CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 18-8977 DIVISION "B-5"

LLOYD FRANCIS, et al

VERSUS

MAKE IT RIGHT-NEW ORLEANS, LLC, et al

FILED:_____ _____
DEPUTY CLERK

DEFENDANT BRAD PITT'S PEREMPTORY EXCEPTIONS OF NO RIGHT OF ACTION AND NO CAUSE OF ACTION AND, ALTERNATIVE DILATORY EXCEPTION OF VAGUENESS

NOW COMES, through undersigned counsel, defendant, Brad Pitt, who respectfully submits these Peremptory Exceptions of No Right of Action and No Cause of Action and, Alternative Dilatory Exception of Vagueness in response to the Plaintiffs' First Supplemental and Amending Petition (the "Amended Petition"). As more fully shown in the Memorandum in Support accompanying these exceptions, plaintiffs attempt, but fail, to address the defects of their original Petition as shown by Mr. Pitt's prior Peremptory and Dilatory Exceptions. Despite the addition of new allegations and claims, plaintiffs have no right of action against Mr. Pitt, and they still fail to state a cause of action against him. Having already had an opportunity to amend, and failing to cure the deficiencies in their pleading, all claims against Mr. Pitt should be dismissed with prejudice. Alternatively, the Amended Petition remains impermissibly vague and plaintiffs should be ordered to amend to clarify their claims on penalty of dismissal with prejudice.

WHEREFORE, defendant, Brad Pitt, prays that after due proceedings are had that these Peremptory Exceptions of No Right of Action and No Cause of Action and, Alternative Dilatory Exception of Vagueness be sustained and all claims against him dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this ____ day of August, 2019, I delivered the forgoing document to the opposing counsel via ___ U.S. Mail, **X** email and/or _____ facsimile transmission.

/s/Kyle Schonekas
KYLE SCHONEKAS

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ORDER

The foregoing Peremptory Exceptions of No Right of Action and No Cause of Action and, Alternative Dilatory Exception of Vagueness submitted by defendant, Brad Pitt, having been considered;

IT IS ORDERED that plaintiffs, Lloyd Francis and Jennifer DeCuir, appear and show cause, if they can, on the _____ day of _____, 2019 at ___ o'clock __.m. why the exceptions should not be sustained.

New Orleans, Louisiana this ____ day of August, 2019.

_____
JUDGE

PLEASE SERVE:
Lloyd Francis and Jennifer DeCuir
Through their attorneys of record:
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Catherine Hilton
Sean Steinman
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Harvey, Louisiana 70058

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

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MEMORANDUM IN SUPPORT OF
DEFENDANT BRAD PITT'S PEREMPTORY EXCEPTIONS
OF NO RIGHT OF ACTION AND NO CAUSE OF ACTION
AND, ALTERNATIVE DILATORY EXCEPTION OF VAGUENESS

Defendant Brad Pitt, through undersigned counsel, respectfully submits this Memorandum in Support of his Peremptory Exceptions of No Right of Action and No Cause of Action and, Alternative Dilatory Exception of Vagueness in response to the Plaintiffs' First Supplemental and Amending Petition (the "Amended Petition"). Plaintiffs attempt, but fail, to address the defects of their original Petition as shown by Mr. Pitt's prior Peremptory and Dilatory Exceptions. As shown below, despite the addition of new allegations and claims, plaintiffs have no right of action against Mr. Pitt, and they still fail to state a cause of action against him. Plaintiffs' amended claims against Mr. Pitt, in fact, are more specious than the original claims. Having already had an opportunity to amend, and failing to cure the deficiencies in their pleading, all claims against Mr. Pitt should be dismissed with prejudice. Alternatively, the Amended Petition remains impermissibly vague and plaintiffs should be ordered to amend to clarify their claims on penalty of dismissal with prejudice.

INTRODUCTION

Make It Right Foundation, Inc. (the "Foundation") is a charitable organization founded with the mission of building high-performance, sustainably-designed homes to be sold at affordable prices to residents of the Lower Ninth Ward, following the devastation of Hurricane Katrina. Mr. Pitt is a member of the Foundation's Board of Directors.

On September 7, 2018, plaintiffs filed suit seeking damages, individually and purportedly on behalf of others similarly situated, based on claims that their homes were allegedly constructed

and built in a deficient manner.[1] After Mr. Pitt filed Peremptory and Dilatory Exceptions, plaintiffs filed their Amended Petition in an unsuccessful attempt to remedy the deficiencies in their pleadings. Plaintiffs, notably, have now abandoned the Louisiana Unfair Trade Practices Act ("LUTPA") claim and their Intentional Infliction of Emotional Distress claims.[2]

The Amended Petition still suffers from the same deficiencies as the original petition and their claims against Mr. Pitt must be dismissed in their entirety. Moreover, their newly added warranty claim does not state a cause of action. Because plaintiffs have already attempted, unsuccessfully, to amend, no further opportunity to amend should be granted and all claims against Mr. Pitt must be dismissed with prejudice. Alternatively, plaintiffs should be ordered to amend to cure the deficiencies on penalty of dismissal with prejudice.

PLAINTIFFS' ALLEGATIONS

Plaintiffs, Lloyd Francis and Jennifer Decuir, individually, and purportedly on behalf of other persons similarly situated seek to have this lawsuit certified as a class action against three entity defendants, the Foundation, Make It Right-New Orleans, LLC ("MIR LLC"), and Make It Right-New Orleans Housing, LLC ("Housing LLC"), as well as eleven named individuals, including Mr. Pitt, and "Does 1-50." *See* Amended Petition, ¶¶ 1-2. In their Amended Petition, Plaintiffs contend that "[a]t all times relevant hereto" Mr. Pitt "either directly or through his publicist, represented that he was a builder of the Make It Right community in New Orleans." *Id.*,

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[1] This case was removed to federal court by defendants Samuel W. Whitt, S.H. "Jim" Fogleman, and Latoya King on October 24, 2018; on May 15, 2019, the case was remanded back to this Court.

[2] The Amended Petition asserts that plaintiffs "adopt and incorporate by reference all allegations contained in the original Petition for Damages, as if copied here *in extenso*, **except as otherwise supplemented or amended herein**." *See* Amended Petition, ¶ 150. The language of the Amended Petition makes clear that plaintiffs intended to abandon the LUTPA and Intentional Infliction of Emotional Distress ("IIED") counts. For example, in the Amended Petition, plaintiffs specifically restate their claims for Detrimental Reliance, Breach of Contractual Obligations, Negligence, and Negligent Infliction of Emotion Distress, but do not restate the LUTPA claim or IIED claim. *Id.*, ¶¶ 88-149. In the original petition, the LUTPA claim was the "First Cause of Action" and the IIED claim was the "Sixth Cause of Action." *See* original Petition, ¶¶ 54-70; 89-94. In the Amended Petition, however, the First Cause of Action is now Detrimental Reliance, and the Sixth Cause of Action is now Negligent Infliction of Emotional Distress. *See* Amended Petition, ¶¶ 88-100; 143-44. Plaintiffs have also consecutively numbered all paragraphs in their Amended Petition from 1 to 151, further demonstrating their intention to replace the allegations of the original Petition with those in the Amended Petition. Should, however, plaintiffs argue and the Court agree that the LUTPA and IIED claims are not abandoned, Mr. Pitt reiterates and incorporates herein by reference his prior Exceptions and all arguments previously raised in favor of dismissal of those claims. *See* Mr. Pitt's May 30, 2019 Peremptory Exceptions of No Cause and No Right of Action, Peremption, and Alternatively, Dilatory Exception of Vagueness and supporting memorandum.

¶ 21; *see also* ¶ 2(K)(6).[3] They admit, however, that they did not enter any contracts with Mr. Pitt for the purchase, construction, warranty or repair of their homes, as all such contracts were allegedly made with the entity defendants, that is, the Foundation, MIR LLC, and/or Housing LLC. *Id.*, ¶¶ 82, 102.

Plaintiffs contend that in or around June 16, 2007, prior to the organization of the Foundation, MIR LLC or Housing LLC, Mr. Pitt met with representatives of a non-profit group known as the Lower 9th Ward Stakeholders Coalition (the "Coalition") and executed an alleged "Memorandum of Understanding ('MoU')" "on behalf of the unincorporated 'Make it Right Team.'" *Id.*, ¶ 9; *see also* ¶ 2(K)(2).[4] The Coalition is a duly organized Louisiana non-profit corporation, which has not been made a party to this litigation. Plaintiffs do not allege that they were present at this meeting, nor do they allege that they are parties to the MoU, or have any relationship whatsoever with the Coalition, much less any right to assert claims for breaches of alleged promises made to the Coalition. Among the alleged promise plaintiffs contend Mr. Pitt made to the Coalition was that the Make It Right homes would be "safe" and of "high quality;" would "incorporate innovative green building techniques" and "components;" would use "sustainable building and design" and be constructed by licensed and qualified experts and builders, including an "independent construction manager;" and that the Foundation "would maintain a physical presence in the community." *Id.*, ¶¶ 9-15.

Despite that no promises were made directly to them, plaintiffs claim *reliance* on the alleged promises Mr. Pitt purportedly *made to the Coalition* in the MoU and that his "personal participation in the meeting and execution of the MoU was a significant factor in the Coalition's acceptance and subsequent community outreach of the Make It Right building project." *See* Amended Petition, ¶¶ 9-10. Plaintiffs claim that the Coalition then "conduct[ed] outreach services on behalf of Mr. Pitt and the Make It Right Team" seeking to "connect with homeowners for the

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[3] For the for purposes of these exceptions only (and reserving all rights concerning the same), Mr. Pitt accepts as true the characterization that he is a "builder." As Mr. Pitt. contests in toto plaintiffs' theories of Mr. Pitt's individual liability, the arguments presented here are based on plaintiffs' allegations as currently pleaded. Mr. Pitt makes no admission and reserves all rights, exceptions, and defenses concerning the meaning of "builder" under the New Home Warranty Act.

[4] This allegation alone—that Mr. Pitt executed the MoU "on behalf of the unincorporated Make it Right Team"—should defeat personal liability as to Mr. Pitt because it recognizes that Mr. Pitt's alleged statements were made on behalf of the Foundation and its entities, not by him as an individual.

purposes of bringing these homeowners back to the Lower 9th to purchase Make It Right homes." *Id.*, ¶¶ 11, 13.

The Amended Petition does not contain any specific facts as to whether or when either plaintiff, or any class member for that matter, was ever contacted by the Coalition or anyone else acting on Mr. Pitt's behalf in this "outreach" effort. Rather, the Amended Petition alleges vaguely, that "the displaced community" was promised safe, high quality homes incorporating innovative green building technologies, among other purported promises. *Id.*, ¶ 14. Again, plaintiffs do not allege whether or when either of them or any class member was approached by anyone from the Coalition or other person acting on behalf of Mr. Pitt or what specific promises were purportedly made to plaintiffs or any class members.

Despite these factual deficiencies, plaintiffs claim they "and other homeowners **relied upon the representations personally made by Brad Pitt to the Coalition**, **as explained to them by Foundation employees and/or community outreach organizers** from the [Coalition] and **made decisions to purchase Make It Right homes**." *Id.*, ¶ 15 (emphasis added). The Amended Petition contains no factual information as to when either plaintiff, or any class member, allegedly purchased a Make It Right home or from whom the home was purchased. Plaintiffs then allege that they have since learned that Mr. Pitt's "personal promises to the Make It Right community were false." *Id.*, ¶ 16.

Plaintiffs allege that MIR LLC and Housing LLC were set up in 2008, and **"[w]ithin a year of completion**, systemic problems appeared in the first homes related to moisture and water intrusion into the newly built homes and persist to the present time." *Id.*, ¶¶ 17, 24 (emphasis added). Plaintiffs thus concede that they were aware of the alleged defects in their homes as early as 2009. *See also* ¶¶ 25, 2(A)(2), (B)(2), (C)(2), (D)(1), (alleging that defendants were put on "notice of systemic defective conditions identified in the new homes … as early as 2009"); ¶ 2(E)(3) (alleging that defendant was aware of "the reported systemic defective conditions [that] had existed since 2009"); ¶ 2(J)(4) (alleging that the "systemic problems and/or defects with the homes had been reported as early as 2009"). Plaintiffs allege that the Foundation completed construction of the last of the Make It Right homes "[b]y the end of 2011." *Id.*, ¶ 38.

Plaintiffs vaguely contend that between 2010 and 2013, the entity defendants and individual directors "conspired to divert available funds" which plaintiffs allege should have been used to correct the alleged defective conditions in the Make It Right homes in New Orleans, "to developments in other states" such as New Jersey, Missouri, and Montana. *Id.*, ¶¶ 35-41.

Plaintiffs vaguely allege that Mr. Pitt "represented that he was personally responsible to correct the defective conditions in the Make It Right community in New Orleans" and "remained committed to correct the defective conditions" which plaintiffs admit they knew of as early as 2009. *Id.*, ¶¶ 22, 23. Plaintiffs further contend that Mr. Pitt "personally participated in a plan" to mislead homeowners and "make false promises" regarding investigation and repair of the defective conditions in the homes. *Id.*, ¶ 2(K)(9), (10). Plaintiffs allege that the Foundation's Board of Directors, including Mr. Pitt, "conspired to suppress the truth of the conditions and their causal links from homeowners and prospective homeowners, despite admitted knowledge as early as 2009." *Id.*, ¶ 30; *see also* ¶¶ 42-44, 47.

Again, the Amended Petition contains no specific factual allegations as to when, where, or by whom any promises of repair were made directly to them, or any other class member. **The Amended Petition does not contain any specific facts as to how the defective conditions, *which by plaintiffs' own description were obvious and not latent*, were purportedly "concealed" by defendants from plaintiffs**. *See* ¶ 83 (asserting that the homes suffered from "water intrusion" leading to "the growth of mold and other bacteria" as well as "delamination of building materials," "rotten wood" and "caus[ing] porches to rot" as well as faulty construction "caus[ing] stair railings to fail". Plaintiffs, in fact, allege that defendants disclosed the warranty liability in tax filings in mid to late 2015, and that the conditions were so serious that some homeowners consented to engineering inspections of their homes in 2016. *Id.*, ¶¶ 45, 51-52.

Yet, despite the fact that defendants allegedly repeatedly broke their purported promises to provide answers, repairs, and engineering reports, or according to plaintiffs, just simply ignored plaintiffs' inquiries for "months and/or years," **plaintiffs took no legal action for another three years until this class action suit was finally filed in September 2018**. *Id.*, ¶¶ 52, 54-56, 71. Plaintiffs attempt to explain their lack of diligence, and invoke the doctrine of contra non valentem, by vaguely alleging that from 2016 through September 2018 they "continued to rely upon

Defendant Pitt's personal promises [which are not described in any detail and not alleged to have been made to any of them directly] and ongoing promises made by the Foundation employees [which are never described in any detail] at the instruction and direction of the original Board of Director Defendants, that their homes would in fact be repaired, if necessary." *Id.*, ¶ 57; *see also* ¶¶ 70-71. Plaintiffs contend that they simply "patiently awaited the production of the engineering reports based on their belief in these promises." *Id.*, ¶ 57.

Plaintiffs' conduct is not reasonable and their failure to act timely defeats all of their claims. Plaintiffs admit, in fact, that their claims are governed by the limitation periods under the New Home Warranty Act, and that they failed to timely pursue their claims. *Id.*, ¶¶ 60-62. As shown below, the New Home Warranty Act is plaintiffs' exclusive remedy and the limitation periods thereunder are peremptive and not subject to suspension even if plaintiffs could somehow prove contra non valentem. As further shown below, even if the claims were not otherwise preempted by the New Home Warrant Act, they each independently fail and must be dismissed.

THE CLAIMS ASSERTED AGAINST MR. PITT IN THE AMENDED PETITION

Having recognized the numerous deficiencies in the original pleading pointed out in Mr. Pitt's May 30, 2019 Peremptory and Dilatory Exceptions, plaintiffs filed their Amended Petition on July 18, 2019. Gone are the claims under LUTPA and for intentional infliction of emotional distress. Plaintiffs reallege, however, the following claims against Mr. Pitt: Detrimental Reliance; Negligence; Fraud; and Negligent Infliction of Emotional Distress. *Id.*, ¶¶ 88-100; 118-144. Plaintiffs have also added a new claim for Breach of Legal Obligation of Warranty (under New Home Warranty Act). *Id.*, ¶¶ 111-17. As shown herein, plaintiffs have no cause or right of action against Mr. Pitt personally. Alternatively, the Amended Petition remains impermissibly vague and ambiguous.

LAW AND ARGUMENT

I. EXCEPTION OF NO RIGHT OF ACTION.

A. Legal Standard.

The purpose of the peremptory exception of no right of action is to challenge the plaintiff's interest in the subject matter of the suit or his capacity to proceed with the suit. *McCall v. McCall,* 96-0294 (La. App. 4 Cir. 1/29/97), 688 So. 2d 193, *writ denied* 97-0534, 97-0539 (La. 5/1/97),

693 So. 2d 745. Its essential function is to provide a threshold device terminating a suit when the plaintiff "has no interest in judicially enforcing the right asserted." *N. Clark, L.L.C. v. Chisesi*, 16-0599 (La. App. 4 Cir. 12/7/16); 206 So. 3d 1013, 1016–17 (*citing Stassi v. State*, 11–2264, p. 4 (La. App. 1 Cir. 9/13/12); 102 So. 3d 896, 898). Under article 681 of the Code of Civil Procedure, "[e]xcept as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts." *Id.* (*quoting* La. Code Civ. Proc. art. 681).

"The function of an exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit." *Id.* (*quoting Hood v. Cotter*, 08–0215, p. 17 (La. 12/2/08); 5 So. 3d 819, 829). "When the facts alleged in the petition provide a remedy under the law to someone, but the plaintiff who seeks the relief for himself or herself is not the person in whose favor the law extends the remedy, the proper objection is no right of action, or want of interest in the plaintiff to institute the suit." *Id.* (*quoting Howard v. Administrators of Tulane Educ. Fund*, 07–2224, p. 16 (La. 7/1/08); 986 So. 2d 47, 59) (internal citations and quotations omitted).

When considering an exception of no right of action, absent evidence to the contrary, the allegations of the petition are taken as true. *Id.* (*citing Huntsman Int'l LLC v. Praxair, Inc.*, 15-0975, p. 4 (La. App. 4 Cir. 9/14/16); 201 So. 3d 899, 904). The function of the exception is "to have the plaintiff's action declared legally nonexistent, or barred by effect of law, and hence this exception tends to dismiss or defeat the action." La. Code Civ. Proc. art. 923. Accordingly, when the grounds for the exception cannot be removed by amendment, the claim must be dismissed. La. Code Civ. Proc. art. 934. Thus:

> [w]hile article 934 provides that a judgment sustaining a peremptory exception should permit amendment to the petition when the grounds for the exception can be removed by amendment, **amendment is not permitted when it would constitute a vain and useless act**.

Roy Anderson Corp. v. 225 Baronne Complex, L.L.C., 17-1005 (La. App. 4 Cir. 7/11/18); 251 So. 3d 493, 503 (*citing Doe v. Entergy Services, Inc.*, 608 So. 2d 684, 687 (La. App. 4 Cir. 1992)) (emphasis added).

B. Plaintiffs Cannot State Direct Claims Against Mr. Pitt For Breaches Of Duties Owed As A Director.

Mr. Pitt adopts, realleges, and incorporates herein by reference his May 30, 2019 Peremptory and Dilatory Exceptions and supporting memorandum. Plaintiffs' Amended Petition does not resolve the issues raised in the prior Exceptions, namely that plaintiffs cannot state a direct claim against Mr. Pitt under Delaware or Louisiana law for breach of any duty because, as a director, his duty is to the Foundation rather than to third parties or creditors, even if the corporation is insolvent. *See In re Orchard Enterprises, Inc. Stockholder Litig.*, 88 A.3d 1, 33, n.14 (Del. Ch. 2014) (*citing Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006); *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989); *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986)); *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 99, 103 (Del. 2007); *Torch Liquidating Trust v. Stockstill*, 561 F.3d 377, 385 (5th Cir. 2009) (*citing Gheewalla*, 930 A.2d at 101–02); *Korson v. Independence Mall I, Ltd.*, 595 So. 2d 1174, 1178 (La. App. 5 Cir. 1992); *Terrebonne Concrete, LLC v. CEC Enterprises, LLC*, 11-0072 (La. App. 1 Cir. 8/17/11); 76 So. 3d 502, 509, *writ denied*, 11-2021 (La. 11/18/11); 75 So. 3d 464; *Alvis v. CIT Grp. Equip. Fin., Inc.*, 03-1364 (La. App. 3 Cir. 3/3/04); 867 So. 2d 102, 104–05; *Sam v. Genesis Behavioral Hosp., Inc.*, 18-9 (La. App. 3 Cir. 8/29/18); 255 So. 3d 42, 49; *Donnelly v. Handy*, 415 So. 2d 478 (La. App. 1 Cir. 1982).[5]

Under these authorities, and even assuming the Amended Petition otherwise contains sufficient factual allegations to state claims upon which relief could be granted, which it does not, there can be no doubt that plaintiffs do not have any right to assert *direct* claims against Mr. Pitt for alleged breaches of duties he owed as a director of the Foundation. Each of the counts attempted to be stated against him is based on the legal fallacy that Mr. Pitt, in his capacity as a foundation director is legally obligated *directly* to plaintiffs because they transacted business with one of the entity defendants. Whatever acts or omissions the Amended Petition contends were

[5] That a director's duties are owed to the corporation, rather than third parties, is also codified in the Louisiana Business Corporation Act. *See gen.* La. Rev. Stat. § 12:1-830(A) (requiring a director to "act in good faith and in a manner the director reasonably believes to be *in the best interests of the corporation*"); La. Rev. Stat. Ann. § 12:1-831 (strictly limiting a director's liability "*to the corporation or its shareholders* for any decision to take or not to take action, or any failure to take any action, as a director" only when certain circumstances are present).

committed by Mr. Pitt, it is apparent that any such conduct was taken solely in his capacity as a director.[6]

Plaintiffs fail to cure this deficiency in their Amended Petition. Accordingly, all claims against Mr. Pitt should be dismissed with prejudice. La. Code Civ. Proc. art. 934; *Roy Anderson*, 251 So. 3d at 503.

C. Mr. Pitt Is Entitled To Immunity From Suit.

Under Louisiana law:

> A person who serves as a director, officer, or trustee of a nonprofit organization qualified as a tax-exempt organization under Section 501(c) of the Internal Revenue Code of 1954, as amended, and who is not compensated for such services on a salary basis **shall not be individually liable for any act or omission resulting in damage or injury, arising out of the exercise of his judgment in the formation and implementation of policy or arising out of the management of the affairs of the organization while acting as a director, officer, or trustee of that organization**, provided he was acting in good faith and within the scope of his official functions and duties, unless such damage or injury was caused by the willful or wanton misconduct of such person.

La. Rev. Stat. § 9:2792.1 (emphasis added). The application of immunity statutes is typically considered by Louisiana courts through the exception of no right of action. *Walker v. State Farm Mut. Auto. Ins. Co*., 33,781 (La. App. 2 Cir. 8/25/00); 765 So. 2d 1224, 1226 (collecting cases). Under Louisiana law, a lack of good faith "means more than mere bad judgment or negligence and it implies the conscious doing of a wrong for dishonest or morally questionable motives" equal to "an intentional and malicious failure to perform." *Volentine v. Raeford Farms of Louisiana, L.L.C*., 48,219 (La. App. 2 Cir. 7/24/13); 121 So. 3d 742, 753, *writ denied*, 13-2493 (La. 1/17/14); 130 So. 3d 948. "Willful or wanton" conduct generally has the same meaning in Louisiana law as gross negligence *i.e.* the "want of even slight care and diligence" or the "entire absence of care" or an "extreme departure from ordinary care or the want of even scant care." *Rabalais v. Nash*, 06-0999 (La. 3/9/07); 952 So. 2d 653, 658 (citations omitted).

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[6] There is an exception to the general rule that corporate directors cannot be held personally liable to third parties for the corporation's conduct for certain torts such as "the tort of fraud or the tort of intentional interference with a contract." *Id*.; *see also*,*Tubos de Acero de Mexico, S.A. v. Am. Int'l Inv. Corp.*, 292 F.3d 471, 479 (5th Cir. 2002) (Under Louisiana law, "[a] director or officer who has practiced fraud upon any person, may be held personally liable for the resultant damages"). However, as discussed below, plaintiffs' attempted fraud claim against Mr. Pitt is insufficient and does not state a cause of action.

Mr. Pitt, as a non-compensated director of a non-profit corporation, is entitled to immunity from suit under La. Rev. Stat. § 9:2792.1. The Amended Petition contains no factual allegations, other than mere conclusions, to indicate that he was not "acting in good faith and within the scope of his official functions and duties" much less any allegations to indicate that plaintiffs' alleged injuries were due to his "willful or wanton misconduct" as those terms are defined in Louisiana law. *Volentine*, 121 So. 3d at 753; *Rabalais*, 952 So. 2d at 658.

Relatedly, Mr. Pitt is entitled to immunity under La. Rev. Stat. § 9:2792. That statue states,

> A person serving with or without compensation as a member, director, trustee or officer of any public, charitable or nonprofit hospital, institution or organization shall not be individually liable to any person, firm or entity, public or private, receiving benefits from the hospital, institution or organization for any act or omission to act by any employee or other officer of such public, charitable or nonprofit hospital, institution or organization.

As such, plaintiffs cannot hold Mr. Pitt liable for the acts of any employee, officer, or director of the Foundation, MIR LLC, or Housing LLC. *See id.* Accordingly, plaintiffs have no right of action against Mr. Pitt, and all claims against him should be dismissed with prejudice.

II. EXCEPTION OF NO CAUSE OF ACTION.

Even if plaintiffs had pled sufficient facts to allege that Mr. Pitt owed some personal duty to them, apart from his mere role as a director or officer, which they have not, all of the claims attempted to be stated against Mr. Pitt remain fatally defective. The claims for Detrimental Reliance, Breach of Legal Obligation of Warranty, Negligence, Fraud, and Negligent Infliction of Emotional Distress, are insufficient as a matter of law; therefore, plaintiffs have no cause of action against Mr. Pitt and all such claims must be dismissed.

A. Legal Standard.

A peremptory exception of no cause of action tests the legal sufficiency of the petition, and the trial court must determine whether the law affords a remedy for the particular harm alleged. *Davy v. Reed*, 95-2445 (La. App. 4 Cir. 2/15/96); 669 So. 2d 1293, 1294 (citation omitted). The issue is whether, on the face of the petition, plaintiff is legally entitled to relief. *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So. 2d 1234, 1235 (La. 1993). Generally, no evidence may be introduced in support of the exception. La. Code Civ. Proc. art. 931. For purposes of ruling on an exception of no cause of action, the court must accept all well-pleaded

allegations of fact as true. *Everything on Wheels*, 616 So. 2d at 1235. However, "the mere conclusions of the plaintiff unsupported by facts does not set forth a cause of action." *Raimey v. Decaire*, 03-1299, p.7 (La. 3/19/04); 869 So. 2d 114, 118. As explained by the Louisiana Supreme Court:

> Although the correctness of the plaintiff's well pleaded allegations of fact is assumed, the correctness of its conclusions of law is not conceded for purposes of a ruling on an exception of no cause of action. [citations omitted].
>
> C.C.P. 891 provides that a petition 'shall contain a short, clear, and concise statement of the object of the demand and of the material facts upon which the cause of action is based . . .' **From that language it is clear that a court when considering an exception of no cause of action must consider only the facts alleged by the plaintiff, and that a mere statement of a conclusion of law will not state a cause of action.**

Delta Bank & Trust v. Lassiter, 383 So. 2d 330, 336 (La. 1980) (emphasis added).

Thus, when a petition is "completely devoid of any factual allegations that would support" the claim alleged, the exception of no cause of action must be sustained. *Id.* The mere regurgitation of statutory language or legal elements, **without "specific facts pleaded" to support those conclusions,** does not state a cause of action. *Id.* "In the absence of a statement of the material facts upon which it bases its claim, the plaintiff's pleadings do not set forth a cause of action." *Id.* Further, when the grounds pled in a peremptory exception cannot be removed by amendment, the claim shall be dismissed. La. Code Civ. Proc. art. 934. As noted above, a plaintiff will not be permitted an opportunity to amend "when it would constitute a vain and useless act." *Roy Anderson Corp.*, 251 So. 3d at 503.

B. The New Home Warranty Act is Plaintiffs' Exclusive Remedy; the Amended Petition Fails to State a Claim Thereunder; and All Other Claims are Excluded.

1. Legal Standards.

The New Home Warranty Act ("NHWA") was enacted in 1986 and amended in 1999 for the purpose of "promot[ing] commerce in Louisiana by providing clear, concise, and mandatory warranties for the purchasers and occupants of new homes in Louisiana and by providing for the use of homeowners' insurance as additional protection for the public against defects in the

construction of new homes." *Carter v. Duhe*, 05-0390 (La. 1/19/06); 921 So. 2d 963, 965–67 (*quoting* La. Rev. Stat. § 9:3141). In furtherance of this goal, the NHWA:

> … **provides the exclusive remedies, warranties, and peremptive periods as between builder and owner relative to home construction** and no other provisions of law relative to warranties and redhibitory vices and defects shall apply. Nothing herein shall be construed as affecting or limiting any warranty of title to land or improvements.

Id. (*quoting* La. Rev. Stat. § 9:3150) (emphasis added). Under the NHWA, and subject to certain exceptions, the builder warrants that the home will be free of specified defects under one, two, and five-year periods. La. Rev. Stat. § 9:3144(A). However, the NHWA mandates that:

> Before undertaking any repair himself or instituting any action for breach of warranty, **the owner shall give the builder written notice, by registered or certified mail, within one year after knowledge of the defect**, advising him of all defects and giving the builder a reasonable opportunity to comply with the provisions of this Chapter.

La. Rev. Stat. § 9:3145(A) (emphasis added).

The Supreme Court, interpreting the NHWA, has held that "the legislature has **specifically excluded from the home builder's warranty any defects of which the owner fails to give the builder the required notice under the NHWA**." *Carter*, 921 So. 2d at 968 (construing La. Rev. Stat. §§ 9:3144(B)(4)(c), (B)(16), and 9:3145(A)) (emphasis added). Specifically, the NHWA excludes from the warranty "[a]ny damage to the extent it is caused or made worse by … **[f]ailure by the owner to give written notice by registered or certified mail to the builder** of any defect within the time set forth in R.S. 9:3145." La. Rev. Stat. § 9:3144(B)(4)(c) (emphasis added). The NHWA also excludes from the warranty **"[a]ny defect not reported in writing by registered or certified mail to the builder** or insurance company, as appropriate, **prior to the expiration of the period specified in Subsection A of this Section for such defect plus thirty days**." La. Rev. Stat. § 9:3144(B)(16) (emphasis added).

Significantly, the Supreme Court has held that when the owner fails to give notice as required under the NHWA, "not only is the owner precluded from recovery under the NHWA, **he is also precluded from any other theory of recovery because the NHWA provides the exclusive remedy between owners and new home builders**." *Id.* at 968 (emphasis added). "Thus, the applicability of the NHWA is not waived in such a case, it still applies as it is

the exclusive remedy, but this type of defect is excluded from the builder's warranty as a penalty of the failure to give notice." *Id.*[7]

2. Plaintiffs' Claims Are All Excluded Under the NHWA and Must Be Dismissed.

The allegations in this matter are substantially similar to those made in *Carter*. In that matter, the plaintiffs entered a contract for the construction of a new home with Duhe. *Carter*, 921 So. 2d at 965. They moved into the new home in November 1999 and immediately began to discover numerous defects. *Id.* They discovered additional defects in March 2003 to the roofing system, walls, partitions, and flooring. *Id.* The plaintiffs gave verbal and written notice to Duhe throughout 2003, including a written notice by certified letter in May 2003. *Id.* Duhe undertook some repairs and also "assured the Carters that the work had been completed and repaired." *Id.* In some instances, however, "Duhe did not remedy the defects." *Id.* The plaintiffs then filed a lawsuit for damages on April 7, 2004 alleging negligence and breach of contract in the construction of the home. *Id.* Duhe responded with an exception of no cause of action arguing, correctly, that the NHWA provided the plaintiffs' exclusive remedy and that all other claims must be dismissed as a matter of law. *Id.* Duhe also filed an exception of peremption urging that most of the plaintiffs' claims were perempted. *Id.* In response, the plaintiffs argued that Duhe failed to give them required notice of the provisions of the NHWA at the time of closing and therefore NHWA is not their exclusive remedy, nor are their claims perempted. *Id.* The trial court agreed with Duhe and granted his exceptions, dismissing the plaintiffs' claims. The appellate court reversed and the matter came before the Supreme Court on review. The Supreme Court reinstated the judgment of the trial court sustaining the exception of no cause of action and dismissing the plaintiffs' negligence and breach of contract claims. *Id.* at 970.[8]

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[7] Conversely, the Court held that "the legislature has not provided any penalties or exclusions where the builder fails to provide the owner with notice of the provisions of the NHWA at the time of closing." *Id.* at 968. Thus, the owner's alleged ignorance of the provisions of the NHWA, even when purportedly due to the builder's failure to provide notice of its provisions, will not excuse the owner's failure to adhere to the notice requirements or time limitations under the NHWA. *Id.* This is because, "under Article 5 of the Civil Code, '[n]o one may avail himself of ignorance of the law.'" *Id.* at 969 (*quoting* La. Civ. Code art. 5). "A mandatory requirement that a party give another notice of the relevant law in order for that law to apply would be contrary to one of our most basic legal tenets, that citizens are charged with knowledge of the law." *Id.*

[8] As plaintiffs had subsequently amended to attempt to reassert their claims under the NHWA, the Court remanded the matter for determination of whether the claims are perempted based on the new factual allegations. *Id.*

Similarly here, the Amended Petition does not contain any allegations that plaintiffs complied with the notice requirements under the NHWA. Plaintiffs do not allege that they provided to Mr. Pitt, or any of the entity defendants, *notice in writing by registered or certified mail* of any of the alleged defects within one year of their knowledge of the alleged defects, or prior to the expiration of the one, three, and five year time periods provided under the statute. *See* La. Rev. Stat. §§ 9:3144(A), (B)(4)(c), (B)(16) and 9:3145(A). Thus, as in *Carter*, plaintiffs' Third Cause of Action under the NHWA fails to state a cause of action. Moreover, **because the NHWA is their exclusive remedy**, and despite the fact that they cannot state a claim under the NHWA, **all other claims for damages related to alleged defective construction must be dismissed** including plaintiffs' First Cause of Action for Detrimental Reliance, Fourth Cause of Action for Negligence, Fifth Cause of Action for Fraud, and Sixth Cause of Action for Negligent Infliction of Emotional Distress.[9] The Amended Petition makes plain that, despite the theory plead, *the only damages plaintiffs seek are related to the alleged construction defects* including but not limited to "costs to repair their property;" "loss of use;" "relocation damages;" "diminution of value" or "stigma damages;" and "mental distress." *See* Amended Petition, ¶¶ 145-50. Thus, all claims seeking damages related to alleged construction defects must be dismissed.

C. The Amended Petition Does Not State a Cause of Action For Detrimental Reliance.

If the Court finds that the NHWA does not preclude plaintiffs' Detrimental Reliance claim, which would be error, plaintiffs nonetheless fail to state a cause of action for Detrimental Reliance.

1. Legal Standards

The Louisiana Civil Code states:

> … A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.

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[9] Although not stated against Mr. Pitt, *Carter* makes plain that plaintiffs cannot separately sustain a claim for "Breach of Contractual Obligations" related to the construction of the Make It Right homes outside of the NHWA.

La. Civ. Code art. 1967 (emphasis added). To state a claim for detrimental reliance, a party must allege the following elements: "(1) the defendant (promisor) made a promise to the plaintiff (promisee); (2) the defendant knew or should have known that the promise would induce the plaintiff to rely on it to his detriment; (3) the plaintiff relied on the promise to his detriment; (4) the plaintiff was reasonable in relying on the promise; and (5) the plaintiff suffered damages as a result of the reliance." *McLin v. HI HO, Inc*., 13-0036 (La. App. 1 Cir. 6/7/13); 119 So.3 d 830, 833 (*citing Wooley v. Lucksinger*, 06–1167 (La. App. 1 Cir. 5/4/07); 961 So. 2d 1228, 1238).

2. Plaintiffs Fail to Plead All Required Elements of Detrimental Reliance.

In their First Cause of Action for Detrimental Reliance, plaintiffs allege that defendants, including Mr. Pitt, knew of the alleged defects but "materially suppress[ed] information" regarding the defective conditions "while promising to make cosmetic repairs." *See* Amended Petition, ¶ 89. The Amended Petition contains no specific allegations as to how information was "suppressed" or who made these promises, when they were made, or to whom they were made. There are no specific allegations that Mr. Pitt made any direct promises to any plaintiff or potential class member, and contains only vague and unsupported conclusions that he allegedly had knowledge of some conspiracy to conceal information or mislead plaintiffs. As such, the Amended Petition does not contain sufficient facts to satisfy the first or second elements of a detrimental reliance claim.

Accordingly, the First Cause of Action for Detrimental Reliance fails to state a cause of action upon which relief can be granted and should be dismissed. La. Code Civ. Proc. art. 934.

D. The Amended Petition Does Not State a Cause of Action For Negligence.

If the Court finds that the NHWA does not preclude plaintiffs' Negligence claim, which would be error, plaintiffs nonetheless fail to state a cause of action for Negligence.

1. Legal Standards.

Negligence under the duty/risk analysis applicable in Louisiana law, requires proof of five separate elements: "(1) whether the defendant had a duty to conform his conduct to a specific standard (the duty element); 2) whether the defendant's conduct failed to conform to the appropriate standard (the breach element); (3) whether the defendant's substandard conduct was a cause-in-fact of the plaintiff's injures (the cause-in-fact element); (4) whether the defendant's

substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and (5) whether the plaintiff was damaged (the damages element)." *Hanks v. Entergy Corp*., 06-477 (La. 12/18/06); 944 So. 2d 564, 579 (citations omitted). "The threshold issue in any negligence action is whether the defendant owed the plaintiff a duty, and whether a duty is owed is a question of law." *Id.*

2. Mr. Pitt Owed No Personal Duty to Plaintiffs.

In their Fourth Cause of Action for Negligence, plaintiffs allege that "all named Defendants" collectively "were negligent in failing to inform the homeowners of systemic material, construction, and design defects in a timely manner once they were made aware of the defects …" *See* Amended Petition, ¶ 119. Plaintiffs contend that the individual directors, including Mr. Pitt, knew of the entity defendants' failure "to effect repairs, effect changes to the defective designs, effect changes to the defective construction processes, and effect changes to the defective materials being used in construction" but nonetheless "negligently failed to properly and fully develop a plan to correct the defective conditions . . ." *Id.*, ¶ 121. Plaintiffs further contend that the individual directors, including Mr. Pitt, "negligently presented homeowners with plans for inadequate repairs." *Id.*, ¶ 124. Plaintiffs also contend that the individual directors', including Mr. Pitt's, alleged "active participation in management" of the entity defendants and "instruction not to apprise homeowners of the" alleged defects, as well as purported concealment regarding the extent of damages, "constitutes a continuing tort" under Louisiana law. *Id.*, ¶¶ 122, 125. Plaintiffs contend that the entity defendants and the individual directors "negligently and/or fraudulently diverted funds to other developments instead of conducting known warranty repairs" resulting in the alleged insolvency of the entity defendants. *Id.*, ¶ 123.

Plaintiffs cannot state a claim against Mr. Pitt for negligence because they fail to allege, and cannot allege, that he owed any legal duty to plaintiffs. As an initial matter, plaintiffs' generalized group pleading against "all … defendants collectively, lumping the … individual defendants in with the corporation" is insufficient as a matter of law "to state a cause of action in tort against" officers or directors of a corporation. *B-G & G Inv'rs VI, L.L.C. v. Thibaut HG Corp*., 08-0093 (La. App. 4 Cir. 5/21/08); 985 So. 2d 837, 842.

Moreover, numerous courts have rejected similar allegations against corporate officers for failure to allege a personal duty owed by the officer. In *B-G & G*, the Fourth Circuit Court of Appeal found the trial court correctly sustained an exception of no cause of action by corporate officers regarding plaintiffs' claims of intentional failure to reveal encroachment on property in connection with a contract the plaintiffs entered with a corporation. *Id.* at 841-42. The appellate court concluded that the plaintiffs had not stated a cause of action against the officers, individually, because "the petition does not allege [the existence of] any such personal duty" owed by the officers. *Id.* at 842; *see also Donnelly*, 415 So. 2d at 481, *supra* (holding that plaintiffs had no direct cause of action against the principal of construction company for negligent failure to supervise, govern, control, and manage construction of their home).[10]

Here, other than conclusory allegations lacking supporting facts, the Amended Petition fails to show that Mr. Pitt undertook any personal, legal obligation to plaintiffs. "Where there is no duty on the part of the defendant to protect the plaintiff from the risk involved, there can be no liability under a duty/risk analysis." *Taylor v. Shoney's, Inc.*, 98-810 (La. App. 5 Cir. 1/26/99); 726 So. 2d 519, 523, *writ denied,* 99-0540 (La. 4/9/99); 740 So. 2d 635. "When no duty exists, a court will dismiss a petition as a matter of law for failure to state a cause of action." *Id.*

This deficiency also cannot be cured by amendment; thus, the Court should dismiss with prejudice plaintiffs' Fourth Cause of Action for Negligence.

E. The Amended Petition Does Not State a Cause of Action For Fraud.

If the Court finds that the NHWA does not preclude plaintiffs' Fraud claim, which would be error, plaintiffs nonetheless fail to state a cause of action for Fraud.

1. Applicable Legal Standards.

Under Louisiana law, fraud requires three basic elements: "(1) a misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to the other party; and (3) the resulting error must relate to a circumstance substantially influencing the other party's contractual consent." *Terrebonne*

[10] *See also* Mr. Pitt's exception of no right of action, describing other Delaware and Louisiana authorities holding that a director of a corporation owes no personal duties directly to the alleged creditors of a corporation.

Concrete, LLC v. CEC Enterprises, LLC, 11-0072 (La. App. 1 Cir. 8/17/11); 76 So. 3d 502, 509, *writ denied*, 11-2021 (La. 11/18/11); 75 So. 3d 464. "Fraudulent intent, or the intent to deceive, is a necessary and inherent element of fraud." *Id.*

Moreover, "[i]t is well settled that fraud cannot be predicated on unfulfilled promises or statements as to future events, and statements promissory in their nature and relating to future actions do not constitute actionable fraud." *Id.* at 512; *see also Sun Drilling Products Corp. v. Rayborn*, 00–1884 (La. App. 4 Cir.10/3/01); 798 So. 2d 1141, *writ denied*, 01–2939 (La. 1/25/02), 807 So.2d 840. As correctly explained by one court **"[t]he mere failure to do what one promises in order to induce another to sign a contract is not fraud but a mere breach of promise**." *Johnson v. Unopened Succession of Alfred Covington, Jr.*, 42,488 (La. App. 2 Cir. 10/31/07); 969 So. 2d 733, 742 (*citing Dutton & Vaughan, Inc. v. Spurney*, 600 So.2d 693 (La. App. 4 Cir. 1992); *writ denied*, 601 So. 2d 663 (La. 1992) (emphasis added). "**To constitute actionable fraud, the false statements, if such are made, must relate to facts then existing or which have previously existed**." *Id.* (emphasis added).

Louisiana Code of Civil Procedure article 856 requires that the plaintiff plead "the circumstances constituting fraud. . . with particularity." La. Code Civ. Proc. art. 856. The exception of no cause of action is the proper procedural mechanism to address a plaintiff's failure to plead fraud with particularity. *See e.g., B-G & G Inv'rs VI, L.L.C. v. Thibaut HG Corp.*, 2008-0093 (La. App. 4 Cir. 5/21/08), 985 So.2d 837, 842. The plaintiff must "'**specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent**.'" *In re JCC Envtl., Inc.*, 575 B.R. 692, 699 (E.D. La. 2017) (*quoting Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 207 (5th Cir. 2009) (*quoting Smallwood v. Pearl Brewing Co.*, 489 F.2d 579,605 (5th Cir. 1974)) (emphasis added).

Under Louisiana law, general and conclusory allegations of "false representations and assurances" without any indication of the specific "content or nature of those representations" do not "fulfill the particularity required by La. C.C.P. art. 856." *Laneaux v. Theriot*, 488 So. 2d 1327, 1329 (La. App. 3 Cir. 1986). Allegations of "a failure to perform, poor workmanship, failure to obtain permits, improper or poor materials, improper installation" are merely claims for breach of

contract and do not constitute fraud. *Long v. Jeb Breithaupt Design Build Inc*., 44,002 (La. App. 2 Cir. 2/25/09); 4 So. 3d 930, 940. Even allegations that a party misrepresented his qualifications to perform the contracted work, without supporting "specific facts and circumstances regarding how and when" the alleged misrepresentations were made, do not satisfy article 856's particularity requirement. *Id.*

2. The Amended Petition Does Not Specify Fraud With Particularity or Contain Sufficient Facts to Support a Fraud Claim Against Mr. Pitt.

In their Fifth Cause of Action for Fraud, plaintiffs contend that all defendants, including Mr. Pitt, "intentionally and fraudulently suppressed and/or misrepresented material facts to Plaintiffs . . . in tax filings, and in audited financial statements" and/or "intentionally and fraudulently made false promises or instructed others to make false promises to homeowners and/or potential home purchasers. . ." *See* Amended Petition, ¶ 128. Plaintiffs vaguely and confusingly assert that defendants made the following "misrepresentations":

1. That the homes contained defective materials;
2. That the homes were defectively designed;
3. That the homes were defectively and improperly constructed;
4. That the Foundation would provide engineering reports to the homeowners on their own properties;
5. That repairs to the properties would be properly made;
6. That the Homeowners would give up important legal rights by signing documents to obtain repairs on their properties;
7. That the Foundation was obligated to perform the repairs, under the New Home Warranty Act, without the need for the homeowners to give up important legal rights;
8. That the homes suffered from systemic water intrusion;
9. That the damages to the entire community resulting from defective materials, design and/or construction exceeded the value of the homes;
10. Failure to disclose the full amount of warranty liabilities;
11. Other acts and omissions to be established through discovery.[11]

Id. The Amended Petition, however, contains no specific facts demonstrating who made these alleged misrepresentations, when they were made, or to whom they were made. La. Civ. Code art. 856; *Laneaux*, 488 So. 2d at 1329; *Long*, 4 So. 3d at 940. Other than bald conclusions, the Amended Petition contains no allegations of fraudulent intent. *Flaherty*, 565 F.3d at 207.

[11] It is unclear which of these alleged representations plaintiffs claim were falsely represented and which they claim are truthful facts that were suppressed.

The Amended Petition certainly does not contain any facts to show that *Mr. Pitt* made any fraudulent misrepresentations. At best, the Amended Petition alleges that Mr. Pitt made *purported promissory statements as to future events* to the Coalition or the general public, which were allegedly then repeated to potential homeowners, and which he then allegedly failed to fulfill. *See* Amended Petition, ¶¶ 9-16. Even if these contentions were true, which is denied, this is not actionable fraud as a matter of law. *Terrebonne Concrete,* 76 So. 3d at 509; *Johnson*, 969 So. 2d at 742.

Plaintiffs' attempt to allege the existence of some conspiracy to mislead the homeowners or to conceal material information from them is also unavailing. *Id.*, ¶¶ 130-36. The Amended Petition contains no specific facts to support these contentions, and does not allege, other than in the most conclusory way, that Mr. Pitt was in any way involved. *Id.*, ¶¶ 130-36.[12]

Equally insufficient are plaintiffs' allegations of an alleged "conspiracy" to misrepresent the extent of the alleged defects, to suppress the engineering reports, and to mislead plaintiffs into believing repairs would be made. *Id.*, ¶¶ 51-56; 136-38. First, the Amended Petition contains no specific allegations to show that Mr. Pitt was in any way involved in the alleged conspiracy. Further, the Amended Petition does not state when or where any alleged misrepresentation occurred; the content of the alleged misrepresentations; or to whom the alleged misrepresentation was made. Thus, these allegations do not satisfy the particularity requirement. La. Civ. Code art. 856; *Laneaux*, 488 So. 2d at 1329; *Long*, 4 So. 3d at 940.

At best, the Amended Petition alleges that some Make It Right homes, but not necessarily those of either of the plaintiffs, were inspected by engineers in 2016 and that despite alleged promises to provide the reports, the reports were not provided, and the results of the reports were not otherwise shared with the homeowners. *See* Amended Petition, ¶¶ 51-56. Again, this does not constitute actionable fraud, but is merely a breach of an alleged promise. *Terrebonne Concrete,* 76 So. 3d at 509; *Johnson*, 969 So. 2d at 742. Moreover, the Amended Petition contains no specific

[12] Even if the entity defendants' tax filings were inaccurate, which is denied, these tax filings are not "representations" to the plaintiffs who have not, and cannot, plead that they even knew of them at the time they made any alleged decisions relevant to this matter, much less that they relied on them in any way. Clearly, plaintiffs' attorneys learned of the tax filings after the fact and are attempting to use them to manufacture some basis to sustain a fraud claim.

facts to show that Mr. Pitt was in any way involved in the alleged decision to withhold engineering reports.

Similarly, allegations that unspecified persons made vague promises of "repairs" do not state a claim for fraud. *Id.*, ¶¶ 22, 23. As all other allegations, these contentions lack particularity and do not identify what specific repairs were promised, who made the promises, to whom they were made, where they were made, or when they were made. La. Civ. Code art. 856; *Laneaux*, 488 So. 2d at 1329; *Long*, 4 So. 3d at 940. Again, the mere breach of a future promise does not constitute fraud. *Terrebonne Concrete,* 76 So. 3d at 509; *Johnson*, 969 So. 2d at 742.

Finally, to the extent that plaintiffs attempt to plead that through the alleged conspiracy of misrepresentations and suppressions of the truth, defendants, including Mr. Pitt, "fraudulently deprived homeowners of their right to pursue legal actions under Louisiana's New Home Warranty Act, codified at R.S. 9:3141 *et seq.*" this claim fails as a matter of law. As discussed above, the Supreme Court has made clear that a builder's failure to advise an owner of his rights under the NHWA does not relieve the owner of the consequences of his failure to timely exercise those rights. *Carter*, 921 So. 2d at 968-69. As stated by the Court, plaintiffs "are charged with knowledge of the law" and "may [not] avail [themselves] of ignorance of the law." *Id.* (*citing* La. Civ. Code art. 5).

Accordingly, plaintiffs' Fifth Cause of Action for Fraud fails to state a cause of action and should be dismissed. La. Code Civ. Proc. art. 934.[13]

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[13] In what appears to be an afterthought, plaintiffs insert new allegations in their fraud cause of action alleging that the individual directors are personally responsible for the alleged debts of the defendant entities under a theory of "veil piercing." *See* Amended Petition, ¶ 139. Plaintiffs' vague and conclusory contentions that the individual directors personally participated in fraud, coupled with vague allegations of "commingling of funds" and alleged improper "diversions" of funds are insufficient to justify resort to the extraordinary and radical remedy of veil piercing. *Id.*, ¶¶ 139-40; 35-41; *see gen. Hickey v. Angelo*, 18-0550 (La. App. 4 Cir. 5/29/19); 2019 WL 2291610, **10-12 (*quoting Collins v. State Farm Ins. Co*., 14-0419, p. 16 (La. App. 4 Cir. 2/4/15); 160 So. 3d 987, 997); *Riggins v. Dixie Shoring Co*., 590 So.2d 1164, 1168 (La. 1991)) (discussing necessary elements to pierce corporate veil to reach *shareholder's* assets). To be sure, insolvency alone, even if this were true, does not justify veil piercing. *See gen. McDonough Marine Serv., a Div. of Marmac Corp. v. Doucet*, 95-2087 (La. App. 1 Cir. 6/28/96); 694 So. 2d 305, 310–11 (despite commingling of funds, declining to pierce corporate veil of bankrupt entities where there was no evidence of fraud or that shareholders failed to conduct corporations' business on a corporate footing). Further, veil piercing is a remedy used in exceptional circumstances to reach the assets of a *shareholder* of a corporation. The Amended Petition does not allege that any of the individual directors, including Mr. Pitt, were shareholders in any of the entity defendants, and the undersigned is not aware of any authority that would make a non-shareholder director or officer personally liable for corporate debts under the facts presented here. In any case, the Amended Petition contains no facts to support holding Mr. Pitt liable for corporate debts under a veil piercing theory as a shareholder or director.

F. The Amended Petition Does Not State a Cause of Action For Negligent Infliction of Emotional Distress.

If the Court finds that the NHWA does not preclude plaintiffs' Negligent Infliction of Emotional Distress claim, which would be error, plaintiffs nonetheless fail to state a cause of action for Negligent Infliction of Emotional Distress.

1. Applicable Legal Standards.

Absent physical injury "Louisiana law does not generally recognize an independent cause of action for negligent infliction of emotional distress." *Lann v. Davis*, 34,892 (La. App. 2 Cir. 8/22/01); 793 So. 2d 463, 466 (*citing Moresi v. Department of Wildlife,* 567 So. 2d 1081 (La. 1990)).

> Under the general rule followed by the great majority of jurisdictions, **if the defendant's conduct is merely negligent and causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, the defendant is not liable for such emotional disturbance**.

Moresi, 567 So. 2d at 1095 (emphasis added).

Such a cause of action is recognized "only in extraordinary situations." *DirecTV, Inc. v. Atwood*, CIV.A. 03-1457, 2003 WL 22765354, at *3 (E.D. La. Nov. 19, 2003). "To state a claim for negligent infliction of emotional distress, a plaintiff must allege the following elements: (1) that an independent, direct duty was owed to plaintiff by defendant; (2) that the duty afforded protection to plaintiff for the risk and harm caused; (3) that the duty was breached; and (4) that the mental anguish suffered by the plaintiff was genuine and serious." *Id.*

Generalized allegations of embarrassment, fear, or fright "do[ ] not rise to the level of serious emotional distress." *Id.* Rather, under Louisiana law, "emotional distress is considered 'serious' if 'a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case' and as a result suffers 'neuroses, psychoses, chronic depression, phobia, and shock'" or similar conditions. *Id.* (*quoting Held v. Aubert,* 02-1486 (La. App. 1 Cir. 5/9/03); 845 So. 2d 625, 633). A plaintiff who fails to allege such "special circumstances" or serious emotional injuries does not "state a claim for negligent infliction of emotional distress under Louisiana law." *Id.*

2. The Amended Petition Does Not Allege Any Mental or Physical Injury.

In their Sixth Cause of Action for Negligent Infliction of Emotional Distress, plaintiffs allege merely that "[t]he conduct of all the Defendants as set forth hereinabove was reckless and wanton, constituting the tort of negligent infliction of emotional distress, which resulted in damages to Plaintiffs." *See* Amended Petition, ¶ 144. The Amended Petition alleges that "[t]he Foundation's insolvency has caused **severe mental distress** to the class representatives and upon information and belief the putative class, most of whom have mortgages on their properties and will continue to owe mortgages on their properties for twenty (20) or more years." *Id.*, ¶ 76 (emphasis supplied). Plaintiffs also contend that their mental distress has been caused by "detrimental reliance on Defendants' false promises;" "Defendants' breach of contract;" "Defendants' breach of legal warranty obligations;" "Defendants' Negligence;" and "Defendants' ongoing fraud." *Id.*, ¶¶ 99; 109; 117; 126; 141. The Amended Petition, notably, lacks any specific factual allegations that any plaintiff has suffered any physical injury or illness as a result of any defendant's alleged conduct. *See gen.* ¶ 83 (describing the alleged damages); ¶¶ 145-147 (listing alleged "Damages").

However, nowhere in the Amended Petition do plaintiffs contend that they or potential class member suffered a physical injury or illness as a result of any negligent act of any defendant, much less Mr. Pitt. The Amended Petition contains no allegations that Mr. Pitt committed any act or omission, which allegedly caused plaintiffs' purported emotional distress (other than generalized references to each cause of action and the Foundation's alleged insolvency), much less a physical injury. Certainly, plaintiffs have not alleged any special circumstances that would give rise to a personal, legal obligation for Mr. Pitt to protect plaintiffs from distress, nor have they alleged "serious" emotional injuries of the type necessary to state a claim. *See Atwood*, 2003 WL 22765354 at *3.

As such, the Sixth Cause of Action for Negligent Infliction of Emotional Distress fails to state a claim and should be dismissed. La. Code Civ. Proc. art. 934.

III. ALTERNATIVE EXCEPTION OF VAGUENESS.

In the alternative, if the Court does not dismiss the Amended Petition on the exceptions of no right of action and no cause of action, plaintiffs should be ordered, at a minimum, to amend the

Amended Petition, as to any remaining claim, to include specific factual allegations indicating that plaintiffs have a viable right of action and a cause of action against Mr. Pitt, individually.

A. Legal Standard.

As the Louisiana Supreme Court has explained, the purpose of an exception of vagueness "is to compel the plaintiff to amplify and make more definite his claim in order that defendant may properly prepare his defense." *City of Gretna v. Gulf Distilling Corp.*, 21 So. 2d 884, 889 (La. 1945). Another purpose of the exception of vagueness is to place the defendant "on notice of the nature of the facts sought to be proved so as to enable him to identify the cause of action, thus preventing its future relitigation after a judgment is obtained in the present suit." *Vanderbrook v. Jean*, 06-1975, p.2 (La. App. 1 Cir. 2/14/07); 2007 WL 466585; *see also Joseph v. Wasserman*, 16-0528 (La. App. 4 Cir. 12/7/16); 206 So. 3d 970, 973.

Article 891 provides, in relevant part:

> The petition shall comply with Articles 853, 854, and 863 … It shall set forth the name, surname, and domicile of the parties; **shall contain a short, clear, and concise statement of all causes of action arising out of, and of the material facts of, the transaction or occurrence that is the subject matter of the litigation** …

La. Code Civ. Proc. art. 891 (emphasis added).

Further, article 854 mandates that all allegations of fact set forth in a petition "shall be simple, concise, and direct." La. Code Civ. Proc. art. 854. As such, when the grounds for a dilatory exception can be cured by amendment of the petition, the court shall order the plaintiff to so amend within a certain time on penalty of dismissal. La. Code Civ. Proc. art. 933(B).

B. The Amended Petition is Impermissibly Vague.

Despite the amendment, the Amended Petition remains impermissibly vague and ambiguous. Although the Amended Petition contains more than 150 paragraphs of allegations, there are no specific factual allegations indicating any wrongful conduct by Mr. Pitt, personally. Rather, plaintiffs consistently lump Mr. Pitt in, collectively, with other defendants, without adequate facts to support a claim against him individually. As has been stated before, plaintiffs cannot state claims against Mr. Pitt directly based solely on actions he took as a director, absent some allegations that he undertook a personal duty to them or committed some personal act of fraud against them. Thus, the Amended Petition remains insufficient to put Mr. Pitt on notice of

the nature of the facts sought to be proven, so as to enable him to prepare an adequate defense. *Joseph*, 206 So. 3d at 973. Accordingly, if the Court does not dismiss the claims against Mr. Pitt in their entirety, plaintiffs should be ordered to again amend their pleading, as to any remaining claim, to include specific factual allegations indicating that plaintiffs have a viable right of action and a cause of action against Mr. Pitt, individually. If plaintiffs are unable to do so, the Amended Petition should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, the Peremptory Exceptions of No Right of Action and No Cause of Action and, Alternative Dilatory Exception of Vagueness filed by defendant, Brad Pitt, should be sustained, and all claims against Mr. Pitt should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this 12th day of August, 2019, I delivered the forgoing document to the opposing counsel via ___ U.S. Mail, **X** email and/or _____ facsimile transmission.

_____
McClain Schonekas