IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Phillip S. Figa

Civil Case No. 00-F-731 (OES)

INFANT SWIMMING RESEARCH, INC., a Florida corporation,

Plaintiff,

v.

ANN SHIDLER, individually and d/b/a Infant Aquatic Survival,
JUDY HEUMANN, individually and d/b/a Infant Aquatic Survival, and
ALISON GERDES, individually and d/b/a Infant Aquatic Survival,

Defendants.

GLOBAL ORDER ON ALL POST-TRIAL MOTIONS

This case was set for a hearing on post-trial motions for Friday, April 9, 2004 at 3:00 p.m. At the request of plaintiff, the hearing was continued to June 1, 2004. Since that time, the Court has carefully reviewed all the post-trial motions and has decided that a hearing is not necessary. Accordingly, the following is a global order on post-trial motions constituting a final judgment.

THE TRIAL RESULTS

This case was tried to a jury during the week of January 26, 2004. The jury returned its verdict on February 2, 2004, answering special interrogatories on each of the three claims asserted by plaintiff against each of the three defendants, namely (1) misappropriation of trade secrets, (2) breach of a covenant not to compete contained in written license agreements between each defendant and plaintiff and (3) breach of confidentiality provisions contained in the license agreements between each defendant and plaintiff. The special verdict form also required the jury to answer a question as to the separate element of whether or not plaintiff possessed a trade secret.

In answer to the question of whether plaintiff possessed a trade secret, the jury answered "yes." In answer to the question of whether any defendant misappropriated any trade secret of plaintiff, the jury answered "no" as to each defendant. Having found no misappropriation, the jury made no award of damages or punitive damages for that claim.

In addition, by finding that there was no misappropriation of trade secrets, the jury implicitly determined that there was no breach of the covenant not to compete. Prevailing on such a claim necessarily depended on a misappropriation of trade secrets, as required by C.R.S. § 8-2-113(2)(b).

With respect to the claim for breach of the confidentiality provisions of the contracts, the jury found in favor of Defendant Gerdes that there was no breach, and against Defendants Shidler and Heumann that there was a breach. The jury awarded damages in the amount of $50,000 against Defendants Shidler and Heumann each. It appears that the amount awarded was based on the liquidated damages provision contained in the confidentiality provision and remedies section of each license agreement and followed the liquidated damages instruction given to the jury (Instruction No. 32). Judgment on the jury verdict was entered on February 4, 2004.

THE PENDING POST-TRIAL MOTIONS

The following eight post-trial motions were timely filed and are presently pending:

1) Plaintiff's motion to alter or amend the judgment seeking to amend the judgment to the extent it awarded costs to Defendant Gerdes (Dkt. #239);

2) Plaintiff's request for a permanent injunction against Defendants Shidler and Heumann (Dkt. #243);

3) Plaintiff's motion for attorneys' fees and costs (Dkt. #247);

4) Plaintiff's motion for review of taxation of costs which seeks reversal or reduction of the award of costs to Defendant Gerdes (Dkt. #253);

5) Defendant Gerdes' motion for attorneys' fees (Dkt. #246);

6) Defendant Gerdes' motion for review of bill of costs (Dkt. #252); and

7) Defendants Shidler's and Heumann's Joint Renewed Motion for Judgment as a Matter of Law pursuant to Rule 50, or for New Trial Pursuant to Rule 59; ("Defendants' Joint Motion") (Dkt. #241);

8) Defendants' Motion to Prohibit Additional Testimony, filed April 22, 2004.

THE MOTIONS RELATING TO DEFENDANT GERDES.

The Court first addresses the pending motions relating to Defendant Gerdes.

A. Plaintiff's Objection to Award of Costs

Plaintiff asserts that Defendant Gerdes is not entitled to the costs awarded in the judgment in her favor, claiming that despite the fact that the jury found in her favor on all claims, "the filing of the lawsuit was a significant catalyst in Ms. Gerdes ceasing use of [plaintiff's] trade secrets and confidential information and stopping participation in

Defendant's business." (Plaintiff's Motion to Alter or Amend the Judgment (Dkt. #239), at 2-3.) Plaintiff also contends, on the other hand, that it will be seeking a permanent injunction against Ms. Gerdes because "she has maintained that she may train instructors using the same or similar methods used by [plaintiff] and the injunction is therefore necessary." (*Id.* at 3).

As to its first point, the plaintiff cites no authority for the proposition that costs may be awarded against a prevailing party because the lawsuit was the "catalyst" to stop conduct alleged in the case to be wrongful. Even if plaintiff were correct as to its assertion, once the conduct of Ms. Gerdes ceased the plaintiff could have dismissed the case against her and avoided, or at least minimized, the costs now assessed against it in her favor. Indeed, the Court expressly presented plaintiff with the opportunity to dismiss its claims against Ms. Gerdes at the close of the evidence in response to Ms. Gerdes' motion under F.R.Civ.P., Rule 50. Plaintiff declined to do so, choosing instead to have the question submitted to the jury. The jury has now spoken. Ms. Gerdes has prevailed on all counts and is entitled to costs.

Insofar as the plaintiff asserts that it is still entitled to an injunction against Ms. Gerdes, this Court disagrees. First, as noted above, the jury has spoken. It found no violation of either agreement on the part of Ms. Gerdes or a common law misappropriation of trade secrets. Plaintiff has not filed a motion for a new trial or any post-trial relief as to this aspect of the jury's verdict. There is no basis to enter an injunction against Ms. Gerdes. Accordingly, the entry of judgment in favor of Ms. Gerdes awarding her costs is correct and the plaintiff's motion is denied.

B. Plaintiff's Motion for Review of Taxation of Costs

Plaintiff also challenges the actual amount of costs awarded to Ms. Gerdes by the Court Clerk's taxation of costs on March 4, 2004, in which Ms. Gerdes was allowed $7,541.14 in costs (Plaintiff's Motion for Review of Bill of Costs (Dkt. #252)). Again plaintiff argues that the lawsuit was the "catalyst" for Ms. Gerdes ceasing use of plaintiff's trade secrets, citing to *Dahlem v. Board of Education of Denver Public Schools,* 901 F.2d 1508, 1512 (10th Cir. 1990). In that case, however, the prevailing party was awarded attorneys' fees and costs on the basis that he had received preliminary injunctive relief. Moreover, the appellate court indicated that the cessation of defendant's conduct followed the entry of the preliminary injunction and did not occur because "the defendant acted supererogatorily." *See, Dahlem, supra,* 901 F.2d at 1511 n.3. Significantly, the "catalyst" theory as a basis of recovery of attorney fees in a statutory fee shifting context was explicitly rejected by the Supreme Court in *Buckhannon v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598, 605, 609-10 (2001) (fee shifting provisions of certain federal civil rights laws requires plaintiff to secure a judgment or a court-ordered consent decree to qualify as a "prevailing party," not merely defendant's cessation of the challenged activity). The same rationale applies here in denying plaintiff relief from what Defendant Gerdes is otherwise entitled to on the basis that plaintiff's unsuccessful prosecution of claims against her modified her behavior. Plaintiff obtained no injunctive relief against Ms. Gerdes, and there is no indication that Ms. Gerdes ceased teaching swimming other than on a voluntary basis. Accordingly, there is no basis to find that plaintiff has prevailed in any way against Ms. Gerdes and therefore is entitled to costs, or that Ms. Gerdes is not so entitled. The Court does, however, have an issue with the amount of costs awarded to Defendant Gerdes, as is discussed below.

C. Defendant Gerdes' Request for Attorneys' Fees and Costs

Defendant Gerdes has moved for attorneys' fees and assessment of "non-taxable costs," asserting that she is the prevailing party on the contract claims brought by plaintiff. She bases her claim on the contract provision in the license agreement that provides: "the prevailing party shall be entitled to all court costs and reasonable attorney fees." (Defendant Gerdes Motion for Attorneys' Fees, at 2 (Dkt. #246).) Defendant Gerdes seeks an award of attorneys' fees in the amount of $396,351.00, and non-taxable costs in the amount of $54,092.83.

Before reaching issues regarding the reasonableness of specific hours or the hourly rates, this Court notes two problems with Defendant Gerdes' request for fees.

1. Some of the periods for which fees are requested are outside this Court's jurisdiction.

First, from a review of the billing records attached to the affidavit of defendants' counsel, Mark W. Fischer, Esq., it appears to this Court that the fee request covers the period from February 2000 (the date of filing of the complaint) through February 2004 (the date of completion of trial). The Court is aware that when this case was pending before Chief Judge Babcock, he entered an order in January 2002 granting summary judgment to the defendants on all the claims. Defendants then voluntarily dismissed the counterclaims they had filed against plaintiffs. On February 4, 2002, plaintiffs filed a notice of appeal from the grant of summary judgment.

In an order entered on August 13, 2002, Chief Judge Babcock awarded defendants attorneys' fees on the basis of the "prevailing party" provision in the licensing agreements. He denied plaintiffs' request for attorneys' fees in connection with the dismissed counterclaims. Chief Judge Babcock denied defendants' request for "additional non-taxable" costs, because the defendants did not properly identify "pooled expenses" and therefore he held that they failed to meet their burden to establish entitlement to non-taxable costs. Chief Judge Babcock did not fix the amount of fees in his August 13, 2002 order, giving defendants leave to submit "satisfactory evidence" that the requested rates were in line with those prevailing in the community. Defendants submitted affidavits on August 26, 2002. Defendants also requested reconsideration of the denial of non-taxable costs in a motion filed January 28, 2003. Chief Judge Babcock denied that motion on January 28, 2003. In a filing of February 10, 2003, defendants again requested additional costs and attorneys fees for work performed since the filing of their motion in 2002.

In an order entered on February 24, 2003, Chief Judge Babcock awarded defendants $143,435 as attorneys' fees. It is clear from that order that Chief Judge Babcock awarded fees based on the number of hours he found to be a reasonable amount of work as of August 13, 2002, and he did not allow additional fees for work performed during the interim period between August 2002 and his February 2003 Order.

On March 4, 2003, plaintiffs filed a second notice of appeal, specifying that they were appealing from the orders entered on August 13, 2002 and February 24, 2003 which together awarded attorneys' fees to defendants. On March 20, 2003, defendants filed a notice of cross-appeal from the same orders, stating that the cross-appeal "was to the extent that said orders deny Defendants' their reasonable costs." This second appeal was assigned a different appellate docket number by the Tenth Circuit than had been assigned to plaintiffs' appeal of the grant of summary judgment.

On August 6, 2003, the Tenth Circuit affirmed the summary judgment entered on the plaintiffs' trademark claims, but reversed the grant of summary judgment on the above-described state law claims for misappropriation of trade secrets and breach of the confidentiality and non-compete provisions of the contracts, and remanded the case. These claims were tried before this Court in January 2004. The Tenth Circuit opinion did not resolve the separate appeal over the attorneys' fees and costs. Rather, on August 26, 2003, the Tenth Circuit entered a separate order abating the appeals of the attorneys' fees issues until a final ruling in the instant case. The order states: "Upon a final ruling by the district court, appellant and cross-appellant shall advise this court as to whether they will continue the prosecution of their respective pending appeals." As far as this Court knows, the attorneys' fees orders entered by Chief Judge Babcock are still pending on appeal before the Tenth Circuit and this Court has no jurisdiction to address those orders, amend that fee award, fee denial and denial of costs.

Accordingly, to the extent the presently pending request by Defendant Gerdes seeks attorneys' fees for hours and fees already included in the order entered by Chief Judge Babcock, the request must be denied at this time. From a review of Chief Judge Babcock's order, it appears clear that he already awarded fees for work performed at least through August 2002. He appears to have denied fees for the period August 2002 through January 2003. The present application for fees is thus duplicative of that period to the extent the present application requests fees for billings prior to the entry of Chief Judge Babcock's Order awarding the same in February 2003. The present application also appears to request again the fees not allowed in the Orders of August 13, 2002 and February 24, 2003.

Because those fees have already been denied by Chief Judge Babcock, that order remains the law of the case. In addition, to the extent that denial is the subject of the cross-appeal by defendants, that matter too is still pending before the Tenth Circuit, and this Court has no jurisdiction to address it.

Moreover, for the period between August 2002 and August 2003, the date of the Tenth Circuit's decision reversing the grant of summary judgment, the billings described in the attachments to the affidavit of Mr. Fischer, to the extent they do not relate to the attorneys' fees and cost requests, appear to relate primarily to work on the appeals of the various orders. Fees and costs related to the appeals are properly submitted to the appellate court in the first instance and not to this Court. *See Hoyt v. Robson Cos., Inc.*, 11 F.3d 983, 985 (10th Cir. 1983); *Gamble, Simmons & Co. v. Kerr-McGee Corp.*, 2002 WL 1608453 (10th Cir. July 22, 2002). Accordingly, to the extent the present request by Defendant Gerdes includes hours and billings for that work it must be denied, as this Court lacks jurisdiction to make such an award.

2. The fee request does not apply only to work performed for Gerdes.

Defendant Gerdes' attorneys' fee request recognizes that much of the work performed by defendants' counsel was performed for the benefit of non-prevailing parties, Shidler and Heumann, as well as for Defendant Gerdes, and the work was not therefore performed solely for the prevailing party. In an attempt to address this problem, the fee requests argues that "when claims against multiple parties share a 'common core of facts' or 'related legal theories' a fee applicant may claim all hours reasonably necessary to litigate those issues." (Defendant Gerdes Motion, at 3). Defendant's request cites to the decision in *Louisiana Power & Light v. Kellstrom,* 50 F.3d 319 (5th Cir. 1995). The case cited by Defendant Gerdes, however, as well as the cases cited in that decision, relate to situations where a plaintiff prevailed against one of several defendants, and sought fees for all the work performed as to the multiple defendants. Here, the situation is quite different. Two of the defendants for whom the work was performed did not prevail at all. Work performed for the benefit of a non-prevailing party should not be compensated.

If, as Defendant Gerdes claims, the work for all defendants was based on a common core of facts and legal theories, and Defendant Gerdes does not separate the work specific to her, then this Court must find that approximately one-third of the amount of work performed was for her benefit, and the remaining two-thirds was for the benefit of the non-prevailing defendants. Accordingly, at most, Defendant Gerdes will be allowed one-third of the reasonable amounts billed by defense counsel during the relevant periods.

3. Fees allowed during for the relevant period.

Either fortuitously or in anticipation of this Order, the Court notes that the summary chart of hours and rates attached to the affidavit of Mr. Fischer separates out the hours billed from September 1, 2003 (shortly after the Tenth Circuit decision) through February 2, 2004, the completion date of the trial. The Court's review of these hours indicate that they relate primarily to preparation for the trial in late January 2004.

Accordingly, the lodestar from which this Court begins its fees analysis are the hours and fees reflected for that period, from September 2003 through February 2, 2004. According to the Court's arithmetic, this amount of hours and fees is as follows:

Name	Rate	Hours	Sub-Total
M. Fischer	$310	197.5	$ 61,225
A. Shuffield	$180	227.1[1]	$ 40,878
J. Sullivan	$210	13.9	$ 2,919
D. Eurich	$140	12.3	$ 1,722
S. Lahr	$135	142.0	$ 19,170
L. O'Brien	$155	14.0	$ 2,170
M. Paskvan	$160	2.4	$ 384
J. Pearce	$135	221.8	$ 29,943
M. Whittington	$135	54.9	$ 7,411

The total amount of fees billed for the allowed period total is $165,822.48.

Defendant acknowledges in her request that the work related to the taking of the depositions of witnesses Kathy Nowak, Todd Uble and Melody Uble, who were students of Defendant Heumann, was not performed for the benefit of Defendant Gerdes. (Defendant's Request, at 3). The Court finds hours and fees billed for this work in November 2003, with fees totaling $5,808. According to Defendant Gerdes' own

[1] Ms. Shuffield's hours on the summary chart are recorded for the period April 1, 2003 to February 2, 2004 and totaled 338.0 hours. The Court has reviewed her daily billings and deducted the hours billed during that period which relate to preparation of the appeal or matters related thereto (including the day of June 30, 2003, for which she billed 15.10 hours), leaving a balance of 227.1 hours.

statements, this amount should be deducted from the above fee total, leaving a sub-total of $160,014.48. Taking one-third of this sub-total, for the reasons explained above, yields fees of $53,338.16. This is the lodestar amount for fees allowed to Defendant Gerdes as the prevailing party in the trial held in January 2004.

Plaintiff has objected to an award of fees to Defendant Gerdes on the same grounds that it objected to the award of costs. For the reasons set forth above, the plaintiff's argument is rejected. However, plaintiff also objects that the fees sought include too many lawyers and paralegals and fees for "repeated duplication of services." (Plaintiff's Response, at 5-6). Plaintiff may well be correct, but plaintiff has not specified which hours are duplicative or which of the several lawyers or paralegals work was unnecessary. To paraphrase plaintiff's own argument, it is not the responsibility of the Court to "sift through the record" to ascertain the information to support a party's arguments about fees. *See SEC v. Thomas, 965 F. 2d 825, 827*(10th Cir. 1992). Thus, this Court is not in a position to reduce the fees based on plaintiff's general argument of duplication or unnecessary work.

However, this Court notes that neither the defendant's request for fees, nor the supporting affidavit of Mr. Fischer, supply any information about the identities of the billing parties reflected on the fee summary or on the bills, or about their experience, qualifications or level of responsibility. *Cf. Ramos v. Lamm,* 713 F. 2d 546, 555, 558-59 (10th Cir. 1983). Although Mr. Fischer's affidavit states the range of the rates of the lawyers, and the range of the rates of the paralegals, these ranges overlap, so that the Court is left to guess which of the billing parties are paralegals and which are lawyers.

Moreover, there is no evidence offered as to the prevailing rates for paralegals in the relevant community. *See, Missouri v. Jenkins by Agyei,* 491 U.S. 274, 286-88 (1989).

Nonetheless, the Court notes that according to the affidavit, some of the paralegals were billing at rates as high as $160 per hour. The Court recognizes at least one paralegal, listed on the summary as having billed 142.0 hours, as being billed at $135 per hour. These rates for paralegals appear to this Court to be excessive, particularly in the absence of a description of their qualifications and experience and level of responsibility, or evidence of the prevailing paralegal rate in the community.[2] Where a district court does not have before it adequate evidence of prevailing market rates, the court may use other relevant factors, including its own knowledge, to establish the rate. *Guides Ltd. v. Yarmouth Group Recovery Management, Inc.*, 295 F.3d 1065, 1079 (10th Cir. 2002). In the Court's judgment, the amounts allowed for paralegal billing should not exceed $100 per hour.

The Court believes, from a review of the billing records, that S. Lahr, L. O'Brien, J. Pearce, and M. Whittington are paralegals. Their hours, as reflected on the billing summary, are allowed at a rate of $100 per hour rather than at the rate reflected on the summary, resulting in a reduction of $15,568. One-third of that amount, or $5,189.33,

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[2] In her reply to plaintiff's opposition to the request for fees, Defendant Gerdes submitted an affidavit from Mr. William Gray, Esq. attesting to the reasonableness of the rates charged by the lawyers who worked on the case (Defendant Gerdes Reply to Plaintiff's Response, filed April 5, 2004, Exhibit C, thereto). But the affidavit of Mr. Gray provides no opinion as to the reasonableness of the rates charged for paralegals, or their prevailing rates in the community. Separate affidavits dated August 2002, from William Meyer, Esq. and Chesley Culp, Esq., which are also attached as part of an exhibit to Defendant Gerdes' recent reply, state that the prevailing rate for paralegals in the community range from $65-95 per hour, quite a bit lower than rate claimed now on behalf of Ms. Gerdes as being reasonable.

must be deducted from the lodestar amount allowed to Defendant Gerdes. The net allowed attorney fee amount for her is then $48,148.83.

This Court thus finds that the amount of $48,148.83 is a reasonable amount of attorneys' fees to be allowed to Defendant Gerdes as the prevailing party on the contract claims against plaintiff.

4. Costs allowed to Defendant Gerdes during the relevant period.

In her request for attorneys fees and costs, Defendant Gerdes requested an award of $54,092.83 in "non taxable" costs. The Court notes that, as with the attorneys billings, the costs requested span the entirety of the case and are not separated as to periods or as to the separate defendants. As the Court ruled above with respect to the attorneys' fees request, costs will not be allowed for any period preceding the entry of the decision by the Tenth Circuit, dated August 6, 2003, and any costs allowed will be awarded only on the basis of a one-third allocation.

The Court also notes that in the request for costs and attorneys' fees, filed on February 24, 2004, Defendant Gerdes stated that there was a pending bill of costs before the Clerk of the Court, and that "if the Clerk awards any costs, Ms. Gerdes will supplement her request for costs contained herein to eliminate those granted as taxable costs." (Defendant's Request, at 6). The Clerk did award Defendant Gerdes $7,541.14 in costs on or about March 4, 2004. However, the Court does not find the supplementation promised by Defendant Gerdes. Instead, the Court finds that on March 11, 2004, Defendant Gerdes filed a Motion for Review of Bill of Costs seeking more costs than allowed. Accordingly, this Court is not in a position to award costs based on the original request, as it does not know what has already been awarded and what has been disallowed from those costs sought in the original request.

Moreover, insofar as the Clerk of the Court allowed costs in the amount of $7,541.14, that allowance does not indicate whether it allowed 100% of the cost for each item, or adjusted the requested to the one-third amount allowed based on the rationale described above. The Court assumes that the Clerk did not make such an adjustment. This Court will adjust the allowed costs to Defendant Gerdes to the amount of $2,513.71, representing one-third of the allowed costs, unless Defendant Gerdes provides additional information indicating that the allowed costs had been specifically allocated to her. Other than as provided herein, at the present time, her motion to review taxation of costs is denied.

MOTIONS RELATING TO VERDICTS AGAINST DEFENDANTS SHIDLER AND HEUMANN

Before deciding the remaining motions of plaintiff, logically the Court must first address the motion of the other two defendants to overturn the jury's verdict.

A. Defendants Shidler's and Heumann's Joint Renewed Motion

Defendants Shidler and Heumann request this Court pursuant to F.R.Civ.P. Rule 50, to enter judgment in their favor as a matter of law, or pursuant to F.R.Civ.P. Rule 59, to grant them a new trial, with respect to the jury verdict finding that they breached the confidentiality provision of their contracts with plaintiff. These defendants assert the verdict may not stand, and judgment should be entered for them, for essentially the following reasons.

First, the moving defendants argue, since the jury found that these defendants "did NOT disclose any trade secret information" judgment as a matter of law should be entered on the claim that these defendants breached the "confidentiality provision of the contract." (Joint Renewed Motion, at 1). They further assert that because there was no identification of confidential information separate from the plaintiff's trade secret, and the jury found no misappropriation of trade secrets, this necessarily precluded a finding of breach of a confidentiality agreement. These defendants moreover contend that even if a claim could exist for breach of a confidentiality agreement separate from a claim for misappropriation of trade secrets, there was no evidence that defendants disclosed any of the confidential information of plaintiff. Finally, their motion proclaims, that the verdict amounts of $50,000 against each of them, appearing to be based on the liquidated damages provisions of the contracts, may not stand as the amount of damages for the award is not reasonably related to any damages suffered by plaintiff.

Alternatively, defendants argue that the jury was not properly instructed on the claim for breach of a confidentiality agreement, warranting a new trial for these two defendants on this single claim.

This Court finds that defendants' arguments are not persuasive based on the facts and circumstances of this case, that the jury verdicts are supported by a viable legal theory and sufficient evidence, and that the instructions were proper.

B. Defendants' Motion For Judgment As Matter of Law

The Court's analysis begins with the parties' stipulation that each of the defendants "signed License Agreements and Non-disclosure Confidentiality Agreements with plaintiff ISR." (Undisputed Facts ¶ 3f, Scheduling Order).

The confidentiality provision of the1998 license agreements signed by Defendants Shidler and Heumann, in pertinent part, provides as follows:

> **VIII. CONFIDENTIALITY OF INFORMATION**
>
> The research and printed materials provided by . . . Infant Swimming Research, Inc., which pertain to the education of infants and children in aquatic survival and swimming techniques, are unique intellectual properties entitled to protection as such at law.
>
> Licensee shall not at any time in or in any way during the term of this agreement or after it's termination, divulge, disclose or communicate to any person or organization in any manner whatsoever any information concerning any matters affecting or relating to the business and trade secrets of Licensor.
>
> Licensee further agrees not to write for publication any article concerning Infant Swimming Research, teaching, data, techniques, theory, or trade secrets, infant swimming or infant and young child aquatic activities and drowning accidents and not to grant interviews to other individuals or agencies concerning Infant Swimming Research, Inc.
>
> Licensee agrees not to train or not to endeavor to train instructors or assistants in the same or similar methods without SPECIFIC WRITTEN CONSENT FROM LICENSOR.
>
> Licensor will not knowingly allow any Infant Swimming Research, Inc. documents or training videos to be copied or reproduced in whole or in part at any time.

> Licensee will not disclose to another person any of the methods, techniques, trade secrets or systems used by Licensor in business.

(Trial Exhibits 10 and 11, ¶ 8.)

The plain language of the agreements provide protection for more than plaintiff's trade secrets. The defendants agreed not to disclose any "methods," "techniques" or "systems" used by plaintiff, further agreed not to "train instructors or assistants in the same or similar methods" and further agreed not to "divulge, disclose or communicate to any person or organization in any manner whatsoever any information concerning any matters affecting or relating to the business and trade secrets" of plaintiff.

As a matter of law, a cause of action for breach of a confidentiality agreement can exist along with a separate claim for misappropriation of trade secrets. *See, e.g.*, *Trans-Rim Enterprises, Ltd. v. Adolph Coors Co.*, 1995 WL 231381, at **6-8 (10th Cir. April 7, 1995). This appears to be an implicit if not explicit holding of the Tenth Circuit in this case. *See Harvey Barnett, Inc. v. Shidler*, 338 F.3d 1125, 1134 (10th Cir. 2003).

Here, the jury found that plaintiff did possess information that constituted a trade secret. The jury found, however, that defendants did not misappropriate the plaintiff's trade secrets. Misappropriation was defined, in accordance with Colorado law, as "disclosure or use of a trade secret." (*See* Jury Instruction No. 20; C.R.S. § 7-74-102 (2)). Thus, defendants now argue that the jury's finding that there was no misappropriation must mean that there was no disclosure of confidential information.

However, in finding for plaintiff on the claim for breach of the confidentiality agreements the jury could have reasonably found that Defendants Shidler and Heumann violated their agreements in ways other than "disclosure" of trade secret information. For example, the jury may have found that defendants "trained or endeavored to train instructors or assistants in the same methods." There was certainly evidence from which the jury could have reasonably found that both Shidler and Heumann trained other instructors using the methods taught to them by plaintiff. Or, the jury may have found that Defendants Shidler and Heumann communicated to others information concerning matters affecting or relating to plaintiff's business, which information did not fall within the definition of trade secrets.[3] There was certainly evidence from which the jury could have found that defendants used forms and documents devised by plaintiff, such as the national registration forms or the so-called "BUDS" form, which information would not necessarily be a trade secret, but was nonetheless plaintiff's methods and design. Or, the jury may have found that defendants knowingly allowed plaintiff's documents or videos to be copied. As noted, certainly there was evidence from which the jury could have found that defendants used forms that either were copies of, or derivations of, forms devised by plaintiff.

As the non-prevailing defendants correctly state, F.R.Civ.P. 50(a) provides that judgment as a matter of law may be entered against a party when there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on an issue. As stated in the case they cite, *Hurd v. American Hoist and Derrick Co.*, 724 F.2d 494, 499 (10th Cir. 1984), the question is not whether there is literally no evidence supporting the

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[3] This provision of the confidentiality agreements did not expressly limit each defendant's obligation of non-disclosure to plaintiff's "confidential" information. However, in instructing the jury, the Court limited the claim regarding the confidentiality provision, by instructing the jury that it must first find "that Plaintiff's program contained confidential information protected under this provision" of the contract. (*See* Jury Instruction No. 30.)

[non-moving] party . . . but whether there is evidence upon which the jury could properly find [for that party]. In determining whether judgment as a matter of law is proper, the Court may not weigh the evidence, consider the credibility of witnesses, or substitute its judgment for that of the jury. *See Lucas v. Dover Corp.*, 857 F.2d 1397, 1400 (10th Cir. 1988). Here there was evidence that supported the claim that both those defendants violated the above-quoted provisions of their license agreements with plaintiff, and the evidence is legally sufficient to establish such a claim. Thus, this Court finds there was evidence from which the jury could find that Defendants Shidler and Heumann breached the confidentiality provision of their license agreements, even though they may not have disclosed or used plaintiff's trade secrets.

C. Defendants' Motion For New Trial

These two defendants also object to the jury instructions given regarding the claims for breach of the confidentiality agreements, specifically instructions Nos. 30 and 31. (Defendants' Joint Renewed Motion, at 2). They request a new trial under F.R.Civ.P. 59. Instruction No. 30, as indicated by footnote 3 above, was given to the jury to define plaintiff's claim for breach of the confidentiality provision. In its entirety, Instruction No. 30, as given, reads as follows:

> With regard to the confidentiality provision of the license agreement, if you find that plaintiff's program contained confidential information protected under this provision, and the defendants, or any one of them, failed to comply with the confidentiality provision, then your verdict must be for the plaintiff and against the defendants, or any one of them.
>
> On the other hand, if you find that the plaintiff's program did not contain confidential information, or that defendants, or any of them, did not breach the confidentiality provisions,

> than your verdict on this claim must be for the defendants, or any one of them.

Jury Instruction No. 30.

Defendant's objection to the instruction as a whole was based on defendant's legal argument that if the jury did not find a misappropriation of a trade secret, it could not find a breach of the confidentiality provision of the license agreements. For the reasons discussed above, the Court rejected this argument at the time of trial and rejects the argument again in ruling on this motion.

Also important to note regarding Instruction No. 30 is that at the time it was tendered to counsel for their review before submission to the jury it contained an additional phrase to which <u>defendants'</u> counsel objected, resulting in its deletion. The additional phrase, originally appearing after the words "failed to comply with the confidentiality provision" read: "and have used the confidential information of the Plaintiff." This language would have required the jury to find that defendants both "failed to comply" with the confidentiality provision of their agreements and "used confidential information of Plaintiff." Why defendants' counsel objected to this additional wording is unclear.[4] The Court pointed out to counsel that eliminating the wording would lessen somewhat plaintiff's burden. Plaintiff did not object to the deletion of these words, and so they were deleted. If the upshot of defendants' current objection to Instruction No. 30 is the absence of the qualifying words that would have

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[4] According to the "real-time" draft of the trial transcript, counsel stated: "And it would be our position that the confidentiality provision, that this instruction should simply say, fail to comply with the confidentiality provision, then your verdict must be for the plaintiff. The insertion 'and have used the confidential[ity] information of the plaintiff' is inconsistent with the language of the license agreement." Trial Transcript, p. 826.

limited their liability to cases where the defendants "used confidential information of Plaintiff," the absence of the limitation is the fault of defendants and they will not now be heard to complain.[5]

One additional instruction in dispute is Instruction No. 31. As given to the jury, it stated:

> Only confidential information acquired during the course of employment may be protected, not the general knowledge of a business operation. Information already known to competitors or readily ascertainable elsewhere cannot be protected as confidential.

This instruction was derived from the opinion in *Mulei v. Jet Couriers*, 739 P.2d 889, 892 (Colo. App. 1987). Defendant now objects that this instruction was incomplete because it did not include what defendants refer to as the "additional sentence regarding general ability and know how" included in the *Mulei* decision. (Defendant's Joint Motion, at 13-14.) The sentence from *Mulei* omitted from the instruction reads: "Moreover, the general ability and know-how an employee brings into employment, and the skill and experience acquired during it, are not the employer's property; the right to use and expand these powers remains the employee's." 739 P.2d at 892-93.

The Court, and not the defendants, proffered this instruction in the first instance. The Court believed that it would assist the jury in understanding what Colorado law considered to be confidential information, and what was excluded from that term.

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[5] A notable quote about estoppel can be found in *Southern Surety Co. v. Peterson*, 86 Colo. 350, 354, 281 P. 746, 747 (Colo. 1929), which goes: "It may be said that he who remains silent when duty requires him to speak will not be heard when justice requires him to be silent." A variant of that theme perhaps applicable here is: "One who speaks who should have remained silent will not be heard again to complain about what occurred due to his having spoken."

Defendants did not offer any instruction on this subject at all. Plaintiff did not object to the instruction as proposed. When the Court included this instruction, defendants responded as indicated above, requesting an additional sentence. Defendants' counsel stated that he preferred inclusion of the two sentences taken from *Mulei*, excluding the third, rather than none of those statements of law. The Court indicated then, and still believes, that the instruction as given informed the jury sufficiently on the state of the law, that the instruction was accurate and that the additional sentence was not required, particularly since defendant did not tender an instruction on the subject. Instructing the jury using the two sentences from *Mulei*, but not the third, was neither error nor justifies a new trial.

D. The Liquidated Damages Award

Defendants further request this Court to overturn the jury's award of $50,000 damages as against each defendant, arguing that this amount of liquidated damages is not supported by the record and the Court did not provide an adequate instruction to the jury. The instruction given to the jury on liquidated damages provides as follows:

> If you find in favor of the Plaintiff on its claim of breach of contract under the confidentiality provision of the Licensing Agreement, and if you also find that the parties agreed on an amount to be paid to the Plaintiff in the event of a breach of the confidentiality provision, by the Defendants, or any of them, then you shall award that amount as the Plaintiff's damages.

Instruction No. 32.

This instruction is based on the Colorado Jury Instructions, Civ. 4th, 30:47 "Liquidated Damages." There was no dispute that the License agreements signed by defendants included the following provision within the section entitled Confidentiality of Information:[6]

> ANY BREACH OF THE TERMS OF THIS PARAGRAPH SHALL BE A MATERIAL BREACH OF THIS AGREEMENT AND SHALL RESULT IN IMMEDIATE REVOCATION OF THE LICENSE AND TERMINATION OF THIS AGREEMENT. It is stipulated that if Licensee breaches the provision of this paragraph, Licensor shall be entitled to recover fifty thousand dollars ($50,000) as liquidated damages for such breach, without affecting the Licensor's rights to injunctive relief.

(Trial Exhibit 11, ¶ 8.)

The License agreements also contain the following provision:

> **XII Remedies For Breach of Contract**
>
> Upon breach of any one or more of the terms of this Agreement, Licensee shall pay to Licensor the sum of fifty thousand dollars ($50,000.00) to compensate Licensor for injury by reason of such breach. Due to the near impossibility of ascertaining or estimating the injury that Licensor may sustain by reason of such breach, this sum is agreed upon as liquidated damages and is intended as compensation for the injury suffered by the Licensor.

Thus, the parties here agreed that damages for breach of the confidentiality provision of the License agreements would be difficult to quantify, and that a proper amount for each breach would be $50,000.

Defendants Shidler and Heumann correctly cite the Colorado law applicable to enforcement of liquidated damages provisions, which requires that: a) the anticipated

[6] The exhibit reflecting Defendant Shidler's agreement, Exhibit 10, inexplicably omitted the page containing the following language, yet the testimony did not reveal Shidler's agreement to be different from other such ISR agreements with its instructors, and the jury, after sending a note inquiring as to the omitted page, not erroneously inferred its existence.

damages are uncertain in amount or difficult to be proved; b) that the parties intended to liquidate them in advance; and c) that the amount stated is a reasonable one, that is, not greatly disproportionate to the presumed loss or injury, citing to *Sierra Trading Corp v. Winkler*, 482 F.2d 333, 335-36 (10th Cir. 1973) and to *Perino v. Jarvis*, 312 P.2d 108, 109 (Colo. 1957).

Defendants now argue that "plaintiff provided no evidence that the $50,000 liquidated damages provision amount in the license agreement" meets these legal requirements, and plaintiff "provided no evidence that would even imply that such an amount is reasonable." (Defendants' Joint Renewed Motion, p. 16). Defendants' argument is not well-taken. There is evidence that the parties agreed that any damages incurred by plaintiff for breach of the confidentiality provision were uncertain and that the parties mutually agreed to a liquidated damages amount, for this is expressly stated in the above-quoted language from the License agreements. Moreover, whether the $50,000 amount is reasonable is a question of fact. *See Sierra Trading , supra*, 482 F.2d at 336. Colorado law provides that "[u]nless the contract on its face reveals that the stipulated liquidated damages are so disproportionate to any possible loss as to constitute a penalty, the determination of whether the specified damages constitute a penalty is a question of fact." *Yerton v. Bowden*, 762 P.2d 786, 788 (Colo. App. 1988), *citing Rohauer v. Little*, 736 P.2d 403 (Colo. 1987). *See also Board of County Commissioners of Adams County v. City and County of Denver*, 40 P.3d 25, 29 (Colo. App. 2001).

However, contrary to the implication in defendants' argument, there is no burden on the claimant of the damages to prove "reasonableness" of the liquidated damages. Rather, the burden is on the party asserting that the liquidated damages clause is unreasonable and constitutes a penalty. *See Jobe v. Writer Corp.*, 526 P.2d 151, 152 (Colo. App. 1974) ("Unless it patently appears from the contract itself that the liquidated damages agreed upon are out of proportion to any possible loss, which is not the case here, the party asserting that the damages constitute a penalty has the burden of proving that contention."). *See also, Board of County Commissioners of Adams County v. City and County of Denver, supra,* 40 P.3d at 29.

The burden in the instant case was not on the plaintiff to prove the $50,000 amount was reasonable. Rather, the defendants here had the burden to convince the jury that the $50,000 predetermined amount was unreasonable. Defendants were certainly free to argue as much. This Court does not recall such argument being made to the jury, but in any event, the jury was free to reject the argument even if it was made.

The Court also finds that the $50,000 liquidated damages amount is not so "greatly disproportionate to the presumed loss" that it cannot stand. Plaintiff offered evidence that it trained instructors at rates of $10,000 per instructor. Thus for each instructor trained by defendants in violation of the confidentiality provision, plaintiff arguably would lose $10,000. The evidence at trial showed that Defendant Heumann trained at least three instructors, charging them $5,000 each. Defendant Shidler also trained several instructors, although she apparently did not charge. Taken as a whole, this evidence does not demonstrate that the liquidated damages amount is so "greatly disproportionate to the presumed loss" that it is void as a matter of law.

For all the reasons stated above, the non-prevailing defendants' motion for judgment as a matter of law under Rule 50 and their motion for a new trial under Rule 59 are DENIED.

E. Plaintiff's Motion For Permanent Injunction

Plaintiff has moved the court to enter a permanent injunction, enjoining all defendants, including Defendant Gerdes, from seven enumerated types of conduct listed in plaintiff's motion at pages 2-3. For the reasons set forth above, the Court will not enjoin any action of Defendant Gerdes. The jury has found no wrongdoing on her part. There is simply no basis for this Court to enter an injunction on the basis of plaintiff's speculative assertion that "she still maintains that she may train instructors using the same or similar methods use by ISR." (Plaintiff's Motion for Permanent Injunction, at 2).

As to Defendants Shidler and Heumann, plaintiff requests a permanent injunction that would provide:

> 1) Defendants shall not train or endeavor to train instructors or assistants in the same or similar methods, materials techniques, trade secrets and/or systems used by ISR;
>
> 2) Defendants shall not use and/or divulge, disclose or communicate, to any other person or entity of any kind or type, any of the methods, materials, techniques, trade secrets and/or systems used by ISR;
>
> 3) Defendants shall not write for publication any article concerning the methods, materials techniques, trade secrets and/or systems used by ISR in its business, and

shall not participate in interviews with any person or entity of any kind or type, concerning any of the methods, materials, techniques, trade secrets and/or systems used by ISR;

> 4) Defendants shall not allow any ISR materials, documents and/or training videos to be copied, reproduced or replicated in whole or in part;
>
> 5) Defendants shall surrender to ISR all ISR materials, documents and/or training videos;
>
> 6) Defendants shall cease any and all utilization and/or association with the name ISR or Harvey Barnett, Inc.;
>
> 7) Defendants shall not divert and/or attempt to divert away any employees, licensees, and/or instructors of ISR.

Plaintiff's Motion for Permanent Injunction, at 2-3.

Plaintiff argues that such injunctive relief is "appropriate to protect ISR's trade secrets and confidential information." *Id.* Defendants oppose the injunction in all respects, arguing that plaintiff did not succeed on the merits of its case regarding misappropriation of a trade secret and because there has been no showing that such an injunction is necessary to prevent irreparable harm to plaintiff.

This Court starts from the fact that while the jury did find the existence of a "trade secret" possessed by plaintiff, it found no misappropriation of plaintiff's trade secret by any of the defendants. The Court also agrees with the defendants that despite all the evidence offered at trial, it is difficult to articulate the contours of plaintiff's trade secret with any precision. Thus, just as this Court has indicated with respect to Defendant Gerdes, there is no basis on which to enjoin any defendant from violating plaintiff's unspecified trade secret(s), whatever those trade secret(s) may be.

Moreover, although the jury found that these two defendants violated the confidentiality provision of their License agreements, and this Court finds there was evidence to support that verdict so that it should not be vacated under Rules 50 or 59, it remains unclear to this Court exactly what "confidential information" may have been used by the defendants in their business of teaching swimming to either instructors or students. It also remains murky to this Court exactly what part of the "methods, materials, techniques, trade secrets and/or systems used by ISR" are confidential, for as the defendants correctly point out, plaintiff argued that it was the system as a whole that was the trade secret. To the extent that plaintiff has not articulated with specificity the contours of plaintiff's "confidential information," or the confidential "methods, materials, techniques, trade secrets and/or systems used by ISR," which it seeks to be the subject of the proposed injunction, this Court agrees with defendants that any such injunction would be imprecise and could lead to further costly and probably meaningless litigation. Moreover, such an injunction would run afoul of the provisions of F.R.Civ.P. 65(d), as stated by the Seventh Circuit in *3M v. Pribyl*, 259 F.3d 587 (7th Cir. 2001):

> The requirements for a valid injunction are found in Fed.R.Civ.P. 65(d), which provides, so far as pertinent here, that "[e]very order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." As the Supreme Court has noted, "the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." Schmidt v. Lessard, 414 U.S. 473, 476 (1974).

> The problem of framing an appropriate order may be particularly acute in trade secrets cases, (citation omitted) and it for that reason that courts have often set aside trade secrets injunctions as failing to comply with Rule 65(d)'s specificity requirements, (citations omitted).

259 F.3d at 597. Accordingly, this Court is not inclined to exercise its discretion by entering vaguely worded or imprecise injunctive relief.

However, to the extent plaintiff asks for specific injunctive relief, that does not cut against the public interest, or the defendants' interests in maintaining their business as swim instructors, this Court will grant that limited relief. Thus this Court will order Defendants Shidler and Heumann to:

> not allow any ISR materials, documents and/or training videos which may still be in their custody or control to be copied, reproduced or replicated in whole or in part;
>
> surrender to ISR all ISR materials, documents and/or training videos which may still be in their custody or control;
>
> cease any and all future utilization and/or association with the name ISR or Harvey Barnett, Inc., except that defendants may disclose that they were trained by ISR or Harvey Barnett, Inc., but any such disclosure, if made, should include a statement that they are no longer associated with ISR or Harvey Barnett, Inc.

This Court will **not** enjoin defendants from "diverting, and/or attempting to divert away any employees, licensees, and/or instructors of ISR," because such activity has not been proved at trial, and is not precluded by the "confidentiality provision" of the License agreement. The jury did not find for the plaintiff on its claim for breach of the covenant not to compete, and the language of this requested injunctive provision emanates from the language of that provision of the license agreement rather than the "confidentiality provision." However, this Court makes no suggestion, one way or the other, whether or not such activity would or could amount to interference with contract, as that claim has never been presented in this case.

An injunction along these lines will be entered, but the remainder of plaintiff's request for permanent injunctive relief is denied.

F. Plaintiff's Request For Attorneys' Fees and Costs

On February 25, 2004, plaintiff filed a request for an award of attorneys' fees and costs asserting its right under the License agreement as the prevailing party entitled to all court costs and a reasonable attorney fee. The request is accompanied by an affidavit from plaintiff's counsel, Douglas Jaffe, Esq., and attached billing records and invoices for costs. The application requests attorneys fees of $235,100 based on 1229.90 hours of Mr. Jaffe's billed time at rates of $175 to $200 per hour. (Jaffe Affidavit, at 2). The motion requests $27,706.81 in costs.

1. Plaintiff's Request for Attorneys' Fees

Plaintiff, like Defendant Gerdes, now requests attorneys' fees from the inception of this case through the entry of judgment. As with Defendant Gerdes' request for fees, this Court has several "structural" problems with plaintiff's request for attorneys' fees.

First, when Chief Judge Babcock ruled in August 2002 on the cross-motions for attorneys' fees, he denied plaintiff's request for attorneys' fees and costs in connection with the dismissal of the counterclaims. In a motion filed on February 1, 2002, plaintiff had represented to the Court that it had incurred $74,707.50 in attorneys fees for 426.9 billed hours of Mr. Jaffe's time through January 2002, "due to the dismissal of Defendants' counterclaims" (*see* Plaintiff's Motion for Attorney Fees and Affidavit of Douglas Jaffe, attached thereto, ¶ 4). The motion represented that plaintiff had incurred $13,990.84 in costs "in defending the claims plaintiffs ultimately abandoned." (Plaintiff's Motion for Attorney fees, at 2).

In his order of August 13, 2002, Chief Judge Babcock denied plaintiff's request for these fees and costs. That order remains the law of the case. Moreover, since that order was made final for purposes of appeal, and since plaintiff's notice of appeal dated March 4, 2003, states that plaintiff is appealing the order "denying plaintiff's motion for attorneys' fees" entered on August 13, 2002, that order is the subject of the still-pending appeal before the Tenth Circuit and this Court is without jurisdiction to consider fees for plaintiff that have already been denied.

Since plaintiff's fees and costs through August 2002 have already been denied by Chief Judge Babcock, and are the subject of the pending appeal, the amount of $74,707.50 must be deducted from the present fee request just to get to the plaintiff's lodestar amount.

Second, the Court has reviewed Mr Jaffe's billing records for the period between January 2002 and August 2003. As the Court has ruled with respect to the fee request from Defendant Gerdes, this Court will not allow plaintiff to recover for attorneys' time expended for preparation of the attorneys' fees and cost requests before Chief Judge Babcock, nor does it presently have jurisdiction to award fees for the preparation of the appellate briefs or the appeal. The Court has reviewed Mr. Jaffe's time records for the work billed during the period January 2002 through August 2003, and has identified $52,522.50 worth of work in these categories that will not be allowed.[7]

[7] This Court may well review this ruling, and those relating to defendants' earlier fees and costs, if and when the Tenth Circuit issues and order remanding attorneys' fees issues upon conclusion of the pending appeal.

Thus, deducting $74,707 and $52,522.50, respectively, from the amount presently requested by plaintiff leaves a sub-total amount of $107,871 for work performed related to the trial in which plaintiff prevailed on one claim of breach of contract against Defendants Heumann and Shidler.

Plaintiff tried two sets of claim against these defendants: one for common law misappropriation of trade secrets and one for breach of contract. The attorneys' fees may be allowed only for the claim for breach of contract as they are based on the prevailing party provision. Since the work performed by counsel is not separated out in his affidavit, or by his billing records, this Court cannot determine which hours relate to which claim. However, as noted above, when a plaintiff brings multiple claims, and the claims involve a "common core of facts" or "'related legal theories" a fee applicant may claim all hours reasonably necessary to litigate those issues. *Louisiana Power & Light v. Kellstrom,* 50 F.3d 319, 327 (5th Cir.1995). Thus, the Court will not reduce the fees based on the fact that the attorney's work on the trade secret claim may also have related to work on the contract claim on which plaintiff prevailed.

However, the plaintiff brought two breach of contract claims under the license agreement against the Defendants Heumann and Shidler, one for breach of the covenant not to compete and one for breach of the confidentiality provision, and prevailed on only the latter of these claims. Thus, the Court will award only one-half of the sub-total amount set forth above under the prevailing party language of the license agreement.[8] This reduces the sub-total lodestar amount to $53,935.50.

[8] Defendants Heumann and Shidler, although prevailing parties on the claim for breach of covenant not to compete, have not sought attorneys' fees.

Finally, since plaintiff prevailed only against Defendants Heumann and Shidler, and not against Defendant Gerdes, the court must reduce by one-third the lodestar amount, just as was done with Defendant Gerdes' fee request above. This leaves a final lodestar amount of $35,921.04.

The Court has reviewed the entries and has considered the rates charged by Mr. Jaffe. Even without the expert affidavits that plaintiff has stated it would submit at a hearing on fees, this Court finds that Mr. Jaffe's hourly rates of $175 per hour and $200 per hour were reasonable. In addition, the Court notes that Mr. Jaffe asks for no time for associates, paralegals, or other assistants. While this could arguably indicate that some work performed by Mr. Jaffe could have been performed by a lower billing person, defendants have not raised any such objection. In any event, given Mr. Jaffe's quite reasonable hourly rate, this Court believes that his performing such work himself would most likely result in efficiencies that justify paying for him to do the work. Therefore, taken as a whole, this Court finds that a reasonable attorneys' fee to allow to plaintiff as the prevailing party on its contract claim against Defendants Heumann and Shidler is $35,921.04.

2. Plaintiff's Request For Costs

Plaintiff also requests $27,706.81 for costs. As a prevailing party, plaintiff should have filed a bill of costs with the Clerk to recover some of these costs. It is not clear why it did not do so. Moreover, while plaintiff lists costs for airfare, lodging and "costs incident to taking depositions," it did not attach invoices or itemizations of these costs other than in a few instances. Except to the extent the costs are itemized, they are disallowed.

The Court notes that of the itemized costs of $4,582 requested for "witness fees," much of that amount relates to the attendance of Harvey Barnett and Joann Barnett at the trial and at the preliminary injunction hearing. These individuals were not attending as witnesses but rather as a party and as a representative of a party. Fees are not allowed for the attendance of parties. The plaintiff also requests fees for the attendance of witness Kelly Whitemore. According to the Court's notes, Ms. Whitemore never testified. The Court will allow witness fees only for witness Werts in the amount of $511.

Plaintiff has attached invoices for the purchase of deposition transcripts for the depositions of each of the three defendants, for plaintiff representatives Harvey Barnett and Joann Barnett, for defendants' expert David Dubois and for deponents Todd Ubel, Melody Ubel and Kathy Nowak. The plaintiff will only be allowed the costs for the depositions of the three defendants and for witness Dubois. The Ubels and Ms. Nowak did not testify, nor were their depositions offered into evidence. Plaintiff is not entitled to costs for copies of the depositions of either Harvey or Joann Barnett as the were not used by plaintiff for impeachment or any other purpose. The amount allowed for the deposition transcripts based on the invoices attached to plaintiff's request is $3,327.50. In addition, plaintiff is allowed the costs for the copying of a VHS cassette based on the attached invoice in the amount of $32.33.

Plaintiff is allowed as total costs the amount of $3,870.83.

3. Plaintiff's Final Allowance For Fees and Costs

As a total for fees and costs, plaintiff is allowed $39,791.87 consisting of $3,870.83 in costs and $35,921.04 as attorneys' fees.

CONCLUSION

For the reasons set forth above, the seven pending motions are decided as follows:

1) Plaintiff's motion to alter or amend the judgment (Dkt. #239) is DENIED;

2) Plaintiff's Request for a permanent injunction against Defendants Shidler and Heumann (Dkt. #243) is GRANTED in part and DENIED in part as set forth herein;

3) Plaintiff's motion for attorneys' fees and costs (Dkt. #247) is GRANTED in part and DENIED in part. Plaintiff is awarded reasonable attorneys fees of $35,921.04 and costs of $3,870.83, totaling $39,791.87, against Defendants Shidler and Heumann, jointly and severally;

4) Plaintiff's motion for review of taxation of costs (Dkt. #253) is DENIED;

5) Defendant Gerdes motion for attorneys' fees (Dkt. #246) is GRANTED in part and DENIED in part; said defendant is awarded reasonable attorneys fees of $48,148.83 against plaintiff;

6) Defendant Gerdes motion for review of bill of costs (Dkt. #252) is DENIED; and

7) Defendants' Joint Motion (Dkt. #241) is DENIED.

In light of the above rulings, the hearing scheduled for June 1, 2004 is vacated. It is the Court's view that expert testimony is not needed on the reasonableness of the attorneys' fees sought in light of the rulings reached above. Moreover, although plaintiff seeks to offer additional testimony in support of its motion for permanent injunctive relief, this Court finds that such evidence is not warranted as plaintiff had a full opportunity to make its record at trial. Accordingly, Defendants' Motion to Prohibit

Additional Testimony, filed April 22, 2004, is DENIED as Moot. Finally, further argument on defendants' post-trial motion would not be helpful. This Order represents the final order of this Court in this case. The Clerk of Court is directed to enter judgment or amend the existing judgment in accordance with this Order.

DATED: May 4 , 2004

BY THE COURT:

Phillip S. Figa
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE

Civil Case No. 00-F-731 (OES)

The undersigned certifies that a copy of the foregoing **Global Order on All Post-Trial Motions** was served on May 4, 2004, by:

(X) delivery to:

Magistrate Judge O. Edward Schlatter

Chief Judge Lewis T. Babcock

Mark W. Fischer, Esq.
Alice E. Shuffield, Esq.
Faegre & Benson
D. C. Box 21

(X) depositing the same in the U.S. Mail, postage prepaid, addressed to:

Douglas Jaffe, Esq.
402 West Broadway, 4th Floor
San Diego, CA 92101

GREGORY C. LANGHAM, CLERK

By: ______________________
Deputy Clerk/Secretary