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.

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

O R D E R

This matter is currently before the Court on Plaintiff's motion for temporary restraining order and interlocutory injunction [#2], Plaintiff's motion for expedited discovery [#5], and Plaintiff's amended motion for temporary restraining order and interlocutory injunction [#6]. After a hearing on March 19, 2009, at which all parties were present, the Court finds that Plaintiff is entitled to a temporary restraining order pending a full evidentiary hearing on Plaintiff's request for a preliminary injunction.

I. Background

A. The Wood Preservative Industry

Plaintiff Osmose, Inc. develops, manufactures, and sells wood preservative chemical formulations that protect wood against rot, decay, and

insect attack. (Compl. ¶ 1.) Osmose developed a particular copper-based wood preservative system, which it trademarked and markets as MicroPro. (Id. ¶ 2.) Micronized Copper Quaternary wood preservative ("MCQ") is an Osmose product used in 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.) According to Osmose, wood treated with MicroPro technology has several advantages over wood treated with prior copper-based products, including: the treatment is less corrosive and more easily paintable, the treatment does not require chemicals to dissolve the copper, the chemicals are less likely to leach out of the wood, the wood is clean in appearance, and it has been certified as environmentally preferable. (Id. ¶ 41.) International Code Council-Evaluation Services, Inc. (“ICC-ES”) approved MCQ, and Scientific Certification Systems (“SCS”) certified the MicroPro process as an Environmentally Preferable Product (“EPP”). (Id. ¶ 32.)

Defendant Viance, L.L.C. is one of Osmose's competitors in the business of manufacturing and selling wood preservative treatment products. (Id. ¶ 37.) Viance manufactures a wood treating preservative chemical formulation called ACQ, which competes directly with Osmose's MCQ product. (Id. ¶ 38.) ACQ is a prior generation copper-based wood treating product. (Id. ¶ 41.)

Defendant Stephen Ainscough is the president and C.E.O. of Viance. (Id. ¶ 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., a wholly owned subsidiary of Rockwood Holdings, Inc. (Compl. Ex. B at 3.) Defendant Seifollah Ghasemi is the president and C.E.O. of Defendant Rockwood. (Compl. ¶ 18.)

B. The Advertising Campaign

Osmose contends that, beginning in April 2008, Viance began a campaign of false advertising and unfair competition using print ads, press releases, trade meetings, seminars, e-mails, and the internet. (Id. ¶ 43.) In the spring of 2008, Defendants began to attack the MicroPro technology and MCQ product, claiming poor performance and the possibility of premature decay. (Id. ¶ 48.) Defendants based these conclusions on field stake tests performed in Japan and Hawaii. (Id.)

In the fall of 2008, Viance began to search the United States for MCQ treated posts in service which were showing signs of early decay. (Id. ¶ 49.) Viance alleged that they found some early decay in MCQ treated posts in Baton Rouge, Louisiana. (Id. ¶ 50.) Viance hired Timber Products, Inc. to perform an evaluation of certain of these posts. (Id. ¶ 51.)

On November 14, 2008, Timber Products issued a report regarding the

posts (the "November 2008 TP Report"). (Id. ¶ 52; Greer Decl. Ex. A.) 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." (Greer Decl. Ex. A at 2.) 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 in the Report 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." (Id. at 4.)

Sometime in the winter of 2008-2009, Viance again searched the United States for micronized copper-treated wood in service which showed premature decay. (Compl. ¶ 62.) Viance allegedly found several posts showing premature decay in Alpharetta, Georgia. (Id.) Viance again hired Timber Products to inspect the posts in question. (Id. ¶ 63.)

Timber Products issued a second report on January 21, 2009 (the "January 2009 TP Report"). (Compl. Ex. E.) 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, Georgia.

(Id. at 1.) Timber Products representatives then took fourteen of the forty-five selected posts and brought them back to the Timber Products office to conduct a more thorough investigation. (Id.) Timber Products used an American Wood Preservers Association (AWPA) rating scale to rate the posts in the two tests. (Id. at 3.) The visual tests performed on the 45 initial posts yielded the following results:

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

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

Rating Given to Posts	Number of Posts Rated with this Rating	What Rating Means

10	4	Sound: no sign or evidence of decay.
9.5	5	Trace-Suspect: some areas of discoloration and/or softening.
9	2	Slight Attack: up to 3% of cross sectional area affected by decay or wood softening.
8	2	Moderate Attack: 3-10% of cross sectional area affected by decay or wood softening.
7	1	Moderate/Severe Attack: 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 February 9, 2009, Viance released two nearly identical press releases. (Compl. Exs. B, C.) The first press release begins by stating "Viance has uncovered evidence that micronized copper quarternary (MCQ™) preservative has failed to prevent decay of 4x4 wood posts at several subdivisions in the southeastern United States." (Compl. Ex. B at 1.) The second press release began with a similar statement. (Compl. Ex. C. 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. (Compl. Exs. B, C.) The press releases go on to suggest that the 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 also sent out an e-mail on February 9, 2009, with a subject line of "Is a Treated Wood Lawsuit in Your Future?" (Compl. Ex. D.) 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.)

C. 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"). (Compl. Ex. F.) The stated purpose of the Memorandum was to "answer questions that have been posed to [Timber Products]" regarding "the nature of the tests [described in the 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.

First, Timber Products noted that it "tested only the posts that Viance directed [Timber Products] to test." (Id.) Timber Products clarified that it "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.)

Next, Timber Products noted in the Memorandum that "there is a subjective element to the grading reflected in the Report." (Id.) Timber Products explained that "although 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 Memorandum stated that "no comparable study [exists] for other preservatives." (Id.) Timber Products stated that it 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 also explained its "role as an independent inspection agency." (Id.) Timber Products explained that it "is retained by various parties within the treated wood industry to perform tests in accordance with AWPA and ICC standards." (Id.) Timber Products noted that, in this case, it

"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 stated that it 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." (Compl. Ex. H.) Some of the companies listed on the statement manufature 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.)

D. The Lawsuit

On March 3, 2009, Osmose filed a complaint against Viance, Rockwood Holdings, Inc., and several individual officers. Osmose alleges seven separate 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.

II. Legal Standard

In order to obtain a TRO or 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. Medical 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).

III. Discussion

Osmose seeks a temporary injunction enjoining Defendants from making further false and misleading representations about the nature, characteristics, or quality of Osmose's MCQ product. Thus, Osmose must demonstrate the above four factors in order to be entitled to a TRO or preliminary injunction.

A. Likelihood of Success on the Merits

"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 commerce;[1] 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). Osmose has demonstrated a likelihood of success in proving each of the elements of its false advertising claim.[2]

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

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[1] Neither party disputes that the products involved in this lawsuit affect interstate commerce.

[2] Osmose also seeks an injunction under the Georgia Uniform Deceptive Trade Practices Act ("UDTPA"). "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 Jellibeans, 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 claim will also dispose of the UDTPA issues. Id.

misleading, courts "must analyze the message conveyed in full context," and "must view the face of the statement in its entirety, rather than examining the eyes, nose, and mouth separately and in isolation from each other." Id. at 1248 (citations omitted). Osmose contends that Defendants' advertisements are literally false.

"[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." Johnson & Johnson, 299 F.3d at 1248 (citing, among other cases, Rhone-Poulenc Rorer Pharms., Inc. v. Marion Merrell Dow, Inc., 93 F.3d 511, 514-15 (8th Cir. 1996)). Thus, courts typically place comparative advertising claims into one of two categories: (1) "my product is better than yours" advertisements; and (2) "tests prove that my product is better than yours" advertisements. Rhone-Poulenc, 93 F.3d at 514. 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).

In this case, when the press releases are read in their entirety, the "tests" conducted by Timber Products do not establish the proposition for which they were cited in the press releases. The press releases make sweeping generalizations about wood treated with micronized copper preservatives:

- "The decay, verified by Timber Products [], is considered unacceptable for providing long-term structural integrity for residential and commercial uses." (Compl. Ex. B at 1.)

- "[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." (Id.)

- "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.)

- "The recent decay findings of these micronized copper-treated wood products in residential locations also indicate that many environmental and lifecycle marketing claims may be unsubstantiated. The rate of accelerated decay on these posts highlights that the durability and the lifecycle claims and certifications for these products should be reevaluated." (Id. at 3.)

- "The decay present in micronized copper-treated wood within such short periods of time has been much more aggressive and rapid than wood preservatives previously brought to market for residential use. 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.)

The other press release also contained similar generalizations about micronized copper-treated wood:

- "Findings on 4x4 posts at residential locations reveal dramatic evidence that wood treated with micronized copper preservative (MCQ) is decaying more rapidly than anticipated. 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." (Compl. Ex. C.)

- "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.)

- "Viance [is] a leading provider of wood preservation technologies that refuses to offer micronized copper preservatives due to ongoing concerns about the technology." (Id.)

The email press release also contained such 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." (Compl. Ex. D.)

- "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.)

Although Viance states that these findings were "verified" by Timber Products, the Timber Products Reports do not support such sweeping generalizations about micronized copper-treated wood. For example, the 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." (Ex. E at 5.) 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 out of the millions of MCQ-treated posts in the country. The Timber Products Reports also 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.

In addition, after the above 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. (Compl. Ex. F.) Timber Products made several important observations in the Memorandum:

- Timber Products stated that it "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 concluded by repeating that its "objective" in sending the Memorandum was "to provide clarifying and limiting information regarding the Report[.]" Timber Products stated that it 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 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.)

Greer also said that "in light of the numerous possible causes for decay,

the mere existence of some decay is not, in itself, an indication that any wood preservative . . . is prone to premature decay or failure or is unsafe in use." (Id. ¶ 7.) 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." (Id. ¶ 9.)

Moreover, several statements made in the press releases concerning Timber Products involvement were false. For example, the press releases state that "Viance engaged TP to manage, inspect and verify these decay findings" and "TP supervised the identification, extraction and testing of posts at all locations." (Compl. Ex. B at 1; Ex. C.) However, Timber Products noted in the 2009 TP Memorandum that it "tested only the posts that Viance directed [Timber Products] to test." (Compl. Ex. F.) Thus, the statement by Viance that Timber Products "supervised the identification, extraction and testing of posts at all locations" is false.

By way of another example, the press releases state that "identification tags still affixed to the posts in *all locations* confirmed that they were treated with micronized copper quarternary (MCQ™)." (Compl. Ex. B. at 1 (emphasis added).) However, the Timber Products reports stated that "end tags from multiple facilities found on *some posts* listed the treatment as MCQ 0.40."

(Compl. Ex. E at 1 (emphasis added).) Greer also clarified in his declaration that "some, but not all, of the posts had one or more areas of decay" and "some, but not all, were micronized copper wood treated posts." (Greer Decl. ¶ 7.) Thus, the implication that *all* the posts tested by Timber Products were MCQ-treated posts is false.

At the March 19, 2009 hearing, Defendants produced evidence concerning other tests – performed by Viance prior to the Timber Products tests – which showed some decay on field-tested MCQ-treated wood. (See, e.g., Nicholas Decl. Exs. B, C, D, E.) Even assuming these in-house field tests support a finding that micronized copper-treated wood is subject to premature decay, the advertisements in question rely almost entirely on the independent study of Timber Products. The advertisements falsely attribute findings – which may or may not be supported by the prior in-house tests – to the Timber Products Reports.

In summary, when read in their entirety, the press releases make sweeping generalizations about the quality of wood treated by micronized copper preservatives that are not supported by the Timber Products Reports. In addition, Viance made several literally false statements in the advertisements concerning Timber Products association with the studies. Lastly, even assuming Viance's in-house studies support a finding that

micronized copper-treated wood is subject to premature decay, the advertisements falsely attribute Viance's opinions about micronized copper-treated wood to the Timber Products Reports. Thus, Osmose has met its burden of showing a likelihood of success on the merits of its claim that these portions of the advertisements are literally false.

2. Consumer Deception

"Once a court deems an advertisement to be literally false, the movant need not present evidence of consumer deception." N. Am. Medical Corp., 522 F.3d at 1225 n.11 (quoting Johnson & Johnson, 299 F.3d at 1247). Because Osmose has demonstrated a likelihood of proving that the advertisements in question are literally false, evidence of consumer deception is not required.

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. Medical 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)).

The press releases used language such as "raises alarming consumer safety concerns" (Compl. Ex. B at 1), "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" (Compl. Ex. C), and "concerned about the safety of possibly millions of consumers" (id.). Moreover, the advertisements contain ominous titles, such as "Decaying 4x4 Poses Confirm Performance Concerns with Micronized Copper Wood Preservatives," "Hidden Danger in Your Backyard," and "Is a Treated Wood Lawsuit in Your Future?" (Compl. Exs. B, C, and D.) Thus, the advertisements in question attack an inherent quality or characteristic of micronized copper-treated wood: its ability to prevent decay and maintain 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). Osmose demonstrates a likelihood of establishing that the advertisements are likely to influence purchasing decisions.

4. Likelihood of Injury

The last element a movant must establish to show a likelihood of success on the merits of a false advertising claim is 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 Osmose 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 Osmose's false advertising claim.

B. Irreparable Injury

Osmose contends that the Court may presume irreparable harm because Defendants' advertisements are both literally false and comparative in nature. In false advertising cases, "[p]roof of falsity is . . . sufficient to sustain a finding of irreparable injury when the false statement is made in the context of comparative advertising between the plaintiff's and defendant's products." N. Am. Medical Corp., 522 F.3d at 1227 (citing 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:37 (4th ed. 2003)). Thus, courts may presume irreparable harm if the plaintiff

can demonstrate that the defendant's advertisements are: (1) literally false; and (2) comparative to the plaintiff's products. Id.

As noted above, Osmose has shown a substantial likelihood of demonstrating that the advertisements in question are literally false. In addition, the advertisements are comparative in nature. They make repeated references to Osmose and its MCQ product. In addition, one of the press releases explicitly states that "[o]lder posts treated with [ACQ] . . . in service in similar structures at nearby locations in Georgia and Louisiana, remained 100 percent sound, showing no evidence of decay." (Compl. Ex. B at 2.) Thus, Viance directly compared their ACQ product to Osmose's MCQ product. As such, Osmose has a likelihood of success in proving that the advertisements in question are both literally false and comparative. Thus, under the current status of the law, the Court could presume irreparable injury.

However, the Supreme Court recently suggested in eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 126 S. Ct. 1837 (2006) that courts should not apply categorical rules in place of the traditional four-factor test when determining whether to issue injunctive relief. In eBay, the Supreme Court reversed the district court for applying "certain expansive principles suggesting that injunctive relief could not issue in a broad swath of cases." 547 U.S. at 393, 126 S. Ct. at 1840. The Supreme Court also admonished the

Federal Circuit for articulating a "general rule, unique to patent disputes, that a permanent injunction will issue once infringement and validity have been adjudged." Id. at 393-94, 126 S. Ct. at 1841 (internal citation and quotation omitted). The Supreme Court concluded by noting:

> We hold only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.

Id. at 394, 126 S. Ct. at 1841.

Several courts have suggested that the Supreme Court's decision in eBay requires courts to make evidentiary findings for all four factors of the preliminary injunction test in all cases, and, therefore, courts may not presume irreparable harm in determining whether injunctive relief is appropriate. See, e.g., Paulsson Geophysical Servs., Inc. v. Sigmar, 529 F.3d 303, 313 (5th Cir. 2008); Hansen Beverage Co. v. Vital Pharm., Inc., No. 08-CV-1545 IEG (POR), 2008 WL 5427601, at *5 (S.D. Cal. Dec. 30, 2008); Tillery v. Leonard & Sciolla, LLP, 437 F. Supp. 2d 312, 329 (E.D. Pa. 2006). The only court to definitively state whether eBay precludes a presumption of irreparable harm is the Southern District of New York. See Lennon v. Premise Media Corp., 556 F. Supp. 2d 310, 319-20 (S.D.N.Y. 2008) (rejecting the defendant's argument that "the extensive Second Circuit precedent

holding that a presumption of irreparable harm exists in copyright infringement actions . . . was abrogated by . . . eBay" and noting that "since eBay, the Second Circuit has applied a presumption of irreparable harm in the context of a preliminary injunction sought pursuant to a false advertising claim.") (citations omitted).

In N. Am. Medical Corp., the Eleventh Circuit noted that the Supreme Court's decision in eBay "calls into question whether courts may presume irreparable harm merely because a plaintiff in an intellectual property case had demonstrated a likelihood of success on the merits." N. Am. Medical Corp., 522 F.3d at 1227. In concluding that irreparable injury may be presumed in false advertising cases involving literally false comparative advertising, the Eleventh Circuit stated that "in reaching this conclusion, we need not address whether this conclusion is also indicated by [eBay]." Id. at 1227. Thus, in this Circuit, the question remains open as to whether the presumption of irreparable harm in literally false comparative advertising cases is precluded by eBay.

This Court, however, need not determine whether it may presume irreparable harm 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." (Compl. Ex. C.) Once such a serious indictment of micronized copper-treated wood products is released to the consumer, it cannot be retracted. Like the old saw about improper statements to a jury, the bell cannot be unrung. Consumers who have read it are likely to remember it. Thus, the serious nature of the unsupported claims, along with the fact that they refer to Osmose and its MCQ product, make it likely that Osmose will suffer irreparable injury from such false advertisements pending a full preliminary injunction hearing.

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 cease their advertising campaign until the preliminary injunction hearing will cause little, if any, harm to Defendants. 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.

IV. Scope of the Temporary Injunction

Based on the foregoing, the Court finds that limited temporary injunctive relief is appropriate. Although the Court finds that Osmose is entitled to a temporary injunction pending the preliminary injunction hearing, Plaintiff 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 any studies in their possession concerning the effectiveness of using micronized copper preservatives to treat wood.

2. Defendants may not, however, claim that those studies support

broad conclusions about the effectiveness of micronized copper preservatives in general. Specifically, Defendants may not indicate or imply that those studies demonstrate that:

a. micronized copper preservatives are defective in general or are less effective than solubilized copper preservatives;

b. micronized copper-treated wood is subject to premature decay; or

c. structures built using micronized copper-treated wood are dangerous or pose a threat to consumers.

3. Defendants may not draw their own conclusions about what the studies indicate and then attribute those conclusions to the studies themselves. Any conclusions attributed to the studies must be stated in the studies themselves.

4. 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.

V. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiff's motion for temporary restraining order and interlocutory injunction [#2] and Plaintiff's amended motion for temporary restraining order and interlocutory injunction [#6] inasmuch as Plaintiff is seeking a temporary injunction pending a full evidentiary hearing on Plaintiff's request for a preliminary injunction.

The Court also **GRANTS** Plaintiff motion for expedited discovery [#5]. The preliminary injunction hearing will begin at 9:30 a.m. on Tuesday, May

19, 2009 at the U.S. Courthouse, 18 Greenville Street, Newnan, Georgia, third floor courtroom. The Court points out that the purposes of the preliminary injunction hearing is not to determine which product – MCQ or ACQ – is better than the other. Rather, the purpose of the preliminary injunction hearing is to determine what Defendants may say in their advertisements in light of the studies available. The Court **DIRECTS** the parties to file proposed findings of fact and conclusions of law, exhibits lists, and witness lists no later than the close of business on Thursday, May 14, 2009. The following guidelines shall apply to discovery conducted prior to the preliminary injunction hearing:

- The parties may exchange written discovery. The parties will have ten (10) days to respond to written discovery.
- Each party may conduct no more than 10 depositions. Notwithstanding this limitation, the parties may agree to conduct additional depositions.

SO ORDERED, this 20th day of March, 2009.

JACK T. CAMP
UNITED STATES DISTRICT JUDGE