

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202

Plaintiff: IMPAIRED PROFESSIONAL
DIVERSION PROGRAM d/b/a COLORADO
NURSE HEALTH PROGRAM, a Colorado
nonprofit corporation,

v.

Defendant: COLORADO DEPARTMENT OF
REGULATORY AGENCIES

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Case Number: 2008 CV 4924

Div. 2 Ctrm:

**PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM-
MOTION WHICH DEFENDANT HAS ALREADY FILED IN 2008 CV 5592,
DIVISION 6, DENVER DISTRICT COURT, AND
TO STRIKE DEFENDANT'S AMENDED ANSWER**

Plaintiff requests that this Court dismiss the Defendant's Counterclaim/Motion for Temporary Restraining Order and for Preliminary Injunction, appended to its Answer and filed as an Amended Answer, as Defendant has already filed these motions against Plaintiff in a separate action which Defendant initiated last week in Denver District Court (Case No. 2008 CV 5592, Division 6) and on which Judge Hood has already entered an initial ruling, and Plaintiff further requests that this Court strike Defendant's Amended Answer filed more than twenty days after service solely to incorporate its motion which is already the subject of Case

No. 2008 CV 5592, Division 6, in an attempt to forum shop and circumvent another court's initial ruling.

DEFENDANT FILED CASE NO. 2008 CV 5592 SIXTEEN DAYS AFTER BEING SERVED IN THE PRESENT MATTER, IN AN ATTEMPT TO OBTAIN AN EX PARTE RULING WITHOUT NOTICE TO PLAINTIFF IN THIS ACTION, AND NOW IS TRYING TO CIRCUMVENT JUDGE HOOD

Defendant Colorado Department of Regulatory Agencies ("DORA") was served in the present action on June 10, 2008. That return of service is on file with this Court.

On June 26, 2008, sixteen days after being served in the present action, DORA filed its own action in Denver District Court, which is 2008 CV 5592 (entitled *Colorado Department of Regulatory Agencies v. Impaired Professional Diversion Program d/b/a Colorado Nurse Health Program*), in an attempt to obtain an *ex parte* ruling, without notice, against the Impaired Professional Diversion Program d/b/a Colorado Nurse Health Program ("CNHP") (CNHP is the Plaintiff in the present action, which DORA named as its Defendant in 2008 CV 5592). DORA made no attempt whatsoever to serve CNHP in 2008 CV 5592, or to notify CNHP's counsel of the action filed in Division 6 before Judge Hood, except that DORA apparently put a copy of its lawsuit "in the mail" to the undersigned on the same day that it went before Judge Hood to obtain relief. Judge Hood was not fooled, and did not allow DORA the relief requested. On June 27, 2008, counsel for DORA, Ms. Comer, sent an e-mail to the undersigned that she had appeared in Court and not obtained relief and stated she would be "mailing" a copy of Judge Hood' order to the undersigned on June 30th (Exhibit A). Ms. Comer could have appended Judge Hood' order to her e-mail on June 27th, but did not. The undersigned also has not, to date, received a copy of that order from Ms. Comer in the mail (although the Court was called on Monday to have the order read over the phone).

In a nutshell (and CNHP would appreciate the opportunity to file a brief on this, should this Court decide not to grant the relief requested in this Motion beforehand), 42 C.F.R. 2.19 requires CNHP to destroy its files upon dissolution (as it would have no way to maintain them past dissolution); DORA is seeking to force CNHP to dissolve immediately so that it cannot prosecute its case in this Court, and is also seeking to control CNHP's files contrary to law. CNHP believes that Ms. Comer, senior litigation counsel for the AG's office appearing on behalf of DORA, plans to appear before this Court *ex parte* today, and so CNHP is also filing this Motion to put this Court on notice of what has already transpired, as well as to request the appropriate relief.

1. Clear reason for filing of separate lawsuit was to obtain relief without notice to CNHP; now that this relief has been denied by Judge Hood, DORA should not be able to file the same motion in this Court.

DORA's filing of the separate lawsuit against CNHP in 2008 CV 5592 was done solely to obtain *ex parte* relief without allowing CNHP to respond. On Thursday, June 26, 2008, Ms. Comer, senior litigation counsel for the Office of the Attorney General, wrote to the undersigned that she planned to seek injunctive relief to control CNHP's files (Exhibit B). Ms. Comer was aware that 42 C.F.R. 2.19 required CNHP to destroy its files upon dissolution (as it would have no way to maintain them past dissolution) and DORA was also trying to force CNHP to dissolve on June 30, 2008 by cutting off CNHP's funding to operate. Clearly, DORA was also intending to siphon any remaining funds that CNHP may have left into litigation costs. When Ms. Comer filed her suit for injunctive relief in a separate action in Denver District Court without even attempting to serve CNHP in that action, and put a copy of her pleadings in the U.S. Mails (when she has e-mailed everything else), this was clearly

calculated to obtain *ex parte* relief without giving CNHP notice or an opportunity to appear. Ms. Comer's self-serving statement to the undersigned in her e-mail of June 27th (Exhibit A) is nonsensical – there is no “off chance” that the undersigned would have had notice of a lawsuit through “lexus nexus” when she was not counsel of record, and the Defendant had not even been served.

In light of the devastating consequences that would ensue if DORA were given control of CNHP's files contrary to law, and in light of the fact that the undersigned had no idea of what Judge Hood's ruling was from Lexis Nexis (as it was not viewable on the docket sheet, and Ms. Comer was not even intending to “mail” it until Monday), the undersigned researched and drafted a Response to Ms. Comer's pleading over the weekend and filed same on Monday in Case No. 2008 CV 5592, Division 6.

Now, Ms. Comer has tailored her motion for injunctive relief and appended it in her Amended Answer, filed without leave yesterday, more than twenty days after service. Ms. Comer intimates in her e-mail sent at 4 p.m. yesterday (Exhibit C) that she plans to again appear before the Court, this time before Judge Stern, in order to seek *ex parte* relief today.

The fact that Ms. Comer's motions for injunctive relief are the same as those filed in Case No. 2008 CV 5592 is substantiated by the fact that Ms. Comer has the audacity to append CNHP's Response, filed in Case No. 2008 CV 5592, as an exhibit to her Amended Answer in this case. Further, the Amended Answer actually states: “This Counterclaim-motion is essentially a resubmission of that motion [already filed in 2008 CV 5592] with updated facts, additional exhibits, and the requisite certifications. The legal basis remains the same. . . .” (Amended Answer, p. 6, ¶ 9). So, apparently, DORA believes that it can just refile its same motion another time, in another case, try to fix it up a bit after reading CNHP's

response in the first case, and append CNHP's response from the first case as an exhibit – then march in to this Court *ex parte* to seek the same relief again here! Forum shopping is not allowed, and the Counterclaim-motion which has been filed as an Amended Answer should be dismissed and/or stricken.

2. DORA asserts that it will just dismiss 2008 CV 5592 in order to get a TRO in this action; however, as CNHP already filed a response in 2008 CV 5592, DORA knows it is unable to unilaterally do so pursuant to Rule 41, C.R.C.P.

Ms. Comer also asserts that she now intends to unilaterally dismiss the action which she filed in 2008 CV 5592 (Exhibit C) so that she can now seek the relief which Judge Nave denied to her by going in today to seek an audience *ex parte* in this Court. However, as CNHP filed a response in 2008 CV 5592 on Monday, she knows that she is unable to unilaterally dismiss that action under Rule 41, C.R.C.P.

DORA'S AMENDED ANSWER IS UNTIMELY, REDUNDANT, AND SUBMITTED WITHOUT LEAVE OF COURT SOLELY FOR THE PURPOSE OF HARRASSMENT AND DELAY

DORA had notice that its motion in 2008 CV 5592 was denied on June 27, 2008 and had time to include any request consequent to this in its Answer filed in this action on Monday, June 30, 2008; there is no legal basis to now allow an amendment to this answer to assert motions filed in another case as a “counterclaim” in the present action, clearly for the purpose of harrassment and delay. As DORA was served in the present matter on June 10, 2008, and the Office of the Attorney General was previously informed that no extension of time to answer could be allowed in light of CNHP's forced dissolution by DORA (phone conversation with Will Allen, attorney with the Office of the Attorney General, on June 24, 2008), there is no legal or equitable reason to allow the Amended Answer to stand. Further,

as the purpose of the Amended Answer is clearly to reassert motions which DORA filed in another Division of this Court, the Amended Answer is redundant and should be stricken pursuant to Rule 12, C.R.C.P.

**INEQUITY OF ALLOWING DORA TO ACCELERATE CNHP'S DISSOLUTION
WHILE ATTEMPTING TO CONFISCATE ITS FILES**

DORA believes it can operate with impunity in this matter, by forcing CNHP to dissolve by cutting off its funding and increasing its litigation costs, and asking this Court to allow it to control CNHP's files, clearly contrary to law. (See Affidavit of Marjorie Derozier, filed independently to support this and another pending motion by CNHP). DORA is glib about the fact that it will not even be required to post a bond for the relief that it requests against CNHP (phone conversation with Linda Comer on June 25, 2008). Surely, at some point, there should be some reasonable sanction entered against DORA for refileing for the same relief in this Court that it has already been denied in Division 6, and for forum shopping, *inter alia*. As CNHP is on the cusp of dissolution and was forced to lay off all but three employees on Monday, it requests that this Court consider such other and further relief as may be appropriate under Rule 11, C.R.C.P. or otherwise.

WHEREFORE, pursuant to Rule 12 of the Colorado Rules of Civil Procedure, CNHP respectfully moves this Court to dismiss or strike DORA's Motion for Temporary Restraining Order and Motion for Preliminary Injunction appended in its Amended Answer, which DORA has already been filed in Case No. 2008 CV 5592, Denver District Court, Division 6, before Judge Hood, and award sanctions as appropriate for needlessly increasing the cost of this

litigation. Plaintiff further requests that this Court strike the Amended Answer of Defendant as redundant, also pursuant to Rule 12, C.R.C.P. Finally, CNHP requests such other and further relief as this Court may deem appropriate.

DATED this 3rd day of July, 2008.

Respectfully submitted,
LESLIE J. RANNIGER, P.C.

/s/ Leslie J. Ranniger
Original signature on file
By: Leslie J. Ranniger, #15202
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I did, on this 3rd day of July, 2008, serve a true and correct copy of the foregoing on the following via LexisNexis:

Linda Comer, Esq.
Senior Litigation Counsel
Office of Attorney General
1525 Sherman St., 7th floor
Denver, CO 80203
Counsel for Defendant, Colorado
Department of Regulatory Agencies

/s/ Leslie J. Ranniger
Original signature on file