

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-

**DECLARATION OF
JORDAN FINGER**

ASHLEIGH NANKIVELL,

Defendant.

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State of New York)

County of New York)

I, Jordan Finger, declare and state as follows:

1. I am the Founder, President, CEO and 100% owner of each of the Plaintiffs, Ardis Health, LLC (“Ardis”), Curb Your Cravings LLC (“CYC”), and USA Herbals, LLC (“USA Herbals”) (Ardis, CYC and USA herbals are collectively “Plaintiffs”). I have personal knowledge of the matters set forth in this affidavit and, if called as a witness, would competently testify to them.

2. I have fifteen years of executive level experience in the Internet marketing and e-commerce industry.

3. I hold a BSM Degree in Marketing from the A.B. Freeman School of Business at Tulane University.

4. I am entrepreneur who has built and managed an international e-commerce business involving several companies that market health and beauty products in the United States and in seven European countries. My business has processed millions of customer transactions.

5. Each of the Plaintiffs is part of the marketing enterprise run by me.

6. 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.

7. Plaintiffs market their products widely on the Internet and have become recognized as a leader in the online marketplace.

8. Plaintiffs have expended significant time and effort in the development, promotion and marketing of their products and services under a portfolio of trademarks.

9. Plaintiffs' success is attributable largely to their creative advertising abilities coupled with Internet marketing savvy.

10. The fast paced world of Internet marketing requires a dynamic advertising model that is targeted over many platforms including social networks such as Facebook and Twitter, as well as blog sites.

11. In my experience, 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.

12. 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").

13. Among other things, 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.

14. CYC is the main entity that conducts the online business in my enterprise.

15. All employees are hired by CYC, and employment agreements are established through CYC.

16. CYC outsources its employee payroll to USA Herbals.

17. In connection with their employment for CYC, I often direct my employees to create online marketing content for my other entities, including Ardis.

18. I solely manage all CYC's employees and oversee the development of the creative advertising and Plaintiffs' marketing strategies created with the assistance of my employees.

19. In 2008, Plaintiffs' primary business was located at 575 8th Avenue, New York, New York, until October 2010, when the primary business location was moved to 1001 6th Avenue, Suite 1103, New York, New York, where it is presently located.

20. Plaintiffs operate collaboratively under my direction and control.

21. In October 2008, I hired Defendant Ashleigh Nankivell ("Defendant") as a salaried employee.

22. At all times during her employment, Defendant was a regular W-2 salaried employee, hired by CYC and paid by CYC and USA Herbals. True and accurate copies of Defendant's W-2's are attached as Exhibit A.

23. My companies made appropriate tax withholdings for the Defendant, classifying her as a salaried employee. In connection with her employment, Defendant received paychecks on a regular basis.

24. In connection with her employment, Defendant executed an acknowledgement of CYC's employee handbook ("Handbook"). A true and accurate copy of CYC's Handbook is attached herewith as Exhibit B.

25. I also provided Defendant 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. The Handbook sets forth the benefits Defendant received.

26. During her employment, Defendant held the title of Video & Social Media

Producer.

27. Defendant had no role in hiring or paying assistants.

28. Defendant's duties and responsibilities as my 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 my other entities' websites, blogs, email and other venues on the Internet.

29. Defendant's duties and responsibilities also encompassed designing other Proprietary Content, including websites for my enterprises' products and services, and social media fan pages on Facebook, Twitter and elsewhere.

30. At all relevant times, I maintained the right to control the manner and means by which the Proprietary Content was accomplished, including all Proprietary Content created by Defendant.

31. Plaintiffs are the owners of all Proprietary Content, including all Proprietary Content created by Defendant.

32. 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. A true and accurate copy of the password, login and hosting information ("Access Information") that Defendant maintained for Plaintiffs is attached herewith as Exhibit C.

33. In order to perform the functions of her job, Plaintiffs purchased and provided Defendant with various computer and video equipment, including a Macintosh computer, digital camera, software and related equipment ("Equipment"). Throughout her employment, Defendant stored a significant amount of Plaintiffs' critical information and Proprietary Content on the Equipment. Attached herewith as Exhibit D is an invoice demonstrating that CYC

purchased the Macintosh computer, which was provided to Defendant.

34. In October 2008, Defendant executed a Non-Disclosure and Rights to Work Product Agreement in connection with her employment with Plaintiffs (“Work Product Agreement”). A true and accurate copy of the Work Product Agreement is attached herewith as Exhibit E.

35. Pursuant to the Work Product Agreement, Defendant expressly agreed 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 Exhibit E, ¶ 10.

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

37. Pursuant to the Work Product Agreement, 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. Pursuant to the Work Product Agreement, Plaintiffs’ Access Information is confidential information. See Exhibit E, ¶ 3.

38. I believe that the Defendant was aware at all times that the work she created in connection with her employment belonged to Plaintiffs.

39. In approximately June 2010, I began developing a concept for a service known as “Whatsinurs”.

40. The purpose of Whatsinurs was to provide content related to cosmetic and beauty products over the Internet and mobile to a social media community.

41. 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.

42. Plaintiffs, chiefly through me, began to develop the Whatsinurs concept and registered the domain Whatsinurs.com.

43. Plaintiffs developed the Whatsinurs.com website (“Whatsinurs Website”). A PDF version of the Whatsinurs Website is attached herewith as Exhibit F.

44. 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.

45. On February 27, 2011, the trademark, Whatsinurs, was first used in commerce (the “Whatsinurs Mark”), which is an integral part of the Whatsinurs Website.

46. On April 6, 2011, Plaintiffs sought registration of the Whatsinurs Mark with the United States Patent and Trademark Office (“USPTO”). Attached herewith as Exhibit G is a detail from the USPTO Trademark Electronic Search System demonstrating that the application is on file.

47. In connection with the application, and as set forth in the attached Office Action, the USPTO Examiner conducted a search and determined that there are no trademarks that conflict with the Whatsinurs Mark. See Exhibit H.

48. Registration of the Whatsinurs Mark, USPTO Serial No. 85287919, is pending.

49. Through Plaintiffs’ extensive and exclusive use of the Whatsinurs Mark and Whatsinurs Trade Dress, they have become distinctively connected with Plaintiffs.

50. In connection with her employment, I asked Defendant to assist me with the creative development of Whatsinurs in her capacity as Plaintiffs’ employee.

51. Under my 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.

52. Unfortunately, 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.

53. Unbeknownst to me 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.

54. 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.

55. I 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. A representative sample of the applications prepared by Defendant using Plaintiffs' equipment and facilities is attached herewith as Exhibit I.

56. On June 23, 2011, after Defendant failed to show up for work without excuse, I terminated Defendant's employment.

57. The Handbook made clear that Defendant was an employee at will, and, as such, could be discharged for any reason and without cause.

58. Defendant has subsequently filed for unemployment, thereby acknowledging that she was Plaintiffs' employee. A true and accurate copy of the Notice of Potential Charges from the New York Department of Labor, in connection with Defendant's unemployment claim is attached herewith as Exhibit J.

59. At the time of her termination, I requested that Defendant return all Equipment and information, including Proprietary Content in her possession, as well as the Access Information that belonged to Plaintiffs. Email correspondence I sent to Defendant in connection with this request is attached herewith as Exhibit K.

60. 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.

61. 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. While my investigation is ongoing, attached herewith as Exhibit L is a list of Access Information that I have been able to identify to date, which Defendant unilaterally changed without authorization and which Plaintiffs presently do not have access.

62. Because Defendant changed this 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.

63. As a result of Defendant's refusal to return this property, Plaintiffs' business is suffering in that it is unable to change or control its advertising websites and alter or modify their content, which is significantly harming its advertisement business.

64. For example, Plaintiffs are unable to access a number of Facebook pages, which were set up for the benefit of Plaintiffs' products. For example, others are now posting competing advertisements on Plaintiffs' Facebook pages in an effort to drive prospective customers away from Plaintiffs' sites. Attached herewith as Exhibit M are screenshots of some of marketing pages replete with competitor advertisements.

65. Because Defendant maintains exclusive access to these pages, Plaintiffs are unable to remove the offending posts, which are resulting in a loss of customers.

66. After her termination, on June 27, 2011, in a public post on Defendant's Facebook webpage, Defendant made false statements about Plaintiffs. Attached herewith as Exhibit N are screenshots of Defendant's Facebook page on June 27, 2011.

67. 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. Attached herewith as Exhibit O are screenshots of Anankivell.com, captured on July 27, 2011.

68. It is my understanding that Defendant uses Anankivell.com in a commercial capacity to promote herself and her work.

69. As set forth on Exhibit O, Defendant copied portions of the Whatsinurs Website on to Anankivell.com.

70. A Google search for the term “whatinurs” performed on July 27, 2011, reveals that Anankivell.com appears among the top results. See Exhibit P. Customers searching for Plaintiffs’ products would therefore confuse Defendant’s website as affiliated with or sponsored by Plaintiffs.

71. Plaintiffs did not authorize Defendant to display portions of the Whatsinurs Website on to Anankivell.com following her termination from employment.

72. In using the Whatsinurs Website content, Defendant provided no attribution to any of Plaintiffs.

73. In using the Whatsinurs Website content, Defendant has improperly appropriated Plaintiffs’ Proprietary Content for her own benefit.

74. 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.

75. 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.

76. On July 27, 2011, Plaintiffs received a copyright registration for the Whatsinurs Website. See Exhibit Q.

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

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of August, 2011 at New York, New York.



JORDAN FINGER