

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

THINK AKSARBEN PHARMACY, LLC, and
THINK AKSARBEN SPECIALTY
PHARMACY, LLC,

Plaintiffs,

v.

HY-VEE, INC.,

Defendant.

Case No. 8:22-cv-00036

COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs Think Aksarben Pharmacy, LLC and Think Aksarben Specialty Pharmacy, LLC (collectively, “Think”), for their Complaint against Defendant Hy-Vee, Inc. (“Hy-Vee”), state and allege as follows:

INTRODUCTION

1. Hy-Vee contracted with Think to purchase pharmacy assets and inventory from a retail pharmacy and specialty pharmacy owned and operated by Think located at 7100 West Center Road, Omaha, Nebraska 68106.

2. Think and Hy-Vee executed a Purchase Agreement dated August 24, 2021, as amended by the First Amendment to the Purchase Agreement dated September 13, 2021 (collectively, the “Agreement”).

3. During the time period that the parties were finalizing the Agreement and correspondence regarding payment under the Agreement and despite the high level of security measures Think has in place to protect its electronic systems, a sophisticated fraudster was able to infiltrate the email account of Think’s Chief Financial Officer.

4. As a result of this email network intrusion, and unbeknownst to Think, certain wire instructions that were sent to Hy-Vee relating to payment to a third party were compromised.

5. Contrary to reasonable and expected standards, Hy-Vee neglected to verify the wire instructions by phone and subsequently wired the payment under the Agreement to the incorrect recipient, a fraudster.

6. Think fulfilled all its obligations under the Agreement. However, Hy-Vee is in breach of the Agreement by refusing to pay to Think the full Purchase Price under the Agreement and by failing to act in good faith and follow reasonable standards of care. Moreover, because Hy-Vee has received the benefit of assets and inventory pursuant to the Agreement, for which Hy-Vee has not paid, Hy-Vee is being unjustly and inequitably enriched at Think's expense.

7. Think brings this action to recover for the losses suffered because of Hy-Vee's breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, and negligence.

THE PARTIES

8. Think Aksarben Pharmacy is a limited liability company existing under Nebraska law. Its sole member is located at 7100 West Center Road, Omaha, Nebraska 68106. Think Aksarben, LLC is the sole member of Think Aksarben Pharmacy. Think Aksarben, LLC is owned by Think Nebraska, LLC and Think ACO, LLC. Think Nebraska, LLC is owned by Goodlife Solutions, Inc., a Nebraska Corporation, and Transforming Healthcare LLC. Transforming Healthcare, LLC's sole member is Clarkson Regional Health Services, Inc., a Nebraska Corporation. Think ACO, LLC's sole member is Think Aksarben, LLC. As a result, no member of Think Aksarben Pharmacy is a citizen of Iowa.

9. Think Aksarben Specialty Pharmacy is a limited liability company existing under Nebraska law. Its sole member is located at 7100 West Center Road, Omaha, Nebraska 68106.

Think Aksarben Specialty Pharmacy's sole member is also Think Aksarben, LLC, which has the ownership as set forth in paragraph 8. As a result, no member of Think Aksarben Specialty Pharmacy is a citizen of Iowa.

10. Hy-Vee is incorporated in the State of Iowa. Its principal place of business is located at 5820 Westown Parkway, West Des Moines, Iowa 50266.

JURISDICTION AND VENUE

11. This Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because Think is a citizen of a different state (Nebraska) than Defendant (Iowa) and the matter in controversy exceeds \$75,000, with the amount of damages sought by Think well in excess of that amount.

12. This Court has personal jurisdiction over Hy-Vee by virtue of Hy-Vee's contacts with Nebraska, including, but not limited to, the following:

- a. Hy-Vee conducts business in Nebraska by way of its store locations.
- b. Hy-Vee markets its products and services throughout the Midwest, including to Nebraska residents.
- c. Hy-Vee engaged in a business transaction with Think (both of whom are Nebraska limited liability companies) concerning pharmacy assets and inventory located at a retail pharmacy and specialty pharmacy in Nebraska.

13. Venue in this Court is proper pursuant to 28 U.S.C. § 1391 because the events and omissions giving rise to this action occurred in this district.

14. Pursuant to the Agreement's choice-of-law provision, this action is governed by Iowa law.

FACTUAL BACKGROUND

15. Think and Hy-Vee executed a Purchase Agreement dated August 24, 2021, as amended by the First Amendment to the Purchase Agreement dated September 13, 2021 (collectively, the “Agreement”).

16. Hy-Vee contracted with Think to purchase pharmacy assets and inventory used in the operation of a retail pharmacy and specialty pharmacy owned and operated by Think located at 7100 West Center Road, Omaha, Nebraska 68106.

17. The Agreement provides that:

Subject to the terms and provisions of this Agreement, on the Date of Closing, Buyer, or its nominee, agrees to purchase, and Seller agrees to sell, all of Seller’s right, title, and interest in and to all of the Assets and Inventory free and clear of all liens and encumbrances. Payment shall be made in the form of a corporate check or by federal funds to be wired to a bank account designated by Seller.

18. The Agreement provides that “[w]ithin five (5) days of the Closing Date, Buyer *shall pay to the Seller*, as and for the total purchase price for the Assets and restrictive covenants described in Section 7.” (emphasis added).

19. Hy-Vee elected to pay a large portion of the Purchase Price (as defined in the Agreement) directly to a third party, which held liens on pharmacy assets and inventory that was being purchased pursuant to the Agreement, for the benefit of Think. Rather than get wiring information directly from the third party it was paying, Hy-Vee requested that Think obtain the wire information and then pass it on to Hy-Vee. Hy-Vee had never wired money to this third party before.

20. On or about September 22, 2021, Think Chief Financial Officer’s email was hacked (despite the stringent security measures Think has in place) and, unbeknownst to Think, the wire instructions that had been provided by the third party were compromised by fraudsters. As a result, the wire instructions purportedly sent by Think’s Chief Financial Officer were not the correct wire

instructions for the third party. Think and its Chief Financial Officer were unaware of any alteration to the wire instructions when the email was sent to Hy-Vee.

21. On September 24, 2021, Hy-Vee wired \$2,277,115.99 to an incorrect recipient, a fraudster.

22. Hy-Vee failed to follow well-established and ordinary practices and standards of care in connection with the verification of wire instructions. Hy-Vee did not call to orally verify the wire instructions. Instead, Hy-Vee chose to send a “test” wire to the altered wire instructions to confirm they were accurate.

23. Hy-Vee’s failure to comply with the reasonable practices and standards of care only perpetrated the scam further and made it easier for the fraudsters to obtain the money, as they were able to confirm the fraudulent wire instructions. When dealing with fraudulent wire instructions, as the parties were here, Hy-Vee’s policy of sending a test wire is useless in detecting a fraudulent wire situation.

24. As a result of Hy-Vee’s failure to orally verify the wire instructions, requiring a call to the recipient of the funds to confirm the wiring instructions, the funds were never delivered nor placed into possession of Think or the intended third party for the benefit of Think; rather, the funds were wired to fraudsters.

25. Working with the banks, Hy-Vee has been able to recover approximately \$881,000 of the funds sent by Hy-Vee to the fraudulent bank account, which have been paid to Think. Interestingly, prior to wiring those funds, Hy-Vee *did* require oral verification of the wire instructions. However, Think has yet to receive \$1,397,115.00 of the Purchase Price due and owing from Hy-Vee pursuant to the Agreement.

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