

19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

NO.: 651,069

SECTION 22

JAMES J. DONELON, COMMISSIONER OF INSURANCE
FOR THE STATE OF LOUISIANA, IN HIS CAPACITY AS REHABILITATOR OF
LOUISIANA HEALTH COOPERATIVE, INC.

VERSUS

TERRY S. SHILLING, GEORGE G. CROMER, WARNER L. THOMAS, IV, WILLIAM A.
OLIVER, CHARLES D. CALVI, PATRICK C. POWERS, CGI TECHNOLOGIES AND
SOLUTIONS, INC., GROUP RESOURCES INCORPORATED, BEAM PARTNERS, LLC,
MILLIMAN, INC., BUCK CONSULTANTS, LLC, AND TRAVELERS CASUALTY AND
SURETY COMPANY OF AMERICA

FILED: _____

DEPUTY CLERK

**BUCK GLOBAL, LLC'S MOTION TO COMPEL LOUISIANA DEPARTMENT OF
INSURANCE'S COMPLIANCE WITH SUBPOENA DUCES TECUM**

NOW INTO COURT, through undersigned counsel, comes Buck Global, LLC f/k/a Buck Consultants, LLC ("Buck"), who respectfully moves this Honorable Court pursuant to La. Code Civ. Proc. arts. 1354, 1463, and 1469 for an order compelling the Louisiana Department of Insurance ("LDI") to comply with the subpoena duces tecum served upon on it on October 22, 2020, upon showing that:

1.

The requested LDI documents are directly relevant to the Plaintiff's claims and/or are reasonably calculated to lead to the discovery of admissible evidence. Although Buck's subpoena seeks documents that fall well within the scope of the "broad and liberal" discovery allowed by Louisiana law, the LDI has refused to produce a single document.

2.

LDI's boilerplate and unsupported objections *to every single one* of Buck's document requests fail to preserve, and thereby waive, any objections to the subpoena. Further, LDI has not asserted any applicable ground of privilege and/or confidentiality pertaining to any subpoenaed document. And any relevant claim of privilege or confidentiality has been waived

by the failure to properly assert it, the filing of the instant suit against the defendants, and the LDI's previous publication of related information.

3.

In support of this Motion to Compel, Buck attaches the following exhibits:

- Exhibit A:** Plaintiff's Second Amended Petition
- Exhibit B:** Notice of Records Only Deposition and Subpoena Duces Tecum to LDI with Exhibits
- Exhibit C:** Sheriff's Service Return
- Exhibit D:** LDI's Objections to Subpoena Duces Tecum
- Exhibit E:** Transcript of Non-Appearance at November 11, 2020 Records Deposition
- Exhibit F:** Excerpts of Plaintiff's Opposition to Defendants' Motion to Compel on Custody and Control
- Exhibit G:** Transcript of September 25, 2020 Hearing
- Exhibit H:** Commissioner's Public Records Request to LDI and transmission of response
- Exhibit I:** Excerpts of Commissioner's Responses to Buck's Written Discovery Requests (undertaking to produce LDI records in his "possession and control.")
- Exhibit J:** Lewis & Ellis Reports Published on LDI website
- Exhibit K:** Crohan Affidavit Authenticating Lewis & Ellis Reports

Buck respectfully requests that the Court sign the Rule to Show Cause filed with this Motion setting it for hearing at the earliest feasible date. In compliance with Local Rule 9.8, Buck represents that this case is not set for trial, and that live testimony will not be offered at the hearing of this motion.

WHEREFORE, Buck respectfully prays that, after hearing of this matter, the Court grant its motion to compel and order the Louisiana Department of Insurance to comply fully with Buck's subpoena duces tecum and produce documents responsive to Buck's discovery requests.

Respectfully submitted,

/s/ James A. Brown
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RULE 10.1 CERTIFICATE OF CONFERENCE

I, the undersigned counsel for Buck Global, LLC, personally conferred with John Ashley Moore, counsel for Louisiana Department of Insurance, by telephone on December 1, 2020. At this conference, there was a substantive discussion of every item presented to the Court in this motion and, despite their best efforts, counsel were unable to resolve the matters presented.

Certified this 16th day of December, 2020

/s/ James A. Brown (Bar #14101)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Compel has been served upon all parties through their counsel of record, by e-mail, and, additionally, upon counsel for Louisiana Department of Insurance by certified mail, return receipt requested, this 16th day of December, 2020.

/s/ James A. Brown

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FILED: _____

DEPUTY CLERK

**BUCK GLOBAL, LLC'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL
LDI'S COMPLIANCE WITH SUBPOENA DUCES TECUM**

Buck Global, LLC f/k/a Buck Consultants, LLC ("Buck"), respectfully submits this memorandum in support of its Motion to Compel the Louisiana Department of Insurance ("LDI") to comply with Buck's subpoena duces tecum that was served upon it on October 22, 2020.

As more fully set forth below, the documents that Buck seeks are relevant and/or reasonably calculated to lead to the discovery of admissible evidence. Moreover, Buck has been unable to obtain the requested information from other sources. Responsive LDI documents are relevant to the ultimate determination of causation, liability, and damages in the pending litigation.

The Plaintiff has already conceded the discoverability of LDI documents pertaining to Louisiana Health Cooperative, Inc. ("LAHC") by undertaking to produce them to the extent they are within his "possession and control" and by issuing a "public records" request to LDI for records pertaining to LAHC. And while this Court previously ruled that the Commissioner, as Rehabilitator's, "possession and control" of LDI documents is limited to what is in the records of LAHC, in rehabilitation, at the same time the Court has suggested that other LDI records may be sought by means of a subpoena duces tecum directed to the LDI. But when Buck sought

discovery of documents directly from LDI through a subpoena duces tecum, it was met with wholesale, boilerplate objections to each and every request set forth in the subpoena. And, as shown below, LDI's previous "public records" production, consisting of largely irrelevant information, is meaningless. LDI's objections to Buck's subpoena duces tecum are legally ineffective and without merit. This Court should enforce Buck's subpoena duces tecum and direct LDI to comply with the subpoena's document requests.

I. BACKGROUND

A. Relevant Procedural History

This lawsuit arises out of the failure of Louisiana Health Cooperative, Inc. ("LAHC"), a consumer operated and oriented health care plan ("CO-OP") created under the Patient Protection and Affordable Care Act ("ACA"). LAHC, a Louisiana nonprofit corporation, was formed in 2011 and was licensed to operate as a health maintenance organization by the Louisiana Department of Insurance ("LDI") in 2013. In September 2015, LDI placed LAHC into rehabilitation under the direction and control of Plaintiff, James J. Donelon, Commissioner of Insurance for the State of Louisiana, as Rehabilitator.

In August 2016, the Commissioner, appearing herein as Rehabilitator ("Plaintiff" or "Commissioner"), filed this suit against several Defendants, including LAHC's former directors and officers (the "D&O Defendants"),¹ the developer and initial manager of LAHC, Beam Partners, LLC ("Beam"), and LAHC's third-party administrators, CGI Technology and Solutions, Inc. ("CGI") and Group Resources, Inc. ("GRI").² He later amended his petition to name two Defendants who provided actuarial services to LAHC – Milliman, Inc. ("Milliman") and Buck - and, later, several insurers of LAHC's directors and officers. According to the Commissioner's suit, the supposed acts or omissions of all defendants combined to cause LAHC's insolvency and required LDI to place it into rehabilitation.

On November 20, 2020, the Court held a Zoom hearing on Plaintiff's opposed motion for partial summary judgment on "Regulator Fault" affirmative defenses. Although the Court ultimately granted Plaintiff's motion and dismissed certain affirmative defenses, it recognized

¹ The D&O Defendants are now named as nominal defendants pursuant to a "*Gasquet*" release.

² Plaintiff has settled its claims against Beam and CGI. His claims against GRI remain pending.

that its ruling was not dispositive of the discoverability of LDI documents. Rather, the Court correctly recognized that LDI regulatory documents may be discovered upon a showing that they fall within the broad ambit of discovery allowed by Louisiana law.

B. The LDI documents are relevant to the Commissioner's lawsuit.

LDI's role and involvement relative to LAHC are intertwined with and relevant to the Commissioner's claims against Buck and other defendants. For example, the Second Amended Petition (the "SAP"), attached to the Motion to Compel as **Exhibit A**, asserts:

"State regulators, like the Louisiana Department of Insurance ("LDI"), have the primary oversight of CO-OP's as health insurance issuers." Ex. A, SAP at ¶ 16.

"The LDI placed LAHC in rehabilitation in September 2015, and a Receiver, Billy Bostick, was appointed by this Court to take control of the failed Louisiana CO-OP." Ex. A, SAP at ¶21.

"For instance, when the LDI took over the operations of LAHC, the CO-OP had a backlog of approximately 50,000 claims that had not been processed." Ex. A, SAP at ¶22.

"Milliman's advice and/or reports to LAHC and/or LDI and/or CMS concerning LAHC's funding needs negligently misrepresented the actual funding needs and premium rates of LAHC." Ex. A, SAP at ¶139.³

"Buck's advice and/or reports to the LAHC and/or LDI and/or CMS concerning LAHC's funding needs negligently misrepresented the actual funding needs and premium rates of LAHC." Ex. A, SAP at ¶144.⁴

"Because of Defendant's gross negligence, as of December 31, 2015, LAHC has lost more than \$82 million." Ex. A, SAP at ¶22.

"Buck's failure to exercise reasonable care, and its failure to act in accordance with the professional standards to actuaries was the legal cause of all of, or substantially all of, LAHC's damages as set forth herein." Ex. A, SAP at ¶134.

Buck's subpoena duces tecum issued to LDI is directly related to these allegations. *See* Subpoena Duces Tecum, attached to the Motion to Compel as **Exhibit B**. Buck is certainly

³ In his Fourth Amended Petition, Plaintiff seeks to replace this language with the following: "In Milliman's reports concerning LAHC's funding needs and premium rates, Milliman negligently misrepresented the actual funding needs and premium rates required of LAHC. 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." Regardless of the amendment, the LDI documents remain relevant and discoverable.

⁴ In Plaintiff's Fourth Amended Petition, he seeks to replace this language with the following allegation: "In Buck's reports concerning LAHC's funding needs and premium rates, Buck negligently misrepresented the actual funding needs and premium rates required of LAHC. Buck'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." Regardless of the amendment, the LDI documents remain relevant and discoverable.

entitled to discovery of responsive documents from the LDI, the entity that had “primary oversight” of LAHC—the failure of which is at the center of this litigation.

It is indisputable the LDI has special and direct knowledge relevant to this action. By way of example, LDI and/or its consulting actuaries contemporaneously reviewed Buck’s and Milliman’s rate projections. LDI documents therefore may support, or contradict, the Commissioner’s claims that those rate projections were unreasonable and misleading. LDI documents likewise may support, or contradict, the Commissioner’s allegations that the Defendants caused LAHC to become insolvent, requiring LDI to place it into rehabilitation.

The responsive LDI records thus are relevant and discoverable,⁵ and hence the Commissioner has already expressly agreed to produce LDI records that are “in his possession and control.” For example, in response to Buck’s Interrogatory No. 4, which asked the Commissioner to “[e]xplain in detail LDI’s review and approval of LAHC’s 2014 and 2015 rates,” the Commissioner, subject to a number of objections, represented that: “Without waiving these objections, to the extent that there are responsive pre-Receivership documents related to LAHC’s 2014 or 2015 rates by anyone including LDI, Buck and/or Milliman, which Plaintiff has in his possession and control, those documents will be produced in connection with his Electronic Discovery Responses.”⁶

Further implicitly conceding the discoverability of LDI materials, the Commissioner previously issued a “public records” request to LDI for records pertaining to LAHC and provided that production—however incomplete—to the defendants in this case.⁷ But, as

⁵ See La. Code Civ. Proc. art. 1422 (“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party”); *Donelon v. Herbert Clough, Inc.*, No. CV 03-282-A-M2, 2006 WL 8436324, at *5 (M.D. La. Oct. 19, 2006) (“courts have . . . held that the Commissioner should be required to produce documents in his capacity as ‘regulator’ which have been ‘placed at issue’ by the litigation and which are in his or her possession or control, *i.e.* because the documents are within the Insurance Department.”) (citing *Benjamin v. Sawicz*, 823 N.E.2d 879, 885 (Ohio App. Ct. 2004); *In re Ideal Mutual Insurance Company v. Becker*, 140 A.D.2d 62, 532 N.Y.S.2d 371, 375-76 (N.Y. App. Div. 1988)).

⁶ See **Exhibit I**, Excerpts of Commissioner’s Response to Buck’s Written Discovery Requests, Interrogatory No. 4 (emphasis added). The Commissioner’s Responses to Buck’s Interrogatory Numbers 5-8, 19, 22 and Request for Production Numbers 3-4, 12-16, 28, 31-33, 34, 37, and 38 similarly promised, subject to stated objections, to produce responsive LDI records that were in the Commissioner’s “possession and control.”

⁷ See **Exhibit H**, Commissioner’s Public Records Request to LDI.

shown below, the records that LDI produced as “public records” are largely irrelevant and so cannot even remotely suffice as a response to Buck’s subpoena duces tecum.

C. The Discovery Dispute

On September 25, 2020, this Court held a hearing on Defendants’ motion to compel the Plaintiff, James J. Donelon, the Commissioner of Insurance as the Rehabilitator of LAHC, to produce responsive LDI documents. The Court ruled that the Commissioner, as Rehabilitator’s, “possession and control” of LDI records extends only to those that are in the records of LAHC, in rehabilitation.⁸ In its ruling, the Court recognized that Defendants could seek discovery from LDI through alternative means. Specifically, the Court reasoned that Defendants are not limited by the strictures of a “public records” request to LDI, but could proceed by “third-party subpoena, which the court believes is the proper vehicle through which to obtain the documentation [from the LDI].” *See Exhibit G* to the Motion to Compel at p. 50 [bracketed material added]. At that same hearing, the Commissioner’s counsel also asserted that LDI records could be sought by means of subpoena duces tecum served on the LDI.⁹

In accordance with the Court’s statements and ruling at the September 25th hearing, and subject to Buck’s pending writ application from that ruling, on October 13, 2020, the Clerk, at Buck’s request, issued a Notice of Records Only Deposition and Subpoena Duces Tecum to LDI through its records custodian, James J. Donelon, Commissioner of Insurance, seeking production of documents relating to LAHC and the Commissioner’s claims against Buck and other defendants.¹⁰ The East Baton Rouge Sheriff served LDI with Buck’s subpoena duces tecum on October 22, 2020.¹¹ On November 9, 2020, *after* the expiration of the 15-day deadline for lodging objections to the subpoena provided by La. Code. Civ. P. article 1354(B), the LDI served

⁸ Following the mailing of the Court’s written Judgment, and within the return date set by this Court, on November 10, 2020, Buck timely filed a supervisory writ from the Court’s “custody and control” ruling, which is pending before the Louisiana First Circuit Court of Appeal.

⁹ *See Exhibit G*, Transcript of Sept. 25, 2020 Hearing, at p. 20 (“[Plaintiff] would suggest to [the court] regardless of the ultimate decision on custody. . . there are other vehicles. I mean, a third-party subpoena. . . . Nothing prevents the defendants from issuing a third-party subpoena to the Department of Insurance, which would be bound by the discovery rules set by Your Honor.”); *see also Exhibit G* at pp. 28, 34, 35, 38, 40 (Plaintiff advising the Court that Defendants have relief through a subpoena); Excerpts of Plaintiff’s Opposition to Defendants’ Motion to Compel on Custody and Control, attached hereto as **Exhibit F** at pp. 7, 10.

¹⁰ *See Exhibit B*, Notice of Records Only Deposition and Subpoena Duces Tecum to LDI.

¹¹ *See Exhibit C*, Sheriff’s Return.

undersigned counsel with blanket, boilerplate objections to *every single request* set forth in the subpoena.¹² On November 11, 2020, LDI failed to appear for the scheduled records deposition.¹³

In its objections, LDI contends that Buck’s subpoena requests are “incomprehensible,” “vague,” “not relevant” and “not reasonably calculated to lead to the discovery of admissible evidence.”¹⁴ Additionally, LDI cites generically to La. R.S. 22:2043.1 and La. R.S. 22:2045 without tying those statutes to any objection or explaining how any statutory provision might support any such objection.¹⁵

In accordance with Local Rule 10.1, Buck conferred by telephone with counsel for LDI, John Ashley Moore, on December 1, 2020, in an attempt to resolve the discovery dispute. However, the parties were unable to reach a resolution.¹⁶ To date, LDI has not produced any documents in response to Buck’s subpoena duces tecum.

The LDI’s blanket refusal to comply with Buck’s subpoena for documents within the realm of the “broad and liberal” discovery afforded under Louisiana law should not be countenanced. Ultimately, Buck is being denied a significant source of relevant and responsive materials—the records of the LDI pertaining to LAHC—regardless of the procedural vehicle Buck pursues. This Court should order LDI to comply with the subpoena.

¹² See **Exhibit D**, LDI’s Objections to Subpoena Duces Tecum. The untimeliness of LDI’s objections could support an argument of waiver based upon delay. *E.g., Payne v. Forest River, Inc.*, No. CIV.A. 13-679-JWD, 2014 WL 7359059, at *4 (M.D. La. Dec. 23, 2014) (quoting *La. Generating, L.L.C. v. Ill. Union Ins. Co.*, No. 10–516, 2011 WL 6259052, at *2 (M.D. La. Dec. 14, 2011)). But given that LDI served its objections on the Monday following the Friday on which they were due, Buck has elected to forego an argument of waiver based upon delay in the spirit of fairness and to reduce the number of issues before the Court. However, as set forth in the argument sections of this brief, Buck vigorously asserts that LDI has waived objections to Buck’s subpoena by failing to assert or support them with any particularity.

¹³ See **Exhibit E**, Transcript of Non-Appearance.

¹⁴ **Exhibit D**, LDI’s Objections. The title to LDI’s objections also incorrectly suggests that the subpoena was “incompletely and improperly served without pages 5-7, DOCUMENTS TO BE PRODUCED.” But, as evidenced by the record, the Notice of Records Only Deposition and Subpoena Duces Tecum, with exhibits A and B attached thereto, *including* pages 5-7 “Documents to be Produced,” were filed with the Clerk and provided to the Sheriff for service. See **Ex. B**. Further, the subpoena and attached exhibits *in full* were emailed to Walter Corey, Attorney Supervisor for the LDI, on October 22, 2020 (the same day of service). In any event, LDI did not make or preserve any objection to the form or completeness of the service, so that issue is moot. See **Ex. D**.

¹⁵ **Exhibit D**, LDI’s Objections.

¹⁶ See Rule 10.1 Certificate of Conference, p. 3 of the Motion to Compel.

II. Law and Argument

A. LDI documents are discoverable under the “broad and liberal” discovery permitted by La. Code. Civ. P. article 1422.

The documents subpoenaed from the LDI are relevant to the subject matter involved in this litigation and are discoverable under the broad and liberal discovery guaranteed by Louisiana law. Under La. Code Civ. P article 1422, “[p]arties may obtain discovery regarding *any matter*, not privileged, which is *relevant to the subject matter* involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]” La. Code Civ. Proc. art. 1422 (emphasis added). The Louisiana Supreme Court has made clear that litigants are entitled to “extremely broad” discovery. *MTU of N. Am., Inc. v. Raven Marine, Inc.*, 475 So. 2d 1063, 1067 (La. 1985). The broad scope of permissible discovery extends to discovery sought through a subpoena duces tecum. *See, e.g., Francois v. Norfolk S. Corp.*, 2001-1954 (La. App. 4 Cir. 3/6/02), 812 So. 2d 804; *Young v. Young*, 97-1261 (La. 5/16/97), 693 So. 2d 788.

Relevant evidence includes “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” La. Code Evid. art. 401. The test for discoverability is not whether the information sought will be admissible at trial, but whether the information sought appears reasonably calculated to lead to the discovery of admissible evidence. La. Code Civ. Proc. art. 1422; *see also Lehmann v. Am. S. Home Ins. Co.*, 615 So. 2d 923, 925 (La. App. 1 Cir. 1993); *accord Stewart v. Mitchell Transp.*, No. 01-2456-JWL, 2002 WL 1558210, at *4 (D. Kan. July 11, 2002) (“Relevancy is broadly construed, and a request for discovery should be considered relevant if there is ‘any possibility’ that the information sought may be relevant to the claim or defense of any party.”). “[A]ny relevant matter, not privileged, is discoverable.” *Collins v. Crosby Grp., Inc.*, 551 So. 2d 42, 43 (La. App. 1 Cir. 1989), *writs denied*, 556 So. 2d 39, 42 (La. 1990); *see also Wollerson v. Wollerson*, 29,183 (La. App. 2 Cir. 1/22/97), 687 So. 2d 663, 665.

The Louisiana Supreme Court has recognized that the discovery process serves important objectives and is intended “to allow parties to obtain pertinent facts, to discover true

facts and to compel their disclosure, to assist in trial preparation, to narrow and clarify the issues, and to encourage settlement or abandonment of claims lacking merit.” *Hodges v. S. Farm Bureau Cas. Ins. Co.*, 43 So. 2d 125, 129 (La. 1983). The discovery statutes are to be “liberally and broadly construed” to achieve these objectives. *Id.* (emphasis added); *see also Fox v. Fox*, 47,937 (La. App. 2 Cir. 4/10/13), 113 So. 3d 457, 462, *writ denied*, 2013-1320 (La. 6/21/13), 118 So. 3d 426 (“Louisiana jurisprudence requires that discovery statutes be liberally and broadly construed.”).

Buck therefore is entitled to “extremely broad” discovery related to the issues raised in this litigation. *MTU of N. Am., Inc.*, 475 So. 2d at 1067. The instant case arises out of the rehabilitation of LAHC. The Commissioner’s lawsuit seeks to recover tens of millions of dollars in damages from defendants for their alleged negligence in supposedly causing LAHC to be placed in rehabilitation. As the entity that placed LAHC into rehabilitation, LDI’s documents are, at minimum, discoverable. Merely by way of example, LDI’s records may reflect or pertain to the factors that caused LAHC to be in a condition requiring that it be placed in rehabilitation. Those facts may or may not be related to any act or omission of any defendant.

LDI documents may support, or contradict, the Commissioner’s allegations that Milliman and Buck “negligently misrepresented the actual funding needs and premium rates of LAHC.” It cannot be disputed that LDI and its consulting actuaries received Buck’s rate projections and reviewed them *contemporaneously*, based upon the financial data and other information known *at the time*, as opposed to with 20/20 hindsight.

LDI’s and its consulting actuaries’ records are thus, at minimum, discoverable on the factual issues of (1) what financial information, market factors, and other data actually were known and available at the time, (2) whether the actuaries’ assumptions and rate projections were, or were not, reasonable at the time based upon that available information, and/or (3) whether their work caused any of LAHC’s losses. *See, e.g., FDIC v. Clementz*, No. 2:13-CV-00737-MJP, 2014 WL 4384064, at *1 (W.D. Wash. Sept. 4, 2014) (holding that internal regulatory documents regarding the FDIC’s contemporaneous evaluation of the at issue loans were “relevant to the propriety of the [defendants’] approval of specific loans”). Such

information would likely inform the opinions of both sides' actuarial and damages experts. This information could and likely will be used on direct and/or cross examination of Plaintiff's experts during the Plaintiff's case in chief before any burden shifts to the defendants to put on a defense.

Critically, the reviews undertaken by LDI and its consulting actuaries at the time are the *only* source of evidence of *contemporaneous* evaluations of the actuarial defendants' rate projections, uncontaminated by hindsight knowledge of future events. As actuaries must project the unknown future based upon information available to them *at the time*, contemporaneous reviews and evaluations of their projections by others who likewise have no knowledge of the future are obviously critical evidence going to whether or not the actuaries breached any duty or standard of care. Only LDI and its consulting actuaries have this contemporaneous information. These documents obviously meet and far exceed all criteria for discoverability.

LDI documents are also relevant to a host of other factual issues raised by the Commissioner's claims against Buck and other defendants, including:

- Representations that LAHC's directors and officers made to LDI regarding its HMO license and financial prospects; the work and rate projections provided by Milliman and, later, Buck; the work of LAHC's third party administrators named as defendants herein ("TPA's); and related issues;
- Statements that LDI may have made to LAHC's directors and officers regarding Milliman's and/or Buck's actuarial work and rate projections, which may have informed their understanding, or not, of the actuaries' work and rate projections and the reasonableness, or not, of their reliance, on those projections. For example, we know that in 2014/15, LDI posted on its public website a contemporaneous report of its consulting actuary, Lewis & Ellis, finding Buck's rate projections for 2015 to have been reasonable and in accordance with applicable guidelines and standards.¹⁷ Similar LDI communications with LAHC's directors and/or officers may have caused their

¹⁷ See **Exhibit J**, Lewis & Ellis Report downloaded from LDI's public website, at pp. 1-3, 4, 5, 6, 7, 8, 10-12, 13, 16-17; **Exhibit K**, Crohan Affidavit authenticating Lewis & Ellis reports that he downloaded from LDI website.

reliance on Buck's rates to have been reasonable, in turn bearing upon their fault as compared to any fault of Buck.

- Representations that LDI may have made to LAHC regarding the work of the TPA defendants, which may have informed its directors' and officers' understanding of and/or reliance, or not, on their work and related issues of comparative fault of all defendants;
- Whether LAHC's directors and officers ignored or failed to heed advice or warnings from LDI or its consulting actuaries regarding the rate projections provided by Milliman, Buck and/or the work of the TPA defendants;
- Why LAHC terminated contracts with prior TPAs and Milliman and the extent that may bear upon Buck's and/or other defendants' comparative fault, if any, and/or contributed to LAHC's insolvency;
- Communications between the LDI, LAHC and/or the federal government regarding the federal government's failure to make over \$60 million in "risk corridor" payments, the post-hoc changing of the rules and regulations governing the ACA CO-Ops, and the impact of those factors on LAHC's financial condition;
- The degree to which the federal government's failure to make risk corridor payments was, or was not, foreseeable to Milliman, Buck, the director and officer defendants, and/or the TPA's of LAHC, bearing upon the comparative fault of all of those defendants;
- Whether LAHC and its directors and officers complied, or not, with LDI's statements, requirements, and reporting/filing requirements, bearing directly upon their fault as compared to any fault of Buck or other defendants;

Louisiana's "extremely broad," "liberally construed" discovery rules entitle Buck and the other defendants to discovery of LDI records going to the above and related factual issues.

B. Courts have consistently held that regulatory documents are discoverable in analogous cases.

Other courts in analogous cases, including those brought by Commissioner Donelon himself, have repeatedly held that regulatory documents pertaining to the institution in

rehabilitation and/or liquidation are, at minimum, discoverable. As here, in *Donelon v. Herbert Clough, Inc.*, 2006 WL 8436324 (M.D. La. Oct. 19, 2006), Commissioner Donelon, in his capacity as rehabilitator/liquidator, asserted that the actions and inactions of the defendants in that case caused the insolvency of the institution. The Court in *Herbert Clough* ruled that the Commissioner's suit opened the door to the regulatory records of the LDI. Therefore, the Commissioner was obliged to produce the "investigative and/or regulatory files" related to the insurer in rehabilitation. 2006 WL 8436324, at *5.

Other state courts in analogous insurance receivership cases have likewise compelled production of the regulatory records pertaining to the failed institution. In *Benjamin v. Sawicz*, 823 N.E.2d 879 (Ohio Ct. App. 2004), the appellate court affirmed the trial court's discovery order requiring the Superintendent of Insurance to respond to defendants' discovery demands irrespective of her statutorily separate capacities as liquidator and Director of the Ohio Department of Insurance ("ODI"). *Id.* at 887. The court held that the conduct occurring prior to the liquidation was placed in issue by the superintendent through the claims she asserted in her complaint. Because the superintendent, through the department of insurance, had "special and direct knowledge vital to the action," she was required to disclose all information material and relevant to the action.

The *Sawicz* court firmly rejected the notion that the "ODI should be permitted to take control of a privately owned company, put it out of business, sue its officers for failing to run the company properly, and deny the officers access to documents that could allow them to defend themselves." *Id.* Because the superintendent initiated an action against officers of a failed corporation and raised claims implicating matters within the knowledge of the department of insurance, the regulator was required to submit to discovery. *Id.*; *see also In re Ideal Mut. Ins. Co. v. Becker*, 140 A.D.2d 62 (N.Y. App. Div. 1988) (same principles).

RTC v. Deloitte & Touche, 145 F.R.D. 108 (D. Colo. 1992), is also "instructive." In *Deloitte*, the Resolution Trust Corporation ("RTC") filed suit against the auditing and financial consulting firm of Deloitte & Touche. In essence, "the OTS served as the regulator of 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 *Deloitte* court granted the defendants' motion to compel the production of regulatory documents. *Id.* at 112. The court reasoned that the regulatory documents concerning the failed thrift were relevant to the lawsuit and opined that RTC had "undoubtedly reviewed a substantial amount of regulatory documentation in connection with this case." *Id.* at 111. Further, the court ruled that "any regulatory privilege applicable to pre-conservatorship documents has been waived by the filing of this lawsuit." *Id.* at 112 n.6. *See also FDIC v. Wise*, 139 F.R.D. 168, 172 (D. Colo. 1991) (holding that the FDIC waived asserted "regulatory" privileges, and stating: "[W]e are persuaded that defendants' ability to test these allegations by reviewing the regulatory documents is vital to their defense.").

C. Regulatory documents are discoverable even when "regulator fault" defenses are disallowed.

Courts have likewise consistently held that regulatory documents are relevant and discoverable in receivership cases like this one, *even when* "regulator fault" defenses have been disallowed. For example, in *F.D.I.C. v. Dosland*, No. C13-4046-MWB, 2014 WL 1347118, at *4 (N.D. Iowa Apr. 4, 2014), the court held that internal Office of Thrift Supervision ("OTS") regulatory documents were relevant and discoverable even though the court had previously "limit[ed] defendants' ability to rely on OTS's actions as an affirmative defense" The Court found that "FDIC-R must prove that the defendants' conduct violated an applicable standard of care. It is within the realm of reasonable possibility that internal OTS documents may contain information that is relevant to the defendants' denials that any such violations occurred." *Id.*

Similarly, in *F.D.I.C. v. Berling*, No. 14-CV-00137-CMA-MJW, 2015 WL 3777408, at *2 (D. Colo. June 16, 2015), the court found that "the documents may ultimately prove inadmissible for a variety of reasons. But either way, they might nonetheless contain information leading to the discovery of admissible evidence." "The records would shine light on [the Defendants'] conduct—specifically, whether they followed their internal policies generally, and whether they met their standard of care." *Id.*

The reasoning in *F.D.I.C. v. Clementz*, No. 2:13-CV-00737-MJP, 2014 WL 4384064, at *3 (W.D. Wash. Sept. 4, 2014), supports Buck's position that responsive LDI documents are

discoverable. In *Clementz*, the court, over the FDIC Receiver's objections, granted Defendant D&O's motion to compel production of internal documents held by FDIC regulators "related to any regulatory examinations, loans, and handling of loans, warnings, or criticisms and oversight." *Id.* at *1. The court found that the FDIC's contemporaneous evaluation of the loans in question were relevant to the propriety of the FDIC Receiver's claims against the defendants. *Id.* at *2. In a subsequent ruling, despite dismissing regulator fault defenses, the *Clementz* court reiterated its discoverability ruling: As "this Court has already ruled, the FDIC's conduct as regulator and examiner remains relevant to whether Defendants breached their duties of care, and Defendants are still entitled to raise the FDIC's approval and authorization of specific loans to attack Plaintiff's case in chief." *F.D.I.C. v. Clementz*, No. C13-737 MJP, 2015 WL 11237021, at *4 (W.D. Wash. Sept. 23, 2015).

Likewise, the court in *Colonial BancGroup, Inc. v. PricewaterhouseCoopers, LLP*, 110 F. Supp. 3d 37 (D.D.C. 2015), recognized the relevancy and discoverability of pre-receivership regulatory documents, even though regulator fault defenses were barred. The OCC documents "would reflect real-time observations, analyses, and assessments of bank management, the MWLD, risk factors, controls, audits, and other aspect of the bank that relate directly to the claims and defenses, or at least reasonably could lead to information bearing on [these] issues." *Id.* at 41-42.

In line with these cases, this Court correctly observed at the Zoom hearing on November 20, 2020, that, notwithstanding the Court's dismissal of Defendants' "Regulator Fault" affirmative defenses, LDI regulatory documents may be discovered upon a showing that they fall within the broad scope of discovery permitted under Louisiana law. The LDI documents that Buck has subpoenaed fall well within that broad scope, as demonstrated above.

E. Denial of discovery of LDI records pertaining to LAHC would deprive Buck of federal and state constitutional due process rights.

The foregoing precedents firmly support the entry of an order compelling LDI to comply with Buck's subpoena duces tecum. Buck's right to discovery of LDI documents under Louisiana's liberal discovery rules is particularly evident in this case, in which the Commissioner has sued Buck and other defendants for tens of millions of dollars in alleged

damages. Denial of Buck's right to broad discovery of LDI records pertaining to LAHC would deprive it of federal and state constitutional due process rights. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *National Union Fire Ins. Co. of Pittsburgh v. City Savings, F.S.B.*, 28 F.3d 376, 394 (3d Cir. 1994).

F. The Commissioner's meaningless "public records" production cannot possibly substitute for compliance with Buck's subpoena duces tecum.

As set forth above, the Commissioner has already conceded the discoverability of LDI records pertaining to LAHC by agreeing to produce LDI documents that he considers to be in his "possession and control," and by issuing a "public records" request to the LDI on September 3, 2020.¹⁸ LDI's response to Buck's subpoena duces tecum refers to the prior public records production generically, "subject to" its objections, but it fails to assert that production as grounds for any specific objection to any of Buck's document requests.¹⁹ Hence, any objection based upon the prior "public records" production is waived.

But, even putting waiver aside, the LDI's "public records" production is essentially meaningless – consisting of director and officer biographical information and other largely irrelevant material. The production is totally *un*responsive to Buck's subpoena and hence cannot possibly pose as a substitute for LDI's compliance with it.

As one glaring example, despite the Commissioner's "public records" request for "all communications" between the LDI and LAHC and at least 17 other entities/individuals from January 2011 to September 2015, LDI produced only 60 documents in total in response to the public records request.²⁰ That paltry production could not possibly have been the result of any meaningful or fulsome review of relevant communications, e-mail, and other records pertaining to LAHC. Of the trifling number of documents produced, many are obviously incomplete and missing attachments, and the bulk are irrelevant to Buck's subpoena.

As other examples, the public records request and response failed to include numerous relevant documents that Buck has subpoenaed, including:

¹⁸ **Exhibit H**, Commissioner's Public Record Request to LDI.

¹⁹ *See Exhibit D*, LDI's Objections to Buck's requests Nos. 5-10, 13-23.

²⁰ *See Exhibit H*, Commissioner's Public Record Request to LDI.

- Communications between the LDI and its consulting actuary, Lewis & Ellis, pertaining to LAHC. No documents pertaining to Lewis & Ellis or communications with it were included in the public records request or response and none were produced to the defendants.
- The documents pertaining to Buck and Milliman are missing. Only 4 documents mentioning Buck were produced, and one mentioning Milliman was produced. That cannot possibly be a complete production of those LDI records.
- No documents reflecting review of actuarial projections and/or rates were produced. This could not possibly be complete.
- Only one document mentioning risk corridor payments was produced, even though the government's failure to make those payments likely was the principal cause of LAHC's insolvency. And those documents go directly to whether or not Buck's and other defendants' contemporaneous expectations that the federal government would honor its risk corridor obligations were reasonable, or not. This production could not possibly be complete.
- Also missing are the documents supporting and pertaining to LAHC's Co-Op application, including financial and rate projections, market assumptions and other information – showing what information was available *contemporaneously* to support, or not support, the rate projections of LAHC's actuaries and the assumptions and expectations of all defendants. That contemporaneous information is directly at issue in this case.

Because the response to the public records request was incomplete and non-responsive, this Court should enforce Buck's subpoena duces tecum served on LDI.

G. LDI's blanket, boilerplate objections to Buck's subpoena are legally insufficient.

LDI's boilerplate, unexplained and unsupported objections to *every single one of* Buck's requests as "not relevant and [] not reasonably calculated to lead to the discovery of admissible evidence," are legally insufficient to preserve a valid objection to any specific request. *See, e.g., Am. Fed'n of Musicians of the United States & Can. v. Skodam Films, LLC,*

313 F.R.D. 39, 46 (N.D. Tex. 2015) (“A non-party’s Rule 45(d)(2)(B) objections to discovery requests in a subpoena are subject to the same prohibition on general or boiler-plate objections and requirements that the objections must be made with specificity and that the responding party must explain and support its objections.”); *F.D.I.C. v. Brudnicki*, 291 F.R.D. 669, 674 n.4 (N.D. Fla. 2013) (declining to consider FDIC-R’s boilerplate objections: “Intoning the ‘overly broad burdensome’ litany, without more, does not express a valid objection.”); *Chevron Midstream Pipelines LLC v. Settoon Towing LLC*, 2015 WL 269051, at *3 (E.D. La. Jan. 21, 2015) (“Boilerplate and general objections, including those vaguely asserted privileges, are taglines, completely devoid of any individualized factual analysis” and are “inadequate to voice a successful objection.”); *KeyBank Nat. Ass’n v. Perkins Rowe Assocs., LLC*, 2011 WL 765925 at *4 (M.D. La. Feb. 25, 2011) (Blanket objections or objections that are not supported with any factual or legal basis “cannot be sustained.”).²¹

LDI’s objections also stretch the limits of good faith. For example, LDI professes an inability to understand the meaning of the word “work” in Buck’s first and second document requests, which seek records “reflecting Buck’s [and Milliman’s] professional services and work for LAHC.”²² LDI asserts that these requests are “incomprehensible” because the “[t]he word “work” is undefined, vague and indefinite. . .”²³ That is nonsense, plain and simple. Equally preposterous is LDI’s assertion that Buck’s request No. 11, for documents reflecting or analyzing Commissioner Donelon’s November 5, 2015 testimony to Congress on the factors that caused LAHC’s financial problems, is “incomprehensible” and “would necessarily include Commissioner Donelon’s birth certificate, social security card, driver’s license, wedding license and similar documents.”²⁴

LDI likewise objects that Buck’s requests 1-4 lack a “subject designation and temporal limitation.” These objections can quickly be rejected because Buck’s requests (i) obviously are limited to Milliman’s and Buck’s professional services to LAHC, and (ii) as alleged in the

²¹ *In re Kuntz*, 06-0487 (La. 05/26/2006), 934 So. 2d 34, 35 (Louisiana discovery rules are derived from federal rules, and analogous federal rules are persuasive authority).

²² **Exhibit D**, LDI’s Objections, at pp.1-2.

²³ *Id.*

²⁴ **Exhibit D**, LDI’s Objections, at p. 9.

Commissioner's amended petition, encompass a distinct timeframe as Milliman provided professional services to LAHC from August 2011 through March 2014, and Buck provided professional services to LAHC from March 2014 through July 2015. To clarify this limited scope, Buck, by letter, made clear to LDI's counsel that these requests were limited to LAHC and to these time periods - to no avail. These implausible objections are insufficient and lacking in merit. This Court should order LDI to comply with Buck's subpoena duces tecum.

H. LDI's citations to La. R.S. 22:2043.1 and La. R.S. 22:2045 are wholly inadequate to preserve any objection.

It is unclear the extent, if any, of LDI's reliance on La. R.S. 22:2043.1 and La. R.S. 22:2045. LDI simply recites the language of these statutes over and over again "subject to" its objections, but without asserting them in support of any objection or explaining how they might support any specific objection.²⁵

Such abstract, boilerplate recitations fail to preserve any objection, whether based on a privilege, confidentiality interest, or otherwise. "Under Louisiana law, the party asserting the privilege has the burden of proving that the privilege applies; further, the party asserting the privilege must adequately substantiate the claim and cannot rely on a blanket assertion of privilege." *Nelson v. Carroll Cuisine Concepts, LLC*, 2018-1079, p. 1 (La. App. 1 Cir. 11/09/18), 2018 WL 5881710; *see also Fleisher v. Phoenix Life Ins. Co.*, 2013 WL 42374, at *3 (S.D. N.Y. Jan. 3, 2013) ("[T]he burden is on a party claiming the protection of the privilege to establish those facts that are essential elements of the privileged relationship, a burden not discharged by mere conclusory or ipse dixit assertions."). Accordingly, any objections that might have been asserted based upon the recited statutory provisions are waived.

Further, while La. R.S. 22:2043.1 immunizes the Commissioner from liability and certain defenses, such immunity does not shield its documents potentially relevant to this lawsuit from discovery. There is not a single Louisiana case applying La. R.S. 22:2043.1 to bar discovery of relevant LDI records.

And there is no possible basis for an objection under La. R.S. 22:2045, as its protects the confidentiality of documents produced by, obtained by, or disclosed to the Commissioner "in the

²⁵ See **Exhibit D**, LDI's Objections to Buck's document requests Nos. 5-10, 13-23.

course of an action pursuant to this Chapter”—meaning Chapter 9: “Rehabilitation, Liquidation, Conservation.” See La. R.S. 22:2045 (emphasis added). The subpoenaed LDI documents were not produced by, obtained by, or disclosed to the Commissioner “*in the course of an action pursuant to*” Chapter 9. The LDI documents were generated *before* LAHC was placed in receivership - which is the very reason Buck was forced to issue the subpoena duces tecum to the LDI based on the Commissioner’s “different capacities” argument. Hence, this statutory provision could not apply to bar production to the defendants of pertinent LDI documents in this case. And the LDI has not asserted any other statutory basis for a privilege applicable to the documents that Buck has subpoenaed, so any such objection is waived.

And, even absent waiver, any other statutory privilege or confidentiality that might be argued to apply to the LDI’s records has been waived by the Commissioner’s filing of the instant suit. Under basic principles of due process and fundamental fairness, the Commissioner cannot file a multi-million dollar lawsuit implicating LDI records while at the same time refusing to produce them to the defendants he has sued based upon an inadequately alleged statutory privilege. See *RTC v. Deloitte & Touche*, 145 F.R.D at 112 n.6 (finding that that “any regulatory privilege applicable to pre-conservatorship documents has been waived by the filing of this lawsuit.”); see also *FDIC v. Wise*, 139 F.R.D. 168, 172 (D. Colo. 1991) (finding that the FDIC waived asserted “regulatory” privileges, and stating: “[W]e are persuaded that defendants’ ability to test these allegations by reviewing the regulatory documents is vital to their defense.”); *Sawicz*, 823 N.E.2d at 887 (firmly rejecting the Superintendent of Insurance’s argument that he should be allowed “to take control of a privately owned company, put it out of business, [and] sue its officers for failing to run the company properly,” while denying them access to department of insurance regulatory records pertaining to the company).

Finally, LDI’s publication on its public website of reports of reviews and evaluations of Buck’s actuarial rate projections eliminates any possibility of a claim of confidentiality or privilege as to that and related information.²⁶ LDI’s claim of confidentiality and privilege, *even for documents that it publishes on its own website*, shows that LDI clearly has not made a

²⁶ See **Exhibit J**, Lewis and Ellis report downloaded from LDI public website, at pp. 1-3, 4-8, 10-12, 13, 16-17.

good faith effort to determine whether any particular document may be subject to a privilege, as is its burden when objecting to a subpoena duces tecum. Nor has it provided a description of any document withheld on grounds of privilege or confidentiality. LDI's boilerplate objections are insufficient as a matter of law to preserve any such privilege or confidentiality interest. Finally, the protective order already entered in this case will more than suffice to preserve any confidentiality that may attach to records produced by the LDI in compliance with Buck's subpoena. *See Stewart*, 2002 WL 1558210, at *5 (“[D]ocuments are not shielded from discovery on the basis of confidentiality,” but may be subject to a protective order.).

III. CONCLUSION

For all of the foregoing reasons, this Court should order LDI to comply with Buck's subpoena duces tecum, in accordance with the “extremely broad,” “liberal discovery” that should be afforded to Buck in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been served upon all counsel of record by e-mail, and, additionally, upon counsel of record for LDI by certified mail, return receipt requested, this 16th day of December, 2020.

/s/ James A. Brown