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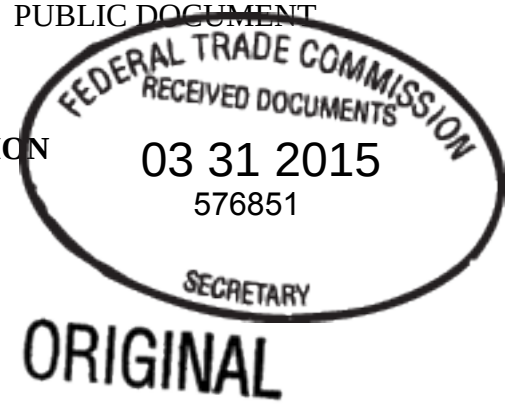

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright
Terrell McSweeny

In the Matter of	)	
ECM BioFilms, Inc.,	)	**Docket No. 9358**
a corporation, also d/b/a	)	
Enviroplastics International	)	**PUBLIC**

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Dated: March 31, 2015

RECORD REFERENCES

CC App. Br. – Complaint Counsel's Appeal Brief

CCFF – Complaint Counsel's Proposed Findings of Fact

CCX – Complaint Counsel's Exhibit

CCPTB – Complaint Counsel's Post-Trial Brief

CCPTRB – Complaint Counsel's Post-Trial Reply Brief

Dep. – Deposition transcript

ID – Initial Decision

IDFF – Initial Decision Findings of Facts

Resp. App. Br. – Respondent's Appeal Brief

RX – Respondent's Exhibit

Tr. – Trial Transcript

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I. INTRODUCTION

On appeal, Respondent ECM BioFilms, Inc. ("ECM") argues that Complaint Counsel did not prove that ECM's express claim, that plastic treated with its additive ("Additive") would completely biodegrade in nine months to five years ("Rate Claim"), was material to ECM's customers or end-use consumers. ECM's argument fails for four reasons. First, ECM applies the wrong evidentiary standard. Second, by conceding that its unqualified biodegradable claims were material, ECM effectively concedes the materiality of the Rate Claim. Third, as the ALJ correctly found, four lines of evidence provide abundant support for the conclusion that ECM's Rate Claim is material. Finally, each of ECM's arguments that the Rate Claim was immaterial utterly fails to undermine the substantial evidence of materiality.

Unable to meaningfully dispute the overwhelming evidence that it made false and unsubstantiated material claims, ECM uses its appeal brief as a bully pulpit for irrelevant (and often nonsensical) policy arguments and conspiracy theories. Each of these arguments—like its materiality argument—is entirely meritless.

II. ARGUMENT

A. ECM's Claims Are Material.

A claim is material if it is "likely to affect the consumer's choice of or conduct regarding a product." FTC Policy Statement on Deception, 103 F.T.C. 174, 182 (1984) ("*Deception Statement*"). Three types of claims are presumed material: (1) express claims; (2) implied claims the seller intended to make; and (3) claims involving the product's "central characteristics," such as its purpose or efficacy. *Id.* at 182. To rebut the presumption, a respondent must supply "sufficient evidence to support a finding that the claim at issue is not

material." *Novartis Corp.*, 127 F.T.C. 580, 686 (1999). If a respondent rebuts the presumption, the fact-finder should weigh all evidence of materiality. *Id.*

ECM's Rate Claim is presumptively material because it is an express claim ECM intended to make that pertains to the Additive's central—indeed, only—characteristic.[1] Even if it could rebut the presumption (which it cannot), the ALJ correctly found that overwhelming evidence proves the Rate Claim is material. Specifically, ECM's appeal fails for the four reasons discussed below.

1. ECM Applies the Wrong Evidentiary Standard.

First, ECM argues that without proof of actual consumer injury, Complaint Counsel did not satisfy the preponderance standard. (Resp. App. Br. at 21, quoting *Aluminum Co. of Am. v. Preferred Metals Prods.*, 37 F.R.D. 218, 221 (D.N.J. 1965).) This argument rests on two incorrect legal propositions. First, Respondent argued that Complaint Counsel never proved materiality in the first place. (Resp. App. Br. at 18.) However, Respondent's Rate Claim is presumptively material. Even if ECM rebutted this presumption (which it did not), the preponderance standard does not require conclusive proof of injury, as Respondent suggests—or conclusive proof of anything else. To the contrary, the preponderance standard simply requires proof that "the existence of a fact is more probable than its nonexistence." *Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993). As the ALJ correctly found, and the evidence overwhelmingly shows, Complaint Counsel has proven that it is more likely than not that the Rate Claim influenced ECM customers' purchasing

[1] ECM argues that the Additive has other characteristics, such as cost, compatibility with manufacturing processes, ability to preserve shelf durability of plastic, safety for food, etc. (Resp. App. Br. at 30-31.) However, these are merely secondary characteristics: if the Additive did not allegedly make plastic biodegrade far faster than untreated plastic, no purchaser would care about these secondary characteristics.

decisions. That ECM can concoct far-fetched, alternative explanations for individual pieces of evidence does not undercut the substantial evidence of materiality. *Cf. Seganish v. District of Columbia Safeway Stores, Inc.*, 406 F.2d 653, 657 n.21 (D.C. Cir. 1968) (quotations omitted) ("From the mere fact that the evidence permits two or more possible inferences, it does not necessarily follow that the evidence is not substantial.").

Second, contrary to ECM's repeated argument, (Resp. App. Br. at 5, 17, 21, 25, 29, 31), "proof of actual consumer injury is not required" to prove materiality. *Novartis*, 127 F.T.C. at 685. Indeed, it is well-established that Section 5 does not require proof of actual injury, only proof that a claim is misleading to reasonable consumers and likely to affect their choice or conduct. *See Deception Statement*, 103 F.T.C. at 182; *see also* ID 291 (collecting cases affirming that no proof of actual injury is required).

2. ECM Concedes that Biodegradable Claims Are Material.

Second, ECM repeatedly argues that its Rate Claim was not material because its customers simply cared that the Additive purportedly made plastic "biodegradable." (Resp. App. Br. at 4, 16, 30-31.) ECM's concession—that its unqualified biodegradable claims were material—effectively determines all materiality inquiries in this case. As explained in Complaint Counsel's appeal brief, there is overwhelming evidence that at least a significant minority (and likely a majority) of consumers understand "biodegradable" to mean complete landfill breakdown in a reasonably short period of one to five years. (CC App. Br. at 6-30.) In other words, the concept of rate—*i.e.*, complete breakdown in one to five years—is embedded in "biodegradable" claims. If unqualified biodegradable claims are material to ECM's customers and end-use consumers (which ECM concedes and the record clearly establishes), then a rate claim of nine months to five years is necessarily material.

Indeed, ECM's desperate attempt to disentangle its unqualified biodegradable claim from the rate of biodegradation leads to an absurd argument: that businesses and consumers who purchase "biodegradable" plastic do not care if the product takes several millennia to biodegrade because they "abandon [] interest" in it upon disposal. (Resp. App. Br. at 36.) If this were true, no one would pay for the ECM Additive or pay more for plastic containing it in the first place.

3. The ALJ Correctly Found the Rate Claim Material.

The presumption that ECM's express claims are material, combined with ECM's concession about the materiality of its biodegradable claims, should end the materiality inquiry. But, even setting this aside, the ALJ correctly found that ECM's Rate Claim was material to its customers and downstream customers.[2] (ID 288.) Specifically, the ALJ properly found that four lines of evidence—each of which ECM grossly mischaracterizes in its appeal—support a finding of the Rate Claim's materiality. (ID 288-91.)

a) ECM's Rate Claim Pervaded Its Advertising.

The ALJ correctly observed that "'predicate facts that g[i]ve rise to the presumption [of materiality]'" are "'evidence from which materiality can be inferred.'" (ID 287-88; quoting *Novartis*, 127 F.T.C. at 686.) Specifically, the fact that ECM made the Rate Claim expressly, prominently and repeatedly; that the claim pertains to the Additive's central, and only, characteristic; and that ECM intended to make the claim are powerful evidence of the claim's materiality. (*See* ID 288; *see also Novartis,* 127 F.T.C. at 687-89.) Indeed, the only logical conclusion from ECM's constant repetition of the highly conspicuous Rate Claim was that it thought the claim was likely to affect customers' purchasing decisions. (*See* ID 288; *see also*

[2] The ALJ correctly observed that because ECM's deceptive claims were material to ECM's customers and their downstream customers, it was unnecessary to address whether the claims were material to end-use consumers. (ID 291 n.55.)

Novartis, 127 F.T.C. at 688-87 (record "replete" with evidence of claim being made is "strong evidence" of materiality).)

ECM now suggests that the Rate Claim was a minor part of its minimal advertising. (Resp. App. Br. at 12-13.) To the contrary, as the ALJ correctly found, the Rate Claim was integral to ECM's marketing strategy, appearing prominently on almost every marketing document. (ID ¶¶ 245-46.) For example, the very first bullet point on both its widely-distributed marketing flyer[3] and the "Our Product" page on the ECM website, stated that plastic treated with the ECM additive ("ECM Plastic") would "[f]ully biodegrade in 9 months to 5 years." (CCX-3; CCX-19 at 5.) The first sentence of ECM's "Technology Explanation" on its "Our Technology" webpage featured the Rate Claim. (CCX-6.) The Rate Claim appeared in both ECM's sole brochure and its form "Letter[s] to an Interested Party"—even though each document only briefly summarized the Additive's technology. (CCX-7 at 6; CCX-10 at 2; CCX-11 at 2.) The Rate Claim even had its own devoted flyer, titled the "Life Expectancy of Products Manufactured with ECM Masterbatch Pellets." (CCX-5.) It defies logic that ECM would devote so much of its precious marketing space to an immaterial claim.

As the ALJ correctly found, the Rate Claim also held a prominent place in ECM's one-on-one customer[4] communications. (*See* ID ¶ 247; *see also infra* at 8 n.7.) For example, when a

[3] Sale Director Tom Nealis explained that the flyer was part of the "standard packet" of marketing materials he sent to customers. (CCX-813, Nealis Dep. 144, 191.)

[4] On appeal, ECM argues that its claims could only have been material to actual purchasers of its product, not other companies to whom ECM made deceptive claims. (Resp. App. Br. at 23-25.) This distinction, however, does not match ECM's business model, which relies on persuasion (via deceptive claims) throughout the supply chain. As CEO Robert Sinclair explained, ECM frequently makes advertising claims to companies who, in turn, ask their plastic manufacturer to purchase and use the ECM additive. (CCX-818, Sinclair Dep. 205). For example, grocery store chain Down to Earth frequently communicated directly with ECM, asked ECM to review its ad copy, and used the Rate Claim on its grocery bags. (CCX-818, Sinclair

customer asked Sales Director Tom Nealis to "explain the process in say a few easy to understand lines," Mr. Nealis responded with a short list: "1. Fully biodegradable in 9 months to five years." (CCX-276.) Another customer asked CEO Robert Sinclair: "Your literature says nine months to five years, but our sales guys ask if we can be more specific." (CCX-280 at 3.) Mr. Sinclair responded by explaining "the 9 month to 5 year window of biodegradation." (CCX-280 at 1.) A third customer asked ECM's "Regulatory Specialist," Alan Poje: "[S]o all this time your marketing materials say that our plastic would biodegrade in landfills specifically within 9 months to 5 years. Are you now saying this is not so??" (CCX-275.) Mr. Poje replied: "[Biodegradation] normally occur[s] within the 9 to 60 month time frame." (CCX-275.) When deposed, Mr. Nealis admitted that he routinely told customers that "the process will not normally take longer than five years," (CCX-813, Nealis Dep. 249), and Mr. Poje agreed that during his tenure at ECM, "the general timeframe that ECM conveyed to customers" was "nine months to five years," (CCX-816, Poje Dep. 71).

The persistence with which ECM made the claim bolsters the ALJ's materiality finding. *See Novartis*, 127 F.T.C. at 689 (respondent's continuing to make the claim during FTC investigation is evidence that it believed the claim material); *Kraft, Inc.*, 114 F.T.C. 40, 137 (1991) (noting that the persistence with which respondent made the claim is evidence that it thought the claim material). Specifically, ECM continued to make the Rate Claim for more than two years after Staff began its 2011 investigation. (CCFF ¶ 38.) ECM claimed to have finally removed the claim from its marketing materials at the end of 2012 to comply with the

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Dep. 205-06; ID ¶ 281, citing CCX-307; CCX-248; CCX-252; CCX-44.) However, it was Down To Earth's supplier, Island Plastic Bags, which actually purchased the additive. (ID ¶ 36.) For brevity, Complaint Counsel refers to all companies to whom ECM made claims as "customers."

Commission's revised Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260 ("Green Guides"), but, in fact, ECM continued to make the claim until at least the end of 2013. (CCFF ¶¶ 38-41, citing examples of Rate Claim on ECM's website and in marketing materials and customer communications through 2013.)[5]

ECM's belief in the importance of rate is also evident from the fact that the few marketing documents that do not contain the Rate Claim itself, almost without exception, otherwise mention time or rate. For example, ECM required every customer to sign a "Certificate of Assurance of Minimum Loading Rate," which stated that customers agreed to use 1% Additive in their plastic because ECM's reputation would be damaged if ECM Plastic did not biodegrade in a "reasonable period of time." (CCX-832.) ECM's "Mechanism" page on its website addressed a common time-related concern: "People often wonder whether significantly greater quantities of our additive will reduce the biodegradation times." (CCX-4.) And ECM's "Certificate of Biodegradability" certifies that ECM (allegedly) conducted testing to determine the "rate and extent of biodegradation" of ECM Plastic (CCX-1)—a fact that ECM misstates on appeal. *See* Resp. App. Br. at 33 (claiming that the "certificate lacks any reference to rate of biodegradation").[6] The only logical conclusion from these nearly ubiquitous references to rate

[5] Moreover, even when ECM stopped making the Rate Claim, it continued to deceptively claim a short biodegradation timeframe—*i.e.*, that plastic with the ECM additive would biodegrade in "some period greater than a year." (ID ¶ 253.) As explained in Complaint Counsel's appeal brief, at least a significant minority of consumers understand this claim to imply biodegradation within a year, because, as anchoring expert Dr. Shane Frederick explained, the timeframe of one year functions as an "anchor" on which consumers heavily rely when interpreting the claim. (CC App. Br. at 8, 27-28.)

[6] ECM argues that the absence of the Rate Claim from its "Comparison Chart" shows the claim's immateriality. (Resp. App. Br. at 32, citing CCX-12.) But the claim's absence from a single marketing document is insignificant compared to its presence on so many others. Moreover, its absence from the Comparison Chart makes sense because the chart compared products that <u>all</u> purport to biodegrade quickly (*i.e.*, compostables and bioplastics).

generally, and the Rate Claim specifically, is that ECM knew that rate was highly material to its customers.

b) Customers Asked About Biodegradation Rate.

The ALJ also correctly relied on abundant evidence demonstrating that ECM's customers frequently asked about time. (ID 288.) ECM argues on appeal that the ALJ should not have considered this compelling evidence because, ECM inaccurately claims, "only four such party queries out of a universe of 300 [customers] proves the opposite, that the matter was not material . . . ." (Resp. App. Br. at 23.) This argument grossly misstates the evidence. The ALJ cited four examples of customer questions, (ID 288, citing ID ¶ 1502), but the record contains dozens of others.[7]

[7] For example, ECM received the following questions, comments, and concerns about biodegradation rate from customers, prospective customers, and end-use consumers:

- CCX-269 at 1 ("What determines 9 months vs 5 years as it is such a variance?");
- CCX-275 at 3 ("Do you have any literature explaining the time (5 years or less) process?? [sic] I know you told me 9 months – 5 years …. [W]e are trying to use the proper language in our company literature.");
- CCX-277 at 5 (asking ECM to advise on what "claims can be made" such as "plastic breaking down in 5 years");
- CCX-278 at 2 ("I noticed that the biodegrade [sic] life is anywhere from 9 months to five years.");
- CCX-279 at 3 (expressing concern about "the ability to claim without exception the speeded up breakdown");
- CCX-280 at 3 ("We do have some nagging concerns that we need to resolve. The first question is 'how long does it take to degrade'.");
- CCX-281 at 2 (asking about "decomposition during a certain time span (a couple years)");
- CCX-282 at 2 (asking about "degradable timing");
- CCX-283 at 2 (asking if ECM can provide a "statement of certainty" that ECM Plastic will "'break down in approximately 9 months to 5 years…'");
- CCX-296 at 6 ("When the product will [sic] start to breakdown?");
- CCX-300 at 1 (asking about testing "end-users' products to ensure that they biodegrade in less than 5 years");

- CCX-307 at 2 (asking ECM to review "a statement explaining the attributes of interest to consumers," *i.e.*, that ECM Plastic would "fully biodegrade in 9 months to 5 years");
- CCX-326 (consumer who saw ECM website on grocery bag asking about time);
- CCX-328 at 2 (expressing concern that "[i]n my view, and in the view of some leading scientists . . . there is no proof here of biodegradation and certainly nothing that quantifies the rate");
- CCX-367 at 5 (asking for "the expected time" for biodegradation);
- CCX-375 (expressing concern that ECM Plastic netting did not biodegrade at all in three years);
- CCX-378 (expressing concern about evidence "to support a claim that the material will biodegrade in 9 months to 5 years");
- CCX-397 (asking ECM to confirm accuracy of statement: "Full Circle bags will decompose anywhere that natural organic material will in nine months to five years");
- CCX-399 at 2 (asking whether using more additive will "speed up the break down [sic] of the plastic");
- CCX-400 at 4 (asking ECM precisely how much additive it needed to use in its products "to meet your stated degradation timeframe of 9 months to 5 years");
- CCX-407 at 3 ("The only question now is how long [to biodegrade] in our application.");
- CCX-423 at 9 (asking whether "the complete biodegradation can be stated to happ[e]n by the 5 years on the max end");
- CCX-427 (recording customer query for information "to better understand the time frames [sic] of the biodegradation");
- CCX-429 at 4 ("[H]ow long will take [sic] to bio degrade [sic] in landfill?");
- CCX-452 at 1 ("Where do you derive the 9 months to 5 years timeframe biodegradation??)
- RX-135 at 1 ("[I]n how much time a film should degrade [sic]…?");
- RX-135 at 6 ("How long in typical landfills does your plastic break down?");
- RX-135 at 15 ("Will the PE degrade eventually?");
- RX-135 at 16 ("For what depend the time of biodegradation? You tell 9 months to 5 years…");
- RX-135 at 20 ("How quickly will film using the ECM additive full biodegrade? Your flyer states 9 months to 5 years. That seems pretty broad. Have you been able to narrow that down?");
- RX-135 at 25 ("I understand that the plastics…do biodegrade varying 9 months to 5 years…what conditions or factors do determine the biodegradation time.");
- RX-135 at 44 ("[O]ur customer is requesting…information regarding the actual timeline or lifeline of the biodegradable material.");
- RX-135 at 53 ("In your pamphlet, you've got biodegradation from 9 months to 5 years, dependant [sic] on conditions. For polyethylene films, would it have a smaller window?");
- RX-135 at 55 ("[W]hat time … [for] the degradation?");

Tellingly, in a candid moment, ECM's own CEO, Robert Sinclair, summarized customers' attitude toward rate: "Lots of people get hung up on how long." (CCX-423 at 9 (emphasis added) (advising client of nine-month-to-five-year timeframe in October 2013, a year after ECM allegedly stopped making the Rate Claim).) Other ECM employees concurred. For example, CFO Ken Sullivan testified that customers often asked how quickly ECM Plastic would biodegrade. (CCFF ¶ 35.) The only reasonable conclusion from so many examples of customer inquiries about time is that the Rate Claim was material to ECM's customers.

c) ECM Gave Customers the Tools To Pass On the Rate Claim.

The ALJ also correctly relied on abundant proof that ECM gave its customers the tools to pass its deceptive claims, including the Rate Claim, to their customers. (ID 288-89.) For example, ECM distributed its flyer, which prominently featured the Rate Claim in its very first bullet point, as a "sales tool" for customers to send to their customers. (*See, e.g.*, ID ¶ 280 (collecting examples).) As the ALJ correctly observed, the fact that ECM provided such materials and encouraged customers to pass them on to their customers is further indication of the Rate Claim's materiality. (ID 288-89.) Tellingly, in its appeal brief, ECM devotes no more than a single line to this evidence—and offers no alternative explanation for this conduct. (Resp. App. Br. at 22.)

d) Customers Passed On the Rate Claim.

Finally, the ALJ relied on proof that ECM customers did in fact pass the Rate Claim to their customers and end-use consumers. (ID 288-91.) In its appeal brief, ECM argues that

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- RX-135 at 72 ("What Marcela was asking you is related to how these bags biodegrade and how much time it takes?")
- RX-135 at 73 ("We don't mind that [biodegradation] takes 5 years….");
- RX-135 at 77 ("Please provide your synopsis supporting the 9 month to 5 year claim for degradation ASAP.")

because, allegedly, only seven of its 300 customers placed the Rate Claim on their own advertising, the claim was not material to the remaining 293 customers. (Resp. App. Br. at 22, 33.)

Both the facts and logic upon which this argument rest are fatally flawed. First, ECM ignores the many examples in the record of customers' passing on the Rate Claim[8]—as well as an even greater number of examples of customers passing on unqualified biodegradable claims that imply a comparable rate.[9] The most reasonable conclusion from these examples (from

[8] For example, the following advertisements or products featured the Rate Claim:

- CCX-33 at 1 (repeating "nine months to five years" in marketing literature for air pillows);
- CCX-34 at 1 (same in memorandum to its distributors for plastic film);
- CCX-37 at 1, 2 (same on website advertising rigid cards like credit cards);
- CCX-38 at 1, 2 (same on brochure for packaging);
- CCX-40 at 2 (claiming biodegradation "up to 5 years" for packaging);
- CCX-44 at 1 (same on grocery bag);
- CCX-53 at 2 (stating product would degrade in one to five years in brochure);
- CCX-55 at 1 (same on "certification of biodegradability");
- CCX-57 at 1 (repeating "9 months to 5 years" on marketing materials);
- CCX-102 at 1 (stating on marketing card that product is biodegradable in 1-5 years);
- CCX-105 at 1 (repeating "nine months to five years" in advertisement);
- CCX-134 at 1 (repeating claim on bag);
- CCX-500 at 1 (repeating claim in press release for launch of ECM Plastic bags);
- CCX-501 at 1 (same on website);
- CCX-502 – CCX-505 (same in news articles about bag launch);
- CCX-563 at 1 (Rate Claim on ad for air cushions);
- CCX-564 at 1 (same on ad for loosefill);
- CCX-565 at 1 (same);
- CCX-627 at 1 (same on fact sheet for "Bio Ultra Blend Liners")
- CCX-961 at 1 (repeating "Fully biodegradable in 9 months to 5 years" on website's "Going Green" advertisement for plastic shopping bags);
- RX-9 at 1 (claiming that ECM Plastic will "start biodegrading at 9 months").

[9] *See* CCFF ¶ 25 (describing unqualified biodegradable claims on products and packages as diverse as shampoo bottles, Frisbees, golf tees, highlighters, storage cases, shoe soles, mailers, zippers, plastic cutlery, straws, trash bins, bottles, and more).

which the ALJ selected seven) is that ECM's customers, their customers, and end-use consumers all considered the Rate Claim important. Indeed, companies such as Down To Earth, a natural grocery store chain in Hawaii, thought the claim so important that Down To Earth included the Rate Claim (with ECM-approved ad copy) on bags that every grocery store customer received. (CCX-44; ID ¶ 1510.) Down To Earth was not alone. Its supplier, Island Plastic Bags, included the Rate Claim on bags for "50 to 100" different customers (*i.e.*, producing over 10 million bags with the Rate Claim). (ID ¶ 300.) As Island Plastic Bags explained, the Rate Claim was important because it helped to convey to customers that "this is an actual technology . . . it's for real." (CCX-811, IPB Dep. at 54-55.)

4. ECM Offers No Meaningful Evidence that Time Was Not Material.

At trial, ECM made a number of flawed arguments about lack of materiality, each of which the ALJ properly rejected. On appeal, ECM renews these faulty arguments, none of which meaningfully challenges the Rate Claim's materiality.

First, ECM argues that its consumer perception expert, Dr. Stewart, testified that consumers have varied understandings of biodegradability, which makes it "unlikely" that ECM's claims about biodegradability are material. (Resp. App. Br. at 26-27.) ECM further contends that Dr. Stewart's telephone landline survey "reveals that End-Use Consumers have no universal benchmark for biodegradation rate from which they can assess [] any particular speed." (*Id*. at 27.) According to ECM, this lack of "universal benchmark" means that consumers cannot be influenced by rate claims, much less ECM's Rate Claim. (*Id.*)

This argument has three fatal flaws. First, lack of consumer consensus about biodegradability is irrelevant. All that matters under Section 5 is that a "significant minority" of consumers perceived and were influenced by the deceptive rate claim. *See Novartis*, 127 F.T.C. at 693, citing *Deception Statement*, 27 F.T.C. at 177 n.20. Second, the argument ignores that

each of the four consumer perception studies in evidence (including Dr. Stewart's) shows that a significant minority of consumers understand biodegradable claims to entail a one-to-five year timeframe for complete breakdown. (CC App. Br. at 7-29.) In other words, contrary to ECM's argument, at least a significant minority (and probability a majority) of consumers do have a "benchmark" to assess rate claims. If, as ECM concedes, unqualified biodegradable claims (which imply a one-to-five-year timeframe) are material, then the Rate Claim (with its express nine-months-to-five-year timeframe) must be material.[10] Third, even setting aside this evidence of materiality to end-use consumers, the overwhelming evidence of the deceptive Rate Claim's materiality to ECM's customers by itself establishes a Section 5 violation. (*Cf.* ID 291 n.55 (properly reaching this conclusion).)

ECM also argues that during "lengthy negotiations" with its "sophisticated" customers, it qualified the Rate Claim such that it could not have influenced customers' purchasing decisions. (Resp. App. Br. at 28-30.) Though styled as a materiality argument, this is a repackaged version of ECM's specious argument that it did not make the Rate Claim at all.[11] This argument is not persuasive for two reasons. First, no matter the alleged length of "negotiations," there is an enormous amount of evidence proving that ECM repeatedly and prominently made the Rate Claim and the claim was important to customers. (*See supra* Section II.A.3; ID 288-91.)

[10] Tellingly, Dr. Stewart himself acknowledged that if ECM Plastic will not biodegrade in landfills in less than five years, "prohibiting that specific claim would serve consumer welfare." (CCFF ¶ 191.)

[11] As explained in Complaint Counsel's Post-Trial Brief, this "qualification defense" fails not only as a matter of fact (ECM very clearly made the claim) but also as a matter of law. (CCPTB at 90-92.) It is well-established that an advertiser cannot "cure the deception" in one advertisement with different statements in another. *See, e.g.*, *In re Chrysler Corp.*, 87 F.T.C. 719, 751 (1976); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496-97 (1st Cir. 1989). Moreover, any "qualification" that the Rate Claim was an approximate timeframe fails because as ECM's own expert, Dr. Sahu, admitted, the nine-month-to-five-year timeframe is off by decades or centuries. (CCFF ¶ 132.)

Second, the evidence clearly shows that ECM's customers, though sophisticated about manufacturing plastic, were not sophisticated in biodegradation. (*See* ID 290 (citing testimony from multiple customers who relied on ECM because they lacked the facilities and expertise to evaluate biodegradability); CCPTB at 23-25; 88-91 (describing customers' reliance on ECM to explain testing and contrasting them with sophisticated companies like 3M Company that tested the Additive, found no biodegradation, and declined to purchase).) Indeed, it is impossible to square ECM's argument that customers were too sophisticated to be influenced by its express claim with evidence that: (1) ECM made the claim conspicuously and persistently; (2) many customers asked about the claim; (3) ECM repeatedly provided tools to pass the claim on; and (4) customers did in fact pass on the claim to business customers and end-use consumers.

Next, ECM argues that because other features of the Additive were important to customers (*e.g.*, cost, adaptability to manufacturing process), the Rate Claim was necessarily immaterial to them. (Resp. App. Br. 16, 30-32.) This argument is based on a misconception of both fact and law. First, complete breakdown in one to five years after disposal is the Additive's primary purported attribute; characteristics like cost or ease-of-use only become relevant only if a customer initially determines that it wants a "biodegradable" plastic. Second, even if rate were just one of several characteristics, materiality does not require proof that the claim was "the *only* factor or the *most* important factor likely to affect a consumer's purchase decision." (ID 290, quoting *Novartis*, 127 F.T.C. at 695 (emphasis in original).) To be material, a claim simply has to be "*an* important factor'" in a customer's purchase decision. *Id.* (emphasis in original). Thus, the Rate Claim is material even if cost, ease-of-use, general environmental benefit, or some other factor were also important to customers.

As part of this flawed argument, ECM cites two deposition transcripts as evidence that customers were "never concerned" about how long it takes ECM Plastic to biodegrade. (Resp. App. Br. at 30, citing CCX-800 and 801.) In fact, these citations simply establish that these customers understood that ECM Plastic would degrade over time. (*See* CCX-800 (Ringley Dep. 32-33) (BER understood that ECM Plastic would biodegrade in nine months to five years); *id.* at 29 (BER understood ECM Plastic would biodegrade 100% "[o]ver time"); CCX-801 (Kizer Dep. 22) (D&W understood that ECM Plastic would degrade "over a period of time").) ECM also cites deposition testimony as support for its claim that customers' "sole interest" was so-called "intrinsic" biodegradability—to the exclusion of "biodegradation rate." (Resp. App. Br. at 16, 30.) But only one citation arguably supports ECM's argument that customers who wanted to make unqualified biodegradable claims actually separated biodegradability (a process that occurs over time) from time.[12]

Next, ECM argues that by issuing the Green Guides in 1996, the FTC "coerced industry, including ECM, into using 'rate' qualifiers." (Resp. App. Br. at 34.) According to ECM, this "coercion" was the only reason ECM made the claim and customers cared about the claim. (*Id.* at 34-36.) Leaving aside the absurdity of this argument, the 1996 Green Guides simply provided

[12] *Compare* CCX-800 (Ringley Dep. 17, 32-33) (company bought ECM additive, which it understood in terms of Rate Claim, because customers wanted biodegradable plastic); CCX-801 (Kizer Dep. 22) (company offered customers who wanted biodegradable product ECM Plastic, which would degrade "over a period of time"); CCX-802 (Leiti Dep. 52-53) (company made biodegradable claims "based off of what was given to us by ECM"); CCX-804 (Collins Dep. 15) (customers wanted biodegradable product); CCX-810 (Blood Dep. 197) (consumers care if biodegradation is accelerated); CCX-812 (Gormley Dep. 14-15) (company understood biodegradable claims customers wanted in terms of Rate Claim); CCX-817 (Bean Dep. 32-33) (company provided Rate Claim to downstream customer who wanted biodegradable product); CCX-822 (Samuels Dep. 12-13) (company interested in Additive and its Rate Claim because wanted a biodegradable product) *with* CCX-809 (Sandry Dep. 75) (company only concerned with "break down," not time).

that any marketer making an unqualified degradable claim should qualify the claim to the extent necessary to avoid deception about the rate and extent of degradation. 16 C.F.R. § 260.8 (Oct. 11, 1996). The Guides did not grant a license to lie.

Finally, ECM argues that the Rate Claim is immaterial because "[i]f scientists are unconcerned with biodegradation rate, then, by extension, industry dependent on biodegradation science has little reason to be concerned with rate." (Resp. App. Br. at 38.) This argument is a *non sequiter*. Even if rate were irrelevant to scientists with biodegradation expertise (which it is not, *see* CC App. Br. at 33-47), scientists' views say nothing about the claim's importance to ECM's non-expert customers and their customers.

B. ECM's Various Arguments Against Entry of the Order Are Meritless.

Without viable legal or factual arguments, ECM resorts to challenging the administrative process. Specifically, ECM argues that entry of the Order violates its due process rights, is not in the public interest, and constitutes an *ultra vires* agency action. For the reasons explained below, these arguments are meritless.

1. ECM's Due Process Arguments Are Groundless.

ECM makes baseless assertions that Complaint Counsel violated its due process rights by engaging in unfair litigation tactics. (Resp. App. Br. at 44-50.) ECM intertwines this accusation with equally groundless allegations that Complaint Counsel engaged in "legerdemain" and its experts "dissembled." (Resp. App. Br. at 45-47). Such attacks are nothing new for ECM, which has long vilified its academic and industry critics as "paid assassins" and "paid proselytizers." (CCX-289; CCX-294; *cf.* CCFF ¶¶ 104-106.) As with those *ad hominem* attacks, ECM's arguments here seek only to deflect attention from the simple fact that ECM's technology does not work.

a) Complaint Counsel Did Not Engage in Unfair Litigation Tactics.

The thrust of ECM's accusation appears to be that Complaint Counsel took efforts to conceal the existence of the Ohio State Study[13] (showing the ECM Additive does not work) and Dr. Michel (the study's author) in order to "foist it upon" Robert Sinclair in his deposition and to surprise ECM in our rebuttal case.[14] (Resp. App. Br. at 44-45.) This marks the seventh attempt by ECM to exclude Dr. Michel and the Ohio State Study, the only peer-reviewed scientific study evaluating ECM Plastic.[15] Unsurprisingly, ECM's conspiracy theory is mere fantasy. The short delay between Complaint Counsel's receipt of the published study and its questioning of Mr. Sinclair caused no conceivable prejudice. Moreover, Complaint Counsel's identification and use of Dr. Michel as a rebuttal witness was timely and fair. Finally, ECM's last-ditch attacks on Dr. Michel are unsupported by the record.

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[13] CCX-164 and 880, Eddie, F. Gómez & Frederick C. Michel, Jr., *Biodegradability of Conventional and Bio-Based Plastics and Natural Fiber Composites During Composting, Anaerobic Digestion, and Long-Term Soil Incubation*, 98 POLYMER DEGRADATION AND STABILITY 2583-2591 (2013).

[14] It is not clear from ECM's argument why, if we intended to surprise ECM with this study in our rebuttal case, we showed the article to Mr. Sinclair at his deposition.

[15] ECM filed three motions to exclude the Ohio State Study and three motions to exclude the rebuttal testimony of Dr. Michel: (1) Respondent's Motion for Sanctions, filed Feb. 28, 2014 (request to rule Ohio State Study inadmissible); (2) ECM BioFilm's Motion to Sanction Complaint Counsel for Unauthorized Intentional Dissuasion of Response to Subpoena Duces Tecum, filed Mar. 25, 2014 (requesting exclusion of Ohio State Study); (3) Respondent ECM BioFilms' Motion to Compel and to Sanction Complaint Counsel for Violation of Discovery Rules, filed Mar. 25, 2014 (requesting Ohio State Study be excluded from evidence and to prohibit any mention of Dr. Michel during trial); (4) Respondent's Combined Motion for Sanctions to Exclude Complaint Counsel's Concealed Expert Rebuttal Witness (Not Identified By Notice in Accordance with Rule 3.31A and the Revised Scheduling Order) and For Leave to Include Surrebuttal Expert, filed July 9, 2014 (seeking to exclude Dr. Michel as a rebuttal expert); (5) Respondent's Supplement to Motion for Sanctions and to Exclude, filed July 21, 2014 (seeking to exclude Dr. Michel); and (6) Respondent ECM BioFilm's Motion to Extend Page Count In Response to Complaint Counsel's Motion for Leave to Call Rebuttal Fact Witness and Motion to Prohibit Dr. Michel from Testifying as a Rebuttal Expert Witness, filed Aug. 26, 2014.

(1) *Complaint Counsel Timely Produced the Ohio State Study.*

In October 2013, Dr. Michel published the Ohio State Study in POLYMER DEGRADATION AND STABILITY, a well-regarded, peer-reviewed scientific journal. The Ohio State Study tested several ECM Plastics as well as over a dozen other potentially biodegradable materials (including an additive manufactured by an actual ECM competitor). (*See generally* CCX-164.) Significantly, the Ohio State Study concluded: "plastics containing additives that supposedly confer biodegradability to polymers such as polyethylene and polypropylene [including the ECM Additive] did not improve the biodegradability of these recalcitrant polymers." (CCX-164 at 8.)

Complaint Counsel first received a copy of the Ohio State Study a little after 8 p.m. on Friday, February 14, 2014. (*See generally* Complaint Counsel's Opposition to Respondent's Motion for Sanctions.) Following the President's Day holiday weekend, Complaint Counsel began Robert Sinclair's deposition in his capacity as ECM's corporate designee on Tuesday, February 18th. Complaint Counsel produced the study as an exhibit on the second day of Mr. Sinclair's deposition, February 19th—the second business day after receiving it. During the deposition, Complaint Counsel's inquiry was limited to a handful of questions about whether ECM was familiar with the study and whether it had any reason to believe the authors were biased. (CCX-819 at 144-150.)

The ALJ incorrectly sanctioned Complaint Counsel for not timely supplementing its discovery responses by prohibiting Complaint Counsel from using or relying on Mr. Sinclair's deposition testimony.[16] That testimony, however, was meaningless because Mr. Sinclair gave no

[16] Even this mild sanction was unreasonable. The ALJ's order essentially interprets Commission Rule 3.31(e) as imposing a duty on parties to turn over supplemental discovery within one business day. This is both an unreasonable burden and inconsistent with the ALJ's Scheduling Order. (Scheduling Order, filed Nov. 13, 2013, ¶ 14 (requiring parties to produce

substantive responses to these brief inquiries. More importantly, the ALJ found that, other than not having a chance to review the study prior to questioning, Respondent was not prejudiced. The ALJ, therefore, rejected Respondent's many motions to exclude the study and otherwise sanction Complaint Counsel.[17]

(2) *ECM Was Not Prejudiced.*

ECM cannot reasonably argue that Complaint Counsel's not producing the study twenty-four hours earlier caused prejudice. First, the fact that Complaint Counsel never used Mr. Sinclair's testimony eliminates any possible prejudice from the deposition questioning. Second, ECM had constructive, if not actual, notice of the study long before Complaint Counsel. ECM's business records reveal that the company that commissioned the Ohio State Study, Myers Industries Lawn and Garden, contacted ECM in January 2010 about incorporating the ECM Additive into nursery pots, and subsequently informed ECM that it had commissioned Ohio State University to conduct ASTM D5511 tests of pots infused with the ECM Additive in February 2010.[18] (CCX-417.)

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documents from non-parties within three business days).) Moreover, the Ohio State Study had been publicly available for more than four months. (*See* CCX-164.)

[17] Order Granting in Part and Denying in Part Respondent's Motion for Sanctions, filed Mar. 21, 2014; Order Denying Respondent's Motion to Sanction Complaint Counsel for Violation of Discovery Rules, filed Apr. 7, 2014; Order Denying Respondent's Motion to Sanction Complaint Counsel for Unauthorized Dissuasion of Response to Subpoena *Duces Tecum*, filed Apr. 9, 2014.

[18] And, as was ECM's usual practice, it both attempted to dissuade Myers from conducting its own testing, insisting that ECM's testing was sufficient (CCX-417 at 4), and then steered Myers to other labs that had "successful" tests (CCX-417 at 12-14). ECM also falsely told Myers: "this is the first time we have been told there is no biodegradation in a product with our additive." (CCX-417 at 13.) In fact, ECM had received repeated warnings that its claims were false and lacked proof. *See, e.g.*, CCX-323 at 3 ("The bottom line is that up to now, there has been no information provided that definitively substantiates ECM's claims…."); CCX-328 at 2 ("[I]n the view of some leading scientists whom I earlier questioned about the ECM paper on their website, there is no proof here of biodegradation and certainly nothing that quantifies the

Third, even if ECM did not already have notice of the study,[19] Complaint Counsel produced it three months before the close of fact discovery and almost five months before the close of expert discovery.[20] Thus, ECM had more than sufficient time to conduct necessary discovery, and for its experts to analyze and report on the study's findings. ECM took every advantage of this time. ECM served Dr. Michel and Ohio State University and other third parties[21] with subpoenas *duces tecum* before the end of February and received responsive information before the end of March, two months before the close of fact discovery. Indeed, both Drs. Sahu and Burnette's expert reports contained an analysis of the Ohio State Study. Accordingly, ECM knew about the Ohio State Study well in advance of trial, so there was no prejudice to ECM and no due process issue.

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rate."); CCX-375 at 1 ("Are you aware the testing which we conducted on our netting using your product did not produce any results [from] the ASTM D5511 test….[?]"); CCX-701 at ("[T]he ECM data for 'biodegradation in a landfill' does not meet accepted norms and standards for biodegradable materials…."') and CCX-816 at 138 (ECM employee Alan Poje stating in deposition that he was familiar with CCX-701); CCX-716 at 3 ("Every scientist[] we have spoken to tell[s] us that your claims are false and impossible to prove."); *see also* CCFF ¶¶ 102-103.

[19] Tellingly, none of ECM's so-called "experts" who testified to conducting a broad literature search on the topic of biodegradable plastic identified the study, although it was in the public sphere as of October 1, 2013. (CCX-164.)

[20] ECM's argument that Complaint Counsel prevented it from conducting a fact deposition of Dr. Michel is equally preposterous. In fact, the communications between the parties demonstrate that ECM and Complaint Counsel stipulated to the admissibility and authenticity of the Ohio State Study to avoid taking another unnecessary deposition. (*See* Complaint Counsel's Opposition to Respondent's Combined Motion for Sanctions, to Exclude Complaint Counsel's Rebuttal Witness, and for Leave to Include Surrebuttal Expert, filed July 21, 2014, at Exhibit CCX-D). In any event, ECM ultimately took Dr. Michel's deposition and questioned him extensively about the study. (*See generally* RX-970, Michel Dep. Tr.)

[21] ECM also served subpoenas *duces tecum* on Elsevier, the publisher, Dr. Ramani Narayan, who provided Complaint Counsel the unsolicited copy of the Ohio State Study, and Eddie Gómez, the Ph.D. student who assisted Dr. Michel with the study.

(3) *Complaint Counsel's Identification of Dr. Michel as Rebuttal Expert Witness Was Timely and Fair.*

Similarly, ECM was not prejudiced by Complaint Counsel's identification or use of Dr. Michel as a rebuttal expert witness.[22] Complaint Counsel was under no duty to identify Dr. Michel as a rebuttal expert witness until June 30, 2013, when it did so by filing its expert rebuttal report.[23] (Order Denying Motion to Exclude Michel; *see also* Amended Scheduling Order, filed Apr. 10, 2014.) Despite ECM's protestations otherwise, Dr. Michel's report was limited to rebuttal of points raised by Drs. Sahu and Burnette. (Order Denying Motion to Exclude Michel.) In effect, ECM simply complains that Complaint Counsel followed the rules.

b) ECM's Attempts to Discredit Dr. Michel Fail.

As a last resort, ECM attempts to discredit Dr. Michel and the Ohio State Study with outrageous accusations. ECM asserts that Dr. Michel and Myers Industries were "competitors" of ECM, insinuates that they conspired to falsify a negative report about ECM, and accuses Dr. Michel of "dissembling" under oath to further the conspiracy. (Resp. App. Br. at 46-47.) But ECM's own records refute the motive ECM attributes to Dr. Michel and Myers (*i.e.*, their alleged desire to buoy the compostable industry (Resp. App. Br. at 9)). Over the course of a year, Myers and ECM actively engaged in discussions about making biodegradable pots, which included calls

[22] *See* Order on Respondent's Combined Motion for Sanctions, to Exclude Expert Witness, and For Leave ("Order Denying Motion to Exclude Michel"), filed July 23, 2014 (ALJ rejected ECM's arguments that Complaint Counsel did not properly disclose Dr. Michel as a rebuttal expert witness); and Order Denying Complaint Counsel's Motion for Leave to Call Rebuttal Fact Witnesses and Respondent's Request to Bar Rebuttal Expert Witness (ALJ explaining that Dr. Michel's testimony was limited to matters in expert rebuttal report to avoid prejudice to ECM).

[23] Ironically, ECM complains about receiving the rebuttal report shortly before midnight (Resp. App. Br. at 50 n.34), even though it did not serve Complaint Counsel with its expert reports until 1:09 a.m. on June 19, 2014—technically the day after they were due under the Amended Scheduling Order.

from Myers with "technical questions" (CCX-417 at 2), a three-hour in-person meeting at ECM (CCX-417 at 3), a site visit of Myers' manufacturing facility by Mr. Sinclair (CCX-417 at 4), a test-run of plastics with ECM Additive (CCX-417 at 5), and negotiations regarding an exclusivity agreement between Myers and ECM (*see generally* CCX-417). ECM was aware as early as January 2010 that Myers intended to conduct biodegradability testing, and as early as February 2010 that Myers was conducting biodegradability testing of its ECM Plastic at Ohio State University under ASTM D5511. It appears from ECM's records that the only reason Myers did not move forward with the purchase was that the ECM-infused samples showed no biodegradation under these tests. (CCX-417 at 12-14.)

Furthermore, Dr. Michel provided uncontested testimony that he tested the material for Myers to determine whether the ECM Additive worked so it could market products that incorporate it. (Tr. 2934 (Dr. Michel testifying that Meyers' only interest was evaluating materials with the ECM Additive to see whether it could market them as biodegradable); Tr. 2982-2983 (Dr. Michel testifying that he had no reason to believe that Myers did not manufacture the plastic properly because "it's what they do"); Tr. 2996 (Dr. Michel's understanding is that Myers wanted the ECM technology to work).) There is no evidence whatsoever to support ECM's insinuations of impropriety.[24]

[24] ECM makes numerous unsupported factual assertions regarding Dr. Michel's and Dr. McCarthy's supposed connections to alleged competitors in the compostable industry. (Resp. App. Br. at 8 n.4, 9.) For instance, ECM points to Dr. Michel's consultancy for DuPont and then claims DuPont is a member of the Biodegradable Products Institute ("BPI"). (*Id.*) However, other than ECM's counsel's representation that DuPont is a member of BPI, there is nothing in the record supporting that assertion, or even describing the nature of the consultancy, or when it occurred. Moreover, ECM does not explain why or how Dr. Michel's receipt of a "small grant" from DuPont (Tr. 2918) affected his opinions in this matter. Likewise, ECM makes much of Dr. McCarthy's connection with Metabolix. (Resp. Br. at 9.) But, as explained in Complaint Counsel's Post-Trial Reply Brief, there is absolutely no evidence that Dr. McCarthy's (or Dr.

It is worth noting that every substantive challenge ECM raises to Dr. Michel's study is equally true of the studies ECM relies on. No lab independently evaluated the material to determine the amount of ECM Additive in the plastic, nor do the reports contain information about the source, production, or chain of custody of the test samples.[25] (*See* Tr. 1932-1933; 1940, 1961.) In the end, because ECM conducted such prolific discovery, there is more information and data available in connection with the Ohio State Study than any other of an ECM Plastic. And this data definitively demonstrates that even under optimized conditions, the ECM Additive does nothing.

c) ECM Was Not Denied Fair Rebuttal to Challenge the Credibility of Dr. McCarthy.

ECM argues that its due process rights were further limited because it had no opportunity to challenge the credibility of Dr. McCarthy through Dr. Grossman, its proposed surrebuttal expert. (Resp. App. Br. at 48-50.) This convoluted and unpersuasive argument misstates essential facts.

Michel's) opinions were financially motivated or otherwise affected by these relationships. (*See* CCPTRB 19-21.)

[25] ECM also alleges that biodegradation of the control plateaued prematurely at 70%, invalidating the Ohio State Study results. But Dr. Michel explained in his rebuttal report, and both during his deposition and at trial that there was no premature "plateau." Instead, the data reflect the widely-accepted view that biodegradation will not reach 100%: "the plateau is evidence that the biotransformation of cellulose was complete and that the remaining carbon had been converted into more recalcitrant residues." (CCX-895, Michel Dep. 8.) Moreover, to be valid, the test method only requires 70% biodegradation of the positive control in 30 days, which is indisputably reflected in the data. (CCX-85.) Certainly, the editor and referee would have identified any such problem with the test during the peer review process. Instead, Dr. Tadahisha Iwata, an expert in the area of degradable plastics and the editor of POLYMER DEGRADATION AND STABILITY that published the Study, testified that the data submitted with the draft article (reviewers never view the raw data itself, only what is submitted, CCX-808 at 20) did not appear incorrect, fabricated, or incomplete. (CCX-808, Iwata Dep. 17-18.) And the referee approved publication of the Study without any revisions, which is rare. (CCX-808, Iwata Dep. 15.)

ECM moved to introduce the surrebuttal report of Dr. Grossman before trial.[26] In addition to being untimely, ECM's motion was improper because ECM made no attempt to challenge the rebuttal opinions of Dr. McCarthy. Instead, ECM tried to use Dr. Grossman to challenge Dr. McCarthy's credibility and the opinions contained in his first expert report. Thus, ECM improperly attempted to do what it accused Complaint Counsel of doing—using the surrebuttal report to support its case in chief.

ECM also argues that the ALJ improperly rejected Dr. Grossman's rebuttal to Dr. McCarthy's trial testimony. (Resp. App. Br. at 48.) But ECM never filed a motion or made a request during trial asking the ALJ to permit Dr. Grossman's testimony (as it reserved its right to do for Dr. Michel, *see* Tr. 2622). Thus, there is absolutely no basis for ECM's accusation that it was deprived of a full and fair opportunity to challenge Dr. McCarthy's opinions before, or during, trial.

2. This Proceeding Is In the Public Interest.

ECM also makes two meritless "public interest" arguments. First, it argues that Complaint Counsel has not shown injury. (Resp. App. Br. at 40-42.) Second, ECM argues that the order is against the public interest because it will result in bad environmental policy. (Resp. App. Br. at 42-43.) Both arguments fail, for the reasons explained below.

a) ECM's Deceptive Claims Have the Potential to Injure the Public.

ECM's argument that there is no proof of injury has no substance. Relying on two factually distinguishable cases, *Buchsbaum* and *Arnold Stone*, ECM argues that Complaint

[26] Respondent's Combined Motion for Sanctions to Exclude Complaint Counsel's Concealed Experts Rebuttal Witness (Not Identified By Notice in Accordance with Rule 3.31A and the Revised Scheduling Order) and For Leave to Include Surrebuttal Expert, filed July 9, 2014.

Counsel must show actual injury to demonstrate that the order is in the public interest. (Resp. App. Br. at 40-42.) This is wrong.[27] Rather, Complaint Counsel must demonstrate that ECM's deceptive claims may be detrimental to the public at large. *Cf. S. Buchsbaum & Co. v. FTC*, 160 F.2d 121, 123–24 (7th Cir. 1947); *Arnold Stone Co. v. FTC*, 49 F.2d 1017, 1018 (5th Cir. 1941). In both *Buchsbaum* and *Arnold Stone*, the courts held that the public interest is not served where there is no deception, or potential for deception, of the intended audience. *Id.* In both cases, the evidence failed to show that the intended audience, *i.e.*, consumers (*Buchsbaum*) or customers (*Arnold Stone*), were deceived or could have been deceived. *Buchsbaum*, 160 F.2d at 123-124; *Arnold Stone*, 49 F.2d at 1018.

The evidence here demonstrates both high likelihood of actual deception of ECM's customers and consumers, *see supra* Section II.A, as well as myriad potential harms to consumers in allowing ECM's deceptive claims. Environmentally conscious consumers (a large segment of the consumer population) are likely to purchase "biodegradable" plastics in lieu of traditional plastics—and pay higher prices for the perceived environmental benefit. (CCFF ¶ 14; *see also* CCX-35 at 1 (discussing premium charged for ECM Plastic); CCX-417 at 14 (same); CCX-487 at 3 (same); RX-23 (discussing cost-competitiveness of ECM Plastic); CCX-38 at 8 (discussing passing cost of ECM Plastic to consumers); CCX-56 (Island Plastic's brochure discussing 15% premium for ECM Plastic bags).) *See Thompson Med. Co.*, 104 F.T.C. 648, 824 (1984) (significant economic harm "result[s] from the repeated purchase of an ineffective product by consumers who are unable to evaluate" the efficacy claims, even where "there is little

[27] *See* infra at 3. Importantly, the Commission would not have issued the Complaint had it determined that this case would not be in the public interest, and absent extraordinary circumstances (not present here), the Commission will not revisit that determination. *In re Brake Guard Prods., Inc.*, 125 F.T.C 138, 247 (1998) (citing cases).

potential for the product to cause serious injury to consumers' health"); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) ("[A] major purpose of the Federal Trade Commission Act is to prevent consumers from economic injuries."); *see also POM Wonderful LLC*, No. 9344, 2013 FTC LEXIS 6, at *50 (Jan. 10, 2013) (holding the ALJ erred in finding no economic injury where consumers paid more for a perceived health benefit of the POM products, even if safe). Also, this same large segment of environmentally-conscious consumers will be harmed (because they care about the environment) if they replace environmentally beneficial practices such as recycling with disposal of "biodegradable" plastic in landfills, a practice that has dubious environmental benefit. (*See* CCX-943, Barlaz Dep. Tr. at 168 (discussing Dr. Barlaz's study concluding that landfill disposal of biodegradable materials may be harmful to the environment); Tr. 2289 (Dr. Barlaz explaining that it is a complicated analysis to determine the environmental benefit of a product that biodegrades in a landfill).) And, of course, false claims of biodegradability (when exposed as false) undercut faith in truthful claims. Consequently, ECM's deceptive biodegradability claims have the potential to result in injury to the public, and, therefore, preventing these deceptive claims serves the public interest.

Citing *U.S. v. Klesner*, 280 U.S. 19, 25 (1929), ECM also argues that mere deception is insufficient to justify an action as in the public interest. (Resp. App. Br. at 40.) But *Klesner* is inapposite. Specifically, *Klesner* addresses whether the FTC Act could be used to vindicate private wrongs. *Klesner*, 280 U.S. at 25-29. The Court held that the FTC Act does not "provide private persons with an administrative remedy for private wrongs" including deception. *Id.* at 27. Instead, "the purpose must be protection of the public." *Id.* In explaining the scope of the public interest, the Court explained that the "Commission exercises a broad discretion." *Id.* at

28. The Court provided examples where the public interest is sufficient: harm to competition, oppression of the weak by the strong, and widespread aggregate loss. *Id.*

Through promulgation of the Green Guides, the Commission has long recognized the public interest in truthful and substantiated environmental benefit claims. *Green Guides*, 61 Fed. Reg. 53,312 (Oct. 11, 1996) ("The Commission promulgates industry guides 'when it appears to the Commission that guidance as to the legal requirements applicable to particular practices would be beneficial in the public interest . . . .'") (citing 16 C.F.R. 1.6). Thus, the Commission clearly recognizes that prohibiting deceptive environmental claims serves the public interest by, *inter alia*, "stemming the tide of spurious environmental claims, bolstering consumer confidence . . . and increasing the flow of specific and accurate environmental information to consumers, enabling them to make informed purchasing decisions." *Cf. Green Guides*, 61 Fed. Reg. 53,312 (Oct. 11, 1996) (codified at 16 C.F.R. pt. 260); *Green Guides*, 75 Fed. Reg. 63,555 (Oct. 15, 2010) (codified at 16 C.F.R. pt. 260).

b) Effect on Environmental Issues is Not Relevant to Whether this Case or the Order is in the Public Interest.

ECM also argues that, if the order is enforced, it will lead to more methane emission into the atmosphere. (Resp. App. Br. at 42.) This argument fails in several ways. First, ECM has no evidence that allowing ECM to market its product deceptively has an environmental benefit. In fact, Dr. David Stewart, ECM's consumer perception expert agreed that prohibiting claims like "nine months to five years" would serve the public interest if they do not have scientific support. (CCFF ¶ 191.)

Moreover, ECM's argument assumes that the product works, and in a manner that could reduce methane emissions, but the evidence shows it does not.[28] Additionally, assuming ECM could substantiate any efficacy, it could qualify its claim in a number of ways to make it non-deceptive, as permitted by the Notice Order. (*See* CC App. Br. at 51; CCPTB at 92, 93 (discussing scope of Notice Order provisions).)

Finally, even assuming the proposed order caused some negative environmental impact, the Supreme Court has previously rejected the argument that an environmental benefit is a license to deceive:

> Finally, the argument is made that the restraining orders are not necessary to protect the public interest (see Federal Trade Commission v. Royal Milling Co., supra), but to the contrary that the public interest will be promoted by increasing the demand for pinus ponderosa, though it be sold with a misleading label, and thus abating the destruction of the pine forests of the east.
>
> The conservation of our forests is a good of large importance, but the end will have to be attained by methods other than a license to do business unfairly.

FTC v. Algoma Lumber Co., 291 U.S. 67, 81 (1934). Therefore, even if ECM had substantiation that its additive reduces methane emissions (it does not), this would not give ECM license to deceive its customers and end-use consumers.

c) This Order is Not Ultra Vires.

ECM argues that this action is *ultra vires* because it is, in effect, setting nationwide environmental policy, a power delegated to the EPA. (Resp. App. Br. at 43-44.) ECM's argument is a rehashing of its public interest argument. Essentially, ECM argues that consumers' understanding of the marketing term "biodegradable" incentivizes marketers to make

[28] *See generally* CCPTB 54-76 (discussing falsity and lack of substantiation for ECM's claims); CC App. Br. 30-47. Curiously, ECM now seems to be arguing that its Rate Claim, if true, would be environmentally harmful.

rapidly biodegrading products, or will keep marketers from making biodegradable products at all, both in supposed conflict with environmental policy set by the EPA. As explained above, there is no support for ECM's assertion that its technology will result in fewer methane emissions. Furthermore, an appropriate order will not stop ECM from making appropriately-qualified, truthful, and substantiated claims. Finally, any alleged, speculative effect that an order crafted to prevent deception may have on environmental policy is irrelevant.

III. CONCLUSION

For the reasons stated above, Respondent's practices, as alleged in the Complaint, constitute unfair or deceptive acts or practices, in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act. Complaint Counsel respectfully requests that the Commission enter the relief proposed in the Notice Order.

Respectfully Submitted,

/s/ Katherine Johnson

Dated: March 31, 2015

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Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2015, I caused a true and correct copy of the foregoing to be served as follows:

One electronic copy, one copy through the FTC's e-filing system, and twelve hard copies to the **Office of the Secretary**:

Donald S. Clark, Secretary
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One electronic copy to the **Office of the Administrative Law Judge:**

The Honorable D. Michael Chappell
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I further certify that I possess a paper copy of the signed original of the foregoing document that is available for review by the parties and the adjudicator.

Date: March 31, 2015

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Notice of Electronic Service

I hereby certify that on March 31, 2015, I filed via hand a paper original and electronic copy of the foregoing Complaint Counsel's Answering Brief, with:

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Chief Administrative Law Judge
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I hereby certify that on March 31, 2015, I filed via E-Service of the foregoing Complaint Counsel's Answering Brief, with:

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