

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MEYERS DIVISION**

Case No. _____

AJS WEIGHTLOSS, LLC, d/b/a
NUVIVA MEDICAL WEIGHTLOSS

Plaintiff,

v.

MICHAEL S. ROSENTHAL, and
WAGNER, JOHNSTON & ROSENTHAL, P.C.,

Defendants.

_____ /

COMPLAINT

Plaintiff, AJS WEIGHTLOSS, LLC, d/b/a NUVIVA MEDICAL WEIGHTLOSS, by and through its undersigned counsel, hereby sues Defendants, MICHAEL S. ROSENTHAL and WAGNER, JOHNSTON & ROSENTHAL, P.C., and states as follows:

INTRODUCTION

1. This is a civil action brought by AJS WEIGHTLOSS, LLC, d/b/a NUVIVA MEDICAL WEIGHTLOSS (hereinafter “Nuviva” or “Plaintiff”) and against MICHAEL S. ROSENTHAL (hereinafter “Rosenthal”) and WAGNER, JOHNSTON & ROSENTHAL, P.C. (hereinafter “WJR”) (hereinafter collectively “Defendants”) for breach of contract, and professional negligence resulting from the parties alleged professional relationship.

PARTIES, JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(1) as the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different States.

3. Plaintiff, AJS WEIGHTLOSS, LLC, is a Florida limited liability company with its principal place of business in Fort Myers, Florida.

4. Defendant, MICHAEL S. ROSENTHAL, is an individual who, upon information and belief, resides in Atlanta, Georgia. MICHAEL S. ROSENTHAL, is a shareholder of WAGNER, JOHNSTON & ROSENTHAL, P.C.

5. Defendant, WAGNER, JOHNSTON & ROSENTHAL, P.C., is a Georgia corporation with its principal place of business in Atlanta, Georgia.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(3) in that the Defendants are subject to this Court's personal jurisdiction.

7. All conditions precedent to the filing of this action have been satisfied.

FACTUAL ALLEGATIONS

8. In June 2010 Plaintiff retained Rosenthal, an attorney and shareholder at WJR, for Rosenthal to review Nuviva's draft Franchise Disclosure Document ("FDD") for its legal compliance with FTC regulations. *See* engagement letter, dated June 16, 2010, and attached as **Exhibit A**.

9. Plaintiff paid Rosenthal approximately \$4,000.00 for said professional services. *See* Exhibit A, *supra*, and invoices for professional services, attached as **Exhibit B**.

10. The Nuviva FDD was drafted by non-attorneys at a business management company called Third Eye Management, which referred Plaintiff to Rosenthal and WJR for the aforementioned legal review.

11. Upon information and belief, Rosenthal failed to engage in a competent and reasonable review of the franchise documents.

12. The documents, allegedly reviewed by Rosenthal, contain numerous material legal violations of the FTC's rules and regulations regarding the sale of franchises.

13. Namely, the FDD reviewed and approved by Rosenthal and WJR violated the FTC Rule by:

- a. Failing to disclose the cost of the initial inventory to be purchased by the Franchisor;
- b. Failing to disclose the local advertising requirement, fees for location and management assistance, fees for an advertising co-op, fees to approve a new vendor;
- c. Failing to disclose the experience of the franchisor in compiling the estimated initial investment;
- d. Failing to adequately distinguish purchases from the Franchisor, its designees, approved suppliers, or those pursuant to the Franchisor's specifications;
- e. Failing to list the costs of required purchases or leases and the proportion of required purchases or leases to all purchases and leases by the franchisee of goods and services;
- f. Failing to disclose payment from designated suppliers;
- g. Failing to disclose purchasing or distribution cooperatives or negotiation of purchase arrangements;
- h. Failing to disclose material benefits received by the franchisor based on franchisees' purchases;
- i. Inadequately disclosing the training and experience of the instructors;
- j. Failing to disclose grand opening advertising, local advertising and the National Marketing Fund;
- k. Failing to disclose the Table of Contents of the Manual;
- l. Failing to describe the type of hardware and software for computer systems;
- m. Failing to disclose the minimum territory and any relocation rights;

- n. Failing to disclose whether the franchisor operates a similar business under a different mark;
 - o. Failing to contain negative disclosure of state trademark registrations;
 - p. Failing to cross-reference the state addenda and related requisite language;
 - q. Failing to include Financial Performance Representations made as required by the Amended Franchise Rule FAQ 33; and
 - r. Failing to make a disclosure regarding a Franchise Advisory Board or an Independent Franchisee Association.
14. Moreover, Rosenthal failed to ever communicate with Plaintiff, his true client, but instead communicated regarding his representation of Plaintiff with Third Eye Management. *See Exhibit B, supra.*
15. Rosenthal and WJR knew that AJS was their client, but communicated exclusively with Third Eye Management throughout the representation. *See Exhibits A and B, supra.*
16. As a result of Defendants' failure to fulfill their professional and contractual responsibilities, Plaintiff has been damaged.
17. Plaintiff has been forced to retain the undersigned to represent its interests and is required to pay the undersigned a reasonable fee.

LEGAL CLAIMS

Count I- Breach of Contract

18. Plaintiff incorporates the allegations contained in paragraphs 1-15 as if fully alleged herein.
19. Plaintiff and Defendants entered into a valid and binding written agreement for professional services. *See Exhibit A, supra.*

20. Pursuant to the agreement's mutual obligations, Plaintiff remitted payment to Defendants and Defendants were obligated to review the Nuviva franchise documents for legal compliance. *See Exhibit A, supra.*

21. Also pursuant to the agreement, Defendants were required to protect the client information it received from Plaintiff and hold it in confidence. *See Exhibit A, supra.*

22. However, Defendants breached their contractual duties by failing to reasonably review the Nuviva franchise documents, communicate with the Plaintiff, identify several legal issues in the FDD, or hold the client information they received from Plaintiff in confidence.

23. As a direct and proximate cause of Defendants' breach, Plaintiff has suffered substantial damages.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in their favor and enter an award of money damages, actual and compensatory, in an amount to be determined at trial, in addition to special damages resulting from Plaintiff's settlement with Nuviva franchisee, Ms. Giddens, and expenses related to hiring alternate counsel to correct the deficiencies in the franchise documents.

Count II- Professional Negligence

24. Plaintiff incorporates the allegations contained in paragraphs 1-15 as if fully alleged herein.

25. Defendants had a duty to exercise reasonable care in carrying out their professional obligations to Plaintiff.

26. Defendants breached that duty when they failed to perform their professional duties in a reasonable manner and hold the client information they received from Plaintiff in confidence.

27. As a direct and proximate cause of Defendants' failures to use reasonable care, Plaintiff has suffered substantial damages.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in their favor and enter an award of money damages, actual and compensatory, in an amount to be determined at trial, in addition to special damages resulting from Plaintiff's settlement with Nuviva franchisee, Ms. Giddens, and expenses related to hiring alternate counsel to correct the deficiencies in the franchise documents.

JURY DEMAND

28. Plaintiff demands a trial by jury on all claims triable.

Dated: October 2, 2013

Respectfully submitted,

s/ C.C. TRAINA

Joseph Garrity, Esq.

Florida Bar No. 87531

jgarrity@gwlawfirm.net

C.C. Traina, Esq.

Florida Bar No. 91238

ctraina@gwlawfirm.net

GARRITY-WEISS, P.A.

1002 East Newport Center Drive, Suite 102

Deerfield Beach, FL 33442

Telephone: (954) 570-6616

Facsimile: (954) 570-6618

Counsel for Plaintiff

EXHIBIT A

Garrity-Weiss, P.A.

1002 East New Port Center Drive, Suite 102, Deerfield Beach, Florida 33442

Broward (954) 570-6616

Fax (954) 570-6618

Wagner, Johnston & Rosenthal, P.C.

ATTORNEYS AT LAW
5855 SANDY SPRINGS CIRCLE, SUITE 300
ATLANTA, GEORGIA 30328-4834

MICHAEL S. ROSENTHAL

Email: msr@wjrlaw.com

(404) 261-0500
FACSIMILE (404) 835-5123

June 16, 2010

Via email to: abevan@thirdeyemanagement.com

Alex Joseph, CEO
AJS Weight Loss, LLC
d/b/a New Life Weight Loss Centers
c/o Adrian Bevia
13450 Parker Commons Blvd. #105
Fort Myers, FL 33912

Re: Franchise Disclosure Documents Review

Dear Alex:

This will confirm our discussions with Mr. Bevia wherein we agreed to represent you as follows:

1. **Matter:** We will represent you in regard to the review of Franchise Disclosure Documents and for any other matters which you may determine.
2. **Billing:** We will bill you as follows:
 - a. Detailed billing statements ("Statements") will be rendered on a monthly basis showing the work performed by date, professional and the amount of time spent (and sent in care of Mr. Bevia);
 - b. We will bill you on the basis of fees, plus expenses, with fees being determined by the regular hourly rate for attorneys and paralegals (please see the attached Memo on WJR Billing Policies);
 - c. The current hourly rate for those individuals who will be primarily responsible for work on your matter is:

Michael S. Rosenthal \$360.00

d. Whenever the services of other professionals are utilized, their time will be billed at their regular hourly rates and, to the extent practicable, we will make use of associates and paralegals to minimize the cost to you;

e. All Statements outstanding over thirty (30) days will bear interest at the rate of one percent (1%) per month (twelve percent [12%] per annum), simple interest; and

f. Any complaint regarding any Statement or any of the services provided by us in connection with any Statement will be made in writing, and, if not received by us within thirty (30) days of such Statement, the Statement will be deemed correct and any such complaint will be waived.

3. **Coordination**: We will represent you on an hourly basis as set forth above, for which you will deposit with us a retainer of \$2,000.00 which we will deposit in an escrow account and which will be credited against fees and expenses invoiced as set forth above. Any unused portions will be returned to you.

If you agree with the foregoing as the basis for our engagement, please sign at the bottom of this letter in the space provided and return it to me via pdf or facsimile (404) 835-5123.

I appreciate the opportunity to be of service to you in this matter and look forward to working with you.

Very truly yours,

Wagner, Johnston & Rosenthal, P.C.



Michael S. Rosenthal

Enclosures

AGREED TO BY:

Alex Joseph, CEO
On behalf of AJS Weight Loss, LLC
d/b/a New Life Weight Loss Centers

WAGNER, JOHNSTON & ROSENTHAL, P.C.

Attorneys at Law

5855 SANDY SPRINGS CIRCLE
SUITE 300
ATLANTA, GEORGIA 30328-4834

(404) 261-0500
FACSIMILE (404) 261-6779

www.wjrlaw.com

December, 2009

Dear Client:

The following information concerning Wagner, Johnston & Rosenthal, P.C.'s (WJR) general billing policies is provided for your reference. These policies will apply unless your fee agreement provides otherwise:

1. **Hourly Rates:** WJR will bill the Client on the basis of fees, plus expenses, with fees being determined by the regular hourly rate for the firm's attorneys and paralegals which are adjusted on an annual basis. Our current hourly rates are set forth below.

**Wagner, Johnston & Rosenthal, P.C.
Attorney Hourly Rates for 2010**

Justin S. Daniels	\$305.00
Barbara H. Ellenberg	\$230.00
C. David Johnston	\$350.00
Roger A. Kirschenbaum	\$325.00
Anthony J. Rollins	\$310.00
Michael S. Rosenthal	\$360.00
S. Bradley Shipe	\$280.00
John R. Thornburgh	\$320.00
John Tyler	\$375.00
Craig A. Wagner	\$350.00
R. Kyle Woods	\$325.00

Legal Assistant \$ 95.00 - \$115.00

2. **Billing Statements:** WJR will provide detailed billing statements on a monthly basis showing the work performed by date, professional, and the amount of time spent, with a summary of expenses charged to Client. All statements outstanding over thirty (30) days may bear interest at the rate of one percent (1%) per month, twelve percent (12%) per annum, simple interest. **Any complaint regarding any statement or any of the services provided by WJR in connection with any statement must be made in writing and, if the same is**

not received by WJR within thirty (30) days of such statement, the statement will be deemed correct and any such complaint will be waived.

3. **Outside Expenses:** Client will, at the option of WJR, either prepay or reimburse WJR for any expense advanced by WJR to third parties on behalf of Client, or pay directly any such expense. Such expenses shall include any and all costs or expenses incurred or contracted in the course of the representation of Client. Without limiting the generality of the foregoing, such costs and expenses shall include travel expenses (including certain meals), parking and tolls, outside photocopies, overnight or special delivery charges, expert witness fees and expenses, filing fees and other court charges, court reporter fees, deposition costs, exhibit preparation costs, cost of obtaining specialized reports, and all other costs attributable to the representation of Client. Such charges will be billed at WJR's actual cost except as follows:
 - a. Overnight courier charges are charged at cost plus a 20% accounting and bookkeeping charge.
 - b. Courier charges and postage are charged at cost plus a 20% accounting and bookkeeping charge.
 - c. Mileage is charged at \$0.55 per mile, as amended by IRS regulations.
 - d. Outside photocopies are billed at cost.
4. **Internal Costs:** Internal costs are billed as follows:
 - a. Outgoing facsimiles are charged at a flat rate of \$7.50, regardless of the number of pages. (Incoming facsimiles are not charged).
 - b. In-house photocopies are charged at \$0.24 per page.
 - c. From time to time, effective representation of the client may require some overtime for administrative staff persons. When such an expense is necessitated solely by the Client's needs, the Firm shall bill the Client at WJR's actual cost, including applicable payroll taxes.
 - d. All other charges will be billed at WJR's actual cost.
5. **Multimedia Equipment:** Use of Multimedia LCD projector and Multimedia portable computer at trial, hearing, other proceeding, or special events will be charged at \$100.00 per day, plus up to one day's charge for use of equipment in preparation for trial, hearing, other proceeding or special event, where applicable. There is a maximum charge of \$500 per use.
6. **Prepayment:** WJR may require prepayment of out-of-pocket expenses, particularly those in excess of \$100.
7. **Privacy Policy.** Attorneys, like other professionals who advise on personal financial matters, are now required by a new federal law to inform their clients of their policies regarding

privacy of client information. Attorneys have been, and continue to be, bound by professional standards of confidentiality that are even more stringent than those required by this new law. Therefore, we have always protected your right to privacy and do not take lightly the confidence you place in us.

In the course of representing our clients, we receive significant personal financial information about you either from you or with your authorization. If you are a current or former client of Wagner, Johnston & Rosenthal, P.C., you should know that all information that we receive about you is held in extreme confidence, and is not released to any person or entity outside of this law firm, except as agreed upon by you, or as required under applicable law.

We retain records relating to professional services that we provide so that we are better able to assist you with your professional needs and, in some cases, to comply with professional guidelines. In order to guard your non-public personal information, we maintain physical, electronic, and procedural safeguards that comply with our professional standards.

Please call if you have any questions regarding this matter. Your privacy, our professional ethics, and the ability to provide you with quality legal services are very important to us.

Please let us know if you have any questions about the foregoing.

Wagner, Johnston & Rosenthal, P.C.

EXHIBIT B

Garrity-Weiss, P.A.

1002 East New Port Center Drive, Suite 102, Deerfield Beach, Florida 33442

Broward (954) 570-6616

Fax (954) 570-6618

WAGNER, JOHNSTON & ROSENTHAL, P.C.

5855 Sandy Springs Circle

Suite 300

Atlanta, GA 30328

(404) 261-0500

FACSIMILE (404) 261-6779

www.wjrlaw.com

Fed ID No.
58-1439192AJS Weightloss, LLC
13450 Parker Commons Blvd
#105
Ft. Myers, FL 33912Statement Date: July 7, 2010
Invoice No.: 21234
Client/Matter No.: 2945.001
Page: 1

RE: FDD Review

PROFESSIONAL SERVICES:

			Hours	
06/16/2010	MSR	Correspondence to A. Bevan; telephone call to Barbara H. Ellenberg. (no charge) (.3)	0.30	
06/19/2010	MSR	Review Franchise Agreement and Franchise Disclosure Documents.	2.00	
06/21/2010	MSR	Review Franchise Disclosure Documents and correspondence from A. Bevan.	0.50	
06/22/2010	MSR	Review Franchise Disclosure Documents draft.	1.40	
06/23/2010	MSR	Review Franchise Agreement draft.	1.10	
06/24/2010	MSR	Review/revise Franchise Agreement; telephone call from client Adrian and Karl.	3.40	
06/26/2010	MSR	Preparation of suggested language for Franchise Disclosure Documents/Franchise Agreement; email to Adrian and Karl and Thirdeye Management.	0.60	
06/29/2010	BHE	Conference with Michael S. Rosenthal regarding business model and inclusion of product sales; Telephone call with Florida Secretary of State regarding state trademark filing.	0.40	
		TOTAL Professional Services	9.70	3,062.00
		TOTAL AMOUNT THIS BILL (New Charges)		3,062.00
07/15/2010		Payment - Thank you. Transfer from Trust.		-2,000.00
		TOTAL BALANCE DUE		<u>\$1,062.00</u>

RE: FDD Review

TRUST ACTIVITY:

	Opening Balance	\$0.00
06/24/2010	Retainer	2,000.00
07/07/2010	Attorney fees and expenses	
	PAYEE: Wagner, Johnston & Rosenthal, PC	-2,000.00
	Closing Balance	\$0.00

If you are not receiving your statements via email and would like to do so, please contact Pam Ritchie at pjr@wjrlaw.com

INTEREST ACCRUES AT THE RATE OF ONE PERCENT (1%) PER MONTH ON ALL INVOICES NOT PAID WITHIN THIRTY (30) DAYS OF THE ORIGINAL INVOICE DATE.

WAGNER, JOHNSTON & ROSENTHAL, P.C.Fed ID No.
58-14391925855 Sandy Springs Circle
Suite 300
Atlanta, GA 30328(404) 261-0500
FACSIMILE (404) 261-6779
www.wjrlaw.comAJS Weightloss, LLC
13450 Parker Commons Blvd
#105
Ft. Myers, FL 33912Statement Date: July 7, 2010
Invoice No.: 21492
Client/Matter No.: 2945.002
Page: 1

RE: Trademark Filings

PROFESSIONAL SERVICES:

			Hours	
06/16/2010	BHE	Telephone call with client; Initial trademark research; Research classifications.	1.00	
06/21/2010	BHE	Correspondence to and from client regarding potential trademarks.	0.20	
06/23/2010	BHE	Conference with Michael S. Rosenthal; Finalize and order search.	0.30	
06/28/2010	BHE	Correspondence to and from search company; Initial review of NewMed search results.	0.50	
06/29/2010	BHE	Receive and review Nuviva searches; Review potentially conflicting filed marks; Telephone call with client; Conference with Michael S. Rosenthal.	2.30	
	MSR	Conference with Barbara H. Ellenberg regarding Trademark filings; email from/to A. Bevan regarding entity name and choice of entity.	0.20	
		TOTAL Professional Services	4.50	1,055.00
		TOTAL AMOUNT THIS BILL (New Charges)		1,055.00
07/15/2010		Payment - Thank you. Transfer from Trust.		-1,055.00
		TOTAL BALANCE DUE		<u>\$0.00</u>

TRUST ACTIVITY:

	Opening Balance	\$0.00
06/24/2010	Retainer	3,000.00

RE: Trademark Filings

06/24/2010	2010037077 06/26/10 \$625.00	
	NEWMED	
	2010037072 06/25/10 \$562.50	
	NUVIVA	
	PAYEE: Thomson CompuMark	-1,187.50
07/07/2010	Attorney fees and expenses	
	PAYEE: Wagner, Johnston & Rosenthal, PC	-1,055.00
	Closing Balance	<u>\$757.50</u>

If you are not receiving your statements via email and would like to do so, please contact Pam Ritchie at pjr@wjrlaw.com

INTEREST ACCRUES AT THE RATE OF ONE PERCENT (1%) PER MONTH ON ALL INVOICES NOT PAID WITHIN THIRTY (30) DAYS OF THE ORIGINAL INVOICE DATE.