

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

19TH JUDICIAL DISTRICT COURT

VERSUS

* DOCKET NO: 651,069, SECTION 22

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

EAST BATON ROUGE PARISH,
LOUISIANA

**GEORGE G. CROMER AND CHARLES D. CALVI'S EXCEPTIONS OF NO RIGHT OF
ACTION, NO CAUSE OF ACTION, AND VAGUENESS**

Defendants, George G. Cromer ("Cromer") and Charles D. Calvi ("Calvi"), through undersigned counsel, except to the Petition filed by James J. Donelon, Commissioner of Insurance for the State of Louisiana, in his capacity as Rehabilitator of Louisiana Health Cooperative, Inc. ("LAHC") on the following basis:

1.

Cromer and Calvi except to the Petition, asserting a peremptory exception of no right of action pursuant to La. CCP Art. 927(A)(6) on the basis that Donelon lacks the authority to assert a derivative action on behalf of LAHC, the claims for breach of fiduciary duty are derivative in nature and may only be brought on behalf of LAHC, and Plaintiff lacks authority to bring suit for breaches of fiduciary duties.

2.

Cromer and Calvi except to the Petition, asserting a peremptory exception of no cause of action pursuant to La. CCP Art. 927(A)(5) because Plaintiff has failed to state a cognizable claim for breach of fiduciary duty and has failed to adequately plead any alleged violations against Cromer and Calvi.

3.

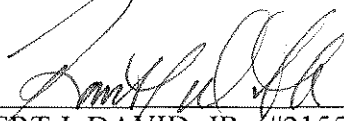
Cromer and Calvi except to the Petition, asserting a dilatory exception of vagueness pursuant to La. CCP Art. 926(A)(5), as the allegations concerning Cromer and Calvi are so

vague that they do not enable Cromer and Calvi to ascertain the allegations against them or to adequately prepare a defense.

Wherefore, Defendants, George G. Cromer and Charles D. Calvi, pray that this Honorable Court maintain their exceptions and dismiss the Petition at Plaintiff's cost. Defendants further pray for any and all general and equitable relief to which they are justly entitled.

Respectfully submitted,

JUNEAU DAVID, APLC



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Counsel for Defendants, George G. Cromer and
Charles D. Calvi

PLEASE SERVE:

JAMES J. DONELON
Through his Attorney of Record
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Baton Rouge, LA 70810

CERTIFICATE OF SERVICE

I hereby certify that a copy of George G. Cromer and Charlie Calvi's Dilatory Exception of Vagueness has this 17th day of February, 2017, been forwarded to the following attorneys of record via electronic and U.S. Mail:

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RULE TO SHOW CAUSE

Considering the foregoing Exceptions of No Right of Action, No Cause of Action, and
Vagueness:

IT IS HEREBY ORDERED that Plaintiff, James J. Donelon, show cause on the ___ day
of _____, 2017 at _____ a.m./p.m. why Cromer and Calvi's Exceptions of No Right of
Action, No Cause of Action, and Vagueness should not be granted.

IT IS FURTHER ORDERED that Plaintiff, James J. Donelon, show cause why he should
not be cast with costs in connection with the filing of Cromer's and Calvi's Exceptions of No
Right of Action, No Cause of Action, and Vagueness.

THUS DONE AND SIGNED on the _____ day of _____, 2017.

DISTRICT JUDGE

PLEASE SERVE:
JAMES J. DONELON
Through his Attorney of Record
Mr. J. E. Cullins, Jr.
Walters, Papillion, Thomas, Cullens, LLC
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Baton Rouge, LA 70810

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**MEMORANDUM IN SUPPORT OF EXCEPTIONS OF NO RIGHT
OF ACTION, NO CAUSE OF ACTION, AND VAGUENESS**

MAY IT PLEASE THE COURT:

This memorandum is respectfully submitted in support of the exceptions of no right of action, no cause of action, and vagueness filed by Defendants, George G. Cromer (“Cromer”) and Charles D. Calvi (“Calvi”), in response to the Petition filed by James J. Donelon (“Donelon”), in his capacity as Commissioner of Insurance and Rehabilitator of Louisiana Health Cooperative, Inc. For the following reasons, Defendants’ exceptions should be maintained, and the allegations against them should be dismissed.

I. INTRODUCTION

The Patient Protection and Affordable Care Act (“ACA”) created the consumer operated and oriented plan program – known as the CO-OP Program. Under the CO-OP Program, the Department of Health and Human Services distributed loans to consumer-governed, nonprofit health insurance companies. The ACA authorized \$6 billion in CO-OP funding and required HHS to fund at least one qualified CO-OP in every state before funding additional issuers. In 2011, Congress reduced the funding to \$3.4 billion. On January 1, 2013, further legislation eliminated additional funding. Ultimately, \$2.4 billion in awards was made to help 23 CO-OPs operate in 23 different states. Of the CO-OPs originally created, only 5 remain in business.

LAHC was incorporated on September 12, 2011 as a qualified not-for-profit organization under Section 501(c)(29) of the Internal Revenue Code, Section 1332 of the ACA, and the

Louisiana Nonprofit Corporation Law. LAHC was awarded a startup loan of \$12,426,560.00 and solvency loan of \$52,614,100.00 by the federal government.

On or about May 8, 2013, the Louisiana Department of Insurance granted LAHC its license to operate as a health maintenance organization in Louisiana. During this timeframe, LAHC conducted a search for a new chief executive officer. Cromer, a state representative from Slidell, Louisiana, and the chairman of the House Insurance Committee, was under consideration for the position. On May 13, 2013, Donelon wrote a glowing recommendation of Cromer for the position. In addition, on May 1, 2013, Noble Ellington, Chief Deputy Commissioner, also wrote an equally positive letter of recommendation for Cromer. Cromer was hired as the Chief Executive Officer of LAHC on or about July 7, 2013. Cromer subsequently offered employment to Calvi, who had previously served as the head of the Office of Group Benefits, to serve as LAHC's Chief Marketing Officer. Calvi was hired by LAHC in January 2014.

A Petition for Rehabilitation of LAHC was filed on September 1, 2015, and on September 21, 2015, the Order of Rehabilitation was made permanent, and the LAHC was placed under the director of Donelon and Billy Bostick, the appointed receiver of LAHC.

On August 31, 2016, Donelon filed the Petition for Damages and Request for Jury Trial in this matter. A First Supplemental, Amending, and Restated Petition for Damages and Request for Jury Trial was filed on November 29, 2016. Even a cursory review of the Petition reveals a shotgun approach at all of the named directors and officers, without any level of specificity. In essence, the Petition asserts that anything and everything done at LAHC constituted actionable breaches of fiduciary duty. For these reasons, and a host of others, the Petition is fatally deficient and should be dismissed.

II. EXCEPTION OF NO RIGHT OF ACTION

Cromer and Calvi adopt the exception of no right of action, and the arguments and authorities cited therein, filed by co-defendants, Warner L. Thomas, IV and William A. Olivier. The points and authorities cited by Warner and Olivier apply equally to Cromer and Calvi and mandate dismissal of the Petition.

III. EXCEPTION OF NO CAUSE OF ACTION

Cromer and Calvi adopt the exception of no cause of action, and the arguments and authorities cited therein, filed by co-defendants, Warner L. Thomas, IV and William A. Olivier. The points and authorities cited by Warner and Olivier apply equally to Cromer and Calvi and

mandate dismissal of the entire Petition. In further support thereof, Cromer and Calvi submit as follows.

The seminal case on the exception of no cause of action is *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*¹. A cause of action “means the operative facts which give rise to the plaintiff’s right judicially to assert the action *against the defendant.*”² In *Everything on Wheels Subaru, Inc.*, the Supreme Court relied on prior Supreme Court precedent in *Hope v. Madison*.³

A cause of action is an act *on the part of the defendant* which gives rise to a plaintiff’s cause of complaint; ‘the existence of those facts which give a party a right to judicial interference in his behalf’; ‘the situation or state of facts which entitles a party to sustain an action’.

‘When used with reference to the pleadings by which the cause of action is alleged, the phrase signifies *the facts* upon which the plaintiff’s right to sue is based, and *upon which the defendant’s duty has arisen, coupled with the facts which constitute the latter’s wrong.*’ Quotations from #2, Words & Phrases, First Series, Cause of Action, P. 1017.⁴

In *Stovall v. Carimi*,⁵ the plaintiff filed a breach of fiduciary duty claim against the defendant attorneys for overcharging for costs not permitted by the Rules of Professional Conduct, not contracted for, and not provided in a written agreement. One of the defendant attorneys was a contract attorney. The trial court upheld the contract attorney’s exception of no cause of action, and the Fourth Circuit affirmed. The basis for finding no cause of action was due to the fact that the petition contained no specific allegations against the contract attorney. Rather, the petition contained only general allegations against all of the “defendants.” In finding these allegations inadequate, the Fourth Circuit said, “[t]he only specific allegation addressed to [the contract attorney] alleges only that he is a defendant, is of the age of majority, and resides in Orleans Parish.”⁶ The court determined that there were no factual allegations particular to the contract attorney to support the finding of a fiduciary duty owed by him to the plaintiff or a breach of that duty. The court held, “[t]he conclusory language of the petition referring to ‘defendants’ is insufficient to state a cause of action.”⁷

¹ 91-2708 (La. 4/12/93), 616 So.2d 1234, 1235.

² *Id.* at 1238 (emphasis added).

³ 192 La. 593, 188 So. 711, 715 (1939).

⁴ (Emphasis added.)

⁵ 95-0766 (La. App. 4 Cir. 11/30/95), *writ denied*, 672 So.2d 692 (5/3/96).

⁶ *Id.*

⁷ *Id.* at 1110.

Just as in *Stovall*, and as is clearly apparent from the Petition in the instant case, the only allegations against Cromer and Calvi are Plaintiff's statement of their name as defendants and their respective positions and dates of employment.⁸

All of the allegations set forth in the Petition are couched in terms of "the D&O Defendants" or "Defendants," making it impossible to determine whether the allegations do or do not pertain to Cromer or Calvi. None of the allegations establish whether Cromer, Calvi, or any other officer or director was or was not serving on the board or as an officer at the time relevant to that particular allegation. Furthermore, when Donelon complains of action by the "D&O Defendants," he never sets forth whether the action in question involved a particular officer or director.

Donelon is seeking to recover for Cromer's and Calvi's alleged breaches of fiduciary duty. But, the Petition does not specify how Cromer or Calvi are alleged to have breached their fiduciary duties. It does not list any wrongful act that each allegedly committed. It does not detail even a single act of alleged neglect on either's part. It does not set forth how Cromer or Calvi's conduct justifies overcoming the business judgment rule or the exculpatory clause in the Articles of Incorporation. Consequently, the Petitions fails to state a cause of action against Cromer or Calvi.

IV. EXCEPTION OF VAGUENESS.

The purpose of the dilatory exception of vagueness, which is provided for in La. CCP 926(5), is to place a defendant on notice of the nature of the facts sought to be established by the plaintiff in the lawsuit and to fairly inform the defendant of the nature of the cause of action, including sufficient particulars for the defendant to be able to prepare his defense.⁹ This can be accomplished by complying with the Code of Civil Procedure's requirements for pleading material facts.¹⁰

As noted by the Louisiana Supreme Court, "[o]ur code of civil procedure sets forth a system of fact pleading."¹¹ Article 854 provides that all factual allegations shall be set forth in the petition in numbered paragraphs, and Article 891 provides that a petition must contain a

⁸ (Petition, ¶¶ 10(b), (e), 15(1))

⁹ *Smart v. Gold, Weems, Bruser, Sues & Rundell*, 2006-1414 (La. App. 3 Cir. 04/04/07), 955 So.2d 263, 267, writ denied, 2007-0854 (La. 6/22/07), 959 So.2d 497.

¹⁰ *Price v. Kids World*, 2008-1815 (La. App. 1 Cir. 3/27/09), 9 So.3d 992, 995-996.

¹¹ *Fitzgerald v. Tucker*, 1998-2313 (La.6/29/99), 737 So.2d 706, 713.

short, clear, and concise statement of the material facts relevant to the transaction or occurrence that is the subject matter of the litigation. “To plead ‘material facts,’ the petitioner must allege more than mixed questions of law and fact, such as that the defendant breached the contract or acted unreasonably. Rather, ‘[t]he Code requires the pleader to state what act or omission he or she will establish at trial.’”¹² Therefore, when a petition merely “advances the broadest of allegations,”¹³ or fails to plead material facts,¹⁴ the exception of vagueness should be granted.

In this case, insufficient facts specific to Cromer and Calvi are set forth in the Petition, and the exception of vagueness should be sustained.

Cromer’s and Calvi’s names appear only two times in the 38 page, 143 paragraph petition. Each of those references is in the paragraphs where they are named as a defendant. There is no paragraph in the entire Petition when a substantive allegation is made using Cromer’s and Calvi’s names. There is no allegation in any paragraph that specifically states that Cromer or Calvi did anything wrong, breached any duty owed anyone, or caused any damage.

Donelon has summarily lumped Cromer and Calvi with the other director and officer defendants in a way that makes it impossible to determine what it is that each is accused of having done – or not done – that might support a judgment in favor of Donelon. This type of “group pleading” is wholly improper because it deprives the directors and officers of knowing which acts Plaintiff contends were committed by each defendant.¹⁵ The fatal problem with this mode of pleading is that a breach of fiduciary duty “is determined on an individual – rather than a collective basis.”¹⁶

Donelon has not satisfied the Code of Civil Procedure’s requirement that material facts be pled. He has not stated what act or omission it is that he plans to establish at trial concerning Cromer or Calvi. Therefore, the Petition is impermissibly vague as it concerns Cromer and Calvi. For that reason, Cromer’s and Calvi’s exception of vagueness should be sustained.

¹² *Fitzgerald*, 737 So.2d at 713 (internal citations omitted).

¹³ *Smart*, 955 So.2d at 267.

¹⁴ *Price*, 9 So.3d at 996.

¹⁵ See, *Roache v. Alpha Technical Servs., Inc.*, 10-1086 (La. App. 5 Cir. 6/29/11), 71 So.3d 520, 523, writ denied, 2011-1622 (La. 9/30/11), 71 So.3d 294 (“[i]t is fundamental that a petition for damages must give a defendant sufficient notice of the facts sought to be proven against him so as to enable him to prepare a defense[.]”).

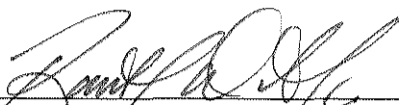
¹⁶ *In re: Gulf Fleet Holdings, Inc.*, 491 B.R. 747, 778 (Bankr. W.D. La. 2013), citing *In Re: Farmland Industries, Inc.*, 335 B.R. 398, 410 (Bankr. W.D. Mo. 2005); *Quintero Community Ass’n v. FDIC*, 792 F.2d 1002, 1009 (8th Cir. 2015) (upholding dismissal under Federal Rules of breach of fiduciary duty claims where group pleading employed).

V. CONCLUSION

For the foregoing reasons, the exceptions submitted by George G. Cromer and Charles D. Calvi should be granted, and the Petition should be dismissed, at Plaintiff's cost.

Respectfully submitted,

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