

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ELDER CARE PROVIDERS OF	)	
INDIANA, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 14-cv-1894
	)	
HOME INSTEAD, INC.,	)	
	)	
Defendant.	)	

COMPLAINT FOR DECLARATORY RELIEF AND DAMAGES

Plaintiff, Elder Care Providers of Indiana, Inc. (“Elder Care”), by counsel, for its Complaint for Declaratory Relief and Damages against Defendant, Home Instead, Inc. (“Instead”), alleges and states that:

PARTIES

1. Elder Care is an Indiana corporation with its office and principal place of business located 5455 Harrison Park Lane, Suite A, Indianapolis, Indiana 46216. Elder Care is a citizen of the State of Indiana.

2. Instead is a Nebraska corporation with its office and principal place of business located at 13330 California Street, Suite 200, Omaha, Nebraska 68154. Instead is a citizen of the State of Nebraska.

VENUE AND JURISDICTION

3. This Court has diversity subject matter jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1332(a)(1) because the amount in controversy is in excess of \$75,000 exclusive of interest and costs and is between Elder Care and Instead which are citizens of different states.

4. This Court has personal jurisdiction over Instead because Instead regularly conducts business in the State of Indiana and upon information and belief, receives revenues in excess of \$2,000,000 per year from business activities performed in the State of Indiana.

5. Venue is proper in this Court because the parties' business activities which are material to this litigation are conducted in substantial part in Marion County, Indiana, and Hancock County, Indiana, both of which are located in the Southern District of Indiana.

ELDER CARE'S INSTEAD FRANCHISE AGREEMENT

6. Established in 1994, Instead is engaged in the business of providing non-medical companionship and domestic care services for senior citizens operating under the trade name Home Instead Senior Care (the "Business"). Instead operates the business as a franchisor of over 1,000 independently owned and operated franchises worldwide.

7. Anthony Smith and Georgette Smith, husband and wife (together, the "Smiths"), are the sole shareholders of Elder Care.

8. On or about October 16, 2006, Instead and Elder Care entered into a Franchise Agreement (the "Agreement"), a true and accurate copy of which is attached hereto and incorporated herein by reference as Exhibit A.

9. The Agreement is governed by the Indiana Franchise Act, Ind. Code § 23-2-2.5-1 *et seq.*, and the Indiana Deceptive Franchise Practices Act, Ind. Code § 23-2-2.7-1 *et seq.*

10. The Indiana Deceptive Franchise Practices Act provides, *inter alia*, that it is unlawful for a franchise agreement entered into with an Indiana resident or a nonresident operating a franchise in Indiana to "permit[] unilateral termination of the franchise if such termination is without good cause or in bad faith. Good cause . . . includes any material violation of the franchise agreement." Ind. Code § 23-2-2.7-1(7).

11. The Indiana Deceptive Franchise Practices Act makes it unlawful, *inter alia*, for a franchisor to “[c]oerc[e] the franchisee to . . . enter into any agreement with the franchisor or any designee of the franchisor, or do any other act prejudicial to the franchisee, by threatening to cancel or fail to renew any agreement between the franchisee and the franchisor.” Ind. Code § 23-2-2.7-2(1)(iv).

12. Pursuant to Paragraph 2(A) of the Agreement, Instead grants Elder Care the exclusive right and franchise to own and operate the Business within a defined geographic area in the State of Indiana for a period of ten (10) years commencing on October 16, 2006, and continuing through and until October 15, 2016. Paragraph 2(A) further specifically provides: “The license and right granted by the Agreement is limited to the right to provide non-medical services . . . in compliance with Franchisor’s policies and procedures.”

13. The Agreement also grants Elder Care the right to use the “Licensed Marks,” defined as “a unique management and business System for non-medical companionship and domestic care-services for senior citizens known as HOME INSTEAD SENIOR CARE . . . operated under certain trademarks, domain names, service marks, logos and other commercial symbols, including HOME INSTEAD SENIOR CARE®[.]” Agreement, Paragraphs 1, 6(A).

14. According to Paragraph 9(B) of the Agreement, Elder Care is required to pay, and has paid, a non-refundable royalty fee to Instead equal to five (5) percent of Elder Care’s gross sales. According to Paragraph 9(C) of the agreement, gross sales means all sales generated by Elder Care in connection with the Business pursuant to the Agreement. For the period from August 1, 2006, to October 31, 2014, Elder paid royalties to Instead in the total amount of \$637,271.38.

15. Paragraph 7(C) provides that, during the term of the Agreement, the Smiths, as the principals of Elder Care, are restricted from engaging “in any other *non-medical* companionship and domestic care service business or any business, entity or activity competitive with a Home Instead Senior Care business[.]” (Emphasis added.) The Agreement does not restrict the Smiths, in any capacity, from providing *medical* services or any other services that are not competitive to the Business.

16. Instead’s operating policies provide that Instead franchises are permitted only to offer non-medical services. According to Instead’s Operations Manual, “Each franchise office is prohibited from providing services that are outside the scope of non-medical services as defined by Home Instead, Inc.”

17. Instead’s operating policies further acknowledge that home health agencies offer complementary, rather than competitive, services to Instead, and that home health agencies, along with other primary care medical providers, are the “top referral providers” for Instead’s non-medical senior care services.

18. Paragraph 16 of the Agreement, Termination, provides limited conditions under which Instead may terminate the Agreement prior to the end of the ten (10) year term. Paragraph 16(B) provides, *inter alia*, that “Franchise is deemed to be in material default and Franchisor may, at its option, terminate this Agreement and all rights granted without granting Franchisee any opportunity to cure the default, effective immediately upon notice to Franchisee, upon the occurrence of any of the following events: . . . (7) If Franchisee makes any unauthorized use of the Licensed Marks.”

19. Paragraph 16(C) of the Agreement allows Instead to terminate the Agreement upon thirty (30) days written notice of a material default constituting good cause of the

Agreement on the part of Elder Care provided that Elder Care has been given thirty (30) days written notice of the material default constituting good cause and an opportunity to cure such default prior to termination.

THE SMITHS' ESTABLISHMENT OF A COMPLEMENTARY HOME HEALTH AGENCY

20. Since on or about November 9, 2011, the Smiths have been the sole shareholders of Home Again Senior Care, Inc. ("Again"), an Indiana corporation. Again is a certified and licensed home health agency in the State of Indiana. Again is a provider of home-based medical care for senior citizens that secures reimbursement through Medicaid Traditional. Again also receives reimbursement through Respite HHA and Skilled Nursing services by the Medicaid Waiver program which can only be performed by a certified home health agency.

21. Again was established by the Smiths specifically to provide medical home care services for seniors that are complementary to the non-medical services provided by Elder Care, their Instead franchise. The Smiths found through experience that Elder Care was losing business to other agencies that provided both medical and non-medical home care services to Indiana seniors.

22. Again, as an Indiana licensed home health agency, is regulated by Title 405 of the Indiana Administrative Code. Again is overseen by a Professional Advisory Board that includes an Indiana licensed physician Medical Director. Again's staff includes a Director of Nursing, Alternate Director of Nursing, registered nurses, licensed practical nurses, and home health aides, all of whom are authorized to provide regulated medical care in the State of Indiana.

23. Elder Care, as a franchisee of Instead, is not a licensed or certified health care provider in the State of Indiana and is not subject to the requirements of Title 405, nor is it able

to secure payment or reimbursement through Medicaid Traditional. Elder Care does not employ any licensed or certified medical professionals in their capacities as such.

24. Again provides its services pursuant to a Plan of Care authorized and directed by the patient's physician with orders written as a prescription. Again's medical services are performed exclusively by or under the supervision of Indiana licensed or certified medical personnel.

25. Medicaid differentiates between medical-related domestic care (Home Health Agency, Type 06 Provider) and non-medical domestic care (Waiver Provider, Type 32 Provider). Type 06 Providers are eligible for Medicaid Traditional payment, whereas Type 32 Providers are only eligible for Medicaid Waiver payment. Again operates as a Provider Type 06, and Elder Care, as a franchisee of Instead, operates as a Type 32 Provider. Again receives its funding exclusively from Medicaid Traditional and Medicaid Waiver Respite HHA and Skilled Nursing, whereas Elder Care receives its funding from private payors or Medicaid Waiver.

26. Again regularly refers patients to Elder Care who become clients of Elder Care. Elder Care, as the franchisee of Instead, has grown substantially since Again was established, largely as a result of referrals from Again and the ability to provide a continuum of care for Medicaid patients.

27. Again and Elder Care are separate legal organizations with separate human resources personnel and functions. Although Again and Elder Care share some employees, those individuals are separately employed by each company, work in different roles for each company, are paid separately by each company, and receive different rates of pay from each company.

28. Again has not utilized any Instead materials or information relating to training or operations in its business or with its personnel. Again utilizes its own training materials and operational process in conducting its business.

29. Instead has been aware of the operation of Again, as a licensed Indiana home health agency, since on or about September 2013. This knowledge has included an awareness that Again is operating under the trade name “Home Again Senior Care.” Prior to November 7, 2014, Instead took no action to prevent Again from using the “Home Again Senior Care” or “Home Again” trade names.

30. Elder Care has never made any unauthorized use of the Instead trademarks or trade names. In all material respects, Elder Care has fully complied with the Agreement.

NOTICE OF TERMINATION OF THE AGREEMENT BY INSTEAD

31. On November 7, 2014, Tanya Morrison, General Counsel for Instead, sent an email to Joshua Brown, outside counsel for Elder Care (the “Morrison Email”), a true and accurate copy of which is attached hereto and incorporated herein by reference as Exhibit B. The Morrison Email advised Mr. Brown of Instead’s position that (a) the Smiths’ operation of Again was in direct violation of the in-term competitive restrictions of the Agreement, and (b) that the Smiths’ use of the name “Home Again Senior Care” infringed upon Instead’s federal registered trademarks and caused confusion in the marketplace.

32. Attached to the Morrison Email was a copy of a formal notice of termination of the Agreement, also dated November 7, 2014 (the “Termination Notice”), a true and accurate copy of which is attached hereto and incorporated herein by reference as Exhibit C. According to the Morrison Email, the original Termination Notice was also sent that same day by certified mail to the Smiths. The Termination Notice purported to terminate the Agreement effective three

(3) days thereafter, or November 10, 2014, pursuant to Paragraph 16(B)(7), based upon the Smiths alleged unauthorized use of the Instead trademarks. Specifically, the Termination Notice alleged that the Smiths, as guarantors of the Agreement, had “us[ed] the name Home Again Senior Care, Inc., which is confusingly similar to and constitutes a modification of one or more of Home Instead’s Licensed Marks.”

33. The Termination Notice further stated that the Smiths were in violation of the in-term non-competition and non-disclosure covenants of the Agreement, and that the Smiths had diverted business from Elder Care to Again in violation of the Agreement. The Termination Notice also purported to terminate the Agreement with three (3) days’ notice on the basis of these alleged defaults as well, although the Agreement requires thirty (30) days’ notice with a right to cure of any such default.

34. The Morrison Email also stated, however, that Instead was suspending its termination rights under the Agreement through November 14, 2014, at 5:00 p.m. CST, to allow the Smiths to accept a Confidential Settlement Agreement which was also attached to the email (the “Instead Settlement Offer”), a true and accurate copy of which is attached hereto and incorporated herein by reference as Exhibit D.

35. In the event the Smiths did not accept the Settlement Offer on or before November 14, 2014, the Morrison Email stated that the Termination Notice would take effect and Instead would file a Complaint in the United States District Court for the District of Nebraska the following Monday, November 17, 2014, a draft of which was also attached to the email (the “Instead Complaint”), a true and accurate copy of which is attached hereto and incorporated herein by reference as Exhibit E.

36. In a telephone conversation between Mr. Brown and Terri D. Koller, Instead's outside counsel, on Thursday, November 13, 2014, and as confirmed in a follow up email from Ms. Koller to Mr. Brown that same date, Instead gave Elder Care until the "end of the day Tuesday, November 18, 2014 to commit to engaging in settlement negotiations" before the Termination Notice would take effect.

37. The Settlement Offer purports to require the Smiths, Elder Care, and Again to pay a royalty fee to Instead equal to five (5) percent of the gross sales generated by Again for the period from 2011 through October 31, 2014. Effectively, this would require Again, an entity with which Instead has no contractual relationship, to pay full franchise royalties to Instead based upon the provision of medical services that Elder Care, as a franchisee of Instead, was expressly prohibited by the Agreement from providing.

38. Instead has no lawful, good faith basis under the Agreement to claim royalties from Elder Care, the Smiths or Again on any revenues generated by Again.

39. The threat by Instead to terminate the Agreement pursuant to the Termination Notice was not issued in good faith but was an attempt by Instead to coerce Elder Care and the Smiths to enter into an agreement and to do other acts, *i.e.*, pay monies to Instead to which Instead is not entitled, that are prejudicial to Elder Care and the Smiths.

COUNT I:
DECLARATORY RELIEF

40. Elder Care incorporates by reference herein the allegations set forth in Paragraphs 1 through 39 hereof.

41. Pursuant to Paragraph 16(B) of the Agreement, Instead may not terminate the Agreement immediately upon written notice unless Elder Care first "is deemed to be in material fault" by "mak[ing] any unauthorized use of the Licensed Marks."

42. Elder Care has not made any unauthorized use of the Licensed Marks.

43. Elder Care seeks an order of this Court declaring that Elder Care has not made any unauthorized use of the Licensed Marks and that Instead's purported termination of the Agreement on November 7, 2014, is null and void and of no legal effect.

44. The Termination Notice further states alleged grounds for termination of the Agreement pursuant to Paragraph 16(C) of the Agreement, which requires thirty (30) days prior written notice of the alleged basis for such termination and an opportunity to cure. The Termination Notice, however, offered no opportunity to cure the alleged violations.

45. Elder Care did not violate the Agreement, and is not in violation of the Agreement, on any of the bases stated in the Termination Notice.

46. Elder Care seeks an order of this Court declaring that Elder Care is not in violation of the Agreement on any of the bases set forth in the Termination Notice and that Instead's purported termination of the Agreement on November 7, 2014, is null and void and of no legal effect.

COUNT II:
BREACH OF CONTRACT

47. Elder Care incorporates by reference herein the allegations set forth in Paragraphs 1 through 46 hereof.

48. Instead's purported termination of the Agreement on November 7, 2014, is unlawful and in breach of the Agreement.

49. Elder Care has suffered and will continue to suffer money damages as a result of Instead's breach.

50. Elder Care seeks damages for Instead's breach of contract in an amount in excess of \$75,000 to be proved at trial.

COUNT III:
VIOLATION OF THE INDIANA DECEPTIVE FRANCHISE PRACTICES ACT

51. Elder Care incorporates by reference herein the allegations set forth in Paragraphs 1 through 50 hereof.

52. Instead threatened and/or purported to terminate the Agreement without good cause in violation of the Indiana Deceptive Franchise Practices Act.

53. Instead threatened and/or purported to terminate the Agreement in bad faith in violation of the Indiana Deceptive Franchise Practices Act.

54. The Morrison Email and the Termination Notice constitute unlawful coercion under the Indiana Deceptive Franchise Practices Act, Ind. Code § 23-2-2.7-2(1).

55. Elder Care has suffered damages in excess of \$75,000 as a result of the illegal termination of the Agreement by Instead.

56. Elder Care seeks damages in excess of \$75,000 in an amount to be proved at trial pursuant to the Indiana Deceptive Franchise Practices Act, Ind. Code § 23-2-2.7-4.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Elder Care Providers of Indiana, Inc., by counsel, respectfully requests that the Court: (a) enter a declaratory judgment finding that Elder Care has not made any unauthorized use of the License Marks, nor is Elder Care otherwise in material violation of the Agreement, and that Instead's purported termination of the Agreement on November 7, 2014 is null and void and of no legal effect; (b) enter a monetary judgment against Instead for damages incurred by Elder Care as the result of Instead's breach of contract and violations of the Indiana Deceptive Franchise Practices Act; (c) order a speedy hearing as provided by Rule 57 of the Federal Rules of Civil Procedure, and (d) grant any and all other appropriate relief.

JURY DEMAND

Elder Care requests a trial by jury on all claims so triable.

Respectfully submitted,

s/Gregory W. Guevara

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