

COMPASSIONATE CARE HOSPICE GROUP, LTD., an Illinois corporation, and **COMPASSIONATE CARE HOSPICE OF CLIFTON, LLC**,

Plaintiffs,

- vs. -

COMPENSATION SOLUTIONS INCORPORATED, a New Jersey corporation, and **STEVEN POLITIS**,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : PASSAIC COUNTY

CIVIL ACTION NO. L-5607-10

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
APPLICATION FOR A PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

Plaintiffs Compassionate Care Hospice Group, Ltd. and Compassionate Care Hospice of Clifton, LLC (collectively "CCH") submit this Memorandum of Law in support of their application for a preliminary injunction. CCH seeks specific performance by defendant Compensation Solutions Incorporated ("CSI") of certain contractual requirements in the payroll and benefits administration agreement between them ("the Agreement") which CSI refused to perform, despite having both been paid and having "paid itself," as set forth in the Verified Complaint and other papers in this matter, over \$700,000 of CCH's money simply by removing it from CCH's bank account. CCH now seeks the Court's aid by requiring CSI to perform these acts so that CCH and its employees can comply with tax and other statutory obligations that they are powerless to do because of CSI's obstinate refusal to give CCH access to its own information.

The Court is familiar with the events that triggered CCH's previous motion in December of 2010, which for the sake of brevity will not be repeated in detail here. Since that time, however, and still angered by CCH's invocation of its lawful termination right, CSI has continued to lash out at CCH, now deliberately refused to provide certain basic contract services through December 31, 2010 which has prevented CCH from complying with federal, state and local taxes and filing deadlines. Pursuant to the Agreement between the parties, CSI is required to provide CCH with detailed files and reports to complete quarterly filings of Form 940 and Form 941 for the year 2010. On January 31, 2011, CCH was required to file Form 940 and Form 941 with the IRS for the 4th quarter period, covering November, 2010 and December, 2010. CCH was unable to file Form 940 and Form 941 with the IRS because CSI refused to provide detail files and reports as it had done for prior quarterly filings. Denied access to the reports by CSI, CCH was unable to process the reports and information needed to prepare and

file Forms 940 and 941 by the January 31, 2011 deadline. Additionally, CSI's refusal to provide the same files or allow CCH access to the information that contains the payroll registers by state with a summary of gross to net wages and all taxes withheld, has further prevented CCH from complying with state and local payroll taxes and filings.

Without cooperation from CSI, which it refuses to render and which is the subject of the injunctive relief sought here, CCH cannot prepare and submit federal, state and local tax filings for 2010, correct erroneous IRS Form W-2 and 1099 statements or contribute to its employees' 401(k) plan which is administered, and presently "held hostage," by CSI. This presents, in short, another sad example of CSI's continued pattern of doing everything it can to impose economic harm on CCH and the thousands of employees with whom CSI supposedly has a fiduciary relationship, out of what can only be described as spite – for the cost of cooperation with CCH here would be either nothing or of trivial magnitude. It is also a perfect example of a situation justifying the use of this Court's injunction power to prevent harm, for CCH here asks the Court merely to order the performance of a series of simple administrative acts which the party seeking the relief could not effectuate itself at any price.

STATEMENT OF FACTS¹

As set forth in the Amended Verified Complaint, pursuant to the Agreement between the parties effective June 1, 2010 (attached to the Amended Verified Complaint), in 2010 CSI provided payroll, human resources and administrative services for CCH. The Agreement required CCH to pay CSI certain fees for these services, and to designate CSI as broker of record ("BOR") for various insurance policies administered by CSI that cover CCH employees. Effective August 1, 2010, the parties agreed to a modification to the Agreement that excluded payment to CSI for the administration of workers' compensation services. Ultimately, and as set out in detail in the Verified Complaint, CSI was terminated as provided under the Agreement and CCH began the process of, following year's end when CSI would complete its payroll processing obligations under the Agreement, transferring administration of its payroll and benefits elsewhere.

On November 10, 2010, however, defendant Steven Politis, the in-house attorney for CSI, utilized the banking privileges entrusted to CSI for the benefit of CCH and its employees and removed \$518,001.88 from CCH's bank account without authorization. Politis claimed that this defalcation was made for the purpose of satisfying a self-determined contractual "penalty" to CSI in that amount minus \$2,475.00 for reimbursement of certain third-party charges. In the subsequent months, CSI defrauded CCH of approximately \$200,000 more by diverting for its own use monies conveyed to CSI for payroll and other withholding payments. As of the last payroll in December, the parties ceased doing business together, but of course CSI remained in possession of all data and reports concerning CCH's payroll, withholding and other payroll and benefits administration for 2010. CSI refuses to surrender that information or, where it has given certain

¹ All of the facts and circumstances relevant to the instant application are set forth in the certifications of Jacqueline Shropshire and Ann Klauber and from the Amended Verified Complaint from which all the following is drawn.

data to CCH, it refuses to either render it into usable form – which can only be done via CSI’s own proprietary systems – or to take corporate responsibility for the incomplete and incorrect data it has provided.

In terms of legal compliance, CCH’s hands have been tied by CIS's refusal to meet basic standards of commercial practice, much less to meet its own legal obligations. Under IRS regulations, for example, IRS Form 940 and Form 941, by which businesses report their payroll deductions, must be filed on a quarterly basis. Under the Agreement between CSI and CCH, CSI was required to provide certain services to CCH for the year 2010, including completion of the quarterly filings of Form 940 and Form 941 on CCH's behalf. CSI was paid for these services. Thus under the prior quarterly filings for 2010 for Forms 940 and 941, CSI provided CCH with access to its server in order to prepare the 940 and 941 Forms, per the Agreement. CCH's personnel accessed a file on the CSI system to print the reports that contained all the information required to prepare the Forms.

The first such deadline for filing after the commencement of this litigation, however, was on January 31, 2011. On that date, CCH was required to file, with the IRS, Form 940 and Form 941 for the 4th quarter of 2010. CCH, however, was unable to complete this filing because CSI refused to provide "detail files" — the information necessary to complete the forms properly — or payroll withholding reports. As a result, CCH is now exposed to continuing penalties and late-filing fees.

Additionally, CSI has refused to provide CCH’s files or allow CCH access to the information that contains the payroll registers, broken out by state and summarizing information such as gross versus net wages and all taxes withheld. This, in turn, is preventing CCH from complying with state and local payroll taxes and filings. For example, most local taxes are due

monthly. Because CSI refuses to provide CCH with the necessary data to make the appropriate filings and payments, however, CCH is currently past due on local taxes in Delaware, Pennsylvania, New York and Mississippi.

There is more; CSI's ongoing damage to CCH's ability to comply with the law does not end with payroll issues. For example, CCH's company tax filing for an S-Corporation due date is March 15, 2011. Without the 4th quarter 940/941 filings, however, CCH cannot make an accurate and complete filing of its S-Corporation taxes. Similarly, the New Jersey Gross Income Tax ("NJGIT") filing was due on January 31, 2011. Lacking the data needed to file the NJGIT, which only CSI could provide, CCH missed that deadline as well. Moreover, CCH does not have the ability to file any of its tax payments or forms electronically. CSI is still CCH's fiduciary and still maintains the sole password with many of the tax agencies needed to import, download or upload data electronically. Only CSI can provide CCH with current access to these online systems, as well as those of the IRS and the Social Security Administration – and CSI has refused to give it back to CCH, the actual taxpayer, thus “locking out” CCH from control over its own tax compliance, reporting and payment. Lacking this, CCH will need to reset each agency one at a time, causing further delays and penalties — an entirely avoidable situation.

Ultimately the reports necessary to prepare the federal Form 940 and Form 941, as well as the state and local payroll taxes and filings, and the ability to generate accurate and consistent data, remain within the exclusive control and possession of CSI. Despite CCH's requests and the fact that providing this information would cost CSI nothing, or a trivial amount – which CCH would gladly pay – CSI has instead deliberately impeded CCH's ability to comply with federal, state and local tax filings by failing to provide the reports or allowing CCH access to the reports on CCH's internal server. Moreover, CCH cannot hire another outside service to perform this

service as all of the necessary information for the time period covering November and December, 2010, is within CSI's exclusive control.

The Court should be aware that, after repeated requests from CCH, CSI did, eventually, provide CCH with computer data media (a USB drive) purporting to contain all the necessary information for CCH to comply with its filing obligations. It did not. For example, the USB drive provided by CSI contained no monthly payroll registers or monthly summaries of payment by CCH locations broken out by state. This information is critical for CCH to make its filings. Additionally, CCH employees cannot file their tax returns because of erroneous and defective W-2's generated, at CCH's considerable expense, based on the data provided by CSI on that USB drive. CCH has determined, for example, that CSI included certain employee reimbursement payments as income under the category of "state wages." Thus, the state taxable wage amount, which erroneously includes the expense reimbursement money, differs from the federal taxable wage shown in sometimes very significant amounts. Consequently, the W-3 filing made with the Social Security Administration will show a higher state taxable wage amount compared to the federal wage amount. Besides causing immeasurable difficulties for employees, this discrepancy too exposes CCH to IRS penalties.

CCH is obligated to provide accurate W-2s immediately. To make the W-2 corrections, CSI must review the CCH employees' detailed check history that CSI prepared, based on data in its sole possession, in order to correct the instances where expense reimbursement payments are being shown as state taxable wages. Without CSI making these corrections to the general reimbursement income, CCH cannot provide its employees with corrected and accurate W-2 forms.

The problems caused by CSI's intransigence are not limited to "merely" compliance with IRS and state tax laws. Under the Agreement between the parties, CSI provided payroll administration in connection with a Transamerica 401(k) Multiple Employer Plan. But the contributions for the December, 2010 payroll have not been made in connection with CCH's 401(k) plan being administered by Transamerica. To do this, CCH needs to know its employees' contribution amounts for December, 2010, but because CSI is the ERISA trustee for the Transamerica 401(k) Plan, CSI does not have any of the contact information for the Plan – and, again, CSI has refused to provide it. In particular, to make the actual employee contributions for the Transamerica 401(k) Plan, CCH needs the following contact information which CSI has refused to provide:

- The account number for the Transamerica 401(k) Plan;
- The name of the contact person at Transamerica with responsibility for this account;
- The address at Transamerica to which correspondence concerning this account is to be directed;
- Paperwork to change the Transamerica 401(k) Plan over to another trustee; and
- “Approval” by CSI of such a change.

Without this basic information, CCH's employee contributions for the Transamerica 401(k) Plan could not and still cannot be processed for December, 2010. Similarly, neither does CCH have access to the files concerning any employee claims under its long- and short-term disability policies, nor any claims made under the Family Medical Leave Act, during 2010. All the necessary administrative and contact information needed by CCH to administer, follow up on or

even confirm that it has met its obligations under these statutory, fiduciary and other benefits and programs are in the sole possession of CSI — and it refuses to surrender them or otherwise cooperate with CCH.

LEGAL ARGUMENT

CCH IS ENTITLED TO A PRELIMINARY INJUNCTION FOR SPECIFIC PERFORMANCE BY CSI TO PROVIDE THE REPORTS AND DATA RELATED TO CCH'S FEDERAL, STATE AND LOCAL TAX FILINGS, EMPLOYEE CONTRIBUTIONS FOR ITS 401(K) PLAN AND OTHER BENEFIT AND CLAIMS ADMINISTRATION.

The standards for granting a preliminary injunction in New Jersey are well established. In determining whether to award such relief, the Court considers: (1) the likelihood of success on the merits; (2) whether a settled legal right supports the claim; and (3) threatened irreparable harm; and (4) the relative hardship to the parties in granting or denying the relief. *Crowe v. DeGoia*, 90 N.J. 126, 133-34 (1982). Here, as demonstrated below, all these criteria favor the granting of the injunction sought by CCH.

A. CCH is likely to succeed on the merits of its claim

As stated in CCH's original motion with respect to the funds stolen by CSI from CCH's bank account through fraudulent use of its fiduciary privileges, CCH funds placed in CSI's care by CCH – including those CSI was authorized, as a matter of course, to withdraw solely for authorized purposes, such as payment of payroll taxes – were held by CSI as trustee or fiduciary as a matter of law. *See, e.g., In re AAPEX Sys., Inc.*, 273 B.R. 19, 27 (Bankr. W.D.N.Y. 1999) (trust on federal withholding taxes, unlike a common-law trust where there is an identifiable *res*, is trust in an abstract amount that is a dollar figure not tied to any particular assets). CSI's unlawful and unauthorized seizure of those funds was itself a serious fiduciary breach and

abuse of funds properly held only in trust by CSI for the payment of taxes. That money should have been treated like a trust and only as a result of defendants' sharp practice with respect to removal was this court deprived of the opportunity, on CCH's original motion, to impose a constructive trust over those funds as provided by New Jersey law. See, *Cipala v. Lincoln Technical Inst.*, 179 N.J. 45, 54 (2004) (trust appropriate where it "gives plaintiff no more than she would have received if the contract had not been breached"); *Delaware River & Bay Auth. v. York Hunter Const., Inc.*, 344 N.J. Super. 361, 369-70 (Ch. Div. 2001) (defendant not entitled to apply any unrestricted funds in its control to its own benefit until it has corrected its misappropriation of funds belonging to plaintiff and obtained in trust). Defendants' entire modus operandi, involving on unauthorized withdrawals covered by phony "notices" sent to non-working email addresses, itself gives rise to a presumption of that CCH is likely to proceed on its claims. "Where a plaintiff has established *a prima facie* case of wrongdoing by a defendant, New Jersey courts have, in a limited variety of contexts, afforded plaintiffs a presumption of liability, thereby shifting the burden of going forward to the defendant to rebut the presumption." *De Milio v. Schrager*, 285 N.J. Super. 183, 198 (Law Div. 1995).

This importance of this factor has only been magnified by CSI's completely unjustifiable conduct and its refusal to meet its fiduciary duties under the IRS code, the Employee Retirement Income Security Act ("ERISA") and innumerable state statutes, by withholding basic payroll and 401(k) data and information. It cannot be controverted but that CSI has refused to deliver this information in the form needed by CCH. CSI's breaches of its contractual, fiduciary and statutory obligations to the plan beneficiaries and, by virtue of CSI's causing CCH to accrue

penalties and interest due to serial missed deadlines, to CCH, are fundamental breaches of its obligation as a fiduciary to CCH itself, and provide an adequate basis for this Court to determine the likelihood of success by CCH due to CSI's breach of contract, breach of the covenant of fair dealing and breach of fiduciary duty claims. *See, Cox Indus. Equip. Co., Inc. v. Smiley*, 443 F. Supp. 2d 1073, 1074-75 (E.D. Mo. 2005) (plaintiff stated claim where payroll service and that individual defendants "used their access to plaintiffs' bank account to divert substantial sums of money for their personal use rather than to pay plaintiffs' federal tax liabilities, resulting in plaintiffs' receipt of an Internal Revenue Service notice of intent to levy, based on an outstanding tax liability of more than \$400,000"). Besides constituting a gross breach of contract by CSI, CSI's refusal to release this information constitutes serious fiduciary and other wrongdoing, and an unjustified and arbitrary imposition of damage on CCH and its employees, such that CCH is highly likely to succeed on the merits of its claims here.

B. Settled Legal Right Supports CCH's Claim

"Equitable remedies are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties." *Knecht v. Mandek Corp.*, 281 N.J. Super. 439, 446 (App. Div. 1995), quoting *Sears Roebuck & Co. v. Camp*, 124 N.J.Eq. 403, 411-12 (E. & A.1938). In particular, the purpose of specific performance — the nature of the injunction sought here — is to craft a remedy where, as here, the remedy at law is inadequate. *Fleischer v. James Drug Stores*, 1 N.J. 138 (1948). Here

CCH asks the Court only to mandate that CSI do what it has already contracted to do: Provide payroll services for a fee – paid by CCH – including furnishing of tax and other fiduciary and statutory information that only CSI can provide and which no expenditure of money by CCH could remedy. Thus specific performance is granted where the subject matter of the contract is of such a "special nature" or of such a "peculiar value" that legal remedies "would not be a just and reasonable substitute for or representative of that subject-matter in the hands of the party who is entitled to its benefit." *Id.* at 146.

This case presents a textbook application of these principles. Only CSI can provide the data requested; it is contractually and legally obligated to do so, but refuses; its ongoing refusal threatens the welfare of both CCH and its employees, as set out below; no award of money can enable CCH to meet its statutory deadlines for tax reporting and filing as each of them slips away; and, as a matter of public policy, both law and equity favor compliance with such deadlines. Yet CSI refuses, with no justification, to do what it ought to do and easily can do to avoid these problems. Thus this Court is the last resort of CCH, its employees, and – silently – the taxing authorities, both within and without this State, being deprived of compliance with their respective requirements by CSI's intransigence. The powers of equity are given to this Court precisely to grant the sort of straightforward, just and unburdensome relief requested by CCH here.

C. CSI's Actions Threaten Irreparable Harm

"As the Supreme Court has observed, 'parts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.' *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 803 (3d Cir. 1989) (citing *Virginian Ry. Co. v. System Fed'n No.*

40, 300 U.S. 515, 552 (1937)). The facts here not only demonstrate the high likelihood of irreparable harm, but the fact of it – both in the past and as an ongoing proposition. Quite apart from the unjustifiable and reckless imposition of statutory penalties on CCH for missing tax filing deadlines, because of CSI's stubbornness, CCH cannot meet its fundamental duties as a corporate citizen and taxpayer to make timely filings and payments in multiple jurisdictions. CCH employees cannot file their tax returns because of the erroneous and defect W-2s that contain reimbursement expenses as state taxable wages. Furthermore, the interests of thousands of employee participants in CCH's Transamerica 401(k) Plan are being held hostage because of CSI unjustifiable conduct.

D. The balance of hardships clearly favors CCH here

As explained above, in this situation CCH cannot – absent the relief sought here – comply with its tax and fiduciary obligations, or meet its obligations to fund its employees' 401(k) plan, no matter what it does on its own. The hardship on CCH, absent an injunction mandating that CSI do what CCH paid it to do as part of its 2010 payroll processing services, is unavoidable and potentially enormous, especially when considering the impact on untold numbers of CCH employees of CSI's refusal to provide CCH with the information required or even merely access to the CSI data accessible through CSI data interface that was available to CCH through most of 2010.

In contrast, if an injunction is entered, CSI will merely be required to give CCH access to, and otherwise provide, automated data already in its computer system, and already bought and paid for by CCH. That information, those reports and the furnishing of correct and complete W-2's, 1099's and other IRS forms, were the fundamental functions CSI performed and was compensated for by CCH as a payroll processing company. The balance of hardships readily

favors CCH in this application.

CONCLUSION

For all of the foregoing reasons, this Court should issue a preliminary injunction directing defendant Compensation Solutions Incorporated ("CSI") to perform the contractual requirements of the Agreement set forth herein.

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