

RECEIVED
JUDICIAL DEPARTMENT
WASHINGTON COUNTY
2010 MAR -1 AM 11:22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CIRCUIT COURT OF OREGON
COUNTY OF WASHINGTON

NIKE, INC., an Oregon corporation,
Plaintiff,

v.

VINCE LOMBARDI, JR., an individual, and
SUSAN LOMBARDI, an individual, together
doing business as THE ESTATE OF VINCE
LOMBARDI; and CMG WORLDWIDE, INC.,
an Indiana corporation,
Defendants.

Case No. **0101241 CV**

**COMPLAINT (Breach of Contract,
Mutual Mistake, Fraud)**

**AMOUNT OF DAMAGES:
\$150,000**

*(Claim Not Subject to Mandatory
Arbitration)*

For its complaint against defendants Vince Lombardi, Jr., individually, and
Susan Lombardi, individually, together doing business as the Estate of Vince Lombardi, and
defendant CMG Worldwide, Inc. ("CMG"), plaintiff NIKE, Inc. ("plaintiff" or "NIKE")
alleges as follows:

PARTIES

1.

Plaintiff is an Oregon corporation, with its principal place of business in
Washington County, Oregon.

2.

Defendant Vincc Lombardi, Jr. is an individual residing in the State of
Washington.

3.

Defendant Susan Lombardi is an individual residing in the State of Florida.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

4.

Defendants Vince Lombardi, Jr. and Susan Lombardi each own a 50 percent interest in the intellectual property related to the late Vince Lombardi and, in particular, the intellectual property at issue in this complaint. Together they do business related to this intellectual property as the Estate of Vince Lombardi. This complaint shall refer to defendants Vince Lombardi, Jr. and Susan Lombardi as "the Estate."

5.

Defendant CMG Worldwide, Inc., an Indiana corporation, is the exclusive worldwide business representative of the Estate of Vince Lombardi. At all times material to the allegations in this complaint, CMG was acting as the authorized agent of the Estate and acted within the scope of its agency.

JURISDICTION AND VENUE

6.

This Court has personal jurisdiction over defendants under ORCP 4 E(3) and L because defendants made a promise to deliver something of value to NIKE in Oregon, and the agreement between the parties was signed in this State.

7.

Venue is proper under ORS 14.080 because events giving rise to the cause of action occurred in Washington County and none of the defendants resides in this State.

GENERAL ALLEGATIONS

8.

In or around June 2008, NIKE approached the Estate, through the Estate's agent, CMG, to discuss the possibility of licensing the words and audio recording of a speech given by the late Vince Lombardi ("Lombardi Speech"). NIKE sought the license to use the Lombardi Speech in a television and internet advertising campaign ("Advertisement").

* * * * *

1 9.

2 On June 25, 2008 CMG sent NIKE a draft license agreement relating to the
3 Lombardi Speech. After reviewing the document, NIKE informed CMG that the agreement
4 was unacceptable in its current form. NIKE demanded two changes to the agreement:
5 (1) payment for the license must be contingent upon the Advertisement airing, and (2) NIKE
6 would not display any trademark notification on the Advertisement that would be visible to
7 viewers. In the same written communication, NIKE stated that the license must extend to
8 both the words and the voice recording of the late Vince Lombardi. In addition, NIKE asked
9 for "confirmation that Lombardi wrote the speech we want to use, the words were original to
10 him, and that the Estate owns the copyright to the recording."

11 10.

12 In response, CMG confirmed that it "could make all the changes" except one
13 related to the time of payment. CMG's failure to specifically reject NIKE's understanding
14 that the license would include both the words and voice recording of Vince Lombardi
15 implied that NIKE's understanding was correct.

16 11.

17 CMG asked NIKE for the favor of paying the \$150,000 license fee before the
18 Advertisement ran. NIKE was willing to make the payment before the Advertisement ran
19 because NIKE enjoyed a long-term relationship of trust with CMG.

20 12.

21 The NIKE representative in charge of the negotiations informed CMG that
22 NIKE was satisfied with the agreement as long as it contained the changes NIKE had
23 requested. He also informed CMG that he was running out the door on a personal trip and if
24 he received the agreement before he left he would sign it immediately; otherwise the deal
25 would close the following week.

26 * * * * *

PAGE 3 - COMPLAINT (Breach of Contract, Mutual Mistake, Fraud)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

13.

CMG responded that same day, June 25, 2008, by sending an email to NIKE stating that the revised agreement ("License Agreement") contained "all the changes" NIKE had requested. CMG followed that email with another email to NIKE that attached the License Agreement. The License Agreement that CMG sent to NIKE did not contain the agreed-upon changes. It specifically did not include the requested provision that made payment for the license contingent upon the Advertisement running. Instead, CMG added language to the License Agreement that NIKE and CMG had never discussed—it made NIKE's advance payment for the license "nonrefundable." Furthermore, CMG did not disclose the fact that the recording of the Lombardi Speech did not exist. CMG also failed to include Schedule A to the License Agreement that would have revealed that the recording did not exist.

14.

NIKE relied on CMG's silence and receipt of the License Agreement to support NIKE's understanding that the Lombardi voice recording existed and that the Estate had the rights to the Lombardi Speech and voice recording. NIKE further relied on CMG's representations that it had made all the required changes to the License Agreement. As a result, NIKE's representative quickly signed the License Agreement at his Oregon office before leaving on his trip.

15.

Subsequently, NIKE discovered that the Estate did not, in fact, have an audio recording of the Lombardi Speech. The Advertisement that was designed with the Lombardi Speech in mind required such a recording. The mere text of the Lombardi Speech was of no value to NIKE.

16.

NIKE informed CMG that the Vince Lombardi voice recording was material

1 to the License Agreement and demanded that the Estate return the payment that NIKE had
2 made to it under the License Agreement. The Estate refused.

3 **FIRST CLAIM FOR RELIEF**
4 **(Breach of Contract—Against the Estate)**

5 **Count I**

6 **(Failure to Deliver Promised Voice Recording)**

7 17.

8 NIKE realleges and incorporates herein the allegations in paragraphs 1
9 through 16, above.

10 18.

11 Pursuant to the License Agreement, the Estate promised to deliver to NIKE an
12 authentic voice recording of the Lombardi Speech and rights thereto for use in the
13 Advertisement.

14 19.

15 The Estate failed to deliver the audio recording to NIKE.

16 20.

17 NIKE has performed all conditions precedent to obligate the Estate to perform
18 under the License Agreement.

19 21.

20 NIKE has been damaged by the Estate's breach in an amount to be proven at
21 trial, but in no event less than \$150,000.

22 **Count II**

23 **(Failure to Refund Advance Payment)**

24 22.

25 NIKE realleges and incorporates herein the allegations in paragraphs 1
26 through 16, above.

PAGE 5 - COMPLAINT (Breach of Contract, Mutual Mistake, Fraud)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

23.

The Estate agreed that retaining payment under the License Agreement would be contingent upon the Advertisement running. NIKE is entitled to enforce this term of the License Agreement in spite of contradictory language in the License Agreement because CMG added the contradictory language to the License Agreement without notice to NIKE and under circumstances that deceived NIKE.

24.

The Advertisement never ran. Nonetheless, the Estate has refused to refund the advance payment NIKE made.

25.

NIKE has performed all conditions precedent to obligate the Estate to perform under the License Agreement.

26.

NIKE has been damaged by the Estate's breach in an amount to be proven at trial, but in no event less than \$150,000.

SECOND CLAIM FOR RELIEF
(Mutual Mistake—Against the Estate)

27.

NIKE realleges and incorporates herein the allegations in paragraphs 1 through 16, above.

28.

NIKE and the Estate were mutually mistaken about the existence of the audio recording of the Lombardi Speech at the time the License Agreement was executed.

29.

The existence of the audio recording was material to the License Agreement.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

30.

The fact that the recording does not exist frustrates the purpose of the License Agreement.

31.

NIKE did not bear the risk of this mistake. As between NIKE and the Estate, only the Estate was in a position to determine the true facts regarding the existence of an audio recording of the Lombardi Speech. Therefore, NIKE is entitled to rescind the agreement and the Estate is obligated to return the \$150,000 advance payment.

THIRD CLAIM FOR RELIEF
(Fraud—Against Defendant CMG)

32.

NIKE realleges and incorporates herein the allegations in paragraphs 1 through 16, above.

33.

In response to NIKE's request that CMG confirm the existence of and right to license the Lombardi Speech voice recording, CMG delivered the License Agreement to NIKE that recites "Licensor is the proprietor of various copyrights in speeches by Vince Lombardi as well as rights . . . associated with the . . . voice and visual representation of the late Vince Lombardi . . ." CMG's delivery of the License Agreement was a representation to NIKE that a voice recording of the Lombardi Speech existed and was subject to the License Agreement.

34.

Alternatively, CMG's silence in response to NIKE's request that CMG confirm the existence of and right to license the Lombardi Speech voice recording in connection with delivering the License Agreement was a representation by omission.

* * * * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

35.

CMG intended NIKE to rely on CMG's representations about the existence of and the Estate's right to license the Lombardi Speech voice recording. NIKE, in fact, did rely on those representations, forming a belief that the Lombardi Speech voice recording existed. NIKE would not have entered into the License Agreement with the Estate had it known the truth about the voice recording. CMG knew that NIKE believed the audio recording existed. CMG also knew that NIKE had conditioned its acceptance of the License Agreement on the existence of such an audio recording.

36.

CMG's representations in paragraphs 33 and 34, above, were false.

37.

CMG acted with at least reckless disregard for the truth about the existence of a voice recording of the Lombardi Speech. In spite of access to the truth about the existence of the Lombardi Speech voice recording, CMG at a minimum recklessly failed to ascertain the truth.

38.

NIKE has been damaged by CMG's fraudulent misrepresentations in an amount to be proven at trial, but in no event less than \$150,000.

WHEREFORE, plaintiff prays for the following relief:

- A. On all claims that the Court enter judgment in favor of plaintiff and against defendants;
- B. On plaintiff's First Claim for Relief, a judgment in plaintiff's favor and against the Estate in the amount of \$150,000;
- C. On plaintiff's Second Claim for Relief, a judgment rescinding the License Agreement and ordering the Estate to return the payment NIKE made to the Estate;

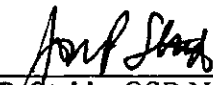
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

D. On plaintiff's Third Claim for Relief, a judgment in plaintiff's favor and against CMG in the amount of \$150,000; and

E. On all claims, such other and further relief as the Court deems just and equitable.

DATED this 1st day of March, 2010.

TONKON TORP LLP

By 
Jon P. Stride, OSB No. 903887
Direct Telephone: 503.802.2034
Direct Facsimile: 503.972.3734
Email: jon.stride@tonkon.com
David M. Weiler, OSB No. 085639
Direct Telephone: 503.802.5766
Direct Facsimile: 503.972.7466
Email: david.weiler@tonkon.com
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2099
Attorneys for Plaintiff NIKE, Inc.

Trial Attorney: Jon P. Stride, OSB No. 903887

003231/00819/1818879v1