

Roger Cleveland Golf Company, Inc.,	)	Civil Action No. 2:09-2119-MBS
	)	
Plaintiff,	)	
	)	
vs.	)	<b><u>PLAINTIFF'S OPPOSITION</u></b>
	)	<b><u>DEFENDANT BRIGHT BUILDERS</u></b>
Christopher Prince, Sheldon Shelley, Prince	)	<b><u>INC.'S MOTION FOR SUMMARY</u></b>
Distribution, LLC, and Bright Builders,	)	<b><u>JUDGMENT</u></b>
Inc.	)	
	)	
Defendants.	)	

# INTRODUCTION

Bright Builders' motion must fail as it (1) lacks any supportive authority whatsoever and thus fails to meet the initial burdens of Fed. R. Civ. P. Rule 56 and requirements of DSC Local Civil Rules 7.04 and 7.05; and (2) there is abundant evidence in the record that Bright Builders helped create, host, and optimize a website, named copycatclubs.com, which Bright Builders

knew or should have known that the copycatchclubs.com website was selling and advertising counterfeit golf clubs in violation of federal trademark law.

Cleveland has asserted claims for contributory, vicarious, and common law trademark infringement as well as a claim for violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code § 39-5-10, *et seq.*, against Bright Builders for its role in mentoring, training and partnering with a client to sell counterfeit golf clubs. Specifically, Cleveland's claims for secondary trademark liability are predicated upon undisputed underlying acts of direct infringement by co-defendants Christopher Prince ("Prince") and Prince Distribution, LLC, whose website, copycatchclubs.com, Bright Builders assisted in creating and developing. It is worth noting that Bright Builders does not now dispute that copycatchclubs.com did, in fact, sell and advertise counterfeit golf clubs. *See* Defendant Bright Builders, Inc.'s Motion for Summary Judgment, page 1 ("The Defendant Prince has since admitted such liability").

### **STATEMENT OF MATERIAL FACTS IN DISPUTE**

In 2008, while surfing the internet, defendant Christopher Prince "stumbled upon" defendant Bright Builders' website. *See* Deposition of Christopher Prince, page 99, lines 16-18 (hereinafter "Prince Depo. at pg. \_\_, ln. \_\_").<sup>1</sup> Bright Builders advertises and holds itself out to the public as being a program that teaches individuals how to build their own online stores by providing one-on-one coaching and mentoring services to their clients.<sup>2</sup> Desperate for a source of income, Prince purchased, for more than \$10,000, Bright Builders' coaching and mentoring program.<sup>3</sup> After Prince's purchase, Bright Builders assigned a Project Advisor that provided one-

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<sup>1</sup> The relevant portions of Prince's Deposition are attached hereto as Exhibit A.

<sup>2</sup> A sampling of advertisement received by Prince from Bright Builders are attached hereto as Exhibit B.

<sup>3</sup> A copy of the Agreement between Prince and Bright Builders is attached hereto as Exhibit C.

one-one involvement "offering priceless knowledge, advice and skills" to Prince to assist with the development of cypcatclubs.com. Prince Depo at pg.102, ln.7-10; see also Coaching Sessions materials.<sup>4</sup> Prince discussed with his Bright Builders team the idea of selling golf clubs. Id at pg. 104, ln. 16-18. Bright Builders' account representative encouraged Prince to start an online golf store and Bright Builders' representative stated that he had recently set up an online golf store for his father-in-law. Id at pg. 104, ln. 19 - pg. 105, ln. 3. Prince's Project Advisor helped define this niche, including walking Prince through the necessary research that included "creating a name and brand recognition [for the website]." *See* Coaching Sessions materials at Exhibit D. Prince and Bright Builders designed and created cypcatclubs.com together. Id at pg. 40, ln. 9 - pg. 41, ln. 8. Without Bright Builders' help, cypcatclubs.com would have never been created by Christopher Prince. Id at pg. 106, ln. 8 – 19.

As the record before this Court shows that Bright Builders was intimately involved in the creation of cypcatclubs.com, Bright Builders knew or should have known of the illegal and counterfeit nature of the goods being sold through the website. Because Bright Builders continued to build and assist Prince in developing cypcatclubs.com when it knew or should have known of the infringing copied clubs Prince intended to sell, Bright Builders has contributed to the infringement of Cleveland's trademarks and has engaged in violations of the SCUTPA.

## **ARGUMENT**

### **A. Bright Builders' Motion Fails to Meet Its Initial Burden as a Matter of Law.**

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R.

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<sup>4</sup> Attached hereto as Exhibit D.

Civ. P. 56(c). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the non-moving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the evidence is such that a reasonable jury could return a verdict for the nonmoving party, summary judgment is not proper. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968). "All that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." Id. at 288-89. If reasonable minds could differ as to the import of the evidence, summary judgment is not proper. Wilkerson v. McCarthy, 336 U.S. 53, 62 (1949). The judge's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but only to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249.

The party moving for summary judgment **bears the initial burden of establishing the absence of a genuine issue of material fact** and can satisfy this burden by presenting evidence that negates an essential element of the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Once the moving party meets its initial burden, the non-moving party must "go beyond the pleadings and by her own affidavits, or by 'the depositions, answers to interrogatories, and admissions on file,' [and] designate 'specific facts showing that there is a genuine issue for trial.'" Id., 324 (quoting Fed. R. Civ. P. 56(e)).

Bright Builders' motion falls woefully short of meeting its initial burden as it fails to cite *any* case law, let alone applicable case law, and fails to make *any* reference whatsoever to the record in the case. In fact, Bright Builders' entire motion for summary judgment, including the case heading and signatory block, is only two pages long, fails to even make rote citations to the standard applicable to a summary judgment motion, references no documents exchanged or

depositions taken in discovery, and contains no supporting memorandum. Without providing legal authority, case citations or referencing materials in the record, Bright Builders cannot overcome the initial burden of establishing the absence of a genuine issue of material fact as required by Celotex.

Not only does Bright Builders' motion fall woefully short of the movant's burden as articulated by the Supreme Court in Celotex, but this scarce pleading style also runs afoul of this Court's Local Rules. DSC Local Civil Rule 7.04 states, in pertinent part:

*7.04: Supporting Memoranda.* All motions made other than in a hearing or trial or to compel discovery shall be timely filed **with an accompanying supporting memorandum** which shall be filed and made part of the public record....Where appropriate, motions shall be accompanied **by affidavits or other supporting documents**.

DSC Local Civil Rule 7.04 (emphasis added). Admittedly, DSC Local Rule 7.04 permits the filing of just a motion; however, this is only when "a full explanation of the motion as set forth in Local Civil Rule 7.05 is contained within the motion and a memorandum would serve no useful purpose."

DSC Local Civil Rule 7.05(A)(2) requires that a memorandum contain "a concise statement of the facts that pertain to the matter before the Court **with references to the location in the record**." Likewise, DSC Local Civil Rule 7.05(A)(3) requires that memorandum contain appropriate legal citations. Bright Builders' motion contains a stream of unsupported (and disputed) statements with no citations to legal authority. For this fact alone, the Bright Builder motion for summary judgment ought to be denied.<sup>5</sup> Trexler v. Giese, 2010 WL 3218883

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<sup>5</sup> For instance, note that the revised text of FRCP Rule 56, effective December 1, 2010, absent contrary Congressional action, requires that a party support its assertions by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers or other materials.

(D.S.C.) (Currie, J.) (denying motion to dismiss for failure to comply with DSC Local Rule 7.04).

B. Cleveland Presented Disputed Issues of Material Fact That Warrant Denial of Summary Judgment.

As additional grounds for denial of the motion, Cleveland argues that there are genuine issues of material fact as to whether Bright Builders is secondarily liable as an infringer of Cleveland's trademarks. Contributory infringement occurs when the defendant either intentionally induces a third party to infringe the plaintiff's mark or supplies a product to a third party with actual or constructive knowledge that the product is being used to infringe the mark. Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844, 853-54 (1982)); see also Size, Inc. v. Network Solutions, Inc., 255 F.Supp.2d 568, 572-73 (E.D.Va.2003) and Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264-65 (9th Cir.1996) (also applying the *Inwood* test for contributory trademark liability). Contributory liability can be imposed in cases where defendant was “‘willfully blind’ to the ongoing violations” of the third party infringer. Fonovisa, 76 F.3d at 265 (citing Hard Rock Cafe Licensing Corp. v. Concession Services, Inc., 955 F.2d 1143, 1149 (7th Cir.1992)). Vicarious liability includes circumstances where the defendant and the direct infringer “exercise joint ownership or control over the infringing product” or where the defendant acts as an agent for the direct infringer. GEICO v. Google, Inc., 330 F.Supp.2d 700, 705 (E.D.Va. 2004) (citing Hard Rock Cafe Licensing Corp. v. Concession Services, Inc., 955 F.2d 1143, 1150 (7th Cir. 1992)).

Cleveland has alleged and presented evidence in the record, that Bright Builders “coached and mentored” Prince in developing a website named copycatclubs.com.<sup>6</sup> The Bright Builders Project Advisor for Prince has testified that it is unlikely that name-brand products

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<sup>6</sup> See Exhibits A, B, C, D.

would be sold in the manner that Mr. Prince used; namely a drop shipper. *See* Deposition Transcript of Michael Johnson, page 110, line 11 through page 111, line 16 (hereinafter "Johnson Depo. at pg. \_\_, ln.\_\_").<sup>7</sup> The Project Advisor also admitted that he knew that Prince was struggling to find a source of golf clubs that he could re-sell for a profit.<sup>8</sup> These facts in combination with the knowledge that Prince's website was named copycatclubs.com provided at least constructive notice that counterfeit products were being sold.

Furthermore, Cleveland has presented evidence in the record that Prince would not have been able to develop and create copycatclubs.com on his own.<sup>9</sup> Prince himself testified that it was only with the help of Bright Builders and the Bright Builders' account representative assigned to Prince, that Prince was able to create this online storefront.<sup>10</sup> While Bright Builders may stick its head in the sand and allege that it was unaware that there were copied golf clubs being sold and advertised on copycatclubs.com, the law is clear in that willful blindness is not a defense to infringement. Moreover, there is ample evidence in the record showing that Bright Builders was in fact on notice that copycatclubs.com was selling copied golf clubs.<sup>11</sup>

There is also evidence in the record that employees of Bright Builders submitted the several domain names owned by Prince, which in a light most favorable to Cleveland must include copycatclubs.com, to more than 2,500 search engines. *See* Transcript of Prince Account printout.<sup>12</sup> Bright Builders was paid for these services that are part of the greater package

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<sup>7</sup> The relevant portions of Johnson's Deposition are attached hereto as Exhibit E.

<sup>8</sup> Id.

<sup>9</sup> *See* Exhibit A.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> The relevant portions of this transcript are attached hereto as Exhibit F.

offered to Prince.<sup>13</sup> In doing so, Bright Builders acted as Prince's agent and exercised control over a key aspect of marketing a website that sold counterfeit golf clubs.

Additionally, the Bright Builders Hosting Agreement gave Bright Builders the power to terminate hosting and operating the copycatchclubs.com website if Prince infringed the intellectual property or other proprietary rights of any third party. *See* Hosting Agreement.<sup>14</sup> Bright Builders never exercised such power under its Hosting Agreement.

Therefore, there is a genuine issue of material fact as to whether Bright Builders participated in Prince's business to the extent required to consider it to be secondarily liable for trademark infringement. As such, Defendant's motion for summary judgment as to the trademark infringement claims must be denied.

C. Cleveland has Presented Disputed Issues of Material Fact That Warrant Denial of Summary Judgment As To Cleveland's SCUTPA Claim

The SCUTPA declares unlawful “unfair ... acts or practices in the conduct of any trade or commerce.” S.C. Code § 39-5-20(a). “An act is ‘unfair’ when it is offensive to public policy or when it is immoral, unethical, or oppressive.” Gentry v. Yonce, 337 S.C. 1, 12 (1999). As discussed *supra*, there is ample evidence in the record detailing Bright Builders' acts of coaching, mentoring and assisting with the development and creation of a website called copycatchclubs.com. As such, there is a genuine issue of material fact as to whether Bright Builders' acts or inaction are "unfair" pursuant to SCUTPA and Bright Builders' motion for summary judgment must be denied.

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<sup>13</sup> See Exhibit C.

<sup>14</sup> Attached hereto as Exhibit G.



## CONCLUSION

WHEREFORE, the Plaintiff respectfully requests that Defendant Bright Builders' Motion for Summary Judgment be denied. Furthermore, Cleveland asks this Court to award Cleveland its fees in preparing its opposition to Bright Builders' two page motion for summary judgment containing, no legal authority, no case citations, and no supporting memorandum. .

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October 18, 2010