SHORT FORM ORDER

INDEX NUMBER: 20432-2011

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

***Present*: HON. EMILY PINES**
J. S. C.

Original Motion Date: 04-17-2013
Motion Submit Date: 04-17-2013
Motion Sequence No.: 006 MD
007 MOTD

[ ] FINAL
[x] NON FINAL

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THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiff,

-against-

COALITION AGAINST BREST CANCER, INC., ANDREW SMITH, DEBRA KOPPELMAN, PATRICIA SCOTT, CAMPAIGN CENTER, INC., and GARRETT MORGAN,

Defendants.

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In an action brought by the State of New York ("State" or "Plaintiff") against a "sham charity", Defendant Coalition against Breast Cancer ("CABC"), which the State claims raised millions of dollars from public donations over many years, and which it alleges were diverted to pay the charity's fundraisers, officers and directors, the State moves, pursuant to CPLR § 3212, for Summary Judgment on its First, Second, Sixth, Seventh and Eighth causes of action, consisting of those claims it has asserted against Defendants Campaign Center, Inc. ("Campaign Center") and Garrett Morgan ("Morgan"). The Campaign Center and Morgan have likewise moved for Summary

Judgment, seeking an order dismissing all of these claims against them. CABC is a not-for-profit charitable corporation, formed for the stated purpose of: "1) provid[ing] public awareness as to prevention, cause and treatment of breast cancer [;and] 2)provid[ing] aid to caregiver organizations whose goals include the support and assistance of women afflicted with Breast Cancer". The Campaign Center is the for-profit organization that provided major fund-raising services for CABC during the period from 2005 through the commencement of this action in 2011. Morgan is the founder, president and owner of the Campaign Center.

On March 19, 2013, this Court signed a Consent Order and Judgment between the State and Defendants CABC, Andrew Smith ("Smith"), Debra Koppelman ("Koppelman"), and Patricia Scott ("Scott"), which provided, inter alia, that: 1) the State was entitled to enter Judgment against those Defendants in a combined amount of $1,555,000.00; 2) CABC is to be dissolved; 3) those individual Defendants are enjoined from serving in any manner for any entity or person that holds or solicits charitable contributions in the State of New York[1]; receiving any benefit derived from solicitation of contributions for charitable organizations in the State of New York; financially benefitting in any way from such solicitations conducted by any entity or individual acting within the State of New York; and/or acting or registering as a professional fundraiser or solicitor as defined in Executive Law § 171 in the State of New York; 4) those individual Defendants are to provide an accounting of all CABC's assets and liabilities to the Office of the State Attorney General within 45 days; and 5) those individual Defendants are to cooperate fully in the State's remaining action against the Campaign Center and Morgan.

The State's remaining claims, which are the subject of the motions for Summary Judgment of both Plaintiff and the remaining Defendants, seek the following relief: 1) to enjoin Morgan and the Campaign Center from engaging in the solicitation and

[1]The Consent Order contains an exception to this requirement to the extent of permitting Koppelman and Scott to participate in charitable events, such as walk/runs and personally solicit charitable donations with a maximum monetary benefit to them of $1,000 per year.

collection of contributions on behalf of any charitable organization as well as participating in any manner or receiving compensation from a business so engaged pursuant to Executive Law §§ 63(12), 175(2) and General Business Law § 349(b); 2) cancelling the registration statement for the Campaign Center filed with the State Attorney General pursuant to Executive Law § 175 (2); 3) dissolving the Campaign Center as a corporation in New York pursuant to Executive Law § 175 (2); 4) ordering Morgan and the Campaign Center to pay penalties for violations of General Business Law § 349; 5) ordering Morgan and the Campaign Center to disgorge profits and pay restitution for their violations of Executive law §§ 63(12) and 172-d(2) and General Business Law § 349; 6) ordering those Defendants to pay the litigation costs of the Attorney General under Executive Law § 175(2) and CPLR § 8001; and 7) holding an inquest to determine the amount of be paid in restitution and disgorgement of profits.

According to the Attorney General, Morgan and one of CABC's directors, Smith, began CABC's fundraising operation in 1995, at approximately the same time as Morgan was working as a fundraiser for another sham charity on Long Island, "Meals on Wheels", which the State shut down after requiring Morgan and others to comply with measures to protect the public against fraudulent fundraising practices. Since 2005, CABC outsourced all of its fundraising business to the Campaign Center, owned by Morgan, either directly or through Morgan's role as a broker, selecting other fundraising organizations, from which he received an additional fee. Under the CABC contract with the Campaign Center and Morgan, those Defendants have received a minimum of 80-85% of the funds raised. In 2010, CABC made Morgan's broker agreement exclusive.

According to the Affidavit of Cintia Brown-Felder, Senior Accountant in the Charities Bureau of the Office of the New York Attorney General, professional fundraisers for charities are required to file a "Form CHAR037" (Ex. 2 to Felder affidavit) along with the charity for each year. Having reviewed those submitted by the Campaign Center and signed by Morgan under penalties of perjury between 2005 and 2011, she found that, although the form requests the total amount which a charity paid to a professional fundraiser in fundraising fees, not a single dollar was reported by the

Campaign Center for broker's fees from 2005 through 2010. As a result of the State's investigation in this case, she found that CABC paid the Campaign Center $130,685 for that period specifically for brokerage services. She also found that for the period from 2005 through 2011, the Campaign Center generated $4,861,224 in contributions for CABC through its own direct fundraising activities and that CABC paid the Campaign Center $3,908,262 for such services (80 percent of the Campaign Center generated contributions). These figures are derived from the Campaign Center's CHAR037 filings. [Statement of Undisputed Facts ("SUF") para 69].

Plaintiff, as well as CABC former director Smith, set forth that Morgan led the design and implementation of CABC's fundraising program, including creating all the materials for business solicitations and helped create the original script for calls to residences and businesses. Smith states that from the inception of the charity, Morgan, although solely its outside fundraiser, played an active and central part in CABC's expenditures of its funds. Smith asserts that although small research grants were made in the early years, they stopped totally long before Morgan's company took over as fundraiser in 2005. In addition, Smith informed Morgan well before 2005 that both a mammography van as well as educational seminars had been discontinued by the charity and that CABC funding for individual mammographies was very limited. He states between 2005 and 2011 CABC did not provide funding or conduct breast cancer research, and that its small grants to organizations were never earmarked for research of any kind. The Statement of Undisputed Facts demonstrates a Morgan-prepared script for Campaign Center employees, as well as a rebuttal script containing stock answers to typical questions asked by prospective donors (SUF paras. 35,37-39,41, 46). The State also provided the Court with the tri-fold brochure that was sent to those who made a verbal pledge by the Campaign Center containing information about CABC (SUF paras. 43-44).

The Attorney General provided, in support of its motion, copies of the solicitation forms used by the Campaign Center that claim that CABC is helping "women survive" through "research" relating to breast cancer and by providing a mammography van (SUF

53-54,69,79) when it conducted no research and had no mammography van for the years in question; that such materials falsely claimed that CABC provides "constant" seminars and forums for women when none were held (SUF paras 51-55, 58-61, 70-72, 76); that it misled prospective donors about the existence of a "mammography fund" claiming this will "help provide free mammographies for women that have no insurance", when between 2008 and 2011 despite raising over $4 million, CABC funded mammographies for only 11 women. After paying its professional fundraisers' fees, CABC spent $1,474,688 (15 percent) to pay compensation to its Directors and overhead expenses, $918,951 of which went directly to the Directors (SUF 69). Based upon the required filings with the State, CABC's charitable activities between 2005 and 2011, while the Campaign Center was its official fundraiser, were limited to the following: 1) a scholarship program for students with a relative with breast cancer (3.4 percent of total expenditures); 2) funding mammograms and treatment for approximately 40 women (.49 percent of total expenditures); and 3) donations to women's health events (.22 percent of total expenditures). In other words, of the almost $10 million raised on behalf of CABC by the Campaign Center (and other fundraisers, for which it was a broker), less than 4.4 % of such funds were expended for charity related to breast cancer.

In addition to providing false and misleading content in its solicitation materials, the State sets forth that the Campaign Center utilized fraudulent fundraising tactics to maximize donations collected, most of which arrived in their own coffers. These were found by the State through use of undercover investigators and include the following: 1) the Campaign Center sent donors an "official invoice" claiming the donor agreed to make a pledge when such donor declined to do so; 2) some "pledge donors" never even received a solicitation call; 3) the Campaign Center sent out repeated invoices, even after the pledge had been paid; 4) the Campaign Center stated that it was calling for a local charity, and the telemarketers changed the town of their script so that it matched that of the potential donor to convey the false impression that donations would stay in the community; 5) the solicitors used false names, varying their last name in an attempt to identify the perceived racial, religious, or ethnic group of the potential donor; 6) the solicitors routinely stressed that CABC gave free mammograms, when virtually no funds were utilized for such purpose; and 7) the solicitors for the Campaign Center never stated

that they were paid professional solicitors employed by a professional fundraiser. A review of the one of the scripts the Campaign Center used to solicit on behalf of CABC and provided by Morgan during discovery is called "Generic Rebuttals" and sets forth the following advice. It states to the solicitor that where the potential donor asks: "What percentage goes to the charity?", the telemarketer is to state as follows: "I'm glad you asked that most people don't! Your check is made out directly to the charity & when you get the information in the mail there's an 800# and address where you write the charity and obtain a complete financial statement which will answer all those questions better than I can. It's a great cause to get behind and the smallest pledge we ask for is only $15 and of course we send everything in the mail first for your review, would that be OK?".

Smith asserts that Morgan also acted as a broker identifying other fundraisers in exchange for his receipt of 5 to 6% of the funds raised by those separate organizations. He sets forth that Morgan conducted all contract negotiations with such firms and provided all information regarding CABC. In Smith's review of the solicitation scripts produced in this litigation by the Campaign Center, he states that the phrase "early detection, education and research", contained in the Campaign Center's scripts, is untrue as all post-2004 activities related in any manner to early detection were limited to funding mammograms for fewer than fifty women over a six-year period. This is confirmed by the OAG accountant's statement that, based upon the records provided, $48,572 out of $9,978,434 raised from the telephone calls and the brochures, was expended to provide mammograms and related medical treatment for those unable to afford the same. According to the records produced during discovery in this action, the State asserts that Morgan knew of the falsity of the information he and the Campaign Center were providing the public. The IRS Form 990, copies of which Morgan had, reported all the amounts CABC received as well as the name of all organizations to which it contributed and the amounts Morgan's organization received. Morgan never revised the solicitation materials to remove references to "research" and "education" despite his knowledge that CABC had stopped funding research and conducting educational seminars as demonstrated in his 2009 letter to Koppelman suggesting that CABC begin such activities again (SUF paras 86, 88, 96-97). The solicitations

continued to set forth early detection as a goal when CABC's only program in that field was a mobile mammogram van program which had been discontinued years before (SUF paras 65,86, 97).

Debra Koppelman a former Director of CABC from 2005 through 2011, the period in question in this litigation, submitted a detailed affidavit as part of her participation in the Consent Order she signed with the State. Throughout this period, she asserts that CABC itself did not engage in any fundraising activities directly, but contracted with professionals, such as the Campaign Center, responsible for most of CABC's fundraising. She states that she relied on Morgan as CABC's fundraising expert and also utilized Morgan to recruit additional fundraisers pursuant to a brokerage agreement, whereby CABC paid the Campaign Center a percentage of the gross revenues these brokered fundraisers generated for CABC. She set forth that one of the professional fundraisers the Campaign Center and Morgan brought to CABC, Resource Hub, Inc. d/b/a the Resource Center initiated a fraudulent scheme charging donors' credit cards multiple times based on a single pledge and sent individuals invoices for pledges they never made. The Office of the Attorney General, she states, forced this professional fundraiser to close and barred its principals from raising funds for charities in New York. According to Koppelman, Morgan also recommended Mark Gelvan to CABC as a fundraiser, causing CABC to retain him, without informing CABC that Gelvan had already been barred from soliciting charitable contributions in the State of New York.

Agreeing with Smith, Koppelman asserts that Morgan wrote all the material that the Campaign Center utilized to solicit on behalf of CABC. She also avers that between 2005 and 2011, CABC did not conduct, or provide financial or other support for any educational seminars, conferences or other public programs about breast cancer and did not provide mammography van services. Thus, the Campaign Center's scripts, constantly referring to "early detection, education and research", were false. Agreeing with Smith, Koppelman asserts that Morgan was aware that CABC did not conduct or fund research and education as evidenced from Morgan's e-mail to Koppelman in 2009 suggesting CABC might undertake "funding research, providing seminars again". In

addition, she reiterates that between 2005 and 2011, CABC helped only 35 women pay for mammograms and provided financial assistance to only 4 women. Out of over $9.9 million in funds raised from the public, only $48,572 was utilized to pay for mammograms and financial assistance referred to in solicitation materials prepared by Morgan. Koppelman states that the Campaign Center scripts prepared by Morgan for his telemarketers, misleadingly refer to a "local drive" to fight breast cancer; however, all of the Campaign Center's fundraising efforts were conducted from its central telemarketing call centers in Lindenhurst and CABC services, to the extent they were provided, were available without reference to the residence of the recipient.

The Defendants, Morgan and the Campaign Center, also move for Summary Judgment, seeking an order dismissing all the State's claims against them, whether under the Executive law or the General Business law, on the grounds that the Campaign Center made no false or misleading statements to prospective donors; that its invoice system in connection with over 6,000 telephone solicitation calls made per day from its offices resulted in an extremely small unavoidable number of errors when measured against the number of pledges made; that the State received annual statements from CABC which detailed its broker agreement with that entity and any failure to submit such figures on its part was at most a procedural oversight as such amounts were submitted by each of the organizations which shared its fees with the Campaign Center.

In his affidavit in support of the Defendants' motion for Summary Judgment, Morgan states that he has been an active fundraiser since 1974 and formed NPS (assignor to the Campaign Center) in 1982. He states that NPS has provided professional fundraising to numerous organizations, including the First Marine Division Association, Suffolk and Nassau County VFW's; several Knights of Columbus Councils; Disabled Veterans' of America; American Foundation for Disabled Children; several Marine Corps. League Detachments; Defeat Diabetes Foundation, Inc; American Foundation for Disabled Children; as well as CABC. He asserts that NPS first became involved with CABC at Smith's request, as a consultant, but that Smith wanted the Campaign Center to take over, as CABC could not net the same amount of money carrying its own costs

and overhead. He sets forth that the proceeds obtained by the Campaign Center fund the entire cost of the fundraising campaign including lease of space, utility costs, telephone equipment, billing, design and printing of promotional materials, invoices, stationary, letters and brochures, networking and travel expenses, recruiting, hiring and training, and paying the salaries of telemarketing personnel.

While Morgan acknowledges that the 80/20 split set forth in his corporation's contract with CABC may sound high, a review of the Attorney General's report entitled "Pennies for Charity" relating to the years 2006 through 2008 demonstrates that such percentages are commensurate with many other professional fundraisers. The report, a copy of which is annexed to Morgan's motion papers, demonstrates that 28% of all charitable organizations accepted less than 20% of the gross receipts collected by professional fundraisers on their behalf. In this vein, he argues that there is no law precluding a professional fundraiser from entering into any agreement it deems appropriate with respect to distribution of funds between itself and a charitable organization.

Morgan sets forth that while the Campaign Center did not file the broker's agreement with the State, all contracts between the other fundraising entities and CABC that were recommended by the Campaign Center and resulted in that entity receiving a broker's commission were filed by those companies themselves. In addition, he sets forth that as testified to by Smith, CABC's annual reports to the State detail the commissions paid to the Campaign Center. Further, Morgan sets forth that he has in the past and still now believes, in good faith, that the question on the State disclosure forms regarding his association with any charitable organization other than pursuant to the disclosed contract, (meaning the fundraising contract) should be answered in the negative.

Morgan argues that all solicitation materials he used were created utilizing information provided him by CABC and were approved by that organization prior to their use. He sets forth that the invoices and reminder notices sent by his entity to donors

informs them that their donations will assist CABC in helping them to "[c]ontinue [their] mission to increase public awareness about the seriousness of breast cancer, provide information and education on the importance of early detection through proper self-exams, annual mammography's and to fund research when available". Morgan does not believe that any specific representations were made as to how the funds would be distributed. With regard to the scripts utilized by telemarketers, he avers that they merely inform people that CABC is conducting a drive to "[h]elp women fight breast cancer through early detection, education and research". Morgan counters the State's claim and avers that his review of CABC's filings over the years demonstrates that funds were in fact utilized by CABC to fund research including a $10,000 research grant which he annexes to his papers to Albert Einstein College of Medicine. He also annexes papers demonstrating the contributions to Mather Hospital and Avon Products Foundation, and argues that monies were also expended for mammographies. He states that the only reason the representation was made in certain scripts that CABC would expend monies to help provide free mammographies is because CABC principals assured him that they intended to do so. While Morgan acknowledges his possession of a document produced in discovery concerning CABC research affiliations with Memorial Sloan-Kettering in New York, which never occurred, he argues that he created such document as a draft rebuttal to reports he received that consumers had asked solicitors about an entity that was soliciting donations from CABC donors and that he never utilized the document during his tenure as fundraiser for CABC. With regard to the statement that the State characterizes as "false" concerning CABC's helping "women survive breast cancer" and contributing to the effort to "eradicate" the same, Morgan asserts that the approximately 350,000 annual pledge forms all contained important information regarding the history and facts of the disease including the benefit of early detection through self examination and annual mammograms.

Morgan strenuously denies that his solicitors are told to engage in any improper conduct to pressure or mislead prospective donors. He avers that the script specifies a dollar amount and then reduces the amount until the donor reaches a level of comfort. After the pledge is secured, the donor is informed of a pledge packet to be provided,

followed by a Reminder Notice after 20 days if the pledge is not received. Thereafter, a second notice is mailed to the prospective donor 20 days later, again only if the pledged amount is not received. While he acknowledges that the Campaign Center occasionally receives a complaint from one who has not made a pledge having received the packets, this is rare , considering an average of 6,000 calls per day made by the Campaign Center. He argues that his solicitors are made aware that any misrepresentations to donors will result in their termination. He also sets forth that when asked at his deposition whether any of CABC's solicitors may have made intentional errors regarding what a prospective donor pledged, that such had not occurred.

In further support of its motion for Summary Judgment and in opposition to the Defendants' motion for the same, the State makes the following arguments. Four scripts were identified by Morgan during his deposition testimony as used by the Campaign Center to solicit funds; and each one set forth falsely that CABC was engaged in education and research. In addition, according to Plaintiff, these solicitations stated that CABC was funding mammograms and expenses for poor women on which CABC was expending mere tokens; and none of these materials made mention of the only items on which any more significant money was really expended; that being scholarships. The deceptiveness of the Campaign Center's solicitation materials is supported by the Form 990's provided by CABC, according to the State. Thus, although the solicitation materials informed prospective donors that their contributions would help women "survive" or "fight" breast cancer "through early detection, education and research", CABC spent a total of $435,273 out of over $9.9 million between 2005 and 2011, consisting of $364,700 or 3.4% on scholarships for relatives of cancer victims, $48,572 or .49 % of funding for mammograms or treatment for the poor; and $22,000 or .22 % on grants to health events and a medical institution, none of which, including those mentioned by Morgan in his opposition papers, were earmarked for research or education. As set forth in its earlier papers, the State points to Morgan's knowledge of the same based upon his 2009 e-mail to Koppelman asking if CABC will begin funding research and providing seminars "again".

The State also avers that the Campaign Center's telemarketing calls in no way constituted efforts to help women survive breast cancer or to eradicate the disease as set forth in the Defendants' motion, as in his 2010 deposition testimony, Morgan stated that these materials were only mailed to those who had pledged money and that education and public awareness throughout the process "didn't come up"; rather, he concerned himself with "returns on efficiency and not wasting money" (Nov 24, 2010 Tr. At 459-460). In addition, the State reiterates that the Campaign Center admits it did not file its broker's agreement with CABC and that the Defendants' assertion that such was corrected by CABC's 990's is belied by the fact that CABC's 990's do not identify the purpose or the recipient of the brokerage payments until after his lawsuit was commenced by the State.

Finally, while the Campaign Center asserts that it performs other charitable fundraising, the State sets forth a prior incident where Morgan and the Campaign Center's assignor corporation were subject to a Consent Order based upon an earlier action brought by the State to shut down another fraudulent solicitation scheme called " meals on wheels". Indeed the State has brought a motion under that prior action based upon allegations of Morgan's repeated violations of the prior Consent Judgment.

STATE LAW REGARDING CHARITABLE SOLICITATIONS

Executive Law Article 7-A both sets forth mandatory disclosure requirements for all charitable solicitations and prohibits solicitation fraud. Disclosure requirements are set forth in Executive Law § 174-b as follows:

> "1. Any solicitation, by any means, including but not limited to oral solicitation, by or on behalf of a registered charitable organization which is required to file financial reports pursuant to this article and has filed such reports, shall include therein a statement that upon request, a person may obtain from the organization or from the attorney general, a copy of

the last financial report filed by the organization with the attorney general.

* * *

2. Any solicitation used by or on behalf of any charitable organization shall provide a clear description of the programs and activities for which it has requested and has expended or will expend contributions . . .

* * *

4. If any charitable organization makes contributions to another organization which is not its affiliate . . . such solicitation shall include a statement that such contributions have been made and that a list of all organizations which have received contributions during the past twelve months from the soliciting organization may be obtained from that organization . . ."

Executive Law § 172-d(2) prohibits charitable solicitation fraud by fundraisers, stating that "no person shall":

"Engage in any fraudulent or illegal act, device, scheme, artifice to defraud or for obtaining money or property by means of a false pretense, representation or promise, transaction or enterprise in connection with any solicitation or with the registration, reporting and disclosure provisions of this article. The term "fraud" or "fraudulent" as used herein shall include those acts which may be characterized as misleading or deceptive including but not limited to those acts

covered by the term "fraud" or "fraudulent" under subdivision twelve of section sixty-three of this chapter. To establish fraud neither intent to defraud nor injury need to be shown;"

Executive Law § 171-a(3) defines "a person" as:

"[a]ny individual, organization, group, association, partnership, corporation, or any combination of them."

The term "solicit" as utilized under the Executive Law § 171-a(10), occurs whether or not a contribution is made and is defined as:

"[t]o directly or indirectly make a request for a contribution."

The Attorney General is authorized by law to seek enforcement of the provisions of Executive law Article 7-A, where it has reason to believe that the Article is being violated by an entity including one acting on behalf of a charitable organization to the extent of pursuing an action or proceeding in Supreme Court :

" [t]o enjoin such organization and/or persons from continuing the solicitation or collection of funds or property or engaging therein or doing any acts in furtherance thereof, and to cancel any registration statement previously filed with the attorney general pursuant to [such] article and for an order awarding restitution and damages, penalties and costs; and removing any director or other person responsible for the violation of [the] article; dissolving a corporation and any other relief which the court may deem proper, whenever the attorney general has reason to believe that [such] . . . organization or other person:

* * *

> (d) has made a material false statement in an application, registration or statement required to be filed pursuant to this article;
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> * * *
>
> (g) has used . . . false or materially misleading advertising or promotional material in connection with any solicitation . . ."

Exec Law § 175(2).

Executive law § 63(12) also authorizes the State Attorney General to obtain relief in the form of injunctions, and monetary damages, "[w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in carrying on, conducting or transaction of business. . ..". The term "fraud", which, as shown above, is also incorporated in the provisions of Article 7-A of the Executive Law, includes:

> "[a]ny device, scheme, or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term 'persistent fraud' or 'illegality' as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term 'repeated' as used herein shall include repetition of any separate and distinct fraudulent act, or conduct which affects more than one person."

The General Business Law sets forth separate bases for actions by the State in connection with deceptive business practices. As stated in General Business law § 349:

"(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

(b)Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association . . . has engaged in . . . any of the acts or practices stated to be unlawful he may bring an action in the name and on behalf of the people of the State of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices . . ."

Thus, the Executive Law pr ohibits fraudulent, deceptive and/or misleading charitable solicitations, specifically setting forth that neither intent to defraud nor injury are required to be demonstrated to constitute fraud under the statute. Exec Law § 172-d(2). Injunctive and monetary relief, as well as required dissolution of an entity engaged in violative conduct, are able to be sought where any person is engaged in repeated fraudulent or illegal acts, and incorporated within those terms are all devices and schemes to defraud as well as any deception, misrepresentation, false pretense or false promise. Exec. Law §§ 63(12), 175. Each repetition of any of such acts falls within the definition of the term "repeated". The caselaw interpreting these provisions of the Executive law holds that they are designed to protect the consumer and are to be viewed from the consumer's perspective rather than from that of the purported violator. Thus, the test applied to determine whether Exec law § 63(12) has been violated is whether the act that gives rise to the State's action "[h]as the capacity or tendency to deceive or creates an atmosphere conducive to fraud". **People v General Electric Co**, 302 AD 2d 314, 756 NYS 2d 520 (1st Dep't 2003). The alleged deceptive statement or material

must be viewed based upon its capacity, tendency or effect in deceiving or misleading consumers; however, the court is not guided by the reaction of the average consumer; but rather, by that of the vast multitude, including the "[i]gnorant, unthinking and credulous, who . . . do not stop to analyze but are governed by appearances and general impressions". **Guggenheimer v Ginzburg**, 43 NY 2d 268, 401 NYS 2d 182, 372 NE 2d 17 (1977); **Matter of People v Applied Credit Card Sys Inc**, 27 AD 3d 104, 805 NYS 2d 175 (3d Dep't 2005); **People v General Electric Co, supra.** Under Executive Law § 63(12), as is clear from the statute itself, it is the falsity of the promises themselves that constitute a violation, and scienter on behalf of the organization is nowhere required. **People v American Motor Club**, 179 AD 2d 277, 582 NYS 2d 688 (1st Dep't 1992). In addition to corporate liability for false promises under this statute, corporate officers and directors are held liable individually if they personally participate in the fraud as defined under that law. **See, People v American Motor Club, supra**; **People v Court Reporting Inst.,** 245 AD 2d 564, 666 NYS 2d 730 (2d Dep't 1997). In addition to commission of fraudulent acts, as defined, Executive Law § 63(12) separately prohibits acts which are otherwise illegal. **See, People v American Motor club, supra.**

To sustain a claim under the General Business Law § 349, the State must demonstrate that the false, deceptive or misleading representations at issue are "[l]ikely to mislead a reasonable consumer acting under the circumstances", **Matter of People v Applied Card Sys Inc, supra** (quoting **Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank**, 85 NY 2d 20, 623 NYS 2d 529, 647 NE 2d 741). However, the conduct need not amount to the level of fraud and even omissions may be the basis for such claims. **People v Applied Card Sys Inc, supra; see, Oswego Laborers Local 214 Pension fund, supra**. As stated by the Court of Appeals in **Gaidon v Guardian Life Ins Co. of Am.**, 94 NY 2d 330, 704 NYS 2d 177, 725 NE 2d 598 (1999), GBL § 349, unlike common law fraud, was designed to address broad consumer protection concerns, due to the "[e]ver changing types of false and deceptive business practices –willful or otherwise–which plague consumers in our State." (NY Dept of Law, Mem to Governor, bill Jacket L.1963, ch.813). As a threshold matter, the State is required to

demonstrate that the complained of conduct, which can be by both individuals and/or entities, is directed at the consumer. **Oswego Laborers' 214 Pension Fund v Marine Midland Bank, supra**. However, as this statute was designed to eliminate consumer fraud at its inception, the statute does not require either a pattern or recurring conduct. **Id.**

In order to determine whether any particular solicitations fall within the prohibitions of the Executive law and/or the General Business Law, they must be viewed as a whole under the totality of the circumstances . **See, People v Applied Credit Card Sys Inc, supra; Matter of Lefkowitz v EFG Baby Prods Co**, 40 AD 2d 364, 340 NYS 2d 3 (3d Dep't 1973). While the above statutes set forth the various forms of relief which the Attorney General may seek for violation of these statutes, the choice of statutory remedy is left to the discretion of the court. **See, State of New York v Princess Prestige Co.**, 42 NY 2d 104, 397 NYS 2d 360, 366 NE 2d 61 (1977); **People v Wilco Energy Corp.**, 284 AD 2d 469, 728 NYS 2d 471 (2d Dep't 2001).

SUMMARY JUDGMENT

The proponent of a motions for Summary Judgment must demonstrate to the court the absence of any material and triable issues of fact, thereby entitling such party to judgment as a matter of law. CPLR § 3212; **see, Morjan v Rais Const. Co.**, 7 NY 2d 203, 818 NYS 2d 792, 851 NE 2d 1143 (2006); **Winegrad v New York University Medical Center**, 64 NY 2d 851, 487 NYS 2d 316, 476 NE 2d 642 (1985). Upon such showing, the burden shifts to the party opposing the motion to demonstrate either that material issues of fact exist or that even undisputed facts do not entitle the movant to judgment as a matter of law. **Winegrad, supra**. Where such material issues are set forth in the moving or opposition papers, the court must deny the motion and proceed to trial. **Fed. Ins. Co. v Automatic Burglar Alarm Corp.**, 208 AD 2d 494, 617 NYS 2d 53 (2d Dep't 1994).

USE OF DEPOSITION TESTIMONY IN MOTIONS FOR SUMMARY JUDGMENT

CPLR § 3116 requires that deposition transcripts be submitted to the witness for examination, permitting such witness to make any changes and forward them within sixty days. Where the deposition has not been provided the witness, it cannot be utilized as admissible evidence in a motion for Summary Judgment. **See, Marmer v IF USA Express, Inc**, 73 AD 3d 868, 899 NYS 2d 884 (2d Dep't 2010).

DETERMINATION

Based upon the documentary evidence submitted in the form of all the solicitation, telemarketing, and mailed materials, the Form CHAR037's and Form 990's submitted by the State's accountant with her affidavits, as well as various writings and the November 24, 2010 deposition testimony of Morgan, the Court finds that Plaintiffs have made a prima facie showing of entitlement to Summary Judgment on liability, and that Defendants have not sustained their burden in opposition. While the Court did not consider the 2013 Morgan deposition since the State only provided the same after the motions herein were first filed, the 2010 deposition was mailed, as demonstrated by the State in its Reply Brief, in 2012 and no corrections thereto were made and sent to the Plaintiff's counsel.

The State has demonstrated entitlement as a matter of law to a finding that both the Campaign Center and Morgan have acted in violation of the Executive Law and the General Business Law provisions set forth above. The Court finds that, viewed as a whole, the following solicitation materials provided by those Defendants to consumers were false, deceptive, inaccurate and misleading:

1) The solicitation materials, consisting of scripts and mailings, falsely stated that CABC was involved with research and education activities; whereas, CABC's 990's demonstrate that CABC did not report conducting or directly funding any

research or provide any educational programs for the period between 2005 and 2011 while the Campaign Center utilized these false materials. All of the Form 990's were either in Morgan's possession or available to him on line. Morgan's correspondence with Koppelman demonstrates his actual knowledge that no education or research was continuing during at least several years of his tenure as CABC's fundraiser;

2) The aforementioned solicitation materials' reference to the fact that contributions would be used to facilitate "early detection" and "help provide mamographies (sic) for women that have no insurance" or "help sponsor a mammography for women that have lost their insurance" was both deceptive and misleading, when less that $50,000 of over $9.9 million dollars raised was expended for approximately 40 women between 2005 and 2011. In this vein, the Defendants' assertion that their mailed materials to those whose contributions they sought somehow constituted "education" or promoted early detection is incredible as a matter of law. Such a claim implies that a prospective donor, told that his/her donation would be used for education or early detection, could possibly understand that such statement somehow referred to the donor rather than to the public at large. This Court refuses to entertain such a specious argument;

3) The solicitation materials failed to even mention that scholarships were the bulk of the very limited funds used by CABC for charitable purposes.

In addition to the above, the Campaign Center failed to disclose its broker's agreement with CABC, a repeated violation each year of Executive law § 174(b), whereby it received a percentage of the funds it raised. This violation was not mooted by the CABC's filings. A review of the Form 990's submitted by CABC demonstrates that such do not identify the brokerage agreement nor the purpose or recipients of the payments that were, in fact, the Defendant's broker's fees.

The above facts, which are clear on their face, as set forth, from documents

utilized by the Defendants, whether created by them or with them or for them, and filings required to be filed with the State, when viewed as a whole, as the case law requires, in conjunction with the shockingly small percentage of funds raised that was actually expended on charity, supports the Court's conclusion that the Attorney General is entitled to Judgment as a matter of law. Thus, this Court finds that the above cited actions constituted repeated violations of Executive Law §§ 172-d(2), 174(b) and 63(12). In addition, the Court finds that such repeated misleading and deceptive information contained in the scripts and mailings were likely to mislead not only the unsophisticated consumer protected by the provisions of the Executive law, but also the average consumer within the purview of the General Business Law § 349.

Violations of the above provisions of the law do afford the Attorney General the right to seek both broad injunctive and monetary relief. Based upon the facts that are undisputedly found in the records produced in these Summary Judgment motions, the Court finds that the Attorney General is entitled to the injunctive relief it seeks, prohibiting the Campaign Center and Morgan individually from engaging in any further false and deceptive business practices and, more significantly, from engaging in any future charitable solicitations for profit whatsoever within the State of New York. Of significance in reaching this determination, the Court takes into consideration the huge number of repetitive deceptive, false and misleading statements, contained in the written and scripted material disseminated by the Campaign Center's employees. Despite Morgan's repeated assertions that CABC created such materials, it matters not whether such were the product of CABC directors or Garrett Morgan himself; he knew they were false for a significant period of time and he certainly should have known such for his entire tenure as fund raiser for CABC. In addition, the Court is in possession of and takes judicial notice of the undisputed prior consent order in the "Meals for Wheels" proceeding, pursuant to which Morgan was required to refrain from precisely the kinds of acts involving false advertising that are the subject of this action and that he and his current corporation have been engaged in for almost seven years.(Exh. 22. Nachman Affirmation in opposition). In that case, **People v Senior Citizens Assistance Group** (Index # 24842/95), Morgan was required to comply with the following:

> "c. [u]pon the request of any individual solicited, provide a list of the designated charitable recipients of funds collected and disclose the amount or percentage of funds collected that Fund raising Defendants have agreed to pay to aid charitable recipients.
>
> * * *
>
> "f. [f]und raising Defendants shall provide information with respect to the charitable organization in accordance with Executive law Article 174-(b) Parts 1 and 2."

In addition such Consent Order expressly sets forth the remedy for a violation of its terms, to wit"

> "Upon application by the New York State Attorney General, showing that any Defendant herein has violated any provision of this Consent Order the Attorney General has the right to proceed and request that the Court enter an order permanently enjoining Defendants from operating, owning, managing any business in New York State involving any solicitation of charitable funds from the public."

Based upon the continued and repeated violations of State law by the Campaign Center and Morgan individually as set forth, and regarding the situation as a whole, including the prior Consent order as set forth, the Court finds that the State is entitled to several other forms of relief requested under Executive Law § 175, including reimbursement of the costs of the Attorney General, cancellation of the Campaign Center's registration statement filed with the Attorney General and a mandated dissolution of the Campaign Center. Executive Law § 175.

In its discretion, the Court finds that the State has demonstrated that the remedy of restitution to those consumers that have been the subject of the asserted fraud is

warranted. Again, as the purpose of Executive Law § 63(12) is the protection of the consuming public (**See, State v Maiorano**, 189 AD 2d 766, 592 NYS 2d 409 [2d Dep't 1993]), such a remedy is precisely what is required. The Court agrees with the State that the method and amount of restitution must be determined at an inquest, limited solely to that issue as well as proof by the State of the costs it has incurred in connection with this action. Having awarded the State, on Summary Judgment, the remedies of broad injunctive relief, prohibiting the Campaign Center and Morgan from any engagement in solicitation activity for profit whatsoever, dissolution of the Campaign Center organization, cancellation of that entity's statement filed pursuant to Executive Law § 175, restitution for the consuming public and the Attorney General's costs, the Court declines to award the State its additional requested relief in the form of disgorgement of additional funds by these Defendants.

Having granted the State Summary Judgment on the issue of liability and having determined the award for the forms of relief as stated under the statutes set forth herein, the inquest will not be utilized as an opportunity to revisit those issues that have been decided herein. It will be limited solely to the issue of the method and amount of restitution to be provided as well as the costs of the Attorney General.

Accordingly, for the reasons set forth, the Court will hold an inquest only on such issues on the previously scheduled dates, commencing May 20,2013.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: May 2, 2013
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

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[x] NON FINAL