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 MAKE IT RIGHT FOUNDATION'S PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION AND ALTERNATIVELY, DILATORY EXCEPTION OF VAGUENESS

NOW COMES, through undersigned counsel, defendant, Make It Right Foundation (the "Foundation"), who respectfully submits this Peremptory Exception of No Cause of Action and Alternatively, 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. Despite the addition of new allegations and claims, plaintiffs still fail to state a cause of action against the Foundation. Having already had an opportunity to amend, and failing to cure the deficiencies in their pleading, all claims against the Foundation 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, Make It Right Foundation, prays that after due proceedings are had that this Peremptory Exception of No Cause of Action and Alternatively, Dilatory Exception of Vagueness be sustained and all claims against it be dismissed with prejudice.

Respectfully submitted,

/s/Kyle Schonekas

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Attorneys for defendants, Make it Right – New Orleans Housing, LLC and Make It Right- New Orleans, LLC

CERTIFICATE OF SERVICE

I do hereby certify that on this 16th 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 Exception of No Cause of Action and Alternatively, Dilatory Exception of Vagueness submitted by defendant, Make It Right Foundation, 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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MEMORANDUM IN SUPPORT OF DEFENDANT MAKE IT RIGHT FOUNDATION'S PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION AND ALTERNATIVELY, DILATORY EXCEPTION OF VAGUENESS

Defendant Make it Right Foundation (the "Foundation"), through undersigned counsel, respectfully submit this Memorandum in Support of its Peremptory Exception of No Cause of Action and alternatively, Dilatory Exception of Vagueness in response to Plaintiffs' First Amended and Supplemental Petition (the "Amended Petition"). Because plaintiffs' claims are insufficient as a matter of law, this Court should grant defendant's peremptory exception and dismiss all claims against it. Further, and alternatively, plaintiffs' claims against the Foundation are impermissibly vague and ambiguous. Therefore, at a minimum, plaintiffs should be ordered to amend the Amended Petition to state particular factual allegations against the Foundation, which would give rise to a cause of action against it.

BACKGROUND

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. Make It Right- New Orleans Housing LLC ("Housing LLC") and Make It Right – New Orleans , LLC ("MIR LLC") are legally distinct entities, with a separate legal existence from the Foundation.

I. THE ALLEGATIONS OF THE AMENDED PETITION.

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. Then, on July 18, 2019, before the Foundation responded to the

Petition, plaintiffs sought leave to file a First Supplemental and Amending Petition. Soon thereafter, the Court granted plaintiffs leave and entered the Amended Petition into the record. Relying on nothing more than conclusory allegations and summary "group pleading," plaintiffs seek damages from the Foundation and a sprawling list of other defendants. The Amended Petition is largely devoid of any specific allegations against the Foundation, other than alleging that it implemented a plan to design and build homes; that it participated in marketing and outreach; that it sold and warranted the homes;[1] that a Board Member of the Foundation served as Executive Director at the principal place of business of the Foundation; that a Board Member of the Foundation reported relevant information regarding notice of the defective conditions to the Foundation's Board of Directors as early as 2009; and that the Foundation was operated like a closely held corporation. *See* Amended Petition, ¶ 2A. Plaintiffs use a defined term in the Amended Petition to refer to the Foundation, Housing LLC, and MIR LLC by stating that all of the entity defendants are referred to, collectively, as "the Foundation," but then proceeds to inconsistently use the defined term in contexts that suggest plaintiffs are actually referring to the Foundation alone. *See* Amended Petition, ¶ 2(C) (stating "the Foundation and its subsidiary limited liability companies are collectively referred to as 'the Foundation'"); *see also id.*, ¶¶ 7, 17, 19 (referring to "the Foundation" but apparently meaning only the one entity). In other allegations, it is unclear whether plaintiffs are referring only to the Foundation or to all three entities collectively. *Id.*, ¶¶ 8, 9, 14, 15, 18, 26, 32, 35, 36, 38, 39-41, 55, 56, 57, 58, 73, 74, 75, 76, etc.

To further confuse things, in many instances, plaintiffs make allegations against "MAKE IT RIGHT FOUNDATION, MAKE IT RIGHT – NEW ORLEANS, LLC, *AND/OR* MAKE IT RIGHT – NEW ORLEANS HOUSING, LLC", or against "Make it Right," or simply against all "defendants" collectively. *Id.*, ¶¶ 2(B)-(N), 67, 70, 71 72, 76, 77, 78, 80, 81, 82, 84, 85, 89, 90, 97, 99, 100, 105-108, 109, 112, 113, 116, 119, 123, 128, 137, 144, 145-148. All told, the Amended Petition makes it impossible to ascertain which of the many defendants are alleged to have committed which acts. Yet, despite the Amended Petition containing no particularized allegations

[1] To be clear, Plaintiffs allege that the Foundation and other defendants "were builders of new homes and had a mandatory obligation to provide new home warranties for defects in construction." *See* Amended Petition, ¶112.

against the Foundation, plaintiffs attempt to state causes of action against the Foundation for (1) Detrimental Reliance, (2) Breach of Contractual Obligations, (3) Breach of Legal Obligation of Warranty, (4) Negligence, (5) Fraud, and (6) Negligent Infliction of Emotional Distress.[2]

Further, Plaintiffs allege that the Foundation set up MIR LLC and Housing LLC 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. 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 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 allege that the Foundation's Board of Directors, "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.

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[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, the Foundation incorporates and responds to the Original Petition by these Exceptions and reserve all rights, defenses, and exceptions to the claims asserted in the Original Petition. Further, if such ruling is made, the Foundation submits that the Court should grant it leave to respond to the allegations in the Original Petition.

Significantly, 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 the Foundation 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. As shown below, the New Home Warranty Act is plaintiffs' exclusive remedy, precluding all other claims, and plaintiffs fails to state a claim thereunder.[3] As further shown below, even if the claims were not otherwise precluded by the New Home Warrant Act, they each independently fail and must be dismissed.

LAW AND ARGUMENT

I. EXCEPTION OF NO CAUSE OF ACTION.

All the claims asserted against the Foundation are fatally defective. Plaintiffs have no cause of action for Detrimental Reliance, Breach of Contractual Obligations, Breach of Legal Obligation of Warranty, Negligence, Fraud, and Negligent Infliction of Emotional Distress; therefore, the Court should dismiss all such claims.

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[3] For the for purposes of these exceptions only, the Foundation accepts as true the characterization that it is a "builder" and that New Home Warranty Act obligations apply, as alleged in ¶¶ 112 and 113 of the amended petition. The arguments presented here regarding the New Home Warranty Act are based on plaintiffs' allegations as pled. MIR makes no admission – and reserves all rights, exceptions, and defenses – concerning the meaning of "builder" and the application of the New Home Warranty Act.

A. Legal Standards.

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. P. 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. v. 225 Baronne Complex, L.L.C*, 2017-1005, p. 15 (La. App. 4 Cir. 7/11/18), 251 So. 3d 493, 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.*[4]

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

[4] 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.*

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.[5]

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 the Foundation, *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, Second Cause of Action for Breach of Contractual Obligations, Fourth Cause of Action for Negligence, Fifth Cause of Action for Fraud, and Sixth Cause of Action for Negligent Infliction of Emotional Distress.[6] 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.

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[5] 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.*

[6] Additionally, *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.

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.

La. Civ. Code art. 1967 (emphasis added). "In order to invoke the doctrine of detrimental reliance, the claimant must prove three elements: (1) a representation by word or conduct; (2) justifiable/reasonable reliance; and (3) a change in position to one's detriment because of the reliance." *Bains v. Young Men's Christian Ass'n of Greater New Orleans*, 06-1423 (La. App. 4 Cir. 10/3/07); 969 So. 2d 646, 650, *writ denied*, 07-2146 (La. 1/7/08); 973 So. 2d 727.

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 the Foundation, 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 the Foundation, or employees acting on their behalf, made any direct promises to any plaintiff or potential class member, and contains only vague and unsupported conclusions that they 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 Fails to State a Cause of Action for Breach of Contractual Obligations.

In their Second Cause of Action, Plaintiffs allege that the Foundation and the other entity defendants "entered into contracts with plaintiffs for the construction, warranty, and/or repair of their homes;" that they "breached their contractual obligations to provide homes free from

construction defects;" that they "breached their contractual obligations to provide homes free from material defects;" and that they "breached their contractual obligations of warranty." Amended Petition, ¶¶ 102, 106-108. Because the "NHWA [New Home Warranty Act] provides the exclusive remedies, warranties, and peremptive periods as between the builder and owner relative to new home construction," plaintiffs have no cause of action to assert a breach of contract claim regarding the construction of their homes. *See Carter,* 921 So. 2d at 964-65. Plaintiffs cannot cure the grounds for this exception by amending their Amended Petition. Thus, the Court should dismiss this claim. La. Code Civ. Proc. art. 934.

E. The Amended Petition Fails to State a Cause of Action for Negligence against the Foundation.

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 … [and that]
>
> …the Foundation entities and the Board of Director Defendants negligently . . . diverted funds to other developments instead of conducting know warranty repairs . . . [and that]
>
> The Foundation entities . . .negligently presented homeowners with plans for inadequate repairs which failed to address the systemic problems with water intrusion . . . [and that]
>
> Defendants' continual negligent actions and omissions . . .constitute continuing torts within the meaning of Louisiana law . . .

See Amended Petition, ¶¶ 119-125. Simply put, Plaintiffs have no cause of action to assert a negligence claim regarding the design problems and inadequate repairs of their newly constructed homes because the "NHWA [New Home Warranty Act] provides the exclusive remedies, warranties, and peremptive periods as between the builder and owner relative to new home construction." *See Carter,* 921 So. 2d at 964-65. This deficiency also cannot be cured by amendment; thus, the Court should dismiss with prejudice plaintiffs' Fourth Cause of Action for Negligence.

F. The Amended Petition Fails to 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. Pleading Fraud, Generally.

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 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 Any Facts to Support a Fraud Claim.

In their Fifth Cause of Action for Fraud, Plaintiffs contend that the Foundation, and all the other defendants, "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.[7]

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.

The Amended Petition certainly does not contain any facts to show that the Foundation made any fraudulent misrepresentations. At best, the Amended Petition alleges that a precursor unincorporated group to the Foundation 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 they 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 the Foundations was in any way involved. *Id.*, ¶¶ 130-36.[8]

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. 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.

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

[8] 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.

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.

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 "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.

G. The Amended Petition Fails to 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 the Foundation. The Amended Petition contains no allegations that the Foundation 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 the Foundation 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.

II. ALTERNATIVE EXCEPTION OF VAGUENESS.

In the alternative, if the Court does not dismiss the Amended Petition on the exception of 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 cause of action against the Foundation.

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 wrongful conduct by the Foundation. Rather, plaintiffs consistently lump the Foundation with Housing LLC and MIR LLC, and in other circumstances, collectively, with other defendants, without adequate facts to support a claim against it. Thus, the Amended Petition remains insufficient to put the Foundation on notice of the nature of the facts sought to be proven, so as to enable it to prepare an adequate defense. *Joseph*, 206 So. 3d at 973. Accordingly, if the Court does not dismiss the claims against the Foundation 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 cause of action against it. If plaintiffs are unable to do so, the Amended Petition should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, the Court should sustain the Peremptory Exception of No Cause of Action, and all claims against Make It Right Foundation should be dismissed. In the alternative, if the Court does not dismiss the claims against Make It Right Foundation at this time, the Court should grant the Dilatory Exception of Vagueness and order plaintiffs to amend their Amended Petition to state sufficient facts to demonstrate that they have a non-perempted cause of action against Make It Right Foundation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this 16th 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