994); *Church Mut. Ins. Co. v. Dardar*, 2013-2351 (La. 5/7/14), 145 So.3d 271. Clearly, no rights of any defendant here vested before the enactment of 22:2043.1 in 2012.

Third, *United States v. Armour & Co.*, 402 U.S. 673, 91 S. Ct. 1752 (1971) and *State v. Wilson*, 2017-0908 (La. 12/5/18), cited by Milliman, are completely inapposite. *Armour & Co.* merely stated, in passing, that a party generally has a right to litigate claims against it that it waives by entering into a consent decree, so the consent decree must be construed strictly only to matters expressly intended by both parties. And *Wilson* involved serious infringement on the rights of a criminal defendant to defend himself and is expressly limited to that completely irrelevant context.

And fourth, because defendants are seeking a declaration that La. R.S. 22:2043.1 is unconstitutional, they are required by applicable Louisiana law to serve the Louisiana Attorney

[13] *See* Buck Opp. Memo., pp. 3-4; Milliman Opp. Memo., pp. 14-17.

General with a copy of the argument and provide his office an opportunity to be heard. La. Code Civ. Proc. art. 1880. Furthermore, the law requires this type of challenge to be raised in a "pleading," which does *not* include a memorandum, opposition or brief. *Vallo v. Gayle Oil Co., Inc.*, 94–1238 (La.11/30/94); 646 So.2d 859, 864–65. That defendants have made no attempt to comply with these mandatory procedural requirements reveal that they are not serious about their constitutional complaints.

6. The Motion is Not Overbroad

Defendants argue that their defenses are broader that just "regulator fault" and encompass other, potential defenses based upon third-party fault.[14] Although defendants' observation is accurate, it does not inform or alter the specific relief sought by Plaintiff's Motion. The Receiver's Motion seeks only that the defendants' defenses regarding regulator conduct be dismissed via partial summary judgment or stricken as a matter of law.[15] As correctly acknowledged by at least one defendant:

> Plaintiff has laser-focused, in whole or in part, only those defenses calling into question the receiver or regulator's actions and/or failure to mitigate. To the extent the Court grants, in whole or in part, any part of the Motion with respect to Atlantic, Atlantic avers that the ruling should be no broader than the relief which the Plaintiff prayed for in its Motion. For those defenses which Plaintiff limited its Motion only "to the extent that this include regulator or receiver actions" or similar language, the application of the defense to issues beyond that limiting language are not before the Court and cannot be ruled upon.

Atlantic Opp. Memo., p. 10. The Receiver agrees with Atlantic that, if his Motion is granted, only all defenses regarding regulator conduct—whether characterized as negligence, ratification, causation, failure to mitigate, or otherwise—should be stricken from defendants' pleadings. In his Original Motion and prayer for relief below, the Receiver has attempted to identify those specific defenses which he maintains should be stricken as a matter of law.

B. The Receiver Withdraws his Motion Regarding "Receiver Fault"

After consideration of defendants' opposition memoranda, the Receiver respectfully withdraws his Motion to the extent it relates to "Receiver Fault." That is, while fully reserving his right to seek dismissal of any defense regarding "Receiver Fault" or any post-receivership conduct through any legal vehicle available to him and upon any legal basis at a later date, the Receiver hereby withdraws that portion of his Motion regarding "Receiver Fault" at this time. As a result

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[14] *See* Buck Opp. Memo., p. 5; RSUI Opp. Memo., p. 4.

[15] As stated and discussed in Section B, *infra*, the Receiver has withdrawn his Motion to the extent it seeks dismissal of defenses relating to post-receivership conduct by the Receiver.

of this withdrawal, the Receiver acknowledges that defendants may plead post-receivership conduct as a defense to the Receiver's claims asserted herein and may conduct reasonable discovery regarding the same at this time.

C. Conclusion and Prayer

For all of the foregoing reasons, plaintiff respectfully requests that his Motion be GRANTED as to "regulator fault" and that all of defendants' defenses regarding regulator conduct be stricken as a matter of law. Although tedious, the Receiver prays that the following specific defenses by stricken and/or modified as follows:

a. That the following Defendants' affirmative defenses be wholly stricken from their answer:

1. MILLIMAN'S SEVENTH DEFENSE: Plaintiff's claims are barred by the doctrines of estoppel, waiver, ratification, and acquiescence in that the Commissioner and his employees and agents and/or the Louisiana Department of Insurance reviewed the activities now complained of, and gave explicit or implicit approval of those activities. Milliman relied to its detriment upon those actions of the Commissioner and his employees and agents and/or the Louisiana Department of Insurance.
2. MILLIMAN'S NINTH DEFENSE: The Commissioner, his employees, his agents, and/or the Louisiana Department of Insurance had knowledge of and approved the activities forming the basis of the present claims.
3. MILLIMAN'STENTH DEFENSE: Plaintiff's claims are barred by the filed rate doctrine.
4. BUCK'S SEVENTH DEFENSE: Plaintiff's claims are barred by the doctrines of estoppel, waiver, ratification, and acquiescence in that the Commissioner and his employees and agents reviewed the activities now complained of, and gave explicit or implicit approval of those activities. Buck relied to its detriment upon those actions of the Commissioner and his employees and agents.

b. that some of the following defenses be modified as follows to exclude, and all of the following defenses be qualified to be inapplicable to, the acts of the Louisiana Department of Insurance or the Commissioner of Insurance in their capacity as regulator as follows:

1. MILLIMAN'S FIFTH DEFENSE: Plaintiff's damages, if any, were caused or contributed to by the negligence, wrongdoing, want of care and fault or comparative fault of Billy Bostick as the Receiver (the "Receiver"), and/or LAHC, and/or each of their respective employees, agents, attorneys, and/or contractors, and/or other parties for whom Milliman is not responsible and over whom Milliman had no control.
2. MILLIMAN'S THIRTEENTH DEFENSE: Plaintiff's damages, if any, were not caused by Milliman, but were the proximate result, either in whole or in part, of the actions or omissions of persons or entities other than Milliman, including but not limited to, the Receiver, LAHC, the federal government, third parties, other defendant(s) and/or each such person or entity's respective employees or agents.
3. BUCK'S FIFTH DEFENSE: Plaintiff's damages, if any, were caused or contributed to by the negligence, wrongdoing, want of care and fault or comparative fault of Billy Bostick, as the Receiver (the "Receiver"), and their employees, agents, attorneys, and contractors, of LAHC and its officers, directors, employees, agents, and contractors, and of third parties for whom Buck is not responsible and over whom Buck had no control.

4. BUCK'S SIXTH DEFENSE: Plaintiff's damages, if any, were caused by regulatory misconduct and negligence of the Receiver, and their employees and agents.
5. BUCK'S EIGHTH DEFENSE: Plaintiff has failed to mitigate the damages that were incurred, if any. Furthermore, the Receiver, and their employees, agents, and contractors, committed acts of negligence and misconduct in the conservation, rehabilitation, and liquidation of LAHC, and other acts and omissions that may be discovered and presented at trial.
6. BUCK'S ELEVENTH DEFENSE: Plaintiff's damages, if any, were not caused by Buck.
7. GRI'S 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.
8. GRI'S FOURTH AFFIRMATIVE DEFENSE: The claims asserted are barred by laches, waiver, unclean hands, ratification, and any applicable period of prescription.
9. GRI'S 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.
10. RSUI'S NINTH DEFENSE: Plaintiff's claims are barred, or alternatively reduced, by the doctrine of avoidable consequences.
11. RSUI'S ELEVENTH DEFENSE: RSUI alternatively avers upon information and belief that the claims, damages and other relief requested or set forth in the Second Amended Petition arose from the negligence, fault and/or want of due care on the part of parties other than any insured under the RSUI Policies, and/or other natural and juridical persons and/or other circumstances, that bar or alternatively reduce any right of recovery against RSUI.
12. RSUI'S THIRTEENTH DEFENSE: Upon information and belief, any damage(s), losses or other relief described in the Second Amended Complaint, if any, were caused by parties or non-parties for whose actions, conduct, fault, negligence or omissions RSUI is not responsible or liable.
13. RSUI'S FIFTEENTH DEFENSE: Plaintiff's claims against RSUI are barred, in whole or in part, by the principles of acquiescence, consent, amendment, modification, merger, estoppel, waiver, legal justification, license, excuse and/or privilege, transaction and compromise, payment, set off, failure or lack of consideration, and by its own particular acts and omissions.
14. RSUI'S SEVENTEENTH DEFENSE: RSUI hereby adopts and incorporates, as if set forth herein, any and all defenses asserted or to be asserted by Allied World in response to the Second Amended Complaint.
15. RSUI'S EIGHTEENTH DEFENSE: RSUI hereby adopts and incorporates, as if set forth herein, any and all defenses asserted or to be asserted by Evanston in response to the Second Amended Complaint.
16. EVANTSON'S THIRD AFFIRMATIVE DEFENSE: Plaintiff's injuries and damages were caused by the fault and/or negligence of a third party for whom Evanston is not responsible, and that fault and/or negligence should reduce or bar recovery under any policy issued by Evanston, the entitlement to which is expressly denied.
17. EVANSTON'S FOURTH AFFIRMATIVE DEFENSE: Plaintiff's claims are barred, in whole or in part, by the doctrine of intervening and/or superseding cause.
18. EVANSTON'S FORTY-EIGHTH AFFIRMATIVE DEFENSE: Evanston adopts and incorporates any defenses that have been or may be asserted by any of the D&O Defendants that have been or may be asserted as if fully set forth herein.
19. EVANSTON'S FORTY-NINTH AFFIRMATIVE DEFENSE: Evanston adopts and incorporates any defenses that have been or may be asserted by any of the Insurer Defendants that have been or may be asserted as if fully set forth herein.
20. EVANSTON'S FIFTY-FIRST AFFIRMATIVE DEFENSE: Evanston pleads and incorporates herein by reference, as though copied in extenso, any and all defenses, affirmative or otherwise, pled by any other defendant in this matter that are not

inconsistent with Evanston's position and/or affirmative defenses as described in this pleading.

21. ATLANTIC SPECIALTY'S Thirty-Third Defense: Neither Atlantic Specialty nor its alleged insureds' conduct was the cause in fact or proximate cause of any injury alleged by Plaintiff. Plaintiff's recovery is barred, in whole or in part, to the extent there are numerous intervening and superseding causes of the injuries/damages allegedly sustained by Plaintiff.
22. ATLANTIC SPECIALTY'S Thirty-Fourth Defense: Plaintiff's claims may be barred or limited by its own comparative fault.
23. ATLANTIC SPECIALTY'S Thirty-Sixth Defense: Plaintiff's alleged injuries and damages, if any, were caused by the negligence or fault of other parties, for which Atlantic Specialty and its alleged insureds are not liable.
24. ATLANTIC SPECIALTY'S Forty-Eighth Defense: Plaintiff's claims against Atlantic Specialty are barred, in whole or in part, to the extent that the damages alleged were caused by the contributory or comparative fault of other parties besides Atlantic Specialty's alleged insureds.
25. ATLANTIC SPECIALTY'S Forty-Ninth Defense: Atlantic Specialty pleads superseding and/or intervening causes as a defense and a bar to recovery.
26. ATLANTIC SPECIALTY'S Fiftieth Defense: Plaintiff's claims against Atlantic Specialty are barred, in whole or in part, to the extent that the damages alleged were caused by conditions over which neither Atlantic Specialty nor its alleged insureds has control.
27. ALTANTIC SPECIALTY'S Fifty-First Defense: Atlantic Specialty avers that, in accordance with La. C.C. art. 2323, the percentage of fault of all persons causing or contributing to the damages must be determined, and that the amount of damages recoverable, if any, must be reduced in proportion to the percentage of fault attributable to other parties, including Plaintiff, parties that are insolvent, and parties that are not named as defendants.
28. ATLANTIC SPECIALTY'S Sixty-Third Defense: Atlantic Specialty adopts and incorporates any defenses that have been or may be asserted by any of the D&O Defendants, Allied World Specialty Insurance Company (f/k/a Darwin National Assurance Company), RSUI Indemnity Company, Evanston Insurance, and Zurich American Insurance Company as if fully set forth herein.
29. ZURICH'SFIFTH DEFENSE: In the alternative, Zurich pleads the affirmative defense of comparative fault, assumption of the risk, and/or contributory negligence.
30. ZURICH'S SIXTH DEFENSE: Plaintiff's claims against Zurich are barred, in whole or in part, to the extent the incidents giving rise to this lawsuit were caused by a party or parties over whom Zurich had no responsibility or legal liability.
31. ZURICH'S THIRTIETH DEFENSE: Zurich specifically and affirmatively pleads as an affirmative defense and adopts by reference as if incorporated herein all affirmative defenses set forth by the insurer defendant who issued the Followed Policy (including but not limited to express adoption of Affirmative Defenses nos. 1 through 35 contained in Allied World Specialty Insurance Company's Answer, Exceptions, and Affirmative Defenses To Second Supplemental, Amending and Restated Petition for Damages dated Dec. 18, 2017), and the Other Underlying Insurance, including all affirmative defenses set forth by Allied World Specialty Insurance Company a/k/a Darwin National Assurance Company; Atlantic Specialty Insurance Company; Evanston Insurance Company; and RSUI Indemnity Company including all successors to those entities.
32. ZURICH'S FIFTY-SECOND DEFENSE: This action along with any relief sought by plaintiff may be barred, in whole or in part, on the basis of the doctrine of equitable estoppel, judicial estoppel, waiver, laches, and/or unclean hands.
33. ZURICH'S SIXTY-FIRST DEFENSE: To the extent not inconsistent with the affirmative defenses set forth above, in the alternative, Zurich adopts by reference the affirmative defenses of all other insurer defendants, and to the extent appropriate, all nominal defendants.
34. ZURICH'S SIXTY-SECOND DEFENSE: Zurich adopts by reference as if incorporated herein the defenses and exceptions set forth in the Answer of Allied World National Assurance Company including: the exception of no right of action under the Direct Action Statute because: 1) at the time Zurich was joined to this lawsuit, the nominal defendants were parties without any potential liability and

therefore plaintiff has no right of action under the Direct Action Statute; 2) All of the policies at issue are indemnity policies not liability policies; 3) Because Ochsner has not and will not pay a Loss on behalf of the nominal defendants who have no personal liability, the indemnity coverage in the policies is not triggered; and 4) any applicable policies only cover "Loss" which expressly does not include "amounts which an insured is not legally obligated to pay."

Zurich furthermore adopts by reference as if incorporated herein the defenses and exceptions set forth in the Answer of Allied World National Assurance Company including: the exception of no cause of action under the Direct Action Statute because: 1) the Petition fails to allege facts sufficient to possibly trigger coverage under any policy at issue; 2) the indemnity coverage provided by the policies at issue is not subject to the Direct Action Statute; 3) any applicable policies only cover "Loss" which expressly does not include ' amounts which an insured is not legally obligated to pay."; and 4) Because Ochsner has not and will not pay a Loss on behalf of the nominal defendants who have no personal liability, the indemnity coverage in the policies is not triggered.

35. ALLIED WORLD'S Thirtieth Affirmative Defense: Neither Allied World nor its alleged insureds' conduct was the cause in fact or proximate cause of any injury alleged by Plaintiff. Plaintiff's recovery is barred, in whole or in part, to the extent there are numerous intervening and superseding causes of the injuries/damages allegedly sustained by Plaintiff.
36. ALLIED WORLD'S Thirty-Third Affirmative Defense: Plaintiff's alleged injuries and damages, if any, were caused by the negligence or fault of other parties, for which Allied World and its alleged insureds are not liable.
37. ALLIED WORLD'S Thirty-Fifth Affirmative Defense: Allied World adopts and incorporates any defenses that have been or may be asserted by any of the D&O Defendants, as if fully set forth.

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 12th day of November, 2020, in Baton Rouge, Louisiana.

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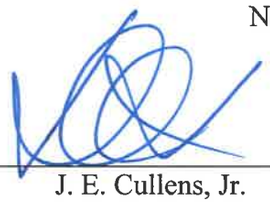

J. E. Cullens, Jr.