

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PANDA HERBAL INTERNATIONAL, INC. : CIVIL ACTION  
:  
v. :  
:  
JOHN F. LUBY, et al. : NO. 05-2943

**MEMORANDUM AND ORDER**

JACOB P. HART  
UNITED STATES MAGISTRATE JUDGE                      October 5 , 2006

The parties in this infringement case each seek partial summary judgment. Reading the motions and responses; however, it is apparent that issues of material fact bar the entry of judgment at this time. At the heart of the dispute is the ownership of the name and herbal sales company known as Viable Herbal Solutions, about which factual issues abound. Resolution of this question will require credibility determinations as the Plaintiff has presented a signed, notarized purchase agreement for the company, the conditions of which were never met. The Defendant contends that the agreement is a forgery.

The motions and responses are replete with challenges to the truthfulness and accuracy of the opposing party's evidence (Defendant's Response to Plaintiff's Motion, at ¶4 Defendant's Memorandum supporting Response, at 6, 7); challenges to the forthrightness of the parties (Plaintiff's Memorandum supporting Motion, at ¶ 24; Plaintiff's Response, at ¶32; 61); and outright character assassination (Defendant's Memorandum supporting Response, at 7; Plaintiff's Memorandum supporting Motion, at ¶ 29). Resolution of the underlying issues will require credibility determinations at trial. On this record, summary judgment is not appropriate.

We are compelled, however, to address one argument raised by the defense to eliminate any question about the scope of this litigation. The Defendant argues that until Farr, the principal

of Panda, formally revoked his consent to Luby using the challenged Marks in February, 2005, no infringement could have occurred. (Memorandum supporting Response, at 10). The problem with the Defendant's argument is that, according to Panda, it was under the mistaken belief that Luby was using the challenged Marks for the benefit of Panda, not for his own benefit. In short, Viable Herbal Solutions was using the challenged Marks. The crucial question for the jury is, who owns Viable Herbal Solutions.

The motions for summary judgment will be denied.

