

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA ex rel.)	
THOMAS J. MILLER,)	
ATTORNEY GENERAL OF IOWA,)	
99AG25112,)	EQUITY NO. _____
)	
Plaintiff,)	
)	PETITION
v.)	
)	
HEATHER MANOR, L.L.C.,)	
)	
CARROLL ROBERT McCLURG, in his)	
corporate capacity and in his individual capacity)	
)	
LARRY A. WEIDE, in his corporate capacity)	
and in his individual capacity)	
)	
DANIEL LEE SPENCER, in his corporate capacity)	
and in his individual capacity)	
)	
)	
Defendants.)	

The State of Iowa ex rel. Attorney General Thomas J. Miller files this Petition pursuant to the provisions of Iowa Code chapter 633, Division XXI, commonly known as the Iowa Trust Code, and the provisions of Iowa Code section 714.16, commonly known as the Iowa Consumer Fraud Act. In support of claims, the Attorney General states the following:

INTRODUCTION

The Attorney General brings this civil action against a limited liability company, Heather Manor, L.L.C., and its managers/members concerning the purchase of real estate from a nonprofit

corporation, Horace Mann Home for the Aged, Inc., and the subsequent actions of individual Defendants serving as Trustees on the Board of the Horace Mann Home for the Aged, Inc. The Defendants engaged in a series of transactions in which they breached their fiduciary duties as Trustees. The acts of the Defendants have caused financial troubles for Horace Mann by imposing an onerous and excessive rent and by causing a dramatic increase in the property taxes. As a result, the Defendants have diminished the financial condition of the non-profit corporation and thereby placed at risk the monetary investments and security of the elderly residents of Heather Manor, the residential facility established by the Horace Mann Home for the Aged.

Defendants have harmed the elderly Iowans who reside in the Heather Manor facility. The Attorney General brings this action to stop Defendants' unlawful practices, to ensure that Defendants' ill-gotten gains are disgorged, to impose civil penalties and to secure such additional relief as the Court deems just and equitable.

PARTIES

1. Thomas J. Miller is the duly elected Attorney General of the State of Iowa.
2. Defendant Heather Manor, L.L.C. is an Iowa limited liability company which does business in the State of Iowa.
3. Defendant Carroll Robert McClurg (hereinafter 'McClurg') is a member and manager of Heather Manor, L.L.C. McClurg is a resident of the State of Iowa and regularly transacts business in the State of Iowa.

4. Defendant Larry A. Weide (hereinafter “Weide”) is a member and manager of Heather Manor, L.L.C. He is a resident of the State of Iowa and regularly transacts business in the State of Iowa.

5. Defendant Daniel Lee Spencer (hereinafter “Spencer”) is a member and manager of Heather Manor, L.L.C. It is believed that he was a resident of the State of Iowa at relevant times and regularly transacts business in the State of Iowa through Heather Manor, L.L.C. It is believed that he currently resides in Loveland, Colorado.

JURISDICTION

6. With respect to charitable trusts, the Attorney General is authorized “to investigate for the purpose of determining and ascertaining whether or not [an] estate or trust is being administered in accordance with law and within the terms and purposes thereof, and may, at any time, make application to the court for such orders therein as may appear to be reasonable and proper to carry out the purposes of the trust.” Iowa Code §§ 633.303 and 633.5104.

7. With respect to consumer frauds, if it appears to the Attorney General that a person has engaged in or is engaged in an “unfair practice” declared to be unlawful under Iowa Code section 714.16, the Attorney General may bring an action in district court. Iowa Code § 714.16(7)

VENUE

8. Venue is proper in Polk County, pursuant to Iowa Code section 633.6104, for the

breach of trust allegations as the beneficiaries reside in Polk County and the trust property is located in Polk County.

9. Venue is proper in Polk County, pursuant to Iowa Code section 714.16(10), for the Consumer Fraud Act violations because the Defendants have a principal place of business in Polk County and the victims reside in Polk County.

FACTUAL ALLEGATIONS

Heather Manor

10. Horace Mann Home for the Aged, Inc., (“Horace Mann”) was incorporated in 1956 as a non-profit corporation under the Internal Revenue Code, 26 U.S.C. § 501(c)(3). It is established as a charitable trust as defined in Iowa Code section 633.303 and was originally intended to be operated as a home for retired teachers.

11. Since approximately 1970, Horace Mann has owned and operated a residential facility known as Heather Manor, located at 600 East 5th Street, Des Moines, Iowa. This facility was constructed with financing from a loan backed by the United States Department of Housing and Urban Development (“HUD”).

12. Although the Horace Mann Articles of Incorporation have been amended from time to time, it remains a non-profit institution intended to provide elderly persons with housing

facilities specially designed to meet their physical and social needs. The residents of the Heather Manor facility are almost exclusively senior citizens who occupy individual apartment units through residential tenancy agreements or other “life care” or “continuing care” contracts.

The Sale

13. Upon information and belief, Horace Mann, was founded in 1956. From 1956 through 2002, the Board of Trustees of Horace Mann was controlled in part by the Iowa State Education Association (“ISEA”) through common Board memberships.

14. Beginning in approximately 2000, the Horace Mann Board of Trustees began to offer to sell the Heather Manor facility.

15. In March 2002, Defendants McClurg, Weide, and Spencer formed an Iowa limited liability company called Heather Manor, L.L.C. (“HMLLC”) for the sole purpose of obtaining and holding title to the Heather Manor facility. Although HMLLC considered buying the Heather Manor facility for nearly eight months dating from April 2002 through December 2002, HMLLC never obtained an appraisal of the facility. McClurg stated in Bankruptcy Court that he feared that an appraisal of Heather Manor might be as high as six to eight million dollars.

16. In October 2002, HMLLC made an offer to purchase the Heather Manor facility from the Horace Mann Board for \$1,750,000. The purchase was structured so that \$750,000 of the sale price was to be financed by the seller, Horace Mann, secured by a second mortgage. One of the conditions of the purchase imposed by HMLLC was that the voting membership and

control of the Horace Mann Board of Trustees would be transferred to the members of HMLLC, McClurg, Weide and Spencer. Thus, the for-profit members of HMLLC simultaneously controlled the non-profit Horace Mann.

17. On January 1, 2003, Polk County records showed an assessed value of \$3,835,000 for the buildings and land of the Heather Manor facility.

18. On January 30, 2003, HMLLC purchased the Heather Manor facility from Horace Mann for \$1,750,000. The HUD-insured mortgage was paid off as a part of the transaction. The second mortgage and note of \$750,000 was immediately assigned from Horace Mann to the ISEA.

19. In order to purchase the Horace Mann facility, HMLLC obtained a \$2.25 million loan from Iowa Securities Corporation of Waterloo, Iowa. Acting in their capacity as Trustees of Horace Mann, McClurg, Weide and Spencer forced Horace Mann to give a guaranty to Iowa Securities for the HMLLC loan. Horace Mann received no benefit for acting as a guarantor for Defendants' loan from Iowa Securities.

20. In fact, part of the \$2.25 million loan from Iowa Securities was used by Defendants to purchase unrelated real property in Cerro Gordo County which was transferred to another company belonging to McClurg, Weide and Spencer called Brickyard, L.L.C.

The Triple Net Lease

21. On January 30, 2003, the same date as the sale of the property, HMLLC executed a

“triple net” lease with Horace Mann. The lease obligated Horace Mann to pay HMLLC \$30,000 per month for a period of twenty years. The lease included a 3.5% annual increase.

22. McClurg signed the lease for both the lessor and lessee. McClurg has admitted under oath at a December 2, 2004 U.S. Bankruptcy hearing that the lease was prepared by HMLLC attorneys and that no one negotiated the terms of the lease on behalf of Horace Mann. McClurg further admitted he was, with regards to the lease, “wearing both hats” as lessor and lessee.

The Horace Mann Board of Trustees

23. McClurg, Weide, and Spencer controlled the Horace Mann Board of Trustees from January 30, 2003 through the Summer of 2004. As Board members, McClurg, Weide and Spencer possessed and controlled the assets of Horace Mann and held those assets in trust for Horace Mann.

24. As members of the Horace Mann Home Board of Trustees, McClurg, Weide and Spencer owed to Horace Mann and to the public a fiduciary duty of good faith, loyalty and due care in connection with the preservation, maintenance and use of the Horace Mann assets. McClurg, Weide and Spencer owed Horace Mann the fiduciary duty to refrain from self-dealing and the duty of disclosure.

25. As members of the Horace Mann Home Board of Trustees, McClurg, Weide and Spencer owed fiduciary duties to make the Horace Mann assets productive in furtherance of the charitable purposes and charitable beneficiaries.

26. As members of the Horace Mann Home Board of Trustees, McClurg, Weide, and Spencer were obligated to exercise their fiduciary duties with the degree of care and skill which an ordinarily prudent person would have used in dealing with his own property.

27. Weide resigned from the Horace Mann Board in the Summer of 2004. McClurg and Spencer resigned from the Board on September 27, 2004.

The Financial Consequences

28. Prior to the sale to HMLLC, Horace Mann paid real property taxes under a residential classification that entitled Heather Manor to a residential rollback of approximately 48%. After the sale to HMLLC, Heather Manor has now been classified as commercial property. The property taxes under the commercial classification are currently \$62,060 per year or approximately \$5,000 per month. This re-classification essentially doubled the property taxes due.

29. Prior to the sale to HMLLC, Horace Mann paid approximately \$13,600 per month in mortgage payments. As a result of the 2003 sale and execution of the triple net lease, Horace Mann's obligation for rent is now approximately \$16,400 more per month than its previous mortgage payment.

30. In addition to the increases in rent and real estate taxes, Horace Mann has become liable for all maintenance, utilities, taxes, and insurance under the terms of the triple net lease.

31. Immediately after McClurg and Spencer resigned from the Horace Mann Board in

September 2004, HM LLC attempted to evict Horace Mann as tenant from the Heather Manor facility. This precipitated Horace Mann filing for relief in the U.S. Bankruptcy Court (Chapter 11 reorganization) on October 14, 2004. The bankruptcy petition was dismissed May 12, 2005.

CAUSES OF ACTION

COUNT I

Breach of Fiduciary Duty In Connection with a Charitable Trust

32. Paragraphs 1 through 31 are incorporated herein by reference.

33. As members of the Horace Mann Board of Trustees, McClurg, Weide and Spencer breached the fiduciary duty they owed to Horace Mann by creating and signing the onerous January 30, 2003 triple net lease.

34. As members of the Horace Mann Board of Trustees, McClurg, Weide and Spencer breached their fiduciary duty by pledging the assets of Horace Mann in a guaranty in favor of Iowa Securities.

35. As members of the Horace Mann Board of Trustees, McClurg, Weide and Spencer breached their fiduciary duty by causing the Horace Mann to pay excessive rent to their benefit.

36. As members of the Horace Mann Board of Trustees, McClurg, Weide and Spencer violated their fiduciary duty by causing the Horace Mann to incur additional county property tax liability.

37. As members of the Horace Mann Board of Trustees, McClurg, Weide and Spencer

breached their fiduciary duty by using the assets of Horace Mann to support business activities of for-profit organizations – HMLLC and the related Brickyard, L.L.C.

38. As members of the Horace Mann Board of Trustees, McClurg, Weide and Spencer jointly and severally breached their fiduciary duties of good faith, loyalty and due care by improperly, knowingly, recklessly, negligently, and /or with improper motive or purpose using charitable assets for purposes inconsistent with the charitable purposes of Horace Mann and its beneficiaries.

39. The conduct of McClurg, Weide and Spencer fell below those standards established by law for the protection of Horace Mann and its beneficiaries. McClurg, Weide and Spencer should have anticipated or seen the likelihood of harm that resulted from their conduct.

40. As a direct and proximate cause of the breach of duty by McClurg, Weide and Spencer, a waste of charitable assets occurred and charitable services were not performed to the detriment of Horace Mann and its charitable beneficiaries.

41. HMLLC, McClurg, Weide and Spencer are jointly and severally liable in the form of compensatory damages for the value of all assets currently in their possession that were wrongfully appropriated, for their breach of fiduciary duty, and for their negligent, grossly negligent and/or reckless conduct.

Request for Relief

The State respectfully requests the Court grant relief against the Defendants as follows:

A. Make a full determination of and award all amounts misappropriated by Defendants which are reasonable and proper to carry out the purposes of the trust.

B. Award compensatory and consequential damages, jointly and severally, to the charitable beneficiaries, i.e., the individual residents of Heather Manor in amounts to be determined at trial and which are reasonable and proper to carry out the purposes of the trust.

C. Grant other relief as the Court deems proper and necessary.

COUNT II

Consumer Fraud

42. Paragraphs 1 through 31 are incorporated herein by reference.

43. Defendants, both individually and as a collective scheme, have engaged in an unfair practice prohibited by Iowa Code § 714.16(2)(a) by executing the triple net lease entered into between HMLLC and Horace Mann on January 30, 2003, which constitutes “merchandise” pursuant to Iowa Code § 714.16(1)(i), that has caused “substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits which the practice produces.”

44. The Consumer Fraud Act violations for which Defendants are responsible were committed against older persons and give rise to the additional civil penalty provided for in Iowa Code § 714.16A.

Request for Relief

A. That the Court, pursuant to Iowa Code § 714.16(7), permanently enjoin each of the Defendants and (as applicable) each Defendant's directors, officers, principals, partners, employees, agents, representatives, subsidiaries, affiliates, successors, assigns, merged or acquired predecessors, parent or controlling entities, and all other persons, corporations, or other entities, acting in concert or participating with Defendants who have actual or constructive notice of the Court's injunction from engaging in the unfair acts and practices alleged in this Petition or otherwise violating the Iowa Consumer Fraud Act. In addition to the Consumer Fraud Act provisions cited above, Iowa R. Civ. P. 1.1501 *et seq.* provide for entry of temporary injunctive relief. Iowa R. Civ. P. 1.1507 provides that a temporary injunction may issue after reasonable notice. A prompt hearing is required because delaying injunctive relief is likely to result in an extended period during which the residents of the Heather Manor Health Center may be harmed by being forced to move to different care facilities. Unless HMLLC is enjoined, HMLLC may take steps to close the Health Center. This will result in grave harm to the 28 residents of the Health Center of Heather Manor. The Court should require the Defendants receive Court approval before taking any action that would have an effect on the residents of the Heather Manor facility. The Affidavit of James Haley in support of this Petition is attached hereto as Exhibit 1 (two pages in length with a two page attachment). The Affidavit of Richard Shaffer is attached as Exhibit 2 (one page in length). The Affidavit of Art Filean is attached as Exhibit 3 (two pages in

length). Although there are various versions of the ‘Residency Agreement,’ a typical example is attached as Exhibit 4 (fourteen pages in length).

B. That the Court expand the provisions of the permanent injunctions as necessary by including such “fencing in” provisions as are reasonably necessary to ensure that the Defendants and other enjoined persons and entities do not return to the unlawful practices alleged herein, or commit comparable violations of law.

C. That the Court enter judgment against Defendants, jointly and severally, for amounts necessary to restore to consumers all money acquired by means of acts or practices that violate the Consumer Fraud Act, pursuant to Iowa Code § 714.16(7).

D. That the Court enter judgment against Defendants, jointly and severally, for such additional funds as are necessary to ensure complete disgorgement of all ill-gotten gains traceable to the unlawful practices alleged herein, pursuant to Iowa Code § 714.16(7).

E. That the Court enter judgment against Defendants, jointly and severally, for up to \$40,000.00 for each separate violation of the Consumer Fraud Act, by each Defendant, pursuant to Iowa Code § 714.16(7).

F. That the Court award additional civil penalties for consumer fraud against older persons pursuant to Iowa Code § 714.16A.

G. That the Court award the State interest as permitted by law.

H. That the Court enter judgment against Defendants, jointly and severally, for

mandatory attorney fees, state's costs and court costs, pursuant to Iowa Code § 714.16(11).

I. That the Court grant such additional relief as the Court deems just and equitable.

Respectfully submitted,

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