

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

OSMOSE, INC.,

Plaintiff,

v.

VIANCE, LLC, ROCKWOOD
HOLDINGS, INC., STEPHEN B.
AINSCOUGH, SEIFOLLAH E.
GHASEMI, and CHRISTOPHER R.
SHADDAY,

Defendants,

VIANCE, LLC,

Counterclaim-Plaintiff,

v.

OSMOSE, INC., PAUL GOYDAN,
STEPHEN C. REEDER, and
RICHARD J. ZIOBRO,

Counterclaim-Defendants.

CIVIL CASE NO.
3:09-CV-23-JTC

ORDER

This is a false advertising case involving developers and manufacturers of chemical wood preservatives, which are used to protect wood against rot, decay, and insect attack. Plaintiff Osmose, Inc. and Defendant Viance, LLC – both manufacturers of wood preservatives – accuse each other of various false advertising practices. The case is before the Court on Plaintiff’s motion for preliminary injunction [#2] and Defendants’ counter motion for preliminary

injunction [#61].

The Court held a preliminary injunction hearing beginning June 24, 2009 and concluding July 2, 2009. For the reasons discussed in this order, the Court **GRANTS** Plaintiff's motion for preliminary injunction [#2] and **DENIES** Defendants' motion for preliminary injunction [#61].

I. Glossary

In view of the significant amount of live testimony, deposition testimony, and the number of exhibits (1033) which Viance submitted, as well as the number offered by Osmose (452), a glossary describing the dramatis personae may be useful to the reader.

1. **ACQ:** A copper-based, wood-treating preservative manufactured by Viance. A competitor with Osmose's MCQ.
2. **Ainscough, Stephen:** President and CEO of Viance.
3. **AWPA:** American Wood Protection Association, a nonprofit trade organization, which promulgates voluntary wood preservation standards.
4. **CSI:** Chemical Specialties, Inc. Viance's predecessor company.
5. **EPP:** Environmentally Preferable Product, a designation used by the EPA, SCS, and other environmental groups to designate products which have reduced impacts on human health and the environment when compared to other products that serve the same purpose.
6. **EPA:** United States Environmental Protection Agency
7. **Ghasemi, Seifollah:** President and CEO of Rockwood Holdings, the parent company of Viance, LLP. Rockwood Holdings, Inc. primarily sells specialty chemicals.

8. Goydan, Paul: President of Osmose. Osmose Holdings, Inc. is a privately held company which, among other things, develops and sells new technologies in the wood preservation industry.
9. Greer, Todd: Vice President of Timber Products Inspection, Inc. Timber Products Inspection, Inc. is a third party wood products inspection, testing, and consulting company.
10. ICC-ES: International Code Council – Evaluation Service. ICC-ES is a membership association that develops building codes used to construct residential and commercial buildings. The Association issues evaluation reports for building products and materials which certify whether they comply with the model building codes.
11. IRG: International Research Group on Wood Protection, an international research group on wood protection located in Stockholm, which both disseminates new research and organizes annual conferences to discuss significant research in the field.
12. McCown, Colin: CEO of the AWWA, above.
13. MCQ: Micronized Copper Quaternary wood preservative, an Osmose product which uses the MicroPro technology; see below.
14. MicroPro: A copper-based wood preservative system developed and marketed by Osmose. The technology consists of solid minute particles of copper that have been “micronized” and suspended in a liquid.
15. Nicholas, Dr. Darrel: A professor in wood science at Mississippi State University hired by Viance to inspect and rate the pressure treated wood stakes from the 2007 field stake tests.
16. O’Reardon, Michael: Regional director for ICC-ES. See above.
17. Osmose, Inc.: Operates as a subsidiary of Osmose Holdings, Inc. and is a developer and manufacturer of preservatives which protect wood against rot, decay, and insect attack.
18. Reeder, Stephen: Senior Vice President of Osmose.
19. Rockwood Holdings, Inc.: A Fortune 1000 company, one of the

subsidiaries of which is Defendant Chemical Specialties, Inc. CSI, as a partner of Rohm & Haas, formed Viance to produce and sell wood preservative products.

20. SCS: Scientific Certification Systems, an independent group which certifies a broad variety of companies' environmental and sustainability claims.
21. Shadday, Christopher: Commercial Vice President of Viance.
22. TP: Timber Products Inspection, Inc.: An independent company which inspects and tests wood. See above.
23. Viance, LLC: A joint venture between Rohn & Haas Company and Chemical Specialties, Inc., a wholly owned subsidiary of Defendant Rockwood Holdings, Inc. Located in Charlotte, North Carolina, Viance manufactures chemicals for wood treatments and preservation applications.
24. Zhang, Dr. Jun: Director of Research for Osmose, listed as a co-author of the "Micro-Distribution of Micronized Copper in Southern Pine" paper and presented it at the IRG conference.
25. Ziobro, Richard: Vice President of Research of Osmose.

II. Background

A. The Parties

Plaintiff Osmose, Inc. develops, manufactures, and sells wood preservatives, which protect wood against rot, decay, and insect attack.

(Compl. ¶ 1.) Osmose developed a copper-based wood preservative system, which it trademarked and markets as MicroPro. (Id. ¶ 2.) Micronized Copper Quaternary wood preservative ("MCQ") is one Osmose product and uses the MicroPro technology. (Id. ¶ 3.) Osmose's MicroPro copper technology consists

of solid “micronized” particles of copper that are suspended in a liquid. (Id. ¶ 40.) The technology is based on the preservative effect of copper, but MicroPro used a new method of placing copper into the wood.

Counterclaim-Defendant Paul Goydan is the President of Osmose. (Answer and Counterclaim ¶ 172.) Counterclaim-Defendant Stephen Reeder is a Senior Vice President of Osmose, and Counterclaim-Defendant Richard Ziobro is Vice President of Research of Osmose. (Id. ¶¶ 173-174.) ACQ is also a copper-based preservative.

The original defendant, Viance, LLC, is one of Osmose’s competitors in the business of manufacturing and selling wood preservatives. Viance manufactures a wood treating preservative called ACQ, which competes directly with Osmose’s MCQ product.

Defendant Stephen Ainscough is the president and C.E.O. of Viance. (Compl. ¶ 12.) Defendant Christopher Shadday is the commercial vice president of Viance. (Id. ¶ 14.) Viance is a joint venture between Rohm and Haas Company and Chemical Specialties, Inc. (Compl. Ex. B at 3.) Defendant Seifollah Ghasemi is the president and C.E.O. of Defendant Rockwood Holdings, the parent corporation. (Compl. ¶ 18.)

B. Development and Certification of Micronized Wood Preservatives and Approval by ICC-ES

Prior to Plaintiff’s development of micronized copper wood

preservatives, ACQ was the dominant wood treatment technology in the marketplace. (Tr. at 98:18-21; 957:3-11.) Previously, Osmose used the ACQ technology in its products pursuant to a license from Viance. (Id. at 944:14-23; Def. Ex. 10 ¶ 13.)¹ Under the licensing agreement, Osmose became one of the largest sellers of ACQ in the United States.

Osmose began researching and developing its MCQ, micronized copper wood preservative system, in 2002. (Horton Dep. 29:8-24.) MCQ is one of the micronized copper wood preservative systems sold by Osmose. MCQ is made up of micron size particles of copper suspended in a liquid.² (Tr. at 127:5-128:4.)

In October, 2004, Osmose contacted the International Code Council – Evaluation Service (“ICC-ES”) in order to obtain approval for its MCQ product. (Tr. at 579:8-10; Horton Dep. 34:16-35:4) ICC-ES issues evaluation reports for building products and materials to determine whether they comply with model building codes. (Archer Decl. ¶ 11.) Wood treated with a preservative which has not obtained certification from an organization such as ICC-ES cannot be used in many jurisdictions. (Id. ¶ 10.)

¹ Several exhibits cited in this Order were not introduced at the hearing. Any exhibits not introduced at the hearing that were not objected to in the parties’ pre-hearing filings are admitted for the purposes of this Order.

²A micron is a metric unit of length equal to one millionth of a meter.

A Vice President at Osmose, met with Michael O'Reardon, regional director for ICC-ES, on October 21, 2004. (Tr. at 579:8-20; Horton Dep. 34:16-35:4, 38:15-39:12; O'Reardon Dep. 76:9-77:13.) At the meeting, he explained the difference between ACQ and MCQ: MCQ uses micronized copper particles suspended in a liquid rather than using a dissolved copper solution. (Tr. at 581:21-582:2; Horton Dep. 42:7-23.) O'Reardon reviewed data from various tests Osmose had performed on its MCQ product. (Horton Dep. 42:24-54:18.) Although a new product typically cannot be added to an ICC-ES approval report through an editorial change, O'Reardon indicated that Osmose could seek an editorial change to the existing approval ICC-ES had given to Osmose's ACQ product, rather than applying for an entirely new approval report, as long as Osmose simultaneously applied for a conversion of its existing report. (Tr. at 579:8-580:6; O'Reardon Dep. 31:8-32:9, 82:7-24; Horton Dep. 55:8-56:19.)

Osmose then applied for the editorial change to its existing ICC-ES approval to add the new product to the existing certification. (Tr. at 580:7-13.) Osmose provided ICC-ES with all the information ICC-ES requested in conjunction with the application. (Id.; See also Def. Ex. 210.) Osmose did not rely on ACQ test data to obtain MCQ approval. (Tr. at 581:3-19.) ICC-ES was aware that the copper in the new product was micronized copper

particles rather than copper dissolved in ammonia or monoethanolamine (MEA) as ACQ was. (See O'Reardon Dep. 77:21-78:18; Def. Exs. 199 at 2, 210 at 9.) ICC-ES approved Osmose's MCQ product on April 1, 2006. (Def. Ex. 210; O'Reardon Dep. 33:20-34:1.)

After the approval, a Viance entity, Chemical Specialties, Inc (CSI), complained to ICC-ES that Osmose improperly relied on ACQ test data to receive certification of its MCQ product and also stated concerns about the effectiveness of MCQ preservatives. (Pl. Ex. 23; Def. Ex. 207.) As a result, O'Reardon suggested that Osmose provide ICC-ES with an independent analysis of MCQ. (Tr. at 589:20-590:20.) As requested, Osmose provided ICC-ES with an independent analysis which compared MCQ to ACQ. (Id. at 598:21-598:7; Pl. Ex. 9.) On November 10, 2006, ICC-ES sent Osmose a letter stating that it rejected the Viance arguments and found no technical justification for revoking MCQ's approval. (Def. Ex. 155.)

On December 5, 2006, CSI's counsel sent another letter to ICC-ES alleging that Osmose failed to follow proper procedure in seeking approval of MCQ. (Def. Ex. 213.) In the letter, CSI's counsel stated that they "find it difficult to believe that ICC-ES would knowingly expose itself to the legal consequences of issuing a code compliance finding in violation of its own rules and contrary to even a minimum legal standard of care." (Id. at 3.) As a

result, ICC-ES referenced the letter from CSI's counsel and threatened to revoke the approval of MCQ. (See Def. Ex. 217.) Osmose and CSI, however, later settled the dispute, and CSI withdrew its complaint with ICC-ES. (Pl. Ex. 22.) As a result, ICC-ES took no further action with regard to its certification of MCQ.

Sometime after the introduction of MCQ to the market, Scientific Certification Systems ("SCS") certified MCQ as an environmentally preferable product. SCS offers an independent certification of environmental and sustainability claims. Osmose provided SCS with all the data and information in its possession, including lab test and field stake test data. (Tr. at 610:4-14; Rhodes Dep. 82:12-91:7, 107:9-108:1.) SCS also obtained information from suppliers of the raw materials used to manufacture MCQ. (Tr. at 610:15-611:1.) In certifying MCQ as an environmentally preferable product, the founder of SCS stated that SCS conducted a full Life-Cycle Assessment of MCQ preservatives and MCQ treated wood. (Rhodes Dep. 29:13-15, 75:15-81:13, 199:24-202:20, 245:1-23.) This Life-Cycle Assessment was based on stake tests, lab tests, fundamental chemistry, and SCS's extensive experience in the wood treating industry. (Id. 82:12-83:24.)

C. Viance's Advertisements Concerning MCQ

Osmose alleges that Defendants have published numerous

advertisements which assert that wood treated with MCQ is subject to premature decay and that structures built with MCQ treated wood are unsafe. Osrose contends that the advertisements are literally false. The following is a history of Viance's studies and subsequent statements concerning MCQ preserved wood.

1. *Viance's Initial Response and the SEM Analysis*

Viance first learned of Osrose's micronized copper technology in early 2006. (Tr. at 809:1-11.) Viance's initial response was one of concern. (Id. at 809:19-810:4, 812:11-815:10.) Viance expressed doubt that the micronized particles of copper could penetrate the wood sufficiently to deposit the copper inside the cell walls, which it asserts is essential to the preservative's effectiveness. (Id.)

To verify its claims, Viance purchased commercially available MCQ treated wood and sent it to a lab to be analyzed using a scanning electron microscope ("SEM"). (Id. at 815:22-817:3.) According to Dr. Preston, the SEM analysis verified their doubt that the copper particles could sufficiently penetrate the cell walls of the wood. (Id.) The SEM results showed copper material built up on surfaces and membranes of cells, but the copper did not appear to penetrate the cell walls. (Id.)

Dr. Kevin Archer of Viance presented the SEM findings at the 2007

annual International Research Group on Wood Protection (IRG) conference. (Def. Ex. 17.)³ In his presentation, Dr. Archer concluded that the concentration of copper in the cell walls of MCQ treated wood was “significantly lower than in wood treated with ACQ” but that “the long term performance implications in ground contact are unknown.” (Def. Ex. 17 at 31, 42.)

2. *Viance’s Field Stake Tests*

“Field stake tests” are an accepted method of testing the effectiveness of a wood preservative. In the spring of 2007, Viance initiated field stake tests in Hawaii and Japan to compare the performance of MCQ treated stakes with ACQ treated stakes. (Tr. at 820:25-821:18.) Viance purchased commercially available MCQ treated square posts and ACQ treated square posts from local home improvement stores. (Def. Ex. 310 at 2.) Viance cut stakes from each corner of the square post, such that two sides of the stakes were outside edges and two sides of the stakes were inside edges. (*Id.*) Viance did not “field coat” the inside surface of the stakes to ensure that the it had a “prophylactic seal” of wood preservatives. (Tr. at 1057:8-10.)

³ Defendants’ Exhibit 17 was not introduced at the hearing, and Plaintiff objected to the exhibit in its pre-hearing filings under Fed. R. Evid. 401, 402, and 703. The Court overrules Plaintiff’s objections, and the exhibit is admitted for purposes of this Order.

After 11 months, Viance claimed the ACQ treated stakes remained close to 100% sound, while the MCQ treated stakes showed signs of termite damage and were approximately 95% sound. (Def. Ex. 7 at 45.) After 9 months at the site in Japan, Viance claimed the ACQ treated stakes were 100% sound while the MCQ stakes were approximately 79% sound. (Id. at 33.)

Viance hired Dr. Darrel Nicholas, a wood scientist at Mississippi State University, to inspect and rate the stakes. (Tr. at 1020:22-1021:18.) Dr. Nicholas prepared a report on his findings. (Id. at 1021:19-1022:6; Def. Ex. 310.) In his report, Dr. Nicholas concluded that MCQ was “performing poorly” and that “it is apparent that the MCQ formulation is not performing in ground contact as would be expected for a commercial wood preservative.” (Def. Ex. 310 at 4, 5.) However, Dr. Nicholas qualified his findings by noting that “[a]dditional field stake test data will be required to confirm this concern about the performance of MCQ in ground contact applications. . . . [I]t is recommended that the field stakes be closely monitored in the future.” (Id.) Despite this recommendation, Dr. Nicholas has not inspected the stakes since his initial inspection, and he does not know whether Viance has inspected the stakes. (Tr. at 1044:17-1045:15.)

3. *Viance’s In-Service Post Surveys*

After conducting the field stake tests in Japan and Hawaii, Viance began to search the United States for in-service wood treated with MCQ to find signs of premature decay. (See Pl. Exs. 200, 210, 218, 220, 226, 228, 229, 231, 232, 273, 365.) Viance hired a private investigation firm to search for in-service MCQ posts that showed signs of decay in the central Florida area. (Pl. Exs. 54, 207 at 1.) In July 2008, the private investigation firm prepared a report summarizing their findings. (Pl. Ex. 54.) The firm had visited 18 different sites, interviewed over 40 retailers and builders, and found that “all of those interviewed, both skeptics and advocates, stated that they have not had or heard of any problems in regard to premature decay of the MCQ material.” (Id. at 4.)

Viance continued its search, and in November 2008 Viance claims to have discovered signs of early decay in MCQ treated posts in the Baton Rouge, Louisiana area. Viance hired Timber Products Inspection, Inc. (TP) to perform an evaluation of selected posts. (Tr. at 739:24-740:14.) TP is an independent company which inspects and tests wood products. The firm accompanied Viance to five sites in the Baton Rouge area to inspect and extract MCQ posts from existing fences. (Id. at 740:15-741:8.) Viance chose which posts to extract and inspect. (Tr. at 740:15-742:3; Greer Dep. at 39:10-43:7.)

On November 14, 2008, Timber Products issued its report (the “November 2008 TP Report”). (Def. Ex. 120.) The Report stated that “[i]t was visually determined that the posts showed signs of deterioration and were given ratings ranging from 9 to 9.5.” (Id. at 2.) Under the established rating system in the industry,⁴ a rating of 9.5 represents “some areas of discoloration and/or softening associated with superficial microorganism attack,” while a rating of 9 indicates that “decay and wood softening is present; up to 3% of cross sectional area is affected.” (Id.) The Report also stated that “[t]here was no termite attack observed on the post.” (Id.) Timber Products qualified its findings as follows: “This inspection report should not be considered as acceptance or rejection for the grade, treatment or physical quality of the above-referenced material.” (Def. Ex. 120 at 4.)

After the Louisiana study, Viance continued to look for in-service MCQ treated wood which showed signs of decay. Sometime in the winter of 2008-2009, Viance allegedly found several more MCQ treated posts showing signs of premature decay in Alpharetta, Georgia. (Archer Decl. ¶ 42.) The posts allegedly had been installed in September or October of 2007. (Id. ¶ 44.)

⁴The scale used in these tests is standard within the wood products industry and ranges from 0-10. At the zero end of the scale, the wood sample has functionally failed. At the ten end of the scale, the wood sample is sound and shows no evidence of decay, wood softening or discoloration caused by microorganism attack.

Viance again hired TP to inspect the posts. (Tr. at 753:11-22.)

Timber Products issued a second report on January 21, 2009 concerning the Alpharetta, Georgia posts (the "January 2009 TP Report"). (Def. Ex. 128.) In that Report, Timber Products indicates that it met with Viance representatives to give a visual decay rating of forty-five selected posts located in a subdivision near Alpharetta. (Id. at 1.) TP representatives took fourteen of the forty-five posts selected by Viance to conduct a more thorough investigation. (Id.) Timber Products used the American Wood Protection Association (AWPA) "1 to 10" rating scale. (Id. at 3.) The visual examination of the 45 initial posts yielded the following results:

Rating Given to Posts	Number of Posts with this Rating	What Rating Means
10	26	<u>Sound</u> : no sign or evidence of decay.
9.5	11	<u>Trace-Suspect</u> : some areas of discoloration and/or softening.
9	5	<u>Slight Attack</u> : up to 3% of cross sectional area affected by decay or wood softening.
8	2	<u>Moderate Attack</u> : 3-10% of cross sectional area affected by decay or wood softening.
7	1	<u>Moderate/Severe Attack</u> : 10-30% of cross sectional area affected by decay or wood softening.

The secondary tests performed by Timber Products on the fourteen selected posts yielded the following results:

Rating Given to Posts	Number of Posts with this Rating	What Rating Means
10	4	<u>Sound</u> : no sign or evidence of decay.
9.5	5	<u>Trace-Suspect</u> : some areas of discoloration and/or softening.
9	2	<u>Slight Attack</u> : up to 3% of cross sectional area affected by decay or wood softening.
8	2	<u>Moderate Attack</u> : 3-10% of cross sectional area affected by decay or wood softening.
7	1	<u>Moderate/Severe Attack</u> : 10-30% of cross sectional area affected by decay or wood softening.

The January 2009 TP Report concluded with the same qualification as the November 2008 TP Report: “This inspection report should not be considered as acceptance or rejection for the grade, treatment or physical quality of the above referenced material.” (Id. at 5.)

On March 13, 2009, Dr. Nicholas and Lee Gjovik, another wood scientist, rated fourteen of the posts removed from the Alpharetta site. (Tr. at 1028:16-1029:11; 1030:12-18.) The posts had been stored in a cold room at Viance’s facilities. (Id. 1028:23-25.) Of the fourteen posts, six were judged to

be 9 or below on the rating scale. (Def. Ex. 1028.) On March 16, 2009, Dr. Nicholas and Gjovik went to one of the Louisiana sites and rated six of the posts originally rated by Viance and Timber Products, as well as two additional posts. (Tr. at 1029:12-1030:3; 1030:12-18.) Of the eight posts from the Louisiana site, Dr. Nicholas and Gjovik rated six of the posts at 9 on the rating scale and two of the posts at 8. (Def. Ex. 1028.)

Throughout their search for in-service MCQ posts, Viance searched a number of sites all over the country. (Tr. at 911:1-5.) Viance estimates that it inspected approximately 800 in-service posts, roughly two-thirds of which were treated with MCQ and one-third treated with ACQ. (Tr. at 1104:11-17.) Thus, Viance inspected a total of approximately 530 MCQ treated posts.

4. *Viance's Advertisements*

On February 9, 2009, Viance released two nearly identical press releases with the following titles: "Decaying 4x4 Posts Confirm Performance Concerns with Micronized Copper Wood Preservatives" and "Hidden Danger in Your Backyard." (Def. Exs. 13, 232.) The first press release begins by stating that "Viance has uncovered evidence that micronized copper quaternary (MCQ™) preservative has failed to prevent decay of 4x4 wood posts at several subdivisions in the southeastern United States." (Def. Ex. 13 at 1.) The second press release began with a similar statement. (Def. Ex. 232

at 1.) Both press releases stated that Timber Products “verified” the decay, and that Timber Products “supervised the identification, extraction and testing of” the posts in question. (Def. Exs. 13, 232.) The press releases suggested that the Timber Products tests raise concerns about the integrity of structures built using MCQ treated wood and the safety of consumers whose structures are built with MCQ treated wood. (Id.) Both press releases mention MCQ and Osmose by name several times. (Id.)

Viance next sent out an e-mail on February 9, 2009, with a subject line of “Is a Treated Wood Lawsuit in Your Future?” (Def. Ex. 271.) Among other things, the e-mail contains a phrase written in bold which states “the safety of your customers and clients is at stake if your projects’ support structures are being built with Micronized treated wood that cannot adequately resist decay.” (Id.)

5. *The Timber Products Memorandum*

On February 12, 2009, Timber Products sent a memorandum to “Interested Parties in the Treated Wood Industry” (the “February 2009 TP Memorandum”). (Def. Ex. 139.) The Memorandum stated its purpose was to “answer questions that have been posed to [Timber Products]” regarding “the nature of the tests [described in its Reports] and the implications of the results” as well as “to note certain limitations of the report.” (Id.) The

February 2009 TP Memorandum contained several important clarifications regarding the January 2009 TP Report cited in Viance's advertisements.

First, Timber Products noted that it "tested only the posts that Viance directed [Timber Products] to test." (Id.) Timber Products "was not directed to, and thus did not, identify a random sampling of posts treated with MCQ for testing" and "the posts described in the Report should not necessarily be viewed as a representative sample of MCQ posts in use at this time in the United States." (Id.)

Timber Products further noted that "there is a subjective element to the ratings reflected in the Report." (Id.) "[A]lthough the grades in the Report were assigned by highly-trained and experienced personnel, it is possible that other colleagues would have assigned slightly different values to the tested samples." (Id.)

Third, the Timber Products Memorandum stated that "no comparable study [exists] for other preservatives." (Id.) Timber Products was aware of no study "that examines the effectiveness of preservatives other than MCQ after a period of time in the field." (Id.)

Timber Products explained its "role as an independent inspection agency:" Timber Products "is retained by various parties within the treated wood industry to perform tests in accordance with AWPA and ICC

standards.” (Id.) Here, Timber Products “was retained by Viance” and it “is not an advocate for producers of any particular type of preservative.” (Id.)

Timber Products concluded by repeating that its “objective” in sending the Memorandum was “to provide clarifying and limiting information regarding the Report[.]” Timber Products hoped “that such information will preclude interested parties from using the Report to make generalizations that may not be supported by the Report.” (Id.)

Subsequent to the February 2009 TP Memorandum, on February 17, 2009, a group of “concerned members of the pressure-treated community” issued a statement “urg[ing] Viance LLC to abandon this damaging campaign.” (Def. Ex. 248.) Some of the companies listed on the statement manufacture micronized copper pressure-treated lumber, and some do not. (Id.) The companies noted that they were “taking the unusual step of coming together to denounce the recent efforts being employed by Viance LLC to discredit micronized copper pressure-treated lumber.” (Id.)

6. *The Complaint*

On March 3, 2009, as a result of the above advertisements, Osmose filed the complaint in this action against Viance, Rockwood Holdings, and several individual officers. In the complaint, Osmose alleges seven counts: (1) unfair competition, false advertising, and product disparagement under

Section 43(a) of the Lanham Act; (2) common law unfair competition; (3) violation of the Georgia Uniform Deceptive Trade Practices Act; (4) defamation; (5) tortious interference with contract and business relations; (6) attorney's fees and expenses of litigation under Georgia law; and (7) punitive damages under Georgia law. In addition to monetary damages, Osmose seeks a preliminary and permanent injunction enjoining Defendants from further false and misleading advertising under the Lanham Act.

D. Osmose's Advertising Campaign

In response to Plaintiff's false advertising allegations, Defendants contend that Osmose is publishing false and misleading advertisements concerning the characteristics and efficacy of its MCQ product. Specifically, Defendants contend that five types of advertisements made by Osmose are false or misleading: (1) claims that Timber Products has determined that MCQ is as effective as ACQ; (2) claims that certain tests are independent; (3) claims that there are 17 tests which prove the efficacy of MCQ; (4) suggestions that MCQ has been approved by the AWPA; and (5) claims that MCQ is "environmentally preferred" over ACQ.

1. Timber Products Advertisements

In May, 2008, Osmose distributed a publication titled "MicroPro Treated Wood Facts" which included several statements concerning

inspections performed by Timber Products on MicroPro treated wood. (Def. Ex. 133.) According to Osmose, Timber Products had inspected MicroPro and ACQ treated wood at a field stake test site in Florida, and the inspection results indicated that MicroPro provided protection similar to that provided by ACQ wood. (*Id.* at 2.) Defendants contend that Timber Products has not concluded that MCQ performs similarly to ACQ and, therefore, the above statements are false.

2. Independent Tests

At least one of Osmose's advertisements reference "independent studies" performed on MCQ treated wood. (*See, e.g.*, Def. Ex. 157.) Defendants contend that the study referenced in the advertisements was not "independent" because it was authored by Osmose employees and because the non-Osmose authors were paid by Osmose to write the papers. Thus, Viance contends that these statements are false.

3. 17 Separate Tests

In several of its advertisements, Osmose states that seventeen field tests have confirmed that MCQ treated wood performs comparably to ACQ treated wood. (*See, e.g.*, Def. Exs. 520, 521.) Viance contends that Osmose does not have 17 field tests which demonstrate that MCQ treated wood performs as well as or better than ACQ treated wood and, therefore, these

statements are false.

4. *AWPA Approval*

Defendants also allege that Osrose has made several statements suggesting that MCQ has been approved by the AWPA. (See, e.g., Def. Ex. 31 at 3 (“MicroPro treated wood products have been independently tested and evaluated in accordance with American Wood Protection Association (AWPA) . . . laboratory and field test procedures.”).) Defendants contend that such statements are misleading because they imply that MCQ has received AWPA approval when it has not.

In March, 2009, the AWPA issued a press release in order to “provide clarity in a confusing marketplace.” (Def. Ex. 526.) The AWPA press release noted that there had been several public statements made regarding the efficacy of wood preservatives containing micronized copper. (*Id.*) The AWPA then noted that, because those statements “refer to AWPA Standards, . . . it seems that a large number of people now assume that the ‘micronized’ wood preservative systems have been evaluated and approved by AWPA.” (*Id.*) The AWPA clarified that the “assumptions [we]re not true” and that “no data supporting the effectiveness of ‘micronized’ copper systems ha[d] been submitted to AWPA for evaluation or standardization.” (*Id.*) Defendants contend that the AWPA press release demonstrates that Osrose’s references

to the AWWA have misled consumers.

5. *Environmental Benefits of Micronized Copper Preservatives*

Defendants contend that Osmose has made false and misleading statements concerning the environmental benefits of micronized copper preservatives. These statements can be broken down into three categories.

a. Environmental Benefits of MCQ.

First, Osmose has made several statements concerning the environmental impacts of MCQ treated wood when compared to prior wood treating preservatives. (See Def. Exs. 34-38.) Defendants contend that these statements are false and misleading because Osmose has produced no basis for making the allegations. (Def. Proposed Findings [#164] at 103.) The statements Viance complains of include statements that MicroPro:

- “reduces total energy use by approximately 80% and greatly reduces greenhouse gas emissions[;]”
- “result[s] in the release of 90% to 99% less copper into aquatic and terrestrial environments when compared to standard treated wood products. The very small amount released bonds readily to organic matter in the soil and becomes biologically inactive, thus effectively eliminating eco-toxic impacts[;]”
- results in “reduced air emissions[;]” and
- when used “in lieu of standard wood treatment formulations reduces an estimated 20,000 tons or more of greenhouse gas emissions each year.”

(See, e.g., Def. Exs. 38.)

b. EPA Approval of MCQ.

Defendants also contend that Osmose has falsely implied that its product has been evaluated and approved by the United States Environmental Protection Agency (“EPA”). This claim is based on several Osmose advertisements which stated that its MicroPro wood treating technology was certified as an “Environmentally Preferable Product (EPP)” by “Scientific Certification Systems (SCS)” and that “EPP guidelines published by the U.S. Environmental Protection Agency (EPA) require that such products have reduced impacts on human health and the environment when compared to other products that serve the same purpose.” (Def. Ex. 158; see also Def. Exs. 36-37, 40.)

Defendants contend that the above statements are misleading in light of a letter the EPA sent in response to an inquiry by Viance. In the letter, the EPA stated the following:

The US EPA’s Environmentally Preferable Purchasing (EPP) Program does not approve or endorse specific products. A number of other public and private organizations have their own environmentally preferable purchasing/product programs, such as the SCS EPP certification program cited in your letter, and many of these programs have adopted the US EPA’s definition and guiding principles for EPP. However, the US EPA does not have any direct connection to the EPP programs of other organizations and any findings, claims, etc. by those programs should be

attributed solely to the subject organizations.

(Def. Ex. 382.) Defendants claim this letter demonstrates that the EPA has rejected any association with Osmose's MicroPro technology and renders the above statements misleading.

c. Life-Cycle Assessment of MCQ.

Osmose also stated that SCS performed a full "Life-Cycle Assessment" of Osmose's MicroPro wood treating systems. (See, e.g., Def. Ex. 34.) Viance contends that these statements are false because SCS only evaluated the MCQ preservative itself, rather than the full life-cycle of the preservative *and* the wood treated with MCQ. (Def. Proposed Findings [#164] at 106.)

6. *Viance's Counterclaims*

After Osmose filed its Complaint, Defendants filed counterclaims against Osmose, Paul Goydan, Stephen Reeder, and Richard Ziobro (collectively the "Counterclaim Defendants") based upon the above advertisements. Defendants allege six separate claims: (1) unfair competition and false advertising under Section 43(a) of the Lanham Act; (2) common law unfair competition; (3) violation of the Georgia Uniform Deceptive Trade Practices Act; (4) defamation; (5) tortious interference with business relations; and (6) attorney's fees and litigation costs under Georgia law. (Answer and Counterclaim ¶¶ 256-295.) In addition to monetary relief and

punitive damages, Defendants seek a preliminary and permanent injunction enjoining the Counterclaim Defendants from further false and misleading advertising.

E. The Temporary Restraining Order

On March 20, 2009, the Court granted Osmose's motion for a temporary restraining order. (See Order, Mar. 20, 2009.) The Court also scheduled a hearing on Plaintiff's request for a preliminary injunction. (Id.)

Defendants' response was to move for a TRO and preliminary injunction against Osmose. The Court denied Defendants' motion for a TRO, but held that Defendants' motion for a preliminary injunction would be addressed at the hearing on Plaintiff's request for a preliminary injunction. (See Order, Apr. 20, 2009.) The preliminary injunction hearing began on June 24, 2009 and concluded on July 2, 2009.

III. Legal Standard

A. Preliminary Injunction Standard

In order to obtain a preliminary injunction, the movant must demonstrate that:

1. it has a substantial likelihood of success on the merits;
2. irreparable injury will be suffered unless the injunction issues;
3. the threatened injury to the movant outweighs whatever damage

the proposed injunction may cause the opposing party; and

4. if issued, the injunction would serve the public interest.

See N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1217 (11th Cir. 2008); Schiavo v. Schiavo, 403 F.3d 1223, 1225-26 (11th Cir. 2005); Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla., 896 F.2d 1283, 1284-85 (11th Cir. 1990). “The preliminary injunction is an extraordinary and drastic remedy not to be granted until the movant clearly carries the burden of persuasion as to the four prerequisites.” Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am., 896 F.2d at 1285.

The Eleventh Circuit will not disturb a district court’s decision to grant or deny a preliminary injunction absent a clear abuse of discretion. Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1253-54 (11th Cir. 2005).

In considering the motion for preliminary injunction, the district court could assess the likelihood that [the plaintiff’s] evidence would be persuasive to a fact-finder in light of [the defendant]’s evidence. In resolving whether [the plaintiff] would likely succeed on the merits, the district court could consider the credibility of witnesses and was not limited to resolving any disputed issues of fact in the light most favorable to [the plaintiff].

Imaging Business Machines, LLC v. BancTec, Inc., 459 F.3d 1186, 1192 (11th Cir. 2006).

B. False Advertising Claims Under the Lanham Act⁵

In applying the Lanham Act to the conflicting claims of the parties, the Court reaches no conclusion of the effectiveness of the product of either party. The purpose of the Lanham Act is to prevent misleading or deceptive statements in advertising, not to determine which product is superior. As several witnesses testified, the evidence appears to be insufficient to reach a conclusion as to the grade, treatment, or physical quality of the competing products.

“To establish the likelihood of success on the merits of a false advertising claim under § 43(a) of the Lanham Act, . . . the movant must establish” that:

1. the ads of the opposing party were false or misleading;
2. the ads deceived, or had the capacity to deceive, consumers;
3. the deception had a material effect on purchasing decisions;
4. the misrepresented product or service affects interstate

⁵ Both parties seek injunctions under the Georgia Uniform Deceptive Trade Practices Act (“UDTPA”) in addition to the Lanham Act. “The [UDTPA] involves the same dispositive questions as the Federal Lanham Act.” Energy Four, Inc. v. Dornier Med. Sys, Inc., 765 F. Supp. 724, 731 (N.D. Ga. 1991) (citing Jellibears, Inc. v. Skating Clubs of Ga., Inc., 716 F.2d 833, 839 (11th Cir. 1983)) (Forrester, J.). Thus, the Court’s analysis of the Lanham Act claims will also dispose of the UDTPA issues. Id.

commerce;⁶ and

5. the movant has been – or is likely to be – injured as a result of the false advertising.

Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1247 (11th Cir. 2008).

1. *False or Misleading Statements*

The first element of a false advertising claim is “satisfied if the challenged advertisement is literally false, or if the challenged advertisement is literally true, but misleading.” Johnson & Johnson, 299 F.3d at 1247 (citation omitted). When determining whether an advertisement is false or misleading, courts “must analyze the message conveyed in full context,” and “must view the face of the statement in its entirety....” Id. at 1248 (citations omitted).

“[T]he nature of a plaintiff’s burden in proving an advertisement to be literally false should depend on whether the defendant’s advertisement *cites consumer testing*.” Id. (citing, among other cases, Rhone-Poulenc Rorer Pharms., Inc. v. Marion Merrell Dow, Inc., 93 F.3d 511, 514-15 (8th Cir. 1996))(emphasis added). Thus, courts typically place comparative advertising claims into one of two categories: (1) “my product is better than yours”

⁶ Neither party disputes that the products involved in this lawsuit affect interstate commerce.

advertisements; and (2) “tests prove that my product is better than yours” advertisements. Rhone-Poulenc, 93 F.3d at 514. Courts differentiate between these types of false advertising because the latter, which purport to rely on the scientific method, are more likely to mislead consumers. To challenge the first type of false advertising, “a Lanham Act plaintiff must prove that defendant’s claim of superiority is false.” Id.

If the advertisement in question cites consumer testing, “the advertisement is labeled as an ‘establishment’ claim.” Johnson & Johnson, 299 F.3d at 1248 (citing BASF Corp. v. Old World Trading Co., 41 F.3d 1081, 1090 (7th Cir. 1994)). “To prove an establishment claim literally false, the movant must ‘prove that the[] tests did not establish the proposition for which they were cited.’” Id. (quoting Castrol, Inc. v. Quaker State Corp., 977 F.2d 57, 62 (2d Cir. 1992)). See also Rhone-Poulenc, 93 F.3d at 514-15 (“[T]o successfully challenge the second type of claim, where defendant has hyped the claim of superiority by attributing it to the results of scientific testing, plaintiff must prove only ‘that the tests [relied upon] were not sufficiently reliable to permit one to conclude with reasonable certainty that they established the proposition for which they were cited.’”) (quoting Quaker State, 977 F.2d at 62-63).

2. *Consumer Deception*

“Once a court deems an advertisement to be literally false, the movant need not present evidence of consumer deception.” N. Am. Med. Corp., 522 F.3d at 1225 n.11 (quoting Johnson & Johnson, 299 F.3d at 1247). If, on the other hand, “the court deems an ad to be true but misleading, the movant – even at the preliminary injunction stage – must present evidence of deception.” Id. (quoting Johnson & Johnson, 299 F.3d at 1247).

Evidence of consumer deception may be “in the form of consumer surveys, market research, expert testimony, or other evidence.” Hickson Corp. v. N. Crossarm Co., Inc., 357 F.3d 1256, 1261 (11th Cir. 2004) (citing Johnson & Johnson, 299 F.3d at 1247). “Consumer survey research often is a key part of a Lanham Act claim alleging that an advertisement is misleading or deceptive.” Id. (citation omitted).

3. *Materiality of the Deception*

A plaintiff “must establish materiality even when a defendant’s advertisement has been found literally false.” Johnson & Johnson, 299 F.3d at 1251. A plaintiff may establish materiality by demonstrating “that the deception is likely to influence the purchasing decision.” N. Am. Med. Corp., 522 F.3d at 1226 (quoting Johnson & Johnson, 299 F.3d at 1250). A plaintiff may also demonstrate materiality by showing that the defendant “misrepresented an inherent quality or characteristic of the product.”

Johnson & Johnson, 299 F.3d at 1250 (quoting Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 855 (2d Cir. 1997)).

4. *Likelihood of Injury*

Finally, to show a likelihood of success on the merits of a false advertising claim requires that “the movant has been – or is likely to be – injured as a result of the false advertising.” Johnson & Johnson, 299 F.3d at 1247. Because the parties must demonstrate irreparable injury in order to be entitled to a preliminary injunction, the Court’s analysis of the irreparable injury requirement for a preliminary injunction will dispose of the likelihood of injury element of the parties’ false advertising claims.

IV. Plaintiff’s Motion for Preliminary Injunction [#2]

Osmose asks the Court to enjoin Defendants from making further false representations about the nature, characteristics, or quality of Osmose’s MCQ product. Osmose has demonstrated a likelihood of success on the merits of its Lanham Act claim, and Osmose would be irreparably harmed absent injunctive relief. Accordingly, the Court **GRANTS** Osmose’s motion for a preliminary injunction pending a final resolution of the case.

A. Likelihood of Success on the Merits

The advertisements challenged by Osmose include Viance’s February 9, 2009 press releases, as well as the February 9, 2009 e-mail. (See Def. Exs. 13,

232, 271.) Osmose demonstrated that the advertisements in question are literally false, material to the purchasing decision, and have a likelihood of causing injury to Osmose. Thus, Osmose has demonstrated a likelihood of success in proving each of the elements of its false advertising claim.

1. *False or Misleading Statements*

Osmose contends that the advertisements in question are literally false, rather than literally true but misleading. (Pl.'s Proposed Findings [#162] at 53.) Because the challenged advertisements cite to testing, Osmose must demonstrate only that the cited tests do not establish the proposition for which they were cited. See Johnson & Johnson, 299 F.3d at 1248 (quoting Castrol, Inc., 977 F.2d at 62).

a. *Statements Concerning the Efficacy of MCQ.*

The advertisements in question contain numerous statements which are not supported by the tests cited in the advertisements. The press releases contain statements such as:

- “[T]he severity of the decay on these micronized copper-treated posts raises alarming consumer safety concerns about structures built using micronized copper treated wood.” (Def. Ex. 13.)
- “Viance . . . is concerned that decay occurring this early in the service life of wood poses a substantial safety hazard to consumers with structures built from micronized copper-treated wood.” (Id. at 2.)

- “These findings provide evidence that micronized copper-treated wood is prone to premature decay, and Viance believes that its continued use raises serious consumer safety concerns.” (Id.)
- “These decay findings raise serious concerns about the structural integrity and safety of outdoor structures, such as decks and fencing, built with micronized copper preservatives within the last three years.” (Def. Ex. 232.)
- “We are very concerned about the safety of possibly millions of consumers whose decks and other structures were built with micronized copper-treated wood because the wood may be subject to early failure and possible collapse[.]” (Id.)

The email press release also contained broad conclusions:

- “The safety of your customers and clients is at stake if your projects’ support structures are being built with Micronized treated wood that cannot adequately resist decay.” (Def. Ex. 271.)
- “Our findings show that micronized copper-treated wood will lead to problems with structural integrity.” (Id.)
- “We are concerned that micronized copper wood preservative systems fail to prevent decay and termite attack, thereby compromising the dependability of the wood used to build support structures. In the case of raised decks, this poses a considerable safety hazard as deck supports we believe will fail.” (Id.)

Viance cited several tests to support these propositions, including Viance’s in-service survey and its field stake tests conducted in Hawaii and Japan. However, those tests do not support such broad conclusions about the safety of structures built with MCQ treated wood.

First, the above statements are not supported by Viance’s survey of in-

service MCQ treated wood. Although the advertisements state that the findings raise questions about the structural integrity of structures built with MCQ treated wood, Viance did not inspect structures built with MCQ treated wood. Rather, the Georgia and Louisiana inspections involved fence posts and lot markers. Thus, the survey did not indicate that the safety of consumers is at stake if their structures were built with Micronized treated wood.

In addition, although Viance did discover evidence of early decay in the Louisiana and Georgia posts, Viance had to expend substantial time and resources to find MCQ posts that were showing signs of decay. (See Pl. Exs. 200, 210, 218, 220, 226, 228, 229, 231, 232, 273, 365.) Viance searched numerous sites all over the country for MCQ treated posts, (Tr. at 911:1-5), and Viance estimates that it inspected approximately 800 in-service posts, roughly two-thirds of which were treated with MCQ (*Id.* at 1104:11-17). Out of the approximately 530 MCQ treated posts Viance inspected, only 13 – or 2.45% – were rated at 9.0 or lower.

A finding that 2.45% of in-service posts showed some decay does not support the sweeping generalizations about the integrity of structures built with MCQ treated wood or the safety of consumers whose structures are built with MCQ treated wood. Thus, Viance may not rely on the in-service survey

to make broad conclusions similar to those stated above. Furthermore, the testing agency, Timber Products, had specifically qualified the reports as not providing the basis for any conclusion as to the “grade, treatment, or physical quality” of actual MCQ treated posts and the danger posed.

Second, the field stake tests conducted in Hawaii and Japan do not support the broad conclusions about the integrity of structures built with MCQ treated wood. Like the in-service survey, the Hawaii and Japan stake tests tested stakes separately inserted into the ground, not structures built with MCQ-treated wood. Viance did not test the effect of the alleged decay on the integrity of structures built with MCQ treated wood.

Moreover, Dr. Nicholas, who prepared the report on the field stake tests, qualified his findings concerning the field stake tests by noting that “[a]dditional field stake test data will be required to confirm this concern about the performance of MCQ in ground contact applications. . . . [I]t is recommended that the field stakes be closely monitored in the future.” (Def. Ex. 310 at 5.) Despite this recommendation, Dr. Nicholas has not inspected the stakes since his initial inspection, and he does not know whether Viance has inspected the stakes. (Tr. at 1044:17-1045:15.) Thus, although the field stake tests indicated that, after a short time, some stakes decayed faster than others, the tests do not support broad conclusions about the safety of

consumers whose structures are built with MCQ timbers.

b. Statements Regarding Timber Products.

Defendant Viance's advertisements also state that Timber Products verified the conclusions stated in the ads and imply that Timber Products shares Viance's concerns over MCQ. (See, e.g., Def. Ex. 13 ("The decay, *verified by Timber Products* [], is considered unacceptable for providing long-term structural integrity for residential and commercial uses.") (emphasis added).) These Viance statements are literally false.

Although Viance states that these findings were "verified" by Timber Products, the Timber Products Reports do not support the sweeping generalizations about micronized copper-treated wood. For example, both Reports stated that "[t]his inspection report should not be considered as acceptance or rejection for the grade, treatment, or physical quality of the above-referenced material." (Def. Exs. 120, 128.) The press releases do not explain that the majority of the tested posts received high ratings, and that Timber Products only tested a handful of posts that were hand-selected by Viance out of the millions of MCQ-treated posts in the country. The Timber Products Reports contain no conclusions as to the structural integrity of the tested posts, and the Reports do not discuss any safety concerns in using micronized copper-treated posts. (See *id.*)

In addition, after the advertisements were released, Timber Products issued the February 2009 TP Memorandum, in which Timber Products clarified that its Reports should not be used to make generalizations about the quality of micronized copper-treated wood. (Def. Ex. 139.) Timber Products made several important observations in the Memorandum:

- Timber Products “tested only the posts that Viance directed [Timber Products] to test.” Timber Products “was not directed to, and thus did not, identify a random sampling of posts treated with MCQ for testing” and “the posts described in the Report should not necessarily be viewed as a representative sample of MCQ posts in use at this time in the United States.”
- Timber Products’ “objective” in sending the Memorandum was “to provide clarifying and limiting information regarding the Report[.]” Timber Products hoped “that such information will preclude interested parties from using the Report to make generalizations that may not be supported by the Report.”

The vice president of Timber Products – Todd Greer – subsequently stated in a declaration that the Timber Products Reports “do not provide the basis for a conclusion that wood treated with a micronized copper preservative or using a micronized copper wood treating system is unsafe or will fail prematurely in service.” (Greer Decl. ¶ 4.) Greer stated that any claim or suggestion that structures built with micronized copper-treated wood may be unsafe or may prematurely fail “is not warranted by any of the findings contained in either of the[] reports.” (*Id.* ¶ 5.) In his deposition,

Greer again testified that the November 2008 and January 2009 TP Reports, together with all data that has been made available to him, do not support a conclusion that wood treated with micronized copper preservatives is prone to premature decay or is unsafe. (Greer Dep. 154:25-155:9.)

Greer went so far as to say that, had Timber Products known *how* Viance intended to use the Reports in the press releases, Timber Products “would not have performed the services referenced in Viance’s February 9, 2009 press release.” (Greer Decl. ¶ 9.) At the preliminary injunction hearing, Greer confirmed that he continues to stand by his declaration and he does not wish to change it. (Tr. at 793:8-20.) Thus, statements that Timber Products “verified” the conclusions drawn by Viance are literally false.

c. Conclusion as to Falsity.

In summary, the in-service survey conducted by Viance and the Hawaii/Japan field stake tests do not support broad conclusions about the safety of consumers or the integrity of structures built with Micronized treated wood. Such statements are literally false, and statements that Timber Products “verified” the conclusions drawn by Viance are also literally false.

2. *Consumer Deception*

Because Osmose has demonstrated a likelihood of proving that the

advertisements in question are literally false, evidence of consumer deception is not required. See supra Section III.A.1. Moreover, Plaintiff produced no evidence of consumer deception. Thus, only those statements which the Court found to be literally false are enjoined.

3. *Materiality of the Deception*

The materiality of the deception is self-evident. The press releases used language such as “raises alarming consumer safety concerns” (Def. Ex. 13), “substantial safety hazard to consumers” (*id.* at 2), “serious safety concerns for consumers” (*id.* at 3), “raises serious concerns about the structural integrity and safety” (Def. Ex. 232), and “concerned about the safety of possibly millions of consumers” (*id.*). The advertisements contained even more ominous titles: “Decaying 4x4 Posts Confirm Performance Concerns with Micronized Copper Wood Preservatives,” “Hidden Danger in Your Backyard,” and “Is a Treated Wood Lawsuit in Your Future?” (Def. Exs. 13, 232, 271.) Thus, the advertisements in question attack the inherent characteristics of MCQ as a wood preservative: its ability to prevent decay and preserve structural integrity.

As one commentator has observed,

Claims relating to . . . regulatory approval . . . have been presumed to be material under this essential characteristics or qualities rubric. *So have claims relating to health, safety and*

other areas of obvious consumer concern. Some of these types of claims are treated as virtually per se material because of their obvious potential effect on purchasing decisions

Richard J. Leighton, Materiality and Puffing in Lanham Act False Advertising Cases: The Proofs, Presumptions, and Pretexts, 94 Trademark Rep. 585, 595 (2004) (footnotes omitted) (emphasis added). Thus, Osmose demonstrated a likelihood of establishing that the advertisements are likely to influence purchasing decisions.

B. Irreparable Injury

In the past, courts could presume irreparable harm in Lanham Act false advertising cases if the plaintiff could demonstrate that the defendant's advertisements were: (1) literally false; and (2) comparative. See N. Am. Med. Corp., 522 F.3d at 1227 (citing 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:37 (4th ed. 2003)). However, as noted in this Court's TRO, some doubt exists as to whether courts may continue to presume irreparable harm in literally false comparative advertising cases. (See Order, Mar. 20, 2009, at 22-26.)

This Court need not determine whether it may presume irreparable harm, however, because the Court need not apply any presumption in this case to find irreparable injury. On their face, the advertisements in question would likely cause irreparable harm. As noted, the advertisement aimed at

consumers was titled “Hidden Danger in Your Backyard,” and it contained language such as “raises serious concerns about the structural integrity and safety” and “concerned about the safety of possibly millions of consumers.” (Def. Ex. 232.) Once such a serious indictment of micronized copper-treated wood is released to the consumer, it cannot be retracted; consumers who have read it are likely to remember it.

Moreover, Viance intended their advertising campaign to cause irreparable injury to Osmose; the “real goal” of Viance’s advertising program was to “put Osmose out of business.” (Pl. Ex. 193.) Even if Osmose has not yet been harmed, Osmose will be irreparably harmed if Viance reaches its goal. Paul Goydan testified that some retailers have already elected not to purchase micronized copper preservatives as a result of Viance’s advertising campaign. (Goydan Dep. 41:8-42:2.) Thus, the serious nature of the unsupported claims, along with the fact that they refer to Osmose and its MCQ product, establish that Osmose will suffer irreparable injury from such false advertisements.

C. Balance of Harms

The denial of injunctive relief could lead to further harm to Osmose. Allowing Defendants to continue to falsely imply to consumers that there are serious safety concerns surrounding all wood treated with micronized copper

preservatives could severely damage Osmose's good will among consumers and the treated wood industry. On the other hand, requiring Defendants to stop making the above statements until a final resolution of the case will cause little, if any, harm to Defendants. Defendants may still publish their test results, they simply cannot continue to make broad generalizations about the safety of MCQ products based upon those tests. Therefore, the balance of the harms weighs in favor of granting the injunction.

D. Public Interest

“Consumer deception, by its very nature, is against the public interest.” Energy Four, 765 F. Supp. at 734-35 (citations omitted). “[T]he public interest is served by preventing consumer confusion in the marketplace.” Davidoff & CIE, S.A. v. PLD Int'l Corp., 263 F.3d 1297, 1304 (11th Cir. 2001) (citation omitted). Therefore, the public's best interest is served by preventing Defendants from disseminating broad conclusions concerning the safety of structures built using micronized copper-treated wood which far exceed the findings of the reports cited in support of those conclusions.

E. Defendants' Unclean Hands Argument

Viance contends that Osmose should not be entitled to an injunction due to Osmose's own unclean hands. To rely on an unclean hands defense, a defendant must first demonstrate “that the plaintiff's wrongdoing is directly

related to the claim against which it is asserted.” Calloway v. Partners Nat’l Health Plans, 986 F.2d 446, 450 (11th Cir. 1993) (citing Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245, 54 S. Ct. 146, 147-48 (1933)).

Second, even if a defendant demonstrates that the plaintiff’s wrongdoing is directly related, such wrongdoing will not bar relief “unless the defendant can show that it was personally injured by [the plaintiff’s] conduct.” Id. (citing Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 863 (5th Cir.1979), *cert. denied*, 445 U.S. 917, 100 S. Ct. 1277 (1980)). Each of Viance’s allegations of wrongdoing by Osmose fail.

Viance first argues that Osmose made false representations to ICC-ES when Osmose was seeking certification of its MicroPro preservatives. The evidence introduced at the preliminary injunction hearing, however, demonstrated that Osmose provided ICC-ES with all the information requested and that ICC-ES was aware that MicroPro preservatives were materially different from ACQ.

At a meeting between Osmose’s representative and Michael O’Reardon, the representative explained the difference between ACQ and MCQ: that MCQ uses micronized copper particles suspended in a liquid rather than using a dissolved copper solution. (Tr. at 581:21-582:2; O’Reardon Dep. 76:9-77:13.) Based on this discussion, O’Reardon allowed Osmose to seek an

editorial change in the ICC-ES report approving Osmose's ACQ product, rather than applying for an entirely new approval report as long as Osmose simultaneously applied for an ESR conversion. (Tr. at 579:8-580:6; O'Reardon Dep. 31:8-32:9, 82:7-24.) Osmose provided ICC-ES with all the information ICC-ES requested in conjunction with its application for approval of MCQ, (*id.*), and ICC-ES was aware that the copper in the new product was micronized copper particles rather than copper dissolved in ammonia or MEA (*see* O'Reardon Dep. 77:21-78:18; Def. Exs. 199 at 2, 210 at 9).⁷ Osmose did not rely on ACQ test data to obtain MCQ approval. (Tr. at 581:3-19.)

Moreover, Viance failed to demonstrate that the alleged misrepresentations to ICC-ES injured Viance. Thus, Viance failed to meet the second prong of the unclean hands test.

Viance also argues that Osmose should not be entitled to injunctive relief because Osmose made false and misleading statements in its advertisements. In other words, Viance argues that Osmose should not be entitled to relief under the Lanham Act because Osmose itself has violated

⁷ Viance also alleges that Osmose committed wrongdoing by submitting efficacy data to ICC-ES based on wood treated with a micronized copper preservative made by a company called Nanophase rather than a preservative made by Osmose itself. However, for the reasons discussed below, Viance failed to demonstrate that the Nanophase product is materially different from the product manufactured by Osmose or that wood treated with the Nanophase product would perform differently than MCQ. *See infra* Section IV.A.3.

the Lanham Act. Viance relies on the same alleged misrepresentations that are the basis for its counterclaims and motion for a preliminary injunction. For the reasons discussed below, however, Viance failed to demonstrate that Osmose's advertisements violated the Lanham Act. Therefore, Viance's unclean hands argument fails.

F. Conclusion and Scope of the Injunction

In summary, the Court finds that preliminary injunctive relief is appropriate and the Court **GRANTS** Plaintiff's motion for preliminary injunction [#2]. Although Osmose is entitled to a preliminary injunction, it is not entitled to the broad injunction it requests. Accordingly, Defendants, their officers, directors, agents, servants, members, and employees, and all other persons in active concert or participation with them who receive actual notice of this Order, are **ENJOINED** as follows:

1. Defendants may publish the results of the in-service survey performed by Viance and the field stake tests conducted in Hawaii and Japan.
2. Defendants are enjoined, however, from claiming or implying that those studies demonstrate that structures built using micronized copper-treated wood are unsafe, pose a threat to consumers, or are structurally unsound.
3. Defendants are enjoined from claiming or implying that the studies demonstrate that micronized copper preservatives are defective in general or are less effective than solubalized copper preservatives.

4. Defendants may not draw their own conclusions about what the studies indicate and then attribute those conclusions to the studies themselves unless the data in the studies clearly support such conclusions. Any conclusions attributed to the studies must be stated in the studies themselves or must be readily apparent from the data contained in the studies.
5. Defendants may not indicate or imply that any conclusions or opinions stated in their advertisements concerning the effectiveness of micronized copper preservatives or the safety of structures built with micronized copper-treated wood are verified or endorsed by Timber Products.
6. Defendants may not claim or imply that Osmose's MicroPro process was not certified as EPP by SCS, or that SCS did not consider life cycle analysis including efficacy analysis in awarding EPP certification to Osmose's MicroPro process.

V. Defendants' Motion for Preliminary Injunction [#61]

Defendants seek a preliminary injunction enjoining Plaintiff from making certain public representations about the efficacy of its MCQ product. Thus, Defendants must prove the above four factors – a likelihood of success on the merits of their Lanham Act claim, irreparable injury, balance of the harms, and the public interest – in order to be entitled to a preliminary injunction. Defendants failed to show entitlement to a preliminary injunction, and Defendants motion for a preliminary injunction is **DENIED**.

A. Likelihood of Success on the Merits

Defendants contend that five types of advertisements made by Osmose are false or misleading: (1) claims that Timber Products has determined that

MCQ is as effective as ACQ; (2) claims that certain tests are independent; (3) claims that 17 field tests were conducted which prove MCQ effective; (4) suggestions that MCQ has been approved by the AWWA; and (5) claims that MCQ is “environmentally preferred” over ACQ. The Court will address each statement individually.

1. Timber Products Statements

In May, 2008, Osmose distributed a publication titled “MicroPro Treated Wood Facts.” (Def. Ex. 133.) This publication included several statements concerning inspections performed by Timber Products, including the following:

1. Timber Products Inspection Service (TPI) has inspected MicroPro and ACQ treated wood at the Gainesville, Florida test site managed by the University of Florida.
2. The TPI inspection results show that MicroPro is providing effective protection similar to ACQ material treated at similar retention levels.

(Id.) Defendants contend that Timber Products has not concluded that MCQ treated wood performs similarly to ACQ treated wood and, therefore, the above statements are false. Defendant offered no evidence of consumer deception with respect to these statements; therefore, the Court can only enjoin these statements if they are literally false.

Timber Products inspected stakes at Osmose’s Gainesville, Florida test

site. (Tr. at 298:11-300:3.) The results of the Timber Products inspection demonstrated that the MCQ stakes were performing as well as or better than the ACQ stakes. (Tr. at 302:2-306:17; Pl. Ex. 96.) The Timber Products inspection was “blind,” such that Timber Products personnel would not know whether the particular stake they were rating was treated with ACQ or MCQ. (Tr. at 299:10-301:24.)

Moreover, Todd Greer – the Vice President of Timber Products – testified that Timber Products inspected the MCQ and ACQ stakes at the Gainesville, Florida site, and that statements to that effect are true. (Greer Dep. 8:2-8, 93:25-95:21, 97:15-99:16.) He testified that his only issue with the advertisement was the fact that Osmose referred to Timber Products as “TPI” rather than “TP.” (Id. 93:25-95:21, 97:15-99:16.) Had Greer had the opportunity to review the ad prior to its publication, the only thing he would have changed was the use of “TPI” rather than “TP.” (Id. 97:23-98:15. See also Tr. at 795:25-797:21.) Thus, the statements made by Osmose about Timber Product’s inspections were literally true. Viance failed to demonstrate a likelihood of success on the merits of these claims concerning the Timber Products statements made by Osmose.

2. *Independent Tests*

Several of Osmose’s advertisements reference “independent studies”

performed on MCQ treated wood. Viance contends that these statements are false because the study referenced in the advertisements is not “independent” since it was authored by Osmose employees.

The July 28, 2008 press release issued by Osmose stated that “[i]ndependent studies on MicroPro treated wood products were presented in May of this year at the International Research Group on Wood Protection (IRG) meeting in Turkey” (Def. Ex. 157.) The press release also stated that Osmose was “publicly releasing the results of the latest independent scientific study[.]” (Id.) The “independent scientific study” referred to in the press release is titled “Micro-Distribution of Micronized Copper in Southern Pine.” (Id.)

At the preliminary injunction hearing, Dr. Zhang admitted that Osmose paid Dr. Sterling to write the “Micro-Distribution” paper. (Tr. at 350:1-19.) Dr. Zhang – who is an Osmose employee – also acknowledged that he was listed as an author on the paper. (Id. at 348:23-348:25.) Although Dr. Zhang contends that he did not make any significant contributions to the paper, Dr. Zhang presented the paper at the IRG conference. (Id. at 350:20-22.) It would be unusual for a person to be listed as an author on a paper or to present a paper at a conference if that person did not actually work on the paper. (Id. at 1024:20-1025:1.)

Thus, the “Micro-Distribution” paper referenced in the advertisements as an “independent” study was not truly independent, and the statements by Osmose to the contrary were literally false. Because the statements are literally false, Viance need not demonstrate consumer deception.

Viance must, however, demonstrate that the statements by Osmose describing the “Micro-Distribution” paper as independent had a material impact on purchasing decisions. Viance offered no evidence that these statements were likely to influence purchasing decisions. Moreover, unlike statements concerning the efficacy or safety of a product, statements falsely referring to a study as independent do not misrepresent an inherent quality or characteristic of the product. Viance did not show that the false statements about the “Micro-Distribution” paper had a material effect on purchasing decisions and, therefore, Viance has not demonstrated a likelihood of success on the merits of this claim.

3. *17 Separate Tests*

In several advertisements, Osmose stated that seventeen field tests have confirmed that MCQ treated wood performs comparably to ACQ treated wood. For example, one advertisement stated that “[s]eventeen field tests of MicroPro systems have been conducted or evaluated by independent ISO accredited agencies in accordance with AWWA Standard E7. The results have

shown that MicroPro treated stakes provide excellent protection against fungal decay and termite attack in various internationally recognized field test sites around the world, comparable to ACQ treated wood.” (Def. Ex. 520. See also Def. Ex. 521.)

Viance contends that Osmose does not have 17 field tests showing that MCQ treated wood performs as well as or better than ACQ treated wood and, therefore, these statements are false. Viance offered no evidence of consumer deception with respect to the statements; therefore, they may be enjoined only if they are literally false.

Dr. Zhang testified that Osmose has conducted at least 26 MCQ field tests and 17 MCQ tests. (Tr. at 294:10-297:7; see also Pl. Ex. 410.) Of those 43 total tests, 40 of them were conducted pursuant to AWP standard E7 and 27 were independently evaluated. (Tr. at 294:10-297:7.) Moreover, the results of those tests indicated that MCQ treated wood was performing as well as or better than ACQ treated wood at similar retention levels. (See Pl. Exs. 75, 76.) Thus, Osmose does in fact have 17 separate field tests which demonstrated that MCQ is working as well as or better than ACQ, and statements to that effect are literally true.

Viance makes several specific arguments which Viance contends renders the tests unreliable. For example, Viance argues that several of the

tests upon which Osmose relied used a product manufactured by a company called Nanophase. Viance contends that the Nanophase product was made using copper oxide rather than copper carbonate. According to Viance, because MCQ is made with copper carbonate, the Nanophase tests cannot be used to support MCQ products.

However, Viance failed to demonstrate that micronized copper products made with copper oxide would perform differently or have different characteristics from micronized products made with copper carbonate. Dr. Zhang testified that it does not matter whether micronized copper preservatives are made with copper oxide or copper carbonate. (Tr. at 316:4-19, 326:25-328:13, 336:15-337:6.) The relevant questions concerning whether a wood preservative will work are: (1) will the preservative penetrate the wood; and (2) if it does, will the preservative deposit the copper ion in the wood. (Id.) Dr. Zhang explained that, because both copper carbonate and copper oxide contain the necessary copper ion, and because both types of copper will deposit the ion into the wood, it does not matter whether the preservative is made with copper oxide or copper carbonate. (Id.) Dr. McIntyre and Dr. Kamden corroborated Dr. Zhang's testimony. (See id. at 78:22-79:12, 168:7-170:12, 384:18-24.) Viance's argument concerning the Nanophase product fails.

Viance also argues that most of the tests cannot be relied on to support MCQ products because the tests were conducted on wood treated with MCQ to retention levels of 0.40 pounds per cubic foot while MCQ wood is currently sold at a retention level of 0.34 pounds per cubic foot. Of the 17 tests referred to in Osmose's advertisements, none of the tests were conducted with stakes treated to 0.34 pounds per cubic foot. (Tr. at 338:13-19.) Commercially available MCQ treated wood was formerly treated to 0.40 pounds per cubic foot but it is now treated to 0.34 pounds per cubic foot. (Tr. at 339:4-15.) Thus, consumers cannot buy MCQ treated wood at the same retention as ACQ treated wood – which is treated to 0.40 pounds per cubic foot. (Id.)

However, the advertisements in question simply state that “[t]he results have shown that MicroPro treated stakes provide excellent protection against fungal decay and termite attack . . . comparable to ACQ treated wood[,]” (see Def. Ex. 520), and “test results have consistently shown that MicroPro treated wood provides excellent protection against fungal decay and termite attack, comparable to ACQ treated wood[,]” (see Def. Ex. 521). The test results demonstrated that MicroPro treated wood did in fact perform comparably to ACQ treated wood. (See Pl. Exs. 75, 76.) Thus, Osmose's statements to that effect are literally true, and the fact that MCQ treated wood is now treated to 0.34 pounds per cubic foot rather than 0.40 pounds per

cubic foot does not render those statements *literally false*.

Viance failed to demonstrate that Osmose's statements concerning the 17 field tests are literally false and is not entitled to an injunction under the Lanham Act.

4. *AWPA Approval*

In one advertisement, Osmose stated that "MicroPro treated wood products have been independently tested and evaluated in accordance with American Wood Protection Association (AWPA), American Society of Testing Materials (ASTM), the International Code Council (ICC), and other internationally recognized laboratory and field test procedures." (Def. Ex. 31 at 3.) Viance contends that such statements are misleading because they imply that MCQ has received AWPA approval when it has not.

The advertisements do not state that MicroPro wood treating preservatives have received AWPA approval; rather, they state that MicroPro treated wood products have been tested according to AWPA protocols. (See Def. Ex. 31 at 3. See also Ainscough Dep. 261:12-23.) As Dr. Zhang testified, Osmose has conducted numerous field tests on MCQ and MCA treated wood pursuant to AWPA testing protocols. (Tr. at 295:2-7.) The C.E.O. of the AWPA even stated that the statements are true, because the products were in fact tested according to AWPA standards. (McCown Dep. 120:18-121:1,

215:14-18.) Stephen Ainscough admitted that he is not aware of any Osrose advertisement where Osrose claimed that MCQ was AWPA approved.

(Ainscough Dep. 261:21-23.) Thus, the statements concerning the AWPA are literally true. To demonstrated a likelihood of success under the Lanham Act, Viance must demonstrate that the statements are misleading and had the capacity to deceive consumers.

Viance points to a press release issued by the AWPA as evidence of consumer deception. In March, 2009, the AWPA issued a press release in order to “provide clarity in a confusing marketplace.” (Def. Ex. 526.) The AWPA press release referred to several public statements made regarding the efficacy of wood preservatives containing micronized copper. (Id.) The AWPA then noted that, because those statements “refer to AWPA Standards, . . . it seems that a large number of people now assume that the ‘micronized’ wood preservative systems have been evaluated and approved by AWPA.” (Id.) The AWPA clarified that the “assumptions [we]re not true” and that “no data supporting the effectiveness of ‘micronized’ copper systems ha[d] been submitted to AWPA for evaluation or standardization.” (Id.)

Colin McCown, the C.E.O. of the AWPA in Birmingham, Alabama, testified that it was not the press releases themselves that caused the AWPA to issue the press release. (McCown Dep. 13:22-24, 67:3-8.) Rather, it was

the response from the public that necessitated the AWPA press release. (Id. 67:3-8.) McCown explained that other companies have made the same statements in the past, but this is the first time the public has responded by assuming that such statements mean that the AWPA has approved a product. (Id. 173:17-176:5.) AWPA received from 10 to 20 telephone calls and emails from members of the wood treating industry – including architects, engineers, contractors, and the trade press. (Id. 67:7-71:1, 118:23-119:8.) Thus, Viance has shown that the statements concerning the AWPA had the capacity to deceive consumers.

Viance must also demonstrate that the statements by Osmose had a material effect on purchasing decisions. Viance offered no evidence that these statements were likely to influence purchasing decisions. In addition, unlike statements concerning the efficacy or safety of a product or statements concerning the *results* of a test, statements concerning the *procedures* by which a product was tested do not misrepresent an inherent quality or characteristic of the product. Thus, statements that MCQ was tested pursuant to AWPA protocol do not qualify as statements have a material affect on purchasing decisions, Viance has not demonstrated a likelihood of success on the merits of this claim.

5. *The Environmental Benefits of MCQ*

Viance contends that Osmose has made several false and misleading statements concerning the environmental benefits of micronized copper preservatives. The environmental statements in question can be divided into several categories, which the Court will address individually.

a. MCQ is Environmentally Preferable to ACQ.

Viance contends that Osmose has made numerous false statements that MCQ is “environmentally preferable” to ACQ. For example, in various advertisements, Osmose has alleged that the MicroPro wood treating process:

- “reduces total energy use by approximately 80% and greatly reduces greenhouse gas emissions[;]”
- “result[s] in the release of 90% to 99% less copper into aquatic and terrestrial environments when compared to standard treated wood products. The very small amount released bonds readily to organic matter in the soil and becomes biologically inactive, thus effectively eliminating eco-toxic impacts[;]”
- results in “reduced air emissions[;]” and
- when used “in lieu of standard wood treatment formulations reduces an estimated 20,000 tons or more of greenhouse gas emissions each year.”

(See Def. Exs. 34-38.) Viance offered no evidence that these statements deceived or had the capacity to deceive consumers; therefore, such statements may be enjoined only if they are literally false.

Viance’s primary complaint about the statements is that “Osmose has

produced no basis for these comparisons.” (Defs.’ Proposed Findings [#164] at 103.) To the contrary, multiple witnesses testified at the preliminary injunction hearing that micronized copper preservatives leach less copper into the soil than ACQ. (See, e.g., Tr. at 111:6-14, 147:8-19, 205:25-206:9, 330:21-331:19, 460:2-4.) In addition, the report prepared by FFK during SCS’s Life Cycle Assessment of MCQ concluded that, when compared to ACQ, MCQ: depletes fewer energy and metal resources, disrupts habitats less, results in lower greenhouse gas emissions, and results in lower ozone and PM 2.5 exposures. (Def. Ex. 391 at 11-13.) Thus, Osmose has supplied a basis for the statements, and Viance, who bears the burden, failed to rebut such evidence.

Stanley Rhodes, the founder of SCS, did testify that statements that the copper in MCQ treated wood “becomes biologically inactive, thus effectively eliminating eco-toxic impacts” is an “overstatement” and is “aggressive.” (Rhodes Dep. 221:16-224:4, 243:6-244:1.) However, the statement in question was written by Winslow, an employee of SCS, not Osmose. (Tr. at 642:7-10; Rhodes Dep. 221:16-224:4.) Moreover, while evidence that an advertisement was an “overstatement” or “aggressive” might be relevant to whether the statement was misleading, it does not by itself demonstrate that the statement was literally false.

Defendants failed to demonstrate that the statements concerning the

environmental benefits of MCQ were literally false. Because Defendants offered no evidence of consumer deception, the statements cannot be enjoined under the Lanham Act.

b. EPA Certification.

Viance also contends that Osmose has falsely implied that its product has been evaluated and approved by the EPA. In several advertisements, Osmose stated that its MicroPro wood treating technology was certified as an “Environmentally Preferable Product (EPP)” by “Scientific Certification Systems (SCS)” and that “EPP guidelines published by the U.S. Environmental Protection Agency (EPA) require that such products have reduced impacts on human health and the environment when compared to other products that serve the same purpose.” (Def. Ex. 158; see also Def. Exs. 36-37, 40.)

Defendants do not contend that the above statements are literally false. Rather, Defendants contend that the statements falsely imply that MCQ has been approved by the EPA. To demonstrate consumer deception, Viance points to the following letter the EPA sent in response to an inquiry by Viance:

The US EPA’s Environmentally Preferable Purchasing (EPP) Program does not approve or endorse specific products. A number of other public and private organizations have their own

environmentally preferable purchasing/product programs, such as the SCS EPP certification program cited in your letter, and many of these programs have adopted the US EPA's definition and guiding principles for EPP. However, the US EPA does not have any direct connection to the EPP programs of other organizations and any findings, claims, etc. by those programs should be attributed solely to the subject organizations.

(Def. Ex. 382.) According to Viance, this letter demonstrates that the EPA has rejected any association with Osmose's MicroPro technology, which renders the above statements misleading.

To the contrary, the letter by the EPA does not indicate that consumers have been deceived by the above statements. In fact, Osmose had a meeting with representatives of the EPA, where the EPA agreed that the statements made concerning EPP certification of MCQ were true. (Tr. at 646:18-648:19.) The EPA asked Osmose not to use the EPA's name in future advertisements only because the EPA has a policy of not allowing private companies to use its name in advertisements. (Id.)

Viance also contends that several of Osmose's customers have been deceived by the statements. Two customers published on their websites statements such as "EPP guidelines published by the [EPA] require that such products have reduced impacts on human health and the environment when compared to other products that serve the same purpose." (Def. Ex. 531; see also Def. Ex. 532.) However, these statements do not indicate that the

consumers mistakenly believe that MCQ has been certified by the EPA. Rather, the statements simply state that the EPA's EPP guidelines require that certified products have reduced impacts on health and the environment, which is true.

In short, Viance failed to demonstrate that the statements concerning EPP certification were literally false. Viance also failed to demonstrate that the statements were misleading or that they had the capacity to deceive consumers into believing MCQ was EPA certified. Accordingly, Viance cannot show a likelihood of success on the merits of this claim.

c. Life-Cycle Assessment.

Osmose also made several statements in its advertisements concerning a "Life-Cycle Assessment" performed by SCS. Osmose has stated that "MicroPro Technology is the first treated wood process to be certified under [SCS's EPP] program based on Life-Cycle Assessment." (Def. Ex. 34.) Osmose also stated that the "MicroPro wood treatment process systems were analyzed by [SCS] under an exhaustive environmental review process called Life-Cycle Assessment" (Id. See also Def. Ex. 35.) Viance contends that these statements are false because SCS's evaluation of MCQ consisted solely of a review of the formulation of the preservative, not the full life-cycle of MCQ-treated wood.

However, SCS told Osmose to make these statements. (Tr. at 612:15-22.) Osmose provided SCS with all the data and information SCS requested, including lab test and field stake test data. (Tr. at 610:12-14; Rhodes Dep. 82:12-91:7, 107:9-108:1.) Moreover, Stanley Rhodes, the founder of SCS, testified that SCS gave MCQ a full Life-Cycle Assessment based upon stake tests, lab tests, and SCS's extensive experience in the industry. (Rhodes Dep. 75:15-81:13, 199:24-202:20, 245:1-23.) Rhodes stated that SCS gave MCQ a full cradle-to-grave evaluation, and that the Life-Cycle Assessment report showing only a cradle-to-product delivered assessment was not the only data SCS relied upon in performing its assessment. (Id.; Def. Ex. 391.)

Thus, the statements are not literally false. Because Viance failed to offer evidence of consumer deception with respect to the Life-Cycle Assessment statements, Viance failed to meet its burden of demonstrating a likelihood of success on the merits of this claim

B. Conclusion as to Defendants' Motion

In summary, Defendants failed to demonstrate a likelihood of success on the merits of their false advertising claims. As such, the Court need not address the remaining elements necessary for a preliminary injunction under the Lanham Act, and the Court **DENIES** Defendants' request for a preliminary injunction.

VI. Plaintiff's Motions to Strike [#172, #173]

Plaintiff filed several motions to strike certain post-hearing filings made by Defendants. Plaintiff first moves to strike Defendants' post-hearing responsive brief on the grounds that it exceeds the applicable page limitations. The Court **DENIES** Plaintiff's motion to strike Defendants' post-hearing brief [#172] because this District's Local Rules provide that responsive briefs are limited to 25 pages and Defendants' brief complied with that limitation.

Plaintiff also moves to strike Exhibits A and B to Defendants' post-hearing brief. The Court **DENIES as moot** Plaintiff's motion to strike the exhibits [#173] because the information Plaintiff seeks to strike had no impact on the Court's instant ruling.

VII. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiff's motion for preliminary injunction [#2] and **DENIES** Defendants' motion for preliminary injunction [#61]. The above injunction shall apply pending a final resolution of the case.

The Court also **DENIES** Plaintiff's motion to strike Defendants' post-hearing brief [#172] and **DENIES as moot** Plaintiff's motion to strike Exhibits A and B to Defendants' post-hearing brief [#173].

The parties are **DIRECTED** to appear for a status conference at 10:00AM on Tuesday, January 5, 2010 at the U.S. Courthouse, 18 Greenville Street, Newnan, Georgia, third floor courtroom. At the status conference, the Court will address a schedule for bringing this case to an efficient final resolution.

SO ORDERED, this 29th day of September, 2009.

A handwritten signature in blue ink, appearing to read "Jack Camp", written over a horizontal line.

JACK T. CAMP
UNITED STATES DISTRICT JUDGE