

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FIRECLEAN, LLC,

Plaintiff,

v.

**GEORGE FENNELL and STEEL
SHIELD TECHNOLOGIES, INC.,**

Defendants.

Civil Action No. 1:16-cv-293-TSE-JFA

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF
MOTION IN LIMINE REGARDING WITHDRAWN GUMMING CLAIMS**

Plaintiff FireClean, LLC (“FireClean”), respectfully requests this Court enter an order precluding Defendants George Fennell (“Fennell”) and Steel Shield Technologies, Inc. (“SST”), from making reference to and introducing evidence of reports that FIREClean® became “sticky” or “gummy,” as such evidence is irrelevant, prejudicial, and based on inadmissible hearsay.

INTRODUCTION

In this case, FireClean claims that Defendants Fennell and SST engaged in false advertising under the Lanham Act and defamation under Virginia common law by falsely equating FIREClean® to Crisco Vegetable Oil. Plaintiff’s original Complaint also included defamation and Lanham Act claims arising from Defendants’ statements that FIREClean® will polymerize or “gum” and become “sticky” on weapons (the “Gumming Claims”). Plaintiff withdrew these Gumming Claims in its Amended Complaint. Nevertheless, Defendants’ Exhibit and Witness List (Dkt No. 283) indicates that they intend to introduce evidence on this topic at trial. As FireClean is no longer asserting its Gumming Claims, testimony that

FIREClean® has gummed is irrelevant, prejudicial, and—based on the evidence disclosed by Defendants in their Exhibit and Witness Lists—would be based on inadmissible hearsay.

However, Defendants appear ready to introduce extensive evidence on whether or not FIREClean® becomes sticky and gummy.

- Defendants' Exhibit List includes numerous complaint emails alleging that FIREClean® became sticky or gummy on a firearm. (*See* Exhibit List 2-4, Dkt No. 283).
- Opinion 5 of the report of Defendants' expert Dr. Lori Streit, Ph.D., includes proposed testimony that FIREClean® oxidizes and becomes sticky, tacky, and gummy. (*See* Streit Report 5, Dkt No. 378, Exhibit 1).
- Defendants' Witness List also includes potential fact witnesses on this topic. Of the twelve witnesses Defendants listed on the topic of FIREClean® becoming sticky and gummy in their August 26 supplemental initial disclosures, Defendants expect to present five at trial: SST corporate representative James McDonough, Defendant George Fennell, David Sugg, Edward Sugg, and Theodore Domine. (*See* Defendants' Exhibit List 1, Dkt No. 283). Defendants' initial disclosures identify the first four of these witnesses as knowledgeable of reports of FIREClean® becoming sticky and gummy and identify the fifth as knowledgeable of FIREClean® becoming “gummy, sticky, and gooey on weapons.” Plaintiff believes that Defendants will also attempt to illicit testimony on this topic from other witnesses listed on their witness list, including Jonathan Gifford and Robb Jensen.

ARGUMENT

A. Evidence suggesting FIREClean® becomes sticky and gummy is irrelevant and should be excluded.

Evidence of FIREClean® becoming sticky or gummy is not relevant to any of the parties' claims or defenses and should be excluded. "[W]hat constitutes 'relevant evidence' depends on the facts of the case, the nature of the claims, and the associated defenses to the claims."

Computer Scis. Corp. v. Maguire, 1:16-CV-261 (JCC/IDD) (E.D. Va. Dec. 6, 2016) (Cacheris, J.) (citing Fed. R. Evid. 401 (defining "relevant" evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence")). Even relevant evidence may be excluded at trial based on its prejudicial effect. *See* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

Plaintiff's claims are limited to statements equating FIREClean® to Crisco vegetable oil. All other claims involving statements that FIREClean® would become sticky and gummy have been withdrawn. The relevant issue for the jury is simply whether FIREClean® is, or is not, scientifically equivalent to Crisco Vegetable Oil. The truth or falsity of whether FIREClean® becomes sticky and gummy is no longer at issue and is, therefore, not relevant evidence in this case. *See* Fed. R. Evid. 401; *see also Computer Scis. Corp. v. Maguire*, 1:16-CV-261 (JCC/IDD) (E.D. Va. Dec. 6, 2016) (Cacheris, J.) ("Plaintiff has already agreed to dismiss with prejudice its claims involving the Confidential Information and Customer Evidence. It cannot now assert, without elaboration, that such evidence may be relevant at trial . . ."). Such irrelevant evidence will only serve to prejudice the jury against FireClean and will confuse them as to the relevant

facts of the case. *See* Fed. R. Evid. 403. This Court should, therefore, bar Defendants from presenting exhibits and testimony, including the expert testimony of Dr. Streit, that supports the suggestion that FIREClean® is sticky or gummy or that otherwise relate to Plaintiff's withdrawn Gumming Claims. Plaintiff believes Defendants may put Mr. Domine, Mr. Gifford, Mr. Jensen, and other witnesses on the stand to testify in this regard. They should be precluded from doing so. Such evidence is irrelevant and will only prejudice and confuse the jury, prolong the trial, and detract from the relevant issues before the Court.

B. Hearsay reports of FIREClean® becoming sticky and gummy should be excluded.

Emails and testimony of reports of FIREClean® becoming sticky or gummy are inadmissible hearsay and should be excluded. The hearsay rule prohibits the admission of evidence of an out-of-court statement offered to prove the truth of the matter asserted in the statement. *See* Fed. R. Evid. 801(c); *see also United States v. Levy*, No. 1:07CR265 (JCC), 2008 WL 373646, at *5 (E.D. Va. Feb. 8, 2008) (Cacheris, J.) (“If the emails are offered by the Government for the truth of their contents, then they are hearsay and, if the contents are not within one of the hearsay exceptions, may be deemed inadmissible.”).

Defendants intend to introduce various emailed complaints regarding FIREClean® becoming sticky and gummy. (*See* Exhibit List 2-4, Dkt No. 283). None of the authors of the emails are listed as witnesses on Defendants' Exhibit List. Any offering of their statements for the proposition that FIREClean® gummed or became sticky would necessarily constitute hearsay. Therefore, in addition to being irrelevant and prejudicial, these exhibits are based on inadmissible hearsay and must be excluded.

Defendants may also attempt to introduce the testimony of fact witnesses such as Mr. McDonough, Mr. Fennell, and Mr. David and Edward Sugg regarding reports of FIREClean®

becoming sticky and gummy. Such reports are based on hearsay, out-of-court statements offered to prove the truth of the matter asserted. To the extent these witnesses have no firsthand knowledge of FIREClean® becoming sticky and gummy and their knowledge is instead based on third-party reports, their testimony is inadmissible and should be excluded on hearsay grounds. And, as previously discussed, to the extent any witness is presented to testify on this topic based on personal knowledge, their testimony should be excluded as irrelevant and prejudicial. Plaintiff, therefore, requests this Court bar Defendants from presenting any exhibits or testimony based on reports of FIREClean® becoming sticky or gummy on the grounds of hearsay and also bar any “sticky/gummy” evidence—whether in the form of exhibits, fact testimony, or expert opinion—on the grounds of relevance and prejudice as such evidence will only serve to confuse the jury, prolong the trial, and detract from the issues before the Court.

CONCLUSION

Plaintiff FireClean, LLC, respectfully moves this Court for an order *in limine* precluding from the trial of this case any exhibits, argument by counsel for Defendants, question by counsel, and testimony by any witness relating to FIREClean® becoming sticky and gummy. Plaintiff also requests the Court preclude Defendants from introducing hearsay evidence on this topic. Alternatively, in the event the Court determines that a ruling on some of these matters should be deferred until later in the course of the trial, Plaintiff requests that there be no mention of these matters during *voir dire* of the jury or opening statements and that counsel be instructed to provide advance notice to the Court and opposing counsel, out of the hearing of the jury, prior to any reference to the matters.

