

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION (RALEIGH)

HUMMINGBIRD CREDIT COUNSELING)
AND EDUCATION, INC.,)
Plaintiff,)

v.)

ERIC H. HOLDER, JR., U.S. ATTORNEY)
GENERAL, DEPARTMENT OF JUSTICE/)
EXECUTIVE OFFICE OF UNITED STATES)
TRUSTEES,)

Defendants.

Civil Action No. _____

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff Hummingbird Credit Counseling and Education, Inc. (“Hummingbird”), by and through its undersigned counsel, hereby brings this Complaint against the Defendant as follows:

PARTIES

1. Hummingbird is a taxable non-profit corporation duly organized under the laws of the State of North Carolina, with its principal place of business in Raleigh, North Carolina.

2. The Executive Office of the United States Trustee (“EOUST”) is a division of the United States Department of Justice, having its principal office in Washington, D.C.

JURISDICTION AND VENUE

3. This Court has jurisdiction to entertain this action under 28 U.S.C. § 1331, 11 U.S.C. § 111(e) and the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*

4. Venue is proper in the United States District Court for the Eastern District of North Carolina under 28 U.S.C. § 1391(b)(2).

STATEMENT OF FACTS

5. Pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), individual debtors may not receive a discharge of debt under 11 U.S.C. § 727 or 11 U.S.C. § 1328, without filing a certificate of completion for a personal financial management instructional course (“Debtor Education”) given by a provider that is approved by the United States Trustee or applicable Bankruptcy Administrator in the debtor’s district. 11 U.S.C. §§ 727(a)(11) and 1328(g)(1).

6. The U.S. Trustee and Bankruptcy Administrators of each judicial district have the authority to approve and disapprove providers of Debtor Education pursuant to 11 U.S.C. § 111(d). The Bankruptcy Administrators of each judicial district perform this duty in North Carolina and Alabama. In all other judicial districts, the EOUST approves or disapproves Debtor Education Providers pursuant to 11 U.S.C. § 111 and 28 C.F.R. Part 58.

7. Hummingbird has been an approved Debtor Education Provider in all federal judicial districts since approximately 2006.

8. Hummingbird is not a tax-exempt organization and has never sought such status.

9. On December 18, 2013, the EOUST issued a Notice of Removal of Hummingbird as an Approved Provider of Personal Financial Instructional Course and Denial of Hummingbird’s Pending Request for Re-Approval (“Notice of Removal”) pursuant to the regulatory procedure set out in 28 C.F.R. Part 58 (hereinafter, “the EOUST Regulations”).

10. The EOUST Notice of Removal does not allege any failure by Hummingbird to provide consumers with quality financial education in compliance with applicable law and regulation, but alleges only that Hummingbird failed to establish that it was in compliance with all state and federal laws and regulations regarding certain aspects of its corporate dealings.

Specifically, the Notice of Removal asserts that (1) Hummingbird is “effectively controlled” by a individual who is neither a member of the Board of Directors nor an officer, and is not otherwise listed in Hummingbird’s Articles of Incorporation, in violation of N.C. Gen. Stat. § 55A-8-01(ab) and (c); (2) that Hummingbird conferred a “private benefit” on such individual and several entities in violation of its Articles of Incorporation and Bylaws and N.C. Gen. Stat. § 55A-1-40(17); and (3) that Hummingbird impermissibly paid distributions to that individual as an “insider” in violation of N.C. Gen. Stat. § 55A-1-40(17). Based on these allegations, the EOUST concluded that Hummingbird has failed to comply with “all applicable laws and regulation of the United States and each state” in which Hummingbird operates, in violation of 28 C.F.R. § 58.33(a) which is incorporated into 28 C.F.R. § 58.32(b). A true and accurate copy of the Notice of Removal is attached hereto as Exhibit 1 and incorporated herein by reference in its entirety.

11. The EOUST Notice of Removal was based largely on the unsworn allegations of the principal of a competitor who tried to acquire Hummingbird on three (3) separate occasions, and the company’s former Director of Counseling Services/Compliance Officer/Staff Attorney, who contacted the EOUST immediately following his termination with Hummingbird to begin making wild allegations against Hummingbird that appeared largely to be an attempt by him to try and distance himself from some highly questionable behavior on his own part while employed by Hummingbird.

12. Under the procedures governing the EOUST’s action against Hummingbird, set out in the EOUST Regulations, Hummingbird timely filed an Appeal to the EOUST Notice of Removal, which included the submission of 26 sworn affidavits and 22 documentary exhibits. Among these were the Affidavits of Joel Minton, Gregory Norman Frey, Annette Conard Chilton and Robert Brasco, true and accurate copies of which are attached hereto as 2, 3, 4, and 5, respectively, and

incorporated herein by reference in their entirety. Also among these were Hummingbird's Articles of Incorporation and Bylaws, a true and accurate copy of which are attached hereto as Exhibits 6 and 7, respectively, and incorporated herein in their entirety.

13. On April 3, 2015, after reviewing the materials provided by Hummingbird in connection with its Request For A Review, and a Response to same filed by the EOUST, the Director of the EOUST issued a Final Agency Action, finding that the evidence in the record failed to persuade him that Hummingbird should be removed as an Approved Provider and its pending Request For Re-Approval denied based on the first or third grounds cited by the EOUST in its Notice of Removal. However, the Director affirmed the action of the EOUST with respect to the second ground, i.e., violation of N.C. Gen. Stat. § 55A-8-01(b). A true and accurate copy of the Final Agency Action is attached hereto as Exhibit 8 and incorporated herein in its entirety.

14. Hummingbird has exhausted all of its administrative remedies with regard to the controversy in question and is now entitled to seek redress in this Court as provided in 28 C.F.R. § 58.36(r) with respect to the above-described action by the EOUST.

CLAIM ONE
REQUEST FOR DECLARATORY JUDGMENT

15. Hummingbird reincorporates and re-alleges the allegations of Paragraphs 1 through 14 above as fully as if repeated herein verbatim.

16. Hummingbird petitions the Court to exercise its authority under 11 U.S.C. § 111 to fully investigate Hummingbird's qualifications as an approved provider of a personal financial management instructional course as described in 11 U.S.C. § 111(d).

17. Hummingbird further requests that in connection with such investigation, Hummingbird be afforded the opportunity to present to the Court such witness testimony and documentary evidence as Hummingbird believes would be relevant and pertinent to the Court's investigation.

18. Hummingbird further requests that at the conclusion of such investigation, this Court find that the action by the EOUST which is the basis of this action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and was unwarranted by the facts, and that Hummingbird does in fact fully meet the qualifications as an approved Provider of Personal Financial Management Instructional Course under 11 U.S.C. §111, notwithstanding the Final Agency Decision by the EOUST to the contrary.

CLAIM TWO
REQUEST FOR INJUNCTIVE RELIEF

19. Hummingbird reincorporates and re-alleges the allegations of Paragraphs 1 through 18 above as fully as if repeated herein verbatim.

20. Law offices that regularly file any volume of bankruptcy cases for consumer debtors ("Bankruptcy Law Offices") generally choose a particular approved provider or providers for their clients' pre-bankruptcy credit counseling and post-filing Debtor Education requirements. These Bankruptcy Law Offices typically collect the fees from their clients for these services and have standard billing arrangements with these approved providers. As a result of these arrangements, Bankruptcy Law Offices only change their vendor relationships when there is a compelling reason to do so. At this time, Hummingbird has such an arrangement with approximately 820 Bankruptcy Law Offices throughout the United States.

21. Most U.S. Trustee judicial districts have approximately 100 approved Debtor Education Providers that are fiercely competing for the same Bankruptcy Law Offices' clients, actively

sending mail solicitations to represented bankruptcy debtors as well as trying to “sign” Bankruptcy Law Offices away from their current vendor for Debtor Education.

22. Should an approved provider of Debtor Education be required to cease doing business for any significant length of time, that provider would not only lose all business temporarily, but would never be able to recover its market share upon regaining approved status. Not only would the loss of approved status immediately impair the trust of the Bankruptcy Law Office community in the disapproved provider, but the competing Debtor Education providers would take immediate action to convert that disapproved providers’ Bankruptcy Law Office clients to themselves.

23. If Hummingbird is required to cease doing business during the pendency of this appeal, it will also essentially “go out of business,” since providing debtor education is Hummingbird’s sole source of revenues. Without those revenues, Hummingbird will have no choice but to shutter its offices and let go all of the employees who work on Hummingbird’s behalf, with obviously no guarantee that any of them would return at any point in the future. As such, even if Hummingbird is ultimately successful in its appeal of the Notice of Removal, it will have to re-build its business operations “from the ground up” at an enormous investment of time and money which Hummingbird may well not be able to ultimately muster in order to get back anywhere near where it is today.

24. In that context, if Hummingbird is required to cease doing business during the pendency of this appeal pursuant to 28 C.F.R. § 58.36(q)(1), it would indisputably cause immediate and irreparable harm to Hummingbird in all U.S. Trustee judicial districts throughout the United States, making any redress in a court of competent jurisdiction meaningless since the company, even should it prevail, would lose all of its customers and thus be forced out of business.

24. In contrast, there would appear to be no harm to the EOUST if the stay of the Removal Order requested by Hummingbird herein is granted. Although it is unquestionably the duty of the

EOUST to oversee all debtor education companies such as Hummingbird in order to protect the public, neither the Notice of Removal nor the Final Agency Action by the EOUST took issue with the quality of the services provided by Hummingbird to the public, or any breach by Hummingbird of its duties and obligations to the debtors using its services.

25. The stay of the Removal Order requested by Hummingbird herein also would not adversely affect the public. To the contrary, the immediate cessation of Hummingbird's Debtor Education services would have a significant adverse impact on the public. Potential bankruptcy debtors typically watch the 2-hour Debtor Education video and then take the on-line test accompanying same over a period of days and sometimes weeks. For the month of May 2014 alone, Hummingbird issued 1,237 Debtor Education certificates. If Hummingbird's Debtor Education services were to be pulled from the marketplace, potentially hundreds of consumers who are in the process of obtaining their Debtor Education through Hummingbird would be left without the means to complete the same and would have to completely start over with another provider, causing additional stress, confusion and cost to a vulnerable group of people.

26. Finally, as more fully outlined and discussed in its Memorandum of Law in support of the Motion For Injunctive Relief filed contemporaneously herewith, as well as evidenced by the uncontroverted Affidavits of Joel Minton, Robert Brasco, Annette Conard Chilton and Gregory Norman Frey attached hereto, Hummingbird asserts that in running its corporate affairs from the inception, it has at all times acted in full accordance not only with the plain language but also the intent of N.C. Gen. Stat. § 55A-8-01. Accordingly, Hummingbird asserts that the record strongly indicates Hummingbird's likelihood of success in having the Notice of Removal deemed unfounded once this Court has had the opportunity to fully review the entire record before the EOUST and such additional documents and testimony as is relevant to this matter.

27. Pursuant to 5 U.S.C. § 705 and Rule 65 of the Federal Rules of Civil Procedure, Hummingbird therefore also requests that the Court immediately issue an order restraining the EOUST from removing Hummingbird as an Approved Provider of Personal Financial Instructional Course under 11 U.S.C. § 111 pending final resolution of this action.

WHEREFORE, Hummingbird prays:

1. That the Court issue an order restraining the EOUST from removing Hummingbird as an Approved Providers of Personal Financial Management Instructional Course under 11 U.S.C. § 111 pending a final determination by the Court of the substantive issues presented herein;

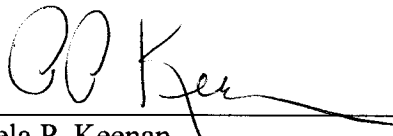
2. That after conducting a full investigation, including an opportunity for Hummingbird to present such witness testimony and documentary evidence as Hummingbird believes would be relevant to such investigation, the Court find that the decision by the EOUST in issue in this case is arbitrary, capricious, an abuse of discretion or otherwise contrary to law, and unwarranted by the facts, and that Hummingbird does in fact fully meet the qualifications as an Approved Provider of Personal Financial Management Instructional Course under 11 U.S.C. §111;

3. That the Court therefore reverse the EOUST's decision to remove Hummingbird as an Approved Provider of Personal Financial Instructional Course under 11 U.S.C. § 111 and remand this case to the EOUST for agency action in conformity with the Court's judgment;

4. That EOUST be charged with all costs of this action; and

5. That Hummingbird have such other and further relief as the Court may deem just and proper.

Date: April 7, 2015.

/s/  _____

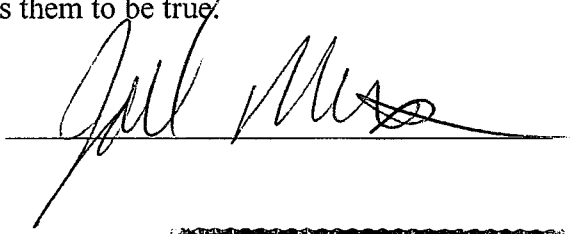
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STATE OF NORTH CAROLINA

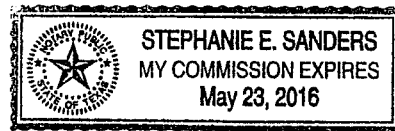
COUNTY OF WAKE

VERIFICATION

Joel Minton, being duly sworn, states that he is a Director and the President of Hummingbird Credit Counseling and Education, Inc. ("Plaintiff"); that in such capacity, he is authorized to file this Complaint on behalf of Plaintiff; and that all of the allegations set forth in the foregoing Complaint are true of his own personal knowledge or from knowledge gained from his review of Plaintiff's duly maintained business records, except as to matters and things therein stated on information and belief, and as to such matters and things, he believes them to be true.



SWORN to and SUBSCRIBED before me
this the 7th day of April, 2015.



Stephanie E. Sanders
Notary Public

My Commission Expires: May 23, 2016