IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

DirectBuy, Inc.,	)	
Plaintiff	)	
v.	)	No. 2:15-CV-
	)	Judge
Buy Direct, LLC, Tom Pope, and Elona Pope,	)	Magistrate Judge
	)	
Defendants	)	

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

DirectBuy, Inc. ("DirectBuy"), by its attorneys, complains of defendants Buy Direct, LLC, Tom Pope, and Elona Pope as follows:

Nature of the Case

1. On August 25, 2015, DirectBuy terminated the DirectBuy of Houston franchise. Buy Direct, LLC, which Tom and Elona Pope own, had been the franchisee.

2. At the time of the termination, the defendants had in their warehouse over $300,000 of merchandise (some 600 pieces of furniture, case goods, and other home furnishings) for which DirectBuy members had pre-paid. That merchandise is the members' property which the defendants were storing until member pick-up or delivery.

3. Concurrently with the franchise termination, and as expressly provided in §16.03 of the Franchise Agreement, DirectBuy had personnel and a tractor-trailer on-site at the defendants' warehouse, for the purpose of picking up the members' merchandise and then getting it into the members' hands. Defendants did not permit the removal of the members' merchandise.

4. Efforts in the following days to arrive at an arrangement which would free the members' merchandise did not succeed, except that on August 28, 2015, defendant Tom Pope agreed that DirectBuy could remove the merchandise on Monday, August 31, 2015 at 11:00 a.m., but he arbitrarily refused to allow DirectBuy to use the loading dock.

5. Loading dock available to them or not, on August 31, 2015, a DirectBuy crew of six and another tractor-trailer arrived at the defendants' warehouse, prepared to do whatever it would take to remove and secure the members' merchandise. Defendant Tom Pope set 26 pieces of member merchandise in the warehouse parking lot, which the DirectBuy team promptly loaded. Defendant Tom Pope then complained of a sore shoulder, locked the warehouse, refused to allow DirectBuy to retrieve any further items, and drove off.

6. Having paid in full, the members are owed their merchandise immediately. Yet the defendants—even though acknowledging that the merchandise belongs to the members and not to the defendants, and even though §16.03 of the Franchise Agreement gives DirectBuy "the right immediately…to take possession of and remove…all…member merchandise"—have refused and continue to refuse to release the members' merchandise from defendants' warehouse.

7. DirectBuy brings this action seeking this Court's Order enjoining the defendants from further violation of the franchise agreement and requiring the defendants to release the members' merchandise to DirectBuy for delivery to the members as soon as possible. DirectBuy also seeks recovery from the defendants of over $350,000 due and owing to DirectBuy from the defendants, unrelated to the merchandise.

The Parties, Jurisdiction, and Venue

8. DirectBuy, Inc. is a corporation organized and existing under the laws of the State of Indiana, and has its principal place of business in Merrillville, Lake County, Indiana, within this judicial district.

9. Buy Direct, LLC is a limited liability company. Its members are Tom and Elona Pope, each of whom owns 50% of the LLC.

10. Tom Pope is a citizen of the State of Texas.

11. Elona Pope is a citizen of the State of Texas.

12. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. §1332(a)(1) because the action is between citizens of different States, and the amount in controversy, exclusive of interest and costs, exceeds the sum of $75,000.

13. Venue is proper in this district under 28 U.S.C. §1391(b)(2) because a substantial part of the events giving rise to DirectBuy's claim occurred in this district. In addition, §18.02 of the Franchise Agreement between DirectBuy and Buy Direct, LLC specifies:

> You [Buy Direct, LLC], each of your Owners and Operating Partners and each person signing a guaranty of this Agreement agree that the U.S. District Court for the Northern District of Indiana, Hammond Division...shall be the exclusive forum and venue in which to adjudicate any case or controversy arising from or relating to this Agreement and any agreement, including any guaranty, executed in connection with this Agreement....

A copy of the Franchise Agreement is attached to this complaint as Exhibit A.

14. In conjunction with the execution of the Franchise Agreement, defendants Tom and Elona Pope signed an Owner's Personal Guaranty of Franchisee's Obligations (Ex. A, Franchise Agreement, last two pages), which also provides in pertinent part that defendants Tom and Elona Pope each "agrees personally to be bound by…each and every provision in the [Franchise] Agreement, which each of the undersigned [defendants Tom and Elona Pope] acknowledges includes…governing law and exclusive jurisdiction for disputes…."

Franchise Termination

15. On June 27, 2014, Buy Direct, LLC entered into a Franchise Agreement for the operation of a DirectBuy franchise in Houston, Texas (Houston North), and on June 30, 2014, a DirectBuy subsidiary, National Management Company, sold the defendants an additional franchise territory in the Houston market (Houston Southwest), pursuant to an "Asset Purchase Agreement — Houston Southwest", a copy of which is attached as Exhibit B. Both the Franchise Agreement (§2.03) and the Asset Purchase Agreement (§3) imposed minimum membership sales production requirements on franchisees.

16. On July 2, 2015, defendants Tom and Elona Pope signed the Owner's Personal Guaranty of Franchisee's Obligations (Ex. A, Franchise Agreement, last two pages) identified in ¶14 above. In that Personal Guaranty, defendants Tom and Elona Pope guaranteed the franchisee's performance under the Franchise Agreement in every respect, including "the full and timely payment of sums due and the performance by Franchisee of each and every undertaking, agreement and covenant set forth in the [Franchise] Agreement."

17. On August 25, 2015, DirectBuy terminated the defendants' franchise, in part due to deefendants' failure to come close to meeting the minimum membership production requirements of both the Franchise Agreement and the Asset Purchase Agreement. A copy of the Notice of Termination is attached to this complaint as Exhibit C. Included in the Notice of Termination (Ex. C, page 2), DirectBuy exercised its option (Ex. A, Franchise Agreement §16.05) to acquire all of the defendants' Membership Agreements via a self-executing assignment from Buy Direct, LLC to DirectBuy.

DirectBuy Membership, and Ordering Merchandise

18. DirectBuy franchisees sell memberships to consumers. A copy of the most recent form of DirectBuy of Houston Membership Agreement (but not including the DirectBuy New Membership Guide, Benefit Summary, and Travel Guide which are incorporated into the Membership Agreement) is attached to this complaint as Exhibit D. DirectBuy membership enables consumers to purchase products from hundreds of top-brand manufacturers in the home furnishings, home improvement, entertainment and outdoor, flooring, and accessories categories, at manufacturers' prices without hidden retail markup. The savings to members are significant, even compared to big-box stores and internet vendors.

19. When a member has identified merchandise to purchase, either at a club location or on the mydirectbuy.com website, the member places an order for the desired product, and pays for it in full at the time of order placement. When DirectBuy receives the member's order and payment, it submits the member's order to the manufacturer or supplier. When that vendor ships the order—either directly to the member's home, or to a club location or other DirectBuy receiving facility—the vendor invoices DirectBuy. DirectBuy then pays the vendor. Whether the member receives the merchandise at home or has it delivered to a club location or a receiving facility, neither DirectBuy nor the franchisee ever takes title to the merchandise. The profit and loss statements of DirectBuy and of DirectBuy franchisees do not record merchandise sales as revenue and do not record merchandise cost as cost of goods sold. In short, title transfers from the vendor to the member.

20. In the instance of DirectBuy of Houston, as of the August 25, 2015 franchise termination date, the defendants had received and had been storing in their warehouse approximately 600 items of members' merchandise which some 147 members had ordered under 188 purchase orders having a total value in excess of $317,000, all pre-paid in full. The 147 members, and not the defendants Buy Direct, LLC or the Popes, own that $317,000 of merchandise. In at least two phone-calls with DirectBuy on August 26 and 27, defendant Tom Pope expressly acknowledged that the merchandise is the members' property, and does not belong to defendants Buy Direct, LLC or the Popes.

21. When a vendor ships a member's merchandise to a franchisee's club location, the franchisee receives that merchandise, inspects it for freight damage or other visible defect, notifies the member that the merchandise has arrived, and then stores the merchandise on the member's behalf until the member either picks it up or arranges for home-delivery.

22. Immediately upon termination of the Franchise Agreement, the defendants lost all right to continue to hold the members' merchandise. In fact, in §16.03 of their Franchise Agreement, the defendants specifically agreed in pertinent part as follows:

> Upon expiration or termination of this Agreement, we [DirectBuy, Inc.] have the right immediately to enter...any...premises where any member's merchandise...may be found, ...and to take possession of and remove...all such member merchandise....

The Defendants' Reaction to the Franchise Termination

23. In response to the termination of the DirectBuy of Houston franchise, the defendants immediately terminated all their employees and shut down all operations. Defendants no longer employ any warehouse or other staff.

24. In further reaction to the franchise termination, the defendants, through defendant Tom Pope, began an active disparagement campaign on the internet and social media against DirectBuy and certain of its executives, using "hashtags", which are social media designations affixed to an internet posting, intended to generate wide dissemination of those posting.

25. Since the August 25, 2015 franchise termination, defendant Tom Pope has used at least the following hashtags in connection with postings relating to DirectBuy and/or DirectBuy personnel:

#StayAwayFromMyHotWifeScumbag
#60minutes
#LegalAffairAtWork
#LegalScum
#Scumbags
#FuckYouScumbags
#FreedomofSpeach [*sic*]
#IwillPunishScumLikeMyDad
#DrunkScum
#SupportElonaPope
#RecordedScum
#GoingHunting
#DirectBuy

26. Defendant Tom Pope also contacted and attempted to contact the wives of various DirectBuy officers on Facebook or LinkedIn, and in several instances, went onto a DirectBuy officer's Facebook page and registered "likes" of photos of that officer's young children which were posted on Facebook.

COUNT I—CIVIL AND CRIMINAL CONVERSION (INJUNCTIVE RELIEF)

Defendants Deprive the Members of Possession of Their Property

27. DirectBuy realleges ¶¶1-26.

28. As part of their post-termination campaign against DirectBuy, the defendants also decided they would intentionally deprive the members of access to and possession of their $317,000+ in prepaid merchandise.

29. Since the August 25, 2015 franchise termination, the defendants have repeatedly refused both to keep their warehouse open and operating so that members could pick up their merchandise (instead, defendants have locked and shut down the warehouse and terminated all staffing there), and to permit DirectBuy to remove the members' merchandise as provided in §16.03 of the Franchise Agreement, to a secure location from which DirectBuy could arrange to put the merchandise in the members' hands.

30. As recently as last Thursday, September 3, 2015, DirectBuy submitted a specific, detailed plan to the defendants for DirectBuy to pick up the members' merchandise on September 9, 2015. A copy of DirectBuy's 9/3/15 email to defendant Tom Pope setting out arrangements for a September 9 retrieval of the members' merchandise is attached to this complaint as Exhibit E.

31. Defendants, through defendant Tom Pope, immediately rejected DirectBuy's plan.

32. Defendants continue unlawfully to exercise complete dominion and control over the members' merchandise in defendants' warehouse and possession, to the exclusion and in defiance of the rights of the members who are the owners of the merchandise, and who have an immediate, unqualified right to possession of their property. Defendants' conduct is also in defiance of DirectBuy's rights under §16.03 of the Franchise Agreement "immediately to enter...any...premises where any member's merchandise...may be found, ...and to take possession of and remove...all such member merchandise...."

33. But for the termination of the Franchise Agreement, the defendants had the obligation to complete the fulfillment of those 147 members' orders by giving those members their merchandise. By reason of the assignment of the Houston Membership Agreements from Buy Direct, LLC to DirectBuy, DirectBuy now stands in the shoes of the defendants with regard

to completion of the members' orders. As assignee of the Membership Agreements, it is therefore now DirectBuy's obligation to put the members' merchandise into the members' hands. Section 16.03 of the Franchise Agreement is meant to provide DirectBuy with the means to accomplish this.

34. The defendants are nevertheless intentionally depriving DirectBuy of the ability to remove the members' merchandise from the defendants' warehouse so that DirectBuy can arrange for the members to have it.

35. Without this Court's Order compelling the defendants to release the members' property to DirectBuy, the members will have been deprived without any basis of $317,000 of their property, and DirectBuy will have suffered immediate and irreparable harm to its reputation and to the goodwill attaching to the DirectBuy trademark. DirectBuy has no adequate remedy at law: Even apart from issues of collectability, a damages suit against the defendants does not put the members' property into the members' hands, and does not avoid the brand damage that $317,000 of unfilled, incomplete but fully paid-for member purchase orders will cause to DirectBuy.

36. Moreover, in §18.03 of the Franchise Agreement, the defendants specifically agreed that any violation of §16.03 of the Franchise Agreement

> would result in irreparable injury to us [DirectBuy] for which we would have no adequate remedy at law. Accordingly, you [franchisee] and each of your Owners consent to the issuance of an injunction at our request (without posting a bond or security) prohibiting any conduct in violation of any of those sections [§16.03, among others] and agree that the existence of any claims you or any of your Owners may have against us, whether or not arising herefrom, shall not constitute a defense to the enforcement of any of those Sections.

37. In these circumstances, where the defendants have violated §16.03 and are unlawfully depriving members of their property, the defendants *consent* under §18.03 of the Franchise Agreement to the issuance of an injunction against the defendants at DirectBuy's request, without bond.

38. Even without defendants' consent to entry of an injunction against them, an injunction is fully warranted because defendants' conduct is causing immediate and irreparable injury to DirectBuy and to the members, for which DirectBuy has no adequate remedy at law, and entry of the injunction will cause defendants no harm.

39. DirectBuy therefore requests that the Court Order as follows:

A. Set a specific date and time as soon as possible for DirectBuy to retrieve all the members' merchandise from the defendants' possession;

B. Defendants shall give DirectBuy open access at that time, without preconditions of any kind, to the members' merchandise inside the defendants' warehouse or otherwise under the defendants' control, for the purpose of removing that merchandise;

C. DirectBuy may use personnel of its own selection, without obtaining the defendants' agreement, to conduct the merchandise removal;

D. Defendants shall give DirectBuy full access to their warehouse loading dock for purposes of facilitating DirectBuy's removal of the members' merchandise from that warehouse;

E. Defendants shall give DirectBuy all of the merchandise in their warehouse or at any other location that belongs to DirectBuy members;

F. Defendants shall fully cooperate in DirectBuy's removal of the members' merchandise and defendants shall not in any manner obstruct, interfere with, or impede DirectBuy's retrieval of the members' merchandise.

40. In §18.04 of the Franchise Agreement, the defendants agreed to pay DirectBuy all its costs, expenses, and attorneys' fees incurred in enforcing the Franchise Agreement.

WHEREFORE, plaintiff DirectBuy, Inc. prays that the Court enter its Order as requested in paragraph 39 above, granting plaintiff all such injunctive relief as is needed to accomplish the removal of the members' merchandise now being held in defendants' warehouse or elsewhere, and that the Court grant plaintiff its costs, expenses, and attorneys' fees, as well as any and all such further relief as the Court sees fit.

COUNT II—DAMAGES FOR CRIMINAL CONVERSION

41. DirectBuy realleges ¶¶1-34.

42. Section 18.01 of the defendants' Franchise Agreement specifies that Indiana law governs all issues arising from or relating to the Franchise Agreement or to the relationship of the parties.

43. Defendants' exercise of unlawful, improper, and unauthorized dominion and control over the members' merchandise in defiance of both the members' property rights and DirectBuy's §16.03 rights to possession of the members' merchandise constitutes conversion. Ind. Code §35-43-4-3.

44. The property the defendants converted has a value of over $317,000.

45. Pursuant to Ind. Code §34-24-3-1, the defendants are liable for treble damages of at least $951,000 due to their conversion of members' merchandise and their deprivation of DirectBuy's rights of possession, plus costs and attorneys' fees.

WHEREFORE, plaintiff DirectBuy prays that the Court enter Judgment in its favor and against the defendants in the amount of $951,000 or such further amount as may be proved at trial, and also award DirectBuy its costs and attorneys fees, together with any and all such further relief as the Court sees fit.

COUNT III—DAMAGES FOR BREACH OF CONTRACT

46. DirectBuy realleges ¶¶1-34.

47. Section 2.03 of the defendants' Franchise Agreement required the defendants to sell an average of 37 new memberships per month.

48. Far from selling 37 memberships per month, in the 14-month period from June, 2014 when defendants signed the Franchise Agreement, through the August 25, 2015 franchise termination, defendants sold a *total* of 40 net new memberships, an average of fewer than 3 (three) new memberships per month.

49. The Asset Purchase Agreement additionally required defendants to sell a minimum of net new membership revenue (§3(a)). The Asset Purchase Agreement provided that if defendants' performance ranked in the top five of all clubs in the DirectBuy network, defendants would be entitled to an incentive payment (§3(b)(2)), and correspondingly, if defendants' performance did not rank among the top ten clubs in the DirectBuy network, defendants would incur a financial charge in favor of DirectBuy as computed in the Performance Grid attached as Exhibit C to the Asset Purchase Agreement.

50. In no month while they were in operation, did the defendants ever perform in the top ten of clubs in the DirectBuy network, and as a result they incurred monetary obligations to DirectBuy under the Performance Grid in excess of $192,000.

51. In addition, while in operation, defendants incurred debts to DirectBuy. At the time of franchise termination, defendants owed DirectBuy over $162,000 in general bills indebtedness.

52. Pursuant to their Personal Guaranty, defendants Tom and Elona Pope personally and unconditionally guaranteed "the full and timely payment of all sums due" from defendant Buy

Direct, LLC to DirectBuy under the Franchise Agreement or under any other agreement between them, which included the Asset Purchase Agreement.

53. DirectBuy has fully performed all its obligations under the Franchise Agreement and the Asset Purchase Agreement.

54. Despite demands, the defendants have failed and refused, in breach of their Agreements, to pay the amounts owed to DirectBuy.

55. In §18.04 of the Franchise Agreement, the defendants agreed to pay DirectBuy all its costs, expenses, and attorneys' fees incurred in enforcing the Franchise Agreement.

WHEREFORE, plaintiff DirectBuy prays that the Court enter Judgment in its favor and against the defendants in the amount of $354,000 or such further amount as may be proved at trial, and also award DirectBuy its costs, expenses, and attorneys fees, together with any and all such further relief as the Court sees fit.

/s/ C. Joseph Yast
One of the Attorneys for Plaintiff DirectBuy, Inc.

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VERIFICATION

I, C. Joseph Yast, solemnly affirm that the matters stated in the above complaint are true and correct, to the best of my knowledge, information, and belief.

/s/ C. Joseph Yast