

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

STATE OF NORTH DAKOTA EX REL.
WAYNE STENEHJEM,
ATTORNEY GENERAL,

Civil No. 08-2018-CV-02064

Plaintiff,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER FOR JUDGMENT**

-VS-

AMERICAN CANCER SOCIETY OF
BISMARCK, INC., AMERICAN CANCER
SOCIETY OF NORTH DAKOTA, INC., and
AMERICAN CANCER SOCIETY FOR
CHILDREN OF NORTH DAKOTA, INC.,
and individually,

Defendants.

CPAT 180119.002

[¶1] This matter came before the Court on Plaintiff's Motion for Summary Judgment, dated September 27, 2018 and filed on September 27, 2018. Defendants Ian R. Hosang, Judith Culzac, Rhett McIntosh, Claudia Stephen, American Cancer Society of Bismarck, Inc., American Cancer Society of North Dakota, Inc., and American Cancer Society for Children of North Dakota, Inc., were served with the Motion for Summary Judgment by mail on September 27, 2018. More than 33 days have passed since the Defendants were served with the Motion, and Defendants are now in default and have failed to dispute the facts and allegations set forth in Plaintiff's Motion for Summary Judgment.

[¶2] WHEREFORE, the Court, having reviewed Plaintiff's Motion for Summary Judgment together with all supporting documents filed therewith and all other

documents filed in this matter, and the Court being duly advised on the premises of this action, makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

[¶3]None of the Defendants is registered as a charitable organization in North Dakota. Index # 15 ¶¶ 3-9.

[¶4]Without registering with the Secretary of State as a charitable organization, Defendants purported to engage in the solicitation of contributions for a charitable purpose.

[¶5]On October 10, 2016, Defendant Hosang filed with the North Dakota Secretary of State Articles of Incorporation to form the nonprofit corporations American Cancer Society of Bismarck, American Cancer Society of North Dakota, and American Cancer Society for Children of North Dakota. Index # 12, pp. 1, 5, 7. Defendant Hosang is listed as the incorporator of each entity, and provided that the purpose of each, under Article 4, is to “actively assist children who have cancer by providing them and their families with money, food, clothing, and transportation during their hospitalization and recovery period.” Id. Under Article 5, Defendant Hosang incorporated an attached exhibit, designated Exhibit A, which, among other things, represents that the entities were formed “exclusively for charitable, religious, educational, and scientific purposes under section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code.” Id. at pp. 2, 6, 8. By operation of N.D.R.Civ.P. 8(b)(6), these allegations are admitted.

[¶6]On December 5, 2017, Defendants filed an annual report. Id. at pp. 3-4. Defendant Hosang is listed as the President; Defendant Culzac is listed as the Vice

President; Rhett McIntosh is listed as the Treasurer; and Claudia Stephen is listed as the Secretary. Id. at p. 3. Defendants represent that their business activities include “provid[ing] food/money/clothes/transportation to cancer patients,” and they continue to claim tax exemption pursuant to section 501(c)(3) of the Internal Revenue Code. Id. at pp. 3-4. By operation of N.D.R.Civ.P. 8(b)(6), these allegations are admitted.

[¶7] Without being registered with the North Dakota Secretary of State as a charitable organization, Defendants purported to engage in the solicitation of contributions for charitable purposes, including “actively assist children who have cancer by providing them and their families with money, food, clothing, and transportation during their hospitalization and recovery period,” and “provid[ing] food/money/clothes/transportation to cancer patients.” Index # 12 at pp. 1, 3, 5, 7. By operation of N.D.R.Civ.P. 8(b)(6), these allegations are admitted.

[¶8] The names “American Cancer Society of Bismarck,” “American Cancer Society of North Dakota,” and “American Cancer Society for Children of North Dakota” are deceptively similar to, or deceptively imply a connection with, the American Cancer Society, a volunteer health organization and foreign nonprofit corporation also registered in North Dakota. Index # 13. By operation of N.D.R.Civ.P. 8(b)(6), Defendants admit that the entities “American Cancer Society of Bismarck,” “American Cancer Society of North Dakota,” and “American Cancer Society for Children of North Dakota” are deceptively similar to, or deceptively imply a connection with, the American Cancer Society.

[¶9] On June 19, 2018, the Attorney General issued a letter to Defendant Hosang informing him that the Attorney General intended to seek dissolution of the American

Cancer Society entities pursuant to N.D.C.C. § 10-33-107(d). Index # 14. Greater than thirty days later, on August 7, 2018, the Attorney General initiated this action by serving the Summons and Complaint on Defendants. Index # 4-6.

[¶10]The formation of the entities themselves was deceptive and part of a scheme to purportedly engage in the solicitation of charitable contributions while “passing off” Defendants’ American Cancer Society entities as the actual American Cancer Society or to imply a connection with the actual American Cancer Society. Defendants may not cure their fraud by amending the articles of incorporation of their American Cancer Society entities when the entire existence of the entities themselves is deceptive.

II. CONCLUSIONS OF LAW

[¶11]The State of North Dakota brought this action on the relation of Wayne Stenehjem, Attorney General of the State of North Dakota, in the public interest pursuant to N.D.C.C. ch. 51-15. The State of North Dakota ex rel. Wayne Stenehjem, Attorney General, has authority to act in this matter pursuant to N.D.C.C. ch. 51-15;

[¶12]The Court has subject matter jurisdiction pursuant to N.D.C.C. § 51-15-07;

[¶13]The Court has personal jurisdiction over Defendants American Cancer Society of Bismarck, Inc., American Cancer Society of North Dakota, Inc., and American Cancer Society for Children of North Dakota, Inc.

[¶14]Under N.D.C.C. §§ 51-15-07, 51-15-10, and 51-15-11 the district court has jurisdiction to enter appropriate orders.

[¶15]The venue of this action in Burleigh County is proper under N.D.C.C. § 28-04-05 and § 28-04-03 because all or part of the cause of action arose in Burleigh County.

[¶16] There is no material issue of fact preventing an entry of summary judgment as a matter of law.

[¶17] N.D.C.C. § 50-22-01(2)(a) defines “charitable organization” as a “person that engages in or purports to engage in solicitation for a charitable purpose and includes a chapter, branch, area office, or similar affiliate or a person soliciting contributions within the state for a parent charitable organization.” N.D.C.C. § 50-22-01(2)(a).

[¶18] N.D.C.C. § 50-22-01(3) defines “charitable purpose” as a “charitable, benevolent, philanthropic, religious, social service, welfare, educational, cultural, artistic, or public interest purpose, either actual or purported.” N.D.C.C. § 50-22-01(3).

[¶19] North Dakota Century Code Section 50-22-04.3 provides:

50-22-04.3. Fraud – Misrepresentation.

A charitable organization, professional fundraiser, or any agent or employee of a charitable organization or professional fundraiser may not use any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation with the intent that others rely thereon in connection with the solicitation of a charitable contribution.

N.D.C.C. § 50-22-04.3.

[¶20] N.D.C.C. § 51-15-02 provides, in pertinent part:

51-15-02. Unlawful practices – Fraud – Misrepresentation – Unconscionable.

The act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or solicitation of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice.

N.D.C.C. § 51-15-02.

[¶21] “Merchandise” includes “charitable contributions.” N.D.C.C. § 51-15-01(3).

[¶22] Defendants are or were engaged in, or purported to engage in, the solicitation of charitable contributions in North Dakota, within the meaning of N.D.C.C. § 50-22-01.

[¶23]In connection with the solicitation of charitable contributions, Defendants were not, prior to solicitation, registered as a charitable organization, in violation of N.D.C.C. § 50-22-02(1).

[¶24]Defendants are or were engaged in the advertisement, solicitation, and sale of merchandise, as that term is defined in N.D.C.C. § 51-15-01, in the State of North Dakota, including the solicitation of charitable contributions within the meaning N.D.C.C. § 50-22-01.

[¶25]It is consumer fraud to "pass off" or use another entity's label, trade name, trademark, or official seal without permission. See, e.g., Niresk Indus., Inc. v. F.T.C., 278 F.2d 337, 340, 341-42 (7th Cir. 1960); J.C. Penney Co. v. Parrish Co., 339 F. Supp. 726, 727 (D. Idaho 1972); Midway Mfg. Co. v. Dirkschneider, 571 F. Supp. 282, 286 (D. Neb. 1983); Bicentennial Comm'n v. Olde Bradford Co., 26 Pa. Comwlth. 636, 638 (1976).

[¶25]In connection with the solicitation and sale of merchandise, Defendants made untrue, deceptive, and misleading representations with the intent that others rely thereon, in violation of N.D.C.C. §§ 50-22-04.3 and 51-15-02. Defendants' actions constitute false pretense, false representation, or actual fraud.

[¶26]N.D.C.C. § 10-33-107(e) provides:

e. An action may not be commenced under subdivision d until thirty days after notice to the corporation by the attorney general for the reason for the filing of the action. If the reason for filing the action is an act that the corporation has done, or has omitted to do, and the act or omission may be corrected by an amendment of the articles or bylaws or by performance of or abstention from the act, the attorney general shall give the corporation thirty additional days in which to effect the correction before filing the action.

N.D.C.C. § 10-33-107(e).

[¶27]Under N.D.C.C. § 10-33-107(1)(d), the Attorney General “is given specific authority to commence a civil action to dissolve a corporation for violations of the law.” State ex rel. Heitkamp v. Family Life Servs., Inc., 2000 ND 166, ¶ 7 (citing Perry Center, Inc. v. Heitkamp, 1998 ND 78, ¶ 49.).

[¶28]While a corporation may amend a corporate name, in a consumer fraud action, cessation of deceptive conduct does not moot an attorney general's action. See, e.g., State v. Goodyear Tire & Rubber Co., 128 Ariz. 483 (Ct. App. 1981); Commonwealth ex rel. Stephens v. Isaacs, 577 S.W.2d 617 (Ky. Ct. App. 1979); People ex rel. Spitzer v. Network Assoc., Inc., 195 Misc. 2d 384 (Sup. Ct. 2003); People ex rel. Lefkowitz v. Therapeutic Hypnosis, Inc., 83 Misc. 2d 1068 (Sup. Ct. 1975); State ex rel. McLeod v. Brown, 294 S.E.2d 781 (S.C. 1982).

[¶29]Injunctive relief is necessary and appropriate in this case in order to prohibit Defendants from engaging in continued or future violations of N.D.C.C. § 51-15-02, and injunctive relief is justifiable under the circumstances of this case.

[¶30]Defendants are liable to pay such restitution necessary to restore any loss suffered by persons as a result of their deceptive acts or practices, pursuant to N.D.C.C. § 51-15-07.

[¶31]Defendants are liable to pay the Attorney General for the fees and costs incurred in investigating and prosecuting this matter, pursuant to N.D.C.C. § 51-15-10.

[¶32]Civil penalties are appropriate in this case based on Defendants' conduct.

[¶33]Dissolution of the entities “American Cancer Society of Bismarck, Inc.,” “American Cancer Society of North Dakota, Inc.,” and American Cancer Society for Children of North Dakota, Inc.” is appropriate because the formation of the entities

themselves was deceptive and part of a scheme to purportedly engage in the solicitation of charitable contributions while “passing off” Defendants’ American Cancer Society entities as the actual American Cancer Society or to imply a connection with the actual American Cancer Society.

ORDER FOR JUDGMENT

¶34] THEREFORE, IT IS HEREBY ORDERED pursuant to N.D.C.C. §§ 10-33-107, 50-22-05, and 51-15-02 et seq., that:

A. Plaintiff’s Motion for Summary Judgment is granted.

B. That Defendants be adjudged in violation of the charities law, N.D.C.C. § 50-22-02, for purporting to engage in the solicitation of charitable contributions in North Dakota before properly registering with the Secretary of State as a charitable organization.

C. That Defendants be adjudged in violation of the charities law, N.D.C.C. § 50-22-04.3, for engaging in deceptive acts or practices, fraud, false pretense, false promises, or misrepresentations, with the intent that others rely thereon, in connection with the solicitation of charitable contributions in the State of North Dakota.

D. That Defendants be adjudged in violation of the consumer fraud law, N.D.C.C. § 51-15-02, for engaging in deceptive acts or practices, fraud, false pretenses, false promises, or misrepresentations, with the intent that others rely thereon in connection with the solicitation of charitable contributions in the State of North Dakota.

E. That Defendants, their agents, employees, representatives, assigns, and all other persons in active concert or participation with them, pursuant to N.D.C.C. § 51-15-07, be permanently enjoined and restrained from directly or indirectly making false statements, false promises, or misrepresentations and the act, use and employment

of any deceptive acts or practices in connection with the advertisement or sale of merchandise, as defined by N.D.C.C. § 51-15-01(3), within the State of North Dakota.

F. That Defendants, their agents, employees, representatives, assigns, and all other persons in active concert or participation with them, pursuant to N.D.C.C. § 51-15-07, be permanently enjoined and restrained from engaging in deceptive acts or practices and from directly or indirectly making false statements, false promises, or misrepresentations in connection with the advertisement or solicitation of charitable contributions, or any other merchandise, as defined by N.D.C.C. § 51-15-01(3).

G. That Defendants, their agents, employees, representatives, assigns and all other persons in active concert or participation with them, pursuant to N.D.C.C. § 51-15-07, be enjoined and restrained from the advertising or solicitation of charitable contributions in accordance with paragraph H.

H. That, pursuant to N.D.C.C. § 51-15-07, Defendants, their agents, employees, representatives, assigns, and all other persons in active concert or participation with them, are permanently enjoined and restrained from engaging in the advertisement or solicitation of charitable contributions. Notwithstanding the permanent injunction, Defendants may engage in the future solicitation of charitable contributions if Defendants apply to the Attorney General and the Court to lift the permanent injunction and the Court finds Defendants have fully complied with the following terms and conditions and otherwise are rehabilitated:

1. Five or more years have expired since the entry of judgment herein;
2. Defendants have paid in full all restitution to consumers pursuant to the judgment herein;

3. Defendants have paid in full restitution to all consumers from whom Defendants solicited any charitable contributions in the state of North Dakota in violation of N.D.C.C. chs 50-22 and/or 51-15;

4. Defendants have paid all amounts owed to the Attorney General pursuant to entry of judgment herein;

5. Defendants establish that they will not solicit charitable contributions using a business name that is deceptively similar to any other entity whether registered in the State of North Dakota or not; and

6. Defendants are properly registered as a charitable organization or professional fundraiser in full compliance with N.D.C.C. ch. 50-22.

If the Court thereafter finds, pursuant to an agreement between the Attorney General and Defendants, or after a hearing, that Defendants are sufficiently rehabilitated pursuant to the terms and conditions herein, Defendants, upon order of the Court, may engage in the solicitation of charitable contributions provided they have properly registered with the North Dakota Secretary of State pursuant to N.D.C.C. ch. 50-22 and have complied with all requirements appropriate and necessary for the solicitations to be undertaken by them.

“Pay in full” or “paid in full” mean that all amounts must be paid, and does not include any settlement, forgiveness, compromise, reduction, or discharge of any of the debts or refund obligations.

I. That Plaintiff shall have Judgment against Defendants, jointly and severally, in the amount of \$1,000.00 for civil penalties, pursuant to N.D.C.C. §§ 50-22-05 and 51-15-11.

J. That Plaintiff shall have Judgment against Defendants, jointly and severally, in the amount of \$1,500.00 for costs, expenses, and attorney's fees pursuant to N.D.C.C. §§ 50-22-06 and 51-15-10, incurred by the Attorney General in the investigation and prosecution of this action.

K. That Defendants, jointly and severally, pursuant to N.D.C.C. §§ 50-22-05 and 51-15-07, shall pay restitution to all North Dakota consumers, which have suffered any ascertainable loss, and to restore to any person in interest any moneys or property, real or personal, which has been acquired by Defendants by means of any practice declared to be unlawful under N.D.C.C. § 51-15-02.

L. That, pursuant to N.D.C.C. § 10-33-107, American Cancer Society of Bismarck, Inc., American Cancer Society of North Dakota, Inc., and American Cancer Society for Children of North Dakota, Inc., are ordered involuntary dissolved for Defendants' violations of N.D.C.C. chs. 50-22 and 51-15.

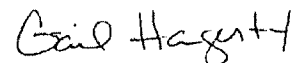
M. The Judgment entered shall be a Judgment for which execution may issue.

N. Interest shall accrue on this Judgment in accordance with the interest rate on judgment as provided by N.D.C.C. § 28-20-34.

Dated this _____ day of _____, 2018

BY THE COURT:

Signed: 10/30/2018 4:31:22 PM



Honorable Gail Hagerty
District Court Judge

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

STATE OF NORTH DAKOTA EX REL.
WAYNE STENEHJEM,
ATTORNEY GENERAL,

Civil No. 08-2018-CV-02064

Plaintiff,

JUDGMENT

-VS-

AMERICAN CANCER SOCIETY OF
BISMARCK, INC., AMERICAN CANCER
SOCIETY OF NORTH DAKOTA, INC., and
AMERICAN CANCER SOCIETY FOR
CHILDREN OF NORTH DAKOTA, INC.,
and individually,

Defendants.

CPAT 180119.002

[¶1] This action came on before the Honorable Gail Hagerty, Judge of the Burleigh County District Court, South Central Judicial District, on a Motion for Summary Judgment, filed by Plaintiff, the State of North Dakota, on the relation of Wayne Stenehjem, Attorney General, and served upon Defendant by mail on September 27, 2018. Defendants failed to respond in opposition to the Motion for Summary Judgment.

[¶2] The Court, having reviewed its file and records herein, including the Motion for Summary Judgment with supporting documents, and being fully advised in the premises, having made and entered its Findings of Fact, Conclusions of Law and Order for Summary Judgment; IT IS NOW ORDERED, ADJUDGED AND DECREED:

- A. Plaintiff's Motion for Summary Judgment is granted.
- B. That Defendants be adjudged in violation of the charities law, N.D.C.C. § 50-22-02, for purporting to engage in the solicitation of charitable contributions in North Dakota before properly registering with the Secretary of State as a charitable organization.

C. That Defendants be adjudged in violation of the charities law, N.D.C.C. § 50-22-04.3, for engaging in deceptive acts or practices, fraud, false pretense, false promises, or misrepresentations, with the intent that others rely thereon, in connection with the solicitation of charitable contributions in the State of North Dakota.

D. That Defendants be adjudged in violation of the consumer fraud law, N.D.C.C. § 51-15-02, for engaging in deceptive acts or practices, fraud, false pretenses, false promises, or misrepresentations, with the intent that others rely thereon in connection with the solicitation of charitable contributions in the State of North Dakota.

E. That Defendants, their agents, employees, representatives, assigns, and all other persons in active concert or participation with them, pursuant to N.D.C.C. § 51-15-07, be permanently enjoined and restrained from directly or indirectly making false statements, false promises, or misrepresentations and the act, use and employment of any deceptive acts or practices in connection with the advertisement or sale of merchandise, as defined by N.D.C.C. § 51-15-01(3), within the State of North Dakota.

F. That Defendants, their agents, employees, representatives, assigns, and all other persons in active concert or participation with them, pursuant to N.D.C.C. § 51-15-07, be permanently enjoined and restrained from engaging in deceptive acts or practices and from directly or indirectly making false statements, false promises, or misrepresentations in connection with the advertisement or solicitation of charitable contributions, or any other merchandise, as defined by N.D.C.C. § 51-15-01(3).

G. That Defendants, their agents, employees, representatives, assigns and all other persons in active concert or participation with them, pursuant to N.D.C.C.

§ 51-15-07, be enjoined and restrained from the advertising or solicitation of charitable contributions in accordance with paragraph H.

H. That, pursuant to N.D.C.C. § 51-15-07, Defendants, their agents, employees, representatives, assigns, and all other persons in active concert or participation with them, are permanently enjoined and restrained from engaging in the advertisement or solicitation of charitable contributions. Notwithstanding the permanent injunction, Defendants may engage in the future solicitation of charitable contributions if Defendants apply to the Attorney General and the Court to lift the permanent injunction and the Court finds Defendants have fully complied with the following terms and conditions and otherwise are rehabilitated:

1. Five or more years have expired since the entry of judgment herein;
2. Defendants have paid in full all restitution to consumers pursuant to the judgment herein;
3. Defendants have paid in full restitution to all consumers from whom Defendants solicited any charitable contributions in the state of North Dakota in violation of N.D.C.C. chs 50-22 and/or 51-15;
4. Defendants have paid all amounts owed to the Attorney General pursuant to entry of judgment herein;
5. Defendants establish that they will not solicit charitable contributions using a business name that is deceptively similar to any other entity whether registered in the State of North Dakota or not; and
6. Defendants are properly registered as a charitable organization or professional fundraiser in full compliance with N.D.C.C. ch. 50-22.

If the Court thereafter finds, pursuant to an agreement between the Attorney General and Defendants, or after a hearing, that Defendants are sufficiently rehabilitated pursuant to the terms and conditions herein, Defendants, upon order of the Court, may engage in the solicitation of charitable contributions provided they have properly registered with the North Dakota Secretary of State pursuant to N.D.C.C. ch. 50-22 and have complied with all requirements appropriate and necessary for the solicitations to be undertaken by them.

"Pay in full" or "paid in full" mean that all amounts must be paid, and does not include any settlement, forgiveness, compromise, reduction, or discharge of any of the debts or refund obligations.

I. That Plaintiff shall have Judgment against Defendants, jointly and severally, in the amount of \$1,000.00 for civil penalties, pursuant to N.D.C.C. §§ 50-22-05 and 51-15-11.

J. That Plaintiff shall have Judgment against Defendants, jointly and severally, in the amount of \$1,500.00 for costs, expenses, and attorney's fees pursuant to N.D.C.C. §§ 50-22-06 and 51-15-10, incurred by the Attorney General in the investigation and prosecution of this action.

K. That Defendants, jointly and severally, pursuant to N.D.C.C. §§ 50-22-05 and 51-15-07, shall pay restitution to all North Dakota consumers, which have suffered any ascertainable loss, and to restore to any person in interest any moneys or property, real or personal, which has been acquired by Defendants by means of any practice declared to be unlawful under N.D.C.C. § 51-15-02.

L. That, pursuant to N.D.C.C. § 10-33-107, American Cancer Society of Bismarck, Inc., American Cancer Society of North Dakota, Inc., and American Cancer Society for Children of North Dakota, Inc., are ordered involuntary dissolved for Defendants' violations of N.D.C.C. chs. 50-22 and 51-15.


M. The Judgment entered shall be a Judgment for which execution may issue.

N. Interest shall accrue on this Judgment in accordance with the interest rate on judgment as provided by N.D.C.C. § 28-20-34.

Dated this _____ day of _____, 2018.

Signed: 10/31/2018 12:07:56 PM

CLERK OF DISTRICT COURT



By: _____