IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

TRANS-RADIAL SOLUTIONS, LLC,

Plaintiff,

v. **CIVIL ACTION NO. 2:18-cv-656**

BURLINGTON MEDICAL, LLC, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiff Trans-Radial Solutions, LLC's ("TRS" or "Plaintiff") Motion for Summary Judgment on Liability, Defendants Burlington Medical, LLC, Fox Three Partners, LLC, and Phillips Safety Products, Inc.'s Motion for Summary Judgment, and Defendant John Williams's Motion for Summary Judgment (the "cross motions"). ECF Nos. 149, 155, 163. The parties' cross motions were filed pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons stated herein, Plaintiff's Motion for Summary Judgment is **DENIED**. Defendants Burlington Medical, LLC, Fox Three Partners, LLC, and Phillips Safety Products, Inc.'s Motion for Summary Judgment is **GRANTED** on Count VI, **GRANTED IN PART** on Counts VII and XI, and **DENIED** on all remaining counts. Defendant John Williams's Motion for Summary Judgment is **DENIED**.

I. FACTUAL & PROCEDURAL HISTORY

On December 12, 2018, Plaintiff filed the instant action against four defendants: Burlington Medical, LLC ("Burlington"), John Williams ("Williams"), Fox-3 Partners LLC ("Fox Three"), and Phillips Safety Products, Inc. ("Phillips") (collectively "Defendants"). *See* Complaint ("Compl."),

ECF No. 1. The Complaint initially alleged thirteen counts; however, the following ten counts remain:

- **Count I:** Patent Infringement (*against Burlington and Phillips*)
- **Count II:** Copyright Infringement Reproduction (*against Burlington and Phillips*)
- **Count III:** Copyright Infringement Marketing and Sale (*against Burlington and Phillips*)
- **Count IV:** Unfair Competition, False Advertising and False Designation of Origin Pursuant to 15 U.S.C. § 1125(a) (*against all Defendants*)
- **Count VI:** Common Law Passing Off (*against all Defendants*)
- **Count VII:** Tortious Interference with Prospective Contractual Relations (*against all Defendants*)
- **Count VIII:** Conversion (*against Williams and Burlington*)
- **Count X:** Breach of Contract (*against Burlington*)
- **Count XI:** Civil Conspiracy (*against all Defendants*)
- **Count XII:** Misappropriation of Trade Secrets, 18 U.S.C. § 1836 (*against Williams, Burlington, and Fox Three*)

Upon completion of discovery, the parties filed their respective motions for summary judgment and accompanying memoranda. *See* ECF Nos. 149, 155, 163. Each party filed responses to the cross motions for summary judgment. *See* ECF Nos. 179, 182, 185, 189. Plaintiff and Defendants Burlington, Fox Three, and Phillips then filed replies. *See* ECF Nos. 194 and 199. While the parties rarely agreed on many of the underlying facts in their cross motions for summary judgment, the undisputed facts relevant to this Memorandum Opinion and Order are as follows:

- TRS developed two radiation protection products named the Rad-Guard and the Cardio-TRAP. ECF No. 159 at 6, ECF No. 151 at 3.
- On October 15, 2014, TRS entered into a Non-Exclusive Distributorship Agreement (the "Distribution Agreement") with Burlington Medical Supplies Inc. ("BMS") for the distribution of TRS's Rad-Guard and the Cardio-TRAP. ECF No. 159 at Ex. 12, ECF No. 151 at Ex. 9.

- The Distribution Agreement required, among other things, that BMS "agrees not to engage in the distribution[,] promotion, marketing or sale of any goods or products that compete or conflict with Manufacturer's Products." *Id.*
- On December 4, 2014, TRS filed a provisional patent application for the Rad-Guard. ECF No. 159 at 7. The Rad-Guard (i.e. the patent-in-suit) was later issued Patent Number 9,795, 346 by the U.S. Patent and Trademark Office. ECF No. 151 at Ex. 1.
- Burlington was created on April 30, 2015. ECF No. 179 at 6, ECF No. 151 at Ex. 16. Burlington's owners/stockholders include Defendant Fox Three, Defendant Williams, Fox-Peninsula Holdings Inc., and The Peninsula Fund V Limited LLC. *Id.*
- The factual evidence is inconclusive as to the relationship between BMS and Burlington. While Defendants argue that Burlington is a new company, separate from BMS and not bound to the Distribution Agreement, ECF No. 179 at 6-7, Plaintiff argues that "[Burlington] is a continuation of [BMS]" and obligated to abide by the terms of the Distribution Agreement, ECF No. 183 at 2. It is undisputed, however, that after Burlington was created, Burlington sold Rad-Guards and Cardio-Traps on behalf of Plaintiff. ECF No. 151 at 10.
- In late 2015, Burlington began selling its own radiation protection equipment named the IV Mounted Barrier. ECF No. 159 at 8. Burlington and Burlington's former chief executive officer, Defendant Williams, worked with Phillips to manufacture and sell the IV Mounted Barrier. ECF No. 151 at 7-8, ECF No. 179 at 7.
- In August of 2015, McLaren Bay Regional Hospital ("McLaren Bay") purchased a Rad-Guard through Burlington. ECF No. 151 at Ex. 11. In April of 2017, an employee of McLaren Bay contacted TRS to purchase more Rad-Guards. ECF No. 159 at 31. TRS then referred McLaren Bay back to Burlington to purchase the Rad Guard. ECF No. 151 at Ex. 11.

McLaren Bay ultimately contacted Burlington and purchased two IV Mounted Barriers from Burlington. ECF No. 151 at Ex. 11, ECF No. 159 at 9-10, ECF No. 159 at Ex. 31. The factual evidence is inconclusive as to how and why McLaren Bay purchased the IV Mounted Barriers instead of the Rad-Guards.

- To promote the IV Mounted Barrier product, Burlington used an advertising template that was the same as, or substantially similar to, the flyer TRS used to market its Rad-Guard. ECF No. 151 at 11, ECF No. 179 at 7. TRS's flyer contained copyrighted photographs of the Rad-Guard. *Id.* The copyrighted images are associated with Copyright Registration Numbers VAu 1-260-031 (the "'013 Registration") and VA 2-178-713 (the "'713 Registration"). ECF No. 151 at 4 and Exs. 5 and 6. The factual evidence is inconclusive as to whether the copyright is valid and whether Burlington copied the copyrighted images when it created its own promotion materials.

Plaintiff seeks summary judgment for liability on all ten of the remaining counts in controversy. Likewise, Defendants Burlington, Fox Three, and Phillips seek summary judgment for each of the ten counts, claiming that Plaintiff will be unable meet its burden of proof at trial. Defendant Williams seeks summary judgment for the five remaining counts against him, alleging that Plaintiff has produced insufficient evidence to 'pierce the corporate veil.' The parties contend that there are no issues of genuine fact despite clear disagreement on most of the facts in support of each count in controversy. Upon review of the parties' filings, the Court finds that a hearing is not required, and the parties' cross motions are now ripe for disposition.

II. LEGAL STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, "[t]he Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a); *see also McKinney v. Bd of Trustees of Md. Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992) ("[S]ummary judgments should be granted in those cases where it is perfectly clear that no issue of fact is involved and inquiry into the fact is not necessary to clarify the application of the law.") (citations omitted). In deciding a motion for summary judgment, the court must view the facts, and inferences to be drawn from the facts, in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247-48 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). When considering cross-motions for summary judgment, the Court "must review each motion separately on its own merits 'to determine whether either of the parties deserves judgment as a matter of law.'" *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (*quoting Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 62 n.4 (1st Cir. 1997)).

Once a motion for summary judgment is properly made and supported, the opposing party "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita*, 475 U.S. at 586-87 (internal quotations omitted). Summary judgment will be granted "against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." *Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985), *abrogated on other grounds by*, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)); *see also Ash v. United Parcel Serv., Inc.*, 800 F.2d 409, 411–12 (4th Cir. 1986) (noting that the

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