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

N3 OCEANIC, INC.	:	CIVIL ACTION
	:	
v.	:	No. 06-1304
	:	
WILLIAM T. "TED" SHIELDS, et al.	:	

MEMORANDUM

Juan R. Sánchez, J. **August 21, 2006**

Plaintiff N3 Oceanic, Inc. instituted suit against William T. "Ted" Shields, its former president, and LifeGuard Health LLC, the company he helped form, asserting violations of the Lanham Act, misappropriation of trade secrets, unfair competition, breach of fiduciary duty, and tortious interference with current and prospective contractual relations. N3 also moves for injunctive relief to remedy the alleged misappropriation of its trade secrets and requests this Court to enjoin LifeGuard from employing Shields for a period of one year. I consolidated the hearing on injunctive relief with the trial on the merits and, upon consideration of the evidence before me, will enter judgment in favor of the Defendants on all counts and deny N3's motion for injunctive relief.

FINDINGS OF FACT

In 2001, Timothy Shields, the brother of Ted Shields, founded N3, a Pennsylvania corporation that sells nutritional supplements by direct mail. Richard "Bo" Dietl is one of the original investors in N3, has been chairman of its board of directors since his initial $75,000 investment, and holds 45% of N3's shares. Tim Shields also held a 45% interest in N3, but, since

his death in April, 2004, these shares are now owned by his estate.[1]

N3's products bear its Res-Q® trademark, which the U.S. Patent and Trademark Office assigned to N3 on March 23, 2006. The three primary Res-Q® products N3 offers are: Res-Q® 1250, an Omega 3 supplement; Res-Q® LDL-X, a cholesterol-reducing capsule; and Res-Q® Cell Power, an antioxidant. The company markets these products almost exclusively through radio infomercials and offers them in a ninety-day "starter" pack.

N3's founder Tim Shields hosted the company's first radio infomercial, which aired in September, 2001 on WPHT, a radio station in Philadelphia, Pennsylvania. N3 presently airs infomercials on forty-two stations in various geographic areas of the United States. In December, 2003, Tim Shields hired his brother Ted Shields to assist with N3's direct market radio programs. Prior to joining N3, Ted Shields worked at New Brunswick Scientific Company for thirty-seven years in various sales positions and, along with his brother Tim, started an Internet-based company named SeaLink that sold Omega 3 products. SeaLink was not a successful business venture and predated Tim Shields's formation of N3. Shields also founded and ran his own company named Scotty Corp., which sold metallic colloids through radio infomercials he presented, including infomercials on radio station WPHT. As a result, Ted Shields met WPHT station manager Mike Baldini and announcer Bob Bumbera. WPHT announcer Paul Perillo hosted Ted Shields's infomercials on behalf of N3.

Tim Shields died on April 22, 2004, and, at a meeting on the day of his funeral, N3's shareholders elected Ted Shields president of the company. Immediately following his election as president, Shields's annual salary increased from $150,000 to $200,000, he received a 20% bonus,

[1] The remaining 10% of N3's shares are held by Steven Lamm (5%) and Heineman (5%).

paid quarterly, resulting in another $40,000 per year in 2004 and 2005, and discretionary bonuses of $75,000 in 2004 and $25,000 in 2005. In addition, N3 provided Shields with a Mercedes Benz S500.

Although he held the title of president, Shields spent most of his time preparing for and co-hosting N3's radio infomercials. Through the radio programs, Shields became the voice of N3. During the time Shields served as N3's radio spokesperson, N3 experienced a growth in sales, due, in large part, to Ted's ability to connect with listeners. For example, N3's sales increased from $10,000,000 in 2003, to $18,000,000 in 2004, and to $25,000,000 in 2005. The dramatic increase in sales allowed N3 to pay extraordinary dividends to its shareholders. Over a four-year period, N3's shareholders collectively received in excess of $10 million in dividends, and Dietl alone received over $5 million.

As president, Shields had access to N3's financial and general business information, the identity of N3's suppliers, the costs N3 negotiated with these suppliers, and N3's contacts at the radio stations with which it coordinates its radio programs. Shields also participated in regular meetings with the management of N3 to discuss business and marketing strategies. At these meetings, Shields discussed N3's sales, revenues, profits, the profitability of its radio markets, and other financial information. Further, Shields received monthly reports of the sales performance of the radio stations on which N3 broadcast his programs so he could determine N3's profitability per market. This data was presented in graphical and numerical form.

Although Shields's role as president was substantial, Dietl, as chairman of N3, had ultimate control and decision-making authority with respect to N3's business affairs. Throughout 2005, N3's shareholders engaged in a concerted effort to sell N3 and directed Shields to make sales

presentations to potential investors because Shields was the driving force behind N3. During this time, more than ten entities looked at N3 as a potential investment, and at least three of those entities conducted due diligence. During the course of the effort to sell N3, potential investors were provided detailed information about N3, including: its financials; information about its business, marketing and distribution models; N3's products, including prices and margins on the sales of those products; N3's radio schedules; N3's direct-mail promotions; N3's cost of sales; and N3's growth strategy. Not all of the potential investors that received this information signed non-disclosure agreements. N3 was never sold, and the sale process created uncertainty and insecurity among N3's employees, including Shields, and stifled new business initiatives or expansion.

Shields never wanted to leave N3 and, throughout his time at the company, sought long-term employment with N3 under an employment agreement. Beginning in the late summer or early fall of 2004, and up until his resignation from N3 in November, 2005, Shields and Dietl had a series of discussions regarding an employment agreement. In those discussions, Shields maintained that he wanted long-term job security, compensation commensurate with his substantial contributions to N3's success, and an equity interest in N3. Shields was prepared to agree to a post-employment non-competition provision as part of the agreement.

At the start of the employment contract negotiations in 2004, Dietl asked Shields to provide him with a draft of an employment agreement. Shields, with the help of N3's lawyers, formulated an agreement and presented it to Dietl in 2004. Dietl rejected the proposal, but the two men continued to have discussions regarding an employment contract. N3, though, never made a written counter proposal to Shields, and Dietl often told Shields that a written contract proposal was being delayed by the shareholders' attempts to sell N3.

In September, 2004, Shields contemplated forming a company that would sell Omega 3 and related products and wrote to an individual named Steve Grossnickle to determine if he had an interest in investing in such a company. The letter contained some general information about N3's sales and profits, but Mr. Grossnickle (through his wife) responded he had no interest. This isolated communication was not related to the formation of LifeGuard.

On March 12, 2005, Shields sent a letter to Dietl outlining his dissatisfaction with the employment contract negotiations and threatened to leave N3. In response, Dietl contacted Shields and again assured him N3, or its purchaser, would provide him with an employment contract; however, no draft of a written agreement was forthcoming.

In the spring of 2005, Dr. Michael Gross and Shields began discussing the possibility of forming their own company to sell Omega 3 products. Shields met Gross because Gross purchased N3's Res-Q® products for his personal use and to give to friends and family members. At that time, Gross was a consultant to Doylestown Hospital, and, in particular, to Doylestown Hospital's Health and Wellness Center in Warrington, Pennsylvania. Robert Bauer was Vice President for Finance at Doylestown Hospital and worked with Gross. The Wellness Center began selling Res-Q® products at the very end of 2005, but, after Bauer left Doylestown Hospital, it ceased ordering them because the center's new medical director was uncomfortable selling Omega 3 products of any sort. The Wellness Center has never sold LifeGuard products.

In the early summer of 2005, Shields and Gross approached Bauer to discuss his interest in forming a company to sell Omega 3 products and other nutritional supplements. Gross and Bauer then approached Terrence Tormey to see if he was interested in participating as an investor and officer if the new company was formed. During the early discussions relating to the formation of

a new company, Shields told Gross, Bauer and Tormey (collectively, the "LifeGuard Group") about N3's phenomenal sales growth and his role in N3's success. He also informed them about the potential sale of N3 and explained he was concerned about his future at N3. The information Shields relayed during these discussions was general financial information about N3's revenues and profit margins. Shields also approached Olav Sandnes, the owner of Marine Nutraceuticals and N3's supplier of Omega 3 products, because Shields and Sandnes had briefly discussed the idea of starting their own Omega 3 business after Tim Shields died. Sandnes was, in fact, interested and planned to invest in LifeGuard until Dietl subsequently informed him N3 would seek other suppliers if he did not withdraw from his involvement with LifeGuard. At no time did Sandnes contemplate terminating his relationship with N3.

Ted Shields presented the LifeGuard Group with a business plan he created that contained financial data about N3 and the overall Omega 3 market – the same information contained in the written presentation made to potential purchasers of N3. This business plan was also presented to potential investors in LifeGuard, including Joseph Beck and Vinton Rollins at Shattuck Hammond Partners, and Kenneth Krieg.

In October, 2005, Shields suggested Tormey contact High Performance Formulas, which was N3's supplier of red yeast rice, about supplying red yeast rice to LifeGuard once it began operating. High Performance Formulas, via telephone, offered Tormey a price for red yeast rice that was high, relative to other suppliers in the marketplace. Shields told Tormey N3 paid a much lower price to High Performance Formulas, so, Tormey placed a subsequent call to High Performance Formulas, challenging its representative on the price offered to LifeGuard, noting that High Performance Formulas was charging much less to another company, possibly mentioning N3 specifically. High

Performance Formulas did not offer LifeGuard a lower price, and LifeGuard never purchased red yeast rice from High Performance Formulas.

Ted Shields used the personal contacts he developed prior to and during his time at N3 to assist the LifeGuard Group make contacts at radio stations. Although Shields had contacts at WPHT that predated his employment at N3, he was not responsible for obtaining the time slot LifeGuard received from WPHT. Doylestown Hospital had a two-hour time slot on Saturday afternoons for a health-related talk show. After Bauer departed Doylestown Hospital, the program was cancelled, so that time slot became avaiable. Upon receiving this news, Bauer called the WPHT station manager and arranged to purchase one of the two hours for LifeGuard.

In mid-November, 2005, Shields met Krieg for the first time. At that meeting, Krieg advised Shields to consider resigning from N3 because Krieg suspected Shields was getting close to the point in his involvement with LifeGuard where he could no longer represent N3's interest. This tension manifested itself in a November 6, 2005 email Shields sent to Gross wherein he wrote: "Is it wise to promote the Res-Q name [to Doylestown Health and Wellness Center] at this point?" The Wellness Center, though, subsequently began purchasing Res-Q® products at the behest of Gross and Bauer.

On November 28, 2005, Shields verbally informed Dietl he was resigning from N3. Two days later, N3, for the first time, presented Shields with a draft of a proposed employment contract that contained a six-month term of employment with a three-year non-competition clause. Shields rejected N3's proposal. In addition, N3's proposal did not offer Shields any equity in N3. Shields sent a written letter of resignation to Dietl on December 15, 2005. After Shields tendered his resignation, Dietl requested that he remain radio spokesperson for an additional month, and Shields

agreed to do so. Upon his departure from N3, Shields did not contact any N3 employees about leaving with him to join LifeGuard, and Shields also did not inform any N3 customers of his resignation.

No one associated with LifeGuard, including Shields, has ever possessed or seen a copy of N3's customer list. After resigning from N3, Shields discarded and erased from his computer copies of documents containing information he believed to be proprietary to N3, including any remaining copies of the business plan he had presented to the LifeGuard Group and potential investors in LifeGuard. Shields, though, confirmed in his trial testimony that Exhibit 42, which is a presentation made to potential investors at Shattuck Hammond Partners, contains the same information about N3 contained in the discarded business plan.

Shields is president of LifeGuard, a Delaware limited liability corporation formed in the first quarter of 2006. LifeGuard commenced operations on March 4, 2006, the date its first infomercial aired, and directly competes with N3 in the market for Omega 3 products and other nutritional supplements. N3 and LifeGuard both use the radio infomercial format to reach customers, and LifeGuard airs its infomercials in some markets in which N3 airs its programs. All of LifeGuard's sales to date have resulted from radio infomercials; however, LifeGuard's business plan contemplates selling its products to health and fitness centers and directly to physicians.

The Omega 3 products LifeGuard offers are branded Omega Cardio, Omega Mind, and Omega Flex. The formulae for the three LifeGuard Omega 3 products are different from the formula for Res-Q® 1250. LifeGuard's HDL product is named HDL Boost!, and the company sells a product called HDL Reduce!, which includes red yeast rice and CoQ10. N3 no longer sells a red yeast rice product.

While performing radio infomercials for LifeGuard, Shields inadvertently mentioned the name Res-Q®, failed to correct a caller who impliedly referred to N3's products, and thanked his co-host, Gross, after Gross made a reference to Res-Q®. Faith Kilpatrick, a WPHT listener whose testimony N3 presented by deposition, testified that, as soon as she heard Shields on a radio infomercial promoting LifeGuard products, she wondered what had happened to the Res-Q® products he previously promoted.

CONCLUSIONS OF LAW

N3 claims Shields and LifeGuard violated the Lanham Act, asserting infomercials featuring Shields have caused, and will continue to cause, confusion, mistake, or deception in violation of 15 U.S.C. 1125(a).[2] To prevail on this count, N3 must prove: "(1) it has a valid and legally protectable

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[2]This section provides, in relevant part:

> (a) Civil action
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> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a).

mark; (2) it owns the mark; and (3) the defendant's use of the mark to identify goods and services causes a likelihood of confusion." *A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 210 (3d Cir. 2000). N3 has met its burden of proof with respect to the first two requirements, so the only issue is whether N3 has proved, by a preponderance of the evidence, there is a likelihood of confusion in violation of the Lanham Act. "A 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.'" *Id.* at 211 (quoting *Dranoff-Perlstein Assocs. v. Sklar*, 967 F.2d 852, 862 (3d Cir.1992)).

Here, LifeGuard's products directly compete with those of N3. To determine the likelihood of confusion in this type of situation, a court should consider a number of factors, including:

> (1) the degree of similarity between the owner's mark and the alleged infringing mark; (2) the strength of the owner's mark; (3) the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase; (4) the length of time defendant has used the mark without evidence of actual confusion arising; (5) the intent of the defendant in adopting the mark; (6) the evidence of actual confusion; (7) whether the goods, though not competing, are marketed through the same channels of trade and advertised through the same media; (8) the extent to which the targets of the parties' sales efforts are the same; (9) the relationship of the goods in the minds of the public because of the similarity of function; [and] (10) other facts suggesting that the consuming public might expect the prior owner to expand into the defendant's market.

Commerce Nat'l Ins. Serv., Inc. v. Commerce Ins. Agency, Inc., 214 F.3d 432, 439 (3d Cir. 2000). Although "not all factors must be given equal weight," *Fisons Horticulture, Inc. v. Vigoro Indus., Inc.*, 30 F.3d 466, 473 (3d Cir. 2000), the Third Circuit has recognized thatin the "multi-factor confusion analysis," mark similarity – the first factor – "'may be the most important of the ten

factors,'" *Checkpoint Sys., Inc. v. Check Point Software Tech., Inc.*, 269 F.3d 270, 281 (3d Cir. 2001) (quoting *Fisons Horticulture, Inc.*, 214 F.3d at 476). More importantly, in the context of directly-competing products, a court "need rarely look beyond the mark itself," *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 462 (3d Cir. 1983), because "[t]he single most important factor in determining likelihood of confusion is mark similarity," *A & H Sportswear, Inc.*, 237 F.3d at 216. When considering the degree of similarity between the marks, a court should assume the perspective of the ordinary consumer and examine the appearance, sound, and meaning of the marks, and the impression that each engenders. *Checkpoint Sys., Inc.*, 269 F.3d at 281.

Applying these foundational principles here, I conclude neither LifeGuard's corporate name nor the names of any of its products would confuse an ordinary consumer with regard to the products' source. First, except for the standard cylindrical-shaped supplement container, the trade dress on each Res-Q® product is distinctively different than LifeGuard's packaging, so in terms of appearance, the marks, while both suggestive of a nutritional supplement, are dissimilar in color and in labeling.[3] Second, although the sound of competing marks is of even greater significance when products are marketed via infomercials (because customers do not see the product before they purchase it), there is no aural similarity between the Res-Q® trademark and the LifeGuard corporate name or any of the products LifeGuard offers. More specifically, "Res-Q® 1250" does not sound like "Omega Cardio," "Omega Mind," or "Omega Flex." Likewise, "HDL Boost!" is distinct from its direct competitor, "Res-Q® HDL." Simply put, the similarity between the two companies is Shields; not the marks. As N3's own sales figures demonstrate, Shields was the voice of N3 and

[3]For example, LifeGuard's Omega 3 products feature a large "O" prominently displayed on the front of the container, whereas the container for N3's Omega 3 capsules draws the consumer to the company's Res-Q® trademark.

became synonymous with N3's products through the infomercials. In fact, the testimony of WPHT listener Faith Kilpatrick reveals there is no evidence of actual confusion (under the fourth and sixth factors) because she recognized the similarity in the medium through which LifeGuard markets its products (*i.e.*, infomercials featuring Shields), but she was immediately cognizant of the distinction between the companies' respective marks.[4]

Therefore, I will enter judgment in favor of Defendants on N3's Lanham Act claim, as well as its state-law claim, for unfair competition.[5]

In its count for misappropriation of trade secrets under Pennsylvania law, N3 alleges Shields and LifeGuard possess information that is proprietary to N3 and provides it a competitive advantage in the marketplace. According to N3, the following qualify as its trade secrets: its marketing plan; its financial information (*i.e.*, data on sales, revenues, profits, and profit margins); the costs it pays suppliers; and the relationships N3 has developed with contacts in the radio industry. I conclude, though, that none of this information qualifies as a trade secret.

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[4]N3's Res-Q® mark is strong (second factor) and N3's and LifeGuard's sales efforts are the same (eighth factor). From the outset, LifeGuard planned to directly compete with N3, and the words "lifeguard" and "rescue" (Res-Q® used phonetically) are often used in the same context. Even without direct evidence of LifeGuard's intent in adopting its mark, the fifth and ninth factors (inferentially) favor N3 because the companies offer functionally similar products. The third factor is neutral because the record does not contain sufficient evidence from which I can discern the level of care and attention consumers expend in purchasing Omega 3 products and similar nutritional supplements. (The seventh and tenth factors are not relevant to this analysis.)

Although four of the factors generally favor N3, the dissimilarity of the marks and direct evidence that Kilpatrick was, in fact, not confused when she heard the LifeGuard radio infomercial, indisputably tilts the scales in favor of Defendants in determining whether a likelihood of confusion exists.

[5]The elements of N3's cause of action for unfair competition under Pennsylvania law is doctrinally identical to the federal one, so there is no need to independently analyze the state-law count. *The Scott Fetzer Co. v. Gehring*, 288 F. Supp. 2d 696, 703 (E.D. Pa. 2003).

Pennsylvania law defines a "trade secret" as:

> information, including a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process that:
>
> (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

12 Pa. C.S. § 5302. "The crucial indicia for determining whether certain information constitutes a trade secret are substantial secrecy and competitive value to the owner." *O.D. Anderson, Inc. v. Cricks*, 815 A.2d 1063, 1070 (Pa. Super. Ct. 2003). A court may also consider:

> (1) the extent to which the information is known outside the owner's business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the owner to guard the secrecy of the information; (4) the value of the information to competitors; (5) the amount of effort or money expended by the owner in developing the information; and (6) the ease or difficulty with which the information could be properly acquired by others.

Omicron Sys., Inc. v. Weiner, 860 A.2d 554, 562 (Pa. Super. Ct. 2004). The burden is on the party seeking protection to establish the existence of a trade secret. *Christopher M's Hand Poured Fudge, Inc. v. Hennon*, 699 A.2d 1272, 1275 (Pa. Super. Ct. 1997) (citing *Gilbert v. Otterson*, 550 A.2d 550, 555 (Pa. Super. Ct. 1988)).

Preliminarily, Dietl testified N3 did not have a marketing plan, so this contention is factually unsupported. To the extent N3 is attempting to protect the radio infomercial format as a trade secret, I conclude this position is without merit because the independent economic value of a trade secret depends, as the statute states, on it "not being readily ascertainable by proper means by other

people." 12 Pa. C.S. § 5302. Infomercials are not a novel or an original marketing tool, and LifeGuard could have learned about this strategy from numerous sources or examples. The fact that infomercials worked for N3 does not make this generic marketing technique proprietary to N3.

N3's financial data is also not a trade secret because it provides no competitive advantage vis-a-vis LifeGuard. As Defendants correctly note, the information N3 seeks to protect as confidential is disclosed by public companies every quarter, so it would be anomalous to conclude that N3 has an economic advantage over LifeGuard because it is not under an independent obligation to inform the public of its financial performance. Additionally, if N3 wished to maintain its financial information secret, then it could have extracted confidentiality agreements from those to whom it chose to disclose its financials. The unconvtroverted evidence, though, reveals N3 did not do so. In fact, N3 was unable to produce at trial non-disclosure agreements for all of the potential purchasers who received the financial information Shields presented to them. Moreover, Shields's use of N3's financial data in the business plan he developed for LifeGuard demonstrated solely that N3 was extremely profitable by selling Omega 3 products via radio infomercials. To the extent N3 possesses proprietary processes, formulas, or methods, this information was neither included in the business plan nor was it disclosed by Shields to anyone involved with LifeGuard prior to or after the company's formation.

Additionally, Pennsylvania law does not accord trade secret status to information "that would be learned in any productive industry,. . . [such as] material sources and costs," so N3 has no right to protect the costs it pays suppliers as proprietary. *Van Prods. Co. v. General Welding & Fabrication Co.*, 213 A.2d 769, 776 (Pa. 1965). There is also no ground to conclude this information was shrouded with substantial secrecy for the simple reason these prices are already well

known to third parties – the vendors. The same is true of N3's radio contacts. This information is not secret: in fact, it is readily known by the employees of the station and can be easily inferred from competitors and consumers. Moreover, an employee, upon terminating the employment relationship, "is entitled to take with him the experience, knowledge, memory, and skill," gained during the relationship. *Id.* at 775. The evidence before me reveals the radio contacts are not proprietary to N3 because Shields, through his own skill, developed these relationships. Under Pennsylvania law:

> A man's aptitude, his skill, his dexterity, his manual and mental ability, and such other subjective knowledge as he obtains while in the course of employment, are not the property of his employer and the right to use and expand these powers remains his property unless curtailed through some restrictive covenant entered into with the employer.

Id. There is no employment agreement or restrictive covenant here, and I conclude N3 has no basis upon which to claim these contacts as its own secret.

Therefore, I hold N3's claim for misappropriation of trade secrets fails because the information it seeks to protect does not qualify as a trade secret under Pennsylvania law.

N3 directs its breach of fiduciary duty cause of action only against Shields, and neither party disputes Shields, as N3's former president, owed a duty of loyalty to N3. The only issue here is whether Shields's conduct in preparing to form LifeGuard, while still employed at N3, amounted to a breach of this duty.

To prove a breach of fiduciary duty, N3 must demonstrate: (1) Shields negligently or intentionally failed to act in good faith and solely for the benefit of N3 in all matters for which he was employed; (2) N3 suffered injury; and (3) Shields's failure to act solely for N3's benefit and to use the skill and knowledge demanded of him by law was a real factor in causing N3's injuries.

McDermott v. Party City Corp., 11 F. Supp. 2d 612, 626 n.18 (E.D. Pa. 1998) (applying Pennsylvania law). Much of N3's breach of fiduciary claim is built upon the theory that Shields's misappropriation of trade secrets and confidential information resulted in disloyalty to N3. Having concluded N3's trade secret claim fails, this aspect of its breach of fiduciary cause of action is also unavailing. N3 also premises its claim on evidence tending to show Shields actively took steps to form LifeGuard while still employed by N3 and that he interfered with the promotion of N3's products at the Doylestown Health and Wellness Center. Shields, though, proved, by a preponderance of the evidence, that, throughout his employment with N3, he performed his duties – particularly those as a radio spokesperson – competently, loyally, and to the best of his abilities, and N3's extraordinary success reflected Shields's efforts. Therefore, N3 cannot establish that Shields negligently or intentionally failed to act in good faith for the benefit of N3. Even assuming Shields's email – the one in which he questioned the wisdom of promoting N3's products to Doylestown Hospital's Health and Wellness Center shortly before his resignation – could be construed as a failure to act in good faith, N3's breach of fiduciary claim still fails because it suffered no harm or injury from this act. The Wellness Center purchased N3's products and continued to do so until it stopped selling them altogether. Therefore, N3's breach of fiduciary claim against Shields fails.

N3's counts for tortious interference with current and prospective contractual relations are predicated on the theory that Shields and LifeGuard interfered with N3's relationships with existing and potential customers, as well as with the radio stations on which N3 currently airs its infomercials. Under Pennsylvania law, claims for tortious interference require:

> (1) the existence of a contractual, or prospective contractual relation

> between the complainant and a third party;
> (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;
> (3) the absence of privilege or justification on the part of the defendant; and
> (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Reading Radio, Inc. v. Fink, 833 A.2d 199, 211 (Pa. Super. Ct. 2003). The interference must also be improper and not privileged. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175, 1183 (Pa. 1978). Conduct is considered privileged if it: "(1) concerns the subject of competition between the parties; (2) does not use wrongful means; (3) does not create an unlawful restraint on trade; and (4) has at least a partial goal of advancing an interest in competing with the plaintiff." *Intervest Fin. Serv. v. S.G. Cowen Sec. Corp.*, 206 F. Supp. 2d. 702, 721 (E.D. Pa. 2002) (applying Pennsylvania law).

N3 adduced no evidence at trial that Shields or LifeGuard obtained a copy of N3's customer list or informed customers and employees of N3 that Shields, upon his resignation from N3, would begin working for a competitor. Moreover, the departure of customers from N3 to LifeGuard would be privileged because LifeGuard is in direct competition with N3 and Shields was not acting in derogation of a restrictive covenant.

To summarize, N3 has failed to prove each of its claims against Defendants by a preponderance of the evidence, so I will enter judgment in favor of Defendants on all counts.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

N3 OCEANIC, INC.	:	CIVIL ACTION
	:	
v.	:	No. 06-1304
	:	
WILLIAM T. "TED" SHIELDS, et al.	:	

ORDER

AND NOW, this 21st day of August, 2006, judgment is entered in favor of Defendants William T. "Ted" Shields and LifeGuard Health, LLC on all counts N3 Oceanic, Inc. has directed against them, and N3 Oceanic, Inc.'s Motion for Preliminary Injunctive Relief (Document 8) and its Motion for Sanctions for Spoliation of Evidence (Document 18) are DENIED.[6]

[6]N3 seeks the drastic remedy of a judgment in its favor against both Defendants for spoliation. There is no basis to impose any sanction whatsoever against LifeGuard, and, as to Shields, any degree of fault is minimal because he discarded the documents to avoid impropriety, not to engage in it. Shields discarded the documents before any litigation began and did not attempt to hide the fact of the destruction once litigation commenced. Thus, there is no basis for a sanction to deter others from similar conduct. Under these circumstances, judgment against Defendants for spoliation would be unwarranted.

In the alternative, N3 asks the Court to draw an adverse inference as a result of the allegedly missing documents. Such a sanction would serve no purpose here. The evidence that is the subject of the spoliation claim is in the record, and N3 has suffered no prejudice from Shields's conduct. Accordingly, there is no remedial concern here because the evidence is in the record and the parties were on equal footing before me.

This case should be CLOSED for statistical purposes.

BY THE COURT:

\s\ Juan R. Sánchez
Juan R. Sánchez, J.