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

CGI TECHNOLOGIES AND SOLUTIONS, INC., GROUP RESOURCES INCORPORATED, BEAM PARTNERS, LLC, MILLIMAN, INC., BUCK CONSULTANTS, LLC, WARNER L. THOMAS, IV, WILLIAM A. OLIVER, SCOTT POSECAI, PAT QUINLAN, PETER NOVEMBER, MICHAEL HULEFELD, ALLIED WORLD SPECIAL INSURANCE COMPANY a/k/a DARWIN NATIONAL ASSURANCE COMPANY, ATLANTIC SPECIALTY INSURANCE COMPANY, EVANSTON INSURANCE COMPANY, RSUI INDEMNITY COMPANY, AND ZURICH AMERICAN INSURANCE COMPANY

FILED: _____ _____
DEPUTY CLERK

DEFENDANT MILLIMAN, INC.'S MOTION TO COMPEL LDI'S COMPLIANCE WITH *SUBPOENA DUCES TECUM*

NOW INTO COURT, through undersigned counsel, comes Milliman, Inc. ("Milliman"), 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 (the "LDI") to comply with the *subpoena duces tecum* served upon it on November 19, 2020 (the "Subpoena"), upon showing that:

1.

The requested LDI documents are directly relevant to the Plaintiff's claims and/or Milliman's defenses, and are reasonably calculated to lead to the discovery of admissible evidence. Although Milliman'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 Milliman's document requests fail to preserve, and thereby waive, any objections to the Subpoena. The LDI privilege and statutory objections on the grounds of La. R.S. §§ 22:2043.1 and 22:2045 are also without merit, and any relevant claim of privilege or confidentiality has been waived by the LDI's failure to properly assert it. Finally, the LDI's public records production does not satisfy its discovery obligations under Louisiana law.

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

Exhibit A:	Milliman's Amended Notice of Records Only Deposition to the Louisiana Department of Insurance served November 19, 2020.
Exhibit B:	Pl.'s Resp. to Buck Global, LLC's First Set of Interrog. and Req. for Production of Documents (Sept. 30, 2020).
Exhibit C:	James J. Donelon, Testimony of the Louisiana Commissioner of Insurance Before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, United States House of Representatives Regarding: "Examining the Costly Failures of Obamacare's CO-OP Insurance Loans" (Nov. 5, 2015).
Exhibit D:	Second Supp., Am. and Restated Pet. for Damages and Request for Jury Trial, *Donelon v. CGI Tech. & Solutions, Inc., et al.*, No. 651,069 (Oct. 25, 2017).
Exhibit E:	Tr. of Hr'g on Defs.' Mot. to Compel, *Donelon v. CGI Tech. & Solutions, Inc., et al.*, No. 651,069 (Sept. 25, 2020).
Exhibit F:	Objections of Louisiana Department of Insurance to *Subpoena Duces Tecum* served November 17, 2020 by Defendant, Milliman, Inc.
Exhibit G:	Objections of Louisiana Department of Insurance to Amended *Subpoena Duces Tecum* served November 19, 2020 by Defendant, Milliman, Inc.
Exhibit H:	Chart: The Responsiveness of the LDI's September 2020 Public Records Production.

Milliman respectfully requests that the Court sign the Rule to Show Cause filed with this Motion to Compel and, as a matter of judicial efficiency, set it for a hearing for February 12, 2021 at 9:30 a.m., the same date and time as the hearing on Defendant Buck Global, LLC's Motion to Compel LDI's Compliance with *Subpoena Duces Tecum*. In compliance with Local Rule 9.8, Milliman represents that this case is not set for trial, and that live testimony will not be offered at the hearing of this motion.

WHEREFORE, Milliman respectfully prays that, after hearing of this matter, the Court grant its Motion and order the LDI to comply fully with Milliman's Subpoena and produce documents responsive to Milliman's discovery requests.

Respectfully submitted,

/s/ Harry Rosenberg

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Counsel for Defendant Milliman, Inc.

RULE 10.1 CERTIFICATE OF CONFERENCE

I, Justin Kattan, the undersigned counsel for Milliman, Inc., personally conferred with John Ashley Moore, counsel for Louisiana Department of Insurance, by telephone on December 15, 2020. At this conference, despite their best efforts, counsel were unable to resolve the matters presented.

Certified this 7th day of January, 2021,

/s/ *Justin N. Kattan* (admitted *pro hac vice*)

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 7th day of January, 2021.

/s/ Harry Rosenberg

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FILED: _____ _____
DEPUTY CLERK

RULE TO SHOW CAUSE

Considering the Foregoing Motion to Compel the Louisiana Department of Insurance to Comply with Subpoena Duces Tecum filed by Defendant Milliman, Inc. ("Milliman's Motion to Compel"),

IT IS HEREBY ORDERED that a hearing on Milliman's Motion to Compel will be conducted on the _____ day of _____, 2021 at _____:_____ ___.M. The hearing will be held by Zoom for the safety of all participants due to the COVID-19 pandemic.

Baton Rouge, Louisiana, this ____ day of January, 2021.

_____
HONORABLE JUDGE TIMOTHY KELLEY

Movant will serve the foregoing
Rule to Show Cause upon The Louisiana Department of Insurance
through counsel, John Ashley Moore,
450 Laurel Street, Suite 800
Baton Rouge, LA 70801
by CERTIFIED MAIL, RETURN RECEIPT REQUESTED
in accordance with La. CCP art. 1313(C).

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

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FILED: _____ _____
DEPUTY CLERK

DEFENDANT MILLIMAN, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL LDI'S COMPLIANCE WITH *SUBPOENA DUCES TECUM*

Milliman, Inc. ("Milliman") respectfully submits this memorandum in support of its Motion to Compel the Louisiana Department of Insurance (the "LDI") to comply with Milliman's November 19, 2020 amended *subpoena duces tecum* (the "Subpoena") (attached as **Exhibit A**). The LDI has objected to every one of Milliman's document requests on "relevance" grounds, and also based on La. R.S. §§ 22:2043.1 and 22:2045, which, the LDI contends, completely insulate the LDI from discovery here. The LDI has refused to produce any documents in response to the Subpoena.

The LDI undoubtedly possesses—and may be the ***only*** source of—critical information that directly bears on whether Milliman's work was done reasonably and competently, whether its work caused any of LAHC's losses, as the Receiver alleges, and whether the actuarial assumptions that underlay Milliman's work were reasonable given what was known at the time.

The Receiver's claims against Milliman are based, in part, on allegations that Milliman's reports supporting Louisiana Health Cooperative, Inc.'s ("LAHC") rate filings submitted to the LDI fell short of actuarial standards and were otherwise improper. Communications concerning the LDI's review of Milliman's reports and/or approval of LAHC's rates are probative because they establish a ***contemporaneous*** record—unaffected by hindsight or after-the-fact attempts to shift blame for LAHC's losses—that cannot be obtained from other sources concerning the quality and reasonableness of Milliman's work for LAHC. Plaintiff has admitted as much by agreeing to

produce documents "in [the Receiver's] possession and control" concerning "LDI's review and approval of LAHC's 2014 and 2015 premium rates," as well as "actuarial documents by anyone including LDI, Buck, and/or Milliman." (Pl.'s Resp. to Buck Global, LLC's First Set of Interrog. and Req. for Production of Documents, at Resp. Nos. 4-8 (Sept. 30, 2020) (attached as **Exhibit B**)). If such evidence in the Receiver's possession is relevant and discoverable, the same categories of evidence are relevant and discoverable from the LDI.

The Receiver's Petition also alleges that Milliman's reports relied on improper assumptions concerning levels of policyholder enrollment, claim coding intensity, and provider discounts, particularly as compared to other carriers in Louisiana. Milliman must be able to test these allegations by obtaining information from the LDI concerning, *inter alia*, state-wide enrollment levels, rates of other carriers, and whether or to what extent these allegedly "unreasonable" assumptions actually impacted LAHC's financial condition. ***Only*** the LDI has in its files this contemporaneous information, data, and analyses from other insurers who sold ACA-compliant health insurance in Louisiana. Milliman has none of it.

Similarly, the LDI will likely have information concerning what caused LAHC's financial losses and insolvency, which is directly relevant to Milliman's defenses in this case. We know, from the Insurance Commissioner's testimony before Congress in 2015, that the LDI closely monitored LAHC's financial condition, recommended in July 2015 that LAHC voluntarily wind down its operations, and had "constant and on-going contact with" the federal government. (James J. Donelon Testimony before U.S. House of Representatives Subcommittee on Oversight and Investigations re "Examining the Costly Failures of Obamacare's CO-OP Insurance Loans." (Nov. 5, 2015) (attached as **Exhibit C**)). Therefore, the LDI is likely to have information that bears directly on Milliman's contention that its work did not cause LAHC's losses, but rather that LAHC's losses were caused by factors unrelated to Milliman—including the federal government's unforeseeable decision to withhold "Risk Corridor" payments that were designed to buffer LAHC's losses in its early years. Milliman is entitled to the LDI's information concerning LAHC's financial collapse.

Finally, Milliman is entitled to obtain discovery concerning the LDI's review and approval of the settlement in the federal *Health Republic* class action, in which LAHC was the only insurer—out of 148—that did not get paid 100% of the Risk Corridor payments owed by the federal government. The Receiver has conceded that Milliman is entitled to put on a defense and

"conduct reasonable discovery" concerning the Receiver's post-receivership conduct, which includes the facts and circumstances surrounding the *Health Republic* settlement. (Pl.'s Reply Mem. to Defs.' Opp'n Mem. Regarding "Regulator Fault" or "Receiver Fault" Defenses, Or In the Alternative, Mot. to Strike Defenses as a Matter of Law, at 11 (Nov. 12, 2020)).

Because the LDI cannot credibly contest the relevance of the documents the Subpoena requests, its "relevance" objections should be overruled. Milliman also offered to work with the LDI's counsel to ease any burden the Subpoena may impose on the LDI. The LDI refused to negotiate over the scope of any particular requests, however, because the LDI has also asserted wholesale statutory objections to the Subpoena.

The LDI's statutory objections are without merit. First, the LDI has echoed the Receiver's argument that La. R.S. § 22:2043.1 insulates the LDI from liability and precludes defenses based on a regulator's "action or inaction." However, immunity from ***liability*** does not shield a regulator's documents, knowledge, and other evidence potentially relevant to this (or any) lawsuit from ***discovery***. Moreover, Milliman is entitled to see the LDI's communications about LAHC's rate filings and the other information it has requested, not to prove the LDI's liability, or to assess its "actions or inactions," which is what the statute addresses. Rather, Milliman is looking to obtain evidence and data bearing on whether Milliman's work product was prepared competently, the reasonableness of Milliman's assumptions, and the extent to which the federal government (or other external factors) caused LAHC's losses.

The LDI's objection based on La. R.S. § 22:2045 is similarly unavailing. By its plain terms, that statute only applies to documents that are (1) "produced by, obtained by, or disclosed to the commissioner. . . in the course of" a Receivership or Rehabilitation action, and (2) otherwise privileged. Neither criterion is satisfied here, as the Subpoena requests pre-insolvency documents, and the LDI has not identified an applicable privilege that would shield everything Milliman has requested from discovery.

Finally, the LDI's production of 60 non-substantive documents in response to the Receiver's public records request last year does not satisfy the LDI's discovery obligations in response to the Subpoena.

For all of the reasons discussed herein and in Defendant Buck Global, LLC's ("Buck") Motion to Compel LDI's Compliance with Buck's *subpoena duces tecum*, Milliman's Motion to Compel should be granted.[1]

I. BACKGROUND

A. The LDI Possesses Information Relating To The Receiver's Allegations Against Milliman And Milliman's Defenses

By this action, the Louisiana Commissioner of Insurance, acting as Rehabilitator of LAHC, seeks to hold Milliman and its co-defendants jointly and severally responsible for LAHC's insolvency and all of its resultant losses. The Receiver's allegations against Milliman directly implicate documents and information the LDI possesses.

The Receiver's core allegations against Milliman assert that Milliman's reports supporting LAHC's 2014 rate filings were misleading and contravened actuarial standards. Because those rate filings were submitted to the LDI, the LDI is likely to have information concerning the reasonableness and propriety of Milliman's work.

Furthermore, the Petition alleges that Milliman's reports unreasonably assumed: "LAHC would achieve provider discounts on their statewide PPO product that were equal to Blue Cross Blue Shield of Louisiana" (Second Supp., Am. and Restated Pet. ("Petition") ¶ 95 (attached as **Exhibit D**)); "that there would be no difference in coding intensity between LAHC and the other insurance carriers in the State of Louisiana" (*Id.* at ¶¶ 104-5); and "that LAHC's coding efficacy would be the same as larger established health insurance carriers" (*Id*. at ¶ 107). The LDI, as the regulator with oversight over all Louisiana insurers, possesses information about other insurers' 2014 premium rate filings that could be probative of the reasonableness of Milliman's assumptions in its work for LAHC. None of this information concerns the LDI's "actions or inactions" as regulator.

Milliman's defenses likewise raise issues about which the LDI is likely to have discoverable information. For example, Milliman has alleged that other parties, and non-parties like the federal government, caused LAHC's losses, not Milliman. The LDI's Commissioner testified before Congress that the LDI played an active role in monitoring LAHC's financial condition before ultimately recommending that LAHC wind down, including the review of an "alarming" number of consumer complaints against LAHC. *See* Ex. C at 4. Per the

[1] Milliman adopts and incorporates by reference the arguments in Buck's December 16, 2020 Memorandum in Support of Motion to Compel LDI's Compliance with its *subpoena duces tecum*.

Commissioner's Congressional testimony, the LDI conducted an on-site market conduct and financial examination and determined that LAHC had triggered several provisions of the state's Hazardous Financial Condition Regulation in March 2015. *Id*. at 5. In the months that followed, the LDI examined LAHC's ongoing viability, ultimately recommending in July 2015 that "[LAHC] . . . wind down its operations over the remainder of the 2015 calendar and plan year, rather than risk insolvency in 2016 and force enrollees to find new coverage in the beginning of the 2016 plan year." *Id.* Given the LDI's role in examining LAHC's financial and operational issues, the LDI is likely to possess information relevant to the central issue in the case—i.e., what caused LAHC's financial losses and insolvency.

The LDI's communications with and about the federal government with respect to LAHC will likewise bear directly on Milliman's defense given the government's central role in wrongfully causing LAHC's failure.[2] Neither information concerning LAHC's financial condition nor the LDI's communications with the federal government implicate the LDI's pre-receivership "actions or inactions."

B. <u>Milliman's Subpoena To The LDI</u>

In light of the allegations and defenses at issue in this case, Milliman's document demands to the Receiver sought responsive documents in the LDI's possession, custody or control. As this Court is aware, the Receiver refused to produce LDI documents (other than those on LAHC's own servers), and Defendants moved to compel. In opposing that motion, the Receiver argued that Defendants could obtain the documents being sought by "mak[ing] a simple public records request to the [LDI] requesting the production of regulatory documents maintained by LDI regarding LAHC . [. . .]" (Opp. Mem. to Defs.' Mot. to Compel, at 2 (Sept. 17, 2020); *see also* Tr. of Hr'g on Defs.' Mot. to Compel, at 20 (Sept. 25, 2020) (attached as **Exhibit E**) ("[The Receiver] 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.")).[3] This Court, in denying Defendants' Motion, stated that Defendants could

[2] This Court has recognized the significance of the federal government's failure to make Risk Corridor payments, including in its Order compelling LAHC to file monthly updates regarding the status of litigation concerning these payments.

[3] *See also* Ex. E, at 28-35, 38, 40 (Receiver's counsel advising the Court that Defendants can obtain the requested documents through a subpoena directed to the LDI).

proceed by "third-party subpoena, which the court believes it the proper vehicle through which to obtain the documentation [from the LDI]." Ex. E at 50.

At the November 20, 2020 hearing on the Receiver's Motion for Partial Summary Judgment and Motion To Strike "Regulator Fault" defenses, the Court recognized that its grant of the Receiver's Motion was not dispositive of the discoverability of LDI documents. Rather, the Court correctly recognized that LDI regulatory documents may be discoverable under Louisiana's broad discovery rules.

On or about November 17, 2020, Milliman served a subpoena on the LDI. Milliman served the amended Subpoena on November 19, 2020. The Subpoena requested, among other documents, the following categories of information that related directly to the Receiver's claims against Milliman and Milliman's defenses:

- Communications concerning Milliman's reports in support of LAHC's 2014 rate filings (*See, e.g.*, Ex. A, Reqs. 12, 13, 15);
- Information concerning other insurers' 2014 rate filings, which could be used to test the reasonableness of Milliman's assumptions (*Id.*, Reqs. 16, 17);
- Documents concerning LAHC's financial condition and insolvency (*Id.*, Reqs. 29-33);
- Communications with the federal government concerning changes to and implementation of the Affordable Care Act on LAHC's financial condition (*Id.*, Reqs. 19, 20); and
- Communications concerning the *Health Republic* settlement (*Id.*, Reqs. 37, 38).

The LDI responded to the original subpoena on December 4, 2020 (attached as **Exhibit F**), and the amended Subpoena on December 8, 2020 (attached as **Exhibit G**). The LDI asserted wholesale objections to every one of Milliman's requests. With no explanation, the LDI objected that Milliman's requests seek documents that are "not relevant and are not reasonably calculated to lead to the discovery of admissible evidence," and/or are "overbroad, lacking a reasonably accurate description of the documents being requested, lacking proportionality, unreasonable, oppressive, and incomprehensible." (Ex. G, Resp. to Reqs. 1-38). The LDI also incorrectly claims that its documents are protected from disclosure under La. R.S. §§ 22:2043.1 (*id.*, Resp. to Reqs. 1, 7, 9, 10, 12-15, 17-24, 28-34, 38) and/or 22:2045 (*id.*), and/or that its discovery obligations have been satisfied by its production in response to the Receiver's public records request last year. (*Id.*, Resp. to Reqs. 2-3). Compounding the LDI's unfounded blanket objections is its highly irregular

position that it is unable to understand common terms, such as the word "work," a term the LDI itself uses.[4]

On December 15, 2020, counsel for Milliman met and conferred by telephone with counsel for the LDI, in an attempt to resolve the discovery dispute in accordance with Local Rule 10.1. Counsel for the LDI stated that the LDI would maintain its statutory objections, therefore there was no reason for Milliman to negotiate over the scope of any of its requests. Counsel for the LDI confirmed that it will not produce any documents in response to Milliman's Subpoena, necessitating this motion to compel.

II. ARGUMENT

A. The LDI's "Relevance" Objections Should Be Overruled Because Milliman's Requests Relate To Claims And Defenses In This Action And Are Reasonably Calculated To Lead To The Discovery Of Admissible Evidence

Under La. Code Civ. P. art. 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. "The test of discoverability is not the admissibility of the particular information sought, but whether the information appears reasonably calculated to lead to the discovery of admissible evidence." *Lehmann v. Am. S. Home Ins. Co.*, 615 So. 2d 923, 925 (La. App. 1 Cir. 1993). 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); *see also Collins v. Crosby Grp., Inc.*, 551 So. 2d 42, 43 (La. App. 1 Cir. 1989), *writs denied*, 556 So. 2d 39, 42 (La. 1990) ("[A]ny relevant matter, not privileged, is discoverable.").

We are aware of no authority, and the LDI has provided none, that insulates an insurance regulator from producing documents that relate to an insurer's insolvency in a suit where, as here, a receiver seeks damages from a defendant for causing that insurer's insolvency. On the contrary, courts in Louisiana and elsewhere have consistently determined that regulators must produce relevant documents in such cases. In *Donelon v. Herbert Clough, Inc.*, the court compelled the LDI to produce documents related to its supervision of a failed insurer where the Commissioner, as receiver, alleged that defendants caused the insurer's losses and insolvency. No. CV 03-282-A-M2, 2006 WL 8436324, at *6 (M.D. La. Oct. 19, 2006). The *Herbert Clough* court

[4] The Receiver's Petition refers to Milliman's "work" no less than five times. Ex. D at ¶¶ 22, 89, 92, 93, 112.

held that the Commissioner's suit opened the door to the LDI's regulatory records and that the Commissioner "has an obligation, in his capacity as 'regulator' or 'director' of the DOI, to produce all non-privileged documents relevant to the supervision of [the insurer] prior [to] its rehabilitation and liquidation." *Id.*[5]

Similarly, in *Benjamin v. Sawicz*, an Ohio appellate court affirmed the trial court's discovery order compelling the regulator to produce documents about a failed insurer. 159 Ohio App. 3d 265, 270 (2004). The *Sawicz* court firmly rejected the notion that the "[Ohio Department of Insurance] 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.* at 275 (internal quotations omitted). The *Sawicz* court held that "[u]nder these circumstances, and where [the Superintendent] has under her control, through the department of insurance, special and direct knowledge vital to the action, [. . .] the superintendent must disclose all information material and relevant to this action, whether in the superintendent's capacity as regulator or liquidator." *Id.* (internal quotations omitted). *See also Matter of Ideal Mut. Ins. Co.*, 140 A.D.2d 62, 532 N.Y.S.2d 371, 375-76 (1988); *Resolution Tr. Corp. v. Deloitte & Touche*, 145 F.R.D. 108 (D. Colo. 1992) (granting defendants' motion to compel production of regulatory documents concerning the cause for a failed thrift's insolvency).

The LDI also fails to explain why it believes that Milliman's requests are "not relevant" or "not reasonably calculated to lead to the discovery of admissible evidence." For that reason alone, the LDI's objections are legally insufficient. *See, e.g., 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 asserting privilege(s), 'are taglines, completely devoid of any individualized factual analysis'" and are "not adequate to voice a successful objection"); *KeyBank Nat. Ass'n v. Perkins Rowe Assocs.*, 2011 WL 765925, at *4 (M.D. La. Feb. 25, 2011) (holding that blanket objections or objections that are not supported with any factual or legal basis "cannot be sustained"). Similarly, there is no reasonable justification for LAHC's boilerplate objections to Milliman's requests as "lacking subject designation and temporal limitation," especially when LAHC was only operational for less than two years.

[5] The Louisiana Supreme Court has stated that Louisiana's discovery rules are derived from the Federal Rules of Civil Procedure, and therefore authority construing analogous federal rules is persuasive in Louisiana. *In re Marriage of Kuntz*, 2006-0487 (La. 05/26/06), 934 So. 2d 34, 35.

Discovery from the LDI is directly relevant to Milliman's ability to defend itself, and the LDI cannot evade its obligations with boilerplate objections that every one of Milliman's requests is "not relevant" and "not reasonably calculated to lead to the discovery of admissible evidence." Each of Milliman's requests seeks relevant discovery about the propriety of Milliman's work and the reasons for LAHC's losses both pre-receivership and as a result of the Receiver's management of LAHC's estate. Moreover, Milliman's requests for LDI documents are, at a minimum, reasonably calculated to lead to the discovery of admissible evidence. For example, regardless of whether LDI communications concerning LAHC's 2014 or 2015 premium rates are admissible, if the LDI's analysis relied on data from other insurance companies or rate books, that factual rate data, which does not implicate the LDI's "actions or inactions," could be admissible evidence if it bears on the reasonableness of Milliman's assumptions.

B. La. R.S. § 22:2043.1 Does Not Allow The LDI To Withhold Documents Responsive To Milliman's Subpoena

The LDI's objections based on La. R.S. § 22:2043.1 are meritless for two reasons. First, Milliman is not seeking discovery from the LDI to assess the regulator's "actions or inactions" or to "delegate responsibility" to a state agency. *Wooley v. Lucksinger*, 61 So. 3d 507, 606 (La. 2011). Rather, the LDI's review and approval of Milliman's work in connection with LAHC's rate filings goes to whether that work was reasonable and competent. Likewise, Milliman's requests for LDI's documents related to the reasons for LAHC's financial insolvency and/or the LDI's review and approval of the settlement in the federal *Health Republic* class action are reasonably calculated to lead to the discovery of admissible evidence concerning whether other parties—including the federal government—may have caused LAHC's losses. Thus, as this Court stated at the November 20, 2020 hearing, LDI documents may be discovered if they fall within the broad scope of discovery permitted under Louisiana law notwithstanding the Court's dismissal of Defendants' "regulator fault" affirmative defenses.

Second, the LDI's immunity from ***liability*** does not immunize it from ***discovery***. Courts in analogous cases have held that regulatory documents are relevant and discoverable in receivership actions, even when "regulator fault" defenses are disallowed. For example, in *F.D.I.C. v. Dosland*, the court held that the 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." No. C13-4046-MWB, 2014 WL 1347118, at *4 (N.D. Iowa Apr. 4, 2014). The court held 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.*; *see also F.D.I.C. v. Berling*, No. 14-CV-00137-CMA-MJW, 2015 WL 3777408, at *2 (D. Colo. June 16, 2016) (compelling production of documents in regulator's possession even where they "may ultimately prove inadmissible for a variety of reasons," because "they might nonetheless contain information leading to the discovery of admissible evidence").

Similarly, in *F.D.I.C. v. Clementz*, No. 2:13-CV-00737-MJP, 2014 WL 4384064, at *2-4 (W.D. Wash. Sept. 4, 2014), the court, over the FDIC receiver's objections, granted the defendant'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 held that the FDIC's contemporaneous evaluation of the loans in question was relevant to the FDIC receiver's claims against the defendants and thus discoverable. *Id. See also F.D.I.C. v. Clementz*, No. C13-737 MJP, 2015 WL 11237021, at *4 (W.D. Wash. Sept. 24, 2015) (in a subsequent ruling, reiterating that "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"); *Colonial BancGroup, Inc. v. PricewaterhouseCoopers, LLP*, 110 F. Supp. 3d 37, 41-42 (D.D.C. 2015) (pre-receivership regulatory documents discoverable even though regulator fault defenses were barred because documents "would reflect real-time observations, analyses, and assessments of bank management, the MWLD, risk factors, controls, audits, and other aspects of the bank that relate directly to the claims and defenses [. . .], or at least reasonably could lead to information bearing on [these] issues").

C. La. R.S. § 22:2045 Does Not Allow The LDI To Withhold Contemporaneous, Non-Privileged Documents Responsive To The Subpoena

The LDI's objections based on La. R.S. § 22:2045 are also without merit. La. R.S. § 22:2045 protects the confidentiality of documents that are both: (1) "produced by, obtained by, or disclosed to the Commissioner [. . .] ***in the course of an action pursuant to***" Louisiana Insurance Code Chapter 9, ***and*** (2) "confidential or privileged pursuant to any other provision of law." (emphasis added). La. R.S. § 22:2045 does not preclude the LDI from producing documents responsive to the Subpoena because Milliman seeks contemporaneous evidence generated ***before*** LAHC was placed in receivership.

Moreover, La. R.S. § 22:2045 only protects documents that are otherwise "confidential or privileged pursuant to any other provision of law." To the extent that the LDI claims that responsive documents are otherwise privileged, the LDI has the burden of proving that that privilege applies. The LDI's objections fail to identify any applicable privilege that covers the documents at issue. As the First Circuit Court of Appeals has held, "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). The LDI has made a "blanket" assertion of privilege that is not sufficient to sustain its burden

D. The LDI's Production In Response To Plaintiff's Public Records Request Does Not Satisfy Its Obligations Under The Subpoena

The LDI also objects to the majority of Milliman's requests by arguing that "public records regarding LAHC, subject to production pursuant to La. R.S. § 44:1, *et seq*., were produced to J.E. Cullens, Jr. of Walters, Papillion, Thomas, Cullens, LLC, who produced such documents to 'All Defense Counsel in LAHC,'" and that such production satisfies the LDI's discovery obligations in response to the Subpoena. (Ex. G, LDI's Resp. to Reqs. 1, 7, 9, 10, 12-15, 17-24, 28-34, 38). The LDI's production in response to the Receiver's public records request, consisting of only 60 documents, is incomplete and does not respond to the vast majority of Milliman's requests.

The LDI also does not, and cannot, deny that it possesses more documents than those contained in its production to the Receiver. The LDI's minimal production contains ***zero*** documents related to: (1) LAHC's premium rates, (2) LAHC's financial losses (other than a statement for a single quarter), (3) LAHC's enrollment issues, or (4) the decision to place LAHC into rehabilitation (other than the Petition for Rehabilitation, which is in the public record). The LDI produced only ***one*** email that references Milliman in any way at all. The 51 documents in the LDI's production reflecting communications between the LDI and LAHC are non-substantive, perfunctory emails, primarily relating to employee, director, or officer hires and terminations—nothing relating to the claims and defenses at issue in this case.

Attached as **Exhibit H** is a chart reflecting that few of the LDI's previously-produced documents correspond to Milliman's requests for production in the Subpoena. Given the LDI's extensive involvement with and monitoring of LAHC, the LDI's minimal, non-probative production cannot be the extent of the LDI's files concerning LAHC.

III. Conclusion

For all of the foregoing reasons, this Court should grant Milliman's Motion To Compel and order the LDI to comply with Milliman's Subpoena *duces tecum*.

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 7th day of January, 2021.

/s/ Harry Rosenberg