

**No. 20-3379**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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FEDERAL TRADE COMMISSION,  
*Plaintiff-Appellant,*

v.

INNOVATIVE DESIGNS, INC.,  
*Defendant-Appellee.*

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On Appeal from the U.S. District Court for  
the Western District of Pennsylvania  
No. 2:16-CV-01669  
(Hon. Nora Barry Fischer)

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**BRIEF OF THE FEDERAL TRADE COMMISSION**

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## TABLE OF CONTENTS

Table of Authorities.....	iii
Introduction.....	1
Jurisdiction.....	3
Question Presented.....	3
Statement of Related Cases and Proceedings.....	3
Relevant Statutes.....	4
Statement of the Case.....	4
A. <i>Deceptive Marketing under the FTC Act</i> .....	4
B. <i>Home Insulation and the FTC’s R-Value Rule</i> .....	8
C. <i>IDI’s Deceptive Marketing Practices</i> .....	10
1. IDI’s Insultex House Wrap.....	10
2. The R-Value of IDI’s Insultex House Wrap.....	12
3. IDI’s Misrepresentations to Consumers.....	17
D. <i>The Proceedings Below</i> .....	20
1. The FTC’s Complaint and IDI’s Admissions.....	20
2. Pretrial Proceedings.....	22
3. The FTC’s Trial Evidence.....	25
4. The Court’s <i>Daubert</i> Ruling.....	28
5. The Court’s Judgment on Partial Findings.....	29
Summary of Argument.....	32
Standard of Review.....	34
Argument.....	35
I. The Parties’ Joint Stipulations Establish that IDI Violated the FTC Act. ....	36

A.	IDI’s Pretrial Stipulations Alone Establish that Its R-Value Claims Are False or Unsubstantiated. ....	36
1.	IDI’s Specific Establishment Claims.....	37
2.	IDI’s Non-Specific Establishment Claims.....	38
II.	IDI’s Proffered Substantiation Evidence under the “Modified” Testing Standard Is Baseless and Inadmissible Anyway.....	42
A.	IDI Had to—But Could Not—Justify Its Modification to ASTM C518. ....	43
B.	The District Court’s Own Evidentiary Rulings Rendered the BRC Test Results Inadmissible.....	47
	Conclusion .....	48
	Combined Certifications	
	Statutory Addendum	

**TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PAGE</b>
<i>American Home Prods. Corp. v. FTC</i> , 695 F.2d 681 (3d Cir. 1982).....	4, 5
<i>Beneficial Corp. v. FTC</i> , 542 F.2d 611 (3d Cir. 1976).....	5
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579 (1993) .....	29
<i>DLJ Mortgage Capital, Inc. v. Sheridan</i> , 975 F.3d 358 (3d Cir. 2020).....	34, 35, 38
<i>EBC, Inc. v. Clark Bldg. Sys., Inc.</i> , 618 F.3d 253 (3d Cir. 2010).....	34, 35, 38
<i>FTC v. Alcoholism Cure Corp.</i> , No. 10-266, 2011 WL 13137951 (M.D. Fla. Sept. 16, 2011) .....	7, 44
<i>FTC v. Click4Support, LLC</i> , No. 15-5777, 2015 WL 7067760 (E.D. Pa. Nov. 10, 2015) .....	5
<i>FTC v. Direct Mktg. Concepts, Inc.</i> , 624 F.3d 1 (1st Cir. 2010).....	5, 7, 39, 43, 44
<i>FTC v. NHS Sys., Inc.</i> , 936 F. Supp. 2d 520 (E.D. Pa. 2013) .....	5
<i>FTC v. Pantron I Corp.</i> , 33 F.3d 1088 (9th Cir. 1994) .....	4, 5, 7

<b>CASES (Cont'd)</b>	<b>PAGE</b>
<i>FTC v. QT, Inc.</i> , 448 F. Supp.2d 908 (N.D. Ill. 2006) .....	37
<i>Kraft, Inc. v. FTC</i> , 970 F.2d 311 (7th Cir. 1992) .....	5
<i>Pfizer, Inc., In re</i> , 81 F.T.C. 23 (1972) .....	5
<i>Pom Wonderful, LLC v. FTC</i> , 777 F.3d 478 (D.C. Cir. 2015).....	5, 6, 7, 8, 37, 39, 43
<i>Rego v. ARC Water Treatment Co. of Pennsylvania</i> , 181 F.3d 396 (3d Cir. 1999).....	34
<i>Removatron Int’l Corp., In re</i> , 111 F.T.C. 206 (1988) .....	6
<i>Removatron Int’l Corp. v. FTC</i> , 884 F.2d 1489 (1st Cir. 1989).....	6, 7, 8, 37, 39, 43
<i>Roberts v. Fleet Bank (R.I.)</i> , 342 F.3d 260 (3d Cir. 2003).....	4
<i>Sandoz Pharmaceuticals Corp. v. Richardson–Vicks, Inc.</i> , 902 F.2d 222 (3d Cir.1990).....	4
<i>Sterling Drug, Inc. v. FTC</i> , 741 F.2d 1146 (9th Cir. 1984) .....	6, 39
<i>Zoloft (Sertraline Hydrochloride) Prods. Liability Litig., In re</i> , 858 F.3d 787 (3d Cir. 2017).....	31, 45, 46

<b>STATUTES &amp; REGULATIONS</b>	<b>PAGE</b>
15 U.S.C. § 45(a)(1) .....	4
28 U.S.C. § 1331 .....	3
28 U.S.C. § 1337(a).....	3
28 U.S.C. § 1345 .....	3
28 U.S.C. § 1291 .....	3
16 C.F.R. pt. 460.....	9
16 C.F.R. § 460.1 .....	10
16 C.F.R. § 460.5 .....	9, 15, 39
16 C.F.R. § 460.5(a) .....	10, 12, 45, 46
16 C.F.R. § 460.5(e)(1)(ii) .....	31
<i>Trade Regulation Rules: Labeling and Advertising of Home Insulation,</i> 44 Fed. Reg. 50218 (Aug. 27, 1979).....	8, 9, 12, 15, 16
<i>Trade Regulation Rules: Labeling and Advertising of Home Insulation,</i> 70 Fed. Reg. 31258 (May 31, 2005).....	9
<b>MISCELLANEOUS</b>	
Alaska Housing Finance Corp., <i>R-Value of Building Materials,</i> <a href="https://www.ahfc.us/iceimages/manuals/building_manual_ap_1.pdf">https://www.ahfc.us/iceimages/manuals/ building_manual_ap_1.pdf</a> .....	15

MISCELLANEOUS (Cont'd)	PAGE
Colorado Energy, <i>R-Value Table</i> , <a href="https://www.coloradoenergy.org/procorner/stuff/r-values.htm">https://www.coloradoenergy.org/procorner/ stuff/r-values.htm</a> .....	15
Federal Trade Commission, <i>Press Release: FTC Approves Final Amendments to its R-value Rule for Home Insulation Products</i> (Oct. 29, 2018), <a href="https://www.ftc.gov/news-events/press-releases/2018/10/ftc-approves-final-amendments-its-r-value-rule-home-insulation">https://www.ftc.gov/news-events/press- releases/2018/10/ftc-approves-final-amendments-its-r- value-rule-home-insulation</a> .....	9
Serway, Raymond A. <i>et al.</i> , PHYSICS FOR SCIENTISTS AND ENGINEERS WITH MODERN PHYSICS (Saunders College Publishing 5th Ed. 1990) .....	15
Venkataraman, Mohanapriya <i>et al.</i> , <i>Aerogel Based High Performance Thermal Insulation Materials</i> , IOP Conf. Series: Materials Science and Engineering Paper No. 553-012043 (2019).....	13

## INTRODUCTION

The Federal Trade Commission (FTC) sued Innovative Designs, Inc. (IDI) for deceptive marketing of IDI’s “Insultex House Wrap,” a building construction product. The FTC alleged that IDI made false or deceptive claims about Insultex’s “R-value,” an industry metric of the heat insulating capability of a product; the higher the R-value, the better the insulation. IDI claimed that Insultex has an R-value of R-3 or R-6, depending on the thickness of the product used. It also claimed that scientific standard tests supported those high R-value claims. The FTC alleged in its complaint that IDI’s claims were either false or were made without adequate scientific substantiation.

In pretrial proceedings, IDI made several material admissions that were made part of the record as Joint Stipulations (ECF\_127) (Appx239). IDI admitted making both the challenged R-value claims and claims that using Insultex saves on energy costs. It also admitted claiming that Insultex’s R-values are based on testing conducted pursuant to “ASTM C518”—which the court found to be the prevailing industry standard for measuring R-values. But, critically, IDI admitted that R-value tests that complied with that standard in fact “never”



returned the R-values it claimed in marketing campaigns. Finally, IDI admitted that it used a “modified” testing standard—which IDI relied on to substantiate its high R-value claims—that employed two 3/4-inch air gaps, which artificially increased the reported insulating capacity, on either side of the Insultex specimen being tested.

The use of air gaps in R-value testing directly contravenes an FTC trade regulation rule—the “R-value Rule”—that regulates the testing of home insulation products. Moreover, IDI claimed that Insultex’s high R-values were supported by *standard* scientific testing, not by its own modified testing method using air-gaps.

IDI’s admissions alone sufficed to support the FTC’s claim that IDI lacked substantiation for its marketing claims and thus acted deceptively under the FTC Act. But the district court ignored those fatal admissions and ruled that the FTC failed to show that IDI’s marketing claims were misleading. That is reversible error.

The district court compounded its error by ignoring the import of its own pretrial evidentiary rulings, which rendered inadmissible IDI’s proffered substantiation evidence. The court’s reliance on that evidence

was, therefore, also erroneous. This Court should reverse the judgment below and remand the case for further proceedings.

### **JURISDICTION**

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345. The court entered final judgment on September 24, 2020. The FTC timely filed its notice of appeal on November 23, 2020.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

### **QUESTION PRESENTED**

Whether the district court erred in granting judgment on partial findings under Federal Rule of Civil Procedure 52(c) when the record evidence, including stipulated facts, and the court's own pretrial rulings establish that IDI made material misrepresentations to consumers regarding its products' R-values. *See* FTC Opp'n to Rule 52(c) Mot. (ECF\_227) at 1-9 (Appx542-550).<sup>1</sup>

### **STATEMENT OF RELATED CASES AND PROCEEDINGS**

This case has not previously been before this Court. The FTC is unaware of any other case or proceeding that is in any way related,

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<sup>1</sup> Citations in the form Appx\_\_ refer to the pages of the opening Appendix filed herewith. Citations to pages in the record refer to the district court docket ECF page numbers.

completed, pending or about to be presented before this Court or any other court or agency, state or federal.

## RELEVANT STATUTES

The pertinent parts of the relevant statutes are set forth in the addendum.

## STATEMENT OF THE CASE

### A. *Deceptive Marketing under the FTC Act.*

Section 5 of the FTC Act prohibits “deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1). Marketing claims can be deceptive in any of several different ways, including claims “containing false or misleading representations or material omissions.” *Roberts v. Fleet Bank (R.I.)*, 342 F.3d 260, 269 (3d Cir. 2003) (quoting *Sandoz Pharmaceuticals Corp. v. Richardson–Vicks, Inc.*, 902 F.2d 222, 226 (3d Cir.1990)). Falsity “encompasses not merely [claims] that are literally untrue, but also materially misleading [ones]—even where it is only the failure to reveal material facts that renders the [claim] misleading.” *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 683-84 (3d Cir. 1982); accord *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1099 (9th Cir. 1994). A claim can be misleading “even absent evidence of that actual effect on customers.” *American Home Prods.*, 695 F.2d at 687 n.10

(quoting *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976)). It is “the likelihood or propensity of deception” that is the relevant criterion. *Id.*

Claims can also be deceptive if they are not backed by “an adequate ‘reasonable basis’” of support. *American Home Prods.*, 695 F.2d at 693 (citing *Pfizer, Inc.*, 81 F.T.C. 23 (1972)); accord *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 8 (1st Cir. 2010). If advertisers “lack adequate substantiation evidence, they necessarily lack any reasonable basis for their claims,” which therefore are deceptive. *Direct Mktg. Concepts*, 624 F.3d at 8.<sup>2</sup>

When it comes to assessing whether an advertiser has adequate substantiation, marketing claims fall into two categories: “efficacy” or “performance” claims, and “establishment” claims. A performance claim

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<sup>2</sup> To violate the FTC Act, a claim must be not only deceptive, but also material to a purchaser’s decision to buy the product. *Pantron*, 33 F.3d at 1095; *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992); see also Op. 24 (Appx031) (citing *FTC v. Click4Support, LLC*, No. 15-5777, 2015 WL 7067760, at \*4 (E.D. Pa. Nov. 10, 2015); *FTC v. NHS Sys., Inc.*, 936 F. Supp. 2d 520, 531 (E.D. Pa. 2013)). IDI conceded below that its representations to consumers about Insultex’s R-values were material. See ECF\_231 (Memorandum Opinion of September 24, 2020), at 24 (Appx031) (citing ECF\_227 at 2 (Appx543), ECF\_228).

represents that a product successfully performs the claimed benefit, such as that a sealant protects against water leaks or that a building product saves energy costs. *See Pom Wonderful*, 777 F.3d at 490. The advertiser must have a “reasonable basis” for making such claims. *Id.*

An “establishment claim” is a representation that the product’s claimed benefit is based on a particular type of evidence, such as scientific tests or studies. *Pom Wonderful*, 777 F.3d at 490; *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1492 n.3 (1st Cir. 1989). “If an advertisement represents that a particular claim has been scientifically established, the advertiser must possess a level of proof sufficient to satisfy the relevant scientific community of the claim’s truth.” *In re Removatron Int’l Corp.*, 111 F.T.C. 206, 242 (1988), *aff’d*, 884 F.2d 1489 (1st Cir. 1989); *accord Pom Wonderful*, 777 F.3d at 490; *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1150 (9th Cir. 1984).

The R-value claims at issue in this case “are establishment claims.” ECF\_231 (Memorandum Opinion of September 24, 2020) (hereinafter “Op.”), at 31 (Appx038). As the district court held, “IDI’s R-value claims *per se* convey that it has scientific proof because R-value can only be established by testing.” *Id.* Indeed, IDI made two

establishment claims in this case: *non-specific* establishment claims—that Insultex has R-values of R-3 or R-6 based implicitly on testing—and *specific* establishment claims that Insultex’s R-values of R-3 and R-6 are based specifically on the “ASTM C518” testing standard.

The Commission’s burden of proof depends on the particular theory of deception on which it proceeds. If the agency charges that a claim is false, it must prove falsity. *Pantron*, 33 F.3d at 1097; *see* Op. 25 (Appx032) (citing *FTC v. Alcoholism Cure Corp.*, No. 10-266, 2011 WL 13137951 (M.D. Fla. Sept. 16, 2011)).

If the agency challenges a non-specific establishment claim under the “substantiation or reasonable-basis theory,” a burden-shifting framework applies. The FTC must first demonstrate “what evidence would in fact establish such a claim in the relevant scientific community.” *Direct Mktg. Concepts*, 624 F.3d at 8 (quoting *Removatron*, 884 F.2d at 1498). The defendant-claimant must then produce evidence that satisfies that substantiation standard. It then falls to the FTC to show that the claimant’s proffered evidence is inadequate. *Id.*; *accord Pom Wonderful*, 777 F.3d at 490-91; *Removatron*, 884 F.2d at 1498; *see* Op. 31-32 (Appx038-039).

If an establishment claim “states a specific type of substantiation,” the burden is on the advertiser to show that it “possess[es] the specific substantiation claimed.” *Pom Wonderful*, 777 F.3d at 491 (quoting *Removatron*, 884 F.2d at 1492 n.3). Here, IDI claimed that Insultex has a particular R-value based on “ASTM C518.” As the district court held, “IDI must possess the level of proof that it claimed in its advertisement.” Op. 31 (Appx038).

**B. *Home Insulation and the FTC’s R-Value Rule***

Home insulation “can be a very significant energy conservation measure.” *Trade Regulation Rules: Labeling and Advertising of Home Insulation*, 44 Fed. Reg. 50218, 50218 (Aug. 27, 1979). The insulating capacity of any particular material is often measured by its R-value, which “signifies the insulation’s degree of resistance to the flow of heat.” *Id.* That metric “can tell the consumer how the insulation is likely to perform as an insulator, and whether the cost of the insulation is justified.” *Id.*

Thus, in 1979, responding to the increase in consumers’ use of home insulation to counter fuel supply shortages and rising prices, the FTC promulgated a trade regulation rule specifically “to correct the

failure of the home insulation marketplace to provide this essential pre-purchase information to the consumer.” *Id.*; see Trade Regulation Rule Concerning Labeling and Advertising of Home Insulation (the “R-value Rule”), 16 C.F.R. pt. 460 (1979). The FTC amended the R-value Rule in 2005 and, most recently, in 2018.<sup>3</sup>

The R-value Rule sets requirements for the advertisement or promotion of thermal insulation products used in the residential market and prohibits particular marketing claims unless they are proven to be true. 70 Fed. Reg. 31258, 31258 (May 31, 2005). Most relevant here, the Rule regulates the means of substantiating R-value claims: “R-values given in labels, fact sheets, ads, or other promotional materials must be based on tests done under the methods listed [therein],” as “designed by the American Society of Testing and Materials (ASTM).” 16 C.F.R. § 460.5.

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<sup>3</sup> The FTC promulgated the 2018 amendment in order to “reduce the regulation’s burden, clarify its requirements, and make it easier for the FTC to take action against deceptive R-value claims for non-insulation products.” See Federal Trade Commission, *Press Release: FTC Approves Final Amendments to its R-value Rule for Home Insulation Products* (Oct. 29, 2018), <https://www.ftc.gov/news-events/press-releases/2018/10/ftc-approves-final-amendments-its-r-value-rule-home-insulation> (last visited Feb. 2, 2021). The amendment did not alter the standards by which R-value claims are properly substantiated.



One of the listed testing methods—ASTM C518: “Standard Test Method for Steady-State Thermal Transmission Properties by Means of the Heat Flow Meter Apparatus”—is the R-value testing standard at issue in this case. *Id.* § 460.5(a). The Rule provides for various testing parameters for R-value substantiation. R-value tests must meet certain temperature conditions, for example, and—significantly for this case—they “must be done on the insulation material alone (*excluding any airspace*).” *Id.* (emphasis added). The Rule states expressly that advertising not in compliance with its requirements “is an unfair and deceptive act or practice.” *Id.* § 460.1.

### **C. IDI’s Deceptive Marketing Practices**

#### **1. IDI’s Insultex House Wrap**

IDI markets “Insultex House Wrap” as a form of house insulation product available in two thicknesses that the company claims has R-values of R-3 or R-6, depending on the thickness. House wrap is a thin,<sup>4</sup> weather-resistant barrier that is installed between a building’s wall and its exterior sheathing. Joint Stipulations (ECF\_127) ¶5 (Appx240). It is designed to prevent moisture from penetrating the exterior wall while

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<sup>4</sup> Insultex, for example, is between 1.0 to 1.5 millimeters thick. J72 at 3, 5 (Appx652, 654).

allowing the evaporation of water from inside the structure. *Id.*; Op. 12 (Appx019). Because a thin house wrap like IDI’s generally offers little benefit as a thermal insulator, manufacturers—other than IDI—do not market such house wraps as themselves having a significant R-value. *See* J72 at 1, 31 (Appx650, 680); Answer ¶11 (Appx228).

IDI began marketing “raw” Insultex in 2002 as a low-density polyethylene foam for use in cold-weather clothing. Joint Stipulations (ECF\_127) ¶2 (Appx239); Op. 12 (Appx019). In 2011, IDI started marketing “Insultex House Wrap,” with an R-value of R-3, and followed that in 2014 with a slightly thicker version marketed with an R-6 claim. Joint Stipulations (ECF\_127) ¶¶10, 12 (Appx241). Both versions have three components: a webbing layer for drainage, the Insultex foam layer, and a laminate film that holds the other layers together. Joint Stipulations (ECF\_127) ¶6 (Appx240); Op. 12 (Appx019). The only difference between the two products is the thickness of the foam layer: The R-3 Insultex contains 0.5 millimeter of foam; the R-6 version 1.0 millimeter. Joint Stipulations (ECF\_127) ¶7 (Appx240).

## 2. The R-Value of IDI's Insultex House Wrap

IDI has admitted that when it began marketing Insultex with R-value claims, the only standardized R-value tests it had conducted to substantiate those claims showed that Insultex had a negligible R-value. *See* Joint Stipulations (ECF\_127) ¶¶35-37 (Appx244); Op. 13 (Appx020). Specifically, in April 2009, IDI commissioned Intertek, a well-known insulation-testing lab, to conduct an ASTM C518 test on its product. *Id.* ASTM C518 is “the most reliable and accurate” thermal test for evaluating home insulation, 44 Fed. Reg. at 50226, and is specified in the FTC’s R-value Rule as an acceptable testing methodology. *See* 16 C.F.R. § 460.5(a). Intertek conducted its test on the 0.5-millimeter-thick version of Insultex—which IDI later claimed to have an R-3 insulating capability—and found an R-value of less than 0.2. Joint Stipulations (ECF\_127) ¶37 (Appx244); Op. 13 (Appx020); *see also* J17 (Appx629) (Test Report of Intertek, dated April 30, 2009) .

Shortly thereafter, in August 2009, IDI commissioned another recognized lab, Vartest Laboratories, Inc., to conduct a second test—this time using a standard methodology known as ISO-11092. Joint Stipulations (ECF\_127) ¶37 (Appx244). The ISO-11092 standard is

commonly used for testing R-value in clothing fabrics and is comparable to the ASTM C518 standard. *See* Mohanapriya Venkataraman *et al.*, *Aerogel Based High Performance Thermal Insulation Materials*, IOP Conf. Series: Materials Science and Engineering Paper No. 553-012043 (2019), at 3. Like the earlier test, Vartest tested the 0.5-millimeter Insultex (the supposed R-3 product) and reported an R-value of 0.264. Joint Stipulations (ECF\_127) ¶37 (Appx244); Op. 13 (Appx020); J61 at 11 (Appx646) (Test Report of Vartest dated August 10, 2009).

In keeping with those uncontested test results, IDI has stipulated that a standard ASTM C518 test conducted on a single layer of either of its purportedly R-3 or R-6 product “has never returned” the claimed R-value. Joint Stipulations (ECF\_127) ¶¶35-36 (Appx244); Op. 13 (Appx020).

Unable to achieve the results it sought from an experienced lab using standardized and scientifically valid methods, IDI set out to design its own test that would yield the R-values claimed for Insultex. *See* ECF\_226 (Pretrial Hearing Transcript) at 25 (Appx069) (the district court noting that “IDI went looking for a test.”). In March 2010, IDI contacted BRC Laboratory, Inc. (BRC)—a single-employee water-testing

company that had never conducted, and was not accredited to conduct, any type of thermal testing, whether on home insulation, fabrics, or any other material. Joint Stipulations (ECF\_127) ¶¶24-26 (Appx242-243). BRC did not even possess equipment to conduct thermal resistance testing, so IDI arranged for it to borrow an apparatus from Federal-Fabrics-Fibers, Inc. (Federal Fabrics), a textile manufacturer that had built an experimental machine for testing thermal fabrics. Joint Stipulations (ECF\_127) ¶26 (Appx243); Op. 13 (Appx020).

Federal Fabrics's experimental apparatus was not designed for conducting thermal tests pursuant to ASTM C518 (or the comparable ISO-11092 standard). Joint Stipulations (ECF\_127) ¶26 (Appx243). Its Technical Director flatly admitted that “[t]here are no specifications for which this testing apparatus was specifically designed.” J155 (Appx753). Unlike ASTM- and ISO-compliant testing equipment, moreover, the Federal Fabrics machine was designed to test not simply the sample in question, but instead the sample *combined with* a 2-inch air gap. See J128 at 4-5 (Appx746-747). Because, as IDI itself notes on its website, “[a]ir is an excellent insulator,” J72 at 5 (Appx654), and because R-values generally reflect the cumulative thermal properties of

all substances being tested as an assembly, *see* 44 Fed. Reg. at 50238 n.190, the R-value results that BRC reported revealed *not* the R-value of Insultex itself but an assembly consisting of Insultex plus two inches of air.<sup>5</sup> Such testing violates the standards in the FTC’s R-value Rule, which provides that R-value tests “must be done on the insulation material alone (*excluding any airspace*).” 16 C.F.R. § 460.5 (emphasis added).

Nevertheless, having received the R-value test results it sought, IDI spent nearly \$300,000 to have a facsimile of the Federal Fabrics machine custom-built, Joint Stipulations (ECF\_127) ¶27 (Appx243)—far more than the cost of a commercially available testing unit that would comply with ASTM C518. Like the Federal Fabrics machine, IDI’s custom-built apparatus incorporated a 3/4-inch air gap on either side of every specimen tested. *Id.* That testing assembly purportedly

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<sup>5</sup> Enclosed airspaces are widely reported as adding at least R-1.0 to the R-value of an assembly—for *every* air gap of 0.5-4.0 inches thick. *See, e.g.,* Raymond A. Serway *et al.*, PHYSICS FOR SCIENTISTS AND ENGINEERS WITH MODERN PHYSICS (Saunders College Publishing 5th Ed. 1990) at 626-627; Colorado Energy, *R-Value Table*, <https://www.coloradoenergy.org/procorner/stuff/r-values.htm> (last visited January 27, 2021); Alaska Housing Finance Corp., *R-Value of Building Materials*, at 2, [https://www.ahfc.us/iceimages/manuals/building\\_manual\\_ap\\_1.pdf](https://www.ahfc.us/iceimages/manuals/building_manual_ap_1.pdf) (last visited January 27, 2021).

yielded the R-3 and R-6 readings that IDI had sought, which BRC reported in “Certificates of Analysis.” *See* J4-J13 (Appx596-624). The district court found that “[e]very [BRC] certificate reported the results of testing that used 3/4-inch air gaps bounding each side of the Insultex sample.” Op. 15 (Appx022). Despite that testing modification, however, IDI continued to claim without qualification in its marketing materials that Insultex has those high R-values. It did not acknowledge that BRC obtained those results with the use of two air gaps. To the contrary, “the certificates reported that BRC complied with ASTM Guidelines.” Op. 15 (Appx022). And although the R-3 and R-6 readings were obtained using air gaps, IDI instructs its customers to install Insultex House Wrap “flat and tight”—i.e., without any air space on either side of the wrap material. J72 at 18 (Appx667). *See* 44 Fed. Reg. at 50218 (“R-values must be determined ... at a product’s installed ... thickness.”).

In an effort to buttress the credibility of BRC’s test results given its utter lack of expertise in thermal testing, IDI paid for BRC to be accredited. Like its choice of BRC in the first place, IDI’s accreditation efforts were also results-driven. The firm it chose, Perry Johnson Laboratory Accreditation, Inc. (PJLA), had never before accredited any

lab conducting thermal resistance testing (and it has not done so since). Joint Stipulations (ECF\_127) ¶¶33-34 (Appx244); Op. 14 n.18 (Appx021). Worse, PJLA “never actually observed any testing” at BRC, and it did not address the 3/4-inch air-gap design of the testing unit. Op. 14 (Appx021). Indeed, PJLA was “unaware” of that design feature when it granted accreditation. *Id.*; PJLA Dep. Tr. at 155:15-157:21 (Appx276-277).<sup>6</sup>

### **3. IDI’s Misrepresentations to Consumers**

IDI markets Insultex as “the only house wrap on the market with an R-value.” Answer ¶11 (Appx228). Specifically, it tells customers that Insultex has R-values of R-3 and R-6; that those R-values were proved in certified testing; and that Insultex’s insulating capabilities provide energy savings to its users. Joint Stipulations (ECF\_127) ¶¶10-14, 22-23 (Appx241-242); Op. 15 (Appx022). IDI emphasizes those R-values and energy savings as central selling features that distinguish Insultex from competitors. Op. 15 (Appx022). IDI’s marketing brochures include,

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<sup>6</sup> PJLA’s accreditation “does not certify testing results.” Op. 14 (Appx021). Its certificate notes that its accreditation provides only a snapshot in time about a lab’s “technical competence” to conduct the tests—not a guarantee of testing accuracy. J14 (Appx625) (PJLA’s Certificate of Accreditation of BRC Laboratory, Inc.).



for example, a home builder's testimonial that "energy savings that my customers will realize has made [Insultex House Wrap] their preferred house wrap." J72 at 2 (Appx651). Its website touts Insultex's comparative insulation and energy saving advantages. J72 at 5 (Appx654).

IDI's claims of high R-value and energy savings have been ubiquitous. To take one example, its website contained the following Frequently Asked Questions:

Q: Why Choose Insultex House Wrap?

A: 3 & 6 R-Value Insulation \* \* \*.

Q: Does Insultex House Wrap cost more than other house wraps?

A: The actual cost of Insultex House Wrap may be slightly higher, but you need to look at the entire picture. Are you comparing Insultex House Wrap to another house wrap with an R-value? Are you taking into account the cost savings when comparing it to the elimination of 4 x 8 sheets of insulated board that is no longer necessary along with the labor costs? \* \* \*

Q: Will using Insultex House Wrap help me save on my energy bills?

A: Not only will you realize savings if you live in a region that experiences cold winters, but your energy bills will also decrease when the air conditioning is running in the summer!

J72 at 5 (Appx654). IDI's website also contained purported customer testimonials touting the high R-value and energy savings of Insultex:

- “Using Insultex House Wrap now allows me to meet required insulation values by simply applying the house wrap.”
- “[W]e decided to use Insultex House Wrap because of its R-3 value rating.”
- “[W]e have noticed warmth in our home that we have never experienced in the past twenty years. We attribute this new-found coziness to your R-6 house wrap.”
- “[A]fter purchasing and installing Insultex R-6 House Wrap on our home \* \* \* our utility bill has dropped 40%.”

J72 at 13-14 (Appx662-663); *see* Op. 15-16 (Appx022-023).

IDI’s promotional materials tout Insultex’s purported R-value of R-3 or R-6 over competing house wraps with an R-value of R-0. The company tells consumers that its high R-value claims rest on scientific testing. *See, e.g.*, J111 at 4 (Appx691) (tabulating “Testing Comparisons”); J72 at 31-33 (Appx680-682) (same); *see* Op. 16 (Appx023).

Indeed, IDI expressly claims that its R-values of R-3 and R-6 were based on the ASTM C518 testing standard. Op. 16 (Appx023). An Insultex marketing brochure entitled “House Wrap and Insulation Wrapped into One,” for example, includes a “Testing Comparisons” chart clearly indicating that the Insultex R-3 and R-6 test results were obtained through the “Test Method” of “ASTM C-518.” J74 at 3

(Appx687). IDI made those same claims on its website. *See, e.g.*, J72 at 31 (Appx680) (showing a similar “Testing Comparisons” chart); Op. 16 (Appx023).

#### **D. *The Proceedings Below***

##### **1. The FTC’s Complaint and IDI’s Admissions**

On November 3, 2016, the FTC sued IDI for deceptive marketing of Insultex House Wrap. *Complaint for a Permanent Injunction and Other Equitable Relief* (ECF\_1) (Appx215). The FTC alleged that IDI’s R-value and energy savings claims contravened the FTC Act in three respects: Count I alleged false, misleading, or unsubstantiated “Performance Claims”—i.e., IDI’s claims that Insultex has an insulation R-value of R-3 or R-6, and that using Insultex will save consumers money. *Id.* ¶¶29-30 (Appx222). Count II alleged a false or misleading “Establishment Claim of R-values”—i.e., IDI’s claim that Insultex’s high R-values are based on valid testing. *Id.* ¶¶31-32 (Appx223). Finally, Count III alleged that IDI—by furnishing Insultex resellers with deceptive promotional materials—has provided “the means and instrumentalities” for those resellers’ own false or misleading claims, in contravention of the FTC Act. *Id.* ¶33 (Appx223). The FTC sought a permanent injunction against future violations and equitable monetary

relief to redress consumers who overpaid for the product. *Id.* ¶¶34-36 (Appx223-224).

In its answer and during discovery, IDI made several material admissions that the court made part of the trial record as the parties' Joint Stipulations (ECF\_127) (Appx239) and Joint Stipulations as to Experts (ECF\_186) (Appx281). IDI admitted making the challenged R-value and energy saving claims. Joint Stipulations (ECF\_127) ¶¶7, 11, 14, 22 (Appx240-242). It admitted making express claims that its products' high R-values were based on the ASTM C518 testing standard. *Id.* ¶¶13, 23, 29-30 (Appx241-243). And it admitted providing its sales representatives and other independent resellers with promotional materials that included those challenged claims. *Id.* ¶¶16-17, 31 (Appx241-242, 243-244).

Specifically concerning its R-value performance and establishment claims, IDI admitted that, before it enlisted BRC to conduct the customized testing of Insultex, all of IDI's testing showed that Insultex had only a negligible R-value of R-0.2-0.3. Joint Stipulations (ECF\_127) ¶37 (Appx244). It also admitted that BRC's tests were all based on a "modified" ASTM C518 methodology—using 3/4-inch air gaps on each

side of the Insultex specimen being tested. *Id.* ¶¶30, 32 (Appx243-244). Finally, IDI admitted that R-value testing conducted under the ASTM C518 standard on a single layer of Insultex House Wrap—i.e., in the manner in which the product is sold and installed—“has never returned” the claimed R-3 and R-6 readings. *Id.* ¶¶35-36 (Appx244).

## **2. Pretrial Proceedings**

The district court conducted a pretrial conference hearing on July 23, 2019, to establish trial procedures and resolve various evidentiary disputes. *See* Pretrial Conference Hearing Transcript (PTC Tr.) (ECF\_226) at 2:16-4:2 (Appx046-048); *see also* ECF\_191 (Appx042), 195 (Appx283) (memorializing court evidentiary rulings on trial exhibits). Significantly for this appeal, the court’s evidentiary and procedural rulings in effect precluded IDI from establishing at trial any scientific substantiation of its R-value claims.

Specifically, the court ruled that reports of scientific testing of Insultex would be admitted in evidence for their substance—as opposed to for merely showing notice to the party receiving the reports—*only if* trial testimony by those who conducted the testing could explain those tests to the satisfaction of the court. *See* ECF\_218 (Memorandum

Opinion of February 14, 2020) (hereinafter “Daubert Op.”), at 7 (Appx548) (a party cannot “rely on the substance of these [test] reports without having elicited the supporting testimony.”). That ruling applied to testing such as the one commissioned by IDI competitor DuPont, whose test showed an R-value for Insultex of R-0.17. PX22d (J241 at 7) (Appx811). The court admitted PX22d in evidence for notice purposes only. *See* PTC Tr. (ECF\_226) at 75:4-24, 77:7-79:9 (Appx119, 121-123); ECF\_191 ¶9 (Appx043).<sup>7</sup> The court treated similarly the test report of another IDI competitor, Kimberly-Clark, showing an R-value of R-0.10 (PX108, J242 at 2 (Appx814); J16 at 2 (Appx628)), ruling that, unless explained further at trial, PX108 could be considered only for purposes of notice to IDI. PTC Tr. (ECF\_226) at 97:12-101:24, 106:20-107:9, 109:8-112:4 (Appx141-145, 150-151, 153-156); ECF\_191 ¶16 (Appx043). *See also, e.g.*, PTC Tr. (ECF\_226) at 93:10-13, 94:16-18, 95:24-25, 96:1-4, 97:8 (Appx137, 138, 139, 140, 141) (same evidentiary limitation on PX64, PX67, PX69, PX71, PX75, PX76); ECF\_191 ¶¶15-16 (Appx043)

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<sup>7</sup> As explained at the hearing, PX22d comprised various documents. PTC Tr. (ECF\_226) at 77:8-12 (Appx121). The test report commissioned by DuPont runs from page 4 to page 11 of PX22d. It was separately designated as PX24a and later admitted in evidence as Joint Exhibit J241 (Appx805)—subject to the court’s evidentiary limitation. *Id.*

(memorializing the court's evidentiary rulings). The court agreed that the same evidentiary limitation applies to the BRC test reports that IDI had proffered to substantiate its high R-value claims. PTC Tr. (ECF\_226) at 107:18-108:10 (Appx151-152).

The court's limitation of testing evidence had the practical effect of leaving IDI without any evidence that it had substantiation for its claim that the R-value of Insultex was supported by testing. The only witness who could explain BRC's testing protocol was its president and *sole employee*, Robert Manni. As the court noted, Manni was "integral" to IDI's defense, and the trial had been scheduled in part to accommodate his appearance. PTC Tr. (ECF\_226) at 24:21-25:5, 21:22-23:4 (Appx068-069, 065-067). But, without explaining why, IDI withdrew Manni from its witness list. *See id.* at 23:5-20 (Appx067). It confirmed to the court that it "won't be using Manni by deposition or otherwise" at trial. *Id.* at 29:10-16 (Appx073). That left IDI without a witness who could, under the terms of the court's pretrial rulings, explain the BRC modification to the ASTM C518 test or the reports on which IDI based its

substantiation.<sup>8</sup> IDI proffered no other scientific substantiation for its R-value claims.

### 3. The FTC's Trial Evidence

A non-jury trial began on July 29, 2019. ECF\_201-202 (Appx295-511). In light of the extensive factual admissions that IDI had made before trial, and the deposition testimony and exhibits it moved in evidence at the start of the trial, the FTC focused its affirmative live presentation on the testimony of Dr. David Yarbrough, one of the country's foremost experts on thermal insulation technology and testing. *See* ECF\_201 (Transcript of Day One of Trial) at 24:2-25:6, 28:3-30:16, 79:4-15 (Appx318-319, 322-324, 373). IDI did not challenge Dr. Yarbrough's qualification as an expert in those fields. *Id.* at 38:5-18 (Appx332); ECF\_186 (Joint Stipulations as to Expert Qualifications and to the Admissibility of Expert Reports) ¶2.a (Appx281-282).

Dr. Yarbrough first explained to the court the general principles of heat transfer and insulation. ECF\_201 (Transcript of Day One of Trial) at 44:23-49:12 (Appx338-343). He then described the ASTM C518

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<sup>8</sup> IDI's proffered expert, Dr. Donald Garlotta, could not offer such testimony because he neither conducted nor observed such testing. *See* ECF\_133 at 4 n.16.



standard testing that he conducted on Insultex at a lab that specialized in thermal testing. *Id.* at 31:6-25; 41:10-42:11, 58:2-3, 59:10-63:21, 65:14-70:5, 72:15-77:6, 93:20-110:3 (Appx325, 335-336, 352, 353-357, 359-364, 366-371, 387-404). He testified that his testing yielded R-values an order of magnitude lower than the R-3 and R-6 that IDI claimed—but that were consistent both with the third-party testing that he reviewed and with IDI's own tests before it commissioned BRC to conduct testing with air-gaps. *Id.* at 110:4-112:6 (Appx404-406). He thus concluded that IDI's R-value claims were false. *Id.* at 43:12-44:18, 110:17-23 (Appx337-338, 404).

Dr. Yarbrough opined further that BRC's test results cannot substantiate IDI's R-value claims because the BRC testing contravened the ASTM C518 testing standard in a significant manner. ECF\_201 (Transcript of Day One of Trial) at 128:20-25 (Appx422). He noted that—unlike tests that employed the standard ASTM C518 and yielded R-values below 0.5—the BRC customized tests were conducted using a 3/4-inch air gap on either side of the Insultex specimen being tested. *Id.* at 125:14-126:11 (Appx419-420). He explained that, due to the insulating capacity of the air gaps, the modification materially skewed

the R-value results that BRC reported. In reality, the tests measured not the insulating capacity of Insultex alone but of an assembly consisting of Insultex combined with a 3/4-inch air gap on either side. *Id.* at 126:23-127:11 (Appx420-421).

On cross-examination, IDI sought to challenge Dr. Yarbrough's conclusions on the grounds that (1) ASTM C518 permits flexibility in the testing procedures and (2) that Dr. Yarbrough did not measure the precise R-value of the two 3/4-inch air gaps in the BRC testing unit. *See* ECF\_201 (Transcript of Day One of Trial) at 134-172 (Appx428-466). Dr. Yarbrough testified that those factors did not affect his bottom-line conclusions. *Id.* at 173-191 (Appx467-485). He explained that, while the ASTM C518 standard permits appropriate deviations from its testing parameters, the critical flaw in BRC's testing was in not accounting for those 3/4-inch air gaps when reporting the R-value of Insultex.<sup>9</sup> As he put it, "the devastating factor is the failure to identify or recognize the resistance of the airspaces as being part of the specimen." ECF\_201 (Transcript of Day One of Trial) at 183:10-12 (Appx477). He also explained that the use of airspace for insulation is both scientifically

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<sup>9</sup> Dr. Yarbrough's testimony did not address the R-value Rule's prohibition on the use of air gaps. *See* 16 C.F.R. § 460.5.

recognized and practically quite common, so the proposition that the two 3/4-inch air gaps built into the BRC testing unit would significantly skew the R-value of the tested specimen is hardly controversial. Indeed, it is supported by standard scientific references such as the ASHRAE Handbook of Fundamentals, which contains R-value tables of various enclosed airspaces. ECF\_201 (Transcript of Day One of Trial) at 173-174 (Appx467-468).<sup>10</sup>

#### **4. The Court's *Daubert* Ruling**

After the FTC had rested its case-in-chief, IDI moved to exclude Dr. Yarbrough's testimony concerning the Insultex R-value on the ground that it was based on tests that "used C518 standard" but did not "comply with C518." ECF\_202 (Transcript of Day Two of Trial) at 7:4-8:14 (Appx494-495). After further briefing,<sup>11</sup> the court struck Dr. Yarbrough's expert opinions in their entirety. *Daubert Op.* (ECF\_218)

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<sup>10</sup> ASHRAE is the American Society for Heating, Refrigerating and Air-Conditioning Engineers—of which Dr. Yarbrough is a member of the committee that deals with the designs and materials of buildings' envelopes. ECF\_201 (Transcript of Day One of Trial) at 29:5-15 (Appx323).

<sup>11</sup> The district court suspended the trial to receive the supplemental briefs—over the FTC's objection that such a measure was unnecessary because IDI's motion, even if granted, would not preclude IDI's liability, which is supported by other evidence in the record. ECF\_202 (Transcript of Day Two of Trial) at 20:22-23:6 (Appx507-510).

at 1-2 (Appx512-513). It concluded that Dr. Yarbrough's views did not meet the "reliability" and "fit" prongs of Fed. R. Evid. 702, which memorializes the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Daubert Op. (ECF\_218) at 17-18 (Appx528-529). It faulted Dr. Yarbrough for insufficiently explaining the apparent deviations of his testing procedures from the stated parameters of the ASTM C518 standard. *Id.* at 20-27 (Appx531-538).

## 5. The Court's Judgment on Partial Findings

IDI then moved under Federal Rule of Civil Procedure 52(c) for judgment on partial findings. ECF\_224. IDI argued that the opinions of two other experts, Dr. Anastassios Mavrokefalos and Dr. Jonathan Malen, which were already in evidence via their deposition testimony and reports, should also be struck under *Daubert*, and contended that the FTC's claims cannot survive without such expert testimony. *Id.* at 2-3.<sup>12</sup> The FTC opposed the *Daubert* motion and argued as well that

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<sup>12</sup> IDI originally proffered Dr. Mavrokefalos's testimony opining that IDI's claims were substantiated and that BRC's testing was reliable. But, after conducting his own tests at IDI's request, Dr. Mavrokefalos recanted those views, testifying that IDI's R-value claims were in fact false and unsubstantiated, and that BRC's bespoke machine was not

judgment under Rule 52(c) was inappropriate in any event because other evidence, including IDI's stipulated admissions, established that IDI made material misrepresentations to consumers about Insultex's R-value. *See* ECF\_227 at 3-9 (Appx544-550).

The court granted IDI's motion, ECF\_232 (Appx007), and entered final judgment against the FTC, ECF\_233 (Appx006). The court struck Dr. Mavrokefalos's expert testimony, Op. 26-29 (Appx033-036); ruled that Dr. Malen had been proffered only as a rebuttal witness—even though his expert report was already admitted in evidence, *see* J214 (Appx754) (Malen Expert Report); ECF\_195 (Appx283) (confirming admission of J214), Op. 22-23 (Appx029-030); and held that, without expert testimony, the FTC's claims fail. Op. 25-26 (Appx032-033).

The district court first set out the relevant scientific standard of substantiation in this case. It found that, to constitute competent and reliable scientific evidence sufficient to support IDI's R-value claims, a test must be conducted either: (1) in strict compliance with the standards of ASTM C518 and the R-value Rule; or (2) using “well-

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capable of reliably measuring the R-value of Insultex. Op. 4-5, 18-19 (Appx011-012, 025-026). At trial, the FTC offered Dr. Mavrokefalos's deposition testimony on those issues as part of its case-in-chief.

explained” modifications to those standards. *See* Op. 26-27 (Appx033-034) (citing 16 C.F.R. § 460.5(e)(1)(ii); J1 § 1.11 (Appx566); J2 § 1.11 (Appx581); *In re Zolofit (Sertraline Hydrochloride) Prods. Liability Litig.*, 858 F.3d 787, 797 (3d Cir. 2017)).

The court faulted the FTC for “not proffer[ing] any expert testimony to show BRC’s testing did not conform with the ASTM C518 Standards” and dismissed IDI’s pretrial stipulations on this very issue as “not dispositive.” Op. 30 (Appx037). Specifically concerning the FTC’s charge that BRC’s testing cannot substantiate IDI’s R-value claims because it used air gaps, the court ruled that the FTC offered no expert testimony to support that charge—ignoring IDI’s stipulations and faulting the FTC for “improperly attempt[ing] to shift the burden” to IDI to prove its case. Op. 32 (Appx039). Finally, the court held that, because the FTC failed to establish that IDI’s R-value claims were misleading, the complaint counts relating to IDI’s energy savings claims and providing the means and instrumentalities to others must also fail. Op. 32-33 (Appx039-040).

The FTC now appeals that judgment. As we show below, even in the absence of expert testimony, the court's judgment cannot be sustained under facts admitted by IDI.

### **SUMMARY OF ARGUMENT**

The district court committed two separate errors of law, and its judgment should be reversed.

1. Rule 52(c) requires the court to weigh all the evidence in the record, but the court below considered only part of that record, a basic error of law. The court ignored IDI's stipulations, which in effect admitted that IDI's marketing claims were deceptive, precluding judgment against the FTC. Instead, the court focused exclusively on the absence of expert testimony.

Specifically, IDI admitted that (1) it told consumers that Insultex had insulating R-values of R-3 and R-6; (2) it claimed that those values were based on "ASTM C518," the industry's prevailing standard; and (3) in fact, no testing under ASTM C518 has ever returned the R-values IDI claimed. Those stipulations were enough by themselves to show a violation of the FTC Act; a fortiori, they precluded judgment against the FTC under Rule 52(c).

But the district court did not examine the effect of those admissions. Instead, it considered only whether the FTC could prove its case without expert testimony showing that IDI's claims were untrue given its use of a modified air-gap testing methodology that conformed neither to ASTM C518 nor to the FTC's R-value Rule, which expressly disallows using air gaps in R-value testing. That was error because IDI advertised without any qualification an insulating value calculated under "ASTM C-518," not a bootleg version. The law of deceptive advertising required the court to determine whether that specific claim had a valid basis; in the wake of IDI's admissions, the claim had no basis, regardless of the excluded expert testimony.

Aside from IDI claiming specific reliance on "ASTM C-518," the district court also wrongly discounted IDI's pretrial stipulations on the theory that ASTM C518 permits innovation in testing methods and thus permitted IDI's testing modification. The language of the standard is clear on its face that it contemplates the development of the testing standard via the processes of peer-reviewed developments by standard-setting organizations. It plainly does not refer to bespoke standards tailored to individual marketers.



2. The district court erred further by crediting IDI's proffered substantiation of its R-value claims. IDI's evidence lacked any scientific basis. IDI did not explain why it used air gaps in its R-value testing even though the FTC's R-value Rule, which incorporates the prevailing industry standard, directly prohibits them. Yet the court improperly required that the FTC disprove the validity of IDI's test modification rather than requiring IDI to explain its "nonstandard techniques," as the law demands. Moreover, whether or not the modified testing was valid, that evidence was inadmissible. IDI withdrew the only witness who could explain that testing and its results to the court. Under the court's pretrial evidentiary rulings, IDI's failure to produce a witness to explain its testing rendered its test results inadmissible.

### **STANDARD OF REVIEW**

In judgments entered under Rule 52(c), the Court reviews findings of fact for clear error and conclusions of law *de novo*. *DLJ Mortgage Capital, Inc. v. Sheridan*, 975 F.3d 358, 371-72 (3d Cir. 2020); *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 273 (3d Cir. 2010); *Rego v. ARC Water Treatment Co. of Pennsylvania*, 181 F.3d 396, 400 (3d Cir. 1999).

## ARGUMENT

The district court wrongly granted judgment on partial findings. “In considering whether to grant judgment under Rule 52(c), the district court applies the same standard of proof and weighs the evidence as it would at the conclusion of the trial.” *DLJ Mortgage Capital*, 975 F.3d at 371 (quoting *EBC*, 618 F.3d at 272). It should “not view the evidence through a particular lens or draw inferences favorable to either party.” *Id.* (citing *EBC*, 618 F.3d at 272-73). Here, the court erred in two ways. First, it improperly focused exclusively on the FTC’s proffered expert testimony and thus wrongly failed to consider other evidence in the record that was both uncontested and dispositive. Among other things, IDI admitted in pretrial joint stipulations that its advertising claimed that it had ASTM C518 standard tests showing that Insultex’s R-value was R-3 or R-6, but it never had such tests. That admission alone showed that IDI violated the FTC Act. The tests IDI did have are, by its own admissions, nonstandard and plainly did not comply with the requirements of the FTC’s R-value rule, which prohibits the use of air gaps.

The court erred further in ignoring the effect on the merits of its pretrial rulings on the admissibility of the Insultex testing reports. Under those rulings, which required nonstandard tests to be “well explained,” IDI’s withdrawal of the BRC representative from its trial witness list precluded IDI’s reliance on BRC’s tests to substantiate its R-value marketing claims. Thus, whether or not BRC’s “modified” R-value testing could be considered valid, IDI had no admissible substantiation for its marketing claims, in violation of the FTC Act.

**I. THE PARTIES’ JOINT STIPULATIONS ESTABLISH THAT IDI VIOLATED THE FTC ACT.**

**A. IDI’s Pretrial Stipulations Alone Establish that Its R-Value Claims Are False or Unsubstantiated.**

IDI made both specific and non-specific establishment claims about Insultex’s R-value. It told consumers that Insultex’s R-values are based on the “ASTM C-518” standard (a specific claim), J74 at 3 (Appx687); *see also* J72 at 31 (Appx680); Op. 15-16 (Appx022-023), and that Insultex was unique because it had an R-value to begin with (a non-specific claim), Answer ¶11 (Appx228); *see also* J111 at 4 (Appx691); Op. 15 (Appx022). As the court found below, both IDI’s specific and non-specific R-value claims must be substantiated with the *same* scientific evidence: R-value tests conducted in accordance with the

ASTM C518 standard, *see* Op. 31, 9 (Appx038, 016), which IDI has stipulated it did not possess.

### 1. IDI's Specific Establishment Claims

IDI's website and promotional materials specifically claimed that the R-values of R-3 and R-6 were based on the "Test Method" of "ASTM C-518." J74 at 3 (Appx687); J72 at 31 (Appx680); *see* Op. 16 (Appx023). IDI also distributed "Certificates of Analysis" claiming that the reported R-values for Insultex were based on "R-Value Testing as per ASTM C518." J10-J13 (Appx617-624); *see* Op. 16 (Appx023); ECF\_127 ¶¶30-31 (Appx243-244). IDI therefore "must possess the specific substantiation [it] claimed." *Pom Wonderful*, 777 F.3d at 491 (quoting *Removatron*, 884 F.2d at 1492 n.3); *see* Op. 31 (Appx038) (citing *FTC v. QT, Inc.*, 448 F. Supp.2d 908, 959 (N.D. Ill. 2006)).

It did not. Quite to the contrary, IDI stipulated that "[a] standard ASTM C518 test conducted on a single layer of R-3 *has never returned* an R-value of R-3," Joint Stipulations (ECF\_127) ¶35 (Appx244) (emphasis added), and that "[a] standard ASTM C518 test conducted on a single layer of R-6 *has never returned* an R-value of R-6," Joint Stipulations (ECF\_127) ¶36 (Appx244) (emphasis added).

The district court nevertheless ignored those admissions. In doing so, the court committed the errors of “view[ing] the evidence through a particular lens” and “draw[ing] inferences favorable to” IDI. *DLJ Mortgage Capital*, 975 F.3d at 371 (citing *EBC*, 618 F.3d at 272-73).

IDI’s conduct underscores the court’s error. In 2015, after learning of the FTC’s investigation into its R-value claims, IDI changed its claim that Insultex’s R-3 was per “ASTM C-518” to the claim that the R-value is based on “ASTM C518 *Modified*.” *See, e.g.*, J111 at 6 (Appx693) (BRC accreditation used to market Insultex on IDI website) (emphasis added); Op. 14 (Appx021). As Part II below shows, even that change does not cure the deception. But IDI’s decision to alter its marketing materials shows a recognition that its prior specific claims were unsubstantiated.

## **2. IDI’s Non-Specific Establishment Claims**

IDI also made the non-specific establishment claim that Insultex is “the only house wrap on the market with an R-value” of R-3 and R-6. Answer ¶11 (Appx228); Joint Stipulations (ECF\_127) ¶¶10-13, 22-23 (Appx241, 242). As the district court found, “R-value can only be established by testing.” Op. 31 (Appx038). Accordingly, IDI’s substantiation evidence for those non-specific R-value claims must be

testing that “would in fact establish such a claim in the relevant scientific community.” *Removatron*, 884 F.2d at 1498; *accord Pom Wonderful*, 777 F.3d at 490; *Sterling Drug*, 741 F.2d at 1150.

Here, the FTC demonstrated, and the district court found, that ASTM C518 is “the prevailing standard in the industry” for home insulation R-value testing. Op. 26 (Appx033) (quoting Daubert Op. (ECF\_218) at 20-21 (Appx531-532)). That testing method is also incorporated in the FTC’s R-value Rule. 16 C.F.R. § 460.5. Thus, as was the case with IDI’s specific establishment claims discussed above, R-value testing results obtained in accordance with the ASTM C518 standard constitute the kind of substantiation evidence required by the relevant scientific community to support IDI’s non-specific R-value claims. As shown above, however, IDI has stipulated that it never possessed such testing results. *See* Joint Stipulations (ECF\_127) ¶¶35-36 (Appx244). That is enough to satisfy the FTC’s burden of showing that IDI did not possess the required substantiation for its non-specific establishment claims. *See Pom Wonderful*, 777 F.3d at 490-91; *Direct Mktg. Concepts*, 624 F.3d at 8; *Removatron*, 884 F.2d at 1498.

Instead of assessing the effect of IDI's admissions, the district court faulted the FTC for not "proffer[ing] any expert testimony to show BRC's testing did not conform with the ASTM C518 Standards." Op. 30 (Appx037). It ruled that "IDI's pretrial stipulations are not dispositive on this issue" because "[t]he Standards permit innovation." *Id.*

That reasoning is faulty in two respects. *First*, the court wrongly determined that the FTC could not show that BRC's testing failed to substantiate the R-value claims because its expert testimony had been excluded. That was an error because the FTC in fact made that showing via IDI's stipulations. IDI admitted that it never possessed test results under ASTM C518—the required scientific standard for substantiating R-values—showing the R-values it claimed. Joint Stipulations (ECF\_127) ¶¶35-36 (Appx244). IDI did not qualify those stipulations; the admission thus applies to the BRC tests as well. *Id.* No expert was needed, therefore, to show that those claims were unsubstantiated.

*Second*, the court erred in its interpretation of the ASTM C518 standard. The court held that the standard "permits innovation," and thus allowed IDI to claim R-values based on its own modification to the standard—namely, employing two 3/4-inch air gaps in its testing

*without* accounting for the R-value that those air gaps have added in its reported results. ASTM C518 does not support such an expansive reading. It says that “[s]tandardization of this test method is not intended to restrict in any way the future development of improved new methods or procedures by research workers.” Op. 9 (Appx016) (quoting J1 § 1.11 (Appx566); J2 § 1.11 (Appx581)).

Even if it were reasonable for the court to read this language as “permit[ting] innovation,” to some degree, Op. 30 (Appx037), the language does not nearly sustain the court’s ruling that it allows marketers to create their own customized testing methodology to validate their predetermined R-value claims. For one thing, the standard refers to “research workers” amending the standard, not product marketers or their paid agents. The language is clearly intended to permit the further development of the C518 standard by those who actually participate in standard-setting activities. Neither IDI nor BRC ever claimed such a role in the materials-testing scientific community.

More significantly, the ASTM C518 language discusses the “standardization” of testing methods. But IDI’s “modified” ASTM C518



bears no resemblance to an industry standard. The testing modification was carried out by a single entity—BRC—with no prior experience in thermal testing. It was undertaken without consulting scientists in the field of insulation testing or seeking peer review and approval by the standard-setting organization. Most significantly, by not accounting for the widely-recognized fact that air gaps contribute substantially to the R-value of an assembly specimen, IDI’s method fails basic science and thus cannot lessen the dispositive weight of IDI’s pretrial stipulations.

**II. IDI’S PROFFERED SUBSTANTIATION EVIDENCE UNDER THE “MODIFIED” TESTING STANDARD IS BASELESS AND INADMISSIBLE ANYWAY.**

IDI proffered R-value testing results (i.e., BRC’s Certificates of Analysis) that nominally showed R-3 and R-6 readings—using the “modified” ASTM C518 testing method. Without expert testimony, the court ruled, the FTC could not show that BRC’s modified testing was invalid and thus could not show that IDI’s proffered substantiation evidence was inadequate. *See* Op. 25-26, 30-32 (Appx032-034, 037-039). That reasoning is faulty in two respects. First, the court improperly shifted the burden to the FTC to disprove the validity of IDI’s modification to the ASTM C518 standard; in fact, IDI had the burden to

explain why its changes to the prevailing testing standard were permissible—which it could not do. Second, whether or not the modified standard was valid, the court erroneously ignored the effects of its own pretrial evidentiary rulings, which precluded IDI from using the results of BRC’s modified testing to substantiate its R-value claims.

**A. IDI Had to—But Could Not—Justify Its Modification to ASTM C518.**

IDI proffered BRC’s modified tests to substantiate the non-specific establishment claim that Insultex has R-values of R-3 or R-6. *See Joint Stipulations (ECF\_127) ¶¶13, 23, 29-32 (Appx241, 242, 243-244)*. When the FTC challenges a non-specific establishment claim, it must first demonstrate “what evidence would in fact establish such a claim in the relevant scientific community.” *Direct Mktg. Concepts*, 624 F.3d at 8; *accord Pom Wonderful*, 777 F.3d at 490-91; *Removatron*, 884 F.2d at 1498. Here, the district court ruled that the FTC met that burden, finding that the “ASTM C518” testing methodology is “the prevailing standard in the industry” for proving R-value claims. Op. 26 (Appx033) (quoting *Daubert Op. (ECF\_218)* at 20-21 (Appx531-532); citing R-value Rule, 16 C.F.R. § 460.5).

On that required level of substantiation, the FTC showed—through the parties’ pretrial stipulations—that IDI never possessed any substantiation evidence that meets this standard. Joint Stipulations (ECF\_127) ¶¶35-37 (Appx244). The FTC also showed, again through stipulations, that the BRC test reports did *not* comply with the required testing standard but were based instead on a modification to ASTM C518 involving the incorporation of two 3/4-inch air gaps into the BRC testing apparatus. Joint Stipulations (ECF\_127) ¶¶29-30, 32 (Appx243, 244). The stipulations thus showed conclusively that IDI’s R-value claims lacked substantiation. *See* Op. 31-32 (Appx038-039) (reciting the liability standard).<sup>13</sup>

The district court acknowledged IDI’s stipulations, Op. 13-15 (Appx020-022), but nevertheless held that the FTC had failed to show that the claims were unsubstantiated. It ruled that, “to the extent that

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<sup>13</sup> “When the FTC brings an action based on the theory that advertising is deceptive because the advertisers lacked a reasonable basis for their claims, the FTC must: (1) demonstrate ‘what evidence would in fact establish such a claim in the relevant scientific community’; and (2) ‘compare ... the advertisers’ substantiation evidence to that required by the scientific community to see if the claims have been established.’” Op. 31-32 (Appx038-039) (quoting *Alcoholism Cure Corp.*, 2011 WL 13137951, at \*26; *Direct Mktg. Concepts*, 624 F.3d at 8).

the FTC argues that IDI's claims are false because it did not have certain testing results, the FTC has not proffered any expert testimony to show BRC's testing did not conform with the ASTM C518 Standards." Op. 30 (Appx037). In fact, the FTC *did* make that showing, through IDI's own admissions. *See supra* at 39.

But even aside from that, the court's reasoning improperly shifted to the FTC the burden of showing that BRC's use of air gaps was unjustified. Indeed, the court acknowledged that testing techniques "that deviate from the R-value Rule or the [ASTM] C518 Standards, need to be well explained." Op. 26 (Appx033) (quoting Daubert Op. (ECF\_218) at 20-21 (Appx531-532); citing *In re Zolof*, 858 F.3d at 797). But instead of requiring IDI to explain *its* deviations, the court erroneously placed that burden on the FTC. It did so despite having held that the *un-modified* ASTM C518 is "the prevailing standard in the industry" because it is "incorporated by reference in the FTC's R-value Rule," *id.*, and despite the R-value Rule's expressly prohibiting the use of air gaps in R-value testing, 16 C.F.R. § 460.5(a).

IDI cannot justify telling consumers, which it continues to do, that its products have R-values of R-3 and R-6 when, in fact, its testing

measured the R-value of an assembly consisting of two 3/4-inch air gaps sandwiching its product. IDI's purported substantiation not only deviates from ASTM C518 but it also directly violates the FTC's R-value Rule, which unequivocally rules out using air gaps in testing. The rule states: "The [R-value] tests must be done on the insulation material alone (*excluding any airspace*)." *Id.* (emphasis added). That is because—as IDI itself correctly tells its customers—"[a]ir is an excellent insulator." J72 at 5 (Appx654). Failing to account for the air gaps' "excellent" insulating properties significantly skews the R-value results, undermining the reliability of such tests. Moreover, IDI tells its customers to apply its house wrap "flat and tight" against the surface of the house, thus negating any insulation benefits of the air gaps when applied in real world conditions.

Nor could IDI explain its modified testing after its withdrawal of Robert Manni from its witness list. PTC Tr. (ECF\_226) at 29:3-16 (Appx073). Manni was BRC's only employee, Joint Stipulations (ECF\_127) ¶26 (Appx243), and the only person who could explain that "nonstandard technique[]." *In re Zoloft*, 858 F.3d at 797; see Joint

Stipulations (ECF\_127) ¶30 (Appx243). With Manni unavailable, IDI had no means of justifying its reliance on BRC's testing methodology.<sup>14</sup>

**B. The District Court's Own Evidentiary Rulings Rendered the BRC Test Results Inadmissible.**

Finally, whether the modified testing standard is deemed valid or not, IDI could not substantiate its claims because its substantiation evidence was inadmissible by virtue of the district court's pretrial rulings concerning the standard for admissibility of scientific test reports. It was error for the court to accept that evidence despite its earlier rulings.

The court repeatedly ruled that R-value test reports can be admitted for their substance—i.e., for the R-values they report—*only if* the persons who conducted those tests explained them to the court at trial. *See supra* at 22-24; *see also* Daubert Op. (ECF\_218) at 22 (Appx533) (citing admissibility standard to exclude FTC's proffered

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<sup>14</sup> The district court pointed to PJLA's accreditation of BRC as "[a]dding credence" to IDI's efforts to justify the use of air gaps. Op. 30 (Appx037). But PJLA—with no experience evaluating thermal testing—lacked the expertise to recognize the effects of using air gaps in R-value testing. Indeed, PJLA "never actually observed any testing" and was "unaware that BRC was using air gaps in its testing." Op. 14 (Appx021) (citing PJLA Dep. Tr. at 118:4-119:19, 122:4-14, 157:1-21 (Appx267, 268, 277)).

evidence to support expert testimony); Op. 29-30 (Appx036-037) (citing the standard to reject “other laboratory testing found in the record.”). Under that ruling, the BRC testing reports on which IDI based its substantiation proffer were inadmissible for their substance. IDI withdrew from its witness list Robert Manni, the only person who could explain the BRC reports at trial. PTC Tr. (ECF\_226) at 29:3-16 (Appx073). IDI also removed Manni’s deposition testimony designations from the trial record. *Id.* Those actions were fatal to IDI’s substantiation case because without them, IDI cannot explain its test reports and thus lacks any substantiation for its marketing claims. The district court committed clear error when it gave dispositive weight to evidence inadmissible under its own rulings.

### **CONCLUSION**

For the foregoing reasons, the judgment of the district court should be reversed and the case should be remanded for further proceedings.

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## **COMBINED CERTIFICATIONS**

### **COMPLIANCE WITH VOLUME, TYPEFACE AND STYLE**

1. This brief complies with the type-volume limit of Fed. R. App. P. 37(a)(7)(B) because it contains 9,348 words (excluding the parts of the brief exempted by Fed. R. App. P. 32(f)).
2. This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it was prepared in 14-point Century Schoolbook proportionally spaced font using Microsoft Word 2010.

### **BAR MEMBERSHIP**

All signatories to this brief are federal government attorneys.

### **IDENTICAL COMPLIANCE OF BRIEFS**

I certify that the text of the electronically filed brief is identical to that of the paper copies mailed to the Clerk of the Court of the U.S. Court of Appeals for the Third Circuit.

### **PERFORMANCE OF VIRUS CHECK**

I certify that on February 8, 2021, I performed a virus check on the electronically filed copy of this brief using 2018 Windows Defender Antivirus Version 1.325.1430.0 (last updated 1:56 AM February 8, 2021). No virus was detected.

### **SERVICE**

I certify that on February 8, 2021, I filed the foregoing brief via the Court's CM/ECF system. All parties will be served by that system.

February 8, 2021

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## STATUTORY ADDENDUM

### Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*

#### § 45. Unfair methods of competition unlawful; prevention by Commission

##### (a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless--

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect--

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

**(B)** such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

**(4)(A)** For purposes of subsection (a), the term “unfair or deceptive acts or practices” includes such acts or practices involving foreign commerce that--

**(i)** cause or are likely to cause reasonably foreseeable injury within the United States; or

**(ii)** involve material conduct occurring within the United States.

**(B)** All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

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