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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

vs.

Lightning Protection Institute, et al.,
Defendants.

No. CV 96-2796-PHX-ROS
ORDER

This case presents a variety of complex antitrust and false advertising issues in dispute among the parties, all participants in the lightning protection system industry. On March 31, 2003, the Court issued preliminary rulings on a number of pending motions, and on May 2, 2003, the Court held a hearing and heard arguments on all pending motions, including those with preliminary rulings. This Order resolves all pending motions and supersedes all previous rulings on these motions.

I. BACKGROUND

A. Procedural Overview

Plaintiffs are three manufacturers and distributors of lightning protections systems, Heary Brothers Lightning Protection Co., Inc. ("Heary Bros."), Lightning Preventor of America, Inc. ("LPA"), and the National Lightning Protection Corp. ("NLPC"). In or about 2001, LPA was merged into and became a division of Heary Bros. ("Heary/LPA"). Heary

(341)

1 October Aff. ¶2 [Doc. #282]. Heary/LPA manufactures and distributes two types of
2 lightning protection systems: "conventional" systems (also known as "Faraday" or "Franklin"
3 systems), and Early Stream Emission ("ESE") systems. Heary Oct. Aff. ¶3. NLPC
4 manufactures and distributes conventional systems, and also distributes an ESE system
5 known as the Prevector, which is manufactured by Indelec, a French-based company. Rapp
6 Aff. ¶3 [Doc. #283].

7 Defendants are a number of other entities involved in the lightning protection industry.
8 Defendant Lightning Protection Institute ("LPI") is a not-for-profit corporation that functions
9 as a trade association of manufacturers and distributors of lightning protection systems.
10 Second Amended Compl. ¶9 [Doc. #206]. Defendant Thompson Lightning Protection Inc.
11 ("Thompson") is a manufacturer and distributor of lightning protection systems, and
12 Defendant Allan Steffes ("Steffes") is the Chairman, agent, and representative of Thompson.
13 Sec. Am. Compl. ¶¶10-11. Defendant East Coast Lightning Equipment, Inc. ("East Coast")
14 is also a manufacturer and distributor of lightning protections systems. Sec. Am. Compl.
15 ¶12. The President of East Coast, Charles Ackerman ("Ackerman") was originally named
16 as a Defendant but was dismissed for lack of personal jurisdiction, though Plaintiffs continue
17 to name him as a co-conspirator for purposes of the Sherman Act. Order of 12/4/97 [Doc.
18 #75]. Thompson manufactures and distributes both conventional and ESE systems, but East
19 Coast manufactures only conventional systems of lightning protection.

20 In its Second Amended Complaint, Plaintiff sues Defendants on a variety of counts.
21 Count I alleges violations of Section 1 of the Sherman Act, 15 U.S.C. §1, against all
22 Defendants. Count II alleges violations of Section 43(a) of the Lanham Act, codified at 15
23 U.S.C. §112(a), against Defendants Thompson, Steffes, and East Coast. Count III alleges
24 common law claims for unfair competition, product defamation, and civil conspiracy against
25 all Defendants. Count IV alleges common law interference with contractual relations against
26 Defendant East Coast. In addition, East Coast has filed a Counterclaim against all Plaintiffs,
27 alleging violations of Section 43(a) of the Lanham Act. As further explained below,
28

1 Plaintiffs' Sherman Act claim (Count I) and East Coast's Lanham Act Counterclaim remain
2 the key issues in dispute.

3 **B. Statement of Facts**

4 Plaintiffs' Sherman Act claim centers around a meeting of the National Fire Protection
5 Association in November 1993. The National Fire Protection Association ("NFPA")
6 promulgates a particular standard for the installation of lightning protection systems, NFPA
7 780. EC SSOF ¶3. The NFPA has maintained this standard, subject to some modifications
8 and revisions, since 1904. DSOF ¶3. Lightning protection systems installed in conformance
9 with NFPA 780, require a series of air terminals (commonly known as "lightning rods")
10 spaced out over defined intervals on the protected structure, in addition to a network of
11 ground terminations, conducting cables, and surge suppression devices. EC SSOF ¶4. These
12 lightning protection systems function when lightning strikes an air terminal, and the resulting
13 charge is dispersed safely to the ground. EC SSOF ¶¶2, 5. Certain organizations, most
14 prominently the Underwriters Laboratory ("UL"), certify that conventional lightning
15 protection systems are installed in compliance with NFPA 780. EC SSOF ¶¶3, 6.

16 ESE lightning protection systems are founded upon use of an ESE air terminal.
17 According to its proponents, ESE air terminals function differently than conventional air
18 terminals. The proponents of ESE terminals claim that ESEs produce greater levels of
19 ionization at an earlier time before an imminent lightning strike than do conventional air
20 terminals. The ionization results in a "upward streamer" which draws the lightning, such that
21 it strikes the ESE terminal rather than any surrounding structure (hence, the name "Early
22 Streamer Emission"). While conventional air terminals also produce "upward streamers,"
23 ESE proponents claim that the early time advantage translates into a longer upward streamer,
24 and that this length provides a greater "zone of protection" than would a conventional air
25 terminal standing alone.

26 Because ESE terminals allegedly provide an enhanced zone of protection, ESE
27 systems require many less terminals than conventional systems, and smaller structures might
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1 require only a single terminal. ESE terminals themselves cost more than conventional
2 terminals, but ESE systems are often cheaper than conventional systems, because less
3 equipment may be required, depending on the size of the structure. EC SSOF ¶13. While
4 ESE terminals can be installed in compliance with NFPA 780, the added cost of multiple
5 ESE terminals would be considerably more expensive. Proponents claim that an ESE system,
6 installed in a configuration not in compliance with NFPA 780, can protect more area than a
7 conventional system installed in compliance with NFPA 780.

8 On or about April 24, 1990, the Standards Council of the NFPA formed a technical
9 committee (the "781 Committee") to investigate lightning protections systems using ESE
10 technology. DSOF ¶7. The 781 Committee was charged with determining whether the
11 development of a standard for ESE systems was appropriate. DSOF ¶7. Both Kenneth
12 Heary, of Plaintiff Heary Bros., and Robert Rapp ("Rapp") of Plaintiff NLPC were members
13 of the 781 Committee. DSOF ¶9. The 781 Committee drafted a proposed standard for the
14 installation of ESE systems, known as the Draft or Proposed NFPA 781 Standard, which was
15 circulated to the NFPA membership for commentary sometime in March or April 1993.
16 DSOF ¶¶10-11. The NFPA received approximately 269 comments regarding the Draft
17 NFPA 781, and these comments, together with the 781 Committee's responses, were
18 circulated to the NFPA's membership prior to a general membership meeting on November
19 15-18, 1993 in Phoenix, Arizona. DSOF ¶¶12-13.

20 On November 17, 1993, the general membership of the NFPA was scheduled to vote
21 on the Technical Committee report regarding Proposed NFPA 781. DSOF ¶14. The
22 membership vote could either adopt some or all of the report, or return some or all of the
23 report to the Technical Committee for further study. DSOF ¶5. A membership vote to adopt
24 the report would *not* have resulted in the immediate adoption of the NFPA 781 standard;
25 rather, the Standards Council would make the final judgment whether to adopt the standard
26 on the basis of "the entire record," which included the vote taken at the NFPA general
27 membership meeting. DSOF ¶6.

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1 On or before the scheduled vote of November 17, a number of individuals, including
2 Charles Ackerman ("Ackerman"), President of East Coast, distributed handouts opposing the
3 adoption of NFPA outside the hotel, in the lobby, and allegedly inside the meeting room.
4 DSOF ¶15. Ackerman admitted in his deposition that he was told by some staff member of
5 the NFPA to stop distributing the handouts. Although he testified that he believed that he
6 had a right to hand them out in a public place, and that the NFPA "kind of drew a line and
7 told us not to hand them out towards the entrance of the meeting hall or towards the door,"
8 he also testified that he continued to distribute the handouts, saying "NFPA told us to stop.
9 We didn't stop." Ackerman Dep. at 247-8, Exh. 6 to PSOF. David McAfee ("McAfee"),
10 acting chairman of the 781 Committee, met with other members of the 781 Committee,
11 including Ken Heary and Rapp, to discuss how to respond to the distribution of the handouts.
12 PSOF ¶¶16-18. Based in part upon the advice of Andy O'Connor ("O'Connor"), who chaired
13 the 781 Committee but who was unable to attend the meeting, the members of the 781
14 Committee reached a "consensus" that they would not dispute the handouts during the
15 membership debate. PSOF ¶¶15, 19-23. McAfee met with a few officials of the NFPA, and
16 discussed the handouts, before the November 17 vote. PSOF ¶¶24-30.

17 On November 17, the NFPA 781 report came up for vote by the general membership,
18 and, after a short debate, was voted to be returned to committee for further investigation.
19 PSOF ¶¶33-35. William Heary, of Plaintiff Heary Bros., himself called the vote to return to
20 Committee "overwhelming." W. Heary Dep. at 86, Exh. 13 to PSOF.

21 On December 7, 1993, Plaintiffs' attorney Linda Joseph ("Joseph"), on behalf of
22 Kenneth Heary, Frederick Heary, and LPA, filed a complaint with the Standards Council,
23 requesting that the Standards Council reject the membership vote and issue NFPA 781.
24 PSOF ¶45. On January 12, 1994, the Standards Council held a hearing regarding these
25 complaints, at which Kenneth Heary, William Heary, and Rapp were afforded the
26 opportunity to speak. PSOF ¶¶46-47. On January 26, 1994, the Standards Council issued
27 its decision, finding that it "did not agree with the contention that the processing of the
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1 document on the floor of the *Fall Meeting* was inappropriate." Exh. 17 to PSOF. It further
2 concluded that "[t]here has been no serious claim, or has any evidence been presented, either
3 that NFPA rules were not complied with, that the membership in attendance was in any way
4 improperly stacked in opposition to the document, or that anyone was denied a fair
5 opportunity to state their position or rebut that of their opponents." *Id.* The Standards
6 Council decided to defer further action until an independent third party review was
7 conducted. *Id.* This decision was appealed to the Board of Directors of the NFPA, and was
8 upheld. PSOF ¶¶56-59.

9 Thereafter, the NFPA arranged for the National Institute of Science & Technology
10 ("NIST") to conduct an independent third-party review of ESE technology. PSOF ¶60. The
11 Report of the NIST was drafted by Dr. Richard Van Brunt, who solicited comments from
12 various interested parties, but who authored the Report on his own. PSOF ¶¶ 68, 71-76. The
13 NIST Report concluded that "it is nearly impossible to make quantitatively meaningful
14 statements or judgments about the about the performance of ESE devices in comparison to
15 conventional Franklin rods." Exh. 28 to PSOF, at 24. He also wrote that "the precise amount
16 by which this [ESE] enhancement in streamer initiation improves the lightning attraction
17 efficiency of an air terminal remains questionable. There is reason to doubt that it
18 significantly extends the maximum range of protection." *Id.* at 25.

19 On July 18, 1995, the Standards Council held a hearing at which Dr. Van Brunt spoke,
20 as well as various proponents and opponents of NFPA 781, including Rapp, William Heary,
21 and Kenneth Heary. PSOF ¶¶83-87. The Standards Council then issued a decision in which
22 it determined that there was insufficient technical evidence to justify adopting a new
23 standard, and decided to disband the 781 Technical Committee. PSOF ¶¶88-90. The decision
24 was appealed to an Appeals Subcommittee of the NFPA Board of Directors, who reviewed
25 the entire record and upheld the decision of the Standards Council. PSOF ¶¶98-102.

26 On December 20, 1996, Plaintiffs initiated this lawsuit, naming the NFPA as a
27 Defendant. In October 1998, Plaintiffs settled with the NFPA, releasing them from all claims
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1 of liability in this action in exchange for a reconsideration of its decision to not issue NFPA
2 781. DSOF ¶¶105-7. The NFPA agreed to consider the results of an independent third-party
3 investigation, conducted by a panel led by Dr. John Bryan (the "Bryan Panel"), into the
4 scientific basis of ESE technology. DSOF ¶¶109-10. The Bryan Panel received input from
5 both proponents and opponents of ESE technology, and issued its Report on September 1,
6 1999. DSOF ¶¶111-116. The Bryan Report was critical of the scientific basis for a standard
7 for both ESE technology and conventional lightning protection systems. Exh. 38 to DSOF;
8 DSOF ¶¶117-119, 122. On April 28, 2000, based upon the conclusions of the Bryan Report,
9 the Standards Council again issued a decision not to adopt NFPA 781. Exh. 41 to DSOF;
10 DSOF ¶126. The decision was appealed to an Appeals Subcommittee of the Standards
11 Council, which affirmed the decision and dismissed the appeal on October 6, 2000. DSOF
12 ¶¶134-38.

13 In proceedings parallel to their attempt to convince the NFPA to issue 781, Plaintiffs
14 launched an attack on the validity of NFPA 780 before the Standards Council, proposing that
15 it be withdrawn for lack of supporting scientific evidence. Plaintiffs' claim, throughout
16 numerous proceedings before the NFPA, and before this Court as well, has been that the
17 NFPA has applied disparate and discriminatory criteria in evaluating the supporting
18 consensus of 780 and 781. Rapp's initial request to withdraw 780, in 1995, was denied by
19 the Standards Council. PSOF ¶¶92-96. However, five years later, after considering the
20 conclusions of the Bryan Panel Report, the Standards Council announced its intention in
21 2000 to withdraw 780 unless proponents could provide "adequate substantiation" of its
22 scientific validity. Exh. 43 to DSOF, at 24.

23 Thereafter, proponents of 780 submitted at least two documents in support of the
24 scientific basis of NFPA 780: a report by a Federal Interagency Lightning Protection User
25 Group (the "Interagency Report") and a report by the Committee on Atmospheric and Space
26 Electricity of the American Geophysical Union ("AGU Report"). On October 4, 2001, the
27 NFPA issued a decision to retain NFPA 780, concluding that the Interagency Report
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1 "provides the minimum independent literature review and analysis that the Council was
2 soliciting . . ." Exh. 53 to DSOF, at 1-2. In that decision, the Standards Council extensively
3 discussed the relationship between NFPA 780 and 781, the scientific basis of ESE
4 technology, and the Heary Brothers' challenge to 780:

5 The opponents of NFPA 780, and in particular the representative of the Heary
6 Brothers . . . have made a multitude of arguments attacking the reports, the
7 ethics and the bias of the authors [of the Interagency Report], and the
8 soundness of their conclusions. . . . The Council has reviewed all of these
9 arguments [and found them unpersuasive]. . . . The Hearys have explicitly tied
10 their newfound opposition to NFPA 780 to the asserted unequal treatment
11 accorded to ESE technology within the NFPA system. . . .

12 Suffice it to say there has been no disparate treatment of ESE. The Council is
13 well aware of its obligation to ensure that new products, services, or methods
14 receive a fair hearing within the NFPA codes and standards development
15 system. It is for this reason that the Council has given the subject of ESE
16 lightning protection lengthy and, indeed, unprecedented consideration, even
17 after the proposed standard for ESE failed to receive the support of the NFPA
18 codes and standard development process. . . . The Council voted to decline to
19 issue a standard for ESE lightning protection systems because it failed to
20 receive the support of the NFPA codes and standards development system, and
21 because, apart from the doubts about the technology that were reflected in that
22 failure, two separate independent reviews of the technology, by the [NIST] and
23 by the Bryan Panel, concluded that the claims of vastly superior performance
24 of ESE terminals over conventional terminals simply had not been validated.

25 In contrast, the Council has voted to continue its project on conventional
26 lightning protection systems because NFPA 780 has repeatedly, unfailingly,
27 and overwhelmingly received the support of the NFPA codes and standards
28 development process. . . . No reasonable or credible arguments have been
made to undermine these [independent reports and analyses] or to cause the
Council to question the conclusions of the scientists, engineers and safety
experts who authored them. There has been no disparate treatment.

29 Exh. 53 to DSOF, at 6-9. On May 8, 2002, the Appeals Subcommittee of the NFPA Board
30 of Directors upheld the Standards Council decision. Exh. 54 to DSOF.

31 **II. PLAINTIFFS' SHERMAN ACT CLAIM**

32 **A. Legal Standard**

33 To establish a claim under Section 1 of the Sherman Act, Plaintiffs must show three
34 elements: "(1) an agreement or conspiracy among two or more persons or distinct business
35 entities; (2) by which the persons or entities intend to harm or restrain competition; and (3)
36 which actually injures competition." Les Shockley Racing, Inc., v. National Hot Rod Ass'n,
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1 884 F.2d 504, 507 (9th Cir. 1989) (quoting Olitz v. St. Peter's Comm. Hosp., 861 F.2d 1440,
2 1445 (9th Cir. 1988)). The fact-finder must then apply a "rule of reason" analysis to
3 determine if a challenged restraint is "unreasonable," meaning that "the factfinder must
4 weigh the anticompetitive effects and the procompetitive effects or business justifications
5 advanced for the challenged restraint. . . ." Id. at 507. "Although antitrust cases are
6 sometimes difficult to resolve on summary judgment because of their factual complexity,
7 summary judgment is still appropriate in certain cases." County of Tuolumne v. Sonora
8 Community Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001).

9 The legal framework for this case begins with Allied Tube & Conduit Corp. v. Indian
10 Head, Inc., 486 U.S. 492 (1988), a case which also involved manipulation of the standard-
11 setting process of the NFPA. In Allied Tube, the original plaintiff, a seller of a new type of
12 electrical conduit, initiated a proposal for certification by the NFPA of its type of electrical
13 conduit to meet NFPA standards. The proposal was scheduled for a floor vote at the NFPA's
14 annual meeting. At that vote, the original defendant and other interests conspired to pack the
15 meeting vote by, among other activities, recruiting 230 members to join the organization and
16 paying their membership and travel expenses to attend the meeting solely to defeat the
17 proposal. The proposal was defeated by four votes. Id. at 496-7. At trial, the jury awarded
18 damages for antitrust liability, and the case was appealed on the basis of whether the
19 competitors had so-called Noerr immunity because the NFPA was akin to a legislative body.¹
20 The Supreme Court, disclaiming that "we do not here set forth the rules of antitrust liability
21 governing the standard-setting process," held that the defendants had no immunity from
22 antitrust liability "flowing from the effect the standard has of its own force in the
23 marketplace." Allied Tube, 486 U.S. at 509-10. The Supreme Court did not grant certiorari
24 on the question of whether the defendant's actions were actually illegal under the Sherman
25 Act. Id. at 499, n.3.

26
27 ¹Under Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S.
28 127 (1961) (Noerr), and its successive cases, concerted efforts to restrain trade by petitioning
government officials and bodies are immune from antitrust liability.

1 The Supreme Court in Allied Tube acknowledged that courts have applied a rule of
2 reason analysis to the activities of *private* standard-setting organizations. "When . . . private
3 associations promulgate safety standards based on the merits of objective expert judgments
4 and through procedures that prevent the standard-setting process from being biased by
5 members with economic interests in stifling competition, those private standards can have
6 significant procompetitive advantages. It is this potential for procompetitive benefits that has
7 led most lower courts to apply rule-of-reason analysis to product standard-setting by private
8 associations." Allied Tube, 486 U.S. at 501. For this reason, more extensively discussed in
9 the Court's July 1998 Order [Doc. #135], the Court held that if Plaintiff could show that
10 "Defendants conspired to prevent the issuance of an NFPA safety standard for ESE systems,"
11 then "it is possible that Plaintiffs [would] be able to prove the existence of an implicit
12 agreement to enforce the status quo," thereby stating a claim under the Sherman Act. See
13 Order [Doc. #135] at 11-12.

14 Defendants are only liable for *unreasonable* activities that cause antitrust activities,
15 and the rule of reason has a particular application in standard-setting cases. In Clamp-All
16 Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478 (1st Cir. 1988), the First Circuit provided the
17 framework for finding liability in an almost analogous case. In Clamp-All, the plaintiff
18 alleged that its competitors, the defendants, had prevented a standard-setting organization
19 from adopting a standard that would have benefitted the plaintiff. The First Circuit, in an
20 opinion written by then Judge Breyer, held that "we do not see how plaintiff could succeed
21 on its antitrust claim unless (at a minimum) [defendants] *both* prevented [the standard-setting
22 organization] from adopting a national performance standard that would have benefitted
23 [plaintiff] *and* did so through the use of unfair, or improper practices or procedures." Id. at
24 488 (emphasis in original). Only improper manipulation of the standard-setting process
25 constitutes an unreasonable restraint of trade. Therefore, in order to determine liability, the
26 Court must determine whether Defendant's actions were "improper," then determine whether

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1 a fact-finder could find that improper actions actually caused the alleged injury to
2 competition.

3 However, the Court must recognize that mere speech on behalf of or against a
4 proposed standard cannot be held to be improper and unreasonable. Clamp-All, 851 F.2d at
5 488. As Clamp-All acknowledged, it is reasonable for groups to express their views and
6 lobby on behalf of standards that benefit themselves. "Certifiers may reasonably believe that
7 they can do their job properly (a job that benefits consumers) only if all interested parties are
8 allowed to present proposals, frankly present their views, and vote." Id. at 488. Different
9 courts have taken different positions on whether speech that is merely false or misleading
10 may constitute "improper" or unreasonable conduct that can form the basis of antitrust
11 liability.

12 For example, in Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397
13 (7th Cir. 1989), the Seventh Circuit considered a case where the speech of a trade association
14 criticizing a certain procedure as "experimental" was challenged as an unreasonable restraint
15 of trade. The Court held that expression of an opinion, without a tangible ability to enforce
16 conformity to its recommendations, does not unreasonably restrain trade. "If such statements
17 should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust
18 litigation but more speech – the marketplace of ideas." Id. at 400.

19 Although the Court in Schachar analyzed the effect of an organization's speech on the
20 market, in this case, the effect of the speech is even more attenuated; Defendants' speech
21 could serve only to persuade or dissuade other members of the NFPA. The counter to
22 Defendants' allegedly false and misleading speech is more speech, a response in which
23 Plaintiffs concede they have vigorously engaged. Further courts have indicated that lies or
24 misrepresentations may be sufficiently improper as to constitute a subversion of the standard-
25 setting process.

26 Merely to say that [quality] standards are disputable or have some market
27 effects has not generally been enough to condemn them as 'unreasonable' under
28 the Sherman Act. . . . [S]omething else or more extreme is generally present
in the cases that have condemned quality standards as anticompetitive. In such

1 cases, the principal concern has been the use of standards setting as a predatory
2 device by some competitors to injure others; normally there is a showing that
3 *the standard was deliberately distorted by competitors of the injured party*,
sometimes through lies, bribes, or other improper forms of influence, in
addition to a further showing of market foreclosure.

4 DM Research, Inc. v. College of Amer. Pathologists, 170 F.3d 53, 57 (1st Cir. 1999)
5 (emphasis added). See also Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 523 (5th
6 Cir. 1999) ("in the municipal bidding context, permissible competition is not restricted to the
7 bid itself but can also occur in the process of 'selling' specifications and contract forms, when
8 companies 'tout the virtues' of their product").

9 After a showing of improper means, Plaintiffs must show that Defendants' improper
10 actions were the but-for cause of the antitrust injury. See Greater Rockford Energy & Tech.
11 Corp. v. Shell Oil Co., 998 F.2d 391, 401 (7th Cir. 1993) (In establishing antitrust injury,
12 courts must first delineate types of interest protected by antitrust laws and, second, must
13 determine whether violation was cause-in-fact of injury--but for violation, injury would not
14 have occurred); Chelson v. Oregonian Publ'g Co., 715 F.2d 1368, 1371 (9th Cir. 1983) (If
15 news dealers can show that they and newspaper publisher and would have reached an
16 agreement "but for the actions" of a competing publisher, the dealers have established
17 antitrust injury.). In this case, Defendants must show that Plaintiffs' improper actions
18 actually caused the NFPA to decide to reject NFPA 781. In Sessions Tank Liners, Inc. v.
19 Joor Mfg., Inc., 17 F.3d 295 (9th Cir. 1994), the Ninth Circuit analyzed a similar case also
20 with an intervening cause. In Sessions, the plaintiff petitioned a government agency to set
21 a standard that would injure its competitor in the market. The Ninth Circuit found that the
22 defendant was shielded by Noerr petitioning immunity because the damages were the result
23 of government action. Id. at 299-300. Although Noerr immunity is not relevant in this case,
24 the Court's analysis of the causation involving a third-party standard-setting actor is highly
25 instructive.² To hold the defendant liable for injuries flowing from intervening government
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27 _____
28 ²In arguing that Sessions is inapplicable, see Sherman Act Resp. Memo. at 32-34,
Plaintiffs focus erroneously on the parts of the decision that do not involve causation, namely

1 action (assuming no Noerr immunity), the Court held that "we would have to find that the
2 restraint was imposed *because of* [defendant's] petitioning efforts. Proof of causation would
3 entail deconstructing the decision-making process to ascertain what factors prompted the
4 various governmental bodies to erect the anticompetitive barriers at issue." Id. at 300
5 (emphasis in original). Similarly, to find liability for Defendants' actions lobbying the NFPA,
6 a fact-finder must be able to conclude that the alleged restraint imposed by the third party,
7 the NFPA, was imposed *because of* the improper lobbying efforts of Defendant. Further, the
8 Ninth Circuit suggests that such proof must entail "deconstructing the decision-making
9 process." Id.

10 Other Ninth Circuit precedent also imports a but-for causation test for antitrust
11 liability. In Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 997 (9th Cir. 1979), the Ninth
12 Circuit held that, "[a]ccording to Brunswick [Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477
13 (1977)], plaintiff must show more than that it suffered injury causally linked to the antitrust
14 violation; the injury must be shown to have "flowed" from the wrong. . . . To be one of
15 several causes is not enough." Noting that the lower court gave a "proximate cause" or
16 "substantial part" instruction on causation, the Court stated that it is "left in doubt whether
17 the Brunswick test has been met" and reversed for error. Id. at 997; see Brunswick, 429 U.S.
18 at 489 (holding that antitrust plaintiffs "must prove antitrust injury, which is to say injury of
19 the type the antitrust laws were intended to prevent and that flows from that which
20 defendants' acts unlawful).³ See also Microbix Biosystems, Inc. v. BioWhittaker, Inc., 184
21 F.Supp.2d 434, 437 (D. Md. 2000) ("[I]n the antitrust context . . . Plaintiff has the burden of
22

23 the discussion of Noerr immunity and the question of antitrust injury. They fail to refute
24 Defendants' interpretation of the causation analysis and fail to offer competing case law.

25 ³Plaintiffs contend that Handgards is inapplicable because it was a case brought under
26 §2 of the Sherman Act, not §1. However, the discussion in Handgards about antitrust injury
27 is in general terms, as evidenced by the fact that Brunswick, the case upon which it relies,
28 was an antitrust action brought under the Clayton Act. Moreover, Plaintiffs fail to identify
a single Ninth Circuit decision discussing causation under §1, or any alternative controlling
case law upon which the Court should rely.

1 proving that the alleged illegal conduct was a substantial or materially contributing factor in
2 its injury. . . . [E]vidence that is merely speculative will not satisfy this burden.”).

3 A court must grant summary judgment if the pleadings and supporting documents,
4 viewed in the light most favorable to the non-moving party, “show that there is no genuine
5 issue as to any material fact and that the moving party is entitled to judgment as a matter of
6 law.” Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
7 Jesinger v. Nev. Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law
8 determines which facts are material, and “[o]nly disputes over facts that might affect the
9 outcome of the suit under the governing law will properly preclude the entry of summary
10 judgment.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see Jesinger, 24 F.3d
11 at 1130. In addition, the dispute must be genuine, that is, “the evidence is such that a
12 reasonable jury could return a verdict for the nonmoving party.” Anderson, 477 U.S. at 248.

13 A principal purpose of summary judgment is “to isolate and dispose of factually
14 unsupported claims.” Celotex, 477 U.S. at 323-24. Summary judgment is appropriate
15 against a party who “fails to make a showing sufficient to establish the existence of an
16 element essential to that party’s case, and on which that party will bear the burden of proof
17 at trial.” Id. at 322; see Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir. 1994).
18 The moving party need not disprove matters on which the opponent has the burden of proof
19 at trial. Celotex, 477 U.S. at 323.

20 Furthermore, the party opposing summary judgment “may not rest upon the mere
21 allegations or denials of [the party’s] pleadings, but . . . must set forth specific facts showing
22 that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); see Matsushita Elec. Indus. Co.,
23 Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Brinson v. Linda Rose Joint
24 Venture, 53 F.3d 1044, 1049 (9th Cir. 1995); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.
25 1989); see also Rule 1.10(1)(1), Rules of Practice of the United States District Court for the
26 District of Arizona (“Any party opposing a motion for summary judgment must . . . set[]
27 forth the specific facts, which the opposing party asserts, including those facts which
28

1 establish a genuine issue of material fact precluding summary judgment in favor of the
2 moving party.”). There is no issue for trial unless there is sufficient evidence favoring the
3 non-moving party; if the evidence is merely colorable or is not significantly probative,
4 summary judgment may be granted. Anderson, 477 U.S. at 249-50. However, because
5 “[c]redibility determinations, the weighing of evidence, and the drawing of inferences from
6 the facts are jury functions, not those of a judge, . . . [t]he evidence of the non-movant is to
7 be believed, and all justifiable inferences are to be drawn in his favor” at the summary
8 judgment stage. Id. at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59
9 (1970)); see Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995).

10 **B. But-for Causation**

11 On the issue of causation, Defendants have filed Motion for Summary Judgment: Lack
12 of Proof of Causation [Doc. #316]. Plaintiffs, in their Sherman Act Response Memorandum
13 [Doc. #309], describe the "gravaman" [sic] of their complaint as "the Defendants' abuse of
14 the standard-setting process resulted in a lack of 'consensus' for proposed NFPA 781 at the
15 1993 Phoenix meeting and thereafter manipulated the NFPA standard-setting process to
16 maintain a 'consensus' for the retention of NFPA 780." Id. at 17. Plaintiffs thus have two
17 theories of causation: (1) that Defendants' actions at the 1993 NFPA meetings directly caused
18 a lack of consensus for 781, leading to the rejection of NFPA 781, and (2) Defendants
19 manipulated this consensus to improperly convince the NFPA to retain NFPA 780. On this
20 latter point, the Plaintiffs argue that "[b]ased on this 'lack' of consensus for NFPA 781 and
21 the 'consensus' for NFPA 780 ... the NFPA thereafter imposed a greater standard of scientific
22 and technical validity on ESE systems than was applied in deciding to retain NFPA 780,
23 resulting in the anti-trust injury, whereby there is only one nationally recognized standard for
24 lightning protection." Id.⁴

25 _____
26 ⁴Although the NFPA's rejection of the proposed 781 standard and retention of NFPA
27 780 are related, Plaintiffs admitted at the hearing that the mere retention of 780 (despite the
28 Plaintiffs' efforts to have it withdrawn) does not give rise to an antitrust claim. In particular,
Plaintiffs provide no evidence of injury or damages flowing from the NFPA's decision not

1 Under the framework of Clamp-All and Sessions, the Plaintiffs must show both that
2 Defendants' actions in regards to the NFPA's standards-setting process were improper, and
3 that the NFPA failed to issue 781 (or failed to repeal 780) *because of Defendants' improper*
4 *actions.* Clamp-All, 851 F.2d at 488; Sessions, 17 F.3d at 300. The analysis of Plaintiffs'
5 claim begins with whether Defendants' actions in November 1993 were improper, and
6 whether they were the but-for cause of the NFPA's decision.

7 **(1) Were Defendants' Actions Improper?**

8 Plaintiffs identify two sets of allegedly improper actions taken by Defendants at the
9 1993 NFPA meeting. First, Plaintiffs criticize the distribution of handouts before the general
10 membership vote. Plaintiffs argue that the distribution of handouts was itself improper, and
11 that the statements contained in the handouts were false or misleading. Second, Plaintiffs
12 claim that various statements made by Defendants and their allies on the floor of the
13 membership debate were false or misleading.

14 **(a) Handouts**

15 Plaintiffs initially contend that the distribution of handouts at the 1993 meeting was
16 itself improper and greatly injured the consensus standard-setting process. They base their
17 allegation on an NFPA Guideline (admittedly adopted after 1993) that the standard-setting
18 process be "open, fair, and honest to all participants." Exh. 31 to PSOF, at 11. It is unclear
19 from the record evidence whether the distribution of handouts at the general membership
20 meeting was against NFPA regulations. Plaintiffs assert, however, that this fact is irrelevant
21 because the NFPA later changed its rules in response to the handout incident. Plaintiffs rely
22 on Allied Tube, which noted that "[t]he antitrust validity of these [allegedly illegal] efforts
23 is not established, without more, by petitioner's literal compliance with the rules of the
24 Association, for the hope of procompetitive benefits depends upon the existence of

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26 to withdraw 780. To do so, Plaintiffs would have to present evidence of a but-for market
27 where there were *no* NFPA standards at all. As discussed in Part C, concerning Mr. Guth's
28 expert report, Mr. Guth performed no such calculations, and Plaintiffs present no such
evidence.

1 safeguards sufficient to prevent the standard-setting process from being biased by members
2 with economic interests in restraining competition." Allied Tube, 486 U.S. at 509. In Allied
3 Tube, liability was supported by the fact that the NFPA changed its rules in response to the
4 defendant's actions, and the NFPA officially found that the defendant had "circumvented"
5 NFPA rules. See Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 947 (2d
6 Cir. 1987), aff'd, Allied Tube, 486 U.S. 492.

7 Here, Plaintiffs provide some evidence that the handout distribution might have been
8 improper. Arthur Cote, testifying on behalf of the NFPA, testified that "we, has [sic] a
9 general rule, do not allow handout materials in the actual area where the meeting – where the
10 votes are going to be taken." Cote Dep. at 89-90, Exh. 34 to PSOF. Further, Cote described
11 the prohibition as "a blanket prohibition regardless of content," and stated that "NFPA has
12 taken the position that we do not believe the process is enhanced by having additional
13 materials presented for the membership at the time the committee reports are being debated."
14 Id. at 92. However, another witness, John Bryan, testified that the distribution of handouts
15 was not against NFPA rules "at that time," but that "after that incident, the Standards Council
16 or somebody made a ruling that they could distribute materials outside the technical session
17 room but not within the room." Bryan Dep. at 183-4, Exh. 32 to PSOF. Finally, Defendants
18 admit that Ackerman was told by someone at the NFPA to stop distributing the handouts but
19 nevertheless continued to distribute them.

20 Still, the evidence is not adequately persuasive that the handout distribution was
21 sufficiently improper to support antitrust liability. Under NFPA rules in force in November
22 2001, materials distributed *inside the meeting room* must have prior approval by the
23 Secretary of the Standards Council, and only NFPA members can distribute them. Exh. 35
24 to PSOF.⁵ There appears to be no regulation of distribution outside the meeting room or in
25

26 ⁵The date at which the NFPA Technical Meeting Convention Rules, attached as Exh.
27 35 to PSOF, were passed is unclear from the document and related testimony. Also,
28 Defendants have moved to strike PSOF ¶71, 72, and 154 regarding the prohibition on
handouts. The Court has relied on the underlying testimony rather than Plaintiffs'

1 advance of the meeting. Cote's testimony on behalf of the NFPA does not indicate that
2 handouts are an inherent threat to the process, only that they are procedurally disfavored by
3 the NFPA. Cf. Indian Head, 817 F.2d at 947 (liability found where defendant "violated the
4 integrity of the NFPA's procedures" and "subverted the code making process"). Further,
5 though the NFPA later changed the rules regarding handouts, they have also, as discussed
6 in the next section, continued to assert that the membership vote was fairly conducted despite
7 the handouts. The conclusion that the handout prohibition is primarily procedural is
8 reinforced by the fact Defendants were free to *inform* members all of the information
9 contained in the handouts. Certainly, the distribution of handouts does not, on its face,
10 contravene the vague NFPA Guideline that the process be "open, fair, and honest to all
11 participants." Exh. 31 to PSOF, at 11. Ultimately, there is insufficient evidence that
12 distribution of handouts, standing alone, so undermines the fairness of a standard-setting
13 process such that it can form the basis for antitrust liability.⁶

14 Aside from the bare complaint that Defendants distributed the handouts, Plaintiffs
15 contend that the information contained in the handouts was false and misleading. In their
16 Sherman Act Response Memorandum [Doc. #309], Plaintiffs identify a range of statements
17 that they claim are misleading.

18 First, one handout contained the statement that "the NFPA Standards Council is so
19 concerned about the makeup of this [781] Committee that they have commissioned an
20 investigation." Exh. 67 to PSOF. This statement is misleading because East Coast and

21 _____
22 characterization in their SOF.

23 ⁶Plaintiffs are correct that *ex post* approval by a standards-setting organization does
24 not provide conclusive evidence of propriety of a member's anticompetitive actions. See
25 American Soc. of Mech. Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) (liability
26 found even where standards-setting organization decided that all members had acted
27 properly). Hydrolevel, however, is not exactly analogous, because it involved a case where
28 a member's actions were vicariously imputed to the organization itself, such that the
organization was essentially conducting an investigation into the propriety of *its own*
conduct. The NFPA's investigation here was an investigation into whether third parties
violated NFPA procedures.

1 Thompson challenged the balance of the makeup of the 781 Committee membership shortly
2 before the November 1993 membership meeting, and the Standards Council was required to
3 conduct an investigation regardless of the merits of the complaint. See Exh. 47 to PSOF at
4 5-6, 44 (Standards Council minutes of 10/14/93), Cote Dep. at 125. It appears that the
5 membership of the 781 Committee was available in March 1993 and Defendants waited until
6 October to register a challenge with the Standards Council. See Exh. 10 to DSOF (proposed
7 Technical Committee Report listing members); Exh. 48 to PSOF (Larsen note dated 3/23/93
8 to Rison enclosing report). Therefore, the assertion that the Standards Council was
9 concerned about the makeup of the committee and conducting an investigation was
10 misleading, and misrepresented both the NFPA process and Defendants' role therein.

11 Next, the handouts state that "Document 781 contains nearly 50 new or changed
12 paragraphs that have not been subjected to public review," even though O'Connor (a 781
13 Committee member) testified at the October Standards Council meeting, at which
14 Defendants' representatives were present, that the changes were primarily the result of
15 printing errors. Exh. 67 to PSOF; Exh. 47 to PSOF at 37-8, 42-3. This statement, while
16 literally true, was potentially misleading.

17 Next, the handouts indicated that the "American scientific community" opposed NFPA
18 781, yet only five scientists submitted official comments, and almost 80% of the scientific
19 comments were submitted from two individuals, Dr. William Rison ("Rison") and Prof.
20 Charles Moore ("Moore"), the latter of whom had comments reviewed by LPI before
21 submission. Dr. Rison and Prof. Moore are both researchers at the Langmuir Laboratories
22 at New Mexico Institute of Mining and Technology ("New Mexico Tech"), that has received
23 funding from Defendants to conduct research on lightning protections systems. Plaintiffs
24 argue that Defendants should have disclosed that Rison and Moore had received research
25 funding from Defendants, that Moore had his comments reviewed by LPI, and/or that New
26 Mexico Tech received funding from Thompson for additional lightning research

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28

1 approximately six weeks after Moore submitted his comments.⁷ PSOF ¶¶105-116, 122-3,
2 164. However, Plaintiffs point to no requirement that Defendants affirmatively disclose any
3 potential conflicts of interest of the scientists who made comments. Further, Plaintiffs had
4 the opportunity to rebut the comments by showing a conflict of interest, and, in fact, Moore
5 and Rison's comments were distributed along with the 781 *Committee report*, in advance of
6 the vote. Even if Defendants' claims of the "American scientific community" were
7 exaggerated (and Plaintiffs have not conclusively shown or established an issue of fact that
8 they are), both Plaintiffs and the NFPA members knew of the comments of the scientists in
9 advance of the meeting.

10 Next, the handout claims that an ESE terminal failed testing conducted at New
11 Mexico Tech, and "[l]ightning struck within the claimed protected area." Exh. 67 to PSOF.
12 Plaintiffs argue that the handout failed to discuss the financial backing for the test, which was
13 provided by Defendants, in furtherance of earlier litigation. PSOF ¶¶43, 175. Further,
14 Plaintiffs dispute, for a variety of reasons, whether the tests were accurately conducted.
15 PSOF ¶46. However, as Defendants point out in their motion to strike ¶46, Rison did not
16 concede that he thought the experiment was flawed. Rison testified that he did not follow
17 two instructions for installation, but he also thought the ESE terminals were "sufficiently
18 grounded" to conduct testing. Rison Dep. at 23-24, Exh. 25 to PSOF. Plaintiffs present no
19 evidence that Defendants were under an obligation to state the potential criticisms of the test,
20 or whether or not they themselves commissioned the experiments. Plaintiffs were free to
21 dispute the results of the test themselves. However, one handout comment indicating that

22
23 ⁷Defendants have moved to strike some of the Statement of Facts in support of these
24 allegations. PSOF ¶107, claiming that Heary Bros. was not informed of LPI's comment
25 solicitation efforts, is unsupported by the evidence and will be stricken. Larsen testified only
26 that he personally never informed Kenneth Heary of the solicitation. PSOF ¶108, claiming
27 that LPI solicited *negative* comments, is a speculative characterization of what occurred and
28 will be stricken. Though a jury could infer that LPI desired negative comments, there is no
admissible record evidence that they specifically sought them out. PSOF ¶117, describing
Thompson's funding to New Mexico Tech, will not be stricken because it is supported by the
record. See Steffes 6/2/93 letter, Exh. 58 to PSOF.

1 "data about field tests were not presented to the Committee" may be false or misleading,
2 because Plaintiffs claim, without dispute, that the 781 Committee did review the results of
3 the New Mexico Tech test. PSOF ¶¶96-7.

4 Finally, Plaintiffs point out a number of statements in the handouts that are
5 inconsistent with positions that many of the Defendants have taken at other times. These
6 statements are not actually false or misleading; Defendants cannot be held liable for an
7 antitrust violation for making *inconsistent* arguments unless there is proof that they
8 intentionally did so. First, the handout says that the 781 Committee is "grossly out of
9 balance" and provides a chart purporting to link the members together and expose their
10 affiliations. Plaintiffs claim that East Coast should have disclosed that LPI encourages its
11 own members to participate on the NFPA 780 Technical Committee to further their economic
12 interests, and that LPI allegedly has control of the 780 Committee. PSOF ¶¶172-3.⁸
13 Defendants' position is not misleading, even if they pursue similar strategies themselves in
14 other contexts.

15 Second, one handout criticizes the 781 Committee balance because the scientists on
16 the Committee had backing from the lightning protection industry. However, East Coast has
17 also taken the position, albeit in a letter written seven years later, that it is unrealistic to
18 expect scientists on Technical Committees to operate independently of corporate
19 sponsorship. Exh. 68 to PSOF. Again, this might be an inconsistent argument on East
20 Coast's part, but the statements about the affiliations of the scientists are not false or
21 misleading.

22 Third, one handout claims that ESE proponents "do not have a right to use a NFPA
23 document as a marketing tool," though East Coast and Thompson arguably do use the NFPA

24
25 ⁸Defendants have moved to strike PSOF ¶27, which is the evidence supporting the
26 allegation that LPI encourages its members to participate on the 780 Committee. This
27 statement will be stricken, because the only evidence in the record is a fax from Thompson
28 to LPI enclosing a draft letter, upon which the statement is based. Plaintiffs have not proven
that the letter was sent, and there is no evidence upon which a jury may reasonably infer such
a fact.

1 standard as a marketing tool. Exh. 67, 72, 73 to PSOF. This statement is not even
2 inaccurate, since East Coast and Thompson do not claim a "right" to use NFPA approval as
3 a marketing tool, even if they avail themselves of the opportunity.

4 In sum, Plaintiff can identify, at most, three statements contained in the handouts that
5 were potentially false or misleading, such that they might be "improper."

6 **(b) Statements made on the floor at the meeting**

7 Plaintiffs also contend that some of the statements made during the debate were false
8 and misleading. Many of these statements overlap with the allegedly false and misleading
9 statements identified by the Plaintiffs in the handout.

10 Plaintiffs object to Rison's testimony about the New Mexico Tech lab results at the
11 floor debate. Rison actually testified at the hearing that the New Mexico Tech tests "were
12 conducted, one, by a law firm with regard to litigation. Another was requested by one of the
13 opponents." Exh. 77 to PSOF at 35-36. However, Plaintiffs object to his statement that
14 experimental ESE device had been installed as recommended by the manufacturer, though
15 he admitted in his deposition that he made two modifications to the installation. Exh. 77 to
16 PSOF at 36; Rison Dep. at 23-24. The statement is arguably misleading. Plaintiffs' other
17 complaint is that Rison's testimony was inconsistent with other opinions he has taken at later
18 times regarding testing of lightning protection systems. PSOF ¶201. Again, arguably
19 inconsistent positions taken a number of years apart are not analogous to false or misleading
20 statements.⁹

21 Next, Plaintiffs complain that Ackerman claimed that the 781 standard was opposed
22 by "the U.S. scientific community" and that the "Standards Council has established a task
23 force to investigate the makeup of the committee." Exh. 77 to PSOF at 21, 22. As discussed
24

25 ⁹The Court notes that Rison is not a named Defendant or a paid expert for any
26 Defendant, although his attendance at the NFPA meeting was financed by Defendants. It is
27 therefore unclear whether Defendants may be held liable for his statements. The Court need
28 not resolve that question, because, as discussed below, the sum total of alleged improprieties
in insufficient to support a finding of causation.

1 above, the first claim is an exaggeration at best for Plaintiffs' proof. The second claim, as
2 phrased by Ackerman at the meeting, is not actually false, though it may be misleading.

3 Finally, Plaintiffs point to statements by Al Steffes claiming that an ESE system
4 installed at the Dolphin Hotel had failed, allegedly resulting in lightning striking the tail of
5 a 60-foot-tall dolphin icon mounted on the building. Plaintiffs claim that Steffes was making
6 misrepresentations, because Steffes had been present at the deposition of a representative of
7 the building owner, James Nagy, who indicated that the owners originally filed a claim for
8 lightning damage, but then did not challenge the determination of Heary Bros. and its
9 "investigator," Alex Chaberski ("Chaberski"), that the damage was due to an unexpected
10 methane gas buildup. Nagy Dep. at 20-27, Exh. 79 to PSOF.¹⁰ Notwithstanding this
11 testimony, Steffes had an adequate basis to support his thesis. As for personal knowledge,
12 he stated that "I have been in the lightning business since the early 1970s and I know what
13 lightning damage is. I viewed the Dolphin Icon. The structure was clearly struck with
14 lightning. . . ." Steffes Aff. ¶12 [Doc. #239]. Moreover, Chaberski later testified that he
15 conducted no investigation of the dolphin icon, evaluated no physical evidence, and based
16 his opinion entirely on Edwin Heary telling him (inaccurately) that there was no lightning
17 storm when the dolphin exploded. Chaberski Dep. at 113-120, Exh. 1 to Steffes Aff. Thus,
18 Steffes's statements at the November meeting were, at best for Plaintiffs' proof debatable, and
19 not false or misleading.

20 Even the misleading statements made during the floor debate do not necessarily
21 constitute "improper" actions, because Plaintiffs had a full opportunity to rebut the
22 allegations of the handouts and the arguments made during the floor debate at the time of the
23

24
25 ¹⁰Defendants have moved to strike PSOF ¶205 because it is a deposition taken from
26 prior litigation. However, Steffes himself was present at the deposition, taken on behalf of
27 LPI, and he offered part of the transcript as an exhibit to his Affidavit. Therefore, under Fed.
28 R. Civ. P. 32(a)(4), other parts of the deposition should be considered "in fairness." What
is more, it is admissible as not hearsay because it was not offered to prove the truth of the
matter asserted. Fed. R. Evid. 801.

1 floor debate. Enigmatically, Plaintiffs, in fact, chose to remain silent throughout most of the
2 proceedings. Rapp did speak in support of NFPA 781, and various other Heary Brothers
3 participants testified that no one would have stopped them from speaking out at the meeting.
4 See K. Heary Dep. at 475, Exh. 8 to DSOF. Though Plaintiffs now contend that the NFPA
5 influenced their decision not to address the handouts explicitly, Plaintiffs' evidence, at most,
6 indicates that some of the 781 Committee members made a strategic decision not to address
7 the handouts at the meeting. McAfee, the acting chair of the 781 Committee testified that
8 he met with a number of NFPA representatives, but also testified that they gave him no
9 instructions regarding what 781 Committee members should or should not say during the
10 floor debate. See McAfee Dep. at 157-8, 221, Exh. 12 to DSOF.

11 Frederick Heary and Rapp, through their affidavits, have contradicted McAfee's
12 testimony and insisted that they relied on assurances by the NFPA that the handouts would
13 be investigated and remedial action would be taken. Defendants have moved to strike this
14 evidence as hearsay. Rapp's testimony, in ¶41 of his affidavit, is based on hearsay from
15 unattributed sources. Rapp claims that the 781 Committee "was told that the NFPA was
16 concerned. . ." and "NFPA representatives advised the 781 Technical Committee members
17 that . . ." This evidence is admissible not for the truth, but only as evidence of Rapp's state
18 of mind concerning why he did not respond to the handouts at the meeting, not that the NFPA
19 was actually concerned or actually planning to investigate the handout. Similarly, Frederick
20 Heary's affidavit, specifically ¶53, relies on McAfee's statements about what McAfee was
21 told by the NFPA, adding a second layer of inadmissible hearsay. Finally, a memo that
22 McAfee later wrote describing the discussions with the NFPA, Exh. 75 to PSOF, is hearsay
23 because offered for the truth, and is not admissible, as Plaintiffs contend, as a past
24 recollection recorded, because McAfee testified in his deposition without the need to refresh
25 his mind as to a present recollection of the NFPA meeting events. See Fed. R. Evid. 803(5)
26 (hearsay admissible of "record concerning a matter which about which a witness once had
27 knowledge but now has insufficient recollection to enable the witness to testify fully and
28

1 accurately"). McAfee's testimony shows that the NFPA made no affirmative assurances or
2 instructions to prevent the 781 Committee members from speaking at the floor debate.¹¹
3 Indeed, all the evidence indicates that the silence of the Committee members was a strategic
4 decision. PSOF ¶187.

5 Having narrowed down the list of arguably improper conduct from Plaintiffs'
6 extensive litany of allegations, the Court must determine if any genuine issues of material
7 fact exist to support a finding of but-for causation.

8 **(2) Were the allegedly improper acts the but-for cause of the failure to adopt**
9 **NFPA 781?**

10 Plaintiffs have two critical links which they must make in order to prove but-for
11 causation. First, they must show that Defendants' actions at the November 1993 meetings
12 actually changed the outcome of the membership vote. Second, they must show that the 1993
13 membership vote was the but-for cause of the Standards Council's decision to not issue
14 NFPA 781. Plaintiffs must show both of these links to establish causation. The Court
15 concludes that Plaintiffs can not establish either.

16 **(a) Evidence from the November 1993 meeting**

17 Plaintiffs are without admissible evidence that the handouts or allegedly misleading
18 arguments made at the membership meeting actually caused the membership to vote to send
19 the 781 report back to the Technical Committee. As previously noted, William Heary
20 conceded that the vote was "overwhelming." W. Heary Dep. at 86, Exh. 13 to DSOF. The
21 evidence that the flyers actually changed the outcome of the vote rests on pure speculation.
22 For example, the extent of Edwin Heary's "proof" that Defendants influenced the outcome
23 was "*it seems to me they were successful in getting the people to vote it down; the firemen.*"
24 E. Heary Dep. at 91, Exh. 14 to DSOF (emphasis added). He conceded that he knew of no
25

26 ¹¹Even if Plaintiffs could show that the NFPA had somehow discouraged or prevented
27 Plaintiffs from presenting their case to the membership, that fact would not necessarily show
28 liability on the part of Defendants, since it would only show that the NFPA, which is *not* a
Defendant, intervened to alter the outcome of the floor vote.

1 member who changed his or her vote because of the handout. *Id.* at 99, 109-110. William
2 Heary also testified that he knew of no member whose vote was changed, and that "there was
3 a large firemen's contingency there, and they all wanted to move on to their business, and so
4 they all voted in pretty much a block. . . ." W. Heary Dep. at 87. Rapp testified that he talked
5 to between three and ten members of the membership audience, but did not relate what any
6 of them told him. Rapp Dep. at 87, Exh. 9 to DSOF. In Plaintiff's Statement of Facts, they
7 do not point to a bit of evidence suggesting that the membership vote was changed because
8 of the Defendants' handouts and statements. *See* PSOF ¶¶208-209 (describing, without
9 elaboration, movement of members in and out of meeting room).

10 The extent of Plaintiffs' argument is such: "Plaintiffs do not need to reconstruct the
11 NFPA membership vote in Phoenix. A reasonable jury could find that the Defendants'
12 conduct was a substantial or [a] materially contributing factor to the NFPA membership's
13 vote based on the conduct of Defendants before the vote occurred." Plaintiff's Resp. Memo.
14 [Doc. #309] at 66. Plaintiffs offer no case law to support the argument that a jury could infer
15 causation from improper conduct alone, nor was the Court able to find any. For one, there
16 is no record evidence of any causative effect at all, merely speculation by the Plaintiffs.
17 Second, there are many other possible contributing factors, including the recorded objections
18 to the 781 Committee report, as well as the lobbying and arguments made by Defendants
19 before the vote that were not "improper." Indeed, the crux of Defendants' arguments against
20 781 is that the ESE technology simply does not work as claimed, an argument that even
21 Plaintiffs do not dispute as "improper." In short, Plaintiffs have no evidence that the
22 allegedly improper acts influenced the vote *at all*, much less evidence to support that
23 Defendants' acts were the but-for cause of the vote.

24 Notably, Allied Tube provides no support for Plaintiffs' argument regarding causation,
25 because in that case causation was not at issue. In Allied Tube, the lower court found
26 conclusively that the membership-packing had led the outcome of the vote. In that case, the
27 defendant had packed an NFPA meeting with around 230 members whose sole purpose was
28

1 to defeat the proposed standard, and the standard failed by only four votes. Allied Tube, 486
2 U.S., at 496-7. Furthermore, at the time of the Allied Tube vote, the NFPA membership vote
3 would have resulted in the adoption of the standard, see Allied Tube, 486 U.S. at 496,
4 whereas approval by the membership of NFPA 781 in 1993 would have only sent the report
5 to the Standards Council for further review. In Allied Tube, the critical causation links that
6 Plaintiffs must prove were not at issue.

7 As a final argument against Defendants' summary judgment motion on causation,
8 Plaintiffs argue that Defendants' causation argument "essentially asks for antitrust immunity
9 regardless of what misrepresentations they might make before an NFPA membership vote."
10 Plaintiff's Resp. Memo. [Doc. #309] at 66, n.21. In making this argument, Plaintiffs confuse
11 an element of their cause of action with a potential affirmative defense. Plaintiffs bear the
12 burden of showing that the alleged misrepresentations actually caused the change in the vote
13 because *causation is always an element of the antitrust claim*. If Defendants prevail on the
14 causation issue, it is not because they are "immune" from antitrust liability, but because
15 Plaintiffs fail to meet their burden. Simply put, not every false statement made during a floor
16 debate on a standard can form the basis of a Sherman Act claim; Plaintiffs' obligations are
17 the same as all litigants; they must show that the statements *actually caused* an antitrust
18 injury. There is no such proof in this case.

19 **(b) Subsequent NFPA actions rejecting 781**

20 Even if the Plaintiffs could show that Defendants' improper conduct caused the
21 outcome of the membership vote, they cannot show that the vote was the but-for cause of the
22 Standards Council's decision not to issue 781. As previously noted, a membership vote
23 approving the Report in 1993 would only have had the effect of sending the 781 standard to
24 the Standards Council, which makes the final decision. The Standards Council has
25 repeatedly based its decision not to issue NFPA 781 on the lack of scientific consensus that
26 ESE technology works at all.

27
28

1 Plaintiffs contend that the lack of "consensus" surrounding NFPA 781 was based on
2 Defendants' improper actions at the 1993 meeting. In its 1994 decision regarding complaints
3 about the 1993 meeting, the Standards Council concluded that "the overwhelming vote of the
4 membership recommending the return of the document for further study indicates that the
5 consensus necessary to issue the document has not yet been achieved." Exh. 17 to PSOF.
6 However, the Standards Council traced this lack of consensus to *legitimate* questions about
7 the scientific underpinnings of ESE technology. "The Council further believes, based on its
8 review of the entire record, that despite the sometimes contentious nature of the debate, the
9 lack of consensus derives from genuine and legitimate questions on whether the early
10 streamer emission technology has been adequately demonstrated to be effective." *Id.*
11 Therefore, the Standards Council concluded that the necessary consensus was not achieved
12 because of legitimate scientific arguments that, under any interpretation, Defendants and
13 other opponents of ESE technology were allowed to make without running afoul of antitrust
14 liability. In fact, Arthur Cote, the Secretary of the Standards Council, testified that the 1993
15 membership vote had no bearing on the conclusions reached by the Standards Council not
16 to issue the 781 standard. Cote Dep. at 193-4, Exh. 20 to DSOF.

17 Further, after the 1994 decision, the NFPA commissioned the independent NIST
18 Report, which was authored by Dr. Van Brunt. He also found a lack of scientific evidence
19 that ESE terminals are more effective than conventional terminals. At a Standards Council
20 hearing in 1995, Plaintiffs again had an opportunity to address the issues of scientific proof.
21 The Standards Council again decided, in its 1995 decision, not to issue the 781 standard
22 based on a lack of scientific or technical proof. After the NFPA reached a settlement in this
23 lawsuit and examined the independent Bryan Report, the NFPA again declined to issue 781.
24 In its most recent 2001 decision, the NFPA clarified that "[t]he Council voted to decline to
25 issue a standard for ESE lightning protection systems because it failed to receive the support
26 of the NFPA codes and standards development system, and because, *apart from the doubts*
27 *about the technology that were reflected in that failure*, two separate independent reviews

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1 of the technology, by the [NIST] and by the Bryan Panel, concluded that the claims of vastly
2 superior performance of ESE terminals over conventional terminals simply had not been
3 validated." Exh. 53 to DSOF, at 9 (emphasis added).

4 This evidence shows that there are simply too many intervening causes to the
5 Plaintiffs' alleged antitrust injury. The NFPA has repeatedly decided, based on independent
6 reports of lack of scientific proof, to not issue 781, and Defendants are not responsible for
7 the NFPA's actions. Plaintiffs' responsive argument is that the NFPA claims to rely on
8 "consensus" in making its decisions, and Defendants allegedly destroyed a "consensus" at the
9 1993 membership vote. Plaintiffs' argument fails because they use the term "consensus" too
10 broadly. Plaintiffs must show that the NFPA relied up on the "consensus" *of the membership*
11 *vote* in order to show causation, even though the NFPA claims that it relied on the consensus
12 of scientific community (i.e., through the availability of scientific proof).

13 In response to the NFPA's defense of its 781 decision, Plaintiffs argue that the NFPA
14 is being inconsistent: it either overreached in demanding scientific proof for 781 because
15 NFPA 780 specifically disclaims that the NFPA "does not independently test, evaluate, or
16 verify the accuracy of any information or the soundness of any judgments contained in its
17 codes or standards," Exh. 11 to PSOF, or misapplied its *own* standard for consensus
18 standard-setting in failing to repeal 780 for lack of scientific proof. This argument does not
19 save Plaintiffs' claims. Whether the NFPA misapplied its own standards is not relevant to
20 a claim against *Defendants*; if anything, it shows that the NFPA, not Defendants, was the
21 cause of the alleged antitrust injury.

22 Finally, Plaintiffs' argument that the NFPA is applying its own standards incorrectly
23 is not an issue for the Court to decide. The Court cannot infer that the NFPA (and then, by
24 some extension, the Defendants) are the cause of an antitrust injury by evaluating the
25 substantive outcome of a standard-making decision. "Neither anticompetitive animus nor the
26 other elements of a section 1 claim can be inferred solely from the incorrectness of a single
27 business decision by a standard-setting trade association. . . . An individual business decision
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1 that is negligent or based on insufficient facts or illogical conclusions is not a sound basis for
2 antitrust liability." Consolidated Metal Products, Inc. v. American Petroleum Inst., 846 F.2d
3 284, 297 (5th Cir. 1988). As the Fifth Circuit emphasized, federal courts must not "become
4 boards of automatic review for trade association standards committees," which would "tax
5 the abilities of the federal courts. . . [and] discourage the establishment of useful industry
6 standards." Id. at 297. Further, "it is not antitrust's mission to correct standards that are
7 substantively wrong or even irrational, but only to seek out injuries to competition." 13
8 Areeda & Hovenkamp, Antitrust Law §2232d, at 361 (1999). See also Schacher, 870 F.2d
9 at 400 (role of Sherman Act is not to evaluate the merits of an organization's conclusion, just
10 whether it had anticompetitive effect); 13 Areeda & Hovenkamp, Antitrust Law §2232a, at
11 354 (1999) ("To the extent possible, antitrust must evaluate standard setting without asking
12 the litigation fact finder to determine such questions as . . . whether a certain product is
13 dangerous or defective.").

14 **(3) Plaintiffs' other assorted allegations of impropriety**

15 Plaintiffs also offer a laundry list of allegedly improper acts on the part of Defendants
16 over the course of a decade. Most of these are not relevant because Plaintiffs make no real
17 attempt to link the activities to any facet of the NFPA's decision-making. Without a showing
18 of causation, many of Defendants' activities can be summarized and dismissed.

19 The Plaintiffs specify a number of actions taken by Defendants before the November
20 1993 meeting that they consider "improper." See Plaintiffs' Response Memo at 46-7.
21 However, Plaintiffs do not allege that any of these acts changed the outcome of the
22 membership vote. Plaintiffs claim that Ed Lobnitz, a member of the 781 Committee, failed
23 to disclose his affiliation with LPI before serving on the Committee. This allegation is
24 irrelevant because the 781 Committee succeeded in submitting the 781 report over the
25 dissenting vote of Lobnitz, thus neutralizing any effect he could have on the outcome.
26 Plaintiffs claim that Defendants reviewed and edited comments from Moore before
27 submitting them to the members. This allegation is addressed in the handouts discussion
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1 above. Finally, Plaintiffs argue that the challenge to committee balance made in October was
2 "unusual" in its timing. Shannon Dep. at 45, Exh. 33 to PSOF. However, Plaintiffs' actions
3 to attempt to block the 781 report in October were neither against NFPA policy, nor
4 successful. Plaintiffs' litany of alleged improprieties only highlights how little any of them
5 support a finding of causation.

6 Plaintiffs also argue that Defendants made a number of misrepresentations when
7 submitting the results of the New Mexico Tech to the NIST. See Sherman Act Response
8 Memo. at 48-50. The most serious allegations are that Defendants did not disclose that
9 Ackerman and Moore discussed funding for the New Mexico Tech research at the same time
10 Moore was testifying before the NFPA, and that Steffes convinced Moore to delete
11 statements critical of conventional lightning protection systems from his report. There is no
12 evidence that the New Mexico Tech submissions, much less the improper conduct, caused
13 Dr. Van Brunt to alter his conclusions. The NIST contained a bibliography of 302
14 documents upon which Dr. Van Brunt relied. Exh. 28 to DSOF. Moreover, Dr. Van Brunt
15 examined the New Mexico Tech tests specifically and questioned the reliability of tests
16 conducted at that altitude. Id. at 21. Rapp, in his deposition, admitted that Dr. Van Brunt
17 discounted, at least to some extent, the reliability of those tests. Rapp. Dep. at 154-156.
18 Thus, Plaintiffs have failed to show a causal link.

19 Plaintiff's final set of alleged improprieties deals with Rison's conduct in preparing
20 the AGU Report in the most recent (2000-1) round of hearings on NFPA 780. Not only are
21 the alleged improprieties minimal in effect, but the Standards Council indicated that it relied
22 upon the separate, independent Interagency Report in making its determination not to
23 withdraw 780. Exh. 53 to DSOF, at 1-2 (explaining that the Interagency Report "alone"
24 provides sufficient evidence to maintain NFPA 780). Again, Plaintiffs make no real attempt
25 to show causation for these assorted allegations of impropriety.

1 **C. Antitrust Injury / Daubert Motion to Exclude Expert Testimony of Guth**

2 Defendants have also filed two motions contesting whether Plaintiffs can establish
3 proof of antitrust damages: Motion for Summary Judgment: Plaintiffs Cannot Establish
4 Damages [Doc. #249], and Defendant's Daubert Motion to Exclude Testimony Offered by
5 Louis Guth [Doc. #251]. The two motions are interrelated because Plaintiffs rely entirely on
6 Mr. Guth's expert report to establish damages, and Plaintiffs bear the burden of showing an
7 actual injury to competition. Les Shockley, 884 F.2d at 507. Exclusion of Mr. Guth's
8 testimony leaves the Plaintiffs with no proof on injury, an essential element of their Sherman
9 Act claim. The Court will grant both motions which, as with the Court's decision on
10 causation, is dispositive of this litigation.

11 **(1) Overview of Mr. Guth's Report**

12 In his report, Mr. Guth initially concluded that the relevant product market is the
13 national market for lightning protections systems ("LPS"), excluding labor associated with
14 installation. Guth Expert Report (November 16, 1998) at 6 ("Guth Report"). Using Heary
15 Bros.'s bids from October 1994 until the time of his report, he compared the ratio of bid price
16 for a Faraday system to bid price for an ESE system for all projects in which Heary Bros.
17 made a bid for both systems for the same project, including installation costs. He concluded
18 that the overall price of ESE systems, including installation, is usually a fraction of Faraday
19 systems in most instances, excepting the smallest projects. Id. at 8. However, the majority
20 of installed systems remain Faraday systems, reflecting buyers' uncertainty about the
21 performance of ESE systems and the decision to use Faraday systems because they
22 conformed to NFPA standards. Id. at 9.

23 Mr. Guth concluded that if an NFPA standard had issued for the ESE system, there
24 would have been an (1) increase in the selection of ESE systems, (2) increase in the price of
25 ESE systems, and (3) increase in the number of firms offering ESE systems. Id. He reasoned
26 that a calculation of lost profits is the appropriate measure of economic damages necessary
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1 to put Plaintiffs in a position economically equivalent to where they would have been had the
2 NFPA issued 781. Id.

3 To estimate lost profits, Mr. Guth first estimated the total "but for" sales of ESE
4 systems. during the calculation period. Id. He believed that the increase in "but for" sales
5 of ESE systems would commence at the beginning of 1994 and persist through 1998. Id. To
6 arrive at an estimate of the total market share consisting of ESE systems, he analyzed Heary
7 Bros.'s bidding data where the company bid on both an ESE system and a Faraday system
8 for the same project by sorting this data by overall costs of an LPS, including materials and
9 installation. Id. at 17. This resulted in 60% (by dollar value) of the projects having less cost
10 using ESE as opposed to Faraday technology. Id. Therefore, he concluded that over time
11 ESE systems would account for 60% of the total LPS business. Id. at 17-18.

12 Next, Mr. Guth estimated the total market share of ESE systems for each year from
13 1994 through 1998. To obtain these figures, he used a lognormal cumulative distribution
14 function for the market share of ESE systems, with a long-run maximum figure of 60%. Id.
15 at 18. These share figures were used (presumably in conjunction with the U.S. Government
16 Census of Manufacturers data) to calculate total market revenues for ESE system materials
17 only for each year. Id. Next, he made an upward adjustment to reflect the higher materials-
18 only cost of ESE systems to account for consumers switching their choices from Faraday to
19 ESE systems. Id. This resulted in materials-only revenues for the total "but for" sales of
20 ESE terminals to be \$9.7 million in 1994 and growing to approximately \$40 million by 1997.
21 Id.

22 Next, Mr. Guth estimated the share of the "but for" revenues from the total sales of
23 ESE terminals going to Heary Bros. and NLPC. Id. First, he assumed that the two Plaintiffs
24 were initially the only sellers of ESE systems and relied upon their actual shares of ESE sales
25 during the damage period. Id. Second, to account for new market entrants, he assumed
26 market entry would begin in 1995 and the aggregate of the new entrants' market share would
27 steadily increase until equal to that of NLPC in 1998. Id. at 19. To estimate market shares
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1 for each year of the damage period belonging to Heary Bros., NLPC, and the aggregate of
2 new entrants, he used the Cournot model of competition. Id. In the initial year of the
3 damage period, he assumed that Heary Bros. held 80% of the market while NLPC held 20%.
4 Id. By using the Cournot model, Mr. Guth calculated market shares for each of the Plaintiffs
5 and the aggregate of new entrants for each year of the damage period. (Id.) The Cournot
6 calculation resulted in “but for” 1998 market share estimates of approximately 43% for
7 Heary Bros., 28.5% for NLPC, and 28.5% for the aggregate of new entrants. Id.

8 Finally, Mr. Guth calculated Plaintiffs' lost profits from the estimate of projected
9 market share. He offset Plaintiffs' lost profits resulting from the decrease in sales of
10 Plaintiffs' Faraday systems in the “but for” world. Id. After making this offset adjustment,
11 the final “but for” revenue estimate for Heary Bros. ranged from \$15.4 million in 1994 to
12 \$16.7 million in 1998. Id. at 20. The final “but for” revenue estimate for NLPC ranged from
13 \$2.4 million in 1994 to \$12.9 million in 1998. Id. To convert lost revenues to lost profits,
14 Mr. Guth used the actual profit margins of Heary Bros. in each year of the damage period and
15 applied these figures to both Heary Bros. and NLPC. Id. at 20. This resulted in lost profits
16 of \$14,861,568 and \$7,214,992 for Heary Bros. and NLPC, respectively. Id. After further
17 adjustment for lost profits from a failed draft agreement with Home Depot, Mr. Guth added
18 the estimated present values of the Home Depot agreement to Heary Bros.'s lost profits,
19 arriving at a total damage estimate for Heary Bros. ranging from \$17,840,748 to
20 \$18,486,361. Id. at 21.¹²

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22 ¹²Heary Bros. claimed lost profits from a failed agreement with Home Depot to supply
23 residential and small business kits for installing ESE systems. Id. at 20. In 1994, while
24 NFPA was being evaluated, Heary Bros. negotiated with Home Depot a draft contract to
25 supply these kits. Id. According to this document, Heary Bros. would supply Home Depot
26 with 5000 kits during the second quarter of 1995 at a unit price of \$400. Id. Mr. Guth
27 estimated that at Heary Bros.'s average profit margin of 18%, Heary Bros. would have made
28 a profit of approximately \$360,000. Id. at 21. However, because 781 was not issued, the
agreement was not implemented. Id. To analyze damages, Mr. Guth estimated the present
value of the Home Depot agreement opportunity beginning in 1995, producing estimates
ranging from \$2,979,180 to \$3,624,793. (Id.)

1 Furthermore, the Court found that “rule 702’s ‘helpfulness’ standard requires a valid
2 scientific connection to the pertinent inquiry as a precondition to admissibility.” Id. at 593.
3 Whether the testimony presented by the expert is “sufficiently tied to the facts of the case .
4 . . . has aptly been described . . . as one of ‘fit.’” Id. at 591. However, “[s]cientific validity for
5 one purpose is not necessarily scientific validity for other, unrelated purposes. Id.

6 In the Court’s subsequent decision of Kumho Tire Co. v. Carmichael, the Supreme
7 Court clarified that the trial courts’ gatekeeping function is not limited to ‘scientific’ expert
8 testimony, but rather applies to all expert testimony. 526 U.S. 137 (1999). The Court stated
9 that there is not a clear line dividing “scientific” knowledge, “technical” knowledge, or
10 “other specialized knowledge, and the Daubert factors may or may not apply depending on
11 the facts of each case:

12 The factors identified in Daubert may or may not be pertinent in assessing
13 reliability, depending on the nature of the issue, the expert’s particular
14 expertise, and the subject of his testimony. The conclusion, in our view, is that
15 we can neither rule out, nor rule in, for all cases and for all time the
applicability of the factors mentioned in Daubert, nor can we now do so for
subsets of cases categorized by category of expert or by kind of evidence. Too
much depends upon the particular circumstances of the particular issue.

16 Id. at 148. The objective of the inquiry is to “make certain that an expert, whether basing
17 testimony upon professional studies or personal experience, employs in the courtroom the
18 same level of intellectual rigor that characterizes the practice of an expert in the relevant
19 field.” Id. at 152. Thus, Kumho Tire emphasizes that judges are entitled to broad discretion
20 when discharging their gatekeeping function.

21 Generally, antitrust damages cannot be measured with absolute accuracy. In Story
22 Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931), the Court noted
23 that “[t]he rule which precludes the recovery of uncertain damages applies to such as are not
24 the certain result of the wrong, not to those damages which are definitely attributable to the
25 wrong and only uncertain in respect of their amount.” The Court emphasized:

26 [I]t would be a perversion of fundamental principles of justice to deny all relief
27 to the injured person, and thereby relieve the wrongdoer from making any
28 amend for his acts. In such case, while damages may not be determined by
mere speculation or guess, it will be enough if the evidence shows the extent

1 of the damages as a matter of just and reasonable inference, although the result
2 be only approximate. The wrongdoer is not entitled to complain that they
3 cannot be measured with the exactness and precision that would be possible
if the case, which he alone is responsible for making, were otherwise.

4 Id. at 563. Therefore, the Court must distinguish between damage calculations that rely on
5 impermissible speculation and those that rely upon permissible inferences. Bigelow v. RKO
6 Radio Pictures, 327 U.S. 251, 264 (1946). "[E]ven where the defendant by his own wrong
7 has prevented a more precise computation, the jury may not render a verdict based on
8 speculation or guesswork. But the jury may make a just and reasonable estimate of the
9 damage based on the relevant data, and render its judgment accordingly." Id. at 264.

10 **(3) Mr. Guth's testimony will be excluded.**

11 Defendants challenge the admissibility of Mr. Guth's testimony under FRE 702 on a
12 number of grounds. The Court finds two of the challenges persuasive.

13 **(a) Mr. Guth assumed that Plaintiffs were the only sellers of ESE in 1993**

14 Defendants argue that Plaintiffs' damage estimate is incorrect because Mr. Guth's
15 calculations include only two sellers (Plaintiffs Heary/LPA and NLPC) of ESE systems in
16 1993 in his expert analysis. In his analysis, Mr. Guth assumed that the sellers existing in 1993
17 would retain the entire ESE market share following the passage of 781 and continuing until
18 1995, when other companies would enter the market. Defendants argue that there were
19 numerous sellers of ESE technology in 1993. Defendants' primary evidence is a 1993 letter
20 dated January 18, 1993 written by Ed Heary specifying a number of other U.S. sellers of ESE
21 terminals. Exh. 4 to Def.'s Daubert Motion [Doc. #251]. The letter names eight
22 manufacturers and twenty-four sellers of ESE systems in the United States, and notes that
23 "[i]n the last few years the number of dealers in the United States who distribute the various
24 types of early streamer emission air terminals which are equivalent to the product of [LPA]
25 has grown by leaps and bounds." Id. Further, the intent of the letter is clearly to *refute* a
26 claim that LPA would be the only competitive bidder to a project specifying ESE systems.

1 In Response, Plaintiffs argue that Defendants must come forward with evidence that
2 some other company had a share of the ESE market in 1993. Plaintiffs offer the affidavit of
3 Mr. Guth, who states that he saw no information of material sales of ESE systems by any
4 other of the listed companies in the relevant market during the time of his analysis. Guth.
5 Aff. [Doc. #308] ¶ 26. He indicates that he could "easily accommodate this information into
6 [the] analysis if it were provided." *Id.* Plaintiffs further argue that the 1993 letter does not
7 prove that any other market participant could compete on a significant or substantial level
8 in 1993. During the hearing, Plaintiffs referred to the ESE capacity of other manufacturers
9 and distributors in 1993 as "de minimis."

10 Plaintiffs' response is insufficient to substantiate Mr. Guth's conclusions. First, Mr.
11 Guth never indicated that he *concluded* that there were no other significant market
12 participants in 1993. He was simply not presented with any information (by Plaintiffs) that
13 there were other market participants in 1993. Second, Plaintiffs, not Defendants, bear the
14 burden of showing that the evidence is admissible and showing the measure of antitrust
15 damages. Here, Defendants are the only parties presenting any proof, in the form of a letter
16 essentially written by Plaintiffs. Third, the context of the 1993 letter contradicts Plaintiffs'
17 assertion, ten years later, that the competitive power of other market participants was de
18 minimus in 1993. As is apparent from reading the letter, not only does Ed Heary name eight
19 manufacturers and twenty-four distributors by name, the point that Ed Heary makes in the
20 letter is that LPA would face considerable competition from other ESE market participants
21 if ESE terminals were specified in design specifications.

22 Here, the problem is that there is *no* evidence *at all* supporting Mr. Guth's assumption
23 that there were no other serious market competitors in 1993. All damage estimates must be
24 "based on sufficient facts or data." Fed. R. Evid. 702. "The language 'facts or data' is broad
25 enough to allow an expert to rely on hypothetical facts that are supported by evidence." Fed.
26 R. Evid. 702 Advisory Committee's note (2000). However, the *only* evidence in the record
27 is the 1993 letter which explicitly contradicts Mr. Guth's assumption that there were only two
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1 U.S. manufacturers in the market in 1993. Mr. Guth is permitted to make reasonable
2 assumptions in his analysis, but the assumption about market participants in 1993 is
3 unreasonable given that the only record evidence directly contradicts the assumption. This
4 assumption is critical to Mr. Guth's analysis because he relied on the state of the 1993 market
5 to calculate Plaintiffs' "but for" market share of ESE systems through 1998. The failure of
6 the initial market share assumption renders the rest of the calculations unreliable.

7 Plaintiffs' final argument is that Plaintiffs' initial market share is a factual issue to be
8 left to a jury. However, not only does the Court have an obligation to exercise its
9 "gatekeeping" responsibilities to ensure reliability under Daubert, there is no conflicting
10 evidence for a jury to consider, and no reasonable jury could find that Mr. Guth's
11 assumptions were supported by reliable evidence.

12 **(b) Mr. Guth misapplied the Cournot Model**

13 Defendants argue that Mr. Guth's economic model – the Cournot model¹⁴ – does not
14 "fit" the reality of the LPS market, and that Mr. Guth did not apply the methodology of the
15 model consistently.¹⁵ Under the Cournot model, for a specific market, any individual firm's
16 market share is completely determined by that firm's marginal cost of production. The
17 Cournot model assumes that each firm competes by taking into account the expected output
18 of a small number of rivals; that is, each firm's competitive strategy is based on what it
19 believes will be the production decisions of its rivals. Once all firms have made mutually
20 consistent production decisions, the market demand determines the market price. Each firm's

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22 ¹⁴The Court recognizes that Mr. Guth disclaims following a particular "model,"
23 maintaining that he merely used "a relationship from the Cournot model." Guth Aff. ¶¶21,
24 23. As explained below, Mr. Guth did not use a unitary economic model for every facet of
25 his damages calculation. The Court's use of the term "Cournot model" recognizes that Mr.
26 Guth did not use a unitary model, but that, as he admits, he used the economic relationship
that forms the foundation of the Cournot model in performing one aspect of his calculations.

27 ¹⁵In support of their motion, Defendants submit the Affidavit of James R. Kearl, an
28 expert economist. Exh. 1 to Daubert Motion. The Court's explanation is informed by Mr.
Kearl's analysis in addition to the parties' and Mr. Guth's arguments and analysis.

1 market share is determined by the elasticity of market demand and the firm's marginal
2 production costs. Therefore, if one firm has lower marginal costs than its rivals, the Cournot
3 model predicts that it will have a higher market share. For example, in a market where firms
4 have the same marginal costs, the firms will divide the market equally. Conversely, if firms
5 have different relative shares of the market, then they must have different marginal costs.

6 Mr. Guth's assumptions, however, do not fit the Cournot model. Mr. Guth uses the
7 Cournot model to estimate the Plaintiffs' "but for" market share in each successive year after
8 NFPA 781 would have been adopted. Mr. Guth assumes that in 1994 Heary Bros. had 80%
9 of the ESE market while NLPC had 20%. If the Cournot model was applicable to this
10 market, the model should predict that NLPC had much higher costs. However, Mr. Guth also
11 assumes that NLPC and Heary Bros. had the same profit margin in his analysis. Since both
12 firms face the same market price, and since profit margin is price minus costs, if NLPC and
13 Heary Bros. have the same profit margin, then they must have the *same costs*. But under the
14 Cournot model, two firms with the same costs must have the same market share. This
15 contradiction continues throughout the subsequent years of Mr. Guth's damage analysis,
16 because he maintains the assumption that Heary Bros. and NLPC have the same profit
17 margin, but in each of these years the two continue to have different market shares. If the
18 Cournot model applies to the ESE market, then these firms cannot have the same profit
19 margin, sell in the same market, and have different market shares.

20 In addition, Defendants argue that the Cournot model does not fit the LPS market
21 because the Cournot model assumes that firms choose the production quantity and then take
22 whatever market price results. Therefore, if firms compete on *price*, the Cournot model does
23 not apply. It is undisputed that LPS firms compete on the price, not quantity, because they
24 compete by price bidding. The firms do not decide how many LPS systems to produce and
25 then take whatever price the market will bear. Rather, LPS firms typically compete for
26 specific jobs by submitting price bids – and thus the Cournot model does not fit the economic
27 reality.

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1 In response, Plaintiffs argue that Mr. Guth only used the Cournot model for a limited
2 purpose. In his affidavit, Mr. Guth indicates that he did not use the Cournot Model either to
3 analyze the competitive effect of standard-setting or to calculate Plaintiffs' lost sales. Guth
4 Aff. ¶ 4. Rather, he used the Cournot Model to reduce the amount of Plaintiffs' damages to
5 reflect the projection that new participants would enter the market once an ESE standard was
6 adopted. *Id.* In other words, Mr. Guth used the Cournot model only when calculating how
7 much to *reduce* Plaintiffs' damage estimate to reflect new market entrants. *Id.* ¶23.

8 The Court recognizes the Cournot model was employed only for a limited purpose
9 in the damages calculation. However, an estimation of how new market participants would
10 affect Plaintiffs' profits is integral to the calculation. Plaintiffs point out that Defendants
11 have no alternative model, and argue that Mr. Guth's use of the Cournot model is at least an
12 approximation of how new market entrants would affect Plaintiffs' profits in a "but for"
13 world. Plaintiffs' argument is unavailing. If Mr. Guth had performed *no* calculation
14 discounting market share by new market entrants, Mr. Guth's entire expert report would be
15 excluded as unreliable. The fact that Mr. Guth used an economic model to reduce the
16 amount of damages that admittedly did not *fit* the LPS market does not make the report any
17 *more* reliable.¹⁶ On the contrary, Plaintiffs are left without a reliable methodology for
18 calculating damages that is consistent with the economic market. A flaw in this one aspect
19 of the expert report renders the testimony and report useless to assist the a jury in calculating
20 damages with any degree of accuracy. Mr. Guth's report will be excluded, and the motion
21 for summary judgment granted.

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25 ¹⁶At the hearing, Plaintiffs also advanced the argument that the difference between the
26 Heary and NLPC market share can be explained by production capacity. Plaintiffs cite
27 footnote 34 of the original report, but that footnote does not mention capacity. Indeed, the
28 Court cannot identify any portion of Mr. Guth's report or affidavit where he explains how
capacity would affect the economic model, which, as discussed above, considers only a
limited number of variables.

1 **D. Defendants' Additional Motions Regarding Sherman Act Claim**

2 Defendants have filed two additional summary judgment motions, Motion for
3 Summary Judgment: No Anti-Competitive Effect / No Antitrust Injury [Doc. #232], and
4 Motion for Summary Judgment: No Conspiracy [Doc. #247]. In their Reply [Doc. #318],
5 Defendants seem to abandon their conspiracy arguments. Nevertheless, the Court need not
6 consider these motions in light of its decision to grant summary judgment for Defendants on
7 the Sherman Act claim. The motions will be denied as moot.

8 **III. EAST COAST'S LANHAM ACT COUNTERCLAIM AGAINST PLAINTIFFS**

9 **A. Legal Standard and Description of Challenged Advertisements**

10 East Coast has filed an Amended Counterclaim [Doc. #172] against Plaintiffs alleging
11 false advertising under §43(a) of the Lanham Act, 15 U.S.C. §1125(a). East Coast must
12 prove five elements to prevail on a §43(a) claim: "(1) a false statement of fact by the
13 defendant in a commercial advertisement about its own or another's product; (2) the
14 statement actually deceived or has the tendency to deceive a substantial segment of its
15 audience; (3) the deception is material, in that it is likely to influence the purchasing
16 decision; (4) the defendant caused its false statement to enter interstate commerce; and (5)
17 the plaintiff has been or is likely to be injured as a result of the false statement. . . ."
18 Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997). Further, "[t]o
19 demonstrate falsity within the meaning of the Lanham Act, a plaintiff may show that the
20 statement was literally false, either on its face or by necessary implication, or that the
21 statement was literally true but likely to mislead or confuse consumers." Southland, 108 F.3d
22 at 1139. In this case, East Coast is asserting that Plaintiffs' advertising claims are literally
23 false.

24 East Coast has abandoned many of its original allegations of false advertising in its
25 Counterclaim. In their summary judgment motion, Plaintiffs argue that many of East Coast's
26 allegations do not concern literal falsity, and are merely misleading advertising. Without a
27 showing of literal falsity, East Coast bears the burden of providing evidence of some
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1 consumer confusion in order to prevail on false or misleading advertising claim. Southland,
2 108 F.3d at 1140; see also U-Haul Int'l. Inc. v. Jartran, Inc., 793 F.2d 1034, 1040 (9th Cir.
3 1986) ("[P]ublication of deliberately false comparative claims gives rise to a presumption of
4 actual deception and reliance."). East Coast has not presented any evidence of actual
5 consumer confusion, and thus cannot state a claim for literally true but misleading
6 advertising. Further, East Coast has neither responded to Plaintiffs' argument nor opted to
7 argue its claims against Plaintiffs are not based on literal falsity. Therefore, summary
8 judgment will be granted against East Coast's allegations in its Counterclaim that: (1)
9 Plaintiff advertised independent testing of their products in a misleading fashion
10 (Counterclaim ¶22(b)); (2) Plaintiffs' advertising relies on a misleading "International
11 Standard" (Counterclaim ¶22(c)); (3) Plaintiffs offer financial guarantees that are misleading
12 and they cannot honor (Counterclaim ¶22(d)); (4) Plaintiffs make false statements about East
13 Coast's products (Counterclaim ¶22(f)); (5) Plaintiffs promulgate project specifications which
14 are misleading for reasons related to the above allegations (Counterclaim ¶23).

15 East Coast argues that two particular claims constitute literal false advertising:
16 Plaintiffs' claims that ESE devices provide a specific and measurable zone of protection, and
17 the claims that ESE systems can protect against lightning strikes in open spaces. These two
18 claims are interrelated, because Plaintiffs claim they can protect from lightning strikes in
19 open spaces *because* the zone of protection extends to cover those spaces. East Coast
20 submits evidence of a number of advertisements for Heary/LPA's Preventor and NLPC's
21 Prevector. Heary/LPA's advertisements include a variety of claims about a measurable zone
22 of protection, such as: "Our most recent development, PREVENTOR SYSTEM 2005, is an
23 efficient mast-type system, which creates an impenetrable capture zone with a range of 100
24 meters," Exh. F to East Coast's SSOF [Doc. #244]; a diagram showing the Preventor 2005
25 protecting a ground area with a radius of 328 feet, Exh. V to EC SSOF; "The protection zone
26 of each Preventor unit (as laboratory tested by Inchcape) is a radius of 50 meters, if installed
27 on highest projection of the structure," Exh. W to EC SSOF; "One Lightning Preventor
28

1 protects up to 450,000 sq. ft.," Exh. Y to EC SSOF. One brochure also includes this
2 information:

3 Q. Is the Preventor air terminal tested to document that the zone of protection
4 is valid?

5 A: Preventor air terminals have been performance tested in ETL/Inchcape
6 Laboratories high voltage lightning test cell documenting the time of the
7 upward early streamer emission validating ΔL , and certifying the area of the
8 zone of protection the Preventor air terminal provides.

9 Exh. V to EC SSOF. Also, some Heary/LPA materials indicate that the Preventor "provides
10 lightning protection for open areas and structures," and specifically mentions lightning
11 protection for "athletic fields." Exh. F to EC SSOF. Finally, East Coast presents one
12 advertisement for NLPC's Prevelectron which specifies a "minimum radius of protection" for
13 systems mounted at different heights, such as 52 feet for a "Prevelectron 6" mounted at a
14 height of 5 feet. Exh. X to EC SSOF.

15 East Coast contends that these advertisements are literally false because they rely on
16 testing which East Coast claims is scientifically groundless. Under Ninth Circuit precedent,
17 East Coast may prove literal falsity by showing that the underlying tests are unreliable. "To
18 prove that an advertisement claim based on product testing is literally false, 'a plaintiff must
19 do more than show that the tests supporting the challenged claim are unpersuasive. Rather,
20 the plaintiff must demonstrate that the tests are not sufficiently reliable to permit one to
21 conclude with reasonable certainty that they established the claim made.'" Southland, 108
22 F.3d at 1139 (quoting McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co., 938 F.2d 1544, 1549
23 (2d Cir. 1991)). The plaintiff (here, the counterclaimant East Coast) bears the burden of
24 showing that the tests are unreliable. However, "[a] plaintiff may meet this burden either by
25 attacking the validity of the defendant's tests directly or by showing that the defendant's tests
26 are contradicted or unsupported by other scientific tests." Southland, 108 F.3d at 1139.

1 **B. East Coast's Evidence of Unreliability**

2 East Coast relies primarily on the expert report of Dr. Martin Uman, attached as Exh.
3 T to EC SSOF. Dr. Uman concludes that, in his opinion, "based on over 35 years experience
4 in lightning, laboratory spark, and gaseous electronics research, there is no basis for the claim
5 that systems using so-called 'early streamer emission' (ESE) air terminals provide superior
6 lightning protection to the protection provided by a standard Franklin rod system as described
7 in NFPA 780. . . ." Id. at 1. Dr. Uman's report indicates that he examined the underlying
8 ESE theory, field studies, laboratory studies, and academic literature in preparation of the
9 report. Dr. Uman believes that "[c]laims for the superiority of ESE devices are based on
10 questionable theory, inconclusive laboratory experiments that are questionably extrapolated
11 to natural lightning, and two inconclusive experiments on triggered lightning." Id. at 1.
12 Further, Dr. Uman believes that the weight of opinion within the scientific community is
13 against proponents of ESE systems, nothing that "[t]he ESE theory is rejected by the majority
14 of scientists in the field of lightning physics and protection; three recent papers in peer-
15 reviewed scientific journals by internationally acknowledged experts severely criticize the
16 ESE approach; and the claims and experiments of ESE proponents have not been presented
17 by them for rigorous peer review in appropriate scientific journals." Id. Finally, he indicates
18 that "the use of ESE devices, in configurations that do not conform to NFPA 780, can be
19 dangerous. For example, the use of ESE rods based on claims of relatively-long collection
20 distances to protect the recreationists in a large outdoor area invites the death of the
21 recreationists if the ESE claims of protected area are not valid." Id. at 7.

22 Plaintiffs do not criticize the qualifications of Dr. Uman as an expert witness in the
23 relevant area of expertise under Fed. R. Evid. 702; they criticize his opinion. First, Plaintiffs
24 contend that Dr. Uman's expert report is inconsistent with the lack of reported failures of
25 ESE terminals in the field. Dr. Uman has testified that lightning protection systems do work
26 in the field despite lack of understanding of a theory of "zones of protection." In his
27 deposition, Dr. Uman stated that, "I do believe, you know, that the cone protection is not a
28

1 well – theoretically well-justified concept, but it works in practice, it has worked for a long
2 time. . . ." Uman Dep. at 193, Exh. 71 to PSOF. Dr. Uman's statements, made in the context
3 of discussing an article, are not clarified, and it is unclear what exactly "works in practice."
4 However, this criticism of Dr. Uman's report is misleading. East Coast is not claiming that
5 Plaintiffs' advertising is false because the advertising claims that ESE devices work in
6 general; rather, East Coast is claiming that the advertising is false because it promises a
7 measurable zone of protection, greater than conventional rods, and that it can function
8 effectively to protect open spaces. Dr. Uman's deposition comments do not contradict those
9 conclusions.

10 Plaintiffs also criticize Dr. Uman for not applying his theory to the physics behind
11 conventional air terminals. Dr. Uman's report, however, does not purport to explain or justify
12 the physics behind conventional terminals. Rather, he concludes that ESE terminals provide
13 no measurable advantage over conventional terminals, much less a particularly enhanced
14 zone of protection, and therefore, that *installation* of ESE terminals in a configuration not
15 compliance with NFPA 780 could be dangerous. Dr. Uman concedes that ESE terminals
16 work as well as conventional lightning rods, but argues that ESE systems, which rely on
17 calculations of an enhanced zone of protection, are dangerous because they require fewer air
18 terminals.

19 Nevertheless, Plaintiffs contend that Dr. Uman and the Court must consider the
20 "current state of the testing art," and examine the reliability of testing of conventional air
21 systems to establish a baseline standard for testing of ESE systems. Pl's Reply [Doc. #295],
22 at 17. This argument is unsupported by *any* citation to case law in the Plaintiff's motion
23 papers. The test of literal falsity under Southland is whether Plaintiffs' testing is *objectively*
24 unreliable, not whether it is more or less reliable than the testing of its competitors. The
25 Court is not confronted with the entire state of advertising for the lightning protection
26 industry, and can only rule whether the ads at issue are literally false.

27
28

1 As a final matter, Plaintiffs' criticisms of Dr. Uman's report and opinions as not
2 sufficient under Daubert scrutiny are not sufficient to prevent summary judgment against
3 them. "A party opposing summary judgment may not simply question the credibility of the
4 movant to foreclose summary judgment. Instead, the non-moving party must go beyond the
5 pleadings and by its own evidence 'set forth specific facts showing that there is a genuine
6 issue for trial.'" Far Out Productions, Inc. v. Oskar, 247 F.3d 986, 997 (9th Cir. 2001) (quoting
7 Fed. R. Civ. P. 56(e)). Therefore, Plaintiffs must provide some evidence of reliability to
8 create a genuine issue of material fact.

9 C. Plaintiffs' Evidence of Reliability

10 As an initial matter, much of Plaintiffs' claims of proof are misdirected, because
11 Plaintiffs continue to overstate the extent of East Coast's claim. East Coast's claim is merely
12 that current scientific evidence and testing does not support that ESE terminals provide a
13 measurable zone of protection above the range of conventional terminals, much less "an
14 impenetrable capture zone with a range of 100 meters." Exh. F to EC SSOF. To support this
15 thesis, East Coast presents the expert testimony of Dr. Uman. Nevertheless, Plaintiffs
16 continually attempt to mischaracterize East Coast's Lanham Act claims, particularly in their
17 affidavits. For example, Frederick Heary "testified" in his July 2002 Affidavit that, "[t]he
18 only basis for East Coast's claim that these advertisements are misleading is the fact that the
19 NFPA had decided not to adopt a standard for ESE systems." Heary July Aff. ¶7 [Doc.
20 #235]. East Coast has moved to strike this and other such statements as calling for a legal
21 conclusion, and the Court will strike such statements because conclusions of law are for the
22 Court to determine and therefore inadmissible.¹⁷ See McHugh v. United Serv. Auto. Ass'n,
23 164 F.3d 451, 454 (9th Cir. 1999) (witness testimony only relevant for facts, and not legal
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25

26 ¹⁷Specifically, the Court will strike the following paragraphs of Mr. Heary's July
27 Affidavit, insofar as they profess a legal conclusion: ¶¶4-6; ¶7; first sentence of ¶8; ¶9; first
28 sentence of ¶31; ¶32; ¶35. Plaintiffs contend that Mr. Heary may profess his "understanding"
of East Coast's allegations and legal arguments.

1 conclusions); Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992) (opinions on legal conclusions
2 not helpful to trier of fact and should be excluded).

3 Plaintiffs offer a variety of evidence to attempt to create a genuine issue of material
4 fact regarding whether the underlying tests are "sufficiently reliable to permit one to conclude
5 with reasonable certainty that they established the claim made." Southland, 108 F.3d at 1139.
6 To support the reliability of testing, Plaintiffs offer the lay opinion testimony of Frederick
7 Heary and Robert Rapp, the evidence of the testing itself, the products' conformance with
8 foreign standards, the support of academic literature, evidence of success in the field, and
9 recent specifications by the United States Army. The Court concludes that none of the
10 evidence is admissible to support the validity of Plaintiffs advertisements. In particular, most
11 of the evidence relies on scientific evidence or conclusions that must be supported by expert
12 testimony or admissible lay opinion testimony.

13 *Lay Opinion Testimony of Frederick Heary and Robert Rapp*

14 Both Frederick Heary and Robert Rapp submit affidavits which include conclusions
15 about whether their products provide a measurable zone of protection. Their testimony is not
16 offered under Fed. R. Evid. 702, governing expert testimony, and therefore their opinions
17 must be admissible as lay witnesses under Fed. R. Evid. 701. To support the admissibility
18 of Heary's and Rapp's testimony, Plaintiffs cite a line of cases allowing corporate officers to
19 testify about their personal knowledge of their company and industry. For example, in In re
20 Kaypro, 218 F.3d 1070, 1074-75 (9th Cir. 2000), the Ninth Circuit held that a declarant's five
21 years of experience as a credit manager adequately supported his personal knowledge of
22 "industry practice." See also Allied Systems, Ltd. v. Teamsters Auto. Transp. Chauffeurs,
23 Demonstrators & Helpers, Local 604, 304 F.3d 785, 792 (8th Cir. 2002) (particularized
24 knowledge gained by position in business is admissible under Rule 701). Further, "[t]hat
25 Rule 56(e)'s requirements of personal knowledge and competence to testify have been met
26 may be inferred from the affidavits themselves." Barthelemy v. Air Lines Pilots Ass'n, 897
27 F.2d 999, 1018 (9th Cir. 1990) (*per curiam*).

28

1 Frederick Heary does not have the specialized knowledge to testify about the physics
2 of lightning protection systems. He indicates that he has "more than 30 years experience in
3 the lightning protection industry," Heary Oct. Aff. ¶2, and has "gained personal knowledge
4 regarding industry practices, including personal knowledge regarding various standards that
5 exist within the industry." Heary Supp. Aff. ¶6. However, he concedes that he has no formal
6 education beyond high school. Plaintiffs persistently contend that Heary's personal
7 knowledge of industry practice is sufficient for him to testify regarding scientific or technical
8 matters. However, Plaintiffs confuse the personal knowledge requirement in Rule 602 with
9 Rule 701's limitation on the types of specialized admissible opinion testimony. Mr. Heary
10 might have personal knowledge of some of the facts that underlie the scientific or technical
11 judgments, such as the procedures for the installation of lightning protection devices, but he
12 does not have the specialized knowledge or expertise to testify about the abstract physics of
13 a "zone of protection." And even if he did have such knowledge, his opinions must be
14 admissible under Rule 702 by an assessment of Daubert scrutiny. Likewise, Rapp bases his
15 testimony only on "over 25 years of experience in the lightning protection industry." Rapp
16 Supp. Aff. ¶1.

17 Many of Mr. Heary's opinions will be stricken for failure to establish the expertise
18 necessary to testify as a lay opinion witness. The following portions of Mr. Heary's October
19 Affidavit will be stricken: the technical descriptions of functions of ESE terminals in the first
20 three sentences of ¶8; conclusory assertions of the success of ESE terminals in the last
21 sentence of ¶11, in ¶14 ("based on the success..."), and in ¶23 ("ESE terminals offer a larger
22 area of protection"); and Mr. Heary's understanding of the technical findings by the 781
23 Technical Committee (which are also excluded as inadmissible hearsay) in ¶¶42, 44, 45, the
24 portions of ¶¶56 and 57 that rely on the 781 technical findings, and ¶104. As for ¶¶100-111,
25 the portions which merely describe the Heary Bros. catalog and advertisements are
26 admissible because Mr. Heary has personal knowledge of the contents of these materials.
27 The portions which purport to explain the scientific or technical foundation of the
28

1 calculations for the zone of protection will be stricken: ¶¶103, 106, 107, 108 (which is also
2 multiple hearsay), 109, and 111. Likewise, the following portions of Mr. Rapp's Affidavit
3 will be stricken: ¶16 as it relates to "the expanded coverage of the air terminals," ¶¶31 and
4 32, which also include hearsay as to the beliefs and thought processes of the 781 Technical
5 Committee, and the last sentence of ¶52 (which is also based on hearsay).

6 *Proof of testing*

7 Plaintiffs argue that the fact that their ESE products have been tested to meet
8 particular standards is proof of their effectiveness. In particular, Heary/LPA relies on its
9 products' compliance under testing conducted by ITS laboratories. See also Rapp Aff at
10 ¶¶59-61 (describing testing for NLPC). However, the tests only provide data; they do not
11 prove the validity of the formula to estimate a zone of protection. In fact, Dr. Uman's
12 argument is that the testing is meaningless, because the underlying calculation used to
13 measure a zone of protection is flawed. Therefore, even if Plaintiffs' products did perform
14 under the ITS tests, the tests do not prove a particular zone of protection unless Plaintiffs can
15 independently show that their formula is valid. "[I]f the plaintiff can show that the tests,
16 *even if reliable*, do not establish the proposition asserted by the defendant, the plaintiff has
17 obviously met its burden' of demonstrating literal falsity." Southland, 108 F.3d at 1139
18 (quoting Castrol, Inc. v. Quaker State Corp., 977 F.2d 57, 63 (2d Cir. 1992)) (emphasis
19 added). In fact, representatives of ITS have disclaimed that ITS only tests products in
20 relation to independently drafted standards and does not vouch for the standards themselves,
21 and have also specifically disclaimed the Heary Bros. formula for calculating a zone of
22 protection. See 9/22/98 Letter of Robert Fiske, 2/28/01 Letter of David Feeney, Exh. L, M
23 to EC SSOF.¹⁸

24
25
26 ¹⁸The Fiske letter states that "[i]t is important to note that ITS does not draft standards
27 nor does it guarantee safety of products. ITS only evaluates products according to
28 established standards that were developed for purposes of safety." Exh. L to EC SSOF. The
Feeney letter indicates that "the tests performed by ITS, pursuant to the draft NFPA 781
standard (now withdrawn) do not confirm Heary Bros.' claims of a 'zone of protection. . .'

1 *Compliance with foreign standards*

2 Plaintiffs also argue that the fact that their products conform to a number of foreign
3 standards is proof that the products can provide a measurable zone of protection. However,
4 Plaintiffs provide no admissible evidence that conformance to any foreign standard provides
5 a scientific basis for their claims. For example, Mr. Heary testified in his July 2002
6 Affidavit that "the standard-setting bodies in several countries . . . have found the scientific
7 evidence supporting ESE systems to be sufficient to adopt nationally-recognized standards
8 for ESE systems." Heary July Aff. ¶9. East Coast has moved to strike this statement because
9 Mr. Heary has no personal knowledge of the reasons why the countries adopted an ESE
10 standard, any such knowledge would be based on hearsay evidence, and Mr. Heary has no
11 expertise to interpret the existence of foreign standards as a scientific consensus. For these
12 reasons, Mr. Heary's statements interpreting the relevance of the foreign standards in ¶9 and
13 ¶12 will be stricken.

14 Similarly, Plaintiff NLPC has provided *no admissible evidence either that its product*
15 *actually conforms to the French (or any other foreign) standard or that the conformance with*
16 *that standard provides a basis for a measurable zone of protection. Mr. Rapp's testimony*
17 *concerning compliance with the testing requirements is insufficient, because he does not*
18 *have the scientific or technical expertise to interpret the results of any tests under foreign*
19 *standards that may have been performed. Therefore, absent proof of compliance or expert*
20 *testimony concerning the scientific underpinnings of such compliance, the Court will strike*
21 *the last sentence of ¶3 of Mr. Rapp's Affidavit. Mr. Rapp contends in his Supplemental*
22 *Affadavit ¶13 [Doc. #289] that he has no obligation to prove compliance with foreign*
23 *standards. Again, Mr. Rapp is not a lawyer, and his legal conclusions in an Affidavit are not*

24 _____
25 Since Heary Bros.' mathematical formula has not been accepted or adopted by a national
26 standards organization such as the NFPA, ITS did not and cannot certify or confirm Heary
27 Bros.' 'zone of protection' claims." Exh. N to EC SSOF (emphasis in original). Plaintiffs
28 point out that the second letter is directed at an independent lightning protection distributor,
not Heary/LPA, but that objection is not relevant to evaluating ETS' opinion regarding its
testing results, Plaintiffs' formula, and an alleged zone of protection.

1 admissible, but Mr. Rapp and Plaintiffs misapprehend the burden of proof. If East Coast
2 alleged false advertising on the basis of Plaintiffs not meeting an international standard, East
3 Coast would bear the burden of proving that they did not in fact meet the standard. Here,
4 East Coast has alleged a falsely claimed zone of protection, and Plaintiffs are relying on
5 international standards to *refute* that allegation. Therefore, Plaintiffs bear the burden of
6 showing compliance with and the scientific relevance of foreign standards.

7 On a final note, Mr. Rapp provided no evidence of the actual standards himself until
8 filing his Supplemental Affidavit on Jan. 13, 2003. Exhibit B to the Supplemental Affidavit
9 purports to contain the text of the international standards (though not proof of compliance),
10 but, further supporting the conclusion of the need for expert testimony, attaches a document
11 untranslated from Spanish, one in a language that appears to be Romanian, one in French
12 which appears to be a standard for Yugoslavia (or some previous incarnation of that country),
13 and one in a language that may or may not be Czech. They are not in English, and Plaintiffs
14 provide no translation; the Court will *sua sponte* strike those four documents from Exhibit
15 B to Rapp's Supplemental Affidavit.¹⁹ The admissible evidence concerning foreign standards
16 does not create a genuine issue of material fact regarding a zone of protection for ESE
17 devices.²⁰

18 *Scientific literature*

19 Mr. Heary offers evidence that Plaintiffs relied upon the academic literature
20 supporting the ESE concept in formulating its advertisements. These statements are
21 admissible only to the extent that they show Mr. Heary and his companies relied upon these

22
23 ¹⁹Plaintiffs' Statements of Facts which are based on this evidence will be stricken as
24 well. The Court will strike ¶¶5, 6 of Plaintiffs' Statement of Material Fact in Support of their
25 Motion for Summary Judgment [Doc. #245].

26 ²⁰At times, Plaintiffs allude to the testimony of Gerard Berger, who at one time was
27 disclosed as an expert witness, but who now is offered only as a fact witness. Any testimony
28 of the scientific or technical underpinnings of a foreign standard would require specialized
scientific knowledge. Plaintiffs have withdrawn Dr. Berger as an expert witness, so his
testimony is not admissible in that regard.

1 studies. These statements do not establish the truth of scientific principles or opinions
2 contained in these studies. For one, Mr. Heary's testimony about the purported conclusions
3 of the studies is inadmissible hearsay. Second, Mr. Heary has no scientific or technical
4 background to purport that he understands these studies and can confirm that they are
5 reliable. In contrast, Dr. Uman has the scientific and technical background to review the
6 studies, testified that he did review them, and can also, as an expert witness, rely upon
7 evidence that would be hearsay if relied upon by a lay witness. Because Mr. Heary is not
8 competent to testify about the results of scientific studies, the Court will strike the following
9 statements of Mr. Heary's July Affidavit: first sentence of ¶10, ¶11, first line of ¶19.

10 *Lack of reported failures*

11 Plaintiffs repeatedly emphasize the lack of reported failures of ESE systems, a topic
12 of which both Mr. Heary and Rapp have personal knowledge, to prove that ESE systems are
13 effective. This "evidence" is not sufficient. The lack of reported failures does not itself
14 provide support for a measurable zone of protection. In fact, the lack of failures requires a
15 scientific or technical inference to support a claim of effectiveness or an enhanced zone of
16 protection; Plaintiffs must provide expert testimony establishing the inference. Moreover,
17 the anecdotal evidence is not responsive to East Coast's attacks on the validity of the testing.
18 East Coast's claim of literal falsity is established by attacking the foundation of the scientific
19 tests, see Southland, 108 F.3d at 1139, but an anecdotal record of success does not buttress
20 the *scientific* validity of testing.

21 *United States Army Technical Manual*

22 In his Supplemental Affidavit, Mr. Heary attaches portions of a Technical Manual
23 issued by the United States Army on September 10, 2001 ("Technical Manual"). Exh. A to
24 Heary Supp. Aff.²¹ The stated purpose of the Manual is "to familiarize qualified personnel
25

26 ²¹Mr. Heary volunteers that the submitted portions of the Technical Manual were
27 "downloaded from the U.S. Army Corps of Engineers website," but provides no pinpoint
28 citation. Heary Supp. Aff. ¶10. The document is available at
<http://www.usace.army.mil/publications/armytm/tm5-689>.

1 with problem areas of supplying electrical power to automated data processing (ADP)
2 systems." Technical Manual at 1-1. Describing ESE systems, the Army report lists ESE
3 systems as one of three types of lightning protection system and suggests that "each should
4 be considered." Technical Manual at 7-6. It further indicates that ESE systems "have
5 successful track records proven by hundreds of installations" and that these systems "ha[ve]
6 been successfully tested in U.S. labs where 95 percent of discharges tested were attracted
7 away from conventional rods by these terminals." Technical Manual at 7-7.

8 The Court concludes that the Technical Manual is not admissible to the extent that it
9 creates a genuine issue of material fact as to whether the tests reliably prove a measurable
10 zone of protection or protection in open spaces. First, the Technical Manual is itself hearsay
11 if offered to show that the tests are reliable. Rule 803(8) governs the admissibility of
12 government records and reports and provides that "[r]ecords, reports, statements, or data
13 compilations, in any form, of public offices or agencies, setting forth (A) the activities of the
14 office or agency. . . or (C) in civil actions . . . factual findings resulting from an investigation
15 made pursuant to authority granted by law, unless the sources of information or other
16 circumstances indicate lack of trustworthiness," are admissible.²² The Technical Manual is
17 admissible to show that some member of the Army Corps of Engineers recommends that the
18 Army considered using ESE systems, but it is not admissible to show *conclusions* reached
19 by the author of the Technical Manual. Under Rule 803(8)(A) , conclusions are not
20 "activities of the office or agency." As for Rule 803(8)(C), there is no evidence in the
21 Manual (and certainly no evidence from Mr. Heary) that the factual finding resulted from an
22 investigation "made pursuant to authority granted by law," nor what kind of investigation the
23 author conducted at all. Further, Dr. Uman's testimony establishes that the "sources of

24
25 ²²Rule 803(8)(A) and (C) provide the most relevant hearsay exceptions. The Army
26 Manual is clearly not admissible as a business record pursuant to Rule 803(6) because
27 Plaintiffs offer no evidence of a regularly conducted business activity nor the testimony of
28 a custodian or otherwise qualified witness. Also, Rule 803(8)(B) does not apply because
Plaintiffs provide no evidence of a "duty imposed by law as to which matter there was a duty
to report."

1 information . . . indicate[] lack of trustworthiness," and there are no affirmative guarantees
2 within the Technical Manual that the author has the expertise to evaluate the lightning tests,
3 nor that the author undertook a comprehensive or reliable investigation of the scientific
4 validity of lightning protection systems. As the Ninth Circuit has noted, "the district court's
5 [Daubert] 'gatekeeper' role is not abrogated simply because the evidence falls under Rule
6 803(8)(C)." Desrosiers v. Flight Int'l of Florida Inc., 156 F.3d 952, 962 (9th Cir. 1998)
7 (holding district court did not abuse discretion in excluding factual findings of government
8 report as untrustworthy where opinions were made by non-expert with no formal training).
9 There is no evidence that the author had the scientific or technical expertise to support his
10 or her conclusions, and the Plaintiffs may not circumvent that requirement of offering
11 scientific or technical evidence merely because the Technical Manual is issued by the
12 government. See Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 168 (1988) (describing Rule
13 803(8)(C)'s "limitations and safeguards" as "the requirement that reports contain factual
14 findings bars the admission of statements not based on factual investigation" and "the
15 trustworthiness provision requires the court to make a determination as to whether the report,
16 or any portion thereof, is sufficiently trustworthy to be admitted").

17 Second, the Technical Manual's conclusions about the tests' reliability are based on
18 inadmissible hearsay. The author gives no indication that he or she has personal knowledge
19 of the lightning tests, so the author's knowledge is based on reports of the tests, which are
20 themselves hearsay without an exception. The factual findings must be excluded as hearsay
21 on this ground as well. See United States v. Chu Kong Yin, 935 F.2d 990, 999 (9th Cir. 1991)
22 ("The mere fact that a document qualifies as a public record, however, does not ipso facto
23 overcome the hearsay objection unless the document relates to an event to which the author
24 could himself testify. This is for the reason that the public documents exception to the
25 hearsay rule is only the substitute for the appearance of the public official who made the
26 record.") (quoting Yaich v. United States, 283 F.2d 613, 616 (9th Cir. 1960)).

1 Third, even if admissible, the Manual itself limits its intended scope. It disclaims that
2 "[t]his manual is not intended as a replacement for the engineering text furnished as part of
3 ADP system components, but rather, should be used to supplement and better evaluate
4 established design practices." Technical Manual at 1-1. The Technical Manual is, at best,
5 a generalized guide, not an offer of proof of the subjects that it summarizes. Finally, the
6 Manual makes no mention about specified zones of protection or open spaces, and does not
7 reference any standard for the installment of ESE systems (although it does repeatedly cite
8 NFPA 780). For these reasons, the conclusions of the Technical Manual regarding ESE
9 systems are both inadmissible and irrelevant if offered to prove the scientific validity of the
10 tests underlying Plaintiffs' advertisements.

11 D. Remedies

12 Because Plaintiffs have no admissible evidence to controvert the expert testimony of
13 Dr. Uman, the Court must grant summary judgment in part against Plaintiffs. East Coast
14 offers Dr. Uman's testimony to "demonstrate that the tests are not sufficiently reliable to
15 permit one to conclude with reasonable certainty that they established the claim made."
16 Southland, 108 F.3d at 1139. In response, Plaintiffs present no admissible evidence to create
17 a genuine issue of material fact that the tests are actually reliable. Therefore, Plaintiffs'
18 claims that their ESE products provide a measurable zone of protection and protect against
19 lightning strikes in open spaces are not supported by tests sufficiently reliable to support
20 those claims, and are "literally false" under the Lanham Act.

21 The Court must determine the appropriate remedy. In its summary judgment papers,
22 East Coast indicated that it sought both disgorgement of Plaintiffs' profits and injunctive
23 relief against false advertising. In response, Plaintiffs argued that East Coast should be
24 limited to only injunctive relief, since injunctive relief was the extent of the relief requested
25 in the Counterclaim. East Coast did not address Plaintiffs' argument about damages, and at
26 the hearing, East Coast conceded that it was only seeking injunctive relief.

1 In arguing against injunctive relief, Plaintiffs contend that granting injunctive relief
2 would require the Court to administer a broad and intrusive injunction to regulate the
3 lightning protection industry. Plaintiffs' arguments are overstated. For example, Plaintiffs
4 argue that an injunction "would place the Court in the position of ordering that all lightning
5 protection systems be installed in compliance with NFPA and U.L. standards" and
6 "effectively prevent[] any competing systems of lightning protection from being sold or
7 distributed in the United States." Pl's MSJ [Doc. #235], at 4. These claims are unfounded,
8 because the injunction would only affect Plaintiffs' advertising, not compliance standards or
9 distribution. Now that the Court has determined that summary judgment should be granted
10 for East Coast, the Court suspects that Plaintiffs' view of the scope of the injunction will be
11 narrower.

12 In fact, Plaintiffs do repeatedly allude to the fact that any injunction against
13 advertising must be carefully tailored to comply with the First Amendment's protection of
14 free speech. The Court is not presented with a precisely-worded injunction to consider on
15 the cross-motions for summary judgment. Therefore, the Court will order East Coast to
16 submit a proposed injunction as part of a proposed form of judgment, and the Court will
17 allow Plaintiffs to file objections, East Coast to file a response, and Plaintiffs to file a reply.
18 The parties should address any First Amendment issues relating to the scope of the
19 injunction, as well as any other pertinent objections.

20 **IV. PLAINTIFF'S LANHAM ACT CLAIMS AGAINST THOMPSON AND STEFFES**

21 Plaintiffs have sued Thompson and Steffes for literal false advertising under §43(a)
22 of the Lanham Act as well.²³ Thompson and Steffes have filed a Motion for Summary
23 Judgment Re: Lanham Act [Doc. #248]. In response, Plaintiffs have narrowed their
24 challenge to two particular advertisements.

25
26 ²³In their Second Amended Complaint, Plaintiffs also alleged that the same literally
27 false advertising statements supported a claim for common law unfair competition. At the
28 hearing, the parties clarified that these common law unfair competition claims were also
abandoned along with the common law claims discussed in Part V.

1 First, Plaintiffs contend that one brochure for Thompson's own ESE product, the
2 Emitter, attached as Exh. 4 to PSOF, constitutes literally false advertising. The brochure
3 contains two pages in dispute. The first page notes that, "[t]he Emitter has been developed
4 to fill the need for an improved 'Early Streamer' air terminal. Early streamer air terminals
5 produce a greater level of ionization. Such ionization allows the development of a rising
6 streamer . . . expanding the zone of protection." It continues, "[a]dvantages offered by the
7 Emitter are: a wider range of protection per air terminal. . ." The next page is captioned,
8 "The Emitter: Field Tested Superior." It reports the results of the New Mexico Tech test and
9 claims, "[t]hese Tables indicate that the Emitter air terminal provided the greatest level of
10 ionization enhancement." Plaintiffs attack the brochure as literally false by questioning the
11 accuracy of its reliance on the New Mexico Tech testing.

12 Thompson and Steffes respond persuasively that this brochure for the Emitter is not
13 an advertisement of the type identified in the Lanham Act claim in Plaintiffs' Second
14 Amended Complaint. Paragraph 116 of the Second Amended Complaint alleges that
15 Thompson and Steffes "have engaged in making false statements concerning Plaintiffs'
16 products which have misled and deceived consumers as to the safety and efficacy of ESE
17 systems and as to the superiority of ESE Systems over Faraday Systems." In marked
18 contrast, the Emitter brochure makes no mention of Plaintiffs' products and actually
19 promotes, rather than disparages, ESE technology. Paragraph 117 references twelve other
20 paragraphs containing allegations of false statements by Thompson, Steffes, or East Coast,
21 but none of those particular allegations encompass Thompson's brochure for the Emitter;
22 each paragraph concerns specific statements – many discussed in Section I under the
23 Sherman Act – made allegedly to disparage ESE technology. Finally, paragraph 118 repeats
24 the allegation of "false statements and conduct misleading and deceiving customers as to the
25 safety and efficacy of ESE systems and as to the relative merits of ESE Systems and Faraday
26 Systems." Even under Rule 8(a)'s liberal pleading requirements, the Second Amended
27 Complaint simply does not allege that Thompson or Steffes engaged in false advertising by
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1 *promoting* their own ESE device on the basis of the New Mexico Tech tests. On the
2 contrary, it alleges false advertising on the basis of disparaging ESE products. Therefore,
3 Thompson and Steffes's motion for summary judgment regarding the Emitter brochure will
4 be granted.

5 Plaintiffs also contend that another flyer distributed by Thompson contains literally
6 false statements about Plaintiffs' product guarantee. Plaintiffs present a Thompson flyer with
7 the caption, "Promotional Insurance Guarantee Deceptive." Exh. 22 to PSOF. The text
8 continues, "[i]t is implied that this guarantee provides \$6 million in coverage to make repairs
9 to property. This is not the case. This is merely a product guarantee. . . ." Neither this
10 excerpted section nor the rest of the paragraph make any mention of *whose* product guarantee
11 the flyer is criticizing. The flyer references only "this" guarantee, and the rest of the flyer
12 references only general ESE systems, not Plaintiffs in particular. Plaintiffs' name appears
13 nowhere in this document, and Plaintiffs fail to provide any context that could allow a fact-
14 finder to conclude the flyer is a reference to them at all. Plaintiffs thus fail to establish an
15 essential element of a Lanham Act claim, "a false statement of fact by the defendant . . .
16 about its own or another's product." Southland, 108 F.3d at 1139. Summary judgment must
17 be granted in regard to this flyer as well.

18 Plaintiffs provide no other allegedly false advertisements other than these two.
19 Therefore, Thompson and Steffes's Motion for Summary Judgment Re: Lanham Act [Doc.
20 #248] will be granted.

21 **V. PLAINTIFFS' REMAINING CLAIMS AND MOTION FOR SANCTIONS**

22 Plaintiffs originally sued East Coast on Lanham Act claims (Count II), common law
23 unfair competition claims (Count III), and interference with contract (Count IV), and sued
24 LPI on Count III as well. East Coast and LPI have moved for summary judgment on these
25 claims, and Plaintiffs have decided to concede all of them. See Pl's Resp. to Summ. Judg.
26 Re: Common Law / Lanham Act [Doc. #276], at 2-4. Therefore, the Court will grant the
27 following motions for summary judgment: Defendant East Coast Lightning Equipment's
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1 Motion for Summary Judgment Re: Count II Lanham Act Claims and Count III Common
2 Law Claims [Doc. #234], Defendant East Coast Lightning Equipment's Motion for Summary
3 Judgment Re: Interference with Contract [Doc. #241], and Defendant Lighting Protection
4 Institute's Motion for Summary Judgment on Count III [Doc. #226].

5 In response to Plaintiffs' concession of these claims, East Coast in its Reply requested
6 sanctions and/or attorneys' fees for costs incurred in preparation of the summary judgment
7 motions on Count II, III, and IV. East Coast argued that "these issues have been pending
8 since 1997, Plaintiffs have twice amended their Complaint, [and] Defendant East Coast
9 Lightning has spent thousands of dollars in discovery and motions responding to these
10 claims." Def's Reply [Doc. #298]. At the hearing, the Court instructed East Coast to brief
11 the issue of sanctions, and East Coast has filed a Motion for Sanctions Against Plaintiffs and
12 Their Counsel [Doc. # 333].

13 In response, Plaintiffs contend that the claims have merit, but that Plaintiffs chose not
14 to pursue them for what can only be characterized as ambiguous "strategic" reasons. On
15 Count IV, Plaintiffs alleged interference with contract with ETL, the testing laboratory.
16 Plaintiffs decided not to pursue the claim sometime after winning an award in a breach of
17 contract case against ETL in New York. Plaintiffs' reasons for abandoning Counts II and III
18 are not based on recent developments or evidence: "Plaintiffs have determined that –
19 although this raises an issue of fact for the jury – to continue to pursue these claims against
20 Defendants East Coast and LPI would unduly complicate a trial in this action. Therefore,
21 Plaintiffs have determined not to pursue these claims." Pl's Resp. at 3-4 [Doc. #276].²⁴ In
22 their Opposition to the Motion, Plaintiffs emphasize that they failed to oppose the summary
23 judgment motions "solely for strategic reasons." Opp. [Doc. #334] at 9. In an affidavit,
24 Plaintiffs' counsel Ms. Joseph avers that she "was concerned that providing a detailed
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26 ²⁴Plaintiffs also allude to representations made by NFPA about the 780 standard in
27 1997 or 2000, and though the relevance of these statements is unclear, it is uncontested that
28 the NFPA's position did not change in the year before the summary judgment motions were
filed.

1 explanation could reveal Plaintiffs' trial strategy and information protected by the work
2 product privilege" and that she made "strategic decisions." Aff. of Joseph, attached to Opp
3 [Doc. #33] at ¶¶ 12, 13.

4 East Coast moves for sanctions and attorneys' fees on the basis of Fed. R. Civ. P. 11,
5 28 U.S.C. § 1927, and the Court's inherent powers.

6 Sanctions may be imposed under Fed. R. Civ. P. 11 for the filing of a paper "for any
7 improper purpose, such as to harass or to cause unnecessary delay or needless increase in the
8 cost of litigation." Fed. R. Civ. P. 11(b)(1). Rule 11 governs only papers filed with the
9 court. See Fed. R. Civ. P. 11; Chambers v. NASCO, Inc., 501 U.S. 32, 41 (1991); Primus
10 v. Auto. Fin. Serv., Inc., 115 F.3d 644, 648 (9th Cir. 1997). Further, "Rule 11 . . . imposes
11 an objective standard of reasonable inquiry which does not mandate a finding of bad faith."
12 Chambers, 501 U.S. at 47. See G.C. & K.B. Investments, Inc. v. Wilson, 326 F.3d 1096,
13 1110 (9th Cir. 2003) ("As with frivolous pleadings, whether a paper is filed for improper
14 purpose is tested by objective standards.") (quotations omitted). A motion for Rule 11
15 sanctions "shall not be filed with or presented to the court, unless, within 21 days after
16 service of the motion [on the opposing party] the challenged paper, claim, defense,
17 contention, allegation, or denial is not withdrawn or appropriately corrected." Fed. R. Civ.
18 P. 11(b)(1)(A). Reasonable attorney's fees can only be collected if the Rule 11 violation is
19 imposed on motion. See Fed. R. Civ. P. 11(c)(2).

20 Title 28 U.S.C. § 1927 provides that "[a]ny attorney...admitted to conduct cases in any
21 court of the United States...who so multiplies the proceedings in any case unreasonably and
22 vexatiously may be required by the court to satisfy personally the excess costs, expenses, and
23 attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Section
24 1927 sanctions must be supported by a finding of subjective bad faith, which is present when
25 an attorney knowingly or recklessly raises a frivolous argument. B.K.B. v. Maui Police
26 Dep't, 276 F.3d 1091, 1107 (9th Cir. 2002) (citing In re Keegan Mgmt. Co., Sec. Litig., 78
27 F.3d 431, 436 (9th Cir. 1996)). Section 1927 applies only to unnecessary filings and tactics

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1 once a lawsuit has begun. Keegan, 78 F.3d at 435. As such, an attorney is subject to
2 sanctions under this section for all proceedings other than the filing of the complaint. Id.
3 "For sanctions to apply, if a filing is submitted recklessly, it must be frivolous, while if it is
4 not frivolous, it must be intended to harass. . . ." B.K.B., 276 F.3d at 1107 (quoting Keegan,
5 78 F.3d at 436).

6 Finally, the Court possess the inherent power to sanction. "Courts of justice are
7 universally acknowledged to be vested, by their creation, with power to imposed silence,
8 respect, and decorum, in their presence, and submission to their lawful mandates." Chambers
9 v. NASCO, Inc., 501 U.S. 32, 43 (1991). Chambers emphasizes the continuing need for
10 Courts to use the inherent power, because it is "both broader and narrower than other means
11 of imposing sanctions." Id. at 46. Because of their very potency, inherent powers must be
12 exercised with restraint and discretion. Id. at 44. A primary aspect of that discretion is the
13 ability to fashion an appropriate sanction for conduct which abuses the judicial process. Id.
14 at 44-45. The "less severe sanction" of an assessment of attorney's fees is undoubtedly within
15 a court's inherent power. Id. at 45. A district court has the inherent authority to impose
16 sanctions for bad faith, which includes a broad range of willful improper conduct. Fink v.
17 Gomez, 239 F.3d 989, 992 (9th Cir. 2001). Regardless of whether behavior constitutes bad
18 faith *per se*, reckless and knowing conduct that is tantamount to bad faith is sanctionable
19 under the court's inherent power. B.K.B., 276 F.3d at 1108. An attorney's recklessness,
20 when coupled with frivolousness, harassment, or improper purpose, is sanctionable under a
21 court's inherent power. Fink, 239 F.3d at 994.

22 Plaintiffs are correct that Rule 11 sanctions are not available here because East Coast
23 did not serve its motion on Plaintiffs pursuant to Rule 11(c)(1)(A)'s "safe harbor" before
24 filing the motion with the Court. East Coast argues that compliance with the safe harbor
25 would have been pointless, because East Coast is attacking Plaintiffs' *failure to withdraw* its
26 claim before papers were filed, not the filing of a particular paper. Putting aside the question
27 of whether this conduct is sanctionable under Rule 11, because the Rule applies only to
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1 written pleadings East Coast is not excused from complying with the formal requirements
2 of serving a Rule 11 motion. The Ninth Circuit has clearly held that Rule 11's safe harbor
3 requirements are mandatory, and it would be an abuse of discretion for the Court to excuse
4 or waive them. Radcliffe v. Rainbow Construction Co., 254 F.3d 772, 789 (9th Cir. 2001);
5 Barber v. Miller, 146 F.3d 707, 710-11 (9th Cir. 1998). In response, Plaintiffs also suggest
6 that the Court award them attorneys' fees for being forced to respond to East Coast's failed
7 Rule 11 motion. However, East Coast's Rule 11 failure was technical and not a decision on
8 the merits.

9 The Court finds that Plaintiffs pursuit of Counts II, III, and IV against East Coast was
10 in bad faith, with the purpose to harass and increase litigation expense by prompting
11 unnecessary motions for summary judgment, and that this conduct merits an award of
12 attorneys' fees under § 1927 and the Court's inherent power. As of July 2001 at the latest,
13 when Plaintiffs prevailed on their contract claim in New York, Plaintiffs were aware of the
14 same factual bases of their claims under Counts II, III, and IV that exist today. Plaintiffs had
15 one year to determine whether to pursue those claims before East Coast filed its motions for
16 summary judgment in July 2002. Again, Plaintiffs indicate that they conceded the summary
17 judgment motions for the elusive "strategic" reasons, but the Court is at a loss to understand
18 what sort of *defensible* strategy supported the decision to concede Counts II, III, and IV.
19 Plaintiffs admit that no set of facts changed between the time East Coast filed the summary
20 judgment motions and Plaintiffs' decision to concede the motions. Yet Plaintiffs had an
21 obvious motive for not conceding those claims until after the initial round of summary
22 judgment motions, which is that East Coast would incur fees and spend more time defending
23 four claims instead of one, the Sherman Act claim which Plaintiffs now admit is the focus
24 of their Complaint.

25 The Court is left to conclude that Plaintiffs engaged in ignoble defiance of legal and
26 professional conduct. Plaintiffs had no intention, for perhaps a year before filing of summary
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1 judgment motions, to pursue Counts II, III, and IV at all, but purposely waited until after East
2 Coast filed its motions for summary judgment to concede those claims.²⁵

3 As a final response in the surfeit of meritless arguments, Plaintiffs repeatedly insist
4 that the original claims have legal merit, even if Plaintiffs chose to concede the summary
5 judgment motions. This argument is simply not a defense, because the possible legal merit
6 of Plaintiffs' claims is not controlling to a finding of bad faith. There must be some virtue
7 in Plaintiffs' abandonment of them after Defendants were prejudiced by preparing and filing
8 responses. When awarding sanctions under the inherent power of the Court, "a finding of
9 bad faith does not require that the legal and factual basis for the action prove totally
10 frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or *mala*
11 *fides*, the assertion of a colorable claim will not bar the assessment of attorney's fees."
12 B.K.B., 276 F.3d at 1108 (quoting Fink, 239 F.3d at 992). Moreover, an attorney may be
13 sanctioned for improper conduct under § 1927 whether or not he or she filed a paper
14 containing misstatements. Gomez v. Vernon, 255 F.3d 1118, 1134 (9th Cir. 2001). "Tactics
15 undertaken with the intent to increase expenses or delay may also support a finding of bad
16 faith [under § 1927]." New Alaska Development Corp. v. Guetschow, 869 F.2d 1298, 1306
17 (9th Cir. 1989). Plaintiffs' counsel's persistence in maintaining the additional claims without
18 rational explanation before East Coast briefed the motions for summary judgment is
19 sanctionable because it unreasonably and vexatiously multiplied the proceedings and it was
20 Plaintiffs' intention to do so.

21 Plaintiffs will be ordered to pay the reasonable attorneys' fees and costs incurred by
22 East Coast in filing its two summary judgment motions on Counts II, III, and IV.

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²⁵ Certainly, the Court is not prepared to conclude that Plaintiffs' counsel is inept and incapable of perceiving the merit and quality of its claims and arguments.

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Accordingly,

IT IS ORDERED that Defendants' Daubert Motion to Exclude Opinions Offered by Louis Guth [Doc. #251] is **GRANTED**.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (Count I): No Damages [Doc. #249] is **GRANTED**.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (Count I): Lack of Proof of Causation [Doc. #316] is **GRANTED**.

IT IS FURTHER ORDERED that Defendant East Coast Lightning Equipment's Motion for Summary Judgment Re: Count II Lanham Act Claims and Count III Common Law Claims [Doc. #234] is **GRANTED**.

IT IS FURTHER ORDERED that Defendant East Coast Lightning Equipment's Motion for Summary Judgment Re: Interference with Contract [Doc. #241] is **GRANTED**.

IT IS FURTHER ORDERED that Defendant Lighting Protection Institute's Motion for Summary Judgment on Count III [Doc. #226] is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment against Defendant East Coast Lightning Equipment on Counterclaim [Doc. #235] is **GRANTED IN PART** and **DENIED IN PART** as explained in this Order.

IT IS FURTHER ORDERED that Defendant East Coast Lightning Equipment's Motion for Summary Judgment Regarding Counterclaim [Doc. #240] is **GRANTED**.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment Regarding Failure to Establish Conspiracy [Doc. #247] is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment on Count I: No Anti-Competitive Effect / No Antitrust Injury [Doc. #232] is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that Defendants Allan Steffes and Thompson Lightning Protection's Motion for Summary Judgment Regarding Count II Lanham Act Claims [Doc. #248] is **GRANTED**.

1 **IT IS FURTHER ORDERED** that Defendants Allan Steffes and Thompson
2 Lightning Protection's Motion for Summary Judgment Regarding Count III [Doc. #230] is
3 **GRANTED**.

4 **IT IS FURTHER ORDERED** that Defendants' Motion to Strike Plaintiffs' Sherman
5 Act Statement of Facts [Doc. #293] is **GRANTED IN PART** and **DENIED IN PART** as
6 explained in this Order.

7 **IT IS FURTHER ORDERED** that East Coast's Motion to Strike Plaintiffs'
8 Counterclaim MSJ Statement of Facts [Doc. #272] is **GRANTED IN PART** and **DENIED**
9 **IN PART** as explained in this Order.

10 **IT IS FURTHER ORDERED** that Defendants' Motion for Order to Depose Linda
11 H. Joseph [Doc. #261] is **DENIED AS MOOT**.

12 **IT IS FURTHER ORDERED** that Plaintiffs' Motion to Permit Late Filing of
13 Opposition [Doc. #320] is **GRANTED**.

14 **IT IS FURTHER ORDERED** that Defendant East Coast's Motion for Sanctions
15 [Doc. #333] is **GRANTED**. Plaintiffs shall pay the reasonable attorneys' fees and costs
16 incurred by East Coast in filing East Coast Lightning Equipment's Motion for Summary
17 Judgment Re: Count II Lanham Act Claims and Count III Common Law Claims [Doc. #234]
18 and East Coast Lightning Equipment's Motion for Summary Judgment Re: Interference with
19 Contract [Doc. #241].

20 **IT IS FURTHER ORDERED** that Defendant East Coast shall submit a Proposed
21 Form of Judgment regarding the Counterclaim, including a Proposed Injunction, by
22 November 17, 2003. Plaintiffs shall file Objections by December 1, 2003, East Coast shall
23 filed a Response by December 15, 2003, and Plaintiffs shall file a Reply by December 22,
24 2003.

25 **IT IS FURTHER ORDERED** that this Order supersedes and amends the Court's
26 Order of March 31, 2003 [Doc. #330] and any previous rulings inconsistent with this Order
27 are hereby amended.

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IT IS FURTHER ORDERED that the Second Amended Complaint [Doc. #206] is
DISMISSED WITH PREJUDICE.

DATED this 30 day of October, 2003.



Roslyn O. Silver
United States District Judge