

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ROBERT G. FRANKE
SARA FRANKE BOWLING

PLAINTIFFS/COUNTERDEFENDANTS

V.

CASE NO. 4:09-CV-341 GTE

PARKSTONE LIVING CENTER, INC.,
d/b/a FOX RIDGE AT NORTH LITTLE ROCK

DEFENDANT/COUNTERCLAIMANT

ANSWER AND COUNTERCLAIM

Parkstone Living Center, Inc., d/b/a Fox Ridge at North Little Rock (“Fox Ridge”), for its answer to plaintiffs’ complaint and counterclaim against Robert G. Franke and Sara Franke Bowling, states:

ANSWER

1. Fox Ridge admits that plaintiffs purport to bring this action under the Fair Housing Act, Title III of the Americans with Disabilities Act of 1990, the Arkansas Civil Rights Act of 1993, and the Arkansas Fair Housing Act. Fox Ridge denies that plaintiffs have stated a claim upon which relief can be granted under any of these statutes or otherwise and denies that plaintiffs are entitled to any relief. Fox Ridge denies any remaining allegations in paragraph 1 of plaintiffs’ complaint.

2. Fox Ridge denies the allegations in paragraph 2 of plaintiffs’ complaint.

3. Fox Ridge admits that this Court has subject matter jurisdiction. Fox Ridge denies any remaining allegations in paragraph 3 of plaintiffs’ complaint.

4. Fox Ridge admits that this Court has subject matter jurisdiction. Fox Ridge denies any remaining allegations in paragraph 4 of plaintiffs’ complaint.

5. Fox Ridge admits that venue is proper in this District. Fox Ridge denies any remaining allegations in paragraph 5 of plaintiffs' complaint.

6. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 6 of plaintiffs' complaint and, therefore, denies those allegations.

7. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 7 of plaintiffs' complaint and, therefore, denies those allegations.

8. Fox Ridge admits the allegations in paragraph 8 of plaintiffs' complaint.

9. Fox Ridge admits that Dr. Franke is infected with HIV. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 9 of plaintiffs' complaint and, therefore, denies those allegations.

10. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 10 of plaintiffs' complaint and, therefore, denies those allegations.

11. Fox Ridge denies the allegations in paragraph 11 of plaintiffs' complaint.

12. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 12 of plaintiffs' complaint and, therefore, denies those allegations.

13. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 13 of plaintiffs' complaint and, therefore, denies those allegations.

14. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 14 of plaintiffs' complaint and, therefore, denies those allegations.

15. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 15 of plaintiffs' complaint and, therefore, denies those allegations.

16. Fox Ridge admits the allegations in paragraph 16 of plaintiffs' complaint.

17. Fox Ridge admits the allegations in paragraph 17 of plaintiffs' complaint.

18. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 18 of plaintiffs' complaint and, therefore, denies those allegations.

19. Fox Ridge denies the allegations in paragraph 19 of plaintiffs' complaint.

20. Fox Ridge denies the allegations in paragraph 20 of plaintiffs' complaint.

21. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 21 of plaintiffs' complaint and, therefore, denies those allegations.

22. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 22 of plaintiffs' complaint and, therefore, denies those allegations.

23. Fox Ridge admits that the Occupancy Admission Agreement is part of the materials Fox Ridge provided to Dr. Franke. Fox Ridge admits that the Occupancy Admission Agreement is a contract regarding the relationship between Fox Ridge and a resident. Fox Ridge

lacks information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 23 of plaintiffs' complaint and, therefore, denies those allegations.

24. Fox Ridge admits the allegations in paragraph 24 of plaintiffs' complaint.

25. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 25 of plaintiffs' complaint and, therefore, denies those allegations. Fox Ridge admits that a section of Dr. Franke's medical forms indicates a diagnosis of "HIV+." Fox Ridge denies any remaining allegations in paragraph 25 of plaintiffs' complaint.

26. Fox Ridge admits the allegations in paragraph 26 of plaintiffs' complaint.

27. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 27 of plaintiffs' complaint and, therefore, denies those allegations.

28. Fox Ridge admits the allegations in paragraph 28 of plaintiffs' complaint.

29. Fox Ridge admits the allegations in paragraph 29 of plaintiffs' complaint.

30. Fox Ridge denies the allegations in paragraph 30 of plaintiffs' complaint.

31. Fox Ridge admits that Ms. McMillan called David Bowling. Fox Ridge denies the remaining allegations in paragraph 31 of plaintiffs' complaint.

32. Fox Ridge admits that Mr. Reagor was involved in the decision to ask that Dr. Franke leave Fox Ridge. Fox Ridge admits that Mr. Reagor was acting in the course and scope of his employment during that involvement. Fox Ridge denies the remaining allegations in paragraph 32 of plaintiffs' complaint.

33. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 33 of plaintiffs' complaint and, therefore, denies those allegations.

34. Fox Ridge denies that its action caused a "crisis." Fox Ridge denies that Ms. Bowling was unable to communicate freely with her husband and brother. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 34 of plaintiffs' complaint and, therefore, denies those allegations.

35. Fox Ridge denies the allegations in paragraph 35 of plaintiffs' complaint.

36. Fox Ridge denies that Mr. Reagor told Mr. Bowling that Fox Ridge was "evicting Dr. Franke from Fox Ridge." Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegation that Mr. Bowling called Mr. Reagor from New York and, therefore, denies that allegation. Fox Ridge admits the remaining allegations in paragraph 36 of plaintiffs' complaint.

37. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 37 of plaintiffs' complaint and, therefore, denies those allegations.

38. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 38 of plaintiffs' complaint and, therefore, denies those allegations.

39. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 39 of plaintiffs' complaint and, therefore, denies those allegations.

40. Fox Ridge denies the allegations in paragraph 40 of plaintiffs' complaint.

41. Fox Ridge denies the allegations in paragraph 41 of plaintiffs' complaint.

42. Fox Ridge restates paragraphs 1 through 41 of this answer in response to paragraph 42 of plaintiffs' complaint.

43. Fox Ridge lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 43 of plaintiffs' complaint and, therefore, denies those allegations.

44. Fox Ridge denies the allegations in paragraph 44 of plaintiffs' complaint.

45. Fox Ridge denies the allegations in paragraph 45 of plaintiffs' complaint.

46. Fox Ridge denies the allegations in paragraph 46 of plaintiffs' complaint.

47. Fox Ridge denies the allegations in paragraph 47 of plaintiffs' complaint.

48. Fox Ridge denies the allegations in paragraph 48 of plaintiffs' complaint.

49. Fox Ridge denies the allegations in paragraph 49 of plaintiffs' complaint.

50. Fox Ridge denies the allegations in paragraph 50 of plaintiffs' complaint.

51. Fox Ridge denies the allegations in paragraph 51 of plaintiffs' complaint.

52. Fox Ridge restates paragraphs 1 through 41 of this answer in response to paragraph 52 of plaintiffs' complaint.

53. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 53 of plaintiffs' complaint and, therefore, denies those allegations.

54. Fox Ridge denies the allegations in paragraph 54 of plaintiffs' complaint.

55. Fox Ridge denies the allegations in paragraph 55 of plaintiffs' complaint.

56. Fox Ridge denies the allegations in paragraph 56 of plaintiffs' complaint.

57. Fox Ridge denies the allegations in paragraph 57 of plaintiffs' complaint.

58. Fox Ridge denies the allegations in paragraph 58 of plaintiffs' complaint.

59. Fox Ridge denies the allegations in paragraph 59 of plaintiffs' complaint.

60. Fox Ridge restates paragraphs 1 through 41 of this answer in response to paragraph 60 of plaintiffs' complaint.

61. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 61 of plaintiffs' complaint and, therefore, denies those allegations.

62. Fox Ridge denies the allegations in paragraph 62 of plaintiffs' complaint.

63. Fox Ridge denies the allegations in paragraph 63 of plaintiffs' complaint.

64. Fox Ridge admits the allegations in paragraph 64 of plaintiffs' complaint.

65. Fox Ridge denies the allegations in paragraph 65 of plaintiffs' complaint.

66. Fox Ridge denies the allegations in paragraph 66 of plaintiffs' complaint.

67. Fox Ridge denies the allegations in paragraph 67 of plaintiffs' complaint.

68. Fox Ridge denies the allegations in paragraph 68 of plaintiffs' complaint.

69. Fox Ridge restates paragraphs 1 through 41 of this answer in response to paragraph 69 of plaintiffs' complaint.

70. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 70 of plaintiffs' complaint and, therefore, denies those allegations.

71. Fox Ridge denies the allegations in paragraph 71 of plaintiffs' complaint.

72. Fox Ridge denies the allegations in paragraph 72 of plaintiffs' complaint.

73. Fox Ridge denies the allegations in paragraph 73 of plaintiffs' complaint.

74. Fox Ridge denies the allegations in paragraph 74 of plaintiffs' complaint.

75. Fox Ridge denies the allegations in paragraph 75 of plaintiffs' complaint.

76. Fox Ridge denies the allegations in paragraph 76 of plaintiffs' complaint.

77. Fox Ridge denies the allegations in paragraph 77 of plaintiffs' complaint.

78. Fox Ridge denies the allegations in paragraph 78 of plaintiffs' complaint.

79. Fox Ridge restates paragraphs 1 through 41 of this answer in response to paragraph 79 of plaintiffs' complaint.

80. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 80 of plaintiffs' complaint and, therefore, denies those allegations.

81. Fox Ridge denies the allegations in paragraph 81 of plaintiffs' complaint.

82. Fox Ridge denies the allegations in paragraph 82 of plaintiffs' complaint.

83. Fox Ridge denies the allegations in paragraph 83 of plaintiffs' complaint.

84. Fox Ridge denies the allegations in paragraph 84 of plaintiffs' complaint.

85. Fox Ridge denies the allegations in paragraph 85 of plaintiffs' complaint.

86. Fox Ridge denies the allegations in paragraph 86 of plaintiffs' complaint.

87. Fox Ridge restates paragraphs 1 through 41 of this answer in response to paragraph 87 of plaintiffs' complaint.

88. Fox Ridge lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 88 of plaintiffs' complaint and, therefore, denies those allegations.

89. Fox Ridge denies the allegations in paragraph 89 of plaintiffs' complaint.

90. Fox Ridge denies the allegations in paragraph 90 of plaintiffs' complaint.

91. Fox Ridge denies the allegations in paragraph 91 of plaintiffs' complaint.

92. Fox Ridge denies the allegations in paragraph 92 of plaintiffs' complaint.

93. Fox Ridge denies the allegations in paragraph 93 of plaintiffs' complaint.

94. Fox Ridge restates paragraphs 1 through 41 of this answer in response to paragraph 94 of plaintiffs' complaint.

95. Fox Ridge lacks information or knowledge sufficient to form a belief as to the allegations in paragraph 95 of plaintiffs' complaint and, therefore, denies those allegations.

96. Fox Ridge denies the allegations in paragraph 96 of plaintiffs' complaint.

97. Fox Ridge denies the allegations in paragraph 97 of plaintiffs' complaint.

98. Fox Ridge denies the allegations in paragraph 98 of plaintiffs' complaint.

99. Fox Ridge denies the allegations in paragraph 99 of plaintiffs' complaint.

100. Fox Ridge denies the allegations in paragraph 100 of plaintiffs' complaint.

101. Fox Ridge restates paragraphs 1 through 100 of this answer in response to paragraph 101 of plaintiffs' complaint.

102. Fox Ridge denies that an "actual and present controversy exists" between plaintiffs and Fox Ridge as alleged in paragraph 102 of plaintiffs' complaint. Fox Ridge admits that plaintiffs contend that Fox Ridge has discriminated against Dr. Franke on the basis of his disability in violation of the FHA, the ADA, the AFHA, and the ACRA; that plaintiffs contend that Fox Ridge has violated rights of Ms. Bowling under the FHA, the AFHA, and the ACRA; and that plaintiffs contend that plaintiffs have been harmed thereby and, as a result, are entitled to relief from this Court. Fox Ridge denies that it has discriminated against Dr. Franke on the basis of his disability in violation of the FHA, the ADA, the AFHA, and the ACRA; that Fox Ridge has violated rights of Ms. Bowling under the FHA, the AFHA, and the ACRA; and that

plaintiffs have been harmed and are entitled to relief. Fox Ridge denies the remaining allegations in paragraph 102 of plaintiffs' complaint.

103. Fox Ridge denies the allegations in paragraph 103 of plaintiffs' complaint.

104. Fox Ridge denies the allegations in paragraph 104 of plaintiffs' complaint.

105. Fox Ridge denies all allegations made against it in plaintiffs' prayer for relief.

106. Fox Ridge denies each and every allegation in plaintiffs' complaint unless specifically admitted in this answer.

AFFIRMATIVE DEFENSES

107. Fox Ridge states that plaintiffs' complaint fails to state a claim upon which relief can be granted and that it should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

108. Fox Ridge states that plaintiffs' claims fail in whole or in part because Dr. Franke was not an individual qualified for admission to Fox Ridge.

109. Fox Ridge states that plaintiffs' claims fail in whole or in part because Dr. Franke has a communicable disease that poses a direct threat to the health and safety of others at Fox Ridge.

110. Fox Ridge states that plaintiffs' complaint is barred because of plaintiffs' negligent, willful, or fraudulent acts and misrepresentations.

111. Fox Ridge states that plaintiffs' claims fail in whole or in part because plaintiffs failed to request a reasonable accommodation.

112. Fox Ridge states that plaintiffs' claims fail in whole or in part because any accommodation would impose an undue burden on Fox Ridge.

113. Fox Ridge states that plaintiffs' claims fail in whole or in part because any modification would fundamentally alter the nature of Fox Ridge or the services or programs offered by Fox Ridge.

114. Fox Ridge states that plaintiffs' complaint is barred in whole or in part by the failure to mitigate damages.

115. Fox Ridge states that all actions taken by Fox Ridge were required by Arkansas state and regulatory law.

116. Fox Ridge states that all actions taken by Fox Ridge were made in good faith under Arkansas state and regulatory law.

117. Fox Ridge asserts all affirmative defenses available under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*

118. Fox Ridge asserts all affirmative defenses available under Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181 *et seq.*

119. Fox Ridge asserts all affirmative defenses available under the Arkansas Civil Rights Act of 1993, Ark. Code Ann. §§ 16-123-101 *et seq.*

120. Fox Ridge asserts all affirmative defenses available under the Arkansas Fair Housing Act, Ark. Code Ann. §§ 16-123-201 *et seq.*

121. Fox Ridge states that plaintiffs' complaint is barred in whole or in part by doctrines of waiver, laches, estoppel, unclean hands, and release.

122. Fox Ridge states that plaintiffs' complaint is barred in whole or in part by the statute of limitations.

123. Fox Ridge states that plaintiffs' complaint is barred by their failure to exhaust their administrative remedies.

124. Fox Ridge reserves the right to assert additional affirmative defenses, including but not limited to all affirmative defenses available under Fed. R. Civ. P. 8(c).

JURY DEMAND

125. Fox Ridge demands a jury trial.

COUNTERCLAIM

1. On or about February 9, 2009, Robert G. Franke executed an Occupancy Admission Agreement (the “Agreement”) with Fox Ridge. A true and correct copy of the Agreement is attached as Exhibit 1 and incorporated by reference.

2. Sarah Franke Bowling executed the Agreement as a responsible party.

3. In the Agreement, Dr. Franke and Ms. Bowling acknowledged that Fox Ridge is licensed by the Arkansas Department of Health and Human Services, Division of Medical Services, Office of Long Term Care to operate a Level II Assisted Living Facility.

4. In the Agreement, Dr. Franke and Ms. Bowling agreed to abide by the terms of the Agreement and the Rules and Regulations of Fox Ridge. *See* Agreement, Exhibit 1, ¶ 20.

5. Dr. Franke and Ms. Bowling also agreed that all of Fox Ridge’s obligations under the Agreement were based on the truth and accuracy of Dr. Franke’s and Ms. Bowling’s representations as stated in the Agreement. *See* Agreement, Exhibit 1, ¶ 1.

6. Under the Agreement, Dr. Franke and Ms. Bowling were obliged to pay a Community Fee as evidence of their good-faith commitment to honor and comply with the terms and conditions of the Agreement. *See* Agreement, Exhibit 1, ¶ 3.

7. As part of the Agreement, Dr. Franke and Ms. Bowling warranted and represented that Dr. Franke did not have a communicable disease that posed a direct threat to the health or safety of other residents or staff. *See* Agreement, Exhibit 1, ¶¶ 4.e, 59.

8. At the time Dr. Franke and Ms. Bowling executed the Agreement, Dr. Franke was infected with HIV.

9. At the time Dr. Franke and Ms. Bowling executed the Agreement, Dr. Franke had a communicable disease that posed a direct threat to the health or safety of other residents or staff.

COUNT I: BREACH OF CONTRACT

10. Fox Ridge reasserts the allegations made in paragraphs 1 through 9 of this counterclaim.

11. Fox Ridge and Dr. Franke had a valid written contract whereby Dr. Franke agreed to make true and accurate representations regarding his health.

12. As a responsible party under the Agreement, Ms. Bowling agreed to make true and accurate representations regarding the health of Dr. Franke.

13. Fox Ridge performed its obligations under the contract.

14. Dr. Franke and Ms. Bowling breached the express terms of the contract by representing and warranting that Dr. Franke did not have a communicable disease that posed a direct threat to the health or safety of other residents or staff when, at the time they executed the Agreement, Dr. Franke had a communicable disease that posed a direct threat to the health or safety of other residents or staff at Fox Ridge.

15. Due to the breach of contract by Dr. Franke and Ms. Bowling, Fox Ridge has been called on to defend the above-captioned lawsuit and has otherwise sustained damages.

16. Due to the breach of contract by Dr. Franke and Ms. Bowling, Dr. Franke and Ms. Bowling must remit in full the balance of the Community Fee.

17. Fox Ridge is entitled to a judgment against Dr. Franke and Ms. Bowling for breach of contract.

18. Fox Ridge is entitled to pre-judgment interest in the greatest amount allowed by law.

19. Fox Ridge is entitled to attorney's fees and costs pursuant to Ark. Code Ann. § 16-22-308 and Fed. R. Civ. P. 54.

JURY DEMAND

20. Fox Ridge demands a jury trial.

PRAYER FOR RELIEF

WHEREFORE, Parkstone Living Center, Inc., d/b/a Fox Ridge at North Little Rock, prays that the Court dismiss plaintiffs' complaint with prejudice, enter judgment in its favor and against plaintiffs on plaintiffs' complaint and in its favor and against Robert G. Franke and Sara Franke Bowling, jointly and severally, on its counterclaim, and award to it compensatory damages, attorneys' fees, costs, prejudgment and postjudgment interest, and all other relief to which it is entitled.

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*Attorneys for Parkstone Living Center, Inc., d/b/a
Fox Ridge at North Little Rock*

CERTIFICATE OF SERVICE

I certify that on this 19th day of August, 2009, I electronically filed with the Clerk of the Court the foregoing using the CM/ECF system, which shall send notification of such filing to the following:

- **Scott A. Schoettes, Esq.**
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