

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ZHEJIANG MEDICINE CO., LTD., <i>et al.</i>	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. H-11-1052
	§	
KANEKA CORPORATION	§	
	§	
Defendant.	§	

**MEMORANDUM AND ORDER ON
DEFENDANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pending before the Court is Defendant Kaneka Corporation’s (“Defendant” or “Kaneka”) Motion for Partial Summary Judgment (**Instrument No. 135**), filed on January 31, 2014.

I.

A.

On March 22, 2011, the United States Patent and Trademark Office (“USPTO”) issued U.S. Patent No. 7,910,340 (the “’340 patent”), entitled “Processes for Improving Coenzyme Q10,” to Kaneka. (Instrument No. 136-8 at 25-42). The ’340 patent details a process for producing reduced CoQ10 and a process for producing oxidized CoQ10. *Id.* at 28. Oxidized CoQ10 has been widely used for health supplements and other products, while reduced CoQ10 has not traditionally garnered the same attention. *Id.* Kaneka and Plaintiffs Zhejiang Medicine Co., Ltd. and ZMC-USA L.L.C. (collectively “Plaintiffs” or “ZMC”) research, develop, and sell products containing CoQ10. (Instrument Nos. 41 at 1-2; 94 at 1-2).

On March 21, 2011, ZMC filed suit against Kaneka in the United States District Court for the Southern District of Texas, seeking declaratory judgment of non-infringement of the ’340 patent and declaratory judgment of invalidity of the ’340 patent. (Instrument No. 1). ZMC asserts

that the '340 patent is invalid for failure to comply with the requirements of patentability set forth in 35 U.S.C. §§ 101, 102, 103, and 112. *Id.* at 5.

On March 22, 2011, Kaneka filed suit against ZMC and others in the Central District of California, alleging infringement of the '340 patent ("the *Kingdomway* case"). (2:11-cv-02389-MRP-SS, C.D. Cal., Instrument No. 1). Kaneka had previously filed legal proceedings on or about October 28, 2010 against ZMC in the Düsseldorf Regional Court of Germany, claiming infringement of the European counterpart to the '340 patent, European patent number 1,466,983. (Instrument Nos. 41 at 3-4; 94 at 3-4). Kaneka also commenced an action against ZMC and others before the U.S. International Trade Commission (the "ITC"), for which the ITC issued a notice of investigation on July 14, 2011. (Instrument Nos. 143-7 at 49; 98-1 at 8). On June 23, 2011, Kaneka's claims against ZMC were severed from the case pending before the Central District of California, and transferred to the Southern District of Texas. (2:11-cv-02389-MRP-SS, Instrument No. 47). On July 13, 2011, Kaneka filed an answer and counterclaims to ZMC's complaint in the matter pending before this Court. (Instrument No. 9). Kaneka's only counterclaim is infringement by ZMC of the '340 patent. *Id.*

In June 2011, Kaneka's legal counsel sent notice letters to companies in the industry, informing them of the pending legal actions, and its belief that ZMC was infringing on the '340 patent. (Instrument No. 135-10 at 5-8). In July of 2011, Kaneka's legal counsel sent similar letters to companies in the industry, noting that the ITC had begun investigating Kaneka's allegations. *Id.* at 9-10.

ZMC filed its first amended complaint on September 20, 2011, (Instrument No. 39), and its second amended complaint on September 23, 2011. (Instrument No. 41). ZMC added numerous claims in its amended complaints. ZMC alleged that Kaneka's activities and litigation

with regard to the '340 patent constitute monopolization or attempted monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and in violation of Texas Business & Commercial Code § 15.05(b). (Instrument No. 41, at 12-14). ZMC also added claims of patent misuse, tortious interference with existing and prospective business relationships, tortious interference with contract, unfair competition in violation of the Lanham Act, 15 U.S.C. § 1125(A)(1)(B), False Advertising under the Texas Occupations Code § 101.201, product disparagement, business disparagement, libel, and libel per se. *Id.* at 14-30. ZMC subsequently voluntarily dismissed its False Advertising claim under the Texas Occupations Code § 101.201, on November 1, 2011, and its claim of patent misuse on February 21, 2014. (Instrument Nos. 55; 141).

On December 20, 2012, Kaneka filed an amended answer and counterclaims to ZMC's seconded amended complaint. (Instrument No. 94). In its answer, Kaneka maintained the counterclaim from its original answer filed on July 13, 2012. *Id.* at 14.

On October 11, 2011, Kaneka filed a motion to dismiss seven of ZMC's fourteen claims pursuant to 12(b)(6), or in the alternative to provide more definite statements or strike certain claims for redundancy. (Instrument No. 43). On August 13, 2012, the Court Ordered that Kaneka's motion to dismiss be granted in part and denied in part. (Instrument No. 91). The Court dismissed ZMC's monopolization claims under the Sherman Act and Texas Business Code § 15.05(b), as well as ZMC's claims for tortious interference with prospective and existing business relationship and tortious interference with contract. *Id.* The Court denied Kaneka's motion to dismiss ZMC's claim of unfair competition under the Lanham Act. *Id.*

On January 31, 2014, Kaneka filed a motion for partial summary judgment seeking dismissal of ZMC's claims of unfair competition under the Lanham Act, product and business disparagement, and libel and libel per se. (Instrument No. 135). ZMC filed a response to Kaneka's motion on February 21, 2014. (Instrument No. 144). Kaneka filed a reply on February 26, 2014. (Instrument No. 145). On March 11, 2014, ZMC filed a sur-reply. (Instrument No. 153).

On July 31, 2014, the parties consented to proceed before a United States magistrate judge, for all purposes, including the entry of a final judgment, under 28 U.S.C. § 636(c), and on August 5, 2014, the case was transferred to this court. (Instrument Nos. 168; 169).

II.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Warfield v. Byron*, 436 F.3d 551, 557 (5th Cir. 2006).

The "movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25(1986)). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

If the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden by “showing — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325. While the party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant’s case. *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005) (citation omitted). “If the moving party fails to meet [its] initial burden, the motion [for summary judgment] must be denied, regardless of the nonmovant’s response.” *United States v. \$92,203.00 in U.S. Currency*, 537 F.3d 504, 507 (5th Cir. 2008) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc)).

After the moving party has met its burden, in order to “avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party’s case.” *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992). The party opposing summary judgment cannot merely rely on the contentions contained in the pleadings. *Little*, 37 F.3d at 1075. Rather, the “party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim,” *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 457, 458 (5th Cir. 1998); *Baranowski v. Hart*, 486 F.3d 112, 119 (5th Cir. 2007). Although the court draws all reasonable inferences in the light most favorable to the nonmoving party, *Connors v. Graves*, 538 F.3d 373, 376 (5th Cir. 2008), the nonmovant’s “burden will not be satisfied by some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence.” *Boudreaux*, 402 F.3d at 540 (quoting *Little*, 37 F.3d at 1075). Similarly, “unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to

defeat a motion for summary judgment.” *Clark v. Am’s Favorite Chicken*, 110 F.3d 295, 297 (5th Cir. 1997).

In deciding a summary judgment motion, the district court does not make credibility determinations or weigh evidence. *Chevron Phillips*, 570 F.3d 606, 612 n.3 (5th Cir. 2009). Nor does the court “sift through the record in search of evidence to support a party’s opposition to summary judgment.” *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 379-80 (5th Cir. 2010); *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003); *Ragas*, 136 F.3d at 458; *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir.1988) (it is not necessary “that the entire record in the case ... be searched and found bereft of a genuine issue of material fact before summary judgment may be properly entered”). Therefore, “[w]hen evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court.” *Malacara*, 353 F.3d at 405.

III.

Kaneka moves for summary judgment on ZMC’s claims of unfair competition under the Lanham Act, product and business disparagement, and libel and libel per se. (Instrument No. 135). Each of these claims relates to Kaneka’s conduct in filing legal actions against ZMC, and sending notice letters to certain companies in the industry related to those legal actions. ZMC claims that the complaints filed in California and before the ITC, as well the counterclaims filed in this matter, were intended to intimidate and impose costs on ZMC and to interfere with its customer relationships. (Instrument No. 41 at 5).

ZMC further claims that letters sent by Kaneka's counsel, Dariush Adli ("Dr. Adli"), in June and July of 2011 contained false information and were sent to interfere with ZMC's business relationships. (Instrument No. 41 at 6-8). ZMC claims that these letters were sent to at least 156 of ZMC's customers, potential customers, and members of the trade. (Instrument No. 41 at 7). The first set of these letters, sent on June 20, 2011, informed the recipients that Kaneka had filed suit against ZMC, "who import[s] and sell[s] Coenzyme Q10 products that directly and/or indirectly infringe Kaneka's U.S. Patent No. 7,910,340." (Instrument No. 135-10 at 5). The letter further represents that "Kaneka expects that once the ITC investigation is instituted, a trial will be held by May 2012." *Id.* Kaneka advises the recipient to "take all necessary measures to avoid participating in the expansion of the infringing activities in the U.S. by selling or using infringing products that are manufactured or distributed by" ZMC. (Instrument No. 135-10 at 6).

Some portion of these letters also stated:

It has come to our attention that [the recipient] has been purchasing, using, or considering the purchase or use of Coenzyme Q10 products from [ZMC] that fall within the scope of the Kaneka Patent. Such products include Coenzyme Q10 bulk powder and Coenzyme Q10 emulsified powder, which [ZMC is] not authorized to manufacture, import, distribute or sell in the U.S.

(Instrument No. 135-10 at 8). ZMC insists that these letters assert as fact that it has infringed on Kaneka's process, rather than simply informing the recipient of the pending litigation.

(Instrument No. 144 at 15-16).

Kaneka's counsel sent additional letters on July 18, 2011 asserting:

Based on the strength of Kaneka's complaint, the ITC has decided to commence an investigation into [ZMC's] use of the Kaneka Patent and will be considering Kaneka's request for an Exclusion Order barring the importation of infringing products, prohibiting further sales of infringing products that have already been imported, and halting the marketing, advertising, demonstration and warehouse of inventory for distribution and use of such imported products in the United States.

(Instrument No. 135-10 at 9). ZMC claims that this language purposefully misrepresents the ITC proceedings by implying that a decision had been made on the merits about the strength of Kaneka's infringement claims. (Instrument No. 41 at 7).

A.

The basis for ZMC's claim for unfair competition is § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Section 43(a) provides:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . .

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a). Section 43(a) serves as the basis for claims generally known as "false advertising," "trade libel," and "product disparagement." *Zenith Electronics Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1347-48 (Fed. Cir. 1999) (citing 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27:10, at 27-19 to 27-20 (4th ed. 1998)).

To prevail on a claim under § 43(a), a plaintiff must establish: (1) that the defendant has made false or misleading statements as to his own product or another's; (2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; (3) that the deception is material in that it is likely to influence purchasing decisions; (4) that the advertised goods traveled in interstate commerce; and (5) that there is likelihood of injury to the plaintiff in terms of declining sales, loss of goodwill, etc. *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1383 (5th Cir. 1996); *Zenith*, 182 F.3d at 1348.

Marketplace representations of patent infringement may form the basis of a claim under § 43(a), but only if such representations were made in "bad faith." *Zenith*, 182 F.3d at 1353 ("before a patentee may be held liable under § 43(a) for marketplace activity in support of its patent, and thus be deprived of the right to make statements about potential infringement of its patent, the marketplace activity must have been undertaken in bad faith.") *See also Golan v. Pingel Enterprise, Inc.*, 310 F.3d 1360, 1371 (Fed. Cir. 2002) ("patentees do not violate the rules of fair competition by making accurate representations, and are allowed to be inaccurate provided they make them in good faith."). The requirement of "bad faith" "is in addition to the elements required by § 43(a) itself, as § 43(a) alone does not require bad faith." *Zenith*, 182 F.3d at 1353 (citations omitted).

In order to demonstrate "bad faith," a defendant must show that a patentee's assertions of infringement were "objectively baseless." *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 362 F.3d 1367, 1375-76 (Fed. Cir. 2004). A claim is "objectively baseless" if "no reasonable litigant could realistically expect success on the merits." *Id.* (citing *Profl. Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 57 (1993)). "In general, a threshold showing of incorrectness or falsity, or disregard for either, is required in order to find bad faith in the communication of information about the existence or pendency of patent rights." *Mikohn Gaming Corp. v. Acres Gaming, Inc.*, 165 F.3d 891, 897 (Fed. Cir. 1998) (quoted in *Golan*, 310 F.3d at 1371).

"Exactly what constitutes bad faith remains to be determined on a case by case basis." *Zenith*, 182 F.3d at 1354. The Federal Circuit has, however, set forth the types of statements that might equate to bad faith. Specifically:

if the patentee knows that the patent is invalid, unenforceable, or not infringed, yet represents to the marketplace that a competitor is infringing the patent, a clear

case of bad faith representations is made out. Furthermore, statements to the effect that a competitor is incapable of designing around the patent are inherently suspect.

Zenith, 182 F.3d at 1354. However, "although 'bad faith' may encompass subjective as well as objective considerations, and the patent holder's notice is not irrelevant to a determination of bad faith, a competitive commercial purpose is not of itself improper, and bad faith is not supported when the information is objectively accurate." *Mikohn Gaming Corp. v. Acres Gaming, Inc.*, 165 F.3d 891, 897 (Fed. Cir. 1998) (emphasis added).

The law "recognizes a presumption that the assertion of a duly granted patent is made in good faith." *Springs Window Fashions LP v. Novo Industries, L.P.*, 323 F.3d 989, 999 (Fed. Cir. 1998) (quoting *Golan*, 310 F.3d at 1371). In light of the presumption of good faith, the Federal Circuit has held that "to avoid summary judgment, a party claiming bad faith patent enforcement 'must present affirmative evidence sufficient for a reasonable jury to conclude that the patentee acted in bad faith, in light of the burden of clear and convincing evidence that will adhere at trial.'" *Id.*

Kaneka argues that summary judgment should be granted in its favor on ZMC's Lanham Act claim because ZMC cannot show that Kaneka brought these lawsuits or sent letters to the industry in bad faith. Furthermore, Kaneka asserts that ZMC cannot demonstrate that the letters sent by Dr. Adli contained misstatements.

ZMC argues that Kaneka acted in bad faith because at the time that Kaneka filed its counterclaims and sent letters to the industry, it had no reason to believe that ZMC's process infringed on the '340 patent. ZMC asserts that Kaneka relied on a document from the Korean Food and Drug Administration ("KFDA") identifying *agrobacterium tumefaciens* ("AT") as the microorganism used in ZMC's process, and that Kaneka subsequently conducted testing of the reduced CoQ10 molar ratio using that microorganism. (Instrument No. 144 at 11). ZMC argues

that Kaneka in fact believed that ZMC's process used the microorganism *rhodobacter sphaeroides* ("RS"), and that all of Kaneka's testing with that microorganism had failed to produce reduced CoQ10 at the requisite threshold. ZMC also argues that Kaneka conducted no investigation into ZMC's process to show infringement of either the "inert gas atmosphere" or the "sealed tank" limitations.

ZMC cannot demonstrate bad faith simply by showing that Kaneka failed to "conduct a sufficient infringement analysis prior to filing suit." *See Dominant Semiconductors Sdn. Bhd. V. OSRAM GmbH*, 524 F.3d 1254, 1262 (Fed. Cir. 2008). ZMC offers this argument explicitly numerous times in its response to Kaneka's motion for summary judgment, and all of its arguments echo a similar sentiment. ZMC argues that because Kaneka had not found evidence of infringement to a certainty prior to the lawsuits and sending the letters, it must have had ill intent in attempting to enforce its patent. Moreover, ZMC hopes to show subjective bad faith on the part of Kaneka by suggesting that Kaneka conducted tests on AT to produce the desired molar ratio specifically because it knew that it would not find such results were it to test using the microorganism RS. (Instrument No. 144 at 10-12). According to the manager of the intellectual property department at Kaneka, Satoru Tsuda ("Mr. Tsuda"), in 2009 and 2010, Kaneka investigated ZMC's manufacturing process, and came to believe that ZMC's process involved the microorganism AT. (Instrument No. 135-14 at 3). Mr. Tsuda notes that testing done on AT by a Kaneka researcher produced reduced CoQ10 at a ratio above 70 mole %. (Instrument Nos. 135-14 at 3). ZMC's only evidence that Kaneka's testing of AT was done in bad faith is that Kaneka simultaneously conducted testing of RS. Iwao Funahashi ("Mr. Funahashi") and Makoto Ueda ("Mr. Ueda"), employees of Kaneka, both testified about testing conducted by Kaneka during this time based on a belief that ZMC used RS in its process. (Instrument Nos. 143-1 at 59-

60; 143-14 at 20-23). ZMC notes that all of the testing done on RS during this time resulted in reduced CoQ10 ratios below 70%. However, in March 2011, Kaneka attached a copy of an expert report to its filings in the German litigation, which asserted that RS “produces at least a share of 70% of reduced coenzyme Q10, if not more.” (Instrument No. 143-7 at 58). Therefore, at the time these lawsuits were filed, Kaneka had reason to believe that if ZMC’s process used the microorganism RS, then it infringed the molar ratio limitation of the ’340 patent. Furthermore, Kaneka’s most recent testing of ZMC’s actual process, conducted in January of this year, did result in a molar ratio above 70%. *See* (Instrument No. 157-8 at 7). “[A]n objectively reasonable effort to litigate cannot be sham regardless of subjective intent.” *Dominant Semiconductors*, 524 F.3d at 1261. Any nefarious subjective intent that could be inferred from Kaneka’s early testing is irrelevant because the more recent testing shows that the lawsuit is not objectively baseless. The evidence offered by ZMC shows, at most, that Kaneka was unsure which microorganism ZMC used in its process and whether that microorganism produced reduced CoQ10 at a molar ratio greater than 70%. This is not affirmative evidence that Kaneka’s actions were “objectively baseless” or that “no reasonable litigant could realistically expect success on the merits.” *See Globetrotter*, 362 F.3d at 1375-76.

ZMC also argues that Adli’s letters contained false and deceptive statements that demonstrate Kaneka’s bad faith. Specifically, ZMC asserts that Adli incorrectly states that ZMC infringed Kaneka’s process, that the ITC made a decision based on the merits of Kaneka’s claims, and that Kaneka expected an ITC trial to be held by May 2012. Kaneka argues that, when read in the context in which they were written, these statements serve merely to inform the industry of the pending litigation. (Instrument No. 135 at 15-17). Furthermore, Kaneka argues

that the statement as to the date of trial merely illustrates its expectation and is not an assertion of fact.

Kaneka is correct that the language on the trial date merely stated an expectation, and is therefore not false or misleading. However, ZMC is correct that the other statements in question are different in kind from those in the cases offered by Kaneka in support of its argument. Kaneka relies on two district court cases, in which letters informing the marketplace about litigation were deemed devoid of objectively false or factually inaccurate statements. *See* (Instrument No. 135 at 15-16) (citing *Lawman Armor Corp. v. Master Lock Co.*, CIV.A. 02-6605, 2004 WL 362210 (E.D. Pa. Feb. 27, 2004); *Accenture Global Services GMBH v. Guidewire Software Inc.*, 581 F. Supp. 2d 654, 663 (D. Del. 2008)). However, in both of these cases, the letters clearly provided that it was merely the patent-holder's belief that its patent was infringed. *See Lawman Armor*, 2004 WL 362210, at *3-4; *Accenture*, 581 F. Supp. 2d at 665-66. In this case, Adli's letters state as fact that ZMC has infringed Kaneka's process. Nevertheless, ZMC must present clear and convincing evidence both that the allegations were false and that the patentee made them in bad faith, or with knowledge of their falsity. *See Golan*, 310 F.3d at 1371, *see also Iguana, LLC v. Langham*, 835 F. Supp. 2d 1372, 1379-80 (M.D. Ga. 2011) (holding that a letter sent to a supplier of an alleged infringer of a patent, stating as fact that infringement occurred did not alone constitute bad faith). As stated above, ZMC has offered no affirmative evidence that Kaneka did not have a good faith belief that ZMC's process infringed the '340 patent when it made these representations to the marketplace.

Accordingly, the Court GRANTS Kaneka's motion for summary judgment on ZMC's claim of unfair competition under § 43(a) of the Lanham Act. (Instrument No. 135).

B.

ZMC has brought Texas state tort claims of product disparagement, business disparagement, libel, and libel per se, all of which are based on the same conduct as its Lanham Act claim.

“Federal patent law . . . preempts state-law tort liability when a patentee in good faith communicates allegations of infringement of its patent.” *Dominant Semiconductors*, 524 F.3d at 1260. In order for a state tort claim to avoid preemption, “bad faith must be alleged and ultimately proven, even if bad faith is not otherwise an element of the tort claim.” *Zenith*, 182 F.3d at 1355. The bad faith standard is “applicable to all torts, state or federal, based on a patentee’s statements about patent infringement to a potential infringer and the industry.” *Golan*, 310 F.3d at 1370. To survive summary judgment, the party challenging such statements must present “clear and convincing evidence that the infringement allegations are objectively false, and that the patentee made them in bad faith, viz., with knowledge of their incorrectness or falsity, or disregard for either[.]” *Golan*, 310 F.3d at 1371.

For the same reasons provided in the discussion of ZMC’s Lanham Act claim, the Court finds that ZMC has offered no affirmative evidence that Kaneka’s actions to enforce its patent, both in the courts and in the marketplace, were “objectively baseless” or that “no reasonable litigant could realistically expect success on the merits.” *See Globetrotter*, 362 F.3d at 1375-76. Therefore, ZMC’s state tort claims of product disparagement, business disparagement, libel and libel per se are preempted by federal patent law. *See Dominant Semiconductors*, 524 F.3d at 1260, *see also Iguana*, 835 F. Supp. at 1379-80 (applying the *Zenith* standard and finding that Georgia state tort claims of tortious interference and defamation were preempted by federal patent law).

Accordingly, the Court GRANTS Kaneka's motion for summary judgment on ZMC's claims of product disparagement, business disparagement, libel, and libel per se.¹ (Instrument No. 135).

IV.

For the foregoing reasons, IT IS HEREBY ORDERED THAT Defendant Kaneka's motion for partial summary judgment seeking dismissal of ZMC's claims of unfair competition, business and product disparagement, and libel and libel per se (**Instrument No. 135**) is **GRANTED**.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 22nd day of September, 2014, at Houston, Texas.

A handwritten signature in black ink, appearing to read 'Mary Milloy', is centered on the page.

**MARY MILLOY
UNITED STATES MAGISTRATE JUDGE**

¹ The Court need not consider Kaneka's arguments that ZMC's claims should be dismissed because of an absence of damages or because Kaneka's letters were protected by the litigation privilege.