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COMPETITOR GROUP, INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Competitor Group, Inc.,

Plaintiff,

v.

American Cancer Society, Inc., and DOES 1-10 inclusive,

Defendants.

Case No. '13CV0552 MMAJMA

COMPETITOR GROUP, INC.'S COMPLAINT FOR:

(1) DECLARATORY RELIEF;

(2) BREACH OF CONTRACT; AND

(3) BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Plaintiff COMPETITOR GROUP, INC. ("CGI") alleges as follows:

PARTIES

1. CGI is a leading promoter and organizer of full and half marathons, triathlons, and other endurance sporting events across the country. CGI is a Delaware corporation with its principal place of business in San Diego, California. CGI is and was at all relevant times qualified to do business in California.

2. Defendant American Cancer Society ("ACS") is a New York State Type B non-profit corporation that agreed to a multi-year contract with CGI, to be performed in San Diego, California. Defendant ACS is a large and sophisticated business organization, which, on information and belief, has annual revenues in excess of over $300,000,000 and an employee base of over 7,000 full-time and part-time employees.

3. CGI is unaware of the true names and capacities of defendants sued herein as DOES 1 through 10, inclusive. CGI will seek leave of Court to amend this complaint to allege their true names and capacities as they are ascertained. CGI is informed and believes, and on that basis alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences alleged herein, and that each proximately caused CGI's injuries as alleged herein.

JURISDICTION AND VENUE

4. This Complaint seeks declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. This Court has jurisdiction over the subject matter of the claims for relief asserted herein pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between CGI and Defendant ACS and the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs. CGI is a Delaware corporation with its principal place of business in San Diego, California. Defendant ACS is a New York corporation with its principal place of business in Atlanta, Georgia. Accordingly, CGI is a citizen of Delaware and California and Defendant ACS is a citizen of New York and Georgia.

Complete diversity exists between the parties and the jurisdictional minimum is satisfied.

5. Upon information and belief, Defendant ACS is subject to personal jurisdiction of this Court because it is qualified to do business within California and conducts business on a regular basis within California and this district.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391, as a substantial part of the events giving rise to this claim occurred in this judicial district, and Defendant ACS is subject to personal jurisdiction of this Court.

GENERAL ALLEGATIONS

7. CGI is a for-profit sports and management company focused on event organization and promotion for endurance sports such as full and half marathons, cycling and triathlons (including the flagship Rock 'n' Roll Marathon Series).

8. Due to the success and popularity of CGI's endurance events and multi-media platforms, both for-profit and non-profit organizations seek to enter into sponsorship agreements with CGI to advertise, market and raise awareness of their brands and causes through CGI events. For those sponsors that are qualified Internal Revenue Code Section 501(c)(3) charitable organizations, CGI offers different sponsorship levels: "Official Charity" status; "Preferred Charity" status; "For the Benefit of" status ("FBO"); and "Fundraising Group" status. Each sponsorship level comes with a different set of contractual and financial obligations.

9. In this context, on or about January 13, 2010, Defendant ACS and CGI entered into an arms-length negotiated commercial contract, the Charity Beneficiary Agreement (the "Agreement"). The intent of the Agreement was to create a commercial collaboration whereby ACS would pay certain annual fees and participant fees for various Rock 'n' Roll Marathon events over a three-year period (including races in Seattle, Chicago and New Orleans). In exchange, CGI provided Defendant ACS with FBO status and Preferred Charity status for these and other

events and a multi-platform program for Defendant ACS to advertise, market and raise awareness of its cause. The Agreement was similar in scope and respective obligations to CGI's commercial sponsorship arrangements with its corporate partners. CGI also provided Defendant ACS with a donation for each FBO event covered by the Agreement, based on the total registrants for the applicable race; however the registrants were not made aware of these donations.

10. Due to the success of the collaboration, Defendant ACS and CGI subsequently amended the Agreement in December 2011 to expand the term and scope of the relationship by adding more races.

11. To say the ACS/CGI relationship has been successful would be an understatement. From January 2010 through October 2012, Defendant ACS raised approximately $5,000,000 related to its partnership with CGI. Also, there is no way to measure of the amount of donations and other goodwill received by Defendant ACS as a result of people attending the CGI race events at which Defendant ACS was a FBO or Preferred Charity.

12. After three years of mutual performance and benefit under the Agreement, on October 24, 2012 Defendant ACS elected to terminate the Agreement "for convenience" (the "Termination Notice"). Defendant ACS confirmed the "for convenience" termination of the Agreement in several subsequent emails with CGI.

13. Pursuant to Section 4.B. of the Agreement, a provision demanded by Defendant ACS and included in the Agreement, Defendant ACS had the unilateral right to terminate the Agreement "at any time 'for convenience,'" and in such case, the effective "Date of Termination" of the Agreement is the date "when the party received notice of the termination." CGI received the Termination Notice in the normal course soon after it was mailed by Defendant ACS, and at Defendant ACS's insistence, CGI immediately began to take the steps necessary to sever the business relationship (*e.g.*, the de-branding process).

14. The Agreement, in section 4.C.3, also provides a "for convenience" termination fee in favor of CGI, if "ACS gives CGI no less than thirteen (13) months notice in advance of the terminated Event(s)." Specifically, if Defendant ACS fails to give the required notice, it must pay CGI an amount calculated to include the relevant annual fees for the terminated events plus an average minimum participation guarantee fee for each terminated event. At the time CGI received the Termination Notice, there were three terminated ACS FBO events that were inside the thirteen month notice window. The termination fee in the Agreement is not a "penalty," it was an agreed upon estimation of the lost revenue CGI would incur if Defendant ACS invoked its unilateral right to terminate the Agreement prior to the end of the term. This was a heavily negotiated provision that was designed to compensate CGI for the loss of a major sponsor that it would not have the opportunity to replace in a timely fashion.

15. Defendant ACS clearly understood that by terminating the Agreement "for convenience," it owed CGI termination fees. In fact, in its Termination Notice to CGI, Defendant ACS specifically acknowledged its contractual obligation to compensate CGI for the "for convenience" termination, stating that "we understand that the terms of the Agreement require [ACS] to provide certain monetary compensation to the Competitor Group for this termination. We will be in contact to finalize those arrangements."

16. Following receipt of the Termination Notice, CGI calculated the contractual termination fee in the amount of $1,463,950, and requested payment in full from Defendant ACS. During a subsequent phone call with CGI, Defendant ACS offered only $472,000 for the "for convenience" termination fee, offering no basis for that amount. CGI rejected the offer, and on December 14, 2012, submitted an invoice to Defendant ACS for the full $1,463,950 termination fee.

17. Instead of honoring its contractual obligations, and despite its prior representations acknowledging that it owes CGI "for convenience" termination

fees, beginning in February 2013, Defendant ACS has indicated in letters to and phone discussions with CGI that it does not owe CGI any money because the Agreement, in which both parties had performed for three years, was invalid.

18. To support this erroneous position, Defendant ACS relies on the New York charitable solicitation law, known as the Solicitation and Collection of Funds for Charitable Purposes Act (the "Act"). (NY CLS Exec. § 171-a, et seq.). The Act was designed to protect charities from inexperienced or unscrupulous fundraising professionals by requiring covered fundraisers and charities to file and disclose fundraiser-type contracts with the New York Attorney General, and by requiring that a charity be given a period of fifteen days to cancel a "fundraiser" contract after it is filed with the New York Attorney General.

19. Defendant ACS contends that CGI is either a "professional fundraiser" or a "fundraising counsel" under the Act, and as such, CGI had an affirmative obligation to file the Agreement with the New York Attorney General. Defendant ACS takes the position that, because CGI never filed the Agreement, its fifteen day termination period never expired, and on February 8, 2013, Defendant ACS notified both CGI and the New York Attorney General that it was cancelling the Agreement "without cost, penalty, or liability to ACS."

20. To support this position, however, Defendant ACS has had to turn reason on its head, arguing that the Agreement, which it had previously terminated in October 2012, was still alive, solely to terminate it again in a manner that would allow it to fully escape its contractual obligations. Using the Act impermissibly as a sword, Defendant ACS now contends that, in addition to refusing to pay the contractual "for convenience" termination fee, it also is no longer responsible for approximately $190,000 in outstanding sponsorship fees due under the Agreement for services already provided by CGI prior to the termination.

21. CGI denies that it, or the Agreement, is covered by the Act. The Act was not enacted to apply to firms engaged in CGI's line of business. CGI is a

commercial entity whose primary business is organizing racing events, not soliciting for charities, and, accordingly, it does not fall within the Act's definitions of a "professional fundraiser," "fundraising counsel," or any other covered category.

22. CGI's position that the Act does not apply is further supported by Defendant ACS's own actions. Each year, Defendant ACS files, under penalty of perjury, an Annual Filing for Charitable Organizations to the New York Attorney General (the "Filing"). The Filing specifically asks Defendant ACS to disclose all "professional fundraisers" and "fundraising counsel" that it contracted with over the course of the applicable year, as well producing the subject contracts. For the fiscal year 2010 Filing, which Defendant ACS actually filed on or about June 14, 2012 (about four months before it terminated the Agreement), Defendant ACS did not list CGI as either a "professional fundraiser" or "fundraising counsel," did not list CGI at all in the Filing, and did not produce the Agreement for the Filing. However, Defendant ACS did disclose at least seven separate entities as "fundraising counsel" in the fiscal year 2010 Filing, and also produced their respective contracts. At the time it contracted with CGI, and throughout the term of the relationship, Defendant ACS was well aware of the Act and the need to make distinct contractual and filing arrangements for "fundraising counsel" and "professional fundraisers." It did not do so with regard to CGI and the Agreement, precisely because CGI is neither a "fundraising counsel" nor a "professional fundraiser."

23. Further, under the Act, it is illegal for charities such as Defendant ACS to contract with unregistered "fundraising counsels" and/or "professional fundraisers," and the Act provides extensive remedies directly against charities that violate this rule. Thus, Defendant ACS would not have contracted with CGI if CGI was a "fundraising counsel" and/or "professional fundraiser" because, in so doing, it would have violated the Act and subject itself to various penalties.

24. In addition to taking the untenable position that it does not owe CGI any money under the Agreement, Defendant ACS goes even further. It also contends that CGI's receipt of sponsorship fees from Defendant ACS pursuant to the Agreement violated the Act, and that CGI is now required to return to Defendant ACS the millions of dollars in sponsorship fees that Defendant ACS paid to CGI during the course of the Agreement. However, the Act does not require CGI to return sponsorship fees it earned based on its performance under the Agreement. All such sponsorship fees rightfully and legally belong to CGI.

25. CGI specifically rejects and denies Defendant ACS's above stated contentions, including denying that (a) Defendant ACS can somehow now "cancel" the already terminated Agreement and avoid its contractual liability owed to CGI based on the Act (especially in light of the fact that Defendant ACS already terminated the Agreement in October 2012), (b) Defendant ACS can use the Act as a method to avoid paying CGI the contractually required "for termination" fee of $1,463,950 (along with all other unpaid sponsorship fees incurred during the performance of the Agreement), and (c) CGI has any obligation to return the sponsorship fees it collected from Defendant ACS for the services it provided to Defendant ACS during the course of Agreement.

26. Therefore, a ripe dispute and actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201, and a judicial determination is necessary and appropriate at this time so that the parties may ascertain their respective rights and obligations.

FIRST CAUSE OF ACTION

(Declaratory Judgment)

27. CGI re-alleges and incorporates by reference paragraphs 1 through 26 as though set forth in full herein.

28. A written contract, the Agreement, existed between CGI and Defendant ACS. The parties disagree regarding their respective rights and obligations under the Agreement, and whether the Act applies to the Agreement.

29. An actual controversy now exists between CGI and Defendant ACS relating to whether the Agreement was originally terminated on October 24, 2012. Consistent with the Termination Notice, Defendant ACS effectively terminated the Agreement on or about October 24, 2012, and has a contractual obligation to remit the "for convenience" termination fee to CGI (as well as the previously incurred sponsorship fees). Defendant ACS contends that the Agreement, as written and executed, was invalid and that it has the current right to "cancel" the Agreement under the Act "without cost, penalty, or liability."

30. An actual controversy exists between CGI and Defendant ACS with respect to the enforceability of the "for convenience" termination fee provision in the Agreement. The "for convenience" termination fee clause in the Agreement is valid and enforceable, and when Defendant ACS terminated the Agreement "for convenience," it became contractually obligated to pay CGI the amount of $1,463,950 (along with all other unpaid sponsorship fees incurred during the performance of the Agreement). Defendant ACS has refused to pay CGI the "for convenience" termination fee and other sponsorship fees incurred in connection with the parties' performance under the Agreement.

31. An actual controversy now exists between CGI and Defendant ACS with respect to whether the Act relieves Defendant ACS of its obligations under the Agreement, including its obligation to pay the "for convenience" termination fee it requested be added to the Agreement, and whether CGI is required by the Act to return to Defendant ACS any and all sponsorship fees CGI received from Defendant ACS for the services it rendered under the Agreement.

32. In order to resolve these disputes, CGI requests that the Court declare the rights and obligations of CGI and Defendant ACS pursuant to the Act and the

Agreement. Specifically, CGI requests a declaration that: (1) Defendant ACS terminated the Agreement on October 24, 2012, and cannot now "cancel" the previously terminated Agreement under the Act in an effort to avoid paying the "for convenience" termination fee and other accrued sponsorship fees; (2) Defendant ACS must honor its contractual obligations under the Agreement and pay CGI both the termination fee of $1,463,950, and the unpaid sponsorship fees $190,011; (3) The Act does not relieve Defendant ACS of its obligations under the Agreement, including its obligation to pay the "for convenience" termination fee it requested be added to the Agreement and the unpaid sponsorship fees; and (4) CGI has no obligation, and shall not be required to, return any sponsorship fees collected from Defendant ACS during the course of the performance of the Agreement, and that all such fees rightfully and legally belong to CGI.

SECOND CAUSE OF ACTION

(Breach of Contract)

33. CGI re-alleges and incorporates by reference paragraphs 1 through 32 as though set forth in full herein.

34. CGI entered into a contract (*i.e.*, the Agreement) with Defendant ACS.

35. CGI performed all, or substantially all, of its obligations under the Agreement, and all conditions required by the Agreement for Defendant ACS's performance have occurred.

36. Despite the fact that Defendant ACS terminated the Agreement "for convenience," it has breached the Agreement by failing to pay CGI the contractually required "for convenience" termination fee.

37. Defendant ACS has also breached the Agreement by failing to pay for services CGI provided pursuant to the Agreement.

38. As a direct and proximate result of Defendant ACS's conduct, CGI has suffered substantial damages, including lost revenue and additional damages and expenses, in an amount to be proven at trial.

THIRD CAUSE OF ACTION

(Breach of implied covenant of good faith and fair dealing)

39. CGI re-alleges and incorporates by reference paragraphs 1 through 38 as though set forth in full herein.

40. CGI entered into a contract (*i.e.*, the Agreement) with Defendant ACS.

41. CGI performed all, or substantially all, of its obligations under the Agreement, and all conditions required by the Agreement for Defendant ACS's performance have occurred.

42. Defendant ACS unfairly interfered with CGI's rights to receive the benefits of the Agreement by failing to pay the fee associated with Defendant ACS's termination of the Agreement and other related sponsorship fees.

43. Defendant ACS unfairly interfered with CGI's rights to receive the benefits of the Agreement by failing to pay for services rendered by CGI under the Agreement.

44. As a direct and proximate result of Defendant ACS's conduct, CGI has suffered substantial damages, including lost revenue and additional damages and expenses, in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, CGI seeks judgment as follows:

1. CGI respectfully requests that the Court declare as follows:

(a) Defendant ACS terminated the Agreement on October 24, 2012, and cannot now "cancel" the previously terminated Agreement under the Act in an effort to avoid paying the "for convenience" termination fee and other accrued sponsorship fees;

(b) Defendant ACS must honor its contractual obligations under the Agreement and pay CGI both the termination fee of $1,463,950, and the sponsorship fees of $190,011;

(c) The Act does not relieve ACS of its obligations under the Agreement, including its obligation to pay the "for convenience" termination fee it requested be added to the Agreement and the sponsorship fees of $190,011; and

(d) CGI has no obligation, and shall not be required to, return any sponsorship fees collected from Defendant ACS during the course of the performance of the Agreement, and that all such fees rightfully and legally belong to CGI.

2. For general and compensatory damages in excess of $75,000 according to proof;

3. For attorneys' fees, interest and costs of suit herein incurred; and

4. For such other and further legal and equitable relief as the court deems necessary and proper.

Dated: March 8, 2013

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