

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

---

AVANTI CENTER, INC., f/k/a  
RESEARCH AND DEVELOPMENT  
IN PEDIATRIC THERAPY, INC., formerly d/b/a  
SPECIAL CHILDREN'S CENTER, INC.,

Plaintiff,

OPINION and ORDER

v.

11-cv-196-bbc

AVANTI EDUCATIONAL PROGRAMS, INC.,  
PATRICIA L. WILBARGER,  
AVANTI OT PROJECTS, LLC and  
KRIS WORREL,

Defendants.

---

This case arises out of a dispute about who gets to use the word “Avanti” in connection with summer camps that provide therapy services to children with special needs. Plaintiff Avanti Center, Inc. contends that it is the owner of the “Avanti” mark and that defendants’ use of the word Avanti constitutes trademark infringement in violation of 15 U.S.C. § 1125(a), unfair trade practices in violation of Wis. Stat. § 100.20, fraudulent representation under Wis. Stat. § 100.18 and unfair competition and trademark infringement in violation of state and federal common law. Defendants have filed

counterclaims, contending that plaintiff's use of "Avanti" constitutes trademark infringement, fraudulent representation, unfair trade practices and misappropriation. In addition, defendants contend that plaintiff has filed a fraudulent state trademark application. Both sides have moved for preliminary injunctions, seeking orders that would enjoin the other from using the Avanti name in conjunction with a summer camp for children with sensory integration disorders. Dkt. ##15, 22.

After considering the facts and arguments presented by the parties, I conclude that neither side has shown a reasonable likelihood of prevailing on its respective trademark infringement claims. Specifically, neither side has shown that it has trademark rights to the term "Avanti." Therefore, I will deny the motions for a preliminary injunction.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed solely for the purpose of deciding this motion.

## UNDISPUTED FACTS

### A. The First Avanti Camp

Defendant Patricia Wilbarger is an occupational therapist who specializes in "sensory integration processing" and "sensory defensiveness." In 1982, she designed a summer camp for treating children with sensory integration dysfunctions. She offered the camp in 1983 at a site near Santa Barbara, California, and called it "Avanti . . . Camp Cachuma." The

camp included adventure and group activities as well as individualized therapy programs presented by occupational therapists who were nationally recognized for their specialized knowledge of sensory integration.

Also in 1983, Wilbarger and her daughter, Julia Wilbarger, began conducting business under the names “Avanti Ventures” and “Avanti . . . Camp Cachuma.” Beginning in approximately 1989, defendant Wilbarger began operating under the business name “Avanti Educational Programs.” The business was formally incorporated in 2001 as Avanti Educational Programs, Inc. (one of the defendants in this action). Defendant Patricia Wilbarger is the president of defendant Avanti Educational Programs, which uses the name “Avanti” in association with seminars, publications, group training, retreats and consultations focusing on sensory integration theory and practice. Wilbarger has used the Avanti name in business documents, including banking and tax documents, since 1983. Dkt. ##18-3, 18-4.

After 1989, defendant Wilbarger stopped offering the Avanti camp in California. From 2002 to 2004, Renee Okoye, an occupational therapist, replicated Wilbarger’s Avanti camp in New York with Wilbarger’s permission. The New York camp was called Camp Dove Avanti East.

### B. Avanti Camp in St. Croix, Wisconsin

In approximately 1984, occupational therapist Eileen Richter and fellow therapist Nancy Lawton-Shirley learned about Camp Cachuma and discussed the possibility of having a similar camp in the Midwest. These discussions led to several telephone conversations in 1984, 1985 and 1986 with defendant Wilbarger about the idea. In 1986, Nancy Lawton-Shirley attended Camp Cachuma and worked there with Wilbarger. Lawton-Shirley began the process of replicating the camp in the Midwest with Wilbarger's permission,.

In 1987, Lawton-Shirley and Richter formed plaintiff Research and Development in Pediatric Therapy, Inc., a non-profit corporation through which donors could make tax deductible contributions to be used for the Midwest Avanti camp. In 1989, Lawton-Shirley and Richter held a camp in Hudson, Wisconsin, called Avanti – Camp St. Croix, at the YMCA Camp St. Croix. The camp was an intensive sensory integration summer camp for children who have average or above average intelligence but have received a diagnosis of a learning disability or sensory integration dysfunction. It included canoeing, kayaking, sailing, outdoor games, hiking, nature activities, arts and crafts, music, swimming, horseback riding and the “Wonderlab,” which is a specific sensory environment. The materials used for the camp were created primarily by Patricia and Julia Wilbarger and defendant Wilbarger assisted Lawton-Shirley and Richter in opening the camp.

Plaintiff Research and Development in Pediatric Therapy, Inc. was listed as the

“sponsor” of the Avanti camp on marketing and fund-raising materials. From 1987 to 2005, the board of directors of plaintiff consisted solely of Lawton-Shirley, Richter and defendant Wilbarger. From 1989 until 2009, Lawton-Shirley and Richter, along with a collaboration of therapists and other professionals including defendant Wilbarger, planned, marketed and raised funds for the Wisconsin Avanti camp. During the same period, Lawton-Shirley wrote grant applications through plaintiff for funds for the camp and wrote letters to potential donors using plaintiff’s letterhead. In addition, Lawton-Shirley and defendant Wilbarger founded an adjunct to the camp called the Avanti Summit, which was a gathering of therapists who were involved in the camp that met five to six times each year to learn and discuss evolving theories, treatment and plans for camp.

Since 1989, plaintiff has always been identified in camp brochures and grant requests as the “sponsor” of Camp Avanti. For example, grant applications and donation requests filed by Lawton-Shirley from 1999 to 2007 stated that plaintiff was founded “to provide therapeutic programs for children in the St. Croix Valley area” and that the company’s “primary project, at this time, is Camp Avanti St. Croix.” Dkt. #26-1. In addition, plaintiff’s independent auditor report for years 2006 to 2008 shows that plaintiff’s revenue came from grants, therapy services and “camper fees” and that the company incurred a “camp expense” each year. Dkt. #27-4. Plaintiff has paid the annual insurance, marketing and advertising costs for Camp Avanti since 1989.

In 2006, plaintiff merged with Special Children's Center, which was a separate company owned by Lawton-Shirley engaged in the treatment of children with sensory integration disorder. The merger was essentially a sale by Lawton-Shirley of Special Children's Center's equipment, relinquishment of its corporate status and termination of the long term lease of its building to plaintiff. After the merger, an organizational chart presented at a board meeting showed that plaintiff had four primary programs, namely, Camp Avanti, the Special Children's Center Project, Research and Education. Dkt. #27-1 at 41. Additionally, a newsletter sent by Lawton-Shirley to members of the public in late 2006 identified Camp Avanti and the Special Children's Center as being plaintiff's two primary projects. Dkt. #27-2; see also dkt. #27-3 (2006 letter to potential donors stating that plaintiff "is a non-profit agency that is currently the parent corporation of two programs: Camp Avanti and Special Children's Center.").

After the merger, plaintiff's board of directors changed and neither defendant Wilbarger nor Lawton-Shirley served on the board. Lawton-Shirley continued to manage the company until a new executive director was hired in 2008. The same core group of therapists and clinicians who had been involved in the Avanti camp since its inception, including defendant Wilbarger, continued to be involved in camp planning.

In 2008, Linda Ewing was hired as executive director of the company. Neither she nor any of the board members had any experience in running the Avanti camp. In 2009,

defendant Wilbarger attended the Avanti–St. Croix camp and believed it had problems. Specifically, she thought the camp was too “recreational” and did not have enough licensed therapists. In 2010, Wilbarger learned that Ewing had told defendant Kris Worrell and Eileen Richter that they would not be permitted to codirect the Avanti camp as planned because the company intended to run the camp with a new camp director.

On August 30, 2010, plaintiff changed its name to “Avanti Center, Inc.” It recently erected a building in Hudson, Wisconsin with a large sign advertising the “Avanti Center.” Upon learning that plaintiff had renamed its business to “Avanti Center,” defendant Wilbarger sent a letter to the board president, requesting that plaintiff cease using the name “Avanti.”

In September and October 2010, defendant Wilbarger, defendant Worrell and other therapists held an “Avanti Summit” to discuss the future of the Avanti camp and problems arising from plaintiff’s use of the Avanti name. The group decided to offer an Avanti camp at the YMCA Camp Icagowan site in Amery, Wisconsin, in 2011 and to educate consumers about the difference between the Icagowan and St. Croix camps. The group at the Summit also decided to establish a non-profit entity, defendant “Avanti OT Projects, LLC,” to receive contributions toward camp expenses.

After defendants announced their 2011 camp, plaintiff sent letters to the public claiming ownership of the Avanti name and stating that defendant Wilbarger had no rights

to use it.

## OPINION

To obtain preliminary injunctive relief, the moving party must demonstrate some likelihood of prevailing on the merits, that it has no adequate remedy at law and that it will suffer irreparable harm if the injunction is denied. AM General Corp. v. DaimlerChrysler Corp., 311 F.3d 796, 803 (7th Cir. 2002); Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6, 11 (7th Cir. 1992). If the party satisfies these threshold elements, it must then show that the harm it would suffer if denied an injunction would outweigh the harm the opposing party would suffer if the injunction issues and that the public interest would not be affected negatively by an issuance of an injunction. Abbott Laboratories, 971 F.2d at 11-12.

### A. Likelihood of Success

Section 43(a) of the Lanham Act creates a federal civil remedy against any person who uses in commerce “any word, term, name, symbol, or device” or “any false designation of origin” if it “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.” 15 U.S.C. § 1125(a)(1). Because “the purpose of a trademark, whether federally

registered or unregistered, is to designate the origin of goods, the infringement of such a trademark is actionable under section 43(a).” TMT North America, Inc. v. Magic Touch GmbH, 124 F.3d 876, 881 (7th Cir. 1997) (quoting W.T. Rogers Co. v. Keene, 778 F.2d 334, 337 (7th Cir. 1985)). The Act authorizes federal courts “to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable . . . to prevent the violation of any right” under § 43(a) of the Lanham Act. 15 U.S.C. § 1116(a).

For a party to show a “false designation of origin,” there must be a true designation of origin. Thus, the first question in a § 43(a) case is whether any party has trademark rights in the words or symbols that are at issue. A party may assert trademark rights in an unregistered trademark if the mark has acquired “secondary meaning.” Thomas & Betts Corp. v. Panduit Corp., 138 F.3d 277, 291 (7th Cir. 1998); See also 5 McCarthy, Trademarks and Unfair Competition, § 27:14 (4th ed. 2001).

A mark has secondary meaning if there exists “a *mental association* in buyers’ minds between the alleged mark and a single source of the product.” Packman v. Chicago Tribune Co., 267 F.3d 628, 641 (7th Cir. 2001) (citing 2 McCarthy, Trademarks and Unfair Competition, § 15:5, at 15-9 (4th ed. 2001) (emphasis in original)). In other words, secondary meaning exists if, “in the minds of the public, the primary significance of a product feature . . . is to identify the source of the product rather than the product itself.”

Thomas & Betts, 138 F. 3d at 291) (quotation and citation omitted). The Court of Appeals for the Seventh Circuit considers the following seven factors in determining whether a mark has acquired secondary meaning: (1) direct consumer testimony; (2) consumer surveys; (3) exclusivity, length and manner of use; (4) amount and manner of advertising; (5) amount of sales and number of customers; (6) established place in the market; and (7) proof of intentional copying. Echo Travel, Inc. v. Travel Associates, Inc., 870 F.2d 1264, 1267 (7th Cir. 1989).

In this case, neither plaintiff nor defendants have shown that they have a likelihood of establishing trademark rights in the Avanti mark. Neither side has submitted direct consumer testimony or surveys in which consumers have linked “Avanti” with either plaintiff or defendants. In support of its claim to the term “Avanti,” plaintiff relies solely on its sponsorship and marketing of the Avanti Camp in St. Croix. However, plaintiff points to nothing in its advertisements or grant requests that shows an attempt to link the word “Avanti” with plaintiff’s corporation. Rather, the advertising lists plaintiff as the sponsor of the camp and promotes the camp itself, not plaintiff. In addition, the journal and newspaper articles in the record discussing the camp make no particular connection between plaintiff and the camp. For example, a 1989 article from the Hudson Star Observer describing the first Avanti camp held in Hudson, Wisconsin, states that plaintiff is the “sponsor” of the camp, but adds that that defendant Wilbarger created the Avanti model. Dkt. #19-3.

Similarly, a 1991 article from the Occupational Forum describing the camp does not mention plaintiff at all, but describes defendant Wilbarger as the creator of the first Avanti camp. Dkt. #19-5.

It makes sense that plaintiff made no particular efforts to advertise its own name in conjunction with the camp or the term “Avanti” because the evidence in the record suggests that until plaintiff merged with the Special Children’s Center, its sole purpose was as a funding source for the camp. The camp was operated by a group of therapists, some who were linked to plaintiff and some who were not. It was not until plaintiff merged with Special Children’s Center that it expanded its programs, and it was not until 2010, when it changed its name to “Avanti Center, Inc.”, that it made efforts to encourage consumers and donors to identify its company with the term Avanti.

Moreover, plaintiff’s use of the term “Avanti” in connection with sensory integration therapy or camp settings was not exclusive. A therapist not associated with plaintiff held an “Avanti” camp in New York from 2002 to 2004. In addition, defendant Wilbarger ran an Avanti camp in California until 1989 and has conducted business and published articles in the field of sensory integration therapy through her company “Avanti Educational Programs, Inc.” from 1989 to the present day. Finally, there is no suggestion that plaintiff was involved in the “Avanti Summits” that were held multiple times each year and at which therapists met to discuss evolving therapy methods. In sum, plaintiff’s use of the term “Avanti” in

connection with sensory integration and therapeutic services has not been exclusive and until recently, plaintiff has not used the term Avanti to promote its own organization. Thus, plaintiff has not shown a likelihood of success in establishing a trademark right to the Avanti mark.

Defendant Wilbarger's claim to the mark suffers from similar problems. Although it is undisputed that Wilbarger was the first to use the term Avanti in connection with sensory integration camp therapy services and that she used the term in connection with her business, there is no evidence other than defendants' say-so that Wilbarger has sought to encourage a connection between the term "Avanti" and herself or her unique therapy methods. For example, defendants assert that "[o]ccupational therapists who specialize in sensory integration recognize the name 'Avanti' as a source indicator of services based on the well-recognized Wilbarger protocol." Dfts.' PFOF, dkt. #16, ¶ 37. However, the only evidence offered to support this assertion is a conclusory statement in defendant Worrell's affidavit.

Another problem with Wilbarger's trademark claim is that her use of "Avanti" has not been exclusive. Wilbarger alleges that she gave permission to Lawton-Shirley, Richter and Renee Okoye (the therapist in New York) to replicate her camp model and use the Avanti name for sensory integration therapy camps. It is true that rights in a trademark can be acquired and maintained through the use of the mark by a controlled licensee, TMT North

America, 124 F.3d at 882, but defendant cannot make the necessary showing that either Wilbarger or her licensees have had exclusive control over use of the Avanti name .

First, defendants' evidence that Wilbarger granted a license to Lawton-Shirley and Richter in 1987 is minimal. Defendants have submitted no written agreement or any documentary evidence that such a license existed. The only contemporaneous evidence in the record is a letter dated January 12, 1987 from Richter to Wilbarger stating "As per our recent phone conversation I am writing to confirm our invitation for you to provide supervision and consultation at the First Replication of your Avant[i] Summer Camp Program." Dkt. #18-4. In the letter Richter states that she is trying to "come up with a name" for the camp and proposes the name "Camp Cacoan." Id. There is no mention of an oral license to the name "Avanti," and Richter's proposal of the name "Camp Cacoan" suggests that the parties had not even decided to use "Avanti." The only evidence in the record to support defendants' assertion that Wilbarger granted an oral license to Lawton-Shirley and Richter are the affidavits of Wilbarger, Lawton-Shirley and Richter themselves. Dkt. #18, ¶ 10; #19, ¶ 7; #31, ¶ 5. Although this is some evidence that Wilbarger granted a license, the affidavits provide no description of the details of the license or whether the license was tied specifically to Lawton-Shirley and Richter rather than to their non-profit corporation or the collaboration of therapists who contributed to the camp.

Second, even if defendants had established the existence of a license between

defendant Wilbarger, Lawton-Shirley and Richter, the evidence suggests that the license was nothing more than a “naked license.” In particular, there is no evidence that Wilbarger retained reasonable control or supervision over the Wisconsin camp or the ways in which the Avanti name was used.

The owner of a trademark abandons her mark by granting a naked license. Eva’s Bridal, Ltd. v. Halanick Enterprises, Inc., 639 F.3d 788, 790 (7th Cir. 2011). To avoid abandoning trademark rights through a license, a trademark owner must retain control “sufficient under the circumstances to insure that the licensee’s goods or services would meet the expectations created by the presence of the trademark.” Id. (quoting Restatement (Third) Unfair Competition § 33 (1995)). It is not enough that a trademark owner is confident that a licensee will offer high quality goods or services. Id. Rather, the “decisionmaking authority over quality [must] remain with the owner of the mark.” Id. (holding that plaintiffs abandoned trademark right by granting license under which they exercised no authority over defendants’ business and finding it irrelevant that defendants operated high quality business).

In this case, the evidence suggests that although defendant Wilbarger was “involved” to some degree in the planning and establishment of the Avanti camp in St. Croix, the camp was sponsored by plaintiff and operated through a collaboration of therapists. (The record contains no details about Wilbarger’s specific role or contributions to camp planning.)

Therapists from around the country met each year to exchange ideas and offer their services for the camp. There is no suggestion that Wilbarger had veto power or final say on the workings of the camp or the use of the term Avanti in connection with the camp. In addition, there is no evidence that the licensees were required to use specific therapy methods at the camp or advertise the Avanti model as being Wilbarger's model. In fact, there is no evidence that the alleged license to use the Avanti name contained any conditions at all or that Wilbarger incurred any benefit from the license. Thus, the evidence suggests that to the extent that any licenses existed, they were naked licenses.

In sum, neither plaintiff nor defendants have adduced facts showing that they have rights to the "Avanti" mark that are protected by § 43 of the Lanham Act. Thus, neither side has shown a likelihood of success on the merits of their trademark infringement claim.

Because neither side has shown a likelihood of success on its trademark claims, I need not discuss the other elements of a preliminary injunction analysis. I note, however, that the existence of two therapy camps of the same name within 50 miles of each other will likely cause confusion to potential campers and donors and has the potential to harm both plaintiff and defendants. Even so, "a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, 549 F.3d 1079, 1085 (7th Cir. 2008) (quotations and citations omitted). In this instance, although both sides

may suffer harm, neither has shown that it is entitled to a preliminary injunction. They would be well advised to choose new names for both camps or find some other way to settle their dispute so as to avoid the litigation costs they will incur in prolonging it.

ORDER

IT IS ORDERED that

1. The motion for a preliminary injunction filed by defendants Patricia Wilbarger, Avanti OT Projects, LLC, Kris Worrell and Avanti Educational Programs, Inc., dkt. #15, is DENIED.

2. Plaintiff Avanti Center, Inc.'s motion for a preliminary injunction, dkt. #22, is DENIED.

Entered this 15th day of June, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge