

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY**

FIRST CLUB MARKETING LLC,)	
)	
Plaintiff,)	
v.)	Case No.
)	
KANSAS CITY BARBEQUE SOCIETY)	Division
)	
Defendant.)	

PETITION

Plaintiff First Club Marketing, LLC (“First Club Marketing”) brings this Petition against Defendant Kansas City Barbeque Society (“KCBS”) and states:

PARTIES, JURISDICTION AND VENUE

1. First Club Marketing is a limited liability corporation organized and existing under the laws of the state of Georgia with its principal location in Georgia.
2. KCBS is a Missouri corporation, with its principal place of business in Kansas City, Missouri. KCBS’ mailing address is 2519 Madison Avenue, Suite 100, Kansas City, Jackson County, Missouri 64108. KCBS, at all times relevant hereto, transacted significant business in Missouri.
3. This Court has jurisdiction over KCBS pursuant to RSMo. § 506.500 because KCBS transacts business within this state and has entered into contracts within this state.
4. Venue is proper pursuant to RSMo. § 508.010 because: KCBS is a resident of Jackson County, Missouri; a substantial portion of the conduct at issue occurred in Jackson County, Missouri; and the agreement between the parties has a choice of forum provision making Jackson County, Missouri the proper venue.

THE AGREEMENT

5. On January 2, 2019, First Club Marketing and KCBS entered into a contractual agreement (“the Agreement”). The nature of the Agreement was for First Club Marketing to provide marketing services for KCBS.

6. The Agreement was for three years. The Agreement provided that KCBS would pay First Club Marketing a monthly sum of \$13,000 per month, for a total sum of \$468,000 for the entire three-year contract. The Agreement also provided the following: First Club Marketing shall receive twenty (20) percent of all renewals during the life of the Agreement and for twenty-four (24) months after the termination of the Agreement; First Club Marketing shall receive thirty (30) percent of the partnership revenue on new partnerships, sponsorships, and/or advertising; and First Club Marketing shall receive commission based on the following commission structure:

- a. If First Club Marketing delivers **\$750,000** in revenue prior to December 31st of each year, First Club Marketing shall receive an additional bonus of **5%** of partnership/sponsorship sales;
- b. If First Club Marketing delivers **\$1,000,000** in revenue prior to December 31st of each year, First Club Marketing shall receive an additional bonus of **8%** of partnership/sponsorship sales;
- c. If First Club Marketing delivers **\$1,250,000** in revenue prior to December 31st of each year, First Club Marketing shall receive an additional bonus of **10%** of partnership/sponsorship sales; and
- d. If First Club Marketing delivers **\$1,500,000 or above** in revenue prior to December 31st of each year, First Club Marketing shall receive an additional bonus of **15%** of partnership/sponsorship sales.

7. The Agreement also provides that KCBS is responsible for First Club Marketing’s travel expenses and expenses related to attending trade shows on behalf of KCBS. The Agreement provides that travel expense reimbursement shall not exceed \$1,000 per month.

8. The Agreement contains a “with cause” termination provision. The with cause provision provides that KCBS will pay First Club Marketing any fees and other compensation due under the Agreement through the date of the Agreement’s termination as well as any renewal fees as discussed above in paragraph 6 herein.

9. The Agreement also contains a “without cause” termination provision. The Agreement provides that if First Club Marketing is terminated without cause, KCBS will pay First Club Marketing an amount equal to the prior three (3) months of services and pay liquidated damages. The Agreement also provides that if First Club Marketing is terminated without cause, it is entitled to renewals fees as discussed above in paragraph 6 herein.

10. KCBS breached the Agreement by terminating First Club Marketing for cause when, in fact, KCBS did not have cause to terminate First Club Marketing under the “with cause” provision of the Agreement.

NON-COMPETE PROVISION

11. One provision within the Agreement is a purported non-compete provision (“the Non-Compete provision”).

12. The Non-Compete provision contained in the Contract states:

Except as otherwise provided herein, Agency [First Club Marketing] agrees it will not directly compete against KCBS, this included but is not limited to the sanctioning of events. KCBS acknowledges that Agency has operated events as an official organizer with said event being sanctioned through KCBS, KCBS excludes any event run by Agency and sanctioned by KCBS from any non-compete restrictions. KCBS and Agency have the right to change this clause at anytime with mutual agreement in writing.

13. Neither KCBS nor First Club Marketing modified the Non-Compete provision.

TERMINATION

14. On or around November 1, 2019, eleven months into First Club Marketing's three-year contract, First Club Marketing received a letter from KCBS's counsel terminating the Agreement allegedly "for cause." This termination letter also demanded that First Club Marketing continue to follow the directives in the Non-Compete provision in the Agreement.

15. At no time was First Club Marketing in breach of the Agreement, and at no time did First Club Marketing's conduct merit a valid "for cause" termination.

16. KCBS chose to save money by characterizing First Club Marketing's termination as "for cause" instead of its true nature - a termination without cause because KCBS's Board of Directors wanted to hire a new marketing services contractor and avoid paying First Club Marketing the proper payment described in the Agreement for a termination without cause.

17. To date, KCBS owes payment to First Club Marketing but has not paid First Club Marketing. In addition to not paying on outstanding invoices, KCBS has stated that it does not intend to pay First Club Marketing for various amounts owed and has created pretextual reasons for withholding payments.

18. Additionally, KCBS did not properly calculate the revenue brought in by First Club Marketing for the 2019 calendar year in an attempt to minimize commissions owed.

19. Similarly, KCBS rejected certain business that would have earned First Club Marketing additional commissions and instructed sponsors to avoid communicating with First Club Marketing in an effort to reduce commissions owed.

20. First Club Marketing is also owed at least two years of renewal fees pursuant to the Agreement.

21. On November 6, 2019, six days after the Agreement was terminated by KCBS, KCBS sent a letter to First Club Marketing accusing First Club Marketing of allegedly violating the Non-Compete provision. The letter also threatened that First Club Marketing must continue to comply with the Non-Compete provision or face legal action.

COUNT I
BREACH OF CONTRACT

22. First Club Marketing re-alleges each and every paragraph set forth above as if fully set forth herein.

23. KCBS entered into a valid and binding contract with First Club Marketing, as set forth in the paragraphs above.

24. KCBS had a duty to comply with the contract; however, KCBS breached the contract by terminating the contract without cause and breached its duty of good faith and fair dealing.

25. KCBS has also failed to make payments due and owing and has indicated it intends to withhold funds due and owing.

26. As a direct and proximate result of KCBS's breach of the Agreement, First Club Marketing has suffered damages and injuries and continues to suffer damages and injuries.

27. KCBS is liable for breach of contract damages under the terms of the three-year contract.¹

¹ The Agreement provided that KCBS would pay First Club Marketing a sum of \$13,000 per month, for a total sum of \$468,000 for the entire three-year contract. The Agreement also provided that First Club Marketing shall receive twenty (20) percent of all renewals during the life of the Agreement and twenty-four (24) months after the termination of the Agreement; thirty (30) percent of the partnership revenue on new partnerships, sponsorships, and/or advertising; and commission based upon annual sales.

COUNT II
DECLARATORY RELIEF

28. First Club Marketing re-alleges each and every paragraph set forth above as if fully set forth herein.

29. The January 2, 2019 Agreement contained a purported Non-Compete provision.

30. The Non-Compete provision stated that First Club Marketing could not “directly compete” with KCBS, including but not limited to sanctioning events.

31. The Non-Compete provision did not provide any geographic or temporal limitations beyond the life of the contract.

32. The Non-Compete provision does not provide any definition or explanation as to what type of conduct would directly compete with KCBS.

33. The Non-Compete provision is unlawfully broad, vague, and unduly burdensome; therefore, the Non-Compete provision is unenforceable.

34. The Non-Compete provision, to the extent it was ever valid, is no longer effective because KCBS terminated the Agreement.

35. Nonetheless, KCBS has notified First Club Marketing that it is in alleged violation of the alleged Non-Compete provision.

36. KCBS has not and cannot provide any justifiable limitations for the enforcement of such a potentially broad, vague, unreasonable, and unduly burdensome non-compete provision.

37. Non-compete provisions are disfavored in the law and must be strictly construed against the drafter.

38. Missouri courts routinely declare that non-compete provisions that do not have any type of temporal or geographic limitation are unenforceable.

39. KCBS' actions have and will continue to cause First Club Marketing to suffer irreparable economic injuries and damages due to unlawful restrictions that cannot be adequately remedied at law, including the inability to obtain current business from clients who are concerned about the existence of a non-compete agreement.

40. No action is presently pending that would address the respective rights of the parties with respect to the validity of the Non-Compete provision.

41. First Club Marketing is entitled to seek and obtain a declaratory judgment declaring the "rights, status and other legal relations" of First Club Marketing and KCBS.

42. Pursuant to the provisions of RSMo. § 527.010 *et seq.* and Rule 87.02, First Club Marketing is entitled to and hereby requests the entry of a judgment declaring as follows: (a) KCBS' conduct in attempting to prohibit First Club Marketing from working in its chosen profession without any geographic or temporal limitations is against Missouri law; (b) KCBS's alleged Non-Compete provision is so vague and ambiguous as to render it meaningless; (c) even if the Non-Compete provision within the Agreement was previously enforceable, it is no longer enforceable because KCBS terminated the Agreement; and/or (d) any justification purported by KCBS is pretext or subterfuge for its unlawful conduct in trying to limit competition without a legally protectable right and in jurisdictions where it does not conduct business.

REQUEST FOR RELIEF

WHEREFORE, First Club Marketing requests the Court:

- (1) Enter judgment against KCBS on all claims;
- (2) Enter judgment that the Non-Compete provision is unenforceable;
- (3) Enjoin KCBS from engaging in any conduct that attempts to enforce the Non-Compete provision;

- (4) Award prejudgment and post-judgment interest;
- (5) Award monetary damages as a result of the breach of contract;
- (6) Award costs and legal expenses;
- (7) Award reasonable attorneys' fees and expenses; and
- (8) Award any all other relief as the Court deems just and proper.

JURY DEMAND

First Club Marketing demands a jury trial on all issues triable to a jury.

DATED: December 3, 2019

Respectfully Submitted,

WILLIAMS DIRKS DAMERON, LLC

/s/ Eric L. Dirks

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