UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. **Case No. 6:09-cv-378-Orl-35KRS**

EDWARD SUMPOLEC, individually and d/b/a as Thermakool, Thermacool, and Energy Conservation Specialists,

Defendant.
_____/

ORDER

THIS CAUSE comes before the Court for consideration of Plaintiff's Motion for Summary Judgment (Dkt. 42) to which no timely response has been filed. Upon consideration of all relevant filings and case law and being otherwise fully advised, the Court hereby **GRANTS** Plaintiff's Motion for Summary Judgment (Dkt. 42) as set forth herein.

I. BACKGROUND

A. Case History

This matter arises out of the allegedly unlawful advertising practices of Defendant Edward Sumpolec, an individual who has conducted business as ThermalKool, Thermalcool, and Energy Conservation Specialists. (Dkt. 1 at ¶¶ 4, 6; Dkt. 22 at ¶ 1.) Mr. Sumpolec, as the owner, operator and sole employee of Energy Conservation Specialists, sold radiant barriers and liquid coating products that were designed to stop

heat flow and thereby conserve energy. (Dkt. 1 at ¶¶ 6, 7, 8; Dkt. 22 at ¶¶ 2, 5, 9; Dkt. 42-1 at 6.) In October 2007, the Federal Trade Commission ("FTC") issued a civil investigative demand ("CID") to Defendant Sumpolec requesting answers to written interrogatories as well as the production of advertisements and related documents disseminated by and pertaining to the Energy Conservation Specialists business. (Dkt. 42-3 at 3, 10-11.) On November 15, 2007, the FTC issued a second CID relating to the Defendant's individual involvement in the Energy Conservation Specialists business. (Dkt. 42-3 at 14-25.)

On February 26, 2009, the United States filed a five-count Complaint in this Court, alleging that the Defendant violated the Federal Trade Commission Act ("FTCA")-

Sumpolec engaged in the advertising, offering foer(,)2(4 2Arl)1(,)2( )10(oer)7d(i)6(s)4(t)2eriti f(t)2 la(s)4

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1172, 1181 (11th Cir. 2001) (citation omitted). When a moving party has discharged its burden, the non-moving party must then go beyond the pleadings, and by its own affidavits, or by depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial. Porter v. Ray, 461 F.3d 1315, 1321 (11th Cir. 2006) (citation omitted). The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by facts. Evers v. Gen. Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985) ("conclusory allegations without specific supporting facts have no probative value").

Under Rule 56(e) of the Federal Rules of Civil Procedure, "If a party . . . fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e)(2). However, "the district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed, but, rather, must consider the merits of the motion." Reese v. Herbert, 527 F.3d 1253, 1269 (11th Cir. 2008) (quoting United States v. One Piece of Real Prop. Located at 5800 SW 74th Ave., Miami, Fla., 363 F.3d 1099, 1101 (11th Cir. 2004) er strict cout c th C8t14 F.3e C th C8t14 28p8(9r)7(p0(pp)10(o3(ar)7(y)14(j)6 -0

III. DISCUSSION

false claim inducing the purchase of a product inferior to the product the consumer bargained for." Carter Prods., Inc. v. F.T.C., 323 F.2d 523, 528 (5th Cir. 1963). To establish liability under the 15 U.S.C. § 45(a), the Government must establish that (1) there was a representation; (2) the representation was likely to mislead customers acting reasonably under the circumstances; and (3) the representation was material. F.T.C. v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003).

In support of its position, the Government proffers a number of advertisements it claims were placed by Defendant since 2007. These advertisements include claims that (1) Defendant's products possessed R-values ranging from R-53 to R-100; and (2) Defendant's products can reduce energy bills by between 40% and 60%. (Dkt. 42-1 at 9, 10, 14, 52, 59, 64, 152.) In his filings with the Court and in his deposition testimony, Defendant has not denied plac4 0 T80.25Tw -39 I.002 Tc 28 0 Td ( )TeubjlTw 0.39 mony(r)7(nbjl)6(T

tests required by 16 C.F.R. Part 460 and do not represent or approximate the performance of radiant barriers; and (4) the advertising and marketing in this case did not provide consumers with reliable data or have a scientific basis. (Dkt. 42-7 at 2.)

Defendant Sumpolec, for his part, failed to file a response to the Motion for Summary Judgment and otherwise failed to provide any countervailing evidence or demonstrate any specific facts showing that there is a genuine issue for trial. Defendant Sumpolec suggests throughout his deposition that the claims in his advertisements are not false (see Dkt. 42-1), but he provides no competent evidence to refute the Government's expert report. Defendant Sumpolec also contends that his radiant barrier and liquid coating products are not conventional insulation because they "stop" heat from entering or exiting a structure, while conventional insulation only "slows down" the heat flow. (Dkt. 42-1 at 6; Dkt. 22 at 9.) Although he acknowledges that certain advertisements refer to his products in terms of R-values, such as "Radiant Barrier (R-53)" and "Thermalkool (R-100) – Roof and Wall Coatings," Defendant Sumpolec explains that these sJ -0.6(s)4(a2(B)11(el)6(en14( )-10(i)10(noTc 0 Tw 11.46 6Td [(D)-60.004 Tc

subject him to liability under 15 U.S.C. § 45(a). Defendant repeatedly claims in his advertisements that his products can reduce a home's utility bill by 40% to 60%. (Dkt. 42-1 at 59: "Reasons for Thermalkool [liquid coating product]: Saves 40 to 60% on utility bills"; Dkt. 42-1 at 64: "This [liquid coating product] will cut any home's energy bill 40-60%"; Dkt. 42-1 at 152: "This package is based on a 1000 sft of coverage for all 3 items depending on the size of your home this is all that you will need to drop you homes energy bill between 40 to 60% GUARANTEED.") During his deposition, Defendant did not deny placing these advertisements or disclaim the purported energy savings made therein. (Dkt. 42-1 at 10, 12, 15.)

The Government's expert states in his report that the claimed energy saving from Defendant's liquid coating product "is not substantiated by any technical data. The claim is primarily for attic or roof applications. This claim is not valid since the utility load coming from the roof section does not constitute 40% of the heating and cooling load." (Dkt. 42-7 at 5.) With respect to the radiant barrier products, the expert report states that the energy savings for radiant barriers are "highly dependent on climate" and concludes that the energy savings claims for radiant barriers claims are "without justification." (Dkt. 42-7 at 8-9.) Finally, the report concludes that "the advertising claims for both radiant barrier products and coatings are gross exaggerations of thermal performance that are not supported by any type of empirical evidence or scientific information." (Dkt. 42-7 at 9.) Again, Defendant Sumpolec has not offered any contrary evidence that could create a material dispute of fact regarding his energy savings claims.

were “already done . . . by the manufacturers of the radiant barriers and the coatings.” (Dkt. 42-1 at 7.) However, none of the testing purportedly conducted by the manufacturer is in the record for review. Defendant also admits in several places that “didn’t perform any tests for R-Values at all” and that he did not hire anyone to test his

C.F.R. § 460c4

The Government contends that Defendant Sumpolec violated each of these subsections by making R-value claims in his online advertisements without including the disclosures required under this regulation. (Dkt. 42 at 17-18.) Defendant Sumpolec has failed to offer any evidence or argument to the contrary. The Court, having reviewed the advertisements submitted by the Government, finds that Defendant Sumpolec has failed to comply with the cited requirements of 16 C.F.R. § 460.18. Accordingly, The United States is entitled to summary judgment on Defendant Sumpolec's liability for these violations.

F. Liability under Count V – Violation of 16 C.F.R. § 460.19

Defendant Sumpolec is also subject to liability for his failure to comply with 16 C.F.R. § 460.19. This regulation provides in relevant part as follows:

> (a) If you say or imply in your ads, labels, or other promotional materials that insulation can cut fuel bills or fuel use, you must have a reasonable basis for the claim.
>
> (b) If you say or imply in your ads, labels, or other promotional materials that insulation can cut fuel bills or fuel use, you must make this statement about savings: "Savings vary. Find out why in the seller's fact sheet on R-values. Higher R-values mean greater insulating power."
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> . . .
>
> (f) Keep records of all data on savings claims for at least three years. For the records showing proof for claims, the three years will begin again each time you make the claim. Federal Trade Commission staff members can check these records at any time, but they must give you reasonable notice first.

16 C.F.R. § 460.19. The Government maintains that Defendant Sumpolec's claims that his products can reduce energy consumption by 40% to 60% violate 16 C.F.R. § 460.19(a) because these claims lack a reasonable basis. The Court agrees.

Defendant Sumpolec has failed to support this assertion, which repeatedly appears in his advertisements. The Government has proffered expert testimony demonstrating the falsity of the claim, to which Defendant Sumpolec has failed to respond. In light of this

IV. CONCLUSION

Copies furnished to: