IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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AVON HI-LIFE, INC.,

OPINION AND ORDER

Plaintiff,

13-cv-36-bbc

v.

LAUREN AGRISYSTEMS, LTD,
and DOES 1 through 10, inclusive,

Defendants.

- -

Plaintiff Avon Hi-Life, Inc. brought this action against defendants Lauren Agrisystems, Ltd and Does 1 through 10, contending that all of the defendants embarked upon a campaign of disparagement and false advertising in violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), and that defendant Lauren engaged in trade libel and intentional interference with prospective economic advantage and violated Cal. Bus. & Prof. Code § 17200 *et seq*. and § 17500 *et seq*. Believing that defendants' illegal acts are hurting its sales of its rubber milking liner, plaintiff is seeking a preliminary order from the court enjoining defendant Lauren and is employees, agents, etc. from publishing or disseminating (1) a two-page document reporting the results of a research study on "The Relationship between Bacteria Growth and the Mouthpiece and the Mouthpiece Vent"; (2) a video segment depicting plaintiff's product and purporting to demonstrate that using a mouthpiece vent on a milking liner allows more bacteria to enter the liner; and (3) a Power Point presentation

entitled "Why Silicone?" in which defendant asserts that FDA test results show that defendant's silicone milking liners outscored plaintiff's rubber milking liners on a number of performance measures. Plaintiff wants an order prohibiting defendant from making any disparaging comments based on information in any of these published documents or creating or disseminating any document similar in nature to the ones listed.

Each of the parties filed suit in this matter. Defendant filed first in federal court in Ohio, seeking declaratory relief on its claims that it had not engaged in false advertising; plaintiff filed for injunctive relief and damages in federal court in California. After some procedural skirmishes, plaintiff's case came to rest in this court, where a hearing was held on March 6 and 7 on plaintiff's motion for a preliminary injunction.

After hearing the parties' evidence and having the benefit of their briefing, I conclude that plaintiff's motion must be denied in all respects. Plaintiff has not met its burden of showing that defendant's research report either contains false information or fails to establish the proposition for which it is cited, that in a study of bacterial residue on the inside of milking liners, plaintiff's Milk-Rite liner had more bacteria buildup than defendant's competing liner. It has not shown that there is anything false or misleading about its video demonstration. Plaintiff has shown that the PowerPoint presentation contains a false statement suggesting that the FDA did the testing of the materials, but defendant concedes that the statement is false because liners are self-certified according to FDA regulations but are not tested by the FDA and it has pulled the presentation off its website. Even if it had not done so, plaintiff would not be entitled to preliminary injunctive

relief because it has not shown that the statement actually deceived or is likely to deceive a substantial segment of its audience or that the statement has caused any injury to plaintiff or will do so in the future. As to plaintiff's claim that the presentation includes another false statement about the requirement that milking liners must satisfy both subsections (e) and (f) of 21 C.F.R. § 177.2600, plaintiff has not introduced sufficient evidence to show this statement to be false.

As a preliminary matter, plaintiff filed a motion to take judicial notice of certain supplemental legal authorities in support of its motion for preliminary injunction. Dkt. #38-1. Now that the parties have had a chance to file post hearing briefs in support of their positions, this motion is of little consequence, but it will be granted nevertheless. Plaintiff filed a second motion, dkt. # 73, to take judicial notice of certain records of the Food and Drug Administration. Defendant did not object to this motion and it will be granted as well.

From the evidence adduced at the injunction hearing and the findings of fact proposed by plaintiff and not disputed by defendant, I find the following facts solely for the purpose of deciding the motion for a preliminary injunction.

FACTS

A. The Parties

Plaintiff Avon Hi-Life, Inc. is a Wisconsin corporation with its principal place of business in Wisconsin. Defendant Lauren Agrisystems Ltd. is an Ohio corporation with its principal place of business in Ohio. (Defendants Does 1-10 play no role in this motion and

can be ignored for now.)

B. Background

The parties are direct competitors in the business of selling milking liners and other components of the automated dairy milking business. Milking liners are used as a protective barrier between a cow's teat and the dairy milking machine; they come into direct contact with milk as it is extracted from the dairy cow. Plaintiff sells the liners and tubing throughout the United States under its own brand names and as an original equipment manufacturer for other companies.

The milking liner at issue in this case is known as the Impulse Mouthpiece Vented Liner. It was developed by plaintiff and is marketed and sold under the Milk-Rite brand name. Its unique design and technology incorporate a vent at the top of the liner that vents air from the mouthpiece, allowing the milk to flow more smoothly. No other manufacturer of any size markets a liner with a mouthpiece vent. Defendant's liner uses a "short milk tube" design, with the vent at the bottom of the liner. It is made of silicone, whereas plaintiff's Milk-Rite liners are made of rubber. The Milk-Rite liner has had good sales since its introduction in February 2010 and holds a market share of 16%.

Sometime in September 2012, plaintiff learned that defendant was disseminating information about mouthpiece vented liners that plaintiff viewed as disparaging and false. In its Fall 2012 newsletter, defendant described a research report that discusses the relationship between bacteria growth and the mouthpiece vent and says that researchers had

observed more bacteria present in mouthpiece vent milk liners than in short milk tube liners. The report states that "[t]he concern with a mouthpiece vent should be the build-up of bacteria and other contamination in the upper portion of the liner. The potential for teat end contamination increases in this scenario." The report does not refer to the mouthpiece vent milk liners as plaintiff's product, but plaintiff is the only manufacturer of such liners. Defendant features the newsletter on its website and disseminated it as an insert in major diary magazines, such as Progressive Dairyman. Plaintiff believes that the information gathered in this alleged research is inherently unreliable and not based on sound scientific principles and methods.

Defendant has a video on its website purporting to demonstrate the means by which the mouthpiece vented milk liner allows higher levels of bacteria to enter the liner. Plaintiff believes that this video creates a false and misleading representation of the liner in use in an actual milking situation, in part because the video uses a liner with a vent inserted into the mouthpiece of an unidentified liner and also because it shows water vapor being sprayed directly at the vent to suggest that use of the mouthpiece vented liner will lead to the introduction of more bacteria than would enter the short milk tube liner.

Until recently, defendant had a link on its website to a PowerPoint presentation entitled "Why Silicon?" Slide seven of this presentation is titled "FDA Test Results of Liners" and purports to show that defendant's silicone liners fare better in FDA testing than the rubber or synthetic rubber liners manufactured by plaintiff. The wording in the PowerPoint gives the impression that the Food and Drug Administration had tested the two

liner materials and had concluded that rubber would not pass its tests. In fact, the FDA does not conduct any testing of milking liners, but requires manufacturers to do their own testing and self-certify to the FDA that they have met all FDA requirements. The presentation also said that liners must meet the requirements of both subsections (e) and (f) of 21 C.F.R. § 177.2600. Plaintiff says that only subsection (e) applies.

C. Defendant's Research Study

1. Aaron Kochman

The disputed research study was initiated by Aaron Kochman, a Research and Development Engineer employed by defendant, who devotes about 40% of his work time to research. He is responsible for designing and carrying out tests and recording the results. He has had college-level training in experimental design and has worked in that field with a retired professor from Penn State University, who was a researcher in the milking machine industry, and with Dr. James Shin, who was also employed by defendant. He has also worked with David Gothard, an independent biostatistician. Kochman has carried out hundreds of experiments in which he has identified the variables to be observed, designed a test, determined a sample size, set up the trial, collected the data, performed the analysis and recorded the results. He has published papers describing research experiments that he designed and implemented and these papers have been published by the National Mastitis Council of which he is a member.

In the summer of 2011, Kochman heard comments from farmers and others that

mouthpiece-vented milk liners were exhibiting evidence of bacterial buildup around the inner surface of the mouthpiece. He submitted two samples from plaintiff's Milk-Rite liner and two samples of defendant's liner to the Ohio Agricultural Research and Development Center for bacteria culturing. The results showed more bacteria in the mouthpiece-vented liner. He followed up that report with a discussion with Dr. Frank Welcome, a doctor of veterinary medicine, employed in the Central Laboratory of the Quality Milk Production Services, which is part of a program run by a partnership between the New York State Department of Agriculture and Cornell University. Welcome told Kochman that QMPS had the capacity for bacterial culturing for a larger study, that he could provide a protocol for collecting samples and that QMPS would sell defendant the supplies he needed. Welcome gave Kochman a minimal protocol limited to the protocol for swabbing techniques.

Kochman believed that 60 bacterial samples from each manufacturer's liners (two swabbings from each of 30 liners) were necessary for statistical significance of any study. He instructed two technicians to obtain representative samples from farms in two different areas of the United States (the Southwest and the midwestern states of Ohio, Kentucky and Indiana) and he trained them in the protocol they were to use. The technicians were told to stop at the farms where calls were being made in the ordinary course of defendant's business and ask whether the farmer would agree to having swabs taken; if there was an objection, the technicians moved on to another farm. For each stop, they were to record the dairy size, its location, the time of day the samples were taken, and the time in relation to where the farmer was in the milking shift (half-way through, just beginning, etc.), what type

of wash system was being used, when the liner had been installed and how many times cows had been milked on it. All of this was set out in a research protocol that incorporated the Welcome swabbing protocol.

Kochman had hoped that the technicians could also get samples right after washing when they saw visible buildup on a liner, but time constraints did not allow for doing so. He tested the protocol with one of the technicians at several dairies, going through it with them, taking samples, storing and submitting the samples and validating the protocol, and then followed up with training. The protocol said nothing about wearing gloves because the technicians were trained to do so when performing this kind of work.

The sample collection took placed in July and August of 2012. The technicians took samples from liners in use at 20 commercial dairies in four states, ten of which used plaintiff's liners and ten of which used defendant's liners. The technicians used wooden handled swabs that Kochman had purchased from QMPS. Kochman instructed them to obtain a full 360 degree revolution sample and to have only the cotton area touch the sample area. Each technician was to sample the inside of each liner in two different places inside the liner, at the mouthpiece and inside the barrel, for a total of 60 samples from each manufacturer's liners. During his verification of the protocol, he observed the technician doing the swabbing properly.

After the samples were collected they were submitted to QMPS to be cultured, identified only by a number and initials on each vial, so that QMPS did not know the source of the vials, either the particular dairy or the part of the country the samples came from. Dr.

Welcome oversaw the sample culturing and reported back to Kochman. Welcome assigned each bacterial colony a rating based on the size of the culture, giving them ratings ranging from "very high" to "no growth observed." When Kochman received the ratings, he converted each rating to a number, assigning zero to "no growth" and 6 to "very high," and then sent the data points for analysis to David Gothard, a biostatistician with whom Kochman has worked for several years. The information was "blinded" so that Gothard would not know which data came from Liner A (plaintiff's liner) and which from Liner B (defendant's liner).

2. David Gothard

Gothard has a bachelor's degree in mathematics from Vanderbilt University and a master's in statistics from the University of Kentucky. He has 15 years of experience teaching primarily graduate level statistics and biostatistics courses and is a faculty member in public policy at Northeast Ohio Medical University. He has designed experiments and performed clinical analyses as part of clinical studies submitted to the FDA on behalf of drug companies.

Gothard reviewed the data points that Kochman had coded according to an ordinal scale, Dft.'s Tr. Exh. 511, and made a comparison of bacteria growth in Liner A and Liner B. For Liner A, he had 87 samples; for Liner B, he had 60 samples, the minimum necessary for the test. He found this sample size large enough to enable him to draw statistical conclusions. He performed one test taking the average for each sample and he performed

another one using the worst grade for each sample to determine whether there was any difference between the two liners. He did a " t test" to determine whether there was an average difference in bacterial count between the two liners that was not due to chance, starting with the average of the bacterial grades across the 12 different bacterial colony types that were found. The average bacterial count for Liner A was 1.3333; the average for Liner B was .7069. The standard deviation for Liner A was .79016; for Liner B, it was .64046. As a check, Gothard calculated the worst grades of the 12 bacterial grades in each liner sample and then determined a standard deviation and a mean. He compared these counts using a chi-square test, which determines from the data whether the incidence could be equal between the two liners, and found that the possibility of liner A's higher incidence of high and very high counts occurring by random chance would be less than 5%.

In addition, Gothard compared the worst grades for two sample locations, the barrel and the mouthpiece of each liner. At the mouthpiece location, he determined the mean was 4.8409 for Liner A and 3.100 for Liner B; the standard deviations were 1.76455 for Liner A and 1.62629 for Liner B. The closeness of the standard deviations showed him there was equal consistency in the spread, or variation, of the bacteria grades whenever the samples from the two liners were measured against each other. Each analysis included a p value that was less than .05. (The p value is a nearly universal standard for adopting statistical significance and the one relied upon by the FDA.) Gothard found that in 69% of Liner A bacteria, there was at least one grade of 5 or 6 (high or very high) and that in 20% of Liner B, there was at least one grade of high or very high. The chance of these rates occurring by

randomness was less than one out of 1000.

In doing this testing, Gothard used the principles of comparative effective analysis or "real world testing." In such an analysis, the impact of environmental variables is assumed to be roughly the same so that the effects cancel each other out. Gothard compared this kind of study to one in which a number of individuals are weighed on the same inaccurate scale. At the end, the observer would not know the correct weight of any individual but would be able to determine the differences in weight among the individuals. The Kochman protocol assumed that every cow would arrive for testing with some bacteria. The results of the study would compare relative amounts of bacteria, not the specific amounts different cows had at any given time.

Gothard's conclusion was that liner B was "bacterially" superior to Liner A in terms of average bacteria grade, worst bacteria grade and incidence of high or very high bacteria grades, whether measured at the mouthpiece or barrel. He found that the superiority continued across pre-wash, post-wash and all measurements collectively. Dft.'s Trial Exh. 512. The accuracy of the test was not affected by specific conditions at any farm. He was persuaded that the farms using plaintiff's product were not chosen because they were dirtier than the farms using defendant's product; if they had been, the standard deviations between the two liners would have been greater than they actually were.

Gothard also checked to see whether Liner B had had less use and found that in fact, it had had more. He checked for the effects of post-wash sampling and he checked samples that had scores of zero. In neither case did he find any statistically justified difference

between the two liners.

3. Roger Thomson

Plaintiff called Roger Thomson, a doctor of veterinary medicine, to challenge the protocol defendant used for its study. Thomson works as a veterinarian, specializing in dairy cows, but he also runs a milk quality consulting service, MQ-IQ Consulting, that provides mastitis prevention and he does milk quality consulting for dairy farms. In addition, he works as an independent milk quality consultant for ABS Global, a genetics company, where, among other things, he provides technical support for the company's udder care products and does troubleshooting for mastitis. He has published articles and studies on milk quality or other issues relating to milk production and has been a guest professor at Michigan State University. Thomson has considerable experience in designing scientific studies directed to milk quality.

Thomson testified that farms vary in the amount of bacteria found on them and that one would expect farms with more bacteria to have more bacteria buildup in their milking liners than would be found in milking liners used on cleaner farms. Bacteria is always a concern for farmers because it can cause mastitis, which is the most costly disease in the dairy industry. Thomson reviewed defendant's research report after he saw it summarized in an insert in Progressive Dairyman and found it inadequate in many respects, beginning with the lack of any reference articles listed at the end; no list of authors, no peer review, no specification in the protocols about how the farms were selected or how three

liners in each dairy parlor were chosen for swabbing and the use of wooden-handled swabs, which in Thomson's view are more at risk for contamination than the more expensive "Culturette swab" which has a plastic handle and comes in a separate vial with sterile water.

In Thomson's experience, most research emphasizes the variation in bacteria quantity from farm to farm and liner to liner. He believes that the technicians should have swabbed each teat just before putting on the milking unit so that they would know the number of bacteria in advance and could compare that number with the bacteria taken from the liner after the milking.

D. Defendant's Video Demonstration

Aaron Kochman put together a silicone liner manufactured by defendant with a mouthpiece vent made by puncturing a hole in the mouthpiece of defendant's liner and pushing in a vent made by plaintiff. He then had a video made of the patched-together liner and vent with a water spray directed at the mouthpiece vent. The video describes the creation of the liner shown in the video and states that it is a demonstration intended to simulate a particular scenario and that its sole purpose is "to visually represent the potential for particulate to enter the liner above the teat end." It adds that it "is not intended to represent every scenario for every milking liner vented at the mouthpiece." Dft.'s Tr. Exh. #4. Kochman admitted that spraying water directly into the vent of a liner is not something that farmers would do while cows are being milked, but he testified that he had seen water

being sprayed all over a milking parlor.

E. PowerPoint Presentation

The PowerPoint presentation at issue is entitled, "Why Silicone?" In it, defendant lists the materials used for liners, the performance measures defendant looked for in deciding what material to use and comparisons of natural, nitrile and silicone rubber for tensile strength, resistance to butter fat, heat, flexing and chemicals and other factors. It adds that its research shows that silicone has lower fat absorption and that it is less subject to cracking after flexing and bending and after the use of chlorine in washing. The seventh page of the presentation is titled, "FDA Test Results of Liners." Plt.'s Tr. Exh. 502 at 17. It starts out by saying that "[t]hese are the FDA results of the listed liners—red indicates not passing, however they are able to be sold based on organic and synthetic rubber materials being grandfathered in for liner material—if new today most liner material would not pass!" Id.

Manufacturers of milking liners self-certify that they are in compliance with FDA regulation 177.2600, which applies to the milking liners at issue. The FDA does not conduct such testing.

The next pages of the presentation address 3-A, a voluntary standards organization and the results of testing defendant's Tri-Circle® Liner. Id. at 18-20. Other pages depict surface cracking on "typical black liners" after 1000 milkings. Plaintiff uses black liners; it does not dispute the accuracy of the highly magnified pictures of cracking.

F. Evidence of Injury

1. Paul McDonald

Paul McDonald is employed by Avon Rubber, PLC and is managing director for its global dairy business. Plaintiff is the United States legal entity responsible for all dairy activities in this country.

Plaintiff received a very positive response when it first introduced the mouthpiece vented liner in 2010. Since then, the liner has gained approximately two percent market share each quarter until September 2012, when sales flattened, but not to the point at which the company lost any market share.

McDonald first became aware of defendant's research report in September 2012, when he received a complaint from one of the distributors of plaintiff's products that defendant was claiming that plaintiff's liner (marketed as the IBA Pro Square liner) failed to meet FDA requirements. McDonald checked defendant's website and found the "Why Silicone?" PowerPoint presentation, along with the research report and the video showing the patchwork mouthpiece vented liner.

Plaintiff has received inquiries from customers and potential customers concerning continued or future use of the mouthpiece vented liner since defendant published its research report. Some have asked that the liners be removed from their farms. McDonald is afraid that defendant's research report, the PowerPoint presentation and the video will erode the trust between plaintiff and its customers. He cannot say that any dairy farms have told plaintiff that they are going to stop using plaintiff's liner because of the FDA reference in the

defendant's PowerPoint presentation.

2. Mark Paulsen

Mark Paulsen is employed by plaintiff as its western sales manager. Since defendant's research report was published last year, he has had calls from both customers and end users saying that they were switching from using plaintiff's Milk-Rite liner because of the claims in the report.

OPINION

Plaintiff is seeking the extraordinary relief of a preliminary injunction, which has several prerequisites. At the outset, plaintiff must show that it is reasonably likely to prevail on the merits of at least one of its claims. If it can make this showing, it must also show that it will suffer irreparable harm if an injunction is not granted, that the harm it will suffer if the injunction is denied will outweigh the harm defendant will suffer if the relief is granted and that an injunction will not disserve the public interest. Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Dept. of Health, 699 F.3d 962, 972 (7th Cir. 2012). Plaintiff has alleged five causes of action: (1) a claim under the Lanham Act; (2) a claim of false advertising under the California Business and Professions Code; (3) a claim of unfair competition under a different section of the code; (4) claims for intentional interference with prospective economic advantage; and (5) claims for trade libel.

A. Lanham Act Claim

1. Research study

Plaintiff places most of its emphasis upon its cause of action alleged under the Lanham Act, 15 U.S.C. § 1125(a), which gives persons the right to sue and obtain damages from any person who misrepresents the nature, characteristics or qualities of another person's goods. To prevail on such a claim, a plaintiff has to show that (1) the defendant made false statement of fact about its own or plaintiff'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 the 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). If the plaintiff can show as a matter of fact that the statement is "literally false," it need not show actual consumer confusion. If it can prove only that the statement is "literally true or ambiguous" but implicitly conveys a false impression or is "misleading in context or likely to deceive consumers," it must produce evidence of such confusion. Id. at 820.

Plaintiff starts by challenging the results of defendant's research report and associated advertising. A challenge of this kind is sometimes referred to as an "establishment claim," BASF Corp. v. Old World Trading Co., 41 F.3d 1081, 1090 (7th Cir. 1994), because the statements at issue tend to be stated as "tests show x" or "tests *establish* x." Riddell, Inc. v.

Schutt Sports, Inc., 724 F. Supp. 2d 963, 971 (W.D. Wis. 2010) (citing BASF, 41 F.3d at 1090). A plaintiff may show that such a claim is false by showing that the cited tests do not prove the proposition, which is what happened in BASF. In that case the courts found literally false a claim that the product met the specifications because the producer had not performed any specification tests of any kind. BASF, 41 F.3d at 1091.

Plaintiff does not contend that defendant did not actually perform studies of bacteria in milking liners. It contends that the studies were not sufficiently reliable to allow defendant to conclude that it had established that more bacteria were present on plaintiff's Milk-Rite liner than on defendant's liner. A number of circuits have held that a showing of the unreliability of a particular study can make the establishment claim literally false, even if the unreliable test "proves" the proposition. E.g., Rhone-Poulenc Rorer Pharmaceuticals, Inc. v. Marion Merrell Dow, Inc., 93 F.3d 511, 514-15 (8th Cir. 1996); Mylan Laboratories, Inc. v. Matkari, 7 F.3d 1130, 1138 (4th Cir 1993); Castrol, Inc. v. Quaker State Corp., 977 F.2d 57, 62-63 (2d Cir. 1992).

This issue came up in Riddell, 724 F. Supp. 2d at 972, a case in this court that involved a concussion study in which high school football players wore either a helmet manufactured by Riddell or a traditional helmet. The study's results were published in a neurology journal and Riddell used them in its advertising and in training for sales representatives. When it sued Schutt Sports for patent infringement and other claims, Schutt counterclaimed, alleging false advertising under the Lanham Act and arguing at summary judgment that the study's results were too unreliable to support the statements

Riddell had made in its advertising and sales efforts. I held that interpreting the term literally false to apply to an unreliable study could "lead to a strained reading of the phrase 'literally false': a court's determination that a test is 'unreliable' leads to a conclusion that a statement in the form 'test shows x' is literally false even if the test *really does* show x." I added that, "[i]n my view, if a cited test is unreliable, statements that the 'test proves x' are merely deceptive or misleading, not 'literally false,'" in which case they require direct or survey evidence of confusion, whereas literally false statements do not." Id. However, because the Court of Appeals for the Seventh Circuit had never ruled on the question and other circuits had held that a "not sufficiently reliable" study might amount to a false statement, id., I went on to consider what would make a study not sufficiently reliable, concluding that it would require a showing that "the cited study's methods or findings are not acceptable to the relevant scientific community." Id. at 973.

In this case, plaintiff cannot show that the statements published in defendant's research report comparing bacteria deposits on the competing liners were literally false. To the contrary, the results of defendant's study supported its statements that plaintiff's liner had more bacteria than defendant's liner. Thus, in order to show a likelihood of prevailing ultimately, plaintiff had to show that the testing methods were unreliable. To that end, plaintiff called David Thomson, but it became apparent that Thomson lacked the knowledge of statistics, and of biostatistics in particular, to provide the evidence that plaintiff needed to prove the unreliability of the study. For its part, defendant put in persuasive evidence that its procedures were adequate for the study it was doing, which was simply comparing

the deposit of bacteria on two different sections of liners actually in use at a variety of dairies.

Reading plaintiff's brief before the hearing raised concerns about some of the same things to which Thomson testified, that is, how the farms were chosen for testing, how reliable the swabbing procedures were and whether the cultures were preserved properly, but the evidence that defendant put in at the hearing responded to these concerns convincingly. Defendant showed that its sampling techniques were appropriate to the kind of study it was undertaking, which was a comparison of environmental effects in the "real world," rather than a study designed to determine something entirely different, such as identifying particular strains of bacteria or the extent of bacteria on a particular cow at any particular time, which might require the kind of controls that Thomson was describing. The result of this particular study was to determine whether, in the real world of dairy parlors, milking liners vented at the mouthpiece harbored significantly more bacteria and other contamination than liners vented at the short milk tube. Dft.'s Tr. Exh. 504. Plaintiff did not put in sufficient evidence to undermine the reliability of defendant's study. The report was neither literally false nor based on an unreliable study.

I conclude that plaintiff has failed to show that it has any likelihood of prevailing on this claim.

2. Video demonstration

Plaintiff has not shown that anything said in the demonstration is false. Plaintiff

takes issue with the way that defendant "demonstrates" the inflow of bacteria into the liner through the mouthpiece vent, but it has not shown that anything about the demonstration is literally false or unreliable. It says that the demonstration could have been skewed by defendant's insertion of a mouthpiece vent into one of its own liners, but it has not adduced any evidence that this is true. As for the claim that no dairy would allow water to be sprayed around cows while they are being milked, it is obvious that the water spray in the video was used simply to suggest bacteria moving through the air. Plaintiff has not shown that it is likely to prevail on this aspect of its claim under the Lanham Act.

3. PowerPoint presentation

The one piece of advertising that plaintiff has shown to be literally false is the statement in the PowerPoint presentation showing the results of FDA testing of liners. Defendant concedes that the FDA does no testing of milking liners and that it erred in saying that it did or implying that milking liners must meet the requirements of both subsection (e) and (f) of 21 C.F.R. § 177.2600. This does not mean, however, that plaintiff can prevail on this claim of false advertising. To do that, it would have to show that it could meet all the other prerequisites for a preliminary injunction, including the probability that it would suffer irreparable harm without an injunction. Plaintiff's witness, Paul McDonald, admitted he knew of no loss of sales or even any complaints from any customer about this statement. Moreover, defendant has taken down the PowerPoint presentation that was featured on its website and presumably will not restore it until it has corrected the offending

slide.

Accordingly, I conclude that plaintiff has failed to show any likelihood that it could prevail on its claim that defendant violated the Lanham Act by making false statements about the results of its liner study, in its video demonstration and in its PowerPoint presentation.

B. Plaintiff's Remaining Claims of False Advertising

1. False advertising under California Business & Professions Code, § 17500

The California code prohibits "untrue or misleading" statements generally in Cal. Bus. & Prof. Code, § 17500, and specifically prohibits false or misleading claims purporting "to be based on factual, objective, or clinical evidence" or which compare the product's effectiveness to that of other brands or products." Id. at §17508. It is not necessary to discuss this claim in any detail now that I have found that plaintiff has failed to prove that defendant made any false statements about its research report or its video presentation and that, although it proved that defendant made a false statement in its PowerPoint presentation, it cannot show that it suffered any injury.

2. Trade libel

For the same reasons that plaintiff cannot prevail on its claim under the California Business & Professions Code, it cannot prevail on its claim that defendant engaged in trade libel, which the Restatement (Second) defines as "the publication of matter disparaging the

quality of another's land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other's interests in the property." Restatement (Second) of Torts § 626. "One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity." Id., § 623A.

As with plaintiff's claim under the California Business & Professions Code, one of the elements of trade libel is a false statement. (The others are that the statement was disparaging, that it was published to others, that it induced others not to deal with plaintiff and that it caused special damages in the form of pecuniary loss. New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1113 (C.D. Cal. 2004)). In this case, the only statement plaintiff has shown to be false is the one included in the PowerPoint presentation and plaintiff has made no showing that this statement "played a material and substantial part [in] inducing others not to deal with him or her, and that as a result he or she has suffered special damages." Atlantic Mutual Insurance Co. v. J. Lamb, Inc., 100 Cal. App. 4th 1017, 1035 (Cal. App. 2 Dist. 2002). I conclude that plaintiff has not shown any likelihood of success on its claims of false advertising under California law.

C. Unfair Competition in Violation of California Business & Professions Code, § 17200

Cal. Bus. & Prof. Code § 17200 prohibits any "unlawful, unfair or fraudulent business act or practice or unfair, deceptive, untrue or misleading advertising." Had plaintiff been able to show that defendant's conduct violated the Lanham Act, that same conduct would constitute "unlawful conduct" subject to an injunction under California's unfair competition law. Because it failed to make that showing and has not suggested any other improper conduct by defendant that would constitute unfair competition, it has no viable claim under this statutory provision.

D. Intentional Interference with Prospective Economic Advantage

Plaintiff contends that it is entitled to sue under both California and Wisconsin law for intentional interference with prospective economic advantage or ongoing business relationships, but this proposition is far from clear. It is true, as plaintiff points out, that in Anderson v. Regents of University of California, 203 Wis. 2d 469, 490-91, 554 N.W.2d 509 (Ct. App. 1996), the court of appeals said that "[b]oth Wisconsin and California recognize the tort of interference with prospective economic relations," but the case before it did not involve that particular tort. Instead, it involved the tort of interference with contract, a related but different concept. Plaintiff has cited several Wisconsin cases but none address the tort claim it is asserting. Burbank Grease Services, LLC v. Sokolowki, 2006 WI 103, ¶ 44, 294 Wis. 2d 274, 717 N.W.2d 781, involved a claim of interference with contract, but the court never mentioned interference with prospective economic advantage. See also

Foseid v. State Bank of Cross Plains, 197 Wis. 2d 772, 788, 541 N.W.2d 203, 210 (claim of tortious interference with prospective *contract*); Pure Milk Products Coop. v. National Farmers Organization, 90 Wis. 2d 781, 796, 280 N.W.2d 691 (1979) (Wisconsin imposes liability on persons who wrongfully interfere with existing or prospective contractual relations).

In California, however, the tort seems to be well recognized. In Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376, 380, 902 P.2d 740, 743 (1995), the state supreme court discussed the tort, noting its five essential elements: (1) an economic relationship between the plaintiff and another, containing a probable future economic benefit or advantage to the plaintiff; (2) the defendant's knowledge of the existence of the relationship; (3) the defendant's intentional commission of acts or conduct designed to disrupt or interfere with the relationship; (4) actual disruption; and (5) resulting damage to the plaintiff. After surveying the law, the court concluded that the tort required the additional element of a wrongful act. "A doctrine that blurs the analytical line between interference with an existing business contract and interference with commercial relations *less* than contractual is one that invites both uncertainty in conduct and unpredictability of its legal effect." Id. at 393, 902 P.2d at 751. Therefore, when asserting such a tort, "the plaintiff has the burden of pleading and proving that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.'" Id. at 393, 902 P.2d at 751 (quoting Top Service Body Shop, Inc. v. Allstate Insurance Co., 283 Or. 201, 209, 582 P.2d 1365, 1371 (1978)). See also Korea Supply Co. v. Lockheed Martin Corp., 29

Cal. 4th 1134, 1154, 63 P.3d 937, 951 (2003) (third element of tort requires plaintiff to plead intentional *wrongful* acts on part of defendant designed to disrupt the relationship).

Plaintiff contends that it has alleged all the necessary requirements for proving the tort, arguing that defendant's reliance on a false research report in its advertising is wrongful interference with prospective economic advantage falling outside the boundaries of fair competition. However, its claim founders on the first requirement that it prove the falsity of defendant's advertisements based upon its milking liner research. This omission makes it unnecessary to discuss the remaining requirements of the tort.

ORDER

IT IS ORDERED that plaintiff Avon Hi-Life, Inc.'s motion for judicial notice of exhibit 1, dkt. #73-1, is GRANTED; its motion to file supplemental legal authorities, dkt. #38-1, is GRANTED; and its motion for a preliminary injunction, dkt. #7, is DENIED.

Entered this 25th day of March, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge