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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Case No: 11-cv-05013-NRB

ARDIS HEALTH, LLC, CURB YOUR CRAVINGS,
LLC, and USA HERBALS, LLC,

Plaintiffs,

-against-

ASHLEIGH NANKIVELL,

Defendant.

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PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Ardis Health, LLC (“Ardis”), Curb Your Cravings, LLC (“CYC”), USA Herbals, LLC (“USA Herbals”) (collectively “Plaintiffs”), respectfully submit this Memorandum of Law, together with the Declaration of Jordan Finger with Exhibits (“Finger Dec.”), in support of their Motion for Preliminary Injunction. A Proposed Order is attached herewith.

By this Motion, Plaintiffs merely seek to regain control over what is rightfully their property and to stop Defendant from using it. The Motion seeks an order requiring Plaintiffs’ former Video & Social Media Producer, Defendant Ashleigh Nankivell (“Defendant”), to immediately return all company equipment that she wrongfully retained when she was terminated, as well as all passwords, login, hosting, server and other information for various marketing venues that belong to Plaintiffs. In addition, Plaintiffs seek to enjoin Defendant from using any proprietary content relating to Plaintiffs’ business, including all creative content used in the advertisement and promotion of Plaintiffs’ products and services. Finally, Plaintiffs seek an order enjoining Defendant from further use of Plaintiffs’ trademarks and copyrighted works.

Defendant is a disgruntled former employee who wrongfully kept Plaintiffs’ property upon her termination and then unilaterally changed passwords and other critical information needed by the Plaintiffs to control their business. Defendant is now using Plaintiffs’ proprietary content for her own marketing website without authorization.

As a result of Defendant’s actions, Plaintiffs are losing business and customer goodwill, and such losses continue to mount on a daily basis. Other Internet marketers are using Plaintiffs’ websites to steer prospective customers to their own products. While normally Plaintiffs could easily control their website content, they now have no way of stopping this, as Defendant

changed all the passwords. Plaintiffs also cannot access their critical marketing content, which was uploaded on to a server and which Defendant now improperly controls.

The balance of the equities clearly favors Plaintiffs, as Plaintiffs simply seek to prohibit Defendant from doing that which she has no right to do. Moreover, Defendant's actions are creating confusion in the marketplace and the public has a great interest in protecting the misuse of this property under these circumstances. Accordingly, Plaintiffs are entitled to a preliminary injunction.

STATEMENT OF FACTS

I. Plaintiffs' Business

Plaintiffs are a group of closely affiliated online marketing companies that develop and market a variety of herbal, natural health, wellness and beauty products throughout the United States and Europe. Plaintiffs market their products widely on the Internet. Finger Dec., ¶¶ 6-7.

Plaintiffs operate collaboratively under the direction and control of their founder, Jordan Finger. Mr. Finger is the sole member and 100% owner of each of the Plaintiffs, along with various other related entities. Finger Dec., ¶¶ 1, 20.

CYC is the main entity that conducts the online business of Mr. Finger's enterprise. All employees are hired by CYC, and employment agreements are established through CYC. CYC outsources its employee payroll to USA Herbals, one of its affiliated companies. In connection with their employment for CYC, Mr. Finger often direct his employees to create online marketing content for his other entities, including Ardis. Finger Dec., ¶¶ 14-17.

Mr. Finger solely manages all CYC's employees and oversees the development of creative advertising and Plaintiffs' marketing strategies, which are created with the assistance of his employees.

Plaintiffs' success is attributable largely to their creative advertising abilities coupled

with Internet marketing savvy. The fast paced world of Internet marketing requires a dynamic advertising model that is targeted over many platforms including on social networks such as Facebook and Twitter, as well as blog sites.¹ Successful Internet marketers must be able to adapt their advertising campaigns on the fly in order to respond to the demands of consumers, the actions of competitors, as well as Internet search engines, which prioritize marketers' visibility to consumers based on the quality of the content and the ability of the advertiser to drive traffic to an individual website. Thus, the ability to immediately and seamlessly modify the content of an advertisement or website can mean the difference between the success and failure of a brand. Finger Dec., ¶¶ 9-11.

Because creative content is the lifeblood of Plaintiffs' business, Plaintiffs have undertaken significant efforts to protect and ensure their continued ownership and control over the creative content used in the advertisement and promotion of their products and services ("Proprietary Content"). Finger Dec., ¶ 12. Plaintiffs have expended significant time and effort in the development, promotion and marketing of their products and services under a portfolio of trademarks. Finger Dec., ¶ 8. Plaintiffs register their trademarks and copyrights, police the unauthorized use of their Proprietary Content by others on the Internet, and secure agreements with their affiliate advertisers, employees and others to ensure that their creative content is not misused or misappropriated. Finger Dec., ¶ 13.

II. Defendant's Employment

In October 2008, Mr. Finger hired Defendant as a salaried employee. At all times during her employment, Defendant was a regular W-2 salaried employee, hired by CYC and paid by CYC or USA Herbals. Mr. Finger's entities made appropriate tax withholdings for the Defendant, classifying her as a salaried employee. In connection with her employment,

¹ Blogs are usually websites maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video.

Defendant received paychecks on a regular basis. Finger Dec., ¶¶ 21-23, Exh. A.

Around the time of her hire, Defendant executed an acknowledgement of CYC's employee handbook ("Handbook"). Finger Dec., ¶ 24, Exh. B. As set forth in the Handbook, Defendant was provided with group health insurance benefits and worker's compensation insurance. Defendant also received up to five days of paid sick time and up to ten days of paid vacation days, as well as seven paid holidays per year. Finger Dec., ¶ 25 Exh. B.

During her employment, Defendant held the title of Video & Social Media Producer. Defendant's duties and responsibilities as Mr. Finger's employee involved the creation of Proprietary Content, including creating videos for and about Plaintiffs' products and services. Defendant's creative work was used, among other things, on Plaintiffs', as well as Mr. Finger's other entities' websites, blogs, and other venues on the Internet. Defendant's duties and responsibilities also encompassed designing other Proprietary Content, including websites for his enterprise's products and services, and social media fan pages on Facebook, Twitter and elsewhere. Defendant had no role in hiring or paying assistants. Finger Dec., ¶¶ 26-29.

At all relevant times, Mr. Finger maintained the right to control the manner and means by which the Proprietary Content was accomplished, including all Proprietary Content created by Defendant. Plaintiffs are the owners of all Proprietary Content, including all Proprietary Content created by Defendant. Finger Dec., ¶¶ 30-31.

As part of her job, Defendant was responsible for maintaining, and she exclusively maintained, Plaintiffs' passwords, login, hosting and other information for various websites, email accounts, social media accounts and other accounts that were established on behalf of Plaintiffs. Defendant also exclusively maintained password information to servers hosted by third parties, which are accessible online, where a significant amount of Plaintiffs' critical and

proprietary data, including Proprietary Content, was uploaded and stored. (collectively, “Access Information”) Finger Dec., ¶ 32, Exh. C.

In order to perform the functions of her job, Plaintiffs provided Defendant with various computer and video equipment, including a Macintosh computer, digital camera, software and related equipment (“Equipment”), which was paid for by Plaintiffs. Throughout her employment, Defendant stored a significant amount of Plaintiffs’ critical information and Proprietary Content on the Equipment. Finger Dec., ¶ 33, Exh. D.

III. The Work Product Agreement

In October 2008, Defendant executed a Non-Disclosure and Rights to Work Product Agreement in connection with her employment with Plaintiffs (“Work Product Agreement”). Finger Dec., ¶ 34, Exh. E.

Pursuant to the Work Product Agreement, Defendant expressly agreed that: (1) any Proprietary Content she created or developed, including names, designs, slogans, concepts, advertisements, copyrightable works, trademarks and service marks, belonged solely to Plaintiffs; (2) she had no right, title or interest in any Proprietary Content; and (3) all of the creative work performed by Defendant in connection with her employment was part of Plaintiffs’ Proprietary Content and did not belong to Defendant. Finger Dec. ¶ 35; Exh. E, ¶ 10.

Pursuant to the Work Product Agreement, Defendant agreed to return all confidential information, including Plaintiffs’ Access Information, immediately upon request of Plaintiffs. Finger Dec. ¶ 36; Exh. E, ¶ 5.

Pursuant to the Work Product Agreement, Plaintiffs’ Access Information is confidential information. Defendant agreed to hold Plaintiffs’ Confidential Information in strict confidence, to protect that information, and not to use any confidential information for any purpose other than for her engagement by Plaintiffs. Finger Dec. ¶ 37; Exh. E, ¶ 3. Upon information and belief, Defendant was aware at all times that the work she created in connection with her

employment belonged to Plaintiffs. Finger Dec., ¶ 38.

IV. Whatsinurs Concept

In approximately June 2010, Mr. Finger began developing a concept for a service known as “Whatsinurs”. The purpose of Whatsinurs was to provide content related to cosmetic and beauty products over the Internet and mobile to a social media community. Whatsinurs would enable participants to discover, review, comment on and buy beauty and cosmetic products through the Whatsinurs platform both online and at local retailers. Finger Dec., ¶¶ 39-41.

Plaintiffs, chiefly through Mr. Finger, began to develop the Whatsinurs concept and registered the domain Whatsinurs.com. Plaintiffs developed the Whatsinurs.com website (“Whatsinurs Website”). Finger Dec., ¶¶ 42-43; Exh. F. The Whatsinurs Website has a distinctive look and feel for the Whatsinurs concept (“Whatsinurs Trade Dress”). The Whatsinurs Trade Dress encompasses the color scheme, logo and organizational structure of the Whatsinurs Website. Finger Dec., ¶ 44; Exh. F. On July 27, 2011, Plaintiffs received a copyright registration for the Whatsinurs Website. Finger Dec., ¶ 76; Exh. Q.

On February 27, 2011, the trademark, Whatsinurs, was first used in commerce (the “Whatsinurs Mark”), which is an integral part of the Whatsinurs Website. Through Plaintiffs’ extensive and exclusive use of the Whatsinurs Mark and Whatsinurs Trade Dress, they have become distinctively connected with Plaintiffs. Finger Dec. ¶¶ 45, 49.

On April 6, 2011, Plaintiffs sought registration of the Whatsinurs Mark with the United States Patent and Trademark Office (“USPTO”). Finger Dec., ¶ 46; Exh. G. In connection with the application, the USPTO Examiner conducted a search and determined that there are no trademarks that conflict with the Whatsinurs Mark. Finger Dec., ¶ 47; Exh. H. Registration of the Whatsinurs Mark, USPTO Serial No. 85287919, is pending. Finger Dec., ¶ 48.

In connection with her employment, Mr. Finger asked Defendant to assist him with the creative development of Whatsinurs in her capacity as Plaintiffs’ employee. Under Mr. Finger’s

direction and control, Defendant created Proprietary Content related to the Whatsinurs concept. Among other things, Defendant, as part of her employment responsibilities, assisted in the creation and development of the Whatsinurs Website. Finger Dec., ¶¶ 50-51.

V. Defendant's Termination

Defendant's work became marred by excessive absences, consistent lateness, and unexplained disappearances from the office for hours in the middle of the work day, sometimes for hours on end, which began to escalate in the spring of 2011. Finger Dec., ¶ 52.

Unbeknownst to Mr. Finger and Plaintiffs at the time, Defendant had commenced applying for other jobs and prepared to compete against Plaintiffs using Plaintiffs' facilities and equipment, including her work computer at Plaintiffs' Manhattan office. Finger Dec., ¶ 53.

Defendant engaged in a pattern of leaving work during work hours, without requesting vacation time or leave, in order to seek alternative employment and to interview for positions at competing companies. Mr. Finger later discovered that Defendant had prepared at least sixty job applications, including for work at competitors, using Plaintiffs' equipment and facilities, and while on the job. Finger Dec., ¶ 53.; Exh. I.

On June 23, 2011, after Defendant failed to show up for work without excuse, Mr. Finger terminated Defendant's employment. The Handbook made clear that Defendant was an employee at will, and, as such, could be discharged for any reason and without cause. Finger Dec., ¶¶ 56-57. Defendant has subsequently filed for unemployment, thereby acknowledging that she was Plaintiffs' employee. Finger Dec., ¶ 58, Exh. J.

VI. Defendant's Unlawful Conversion of Plaintiffs' Proprietary Content, Access Information, and Other Post Termination Conduct

At the time of her termination, Mr. Finger requested that Defendant return all Equipment and information, including Proprietary Content in her possession, as well as the Access Information that belonged to Plaintiffs. Finger Dec., ¶ 59, Exh. K. Defendant refused to return the requested items and continues to maintain possession of, among other things, Plaintiffs'

Equipment, Access Information and Proprietary Content, without authorization. Finger Dec., ¶ 60.

In addition, Defendant unilaterally changed the passwords, login, hosting and other information for various hosted servers, websites, email accounts, social media accounts and other accounts that were established on behalf of Plaintiffs, and has refused to allow Plaintiffs access to this Access Information, as well as a significant amount of Proprietary Content and other highly sensitive information belonging to Plaintiffs that was uploaded and stored on servers. Finger Dec., ¶ 61; Exh. L.

Because Defendant changed this Access Information, Plaintiffs do not have access to these company assets and files, and cannot maintain, alter or modify some of their websites and marketing campaigns.

Access to this information is critical to Plaintiffs' business. Finger Dec., ¶ 62. For example, Plaintiffs are unable to access a number of Facebook pages, which were set up for the benefit of Plaintiffs' products. Presently, others are now posting competing advertisements on Plaintiffs' Facebook pages in an effort to drive prospective customers away from Plaintiffs' sites. Because Defendant maintains exclusive access to these pages, Plaintiffs are unable to remove the offending posts, which are resulting in a loss of customers. Finger Dec., ¶¶ 63-65; Exh. M.

After her termination, Defendant publicly displayed and continues to use and publicly display, Proprietary Content from the Whatsinurs Website on her commercial public website, www.anankivell.com ("Anankivell.com"), including the Whatsinurs Mark and Whatsinurs Trade Dress. Defendant copied portions of the Whatsinurs Website on to Anankivell.com. Defendant uses Anankivell.com in a commercial capacity to promote herself and her work. Finger Dec., ¶¶ 67-69; Exh. O.

Plaintiffs did not authorize Defendant to display portions of the Whatsinurs Website on to Anankivell.com following her termination from employment. In using the Whatsinurs Website content, Defendant provided no attribution to any of Plaintiffs and has improperly appropriated Plaintiffs' Proprietary Content for her own benefit. Finger Dec., ¶¶ 70-73; Exh. O.

A Google search for the term “whatinurs” performed on July 27, 2011, reveals that Anankivell.com appears among the top results. Customers searching for Plaintiffs’ products would therefore confuse Defendants’ website as affiliated or sponsored by Plaintiffs. Finger Dec., ¶ 70; Exh. P.

On June 28, 2011, Plaintiffs’ counsel advised Defendant that she must return Plaintiffs’ Proprietary Content and Access Information, as well as cease displaying of portions of the Whatsinurs Website on Anankivell.com. Defendant has refused to return Plaintiffs’ Proprietary Content and Access Information or remove the Whatsinurs Website content from Anankivell.com. She continues to display such content for her own commercial gain. Finger Dec., ¶¶ 74-75.

At no time did Plaintiffs authorize Defendant to use any Proprietary Content, except in connection with her employment and for the benefit of Plaintiffs. Finger Dec., ¶ 77.

ARGUMENT

A. Standard

A court may issue a preliminary injunction if the movant has demonstrated “either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the [plaintiff]’ s favor.” *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010) (alteration in original), quoting *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 476 (2d Cir. 2004).

Injunctive relief is warranted where the movant also establishes irreparable injury in the absence of an injunction. *Id.*, at 79–80. Irreparable harm is established where a plaintiff shows that “(1) ‘he is likely to suffer irreparable injury in the absence of an injunction’; (2) ‘remedies at law, such as monetary damages, are inadequate to compensate for that injury’; (3) the balance of hardships tips in his favor; and (4) ‘the public interest would not be disserved by the issuance of

a preliminary injunction.” *Rex Med. L.P. v. Angiotech Pharms. (US), Inc.*, 754 F.Supp.2d 616, 620 (S.D.N.Y. 2010) (quoting *Salinger, supra*).

Here, Plaintiffs are entitled to a preliminary injunction under this standard.

B. Plaintiffs Are Entitled to Injunctive Relief Based On Defendant’s Wrongful Conversion of Plaintiffs’ Property

Plaintiffs have established a clear likelihood of success on the merits with respect to their Seventh and Eight Claims for conversion of their Proprietary Content, Access Information and Equipment set forth in the Amended Complaint. Defendant wrongfully converted this property, and irreparable harm will result absent an injunction. Accordingly, the Court should immediately enjoin Defendant from retaining possession of, or using Plaintiffs’ property in any way.

1. Defendant Has No Right to Plaintiffs’ Proprietary Content, Access Information or Equipment

A “work made for hire” is “a work prepared by an employee within the scope of his or her employment.” 17 U.S.C. § 101. Whether a person had created a work as an “employee within the scope of his or her employment” is determined by reference to the common law of agency. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). The factors include, among others: “whether the hiring party has the right to assign additional projects to the hired party,” “the hired party’s role in hiring and paying assistants,” “the provision of employee benefits,” and “the tax treatment of the hired party.” *Id.* at 751-52, 109 S.Ct. 2166.

Here, there can be no doubt that all Proprietary Content created by Defendant during her employment belongs to Plaintiffs. At all times during her employment, Defendant was a regular W-2 salaried employee, and was taxed, classified and paid as such. Finger Dec., ¶¶ 21-23; Exh.

A. Defendant had no role in hiring and paying assistants. Finger Dec., ¶ 27. Defendant was afforded benefits that were afforded to all Plaintiffs' employees including health insurance, sick time, paid vacation and paid holidays. Finger Dec., ¶¶ 25, Exh. B. Indeed, Defendant filed for unemployment benefits as Plaintiffs' former employee. Finger Dec. ¶ 58, Exh. J. Under these circumstances, title to all Proprietary Content belongs to Plaintiffs. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 86 -87 (2nd Cir. 1995) (copyright in sculptures belonged to employer where employer paid payroll and social security taxes, provided employee benefits such as life, health, and liability insurance and paid vacations, and contributed to unemployment insurance and workers' compensation funds on artists' behalf and two of the three artists filed for unemployment benefits after their positions were terminated).

Moreover, Defendant's job title was Video & Social Media Producer and she was specifically hired to create Proprietary Content and was paid by Plaintiffs for doing so. Finger Dec., ¶ 26. In connection with her employment, Mr. Finger repeatedly assigned Defendant additional projects to be performed for the various entities of his enterprise. That Defendant was hired by CYC and paid by USA Herbals and performed work for other of Mr. Finger's entities is irrelevant. It is undisputable that Plaintiff was hired as an employee and paid by Plaintiffs for the work she performed and, as such, all Proprietary Content she created during her employment belongs to Plaintiffs under the work for hire doctrine. As Plaintiff is the owner of all Proprietary Content, all Access Information in connection with such content also belongs to Plaintiffs and Defendant had no right to unilaterally change the Access Information.

In addition to the work for hire doctrine, Defendant cannot escape the enforceability of the Work Product Agreement. Under the Work Product Agreement, Plaintiff expressly agreed to return all confidential information, including Plaintiffs' Access Information, immediately upon

request of Plaintiffs. See Exh. E, ¶ 5. Defendant also expressly acknowledged that: (1) any content she created or developed, including names, designs, slogans, concepts, advertisements, copyrightable works, trademarks and service marks, belonged solely to Plaintiffs (2) she had no right, title or interest in any Proprietary Content; and (3) all of the creative work performed by Defendant in connection with her employment was part of Plaintiffs' Proprietary Content and did not belong to Defendant. See Exh. E, ¶ 10. Under the Work Product Agreement, therefore, all Access Information and Proprietary Content belongs to Plaintiffs.

Finally, it cannot be disputed that the Equipment was purchased by Plaintiffs for Defendant's use in connection with her employment, and Defendant can have no ownership claim to the Equipment, which contains Plaintiffs' critical information. Finger Dec., Exh D. Thus, all Equipment, Access Information and Proprietary Content belongs to Plaintiffs.

2. Defendant Wrongfully Converted Plaintiffs' Access Information, Proprietary Content and Equipment

"Conversion is the tort of unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. *Mikhlyn v. Bove* 2008 WL 4610304, *13 (E.D.N.Y. 2008), citing *State v. Seventh Regiment Fund, Inc.*, 98 N.Y.2d 249, 259, 746 N.Y.S.2d 637 (N.Y. 2002). In addition to tangible property, intellectual property, such as a website and its contents, and other intangible property, such as sensitive business information, are forms of property that can be converted. *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F.Supp.2d 609, 618 (S.D.N.Y.2003) (holding that ideas set forth on website constitute "tangible expression or implementation of an idea," which can be converted as a matter of law); *Shmueli v. Corcoran Group*, (2005 N.Y. Slip Op 35302[U] [Sup Ct, N.Y. County 2005] (conversion claim sustained where defendant refused to let plaintiff access customer list she had developed and stored on defendant's computer system).

Here, it cannot be disputed that upon termination, Defendant refused to return Plaintiffs' Equipment, which contained critical business information, including Plaintiffs' Proprietary Content and Access Information. Defendant also unilaterally changed the password and login information to Plaintiffs' hosted servers, websites, email accounts, social media accounts and other accounts that were established on behalf of Plaintiffs. Because Defendant has improperly exercised of the right of ownership and control over Plaintiffs' Equipment, Proprietary Content and Access Information, Plaintiffs have established a clear likelihood of success on the merits of their conversion claims.

3. Injunctive Relief Is Necessary to Prevent Irreparable Harm to Plaintiffs

Absent an injunction, Defendant's conversion of Plaintiffs' property will continue to result in irreparable harm to Plaintiffs. In order to be successful as an Internet marketer, it is critical that Plaintiffs' can adapt their advertising campaigns on the fly and immediately and seamlessly modify the content of their advertisements or websites. By seizing control over Plaintiffs' property, Defendant has hindered Plaintiffs' ability to compete in the marketplace and Plaintiffs will continue to suffer until the property is returned.

Because Defendant changed the Access Information, Plaintiffs do not have access to critical company assets and files, and cannot maintain, alter or modify some of their websites and marketing campaigns. As a result of Defendant's refusal to return this property, Plaintiffs' business is suffering in that they are unable to change or control their advertising websites and alter or modify their content, which is significantly harming their advertisements.

Among other things, Plaintiffs are unable to access a number of Facebook pages, which were set up for the benefit of Plaintiffs' products and to develop Plaintiffs' brand in the eyes of consumers. Presently, Plaintiffs' competitors are now posting competing advertisements on

Plaintiffs Facebook pages, which dilute Plaintiffs' brands and steers customers away from Plaintiffs' marketing sites. *See* Finger Dec., Exh. M. Because Defendant maintains exclusive access to these pages, Plaintiffs are unable to remove the offending posts, which is resulting in a significant loss of customers affecting the goodwill established in Plaintiffs' brands.

Thus, Plaintiffs have presented an imminent threat of continued harm and the difficulty of evaluating the injury in monetary terms as a result of Defendants' act of holding Plaintiffs' property hostage weighs heavily in favor of injunctive relief. *New York City Triathlon, LLC v. NYC Triathlon Club, Inc.*, 704 F.Supp. 2d 305, 343 (S.D.N.Y. 2010) (preliminary injunction appropriate because no monetary sum can sufficiently remedy Plaintiff for harm based on loss of control its reputation and the services offered under its name and brand); *Tom Doherty Assoc., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37–38 (2d Cir.1995) (discussing that the loss of prospective goodwill, which is the potential benefits to a business from selling an essential or unique product, can constitute irreparable harm).

Moreover, in balancing the hardships, it is clear that there is *no* benefit to Defendant in continuing to maintain possession of Plaintiffs' Property, other than to enjoy watching Plaintiffs scramble to protect their brands. Defendant is simply a disgruntled former employee who seeks to harm Plaintiffs in any way that she can in retribution for her termination.

Finally, the public interest would not be disserved by the issuance of a preliminary injunction, which would merely allow Plaintiffs possession of what is rightfully their property. Under these circumstances, Plaintiffs have clearly established all of the elements for a preliminary injunction, and Defendant should be ordered to immediately return all of Plaintiffs' property.

C. Plaintiffs Are Entitled to Injunctive Relief Based On Defendant's Breach of the Work Product Agreement

Plaintiffs have also established a likelihood success on the merits with respect to their Sixth Claim for breach of the Work Product Agreement. Pursuant to the Work Product Agreement, Defendant acknowledged that such a breach would cause Plaintiffs irreparable injury and damage. As such, Plaintiffs are entitled to a preliminary injunction on this ground.

The elements of a breach of contract claim under New York law are as follows: (1) the existence of an agreement; (2) adequate performance of the contract by the plaintiff; (3) breach of contract by the defendant; and (4) damages. *Roswell Capital Partners LLC v. Alternative Constr. Tech.*, 2009 WL 222348,*8 (S.D.N.Y.2009).

Here, the evidence demonstrates that the parties entered into the Work Product Agreement and Plaintiffs performed all obligations under the Work Product Agreement. Defendant breached the Work Product Agreement by using Plaintiffs' confidential information (including Proprietary Content and Access Information) for an improper purpose and failing to return Plaintiffs confidential information as expressly required under the agreement. Finger Dec., Exh. E, ¶¶ 1,5.

Further, Plaintiff breached the Work Product Agreement by failing to acknowledge Plaintiffs' ownership of the Proprietary Content and failing to cooperate with Plaintiffs in protecting its Proprietary Content. Finger Dec., Exh. E, ¶10.

With respect to irreparable injury, pursuant to the Work Product Agreement, Defendant expressly acknowledged that the "actual or threatened breach of this Agreement will cause [Plaintiffs] irreparable harm" and that Plaintiffs shall "in addition to all other remedies available to it, be entitled to injunctive and other equitable relief" Finger Dec., Exh. E, ¶ 8. Thus, in addition to the irreparable injury set forth above, such terms in the Work Product Agreement are

highly relevant to the Court's determination as to whether irreparable harm has occurred.

Roswell Capital Partners LLC, supra, 2009 WL 222348 at *17 (“terms throughout the contracts at issue specify that a default constitutes irreparable harm entitling Plaintiffs to injunctive relief to cure breaches,” which, “[w]hile not dispositive, [may be viewed by] courts ... as evidence of an admission that irreparable harm has occurred”).

Moreover, as stated in Part IB herein, the balance of the hardships and public interest weigh in favor of Plaintiffs. Under these circumstances, Plaintiffs have clearly established that a preliminary injunction is necessary based on Defendant's breach of contract.

D. Plaintiffs Are Entitled to Injunctive Relief Based On Defendant's Trademark Infringement

Plaintiffs have also established a likelihood success on the merits with respect to their First, Second, Fourth and Fifth Claims for trademark and trade dress infringement.

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), creates a federal cause of action for the infringement of an unregistered trademark. *See, e.g., Genesee Brewing Co. v. Stroh Brewing Co.*, 124 F.3d 137, 142 (2d Cir.1997). To prevail on a Section 43(a) claim of trademark infringement under the Lanham Act, “the plaintiff must show, first, that its mark merits protection, and second, that the defendant's use of a similar mark is likely to cause consumer confusion as to the origin, sponsorship, or affiliation of the defendant's goods.” *Pan American World Airways, Inc. v. Flight 001, Inc.* 2007 WL 2040588, 7 (S.D.N.Y. 2007); *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 114 (2d Cir. 2009). The elements necessary to prevail on a common law cause of action for trademark infringement are identical to the elements of a claim under the Lanham Act. *Franklin Res., Inc. v. Franklin Credit Mgmt. Corp.*, 998 F.Supp. 322, 338 (S.D.N.Y.1997).

With respect to trade dress infringement, trade dress “encompasses the design and

appearance of the product together with all the elements making up the overall image that serves to identify the product presented to the consumer.” *Nora Beverages, Inc. v. Perrier Group of Am., Inc.*, 164 F.3d 736, 743 (2d Cir.1998) (internal citations and quotations omitted). A website’s total “look and feel” can constitute a protectible trade dress. *See Blue Nile, Inc. v. Ice.com, Inc.*, 478 F.Supp.2d 1240 (W.D.Wash.2007); *Sleep Science Partners v. Lieberman*, 2010 WL 1881770 (N.D.Cal.2010); *Conference Archives v. Sound Images, Inc.*, 2010 WL 1626072 (W.D.Pa.2010).

To succeed on the merits of a trade dress infringement claim, a plaintiff must demonstrate “(1) its trade dress is distinctive and (2) there exists a likelihood of confusion between its product and the alleged infringer’s product.” *Forschner Group, Inc. v. Arrow Trading Co.*, 124 F.3d 402, 407 (2d Cir.1997). Trade dress is “inherently distinctive” if it serves as an “indication of origin, “so that a consumer would “readily rely on it to distinguish it” from competitors. *Id.* at 407-08.

Here, the Whatsinurs Mark is an arbitrary term, entitled to automatic protection under the under the Lanham Act. *Genesee Brewing Co., Inc. v. Stroh Brewing Co.* 124 F.3d 137, 143 (2d Cir. 1997) (“Marks that are arbitrary, fanciful, or suggestive are considered ‘inherently distinctive,’ and are automatically entitled to protection under the Lanham Act”). Moreover, registration for the Whatsinurs Mark is pending and the USPTO Trademark Examiner has performed a search and found no conflicting marks. *See* Finger Dec., Exh. H (“The Office records have been searched and there are no similar registered or pending marks that would bar registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d). TMEP §704.02”)

Similarly, the color scheme and style selection of the Whatsinurs Website clearly serve as an indication of origin, such that consumers can readily rely on it to distinguish it from

competitors. *See* Finger Dec., ¶¶ 42-44; Exh. F. Thus, the Whatsinurs Trade Dress is inherently distinctive and equally entitled to protection under the Lanham Act. *Forschner Group, Inc.*, *supra*, 124 F.3d at 407.

Further, it cannot be disputed that Defendant is presently displaying the Whatsinurs Mark and Whatsinurs Trade Dress on her own commercial Anankivell Website and without any attribution to Plaintiffs. *See* Finger Dec., Exh. O. Under these circumstances, especially where Defendant's website displays near the top of search engine results, it is presumed that the use of an identical mark is likely to cause consumer confusion as to the origin, sponsorship, or affiliation of the defendant's goods. *See Audi AG v. Shokan Coachworks, Inc.*, 592 F.Supp.2d 246, 273 (N.D.N.Y. 2008) (where marks are "essentially identical" consumers are likely "to believe that [defendant] somehow is associated with [plaintiff] or at least has consented to the use of its trademark."); *Century 21 Real Estate LLC v. Bercosa Corp.*, 666 F.Supp.2d 274, 282 (E.D.N.Y. 2009) (likelihood of confusion established where defendant failed to stop using plaintiff's mark after termination of franchise agreement). Defendant's use of the Plaintiff mark to promote her own website also demonstrates her bad faith intention to capitalize on Plaintiffs' reputation and goodwill. *Tri-Star Pictures, Inc. v. Unger*, 14 F.Supp.2d 339, 357 (S.D.N.Y. 1998) (where infringing marks are identical, defendant has the burden of persuading the court that there is a credible innocent explanation).

With respect to irreparable harm, "[i]n trademark disputes, 'a showing of likelihood of confusion establishes both a likelihood of success on the merits and irreparable harm.'" *Fendi Adele S.R.L. v. Ashley Reed Trading, Inc.* 2010 WL 571804, *7 (S.D.N.Y. 2010); *Zino Davidoff SA v. CVS Corp.*, 571 F.3d 238, 247 (2d Cir. 2009) ("a 'plaintiff who establishes that an infringer's use of its trademark creates a likelihood of consumer confusion generally is entitled to

a presumption of irreparable injury.’”); *Biosafe-One, Inc. v. Hawks*, 524 F.Supp.2d 452, 462-67 (S.D.N.Y.2007) (“[i]rreparable harm is often presumed in copyright, trademark, and trade dress infringement cases”). The theory underlying this presumption is that it is difficult to remedy confusion in the marketplace by an award of damages. *Tough Traveler, Ltd. v. Outbound Products*, 60 F.3d 964, 967-68 (2d Cir.1995) (same in trademark and trade dress context).

Further, irreparable harm is demonstrated by the fact that Defendant’s Anankivell Website shows up among the top results for web searches for the Whatsinurs Mark. Finger Dec., Exh. P. Thus, consumers searching for Plaintiffs services may be directed to Defendant’s website resulting in a loss of Plaintiffs’ customers.

In balancing hardships, there is simply no hardship to the Defendant in granting the injunction, as it merely seeks to prohibit her from using Plaintiffs’ trademarks for her own personal gain and to return Plaintiffs’ property, which does not belong to her. Further, the consuming public has a protectable interest in being free from confusion, deception and mistake. *See New York City Triathlon, supra*, 704 F.Supp.2d at 344.

Accordingly, a preliminary injunction should issue based upon Defendant’s trademark infringement.

E. Plaintiffs Are Entitled to Injunctive Relief Based On Defendants’ Copyright Infringement

Similarly, Plaintiffs are entitled to injunctive relief based on their claim for copyright infringement of the Whatsinurs Website.

“To prevail on a claim of copyright infringement, the plaintiff must demonstrate both (1) ownership of a valid copyright and (2) infringement of the copyright by the defendant.” *Mint, Inc. v. Amad*, 2011 WL 1792570, *2 (S.D.N.Y. 2011). Registration of a copyright before or within five years of first publication is prima facie evidence of the “validity of the copyright.”

17 U.S.C. § 410(c). To establish infringement, the copyright owner must demonstrate that (1) the defendant has actually copied the plaintiff's work; and (2) the copying is illegal because a substantial similarity exists between the defendant's work and the protectible elements of plaintiff's." (Internal quotation marks omitted.) *Mint, Inc, supra*, 2011 WL 1792570, at *2.

Here, Plaintiffs have a valid copyright registration in the Whatsinurs Website and therefore have established a prima facie case of ownership. Finger Dec., Exh. Q. Moreover, Defendant's use of portions of the Whatsinurs Website on the Anankivell Website constitutes direct evidence of copying of the protectable elements of the work. As such, Plaintiff has clearly established a likelihood of success on their claim for copyright infringement.

With respect to irreparable harm, Defendant's continued use of content stolen directly from Plaintiffs' Whatsinurs Website and pasted on to her own commercial website will cause Plaintiffs to suffer irreparable harm. Defendant has usurped control over the Whatsinurs content and is using the content to market herself to competitors. Defendant's use of the content on her website dilutes the brand and customers searching for Plaintiffs services will be driven to Defendant's website, which contains Plaintiffs' copyrighted content. Finger Dec., Exh. P. Plaintiffs should not be expected to suffer a decline in market share – an injury difficult to quantify – owing to Defendant's infringement.

Moreover, a plaintiff has no adequate remedy at law where, absent an injunction, the defendant "is likely to continue infringing" its copyrights. *Warner Bros. Entertainment Inc. v. RDR Books*, 575 F.Supp.2d 513, 553 (S.D.N.Y.2008); See also *SimplexGrinnell v. Integrated Sys.*, 642 F.Supp.2d 167, 196-97 (S.D.N.Y.2009) (finding remedies at law inadequate where evidence suggested defendant would continue unauthorized use of copyright). Here, Defendant continues to infringe Plaintiffs' copyright despite that Plaintiffs' counsel specifically advised

Defendant of the infringing activity. *See Broadcast Music, Inc. v. R Bar of Manhattan, Inc.*, 919 F.Supp. 656, 658 (S.D.N.Y.1996); (granting plaintiffs in copyright infringement action permanent injunction where licensing company's investigator's testimony established defendants repeatedly infringed plaintiffs' copyrights despite knowledge of the copyrights, and continued to permit unauthorized public performance of copyrighted compositions licensed through licensing company).

Further, in balancing the hardships, Plaintiffs merely seek to restrict Defendant from that which she is not legally entitled to do – namely to use Plaintiffs' content for her own commercial purposes. Defendant cannot deny that she is infringing on Plaintiffs' copyrights and Defendant is profiting from the unauthorized use of the content. Thus, the balance of equities tips decidedly in Plaintiffs' favor.

Finally, it is undisputed that there is a strong policy in favor of enforcing copyrights. *See Motown Record Co., L.P. v. iMesh.Com, Inc.*, No. 03 Civ. 7339, 2004 WL 503720, at *7 (S.D.N.Y. Mar. 12, 2004) (“Importantly, plaintiffs assert an action to enforce their U.S. copyrights, an area in which the U.S. has a strong public interest.”).

Thus, because Plaintiffs have established a substantial likelihood of success on the merits as well as satisfied the four-part test required by *Salinger*, the Court should grant Plaintiffs' motion for preliminary injunction.

CONCLUSION

Based upon the foregoing, Plaintiffs, Ardis Health, LLC, Curb Your Cravings, LLC, USA Herbals, LLC, respectfully requests that the Court issue a Preliminary Injunction in the form of the Proposed Order attached hereto.

Dated: August 8, 2011

Respectfully submitted,

Ardis Health, LLC, USA Herbals, LLC and Curb
Your Cravings, LLC

By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants and the lawyer believed to be counsel for the Defendant on August 8, 2011.

/s/ Christopher M. Hennessey
Christopher Hennessey