

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

NATIONAL JEWISH HEALTH, a Colorado non-profit corporation

Plaintiff,

v.

WEBMD HEALTH SERVICES GROUP, INC. and

WEBMD HEALTH CORP.,

Defendants.

ORIGINAL COMPLAINT AND JURY DEMAND

National Jewish Health, a Colorado non-profit corporation (“NJH”) files this, its Original Complaint, and would show the Court as follows:

I. NATURE OF ACTION

1. This is an action for copyright infringement, pursuant to 17 U.S.C. §101 *et seq.*, i.e. 17 U.S.C. §501 for copyright infringement and contributory copyright infringement; for misappropriation of trade secrets, tortious interference with prospective business relations, conversion, and unjust enrichment under the laws of the State of Colorado; and for breach of contract under the laws of the State of New York.

II. JURISDICTION AND VENUE

2. The action for copyright infringement arises under 17 U.S.C. §101 *et seq.*, specifically 17 U.S.C. §501, and this Court has subject matter jurisdiction over NJH’s copyright infringement claim under 28 U.S.C. §§ 1331, 1332, and 1338(a).

3. This Court has jurisdiction over NJH's state law claims under 28 U.S.C. §§ 1367 and 1332, in part because these claims are so related to NJH's Copyright Infringement claim as to be part of the same case or controversy under Article III of the United States Constitution.

4. Venue is proper in this District pursuant to 28 U.S.C. § 1391. On information and belief, Defendants have conducted acts of copyright infringement, breach of contract, misappropriation of trade secrets, and tortious interference with prospective business relations in this District. On information and belief, Defendants are subject to personal jurisdiction in this District and a substantial portion of the acts complained of herein took place within this District.

III. THE PARTIES

5. National Jewish Health ("NJH") is a non-profit corporation organized and existing under the laws of the State of Colorado. Its principal place of business is 1400 Jackson Street, Denver, CO 80206.

6. On information and belief, WebMD Health Services Group, Inc. is a Delaware corporation whose principal place of business is 2701 NW Vaughn St, Portland, OR 97210. Its registered agent for service is CT Corporation, Boston, MA 02110. Service of process is not requested at the current time.

7. On information and belief, WebMD Health Corp. is a Delaware corporation whose principal place of business is 111 Eighth Avenue 7th Floor New York, NY 10011. Its registered agent for service is CT Corporation, Boston, MA 02110. Service of process is not requested at the current time.

IV. FACTUAL BACKGROUND

8. Between 2002 and 2008, NJH created, and/or had created for it, a set of software-implemented wellness programs, including its FITLogix[®] and QuitLogix[®] programs.

9. NJH has been using and/or offering its QuitLogix[®] program for sale and/or use since around December 2002.

10. NJH has been using and/or offering its FITLogix[®] program for sale and/or use since around 2010.

11. The NJH QuitLogix[®] and FITLogix[®] programs are referred to herein singly or collectively as the NJH Works, as the context requires.

12. On information and belief, WebMD Health Services Group, Inc. (“WebMD HSG”) is a wholly owned subsidiary of WebMD Health Corp. (“WebMD”).

13. Beginning sometime in 2009, WebMD and NJH began discussions regarding a possible partnership involving one or more obesity and smoking cessations programs.

14. At that point in time, WebMD did not offer either stand-alone obesity or smoking cessation programs.

15. By late 2009, WebMD visited NJH with a goal of evaluating NJH’s Smoking Cessation and Weight Loss programs for potential acquisition by WebMD.

16. On or around February 4, 2010, a 2009 meeting having been postponed by WebMD, NJH entered into a non-disclosure agreement (“NDA”) with WebMD HSG related to “Tobacco Cessation and Weight Management programs.”

17. WebMD supplied the NDA, which is controlled by New York State law.

18. The NJH Works comprise “Tobacco Cessation and Weight Management programs” as anticipated by and defined within the NDA.

19. Within the NDA, “Confidential Information” is defined to specifically include information regarding business, operations, finances, plans, and trade secrets.

20. Pursuant to the NDA, NJH subsequently presented WebMD HSG with a presentation and materials that included NJH Confidential information, e.g. its business, operations, finances, plans, and trade secrets, related to the NJH Works.

21. This NJH Confidential Information was not and is not known to the public and was and is proprietary to NJH.

22. On or about May 2010, NJH presented a proposal to Lowes, Inc. (“Lowes”) whereby Lowes would implement one or both of the NJH Works.

23. NJH’s proposal to Lowes included a trial period during which NJH would install and Lowes would use and evaluate one or both of the NJH Works.

24. Lowes accepted the trial period offer, and final acceptance of the NJH programs was conditioned on NJH’s satisfaction of one or more Lowes’ approval criteria.

25. Although NJH implemented the NJH Works over a several month time frame and met or satisfied each of Lowes’ approval criteria milestones, Lowes opted not to implement the NJH programs.

26. On information and belief, since February 4, 2010 WebMD HSG and/or WebMD have used NJH’s Confidential Information for purposes outside of the purposes permitted by the NDA.

27. On information and belief, since February 4, 2010 Lowes implemented a WebMD HSG and/or WebMD “Tobacco Cessation and Weight Management” program, evidently titled “My LifeTrack.”

28. On information and belief, these WebMD HSG and/or WebMD programs highly resemble the NJH Works.

29. On information and belief, these WebMD HSG and/or WebMD programs use substantial portions of the NJH Works’ sequencing, screen displays, textual material, and other content.

30. On information and belief, since February 4, 2010 WebMD HSG and/or WebMD have profited from their improper use of NJH Confidential Information.

31. NJH has registered its copyrights in the NJH Works.

32. NJH owns and/or controls the copyrights to and in the NJH Works.

V. FIRST CLAIM FOR RELIEF: COPYRIGHT INFRINGEMENT

33. NJH incorporates by reference paragraphs 1-32.

34. Defendants had access to the NJH Works in which NJH owns the copyrights, and there are probative similarities between the NJH Works and the copied material.

35. On information and belief, without any authorization from NJH, or right under law, the WebMD HSG and/or WebMD programs use elements of the NJH Works that are protected by copyrights owned by NJH.

36. The foregoing acts of infringement by Defendants have been willful, intentional and purposeful, in disregard of, and indifferent to, NJH’s rights in the NJH Works.

37. As a direct and proximate result of Defendants' infringement of NJH's exclusive rights under 17 U.S.C. 101 *et seq.*, NJH is entitled to damages as well as Defendants' profits pursuant to 17 U.S.C. § 504(b).

38. Defendants' conduct is causing and, unless enjoined and restrained by this Court, will continue to cause NJH great and irreparable injury that cannot fully be compensated for or measured in money. NJH has no adequate remedy at law. Pursuant to 17 U.S.C. § 502, NJH is entitled to a preliminary and permanent injunction prohibiting further infringements of its copyrights and exclusive rights under copyright.

VI. SECOND CLAIM FOR RELIEF: CONTRIBUTORY COPYRIGHT INFRINGEMENT

39. NJH incorporates by reference paragraphs 1-32.

40. On information and belief, without any authorization from NJH, or right under law, the WebMD HSG and/or WebMD programs use elements of the NJH Works that are protected by copyrights owned by NJH.

41. On information and belief, without any authorization from NJH, or right under law, Defendants not only committed direct copyright infringement but Defendants further knew of their direct infringement and materially contributed to the infringement of the copyrights in the NJH Works by providing their WebMD HSG and/or WebMD programs to others without any authorization from NJH, or right under law, including but not limited to Lowes.

42. The foregoing acts of infringement by Defendants have been willful, intentional and purposeful, in disregard of, and indifferent, to NJH's rights.

43. As a direct and proximate result of Defendants' infringement of NJH's exclusive rights under 17 U.S.C. 101 *et seq.*, NJH is entitled to damages as well as Defendants' profits pursuant to 17 U.S.C. § 504(b).

44. Defendants' conduct is causing and, unless enjoined and restrained by this Court, will continue to cause NJH great and irreparable injury that cannot fully be compensated for or measured in money. NJH has no adequate remedy at law. Pursuant to 17 U.S.C. § 502, NJH is entitled to a preliminary and permanent injunction prohibiting further infringements of its copyrights and exclusive rights under copyright.

VII. THIRD CLAIM FOR RELIEF: BREACH OF CONTRACT

45. NJH incorporates by reference paragraphs 1-30.

46. The NDA formed a proper, valid contract between NJH and WebMD HSG.

47. Under the NDA, WebMD HSG was not to use NJH's Confidential Information for any purpose other than the Authorized Purpose.

48. On information and belief, without any authorization from NJH, or right under law, Defendants used NJH's Confidential Information to further Defendants' plans to enter into the market for "Tobacco Cessation and Weight Management programs" by using elements of the NJH Works that are protected by copyrights owned by NJH as well as by using NJH's confidential business, operations, finance, planning, and trade secret information related to The NJH Works.

49. By using NJH's Confidential Information for purposes other than the Authorized Purpose, WebMD HSG breached the NDA.

50. As a direct and proximate result of Defendants' breach of the NDA, NJH is entitled to damages.

VIII. FOURTH CLAIM FOR RELIEF: TORTIOUS INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS

51. NJH incorporates by reference paragraphs 1-30.

52. The NDA formed a proper contract between NJH and WebMD HSG.

53. The NDA's Authorized Purpose was a potential business relationship or transaction related to "Tobacco Cessation and Weight Management programs."

54. WebMD HSG was not to use NJH's Confidential Information for any purpose other than the Authorized Purpose.

55. On information and belief, without any authorization from NJH, or right under law, Defendants used NJH's Confidential Information to further Defendants' plans to enter into the market for "Tobacco Cessation and Weight Management programs" by using elements of the NJH Works that are protected by copyrights owned by NJH as well as by using NJH's confidential business, operations, finance, planning, and trade secret information related to the NJH Works.

56. Prior to Defendants' improper use of NJH's Confidential Information, NJH had a prospective business relationship with Lowes.

57. Defendants' actions induced or otherwise caused Lowes not to enter into or continue the prospective relation and/or prevented NJH from acquiring or continuing the prospective relation with Lowes.

58. The foregoing acts of infringement by Defendants have been willful, intentional and purposeful, in disregard of, and indifferent to, NJH's rights.

59. As a direct and proximate result of Defendants' tortious interference with NJH's prospective contractual relations with Lowes, NJH is entitled to damages, including punitive damages.

IX. FIFTH CLAIM FOR RELIEF: MISAPPROPRIATION OF TRADE SECRETS

60. NJH incorporates by reference paragraphs 1-30.

61. The NDA formed a proper contract between NJH and WebMD HSG.

62. The NDA's Authorized Purpose was a potential business relationship or transaction related to "Tobacco Cessation and Weight Management programs."

63. The NDA defined "Confidential Information" as, *inter alia*, all information about the disclosing party's business, operations, finances, properties, employees, relationships with third parties, plans, trade secrets, other intellectual property, and "know-how."

64. NJH's trade secrets include NJH's confidential business, operations, finance, planning, and know-how related to The NJH Works, per C.R.S. § 7-74-102(4).

65. WebMD HSG was not to use NJH's Confidential Information, including NJH's trade secrets, for any purpose other than the Authorized Purpose.

66. On information and belief, without any authorization from NJH, or right under law, Defendants used NJH's Confidential Information including NJH's trade secrets to further Defendants' plans to enter into the market for "Tobacco Cessation and Weight Management programs" by using elements of the NJH Works that are NJH's trade secrets.

67. By using NJH's trade secrets for purposes other than the Authorized Purpose, WebMD HSG breached the NDA and used improper means to knowingly appropriate NJH's trade secrets.

68. The foregoing acts of infringement by Defendants have been willful, intentional, and purposeful, in disregard, of and, indifferent to NJH's rights.

69. As a direct and proximate result of Defendants' misappropriation of NJH's trade secrets, NJH is entitled to damages under C.R.S. § 7-74-104, including punitive damages.

70. Defendants' conduct is causing and, unless enjoined and restrained by this Court, will continue to cause NJH great and irreparable injury that cannot fully be compensated for or measured in money. NJH has no adequate remedy at law. Pursuant to C.R.S. § 7-74-106, NJH is entitled to a preliminary and permanent injunction prohibiting further misappropriation of its trade secrets.

71. Pursuant to § 7-74-105, and in view of Defendants' willful and malicious misappropriation, NJH asks the Court to award NJH reasonable attorney fees.

X. SIXTH CLAIM FOR RELIEF: UNJUST ENRICHMENT

72. NJH incorporates by reference paragraphs 1-30.

73. On information and belief, without any authorization from NJH, or right under law, Defendants used NJH's Confidential Information to further Defendants' plans to enter into the market for "Tobacco Cessation and Weight Management programs" by using elements of the NJH Works that are protected by copyrights owned by NJH as well as by using NJH's confidential business, operations, finance, planning, and trade secret information related to the NJH Works.

74. By using NJH's Confidential Information for purposes other than the Authorized Purpose, WebMD HSG breached the NDA, used improper means to knowingly appropriate

NJH's trade secrets, and then used those trade secrets to obtain business for WebMD HSG's "My Life Track" programs.

75. At NJH's expense, Defendant received a benefit under circumstances that would make it unjust for the Defendant to retain the benefit.

76. Defendants should be made to disgorge the profits directly attributable to their misconduct.

77. In addition, as Defendant's conduct is attended by circumstances of fraud, malice or willful and wanton conduct, NJH is entitled to punitive damages.

XI. JURY DEMAND

78. Pursuant to its Seventh Amendment rights, NJH requests a trial by jury.

X. PRAAYER FOR RELIEF

WHEREFORE, premises considered, NJH requests that this Court enter judgment for NJH as follows:

- A. For a preliminary and permanent injunction enjoining Defendants and their respective officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with each or any of them, from directly committing, aiding, encouraging, enabling, inducing, causing, materially contributing to, or otherwise facilitating the unauthorized reproduction or distribution of copies of programs which include works or portions of works protected by NJH's copyrights;
- B. For a preliminary and permanent injunction enjoining Defendants and their respective officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with each or any of them, from directly committing, aiding, encouraging, enabling, inducing, causing, materially contributing to, or otherwise facilitating the unauthorized use of NJH's Confidential Information;
- C. For all damages to which NJH may be entitled, including Defendants' profits, in such amounts as may be found;

- D. For pre-judgment and post-judgment interest according to law; and
- E. For NJH's attorneys' fees, and full costs and disbursements in this action.

Dated: October 25, 2012

BERENBAUM WEINSHIENK PC

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