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UNITED STATES DISTRICT COURT
DENVER, COLORADO

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JAMES R. MANSPEAKER
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Chief Judge

Civil Action No. 00-B-731

HARVEY BARNETT, INC., a Florida corporation, and INFANT SWIMMING RESEARCH, INC., a Florida corporation,

Plaintiffs,

v.

ANN SHIDLER, individually and d/b/a Infant Aquatic Survival, and JUDY HEUMANN, individually and d/b/a Infant Aquatic Survival, and ALLISON GEERDES, individually and d/b/a Infant Aquatic Survival,

Defendants.

ORDER

Plaintiffs Harvey Barnett, Inc. and Infant Swimming Research (collectively "ISR") bring claims for breach of contract, misappropriation of trade secrets, unjust enrichment, trademark infringement, Lanham Act violations, unfair competition and deceptive trade practices, and "exemplary damages," not a cognizable claim as such. Defendants Ann Shidler, Judy Heumann, Allison Geerdes, and Infant Aquatic Survival (collectively "Defendants") counter-claim for breach of contract, unjust enrichment, breach of fiduciary duty, tortious interference with contract and prospective economic advantage, and breach of covenant of good faith and fair dealing. Defendants move for summary judgment on ISR's claims. The motion is adequately briefed and oral argument would not materially aid its resolution. For the reasons set forth below, I grant Defendants' motion for summary judgment.

I. Facts and Procedural History

ISR previously moved for a preliminary injunction under Fed. R. Civ. P. 65. An evidentiary hearing was held, and on April 16, 2001 I issued Findings of Fact and Conclusions of Law. *See Harvey Barnett, Inc. v. Shidler*, 143 F.Supp.2d 1247 (D. Colo. 2001). The parties incorporate the transcripts and evidence from that hearing into their summary judgment exhibits. The facts are sufficiently set out in that Order, and are not disputed by the parties with exceptions that are not applicable to this Order. *See id.* at 1249-1251. The facts therefore need not be fully repeated here.

Harvey Barnett is the founder and President of ISR. He holds a Ph.D. in psychology, and developed a program to teach infants and toddlers to survive in water. In a variation of a skill taught by swimming schools around the world and throughout the United States, children are taught to swim, flip over and float, then flip over and swim again. Thus, the method is called "swim, float, swim." ISR provides program materials both to instructors and to parents who enroll their children in ISR, including videotapes and manuals.

Defendants Judy Heumann and Ann Shidler trained as ISR instructors. Ms. Heumann taught swimming lessons, including the swim, float, swim method, prior to joining ISR. Ms. Heumann was trained by ISR in 1984, using commercially available texts. Ms. Shidler was trained by ISR in 1990. While affiliated with ISR, both Ms. Heumann and Ms. Shidler signed a "Non-disclosure and Confidentiality Agreement"and a "License Agreement." Ms. Shidler and Ms. Heumann eventually separated from ISR. The three Defendants formed Infant Aquatic Survival, a company which teaches infant and child swimming in Colorado. They teach a swim, float, swim method, although they have significantly deviated from ISR methods.

ISR asserts that its program is a trade secret, both because of unique methods and because it teaches children survival skills in ten minutes a day for three to four weeks. ISR argues that in

1996 the program became fully developed and acquired trade secret status. *See. e.g.,* Exhibit 1 to Westcott Affidavit at 195. Although the Agreements include a Florida choice of law provision, the parties have stipulated that Colorado law is virtually identical and should apply.

II. Motion for Summary Judgement

The purpose of a summary judgment motion is to assess whether trial is necessary. *See White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Rule 56(c) provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, that it believes demonstrate the absence of genuine issues for trial. *See Celotex*, 477 U.S. at 323; *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992). Once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in the complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried. Rule 56(e); *see also Otteson v. United States*, 622 F.2d 516, 519 (10th Cir. 1980). These facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves." *Celotex*, 477 U.S. at 324.

A. Misappropriation of Trade Secrets

Defendants first move for summary judgment on ISR's claim for misappropriation of trade secrets. What constitutes a trade secret is generally a question of fact. *See Network*

Telecommunications, Inc. v. Boor-Crepeau, 790 P.2d 901 (Colo. Ct. App. 1990); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 848 (10th Cir. 1993). Colorado has adopted the Uniform Trade Secrets Act, which defines a trade secret as "any scientific or technical information, design, process, procedure, formula, [or] improvement . . . ." Colo. Rev. Stat. § 7-74-102. The following factors are considered in determining whether certain information is a trade secret:

> (1) the extent to which the information is known outside the business;
> (2) the extent to which the information is known to those inside the business;
> (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information;
> (4) the savings effected and the value to the holder in having the information as against competitors;
> (5) the amount of effort or money expended in obtaining and developing the information; and
> (6) the amount of time and expense it would take for others to acquire and duplicate the information.

See CATHY STRICKLIN KRENDALL, COLORADO METHODS OF PRACTICE §19.25 (4th ed. 1997) (citing cases).

Additionally, the owner of any trade secret "must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner . . . ." *Id.* § 7-74-102(4). Such precautions must be more than normal business procedures. *See Colorado Supply Co. Inc. v. Stewart*, 797 P.2d 1303, 1306 (Colo. Ct. App. 1990). Such efforts may include advising employees of the existence of a trade secret, limiting access to a need-to-know basis, and controlling access to locations where the information may be learned. *See* KRENDALL, at § 19.25 (citing cases).

Defendants first argue that as a matter of law the ISR program is not a trade secret. I agree. Variations on the swim, float, swim method are known both inside and outside the children's aquatic business. Although ISR took precautions to guard the secrecy of its information, it did not do so until at least 1996, after hundreds of instructors had been trained and thousands of students taught. ISR did, eventually, advise its independent contractors and employees of the existence of a trade secret. However, ISR did not limit access to a need-to-know basis, and did not control access to locations where the information may be learned. *See Stewart*, 797 P.2d at 1306. Parents and bystanders were allowed to watch and videotape lessons. Instructors broke off from ISR at various points, and not all were required to stop teaching the ISR method. Although parents can not fully recreate the ISR program by watching it, Ms. Shidler testified that in 1989 her sister taught Ms. Shidler's children the ISR program for at least ten days, based solely on what she saw her own children doing in ISR lessons. These introductory sessions significantly curtailed the length of the children's later ISR-sanctioned lessons. Further, a variation on ISR's methods could be created through a perusal of commercially available child psychology, child health, and swimming instruction books. *See, e.g.,* Exhibits A58, A62, A67, A69, A70, A72, A98A, A101. Although such an effort would not recreate ISR's methods identically, it would not be difficult to develop a system in which a child learned the swim, float, swim method through positive reinforcement and behavioral conditioning.

Further, ISR allowed its program to become part of the public domain before seeking protection. ISR admits that various features of its program were documented and made public at various times in the company's history, including the information contained in the <u>Instructor</u>

Development Handbook. Finally, the Prompts and Procedures, based on principles of behavioral conditioning, was already in use to teach children swim, float, swim throughout the nation. Although other programs do not use the same labels for each action, the basic process was and is in wide use. I therefore conclude as a matter of law that ISR has no protectable trade secret, and grant Defendants' motion for summary judgment as to this claim.

B. Breach of Contract

Defendants next move for summary judgment on ISR's breach of contract claim. ISR alleges that regardless of whether its program is a trade secret, the Defendants have a duty not to disclose any ISR information because they signed a confidentiality agreement. I disagree.

The Confidentiality Agreement states that, "Licensee agrees to hold said further confidential information in trust and confidence and agrees that it shall be used only for the contemplated purposes as set forth in said license agreement and this agreement, and shall not be used for any other purpose, or disclosed to any third party." *See, e.g.*, Preliminary Injunction Exhibit 7. It is therefore necessary to look to the terms of the License Agreement. Two portions are pertinent here: the "Covenant Not to Compete" and "Confidentiality of Information" sections. I consider the legal effect of each separately.

1. Covenant Not to Compete

The License Agreement sets out in a section entitled "Covenant Not to Compete" that:

> "Licensee shall not, during the term of this Agreement and for two (2) years immediately following the termination of this Agreement, regardless of who initiated the termination, engage directly or indirectly in the teaching of infants or young children to swim or engage in the business of training other individuals for the purpose of teaching infants or young children to swim, other than pursuant

> to the terms of this agreement. . . . This Covenant Not to Compete shall be effective within a five hundred (500) mile radius from the present site of the business address of Licensee. This Covenant applies to self-employment or employment on behalf of any other person, firm, corporation, partnership or other business organization."

See id.

Colorado has limited non-competition contracts to narrowly defined categories. The statute states in relevant part:

> "Any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void, but this subsection (2) shall not apply to:
> (a) Any contract for the purchase or sale of a business or the assets of a business;
> (b) Any contract for the protection of trade secrets;
> (c) Any contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years;
> (d) Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel."

Colo. Rev. Stat. § 8-2-113. A covenant that fails to meet one of the exceptions defined in the statute "is facially void, rather than voidable . . . ." *Management Recruiters of Boulder. Inc. v. Miller*, 762 P.2d 763, 765 (Colo. Ct. App. 1988). Section (b) allows parties to enter into non-competition contracts to protect a trade secret. Of course, any information ISR wished to protect under this section must be a *bona fide* trade secret. *See Porter Indus. v. Higgins*, 680 P.2d 1339 (Colo. Ct. App. 1984). However, I have already found that the ISR program does not constitute a protectable trade secret. No other exceptions to the Colorado statute apply. Because the Covenant not to Compete contained in the License Agreement is void under Colorado law, ISR may not enforce it here.

2. Confidentiality of Information

The section entitled "Confidentiality of Information" states that,

> The research and printed material provided by Dr. Harvey Barnett, Harvey Barnett, Inc. and 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 or in any way during the term of this Agreement or after its 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."

See, e.g., Exhibit 7. The section goes on to limit correspondence with insurance companies, forbid the writing of articles on the topic of children's swimming, forbid the granting of interviews, forbid the training of other instructors, and provide for the return of ISR's materials upon termination. The section also provides for liquidated damages in the event of a breach. *See id.* It then states,

> Licensee will not disclose to another person any of the methods, techniques, trade secrets, or systems used by Licensor in business. Further, at any time following termination of this Agreement, use of Licensor's trade secrets under any other name or organization constitutes unfair competition due to the distinctive results of Licensor's techniques. Terms of this and all paragraphs are permanent.

See id.

ISR cites *Kodekey Elecs., Inc. v. Mechanex Corp.*, 486 F.2d 449 (10th Cir. 1973) for the proposition that an agreement not to disclose a trade secret is enforceable, even if no underlying trade secret exists. The Colorado courts have found that when the terms of an agreement declare that confidential information constitutes a trade secret and that the confidential nature of the information will not be subject to contest, the agreement is enforceable. *See Gold Messenger,* *Inc. v. McGuay*, 937 P.2d 907, 911-12 (Colo. Ct. App. 1997); *Kodekey Electronics, Inc. v. Mechanex Corp.*, 486 F.2d 449 (10th Cir. 1973). However, as outlined in my preliminary injunction Order, I find these cases distinguishable.

The agreement in *McGuay* stated that "confidential information constitutes the 'trade secrets' of Gold Messenger and that the confidentiality of this information will not be subject to contest." *McGuay*, 937 P.2d at 911. No such non-contest clause appears here. Moreover, the court in *McGuay* found that a trade secret did in fact exist. Thus, the language in the contract bolstered the court's own conclusion. *See id.* at 911-12. In *Kodekey*, the court, applying Colorado law, found that an agreement by defendants not to disclose information, not to compete, and not to use information detrimentally was an acknowledgment of fact that the information was a trade secret. The court, applying pre-Uniform Trade Secrets Act law, found that a trade secret existed. Therefore, the language in the *Kodekey* contract also served to reinforce the court's conclusion that a trade secret existed. *See Kodekey*, 486 F.2d at 449. Here, however, no such acknowledgment exists. Further, any such acknowledgment would be contrary to my previous conclusion that no trade secret exists. Finally, both *McGuay* and *Kodekey* involved information which had been kept confidential. Here, in contrast, ISR made no effort to keep its program secret until 1996.

Even assuming, however, that I were to find that Defendants' signature on the Non-Disclosure and Confidentiality Agreement created an enforceable duty on Defendants not to disclose information, the language used by ISR creates an unenforceable covenant not to compete.

The Non-Disclosure and Confidentiality Agreement states that the confidential information relates "to specialized methods, procedures and techniques for teaching infants and children water survival, *swimming and associated aquatic skills* . . . ." *See, e.g.*, Preliminary Injunction Exhibit 8 (emphasis added). The License Agreement then requires the Defendants "not to endeavor to train instructors or assistants in the same *or similar methods* without SPECIFIC WRITTEN CONSENT FROM LICENSOR . . . .Terms of this and all paragraphs *are permanent*." *See, e.g.*, Preliminary Injunction Exhibit 9 at 3 (italicized emphasis added).

This language is unreasonably broad. First, its duration is unreasonable, as it would prevent Defendants from teaching swimming or aquatic skills to children or other instructors in perpetuity. Second, its geographic scope is limitless. Moreover, as I determined, ISR's program consists in large part of information available in the public domain. Therefore, the limitations in the Agreement are in conflict with Colorado's clear stance against broad non-compete agreements. *See* Colo. Rev. Stat. § 8-2-113(a) ("Any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void . . . ."); *Rivendell Forest Prod., Ltd. v. Georgia- Pacific Corp.*, 824 F. Supp. 961, 969 (D. Colo. 1993) (non-competition agreement must be reasonable as to both duration and scope), *rev'd on other grounds*, 28 F.3d 1042 (10th Cir. 1994); *Axelson v. Columbine Laundry Co.*, 254 P. 990 (Colo. 1927) (six month provision held enforceable); *Weber v. Nonpareil Baking Co.*, 274 P. 932 (Colo. 1929) (perpetual covenant limited to one county held enforceable). Because the broad language of the Agreement would perpetually limit Defendants' ability to train other instructors the widely-known skill of teaching swimming to infants and young children worldwide, it is unenforceable.

I therefore conclude that ISR's confidentiality agreement is not enforceable, and accordingly grant summary judgement to Defendants on ISR's breach of contract claim.

C. Unjust Enrichment

Defendants next move for summary judgment on ISR's unjust enrichment claim. I conclude that this claim must fail for two reasons. First, ISR failed to state its claim for unjust enrichment in the Pre- Trial Order. Claims in the Pre-Trial Order supercede claims in the Complaint. *See* Fed. R. Civ. P. 16(e). Second, even if the claim were properly made it is based on the Defendants' receipt of ISR's alleged trade secret. Again, no such trade secret exists. ISR's claim for unjust enrichment therefore fails, and I grant summary judgment to Defendants on that basis.

D. Trademark Infringement

Defendants next move for summary judgment on ISR's trademark infringement claim. ISR's trademark, Federal Service Mark No. 1924194 consists of a circle with text and symbols inside. The top third of the circle has a cross, similar to the Red Cross symbol. The middle third of the circle contains the words "INFANT SWIMMING RESEARCH." The bottom third has "U" shaped waves, with the "water" area blacked-out. *See* ISR's Exhibit 1 at 1. Defendants use the phrase "infant aquatic survival" with no logo. ISR brings a claim for infringement of its registered trademark.

Pursuant to 15 U.S.C. § 1114(1)(a),

> Any person who shall, without the consent of the registrant ... use in commerce any reproduction, counterfeit, copy, or colorable

> imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is *likely to cause confusion,* or to cause mistake, or to deceive ... shall be liable in a civil action by the registrant for the remedies hereinafter provided.

Id. (emphasis added). To prove infringement, the moving party must show: (1) the mark is validly registered; (2) defendants' use of the mark was unauthorized; and (3) defendants' use is likely to cause confusion in the market place concerning the source or quality of the products. *See Durango Herald, Inc. v. Riddle,* 719 F.Supp. 941, 948 (D.Colo. 1988) (citing *USA Network v. Gannett Co. Inc.,* 584 F.Supp. 195, 198 (D.Colo. 1984)).

Defendants argue that their use of the phrase infant aquatic survival is merely descriptive, and therefore does not infringe. It is a defense under 15 U.S.C. §1115, "That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, . . . of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party . . . ." *See id.* at § (b)(4). This section forbids a trademark registrant from appropriating a descriptive term for his exclusive use and to prevent others from accurately describing a characteristic of their goods. *See Soweco, Inc. v. Shell Oil Co.,* 617 F.2d 1178, 1185 (5th Cir. 1980), *cert. denied,* 450 U.S. 981 (1981). *See also Ideal Indus., Inc. v. Gardner Bender, Inc.,* 612 F.2d 1018, 1027 (7th Cir. 1979), *cert. denied,* 447 U.S. 924 (1980); 1 J. McCarthy, *Trademarks & Unfair Competition* §§ 11:17, at 474 (2d ed.1984) (footnote omitted). Here, this affirmative defense is established if: (1) Defendants are not using the term "infant aquatic survival" as a trademark or service mark; (2) "infant aquatic survival" is descriptive of their services; and (3) that such descriptive use is fair and made in good faith. Defendants assert the § 1115(b)(4) defense. ISR fails to respond with either argument or evidence that would create a genuine issue of material fact on this issue. Summary judgment is therefore appropriate.

Even assuming, however, that § 1115(b)(4) were not applicable, summary judgment would still be appropriate because ISR fails to show a genuine issue of material fact on the issue of likelihood of confusion. Likelihood of confusion forms the gravamen for a trademark infringement action. *See King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1089 (10th Cir. 1999) (citing 15 U.S.C. §§ 1114(1), 1125(a)). The Tenth Circuit has identified six factors, derived from the Restatement of Torts § 729 (1938), that aid in determining whether a likelihood of confusion exists between two marks: (a) the degree of similarity between the marks; (b) the intent of the alleged infringer in adopting its mark; (c) evidence of actual confusion; (d) the relation in use and the manner of marketing between the goods or services marketed by the competing parties; (e) the degree of care likely to be exercised by purchasers; and (f) the strength or weakness of the marks. *See id.*, *First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 101 F.3d 645, 652 (10th Cir. 1996); RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 20-23 (1995). "This list is not exhaustive. All of the factors are interrelated, and no one factor is dispositive." *Universal Money Ctrs. Inc. v. American Tel. & Tel. Co.,* 22 F.3d 1527, 1530 (10th Cir. 1994).

ISR brings suit under the "related goods" doctrine. Under this rule, "the owner of a registered mark has protection against use of its mark on any product or service which would reasonably be thought by the buying public to come from the same source, or thought to be affiliated with, connected with, or sponsored by, the trademark owner." *Chrysler Corp. v. Vanzant*, 1997 WL 547993 *2 (9th Cir. Aug. 28, 1997) (citing 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS §§ 24.6; 24:65). Such a trademark owner may recover for infringement of the trademark beyond the specific goods or services registered in the trademark.

They may recover for "any goods on which the use of the mark is likely to cause confusion." *Id.* *See also Planetary Motion, Inc. v. Techplosion, Inc.*, ---- F.3d ----, 2001 WL 930551 (11th Cir. Aug. 16, 2001); 15 U.S.C.§1052(d).

This rule is limited, however, by equitable considerations. "[A] trademark owner cannot by the normal expansion of its business extend the use or registration of its mark to *distinctly different* goods or services not comprehended by its previous use . . . where the result could be a conflict with valuable intervening rights established by another through extensive use . . . of the same or similar mark for like or similar goods and services." *Carnival Brand Seafood Co. v. Carnival Brands, Inc.*, 187 F.3d 1307, 1310-11 (11th Cir. 1999) (citations and quotations omitted); *Physicians Formula Cosmetics, Inc. v. West Cabot Cosmetics, Inc.*, 857 F.2d 80, 82 n.1 (2d Cir. 1988). Courts determine the proper scope of protection of a mark in the context of intervening uses by applying the "source or sponsorship" test. Under this test, a trademark owner has "protection against use of its mark on any product or service which would reasonably be thought by the buying public to come from the same source, or thought to be affiliated with, connected with, or sponsored by, the trademark owner." *Planetary Motion, Inc.*, ---- F.3d ----, 2001 WL 930551 (citing MCCARTHY at § 24:6). Ultimately, the related goods test is "merely a facet of the likelihood of confusion test and therefore requires an inquiry into [the] seven factors affecting the likelihood of confusion . . . ." *Tally-Ho, Inc. v. Coast Cmty. Coll. Dist.*, 889 F.2d 1018, 1027 (11th Cir. 1989); 2 J. THOMAS MCCARTHY, TRADEMARK AND UNFAIR COMPETITION § 24:6, at 183 (2d ed. 1984 & Supp. 1991) ("The 'related goods' test is merely a facet of the ultimate and final test of 'likelihood of confusion.'").

Here, ISR provides evidence on only two of the six factors. While ISR provides some evidence on the degree of similarity between the marks and the intent of the alleged infringers in adopting their mark to arguably create a genuine issue of material fact, its failure to address the other four factors make summary judgment for Defendants appropriate on this additional basis.

E. Lanham Act Violations

Defendants next move for summary judgment on ISR's Lanham Act claim. Pursuant to 15 U.S.C. § 1125(a)(1)(A),

> Any person who, on or in connection with any goods or services . . . 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– 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, . . . 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.

Thus, in order to state a claim under §§ 43(a) of the Lanham Act, a plaintiff must allege: (1) that defendant made material false or misleading representations of fact in connection with the commercial advertising or promotion of its product; (2) in commerce; (3) that are either likely to cause confusion or mistake as to (a) the origin, association or approval of the product with or by another, or (b) the characteristics of the goods or services; and (4) injure the plaintiff. *See Cottrell, Ltd. v. Biotrol Intern., Inc.*, 191 F.3d 1248, 1252 (10th Cir. 1999) (citations omitted).

ISR alleges four violations of the Lanham Act: (1) that Defendants attempted to reserve the names Harvey Barnett, Inc. and Infant Swimming Research with the Colorado Secretary of State; (2) Defendants copied the registration and BUDS form used by ISR; (3) Defendants have a doctored *Boulder Daily Camera* article on their website which states that Ms. Heumann was a "former" ISR instructor in 1993, although she was still with ISR; and (4) Defendants state in a Yellow Page ad that they have had "proven results since 1990."

The first allegation, the attempted reservation of the names Harvey Barnett, Inc. and Infant Swimming Research, fails as a matter of law. It is undisputed that the attempted reservations were done by Michael Shidler. *See* Exhibits 8-9. Although Mr. Shidler is the spouse of a Defendant, he is not a party to this case and ISR has made no effort to legally link his actions to the Defendants through agency theory or some other doctrine. Further, these attempted reservations were not successful and, thus, there was no commercial attempt to link the Defendants' service to either of these names. Therefore, no violation occurred.

ISR's second allegation, that the registration and BUDS forms have been copied, also fails as a matter of law. Even assuming that exact replicas of the ISR forms are used by Defendants, there is no evidence that these forms are "false or misleading representations of fact" or that they are used "in connection with the commercial advertising or promotion of its product." This allegation therefore does not state a claim pursuant to 15 U.S.C. § 1125(a)(1)(A).

ISR's third allegation regards a doctored article on Defendants' website. The article is dated July 25, 1993 and is entitled "*Teaching kids to swim: safety first, fun later.*" The website states that the article is "Excerpted from the Boulder Daily Camera." The bottom of the article contains biographical information in italics, and appears to be part of the original published article. It states that Ms. Heumann:

> was a certified Infant Swimming Research instructor and Master Instructor for 16 years during the 80's and 90's . . . Currently she teaches a program called 'Infant Aquatic Survival' and has joined other aquatic experts in a network dedicated to preventing aquatic

> tragedy through effective survival swimming instruction. The name of this organization is Infant Aquatics.

Exhibit 16 at 2. It is undisputed that in 1993 Ms. Heumann was teaching for ISR, and that Infant Aquatic Survival had not yet come into existence. This allegation therefore states a claim for the first two elements necessary to prove a claim under 15 U.S.C. § 1125(a)(1)(A). However, ISR provides no evidence showing that this biographic information is either likely to cause confusion or mistake as to (a) the origin, association or approval of the product with or by another, or (b) the characteristics of the goods or services. Likewise, ISR has provided no evidence regarding injuries that it has suffered as a direct result of this web site. *See Cottrell, Ltd. v. Biotrol Intern., Inc.*, 191 F.3d 1248, 1252 (10th Cir. 1999) (citations omitted). ISR, therefore, fails to present a genuine issue of material fact.

ISR's fourth allegation is that Defendants have advertised that they achieved "PROVEN RESULTS SINCE 1990." However, Defendants were ISR instructors in the early 1990's. *See* Exhibit 11. ISR argues that the "proven results" are the proven results of the ISR program, and a genuine issue of material fact exists whether the advertising lures customers into the mistaken impression that Infant Aquatic Survival was not a new business. *See* Barnett Affidavit at ¶ 17. I agree in part. Defendants use the phrase in connection with Infant Aquatic Survival, an entity that did not exist in 1990. While Defendants argue that they individually have had proven results since 1990, Infant Aquatic Survival has not. ISR has therefore once again created a genuine issue of material fact as to whether Defendants' use of the phrase violates the first two elements of 15 U.S.C. § 1125(a)(1)(A). However, ISR once again fails to show that the Yellow Page ad is by itself likely to cause confusion or mistake as to (a) the origin, association or approval of the product with or by another, or (b) the characteristics of the goods or services. Further, ISR has again failed to provide any evidence of injury. *See Cottrell, Ltd. v. Biotrol Intern., Inc.*, 191 F.3d 1248, 1252 (10th Cir. 1999) (citations omitted). I therefore grant Defendants' motion for summary judgment on ISR's Lanham Act claim.

F. Unfair Competition and Deceptive Trade Practices

Defendants next move for summary judgment on ISR's unfair competition and deceptive trade practices claim. ISR brings this claim under the Colorado Consumer Protection Act ("CCPA"). The CCPA is a remedial statute intended to deter and punish deceptive trade practices committed by businesses in dealing with the public. *See People ex rel. Dunbar v. Gym of Am., Inc.,* 493 P.2d 660, 667-68 (1972); *People ex rel. MacFarlane v. Alpert Corp.*, 660 P.2d 1295, 1297 (Colo. Ct. App. 1983). The CCPA's broad legislative purpose is "to provide prompt, economical, and readily available remedies against consumer fraud." *Western Food Plan, Inc. v. Dist. Court,* 598 P.2d 1038, 1041 (1979). This purpose is achieved through injunctions and civil penalties such as treble damages and attorney's fees. *See* Colo. Rev. Stat. §§ 6-1-107 to -112 & -113(2).

Pursuant to the CCPA:

> (1) A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person:
> (a) Knowingly passes off goods, services, or property as those of another;
> (b) Knowingly makes a false representation as to the source, sponsorship, approval, or certification of goods, services, or property;
> (c) Knowingly makes a false representation as to affiliation, connection, or association with or certification by another . . . .

Colo. Rev. Stat. § 6-1-105.

Thus, to establish a private claim under the Colorado Consumer Protection Act (CCPA), a plaintiff must show that: (1) a defendant engaged in an unfair or deceptive trade practice; (2) the challenged practice occurred in the course of the defendant's business, vocation, or occupation; (3) the challenged practice significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) the plaintiff suffered injury in fact to a legally protected interest; and (5) the challenged practice caused the plaintiff's injury. *Hall v. Walter,* 969 P.2d 224 (Colo. 1998).

ISR alleges that the same four violations of the Lanham Act are also violations of the CCPA. As in ISR's Lanham Act claim, Defendants attempted reservation of the names Harvey Barnett, Inc. and Infant Swimming Research with the Colorado Secretary of State is not a CCPA violation. First, it was not accomplished by a party to this suit. Second, the attempt was unsuccessful, and thus had no impact on the public as required by the CCPA. *See Hall v. Walter,* 969 P.2d 224 (Colo. 1998).

ISR's second allegation regarding the registration and BUDS forms could be construed as a false representation as to the source or sponsorship of the Infant Aquatic Survival program, falsely giving the impression that ISR and Defendants' program are in some way linked. However, ISR has failed to show any evidence that it has suffered injury in fact as a result of this use. *See Hall v. Walter,* 969 P.2d 224 (Colo. 1998). Thus, no CCPA claim is stated. Likewise, ISR fails to show evidence of any injury in fact as a result of its third and fourth allegations regarding the *Boulder Daily Camera* article and Yellow Page ad. I therefore grant Defendants' motion for summary judgment on ISR's CCPA claim.

G. Exemplary Damages

Defendants next move for summary judgment on ISR's claim for exemplary damages. Exemplary damages are a demand for relief but not a separate claim. *See Fernandez v. Bridgestone/Firestone, Inc.*, 105 F.Supp.2d 1194 (D. Colo. 2000). Further, on the record before me exemplary damages are unwarranted as a matter of law. I therefore grant Defendants' motion for summary judgment on this claim.

Accordingly, IT IS ORDERED that:

1. Defendants' Motion for summary judgment is GRANTED;
2. Plaintiffs' claims are DISMISSED; and
3. Costs are awarded to the Defendants.

Dated: January 4, 2002, in Denver, Colorado.

BY THE COURT:

Lewis T. Babcock

Lewis T. Babcock, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No. 00-B-731

The undersigned certifies that a copy of the foregoing Order was served on Jan 7, 2002, by:

(X) delivery to:

Magistrate Judge O. Edward Schlatter

(X) depositing the same in the United States Mail, postage prepaid, addressed to:

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