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7 *Attorneys for Nurse Olivia Harper*

8 **BEFORE THE STATE BOARD OF NURSING**

9 IN THE MATTER OF REGISTERED
10 NURSE LICENSE NO. RN 1002345
11 ISSUED TO:

12 OLIVIA HARPER,
13
14 RESPONDENT.

**RESPONDENT'S MOTION TO
DISMISS**

CASE NO. 0123444

15 By and through counsel undersigned, Respondent seeks dismissal of the
16 Complaint for failure to prosecute, violation of due process resulting in arbitrary and
17 capricious conduct by the State Board of Nursing contrary to both state and federal law
18 as well as public policy.

19 **I. STATEMENT OF FACTS**

20 The State Board of Nursing received a Complaint from Meredith Grey on or
21 about March 1, 2012, with allegations surrounding Nurse Olivia Harper's care and
22 treatment of Patient G.A. No Other patients are mentioned in the Complaint. (Ex. 1,
23 Email Complaint). On or about April 7, 2012, Olivia Harper received a Notice of
24 Complaint and Questionnaire. (Ex. 2, April 7, 2012 Letter). Investigator Miranda Bailey
25 was assigned to Nurse Harper's case. *Id.*
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1 In the April 7, 2012 letter, the following language is present “Due to the large
2 number of investigations. . . it may take several months to complete the investigation of
3 the Complaint . . . During that time that status of your license remains unchanged and
4 without restrictions. If anyone should contact the Board and inquire about the status of
5 your license, the agency is required to provide public information that there has been
6 either a complaint or self-report received, the date received and a general descriptor of
7 the nature of the complaint”. *Id.*

8
9 Ms. Harper completed her Investigative Questionnaire, including description of
10 the event on or about May 17, 2012. (Ex. 3, Questionnaire). Respondent Harper and her
11 attorney appeared at the State Board of Nursing to review Ms. Harper’s file in May of
12 2013 and the Board’s records were incomplete. As a result, on June 7, 2013, a formal
13 request to schedule a second appointment to review the Nursing Board file was
14 submitted to Investigator Bailey. The request addressed: (1) the incomplete files, i.e.,
15 medical charts of the patients, (2) the lack of notice regarding additional Patient
16 complaints/events the Board wished to address, and (3) requested Ms. Harper’s file.
17 (Ex. 4, June 7, 2013 Letter).

18
19 On July 1, 2013, The Board of Nursing issued a Notice of Meeting for the
20 Board’s July 5, 2013 meeting. (Ex. 5, Notice of Meeting) On July 5, 2013, Board
21 investigator Ms. Miranda Bailey advised the State Board of Nursing that she had
22 concluded her investigation of Complaint filed against Olivia Harper, RN. (Ex. 6,
23 Meeting Minutes). At the regular Board meeting on July 5, 2013, after a presentation of
24 the case by the investigator and response by Ms. Harper, the Board noted that the
25 investigator was recommending a “practice evaluation.” The Board President told
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1 Nurse Harper that a practice evaluation often precedes restrictions, suspension and/or
2 revocation and is considered harsh discipline. Although in theory, a nurse can be
3 “cleared” after an evaluation, the Board President made it clear on the record that such
4 action rarely occurs. The Board opted for more lenient resolution rejecting the
5 recommendation of Ms. Bailey and moving for a “Decree of Censure by Consent
6 Agreement.”

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8 The Consent Agreement was finalized and presented to Ms. Harper on July 31,
9 2013. (Ex. 7, Consent Agreement). The Board forwarded the Consent Agreement to us
10 and advised us, as counsel for the Respondent, as follows: Should your client decide not
11 to accept and sign this Consent Agreement within 30 days, the Board has directed that
12 Notice of Charges be issued as the Board has determined, pursuant to an investigation,
13 that reasonable grounds exist to discipline your client’s license pursuant A.R.S. §§ 32-
14 1606 and 32-1663. To assist you in deciding whether or not to accept the Board’s
15 proposed offer in lieu of proceeding to hearing, your client may request a copy of the
16 Investigative Report by completing, signing, and returning the enclosed Request for a
17 Copy of the Investigative Report. The Board does have the authority to withhold the
18 Complaint and/or the identity of the complainant in limited circumstances.

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20 After careful review, Ms. Harper rejected the Consent Agreement which expired
21 August 31, 2013, and awaited the Notice of Charges. Respondent allowed the Consent
22 to lapse, thereby rejecting the Consent. There was no other procedural mechanism
23 offered to her to communicate her rejection and she anticipated that Notice would be
24 forthcoming. The State Board of Nursing, however, did not issue a Notice of Charges
25 and had no further contact with Respondent.
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1 Miranda Bailey, the lead investigator, advised counsel for the Respondent “The
2 Consent Agreement is due - August 31, 2013, I believe - so likely will write up the
3 Notice Of Charges on Monday– it goes to legal for review and then gets mailed out.”
4 (See Ex. 8, email correspondence from Miranda Bailey). The failure to issue a Formal
5 Notice of Charges upon expiration of the Board’s Order is a violation of due process.

6 The Board took no action whatsoever until inexplicably a “Notice of Charges”
7 was issued March 4, 2014. (Ex. 9, Notice of Charges). This was not an “oversight” but
8 rather a deliberate and intentional act by the State Board of Nursing to delay
9 adjudication of Nurse Harper’s case thereby depriving her due process. The State Board
10 of Nursing staff investigator advised that the Notice of Charges should have been issued
11 upon expiration of the Consent Agreement.

12 Nurse Harper responded quickly by requesting a hearing in respect to the Notice
13 of Charges on March 14, 2014. (Ex. 10, March 14, 2014 Letter). Unfortunately for Ms.
14 Harper, the improper procedure continued. Board staff sent a transfer letter to the
15 Respondent and her attorneys on April 24, 2014. (Ex. 11, April 24, 2014 Letter). The
16 transfer letter caused considerable confusion because there is no rule or statute
17 regarding a “transfer letter.” However, the “transfer letter” contained false and
18 misleading legal options for Respondent’s consideration. Among these options, the
19 transfer letter advised Respondent that she had only one chance to negotiate a settlement
20 agreement; the settlement proposal must be received before the Board’s arbitrary
21 deadline of May 5, 2014 and, if the settlement agreement is not accepted, the matter will
22 proceed to hearing with no further opportunity for settlement with the Board.
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1 On May 1, 2014, Respondent’s counsel set a letter to the Board outlining the due
2 process concerns and requested a dismissal. (Ex.12, May 1, 2014 Letter). The State
3 Board, through attorney general Richard Webber, responded to the request for dismissal
4 on May 10, 2014. (Ex. 13, Response). This was not filed in the Office of
5 Administrative Hearings but presented and filed with the State Board of Nursing.

6 Nonetheless, this mandate caused Respondent several restless nights and
7 increased her anxiety because the State Board of Nursing is vested with the State’s
8 authority and, considering the previous improprieties that occurred, Respondent was
9 confused regarding the procedure and her options. Additionally, neither Respondent nor
10 her attorneys authorized Board staff to communicate directly with Respondent. By
11 sending the transfer letter with blatantly false legal instruction and communicating a
12 “take it or leave it” option directly to Respondent, Board staff purposely injected a
13 conflict of interest between Respondent and her attorneys. After reviewing the letter,
14 Respondent did not know who to trust and the options presented for Respondent eroded
15 the relationship between Respondent and her attorneys. Now, the State Board attorneys
16 take the position that:
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19 The purpose of that deadline is to encourage Respondents to timely address
20 matters in the Hearing Department, and pursuant to this Board's previous direction, the
21 deadline is both informal and flexibly interpreted in order to facilitate resolution of
22 cases. (Ex. 13, State’s Response at pg. 3).

23
24 Unfortunately, the statement contained within the State’s response directly
25 contradicts the plain language of the transfer letter which very clearly explained in
26 UPPERCASE AND UNDERLINED TYPEFACE that the Board would consider only

1 “ONE (1) written settlement offer” which would be Respondent’s only opportunity to
2 resolve this case in lieu of formal hearing. The Board attorneys recanted the position
3 only after Respondent’s attorney presented the settlement offer and explained to Board
4 staff that the deadline was completely arbitrary and violated the law. It is unknown how
5 many unrepresented nurses in Arizona received a similar letter and faced the same stress
6 and anxiety occasioned by State Board staff’s blatantly false legal options presented in
7 the letter to its licensees. (Ex. 14, Letter).
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9 Additionally, the letter plainly stated, “While your client’s care is in the Hearing
10 Department, the status of her license will indicate Complaint – Outcome Pending.”
11 Your client’s status will remain as such until there is a final outcome in this cause. *Id.*
12 A license verification search on the State Board of Nursing shows that Nurse Harper has
13 an unencumbered license. (Ex. 15, License Search). There is no language, notification,
14 or warning of a pending Complaint.
15

16 Finally, on the issue of settlement, the rules require the State Board of Nursing to
17 hold a settlement conference within fifteen (15) days after the Respondent makes the
18 request. *See* A.R.S. § 41-1092.06. Thus, the Board has no authority to set an arbitrary
19 deadline of May 5, 2014, for settlement. On May 2, 2014, the State also filed a Notice
20 of Board Consideration of Request for Dismissal to be heard by the Board on May 16,
21 2014. (Ex. 16, Notice). Respondent filed her Reply to the State’s Motion to Dismiss on
22 May 18, 2014. On May 20, 2014, at the Board hearing, the Board unanimously carried
23 to deny Motion to Dismiss and proceed to hearing. (Ex. 17, May 2014 Meeting
24 Minutes). No further action was taken by the Board, staff, or representatives. Nurse
25 Harper sent another formal request that the State Board of Nursing immediately request
26

1 a hearing date in the Office of Administrative Hearings on July 6, 2014. Once again,
2 no further action was taken by the Board, staff, or representatives until over three years
3 later. Cristina Yang, counsel for the Board emailed Attorney Kent stating that the case
4 was still pending in the hearing department. (Ex. 18, October 1, 2017 email). The
5 Board still did not transfer the case to the hearing department despite threats of transfer.
6 (Ex. 18, October 2017 Emails with C. Yang).

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8 The bottom line is that this "Complaint" is now over six years old without any
9 resolution or opportunity for Nurse Harper to present evidence in her defense.
10 Respondent respectfully moves for dismissal, once again, for failure to prosecute.

11 **II. LEGAL ARGUMENT**

12 **a. THE APA MANDATES RESOLUTION WITHIN 60 DAYS OF** 13 **REQUEST FOR HEARING.**

14 A reasonable time frame for investigation and prosecution of all Complaints
15 against nursing license is two years. This is consistent with the State's civil laws and
16 accomplishes the governments' goal of protecting the public while ensuring due process
17 for the defendants. In this case, Arizona Revised Statutes require that once Notice of
18 Charges is issued, the Office of Administrative Hearings ("OAH") must hold a hearing
19 within sixty (60) days. *See* A.R.S. § 41-1092.05.

20 The State Board of Nursing or the OAH, or both, are acting in direct violation of
21 the law because, the Board has referred the matter for hearing and has no authority
22 thereafter to direct the OAH to "prioritize" or schedule cases. Indeed, the State Board
23 of Nursing has no authority whatsoever to direct OAH. The OAH Director is already
24 endowed by the legislature with the means to ensure prompt hearings. If, for example,
25 the current panel of Administrative Law Judges ("ALJ") are insufficient to handle the
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1 workload, the law allows for the Director of OAH to retain temporary ALJs to ensure
2 prompt resolution. *See* A.R.S. § 41-1092.01 (I). The failure of the Board set the matter
3 for hearing is simply a means to avoid an explicit obligation to resolve this matter
4 within sixty (60) days after the Respondent has formally requested a hearing.

5
6 **b. PROSECUTION OF A CLAIM SIX YEARS AFTER THE EVENT**
7 **IS A DENIAL OF DUE PROCESS AND VIOLATES PUBLIC**
8 **POLICY AS EMBODIED IN A REASONABLE STATUTE OF**
9 **LIMITATIONS.**

10 Although there is no "statute" on point, in general, this state recognizes a
11 limitation on when certain complaints can be investigated or prosecuted. *See generally*
12 *Dahnad v. Buttrick*, 201 Ariz. 394, 36 P.3d 742 (App. 2001). Arizona's Administrative
13 Code, as a whole, reflects the intent of the legislature to investigate and prosecute
14 complaints within a timely manner. The plain purpose of statutes of limitations is to
15 identify the outer limits of the period of time within which an action may be brought to
16 seek, redress, or to otherwise enforce legal rights created by the legislature or at
17 common law. *See In Re Estate of Travers*, 192 Ariz. 333, 336, ¶ 21, 965 p.2d 67, 70
18 (App.1998) ("a statute of limitations is a legislative enactment which sets maximum
19 time periods during which certain actions can be brought." (citing Black's Law
20 Dictionary 927 (6th ed.1990))). As a matter of public policy, our legislature has
21 determined that claims must be brought within an identifiable period of time, and claims
22 brought thereafter are, absent certain circumstances, too stale to be enforceable. *Porter*
23 *v. Spader*, 225 Ariz. 424, 427, ¶ 7, 239 p.3d 743, 746 (App. 2010). The legitimate
24 purposes of statutes of limitations are threefold (1) to protect defendants from stale
25 claims, *See Brooks v. Southern Pacific Co.*, 105 Ariz. 442, 444, 466 p.2d 736, 738
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1 (1970) (pursuit of a claim after an unreasonable amount of time may be thwarted when
2 evidence may have been lost or witnesses' memories have faded); (2) to protect
3 defendants from insecurity — economic, psychological, or both, comment,
4 developments in the law: statutes of limitations, 63 Harv.L.Rev. 1177, 1185 (1950)
5 “there comes a time when he ought to be secure in his reasonable expectation that the
6 slate has been wiped clean of ancient obligations;” and (3) to protect courts from the
7 burden of stale claims. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65
8 S.Ct. 1137, 1142, 89 l.ed. 1628 (1945). *See also Jackson v. Am. Credit Bureau, Inc.*, 23
9 Ariz. App. 199, 531 P.2D 932 (1975) (“the underlying purpose of statutes of limitations
10 is to prevent the unexpected enforcement of stale claims concerning which persons
11 interested have been thrown off their guard by want of prosecution.”

12
13 In this case the Board had ample opportunity and sufficient information
14 regarding the Complaint to offer a consent agreement. Once that agreement was
15 rejected, the Board was required by the public policy and Arizona Administrative Code
16 to hold a hearing within sixty (60) days. The failure to hold a hearing violates all
17 principles and the intent of the legislature to timely prosecute a claim. Moreover, any
18 action taken now would not serve to protect the public and would be highly prejudicial.

19
20 **c. PROSECUTION OF THIS MATTER IS BARRED UNDER THE**
21 **DOCTRINE OF LACHES.**

22 The doctrine of laches is based on the maxim that "equity aids the vigilant and
23 not those who slumber on their rights." *Irwin v. Pac. Am. Life Ins. Co.*, 10 Ariz. App.
24 196, 201, 457 P.2d 736, 741 (1969) A legal right or claim will not be enforced or
25 allowed if a long delay in asserting the right or claim has prejudiced the adverse party."
26

1 In this case, the Complainant no longer works for the facility. Witnesses, even if
2 available, would not have any reliable memory of the events, and the nature of the board
3 proceedings precludes investigation by the Respondent until the Notice of Charges is
4 issued. Thus, in this case, the delay results in prejudice to the Respondent in her
5 inability to preserve and present evidence critical to the defense.

6
7 **d. FEDERAL LAW AND PUBLIC POLICY PRECLUDE PROSECUTION BEYOND A REASONABLE TIME.**

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9 Given the current state of the compact licensure, unreasonable restrictions on the
10 freedom of movement between states is in opposition to the Federal APA, and the
11 Commerce Clause of the United States of the United States Constitution provides that
12 the congress shall have the power to regulate interstate and foreign commerce. (*See* Art.
13 I, §8, cl. 3) The plain meaning of this language might indicate a limited power to
14 regulate commercial trade between persons in one state and persons outside of that state.
15 The Federal APA, 5 U.S.C. Subchapter ii Section 554 directs reviewing courts to
16 “compel agency action unlawfully withheld or unreasonably delayed” and to “hold
17 unlawful and set aside agency action, findings, and conclusions” that violate the law or
18 are otherwise “arbitrary and capricious.” (*See also* Congressional Research Service
19 (December 2016) “An Introduction to Judicial Review of Federal Agency Action” Cole,
20 Jared p. Accessed on 8/8 at <https://fas.org/sgp/crs/misc/r44699.pdf>). This review is
21 admittedly limited to “final agency action” that is not precluded from review by another
22 statute or legally committed to the agency’s discretion. (*See* Federal Administrative
23 Procedure Act (5 U.S.C. Subchapter ii) Section 554 (adjudications)). However,
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1 delaying final resolution to avoid compliance with timely procedures is in violation of
2 the law itself:

3 Accordingly, the federal law mandates inter alia:
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5 (c) the agency shall give all interested parties opportunity

6 for--

7 (1) the submission and consideration of facts,
8 arguments, offers of settlement, or proposals of
9 adjustment when time, the nature of the proceeding,
10 and the public interest permit; and

11 (2) to the extent that the parties are unable to
12 determine a controversy by consent, hearing and
13 decision on notice and in accordance with sections
14 556 and 557 of this title.

15 *See* 5 U.S.C.A. § 554 (West).

16 Here the Commerce Clause supersedes any state statute if the result is that
17 freedom of movement is unreasonably restricted. The Federal APA offers guidance and
18 legal support precluding the untimely prosecution of complaints against Respondent.

19 **III. Conclusion**

20 For the foregoing reasons, Respondent respectfully requests the State Board of
21 Nursing dismiss this Complaint for failure to Prosecute.

22 Dated this 17th day of August 2018.

23 KENT LAW GROUP, PLLC

24 By _____

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Attorneys for Respondent

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Copy of the foregoing mailed this
17th day of August 2018 to:

Assistant Attorney General
c/o State Board of Nursing

SAMPLE BRIEF