

CAUSE NO. DC-18-07841

Margaret Thomas

**EAST LAKE CAPITAL MANAGEMENT
LLC, SH REGENCY LEASING LLC, and
EL FW INTERMEDIARY I LLC**

Plaintiffs and Counter-Defendants,

v.

**NATIONAL HEALTH INVESTORS, INC.
and NHI-REIT OF AXEL LLC**

**Defendants, Counter-Claimant, and
Third-Party Plaintiff.**

v.

**ANDREW WHITE, Individually,
BENJAMIN LORD, Individually,
WESLEY MURRAY, Individually,
DAVID GAWLAS, Individually,
CHELSEA BALESTRA, Individually,
SH REGENCY CHARLOTTE LEASING,
LLC, SH REGENCY INDIANAPOLIS
LEASING, LLC, and SH REGENCY
MADISON LEASING, LLC.**

Third-Party Defendants

IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

95TH JUDICIAL DISTRICT

**COUNTER-DEFENDANTS AND THIRD-PARTY DEFENDANTS' MOTION TO
DISMISS PURSUANT TO THE TEXAS CITIZENS' PARTICIPATION ACT**

Counter-Defendants East Lake Capital Management LLC ("East Lake") and SH Regency Leasing LLC ("Regency") and Third-Party Defendants Andrew White ("White"), Benjamin Lord ("Lord"), Wesley Murray ("Murray"), David Gawlas ("Gawlas"), Chelsea Balestra ("Balestra"), SH Regency Charlotte Leasing, LLC, SH Regency Indianapolis Leasing, LLC, and SH Regency Madison Leasing, LLC (collectively, "Counter-Defendants") file this Motion to Dismiss

Pursuant to the Texas Citizens' Participation Act ("Motion") against Defendant NHI-REIT of Axel, LLC ("NHI-REIT" or "Landlord")¹ and respectfully show as follows.

I. INTRODUCTION

This case involves NHI's wrongful efforts to conceal its poor financial performance at the expense of Counter-Defendants, among others, and, in furtherance of this objective, to egregiously interfere with Counter-Defendants' contracts and business. NHI began this effort by first attempting to re-trade its contracts with Counter-Defendants to shore up NHI's increasingly poor financial performance and mask the gross mismanagement of NHI's executives. As part of its strong-arm tactics to renegotiate the leases on better terms, NHI began making false claims of "default" under the lease, an unfortunately common stratagem among unscrupulous landlords. At the same time, NHI embarked on a campaign to disrupt Counter-Defendants' business and frustrate performance of the very contracts NHI is charged to fulfill, including by "vexatious and harassing" litigation (as ruled by this Court) and trespassing onto Counter-Defendants' leased premises to steal confidential documents and induce Counter-Defendants' employees to sign affidavits containing false information under false pretenses, which Counter-Defendants then used for litigation advantage (all while during a statutorily-required stay in discovery).²

NHI-REIT has now filed its Second Supplemental Counterclaims and Third-Party Claims ("Second Supplemental Counterclaims") to further disrupt Counter-Defendants' business, drive up litigation costs, and harass Counter-Defendants. NHI's misguided tactics fail once again. Indeed, NHI-REIT's Second Supplemental Counterclaims epitomizes a strategic lawsuit against

¹ "NHI" refers collectively to NHI-REIT and Defendant National Health Investors, Inc.

² NHI's and its executives Eric Mendelsohn, Kristi Gaines, Kevin Pascoe, Roger Hopkins, Cameron Bell's extreme malfeasance is detailed at length in Plaintiffs' Original and Supplemental Petitions and Motion for Show Cause Order, Contempt, and Sanctions, which Counter-Defendants incorporate herein by reference.

public participation prohibited by the Texas Citizens' Participation Act ("TCPA" or the "Act").
TEX. CIV. PRAC. & REM. CODE § 27.001, *et seq.*

The Second Supplemental Counterclaims adds new allegations and includes for the first time claims for breach of a security agreement, fraudulent transfer, tortious interference with existing contracts, conspiracy, aiding and abetting/assisting or encouraging, aiding and abetting/assisting and participating, and vicarious and personal liability. These new claims are "based on, relate[] to, [and] in response to" communications by Counter-Defendants concerning payments from residents at Regency's senior care facilities, including specifically:

1. Counter-Defendants allegedly "depositing" the residents' checks in, or "transferring" the funds after depositing the checks to, "bank accounts held in the name of East Lake or another entity associated with White[;]"
2. White allegedly "instruct[ing] employees at the Facilities not to deposit checks received from residents[;]"
3. Counter-Defendants allegedly sending invoices to residents demanding additional payments; and
4. Counter-Defendants allegedly conspiring with one another in performing the above acts in the course of operating their facilities.

These communications trigger the TCPA because they (i) concern a good, product, or service in the marketplace, health or safety, and economic or community well-being; and (ii) were made in furtherance of Counter-Defendants' business enterprise and purported joint effort to the detriment of Counter-Plaintiffs. *Id.* at §§ 27.001, 27.003. In fact, ***NHI-REIT has judicially admitted the applicability of the TCPA here.*** In advance of its own prior TCPA motion to dismiss, NHI-REIT argued that the TCPA applied to communications relating to the operations and services involving Counter-Defendants' senior care facilities because they "quite obviously have a connection to health or safety, economic well-being, and a good, produce, or service in the marketplace."

Accordingly, absent “clear and specific evidence” of each element of its claims, the TCPA requires that this Court dismiss NHI-REIT’s entire Second Supplemental Counterclaims with prejudice, award Counter-Defendants their attorneys’ fees, and sanction NHI-REIT. NHI-REIT cannot meet this burden because its claims are meritless. And even if it somehow did, the Court must still dismiss the Second Supplemental Counterclaims because of Counter-Defendants’ defenses.³

II. NHI-REIT’S ALLEGATIONS

NHI-REIT’s own allegations, without more, establish that the TCPA applies to all of the claims in its Second Supplemental Counterclaims. *See Hersch v. Tatum*, 526 S.W.3d 462, 468 (Tex. 2017) (“When it is clear from the plaintiff’s pleadings that the action is covered by the Act, the defendant need show no more.”). Counter-Defendants therefore only summarize here the relevant allegations. Because the TCPA shifts the burden of proof to NHI-REIT (*see* Section III(A)(1) *infra*), Counter-Defendants do not, at this stage, submit evidence dispositive of NHI-REIT’s claims.

The parties. East Lake is a private equity firm based in Dallas, Texas specializing in real estate and healthcare-related investments. Regency is a tenant who leases and operates healthcare real estate. Specifically, Regency leases and operates, through various contractual relationships with subtenants SH Regency Charlotte Leasing, LLC, SH Regency Indianapolis Leasing, LLC, and SH Regency Madison Leasing, LLC (the “Subtenants”), other entities, affiliate companies,

³ As explained below, Counter-Defendants reserve the right to address any deficiencies or issues in a Reply brief after reviewing NHI-REIT’s response and any purported evidence. Counter-Defendants further reserve their right to submit their defenses, if NHI-REIT is able to shift the burden of proof.

and third-parties, three healthcare facilities pursuant to a Master Lease by and between Regency and Landlord dated June 30, 2015 (the “Regency Lease”).⁴

NHI-REIT’s allegations. On December 17, 2018, NHI filed its Second Supplemental Counterclaims. It centers on the July 1, 2015 Security Agreement between NHI-REIT (the Landlord), Regency, and the Subtenants (“Security Agreement”). NHI-REIT alleges that the Security Agreement was meant to provide NHI-REIT with additional protection in the event Regency defaulted under the Regency Lease by granting NHI-REIT a security interest in the assets of Regency and its Subtenants (the “Collateral”). Sec. Supp. Countercl. ¶ 29. The Collateral, NHI-REIT says, “includes checks written by residents of the Facilities to Regency Tenant.” *Id.* Regency and its Subtenants were permitted to use the Collateral in the ordinary course of business, but that right ceased upon the occurrence and during the continuation of an Event of Default under the Regency Lease. *Id.* at ¶ 32.

NHI-REIT alleges that Regency has been in default of the Regency Lease since early 2018 and thus Regency and Subtenants’ right to use the Collateral “terminated until further notice from Landlord.” *Id.* (brackets omitted). *Id.* at ¶¶ 32, 34. On November 29, 2018, NHI-REIT demanded via letter (the “Security Notice”) that Regency and the Subtenants “(1) notify its Receivable Debtors to make payment of any or all Receivable or Receivables directly to Landlord; and (2) segregate all checks and other forms of remittances received by Debtor on Receivables and deliver them to Landlord in the identical form as that in which received with proper endorsements.” *Id.* at ¶ 35.

⁴ These three facilities are: the Maybelle Carter facility in Nashville, Tennessee (“Maybelle Carter”), the MorningSide of College Park facility in Indianapolis, Indiana (“MorningSide”), and the Regency at Pineville facility in Charlotte, North Carolina (“Regency at Pineville”) (collectively, the “Regency Facilities”).

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