

CAUSE NO. _____

STATE OF TEXAS,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
v.	§	
	§	
NINFA ALBA, AKA NINFA LEAL,	§	
OWNER AND CONTROLLING PARTY	§	
OF AN UNLICENSED ASSISTED	§	BEXAR COUNTY, TEXAS
LIVING FACILITY AND NINFA ALBA,	§	
GARY LEAL AND LINDA LEAL AKA	§	
LINDA VILLAREAL, D/B/A	§	
WWW.ELDERLYCARESANANTONIO.	§	
COM	§	
Defendants.	§	_____ JUDICIAL DISTRICT

**PLAINTIFF’S ORIGINAL PETITION AND APPLICATION FOR AN EX PARTE
TEMPORARY RESTRAINING ORDER AND TEMPORARY AND
PERMANENT INJUNCTIONS**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, Plaintiff, STATE OF TEXAS, acting by and through Attorney General of Texas, GREG ABBOTT, and on behalf of the Texas Department of Aging and Disability Services (“DADS”), and in the public interest, and complains of and files this Original Petition and Application for an Ex Parte Temporary Restraining Order, and Temporary and Permanent Injunction, complaining of and against Defendants, NINFA ALBA, aka NINFA LEAL, (hereinafter “ALBA”) owner and controlling party of unlicensed assisted living facilities, and NINFA ALBA, aka NINFA LEAL, GARY LEAL and LINDA LEAL, aka LINDA VILLAREAL, d/b/a www.elderlycaresanantonio.com (hereinafter “Elderly Care”), who own and operate the website, www.elderlycaresanantonio.com. In support thereof, Plaintiff respectfully shows unto the Court the following:

I. DISCOVERY CONTROL PLAN

1. Discovery is intended to be conducted under a Level 2 discovery control plan, pursuant to Texas Rules of Civil Procedure 190.

II. AUTHORITY

2. This action is brought by the Attorney General of Texas, GREG ABBOTT, through the Consumer Protection and Public Health Division, in the name of the STATE OF TEXAS and in the public interest, under the authority granted by Section 17.47 of the Texas Deceptive Trade Practices Act, TEX. BUS. & COMM. CODE §§ 17.41 et seq. (hereafter “DTPA”), upon the grounds that Defendants have engaged in false, deceptive, and misleading acts and practices in the course of trade and commerce as defined in, and declared unlawful by, Sections 17.46(a) and 17.46(b) of the DTPA. The DTPA permits the Texas Attorney General to bring an action to restrain, by Temporary Restraining Order, Temporary and Permanent Injunction, the use of any method, act, or practice declared to be unlawful by Section 17.46 of the DTPA, where such proceedings are in the public interest.

3. This suit is also brought at the request of the Commissioner of the Texas Department of Aging and Disability Services (“DADS”), as authorized by Chapter 247 of the Texas Health and Safety Code. DADS is responsible for licensing and regulating assisted living facilities. The State may file for a temporary restraining order to prohibit the operation of an assisted living facility without a license under TEX. HEALTH & SAFETY CODE § 247.044(2).

III. PLAINTIFF

4. This suit is brought in the name of the State of Texas by its Attorney General, Greg Abbott, and the Consumer Protection and Public Health Division of the Attorney General in the public interest and under the authority of the Constitution, statutes, and laws of the State of Texas, including TEX. HEALTH AND SAFETY CODE § 247.045(d) and Section 17.47 of the Texas Deceptive Trade Act, TEX. BUS & COMM. CODE §§ 17.41 *et. seq.*

IV. DEFENDANT

5. Defendant Ninfa Alba, is alleged to be the owner and controlling person operating unlicensed assisted living facilities at 3325 Fox Briar, Cibolo, Guadalupe County, Texas 78108 and 15522 Hill Lane, Selma, Guadalupe County, Texas 78154 and can be served with process at 3325 Fox Briar, Cibolo, Guadalupe County Texas, 78108.

6. Defendant Ninfa Alba is a director and owner of two or more unlicensed assisted living facilities and is a controlling person under § 247.005 of the TEX. HEALTH AND SAFETY CODE.

7. Defendant Linda Leal, aka Linda Villareal, is alleged to be operating Linda's TCL in Home Care, LLC, an unlicensed assisted living facility located at 3720 Ridgeway, San Antonio, Bexar County, Texas 78259, which is affiliated with the website www.elderlycaresanantonio.com. Linda Leal can be served with process at her place of business 3720 Ridgeway, San Antonio, Bexar County, Texas 78259.

8. Defendant Gary Leal, is doing business as www.elderlycaresanantonio.com and can be served with process at his home address of 21803 Encino Commons, #810, San Antonio, Bexar County, Texas 78259 or in the alternative at 15522 Hill Lane, Selma, Guadalupe County, Texas 78154.

V. VENUE

9. Venue of this action lies in Bexar County, Texas pursuant to Section 17.47(b) of the DTPA and Section 15.002 of the TEX. CIV. PRAC. & REM. CODE, as the transactions and events giving rise to this action occurred in Bexar County and/or because Defendants Ninfa Alba, Linda Leal and Gary Leal have done or are doing business in Bexar County, Texas as www.elderlycaresanantonio.com.

VI. PURPOSE OF SUIT

10. Defendant ALBA, is the owner and controlling person, operating an assisted living facility without a license, in violation of Chapter 247 of the Texas Health and Safety Code. DADS has

referred this case to the Attorney General, GREG ABBOTT, and his Consumer Protection and Public Health Division for suit, and the State of Texas is seeking injunctive relief under TEX. HEALTH & SAFETY CODE § 247.044 to enjoin the Defendant from operation of these assisted living facilities and any other facility owned, operated or controlled by Defendant Alba, not licensed by the Department of Aging and Disability Services.

11. The State is also seeking appropriate civil penalties, attorneys fees and costs of court, pursuant to chapter 247 of the Texas Health and Safety Code, to be assessed against and paid by Defendant Alba, for violation of chapter 247 of the Texas Health and Safety Code.

VII. PUBLIC INTEREST

12. Plaintiff, has reason to believe that Defendants have engaged in, and will continue to engage in, the unlawful practices set forth below, and Plaintiff has reason to believe that Defendants have, by means of these unlawful acts and practices, caused damage to and acquired money from persons in this State, and caused and will continue to cause adverse effects to legitimate business enterprises which lawfully conduct trade and commerce in this State. Therefore, the Attorney General of Texas has reason to believe that these proceedings are in the public interest.

13. Defendants, Ninfa Alba, Linda Leal and Gary Leal, own and operate the website www.elderlycaresanantonio.com which advertise assisted living facility services through placement of the resident in Defendant's facilities. This website is operating in violation of the Texas Deceptive Trade Practices Act, TEX. BUS. & COMM. CODE § 17.46 *et. seq.*

VIII. ACTS OF AGENTS

14. When it is alleged that Defendants did any act, it is meant that Defendants performed or participated in the act, or Defendants' officers, agents, or employees performed or participated in the act on behalf of and under the authority of the Defendants.

IX. TRADE AND COMMERCE

15. Defendants have, at all times described below, engaged in conduct which constitutes trade and commerce, as those terms defined by Section 17.45(6) of the DTPA.

X. EXHIBITS

16. In support of this petition, the State relies upon and adopts by reference for all purposes the attached exhibits as follows:

- a) Exhibit A is an affidavit from D.R. Garcia, Legal Coordinator in the Regulatory Services Division, Provider Licensing Enforcement Unit, of the Texas Department of Aging and Disability Services, establishing that the Defendants do not have a license to operate an assisted living facility at 3325 Fox Briar, Cibolo, Texas 78108, Facility ID #101292, 15522 Hill Lane, Selma Texas 78154, Facility ID #104422, and 3720 Ridgeway, San Antonio, Texas 78259, Facility ID #104423.
- b) Exhibit B is an affidavit from Robert M. Casias, Program Specialist III for the Long Term Care Regulatory Section, Texas Department of Human Services, describing the investigation of the Defendant's unlicensed assisted living facilities on May 20, 2010, May 24, 2010, May 16, 2011 and May 17, 2011 at 3325 Foxbriar Lane, Cidolo, Texas 78108 and 15522 Hill Lane, Selma, Texas 78154.
- c) Exhibit C is an affidavit from Alma Cruz, a former employee of Ninfa Alba. Mrs. Cruz was employed by Ninfa Alba and provided health care services, such as bathing dressing and assistance with medications for four (4) residents at 3720 Ridgeway Drive, San Antonio, Texas. Mrs. Cruz was then transferred by Ninfa Alba to 15522 Hill Lane, Selma, Texas where she cared for three (3) additional residents until the termination of her employment.
- d) Exhibit D is the affidavit of Gerald Galvan, Investigator for the Consumer Protection and Public Health Division of the Office of the Attorney General of Texas. The affidavit incorporates a website capture of the website, www.elderlycaresanantonio.com, owned and operated by the Defendants and records verifying who pays utilities at the facilities referenced in this suit.

XI. TEXAS HEALTH AND SAFETY CODE VIOLATIONS

17. A person may not establish or operate an assisted living facility without a license issued under Chapter 247 of the Texas Health and Safest Code, TEX. HEALTH & SAFETY CODE

§ 247.021(a). Pursuant to TEX. HEALTH & SAFETY CODE § 247.002 and 247.005, the following words or phrases mean:

- a) **"Assisted Living Facility"** means an establishment that furnishes, in one or more facilities, food and shelter to four or more persons who are unrelated to the proprietor of the establishment and that provides personal care services;
- b) **"Personal Care Services"** means:
 - (i) assistance with meals, dressing, movement, bathing, or other personal needs or maintenance;
 - (ii) the administration of medication by a person licensed to administer medication or the assistance with or supervision of medication; or
 - (iii) general supervision or oversight of the physical and mental well-being of a person who needs assistance to maintain a private and independent residence in a personal care facility or who needs assistance to manage the person's personal life, regardless of whether a guardian has been appointed for the person.
- c) **"Controlling Person"** means if the person, acting alone or with others, has the ability to directly or indirectly influence, direct or cause the direction of the management, expenditure of money, or policies of an assisted living facility or other person is a "controlling person".

18. Chapter 247 of the Texas Health and Safety Code authorizes DADS to promulgate, publish and enforce minimum standards for assisted living facility which ensure the health, safety and comfort of its residents. Under the TEX. HEALTH & SAFETY CODE §§ 247.025 and 247.026, DADS has promulgated minimum licensing standards for assisted living facilities at 40 T.A.C. Chapter 92.

19. TEX. HEALTH & SAFETY CODE § 247.044(a), provides that the Department may seek injunctive relief as follows:

- a) The department may petition a district court for a temporary restraining order to restrain a continuing violation of the standards or licensing requirements provided under this chapter if the department finds that:
 - (1) the violation creates and immediate threat to the health and safety of the assisted living facility residents; or
 - (2) the facility is operating without a license.

20. TEX. HEALTH & SAFETY CODE § 247.044(b) provides that the Department may seek injunctive relief to:

- (1) prohibit a person from continuing a violation of the standards or licensing requirements provided under this chapter;
- (2) restrain the establishment or operation of an institution without a license issued under this chapter, or

(3) grant the injunctive relief warranted by the facts.

21. TEX. HEALTH & SAFETY CODE §§ 247.045(b) and (c) provides that a person who does not possess a license for an assisted living facility as required by TEX. HEALTH & SAFETY CODE § 247.021 is subject to a civil penalty of not less than \$1,000 or more than \$10,000 for each act of violation. Each day of a continuing violation constitutes a separate ground of recovery.

22. TEX. HEALTH & SAFETY CODE § 247.045(e) also authorizes the imposition of investigation and attorney's fees.

23. The State is exempt from filing a bond. TEX. CIV. PRAC. & REM. CODE § 6.001.

XII. FACTUAL ALLEGATIONS AND VIOLATIONS OF THE TEXAS HEALTH AND SAFETY CODE

24. Defendant, Ninfa Alba, owns and operates two assisted living facilities without a license in violation of section 247.021 of the Texas Health and Safety Code. The facilities are located at 3325 Fox Briar, Cibolo, Texas 78108 and 15522 Hill Lane, Selma, Texas 78154. These facilities are an "assisted living facility" as defined under section 247.002(1)(A) of the TEX. HEALTH & SAFETY CODE because they provide in one or more facilities, food and shelter at the facility to at least four (4) persons who are unrelated to the Defendant and the residents are also provided personal care services. *See Affidavit of Alma Cruz attached hereto and incorporated herein as Exhibit C. See also Affidavit from Robert Casias III attached hereto and incorporated herein as Exhibit B.*

25. On May 20, 2010, DADS surveyors conducted a complaint investigation visit to the unlicensed facility located at 3325 Fox Briar, Cibolo, Texas 78108 (the "Fox Briar Facility") and found Defendant Alba providing more than room, board, and laundry to three (3) residents. All residents were unrelated to the owner, proprietor or operator of the Facility. *See Exhibit B.*

26. On May 24, 2010, DADS surveyors conducted another complaint investigation visit to the facility located at 15522 Hill Lane, Selma, Texas 78154 (the "Hill Lane Facility") and found Defendant Alba

providing more than room, board, and laundry to three (3) residents. All residents were unrelated to the owner, proprietor or operator of the Facility. *See Exhibit B.*

27. Further based on information provided to the surveyors, it was determined that at the Fox Briar Facility and the Hill Lane Facility, Defendant Alba was providing six (6) individuals with personal care services, including the assistance and supervision of medications, grooming, bathing and dressing for which an assisted living facility license is required, pursuant to Chapter 247 of the Texas Health and Safety Code. *See Exhibit B.*
28. On May 16, 2011, DADS surveyors conducted another complaint investigation at the Fox Briar Facility located at 3325 Fox Briar, Cibolo, Texas 78108. The DADS surveyors determined that Defendant Alba was continuing to provide three (3) individuals with personal care services, including the assistance and supervision of medications, grooming, bathing and dressing for which an assisted living facility license is required, pursuant to Chapter 247 of the Texas Health and Safety Code. *See Exhibit B.*
29. On May 17, 2011, DADS surveyors conducted another complaint investigation at the Hill Lane Facility located at 15522 Hill Lane, Selma, Texas 78154. The DADS surveyors determined that Defendant Alba was continuing to provide three (3) individuals with personal care services, including the assistance and supervision of medications, grooming, bathing, and dressing for which an assisted living facility license is required, pursuant to Chapter 247 of the Texas Health and Safety Code. *See Exhibit B.*
30. In addition, on May 17, 2011, an investigation revealed Defendant Alba's collaboration between the Hill Lane Facility and the Fox Briar Facility. The website www.elderlycaresanantonio.com shows Defendant Alba directly related to the Hill Lane Facility and an email response from the City of Selma Utility Office, further shows Defendant Alba as the names account holder for the Fox Briar Facility. *See Exhibit B.*

**XIII. FACTUAL ALLEGATIONS AND VIOLATIONS OF THE
TEXAS DECEPTIVE TRADE PRACTICES ACT**

31. Defendants, own and operate the website www.elderlycaresanantonio.com and offer “residential placement opportunities” through *their* “assisted living program”. Defendants offer in home specialization for conditions such as dementia, and Alzheimer’s care and offer assistance with medication, bathing and incontinence care. Further, Defendants advertise that *their* “assisted living facilities monitor residents at all the times, unlike a nursing home,” and provide more “specialized care” by having a 24 hour caretaker at the various assisted living facilities. *See Affidavit of Gerald Galvin attached hereto and incorporated herein as Exhibit D.*
32. Defendant’s advertise *their* “assisted living program” in the facilities at the following locations: 3720 Ridgeway Drive, San Antonio, Texas 78259, 15522 Hill Lane, Selma, Texas 78541 and 3325 Foxbriar Lane, Cibolo, Texas 78108. However, the facilities referenced by the Defendants do not possess an assisted living facility license which is obtained through DADS. *See Exhibit A.*
33. Defendants are in violation of Section 247.021 of the Texas Health and Safety Code by using the term “assisted living” in referring to the facility and the services provided at the facility, when operating and establishing the facility without the required license, in violation of TEX. HEALTH & SAFETY CODE § 247.021(b).
34. Defendants representations as to their “assisted living program” and related facilities result in violations of the DTPA by:
- a) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services, in violation of § 17.46(b)(2);
 - b) causing confusion or misunderstanding as to the affiliation, connection, or association with, or certification by, another, in violation of § 17.46(b)(3);
 - c) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation or connection which he does not, in violation of § 17.46(b)(5);

- d) representing that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another, in violation of § 17.46(b)(7); and
- e) failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed in violation of § 17.46(b)(24).

XIV. MOTION FOR EX PARTE TEMPORARY RESTRAINING ORDER

35. The Plaintiff has good cause to believe that immediate and irreparable injury, loss, or damage would occur as a result of a delay in obtaining a temporary restraining order to enjoin Defendants from continued violations of the DTPA. If Defendants are not immediately restrained, they will continue to engage deceptive acts and thereby cause immediate and irreparable injury, loss, or damage to persons who purchase their services. As such, the Consumer Protection Division filed this lawsuit without notice to Defendants, as authorized by Section 17.47(a) of the DTPA and Texas Health and Safety Code, Chapter 247.021. The State requests that Defendant Alba, her officers, agents, servants, employees and all persons acting in concert with her be restrained from the following:

- a) Preventing or hindering or interfering with agents of DADS, or any other state or local law enforcement agency, from effectuating the immediate orderly transfer of the residents from 3325 Fox Briar, Cibolo, Texas 78108 and 15522 Hill Lane, Selma, Texas 78154, who are not eligible for placement in an assisted living facility, to other licensed facilities, in order to comply with Section 247.002 of the TEX. HEALTH & SAFETY CODE, whereby an unlicensed facility cannot furnish food and shelter to more than four (4) or more persons;
- b) Failing to follow any instructions given by DADS to Defendant and her agents in order to temporarily care for residents while DADS, or any other state or local law enforcement agency, supervises and effectuates the transfer of the residents to other licensed facilities;
- c) Operating at 3325 Fox Briar, Cibolo, Texas 78108, 15522 Hill Lane, Selma, Texas 78154, and 3720 Ridgeway, San Antonio, Texas 78259 as an assisted living facility without an assisted living facility license;
- d) Operating any other assisted living facility in Texas without an assisted living facility license;
- e) Admitting or retaining at 3325 Fox Briar, Cibolo, Texas 78108, 15522 Hill Lane, Selma, Texas 78154 and 3720 Ridgeway, San Antonio, Texas 78259, residents whose needs cannot be met by the facility, in violation of 40 TEX. ADMIN. CODE § 92.2(b)(3)(C);

- f) Failing to care for residents on a temporary and emergency basis while DADS, or any other state or local law enforcement agency, supervises and effectuates the transfer of the residents to other licensed facilities;
- g) Denying any DADS agent or any other state or local law enforcement agency, access to 3325 Fox Briar, Cibolo, Texas 78108, 15522 Hill Lane, Selma, Texas 78154 and 3720 Ridgeway, San Antonio, Texas 78259 or any other facility owned or operated by Defendant in Texas, in order to monitor compliance with this order;
- h) Withholding from residents, or their representatives, any property or records to which the residents are entitled; and
- i) Transferring, spending, hypothecating, concealing, encumbering or removing from the jurisdiction of this Court any money, stocks, bonds, assets, notes, equipment, funds, accounts receivable, policies or insurance, trust agreements, to other property, real, personal or mixed, wherever situated, belonging to or owned by, in possession of, or claimed by Defendant, insofar as such property relates to, arises out of or is derived from the business operations of Defendant, save and except for reasonable and necessary expenditures in the ordinary course of business.
- j) Continuing to advertise residential placement opportunities through an “assisted living program” which places residents in “assisted living facilities” which are not licensed by the Texas Department of Aging and Disability Services by means of the website, www.elderlycaresanantonio.com, or any other means of advertising.

XV. REQUEST FOR TEMPORARY INJUNCTION

36. The State requests this matter be set for a hearing on the State’s request for a temporary injunction within fourteen (14) days from the date the Court signs an order granting the ex parte temporary restraining order requested in section 10, above, and issue an order directing Defendants to appear and show cause as to why the restraining order so issued shall not be continued as a temporary injunction. Pursuant to TEX. HEALTH & SAFETY CODE § 247.044, the State requests this Court issue a temporary injunction in conformity with the terms set forth in section XIV above.

XVI. REQUEST FOR PERMANENT INJUNCTION

37. Upon entry of the temporary injunction requested in section XIV above, the State requests the Court set this matter for a final hearing, and at the conclusion of such hearing, issue a permanent injunction in conformity with the terms set forth in section XIV above, to be in effect pursuant to TEX. HEALTH & SAFETY CODE § 247.044.

XVII. PRAYER

For these reasons, the State respectfully requests the following relief:

- 1) Residents unrelated to the Defendant Alba be immediately removed from 3325 Fox Briar, Cibolo, Texas 78108 and 15522 Hill Lane, Selma, Texas 78154, who are not eligible for placement in an assisted living facility, to other licensed facilities, in order to comply with TEX. HEALTH & SAFETY CODE § 247.002;
- 2) Defendants to be temporarily restrained from operating any assisted living facility in Texas without a license;
- 3) Defendants to be temporarily restrained from advertising residential placement opportunities, an “assisted living program”, and “assisted living facilities” by means of the website, www.elderlycaresanantonio.com.
- 4) The Court issue a show cause order directing Defendants to appear and show cause why the temporary restraining order entered herein should not become a temporary injunction, and upon such hearings, enter a temporary injunction prohibiting Defendants from operating any assisted living facility in Texas without a license; and
- 5) Upon a final trial upon the merits, the State be awarded judgment against the Defendants as follows:
 - a) That Defendants be permanently enjoined from operating any assisted living facility in the State of Texas without a license;
 - b) that Defendants be ordered to pay to the State civil penalties of not less than ONE THOUSAND DOLLARS (\$1,000.00) or more than TEN THOUSAND DOLLARS (\$10,000.00) for each violation of operating an assisted living facility without a license for each day such violation occurred pursuant to TEX. HEALTH & SAFETY CODE § 247.045;

- c) adjudge against Defendants civil penalties in favor of Plaintiff in an amount of not more than \$20,000 per violation of the DTPA (TEX. BUS. & COM. CODE § 17.47(c)(1)); and
 - d) adjudge against Defendants civil penalties in favor of Plaintiff in the amount of \$250,000 for violations of the DTPA (TEX. BUS. & COM. CODE § 17.47(c)(2)).
- 6) The State asks for such other and further relief to which it is justly entitled.

Respectfully submitted,

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