

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

HUMANA INC. and)
)
 CONCENTRA HEALTH SERVICES, INC.)
)
 Plaintiffs)
)
 v.)
)
 PREVAL GROUP, LLC)
)
 Serve: Richard P. Olson)
 Registered Agent)
 30 Milk Street)
 Portland, ME 04101)
)
 Defendant)
)

CIVIL ACTION NO.: 3-12-cv-123-S
 (Electronically Filed)

VERIFIED COMPLAINT

Plaintiffs Humana Inc. and its wholly owned subsidiary Concentra Health Services, Inc. (“Concentra”), (collectively “Humana”), for their Verified Complaint against Defendant Preval Group, LLC (“Preval”), state as follows:

INTRODUCTION

1. Humana brings this action in order to enjoin Preval from continuing its unauthorized use in commerce of the term or word “Concentra” in connection with its marketing, sale and offer for sale of homeopathic “medicine” which is purported to ignite memory function and reactivate a person’s memory. As alleged herein, the use of the term or name “Concentra” for the memory pill by Preval has caused actual confusion and mistake and has deceived consumers as to the source, origin, affiliation, connection or association of Humana’s health care services. Indeed, the use of the term “Concentra” in relation to these memory pills has caused

consumers to believe, in error, that Concentra's "medicine" is authorized, sponsored, approved, endorsed, or licensed by Humana, or that the Concentra product is in some way affiliated with Humana.

2. This false and misleading information is being presented to the public through the internet, advertisements on national radio programs (specifically, at least on the Rush Limbaugh Show) and through print advertising both nationally and locally, in the Courier Journal. As a result of the actual consumer confusion, Humana is irreparably injured in the form of loss of faith in its products and damaged goodwill.

THE PARTIES

3. Humana is a Delaware corporation with its principal place of business in Louisville, Kentucky. Humana is engaged in the business of providing coordinated health insurance coverage and related services, serving over 17 million customers.

4. Concentra Health Services, Inc. is a wholly owned subsidiary of Humana offering comprehensive services to injured and ill patients and their employers through more than 320 medical centers in 40 states, including in Kentucky, under the Concentra trade name.

5. Preval Group, LLC is a Maine corporation. Upon information and belief its principal place of business is in Scarborough, Maine. According to its own marketing materials, it is a marketing company that provides an all-in-one, turn-key solution to successful brand development. Preval is the parent company responsible for the marketing, sale and offering for sale the Concentra memory pills. Preval is also responsible for overseeing and maintaining the website www.regainyourmemory.com, which markets and offers for sale Concentra memory pills.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1332 (civil action arising under the laws of the United States and diversity of citizenship and amount in controversy exceeds \$75,000); and § 1338 (civil action arising under any Act of Congress relating to trademarks).

7. This Court has personal jurisdiction over Preval because it regularly transacts business in this judicial district, and has caused injury to Humana's property situated within this judicial district. Preval has advertised its product to consumers in the Western District of Kentucky through national radio advertisements and through print ads in the Courier Journal and has received complaints from Kentucky residents. Preval has also targeted Humana and Humana's customers in this district through the purchase of key words "concentra healthcare", "concentra com" and "www concentra com".

8. Venue is appropriate in this Court and in this division pursuant to 28 U.S.C. § 1391 because Preval is subject to personal jurisdiction in this district, a substantial part of the events giving rise to the claim have occurred in this district, and a substantial part of the intellectual property rights that are the subject of the action are situated and harmed in this judicial district.

STATEMENT OF FACTS

A. Humana's and Concentra's Health Related Products.

9. Humana is one of the nation's largest health benefits companies. Humana has expended millions of dollars in research and development in an effort to help consumers make better healthcare choices and to assist with disease management.

10. Concentra, Humana's wholly owned subsidiary, provides occupational health services, physical therapy services, health and wellness services, primary care services and

urgent care services under the brand CONCENTRA®. Concentra currently has 320 medical centers in 40 states.

11. CONCENTRA® is a federally registered mark owned by Humana. Humana owns a number of federal registrations that consist of or include the word CONCENTRA. Attached as Exhibit A is a chart identifying certain of Humana's CONCENTRA® federal registrations, all of which are subsisting and in good standing.

B. Preval's Advertising And Marketing Of Its Memory Pills.

12. Preval advertises its Concentra memory pill on the internet at its website www.regainyourmemory.com, in national radio advertising and through local advertising.

13. The Concentra logo is nearly identical to Humana's Concentra Mark. See Preval advertising logo and the CONCENTRA Mark, attached as Exhibit B.

14. Preval has recently advertised the Concentra memory pill on Rush Limbaugh's daily radio show and in the Courier Journal. See Transcript of Rush Limbaugh Commercial, aired on March 5, 2012, an October 23, 2011 Courier Journal advertisement, both attached as Exhibit C. See also the Declaration of Sondra Wojciak, attached as Exhibit D. In its advertisements, Preval claims that the Concentra memory pill will stimulate the memory, concentration and focus and help fight age related memory loss. See Advertising, attached as Exhibit E.

C. Preval Refused To Cease And Desist.

15. In the fall of 2011, Humana learned that Preval was marketing its memory pill as Concentra. At that time, the advertisements, were, to Humana's knowledge, contained on Preval's website and limited print media in Texas. Humana sent a cease and desist letter in November of 2011, demanding that Preval cease all use of the term Concentra. See Cease and Desist letter, attached as Exhibit F.

16. Preval denied any infringement or likelihood of confusion, but claimed it was winding down its operations with respect to the Concentra memory pill and would be depleting its inventory and would not continue sales of the product. See November 15, 2011 Response Letter, attached as Exhibit G.

17. Humana offered to enter into an agreement with Preval, based upon Preval's claim that it was depleting its inventory without intent to continue violation of Humana's rights, but Preval refused to enter into such agreement.

D. After Humana issued its cease and desist letter, Preval Increased its Advertising and Targeted its Efforts to Increase Confusion

18. Notwithstanding Humana's notice, Preval continued to advertise its Concentra memory pill in Texas.

19. In fact, after its exchange of correspondence with Humana, Preval did not begin winding down, but instead broadened its advertising to a national platform. Humana has discovered that beginning in January, Preval has seen an increase in traffic on its website by 325%. See Website Traffic, attached as Exhibit H.

20. Upon information and belief, after the exchange of correspondence with Humana, Preval also purchased keyword advertising for the terms "concentra healthcare", "concentra com" and "www concentra com." These keywords are directly targeted to create an association with Humana's Concentra health services and Humana's website located at www.concentra.com. Attached as Exhibit I is a report from Keyword Spy showing the purchase of these keywords by Preval. There is no indication that Preval purchased keywords for "memory" to associate ads for internet users searching for a memory ad product or "regain your memory" for internet users searching for Preval's website at www.regainyourmemory.com. The impact of this purchase of keywords is that at one time, if a consumer used any of these keywords, the search results would

have shown the Concentra memory pill website as the first choice, appearing even above the search results for Humana's Concentra website.

21. Related to the purchase of keywords is the fact that a consumer who goes to the Courier Journal website and uses a search term of "concentra" will see on the right hand side of the choices a "Sponsored Link" advertisement for Concentra the memory pill. This sponsored link is side by side with results leading the consumer to Humana's Concentra websites. See Screen Shots of Courier Journal Website, attached as Exhibit J.

E. Actual Confusion As To The Origins Of The Concentra Memory Pill.

22. Preval's unauthorized use in commerce of the mark CONCENTRA® in connection with its sale and offer for sale of its memory pill, as alleged herein, has caused actual confusion, and has deceived consumers as to the source, origin, affiliation, connection or association of Preval's memory pill. As such, it is likely to cause people to believe, in error, that Preval's Concentra memory pill have been authorized, sponsored, approved, endorsed, or licensed by Humana, or that Preval is in some way affiliated with Humana or the services that Humana offers under its Marks. Preval's acts, as alleged herein, constitute Federal trademark infringement of Humana's Registrations of the CONCENTRA® Marks in violation of Section 32 of the Federal Lanham Act, 15 U.S.C. § 1114.

23. After the airing of Preval's advertisement on the Rush Limbaugh daily show on March 5, 2012, Humana customers have mistakenly believed that Humana placed advertisements on the Rush Limbaugh show. Examples of customers who have indicated this mistaken belief are attached hereto as Exhibit K. As shown on Exhibit K, customers from across the nation and in Kentucky have called the Humana call center, visited Humana's website and commented on the "contact us" link, and posted to Humana's Twitter and Facebook accounts complaining about

Humana's advertisements on the Rush Limbaugh show and complaining about the ineffectiveness of Humana's "memory pill."

24. Preval knew that its advertisements on the Rush Limbaugh show would garner widespread attention at a time when this show and the placement of advertisements thereon were a national controversy widely discussed in the media.

25. Since Preval's ad aired this week on the Rush Limbaugh show, third parties are posting and blogging information about companies that are continuing to advertise on the Rush Limbaugh show despite the controversy. These third parties refer to "Concentra's" advertisements, and in some instances provide direct links to Humana's Concentra website and Humana's twitter account, even though Preval was the sponsor of the advertisement. See Examples, attached as Exhibit L.

26. As set forth in the Declaration of Nancy Buttyan, attached as exhibit M, the communications received by consumers and the public has been universally negative towards Concentra and indicates significant harm to the company and its reputation and goodwill. For example, one customer wrote "As a healthcare executive who oversees organizations that make literally thousands of referrals for OT/PT a year, I can tell you that so long as you continue to advertise on Rush Limbaugh's show, your facilities will receive absolutely no referrals from me or any of the entities I manage. . . . I have made my position known throughout the healthcare community and I assure you that your continued support of such insanity will negatively impact your bottom-line." Id. at ¶ 5.

27. Ms. Buttyan has also attests that she has personally responded to 30 – 40 emails from customers and the public from all around the country, including a customer from Kentucky indicating "I will stop using your services".

28. Humana has received a complaint from at least one customer in Kentucky who was confused as to the origins of the Preval product and contacted Humana to complain about the advertising on the Rush Limbaugh radio show.

29. By reason of Preval's actions, Humana has suffered irreparable harm to its valuable CONCENTRA® Marks and the goodwill associated therewith. Humana has been, and unless Preval is preliminarily and permanently restrained from its actions, will continue to be irreparably harmed.

30. As a direct and proximate result of Preval's conduct, Humana has suffered and will continue to suffer damages in an amount to be proved at trial.

COUNT I

FEDERAL TRADEMARK INFRINGEMENT OF A REGISTERED TRADEMARK IN VIOLATION OF THE LANHAM ACT, 15 U.S.C. § 1114

31. Humana incorporates by reference paragraphs 1 through 30 as set forth above.

32. Preval's use in commerce of the term Concentra in connection with its sale and offer for sale of its Concentra memory pill, as alleged herein, is likely to and already has caused confusion, mistake, and has deceived consumers as to the source, origin, affiliation, connection, or association of Preval's Concentra memory pill, and is likely to and has caused people to believe, in error, that Preval's Concentra memory pill has been authorized, sponsored, approved, endorsed, or licensed by Humana, or that Preval is in some way affiliated with Humana or the accommodations and services that Humana offers under its federally registered CONCENTRA® marks.

33. Preval's acts, as alleged herein, constitute infringement of a registered mark in violation of the Federal Lanham Act, 15 U.S.C. § 1114.

34. By reason of Preval's actions, Humana has and will continue to suffer irreparable harm to its valuable trademarks and the goodwill associated therewith. Humana has been, and unless Preval is preliminarily and permanently restrained from its actions, will continue to be irreparably harmed.

35. As a direct and proximate result of Preval's conduct, Humana has suffered and will continue to suffer damages in an amount to be proved at trial.

COUNT II
FEDERAL TRADEMARK INFRINGEMENT AND FALSE DESIGNATION OF
ORIGIN, AND UNFAIR COMPETITION IN VIOLATION OF SECTION 43(a) OF THE
LANHAM ACT, 15 U.S.C. § 1125(a)

36. Humana incorporates by reference paragraphs 1 through 35 as set forth above.

37. Preval's use in commerce of the term or word Concentra in connection with the sale and offer for sale of its Concentra memory pill, as alleged herein, is likely to and has caused confusion and mistake, and deceived consumers as to the source, origin, affiliation, connection, or association of Preval's Concentra memory pill, and is likely to and has caused people to believe in error that Preval's Concentra memory pill has been authorized, sponsored, approved, endorsed, or licensed by Humana, or that Preval is in some way affiliated with Humana or the accommodations and services that Humana offers under the CONCENTRA® Marks.

38. Preval's acts, as alleged herein, constitute infringement, false designation of origin, and unfair competition in violation of Section 43(a) of the Federal Lanham Act, 15 U.S.C. § 1125(a).

39. By reason of Preval's actions, Humana has and will continue to suffer irreparable harm to its valuable trademarks and the goodwill associated therewith. Humana has been, and

unless Preval is preliminarily and permanently restrained from its actions, will continue to be irreparably harmed.

40. As a direct and proximate result of Preval's conduct, Humana has suffered and will continue to suffer damages in an amount to be proved at trial.

COUNT III
STATE COMMON LAW UNFAIR COMPETITION

41. Humana incorporates by reference paragraphs 1 through 40 as set forth above.

42. Preval's use in commerce of the term Concentra in connection with the sale and offer for sale of its memory pill, as alleged herein, is likely to and has caused confusion and mistake, and deceived consumers as to the source, origin, affiliation, connection or association of Preval's product, and is likely to cause people to believe in error that Preval's memory pill has been authorized, sponsored, approved, endorsed or licensed by Humana, or that Preval is in some way affiliated with Humana or the services that Humana offers under its CONCENTRA® Marks.

43. Preval's acts, as alleged herein, constitute common law unfair competition under state laws, including the law of Kentucky.

44. By reason of Preval's actions, Humana has suffered irreparable harm to its valuable trademarks and the goodwill associated therewith. Humana has been, and unless Preval is preliminarily and permanently restrained from its actions, will continue to be irreparably harmed.

45. As a direct and proximate result of Preval's conduct, Humana has suffered and will continue to suffer damages in an amount to be proved at trial.

46. As a direct and proximate result of Preval's willful and egregious conduct, Humana is entitled to a recovery of punitive damages.

WHEREFORE, Humana hereby demands the following relief:

A. That Preval, its affiliates, officers, directors, employees, agents, representatives, attorneys, and all persons acting or claiming to act on their behalf or under their direction or authority, and all persons acting in concert or participation therewith, be temporarily, preliminarily, and permanently enjoined from: (i) using or licensing others to use term Concentra, or any confusingly similar mark or colorable imitation thereof, in connection with the promotion, advertisement, display, sale, offer for sale, manufacture, production, circulation or distribution of any goods or services offered by Preval; (ii) performing any act which can or is likely to lead members of the public to believe that any service or product distributed or sold by Preval is in any manner associated or connected with Humana, or is sold, manufactured, licensed, sponsored, approved or authorized by Humana; and (iii) otherwise taking any action likely to cause confusion, mistake, or deception on the part of the public as to the connection, affiliation, or other association of Preval's goods or services with Humana or its goods or services;

B. That Preval, its affiliates, officers, directors, employees, agents, representatives, attorneys and all persons acting or claiming to act on their behalf or under their direction or authority, and all persons acting in concert or participation therewith, be preliminarily and permanently enjoined from engaging in acts of unfair competition;

C. For an order awarding damages, including but not limited to Preval's profits associated with its sale of goods or services bearing the name Concentra or the term Concentra, any damages sustained by Humana, and the costs of the action, in an amount up to three times the amount of actual damages;

D. For an order awarding punitive or enhanced damages, as well as attorney's fees, for

Preval's willful and egregious conduct;

E. For an order directing Preval to provide a full written accounting of all goods and services bearing the name Concentra or the term Concentra used by Preval or its affiliates;

F. For an order directing Preval to destroy, alter, and/or deliver to Humana all materials, including without limitation, labels, signs, prints, advertisements, prototype plans, and similar items, in Preval's possession or under its control bearing or using the name or term Concentra, or any mark confusingly similar thereto;

G. For an order directing Preval to file with this Court, and serve upon Humana's counsel within thirty (30) days after entry of such judgment, a written report under oath, setting forth in detail the manner and form in which they have complied with such Judgment;

H. For an award of Humana's costs and disbursements incurred in this action;

I. For an award of interest, including prejudgment interest;

J. For a trial by jury on all issues so triable; and

K. For such other and further relief as the Court may deem just and proper, including without limitation an order requiring corrective action to minimize damage or to alleviate consumer confusion.

DEMAND FOR TRIAL BY JURY

Plaintiffs, Humana Inc. and Concentra, by counsel and pursuant to Fed. R. Civ. P. 38, hereby demands a trial by jury on all issues raised in this action that are triable to a jury.

Respectfully submitted,

/s/John K. Bush _____

John K. Bush
Christie A. Moore
Amy B. Berge
BINGHAM GREENEBAUM DOLL LLP
3500 National City Tower
101 South Fifth Street
Louisville, KY 40202-3197
502-589-4200 (phone)
Email: jbush@bgdlegal.com
cmoore@bgdlegal.com
aberge@bgdlegal.com

COUNSEL FOR PLAINTIFFS
HUMANA INC AND CONCENTRA HEALTH
SERVICES, INC.