

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

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BRAINSTORM INTERACTIVE, INC.,

Plaintiff,

v.

SCHOOL SPECIALTY, INC.,

Defendant.

ORDER

14-cv-50-wmc

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Before the court is plaintiff Brainstorm Interactive, Inc.'s motion to amend or correct the court's December 5, 2014, opinion and order granting defendant School Specialty, Inc.'s ("SSI") partial motion for summary judgment. (Dkt. #102.) Specifically, plaintiff contends that the court erred in failing to address its false advertising claim under the Lanham Act, 15 U.S.C. § 1051 *et. seq.* While Brainstorm purported to move for summary judgment on a claim that SSI's use of the phrase "School Specialty Exclusive" was false "under Wisconsin and federal law," citing to both 15 U.S.C. § 1125(a)(1)(B) and Wis. Stat. 100.81 (Pl.'s Opening Br. (dkt. #33) 9), Brainstorm failed to plead a false advertising claim under the Lanham Act, as it must. *See Anderson v. Donahoe*, 699 F.3d 989, 998 (7th Cir. 2012) (plaintiff cannot amend its complaint through arguments asserted at summary judgment). Plaintiff affirmatively alleges Lanham Act claims for infringement and counterfeiting, but *only* a state law claim for "**Unfair Trade Practice under Wisconsin Statute § 100.18(1).**" (Compl. (dkt. #1) (bolding in original).)

Even if plaintiff had alleged a false advertising claim, the claim would fail for at least one of the reasons that plaintiff's Wis. Stat. § 101.18 claim failed on summary

judgment: plaintiff failed to offer proof that it was injured by defendant's use of the "School Specialty Exclusive" image, nor could it. *See First Health Group Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 806 (7th Cir. 2001) ("Section 43(a)(1)(B) offers relief only to one who 'is or is likely to be damaged by' the misrepresentation." (quoting 15 U.S.C. § 1125(a)(1))). As already explained in the court's summary judgment opinion, there was no other KnowItAll option for consumers at the time defendant wrongfully used the image in connection with KnowItAll products. (12/5/14 Opinion & Order (dkt. #96) 37-39.) As such, defendant did not divert sales from plaintiff or another third-party licensee. (*Id.*) Indeed, plaintiff received royalty payments for post-termination sales. (*Id.* at 39) Accordingly, plaintiff's motion to correct will be denied as meritless and implicit motion to amend as futile.

#### ORDER

IT IS ORDERED that plaintiff Brainstorm Interactive, Inc.'s motion to correct or amend the court's December 5, 2014, order (dkt. #102) is DENIED.

Entered this 9th day of December, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge