WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Heary Bros. Lightning Protection Co., Inc., et al., Plaintiffs, vs. East Coast Lightning Protection, Inc., Defendant.	No. cv-96-2796-PHX-ROS **ORDER**

Pending before the Court is Defendant East Coast Lightning Equipment, Inc's ("East Coast"'s) Renewed Motion for Compliance with Court Ordered Injunction (Doc. 463). East Coast alleges that Plaintiffs' recent advertising and promotional materials are in violation of the injunction issued by this Court in October, 2005 that enjoined advertising found to be false under the Lanham Act. For the reasons stated herein, Plaintiffs' recent activities are in violation of the terms of the injunction and the order will issue again to comply or suffer contempt of court.

BACKGROUND

All parties are members of the lightning protection system industry. In October, 2003, the Court granted summary judgment to East Coast under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), after finding that "the tests on which Plaintiffs base their advertising claims are not sufficiently reliable to establish that Plaintiffs' air terminal

products provide an enhanced zone of protection within a specific, measurable radius and protection against lightning strikes in open spaces." 287 F. Supp. 2d 1038, 1077 (2003). The advertisements at issue were thus found to be "literally false" under the Lanham Act. Id. In particular, the Court found impermissible advertisements making claims such as "[o]ur most recent development, PREVENTOR SYSTEM 2005, is an efficient mast-type system, which creates an impenetrable capture zone with a range of 100 meters," and "[t]he protection zone of each Preventor unit (as laboratory tested by Inchscape) is a radius of 50 meters, if installed on highest projection of the structure." Id. at 1069. Another advertisement specified a "minimum radius of protection" for systems mounted at different heights, such as 52 feet for a "Prevectron 6" mounted at a height of 5 feet. Id.

In October, 2005 this Court enjoined Plaintiff Heary Bros. Lightning Protection, Inc., Lightning Preventor of America, Inc., and National Lightning Protection Corp. from

> advertising that they sell a lightning protection system utilizing air terminals that provide a measurable zone of protection, greater than systems installed in accordance with NFPA 780;[1] and/or that can function effectively to protect open spaces . . . .

Doc. 391; Defendant's Exhibit A. "Enhanced" systems, including Early Streamer Emission ("ESE") Air Terminals were included specifically in the terms of the injunction. Defendant East Coast Lightning Equipment, Inc. ("East Coast") alleges that Plaintiffs have begun releasing promotional materials violating the terms of this injunction by implying that they cover a greater area than systems installed in accordance with NFPA 780. One brochure, titled "Manufacturer's Installation Standard for Lightning Protection Systems Using Early Streamer Emission Air Terminals HBP-21" (hereinafter "HBP-21") describes three levels of protection, and states that Level 1 and Level 2 "require one (1)

---

[1] The National Fire Protection Association ("NFPA") promulgates a particular standard for the installation of lightning protection systems, NFPA 780. "The NFPA has maintained this standard, subject to some modifications and revisions, since 1904. Lightning protection systems installed in accordance with NFPA 780[] require a series of air terminals (commonly known as 'lightning rods') spaced out over defined intervals on the protected structure, in addition to a network of ground terminations, conducting cables, and surge suppression devices." 287 F. Supp. 2d at 1043 (internal citations omitted).

ESE Air Terminal to be installed on the roof for every circular area of 337,810 square feet;" Level 3 "requires one (1) ESE Air Terminal to be installed on the roof for every circular area of 70,650 square feet." Morgan Affidavit, Attachment 1.

> HBP-21 contains other statements of this sort. For instance, it also states In situations where multiple air terminals are required, the perimeter air terminals shall be positioned so that they are no more than 230' (70m) from the outside edge of the building, nor shall the ESE Air Terminals be spaced more than 460' (140m) apart at any time.

Id. Plaintiffs have also released a brochure stating that

> Lightning Preventor of America, Division of Heary Bros. Lightning Protection Co., hereby guarantees that this Preventor will provide lightning protection for system design complying with the Manufacturer's Standard (HBP-21, Levels 1 & 2) and will maintain this protection for more than 100 years.

Morgan Affidavit, Attachment 2c. Additionally, they have linked insurance coverage to installation in compliance with their installation, stating that the "Preventor system also is fully guaranteed with the added feature of over $10,000,000 insurance coverage when installed in compliance with HBP-21 (Levels 1 & 2)." Morgan Affidavit, Attachment 1.

It is undisputed that these areas specified by Plaintiffs are greater than the measurable zone of protection for systems installed in accordance with NFPA 780. However, Plaintiffs argue that nothing in the injunction prevents them from marketing a configuration of air terminals different than NFPA 780 systems – the differences include terminal heights and bonding requirements in addition to the number and placement of terminals. They add: "Heary Bros. simply makes the truthful factual statement about its experience with ESE systems, namely that these systems have successfully performed for over 25 years across thousands of systems sold."

ANALYSIS

Plaintiffs current crop of advertising is not nearly as definite about the area protected as those advertisements that were the basis of the original injunction. There are no sweeping statements promising protection for large areas and open air spaces. However, Plaintiffs statements clearly combine to create a strong implication that such a guarantee is being given. Where Plaintiffs state that they "hereby guarantee[] that this

Preventor will provide lightning protection for system design complying with the Manufacturer's Standard (HBP-21, Levels 1 & 2) and will maintain this protection for more than 100 years," they are in explicit violation of the injunction as Levels 1 and 2 must reasonably be construed to include the area that is specified in the description of those levels. Even were such a guarantee not given, however, specific instructions to install an air terminal per a particular area that are labeled as "Level 1," "Level 2," and "Level 3" protection strongly implies that entire area is, in fact, protected. Offering insurance guarantees for two of those levels compounds that impression.

Plaintiffs argue that they have not been enjoined from advertising their configuration specifications and their historical experiences with those configuration systems. This is true, however they may not conduct that advertising in such a way that it leaves an impression that the measurable zone protected is greater than NFPA 780 systems. In this case, that might mean including a specific disclaimer to that effect. While Plaintiffs do currently include the text of the Court's injunction on their website, they fail to provide similar context within their printed promotional materials and thus fail to counter the implications of their statements.

East Coast also argues that the product sheets for the Preventor 2005 and the Ellipsoid 10000 prominently display an Applied Research Laboratories Logo and state "Listed and Factory Inspected Components by Applied Research Laboratories" in violation of the Injunction's provisions that forbid advertising that air terminals have been tested and certified by a private testing lab to provide a measurable zone of protection greater than systems installed in conformance with NFPA 780. Morgan Affidavit, Attachment 2a, Attachment 2b. While the listing of a specific area protected (as discussed above) does violate the injunction, the Applied Research Laboratories certification – which specifies that *components* were inspected – is specific enough to not constitute a claim that Applied Research Laboratory is endorsing a specific zone of protection.

Meanwhile, Plaintiffs counter East Coast's allegations by relying on a comment by

the Ninth Circuit in its review of the case:

> Furthermore, as the district court noted, the injunction does not prevent any truthful advertising concerning the plaintiffs' experience with ESE systems, compliance with foreign standards, or availability of insurance guarantees, as long as they do not use such evidence to support claims that ESE systems provide a measurable zone of protection greater than NFPA 780 systems or that ESE systems can protect open spaces.

Joseph Affidavit, Exhibit A. To argue that such verbiage – or similar wording from this Court – ratifies Plaintiffs' current advertising claims is misleading in the extreme. Plaintiffs argue that they are simply making "the truthful factual statement about [their] experience with ESE systems." However, the injunction clearly states that such statements are prohibited when they are made to support that ESE systems provide a zone of protection greater than NFPA 780 systems. For this reason, the Plaintiffs' argument that "[h]ad the Ninth Circuit accepted East Coast's argument that telling consumers how to install a system in a configuration different from NFPA 780 **implies** a measurable zone of protection, it would have held that advertising concerning historical experience with ESE systems was not permissible"is not persuasive. Nothing in the Ninth Circuit's opinion – or, in fact, in this Court's writings on this case – condones advertisement of configuration systems where they also imply a measurable zone of protection greater than that of NFPA 780 systems.

Perhaps of greater import is Plaintiffs' contention that enforcing the injunction in the manner suggested by East Coast would effectively prohibit all advertising of ESE systems and violate both Rule 65 and the principles of due process, which require that an injunction clearly identify the conduct to be enjoined. Fed. R. Civ. P. 65(d) states that:

> Every order granting an injunction and every restraining order must:
> (A) state the reasons why it issued;
> (B) state its terms specifically;
> (C) describe in reasonable detail – and not by referring to the complaint or other document – the act or acts restrained or required.

"While ambiguities in an injunction are construed in favor of the enjoined party, nonetheless 'injunctions are not set aside under Rule 65(d) . . . unless they are so vague that they have no reasonably specific meaning." Portland Feminist Women's Health Ctr.

v. Advocates for Life, Inc., 859 F.2d 681, 685 (9th Cir. 1988). An injunction will be upheld where its terms "place the enjoined parties on fair notice of the actions that are prohibited in language that is reasonably understandable." Id. Courts "have not allowed [] 'tortured constructions' to avoid the terms and spirit of valid court orders." Battle Creek Equipment Co. v. Roberts Mfg. Co., 90 F.R.D. 85, 88 (1981). Here, Plaintiffs were enjoined from advertising, "explicitly or implicitly," that their product offers a range of protection "greater than systems installed in accordance with NFPA 780." This language clearly includes advertisements and promotional material that make an implicit claim of a greater area of protection, and is within the core of the injunction's command. To construe the injunction to include such provisions in no way renders it not reasonably specific or overly vague. Nor does requiring Plaintiffs to craft language that dispels any implication that they are making claims prohibited under the injunction prevent any advertisement of their ESE systems – if they cannot or do not wish to change the configuration area to bring it in line with NFPA 780 systems, they may state in their materials that the greater area they suggest is not scientifically proven or guaranteed.

Further, where there is any doubt, Plaintiffs may petition the Court for clarification of its order. See Battle Creek, 90 F.R.D. at 88 ("If defendant had any doubts as to the propriety of its actions, it could have petitioned this court for a clarification of the order."); NASCO, Inc. v. Calcasieu Television & Radio, Inc., 583 F. Supp. 115, 120 (D. La. 1984) ("[R]espondents had an affirmative duty to petition for a clarification, modification, or construction of the Order before performing acts in the ambiguous area.") (emphasis in original); Nat'l Research Bureau, Inc. v. Kucker, 481 F. Supp. 612, 615 (D.N.Y. 1979) ("[T]he alleged ambiguity of an order is no excuse.").

Plaintiffs finally argue that "[i]f as East Coast contends this Court's injunction prohibits all advertising of ESE systems, then Heary Bros. was prejudiced by its failure to request that this Court issue such a ruling, prior to the completion of briefing before the Ninth Circuit." East Coast makes no claim that all advertising of ESE systems is prohibited. In fact, it states only that the advertising claims currently made by Plaintiffs

"are identical to those that this Court found were illegal under the Lanham Act." Nor, as discussed above, does adoption of East Coast's views need necessarily have the side effect of prohibiting all advertising of ESE systems. This claim is thus without merit.

Accordingly,

IT IS ORDERED Defendant's Motion is **GRANTED.** Plaintiffs are again ordered to comply with the Injunction.

IT IS FURTHER ORDERED if Plaintiffs fail to comply they will be held in contempt and sanctions will be imposed including damages, attorneys fees, and costs.

DATED this 10th day of October, 2008.

Roslyn O. Silver
United States District Judge