

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

DARIUS INTERNATIONAL, INC., : CIVIL ACTION
et al. :
 :
v. :
 :
ROBERT O. YOUNG, et al. : NO. 05-6184

MEMORANDUM AND ORDER

McLaughlin, J.

April 20, 2006

TABLE OF CONTENTS

	<u>PAGE</u>
I. Procedural History and Claims	5
II. Findings of Fact	8
A. Dr. Young's Background	8
B. The Youngs' Original Companies	8
C. Innerlight International, Inc.	9
(1) Size and People	9
(2) Products	9
(3) Marketing	10
(4) Problems	11
D. Initial Contact with Darius	12
E. Agreements	12
(1) Non-Competition Agreement ("NCA")	12
(2) Asset Purchase Agreement ("APA")	15
(3) Consulting Agreement ("CA")	19

(4)	Post-Closing Agreement ("PCA")	22
(5)	Oral Agreements	24
F.	Innerlight	25
(1)	Generally	25
(2)	The Youngs' Involvement and Influence	25
(3)	Distributors	27
a.	Generally	27
b.	Stephanie McAnly and Her Distributors	28
(4)	Marketing	29
(5)	Increased Sales	31
G.	The Youngs' Separate Activities	31
(1)	The Youngs' Website	31
(2)	Separate Businesses and Products	32
H.	Problems	33
(1)	Resale	33
(2)	Attempted Renegotiations in Pennsylvania	35
(3)	Microscopy	35
(4)	The pH Miracle Professional Line	36
a.	Generally	36
b.	Specific Product Comparisons	36
c.	Sale of pH Miracle Products and Use of Trademarks	42
(5)	Harm to Innerlight	47
III.	Jurisdiction and Venue	50

A.	Subject Matter Jurisdiction	50
B.	Personal Jurisdiction	50
(1)	General Jurisdiction	52
(2)	Specific Jurisdiction	52
C.	Venue	54
IV.	Analysis	54
A.	Reasonable Probability of Success on the Merits	55
(1)	Breach of Contract	56
a.	Breach of the CA and NCA	56
1.	Definition of "Business"	56
2.	Competition	58
4.	The Disputed Products	61
5.	Section 1.10 of the APA	62
b.	Breach of the APA and PCA - the "Alkalarian" and "Alkalize and Energize" Trademarks	63
(2)	Unfair Competition	65
(3)	Trademark Infringement	68
(4)	Other Claims	73
a.	Breach of Fiduciary Duty	73
b.	Tortious Interference with Contracts	73
c.	Appropriation of Trade Values	74
B.	Irreparable Harm and Balance of Hardships	74
C.	Public Interest	77
VII.	Conclusion	77

This case involves a dispute in the nutritional and dietary supplement industry. The plaintiffs are corporations, Darius International, Inc. ("Darius"), and Innerlight Inc. ("Innerlight").¹ The defendants are adult individuals, Dr. Robert O. Young and his wife, Shelley R. Young. In early 2001 and thereafter, the parties entered into various agreements, under which they formed a business relationship centering on the development, marketing, and selling of products related to the nutritional and dietary supplement industry.

The plaintiffs claim that the defendants have breached several of these agreements, breached their fiduciary duty, and engaged in trademark infringement, unfair competition, tortious interference, and appropriation of trade values. These claims are largely based upon the defendants' launch of their pH Miracle Professional line of nutritional and dietary supplement products, which the plaintiffs allege compete with Innerlight nutritional and dietary supplement products.

The Court held a hearing on the plaintiffs' motion for a preliminary injunction, the defendants' motion to dismiss, stay or transfer venue, and the defendants' motion in limine to permit the use of parol evidence on January 24 and 25, 2006. The Court held oral argument on these motions on February 17, 2006. The

¹ Darius is a wholly-owned subsidiary of The Quigley Corporation ("Quigley Corp."). Innerlight was formerly known as Darius Marketing, Inc. ("Darius Marketing"), and is a wholly-owned subsidiary of Darius.

Court will grant the motion for a preliminary injunction on the plaintiffs' claims of breach of contract and unfair competition. It will grant the motion in part and deny it in part on the plaintiffs' trademark infringement claim. It will deny the motion for a preliminary injunction on the claims of breach of fiduciary duty, tortious interference and appropriation of trade values. The Court will deny the motion to dismiss, stay, or transfer venue, and the motion in limine to permit the use of parol evidence.

I. Procedural History and Claims

The plaintiffs filed their original complaint on November 28, 2005. On December 8, 2005, they filed a motion for a temporary restraining order and preliminary injunction. They filed a supplemental memorandum of law in support of this motion and an amended complaint on December 13, 2005. On December 15, 2005, the Court met with the parties. The parties agreed to resolve an issue regarding the defendants' website among themselves. The Court denied the motion for a temporary restraining order on December 19, 2005.

On December 21, 2005, the parties had a telephone conference with the emergency judge because the plaintiffs were not satisfied with the way the defendants had changed the website after the previous meeting. Ultimately, nothing came of this

telephone conference. The defendants responded to the motion for a preliminary injunction on December 22, 2005.

On December 29, 2005, the defendants filed a motion to dismiss, stay or transfer venue. The plaintiffs responded to this motion on January 12, 2006.

The plaintiffs filed a motion to amend or correct their amended complaint on January 12, 2006. This motion was granted upon agreement of the defendants on January 20, 2006, and the now-operative second amended complaint ("Complaint") was filed on that date. The Complaint makes the following claims against the defendants: (1) breach of contract; (2) breach of fiduciary duty; (3) trademark infringement; (4) unfair competition; (5) tortious interference; and (6) appropriation of trade values.

Also on January 20, 2006, the parties agreed to a confidentiality order, and the defendants filed a motion in limine to permit the use of parol evidence. The plaintiffs responded to that motion on January 23, 2006.

A hearing on the pending motions was held on January 24 and 25, 2006.² On January 27, 2006, the Court ordered that the plaintiffs could submit an additional brief in support of their motion for a preliminary injunction, and set oral argument for February 17, 2006. The plaintiffs filed a supplemental brief on

² At the hearing, the defendants sought to introduce the depositions of Kathy Christiansen, Shelley Young, McKay Pearson, Ron Howell, and Robert Kaelin into evidence. The plaintiffs objected only to the admission of the Christiansen, Young, and Pearson depositions.

January 31, 2006. On February 1, 2006, the parties agreed that the defendants could have until February 9, 2006, to answer the Complaint, and the defendants filed their answer along with counterclaims on February 8, 2006. The defendants filed their opposition to the plaintiff's supplemental brief on February 10, 2006, and the plaintiffs filed a reply on February 16, 2006. The Court held oral argument on February 17, 2006. With the Court's permission, the defendants filed a sur-reply brief in opposition to the plaintiff's motion for a preliminary injunction on March 3, 2006.

On March 9, 2006, counsel for the plaintiffs sent a letter to the Court describing the website www.snyderhealth.com, which is operated by Dean and Laurette Snyder, former Innerlight distributors. The defendants sent a letter to the Court responding to this letter on March 14, 2006. On March 15, 2006, the plaintiffs and the defendants each sent another letter to the Court.

The Court received word of new factual developments in the case as it was about to issue this injunction, and spoke to the parties on the phone on April 7, 2006. As the new issues have not been fully briefed, the Court will not change its decision at this point. The Court will refer to the new issues only as is necessary.

II. Findings of Fact

A. Dr. Young's Background

1. Dr. Robert Young has various undergraduate, graduate, traditional and nontraditional degrees in science and nutrition, and has published several works in these areas. Dr. Young's philosophy centers on the idea that there is only one sickness and one disease, and that it is caused by the over-acidification of the blood due to lifestyle and dietary choices. He calls his approach the "alkalarian" lifestyle. (Prelim. Inj. Hrg. Tr. ("Tr.") at 213-16, 219-21).

B. The Youngs' Original Companies

2. Around 1987 or 1988, Dr. Young and his wife Shelley founded a company called Innerlight, Inc. in their home.³ The Youngs also formed Hikari Holdings, L.C. ("Hikari"), as a limited liability corporation that holds their intellectual property. (Tr. at 216, 220-21).

3. The Youngs developed and sold health-related products. They did some limited marketing of their products through fairs, trade shows, retreats, home and group meetings, and publications. (Tr. at 216-17, 220).

³ This company in its early form no longer exists, and is distinct from the "Innerlight, Inc." that is a plaintiff in this case. The original company's evolution into the current "Innerlight, Inc." is described below.

C. Innerlight International, Inc.

(1) Size and People

4. The original Innerlight, Inc. eventually became Innerlight International Inc. ("Innerlight International"). In 1999, Innerlight International had 20-25 employees. Between September of 1999 and December of 2000, the management team was let go and Robert Kaelin started as the new President. Kathy Christiansen was in Customer Service, and was then promoted to Operations and given more supervisory responsibilities over products and inventory. (Tr. at 17-19, 21-24).

(2) Products

5. Innerlight International sold various products related to nutrition. In 1999, the two lead products of Innerlight International were Supergreens and Prime pH, which are mixed together with water to form a drink. The purpose of these products is to increase the pH of one's water in order to alkalize the body and improve health. Prior to 2001, Innerlight International also sold one book that Dr. Young had written, and one that his wife had written. The Youngs held some seminars, and operated the Robert O. Young Research Center, also known as the Innerlight Biological Research Center, in Alpine, Utah. Dr.

Young held new biology microscopy⁴ courses. Shelley Young held a cooking class. (Tr. at 20-21, 29, 223-25, 230).

(3) Marketing

6. Innerlight International's products were sold through two different channels. First, they were sold through independent distributors under a multilevel marketing ("MLM") scheme. MLM, also known as network marketing, involves using independent distributors as salespeople for a product. One distributor sells to another, who sells to another down the line, and so on. When distributors sell products at retail cost, they earn the difference between that cost and wholesale cost. They also receive commissions on the sales of any products bought for personal use or resale by distributors under them. They can sell to anyone in the general public, including friends, relatives, co-workers, and people attracted through brochures and flyers. A buyer of the product can, but is not required to, become a distributor himself. (Tr. at 24, 83, 108-09, 221).

7. The second sales channel was Tony Robbins, a speaker who promoted Dr. Young and his products at his own events. Robbins would make large orders from Innerlight International, causing an influx in sales. (Tr. at 24, 26, 28).

⁴ Microscopy involves taking blood from people and examining live blood.

8. Innerlight International used various marketing tools. There was one tape that featured Tony Robbins and Dr. Young. There were no promotional book tours, DVDs, or CDs. There was one convention that was scheduled and then cancelled, and one that took place in Salt Lake City in 2000, that had approximately 25-30 distributors and 50 people total in attendance. There was a newsletter, and there were conference calls. In addition, individual distributors scheduled their own events. (Tr. at 29, 64-66, 177; Def. Prelim. Inj. Hrg. Ex. ("Def. Ex.") 38).

(4) Problems

9. At some point, Robbins developed his own line of products. In addition, he attempted to purchase Innerlight International, but the attempt failed. At that point, Robbins stopped purchasing Innerlight International's products. Although Innerlight International sales had peaked at \$300,000 per month, by late 2000, monthly sales had dropped to \$250,000, and were headed lower. The company was in financial trouble and anticipated being unable to meet its payroll and sales tax obligations. The number of distributors in the company's network had waned by January of 2001. At some point, the Youngs decided that they did not want to focus on the marketing aspect of the business, so they looked into selling the company. (Tr. at 21-28, 158, 221).

D. Initial Contact with Darius

10. Through Russ and Maryann Green, Innerlight International distributors, the Youngs met Ron Howell. Dr. Young eventually learned that Howell was the President of Darius Marketing,⁵ and that Darius was looking to purchase MLM companies. Negotiations commenced between the Youngs and Darius. (Tr. at 225-26).

11. Howell was given carte blanche on the Darius side of the negotiations, although he needed final approval from Quigley Corp.'s general counsel. (Tr. at 356-57; Howell Dep. at 22-23).

12. Innerlight International's President and CEO, Robert Kaelin, conducted some of the negotiations on behalf of the Youngs, because the Youngs were in Hawaii. Dr. Young had direct and indirect conversations with Howell, and the Youngs retained decision-making authority. (Tr. at 226; Kaelin Dep. at 22).

E. Agreements

(1) Non-Competition Agreement ("NCA")

13. On January 2, 2001, Darius Marketing and the Youngs entered into a Non-Competition Agreement ("NCA"). The NCA

⁵ Howell was fired in January of 2002, and was involved in litigation with Darius.

contains a paragraph introducing the parties, an Explanatory Statement, and ten main headings labeled as follows: (1) Non-Competition and Confidentiality Covenants; (2) Compensation; (3) Representations and Warranties Respecting Quigley Stock; (4) Prior Restriction; (5) Assignment; (6) Default; (7) Severability and Reformation; (8) Notices; (9) Waiver of Jury Trial; and (10) Miscellaneous. (Pl. Prelim. Inj. Hrg. Ex. ("Pl. Ex.") 6).

14. The "Explanatory Statement" at the beginning of the NCA states that Darius Marketing purchased the business and certain assets of Hikari and Innerlight International. It contains the following language:

For many years, the [Youngs] have been key employees and principal owners of [Hikari and Innerlight International], and possess valuable knowledge, expertise and experience in the business of developing, marketing and selling nutritional supplements and related products (the "Products" which were purchased by [Darius Marketing], are set forth on Exhibit A to the Acquisition Agreement, and are distributed for sale through independent representatives nationally and internationally (collectively, the "Business").⁶ The Company desires to insure [sic] that the [Youngs] do not compete with the Company, and its affiliates, except as expressly permitted hereby.

(Pl. Ex. 6).

15. Section (1) of the NCA mandates, among other things, that as long as Darius Marketing pays the Youngs a monthly payment pursuant to the terms of a separate agreement, the Youngs cannot without express written consent:

⁶ The Court notes that this sentence is missing a parentheses closure.

1.1.1 Directly or indirectly, anywhere in the world, as a principal, partner, shareholder, agent, director, employee, consultant, or in any other capacity whatsoever engage, participate, invest of [sic] become interested in, affiliated or connected with, render services to, or, in exchange for any compensation or remuneration, direct or indirect, furnish any aid, assistance or advice to any person, corporation, firm or other organization engaged in, a business that is competitive with the Business that is conducted by the Company, or by any Affiliate, as defined in Section 1.4, as of the date hereof or to be conducted by the Company, or by any Affiliate, immediately after the date hereof with the assets acquired pursuant to the Acquisition Agreement.

(Pl. Ex. 6).

16. Section (1) also prohibits the Youngs from disseminating Darius Marketing's confidential information. It requires the Youngs to return materials relating to Darius Marketing's business at the end of the agreement. It states that the parties agree that the NCA is reasonable. (Pl. Ex. 6).

17. Section (2) of the NCA describes the consideration that the Youngs received in exchange for their covenant not to compete. The Youngs received 50,000 shares of Common Stock in Quigley Corp. There are limits on the transferability of this stock. Section (3) sets forth representations and warranties related to the stock, which focus on the fact that the stock was not registered under the Securities Act of 1933, as amended.

(Pl. Ex. 6).

18. In section (4), the Youngs represented that they were not breaching any other agreement by signing the NCA. (Pl. Ex. 6).

19. Section (5) prohibits the Youngs and Darius Marketing from assigning their rights to others. (Pl. Ex. 6).

20. Section (6) states that if one of the Youngs materially violates the NCA, Darius Marketing has the right to set off damages against Quigley Stock in Darius Marketing's possession. It allows Darius Marketing to seek injunctive relief in the event of a material violation by the Youngs. It describes the permissible methods satisfaction of indemnity obligations. (Pl. Ex. 6).

21. Section (7) contains a severability clause. Section (8) sets forth the notice requirements under the NCA. Section (9) contains a waiver of jury trial by the parties. Section (10) requires written amendment, contains an integration clause, notes that the NCA shall be governed by Pennsylvania law, and gives Darius Marketing's affiliates the independent right to enforce the agreement against the Youngs. (Pl. Ex. 6).

(2) Asset Purchase Agreement ("APA")

22. On January 15, 2001, Innerlight International, Hikari, the Youngs, Darius Marketing and Darius entered into an Asset Purchase Agreement ("APA"). The APA contains a paragraph introducing the parties, four "whereas" clauses, and six⁷ Articles, with the following headings: (1) Purchase of Assets;

⁷ Article 5 was "intentionally omitted" by the parties.

(2) Representations and Warranties of [Hikari and Innerlight International] and the Youngs; (3) Representations and Warranties of [Darius Marketing] and Darius; (4) Closing Conditions; (6) Post-Closing Agreements; and (7) Miscellaneous. (Pl. Ex. 4).

23. Article (1) sets out the closing date of January 15, 2001, the assets purchased and sold, excluded assets, the purchase price, including adjustment to it and allocation of it, and the closing documents. Darius Marketing purchased the trademarks, copyrights, formulations, and other proprietary information related to Innerlight International's nutritional and dietary supplements and related products, together with any current or future modifications to the products. Darius Marketing purchased Innerlight International, including its corporate name, inventory, customer lists, rights to modifications of products, equipment, cash, and records. (Pl. Ex. 4).

24. Section 1.08 grants Darius Marketing the right to use the name "Innerlight International, Inc.," and prohibits the Youngs from making further use of that name or a derivative or combination of it. (Pl. Ex. 4).

25. Section 1.09 allows the Youngs, at their sole option, to grant to Darius Marketing the right to obtain some or all of the Youngs' right, title, or interest in any new products

developed by the Youngs at a mutually agreed-upon price. (Pl. Ex. 4).

26. Under § 1.10, the Youngs (and various people and companies associated with them) were permitted to purchase "any and all Products" from Darius Marketing at the Darius Marketing employee discount rate, which was subject to change, but which was approximately 7.5 times smaller than the wholesale rate, and 10 times smaller than the retail rate, for the products. Section 1.10 states that "[a]ny and all purchases made pursuant to this Section 1.10 shall not be resold to [Darius Marketing's] distributors and customers, or used to compete with [Darius Marketing]." (Pl. Ex. 4; Tr. at 17, 396).

27. Section 1.11 grants Darius Marketing and Darius a license to the product formulations of the products that they purchased. Upon full payment of amounts due under the APA, the license would convert to irrevocable title. The plaintiffs were required to keep the formulations confidential. This section contains a sentence indicating that even if the plaintiffs lost the license under it, they would still be allowed to continue "engaging in the Business, including a non-exclusive right to market, distribute and sell the Products." (Pl. Ex. 4).

28. Article (2) contains representations of the Youngs dealing with the organization and status of Innerlight International and Hikari, the authority of the parties relative

to the agreement, a statement that the contract does not violate any prior agreements, financial statements, accounts receivable, the absence of undisclosed liabilities, the absence of material adverse change since the Balance Sheet Date, inventories, the absence of various developments, good title to purchased assets, tax matters, contracts and commitments, pending litigation, brokerage, compliance with laws, employees, regulatory and licensure matters, business records, transactions with certain persons, the absence of certain business practices, intellectual property, material misstatements or omissions, and the effective date of warranties, representations and covenants. In § 2.23, the Youngs warranted that all of the trademarks that they owned were valid, registered, and in full force, and that all proper filings had been made and fees had been paid. (Pl. Ex. 4).

29. Article (3) contains representations of Darius and Darius Marketing dealing with organization, authority relative to agreement, a statement that the contract does not violate any prior agreements, litigation, and brokerage. (Pl. Ex. 4).

30. Article (4) deals with closing conditions including deliveries, due diligence results, the absence of any injunction against the consummation of the transaction, the opportunity of the employees of the sellers to be employed by the purchaser, the suppliers of the sellers, and the maintenance of

relationships with suppliers, customers, independent representatives, and key employees. (Pl. Ex. 4).

31. Article (6) deals with post-closing agreements regarding indemnification by the Youngs, further assurances, non-competition within two years of the agreement, management information and accounting systems, and the preparation and filing of tax returns. (Pl. Ex. 4).

32. Article (7) deals with survival, termination, expenses, amendments and waivers, notices, assignment, severability, integration, third-party beneficiaries, the use of gender and the singular and plural in the agreement, governing law, the meaning of "knowledge" in the agreement, counterparts, waiver of jury trial, and sales taxes. (Pl. Ex. 4).

(3) Consulting Agreement ("CA")

33. Also on January 15, 2001, Darius Marketing and the Youngs entered into a Consulting Agreement ("CA"). The CA contains a paragraph introducing the parties, an Explanatory Statement, and ten main sections labeled (1) Consulting Services; (2) Non-Competition and Confidentiality Covenants; (3) Compensation; (4) Prior Restriction; (5) Assignment; (6) Default; (7) Severability and Reformation; (8) Notices; (9) Waiver of Jury Trial; and (10) Miscellaneous. (Pl. Ex. 5).

34. The Explanatory Statement contains a slightly different definition of the "Business" from the NCA:

For many years, the [Youngs] have been key employees and principal owners of [Hikari and Innerlight International], and possess valuable knowledge, expertise and experience in the business of developing, marketing and selling nutritional supplements, dietary supplements and related products (the "Products" as defined below in Section 3.3); such Products are distributed for sale through independent representatives nationally and internationally (collectively, the "Business"). . . . The Company further desires to insure [sic] that the [Youngs] do not compete with the Company, and its affiliates, except as expressly permitted hereby.

(Pl. Ex. 5).

35. Section (1) of the CA describes the consulting services that the Youngs agreed to perform for Darius Marketing. It requires them to be available for ten hours per month, and at ten events per year, to advise, counsel and inform Darius Marketing employees about the business. It states that the Youngs will be independent representatives of Darius Marketing and will assist and advise Darius Marketing in developing new representatives, products and services implementing Darius Marketing programs. It explains how the Youngs could be terminated by Darius Marketing. (Pl. Ex. 5).

36. Section (2) describes the non-competition and confidentiality covenants made by the Youngs. The covenants are similar to those in the NCA, although the non-competition provision in § 2.1 specifically notes that the monthly payment

that it is subject to can be reduced under a set-off provision.
(Pl. Ex. 5).

37. Section (3) describes the compensation that the Youngs were paid under the CA. Fifty percent of the compensation was for consulting services, and 50% was in consideration of the restrictive covenants. The Youngs were paid as follows: (1) they received 12% of Adjusted Gross Revenues if Adjusted Gross Revenues for the month preceding the payment date were equal to or greater than \$250,000; (2) they received 10% of Adjusted Gross Revenues if Adjusted Gross Revenues for the month preceding the payment date were less than \$250,000; and (3) they received 5% of Adjusted Gross Revenues after payments to them aggregated to the "Minimum Payment" of \$540,000. Adjusted Gross Revenues are revenues attributable to sales of the products purchased by Darius Marketing from the Youngs, adjusted for returns, allowances and discounts. There were separate compensation provisions made in case revenues fell below a certain amount after January 1, 2003, and Darius Marketing agreed to let the Youngs market the products under a private label if Darius Marketing terminated the CA. The payments were subject to reduction, and Darius guaranteed the payments under the CA. Darius Marketing would reimburse the Youngs for expenses incurred in connection with their duties on behalf of Darius Marketing and pre-approved by Darius Marketing. (Pl. Ex. 5).

38. In section (4) of the CA, the Youngs represented that they were able to perform the CA without breaching other agreements. Section (5) states that the rights under the CA are non-assignable by the Youngs. (Pl. Ex. 5).

39. Section (6) governs the situation in which either of the Youngs commits a material violation of the agreement. It states that in the event of such default, Darius Marketing may set off actual and reasonable damages incurred by it against payments otherwise due to the Youngs under the agreement. It expressly allows Darius Marketing to seek injunctive relief if it determines in good faith that the Youngs have breached their non-compete. (Pl. Ex. 5).

40. Section (7) deals with severability and reformation. Section (8) sets out notice requirements. Section (9) contains a jury trial waiver. Section (10) deals with amendment, integration, the governing law of Pennsylvania, and third-party beneficiaries. (Pl. Ex. 5).

(4) Post-Closing Agreement ("PCA")

41. On January 16, 2001, Innerlight International, Hikari, the Youngs, Darius Marketing, and Darius entered into a Post-Closing Agreement ("PCA"). The PCA contains a paragraph introducing the parties, two "whereas" clauses, and 2 main sections labeled (1) Amendments and Waivers and (2) Amendment.

The "whereas" clauses note that the parties made the APA and wish to amend it and certain other documents. (Pl. Ex. 8).

42. Section 1.1 of the PCA amends the APA by deleting Section 1.11 and replacing it with a new Section 1.11. The new section changes some of the terms of the agreement regarding the license for formulas, and divides the section into two parts. (Pl. Ex. 8).

43. Section 1.2 of the PCA adds "Alkalarian" to the list of trademarks purchased by Darius Marketing in the APA. It states that Darius Marketing grants to the Youngs the non-exclusive right to use the marks "Alkalarian" and "Alkalize & Energize" for "purposes of books, publications, and video and audio tapes, provided that use of the Marks shall, in all cases, be subject to the terms of any restrictive covenants now or hereafter in effect between [Darius Marketing] and [Innerlight International] and the Youngs." (Pl. Ex. 8).

44. Section 1.3 states that the purchase price adjustment in the APA shall not include increases attributable to a website or certain pictures or office supplies. (Pl. Ex. 8).

45. Section 1.4 states that the parties agree to waive the condition that the Youngs obtain the consents to assignment of lease from various Innerlight International landlords prior to closing, as long as they do so as soon as possible. (Pl. Ex. 8).

46. Section 1.5 limits the tax liabilities assumed by the Youngs. (Pl. Ex. 8).

47. Section 1.6 replaces Schedule 2.23 of the APA with a new Schedule 2.23. This section contains a redefinition of the term "intellectual property" in the APA to reflect the new terms of the PCA. (Pl. Ex. 8).

48. Section 1.7 deletes § 3.1 of the CA and replaces it with a new § 3.1. The new § 3.1 states that all payments to the Youngs are for consulting services, as opposed to being 50% for consulting services and 50% for the non-compete. (Pl. Ex. 8).

49. Section 2 states that the PCA is intended to modify the APA and related documents, and that it controls in the case of a conflict between the other agreements, but they otherwise remain in effect. (Pl. Ex. 8).

(5) Oral Agreements

50. After these agreements, various other oral agreements were made between the Youngs and Darius Marketing, Darius, and/or Quigley Corp. For example, after Dr. Young developed a chewable vitamin product called "Doc Broc," he made an oral agreement with one or both of the plaintiffs by which he sold the product to the plaintiffs and collected royalties on the

plaintiffs' sale of it and related sales aids. (Def. Ex. 33; Tr. at 364).

F. Innerlight

(1) Generally

51. As per the agreements, Darius Marketing became Innerlight. Innerlight remained similar to Innerlight International in many ways. Although Robert Kaelin left the company on the day the APA was signed, Kathy Christiansen and other employees from Innerlight International stayed on through the acquisition. Kevin Brogan was a distributor before the acquisition and became the head distributor after the acquisition. Before and after the acquisition, the company operated out of Utah, and through MLM. (Tr. at 59, 61, 157, 159; Kaelin Dep. at 30).

(2) The Youngs' Involvement and Influence

52. Although Innerlight was now owned by Darius, Dr. Young remained heavily involved with the company. Innerlight sold products created by him, and associated his science and philosophy with those products through sales aids, conventions, and other means of marketing. Dr. Young was one of the "key" people in selling Innerlight products, in part because he was the person who could explain the technical and scientific basis for

the effectiveness of Innerlight products. Innerlight products were marketed as Dr. Young's products. He would examine them to ensure that their taste and look were satisfactory. (Pl. Ex. 5; Tr. at 30-31, 33-34, 41, 43-44, 49, 96, 101-02, 105, 316).

53. Dr. Young could influence Innerlight sales. At some point, Dr. Young told people that it would be harmful to use Innerlight's Sassoon line of products. As a result, Innerlight lost virtually all sales in that line, and essentially stopped marketing it. The same thing occurred with the Startan line of products. (179, 190-91, 423, 426).

54. Shelley Young focused more on the lifestyle associated with the Innerlight products than the science. She focused on designing meals and foods to integrate the products into people's diets. (Tr. at 163).

55. Under section (3) of the CA, the Youngs (or their company, Hikari) received monthly payments from Innerlight totaling \$3,565,512 between March of 2001 and December of 2005. They were paid \$65,288.98 for January of 2006 and were paid again in February. (Pl Exs. 3, 5; Tr. at 47, 55-56; Def. Sur-Repl. Br. Ex. G).

(3) Distributors

a. Generally

56. Innerlight markets its products through MLM, and consequently, through its independent distributors. Becoming an Innerlight distributor involves filling out an application, paying a \$15 business-building kit fee, and receiving various supplies and information as required by law. (Tr. at 108-112).

57. Often, the distributors are not professional salespeople, but are people looking for supplemental income. They need a duplicable and unique product that sells itself, and that is not available elsewhere. (Tr. at 89-90).

58. At present, there are approximately 170,000 Innerlight distributors, although only approximately 1,000-1,200 actually receive weekly income from Innerlight. Most of those who receive weekly income depend upon that income for their livelihood. (Tr. at 100, 174).

59. If distributors decide to stop doing business, they generally do not contact the company; rather, they simply stop buying and selling products. (Tr. at 117).

60. Innerlight distributors are informed that they do not need to be experts on the science of Innerlight products because they can simply give their customers CDs on which Dr. Young explains his products. They can also participate in weekly

conference calls on which they can learn about the products and other aspects of the business. (Tr. at 45).

61. Many distributors believe that Dr. Young runs Innerlight. (Tr. at 170).

b. Stephanie McAnly and Her Distributors

62. Stephanie McAnly played a crucial role in marketing and selling Innerlight products. (Tr. at 94-102).

63. She began working in MLM in 1995, and studied it in detail thereafter. She worked with several different MLM companies before coming to Innerlight. She would take distributors with her from one company to another. At one point, McAnly helped set up the Sassoon Company, and was its President. (Tr. at 82-85).

64. In late 2000, the Sassoon Company was looking to leave the MLM arena, and McAnly and her distributor network needed a new company. Through contacts in the industry, McAnly learned of Darius and Innerlight. McAnly was impressed with Dr. Young and his products, and saw that he needed better marketing methods. In March of 2001, McAnly joined Innerlight as Executive Director and second in command and Innerlight acquired McAnly's distributor network.⁸ (Tr. at 85-88).

⁸ After McAnly joined Innerlight, Dr. Young met with her twice in Philadelphia, once for a training event and once for a presentation.

(4) Marketing

65. Marketing efforts increased after the acquisition. McAnly's distributors signed up for automatic product shipments ("autoships") and began marketing the Innerlight products and sales plan. McAnly changed the marketing strategy so that initially, distributors would only market the Innerlight products. They would introduce the lifestyle, which is more difficult to follow, later on. McAnly installed a voice-activated phone system and a fax on demand system that gave callers an overview of Dr. Young's philosophy. She took Dr. Young's "bible," a thick booklet explaining his theories, and condensed it into a seven or eight-page brochure. She also did an interview with Dr. Young and Innerlight's top distributor, Kevin Brogan, and put it on a CD. The CD's function was to put a spin on Dr. Young's products to set them apart from other greens products in the market. She put these materials, together with Dr. Young's first book, in a business kit that was given to all distributors. (Tr. at 35, 91-95, 97-99, 165-67).

66. After the acquisition, there were several conventions to promote Innerlight products. Each year, there was one international convention, one national convention, and two to six regional conventions. Attendance at these conventions reached approximately 700 people. At these events, Dr. Young would speak about the benefits of his products and the lifestyle

he promoted. Chad Czerneski, a full-time Innerlight distributor, National Director, and Advisory Board member, would give testimony while Dr. Young was onstage about how SuperGreens and Prime pH had cured his cancer and sterility, which he still sincerely believes. Shelley Young would also often speak. New products, lead sellers, and sales aids, such as CDs and brochures promoting Innerlight's philosophies, would be sold after Dr. Young spoke. At the conventions, the Youngs were permitted to sell some of their own products, such as an exercise trampoline, tapes, CDs, and a medallion. The events were not held unless Dr. Young was present, and he was a big draw to them. Innerlight employees such as Kathy Christiansen eventually had to escort Dr. Young into the conventions, lest he get stuck in crowds of people interested in talking to him. (Tr. at 30-31, 33-34, 96, 101-02, 407-08, 414).

67. Innerlight sponsored a 22-city book tour promoting Dr. Young's pH Miracle book. One of the cities was Philadelphia. Innerlight had no rights in Dr. Young's book, but did the book tour to attract people interested in Dr. Young's book who might also be interested in his nutritional products. (Tr. at 102-05).

68. McAnly and Shelley Young did a tour in 12 or 15 cities in which they promoted the benefits of Innerlight products for women and children. (Tr. at 101).

69. Innerlight covered all of the Youngs' expenses at conventions and the tours, including air and ground transportation, meals, and hotel rooms. (Tr. at 47).

(5) Increased Sales

70. After the acquisition, sales increased steadily. Customers signed up to receive autoships each month, and the Shipping Department went from sending 60-70 packages per day to sending hundreds of packages per day. At their peak, monthly sales exceeded \$2,000,000. (Tr. at 35; Def. Sur-Repl. Br. Ex. F).

G. The Youngs' Separate Activities

(1) The Youngs' Website

71. The Youngs maintained a website, and Innerlight's website originally linked to it. Eventually, however, Quigley Corp. and/or its attorneys discovered that the Youngs' website contained things that they perceived as non-compliant with FDA regulations. Believing that the FDA scrutinizes a company such as Innerlight more heavily than individuals such as the Youngs, Innerlight removed the link to the Youngs' website from its website. Distributors, however, continued to promote the Youngs' website vigorously. (Tr. at 99-100, 133).

72. On their website, the Youngs sell several different products, including a trampoline, a water machine, tapes, books, and educational materials. Distributors and others can opt to receive regular information from the Youngs on the website. (Tr. at 168-69).

73. Prior to November of 2005, no nutritional products were sold on the Youngs' website. There were brief descriptions of Innerlight products and links to main Innerlight websites, where those products could be purchased. There was no mention of nutritional products of other companies on the Youngs' website. (Tr. at 169).

(2) Separate Businesses and Products

74. After the acquisition, the Youngs operated the company Young Naturals. Because the Youngs could not obtain the "youngnaturals.com" web address, as it was associated with a pornography site, the name "Young Naturals" was eventually changed to "pH Miracle."

75. Dr. Young continued to develop products after the acquisition. Examples of Young Naturals products were a hair tonic, a shampoo, and a conditioner. Eventually, these and nine other Young Naturals products, including a clay product, Doc Broc Vitamin, and Doc Broc Chewable Greens, were sold through

Innerlight. The Youngs received royalties on the sales of these products. (Tr. at 127-29, 132, 134, 230-35, 240, 324-25).

76. There were also other products that the Youngs sold themselves after the acquisition, that were not sold to Innerlight. These included books and tapes. The Youngs sold these products under various business names, such as the Young Research Center and the Innerlight Biological Research Center ("the Center"), but these entities were one and the same. (Tr. at 133-34, 230-31).

77. At the Center, Dr. Young saw clients for whom he did dietary and supplementation consultations. The Center was also involved in retreats and microscopy classes. (Tr. at 230).

H. Problems

78. Over time, problems arose in the business relationship between the plaintiffs and the defendants. The parties were able to resolve some of these problems, but others persisted and led to the instant action.

(1) Resale

79. First, there was the issue of resale. The Youngs resold "a lot" of the product that they purchased from Innerlight under § 1.10 of the APA. For example, the Youngs sold Innerlight products to professionals and retail customers through the

Center. They may have sold to "more than a thousand" customers. (Tr. at 241, 324-25, 412).

80. Some of the people who attended the Youngs' retreats, where the Youngs resold Innerlight products, were Innerlight distributors. Dr. Young would solicit distributors to attend his retreats at conventions. For example, Chad Czerneski was solicited by Dr. Young to attend retreats. (Tr. at 241, 324-25, 412).

81. Early in her tenure with Innerlight, McAnly got complaints from distributors who indicated that their customers and distributors under them were buying Innerlight products directly from Dr. Young's office. This was a problem because the distributors would not get commissions on these sales. For example, Dr. Young would provide Innerlight products to patients in his studies, but distributors complained that the participants in these studies were often also distributors, and so distribution of the products to them by Dr. Young deprived the distributors above them of their commissions. (Tr. at 106-07).

82. McAnly became concerned that Dr. Young was purchasing too much product. In total, he purchased \$136,293 of product at the employee discount rate from Innerlight. If he resold the product at retail cost, this would result in approximately \$855,000 of profit for him. (Tr. at 106-07, 135, 429; Pl. Ex. 4).

83. On June 6, 2005, Wes Tate, EVP & COO of Innerlight, sent an e-mail to the Youngs informing them that their monthly personal purchases would be limited to \$100 at their current reduced pricing rate. (Def. Ex. 35).

(2) Attempted Renegotiations in Pennsylvania

84. Dr. Young attempted to renegotiate his contracts with the plaintiffs. He met with Guy Quigley,⁹ founder, Chairman, President, and CEO of Quigley Corp., and a director of Innerlight and Darius, approximately three or four times in Pennsylvania to discuss business related to Innerlight. In August of 2004, at one of these meetings in Doylestown, Pennsylvania, Dr. Young suggested renegotiating the terms of the agreements between the defendants and the plaintiffs. Although they discussed potential changes to the agreements, including increased effort by Dr. Young in return for increased commissions, none ever came to fruition. (Tr. at 391-92, 420).

(3) Microscopy

85. Another problem related to the practice of microscopy by Innerlight distributors. In the fall of 2005, Innerlight policies were amended to require all distributors who were doing microscopy business to conform with their local and

⁹ Guy Quigley was sometimes referred to as Gary Quigley in the testimony.

state government regulations. Dr. Young trained microscopists, and microscopy is part of his philosophy and science. Some distributors were unable or unwilling to comply with the policy amendment. (Tr. at 177-78).

(4) The pH Miracle Professional Line

a. Generally

86. At some point, Dr. Young began selling a line of nutritional supplement products that were not Innerlight products. His product line is called the "pH Miracle Professional Line." The pH Miracle products, like many of the Innerlight products, are dietary or nutritional supplements. The foundational tenet for both product lines is that ingesting the products helps to alkalize and energize the body by achieving pH balance. (Tr. at 287-88).

b. Specific Product Comparisons

87. There are similarities between certain Innerlight and pH Miracle nutritional supplement products, though Dr. Young testified that many of these similarities are coincidental. In the Complaint, the plaintiffs stated that "Defendants' pH Miracle product line is directly in competition with the business of Plaintiffs." In their answer to an interrogatory, the plaintiffs

listed the following products that they were "aware of" as competitive:

pH Miracle Product	Innerlight Product
Greens	SuperGreens
Biolive Sprouts	SuperSoy Sprouts
Terra Cleanse	Earth Essence Clay
Miracle Activator	Prime pH
Miracle Cell Power	BioLight
Silver Defense	Silver Plus
Opti Oils	Marine Lipids/Borage Oil
Osteoplex I	Orthoplex I
Osteoplex II	Orthoplex II
Nutrient Bridge	Z-Link
Minerals	Mega-Vita-Min

They also stated, in response to a question about what products they did not alleged to be competitive, "None. Defendants are barred from selling any nutritional supplements, dietary supplements and related products." In their proposed order, the plaintiffs identify the additional pH Miracle products Core Cleanse, CLA Boost, HCA Plus, and L-Carnitine as competitive.¹⁰

¹⁰ In determining the product ingredients, the Court employed the following methodology. First, when available, the Court gleaned the product ingredients from the product labels. From the point of view of consumers, these ingredient lists would be authoritative. The plaintiffs did not, however, provide the Court with samples of all of the Innerlight products with which they allege the pH Miracle products compete. When the Court did not have a product sample, it relied upon a product comparison sheet developed by Dr. Young. When the Court did not have a sample and the product was not listed on Dr. Young's product

(Compl. ¶ 43; Def. Ex. 20; Tr. at 312, 359; Pl. Proposed Ord.; Def. Sur-Repl. at 1).

88. According to their labels, the common ingredients in pH Miracle Greens and SuperGreens are kamut grass*¹¹, barley grass*, lemon grass, shave grass, wheat grass*, bilberry leaf, alfalfa leaf, dandelion leaf, black walnut leaf, blackberry leaf, plantain leaf, red raspberry leaf, bolodo leaf, papaya leaf, strawberry leaf, rosemary leaf, white willow bark, blueberry leaf, slippery elm bark, marshmallow root, pau d'arco bark, beta carotene, rose hips fruit, couch grass, meadowsweet herb, oat grass, soy sprouts, kale leaf, spinach*, okra fruit, cabbage herb*, celery seed, parsley leaf, broccoli floret*, tomato fruit*, watercress herb, alfalfa leaf juice, peppermint leaf, spearmint leaf, wintergreen leaf, sage leaf, and thyme leaf. SuperGreens alone contains goldenseal leaf, soy lecithin, cornsilk, echinacea tops, turmeric rhizome, mineral mix, and aloe. PH Miracle Greens alone contains avocado. Both products contain 8 calories, 645 IU of Vitamin A, and 3 grams of proprietary blend. The bottles are white, cylindrical, and approximately the same size. The pH Miracle product has a

comparison sheet, the Court relied upon testimony from the hearing or the plaintiff's answers to interrogatories.

¹¹ Where indicated with an asterisk, the pH Miracle ingredient is labeled "organic," but the Innerlight ingredient is not.

picture of the defendants on the label. Both labels prominently feature the color green. (Pl. Exs. 1, 13).

89. According to their labels, pH Miracle Activator and Innerlight Prime pH both contain sodium chlorite. The pH Miracle product alone contains potassium carbonate and potassium hydroxide. Both products are sold in virtually identical blue glass bottles with black droppers. Both labels feature the color red. The pH Miracle product label contains a photograph of the Youngs. Both products are mixed with their respective companies' greens product in water, with the purpose of raising the pH of the water. (Pl. Exs. 2, 17; Tr. at 306).

90. According to their labels, pH Miracle Biolive Sprouts and Innerlight SuperSoy Sprouts both contain certified organic soy sprouts. The Innerlight product also contains lecithin, but the pH Miracle product does not. Both contain 13.95 calories, 5.5 calories from fat, 0.61 grams of total fat, 0.1 grams of saturated fat, no cholesterol, 3.9 mg of sodium, 0.9 grams of total carbohydrate, 0.6 grams of dietary fiber, 0.2 grams of sugars, 1.25 grams of protein, 1.5 iu of Vitamin A, 11.1 mg of calcium, and 200 mcg of iron. Both are sold in cylindrical white containers. The pH Miracle product label contains a photograph of the Youngs. (Pl. Ex. 26; Def. Ex. 2).

91. A container of pH Miracle Terra Cleanse is in evidence, but there is no sample of Innerlight's Earth Essence

clay in evidence. Both of these products contain montmorillonite clay as their key ingredient. The Innerlight clay, in contrast to the pH Miracle clay, is premixed and contains aloe vera and demineralized water. The Innerlight clay was sold before the pH Miracle clay. (Tr. at 327, 398).

92. A bottle of pH Miracle Cell Power is in evidence, but there is no sample of Innerlight's Biolight in evidence. According to Dr. Young's product comparison sheet, both products contain colloidal NADP, silica (in two different forms), and demineralized water (though the water in Cell Power is "plasma activated"). Cell Power alone contains colloidal silver, colloidal vanadium, colloidal magnesium, and colloidal chromium. (Def. Exs. 9, 61).

93. According to their labels, pH Miracle Silver Defense and Innerlight SilverPlus both contain identical amounts of colloidal silver, colloidal gold, colloidal copper, and colloidal titanium. They also both contain de-mineralized water. Both products come in blue bottles with black droppers. The pH Miracle product label contains a photograph of the Youngs. (Pl. Ex. 27; Def. Ex. 11).

94. A bottle of pH Miracle Opti Oils is in evidence, but there is no sample of Innerlight's Marine Borage in evidence. According to Dr. Young's product comparison sheet, the products both contain borage oil, fish oil, and vitamin E. The pH Miracle

product alone contains flax oil, and the Innerlight product alone contains safflower oil. (Pl. Ex. 19; Def. Ex. 61).

95. According to their labels, pH Miracle Osteoplex 1 and Innerlight Orthoplex I both contain colloidal silica and demineralized water. Their other ingredients differ. They both come in virtually identical blue bottles with black droppers that feature the color teal. The Youngs' photographs appear on the pH Miracle product label. (Pl. Ex. 29; Def. Ex. 6).

96. A bottle of pH Miracle Osteoplex II is in evidence, but there is no sample of Innerlight's Orthoplex II in evidence. According to Dr. Young's product comparison sheet, both products contain manganese and magnesium (although in two different forms), calcium ascorbate, vitamins D, B1, B2, B3, B6, and B12, choline, betaine, and RNA-DNA (although from different sources), and aloe. Several other ingredients in the products are different.

97. A bottle of pH Miracle Nutrient Bridge is in evidence, but there is no sample of Innerlight's Z-Link in evidence. According to Dr. Young's product comparison sheet, these two products contain the following ingredients in common: vitamin A, niacin, vitamin B6, folic acid, zinc, dandelion root, red clover, chickweed, cayenne, althea root, and aloe. Nutrient Bridge alone contains mineral cell salts, and Z-Link alone

contains bovine RNA and a bovine gelatin capsule. (Def. Exs. 4, 61).

98. A bottle of pH Miracle Minerals is in evidence, but there is no sample of Innerlight's Mega-Vita-Min in evidence. Innerlight's Mega-Vita-Min is not described in Dr. Young's product comparison sheet. The Minerals label lists Calcium, Potassium, Magnesium Chelate, and a Proprietary Trace Mineral Blend of several different elements as ingredients. In Innerlight's answer to an interrogatory, it lists the Mega-Vita-Min ingredients as including calcium, potassium (combined with other minerals) and magnesium (combined with other minerals), along with several other ingredients. (Tr. at 334).

c. Sale of pH Miracle Products and Use of Trademarks

99. Dr. Young first put the pH Miracle products up for sale indirectly through his website on November 28, 2005. On the website, prospective purchasers are asked if they are Innerlight distributors. The website also links to pages where Innerlight products are available for purchase. As of November 28, 2005, the pH Miracle line was not specifically mentioned anywhere on the website. The website only contained pictures of Innerlight products. The main page of the website contained a testimonial by Tammy Copenhaver thanking the Youngs for assuring her "a life free of cancer, and filled with Innerlight." It also contained

the word "Innerlight" in the section offering information and the purchase of Innerlight products, which appeared directly below the section offering information and the purchase of pH Miracle products. The "Inner Link" mark was displayed on the website as well in conjunction with the pendant. In addition, the website contains the phrase "Discover the Alkalarian Approach to Optimal Living." After filling out the information sheet on the website, however, prospective customers were sent information on and invited to purchase from the pH Miracle product line. (Tr. at 244-48, 329; Pl. Ex. 10-11, 22).

100. In November of 2005, Guy Quigley had two friends go on to the Youngs' website. These friends were James Doyle, a resident of Doylestown, Pennsylvania, and Julie Powers, a resident of West Chester, Pennsylvania. Neither Powers nor Doyle has a business affiliation with any of the parties. (Tr. at 143-44; Pl. Ex. 11).

101. Doyle googled Dr. Young and found his website. He called the number on the website and spoke to someone named Andrew.¹² Doyle told Andrew that he was looking for a greens product. Andrew said that he would have to fill out an information sheet on the website and send it in, and that he would be sent a file of product information. The information sheet asked if Doyle was an Innerlight distributor, and he said

¹² Andrew is the Youngs' son. (Tr. at 332).

no. Doyle filled out the sheet and received an e-mail the next day from the website, pHMiracle.com. The e-mail contained a PDF file with a product list. (Tr. at 144-153).

102. Doyle called the number again and spoke to Andrew, explaining that he did not understand the product information. Andrew recommended various products. Andrew did not ask whether Doyle was affiliated with Innerlight. Doyle assumed that the products were made by Dr. Young, and the only name he knew for the products was "Greens." Doyle said he would review the information. (Tr. at 144-153).

103. He then called back and said that he was only interested in a few products. He also asked whether there were any products that could help his wife with her MS. Andrew said yes, and asked him to hold. Doyle heard talking in the background. Andrew then recommended various products, and Doyle asked if there were a few with which he could start out. Andrew recommended six or seven items, and Doyle proceeded to order them, giving Andrew his credit card information. He paid approximately \$322 for them. (Tr. at 144-153).

104. The products were sent to Doyle's home in the mail. They were pH Miracle products, and included Opti Oils, Terra Cleanse, Core Cleanse, Biolive Sprouts, Greens, and Activator drops. Doyle and his wife did not end up using the products. (Tr. at 144-153).

105. After receiving the products, Doyle received regular e-mails from the pH Miracle website, which included holiday greetings and information about products, services, seminars, retreats and a blood-testing service. (Tr. at 144-153).

106. Guy Quigley eventually looked at the products and informed Doyle that they were not his company's products. He reimbursed Doyle for the products. (Tr. at 144-153).

107. On November 29, 2005, Powers visited Dr. Young's website. She clicked on the "Products" link, and then a "For Information Only" link which allowed her to view products labeled as "Innerlight" products. The "Products" page also allowed her to click on a link labeled "I am an individual interested in purchasing your products," which directed her to a personal information form to be filled out. That page also informed her that someone would contact her to assist her with the products. Powers was asked if she was an Innerlight distributor, and responded, "No." Moments later, she received an e-mail from the Youngs stating that someone would contact and assist her. (Pl. Ex. 11).

108. Powers then called the phone number on the pH Miracle Center website, and spoke to a person named Andrew. Andrew recommended 35 products, or 7 at a minimum. Powers told him she could not afford that, and mentioned "greens" and "drops"

that she had heard about. Andrew responded that those were the "best ones," and that they were a brand new product line developed within the last month by the Youngs. Powers asked why there was information about Innerlight products on the website, and Andrew responded that that was an older line of products. Powers requested additional information, and ended the call. She then received an e-mail from "Andrew at the pH Miracle Center Staff" with product information about the pH Miracle line. (Pl. Ex. 11).

109. Powers ordered pH Miracle Greens and the pH Miracle Activator, along with a water bottle. She gave her credit card information and requested second-day air delivery. She received the package at her home via UPS 2 days later. She paid \$159.44 for the products, and was reimbursed by the plaintiffs. The seller was listed as "Innerlight Biological R" of Alpine, Utah.¹³ She did not use the products, and she delivered them to Guy Quigley. Since receiving the products, she has received approximately 23 additional e-mails from the Youngs, advertising upcoming events. (Pl. Ex. 11, 12, 16, 17; Tr. at 194-99).

110. At some point between December 15, 2005 and December 21, 2005, the Youngs' website was changed. It now

¹³ Other pH Miracle receipts contained the words "Innerlight Foundation," "Innerlight Biological," and "Innerlight Solutions." (Mot. For Prelim. Inj. Exs. E, G).

contains pictures of both pH Miracle and Innerlight products and allows customers to click on links to get information about and purchase both types of products. The links allowing customers to get information about or purchase pH Miracle products appear above the links relating to Innerlight products. (Pl. Ex. 10; Tr. at 331-32).

(5) Harm to Innerlight

111. Word of the pH Miracle Professional line has traveled quickly among Innerlight distributors. In early to mid-November of 2005, Kevin Brogan became aware of Dr. Young's pH Miracle line. Chad Czerneski received an e-mail from Donna Mathias, who also gave testimonials at Innerlight conventions about her cancer reversal, and a Dr. Videan, encouraging him to follow Dr. Young to his new product line on November 20, 2005. By late November or early December, most of the distributors had learned of the pH Miracle line. Czerneski's income and the income of his wife, who is also a full-time Innerlight distributor, have decreased by almost half since Thanksgiving of 2005. At least one distributor that Czerneski worked with for the past four years has left Innerlight to pursue Dr. Young's new product line. (Tr. at 172-75, 410-13).

112. As of March 9, 2006, Dean and Laurette Synder, two former Innerlight distributors, operated a website that described

and promoted the pH Miracle line. The website is www.snyderhealth.com. The website pays commissions to downline distributors through its "Affiliate Program." Despite the defendants' representation to the Court that references to pH Miracle products would be removed from the website pending the outcome of the Court's decision on March 14, 2006, such references remained on the website for another day. They were then removed. (3/9/06 Letter from Frederick Tecce Exs. 1-4; 3/14/06 Letter from Warren E. Kampf with Counter-Declar. of Dean Snyder; 3/15/06 Letter from John P. McShea with Attachments; 3/15/06 Letter from Warren E. Kampf).

113. At some point, the Youngs began blocking McAnly's e-mails, and she had to communicate with them through Kathy Christiansen. Through Christiansen, McAnly has tried to contact Dr. Young to ensure that he will attend conventions in 2006, and he has not responded. Eventually, the Innerlight National Director in London had to cancel the London convention, because Dr. Young's attendance had not been confirmed. Although Dr. Young was apparently still accepting invitations from distributors to do events at the time of the preliminary injunction hearing, Innerlight was not aware of this, and the arrangements for these events were not made through Innerlight. (Tr. at 417-19).

114. Dr. Young never told Guy Quigley or Stephanie McAnly that he would be launching the pH Miracle product line. (Tr. at 393, 432).

115. Innerlight currently has only one room scheduled for a convention in 2006, because it is not clear whether Dr. Young will attend future conventions. Distributors have told McAnly that they are unwilling to invest in further promotion of Innerlight until they know its future regarding Dr. Young's support. Distributors have already invested in and distributed materials containing Dr. Young's website address, and there is no way to retrieve these materials. McAnly does not believe that Innerlight could survive six months if word got out that Dr. Young was allowed to continue his actions. Brogan also believes that the company would not survive the year, because if the distributors do not get paid, they will look to other companies. (Tr. at 44, 114, 120-21, 175).

116. In 2004 and 2005, Innerlight sales ranged from a low of \$1,571,051.56 in December of 2005 to a high of \$2,278,026.90 in March of 2004. From November to December of 2005, Innerlight sales decreased by \$235,433.60. In comparison, from November to December of 2004, sales decreased by \$261,840.01. Innerlight sales in December of 2005 were, however, the lowest of any month in 2004 and 2005. Sales decreased again in January of 2006. In February, sales decreased by

approximately \$150,000.00, and the Youngs' monthly commission was reduced by over \$9,000.00. (Def. Sur-Repl. Ex. F; 3/9/06 Letter from Frederick Tecce Ex. 1).

III. Jurisdiction and Venue

A. Subject Matter Jurisdiction

In their motion to dismiss, the defendants argue that the Court lacks subject matter jurisdiction because the parties are not completely diverse. This objection is now moot because the Complaint includes Lanham Act claims, and the Court has federal question subject matter jurisdiction under 15 U.S.C.A. § 1121.

B. Personal Jurisdiction

The defendants argue in their motion to dismiss that the Court does not have personal jurisdiction over them. They claim that the plaintiffs have failed to specify any regular business conducted by the Youngs in Pennsylvania. They also argue that the Youngs' website is an insufficient basis for personal jurisdiction because it is not interactive enough because a person may not purchase the allegedly competing products from the website, but may only fill out a form to receive further promotional information.

The parties agree that Pennsylvania law governs the analysis of personal jurisdiction. The Pennsylvania long-arm statute permits personal jurisdiction to the fullest extent, and based on the most minimum contacts, allowed by the United States Constitution. 42 Pa. C.S. § 5322(b).¹⁴

To establish personal jurisdiction, the plaintiffs have the burden of proving contacts sufficient to establish either

¹⁴ The relevant provisions of the statute allow:

personal jurisdiction over a person . . . who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

. . .

(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth.

§ 5322(a).

general or specific jurisdiction. BP Chems. Ltd. v. Formosa Chem. & Fibre Corp., 229 F.3d 254, (3d Cir. 2000).

(1) General Jurisdiction

General jurisdiction requires a showing that "the defendant maintained continuous and substantial forum affiliations," and these affiliations need not be related to the claims. Dollar Savs. Bank v. First Security Bank of Utah, 746 F.2d 208, 211-12 (3d Cir. 1984). "[M]inimum contacts analysis is inappropriate when the defendant's forum activities do not give rise to the claim." Id.

Here, Dr. Young met with Guy Quigley and Stephanie McAnly on several occasions in Pennsylvania. (Findings of Fact ("FOF") ¶¶ 64 n. 8, 84). The Youngs have conducted a book tour in Pennsylvania. (FOF ¶ 67). They have also continuously maintained their website, which allows consumers to learn about and ultimately purchase their products in Pennsylvania. (FOF ¶ 99). These contacts may be sufficient to establish general jurisdiction, but the Court need not make this determination, because there is a basis for specific jurisdiction.

(2) Specific Jurisdiction

Specific jurisdiction exists where: (1) the defendant had minimum contacts with the forum state; (2) "the plaintiff's

claim is related to or arises out of the defendant's contacts with the forum;" and (3) the defendant purposefully established those minimum contacts such that he "should reasonably anticipate being haled into court" in the forum state." Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1302 (3d Cir. 1996)(internal quotations omitted).

"Case law clearly holds that telephone, facsimile, and email communications sent by a defendant into the forum state may count toward the minimum contacts necessary to establish personal jurisdiction." George Young Co. v. Bury Bros., Inc., 2004 U.S. Dist. LEXIS at *15 (E.D. Pa. Apr. 2, 2004)(citing Grand Enter. Group., Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 482 (3d Cir. 1993)). Communications into a forum state are sufficient for personal jurisdiction if they show that a defendant purposely directed his activities at forum residents. Mellon Bank (East) PSFS, N.A. v. DiVeronica Bros., Inc., 983 F.2d 551, 556 (3d Cir. 1993).

The defendants argue that their website is too "passive" to justify personal jurisdiction because consumers do not purchase directly from it; rather, consumers can sign up to receive information, and are then contacted by the Youngs about pH Miracle products. This argument misses the mark. Whether or not the website itself justifies jurisdiction, the defendants, through contacts established on the website, proceeded to e-mail

extensively with and sell and ship their products to consumers in Pennsylvania, including but not necessarily limited to James Doyle and Julie Powers. (FOF ¶¶ 101-109). This conduct was purposeful. It is exactly this conduct that the plaintiffs argue was in breach of their contracts with the defendants. Thus, there is specific jurisdiction over the defendants.

C. Venue

The defendants argue that venue is improper, and that the action should be dismissed, stayed, or transferred. Venue is proper under 28 U.S.C. § 1391 because a substantial part of the events giving rise to the plaintiffs' claims occurred in the Eastern District of Pennsylvania, and because the defendants regularly conducted business with the plaintiffs in this district. As the Court has already informed the parties, it will deny their motion to stay or transfer venue.

IV. Analysis

The plaintiffs seek a preliminary injunction against the defendants' advertising and sale of the pH Miracle Professional product line, and other conduct related to it. They have moved for a preliminary injunction on their claims of (1) breach of contract; (2) breach of fiduciary duty; (3) trademark infringement; (4) unfair competition; (5) tortious interference;

and (6) appropriation of trade values. The Court will grant the motion on the claims of breach of contract and unfair competition, grant it in part and deny it in part on the claim of trademark infringement, and deny it on the claims of breach of fiduciary duty, tortious interference and appropriation of trade values.

"The standard for evaluating a motion for preliminary injunction is a four-part inquiry as to: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest." United States v. Bell, 414 F.3d 474 (3d Cir. 2005). "The burden lies with the plaintiff to establish every element in its favor, or the grant of a preliminary injunction is inappropriate." P.C. Yonkers, Inc. v. Celebrations the Party & Seasonal Superstore, LLC, 428 F.3d 504, 508 (3d Cir. 2005).

A. Reasonable Probability of Success on the Merits

The Court finds that the plaintiffs have shown a reasonable probability of success on the merits of their claims of breach of contract and unfair competition, and in part on their claim of trademark infringement, but not on their claims of

breach of fiduciary duty, tortious interference and appropriation of trade values.

(1) Breach of Contract

a. Breach of the CA and NCA

The plaintiffs argue that the defendants breached the CA and NCA by developing, marketing, and selling nutritional and dietary supplements in competition with the plaintiffs' business in violation of their non-competition provisions. This claim is based upon the defendants' launch of their pH Miracle Professional product line on or about November 28, 2005. The defendants make two arguments in opposition to the motion: (1) they are entitled to sell products that compete with the plaintiffs' products so long as they do not sell through the independent distribution representatives of the plaintiffs; and (2) their products do not compete with the plaintiffs' products.

1. Definition of "Business"

In order to resolve the defendants' first argument, the Court must construe the non-competition provisions of the agreements. The NCA bars the Youngs from engaging in "a business that is competitive with the Business." (FOF ¶ 15). The Youngs argue that "Business" is defined in the NCA as "distribut[ion] for sale through independent representatives nationally and

internationally." They argue that this means that they were barred only from using the independent distribution representatives of the plaintiffs, not from developing, marketing or selling in competition with the plaintiffs.

In fact, the complete sentence referred to by the defendants reads as follows:

For many years, the Restricted Persons have been key employees and principal owners of the Sellers, and possess valuable knowledge, expertise and experience in the business of developing, marketing and selling nutritional supplements, dietary supplements and related products (the "Products" which were purchased by the Company, are set forth on Exhibit A to the Acquisition Agreement, and are distributed for sale through independent representatives nationally and internationally (collectively, the "Business").

(FOF ¶ 14).¹⁵ It is true that this sentence is missing a parentheses closure. The defendants, however, have altered the meaning of the sentence by changing "distributed" to "distribut[ion]" and then arguing that "collectively" refers only to that "distribut[ion]," and not to "the business of developing,

¹⁵ In the CA, the equivalent sentence is slightly different, and reads:

For many years, the Restricted Persons have been key employees and principal owners of the Sellers, and possess valuable knowledge, expertise and experience in the business of developing, marketing and selling nutritional supplements, dietary supplements and related products (the "Products" as defined below in Section 3.3); such Products are distributed for sale through independent representatives nationally and internationally (collectively, the "Business").

(FOF ¶ 34). The defendants do not make arguments relating to the definition of the Business in the CA.

marketing, and selling." Even with this change, the sentence does not make sense if "collectively" refers only to "distribution" because "distribution" is a singular noun, and "collectively" refers to a plural noun. In addition, section 1.11 of the APA discusses "the Business, including a non-exclusive right to market, distribute and sell the Products." (FOF ¶ 27).

The Court finds that the "Business" is unambiguously defined to include the developing, marketing and selling of nutritional supplements, dietary supplements and related products, as well as their distribution in the MLM arena.¹⁶

2. Competition

The key question becomes, therefore, whether the plaintiffs have shown a reasonable probability of success on the merits of their claim that the Youngs' sale of pH Miracle products competes with Innerlight's business. The Court finds that the plaintiffs have done so.¹⁷

¹⁶ The Court will not consider parol evidence. The depositions that the defendants seek to introduce into evidence consist largely of parol evidence. The Court will not consider them to the extent that they contain parol evidence. The Court will otherwise admit them into evidence.

¹⁷ The Court accepted the plaintiffs' definition of the "Business" in reaching this conclusion. The Court notes, however, that even if it accepted the defendants' definition of the "Business," there is evidence that the Youngs were violating their non-compete by selling directly to Innerlight distributors and through competing MLM schemes. For example, the plaintiffs'

As described in the FOF, the ingredients in the allegedly competing products are identical or very similar. (FOF ¶¶ 87-98). For example, the labels of Innerlight SuperGreens and pH Miracle Greens reveal that the products contain 42 identical ingredients and only 8 different ingredients, and that they have identical nutritional information. (FOF ¶ 88). Innerlight SuperSoy Sprouts and pH Miracle Biolive Sprouts both consist largely of certified organic soy sprouts, and have identical nutritional information. (FOF ¶ 90). Innerlight Earth Essence and pH Miracle Terra Cleanse both feature montmorillonite clay. (FOF ¶ 91). Innerlight SilverPlus and pH Miracle Silver Defense contain identical ingredients. (FOF ¶ 93). Several other products have largely similar ingredients. (FOF ¶¶ 87-98).¹⁸

With respect to those products with identical ingredients, it is clear that Innerlight owns the formulations.

letters describing www.snyderhealth.com show that as recently as March 14, 2006, the defendants were selling pH Miracle products to former Innerlight distributors. (FOF ¶ 112). In addition, this website allowed visitors to join an "Affiliate Program" that was similar, if not identical to, an MLM scheme. Id.

¹⁸ Dr. Young testified that his certificates of analysis indicate that some of the Innerlight products are mislabeled. In their sur-reply brief, the Youngs presented the Court with some of these certificates of analysis, and argued that they illustrate that the products sold to the plaintiffs in the APA are different from the pH Miracle products. The Court notes that prospective customers do not have access to these certificates of analysis, so that they will have no impact on whether the products compete in the minds of the customers.

With respect to those products with slightly different ingredients or formulations, the plaintiffs have argued that they are modifications of or improvements to Innerlight products that belong to Darius under the APA. (FOF ¶ 23). This would be a separate basis upon which to enjoin the sale of such products.

Aside from ingredients, there are striking similarities between the appearance of Innerlight and pH Miracle products. Many appear in virtually identical cylindrical white canisters, or blue bottles with black droppers. (FOF ¶¶ 87-98). Many of the pH Miracle product labels feature the same color as the corresponding Innerlight product labels. (FOF ¶¶ 87-98).

This similarity in appearance was deliberate by Dr. Young. The Court is not persuaded by Dr. Young's testimony at the hearing that the similarities between pH Miracle and Innerlight products are coincidental. (FOF ¶ 87). The similar appearance and names of the pH Miracle and Innerlight products seem purposeful, not coincidental, particularly given the fact that Dr. Young must have known of the Innerlight product names and packaging design when he developed the pH Miracle products.

In addition, Dr. Young's attempts to distinguish the uses of the pH Miracle and Innerlight products were unpersuasive. Dr. Young has admitted that both types of products are nutritional or dietary supplements. (FOF ¶ 86). The foundational tenet for both lines is that they help alkalize the

body and help a person achieve pH balance. Id. Dr. Young's argument that pH Miracle Greens are distinctive from Innerlight Supergreens in that they contain ingredients that fight cancer is undercut by the fact that on his website and at Innerlight conventions, he had Chad Czerneski and others claim that Innerlight Supergreens had cured their cancer. (FOF ¶ 66).

4. The Disputed Products

The Youngs argue that the plaintiffs included in the proposed order that they presented to the Court at the oral argument on February 17, 2006, four pH Miracle products that they had not previously identified as competitive: Core Cleanse, CLA Boost, HCA Plus, and L-Carnitine. (FOF ¶ 87). It is true that prior to submitting their proposed order at oral argument, the plaintiffs had not specifically identified these products as competitive, although they had stated that "Defendants' pH Miracle product line is directly in competition with the business of Plaintiffs." Id.

In response to the defendants' interrogatories, the plaintiffs listed pH Miracle products that they were "aware of," and the corresponding Innerlight products. Id. They also stated, in response to a question asking what products they did not allege to be in competition, "None. Defendants are barred

from selling any nutritional supplements, dietary supplements and related products." Id.

The evidence showed that the defendants market several of their products together; for example, they attempted to induce James Doyle and Julie Powers to purchase up to 35 different products. (FOF ¶¶ 103, 108). Because the products are marketed as a line of nutritional and dietary supplements and in combination with each other, they all compete with Innerlight nutritional and dietary supplement products. The defendants were on notice that the plaintiffs believed that any and all pH Miracle nutritional and dietary supplement products were competitive. The Court concludes that the plaintiffs' claim encompasses all pH Miracle nutritional and dietary supplement products.

5. Section 1.10 of the APA

The Youngs argue that even if launching the pH Miracle line constituted a breach of the CA or NCA, they were justified because the plaintiffs breached § 1.10 of the APA first by cutting off the Youngs' purchase of Innerlight products. (FOF ¶ 83). The Court finds that the plaintiffs have a reasonable probability of success with their argument that no action on their part justified the defendants' breach. Whether or not a breach by the plaintiffs would justify the defendants' breach

under normal circumstances, the plaintiffs only cut off the defendants' supply of Innerlight products after they had reason to believe that the defendants had been breaching § 1.10 by reselling Innerlight products in competition with Innerlight and to Innerlight distributors and customers. (FOF ¶¶ 79-82). The evidence shows that Dr. Young resold "a lot" of Innerlight products to Innerlight distributors and actual and potential Innerlight customers over the years. Id.

There is a reasonable probability of success on the merits of the claim that the Youngs breached the CA and NCA by launching the pH Miracle product line, and the Youngs have not made a sufficient showing that their breach was justified.

b. Breach of the APA and PCA - the "Alkalarian" and "Alkalize and Energize" Trademarks

The plaintiffs acquired the "Alkalarian" and "Alkalize and Energize" trademarks from the defendants pursuant to the APA and the PCA. Under the PCA, the plaintiffs granted the defendants certain non-exclusive rights to use these two trademarks, subject to the terms of the restrictive covenants the defendants executed. (FOF ¶ 43). The plaintiffs claim that the defendants have breached their restrictive covenants by utilizing these two trademarks to market their own line of pH Miracle nutritional supplement products in direct competition with the plaintiffs' Innerlight nutritional supplement products.

The defendants argue that Innerlight wanted them to use these trademarks, that they had a license under the PCA to use them, and that the plaintiffs never established their validity at the hearing.

The PCA provision dealing with these marks stated that the Youngs could use them "for purposes of books, publications, and video and audio tapes, provided that the use of the Marks shall, in all cases, be subject to the terms of any restrictive covenants now or hereafter in effect between the Purchaser and Innerlight and the Youngs." Id. Thus, even if the Youngs had a license, this arrangement was still subject to the CA and NCA non-competition provisions.

In § 2.23 of the APA, the defendants warranted that the trademarks that they were selling to the plaintiffs were valid and properly registered. (FOF ¶ 28). This is sufficient to establish the validity of the "Alkalarian" and "Alkalize and Energize" marks at this stage.

The Youngs have been using these marks to some extent in conjunction with the pH Miracle Professional product line. For example, their website contains, on the same page on which the pH Miracle Professional Line products can be viewed, the phrase, "Discover the Alkalarian Approach to Optimal Living." (FOF ¶ 99). To the extent that the Youngs are using these trademarks in conjunction with competing nutritional products

such as the pH Miracle line, there is a reasonable probability of success that the plaintiffs will prevail on their claim for breach of the APA and PCA.

(2) Unfair Competition

The plaintiffs also make common law and Lanham Act claims of unfair competition relating to their unregistered marks. In Pennsylvania, a common law claim of unfair competition is analyzed according to the standard set out in the Restatement (Third) of Unfair Competition § 1. Section 1 allows for liability for unfair competition where harm results from acts relating to deceptive marketing, infringement of trademarks or other indicia of identification, appropriation of intangible trade values including trade secrets and the right of publicity, "or from other acts or practices of the actor determined to be actionable as an unfair method of competition, taking into account the nature of the conduct and its likely effect on both the person seeking relief and the public." § 1.

To establish unfair competition based upon the use of registered or unregistered trademarks, a plaintiff must prove that (1) it owns the disputed mark, (2) the mark is valid and legally protectable, and (3) the defendant's use of the mark to identify goods or services is likely to create confusion. A.J. Canfield Co. v. Honickman, 80 F.2d 291, 296 (3d Cir. 1986).

There are several factors to be considered in analyzing a claim of a likelihood of confusion under the Lanham Act: (1) the similarity between the marks; (2) the strength of the plaintiff's mark; (3) the price of the goods and other factors indicating the level of care and attention customers will employ when making a purchase; (4) the length of time the defendant has used the mark without evidence of actual confusion; (5) the intent of the defendant in adopting the mark; (6) the evidence of actual confusion; (7) whether the goods are marketed through the same channels of trade and advertised through the same media; (8) the extent to which the parties' sales efforts have similar targets; (9) the relationship of the goods in the minds of consumers because of the similarity of functions; and (10) other facts suggesting that the consuming public might expect the prior owner to manufacture a product in the defendant's market or that he is likely to expand into that market. Checkpoint Sys. Inc. v. Check Point Software Techs., Inc., 269 F.3d 270, 280 (3d Cir. 2001).

Initial interest confusion, where a consumer is lured to a product by its similarity to a known mark, even though he realizes the true identity and origin of the product before final purchasing, is actionable under the Lanham Act. Id. at 294.

The plaintiffs' common law and Lanham Act unfair competition claims relate to the following of the plaintiffs'

unregistered marks: "SuperGreens," "SuperSoy," "Silver Plus," "OptiMood," "Orthoplex," and "Trace Minerals." (Pl. Add'l Br. in Supp. of Mot. for Prelim. Inj. at 14). The alleged infringing marks are "Greens," "Soy Sprouts," "Silver Defense," "Opti Oils," "Osteoplex," and "Minerals." Id. The defendants again argue that they were allowed to use the plaintiffs' trademarks and that their products and marks were different from those of the plaintiffs.

The defendants do not contest ownership or validity, and there is evidence of actual confusion and a likelihood of confusion. For example, customers who are driven by Innerlight distributors to the Youngs' website would logically believe that the pH Miracle products are associated with the Innerlight products that are also available there. The pH Miracle products' names are confusingly similar to the Innerlight products' names. (FOF ¶ 87). Their packaging is also confusingly similar. (FOF ¶¶ 88-98). The target sales audience, including Innerlight distributors, people interested in improving their health through supplements, and the general public, is the same. (FOF ¶ 111-112, 115). The channels of trade, advertising methods, and media, specifically the Youngs' website, is the same. (FOF ¶ 99).

Finally, customers who go onto the Youngs' website to purchase Innerlight products may be diverted by the direct link

to the similarly named and packaged pH Miracle products. (FOF ¶ 110). They may purchase those products after e-mail or telephone communications with pH Miracle representatives. (FOF ¶¶ 99-110). On at least one occasion, Andrew from the pH Miracle Center, in making a sale of pH Miracle products, told a customer who inquired about Innerlight products that Innerlight products were an older line, and that the pH Miracle line was the "best" product line. (FOF ¶ 108). The defendants' actions go beyond initial interest confusion, because it is not clear that all customers realize the true identity and origin of the defendants' products, even when they finally purchase them. It appears that the defendants were intentionally diverting customers away from Innerlight products and towards pH Miracle products by marketing the pH Miracle line as newer and better. The plaintiffs have a reasonable probability of success on the merits of their unfair competition claim.

(3) Trademark Infringement

The plaintiffs make Lanham Act and common law claims of trademark infringement based upon the defendants' use of the "Innerlight" and "Inner Link" marks in conjunction with the pH Miracle Professional product line and a homeopathic magnetic pendant, respectively. The Court concludes that the plaintiffs have a likelihood of success on the merits of their claim with

respect to the "Innerlight" mark, but not with respect to the "Inner Link" mark.

To establish trademark infringement, a plaintiff must prove that (1) it owns the disputed mark, (2) the mark is valid and legally protectable, and (3) the defendant's use of the mark to identify goods or services is likely to create confusion.

Checkpoint Sys. Inc., 269 F.3d at 279.

Validity, legal protectability and ownership are proved if the mark at issue is federally registered and has become incontestable. Id. at 280. "A trademark becomes incontestable after the owner files affidavits stating that the mark has been registered, that it has been in continuous use for five consecutive years, and that there is no pending proceeding and there has been no adverse decision concerning the registrant's ownership or right to registration." Fisons Horticulture, Inc. v. Vigoro Indus., Inc., 30 F.3d 466, 472 n. 7 (3d Cir. 1994).

"Likelihood of confusion exists when consumers viewing the mark would probably assume that the product or service it represents is associated with the source of a different product or service identified by a similar mark." Pappan Enters., Inc. v. Hardee's Food Sys., Inc., 143 F.3d 800, 804 (3d Cir. 1998)(quoting First Keystone Fed. Savs. Bank v. First Keystone Mortgage, Inc., 923 F. Supp. 693, 703-04 (E.D. Pa. 1996)). Where the trademark owners and the infringers deal in competing goods,

and "the overall impression created by the marks is essentially the same," a court rarely need look beyond the marks themselves, and they are probably confusingly similar. Opticians Ass'n of America v. Independent Opticians of America, 920 F.2d 187, 195 Cir. 1990). Intentional, willful, and admitted adoption of a similar mark, and evidence of actual confusion weigh in favor of finding a likelihood of confusion. Checkpoint Sys. Inc., 269 F.3d at 286; Pennsylvania Bus. Bank v. Biz Bank Corp., 330 F. Supp. 2d 511, 522 (E.D. Pa. 2004).

Trademarks may be licensed, and licenses may be express or implied. Doebblers' Pennsylvania Hybrids, Inc. v. Doebler, 2006 U.S. App. LEXIS 7197 at *31 (3d Cir. Mar. 23, 2006).

Pursuant to § 1.02(b)(i) of the APA, the plaintiffs owned the "Innerlight" trademark and any trademarks related thereto. They contend that they are the exclusive owners of the "Innerlight" mark, and that it is federally registered and incontestable, arbitrary and fanciful, or at least descriptive with proof of secondary meaning. They claim that the defendants are using that mark intentionally and without consent in connection with the sale of their own nutritional products. They argue that the "Inner Link" mark is related to the "Innerlight" mark, and that the products, including the pendant, are substantially similar, such that the defendants' actions have caused actual confusion in the marketplace.

The defendants argue that the plaintiffs wanted them to use their trademarks, and that they had a license under the APA to use them. The defendants also argue that the plaintiffs never presented any evidence regarding the registration of the "Innerlight" and "Inner Link" marks, although they do not actually argue that the marks are invalid.

It is not clear that the defendants' magnetic pendant competes with any Innerlight products. It is also not clear whether the Youngs were permitted to use the "Inner Link" mark in conjunction with this pendant prior to their launch of the pH Miracle line. The Court's order only extends to the use of these trademarks in conjunction with nutritional and dietary supplements, not the magnetic pendant.

The defendants admit that they conveyed their interest in the "Innerlight" trademark to the plaintiffs, although they claim that they retained the right to use this trademark in books and other publications. In § 2.23 of the APA, titled "Intellectual Property," the Youngs warranted that the trademarks that they owned and were selling to the plaintiffs were valid and properly registered. (FOF ¶ 28). The Court finds this warranty by the defendants sufficient to show that the plaintiffs have a reasonable probability of proving that the "Innerlight" mark is valid.

The defendants use the "Innerlight" mark on their website in connection with testimonials and Innerlight products. (FOF ¶ 99). They also used the mark on various receipts for pH Miracle products. (FOF ¶ 109).

It is clear that the Youngs were permitted to use the "Innerlight" mark to promote Innerlight and non-competing products, for example, at conventions and on the website. Whether this license was written, oral or implied, it clearly existed. To the extent that the defendants had a license to use this mark, their use does not constitute trademark infringement.

There is no evidence, however, that the defendants were ever permitted to use the "Innerlight" mark in conjunction with competing products. Such use is outside of the scope of any oral or implied license. It is also confusing. If customers knew that the Youngs used these marks over the years to promote Innerlight nutritional supplement products, and then suddenly they began using them to promote pH Miracle nutritional supplement products, the customers would likely assume that the pH Miracle products were Innerlight products. For example, customers sent to the Youngs' website by Innerlight distributors would logically believe that nutritional supplement products associated with the "Innerlight" mark were Innerlight products. Innerlight distributors themselves believed that Dr. Young ran

Innerlight, evidencing actual confusion. (FOF ¶ 61). The potential for further confusion is significant.

The plaintiffs have shown a reasonable probability of success on the merits of the claim that the use of "Innerlight" and related marks in conjunction with the sale of nutritional and dietary supplement products by the defendants constitutes trademark infringement.

(4) Other Claims

a. Breach of Fiduciary Duty

The plaintiffs did not submit legal authority on their breach of fiduciary duty claim separate from their briefing of the breach of contract issues. The Court will not base the preliminary injunction on this claim.

b. Tortious Interference with Contracts

The plaintiffs make a claim of tortious interference with contracts, which the defendants do not specifically rebut. The Court finds that the plaintiffs do not have a reasonable probability of succeeding with their tortious interference claim because they have an adequate remedy at law on that claim.

c. Appropriation of Trade Values

The plaintiffs also move for a preliminary injunction on their appropriation of trade values claim. The plaintiffs' claim relates to their alleged interest in the goodwill and reputation of the Youngs and their products and businesses. Although there is evidence that the plaintiffs' efforts contributed to the Youngs' goodwill and reputation, the plaintiffs have not fully explained the legal basis for their claim that they have rights against the Youngs' use of their own goodwill and reputation. The Court will not decide this issue at this stage, and will not base the preliminary injunction on this claim.

B. Irreparable Harm and Balance of Hardships

The plaintiffs argue that they will suffer irreparable harm to their customer relationships and goodwill if Dr. Young's influential name is attached to a competing product line. They argue that they purchased the Youngs' company and agreed to pay them significant sums of money in order to be associated with Dr. Young's name. They argue that because the defendants have only marketed their own line since late November of 2005, they cannot suffer irreparable harm if they are enjoined from continuing to do so. They note that the defendants may continue to sell their non-competing products.

Loss of customer goodwill can constitute irreparable harm. Pappan Enters., Inc. v. Hardee's Food Sys., Inc., 143 F.3d 800, 805 (3d Cir. 1998); Nextgen Healthcare Information Sys., Inc. v. Messier, 2005 U.S. Dist. LEXIS 27243 at *38 (E.D. Pa. Nov. 10, 2005).

The plaintiffs claim that they have already seen a decrease in sales, and that sales will continue to drop off sharply if Dr. Young is allowed to continue with the pH Miracle line. McAnly testified that Innerlight sales had never decreased prior to November of 2005. (Tr. at 423). In fact, the Innerlight sales records indicate that Innerlight sales fluctuated in 2004 and 2005, and that there were months when sales decreased relative to previous months. (FOF ¶ 116). Sales decreased more significantly in December of 2004 than in December of 2005. In December of 2005, however, Innerlight had lower sales than it had in any other month of 2004 or 2005. Id. Sales decreased again in January and February of 2006.

The defendants argue that "[e]ntering the injunction sought by Plaintiffs would severely impact Defendants' ability to earn a living while denying the request for an injunction would have little impact on Plaintiffs, companies with vast financial resources." The Court disagrees. First, and most obviously, the defendants earn millions of dollars as a result of their agreements with the plaintiffs. They also earn income from their

books, retreats, microscopy courses, and other products and services. Thus, prohibiting them from selling their own competing products would not "severely impact [their] ability to earn a living." Also, the plaintiffs claim, and the defendants do not dispute, that the defendants' names carry great weight and marketability.

Although the plaintiffs may have exaggerated the recent Innerlight sales decrease relative to past sales decreases, it is clear that sales for December of 2005 and January and February of 2006 were low, and that the potential for further decreases as the public learns that Dr. Young has launched competing products and more distributors defect to his company is great.¹⁹ Individual distributors are already experiencing business losses as a result of the Youngs' product line. (FOF ¶ 111). In addition, because of the significant influence that Dr. Young possesses, the attachment of his name to a competing product line will cause irreparable harm to Innerlight, particularly given the evidence that he has referred to Innerlight products as an older line. (FOF ¶ 108). The balance of hardships also weighs in favor of granting the injunction.

¹⁹ The fact that Innerlight may be developing affiliations with people other than the Youngs, such as Dr. Gabriel Cousens or Dr. David Wolfe, in order to attempt to salvage its business, does not mean that the Youngs' actions have not caused Innerlight irreparable harm. (FOF ¶ 39).

C. Public Interest

The plaintiffs argue that it is in the public interest to uphold agreements. They also argue that the public has a right not to be deceived or confused, which the record shows they have been by the pH Miracle line.

The defendants argue that the public interest disfavors the restraint of trade and free competition. Because the defendants have made no argument that the agreements were unreasonable, they cannot now argue that the impact on trade alone weighs in favor of disregarding them. They voluntarily entered into the agreements, obviously with significant bargaining power, and cannot now argue that it is in the public interest to allow them to skirt these agreements.

VII. Conclusion

The Court will deny the defendants' motions to dismiss and to permit the use of parol evidence. In addition, because the plaintiffs have a reasonable probability of success on the merits of some of their claims, and because the balance of hardships, the possibility of irreparable harm, and the public interest all weigh in their favor, the Court will grant the motion for a preliminary injunction on the claims of breach of contract and unfair competition, grant it in part and deny it in part on the claim of trademark infringement, and deny in on the

claims of breach of fiduciary duty, tortious interference and appropriation of trade values.

An appropriate order follows.

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

DARIUS INTERNATIONAL, INC., : CIVIL ACTION
et al. :
 :
v. :
 :
ROBERT O. YOUNG, et al. : NO. 05-6184

ORDER

AND NOW, this 20th day of April, 2006, upon consideration of the Plaintiffs' Motion for Preliminary Injunction (Docket No. 3), several briefs and letters in support of and in opposition to the motion, the Defendants' Motion to Dismiss, Stay, or Transfer Venue (Docket No. 15), the response thereto, the Defendants' Motion in Limine to Permit the Use of Parol Evidence (Docket No. 19), and the response thereto, and after several conferences and telephone conferences, a hearing on the motions on January 24 and 25, 2006, and oral argument on February 17, 2006, IT IS HEREBY ORDERED that for the reasons stated in a memorandum of today's date:

1. The plaintiffs' motion for a preliminary injunction is GRANTED IN PART and DENIED IN PART. The motion is granted with respect to the plaintiffs' claims of breach of contract and unfair competition. It is granted in part and denied in part with respect to the plaintiffs' claims of trademark infringement. It is denied with respect to the

plaintiffs' claims of breach of fiduciary duty, tortious interference, and appropriation of trade values.

2. The defendants' motion to dismiss, stay, or transfer venue is DENIED.

3. The defendants' motion in limine to permit the use of parol evidence is DENIED.

4. The depositions of Kathy Christiansen, Shelley Young, McKay Pearson, Ron Howell, and Robert Kaelin are ADMITTED into evidence, but disregarded to the extent that they contain parol evidence.

IT IS FURTHER ORDERED that:

5. The defendants are enjoined from endorsing, developing, marketing and selling any and all nutritional and dietary supplement products that compete with the plaintiffs' products, including but not limited to the nutritional and dietary supplement products discussed in the memorandum of today's date.

6. The defendants are enjoined from using the "Innerlight," "Alkalarian," "Alkalize & Energize" and related marks in conjunction with the products described in paragraph 5 above.

7. The defendants shall immediately remove from any website the control, including without limitation www.phmiracleliving.com, all references to the pH Miracle Professional line of nutritional and dietary supplement products,

including the hypertext link to such products. The defendants are also enjoined from including a reference to the pH Miracle Professional line of nutritional and dietary supplement products on any website.

8. Plaintiff shall post bond in the amount of \$200,000.00.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.