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Attorneys for Plaintiffs Zounds Hearing Franchising LLC and
Zounds Hearing Inc.

UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

**Zounds Hearing Franchising, LLC, an
Arizona limited liability company; and
Zounds Hearing Inc., a Delaware
corporation,**

Plaintiffs,

v.

**Zounds Metro of Chicago, LTD., an Illinois
corporation; Zounds Metro of Chicago 2,
LTD., an Illinois corporation; Zounds
Metro of Chicago 3, LTD., an Illinois
corporation; and Derek Rolison, a married
man;**

Defendants.

Case No. CV _____

Complaint

CIVIL ACTION - COMPLAINT**INTRODUCTION**

Zounds Hearing Franchising, LLC (“Franchisor”) and Zounds Hearing, Inc. (“ZHI”) initiate this action against Derek Rolison (“Rolison”), Zounds Metro of Chicago, Ltd. (the “Highland Park Entity”), Zounds Hearing of Chicago 2, Ltd. (the “Skokie Entity”) and Zounds Hearing of Chicago 3, Ltd. (the “Chicago Entity”) to resolve a dispute between the parties arising out of: (i) Franchisor’s awarding of three franchises to Rolison and each of the foregoing entities (collectively, the “Rolison Entities”) pursuant to three franchise agreements entered into on December 31, 2013 (the “Franchise Agreements”); and (ii) Franchisor’s termination of one of these franchise agreements based on Rolison’s and Highland Park Entity’s to ever open or even secure an approved site for a ZOUNDS franchised business as required under that agreement.

First, Franchisor and ZHI seek expectation and other monetary damages from Rolison and the Highland Park Entity that they suffered as a result of the failure by Rolison and Highland Park Entity to open a ZOUNDS franchised business within the territory referred to as “Highland Park” as required under the governing franchise agreement (the “Highland Park FA”).

Plaintiffs also seek a declaratory judgment from this Court that the parties’ agreement to have Rolison pay ZHI for the initial stock of inventory that needed to be ordered and manufactured for each of Defendants’ three ZOUNDS franchises did not constitute the

1 collection of an initial “franchise fee” in violation of the Illinois Franchise Disclosure Act
2 (“IFDA”).

3
4 **THE PARTIES**

5 1. Franchisor is an Arizona limited liability company with a principal place of
6 business located at 9365 S. McKemy Street, Suite 105, Tempe, Arizona 85284. Franchisor is
7 the franchisor of the ZOUNDS franchise system. Franchisor grants third parties the right to
8 independently own and operate ZOUNDS franchises (each, a “Franchised Business”) that (a)
9 feature and sell a proprietary line of ZOUNDS-branded hearing aid devices and related
10 accessories (the “Approved Products”), and (b) utilize Franchisor’s proprietary marks (the
11 “Proprietary Marks”) and proprietary system that Franchisor and its affiliates have developed
12 for use in connection with the establishment and ongoing operation of a Franchised Business
13 (the “System”). Franchisor’s sole member is ZHI, a Delaware corporation whose principal
14 place of business is in Tempe, Arizona.
15

16
17 2. ZHI is a Delaware corporation with a principal place of business at 9365 S.
18 McKemy Street, Suite 105, Tempe, Arizona 85284. ZHI is engaged in the business of selling
19 certain of the Approved Products to Franchisor’s franchisees, other ZOUNDS locations, and
20 third parties.
21

22 3. The Highland Park Entity, Skokie Entity and Chicago Entity are each an
23 Illinois corporation with an address at 2041 Thornwood Ave., Wilmette, Illinois 60091. Each
24 Rolison Entity is owned by Rolison and his spouse, Nancy Rolison. Upon information and
25 belief Rolison and his spouse are both residents of Illinois.
26

1 Franchised Businesses and other ZOUNDS locations (the Approved Products). Each
2 ZOUNDS franchisee is required to purchase an initial stock of Approved Products for any
3 Franchised Business prior to the opening of that Franchised Business so that ZHI can order
4 and manufacture that inventory before the Franchised Business opens and commences
5 operation. ZHI estimates that it typically takes between 16 and 24 weeks from the time an
6 order is placed for the initial stock of inventory in connection with a new Franchised
7 Business and the time that order is ready for shipment.
8

9 **Franchisor's Initial Dealings with Rolison**

10
11 9. After Rolison was disclosed with Franchisor's 2013 version of FDD for use in
12 the State of Illinois (the "2013 FDD"), Rolison contacted Franchisor to express interest in
13 purchasing one or more Franchised Businesses in the area of Chicago, Illinois. A true and
14 correct copy of the 2013 FDD is attached to this Complaint as Exhibit "A".
15

16 10. Rolison subsequently attended a discovery day at Franchisor's headquarters in
17 Tempe, Arizona, and otherwise corresponded with Franchisor regarding the franchise
18 offering. At the discovery day and on various other occasions, Franchisor advised Rolison
19 that Rolison would not be required to pay Franchisor the \$40,000 initial franchise fee
20 described in Item 5 of the 2013 FDD (the "Initial Franchise Fee") at the time the Franchise
21 Agreements were executed. Instead, Franchisor advised Rolison that Rolison would not need
22 to pay the Initial Franchise Fee due under a given Franchise Agreement until the Franchised
23 Business governed by that agreement was opened.
24
25
26

1 11. Franchisor's decision to defer the Initial Franchise Fee as described above was
2 also clearly disclosed in the Illinois state-specific addendum to the 2013 FDD. See Exhibit
3 "A" at State Specific Addenda (to both FDD and Franchise Agreement).

4
5 12. At the discovery day and at various times thereafter, Franchisor further advised
6 Rolison that ZHI would request that Rolison pay for the initial \$25,000 stock of Approved
7 Products in connection with any Franchised Business at or around the time the parties
8 entered into a franchise agreement for that Franchised Business.

9
10 **Parties' Negotiation and Signing of the Franchise Agreements and Addendum**

11 13. Subsequent to these conversations, Rolison requested the right to open and
12 operate a total of three Franchised Businesses in the Chicago area. Franchisor agreed to grant
13 Rolison the right to operate a Franchised Business within each of the following territories in
14 or around Chicago: (i) Highland Park (the "Highland Park Territory"); (ii) Chicago (the
15 "Chicago Territory"); and (iii) Skokie (the "Skokie Territory").

16
17 14. Rolison reached out to Franchisor via email on December 20, 2013, wherein
18 Rolison requested that Franchisor make certain concessions and other revisions to the
19 Franchise Agreements. In that correspondence, Rolison advised Franchisor that his franchise
20 counsel had reviewed the 2013 FDD in full, and that Rolison was only raising a handful of
21 the much longer list of issues raised by his counsel.

22
23 15. Franchisor and Rolison then negotiated and agreed to a form of addendum to
24 the Franchise Agreements (the "Addendum"), wherein Franchisor agreed to certain of the
25 revisions requested by Rolison and his counsel.
26

1 16. On December 30, 2015, the Highland Park Entity signed the Highland Park
2 FA, the Chicago Entity signed the Franchise Agreement governing the Chicago Territory
3 (the "Chicago FA"), and the Skokie Entity signed the Franchise Agreement governing the
4 Skokie Territory (the "Skokie FA"). Rolison executed the form of personal guaranty attached
5 to each Franchise Agreement, under which Rolison agreed to personally guaranty and be
6 personally bound by the obligations of the respective corporate "Franchisee" under each
7 Franchise Agreement (each, a "Guaranty"). A true and correct copy of the Highland Park
8 FA, as well as the relevant signing pages of the other two Franchise Agreements, are
9 attached hereto as Exhibit "B".
10

11
12 17. After executing the Franchise Agreements, the Highland Park Entity executed
13 the Addendum as the "Franchisee" under all the Franchise Agreements. A true and correct
14 copy of the Addendum is attached hereto as Exhibit "C".
15

16 18. On or around January 4, 2014, Rolison sent the signed agreements to
17 Franchisor, along with a check in the amount of \$75,000 to cover the initial \$25,000 stock of
18 inventory that ZHI would need to order and manufacture for shipment to each of the three
19 Franchised Businesses prior to their opening (the "Initial Inventory Payment").
20

21 19. Franchisor countersigned the Franchise Agreements upon receipt, and the
22 check covering the Initial Inventory Payment was forwarded to ZHI and deposited directly
23 into ZHI's bank account.
24
25
26

Pre-Opening Obligations and Performance under the Franchise Agreements

20. Section 7(A) of the Franchise Agreements required Rolison to secure an approved premises for each Franchised Business (each, a “Premises”) within 90 days of the date the Franchise Agreements were executed, and Section 7(D) of the Franchise Agreements required Rolison to have each Franchised Business open and operating within six months of the date the Franchise Agreements were executed. See Exhibit “B”.

21. Rolison was not able to secure an Approved Location for any of the Franchised Businesses within the prescribed 90-day period. Rolison eventually secured a Premises for: (i) the Franchised Business within the Skokie Territory at 7144 Carpenter Rd., Skokie, IL 60077 (the “Skokie Store”); and (ii) the Franchised Business within the Chicago Territory at 845 N. Michigan Ave., Chicago, IL 60611 (the “Chicago Store”). Both locations were secured by Rolison as of May 2014.

22. Rolison attended Franchisor’s proprietary initial training program at Franchisor’s designated training facility in Arizona beginning on or around May 23, 2014, and Franchisor’s training personnel provided Rolison with additional on-site training in connection with the Chicago Store and Skokie Store beginning on or around September 12, 2014.

Inventory Shipments and Opening of Chicago Store and Skokie Store

23. ZHI shipped \$25,000 in Approved Products to both the Skokie Store and Chicago Store (for a total of \$50,000 in Approved Product) in July 2014 at Rolison's written request.

24. Rolison opened the Chicago Store and Skokie Store (collectively, the "Open Locations") in September 2014, which was about three months after the six-month opening deadline set forth in Section 7(D) of the governing Franchise Agreements. Upon the opening of these locations, Rolison sent Franchisor a check for \$70,000 to cover the Initial Franchise Fee due under the Chicago FA and Skokie FA (Franchisor was entitled to \$80,000 in Initial Franchise Fees, but agreed to take a reduced Initial Franchise Fee because Rolison purchased multiple franchises).

25. Rolison sold the initial \$50,000 in Approved Products to customers at the Chicago Store and Skokie Store, respectively. Rolison also made various orders to replenish such inventory at the Open Locations over the first six months they were operating. A true and correct copy of a chart detailing such inventory orders by Rolison that were fulfilled by ZHI as of November 26, 2015 is attached hereto as Exhibit "D".

26. In April 2015, Rolison emailed Franchisor and requested that ZHI ship Rolison the remaining \$25,000 in Approved Product that he initially purchased so that Rolison could sell that inventory at his Open Locations. This remaining \$25,000 in Approved Product was intended for Rolison's third Franchised Business in Highland Park Territory prior to its

1 opening. A true and correct copy of the relevant portions of the email exchange between
2 Rolison and Franchisor regarding this inventory shipment is attached hereto as Exhibit “E”.

3 27. Although Franchisor could have denied this request and/or terminated the
4 Highland Park FA due to Rolison’s failure to open a Franchised Business within the
5 Highland Park Territory and terminated the Franchise Agreements governing the Open
6 Locations under the cross-default provision contained in those agreements, Franchisor
7 elected to instead instruct ZHI to ship the remaining \$25,000 in Approved Product to Rolison
8 on April 22, 2015 per his instructions (with \$12,500 going to the Skokie Store and \$12,500
9 going to the Chicago Store).

10
11
12 28. Since that time, Rolison has continued to submit orders for additional
13 Approved Product to sell at the Open Locations, and ZHI has continually and timely fulfilled
14 those inventory orders.

15 16 **Rolison’s Dispute Notice**

17 29. Given that Rolison never raised any type of dispute or claim in the 20-month
18 period following the execution of the Franchise Agreements regarding the Open Locations or
19 any other aspect of the franchise relationship, Franchisor was surprised to receive a notice of
20 dispute from Rolison and the Rolison Entities dated August 6, 2015 (the “Dispute Notice”),
21 wherein Rolison and the Rolison Entities erroneously claim that the agreed-upon Initial
22 Inventory Payment by Rolison constituted the collection of an initial “franchise fee” in
23 violation of the IDFA. A true and correct copy of the Dispute Notice is attached hereto as
24 Exhibit “F”.
25
26

1 30. The Dispute Notice contains no other allegations or claims of wrongdoing on
2 the part of Franchisor.

3 31. Since that time, Franchisor has attempted to resolve this matter amicably and
4 consistent with the internal dispute resolution and mediation provisions set forth in Sections
5 22(B) and 22(C) of the Franchise Agreements, respectively. Franchisor conveyed to Rolison
6 that their agreement to have Rolison pay ZHI for the initial stock of Approved Products for
7 his three Franchised Businesses is not only entirely consistent with the disclosures contained
8 in Items 5 and 7 of the 2013 FDD, Section 705/3 of the IFDA specifically exempts this type
9 of inventory payment from the definition of a “franchise fee” thereunder.
10

11 32. Despite the foregoing efforts, the dispute regarding Rolison’s payment for the
12 initial stock of Approved Products remains unresolved.
13

14 **Termination of the Highland Park FA by Franchisor**
15

16 33. Franchisor’s recent correspondence with Rolison has led Franchisor to
17 reasonably determine that Rolison has no intention of ever opening a Franchised Business
18 within the Highland Park Territory.
19

20 34. In light of the foregoing, Franchisor sent Rolison and the Highland Park Entity
21 a written notice on December 7, 2015, terminating Highland Park FA pursuant to Section
22 16(B) thereof on the grounds that: (i) to date, Rolison and the Highland Park Entity have
23 failed open a Franchised Business within the Highland Park Territory; and (ii) Rolison and
24 the Highland Park Entity had otherwise abandoned the franchise granted thereunder (the
25 “Termination Notice”). The Termination Notice provides that Franchisor and ZHI will be
26

1 seeking all remedies available to them under the Franchise Agreement and applicable law,
2 including payment of future lost royalties and future lost inventory payments that Franchisor
3 and ZHI would have received over the balance of the Highland Park FA if not for the
4 material breaches of Rolison and the Highland Park Entity thereunder. A true and correct
5 copy of the Termination Notice is attached hereto as Exhibit "G".
6

7
8 **COUNT I**
9 **BREACH OF CONTRACT**
10 **(Against Highland Park Entity and Rolison)**

11 35. The foregoing paragraphs in this Complaint are hereby incorporated by
12 reference as if fully set forth in this averment.

13 36. Franchisor entered into the Highland Park FA with the Highland Park Entity
14 and Rolison on January 8, 2014 when Franchisor counter-signed all the Franchise
15 Agreements. Under the corresponding Guaranty, Rolison agreed to personally guaranty, as
16 well as be personally bound by, all obligations of the "Franchisee" under the Highland Park
17 FA.

18 37. Franchisor terminated the Highland Park FA via written notice dated
19 December 7, 2015, based on the failure of the Highland Park Entity and Rolison to open a
20 Franchised Business within the Highland Park Territory within six months of the date the
21 Highland Park FA was executed as required under Section 7(D) thereof, as well as these two
22 Defendants' abandonment of the franchise granted under the Highland Park FA.
23

24 38. Pursuant to the Illinois state-specific addendum to the Highland Park FA, the
25 Highland Park Entity was required to pay Franchisor the Initial Franchise Fee due under
26

1 Section 5(A)(1) of the Highland Park FA upon the opening of a Franchised Business within
2 the Highland Park Territory. Pursuant to Section 22(J) of the Highland Park FA, Franchisor
3 is entitled to seek and obtain all expectation and consequential damages stemming from
4 Franchisee's breaches of the Highland Park FA, including future lost royalties and related
5 damages due over the balance of the term of the Highland Park FA.
6

7 39. Under Section 22(F) of the Highland Park FA, ZHI is an express third-party
8 beneficiary with respect to the provisions of the Highland Park FA, including the right to
9 seek damages arising out of or related to breaches of the Highland Park FA by the Highland
10 Park Entity and Rolison.
11

12 40. In light of the foregoing, the failure of the Highland Park Entity and Rolison to
13 open a Franchised Business in material breach of the Highland Park FA has caused monetary
14 harm and damages to Franchisor and ZHI, including: (i) the Initial Franchise Fee that was
15 due upon the opening of the Franchised Business; (ii) past and future lost royalty payments
16 that were due to Franchisor over the term of the Highland Park FA; and (iii) past and future
17 lost inventory payments that would have been paid to ZHI to initially stock the Franchised
18 Business within the Highland Park Territory and continually replenish inventory for resale at
19 that Franchised Business. On information and belief, these amounts collectively exceed
20 \$75,000.
21

22
23 **WHEREFORE**, Zounds Hearing Franchising, LLC and Zounds Hearing, Inc. hereby
24 demand judgment in their favor and against the Defendants Rolison and the Highland Park
25 Entity as follows:
26

- 1 (i) monetary damages in excess of \$75,000 amounting to the Initial Franchise Fee,
2 royalties, inventory payments and other amounts that Franchisor and ZHI were
3 entitled to collect from Defendants Rolison and the Highland Park Entity over
4 the term of the Highland Park FA if the Franchised Business was opened
5 around the same time as the Open Locations and Franchisor was not forced to
6 terminate the Highland Park FA due to the breach described herein, with said
7 amount to be determined by this Court;
- 8 (ii) the attorneys' fees and costs incurred by Plaintiffs in connection with this
9 action, which Franchisor and ZHI are entitled to seek and obtain pursuant to
10 Section 20(D) of the Highland Park FA and A.R.S. § 12-341.01; and
- 11 (iii) any other relief that this Court deems appropriate.

12 **COUNT II**
13 **DECLARATORY JUDGEMENT**

14 41. The foregoing paragraphs in this Complaint are hereby incorporated by
15 reference as if fully set forth in this averment.

16 42. Contrary to Rolison's assertion in the Dispute Notice, the parties' agreement to
17 have Rolison pay ZHI for the initial \$25,000 stock of Approved Products for each of his
18 three Franchised Businesses (for a total of \$75,000) around the time the Franchise
19 Agreements were signed did not constitute the payment of an initial "franchise fee" under the
20 IFDA.

21 43. The IFDA, at 815 Ill. Comp. Stat. Ann. 705/3, specifically excludes such
22 inventory payments from the definition of a "franchise fee" as follows:

23 "Franchise fee" means any fee or charge that a franchisee is required to pay
24 directly or indirectly for the right to enter into a business or sell, resell, or
25 distribute goods, services or franchises under an agreement, including, but
26 not limited to, any such payment for goods or services, provided that the
Administrator may by rule define what constitutes an indirect franchise fee,
and provided further that the following shall not be considered the payment
of a franchise fee: (a) the payment of a reasonable service charge to the issuer

1 of a credit card by an establishment accepting or honoring such credit card;
2 (b) amounts paid to a trading stamp company by a person issuing trading
3 stamps in connection with the retail sale of merchandise or services; (c) the
4 purchase or agreement to purchase goods for which there is an established
5 market at a bona fide wholesale price; (d) the payment for fixtures necessary
6 to operate the business; (e) the payment of rent which reflects payment for
7 the economic value of the property; or (f) the purchase or agreement to
8 purchase goods for which there is an established market at a bona fide retail
9 price subject to a bona fide commission or compensation plan. The
10 Administrator may by rule define what shall constitute an established market.
11 (emphasis added).

12 44. As Franchisor has consistently conveyed to Rolison before and after the
13 Franchise Agreements were signed, the Initial Inventory Payment was for the initial stock of
14 Approved Products supplied by ZHI at wholesale price for resale at the three Franchised
15 Businesses that were required to be opened under the Franchise Agreements.

16 45. The hearing aid market is well established in the Chicago area and the United
17 States generally.

18 46. Rolison's check for the Initial Inventory Payment was deposited directly into
19 ZHI's bank account, and ZHI timely shipped Rolison all \$75,000 of the Approved Products
20 covered by the Initial Inventory Payment to the Open Locations in the amounts that Rolison
21 requested in his various orders. Rolison also submitted various other inventory orders for
22 additional Approved Products for resale at the Open Locations, all of which were timely
23 fulfilled by ZHI.

24 47. Rolison did pay Franchisor the Initial Franchise Fee due in connection with
25 each of the Open Locations, but not until September 2014 when those Open Locations
26

1 commenced operating. Rolison has never paid Franchisor any Initial Franchise Fee in
2 connection with the Highland Park FA because Rolison failed to open a Franchised Business
3 within the Highland Park Territory.

4
5 48. Defendants' asserted claim in the Dispute Notice has created a live dispute that
6 exists between the parties. There is a substantial controversy between the parties having
7 adverse legal interest of sufficient immediacy in reality which warrants the issuance of a
8 declaratory judgment. A real and justiciable question of conflicting legal interest is presented
9 to this Court for its determination.

10
11 **WHEREFORE**, Zounds Hearing Franchising, LLC and Zounds Hearing, Inc. hereby
12 demand judgment in their favor and against the Defendants Rolison and the Rolison Entities
13 as follows:

- 14
15 (i) a declaratory judgment that: (a) Rolison's payment of the Initial Inventory
16 Payment to ZHI as described in this Complaint does not constitute the payment
17 of an initial "franchise fee" in violation of the IFDA; and (b) neither Franchisor
18 nor ZHI otherwise violated the IFDA in any manner when ZHI collected the
19 Initial Inventory Payment from Rolison;
- 20 (ii) the attorneys' fees and costs incurred by Plaintiffs in connection with this
21 action, which Franchisor and ZHI are entitled to seek and obtain pursuant to
22 Section 20(D) of the Highland Park FA and A.R.S. § 12-341.01; and
- 23 (iii) any other relief that this Court deems appropriate.
- 24
25
26

1 Respectfully submitted this 7th Day of December, 2015.

2 **BROOKS & AFFILIATES, PLC**

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