



State of Louisiana
Department of Health and Hospitals
Bureau of Legal Services

November 20, 2014

Via Hand Delivery

Honorable Clerk of Court
19th Judicial District Court
300 North Boulevard
Baton Rouge, LA 70801

RE: New Orleans Home for the Incurables, Inc. vs.
Kathy Kliebert, et al.
Docket No.: 634638

Dear Clerk of Court:

Please find an original and three (3) copies of an Answer, Reconventional Demand and Request for Notice and an original and two (2) copies of an Exception of Res Judicata and No Right of Action and No Cause of Action in the Alternative filed on behalf of Louisiana's Department of Health and Hospitals (DHH).

We would appreciate the following actions taken on behalf of DHH:

- 1) Please date stamp each pleading and file a copy into the suit record;
- 2) Return a conformed copy of the pleadings to DHH in the enclosed envelopes;
- 3) Have a copy of the Answer, Reconventional Demand and Request for Notice served by Sheriff on the Plaintiff; and
- 4) Forward a copy of each pleading to Honorable Judge Morvant.

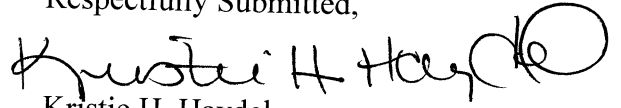
Finally, the State of Louisiana, through DHH, respectfully requests that it be exempt from paying all costs of court related to this matter in accordance with LSA-R.S. 40:31.

I appreciate your assistance with filing this matter. Should you have any concerns

DATE
Page 2

or questions, please contact me at (225) 342-5745.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Kristie H. Haydel", with a large, stylized circular flourish at the end.

Kristie H. Haydel
Attorney at Law

Enclosures

cc: Russell Stegeman
Veronica Sizer

VERSUS

19TH JUDICIAL DISTRICT COURT

KATHY KLIEBERT, SECRETARY
OF THE LOUISIANA
DEPARTMENT OF HEALTH AND
HOSPITALS AND KRISTY NICHOLS,
LOUISIANA COMMISTIONER OF
ADMINISTRATION

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

ANSWER, RECONVENTIONAL DEMAND and REQUEST FOR NOTICE

NOW INTO COURT, through undersigned counsel, comes **KATHY KLIEBERT**, in her official capacity as the Secretary of the Louisiana Department of Health and Hospitals, who denies each and every allegation contained in the Petition for Damages except such as may be hereinafter specifically admitted as follows:

1.

The allegations contained in Paragraph 1 do not require an answer from this defendant.

2.

The allegations contained in Paragraph 2 are admitted.

3.

The allegations contained in Paragraph 3 do not require an answer from this defendant.

4.

The allegations contained in Paragraph 4 are denied for lack of sufficient belief to justify the truth therein.

5.

The allegations contained in Paragraph 5 are admitted.

6.

The allegations contained in Paragraph 4 are denied for lack of sufficient belief to justify the truth therein.

7.

The allegations contained in Paragraph 7 are denied as written. The law speaks for itself as the best evidence of what is stated within the cited provisions.

8.

Respondent admits that a lease contract was signed with an effective date of April 18, 2011. The remaining allegations contained in Paragraph 8 are denied as written.

9.

The allegations contained in Paragraph 9 are denied.

10.

The allegations contained in Paragraph 10 are denied.

11.

The allegations contained in Paragraph 11 are denied.

12.

The allegations contained in Paragraph 12 are denied.

13.

The allegations contained in Paragraph 13 are denied as written. The law speaks for itself as the best evidence of what is stated within the cited provisions.

14.

The allegations contained in Paragraph 14 are denied as written. Respondent denies that the "Lease Agreement" referenced herein is the lease agreement "in whole" which exists between the parties.

15.

The allegations contained in Paragraph 15 are denied as written.

16.

The allegations of Paragraph 16 are denied as written. Section I of the Lease Agreement states:

"The objective of the Agreement is to lease to Home the facility known as the John J. Hainkel Home and Rehabilitation Center and the associated CON for long term care beds, and for the Home to provide nursing home level services and adult day health care services, and quality health care services to the general public including, but not limited to, indigent purposes, and to serve as a medical and clinical training facility."

17.

The lease agreement speaks for itself as the best evidence of what is stated within Section

IV.

18.

The allegations contained in Paragraph 18 are denied.

19.

The allegations contained in Paragraph 19 are denied as written. La.R.S.40:16.3 states “That the Medicaid rate shall be set at the rate as of March 19, 2010, and shall be set at such rate for at least one year from the effective date of any lease *and for any period after one year from the effective date of any lease* the Medicaid rate shall be set at the rate which would be paid under the nursing home reimbursement methodology, subject to approval by the Centers for Medicare and Medicaid Services.”

20.

The allegations contained in Paragraph 34 are denied as written.

21.

The allegations contained in Paragraph 21 are denied.

22.

The allegations contained in Paragraph 22 are denied.

23.

The allegations contained in Paragraph 23 are denied as written. The Lease Agreement provides that “Home agrees to pay to the state through DHH during the Primary Term an annual rental equal to the actual out-of-pocket expenses...incurred by DHH and related to the Center up to a maximum of \$400,000 for any lease year, provided that if the Annual Costs are less than \$150,000 for any lease year, the minimum annual rental will be \$150,000.

24.

The allegations contained in Paragraph 24 are denied as written. The Lease Agreement requires that the state provide “documentation of actual expense supporting the amount of the Costs and Expenses in support of the quarterly payment.”

25.

The allegations contained in Paragraph 25 are denied.

26.

The allegations contained in Paragraph 26 are admitted.

27.

The allegations contained in Paragraph 27 are admitted.

28.

The allegations contained in Paragraph 28 are denied.

29.

The allegations contained in Paragraph 29 are denied.

30.

The allegations contained in Paragraph 30 are denied.

31.

The allegations contained in Paragraph 31 are admitted.

32.

The allegations contained in Paragraph 32 are denied.

33.

The allegations contained in Paragraph 33 are denied.

34.

The allegations contained in Paragraph 34 are denied as written. Section 11 of the Lease Agreement states that:

“If, prior to termination of this Lease, through no fault or design of Lessee, the Leased Premises and/or said building be destroyed by fire or other casualty, or be unfit for occupancy, this Lease shall be cancelled ipso facto, unless the Leased Premises can be rendered fit for occupancy within one hundred and eighty (180) days from the happening of such fire or other casualty, in which event the State shall repair the same with reasonable diligence and Home shall be entitled to such reduction or remission of rent as shall be just and proportionate.”

35.

The allegations contained in Paragraph 35 are denied.

36.

The allegations contained in Paragraph 36 are denied.

37.

The allegations contained in Paragraph 37 are admitted. The law speaks for itself as the best evidence of what is stated within the cited Article.

38.

The allegations contained in Paragraph 38 (a-c) are denied.

39.

The allegations contained in Paragraph 39 (a-e) are denied.

40.

The allegations contained in Paragraph 40 are denied for lack of sufficient belief to justify the truth therein.

41.

The allegations contained in Paragraph 41 are denied.

42.

The allegations contained in Paragraph 42 are denied.

43.

Respondent is not called upon to admit or deny the allegations contained in Paragraph 43.

44.

Respondent denies the allegations of Paragraph 44 for lack of information sufficient to justify a belief therein.

45.

The allegations contained in Paragraph 45 are denied.

46.

The allegations contained in Paragraph 46 are denied.

47.

The allegations contained in Paragraph 47 are denied as written.

48.

The allegations contained in Paragraph 48 are denied.

49.

The allegations contained in Paragraph 49 are denied.

50.

The allegations contained in Paragraph 50 are denied.

51.

The allegations contained in Paragraph 51 are denied.

52.

The allegations contained in Paragraph 52 are denied.

53.

The allegations contained in Paragraph 53 are denied.

54.

The allegations contained in Paragraph 54 (a-e) are denied.

To the extent the prayer of the Petition for Damages, requires an answer on the part of respondent, a general denial is pled.

AND NOW, further answering the allegations of the Petition for Damages, respondent pleads as follows:

55.

Respondent denies any liability whatsoever as asserted in the Petition for Damages.

56.

In the event that this Court should conclude that respondent is liable for any allegation contained in the Petition for Damages, which is denied, then in such event, respondent pleads the benefit of comparative fault so as to reduce all or part of plaintiff's recovery.

57.

In the further alternative, respondent shows that it is entitled to a credit or offset of any sums owed to respondent and/or paid to plaintiff by any person, firm, or insurer liable to plaintiff for all or any portion of plaintiff's damages, if any.

58.

Further pleading in the alternative, respondent affirmatively pleads the failure of plaintiff to mitigate damages, if any.

59.

Respondent further pleads that it is entitled to any and all equitable relief this Court deems just under the circumstances. In the alternative, if the Court determines there is no meeting of the minds in regard to calculation of the lease rental payments, respondent seeks to have this Court deem the lease agreement dissolved in its entirety.

60.

Respondent reserves the right to assert additional affirmative defenses as discovery progresses until a trial on the merits.

AND NOW, respondent assuming the position of "Plaintiff-in-Reconvention" and pleads as follows:

RECONVENTIONAL DEMAND

NOW COMES, Kathy Kliebert, in her official capacity as the Secretary of the Louisiana Department of Health and Hospitals (hereinafter referred to as “DHH”), who now assumes the role as plaintiff-in-reconvention, to pray as follows:

61.

Made defendant-in-reconvention is the New Orleans Home for Incurables, Inc. (hereinafter referred to as NOHI) a Louisiana not-for-profit corporation licensed to do business in the Parish of Orleans, State of Louisiana. NOHI is indebted unto DHH in the amount of \$289,731.13, and for any all other general and equitable relief that may be due and owing under the lease agreement entered into between DHH and NOHI. (DHH’s Exhibit A).

62.

In January of 2011, DHH, the Louisiana Department of Administration (“DOA”), also a party to this matter and represented by separate counsel, and NOHI entered into a lease contract for the John J. Hainkel, Jr. Home and Rehabilitation Center (“Hainkel Home”) for a primary term of five (5) years commencing April 1, 2011 and ending on March 31, 2016. The lease was later amended in March of 2011, to change the effective date of the lease to April 19, 2011, with an end date of March 31, 2016.

63.

The lease agreement was authorized by Act No. 933 of the 2010 Louisiana Legislature, codified as La. Rev. Stat. Ann. 40:16.3 which allowed the Secretary of DHH and the Commissioner of Administration of DOA to negotiate the terms and conditions of a lease document ensuring that the Hainkel Home continued as a long-term care facility. (Plaintiff’s Exhibit B).

64.

NOHI was required to accept for a one year period from the effective date of the lease, the Medicaid rate set as of March 19, 2010. La. R.S. 40:16.3c(5) required that “for any period after one year from the effective date of any lease the Medicaid rate **shall be set** at the rate which would be paid under the nursing home reimbursement methodology, subject to approval by the Centers for Medicare and Medicaid Services”. (Plaintiff’s Exhibit B).

65.

NOHI was an active participant and signatory to the contract and agreed to all terms and conditions, including payment, as set out in the lease agreement. Plaintiff agreed to pay to the State

an annual rental rate equal to the actual out-of-pocket annual costs and expenses incurred by DHH related to the Hainkel Home up to a maximum of \$400,000 for any lease year, with a minimum of \$150,000 if the annual costs were less than \$150,000 for any lease year.

66.

The lease agreement provided that the annual costs would include "LEAF Payoff, Termination Pay, Unemployment Compensation, Premiums Payable to the Office of Risk Management, Elevator Maintenance Contract, Retiree Group Insurance, and any other unanticipated cost".

67.

The second lease amendment made on March 18, 2011, required quarterly payments of \$100,000 due and payable on July 19, 2011, October 19, 2011, January 19, 2011, April 19, 2012 and on the 19th day of every quarter thereafter. (DHH's Exhibit A).

68.

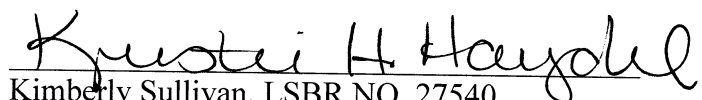
NOHI failed to make its quarterly rental payments of \$100,000 on April 19, 2014 and again on July 19, 2014. (DHH's Exhibit B).

69.

NOHI also failed to make a third quarterly rental payment to DHH in the amount of \$89,731.13 on October 19, 2014. (DHH's Exhibit B). To date, NOHI owes to DHH past due rental payments in the amount of \$289,731.13.

WHEREFORE, respondent and plaintiff-in-reconvention, **KATHY KLIEBERT**, in her official capacity as the Secretary of the Louisiana Department of Health and Hospitals prays that, after all legal delays and due proceedings are had there be judgment in the amount of \$289,731.13, plus attorney fees and costs, rejecting and denying the demands of plaintiff at plaintiff's sole cost and for all other general and equitable relief to DHH as is necessary and proper in this proceeding.

RESPECTFULLY SUBMITTED:



Kimberly Sullivan, LSBR NO. 27540

Kristie H. Haydel, LSBR NO. 27499

Lindsay L. Pantaleo, LSBR NO. 32561

Stephanie M. Borghardt, LSBR NO. 33465

Department of Health and Hospitals

Bureau of Legal Services

628 N. 4th Street, 70802

P. O. Box 3836

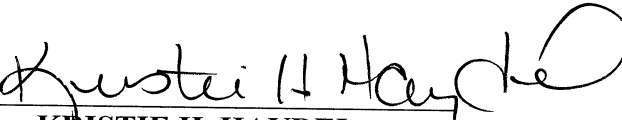
Baton Rouge, Louisiana 70821

Telephone: (225) 342-9286

Fax: (225) 342-2232

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer and Reconventional Demand have been served upon the following counsel of record by facsimile and by depositing same in the U.S. Postal Service properly addressed and postage prepaid, this 20TH day of November, 2014.


KRISTIE H. HAYDEL

PLEASE SERVE:

NEW ORLEANS HOME FOR INCURABLES, INC.

Through its Attorney of Record
Russell Stegeman
1 Summerhaven Court
Madisonville, LA 70447
Counsel for Plaintiff and Defendant-in-Reconvention

NEW ORLEANS HOME FOR
THE INCURABLES, INC.

DOCKET NO. 634638 SEC. 23

VERSUS

19TH JUDICIAL DISTRICT COURT

KATHY KLIEBERT, SECRETARY
OF THE LOUISIANA
DEPARTMENT OF HEALTH AND
HOSPITALS AND KRISTY NICHOLS,
LOUISIANA COMMISTIONER OF
ADMINISTRATION

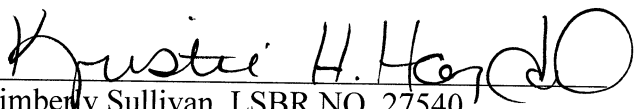
PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

REQUEST FOR WRITTEN NOTICE

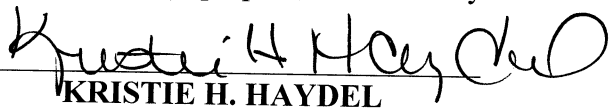
Pursuant to Article 1572 of the Louisiana Code of Civil Procedure, KATHY KLIEBERT, Secretary for the Department of Health and Hospitals, hereby requests written notice of the date set for trial of the above numbered and entitled cause, or of the date set for trial of any pleadings or motions therein, at least ten (10) days before any trial. We also request notice of the signing of any final Judgment or the rendition of any interlocutory order or Judgment in said cause as provided by Article 1913 and 1914 of the Louisiana Code of Civil Procedure.

RESPECTFULLY SUBMITTED:


Kimberly Sullivan, LSBR NO. 27540
Kristie H. Haydel, LSBR NO. 27499
Lindsay L. Pantaleo, LSBR NO. 32561
Stephanie M. Borghardt, LSBR NO. 33465
Department of Health and Hospitals
Bureau of Legal Services
628 N. 4th Street, 70802
P. O. Box 3836
Baton Rouge, Louisiana 70821
Telephone: (225) 342-9286
Fax: (225) 342-2232

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Request for Notice has been served upon the following counsel of record by facsimile and by depositing same in the U.S. Postal Service properly addressed and postage prepaid, this 20TH day of November, 2014.


KRISTIE H. HAYDEL

NEW ORLEANS HOME FOR
THE INCURABLES, INC.

DOCKET NO. 634638 SEC. 23

VERSUS

19TH JUDICIAL DISTRICT COURT

KATHY KLIEBERT, SECRETARY
OF THE LOUISIANA
DEPARTMENT OF HEALTH AND
HOSPITALS AND KRISTIE NICHOLS,
LOUISIANA COMMISSIONER OF
ADMINISTRATION

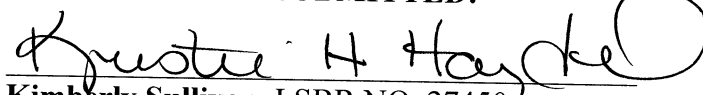
PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

PEREMPTORY EXCEPTION OF RES JUDICATA,
NO RIGHT OF ACTION AND/OR NO CAUSE OF ACTION IN THE ALTERNATIVE

NOW INTO COURT, through undersigned counsel, comes the Exceptor, KATHY KLIEBERT, Secretary of the Louisiana Department of Health and Hospitals (hereinafter referred to as "DHH"), who excepts to the Petition for Declaratory Judgment and Injunctive Relief and for Damages (hereinafter referred to as "Petition") filed by New Orleans Home for Incurables, Inc. (hereinafter referred to as "NOHI") on the ground of res judicata, no right of action and/or in the alternative, no cause of action, pursuant to Article 927 of the Louisiana Civil Code of Procedure.

RESPECTFULLY SUBMITTED:



Kimberly Sullivan, LSBR NO. 27450

Kristie H. Haydel, LSBR NO. 27499

Lindsay L. Pantaleo, LSBR NO. 32561

Stephanie M. Borghardt, LSBR NO. 33465

Department of Health and Hospitals

Bureau of Legal Services

628 N. 4th Street, 70802

P. O. Box 3836


Baton Rouge, Louisiana 70821

Telephone: (225) 342-9286

Fax: (225) 342-2232

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Peremptory Exception of Res Judicata, No Right of Action and/or in the Alternative No Cause of Action has been served upon the following counsel of record by facsimile and by depositing same in the U.S. Postal Service properly addressed and postage prepaid, this 20TH day of November, 2014.



KRISTIE H. HAYDEL

NEW ORLEANS HOME FOR
THE INCURABLES, INC.

DOCKET NO. 634638 SEC. 23

VERSUS

19TH JUDICIAL DISTRICT COURT

KATHY KLIEBERT, SECRETARY
OF THE LOUISIANA
DEPARTMENT OF HEALTH AND
HOSPITALS AND KRISTIE NICHOLS,
LOUISIANA COMMISSIONER OF
ADMINISTRATION

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

MEMORANDUM IN SUPPORT OF THE
PEREMPTORY EXCEPTION OF RES JUDICATA,
NO RIGHT OF ACTION AND/OR IN THE ALTERNATIVE NO CAUSE OF ACTION

MAY IT PLEASE THE COURT:

This Memorandum of Law is submitted by Exceptor, KATHY KLIEBERT, Secretary of the Louisiana Department of Health and Hospitals, in support of the Peremptory of Res Judicata, No Right of Action and/or No Cause of Action in the alternative in the above entitled and captioned matter.

1. FACTS AND PROCEDURAL HISTORY

The instant litigation was instituted on November October 30, 2014, when the New Orleans Home for Incurables, Inc. (hereinafter referred to as NOHI) filed a Petition for Declaratory Judgment and Injunctive and for Damages against Exceptor and the Louisiana Division of Administration (“DOA”), also a party to this matter and represented by separate counsel.

DHH, DOA, and NOHI entered into a lease contract for the John J. Hainkel, Jr. Home and Rehabilitation Center (“Hainkel Home”) for a primary term of five (5) years commencing April 1, 2011 and ending on March 31, 2016. The lease was later amended in March of 2011, to change the effective date of the lease to April 19, 2011, with an end date of March 31, 2016. The lease agreement was authorized by Act No. 933 of the 2010 Louisiana Legislature, codified as La. Rev. Stat. Ann. 40:16.3 which allowed the Secretary of DHH and the Commissioner of Administration of DOA to negotiate the terms and conditions of a lease document ensuring that the Hainkel Home continued as a long-term care facility. (Plaintiff’s Exhibit B).

NOHI was required to accept for a one year period from effective date of the lease, the Medicaid rate set as of March 19, 2010. La. R.S. 40:16.3c(5) required that “for any period after one year from the effective date of any lease the Medicaid rate **shall be set** at the rate which would

be paid under the nursing home reimbursement methodology, subject to approval by the Centers for Medicare and Medicaid Services”. (Plaintiff’s Exhibit B).

NOHI agreed to pay to the State an annual rental rate equal to the actual out-of-pocket annual costs and expenses incurred by DHH related to the Hainkel Home up to a maximum of \$400,000 for any lease year, with a minimum of \$150,000 if the annual costs were less than \$150,000 for any lease year. The lease agreement provided that the annual costs would include “LEAF Payoff, Termination Pay, Unemployment Compensation, Premiums Payable to the Office of Risk Management, Elevator Maintenance Contract, Retiree Group Insurance, and any other unanticipated cost”. The second lease amendment made on March 18, 2011, required quarterly payments of \$100,000 due and payable on July 19, 2011, October 19, 2011, January 19, 2012, April 19, 2012 and on the 19th day of every quarter thereafter. (DHH’s Exhibit A).

NOHI failed to make its quarterly rental payments of \$100,000 on April 19, 2014 and again on July 19, 2014. (DHH’s Exhibit B). NOHI also failed to make a third quarterly rental payment to DHH in the amount of \$89,731.13 on October 19, 2014. (DHH’s Exhibit B). To date, NOHI owes past due rental payments in the amount of \$289,731.13 to DHH.

NOHI raises several allegations against DHH in its Petition for Damages, and seeks to recover from DHH, attorney fees, damages, and any all other legal and equitable relief, including emotional distress sustained by its administrators and staff.

2. PEREMPTORY EXCEPTION OF RES JUDICATA

NOHI’s Petition should be dismissed with prejudice pursuant to Article 927 of the Louisiana Code of Civil Procedure because the Petition is based on the same transaction or occurrence that forms the basis of a Settlement Agreement (See Exhibit C) reached by both parties of the case at present on July 9, 2013. DOA was not involved in the settlement between DHH and NOHI.

Under the principle of *res judicata*, NOHI is obligated to raise all known claims in one suit in order to promote judicial efficiency and to prevent the re-litigation of previously determined issues. The doctrine of *res judicata* requires an existence of a valid and final judgment between parties that are the same in both suits. *Burguires v. Pollingue*, 843 So.2d 1049, 1053 (La. 2003). A valid judgment is one rendered by a court with jurisdiction over both the subject matter and the parties after proper notice was given. La. R.S. 13:4231. Likewise, a final judgment is one that disposes of the merits in whole or in part. *Id.* The third requirement of *res judicata* is that the parties

in both suits are the same. *Burguires v. Pollingue*, at 1053. This requirement does not mean that the parties must have the same physical identity, but that the parties must appear in the same capacities in both suits. *Id.*

Furthermore, the doctrine of *res judicata* applies when the opposing parties enter into a compromise or settlement of a disputed matter. *Pal v. Stranco, Inc.*, 76 So.3d 477 (La. App. 1st Cir. 2011). A settlement agreement is *res judicata* as between parties and is entitled to same effect as judgment. *Louisiana Workers' Compensation Corp. v. Betz*, 792 So.2d 763 (La. App. 4th Cir. 2001).

In the case at present, NOHI avers in the “Bad Faith Allegations” section of the Petition that DHH is liable for all damages sustained due to DHH’s failure to perform in good faith in regards to past license revocation actions. However, settlement was reached between the DHH and NOHI regarding these same previous license revocation actions on July 9, 2013. Specifically, the Settlement Agreement states that each party will bear its own costs, expenses and attorney’s fees. In addition, the Settlement Agreement goes on to state that “[d]ismissal with prejudice shall not allow the Parties to litigate or otherwise reopen issues resolved by this Settlement Agreement.”

Because NOHI bases its Petition, specifically the “Bad Faith Allegations” section, on the same facts and issues that have already been settled upon and decided, DHH’s peremptory exception of *res judicata* should be granted.

3. PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION AND/OR NO CAUSE OF ACTION IN THE ALTERNATIVE

Article 927 of the Louisiana Civil Code of Procedure provides for a Peremptory Exception of No Right of Action and/or No Cause of Action. On an exception of no right of action, the exception contemplates that no right exists for a particular plaintiff to which the law grants a maintainable cause of action. This exception terminates those suits brought by individuals who have no interest in judicially enforcing the right asserted. *Jeffries v. Estate of Pruitt*, 638 So.2d 723 (La. App. 1 Cir. 6/25/94). Peremptory exceptions should be regularly pleaded, but an exception that plaintiff is absolutely without right to stand in judgment or without interest in the subject matter of suit, may be pleaded at any stage of the proceedings. *Brown v. Sons v. Saul*, 4 Mart (N.S.) 434, 16 Am. Dec. 175(1826).

An Exception of No Right of Action is the nature of an exception to want an interest in plaintiff to maintain suit. LSA-C.C.P. Art. 681; *Outdoor Electric Advertising, Inc. v. Saurage*, 207 La. 344 So.2d 375 (1945).

“To have standing the plaintiff must assert an adequate interest in himself, which the law recognizes, against a defendant having a substantial adverse interest.” *Terrebonne Parish Police Jury v. Matherne*, 405 So.2d 314, 318 (La. 1981), *cert denied*, 456 U.S. 972, 102 S. Ct. 2234, 72 L.Ed.2d 845 (1981).

In the instant litigation, in Paragraphs 37-39 of plaintiff's Petition for Declaratory Judgment and Injunctive Relief, NOHI seeks relief for emotional distress caused to its administrators and staff “from the unjustified efforts [that] cause[d] the facility to fail financially”. NOHI further asserts in Paragraphs 43 – 52 of its Petition for Injunctive Relief, that the patients will sustain irreparable harm if the facility were closed or the patients were forced to relocate. However, since the patients and administrators/employees of NOHI are not parties to this action, nor are they plaintiffs in this action, they do not have standing to sue. Nor does plaintiff have standing to seek the relief requested on their behalf as there is no evidence that the employees assigned their claims to NOHI or indicated a desire to participate in the lawsuit.

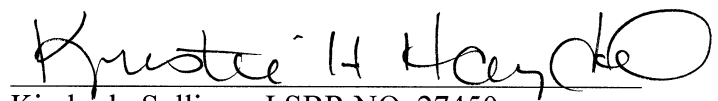
Nor can NOHI claim that it has “associational standing” to sue on their behalf. In order to have associational standing to sue on behalf of individuals who are non-parties, a group must establish (1) that its members would have standing to sue in their own right, (2) that the interests the group seeks to protect are germane to its organization purpose, and (3) that neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit. *Association for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Center Board of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994).

NOHI does not possess nor does it even claim to possess associational standing to sue. NOHI has standing to sue on its own behalf, *but not* on behalf of its administrators, employees, or patients. Therefore, NOHI cannot assert claims or request relief on their behalf and the Exception of No Right of Action and/or No Cause of Action in the alternative should be granted.

WHEREFORE, Exceptor prays that these exceptions are sustained and there is judgment in favor of Kathy Kliebert, Secretary of the Department of Health and Hospitals, with a full dismissal of New Orleans Home for Incurables, Inc.'s Petition for Declaratory Relief and

Injunctive Relief and for Damages, at Plaintiff's sole cost.

Respectfully submitted,



Kimberly Sullivan, LSBR NO. 27450

Kristie H. Haydel, LSBR NO. 27499

Lindsay L. Pantaleo, LSBR NO. 32561

Stephanie M. Borghardt, LSBR NO. 33465

Department of Health and Hospitals

Bureau of Legal Services

628 N. 4th Street, 70802

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Baton Rouge, Louisiana 70821

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Peremptory Exception of Res Judicata, No Right of Action and/or No Cause of Action in the alternative has been served upon the following counsel of record by facsimile and by depositing same in the U.S. Postal Service properly addressed and postage prepaid, this 20th day of November, 2014.


KRISTIE H. HAYDEL