

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

FILED
U.S. DISTRICT COURT
STATESBORO, GA.
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SOUTHERN DISTRICT OF GA.

FEDERAL TRADE COMMISSION, *
 *
 Plaintiff, *
 *
 v. *
 *
 F&G INTERNATIONAL GROUP *
 HOLDINGS, LLC; FG *
 INTERNATIONAL, LLC; and J. *
 GLENN DAVIS, *
 *
 Defendants. *

CV 620-073

ORDER

Before the Court is Plaintiff Federal Trade Commission's ("FTC") motion for summary judgment (Doc. 46), Defendants' motion to dismiss the FTC's request for equitable monetary relief and alternative motion for summary judgment (Doc. 48), and Defendants' motion to preserve Daubert challenge for trial (Doc. 50).

I. BACKGROUND

Defendant F&G International Group Holdings, LLC ("FG Group") and Defendant FG International, LLC ("FG International") (collectively, the "Corporate Defendants") are entities owned and operated by Defendant J. Glenn Davis in Collins, Georgia. (Compl., Doc. 2, at 2-3.) The FTC filed suit against Defendants on July 28, 2020 under Section 13(b) of the FTC Act ("FTCA"), 15 U.S.C. §

53(b), to obtain permanent injunctive relief, rescission or reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten monies, and other equitable relief for Defendants' acts or practices in violation of Section 5(a) of the FTCA, 15 U.S.C. § 45(a). (Id. at 1.) The FTC alleges Defendants market FGI-4440 ("the Product"), an insulation coating, using deceptive claims related to R-values. (Id.) The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345. (Id. at 2.)

Before providing an overview of the underlying facts, the Court must first address an issue regarding the statement of undisputed material facts ("SUMF"). For summary judgment motions, the Local Rules require:

Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, in addition to the brief, there shall be annexed to the motion a separate, short, and concise statement of the material facts as to which it is contended there exists no genuine dispute to be tried as well as any conclusions of law thereof. Each statement of material fact shall be supported by a citation to the record. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by a statement served by the opposing party.

L.R. 56.1, SDGa. The FTC argues Defendants do not contest the bulk of its SUMF (Doc. 46-1), including those supported by its expert Dr. David W. Yarbrough, and therefore those facts should be deemed admitted. (Doc. 60, at 1.) However, Defendants did file

a "Statement of Material Facts to Which Exist Genuine Disputes to be Tried."¹ (Doc. 54.) While other districts, such as the Northern District of Georgia, require the opposing party to file an individually numbered response to the movant's SUMF, this District's Local Rules are not that explicit. As stated in Local Rule 56.1, facts are deemed admitted "unless controverted by a statement served by the opposing party." L.R. 56.1, SDGa. "This District's rule does not define what constitutes a 'statement,' nor can the Court locate a case doing so. Absent more direct guidance, the Court declines to import the Northern District's language requiring of such a statement individually numbered responses to a SUMF." Ratchford v. F.D.I.C., No. 6:11-CV-107, 2013 WL 2285805, at *4 (S.D. Ga. May 23, 2013). Based on this holding, to the extent Defendants' filing and responses controvert the FTC's SUMF, the Court will not deem the FTC's SUMF admitted. However, if Defendants failed to controvert any aspects of the FTC's SUMF, those facts will be deemed established as a matter of law. See id.

With this clarification, an overview of the underlying facts is as follows. Starting in 2004 or 2005, and through the date of filing of this suit, Defendant FG International began advertising,

¹ Defendants also filed an Affidavit by Defendant Davis (Doc. 55) which the FTC filed objections to, or in the alternative moved to exclude (Doc. 59). Based on the wealth of information and undisputed facts elsewhere in the record, the Court did not reach the merits of the FTC's objections or exclusion of this Affidavit.

marketing, distributing, and selling the Product to consumers in the United States. (Doc. 46-1, at 2.) FG International is now a registered trade name of FG Group. (Id. at 3.) Defendant Davis is the Corporate Defendants' principal, sole owner, and only employee, and since starting the Corporate Defendants he has formulated, directed, controlled, had the authority to control, and participated in their acts and practices. (Id.)

Defendants manufacture and market coatings, including the Product, for use in commercial applications. (Id. at 4.) Specifically, the Product is an epoxy-ceramic coating that is a thermal barrier and provides moisture and corrosion protection. (Doc. 54, at 2.) Defendants claim an individual named Bill Bradshaw, who is now deceased, invented the Product and named it TAR-007. (Doc. 46-1, at 4.) The Product sold by Defendants is the same as TAR-007, and Defendant Davis uses Mr. Bradshaw's representations as to its proper application thickness and substantiation. (Id. at 4-5.) In fact, Defendants have never themselves tested the Product or commissioned any thermal insulation testing on it - they simply rely on data provided by Mr. Bradshaw. (Id. at 5.)

The representations regarding the R-value of the Product are the main issue in this case. R-value is a measurement of resistance to heat flow. (Id. at 10.) The FTC's Complaint alleges Defendants claim the Product provides "an equivalent R value

greater than 30;" however, the FTC argues the claims are false, Defendants cannot substantiate them, and the Product in fact has an R-value substantially less than one. (Compl., at 1-2.) The greater the R-value, the greater the reduction in heat flow, and the more energy can be saved when heating or cooling a building. (Doc. 46-1, at 10.) The FTC's expert, Dr. Yarbrough, provides that ASTM C518 is the "Standard Test Method for Steady-State Thermal Transmission Properties by Means of the Heat Flow Meter Apparatus" and is a standard test method to determine a material's R-value and thermal properties. (Id. at 14.) Dr. Yarbrough oversaw multiple tests of the Product and found it did not meet the R-value represented by Defendants. (Id. at 15; Doc. 46-4, at 24.)

Defendants have disseminated advertising and promotional materials for the Product through online and other means, as well as directly corresponding with potential buyers stating that testing reveals the Product has an insulation value greater than R-30 when used as directed. (Doc. 46-1, at 17-19.) They have also provided prospective customers with ASTM test results completed by a third party, South West Labs ("SWL") - but, this referenced test was in fact conducted by Mr. Bradshaw on his TAR-007 product. (Id. at 18, 21-22.) Defendants know their representations concern the Product's efficacy in insulating and that prospective customers are interested in the R-value and

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