IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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THERMAL DESIGN, INC. and
SPORTS INTERIORS, INC.,

Plaintiffs,

v.

INDOOR COURTS OF AMERICA, INC. and
THE CINCINNATI INSURANCE COMPANY,

Defendants.

OPINION AND ORDER

03-C-249-C

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In this civil action for injunctive and monetary relief, plaintiffs Thermal Design, Inc. and Sports Interiors, Inc. are suing defendants Indoor Courts of America, Inc. and The Cincinnati Insurance Company for 1) tortious interference with a prospective business contract; 2) unfair competition and fraudulent representation under Wisconsin law; 3) unfair competition and false advertising under § 43(a)(1)(A) of the Lanham Act (15 U. S.C. § 1125(a)); 4) unfair competition and false advertising under § 43(a)(1)(B) of the Lanham Act (15 U. S.C. § 1125(a)); 5) disparagement under Wisconsin law; and 6) defamation under Wisconsin law. This court has subject matter jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331 and 1338. Because the state claims appear to be "so related

to claims in the action . . . that they form part of the same case or controversy," supplemental jurisdiction attaches under 28 U.S. C. §1367(a).

Presently before the court are defendants' motion for summary judgment on all of plaintiffs' claims and plaintiffs' motion for summary judgment on its claim under § 43(a)(1)(B) of the Lanham Act. I will grant defendants' motion as to plaintiffs' claims for unfair competition and false advertising under § 43(a)(1)(B) of the Lanham Act and as to plaintiffs' claims for unfair competition and fraudulent representation, disparagement and defamation under Wisconsin law because plaintiffs have adduced no evidence from which a reasonable jury could find that any of the statements in defendant Indoor Courts' advertisements, press release or video are false, except the phrase "Cook County fire marshal." With respect to this single exception, plaintiffs have adduced no evidence to show an injury resulting from Indoor Courts' use of that phrase. Therefore, I will grant defendants' motion as to plaintiffs' claim that use of that phrase violates § 43(a)(1)(B) of the Lanham Act and Wisconsin law regarding unfair competition and fraudulent representation, disparagement and defamation. Because plaintiffs have failed to develop their arguments regarding § 43(a)(1)(A) of the Lanham Act and tortious interference with contract, I consider those claims waived and will grant defendants' motion with respect to them.

For the purpose of deciding these motions for summary judgment, I have looked to

the parties' proposed findings of fact to determine whether there are any material facts in dispute. Because the parties have proposed so few facts supported by admissible evidence for the court to consider, it is a challenge to reach the merits of this case. Fed. R. Civ. P. 56(e) requires supporting and opposing affidavits to be made on personal knowledge, to set forth such facts as would be admissible in evidence, and to show that the affiant is competent to testify to the matters stated in the affidavit. Proposed facts that are supported only by the testimony of a witness who lacks personal knowledge of the matters about which he testifies are disregarded when the court makes findings of undisputed fact.

Much of plaintiffs' evidence is inadmissible. In addition to ignoring citation rules in Rule I(B)(2) in this court's Procedure to be Followed on Motions for Summary Judgment, plaintiffs' attorney attempts to introduce documents about which he has no personal knowledge. One proposed fact will illustrate the problems plaintiffs' proposed facts present. Plaintiffs state that the "Simple Saver System" does not use "faced" insulation. Plts.' Amended Reply to Dfts.' Resp. to PPFOF, dkt. #158, ¶6. Plaintiffs cite "Exhibit 5" as support for this fact. Exhibit 5 is an advertisement by plaintiffs, introduced through an affidavit by plaintiffs' attorney. Defendants object to the admission of this evidence on hearsay grounds. Plaintiffs respond by stating that Exhibit 5 is not being offered to prove the truth of the matters asserted in the brochure, "but to demonstrate components of the Simple Saver System as advertised to potential customers." Id.

Plaintiffs' assertion makes no sense. Plaintiffs have no reason to offer the advertisement except to show that their Simple Saver System does not use a certain kind of insulation. This is "the truth of the matter." What plaintiffs advertise to potential customers is immaterial to any issue in this case. Plaintiffs propose other facts to show that defendant's Energy Miser System uses faced insulation, Id. at ¶23, and that a key assumption in an article referred to in one of Indoor Courts' advertisements is that "faced insulation is used." Id. at ¶53. Plaintiffs seem to be trying to use Exhibit 5 to show that the Simple Saver System does not use faced insulation. Plaintiffs' attorney has not established that he is in a position to testify to this fact. See Fed. R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."); Rule I(C)(1)(e) of this court's Procedure to be Followed on Motions for Summary Judgment ("Affidavits must be made by persons who have first hand knowledge and must show that the person making the affidavit is in a position to testify about those facts."). As another illustration, to support their assertion that defendant Indoor Courts' Energy Miser System uses faced insulation, plaintiffs cite "Exhibit 11," which is a brochure concerning the Energy Miser System. Id. at ¶23. Defendants object to this exhibit on hearsay grounds. Id. Plaintiffs concede that the brochure is hearsay, but argue that it is admissible under the party admission exception, Fed.

R. Evid. 801(d)(2)(B), and "has been authenticated by Mike Thomas, an employee of [Indoor Courts of America]." Id. However, plaintiffs fail to cite any evidence of authentication by Mike Thomas. The parties were warned in the Procedure to be Followed on Motions for Summary Judgment that "[t]he court will not search the record for evidence." Rule I(C)(1).

The Court of Appeals for the Seventh Circuit has stated:

> This Court, along with the other twelve circuits has in the past recognized and will continue to recognize the importance of enforcing its procedural rules for filing and responding to motions for summary judgment; if we did not, we would essentially be left with a court in chaos. An entry of summary judgment will be sustained 'where the nonmovant has failed to submit a factual statement *in the form called for by the pertinent rule* and thereby conceded the movant's version of the facts, if on the basis of the factual record the movant is entitled to judgment as a matter of law.

Johnny Blastoff, Inc. v. Los Angeles Rams Football Co., 188 F.3d 427, 439 (7th Cir. 1999).

There are a number of other proposed facts that I have rejected because plaintiffs' attorney failed to follow the citation rules or because he failed to demonstrate personal knowledge about the proposed fact. See, e.g., Plts.' Amended Reply to Dfts.' Resp. to Plts.' PFOF, dkt. #158, ¶¶ 4, 5, 6, 21, 22, 23, 24, 31 (no citation at all), 36, 37, 38, 39, 40, 41, 43, 46, 50, 52, 59, 60, 61, 63, 64, 65, 68, 69, 88 (no citation at all), 90, 92, 93, 96 and 102. Even when plaintiffs cite admissible evidence, the evidence does not always support the fact proposed. See, e.g., Plts.' Responses to DPFOF, dkt. #142, ¶ 38. Rule(1)(B)(4) of

this court's procedures advises the parties that "the court will not consider facts contained only in a brief." Finally, I have not considered any of the proposed findings of fact and supporting evidence submitted by plaintiffs in conjunction with their reply brief. Plts.' PFOF, dkt. #154. Not only are such supplemental submissions not in accordance with this court's procedures, but consideration of those facts would be unfair to defendants, who have not had a chance to respond to them.

From the parties' proposed findings of fact and the record, I find that the following facts are material and not in dispute.

UNDISPUTED FACTS

Plaintiff Thermal Design, Inc. is a Nebraska Corporation that manufactures and sells the Simple Saver System, a type of ceiling insulation system. Plaintiff Sports Interiors, Inc. sells and installs Thermal Design's Simple Saver system with a specialized fabric. In addition, plaintiff Sports Interiors sells an indirect lighting fixture for indoor tennis facilities. Thermal Design has sold over 6,000 Simple Saver Systems in the past five years, resulting in millions of dollars in sales.

One of plaintiff Sports Interior's primary competitors for the sale of insulation systems and indirect light fixtures is defendant Indoor Courts of America. Defendant sells insulation systems under the trade name Energy Miser. The different insulation systems

developed by defendant are called the Energy Miser, the Tube System and the EconoCeil. Defendant sells the Energy Miser system nationwide. Defendant, The Cincinnati Insurance Company is in this suit only as defendant Indoor Courts' insurer. It took no part in the allegedly defamatory acts. Therefore, I will use "defendant" in the singular for the remainder of this opinion, referring to Indoor Courts of America.

Defendant has developed advertisements and a press release and accompanying video about its products. In one of its advertisements, defendant claims that "Energy Miser Outperforms Simple Saver by 33%!" The advertisement includes a table for the Simple Saver system and the Energy Miser System, comparing the R-values, a measure of thermal performance. The table indicates that the nine inches of insulation material used in both the Simple Saver System and Energy Miser System have an R-value of 29 but "in-place" the systems have R-values of 24 and 32 respectively. Also, the advertisement states that "[a] recent study by the North American Insulation Manufacturers Association (NAIMA), published in Metal Construction News (February 2000, pp. 58-61) confirms that, when using the same material R-values, the in-place Energy Miser System outperforms the in-place Simple Saver System by 33%." The Metal Construction News article referred to in the advertisement does not identify the Energy Miser or the Simple Saver System. However, those who conducted the study assumed that faced insulation is used when calculating the test results of the system described in the article.

Defendant distributed another advertisement that compares its TurboCaindle light fixture to plaintiff Sports Interiors' Sun Series light fixture. In the advertisement, defendant states that it has been asked frequently to explain the difference in the light output between its TurboCaindle product and plaintiff Sports Interiors' Sun Series product. The advertisement reads: "[B]ased on Sports Interiors' published data, [defendant] asked an independent lab to run a photometric study on [defendant]'s TurboCaindle fixture using the same building data." In the advertisement, defendant concludes that its product outperformed plaintiff's Sun Series product by "18% using 10 fixtures per court, and 16% using 8 fixtures per court, making the TurboCaindle system the lowest cost system to own and operate!" Defendant's TurboCaindle product outperformed plaintiff Sports Interiors' Sun Series fixture by 18%. (Plaintiffs attempted to dispute this proposed fact, Plts.' Response to DPFOF, dkt. #142, ¶31, but failed to cite admissible evidence to refute it, so I consider the fact undisputed.)

Defendant distributed the advertisement in competitive bidding situations. Defendant's president faxed the advertisement to Stan Clark of Eastern Hills Tennis Facility, a potential customer with a project on which both plaintiff Sports Interiors and defendant were bidding. Clark did not purchase plaintiff Sports Interiors' fixture. Defendant is no longer using this advertisement on its website.

In 2003, defendant developed a press release and accompanying video. The video

displays a flame test of two fabrics, one of which was labeled "Simple Saver System Sports Interiors." The press release reads:

> Prior to the Rhode Island nightclub fire, in December 2002, Northwestern University, located in Evanston, Ill., contacted Indoor Courts of America to install its Energy Miser system in the university's new five-court tennis facility. A competitive product – the Simple Saver insulating system, manufactured by Thermal Design – was specified, and subsequently rejected, by the Cook Co. fire marshal after field tests found that in the event of fire this product supported a flame and dripped molten plastic from the ceiling. Indoor Courts of America's proprietary TC-120 reflective material, a key component of the Energy Miser system, passed the fire marshal's test and was therefore specified for installation.
>
> As a result of this experience, Indoor Courts of America conducted its own flame test of each of the two products. The test was repeated numerous times and simultaneously videotaped. We have enclosed a CD-ROM featuring a video clip of our flame test for your review.
>
> It is unfortunate that inferior and unsafe components ever get used in a sports facility. We should all do everything we can to keep our clients, customers and children safe while they enjoy recreation facilities," notes Lex Kessler, Indoor Courts of America president.

Chuck Bennett, Jr., the architect and general contractor for the Northwestern University project referred to in this press release, provided Chief Alan Berkowsky, fire marshal for the City of Evanston, Illinois, a sample of plaintiff Sports Interiors' fabric specified for use in the Northwestern facility. Chief Berkowsky told Bennett that he had performed a flame test on plaintiffs' material and that the results were not favorable. Berkowsky did not approve of the use of plaintiff Sports Interiors' fabric in the

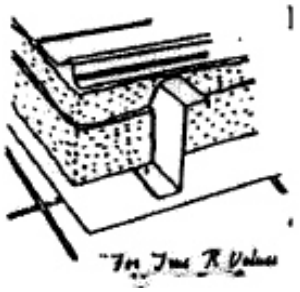
Northwestern facility after his flame test showed that the material "burnt violently," supported a flame and dripped molten plastic. Northwestern University did not select plaintiff Sports Interiors to install a system for a number of reasons, one of which was Bennett's concerns regarding the fire rating of the material. Another was that plaintiff's system did not match the roof lines of the building, creating more expense to install plaintiff's system.

Bennett contacted defendant to find out whether it would be interested in bidding on the Northwestern project. Defendant provided Berkowsky with its TC-120 product so that he could perform the same flame test that he had performed on plaintiff Sports Interiors' product. Berkowsky found that defendant's material "responded as he would have expected a fire retardant material to respond." Berkowsky approved defendant's material for use at the Northwestern tennis facility. Plaintiffs do not know of any misrepresentations by defendant that caused Sports Interiors to lose the Northwestern project and consequently, plaintiff Thermal Design to lose the sale of its Simple Saver System. Plaintiffs do not know whether defendant misrepresented anything about the quality and character of plaintiff Thermal Design's products to the general contractor or architects on the Northwestern project.

Some of plaintiffs' fabrics tested under an ASTM 84 test displayed dripping and burning. Defendant's fabric is self-extinguishing and does not burn in a violent manner

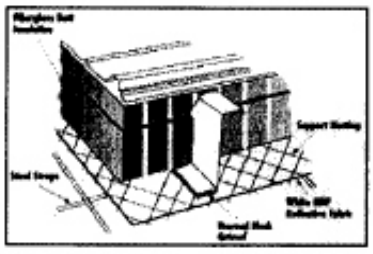
under the National Fire Protection Association 705 test. However, the 705 test is not determinant of all fire characteristics of a material.

Plaintiff Thermal Design never registered the following trademark:



Plaintiffs have not conducted written or oral surveys to discover whether the relevant target group identifies the depiction with plaintiff Thermal Design as the single source for the product.

Defendant uses the following depiction in connection with its EconoCeil system:



Defendant has not sold its EconoCeil product for over seven years. Defendant has never sold more than two or three EconoCeil units.

OPINION

Plaintiffs have moved for summary judgment on one issue: whether defendant's advertisements and press release violated § 43(a)(1)(B) of the Lanham Act. (Plaintiffs have withdrawn their motion for summary judgment under § 43(a)(1)(A) of the Lanham Act. Plts.' Reply Br., dkt. #153, at 1.) Defendant has moved for summary judgment on all of plaintiffs' claims: 1) tortious interference with contract; 2) unfair competition under Wisconsin Stat. § 100.18 and common law; 3) unfair competition and false advertising under § 43(a)(1)(A) of the Lanham Act; 4) unfair competition and false advertising under § 43(a)(1)(B) of the Lanham Act; 5) disparagement under Wisconsin state law; and 6) defamation under Wisconsin state law.

A. Unfair Competition and False Advertising under § 43(a)(1)(B)

At the outset, I note that the "[Federal Trade Commission] believes that consumers gain from comparative advertising, and to make the comparison vivid the Commission 'encourages the naming of, or reference to competitors.'" August Storck K.G. v. Nabisco, Inc., 59 F.3d 616, 618 (7th Cir. 1995) (quoting 16 C.F.R. § 14.15(b)). At times, however, comparative advertisements cross the line of helpfulness into the area of deceit. To establish that this has happened and to make out a claim of false or deceptive advertising under § 43(a)(1)(B) of the Lanham Act, plaintiffs must show all of the following: "(1) a false

statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its products." Hot Wax, Inc. v. Turtle Wax, Inc., 191 F.3d 813, 819 (7th Cir. 1999).

Generally, the first prong of deceptiveness, "false statement," covers two categories: 1) statements that are "literally false" as a factual matter; and 2) statements that may be "literally true or ambiguous, but which implicitly convey a false impression, are misleading in context, or likely to deceive consumers." Id. at 820. "When the statement in question is actually false, the plaintiff need not show that the statement either actually deceived customers or was likely to do so." Id. However, when a statement is literally true or ambiguous, the plaintiff must prove that the statement is misleading in context by showing actual consumer confusion. Id. Actual confusion can be shown by either direct evidence or survey evidence. Rust Environment & Infrastructure, Inc. v. Teunissen, 131 F.3d 1210, 1218 (7th Cir. 1997).

1. Energy Miser outperforms Simple Saver by 33%

Plaintiffs contend that the print advertisement in which defendant claims that its Energy Miser product outperforms the Simple Saver product by 33% is literally false because: 1) defendant failed to disclose the particular configuration of its product compared to plaintiffs' product; 2) it failed to disclose that its product had three additional inches of insulation, creating false test results; 3) defendant's expert confirmed that plaintiffs' product outperforms defendant's product; 4) plaintiffs' product performs better than the typical cavity-filled system identified in defendant's advertisement; and 5) the North American Insulation Manufacturers Association did not conduct a study that determined the material R-value of plaintiffs' Simple Saver product.

With respect to plaintiffs' first assertion, the failure to disclose the configuration of defendant's product is not literally false. At the most it is misleading or ambiguous. Cf. General Motors Acceptance Corp. v. Central National Bank, 773 F.2d 771, 778 (7th Cir. 1985) ("Even in the absence of a confidential relationship, fraud may be based on a failure to disclose, which together with an affirmative statement or act is *misleading*) (emphasis added); Emery v. American General Finance, Inc., 71 F.3d 1343, 1346 (7th Cir. 1995) (half-truth may be *misleading*) (emphasis added). Therefore, plaintiffs must demonstrate actual consumer confusion. Hot Wax, Inc., 191 F.3d at 820.

Plaintiffs have not adduced any evidence of actual consumer deception resulting from

defendant's advertisement. (To support their claim of consumer deception, plaintiffs cite exhibits 22 and 23 in their brief, Plts.' Br., dkt. #118 at 16, which are copies of defendant's balance sheet and plaintiffs' financial data. Even if these exhibits had been submitted in accordance with this court's summary judgment procedures, which they were not, it is unclear how this information would demonstrate consumer deception or confusion.)

Plaintiffs fail to adduce any admissible evidence to support their second assertion that defendant's advertisement is literally false because the actual results relied on three additional inches of insulation material. Plts.' Br., dkt. #153, at 5. For support, plaintiffs cite a deposition of Steven Wright and an Owens/Corning Sweets advertisement. Plts.' Amended Reply to Dfts.' Resp. to Plts.' PFOF, dkt. #158, ¶34. The cited deposition is missing some of the pages to which plaintiffs cite. Furthermore, the deposition page that does exist fails to support the proposed fact. Plaintiffs' citation to the Owens/Corning Sweets advertisement does not help them; the truth of the matter asserted in the advertisement is inadmissible because it is hearsay. Plaintiffs' attorney introduced the document, but he does not have personal knowledge to testify to the truth of the document's contents. (Plaintiffs ask the court to consider the market report and commercial publications exception to the hearsay rule, Fed. R. Evid. 803.17, because, they claim, the Owens/Corning Sweets advertisement is "relied upon by contractors for product information." Plaintiffs fail to adduce any evidence to support that claim. Therefore, the

document is not exempt from the hearsay rule.)

Generally speaking, plaintiffs have not adduced admissible evidence to support their remaining three arguments that defendant's advertisement is literally false. Plaintiffs rely on reports and articles about which their attorney has no personal knowledge, see, e.g., Plts.' Amended Reply to Dfts.' Resp. to Plts.' PFOF, dkt. #158, ¶¶43, 49, or they fail to cite any evidence at all, see id. at ¶48. Plaintiffs fail to show that their product outperforms defendant's product, that their product performs better than the typical cavity-filled system identified in defendant's advertisement or that the North American Insulation Manufacturers Association conducted a study that helped determine the material R-value of plaintiffs' Simple Saver product. Plaintiffs argue the admissibility of "Exhibit 19," a report by Owens-Corning Fiberglass from 1980, under the ancient document exception to the hearsay rule, Fed. R. Evid. 803(16). Plts.' Amended Reply to Dfts.' Resp. to Plts.' PFOF, dkt. #158, ¶36. Further, plaintiffs state that under Fed. R. Evid. 901(b)(8), a document may be authenticated as ancient by evidence that it: 1) is in such condition as to create no suspicion concerning its authenticity; 2) was in a place where if authentic, it would likely be; and 3) has been in existence 20 years or more at the time it is offered. Id. However, plaintiffs have not introduced the document in the manner suggested under Fed. R. Evid. 901(b)(8) or any other satisfactory manner.

In addition, plaintiffs argue that their Simple Saver product was not part of the study

by the North American Insulation Manufacturers Association, referred to in defendant's advertisement, because the product in the study used faced insulation and the Simple Saver System does not. Therefore, plaintiffs conclude, the study does not provide a basis for defendant's assertion that its product outperforms plaintiffs' Simple Saver System by 33%. However, as noted earlier, plaintiffs adduce no admissible evidence to show that their product does not use faced insulation. Plaintiffs fail to show that the Energy Miser System does not outperform plaintiffs' product by 33%.

2. TurboCaindle outperforms Sun Series by 18%

For the following reasons, plaintiffs argue that defendant's advertisement about its TurboCaindle product is literally false: 1) defendant tested its fixture using additional undisclosed fixtures, thereby creating false results; 2) defendant compared its best court to the average court of plaintiff Sports Interiors; and 3) defendant compared its fixture to a discontinued Sun Series fixture. Plaintiffs contend that the advertisement is false because the independent lab referred to in the advertisement tested 42 light fixtures rather than 40 light fixtures, as shown in the advertisement, thereby inflating the performance number of defendant's product. Plts.' Br., dkt. #118, at 18. Plaintiffs buttress these arguments by citing exhibits 24 and 25, which are the test results from the independent lab and an analysis of the test by Robert Van Dixhorn, General Manager of plaintiff Sports Interiors. Plts.'

Amended Reply to Dfts.' Resp. to Plts.' PFOF, dkt. #158, ¶¶59, 65. This evidence is inadmissible because it has not been properly attested to by someone with personal knowledge of its contents. Aff. of Thaddeus C. Stankowski, dkt. # 120, ¶¶25, 26. Plaintiffs have failed to meet their burden to show that defendant's advertisement used additional undisclosed fixtures.

Plaintiffs aver that defendant's advertisement is literally false because defendant compared its best court to the average court of plaintiff Sports Interiors, rather than the average courts of both companies. To show literal falsity, plaintiffs must either show that defendant's test does not prove the proposition or offer affirmative proof that the advertisement is false. BASF Corp. v. Old World Trading Co., Inc., 41 F.3d 1081, 1091 (7th Cir. 1994) ("If the challenged advertisement makes implicit or explicit references to tests, the plaintiff may satisfy its burden by showing that those tests do not prove the proposition; otherwise, the plaintiff must offer affirmative proof that the advertisement is false."). Plaintiffs fail to adduce admissible evidence to call defendant's test into question. Plaintiffs cite "Exhibits 24 and 25," which I have determined are inadmissible. Plts.' Amended Reply to Dfts.' Resp. to Plts.' PFOF, dkt. #158, ¶67. Also, plaintiffs cite deposition testimony to support their position that the advertisement does not offer a fair comparison. Id. Even if I assume that the deposition testimony shows that defendant compared its best court to plaintiffs' average court, such testimony does not make the

advertisement literally false or even misleading. Plaintiffs point to no language in the advertisement that would cause consumers to believe that defendant is comparing its average court to plaintiffs' average court. The advertisement states that defendant used plaintiffs' "published data" as the basis for comparison. Defendant did not misrepresent that fact.

Similarly, plaintiffs argue that literal falsity is shown by defendant's failure to disclose their use of a discontinued model of plaintiffs' product as the basis of the comparison in the advertisement. Plaintiffs fail to adduce admissible evidence to show that the Sun Series model used by defendant is discontinued. Plaintiffs cite exhibit 25, the report from Robert Van Dixhorn, the general manager of plaintiff Sports Interiors, to support their proposed fact that plaintiff Sports Interiors has not sold the fixture for over four years, Plts.' Amended Reply to Dfts.' Resp. to Plts.' PFOF, dkt. #158, ¶68, but I have found exhibit 25 inadmissible. Contrary to what plaintiffs state in their brief, Plts.' Br., dkt. #153, at 13, plaintiffs bear the burden of showing that defendant's advertisement contains a false statement of fact. Hot Wax, Inc., 191 F.3d at 819 (to establish claim under false or deceptive advertising prong of § 43(a) of Lanham Act, *plaintiff* must prove false statement of fact); BASF Corp., 41 F.3d at 1091 (under Lanham Act, *plaintiff* bears burden of proving literal falsity). Although on summary judgment defendants bear the burden of showing that plaintiffs cannot prove their claim as a matter of law, plaintiffs must show that they have sufficient evidence to put each issue into dispute. Plaintiffs have not met their burden.

Because it is undisputed that defendant's TurboCaindle product outperformed plaintiff Sports Interior's Sun Series fixture by 18% and because plaintiffs fail to adduce evidence to put the literal falsity of defendant's advertisement into dispute, I cannot find that the advertisement asserts a false statement of fact in its comparison of the TurboCaindle and Sun Series products.

3. Press release and video: fire safety of the energy-miser insulation system

Plaintiffs argue that defendant's video is false because the fabric used in the video and labeled "Simple Saver System Sports Interiors" is not one of plaintiffs' fabrics. According to plaintiffs, they do not sell the "Nova-Thene 9700" type of fabric burned in the video. Plts.' Br., dkt. #118, at 25. For support, plaintiffs cite "Exhibit 27," a deposition of Russ Cain, defendant's Vice President and "Exhibit 30," a deposition of Dan Harkins, a principal of plaintiff Thermal Design. Plts.' Amended Reply to Dfts.' Resp. to Plts.' PFOF, dkt. #158, ¶¶82, 83, 84, 85. Although this evidence is admissible, it does not support plaintiffs' argument that they never sold or supplied the Nova-Thene 9700 fabric or that this was the type of fabric used in the video. In fact, in his deposition, Harkins admits to purchasing one batch of Nova-Thene 9700 presumably for inclusion into plaintiffs' system. Dkt. #126, exh. 30, p. 91. Summary judgment is the "put up or shut up" moment in a lawsuit, see, e.g., Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 901 (7th Cir. 2003). At this stage,

plaintiffs are obliged to produce some evidence to show how defendant's video is false. Plaintiffs have not met this burden.

Plaintiffs object to defendant's press release for two reasons: 1) it contains a false statement that the "Cook County fire marshal" rejected plaintiffs' Simple Saver product; and 2) it implies that plaintiffs' product is unsafe. Plaintiffs argue that the *City of Evanston* fire marshal, Chief Berkowsky, would have approved their product for the Northwestern University tennis facility project had Bennett, the architect for the project, provided him with additional information. Plts.' Br., dkt. #118, at 30-32. This argument does nothing to advance plaintiffs' case. It is undisputed that Berkowsky did not approve of the use of plaintiff Sports Interior's fabric in the Northwestern facility after his flame test found that plaintiff's material "burnt violently," supported a flame and dripped molten plastic. To not approve something is essentially to reject it. As a result, plaintiffs fail to show that they have any evidence that would allow a jury to find that the word "rejected" makes the statement false. However it is undisputed that the press release should read "a fire marshal in Cook County." Because this statement is literally false, plaintiffs are not required to show actual deception of customers.

Although plaintiffs do not need to show actual deception, they would have to prove at trial that they have been "injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a loss of goodwill associated with its

products." Hot Wax, Inc., 191 F.3d at 819. Plaintiffs attribute the loss of the Northwestern University project to defendant's undercutting of plaintiffs' price when it knew the fire marshal had not "fully" rejected plaintiffs' product. Plts.' Br., dkt. #118, at 32-33; Plts.' Br., dkt. #153, at 18. In effect, plaintiffs concede that the loss did not result from the false statement in the press release, but to defendant's competitive business practices. See, e.g., Speakers of Sport, Inc. v. ProServ, Inc., 178 F.3d 862, 865 (7th Cir. 1999) (competition, though painful, fierce, frequently ruthless, sometimes Darwinian in its pitilessness, is cornerstone of our highly successful economic system; "Competition is not a tort.").

Plaintiffs adduce deposition testimony by Robert Van Dixhorn and Tom Van Dixhorn of plaintiff Sports Interiors to show that consumers expressed concerns about plaintiffs' product as a result of defendant's advertisements and press release. Plts.' Response to DPFOF, dkt. #142, ¶38; PPFOF, dkt. #143, ¶15. The deposition of Tom Van Dixhorn does not support the proposition that consumers expressed concerns about plaintiffs' product. Rather, Tom Van Dixhorn discusses interference with contracts. In his deposition, Robert Van Dixhorn discusses consumers' expression of concern about plaintiffs' products as a result of defendant's "letter" and video, (I note that page 217 of the deposition, to which plaintiffs cite, PPFOF, dkt. #143, ¶15, is missing from "exhibit S.") but, nothing in the record shows that the "Cook County fire marshal" statement injured plaintiffs either economically or by loss of goodwill. Plaintiffs have not shown that a more accurate

statement would have made a difference.

As to plaintiffs' second objection to defendant's press release, plaintiffs contend that the press release implies that their product is unsafe because it mentions their product in the context of a discussion on fire safety. Plaintiffs argue that had the National Fire Protection Association 286 test been performed on plaintiffs' product, it would have shown plaintiffs' product to be safe. Plts.' Br., dkt. #153, at 18; Plts.' Br., dkt. #118, at 35. However, plaintiffs adduce no admissible evidence from which a jury could find that plaintiffs' product passed the National Fire Protection Association 286 test or that it would have passed had it been tested. Plts.' Amended Reply to Dfts.' Resp. to Plts.' PFOF, dkt. #158, ¶102 (citing "Exhibit 43," which is a letter to Dan Harkins from Jeff Simmons, introduced by plaintiffs' attorney and which provides no indication that plaintiffs' product "passed" the test). Furthermore, it is undisputed that some of plaintiffs' fabrics tested under an ASTM 84 test displayed dripping and burning and that Berkowsky's flame test found that plaintiff's material supported a flame, "burnt violently" and dripped molten plastic. Plaintiffs have failed to adduce any evidence that would enable a reasonable jury to find a false implication in defendant's press release that plaintiffs' Simple Saver product is unsafe.

Because plaintiffs have not met their burden of adducing evidence from which a jury could find that any of defendant's advertisements or press release and video contained a false statement, caused actual consumer deception or produced actual or likely injury. I will grant

defendant's motion for summary judgment on plaintiffs' claim of unfair competition and false advertising under § 43(a)(1)(B) of the Lanham Act and deny plaintiffs' motion as to that claim.

B. Unfair Competition and False Advertising under § 43(a)(1)(A)

A plaintiff may bring a claim for infringement of an unregistered trademark under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). See Zazu Designs v. L'Oreal S.A., 979 F.2d 499, 502 (7th Cir. 1992). To prevail on such a claim, the plaintiff must show both that the mark is entitled to protection and that it has been infringed. Platinum Home Mortgage Corp. v. Platinum Financial Group, Inc., 149 F.3d 722, 726 (7th Cir. 1998); Echo Travel, Inc. v. Travel Associates, Inc., 870 F.2d 1264, 1266 (7th Cir. 1989). A term is entitled to protection as a trademark if it "specifically identifies and distinguishes one company's goods or services from those of its competitors." Platinum Home Mortgage, 149 F.3d at 726. In order to designate a product or service, a mark must be distinctive. Marks occupy a spectrum of inherent distinctiveness, starting at the bottom end with generic terms, such as "shoe" or "car," which commonly designate a type of good or service and do not identify the source of a particular product. Id. at 727; Mil-Mar Shoe Co. v. Shonac Corp., 75 F.3d 1153, 1156 (7th Cir. 1996). Generic terms cannot qualify as trademarks; thus they receive no protection. When the mark at issue is not federally registered, the burden is on the claimant

to establish that it is not an unprotectible generic mark. Mil-Mar Shoe Co., 75 F.3d at 1156.

It is undisputed that the mark at issue in this case is not federally registered. Therefore, plaintiffs must adduce enough evidence to allow a reasonable jury to conclude that the mark is not generic. In their brief, plaintiffs assert that plaintiff Thermal Design has used its mark for over 20 years to sell and promote its Simple Saver System and that defendant cannot provide evidence that any company other than plaintiff Thermal Design and defendant uses the same depiction to sell and promote a liner fabric system. Plts.' Br., dkt. #141, at 13. Plaintiffs fail to develop this argument. A two-sentence argument concerning the length of time plaintiffs have used the mark at issue is insufficient to show distinctiveness of the mark. Furthermore, it is undisputed that plaintiffs have not conducted written or oral surveys to discover whether the relevant target group identifies the depiction with plaintiff Thermal Design as the single source for the product. See, e.g., Bliss Salon Day Spa v. Bliss World LLC, 268 F.3d 494, 497 (7th Cir. 2001) (generic marks designate products themselves rather than any particular maker). As a result of their failure to develop an argument that the mark at issue is not generic, plaintiffs have waived their claim under § 43(a)(1)(A) of the Lanham Act. See Central States, Southeast & Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments not developed in any meaningful way are waived."). I will grant defendant's motion for

summary judgment on this claim.

C. Unfair Competition and Fraudulent Representation Under Wisconsin Law

Defendant has moved for summary judgment on plaintiffs' claim for unfair competition and fraudulent representation under Wisconsin common law and Wis. Stat. § 100.18(1). Plaintiffs argue that defendant both intentionally and negligently misrepresented facts in its advertisements and press release. Plts.' Br., dkt. #141, at 3. The common elements of intentional and negligent misrepresentation are: 1) the representation must be one of fact and made by the defendant; 2) the representation of fact must be untrue; and 3) the plaintiff must believe such representation to be true and rely on it to his damage. Ollerman v. O'Rourke Co., Inc., 94 Wis. 2d 17, 25, 288 N.W.2d 95, 99 (Wis. 1980). "The gravamen of the wrong is the nature of the false words used and the reliance which they may reasonably induce." Id. at 26, 288 N.W.2d at 99 (noting difference between "false words" and failure to disclose, which is not intentional misrepresentation unless seller has duty to disclose).

Wis. Stat. § 100.18 prohibits defendant from making, publishing, disseminating, circulating or placing before the public an advertisement, announcement, statement or representation of any kind relating to the purchase, sale, hire, use or lease of real estate, merchandise, securities, service or employment, that contains any assertion, representation

or statement of fact which is untrue, deceptive *or* misleading. See Tim Torres Enterprises, Inc. v. Linscott, 142 Wis. 2d 56, 65, 416 N.W.2d 670, 673 (Wis. Ct. App. 1987) (analogizing statute to Lanham Act and stating that "[s]ince the statute lists three separate alternatives, [untrue, deceptive or misleading], the fact-finder only has to determine that a statement is untrue to find a violation of the statute."). "A statement is untrue which does not express things exactly as they are." Id. at 65, n. 3, 416 N.W.2d at 673, n. 3 (defining "untrue" as used in Wis. Stat. § 100.18(1)). The statute permits a person to sue for fraudulent representation if he or she suffers a pecuniary loss because of a violation of the statute. Wis. Stat. § 100.18(11)(b).

In their complaint, plaintiffs list fifteen statements derived from defendant's advertisements and press release that they allege are false. Plaintiffs no longer dispute the truth of one statement, that defendant "had a product that passed." Therefore, fourteen statements remain in dispute.

In order to survive summary judgment on their claim of unfair competition and fraudulent representation under Wisconsin common law and Wis. Stat. § 100.18(1), plaintiffs must adduce enough evidence to allow a reasonable jury to find that the fourteen disputed statements contain words that are untrue or that the statements are deceptive or misleading and that the plaintiff suffered a loss as a result of the statement.

1. Northwestern University contacted defendant Indoor Courts of America

Plaintiffs pull this statement from defendant's press release. Plaintiffs argue that this statement is false because it was Chuck Bennett, the architect and general contractor for the Northwestern University tennis facility project, and not Northwestern University, who contacted defendant. I do not view these words as untrue. It is undisputed that *Northwestern University* did not select plaintiff Sports Interiors to install a system for a number of reasons, including the fact that the roof lines of the building did not match up, that it would cost more money to install plaintiffs' system than to install some other system and that Bennett had concerns about the fire rating of plaintiffs' product. The undisputed facts show that Northwestern University relied on Bennett's recommendations. Plaintiffs have not proposed any admissible evidence showing that Bennett did not act on behalf of Northwestern University when he contacted defendant. (Plaintiffs assert in their brief that Northwestern University, and not Bennett, wanted and originally specified the Simple Saver System. Plts.' Br., dkt. #141, at 5. This fact is not proposed in any of plaintiffs' proposed findings of fact. Rule I(B)(4) of the court's Procedures to be Followed on Motions for Summary Judgment states that the "court will not consider facts contained only in a brief.") A reasonable jury could not find that these words are false.

2. Thermal Design Inc.'s Simple Saver System was rejected by the Cook County fire marshal

Plaintiffs argue that this statement, derived from defendant's press release, is false because: 1) the City of Evanston, not the Cook County, fire marshal 2) did not reject 3) the Simple Saver *System*. Plaintiffs point out that the fire marshal examined only swatches of material, not plaintiffs' entire system.

As noted earlier, although the phrase "Cook County fire marshal" is not accurate, plaintiffs fail to adduce evidence that the phrase injured them. Because evidence of injury is a requirement for both the common law and Wis. Stat. § 100.18(11)(b), I cannot find that defendant's phrase violates Wisconsin law.

I have concluded that the undisputed facts show that Berkowsky did not approve of the use of plaintiff Sports Interior's fabric in the Northwestern facility and that plaintiffs fail to adduce any evidence to show that use of the word "rejected" makes the statement false.

Finally, plaintiffs fail to adduce any evidence that rejecting a swatch of fabric from the Simple Saver System is different from rejecting the whole system. Without any admissible evidence showing that Berkowsky would have acted differently had he tested the whole system rather than a swatch of fabric, I cannot conclude that a reasonable jury would find the use of the word "system" a misrepresentation. Therefore, I do not find this statement to be untrue.

3. Proper field tests were performed

This statement does not appear anywhere in defendant's advertisements or press release. (The term "field tests" was used in the press release but not the entire phrase, "proper field tests were performed.") Because the allegedly false statement does not exist in any of defendant's advertisements or press release, a jury could not find that the advertisements or press release use false words as required under Wisconsin common law or expresses things exactly as they are as required under Wis. Stat. § 100.18(1). As a result, this is not a false statement.

4. Field tests were performed on the Simple Saver System

This statement appears in defendant's press release, though not in this exact form. Plaintiffs argue that this statement is untrue because Berkowsky did not perform field tests on the entire Simple Saver System but only on the fabric used in the system. Plaintiffs fail to adduce any evidence that field tests on plaintiffs' fabric are different from field tests conducted on plaintiffs' entire system. Without more evidence, a reasonable jury could not conclude that testing the fabric is different from testing the entire system.

5. The fire marshal found that the Simple Saver System supported a flame and dripped molten plastic from the ceiling

Plaintiffs derive this statement from defendant's press release. According to

plaintiffs, this statement is untrue because the fire marshal never concluded that their material would drip plastic *from the ceiling*. Plaintiffs fail to adduce any evidence in their proposed findings of fact that would make it unreasonable for a jury to find that a fabric that dripped plastic in a test would not drip plastic when attached to the ceiling. (Plaintiffs make factual assertions to support their position that such a jury finding would be unreasonable but they make the assertions only in their brief, Plts.' Br., dkt. #141, at 7, and as I have noted, the Procedures to be Followed on Motions for Summary Judgment state that the "court will not consider facts contained only in a brief.") Therefore, I cannot find this statement untrue.

6-11. The following statements do not appear anywhere in defendant's advertisements or press release:

- Thermal Design, Inc. sells and distributes an inferior product
- Sports Interiors sells and distributes an inferior product
- Thermal Design, Inc.'s products are unsafe
- Sports Interior's products are unsafe
- Indoor Courts of America conducted an accurate test on Thermal Design, Inc.'s system
- Indoor Courts of America conducted an accurate test on its product as installed

Plaintiffs do not argue that these statements are made in defendant's advertisements and press release, but that they are implied. Mere implication does not amount to the use of false words as required under Wisconsin common law or fail to express things exactly as they are as required under Wis. Stat. § 100.18(1). As a result, these are not false statements.

12. North American Insulation Manufacturers Association evaluated Thermal Design, Inc.'s Simple Saver System

Plaintiffs argue that this statement is false because the study conducted by the North American Insulation Manufacturers Association does not identify either the Simple Saver System or Energy Miser System. As noted earlier, plaintiffs have adduced no admissible evidence from which a jury could find that their product is not the functional equivalent of the products that the association evaluated. Therefore, plaintiffs fail to show that the Association did not evaluate the Simple Saver System.

I have concluded earlier in this opinion that plaintiffs have failed to show the falsity of the statement that the Energy Miser System outperforms plaintiffs' product by 33% (statement no. 13) and that Indoor Courts of America's TurboCaindle outperformed Sports Interiors' Sun Series Fixture by 18% (statement no. 14).

Because I find that none of the statements at issue are untrue, I will grant defendants' motion for summary judgment on plaintiffs' claim of unfair competition and fraudulent

representation under Wisconsin common law and Wis. Stat. § 100.18.

D. Disparagement and Defamation

Both sides agree that a common element for claims of disparagement and defamation is a false statement of fact that causes harm. Plts.' Br., dkt. #141, at 23-24; Dfts.' Br., dkt. #122, at 39, 51; see also Bauer v. Murphy, 191 Wis. 2d 518, 523, 530 N.W.2d 1, 3 (Ct. App. 1995) ("A communication is defamatory 'if it tends so to harm the reputation of another as to lower him [or her] in the estimation of the community or to deter third persons from associating or dealing with him [or her].'"). At issue are the same statements at issue in plaintiffs' claim of unfair competition and fraudulent representation under Wisconsin common law and Wis. Stat. § 100.18. I have determined that none of these statements is false, except for "Cook County fire marshal," and that as to this statement, plaintiffs are unable to show an injury. Therefore, I will grant defendant's motion for summary judgment on plaintiffs' disparagement and defamation claims.

E. Tortious Interference with Contract

"To prevail on a tortious interference [with contract] claim under Wisconsin law, a plaintiff must satisfy five elements: (1) an actual or prospective contract existed between the plaintiff and a third party; (2) the defendant interfered with that contract or prospective

contract; (3) the interference was intentional; (4) the interference caused the plaintiff to sustain damages; and (5) the defendant was not justified or privileged to interfere." Shank v. William R. Hague, Inc., 192 F.3d 675, 681 (7th Cir. 1999).

Plaintiffs offer a two-sentence argument in opposition to defendants' motion on this claim. Plaintiffs state: "[Defendant] has refused to identify recipients of [defendant]'s false advertisements. Without the identification, plaintiffs are unable to identify specific prospective contracts that [defendant] interfered with." To the extent that plaintiffs argue that they are unable to support their claim because defendant is not cooperating with discovery, plaintiffs should have moved to compel discovery, not use "lack of cooperation" as a response to a motion for summary judgment. Because plaintiffs' argument on this claim is undeveloped, it is deemed waived. Central States, Southeast and Southwest Areas Pension Fund, 181 F.3d at 808 ("Arguments not developed in any meaningful way are waived."). Accordingly, I will grant defendants' motion for summary judgment on plaintiffs' claim of tortious interference with contract.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Indoor Courts of America and The Cincinnati Insurance Company is GRANTED as to each claim alleged by plaintiffs

Thermal Design, Inc. and Sports Interiors;

2. Plaintiffs' motion for summary judgment is DENIED;

3. The clerk of court is directed to enter judgment in favor of both defendants and close this case.

Entered this 9th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge