Verified Supplemental Counterclaims and Affirmative Defense

NOW COME the Defendants/Counter-Plaintiffs, NORMAN JOHNSON, M.D., BRENDA J. JOHNSON ("Johnsons"), and ADVANCED CORRECTIONAL HEALTHCARE, INC. (hereinafter "Advanced"), by and through their attorneys, Elias, Meginnes, Riffle & Seghetti, P.C., and as and for their Verified Supplemental Counterclaims VIII, IX and X, and Affirmative Defense VI, state as follows:

BACKGROUND

1. The individual Defendants and the individual Plaintiffs formed Health Professionals, Ltd. (HPL) in 1996 to provide**medical** and pharmaceutical services and supplies to correctional facilities.

2. HPL provided those services on a contractual, fixed cost basis (with limited exceptions) thereby taking on the financial risk and potential benefit attendant to the cost of providing these services.

3. In essence, HPL (and now ACH) allow corrective facilities to outsource their **medical** and pharmaceutical needs on a contractual basis. HPL began to encounter financial difficulties beginning in January of 2001 (having previously enjoyed significant financial success).

4. In January of 2002, HPL's lender threatened to foreclose on its loan to HPL, and in February, 2002 offered HPL and its shareholders forbearance terms.

5. The Johnsons agreed to those terms; however, Stephen A. Cullinan, M.D. and Theresa M. Falcon-Cullinan, M.D. (the Cullinans) initially refused to agree to the terms of the forbearance agreement.

6. HPL's lender, at the direction of Dr. Cullinan, offset HPL's operating account to the amount of $1,250,000 on April 9, 2002.

7. HPL was owned 50% by the Johnsons, and 50% by the Cullinans.

8. As of April, 2002, HPL was "deadlocked", and it was clear that no resolution could be worked out whereby the Johnsons and Cullinans would continue to work together within HPL. It was decided that the Cullinans would buy-out the Johnsons' stock in HPL.

9. The Cullinans made it clear to the Johnsons that if they did not execute an agreement containing the restrictive covenants at issue in this case, they would allow HPL to fail to meet its payroll and employment tax liabilities, HPL would go out of business, and the lender would enforce its guarantees against the Johnsons personally.

10. Given the time constraints and Plaintiffs' statements, the Johnsons felt that they had no choice other than to accede to the Cullinan's demand that they sign the restrictive covenant at issue. The Noncompetition, Nondisclosure and Nonsolicitation Agreement ("the Agreement") is attached as Exhibit A, and is incorporated herein by this reference.

11. The restrictive covenant, under Plaintiffs' view, would prohibit Defendants from providing any **medical** services to any Wisconsin, Missouri or Illinois County jails, to any state prisons in Wisconsin, Missouri, Illinois or Indiana, and to the penal and correctional facilities managed or owned by a national service provider, other than eight (8) facilities which were "assigned" to ACH (the "Exempted Facilities").

12. As to the Exempted Facilities "assigned" to ACH ("the Johnson Entity"), Plaintiffs ("Buyers" and "the Company") made reciprocal noncompetition and nonsolicitation covenants in favor of Defendants:

For the shorter of (i) a period of three years after the Closing or (ii) until an Assignment by Sellers:

(x) Neither Buyer nor the Company will, directly or indirectly, engage or invest in, own, manage, operate, finance, control or participate in the ownership, management, operation, financing or control of, be employed by, associated with or in any manner connected with, or render services or advice or other aid to, or guarantee any obligation of, any Person engaged in or planning to become engaged in the business of managing and/or providing healthcare or healthcare related services to inmates and personnel at the Exempted Facilities. * * *

(y) Each buyer and the Company agrees not to, directly or indirectly, induce or attempt to induce any of the Exempted Facilities to cease doing business with the Johnson Entity or in any way interfere with the relationship between such customer and the Johnson Entity if the Buyers are prohibited under Section [5][(a)](x) above from rendering health care services to such customer.

Pertinent portions of Section 5(a) of the Agreement, Exhibit A.

13. The final stock purchase and the execution of the Agreement occurred on May 18, 2002.

14. Subsequent to executing the Agreement, an employee of ACH sent letters to a number of the clients which they formerly served.

15. Those letters did not solicit business from HPL's customers, did not disparage HPL's business, and did not result in the formation of any business relationship between Defendants and any of HPL's customers.

16. On July 26, 2002, Plaintiffs instituted this action, seeking to enforce the covenant, and soon thereafter filed a Motion for Preliminary Injunction seeking to enjoin Defendants from:

A. Having any form of contract, whether written or verbal, with Plaintiffs' customers;

B. Having any form of contact, whether written or verbal, with any person or entity described in Section 4(a) of the Noncompetition, Nondisclosure and Nonsolicitation Agreement.

17. Later, on October 29, 2002, one of the Plaintiffs, Dr. Theresa M. Falcon-Cullinan, rendered **medical** services to an individual who was detained by the Woodford County Jail (the Detainee). Specifically, Dr. Falcon-Cullinan performed surgery relating to an ectopic pregnancy.

18. The Detainee was attended by Dr. Falcon-Cullinan while the Detainee was "under guard". Dr. Falcon-Cullinan was well aware of the fact that the Detainee was a Detainee of an Exempted Facility at the time she rendered the **medical**services.

19. Woodford County Jail is an Exempted Facility under the terms of the covenant. (Section 3(a) of the Agreement, Exhibit A.)

20. Dr. Falcon-Cullinan breached the covenant made by the "buyers" of HPL in the Stock Purchase transactions, in that she rendered services to an inmate or detainee at an Exempted Facility via the facility's management, in violation of Section 5(a)(x) of the

Agreement, and interfered with the relationship between Defendants and the facility, in violation of Section 5(a)(y) of the Agreement.

21. Dr. Falcon-Cullinan invoiced the Detainee at the Woodford County Jail for $2,000.00 due and owing for receipt of**medical** services. A redacted copy of the invoice (deleting the Detainee's name) is attached as Exhibit B, and is incorporated herein by this reference.

22. HPL maintains a website, at *www.hpltd.com*. As of December 3, 2002, one page of that website, titled "what's new" contained information about HPL's clients and contracts. A copy of the "what's new" page, printed from the website on December 3, 2002, is attached as Exhibit C and is incorporated herein by this reference.

23. The "what's new" page listed the Exempted Facilities along with its own clients, as facilities to which HPL has provided services. There were asterisks beside the names of the Exempted Facilities, but no explanation was given on the page as to the import of the asterisks.

24. While the page has since been removed from the website, the listing of the Exempted Facilities was a blatant violation of the covenants in the Agreement, in that the use of the Exempted Facilities as advertisements interfered with the relationship between Defendants and the Facilities, in violation of Section 5(a)(y) of the Agreement.

AFFIRMATIVE DEFENSE VI

UNCLEAN HANDS

1-24. Defendants/Counter-Plaintiffs repeat and reallege paragraphs 1-24 above, as and for the allegations of paragraph 1-24 of Affirmative Defense VI.

25. Plaintiffs/Counter-Defendants willfully and knowingly breached the terms of the covenants that they wrote, even as they sued to enforce the covenants' terms in regard to Defendants/Counter-Plaintiffs.

26. Plaintiffs/Counter-Defendants have unclean hands in this matter.

WHEREFORE, Defendants/Counter-Plaintiffs respectfully request that all relief prayed for in the Plaintiffs'/Counter-Defendants' Verified Complaint be denied, that the Court award Defendants/Counter-Plaintiffs their reasonable attorneys' fees incurred herein, and for such other and further relief as is deemed appropriate in the circumstances.

COUNTERCLAIM COUNT VIII

BREACH OF COVENANT

1-24. Defendants/Counter-Plaintiffs repeat and reallege paragraphs 1-24 above, as and for the allegations of paragraphs 1-24 of Counterclaim Count VIII.

25. Section 6 of the Agreement provides that any breach of Section 5 of the Agreement may be remedied through monetary damages and injunctive relief, and provides that no bond need be provided in a request for injunctive relief.

26. Section 7 of the Agreement provides that the prevailing party in any litigation under the Agreement is entitled to recover attorneys' fees and costs of suit from the losing party.

27. Defendants/Counter-Plaintiffs are challenging the validity and enforceability of the covenants at issue in this case. This Counterclaim is pled in the alternative (*Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 586 N.E.2d 600, 616, 224

Ill.App.3d 559, 582, 166 Ill.Dec. 642, 658 (Ill.App. 1 Dist. 1991); *Stolzenbach v. Pagoria*, 71 Ill.App.3d 863, 390 N.E.2d 376, 28 Ill.Dec. 209 (Ill.App. 1 Dist. 1979)) to Defendants'/ Counter-Plaintiffs' claims that the covenants are invalid and unenforceable. Defendants/Counter-Plaintiffs seek recovery under the Count VIII if, and only if, the covenants are found to be valid and enforceable.

WHEREFORE, Counter-Plaintiffs respectfully request the following relief:

1. An award of monetary damages in an amount to be established at trial, including at least an amount representing the profit Dr. Falcon-Cullinan garnered as a result of the breach.
2. Imposition of a preliminary and then permanent injunction restraining Plaintiffs/Counter-Defendants, and their officers, agents, employees and attorneys and other persons in active concert or participation with them, from violating Section 5(a) of the Agreement.
3. A waiver of bond as provided in the Agreement.
4. An award of attorneys' fees and costs of suit, as allowed by the Agreement.
5. Award of such other and further relief as is deemed appropriate in the circumstances.

COUNTERCLAIM COUNT IX

BREACH OF CONTRACT

1-15. Defendants/Counter-Plaintiffs repeat and reallege paragraphs 1-13, and 16 above, as and for the allegations of paragraphs 1-15 of Counterclaim Count IX.

16. Though the Agreement was signed on May 18, 2002, Dr. Johnson was unable to obtain **medical malpractice**insurance at that time, and therefore could not take over the healthcare management of the Exempted Facilities.

17. The parties addressed Dr. Johnson's situation in the First Amendment to Stock Purchase Agreement (“the Subcontract”), which was executed on May 18, 2002, with the rest of the Stock Purchase Agreement. A true and accurate copy of the First Amendment to Stock Purchase Agreement is attached hereto as Exhibit D, and is incorporated herein by this reference.

18. The express duration of the Subcontract was the expiration of 120 days or until Dr. Johnson obtained his own insurance, whichever occurred first.

19. Pursuant to the Subcontract, HPL promised to provide “tail” **medical malpractice** insurance and other monetary incentives, and Dr. Johnson would manage the Exempted Facilities. The Exempted Facilities would continue to pay HPL (as though Dr. Johnson were an HPL employee), and HPL would then compensate Dr. Johnson for his managerial and **medical** services at the Exempted Facilities and for pharmaceutical supplies (though not for staffing costs, as the employees would continue to be paid by HPL until Dr. Johnson obtained his own **medical malpractice**insurance). The terms of the Subcontract are contained in the Amendment (Exhibit D), at “Exhibit A”.

20. HPL obtained **medical malpractice** insurance for Dr. Johnson, and Dr. Johnson ran the Exempted Facilities. The Exempted Facilities continued to send monthly payments to HPL. On August 2, 2002, retroactive to August 1, 2002, Dr. Johnson obtained **medical malpractice** insurance of his own name.

21. At no time, either between May 18, 2002 and July 31, 2002, or since that time, did HPL comply with the payment terms of the Subcontract in three respects: (1) transfers of payments to Dr. Johnson from two facilities, (2) Karen Stocke's salary payments and (3) Dr. Johnson's allowance.
22. First, HPL failed to transfer to Dr. Johnson the payments made by the Kenosha County and Lee County facilities to HPL for services rendered at those facilities in July, 2003, by Dr. Johnson. The Kenosha contract for July, 2003, totaled $3,466.67, and the Lee contract totaled $1,433.33. The total sum owed Dr. Johnson sums at *$4,900.00*.
23. Second, HPL failed to "re-hire Karen Stocke for a period of 120 days...or until Dr. Johnson secures insurance, whichever comes first". Rather, HPL retained Ms. Stocke while charging Dr. Johnson for her services, in that HPL withheld a portion of its payments to Dr. Johnson under the Subcontract to pay for Ms. Stocke's services. The total sum withheld from Dr. Johnson was *$4,062.50*, as reflected in the HPL Check Requisition attached hereto as Exhibit E, and incorporated herein by this reference.
24. Third, HPL failed to "pay Dr. Johnson a $1,720 allowance per month for 120-days or until he secures insurance, whichever comes first". Dr. Johnson was without insurance for thirteen (13) days in May, and all of June and July. Therefore, the amount owed him under the allowance provision in the Subcontract totals *$4,161.29*.
24. Among their original Counterclaims, filed with the **Answer** on August 19, 2002, Defendants/Counter-Plaintiffs included a Counterclaim Count VII, that related to this same contract breach.
25. Section 7 of the Agreement provides the the prevailing party in any litigation under the Agreement is entitled to recover attorneys fees and costs of suit from the losing party.
WHEREFORE, Counter-Plaintiffs respectfully request the following relief:
1. That the Court permit Defendants/Counter-Plaintiffs to voluntarily dismiss their original Counterclaim Count VII, and accept this Supplemental Counterclaim Count IX as a refiling of the same claims, as amended.
2. An award of monetary damages in the amount of $13.123.79, as appropriate under the Subcontract.
3. An award of prejudgment interest at the statutory rate of 9% per annum (735 ILCS 5/§2-1303).
4. An award of attorneys' fees and costs of suit, as allowed by the Agreement.
5. Award of such other and further relief as is deemed appropriate in the circumstances.

COUNTERCLAIM COUNT X

UNJUST ENRICHMENT

1-15. Defendants/Counter-Plaintiffs repeat and reallege paragraphs 1-13, and 16 above, as and for the allegations of paragraphs 1-15 of Counterclaim Count X.
16-20. Defendants/Counter-Plaintiffs repeat and reallege paragraphs 16-20 of Count IX, above, as and for the allegations of paragraphs 16-20 of Counterclaim Count X.

21. As of August 1, 2002, Dr. Johnson fully assumed the contracts for healthcare services for the Exempted Facilities, including payment of all expenses associated with managing the Facilities (pharmaceutical costs, staffing costs, and so forth).
22. All or most of the Exempted Facilities continued to make payments for the healthcare services rendered by Dr. Johnson and ACH during August and September to HPL. During this time, HPL performed no services on the contracts with the Exempted Facilities.
23. HPL failed to forward the payments made by the Exempted Facilities to Dr. Johnson and ACH. In most cases, HPL failed to send any payments at all, and in some cases, HPL sent only a portion of the compensation from the Exempted Facilities to Dr. Johnson.
24. HPL has unjustly retained monies due and owing Dr. Johnson and ACH, based on services Dr. Johnson and ACH rendered at the Exempted Facilities throughout August and September of 2002, in the total amount of *$95,611.76*, as of the date of this filing. The amounts due and owing are allocated in the following table by month and Facility:

	August	***September***	**TOTAL**
Kenosha	$0	$3,466.67	$3,466.67
Knox	$751.84	$0	$751.84
Lee	$0	$0	$0
Livingston	$1,790.00	$5,000.00	$6,790.00
Peoria Juvenile	$6,188.58	$6,719.00	$12,907.58
Peoria County	$25,388.00	$32,757.25	$58,145.25
Tippecanoe	$13,464.17	$0	$13,464.17
Woodford	$86.25	$0	$86.25
TOTAL	$47,668.84	$47,942.92	**$95,611.76**

Again, the above numbers are accurate as of the date of this filing.
25. Among their original Counterclaims, filed with the **Answer** on August 19, 2002, Defendants/Counter-Plaintiffs included a Counterclaim Count VII, that related to this same claim for unjust enrichment.
26. Section 7 of the Agreement provides that the prevailing party in any litigation under the Agreement is entitled to recover attorneys' fees and costs of suit from the losing party.
WHEREFORE, Counter-Plaintiffs respectfully request the following relief:
1. That the Court permit Defendants/Counter-Plaintiffs to voluntarily dismiss their original Counterclaim Count VII, and accept this Supplemental Counterclaim Count X as a refiling of the same claim.
2. An award of monetary damages in excess of $50,000, in the amount by which HPL was unjustly enriched.
3. An award of prejudgment interest at the statutory rate of 9% per annum (735 ILCS 5/§ 2-1303).
4. An award of attorneys' fees and costs of suit, as allowed by the Agreement.
5. Award of such other and further relief as is deemed appropriate in the circumstances.
Respectfully submitted,
NORMAN OHNSON, M.D., BRENDA J. JOHNSON, and ADVANCED CORRECTIONAL HEALTHCARE, INC., Defendants
By: <<signature>>

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