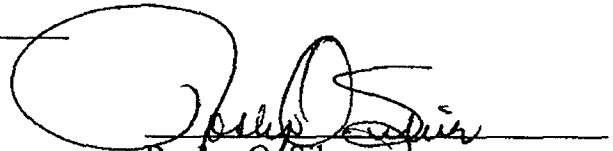


1 **FURTHER**, the Court has ordered Plaintiffs to pay reasonable attorneys' fees and
2 costs incurred by Defendant East Coast Lightning Equipment, Inc. in filing its two
3 summary judgment motions on Counts II, III, and IV. Accordingly, East Coast Lightning
4 Equipment, Inc. shall have JUDGMENT against Plaintiffs for its attorneys' fees and costs
5 in the amount of \$10,658.00.

6 **FURTHER**, the Court orders that East Coast Lightning Equipment, Inc. shall have
7 JUDGMENT against Plaintiffs for their violations of Section 43(a) of the Lanham Act, 15
8 U.S.C. §1125(a) and Plaintiffs are permanently enjoined as directed by this Court's
9 Injunction and Order issued contemporaneously with this JUDGMENT.

10 Dated

11 *October 7, 2005*



12 Roslyn O. Silver
13 U.S. District Judge
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1 **WHEREAS**, the Court, having therefore determined that Plaintiffs' advertising
2 claims regarding the range of protection provided by their air terminal products and the
3 claims of protection from lightning in outdoor settings are "literally false" under Section
4 43(a) of the Lanham Act, 15 U.S.C. §1125(a);

5 **THEREFORE, IT IS ORDERED THAT** an injunction shall issue enjoining and
6 restraining the Plaintiffs, their successors, officers, agents, employees, dealers,
7 distributors, and attorneys and on all persons, partnerships or corporations in present or
8 future active concert or participation with the Plaintiffs or any other person, partnership or
9 corporation acting on behalf of the Plaintiffs, from advertising, whether explicitly or
10 implicitly, that any or all Plaintiffs sell a lightning protection air terminal or similar
11 product that has been proven to significantly extend the maximum range of protection
12 against lightning damage beyond that afforded by NFPA 780 requirements.

13 For purposes of this Order and Injunction, the term "advertising" shall encompass
14 oral and written statements made in the context of commercial advertisement or
15 promotion of Plaintiffs' air terminal products and systems utilizing Plaintiffs' air terminal
16 products, for the purpose of influencing even a single potential customer to buy, or
17 recommend the purchase of, Plaintiffs' air terminal products and systems utilizing
18 Plaintiffs' air terminal products.

19 **AND FURTHERMORE THAT:**

20 1. Plaintiffs are enjoined and restrained from advertising that they sell a
21 lightning protection system utilizing air terminals that provide a measurable
22 zone of protection, greater than systems installed in accordance with NFPA
23 780; and/or that the system can function effectively to protect open spaces;
24 and

25 2. Plaintiffs are enjoined and restrained from advertising that they sell an
"improved," "enhanced," or "more efficient" lightning protection system
utilizing air terminals that rely on calculations of an enhanced range of
protection; and

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3. Plaintiffs are enjoined and restrained from advertising that any "enhanced" air terminal system manufactured, marketed, and/or sold by Plaintiffs (including but not limited to the "Early Streamer Emission" air terminal product, the "Electronically Activated Streamer Emission" air terminal product, so-called "Active" air terminal products, "Radioactive" air terminal products, and "Ionizing" air terminal products):

a) Is accepted by Underwriters Laboratories ("UL"), the National Fire Protection Association ("NFPA"), the Institute of Electrical and Electronics Engineers ("IEEE"), the International Electrotechnical Commission ("IEC"), the National Electric Code (NEC) and/or the Lightning Protection Institute ("LPI");

b) Has been tested and certified by a private testing lab to provide a measurable zone of protection greater than systems installed in conformance with NFPA 780;

c) Is able to protect open areas, including but not limited to amusement parks, golf courses, stadiums, and playing fields;

Plaintiffs are further **ORDERED**:

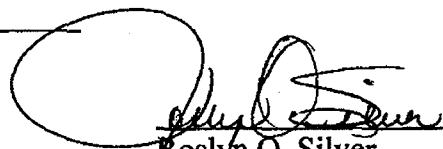
4. To file with the Court and serve on counsel for East Coast Lightning Equipment, Inc., within 30 days after the entry of this Order and Injunction, or within such period as this Court may direct, a report in writing and under oath, setting forth in detail the manner and form in which each Plaintiff has complied with this Order, including copies of all advertising and promotional material demonstrating compliance herewith; and

5. To post a copy of this Injunction and Order, and attached Judgment on Plaintiffs' websites and other sources of electronic advertising.

AND FURTHERMORE:

The Court shall retain jurisdiction of this action, and noncompliance by any person
1 or entity subject to this Order and Injunction shall be subject to the Court's power of
2 contempt.

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4 Dated October 7, 2005

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7 Roslyn O. Silver
U.S. District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Heary Bros. Lightning Protection Co.,
Inc., et al.,

Plaintiffs,

vs.

Lightning Protection Institute, et al.,

Defendants.

No. CV 96-2796-PHX-ROS

ORDER

Pending are Plaintiffs' and Defendant East Coast Lightning Equipment, Inc.'s ("East Coast") proposed forms of injunction. Also pending are Defendant East Coast Lightning Equipment, Inc.'s Motion and Memorandum in Support of Entry of Sanctions for Bad Faith Affidavits (Doc. #368); Defendant East Coast Lightning Equipment, Inc.'s Amended Motion to Strike Facts Asserted in Plaintiffs' Supporting Affidavits Re: Objection to East Coast's Proposed Injunction (Doc. #369); Plaintiffs' Cross-Motion to Strike Portions of Defendant's Supplemental Submission (Doc. #374); and Defendant East Coast Lightning Equipment, Inc.'s Motion and Memorandum of Points and Authorities to Strike Facts Asserted in Affidavit of Counsel Re: Objection to East Coast's Proposed Injunction (Doc. #384).

I. BACKGROUND

On October 23, 2003, the Court filed its Order disposing of the parties' various motions, including motions for summary judgment, and ordered Plaintiffs' Second Amended

1 Complaint dismissed with prejudice. [Doc. #341]. The Court granted Defendant East Coast
2 Lightning Equipment's ("East Coast's") Motion for Summary Judgment on Counterclaim
3 (claims of false description, and deceptive practices in violation of the Lanham Act), and
4 ordered East Coast to submit a proposed injunction. Both parties submitted forms of
5 injunction and a variety of other motions which were addressed in this Court's Order filed
6 on September 27, 2004 (Doc. #361).

7 The September 27, 2004 Order permitting additional briefing regarding Plaintiffs'
8 business dealings subsequent to the entry of this Court's October 23, 2003 Order (Doc. #361).
9 The parties were given a briefing schedule for arguments addressing the parties' separate
10 proposed injunctions and Defendants' claims that Plaintiffs have violated the intent
11 underlying the rulings within the Court's October 23, 2003 Order. The parties filed the
12 currently-pending motions in conjunction with the permitted additional briefing,

13 **A. The October 23, 2003 Order granting summary judgment in favor of Defendants**

14 The Court's October 23, 2003 Order addressed, at pages 42 through 57, East Coast's
15 Lanham Act Counterclaim against Plaintiffs, in which East Coast alleged that Plaintiffs
16 engaged in false advertising. East Coast's claims of literal false advertising addressed claims
17 by Plaintiffs that the early streamer emission ("ESE") air terminals (lightning rods) marketed
18 by Plaintiffs provide "a specific and measurable zone of protection" from lightning strikes
19 and that these devices can protect against lightning strikes in open spaces. As is set forth in
20 the Order, East Coast submitted evidence of a number of Plaintiffs' advertisements in which
21 Plaintiffs claimed a measurable zone of protection for various ESE products and also claimed
22 that the products protected open areas such as athletic fields. The Court recognized that East
23 Coast's false advertising claims were "interrelated, because Plaintiffs claim they can protect
24 from lightning strikes in open spaces *because* the zone of protection extends to cover those
25 spaces." [Id.]

26 Plaintiffs argued against East Coast's Counterclaim in part by criticizing the opinion
27 of East Coast's expert, Dr. Martin Uman, who stated that claims regarding the superiority of
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1 ESE devices were based on questionable theory and inconclusive experiments in the
2 laboratory and under natural conditions. Plaintiffs contended that Dr. Uman's expert report
3 was inconsistent with the lack of reported failures of ESE terminals in the field, and that Dr.
4 Uman himself had conceded that conventional lightning rod systems were not based on a
5 "theoretically well-justified concept, but it works in practice, it has worked for a long time
6" [*Id.*, p. 46.] In its Order granting summary judgment for East Coast, this Court
7 observed that "East Coast is not claiming that Plaintiffs' advertising is false because the
8 advertising claims that ESE devices work in general; rather, East Coast is claiming that the
9 advertising is false because it promises a measurable protection, greater than conventional
10 rods, and that it can function effectively to protect open spaces." [*Id.*, p. 46.]

11 In response to Plaintiffs' argument that the Court must consider the reliability of
12 testing of conventional lightning rod systems to establish a baseline standard for the testing
13 of ESE systems, the Court declared that the pleadings had not required a decision regarding
14 "the entire state of advertising for the lightning protection industry," and that it was only
15 ruling on "whether the ads at issue are literally false." [*Id.*]

16 Plaintiffs also contended that Mr. Heary and Mr. Rapp could testify, based on their
17 personal knowledge, that there has been a lack of reported failure of ESE systems and that
18 this is evidence to support the claim that ESE systems are effective. The Court stated: "[t]he
19 lack of reported failures does not itself provide support for a measurable zone of protection.
20 In fact, the lack of failures requires a scientific or technical inference to support a claim of
21 effectiveness or an enhanced zone of protection; Plaintiffs must provide expert testimony
22 establishing the inference." [*Id.*, p. 53.]

23 Summarizing its holding, the Court noted in conclusion that "Plaintiffs' claims that
24 their ESE products provide a measurable zone of protection and protect against lightning
25 strikes in open spaces are not supported by tests sufficiently reliable to support those claims,
26 and are "literally false" under the Lanham Act." [*Id.*, p. 56.]

1 **B. East Coast Lightning Equipment, Inc.'s Proposed Injunction**

2 On October 20, 2004, Defendant East Coast again submitted a proposed injunction.
3 The proposed injunction, among other things, enjoins Plaintiffs and those acting on their
4 behalf or in participation with them from "advertising, whether explicitly or implicitly, that
5 any or all Plaintiffs sell a lightning protection air terminal or similar product that has been
6 proven to significantly extend the maximum range of protection against lightning damage
7 beyond that afforded by United States safety standard requirements." [Defs.' Proposed
8 Injunction, p. 2.] The proposed injunction would also enjoin Plaintiffs from advertising that
9 its air terminal systems "can function effectively to protect open spaces," that its air terminal
10 systems "rely on calculations of an enhanced range of protection," or have been tested and
11 certified to perform as claimed, have a measurable range of protection based on sound
12 technical research establishing the claimed range, or has a measurable range of protection
13 because the system "conforms with a foreign lightning protection standard." [Id., pp. 3-4.]

14 The injunction would require Plaintiffs to serve a copy of the injunction order and
15 judgment in this matter to Plaintiffs' past air terminal products customers, likely purchasers
16 or specifiers of lightning protection systems, all lightning protection contracting firms, and
17 "all potential customers to whom Plaintiffs have previously disseminated their literally false
18 advertising materials" [Id., pp. 4-5.] East Coast's proposed injunction would further
19 require Plaintiffs to "monitor construction reporting services" for five years in the future to
20 identify projects in the U.S. in which Plaintiffs' products have been specified and to serve a
21 copy of the injunction on them, to advertise that the installation of air terminals in a
22 configuration that deviates from the standard for conventional protection system "could be
23 dangerous." [Id., p. 10.] Additionally, the proposed injunction would mandate that
24 Plaintiffs spend \$50,000.00 per year in the five years following entry of the Order on print
25 advertising communicating that Plaintiffs' claims for enhanced zones of protection for air
26 terminals "lack validity" and "may be dangerous" if installed in a configuration other than
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1 that applied to conventional lightning protection systems, and also to post a copy of the
2 injunction on Plaintiffs' "websites and other sources of electronic advertising." [*Id.*, p. 11.]

3 **C. Plaintiffs' opposition to East Coast's proposed injunction**

4 Plaintiffs complain that East Coast's proposed injunction is overbroad and does not
5 properly reflect the Court's holding on summary judgment. Specifically, Plaintiffs argue that
6 the proposed injunction is improper because it is based on two conclusions that were not
7 decided by the Court: that ESE air terminal systems do not work and are dangerous when not
8 installed in conformance with standards governing the installation of conventional lightning
9 protection systems. Instead, Plaintiffs contend that they should be able to advertise that their
10 ESE systems work, based on 25 years of experience during which "neither Plaintiff has had
11 a single verified reported failure of a properly installed and maintained system." [Doc. #373
12 (Pls.' Sur-Surreply), p. 5.]

13 **II. DISCUSSION**

14 The Court's Order on Summary Judgment held that Plaintiffs' advertising that ESE
15 systems provide a measurable zone of protection and protect against lightning strikes in open
16 spaces was literally false, violated the Lanham Act, and would be subject to an injunctive
17 remedy. This holding was based on Ninth Circuit precedent permitting a party to establish
18 literal falsity by showing that tests underlying the false claims is unreliable. [Doc. #341, p.
19 44.] The Court did not hold that Plaintiffs' advertising regarding the specified zone of
20 protection was false only if the advertising explicitly stated that the zone of protection was
21 based on scientific testing. Instead, the Court found that East Coast had proffered evidence,
22 which Plaintiffs had failed to refute with controverting evidence, that the advertised zone of
23 protection was "not supported by tests sufficiently reliable to support those claims." [*Id.*, p.
24 56.] Moreover, this Court specifically found that Mr. Heary's and Mr. Rapp's personal
25 knowledge of a lack of reported failures of ESE systems did not support Plaintiffs' advertised
26 claim of a measurable zone of protection, and was not responsive to East Coast's attacks on
27 the validity of testing relied on by Plaintiffs.

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1 Plaintiffs misperceive the effect of this Court's Order on summary judgment by
2 arguing that they are able to continue to advertise a measurable zone of protection based on
3 the alleged lack of reported failures of ESE systems or on alleged compliance with foreign
4 standards. As noted, the Court made no findings in its October 23, 2004 Order whether ESE
5 systems work in general, but rather found that claims of a measurable zone of protection
6 were not based on reliable scientific testing. This conclusion was necessarily directed to the
7 configuration of ESE systems advertised, which all parties agree include far fewer air
8 terminals and related equipment than conventional lightning rod systems. As the Plaintiffs
9 note, however, the Court did not make a finding that conventional systems were safe or that
10 ESE systems were unsafe. Moreover, the Court did not conclude that Plaintiff could not
11 advertise a lack of reported failures (if truthful), but did hold that testimony of the lack of
12 reported failures did not support the advertised claim of a measurable zone of protection.

13 **III. East Coast Lightning Equipment, Inc.'s Proposed Injunction and Order**

14 The portions of East Coast's proposed injunction disputed by the parties are discussed
15 below.

16 **1. Reference to United States safety standard requirements**

17 At page 2, lines 10 through 21, the proposed injunction would enjoin Plaintiffs and
18 others working with them "from advertising, whether explicitly or implicitly, that any or all
19 Plaintiffs sell a lightning protection air terminal or similar product that has been proven to
20 significantly extend the maximum range of protection against lightning damage beyond that
21 afforded by United States safety standard requirements." The final wording in that sentence,
22 i.e., "beyond that afforded by United States safety standard requirements" is vague, and does
23 not provide clear guidance to Plaintiffs. East Coast concedes this criticism in its Response
24 (Doc. #364, p. 7) and offers to omit "United States safety standard" and substitute instead the
25 term "afforded by NFPA 780 or UL96A requirements." Because the conclusions in Dr.
26 Uman's report, on which the Court relied, are based on NFPA 780 as the baseline installation
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1 configuration, the proposed injunction will be amended to substitute "NFPA 780" for the
2 term "United States safety standard requirement."

3 Plaintiffs object to the use of NFPA 780 because there was no finding that this safety
4 standard provides a sufficiently reliable basis for a specific, measurable zone of protection.
5 [Doc. #363, p. 9.] As noted in the October 2003 Order, the pleadings in this matter did not
6 require the Court to decide the state of advertising for the lightning protection industry, but
7 only whether the ads at issue are literally false.

8 **2. Statements regarding the historical performance in the field of ESE**
9 **systems**

10 Plaintiffs argue that nothing in the Order prevents them from advertising that, based
11 on historical experience, ESE systems "will provide protection to structures from lightning
12 damage." [Doc. #363, p. 15.] Again, the October 2003 Order concluded that the proposed
13 testimony of Frederick Heary and Robert Rapp regarding the lack of reported failures of ESE
14 systems did not provide support for a measurable zone of protection. [Doc. #341, p. 53.]
15 Specifically, the Order reasoned that

16 the lack of reported failures does not itself provide support for a measurable
17 zone of protection. In fact, the lack of failures requires a scientific or technical
18 inference to support a claim of effectiveness or an enhanced zone of
19 protection; Plaintiffs must provide expert testimony establishing the inference.
Moreover, the anecdotal evidence is not responsive to East Coast's attacks on
the validity of the testing.

20 [Id.] Accordingly, Plaintiffs may not advertise a measurable zone of protection based on the
21 historical performance in the field of ESE systems. East Coast's proposed injunction as
22 drafted prevents Plaintiffs from employing such advertising.

23 **3. Listing by Underwriters Laboratory, Inc.**

24 East Coast's proposed injunction would enjoin Plaintiffs from advertising that the ESE
25 system "is accepted" by Underwriters Laboratories ("UL") and a number of other entities.
26 Plaintiffs complain that the term "accepted by" is impermissibly vague and also overreaching
27 because there has been no such advertising. [Doc. #363, pp. 17-18.] Moreover, Plaintiffs
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1 argue that component parts of the ESE system have been listed with UL, and so they can
2 truthfully advertise that fact. Plaintiffs assert that Paragraph 3(a) of the proposed injunction
3 fails to comply with Rule 65, Fed.R.Civ.P.

4 Defendants counter that because UL does not have a standard for ESE systems,"any
5 representations relating to UL in the context of advertising ESE systems deceptively suggest
6 UL's endorsement - a powerful consumer inducement." [Doc. #364, p. 15.]

7 Plaintiffs may not be enjoined from truthful advertising that component parts of the
8 ESE system are listed with UL, as long as that advertising is not done in a manner that
9 reasonably implies that UL has endorsed the system as a whole or its installation. East
10 Coast's proposed injunction does not prevent Plaintiffs from advertising that component parts
11 used in ESE systems are listed with U.L., but only prohibits advertising directed to ESE
12 systems as a whole.

13 **4. Product guarantees and insurance coverage**

14 East Coast's proposed injunction would enjoin Plaintiffs from advertising that ESE
15 systems sold by them have "a measurable, expanded, range of protection that is insured by
16 multi-million dollar product guarantee policies[.]" Plaintiffs note that the Court granted
17 summary judgment in favor of Plaintiffs on East Coast's claims regarding product guarantees
18 and insurance coverage.

19 East Coast responds that its proposed injunction would not prevent Plaintiffs from
20 advertising that they have insurance and guarantee the product, but only that the devices
21 provide measurable, specific ranges of protection.

22 After the mention of insurance guarantees is removed from Paragraph 3(b), the
23 residual language refers to advertising that the ESE system "[h]as a measurable, expanded,
24 range of protection." This remaining language is repetitive and will be ordered removed.
25 The proposed injunction elsewhere enjoins Plaintiff from advertising that the ESE systems
26 provide a measurable zone of protection. Thus, the proposed injunction would also enjoin
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1 Plaintiff from advertising that there is insurance and product guarantees for such measurable
2 zone of protection. Paragraph 3(b) will be ordered omitted from the proposed injunction.

3 **5. Compliance with the French national standard**

4 At Paragraph 3(g), East Coast's proposed injunction would enjoin Plaintiffs from
5 advertising that their ESE systems have "a 'proven' measurable zone of protection because
6 it allegedly conforms with a foreign lightning protection standard." Plaintiffs object to this
7 limitation because this Court's October 2003 included nothing that would prevent them from
8 truthfully stating that their ESE systems comply with foreign standards, as long as they did
9 not also assert a specific measurable zone of protection based on the foreign standards.

10 The October 2003 Order noted that Plaintiffs had raised the issue of compliance with
11 foreign standards to refute East Coast's allegation that Plaintiffs falsely advertised that the
12 ESE system provided a measurable zone of protection. This Court concluded that Plaintiffs
13 had not provided admissible evidence that "conformance to any foreign standard provides
14 a scientific basis" for such advertising. As noted, because Plaintiffs are enjoined from
15 advertising a specific, measurable zone of protection it would be redundant for the injunction
16 to also specifically enjoin Plaintiffs from advertising a zone of protection based on
17 compliance with foreign standards. Sub-paragraph 3(g) will be omitted from the proposed
18 injunction. For the same reason, sub-paragraph 3(e) is redundant and will also be removed.

19 **6. Corrective advertising**

20 Plaintiffs state that East Coast's proposed injunction propose two categories of
21 corrective advertising: (1) serving a vast array of persons with a copy of the injunction via
22 certified mail; and (2) requiring Plaintiffs to affirmatively state that the ESE system is
23 dangerous and/or must be installed in compliance with NFPA 780. [Doc. #363, pp. 20-21.]
24 Plaintiffs complain that corrective advertising is not appropriate because East Coast has not
25 established that consumers have been actually influenced by the literally false advertising and
26 that this consumer impression is likely to linger even after the false advertising ceased.
27 Additionally, Plaintiffs argue that consumers of lightning protection systems are
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1 sophisticated and that Defendants have not identified even one consumer of lightning
2 protection products who was unaware of the industry-wide debate surrounding ESE systems
3 and the zone of protection controversy relating to the test methods for such systems.
4 Plaintiffs also argue that the proposed injunction is overly broad, requiring Plaintiffs to
5 disseminate the injunction to a range of persons and entities that is indiscernible and
6 potentially bankrupting. Finally, Plaintiffs complain that any requirement that Plaintiffs
7 advertise that their products are dangerous exceeds both the scope of East Coast's claims and
8 this Court's Order.

9 East Coast cites Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977) to
10 support its argument that even though it has not submitted evidence of actual consumer
11 confusion, it should be presumed that Plaintiffs' advertising resulted in such confusion. In
12 dicta, the D.C. Circuit suggested that:

13 it might be appropriate in some cases to presume the existence of the two
14 factual predicates for corrective advertising [that deceptive advertising played
15 a substantial role in creating or reinforcing in the public's mind a false belief
16 about a product, and that this belief would linger on after the false advertising
ceases]. But we need not decide that question, or rely on presumptions here,
because the [Federal Trade] Commission adduced survey evidence to support
both propositions.

17 562 F.2d at 762.

18 East Coast has not identified any instances in which a court has actually presumed the
19 factual predicate for corrective advertising, as East Coast urges this Court to do. Instead, as
20 the cases cited by Plaintiffs illustrate, courts have relied on evidence of confusion before
21 permitting corrective advertising. See Novartis Corp. v. FTC, 223 F.3d 783, 787-88 (D.C.
22 Cir. 2000) (court affirmed FTC's requirement for corrective advertising was based on studies
23 that attempted to quantify the improvement in consumer perception of pain reliever after a
24 nine-year advertising campaign, including a survey of "lingering effects" six months after the
25 campaign concluded); Warner-Lambert, 562 F.2d at 762-63 (finding that product survey data
26 and related expert testimony "constitute substantial evidence in support of the need for
27 corrective advertising . . ."); PBM Prods., Inc. v. Mead Johnson & Co., 174 F. Supp. 2d

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1 417, 422 (E.D. Va. 2001) (noting that courts "have considered the existence and reliability
2 of consumer surveys" in assessing the evidence needed to support a claim for prospective
3 corrective advertising, citing Novartis and Warner-Lambert); and American Farm Bureau
4 Fed'n v. Alabama Farmers Fed'n, 935 F. Supp. 1533, 1550-51 (M.D. Ala. 1996) (relying on
5 surveys establishing consumer confusion between parties to award corrective advertising
6 damages).

7 Although the Warner-Lambert court logically surmised that companies would be
8 "wasting their massive advertising budgets" if the advertising did not have any effect on
9 consumer belief, 562 F.2d at 762, here there is no evidence to indicate what consumers of
10 ESE systems actually believed about the product, let alone what effect Plaintiffs' advertising
11 had on those beliefs.

12 East Coast notes that Plaintiffs stated that between the early 1980's and 2001, East
13 Coast wrote thousands of letters to architects, engineers and others who made
14 recommendations on lightning protection systems advising that reliable testing did not
15 support a measurable zone of protection for ESE terminals or that the terminals were
16 effective to protect open spaces. Because Plaintiffs, in opposing summary judgment, did not
17 specify any instance in which East Coast's letters actually prevented the purchase of an ESE
18 system, East Coast urges the Court to conclude that Plaintiffs' advertising must have had the
19 intended effect. Such a conclusion, however, would be entirely speculative and is not drawn.

20 East Coast argues that the proposed injunction must require Plaintiffs to "run
21 corrective ads specifically stating that systems that are not installed in conformance with
22 NFPA 780 and/or UL96A can be dangerous, and must provide copies of the Injunction and
23 the Court's Order to prospective customers. . . ." This requirement, however, would exceed
24 the injunctive relief contemplated in this Court's October 2003 Order:

25 In arguing against injunctive relief, Plaintiffs contend that granting injunctive
26 relief would require the Court to administer a broad and intrusive injunction
27 to regulate the lightning protection industry. Plaintiff's arguments are
28 overstated. For example, Plaintiffs argue that an injunction "would place the
Court in the position of ordering that all lightning protection systems be
installed in compliance with NFPA and U.L. standards" and "effectively

1 prevent[] any competing systems of lightning protection from being sold or
2 distributed in the United States." . . . These claims are unfounded, because
3 the injunction would only affect Plaintiffs' advertising, not compliance
standards or distribution.

4 [Doc. #341, p. 57.] If the Court were to require Plaintiffs to run corrective ads stating that
5 systems not installed in conformance with NFPA 780 or UL96A are dangerous, this would
6 in effect go beyond advertising and require a product's compliance with those standards. By
7 limiting the injunction to preventing Plaintiffs from advertising that the ESE system provides
8 a measurable zone of protection greater than that of conventional lightning rods or that ESE
9 systems protect open spaces, the injunction conforms with this Court's holdings in the
10 October 2003 Order.

11 **7. Required revisions to East Coast's Proposed Injunction and Order**

12 Consistent with the above discussion, East Coast will be required to revise its
13 Proposed Injunction and Order filed on October 20, 2004, as follows:

- 14 • On page 2, lines 19 and 20, replace the phrase "United States safety standard"
15 with "NFPA 780 requirements";
- 16 • Omit as redundant: page 3, sub-paragraph (b); page 4, sub-paragraphs (e), (f), and (g);
- 17 • On page 4, sub-paragraph (c), replace the phrase "perform as claimed" with "provide
18 a measurable zone of protection greater than systems installed in conformance with
19 NFPA 780";
- 20 • Omit paragraphs 4 through 8, pages 4 through 11.

21 **B. Defendant East Coast Lightning Equipment, Inc.'s Motion and Memorandum
22 in Support of Entry of Sanctions for Bad Faith Affidavits (Doc. #368)**

23 East Coast argues for Court-ordered sanctions against Plaintiffs for submitting
24 affidavits in support of their arguments against East Coast's proposed injunction. East Coast
25 contends that Plaintiffs "mis-characterize and misrepresent specific findings" in the October
26 2003 Order in a knowing or reckless manner. East Coast's allegations center primarily on
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1 Plaintiff's argument that they should be able to advertise a specific, measurable zone of
2 protection based on personal experience in the field rather than on scientific testing.

3 Although the Plaintiffs' disputed affidavits in fact misconstrue this Court's holdings
4 set forth in its October 2003 Order, there is room for differing interpretations of the Order,
5 particularly where the Court has not yet issued an injunction. It does not appear that
6 Plaintiffs' affidavits were necessarily made recklessly or with knowledge the statements were
7 false. East Coast's request for sanctions will be denied.

8 **C. Defendant East Coast Lightning Equipment, Inc.'s Amended Motion to Strike**
9 **Facts Asserted in Plaintiffs' Supporting Affidavits Re: Objection to East Coast's**
10 **Proposed Injunction (Doc. #369)**

11 East Coast objects to statements made in the affidavits of Frederick Heary and Robert
12 Rapp, as well as in a letter attributed to Arnaud Lefort. East Coast's objections will be
13 addressed in turn.

14 Plaintiffs state that because they are only providing supplemental information to guide
15 the Court in defining the parameters of an injunction in this matter, the rules bearing on
16 admissibility of evidence applicable to consideration of summary judgment pursuant to Rule
17 56 should not be applied. Plaintiffs further state that, pursuant to Rule 65, the Court's focus
18 should not be on the admissibility of evidence, but rather "how it can proceed to tailor the
19 injunction to eliminate only the specific harm found by the Court." [Doc. #375, p. 4.]

20 East Coast urges the Court to review the testimonial evidence submitted in the
21 parties' supplemental briefing as it would any other such evidence, regardless of whether the
22 evidence is exercising legal or equitable jurisdiction.

23 A court may consider evidence that is not admissible when considering a preliminary
24 injunction. See Moore's Federal Practice 3d §65.23[2] ("The requirements of Rule 56(e) for
25 affidavits in support of a motion for summary judgment are not expressly applicable to
26 affidavits in support of a preliminary injunction. Since injunctive relief is discretionary and
27 non-final, application of the standards for summary judgment affidavits would be
28 inappropriate."); Butcher v. Gerber Prods. Co., 8 F. Supp. 2d 307, 314 (S.D.N.Y. 1998)

1 ("Because the purpose of a preliminary injunction is on to preserve the *status quo* in a given
2 case until a trial can be held, and 'given the haste that is often necessary if these positions are
3 to be preserved, a preliminary injunction is customarily granted on the basis of procedures
4 that are less formal and evidence that is less complete than a trial on the merits . . ."). The
5 injunction in this case, however, is to be entered after the Court has considered the merits and
6 has entered summary judgment, and will be permanent, not preliminary. Thus, the relaxed
7 procedures applicable to a preliminary injunction do not hold.

8 **1. Frederick Heary's November 2003 affidavit**

9 East Coast objects to a number of averments asserted by Mr. Heary in his November
10 2003 affidavit. Each is addressed in turn.

11 **a. Statement 2**

12 Mr. Heary states that he believes, pursuant to this Court's October 2003 Order, that
13 while Heary Bros. may not advertise "a measurable zone of protection based on . . . testing,"
14 "Heary Bros. should be permitted to engage in truthful advertising of its ESE products." East
15 Coast argues this is legal argument and not a statement of facts on which Mr. Heary is
16 competent to testify, and that his belief on how the Court should craft the injunction is
17 irrelevant. The Court agrees with East Coast: Statement 2 will be stricken as impermissible
18 legal argument.

19 **b. Statement 3**

20 In Statement 3, Mr. Heary states what he believes would be the effects of East Coast's
21 proposed injunction if adopted by the Court, and argues that his personal experience has
22 shown that both ESE systems and conventional systems are equally effective. The first and
23 fourth sentences of Statement 3 will be stricken as legal conclusion.

24 **c. Statements 5 and 6**

25 East Coast complains that Statements 5 and 6 are not statements of fact, but rather
26 conclusory allegations and legal argument. The Court agrees and will order Statements 5 and
27 6 stricken.

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d. Statements 7-10

Mr. Heary's statement in Statement 10 regarding violation of free speech rights will be stricken as an impermissible legal conclusion. The balance of Statements 7 through 10 are within Mr. Heary's competence and will not be stricken.

e. Statement 12

In Statement 12, Mr. Heary makes statements regarding the insurance coverage history of his company. He is competent to make the factual statements asserted. East Coast's motion to strike will be denied as to Statement 12.

f. Statements 13-15

These statements contain Mr. Heary's response to a specific term in East Coast's proposed injunction and are statements reasonably within his competence. East Coast's motion to strike will be denied as to these statements.

g. Statements 16-18

East Coast complains that "Mr. Heary is engaging in hyperbole and false assumptions based on his reading of the Proposed Injunction. His argument is better left to counsel to brief and should be stricken."

The last sentence of Statement 17 and the first sentence of Statement 18 consist of legal argument, and will be stricken.

h. Statements 26-32

East Coast complains that Mr. Heary is testifying on topics beyond his personal knowledge in Statements 26 through 32.

East Coast is partially correct. The following will be stricken for lack of foundation: Statements 28 and 29; the last sentence of Statement 30 and the portions of Statement 30 in which he speculates regarding the Defendants' motivations or decisions; and Statement 31 and the portion of Statement 32 in which Mr. Heary speculates on Defendants' motivation to drive Heary Bros. out of business.

1 **2. Frederick Heary's December 2003 Reply affidavit**

2 Plaintiffs attached an affidavit from Frederick Heary dated December 22, 2003 to their
3 Reply to the proposed injunction. East Coast objects to Statements 11 and 12 of the affidavit,
4 complaining that Mr. Heary's declaration of the parameters of his company's intended
5 advertising pending appeal in this matter are a misrepresentation "of the important facts
6 found by the Court in its decision." Mr. Heary is competent to testify as to his company's
7 interpretation of this Court's Order and his position regarding the scope of advertising
8 permitted under the Order. East Coast's motion to strike will be denied as to Statements 11
9 and 12 of Mr. Heary's December 2003 affidavit.

10 **3. November 2003 affidavit of Robert Rapp**

11 Plaintiffs attached the November 25, 2003 affidavit of Robert Rapp, an officer of
12 Plaintiff National Lightning Protection Corp., to its Objections to Proposed Injunction (Doc.
13 #363). East Coast objects to a number of statements asserted in the affidavit, many of which
14 are duplicative of statements in Mr. Heary's November 2003 affidavit. The objections are
15 addressed in turn.

16 **a. Statement 2**

17 East Coast objects to Mr. Rapp's statement and related argument that East Coast has
18 conceded the existence of foreign safety standards. Mr. Rapp's statement is primarily legal
19 argument and will be stricken.

20 **b. Statement 5**

21 East Coast objects to Mr. Rapp's interpretation of the Court's October 2003 Order as
22 it affects his ability to advertise that his ESE systems comply with foreign standards and that
23 the systems have provided effective lightning protection to structures.

24 Mr. Rapp is competent to testify on these issues. East Coast's motion to strike will be
25 denied as to Statement 5.

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c. Statements 6-10

East Coast asserts that Statements 6-10 are essentially the same as Statements 7-10 in Mr. Heary's November 2003 affidavit, and objects for the reasons stated with regard to the latter. Mr. Rapp's testimony in Statement 9 regarding violation of free speech rights and the last sentence of Statement 10 regarding international trade will be stricken as legal argument. East Coast's motion to strike will be denied as to the balance of Statements 6-10.

d. Statement 12

East Coast objects to Statement 12 for the same reason it objected to Statement 12 of Mr. Heary's November 2003 affidavit. Because Mr. Rapp is competent to make the factual statement asserted, East Coast's motion to strike will be denied as to Statement 12.

e. Statements 13-15

East Coast objects to Statements 13-15 for the same reasons it objected to Statements 13-15 of Mr. Heary's November 2003 affidavit. Because the statements are reasonably within Mr. Rapp's competence, the motion to strike will be denied as to Statements 13-15.

f. Statements 16-18

East Coast objects to Statements 16-18 for the same reasons it objected to Statements 16-18 of Mr. Heary's November 2003 affidavit. The first sentence of Statement 18 consists of legal argument and will be stricken. East Coast's motion to strike will be denied as to the balance of Statements 16-18.

g. Statements 27-32, 34

Again, East Coast refers the Court to its objections to statements in Mr. Heary's November 2003 affidavit and asks that Mr. Rapp's statements be stricken for the same reasons.

Mr. Rapp's statements lack foundation and are argumentative and will thus be stricken.

1 **4. Robert Rapp reply affidavit dated December 22, 2003**

2 East Coast objects to several statements included in Robert Rapp's affidavit dated
3 December 22, 2003, attached to Plaintiffs' Reply to East Coast's Proposed Injunction. The
4 objections are addressed in turn.

5 **a. Statement 13**

6 Statement 13 contains a recital of Mr. Rapp's understanding of certain holdings of this
7 Court's October 2003 Order. It does not include legal argument and will not be stricken.
8 East Coast's motion to strike will be denied as to Statement 13.

9 **b. Statement 14**

10 As East Coast complains, Statement 14 does include a legal conclusion and will be
11 stricken on that basis.

12 **c. Statement 15**

13 East Coast objects to Statement 15 because Mr. Rapp is offering legal conclusions.
14 The Court agrees and will grant the motion to strike Statement 15.

15 **d. Statements 17-18**

16 East Coast objects to Statements 17 and 18, alleging that the statements Mr. Rapp
17 makes are factual and further that the statements "appear to be made in bad faith, and
18 constitute a highly reckless representation of the important facts already found by the Court."
19 Mr. Rapp's statements, however, are expressly his "belief" based on his reading of the Court's
20 Order. He is competent to testify as to his understandings.

21 **5. Arnaud Lefort letter affidavit**

22 Plaintiffs attached an apparently redacted letter dated December 1, 2003 signed by
23 Arnaud Lefort, Chairman of the Board of Indelec, the manufacturer of the Prevelectron ESE
24 air terminal sold by Mr. Rapp. East Coast moves to strike the letter because it is
25 unauthenticated and redacted, and further because the affidavit/letter purports to establish a
26 scientific foundation for the French safety standard applicable to ESE systems. East Coast
27 notes that Mr. Lefort was never disclosed as an expert on any topic.

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1 Mr. Lefort's letter/affidavit exceeds the scope of the supplemental briefing permitted
2 by this Court and will be stricken.

3 **D. Plaintiffs' Cross-Motion to Strike Portions of Defendant's Supplemental**
4 **Submission (Doc. #374)**

5 On October 7, 2004, East Coast filed Supplemental Affidavits and Materials
6 Regarding Plaintiffs' Violation of Court Order (Doc. #370). On October 18, 2004, Plaintiffs
7 filed a Cross-Motion to Strike Portions of Defendant's Supplemental Submission (Doc.
8 #374). In the Cross-Motion, Plaintiffs object to several statements included in the affidavit
9 of Jennifer Morgan, an East Coast Vice-President, in which she introduced documents
10 submitted pursuant to this Court's September 27, 2004 Order (Doc. #361) permitting the
11 filing of supplemental materials regarding East Coast's complaints that Plaintiffs had
12 continuously violated this Court's October 23, 2003 Order.

13 **1. Morgan Affidavit Paragraph 4, Attachments 3, 4, 6 and 7**

14 Ms. Morgan states that these attachments are internet advertisements presented by
15 Heary Brothers distributors. She provides the website from which each advertisement was
16 accessed. East Coast provided these documents to demonstrate that Plaintiffs' distributors
17 continued to advertise a specified measurable zone of protection after entry of the October
18 2003 Order. Plaintiffs complain that Ms. Morgan does not state that she has personal
19 knowledge that the entities placing the internet advertisements are distributors of Heary
20 Brothers, and that except for the entity identified in Attachment 6, the entities are not
21 distributors of Heary Brothers' products.

22 The reference in Ms. Morgan's affidavit to "distributor(s)" will be stricken from the
23 descriptions included under Paragraph 3, Attachments 3, 4, and 7.

24 **2. Morgan Affidavit Paragraph 4, Attachment 8**

25 Plaintiffs complain that Ms. Morgan has established no foundation for, and has failed
26 to authenticate, Attachment 8, which Morgan described as "A Heary Bros. 'Certificate of Test
27 and Guarantee,' sent by Heary Bros. to a potential customer, Virtua Health Support Services
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1 Center in Marlton, NJ." East Coast does not address this allegation in its Response.
2 Attachment 8 will be stricken.

3 **3. Morgan Affidavit Paragraph 4, Attachment 9**

4 Ms. Morgan avers that Attachment 9 contains "Specifications for ESE systems that
5 I printed from the McGraw-Hill Construction Product Newsletter ("Dodge Scan") on the
6 dates specified on the documents." Plaintiffs do not object to the Affidavit, but rather dispute
7 East Coast's arguments which reference the Attachment. Having established no basis for
8 striking Attachment 9, Plaintiff's Cross-Motion will be denied as to that attachment.

9 **4. Morgan Affidavit, Paragraph 4, Attachment 2**

10 Ms. Morgan describes Attachment 2 as: "Relevant pages from the Manufacturer's
11 Installation Standard for Lightning Protection Systems Using Early Streamer Emission Air
12 Terminals, HBP-21, downloaded from the Lightning Preventor of America site,
13 www.lightningpreventor.com." Plaintiffs state that Attachment 2 is actually product
14 descriptions and specifications "for use in conjunction with designing ESE systems pursuant
15 to" the Manufacturer's Installation Standard. The page from HBP-21 included in Attachment
16 2 specifies zones of protection based on "over 25 years of successful field experience with
17 ESE systems."

18 Plaintiffs move to strike the Attachment document because it is not advertisement, but
19 rather "instructions" for installation. As Plaintiffs concede, Ms. Morgan does not state that
20 the document is advertisement, although East Coast argues that the material is included in
21 advertising materials for Plaintiffs' ESE systems. Plaintiffs fail to establish a basis for
22 exclusion of this document. The Cross-Motion will denied as to Paragraph 4, Attachment
23 2 of Ms. Morgan's affidavit.

24 **5. Morgan Affidavit, Paragraph 4, Attachment 1**

25 Ms. Morgan describes the document included under Attachment 1 as "A Preventor
26 brochure obtained from the Heary Bros. booth at a trade show in Salt Lake City, Utah on
27 May 23, 2004." Plaintiffs request to strike this document as "misleading" because it is
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1 incomplete and because "the current version of Plaintiffs' brochure as of August 12, 2004 is
2 attached to the Heary Affidavit as Exhibit B."

3 The Court permitted East Coast to submit supplemental materials and affidavits
4 relevant to its claim that Plaintiffs have violated the intent of the October 2003 Order.
5 Plaintiffs do not explain why the brochure offered by East Coast is incomplete; moreover,
6 simply because a newer brochure has been made available does not by itself render an older
7 brochure inadmissible. Plaintiffs' Cross-Motion will be denied with respect to Attachment
8 1.

9 **E. Defendant East Coast Lightning Equipment, Inc.'s Motion and Memorandum**
10 **of Points and Authorities to Strike Facts Asserted in Affidavit of Counsel Re:**
11 **Objection to East Coast's Proposed Injunction (Doc. #384)**

12 East Coast moves to strike certain statements of Plaintiffs' counsel Linda Joseph
13 attached to Plaintiffs' Sur-Surreply (Doc. #373). East Coast refers to Ms. Joseph's statements
14 regarding an article authored by Defendants' expert, Dr. Uman, in the December 2002 issue
15 of the *American Meteorological Society*. East Coast requests that most of paragraphs 4 and
16 5, and all of paragraph 6 of Ms. Joseph's October 14, 2004 affidavit be stricken because she
17 wrongly concludes that the Uman article states that U.S. safety standards are not based on
18 the physics of lightning, and otherwise lacks specific facts and offers only conclusory
19 statements.

20 As noted above, language in East Coast's proposed injunction requiring Plaintiffs to
21 advertise that ESE systems configured in a manner inconsistent with NFPA 780 are
22 dangerous will be omitted as beyond the scope and the holding of the October 2003 Order.
23 Ms. Joseph's averments dealing with the basis for NFPA 780 are similarly beyond the scope
24 of the October 2003 order. East Coast's motion to strike will be granted on that basis.

25 Accordingly,

26 **IT IS ORDERED** that Defendant East Coast Lightning Equipment, Inc. will submit
27 a form of Injunction and Judgment incorporating the revisions set forth in section III (7)
28 above within ten (10) days of the date of this Order.


1 **IT IS FURTHER ORDERED DENYING** Defendant East Coast Lightning
2 Equipment, Inc.'s Motion . . . [for] Sanctions for Bad Faith Affidavits (Doc. #368).

3 **IT IS FURTHER ORDERED** that Defendant East Coast Lightning Equipment, Inc.'s
4 Amended Motion to Strike Facts Asserted in Plaintiffs' Supporting Affidavits Re: Objection
5 to East Coast's Proposed Injunction (Doc. #369) is **GRANTED IN PART** and **DENIED IN**
6 **PART** as explained in this Order.

7 **IT IS FURTHER ORDERED** that Plaintiffs' Cross-Motion to Strike Portions of
8 Defendant's Supplemental Submission (Doc. #374) is **GRANTED IN PART** and **DENIED**
9 **IN PART** as explained in this Order.

10 **IT IS FURTHER ORDERED GRANTING** Defendant East Coast Lightning
11 Equipment, Inc.'s Motion . . . to Strike Facts Asserted in Affidavit of Counsel Re: Objection
12 to East Coast's Proposed Injunction (Doc. #384).

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14 DATED: 9/9, 2005.

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18 Roslyn O. Silver
19 United States District Judge
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